A TRIVIAL PURSUIT: SCRABBLING FOR A BOARD GAME COPYRIGHT RATIONALE

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INTRODUCTION

Imagine a clever toy designer who regularly registers his creations as copyrighted sculptural works. One day, in a burst of creative energy, he conceives a different type of toy: an original board game, one that he is certain will be a big hit. He scribbles the basic rules of the game on a few sheets of paper and rushes to his attorney to begin the process of obtaining a copyright on the game. To his surprise, however, his attorney seems reticent. When he asks his attorney why, she explains that board games are not copyrightable, and that he will be able to receive copyright protection only for the game's particular wording of the rules and any original graphics or sculptural elements used. In fact, she explains, the "heart" of the game might as well not even exist for copyright purposes; in the eyes of copyright law, a board game looks like a mere box of drawings accompanied by an uninteresting short story. The toy designer does not understand—why are his toys protectable, but not his equally creative game? Could another game manufacturer simply steal his idea, change the wording of the rules and the game's graphics, and produce millions of copies? The attorney tells him the bad news—there is no clear reason why the expressive content in the "heart" of a game is not protectable, but it is not, and a game manufacturer could indeed copy the heart of the game to its heart's content.[1]

People generally think board games[2] are copyrightable.[3] A Google search of *copyright my game* yields millions of results, many involving questions from game creators as to how they might copyright their fantastic new board games.[4] Explaining to those creators why their games are not copyrightable is difficult.[5] Indeed, the answers posted in response to their

1. *See* discussion *infra* Part I.

2. The term "board games" is used throughout this paper to refer more generally to non-video games and without a strict requirement of a literal board; thus, games such as Boggle and Yahtzee are intended to fall under the term "board games."

3. *See, e.g.*, *MythBusting: Game Design and Copyright, Trademarks, and Patents (US Law)*, BOARDGAMEGEEK, (Feb. 9, 2012), http://boardgamegeek.com/thread/493249/mythbusting-game-design-and-copyright-trademarks-a (explaining the general misconception).

4. *Copyright My Game–Google Search*, GOOGLE, (Feb. 9, 2012), http://google.com/search?q="copyright+my+game".

5. "Games seem to straddle the boundaries between copyright and patent,

questions often jumble the law terribly, mixing up patent, trademark, and copyright.[6] Moreover, even the most accurate answers seem unsatisfactory in their attempts to explain the idea-expression dichotomy[7] as the underlying reason why a particular rule book's language and layout may be protected by copyright while the game behind it may not.[8] One may easily imagine the deflation felt by these creators as they discover that someone may legally copy their games with impunity.[9] It is easy to understand their confusion and frustration, particularly when copyright has been extended over the last century to many odd examples of creativity, including short advertising jingles,[10] choreographed dances,[11] and small segments of computer code.[12]

The noncopyrightable nature of board games appears generally accepted as black letter copyright law.[13] The only

between author, performer, and reader, and between protected and unprotected material." Bruce E. Boyden, *Games and Other Uncopyrightable Systems*, 18 GEO. MASON L. REV. 439, 439 (2011).

6. *See MythBusting*, *supra* note 3.

7. *See* Autoskill Inc. v. Nat'l Educ. Support Sys., Inc., 994 F.2d 1476, 1491 (10th Cir. 1993) (focusing on the idea-expression dichotomy); Toro Co. v. R & R Prods. Co., 787 F.2d 1208, 1211–12 (8th Cir. 1986) (stating that the Copyright Act codifies an idea-expression dichotomy).

8. *See* 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 2.18[H][3][a] (2010) (hereafter NIMMER & NIMMER); 17 U.S.C. § 102 (2006).

9. *See generally MythBusting*, *supra* note 3.

10. *See, e.g.*, Korman v. HBC Fla., Inc., 182 F.3d 1291 (11th Cir. 1999) (recognizing musical jingles as copyrightable).

11. 17 U.S.C. § 102(a)(4).

12. *See* Apple Computer, Inc. v. Franklin Computer Corp., 714 F.2d 1240, 1248 (3d Cir. 1983) (recognizing that computer "programs are copyrightable and are otherwise afforded copyright protection").

13. 17 U.S.C. § 102 (listing subject matter entitled to copyright protection). The "rules of a game" are not entitled to copyright protection. Chamberlin v. Uris Sales Corp., 56 F. Supp. 987, 988 (S.D.N.Y. 1944), *aff'd*,150 F.2d 512 (2d Cir. 1945). Atari, Inc. v. N. Am. Philips Consumer Elecs. Corp., 672 F.2d 607, 615 (7th Cir. 1982) ("[C]opyright protection does not extend to games . . . .") (citing *Chamberlin*, 150 F.2d 512). *See also* Affiliated Hosp. Prods., Inc. v. Merdel Game Mfg. Co., 513 F.2d 1183, 1188 (2d Cir. 1975) ([T]he simplicity of [a] game[] makes the subject matter [of its copyright] extremely narrow").
However, the leading copyright treatise cautions that "[t]he general proposition that "games are not copyrightable . . . is subject to qualification." NIMMER & NIMMER, *supra* note 8, § 2.18[H][3][a] (citing *Chamberlin*, 56 F. Supp. 987). It goes on: "[S]ome limited copyright protection is . . . available." *Id.* For instance, "artistic expression, if original, would render copyrightable labels for games, as well as the pattern or design of game boards and playing cards as pictorial or graphic works." *Id.* (citations omitted).

protectable elements of board games are their particular original expressions of the rules and visually expressive and artistic elements.[14] This protection formula is reminiscent of the useful article doctrine, which states that the only protectable elements of such articles are those that remain after separating them physically or conceptually from the article's functional aspects.[15] Names of games may well be protected under trademark law, and often are,[16] but the game itself—the manner of play, the way the game proceeds, the very "heart" of the game—appears to be unprotectable.[17] Surprisingly, however, although the position is very old and only rarely challenged, it is difficult to find a well-articulated legal reason for the blanket exclusion of board games from copyright protection.[18] Part I of this Article discusses the historical lack of protection in games. Part II presents arguments in favor of extending copyright protection to board games, comparing board games to several types of protected works and offering policy reasons for protecting board games. Part III examines the lack of pressure for copyright in board games. Last, Part IV anticipates several arguments that may be raised against extending copyright protection to board games and addresses each argument briefly.

Likewise, "the wording of instructions for the playing of a game is itself copyrightable so as to prevent a literal or closely paraphrased copying. Such copyright would not, however, permit a monopoly in the method of play itself, as distinguished from the form of instructions for such play." *Id.* (citations omitted). A board game's "copyright only protects [the creator's] arrangement of the rules and the manner of their presentation, . . . not their content. . . . *Id. See also* 2 WILLIAM F. PATRY, PATRY ON COPYRIGHT § 4:20 (2010) (hereinafter PATRY); U.S. COPYRIGHT OFFICE, GAMES, FL-108, (2010), *available at* http://copyright.gov/fls/fl108.pdf.

14. NIMMER & NIMMER, *supra* note 8, § 2.18[H][3][a]; PATRY, *supra* note 13, § 4:20; U.S. COPYRIGHT OFFICE, *supra* note 13. *See also* discussion *infra* Part I.

15. *See, e.g.*, Mazer v. Stein, 347 U.S. 201 (1954).

16. Jeanne Hamburg, *Copyrights and Trademarks: (Almost) Everything You Need to Know*, CASUAL CONNECT MAG., Summer 2008, at 42 (noting that although "a game title will never be copyrightable . . . it can be a trademark"). *See also* U.S. COPYRIGHT OFFICE, *supra* note 13 (stating that "[c]opyright does not protect the . . . name or title" of a game).

17. NIMMER & NIMMER, *supra* note 8, § 2.18[H][3][a]; PATRY, *supra* note 13, § 4:20; U.S. COPYRIGHT OFFICE, *supra* note 13.

18. *See* discussion *infra* Part I.

I: HISTORICAL LACK OF PROTECTION FOR BOARD GAMES

Professor Bruce Boyden has written about the history of copyright in games and argues against their copyrightability because they are a particular type of system, and systems are not copyrightable.[19] The Copyright Act appears straightforward with respect to the exclusion of systems: "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."[20] The legislative history of this exclusion shows that the intention of Congress was to codify the principal holdings of *Baker v. Selden*[21] and the cases that followed it:

> *Baker* and its progeny constitute the principal case law foundations for the system, method, and process exclusions . . . . Congress intended for [the exclusion] to codify the principal holdings of *Baker* and its progeny to limit the scope of copyright protection in functional writings, such as programs.[22]

As Professor Boyden details, however, the inquiry does not end with declaring games "systems" and applying the exclusion.[23] Professor Pamela Samuelson's article on the exclusion of systems and processes from copyright protection includes a short section on games, but she concedes that the "cases on games and rules are quite spare in analysis,"[24] finding no clear explanation in the cases for why the games are not copyrightable.[25] Boyden builds on her work by

19. *See* Boyden, *supra* note 5. Boyden's article, in this author's opinion, is destined to become a seminal piece on the history of copyright in games.

20. 17 U.S.C. § 102(b) (2006).

21. Baker v. Selden, 101 U.S. 99 (1879).

22. Pamela Samuelson, *Why Copyright Law Excludes Systems and Processes from the Scope of Its Protection*, 85 TEX. L. REV. 1921, 1923 (2007). Professor Samuelson argues forcefully that § 102(b)'s limitations on copyright protection were intended to operate quite strongly on systems and processes, particularly computer programs. She contends that Professor Melville Nimmer misinterpreted the holdings in *Baker* and *Mazer v. Stein* to exclude only abstract ideas from copyright protection and that this led some courts to "construe[] the scope of copyright protection for programs more broadly than Congress had intended." *Id.* at 1924.

23. Boyden, *supra* note 5, at 467–71.

24. Samuelson, *supra* note 22, at 1943.

25. *Id.* at 1944 n.161.

examining these cases and painstakingly analyzing the applicability of each element of the exclusion to games.[26]

First, Boyden acknowledges the truth of Samuelson's observation regarding the sparseness of analysis in the entire body of games cases, evoking Botticelli's "The Birth of Venus" as he states that the rule excluding games from copyright "emerged fully formed, without explanation, in the 1920s and 1930s . . . ."[27] Furthermore, these cases and those that followed often stated the rule not only without articulating its reasoning but also with hedging language.[28] Nimmer's treatise hedges as well, going only so far as to state: "It is said that games are not copyrightable, but this general proposition is subject to qualification."[29]

Boyden's analysis of the exclusions leaves open only systems, processes, and procedures as the bases for denying copyright protection to games.[30] Addressing processes and procedures, he finds that their ambiguity in the copyright world renders them incapable on their own to justify the wholesale exclusion of games.[31] If *all* works defined as instructions for producing entertainment are excluded from copyright protection because they are considered processes and procedures, then play scripts and sheet music would be excluded from protection as well.[32] Boyden then points to a "hidden distinction" found in the sparse scholarly literature on the subject that allows for both copyrightable processes

26. Boyden, *supra* note 5, at 449–58. Boyden first concludes that games are systems. *Id.* at 455. He then limits the field of § 102(b)'s exclusions as applied to games to the "systems" category by sequentially examining each in turn: games are not merely "ideas" because copyright law generally casts ideas in a narrow sense as abstract "general synopses of some larger, more detailed work"; games are not "principles" because principles, for purposes of copyright law, are considered akin to scientific or mathematical laws; games are not "concepts" because concepts, while not clearly defined in copyright law, are likely only "theories that have not yet been well-established enough to become 'principles'"; games are not "discoveries" for obvious reasons; games are not "methods of operation" because that term is usually found to apply to machines. *Id.* at 458–79.

27. *Id.* at 442.

28. *See id.* at 444 (quoting Chamberlin v. Uris Sales Corp., 56 F. Supp. 987, 988 (S.D.N.Y. 1944) ("it is very doubtful if rules of a game can, in any event, be copyrightable subject matter")).

29. NIMMER & NIMMER, *supra* note 8, § 2.18[H][3][a].

30. *See* Boyden, *supra* note 5, at 466–71.

31. *Id.*

32. *Id.* at 470–71.

and uncopyrightable ones: only processes that are "purely functional" are barred outright from protection.[33]

Boyden then acknowledges that games appear susceptible to copyright protection as systems that provide entertainment in the same way that sheet music is protectable as a process that provides entertainment.[34] He nevertheless concludes that games may merit exclusion from protection because the way information is transmitted to the audience from the author of plays or musical works differs from the way it

33. *Id.* at 471 (citing Dennis S. Karjala, *Distinguishing Patent and Copyright Subject Matter*, 35 CONN. L. REV. 439, 524 (2003)). Functional processes may be patented: the core requirements for a patent grant are patentable subject matter, novelty, nonobviousness, and usefulness. *See, e.g.*, 2 JOHN GLADSTONE MILLS, III, DONALD C. REILEY, III, & ROBERT C. HIGHLEY, PATENT LAW FUNDAMENTALS § 7:1 (2d ed. 2006). These requirements present high bars to overcome for a creative but simple board game. While it is beyond the scope of this paper to address fully the patentability of games, it is worthwhile to note the ambiguity regarding the scope of patent protection that games may receive. Three leading patent law treatises handle the issue in three somewhat different ways. One leading treatise summarizes the relevant holdings as follows, with the last sentence highlighting the inconsistency:

> While the apparatus involved in playing a game, including the game board and the game pieces may be patentable separately or in combination, the method of playing a game per se, that is, the actual "play of the game," as it is sometimes called, has been deemed not to constitute statutory subject matter. . . . Nevertheless, it should be pointed out that one of the most financially successful inventions ever patented is the game "Monopoly."

Id. § 7:18. Another leading treatise states that "recreation and amusement is a beneficial purpose, and hence games have been held patentable." 1 DONALD S. CHISUM, CHISUM ON PATENTS § 4.02 (2010) (citing Cusano v. Kotler, 159 F.2d 159 (3d. Cir. 1946) (upholding a patent for a combination billiards/shuffleboard table)).

In addition to the legal difficulties surrounding the patentability of games, the practical differences between patent and copyright are also noteworthy. Copyright registration requires little or no legal assistance and costs between $35 for basic online registration for one work and $220 for paper registration of a vessel hull design. U.S. COPYRIGHT OFFICE, COPYRIGHT OFFICE FEES, CIRCULAR 4 6 (2012), *available at* http://copyright.gov/circs/circ04.pdf. Also, it usually takes less than six months to complete for a simple online registration. *Frequently Asked Questions Concerning Submissions*, U.S. COPYRIGHT OFFICE, http://copyright.gov/help/faq/faq-what.html#certificate (last updated Jul. 1, 2011). Obtaining a patent, on the other hand, often requires legal assistance and costs about $1,500 in fees (without considering the cost of a patent attorney or professional drafting of patent drawings). *See Getting a Patent on Your Own*, NOLO, http://www.nolo.com/legal-encyclopedia/getting-patent-yourself-29493.html(last visited Jan. 9, 2012). It currently takes an average of almost three years from filing to final disposition. *See Data Visualization Center*, U.S. PAT. & TRADEMARK OFFICE., http://uspto.gov/dashboards/patents/main.dashxml (last visited Jan. 9, 2012).

34. Boyden, *supra* note 5, at 471.

occurs in the context of games.[35] For example, the author of a play transmits his expression through actors to an audience, whereas the creator of a game relies on the players to create the expression themselves.[36] He relies primarily on the public performance right to support his point, distinguishing the type of play in the game context from play in the dramatic work context and suggesting that it would be absurd to contemplate a copyright prohibition on playing Scrabble in a public park.[37] It is an unsatisfying distinction and disappointingly thin conclusion to an excellent article on the question of why the exclusion of games from copyright protection is generally considered black letter law.

II. ARGUMENTS FAVORING COPYRIGHT PROTECTION FOR BOARD GAMES

A. *Board Games as Creative Works Versus Practical Ones*

Games can be differentiated from the types of methods excluded from copyright protection in that they are created not for practical application but for entertainment. A primary rationale for the exclusion of systems and processes from copyright protection involves function and practice. *Baker* emphasizes the importance of dedicating the practical application of the forms and methods at issue in that case to the public.[38] In that case, Selden had published a method for bookkeeping complete with sample forms, and Baker later published a book of his own with similar methods and forms.[39] The Supreme Court held that Selden's methods and forms were not copyrightable.[40] While some methods are so novel and nonobvious as to warrant patent protection, others, like those in *Baker*, which apparently were found unpatentable,[41] do not meet those criteria. The language in *Baker* suggests that the "backdoor patent" sought via copyright protection for an unpatentable system like Baker's is impermissible, at least

35. *Id.* at 476–77.
36. *Id.* at 477.
37. *Id.* at 471.
38. Baker v. Selden, 101 U.S. 99, 103 (1879).
39. *Id.*
40. *Id.*
41. *See* Samuelson, *supra* note 22, at 1933.

partially because of the importance of dedicating basic, practical methods to the public domain.

Professor Samuelson, in arguing against reading the exclusions from protection too narrowly, notes the following:

> The post-*Baker* case law is richest in its exclusion of systems and methods from the scope of copyright protection. Indexing, shorthand, stenography, tax collection, and pension plan systems were all held to be unprotectable systems under *Baker*, as were blank forms that implemented or were constituent elements of unprotected systems. Methods of consolidating freight tariff information and for judging the credit worthiness of residents of local communities were similarly excluded from copyright protection.[42]

All of the above listed systems and methods are practical ones; they are not impractical works such as games. Indeed, as previously noted,[43] scholars have drawn distinctions between functional and nonfunctional works to explain the exclusions.[44]

Games are neither functional systems nor processes in the sense described any more than sheet music or plays. While they may be said to possess practical *benefits*,[45] they are not themselves systems intended for the "practical application" lauded in *Baker*.[46] The pitfalls of protecting practical methods are thus not present when affording protection to games. In order to afford protection for games, courts will need to draw distinctions between practical systems and games intended for entertainment. This sort of distinction should not prove too difficult. Even a very "practical" game, such as one designed for educational purposes, is distinguishable from methods of bookkeeping, forms, pension plan systems, and the like, which are designed for producing only practical results without any entertainment value.[47] Games inherently and

42. *Id.* at 1944.
43. *See* discussion *supra* Part I.
44. *See* sources cited *supra* note 33 and accompanying text.
45. *See* discussion *infra* Part II.D.
46. *See* Baker v. Selden, 101 U.S. 99, 103 (1879).
47. Professor Boyden notes a consequence of such distinctions: "Drawing the line between informational and non-informational functions allows back into copyright a large amount of material that was previously excluded." *Boyden*, *supra* note 5, at 478. He explains:

> The problem arises from looking at works in the abstract, as either functional

primarily aim for entertainment, and this very lack of practicality supports their protection as creative works. While the public would suffer if its access to practical systems and methods were limited by copyright protection (because it could not employ those methods without fear of infringement), the way a game is played is not useful in the same way, and the same concerns about the public are not warranted. In contrast, as will be argued,[48] the public could benefit from the extension of copyright protection to games by incentivizing individual creators to create new, original games in greater numbers and bring them to market.[49]

B. Copyright Protection for Comparable Works

Given the rationales for protection in other areas, such as plays, sheet music, video games, computer software, no obvious reason appears to exist for the exclusion of board games from the realm of copyright. Indeed, some of the arguments for protecting many of these works via copyright could be made just as well for board games.

1. Plays and Similar Dramatic Works

The fact that plays are distinguishable from games is not enough to justify a blanket ban on copyright protection for the latter. Dramatic works include plays, operas, and even poems with instructions for performing a story, with or without dialogue.[50] A game—at least a fairly complex game such as Scrabble—could well be considered a dramatic work in that it sets out a "script" via its rules, and its players "perform" that clever script, adding improvisation in each turn.[51] The

> or expressive outside of any context of use. Copyrighted works are communications. The key element that is missing from these analyses is therefore to look at both ends of the communication and to determine whether the expression that is transmitted from author to user is the primary source of meaning. In other words, is the material in question directly communicating some message to the user? Or is it being used instrumentally to perform some other task?

Id.

48. *See* discussion *infra* Part II.D.
49. *See* discussion *infra* Part II.D.
50. PATRY, *supra* note 13, § 3:94.
51. For an enlightening take on copyright in improvisational theater, *see* Brian M.

similarities do not end there. In fact, the primary purpose for both a "normal" play and for a game is entertainment.[52] The writing of the script or rules of each involves fixed expression, albeit incomplete expression until actors or players perform the work.[53]

Certainly, as Boyden argues, there is a difference between the conveyance of the author's expression via a play's script and the conveyance of such expression during the play of a game.[54] A playwright attempts to tell a complex story, full of emotional content, intertwining story arcs, and resonant themes, while the creator of a game just wants his "actors" to have fun. Boyden is also correct to note that a play is virtually always intended to communicate expression through performance to an audience, whereas a game is often intended to have no audience whatsoever, or at least a very limited one.[55] But this intention to convey a message to an audience is not dispositive or even relevant to the copyright analysis.[56] Copyright attaches at the moment a fixed, sufficiently original work is created, regardless of the intention that it be viewed or remain hidden, and regardless of whether it is ever performed or displayed, in front of an audience.[57] Perhaps an argument could be made that the sheer *quantity* of expressive content comprising most games is insufficient for copyright protection as compared to most plays or other dramatic works, but that argument relates to how *thin* a game's

Levy, *Legal Protections in Improvisational Theater*, 9 ART & L. 421, 446–50 (1985). Improvisational theater seems to be quite comparable to games in that the actors supply a great deal of the content when they perform the theater or play the game. Such improvisation is not protected by copyright unless it is fixed with the authority of the author; however, if there is an underlying dramatic work that contains the basis for the improvisation, it would surely be copyrightable, assuming it is sufficiently fixed and original. *See* PATRY, *supra* note 13, § 3:22.

52. Boyden, *supra* note 5, at 471 (noting that games "like music and plays, have the function of entertaining their users"). "There is no value to having three 'X's' in a row other than winning a game of tic-tac-toe. The victory conditions exist purely for the purpose of playing the game." *Id.* at 454 (citing BERNARD SUITS, THE GRASSHOPPER: GAMES, LIFE AND UTOPIA 47 (Broadview Press 2005) (1978) ("Games require obedience to rules which limit the permissible means to a sought end, and where such rules are obeyed just so that such activity can occur.")).

53. 17 U.S.C. § 101 (2006) (defining when a work is "fixed").

54. Boyden, *supra* note 5, at 472–79.

55. *Id.* at 477–78.

56. *See* 17 U.S.C. § 102(a) (2006).

57. *See id.*

copyright might normally be, not one that supports a categorical exclusion of games from copyright protection.

2. Sheet Music

Although the importance of sheet music is not as great as it once was for purposes of copyright,[58] it is certainly still a perfectly acceptable way of fixing an original musical composition.[59] Furthermore, the expression that is actually copyrighted when a musical composition is embodied in sheet music is intangible: it is the underlying music itself, not merely ink on paper.[60] In other words, the "heart" of the

58. The Copyright Act of 1976 expressly did away with the requirement elucidated in *White-Smith Music Co. v. Apollo Co.*, 209 U.S. 1 (1908), and embodied in the Copyright Act of 1909, that a musical work be reduced to written notation in order to receive copyright protection. *See* 17 U.S.C. § 102(a). For the first time, the recording of a musical work onto a physical medium, called a phonorecord, would satisfy the fixation requirement. *Id.* Though one might analogize a board game's rule book to a phonorecord, because that analogy is somewhat more difficult to envision, the medium of fixation of musical composition on which this article will focus is sheet music.

59. This author noted heated disagreement among the three major copyright treatises in their authors' discussions of musical compositions. For instance, Professor Patry disagrees strongly with Professor Nimmer's treatment of the potential for originality in works of musical harmony. *Compare* PATRY, *supra* note 13, § 3:93, *with* NIMMER & NIMMER, *supra* note 8, § 2.05. Nimmer's treatise, in a footnote, cites a case involving Duke Ellington's jazz classic "Satin Doll," and asserts that "[t]he court [there] recognized that harmony is usually simply driven by the melody, and hence unprotectable." NIMMER & NIMMER, *supra* note 8, § 2.05[D] n.54 (citing Tempo Music, Inc. v. Famous Music Corp., 838 F. Supp. 162 (S.D.N.Y. 1993)). Patry quotes this text and calls Nimmer's position "totally ignorant of actual musical composition and history," claiming that "[w]hile conventional harmonic progressions are not protected, there is plenty of room for originality in harmony." PATRY, *supra* note 13, § 3:93 n.8. Patry also includes a subchapter in his section on derivative works dedicated to criticizing Professor Goldstein's apparent position that to meet copyright's requirements for originality, a derivative work must be able to "stand on its own as a copyrightable work." *Id.* § 12:14.50 (quoting 2 PAUL GOLDSTEIN, GOLDSTEIN ON COPYRIGHT § 7.3 (3d ed. 2005)). Patry comments that this would be "worthless academic tussling" were it not for the employment of Goldstein's allegedly erroneous take by the Recording Industry Association of America in its successful bid to make cellular telephone ringtones subject to compulsory licensing, as well as an apparent confusion of the same issue by the Copyright Office. *Id.* (citing Mechanical and Digital Phonorecord Delivery Rate Adjustment Proceeding, 71 Fed. Reg. 64,303, 64,309–14 (U.S. Copyright Office Nov. 1, 2006) (Peters, Arb.)).

60. *See, e.g.*, PATRY, *supra* note 13, § 3:22 ("A musical composition may be embodied in sheet music, on an audiotape, on a compact disc, on a computer hard drive or server, or as part of a motion picture soundtrack. In each of the fixations, the intangible property remains a musical composition.").

musical composition is what is protected.

The ways in which a copyrighted musical composition embodied in sheet music may be infringed help to illustrate this concept. Making photocopies of the sheet music itself or reproducing its notation exactly is, of course, not the only way to infringe; publicly performing the music embodied in the visual notation, making a sound recording (a derivative work) of the composition, and creating a musical arrangement (another derivative work) based on the composition may all constitute infringement, if unauthorized.[61] Sheet music may be thought of a set of instructions to be read by musicians in order to perform the "heart" of the musical work. Musicians play according to the instructions, often to produce entertainment for themselves and any audience that may be listening.

The rules for a board game and the underlying "heart" of the game may be analogized to sheet music and the underlying musical work. In both cases, there are instructions for play created by someone; there is no play or performance without someone or something interpreting the work; and the players and possibly an audience may be entertained by the performance. There are differences, of course. As Boyden notes, a musical composition embodies a composer's rather definite expression, the performance of which communicates that expression, whereas a board game contains only an indefinite expression of its creator, designed deliberately to be open-ended in its play.[62] Another difference is that board games are generally designed to be competitive, even single player games wherein one is competing against the game itself or a performance goal, while few musical works could be said to promote competition among its players ("Dueling Banjos" notwithstanding).[63]

To this author, however, the similarities outweigh the differences when viewed in the context of copyright law. The

61. 17 U.S.C. § 501 (2006).
62. *See* Boyden, *supra* note 5, at 477–78.
63. SUITS, *supra* note 52, at 47 (positing that "the stipulation of what it means to win," creates the pursuit of games' ends, "the activity of trying to win—that is, playing a game"); Boyden, *supra* note 5, at 477 n.224 (recognizing that, although "a musical performance might be for the purposes of a competition," this is an "atypical example[]").

copyrightability of a musical work surely would not be diminished if, for example, the composer included a note at the beginning of the sheet music encouraging free-wheeling improvisation in its performance. Nor would it diminish if the composer further encouraged performers to compete with each other as to who could play his part better, or even to play for points or for speed. Stretching the analogy only somewhat thus supports the comparison of copyright protection for a sufficiently original board game with the longstanding copyrightability of musical compositions embodied in sheet music.

3. Video games

Video games are protected by copyright in three ways: as audiovisual works, as computer programs, or as both.[64] The audiovisual copyrightability relates to the images displayed on screen as the game is played.[65] This portion protects the "video" aspect of video games in the same way that movies are protected.[66] Non-video games by definition do not display images on a video screen or produce sounds substantial enough to invoke "audiovisual work" protection. Even in cases where courts analyze the "total concept and feel" of a video game, that concept and feel relate to the audiovisual aspect of the game, not the underlying "heart" of the game.[67] In short, courts appear to have relied only on the audiovisual aspects of video games or on their underlying computer programs as the bases for awarding such games copyright protection[68]; they have not reached the issue of copyright in

64. *See generally* Stern Elecs., Inc. v. Kaufman, 669 F.2d 852, 855–56 (2d Cir. 1982) ("The visual and aural features of the audiovisual display are plainly original variations sufficient to render the display copyrightable even though the underlying written program has an independent existence and is itself eligible for copyright").

65. *Id.*

66. *Id.*

67. *See, e.g.*, M. Kramer Mfg. Co. v. Andrews, 783 F.2d 421 (4th Cir. 1986) (finding audiovisual copyright in plaintiff's video poker game protected the underlying program, insofar as it was used to generate the sounds and display); Atari, Inc. v. N. Am. Philips Consumer Elecs. Corp., 672 F.2d 607 (7th Cir. 1982) (holding that the total concept and feel of the characters and "pieces" in the original Pac-Man game constituted protectable expression, but stating that Philips could create a noninfringing game with the same concepts but different audiovisual elements).

68. *See* discussion *infra* Part.II.B.2.

the game itself.[69]

One aspect of protection in video games, however, is noteworthy in a discussion of copyright in games generally: protection is not destroyed because of the interactive, dynamic nature of the games, i.e., the fact that players determine in large part what the software displays on the screen.[70] This now well-established doctrine, read alongside the basis for the protection of dramatic, non-video works, offers support for the analogy of games to plays. The continued protection despite the dynamism of the work stands to reason when viewed in light of other established copyrightable works: for example, music is never performed precisely the same way twice,[71] and indeed may involve substantial improvisation and interpretation without destroying the right to public performance granted to the underlying musical composition.[72]

4. Computer software.

Computer software has been protected by copyright since it was explicitly added, via amendment, to the Copyright Act.[73] The amendment added the definition of "computer

69. *See, e.g.*, MDY Indus., LLC v. Blizzard Entm't, Inc., 616 F. Supp. 2d 958 (D. Ariz. 2009), *vacated*, 629 F.3d 928 (9th Cir. 2010); *Andrews*, 783 F.2d 421; *N. Am. Philips Consumer Elecs. Corp.*, 672 F.2d 607; Nintendo of Am., Inc. v. Elcon Indus., Inc., 564 F. Supp. 937 (E.D. Mich. 1982).

70. "Audio-visual displays of computer games are subject to copyright protection, and a player's interaction with the software of those games does not defeat this protection even though the player's actions in part determine what is displayed on the computer screen." *Blizzard Entm't, Inc.*, 616 F. Supp. 2d at 966–67; *see also* Midway Mfg. Co. v. Artic Int'l, Inc., 704 F.2d 1009, 1011–12 (7th Cir. 1983); Williams Elecs., Inc. v. Artic Int'l, Inc., 685 F.2d 870, 874 (3d Cir. 1982); Stern Elecs., Inc. v. Kaufman, 669 F.2d 852, 855–56 (2d Cir. 1982).

71. Sarasvati Bodhisattva, a musician, expressed the following:

> Each song is its own animal no matter how many times it is played, and no song will ever sound "exactly" the same way twice because the energy present during the song is never exactly the same way twice, even if a musician is singing and playing the same notes every time. Each moment in life is unique and this carries throughout everything we do, even if it is not obvious to us.

Ramon Fagan, *Sarasvati Bodhisattva (a.k.a. Summer Spillman) Grants an Interview*, CONVENTION FANS (June 2, 2011), http://conventionfansblog.com/2011/06/02/sarasvati-bodhisattva-aka-summer-spillman-grants-an-interview.

72. *See* discussion *supra* Part.II.B.2.

73. Act of Dec. 12, 1980, Pub. L. No. 96-517, sec. 10, 94 Stat. 3028 (codified as amended at 17 U.S.C. § 101 (2006)) (amending the statute to recognize computer programs as copyrightable).

program"[74] as well as express limitations on the rights of "authors" of such programs.[75] Courts have found computer programs as protected within the definition of "literary works."[76]

The Third Circuit has found copyrightable expression in a computer program's "structure, sequence, and organization,"[77] an analysis which has been noted with approval by the Fifth[78] and Tenth[79] Circuit Courts of Appeal but criticized by the Second Circuit.[80] Criticism notwithstanding, the premise of examining the structure, sequence, and organization of a computer program highlights the fact that copyright may subsist in something other than the literal code of the program: the creative expression of a computer program may be separable both from the underlying ideas and from the literal code.[81] In the same way, the protectable creative expression of a board game should not be limited only to the literal phrasing of the rules in the effort to avoid the improper protection of ideas; there is an expressive middle ground between the literal and the conceptual that could be protected.

5. Sui Generis Protection for Architectural Works.

Architectural *drawings* have been eligible for copyright

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74. "A 'computer program' is a set of statements or instructions to be used directly or indirectly in a computer in order to bring about a certain result." 17 U.S.C. § 101.

75. *See id.* § 117.

76. *See, e.g.*, Computer Assocs. Int'l, Inc. v. Altai, Inc., 982 F.2d 693, 701 (2d Cir. 1992); Apple Computer, Inc. v. Franklin Computer Corp., 714 F.2d 1240, 1247 (3d Cir. 1983) ("'Literary works' are works, other than audiovisual works, expressed in words, numbers, or other verbal or numerical symbols or indicia, regardless of the nature of the material objects, such as books, periodicals, manuscripts, phonorecords, film, tapes, disks, or cards, in which they are embodied" (quoting § 101)).

77. Whelan Assocs., Inc. v. Jaslow Dental Lab., Inc., 797 F.2d 1222, 1248 (3d Cir. 1986). Professor Patry states approvingly that the Third Circuit later abandoned this "structure, sequence, and organization" test in *Dun & Bradstreet Software Services, Inc. v. Grace Consulting, Inc.*, 307 F.3d 197 (3d Cir. 2002). PATRY, *supra* note 13, § 9:165. But it is not clear from the Third Circuit's opinion that the structure, sequence, and organization test is dead. *See Grace Consulting, Inc.*, 307 F.3d 197.

78. *See* Kepner-Tregoe, Inc. v. Leadership Software, Inc., 12 F.3d 527, 535 (5th Cir. 1994).

79. *See* Gates Rubber Co. v. Bando Chem. Indus., Ltd., 9 F.3d 823 (10th Cir. 1993).

80. *See Altai, Inc.*, 982 F.2d 693.

81. *See Whelan*, 797 F.2d at 1235–36.

protection for decades, but in 1990 Congress extended that protection[82] to include "architectural works," which requires no drawings at all: copyright could now subsist in "the design of a building as embodied in any tangible medium of expression, including a building. . . . includ[ing] the overall form as well as the arrangement and composition of spaces and elements in the design. . . ."[83] First, this serves as a reminder that Congress has the ability to make specific provisions for certain types of works, including statutorily lessening the impact of the useful article doctrine on the copyrightability of an entire class of works;[84] it could do the same for games. Second, it demonstrates Congress's understanding that a work may find its fixed expression in "overall form," which is reminiscent of the "total concept and feel" test used by some courts in infringement actions.[85] This lends support to the argument that, in the board game context, something less abstract than an idea but more abstract than the literal expression of a game's rules might be protectable.

C. Substantial Similarity and the "Heart" of a Work

The tests for substantial similarity in infringement actions, though they are employed only when an accusing work is already found to be validly protected by copyright, are enlightening to the question of whether the "heart" of a game may be copyrighted. Determining whether two works are substantially similar is notoriously difficult, and courts employ a variety of tests to handle the difficulty. The common goal of all these tests is to determine when improper copying of expression occurs in the absence of literal copying, which serves to guard against the ability of an infringer to avoid liability simply by making his or her work only technically different from a copyrighted work, for example by paraphrasing an entire book.

82. Visual Artists Rights Act of 1990, Pub. L. No. 101-650, 104 Stat. 5128 (codified as amended in scattered sections of 17 U.S.C.).

83. 17 U.S.C. § 101 (2006).

84. *See* Kal Raustiala & Christopher Sprigman, *The Piracy Paradox: Innovation and Intellectual Property in Fashion Design*, 92 VA. L. REV. 1687, 1751 (2006).

85. *See* discussion *infra* Part II.C.

One somewhat controversial[86] test for substantial similarity, first employed by the Ninth Circuit and now also used in the Second Circuit, examines the "total concept and feel" of the works at issue.[87] A similar test used by the D.C. Circuit looks at "overall look and feel."[88] Many of the tests employed by the federal circuits overlap with various tests using similar formulations: most notable among these are the "ordinary observer" test (First, Second, Fourth, Sixth, Seventh, Ninth), the "more discerning observer" test (Second), the "intended audience" test (Fourth), the "abstraction-filtration-comparison" test (Second, Seventh, Tenth), and the "analytic dissection" test (Ninth).[89]

Perhaps the most fundamental difficulty encountered in a substantial similarity analysis is how to determine, when no literal copying of a work exists, how much of the similarity between two works is merely that of the abstract *ideas* of the works, which are not protectable and thus cannot be infringed, and how much is the similarity of the *expressions* of those ideas. For the purposes of this Article, however, it may be assumed that there is no such difficulty. Even if courts were perfectly able to draw the line between idea and expression, the fact that nonliteral copying is actionable leads logically to the conclusion that somewhere under the literal, fixed work exists an intangible yet copyrightable expression susceptible of infringement—one may call it the "heart" of the

86. The disdain for the "total concept and feel" test, particularly when it is used in software infringement cases, is evident in Nimmer's treatise NIMMER ON COPYRIGHT, and the arguments offered there for abandoning or deprecating it are persuasive. 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.03 [A][1][c] (2010). The treatise's criticism of the very use of the words "concept" and "feel" to determine copyright infringement is hard to rebut. *See id.*

87. PATRY, supra note 77, § 9:137. Patry offers the following description of this test that is far less critical than Nimmer's and is concise and colorful:

> The Second Circuit frequently employs the "total-concept-and-feel" test (derived from the Ninth Circuit). That test requires the ordinary observer to focus on the forest, not the trees. Where the parties' works contain a significant amount of public domain material, the court of appeals has used the "more-discerning-observer" test, which requires that in using a total-concept-and-feel approach, public domain trees be left out of the forest.

Id.

88. *See, e.g.*, Sturdza v. United Arab Emirates, 281 F.3d 1287 (D.C. Cir. 2002).

89. *See* PATRY, supra note 13, §§ 9:120–9:278. It is beyond the scope of this Article to examine the complexities of each test; the point of listing them is to provide a broad overview of the difficulty surrounding substantial similarity analysis.

work. Therefore, it must be conceivable that somewhere under the literal, fixed expression of the rules of a game exists the same sort of copyrightable expression, the same protectable "heart."

D. Benefits of Copyright

Though people may be quick to dismiss the public value of simple board games such as Yahtzee, there are many books and studies tying games to human learning and social development.[90] Moreover, the arguably low cultural value of, for example, popular music and comic books does not undercut their eligibility for copyright protection.[91] Fixed, original board games thus may fit squarely into the types of creative works that copyright law is designed to incentivize.

1. Incentivizing Creation of Board Games

Market evidence may support a theory that the lack of copyright protection for board game creators cuts against copyright's goal to incentivize creation. Games and puzzles comprise a $2.4 billion industry (excluding video games, the market for which is over eight times as large). The dominant player in the market is Hasbro, which controls around 60% of the market.[92] Other players include Mattel, with around 15% of the market; Lego, with 2%; Imagination; and Mayfair (the English-speaking country licensee of the popular German game "Settlers of Catan").[93] The following table provides the

90. *See generally* Roberto A. Weber, *Learning and Transfer of Learning with No Feedback: An Experimental Test Across Games* (Apr. 1, 2003) (unpublished manuscript), http://repository.cmu.edu/sds/26; SUITS, *supra* note 52 (arguing that games are beneficial to human development because they "playing a game is a voluntary attempt to overcome unnecessary obstacles"); ROGER CAILLOIS, MAN, PLAY AND GAMES (Meyer Barash, trans., 2001) (defining and relating play and games to human culture); STUART BROWN & CHRISTOPHER VAUGHAN, PLAY: HOW IT SHAPES THE BRAIN, OPENS THE IMAGINATION, AND INVIGORATES THE SOUL (2009) (detailing years of study of human and animal play and concluding that game-playing is essential to brain development and socialization).

91. *See, e.g.,* Bill Patry, *Copyright and Morals*, THE VOLOKH CONSPIRACY (Oct. 5, 2009, 7:05 PM), http://volokh.com/2009/10/05/copyright-and-morals.

92. Lutz Miller, *Lego Toys with Hasbro's U.S. Games Monopoly*, TDMONTHLY (Aug. 2010), http://toydirectory.com/monthly/article.asp?id=4263.

93. *Id.*

market shares of the major game companies.[94]

Manufacturer	U.S. Market Share: Games and Puzzles Category (all channels)	U.S. Market Share: Games and Puzzles Category (online only)	Main Product
Hasbro	60%	45.1%	Monopoly
Mattel	15%	7.5%	Apples to Apples
Cardinal Games	8%	0%	-
Pressman	7%	5%	Rummikub
Mayfair/Catan	3%	3.6%	Settlers of Catan
Lego	2%	12.4%	Minotaurus
Others	6%	26.4%	

Board game creators are afraid that their designs will be stolen if they are publicized or even pitched to one of the industry players. Board game message boards are littered with naïve questions from aspiring game designers along with discouraging answers from experienced aficionados who have learned that there is little hope for protecting a new game design.[95]

Even if creators understood the nuances of copyright law, they would likely find it infeasible to obtain any kind of intellectual property protection for their designs.[96] The only elements capable of copyright protection are likely artistic

94. *Id.*

95. *See, e.g.*, *MythBusting*, *supra* note 3; Steve Chang & Ross Dannenberg, *Hey, That's MY Game!: Intellectual Property Protection for Video Games*, GAMASUTRA (Feb. 25, 2008), http://gamasutra.com/view/feature/3546/hey_thats_my_game_intellectual_.php; George H. Morgan, *Copyright & Patents: Board Game Patent vs Copyright*, ALLEXPERTS (June 27, 2008), http://en.allexperts.com/q/Copyright-Patents-915/2008/6/Board-Game-Patent-vs-1.htm; *Information on Trademarking and Patenting Games*, GAME CRAFTER, http://thegamecrafter.com/forums/publishing-support/trademark-and-patent (last visited Feb. 14, 2012); Braniac, *How To Sell Your Original Board Game*, EHOW.COM, http://ehow.com/how_2130470_sell-original-board-game.html (last visited Jan. 14, 2012); Brand Gamblin, *I've Been Chuzzled So Many Times . . .*, MINDSAY (June 15, 2005, 4:23 PM), http://gamecoder.mindsay.com/ive_been_chuzzled_so_many_times.mws (relating story of game ideas being stolen by Hasbro).

96. *See* discussion *supra* Part I.

ones that the big game manufacturers would add during refinement and production, in any event, not the author's original conception of the game play because the "heart" of the game likely lacks protection under current interpretations of the law.[97] Other protections such as trademark protection would be difficult for an individual author to attain, as source distinction in a market for a game that does not yet exist means little for the game's creator.[98] In effect, to obtain the same types of protections for a board game design that a game company would acquire, a creator would have to create a game, design its art and rules in an original, expressive way, and possibly apply for trademark protection. Yet, the protection obtained could well be worthless. Moreover, the creator's game still could be summarily appropriated by a game manufacturer simply by stealing the "heart" of the game while changing the name, the wording of the rules, and the graphical treatment.[99]

In the cases of other creative works such as books, movies, and music, there are rights to the "hearts" of the works[100] that vest in the copyright owner at the moment of fixation.[101] Even if those rights are often quickly signed away to publishers, distributors, and record companies, they may at least provide a bargaining position and a legal basis for entering a contract. The "heart" of a game, by contrast, is not protected in the first place.[102] The only realistic options for a board game creator are to try to get a job with a favorable employment contract with one of the industry players or to race to the market with a game like Cranium and hope to be so successful that Hasbro or another company buys the rights to the game.[103]

If innovation in board games was being incentivized, the

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97. *See* discussion *supra* Part I.

98. Indication of source is a key requirement of a trademark. 15 U.S.C. § 1127 (2006).

99. For several such stories and a resigned take on the subject, *see* Tom Jolly, *Those Bastards Stole My Game!*, GAMES JOURNAL (May 2002), http://thegamesjournal.com/articles/StolenGame.shtml.

100. *See* discussion *supra* Part II.C.

101. 17 U.S.C. § 102(a) (2006).

102. *See* discussion *supra* Part I.

103. *See* Amy Martinez, *Nice Move: Cranium's $77 Million Sale*, SEATTLE TIMES (Jan. 5, 2008), http://seattletimes.nwsource.com/html/businesstechnology/2004108724_cranium05.html

public might know not only the trademarked names of games and their parent companies but also the names of board game designers. There is no denying the fame of countless authors, directors, and musicians, but few "authors" of board games are widely known—two mildly recognizable names are Alfred Mosher Butts, the creator of Scrabble, and Charles Darrow, who brought Monopoly to the masses.[104] At least an occupation called "board game designer" would be more well-known; there is a large and growing field for video game designers, but the same is not true for non-video game designers, perhaps in some part due to the availability of copyright protection to video games but not to the same extent in board games.[105]

III. LACK OF PRESSURE FOR COPYRIGHT IN BOARD GAMES

It appears there has never been a serious industry effort to lobby for copyright protection in non-video games. As discussed throughout this Article, the longstanding rules appearing to declare definitively that board games are not

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104. For a short account of the fascinating story of the origins of the legendary Monopoly board game, *see Inventor of the Week Archive*, LEMELSON-MIT (Oct. 1997), http://web.mit.edu/invent/iow/monopoly.html.

> The board game Monopoly(TM) was itself the winner in a field of real estate games. The first, called "The Landlord's Game," was invented by Lizzie Magie of Virginia (patented 1904). In it, players rented properties, paid utilities and avoided "Jail" as they moved through the board. . . .
>
> In the early 1930s, Charles Darrow of Germantown, Pennsylvania played such a game at a friend's house. Unemployed amidst the Great Depression, he understood the dream of financial success. He set about creating his own version, modeled on his favorite resort, Atlantic City. Darrow made numerous innovations for his game . . . . Darrow's "Monopoly" (1933) was a perfect combination of the cutthroat and the cute.

Id.

105. According to O*NET OnLine, a site of the U.S. Department of Labor, there were 210,000 video game designers employed in 2010, with 51,600 projected job openings for 2010-2020. *Summary Report for: 15-1199.11 – Video Game Designers*, O*NET ONLINE, http://www.onetonline.org/link/summary/15-1199.11 (last visited Sept. 17, 2012). Data for non-video game designers is not as readily available, but one could speculate that they comprise a portion of toy designers, which in turn comprise "a small subset" of commercial and industrial designers—who numbered only 41,000 employees in 2010. *See* Elka Maria Torpey, *Toy Jobs Work in the Business of Play*, OCCUPATIONAL OUTLOOK QUARTERLY, at 6 (Winter 2008/2009), http://www.bls.gov/opub/ooq/2008/winter/art01.pdf; *Summary Report for: 27-1021:00 – Commercial and Industrial* Designers, O*NET ONLINE, http://www.onetonline.org/link/summary/27-1021.00 (last visited Sept. 17, 2012).

protectable by copyright may have seemed too difficult to overcome, or other forces may have kept board game creators on the sidelines of the copyright battles.

A. Legal Hurdles

The idea that the historical exclusion of games from copyright protection precluded a concerted effort from the game industry or game creators seems unlikely. A similar argument was addressed in a recent article examining the low cultural value intellectual property fashion design industry.[106] The authors there considered whether the useful articles doctrine from *Mazer v. Stein*[107] and its progeny produced an "insurmountable obstacle" to the pursuit of copyright protection in the fashion industry.[108] They argued that such an acceptance of the exclusion of fashion from intellectual property protection was unlikely for two related reasons: first, the useful articles doctrine is a "surface feature" of copyright law that could be altered by Congress without disrupting the overall coherence of copyright laws; second, the extension by Congress of *sui generis* protection to architectural designs, semiconductor mask sets, and boat hulls demonstrates the "malleability" of the useful articles rule.[109]

Such a line of reasoning could also be applied to the world of board games. Not only could judicial arguments be made for copyright in the creative works that are board games, such as those advanced above comparing board games to plays, sheet music, and the like, but industry lobbyists or a consortium of board game creators could make the case to Congress for granting such protection, perhaps a form of limited protection. Indeed, there is currently a heavy push for limited copyright protection for fashion designs that has resulted in several bills before Congress, despite the fact that such protection would reverse decades of copyright doctrine.[110] The bill, which would insert language into the copyright law

106. Raustiala & Sprigman, *supra* note 84.
107. Mazer v. Stein, 347 U.S. 201 (1954).
108. Raustiala & Sprigman, *supra* note 84, at 1745–54.
109. *Id.*
110. *See* S. 3728, 112th Cong. (2012). *See also The IDPPPA – Is The Third Time A Charm?* COLUMBIA BUS. L. REV., http://cblr.columbia.edu/archives/11357 (last visited Sept. 17, 2012).

very similar to that granting protection for boat hull designs, would grant a three-year period of protection to original fashion designs.[111]

B. Board Game Industry Dynamics

The already oligopolistic structure of the board game industry may account for the lack of a push for legal protection. As discussed above, the non-video game and puzzle market is dominated by Hasbro.[112] Still, however, profit margins are slim and have been for a number of years.[113] There may be little incentive and not enough ready capital to entice the few big industry players to lobby for copyright protection for board games, given that the industry leaders have succeeded in dominating the market without copyright protection. Market-entry restrictions are already present, including advertising costs, production costs of getting a game to store shelves, and setting up distribution arrangements with retailers.[114] It could be that the small number of big players actually benefit, or at least believe that their businesses benefit, from the lack of copyright protection. Why would a company advocate affording copyright protection to creators when it already enjoys a great amount of exclusivity based on the current state of the market? [115]

111. *See id.*

112. *See supra* note 92 and accompanying text.

113. *See Toys & Games Industry*, YCHARTS (Aug. 1, 2012, 06:54 PM), http://ycharts.com/industries/Toys%20&%20Games/profit_margin,profit_margin.

114. *See* William Maclean, *The Humble Board Game*, WILLIAM GAMES MACLEAN http://www.amherstlodge.com/games/reference/gameinvented.htm (last visited Oct. 1, 2012) ("Whilst the board games market has its own idiosyncrasies, all too many newcomers underestimate the colossal amount of (often tedious, repetitive and detailed) work that needs to be undertaken to get a board game from the initial idea to the shop shelves.").

115. There are, of course, exceptions to this rule. General Mills, the parent company of Parker Brothers, which owned the rights to the game Monopoly (which was later bought out by Hasbro), fought the makers of the game Anti-Monopoly for years, eventually losing at the U.S. Supreme Court. For a biased account of the story, *see* Ralph Anspach, *The Full Story*, ANTI-MONOPOLY (1999), http://antimonopoly.com/the-legal-fight/the-full-story/. Hasbro has also fought online adaptations of Scrabble clones such as Scrabulous and Yahoo's Literati. *See* Dennis Yang, *Hasbro Sues Scrabulous for Being Too Scrabble-ish*, TECHDIRT (Jan. 11, 2008, 7:13 PM), http://blog.techdirt.com/article.php?sid=20080111/152626. The Scrabble clone with the most serious following, however, is WordBiz. *See* INTERNET SCRABBLE CLUB, http://isc.ro (last visited Jan. 14, 2012). It boasts many of the national Scrabble

Indeed, in eighteenth century England, the Stationers' Company pursued the first modern copyright regime—citing the concerns of its authors—only when competition arose from others with the audacity to operate rival printing presses.[116]

The first-marketer advantage is also very pronounced in the board game industry: being the first to market a certain board game is very important.[117] Arguably, it is unlikely that anyone would want a knock-off board game once another version is a hit. The first game of a certain type to become somewhat popular may become familiar to members of the public to a point where most people will already know the rules and will be intrigued by an invitation to an evening gathering featuring a well-known board game. This is another insulating factor that may help explain the lack of pressure in the board game industry for copyright protection. By affording copyright protection in their innovative board game designs, creators could have a viable position in this rush to market.

IV. ARGUMENTS AGAINST COPYRIGHT IN BOARD GAMES

One might argue that copyright protection for the "heart" of a board game would be so fundamentally at odds with the holding of *Baker v. Selden*[118] that it would be tantamount to overruling it. Games, however, are different from the business methods barred from copyright protection in *Baker* and its progeny. Furthermore, business methods may still be patented, though games generally may not.[119] A judicial or legislative extension of copyright in board games would allow for a measure of protection while continuing the exclusions on the methods of bookkeeping and similar business processes and forms contemplated by *Baker*.

champions. "It was created by [Florin Gheorghe] in the 1990s as a school project." *Internet Scrabble Club Explained*, EXPLAINED.AT, http://everything.explained.at/internet_scrabble_club (last visited Jan. 14, 2012).

116. *See* PATRY, supra note 13, § 1:6 (2010). The industry leaders may yet come around to a desire to revisit copyright protection for their games to fight competition; Hasbro's fights against online Scrabble-like games would certainly have been easier for it to win if it held copyright in the game design.

117. *See*, *e.g.*, O.C. FERRELL & MICHAEL D. HARTLINE, MARKETING STRATEGY 457 (5th ed. 2011) (discussing Mattel).

118. Baker v. Selden, 101 U.S. 99 (1879).

119. *See* Bilski v. Kappos, 130 S. Ct. 3218 (2010).

Another argument against copyright protection for board games is that such protection could cause play of those games in public to risk being an infringing public performance. This worry is easily addressed. First, at least one circuit court has held that "playing of a game is not a 'performance' within the meaning of the Copyright Act."[120] Even if playing board games in public *did* constitute public performances for purposes of copyright, which they likely would if the reasoning behind extending protection to them was based on their similarity to musical compositions or plays, there would be a strong fair use or personal use defense for the vast majority of public play. Additionally, there are statutory limitations to exclusive rights as well as particular exemptions set out in the Copyright Act.[121] One such exemption in the Act provides for a general exemption from liability for nonprofit public performances which would likely apply to virtually any public play of board games.[122] Only organized, commercial public play, such as in tournaments for which the organizers charge admission fees and pocket the proceeds for themselves, would clearly risk infringing any public performance right. Such commercial tournaments and similar exhibitions may well require licenses; however, this would not be undesirable, especially considering that such tournament organizers likely already have to obtain licenses to use the trademarks of the games being played.

Another question that may be raised is whether extending copyright protection to board games would lead to stifling simple, spontaneously-created games. These simple games, such as those made up on the spot by children, might then be protected, if the games are also fixed and original. Asking this question about games, however, is no different from asking the same question about simple drawings, songs, or

120. Allen v. Academic Games League of Am., Inc., 89 F.3d 614, 616 (9th Cir. 1996). The court there declined to extend a public performance right to the playing of a game at a tournament without offering any detailed reasons beyond the following: "Whether privately in one's home or publicly in a park, it is understood that games are meant to be 'played'. . . [and] this court will not [by finding a public performance right] place such an undue restraint on consumers." *Id.*

121. 17 U.S.C. § 110 (2006).

122. *Id.* § 110(4). The first two exemptions cover certain educational performances and displays, while the third exemption covers performances and displays that are part of religious services. *Id.*

stories. All of these works are immediately protected by copyright upon fixation if they are sufficiently original, and this is not generally seen to be a problem.[123] Despite occasional histrionic complaints from copyright skeptics, there is not, at least not yet, a rash of lawsuits about Billy copying Susie's drawing, even though there may be a protected work and a *prima facie* case of copyright infringement in such a situation. The same would likely hold true if board games were afforded some measure of copyright protection. Furthermore, the requirement of originality would provide a significant check on overprotectiveness.[124] Thus, a poker game that simply had a few variations would not likely be sufficiently original to merit copyright protection.[125]

An additional, related concern may be a perceived insurmountable difficulty in determining whether a board game is sufficiently original to merit copyright protection, and if so, what would constitute infringement. Games may be characterized, after all, by relatively standard themes: competition among players, pursuit of certain goals, assignment of points to overcoming certain obstacles, restrictions on the amount of time allowed for a move, and so forth.[126]

As with the question on overprotectiveness, it is helpful to address this concern using reminders of common characteristics from works that are currently protected. Popular music supplies the most obvious example: over the years, there have been thousands of renditions of four-minute songs structured as verse-chorus-verse-chorus-bridge-chorus, with basic time signatures and accompanying lyrics about heartbreak.[127] Determining whether two songs are substantially similar and whether the alleged infringer had access to the accusing work, the elements required in order to

123. *See* discussion *supra* Part I.

124. *See* Chamberlin v. Uris Sales Corp., 56 F. Supp. 987, 988 (S.D.N.Y. 1944), *aff'd*, 150 F.2d 512 (2d Cir. 1945) (holding that even if games could be protected, plaintiff's Acey-Deucy game was not sufficiently original, being an old variant of backgammon).

125. It may conceivably be patented, however. *See, e.g.*, U.S. Patent No. 7,055,822 (filed Dec. 10, 2004) (patenting a game trademarked "2 Jokers Wild 6 Card Thrill").

126. *See*, *e.g.*, Bernard Suits, *What Is a Game?*, 34 PHIL. SCI. 148 (1967).

127. *See*, *e.g.*, John Covach, *Form in Rock Music: A Primer*, *in* DEBORAH STEIN, ENGAGING MUSIC: ESSAYS IN MUSIC ANALYSIS 71 (2005).

prove infringement, involve difficult questions of law and fact.[128] Yet, copyright law finds a way to manage; it may be assumed that virtually every popular song enjoys registered copyright protection, and only occasionally does a story of a tumultuous infringement battle arise. Indeed, difficult judgment calls might be said to be the norm in copyright law, not the exception. Thus, a special concern with respect to copyright in board games would be misplaced.

Considerations about derivative works also may caution against protection for board games; new games, after all, are often surely just built upon the ideas of previous games. Cranium, for example, combines the elements of Pictionary, charades, Name That Tune, and others into a single game.[129] Its parent company, Hasbro, also markets games based on the Cranium's "sub-games."[130] The concern regarding derivative works in the board game context is, similar to other concerns, no less valid for other types of creative works that do enjoy copyright protection. Again, this is neither a new nor unique problem in copyright law—the same issues could be and are raised regarding formulaic movie plots, songs, and books.

CONCLUSION

Board games have long been excluded from the protections given by copyright law, and there has been little pressure to change this circumstance. There are rational arguments supporting the extension of copyright protection to board games, however, both from a legal standpoint and from a public policy standpoint. Board games need not be excluded as systems, processes, or procedures. They are creative works designed to entertain, not useful or practical ones. Protection for them makes sense when viewed in the context of the protection enjoyed by plays, sheet music, computer software, and architectural works. One may consider the "hearts" of the

128. *See*, ABKCO Music, Inc. v. Harrisongs Music, Ltd., 722 F.2d 988 (2d Cir. 1983) (finding that George Harrison's "My Sweet Lord" infringed The Chiffons' "He's So Fine").

129. *See, e.g.*, Patrick Kampert, *A Heads-up on Cranium: It Gets Silly*, CHI. TRIB. (Dec. 22, 2002), http://articles.chicagotribune.com/2002-12-22/features/0212220316_1_cranium-cariboo-whit-alexander-cranium-cadoo.

130. *See Cranium*, HASBRO, http://hasbro.com/games/cranium (last visited Jan. 14, 2012).

games as expressions based upon the jurisprudence regarding substantial similarity. Benefits of protecting them would accrue to creators and to the public. The historical lack of protection, lack of pressure to extend protection, and conceivable arguments against protection do not defeat the arguments in favor of extending some measure of copyright protection to board games. Therefore, board game creators (and their learned counsel) should place their chosen game pieces on "Start" and begin playing to win the game of copyright.