

# Copyrights and Intellectual Property - Portions of Video Games May Constitute Protected Property. (Atari, Inc. v. North American Philips Consumer Electronics Corp.)

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## NOTE

**COPYRIGHTS AND INTELLECTUAL PROPERTY — Portions of Video Games May Constitute Protected Property.** *Atari, Inc. v. North American Philips Consumer Electronics Corp.*, 672 F.2d 607 (7th Cir.), *cert. denied*, 103 S. Ct. 176 (1982).

### I. INTRODUCTION

Copyright encourages individual effort by ensuring personal gain for creators' efforts.<sup>1</sup> Yet, the primary purpose of copyright law is not to secure an economic benefit for an author, but to benefit society<sup>2</sup> by stimulating the production of the sciences and useful arts.<sup>3</sup> The policy which underlies the grant of a copyright monopoly is that creators who know they will be rewarded for their efforts will produce works which will benefit society.<sup>4</sup> Copyright law attempts to protect a creator's efforts from piracy, while not creating too broad a monopoly which might circumscribe the development of the sciences and useful arts.

To fulfill the constitutional purpose of the copyright clause, copyright law must continually adapt to technological developments.<sup>5</sup> Recently, the development of video games has caused the law of copyright to evolve. Prior to 1981, the inventors of video games could not rely on copy-

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1. The United States Supreme Court has stated that the "economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts.'" *Mazer v. Stein*, 347 U.S. 201, 219 (1954).

2. See 1 M. NIMMER, *NIMMER ON COPYRIGHT* § 1.03[A] (14th ed. 1982).

3. "The Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." U.S. CONST. art. I, § 8, cl. 8. However, "[t]here is some disagreement on whether 'science' refers to the work of authors and 'useful arts' to the product of inventors, or whether the relationship is reversed." See M. NIMMER, *supra* note 2, § 1.03 n.1.

4. See *Mazer v. Stein*, 347 U.S. 201, 219 (1954).

5. See generally *Midway Mfg. Co. v. Bandai-America, Inc.*, 546 F. Supp. 125 (D.N.J. 1982).

right law to protect their products from piracy. The originator was given a Hobson's choice: he could register the video game's software, or he could attempt to register the game itself. Neither type of registration would provide sufficient protection.

If the creator registered the video game's software, it would be protected. Courts have held that computer programs are the type of work intended by Congress to be included among "works of authorship"<sup>6</sup> protected by the copyright act.<sup>7</sup> As a practical matter, however, the value of this type of copyright is limited because "[t]he identical audiovisual display may be created from many different computer programs . . . ."<sup>8</sup> Consequently, the originator is assured of a copyright, but its protection is minimal.

If the originator chose to copyright the game itself, the scope of protection is limited as well because a game is, for the most part, a "work of utility."<sup>9</sup> A work of utility is not within the subject matter of work protected by copyright law.<sup>10</sup> For an object to be copyrightable, it must be a work of authorship.<sup>11</sup> A court must determine what part of the game is utilitarian and, therefore, not protected and what part is a pictorial, graphic or sculptural work of authorship, sufficiently original to be protected.<sup>12</sup> Generally, games as a whole have been held not to be copyrightable,<sup>13</sup> while parts of games which are sufficiently close to the statutory subject matter have been granted copyrights.<sup>14</sup> Labels for games,

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6. "Copyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device." 17 U.S.C. app. § 102(a) (1976).

7. *Tandy Corp. v. Personal Micro Computers, Inc.*, 524 F. Supp. 171, 173 (N.D. Cal. 1981).

8. *Stern Elecs., Inc. v. Kaufman*, 523 F. Supp. 635, 639 (E.D.N.Y. 1981), *aff'd*, 669 F.2d 852 (2d Cir. 1982).

9. *See* 1 M. NIMMER, *supra* note 2, § 2.18. Games and toys are included in this section as works of utility. *Id.* § 2.18(H)(1), (3).

10. *Id.* § 2.18.

11. 17 U.S.C. app. § 102(a) (1976).

12. *Durham Indus., Inc. v. Tomy Corp.*, 630 F.2d 905, 914-15 (2d Cir. 1980).

13. *See, e.g., Anti-Monopoly, Inc. v. General Mills Fun Group*, 611 F.2d 296 (9th Cir. 1979); *Chamberlin v. Uris Sales Corp.*, 56 F. Supp. 987 (S.D.N.Y. 1944), *aff'd*, 150 F.2d 512 (2d Cir. 1945).

14. 1 M. NIMMER, *supra* note 2, § 2.18(H)(3).

patterns of game boards and designs on playing cards have been copyrighted as pictorial or graphic works.<sup>15</sup>

However, the subject matter of video games does not fit under the traditional copyright categories for games — pictorial or graphic works. Rather, the subject matter of video games — a motion picture or other audiovisual work — falls under title 17, section 102(a)(6) of the United States Code. Audiovisual works are

works that consist of a series of related images which are intrinsically intended to be shown by the use of machines, or devices such as projectors, viewers, or electronic equipment, together with accompanying sounds, if any, regardless of the nature of the material objects, such as films or tapes, in which the works are embodied.<sup>16</sup>

The subject matter of a motion picture or audiovisual work is generally not constrained by the notion of the work as being utilitarian.<sup>17</sup> Thus, a video game could receive enhanced protection under a copyright as an audiovisual work.

A series of recent cases has discussed the scope of copyright protection for a video game under a copyright as an audiovisual work.<sup>18</sup> *Atari, Inc. v. North American Philips Consumer Electronics Corp.*,<sup>19</sup> decided by the Court of Appeals for the Seventh Circuit on March 2, 1982, is a case within the mainstream of these developments. This note will examine the foundations for the *Atari* decision and will ad-

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15. *Id.*

16. 17 U.S.C. app. § 101 (1976).

17. See generally *Mitchell Bros. Film Group v. Cinema Adult Theater*, 604 F.2d 852 (5th Cir. 1979), *cert. denied*, 445 U.S. 917 (1980); *Time, Inc. v. Bernard Geis Assocs.*, 293 F. Supp. 130 (S.D.N.Y. 1968).

18. *Williams Elec., Inc. v. Artic Int'l, Inc.*, 685 F.2d 870 (3d Cir. 1982); *Atari, Inc. v. North Am. Philips Consumer Elecs. Corp.*, 672 F.2d 607 (7th Cir.), *cert. denied*, 103 S. Ct. 176 (1982); *Stern Elecs., Inc. v. Kaufman*, 669 F.2d 852 (2d Cir. 1982); *Midway Mfg. Co. v. Omni Video Games*, 668 F.2d 70 (1st Cir. 1981); *Durham Indus., Inc. v. Tomy Corp.*, 630 F.2d 905 (2d Cir. 1980); *Cinematronics, Inc. v. K. Noma Enter.*, No. 81-4644, slip op. (C.D. Cal. Apr. 20, 1982); *Midway Mfg. Co. v. Artic Int'l, Inc.*, 547 F. Supp. 999 (N.D. Ill. 1982); *Atari, Inc. v. Amusement World, Inc.*, 547 F. Supp. 222 (D. Md. 1981); *Midway Mfg. Co. v. Bandai-America, Inc.*, 546 F. Supp. 125 (D.N.J. 1982); *Midway Mfg. Co. v. Dirkschneider*, 543 F. Supp. 466 (D. Neb. 1981); *Nintendo of America, Inc. v. Bay Coin Distrib., Inc.*, COPYRIGHT L. REPS. (CCH) ¶ 25,409 (E.D.N.Y. May 28, 1982).

19. *Atari, Inc. v. North Am. Philips Consumer Elecs. Corp.*, No. 81-C-6434, slip op. (N.D. Ill. Dec. 4, 1981), *rev'd*, 672 F.2d 607 (7th Cir.), *cert. denied*, 103 S. Ct. 176 (1982).

dress how early objections to the copyright of video games were resolved, the methodologies used by the *Atari* court to find the likelihood of infringement, and how these methodologies reflect the purposes of the copyright clause.

## II. A PRIMER ON COPYRIGHT LAW

Section 102(a) of the copyright law delineates the subject matter of copyright protection and protects original works of authorship fixed in any tangible medium of expression.<sup>20</sup> The scope of this grant, however, is limited by section 102(b), which provides that copyright protection does not extend to an idea.<sup>21</sup> "The copyright owner's protectible property consists in the development, treatment and expression given in the copyrighted work . . ."<sup>22</sup> Thus, while an idea is not copyrightable, its expression is.<sup>23</sup> If the medium of expression is a literary work, its expression is characterized as a series of words, numbers or other verbal or numerical symbols or indicia.<sup>24</sup> For example, characters or themes are generally not copyrightable<sup>25</sup> in a literary work. If the medium of expression is an audiovisual work, the expression is characterized as a series of related images.<sup>26</sup> This series, if it is original, will be protected by copyright law.

Basically, there are two elements to an infringement action: first, the establishment of a valid copyright;<sup>27</sup> and second, the establishment of copying by the defendant.<sup>28</sup>

20. 17 U.S.C. app. § 102(a) (1976).

21. "In no case does copyright protection for an original work of authorship extend to any idea . . ." 17 U.S.C. app. § 102(b) (1976).

22. *Columbia Pictures Corp. v. National Broadcasting Co.*, 137 F. Supp. 348, 353 (S.D. Cal. 1955). See Chafee, *Reflections on the Law of Copyright*, 45 COLUM. L. REV. 503, 513 (1945).

23. See Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 U.C.L.A. L. REV. 1180, 1189 (1970).

24. 1 M. NIMMER, *supra* note 2, § 20.4(A).

25. See, e.g., *Warner Bros. Pictures, Inc. v. Columbia Broadcasting Sys.*, 216 F.2d 945 (9th Cir. 1954). But see *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751 (9th Cir. 1978), *cert. denied*, 439 U.S. 1132 (1979) (cartoon characters may be copyrightable).

26. 1 M. NIMMER, *supra* note 2, § 2.09(A).

27. 3 M. NIMMER, *supra* note 2, § 13.01(A).

28. *Atari, Inc. v. North Am. Philips Consumer Elecs. Corp.*, 672 F.2d 607, 614 (7th Cir.), *cert. denied*, 103 S. Ct. 176 (1982); *Warner Bros., Inc. v. American Broadcasting Cos., Inc.*, 654 F.2d 204, 207 (2d Cir. 1981).

Copying can be inferred if the defendant had access to the original work<sup>29</sup> and if the challenged work is substantially similar to the original work.<sup>30</sup>

### III. FOUNDATION FOR THE *ATARI* DECISION — THE VALIDITY OF COPYRIGHT PROTECTION

In cases decided prior to the *Atari* decision, two arguments were asserted challenging the video game creator's ability to copyright a game.<sup>31</sup> First, it was argued that the works were not copyrightable subject matter,<sup>32</sup> and, second, it was argued that the works were not original because of player participation.<sup>33</sup> These defenses were raised in most of the early cases and were consistently rejected.<sup>34</sup>

The defense based on subject matter centered on the requirement of section 102(a) that the work of authorship be fixed in a "tangible medium of expression."<sup>35</sup> Defendants argued that a video game was simply not a tangible medium of expression and, therefore, constituted noncopyrightable subject matter. However, the courts rejected this argument because it failed to distinguish between the work which is subject to copyright protection (the audiovisual display) and the tangible medium in which the work is fixed (the computer program).<sup>36</sup>

In *Midway Manufacturing Co. v. Dirkschneider*<sup>37</sup> the Federal District Court for Nebraska proposed a test to make this distinction: "First, the Court must determine whether the plaintiff's works fall within one of the copyrightable subject matters enumerated in the Act. 17 U.S.C. § 120(a). Second, the court must determine whether the work is fixed in a tan-

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29. 3 M. NIMMER, *supra* note 2, § 13.02(A).

30. *Id.*

31. See Kramsky, *The Video Game: Our Legal System Grapples With A Social Phenomena*, 64 J. PAT. OFF. SOC'Y 335, 341-46 (1982).

32. See, e.g., *Stern Elecs., Inc. v. Kaufman*, 669 F.2d 852, 855 (2d Cir. 1982).

33. *Id.* at 855-56.

34. See, e.g., *id.*; *Midway Mfg. Co. v. Dirkschneider*, 543 F. Supp. 466, 479 (D. Neb. 1981).

35. 17 U.S.C. app. § 102(a) (1976).

36. See, e.g., *Midway Mfg. Co. v. Dirkschneider*, 543 F. Supp. 466, 479 (D. Neb. 1981); 24 PAT. TRADEMARK & COPYRIGHT J. (BNA) 296, 297 (1982).

37. 543 F. Supp. 466 (D. Neb. 1981).

gible medium of expression."<sup>38</sup> A video game fits within the copyrightable subject matter of an audiovisual work.<sup>39</sup> However, a work must not only consist of copyrightable subject matter, but it must also be fixed in a tangible medium of expression.<sup>40</sup> A work meets this test "when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration."<sup>41</sup> In *Dirkschneider* the court concluded that the work is fixed in the printed circuit boards which direct the video sequences.<sup>42</sup> "The printed circuit boards are tangible objects from which the audiovisual works may be perceived for a period of time more than transitory."<sup>43</sup>

The second argument refuting the validity of the copyright was the lack of originality due to player participation.<sup>44</sup> In *Stern Electronics, Inc. v. Kaufman* the United States Court of Appeals for the Second Circuit rejected this argument by finding that "originality" is not destroyed by player participation and that the required originality was supplied when someone first conceived what the audiovisual display would sound and look like.<sup>45</sup>

#### IV. THE ATARI DECISION

##### A. Procedural Posture

The Atari and Midway Corporations jointly registered a copyright for the video game PAC—MAN,<sup>46</sup> and licensed the Atari Corporation to manufacture and sell the game. Subsequently, North American developed a similar game called "K. C. Munchkin." Atari brought suit for copyright

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38. *Id.* at 479.

39. 1 M. NIMMER, *supra* note 2, § 2.18(H)(3)(b).

40. 17 U.S.C. app. § 102(a) (1976).

41. *Midway Mfg. Co. v. Dirkschneider*, 543 F. Supp. 466, 480 (D. Neb. 1981) (quoting 17 U.S.C. § 101 (1976)).

42. *Id.*

43. *Id.*

44. *See, e.g., Stern Elecs., Inc. v. Kaufman*, 669 F.2d 852, 856 (2d Cir. 1982).

45. *Id.*

46. *Atari, Inc. v. North Am. Philips Consumer Elecs. Corp.*, 672 F.2d 607, 610 (7th Cir.), *cert. denied*, 103 S. Ct. 176 (1982).

infringement, initially seeking a preliminary injunction prohibiting the marketing and distribution of North American's game.<sup>47</sup> The United States District Court for the Northern District of Illinois denied the motion, concluding that it was unlikely Atari would succeed in proving copyright infringement.<sup>48</sup> This decision was based principally on three findings of fact. First, the "maze," or game boards, are different. In the K. C. Munchkin game the maze changes continuously.<sup>49</sup> Second, the characters are different. In the K. C. Munchkin game they are much spookier.<sup>50</sup> Third, K. C. Munchkin is played differently. It is more a game of strategy than PAC—MAN.<sup>51</sup> The court held that, since the games are significantly different, the probability of success on the merits of a copyright infringement suit was low.

The plaintiffs appealed the denial of the motion for a preliminary injunction. The court of appeals reversed<sup>52</sup> and criticized the district court for improperly restricting the criteria which should be applied in deciding whether to grant a preliminary injunction.<sup>53</sup> The district court had only considered the plaintiffs' chance of ultimate success on the merits.<sup>54</sup> But, "[f]our factors [should have entered] into the district court's exercise of discretion to grant or deny a preliminary injunction . . . ."<sup>55</sup> The court of appeals, upon considera-

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47. Atari, Inc. v. North Am. Philips Consumer Elecs. Corp., No. 81-C-6434, slip op. (N.D. Ill. Dec. 4, 1981), *rev'd*, 672 F.2d 607 (7th Cir.), *cert. denied*, 103 S. Ct. 176 (1982).

48. *Id.*

49. *Id.* at 7.

50. *Id.*

51. *Id.* at 16.

52. Atari, Inc. v. North Am. Philips Consumer Elecs. Corp., 672 F.2d 607, 620 (7th Cir.), *cert. denied*, 103 S. Ct. 176 (1982).

53. *Id.* at 614.

54. *Id.*

55. These four factors are:

(1) [W]hether the plaintiff will have an adequate remedy at law or will be irreparably harmed if the injunction does not issue; (2) whether the threatened injury to the plaintiff outweighs the threatened harm the injunction may inflict on the defendant; (3) whether the plaintiff has at least a reasonable likelihood of success on the merits; and (4) whether the granting of a preliminary injunction will disserve the public interest.

*Id.* at 613 (citations omitted).

tion of all four factors, directed the lower court to enter a preliminary injunction.<sup>56</sup>

### B. *The Facts*

PAC—MAN and K. C. Munchkin are maze-chase games. In games of this type the player directs a central figure through a maze in which it consumes dots and avoids pursuit figures. The characters can reverse roles so that the central character can chase the original pursuing figures. The goal of this type of game is to accumulate the most points by gobbling dots and monsters.

To determine if copyright infringement exists, a detailed comparison of the games must be made. First, the *Atari* court compared the maze designs.<sup>57</sup> The PAC—MAN maze is rectangular in shape and drawn in bright blue double lines.<sup>58</sup> Located on either side of the maze is a “wrap-around,” which is a tunnel in which the central figure can avoid capture.<sup>59</sup> In the middle of the maze is a corral, which is a rectangular box,<sup>60</sup> where the pursuit figures go to regenerate.<sup>61</sup> K. C. Munchkin’s maze is also rectangular, but it is drawn in a single, more subdued purple line.<sup>62</sup> This maze also contains a wraparound mechanism and a centrally located corral,<sup>63</sup> but the corral is a square which rotates every two or three seconds.<sup>64</sup> K. C. Munchkin, unlike PAC—MAN, has one dead-end passageway.<sup>65</sup>

Next, the court compared the scoring tables.<sup>66</sup> In PAC—MAN the scoring table is located at the top of the maze.<sup>67</sup> The players’ scores are displayed in white on the left and right ends of the table and the high score to date is displayed in the middle.<sup>68</sup> When a player consumes all the dots, the

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56. *Id.* at 620-21.

57. *Id.* at 610-12.

58. *Id.* at 610.

59. *Id.* at 610-11.

60. *Id.* at 611.

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.* at 611-12.

65. *Id.* at 611.

66. *Id.* at 612.

67. *Id.* at 611.

68. *Id.* at 612.

entire maze flashes blue and white and a new maze appears.<sup>69</sup> The scoring table for the K. C. Munchkin game is similar in that the scores register on either end of the table.<sup>70</sup> However, in K. C. Munchkin, the name of the highest scorer can be registered in flashing pink and orange letters.<sup>71</sup>

The court next compared the basic characters.<sup>72</sup> The principal character in both games is a "gobbler." In PAC—MAN the gobbler is a large yellow dot with a v-shaped mouth which opens and closes. The gobbler makes gobbling noises as it travels around the maze.<sup>73</sup> When it is overtaken by a pursuit character, the gobbler deflates, makes a whining sound and disappears in a starburst.<sup>74</sup> K. C. Munchkin's principal character is also a gobbler. It is a blue-green figure with horns, eyes and a mouth.<sup>75</sup> The mouth is v-shaped as is the mouth of the PAC—MAN gobbler.<sup>76</sup> The K. C. Munchkin gobbler also makes gobbling noises as it moves about the maze.<sup>77</sup> If the gobbler is captured by a pursuit figure, it disappears in a manner similar to that of the PAC—MAN gobbler.<sup>78</sup> This central character differs from the PAC—MAN gobbler in the range of expression it can exhibit. The K. C. Munchkin gobbler can smile, chuckle and frown.<sup>79</sup>

The pursuit characters in the PAC—MAN game are called "ghost monsters." There are four ghost monsters, each shaped like a bell jar and colored red, blue, turquoise and orange, respectively.<sup>80</sup> The ghost monsters appear to travel about the maze on three legs.<sup>81</sup> These monsters have large white eyes with blue centers which look in the direction the monster is moving.<sup>82</sup> At the start of the game, the mon-

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69. *Id.*

70. *Id.* at 612.

71. *Id.*

72. *Id.*

73. *Id.* at 611.

74. *Id.*

75. *Id.* at 612.

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.* at 611.

81. *Id.*

82. *Id.*

sters are located in the corral.<sup>83</sup> The K. C. Munchkin game has three ghost monsters.<sup>84</sup> These monsters are round and have two horns, eyes that look in the direction the monster is moving, and three legs.<sup>85</sup> The monsters are also stationed in the corral at the beginning of the game; however, they are arranged in a piggyback type arrangement rather than in a side-by-side arrangement as in PAC—MAN.<sup>86</sup>

In both games when the gobbler consumes a power capsule, the characters' roles are reversed — the gobbler pursues the ghost monsters.<sup>87</sup> In PAC—MAN when the monsters panic, their color turns to blue, their eyes contract, their mouths wrinkle and they reverse direction and proceed at a reduced speed, while in K. C. Munchkin the monsters continue to run at the same speed.<sup>88</sup> Before the roles reverse again, the monsters warn the players by flashing blue and white.<sup>89</sup> If a monster is caught, it disappears and regenerates in the corral.<sup>90</sup> In both games the monsters are vulnerable because they move more slowly than the gobblers. In the K. C. Munchkin game, when a gobbler eats a power capsule, the monsters turn purple and reverse direction.<sup>91</sup> If a ghost monster is caught, it disappears except for its eyes and feet, which wander harmlessly around the board.<sup>92</sup> If, however, a corral opening appears near a captured ghost monster, the monster will enter it and regenerate.<sup>93</sup> Before the characters reverse roles, the ghost monsters flash their original colors.<sup>94</sup>

The gobbler accumulates points by gobbling dots. In PAC—MAN there are over two hundred uniformly spaced

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83. *Id.*

84. *Id.* at 612.

85. *Id.*

86. *Id.*

87. *Id.* at 611.

88. *Id.* The speed at which the monsters travel is an important distinction in the design of the games.

89. *Id.*

90. *Id.*

91. *Id.* at 612.

92. *Id.*

93. *Id.*

94. *Id.*

dots.<sup>95</sup> In *K. C. Munchkin* there are twelve randomly spaced dots, four of which are power capsules.<sup>96</sup>

### C. *The Extent of Protection*

As noted above, although the general subject matter of potential copyright protection may constitute a work of authorship and, therefore, qualify for copyright protection, it does not necessarily follow that the entire work will be copyrightable.<sup>97</sup> Only the expression of an idea can be protected;<sup>98</sup> a bare idea or utilitarian structure is not protected by copyright law.<sup>99</sup> Thus, the analytical starting point, according to the *Atari* decision, is to determine what portion of PAC—MAN constitutes the expression of an idea and what part is the idea itself.<sup>100</sup> Judge Learned Hand in *Nichols v. Universal Pictures Corp.*<sup>101</sup> described a test to make the distinction between an idea and the expression of an idea — the “abstraction test”:

Upon any work . . . a great number of patterns of increasing generality will fit equally well, as more and more of the incident is left out. . . . [T]here is a point in this series of abstractions where they are no longer protected, since otherwise the playwright could prevent the use of his “ideas” to which, apart from their expression, his property is never extended. Nobody has ever been able to fix that boundary, and nobody ever can. . . . As respects plays, the controversy chiefly centers upon the characters and sequence of incident, these being the substance.<sup>102</sup>

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95. *Id.* In PAC—MAN the dots move at a continuous speed.

96. *Id.* In *K. C. Munchkin* the dots move faster as they disappear.

97. *See, e.g., Warner Bros. Pictures, Inc. v. Columbia Broadcasting Sys.*, 216 F.2d 945, 950 (9th Cir. 1954) (court found a valid literary copyright for the story the “Maltese Falcon,” but not for the character “Sam Spade”).

98. 17 U.S.C. app. § 102(a) (1976). *See Sid & Marty Krofft Television Prods., Inc. v. McDonald’s Corp.*, 562 F.2d 1157, 1163 (9th Cir. 1977).

99. *See* 1 M. NIMMER, *supra* note 2, §§ 1.08(d), 2.18. *But see Hopkins, Ideas, Their Time Has Come: An Argument and a Proposal for Copyrighting Ideas*, 46 ALB. L. REV. 443 (1982).

100. *Atari, Inc. v. North Am. Philips Consumer Elecs. Corp.*, 672 F.2d 607, 614-15 (7th Cir.), *cert. denied*, 103 S. Ct. 176 (1982).

101. 45 F.2d 119 (2d Cir. 1930), *cert. denied*, 282 U.S. 902 (1931).

102. *Id.* at 121 (citations omitted).

The idea in PAC—MAN, as identified by the courts, is a maze-chase game designed to appeal to nonviolent players.<sup>103</sup> Thus, North American was free to copy this idea.<sup>104</sup>

This idea-expression dichotomy deserves further comment.<sup>105</sup> In the copyright context, an idea and the expression of this idea are at opposite ends of the continuum of protection. The former, the general overriding theme of a work, is not protected, while the latter, the specified components of a work which collectively express the idea, are protected. As components of a work (such as characters and story sequence) become more generalized, that is, lose their unique or distinguishing features, they lose their right to protection.<sup>106</sup>

The extent to which an expression can be generalized and still be protected is dependent on the nature of the idea and the nature of its expression. The greatest scope of copyright protection exists when the expression is complex and the idea is simplistic.<sup>107</sup> The least amount of protection exists when the idea and its expression are indistinguishable. A well known example of this rule is *Herbert Rosenthal Jewelry Corp. v. Kalpakian*.<sup>108</sup> In that case plaintiff copyrighted a pin in the shape of a bee;<sup>109</sup> the defendant produced a similar pin.<sup>110</sup> Plaintiff commenced a suit for copyright infringement, but the court dismissed the suit: "When the 'idea' and its 'expression' are thus inseparable, copying the 'expression' will not be barred, since protecting the 'expression' in such circumstances would confer a monopoly of the 'idea' upon the copyright owner free of the conditions and limitations imposed by the patent law."<sup>111</sup> Thus, when there is unity of the idea and the expression, only the exact form will be protected from copying.

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103. *Atari, Inc. v. North Am. Philips Consumer Elecs. Corp.*, 672 F.2d 607, 617-18 (7th Cir.), *cert. denied*, 103 S. Ct. 176 (1982).

104. *Id.*

105. *See* Kramsky, *supra* note 31, at 346-51.

106. *See supra* notes 21-26 and accompanying text. *See also* Note, "Expression" and "Originality" in Copyright Law, 11 WASHBURN L.J. 400 (1972).

107. *Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp.*, 562 F.2d 1157, 1168 (9th Cir. 1977).

108. 446 F.2d 738 (9th Cir. 1971).

109. *Id.* at 739.

110. *Id.*

111. *Id.* at 742.

The *Atari* court, using the above noted principles, attempted to distinguish the idea of a maze-chase game from the protected portion. First, the court asked whether there was unity of the idea and the expression in the audiovisual work: that is, is the PAC—MAN type expression the only way to express the game's idea?<sup>112</sup> The court answered this in the negative, finding that the PAC—MAN form provided something additional to the idea<sup>113</sup> and thus no unity existed. Second, the court applied the abstraction test to determine the scope of protection.<sup>114</sup> The court analogized the play of the game to written game rules which have been held to be too abstract to constitute the expression of the idea.<sup>115</sup>

The video and audio components, however, were held to be sufficiently concrete to be copyrightable.<sup>116</sup> The court then distinguished between protected and unprotected video and audio components.<sup>117</sup> The maze, scoring table, tunnel and dots were held to be standard game devices.<sup>118</sup> Thus, *Atari* could claim infringement only if these components were identical. The K. C. Munchkin and PAC—MAN components are not identical; therefore, no copyright infringement exists.<sup>119</sup> The gobbler and PAC—MAN characters themselves were held to be independent creative expressions of the game idea.<sup>120</sup> Based on this finding the court held that the characters were protected by copyright law.<sup>121</sup>

#### D. Infringement

As a general rule infringement is established upon proof of ownership, access and substantial similarity.<sup>122</sup> In *Atari* the only infringement issue was substantial similarity.<sup>123</sup>

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112. *Atari, Inc. v. North Am. Philips Consumer Elecs. Corp.*, 672 F.2d 607, 617 (7th Cir.), *cert. denied*, 103 S. Ct. 176 (1982).

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.* at 617-18.

121. *See generally* 24 PAT. TRADEMARK & COPYRIGHT J. (BNA) 517 (1982).

122. *Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp.*, 562 F.2d 1157, 1162 (9th Cir. 1977).

123. *Atari, Inc. v. North Am. Philips Consumer Elecs. Corp.*, 672 F.2d 607, 614 (7th Cir.), *cert. denied*, 103 S. Ct. 176 (1982).

However, it is the district and appeals courts' differing views on the concept of substantial similarity which result in the different holdings. Professor Nimmer, in his treatise on copyright law, states that infringement exists when the accused work is substantially similar to the original work.<sup>124</sup> It is apparent from the *Atari* district court's comparison of the games as a whole that it applied this general rule.<sup>125</sup> However, this rule is merely a general statement of the concept of infringement and, if applied literally to all cases, could produce "untenable results."<sup>126</sup> The *Atari* appeals court, in its formulation of the rule, restated it to take into consideration the nonprotectibility of ideas and utilitarian structures. Thus, infringement exists only when the accused work is substantially similar to the protected portion of the original work.<sup>127</sup> The latter court phrased the test as "whether the accused work is so similar to the plaintiff's work that an ordinarily reasonable person would conclude that the defendant unlawfully appropriated the plaintiff's protectible expression by taking material of substance and value."<sup>128</sup>

According to the appeals court, the game characters constituted protected property. The court compared the gobblers and determined that they were substantially similar:<sup>129</sup> both are round, have v-shaped mouths, gobble and make

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124. 3 M. NIMMER, *supra* note 2, § 13.03.

125. See *supra* notes 49-51 and accompanying text.

126. For example, one court has used the following illustration to demonstrate this:

[a] copyright could be obtained over a cheaply manufactured plaster statue of a nude. Since ownership of a copyright is established, subsequent manufacturers of statues would take the grave risk of being found to be infringers if their statues were substantially similar and access were shown. The burden of proof on the plaintiff would be minimal, since most statues of nudes would in all probability be substantially similar to the cheaply manufactured plaster one.

*Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp.*, 562 F.2d 1157, 1162-63 (9th Cir. 1977). It has been suggested that access can be inferred if the challenged work is substantially similar to the original work itself, but that infringement only exists if the challenged work is substantially similar to the protected portion of the original work. See generally P. GOLDSTEIN, *COPYRIGHT, PATENT, TRADEMARK AND RELATED STATE DOCTRINES* 849-50 n.1 (1981).

127. *Atari, Inc. v. North Am. Philips Consumer Elecs. Corp.*, 672 F.2d 607, 614 (7th Cir.), *cert. denied*, 103 S. Ct. 176 (1982).

128. *Id.*

129. *Atari, Inc. v. North Am. Philips Consumer Elecs. Corp.*, 672 F.2d 607, 618 (7th Cir.), *cert. denied*, 103 S. Ct. 176 (1982).

gobbling noises. The ghost monsters were also found to be substantially similar.<sup>130</sup> The size, shape, and manner of movement were identical. Also, in both games, the characters exhibited role reversal. The defendants argued numerous dissimilarities but the court found infringement, stating that the focus of a copyright infringement action "is on the similarities in [the] protectible expression."<sup>131</sup>

### *E. The Basis for a Preliminary Injunction*

The district court listed the four factors which should guide the exercise of discretion in granting a preliminary injunction,<sup>132</sup> but its analysis was limited to probable infringement.<sup>133</sup> The Seventh Circuit was adamant that prospective success on the merits was only one of the four positions which should be addressed in a determination of whether a preliminary injunction should issue. The court proceeded to address the three additional issues and stated its finding on each. First, it concluded irreparable injury is presumed from a showing of copyright infringement.<sup>134</sup> Second, it concluded the balance of hardships and public interest factors do not weigh against the issuance of a preliminary injunction.<sup>135</sup> Third, it concluded the purpose of the copyright clause in encouraging creativity is not curtailed by a countervailing public interest, which could be asserted by the defendant.<sup>136</sup> The structure of the appeals court opinion, which based reversal on the failure to analyze all the factors, was a means to prevent the erosion of the four factor test for a preliminary injunction in these circumstances.<sup>137</sup>

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130. *Id.*

131. *Id.* at 619 (emphasis omitted).

132. Atari, Inc. v. North Am. Philips Consumer Elecs. Corp., No. 81-C-6434, slip op. at 15 (N.D. Ill. Dec. 4, 1981), *rev'd*, 672 F.2d 607 (7th Cir.), *cert. denied*, 103 S. Ct. 176 (1982).

133. *Id.* at 14.

134. Atari, Inc. v. North Am. Philips Consumer Elecs. Corp., 672 F.2d 607, 620 (7th Cir.), *cert. denied*, 103 S. Ct. 176 (1982).

135. *Id.*

136. *Id.*

137. See Nintendo of America, Inc. v. Bay Coin Distrib., Inc., No. CV-82-1153, slip op. (E.D.N.Y. May 28, 1982), wherein the probability of success was the only factor in determining whether a preliminary injunction should issue. *But see* Midway Mfg. Co. v. Dirkschneider, 543 F. Supp. 466 (D. Neb. 1981) (analysis of all four factors).

### F. Comparison and Explanation

The district court found a low probability of success on the merits, while the appeals court, presented with the same set of facts, concluded Atari had a high probability of success on the merits of a copyright infringement claim. These different holdings are not merely based on different views of the evidence, but on different methods of analysis.

The district court concluded that the games were substantially different. The court based this holding on a finding that "the maze defendants utilized is different and the way their game is played is different from plaintiff's 'Pac-Man' game."<sup>138</sup> The district court's analysis focused on the total game, rather than reducing the game into protected and unprotected components. The effect of the district court's analysis is to create a more stringent test for infringement since the potential monopoly is greater if the whole game is potentially protected.

The appeals court, on the other hand, concluded that the game board and the method of play were too abstract to be protected. Thus, the appeals court's methodology is more narrow; it would first separate the abstract idea from the protected expression of the idea and then it would compare the original and challenged work to determine substantial similarity.

This more specific test employed by the appeals court serves the purpose of the copyright clause<sup>139</sup> better than the district court's more general analysis. The specific test limits the level of monopolization an original author may secure through a copyright. Only the creative efforts, rather than the ideas, can be monopolized. Thus, society is benefited by the creative efforts of the original author but the source of the original expression is not limited. Because the scope of monopolization is reduced, it is easier to prove infringement.

Moreover, the appeals court's analysis protects the portion of the property which is likely to be copied. The concept of infringement is tied to the value of the property. A

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138. Atari, Inc. v. North Am. Philips Consumer Elecs. Corp., No. 81-C-6434, slip op. at 16-17 (N.D. Ill. Dec. 4, 1981), *rev'd*, 672 F.2d 607 (7th Cir.), *cert. denied*, 103 S. Ct. 176 (1982).

139. U.S. CONST. art. I, § 8, cl. 8 (*see supra* note 3 for a textual reading).

defendant unlawfully appropriates protected property by taking material of substance and value.<sup>140</sup> The appeals court made a practical determination that the PAC—MAN character, with its distinctive size, shape and motion, was the valuable part of the plaintiffs' property. Thus, to allow a competitor to take this portion of the work would discourage the production of artistic and scientific work. The lower court's opinion, although based on general rules of copyright law, does not focus on the part of the plaintiffs' property which might be pirated.

## V. CONCLUSION

Through the registration of the game as an audiovisual work and through the use of the idea-expression dichotomy to limit the protected property, prior to a determination of substantial similarity, a novel result is achieved — "effective" copyright protection for a game.<sup>141</sup> Effective protection occurs because the appeals court's method of analysis provides protection for the valuable portion of the game — the PAC—MAN character. The method of analysis chosen by the appeals court effectuates the purposes of the copyright clause.<sup>142</sup> The *Atari* decision demonstrates that it is not enough for a court to apply general rules to new technological developments; only if the rules are adapted so that they protect the valuable portion of the property can they meaningfully encourage the production of artistic and scientific works.

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140. See *supra* note 12 and accompanying text.

141. Another novel result not discussed by the district or the appeals courts is the significance of copyrighting a character. See *supra* note 25.

142. Esezobor, *Concepts in Copyright Protection*, 23 BULL. COPYRIGHT SOC'Y 258, 266-67 (1976).

