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The Game, the Players, and the Board

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The Game, the Players, and the Board

Bruce E. Boyden*

Abstract: Christopher Seaman and Thuan Tran’s fascinating article, Intellectual Property and Tabletop Games, raises important questions about the role of intellectual property (“IP”) in developing and distributing innovative products. The market for tabletop games, Seaman and Tran argue, is able to sustain a high level of creativity at a high up-front cost, all while protected by some but not all of the IP rights that other industries’ outputs receive. Is that evidence of IP’s necessity or its superfluosity? In this Response, I argue that the answer is a little bit of both. Whereas prior scholarship has shown the lack of an active role for IP in developing products, Seaman and Tran’s fascinating case studies suggest that IP plays a critical passive role in providing breathing space for innovations. But the example of tabletop games demonstrates that not every aspect of innovative creations—not even the most important aspects—necessarily require IP protection to be successful.

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INTRODUCTION

Tabletop games are fun, and reading articles about the law of tabletop games is fun too—at least if you’re a gameplaying law professor specializing in intellectual property (“IP”). But there is a deep and serious side to Christopher Seaman’s and Thuan Tran’s fascinating article, *Intellectual*

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Property and Tabletop Games.¹ It suggests that there is a far more complicated relationship between IP rights and the commercial development of creative works than is commonly realized.² As Seaman and Tran tell us, tabletop games have enjoyed enormous financial success, thus providing a financial reward to the creators, publishers, and investors of the most popular games, but they have done it without the full panoply of IP protections accorded other creative endeavors.³ This balance, Seaman and Tran conclude, is close to optimal: “IP law appears to work fairly well at balancing the important interests of incentivizing the creation of tabletop games and preserving the freedom of others to innovate.”⁴

But that presents a bit of a puzzle for two prevailing theories of IP, one focusing on IP’s generative qualities, the other on its constraints. Is the tabletop gaming industry successful *in spite of* the limitations on IP rights for games, or because of them? Seaman and Tran pose this question at an auspicious time. Over the past two decades, legal scholars have turned their attention to exploring just how, or even whether, IP rights spur innovation. The most lucrative nuggets in this vein are part of the so-called “negative space” literature, which has revealed a mother lode of activities in which a high degree of creativity exists despite little or no IP protection.⁵ Although the authors of these studies are typically careful not to extend the argument beyond their particular example,⁶ there is a latent suggestion that perhaps *all* industries could rely, or rely more, on the non-IP and nonlegal tools that negative space participants use to turn a profit.⁷ Other scholars have argued that, outside of a few special cases, exclusive property-like rights are necessary to protect the up-front investments that many works and inventions require.⁸

1. Christopher B. Seaman & Thuan Tran, *Intellectual Property and Tabletop Games*, 107 IOWA L. REV. 1615 (2022).

2. Seaman and Tran are not the only ones to make this observation. *See, e.g.*, Jonathan M. Barnett, *The Illusion of the Commons*, 25 BERKELEY TECH. L.J. 1751, 1754 (2010); Michael J. Burstein, *Exchanging Information Without Intellectual Property*, 91 TEX. L. REV. 227, 234 (2012); BJ Ard, *Creativity Without IP? Vindication and Challenges in the Video Game Industry*, 79 WASH. & LEE L. REV. 1285, 1297 (2022).

3. Seaman & Tran, *supra* note 1, at 1618.

4. *See id.* at 1677.

5. *Id.* at 1621–22, 1621–22 nn. 35–44 (explaining “negative space” and gathering citations).

6. *See, e.g.*, Kal Raustiala & Christopher Sprigman, Response, *The Piracy Paradox Revisited*, 61 STAN. L. REV. 1201, 1224 (2009) (“The larger lessons that can be drawn from fields like fashion and food are not yet clear.”).

7. Indeed, Mark Lemley has argued that it may be irrational *not* to reach this conclusion. *See* Mark A. Lemley, *Faith-Based Intellectual Property*, 62 UCLA L. REV. 1328, 1335 (2015) (“Instead of questioning the theory of IP in light of this evidence, however, a number of people have instead sought ways to ignore the evidence and keep on doing what they have always been doing.”).

8. *See* Barnett, *supra* note 2, at 1753; Rochelle Cooper Dreyfuss, *Does IP Need IP? Accommodating Intellectual Production Outside the Intellectual Property Paradigm*, 31 CARDOZO L. REV. 1437, 1473 (2010). Although it is sometimes claimed that traditional IP industries have been well-studied, that does not appear to actually be the case. Two relatively recent exceptions are based on interviews of industry participants, coming to divergent conclusions about the value of

That argument is consistent with a long-held view that without legal protection for IP, innovators would not be able to generate profits quickly enough from their creations, because releasing them to the market would almost immediately generate undercutting sales by competitors able to cheaply copy the product and free-ride on the development costs.⁹

Seaman and Tran offer up an intermediate case. Somewhat like “negative space” activities, core aspects of tabletop games are unprotected by IP law, at least as a practical matter.¹⁰ But more like traditional IP industries, tabletop games require a large amount of investment in time and money to produce and generate significant amounts of revenue: by any estimate, it is a multi-billion dollar industry.¹¹ There are at least three possible explanations for this: (1) IP rights are irrelevant to current game innovation, but not an insuperable drag on future innovation;¹² (2) closing the gaps in protection for games would yield even more and better games; or (3) the balance between current and future innovation is about where it should be. Seaman and Tran argue the third,¹³ but is that correct?

In this Response, I argue that the answer is a qualified yes, and that this has important, but highly uncertain, ramifications for other industries. As BJ Ard has recently argued, the particular combinations of legal and nonlegal protections that may allow a developer to reap a profit from an innovative creation are highly contingent—they vary across time, between industries, and even *within* industries.¹⁴ This makes general conclusions about the proper

IP in spurring innovation. Compare Adam Mossoff, *How Copyright Drives Innovation*, 2015 MICH. ST. L. REV. 955, 956–57 (arguing that copyright is a strong incentive for both creation and distribution), with JESSICA SILBEY, THE EUREKA MYTH 12 (2015) (concluding that “IP facilitates some development and distribution of creative or innovative work but rarely the initiation of that work”).

9. See William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325, 328 (1989). This is the view that was famously challenged by then-Professor Stephen Breyer in his tenure article at Harvard. See generally Stephen Breyer, *The Uneasy Case for Copyright*, 84 HARV. L. REV. 281, 291–306 (1970).

10. See Seaman & Tran, *supra* note 1, at 1634.

11. See Jaclyn Peiser, *We’re in a Golden Age of Board Games. It Might Be Here to Stay*, WASH. POST (Dec. 24, 2022), <https://www.washingtonpost.com/business/2022/12/24/board-game-popularity> (on file with the *Iowa Law Review*) (noting that global board game revenue is between \$11 and \$13.4 billion). Seaman and Tran cite a projection that the entire tabletop game industry may exceed \$20 billion in revenue in 2025. See Seaman & Tran, *supra* note 1, at 1618.

12. Cf. Joseph P. Fishman, *Creating Around Copyright*, 128 HARV. L. REV. 1333, 1373 (2015) (arguing that, up to a point, constraints on copying can actually improve innovation).

13. Seaman & Tran, *supra* note 1, at 1683 (“[I]t appears that IP law supports—or at least does not significantly hinder—the high level of innovation currently occurring in the tabletop gaming industry. . . . As a result, the tabletop gaming industry serves as an example of a field where IP law generally balances the interests of creators, publishers, and consumers effectively.”). BJ Ard, studying the video game industry, has a more nuanced conclusion. He argues, somewhat counter-intuitively, that thin IP protection should suffice for the *more* capital-intensive games, but that indie game developers could benefit from thicker protection against cloning of game mechanics. See Ard, *supra* note 2, at 1369.

14. Ard, *supra* note 2, at 1368 (intra-industry variation and inter-industry variation), 1372 (variation across time).

balance between IP and non-IP tools difficult. And there are aspects of the tabletop gaming industry that make it, as Seaman and Tran note, “a unique space.”¹⁵ Gameplay is a more individualized experience than is typically the case for other works,¹⁶ and this explains not only the limited IP protection tabletop games have, but also the challenges that both game developers and would-be copyists have in promoting their games. That distinction may limit the lessons that can be drawn from IP protection of games.

But tabletop games also bear a significant resemblance to other innovation industries. They are often created by individuals who then shop their creations around to multiple publishers.¹⁷ Those publishers try to select games to publish that will have some chance of becoming lucrative hits, that will more than make up for the risk of publishing flops.¹⁸ IP rights appear to help in that process by preventing rival publishers from immediately siphoning off the hits at a price that eliminates any retroactive reward. In other words, the tabletop game industry appears to have many of the same dynamics as industries where IP rights are thought to play a critical role, such as the sound recording, music publishing, television, film, theater, and book publishing industries.¹⁹

Evaluating the wider implications of Seaman and Tran’s study of the tabletop game industry requires consideration of three things: (1) the lay of the theoretical landscape—the “rules of the game,” as it were; (2) the particular way in which tabletop game creators, publishers, and users interact—the “players”; and (3) what is and is not unique about the market for tabletop games—the “board.”

I. THE GAME

Under the standard utilitarian account of IP law, IP solves a kind of public goods problem.²⁰ Intellectual creations cost time and money to

15. Seaman & Tran, *supra* note 1, at 1619.

16. See Bruce E. Boyden, *Games and Other Uncopyrightable Systems*, 18 GEO. MASON L. REV. 439, 455 (2011) (“Games are a forum for *players*, rather than authors, to exercise meaningful choice as to how the game will play out.”). Tabletop games offer a system for gameplay, but the actual unfolding of events depends on what the players—who are also typically the target audience—decide to do. See *id.* at 454–55. Musical compositions are sometimes experienced in a similar way, but often the players and audience are distinct. See *id.* And still other works rely on mechanical “players” that render a fixed presentation. See *id.* at 453–54.

17. See Seaman & Tran, *supra* note 1, at 1631.

18. Nick Bentley, *How Can Board Game Publishers Predict Which Games Will Sell?*, <https://www.nickbentley.games/predicting-board-game-sales> [<https://perma.cc/CF5G-38M7>].

19. Ed Klaris, *INSIGHT: Intellectual Property Rights in the Age of the Streaming Wars*, BLOOMBERG L. (Mar. 9, 2020, 3:00 AM), <https://news.bloomberglaw.com/ip-law/insight-intellectual-property-rights-in-the-age-of-the-streaming-wars> (on file with the *Iowa Law Review*).

20. See ROBERT P. MERGES, *JUSTIFYING INTELLECTUAL PROPERTY* 2 (2011). There are, of course, other accounts. See, e.g., *id.* at 31–136; Elizabeth L. Rosenblatt, *Intellectual Property’s Negative Space: Beyond the Utilitarian*, 40 FLA. ST. U. L. REV. 441, 454–59 (2013). The utilitarian account is particularly popular in American legal culture possibly because of a strong aversion to

produce—sometimes enormous amounts of time and money—but once they are released to the world, there is no natural way to charge for continued access. Indeed, if it is trivially easy to copy the work or invention, then the creator will be able to make precisely one sale at a premium before the price is driven down to the marginal cost of producing additional copies. That premium represents the creator’s only chance to try to recapture not only the costs of development, but also any financial incentives necessary to undertake the risk of failure. In theory, the prospect of the exclusive rights supplied by IP law allow creators to rely on obtaining at least some of those incentives *after* the fact, from sales of their works and inventions to the public. In other words, those rights allow individual consumers, rather than the state or private benefactors, to determine which creations to fund with cash, which should in turn drive authors and inventors to try to create things that tap into widespread but unmet demand.

This theory has always been more of a working presumption than some sort of inductive conclusion.²¹ And recently a number of scholars have begun questioning the alleged connection between IP rights and incentives.²² If IP rights are in fact not necessary to increase the number or quality of works or inventions, then their only effect is to act as a drag on downstream reuse of expression and solutions that would have been produced anyway. That is where the “negative space” literature comes in. Are the “negative space” examples consistent or inconsistent with the traditional account? It depends on whether the reason those activities are excluded from IP protection is just arbitrary historical accident, or whether there is some common set of special conditions that can explain vibrant creativity without IP protection.²³

Proponents and critics of the “negative space” examples have identified several such conditions. First, negative space fields have less of a need to recoup large sums from sales of copies to the public, typically because they require less capital and labor to create.²⁴ Second, negative space fields often

openly normative justifications of law. See MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1870–1960: THE CRISIS OF LEGAL ORTHODOXY* 209–12 (1992).

21. Of course, the same might be said of a lot of theories. Few, if any, legal fields have any significant evidentiary support for their current structure. See, e.g., BEN JOHNSON, *DO CRIMINAL LAWS DETER CRIME? DETERRENCE THEORY IN CRIMINAL JUSTICE POLICY: A PRIMER* 5–6, 9–11 (2019), <https://www.house.leg.state.mn.us/hrd/pubs/deterrence.pdf> [<https://perma.cc/GFG5-D7ZB>] (showing sentence lengths and incarceration rate show little deterrent effect).

22. See Diane Leenheer Zimmerman, *Copyrights as Incentives: Did We Just Imagine That?*, 12 *THEORETICAL INQUIRIES L.* 29, 43 (2011).

23. One explanation seems implausible from the get-go: that lobbying power explains which industries have protection and which don’t. Surely the fashion and database industries have far more pull than choreographers, sculptors, and mimes. Sound recordings have yet to achieve a traditional public performance right, despite years of effort by the record labels—but poems do. Public choice does not seem to be a sufficient explanation.

24. See Barnett, *supra* note 2, at 1753; Ard, *supra* note 2, at 1363. There are exceptions. Amy Kapczynski has identified a model that produces enormously expensive and valuable goods without any IP rights: the “open science” model that is responsible, among other things, for identifying and producing vaccines for seasonal and pandemic flu viruses. See Amy Kapczynski, *Order Without Intellectual Property Law: Open Science in Influenza*, 102 *CORNELL L. REV.* 1539, 1549

feature what BJ Ard refers to as “copy resistance”—some social or practical constraint that limits the ability to quickly copy or sell a successful innovation.²⁵ Third, in negative space fields, informal norms against copying often substitute for formal legal protections.²⁶ Finally, in some fields, such as sports and medicine, it is widely recognized that exclusive rights would cause more harm than good.²⁷

Although the presence of one or more of these conditions may allow a field to be highly creative, and even to sell those creations for profit, there are well-known limitations to all of them. For example, consider norms, which have been a sustained focus of much of the negative space literature. Much of that literature approvingly cites Robert Ellickson’s pathbreaking work on norms, *Order Without Law*.²⁸ But Ellickson himself was cautious in extracting wider implications from his work. His research, he emphasized repeatedly, showed that informal social norms could work in *homogenous, close-knit communities*.²⁹ Disputes in less homogenous communities—which Shasta County was in the process of becoming as Ellickson did his field research there³⁰—often produce conflict over what the norms *should be*, with power rather than consensus determining the outcome. Furthermore, Ellickson emphasized that norms work best for “workaday” disputes: “[a]s the stakes increase, the shadow of the law grows darker.”³¹

The same goes for the other suggested negative space conditions. Many works and inventions require significant labor or capital to produce: films,

(2017). As Kapczynski notes, the structure of the “Flu Network” achieves many things that are often thought to benefit from information gleaned from a private market, such as priority-setting or attribution. *See id.* at 1593–95. But one thing the Flu Network does *not* have to do is recoup its costs through sales of information or vaccines, because it is government funded. It thus ultimately fits the first condition.

25. *See* Ard, *supra* note 2, at 1344; Seaman & Tran, *supra* note 1, at 1622–23 (citing “[f]irst-mover advantage and network effects”); Kal Raustiala & Christopher Jon Sprigman, *When Are IP Rights Necessary? Evidence from Innovation in IP’s Negative Space*, in RESEARCH HANDBOOK ON THE ECONOMICS OF INTELLECTUAL PROPERTY LAW 309, 318 (Ben Depoorter & Peter S. Menell eds., 2019) (citing “nonlegal[] barriers to copying”).

26. *See* Seaman & Tran, *supra* note 1, at 1622.

27. *See id.* at 1623; Rosenblatt, *supra* note 20, at 460 (noting that the second, third, and fourth situations described are consistent with “incentive theory”); Gerard N. Magliocca, *Patenting the Curve Ball: Business Methods and Industry Norms*, 2009 BYU L. REV. 875, 877 (2009) (“[T]here is a norm in the sports community that disseminating and using knowledge is more important than creativity. Consequently, patent law is not helpful or necessary for that business.”); 35 U.S.C. § 287(c) (2018) (excluding medical procedures). One additional condition that has been suggested is that creators in the field may create for reasons other than financial reward. *See, e.g.*, Rosenblatt, *supra* note 20, at 460. But as discussed further below, that might well apply to the vast majority of creations in every field, so it would not distinguish negative space fields in any way.

28. *See* Raustiala & Sprigman, *supra* note 25, at 312 (citing ROBERT C. ELLICKSON, *ORDER WITHOUT LAW* (1991)).

29. ELLICKSON, *supra* note 28, at 251, 267, 283. A loose-knit group is likely to need enforcement mechanisms beyond norms. *See* Kapczynski, *supra* note 24, at 1550.

30. *See* ELLICKSON, *supra* note 28, at 34–35 (noting an influx of new ranchette owners that produced a political battle).

31. *Id.* at 98.

pharmaceuticals, software, and the like. Even works that can be produced by a single person can take up an enormous amount of that person's time, such as novels, plays, or operas. Devoting the time or resources necessary to produce at least some of those innovations would likely be impossible without a reliable future revenue stream. Likewise, not every creative field features "copy resistance," meaning that there is something about innovations in that field that prevents competitors from quickly appropriating all of the value from a new creation. Many fields instead offer minimal resistance to verbatim copies, such as any art form distributed on digital media to the public.³²

It thus seems unlikely that *all* fields could adopt a negative space strategy; in other words, not every creative enterprise could forgo IP rights entirely without a corresponding loss in the amount or quality of creations distributed.³³ But given that several of the negative space examples seem to have arisen almost by accident, it also seems unlikely that there aren't more activities out there that could be equally creative without *as many* IP protections. Identifying the inflection point is therefore important. If we're close to it, then it may not be worth the effort to fine-tune IP law at the expense of increased complexity. But if we're quite far from it, then a considerable number of constraints on downstream innovation could be fruitfully removed.

What we need to do, therefore, is identify when IP rights flip from becoming mostly necessary to mostly unnecessary. And that's why the Seaman and Tran article is important. Tabletop games, as Seaman and Tran argue, represent an intermediate case where the games are subject to some IP protection, but that protection is incomplete in a significant way.³⁴ In particular, while all creations are unprotected to some degree,³⁵ for tabletop games that gap widens to include the core innovation in tabletop games—how the game actually plays.³⁶ Copyright law has long excluded the

32. Nonliteral copies are another matter. While in one sense it should be a simple task to make a nonliteral copy of another work, making a nonliteral copy of another work that is equivalent in *quality*, and therefore likely to significantly compete with the original, may in fact be quite difficult. Indeed, nonliteral copies are expressly permitted for sound recordings, see 17 U.S.C. § 114(b), without apparent harmful effects, and also to some extent for games. See Seaman & Tran, *supra* note 1, at 1635–36 (concerning games); Ard, *supra* note 2, at 1292 (noting that video game "clones" are not prohibited). For patents, only the moribund doctrine of equivalents prevents nonliteral copies of an invention.

33. See Barnett, *supra* note 2, at 1753 ("The conditions under which environments bereft of property rights or other exclusionary instruments have supported, are likely to support, and actually do support, capital-intensive forms of innovation appear to be profoundly limited.").

34. See Seaman & Tran, *supra* note 1, at 1619.

35. This is the point of Learned Hand's famous "levels of abstraction" analysis in *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930). Patented inventions are similarly unprotected against noninfringing substitutes.

36. Seaman & Tran, *supra* note 1, at 1619. Although the experience of playing a game might be said to be its "core" element, other aspects of game design surely contribute to its commercial success. The game now known as "Bananagrams" was first released with a less catchy name and design, to a resounding thud. See Nick Bentley, *Why and How to Design Table Games with Branding in Mind* (2 Methods), NICK BENTLEY, <https://www.nickbentley.games/branding-board-game->

rules of games from protection, and the rules of games define how they are played.³⁷ Methods of play can in theory be patented, but Seaman and Tran demonstrate convincingly that patenting of innovative game designs is unlikely.³⁸ Not only is obtaining a patent beyond the means of most game designers, but the field is so crowded that novelty and nonobviousness are likely to be insuperable challenges.³⁹ Even worse, under recent caselaw, gameplay methods are questionable as patentable subject matter.⁴⁰

What this means is that, while the board design, box art, and pieces of a game can be protected by copyright and the name of a game can be protected by trademark, the *game itself* can be freely appropriated by competitors. But that does not appear to put a huge damper on the tabletop game industry; as noted above, it is enormously successful, and even games that have been bestsellers for decades—*Monopoly*, *Risk*, *Sorry*—continue to sell copies with few imitators cutting into their revenue streams.⁴¹ Is this equilibrium due to some special features of the tabletop game industry, and if so, which ones?

To answer that question, Seaman and Tran briefly explored the histories of three modern games, and what they found has tantalizing hints for the role IP plays in developing and publishing a new game. I'll flesh that out in the next section, focusing on the various "players" in the tabletop game industry.

II. THE PLAYERS

Under the standard story that Seaman and Tran are testing, the lure of supra-competitive prices offered by IP rights incentivizes the creation of additional works and inventions.⁴² But the details of how exactly that works are often glossed over. There are at least three possibilities. One, of course, is that it doesn't work at all; on this account IP rights are simply an after-the-fact

design-techniques [<https://perma.cc/5VBL-2QCE>]. Part of the success of the video game *Angry Birds* is almost certainly due to the animations of the birds and the pigs, which has no impact on gameplay. (I thank Masroor Ahmad for this suggestion.).

37. I have argued elsewhere that this rule makes eminent sense as an application of § 102(b)'s exclusion of "systems," see Boyden, *supra* note 16, at 439–42, and far be it from me to question that argument here. But it is worth noting that the exclusion is of ancient vintage and has not received many forceful challenges in the modern era. It is one of many older rules of copyright that are somewhat in tension with the modern practice of extending copyright protection to any creative choice exercised to any degree in any context. See, e.g., *CDN Inc. v. Kapes*, 197 F.3d 1256, 1259 (9th Cir. 1999) (stating the choice of factors made coin prices copyrightable); *Am. Dental Ass'n v. Delta Dental Plans Ass'n*, 126 F.3d 977, 980–81 (7th Cir. 1997) (denying that a system for billing dental procedures is a system). *But see* Pamela Samuelson, *Functional Compilations*, 54 HOUS. L. REV. 321, 358–67 (2016) (arguing that the trend of later cases is the opposite way).

38. See Seaman & Tran, *supra* note 1, at 1641–51.

39. *Id.* at 1645.

40. See *id.* at 1646–47.

41. See *supra* note 11 and accompanying text. This is particularly notable for *Sorry*, which is a version of the ancient game of pachisi. See *Sorry!* (1929), BD. GAME GEEK, <https://boardgamegeek.com/boardgame/2407/sorry> [<https://perma.cc/5FDG-DSQ2>].

42. Seaman & Tran, *supra* note 1, at 1620.

form of rent extracted by successful publishers.⁴³ A second possibility is that the lure of the exclusive rights of IP motivates creators to create.⁴⁴ This is part of the traditional justification for IP described above. A third is that the exclusive rights of IP motivate *publishers* to find creations that might sell, and to develop and distribute them.⁴⁵ In this third version of the IP incentives story, creative impulses and the attraction of IP rights now operate on different people, which certainly makes the incentive story more complex. The second is much more commonly believed, at least among policymakers and judges, but Seaman and Tran provide some evidence for the third.

Let's begin with the second possibility, the theory that IP incentives operate directly on creators themselves, which has a long history behind it.⁴⁶ The idea is that an author or inventor is more likely to create *because* of the prospect of hitting it big with a smash hit. And indeed, some creators probably are directly incentivized in that fashion, as when John Lennon and Paul McCartney said to each other, “[n]ow let’s write a swimming pool.”⁴⁷ But the evidence is pretty clear that very few authors or inventors create *primarily* due to the prospect of a financial reward.⁴⁸ For one thing, most authors and inventors receive no financial reward whatsoever, so it would be highly irrational for them to create with the expectation of receiving one.⁴⁹ But even established authors and inventors typically have other, internal motivations driving them to create.⁵⁰

43. See MICHELE BOLDRIN & DAVID K. LEVINE, AGAINST INTELLECTUAL MONOPOLY 11 (2008); Brian L. Frye, *Literary Landlords in Plaguetime*, 10 N.Y.U. J. INTELL. PROP. & ENT. L. 225, 234 (2021).

44. See Seaman & Tran, *supra* note 1, at 1620.

45. See Julie E. Cohen, *Copyright as Property in the Post-Industrial Economy*, 2011 WIS. L. REV. 141, 143–44.

46. See The Statute of Anne, 1710, 8 Anne, c.19 (Gr. Brit.) https://avalon.law.yale.edu/18th_century/anne_1710.asp [<https://perma.cc/R4CP-BG6J>] (granting exclusive rights to authors to “encourage[] . . . learned men to compose and write useful books”).

47. David Fricke, *Paul McCartney: One for the Road*, ROLLING STONE (Feb. 8, 1990), <https://www.rollingstone.com/music/music-news/paul-mccartney-one-for-the-road-43295> [<https://perma.cc/Z7VG-gF9W>].

48. See SILBEY, *supra* note 8, at 12 (finding that the “persistent effort to achieve innovative or creative breakthroughs[] is almost always intrinsically motivated”); Zimmerman, *supra* note 22, at 43 (citing scholarship indicating “that the expression of human creativity is primarily driven by intrinsic rather than extrinsic factors”); Kapczynski, *supra* note 24, at 1574 (“When asked about why individuals participated in the Network, scientists would refer to credit and self-interest, but also to a sense of community, as well as the importance of values of respect and fairness . . .”); Jiarui Liu, *Copyright for Blockheads: An Empirical Study of Market Incentive and Intrinsic Motivation*, 38 COLUM. J.L. & ARTS 467, 522–23 (2015) (summarizing surveys of Chinese musicians and the emotional benefits they derived from music production).

49. See Zimmerman, *supra* note 22, at 41. Rebecca Tushnet quotes from several authors to illustrate “the nonrationality of creation,” but the nonrationality in question is the choice to create, not the unjustified expectation of a financial benefit. See Rebecca Tushnet, *Economies of Desire: Fair Use and Marketplace Assumptions*, 51 WM. & MARY L. REV. 513, 525–26 (2009).

50. See Tushnet, *supra* note 49, at 522–26 (2009) (collecting statements of well-known authors suggesting internal motivations).

The idea that IP incentives operate directly on creators themselves may have made more sense in the eighteenth and early nineteenth centuries, when most business owners were sole proprietors or partners. That would have included authors and inventors, who were both creators and the managers of their own business affairs, persons such as Samuel Johnson, Jane Austen, Eli Whitney, and Robert Fulton. But one thing the Industrial Revolution produced was increased specialization of tasks within larger and more complex business organizations.⁵¹ It would make sense that, in such a world, the task of creation would become separated from the task of worrying about finances.

That appears to be precisely what has occurred. Jessica Silbey, in her magisterial qualitative study of the effects of IP on creators, *The Eureka Myth*, found that even those individuals whose creations were earning them money were unable to answer basic questions about those arrangements and “paid little to no attention to the financial terms of their contracts that concern IP royalties.”⁵² Rather, they relied on their lawyers or managers to handle those tasks.⁵³ Even business-savvy game designers likewise seek out publishers who have the “lawyers, PR people, and other staff” that can handle “the more tedious aspects of game development.”⁵⁴ Creators create, and someone else handles the business.⁵⁵

The origin stories that Seaman and Tran have uncovered support this narrative. Tabletop games are developed like novels; individual game designers create them on their own, and only relatively late in the process do they shop them around to various publishers.⁵⁶ Unlike films, news media, computer software, or inventions, large business entities do not appear to be very involved in the decision to initially *create* tabletop games. And in at least two of the three case studies Seaman and Tran examine, creating the game in question appears to have been a labor of love. *Dungeons & Dragons* (“*D&D*”) was created over a period of a few years by two Midwestern wargaming enthusiasts with an interest in medieval fantasy combat, Dave Arneson and Gary Gygax.⁵⁷ *D&D* was essentially self-published by Gygax and his friend Don

51. See generally ALFRED D. CHANDLER, JR., *THE VISIBLE HAND: THE MANAGERIAL REVOLUTION IN AMERICAN BUSINESS* (1977) (explaining the growth of powerful national corporations in the United States as due in large part to the rise of middle management).

52. SILBEY, *supra* note 8, at 98.

53. *Id.* at 99.

54. David B. Nieborg, *How to Study Game Publishers: Activision Blizzard’s Corporate History*, in *GAME PRODUCTION STUDIES* 179, 181 (Olli Sotamaa & Jan Švelch eds., 2021) (describing indie video game developer Eric Barone’s decision to join publisher Chucklefish).

55. Of course, this asymmetry of information can lead to a sort of “market for lemons,” only one where the *sellers* rather than the buyers lack information as to the terms of the sale. See George A. Akerlof, *The Market for “Lemons”: Quality Uncertainty and the Market Mechanism*, 84 Q.J. ECON. 488, 488–89 (1970).

56. See Seaman & Tran, *supra* note 1, at 1631.

57. See *id.* at 1662; see also Jon Peterson, *Forty Years of Adventure*, WIZARDS, <https://dnd.wizards.com/dungeons-and-dragons/what-dd/history/history-forty-years->

Kaye, and their company, Tactical Studies Rules (“TSR”), only became a substantial operation after the first few tiny print runs sold out.⁵⁸

Settlers of Catan (“Catan”) even more clearly fits the model of the lone creator shopping a fully conceived game to a publisher.⁵⁹ *Catan* was designed by a dental technician in Germany, Klaus Teuber, who created games in his basement as an escape from the drudgery of his day job.⁶⁰ Before *Catan*, three of Teuber’s games had become hits, winning the prestigious Spiel des Jahres award for the best boardgame released in German-speaking countries.⁶¹ But even modest hits were not enough to allow Teuber to switch careers.⁶² In 1995, Teuber published *Catan* with Franckh-Kosmos Verlags-GmbH & Co. KG (“Kosmos”), a German publisher of reference books, science kits, and board games.⁶³ It was not until a few years after that, when *Catan* became a runaway success, that Teuber was finally able to quit his job as a dental technician.⁶⁴ Although Kosmos continues to sell the game in Germany,⁶⁵ Teuber appears to have retained the international IP rights, because in 2002, Teuber formed Catan GmbH, which licenses the *Catan* game and *Catan*-related spin-offs in various other countries.⁶⁶

Magic: The Gathering (“*Magic*”) is the one possible exception where a publisher solicited a game from a designer rather than vice versa. Even so, it

adventure [https://perma.cc/S46G-XZNH] (providing a timeline for the development of *D&D*).

58. See Peterson, *supra* note 57. Arneson and Gygax attempted to get large game publishers such as Avalon Hill to publish *D&D*, without success.

59. Although it is not one of Seaman and Tran’s case studies, *Monopoly* fits this pattern as well. Charles Darrow originally developed *Monopoly* on his own, adapting it from a 1903 game, *The Landlord’s Game*, designed by Elizabeth Magie. Like Gygax and Arneson, Darrow self-published his game, creating a few hundred copies that he sold at a department store in Philadelphia. Parker Brothers, attempting to capitalize on what it saw as a fad, picked it up at that point, and it sold better than anyone had expected. See Steven Campion, *Lizzie Magie and the History of Monopoly*, BRIT. LIBR. INNOVATION & ENTER. BLOG (Mar. 6, 2023 3:00 PM), https://blogs.bl.uk/business/2023/03/lizzie-magie-and-the-history-of-monopoly-1.html [https://perma.cc/NK84-JCX5]; Bill Kent, *How the Board Game Got Its Spots*, N.Y. TIMES (Apr. 6, 1997), http://www.nytimes.com/1997/04/06/nyregion/how-the-board-game-got-its-spots.html (on file with the *Iowa Law Review*).

60. See Adrienne Raphael, *The Man Who Built Catan*, NEW YORKER (Feb. 12, 2014), https://www.newyorker.com/business/currency/the-man-who-built-catan [https://perma.cc/8Q29-M66U].

61. Games that are also released in other countries can qualify; for example, in 2004, *Ticket to Ride* won the award. Teuber’s three previous winners were *Barbarossa* (1988), *Hoity Toity* (1990), and *Drunter & Drüber* (1991). See CATAN, *Ludography*, https://www.catan.com/explore-catan/ludography/1988-1990 [https://perma.cc/H92J-JBHX].

62. See Raphael, *supra* note 60 (noting that even after his third Spiel des Jahres, “[Teuber] was still working fourteen-hour days in the dental lab”).

63. See *id.*; *About Us*, KOSMOS, https://www.kosmos.de/de/content/Footer/Service/International/About%20us [https://perma.cc/7X97-6A8B].

64. See Raphael, *supra* note 60.

65. *About Us*, *supra* note 63.

66. See Raphael, *supra* note 60.

was more of a suggestion than an offer. Designer Richard Garfield was a grad student at the University of Pennsylvania in the early 1990s.⁶⁷ In his spare time, he had designed a board game, *RoboRally*, and he sought out the CEO of a small game publisher, Wizards of the Coast (“Wizards”), in 1991.⁶⁸ Wizards did not then have the resources to publish a board game, and, the CEO asked Garfield to create something simple and portable.⁶⁹ *Magic* is the game Garfield came back with.⁷⁰ Although it arose out of an interaction between publisher and designer, the initial creation of the game was almost entirely due to Garfield’s unpaid effort.⁷¹ Still, it seems clear that Garfield, in designing *Magic*, was not simply going wherever his muse beckoned. His muse had led him to *Robo Rally*; the desire to sell a game led to *Magic*.⁷²

Even so, none of Seaman and Tran’s case studies show a definitive example of a game designer motivated to create a game because of the long-term flow of income protected by IP rights. *D&D* and *Catan* were both created by individuals who were more engaged in a hobby than a career. Even in the case of *Magic*, it is not clear that Garfield was thinking of ways to generate a protected stream of income when he designed his card game. Like Teuber, he appears to simply love creating games,⁷³ and may have only been trying to find a way to get a game that he designed into the hands of actual players.

But that hardly ends the search for IP motivations, because in addition to creators, there are also publishers and firms. Unfortunately, there is considerably less evidence shedding light on the motivations and beliefs of executives in the publishing and innovation industries. Some individuals are quoted in Silbey’s qualitative account, expressing frustration with the scientists and artists who appear to believe that their “paycheck comes magically from the checkbook in the sky” and who never have to think about the “pharmaco-economics.”⁷⁴ By contrast, industry lawyers and executives think about revenue streams constantly.⁷⁵ But even they tend to view IP rights

67. See Seaman & Tran, *supra* note 1, at 1668.

68. See *id.*

69. See *id.*

70. See *id.*

71. *The History of Magic*, MAGIC: THE GATHERING, <https://magic.wizards.com/en/content/history> [<https://perma.cc/VK9W-P5J6>] (noting that Garfield “used his free time and a cadre of volunteer playtesters to develop the game”).

72. *Robo Rally* was published by Wizards a year after *Magic*; the profits from *Magic* gave the small company the resources it had lacked previously. See *RoboRally* (1994), BD. GAME GEEK, <https://boardgamegeek.com/boardgame/18/roborally> [<https://perma.cc/2SF9-7K3H>].

73. See Zimmerman, *supra* note 22, at 36 (citing economist Everett Hagen’s conclusion that “innovators are often moved by a sense of duty to create that he considers a form of religious expression”).

74. SILBEY, *supra* note 8, at 97 (quoting an investor and former software engineer who was interviewed for the book).

75. See *id.*

as serving a passive or defensive role, not generating revenue.⁷⁶ It is not immediately clear from such accounts how IP might motivate investment or distribution decisions.

The role of IP in incentivizing the publication of the three games Seaman and Tran discuss is similarly murky. By and large we don't have much of a window into what the principals of TSR, Wizards, and Franckh-Kosmos were thinking. We do know that Wizards thought so much of the value of Garfield's "tapping" mechanic for *Magic* that they applied for a patent on it.⁷⁷ This was hardly common behavior for the small publisher; it had never sought a patent before, and has obtained only two more to the present day.⁷⁸ Other than Wizards' patent, the most visible evidence of the value of IP to the game publishers was their lawsuits and threatened lawsuits.

But those lawsuits, which are thoroughly canvassed by Seaman and Tran, make a weak case for the importance of IP; they range from the inconsequential to the quixotic.⁷⁹ *Magic's* publisher, Wizards, once sued a competitor for launching an online trading card game that duplicated game mechanics but not any of the artwork from the *Magic* deck.⁸⁰ That case settled with the competitor remaining in business.⁸¹ Catan GmbH sent a cease and desist letter to shut down a similar online game, with a questionable legal basis.⁸² And TSR, the publisher of *D&D*, struggled against financial turmoil by pursuing dubious lawsuits against the publishers of adventure modules—whose supplements likely enhanced the popularity of *D&D*—as well as internecine battles between the founders, both of which contributed to TSR's eventual fire-sale to Wizards in 1997.⁸³

76. See *id.* at 109, 111 (explaining that interviewees described IP rights as a "foundation" for financing or a "chit to trade").

77. See Trading Card Game Method of Play, U.S. Patent No. 5,662,332 (filed June 22, 1994). Wizards first applied for its patent eleven months after *Magic* debuted at the Origins Game Fair in July 1993, which indicates that someone had advised them about the statutory bar in (then) 35 U.S.C. § 102(b). See Rich Stein, *25 Years Later—The World of MTG in 1993*, HIPSTERS OF THE COAST (July 9, 2018), <https://www.hipstersofthecoast.com/2018/07/25-years-later-five-fun-facts-about-the-world-in-1993> [https://perma.cc/3XL3-VQBB] (noting that the 1993 fair started on July 13); MPEP § 2133 (9th ed. Rev. 7, Feb. 2023).

78. A search on Google Patents reveals that Wizards' only other patents were U.S. Patent Nos. 9,616,323, and 9,959,397, and one published application, US20070176363A1.

79. See Seaman & Tran, *supra* note 1, at 1662–76.

80. See *id.* at 1671–72.

81. See *id.* (discussing Wizards of the Coast LLC v. Cryptozoic Ent., LLC, 309 F.R.D. 645 (W.D. Wash. 2015)).

82. See Seaman & Tran, *supra* note 1, at 1674–75.

83. See *id.* at 1663–65. Entire books have been written on the rise and fall of TSR. See generally BEN RIGGS, *SLAYING THE DRAGON* (2022); JON PETERSON, *GAME WIZARDS* (2021); DAVID M. EWALT, *OF DICE AND MEN* (2013); SHANNON APPELCLINE, *DESIGNERS & DRAGONS: THE '70S* (John Adamus ed., 2014). The major problem for the company appears to have been that, after saturating the market with copies of the *D&D* rulebooks, TSR lacked a coherent strategy for profiting from supplemental materials or third-party licenses. See APPELCLINE, *supra*, at 106–07; EWALT, *supra*, at 173–74.

The truth is that, as TSR eventually learned, lawsuits don't make money, they *cost* money. Despite Sid Sheinberg's brazen claim forty years ago, no rational person views IP litigation as a "profit center."⁸⁴ IP litigation is therefore a sign of a process that has failed, not one that is succeeding, which is why the executives Silbey interviewed wanted to avoid it if possible.⁸⁵ So if the value of intellectual property is that it supports litigation, Seaman and Tran's accounts show very meager results for IP indeed. Nevertheless, there are tantalizing clues that IP may motivate more than the occasional lawsuit.

IP rights don't fundamentally generate revenue themselves. They can be sold, as when TSR licensed a *D&D* animated series or Wizards licensed a series of *Magic* novels.⁸⁶ But at some point, to break even, either the rightsholder or a licensee is going to have to convert those rights to cash by selling a product or service incorporating the work or invention. And IP's role in *that* process is purely passive. The exclusive rights provided by IP law prevent others from capitalizing on the expression or solution contained in the work or invention. IP provides some breathing room for publishers and innovation firms by warding off competition, but it doesn't otherwise directly govern the exchange between customers and sellers. If creation in the absence of IP rights is IP's "negative space," then perhaps the way in which IP rights attract revenue without any actual enforcement is a kind of "negative energy."

Seaman and Tran's case studies demonstrate this "negative energy" in operation. Take *D&D*, for example. Gygax and Kaye formed their own company, TSR, to publish *D&D* after failing to attract any interest from major publishers such as Avalon Hill.⁸⁷ In 1974 they printed one thousand copies of the game, assembled by hand.⁸⁸ Once that sold out, they printed another one thousand copies, then two thousand more, then five thousand more.⁸⁹ By the fourth printing, TSR was releasing campaign supplements and adventure modules, sponsoring conventions, and publishing a magazine.⁹⁰ A year later, TSR began publishing an expanded version of the game, *Advanced Dungeons & Dragons*, which is the version that is most famous today.⁹¹

84. Universal City Studios, Inc. v. Nintendo Co., 615 F. Supp. 838, 841, 862 (S.D.N.Y. 1985), *aff'd*, 797 F.2d 70 (2d Cir. 1986).

85. See SILBEY, *supra* note 8, at 112 (quoting industry executive calling IP litigation "reprehensible," but noting that "to build a company, sometimes you have to be willing to do that").

86. See *Dungeons & Dragons*, IMDB, <https://www.imdb.com/title/tt0085011> [<https://perma.cc/3HWP-XLXV>] (produced by Marvel Productions); *Magic: The Gathering*, THRIFTBOOKS, <https://www.thriftbooks.com/series/magic-the-gathering/38002> [<https://perma.cc/965V-54CL>].

87. See Peterson, *supra* note 57; PETERSON, *supra* note 83, at 33, 44 (discussing difficulties of working with small publishers and Avalon Hill's lack of interest). Although a co-creator of the game, Arneson had limited involvement in TSR, a fact that later became one source of the bitter acrimony between the founders.

88. See Peterson, *supra* note 57.

89. *Id.*

90. *Id.*

91. See *id.* *Advanced D&D* is now in its fifth edition. *Id.*

None of that would have likely happened if, during the eleven months it took for the first print run to sell out, Avalon Hill had simply swooped in and begun selling its own copies. Indeed, if that had been a likely outcome, the first thousand copies might not have been printed at all, since such copycat sales would have left TSR's retail partners holding the bag with unsold inventory. It's likely that in such a world either those retail stores would not have taken the risk of buying the game in the first place, or TSR would not have taken the risk of printing it.

In other words, whether the game designers or their publishers realized it or not, the stream of money their games received was *in fact* protected in part by intellectual property rights—although which rights, exactly, were driving their success is an interesting question I will return to in Part III. And even if Gygax, Arneson, Teuber, and Garfield created their games with no thoughts about profit, once publishers started to get involved, it is likely that there was *someone* who was thinking seriously about long-term revenue generation. It is the publishers that pull money into the system. How much those publishers could afford to pay designers for their games in turn depended on how long and how large the revenue stream from consumers was likely to be. And that in turn depended on the protection provided by the “negative energy” of IP rights, dispelling direct competition for a game and its related media.⁹²

Although this clarifies the incentive role of IP for tabletop games, it still does not explain how tabletop games can thrive despite less-than-complete IP protection, nor how that compares to both full IP fields and negative-space endeavors. The answers to these questions depend on the competitive landscape that sales occur in, or metaphorically speaking, the “board” on which the game is played.

III. THE BOARD

Works or inventions make money for their owners or licensors when products or services embodying them are sold to consumers. It's often thought, particularly by lawyers and legislators, that these sales are driven entirely by the artificial scarcity provided by IP law, but that is far from correct. In order for products and services to sell, there has to be consumer demand; trademark law can have a role in properly directing that demand, but obviously doesn't create it in the first place. And on the supply side—meaning access to the work or invention—there are typically many limits that go well beyond legal constraints. It is those *nonlegal* boundaries on the ability to access intellectual property that provide the most natural opportunities at which to conduct a sale.

92. Incentivizing dissemination of knowledge, and not just its creation, is a core function of IP law. See Mossoff, *supra* note 8, at 957; SILBEY, *supra* note 8, at 221.

Consider the pre-Internet world. IP rights in, say, a novel prevented a rival publisher from printing its own copies of the novel and selling them.⁹³ But for most consumers, the point of accessing a book was not to duplicate it but to read it. And that required the consumer to obtain a physical copy of the book somewhere. Well-made physical copies were something only publishers had the resources to produce, and if other publishers were dissuaded from offering their own versions, that left a relatively few chokepoints, or “gates,” at which the publisher could charge someone for access to the work—bookstores, mail orders, libraries, etc. The Internet has changed this story somewhat, in that it is far easier to distribute verbatim copies of works, but it turns out that providing access to works in a way that is convenient for the user—e.g., streaming services that run with a minimal amount of preparatory work—still requires resources that only a few entities can provide. Those few provide the natural gates at which to charge users for access, and IP law prevents rival services from making an end-run without paying into the system.

In other words, although the utilitarian theory of IP is that it is a necessary legal construct that counteracts the inherently unregulable flow of ideas, in fact, idea transmission has plenty of *natural* barriers, even in the modern age. IP law thus *supplements* the natural difficulties of accessing an intellectual creation, to reduce competition for that creation and provide a foreseeable expectation of exclusive sales. It’s a bit like wooden fences on a landscape. A wooden fence can help protect a small area on a plain at a reasonable cost, or it can protect a larger area by filling in the gaps between natural borders such as rivers, dense woods, mountains, and the like. But a wooden fence is impractical to protect a large area on a plain; the cost of building and maintaining it—of enforcing its boundaries—is simply too high.⁹⁴

IP rights work similarly; they operate in tandem with other strategies for generating revenue.⁹⁵ It is this feature of IP rights that explains negative spaces, gray spaces, and the surprising lack of concern for formal rights even in full-IP industries. Whatever product embodies the work or invention has to be sold to consumers at a particular set of online or offline locations. And consumers have to be enticed to that location without giving them the entire creation permanently for free; they have to be informed enough of its

93. Copyrights have for over two centuries extended beyond verbatim reproduction of a work, which has caused all sorts of trouble in attempting to delineate between infringement and inspiration. But the theory, at least, is that to some extent even nonliteral reproduction of a work duplicates its protected elements in a way that reduces the revenue that properly belongs to the copyright owner—whatever “properly” might mean. See *Arnstein v. Porter*, 154 F.2d 464, 469 (2d Cir. 1946) (consigning the question of what constitutes “improper appropriation” to the jury).

94. Land on the Great Plains could not feasibly be fenced in until the invention of barbed wire. See Richard Hornbeck, *Barbed Wire: Property Rights and Agricultural Development*, 125 Q.J. ECON. 767, 767–69 (2010).

95. See Ard, *supra* note 2, at 1365 (“[A]ll creative industries feature a combination of elements protected by IP, elements subject to de facto protection, and elements that are freely appropriable.”); Burstein, *supra* note 2, at 234 (“[I]ntellectual property may be one of several mechanisms that overlap and interact in complex ways.”).

contents to be interested in buying it, but not so informed that they don't need the contents anymore. This is easier to accomplish for some sorts of creations than others. And once those consumers are drawn, the ease with which access to the creation can be traded for cash depends on the nature of those locations and the state of technology.

Negative space industries are ones in which there is less need to extract payments for access, and nonlegal constraints on access or dissemination are sufficiently strong to keep enough revenue in the system to make it profitable. Most negative space fields involve creations that require comparatively little resources or labor, meaning that nonlegal barriers have less work they need to do.⁹⁶ But even that is not enough if the creation in question is easily redistributable. What makes for a successful negative space field is the presence of one of the other limiting conditions; there is either some aspect of the creation that is not trivially easy to copy, or there is a group with some sort of power over creation or distribution that can enforce anti-copying norms, or both.

Consider some typical examples of negative space fields: stand-up comedy, fashion, cuisine, tattoos, stage magic, and fan fiction.⁹⁷ In all of these fields, individual creations—jokes, garments, dishes, tattoos, tricks, or stories—tend to require comparatively few resources to produce.⁹⁸ Stand-up, fashion, cuisine, tattoos, and magic all involve an element of performance or skill that may make it difficult for others to duplicate a successful creation.⁹⁹ Finally, in several of these fields there are communities of producers, consumers, or reviewers that can enforce norms against unattributed re-use of others' creations.¹⁰⁰ That norm enforcement may be more or less

96. See Barnett, *supra* note 2, at 1802.

97. See, for example, the studies cited in Christopher Jon Sprigman, *Some Positive Thoughts About IP's Negative Space*, in CREATIVITY WITHOUT LAW 249, 252 & nn.10–22 (Kate Darling & Aaron Perzanowski eds., 2017).

98. There are always exceptions, particularly for fan fiction; fans can, and some have, written entire novels. See Anna Menta, *'Fifty Shades' E.L. James Still Profiting from 'Twilight' Fan Fiction with Christian Grey Book*, NEWSWEEK (Oct. 10, 2017, 5:22 PM), <https://www.newsweek.com/el-james-fifty-shades-twilight-fanfiction-681855> [<https://perma.cc/P4FR-F4RU>].

99. See, e.g., Raustiala & Sprigman, *supra* note 25, at 318 (citing difficulty of executing copied plays in American football).

100. See, e.g., Emmanuelle Fauchart & Eric von Hippel, *Norms-Based Intellectual Property Systems*, in CREATIVITY WITHOUT LAW 17, 27–30 (Kate Darling & Aaron Perzanowski eds., 2017) (discussing norms among French chefs); Aaron Perzanowski, *Tattoos & IP Norms*, 98 MINN. L. REV. 511 (2013) (discussing norms surrounding the copying and reuse of tattoo designs); Jacob Loshin, *Secrets Revealed*, in LAW AND MAGIC 123, 123–30 (Christine A. Corcos ed., 2010) (discussing norms among magicians); Casey Fiesler & Amy S. Bruckman, *Creativity, Copyright, and Close-Knit Communities*, in PROC. ACM ON HUM.-COMPUT. INTERACTION 1, 15–18 (2019) (discussing norm enforcement in online communities); Dotan Oliar & Christopher Sprigman, *There's No Free Laugh (Anymore)*, 94 VA. L. REV. 1787, 1809–31 (2008) (discussing norms among comedians).

powerful,¹⁰¹ and may be inequitable,¹⁰² but even a small amount of deterrence may be enough when the stakes are low and the difficulty of duplicating is high.¹⁰³

Now let's return to the puzzle of tabletop games, which, unlike many of the negative space fields, *do* take substantial resources to produce,¹⁰⁴ but receive less than full IP protection for their creative elements. The very thing that makes games fun to play—their game mechanics and rules—are typically unprotected, which means that they can be freely copied by others. And yet not only is tabletop game publishing profitable, but some games are both *extremely* successful and face no close imitators. How does that happen?

As with negative space fields, the answer has to do with the number of “natural barriers” in the landscape in which tabletop games are accessed.¹⁰⁵ First, there are features that make tabletop games copy-resistant.¹⁰⁶ Tabletop games are expensive to produce, which limits the number of professional competitors for a given game, but they also can't be easily redistributed by consumers, which distinguishes them from some other media such as music or films.¹⁰⁷ But tabletop games have a second distinguishing feature that most other media lack, one that makes it a challenge to attract consumers in the first place. It is difficult for potential players to understand how fun a game is without directly engaging with a physical copy of the game for an extended period of time. This forms a barrier to gaining information about a game that most other creations don't have, and it's one that results from the very thing that makes games non-copyrightable in the first place, namely that games are systems for play, not works in themselves.¹⁰⁸

101. See Henry E. Smith, *Does Equity Pass the Laugh Test?: A Response to Oliar and Sprigman*, 95 VA. L. REV. IN BRIEF 9, 10 (2009) (agreeing with Oliar & Sprigman that decentralized enforcement likely requires simpler norms).

102. See Dreyfuss, *supra* note 8, at 1463–65 (noting inequities in norm enforcement); Patrick Reilly, *No Laughter Among Thieves: Authenticity and the Enforcement of Community Norms in Stand-Up Comedy*, 83 AM. SOCIO. REV. 933, 933 (2018) (noting the same with respect to stand-up).

103. Raustiala & Sprigman, *supra* note 25, at 317 (“[S]ocial norms are more robust and meaningful in creative fields where the field is small and ideally tight-knit and investment in creation is relatively low.”).

104. This difference is not as stark as it appears, however; an increasing number of tabletop games and indie video games now rely on crowdfunding to help offset development costs, which reduces the need to recoup those costs from sales. See Seaman & Tran, *supra* note 1, at 1630; Ard, *supra* note 2, at 1361.

105. Again, this is a metaphor. “Natural barriers” are nonlegal constraints, but they can include things like social norms or consumer demand.

106. The term is BJ Ard's. See Ard, *supra* note 2, at 1344.

107. For much the same reason, BJ Ard observes that so-called AAA video games are “copy resistant.” See *id.* at 1349. While bit-for-bit copies of a game program are trivially easy to make, a nonliteral reproduction of a game such as *Overwatch* or *Elden Ring*, that copied its gameplay but not any of its audiovisual elements, would be incredibly expensive. See *id.* at 1349–50.

108. As I explained in prior work, I am drawing a distinction here between the “game in play” and the “game-in-the-box.” Boyden, *supra* note 16, at 453–54. The materials used to play a game are each individually subject to copyright protection. However, the game as whole, defined as the conditions and constraints on player actions, is not. See *id.* at 457–58.

Other creators have various tools to inform potential consumers about the content of their creations without providing permanent access. Inventions can often be explained or demonstrated. Works that are typically consumed repeatedly, such as musical works, can be broadcast a limited number of times to generate interest. Works that are typically consumed once can either be excerpted or set in a pre-existing franchise that advertises what sort of story it is.¹⁰⁹ But it is hard to convey to potential purchasers how a game plays without actually playing it.¹¹⁰ Tabletop game publishers therefore depend heavily on two methods of distributing information about their games: word of mouth, and industry awards.¹¹¹

Both of those methods offer a foothold for the growth and enforcement of copying norms. Tabletop games by their nature require groups of players, and often those groups form a dispersed community of persons interested in, and even creating their own content for, particular games. *D&D* is the most obvious example of this phenomenon. As Seaman and Tran note, “there is a vibrant community of fans who ‘homebrew’ their own *D&D*-based content.”¹¹² Players have long created their own characters, creatures, settings, modules, or even entire campaigns, at first with the tacit approval of *D&D*’s publisher, but more recently with express encouragement. In 2000, Wizards issued the Open Gaming License (“OGL”) for *D&D* that allowed even the sale of commercial supplements based on the *D&D* materials.¹¹³ The publishers of *Magic* and *Catan* have similarly licensed noncommercial fan creations.¹¹⁴

A vibrant and cohesive fan community will tend to develop norms about permissible and impermissible copying.¹¹⁵ As Wizards recently discovered, those norms can take on a life of their own, separate from whatever the publisher might want for their game. In late 2022, Wizards began working on an update to the OGL, version 1.1.¹¹⁶ OGL version 1.1 would have continued to bless noncommercial player creations, but reversed course on allowing

109. The use of sequels and spin-offs is a strategy used in the video game industry as well, which shares some of the same difficulties in advertising gameplay that tabletop games have. See Ard, *supra* note 2, at 1351.

110. See *The Perfect Box Back*, BD. GAME BUS. PODCAST (Jan. 29, 2016), <https://boardgame.business/2016/01/29/the-perfect-box-back> [<https://perma.cc/3MVJ-8BDH>] (discussing the importance of the back of a game box when selling games).

111. See Seaman & Tran, *supra* note 1, at 1679 (discussing the importance of awards); *Board Game Industry Statistics*, PRINTNINJA, <https://printninja.com/board-game-industry-statistics> [<https://perma.cc/HVX4-7VV8>] (noting that seventy-one percent of consumers surveyed find out “about new games through word-of-mouth”).

112. See Seaman & Tran, *supra* note 1, at 1667.

113. *Id.* at 1665–66.

114. See *id.* at 1672–73, 1676.

115. See Fiesler & Bruckman, *supra* note 100, at 19.

116. See Linda Codega, *Dungeons & Dragons’ New License Tightens Its Grip on Competition*, GIZMODO (Jan. 5, 2023), <https://gizmodo.com/dnd-wizards-of-the-coast-ogl-1-1-open-gaming-license-1849950634> [<https://perma.cc/KM7R-8L2Y>].

royalty-free commercial supplements.¹¹⁷ Fan blowback was harsh, and Wizards had to reconsider.¹¹⁸ While the OGL version 1.1 controversy illustrates a publisher bound by community norms, those norms can work to its advantage as well. A community of players invested in a particular game is unlikely to accept or promote a close copy, which could impede word-of-mouth among the target demographic.¹¹⁹

An even greater issue for would-be knock-off publishers is the importance of tabletop game awards. Awards such as the Spiel des Jahres and the Golden Geek Awards can lead to an enormous boost in sales for a game, but only to games that the award juries deem worthy, such as games that “have a completely new concept” or “bring existing elements together to create a new experience.”¹²⁰ BJ Ard has found a similar policing effect among the “cultural institutions within the indie [video games] sector” that control access to “invitations to expos, nominations for awards, and connections to potential investors for future projects.”¹²¹ The community of game critics for both tabletop games and video games act as gatekeepers for positive information about new releases.

That sort of information is critical for tabletop games because of the difficulty consumers have in understanding the gameplay experience prior to purchase.¹²² Simply describing a game or its rules would be insufficient, as would describing a piece of music, and therefore prospective purchasers are reliant on the attestations of others. But it is worth noting that this information flow problem extends in both temporal directions, both before and after gameplay. *After* having played a game, it is difficult to extrapolate from that experience to determine what *other* games might be similarly fun to play in the future. Even a slight change to the rules can drastically change the game experience.¹²³

117. See *id.*

118. See Linda Codega, *Cancelled D&D Beyond Subscriptions Forced Hasbro's Hand*, GIZMODO (Jan. 14, 2023), <https://gizmodo.com/dungeons-dragons-wizards-hasbro-ogl-open-game-license-1849981136> [<https://perma.cc/DP2A-EZKV>]; Kyle Orland, *D&D Maker Promises to Get Player Feedback for Coming "Open" License Update*, ARS TECHNICA (Jan. 18, 2023), <https://arstechnica.com/gaming/2023/01/dd-maker-promises-to-get-player-feedback-for-coming-open-license-update> [<https://perma.cc/5LUZ-J6XA>].

119. See Ard, *supra* note 2, at 1357–58 (discussing how players of indie video games enforce community norms against copying).

120. *FAQ: Frequently Asked Questions*, SPIEL DES JAHRES, <https://www.spiel-des-jahres.de/en/faq> [<https://perma.cc/9TWH-SWKG>].

121. Ard, *supra* note 2, at 1357.

122. Katherine J. Strandburg, *Who's In the Club?: A Response to Olliar and Sprigman*, 95 VA. L. REV. IN BRIEF 1, 5 (2009) (“Consumers do not purchase individual jokes after examining their quality. Instead, audiences make their entertainment choices ‘sight unseen’ based on the reputations of particular comedians and comedy venues.”).

123. *Monopoly* games have a reputation for going on far too long. In part this is because most players have unknowingly adopted house rules such as putting money on “Free Parking” and eliminating auctions for unpurchased properties, both of which prolong the game. See Connor

This fact about games increases the hold that they have on players who have enjoyed playing them. *Monopoly*, *Risk*, *Stratego*, and *Scrabble* have been popular games for decades not because it would so difficult to create a similar competitor, but at least in part because it is only possible to refer to a widely understood play experience by referring to those games.¹²⁴ Once someone has played the game, the word “Monopoly” invokes that experience, whereas even a detailed description of *Fortuna* (a *Monopoly*-like game) does not.¹²⁵ This gives existing games that have established a reputation among players significant “copy resistance,” but only so long as literal duplication of the most salient elements of the game is not possible: the box art, board, pieces, cards, and most importantly, the name of the game.¹²⁶

In sum, although tabletop games benefit from some of the same “natural barriers” that negative space fields do, game publishers still need to get cash for copies.¹²⁷ And that in turn requires two critical IP protections for tabletop games: a prohibition on literal duplication of game design elements such as box art, boards, and pieces; and trademark protection for the trade dress and name of the game.¹²⁸ But as Seaman and Tran demonstrate, once those protections are in place, tabletop game publishers can still make a profit even though, for most games, the core innovations that make the game fun to play are actually unprotected.

That surprising result leads to a critical next question: what other industries might feature the same dynamics? Video games, for example, also thrive without protection for gameplay mechanics, despite even higher development costs.¹²⁹ If other creations are similarly able to succeed without thick protection against equivalents, then IP law could in those cases sensibly avoid what one judge famously called “the most troublesome [issue] in the

Kockler, *Following ‘House Rules’ Can Needlessly Prolong Family Monopoly Games*, NEWSLEADERS (Jan. 11, 2019), <https://thenewsleaders.com/following-house-rules-can-needlessly-prolong-family-monopoly-games> [<https://perma.cc/KKC7-BLUS>].

124. This fact about games may have been what led the Ninth Circuit, in its infamous decision in *Anti-Monopoly, Inc. v. General Mills Fun Group, Inc.*, 684 F.2d 1316, 1326 (9th Cir. 1982), to conclude that “Monopoly” was generic because it referred to games of *Monopoly*.

125. See *Fortuna* (1984), BD. GAME GEEK, <https://boardgamegeek.com/boardgame/32245/fortuna> [<https://perma.cc/3KVD-Y653>].

126. See Seaman & Tran, *supra* note 1, at 1680 (explaining importance of protection “against slavish copying and unauthorized reproductions”).

127. Several of the negative space fields are performance arts, which have a *literal* physical barrier at the door to the venue.

128. See Ard, *supra* note 2, at 1352 (“Trademarks are important in markets where it would be difficult to evaluate quality before purchasing a good.”). As Ard notes, the same thing applies to the video game industry: “Players cannot inspect game quality firsthand prior to purchase and hundreds of new titles are released for Nintendo, PlayStation, and Xbox home consoles each year; the number is an order of magnitude greater for PC games and greater still for mobile games.” *Id.*

129. See *id.* at 1291–92.

whole law of copyright”¹³⁰—the question of when close but not exact copies are infringing.¹³¹ Tabletop games are “copy resistant” in part because of the strong connection many have between their salient identifiers and the game experience, one that makes it difficult for close copies to compete without duplicating those elements. But other works might have a similarly close connection between their visible elements and their source that makes them resistant to nonliteral copying. Media consumers that have been entertained by one work might be locked in to other stories by the same author set in the same fictional universe, or other recordings of the same song from the same performer, or to physical artwork by the original artist.¹³² If canon, or authenticity, is an important part of the market, then similar versions will not be able to displace the creators’ works without engaging in either verbatim reproduction or misdescription of the source, or both. In such circumstances, as with tabletop games, the need for a thick protection against similar experiences will be reduced.

Some care needs to be taken, however, in drawing lessons from case studies about the balance of incentives protected by IP and nonlegal barriers. The relationship between legal and nonlegal mechanisms is likely to be not only complex, but also to vary within industries and over time.¹³³ As a result, generalizations about incentives will never be completely accurate. But then neither are conclusions about similarity; and given the complexity and unpredictability of similarity decisions,¹³⁴ where they can be profitably avoided in the majority of cases, they should be.¹³⁵ The experience of tabletop game publishers suggest that much of the current drama around similar experiences may not be necessary.¹³⁶

130. *Dellar v. Samuel Goldwyn, Inc.*, 104 F.2d 661, 662 (2d Cir. 1939). Although the *Dellar* court referred to “fair use” as the issue in question, the opinion makes clear that the court meant by that term what we now call “substantial similarity.”

131. A similar move away from discretionary close calls may have occurred in patent law, with the declining importance of the doctrine of equivalents. See David L. Schwartz, *Explaining the Demise of the Doctrine of Equivalents*, 26 BERKELEY TECH. L.J. 1157, 1158–59 (2011). But see Daryl Lim, *The (Unnoticed) Revitalization of the Doctrine of Equivalents*, 95 ST. JOHN’S L. REV. 65, 68 (2021) (arguing that patentees are still able to win doctrine of equivalents claims).

132. See, e.g., Amy Adler, *Why Art Does Not Need Copyright*, 86 GEO. WASH. L. REV. 313, 319–21 (2018) (arguing that copyright is irrelevant to the physical art market).

133. See Ard, *supra* note 2, at 1364 (“[T]o truly evaluate creative production without IP requires more robust definitions of success, more attention to the diversity of strategies throughout each industry, and more recognition that the stability of any IP or non-IP regime is contingent.”); Burstein, *supra* note 2, at 234 (“[I]ntellectual property may be one of several mechanisms that overlap and interact in complex ways.”); Barnett, *supra* note 2, at 1754 (“Analytical rigor demands an intermediate approach that can account for the complexity and diversity of funding and appropriation models across the rich variety of historical and contemporary innovation settings.”).

134. See, e.g., Zahr K. Said, *Jury-Related Errors in Copyright*, 98 IND. L.J. 749, 790–99 (2023).

135. Cf. *Dellar*, 104 F.2d at 662 (“troublesome” issue of substantial similarity “ought not to be resolved in cases where it may turn out to be moot, unless the advantage is very plain”).

136. See, e.g., Isaiah Poritz, *Ed Sheeran’s ‘Thinking Out Loud’ Asks Jury to Mull Music Theory*, BLOOMBERG L. (Apr. 21, 2023, 4:05 AM), <https://www.bloomberglaw.com/product/ip/bloom>

CONCLUSION

Seaman and Tran’s study of IP’s role in the tabletop game industry is not only fascinating on its own merits, but by closely examining an intermediate case of IP protection, it has broken important new ground for studies of incentives and IP. The question now has been squarely presented whether works outside the negative space fields require the full set of IP protections they currently enjoy. Tabletop games lack that full set of protections, and yet they thrive. While games are unique in some respects, there may be similar aspects of “copy resistance” that serve the same function for other works. More such studies are in order, whether of “gray space” industries like tabletop or video games¹³⁷ or “full IP” industries like films, literature, and music.

erlawnews/ip-law/X6B2G6000000 (on file with the *Iowa Law Review*).

¹³⁷. The fruitfulness of this avenue of research is confirmed by the fact that BJ Ard’s excellent and complementary study of the video games industry appeared in print just a few months after Seaman and Tran’s article. See generally Ard, *supra* note 2.