
Tempting Trespass or Suggesting Sociability? Augmented Reality and the Right to Include

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INTRODUCTION

When should one entity be held responsible for activity by another that invades an owner's property? In recent decades, this question has frequently arisen in the context of copyright and patent, where owners have attempted to hold providers of products like copying technology and component parts responsible for infringement committed by users of those products. Results have been mixed and controversial. Courts (and in the case of the Patent Act, Congress) have developed theories of secondary liability that forbid active inducement of infringement but permit the mere distribution of products that have both infringing and non-infringing uses.¹ Many observers have been critical — often

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¹ See 35 U.S.C. § 271(b)–(c) (2012) (containing Patent Act provisions on inducement and contributory infringement); *Commil USA, LLC v. Cisco Sys., Inc.*, 135 S. Ct. 1920, 1926–30 (2015) (discussing inducement and contributory liability standards in patent law); *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 936–37 (2005) (applying inducement concept to copyright infringement); *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 442 (1984) (acknowledging contributory infringement of copyright but with safe harbor for technologies “capable of commercially significant non-infringing uses”).

arguing that these standards create too little incentive for product manufacturers to avoid foreseeable infringements by difficult-to-sue end-users, and that the standards diverge from liability standards applicable in other types of product liability cases.²

The generally-applicable law of product liability is one helpful doctrinal tool for considering questions of secondary liability for copyright and patent infringement. But this body of law typically deals with products that cause bodily harm or damage to personal property. It rarely addresses products that instead cause a property owner to suffer an invasion of her right to exclude. A recent controversy offers a new opportunity to consider just this type of product. In 2016, property owners launched a class action lawsuit against Niantic, the software company behind the popular augmented reality game *Pokémon Go*. The plaintiffs argued that Niantic should face trespass and nuisance liability because the game encourages users to gather near private land, sometimes entering without permission in search of *Pokémon* and sometimes merely creating noise and other disturbances.³ Although as of this writing it is unclear whether a court will ever reach the merits of this particular suit,⁴ the issues it raises are likely to recur, and to resonate across various types of tangible and intangible property.

Like copyright and patent owners who complain that products should have been designed more carefully in order to prevent infringement by users, the *Pokémon Go* plaintiffs implied that Niantic

² E.g., ROBERT P. MERGES, JUSTIFYING INTELLECTUAL PROPERTY 259-61 (2011); Dmitry Karshedt, *Causal Responsibility and Patent Infringement*, 70 VAND. L. REV. 565, 617-21 (2017); Peter S. Menell & David Nimmer, *Unwinding Sony*, 95 CALIF. L. REV. 941, 1017-25 (2007).

³ Consolidated Amended Class Action Complaint at 12-16, *In re Pokémon Go Nuisance Litigation*, No. 3:16-cv-04300-JD (N.D. Cal. Nov. 25, 2016) [hereinafter Amended Complaint]. For other analyses of property conflicts raised by *Pokémon Go*, see Donald J. Kochan, *Playing with Real Property Inside Augmented Reality: Pokémon Go, Trespass, and Law's Limitations*, 38 WHITTIER L. REV. (forthcoming 2017); Andrew L. Rossow, *Gotta Catch . . . a Lawsuit? A Legal Insight into the Intellectual, Civil, and Criminal Battlefield 'Pokémon Go' Has Downloaded onto Smartphones and Properties Around the World*, 16 J. MARSHALL REV. INTELL. PROP. L. 329 (2017); Samuel Mallick, Note, *Augmenting Property Law: Applying the Right to Exclude in the Augmented Reality Universe*, 19 VAND. J. ENT. & TECH. L. 1057, 1073-79 (2017). See generally Mark A. Lemley & Eugene Volokh, *Law, Virtual Reality, and Augmented Reality* (Mar. 15, 2017) (Stanford Pub. Law Working Paper No. 2933867, 2017) (UCLA Sch. of Law, Pub. Law Research Paper No. 17-13, 2017), <https://ssrn.com/abstract=2933867>.

⁴ On July 27, 2017, Judge Donato dismissed the suit without prejudice for failure to adequately allege an amount in controversy sufficient to trigger subject matter jurisdiction. Civil Minutes Document 82, *In re Pokémon Go Nuisance Litigation*, No. 3:16-cv-04300-JD (N.D. Cal. July 31, 2017).

should have designed its game to avoid unauthorized invasion of and interference with their property interests by users of the game.⁵ The parallels between the scenarios offer an opportunity to examine anew how the law does and should hold technology producers liable for violations of (tangible and intellectual) property rights committed by their users.

This essay begins that examination. For simplicity, I focus on the *Pokémon Go* plaintiffs' trespass cause of action and, specifically, on the allegation that Niantic caused Pokémon Go users to enter some of the plaintiffs' yards without authorization in search of Pokémon. Examining the allegations and the most relevant caselaw, I argue that Niantic should not be liable for trespass even if it did design its game to hatch virtual Pokémon and other attractive game features on private property, and thus encouraged users to enter that property. The fundamental reason for my conclusion is this: encouraging entry onto private property should not be equated with encouraging *unauthorized* entry onto private property — which is the sine qua non of trespass. Maintenance of this distinction is critical not only to protect the interests of technologists like Niantic and the users of their products, but also to protect the interests of property owners who welcome the opportunity to interact with those users — that is, property owners who want to exercise their right to include instead of their right to exclude. This is also true, perhaps even more so, in the intellectual realm. Congress and courts should not craft rules for secondary liability built on the assumption that every instance of practicing a patented invention or exercising the rights the law bestows on copyright owners is an infringement, and that third parties should therefore always be held responsible when they enable and even encourage those activities. This insight helps to justify some existing rules and to guide the way to legal developments that would honor intellectual property's inclusive and exclusive features.

I. THE POKÉMON GO CONTROVERSY

Pokémon Go is an augmented reality game produced by the software company Niantic. Players use their smart phones to view the game app, which employs the phones' GPS, camera, and gyroscope features to superimpose images of fantastical Pokémon creatures on top of images of the players' real-world surroundings. The software

⁵ See, e.g., Amended Complaint, *supra* note 3, ¶ 5 (critiquing Niantic for associating game features with GPS coordinates adjacent to private property without the consent of the property owners).

determines the apparent location of these virtual creatures, which players can capture (the goal of the game) by swiping on their phone screens and thereby throwing a virtual ball at the Pokémon. As the *New York Times* described soon after the game's release: "players traverse the physical world following a digital map, searching for cartoon creatures that surface at random. People look through their smartphone cameras to find Pokémon. When an animated creature appears, they toss Pokéballs at it until it is subdued."⁶

The game also features virtual venues (Pokéstops and Pokémon gyms) in which players can collect items helpful to catching Pokémon, engage in virtual battle with other players, and earn PokéCoin (the game's virtual currency), which can be used to buy items in the game. Pokémon, Pokéstops, and Pokémon gyms appear in a variety of locations, superimposed on both private and public property. According to the plaintiffs' complaint, Niantic does not generally ask permission of the owners of private property on which game features virtually appear,⁷ although the company has entered into special partnership arrangements with some locations.⁸

In the first three weeks after its release in July, 2016, Pokémon Go was downloaded more than 30 million times.⁹ Avid users were easy to spot out and about with their phones in hand. As Om Malik colorfully put it in the *New Yorker*: "To say it has spread like wildfire is to exaggerate the power of wildfires."¹⁰ The game has been lauded as "a health booster and a social cementer"¹¹ that encourages players to explore by foot, interacting with their neighbors and other players.¹²

⁶ Nick Wingfield & Mike Isaac, *Go Play Outside, Pokémon Said. Throngs Did.*, N.Y. TIMES, July 12, 2016, at A1.

⁷ See Amended Complaint, *supra* note 3, ¶ 5.

⁸ Sarah E. Needleman, *'Pokémon Go' Adds Starbucks Stores as Gyms and PokéStops*, WALL ST. J. (Dec. 8, 2016), <https://www.wsj.com/articles/pokemon-go-adds-starbucks-stores-as-gyms-and-pokestops-1481224993>.

⁹ Amended Complaint, *supra* note 3, ¶ 4.

¹⁰ Om Malik, *Pokémon Go Will Make You Crave Augmented Reality*, NEW YORKER (July 12, 2016), <http://www.newyorker.com/tech/elements/pokemon-go-will-make-you-crave-augmented-reality>.

¹¹ Wingfield & Isaac, *supra* note 6.

¹² See Amy Butcher, *Pokémon Go See the World in Its Splendor*, N.Y. TIMES (July 14, 2016), <https://www.nytimes.com/2016/07/17/opinion/sunday/pokemon-go-see-the-world-in-its-splendor.html> ("[I]t seems far from terrible to see a father and son racing down suburban sidewalks. To spend an evening not sitting passively before a TV, but interacting simultaneously with both our media and the world. To share in an experience, however seductive or silly, that forces us to go out and explore together."); Nicola Davis, *Pokémon Go Boosts Exercise Levels — but Only for a Short Period*, SAYS STUDY, GUARDIAN (Dec. 13, 2016, 6:30 PM), <https://www.theguardian.com/>

But it has also been charged with a variety of social harms, from traffic accidents to trespass.¹³

In the class action lawsuit heard in the Northern District of California, the plaintiffs faulted Niantic for causing images of Pokémon, Pokéstops, and Pokémon gyms to appear on users' phones when they were in the vicinity of GPS coordinates that corresponded to the plaintiffs' property.¹⁴ Because the goal of the game is to use one's phone to virtually capture Pokémon (with the tag line "catch 'em all!"), the plaintiffs argued that the software thus encouraged users to converge on or near their property and Niantic should be held responsible for that behavior and the harms it caused.¹⁵ As the complaint put it, "By virtue of the incentives created by and criteria for success in the *Pokémon Go* mobile game, Niantic induced *Pokémon Go* players to go to the locations of the Pokémon, Pokéstops, and/or Pokémon gyms in order to advance their progress in the game. Niantic thereby caused third persons to enter the properties of Plaintiffs and other members of the proposed Class."¹⁶

For example, regarding New Jersey named plaintiff Jeffrey Marder, the complaint alleged that "Plaintiff Jeffrey Marder became aware that strangers were gathering outside of his home, holding up their mobile phones as if they were taking pictures. At least five individuals knocked on Mr. Marder's door, informed Mr. Marder that there was a Pokémon in his backyard, and asked for access to his backyard in order to 'catch' the Pokémon."¹⁷ With regard to Florida named plaintiff The Villas of Positano Condominium Association, Inc., the complaint alleged that "[i]nduced by Niantic's unauthorized

technology/2016/dec/13/pokmon-go-boosts-exercise-levels-but-only-for-a-short-period-says-study (quoting author of study on exercise effects of Pokémon Go play, who observed that "there is a huge potential to develop these [augmented reality] games to not only increase physical activity but also boost mental wellbeing, mood and social interaction for people of all ages"); Malik, *supra* note 10 ("Pokémon Go . . . is an inherently social experience. You need to be walking around — on the streets, in public places — to catch the Pokémon The more you move around, the more creatures you find.").

¹³ See, e.g., Beatriz Costa-Lima & Mary Hudetz, *The 'Pokémon Go' Files: 10 Tales of Trespass, Robbery, Murder and More*, INS. J. (July 15, 2016), <http://www.insurancejournal.com/news/national/2016/07/15/420198.htm>; James Rogers, *Death by Pokémon? Public Safety Fears Mount as 'Pokemon GO' Craze Continues*, FOX NEWS (July 14, 2016), <http://www.foxnews.com/tech/2016/07/14/death-by-pokemon-public-safety-fears-mount-as-pokemon-go-craze-continues.html>.

¹⁴ See Amended Complaint, *supra* note 3, ¶¶ 5, 7.

¹⁵ *Id.* ¶¶ 16, 27-51.

¹⁶ *Id.* ¶ 51.

¹⁷ *Id.* ¶ 29.

placement of hard-to-find Pokémon on Villas property, throngs of *Pokémon Go* players continued to trespass onto Villas property on a nightly basis, in order to be present during peak spawning hours.”¹⁸

Niantic vigorously denied liability for trespass, emphasizing that its game rules expressly instruct players not to trespass or attempt to gain access to private property without permission. Instead of designing its features to promote trespass, Niantic argued that it “makes the challenged in-game features visible for the benefit of individuals authorized to access the relevant properties.”¹⁹

II. TEMPTING TRESPASS, OR SUGGESTING SOCIABILITY?

Trespass to land is a famously strict liability tort — in the sense that liability typically stems from unauthorized intentional entry to land regardless of fault or harm.²⁰ But the trespass claims in the *Pokémon Go* litigation are not typical, because the defendant did not personally make any physical entry onto the plaintiffs’ land. Instead, Niantic is accused of causing entry by *Pokémon Go* players. The common law does contemplate the possibility of what we might call indirect or secondary liability for trespass, but such causes of action present special problems with regard to the requirement of intentionality.

The Restatement of Torts provides: “One is subject to liability to another for trespass, irrespective of whether he thereby causes harm to any legally protected interest of the other, if he intentionally . . . enters land in the possession of the other, or causes a thing or a third person to do so”²¹ With regard to entry by a third person, the commentary elaborates:

¹⁸ *Id.* ¶ 31.

¹⁹ Motion to Dismiss at 10, *In re Pokémon Go Nuisance Litigation*, No. 3:16-cv-04300 JD (N.D. Cal. Jan. 27, 2017).

²⁰ See RESTATEMENT (SECOND) OF TORTS § 163 (AM. LAW INST. 1965) (“One who intentionally enters land in the possession of another is subject to liability to the possessor for a trespass, although his presence on the land causes no harm to the land, its possessor, or to any thing or person in whose security the possessor has a legally protected interest.”). Negligent and/or reckless intrusions to land are also actionable in some jurisdictions, with liability potentially extending to third parties, but typically only with proof of harm. *Id.* § 165 (1965) (“One who recklessly or negligently, or as a result of an abnormally dangerous activity, enters land in the possession of another or causes a thing or third person so to enter is subject to liability to the possessor if, but only if, his presence or the presence of the thing or the third person upon the land causes harm to the land, to the possessor, or to a thing or a third person in whose security the possessor has a legally protected interest.”). Non-negligent accidental intrusions are not generally actionable regardless of harm. *Id.* § 166 (1965).

²¹ *Id.* § 158 (1965).

If, by any act of his, the actor intentionally causes a third person to enter land, he is as fully liable as though he himself enters. Thus, if the actor has commanded or requested a third person to enter land in the possession of another, the actor is responsible for the third person's entry if it be a trespass. This is an application of the general principle that one who intentionally causes another to do an act is under the same liability as though he himself does the act in question.²²

In general, the intent required to trigger trespass liability is not intent to trespass, but rather intent to enter. An intruder's mistaken belief that he rightfully possesses the land is no defense, nor is his mistaken belief that he has permission from the possessor.²³ Of course, if the entrant does in fact have permission, his entry does not amount to a trespass.²⁴ That possibility — of authorized and therefore non-trespassory entry — is what can complicate the question of intent with regard to third party entry.

The Restatement suggests that intentionally causing a third party to *enter* land is sufficient to impose liability for a resulting trespass. Courts have held that causation can be satisfied by encouraging, assisting, advising, or suggesting the third party's activity.²⁵ But should merely encouraging entry suffice, given that entry need not amount to trespass if the entrant has permission from the possessor? This

²² *Id.* § 158 cmt. j (1965).

²³ *Id.* § 164 cmt. a (1965) (“In order to be liable for a trespass on land under the rule stated in § 158, it is necessary only that the actor intentionally be upon any part of the land in question. It is not necessary that he intend to invade the possessor's interest in the exclusive possession of his land and, therefore, that he know his entry to be an intrusion. If the actor is and intends to be upon the particular piece of land in question, it is immaterial that he honestly and reasonably believes that he has the consent of the lawful possessor to enter, or, indeed, that he himself is its possessor.”).

²⁴ *Id.* § 158 cmt. e (1965) (“Conduct which would otherwise constitute a trespass is not a trespass if it is privileged. Such a privilege may be derived from the consent of the possessor.”).

²⁵ *E.g.*, *Helsel v. Morcom*, 555 N.W.2d 852, 855 (Mich. Ct. App. 1996) (requiring “‘something by way of encouragement, advice, or suggestion’ that leads to the commission of the trespass” (quoting *Kratze v. Indep. Order of Oddfellows, Garden City Lodge No. 11*, 500 N.W.2d 115 (1993))); *see Parker v. Kangerga*, 482 S.W.2d 43, 47 (Tex. Civ. App. 1972) (“It seems to be the law in this State that liability for trespass is not dependent upon personal participation and one who aids, assists, advises or gives encouragement to the actual trespasser, or concert and cooperation in the commission of a trespass, or subsequent ratification or adoption by one of an act of another for his benefit or in his interest is equally liable with him who does the act complained of.”).

question was at the heart of *Dietz v. Illinois Bell Telephone Co.*,²⁶ a case upon which Niantic relies heavily in the Pokémon Go litigation.²⁷

In *Dietz*, the defendant telephone company granted cable companies licenses to string their cables on telephone company poles that had been installed — with permission — on plaintiff's land.²⁸ When the cable company entered plaintiff's land without his permission to access the poles, the plaintiff sued the telephone company on the theory that it had intentionally caused the trespass.²⁹ The court acknowledged the possibility of indirect liability for trespass: "One can be liable in trespass for an intrusion by a thing or third person if he acts with knowledge that his conduct will, to a substantial degree of certainty, result in the intrusion."³⁰ Surely in this case the telephone company expected that the cable companies that had paid money for licenses to use the telephone poles would in fact *enter* the plaintiff's land to access those poles; but that does not mean it expected them to *trespass*. The court granted the telephone company's motion to dismiss because there were no facts alleged that would establish that the telephone company "intended or knew with a high degree of certainty that by granting the licenses [the cable companies] would fail to seek permission before entering onto plaintiff class' lands, as they were required to do under the terms of the license agreements, and, therefore, trespass upon plaintiff's land."³¹

Combining the logic of *Dietz* with conventional trespass analysis demonstrates how indirect liability for trespass complicates the intent analysis. In cases of direct liability for trespass, intent to enter is sufficient; intent to trespass is not required. In cases of indirect liability, the *Dietz* court's analysis — if not the conventional wisdom as reflected in the Restatement — suggests that a defendant can escape liability by showing that although it intended for a third party to enter land, it did not intend for the third party to trespass — that is, to enter without permission.

We find a similar complication in intellectual property. Neither copyright nor patent infringement requires an intent to infringe by the direct infringer. And there are some circumstances in which liability can also be imposed on a third party in the absence of either knowledge or intent, based instead on the third party's financial

²⁶ *Dietz v. Ill. Bell. Tel. Co.*, 507 N.E.2d 24, 25-28 (Ill. App. Ct. 1987).

²⁷ See Motion to Dismiss, *supra* note 19, at 9.

²⁸ *Dietz*, 507 N.E.2d at 25.

²⁹ *Id.*

³⁰ *Id.* at 26.

³¹ *Id.*

interest in and ability to control the infringing activity (so-called “vicarious infringement”).³² But to be held liable for indirect infringement based on contributing to or encouraging a third party’s infringement, a third-party defendant must either have specific knowledge of the infringement or act with the intent that the infringement happen.³³

These requirements and their subtleties are the topic of frequent litigation and scholarly commentary (much of it critical).³⁴ I will not attempt a full discussion of them here. But I do offer one observation based on the Pokémon Go controversy and the trespass jurisprudence it has surfaced. As the discussion above of the *Dietz* case demonstrates, an important reason not to hold entities strictly liable for aiding or encouraging entries to land by third parties is that one might reasonably expect those third parties to seek and receive permission to enter — especially where the defendant instructed them to ask permission or to avoid trespassing. A legal rule that defied this expectation could deter the provision of assistance, products, and services that facilitate entry to land, because their providers would worry that they would be held responsible if the entrant failed to secure the necessary permissions. This deterrence would in turn

³² See *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 930 (2005) (“One . . . infringes vicariously by profiting from direct infringement while declining to exercise a right to stop or limit it . . .”).

³³ See, e.g., *Commil USA, LLC v. Cisco Sys., Inc.*, 135 S. Ct. 1920, 1926 (2015) (“In contrast to direct infringement, liability for inducing infringement attaches only if the defendant knew of the patent and that ‘the induced acts constitute patent infringement.’ . . . Like induced infringement, contributory infringement requires knowledge of the patent in suit and knowledge of patent infringement.”); *Grokster*, 545 U.S. at 936-37 (“[O]ne who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties The inducement rule . . . premises liability on purposeful, culpable expression and conduct, and thus does nothing to compromise legitimate commerce or discourage innovation having a lawful promise.”); *id.* at 933 (“Sony barred secondary liability based on presuming or imputing intent to cause infringement solely from the design or distribution of a product capable of substantial lawful use, which the distributor knows is in fact used for infringement.”); *Luvdarts, LLC v. AT&T Mobility, LLC*, 710 F.3d 1068, 1072 (9th Cir. 2013) (applying specific knowledge requirement to contributory infringement claim); Mark A. Lemley, *Inducing Patent Infringement*, 39 UC DAVIS L. REV. 225, 235-36 (2005) (“Direct patent infringement is a strict liability offense Indirect infringement, by contrast, has always required some element of knowledge. This requirement probably derives from the common law origin of indirect infringement in accessory liability, which requires that the defendant know that the behavior she aids is wrongful.”).

³⁴ E.g., MERGES, *supra* note 2, at 259-61; Karshedt, *supra* note 2, at 617-21; Menell & Nimmer, *supra* note 2, at 1017-25.

disserve law-abiding entrants who intend to seek both permission from property owners and assistance from third parties to engage in beneficial activities that require entry to land. More interestingly, such a rule would dissuade the interests of those property owners who would like to admit such entrants.

Consider even the plaintiff in *Dietz*, who might want in the future to extract a fee in exchange for permitting a (law-abiding) cable company to enter his land to string cables from the existing telephone poles. That fee might not be forthcoming if the cable company could not secure a license from the telephone company, due to the telephone company's fear that it would be held responsible for trespasses it could not control.

It is clear that many property owners value the experience of welcoming Pokémon Go players to enter their land.³⁵ As Niantic argued, “[i]f these Game Items were inaccessible from private property, people could not play on their own (or friends’) properties.”³⁶ Of course, Niantic could partially solve this problem by seeking advance permission from willing property owners.³⁷ Indeed, it appears to have cooperated with some property owners who have requested Pokéstop or Pokémon gyms status (e.g., business owners eager for new traffic).³⁸ But other property owners may prefer to give case-by-case permission to individual people, rather than blanket permission to a software company. The type of serendipitous encounter triggered by a newly hatched Pokémon desperately sought by a neighborhood child may be hard to anticipate and appreciate in advance, but welcome when it occurs.³⁹ Legal rules should not preclude this possibility by deterring the provision of products that prompt would-be entrants to ask property owners if they may come in. Liability for tempting trespass should not chill products designed to suggest sociability.

³⁵ See Kochan, *supra* note 3 (manuscript at 14) (“[S]ome owners dislike that their property is incorporated into the game. Others see it as an opportunity to lure in new customers or otherwise draw individuals to their locations that might not otherwise visit.”). An internet search for “Pokémon Go welcome signs” yields numerous friendly examples posted by individuals, business owners, churches, and even cemeteries.

³⁶ Motion to Dismiss, *supra* note 19, at 9.

³⁷ See Kochan, *supra* note 3 (manuscript at 23-26) (suggesting an opt-in solution).

³⁸ See Needleman, *supra* note 8.

³⁹ If such encounters happen and are in fact not welcome, it might be reasonable to require Niantic to exclude specific locations upon request. Niantic appears to have a system for processing such requests, although the plaintiffs alleged that it was not effective. Amended Complaint, *supra* note 3, ¶¶ 32, 26.

CONCLUSION: HONORING PROPERTY OWNERS' RIGHTS TO INCLUDE

As recent property literature has emphasized, a full descriptive and normative account of property should be attentive not only to owners' rights of exclusion, but also to their rights of inclusion.⁴⁰ Property owners' interest in exercising their right to include — that is, their interest in allowing entry onto land — could be undermined if the law operated on the assumption that entry would be unwelcome. Instead, the law should encourage would-be entrants to engage with property owners and seek permission. Sometimes that permission will be granted, with the resulting inclusion yielding benefits to both owner and entrant. Even when permission is not forthcoming, such encounters should be viewed as hallmarks of a well-functioning property system — and society — not as annoyances to be avoided and punished.⁴¹

⁴⁰ See, e.g., Daniel B. Kelly, *The Right to Include*, 63 EMORY L.J. 857, 922-23 (2014) (“Recognizing that owners have a right to include, as well as exclude, helps to clarify the social nature of property. Some owners may misuse their property by imposing social costs on others, isolating themselves from others, or discriminating against others. But many owners decide to use their property not only as a ‘wall’ to exclude others but also as a ‘gate’ to include their neighbors, friends and family, colleagues and customers, and even strangers who need help. If so, property is capable of promoting human sociability, not merely atomistic individualism. In this way, understanding the right to include may assist in properly contextualizing the right to exclude and perhaps reconciling competing perspectives about the function of property.” (footnote omitted)); Donald J. Kochan, *I Share, Therefore It’s Mine*, 51 U. RICH. L. REV. 909, 935 (2017) (“By exercising the corollary right to exclusion — meaning the right to include — an owner can make a choice that facilitates exchange of the property (or of the varying and severable rights, interests, and permissions associated with the property). Mutually desirable and beneficial exchanges of rights and permissions helps the market operate to meet the preferences of different actors — including owners and non-owners.” (footnote omitted)); see also Kellen Zale, *Sharing Property*, 87 U. COLO. L. REV. 501, 579 (2016) (“[P]roperty sharing is becoming a fundamental part of our understanding of what property is, and, as such, may offer an alternative perspective to the dominant exclusion model on the shape of property rights and responsibilities.”). Property theorists differ somewhat on whether the right to include is merely part and parcel of the right to exclude. See, e.g., Thomas W. Merrill, *Property and the Right to Exclude II*, 3 BRIGHAM-KANNER PROP. RTS. CONF. J. 1, 3 (2014) (“The right to exclude is a right, not a duty; as such, the right to exclude can be waived Given the nature of the right, the right to exclude and the right to include are effectively the same thing.”).

⁴¹ Cf. *Florida v. Jardines*, 569 U.S. 1, 8 (2013) (“‘A license may be implied from the habits of the country,’ notwithstanding the ‘strict rule of the English common law as to entry upon a close.’ We have accordingly recognized that ‘the knocker on the front door is treated as an invitation or license to attempt an entry, justifying ingress to the home by solicitors, hawkers and peddlers of all kinds.’ This implicit license typically permits the visitor to approach the home by the front path, knock promptly,

These arguments also apply to analogous intellectual property controversies. The right to include is even more important for intellectual property — which can often be shared with no harm and ample benefit to the property owner — than for tangible property. Many intellectual property owners enthusiastically waive some or all of their rights in order to see their creations and inventions disseminated more broadly, remixed in creative ways, and enjoyed by new audiences.⁴² Sometimes these are express, blanket waivers issued in advance of the invited use. But sometimes permission is granted on an individual basis after an unauthorized use has already occurred; and often intellectual property owners are simply silent, tolerating uses that do them no harm while vigorously enforcing their rights against others.⁴³ In order to safeguard these choices, it is important for courts to reject rules built on the false assumption that products that

wait briefly to be received, and then (absent invitation to linger longer) leave. Complying with the terms of that traditional invitation does not require fine-grained legal knowledge; it is generally managed without incident by the Nation's Girl Scouts and trick-or-treaters.") (first quoting *McKee v. Gratz*, 260 U.S. 127, 136 (1922); then quoting *Breard v. Alexandria*, 341 U.S. 622, 626 (1951)); *Martin v. City of Struthers*, 319 U.S. 141, 147-48 (1943) (finding it unconstitutional to ban as trespass knocking on doors to provide literature; U.S. law punishes those who enter property "after having been warned by the owner to keep off," not those who innocently enter another's property "without an explicit command . . . to stay away"); *Intel Corp. v. Hamidi*, 71 P.3d 296, 312 (Cal. 2003) ("The principle of a right not to listen, founded in personal autonomy, cannot justify the sweeping injunction issued here against all communication to Intel addresses, for such a right, logically, can be exercised only by, or at the behest of, the recipient himself or herself.").

⁴² See MERGES, *supra* note 2, at 295-96 ("Often for strategic reasons, rightholders will take action that in effect says, yes, I have an exclusive right, but I hereby relinquish it. For my own ends, I choose not to assert it; I hereby relinquish it. For my own ends, I choose not to assert it; I hereby allow it to lapse as against some or all of those I might otherwise exclude. These decisions, in my view, are an important part of the autonomy that property allows, and indeed promotes The ability to easily *include* is an important flip side to the grant of property rights — one that is obscured by an overemphasis on the muscular rights that accompany a grant of property."); Robert P. Merges, *A New Dynamism in the Public Domain*, 71 U. CHI. L. REV. 183, 184 (2004) (describing "massive growth in private initiatives to expand the public domain"). I serve as Chair of the Board of Creative Commons, a non-profit that helps to facilitate such voluntary sharing of copyrighted works.

⁴³ See Anupam Chander & Madhavi Sunder, *Everyone's a Superhero: A Cultural Theory of "Mary-Sue" Fan Fiction as Fair Use*, 95 CALIF. L. REV. 597, 611 (2007) (observing that while J.K. Rowling's lawyers issued a cease and desist letter to the publisher of a commercial retelling of Harry Potter in Calcutta, she "has generally tolerated literally hundreds of thousands of other fan fiction stories based on her characters"); Tim Wu, *Tolerated Use*, 31 COLUM. J.L. & ARTS 617, 619 (2008) (describing circumstances under which copyright owners elect not to enforce their rights).

facilitate the invasion of intellectual property rights will in fact be used against the wishes of copyright and patent owners. Instead, courts should generally assume that some copyright owners and patent owners will grant permission to engage in activities that would be infringements if unauthorized.⁴⁴ Although in some cases such permission can be solicited on behalf of users by product manufacturers, that kind of blanket *ex ante* permission will in many cases be impractical and insufficient to protect property owners' interests in deciding whether to grant permission to individuals on a case-by-case basis.⁴⁵ Intellectual property law should foster sociable, serendipitous sharing that has not been arranged in advance, but which is likely to enhance the very creativity and invention that this body of law is designed to encourage.

In sum, entities who encourage entry on private property — tangible or intellectual — should not be automatically deemed to be liable for trespass or required to seek blanket permission in advance. Instead, they should be understood to be suggesting sociability. Forbidding that suggestion would not only disserve the interests of those entities and the entrants they encourage. It would also disserve the interests of property owners eager to exercise their right to include.

⁴⁴ Cf. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 446 (1984) (“The respondents do not represent a class composed of all copyright holders. Yet a finding of contributory infringement would inevitably frustrate the interests of broadcasters in reaching the portion of their audience that is available only through time-shifting.”); *id.* at 446-47 (“Of course, the fact that other copyright holders may welcome the practice of time-shifting does not mean that respondents should be deemed to have granted a license to copy their programs. Third party conduct would be wholly irrelevant in an action for direct infringement of respondents’ copyrights. But in an action for *contributory* infringement against the seller of copying equipment, the copyright holder may not prevail unless the relief that he seeks affects only his programs, or unless he speaks for virtually all copyright holders with an interest in the outcome.”); *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 952-54 (2005) (Breyer, J., concurring) (describing authorized distribution of copyrighted works using peer-to-peer software).

⁴⁵ See Mallick, *supra* note 3, at 1075 (“Requiring developers to seek consent from all landowners before launching an application is unrealistic for applications that, like Pokémon GO, utilize a digital map with virtual presences nationwide.”).