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RECENT DEVELOPMENTS

Substantial Similarity Between Video Games: An Old Copyright Problem in a New Medium*

I. INTRODUCTION

Video games have revolutionized the entertainment industry in just a few short years by developing into an enormously profitable business.¹ The young video game industry has suffered a variety of growing pains, such as litigation over harsh state and local government regulation of video game purveyors,² parental fear that playing games may harm children,³ and public outcry against the propriety of marketing video games that contain sexually explicit or other objectionable subject matter.⁴

These problems, however, do not constitute as severe a threat to video game companies as does competition from video games

* The author entered a version of this Recent Development in the Nathan Burkan Memorial Competition, August, 1983.

1. Home video game sales totalled \$2.1 billion in 1982 and constituted 31% of total toy industry sales, up from 19% in 1981. In addition, arcade video game revenues amounted to approximately \$6 billion in 1982. Leaf, *Video Makes-and-Breaks Toy Industry*, 56 *ELECTRONICS* 84, 84-85 (Feb. 24, 1983).

2. See Note, *First Amendment Protection of Artistic Entertainment: Toward Reasonable Municipal Licensing and Zoning Regulation of Video Games*, 36 *VAND. L. REV.* 1223 (1983); Recent Development, *State Regulation of Electronic Game Machines*, 11 *J. L. & EDUC.* 385 (1982).

3. See, e.g., Wanner, *The Electronic Bogeyman*, *PSYCHOLOGY TODAY*, Oct. 1982, at 8; Markey, *What's New, Pac-Man?*, *MCCALLS*, Sept. 1982, at 152.

4. See, e.g., Graham, *Custer May Be Shot Down Again in a Battle of the Sexes Over X-Rated Video Games*, *PEOPLE WEEKLY*, Nov. 15, 1982, at 114 (the objective of game entitled "Custer's Revenge" is to guide a facsimile of General Custer across obstacle filled terrain to a graphically explicit sexual encounter with an Indian woman); *Sink the Frey Bentos!*, *TIME*, Apr. 26, 1982, at 55 (the objective of game entitled "Obliterate," which a game company marketed during the Falkland Islands war, is to torpedo an Argentine battleship).

that illegally infringe the copyrights of popular game models.⁵ The recent spate of video game copyright litigation has presented the federal courts⁶ with the challenge of properly applying the 1976 Copyright Act⁷ (the "1976 Act") to this new medium of expression.

Although Congress apparently did not design the 1976 Act with video games in mind,⁸ Congress did intend that courts apply the 1976 Act with reasonable flexibility toward new technologies.⁹ Thus, courts have faced a variety of imaginative arguments advocating that video games not receive copyright protection but unanimously have rejected them.¹⁰ A more difficult copyright issue for courts has been deciding whether one video game illegally has copied another. Of the cases involving illegal video game copying that courts presently have decided, only *Atari, Inc. v. North American Philips Consumer Electric Corp.*¹¹ has found copyright infringement by a video game that was not virtually identical¹² to the original game.

Part II of this Recent Development discusses the requirement in copyright infringement actions that, in proving copying, a defendant's allegedly infringing work must be substantially similar to a plaintiff's copyrighted work. Part II first discusses the common law idea-expression principle's and the *scenes a faire* doctrine's limitation on finding substantial similarity between two works. Part II then discusses judicial tests for ascertaining whether two works are

5. Infringing games "pose a substantial threat to the health of the electronic video game industry." *Stern Elec., Inc. v. Kaufman*, 523 F. Supp. 635, 638 (E.D.N.Y. 1981), *aff'd*, 669 F.2d 852 (2d Cir. 1982).

6. Federal courts have exclusive original jurisdiction over "any civil action arising under any Act of Congress relating to . . . copyrights . . ." 28 U.S.C. § 1338(a) (1976).

7. In 1976, the United States Congress passed a sweeping revision of the Copyright Act of 1909. Pub. L. No. 94-553, 90 Stat. 2541 (codified at 17 U.S.C. §§ 101-810 (1976)). All video game copyright litigation falls under the 1976 Act. *See* 17 U.S.C. § 102 (Supp. V 1981). Other forms of intellectual property protection for video games are outside the scope of this Recent Development.

8. *Midway Mfg. Co. v. Artic Int'l, Inc.*, 1981-1983 Copyright L. Dec., ¶ 25,337, at 16,890 (N.D. Ill. June 2, 1981) (stating that the framers of the Copyright Act clearly did not anticipate the specific problems advanced electronic games have raised).

9. Authors are continually finding new ways of expressing themselves, but it is impossible to foresee the forms that these new expressive methods will take. The bill does not intend either to freeze the scope of copyrightable subject matter at the present stage of communications technology or to allow unlimited expansion into areas completely outside the present congressional intent.

H.R. REP. NO. 1476, 94th Cong., 2d Sess. 51, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 5659, 5664 [hereinafter cited as HOUSE REPORT].

10. *See infra* notes 133-49 and accompanying text.

11. 672 F.2d 607 (7th Cir.), *cert. denied*, 103 S. Ct. 176 (1982).

12. *See infra* notes 150-201 and accompanying text.

substantially similar, namely the audience test and judicial modifications of the audience test.

Part III discusses recent video game copyright infringement cases. Part III first surveys video game "knock-off" cases, in which defendants produce and market video games that are virtually identical to previously copyrighted video games. Part III then discusses copyright cases concerning video games that are not virtually identical, thereby requiring factfinders to determine whether two games are substantially similar.

Part IV criticizes the substantial similarity analysis that courts use in video game copyright infringement cases. Part IV asserts that these courts treat video games like standard board games and focus primarily on visual videographic similarities between video games to determine whether they are substantially similar. Part IV argues that factfinders should play the video games that an infringement suit involves, and consider both visual videographic similarities and similarities in the manner in which the two games play in determining whether they are substantially similar. Finally, Part IV discusses the benefits of applying its proposed substantial similarity analysis to future video game copyright infringement cases in light of developing trends in the video game industry.

II. LEGAL BACKGROUND

A plaintiff successfully may bring a copyright infringement action by proving that he owned a valid copyright covering a prior work¹³ and that the defendant copied the plaintiff's copyrighted work.¹⁴ Rarely does direct evidence of copying exist.¹⁵ Courts infer copying, however, when a plaintiff proves that a defendant had access¹⁶ to the plaintiff's work and developed a product that was substantially similar to it.¹⁷ Parties rarely contest the access issue in video game copyright infringement actions,¹⁸ and therefore, sub-

13. Normally the plaintiff can satisfy the ownership requirement by producing a certificate of registration from the Copyright Office. This certificate is "prima facie evidence of the validity of the copyright and of the facts stated in the certificate." 17 U.S.C. § 410(c) (1976). See *infra* notes 133-49 and accompanying text for a discussion of challenges to the validity of video game copyrights.

14. See 3 M. NIMMER, NIMMER ON COPYRIGHT, § 13.01 at 13-3 (1983 ed.).

15. *Roth Greeting Cards v. United Card Co.*, 429 F.2d 1106, 1110 (9th Cir. 1970).

16. "Access" is the opportunity to copy a work. *Musto v. Meyer*, 434 F. Supp. 32, 34 (S.D.N.Y. 1977).

17. See 3 M. NIMMER, *supra* note 14, § 13.03[A], at 13-5 to 13-6.

18. See, e.g., *Atari, Inc. v. North Am. Philips Consumer Elec. Corp.*, 672 F.2d 607, 614

stantial similarity often is the key issue.

A. *Limitations on Finding Substantial Similarity*

Courts must undertake two types of analysis to ascertain whether works are substantially similar. First, courts must define the scope of a plaintiff's copyright to determine what a defendant may or may not copy. Central to this determination is the idea-expression principle, which states that copyright laws protect only expressions of ideas, not the abstract ideas underlying a copyrighted work.¹⁹ Second, courts must compare the defendant's work with the plaintiff's protectible expression to decide whether they are substantially similar.²⁰

1. The Idea-Expression Principle

(a) *Theoretical Approach: The Continuum Between Ideas and Expressions*

In 1789 the Constitution's framers granted Congress the power to enact copyright laws.²¹ Since that time, Congress and the courts have struggled to balance properly society's interest in encouraging individual ingenuity in the arts and sciences with society's interest in promoting national progress by allowing individuals to utilize the fruits of another's creativity.²² To accommodate these conflicting goals, the courts have developed the principle that a person may copyright only the expression of an idea, and not the abstract idea itself.²³ Congress codified this principle in the 1976 Act.²⁴ The

(7th Cir.), *cert. denied*, 103 S. Ct. 176 (1982) (parties stipulated access); *Midway Mfg. Co. v. Artic Int'l, Inc.*, 547 F. Supp. 999, 1012 (N.D. Ill. 1982) ("ample evidence" of access shown); *Atari, Inc. v. Amusement World, Inc.*, 547 F. Supp. 222, 227 (D. Md. 1981) (wide dissemination of plaintiff's work indirectly demonstrated access); *Midway Mfg. Co. v. Dirkschneider*, 543 F. Supp. 466, 482 (D. Neb. 1981) (court may not require proof of access when similarity between works is striking).

19. See *infra* notes 21-76 and accompanying text for a discussion of the idea-expression principle. Although courts and commentators often characterize the distinction between ideas and expressions as a dichotomy, this distinction more closely resembles a continuum. See *infra id.*

20. See *infra* notes 90-130 and accompanying text.

21. "The Congress shall have the power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors . . . the exclusive Right to their respective Writings . . ." U.S. CONST. art. I, § 8, cl. 8.

22. *Reyher v. Children's Television Workshop*, 533 F.2d 87, 90 (2d Cir.), *cert. denied*, 429 U.S. 980 (1976).

23. *Mazer v. Stein*, 347 U.S. 201, 217 (1954). The landmark case that established the idea-expression principle was *Baker v. Selden*, 101 U.S. 99 (1879). In *Baker* plaintiff, who previously had published a book describing an accounting system he had developed, tried to

degree of copyright protection courts will give to the expression of an idea traverses a continuum and depends upon the distinguishability of the idea from its expression. At one end of this continuum are expressions which arise from ideas that are capable of expression in only one or a limited number of ways. These ideas and expressions are virtually indistinguishable and courts will grant the expression little, if any, copyright protection.²⁵ For example, in *Herbert Rosenthal Jewelry Corp. v. Kalpakian*²⁶ the plaintiff brought suit claiming that the defendant infringed its copyright on a jeweled bee pin. The United States Court of Appeals for the Ninth Circuit was unable to differentiate between the idea of a jeweled bee pin and its expression.²⁷ Consequently, the court held that when an idea and its expression are inseparable, valid copyright registration would not bar copying the expression.²⁸ Similarly in *Morrissey v. Procter & Gamble Co.*²⁹ the court found that a person could express the rules for a sales promotional contest in only a limited number of ways. Thus, the court refused to allow the party who had designed the contest rules to isolate them from the public by copyrighting all possible expressions of the rules.³⁰

prevent the defendant from selling a book containing book-keeping forms based on that system. The Court held that although the plaintiff's book enjoyed copyright protection, the ideas that his book produced and described through diagrams and illustrations did not deserve copyright protection. *Id.* at 104-05.

Professor Nimmer believes that the first amendment requires the copyright laws to protect only copyrighted expressions of ideas. *See* 1 M. NIMMER, *supra* note 21, § 1.10[B], at 1-72; *Triangle Publications, Inc. v. Knight-Ridder Newspapers, Inc.*, 626 F.2d 1171, 1178-82 (5th Cir. 1980) (Brown, J., concurring and dissenting). *But see* Hopkins, *Ideas, Their Time Has Come: An Argument and a Proposal For Copyrighting Ideas*, 46 ALB. L. REV. 443 (1982).

24. "In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work." 17 U.S.C. § 102(b) (1976). The statute did not change existing copyright law. *See* HOUSE REPORT, *supra* note 9, at 57, reprinted in 1976 U.S. CODE CONG. & AD. NEWS at 5670 ("[T]he basic dichotomy between expression and idea remains unchanged.").

25. *Morrissey v. Procter & Gamble Co.*, 379 F.2d 675, 678 (1st Cir. 1967).

26. 446 F.2d 738 (9th Cir. 1971).

27. *Id.* at 742. The court also considered evidence produced at the district court evidentiary hearing which demonstrated that the defendants had designed their jeweled bee pins themselves after studying bees in nature and in published works. *Id.* at 739.

28. *Id.* *But see* *Herbert Rosenthal Jewelry Corp. v. Grossbardt*, 436 F.2d 315 (2d Cir. 1970), in which the United States Court of Appeals for the Second Circuit held that the defendant infringed the plaintiff's copyright on jeweled bee pins by using the plaintiff's rubber bee pin molds to make its own bee pin.

29. 379 F.2d 675 (1st Cir. 1967).

30. *Id.* at 679 (The court stated that it could not "recognize copyright as a game of chess in which the public can be checkmated.").

Expressions whose complexity and artistry clearly distinguish them from their ideas lie at the other end of the continuum,³¹ and courts require a lesser degree of appropriation of such expressions to find infringement.³² For example, in *Sid & Marty Krofft Television Productions, Inc. v. McDonald's Corp.*,³³ the Ninth Circuit affirmed jury findings that the defendant, McDonald's Corporation, had infringed the plaintiff's copyright on its "H.R. Pufnstuf" children's show by producing "McDonaldland" television commercials.³⁴ Defendant admittedly copied the idea of plaintiff's Pufnstuf, a fantasyland filled with diverse and fanciful action characters.³⁵ Defendants argued, however, that the jury should not have found copyright infringement because the characters, setting, and plot in the two expressions of the fanciful idea were too dissimilar.³⁶ The court found that the expression inherent in the H.R. Pufnstuf series differed markedly from its relatively simple idea.³⁷ The court noted that each of the Pufnstuf characters had developed a unique personality and a particular method of interacting with other characters and the environment.³⁸ Thus, the court relied upon the principle that the scope of copyright protection increases to the extent expression differs from its idea,³⁹ and affirmed the jury's finding that the defendant substantially appropriated the plaintiff's Pufnstuf expression of the fantasyland idea.⁴⁰

(b) *Influential Factors in Judicial Analysis of Idea-Expression Issues*

No single factor dominates judicial analysis of idea-expression issues in copyright infringement cases. Rather, as in "fair use" cases,⁴¹ courts consider a variety of factors when analyzing an idea-

31. See *Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp.*, 562 F.2d 1157, 1168 (9th Cir. 1977).

32. See *Universal Athletic Sales Co. v. Salkeld*, 511 F.2d 904, 908 (3d Cir.), cert. denied, 423 U.S. 863 (1975).

33. 562 F.2d at 1157 (9th Cir. 1977).

34. *Id.* at 1160.

35. *Id.* at 1165.

36. *Id.*

37. *Id.* at 1169.

38. *Id.*

39. *Id.* at 1168.

40. *Id.* at 1169.

41. The fair use section in the 1976 Act provides:

Notwithstanding the provisions of section 106, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means

expression issue.⁴² Two prominent factors that courts consider are the intent of the defendant who copies the work, and the conduct of the defendant in appropriating the work.

First, although a plaintiff does not have to prove that a defendant had the intent to bring a successful infringement claim,⁴³ and a plaintiff can recover even if a defendant only subconsciously appropriates the plaintiff's copyrighted work,⁴⁴ evidence of intent to copy apparently has influenced some courts⁴⁵ in their analysis of infringement cases.⁴⁶ For example, in *Miller v. Universal City Studios, Inc.*,⁴⁷ plaintiff brought an action alleging that the defendants infringed the copyright on his book about an extraordinary kidnapping by producing and broadcasting a television movie concerning the incident. The plaintiff and the movie's producer had negotiated the possibility of selling plaintiff's rights to the producer but failed to reach an agreement.⁴⁸ During the jury trial

specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include-

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

17 U.S.C. § 107 (1976).

42. The factors that § 107 lists are not exclusive. According to § 101 of the 1976 Act, "[t]he terms 'including' and 'such as' are illustrative and not limitative."

43. *But see* 17 U.S.C. § 506(a) (1976) (criminal infringement). The issue of whether a defendant intended to copy a plaintiff's work is a factor courts may weigh in awarding damages. 17 U.S.C. § 504(c)(2) (1976).

44. *See, e.g.,* *Bright Tunes Music Corp. v. Harrisongs Music, Ltd.*, 420 F. Supp. 177 (S.D.N.Y. 1976).

45. *See* *Harold Lloyd Corp. v. Witwer*, 65 F.2d 1 (9th Cir. 1933) (recognizing in dicta the utility of evidence of intent to copy); *Miller v. Universal Studios, Inc.*, 460 F. Supp. 984 (S.D. Fla. 1978); *Para-Tone, Inc. v. Pantone, Inc.*, 171 U.S.P.Q. (BNA) 393 (N.D. Ill. 1971).

46. For a detailed discussion of the significance of intent to copy, see Radin, *The Significance of Intent to Copy in a Civil Action for Copyright Infringement*, 54 *TEMPLE L.Q.* 1, 10-18 (1981).

47. 460 F. Supp. 984 (S.D. Fla. 1978), *rev'd and rem'd*, 650 F.2d 1365 (5th Cir. 1981). On appeal, the Fifth Circuit reversed and remanded the case because the district judge improperly instructed the jury that an author's labor of research was copyrightable. *Miller v. Universal Studios, Inc.*, 650 F.2d at 1370-72. Although the Fifth Circuit held that this improper jury instruction was reversible error, the court stated there was sufficient evidence of copying to support a finding of infringement and a verdict for the author under relevant copyright laws. *Id.* at 1367.

48. *Miller*, 460 F. Supp. at 985-86.

plaintiff introduced a memo in which the screenplay writer informed the producer that he was using the plaintiff's book.⁴⁹ The jury verdict favored the plaintiff, and in its opinion considering defendants' motion for new trial, the court apparently included intent to copy among factors important to plaintiff's proof of defendants' copying and liability for infringement.⁵⁰ For example, the court stated that the memo was "[p]articularly damning evidence against defendants" and concluded that the memo alone was sufficient to justify a finding of infringement.⁵¹

Second, when a defendant's method of appropriating a copyrighted work offends a court, this conduct can influence the court's infringement decision. For example, the defendant in *Herbert Rosenthal Jewelry Corp. v. Grossbardt*⁵² used the plaintiff's rubber mold to duplicate a jeweled bee pin to which the plaintiff held a copyright. The Second Circuit found that this behavior constituted infringement.⁵³ In *Herbert Rosenthal Jewelry Corp. v. Kalpakian*,⁵⁴ however, the United States Court of Appeals for the Ninth Circuit did not find liability when the defendant merely designed a similar piece of jewelry based upon independent research of bees.⁵⁵ The justification for these differing decisions lies in the more offensive behavior of the *Grossbardt* defendant. Similarly, the Ninth Circuit's sense of moral outrage over the defendant's method of copying the plaintiff's work is the only apparent explanation for the court's affirmation of the district court's judgment for the plaintiff in *Runge v. Lee*.⁵⁶ The plaintiff in *Runge*,

49. *Id.* at 986. The memo stated in pertinent part:

The newspaper stories from Miami and Atlanta and the trial transcript that Research wrote for [sic] weeks ago would undoubtedly supply all the information I would need, but to date none of it has arrived. Consequently all I have to go on—and have been using while waiting—is the book, and that is verboten.

Id.

50. Radin, *supra* note 46, at 14.

51. *Miller*, 460 F. Supp. at 986. The Second Circuit, however, subsequently repudiated the *Miller* holding that an author's research is copyrightable. *Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972, 979 (2d Cir. 1980). *Accord Suid v. Newsweek Magazine*, 503 F. Supp. 146, 148 (D.D.C. 1980). See 1 M. NIMMER, *supra* note 14, § 2.11[E], at 2-164 to 2-168. But see Case Comment, *Will the Denial of Copyright to an Author's Research Impede Scholarship?*, *Miller v. Universal City Studios, Inc.*, 5 W. NEW ENG. L. REV. 103 (1982). The Fifth Circuit reversed *Miller* on appeal. *Miller v. Universal City Studios, Inc.*, 650 F.2d 1365 (5th Cir. 1981).

52. 436 F.2d 315 (2d Cir. 1970).

53. *Id.*

54. 446 F.2d 738 (9th Cir. 1971).

55. *Id.* at 739.

56. 441 F.2d 579 (9th Cir.), *cert. denied*, 404 U.S. 887 (1971).

who had published a book describing her facial exercise techniques, hired the defendant and taught her the system.⁵⁷ Subsequently, the defendant left the plaintiff's employment to open her own salon and published a book describing the plaintiff's facial exercises.⁵⁸ The Ninth Circuit held that this behavior infringed the plaintiff's rights, but one commentator has argued forcefully that the court's decision was erroneous.⁵⁹

Because of the general nature of the idea-expression principle, courts sometimes apply it improperly. The principle's generality, however, provides courts with flexible guidelines for determining the appropriate scope of copyright protection. Although commentators frequently are critical,⁶⁰ courts admit that no one has developed a better analytical method than the idea-expression principle to reward works of original authorship without unduly restricting others from utilizing the works.⁶¹

(c) *Idea-Expression Principle Tests*

Judicial application of the idea-expression principle is problematic. Obviously, a defendant infringes another author's copyrighted expression by copying it exactly. If courts restricted copyright protection to exact copying, however, plagiarists could avoid copyright violations by claiming authorship of an immaterially varied version of another person's copyrighted works.⁶² Congress,

57. *Id.* at 580.

58. *Id.*

59. See 3 M. NIMMER, *supra* note 14, § 13.03[A] at 13-21 n.25. Professor Nimmer argues that although the plaintiff in *Runge* originated the exercises, the defendant did not copy the plaintiff's written expression of the exercises. Moreover, he contends that the plaintiff did not author the exercises, but merely discovered certain facts concerning the effect of certain treatments on the human body. Professor Nimmer bases his arguments on the principle that the "first person to espouse a given theory as to the significance of certain facts cannot claim copyright in the theory any more than such person could claim copyright in the facts per se." *Id.* at 13-22 n.25. (citing *McMahon v. Prentice-Hall Inc.*, 486 F. Supp. 1296 (E.D. Mo. 1980)).

60. See, e.g., Hopkins, *supra* note 23; Knowles & Palmieri, *Dissecting Krofft: An Expression of New Ideas in Copyright?*, 8 SAN FERN. V.L. REV. 109, 124-31 (1980); Libbett, *Round the Prickly Pear: The Idea-Expression Fallacy in a Mass Communications World*, 16 COPYRIGHT L. SYMP. (ASCAP) 30 (1968).

61. See, e.g., *Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp.*, 562 F.2d 1157, 1163 (9th Cir. 1977); *Reyher v. Children's Television Workshop*, 533 F.2d 87, 90 (2d Cir.), *cert. denied*, 429 U.S. 980 (1976).

62. See *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930), *cert. denied*, 282 U.S. 902 (1931). See also *Universal Pictures Co., Inc. v. Harold Lloyd Corp.*, 162 F.2d 354, 360 (9th Cir. 1947) (stating that "an infringement is not confined to literal and exact repetition or reproduction; it includes also the various modes in which the matter of any work may be adapted, imitated, transferred, or reproduced, with more or less colorable

therefore, designed the copyright laws to encourage original works of authorship,⁶³ and courts grant these works protection from non-literal copying. The courts, however, limit this protection and attempt to prevent authors from denying society the right to receive any new works that contain the same general subject matter as an original work by utilizing the idea-expression principle. Courts have developed several tests that provide guidelines for application of this principle.

(i) The Abstractions Test

The earliest and most famous idea-expression test is Judge Learned Hand's "abstractions test."⁶⁴ Judge Hand's test resembles a continuum model. At one end of the continuum is a mere abstract idea that is capable of description in a single phrase or sentence. As an idea moves along the continuum, however, it becomes more detailed and requires a longer synopsis to describe it. At some indefinite point along the continuum, the idea becomes sufficiently specific and distinct to constitute a protectible "expression," even though it is not the author's literal expression of the idea.

Commentators have criticized Judge Hand's test as constituting little more than a restatement of the principle that the copyright laws protect only expressions of ideas.⁶⁵ Judge Hand later ad-

alterations to disguise the piracy.").

63. See *supra* text accompanying note 22. Although Congress did not establish originality as a statutory prerequisite for copyright protection until the 1976 Act, the courts traditionally have required it. See Olson, *Copyright Originality*, 48 Mo. L. Rev. 29, 31 (1983).

64. Judge Hand articulated the abstractions test as follows:

Upon any work, and especially upon a play, a great number of patterns of increasing generality will fit equally well, as more and more of the incident is left out. The last may perhaps be no more than the most general statement of what the play is about, and at times might consist only of its title; but there is a point in this series of abstractions where they are no longer protected, since otherwise the playwright could prevent the use of his "ideas," to which, apart from their expression, his property is never extended.

Nichols v. Universal Pictures Corp., 45 F.2d 119, 121 (2d Cir. 1930), *cert. denied*, 282 U.S. 902 (1931).

65. [T]he *abstractions test* for substantial similarity is *no test at all*. Judge Hand's decision clearly states the accepted rule of law . . . that copyright protection extends only to the expression of the idea and not the idea itself. The "abstraction" is merely the idea/expression continuum. The *test* of drawing the line distinctly on that continuum between areas within and outside the scope of copyright protection was not announced by Judge Hand.

Knowles & Palmieri, *supra* note 60, at 119 (emphasis in original). See also 3 M. NIMMER, *supra* note 14, § 13.03[A], at 13-20.1 (Professor Nimmer argues that the "abstractions test is

mitted that no test could determine when an imitator had copied the expression of an idea and not merely the underlying idea.⁶⁶ Consequently, Judge Hand concluded that courts must make this determination on an ad hoc basis.⁶⁷

(ii) The Patterns Test

Professor Chaffee's "patterns test" provides a slightly more precise method than Judge Hand's abstraction test for determining when the similarities between two works are substantial enough to constitute infringement.⁶⁸ Rather than inquiring whether the similarities between two works are abstract, the patterns test compares similarities between the sequence of events and the interplay of characters in the works.⁶⁹ For example, Professor Nimmer used the patterns test to compare the play *Romeo and Juliet* and the movie *West Side Story* and found a pattern of thirteen significant events common to both works.⁷⁰ Based upon this analysis, he concluded that the two works were substantially similar.⁷¹ Professor Nimmer believes that the patterns test allows courts to avoid "the abdication of reasoned analysis" which is implicit in Judge Hand's conclusion that courts must apply the idea-expression principle on an ad hoc basis.⁷²

The patterns test, however, is essentially a glorified version of the abstractions test.⁷³ In describing a work at different levels of abstraction, courts inevitably must discuss the sequence of events and the interplay of characters in the work. Furthermore, explicit and exclusive comparison of only the sequence of events and the interaction of characters in two works may not accurately reflect the degree of their similarity. Less precise factors such as the tone and mood of two works also are influential.⁷⁴

helpful in that it vividly describes the nature of the quest for 'the expression of an idea.' It does not, of course, tell us where in any given work the level of abstraction is such as to cross the line from expression to idea."); B. KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT 48 (1967) ("Hand's explanation does, I think, sharpen our awareness of what we are about, but surely the technique described lacks precision.").

66. *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*, 274 F.2d 487, 489 (2d Cir. 1960).

67. *Id.*

68. See Chaffee, *Reflections on the Law of Copyright: I*, 45 COLUM. L. REV. 503, 513 (1945).

69. *Id.* at 514.

70. 3 M. NIMMER, *supra* note 14, § 13.03[A], at 13-22.1 to 13-24.

71. *Id.* at 13-24. *But cf.* Knowles & Palmieri, *supra* note 60, at 149.

72. 3 M. NIMMER, *supra* note 14, § 13.03[A], at 13-22 to 13-22.1.

73. See Knowles & Palmieri, *supra* note 60, at 136.

74. See *infra* text accompanying notes 103-09.

Most courts use the abstractions and patterns tests to distinguish between ideas and expressions in copyright infringement cases.⁷⁵ In practice, however, judicial opinions seldom do more than cite these tests.⁷⁶ Courts rarely enumerate the common patterns that two works share or pinpoint the similarities that precipitated a finding of infringement.

2. The *Scenes a Faire* Doctrine

In addition to the idea-expression principle's limitations on copyright protection, the *scenes a faire* doctrine also limits the ability of an author to protect his work.⁷⁷ *Scenes a faire* are incidents, characters, or settings that, as a practical matter, are indispensable, or at least standard, in treatments of a certain topic.⁷⁸ While courts usually apply the doctrine to incidents or sequences of events, they occasionally apply it to "stock characters"⁷⁹ or to any other standard aspect of a topic. If *scenes a faire* constitute the only similarity between two works, courts will find no actionable similarity because *scenes a faire* are not copyrightable.⁸⁰ Exam-

75. See 3 M. NIMMER, *supra* note 14, § 13.03[A], at 13-19 to 13-27.

76. But see *id.* at 13-22.1 to 13-24 (in which Professor Nimmer applies the patterns test in making a detailed comparison of *Romeo and Juliet* and *West Side Story*).

77. The term *scenes a faire* originated in *Schwarz v. Universal Pictures Co.*, 85 F. Supp. 270, 275 (S.D. Cal. 1949).

78. *Alexander v. Haley*, 460 F. Supp. 40, 45 (S.D.N.Y. 1978).

Professor Nimmer has described *scenes a faire* as an expression that "necessarily results from the fact that the common idea is only capable of expression in more or less stereotyped form." 3 M. NIMMER, *supra* note 14, § 13.03[A], at 13-29. Few ideas inherently are capable of expression only in a stereotyped form. For example, a heroic figure with super powers is expressible as either a stereotypical character that may receive no copyright protection or as a developed character that receives copyright protection. See *Warner Bros., Inc. v. American Broadcasting Cos.*, 523 F. Supp. 611, 616-18 (S.D.N.Y.) (injunction denied), *aff'd*, 654 F.2d 204, 208-11 (2d Cir. 1981), 530 F. Supp. 1187, 1193-95 (S.D.N.Y. 1982) (summary judgment granted), in which the court held that the lead character in "The Greatest American Hero" television show was not substantially similar to the Superman character. The idea of standard features or stock characters more accurately illustrates the concept of *scenes a faire* than does Professor Nimmer's definition.

79. See, e.g., *Davis v. United Artists, Inc.*, 547 F. Supp. 722, 727 (S.D.N.Y. 1982) (the stock character in a Vietnam story was a man who was patriotic before going to war, but whose war experiences confused his values).

80. See, e.g., *Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972, 979 (2d Cir. 1980) (stating that "[b]ecause it is virtually impossible to write about a particular historical era or fictional theme without employing certain 'stock' or standard literary devices, we have held that *scenes a faire* are not copyrightable as a matter of law."); see also *Davis v. United Artists, Inc.*, 547 F. Supp. 722, 725 (S.D.N.Y. 1982). A better and more intellectually honest view of the *scenes a faire* doctrine is that *scenes a faire* intertwine with a work's underlying ideas and, therefore, lack distinctiveness. Consequently, courts grant them only limited copyright protection.

ples of *scenes a faire* in the movie "Roots," which portrayed the plight of Negroes in slavery, were scenes that depicted attempted slave escapes, happy and sorrowful singing of blacks, the atrocity of buying and selling human beings, and sexual acts between male slaveowners and females slaves.⁸¹

When a defendant copies a large number of *scenes a faire* from another person's copyrighted work, however, the court may find infringement.⁸² In *Universal City Studios, Inc. v. Film Ventures International, Inc.*,⁸³ for example, the court held that the film "Great White" infringed the film "Jaws" because of similarities that retrospectively appear to be *scenes a faire*. The defendants unsuccessfully argued that the similarities between the two films consisted of unprotected general ideas and *scenes a faire*.⁸⁴ The court labelled the defendants' argument an "overly expansive view" of the idea-expression principle.⁸⁵ Many of the similarities the court found, however, resembled *scenes a faire*. For example, the shark in both films was "maniacal and demonic, attacking people and boats for reasons beyond satisfying hunger."⁸⁶ In both movies, the shark attacked a dinghy, capsized it, and consumed the occupant.⁸⁷ These similarities appear to be standard features of any movie about vicious shark attacks. The court's statement that "[t]he similarity in the basic story lines, the major characters, the sequences of events, and the interplay and development of the characters and plot is substantial"⁸⁸ seems correct, but the type of similarities the court cited in finding infringement in *Film Ventures* does not appear distinguishable from other elements of works that courts have labelled *scenes a faire*.⁸⁹ Thus, the *Film Ventures* decision suggests that if a defendant borrows many *scenes a faire* from another person's copyrighted work, a court may find infringement.

81. *Alexander v. Haley*, 460 F. Supp. at 45 & n.7.

82. See, e.g., *Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp.*, 562 F.2d 1157, 1169 (9th Cir. 1977); *Malkin v. Duhinsky*, 146 F. Supp. 111, 114 (S.D.N.Y. 1956).

83. 543 F. Supp. 1134 (C.D. Cal. 1982).

84. *Id.* at 1141.

85. *Id.*

86. *Id.* at 1137.

87. *Id.* at 1138.

88. *Id.* at 1141.

89. See *supra* notes 78-79 for examples of *scenes a faire*.

B. Judicial Tests for Determining Substantial Similarity

1. The Audience Test

(a) Validity of the Audience Test

Although courts agree that determination of substantial similarity is a question of fact, they disagree about the proper method of analyzing this issue.⁹⁰ Most courts purport to apply the ordinary observer or audience test.⁹¹ The audience test basically asks whether an average member of the audience of an allegedly infringing work would view it as substantially similar to the prior work.⁹² In *Harold Lloyd Corp. v. Witner*⁹³ the Ninth Circuit illustrated the audience test with the following example: "If an ordinary person who has recently read [a] story sits through the presentation of [a movie], if there had been literary piracy of the story, he should detect that fact without any aid or suggestion or critical analysis by others. The reaction of the public to the matter should be spontaneous and immediate."⁹⁴

Professor Nimmer has criticized the audience test, claiming that an audience's impression of infringement sometimes does not coincide with actual infringement.⁹⁵ He fears that the audience test allows defendants who unlawfully appropriate another's work to escape liability because the audience fails to detect the similarities between the two works.⁹⁶ Furthermore, Professor Nimmer believes that audiences are very susceptible to overlooking the similarities between two works when a defendant conveys a version of the orig-

90. 3 M. NIMMER, *supra* note 14, § 13.03[E][1], at 13-40.

91. *Id.* Most often courts speak of the ordinary observer test. This Recent Development adopts the audience test terminology to emphasize the fact that when a work appeals to a particular audience, its reaction is a more valid indicator of substantial similarity than that of the ordinary observer. See Note, *Copyright Infringement Actions: The Proper Role for Audience Reactions in Determining Substantial Similarity*, 54 S. CAL. L. REV. 385 (1981).

92. 3 M. NIMMER, *supra* note 14, § 13.03[E][1], at 13-41 (citing *Harold Lloyd Corp. v. Witner*, 65 F.2d 1, 18 (9th Cir. 1933)).

93. 65 F.2d 1 (9th Cir. 1933).

94. *Id.* at 18.

95. Professor Nimmer argues that:

The Copyright Act is intended to protect writers from the theft of the fruits of their labor, not to protect against the general public's "spontaneous and immediate" impression that the fruits have been stolen. To be sure the ordinary observer's impression that there has been a theft is important evidence in establishing that in fact there was a theft, but the two are not the same.

3 M. NIMMER, *supra* note 14, § 13.03[E][2], at 13-43 (emphasis in original) (citations omitted).

96. *Id.*

inal work in a different medium.⁹⁷ He reasons that expression of an author's work through a different medium often camouflages the resemblances between the two works.⁹⁸ For example, a novelist often will include introspective thoughts and emotions within a written story "which of necessity when dramatized will be expressed in a quite different manner."⁹⁹

Professor Nimmer's criticism of the audience test seems unjustified. Congress designed the Copyright Act to encourage authors to make original contributions for the benefit of society. The Act accomplishes this goal by giving authors a legally protected interest in the potential rewards resulting from public approval of their work.¹⁰⁰ If the public perceives the two works as distinct, then the public gains from having both works. Similarly, if ordinary members of the public cannot recognize the similarity between an original work and an allegedly infringing work, the allegedly infringing work probably has not damaged the original work's value in the marketplace. This reasoning led two commentators to analogize Professor Nimmer's criticism of the audience test and his concern about the possibility of undetected literary theft to the philosophical question whether a tree falling in the forest makes a sound.¹⁰¹ They contend "that unless a theft is observable, the theft does not matter" and probably never occurred.¹⁰²

97. *Id.* at 14-49.

98. *Id.* In *Dam v. Kirke La Shelle Co.*, 175 F. 902, 907 (2d Cir. 1910), in which the plaintiff claimed that a play infringed his short story, Professor Nimmer believes that the court accurately described the problem of recognizing similarities between an original work and an allegedly infringing version of that work expressed in a different medium:

It is, of course, true that the play has many additional incidents. It is likewise true that none of the language of the story is used in the play and that the characters have different names. But the right given to the author to dramatize his work includes the right to adapt it for representation upon the stage which must necessarily involve changes, additions and omissions. *It is impossible to make a play out of a story to represent a narrative by dialogue and action without making changes. . . .* Few short stories could be transformed into dramatic compositions without the addition of many new incidents. (emphasis added).

3 M. NIMMER, *supra* note 14, § 13.03[E][2], at 13-44 to 45 (quoting *Dam v. Kirke La Shelle Co.*, 175 F. at 907).

99. 3 M. NIMMER, *supra* note 14, § 13.03[E][2], at 13-44.

100. *Arnstein v. Porter*, 154 F.2d 464, 473 (2d Cir. 1946). *See also Mazer v. Stein*, 347 U.S. 201, 219 (1954) (stating that the "economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts.'").

101. *Knowles & Palmieri*, *supra* note 60, at 142.

102. *Id.*

(b) *The "Total Concept and Feel" Standard*

The courts have enhanced their support for the audience test by adopting the principle that in applying the test to decide the substantial similarity issue, the trier of fact should consider the "total concept and feel" of the works which it compares.¹⁰³ The total concept and feel standard depends on a trier of fact's overall comparison of the two works, not upon an expert's impression of selected parts. While comparison of certain portions of two works is important, and also is the method of analysis under other copyright tests,¹⁰⁴ the substantial similarity analysis should focus primarily on the similarities between two works taken as a whole.

In *Bevan v. Columbia Broadcasting System, Inc.*¹⁰⁵ the federal district court judge overturned a jury finding of copyright infringement and illustrated the importance of properly applying the total concept and feel standard to resolve substantial similarity issues. The plaintiffs in *Bevan* alleged that the defendant's comical television series "Hogan's Heroes" infringed their dramatic play "Stalag 17."¹⁰⁶ The district judge overturned the jury's finding of copyright infringement because he felt that the mood, the details and interaction between characters, and the "dynamic of events" in the two works differed significantly.¹⁰⁷ He reasoned that while grim themes of human desperation pervaded "Stalag 17," the "Hogan's Heroes" series was comical in nature and dealt primarily with scenes of "unabashed slapstick."¹⁰⁸ The *Bevan* decision does not mean that a comedy can never infringe a drama, it merely suggests that triers of fact, when comparing two works, should focus upon specific similarities and differences and upon less specific factors such as overall mood and sequences of events.¹⁰⁹

103. The term "total concept and feel" originated in *Roth Greeting Cards v. United Card Co.*, 429 F.2d 1106, 1110 (9th Cir. 1970).

104. See *supra* notes 64-76 and accompanying text for a discussion of Judge Hand's abstractions test and Professor Chaffee's patterns test for distinguishing ideas from expressions under the idea-expression principle.

105. 329 F. Supp. 601 (S.D.N.Y. 1971).

106. *Id.* at 602.

107. *Id.* at 605.

108. *Id.* at 605-06. See also *Twentieth Century-Fox Film Corp. v. MCA, Inc.*, 209 U.S.P.Q. 200, 204 (C.D. Cal. 1980) (holding that the total concept and feel of "Star Wars" and "Battlestar Galactica" are vastly different because Star Wars resembles a morality play and Battlestar Galactica is a space age cowboys and Indians story.).

109. Courts sometimes improperly apply the total concept and feel standard by merely citing the total concept and feel language and then ignoring it. For example, in *Eden Toys, Inc. v. Marshall Field & Co.*, 675 F.2d 498 (2d Cir. 1982), the United States Court of Appeals purportedly used the total concept and feel standard but then improperly dissected

2. Judicial Modifications of the Audience Test

Courts have developed two modifications of the audience test to assist in determinations of whether works in copyright infringement cases are substantially similar. In *Arnstein v. Porter*,¹¹⁰ the Second Circuit articulated the most famous refinement of the audience test. Under the *Arnstein* approach, courts use a two part test to resolve substantial similarity issues. First, a trial judge must determine whether the similarities between the original and the allegedly infringing works are substantial enough to prove copying.¹¹¹ During this part of the *Arnstein* analysis, parties may dissect the two works analytically to demonstrate their similarities and differences.¹¹² Additionally, parties may introduce expert witnesses to aid the trier of fact in determining whether copying occurred.¹¹³ An expert, for example, could delineate the similarities and differences in sequences of events, plots, and characters in the two works.¹¹⁴ If the plaintiff proves copying under the first part of the *Arnstein* test, he then must prove that the copying was sufficiently substantial to constitute unlawful appropriation.¹¹⁵ Under this second part

the appearance of two toy snowmen, found a number of minor differences between the two toys, and held that the toys were not substantially similar. *Id.* at 499-501. Circuit Judge Lumbard, dissenting, charged the majority with misapplying the ordinary observer test, and implicitly argued that the majority failed to apply the total concept and feel standard. Judge Lumbard stated:

The toy buyers will not have the two side by side for comparison as we did. Nor will they carry rulers to detect that the snowmen's nose widths, lip lengths, eye spaces and button diameters differ by fractions of an inch. Nor will they pause for serious investigation of the different stitching or contours. No; the average observer's glance will light on one with the same favor as on the other. They share similar composition (two snowballs, two buttons, scarf, face and hat), they share similar facial expressions, and, in general, they share the same "aesthetic appeal."

....

In sanctioning this misappropriation, the majority leaves open to future copyists the chance to seize the essence of a work while escaping liability through minor changes. *Id.* at 501-502 (Lumbard, J., dissenting).

110. 154 F.2d 464 (2d Cir. 1946).

111. *Id.* at 468.

112. *Id.*

113. *Id.*

114. For a general example of how parties compare two works, see *Miller v. Columbia Broadcasting Sys., Inc.*, 209 U.S.P.Q. 502 (C.D. Cal. 1980).

115. *Arnstein*, 154 F.2d at 468. If the plaintiff fails to prove unlawful appropriation under the second part of the *Arnstein* analysis, the copying is permissible. Copying might not equal unlawful appropriation for a variety of reasons. A court may find copying permissible when the defendant copied only ideas, copying was de minimis, or the copying was within the boundaries of fair use. The United States Court of Appeals for the Third Circuit artfully articulated this point by stating: "[w]hile a '[r]ose is a rose is a rose,' substantial similarity is not always substantial similarity." *Universal Athletic Sales Co. v.*

of the *Arnstein* analysis the trier of fact must use the standard of an "ordinary lay observer" operating without the assistance of expert testimony or a technical discussion of similarities and differences between the works to decide whether appropriation was unlawful.¹¹⁶

In *Sid & Marty Krofft Television Productions, Inc. v. McDonald's Corp.*,¹¹⁷ the Ninth Circuit offered an alternate approach to the *Arnstein* modification of the audience test. The Ninth Circuit designed the *Krofft* "extrinsic-intrinsic" test to facilitate accurate implementation of the idea-expression principle.¹¹⁸ Under the "extrinsic-intrinsic" test the trial judge first must decide whether the ideas underlying two works are substantially similar.¹¹⁹ This "extrinsic" part of the *Krofft* test allows the court to permit the introduction of expert testimony and the analysis of specific details of the two works.¹²⁰ If the ideas are similar, the factfinder then decides whether the expressions of the ideas are substantially similar.¹²¹ Under this "intrinsic" part of the *Krofft* test, the factfinder operates pursuant to an "ordinary reasonable person" standard and without the assistance of expert testimony or analytical dissection of the two works to determine whether the expressions in the works are substantially similar.¹²² Courts other than the Ninth Circuit generally have not adopted the *Krofft* approach.¹²³

Professor Nimmer feels that the principal difference between the *Arnstein* and *Krofft* approaches is that the *Krofft* test diminishes a court's ability to hold for the defendant as a matter of law.¹²⁴ Under *Krofft* a court has very limited ability to rule for the defendant before trial because the ideas underlying the works in most cases usually are similar in some respect or the plaintiff never would have filed suit.¹²⁵ Trial courts in the Ninth Circuit reacted

Salkeld, 511 F.2d 904, 907 (3d Cir.), cert. denied sub nom. Universal Athletic Sales Co. v. Pinchock, 423 U.S. 863 (1975).

116. *Arnstein*, 154 F.2d at 468.

117. 562 F.2d 1157 (9th Cir. 1977).

118. *Id.* at 1163 n.6. The Ninth Circuit stated that the *Arnstein* court might have tried to accomplish the same result as the "extrinsic-intrinsic" test, but the fact that it may not have does not subtract from the Ninth Circuit's analysis. *Id.* at 1165-66 n.7.

119. *Id.* at 1164.

120. *Id.*

121. *Id.*

122. *Id.*

123. The only case outside the Ninth Circuit adopting the *Krofft* approach is *MGM, Inc. v. Showcase Atlanta Coop. Prods., Inc.*, 479 F. Supp. 351 (N.D. Ga. 1979).

124. See 3 M. NIMMER, *supra* note 14, § 13.03[E][3], at 13-50.

125. *Id.*

to this problem by using the *scenes a faire* doctrine¹²⁶ and a stricter standard for finding similarity of ideas while applying the first step of the *Krofft* approach.¹²⁷ Professor Nimmer also argues that the *Krofft* test limits the ability of appellate courts to reverse jury verdicts that find substantial similarity because appellate courts are reluctant to reverse a factfinder's subjective determination under the intrinsic portion of the *Krofft* test.¹²⁸

The ordinary observer test, which requires juries to determine substantial similarity without the assistance of analytic dissection of two works or expert testimony, seems to be the best test of substantial similarity in copyright infringement cases. Although juries are fallible, the determination of substantial similarity is no more difficult than many other determinations that our legal system entrusts to them. The "battle of the experts" that Professor Nimmer seems to favor would shed little light on the key issue in copyright infringement actions: whether the public believes the two works are substantially similar. Instead, expert witnesses could easily mislead juries by focusing their attention on minor differences or similarities between two works that have little bearing on the infringement issue.¹²⁹ Even less helpful than opinions of expert witnesses in these cases are the opinions of plaintiff-authors because they often have an obsessive belief "that all similarities between their works and any others which appear later must inevitably be ascribed to plagiarism."¹³⁰

126. See *supra* notes 77-89 and accompanying text.

127. Note, *Copyright Infringement: An Argument for the Elimination of the Scenes a Faire Doctrine*, 5 *COM. ENT. L.J.* 147, 168 (1982).

128. See 3 M. NIMMER, *supra* note 14, § 13.03[E][3], at 13-50. In *Krofft* the Ninth Circuit stated that although appellate courts subject a fact finder's conclusion to the "clearly erroneous" standard, an appellate court is "less likely to find clear error when the subjective test for copying of expression has been applied." The intrinsic test is "uniquely suited for determination by the trier of fact," so the court "must be reluctant to reverse it." 562 F.2d at 1166.

129. The testimony of an expert upon such issues, especially his cross-examination, greatly extends the trial and contributes nothing. . . . It ought not to be allowed at all; and while its admission is not a ground for reversal, it cumpers the case and tends to confusion, for the more the court is led into the intricacies of dramatic craftmanship, the less likely it is to stand upon the firmer, if more naive, ground of its considered impressions upon its own perusal. We hope that in this class of cases such evidence may in the future be entirely excluded

Nichols v. Universal Pictures Corp., 45 F.2d 119, 123 (2d Cir. 1930), *cert. denied*, 282 U.S. 902 (1931).

130. *Dellar v. Samuel Goldwyn, Inc.*, 150 F.2d 612, 613 (2d Cir. 1945), *cert. denied*, 327 U.S. 790 (1946).

III. RECENT DEVELOPMENT

Video game copyright infringement cases fall neatly into two categories. The first category contains cases, commonly referred to as "knock-offs," in which defendants produce games that are virtually identical to previously created games and then challenge the validity of the copyrights on those games. Courts, however, have granted copyright protection under the 1976 Act to the previously created games and have held that the defendants' nearly identical games have infringed the plaintiffs' copyrights.¹³¹ The second category consists of cases in which courts have faced the more difficult question of determining whether two video games are substantially similar.¹³² The inconsistent analysis and results in these cases demonstrate the continuing problem courts will face in future video game litigation.

A. The "Knock-Off" Cases

Section 102(a) of the 1976 Act¹³³ protects video games as "audiovisual works."¹³⁴ Video game manufacturers consciously have chosen to register the sounds and visual images of video games as audiovisual works rather than registering the underlying computer programs as literary works.¹³⁵ This strategy protects manufacturers

131. See *infra* text accompanying notes 133-49.

132. See *infra* text accompanying notes 150-201.

133. The 1976 Act provides in pertinent part:

(a) Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include the following categories:

(1) literary works;

. . . .

(6) motion pictures and other audiovisual works

17 U.S.C. § 102(a) (1976).

134. 17 U.S.C. § 101 (1976) defines audiovisual works as follows:

"Audiovisual works" are works that consist of a series of related images which are intrinsically intended to be shown by the use of machines or devices such as projectors, viewers, or electronic equipment, together with accompanying sounds, if any, regardless of the nature of the material objects, such as films or tapes, in which the works are embodied.

135. See *Stern Elec., Inc. v. Kaufman*, 669 F.2d 852, 855 (2d Cir. 1982); *Midway Mfg. Co. v. Artic Int'l, Inc.*, 547 F. Supp. 999, 1006 (N.D. Ill. 1982). The courts have upheld the registration of video games as audiovisual works despite arguments of defendants that the only protectible feature of a video game is its underlying computer program. See, e.g., *Stern Elec., Inc.*, 669 F.2d at 855; *Atari, Inc. v. Amusement World, Inc.*, 547 F. Supp. 222, 226 (D. Md. 1981); see also Jones, *Video Games Litigation and the 1976 Copyright Act: The Ideas of Games, the Expression of Aliens, and the Underlying Computer Software*, 1 J. COPYRIGHT, ENT., & SPORTS L. 17, 44-48 (1982) (suggesting that uncertainty about the ability to

from knock-off video games that use different computer programs to produce games which are virtually identical to previously created games.¹³⁶ As video game manufacturers have brought infringement actions against makers of knock-offs, imaginative litigators have attempted to challenge the validity of video game copyrights on at least two grounds.

First, defendants have argued that video games are not proper subjects for copyright protection because they fail to meet the requirements of section 102(a) of the 1976 Act.¹³⁷ Defendants have claimed that video games are not "fixed" within the meaning of the statute.¹³⁸ Courts have held, however, that because computer circuits embody the audiovisual features of video games, and game machines are capable of reproducing these audiovisual features, they meet the 1976 Act's fixation requirement.¹³⁹ Similarly, defendants have argued that a player's participation in a video game withdraws the audiovisual work from copyright eligibility because the game has no "fixed performance and the player becomes a co-author of what appears on the screen."¹⁴⁰ Courts have rejected this argument, reasoning that although players participate in a video game's audiovisual presentation, the presentation always contains a repetitive sequence of a substantial portion of the game's sights and sounds, and many aspects of the game's display do not vary from game to game regardless of how the player operates the game's controls.¹⁴¹

protect computer programs was an additional reason for registering video games as audiovisual works). The 1980 amendments to the 1976 Act resolved this uncertainty. Act of Dec. 12, 1980, Pub. L. No. 96-517, § 10, 94 Stat. 3028.

136. See *Stern Elec., Inc. v. Kaufman*, 669 F.2d at 855.

137. See *supra* note 133.

138. Section 101 of the 1976 Act defines the term "fixed" as follows:

A work is "fixed" in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration. A work consisting of sounds, images, or both, that are being transmitted, is "fixed" for purposes of this title if a fixation of the work is being made simultaneously with its transmission.

17 U.S.C. § 101 (1976).

139. See *Williams Elec., Inc. v. Artic Int'l, Inc.*, 685 F.2d 870, 873-74 (3d Cir. 1982); *Stern Elec., Inc. v. Kaufman*, 669 F.2d at 855-56; *Midway Mfg. Co. v. Artic Int'l, Inc.*, 547 F. Supp. 999, 1007-08 (N.D. Ill. 1982); *Midway Mfg. Co. v. Dirkschneider*, 543 F. Supp. 466, 480 (D. Neb. 1981).

140. See *Williams Elec., Inc. v. Artic Int'l, Inc.*, 685 F.2d 870, 874 (3d Cir. 1982); *Stern Elec., Inc. v. Kaufman*, 669 F.2d at 856-57 (2d Cir. 1982).

141. *Williams Elec., Inc. v. Artic Int'l, Inc.*, 685 F.2d at 874; see *Stern Elec., Inc. v. Kaufman*, 669 F.2d at 855-56.

Second, defendants have argued that video games do not meet the statutory formalities of depositing the work with the Copyright Office¹⁴² and displaying notice of copyright on the work.¹⁴³ Video game manufacturers have attempted to satisfy the deposit requirement by submitting a videotape of the audiovisual work to the copyright office. The courts have held that although the parties did not deposit actual copies of the video games with the office, the videotapes satisfied the deposit requirement as "identifying material" under Copyright Office regulations.¹⁴⁴ In addition, one court has held that the videotape is as much a "copy" of the audiovisual work as is the game itself, and therefore, depositing the videotape already had met the 1976 Act's deposit requirement without reference to copyright office regulations.¹⁴⁵ Another court, with reference to Copyright Office regulations, held that video game manufacturers satisfied the 1976 Act's copyright notice requirement by including the notice within the visual display of the work or by affixing the notice to the video game's terminal.¹⁴⁶

Subsequent to judicial decisions that video games are copyrightable, courts uniformly have found copyright infringement in knock-off cases. Knock-off video games, by definition, are virtually identical to the copyrighted video game.¹⁴⁷ Even the names of the

142. Section 408 of Title 17 makes deposit a prerequisite for copyright registration. 17 U.S.C. § 408 (1976).

143. Section 401 of Title 17 requires notice of copyright. 17 U.S.C. § 401 (1976).

144. See *Williams Elec., Inc. v. Artic Int'l, Inc.*, 685 F.2d 870, 875 (3d Cir. 1982) (37 C.F.R. § 202.20(c)(2)(ix) (1981) specifically provides that deposit of identifying material at the Copyright Office complies with the regulation); *Atari, Inc. v. Amusement World, Inc.*, 547 F. Supp. 222, 227 (D. Md. 1981) (37 C.F.R. § 202.20(d) allows the Register of Copyrights to grant special relief and permit deposit of alternative identifying material). The requirements for identifying material are listed in 37 C.F.R. § 202.21.

145. See *Midway Mfg. Co. v. Artic Int'l, Inc.*, 547 F. Supp. 999, 1006-07 (N.D. Ill. 1982).

146. See 37 C.F.R. § 201.20(g) (adopted Dec. 1, 1981). See also *Midway Mfg. Co. v. Dirkschneider*, 543 F. Supp. 466, 481-82 (D. Neb. 1981) (characterizing the proposed regulations as a persuasive interpretation of section 401(c) of the 1976 Act).

147. A judge recently compared two video games in a knock-off case and described their similarity as follows:

I have seen the machines, both of them, the accused device and the plaintiff's device in operation, and I spent considerable time because of the fact that I happened to be emergency Judge.

I may say, if I may make a little homely example, if I were a biologist and the machines were animals, . . . I would have to find that both of these machines were . . . at least members of the same type or species.

I think I would have to go further . . . and find that they belonged to the same family.

I would even have to go further but not as far as counsel for the plaintiff says—they are not identical twins. In fact, they are not twins at all, but, in my judg-

infringing and original video games often are similar.¹⁴⁸ Thus, defendants probably will not devise a successful strategy for defending the knock-off cases in the future.¹⁴⁹

B. Substantial Similarity and the Atari Trilogy

The determination of illegal copying is much more difficult in copyright infringement suits in which video games are not virtually identical than it is in knock-off cases. Three infringement cases, all brought by Atari, Inc., have presented courts with the problem of determining whether video games are substantially similar.¹⁵⁰ These cases reveal conflicting views concerning the protectible elements of video games and the correct method of analyzing substantial similarity in video game infringement actions.

1. Atari, Inc. v. Amusement World, Inc.

In *Atari, Inc. v. Amusement World, Inc.*¹⁵¹ Atari sought to enjoin an alleged infringement of its video game "Asteroids" by Amusement World, Inc.'s game entitled " Meteors."¹⁵² The federal

ment, they are hrothers.

Atari, Inc. v. Armenia, Ltd., 1981-1983 Copyright L. Dec., ¶ 25,320, at 16,844-45 (N.D. Ill.). See also *Williams Elec., Inc. v. Artic Int'l, Inc.*, 685 F.2d 870, 872 (3d Cir. 1982) (the games were "virtually identical"); *Stern Elec., Inc. v. Kaufman*, 669 F.2d 852, 855 (2d Cir. 1982) ("virtually identical in both sight and sound"); *Nintendo of America, Inc. v. Bay Coin Distributors, Inc.*, 1981-1983 Copyright L. Dec., ¶ 25,409, at 17,377 (E.D.N.Y.) (the "differences among and between the games demonstrated were miniscule at best."); *Midway Mfg. Co. v. Artic Int'l, Inc.*, 547 F. Supp. 999, 1005 (N.D. Ill. 1982) ("Other than . . . trivial differences, the Artic game is absolutely identical to Midway's Pac-Man"); *Midway Mfg. Co. v. Dirkschneider*, 543 F. Supp. 466, 483 (D. Neb. 1981) ("It cannot be overemphasized that, in virtually every detail, the defendants' games are identical to the plaintiffs'").

148. See, e.g. *Williams Elec., Inc. v. Artic Int'l, Inc.*, 685 F.2d 870, 873 (3d Cir. 1982) ("Defender" and "Defense Command"); *Stern Elec., Inc. v. Kaufman*, 669 F.2d 852, 854 (2d Cir. 1982) ("Scramble" and "Scramble"); *Nintendo of America, Inc. v. Bay Coin Distributors, Inc.*, 1982 Copyright L. Dec., ¶ 25,409, at 17,376 (E.D.N.Y. May 28, 1982) ("Donkey Kong" and "Crazy Cong," "Crazy Kong"); *Midway Mfg. Co. v. Artic Int'l, Inc.*, 547 F. Supp. 999, 1005 (N.D. Ill. 1982) ("Pac-Man" and "Puckman"); *Midway Mfg. Co. v. Dirkschneider*, 543 F. Supp. 466, 482-83 (D. Neb. 1981) ("Pac-Man" and "Mighty Mouth," "Galaxian" and "Galactic Invaders," "Rally-X" and "Rally-X").

149. For a fuller discussion of issues relating to the validity of video game copyrights, see Jones, *supra* note 135, at 27-35. See also Kramsky, *The Video Game: Our Legal System Grapples With a Social Phenomenon*, 64 J. PAT. OFF. SOC'Y 335, 341-46 (1982).

150. *Atari, Inc. v. Amusement World, Inc.*, 547 F. Supp. 222 (D. Md. 1981); *Atari, Inc. v. Williams*, 1981-1983 Copyright L. Dec., ¶ 25,412, at 17,383 (E.D. Cal. Dec. 28, 1981); *Atari, Inc. v. North Am. Philips Consumer Elec. Corp.*, 1981-1983 Copyright L. Dec., ¶ 25,363, at 17,044 (N.D. Ill. Dec. 4, 1981), *rev'd*, 672 F.2d 607 (7th Cir.), *cert. denied*, 103 S. Ct. 176 (1982).

151. 547 F. Supp. 222 (D. Md. 1981).

152. Injunctions are the standard remedy that plaintiffs seek in infringement cases

district court judge examined the two games and found twenty-two similarities and nine differences.¹⁵³ After holding that Atari owned

because the "popularity of audiovisual games is notoriously short-lived." *Midway Mfg. Co. v. Dirkschneider*, 543 F. Supp. 466, 484 (D. Neb. 1981). See also *Atari, Inc. v. North Am. Philips Consumer Elec. Corp.*, 672 F.2d 607, 620 (7th Cir.), cert. denied, 103 S. Ct. 176 (1982) (suggesting the need for preliminary injunctions because of the short-lived nature of video games).

153. The court found that the following design features in "Asteroids" and "Metectors" were either similar or identical in both games:

- (1) There are three sizes of rocks.
- (2) The rocks appear in waves, each wave being composed initially of larger rocks.
- (3) Larger rocks move more slowly than smaller ones.
- (4) When hit, a large rock splits into two medium rocks, a medium rock splits into two smaller ones, and a small rock disappears.
- (5) When a rock hits the player's spaceship, the ship is destroyed.
- (6) There are two sizes of enemy spaceships.
- (7) The larger enemy spaceship is an easier target than the smaller one.
- (8) The player's ship and enemy ships shoot projectiles.
- (9) When a spaceship's projectiles hit a rock or another ship, the latter is destroyed immediately.
- (10) The destruction of any rock or spaceship is accompanied by a symbol of an explosion.
- (11) When an enemy spaceship is on the screen, the player hears a beeping tone.
- (12) There is a two-tone beeping noise in the background throughout the game, and the tempo of this noise increases as the game progresses.
- (13) The player gets several spaceships for his quarter. The number of ships remaining is displayed with the player's score.
- (14) The score is displayed in the upper left corner for one player and the upper right and left corners for two players.
- (15) The control panels are painted in red, white, and blue.
- (16) Four control buttons from left to right, rotate the player's spaceship counter-clockwise, rotate it clockwise, move it forward, and fire the weapon.
- (17) When a player presses the "thrust" button, his spaceship moves forward and when he releases the button the ship begins to slow down gradually (although it stops more quickly in "Metectors");
- (18) The player gets an extra spaceship if he scores 10,000 points.
- (19) Points are awarded on an increasing scale for shooting (a) large rock, (b) medium rock, (c) small rock, (d) large alien craft, (e) small alien craft.
- (20) When all rocks are destroyed a new wave of large rocks appears.
- (21) Each new wave of rocks has progressively more large rocks than the previous waves to increase the challenge of the game.
- (22) A general overhead view of the battle field is presented.

Atari, Inc. v. Amusement World, Inc., 547 F. Supp. at 224-25. The court also found several differences between the two games:

- (1) "Metectors" is in color, while "Asteroids" is in black and white.
- (2) The symbols for rocks and spaceships in "Metectors" are shaded to appear three-dimensional, unlike the flat, schematic figures in "Asteroids."
- (3) The rocks in "Metectors" appear to tumble as they move across the screen.
- (4) "Metectors" has a background that looks like distant stars.
- (5) At the beginning of "Metectors," the player's spaceship is shown blasting off the earth, whereas "Asteroids" begins with the player's spaceship in outer space.
- (6) The player's spaceship in "Metectors" rotates faster.

a valid copyright that covered its Asteroids game,¹⁵⁴ the court considered the idea-expression issue.¹⁵⁵ The court stated that, unlike the jeweled bee pin idea in *Herbert Rosenthal Jewelry Corp. v. Kalpakian*,¹⁵⁶ the idea of a video game in which a player shoots space rocks was sufficiently general to permit more than one form of expression that was distinguishable from the underlying idea.¹⁵⁷ Thus, the court held that Atari's video game was copyrightable.¹⁵⁸

In determining the scope of the plaintiff's copyright, however, the court held that most similarities between the two games were "inevitable."¹⁵⁹ The court stated that similarities which are inextricably associated with the idea of a video game are not protectible because protecting them would give the plaintiff a monopoly over the idea.¹⁶⁰ After discounting the unavoidable similarities between the games and applying the "ordinary observer" test, the court found that an ordinary player who compared Asteroids and Mete-

(7) The player's spaceship in "Meteors" fires faster and can fire continuously, unlike the player's spaceship in "Asteroids," which can fire only bursts of projectiles.

(8) The pace of the "Meteors" game is faster at all stages.

(9) In "Meteors," after the player's spaceship is destroyed, when the new spaceship appears on the screen, the game resumes at the same pace as immediately before the last ship was destroyed; in "Asteroids" the game resumes at a slower pace.

Id. at 225.

154. Amusement World claimed that only the computer program was copyrightable, and that the plaintiffs had not complied with the deposit requirement. *Id.* at 226-27. See *supra* text accompanying notes 133-35 & 144-45.

155. See *supra* notes 21-76 and accompanying text for a discussion of the idea-expression principle.

156. 446 F.2d 738 (9th Cir. 1971). See *supra* notes 21-40 and accompanying text.

157. *Atari, Inc. v. Amusement World, Inc.*, 547 F. Supp. at 227, 229.

158. *Id.* at 226.

159. In discussing the inevitable similarities between the two video games with the same underlying ideas, the district judge stated that:

There are certain forms of expression that one must necessarily use in designing a video game in which a player fights his way through space rocks and enemy spaceships. The player must be able to rotate and move his craft. All the spaceships must be able to fire weapons which can destroy targets. The game must be easy at first and gradually get harder, so that bad players are not frustrated and good ones are challenged. Therefore, the rocks must move faster as the game progresses. In order for the game to look at all realistic, there must be more than one size of rock. Rocks cannot split into very many pieces, or else the screen would quickly become filled with rocks and the player would lose too quickly. All video games have characteristic sounds and symbols designed to increase the sensation of action. The player must be awarded points for destroying objects, based on the degree of difficulty involved.

All these requirements of a video game in which the player combats space rocks and spaceships combine to dictate certain forms of expression that must appear in any version of such a game.

Id. at 229.

160. *Id.*

ors would conclude that the games were different.¹⁶¹ Although the court candidly admitted that Amusement World copied Atari's idea, it held that the two expressions of the idea were not substantially similar.¹⁶² The court reasoned that the overall feel of the way the two games played was different. It emphasized that the graphics in Meteors were more realistic, the spaceship in Meteors handled and fired differently, and the Meteors game generally was faster paced and more difficult than Asteroids.¹⁶³

2. Atari, Inc. v. Williams

In *Atari, Inc. v. Williams*,¹⁶⁴ Atari attempted to enjoin the defendant from marketing its home video game entitled "Jawbreaker," claiming that it infringed their "Pac-Man" game. At the time the defendant sought to market Jawbreaker, Atari had not yet perfected a home video version of Pac-Man.¹⁶⁵ The court found that although both video games used the same idea,¹⁶⁶ a similarity in ideas was not actionable. Specifically the court stated that the copyright laws did not protect the idea of "a player symbol being guided through a maze appearing to gobble up dots in its path while being chased through the maze by several opponents."¹⁶⁷ The court also characterized Pac-Man's rules, strategy, and progress of play as unprotectible ideas.¹⁶⁸ The court's opinion listed several

161. *Id.* at 229.

162. *Id.* at 230. The plaintiff sought to appeal the *Amusement World* decision, but the parties subsequently settled during the summer of 1982. Telephone interview with Daniel W. Vittum, Jr., lead counsel for the plaintiff (Nov. 18, 1982); Letter from David B. Hodges, counsel for the plaintiff (Nov. 1982).

163. *Atari, Inc. v. Amusement World, Inc.*, 547 F. Supp. at 230.

164. 1981-1983 Copyright L. Dec., ¶ 25,412, at 17,383 (E.D. Cal. Dec. 28, 1981).

165. *Id.* at 17,384.

166. The court stated that:

The *idea* of both "Jawbreaker" and "Pac-Man" is basically a maze with a number of small objects (dots or circles) aligned within a maze. An object, appearing to be a mouth, referred to herein as an eater, is guided through the maze by a player and appears to eat the small object. Within the maze, a plurality of chasers chase the eater through the maze. If the chaser catches the eater before he can eat all of the small objects, the player's score is reduced. However, if the eater can devour all of the small objects in the maze before the chaser catches him, then the player's score is increased. If, at one point, the chaser catches the player, a replay begins. In the maze, at certain spots, a larger (power) object appears in the maze. If this larger object is eaten by the eater, it can turn and chase the chasers for a specified time, scoring points as they are devoured.

Id. at 17,384-85 (emphasis in original).

167. *Id.* at 17,386.

168. *Id.*

similarities and differences between the games¹⁶⁹ but concluded that the "symbols and graphics" were sufficiently different that an ordinary observer would not notice the games' similarity.¹⁷⁰ The court also concluded that the balance of equities in the case favored the defendant because he was marketing his home computer game before Atari had perfected or marketed its home version of Pac-Man.¹⁷¹ Therefore, the court denied Atari's request for an injunction because it felt that the sale of Jawbreakers would not cause Atari irreparable harm in the video game marketplace.¹⁷²

169. The court articulated the following similarities and differences between "Jawbreaker" and "Pac-Man":

a. In Plaintiff's game of "Pac-Man", the chasers are in the shape of ghosts which have small legs extending downward and they seem to run along in the maze and travel in the maze in a set pattern in the maze.

In Defendant's game of "Jawbreaker", the chasers are in the form of happy faces which seem to roll along in the maze and travel in a random pattern in the maze while keying in on the object it is chasing.

b. In Plaintiff's game of "Pac-Man", the object which is chased by the chaser is a round-shaped object which has a pie-shaped opening which opens and shuts when it devours dots aligned in the maze.

In Defendant's game of "Jawbreaker", the object which is chased by the chaser is a set of teeth, simulating false teeth, which chomp up and down on small circles aligned in the maze.

c. The colors of the chasers and eaters used in "Pac-Man" are different from those used in the "Jawbreaker" game.

d. The music played is different in both games and "Pac-Man" has an attract mode which plays prior to each game, and "Jawbreaker" has no attract mode.

e. In Plaintiff's game of "Pac-Man", the eyes of the ghost look in the direction in which they are travelling.

In Defendant's game of "Jawbreaker", the smiling faces appear to be rolling and will go in any direction, notwithstanding the direction they are facing.

f. In "Pac-Man", the items used to mark scores are cherries, oranges, strawberries, and grapes, while in "Jawbreaker" the items used to score are candycanes, sailboats, and gumdrops.

g. In Plaintiff's game of "Pac-Man" the energizer dots in the maze glow at a constant color, while in the Defendant's game of "Jawbreaker", the energizer dots in the maze are a plurality of rotating different colored smaller dots.

h. The maze in each game is not the same.

i. In plaintiff's game of "Pac-Man", when the ghosts catch the eater, it appears to melt.

In the defendant's game of "Jawbreaker", when the smiling faces appear to catch the false teeth, the teeth fall out to the bottom of the maze.

Id. at 17,385. The court also found that "Jawbreaker" had many unique features. For example, the court stated that in "Jawbreaker", unlike "Pac-Man", if a player manipulates his eater in such a manner that it devours all the game's dots before a chaser catches it, then a toothbrush appears on the screen and brushes the eater's teeth. In addition, the court observed that each chaser rotates in a different direction and has different faces. *Id.*

170. *Id.* at 17,386.

171. *Id.*

172. *Id.* at 17,385-86.

3. Atari, Inc. v. North American Philips Consumer Electronics Corp.

In *Atari, Inc. v. North American Philips Consumer Electronics Corp.*,¹⁷³ Atari alleged that North American, by producing and marketing its video game entitled "K. C. Munchkin," infringed Atari's copyright on Pac-Man and sought injunctive relief in federal district court.¹⁷⁴ The court found that the central character in K. C. Munchkin, unlike the main character in Pac-Man, had a specific personality, and that the ghost monsters in K. C. Munchkin were spookier than those in Pac-Man.¹⁷⁵ The court also found several differences in the way the two games played. First, the Pac-Man ghosts entered the game by moving upward from a stationary central box while the box in K. C. Munchkin rotated ninety degrees every few seconds.¹⁷⁶ Second, the Pac-Man maze contained over 200 uniformly spaced stationary dots for the central character to gobble, while the K. C. Munchkin maze contained only twelve randomly spaced square dots that travelled throughout the maze.¹⁷⁷ Third, K. C. Munchkin required players to out-think the moving dots and ghosts while Pac-Man allowed players to use a set pattern of movement.¹⁷⁸ Fourth, K. C. Munchkin displayed many different mazes but Pac-Man displayed only one fixed maze.¹⁷⁹ Last, the sounds accompanying the two games were different.¹⁸⁰ Based upon these findings, the district court denied Atari's request for injunctive relief.¹⁸¹

On appeal, the United States Court of Appeals for the Seventh Circuit reversed the district court's decision and held that North American infringed Atari's copyright on the Pac-Man game.¹⁸² After describing the two games in detail,¹⁸³ the court then discussed the developmental history of the K. C. Munchkin game, which showed that North American game designers and executives played Pac-Man, discussed its increasing popularity, and then created K. C. Munchkin in an attempt to develop a modified version

173. 1981-1983 Copyright L. Dec., ¶ 25,363, at 17,044 (N.D. Ill. Dec. 4, 1981).

174. *Id.* at 17,044.

175. *Id.* at 17,047.

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.* at 17,050.

182. 672 F.2d 607 (7th Cir.), *cert. denied*, 103 S. Ct. 176 (1982).

183. *Id.* at 610-13.

of Pac-Man.¹⁸⁴ North American, after examining the first version of K. C. Munchkin, concluded that it was totally different from Pac-Man but instructed its game designer to make changes in the game to prevent consumers from confusing it with the Atari model.¹⁸⁵ North American issued internal instructions to refrain from references to Pac-Man in promoting K. C. Munchkin.¹⁸⁶ Nevertheless, retailers and sales clerks described K. C. Munchkin as a Pac-Man type game in advertisements and sales promotions.¹⁸⁷ The Seventh Circuit, with references to the idea-expression principle¹⁸⁸ and the *scenes a faire* doctrine,¹⁸⁹ stated that the central theme and rules of the Pac-Man game were unprotectible ideas.¹⁹⁰ In addition, the court implicitly applied the *scenes a faire* doctrine and said that certain standard video game features such as a maze design, a scoring table, and edible dots, deserved protection only from virtually identical copying, which the court felt did not occur in this case.¹⁹¹ The court held, however, that North American's K. C. Munchkin game substantially appropriated the fanciful and artistic characters of Pac-Man and portrayed them in a substantially similar manner.¹⁹²

184. *Id.* at 613.

185. *Id.* at 613. K. C. Munchkin's game designer, an independent contractor of North American, changed the color of the game's gobbler from yellow to blue. In addition, North American adopted the name K. C. Munchkin because it was different from the name Pac-Man. *Id.*

186. *Id.*

187. *Id.*

188. *See supra* notes 21-76 and accompanying text.

189. *See supra* notes 77-89 and accompanying text.

190. The court described the Pac Man video game as follows:

PAC-MAN is a maze-chase game in which the player scores points by guiding a central figure through various passageways of a maze and at the same time avoiding collision with certain opponents or pursuit figures which move independently about the maze. Under certain conditions, the central figure may temporarily become empowered to chase and overtake the opponents, thereby scoring bonus points. The audio component and the concrete details of the visual presentation constitute the copyrightable expression of that game "idea."

Id. at 617.

191. *Id.*

192. The court compared the features of K. C. Munchkin and Pac-Man as follows: The K. C. Munchkin gobbler has several blatantly similar features, including the relative size and shape of the "body," V-shaped "mouth," its distinctive gobbling action (with appropriate sounds), and especially the way in which it disappears upon being captured. An examination of the K. C. Munchkin ghost monsters reveals even more significant visual similarities. In size, shape, and manner of movement they are virtually identical to their PAC-MAN counterparts. K. C. Munchkin's monsters, for example, exhibit the same peculiar "eye" and "leg" movement. Both games, moreover, express the role reversal and "regeneration" process with such great similarity that an

The Seventh Circuit then dismissed each of North American's arguments. First, the court found that the "laundry list of specific differences" that persuaded the district court were not numerous enough to override the obvious similarities.¹⁹³ The Seventh Circuit felt that the district court's focus on the minute differences instead of the more obvious similarities between K. C. Munchkin and Pac-Man caused it to lose sight of the forest for the trees.¹⁹⁴ Second, the court noted that video games appeal to a relatively indiscriminating audience, and a player entranced by a game's play would overlook minor differences in detail.¹⁹⁵ Third, the court rejected the argument of North American and the district court by stating that the focus of an infringement action is on the similarities between protectible expressions, not between the way two games play.¹⁹⁶ Although the court realized that differences between two games might alter their visual impressions, it felt that these differences could not excuse the taking of a substantial part of the plaintiff's work—the characters.¹⁹⁷ Finally, the court observed that the history and promotion of the K. C. Munchkin game provided additional evidence of the similarity between the games and the intent of North American to disguise its intentional appropriation of Atari's game.¹⁹⁸

The Seventh Circuit, based on its "ocular comparison" of the two works, concluded that Atari probably would succeed in a copyright infringement suit against North American because K. C. Munchkin captured the total concept and feel of Pac-man.¹⁹⁹ Based upon the likelihood of Atari's success in an infringement suit, combined with the evidence of irreparable harm that Atari

ordinary observer could conclude only that North American copied plaintiff's PAC-MAN.

Id. at 618.

193. *Id.*

194. *Id.*

195. The court discussed the typical video game player's ability to discern subtle differences between similar video games as follows:

Video games . . . appeal to an audience that is fairly indiscriminating insofar as their concern about more subtle differences in artistic expression. The main attraction of a game such as PAC-MAN lies in the stimulation provided by the intensity of the competition. A person who is entranced by the play of the game "would be disposed to overlook" many of the minor differences in detail and "regard their aesthetic appeal as the same."

Id. at 619.

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.* at 619-20.

demonstrated,²⁰⁰ the Seventh Circuit reversed the district court's holding and directed the district court to grant Atari's request for an injunction.²⁰¹

IV. ANALYSIS

A. *Conflicting Models: Game Boards Versus Movies*

Determining whether two video games are substantially similar poses a difficult copyright problem because video games are a new and unique form of copyrightable expression. Since many video games present only one unchanging background, some courts logically might treat video games as standard board games and compare only their static artistic features in resolving substantial similarity questions. Courts, however, should not compare video games by using a game board model. The Copyright Act protects game boards as "pictorial, graphic and sculptural works,"²⁰² but video games qualify for copyright protection under the category of "motion pictures and other audiovisual works."²⁰³ Additionally, game boards are static designs, but video games present moving characters, sequences of events, and other features that are more characteristic of movies than board games.²⁰⁴ In fact, some video game designers foresee using motion pictures, instead of computer graphics, as the visual background of video games in the future.²⁰⁵ Although video games contain expressions that are simpler and more closely related to their ideas than movies, video games should receive the same protection from nonliteral copying as movies, plays, books, and other story-type works. If courts analyze video games as they do movies to determine substantial similarity, then they could grant video game plaintiffs protection against defendants who disguise copied video game expressions with cosmetic differences. A movie model analysis also would allow courts to

200. Courts normally presume irreparable injury when a plaintiff proves copyright infringement. *Id.* (citing *Wainwright Sec., Inc. v. Wall Street Transcript Corp.*, 558 F.2d 91, 94 (2d Cir. 1977), *cert. denied*, 434 U.S. 1014 (1978)). Even without aid of this presumption, however, Atari demonstrated irreparable harm by producing evidence that it had invested \$1.5 million in developing, licensing, and promoting its home version of Pac-Man and that North American would jeopardize this investment by marketing K. C. Munchkin. *Atari, Inc. v. North Am. Philips Consumer Elec. Corp.*, 672 F.2d at 620.

201. *Atari, Inc. v. North Am. Philips Consumer Elec. Corp.*, 672 F.2d at 620-21.

202. 17 U.S.C. § 102(a)(5) (1976).

203. 17 U.S.C. § 102(a)(6) (1976).

204. *See, e.g., Stern Elec., Inc. v. Kaufman*, 523 F. Supp. 635, 639 (E.D.N.Y. 1981), *aff'd*, 669 F.2d 852 (2d Cir. 1982) ("In essence, the work is a movie in which the viewer participates in the action as the fearless pilot controlling the spaceship.")

205. Nulty, *Why the Craze Won't Quit*, *FORTUNE*, Nov. 15, 1982, at 124.

more accurately analyze two video games by comparing the total concept and feel of the works and, as a result, adopt the substantial similarity analysis to future developments in video game technology.

B. The Scope of Protection

The starting point to determine the scope of protection that a video game deserves is to distinguish between the game's unprotectible ideas and the protectible expressions of those ideas. The courts in *Atari v. Williams* and *North American Philips* reached vastly different conclusions concerning the scope of Pac-Man's unprotectible ideas.²⁰⁶ This discrepancy is explainable in several ways. First, courts subjectively determine the scope of a work's idea and this determination inevitably varies from case to case. Second, underlying equitable factors seemed to influence the judges in both cases. For example, in *Atari v. Williams* the court felt that the equities favored the defendant because Atari had not produced or marketed a home version of Pac-Man before the defendant, a small audiovisual company in the video game market, began marketing its game.²⁰⁷ In *North American Philips*, however, the court seemed bothered by the defendant's obvious intent to produce a game resembling Pac-Man.²⁰⁸ Last, the shortage of meaningful precedent that distinguishes video game ideas and expressions gives courts broad discretion in making this determination.

The Seventh Circuit's *North American Philips* opinion is laudable because it clearly outlined the degrees of protection it would afford various aspects of video games. The court stated that it would protect certain expressions of a video game's underlying idea because of their distinct "shapes, sizes, colors, sequences, arrangements, and sounds."²⁰⁹ The court added that it would give greater copyright protection to more complex and fanciful video game expressions than simpler, less fanciful expressions.²¹⁰ In *North American Philips*, the court felt that the Pac-Man characters satisfied the complexity requirement for strong protection against the infringing characters of K. C. Munchkin.²¹¹ The court

206. See *supra* notes 166 & 190 and accompanying text.

207. See *supra* text accompanying note 171.

208. See *supra* text accompanying note 197.

209. 272 F.2d at 617.

210. See *Sid & Marty Krofft Television Prods. v. McDonald's Corp.*, 562 F.2d 1157, 1168-69 (9th Cir. 1977).

211. 672 F.2d at 617-18.

stressed, however, that under the *scenes a faire* doctrine certain standard video game features should receive protection only from virtually identical copying.²¹² The court characterized the maze design, tunnel exits, scoring table, and dots of Pac-Man as *scenes a faire*.²¹³ Finally, the court categorized Pac-Man's rules and idea as not protectible.²¹⁴ The Seventh Circuit's discussion of the scope of copyright protection for various video game features in *North American Philips* provides both judges and future potential litigants with helpful guidance concerning future video game infringement suits.

The district court's reasoning in *Atari v. Williams* concerning the scope of copyright protection that video games deserve was far less helpful than the Seventh Circuit's discussion in *North American Philips*. Although the court described the basic idea underlying Pac-Man,²¹⁵ it provided no explanation concerning how courts should determine whether one video game infringed another. The court merely stated that any similarities between K. C. Munchkin and Pac-Man were "functional" without analyzing or discussing them.²¹⁶ The court's terse reasoning suggests that it used a standard game board analysis²¹⁷ to determine whether the defendant's Jawbreaker game was substantially similar to Pac-Man. As in standard game board cases, the court suggested that it would find substantial similarity between video games only if the two games possessed literal graphic similarities.²¹⁸ The court never considered the possibility of finding infringement for only nonliteral similarity between the two games. The district court erred in this respect. Video games, like movies and books, should receive protection from nonliteral copying to prevent video game infringers from escaping liability by masking their appropriations with cosmetic videographical differences.²¹⁹ To deny video game designers protection from nonliteral similarity would be analogous to finding that a new movie which copied the plot of a previously created and copyrighted movie did not infringe the original movie because the characters in the new movie wore different costumes.

212. *Id.* at 617.

213. *Id.*

214. *Id.*

215. *See supra* note 166.

216. *See supra* text accompanying notes 169-70.

217. *See supra* notes 202-05 and accompanying text.

218. *See supra* note 169 for a discussion of the specific graphic differences between Jawbreaker and Pac-Man that concerned the court.

219. *See supra* text accompanying note 62.

C. Application of the Audience Test

The only valid judge of whether one video game infringes another is the intended audience for those games.²²⁰ Accordingly, courts should evaluate video game copyright infringement claims from the perspective of the average video game player. The Seventh Circuit in *North American Philips* recognized the utility of using the audience test to determine whether two video games are substantially similar when it stated that the stimulation of play, which is the "main attraction" of a video game, prevents consumers from focusing on minor artistic differences.²²¹ Unfortunately, the Seventh Circuit failed to carry this reasoning to its logical conclusion when it held that the differences in the way two games play are important in a substantial similarity analysis only to the extent that they affect the way a player visually perceives the two games.²²² The Seventh Circuit's exclusive focus on "ocular" similarities between two games in determining substantial similarity²²³ seems clearly improper.

Certain video games have achieved widespread popularity because their unique video graphics, combined with the skill and energy they demand from game players, create an exhilarating game playing experience. Thus, a substantial similarity inquiry should search for similarities between two games in both perceivable videographical characteristics and game play. The concept of game play in a video game is analogous to the concept of mood or tone in a movie or story. For example, just as a movie producer, using the same sequence of events, could create two completely different movies by altering the setting, tone, dialogue, and characters, a video game designer, using very similar videographical features, could create two completely different games by making them play differently. The district court in *Amusement World*²²⁴ focused on the difference in game play between *Asteroids* and *Meteors* in holding that the two games were not substantially similar. The court primarily reasoned that *Meteors* played faster and was more difficult than *Asteroids*.²²⁵

220. See *supra* notes 90-109 and accompanying text.

221. See *supra* note 195.

222. 672 F.2d at 619.

223. *Id.*

224. See *supra* notes 151-63 and accompanying text for a discussion of *Atari, Inc. v. Amusement World, Inc.*

225. *Atari, Inc. v. Amusement World, Inc.*, 547 F. Supp. at 229. The court stated, "The overall 'feel' of the way the games play is different. . . . [T]he player's spaceship han-

To ascertain the differences in play between the two video games in a copyright infringement suit, the factfinder actually should play the video games under consideration. Although the idea of federal judges and jury members playing video games during an infringement trial seems comical, this method of comparing two works is analogous to factfinders watching a movie or listening to a song to experience the total concept and feel of the works at issue. The economic structure of copyright law demands no less. Otherwise, copyright law's goal of protecting an author's legal right to the financial rewards his original work generates will go unrealized.²²⁶ Thus, both the game play and the visual graphic features of a video game are important aspects of the game's protectible expression and deserve joint and balanced attention in a substantial similarity analysis.

D. Future Video Game Litigation

The appropriateness of using a movie model to determine whether two video games are substantially similar will increase as video games become more complicated. While the *Atari* cases dealt with video games consisting of one graphical display mode, video game designers currently are creating many new games that have several successive sequences of different videographic displays presenting different types of action. These complex multi-screen games should prompt courts to analyze the sequences of game events and the interaction of game characters in determining whether two games are substantially similar.

Game designers rapidly are improving the quality of videographical images in video games. This trend in the video game industry, however, may prove to be a double-edged sword in copyright infringement actions. As video game characters become more graphically distinct and complex, courts probably will grant them stronger copyright protection from infringing games. If courts continue to focus on minor visual graphic details in comparing games for substantial similarity, however, video game infringers will be

dles differently and fires differently. 'Meteors' is faster-paced at all stages and is considerably more difficult than 'Asteroids.'" *Id.* at 230.

The decision in *Midway Mfg. Co. v. Artic Int'l, Inc.*, 704 F.2d 1009 (7th Cir. 1983), does not diminish the argument that a court should consider speed and other play characteristics when adjudicating a video infringement action. The Seventh Circuit correctly ruled that circuit boards that increase the speed of a video game's play are illegal derivative works. A different speed of play alone does not prevent a video game from infringing another work; however, neither do cosmetic videographic similarities.

226. See *supra* note 100.

able to avoid liability more easily by altering cosmetic videographic features of the copied game that do not significantly affect the game's play, which is the primary attraction of video games to consumers.

The rapid development of more complex and sophisticated video games should prompt courts to grant video games protection from games that are substantially but not literally similar. The growing variety of games that express differently identical underlying ideas debunks the notions that a video game's idea is expressible in only a limited number of ways and that most games are similar in idea only. Furthermore, as the market offers greater financial reward to creators of successful video games, the manufacturers undoubtedly will test the boundary between imitation and infringement.

V. CONCLUSION

Courts in copyright infringement actions have demonstrated a tendency to focus on only visual videographical similarities and differences between video games in their substantial similarity analyses. This approach exacerbates several difficult analytical problems in copyright infringement litigation. First, this approach will cause courts to distinguish improperly between a video game's unprotectible idea and protectible expressions. A video game's concrete expressions, which include its visual sequence of events, set of interacting characters, and artistic videographic scenes and effects, deserve protection from games that are nonliteral but substantially similar copies because finding infringement only for literal similarity between two games improperly narrows the scope of copyright protection. Second, judicial focus only on visual videographic game features will cause courts to undertake an incomplete substantial similarity analysis. Because consumers financially reward video game authors for creating games that present entertaining videographical displays and provide an exciting and challenging game playing experience, courts should compare both game play and visual videographical features to determine whether two video games are substantially similar. Thus, by granting video games protection from nonliteral copying and focusing on both game play and visual videographical game features to determine whether two video games are substantially similar, courts will more accurately analyze video game infringement cases and more effectively serve the goals of the Copyright Act.

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