

## 11. LEGAL PROTECTION OF VIDEOGAMES IN THE AMERICAS

Aldo Fabrizio Modica\*

### ABSTRACT

The objective of this article is to determine the scope of legal protection for videogames in the countries of the American region. The following topics will be analysed: protection regime for videogames, which includes legal nature, type of work, elements protected by intellectual property, authors and right holders; underlying rights in videogames, including moral rights, patrimonial rights, compensation systems for creators, rights in favour of the user, limitations and collective management; assignment of rights and/or licenses in videogames, such as presumptions, applicable transfer regimes, licenses for the organization of tournaments and competitions by third parties; adjacent protection for videogames, including right of publicity, right of privacy and protection of personal data; and other issues related to videogames, establishing additional regulations, and relevant jurisprudence on videogames and intellectual property.

**Keywords:** *Videogames, Americas, legal regime, intellectual property, copyright, adjacent protection*

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\* Lawyer from the Catholic University "Nuestra Señora de la Asunción" (Paraguay). Master in Intellectual Property from the Austral University of Buenos Aires (Argentina). Master in Higher Education Teaching from the Catholic University "Nuestra Señora de la Asunción" (Paraguay). PhD in law from the Austral University of Buenos Aires (Argentina). Professor of Intellectual Property and Legal Research Coordinator at the Catholic University "Nuestra Señora de la Asunción" (Paraguay). Chair of the Entertainment Law Committee (2019-2021) of ASIPI. Email: [fabriziomodica@gmail.com](mailto:fabriziomodica@gmail.com)

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## 1. INTRODUCTION

The Entertainment Law Committee of the Inter-American Association of Intellectual Property (ASIPI), where I sat as Vice Chair during the 2015-2018 working period, prepared and sent a questionnaire with twenty-six questions covering the most important topics related to legal protection of videogames. This questionnaire was sent first to ASIPI representatives (working committees' members and national delegates) and then to non-ASIPI members (national officials, entertainment lawyers, scholars) of all the countries of the American continent, whose results and conclusions are transcribed below. The study covers issues that relate to the protection regime, assignment of rights/licenses, adjacent protection, and other issues related to videogames. Respondents to our questionnaire were representatives from twenty-four countries: Argentina, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Cuba, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Puerto Rico, Trinidad & Tobago, United States, Uruguay, and Venezuela.<sup>1</sup>

Landivar (Bolivia); Susan Abramovitch and Sean Gill M. (Canada); Juan Puga (Chile); José Herrera, Juan Sebastián Rengifo, Juliana Echeverri and Juanita Acosta (Colombia); Monserrat Alfaro (Costa Rica); Jorge Luis Ordelin (Cuba); Maxiell Herrera (Dominican Republic); Johana Aguirre and Francisco Pérez (Ecuador); Julio Vargas and Paola Lamber (El Salvador); María Olga Contreras Mérida (Guatemala); Christian De Lespinasse (Haiti); Graciela Cruz (Honduras); Eduardo Kleinberg (Mexico); Alvaro Malespin and Mayra Navarrete (Nicaragua); Julissa Farah de la Ossa (Panama); Aldo Fabrizio Modica (Paraguay); Carlos Auza and Juli Gutiérrez (Peru); Maristella Collazo (Puerto Rico); Emir Crowne (Trinidad & Tobago); Diana Muller, Mitchell Feller and Annan Kahari (United States); Federico Fischer and Mercedes Castells (Uruguay); Rafael Ortin (Venezuela).

## 2. THE LEGAL REGIME FOR PROTECTION

The first issue is related to the possible existence of a special regulation in the country's legislation for the protection of videogames as a specific type of work in the field of copyright. All twenty-four countries replied there is no videogame regulation as a specific type of work listed in their respective legislations. However, many of them consider videogames falling within the definition of works protected by copyright, provided they meet the characteristics of originality and are capable of being disseminated or reproduced. This is complemented by the fact that enumeration of works protected in the different legislations is merely enunciative and not exhaustive. Generally speaking, copyright protects the fixed expression of ideas and easily qualifies as the best tool for protecting game property because of its ease of use, power, and versatility.<sup>2</sup>

The second question is whether a videogame is protected as software, audiovisual work, multimedia work, or something else. This is where the greatest doubts and different solutions arise. Most countries consider videogames as software,<sup>3</sup> others consider they share features both of software and audiovisual works,<sup>4</sup> some as multimedia work,<sup>5</sup> another as a compiled work,<sup>6</sup> and finally others understand that any of the above options are valid, depending on the videogame elements protected.<sup>7</sup> In the case of assimilation with software, we understand this has its *raison d'être* in the fact that videogames are mostly registered before the respective copyright offices in the forms corresponding to software. It also affects the fact that in criminal cases of piracy, videogames are classified as computer programs.

Regarding the joint comparison of videogame with software and audiovisual work, there is no doubt the software is related to the technical aspects of programming, while the audiovisual work refers to the artistic-literary content of the work—including script, characters, music, animation and other elements that are part of the audiovisual work.<sup>8</sup>

For countries that considered videogame as multimedia work, the proposed solution is more doctrinal than legal since there is no explicit recognition of the type of multimedia work in copyright laws; the countries expressly recognize that several of the individual elements that are part of the multimedia work are separately protectable.<sup>9</sup> In another case, a videogame is considered a compiled work, or collections of works, which we understand will be protected if said collections are original due to the selection, coordination or arrangement of their content. Finally, others consider that a videogame would fall into any of the previous categories as software, audiovisual work, multimedia work, compiled work and even as an autonomous literary work by the description of the program, design, moving images, etc.

Third, the question arises whether a videogame is protected either as collaborative or collective work. Depending on the way in which the videogame was created and the existing contractual relationship between parties, it could be considered as any of the above options. In general, if a videogame is assimilated as software and/or as an audiovisual work, the common thing to do is to presume that we are in the presence of a collective work. This considers that the contributions of

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<sup>2</sup> David Greenspan, 'Mastering the Game: Business and Legal Issues for Video Game Developers' (2014) 73 WIPO Magazine.

<sup>3</sup> Bolivia, Canada, Chile, Costa Rica, Cuba, Haiti, Guatemala, Mexico, Nicaragua, Paraguay, Peru and Uruguay.

<sup>4</sup> Dominican Republic, Brazil, Colombia and Honduras. In Brazil, software is protected as "copyright", although it is a *sui generis* protection, regulated by autonomous legislation.

<sup>5</sup> Argentina and United States.

<sup>6</sup> Canada. The Copyright Law of this country defines as a compiled work the result of the selection or disposition of literary, dramatic, musical or artistic works or parts thereof.

<sup>7</sup> Ecuador, El Salvador, Panama and Venezuela.

<sup>8</sup> David Greenspan, 'Video Games and IP: A Global Perspective' (2014) 2 WIPO Magazine.

<sup>9</sup> Andy Ramos Gil de la Haza, 'Video Games: Computer Programs or Creative Works?' (2014) 4 WIPO Magazine.

each author would be merged into the videogame in its entirety in such a way making it impossible to grant copyright to everyone, corresponding to the producer the exercise of rights. In the case that videogame is considered a collaborative work, the co-authors will jointly be the original holders of the moral and patrimonial rights, having to exercise their rights, if possible, by agreement. The latter would be more suited to the cases of videogames not very complex in which the intervention of the authors is limited in number and the roles are well defined in the sense that you can identify the technical and/or artistic contribution of each author. It also raised the possibility that videogame was the product of a single person, in which case it would be considered as an individual work.

Fourth, which components of videogames are protected by intellectual property (components such as literary, graphic, audio, software, character, benefits, trademarks, patents, trade secrets, etc.)? From what we have seen previously, it became clear there is no comprehensive protection that considers the video game as 'a whole'. Most of the countries responded that as an audiovisual work, literary, graphic, sound, and character elements in their collectivity of graphic sets would be protected, without this preventing them from thinking of autonomous and independent protection for each original aspect.<sup>10</sup> Functional elements such as the technical aspect of programming would be protected by software. In some legislations the title of a work, when it is original, will also be protected as part of the work.

It is possible to protect the title of the videogame, the associated logos and other elements that are sufficiently distinctive to identify products or services, as well as the

name and figure of certain characters as trademarks.<sup>11</sup> In some cases, the possibility of protecting certain peripherals (such as videogame consoles, controls and other accessories) as a three-dimensional mark was mentioned. The latter was also considered valid for protection via industrial design, in which the aesthetic aspect associated with the various peripherals of the videogame console it is considered and acceptable option. In other countries, graphical user interface was also considered protectable under this figure.

For patent protection, all countries (except the United States and Canada) contain an express exclusion regarding software patenting or issues related to game matter, noting they are not considered inventions. Therefore, obtaining a patent on a videogame per se is not allowed.<sup>12</sup> However, for inventions such as a videogame console, a device that captures and reproduces physical movements in the digital domain and virtual reality helmets, among others, legislations in certain cases would allow obtaining a patent for these inventions. In the United States, it is possible to obtain a utility patent for technical inventions used in software engines (included in the game software itself, also inventions related to the underlying architecture, for example, distribution of networks in games, multi-player compatibility, structures security, etc.). Also, in this country, it is possible to obtain a design patent for the display user interfaces and icons.

In the case of trade secrets, the protection would include client lists, monetization strategies, and more recently, the data provided by the beta testers—programmers in charge of looking for bugs or various types of errors in videogames that are still in the testing phase with the

<sup>10</sup> As would be the case of a literary work for the argument and the dialogues; a musical work for the soundtrack and other songs of the game; a drawing or artistic work for the models of the characters, sketches, scenarios and other graphics, among others.

<sup>11</sup> Mexico also recognizes a *sui generis* protection for characters, in what is known as a reservation of rights and that allows a right

to exclusive use over the physical and psychological characteristics of the character. For example, a character can be protected by such a mechanism and continue to be protected even when the videogame enters the public domain.

<sup>12</sup> Emir Crowne, 'Can You Patent That? A Review of Subject Matter Eligibility in Canada and the United States' (2009) 23 Temple Int'l. & Comp. LJ.

purpose that the developers later improve it. In other cases, the source code of videogame and any data or analysis collected from the users of the videogame may also be included.

The next question has to do with the recognition of authorship and the original holder of the copyright for a videogame. Here we must bear in mind that in almost all legislations—with the exception of the United States and Canada—copyright only recognizes the quality of the author to the natural person who performs the intellectual creation, with the author being the original owner of the copyright, both in the moral and patrimonial order. If we talk about a videogame as an individual work, or as a collaborative work, there is no doubt the authors are simultaneously the original holders of copyright. For collective work, although the authors will always be the individuals who contributed to the creation of the work, these contributions have been merged into a set that no longer makes it possible to individualize the various contributions or identify the respective creators, recognizing a legal presumption of transfer of the original holder of the copyright from authors to the producer as a derivative owner. The producer, whether natural or legal person, assumes the responsibility and discloses the work with his own name, exercising the economic rights and certain moral rights, unless stipulated otherwise. This is common with software and especially in the works created in compliance with an employment relationship or in execution of a contract as work made for hire.<sup>13</sup>

In the United States and Canada, an author can be any person who contributes original authorship to the videogame, or the employer of another person for whom

the work was prepared, as work made for hire, as discussed below. Therefore, corporations can qualify as authors where such an employer-employee relationship or other work-made-for-hire relationship exists. That leads to the conclusion that most employees will never be considered authors, because when they are hired to create a certain work, authorship will always vest with the employer, as per Section 201(b) of the U.S. Copyright Act. In general, because producers and publishers usually assume the commercial risk of a video game project, they are the main stakeholders in the value chain. Consequently, these publishers and producers are typically the holders of the intellectual property rights to the video game; although, it will ultimately depend on the contractual arrangements between them and the authors or entities developing the game.

### 3. RIGHTS IN VIDEOGAMES

The second part of the questionnaire refers to the recognition and management of the various rights of authors and holders of related rights linked to videogames. Among the people involved in the creation of a video game we have the producer, game designers, artist, programmer or engineer, audio designer, owners of neighbouring rights and other non-creative positions.<sup>14</sup>

First, it was asked if moral rights were recognized in favour of the authors of videogames, and if so, which rights are involved. While there is no specific regulation for videogames, in general, copyright laws in the Americas recognize authors as having the following moral rights: right of disclosure, right of paternity, right of

time of creation, which also implies that the employer or the principal, as appropriate, has the authorization to disclose the work and exercise the moral rights as necessary for the exploitation of the work.

<sup>14</sup> Ashley Saunders Lipson and Robert D. Brian, *Computer and Video Game Law – Cases, Statutes, Forms, Problems & Materials* (Carolina Academic Press 2009) 54.

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<sup>13</sup> Art. 14 of Law 1328/98 on Copyright and Related Rights of Paraguay establishes that works created in compliance with an employment relationship or in execution of a contract, the ownership of rights that may be transferred will be governed by the agreement between parties. In the absence of express contractual stipulation, it will be presumed that the economic rights over the work have been assigned to the employer or the principal to the extent necessary for their usual activities at the

integrity and right of withdrawal of the work of commerce. In almost all the legislations of the region, moral rights are perpetual, inalienable, unattachable, inalienable and imprescriptible. In countries like Canada, although moral rights cannot be assigned, the author or performer may waive them in whole or in part, but such waiver of moral rights must be explicit. In the United States, moral rights are limited to works of visual arts (such as a painting or sculpture), which, as defined in Section 101 of the U.S. Copyright Act, do not include 'motion pictures or other audiovisual works' or any works made for hire. This implies that the contributors to videogames will not qualify as authors according to the terms of the U.S. Copyright Act and thus will not have moral rights over their contribution to the work.

Likewise, the question arises about which the patrimonial rights are recognized to the original holder of a videogame. Like the previous question, although there is no specific regulation of videogames in copyright laws, in most legislations the authors—and, therefore, original owners—are recognized with the following economic rights: right of reproduction, right of public communication, right of public distribution, right of import, right of translation, adaptation, arrangement, transformation and any other form of use of the work that is not expressly contemplated in the law.

Next, it was asked if fair payment systems have been provided to compensate the creators or authors of videogames. Here, we must first distinguish between countries that do contemplate such mechanisms in their legislation and those that do not. In countries whose legislation applies these mechanisms of remuneration systems, many responded to this that in practice these mechanisms are not applicable, since there is no specific regulation for videogame. However, we understand that an express mention is not necessary from the moment

that fair payment system is contemplated for certain types of works, and videogames, as we have seen, can be assimilated to certain categories of works.

In some legislations, compensatory remuneration is recognized for works published in graphic form, by means of videogames or in phonograms, or in any kind of sound or audiovisual recording. For example, in Uruguay, there is a right of compensatory remuneration for the music contained in audiovisual works, but not for videogames. However, Brazil is an example of a country that recognizes this right for the authors of the musical works inserted in the videogame. In the case of Paraguay, the right of compensatory remuneration for musical and audiovisual works is contemplated, but not for software, which is expressly excluded, so it will have practical effects again the distinction that is made of videogames in their assimilation as audiovisual work, software or other type of work.<sup>15</sup>

We believe this express exclusion of compensatory remuneration for software is due to the presumption established in the law, in the sense that unless otherwise agreed, the authors of the computer program have exclusively assigned to the producer the patrimonial rights recognized in the law. In the same way, the United States does not guarantee an employee's right to compensation for their contributions to works made within the scope of their employment. Works created by an employee as part of their employment duties are generally owned by the employer by default. U.S. Copyright law does not require that a creator/author receive any specific level of compensation for their work. Rather, payment would be covered by the terms of the employment agreement. In many instances, remuneration will simply be salary. Other agreements, such as a lump sum or royalties based on, e.g., distribution, could also be set forth in a specific

<sup>15</sup> Currently in Paraguay, there is a whole discussion about whether the system of compensatory remuneration should be recognized to the authors of the audiovisual work, since the

Paraguayan law establishes that unless otherwise agreed, authors of the audiovisual work have assigned their economics rights exclusively to the producer.

agreement. Likewise, contracts with third party freelancers typically address the terms of payment.

Another issue involves the recognition of any kind of copyright protection to the users or 'players' for the 'contributions' they may make in a videogame (such as the creation and development of new components such as characters, avatars, levels, 'worlds,' and other creative components). Almost all countries responded negatively, simply because their respective legislations do not refer to this issue in an express way. However, it is possible the contents created by the players are eligible for copyright protection provided they meet the requirements to be considered a derivative work.<sup>16</sup> However, videogame players often give up most or all the rights they have to their in-game content when they agree to a Terms of Service or End-User License Agreement to play a game.<sup>17</sup> In the United States, courts typically enforce such agreements. Because these contracts make game companies the owners or licensees of player-generated content, courts have yet to consider whether players can assert copyright protection over their in-game creations, such as where a third party uses the content without permission. The scope of copyrights for player-generated content is limited to the original, creative expression in that added content. Player-generated content is less likely to be original if the creator's choices are tightly constrained by the mechanics of the games he or she plays.<sup>18</sup> So, aspects of player-created game content are eligible for copyright protection, if the originality lies in the adaptation or transformation of the pre-existing work, and the license to use the videogame expressly

authorizes it. Otherwise, like any derivative work, it will require an authorization from the author of the original work.

Regarding neighbouring rights, it was asked whether legislation has accorded any kind of related right protection to users or 'players' equivalent to the rights accorded to artists, performers, or executors for the 'interaction' they have in videogames (think, for example, of the public communication through digital platforms of an extract of a user's or player's 'dance' carried out through a videogame, or of the best goals in a soccer videogame scored by players). Although this is one of the most debated issues, almost all the countries of the American region initially considered this is not possible either simply because there were no specific laws addressing videogame players. Few others considered this would be possible, especially in countries whose legislations establish a broad definition of artist, performer, including the variety and circus artist. These player rights are subsidiary to the copyrights in the images and video from the game held by the game's developer or publisher. The ability to exercise these rights without approval of the owner of the copyrights in the game is uncertain. In some instances, it would be permitted under the doctrine of 'fair use,' which permits limited use of copyrighted material for purposes of comment, criticism, or parody. Because of the ambiguity, this issue is most often addressed in the EULA or a separate agreement with the player.

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<sup>16</sup> In Mexico, if a modification or other creation of a user could be a derivative work, the user could not exploit it (charge other players to use it) without the consent of the owner of the economic rights over the videogame.

<sup>17</sup> For example, the terms of service for 'League of Legends' gives Riot games 'a worldwide, perpetual, irrevocable, sublicensable, transferable, assignable, non-exclusive and royalty-free right and license to use, reproduce, distribute, adapt, modify, translate, create derivative works of, publicly perform, publicly display, digitally perform, make, have made, sell, offer for sale

and import Your Content, including, all copyrights, trademarks, trade secrets, patents, industrial rights and all other intellectual and proprietary rights related thereto, in any media now known or hereafter developed, for any purpose whatsoever, commercial or otherwise, including, giving Your Content to others, without any compensation to you.'

<sup>18</sup> Tyler T. Ochoa, 'Who Owns an Avatar? Copyright Creativity and Virtual Worlds' (2012) 14 Vand. J. Ent. & Tech. L. 959.

Following the questionnaire, the next question is about limitations or exceptions applicable to videogames provided in the national legislations. In the case of countries that follow the European continental right system of *droit d'auteur*, exceptions to the works are expressly established in the respective legislations and are generally related to private and non-profit use, academic purposes or teaching, use in public libraries, use in administrative or judicial matters, use in official acts, quotations, among others, provided that the rule of the three steps of Berne is respected: the exceptions must be limited, must not threaten the normal exploitation of the work or cause unjustified damage to the interests of the author. Meanwhile, common law countries adopted the principle of fair use, allowing the limited use of copyrighted material without the permission of the copyright owner 'for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research.'<sup>19</sup> The availability of fair use as a defence to copyright infringement is very fact specific. Again, the distinction discussed above regarding the legal nature of the videogame comes back to practical importance. If we consider videogame as a software, the only exception available in almost all legislations would be that the user can only make a backup copy necessary to use the game (a copy in RAM memory for example) or to replace a copy legitimately acquired by loss or destruction and nothing else, being the other uses an infringing activity. On the

other hand, if we consider a videogame as an audiovisual work, the exceptions would be much broader in the continental European system of *droit d'auteur*.

In Canada, the Copyright Act includes an exception for non-commercial user-generated content.<sup>20</sup> While it has not yet been tested by the courts, this section could be applicable in the context of user-generated content relating to videogames, ranging from new user-generated downloadable content to players streaming their gameplay on-line or the creation of 'Let's Play' videos.

To conclude this second part, the questionnaire asks if there is any collective organization that arranges for rights for videogame authors and holders. There is not an official and authorized collective management society specifically dedicated to the management of videogame rights in the American region. However, the Entertainment Software Association (ESA) is the U.S. association dedicated to serving the business and public affairs needs of companies that publish computer and videogames for videogame consoles, handheld devices, personal computers and the Internet. The association represents these industry leaders across the nation and on the global stage. ESA offers a wide range of services to its members, including a global content protection program, business and consumer research, government relations and intellectual property protection efforts. ESA

<sup>19</sup> 17 U.S.C. Sec. 107.

<sup>20</sup> Copyright Act, RSC 1985, c C-42, s 29.21, 'It is not an infringement of copyright for an individual to use an existing work or other subject-matter or copy of one, which has been published or otherwise made available to the public, in the creation of a new work or other subject-matter in which copyright subsists and for the individual — or, with the individual's authorization, a member of their household— to use the new work or other subject-matter or to authorize an intermediary to disseminate it, if: (a) the use of, or the authorization to disseminate, the new work or other subject-matter is done solely for non-commercial purposes; (b) the source —and, if given in the source, the name of the author,

performer, maker or broadcaster — of the existing work or other subject-matter or copy of it are mentioned, if it is reasonable in the circumstances to do so; (c) the individual had reasonable grounds to believe that the existing work or other subject-matter or copy of it, as the case may be, was not infringing copyright; and (d) the use of, or the authorization to disseminate, the new work or other subject-matter does not have a substantial adverse effect, financial or otherwise, on the exploitation or potential exploitation of the existing work or other subject-matter —or copy of it— or on an existing or potential market for it, including that the new work or other subject-matter is not a substitute for the existing one.'

also owns and operates E3, the premier global trade show for videogames and related products.

#### **4. ASSIGNMENT OF RIGHTS: LICENSES**

The next chapter refers to the analysis for regulation of assignments of rights or licenses applicable to videogames. The first two issues entail the provision in the country's legislation of some regime of presumption of assignment of exploitation rights in favour of the videogame producer and an assignment or licensing regime for videogames. As was clear from the beginning of this article, since a videogame is not regulated as a special type of work, we start from the basis that no legislation expressly provides for an assignment of rights or licenses applicable to videogames, which is why the analysis will be based on the protection we make of them according to the provisions of the works in general and to their assimilation with software, audiovisual work, multimedia work, among others.

If we refer to the questions of the first part of the work (protection regime), we will see the solutions vary in the sense of whether we are in the presence of an individual work, collective work, work in collaboration or in the works created in compliance of a work relationship or commissioned work. Laws provide for general provisions for the assignment of economic rights and the exploitation of works by third parties (licenses), complementing the general assignment regime and the contracts established in the substantive regulations (work made for hire).

Most legislation requires that any assignment of copyright, whether in general or subject to limitations, must be in writing and must be signed by the owner of the right in respect of which the assignment or concession is made. As with all copyright works, in general, there is no need for registration formalities, agreements or contracts that in any way confer, modify, transfer, encumber or extinguish patrimonial rights, or for which modifications to the work is authorized. However, registration shall be admitted as a principle of

certain proof of the facts and acts contained therein, unless there is evidence to the contrary. All registration leaves the rights of third parties safe.

If we consider a videogame as a software, the legislations generally establish it is presumed, unless otherwise agreed, that the authors of the computer program have assigned to the producer, in an unlimited and exclusive manner, the economic rights recognized in the law; In some legislations, the presumption also implies authorization to decide on the disclosure of the program and to exercise moral rights over the work. Likewise, and unless otherwise agreed, authors cannot object to the producer to make or authorize the implementation of modifications or successive versions of the program or programs derived from it. A license may be executed in writing or may be implied by conduct. The scope of a written license (e.g., a click-wrap license) is dictated by the language of the agreement. If there is no written agreement, a license is likely implied by willingly contributing content without written restrictions; in such a case, the player would be providing an implied, non-exclusive license to the contribution for its intended purpose (e.g., use in the game). In any case, under U.S. law, it is highly recommended to obtain the copyrights in such contributions through a written document, like an End-User License Agreement, which is standard for this sector.

In the case of the identification of videogame as an audiovisual work, legislations generally recognize a presumption, unless otherwise agreed, that the authors of the audiovisual work have assigned their economic rights exclusively to the producer, who is also vested of the ownership of the right to modify or alter it, as well as the right to decide about its disclosure. What usually varies in each legislation is the presumption of co-



authorship.<sup>21</sup> In most cases, the producer is not considered a co-author and in others it is presumed to be one of the main co-authors.<sup>22</sup> In the United States, apart from the work made for hire,<sup>23</sup> created by an employee within his/her employment field, an assignment of rights (instead of a license) can occur only through a signed agreement in writing. As mentioned in the beginning of this paper, the assimilation of videogame as a multimedia work refers more to the separate protection of the individual elements.

The last question in the section refers to whether there is a regulation of a regime for the organization of open videogame tournaments, competitions, payment circuits, professional leagues, contests, or championships by third parties. Since the industry and participants of organizations generally regulate themselves with tools, such as Community Competition Licenses with the game owners, all countries responded negatively. However, this could change in the coming years, considering there is a strong worldwide movement that aims to give eSports (electronic sports) a category within Olympic sports, and all organizations, competitions or professional leagues shall be officially regulated by the International Olympic Committee (IOC).

<sup>21</sup> For example, the Copyright Law of Uruguay, art. 29 of states: 'In the case of an audiovisual work, co-authors are presumed, unless there is evidence to the contrary: the director, the author of the argument, the author of the adaptation, the author of the script and dialogues, the composer if any, and the cartoonist in case of animated designs.'

<sup>22</sup> The Argentine Copyright Law of 1933, in the chapter of collaborative works states that 'except for special agreements, the collaborators of a cinematographic work have equal rights, considering as such the author of the plot and the producer.'

<sup>23</sup> In this regard, a work-for-hire is: 'a work prepared by an employee within the scope of his or her employment (regardless of whether a written agreement exists relating to the 'work for hire'); or a work specially ordered or commissioned that falls into one of nine classes: (1) contribution to a collective work, (2) part of a motion picture or other audiovisual work, (3) translation, (4) supplementary work, (5) compilation, (6) instructional text, (7)

## 5. ADJACENT PROTECTION FOR VIDEOGAMES

In this section, we will deal with issues closely linked to the legal regulation of videogames. Such issues affecting regulation of videogames are regulations of image rights, publicity rights, privacy rights and the protection of personal data. The first questions refer to whether there is an image right in the legislations and in what way it is regulated.

In general, scholars recognize a private image right that is subdivided into two types of protection: privacy rights and publicity rights. Privacy rights are the protection of the private image of people, honour, personal or family circle. Publicity rights is the protection of the image right of people regarding their commercial exploitation. The first of these rights is recognized in almost all countries and refers to the rights inherent to human personality established in constitutional texts, civil codes and other special regulations. The second one, the right to exploit the commercial image of people, is regulated in some countries and not in others. Countries regulating this commercial image right are subdivided into those that expressly contemplate it as a publicity right,<sup>24</sup> others whose legislations refer in general to the protection of

test, (8) answer material for a test, or (9) atlas, provided the parties expressly agree in a written agreement that the work will be considered a work made for hire.'

<sup>24</sup> In the United States, a person's right of publicity is the right to protect his or her name or likeness from being commercially exploited without consent and compensation, if any. While copyright is a federally protected right under title 17 of the United States Code, there is no federal law protecting publicity rights. Instead, publicity rights are the subject of state laws that vary from state to state. New York has codified the right of publicity as part of the New York 'Right of Privacy' statute, at Article 5 of the N.Y. Civil Rights Law. The statute provides protection for a person's name, portrait, picture, and voice. New York does not, however, recognize a posthumous right of publicity for the deceased. Violation of the New York statute occurs when the use of a person's identity is made in the state

the image right,<sup>25</sup> and those who have it established in their copyright legislation as special protection of the portrait or commercial bust of a person.<sup>26</sup>

Other countries mentioned as a form of additional protection to the image right, what is established in almost all the trademark laws of the region on the prohibition of registering as trademarks the names, nicknames, pseudonyms or photographs that can be related to living people, without their consent, or dead without that of their heirs, or any sign that affects the right of the personality of a third party, except with their consent. In the United States, for use of a person's name or image separate from a game character, one could be sued (even if a person's name, image, or likeness is used in a state where the right of publicity isn't recognized), under the federal Lanham Act, 15 USC § 1125(a), for

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of New York, for advertising or trade purposes, and without written consent. California's right of publicity statute, Cal. Civ. Code § 3344, protects a person's name, voice, signature, photography, and likeness. The statute prohibits 'knowing' use of a person's name/likeness/etc., on or in products, merchandise, goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods or services, without such person's prior consent. Unlike New York, California has a separate statute protecting posthumous rights of publicity, found at Cal. Civ Code § 3344.1. The right lasts for 70 years after death. In Puerto Rico, Act No. 139-2011, known as 'The Right to One's Image Act,' protects individuals' rights to undue use of a person's image, particularly for commercial purposes. This Act defines 'image' as the projection or representation of the human figure by means of any procedure or reproduction technique.

<sup>25</sup> Argentina, Ecuador and Panama. For example, the Civil and Commercial Code of Argentina, art. 53 of states: 'Image Right. In order to capture or reproduce the image or voice of a person, in whatever way it is done, their consent is necessary, except in the following cases: a) that the person participates in public events; b) that there is a priority scientific, cultural or educational interest, and that sufficient precautions are taken to avoid unnecessary harm; c) that it concerns the regular exercise of the right to report events of general interest. In case of deceased persons, their heirs or the one designated by the deceased can give their consent in a last-will disposition. If there is

unauthorized uses of a person's identity to create a false endorsement.<sup>27</sup> If the use is within the game itself, however, a First Amendment balancing test is applied. In general, use of third party trademark within a game is infringement if (i) the trademark is used in a way that has no artistic relevance to the underlying work; or (ii) even if there is some artistic relevance, the use is explicitly misleading as to the source or the content of the work (as opposed to merely likely to cause confusion).

Finally, in legislations where the exploitation of the commercial image right of people is not regulated, there are judicial pronouncements through which the unfair exploitation of the image of a person has been protected, especially in the case of the common law.<sup>28</sup>

disagreement between heirs of the same degree, the judge solves. Twenty years after death, non-offensive reproduction is free.'

<sup>26</sup> Argentina, Brazil, Paraguay, Peru, Mexico and Uruguay.

<sup>27</sup> 'Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which: (A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or (B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities, shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.'

<sup>28</sup> Colombia, Canada and the United States. In the northern countries, some state legislations refer to protection through unfair competition, as well as legal theories of common law such as misappropriation of personality, false endorsement, and invasion of privacy among others.

The following question refers to what guarantees and actions the country's legislation grants to enforce image rights. In the case of privacy rights, countries contemplate an action for constitutional protection and civil action to prevent and prohibit the use of one's own image, as well as an action for compensation to claim damages. For the publicity right, civil actions for the cessation of the unauthorized reproduction of the image, and the repair of any damages, are also contemplated. Some legislations that regulate the subject from the scope of copyright also provide for an administrative action that can result in heavy fines for the offender.

The next group of questions deals with the existence in legislation of the recognition of the right of privacy and the protection of personal data. These issues are directly linked to the right of privacy and as such, we have seen their protection is given fundamentally in the constitutional texts, also in the civil codes in some countries, and in the regulations that contemplate personal treatment of data. In the United States, we find special regulations such as the Children's On-Line Privacy Protection Act (COPPA), a federal law that governs the collection of information from children under 13 and details privacy policy requirements as well as when and how to seek parental consent before allowing underage children access or collecting information from them.<sup>29</sup> It is very common to find references to this regulation in video games intended for children.

The following question was related to guarantees and actions granted by the country's legislation to enforce

<sup>29</sup> Children's On-Line Privacy Protection Act (COPPA), 15 U.S.C. §§ 6501–6506.

<sup>30</sup> In the United States, an individual can file a lawsuit to enforce relevant laws in the event of a breach. Because of the number of people usually impacted and the cost of a private lawsuit, a class-action lawsuit brought on behalf of a large group of individuals are not uncommon. Depending on the circumstances, a federal or state regulator may also investigate violations of privacy and data protection laws.

privacy right and protection of personal data. The majority agreed to have the constitutional guarantee of *habeas data* - at the judicial level - for accessing information, to know the use that is made of the data and to be able to request updates, rectification, or destruction of both erroneous and right-affecting data. This is complemented with other actions foreseen in the legislation of personal data protection -at the administrative level- before the corresponding national authority that also translate into the establishment of administrative sanctions such as fines, closures or cancellation of the file, registry or database. Civil actions are also available to the affected party, such as the cessation of unlawful acts, the repair of damages and losses caused, and the possibility of requesting precautionary measures if necessary.<sup>30</sup> Finally, criminal actions should not be forgotten in cases where violation of the domicile is affected, injury to the privacy of the person, injury to the right to communication and to the image, and violation of the communication secret among others punishable facts.

## 6. OTHER ISSUES RELATED TO VIDEOGAMES

This section explores issues not covered in the previous questions on additional regulation applicable to videogames and the possible existence of jurisprudence on videogames and intellectual property. First, some countries contemplate regulations related to the operation of videogame establishments,<sup>31</sup> others contemplate regulations on incentives to the software industry,<sup>32</sup> and others have provisions addressing false or

<sup>31</sup> In Colombia, we have Law No. 1544 of 2012: 'By which rules are issued on the operation of establishments that provide videogame service and other provisions.'

<sup>32</sup> In Argentina, Law No. 26.692 of 2004, 'Regime of Promotion of the Software Industry' stipulates that companies which apply to the Registry of Software and Computer Services Producers will enjoy fiscal stability, will receive a tax credit bonus applicable to the cancellation of national taxes, and will be able to make a tax deduction on the Income Tax.

deceptive representations and deceptive marketing practices in association with the promotion or sale of any product, such as videogames.<sup>33</sup> Finally, others establish regulations for the commercialization of violent videogames<sup>34</sup> or with sexually explicit content.<sup>35</sup>

As countries generally do not have additional regulations specifically related to videogames, other regulations on copyright applied. Thus, some countries contemplate in their respective legislation regulations against the circumvention of technological protection measures that are incorporated into a device or means to prevent reproduction, public communication, or distribution without the authorization the copyright or related rights holder.<sup>36</sup> It is very common to use mod-chips to modify or deactivate the restrictions and limitations imposed by the companies that manufacture videogame consoles.

Finally, we mention relevant jurisprudence on videogames and intellectual property or videogames and

image rights in the country, region or community. Outside the United States and Canada, we have not identified any jurisprudence in the matter in the countries of the American region. Among the most emblematic cases in the United States, we would like to highlight the following: *Brown v. Entertainment Merchants Association*<sup>37</sup>; *Tetris Holding, LLC v. Xio*

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<sup>33</sup> In Canada, the regulations of False or Misleading Representations and Deceptive Marketing Practices, was enacted on November 5, 2015.

<sup>34</sup> In Venezuela, the law on the Prohibition of Video Games and War Toys was approved on December 3, 2009.

<sup>35</sup> In the United States, several states, including California, Georgia, Illinois, Maryland, Michigan, and Washington, have passed laws regulating the sale of violent or sexually explicit videogames. Additionally, cities in Indiana and Missouri have passed ordinances that regulate the sale of such videogames. However, in every case, courts have ruled that computer and videogames are protected speech, and efforts to ban or limit access to, or the sale of, such games violate First Amendment rights.

<sup>36</sup> Law 3440/08, Subsection 3 of art. 184, which partially modified the Paraguayan Penal Code, punishes with penitentiary of up to three years or with a fine to which, '1. elude, modify, alter or transform, without authorization, the technical measures of protection of the works indicated in the preceding paragraphs; or 2. Produced, reproduced, obtained, stored, transferred to another or offered to the public devices or means specifically designed to facilitate the circumvention, suppression or unauthorized neutralization of technical measures of protection of the works indicated in the preceding paragraphs.'

<sup>37</sup> The State of California enacted a law that prohibited the sale or rental of violent video games to minors and required them to be labelled '18'. Respondents challenged the law, claiming it violated the First Amendment rights of the Game publishers and marketers. The district court and appellate court decisions below both concluded that the law violated the First Amendment and enjoined its enforcement. The U.S. Supreme Court affirmed the lower court's decision and held that 'videogames qualify for First Amendment protection. (...) Like the protected books, plays, and movies that preceded them, videogames communicate ideas—and even social messages—through many familiar literary devices (such as characters, dialogue, plot, and music) and through features distinctive to the medium (such as the player's interaction with the virtual world). That suffices to confer First Amendment protection'. The Court acknowledged that many video games had extreme levels of violence but rejected an argument that video games should be treated differently from other media because they are interactive - finding the issue simply one of degree relative to other protected works. The Court concluded that the law did not pass the 'strict scrutiny test' because it was not justified by a compelling government interest and narrowly drawn to serve that interest. *Brown v. Entm't Merch. Ass'n*, 564 U.S. 786 (2011).

*Interactive, Inc.*<sup>38</sup>; *Kirby v. Sega of America*<sup>39</sup>; *Keller v. Elec. Arts Inc.*<sup>40</sup>; *Mil-Spec Monkey, Inc. v. Activision Blizzard*<sup>41</sup>; *Manuel Noriega v. Activision Blizzard Inc.*, among others.<sup>42</sup>

<sup>38</sup> *Tetris Holding, LLC v. Xio Interactive, Inc.*, 863 F. Supp. 2d 394 (D.N.J. 2012) (Copyright - game cloning), Tetris Holding sued Xio Interactive for copyright infringement. Xio argued that there was no copyright infringement because it 'copied only non-protected elements, in particular the rules and functionality of the game, and not its expressive elements.' The Court held that Xio's version of the game infringed the copyright because XIO copied aesthetic choices that went well beyond the idea of the game, copying piece design and colors, piece movement, playing field dimensions, treatment and display of 'garbage lines' and 'ghost pieces' and that there were large numbers of alternative design choices available to Xio.

<sup>39</sup> *Kirby v. Sega of Am*, 144 Cal. App. 4th 47, 50 Cal. Rptr. 3d 607 (2006). Kirby sued Sega alleging that the Ulala character appropriated her look and dress, use of catch phrases, and signature dance moves, and that this violated her rights of publicity, violated the Lanham act by falsely suggesting she sponsored the game, and violated other unfair competition related laws. The court held that the Ulala character, even if it were based on Kirby, was different enough to be a transformative work, and that the First Amendment provided Sega with a complete defense to the claims.

<sup>40</sup> *Keller v. Elec. Arts Inc.*, 724 F.3d 1268 (9th Cir. 2013) (In re NCAA Student-Athlete Name & Likeness Licensing Litigation). Concerning the question of whether, for purposes of an anti-SLAPP motion under Cal. Code Civ. Proc. § 425.16(b)(1), a videogame developer had a First Amendment defense against the right-of-publicity claims of a former college football player whose likeness was used in a videogame, the court held that under the "transformative use" test, use of the player's likeness did not qualify for First Amendment protection as a matter of law because it literally recreated the player in the very setting in which he achieved renown; the Rogers test for Lanham Act false endorsement claims did not apply to right-of-publicity claims; California's state law defenses aimed at protecting the reporting of factual information did not apply because the game developer was not publishing or reporting factual data.

<sup>41</sup> *Mil-Spec Monkey, Inc. v. Activision Blizzard, Inc.*, 74 F. Supp. 3d 1134 (N.D. Cal. 2014). In this action arising from claims of copyright and trademark infringement, plaintiff Mil-Spec

The Canadian courts have not yet considered the appropriation of personality in the context of videogames; however, videogames have been at issue in two important cases regarding copyright. The first case, *Entertainment Software Association v SOCAN*,<sup>43</sup> was an

Monkey, Inc. ("MSM") argued that the video game Call of Duty: Ghosts, created and published by defendant Activision Publishing, Inc. and Activision Blizzard, Inc. (collectively, "Activision") makes illicit use of MSM's "angry monkey" trademark, among the most popular morale patch designs the company promotes and sells online and through third parties. MSM brought five claims against Activision, alleging (1) copyright infringement; (2) trademark infringement under the Lanham Act; (3) false designation of origin; (4) California statutory unfair competition; and (5) common law trademark infringement. Activision moved for summary judgment on the four trademark-related claims, arguing that its use of the angry monkey design in Ghosts is protected by the First Amendment. The court granted the motion, finding that Ghosts – an interactive video game with compelling narrative, realistic graphics, distinctive music and sound, and distinctive characters, among other things – was an expressive work entitled to First Amendment protection.

<sup>42</sup> *Manuel Noriega v. Activision Blizzard Inc.*, BC 551747 (Sup. Court of California. 2014). Manuel Noriega filed a lawsuit against Activision stating that Activision was using his image without his consent and would have shown it as "the culprit of numerous atrocious fictitious crimes" in the videogame Call of Duty: Black Ops II, to increase sales of the game. It stated that the company had infringed its image right, while Activision's position was that the use of the character was protected under the right to freedom of expression. The process was dismissed based on the statute of the State of California that seeks to avoid lawsuits that restrict freedom of expression. The judge proclaimed that Noriega's image right was exceeded by the First Amendment's right to freedom of expression for the defendants, and that there was no evidence of damage to Noriega's reputation. "The Court concludes that the marketability and economic value of the work questioned in this case does not come from Noriega, but from the creativity, the ability and the reputation of the accused."

<sup>43</sup> *Entertainment Software Association v SOCAN*, 2012 SCC 34 (Supreme Court of Canada).

appeal of the decision of the Copyright Board of Canada, which held the download of a file over the internet constituted a communication to the public. As such, the Society of Composers, Authors and Music Publishers of Canada (SOCAN) was entitled to collect royalties on behalf of its members for musical works in videogames downloaded over the internet. The Entertainment Software Association appealed the decision on the basis that a download of a videogame should be considered only a reproduction of the work and not both a reproduction and communication. In a five to four split decision, the majority of the Supreme Court of Canada held that applying an additional 'communication' tariff to the download of a permanent copy of a videogame would be contrary to the principle of technological neutrality, which requires that the Copyright Act apply equally between traditional and more technologically advanced forms of media. The majority found that there was no practical difference between buying a copy of the work in a store, receiving a copy in the mail or downloading a copy over the internet.

The most recent case, *Nintendo of America Inc. v King*,<sup>44</sup> was the first decision to consider the circumvention of technological protection measures, contrary to s. 41.1(1) of the Copyright Act. In an application before the Federal Court of Canada, the applicant, Nintendo of America Inc. (Nintendo), alleged the respondent company, Go Cyber Shopping, had circumvented its technological protection measures (TPMs) and these actions allowed users to play unlicensed copies of Nintendo's videogames. The respondent sold devices that mimicked the game cards used on the Nintendo 3DS system and installed mod chips designed to circumvent the copyright protection mechanisms in the Nintendo Wii console. The Court found that the respondent was liable for secondary infringement of Nintendo's copyrighted works and that the respondents had circumvented the technological protection measures put in place by Nintendo. The Court

awarded the maximum statutory damages (\$20,000) for each of Nintendo's works and \$1million in punitive damages, resulting in an award of over \$12.7 million.

## 7. CONCLUSIONS

After analyzing each of the different answers, we affirm that no country has a specific regulation of videogames as a type of special work recognized in copyright laws. Instead, they are assimilated in many cases as a software, audiovisual, multimedia or other type of works. Although, as mentioned above, the express recognition in the copyright regulations is not necessary to accord the category of work to a videogame, as this is a complex creation involving technical and artistic aspects, it would be desirable to avoid its assimilation with other types of works and establish special provisions in the copyright regulations for videogames (like what happens with software or audiovisual work). Meanwhile, the different copyright offices should take the initiative and provisionally establish a proper form for registration or deposit of videogames as a work in whole, to consign and jointly identify all those characteristic elements that comprise it, avoiding its dismemberment and separately protection.

Regarding videogames protection for other intellectual property rights, such as trademarks, patents, trade secrets, and industrial designs among others, we see that this protection in most countries means, on one hand, an additional safeguard regarding distinctive elements, new technical solutions, list of clients or test results, design and aesthetic appearance of peripherals, characters representation, etc., which in many cases are not subject to copyright protection. While, on the other hand, there is an overlap between what is protected by copyright and these other intellectual property rights (software protection, videogame title and characters representation, functional and aesthetic aspects, etc.). Also, we find other issues related to videogames

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<sup>44</sup> *Nintendo of America Inc. v King*, 2017 FC 246 (Federal Court of Canada).

currently under worldwide discussion as the best way of protecting it (eg. Graphic user interface and icons in a videogame).

On the recognition and assignment of rights, almost all copyright laws have moral and patrimonial rights in videogames, and these latter rights are subject to different types of licenses. However, its scope and exercise will vary depending on the system adopted, creation regime in question, type of work present, quantity and quality of intervening authors, existing contractual relationship, legal presumptions, etc. Issues that are also directly linked are limits or exceptions, compensatory remuneration systems, derivative works, possible related rights in favor of users and the collective management of the rights of authors and game owners. We reiterate that a special regime of videogames will solve all these issues that find different solutions in legislation, and in many cases, are not even contemplated, such as the licensing regime for the organization of tournaments, competitions, among others.

The adjacent protection of videogames in most countries are recognized through the private image of people, subdivided in its aspect of protection of privacy, honor and reputation (privacy rights), as through its aspect of the commercial exploitation of the image of people (publicity rights). However, this last right is not regulated in many of the analyzed legislations, thus, requiring an express acknowledgment for its differentiation from privacy right-- a right that does have constitutional and legislative recognition regarding the privacy and protection of personal data, as well as different actions or guarantees to enforce it are contemplated (especially many countries recognize the figure of *habeas data*).

Among other issues related to videogames, in some countries, there are isolated special regulations on the functioning of certain aspects. In this regard, incentives to the software industry, specific requirements for establishments that offer videogame services, false or deceptive representations in the sale of videogames,

regulations for the sale of violent videogames or explicit sexual content -of doubtful constitutional scope- can be mentioned, and regulations related to copyright in general, but with direct effects on videogames, such as the circumvention of technical security measures.

Finally, we were surprised by the fact that, except for the United States and Canada, there is no case law related to videogames in the American region. There could be many reasons for this, but we can deduce the importance of the videogame industry in those countries to such an extent that the videogame industry has already surpassed in terms of monetization the music and the audiovisual industry together.

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