Video games: IP key aspects

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The gaming industry's growth has been exponential. With a global community of more than 3.2 billion gamers, the revenue expected for 2022 is higher than 196 billion dollars globally. With such economic relevance and being a creative industry, IP rights related to video games play a strategic role in several dimensions of the ecosystem.

At a very first layer, there is the contractual relation between the game publisher and the development team (scriptwriters, designers, programmers, sound designers, among others). Depending on the jurisdiction, this could be the very first sensitive topic. In Brazil, which adopts the "authors' rights"' system, there is no provision in the Copyright Law (Law No. 9.610/98) regarding works for hire and the total and permanent assignment of patrimonial rights of an author is only admitted in writing. The Software Law (Law No. 9.609/98), however, safeguards the ownership of the software to the employer or contracting party, unless otherwise agreed between the parties. Thus, having a written, clear, and well-structured agreement is key for legal certainty regarding the publisher's ownership and exploitation rights of the game, and the wording shall also be technically adapted according to the role of each member of the development team.

A second layer is the legal categorization of video games, which is salient for determining its protection. This assessment, once again, will vary according to each specific jurisdiction. In the Brazilian case, the discussion relies on whether video games should be framed as audiovisual works or a computer program. There are court decisions classifying video games as software for tax purposes and there is no doubt that the game code is protected under the Software Law (Law No. 9.609/98). However, as software protection is limited to the source code itself, and considering the creative elements involved in video games, this regime is not enough for modern games. Thus, based on the audiovisual aspects and even the definition of an audiovisual work provided in the Copyright Law (Law No. 9.610/98)[1], this seems to be the more suitable legal framework. In addition, it is also possible to protect their other distinctive characteristic "look and feel" aspects, based on both copyright and unfair competition (Law No. 9.279) statutes.

Besides such protections, there are also other IP rights to be considered associated with the games that could be protected. Under the Brazilian perspective, there are potential protections by: patent for consoles and its accessories, aiming to protect hardware technical solutions, for example; industrial design registration could also protect the appearance of consoles and its accessories; trademark protection should be considered for the company name, game title and, according to the case, even the characters' name; trade secrets for commercial strategies, development tools or other strategic information concerning the video game, from its creation until its exploitation.

Adding another layer of IP aspects to be considered, a content risk assessment of the video games developed before publishing is also recommended. The purpose is to identify potential third-party rights used in the game, such as trademarks, personality rights and copyrights, assess if there are any risks involved in such use and based on such assessment, establish

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[1] *Art. 5 For the purposes of this Law, it is considered:* (…)
VIII - work: (…)
i) audiovisual - the one that results from the fixation of images with or without sound, which has the purpose of creating, through their reproduction, the impression of movement, regardless of the processes of their capture, the support used initially or later to fix them, as well as the means used for its publication;

the adequate decision: freely use the content, obtain an authorization for using it or remove third-party contents. Taking this precautionary measure is an effective approach of saving costs with attorneys or indemnifications, as well as avoid judicial decisions that could prevent the distribution of the game.

After taking the above-mentioned steps, there are several contractual arrangements for different ways of exploiting the video games that bring a final layer of IP aspects to bear in mind:

1. Distribution agreements - given the growth and relevance of mobile games, for instance, publishers should pay close attention to the terms of the distribution agreements with the digital distribution platforms (the application stores).

2. Partnership marketing - different industries have been using video games as marketing platforms with creative initiatives to promote their services/products or as a way of brand positioning.

3. E-sports - expanding the individual player's experience, the professional gaming competitions have their own ecosystem, composed by different teams, players, fans, sponsors, broadcasters, streamers and so on, besides the major events for the finals with presenters, commentators, and even live presentations.

4. Derivative works - also as a way of expanding the universe of the video game, there are several works that can be generated based on such original creation, such as comics, books, animations, films, etc.

Video games' IP rights is the backbone of all these four types of exploitations, which rely on an authorization from the publisher. Thus, for a professional management and proper protection of the rights involved, companies must be careful with the extension of the rights negotiated.

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