Copyright Protection for Video Games: Determining When Video Games are Similar Enough to Warrant Infringement

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As the video game industry has rapidly grown, and everyday more companies enter into the market with new games, there is a vast amount of litigation between parties that own competing video games. Specifically, since a large number of game creators draw inspiration from earlier popular games, there is a fine line between creating an original video game and creating one that infringes on copyright protections. In order to understand exactly how to advise and protect the intellectual property rights associated with video game, it is pivotal that lawyers and video game creators alike understand the aspects of copyright protection and copyright infringement that are prevalent within the video game industry.

Thus, this paper provides guidance on which elements contained within a video game are protectable and which are not entitled to receive copyright protections. Further, this paper explains the common approaches for determining a substantial similarity between video games during litigation for copyright infringement. From this, the paper suggests practices for lawyers involved in such litigation based on the benefits and potential hardships associated with the different approaches. Primarily, this paper is focused upon determining whether two video games are similar enough to warrant infringement. The guidance provided in this paper is meant to provide lawyers and those within the video game industry on how to ensure protection of video game that contains protected intellectual property. Moreover, this paper offers support on how to avoid accidentally infringing upon a copyright protected video game.

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I. Introduction

With the massive growth of the video game industry since its inception in the late 1950s, there has been a correspondingly large spike in litigation surrounding competing video games.[2] In an effort to maximize profits, influence, and recognition, companies that make and sell video games have turned to intellectual property law to secure their power in the video game industry.[3] Accordingly, it is pivotal to provide both clients working in the video game industry and practitioners, who represent and advise those clients, with guidance on how to determine whether two video games are similar enough to warrant infringement.

This paper is split into three substantive parts—Part II through Part IV. Part II provides a brief background on copyright law pertaining to video games, including which elements within a video game are protectable and what copyright protections are afforded to such protectable elements.[4] Part III analyzes how the courts determine the presence of copyright infringement between video games, while specifically assessing the differences in finding infringement for an identical copy of a protected video game and finding infringement for a game that is similar to a protected video game.[5] Part IV examines the differing methods employed by the courts to determine when there is a "substantial similarity" between a protected and an accused video

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[2] Pamela K. McKenna, Note, *Copyrightability of Video Games: Stern and Atari*, 14 LOY. U. CHI. L. J. 391, 393–395 (1983).

[3] Thomas M. S. Hemnes, *The Adaption of Copyright Law to Video Games*, 131 PENN. L. REV. 171, 171 (1982). (citing the Atari advertisement appearing in the November 1981 issue of Creative Computing, CREATIVE COMPUTING 99 (Nov. 1981)) ("One video game purveyor, Atari, actually fielded a nationwide advertising campaign warning that it 'registers the audiovisual works associated with its games," that it 'considers its games proprietary,' and that it will 'vigorously [enforce] these copyrights.'")

[4] The United States Copyright Office has provided a broad guidance that expressions are protected under copyright law, while ideas are not. *See U.S. Copyright Office Factsheet FL-108: Copyright Registration of Games*, U.S. COPYRIGHT OFFICE (Apr. 2016), https://upload.wikimedia.org/wikipedia/commons/9/96/U.S._Copyright_Office_fl108.pdf ("Copyright does not protect the idea for a game, its name or title, or the method or methods for playing it. . . Copyright protects only the particular manner of an author's expression in literary, artistic, or musical form."). This corresponding part of this paper helps to draw the line between exactly which elements within a video game are considered to be expression and which are considered to be idea.

[5] Understanding how the court decides whether there is substantial similarity is at the core of determining copyright infringement for video games.

game. Specifically, Part IV provides an in-depth explanation of finding a substantial similarity using the subtractive approach, the total-concept-and-feel approach, and the abstraction-filtration-comparison test. Finally, this paper concludes with suggestions on which approach should be sought based upon the position and circumstances of a given party that may be involved in litigation.

II. Copyright Law for Video Games

As video games have evolved with the progression of technology, the video games have grown to contain a plethora of elements and features that may receive copyright protection. Copyright protections, in respect to video games, can be utilized by those with a protected game to ensure that the copyrighted elements of the game are not utilized by competitors or in ways contrary to the wishes of the copyright owner.[6] Further, understanding the scope of copyright protectable elements can help those developing a new game protect themselves from accidental infringement.

A. Protectable Elements

On a basic level, copyright is said to "subsist" under United States law in "original works of authorship that have been fixed in a tangible medium of expression."[7] The 1976 Copyright Act and subsequent case law have provided the test for what elements may receive protection through copyright—namely the test for being "fixed in a tangible medium" and the test for an "original work."[8] The definition of "fixed" comes directly from the letter of the law:

> 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,

[6] *See, e.g.*, Solid Oak Sketches, LLC v. 2K Games, Inc., 449 F. Supp. 3d 333 (S.D.N.Y. 2020)
[7] 17 U.S.C. § 102(a) (2012).
[8] *See* 17 U.S.C. § 101 (2012) (providing definition of "fixed"); 17 U.S.C. § 102(a)(1)–(8) (2012) (providing a non-exhaustive list of types of "works of authorship"); Feist Pub., Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 346 (1991) (highlighting that a modicum of creativity is necessary for a work to be "original").

> 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."[9]

While the statute directly enumerates eight distinct categories of protectable work,[10] the list is widely regarded to be non-exhaustive and allows for works to be protected so long as there is originality.[11] Specifically, with this in mind, the Supreme Court in *Feist Publications* emphasized that the creativity-based originality standard for copyrightability is a constitutional requirement.[12]

This creativity-based originality test has two distinct parts: (1) the work must have "at least a modicum" of creativity, and (2) the work must be the independent creation of its author.[13] The "modicum of creativity" requirement admittedly sets a low bar for what can be copyrightable.[14] Nonetheless, some works do not meet that low standard when they are only reciting facts in a predictable or known fashion.[15] Moving to the second requirement, the "independent creation" requirement limits an author to only works or features that they themselves created. Yet, a creator of a work may still make a copyright protectable element in a work that is identical to an earlier work, "so long as the author did not copy from the earlier work, either consciously or subconsciously."[16]

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[9] 17 U.S.C. § 101 (2012).
[10] *See* 17 U.S.C. § 102(a) (2012) (using the word "include" to reference the possible types of "Works of Authorship" and, thus, expressing an open-ended list).
[11] Pamela Samuelson, *Evolving Conceptions of Copyright Subject Matter*, 78 U. OF PITT. L. REV. 17, 17 (2016).
[12] Feist Publications, Inc., v Rural Telephone Service Company, Inc., 499 U.S. 340, 346 (1991).

[13] *Id*. at 340.
[14] *Id*. at 345 ("[T]he requisite level of creativity is extremely low; even a slight amount will suffice.").
[15] See, e.g, copyrightable not found for phone book.
[16] *Copyright Basics*, University of Michigan (last updated Jul. 19, 2021), https://guides.lib.umich.edu/copyrightbasics/copyrightability (also stating an example of this principle was expressed by Judge Learned Hand: "Borrowed the work must indeed not be, . . . but if by some magic a man who had never known it were to compose anew Keats's Ode on a Grecian Urn, he would be an 'author,' and . . . others might not copy that poem, though they might of course copy Keats's." in the 1936 case, Sheldon v. Metro-Goldwyn Pictures Corp., 81 F.2d 49, 54 (2d Cir. 1936)).

After understanding these standards, the copyrightability of video game elements becomes easier to determine. First, video games are sufficiently stable to be perceived, reproduced, and communicated to customers; they are fixed per the requirements needed to receive copyright protections. However, it is important to note that the video game as a whole is not the subject of copyright protection. Instead, the elements that together comprise the video are what may be potentially protected by copyright. The four standard features that are common across all games: goals, rules, a feedback system, and voluntary participation.[17]

An exploration of these features illuminates the individual elements that are capable of receiving copyright protection (i.e., the elements within a video game that are sufficiently fixed and meet the creativity-based originality standard). The feedback-system feature is largely visual and is made up of visual elements that could potentially receive protection.[18] In addition to these visual cues, the feedback system may also contain auditory stimuli responsive to player actions.[19] Most audio and video elements of the video game come from the feedback-system feature. Additionally, though, the relayed information and potential for player interaction—which together makes up the goals, rules, and voluntary participation—all originates from the computer code.[20] Thus, leading scholars have agreed that video games include creative elements that may be understood as falling within these three categories: Audio Elements, Video Elements, and Computer Code.[21]

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[17] Connor Hutton, *Thinking Cap: What Do All Video Games Have in Common*, PURE PLAYSTATION (July 13, 2016), https://playerassist.com/thinking-cap-what-do-all-video-games-have-in-common/
[18] *Id.*
[19] *Id.*
[20] *See id.*(describing video games as electronic and played via computers and gaming consoles).
[21] ASHLEY SAUNDERS LIPSON & ROBERT D. BRAIN, VIDEOGAME LAW: CASES, STATUTES, FORMS, PROBLEMS & MATERIALS 54 (Carolina Academic Pr., 1st Ed. 2009).

The protectable creative elements that are included within Audio Elements are musical composition, sound recordings, voice, imported sound effects, and internal sound effects.[22] The protectable creative elements that are included within Video Elements are photographic images, digitally captured moving images, animation, and text.[23] The protectable creative elements that are included within Computer Code are primary game engines, ancillary code, plug-ins from third-party subroutines, and comments.[24] It is also important to note that Computer Code encompasses both source code and object code—meaning that both the programming statements created by a programmer that are saved in a file and the output of a compiled file are protectable.[25]

Nonetheless, the scope of copyright protection enjoyed by video games is narrower than many realize. While the concept of protectable elements seems simple on its face—simply "ideas" are not protectable, and "expressions" are protectable—it is much harder to consistently apply in practice.[26] What is important for those entering, or already a part of, the video game industry to keep at the forefront of their minds is the creativity-based originality standard.

Thus, the typical aspects or broad features that can be identified in prior video games are not protectable.[27] This means that ordinary ways to instruct or guide players, like dialog boxes, arrow indicators, and pop-up tips, are not protectable.[28] Moreover, the standard design and mechanics of video games are not protectable,[29] so a video game creator cannot receive

[22] Andy Ramos, Laura López, Anxo Rodríguez, Tim Meng & Stan Abrams, The Legal Status of Video Games, WIPO 1, 8 (2013).
[23] *Id.*
[24] *Id. ;* LIPSON & BRAIN, *supra* note 20.
[25] 15 C.F.R. § 772.1 (providing the definitions of "source code" and "object code").
[26] Bryan K. Wheelock, *Copyright Does Not Protect Ideas, Only Expression*, HARNESS, DICKEY & PIERCE, PLC (Dec. 6, 2017), https://www.lexology.com/library/detail.aspx?g=5fbf6bf2-7b7d-4f91-bc63-08dbea9e2105#:~:text=%22It%20is%20a%20principle%20fundamental,the%20expression%20of%20the%20idea.%22.
[27] Sonali D. Maitra, *It's How You Play the Game: Why Videogame Rules Are Not Expression Protected by Copyright Law*, 7 LANDSLIDE 34 (2015).
[28] *See, e.g.*, Incredible Techs., Inc. v. Virtual Techs., Inc., 400 F.3d 1007 (7th Cir. 2005).
[29] Maitra, *supra* note 26.

protection for the type of "game board" that is utilized within the game.[30] Another typical feature that is not granted protection is the rules of a games—specifically, the "rules and procedures, including the winningconditions" are widely regarded as not protectable.[31] This also leads to the manner of keeping score or leveling up within games as being unprotectable.[32] Lastly, as described in more detail below,[33] common tropes of video games are often not protectable.

On the other hand, specific features individual and identifiable to a particular video game are protectable.[34] Thus, the key takeaway for clients and lawyers within the video game industry is to look piece by piece through the audio, video, and computer code elements of the video game and note exactly which of those elements are special to the video game at issue. Once those elements are identified, the creativity-based originality test, described above, should be performed to determine exactly which elements are protectable.[35]

Still, these above listed elements of video games are still not protected pro se. Accordingly, the following section provides guidance on how to determine whether copyright protection is applicable to the creative elements within video games that this section has identified.

B. Copyright Protections

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[30] Jonathan Bailey, *The Rise of Board Game Plagiarism*, PLAGIARISM TODAY (July 24, 2018), https://www.plagiarismtoday.com/2018/07/24/the-rise-of-board-game-plagiarism/

[31] DaVinci Editrice S.R.L. v. ZiKo Games, LLC, 183 F. Supp. 3d 820, 828–30 (S.D. Tex. 2016).

[32] *See, e.g.*, Data E. USA v. Epyx, Inc., 862 F.2d 204 at 209–10 (9th Cir. 1988) (holding that the fact that two games had identical score keeping methods was inconsequential).

[33] *See* discussion *infra*, Part II(B).

[34] Maitra, *supra* note 26.

[35] Ramos et. al, *supra* note 20, at 8–9. However, some works are recognized as being more likely to meet this test; Catherine Jewell, *Video Games: 21st Century Art*, WIPO: WIPO MAGAZINE (Aug. 2012), https://www.wipo.int/wipo_magazine/en/2012/04/article_0003.html ("Generally speaking, the underlying code is protected as a literary work, and the artwork and sound are protected as an audiovisual work.")

As soon as a creator publishes a work in a fixed, tangible form, the creator becomes the copyright owner.[36] Technically, beyond publishing the work, the creator does not have to perform any more steps to receive the grant of copyright ownership.[37] Instead, these rights are automatically generated.[38]

As illustrated in Part II(A),[39] there are a variety of copyrightable elements. In respect to video games, these elements often manifest as specific art choices, specific characters, specific story, parts of code, original music, and the overall finished game.[40] The term "specific" utilized in the prior sentence is highly important.[41] This is because of the constitutional requirement that sparks the creativity-based originality standard for copyrightability, which requires a level of specificity in order for an element to be rendered original.[42] For example, while the story is a potentially copyrightable element, a story that recites common tropes will have themes that are identifiable in earlier works. However, simply utilizing a common trope for a story does not render it uncopyrightable; instead, it is only the aspects that are original to the game that are subject to the copyright protection.[43] Thus, the level of specificity in aspects is highly important to determining what is copyright protectable. Additionally, there is a prohibition on copyrighting *scenes a fair*—the elements that are necessary to manifest a specific idea.[44] While someone could

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[36] U.S. Copyright Office Circular 1: Copyright Basics, US Copyright Office, https://www.copyright.gov/circs/circ01.pdf (last updated Sep. 2021).

[37] *What Does Copyright Protect, COPYRIGHT.GOV (2021), https://www.copyright.gov/help/faq/faq-protect.html#:~:text=Does%20Copyright%20Protect%3F,What%20does%20copyright%20protect%3F,%2C%20computer%20software%2C%20and%20architecture.*

[38] *Id.*

[39] *See* discussion *infra*, PartII(A).

[40] Bryan W., *Game Design Copyright: What You Can & Can't Protect, and How To Protect Your Own Game*, GAME DESIGNING (March 6, 2021), https://www.gamedesigning.org/gaming/copyright/.

[41] *Copyrightable Authorship: What Can Be Registered, in* COMPENDIUM OF THE U.S. COPYRIGHT OFFICE PRACTICES 300 (3d ed. 2021).

[42] *See* Joseph Scott Miller, *Hoisting Originality*, 31 CARDOZO L. REV. 451, 480 (2009) (describing Judge O'Conner's interpretation of the originality requirement as resting on the originality of the author's "selection, coordination, and arrangement").

[43] *Id.*

[44] Andrew D. Hebl, *A Heavy Burden: Proper Application of Copyright's Merger and Scenes a Fair Doctrines*, 8 WAKE FOREST INTELL. PROP. L. J. 128, 140 (2008).

obtain a copyright on a game for jousting, the lances, armor, and horses would not be copyrightable. By receiving a copyright on these elements, the copyright owner is allowed to choose the ways that the copyrighted work is made available to the public.[45]

Beyond the copyright protection that is available for video games, there is often other intellectual property protection that can be applicable to particular aspects of video games. Logos, character images, and titles of games can all be protected with a trademark. While trademarks offer similar protections to copyrights, the trademark must be registered as a federal or state trademark in order to provide protection outside of a local sphere.[46]

C. Guidance for clients and lawyers.

While copyright protections happen automatically, a client and lawyer should recognize and ensure that the video game is subject to additional benefits that can be obtained through registering the copyright. Particularly, the creator of a video game can receive extra protection by registering the copyright protectable elements in the United States Copyright Office.[47] Once the creator has an official record, it becomes easier to prove information that may be involved in litigation, such as specific dates of inception.[48]

Further, having a copyright registered in the United States Copyright Office provides more power and backing to any actions taken against a potential infringer.[49] Also, when a work contains a valid notice, an infringer cannot claim in court that the infringer was unaware of the copyrighted material or the protections on the copyrightable elements.[50] Thus, by registering a client's copyrightable elements, any potential infringement litigation is made more winnable,

[45] *Copyright in General*, COPYRIGHT.GOV (2021), https://www.copyright.gov/help/faq/faq-general.html
[46] *Trademark Basics*, USPTO (2021), https://www.uspto.gov/trademarks/basics.
[47] Rich Stim, *Copyright Protection: What it Is, How it Works*, STANFORD COPYRIGHT AND FAIR USE CENTER (2016), https://fairuse.stanford.edu/overview/faqs/copyright-protection/.
[48] *Id.*
[49] *Id.*
[50] *Id.*

will likely result in higher damage compensation received by the client, and helps to deter outside parties from infringing.

III. Determining Copyright Infringement

Since the copyright owner inherently has the sole ability to choose the ways that the copyrighted work is made available to the public,[51] any other persons that make the copyrighted material available to the public are infringing upon the rights of the copyright owner.[52] When this occurs, the copyright owner may bring suit against the infringer, through which the copyright owner may seek the infringer to stop using the copyrighted material and may seek damages for any harm resulting from the infringement.[53] Yet, especially in the industry of video games, the process for determining copyright infringement does not have one bright-line test.[54] Instead, determining infringement depends largely on how similar the accused video game is to the protected video game.[55] Since there is a vast variety of elements within a video game that could be the subject of a copyright, it has become an important task of the courts to identify exactly which elements are at issue and how to tell whether those elements have been infringed upon.

To illustrate the standard approach for handling and deciding cases concerning infringement of video games, Part III(A) analyzes how the court has held regarding infringement of an exact clone of a protected video game. Following, to demonstrate the complexity that arises when there are slight differences between the element of the accused video game and the

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[51] *Copyright in General*, *supra* note 44.
[52] ROBERT A. GORMAN, EXCLUSIVE RIGHTS OF THE COPYRIGHT OWNER (HEREIN OF INFRINGEMENT) IN COPYRIGHT LAW AT 99 (2d Ed. 2006).
[53] *Id.*
[54] *See* discussion *infra*, Part IV (outlining the various tests adopted by different circuits for determining infringement for video games).
[55] Oliver Brown, *The Author's Arsenal: Loosening Standards for Protectability and Substantial Similarity in Video Game Copyright*, 3 INTERACTIVE ENT. L. Rev 32, 35 (2020).

protected video game, Part III(B) begins the discussion of determining copyright infringement of a similar game to a protected video game.

A. Infringement of an Exact Clone of a Protected Video Game

When an accused infringer produces a video game that is identical to the original game, courts have unanimously and consistently held that the accused infringer has committed copyright infringement.[56] Regardless of whether the court favors a reading of copyright protection as being a minimal protection or vast protection, the courts have found infringement when there is a direct replica of a protected video game.[57]

In 1983, the Seventh Circuit utilized the statutory language of the 1976 Copyright Act to articulate the rule for handling clones of video games, "among a copyright owner's exclusive rights is the right 'to prepare derivative works based upon the copyrighted work'" and a clone of a game, with only minor changes to speed or uncopyrightable material, is inherently a derivative work.[58] Thus, the test—when the accused video game "clones" the prior game—hinges upon whether the minor changes between the games are made to elements that are not protectable.[59]

For example, the Seventh Circuit further articulated the rules for copyright infringement regarding exact clones in a case shortly following its creation of the standard.[60] In this case, the court was reviewing whether there was infringement on the popular game "Pac-Man" by a company that made an identical clone game named "Puckman," when the only difference between the two games was that Puckman was played at a faster speed.[61] In the instance of the

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[56] Theodore J. Grabowski Jr., Note, *Copyright Protection for Video Game Programs and Audiovisual Displays; and Substantial Similarity and the Scope of Audiovisual Copyrights for Video Games*, 3 LOY. L.A. ENT. L.J. 139, 142 (1983).
[57] Dan Rosen, *New Video Game: Japan's Video Game Producers Lose at the Litigation Game*, 6 VAND. J. ENT. L. & PRAC. 119 (2003).
[58] Midway Mfg. Co. v. Artic Int. Co., 704 F.2d 1009, 1013 (7th Cir. 1983) [hereinafter *Artic I*].
[59] *See id*. at 1012–14.
[60] Midway Mfg. Co. v. Artic Int. Co, 547 F. Supp. 999 (N.D. Ill. 1982) [hereinafter *Artic II*].
[61] *Id.* at 1014.

"Puckman" game, the accused infringing company, Artic, directly copied the graphics, sounds, and gameplay. Analyzing this case under the four features common to all video games, both games contained the same goals, rules, feedback system, and voluntary participation. [62, 63] Artic even used the name "Puckman" from the original version of the Pac-Man game that was made in Japan.[64] The minor change of the speed at which the game was played was insufficient to change the fact that the Puckman game was a direct clone of the audio, video, and computer code for gameplay.[65]

This exemplary case—and the test for copyright infringement that the court has expressed— illustrates how important it is for all parties to be aware of exactly which video game elements are protectable. "Puckman" only differed from "Pac-Man" in that it changed the speed at which the game was played, which is a mechanic of the game. As discussed previously, the elements associated with games mechanics have consistently been recognized as uncopyrightable, due to the non-specific and common nature of those elements.[66]

Thus, acknowledging which elements are protectable by copyright at the outset of developing a video game is important for those about to enter the video game industry, those within the video game industry, and lawyers representing clients within the video game industry alike. For clients that are planning to enter into the video game industry and have taken inspiration from or made a clone of another game, it is vital that the video game be analyzed to see what elements have been changed. If the new video game has only made changes to aspects of the game that are not protectable by copyright, then the game is still considered to be an exact clone in the eyes of the court.[67] For clients that are already within the video game industry and

[62] *See* discussion *supra*, Part II(A).
[63] Hutton, *supra* note 16 (describing elements that are common across all games).
[64] *Artic II*, 547 F. Supp. at 1012.
[65] *Id.*.
[66] Maitra, *supra* note 26.
[67] *Artic I*, 704 F.2d at 1010–13.

have developed a game that other creators may want to copy, it is important for the client and lawyer to have an understanding of which elements within the game are protected. By doing this, a client will readily know whether a potential competitor has produced a clone that has not changed any of the protected elements of the game.[68]

Further, lawyers that have already established the protected and unprotected elements of the video game at issue will know whether any new video games that seem to echo the work of their client's video game. This is highly important because while the court has developed a uniform and concrete way of determining whether an accused video is a clone—and, thus, will be found liable for copyright infringement—the law and standard for finding copyright infringement is not so settled for situations involving similar video games, as discussed below.[69]

B. Infringement of a Similar Game to a Protected Video Game

While it is settled that derivate works of video games made and sold by other creators are liable for copyright infringement, the rule regarding derivative works becomes harder to utilize when there is only a similarity between the copyrightable elements in the video game. The court is split on exactly how to address when an accused infringer has published a game that has similar elements to those that the copyright owner has protections upon.[70] The courts are predominately in agreement that the utilization of similar ideas to those that are copyright protected does not constitute infringement,[71] but the utilization of similar creative expressions to those that are copyright protected does constitute infringement.[72] This hearkens back to the

[68] *See* discussion *supra*, Part II(A).
[69] *See* discussion *infra*, Part III(B).
[70] *See* discussion *infra*, Part IV(A)–(C).
[71] Grabowski Jr., *supra* note 55.
[72] Drew S. Dean, Comment, *Hitting Reset: Devising a New Video Game Copyright Regime*, 164 U. PA. L. REV. 1239, 1253 (2016); *Id.* at 1257.

fundamental test for creativity-based originality and displays the fundamental requirement for an original work.

While the courts agree on the framework of the statutory requirements for obtaining a copyright, the courts differ on exactly how to determine infringement.[73] It hinges on when similar elements are too similar, or "substantially similar."[74] If the accused element is substantially similar to the copyrightable element, then the court will find infringement.[75] As such, it is of the utmost importance that lawyers working to protect the intellectual property rights of their clients in the video game industry comprehensively understand what the tests for substantial similarity are and which test would best serve their clients. Thus, the following section provides guidance on this exact issue.

IV. Determining Substantial Similarity

As mentioned above,[76] the court has boiled down the test to whether an accused element and a copyright protected element are substantially similar. Since video games are considered to meet the fixation requirement, and the test for creativity-based originality has been adopted across the United States to determine copyrightable elements,[77] the question becomes whether the accused and protected video games are substantially similar. There is a circuit split as to whether the courts should assess the similarity of the video games as a whole or in respect to the protected elements.

Despite the circuit split for determining when a substantial similarity exists, the courts are in agreement that while a video game is not protectable by copyright entirely, one of these types

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[73] *Compare* Gates Rubber Co. v. Bando Chemical Indus., Ltd., 9 F.3d 823 (10th Cir. 1993); *with* Brown Bag Software v. Symantec Corp., 960 F.2d 1465 (9th Cir. 1992).
[74] Shyamkrishna Balganesh, Irina D. Manta & Tess Wilkinson-Ryan, *Judging Similarity*, 100 Iowa L. Rev. 267, 268–69 (2014).
[75] *Id.* at 272.
[76] *See* discussion *supra*, Part III(B).
[77] *Feist*, 499 U.S. at 346.

of works is protectable "to at least a limited extent the particular form in which it is expressed . . . provides something new or additional over the idea."[78] Thus, there is an understanding in the current legal system that even if two works at issue are not the same in all respects, if protectable elements from the first work are substantially copied or similar to the first work, then the second work has committed copyright infringement for which the second author can be found liable.[79]

There are three differing tests for finding substantial similarity: the subtractive approach, the abstraction-filtration-comparison test, and the total feed and concept approach. Each of these approaches is centered upon "determin[ing] whether the defendant has appropriated an improper amount of the plaintiff's copyrightable expression."[80] The substance of the test, the frequency the test is utilized, and exemplary illustrations of the test are explained for each of the three tests in Parts IV(A)–(C), below.

A. The Subtractive Approach

One of the most prominent approaches to determining "substantial similarity" between two video games is the "subtractive approach," which is also referred to as the "analytic dissection" approach towards a plaintiff's work.[81] This approach goes hand in hand with the guidance provided in the prior parts of this paper.[82] Specifically, the subtractive approach is highly focused upon the particular elements of the video games and identifying which of those particular elements are subject to copyright protection.[83]

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[78] Atari v. North American Philips Consumer Electronics Corp., 672 F.2d 607, 617 (7th Cir. 1982).
[79] Balganesh et al., *supra* note 73, at 272.
[80] Craig Joyce, Marshall Leaffer, Peter A. Jaszi & Tyler Ochoa, Copyright Law 650 (8th ed. 2010).
[81] 2 Donald S. Chisum, Understanding Intellectual Property § 4H[3][a][1] (2011).
[82] *See* discussion *supra*, Part II(A)–(B).
[83] Gideon Parchomovsky & Alex Stein, *Originality*, 959 Va. L. Rev. 1505, 1523 n.65 (2009).

The subtractive approach is generally regarded as a straightforward test relative to the other tests for substantial similarity.[84] This is because the subtractive approach has only two parts and tends to be the most bright-line of the tests for determining substantial similarity.[85]

The first step of this approach is to break down the whole work element by element.[86] In the context of video games, this means assessing each element of the video game. Within this step, each video game element must be classified in a particular category—typically, audio, video, or computer code.[87] Further, within this step of the subtractive approach, the court explicitly excludes all elements that are directed to or encompassed within "ideas," since those are inherently unprotected.[88] Once each element is categorized, the court then determines which of those elements are subject to copyright protections.[89] Scholars focusing on video game law have articulated the typical elements that are given copyright protection,[90] hence the elements in those categories would be given protection, the elements that are clearly ideas are not protectable, and all other elements would be deemed unprotected. Once the elements are sorted, the court then compares each element against the similar element in the accused infringers product, or video game.

However, a risk that can arise with a rigorous application of the first step within subtractive approach is "missing the protectable forest for the unprotectable trees, and in failing to recognize that there can be protectable authorship in how [a creator] selects and arranges

[84] David E. Shipley, *The Architectural Works Copyright Protection Act at Twenty: Has Full Protection Made a Difference?*, 18 J. Intell. Prop. L. 1, 40–42 (2010).
[85] *Id.* at 40.
[86] *Video Games and the Law: Copyright, Trademark and Intellectual Property*, NEW MEDIA RIGHTS (Oct. 27, 2020), https://www.newmediarights.org/guide/legal/Video_Games_law_Copyright_Trademark_Intellectual_Property.
[87] *See* discussion *supra*, Part II(A).
[88] *Feist*, 499 U.S. at 350.
[89] *Video Games and the Law*, *supra* note 85.
[90] *See* discussion *supra*, Part II.

components and features."[91] Therefore, when facing litigation of copyright infringement in front of a court that favors the subtractive approach, it is—in part—the role of the lawyer to frame the elements with recognition of the "protectable forest" in order to ensure that the court may properly categorizes the protectable elements within the video game.

Once all of the elements within a video game have been categorized during the first step, the second step of the subtractive approach is to determine whether the elements that were categorized as protected are substantially similar.[92] Particularly, the second step is centered upon deciding whether the corresponding elements of the allegedly infringing video game are substantially similar to the protected elements of the plaintiff's video game.[93] "Substantial similarity" within this step is present whenever a reasonable person would find that the allegedly infringing video game contains elements that appropriate the protected expressions.[94] As put by Judge Learned Hand—who also authored the opinion that introduced the subtractive approach[95]—there is substantial similarity where "the ordinary observer, unless he set out to detect the disparities, would be disposed to overlook them, and regard their aesthetic appeal as the same."[96] In a more general sense, if an objective reasonable observer would find the two video games elements are expressing practically the same thing, then the court will find that there is a "substantial similarity" between the two video games.

Since the onset of the subtractive approach, the courts that have adopted this approach have made it clear that the core of the test is not "*how much* of the original game was copied, it's

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[91] Shipley, *supra* note 83, at 41 (citing Metcalf v. Bochco, 294 F.3d 1069, 1074 (9th Cir. 2002) (explaining that the way an author puts together a number of unprotectable elements can be a protected work)).
[92] Jeffery Cadwell, Comment, *Expert Testimony, Scenes a Faire, and Tonal Music: A (Not So) New Test for Infringement*, 46 Santa Clara L. Rev. 137, 147 (2005).
[93] Shipley, *supra* note 83, at 41–42.
[94] Wildlife Express Corp. v. Carol Wright Sales, Inc., 18 F.3d 502, 508–09 (7th Cir. 1994).
[95] *See* Nichols v. Universal Pictures Corp., 45 F.2d 119 (2d Cir. 1930) (L. Hand, J.)
[96] Peter Pan Fabrics, Inc. v. Martin Weiner Corp., 274 F.2d 487, 489 (2d Cir. 1960).

about *what types* of [game] elements were copied." In *Nichols v. Universal Pictures Corp*, the case where this subtractive approach was established, Judge Learned Hand made clear that:

> [T]he *Nichols* test forbids a taking *from* a character, not a taking of a character: to infringe, a derivative character need only be substantially similar to the original; he need not share or summon up the specific identity of the original.[97]

While the subtractive approach of *Nichols* was developed to analyze characters within the plot of a play, the approach is understood to cover the analysis of potential copyright infringement for any protectable elements in a video game.[98]

Accordingly, the subtractive approach has been employed to determine infringement in a plethora of video game litigation.[99] For example, in 1981, the popular video games "Asteroids" and "Meteors" were analyzed under the subtractive approach to determine whether the latter was liable for copyright infringement of the former.[100] Atari faced massive success after launching "Asteroids" in October of 1979—customers purchased a record-breaking amount of the relatively simple game, in which players navigated a small spaceship through space rocks and around enemy ships.[101] By March of 1981, Atari became aware of "Meteors," a game released shortly following the success of "Asteroids" and that Atari contended was substantially similar.[102] The court followed the subtractive approach and, after the first step, found 31 distinct elements.[103] Despite the court explicitly deciding that "defendants based their game [Meteors] on plaintiff's copyrighted game [Asteroids]" and stating, "to put it bluntly, defendants took the

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[97] Lawrence L. Davidow, *Copyright Protection for Fictional Characters: A Trademark Based Approach to Replace Nichols*, 8 COLUM.-VLA ART. & L. 513, 517 (1984) (citing *Nichols*, 45 F.2d at 122).
[98] Brad Wright, *Changing the Standard for Computer Software Copyright Infringement: Computer Associates International v. Altai*, 14 GEO. MASON U. L. REV. 663, 671, 683 (1992).
[99] John Quagliariello, *Applying Copyright Law to Videogames: Litigation Strategies for Lawyers*, 10 HARV. J. SPORTS & ENT. L. 263, 266–69 (2019).
[100] Atari v. Amusement World, inc. (D. Maryland)
[101] *Id.* at 224.
[102] *Id.*
[103] *Id.* at 224–25. Of these 31 elements, the court noted that 22 elements were similar and only 9 were different. *Id.*

plaintiff's idea," the court held "the copyright laws [did] not prohibit this."[104] This was the result of the second step of the subtractive analysis; although there were 31 elements, the protectable elements of the game were within the nine elements that the court determined were different.[105] Thus, the court also concluded that the 22 similar elements were all categorized as unprotectable elements.[106]

The prior case illustrates the importance for lawyers to characterize what the elements the court should recognize in order to protect from an overly-rigorous application of the subtractive approach. While the court did not specifically err in its determination of the elements of the two video games—as the court is given discretion in determining the protectable elements of a video game—the 31 elements that were noted were narrow and specific details.[107] Yet, a side-by-side comparison of the two screens displays that the styling, look, and expression of the two games were practically identical. Thus, scholars have postulated that if this case were determined in recent court with lawyers cognizant of which protectable elements to identify for the court, the court would likely hold that there was copyright infringement present.[108] Ultimately, the most important role of the lawyer when working on litigation in front of a court that favors the subtractive approach is making sure to identify, explain, and present protectable elements at the proper level of abstraction. Thus, whether the lawyer represents the plaintiff or defendant in the

[104] *Id.* at 230.
[105] *Id.*
[106] *Id.*
[107] *See id.* at 224–25. For example, some of the similar design features that were noted by the court were "there are two sizes of enemy ships," "there is a two-tone beeping noise in the background throughout the game, and the tempo of this noise increases as the game progresses," and "the control panels are painted red, white, and blue." Id. However, apart from these specific features of the video games, the court did not view how some of these elements were oriented together to comprise a particular visual expression. *See id.* 223–30.
[108] Eric Adler, *A Game of Clones: Video Game Litigation Illustrated*, PNW STARTUP LAWYER (Jul. 10, 2014), http://pnwstartuplawyer.com/copyright/software/copyright-illustrated-video-game-clones/.

copyright infringement case heavily influences the desirable way to characterize the protectable elements.[109]

Since the Second Circuit's creation of the subtractive approach, the majority of circuits have either acknowledged or directly adopted this approach for determining whether two video games are substantially similar. In fact, every court other than the Ninth Circuit utilizes this approach frequently.[110] Nonetheless, this approach has been slightly modified to become the abstraction-filtration-comparison test and, accordingly, the modification has become prominent in the field of software and computing.[111] As the abstraction-filtration-comparison test follows a different analysis by the courts and involves different concerns, the following section provides guidance on how to handle litigation on copyright infringement in front of a court that tends to adopt the abstraction-filtration-comparison test.

B. The Abstraction-Filtration-Comparison Test

Another common test for substantial similarity arose when Second Circuit created a modification of the circuit's own subtractive approach in the 1990s—the abstraction-filtration-comparison test.[112] This new method for determining substantial similarity was made directly to examine the scope of software copyrights and was aimed at rectifying issues stemming from the Third Circuit analysis for copyright protection of software.[113] When

[109] Typically, the defendant will favor a narrow construction of protectable elements and a plaintiff will favor a broader construction of protectable elements.
[110] Angelo et al., *supra* note 128, at 1004 n.275.
[111] Michael Headley, Ronald Johnson, Randall Davis, Lothar Determann & Felix Wu, *The Proper Scope of Copyright in Software and Tests for Infringement*, Presentation at the 20th Annual BCLT/BTLJ Symposium: Software IP, Berkeley Law (April 14, 2016).
[112] Comput. Assocs. Int'l, Inc. v. Altai, Inc., 982 F.2d 693, 706–12 (2d Cir. 1992).
[113] *Id.* at 702–03.

developing this test and declining to adopt the broad test *Whelan* test of the Third Circuit,[114] the court explicitly noted:

> [The Second Circuit] think[s] that *Whelan*'s approach to separating idea from expression in computer programs relies too heavily on metaphysical distinctions and does not place enough emphasis on practical considerations. As the cases . . . demonstrate, a satisfactory answer to this problem cannot be reached by resorting, a priori, to philosophical first principals [*sic.*].[115]

Thus, an important part of the abstraction-filtration-comparison test is recognizing that it is rooted in practicality. For this reason, rather than having the two broad steps of the subtractive approach—where lawyers are given much discretion in the level of abstraction that they choose to characterize protectable elements—the abstraction-filtration-comparison test uses a three-step process that more clearly and definitively restricts how to categorize protectable elements and nonprotectable elements.[116]

The first step of this approach is to parse the video game into six levels of generally declining abstraction: (1) the main purpose, (2) the program structure or architecture, (3) modules, (4) algorithms and data structures, (5) source code, and (6) object code.[117] The reason for these explicit levels of abstraction is because of the complicated and often ambiguous dichotomy between ideas and expressions in the context of software—which is equally relevant in the related context of determining copyright protections for video games.[118] In sum, for this

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[114] It is important to note that the *Whelan* test of the Third Circuit is not preferred by any circuits across the nation now; instead, the *Whelan* test has been replaced by the Second Circuit's introduction of the abstraction-filtration-comparison test.
[115] *Altai*, 982 F.2d at 706.
[116] *Compare Nichols*, 45 F.2d at 122, *with Altai*, 982 F.2d at 706–12.
[117] John W.L. Ogilvie, *Defining Computer Program Parts Under Learned Hand's Abstractions Test in Software Copyright Infringement Cases*, 91 MICH. L. REV. 526, 533 (1992).
[118] *Id.* at 527.

first step, "a court would first break down the allegedly infringed program into its constituent structural parts" and then sort the parts into the different levels of abstraction.[119]

Following this, the court "filters out all nonprotectable expression by examining the [video game's] structural components at the previously identified levels of abstraction by using traditional doctrines of copyright law."[120] For a video game, the source code (level 5) and the object code (level 6) are commonly agreed upon expressions and are, thus, typically found as protectable by copyright.[121] Yet, at the same time, the main purpose of the video game (level 1) is considered to be only an idea.[122] Thus, based on what is understood in copyright law regarding video games, the filtration process would involve filtering out level "1," keeping levels "5" and "6," and allowing court discretion on the remaining middle levels of abstraction. Moreover, for each level of abstraction where the court has discretion in filtering, the court is tasked with determine whether within these levels each element "was 'idea' or was dictated by considerations of efficiency, so as to be necessarily incidental to that idea; required by factors external to the program itself; or taken from the public domain and hence not protectable expression."[123] It is therefore incredibly important for a lawyer to carefully and consciously determine how to categorize the elements into the levels of abstraction—especially as filtration is considered highly important and where copyright protection is most likely narrowed.[124]

Next, the court moves to the third and final step, the comparison.[125] After the other two steps of the abstraction-filtration-comparison test, the court has "eliminate[d] the unprotectable

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[119] *Altai*, 982 F.2d at 706.
[120] Lisa M. Gable, Note, *The Feasibility of the Abstraction-Filtration-Comparison Test for Computer Software Copyrightability (and Analysis of* Bateman v. Mnemonics*)*, 14 GA. ST. U. L. REV. 447, 464 (1998).
[121] *See* discussion *supra*, Part II(A).
[122] *Id.*
[123] *Altai*, 982 F.2d at 707.
[124] Michael MacAdam Barry, Note, *Software Copyright Upgrade-Engineering Dynamics v. Structural Software Extends AFC to Software Input Data Formats*, 39 ST. LOUIS U. L.J. 1309, 1345 (1995) ("Filtration is the key to achieving narrow copyright protection").
[125] *Altai*, 982 F.2d at 710.

components [and] a core of protectable expression remains."[126] Accordingly, the court in this step compares the core of protectable expression of the allegedly infringing video game with that of the copyright protected video game.[127] While this step operates similarly to the second step of the subtractive approach,[128] the court, when developing this test, stressed that with this abstraction-filtration-comparison test there is often the need for expert opinion to ascertain substantial similarity.[129]

While the abstraction-filtration-comparison test is still the predominant test utilized for determining substantial similarity between computer programs and complicated software,[130] the approach is widely regarded as being difficult in practice. This difficulty in practice arises for two different reasons. First, the process of classifying each element into a different level of abstraction can be difficult to distinguish for the middle levels and is largely up to the discretion of the court. Second, since experts are typically expected or required by the court when using this test,[131] the litigation can be more costly for the client than other comparable approaches. Thus, lawyers that are litigating in front of courts that utilize the abstraction-filtration-comparison test should attempt to categorize as few elements as possible as falling within the middle levels of abstraction. Further, since the all circuits other than the Ninth Circuit prefer some use of either the subtractive approach or abstraction-filtration-comparison test,[132] a lawyer weary of the rigorous abstraction and filtration steps may urge the use of the subtractive approach instead.

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[126] Martin T. Hillery, Note, *The Second Circuit's Attempt to Define Copyright Protection for Computer Software: Is the Abstraction-Filtration-Comparison Test a Workable Solution*, 66 St. John's L. Rev 1127, 1142 (1993).
[127] *See* Rafael V. Baca, Note, *Copyright Law—Tenth Circuit Application of the Abstraction-Filtration-Comparison Test to Determine the Scope of Copyright Protection for Computer Programs: Autoskill v. National Educational Support Systems*, 24 N.M. L. Rev. 413, 420 (1994).
[128] *See* discussion *supra*, Part IV(A).
[129] *Altai*, 982 F.2d at 713.
[130] Matthew Angelo, Lydia Davenport, Juliana Genova, Elizabeth Imbrogna & Hannah Odenthal, *Intellectual Property Crimes*, 57 Am. Crim. L. Rev. 973, 1004 (2020).
[131] Gates Rubber, 9 F.3d 823, 834–36 ("[I]n most cases we foresee that the use of experts will provide substantial guidance to the court in applying an abstractions test.").
[132] Angelo et al., *supra* note 128, at 1004 n.275.

C. The Total Concept and Feel Approach

Between the development of the subtractive approach and the abstraction-filtration-comparison test, the Ninth Circuit created its own two-step approach that used the "total concept and feel" to determine substantial similarity.[133] Aptly, this test was coined as the total-concept-and-feel approach.[134] Further, this test was cemented as a prominent approach for substantial similarities after it was used in the case of *Sid & Marty Krofft Television Productions, Inc. v. McDonald's Corp*.[135] Notably, the total-concept-and-feel approach involves two distinct tests: an intrinsic test and an extrinsic test.[136] These tests represent the first and second "steps," respectively. However, scholars have noted that "the extrinsic/intrinsic distinction in *Krofft* is "more sensibly described as [an] objective and subjective" distinction, wherein the subjective analysis is "virtually devoid of analysis, for the intrinsic test has become a mere subjective judgment as to whether two . . . works are or are not similar."[137]

Following, the total-concept-and-feel approach relies on the subjective evaluation of observers who consider the question of whether the total concept and feel of one work is substantially similar to another.[138] The first step—the extrinsic test—requires that the court perform a complex analysis of the concepts that are underlying the entire works at issue.[139] In the context of video games, the court would look to the field of gaming that the entire game is

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[133] Aaron M. Broaddus, *Eliminating the Confusion: A Restatement of the Test for Copyright Infringement*, 5 DEPAUL J. ART, TECH. & INTELL. PROP. L. 43, 51 (1995)
[134] Roth Greeting Cards v. United Card Co., 429 F.2d 1106, 1110 (9th Cir. 1970); *Sid & Marty Krofft Television Productions, Inc. v. McDonald's Corp.* 562 F.2d 1157 (9th Cir. 1977).
[135] *Sid & Marty Krofft*, 562 F.2d at 1157.
[136] Cavalier v. Random House, Inc., 297 F.3d 815, 822 (9th Cir. 2002).
[137] Carys J. Craig, *Transforming "Total Concept & Feel": Dialogic Creativity and Copyright's Substantial Similarity Doctrine*, 38 CARDOZO ARTS & ENT. L.J. (forthcoming 2021) (manuscript at 21) (quoting Shaw v. Lindheim, 919 F.2d 1353, 1357 (9th Cir. 1990)).
[138] Sarah Brashears-Macatee, Note, *Total Concept and Feel or Dissection: Approaches to the Misappropriation Test of Substantial Similarity*, 68 CHI.-KENT L. REV. 913, 918–920 (1992).
[139] *Id.* at 917.

directed toward and focus on any concepts that are guiding the game as a whole. Often, within this step, the court permits the introduction of expert testimony and the analysis of specific details of the two video games at issue.[140]

Then, in the second step—the intrinsic test—within the judgment of an ordinary person, the expression of the works is compared.[141] During this second step, the court or jury—whoever is acting as the factfinder—uses a reasonableness standard to determine whether the expressions of the allegedly infringing video game and the copyright protected video game are substantially similar.[142] This step operates similarly to the second step of the subtractive approach in that the requirement for substantial similarity remains the same between the tests.[143] However, the total-concept-and-feel approach differs greatly from the two prior approaches because this "intrinsic test" must be decided without the assistance of expert testimony or analytical dissection of the two works.[144] Therefore, in contrast to how the abstraction-filtration-comparison test often is utilized, the total-concept-and-feel approach depends on a trier of fact's overall comparison of the two works, not directly upon an expert's testimony and opinion.[145]

While this test has been adopted, utilized, and—at times in history—preferred by the Ninth Circuit, the other circuits across the country have not accepted this approach.[146] The reason that this total-concept-and-feel approach is disfavored is because it ultimately turns on a highly subjective comparison of the allegedly infringed video game and the copyright protected video game.[147] As a result, the approach can potentially fail to involve the dissection of protectable and

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[140] Steven G. McKnight, *Substantial Similarity Between Video Games: An Old Copyright Problem in a New Medium*, 36 VAND. L. REV. 1277, 1292 (1983).
[141] *Id.*
[142] Arnstein v. Porter, 154 F.2d 464, 468 (2d Cir. 1946).
[143] *See* discussion *supra*, Part IV(A).
[144] McKnight, *supra* note 139, at 1294.
[145] *Id.* at 1292.
[146] Craig, *supra* note 136.
[147] Pamela Samuelson, *A Fresh Look at Tests for Nonliteral Copyright Infringement*, 107 NW. U. L. REV. 1821, 1829 (2013).

unprotectable elements at the substantial similarity stage.[148] Nonetheless, the potential failure of separating the protectable and unprotectable elements within a video game favors the copyright owners—and in some instances may be better suited as the approach to better position the party with the copyright protected video game in litigation.[149]

V. Conclusion

The differing tests to determine copyright infringement and the ambiguity surrounding what exactly is a copyright protectable element can pose a challenge for those working in or entering the video game industry. But, through an understanding of these tests and standards directly in the context of video games, lawyers and clients can both be prepared to handle copyright infringement litigation if it comes their way.

The first important takeaway from this paper is that when developing, selling, or in any way trying to protect a video game, it is vital to know which elements are protectable. Specifically, for video games, there are three types of creative elements that may potentially receive copyright protections—audio elements, video elements, and computer code.[150] Following identifying each element in a video game and sorting it into one of those categories, the test for copyright protectable elements boils down to determining which elements are able to meet the creativity-based originality standard.[151] Thus, typically, specific features individual and identifiable to a particular video game are protectable.[152]

These identified protectable elements are inherently protected by copyright protections, but a lawyer should recognize and ensure that the video game may receive additional benefits by

[148] *Id.*
[149] Brashears-Macatee, *supra* note 137, at 919.
[150] LIPSON & BRAIN, *supra* note 20.
[151] Feist, 499 U.S. at 340.
[152] Maitra, *supra* note 26.

registering the copyright.[153] In particular, registering the copyright will often ease troubles in litigation because of the ability to prove specific dates that could be needed for litigation.[154]

Therefore, lawyers need to make sure to identify the protectable and unprotectable elements within the copyright protected video game in order to protect client interests and prepare for any copyright infringement litigation.[155] Furthermore, the three most prominent tests all require a deep understanding of the protectable elements.[156] While the tests are similar in that respect, there is nonetheless a circuit split on which approach to use to find infringement based on substantial similarity.[157] Therefore, lawyers should make sure to have an understanding of these tests—the subtractive approach, the abstraction-filtration-comparison test, and the total-concept-and-feel approach—in order to stay prepared for whichever approach the lawyer faces during litigation.

The important takeaway for those interested in creating a video game—especially those that are taking inspiration from other existing video games—is to make sure that the used elements are not including protected elements from another game. Even if the two video games are not identical, the creator of the second game needs to ensure that the protectable elements are not substantially similar.[158] If the protectable elements appear to be slightly similar, then the creator should identify what a reasonable person may consider to be a distinguishing feature.[159]

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[153] Stim, *supra* note 46.
[154] *Id.*
[155] Parchomovsky & Stein, *supra* note 81 (noting how identifying protectable elements is an important aspect in determining whether there is a substantial similarity within the common approaches for determining copyright infringement).
[156] Joyce et al., *supra* note 79, at 650.
[157] *See* discussion *supra*, Part IV(A)–(B).
[158] Since the test for copyright infringement has become more and more centered upon whether there is a substantial similarity between the accused work and the copyright protected work—and each of the three leading approaches for finding copyright infringement tackle the question of whether there is substantial similarity—creators seeking to avoid liability for copyright infringement should focus heavily on whether there is substantial similarity. *See* Balganesh et al., *supra* note 73 at 268–69.
[159] *Wildlife Express*, 18 F.3d at 508–09.

The important takeaway for those that already have a video game is to identify all of the elements of the video game that may receive protection. Even though these elements are already inherently copyright protected,[160] it would serve a creator in this position well to go register these copyrightable elements.[161] The reason for this is if the creator is ever involved in litigation, then the creator will have a stronger showing of protection and will be better prepared to prove the dates of inception.[162] Further, having this copyright registered may dissuade other companies from trying to copy the protectable elements.[163]

The important takeaway for lawyers that work in this industry is to identify the protectable and unprotectable elements within their client's video games. This will help ease litigation and protect their clients.[164] If the litigation is occurring outside of the ninth circuit, then it is safest to use the subtractive approach because it is less costly than abstraction-filtration-comparison test and centers heavily on identifying the protectable elements.[165] But, if the lawyer is in front of a court that uses the abstraction-filtration-comparison test, then the lawyer must be cautious of categorizing in middle abstraction levels—levels 2 through 4—since those are discretionary for the court.[166] If possible, a lawyer should try to

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[160] *Copyright in General*, COPYRIGHT.GOV (2021), https://www.copyright.gov/help/faq/faq-general.html.
[161] Aaron K. Harr & Maria Crimi Speth, *Why Register My Copyrights? The Benefits of Copyright Registration*, JABURG WILK ATTORNEYS AT LAW (May 11, 2018), http://www.jaburgwilk.com/news-publications/benefits-of-copyright-registration#:~:text=Registration%20provides%20a%20public%20record%20of%20ownership.&text=Registration%20makes%20the%20copyright%20owner,that%20violate%20the%20owner's%20rights.
[162] Stim, *supra* note 46.
[163] *Id*.
[164] *See* discussion *supra*, Part II(B).
[165] *See* Christopher Jon Sprigman & Samantha Fink Hedrick, *The Filtration Problem in Copyright's "Substantial Similarity" Infringement Test*, 23 LEWIS & CLARK L. REV. 571, 576–85 (2019) (providing a critique of the abstraction-filtration-comparison test and the total-concept-and-feel approach).
[166] While technically all six levels of abstraction are discretionarily filtered by the court in the second step of the abstraction-filtration-comparison test, it is recognized that object code and source code for video games constitute protectable "expressions" and the main purpose of the game is an "idea." *See* LIPSON & BRAIN, *supra* note 19 (categorizing object code and source code as protectable); *see also* Maitra, *supra* note 25 (articulating that main purposes of a video game are too broad and idea-based to be protectable). Thus, the only remaining discretionary choices for the court to determine during the filtration process of the abstraction-filtration-comparison test are related to the middle abstraction levels.

classify an element as source or object code because those are commonly agreed upon expressions that are protectable.[167] Lastly, if litigation is occurring in the Ninth Circuit and the court is using the total-concept-and-feel approach, a lawyer should understand that the plaintiff—the copyright protected video game owner—is inherently in the more favorable position based on the standard for determining substantial similarity.

The guidance provided in this paper is meant to provide lawyers and those within the video game industry on how to ensure protection of a video game that contains protected intellectual property. Additionally, this paper works to guide those entering into the industry how to avoid accidentally infringing upon a copyright protected video game.

[167] *See* LIPSON & BRAIN, *supra* note 20 (categorizing object code and source code as protectable).