

11. LEGAL PROTECTION OF VIDEOGAMES IN THE AMERICAS

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ABSTRACT

The objective of this article is to determine the scope of legal protection for 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

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 pro

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

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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

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,

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,

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

Other countries mentioned as a form of additional

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 sctat

deceptive representations and deceptive marketing practices in association with the promotion or sale of any product, such as videogames.³³ Finally, others establish regulations for the commercialization of violent videogames³⁴ or with sexually explicit content.³⁵

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.³⁶ It is very common to use mod-chips to modify

or deactivate the restrictions and lim]TJEMC /Span </9t1490 9 104.64 532.2 Tmelar dec afyesme cr 0.019 .3 (r)-2.7 (i)-2.7 (e)-13. (es)-0.7 (t)-3.3

Interactive, Inc.³⁸; Kirby v. Sega of America³⁹; Keller v. Elec. Arts Inc.⁴⁰; Mil-Spec Monkey, Inc. v. Activision Blizzard⁴¹; Manuel Noriega v. Activision Blizzard Inc. among others.⁴²

³⁸ 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 color

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*, 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

