Country Case Study

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Country Case Study. Who Owns a Video Game in Spain?
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Abstract

How is a video game legally protected? In Spain there is no specific regulation that shields the creation of a video game. This absence implies that we have to conceive a video game as a mosaic of separate pieces and treat them as different works, in order to grant it comprehensive protection. Thus, on the one hand, it is necessary to process and register the computer program (software) that supports the video game. On the other, the same must be done with the visual part (audiovisual work). This Article deals with the protection of the software and the graphic part, as well as the catalog of rights inherent to both. There are many “gray areas” presented by the abundant casuistry, which is a challenge from the legal point of view. Due to the above, given that the legislation on the subject is insufficient to answer all the questions, it is necessary to resort to the jurisprudence of the Court of Justice of the European Union (CJEU), in order to clarify and delimit the scope of the different ways of protecting a video game, since, according to what has been pointed out, there is no glimpse of a proposal to standardize this matter on the near horizon.

Keywords

Video games, Copyright, Patent Law, software, jurisprudence

1. The Absence of a Specific Legal Framework as a Condition for a Comprehensive Protective Approach

A video game is a specialty product (OLAIA, 2021: 18) that can be defined as an electronic and often interactive application that allows simulating experiences through a device (tv, pc, tablet or smartphone).
The video game industry is the main well-wisher of the entertainment sector. Moreover, video game industry is the first audiovisual entertainment option in Spain, surpassing the combined turnover of the film industry and music. And, what is more important, it keeps our country in the “top 10” of the world in terms of business volume.

However, despite the overwhelming data, which confirm a consolidated growth of the video game industry, which is already the main growth engine of the entertainment sector, this circumstance has not been accompanied by the corresponding regulatory development with specific substantivity.

It could be said that the protection of video games as a cultural industry is relatively recent, given that videogames practically emerged in the 60s, and responds to the emergence of a new industry that begins to generate significant amounts of money quickly. But this protection is not established unanimously in all countries, but the way to protect video games varies in each country, with few common regulations (PÉREZ, 2015: 21).

Video games involve a sum of intangible elements of IP, such as software, images, sounds, characters, graphic designs, dialogues, narrative script, trademarks, patents, etcetera, a combination of assets that, in short, give rise to a complex work that has great value for the company that develops or publishes it, not only due to the number of sales of said video game but, above all, due to the profits derived from its intellectual property. The main asset of any company dedicated to the development of video games is its IP. Therefore, it is essential that these companies correctly protect their IP and, consequently, it is equally essential that there is some legal certainty around the protection of video games and their IP (INSÚA, 2019: 13).

From the IP point of view, a video game is a complex product around which several creators converge, who hold different rights over it.

The absence of specific legislation on video game protection conditions, from a legal point of view, its treatment, since its scope will essentially depend on two issues: the element subject to protection and the specific route that is applied.

In this sense, depending on the object on which the protection is required, we must select one way or another. Specifically, from the list of categories of IP, the following may be indicated: Copyright, trademarks, patents or trade secrets.

Of all of them, the first one stands out, because, although there are more, there are two main elements that make up a video game -the software that supports it and the visual part-.

The confluence of various authors around a video game is what determines that each of its parts must be dissected.

We refer, for example, to software, videos, sounds, images, script, characters or brands, in order to protect the rights inherent to the intellectual property that correspond to them.

Among all of them, software is perhaps the most important as it is the pillar on which the rest of the content is based, hence this issue is addressed in a unique way. The analysis continues with a study of the protection of the graphic part.

In the absence of specific legislation on the matter, the issue of litigation that the casuistry of both aspects raises in legal traffic is approached from the perspective of the CJEU, whose hermeneutical work, as we have advanced, is essential in this specific sector of the national legal system and, therefore, European.

2. The Legal Protection of the Video Game

2.1. Software Protection

Currently, the protection of software is governed by the rules of Copyright.

Copyright protects original intellectual and artistic creations expressed through any medium or medium. The protection they grant does not require any formality, it is not even necessary to make a reservation of
rights, since creations are automatically protected by the mere fact of creation.

In Spain, the duration of Copyright extends for the life of the author and 70 years after his death. However, the duration of Copyright will depend on the specific case and the specific country in question.

The protection of the computer program as a literary work by Copyright does not deserve any discussion, since it is a peaceful matter for doctrine and is reflected, among others, in article 1 of Directive 2009/24/EC, in article 4 of the 1996 WIPO Copyright Treaty and in article 10 of the WTO Agreement on TRIPS (acronym that runs for Trade-Related Aspects of Intellectual Property Rights), as well as in the corresponding national transpositions and implementations.

In Spain, the intellectual property of software is dealt with by Title VII (articles 95 and following), which closes Book I of the Law of this specific sector of the legal system (Royal Legislative Decree 1/1996, of April 12, by which approves the Consolidated Text of the Intellectual Property Law, regularizing, clarifying and harmonizing the current legal provisions on the matter).

The specific object of the protection is dealt with in article 96.1 of the aforementioned law, according to which software should be understood as: "Any sequence of instructions or indications intended to be used, directly or indirectly, in a computer system to perform a function or a task or to obtain a specific result, whatever its form of expression and fixation".

What does this definition imply from a legal point of view? The definition means equating computer programs with literary works, which means offering the former the same tutelage. In short, it responds to a wish of the Spanish legislator to protect an original creation through IP.

Precisely, originality (in the sense of being an intellectual creation inherent to its author) is what is protected.

It is a reinforced guardianship because, in practice, demanding criteria of originality are excluded. What is required, only, is that the program be of its author and not of another.

From a procedural point of view, the registry is not constitutive, that is, it does not generate rights: it is a iuris tantum presumption (admits evidence to the contrary).

To access protection it is necessary that a creation has materialized, and that it has been carried out by a natural person, since the rights are granted and are born by the Registry.

In this sense, the right to register "will belong to the one whose application for registration has an earlier date of filing in Spain, provided that said registration is granted". Part of the consolidated doctrine maintains that what is relevant is not to meet a requirement of form but to enrich the heritage of aesthetic appearance in the field of industry, therefore it should be closer to IP. According to this theory, the author would be the first to make the design available to the public. And it is that, for this author, the priority principle is appropriate for technical inventions or creations, trademarks, but it loses much of its meaning in this area of law that is closely related to IP (OTERO, 2017: 49).

In relation to rights, a distinction should be made between moral rights (paternity, integrity, disclosure, transformation, access to the work and its withdrawal from the market) and economic rights (reproduction, transformation, distribution and public communication).

The basic core of the author’s moral right is made up of the right of recognition of paternity and the right to respect the integrity of the work, a essential core that in turn is closely connected with the fame or professional reputation of the author, even to the point that if there were no recognition of this moral Copyright, an identical or similar protection could possibly be achieved through the protection of honor and professional prestige, as occurs in US law (RODRIGUEZ, 2007: 127).

As regards the moral rights of the author of a computer program, it should be noted that the breadth of protection is difficult to apply in practice. And why is it difficult in practice to enforce moral rights? In essence, because these types of creations are usually carried out in work groups, whether they are collaborative or collective works, or by commission.
Regarding the first modality, it should be noted that in Spain and, therefore, in Europe, when the work is created within the framework of an employment relationship, although moral rights remain in the author’s sphere, since they are inalienable, they are practically lacking of transcendence, since it is complex to split the originality in the part created by the author, given the very nature of the division of tasks of this form of business creation.

As regards the collaborative or collective works, it should be noted that Spanish and foreign doctrine has barely been pronounced, which can be explained by the different legal regime attributed to each one, especially as it relates to the attribution of rights over the same (VERDAGUER, 2010: 62).

In respect of the second modality -commissioned works- it should be noted that beyond the assessments made previously on the rights of paternity and integrity, we must stop at the right of disclosure, to emphasize the fact that the acceptance of the commission.

The work must be interpreted per se as an exercise of the right of disclosure. This is determined both by the specialty of the type of work and by the need to accommodate the exercise of this right to the special nature of the commission, hence, once the program is created, the author cannot refuse to deliver it. the client claiming the exercise of the right of disclosure in its negative aspect, that is, the right of unpublished.

On the contrary, interpretive problems or compliance with the contract will be conducted through the general civil route, and, specifically, by the principle pacta sunt servanda (agreements must be maintained).

Regarding economic rights, we must refer to the specific regulation contained in article 99 of the IP norm, but we must bear in mind that, contrary to what is stated for moral rights, exploitation rights can be assigned/sell/rent to third parties, so it is very common for the owner of the exploitation rights to be a different person from the one who developed the program, that is, the holders of the moral rights.

Curiously, there is no talk of public communication, that is, making the software available to the public. Apparently it is because the legislator understood that it would not make sense to make software available to anyone if they were not allowed to reproduce it. But we must interpret that he would also have this right, that is, the owner of this right will be the one who decides how the program is made available to the public, either through a download link, through sale, through platforms such as Steam ... What we must be clear about is that each right is independent, that is, that I buy a video game (Reproduction Right) does not authorize me to share said video game (Right of Public Communication).

2.2. Protection of the Graphic Part

The IP Spanish Law contains a definition of audiovisual work in its article 86.1, according to which it is: “Creations expressed through a series of associated images, with or without built-in sound, that are essentially intended to be shown through projection devices or by any other means of public communication of image and sound, regardless of the nature of the material supports of that works”.

In this case, we could be facing what the doctrine calls “multimedia work” although this type of audiovisual works are not regulated by the IP Law, we could define it as “that interactive work that incorporates in a digital support various audiovisual and sound elements that the user can be accessed based on various individual choices of articulated navigation through a computer program” (BERCOVITZ, 2018: 76).

In practice, the graphic part is considered to be a collaborative work and, in accordance with the provisions of the Law in its article 7, the rights correspond to all those who have participated in a unitary way in its creation.
The foregoing implies that any eventual modification, transformation, dissemination, etc., requires the consent of all the co-authors. And, also, it implies that de facto it is the producer of the audiovisual work who remains, practically, with all the exploitation rights of the same (the presumption of article 87 of the IP Law in favor of the producer must be taken into account).

Part of the doctrine states that a specific regulation of video games is necessary because, since it is a structurally complex work, formed by the union of different elements susceptible to protection by intellectual property, its legal nature is not entirely clear. This means that currently video games as a work do not have adequate legal protection. For this reason, some consider that the ideal would be for the European Union to carry out an in-depth technical-legal study that would lead to specific regulations for video games. In this way, the legal nature of the same would be defined at once and, in turn, would facilitate the registration of this type of works to the registrars, and its legal protection as a work (TOLMOS, 2018: 172).

2.3. Some of the Main Gray Areas, a Matter of Jurisprudence

The peculiarities of a video game, which is designed to interact and spread, mean that the legislation cannot cover all the issues that arise in legal traffic.

At this point, the interpreting work of the judges becomes essential. In this Article we focus on three aspects that raise doubts and on which the task of resorting to jurisprudence has been necessary to clarify and delimit border issues, which have created litigation.

Specifically, these are issues related to the documentation of a video game software and the transfer of rights (licenses and assignments, mainly).

Regarding the first, it should be noted that the extension of the same form of protection by Copyright to the preparatory documentation of a computer program, as well as technical documentation, program description and user manuals, which are subsumable in the traditional category of literary work, it raises certain problems, given the difficult accommodation of the nature of the aforementioned documentation with the regulation of the exceptions or limits provided for the computer program.

As regards the interfaces present in the program, the differentiation made by the Court of Justice of the European Union in its Judgment of December 22, 2010, in which it is stated that the graphical user interface does not constitute a form of expression of a computer program and, thus, cannot enjoy Copyright protection on computer programs under Directive 2009/24/EC, although its potential protection will have to be assessed, if original, in accordance with the general provisions contained in the Directive, differentiation that is sometimes artificial and difficult to apply in practice.

The second issue -the transfer of rights to third parties (through licenses or assignments, above all)- occurs after the creation of the computer program.

Licenses are contracts by virtue of which the licensor, the owner of the intellectual property of a work, grants a third party, the licensee, a right to use or exploit it with a series of limits, temporary, territorial or related to its scope of application, in exchange for remuneration.

In the specific case of the user license agreement, the licensor usually grants the licensee the minimum of exploitation powers (in practice, reproduction for the purposes of using the program).

A turning point regarding the license of use is the STJUEC-128/11 , of July 3, 2012. According to the High European Court, “the right to distribute the copy of a computer program is exhausted if the owner of the copyright, who has authorized the download from the Internet of said copy on a computer medium, has conferred, in exchange for the payment of a price that allows him to obtain a remuneration corresponding to the economic value of the copy of the work of which he owns, a right of use of such copy, without limit of duration” .

Put it differently, regardless of the nomen iuris (legal name) that the parties have given to this contract, the Court considers it a sale and, consequently, applies the theory of exhaustion at the European level when
the contract had been concluded in the European Union.

According to the consolidate doctrine, the right to distribute a copy of a computer program is exhausted even if it had been obtained through an Internet download, authorized by the owner of the software exploitation rights.

In other words, the CJEU considers in this case that Directive 2009/24 in no way limits the exhaustion of the right of distribution to material supports, also extending to immaterial supports.

In short, more recently, on the occasion of case C-166/15, in a Resolution of October 12, 2016, the CJEU has stated that: “Although the initial purchaser of the copy of a computer program accompanied by a license for unlimited use has the right to resell this used copy and its license to a sub-purchaser, on the other hand, when the physical medium of origin of the copy that was delivered to him is initially damaged or destroyed or has been misplaced, you may not provide this sub-acquirer with your backup copy of this program without permission from the rights holder”.

It follows from the aforementioned conclusion that, if a legitimate purchaser intends to resell a perpetual copy of a computer program without any major complications, he must keep the original physical medium through which said copy was delivered.

Regarding development and maintenance contracts, it must be agreed who owns the exploitation rights over pre-existing materials, as well as those that have been developed as a result of the provision of services.

In general, it is usual for each party to retain its pre-existing intellectual property rights to the formalization of the contract and guarantee to the counterpart that it is the legitimate owner of the IP rights or that they have been transferred by the legitimate owner.

In relation to the rights over the result of the service provided, this means regulating the transfer or not of the exploitation rights over them and, if they are transferred, specify the duration, the territory, the exclusive nature or not, as well as the exploitation rights that are transferred. If nothing is agreed, only those that were necessarily deducted from the contract itself and that were essential to fulfill the object and purpose of the same will be understood to be transferred.

Regarding the legal nature of a video game, the CJEU had the opportunity to rule on the legal nature in case C-355/12 (Nintendo v. PC Box). In this matter, the Court established that “video games (...) are complex material that include not only a computer program, but also graphic and sound elements that, although encoded in computer language, have their own creative value that cannot be reduced to that encoding. To the extent that the parts of a video game, in the present case those graphic and sound elements, participate in the originality of the work, they are protected, along with the work as a whole, by copyright under the regime established by Directive 2001/29”.

From this argument of the Court in relation to this matter, one can extract the idea that video games can be protected as a whole work (including software and audiovisual content) as long as it is sufficiently original; and, on the other hand, that the elements of the video game, such as the graphic and sound elements, have a creative value of their own so they will also be protectable regardless of the computer program to which they are attached.

Thus, the CJEU applies the doctrine that it had been following in previous cases, such as in case C-5/08 (Infopaq), where the court already made it clear that both the work as a whole and the different parts of it, provided that they participate in the originality of the work as a whole (APARICIO, 2015: 437).

Ultimately, a video game will be a type of complex work, of heterogeneous composition, different from the computer program that it uses as the basis for its operation but that is integrated within it to form a unitary work.

For this reason, as contemplated by the CJEU, the video game may be protected as a joint work as long as it is sufficiently original and individually each of the elements that compose it when they have that creative
height necessary to be protected.

3. Conclusions

The video game industry is currently the engine of the entertainment sector, but this growth has not had its corresponding legislative development.

This absence worries video game creators, who face difficulties derived from a product that is technically complex. For example, how to determine its specific authorship and, consequently, how to protect it from eventual copies and reproductions.

To give the game complete protection, the best option is to dissect each of its parts. Specifically, the software, the audiovisual elements (image, video and sound recordings), the script, the characters, the brands, the image rights, the designs and those in charge of reviewing the development of the video game (beta testers).

Of the list exposed, the computer program - the basis of the video game - stands out, which is protected by copyright, which automatically grants the creator a 70-year exploitation right.

However, despite the fact that in theory it is a broad protection, which can be assimilated to the protection that the legislator grants to literary works, the video game is a complex product, which must be taken into account in order to be documented in the specific assignment of the intellectual property over the created and, also, in order to carry out a notarial registration (escrow) of the software code.

The complexity of protecting the intellectual property of a video game can be seen in legal traffic, where its hybrid nature is not always accommodated in some regulatory sectors, which gives rise to "gray areas" that lead to litigation.

To date, the case law of the CJEU on some of the issues that have raised the most controversy (links and hyperlinks, Internet downloads, the right of distribution, documentation of a video game software or contracts for licenses for use or assignments, for example) is peaceful but not consolidated (two judgments of a court in the same sense).

"We must find a middle way that prevents the precedent from owning us," Lord Reid said. Arguments of disparate nature and substance can emerge contradictions, but in a sector so dynamic and constantly pointing to new challenges, a total legislation would reduce flexibility to the judges.

There is no glimpse of a proposal to standardize this matter in the short term, nor in future years. Perhaps because as in other sectors, technological development has a speed much higher than the right. And, while this happens, challenges and dares are assured.

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