Chicago-Kent Journal of Intellectual Property

Volume 9 | Issue 1 Article 4

4-1-2010

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## Recommended Citation

Karlyn R. Meyer, *Doctrine of the Dead: How Capcom v. MKR Exposes the Decreasing Fit Between Modern Copyright Infringement Analysis and Modern Video Games*, 9 Chi. -Kent J. Intell. Prop. 132 (2010).
Available at: https://scholarship.kentlaw.iit.edu/ckjip/vol9/iss1/4

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# DOCTRINE OF THE DEAD:
## HOW *CAPCOM V.* MKR EXPOSES THE DECREASING FIT BETWEEN MODERN COPYRIGHT INFRINGEMENT ANALYSIS AND MODERN VIDEO GAMES

Karlyn Ruth Meyer*

### Introduction

Video games are evolving in both technology and purpose. The industry is shifting its attention from games that operate as interactive, scripted films toward games that provide a dynamic environment for a player's autonomous adventure. This trend toward nonlinear open-world and sandbox gameplay presents unique challenges in applying the copyright infringement analysis to video games.

The extrinsic test of copyright infringement serves as an objective prerequisite to comparing two works' expressive components. Despite the fact-specific and audience-specific nature of the expression inquiry, the results of an extrinsic analysis may foreclose this evaluation. Thus, the points of comparison guiding courts through the extrinsic analysis must accurately assess the works' objective similarities.

The extrinsic factors that so effectively evaluate literary works are unfit for nonlinear, open-world video games. This paper demonstrates how continued use of the extrinsic factors in evaluating this medium will distort the copyright infringement analysis by providing an inaccurate gauge of the works' underlying similarities.

Part I explains how *Capcom v. MKR* exposed flaws in the current test even as the court applied the extrinsic factors to a relatively linear game with a large amount of sandbox gameplay.

Part II chronicles the video game industry's shift toward open, nonlinear gameplay and discusses design innovations furthering this trend.

Part III provides the background framework of copyright's idea-expression dichotomy and the doctrines of merger and scènes à faire, while arguing for unique analyses in literary and nonliterary works.

Part IV describes the extrinsic and intrinsic tests for establishing copyright infringement, arguing that circuits' differing approaches to substantial similarity are inconsequential if they decide the extrinsic test as a matter of law.

Part V demonstrates how the *Capcom* court's extrinsic factors provide inappropriate points of comparison when applied to open-world games and sandbox gameplay. Part V also discusses the misuse of total concept and feel as an extrinsic factor.

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Part VI concludes by addressing the implications of allowing improper criteria to withhold the similarity analysis from a work's specialized audience.

## I. *Capcom v. MKR*: Framing the Debate

Beginning in 1968, director George A. Romero created a series of cult films chronicling a modern zombie apocalypse. The second installment in this series was the highly successful and critically acclaimed 1979 film, George A. Romero's Dawn of the Dead.[1] The MKR Group, whose president produced Dawn of the Dead, owned all copyrights and trademarks to the movie.[2]

Capcom was a successful video game developer and distributor whose resume contained zombie survival horror titles with their own cult followings, such as the Resident Evil series.[3] In 2006 Capcom released Dead Rising, a video game set during a modern zombie apocalypse.[4] Both Dead Rising and Dawn of the Dead follow the actions of survivors taken by helicopter to a small-town shopping mall during an unexplained zombie outbreak.[5] Both works feature characters barricaded in the mall, using its contents for survival, entertainment, and protection when zombies and human psychopaths overrun it.[6] And both works depict zombie slaying using common implements in a darkly comic manner.[7]

Two years before releasing Dead Rising, Capcom contacted MKR regarding the possibility of licensing elements from Dawn of the Dead for use in the game.[8] Capcom never acquired such a license but published a disclaimer on the front of the video game boxes declaring that the Dead Rising was not "developed, approved or licensed by the owners or creators of George A. Romero's Dawn of the Dead™."[9]

A volley of claims and counterclaims placed copyright infringement among several issues before the Northern District of California.[10] Capcom did not contest that MKR owned the rights to Dawn of the Dead, and the court presumed Capcom's access to the film based on the film's popularity.[11] Applying the extrinsic test of copyright infringement, the court sought to evaluate objective similarities between the two works. To do so, it focused on "articulable similarities between the plot, themes, dialogue, mood, setting, pace, characters, and sequence of events" as well as the works' "total concept and feel."[12]

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[1] Capcom Co., Ltd. v. MKR Group, Inc., No. C 08-0904 RS, 2008 WL 4661479, at *1 (N.D. Cal. Oct. 20, 2008).
[2] *Id.*
[3] The goal of these games is to "survive long enough to escape from an isolated location overrun with … zombies. There is often a safe haven where the characters can rest, eat, regain strength, and remain safe from attack." *Id.* at *1 n.1 (internal quotations omitted).
[4] *Id.* at *1.
[5] *Id.*
[6] *Id.* at *2, 9.
[7] *Id.* at *9 n.6.
[8] *Id.* at *1.
[9] *Id.*
[10] *Id.* at *1-2.
[11] *Id.*
[12] *Id.* at *5, 10 (quoting Funky Films, Inc. v. Time Warner Entm't. Co., L.P., 462 F.3d 1072, 1077 (9th Cir. 2006)).

The court focused only on each work's protectable elements, engaging in analytic dissection to filter out any underlying ideas and other elements in the public domain.[13] After evaluating each factor listed above in turn, it ultimately concluded that the only similarities alleged were "driven by the wholly unprotectable concept of humans battling zombies in a mall during a zombie outbreak."[14] Capcom won its motion to dismiss MKR's counterclaims with prejudice,[15] with the court observing a growing trend among district courts to rule on works' similarities so early in the pleadings.[16]

In granting a motion to dismiss during the extrinsic analysis, the *Capcom* court reveals the importance of examining how courts initially determine similarity when one of the works is a video game. To apply the same tests crafted for literary and dramatic works becomes increasingly untenable as video games become less linear and scripted.

## II.The Emergence of Open-World Video Gaming

Early generations of video games required a unique copyright analysis as audiovisual works. The 1975 ball-and-paddle arcade game Breakout included a four-color display of geometric shapes.[17] This game garnered multiple appeals to and remands from the D.C. Circuit to determine whether it was sufficiently creative to warrant protection.[18] Breakout highlighted the difficulties in evaluating early video games, with the struggle to determine whether the game's audiovisual display constituted an expressive whole despite its unprotectable elements. The court noted that "[t]he hallmark of a video game is the expression found in the entire effect of the game as it appears and sounds, its sequence of images."[19] Perceiving a video game as greater than the sum of its parts became easier when games began to resemble films.[20]

Video games evolved from Pac-Man and Pong to Final Fantasy and Halo. In this evolution, games of the latter type operated as audiovisual dramatic works. Video games had the ability to progress from simple puzzles and mazes to interactive epics providing more hours of storytelling than feature films. This transition alone demanded a change in their copyright evaluation. Much like the graphical rendering of a literary character raises that character to a new expressive dimension, modern storytelling video games are comprised of "both the linear, literary mode and the multi-dimensional total perception."[21]

Story-driven titles became more interactive by providing the gamer multiple paths by which to explore a game's drama. The cohesive, nonlinear exploration of a story is a possibility

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[13] *Capcom*, 2008 WL 4661479, at *5-6 (citing Apple Computer, Inc. v. Microsoft Corp., 35 F.3d 1435, 1443 (9th Cir. 1994)).
[14] *Capcom*, 2008 WL 4661479, at *7.
[15] *Id.* at *15.
[16] *Id.* at *2.
[17] Atari Games Corp. v. Oman, 888 F.2d 878, 879 (D.C. Cir. 1989).
[18] Atari Games Corp. v. Oman, 979 F.2d 242, 243 (D.C. Cir. 1992).
[19] *Id.* at 245 (quoting Stern Elecs., Inc. v. Kaufman, 669 F.2d 852, 857 (2d Cir. 1982)) (internal quotations removed).
[20] *See* Douglas L. Rogers, Give the Smaller Players a Chance: Shaping the Digital Economy through Antitrust and Copyright Law, 5 MARQ. INTELL. PROP. L. REV. 13, 72 (2001) (noting courts' progression toward evaluating the total concept and feel of audiovisual displays for video games and computers).
[21] *See* Warner Bros., Inc. v. Am. Broad. Cos., 720 F.2d 231, 241 (2d Cir. 1983).

unique to the medium. The player may be able to influence the story's outcome through the interactive nature of gameplay. Still, many games require the player to complete certain objectives in order to advance to one of its scripted endings. For a player to fight more enemies, uncover more secrets, further interact with non-player characters,[22] and ultimately win the game, the player must accomplish certain tasks in her journey.

### *A. The Industry Shift*

Beyond this, video games have continued their evolution. More powerful systems, increased memory, and more sophisticated development have allowed games to become more expansive. Developers may create open, explorable worlds around their scripted storylines. And in some cases, developers forego the storyline altogether. While remaining immersed in a game's universe, players are increasingly able to create their own experiences within it. In addition to these technological advances, a progressive view of marketing has shifted the video game industry's focus to the player-crafted experience.

As video game machinery switched from coin-operated arcades to player-owned computers and consoles, developers began accommodating the individual player's desires. From a game designer's perspective, the "old-fashioned school of thought is that the player is the designer's opponent; the new school is that the player is [the designer's] audience."[23] One design innovation highlighting this change in focus is a user's ability to choose and change a game's difficulty level. Early video games lacked this feature, as designers crafted them to measure the player's skill. Now, designers create video games to provide a fulfilling experience for players of varying proficiencies.[24]

### *B. Sandbox Modes and Open Worlds*

Focusing on the player as their audience, developers took note that for many, satisfaction with a game lay in their ability to feel as though they truly controlled the character. These players desired the ability to choose what to do in-game at any moment, not to simply perform a prompted or required action at the right time.[25] For them, lack of control had begun to detract from the entertainment, leading them to feel like "disembodied character[s] on a linear path with little possibility to really influence the [game's] events and surroundings."[26]

In response to this, story-driven games began to incorporate sandbox modes. This mode of gameplay allows the player to "fool around in a game's world without being required to meet

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[22] Non-player characters in video games are A.I. bots designed to provide the player with dynamic, realistic interactions in the game world. Brian Mac Namee and Pádraig Cunningham, *Enhancing Non Player Characters in Computer Games using Psychological Models*, EUROPEAN RESEARCH CONSORTIUM FOR INFORMATICS AND MATHEMATICS NEWS NO. 53, Apr. 2003, 37, *available at* http://www.ercim.org/publication/Ercim_News/enw53/EN53.pdf.

[23] Ernest Adams, *50 Greatest Game Design Innovations*, EDGE, Nov. 1, 2007, http://www.edge-online.com/features/50-greatest-game-design-innovations.

[24] *Id.*

[25] Feature: The Complete History of Open World Games Part 1, ComputerAndVideoGames (May 24, 2008), http://www.computerandvideogames.com/article.php?id=189591 [hereinafter CVG Part 1].

[26] CVG Part 1, *supra* note 25.

a particular objective."[27] One of the most successful examples of sandbox gameplay began in the early 2000s with the Grand Theft Auto series.[28] While using this model, Grand Theft Auto IV became United States' best-selling video game in 2008 despite only being released in April.[29] It became the third best-selling game that year in the combined markets of the United States, the United Kingdom, and Japan, although it was not released in Japan until the fourth quarter.[30]

In addition to including sandbox modes in otherwise story-driven games, developers have continued to create freeform, open-world video games featuring advanced artificial intelligence. This makes the game environment "not merely the setting for the action, but [rather] an active part of the overall gameplay [that] affects and reacts to the player as they progress."[31] In open-world games, the designer scripts what amounts to an optional adventure while allowing unlimited possibilities for often unanticipated in-game events.[32]

One example of such a work is Far Cry 2, a 2009 freeform shooting video game hailed for its innovative open-world capabilities. The game provides the player vague instructions to apprehend an enemy, but to do so the player meanders through a highly detailed African landscape however she chooses with no time limitation. The game's universe stretches fifty square kilometers of diverse terrain. The environment features changing weather, full day and night cycles, and is so highly interactive that every object that is flammable in real life can be ignited in the game. Non-player characters and wildlife populate villages, roam the landscape freely, and interact with the player and each other.[33] The end result for each player is an almost completely unscripted game experience.

### *C. Further Trends*

Another design innovation signaling this trend involves the achievement-based reward system modern game consoles employ. This system allows players to unlock abilities and receive trophies for accomplishing specific goals during gameplay, whenever and wherever they occur. Such goals may involve mastering a skill, discovering an in-game feature or location, or completing a task or sequence of activities. A player's achievements are visible to others, allowing "public awards for things that players have done in the course of their unique experience [in] the game."[34] The breadth and specificity of achievements and the manner in which they are unlocked create incentives without forcing players to adopt a particular style of

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[27] Adams, *supra* note 23. The mental image "sandbox gameplay" evokes is accurate; the game provides the environment and tools for the player to create her own experience.
[28] CVG Part 1, *supra* note 25.
[29] THE NPD GROUP, 2008 VIDEO GAME SOFTWARE SALES ACROSS TOP GLOBAL MARKETS EXPERIENCE DOUBLE-DIGIT GROWTH (Feb. 2, 2009), http://www.npd.com/press/releases/press_090202.html.
[30] Dave Rosenberg, *The Best-Selling Video Games of 2008 (so far)*, CNET NEWS, Aug. 21, 2008, http://news.cnet.com/8301-13846_3-10022181-62.html.
[31] Feature: The Complete History of Open World Games Part 2 ComputerAndVideoGames (May 25, 2008), http://www.computerandvideogames.com/article.php?id=189599.
[32] Adams, *supra* note 23.
[33] Far Cry 2 Interview: Keith Stuart, ThreeSpeech (Apr. 25, 2008), http://www.threespeech.com/blog/?p=975.
[34] Mary Jane Irwin, *Unlocking Achievements: Rewarding Skill with Player Incentives*, GamaSutra (Apr. 1, 2009), http://www.gamasutra.com/view/feature/3976/unlocking_achievements_rewarding_.php.

play.[35] This illustrates another industry shift in facilitating movement and exploration beyond the "checkpoint" structure of linear gameplay.

Thus developers are moving from scripted to unscripted, from linear to nonlinear, and from passive to active. As more games abandon the style of interactive films and become interactive worlds, the story often takes a backseat to the universe itself. In open-world and sandbox gaming, the developer sets the rules for the game world and grants the player autonomy to script her own experience within it.

## III.Idea and Expression in Audiovisual Works

Although video games overall receive copyright protection, this protection does not extend to everything they depict. While copyright grants authors exclusive rights in their creative expressions, the "copyright umbrella" does not cover the underlying ideas.[36] The idea-expression dichotomy led to the recognition that although a shared idea might cause works to appear similar on an abstract level, those similarities alone do not reflect protected content.[37] This conception has commonly been referred to as Judge Learned Hand's abstractions test, but "Hand's insight is not a 'test' at all. It is a clever way to pose the difficulties that require courts to avoid either extreme of the continuum of generality."[38]

At one end of that continuum lie ideas and concepts, which are unprotected by statute and remain in the public domain.[39] On the other end lies protected expression—the aspect of a work bearing the author's "stamp" of originality.[40] The struggle to identify which aspects of a work fall into each category has defined copyright disputes for more than a century.[41] Even as levels of abstraction may coalesce in literary works, the analysis within visual works is more amorphous.

Some courts have observed a key difference in media, noting that "[i]solating the idea from the expression and determining the extent of copying . . . necessarily depend to some degree on whether the subject matter is words or symbols written on paper, or paint brushed onto canvas."[42] In making the distinction, "one cannot divide a visual work into neat layers of abstraction in precisely the same manner one could with a text."[43]

Other courts continue to apply the same tests to both visual and literary works. But significant differences between the two call for a distinction. For example, "[a] story has a linear dimension: it begins, continues, and ends."[44] This linear dimension is present in works such as

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[35] *Id.*
[36] Folio Impressions, Inc. v. Byer California, 937 F.2d 759, 765 (2d Cir. 1991); *Cf.* Mazer v. Stein, 347 U.S. 201, 217 (1954).
[37] *See* Nichols v. Universal Pictures Corp., 45 F.2d 119, 121 (2d Cir. 1930), *cert. denied*, 282 U.S. 902 (1931).
[38] Nash v. CBS, Inc., 899 F.2d 1537, 1540 (7th Cir. 1990).
[39] 17 U.S.C. §102(a) (2008).
[40] Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 547 (1985).
[41] *See, e.g.*, Baker v. Selden, 101 U.S. 99, 104 (1879) ("The description of the art in a book, though entitled to the benefit of copyright, lays no foundation for an exclusive claim to the art itself.").
[42] Franklin Mint Corp. v. Nat'l Wildlife Art Exch., Inc., 575 F.2d 62, 65 (3d Cir. 1978).
[43] Judge Jon O. Newman, *New Lyrics for an Old Melody: The Idea/Expression Dichotomy in the Computer Age*, 17 CARDOZO ARTS & ENT. L.J. 691, 698 (1999).
[44] Warner Bros., Inc. v. Am. Broad. Cos., 720 F.2d 231, 241 (2d Cir. 1983).

novels, plays, and films, which are driven and distinguished by the characters they contain and the manner in which their plots unfold.[45] For the same reason, it is also present in story-driven video games. By contrast, "[a] graphic or three-dimensional work is created to be perceived as an entirety."[46] In the same way, audiovisual works that lack a linear dimension, such as open-world video games, might be better perceived as compilations. Even when a compilation consists of independently uncopyrightable elements, it gains protection through the author's creative selection, arrangement, and coordination of the material.[47]

### *A. Merger*

Copyright protection is a balance between authors' interests "in the control and exploitation of their writings" and "society's competing interests in the free flow of ideas [and] information."[48] Thus when one could not convey a given idea without a certain expressive technique, that means of expression merges into that uncopyrightable idea and does not receive protection.[49] Denying protection to the only—or very limited—means of expression avoids conferring a monopoly on the idea.[50] To allow such a monopoly would stand in conflict with the purpose of copyright protection: "to promote the progress of . . . useful arts."[51] This progress requires authors to borrow as well as create, building on each others' work, ideas, and thought.[52] Withholding protection from necessary expressive techniques while extending it to the authors' creative contributions maintains that incentive.

### *B. Scènes à Faire*

A similar copyright limitation withholds protection from scènes à faire. These are "incidents, characters or settings which are as a practical matter indispensable, or at least standard, in the treatment of a given topic."[53] What is standard or indispensable in a work necessarily depends on the subject of that work. The Ninth Circuit employed the doctrine of scènes à faire in video games when it compared two karate-style fighting games for alleged copyright infringement.[54] The court identified scènes à faire specific to that genre by isolating features that "encompass the idea of karate," such as common moves and stances.[55] The court also identified constraints created by the computer system and the limits of possible animation

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[45] *See* Nichols v. Universal Pictures Corp., 45 F.2d 119, 121 (2d Cir. 1930).
[46] *Warner Bros.*, 720 F.2d at 241.
[47] 17 U.S.C. §101 (2008) defines a compilation as "a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship." *Cf.* Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 358-59 (1991).
[48] Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984).
[49] Educ. Testing Servs. v. Katzman, 793 F.2d 533, 539 (3d Cir. 1986).
[50] *See generally* Morrisey v. Procter & Gamble, 379 F.2d 675 (1st Cir. 1967).
[51] U.S. CONST. art. I, § 8.
[52] Nash v. CBS, Inc., 899 F.2d 1537, 1540 (7th Cir. 1990).
[53] Atari, Inc. v. N. Am. Phillips Consumer Elecs Corp., 672 F.2d 607, 616 (7th Cir. 1982), *cert. denied*, 459 U.S. 880 (1982), *superseded on other grounds by rule in part,* FED. R. CIV. P. 52(a).
[54] Data E. USA v. Epyx, Inc., 862 F.2d 204, 208 (9th Cir. 1988).
[55] *Id.* at 209.

quality. As in other cases where a court isolated scènes à faire, the first author received no protection for these aspects of the game, and the court found no infringement.[56]

## IV.The Copyright Infringement Analysis

Where the first author of a work owns a valid copyright, she may prove infringement by establishing that a second work copied original elements from her creation.[57] This is most clearly proved through two propositions: 1) that the alleged infringer copied the primary work, and 2) that this appropriation was unlawful because what the alleged infringer copied was protected expression.[58] Beyond this, the test to determine infringement is necessarily vague and demands a case-specific inquiry.[59]

### *A. Copying and Probative Similarity: The Extrinsic Analysis*

The first proposition may be established through direct evidence, such as when the second author admits to having copied the first work.[60] However, this is more frequently proved circumstantially. When relying on circumstantial evidence, the question of copying creates another two-part inquiry.[61] The first is whether the alleged copier had access to the primary work, and the second is whether the two works are probatively similar—that is, similar enough to provide a reasonable inference of copying.[62]

Copyright protection requires originality, but originality does not require novelty.[63] The classic illustration of this principle involves a pair of authors who independently create identical works (each demonstrating sufficient creativity). Because each author created her work without reference to the other's, copyright would protect each of their creations, making their rights enforceable against even each other.[64] But serving as an example of evidentiary truth over legal fiction, this theoretical protection may never surface. Instead, striking similarity alone might establish this first element of the infringement analysis by "preclud[ing] the possibility" of independent creation.[65] Thus the second element of the copying inquiry may provide evidence of the first, as courts employ the logic that "similarity that is so close as to be highly unlikely to have been an accident of independent creation *is* evidence of access."[66]

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[56] *Id.* at 210.
[57] Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 361 (1991).
[58] Arnstein v. Porter, 154 F.2d 464, 468 (2d Cir. 1946), *cert. denied,* 330 U.S. 851 (1947).
[59] Peter Pan Fabrics, Inc. v. Martin Weiner Corp., 274 F.2d 487, 489 (2d Cir. 1960).
[60] *Arnstein*, 154 F.2d at 468.
[61] Ty, Inc. v. GMA Accessories, Inc., 132 F.3d 1167, 1170 (7th Cir. 1997).
[62] In *Positive Black Talk Inc. v. Cash Money Records Inc.*, the Fifth Circuit notes some jurisdictions' double use of the term *substantial similarity* to define two distinct legal concepts. The Fifth Circuit uses the term *probative similarity* to mean "the similarity needed to prove factual copying" and *substantial similarity* to mean "the similarity needed to prove that the copying is legally actionable." This paper will do the same. 394 F.3d 357, 368 n.7 (5th Cir. 2004).
[63] *Feist*, 499 U.S. at 345.
[64] *Id.* at 345-46; Mazer v. Stein, 347 U.S. 201, 217 (1954).
[65] *Arnstein*, 154 F.2d at 468; *Ty*, 132 F.3d at 1170.
[66] *Ty*, 132 F.3d at 1170 (emphasis in original).

This exception for "striking similarity" may be reserved for relatively sophisticated subject matter.[67] For example, striking similarity might be exceptionally probative in the context of a compilation, in which the author's creative selection, arrangement, and coordination of materials warrants protection.[68] There, the second author's identical selection, arrangement, and coordination of identical materials would require multiple instances of fortuitousness.[69] The existence of common errors in two works is similarly damning.[70] Still, striking similarity provides only a permissible inference for the jury, who must "apply logic and experience to determine if copying is the only realistic basis for the similarities at hand."[71]

Conversely, no amount of access will suggest copying where works are devoid of similarity.[72] While this prevents a finding of infringement between completely disparate works, the inverse ratio rule accepts a lower degree of similarity with evidence of a high amount of access.[73] A second author's access to the first work may be presumed in instances where that work is widely disseminated.[74]

Literal similarity is highly probative of copying in literary works. Nonetheless, copying and copyright infringement exist beyond the realm of verbatim reproduction.[75] In literature, insubstantial variations in phrasing do not allow a copier to sidestep liability.[76] In the same way, protection for visual works extends beyond "photographic reproduction."[77] For dramatic works, the "plot, themes, dialogue, mood, setting, pace, characters, and sequence of events" provide an effective tool for evaluating similarity in the absence of literal appropriation.[78] But just as these factors do not map neatly onto a visual work, open-world video games call for a unique analysis as nonlinear audiovisual works.

### *B. Improper Appropriation and Substantial Similarity: The Intrinsic Analysis*

The intrinsic test for substantial similarity between two works falls "exclusively within the province of the jury" and should only be withheld when a work fails the extrinsic test.[79] It is a subjective inquiry intended for scrutiny by ordinary observers within a work's intended

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[67] Winfield Collection, Ltd. v. Sun Hill Indus., Inc., 2002 WL 1480832, at *4 (E.D. Mich. June 20, 2002).
[68] *See Feist*, 499 U.S. at 358-59.
[69] *See, e.g.*, Lipton v. Nature Co., 71 F.3d 464, 471 (2d Cir. 1995) (second work included seventy-two of the original work's selection of seventy-seven animal-related terms, with multiple instances of the same arrangement).
[70] Eckes v. Card Prices Update, 736 F.2d 859, 863 (2d Cir. 1984).
[71] Price v. Fox Entm't Group, Inc., 499 F. Supp. 2d 382, 386 (S.D.N.Y. 2007).
[72] Arnstein v. Porter, 154 F.2d 464, 468 (2d Cir. 1946).
[73] Rice v. Fox Broad. Co., 330 F.3d 1170, 1178 (9th Cir. 2003) (citing Three Boys Music Corp. v. Bolton, 212 F.3d 477, 485 (9th Cir. 2000)).
[74] *See, e.g.*, Capcom Co., Ltd. v. MKR Group, Inc., No. C 08-0904 RS, 2008 WL 4661479, at *3 n.3 (N.D. Cal. Oct. 20, 2008) (presuming access where original work "sold over one million DVDs," "earned over $7,000,000 in its first two years of release," and "spawned an extensive merchandise licensing program").
[75] Nichols v. Universal Pictures Corp., 45 F.2d 119, 121 (2d Cir. 1930).
[76] *Id.*
[77] Peter Pan Fabrics, Inc. v. Martin Weiner Corp., 274 F.2d 487, 489 (2d Cir. 1960).
[78] *See Capcom*, 2008 WL 4661479, at *5 (quoting Funky Films, Inc. v. Time Warner Entm't. Co., L.P., 462 F.3d 1072, 1077 (9th Cir. 2006)).
[79] *Id.*

audience.[80] Still, some courts decide the issue of substantial similarity as a matter of law by determining either that the works are only similar with regard to their non-copyrightable elements or that no reasonable jury could find them substantially similar.[81]

Circuits are almost evenly divided as to how to apply the improper appropriation analysis to visual works.[82] Seven circuits favor an expansive use of the merger and scènes à faire doctrines, tending to filter unprotectable elements from the works before evaluating the similarity of their expression.[83] Six circuits would restrict the application of merger and scènes à faire in the context of visual works, treating the issue of substantial similarity as a broader, more subjective issue of fact.[84]

However, a court's approach to the second step of the analysis is irrelevant when it ends its inquiry at the first. In many cases, a court may decide the extrinsic test as a matter of law.[85] This exercise of judicial gate-keeping withholds cases from the ordinary observers in the work's target audience.[86] Such a powerful tool is appropriate only when the gate-keeper considers criteria that accurately gauge the similarities between the works involved. *Capcom v. MKR* demonstrates how courts continue to apply, across media, factors that were created to assess literary and dramatic works. When applied to the increasingly open worlds of modern video games, these factors become largely misleading, often inapplicable, and in some cases, useless.

## V.The Extrinsic Factors' Tenuous Applicability to Open-World and Sandbox Gaming

The purpose of the extrinsic test is for a court to consider objective criteria through which it may determine whether copying occurred, potentially as a matter of law.[87] Courts may permit both expert testimony and analytic dissection to establish this element of the copying analysis.[88] Factors would provide a useful tool for objectively evaluating points of similarity between two works at this stage. Despite this convenience, however, the prevailing factor test for literary works is inappropriate and often irrelevant in the context of open-world and sandbox gaming.

### *A. Plot and Sequence of Events*

[80] Litchfield v. Spielberg, 736 F.2d 1352, 1356 (9th Cir. 1984); Lyons P'ship, L.P. v. Morris Costumes, Inc., 243 F.3d 789, 801 (4th Cir. 2000).
[81] *Funky Films*, 462 F.3d at 1076-77; Yankee Candle Co. v. Bridgewater Candle Co., 259 F.3d 25, 33, 36-37 (1st Cir. 2001);Durham Indus., Inc. v. Tomy Corp., 630 F.2d 905, 918 (2d Cir. 1980).
[82] *See generally* Michael Murray, *Copyright, Originality, and the End of the Scènes à Faire and Merger Doctrines for Visual Works*, 58 BAYLOR L. REV. 779 (2006) (comparing circuits).
[83] *Id.*
[84] *Id.*
[85] Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp., 562 F.2d 1157, 1164 (9th Cir. 1977) *superseded on other grounds by* 17 U.S.C. § 504(b).
[86] Murray, *supra* note 82.
[87] *Sid & Marty Krofft*, 562 F.2d at 1164.
[88] *Id.*

The plot and sequence of events constitutes perhaps the single most defining element for evaluating the probative similarity of literary works. The logic of its application extends to any dramatic work. When Judge Hand evaluated the similarity between a film and a play in 1930, he stated that "the controversy centers upon the characters and sequence of incidents."[89] In 1945, Professor Chafee likewise observed that copyright protection extends to the "pattern of the work," which he defined as "the sequence of events, and the development of the interplay of characters."[90]

This factor held steadfast when translated between novels, plays, and films. And insofar as any video game plays like a scripted, interactive film, it remains appropriate. But this factor loses its footing when applied to open-world games that supply only a loose underlying storyline if they supply one at all. Plotlines become vaguer when the purpose of a game shifts from developing a story to developing an interactive universe. The games must only provide a background framework to facilitate the player's self-authored experience.

It has been noted with unintended accuracy of legal parlance that "[w]ithout a story, a game is just an abstraction."[91] In open-world games, the only identifiable plot may exist at high levels of abstraction that have little probative value to the issue of copying. To be sure, most games have at the very least a general objective. The *Capcom* court recognized that in Dead Rising, the "ultimate goal is to survive for three days and return to the helicopter, having deciphered the cause of the zombie outbreak."[92] But a general objective in the context of a game necessarily lies at *Nichols*' highest level of abstraction.[93] The only identifiable plot provides a loose framework within which the player determines the actual sequence of events. Jurisdictions that engage in analytic dissection, such as the *Capcom* court's, will filter out this abstract objective, nullifying the factor altogether.

When a player determines the course of events during her experience, this factor is unascertainable at the outset. Even otherwise story-driven games with large sandboxes—such as the Grand Theft Auto titles—feature optional missions with lax time requirements to maximize the player's freedom. The *Capcom* court subtly acknowledged the player's autonomy within the sandbox by noting that "by its nature," the Dead Rising script "may not track exactly how the game itself appears to the player."[94] This is not the case with a screenplay. The increasingly nonlinear nature of modern games uniquely frustrates any analysis into the plot and sequence of events.

### *B. Characters*

[89] Nichols v. Universal Pictures Corp., 45 F.2d 119, 121 (2d Cir. 1930).
[90] Chafee, *Reflections on the Law of Copyright*, 45 COLUM. L. REV. 503, 513 (1945).
[91] Adams, *supra* note 23.
[92] Capcom Co., Ltd. v. MKR Group, Inc., No. C 08-0904 RS, 2008 WL 4661479, at *2 (N.D. Cal. Oct. 20, 2008).
[93] *See Nichols*, 45 F.2d at 121.
[94] *Capcom*, 2008 WL 4661479, at *4.

The analysis of characters' similarity mirrors the analysis of their copyrightability. The Copyright Act does not expressly include characters as a copyrightable work.[95] Regarding their place in the copyright infringement framework, the Register of Copyrights equated fictional characters with "detailed presentations of plot, setting, or dramatic action," further stating that "afford[ing] them their own statutory category of copyright protection" would be "unnecessary and misleading."[96]

Still, fictional characters in visual works tend to receive protection even where literary characters do not.[97] This is because the "physical as well as conceptual qualities" of visual characters imbue them with greater expression.[98] Courts have already expressed willingness to find copyright infringement where a defendant's game incorporates a plaintiff's copyrighted graphical characters.[99] But it is more difficult to delineate a literary character to such a point of distinctiveness.[100] Between graphic and literary expression in general, the latter leaves more to the imagination.[101]

Beyond physical depictions, a stock character in any type of work falls into the category of scènes à faire: necessary to populate a story but devoid of personal expression.[102] Stock characters lack protection because they are "products not of the creative imagination but of simple observation of the human comedy."[103] Because the underlying character types remain available to the public, their presence in multiple works does not effectively indicate copying.[104]

The *Capcom* court again briefly mentioned one complexity of the game's sandbox format: "*depending in part upon critical choices made by the player*, numerous characters of various kinds come and go as the game progresses."[105] As video games less frequently require players to take certain paths and experience interactions in order, the characters populating the games become less integral to driving the plotline. Where this results in the proliferation of background stock characters, it provides fewer points for effective comparison between works. Even more dominant characters' personalities are often defined only through their dialogue, which will occur less frequently and less meaningfully, as this paper addresses below. As a result, video game characters' physical likeness will become the only accurate gauge of their similarity.

### *C. Theme*

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[95] *See* 17 U.S.C. §106(a) (2008).
[96] 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 2.12 n.2 (2009).
[97] *See* Walt Disney Prods. v. Air Pirates, 581 F.2d 751, 758 (9th Cir. 1978).
[98] Gaiman v. MacFarlane, 360 F.3d 644, 660 (7th Cir. 2004).
[99] *See, e.g.*, Marvel v. NCSoft, No. CV 04-9253RGKPLAX, 2005 WL 878090, at *2 (C.D. Cal. Mar. 9, 2005) (Captain America, Incredible Hulk, and Wolverine).
[100] *Walt Disney Prods.*, 581 F.2d at 758 (citing Warner Bros. Pictures v. Columbia Broad. Sys., 216 F.2d 945 (9th Cir. 1954)).
[101] "A reader of unillustrated fiction completes the work in his mind; the reader of a comic book or the viewer of a movie is passive." *Gaiman*, 360 F.3d at 661.
[102] *Id.*
[103] *Id.* at 660.
[104] *See id.*
[105] Capcom Co., Ltd. v. MKR Group, Inc., No. C 08-0904 RS, 2008 WL 4661479, at *2 (N.D. Cal. Oct. 20, 2008) (emphasis added).

The *Capcom* court's puzzling treatment of this factor reinforces its limited utility. The court evaluated the focus and message of the works, concluding that Dawn of the Dead sought to comment on consumerism through satire, whereas Dead Rising focused exclusively on "the killing of zombies in the process of attempting to unlock the cause of the zombie infestation."[106] This label of the game's theme only articulates the player's general objective, disregarding any message in the underlying storyline. By this logic, even the most story-driven games reduce to basic themes such as creation, exploration, socializing, and combat.

Even before this analysis, the court framed the issue of theme in a way that renders the factor useless as applied to any video game. It disregarded all congruencies by stating that "any similarity in the theme of the movie and the video game relates to the unprotectable idea of zombies in a mall."[107] Yet the concept of a theme is *inherently* one of idea. When evaluating the works in *Nichols*, Judge Hand identified the theme of religious zealotry and stated that "there is no monopoly in such a background."[108] He then emphasized that the plaintiff's "theme was too generalized an abstraction from what she wrote. It was only a part of her ideas."[109] Earlier in its opinion, the *Capcom* court itself identified theme as falling in the sphere of idea, with plot as the manner of expressing it.[110] If courts follow *Capcom* by discounting any similarities in theme *because* they are idea, this factor will lose any significance.

### *D. Dialogue*

Though dialogue remains a probative factor in the extrinsic analysis, it occurs less frequently and less meaningfully in open-world games than in linear works. In video games that play like scripted films, dialogue may and should be analyzed in the same manner as in any other dramatic work. But most dialogue in nonlinear games arises through interactions with non-player characters or during a cut scene triggered when the player advances a mission. Cut scenes are film-like vignettes frequently used as a storytelling device between periods of in-game activity.[111] As missions become optional and infrequent with open-world and sandbox gameplay, the storytelling devices that house most of its significant dialogue will decrease as well.

### *E. Mood*

A game's creators ultimately dictate its mood. They set the rules of the universe, design the game environment, and arrange the music. To a large extent, the player's actions cannot affect the mood beyond the game's parameters. Despite this factor's apparent consistency within the medium, the *Capcom* court noted the difficulty in comparing the mood of two works across different media.[112]

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[106] *Id.* at *9.
[107] *Id.*
[108] Nichols v. Universal Pictures Corp., 45 F.2d 119, 121-22 (2d Cir. 1930).
[109] *Id.* at 122.
[110] "'Plot' consists of the sequence of events by which the author expresses his *theme or idea* in sufficiently concrete terms to warrant a finding of substantial similarity where it is common in both works." *Capcom*, 2008 WL 4661479, at *7 (emphasis added) (citing Zella v. E.W. Scripps Co., 529 F. Supp. 2d 1124, 1135 (C.D. Cal. 2007)).
[111] Adams, *supra* note 23.
[112] *Capcom*, 2008 WL 4661479, at *9.

More importantly, the court demonstrated this factor's limited utility even where it could make the comparison: "[w]hile it is difficult to analyze two different works contained in different media, it is equally difficult to decide how this difference helps one party over another."[113] The court noted that moods are not mutually exclusive and that devices from one mood may occur within another, ultimately accentuating this factor's low value.[114]

### *F. Setting*

A game's setting is the only factor in the extrinsic analysis that gains relevance and probative value with the transition to open-world gaming. The trend toward this format seeks to allow the player more fully and autonomously to explore and interact with her environment. For this reason, the environment itself must become a more distinct and vibrant aspect of the game. As the setting and environment become more creative and nuanced video game features, they will provide increasingly significant points of comparison.

### *G. Pace*

Another highlight of open-world gaming is the player's ability to control the game's pace. The *Capcom* court commented that Dawn of the Dead progresses long enough for a main character to become visibly pregnant, whereas Dead Rising's storyline takes place over three days.[115] For the third time in the opinion, the court acknowledged the complexities of the game's sandbox format. It observed:

> The pace in Dead Rising is one of constant, fast-paced action depending on the player's preference. *If the player follows the game storyline cues*, a fast pace ensues to facilitate completion of the game with the rescue of all survivors within the three day window. By the same token, *if the player chooses not to follow the storyline cues*, then the pace slackens and the player wanders the mall and confronts zombies.[116]

In addition to providing the player with the option to ignore the story within the game's story mode, Dead Rising also features an unlockable "Infinity Mode" that provides an example of truly open gameplay. In this setting, the player simply roams the game freely, surviving as long as possible.[117] Both sandbox-driven games and true open-world games greatly alter the analysis of pacing and timing between works.

### *H. Total Concept and Feel*

In *Capcom*, the court considered the total concept and feel of the works as a final element in the objective, extrinsic test. The court found no similarity here, identifying the film's total

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[113] *Id.* at *9 n.5.
[114] *Id.* at *9 (citing Olson v. Nat'l Broad. Co., 855 F.2d 1446, 1451 (9th Cir. 1988)).
[115] *Id.* at *9.
[116] *Id.*
[117] Ray Whitney, *Dead Rising, Xbox 360 Review*, GAME DISTRICT, Jan. 27, 2009, http://www.gamedistrict.co.uk/2009/01/27/dead-rising-xbox-360-review/.

concept and feel as that of "a world under siege" and the game's total concept and feel as that of "an environment to be conquered."[118]

Although total concept and feel is an integral question in determining the ultimate issue of infringement, the *Capcom* court incorrectly treated it as an extrinsic factor. Total concept and feel is not an objective criterion; it is a subjective assessment reserved for the fact-finder during the intrinsic analysis.[119] Courts have considered total concept and feel alongside other extrinsic factors listed above, specifically for simpler works such as children's books.[120] They have based the use of this factor on the Ninth Circuit's decision in *Roth Greeting Cards v. United Card Co.*,[121].[122] but even that decision posed the inquiry as a subjective analysis. In *Roth Greeting Cards*, while the court analyzed the total concept and feel of greeting cards, it framed the issue as "whether the work is recognizable by an ordinary observer as having been taken from the copyrighted source."[123]

The *Capcom* court's continued misapplication of this factor is especially notable in light of MKR's anecdotal evidence describing how those in the video game industry perceived the works. The court ignored this as evidence of intrinsic similarity, an inquiry it had foreclosed as a matter of law by declaring that the works lacked extrinsic similarity.[124] But by evaluating the works' total concept and feel under the guise of extrinsic analysis, the court still permitted the inquiry, provided that it came from the bench.

Despite the court's misuse of this factor, total concept and feel requires a necessarily subjective analysis. It is intended for the scrutiny of an ordinary observer, unaided by experts.[125] Additionally, this ordinary observer should be a member of the plaintiff's target audience.[126] This draws from the principle that copyright law provides a financial incentive to create by protecting an author's economic returns from her work.[127] A court should thus consider a work's total concept and feel from the perspective of a particular work's target market.[128] This audience alone can accurately gauge whether the second work appropriated enough of what was "pleasing" about the first to have a financial impact.[129] Thus it becomes especially important when the creator intends the first work for a specialized audience beyond the general public.[130]

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[118] *Capcom*, 2008 WL 4661479, at *10.
[119] Dawson v. Hinshaw Music, Inc., 905 F.2d 731, 733 (4th Cir. 1999); Kouf v. Walt Disney Pictures & Television, 16 F.3d 1042, 1045 (9th Cir. 1994).
[120] *See, e.g.*, Williams v. Crichton, 84 F.3d 581, 588-89 (2d. Cir. 1996) (considering total concept and feel alongside "theme, characters, plot, sequence, pace, and setting").
[121] 429 F.2d 1106 (9th Cir. 1970).
[122] Reyher v. Children's Television Workshop, 533 F.2d 87, 91-92 (2d. Cir. 1976).
[123] *Roth Greeting Cards,* 429 F.2d at 1110.
[124] *Capcom*, 2008 WL 4661479, at *10.
[125] Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp., 562 F.2d 1157, 1164 (9th Cir. 1977) *superseded on other grounds by* 17 U.S.C. § 504(b).
[126] Lyons P'ship, L.P. v. Morris Costumes, Inc., 243 F.3d 789, 801 (4th Cir. 2000).
[127] Dawson v. Hinshaw Music, Inc., 905 F.2d 731, 733 (4th Cir. 1999).
[128] *See id.*
[129] *Sid & Marty Krofft*, 562 F.2d at 1165, (citing *Arnstein*, 154 F.2d at 472-73).
[130] *Lyons*, 243 F.3d at 801-03 ("Even if adults can easily distinguish between Barney [the Dinosaur] and Duffy [the Dragon], a child's belief that they are one and the same could deprive Barney's owners of profits in a manner that the Copyright Act deems impermissible.").

A court may logically withhold a case from the fact-finder based on true extrinsic factors, which depend "not on the responses of the trier of fact, but on specific criteria [that] can be listed and analyzed."[131] By addressing total concept and feel on its own, particularly on a motion to dismiss, the court defeats the purpose of the entire inquiry. If a court addresses this factor at all, it must take care to "inquire into the total concept and feel of the works, but *only* as seen through the eyes of the ordinary observer, [who] is to be a member of the intended audience of the plaintiff's work."[132]

When Capcom first released Dead Rising, ordinary observers in MKR's intended audience perceived significant similarities. In one example, an early game reviewer noted, "I was a bit surprised, then, that Capcom would so obviously lift the setting for their latest zombiefest, called Dead Rising, from George Romero's masterpiece. Didn't they know that fans would cry foul?"[133] Many of the similarities the players observed arose in the sandbox; even MKR did not allege similarities in the plot and progression of the larger storyline.[134] But as the review continued, it provided more insight as to how a player in that audience might view the dual aspects of the game:

> Once the game begins in earnest, you'll be given free reign to explore the mall at your leisure, especially if you consider smashing zombies' faces in with various implements of destruction to be a leisurely way to spend a day. . . . While there are plenty of missions to keep you busy, this game is, at its heart, all about killing zombies in the goriest manner possible.[135]

## VI. Implications and Conclusion

When an author creates a work for a specialized audience, average observers in the general public may not approach the work in the same manner as that audience.[136] The intended audience of even an otherwise story-driven video game with sandbox capabilities may not view that game in its capacity as a scripted dramatic work.[137] Dead Rising's early review exemplified how a growing market of video game players reacted to and approached the game's nonlinear, player-controlled environment:

> We had a blast just running around the mall and killing zombies, but will the story give us a good reason to make our way back to the chopper when it's time to leave? We certainly hope so, but we were also happy to hear that you can unlock

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[131] *See Sid & Marty Krofft*, 562 F.2d at 1165.
[132] *Lyons*, 243 F.3d at 801.
[133] Will Tuttle, *When there's no more room in hell, the dead will walk the earth. Their first stop? The mall, naturally.*, GAMESPY, Jul. 6, 2006, http://xbox360.gamespy.com/xbox-360/dead-rising/716782p1.html.
[134] The MKR Group, Inc.'s Answer and Counterclaims at 13, Capcom Co., Ltd. v. MKR Group, Inc., No. C 08-0904 RS, 2008 WL 4661479 (N.D. Cal. Oct. 20, 2008) (No. 3:08-CV-00904).
[135] Tuttle, *supra* note 133.
[136] *See, e.g.*, *Dawson*, 905 F.2d at 737-38 (intended audience of choral directors might perceive similarities in musical arrangements by reading sheet music, not by listening to the composition).
[137] By monitoring unlocked achievements, one game developer discovered that thirty percent of its players skipped the single-player campaign—the game's storytelling mode—entirely. Irwin, *supra* note 54.

> an 'unlimited time' mode that will allow you to wipe out the zombie horde at your leisure.[138]

When a work's target audience looks at similarity of protected expression between that work and its alleged infringer, this can create an "extremely close issue of fact."[139] But many copyright infringement cases involving open-world and sandbox-style video games will not make it to this point under the extrinsic analysis used in *Capcom v. MKR*. If courts continue to evaluate the increasingly popular, nonlinear game style within the framework designed for literary and dramatic works, they will continue to measure probative similarity with an inaccurate gauge.

[138] Tuttle, *supra* note 133.
[139] *Litchfield*, 736 F.2d at 1355.