From Arkham to *Arcane*: Assessing Video Game Intellectual Property Through Comic Book Characters and Caselaw Comparisons

Blythe Bull[*]

INTRODUCTION

For sub-markets of the entertainment industry, intellectual property (or "IP") expansion through cross-industry collaboration enhances monetary value by increasing its audience and usage across platforms.[1] This is an important consideration for video games, where popular characters and their thematic story elements have found growing success in adaptations for film, television, and books.[2] However, cross-industry expansion risks inevitable substantive changes to the intellectual property, diluting copyright ownership, encouraging infringement, and delaying further expansion through contractual disputes.[3] Without proper legal methodology in place, video game copyright could suffer mass casualties across sub-markets.[4]

This Note will argue that legal scholarship must look to outside sources, particularly in the video game and comic book industries, for developing adequate standards to address video games' unique interactive copyright

[*] J.D., New England Law | Boston (2023); B.A., Music and Political Science, Hendrix College (2019). To Oscar, Megan, and Mrs. Susan Dore, the seventh-grade teacher that permitted my first historical term paper topic on Pokémon.

[1] *See* ROB SALKOWITZ, COMIC-CON AND THE BUSINESS OF POP CULTURE: WHAT THE WORLD'S WILDEST TRADE SHOW CAN TELL US ABOUT THE FUTURE OF ENTERTAINMENT 11, 41, 65 (2012).

[2] *See, e.g.*, Bill Desowitz, '*Arcane': How the Netflix Animated Series Transcended Its Video Game Origin as an Innovator*, INDIEWIRE (June 15, 2022, 5:30 PM), https://perma.cc/FW6W-TUAB; Adam Fitch, *Why Is Harley Quinn so Popular? Kevin Conroy Has an Idea*, CBR (Aug. 29, 2017), https://perma.cc/HV5M-ND6N; *see* Brandon Katz, *Video Games Will Soon Be Hollywood's Next Great IP War*, OBSERVER (Dec. 23, 2020, 8:00 AM), https://perma.cc/R2KK-T26J.

[3] *See, e.g.*, SALKOWITZ, *supra* note 1, at 41–43, 63–64, 106–12.

[4] *See* Arlen Papazian, *Let's Stop Playing Games: A Consistent Test for Unlicensed Trademark Use and the Right of Publicity in Video Games*, 8 WM. & MARY BUS. L. REV. 577, 594–96 (2017) (delineating video game market's high value and increasing codependency with sub-markets).

and proper audiovisual transmedia analysis. Part I provides background by defining a video game through its caselaw and corresponding IP: the technical, substantive, and interactive components. Part II illustrates the importance of the video game market and how cross-industry expansion of IP creates value through audience engagement and improved versatility. Part III highlights problems in the judicial system's understanding of video game IP and how proper analysis should handle infringement and right of publicity analysis. Part IV identifies the interactive nature of video game copyright by defining gameplay. Part V considers how comic book industry caselaw can address legal ambiguities in the video game market and in independent transmedia within its substantive copyright. This Note will move beyond current scholarship conclusions that state updates to video game copyright law are necessary, instead defining the legal components of its IP—and how that value substantively increases—as the industry continues to expand.

I. Background

A. *Video Games and Intellectual Property*

A video game is an interactive audiovisual work displayed through an electronic or digital medium.[5] At its core, there are three things that make up a video game: a technical foundation, audiovisual content, and an interactive element.[6] The technical, audiovisual, and interactive components that define video games are known as intellectual property, or a video game's IP.[7] These are the intangible but original identities, ideas, and creations that have legal protections from infringement, or being stolen or copied.[8]

Intellectual property is an umbrella term for concepts and creations with legal protections: patents, trademarks, and copyright.[9] While not a physical object, it identifies tangible creations that hold value, in which an owner can be identified.[10] The United States Constitution provides original protections,

---

[5] Kamran Sedig et al., *Player-Game Interaction and Cognitive Gameplay: A Taxonomic Framework for the Core Mechanic of Video Games*, 4, no. 1, INFORMANTICS, 1, 3 (2017), https://perma.cc/QM7F-MNJV (citing KATIE SALEN TEKINBAS & ERIC ZIMMERMAN, RULES OF PLAY: GAME DESIGN FUNDAMENTALS (2004)).

[6] Deborah F. Buckman, Annotation, *Intellectual Property Rights in Video, Electronic, and Computer Games*, 7 A.L.R. FED. 2D 269, 269 (Westlaw through June 18, 2022); John Kuehl, Article, *Video Games and Intellectual Property: Similarities, Differences, and a New Approach to Protection*, 7, NO. 2 CYBARIS, 314, 319 (2016) (citing Christopher Lunsford, *Drawing a Line Between Idea and Expression in Videogame Copyright: The Evolution of Substantial Similarity for Videogame Clones*, 18 INTELL. PROP. L. BULL. 87, 96–99 (2013)); *see* Sedig et al. *supra* note 5, at 1, 3.

[7] Buckman, *supra* note 6, § 2.

[8] *Trademark, Patent, or Copyright*, U.S. PAT. & TRADEMARK OFF., https://perma.cc/R9CT-DBMS (last visited May 7, 2023) [hereinafter *Trademark, Patent, or Copyright*].

[9] *Id.*

[10] *See id.*

recognizing that innovation and expression are important to further science and the arts.[11] When developers reference a video game franchise's IP, they are referring to a mixture of patents, trademarks, and copyright.[12] Each type of IP protects something different, with rights either automatically vested or requiring initial licensing.[13]

Patents are licensed inventions or mechanisms that solidify an exclusive right to produce the resulting product.[14] This protects an inventor's right to decide how the new design, invention, or process will be used by themselves or third parties.[15] To receive protections, the creator must file an application for a patent with the United States Patent and Trademark Office.[16] The creation has to be new, unique, and usable within an industry to receive protections; otherwise, the patent is not granted.[17]

Trademarks protect an identifiable name, brand, or logo to maintain the value of the product associated with an acquired identity.[18] An improper use of a trademark borrows the reputation of the market associated with its brand or logo, which could misrepresent a product to a consumer and weaken, or dilute, the market value.[19] There is a legal presumption of ownership over a trademark, but registering with the United States Patent and Trademark Office acts as clear evidence of ownership and strengthens the scope of protections and legal remedies.[20] The Lanham Act, or the Trademark Act, regulates the use of trademarks for commercial purposes.[21]

Copyright protects original works of authorship, giving the owner power to decide how their original ideas and expressions are shared, used, and monetized.[22] Artwork, films, original stories, sound recordings, and even architectural designs are a few examples of original ideas granted copyright protections.[23] The Copyright Act of 1976 defines rights of authorship.[24] Once an original idea is created and presented in a tangible

---

[11] U.S. CONST. art. I, § 8, cl. 8.

[12] *See, e.g.*, *Legal Jibber Jabber*, RIOT GAMES, https://perma.cc/Z4EF-8SFS (last updated Aug. 2018) (describing legal ramifications of League of Legends's IP in accessible, non-legal terms).

[13] *See Trademark, Patent, or Copyright*, *supra* note 8.

[14] *Trademark, Patent, or Copyright*, *supra* note 8.

[15] *See Trademark, Patent, or Copyright*, *supra* note 8.

[16] *Trademark, Patent, or Copyright*, *supra* note 8.

[17] 35 U.S.C. § 101.

[18] *Trademark, Patent, or Copyright*, *supra* note 8.

[19] *See Trademark, Patent, or Copyright*, *supra* note 8.

[20] *Trademark, Patent, or Copyright*, *supra* note 8.

[21] *See generally* Lanham Act, 15 U.S.C. §§ 1051–1127 (2013).

[22] *Trademark, Patent, or Copyright*, *supra* note 8.

[23] Copyright Act of 1976, 17 U.S.C §§ 101, 106 (1976) (defining copyright and works of authorship).

[24] *See generally id.* § 101 ("Definitions").

form, those ideas are copyrighted.[25]

Unlike patents, original creative expressions do not need to be unique to receive protections; thematic elements in storytelling and design are shared components of art one person cannot withhold from another.[26] Additionally, copyright protections are mortal; at minimum seventy years after an author dies, their copyright automatically enters the public domain for all to freely use and distribute.[27] While they are alive, copyright owners may share distribution rights with others for adaptations, which retain the same copyright protections as the original work.[28]

In contrast, parodies inspired by original copyright from a different author are deemed derivative works.[29] Whereas a sequel or adaptation borrows and expands the original copyright, derivative works engage with original copyright to produce a fundamentally different creation.[30] If the artistic expression is substantially different, or derivative of the original work, then it is original copyright with separate protections.[31]

In questions of copyright infringement, the initial question is whether one's work is based, in some form, upon the other's copyright.[32] If the offending work stems from another's copyright, then legal analysis must determine if it is sufficiently transformed enough to be a derivative work.[33] In cases of substantial similarity, the offending work is an adaptation; such works created without the author's permission or distribution rights infringe upon original copyright.[34]

B. *The Technical IP of Video Games*

Video games are a digital or electronic medium; put simply, the technical IP is its technology, or the mechanics that run the game itself.[35] This

---

[25] *Id.* § 102(a).

[26] *How Is Copyright Different from a Patent or Trademark?*, RABIN KAMMERER JOHNSON, https://perma.cc/47KD-DWRU (last visited May 7, 2023).

[27] *See* 17 U.S.C. § 302(a).

[28] *Id.* § 106(a); *see* Kuehl, *supra* note 6, at 319.

[29] 17 U.S.C. § 101.

[30] *See id.*; *see also* Elisabeth S. Aultman, *Authorship Atomized: Modeling Ownership in Participatory Media Productions*, 36 HASTINGS COMMC'NS & ENT. L.J. 383, 390 (2014).

[31] *See* 17 U.S.C. § 103(b).

[32] *See id.* § 501; Kuehl, *supra* note 6, at 341 (finding infringement correlated to "just how far the defendants went in copying").

[33] *See* 17 U.S.C. § 501; Kuehl, *supra* note 6, at 348 (citing Capcom U.S.A., Inc. v. Data East Corp., 1994 WL 1751482, at *1 (N.D.CA. Mar. 16, 1994)) (warning derivative works can "look similar and play similarly but are different products").

[34] *See* 17 U.S.C. § 501. *see, e.g.*, Tetris Holding, LLC v. Xio Interactive, Inc., 863 F. Supp. 2d 394, 410 (2012) ("akin to literal copying").

[35] Buckman, *supra* note 6, § 1; *see generally* Sedig et al., *supra* note 5, at 3.

has two components.[36] The first is the actual machinery that powers a video game, such as the console or the joystick on its controller, which is an original invention protected through patents.[37] Patent protections are not automatically vested and have to be acquired through licensing with the United States Patent and Trademark Office.[38]

The second type of technical IP is the intangible technology that runs a video game, such as its software and coding.[39] Unlike the physical machinery, these underlying mechanics receive copyright protections, which protect original ideas and artistic expressions as works of authorship whose use belongs to the original creator. [40] Computer programming variations are not an original invention, but there are infinite possibilities how codes will be strung together and combined; this is analogous to words in a copyrighted novel, or notes in an original song.[41]

The scope of these copyright protections are, however, limited by time.[42] Until the copyright expires and enters the public domain, authors can either grant permission to use or grant distribution rights for others to produce new material using their copyright.[43] Use of copyright against the owner's permission is copyright infringement, in which the owner can take legal action to maintain control over how their creations are shared, used, and monetized.[44] Such remedies are generally settlements for financial reparations or court actions requesting preliminary injunctions during a video game's installment or before its official release.[45]

The Digital Millennium Copyright Act of 1998 ("DMCA") governs copyright infringement for technical IP.[46] Software infringement such as piracy and emulating (copying game software and uploading it for others to

---

[36] *See* Sedig et al., *supra* note 5, at 3.

[37] *See e.g.*, Kyle Orland, *Sony Patents Method for "Significant Improvement of Ray Tracing Speed*," ARS TECHNICA (Feb. 28, 2022, 3:35 PM), https://perma.cc/62HR-97UK (illustrating the evolution of patented hardware and its complexity with examples of higher processing for lighting software); Incredible Techs., Inc. v. Virtual Techs., Inc., 400 F.3d 1007, 1011 (7th Cir. 2005) (classifying trackball on a golf arcade machine as a patent issue, not a copyright issue).

[38] *See Trademark, Patent, or Copyright*, *supra* note 8.

[39] *See generally* Copyright Act of 1976, 17 U.S.C §§ 101, 117 (1976).

[40] *See id.* § 102(a).

[41] *Cf.* 1 WILLIAM F. PATRY, COPYRIGHT LAW AND PRACTICE 168 (1994), *cited in* Micro Star v. FormGen Inc., 154 F.3d 1107, 1112 (9th Cir. 1998) ("What, after all, does sheet music do but describe in precise detail the way a copyrighted melody sounds?").

[42] 17 U.S.C. § 106A(d).

[43] *Id.* § 106A(e).

[44] *See id.* § 501.

[45] *See id.*

[46] *See generally id.* §§ 512, 1201–02; U.S. COPYRIGHT OFF., THE DIGITAL MILLENNIUM COPYRIGHT ACT OF 1998: U.S. COPYRIGHT OFFICE SUMMARY (1998), https://perma.cc/7DVN-SK6C.

download and play online) are prohibited by the DMCA.[47] Reverse engineering, a form of infringement through tinkering, is the inverse of inventing: taking a mechanism apart to determine how it works.[48] Unlike piracy or emulating, reverse engineering can involve both hardware and software infringement because both physical machinery as well as a line of code can be broken apart to discover its functions.[49]

This was the issue at the heart of *Sega Enterprises LTD. v. Accolade, Inc.*, a copyright infringement case where Sega modified their video game cartridge's coding to prevent competitors in the industry from producing video games for their Genesis console.[50] Developers at Accolade, Inc. isolated Sega's code in the cartridges through reverse engineering; through disassembly, Accolade learned how the programming was different and subsequently copied the modified coding for the purposes of producing their own games.[51] The Ninth Circuit decided that Sega's code was technical copyright with legal protections.[52] However, they concluded that Accolade's actions were a fair use of the copyright and did not constitute copyright infringement; Accolade had a legitimate reason for disassembling the code, and doing so was the only way Accolade could learn from the IP.[53]

Although the case occurred before Congress passed the DCMA, the Court applied the fair use doctrine, which remains a valid exception to an infringement claim.[54] This doctrine excuses unauthorized copyright usage for permitted purposes including education, research, reporting, critiques, or commentary.[55] In application, courts use four primary factors to consider fair use on a case-by-case basis: the nature of the copyrighted work, the proportion copied, the reason for its use, and the effect the use had on the potential market for the copyrighted work.[56] The Court utilized *Sega* to tailor the fair use doctrine for video game technology, identifying three key considerations to assess in conjunction with fair use: functionality, public

---

[47] *See* 17 U.S.C. § 512; Kuehl, *supra* note 6, at 322.

[48] 17 U.S.C. §§ 1201(a)(1)(A), (f); *see Coders' Rights Project Reverse Engineering FAQ*, ELEC. FRONTIER FOUND., https://perma.cc/E9UY-7D48 (last visited May 7, 2023) (explaining reverse engineering legality in accessible terms).

[49] David Syrowik, *Restriking the Balance: The Uniform Computer Information Transactions Act (UCITA) and Reverse Engineering*, 82 MICH. BAR J., 30, 32 (Mar. 2003), https://perma.cc/P2HL-ZMG2 (noting the reporter's commentary on whether reverse engineering "is permitted for computer programs" under copyright or patent laws).

[50] 977 F.2d 1510, 1515 (9th Cir. 1992).

[51] *Id.* at 1515–16.

[52] *Id.* at 1517.

[53] *Id.* at 1518; *see* Kuehl, *supra* note 6, at 338–40, 344–45 (explaining that copying is critical for industry).

[54] *See* 17 U.S.C. §§ 107, 512, 1201–1202.

[55] *Id.* § 107.

[56] *Sega Enters. Ltd.*, 977 F.2d at 1523–24, 1527.

policy interests, and the impact of underlying commercial purposes.[57]

In *Sega*, the primary use for reverse engineering stemmed from Accolade's intentions to develop their own original creative works in the form of video games.[58] Fair use is generally inapplicable for large commercial uses or instances of exclusive financial gain.[59] Similar to the thematic elements of a story under the Copyright Act, basic functional concepts of coding should be available to the general public so others can continue to build upon growing material.[60] The Court reasoned that the greater the code's functional use, the weaker its copyright protections.[61] Public policy at that time also encouraged expansion and competition in the video game industry, and the Court ruling otherwise would have been against these public interests, in support of monopolizing a still-developing market.[62]

Although for-profit, Accolade's motive behind disassembling the code was an "essentially non-exploitative purpose" that rendered its commercial purposes "of minimal significance."[63] Ultimately, the Court reasoned that infringement disputes should assess marketed derivative works under the fair use exception—by weighing the technical IP's functional nature against its impact on commercial interests.[64] Technical IP's infringement analysis under the DMCA follows similar reasoning as the Copyright Act: to preserve ingenuity in the "inherently creative" industry, courts must delineate protected expressive elements from its functional components.[65]

C. *The Substantive IP of Video Games*

1. Audiovisual Works Under Copyright Law

The Copyright Act covers seven categories of artistic expression, most of which are single-element creations, such as sound recordings, visual

---

[57] *Id.*; *see* Kuehl, *supra* note 6, at 317, 319, 328 (pointing out the platform's difficult fit within copyright law).

[58] *Sega Enters. Ltd.*, 977 F.2d at 1518.

[59] *See* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 451 (1984).

[60] *See Sega Enters. Ltd.*, 977 F.2d at 1527 (citing Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., Inc., 499 U.S. 340, 349–50 (1991)); *see also* Atari Games Corp. v. Nintendo of Am., 975 F.2d 832, 842–43 (Fed. Cir. 1992); Kuehl, *supra* note 6, at 338–40, 344–45.

[61] *Sega Enters. Ltd.*, 977 F.2d at 1527.

[62] *Id.* at 1523–24, 1527; *see* James Grimmelmann, *Copyright and the Romantic Video Game Designer*, PRAWFSBLAWG (Feb. 2, 2012), https://perma.cc/VBL8-K28S (citing Williams Elecs., Inc. v. Artic Int'l., Inc., 685 F.2d 870, 870 (3d Cir. 1982)), *quoted in* Kuehl, *supra* note 6, at 340–41.

[63] *Sega Enters. Ltd.*, 977 F.2d at 1522–23.

[64] *Id.* at 1526–27; *see* Sony Comput. Ent., Inc. v. Connectix Corp., 48 F. Supp. 2d 1212, 1220 (N.D. Cal. 1999) ("Accolade created something new. Here, Connectix is not creating its own product to be used *in conjunction with* Sony's Playstation. Rather, VGS is a *substitute* product.").

[65] *See Sega Enters. Ltd.*, 977 F.2d at 1526–27.

designs, or live performances.[66] An audiovisual work is defined separately because it is multi-layered, combining recorded sounds and corresponding images to tell a story.[67] This IP is the product of the technical, comprising elements of a story and its thematic accessories.[68] Like television or a major motion film, video games are an audiovisual platform.[69]

In its simplest description, audiovisual copyright is a relay of images with accompanying sound; however, the artistic mediums covered under that legal definition are much broader because of two key considerations.[70] The first consideration is that audiovisual works are displayed by "machines[] or devices," meaning electronic equipment.[71] Physical, live performances, like a musical or a band, cannot constitute an audiovisual work.[72] Film, television, sound recordings, and video games all have this in common: the audiovisual category of copyright is electronic in nature, requiring both the audio and the visual components to be prerecorded.[73]

The second consideration regards its audio element: the sound isn't actually necessary.[74] Both elements, recorded sights and sounds, are considered under a singular entity.[75] This means that the audio and visual components cannot be separated; they are protected as one product.[76] If a video game has no sound, it is still considered an audiovisual work because what matters is the visual display (how the story is being told). [77]

This is evident by the Copyright Act's distinction between literary works, which are specifically defined as "other than audiovisual" material.[78] Although they could be displayed through audiovisual platforms like films or television, the platform used to tell the story does not matter because literary works are expressions of "numbers, or other verbal or numerical symbols or indicia" displayed through textual depictions.[79] When reading a

---

[66] Copyright Act of 1976, 17 U.S.C §§ 101, 106 (1976).

[67] *See id.*

[68] *See id.*

[69] *See* SALKOWITZ, *supra* note 1, at 15–16 (highlighting audiovisual's multimedia platform crossovers, including video games); Sedig et al., *supra* note 5, at 3–4 (concluding a video game's audiovisual content "at the heart of design").

[70] *See* 17 U.S.C. §§ 101, 106.

[71] *Compare id.* § 101, *with* SALKOWITZ, *supra* note 1, at 2 (delineating graphic storytelling qualities in comic book medium with print and digital publications).

[72] *See* 17 U.S.C. § 101.

[73] *See id.*; *see also* SALKOWITZ, *supra* note 1, at 15 (defining "media convergence" as synthesized sub-markets and digitized comic publications).

[74] *See* 17 U.S.C. § 101.

[75] *See id.*

[76] *Id.*

[77] *Id.*; *see also* SALKOWITZ, *supra* note 1, at 16 (engaging the audience on "multiple levels").

[78] 17 U.S.C. § 101; *see* Walt Disney Prods. v. Air Pirates, 581 F.2d 751, 755 (9th Cir. 1978) (delineating literary characters from comic book characters).

[79] 17 U.S.C. § 101; *see* SALKOWITZ, *supra* note 1, at 15 (noting the "convergence of media");

book, the story is told through descriptions, whether read on a page, spoken aloud, or heard on an audiobook.[80] This is fundamentally different from the defined "motion pictures" that tell a story through the "impression of motion"; in films and other audiovisual works, the story is shown to you, providing a display of motion that an audience member must observe to interpret and piece together the story in their mind.[81]

Noting this distinction, copyright law considers the difference in how an audiovisual story is told, rather than on what platform audiovisual works will be displayed.[82] To define the distinction, a fundamental question must be asked: was the original story told or observed?[83] Through literary works, a story is told.[84] Through audiovisual, the story is observed.[85]

2. Video Games and Audiovisual IP

For copyright infringement, there must be substantial similarity in the offending audiovisual's objective details, such as thematic elements, as well as in its "similarity of expression" and overall "feel of the works." [86] Fictional characters and other related substantive elements require a different test than a video game's technical IP; unlike software and programming, copying the thematic elements from another work of authorship does not have an underlying functional use.[87] Instead, the courts use a test to determine whether the copied material constitutes a "derivative work."[88] To constitute a derivative work, the audiovisual copyright must have a fixed, tangible form that significantly incorporates the preexisting work.[89]

The Ninth Circuit outlined the "derivative works" test for video games in *Micro Star v. FormGen Inc*.[90] The game at the center of the lawsuit allowed

---

Michael Jon Anderson, *The Rise of the Producer-Novelist: Shifting Perceptions of Authorship in Transmedia Publishing*, 2 CASE W. RSRV. J.L. TECH. & INTERNET 47, 49 (2011) (noting audiovisual history rooted in "media convergence" of "text and images").

[80] *See* 17 U.S.C. § 101; *see also Walt Disney Prods.*, 581 F.2d at 755.

[81] 17 U.S.C. § 101; *see* SALKOWITZ, *supra* note 1, at 16, 18 (requiring audience participation in storytelling); *see also* Sedig et al., *supra* note 5, at 14 ("This type of reaction behaves like a movie, where changes to a scene are stacked in time and once scene replaces another.").

[82] *See* 17 U.S.C. § 101.

[83] *See id.*; Sedig et al., *supra* note 5, at 14–15 (explaining stacked transition elements).

[84] *See* 17 U.S.C. § 101; *Walt Disney Prods.*, 581 F.2d at 755.

[85] *See* SALKOWITZ, *supra* note 1, at 16; Sedig et al., *supra* note 5, at 14 (analogizing stacked transitions to a movie's story process).

[86] Litchfield v. Spielberg, 736 F.2d 1352, 1356–57 (9th Cir. 1984); *see* Atari, Inc. v. N. Am. Philips Consumer Elecs. Corp., 672 F.2d 607, 620 (7th Cir. 1982); SALKOWITZ, *supra* note 1, at 65.

[87] *See* Micro Star v. Formgen Inc., 154 F.3d 1107, 1113 (9th Cir. 1998).

[88] *See id.* at 1110; 17 U.S.C. § 101 (defining "derivative work").

[89] *Micro Star*, 154 F.3d at 1110; Lewis Galoob Toys, Inc. v. Nintendo of Am., Inc., 964 F.2d 965, 967 (9th Cir. 1992); *Litchfield*, 736 F.2d at 1357.

[90] 154 F.3d at 1110.

players to create and share their own levels with other players.[91] Micro Star copied multiple player-created levels on game discs and sold them, raising the issue of whether Micro Star's product constituted a derivative work under the Copyright Act.[92] The Court found that Micro Star's product was substantially similar in audiovisual display; absent significant adaptations to the preexisting material, the product's resulting stories are sequels rather than its own original, derivative work.[93]

3. Transmedia and Trademarks

A key consideration of a video game's audiovisual nature is its perpetual entanglement with trademark law.[94] For two primary reasons, audiovisual IP requires the courts to synthesize copyright and trademark protections. [95] First, to maintain the value of a game franchise's brand and prevent consumer confusion, unique and identifiable audiovisual copyright receives trademark protections against improper use.[96] Prominent character identities, such as the main character's name, face, and original combat moves, are unique for their direct association to a video game's franchise and company.[97] Those portions of individual IP, such as video game characters and other audiovisual copyright, are called "transmedia" for their ability to transition between media platforms and sub-markets.[98] For example, Sega's speedy blue hedgehog is a transmedia copyright of Sega's *Sonic the Hedgehog* franchise.[99] Although the character originated from a video game platform, Sonic and other foundational elements of the game have easily translated over into Saturday morning cartoons and a successful box office opener from 2020.[100]

A playable avatar may have a distinct name, an identifiable weapon, or a unique set of fighting moves that are unmistakably associated with that

---

[91] *Id.* at 1109.

[92] *Compare id.*, *with* Kuehl, *supra* note 6, at 341 (delineating "wholesale copying").

[93] *Micro Star*, 154 F.3d at 1112.

[94] *See* Robert Van Arnam & Andrew Shores, *Protection or Expression: The Evolution of Copyright Protection and Right of Publicity in the Video Game Industry*, 61 FOR THE DEFENSE MAG. 16, (2019), https://perma.cc/X3JA-8XQ5 (exploring the balance between copyright and trademark in video game IP); *see also* SALKOWITZ, *supra* note 1, at 65.

[95] *See* Van Arnam & Shore, *supra* note 94.

[96] Papazian, *supra* note 4, at 580; *see* SALKOWITZ, *supra* note 1, at 65.

[97] *See, e.g.*, Blizzard Entertainment v. Lilith Games (Shanghai), 149 F.Supp.3d 1167, 1170 (providing examples from "Warcraft" video game series); SALKOWITZ, *supra* note 1, at 152 (describing the success of Batman); Papazian, *supra* note 4, at 602 (a game using a character with likeliness to a famous football player to attract consumers).

[98] SALKOWITZ, *supra* note 1, at 41; Anderson, *supra* note 79, at 48, 50.

[99] *See, e.g.*, Michael McWhertor, *The Origins of Sonic the Hedgehog*, POLYGON (Mar. 21, 2018, 10:13 PM EDT), https://perma.cc/27N7-LZYN.

[100] *Compare, e.g.*, *id.*, *with* Anderson, *supra* note 79, at 50 (developing digital aided multi-platform media), *and* Aultman, *supra* note 30, at 386-87.

game franchise, and as a result, that company could trademark that character.[101] However, a unique character is an original concept, design, and creation, which constitutes clear copyright.[102] Another iconic video game character—Nintendo's Pikachu—is trademarkable property with a clear and direct association to the Pokémon franchise and its corresponding value.[103] Pikachu is also The Pokémon Company's copyrightable entity, with over eight hundred other playable Pokémon creations spanning across audiovisual depictions in classic games on Nintendo's Game Boy Advance, GameCube, DS and 3DS, Wii, and Switch; as well as Niantic, Inc.'s *Pokémon GO* for mobile gaming.[104]

4. Right of Publicity

The second reason a game's substantive copyright is fundamentally intertwined with trademark law is the visual elements of a game, its graphics, or a pixelated display.[105] Substantial improvements in image quality have encouraged greater realism and consequential trademark conflicts.[106] The better the graphics, the harder it is to discern original copyright from copied identities.[107] The Ninth Circuit considered this issue a few times in regard to the game franchise Grand Theft Auto.[108] In *E.S.S. Entertainment 2000 v. Rock Star Videos*, a strip club sued the franchise's game developers, Rockstar, claiming their game's virtual city parodying Los Angeles included a nearly identical depiction of their business.[109] The Court ultimately ruled that although the quality of the game's graphics invoked an impeccable sense of realism, Rock Star Videos intended for Grand Theft Auto to be an artistic caricature of Los Angeles.[110] Realistic similarities were

---

[101] SALKOWITZ, *supra* note 1, at 65; *see, e.g.*, Rich Johnston, *Riot Games Opposes Archie Comics Over Jinx Trademark*, BLEEDING COOL (Aug. 9, 2020, 7:50 AM), https://perma.cc/NQU3-FWL7 (noting trademark dispute where both Archie Comics and League of Legends has a character named "Jinx," known as "The Loose Canon").

[102] *See, e.g.*, *Legal Jibber Jabber*, *supra* note 12.

[103] *Compare Legal Information*, THE POKÉMON CO., https://perma.cc/79ZG-W8GW (last visited May 8, 2023) [hereinafter *Legal Info Pokémon*], *and Legal Information*, NINTENDO OF AUSTRALIA, https://perma.cc/8YLK-7Q5F (last visited May 8, 2023), *with* SALKOWITZ, *supra* note 1, at 65.

[104] *Legal Information Pokémon*, *supra* note 103; Sara Peterson, *How Many Pokemon Are There in Total? (2023 Updated)*, TOYNK (Mar. 29, 2022), https://perma.cc/B2LW-4U9T; *see Nintendo Shares Soar on Pokemon Go Success*, BBC (Jul. 11, 2016), https://perma.cc/W5PD-GGEX.

[105] *See* Van Arnam & Shores, *supra* note 94.

[106] *See* Van Arnam & Shores, *supra* note 94.

[107] *See, e.g.*, Kuehl, *supra* note 6, at 328 ("video games such as *Call of Duty* face legal action for depictions of historical figures."); *see* Van Arnam & Shores, *supra* note 94.

[108] *See, e.g.*, Kuehl, *supra* note 6, at 328; *see also* Anderson, *supra* note 79, at 50 (delineating "franchise storytelling"); Aultman, *supra* note 30, at 386 (defining "fictional franchise universe").

[109] 444 F. Supp. 2d 1012 (C.D. Cal. 2006).

[110] *Id.*; *see* Van Arnam & Shores, *supra* note 94.

insufficient absent exact replicated details, like the strip club's name or its physical description.[111]

An individual's identity is a trademarkable brand, legally protected as a right of publicity.[112] This is a critical consideration in the video game industry where internet personas and their associated avatars are creating income through e-sports, streaming, and building their brand.[113] Recently, legal disputes surrounding audiovisual IP have stemmed from celebrities accusing developers of creating characters copied off of them, infringing on the market value associated with their identity.[114] The Lanham Act and trademark laws apply where someone profits from a commercial endeavor by causing consumers to believe that a celebrity was involved either: intentionally, through deceit, or unintentionally, by mistake.[115]

There's some confusion, however, about how to properly address its improper use as a question of law.[116] The ambiguity stems from this entanglement between trademark and copyright; video games are commercial in nature, falling under the Lanham Act's trademark provisions, but most lawsuits surrounding celebrity depictions are based on the graphics and audiovisual copyright.[117] The Lanham Act's scope for trademark protections is narrow, finding liability where someone either intentionally used another's identity for deceptive purposes or unintentionally caused an economic injury through consumer confusion.[118] This gray area in substantive IP created two separate tests: the *Rogers* and the *Transformative*.[119]

In *Rogers v. Grimaldi*, the Second Circuit determined that a question of improper use of a celebrity's name as a movie title was a trademark issue covered as a claim of false endorsement under the Lanham Act.[120] They developed the *Rogers* test, a two-prong system for assessing right of publicity cases under trademark law.[121] Right of publicity violations occur when consumers make financial decisions based on a celebrity's endorsement,

---

[111] *E.S.S. Ent. 2000*, 444 F. Supp. 2d at 1012.

[112] Lanham Act, 15 U.S.C. §§ 1125(a), 1127 (2013); *see* Rogers v. Grimaldi, 875 F.2d 994, 1000 (2nd Cir. 1989).

[113] *See generally* Jake Ritthamel, Note, *Copyright's Final Boss Encounter: Ownership of Player-Characters in Online Multiplayer Role-Playing Video Games*, U. ILL. J.L. TECH. & POL'Y 183 (2022).

[114] Van Arnam & Shores, *supra* note 94.

[115] *See* 15 U.S.C. §§ 1125(a), 1127.

[116] Van Arnam & Shores, *supra* note 94; *see* Hart v. Elec. Arts, Inc., 717 F.3d 141, 153 (3rd Cir. 2013) (assessing all possible balancing tests in absence of agreed standard).

[117] *See generally* Van Arnam & Shores, *supra* note 94.

[118] 15 U.S.C. §§ 1125(a), 1127; *see Hart*, 717 F.3d at 158; Van Arnam & Shores, *supra* note 94.

[119] *Compare* Rogers v. Grimaldi, 875 F.2d 994, 1000 (2d Cir. 1989), *with Hart*, 717 F.3d at 158.

[120] 875 F.2d at 1000.

[121] *Id.* at 999.

participation, or association with a business and its product.[122] The first prong regards standing, or the nexus that mistaken association occurred because of the defendant's actions; in other words, defendants actively marketed using the celebrity's identity.[123] The second prong asks how the celebrity's identity would have been used in marketing the product.[124] Courts find no infringement in cases where defendants created a stock character, parody, or caricature; this means that any misleading depictions were intended as artistic expression rather than as advertising through an outside brand.[125]

In *Hart v. Electronic Arts, Inc.*, the Third Circuit described a football player's likeness in a video game as a copyright issue, finding trademark protections under the Lanham Act too narrow to otherwise apply.[126] The Court recognized *Rogers* as appropriate for trademark interests, limiting its function as finalizing disputes on consumer confusion.[127] There was no question in this case that Electronic Arts ("EA") based the video game character on Hart, and that this had minimal impact on *Madden*'s market value because—although the industry has drastically adapted to support isolated transmedia sales through in-game content exclusives—players bought games as a unit, regardless of individual character options.[128] Therefore, the Court reasoned that consumer confusion was not the primary issue; they vested the actual violation in Hart's privacy interests, rather than whether consumers believed the character resembled Hart.[129]

The Third Circuit instead applied an alternative test, asking whether Hart's right to privacy outweighed EA's freedom of expression.[130] In other words, the *Transformative* test is another variation of the derivative works exception; it has a substantial difference threshold, requiring the work to have "sufficiently transformed" the celebrity's likeness in the video game to receive copyright protections as an original creation.[131] If the character's likeness is sufficiently transformed, First Amendment protections of the

---

[122] *See generally* 15 U.S.C. §§ 1125(a), 1127; Van Arnam & Shores, *supra* note 94.

[123] *Rogers*, 875 F.2d at 1000.

[124] *Id.*

[125] Hart v. Elec. Arts, Inc., 717 F.3d 141, 154–55 (3rd Cir. 2013); *Rogers*, 875 F.2d at 1000, 1004–05.

[126] 717 F.3d at 154–55, 157–58.

[127] *Id.* at 155.

[128] *Id.* at 145–46; *see, e.g.*, Kuehl, *supra* note 6, at 326–28 (outlining market trends in free to play games); Ritthamel, *supra* note 113, at 188–89, 194–206 (discussing transmedia content's substantial role in the modern video game market through *World of Warcraft* and *Final Fantasy XIV* comparisons).

[129] *Hart*, 717 F.3d at 151.

[130] *Id.* at 165.

[131] *Id.* at 163. *Compare* Micro Star v. FormGen Inc., 154 F.3d 1107, 1113 (9th Cir. 1998) (utilizing "derivative works" test), *with* Sega Enters. Ltd. v. Accolade, Inc., 977 F.2d 1510, 1523–24, 1527 (9th Cir. 1992) (copying functional code to create derivative works is acceptable).

right to creative expression will outweigh a celebrity's protections under the right of publicity.[132]

D. *The Interactive IP of Video Games*

In sum, the technical IP is the console, its controllers, and the programmed commands that relay communication between them.[133] Patents protect the invention of the individual game cartridge, for example, and the copyright covers the coding embedded within that game cartridge.[134] The audiovisual is the television's display, both on its screen and through its speakers, after the console turns on; this includes even the first eight seconds, before the game begins.[135] Trademark and copyright protections overlap, particularly with popular franchises whose copyrights are so well known by individual characters alone.[136]

In this analogy, however, the interactive IP is the gameplay, or everything within the player's control: the direction they turn the controller's joystick, the implications of that decision in the video game, and what the player feels as a result.[137] This is the interactive component that makes video games fundamentally unique from any other audiovisual work.[138] The player's control over the story customizes the experience, making it different every time for every player.[139] For example, when a villain lunges at the protagonist, one player may go for a killing blow,

---

[132] *Hart*, 717 F.3d at 163.

[133] *See How Do Video Games Work? Basic Architecture.*, HOW TO MAKE AN RPG, https://perma.cc/XJ38-MDZX (last visited May 8, 2023) ("From Code to Screen"); *see, e.g.*, Operating Portion of Controller for Electronic Game Machine, U.S. Patent No. D456,854 fig.1 (issued May 7, 2002) [hereinafter *GameCube Controller*]

[134] *See, e.g.*, Sony Comput. Ent., Inc. v. Connectix Corp., 48 F. Supp. 2d 1212, 1215 (N.D. Cal. 1999) (describing PlayStation console's hardware components with patent category of "processes" and firmware as holding "copyright registrations"); Benj . Edwards, *The Untold Story of the Invention of the Game Cartridge*, FAST CO. (Jan. 22, 2015), https://perma.cc/TRZ3-4ML6 (illustrating differences in technical IP through Kirschner's patentable hardware and Haskel's programming copyright); Orland, *supra* note 37.

[135] *See, e.g.*, rubbermuck, *GameCube Startup Logo (HQ)*, YOUTUBE (Jan. 17, 2008), https://perma.cc/2XMG-223W.

[136] *See* SALKOWITZ, *supra* note 1, at 69; *see, e.g.*, SmashBrosIGN, *Villager Trailer – Super Smash Bros.*, YOUTUBE (June 5, 2014), https://perma.cc/Z6DB-T8B4 (illustrating prominence of Nintendo's video game character copyright as franchise trademarks in crossover game, *Super Smash Bros.*—including The Wii Fit Trainer).

[137] Sedig et al., *supra* note 5, at 3; *see, e.g.*, Alex Shevrin Venet, *Letters from My Dead Mom in Animal Crossing*, MOD. LOSS (Mar. 17, 2021), https://perma.cc/2543-ME2V (showing the impact of gameplay in emotional response and player's actions).

[138] Brown v. Ent. Merchs. Ass'n, 564 U.S. 786, 798 (2011); *see* Ent. Software Ass'n v. Granholm, 426 F. Supp. 2d 646, 651 (E.D. Mich. 2006) (finding video games inseparable from their interactive element because the expressive and functional elements are "closely intertwined and dependent on each other in creating the virtual experience").

[139] *See* Sedig et al., *supra* note 5, at 3, 5.

whereas another may dodge and evade.[140] The interactive component gives every player the same tools to create their own experience, resulting in potentially infinite versions of a single story.[141]

The Supreme Court finally defined interactive IP's significance in its *Brown v. Entertainment Merchants Association* decision.[142] The Court addressed a California law banning violent video game sales to minors, finding it violated First Amendment protections for freedom of speech.[143] In its decision, the Court made two substantial distinctions for video game law.[144] First, they recognized that video games have artistic merit as audiovisual works.[145] Second, they delineated video games as unique from other audiovisual works due to their interactive component.[146]

There was discourse in the *Brown* decision as to what that interactive component entailed.[147] Justice Scalia's majority opinion defined all audiovisual works as containing a "degree of interaction."[148] He distinguished video games as having a substantially higher degree of interaction than other audiovisuals.[149] The concurring opinion agreed with the majority decision, but Justice Alito argued that other audiovisual works do not contain interactive components the way video games are "concretely interactive."[150] He also critiqued the majority because the opinion required more substantial consideration of the interactive element and the players who, consequently, "experience in an extraordinarily personal and vivid way."[151]

Beyond *Brown*, interactive IP remains an abstract concept in legal scholarship.[152] Its impact on caselaw has been subtle; courts often refer to it without naming it.[153] In *Micro Star*, the Court acknowledged a difference

---

[140] *Cf.* Sedig et al., *supra* note 5, at 1, 5.

[141] *See* Kuehl, *supra* note 6, at 318; *see, e.g.*, Venet, *supra* note 137; *see also* Matthew Ball, *Netflix and Video Games*, MATTHEWBALL.VC (Aug. 24, 2021), https://perma.cc/Z7VS-TGFX [hereinafter Ball, *Netflix and Video Games*] (noting the significance of "multiplayer storytelling").

[142] 564 U.S. at 798.

[143] *Id.* at 789.

[144] *Id.* at 790.

[145] *Compare id.*, *with* SALKOWITZ, *supra* note 1, at 2, 15–16.

[146] *Brown*, 564 U.S. at 798; *see* Kuehl, *supra* note 6, at 314, 318, 325, 327 (comparing films and video games).

[147] *See* 564 U.S. at 805–21 (Alito, J., concurring).

[148] *Compare Brown*, 564 U.S. at 798 (citing Am. Amusement Mach. Ass'n. v. Kendrick, 244 F.3d 572, 577 (7th Cir. 2001)), *with* SALKOWITZ, *supra* note 1, at 16, 18.

[149] *Brown*, 564 U.S. at 798 (citing *Kendrick*, 244 F.3d at 577).

[150] *Id.* at 819–20 (Alito, J., concurring).

[151] *Id.*

[152] *See id.* at 798, 819–20; Kuehl, *supra* note 6, at 340–41; Papazian, *supra* note 4, at 602 (difficulty defining when both "an artistic medium and a commercial product").

[153] *See, e.g.*, Tetris Holding, LLC v. Xio Interactive, Inc., 863 F. Supp. 2d 394, 405 (D.N.J. 2012); Micro Star v. FormGen, Inc., 154 F.3d 1107, 1112 (9th Cir. 1998) (citing Litchfield v. Spielberg,

between objective and subjective, or interactive, copyright.[154] They reasoned that substantial similarity in objective copyright, the audiovisual elements, will result in infringement on the subjective: the artistic expression, the feel of the game, and its influence on the player.[155]

II. Importance

A. *The Lucrative Industry of Video Games*

The video game industry is often described as "relatively new," but after fifty years, it's anything but; the gaming market is already larger than film and television by 43%.[156] Forty percent of the entire worldwide population play video games.[157] More people in the United States own a video game console than all of the Amazon Prime users in the world.[158] To put that in perspective, before the COVID-19 pandemic, the film industry set a global box office record in ticket sales: $42.5 billion.[159] That same year, the video game industry was estimated to be worth $150 billion.[160]

B. *The Entertainment Industry and Sub-Market Expansion Potential*

Video game developers can increase the value in their substantive IP, the audiovisual, by expanding out into the entertainment industry.[161] This is an umbrella term for an expansive portion of the economy derived from various sub-industries of pop culture and art, including film, music, television, and radio.[162] Main characters have market value; without additional creative effort, sub-market expansion of a character into a film or television adaptation has shown to increase audience engagement and diversity as well as multifunctional use of the character.[163]

Expansion occurs when sub-industries collaborate, allowing individual IP to be utilized across various forms of media and entertainment.[164]

---

736 F.2d 1352, 1356 (9th Cir. 1984); Atari, Inc. v. North American Philips Consumer Elec. Corp., 672 F.2d 607, 620 (7th Cir. 1982)); Kuehl, *supra* note 6, at 329-30 ("idea-expression dichotomy").

[154] 154 F.3d at 1112.

[155] *Id.*; *accord Litchfield* 736 F.2d at 1356–57; Sonali D. Maitra, *It's How You Play the Game: Why Videogame Rules Are Not Expression Protected by Copyright Law*, 5 LANDSLIDE NO. 4, Mar./Apr. 2015, at 16-21, https://perma.cc/XT8D-EBA2 (discussing "merged" ideas and expression).

[156] Katz, *supra* note 2. *Compare* SALKOWITZ, *supra* note 1, at 4, 107, 151 (accounting comic industry's IP at financial mercy of film and television), *with* Kuehl, *supra* note 6, at 328.

[157] Katz, *supra* note 2.

[158] Katz, *supra* note 2; *see* Kuehl, *supra* note 6, at 315.

[159] *See* Katz, *supra* note 2.

[160] Katz, *supra* note 2; *see* Kuehl, *supra* note 6, at 314–15, 318, 325.

[161] *See* SALKOWITZ, *supra* note 1, at 5, 41–42, 65.

[162] *See* SALKOWITZ, *supra* note 1, at 3, 15.

[163] *See* SALKOWITZ, *supra* note 1, at 5, 37, 41–42, 63–65; Andersoen, *supra* note 79, at 50.

[164] *See* Anderson, *supra* note 79, at 50–51, 53; Aultman, *supra* note 30, at 385–86; Matthew Ball, *7 Reasons Why Gaming IP is Finally Taking Off in Film/TV*, MATTHEWBALL.VC (Feb. 27, 2020),

Collaboration is required to expand into other forms of media because each sub-industry is specialized in how it markets, whom it attracts, and what it produces. [165] In other words, each branch within the industry has different resources, making it both cost-effective and efficient to work with other industries.[166] The result is a contractual relationship connecting two contrasting industries by one's copyright and the other's production resources.[167]

C. *Current Trends in Video Game Adaptations*

Film and television adaptations of video games are not a recent occurrence, but what has changed is their success in creating value.[168] There were several failed game adaptations in the late 1990s, with limited opportunity for video game heroes to make Hollywood debuts as successful as Angelina Jolie's over the next decade.[169] Most notably, in 1993, an ill-received *Super Mario Brothers* film adaptation grossed $20.9 million on a $40 million budget.[170] Bob Hoskins, who played Mario, described the adaptation in a 2007 interview as "the worst thing I ever did" and a huge disappointment.[171] The film found fame as a cult classic two decades later, but its failure at the box office set the tone for many years: success on the N64 would not translate over to the 8mm film.[172]

This changed in the late 2010s.[173] Blizzard Entertainment, the video game developer for *World of Warcraft*, released *Warcraft* in partnership with Legendary Pictures; it remains the highest grossing video game film adaptation.[174] Sega's *Sonic the Hedgehog* found box office success in 2020 and

---

https://perma.cc/L6W4-FZ42 [hereinafter Ball, *7 Reasons Why*]; *see, e.g.*, SALKOWITZ, *supra* note 1, at 41, 63–64 (discussing franchise transmedia);

[165] *See* SALKOWITZ, *supra* note 1, at 3.

[166] *See* Ball, *7 Reasons Why*, *supra* note 164.

[167] *E.g.*, SALKOWITZ, *supra* note 1, at 107 (discussing Marvel and Disney's collaborations); *see* Ball, *7 Reasons Why*, *supra* note 164. *But see* Anderson, *supra* note 79, at 53 (collaborating complicates ownership).

[168] *See* SALKOWITZ, *supra* note 1, at 35, 63–64, 72, 100, 104, 106 (changing generational interests and film culture for comic industry as predecessor for video games); Ball, *7 Reasons Why*, *supra* note 164.

[169] Ball, *7 Reasons Why*, *supra* note 164.

[170] *Super Mario Bros: The First Movie Based on a Video Game*, WARPED FACTOR (Mar. 27, 2021), https://perma.cc/B82R-5J9X [hereinafter *Super Mario Bros*].

[171] *Id.*

[172] *See id.*; Katz, *supra* note 2.

[173] *Compare* SALKOWITZ, *supra* note 1, at 4 (expanding comic culture with Marvel's superhero film adaptations and DC's "New 52" initiative occurred in the early 2010s), *with* Katz, *supra* note 2.

[174] *See Blizzard Entertainment® and Legendary Pictures to Produce Live-Action Warcraft® Movie*, GAMESINDUSTRY (May 10, 2006), https://perma.cc/43UX-DPB5; Eddie Makuch, *Highest-Grossing Video Game Movies of All Time*, GAMESPOT (Apr. 14, 2023, 3:58 PM PDT), https://perma.cc/N9Z6-

secured a sequel.[175] Nintendo grossed approximately $430 million worldwide in the Pokémon spinoff, *Detective Pikachu*; even a second attempt at a Mario adaption is in the works for 2022.[176] A recent *Uncharted* adaptation received positive reviews and box office success.[177] Other game series with a larger adult demographic, such as *Assassin's Creed*, *Monster Hunter*, and *Mortal Kombat*, have seen box office success as well.[178]

There are several explanations for video games' recent success in Hollywood.[179] Not only are video games more mainstream, but franchises have now been around for multiple generations, encouraging greater nostalgia.[180] Improvements in animation technology for film aid in depicting action and high fantasy themes, which were previously a challenge in capturing the essence of a game into a movie.[181] Additionally, movies have finally figured out the formula for what makes video game storytelling so popular with audiences and now emulate it in their own filmmaking techniques.[182]

ANALYSIS

III. Legal Scholarship Needs to Level Up by Assessing Infringement Through Agreed upon Standards

A. *Judicial Challenges Behind Understanding a Video Game*

1. Outdated Perceptions

Absent adequate definition or standard clarity, there are two significant misconceptions prevalent in legal scholarship and caselaw.[183] First, some judges still describe video games as "relatively new" media and are not

---

VDQQ.

[175] Katz, *supra* note 2.

[176] *Pokémon: Detective Pikachu (2019)*, THE NOS., https://perma.cc/K726-HVQB (last visited May 8, 2023); *see Super Mario Bros*, *supra* note 170; Katz, *supra* note 2.

[177] Scott Mendelson, *Box Office: BTS Rocks $33 Million Global as 'Uncharted' Tops $300 Million Worldwide*, FORBES (Mar. 13, 2022, 12:30 PM EDT), https://perma.cc/8S26-SPTZ.

[178] Katz, *supra* note 2.

[179] *See* SALKOWITZ, *supra* note 1, at 35, 63–64, 72, 104, 106, 110; *Katz, supra* note 2. *See generally* Ball, *7 Reasons Why*, *supra* note 164.

[180] *See* SALKOWITZ, *supra* note 1, at 41, 63–65, 125; Anderson, *supra* note 79, at 50; Katz, *supra* note 2.

[181] *See Salkowitz, supra* note 1, at 63–65*;* Anderson, *supra* note 79, at 50; Aultman, *supra* note 30, at 386–87; Ball*, 7 Reasons Why*, *supra* note 164; Katz, *supra* note 2.

[182] *See* Katz, *supra* note 2 ("Thanks to emerging technologies, the increasing popularity of gaming, and developing mainstream storytelling tactics, there's no better supply of high-upside gambles than video game properties."). S*ee generally* Ball, *7 Reasons Why*, *supra* note 164.

[183] *See* Kuehl, *supra* note 6, at 316–17 (discussing video game incompatibility as traditional copyright).

aware that the industry has progressed since Pong, a primitive tabletop tennis match controlled by a joystick.[184] Video games have been on the market for the general public since the Magnavox Odyssey in 1972—and later that year, Atari released Pong.[185]

These games had a major impact, but that was fifty years ago.[186] Pac-Man first debuted in Tokyo arcades over forty years ago.[187] The Nintendo Entertainment System, or NES, and Sega Genesis are almost forty years old.[188] Crash Bandicoot turned twenty-five years old in 2021.[189] The Sims said "Sul Sul" to the gaming world over two decades ago.[190] The Wii is sixteen years old.[191] The Xbox, its 360 remake, and the first three PlayStation consoles are even older.[192] The courts must acknowledge that video games have evolved, reaching cinematic heights in software, story, style, and gameplay.[193]

2. Misunderstanding the Artistic Merit

The second problem highlights a more substantial concern in legal scholarship: judges lack understanding that all video game IP has artistic

---

[184] *The Father of the Video Game: The Ralph Baer Prototypes and Electronic Games*, SMITHSONIAN, https://perma.cc/F3SJ-S7PV (last visited May 8, 2023) [hereinafter *The Father of the Video Game*] ("Pong, an arcade ping-pong game"); *accord* Nathan Deardorff, *An Argument That Video Games Are, Indeed, High Art*, FORBES (Oct. 13, 2015, 8:15 AM EDT), https://perma.cc/4UG7-VLH8 (comparing Pong to a present-day video game would show an "exponential difference" in the market).

[185] *The Father of the Video Game, supra* note 184 (dating Pong's arcade and home console release in June 1972 and 1975, respectively). *See generally* Magnavox Co. v. Activision, Inc., 848 F.2d 1244 (Fed. Cir. 1988) (finding a patent infringement of Pong in the first video game lawsuit).

[186] *See* Kuehl, *supra* note 6, at 328; *The Father of the Video Game*, *supra* note 184.

[187] *History*, PAC-MAN, https://perma.cc/48S8-F7RB (last visited May 8, 2023) ("It's been 40 years since the beloved PAC-MAN game was introduced to the world.").

[188] *Video Game Consoles Timeline*, WORLD HIST. PROJECT, https://perma.cc/6ALV-EMTQ (last visited May 8, 2023).

[189] *See* Blake Hester, *Crash Bandicoot: An Oral History*, POLYGON (Jun. 22, 2017, 12:00 PM EDT), https://perma.cc/XE5U-VCWF.

[190] *See* Brennan Kilbane, *A History of Simlish, the Language That Defined the Sims: 20 Years of 'Sul Sul*,*'* THE VERGE (Feb. 7, 2020, 9:30 AM EST), https://perma.cc/3VHM-8ZKR ("'Sul-sul' is akin to 'Aloha.'").

[191] David M. Ewalt, *Nintendo's Wii Is a Revolution*, FORBES (Nov. 13, 2006, 9:15 AM EST), https://perma.cc/7GLM-8R9E.

[192] *Id.*; *Video Game Consoles Timeline*, *supra* note 188.

[193] *Compare, e.g.*, Nintendo of America, *The Legend of Zelda: Breath of the Wild – Nintendo Switch Presentation 2017 Trailer*, YOUTUBE (Jan. 13, 2017), https://perma.cc/DJR6-2MBF (illustrating differences in modern audiovisual and gameplay from the same initial story presented in 1986), *with* Zelda Dungeon, *Legend of Zelda (NES) Intro*, YOUTUBE (Sep. 22, 2009), https://perma.cc/QJ5L-QVJG (showing original audiovisual storytelling with the 1986 Legend of Zelda for the NES).

worth—even *Pong*.[194] Computer software has moved beyond the bounds of simplistic code.[195] Issues surrounding graphics and artistic realism remain a central legal dispute, where image quality will only continue to improve in the age of virtual reality.[196] No one bats an eye when drawings and paintings could be mistaken for photographs.[197] However, these concerns reflect broader gaps in judicial perceptions; the range of games on the market is not reflected in pure realism.[198] In other words, the focus on graphics becoming too realistic only furthers disbelief that video games are, at their core, a work of art.[199] These misconceptions affect how video game developers can hold their competition accountable, encouraging aggressive use of the courts by titans in the industry while limiting smaller protections against infringement.[200]

B. *Absence of Adequate Understanding by the Courts Leads to Case Law Ambiguity*

Legal scholarship generally acknowledges that a video game's IP has technical and substantive qualities.[201] However, the motion picture remains the only delineated audiovisual work in the Copyright Act.[202] Without adequate guidance, the courts struggle to address video games and their IP's unique nature.[203] They have been left to their own devices to define the legal

---

[194] *See* Brown v. Ent. Merchs. Ass'n, 564 U.S. 786, 789 (2011); Tetris Holding, LLC v. Xio Interactive, Inc., 863 F. Supp. 2d 394, 405 (D.N.J. 2012); SALKOWITZ, *supra* note 1, at 2, 15–16 (standing at crossroads between art and commerce, graphic storytelling is applied to many art styles including fine art); Suzanne Jackiw, *Title Defense: Creating Consistency in Video Game Title Trademark Law*, 96 J. PAT. & TRADEMARK OFF. SOC'Y 1, 13 (2014).

[195] *See* Kuehl, *supra* note 6, at 328; Orland, *supra* note 37 (showing evolution of hardware's complexity); Van Arnam & Shores, *supra* note 94 ("evolving beyond functional aspects of game architecture and code to all aspects of the creative elements of this art form").

[196] *See* Van Arnam & Shores, *supra* note 94.

[197] *Compare* Papazian, *supra* note 4, at 602 (noting court's difficulty to decide whether to be treated as a commercial product or having artistic merit), *with Hyperrealism Art – The Best Hyper-Realistic Paintings and Artists*, ART IN CONTEXT (Aug. 6, 2021), https://perma.cc/86H9-MKJ4 (praising the modern art form of hyperrealism and photorealism including a list of notable commercial artists).

[198] *See* SALKOWITZ, *supra* note 1, at 63, 65; Jackiw, *supra* note 194, at 13; Ball, *7 Reasons Why*, *supra* note 164. *See generally* Nicolle Lamerichs, Romancing Pigeons: The Deconstruction of the Dating-Sim in Hatoful Boyfriend, 3 WELL PLAYED: A J. ON VIDEO GAMES, VALUES AND MEANING 43, 43 (2015) (discussing favored absurdity and fantasy in video games).

[199] *See* Aultman, *supra* note 30, at 400–01 ("current copyright regime does embrace financially-motivated creative activity"); Jackiw, *supra* note 194, at 13.

[200] *See* Jackiw, *supra* note 194, at 13.

[201] *See* Copyright Act of 1976, 17 U.S.C. § 101 (1976) (defining "audiovisual" and "major motion picture"); Kuehl, *supra* note 6, at 318–19.

[202] *See* 17 U.S.C. § 101.

[203] *Compare* Sega Enters. Ltd. v. Accolade, Inc., 977 F.2d 1510, 1524 (9th Cir. 1992) ("Thus far, many of the decisions in this area reflect the courts' attempt to fit the proverbial square peg in

boundaries of video game IP.[204] Legal scholarship cannot agree on the proper analysis because decisions are based on case-by-case inquiries by judges with varying viewpoints on the industry.[205] It is impossible to create legal methodology if everyone utilizes differing definitions; as a result, there are multiple standards and methodologies, creating further confusion in the present copyright doctrine.[206]

1. Legal Impact on the Interactive Component

This is evident from case law that struggles to recognize a connection between the story and interactive elements of the platform.[207] For example, the Court in *Gravano v. Take-Two Interactive Software, Inc.* determined that video games like "Grand Theft Auto V" qualified as an audiovisual work of artistic merit.[208] They reasoned that the video game was worthy of equal protections as film or television because it contained "story, characters, dialogue, and environment."[209] However, they also noted that this made the nature of Grand Theft Auto V "unique," or different from other video games.[210]

Although early case law supported this opinion, it is no longer precedent; the Supreme Court's decision in *Brown* solidified that every game has artistic merit worthy of copyright protections.[211] However, the New York Supreme Court's decision in *Gravano* occurred seven years after *Brown*.[212] Beyond an understanding that its IP invokes technical and substantive qualities, the platform's interactive element remains ambiguous, often absent, in case law.[213] Without an adequate definition, the Court misunderstood in *Gravano* that all games have protected interactive expression, regardless of the quantity or quality of its audiovisual content.[214]

Champion v. Take Two Interactive Software, Inc. expanded on *Gravano*'s

---

a round hole."), *with* Kuehl, *supra* note 6, at 317, 319, 328.

[204] *See* Papazian, *supra* note 4, at 602.

[205] *See* Papazian, *supra* note 4, at 602.

[206] *See* Papazian, *supra* note 4, at 578, 602 (explaining how video game questions of law "muddled by multiple standards" cause "inconsistent application of those standards to a relatively new medium" by the courts).

[207] *See, e.g.*, Champion v. Take Two Interactive Software, Inc., 64 Misc. 3d 530, 540–41 (N.Y. Sup. Ct. 2019); Gravano v. Take-Two Interactive Software, Inc., 142 A.D.3d 776, 777 (N.Y. Sup. Ct. 2016); *see also* Papazian, *supra* note 4, at 602.

[208] *Gravano*, 142 A.D.3d at 777.

[209] *Id.*

[210] *Id.*

[211] *See* Brown v. Ent. Merchs. Ass'n, 564 U.S. 786, 798 (2011).

[212] *Compare Gravano*, 142 A.D.3d at 776 (finding in 2018), *with Brown*, 564 U.S. at 786 (finding in 2011).

[213] *See* Buckman, *supra* note 6, § 2; Kuehl, *supra* note 6, at 316, 343–44.

[214] *See Brown*, 564 U.S. at 798; SALKOWITZ, *supra* note 1, at 16, 18, 23.

misunderstanding, deciding that a question of legal infringement rested on whether the basketball game, NBA2k18, included an actual story.[215] Reasoning that only games with artistic merit qualified for First Amendment protections, the New York Supreme Court found NBA2k18 was not a protectable work of fiction because it lacked similar elements as Grand Theft Auto V; for qualifying artistic merit, the Court expected "detailed plot created by the game designers."[216] NBA2K18's gameplay instead left the "plot and storyline and completely defin[ing] their character" exclusively to the player.[217] The Court added that "[c]ertainly, games entirely lacking these qualities—for example Pong and Pac-Man—do not meet this literary standard."[218]

Champion and *Gravano* outline where the courts fall behind, still defining some video games as having no substantive worth at all.[219] No matter how simple, video games have recognized copyright protections for gameplay and expression.[220] Further, the unique nature of video games as an audiovisual work is the creation of a custom story through the interaction with each player.[221] The reality is Pac-Man deserves the same protections as Grand Theft Auto V or NBA2k18, because both tell a story through a video game's inseparable interactive element, regardless of detail.[222]

2. Standardization Struggles for the Right of Publicity

Additional failures to address artistic merit include tension between identifying video games as art or commerce; this is evident in right of publicity matters, where courts remain divided on whether to use the *Rogers* or the *Transformative* test because legal scholarship cannot agree on treating it as a copyright violation or a commercial trademark infringement.[223] The *Rogers* test stems from trademark interests, but the Lanham Act is too narrow to provide adequate protections.[224] The *Transformative* test applies derivative works assessment from copyright law, but the right of publicity stems from

---

[215] 64 Misc. 3d 530, 541 (N.Y. Sup. Ct. 2019) (citing *Gravano*, 142 A.D.3d at 777).

[216] *Compare id.* (quoting statements from the "Holdings" subsection), *with* Deardorff, *supra* note 184.

[217] *Champion*, 64 Misc. 3d at 541.

[218] *Id. But see* Atari, Inc. v. N. Am. Philips Consumer Elecs. Corp., 672 F.2d 607, 617 (7th Cir. 1982) (holding Pac-Man had certain "copyrightable expression[s]").

[219] *See* Papazian, *supra* note 4, at 603.

[220] *See* Tetris Holding, LLC v. Xio Interactive, Inc., 863 F. Supp. 2d 394, 405 (D.N.J. 2012).

[221] *Compare* SALKOWITZ, *supra* note 1, at 18, *with* Kuehl, *supra* note 6, at 318, *and* Sedig, *supra* note 5, at 3.

[222] *See Atari*, 672 F.2d at 617 (holding Pac-Man had certain "copyrightable expression[s]").

[223] *See* Aultman, *supra* note 30, at 400–01; Jackiw, *supra* note 194, at 13.

[224] *See* Hart v. Elec. Arts, Inc., 717 F.3d 141, 158 (3rd Cir. 2013); Van Arnam & Shores, *supra* note 94.

trademark infringement.[225] Additionally, the *Transformative* test assumes that infringement occurred, but freedom of expression often outweighs an individual's privacy interests.[226]

It is unclear if the *Transformative* test provides any greater protections than *Rogers*, where most cases conclude in favor of the video game franchises.[227] There is even a third methodology, the Predominant Use Test, which the Court dispelled from doctrine discussion in *Hart v. Entertainment Association, Inc*.[228] Such ambiguity would not be an issue if judges had a standard understanding of how video games sit between the boundaries of both copyright and trademark law.[229]

C. *Main Objective: Modding Outdated Methodologies*

1. Categorizing Case Law Trends is Critical for Copyright Analysis

Legal scholarship will benefit from a more standardized approach in assessing its intellectual property.[230] This begins with a working legal definition of a video game as an interlay of technical, substantive, and interactive IP rooted both in art and commerce.[231] Additionally, substantive IP can be further categorized into a dichotomy resulting in two fundamentally different legal approaches.[232]

2. A Sandbox Standard for Substantial Similarity

Court cases involving the audiovisual copyright in its entirety, or "the feel of the works," rely on substantial similarity for their analysis.[233] Such copyright matters, which carry the majority of case law, require two main steps.[234] First, does the offending work stem from an original work of authorship?[235] Second, if it does, is it a derivative work that receives

---

[225] *See Hart*, 717 F.3d at 158; Van Arnam & Shores, *supra* note 94.

[226] *See Hart*, 717 F.3d at 158–60; Van Arnam & Shores, *supra* note 94.

[227] *See, e.g.*, *Hart*, 717 F.3d at 158, 170.

[228] *Id.* at 153–54.

[229] *See* Buckman, *supra* note 6, § 2. *Compare* SALKOWITZ, *supra* note 1, at 2, 15–16, 65, *with* Aultman, *supra* note 30, at 391.

[230] *E.g.*, Kuehl, *supra* note 6, at 316–17, 319, 328, 343–44; *see* Papazian, *supra* note 4, at 602.

[231] *See* Kuehl, *supra* note 6, at 319; Papazian, *supra* note 4, at 602; Sedig et al., *supra* note 5, at 3, 5; *see also* Deardorff, *supra* note 184 ("Not all games deserve the title of art or high art. But, to be fair, we also sell terrible paintings and trashy books.").

[232] *Compare* Buckman, *supra* note 6, § 2, *with* Jackiw, *supra* note 194, at 13.

[233] *See, e.g.*, Litchfield v. Spielberg, 736 F.2d 1352, 1356–57 (9th Cir. 1984); Maitra, *supra* note 155.

[234] *See* Copyright Act of 1976, 17 U.S.C. § 102(a) (1976).

[235] *Id.*

copyright protections independent of the original work?[236]

Courts should begin their analysis by categorizing the issue as technical or substantive.[237] That variation tweaks how substantial similarities are addressed.[238] In other words, each category of video game copyright asks these two questions in different ways.[239] If legal assessment initially identifies the IP invoked, then natural methodologies already in place will flow.[240]

For example, questions of content infringement are cases involving a video game's substantive IP.[241] These are copyright matters, involving substantial similarity analysis when it is unclear whether the offending work copied the purported original.[242] Audiovisual provisions apply from the Copyright Act.[243] If the offending work initially stemmed from another author's original, then the court must determine whether there is sufficient difference to deem the offending work a derivative, with independent copyright protections.[244]

In contrast, software infringement cases involve a video game's technical IP.[245] Software cases are also copyright matters, involving a substantial similarity analysis when it is unclear whether reverse engineering actually occurred.[246] From there, however, courts instead apply the DMCA to analyze whether the fair use exception applies.[247] Generally, copying software for commercial purposes will not fall under the fair use exception.[248] In that case, courts apply the modified derivative works test from *Sega*, weighing the code's function to create a derivative work against its replication to capitalize on the original work's commercial market.[249]

---

[236] *Id.*

[237] *Compare* Micro Star v. FormGen Inc., 154 F.3d 1107, 1112 (9th Cir. 1998), *and* Tetris Holding, LLC v. Xio Interactive, Inc., 863 F. Supp. 2d 394, 396 (D.N.J. 2012), *with* Sega Enters. Ltd. v. Accolade, Inc., 977 F.2d 1510, 1523–24 (9th Cir. 1992), *and* Sony Comput. Ent., Inc. v. Connectix Corp., 203 F.3d 596, 599 (9th Cir. 2000).

[238] *Compare* 17 U.S.C. §§ 101, 102(b), *with* 17 U.S.C. §§ 512, 1201–02.

[239] *See* 17 U.S.C. §§ 101, 102(a), 512, 1201–02.

[240] *See Micro Star*, 154 F.3d at 1112; *Sega Enters. Ltd.*, 977 F.2d at 1523–24; *Tetris Holding, LLC*, 863 F. Supp. 2d at 396; *Sony Comput. Ent., Inc.*, 203 F.3d at 602.

[241] *See* 17 U.S.C. § 101 (defining audiovisual works); *see, e.g.*, *Micro Star*, 154 F.3d at 1110.

[242] 17 U.S.C. § 102(a)(6); *see, e.g.*, *Micro Star*, 154 F.3d at 1110.

[243] *See* 17 U.S.C. § 101.

[244] 17 U.S.C. § 102(a); *see Micro Star*, 154 F.3d at 1110; *see also* Kuehl, *supra* note 6, at 341.

[245] *See Sega Enters. Ltd.*, 977 F.2d at 1514; Buckman, *supra* note 6, § 1 (differentiating between substantive and technical IP).

[246] *See* Sony Comput. Ent., Inc. v. Connectix Corp., 48 F. Supp. 2d 1212, 1222 (N.D. Cal. 1999).

[247] 17 U.S.C. §§ 512, 1201–1202; *see, e.g.*, Sony Comput. Ent., Inc. v. Connectix Corp., 203 F.3d 596, 602 (9th Cir. 2000).

[248] *See Sega Enters. Ltd.*, 977 F.2d at 1523 (citing Sony Corp. v. Universal City Studios, 464 U.S. 417, 451 (1984)).

[249] *Id.*

2. Transmedia Analysis: Tackling *Rogers* and *Transformative*

In audiovisual storytelling, basic thematic elements are open-ended enough to allow expansive worldbuilding and new storylines with each new publication.[250] The thematic universe that makes up the franchise is a macro view of the copyright.[251] The foundational elements that ground the story's continuity are single portions of audiovisual IP within an entire franchise.[252] A single, independent element of copyright within an overarching work is "transmedia" copyright, referencing its ability to transcend into other works and platforms.[253] Audiovisual copyright consists of combined transmedia elements; separating an individual piece from the copyright as a whole requires different analysis, focusing on questions of copyright infringement for entities such as fictional characters and their associations, i.e., combo moves.[254]

In games based in realism, such as Grand Theft Auto or Madden, the *Rogers* or *Transformative* tests are more appropriate for disputes surrounding nonfictional entities, such as businesses and celebrities.[255] Although rooted in substantial similarity comparisons, transmedia copyright encompasses inevitable entanglement with trademark law.[256] Acknowledging video games as a commodity with artistic merit better addresses the relationship between copyright and trademark law.[257] These tests are similarly intertwined; they both assess a video game character as a precipitate of a real, recognizable person.[258]

The *Rogers* and *Transformative* tests could be synthesized because they handle each side of the same sword.[259] *Rogers* asks whether infringement occurred, establishing liability through identifying who caused the economic injury and how; *Transformative* follows up by clarifying, if it did occur, whether the identity was sufficiently transformed to constitute an

---

[250] *See* Anderson, *supra* note 79, at 50; Aultman, *supra* note 30, at 388.

[251] *See* SALKOWITZ, *supra* note 1, at 41; Anderson, *supra* note 79, at 50; Aultman, *supra* note 30, at 386–87.

[252] *See* SALKOWITZ, *supra* note 1, at 41, 65; Andersoen, *supra* note 79, at 52.

[253] *See* SALKOWITZ, *supra* note 1, at 42; Anderson, *supra* note 79, at 48; Aultman, *supra* note 30, at 385–86.

[254] *See, e.g.*, DC Comics v. Towle, 802 F.3d 1012, 1021 (9th Cir. 2015); Blizzard Ent. v. Lilith Games (Shanghai) Co., 149 F. Supp. 3d 1167, 1173 (N.D. Cal. 2015); *see also* Anderson, *supra* note 79, at 51–52 (defining "spiderweb transmedia").

[255] *See* Hart v. Elec. Arts, Inc., 717 F.3d 141, 158 (3rd Cir. 2013); Van Arnam & Shores, *supra* note 94.

[256] *See* SALKOWITZ, *supra* note 1, at 65; Jackiw, *supra* note 194, at 13; Van Arnam & Shores, *supra* note 94.

[257] *See* SALKOWITZ, *supra* note 1, at 2, 15–16, 65; Aultman, *supra* note 30, at 400–0l; Buckman, *supra* note 6, at 269; Van Arnam & Shores, *supra* note 94. *See generally* Deardorff, *supra* note 184.

[258] *See* Van Arnam & Shore, *supra* note 94.

[259] *See* Van Arnam & Shore, *supra* note 94.

exception.[260] Once *Rogers* finds sufficient substantial similarities to cause association between the character and the persona, then *Transformative* assesses the depiction's originality to determine whether separate copyright protections are given for the celebrity caricature.[261] In other words, *Rogers* and *Transformative* are variations of the substantial similarity analysis and derivative works exception, respectively.[262]

In cases concerning identity infringement, the court must address whether the video game transmedia is based in realism and intends to depict a real entity.[263] Consequently, the injury would stem from an individual's market value and privacy interests, rather than conceptual property.[264] In contrast, transmedia claims based on original content infringement of artwork and depictions from fantasy genres should utilize a copyright analysis based on a presumption of originality.[265] There is a need to standardize factors considering substantial similarity comparisons for video game transmedia, as well as questions of derivative works: appearance, consistency across works, function within the work, and relationship with other prominent elements.[266]

IV. Video Game Industry Scholarship Provides a Framework for Assessing Interactive IP in Substantial Similarity Analysis.

A. *Building Upon Brown: Objective Gameplay Standards*

Precedent considers interactive IP as a subjective and abstract concept in copyright law.[267] In reality, it is only the court's understanding of the gameplay, or the interactive relationship between the player and the game, that remains subjective.[268] The player responds to the game's audiovisual by inputting their decisions into the game's hardware.[269] The hardware then communicates with its programming, and the cycle continues.[270] Gameplay is the nexus between the platform and its user, creating a cyclical bond.[271]

---

[260] *See Hart*, 717 F.3d at 154–55; Van Arnam & Shore, *supra* note 94.

[261] *See* Van Arnam & Shore, *supra* note 94.

[262] *See* Van Arnam & Shore, *supra* note 94.

[263] *See* Buckman, *supra* note 6, § 2; Van Arnam & Shore, *supra* note 94.

[264] *See* Jackiw, *supra* note 194, at 13.

[265] *See* DC Comics v. Towle, 802 F.3d 1012, 1021 (9th Cir. 2015); Blizzard Ent. v. Lilith Games (Shanghai) Co., 149 F. Supp. 3d 1167, 1173 (N.D.Cal. 2015); *see, e.g.*, SALKOWITZ, *supra* note 1, at 5, 63.

[266] *See DC Comics*, 802 F.3d at 1021; SALKOWITZ, *supra* note 1, at 43.

[267] *See, e.g.*, Brown v. Ent. Merchs. Ass'n, 564 U.S. 786, 788 (2011); Tetris Holding, LLC v. Xio Interactive, Inc., 863 F. Supp. 2d 394, 405 (D.N.J. 2012).

[268] *See* Sedig et al., *supra* note 5, at 3, 6 (describing video games as "systems" with "quantifiable outcomes" and proposing objective factors for analysis).

[269] *See* Sedig et al., *supra* note 5, at 4–5.

[270] *See* Sedig et al., *supra* note 5, at 4–5.

[271] *See* Sedig et al., *supra* note 5, at 3, 5.

However, gameplay occurs at a particular point in the relationship.[272] When the player makes a decision, the game takes a concurring action predetermined by the rules and parameters set forth in the code.[273] The player then sees the outcome of their initial decision through the audiovisual display.[274] It is then up to the player to assess how their decision correlated to the action taken by the game.[275] However, they can only infer this relationship from what is available to them: the result.[276]

In other words, gameplay is the result, where the game directly communicates with the player.[277] More importantly, it is the nexus between the game's creator and their audience that legal scholarship often identifies as the "idea-expression dichotomy."[278] Gameplay is unique to each individual and impossible to replicate, but it is not the player's sole creation.[279] Game developers offer the idea; players perform and, consequently, express.[280]

The bond between idea and expression is not too merged to separate; courts have lacked the objective, analytical standards to do so.[281] The courts can analyze gameplay through objective factors: game mechanics and player feedback.[282] There are twelve proposed gameplay factors for analyzing interactive elements, known as the "INFORM Framework."[283]

1. Game Mechanics

Game mechanics are the actions provided by the game.[284] These action choices interplay with the player's reactions, influencing their following

---

[272] *See* CARLO FABRICATORE, GAMEPLAY AND GAME MECHANICS DESIGN: A KEY TO QUALITY IN VIDEOGAMES 1.1 (2007), https://perma.cc/TQB9-MXKK.

[273] *See id*.

[274] *See* Sedig et al., *supra* note 5, at 4–5.

[275] *See* FABRICATORE, *supra* note 272, at 1.1.

[276] *See* FABRICATORE, *supra* note 272, at 1.1; Sedig et al., *supra* note 5, at 4–5.

[277] *See* FABRICATORE, *supra* note 272, at 1.1.; Sedig et al., *supra* note 5, at 3, 5.

[278] *Compare* Tetris Holding, LLC v. Xio Interactive, Inc., 863 F. Supp. 2d 394, 405 (D.N.J. 2012), *with* Sean Baron, *Cognitive Flow: The Psychology of Great Game Design*, GAME DEVELOPER (Mar. 22, 2012), https://perma.cc/9JC2-AZ49 (offering objective parameters on how to influence player's interaction with a video game).

[279] *See generally* Baron, *supra* note 278.

[280] *See* FABRICATORE, *supra* note 272, at 1.1; Baron, *supra* note 278.

[281] *See* Sedig et al., *supra* note 5, at 3, 6 (describing video games as "systems" with "quantifiable outcomes" and proposing objective factors for analysis).

[282] Sedig et al., *supra* note 5, at 5–6, 11.

[283] Sedig et al., *supra* note 5, at 6.

[284] Sedig et al., *supra* note 5, at 5–6; *e.g.*, Kuehl, *supra* note 6, at 327 (explaining how smartphone Free to Play apps incentivizes payment options for players to speed up gameplay); *see* Maitra, *supra* note 155 (proposing game rules as "limitations and affordances" given to the player).

decisions.[285] These are the relevant factors within interactive IP, resulting in a cyclical relationship.[286] Game mechanic factors relate to the presentation of a player's options.[287] These are: player agency in decisions; sense or flow of time within the game; the amount of time available to a player to make a choice; intended focal points of action; "granularity," or complexity of steps within an action; and presence, or how visually obvious a potential choice displays to the player.[288]

2. Player Feedback

In turn, feedback factors involve a player's perceptions of and reactions to the game.[289] Perception factors include: "activation," or reaction time in response to a committed action; how the player's perceptions of the audiovisual content stay consistent or change as the game progresses; the "flow" of a reaction; and whether an emotional response is immediate or gradual.[290] Resulting decision factors include: whether a player's decision affects either a singular element or congruent game components; the resulting changes to audiovisual elements displayed to the player; and the temporal and spatial transitions between those audiovisual changes.[291]

3. Courts and the Core Mechanic: Identifying Interactive IP

Assessing interactive IP requires asking what makes each gameplay unique.[292] The INFORM Framework presents a model for deciphering gameplay, but not all twelve factors will always be relevant; each game has its own distinct combination of mechanics and player reactions.[293] This is known as the *core mechanic*.[294] Consider gameplay factors as thematic elements, or individual building blocks whose unique combination creates a distinct core mechanic.[295] Identifying the core mechanic uncovers a video

---

[285] Sedig et al., *supra* note 5, at 3, 11; *see* Maitra, *supra* note 155 (explaining how resulting structure offered by game rules creates meaning in player's actions).

[286] Sedig et al., *supra* note 5, at 3–5. C*ompare* Copyright Act of 1976, 17 U.S.C. § 102(a)–(b) (1976) (providing that copyright protection does not extend to ideas), *with* Deardorff, *supra* note 184 ("[T]he goal of art is to embody an idea or invite an experience and/or reaction.").

[287] Sedig et al., *supra* note 5, at 5–6; *see, e.g.*, Maitra, *supra* note 155.

[288] Sedig et al., *supra* note 5, at 7–11.

[289] *See* Maitra, *supra* note 155; Sedig et al., *supra* note 5, at 11.

[290] Sedig et al., *supra* note 5, at 11–15.

[291] Sedig et al., *supra* note 5, at 11–15.

[292] *Compare* Tetris Holding, LLC v. Xio Interactive, Inc., 863 F. Supp. 2d 394, 405 (D.N.J. 2012), *with* Sedig et al., *supra* note 5, at 5 (defining core mechanic).

[293] *Compare* Micro Star v. FormGen Inc., 154 F.3d 1107, 1110, 1112 (9th Cir. 1998) ("What, after all, does sheet music do but describe in precise detail the way a copyrighted melody sounds?") (citing WILLIAM F. PATRY, COPYRIGHT L. & PRAC. 168 (1994)), *with* Sedig et al., *supra* note 5, at 6.

[294] Sedig et al., *supra* note 5, at 5.

[295] *See* Sedig et al., *supra* note 5, at 3 (noting cognitive gameplay "designed indirectly"

game's partial fingerprint, or the interactive "feel of the works."[296] Distinctive core mechanics can arise from game mechanics or player feedback factors.[297] The result discerns a unique, distinguishable interactive experience.[298]

For example, SUPERHOT is a game where the player has to survive varying situational shootouts.[299] Its game mechanic factors are notably unique; time, and the opposing shooters, only move when the player moves.[300] As a result, the player feels as if they actively control every shooters' moves while only deciding the actions of one character.[301] Unlike any other virtual fight, the timing function and granularity within a single move affect how players decide to act; they must solve the puzzle by considering how the game's perceived obstacles will respond to the player's feedback.[302] This interaction between the game's puzzle and the player's strategy is SUPERHOT's core mechanic.[303]

Portal is another unique puzzle game because of its core mechanic: a portal gun, utilizing a point-and-click interface on walls to create passageways.[304] The player is a test subject that must escape rooms, problem solving by "thinking with portals" to warp between locations, among other objectives.[305] The Portal game mechanics shape the player's feedback and

---

through other game components); *see also* Maitra, *supra* note 155 (determining "uncopyrightable aspects of a video game [requires the court] not only [to] define the uncopyrightable idea of a game, but also its uncopyrightable rules").

[296] S*ee* SALKOWITZ, *supra* note 1, at 43 ("The key to survival is identifying your core creative value and differentiation."). *Compare* Litchfield v. Spielberg, 736 F.2d 1352, 1356–57 (9th Cir. 1984) ("feel of the works"), *with* Sedig et al., *supra* note 5, at 5 (defining core mechanic).

[297] Sedig et al., *supra* note 5, at 5–11. *Compare* GameSpot, *SUPERHOT - Launch Trailer*, YOUTUBE (Feb. 25, 2016), https://www.youtube.com/watch?v=vrS86l_CtAY, *with* Gamehelper, *Portal Teaser Trailer*, YOUTUBE (Jul. 18, 2006), https://perma.cc/3U9K-CARA (showing core mechanic tutorial).

[298] *See* Tetris Holding, LLC v. Xio Interactive, Inc., 863 F. Supp. 2d 394, 405 (D.N.J. 2012); *see also* Deardorff, *supra* note 184 (inviting the idea that experience is art). *But see Copyright Form Letters: Games*, FINDLAW, https://perma.cc/4ZXX-3U3L (last updated Sept. 21, 2012) ("Copyright protects only the particular manner of an author's expression in literary, artistic, or musical form.").

[299] GameSpot, *supra* note 297.

[300] *See* GameSpot, *supra* note 297, at 00:37 ("COOLEST GAME MECHANIC I'VE SEEN MY ENTIRE LIFE.").

[301] *See* GameSpot, *supra* note 297. *Compare* GameSpot, *supra* note 297, *with* Maitra, *supra* note 155 (resulting structure offered by game rules creates meaning in players' actions).

[302] *See* GameSpot, *supra* note 297. *Compare* GameSpot, *supra* note 297, *with* Sedig et al., *supra* note 5, at 7–15, *and* Maitra, *supra* note 155.

[303] *Compare* GameSpot, *supra* note 297, *with* Sedig et al., *supra* note 5, at 7–15.

[304] *Compare* Gamehelper, *supra* note 297 (showing unique game mechanic utilizing a "portal gun" and resulting player feedback factor that "now you're thinking with portals"), *with* Sedig et al., *supra* note 5, at 11–17.

[305] *See* Gamehelper, *supra* note 297.

how they decide to interact with the portal gun.[306] Although Portal's Aperture Laboratories and other relevant audiovisual elements are unique, this is fundamentally different from its core mechanic; together, these substantive factors define "the feel of the works" in pinpoint detail.[307]

C. *Copyright Co-Op: Substantive and Interactive Interplay*

Core mechanics are a separate form of unprotected copyright indirectly formed from audiovisual IP.[308] The ambiguous "degree of interaction" referenced in *Brown v. Entertainment Merchants Association* was a primitive acknowledgment of the balance between an audiovisual platform's substantive and interactive IP.[309] There are many games that lack substantial audiovisual content but are known instead for their gameplay.[310] In fact, that was the fundamental issue at hand in *Tetris*; the game had a distinct core mechanic analyzed beyond its rules and mechanics.[311] Pong, Pac-Man, and now Wordle all share similar merit in gameplay, despite their simplistic designs.[312]

Nevertheless, core mechanics are intangible precipitates of substantive IP, requiring legal assessment to occur in conjunction with audiovisual copyright.[313] If both the audiovisual and gameplay are substantially similar, then the video game infringed on another work, regardless of how simplistic

---

[306] *See* Maitra, *supra* note 155; Gamehelper, *supra* note 297.

[307] *See* Maitra, *supra* note 155 ("Consider the game of chess. The rules of the game are familiar and, even if invented today, uncopyrightable. Yet creators often receive copyright protection for chess sets. . . . The differences lie in the expressive/nonfunctional elements of the games."). *Compare* Gamehelper, *supra* note 297 (highlighting interactive IP by explaining Portal's gameplay), *with* Lore, *Portal Lore in a Minute!*, YOUTUBE (Feb. 22, 2012), https://perma.cc/RPK8-R4XR (highlighting substantive IP by explaining Portal's story).

[308] *See* Sedig et al., *supra* note 5, at 3 (noting cognitive gameplay "designed indirectly" through other game components); Van Arnam & Shores, *supra* note 94.

[309] *See* 564 U.S. 786, 798 (2011).

[310] *See, e.g.*, Tetris Holding, LLC v. Xio Interactive, Inc., 863 F. Supp. 2d 394, 405 (D.N.J. 2012).

[311] *Id.*; *see* Sedig et al., *supra* note 5, at 2 ("For example, in the game *Tetris*, the essential interactions are rotation and movement of a shape, and these are repeated continually while playing the game. Consequently, these two interactions form the core mechanic."). *But see* Maitra, *supra* note 155 (arguing that the *Tetris* case decision was incorrectly based on uncopyrightable game rules rather than core mechanic consideration in tandem with substantive audiovisual).

[312] *Compare Wordle*, N.Y. TIMES, https://perma.cc/PY3R-X3PN (last visited May 8, 2023), *with* Kuehl, *supra* note 6, at 347–48 (comparing protected expression in Atari, Inc. v. N. Am. Philips Consumer Elecs. Corp., 672 F.2d 607, 607 (7th Cir. 1982) *and Tetris Holding, LLC*, 863 F. Supp.2d at 394)), *and* andys-arcade, *Original Atari PONG (1972) Arcade Machine Gameplay Video,* YOUTUBE (Dec. 11, 2014), at 2:00, https://perma.cc/W5AB-DHLG.

[313] *See* Sedig et al., *supra* note 5, at 3 (noting cognitive gameplay "designed indirectly" through other game components); *see also* Kuehl, *supra* note 6, at 340–41 (noting historical deference to weak protections for game mechanics).

the game seems.[314] This is because similar audiovisual, coupled with similar core mechanics, will result in similar player reactions.[315] In other words, assessing infringement of a video game in its entirety is fundamentally unique from other copyright assessments because it rests on substantial similarity in both audiovisual and gameplay copyright.[316]

1. Discerning Derivative Works from Core Mechanics

Additionally, gameplay analysis aids the derivative works test.[317] This analysis concerns copyright infringement disputes on video game infringement cases like *Micro Star* and *Tetris*.[318] In other words, this type of analysis examines whether one video game, assessing its audiovisual content in its entirety, copied the IP of another.[319] If two games contain substantially similar audiovisual IP, one may still be distinguishable as an inspired but original work.[320]

For example, modding, or consumer-created modifications to original games, is a common form of derivative works in the gaming community.[321] What if a developer utilized identical audiovisual content from Portal, but its gameplay was fundamentally different?[322] "Aperture Tag: The Paint Gun Testing Initiative" is a fan-made game mod of Portal, where a paint gun replaced the portal gun mechanic.[323] "The Paint-Gun Device" shoots varying Gels that change surface terrain, allowing players to bounce off of walls and

---

[314] *E.g.*, Kuehl, *supra* note 6, at 334–48 (citing Blizzard Ent. v. Lilith Games (Shanghai), 149 F. Supp. 3d 1167, 1173 (N.D.Cal. 2015)); *see Tetris Holding, LLC*, 863 F. Supp. 2d at 405.

[315] *See* Micro Star v. Formgen, Inc., 154 F.3d 1107, 1112 (9th Cir. 1997) (citing Litchfield v. Spielberg, 736 F.2d 1352, 1356 (9th Cir. 1984)); *Atari, Inc.*, 672 F.2d at 620. *See generally* Sedig et al., *supra* note 5, at 1–2.

[316] *See, e.g.*, *Tetris Holding, LLC*, 863 F. Supp. 2d at 405; *see also* Kuehl, *supra* note 6, at 341 (copying is improper when egregious but not necessarily identical). *Compare Micro Star*, 154 F.3d at 1109–10 (reasoning through the "derivative works" test), *with* Sedig et al., *supra* note 5, at 1–2 (conceptualizing core mechanics and gameplay).

[317] *Cf. Aperture Tag: The Paint Gun Testing Initiative*, STEAM (July 15, 2014), https://perma.cc/J69J-FFD5 (showing an example of derivative work) [hereinafter *Aperture Tag*].

[318] *See, e.g.*, *Tetris Holding, LLC*, 863 F. Supp. 2d at 405; *Micro Star*, 154 F.3d at 1109.

[319] *See, e.g.*, *Tetris Holding, LLC*, 863 F. Supp. 2d at 405; *Micro Star*, 154 F.3d at 1109–10.

[320] Kuehl, *supra* note 6, at 341; *e.g.*, David Nathaniel Tan, Note, *Owning the World's Biggest eport: Intellectual Property and DotA*, 31 HARV. J.L. & TECH. 965, 969 (2018) (accounting historical creation of DotA from Warcraft III); *see Micro Star*, 154 F.3d at 1109; Lewis Galoob Toys, Inc. v. Nintendo of Am., Inc., 964 F.2d 965, 967 (9th Cir. 1992); Litchfield v. Spielberg, 736 F.2d 1352, 1357 (9th Cir. 1984).

[321] Michael Wueste, *Gaming Mods and Copyright*, MICH. TECH. L. REV., (Nov. 6, 2012), https://perma.cc/PWJ3-4T29. *See generally* Tan, *supra* note 320.

[322] *Compare* CodyCanEatThis, *I Made Portal 3 Because Valve Wouldn't*, YOUTUBE (Oct. 2, 2020), at 00:22, https://perma.cc/8UZA-RDS3 (showing an example of noncommercial infringement), *with Aperture Tag*, *supra* note 317 (showing an example of derivative work).

[323] *See Aperture Tag*, *supra* note 317.

gain speed to beat the clock in varying puzzles and games of virtual tag.[324]

Although initially copied from Portal, Aperture Tag's game mechanic, solving puzzles with painting, is fundamentally different from the portal interface; this causes a player to "think with Gels" instead of the original player feedback factor, "thinking with portals."[325] The core mechanic changed from a portal to a paint gun, resulting in separate copyright protections.[326] A change in fundamental gameplay factors creates a different overall "feel of the works."[327] As a result, the hypothetical would more likely constitute a parody or a derivative work inspired from Valve's Portal.[328] Establishing what defines a video game, creating standards from already established case law, and characterizing interactive copyright through core mechanics will aid future analysis of game mods, the right of publicity, and other legal gray areas.[329]

V. Courts Must Turn to the Comic Industry for Established Takeaways in Transmedia

A. *Telling Tales Through Transmedia: Industry Crossovers in Audiovisual IP*

Comics are a graphic form of storytelling, emphasizing worldbuilding around a portion of transmedia copyright, such as a superhero or other visually distinct protagonist.[330] The platform tells its story through visual, screenshot depictions of motion coupled with audible elements of dialogue, narration, and sound effects communicated through speech bubbles.[331] What makes comics and graphic novels unique is their representations of motion through individual images known as "panels" or snapshots of moments in time; these allow their readers to observe and fill in the open-ended gaps of

---

[324] *See Aperture Tag*, *supra* note 317.

[325] *See* Sedig et al., *supra* note 5, at 11–15. *Compare Aperture Tag*, *supra* note 317 ("[T]hink with Gels!"), *with* Gamehelper, *supra* note 297, at 2:18 ("Now you're thinking with portals.").

[326] *See* Copyright Act of 1976, 17 U.S.C. § 102(a) (1976); Tan, *supra* note 320, at 977 ("Each version of DotA is therefore a unitary, derivative work and entitled to full protection under the Copyright Act.").

[327] Litchfield v. Spielberg, 736 F.2d 1352, 1357 (9th Cir. 1984); *see* Micro Star v. Formgen Inc., 154 F.3d 1107, 1109 (9th Cir. 1998). *See generally* Sedig et al., *supra* note 5, at 15–20.

[328] *See Litchfield*, 736 F.2d at 1357; Tan, *supra* note 320, at 977; *see also* Sony Comput. Ent., Inc. v. Connectix Corp., 48 F. Supp. 2d 1212, 1220 (N.D. Cal. 1999) ("Accolade created something new. Here, Connectix is not creating its own product to be used *in conjunction with* Sony's Playstation. Rather, VGS is a *substitute* product.").

[329] Jackiw, *supra* note 194, at 5; *see* Tan, *supra* note 320, at 986 (noting industry has embraced modding).

[330] *Compare* SALKOWITZ, *supra* note 1, at 2, 41, 63–65, *and* Aultman, *supra* note 30, at 385–87, *with* Anderson, *supra* note 79, at 50, 52.

[331] DC Comics v. Towle, 802 F.3d 1012, 1021 (9th Cir. 2015); SALKOWITZ, *supra* note 1, at 2, 16, 18, 65; Anderson, *supra* note 79, at 49.

the story. [332] Similar to video games, this open-ended nature of graphic storytelling encourages a higher degree of interaction between the reader and the media.[333]

1. Episodic Elements Affect Audience Engagement

As an artistic medium, comics are an audiovisual work, distinct from written literature in the same way as motion pictures, television, and video games.[334] In literary copyright, story through description requires substantial time to develop, and the characters are dependent on the novel plot, whereas audiovisual copyright has a faster turnover rate.[335] Comics are also episodic in nature, allowing quick publication with detailed continuity embedded in storylines.[336] Although television series are also episodic in nature, their seasonal production of multiple episodes at one time limits the degree of interaction fans can have between episodes.[337]

In contrast, comic developers have an intimate relationship with their fan base, allowing the unique opportunity to observe their responses, process the feedback, and apply it to future publications.[338] In other words, the comic industry can gauge how fans would like the story to proceed between comic issues and adapt their storylines accordingly.[339] The relationships between audiences and films can influence a storyline; the mediums which hold substantially less opportunity for interaction than comics provide less story influence and, consequently, inconsistent consumer engagement.[340]

2. Character Development in Situational Storytelling

Comic book characters are easily recognizable transmedia, appearing in

---

[332] SALKOWITZ, *supra* note 1, at 2, 16; Anderson, *supra* note 79, at 48, 50; Aultman, *supra* note 30, at 385–87 (identifying audience participation).

[333] SALKOWITZ, *supra* note 1, at 2, 18, 65; Anderson, *supra* note 79, at 50; Aultman, *supra* note 30, at 385–87; *see* Brown v. Ent. Merch. Ass'n, 564 U.S. 786, 798 (2011); Ball, *Netflix and Video Games*, *supra* note 141.

[334] Walt Disney Prod. v. Air Pirates, 581 F.2d 751, 755 (1978); SALKOWITZ, *supra* note 1, at 2. *But see* Copyright Act of 1976, 17 U.S.C. § 101, § 102(a)(b) (1976) (lacking statutory delineation).

[335] SALKOWITZ, *supra* note 1, at 2; Anderson, *supra* note 79, at 50; *see* Ball, *Netflix and Video Games*, *supra* note 141.

[336] SALKOWITZ, *supra* note 1, at 2, 41, 63–65, 81; Anderson, *supra* note 79, at 50-51; Aultman, *supra* note 30, at 384–86; Ball, *Netflix and Video Games*, *supra* note 141.

[337] *Compare* SALKOWITZ, *supra* note 1, at 2, 37, *with* Ball, *Netflix and Video Games*, *supra* note 141.

[338] SALKOWITZ, *supra* note 1, at 5, 11, 37, 65, 109; *see, e.g.*, Aultman, *supra* note 30, at 393–94 (identifying fanfiction and user generated content as derivative works).

[339] *See* SALKOWITZ, *supra* note 1, at 5, 11; Anderson, *supra* note 79, at 48–50; Aultman, *supra* note 30, at 386–87, 390.

[340] *Compare* SALKOWITZ, *supra* note 1, at 2, 5, 11, 15–16, *with* Ball, *Netflix and Video Games*, *supra* note 141.

comics as well as film, television, and video games.[341] In contrast, literary characters are generally indistinguishable without their textual descriptions because they cannot be separated from their stories.[342] For example, it would be impossible to delineate copyright protections for a brunette teenage girl holding a bow without first knowing about her victory in the 74th annual Hunger Games.[343] A textual description is insufficient, while a physical depiction allows the courts to identify a character without any knowledge of their story.[344]

The fundamental differences stem from story development.[345] For books, authors write and build upon a plot; as they do, literary characters develop from those plot lines.[346] In graphic storytelling, plots are written in episodes where story developers build scenes and situations around already-established characters.[347] In other words, every comic book issue starts with the hypothetical: if we placed this character in that sticky situation, what would occur?[348]

3. Compatibility in Cross-Industry Collaboration

To bridge the gaps in video game copyright, the courts can turn to comic book case law.[349] Video game transmedia is primarily similar to comic books and graphic novels, holding a strong relationship between the two audiovisual platforms.[350] Their similarity in story elements and episodic nature allow conclusions about video game IP to be drawn from comic book history.[351] This is because comic book characters and video game avatars are cut from the same cloth; the substantive nature of their IPs hold similarities

---

[341] SALKOWITZ, *supra* note 1, at 15–16, 63–65; *see* Anderson, *supra* note 79, at 52 (explaining spiderweb model of transmedia storytelling).

[342] *See* Walt Disney Prods. v. Air Pirates, 581 F.2d 751, 755 (1978).

[343] *Compare* Tirzah Price, *Katniss Everdeen: A Hunger Games Character Guide*, AUDIBLE (Feb. 22, 2022), https://perma.cc/2CRV-TQLW (summarizing literary character), *with* Lionsgate Movies, *The Hunger Games (2012 Movie) – Official Theatrical Trailer – Jennifer Lawrence & Liam Hemsworth*, YOUTUBE (Nov. 14, 2011), https://perma.cc/8HX9-P988 (showing more distinct character as audiovisual transmedia).

[344] *See* DC Comics v. Towle, 802 F.3d 1012, 1021 (9th Cir. 2015) ("physical and conceptual qualities").

[345] *See* SALKOWITZ, *supra* note 1, at 2.; Anderson, *supra* note 79, at 48; Aultman, *supra* note 30, at 385–86; Ball, *Netflix and Video Games*, *supra* note 141.

[346] SALKOWITZ, *supra* note 1, at 2, 41–42, 63–65, 81; *see* Anderson, *supra* note 79, at 50; Aultman, *supra* note 30, at 386–87.

[347] Anderson, *supra* note 79, at 52; Aultman, *supra* note 30, at 386.

[348] *See* Ball, *Netflix and Video Games*, *supra* note 141; *see also* Anderson, *supra* note 79, at 52.

[349] *See, e.g.*, Blizzard Ent., Inc. v. Lilith Games (Shanghai) Co., 149 F. Supp. 3d 1167, 1173 (N.D. Cal. 2015) (citing DC Comics v. Towle, 802 F.3d 1012, 1012 (9th Cir. 2015)).

[350] SALKOWITZ, *supra* note 1, at 15–16, 110; *see* Katz, *supra* note 2.

[351] SALKOWITZ, *supra* note 1, at 2–3, 15–16, 81; Anderson, *supra* note 79, at 53.

in story development, publication timing, and audience engagement.[352] Video games are similarly focused on situational storytelling, developing subplots and side quests around a singular avatar with one overarching motive.[353]

Scalia's distinction of interactive IPin the *Brown* decision also supports why comics hold the greatest similarity to video games.[354] The relationship between a video game and its player results in immediate interaction influencing the story.[355] For comics, the reader also maintains an influential, interactive relationship with the media.[356] This is due to its episodic nature in storytelling coupled with an active and engaging fan base.[357] The comic industry is rich with similar transmedia copyright, including caselaw history after Marvel and DC's cinematic success of comic book superheroes.[358]

B. *Lessons from Caselaw: Copyright Protections for Comic Book Characters*

The Ninth Circuit established copyright protections for comic book characters in *Walt Disney Productions v. Air Pirates*, an infringement case about a parody comic book series depicting Mickey Mouse and other iconic Disney cartoon characters with adult themes.[359] There was ambiguity as to whether Mickey and his friends should be treated as audiovisual elements from a cartoon strip, or literary characters from books and other stories.[360] The Court held that comic book characters were distinct from literary characters because their descriptions were shown rather than told: "a comic book character, which has physical as well as conceptual qualities, is more likely to contain some unique elements of expression."[361] This established cartoon and comic book characters as audiovisual copyright because a physical design is an original work of authorship independent of an overarching storyline.[362]

---

[352] SALKOWITZ, *supra* note 1, at 41–42, 65; *see* Anderson, *supra* note 79, at 52–53.

[353] *See* SALKOWITZ, *supra* note 1, at 2, 15–16, 65, 81; Aultman, *supra* note 30, at 386–87; Kuehl, *supra* note 6, at 318.

[354] *See* Brown v. Ent. Merchs. Ass'n., 564 U.S. 786, 798 (2011); Ball, *Netflix and Video Games*, *supra* note 141.

[355] Ball, *Netflix and Video Games*, *supra* note 141.

[356] SALKOWITZ, *supra* note 1, at 2, 5, 11, 16, 18; *see, e.g.*, Aultman, *supra* note 30, at 393–94.

[357] SALKOWITZ, *supra* note 1, at 4, 36, 107; *see* Anderson, *supra* note 79, at 48, 50; Aultman, *supra* note 30, at 393–94.

[358] *See* SALKOWITZ, *supra* note 1, at 4, 36, 107.

[359] 581 F.2d 751, 755 (9th Cir. 1978).

[360] *Id.* at 757–58.

[361] *Id.* at 755; s*ee also* TMTV Corp. v. Pegasus Broad. of San Juan, 490 F. Supp. 2d 228, 228 (D.P.R. 2007).

[362] *Walt Disney Prods.*, 581 F.2d at 755; *see* SALKOWITZ, *supra* note 1, at 41–42, 106–07; Anderson, *supra* note 79, at 52–53.

1. Batmobile Begins: The DC v. Towle Test

The Court in *DC v. Towle* synthesized a three-pronged test to determine whether a comic book character is entitled to copyright protection.[363] The Court had to determine whether the Batmobile received copyright protections after DC sued Towle for running a business making and selling exact replicas of various models.[364] The Court applied the three-pronged character test, noting that even when a character lacks sentient attributes and does not speak, such as a car, it can still be a protectable character.[365]

First, the character must have ''physical as well as conceptual qualities.''[366] This simply means that it must be audiovisual IP, otherwise it would fall under literary copyright.[367] Second, the character must be consistently recognizable whenever it appears; the character need not have the same visual appearance, but it must have "consistent, identifiable character traits and attributes." [368] Third, the character must be ''especially distinctive'' and ''contain some unique elements of expression.''[369]

2. Objective Standards for Character Copyright

When assessing a comic book character, there is a blended objective and subjective standard.[370] As audiovisual copyright, the Batmobile had multiple visual appearances in comic books as well as film and television adaptations.[371] The Court applied its objective standard, the three-pronged test, by utilizing a fact-specific description to define the crime-fighting vehicle's identity.[372] The Court observed the Batmobile's first appearance in 1941 and discerned consistent traits of the automobile in a holistic look at the derivative works.[373]

Some of the key characteristics the Court noted were appearance and design style, carried weaponry, functional role within the story, and relationship.[374] For example, the Court identified the Batmobile as sleek and

---

[363] 802 F.3d 1012, 1021 (9th Cir. 2015).

[364] *Id.*

[365] *Id.* (quoting Halicki Films, LLC v. Sanderson Sales & Mktg., 547 F.3d 1213, 1224 (9th Cir. 2008)); *see* SALKOWITZ, *supra* note 1, at 65 (discussing recognizability).

[366] *Walt Disney Prods.*, 581 F.2d at 755.

[367] *Id.*

[368] *DC Comics*, 802 F.3d at 1022; Rice v. Fox Broad. Co., 330 F.3d 1170, 1175 (9th Cir. 2003).

[369] *Halicki*, 547 F.3d at 1224–25; *see also* Copyright Act of 1976, 17 U.S.C. § 201(a) (1976); TMTV Corp. v. Pegasus Broad. of San Juan, 490 F. Supp. 2d 228 (D.P.R. 2007) (finding stock characters are not copyrightable).

[370] *See* Societe Civile Succession Guino v. Renoir, 549 F.3d 1182, 1186 (9th Cir. 2008).

[371] *DC Comics*, 802 F.3d at 1021 (quoting *Walt Disney Prods.*, 581 F.2d at 755). *Compare* SALKOWITZ, *supra* note 1, at 15, 37, *with* Anderson, *supra* note 79, at 50–51.

[372] *DC Comics*, 802 F.3d at 1021.

[373] *Id.*

[374] *Id.* at 1021–22.

always "bat-like" in appearance; it carried "high-tech gadgets and weaponry" such as the bat-phone, or shark repellant spray.[375] Its function within the story served Batman as a powerful "crime-fighting" sidekick, aiding Gotham's hero by allowing quick maneuvers while he fights villains.[376] The Court held that the Batmobile deserved copyright protections as a comic book character, noting that its distinctive name identified it as more prominent and recognizable than a stock character.[377]

B. *Multi-Media Metaverse: Synthesizing Character Case Law*

Through the *Towle* test, the Court established three consistent points about comic book IP.[378] First, although absent acknowledgment in the Copyright Act, comic books are audiovisual in nature.[379] Second, trademark law is also inexplicably intertwined with a comic book's audiovisual copyright.[380] Third, the character's copyright strength stems from consistency and distinctive design.[381]

1. The Legal Basis Behind *Blizzard v. Lilith*

Blizzard Entertainment v. Lilith Games (Shanghai) solidified the *Towle* test's cross-industry function when the Ninth Circuit considered transmedia copyright protections for prominent video game franchises.[382] Valve and Blizzard Entertainment are the names behind several well-established franchises in the industry, including "Warcraft," "World of Warcraft," "Starcraft," "Diablo," and "DotA."[383] As Plaintiffs in *Blizzard Entertainment*, they claimed Defendants made two mobile games that copied substantial portions of their audiovisual copyright, including "settings, terrain, background art, and other assets" from their various franchises.[384] "DotA Legends" was initially released in China, and UCool, Inc. later adapted it

---

[375] *Id.*

[376] *Id.*

[377] *Id.* at 1022; *see also* Copyright Act of 1976, 17 U.S.C. § 201(a) (1976); TMTV Corp. v. Pegasus Broad. of San Juan, 490 F. Supp. 2d 228 (D.P.R. 2007).

[378] *DC Comics*, 802 F.3d at 1021.

[379] *Id.*; *see* SALKOWITZ, *supra* note 1, at 2; *see also* 17 U.S.C. § 201(a); *TMTV Corp.*, 490 F. Supp. 2d at 235–36 (finding especially distinctive transmedia protectable independent of the entirety of the work); Anderson, *supra* note 79, at 49 (noting audiovisual roots in non-digital "media convergence").

[380] *DC Comics*, 802 F.3d at 1021–22; *see* Walt Disney Prods. v. Air Pirates, 581 F.2d 751, 755 (1978); SALKOWITZ, *supra* note 1, at 65.

[381] *DC Comics*, 802 F.3d at 1021–22; *see* Aultman, *supra* note 30, at 389; Papazian, *supra* note 4, at 602.

[382] 149 F. Supp. 3d 1167, 1173 (N.D. Cal. 2015) (citing *DC Comics*, 802 F.3d at 1012, 1019).

[383] *Id.* at 1169.

[384] *Id.* at 1169–70. *See generally* Aultman, *supra* note 30, at 386 (defining universe parameters).

into an English version called "Heroes Charge."[385]

Plaintiffs essentially sought standing for copyright infringement of their substantive copyright, regardless of their gameplay.[386] As a result, Blizzard and Valve had to present their claim as mass infringement of multiple transmedia, arguing each separate portion within the collective game were "distinctive characters" by "names . . . appearances, clothing, weapons, traits, abilities." including "copied. . . 'spells' (or in-game abilities), special powers, and icons," as well as "ongoing stories."[387] In other words, they created a general blanket statement; by copying the entirety of the "Warcraft" multiverse, all identifiable transmedia making up the mobile game's audiovisual copyright was a separate offending work, and the majority of the infringed transmedia had copyright protections.[388] The blanket statement attempted to forgo individually listing each piece of Warcraft transmedia they claimed Defendants had copied.[389]

This attempt had a secondary purpose beyond saving everyone in the legal proceeding from inevitable, tedious categorization.[390] If a game series had a unique and original copyright, its franchise would develop in correlation with how popular and notable the series became.[391] Prominent transmedia within the game would become more recognizable as the series developed, and more transmedia would be added with each new game in the franchise; consequently, the multiverse expands in tandem.[392]

By forgoing individual delineation, Plaintiffs claimed copyright protections for their transmedia by association with Warcraft's multiverse.[393] If they agreed, the Court would have reasoned that the franchise's popularity established its originality, and each playable character or other transmedia had equal copyright protections in proportion with their prominence in the franchise.[394] By this logic, copyright protections would be based on association, rather than their originality in design.[395] The Court in

---

[385] *Blizzard Ent.*, 149 F. Supp. 3d at 1169–70; Kuehl, *supra* note 6, at 334–38; Tan, *supra* note 320, at 975.

[386] *Blizzard Ent.*, 149 F. Supp. 3d at 1170. *See generally* Anderson, *supra* note 79, at 50, 52 (delineating franchise and spiderweb models for transmedia storytelling).

[387] *Blizzard Ent.*, 149 F. Supp. 3d at 1170.

[388] *See id.*; Anderson, *supra* note 79, at 50–51.

[389] *See Blizzard Ent.*, 149 F. Supp. 3d at 1170.

[390] Anderson, *supra* note 79, at 50.

[391] *E.g.*, SALKOWITZ, *supra* note 1, at 134 (discussing multiverse expansion strategy); *see* Aultman, *supra* note 30, at 393–94.

[392] Anderson, *supra* note 79, at 50; *see* SALKOWITZ, *supra* note 1, at 41, 63–64.

[393] *Blizzard Ent.*, 149 F. Supp. 3d at 1170, 1173; *see* Anderson, *supra* note 79, at 50–51 (delineating franchise transmedia).

[394] *But see Blizzard Ent.*, 149 F. Supp. 3d at 1173 (quoting Feist Publ'n, Inc. v. Rural Telephone Serv. Co., Inc., 499 U.S. 340 (1991)).

[395] *Compare, e.g.*, Kuehl, *supra* note 6, at 343 ("Maybe because the space the Kardashian family currently occupies in popular culture, their identifying characteristics could fit within the scope

Blizzard Entertainment found this line of analysis incorrect; instead, the Court found the Plaintiffs' all-encompassing description insufficient because the "Warcraft" transmedia could not receive copyright protections based on their role within the franchise.[396]

For their analysis, the Ninth Circuit looked to the comic industry rather than industry-specific caselaw.[397] They cited *DC Comics v. Towle* to explain the insufficiency in the Plaintiffs' description.[398] Specifically, they noted that the Batmobile only received copyright protection "after extensively cataloging the car's distinctive characteristics," whereas Plaintiffs described their transmedia through "conclusory statements."[399] Unless Plaintiffs take the time to both name and describe each instance of alleged transmedia infringement, they "plead no facts demonstrating that any one of the dozens of characters are plausibly copyrightable."[400] In other words, their claim failed to describe what made their purported transmedia original and how the Court could identify uses of their original concept.[401]

2. Identifying Infringement in Conceptual Copying

By citing *DC Comics v. Towle*, the Ninth Circuit determined that legal analysis of video game transmedia rests on the root of the purported injury, rather than a video game as art or commerce.[402] The prominence and popularity, or how recognizable transmedia is to a consumer, concerns its value as an identifiable trademark and its resulting market value.[403] If the claim concerns someone's trademark, identity, or right of publicity, then the purported infringement claims injury by stealing from the economic value of an original commodity.[404] In contrast, the transmedia's substantive content concerns its role as an art medium; although infringement may profit off of another's success, that value is earned by stealing the original

---

of the three-part *Towle* test.") *with, e.g.*, Marc J. Rachman & Brooke Erdos Singer, *Was Missguided Misguided? Kim Kardashian West Obtains $2.7 Million Judgment in Right of Publicity and Trademark Suit*, DAVIS + GILBERT, LLP (Aug. 1, 2019), https://perma.cc/78QQ-LDH3 (explaining rather than selling the Kardashian persona itself, injury stems from "us[ing] her persona and likeness to sell" because it makes consumers "erroneously believe that she was affiliated").

[396] *Blizzard Ent.*, 149 F. Supp. 3d at 1173.

[397] *Compare* Hart v. Elec. Arts, Inc., 717 F.3d 141, 153 (3rd Cir. 2013), *with Blizzard Ent.*, 149 F. Supp. 3d at 1173 (quoting DC Comics v. Towle, 802 F.3d 1012, 1019 (9th Cir. 2015)), *and* Rice v. Fox Broad. Co., 330 F.3d 1170, 1175 (9th Cir. 2003).

[398] *Blizzard Ent.*, 149 F. Supp. 3d at 1174.

[399] *Id.* at 1173–74 (citing *DC Comics*, 802 F. 3d at 1025).

[400] *Id.* at 1174.

[401] *See id.* at 1173; *see also* Kuehl, *supra* note 6, at 330, 332 (differentiating between originality versus novelty).

[402] *See Blizzard Ent.*, 149 F. Supp. 3d at 1173.

[403] *See id.*; SALKOWITZ, *supra* note 1, at 65.

[404] *Compare* Hart v. Elec. Arts, Inc., 717 F.3d 141, 153 (3rd Cir. 2013), *with* 15 U.S.C. §§ 1051–1127.

content itself.[405]

Consequently, this limited the scope of both the *Rogers* and the *Transformative* tests in video game infringement claims.[406] The *Rogers* test determines whether association with the original commodity occurred; the *Transformative* test assesses whether such association is permitted as a derivative work.[407] For plaintiffs to otherwise pursue this analysis, each portion of infringed transmedia must have been a registered trademark of the franchise.[408] Put simply, courts should use the *Rogers* and *Transformative* tests in cases where plaintiffs claim a video game character infringes on a real identity, such as a registered trademark or a celebrity's right of publicity[409]

Claims of copying someone else's original content—such as a multiverse, character, or other fictional entity—should first utilize the *Towle* test to determine whether the defendant's copyright is unique and original enough to claim ownership.[410] Courts must apply the substantial similarity standard and derivative works analysis once plaintiffs establish sufficient delineation of their transmedia: that their character concept is deemed original enough to receive legal protections.[411]

CONCLUSION

As cross-market collaboration within the entertainment industry continues to expand, it becomes increasingly imperative that the legal field establish standardized audiovisual scholarship.[412] That starts with acknowledging the three types of copyright that constitutes a video game, its merit as both art and commerce, and its connection to trademark law.[413] At its core, copyright analysis invokes substantial similarity comparisons and derivative work exceptions; the challenge lies in determining which variation applies. [414] Technical IP invokes fair use and functionality considerations.[415] Analysis of a game requires discerning its core mechanic,

---

[405] *E.g.*, Kuehl, *supra* note 6, at 341; *see* SALKOWITZ, *supra* note 1, at 43.

[406] *Compare Blizzard Ent.*, 149 F. Supp. 3d at 1173 (citing DC Comics v. Towle, 802 F.3d 1012, 1021 (9th Cir. 2015)), *with Hart*, 717 F.3d at 153.

[407] *See Hart*, 717 F.3d at 153.

[408] *See* Lanham Act, 15 U.S.C. §§ 1051–1127 (2013); *Hart*, 717 F.3d at 153.

[409] *See Hart*, 717 F.3d at 153; Papazian, *supra* note 4, at 601–03.

[410] *DC Comics*, 802 F.3d at 1021; *see, e.g.*, *Blizzard Ent.*, 149 F. Supp. 3d at 1173.

[411] *Blizzard Ent.*, 149 F. Supp. 3d at 1173.

[412] *See* Papazian, *supra* note 4, at 594–96, 602.

[413] *See* Jackiw, *supra* note 194, at 13; Kuehl, *supra* note 6, at 316–17; Van Arnam & Shores, *supra* note 94.

[414] Copyright Act of 1976, 17 U.S.C. § 102(a) (1976).

[415] *See* Micro Star v. Formgen Inc., 154 F.3d 1107, 1112 (9th Cir. 1998); Sega Enters. Ltd. v. Accolade, Inc., 977 F.2d 1510, 1523–24 (9th Cir. 1992).

or what makes its gameplay unique, through a comparison of both the Interactive IP and its relations to the audiovisual elements.[416] Transmedia under the Substantive IP considers a *Rogers-Transformative* tag-team for issues stemming from real entities and their identity interests: fictional and conceptual characters are questions of originality under the comic book character's *Towle* test.[417] As courts begin to standardize how they discuss video games, legal scholarship will move past *Pong* into a rich, expansive industry, well on its way towards dominating the box offices.[418]

---

[416] *See* Tetris Holding, LLC v. Xio Interactive, Inc., 863 F. Supp. 2d 394, 396 (D.N.J. 2012); Maitra, *supra* note 155; Sedig et al., *supra* note 5, at 3–5; *see also* FABRICATORE, *supra* note 272.

[417] DC Comics v. Towle, 802 F. 3d 1012, 1021 (9th Cir. 2015); Hart v. Elec. Arts, Inc., 717 F.3d 141, 158 (3rd Cir. 2013); *see* SALKOWITZ, *supra* note 1, at 41–42; Van Arnam & Shores, *supra* note 94.

[418] *See* Salkowitz, *supra* note 1, at 41–42; Ball, *Netflix and Video Games, supra* note 141; Ball, *7 Reasons Why*, *supra* note 164; Katz, *supra* note 2.