

Hybrid Innovation Regimes: The Interplay of IP and Non-IP Protections

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ABSTRACT: Intellectual Property and Tabletop Games by Christopher Seaman and Thuan Tran develops the tabletop game industry into a case study that challenges the usual approach to studying the creative industries. They identify dynamics that help us see that the conventional binary between “full-IP” and “negative-space” industries is too rigid. Advancing their observations, I argue it is more productive to understand creative industries as “hybrid innovation regimes” that combine IP and non-IP protections.

There is room, however, to dispute whether board gaming strikes the optimal balance of IP protections and limitations. Seaman and Tran conclude it does, pointing to total industry revenues and the ongoing proliferation of new games. But this does not entirely answer the question, which requires us to identify our criteria for success, to consider how greater or lesser IP coverage would impact those criteria, and to account for how results may vary over time and among different sectors within the industry.

The breakdown of industry revenues also raises further questions. Four games claim two thirds of the industry’s entire yearly revenue (Monopoly foremost among them, followed by Scrabble, chess, and ludo). These figures establish that the lion’s share of industry revenues go to established incumbents rather than the innovators at the forefront of the board gaming “golden age.” It also adds wrinkles to the story of competition without IP as we consider how the makers of games like chess and ludo can claim a spot among the top-selling board games with practically no IP, and how Monopoly succeeds by leveraging its trademark rights even though it lacks formal rights to stop others from duplicating the game itself.

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INTRODUCTION

Christopher Seaman and Thuan Tran identify tabletop gaming as a creative industry “where [intellectual property] law generally balances the interests of creators, publishers, and consumers effectively.”¹ Although this conclusion may seem understated, it breaks with the typical case study of the creative industries. Many prior studies have canvassed the coverage and limitations of intellectual property (“IP”) to uncover what they identified as IP’s “negative spaces,”² arguing that IP is unnecessary or would be counterproductive for specific domains of creative production.³ By contrast, Seaman and Tran posit that IP plays an instrumental role in tabletop gaming despite its limitations and argue that games occupy the underexplored space between maximal IP and no IP.⁴ Indeed, they suggest that all industries fall somewhere along a continuum between the two extremes⁵—they operate in what I refer to here as “hybrid innovation regimes.”

1. Christopher B. Seaman & Thuan Tran, *Intellectual Property and Tabletop Games*, 107 IOWA L. REV. 1615, 1683 (2022).

2. *See id.* at 1623–24.

3. *See id.* at 1623; *see also* Aaron Perzanowski & Kate Darling, *Introduction*, in *CREATIVITY WITHOUT LAW: CHALLENGING THE ASSUMPTIONS OF INTELLECTUAL PROPERTY 1* (Kate Darling & Aaron Perzanowski eds., 2017) (synthesizing the literature on innovation without IP).

4. Seaman & Tran, *supra* note 1, at 1679–83.

5. *Id.* at 1682–83.

This Essay builds up their findings and outlines potential counterpoints to provide guidance for future case studies that seek to explore IP, its alternatives, and its absence across the creative industries. Part I of this Essay maps the contours of innovation regimes like the one that exists in tabletop gaming and suggests that they are best understood as hybrid innovation regimes.⁶ Seaman and Tran observe that IP covers only limited facets of tabletop games.⁷ Innovators thus have room to create new games that build upon existing game rules and mechanics,⁸ which are generally unprotected,⁹ while established game companies can use trademarks to protect their brands¹⁰ and a combination of copyright and design patents to protect discrete creative elements of their games.¹¹ The authors extrapolate from these findings to argue that most fields of creative work stand in a similar relationship to IP, falling somewhere in the “gray space between IP-intensive fields like biotechnology and motion pictures and ‘negative spaces’ like fashion and fine cuisine that do not require formal IP rights at all.”¹²

Developing the point further, Part I also explains that the board game industry is not unique in occupying this “gray space.”¹³ Rather, each creative industry—even those typically regarded as operating within a full-IP or negative-space environment—can be fruitfully understood as operating within a hybrid innovation regime.¹⁴ Creative works in each field feature a distinctive combination of elements. As Seaman and Tran observe in gaming,¹⁵ some elements in other fields are covered by IP and others are not. Among elements not covered, some are protected by non-IP obstacles to copying and others are free for the taking.¹⁶ Breaking out of the perceived binary between IP-intensive fields and negative spaces provides a more accurate picture of how

6. *See infra* Part I.

7. *See* Seaman & Tran, *supra* note 1, at 1634–61 (detailing the intersections of tabletop gaming with copyright, patent, trademark, and other IP rights).

8. *Id.* at 1677.

9. *See id.* at 1635–36 (explaining the limits of copyright); *id.* at 1644–51 (explaining the limits of patent).

10. *See id.* at 1651–52.

11. *See id.* at 1636–38; *id.* at 1657–58. The combination of these rights also protects publishers against wholesale copying. *Id.* at 1680.

12. *See id.* at 1682–83.

13. *Id.* at 1682; *infra* Section I.D.

14. I advance the same argument in a parallel study of the video game industry:

The world is not neatly divided into “full-IP” and negative-space industries. Rather, all creative industries feature a combination of elements protected by IP, elements subject to de facto protection, and elements that are freely appropriable. To insist on an artificial divide is to obscure trends that cut across both sides of the line.

BJ Ard, *Creativity Without IP? Vindication and Challenges in the Video Game Industry*, 79 WASH. & LEE L. REV. 1285, 1365 (2022).

15. *See supra* notes 7–11 and accompanying text.

16. Ard, *supra* note 14, at 1365. These non-IP obstacles serve to bolster creative works with a measure of “copy-resistance” that reduces the likelihood of appropriation and may accordingly reduce the need for formal IP protection. *See id.* at 1344–45.

contemporary creative industries function and opens the conversation to allow for more sophisticated analysis of how these regimes operate.¹⁷

Part II of this Essay grapples with the question of how to evaluate whether an innovation regime is successful.¹⁸ Seaman and Tran conclude that the existing regime for gaming seems to work “fairly well,”¹⁹ but they do not fully unpack the criteria for measuring success. Many prior studies of creative industries in IP’s negative space seem to dub an industry successful so long as it is capable of producing new works on an ongoing basis.²⁰ Defining success this way allows us to answer the narrow question of whether creative production is possible without comprehensive IP protection, but it sets the bar too low to tell us much else.²¹

More robust measures of success are required if these studies are to achieve their true ambitions. Studies of the creative industries typically seek to make prescriptive claims about whether greater or lesser IP protection would better promote innovation.²² To substantiate these claims, however, requires precision with respect to our criteria for successful innovation and exploration of the myriad ways that the presence or absence of IP rights impacts these criteria. In practice, it may also turn out that the regime works quite differently for different participants in the industry.²³

Tabletop gaming illustrates these complications. As Part III details, the industry’s raw global revenues suggest that tabletop games are thriving.²⁴ But dissection of the figures reveals that the lion’s share of the proceeds go toward well-established games like *Monopoly*, *Scrabble*, chess, and ludo that compete either by trademark or through their ornamental features.²⁵ The slice of the pie remaining for the developers of new games is much more modest when divided among all entrants. To evaluate whether tabletop gaming’s present innovation regime is better than higher- or lower-IP alternatives requires deliberate

17. *Id.* at 1373–74.

18. *See infra* Part II.

19. Seaman & Tran, *supra* note 1, at 1677.

20. *See* Ard, *supra* note 14, at 1364.

21. *See id.*

22. *See id.* at 1288 & n.8.

23. *Cf. id.* at 1368–73 (detailing variation within the video game industry and the precarity of the regime in the face of technological, economic, and social change).

24. *See* Seaman & Tran, *supra* note 1, at 1618 & n.13 (documenting projected global revenues of over \$20 billion by 2025). Seaman and Tran draw on figures published in 2019 by Grand View Research. *See id.* (citing Grand View Research, Inc., *Playing Cards & Board Games Market Size Worth \$21.56 Billion by 2025: Grand View Research, Inc.*, CISION PR NEWswire (Oct. 9, 2019, 6:35 AM), <https://www.prnewswire.com/news-releases/playing-cards--board-games-market-size-worth-21-56-billion-by-2025-grand-view-research-inc-300934566.html> [<https://perm.a.cc/8F3R-TDX>]). Board game sales may have subsequently accelerated due to increased demand during the period of COVID-19 lockdowns in 2020. Seaman & Tran, *supra* note 1, at 1618. Contemporary estimates nonetheless suggest the industry currently takes in only \$11 to \$13.4 billion. *See* Jaelyn Peiser, *We’re in a Golden Age of Board Games. It Might Be Here to Stay*, WASH. POST (Dec. 24, 2022, 7:00 AM), <https://www.washingtonpost.com/business/2022/12/24/board-game-popularity> (on file with the *Iowa Law Review*).

25. *See infra* Section III.A.

decisions about how to weigh different subsectors within the industry and attention to whether IP or something else drives success. It also requires further research on the many ways that IP and its absence shape innovation—sometimes for the better, sometimes for the worse.

I. HYBRID INNOVATION IN TABLETOP GAMING

Seaman and Tran chart new conceptual terrain for the study of innovation regimes. Even though IP coverage is lacking for key game elements, they reject the premise that this makes tabletop gaming a negative space.²⁶ They argue that what we see is not a space where IP is absent, but instead one where IP law works as intended: it covers some aspects of games even while its limitations and exclusions leave others open to copying.²⁷ This hybrid approach to innovation, which relies partly on IP protections and incentives, and partly on non-IP protections and incentives, defies the typical characterization of creative production as either IP-intensive or occurring within IP's negative space. It nonetheless provides a more accurate picture of how most creative industries function.

A. PRODUCTIVE GAPS IN COVERAGE

Games occupy this in-between space due to several key exclusions, some doctrinal and some more practical in nature. Foremost among these exclusions is the lack of protection for game rules.²⁸ Copyright is the IP regime we typically look to for protection of creative works, but it excludes game rules as either unprotectable “ideas” or unprotectable systems, processes, or methods of operation.²⁹ Although IP law ordinarily channels the protection of systems to patent law,³⁰ it too is of limited use to game makers. Older games like *Monopoly* successfully obtained patents because they were invented early in the history of mass-market board games;³¹ the coverage available to later games is more limited³² under patent law's non-obviousness requirement because many rules are “predictable variations” on the elements established in prior games.³³ The

26. Seaman & Tran, *supra* note 1, at 1683.

27. *Id.*

28. For a comprehensive account of this exclusion, see Bruce E. Boyden, *Games and Other Uncopyrightable Systems*, 18 GEO. MASON L. REV. 439, 455 (2011).

29. See Seaman & Tran, *supra* note 1, at 1635–36. Although many cases use the idea-expression framework to explain the exclusion of rules, most of these cases are better understood as the application of copyright's exclusion of systems and methods. Ard, *supra* note 14, at 1322–27.

30. See Viva R. Moffat, *The Copyright/Patent Boundary*, 48 U. RICH. L. REV. 611, 615 (2014).

31. See Seaman & Tran, *supra* note 1, at 1642–43 (documenting patents for *Monopoly*, *Life*, *Sorry*, *Battleship*, *Scrabble*, *Mouse Trap*, and *Twister*).

32. *But see id.* at 1668–71 (documenting a more recent patent for *Magic the Gathering*, which issued in 1997).

33. *Id.* at 1645–46 (quoting *KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. 398, 417 (2007)). As the authors note, the existence of earlier games as prior art also means that the scope of issued patents is narrow even for games that can clear the non-obviousness hurdle. *Id.* at 1649–50. This issue further limits the scope of patent protection for the industry.

expense and uncertainty associated with obtaining and enforcing patents also discourage patenting even in scenarios where patents might be obtainable.³⁴

Seaman and Tran examine the industry's success alongside its limited recourse to IP primarily through case studies of three specific games: *Dungeons and Dragons* ("D&D"), *Magic: The Gathering* ("Magic"), and *Settlers of Catan* ("Catan").³⁵ They establish that, at the very least, limited IP coverage has not stood in the way of significant innovation and investment. Their account opens by highlighting the ongoing "golden age" of board games heralded by the proliferation and diversity of new tabletop games.³⁶ They also point to revenue projections of over twenty billion dollars in 2025,³⁷ which put its revenues in roughly the same league as the more copyright-intensive music industry.³⁸ They also argue that this success derives, to some degree, from the limits of IP because the regime leaves room for follow-on innovation: "other creators are generally free to modify or adapt a game's underlying mechanics to new themes, settings, and topics."³⁹

B. INTERPLAY OF IP AND NON-IP MECHANISMS

Notwithstanding the limits of IP for tabletop gaming, Seaman and Tran look to formal IP as the ultimate mechanism for structuring industry competition. In their appraisal, "[c]opyright and trademark law . . . protects publishers against slavish copying and unauthorized reproductions"⁴⁰ even while leaving room to innovate.⁴¹ Indeed, a regime that simultaneously allows for copying while requiring a degree of innovation may capture what Joseph Fishman has dubbed "constraint's generative upside."⁴² In the related context of video games, for example, the character who would ultimately become Mario was originally meant to be Popeye; Nintendo was compelled to create its own original character because of a copyright in the preexisting character.⁴³ The

34. *Id.* at 1650.

35. *See id.* at 1661–76.

36. *Id.* at 1617–18.

37. *Id.* at 1618. Complicating the picture, however, the bulk of these revenues go toward established games like chess, *Monopoly*, *Scrabble*, and *Ludo* rather than the innovative new games at the center of the golden-age narrative. *See infra* Section III.A.

38. Seaman & Tran, *supra* note 1, at 1618 (citing Marie Charlotte Götting, *Global Recorded Music Revenue From 1999 to 2020*, STATISTA (July 14, 2021), <https://www.statista.com/statistics/272305/global-revenue-of-the-music-industry> [<https://perma.cc/5SS3-2PSV>]).

39. *Id.* at 1677.

40. *Id.* at 1680.

41. *See* text accompanying *supra* note 39.

42. Joseph P. Fishman, *Creating Around Copyright*, 128 HARV. L. REV. 1333, 1339 (2015); *see also* Xiyin Tang, *Art After Warhol*, 71 UCLA L. REV. (forthcoming 2024), (manuscript at 40–42), <https://ssrn.com/abstract=4542784> [<https://perma.cc/837Q-9YRQ>] (documenting contemporary examples where "creating around" has proven generative).

43. Fishman, *supra* note 42, at 1336. The iconic musical theme for the *Legend of Zelda* emerged from the same dynamic. Nintendo composer Koji Kondo had already prepared a digital arrangement of *Boléro* by Maurice Ravel to play over the game's opening scroll. Kellen Russoniello, *Zelda's Study: 'The Copyright Incident' Responsible for the Iconic Zelda Theme*, ZELDA UNIVERSE (Oct. 22, 2019), <https://zeldauniverse.net/2019/10/22/zeldas-study-the-copyright-incident->

imperative to design around similar copyrighted elements in tabletop games may contribute to the differentiation of themes and settings to satisfy varying aesthetic tastes, even among games with similar underlying rules.⁴⁴

One advantage of approaching the industry as a hybrid regime is that it allows us to appreciate how non-IP protections and incentives operate in conjunction with formal legal protections.⁴⁵ Some negative-space studies have identified alternate incentive structures whereby creators are driven not by monetary interests but the intrinsic rewards of their creative work or the gratification that comes from building one's reputation.⁴⁶ Seaman and Tran recognize that these alternate incentives play a role in tabletop gaming.⁴⁷ The intrinsic rewards of creation and fame may explain why hobbyists continue to create despite the risk of appropriation but, as Seaman and Tran acknowledge, it does little to explain substantial commercial investment.⁴⁸

Other work on IP's negative spaces has also identified alternative protection mechanisms. First, case studies across fields as diverse as haute cuisine,⁴⁹ stand-up comedy,⁵⁰ stage magic,⁵¹ tattoo art,⁵² and independent video games⁵³ have documented the existence and enforcement of community norms that impose limits on permissible copying without recourse to formal IP enforcement.⁵⁴ Second, some kinds of works, or some aspects of works, may be copy-resistant.⁵⁵ Autobiographical jokes, for example, are copy-resistant because comedians cannot easily steal jokes from other comedians who have

responsible-for-the-iconic-zelda-theme [<https://perma.cc/W8L8-YT8S>]. Kondo had little choice but to compose an original track upon discovering that Ravel's composition was still under copyright. *Id.*

44. See text accompanying *supra* note 39. These differentiated products thus compete with one another as imperfect substitutes. For exploration of how this dynamic may shape markets for copyrighted works, see Christopher S. Yoo, *Copyright and Product Differentiation*, 79 N.Y.U. L. REV. 212, 221–25 (2004).

45. See Ard, *supra* note 14, at 1374.

46. *Id.* at 1348–49.

47. See Seaman & Tran, *supra* note 1, at 1677–79.

48. *Id.* at 1679–80.

49. Emmanuelle Fauchart & Eric von Hippel, *Norms-Based Intellectual Property Systems: The Case of French Chefs*, 19 ORG. SCI. 187, 188 (2008).

50. Dotan Oliar & Christopher Sprigman, *There's No Free Laugh (Anymore): The Emergence of Intellectual Property Norms and the Transformation of Stand-Up Comedy*, 94 VA. L. REV. 1787, 1812–31 (2008).

51. Jacob Loshin, *Secrets Revealed: Protecting Magicians' Intellectual Property Without Law*, in *LAW AND MAGIC: A COLLECTION OF ESSAYS* 123, 124 (Christine A. Corcos ed., 2010).

52. Aaron Perzanowski, *Tattoos & IP Norms*, 98 MINN. L. REV. 511, 532–67 (2013).

53. Ard, *supra* note 14, 1338–62; see also Shani Shisha, *Fairness, Copyright, and Video Games: Hate the Game, Not the Player*, 31 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 694, 724–31 (2021).

54. See Seaman & Tran, *supra* note 1, at 1622. Seaman and Tran's identification of reputation as an important motivator for some designers, *id.* at 1677–79, also indicates that community norms set the boundaries of permissible copying for some game creators: to win prestigious prizes like the *Spiel de Jahres* and the *Golden Geek Awards*, *id.* at 1679, creators must presumably comply with a set of norms around permissible borrowing and expected innovation. See Ard, *supra* note 14, at 1295 (describing this dynamic with respect to independent video games).

55. Ard, *supra* note 14, at 1344–45.

different identities and life experiences.⁵⁶ My prior work has argued that AAA video games⁵⁷ are copy-resistant because of their high-production values—leading developers invest hundreds of millions of dollars toward graphics and other cinematic features, and competitors cannot duplicate their success without undertaking similar expenditures.⁵⁸

Seaman and Tran appear to sideline these additional perspectives—they recognize a range of negative-space mechanisms,⁵⁹ but do not draw on them to explain what we see in tabletop gaming.⁶⁰ Bruce Boyden’s review essay synthesizes these mechanisms differently: he suggests that the expense of producing a professional-quality game and the difficulty of conveying the gameplay experience for a new game are “natural barriers” that provide copy-resistance to tabletop games.⁶¹ Trademark’s prohibition on copying the name of an existing game are meaningful because it reinforces the difficulty of conveying the gameplay experience for a new game even if it copies the substantive rules of the existing game.⁶² From this perspective, it is incomplete to conclude that the tabletop gaming regime works because IP law, on its own, has struck the right balance between protection and limitations.⁶³ Rather, if IP rights contribute to a productive balance, it is because the interaction between formal legal protections and non-IP mechanisms is properly calibrated.⁶⁴

C. IP AS OBSTACLE?

One perceived advantage of removing IP from creative production is that it eliminates the risk that aggressive IP enforcement will impede follow-on innovation. Seaman and Tran are optimistic that self-interest will curb this risk in tabletop gaming; this perspective emerges from the authors’ focused case studies of *D&D* and *Catan*. Under the ownership of Hasbro-subsiary Wizards

56. See Oliar & Sprigman, *supra* note 50, at 1852–53.

57. For an introduction to AAA video games—a capital-intensive industry sector which adopted the “AAA” nomenclature from bond classifications—see Ard, *supra* note 14, at 1309–13.

58. *Id.* at 1349–50. The case study that launched the study of IP’s negative spaces—Kal Raustiala & Christopher Sprigman, *The Piracy Paradox: Innovation and Intellectual Property in Fashion Design*, 92 VA. L. REV. 1687 (2006)—demonstrated an even more unusual feature that I identify here as *copy-resilience*. Whereas copy-resistance refers to features that insulate works from copying, copy-resilience refers to features that make copying beneficial to the original creator. The fashion industry is copy-resilient because designers actually benefit from copying—it causes old fashions to become played-out and thereby creates the opportunity to sell new ones. See Seaman & Tran, *supra* note 1, at 1623.

59. See Seaman & Tran, *supra* note 1, at 1622–24.

60. See *id.* at 1677–83. The authors recognize that non-pecuniary incentives may motivate individual creators, *id.* at 1677–79, but otherwise attribute the state of the industry to IP rights, including voluntary forbearance by IP holders, *id.* at 1682–83; see also *infra* Section I.C.

61. See Bruce E. Boyden, *The Game, the Players, and the Board*, 109 IOWA L. REV. ONLINE 105, 122 (2024).

62. See *id.* at 125.

63. See Seaman & Tran, *supra* note 1, at 1677.

64. Ard, *supra* note 14, at 1370 (“The ultimate impact of any configuration of rights depends on wider developments in technology, the market, and society at large.”); see also *id.* at 1372 (“These studies also demonstrate that the viability of a particular arrangement in one area of law is often contingent on the state of others.”).

of the Coast (“Wizards”), *D&D* adopted an Open Game License (“OGL”) that has allowed third parties to release compatible supplements and standalone games based on the same core rules since the year 2000.⁶⁵ Wizards also approves and sometimes even promotes individual players’ creation of game modules and other content.⁶⁶ These moves make sense from a self-interested perspective because they generate positive network effects. As the authors note, one Wizards executive has posited that widespread availability of *D&D*-compatible materials will “create customer resistance to the introduction of new systems, and . . . steadily increase the number of people who play [*D&D*], thus driving sales of the core books.”⁶⁷

With respect to *Catan*, the authors note the rightsholders’ forbearance in declining to pursue legal action against a very similar free online game called Colonist.io that launched shortly after the COVID-19 pandemic began in 2020.⁶⁸ Like *D&D*’s endorsement of third-party content, this action may conceivably benefit the maker of the original game by popularizing it and thereby driving future sales and expansions of the physical game.⁶⁹

Other examples leave me less sanguine than the authors, however, regarding the reliability of voluntary forbearance. Game owners have brought the full force of their IP to bear on online adaptations in scenarios where they had plans to launch online versions of their own.⁷⁰ Consider the authors’ third focused case study, dealing with the collectible card game *Magic*—owned by Wizards—particularly its lawsuit against the crowdfunded, free-to-play online trading card game *Hex: Shards of Fate* (“Hex”).⁷¹ *Hex* argued that Wizards’ copyright suit was an attempt “to assert protection over an uncopyrightable idea” and to extend its expired gameplay patent.⁷² The merit of these assertions was not adjudicated before the parties settled.⁷³ Although *Hex* continued for another five years, it discontinued service shortly after *Magic* launched its own online arena.⁷⁴

Likewise, although Seaman and Tran frame *D&D*’s prior episodes of aggressive IP enforcement as historical in nature,⁷⁵ events subsequent to their article’s publication have cast doubt on Wizards’ commitment to open

65. Seaman & Tran, *supra* note 1, at 1665–67.

66. *Id.* at 1667.

67. *Id.* at 1666 (quoting Ryan S. Dancey, *Open Gaming Interview with Ryan Dancey*, WIZARDS OF THE COAST: DUNGEONS AND DRAGONS, <http://www.wizards.com/dnd/article.asp?x=dnd/md/md20020228e> [<https://perma.cc/9FYF-WWQD>]).

68. *Id.* at 1675.

69. *See id.* at 1673–74 (cataloguing *Catan*’s spinoffs and merchandising).

70. Indeed, they may do so even in the absence of such a plan—*Catan*’s forbearance with respect to Colonist.io in 2020 stands in contrast to their earlier assertion of IP against an Android clone of the game. *See id.* at 1674–75.

71. *See id.* at 1671–72.

72. *Id.* at 1672. On Wizards’ patent, see *supra* note 32.

73. *See* Seaman & Tran, *supra* note 1, at 1672.

74. *See id.*

75. *See id.* at 1663–65 (documenting a pattern of litigation against competing game makers, particularly those who were previously affiliated with *D&D*).

licensing. In December 2022, a leaked draft of a revision to the OGL indicated that Wizards planned to eliminate the prior permissions and introduce a new suite of requirements:

a 25 percent royalty on revenue from any OGL creator earning above \$750,000 per year in sales; the right for [Wizards] to use any content created under the license for any purpose; an apparent ban on the virtual tabletop simulators that helped kindle a tabletop gaming boom during pandemic lockdowns; and the de-authorization of anything made according to the previous OGL.⁷⁶

Other provisions would have given Wizards the power to terminate the agreement as to material that was “hateful and discriminatory.”⁷⁷ Wizards relented following public outcry,⁷⁸ retaining the power to terminate the license for discriminatory content but scrapping proposed royalties and other limitations.⁷⁹

On the upside, this turn of events highlights a productive role for IP enforcement: it gives the game owner the ability to police against misuse of their material even while generally opening it for follow-on contributions by third parties. If Wizards had dedicated the game to the public outright, rather than maintaining control over the underlying IP, it would have had no leverage to enjoin third-party hate speech or discrimination. In turn, fans may police against Wizards’ misuse of those IP rights, as they did when they protested changes to the OGL.⁸⁰ On the other hand, however, the fact that Wizards moved toward revoking permissions that had been in place for over twenty years suggests the equilibrium among game owners, their competitors, and their fans may be more tentative and contingent than Seaman and Tran’s case studies indicate.⁸¹

D. HYBRID INNOVATION REGIMES

Seaman and Tran stake a position that challenges IP maximalists and minimalists alike. This challenge is partly about results: they advance tabletop gaming as an example where IP rights, IP limitations, and non-IP motivations

76. Edwin Evans-Thirlwell, *The D&D Open Game License Controversy, Explained*, WASH. POST (Jan. 19, 2023, 5:08 PM), <https://www.washingtonpost.com/video-games/2023/01/19/dungeons-and-dragons-open-game-license-wizards-of-the-coast-explained> (on file with the *Iowa Law Review*).

77. *See id.* (quoting DND Beyond Staff, *An Update on the Open Game License (OGL)*, D&D BEYOND (Jan. 13, 2023), <https://www.dndbeyond.com/posts/1423-an-update-on-the-open-game-license-ogl> [<https://perma.cc/ZLC4-N2QQ>]).

78. Nicholas Gordon, *Hasbro Tried to Take Back Control Over How People Reimagine Dungeons and Dragons. A Weeks-long Fan Backlash Made It Do a 180*, FORTUNE (Jan. 20, 2023, 3:26 AM), <https://fortune.com/2023/01/20/dungeons-and-dragons-ogl-wizards-of-the-coast-hasbro-copy-right-open-game-license> (on file with the *Iowa Law Review*).

79. Jess Weatherbed, *D&D Responds to Community Backlash with New Licensing Terms*, VERGE (Jan. 20, 2023, 5:21 AM), <https://www.theverge.com/2023/1/20/23563712/dnd-wotc-dungeons-and-dragons-ogl-ccl-license-feedback> [<https://perma.cc/A6XG-BD9F>].

80. *See* text accompanying *supra* notes 78–79.

81. *See* text accompanying *supra* notes 63–64.

culminate in an innovation regime that is arguably more effective than one that relies exclusively on IP or eschews IP rights altogether.⁸² The challenge is also conceptual: they challenge the traditional taxonomy between IP-intensive industries and negative spaces. “Instead of viewing IP’s relationship to innovation in a particular field as a binary variable,” they suggest “it should be considered as a continuum between the two extremities.”⁸³

The continuum the authors identify speaks to the existence of hybrid innovation regimes throughout the creative industries. As I have argued in parallel work on the video game industry, each creative industry utilizes a combination of IP strategies alongside non-IP strategies to protect existing works or otherwise promote the creation of new works.⁸⁴

Factually, we see these hybrid strategies in industries regarded as paradigmatic negative spaces. Fashion is an important example because it was the first negative space to be identified as such.⁸⁵ Even though designers benefit from widespread copying of their designs,⁸⁶ fashion houses also rely extensively on formal IP rights through the use of trademarks⁸⁷ and sometimes design patents.⁸⁸ Fields like comedy and stage magic are likewise considered to be negative spaces because norms govern in place of law,⁸⁹ yet stars in these fields sometimes flout anticopying norms⁹⁰ and often reap the benefits of IP by recording and monetizing copyrighted specials.⁹¹

Sectors conventionally regarded as copyright intensive also exhibit hybrid characteristics through their use of non-IP appropriation strategies.⁹² Consider music. The weakening of copyright enforceability in the face of digital distribution has pushed the music industry to rely more on live performances.⁹³

82. See Seaman & Tran, *supra* note 1, at 1682–83.

83. *Id.*

84. Ard, *supra* note 14, at 1365, 1373–75.

85. *Id.* at 1343. The basis for the claim that fashion is a negative space is the argument that design patents and other formal legal rights provide limited protection for garments. Raustiala & Sprigman, *supra* note 58, at 1704–05. Recent scholarship questions that premise, arguing that the claim that design patents are unavailable stems from repeated citation to studies that are flawed and outdated. Sarah Burstein & Saurabh Vishnubhakat, *The Truth About Design Patents*, 71 AM. U. L. REV. 1221, 1226 (2022).

86. See Raustiala & Sprigman, *supra* note 58, at 1691.

87. See Rochelle Cooper Dreyfuss, *Does IP Need IP? Accommodating Intellectual Production Outside the Intellectual Property Paradigm*, 31 CARDOZO L. REV. 1437, 1450 (2010).

88. See Burstein & Vishnubhakat, *supra* note 85, at 1226. For examples of design patents that cover fashion, see Sarah Burstein, *Design Patent Lookbook*, TUMBLR, <https://designpatentlookbook.tumblr.com> [https://perma.cc/4AAP-6Y89].

89. Seaman & Tran, *supra* note 1, at 1621–22.

90. See Oliar & Sprigman, *supra* note 50, at 1824.

91. Dreyfuss, *supra* note 87, at 1450.

92. See Ard, *supra* note 14, at 1345.

93. Christopher Jon Sprigman, *Copyright and Creative Incentives: What We Know (and Don’t)*, 55 HOUS. L. REV. 451, 461 (2017).

Although pirates can easily duplicate a set of MP3s, the experience of attending a live concert is copy resistant.⁹⁴

Seaman and Tran's recognition of this continuum places them at the vanguard of a new wave of scholarship that maps the overlap between IP and non-IP strategies for promoting innovation. While much work remains to be done, recognizing these configurations as hybrid in nature opens the way for us to compare the distinctive configurations of IP and non-IP strategies for promoting innovation across different industries and analyze how these configurations shape what is produced. This investigation also takes us to the ultimate question of how to assess whether a particular equilibrium between formal IP and other constraints works better relative to a system with greater or lesser formal protection.⁹⁵

II. WHAT IT MEANS TO "WORK"

Seaman and Tran cite favorably to prior work on IP's negative spaces for their detailed examinations of how innovation regimes function in practice.⁹⁶ They nonetheless distinguish their own work, concluding that tabletop gaming is not a negative space where IP is absent, but instead a space where IP facilitates innovation through its distinct balance of protections and limitations.⁹⁷ The implicit upshot is to question the skepticism of IP protection that is prevalent in the negative-space literature.⁹⁸

To truly make headway in this debate requires clarity on what it means for an innovation regime to be successful. The authors word their conclusion carefully: "IP law appears to work fairly well at balancing the important interests of incentivizing the creation of tabletop games and preserving the freedom of others to innovate,"⁹⁹ such "that IP law supports—or at least does not significantly hinder—the high level of innovation currently occurring."¹⁰⁰ Studies of IP's negative spaces have likewise concluded that the industries under investigation are working because they have found that some substantial amount of creative production transpires without recourse to formal IP rights.¹⁰¹ Framed this way, however, the ideas of "working well" and "working at all" collapse into one another. To establish that a regime is truly working well requires defining further criteria for success. Moreover, to the extent these studies aim to elucidate the question of how these and other innovation regimes should be structured, they must also contend with whether the regime would be more successful with greater or lesser IP coverage.

94. *See id.* ("[T]he music industry adapted to piracy by re-emphasizing the live concert experience, which, unlike recordings, cannot effectively be pirated.").

95. *See* Ard, *supra* note 14, at 1363–68.

96. *See* Seaman & Tran, *supra* note 1, at 1621–23.

97. *Id.* at 1683.

98. *See id.* at 1623 & n.55.

99. *Id.* at 1677.

100. *Id.* at 1683.

101. Ard, *supra* note 14, at 1364.

To disentangle these issues, the discussion below begins with the question of defining success in gaming or any other creative industry.¹⁰² Seaman and Tran's findings suggest several possibilities worth considering. It then moves to the problems of measuring the success of the present regime and comparing it to alternatives.¹⁰³

A. CRITERIA FOR SUCCESS

Prior negative-space case studies have engaged with the question of whether creative production was possible without IP.¹⁰⁴ Documenting the fact that creative production occurs without reliance on IP was necessary and sufficient to answer this threshold question.¹⁰⁵ Without defining further criteria for success or comparing the extant regime to a higher-IP alternative, however, most of these case studies tell us only that a low-IP regime can continue as-is—they do not establish whether the status quo regime works well.¹⁰⁶

Some studies of intellectual production outside the negative-space literature have been more explicit in their criteria, focusing on metrics like number of works produced or total revenues.¹⁰⁷ The financial snapshot that Seaman and Tran provide suggests that gaming is doing well: its projected global revenues for 2025 are over twenty billion dollars.¹⁰⁸ The authors do not give figures for the number of games released each year, but their references to the ongoing "golden age" of tabletop gaming,¹⁰⁹ the increasing ease of funding and releasing a game,¹¹⁰ and the proliferation of games covering a broad array of themes and settings¹¹¹ all suggest that this number is substantial.¹¹² The breadth of different tastes satisfied through sheer variety¹¹³ also suggests the regime is doing well on the raw utilitarian metric of satisfying consumer preferences.

102. See *infra* Section II.A.

103. See *infra* Section II.B.

104. See *supra* note 101 and accompanying text.

105. Ard, *supra* note 14, at 1374.

106. See *id.*

107. See, e.g., Raymond Shih Ray Ku, Jiayang Sun & Yiyang Fan, *Does Copyright Law Promote Creativity? An Empirical Analysis of Copyright's Bounty*, 62 VAND. L. REV. 1669, 1671–74 (2009) (studying whether expansion of copyright law increased the number of copyright registrations).

108. See *supra* note 24 and accompanying text.

109. See Seaman & Tran, *supra* note 1, at 1617.

110. See *id.* at 1630.

111. See *id.* at 1678.

112. The president of one game studio estimates that game makers publish four-thousand games per year. Nick Bentley, *I Found an Exceptionally Cost-Effective Way to Get Exposure for My Unpublished Board Game*, NICKBENTLEY.GAMES, <https://www.nickbentley.games/board-game-pre-marketing-with-bga> [<https://perma.cc/NWW5-DLPQ>].

113. See *supra* note 44 and accompanying text.

Thoughtful scholars have questioned whether metrics like these adequately capture the aims of IP and innovation policy.¹¹⁴ Revenues and numbers of works produced are, at best, rough proxies for the social value of the industry's creative output.¹¹⁵ Critical scholars have suggested that the better measure for the success of the copyright system is the system's contribution to a democratic and participatory culture¹¹⁶ or human flourishing more broadly.¹¹⁷ In a similar vein, Patrick Goold and David Simon's forthcoming work seeks to rehabilitate the concept of utilitarianism in copyright, arguing that what matters is not mere satisfaction of preferences, but the "higher pleasures" associated with creative work that "feeds the mind, sparks feelings and imagination, and promotes moral sentiments."¹¹⁸ Extending the work of John Stuart Mill, they contrast the lower pleasures of a simple, motor-skills game like push pin, a game similar to snooker, with the higher pleasures of a cerebral game like chess.¹¹⁹

Games that are superficially entertaining, particularly if they are the nth variation on a familiar model (I confess to owning six different versions of *Monopoly*¹²⁰), contribute little from the vantage point of these critics. By contrast, games that communicate a diversity of viewpoints and ways of being, invite players to inhabit new perspectives, or stimulate deep strategic thinking count as valuable contributions.¹²¹ The industry's yearly new releases certainly

114. Others question whether devising these metrics is feasible at all: "[T]he most serious problem is that such analysis is not an act of observation, but an assertion of power. It is the act of deciding what counts, how to count it, and how to compare it to other sources and measures of value." Jeremy N. Sheff, *Values, Questions, and Methods in Intellectual Property*, 90 ST. JOHN'S L. REV. 549, 560 (2016).

115. See Barton Beebe, Bleistein, *The Problem of Aesthetic Progress, and the Making of American Copyright Law*, 117 COLUM. L. REV. 319, 351 (2017) (decrying this measure of value in copyright).

116. See, e.g., Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283, 363–64 (1996) (tracing copyright's role in promoting democratic discourse); Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 1, 39–40 (2004) (articulating a more expansive vision of democracy that includes participation in the making of culture).

117. See, e.g., Madhavi Sunder, *IP³*, 59 STAN. L. REV. 257, 324–25 (2006) (probing intellectual property's relationship to the values of autonomy, culture, democracy, equality, and development); Betsy Rosenblatt, *Belonging as Intellectual Creation*, 82 MO. L. REV. 91, 95, 112 (2017) ("[W]e do humanity a disservice by focusing only on tangible production and ignoring other notions of human flourishing."). Broadly speaking, the democratic and human-flourishing perspectives emphasize the *access* component of copyright's incentives-access paradigm. See BJ Ard, *Taking Access Seriously*, 8 TEX. A&M L. REV. 225, 229–30 (2021) (exploring how expanded "access . . . advances the deeper normative goals of copyright").

118. Patrick Goold & David A. Simon, *On Copyright Utilitarianism*, 99 IND. L.J. (forthcoming 2024) (manuscript at 5), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4408039 [<https://perma.cc/QH2B-JQCS>].

119. *Id.* at 10, 25.

120. Three are official Hasbro *Monopoly* products, including the licensed versions for *The Simpsons* and *Star Wars*. Three are third-party *Monopoly*-like games like *Dachshund-opoly* and the University of Georgia-themed *Dawg-opoly*. See *infra* Section III.B.2.

121. Cf. Anupam Chander & Madhavi Sunder, *Everyone's a Superhero: A Cultural Theory of "Mary Sue" Fan Fiction as Fair Use*, 95 CALIF. L. REV. 597, 608–09 (2007) (explaining how self-insertion into popular media promotes self-empowerment in the context of fan fiction).

include many games that are effectively more of the same. At the same time, the overall number of games and increased ease of entry for new game makers suggest we may also be seeing games that contribute to a more democratic and participatory culture: the abundance of user-generated content, like that which flourishes under *D&D's* OGL, speaks to players' participation in the creation of gaming culture in an even more literal sense.¹²² The expansion of the "Eurogame" and "hobbyist game" categories in recent decades also indicates the rise of games that prioritize deep strategy relative to the luck-based elements of previous mass-market games.¹²³ It remains for future scholars of gaming to identify which of these criteria to prioritize, and to do the even harder work of measuring them.

B. EMPIRICAL CHALLENGES

Measuring the effectiveness of the regime is, of course, easier said than done. As Seaman and Tran note, Mark Lemley has wryly characterized our current IP regimes as "faith-based"¹²⁴: We lack the evidence to say that they work.¹²⁵ We simultaneously lack decisive evidence to say that they do not.¹²⁶ Consider just two of the empirical challenges standing in the way of evaluating the tabletop gaming regime.

First there is the challenge of operationalizing and measuring whichever criteria we choose. Metrics like total revenues and number of games released are appealing largely because they can be measured with a fair degree of precision.¹²⁷ Even so, focusing on total revenues may obscure important information about relative success within the industry and whether it can be attributed to IP protection: We will explore the intra-industry breakdown in greater detail below.¹²⁸

The task of measurement becomes still more complex and subjective when we attempt to evaluate criteria that reflect normative values, like the advancement of an inclusive and participatory culture.¹²⁹ Courts have sought to distance themselves from such questions as a matter of copyright doctrine,¹³⁰ but confronting these questions is necessary to assess whether a regime is working. Our evaluation of these criteria may depend on not only the content of the games being produced, but also the market share of competing

122. See Seaman & Tran, *supra* note 1, at 1682.

123. See *id.* at 1628–30.

124. See *id.* at 1623 (quoting Mark A. Lemley, *Faith-Based Intellectual Property*, 62 UCLA L. REV. 1328, 1344 (2015)).

125. See Lemley, *supra* note 124, at 1334.

126. "The decidedly ambiguous nature of this evidence should trouble us . . ." See *id.*

127. As one scholar notes, "stuff is far easier to measure than human-flourishing." Rosenblatt, *supra* note 117, at 112.

128. See *infra* Section III.A (breaking down revenues); *infra* Section III.B (exploring variation in IP and non-IP competition strategies).

129. See *supra* notes 116–19 and accompanying text.

130. See generally Beebe, *supra* note 115 ("In *Bleistein*, in short, the constitutionally sanctified concept of 'progress' was finally forced to come to terms with—and forced upon—the aesthetic. The result, as this Article seeks to show, would prove to be a disaster for American copyright law.").

games and game makers. A financial snapshot that shows four billion dollars in global sales for *Monopoly* suggests different conclusions than one that shows four billion dollars split across thousands of different games.¹³¹

Second, even concrete metrics like total revenues suffer from the lack of a counterfactual. Subject to the caveats below, the twenty billion dollar figure the article identifies is impressive both on its own and as compared to music industry revenues.¹³² Yet, without the ability to at least postulate as to how those revenues compare to a scenario with greater or lesser IP, such figures cannot tell us whether the contemporary regime has struck an optimal balance.

IP on the whole struggles with the counterfactual problem because the global harmonization of IP laws leaves us with relatively few points of comparison.¹³³ Some scholars have tried to overcome it by using discernable shifts in the enforceability of IP law as the basis for natural experiments.¹³⁴ Glynn Lunney, for example, argues that the de facto weakening of copyright due to digital filesharing pushed artists to release a greater number of high-quality songs rather than resting on their laurels.¹³⁵

In the absence of such an inflection point, we are left to formulate hypotheses about the effect of various levels of IP protection and test them with what data we have. Beyond establishing that the current level of protection strikes a balance between allowing follow-on games¹³⁶ and discouraging destructive forms of copying,¹³⁷ the current evidence does not tell us whether we are close to an optimal state. As the available revenue figures show in the next Part, however, the system appears to be one that rewards incumbents heavily for making familiar games rather than one that supports bold leaps.

III. INTRA-INDUSTRY VARIATION

Inspection of global board game revenues reveals that the industry's financial success does not neatly align with the innovation story celebrated by game enthusiasts. Many speak of the tabletop gaming scene of recent decades as experiencing a "golden age" or "renaissance" as indicated by the diversity and creativity of new games, particularly in the form of alternatives to the typical mass-market game.¹³⁸ However, dissection of the revenue figures identified by Seaman and Tran tells a different story: two thirds of global board

131. Figures from Grand View Research indicate that both observations may be true simultaneously. See *infra* Section III.A.

132. See *supra* notes 37–38 and accompanying text.

133. See Lisa Larrimore Ouellette, *Patent Experimentalism*, 101 VA. L. REV. 65, 67–68 (2015) (confronting this problem in patent law).

134. Mark Lemley assembles an impressive comprehensive set of studies in this vein, documenting the surprising and mixed impacts of internet-based filesharing on the content industries. See Mark A. Lemley, *IP in a World Without Scarcity*, 90 N.Y.U. L. REV. 460, 485–87 (2015).

135. See GLYNN LUNNEY, *COPYRIGHT'S EXCESS: MONEY AND MUSIC IN THE US RECORDING INDUSTRY* 156 (2018) (documenting a correlation between increased music revenues and less or lower-quality music).

136. See *supra* Section I.A.

137. See Boyden, *supra* note 61, at 125.

138. See Seaman & Tran, *supra* note 1, at 1617, 1628–30.

game revenues flow to just four games, leaving only one third to be divided among the thousands of other games in circulation.¹³⁹ The following discussion traces these revenue figures,¹⁴⁰ assesses the variations in competitive strategy between games represented in these figures,¹⁴¹ and reflects on the implications of these contrasting strategies and results.¹⁴²

A. REVENUE BREAKDOWN

Seaman and Tran's article draws its revenue projections from a report by Grand View Research ("GVR"), which estimates \$21.56 billion in revenues in 2025.¹⁴³ Playing cards, including collectible card games like *Magic*, represent thirty-three percent of the total, accounting for \$7.11 billion.¹⁴⁴ As Figure 1 shows, this leaves \$14.4 billion for non-playing card tabletop games.

139. See Dilini Samarasinghe et al., *A Data Driven Review of Board Game Design and Interactions of Their Mechanics*, 9 IEEE ACCESS 114,051, 114,052 (2021) (documenting more than one hundred thousand total games on the board-gaming hub BoardGameGeek).

140. See *infra* Section III.A.

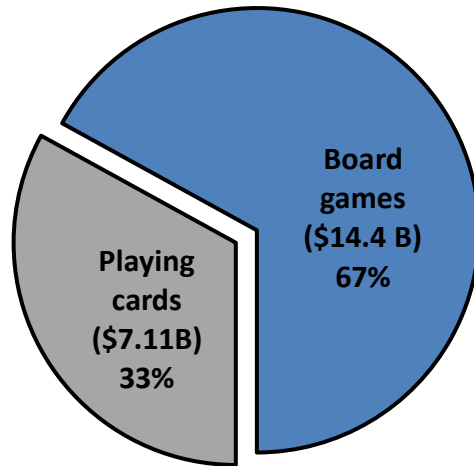
141. See *infra* Section III.B.

142. See *infra* Section III.C.

143. *Playing Cards And Board Games Market Size, Share & Trends Analysis Report By Product (Board Games (Chess, Scrabble, Monopoly, Ludo), Playing Cards), By Distribution Channel, and Segment Forecasts, 2019–2025*, GRAND VIEW RSCH. (2019), <https://www.grandviewresearch.com/industry-analysis/playing-cards-board-games-market> [<https://perma.cc/U973-2X4B>] [hereinafter "GVR Summary"]; see D. Tighe, *Cards and Board Games Market Value Worldwide from 2018 to 2025*, STATISTA (Jan. 14, 2022), <https://www.statista.com/statistics/1072042/global-card-and-board-games-market-value> [<https://perma.cc/9M9D-E89Z>].

144. GVR Summary, *supra* note 143. GVR's public-facing data does not specify what is included in the playing-card category. Comparable studies indicate, however, that the category includes trading card games like *Magic*. D. Tighe, *Forecast Revenue of the Card Game Market Worldwide 2013–2026*, STATISTA (Sept. 9, 2022) (on file with the *Iowa Law Review*). In that spirit, it bears noting that *Magic* emerged in 2022 as "Hasbro's first billion-dollar brand." Hasbro, Inc., Annual Report (Form 10-K) at 10 (Feb. 22, 2023) [hereinafter "Hasbro 10-K"]. Because GVR's public-facing data does not identify the proportion of revenues going to specific card games, I set the playing cards aside for the remainder of this analysis.

Figure 1: 2025 Projected Global Revenues, Playing Cards vs. Board Games



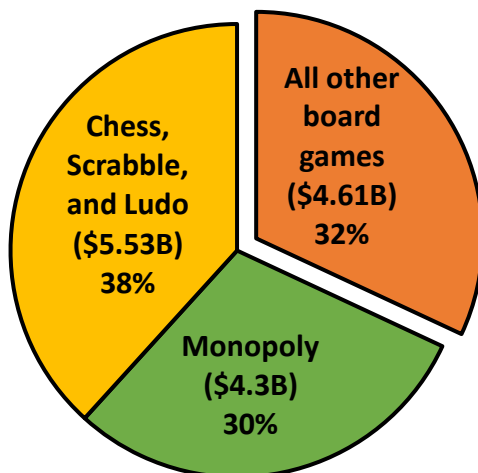
Of the \$14.4 billion claimed by board games, GVR claims that *Monopoly* takes a full 29.8 percent, or \$4.3 billion.¹⁴⁵ Chess, *Scrabble*, and ludo account for another 38.26 percent combined, or \$5.53 billion.¹⁴⁶ As Figure 2 shows, this leaves a more modest \$4.61 billion for every other game—from well-established games like *Risk* and *Trouble*, to modern classics like *Catan* and *Pandemic*, to the thousands of truly new entries at the forefront of the contemporary gaming renaissance.¹⁴⁷

145. GVR Summary, *supra* note 143. Despite their apparent precision, these figures must be taken with a grain of salt. Analysts report that board game sales figures are “surprisingly hard to come by, even from big corporations like Hasbro and Milton Bradley.” Andrew Lisa, *12 of the Bestselling Board Games of All Time*, GOBANKINGRATES (Feb. 8, 2021), <https://www.gobankingrates.com/money/business/12-best-selling-board-games-time> [<https://perma.cc/5QLM-M7BF>]. This means that plausible estimates, even if skewed, hold potential value as a shared point of reference. GVR’s figures are questionable, however, because the revenues imputed from *Monopoly*’s market share are difficult to reconcile with parent company Hasbro’s actual revenues. Even if we adjust downward to award *Monopoly* a proportional share of 2022’s \$11 billion board game market, *see supra* note 24, rather than GVR’s projected \$21.56 billion market, *Monopoly*’s revenues would be \$2.21 billion. The resulting figure does not mesh with parent company Hasbro’s 2022 gaming revenues of approximately \$2 billion, *see* Hasbro 10-K, *supra* note 144, at 44, half of which it attributed to *Magic*, *see id.* at 10. Perhaps GVR includes sales of third-party *Monopoly*-style games in its estimate, *see infra* Section III.B.2, but it seems implausible that off-brand games could make up the difference.

146. GVR Summary, *supra* note 143. Because GVR’s public-facing data does not state market-share percentages for games other than *Monopoly*, estimated market shares for other games are derived from inspection of GVR’s pie chart titled “Global board games market share, by product, 2018 (%)” *See id.*

147. *See* Bentley, *supra* note 112 (reporting an estimated four-thousand new games per year).

Figure 2: 2025 Projected Global Revenues, Share Remaining for All Other Board Games



GVR's breakdown of revenues deepens the puzzle of understanding tabletop gaming's hybrid innovation regime. Significant intellectual production takes place without intensive reliance on IP in each of these market segments. However, the full picture requires us to think beyond the plucky upstarts who rely on IP's exceptions to build new games on top of existing game mechanics. Rather, the breakdown of revenues also begs the question of how game makers can capture such large shares of the market even when their games would seem to have no IP, like chess, or limited IP, like *Monopoly*.

B. VARIATIONS IN STRATEGY

The foregoing division of revenues also highlights the variations in the strategies that different sectors of the industry use to compete, with attendant consequences for the overall outcomes of the innovation regime. For the present discussion, let us expand on three game makers mentioned in the article: the manufacturer of a chess set; Hasbro, as publisher of *Monopoly*; and a hobbyist that seeks to crowdfund a game through a platform like Kickstarter. As we will see, whether the hybrid innovation regime for any given industry is working, and indeed the degree to which it relies on IP versus alternative strategies, varies substantially depending on which industry players we place at the center of our analysis.

1. Chess in the Global Public Domain

The types of IP each game maker relies on vary significantly. Chess is part of the public domain;¹⁴⁸ the manufacturer cannot rely on trademark to stop

148. The same is true of the game ludo, which also places in the top four. *See supra* note 146 and accompanying text. Ludo is based on the centuries old Indian game pachisi, which has been Anglicized as the branded game *Parcheesi*, Bruce Whitehill, *American Games: A Historical*

others from using the name “chess,”¹⁴⁹ nor can it use patent or copyright to stop others from making a similar game.¹⁵⁰ Changing or innovating upon the rules or gameboard would be counterproductive: one of the key selling points is that the game is standardized such that one could play with anyone in the world even without needing to speak the same language.¹⁵¹

The makers of chess sets must instead compete on price and quality. Trademarks may accordingly play the same role as they would with the manufacture of any non-game product; brand names may become a proxy for quality once a manufacturer establishes a reputation.¹⁵² Even so, chess sets can distinguish themselves in the artistry of the chess board and pieces themselves.¹⁵³ Accordingly, some chess sets have been copyrighted as sculptural works,¹⁵⁴ and some manufacturers have obtained design patents for ornamental features.¹⁵⁵ Innovation in this segment of the market centers not on advancements in the game itself, but in artistry and manufacturing.

2. *Monopoly's* Loosely Defended Empire

Monopoly operates differently. The game rules were once patented but they are now in the public domain.¹⁵⁶ Thus, third parties have had leeway to

Perspective, 2 BOARD GAMES STUD. 116, 124 (1999) (noting that *Parcheesi* obtained “one of the oldest trademarks given to an American game”), and also serves as the inspiration for modern games like *Sorry!*, *id.* at 138.

149. Seaman & Tran, *supra* note 1, at 1652–53.

150. To be sure, IP comes into play in other ways: an inventor might devise a new magnetized chess board, *e.g.*, U.S. Patent No. 2,511,774 (filed Aug. 30, 1945), or a manufacturer might strike a deal to make a licensed chess set featuring the copyrighted and trademarked characters from a popular media property like *Super Mario Brothers* or *Harry Potter*. As noted below, IP may apply to chess pieces as manufactured goods much like they would apply to any other household item. *See infra* notes 152–155 and accompanying text. These applications of IP accentuate the fact that we are dealing with a hybrid regime, not a negative space, even for a game squarely in the public domain.

151. Although chess’s global reach is most salient in pop culture as a contact point for international relations during the Cold War, *see generally* DANIEL JOHNSON, WHITE KING AND RED QUEEN: HOW THE COLD WAR WAS FOUGHT ON THE CHESSBOARD (2008), Benjamin Franklin commented on its universality over 244 years ago:

Playing at Chess, is the most ancient and the most universal game known among men; for its original is beyond the memory of history, and it has, for numberless ages, been the amusement of all the civilized nations of Asia, the Persians, the Indians, and the Chinese. Europe has had it above 1000 years; the Spaniards have spread it over their part of America, and it begins lately to make its appearance in these northern states.

Benjamin Franklin, *The Morals of Chess*, COLUMBIAN MAG., Dec. 1786, at 159, *reprinted in* FOUNDERS ONLINE NAT’L ARCHIVES, <https://founders.archives.gov/documents/Franklin/01-29-02-0608> [<https://perma.cc/KB4W-8GF4>] (dating the original manuscript to 1779).

152. *See* II PETER S. MENELL, ROBERT P. MERGES, MARK A. LEMLEY & SHYAMKRISHNA BALGANESH, INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE: 2023, at 935 (2023).

153. *See* Seaman & Tran, *supra* note 1, at 1657.

154. *E.g.*, 32 PIECE NAUTICAL CHESS SET WITH BOARD BOX, U.S. Copyright Office Registration No. VA0001212021 (Aug. 15, 2002).

155. Seaman & Tran, *supra* note 1, at 1657 & n.337.

156. *See id.* at 1642–43.

release countless unofficial, unlicensed “-opoly” games with thematic elements corresponding to essentially every college, locality, and breed of dog.¹⁵⁷

The original *Monopoly* game nonetheless enjoys significant name recognition which it secures through trademark law.¹⁵⁸ Although one plaintiff briefly succeeded in having the trademark cancelled as generic,¹⁵⁹ Congress itself intervened to reverse that decision.¹⁶⁰ And Hasbro does not content itself to continue selling the game as-is. Instead, it releases updated versions to cater to marketing trends, including its kids’ version (*Monopoly Junior*), its contemporized version (*Monopoly: Here and Now*), and its electronic-banking versions (like *Monopoly: Electronic Banking*).¹⁶¹

More prominently, many versions of *Monopoly* reflect trademark- and copyright-licensing deals that allow it to capitalize on popular media franchises like *Star Wars*, *Lord of the Rings*, and *The Simpsons*.¹⁶² It has also engaged in merchandising outside the tabletop gaming space, selling clothing, home goods, and video game versions that further strengthen its brand while also earning additional revenues.¹⁶³ The game maker’s overall competitive strategy centers around trademark management as well as variations on the familiar rules and artistic components of the game.

3. Hobbyist Game Makers

The hobbyist seeking to crowdfund a game on a platform like Kickstarter once again encounters a general lack of legal protection for rules. This is a boon to the extent it leaves space for a new game to utilize or adapt various game mechanics from prior games. But it also means that the hobbyist cannot count on the law to prevent others from borrowing her own innovations in game design. To the extent the hobbyist can obtain legal protection, it will come primarily in the form of trademark protection for the game’s name, copyright protection for any sculptural or graphical features of the game components, and copyright protection for expressive aspects of the story or rulebook to the extent they can be separated from the rules.¹⁶⁴

The hobbyist may still be propelled to innovate in game design for both external and internal reasons. To succeed, she must convince potential players

157. See Sabrina Bodon, *Is Yours One of the Local Cities With Its Own Monopoly Game?*, CHATTANOOGA TIMES FREE PRESS (Feb. 7, 2020, 6:09 PM), <https://www.timesfreepress.com/news/2020/feb/07/yours-one-local-cities-its-own-monopoly-game> (on file with the *Iowa Law Review*) (“Thus far, Late for the Sky has developed over 650 city versions, with more on the way.”).

158. Seaman & Tran, *supra* note 1, at 1651–52.

159. *Id.* at 1653 (discussing *Anti-Monopoly, Inc. v. Gen. Mills Fun Grp., Inc.*, 684 F.2d 1316 (9th Cir. 1982)).

160. *Id.* at 1653–54 (discussing the Trademark Clarification Act of 1984, Pub. L. No. 98-620, § 102, 98 Stat. 3335, 3335).

161. See generally Aine Givens, *History of Monopoly Through 50 Unique Editions*, STACKER (Jan. 13, 2021), <https://stacker.com/retrospective/history-monopoly-through-50-unique-editions> [<https://perma.cc/Y5FC-QDXT>].

162. See *id.*; see also *supra* note 120.

163. See Seaman & Tran, *supra* note 1, at 1652 & n.289.

164. See *id.* at 1619.

to support the game. One way to do so is to promise a game that features genuinely new mechanics or a thoughtful combination of prior elements.¹⁶⁵ She may also be driven by intrinsic motivation.¹⁶⁶ If this is the case, then the economic risks that follow from the potential of others to copy the game may be less salient.¹⁶⁷

Crowdfunding itself also impacts the risk–reward calculus. For the hobbyist who can finance development and manufacturing upfront through crowdfunding, subsequent copying poses fewer economic risks.¹⁶⁸ Even if a third party copies the most appealing features of the game and undercuts the hobbyist’s market, she will be at least partly insulated from the blow. Although a study of the norms of game publishers and players is beyond the scope of the present paper, it also seems likely that publishers and players would side with the originator over a blatant copyist.¹⁶⁹

C. ASSEMBLING THE PUZZLE

Comparing revenues and strategies across these games provides several touchpoints for assessing how the overall regime operates. The continued success of *Monopoly*,¹⁷⁰ and of other branded games like *D&D*, *Magic*, and *Catan*,¹⁷¹ reinforces the point that IP protects investments in trademarks, like game names, and in creative flourishes and storylines that are protected by copyright law.¹⁷² Mainline economic theory predicts that these legal protections will provide incentives to invest in the protected elements.¹⁷³ Other protections, like design patents, come into play for the ornamental features of games like chess that are otherwise free for anyone to manufacture.¹⁷⁴ Innovation at the level of game rules is minimally protected by IP¹⁷⁵—to the extent there are incentives for these investments, they seem to derive from the intrinsic motivations and alternative funding mechanisms at work among hobbyist game makers.¹⁷⁶ Alternatively, the incentives may derive from creators’ expectations that they can adequately stave off copying by asserting IP rights over non-rule elements or relying on non-IP safeguards against

165. As one indicator of community priorities, the prestigious *Spiel de Jahres* award, *see id.* at 1679, states its first criterion as follows: “Does the game introduce new concepts or combine existing elements into a new experience?” Ashley Garipey, *The History of the Spiel des Jahres Board Game Awards*, MEEPLE MOUNTAIN (Apr. 3, 2020), <https://www.meeplemountain.com/articles/a-definitive-guide-to-the-spiel-des-jahres-board-game-awards> [<https://perma.cc/L4DL-AVMN>].

166. Seaman & Tran, *supra* note 1, at 1677–79.

167. Ard, *supra* note 14, at 1348–49.

168. *Id.* at 1361.

169. *Cf. id.* at 1357–59 (examining the role of copying and anti-copying norms in the video game context).

170. *See supra* Section III.B.2.

171. Seaman & Tran, *supra* note 1, at 1661–76.

172. *Id.* at 1680.

173. *See id.* at 1620.

174. *See id.* at 1656–58.

175. *See id.* at 1635–36.

176. *See supra* Section III.B.3.

competition.¹⁷⁷ Established incumbents like Hasbro's *Monopoly* may be able to coast while making minimal investment into gameplay innovation,¹⁷⁸ and classic games like chess and ludo maintain their popularity despite retaining the same rules that were in place when the first sets were mass manufactured.¹⁷⁹

Disentangling whether these features culminate in an optimal regime remains challenging for all the reasons outlined above.¹⁸⁰ So too does the question of sorting out whether its success or failure is *because* of the current configuration of IP rights or *despite* it. Indeed, *Monopoly's* dominance despite limited IP for the core product seems to confound the common complaint that copyright over-rewards the most popular works: "It has been apparent for many years that the copyright system helps to underwrite a cultural star system in which certain works far exceed—on the order of a power-law distribution—other works in their cultural impact and, if they are made for profit, their profitability."¹⁸¹ *Monopoly* maintains comparable star status despite having only partial IP protection. This observation accentuates the challenges involved in discerning how each facet of legal protection contributes to the outcomes and overall function of the regime.

CONCLUSION

Against the backdrop of prior studies of the "negative spaces" where creativity has proliferated without recourse to IP, Seaman and Tran seek to advance tabletop gaming as a case study where the existing configuration of IP rights may, in fact, facilitate creative production. Moreover, their characterization of the relationship between IP and non-IP innovation strategies as a continuum, rather than a binary, provides a framework for further studies of hybrid innovation regimes.

The article also provides a rich case study for confronting how we ought to evaluate the innovation regime for a creative industry. Revenues and total output tell only part of the story. Beyond determining how much is produced, the configuration of IP and non-IP incentives shape what is produced and set the stage for competition in the industry. To see the full picture requires attending to variation among industry players. Following the threads throughout different segments of the tabletop gaming industry not only tells the story of how new entrants take advantage of the limitations of IP, but also invites scrutiny of how incumbents dominate the industry without recourse to formal IP for the core features of their games.

177. See *supra* notes 61–64 and accompanying text.

178. See *supra* Section III.B.2.

179. See *supra* Section III.B.1.

180. See *supra* Part II.

181. Beebe, *supra* note 115, at 391 (footnotes omitted).