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COPYRIGHTS AND INTELLECTUAL PROPERTY—VISUAL AND AURAL ASPECTS OF VIDEOGAMES ARE PROPERLY COPYRIGHTABLE MATERIAL. *Stern Electronics, Inc. v. Kaufman*, 669 F.2d 852 (2d Cir. 1982).

In *Stern Electronics, Inc. v. Kaufman*,¹ the United States Court of Appeals for the Second Circuit held that the visual² and aural³ aspects of videogames⁴ are copyrightable material under the Copyright Act of 1976.⁵ *Stern* is a model study in the dynamic elasticity of American jurisprudence. The material presented to the court for a ruling on its copyrightability represented the state-of-the-art in highly technological leisure products. The court was faced with a sequence of audiovisual images, produced by printed circuit boards and within which a human competitor was enabled to participate. The court was challenged to apply a body of statutes and case law that primarily grew out of motion pictures, phonograph records and television to an entirely new technological advancement. *Stern* is one case from a recent line⁶ of similar cases that has considered the copyrightability of audiovisual materials and the scope of such copyrights.

“Scramble”⁷ was the videogame at issue in *Stern*. A Japanese company, Konami Industry Co., developed Scramble in late 1980

1. 669 F.2d 852 (2d Cir. 1982).

2. The “visual aspects” of a videogame are the images that appear on a cathode ray tube while the game is in operation.

3. The “aural aspects” of a videogame are the auditory sensations; *i.e.*, music and simulated action that parallel the visual activity.

4. A videogame is a relatively simple computer system composed of printed circuit boards, called “read-only-memories” (ROMs), a cathode ray tube and a speaker. The ROMs predetermine the sequence of activity, and the player participates, within that sequence, by means of hand controls. A large cabinet houses the entire system.

5. 17 U.S.C. §§ 101-810 (1976).

6. *See, e.g.*, *Williams Electronics, Inc. v. Artic International, Inc.*, 685 F.2d 870 (3d Cir. 1982); *Atari, Inc. v. North American Philips Consumer Electronics Corp.*, 672 F.2d 607 (7th Cir.), *cert. denied*, 103 S. Ct. 176 (1982); *Midway Mfg. Co. v. Bandai-America, Inc.*, 546 F. Supp. 125 (D.N.J. 1982); *Atari, Inc. v. Amusement World, Inc.*, 547 F. Supp. 222 (D. Md. 1981); *Atari, Inc. v. Armenia, Ltd.*, COPYRIGHT L. REP. (CCH) ¶ 25,328 (N.D. Ill. Nov. 3, 1981); *Midway Mfg. Co. v. Dirkschneider*, 543 F. Supp. 466 (D. Neb. 1981); *Midway Mfg. Co. v. Artic International, Inc.*, 547 F. Supp. 999 (N.D. Ill. 1981), *aff'd*, 704 F.2d 1009 (7th Cir. 1983).

7. The court of appeals in *Stern* detailed the visual and aural aspects of Scramble as follows:

[T]he video screen displays a spaceship moving horizontally through six different scenes in which obstacles are encountered. With each scene the player faces increasing difficulty in traversing the course and scoring points. . . . The player controls the altitude and speed of the spaceship, decides when to release the ship's supply of

and published it in Japan on January 8, 1981. Stern became aware of Konami's development and obtained an exclusive sub-license to market Scramble in North and South America. On March 17, 1981, Stern initiated its marketing campaign.

The provisions of the copyright registration section of the Copyright Act⁸ require the applicant to submit two copies of the work to the Copyright Office. Konami submitted videotapes of Scramble as it appears and sounds in two of its operational modes.⁹ On April 14, 1981, the Copyright Office issued a Certificate of Copyright Registration for Scramble.

Between December 1, 1980 and March 17, 1981, the defendant, Omni Video Games, Inc.,¹⁰ renamed and sold five of its older videogames under the new commercial appellation "Scramble."¹¹ Soon after Stern first marketed its Scramble, Omni commenced marketing a new videogame, similarly entitled "Scramble," which was "virtually identical in both sight and sound"¹² to Stern's Scramble.

Stern, alleging a copyright violation, brought this action in the United States District Court for the Eastern District of New York¹³ and sought a preliminary injunction¹⁴ to prevent Omni from further

bombs, and fires lasers that can destroy attacking missiles and aircraft. . . . The scenes are in color, and the action is accompanied by battlefield sounds. 669 F.2d at 853-54.

8. The copyright registration provisions are set forth in 17 U.S.C. § 408 (1976).

9. *Id.* § 408(c)(1) provides, in part, as follows: "The regulations may require or permit, for particular classes, the deposit of identifying material instead of copies or phonorecords. . . ." See 37 C.F.R. § 202.20(c)(2) (1981). See also *Williams Electronics, Inc. v. Artic International, Inc.*, 685 F.2d 870, 875 (3d Cir. 1982), in which the court stated: "The deposit of videotapes as a satisfactory method of complying with the statutory deposit requirements has been universally accepted in cases considering copyrights for the audiovisual work displayed in these videogames."

10. The other defendants were Omni's distributor and two of Omni's officers.

11. A secondary legal issue also was a part of this action. Omni claimed a trademark right to the name "Scramble" because Omni commercially used the name prior to Stern's commercial use of it.

While it is true that the first party to make a commercial use of a trademark has a claim to its exclusive ownership, see 3 R. CALLMAN, UNFAIR COMPETITION, TRADEMARKS AND MONOPOLIES § 76.2(c) (3d ed. 1969), the claim is by no means absolute. The use of the trademark must be "bona fide." See *Phillips v. Hudnut*, 263 F. 643, 644 (D.C. Cir. 1920); *Blue Bell, Inc. v. Farah Mfg. Co.*, 508 F.2d 1260, 1267 (5th Cir. 1975) (stating that "[m]ere adoption of a mark without bona fide use, in an attempt to reserve it for the future, will not create trademark rights"). Regarding Omni's allegedly preemptive use of the trademark "Scramble," the court of appeals noted, "The District Court was entitled to conclude that Omni was simply attaching a secondary label in a bad faith attempt to reserve a mark." 669 F.2d at 857.

12. *Stern Electronics, Inc. v. Kaufman*, 669 F.2d at 854-55.

13. *Stern Electronics, Inc. v. Kaufman*, 523 F. Supp. 635 (E.D.N.Y. 1981).

14. The district court in *Stern* noted, "Preliminary injunctive relief is the only effective means of protecting a copyright in a videogame since the life span of a successful game is merely six months." 523 F. Supp. at 638.

The determination that a preliminary injunction is an appropriate initial remedy must be based upon a number of carefully resolved considerations, including the following: First, the moving party must show a likelihood of success on the merits on its case. See, e.g., *Dallas Cowboy Cheerleaders, Inc. v. Scorecard Posters, Inc.*, 600 F.2d 1184, 1188 (5th Cir. 1979). Second, the moving party must show that, in the absence of preliminary injunctive relief, it will suffer irreparable injury. See, e.g., *Kontes Glass Co. v. Lab Glass, Inc.*, 373 F.2d 319, 329-

selling its Scramble. The district court granted Stern a preliminary injunction,¹⁵ and the United States Court of Appeals for the Second Circuit affirmed that ruling.¹⁶

To sustain an action for copyright infringement, the plaintiff is required to satisfy two criteria. First, the plaintiff must establish that it possesses a valid copyright.¹⁷ Second, the plaintiff must show "copying" by the defendant.¹⁸ The first of these burdens often is met by the mere possession of a Certificate of Copyright Registration. Possession of a certificate is *prima facie* evidence of its validity.¹⁹ Any attempt to disclaim the validity of a copyright must defeat this presumption. One challenging the validity must establish that the copyrighted material failed to satisfy the requirements of the Copyright Act.²⁰

31 (3d Cir. 1967). Last, a court must resolve any equitable considerations—for example, balance the hardships that the granting of, or the refusal to grant, such relief would impose upon the parties and the effect such relief would have on any particular public interests. *See, e.g., Atari, Inc. v. North American Philips Consumer Electronics Corp.*, 672 F.2d 607, 613 (7th Cir.), *cert. denied*, 103 S. Ct. 176 (1982); *Klitzner Industries, Inc. v. H.K. James & Co.*, 535 F. Supp. 1249, 1253 (E.D. Pa. 1982).

Some courts have permitted a presumption of irreparable injury to follow a showing of likelihood of success on the merits. *See, e.g., Wainwright Securities, Inc. v. Wall Street Transcript Corp.*, 558 F.2d 91, 94 (2d Cir. 1977), *cert. denied*, 434 U.S. 1014 (1978); *Klitzner*, 535 F. Supp. at 1258-59. *See generally* 3 M. NIMMER, NIMMER ON COPYRIGHT § 14.06[A] (1982) (for a general discussion of the role of preliminary injunctions in copyright infringement actions) [hereinafter cited as 3 M. NIMMER].

15. 523 F. Supp. at 639.

16. 669 F.2d at 857.

17. Nimmer disassembles the ownership of a copyright into five "constituent parts" as follows:

(1) Originality in the author; (2) copyrightability of the subject matter; (3) citizenship status of the author such as to permit a claim of copyright; (4) compliance with applicable statutory formalities; and (5) (if the plaintiff is not the author) a transfer of right or other relationship between the author and the plaintiff so as to constitute the plaintiff the valid copyright claimant.

3 M. NIMMER, *supra* note 14, § 13.01[A].

18. *Id.* § 13.01. *See Ferguson v. National Broadcasting Co.*, 584 F.2d 111, 113 (5th Cir. 1978); *Novelty Textile Mills v. Joan Fabrics Corp.*, 558 F.2d 1090, 1092 (2d Cir. 1977); *Midway Mfg. Co. v. Dirkschneider*, 543 F. Supp. 466 (D. Neb. 1981); *Testa v. Janssen*, 482 F. Supp. 198, 202 (W.D. Pa. 1980).

19. 17 U.S.C. § 410(c) (1976) provides in part as follows: "In any judicial proceedings the certificate of a registration made before or within five years after first publication of the work shall constitute *prima facie* evidence of the validity of the copyright and of the facts stated in the certificate." *See also* 3 M. NIMMER, *supra* note 14, § 13.01[A]. The certificate is *prima facie* evidence of the five "constituent parts" of copyright ownership. *See supra* note 17.

20. The general provisions outlining the requirements which specific material must satisfy to obtain a copyright are contained in 17 U.S.C. § 102 (1976). That section reads in pertinent part:

(a) Copyright protection subsists, in accordance with this title, 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. Works of authorship include the following categories:

(1) literary works . . .

(6) motion pictures and other audiovisual works . . .

(b) In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.

Games traditionally have been extended only limited copyright protection,²¹ and the copyright law's historical treatment of games provides little guidance in determining the copyrightability of material as sophisticated as a videogame's audiovisual display. Thus, thorough analysis must consider the specific language of the Copyright Act, the relevant case law,²² and the individual elements of the work for which a copyright is sought.

Clearly, a videogame's underlying computer program (ROM),²³ which determines the audiovisual display projected onto the cathode ray tube, is copyrightable as a "literary work."²⁴ Unfortunately, such a copyright provides only a weak safeguard against potential pirating of the manifested audiovisual display.²⁵ Konami endeavored instead to copyright the display itself as an "audiovisual work."²⁶ The few courts that have considered the issue uniformly have ruled that the sights and sounds of videogames are within the Copyright Act's definition of "audiovisual works."²⁷ Therefore, if a defendant is to succeed in disclaiming the validity of a videogame's copyright, the defendant's assault must be on a different flank.

In *Stern*, Omni contended that the audiovisual features of Stern's Scramble failed to satisfy the statutorily imposed "originality" and "fixed . . . medium" requirements.²⁸ In its "originality" argument, Omni alleged that the visual and aural aspects of Scram-

21. Nimmer comments, "It is true that no copyright may be obtained in the system or manner of playing a game or in engaging in any other sporting or like activity. However, some limited copyright protection is nevertheless available in connection with games." 1 M. NIMMER, *supra* note 14, § 12.18[H][3][a]. For cases considering the copyrightability of traditional games see *Anti-Monopoly, Inc. v. General Mills Fun Group*, 611 F.2d 296 (9th Cir. 1979), *cert. denied*, 103 S. Ct. 1234, *reh'g denied*, 103 S. Ct. 1805 (1983); *Chamberlin v. Uris Sales Corp.*, 150 F.2d 512 (2d Cir. 1945).

22. Copyright law, by its very nature, is not a law of precedents. When a new work seeks a copyright, it must be "original." Therefore, any preceding authority often will touch upon a work at issue in only very general ways. The copyrightability of a videogame's audiovisual display is a glaring example of this. The work is highly innovative, and, hence, truly relevant case law is meager.

23. *See supra* note 4.

24. *See supra* note 20. The Copyright Act defines "literary works" as "works, other than audiovisual works, expressed in words, numbers, or other verbal or numerical symbols or indicia, regardless of the nature of the material objects, such as books, periodicals, manuscripts, phonorecords, film, tapes, disks, or cards, in which they are embodied." 17 U.S.C. § 101 (1976). This statutory definition is broad enough to include computer programs. 1 M. NIMMER, *supra* note 14, § 2.04[c]. *See Tandy corp. v. Personal Micro Computers, Inc.*, 524 F. Supp. 171 (N.D. Cal. 1981).

25. *Stern Electronics, Inc. v. Kaufman*, 669 F.2d at 855.

26. *See supra* note 20. The Copyright Act defines "audiovisual works" as 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. 17 U.S.C. § 101 (1976).

27. *See, e.g., Atari, Inc. v. Amusement World, Inc.*, 547 F. Supp. 222 (D. Md. 1981); *Midway Mfg. Co. v. Dirkschneider*, 543 F. Supp. 466 (D. Neb. 1981); *Stern Electronics, Inc. v. Kaufman*, 523 F. Supp. at 638 (E.D.N.Y. 1981).

28. *See supra* note 20.

ble were mere byproducts of the determinative computer program and that the audiovisual images, therefore, were not "original" within the meaning of the Copyright Act.²⁹ Omni sought to limit Scramble's copyrightability to its computer program, which Omni declared was Scramble's only "original" component.³⁰ The Copyright Act does not specifically define "originality"; a composite sketch of that term may be drawn from relevant case law. "Originality" does not seem to require that the material for which a copyright is sought be "new";³¹ it only requires that the material be the product of the registrant.³² There must be an element of independent creation.³³ Omni thus sought to narrow significantly a rather broad definition to exclude therefrom the secondary, manifest phase in a chain of production.

The court of appeals likened a videogame's particular system of reproduction to the recording of a musical composition.³⁴ An audiotape captures and reproduces a musical composition, but does not strip the composition of copyrightability. Similarly, a printed circuit board captures and reproduces an audiovisual display, but does not strip the display of copyrightability.³⁵

Omni further attempted to repudiate Scramble's "originality" by pointing to its participatory nature. Omni argued as follows: If a player can participate in and alter the sequence of the audiovisual activity, then each play of the game is unique and, hence, not copyrightable.³⁶ Based upon its ocular examination of the work, the court of appeals ruled that, despite these variations, "many aspects of the sights and the sequence of their appearance remain constant during each play of the game."³⁷ The court proceeded to consider the consistency of the aural repetitions³⁸ and ultimately held that "originality" was not sacrificed to human participation.³⁹

29. *Id.*

30. 669 F.2d at 856. Omni asserted a similar contention in the district court. 523 F. Supp. at 638. See also *Atari, Inc. v. Amusement World, Inc.*, 547 F. Supp. 222 (D. Md. 1981), in which the defendant argued that the original work of authorship is the computer program.

31. *Sid & Marty Krofft Television Productions, Inc. v. McDonald's Corp.*, 562 F.2d 1157, 1163 n.5 (9th Cir. 1977).

32. *Id.*

33. *Durham Industries, Inc. v. Tony Corp.*, 630 F.2d 905, 910 (2d Cir. 1980).

34. 669 F.2d at 856.

35. The court of appeals in *Stern* further noted that the creative process involves first the conception of the sights and sounds of the audiovisual display and then the devising of a means to produce and reproduce that display. The court concluded that "originality" resides in the initial conception. *Id.* at 856-57. The district court responded to this same argument by stating, "An author's work does not become any less original after he has found a means to replicate it." 523 F. Supp. at 639.

36. 669 F.2d at 855-56.

37. *Id.* at 856.

38. *Id.*

39. The court stated that "[t]he repetitive sequence of a substantial portion of the sights and sounds of the game qualifies for copyright protection. . . ." *Id.*

Omni's allegation that the visual and aural aspects of Scramble failed to satisfy the "fixed in a tangible medium of expression"⁴⁰ requirement of the Copyright Act also was based on Scramble's participatory quality. Essentially, Omni's argument was that if each play of the game is unique as a result of player participation, then the game cannot be considered "fixed."⁴¹ This same argument surfaced in *Midway Mfg. Co. v. Artic International, Inc.*,⁴² in which the defendant argued that "Galaxian"⁴³ was not "fixed" if the visual images were responsive to the whims of the player.⁴⁴ The court of appeals in *Stern* dispensed with this argument simply by restating its rebuttal to Omni's prior attack on Scramble's participatory nature.⁴⁵

The most common assault on videogames' satisfaction of the "fixation" requirement might be termed the "ephemeral projection" argument.⁴⁶ This argument was articulated in *Midway Mfg. Co. v. Dirkschneider*,⁴⁷ in which the defendant alleged that the work was not "fixed" since "the games' visual displays are merely ephemeral projections on a cathode ray tube."⁴⁸ In *Dirkschneider*, the United States District Court for the District of Nebraska found the argument to be defective because the argument confused the copyrighted work itself with the "medium" in which such works must be "fixed."⁴⁹ A painting is not the canvas beneath it, and a book⁵⁰ is not the pages within it. The audiovisual displays and the determinative computer programs in videogames are separate and distinct entities for the purposes of copyright law. The former are "fixed" in the latter.⁵¹

40. See *supra* note 20. The Copyright Act defines "fixed" at 17 U.S.C. § 101 (1976) as follows:

A work is "fixed" in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under 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. A work consisting of sounds, images, or both, that are being transmitted, is "fixed" for purposes of this title if a fixation of the work is being made simultaneously with its transmission.

41. 669 F.2d at 855-56.

42. 547 F. Supp. 999 (N.D. Ill. 1981), *aff'd* 704 F.2d 1009 (1982).

43. "Galaxian" is the commercial name for a videogame manufactured by Midway Manufacturing Company.

44. 547 F. Supp. at 1007-08.

45. 669 F.2d at 856.

46. See *infra* note 48.

47. 543 F. Supp. 466 (D. Neb. 1981).

48. *Id.* at 479.

49. *Id.* Nimmer commented on this distinction as follows: "An 'original work of authorship' as that phrase is used in the Copyright Act, should not be confused with the material objects in which the work must be embodied in order to satisfy the fixation requirement." 1 M. NIMMER, *supra* note 14, § 2.03[c].

50. "A 'book' is merely a material object which may embody, and hence constitute, a copy of a given literary work." *Id.*

51. *Midway Mfg. Co. v. Dirkschneider*, 543 F. Supp. at 480. See also *Atari, Inc. v. Amusement World, Inc.*, 547 F. Supp. 222 (D. Md. 1981). The Maryland district court similarly ruled that the videogame's audiovisual display was "fixed" in the underlying computer program.

The district court in *Stern* appropriately considered whether Stern's copyright was valid⁵² and whether Omni's acts amounted to "copying" of Stern's videogame.⁵³ The latter issue was not entertained on appeal. The court of appeals accepted the district court's ruling that the two Scrambles were "substantially similar."⁵⁴ The court of appeals specifically disclaimed the necessity of deciding "whether a sequence of images (*e.g.*, a spaceship shooting down an attacking plane) might contain so little in the way of particularized form of expression as to be only an abstract idea portrayed in noncopyrightable form. . . ."⁵⁵ The court here alluded to the statutory prohibition on the copyrighting of "ideas."⁵⁶ As this same court of appeals noted in *Reyher v. Children's Television Workshop*,⁵⁷ copyright protection extends to the expression of an idea and not to the idea itself.⁵⁸ In *Stern*, the court presumably viewed this issue as a component of the larger "copying" issue and hence as an issue of fact⁵⁹ not requiring the court's consideration.⁶⁰

Nonetheless, it is important to note that the idea/expression-of-idea dichotomy also can be viewed as going to the heart of the copyrightability of specific subject matter.⁶¹ In *Atari, Inc. v. Amuse-*

52. 523 F. Supp. at 638-39.

53. *Id.* at 639. See *supra* note 18. Since actual proof of copying is often difficult to obtain, most courts will allow copying to be evidenced by proof of the defendant's access to the copyrighted work and by a showing of "substantial similarity" between the copyrighted work and the accused work. See *Novelty Textile Mills, Inc. v. Joan Fabrics Corp.*, 558 F.2d 1090, 1092 (2d Cir. 1977); *Atari, Inc. v. Amusement World, Inc.*, 547 F. Supp. 222 (D. Md. 1981).

Some courts have extended this general rule to allow a presumption that the defendant had access to the copyrighted work to follow a showing of "substantial similarity." See *Knickerbocker Toy Co. v. Genie Toys, Inc.*, 491 F. Supp. 526, 528 (E.D. Mo. 1980).

54. 523 F. Supp. at 639. Traditionally, the heart of the determination of "substantial similarity" has been an application of the "ordinary observer" test. Judge Learned Hand first articulated this test when he commented that "substantial similarity" exists when "[t]he ordinary observer, unless he set out to detect the disparities, would be disposed to overlook them, and regard their aesthetic appeal as the same." *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*, 274 F.2d 487, 489 (2d Cir. 1960). Another often applied test is to assess whether the accused work exhibits signs of "the total concept and feel" of the copyrighted work. *Roth Greeting Cards v. United Card Co.*, 429 F.2d 1106, 1110 (9th Cir. 1970). See generally 3 M. NIMMER, *supra* note 14, § 13.03, which discusses generally what constitutes "substantial similarity."

55. 669 F.2d at 857.

56. See *supra* note 20.

57. 533 F.2d 87 (2d Cir.), *cert. denied*, 429 U.S. 980 (1976).

58. 533 F.2d at 90. The concept is perhaps best illustrated in terms of the "scenes a faire" approach to the copyrightability of literary works. "Scenes a faire" refers to "incidents, characters or settings which are as a practical matter indispensable, or at least standard, in the treatment of a given topic." *Alexander v. Haly*, 460 F. Supp. 40, 45 (S.D.N.Y. 1978). Hence, the thematic line of boy meets girl, boy loses girl, boy gets girl is noncopyrightable. If this same thematic line is embellished with particularizing details, it may become copyrightable material.

59. *International Luggage Registry v. Avery Products Corp.* was an action based on an alleged copyright infringement, in which the United States Court of Appeals for the Ninth Circuit stated, "The question of 'substantial' or 'noteworthy' similarity is one of fact and on appeal the issue is governed by the clearly erroneous principle stated in Rule 52(a)." 541 F.2d 830, 831 (9th Cir. 1976).

60. On appeal, to a court of appeals, "[f]indings of fact shall not be set aside unless clearly erroneous. . . ." FED. R. CIV. P. 52(a).

61. One commentator has noted, "Originality cannot be dissociated from copyright pro-

ment World, Inc.,⁶² in which the game at issue was entitled "Asteroids," the defendant claimed that Asteroids' copyright was an unlawful copyrighting of the idea of a participatory, audiovisual portrayal of a spaceship defending against an onslaught of meteors.⁶³ The United States District Court for the District of Maryland noted therein that a careful analysis must include an examination of the idea and the medium in which the idea is manifested.⁶⁴ The court concluded that copyright protection does not encompass elements of a work that are necessary by-products of the idea and medium limitations.⁶⁵

The United States Court of Appeals for the Seventh Circuit, in *Atari, Inc. v. North American Philips Consumer Electronics Corp.*,⁶⁶ commented as follows: "The audio component and the concrete details of the visual presentation constitute the copyrightable expression of that game 'idea.'"⁶⁷ Therefore, a videogame that lacks particularized aural and visual details may acquire only limited copyright protection because its expression of an idea differs little from the idea itself.⁶⁸ Materials in which the ideas and the expressions of the ideas are indistinguishable are protected by copyrights only to the extent that the materials are identically copied.⁶⁹ They consequently are virtually noncopyrightable.

The keystone purpose underlying the Copyright Act is to encourage new artistic endeavors.⁷⁰ *Stern* stands as a judicial articulation of that purpose. Videogame developers, manufacturers and distributors, secure in the copyright protection afforded their games' audiovisual displays, consequently will assume greater risks in the research and development of similarly innovative leisure products. The avuncular safeguarding exhibited in the *Stern* court's interpretive application of the Copyright Act will serve to reassure all poten-

tection and infringement. For both concern the nature and measure of the right protected by law. In determining it, the criterion adopted by the Courts stresses not newness of ideas, but their distinctive unfoldment." Yankwick, *Originality in the Law of Intellectual Property*, 11 F.R.D. 457, 458 (1952). See *supra* note 58 and accompanying text.

62. 547 F. Supp. 222 (D. Md. 1981).

63. *Id.*

64. *Id.*

65. *Id.*

66. 672 F.2d 607 (7th Cir. 1982).

67. *Id.* at 617.

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

69. See *Herbert Rosenthal Jewelry Corp. v. Kalpakian*, 446 F.2d 738 (9th Cir. 1971).

70. The United States Constitution grants to Congress the power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writing and Discoveries. . . ." U.S. CONST. art. I, § 8, cl. 8. The Copyright Act of 1976 and its predecessors are the realization of that grant. "The purpose of the Copyright Act is to encourage people to devote themselves to intellectual and artistic creation. . . ." *Quinto v. Legal Times of Washington, Inc.*, 511 F. Supp. 579, 581 (D.D.C. 1981).

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tial contributors of new modes of recreation that their legitimate efforts will not go unprotected.

