

*The Game in the Machine:
Copyright in the Middle Ground Between
Players and Video Games*

Bruce E. Boyden

What is the copyrightable expression in video games? Copyright law treats the appearance and sound of a video game in play as an audiovisual work, just like films and television programs. This categorization fails to recognize the unique characteristics of video games and has some potentially deleterious consequences for users. Among other things, it treats a player's recording of their own game play as a verbatim reproduction of the work—something that would have difficulty qualifying as a fair use. By eliding player contributions to the game in play, copyright avoids doctrinal complexity at the expense of overprotection.

Instead, copyright law should apply a different rule to video games, one that originated in the context of ordinary card and board games: namely, that games are not copyrightable. Copyright has long excluded games from its protection, even though each of the component elements of a game—rule sheet, pieces, board, cards, etc.—can be protected. Although the original purpose of the rule is obscure, it has the salubrious effect of insulating the activity of play from the reach of copyright.

That limit on copyright is important because game play represents a “middle ground” between the author's expression and a user's use, one in which the user's perceptual experience of the work melds with the work as it unfolds. The “middle ground” is where a user actually experiences the work—for example, in reading a book, or watching a film. Like thought, play is free from liability. The result is that while a video games surface elements are copyrightable, the second-order design that gives rise to play, such as intriguing challenges or novel traps, are not. This limit on game copyrights also has implications for copyright law generally.