

The Legal Status of Video Games

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Comparative Analysis in National Approaches

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¹ “The views and opinions expressed in this paper are the sole responsibility of the authors. The paper is not intended to reflect the views of the Member States or the WIPO Secretariat”.

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INTRODUCTION

ORIGIN OF VIDEO GAMES

1. The history of art also involves the history of technological innovation. The evolution of the fine arts traditionally has been conditioned by the tools used to create works of art. In the Upper Paleolithic period, humans used rocks, sticks and natural pigments to draw and carve representations of animals and men. With scientific progress, creators were able to perfect their works of art using new tools, such as better brushes, chisels, casts, as well as improved techniques. This evolution eventually made possible the creation of new works of authorship, such as cinematographic works, databases, computer programs and, more recently, video games.
2. Video games are complex works of authorship – containing multiple art forms, such as music, scripts, plots, video, paintings and characters – that involve human interaction while executing the game with a computer program on specific hardware. Therefore, video games are not created as single, simple works, but are an amalgamation of individual elements that can each individually be copyrighted (i.e., the characters in a given video game, its soundtrack, settings, audiovisual parts, etc.) if they achieve a certain level of originality and creativity.
3. In the video game field, there are multiple genres of games, including action games, action-adventure games, adventure games, role-playing games, simulation games, strategy games, music games, party games, sports games and trivia games.² The constituent elements of each type of game – and, more precisely, within each specific game – will vary. However, all video games share a common element: the computer program that runs the game.³
4. Although the object of this analysis is not the history of video games, it is important to study the early stages of development of these works in order to discuss the evolution of their legal nature. Different sources consider *Spacewar*, created by MIT student Steven Russel, as the first-ever video game, in 1961. This archaic game permits two players to shoot bullets at one another from very basic space crafts. It inspired the most successful video arcade game in history, *Asteroids*, in which one player, operating a rudimentary spaceship, has to destroy asteroids with missiles. Finally, another video game, *Pong*, which conquered the living room, became the most popular home video game of its time, and was widely copied.⁴
5. In the early days of video game creation, and given that computer science was much less developed then, it was not always easy to distinguish between an idea and the expression of that idea. As a consequence, an analysis of the aforementioned video games shows that all of them include a black background, simple geometric shapes and basic functionalities (for example, shooting or ricocheting). This narrow line between idea and expression led to the first lawsuits regarding video games, where judges had to analyze the legal nature and protection of these simple visual works. As described in this work, in the 1980s courts were inclined to think there were forms of expression that were

² This list and its subsets are available at http://en.wikipedia.org/wiki/Video_game_genres. While this list is by no means exhaustive, it is understood to provide adequate information on the types of video games available on the market.

³ However, and as discussed below, video games do not each use the same software.

⁴ A more detailed analysis of the history of video games can be found in *Computer and Video Game Law – Cases, Statutes, Forms, Problems & Materials*, by Ashley Saunders Lipson and Robert D. Brain, Carolina Academic Press, 2009.

inextricably associated with the idea of a particular video game (e.g., in *Asteroids*), such that the visual component of the work would not deserve copyright protection.

However, video games now include numerous forms of expression and, consequently, the idea/expression debate has been replaced by a discussion of the legal nature of video games, which we analyze in this work.

COPYRIGHTABLE SUBJECT MATTER FOUND IN VIDEO GAMES

6. As noted above, video games have evolved along with the development of computer science. In the 1960s, video games only included graphics with basic form; shortly thereafter, developers were able to incorporate rudimentary sounds. This constant evolution has continued over time, with video games now containing multiple elements each of which can receive copyright protection.
7. According to Lipson and Brain,⁵ video games include the following creative elements:
 - I. *Audio Elements:*
 1. *Musical Compositions*
 2. *Sound Recordings*
 3. *Voice*
 4. *Imported Sound Effects*
 5. *Internal Sound Effects*
 - II. *Video Elements*
 1. *Photographic Images (p.e., Giff, Tiff, Jpeg)*
 2. *Digitally Captures Moving Images (p.e., Mpeg)*
 3. *Animation*
 4. *Text*
 - III. *Computer Code (Source Code and Object Code)*
 1. *Primary Game Engine or Engines*
 2. *Ancillary Code*
 3. *Plug-Ins (Third-Party Subroutines)*
 4. *Comments*

Additionally, other subject matter eligible for copyright protection can include the video game script, its plot and other literary works; well-developed characters; choreographies and pantomimes; and maps and architectural works.

8. However, these elements are not protected *per se*, unless they meet each jurisdiction's criteria for protection; in this regard, some countries, like the United States of America, provide copyright protection only to original works of authorship fixed in any tangible medium of expression,⁶ while other countries, like those in the European Union (EU), also guarantee protection to non-fixed works.
9. Accordingly, the real issue, and one of the objects of this study, involves analyzing the legal protection of video games as single, unique works of authorship, since it is

⁵ *Computer and Video Game Law – Cases, Statutes, Forms, Problems & Materials*, by Ashley Saunders Lipson and Robert D. Brain, Carolina Academic Press, 2009, p. 54.

⁶ Section 102(a) of the U.S. Copyright Act.

irrefutable that the individual elements included in video games can deserve independent copyright protection.

PERSONS INVOLVED IN THE CREATION, DEVELOPMENT AND MARKETING OF VIDEO GAMES

10. The video game sector has grown significantly in the last 20 years, as has the number of people involved in developing a given video game. If in the 1980s, in order to create a video game, the production company needed the work and talent of only a few people, modern works require the joint efforts of dozens (sometimes hundreds) of artistic and technical employees before the video game can reach the shelves.

The number of people involved varies depending on the size of the project and the company involved, the kind of video game and the platform for which it was created. Thus, in recent years the market for video games has evolved along with the professionalism and competency of the people who, in one way or another, develop the games. As a consequence, current video game development can involve an even greater number of specialists than do other complex works of authorship, such as movies. These professionals may include the following:

- a. Producer: The producer supervises and oversees the work of all those involved in creating the video game. Video game producers have a similar role, *mutatis mutandis*, to that of a movie director. Other roles found in this category are:
 - i. Production coordinator
 - ii. Assistant producer
 - iii. Associate producer
 - iv. Director of production
- b. Game Designers, which include the following:
 - i. Lead Designer
 - ii. Level Designer
 - iii. Content Designer
 - iv. Game Writer
 - v. System Designer
 - vi. Technical Designer
 - vii. User Interface Designer
 - viii. Creative Director
 - ix. Writer
 - x. Scriptwriter
- c. Artist, the creator of the visual art of the game
- d. Programmer or Engineer, who creates and adapts the video game code
- e. Audio Designer, responsible for creating sound effects and other related sound elements
- f. Owners of neighboring rights:
 - i. Performers and Actors, in relation to both voice and movement
 - ii. Producers of audiovisual and sound recordings

- g. Other non-creative positions:
- i. Quality Assurance Tester
 - ii. Publisher of the video game
 - iii. Accountants
 - iv. Marketing experts
 - v. Community Manager

While these professionals are usually found in most commercial video game production, this list is not exhaustive, as other types of professionals can be involved in producing games of a specific nature (educational, sports, music, etc.).⁷

11. Whether these professionals hold copyrights will depend on their contribution to the work and the specific requirements of each jurisdiction. In general, in order to be a copyright holder, one must develop original and creative elements or perform the work of another creator (e.g., actors, musicians). In most cases, these authors have an employer-employee relationship with the development company, so that rights in the works are retained by the employer. However, if the work is not created within this relationship, the producer must ensure the proper transfer of rights in order to publish and market the video game appropriately.

LEGAL CONTROVERSY – CLASSIFICATION OF VIDEO GAMES

12. As discussed above, modern video games indisputably contain two main parts: (i) audiovisual elements (including pictures, video recordings and sounds); and (ii) software, which technically manages the audiovisual elements and permits users to interact with the different elements of the game. The debate therefore lies in the classification of the work as a whole – whether it is a multimedia work, an audiovisual work or, primarily, a computer program.

Some scholars suggest that video games are essentially multimedia works that belong in the category of audiovisual works, affirming that these works are fundamentally a “*series of related images*”, following the most common definition of an audiovisual work provided in legislation around the world. However, one must take into consideration that these regulations also affirm that such images are “*intrinsically intended to be shown*”, which is not the final purpose of video games. On the contrary, video games are meant to be played and run using a computer program, with (inter)active implications for users, while audiovisual works, as currently defined, imply mostly passive viewer participation.

13. In this regard, other authors also suggest it is not easy to place video games in the category of “audiovisual works”, because (i) the co-authors of these works (generally, the scriptwriters, the director and composer of the original soundtrack) are not necessarily the same sorts of authors as those involved in the development of a particular video game (with character and setting designers, animation designers, video testers, audio engineers, etc.); (ii) the rights requested by producers of video games and audiovisual works do not always coincide; and (iii) audiovisual works involve certain neighboring rights that are not always present in video games.⁸

⁷ For further information on contributors, see: http://en.wikipedia.org/wiki/Video_game_development, http://www.gamecareerguide.com/features/483/types_of_game_.php?page=1, http://www.gamecareerguide.com/features/414/game_production_an_introduction.php, http://www.gamecareerguide.com/features/411/game_design_an_introduction.php

⁸ “Derecho de autor y derechos conexos”, by Delia Lipszyc; pp. 469-470.

14. Therefore, among the countries analyzed for this study, none has clarified or offered definitive answers to the question of video game classification. Thus, in countries like Argentina, Canada, China, Israel, Italy, the Russian Federation, Singapore, Spain or Uruguay, jurisprudence or scholars consider video games to be, predominantly, computer programs, due to the specific nature of the works and their dependency on software for implementation.

In contrast, other countries, including Belgium, Brazil, Denmark, Egypt, France, Germany, India, Japan, South Africa, Sweden and the United States of America, take into account the tremendous complexity of video games in favoring the hypothesis that video games have a distributive classification. As a consequence, legal protection of the different elements of the game must be found separately, according to the specific nature of each work (i.e., whether it is literary, graphic, audiovisual, etc.).

Finally, a small group of countries, including Kenya and the Republic of Korea, are inclined to think that video games, given their visual elements, are essentially audiovisual works. This does not mean that the software used in a video game is unprotected in these jurisdictions, but that their audiovisual elements must prevail.

15. In this context, one must analyze and understand the technical aspects of video games in order to form an opinion on their legal classification. Specifically, one must examine the importance of these works' audiovisual elements, the software and any other relevant elements in order to determine which legal regime is most suitable for video games.

Video games include traditional works of authorship (such as pictorial and literary works, sounds and images) and software, which in this sector is known as a "*game engine*."⁹ A game engine is a technical instrument used both for the development of the video game and to drive the game in the console, *smartphone* or computer. Given the nature of game engines, they are also frequently known in this industry as "*middleware*", because they provide intermediary solutions so that game developers do not need to start a game from scratch but can use the tools and resources created by middleware providers. In the 1980s and 1990s, video game companies commonly developed their own game engines, and only rarely were video games developed with third-party tools. Currently, given the significant time and cost savings, video games are commonly created using third-party tools, and only a small percentage of the code included in a given video game is customized for that specific project.

The consequence of this *modus operandi* is that many video games now share source code (provided by the middleware), and the true, primarily distinctive elements of a game are the small amount of tailor-made code (that is not original *per se*) and all the audiovisual components of the game.

16. This report analyzes the classification that each country has adopted for video games, and provides, in the final section, a tentative classification of these complex works, considering their nature, the elements they are made of and the creative process.

⁹ For more information on "Game Engines", visit the following URLs: http://en.wikipedia.org/wiki/Game_engine
http://www.gamecareerguide.com/features/529/what_is_a_game_php?page=1

ARGENTINA

17. Although Argentina has an established local industry dedicated to video game development with huge growth potential for all types of devices and platforms, there is no specific law regulating copyrights in video games. Argentina protects works or subject matter – such as cinematographic works, musical works, etc. – through *Law No. 11.723, Legal Intellectual Property Regime* (hereinafter, the *Argentinian Copyright Act*), which provides protection for scientific, literary and artistic works.¹⁰ This provision does not specifically mention video games, but it does refer to other types of works whose protection could be applicable by analogy, including computer programs, cinematographic works and compilations.

The only specific legal provision regarding video games in Argentina is in Law 26.043,¹¹ which provides that manufacturers and/or importers of video games must place a label on the video game package warning the consumer that "*Overexposure is harmful to health*" as well as the appropriate qualification. This law does not include any provisions on what a video game is or regarding their regulation.

CLASSIFICATION OF VIDEO GAMES

18. Therefore, in order to classify video games within the appropriate legal framework in Argentina, one must first understand what a video game is. Video games are complex works that can embody multiple creative works of authorship (e.g., computer software, graphics, sounds, musical works and performances, and scripts), compiled in a creative fashion that requires human interaction when run on an audiovisual device. According to the *Argentinian Copyright Act*, a video game is basically software with special features (because of its complex nature) involving creators such as computer professionals, designers, sound engineers, actors and performers. Taking into consideration these characteristics, video games fall within the scope of the *Argentinian Copyright Act*.

Therefore, considering that video games imply a multidisciplinary activity of numerous people, all the works created by the *authors* involved in the creation chain of video games are included in Article 1 of the *Argentinian Copyright Act*.

RIGHTS HOLDERS AND STAKEHOLDERS

19. Authors, hardware manufacturers, publishers, distributors, retailers and consumers/players are all considered stakeholders of the video game industry in Argentina. However, in regard to those defined as rights holders, these are limited solely to authors, publishers, producers, licensors/licensees, wireless providers and advertisers. The *Argentinian Copyright Act* does not define an *author*, stating simply that the author of a work is the holder of the copyright.¹² Nonetheless, experts consider that the term

¹⁰ Article 1 of the *Argentinian Copyright Act*: "*For the purposes of this Law, scientific, literary and artistic works shall comprise writings of all types and scope, and include source and object computer programs; compilations of data or other materials; dramatic works, musical compositions and dramatico-musical works; cinematographic, choreographic and pantomime works; works of drawing, painting, sculpture and architecture; models and works of art or science applied to trade or industry; printed matter, plans and maps; plastics, photographs, recordings and phonograms; and finally any scientific, literary, artistic or didactic production, irrespective of its reproduction procedure.*"

¹¹ Ley 26.043 (BO 18/07/2005): "*Establécese que los fabricantes y/o importadores de videojuegos deberán colocar en los envases en que comercialicen dichos productos la leyenda "La sobre exposición es perjudicial para la salud"*", available at [http://www.aladi.org/nsfaladi/normasTecnicas.nsf/09267198f1324b64032574960062343c/eb488ab4a5cca75b032579e20050384d/\\$FILE/Ley%20N%C2%B0%2026043-2005.pdf](http://www.aladi.org/nsfaladi/normasTecnicas.nsf/09267198f1324b64032574960062343c/eb488ab4a5cca75b032579e20050384d/$FILE/Ley%20N%C2%B0%2026043-2005.pdf)

¹² Article 4 of the *Argentinian Copyright Act*.

“authors” only refers to persons who make contributions to the work, such as the developer of the game idea, computer professionals, the director-producer, the author of the plot, script and dialogue, designers, musicians and sound engineers, people in charge of the acting and the director of photography.

However, if one accepts that video games are cinematographic works, then Article 20 of the Argentinian *Copyright Act* considers that the right in such a work shall vest with the author of the plot, the producer and the director of the film, unless it is a musical cinematographic work, in which case the composer shall also have the same rights as the others.

20. A new category of authors can be found in modern interactive online video games, which include tools for creating and developing new elements for the game, including characters, levels, specific elements and other creative works. As to the legal status of contributions by players involved in interactive online gaming, one might discuss the legitimacy of gamers creating derivative works, as the copyright holder of a given video game has the right to prevent others from using or adapting the work without his or her express consent. However, given that these creation toolboxes are provided by video game developers, one could consider that there is an implicit license to adapt the work or to create derivative works from it. Accordingly, Article 4 of the Argentinian *Copyright Act* establishes that the holder of the copyrights is the person who adapted the work, in this case, the gamer.

On the other hand, other experts deem that the player of a game cannot be considered to be the author of a video game in relation to the images produced in the apparatus of the console. This is because, in their opinion, the apparent creative freedom of gamers is in reality quite limited, expressly and in advance, by the authors who wrote the code and whose discretion allows for such involvement.

THE ISSUE OF THE TRANSFER OF RIGHTS AND THE CONTRIBUTION OF THE AUTHOR

21. Before explaining the different regimes applicable to the transfer of rights, it is important to clarify that in Argentina moral rights always belong to the author and are not assignable. Accordingly, the author always has the right to be named as the author of the work. The author also has the right to oppose any modification, distortion or mutilation of his or her work by others, even where the author has approved such acts and the work is modified without permission. The only rights that an author can assign are economic rights. Transfer of these rights in Argentina is governed by the *Civil Code*, according to which transfer of rights must be done through contract. This contract must be in writing under penalty of nullification. Secondly, through a testamentary disposition, beneficiaries of a testament must take legal action to declare it valid. Lastly, in the case of inheritance, the author's heirs must initiate legal action to be declared as heirs.
22. As noted above, in principle authors own the copyrights in the created work. However, with regard to works made for hire, the Argentinian *Copyright Act* states, in Article 4 d), that the natural or legal persons whose dependents were hired to develop a computer program can be considered the authors, provided that the program was produced while performing their regular duties, unless otherwise stated. Therefore, there is no presumption of transfer of rights between an employee and an employer, unless the work developed is a computer program, in which case the rights shall be deemed to be owned by the video game studio.

The criterion applicable to video game companies is therefore clear: unless the employment contract expressly provides that the ownership of copyright in the programs created in the context of an employment relationship belongs to the employee, the

company will be the owner. This presumption for the company can be rebutted by evidence to the contrary by the employee in the form of a contractual clause to that effect. On the other hand, where the creative element is not a computer program (e.g., a character or script), then such a presumption does not operate and the transfer of rights must be explicitly included in the relevant agreement.

23. Other stakeholders include, for example, the distributor, who is considered the person in charge of the distribution to retailers, including online distributors. Retailers are those responsible for selling the product to consumers. As these roles may overlap in commerce, and may represent different stakes in the value chain, they are not stated to possess any explicit rights to the video game itself, with the exception of the right to distribute or sell the video game.
24. According to the Argentinian *Copyright Act*, the author of a scientific, literary or artistic work has the right to dispose, publish, execute, perform, translate, adapt or authorize its translation and reproduction and to prevent third parties from exploiting the work. Therefore, the author can enter into any agreement with third parties and receive remuneration for that agreement.

In this regard, compensation available for employees may be included in their salary, as an additional lump sum and/or additional proportional compensation. This will depend on the terms of the labor contract between employer and employee. As for independent contractors, the compensation may be a lump sum or a proportional remuneration, depending on the agreement between the contracting parties.

25. Therefore, while the Argentinian *Copyright Act* does not provide a clear classification of video games, these types of modern works are treated as software that embodies other creative elements. Additionally, the rights regime will vary depending on the relationship between the game studio and the contributor (independent contractor or employee) and on the type of work created. While there is a presumption of transfer of rights where the work is a software program, this assumption does not apply where the work is of a different nature. As a consequence, it is recommended that the rights regime be harmonized in environments in which the work created is complex and formed by multiple types of works and contributors.

BELGIUM

26. The regulation of copyright in Belgium is mainly included in the *Loi du 30 juin 1994 relative au droit d'auteur et aux droits voisins* (Act on Copyright and Neighboring Rights – Copyright Act – hereinafter the “LDA”). However, Belgium transposed the European Directive of May 14, 1991, on the legal protection of computer programs through a separate Act adopted the same day (hereinafter the “LPO”).¹³ Neither of these Acts contains specific provisions for video games.

CLASSIFICATION AS CREATIVE WORKS OF AUTHORSHIP

27. As in many other countries, Belgian scholarly opinion considers that video games generally include both a computer program, which can be protected as such under the LPO, and an audiovisual work, protectable through the LDA.¹⁴ This is therefore a readily

¹³ “Act implementing into Belgian law the European Directive of 14 May 1991 on the legal protection of computer programs”.

¹⁴ In particular A. Strowel, “La qualification du produit multimédia: de l'œuvre audiovisuelle aux bases de données” (Multimedia Product Qualification: audiovisual works and databases), in M. Chr. JANSSENS (ed.), “Intellectuele rechten in de informatiemaatschappij - Les droits intellectuels dans la société de l'information”,

[Footnote continued on next page]

accepted dual or distributive classification of simultaneous protection. Neither the interactivity typical of video games nor the lack of a public display has been considered in Belgium to be a barrier to classification as an audiovisual work. Moreover, the preparatory work of the LDA specifically mentions video games as an example of audiovisual works.¹⁵ Additionally, the protection of video games as computer programs includes not only literary elements but also user interfaces and other non-literary works, such as images and sounds.¹⁶

In terms of case law, a decision of the President of the Court of First Instance of Brussels in a case concerning parallel imports of Nintendo game cartridges, also retained this dual classification in 1995, holding that a video game can be deemed an audiovisual work protected by the neighboring right for producers.¹⁷ According to Belgian courts, this classification is appropriate because modern video games regularly include moving images that are not incidental, but were planned by the game developer.

28. Scholarly opinion also notes that specific elements of video games, such as the characters, could be considered artistic works that would qualify for copyright protection independently of the audiovisual work in which they are incorporated. Additionally, these creations may be derived from existing works, which can enjoy protection through other means, including trademarks or design rights.¹⁸

The classification of video games as computer programs or audiovisual works/films is likely to have implications when assessing the existence of an infringement, although this problem has not yet arisen in the Belgian courts. In this regard, some scholars have observed that the classification of video games as audiovisual works is likely to simplify the legal debate since it would be sufficient to compare the sequences of two games (e.g., images, sounds and texts) to determine whether there is infringement. In such a case, the use of experts to analyze the code of the computer program would be superfluous.¹⁹

29. Ultimately, the classification of a particular video game will depend both on the nature of the work and on the relationships between the contributors. In this sense, it has been observed that video games usually involve a significant number of stakeholders (as is analyzed in the next section), which often leads to the classification of the creation as a collaborative work. The LPA does not specifically define a collaborative work, but such kinds of works are mentioned in Articles 2, §2, 4 and 5:

Article 2, §2: *“without prejudice to the second subparagraph of this paragraph, where a work is the result of collaboration, the copyright shall subsist to the benefit of all successors in title for 70 years after the death of the last surviving joint author. The term of protection for an audiovisual work shall expire 70 years after the death of the last survivor of the following persons: the main director, the author of the screenplay, the author of the dialogue and the*

[Footnote continued from previous page]

Bruxelles, Bruylant, 1998, pp. 3-37, and pp. 10-11; A. Strowel & E. Derclaye, “Droit d’auteur et numérique”, Bruylant, Bruxelles, 2001, pp. 413 *et s.*

¹⁵ Doc. Sénat, 2000-2001, n° 2-704/1.

¹⁶ Article cited in footnote 13, p. 11; and “Droit d’auteur et numérique: logiciels, bases de données, multimedia” by A. Strowel & E. Derclaye, Bruylant, 2001, number 413.

¹⁷ *Nintendo v. Horelec*, I.RD.I., 1996, p. 89 (Prés. Com. Bruxelles, 12 December 1995). On appeal, the Court applied the rules on computer programs without questioning the classification of video games as audiovisual works (Bruxelles, 11 April 1997, A&M, 1997, p. 265). The Court held that video games consist of computer programs that organize a series of situations to which players react, causing a series of preprogrammed events.

¹⁸ Cf. A. Strowel and E. Derclaye, *op. cit.*, n° 419, p. 367.

¹⁹ Cf. A. Strowel, *op. cit.*, pp. 12-13.

author of the musical compositions with or without words specifically composed for the work.”

Article 4: *“Where copyright is indivisible, exercise of the right shall be governed by agreement. Failing agreement, none of the authors may exercise the right in isolation, subject to a decision by the courts in the event of disagreement.*

“However, each author may take action, on his own behalf and without the intervention of the other authors, against any infringement of copyright and may claim damages on his own behalf.

“The courts may, at any time, make the authorization to publish a work subject to the measures they deem necessary; they may order, at the request of the opponent author, that he should participate neither in the costs nor in the profits of exploitation or that his name should not be shown on the work.”

Article 5: *“In the case of a work of collaboration in which the contributions of the authors may be individually identified, those authors may not, unless otherwise agreed, deal in their works with new collaborators. However, they shall share the right to exploit independently their contribution where such exploitation does not prejudice the joint work.”*

The Belgian doctrine²⁰ frequently refers to the French definition of a *work of collaboration*, in Article L113-2 of the *French Intellectual Property Code*, which establishes that *“a work of collaboration shall mean a work in the creation of which more than one natural person has participated.”* However, contrary to the French Law, the LPA does not include any reference to *“collective works”*, so this concept would not be recognized in Belgium and is therefore not considered in this analysis.

30. Finally, a particular video game could also use elements from prior works, becoming a derivative work, such that authorization from the copyright holder of the initial work would be required.²¹

KEY STAKEHOLDERS

31. Numerous stakeholders are involved in the development of a video game. The producer takes the initiative to create and market the video game, chooses the creative team, finds the necessary funds and signs contracts with various creators and technicians. Where applicable, tasks are shared between an *executive in charge of production*, responsible for editorial decisions, and an *executive producer*, responsible for the project's financial management.²²

At the creative level, as with films, a scriptwriter and a director are involved in the creative process, although sometimes other individuals – such as the *“interactivity designer”*, the set designer or the character designers – participate in the creation of a video game. All these graphic designers must work in close collaboration with the computer programmers and the director of the video game.²³

²⁰ *“Logiciels libres et droit d'auteur: naissance, titularité et exercice des droits patrimoniaux”*, by Philippe Laurent, (Free Software and Copyright: creation, ownership and exercise of economic rights), Cahiers du Centre de recherche informatique et Droit n° 25.

²¹ A. Strowel & E. Derclaye, *op. cit.*, numbers 452 ff.

²² A.. Strowel, *op. cit.*, p. 34.

²³ *Ibid.*, p. 35.

AUTHORSHIP

32. According to the LDA, producers of video games do not qualify as (initial) authors, since authorship is only attributed to (all) natural persons who make a creative contribution to a work, involving personal choices translated into a tangible form (criterion of originality). This applies not only to designers, authors of the screenplay and the director, but also to computer programmers who write original code for the video game, and to any other person who creates an original work of authorship. However, those assuming purely technical, administrative or financial roles, who do not display originality from an artistic point of view, cannot be considered authors according to the LDA.

As noted below, producers may nevertheless acquire exploitation rights in the video game from the creators. Moreover, if the producer's name or trademark appears on the video game, the producer will be deemed to be the (secondary) author, i.e. the holder of copyright in the work *vis-à-vis* third parties. This rule makes it far simpler to organize counterfeit actions against third parties.

33. It is also worth noting that in terms of audiovisual works, there is a presumption with respect to co-authors. Hence, Article 14 of the LDA provides that, in addition to the principal director, the different individuals who contribute to the audiovisual work shall also be considered authors. Consequently, the LDA establishes that:

“Unless proven otherwise, the following shall be presumed the authors of a jointly created audiovisual work:

- *the author of the screenplay;*
 - *the author of the adaptation;*
 - *the author of the words;*
 - *the graphical author in the case of animated works or of animated sequences in audiovisual works where they represent a significant part of such work;*
 - *the author of the musical compositions, with or without words, specifically composed for the work;*
- *the authors of the original work shall be assimilated to the authors of the new work if their contribution has been used therein.”*

Nothing prevents co-authors of a video game from performing their creative work as part of an employment contract and subject to subordination with respect to the producer. In this case, the rights regime in Belgium is described below.

34. Finally, new means of accessing and distributing video games have permitted the potential creation of a new type of author, namely the player who participates in interactive online gaming. According to some Belgian experts, as the influence of the decisions and actions of players in the execution of a video game generally follows a specific functionality, as limited by the computer program, it does not seem reasonable to conclude that the player can be recognized as co-author of such a video game.²⁴ However, where the gamer has used the tools included in a particular video game to create, for example, new characters, sets and levels, and where these new elements can be considered original and creative in the sense established by the LDA, the gamer could qualify as an author.

²⁴ A. Strowel and E. Derclaye also state that the visual and sound aspects of the video game that are partly dictated by the intervention of the player cannot be held to be derivative works or computer-assisted delivery, because the player's intervention will not normally be sufficiently original and creative to deserve legal protection (*op. cit.*, n° 414 and reference to TGI Paris, 8 December 1982, Expertises, 1983, p. 31.).

TRANSFER OF RIGHTS

35. The rules regarding the ownership of rights are complex because they vary, not only depending on the legal status of creators with respect to their relationship with the producer of a particular video game, but also as to the classification of the work.

For computer programs, there is a presumption of transfer of exploitation rights in favor of the employer, which is very convenient for producers of video games. However, this presumption only applies where an employer-employee relationship exists between authors and producers.²⁵ If computer developers are hired as freelancers within the context of a service agreement relationship (as consultant or independent developer), it is essential to include in the governing agreement a clause establishing the transfer of rights from the author to the producer, in accordance with the requirements under Article 3, § 1 of the LDA.²⁶ It seems that the light regime under Article 3, § 3 of the LDA is not applicable in this case, because the game could be described as a “*cultural work*”.²⁷

In this regard, the classification of video games as audiovisual works also leads to a regime favorable to the producer, quite different than if this classification were rejected. Article 18 of the LDA provides that:

“Unless otherwise agreed, the authors of an audiovisual work and the authors of a creative element lawfully integrated or used in an audiovisual work, except the authors of musical compositions, assign to the producers the exclusive right of exploitation of the audiovisual work, including the rights required for such exploitation such as the right to add subtitles or to dub the work (...).”

This classification leads to a presumption of assignment of rights that is not limited to works created by employees²⁸ and includes freelancers. In addition, producers may invoke, at the same time, their neighboring rights which, among other things, grant them the right to authorize the reproduction of the first fixation of the audiovisual work (Article 39 of the LDA).

36. A classification issue could arise in the event that the original elements of the video game were created by independent authors in the absence of any explicit assignment of rights. In such a case, the producer would prefer the audiovisual work classification, which implies a presumption of transfer of exploitation rights in favor of the producer/employer. To our knowledge, such a case has yet to be presented before the Belgian courts. The producer is advised, therefore, to secure written proof of the transfer of copyrights by freelancers and music composers, including employees.

²⁵ Article 3 of the LPO: “*Unless otherwise provided by contract or statute, the employer is deemed the assignee of rights relating to computer programs created by one or more employees or agents in the performance of their duties or following the instructions of their employer.*”

²⁶ The main requirements of this provision are as follows: “*All contracts affecting the author shall require written form. Contractual provisions relating to copyright and to its modes of exploitation shall be interpreted restrictively (...). The author’s remuneration, the scope and duration of the assignment shall be set out explicitly for each mode of exploitation. The assignee shall be required to exploit the work in accordance with the fair practice of the profession.*”

²⁷ “*Where works are created by an author on a commission, the economic rights may be assigned to the person who has given the commission on condition that the latter’s activity is in a non-cultural field or in advertising, that the work is intended for such activity and that assignment of the rights is explicitly laid down. In such cases, the fourth to sixth subparagraphs of paragraph (1) and paragraph (2) shall not apply.*”

²⁸ Therefore, a specific assignment clause will be necessary if the video game includes musical compositions.

ECONOMIC COMPENSATION

37. For authors working within a labor relationship, there is generally no obligation to provide them specific compensation in addition to the wages paid under the contract work, regardless of the nature of the created work. However, where a particular contribution concerns an audiovisual work (as can be the case for video games under Belgian law – see above), Article 19 of the LDA provides for a system favorable to the author, in return for the presumption of transfer of exploitation rights:

“Save for audiovisual works belonging to the non-cultural field or to advertising, authors shall be entitled to separate remuneration for each mode of exploitation.”

“The amount of such remuneration shall, unless otherwise provided, be proportional to the gross revenue obtained from exploitation. In such case, the producer shall communicate to all authors, at least once a year, a statement of revenue he has obtained for each mode of exploitation.”

The contractual exclusion of proportional compensation, which is usually included in agreements between authors and developers, is obviously unfavorable to authors.

The same system of separate remuneration by type of exploitation, and in proportion to gross income, applies to freelance authors of audiovisual works (Article 19 of the LDA). This remuneration regime is nevertheless residual and can therefore be replaced by lump sum compensation or by a combination of a fixed amount and royalties.

38. Additionally, with respect to the author of a pre-existing creative work incorporated in a video game, such a derivative work would be an *“adaptation”* of the initial work, as in the case of a game based on a pre-existing cartoon or movie. In this case, the law also provides for proportional compensation, although the parties may agree otherwise in writing,²⁹ which often occurs in the video game industry.
39. In conclusion, Belgium is apt to protect video games as audiovisual works, which entails a specific regime for authorship and transfer of rights. As a result of this classification, however, there remain some unanswered questions due to the very specific features of video games compared to ordinary audiovisual works – for instance, issues in relation to creators whose roles do not appear in the list in Article 14 of the LDA. Therefore, considering the increasing importance of this kind of modern work, there may be reasons to build a tailor-made legal framework in Belgium.

BRAZIL

40. In Brazil, creative works, including video games, are protected by *Law No. 9610 of February 19, 1998, on Copyright and Neighboring Rights* (hereinafter, the *Brazilian Copyright Act*),³⁰ which governs copyright, the term encompassing the rights of authors and neighboring rights. This law protects any creation of the mind notwithstanding the

²⁹ Article 17 of the LDA: *“The granting of the right for the audiovisual adaptation of an existing work must be done by a different contract than the publishing contract. The beneficiary undertakes to exploit the work in accordance with the good practices of the sector and to pay the author, unless otherwise stipulated, remuneration proportional to the gross revenues he has received”*.

³⁰ The Portuguese title is *“Lei N° 9.610, de 19 de Fevereiro de 1998—Altera, atualiza e consolida a legislação sobre direitos autorais e dá outras providências”*.

mode of expression, including images, literary works, sounds, graphics, audiovisual works, computer programs and other works that are usually contained within a video game.

CLASSIFICATION OF VIDEO GAMES

41. While there is no explicit classification for video games under Brazilian legislation, video games can be protected, by analogy, by current Brazilian copyright³¹ and software law.³² In terms of copyright, video games can be classified in different ways: with respect to authorship, they may be considered collective works,³³ but in terms of protection, video games can be classified as audiovisual works if the video game falls within the definition of an audiovisual work described in Art. 5 i) of the Brazilian Copyright Act:

“Audiovisual Work: resulting from the fixation of images with or without sounds which has the purpose of creating, through their reproduction, the impression of movement, regardless of the processes used to capture, support the initial or subsequently used to secure it, and the means used for conveying.”³⁴

42. Treating video games as audiovisual works is the common interpretation among intellectual property experts and practitioners in Brazil, who developed this theory of protection through academic journal theses, litigation, private memoranda and legal opinions. Copyright is the most used means of protection in Brazil since it protects the expression of an idea and the whole set of expressions contained in video games may therefore receive protection – such as sounds, images, characters, screens, text and sets of colors.

43. Video games can also receive special protection under the *Software Law*, due to the fact that the development processes and algorithms used are unique, innovative and creative, and their protection is essential under software legislation. The *Law on the Protection of Intellectual Property of Software* describes software as:

“the expression of an organized set of instructions in natural or codified language, contained in a physical support of any kind, necessary for use in automatic machines for processing information, devices, instruments or peripheral equipment, based on digital techniques or analog, to make them work for certain purposes.”

Furthermore, there have been several judgments (especially in criminal courts) that classify video games as software or computer programs.³⁵

³¹ Article 7 including VI and XII § 1 of the Brazilian *Copyright Act*.

³² Article 1 of § Law 9.609/98 on the Protection of Intellectual Property of Software, its Commercialization in the Country, and Other Provisions.

³³ Article 5, including VIII, item h § of the Brazilian *Copyright Act*: h) collective - *created by the initiative, organization and responsibility of a person or entity, who publishes under his name or mark and which is formed by the participation of different authors, whose contributions merge into independent creation.*

³⁴ Article 5, including VIII, item i) § of the Brazilian *Copyright Act*.

³⁵ Diário de Justiça do Estado de São Paulo DJSP de 07/01/2011, p. 193, Case 9110445-88.2007.8.26.0000 I: *“(…) The first relates to the seizure of video games and counterfeit software. There is no doubt that these goods should be taken as a kind of computer program, as are online gaming entertainment, produced and reproduced electronically via personal computer, usually for specific video game consoles. Such games and any other computer program fit perfectly with the concept of the computer program mentioned in Article 1 of Law No. 9.609/98, which states: “A computer program is the expression of an organized set of instructions in natural or codified language, contained in a physical support of any kind, necessary for use in automatic machines for processing information, devices, instruments or peripheral equipment, based on digital techniques or analog, to make them work for certain purposes.” Thus, there is no doubt that in respect of such goods, the object of the violation is specifically addressed in Law No. 9.609/98. It should be noted that this law aims to protect and provide for the intellectual property rights in*

[Footnote continued on next page]

44. Even though video games are commonly protected under copyright law, they may also receive protection in other intellectual property areas, such as trade secrets, patents or trademarks. Video games may also fall within the scope of the Brazilian *Patent Law*. Examples of this protection include new and useful processes (e.g., game play methods, graphic techniques and user interface communications), machines (i.e., a computer programmed with computer software) and new ornamental designs (e.g., icons, user interface artwork and characters).

Moreover, experts emphasize that certain aspects of video games may also be protected as trade secrets. Information and creative processes that involve the business and that have economic value (e.g., customer lists, manufacturing techniques and other tools) can be protected by the laws of trade secrets, which protect against misappropriation by third parties. For the protection to be granted, it is required that there be the use of reasonable precaution by owners and developers, such as controlling access to information, having employees and other people involved sign non-disclosure agreements or marking documents with “Confidential Information” warnings.

Finally, video games may also include trademarks, trade names and logos – all registered and protected under the *Trademark Law*. This kind of protection is important in order to avoid misappropriation of marks by third parties which may confuse consumers as to the origin of the product.

RIGHTS HOLDERS AND STAKEHOLDERS

45. In Brazil, the main stakeholders in the value chain are the producers. Brazilian law stipulates that the producer retains economic responsibility for the work, and in the case of video games, as audiovisual works, the producer is responsible for organizing the contributions of the people involved in the development of the video game. All the intellectual property related rights are distributed among the authors, editors, producers and directors, each according to their participation in developing the work.

The relevant Brazilian legislation under Article 5 stipulates the rights of each stakeholder:

- The editor possesses the exclusive right to reproduce the work and the duty to disclose it within the limits set by the publishing agreement.³⁶
- The producer takes the initiative and has financial responsibility for the fixation of the work on any medium.³⁷
- The author is the creator of the work.³⁸ The authors of a video game are those who have contributed to its creation, such as writers, designers, illustrators, artists, performers and musicians.

46. Finally, because of the interactive creation tools in modern video games, it is possible that gamers, in certain instances, could claim copyright protection for the works they create. In

[Footnote continued from previous page]

computer programs, wherein the legislator understood the need for special treatment, and because they are creations resulting from intellectual effort and the work of one person or a group of people, they need protection for the author's right to have, use and possess his work.

³⁶ Article 5, Section X of the Brazilian *Copyright Act*.

³⁷ Article 5, Section XI of the Brazilian *Copyright Act*.

³⁸ Article 11 of the *Law 9.609/98 on the Protection of Intellectual Property of Software, its Commercialization in the Country*.

this regard, current Brazilian laws indicate that players can be considered authors in interactive games, as they contribute to the formation and development of the video game. In this case, video games are equivalent to a collective work and, therefore, the gamer can invoke his or her moral rights, while the economic rights belong to the organizer.

47. With regard to employment, authors may be employed by producers, editors or directors. By analogy, using the specific regime of the *Software Law*, intellectual property rights do not automatically belong to the authors; instead, the *Software Law* establishes that the computer program belongs solely to the employer, contractor or civil service that developed and elaborated it during the term of contract or statutory relationship.³⁹ These rights must be provided for by agreement, as must any additional compensation beyond the salary already received by the author/employee.
48. Regarding the economic rights belonging to the author,⁴⁰ as established in Article 49 of the Brazilian *Copyright Act*, the copyright may be wholly or partly assigned to third parties, by the author or the author's successors, completely or singularly, personally or through representatives with special powers, through licensing, concession, assignment or other means allowed in law, subject to the following limitations:
- Total assignment shall comprise all copyright, except for the moral rights and those expressly excluded by law;
 - Total and final assignment is only admitted by written contractual provision;
 - In the hypothetical situation in which there is no written contractual provision, the maximum term shall be five years;
 - The assignment shall be valid only for the country in which the agreement was concluded, unless otherwise stipulated;
 - The assignment shall be valid only for the modes of use already existing on the date of the agreement;
 - Where there is no mention of the modes of use, the agreement shall be interpreted restrictively, understood to be limited only to one mode that is indispensable to fulfilling the purpose of the agreement.

There is no specific form of financial compensation provided for by law for authors of video games. The remuneration of authors/employees is thus limited to salary, unless otherwise provided by agreement. In this regard, the Brazilian *Copyright Act* establishes the presumption that the assignment of the author's rights is done for consideration, in the absence of proof to the contrary.

49. Finally, even where Brazilian intellectual property legislation does not offer a direct, specific classification of video games, courts have traditionally established that this kind of work of authorship will be protected as software. However, experts and practitioners

³⁹ Article 4 of the Law 9.609/98 on the Protection of Intellectual Property of Software, its Commercialization in the Country.

⁴⁰ Article 22 of the Law 9.609/98 on the Protection of Intellectual Property of Software, its Commercialization in the Country.

consider that if a particular video game falls within the definition of an *audiovisual work*, then a distributive classification would apply. The statutory rights regime is not clear with regard to authors who develop creative content for video games. Therefore, any transfer of rights should be made in writing. In this same regard, the parties should establish the remuneration for the exploitation of such works, as the Brazilian *Copyright Act* only establishes a presumption in this matter.

CANADA

50. Creations and creators are protected in Canada through the *Copyright Act*, R.S.C. 1985, c. C-42 (hereinafter, the Canadian *Copyright Act*), and though some amendments have come into force in recent years, there is no established legal classification for video games under Canadian copyright law. In this regard, the Canadian *Copyright Act* protects “every original literary, dramatic, musical and artistic work”, which is deemed to include:

“every original production in the literary, scientific or artistic domain, whatever may be the mode or form of its expression, such as compilations, books, pamphlets and other writings, lectures, dramatic or dramatico-musical works, musical works, translations, illustrations, sketches and plastic works relative to geography, topography, architecture or science.”

51. The legal classification of video games derives from statute, namely the Canadian *Copyright Act*. Aspects of a particular video game may largely be protected as a computer program, given that a video game is in essence akin to software (a set of instructions that are stored and used in a computer to bring about a specific result). According to this characterization, a video game product would receive protection as a literary work under Canadian law. Video games also typically embody other works or subject matter, such as cinematographic works, musical works, performers’ performances or sound recordings. For this reason, video games can be classified under Canadian copyright law as “compilations” which are meant to signify works that result from the selection or arrangement of other works or parts thereof, be they literary, dramatic, musical or artistic works.⁴¹

In other respects, video games may also be viewed as “collective works”, in that this characterization applies at law in Canada for “*any work that is created in distinct parts by different authors, or in which works or parts of works of different authors are incorporated.*” This concept, together with that of “works of joint authorship”, is addressed in greater detail below.

STAKEHOLDERS

⁴¹ Section 2 of the Canadian *Copyright Act*, Definition: *Compilations*

2.1 (1) A compilation containing two or more of the categories of literary, dramatic, musical or artistic works shall be deemed to be a compilation of the category making up the most substantial part of the compilation.

Idem

(2) The mere fact that a work is included in a compilation does not increase, decrease or otherwise affect the protection conferred by this Act in respect of the copyright in the work or the moral rights in respect of the work.

52. Given the legal classification of video games in Canada set out above, it follows that the main stakeholders involved in the value chain and in the chain of rights for the creation, production and distribution of video games, will variously be recognized as authors, performers, makers, scriptwriters, publishers or producers. Thus, to the extent a video game contains a computer program, those who have contributed to the design, creation or arrangement of the program code may qualify as authors thereof. To the extent that a video game may embody a cinematographic work or a sound recording, the makers thereof (the persons by whom arrangements are undertaken that are necessary for the making of the cinematographic work or for the fixation of the sounds) will be recognized as such. Finally, where a video game contains a performer's performance, the performer shall own his or her rights.

A recent decision of the Supreme Court of Canada has confirmed that soundtracks are excluded from the definition of a "sound recording" where they accompany a cinematographic work, such that the protection afforded to sound recordings under the Canadian *Copyright Act* is not available to such soundtracks for so long as they remain associated with the cinematographic work.⁴² Presumably, this finding will apply to sound recordings that accompany any cinematographic works embodied in video games (or to the video game itself), but no judicial pronouncement to that effect has yet been made in Canada.

In another recently delivered decision of the Supreme Court of Canada that dealt specifically with video games, it was held that the communication right as recognized under the Canadian *Copyright Act* does not include the downloading of works, unless such works are streamed and observed during transmission.⁴³ As such, no remuneration was payable to the holder of the public performance rights in the context in which video game products were being distributed by their mere transmission in digital form via the Internet.

In yet another recent decision of the Supreme Court of Canada, it was held that content streaming (as opposed to downloading) by means of the Internet is not a private transaction that falls outside of the exclusive right of the copyright owner to communicate a work to the public.⁴⁴ Under the specific facts of the case where there was a series of repeated transmissions of the same work to different recipients, each point-to-point transmission was considered in the aggregate to determine that the activity in question constituted the exclusive right to communicate to the public. This finding was made notwithstanding the fact that the streaming in question had been initiated at the request of an individual member of the public.

These recent decisions will of course shape the identification of the relevant stakeholders in the context of copyright that subsists in video game products.

AUTHORSHIP

53. Canadian law operates under first principles in respect of which contributors to a work may qualify as its authors. No contributor to a video game is named an author or excluded from eligibility by reason of status alone. A work may be authored by a single person or may be a "collective work" or "work of joint authorship", as those terms are defined in Section 2 of the Canadian *Copyright Act*.

⁴² *Sound v. Motion Picture Associations of Canada et al.*, SCC 38 (July 12, 2012).

⁴³ *Entertainment Software Association et al. v. Society of Composers, Authors and Music Publishers of Canada*, SCC 34 (July 12, 2012).

⁴⁴ *Rogers Communications Inc. et al. v. Society of Composers, Authors and Music Publishers of Canada*, SCC 35, (July 12, 2012).

Under the case law of the Supreme Court of Canada, an “original” work under the Canadian *Copyright Act* is one that originates from an author and is not copied from another work. Authorship results from the exercise of skill and judgment. Such skill and judgment must not be so trivial that they could be characterized as a purely mechanical exercise.⁴⁵ Where an individual is the only person to have made creative contributions to the making of a copyrighted work, that person will be considered its author under the Canadian *Copyright Act*. This may be the case in the creation of relatively simple video games, but is unlikely to be the case in respect of complex studio-created games.

54. As noted above, a “collective work” is, *inter alia*, any work written in distinct parts by different authors, or in which works or parts of works of different authors are incorporated. It is conceivable that, if different persons have worked in isolation on different aspects of a video game, with one person working exclusively on visual elements and another person working solely on scripting elements, the resulting contributions could be considered a collective work, with the artist and scriptwriter enjoying independent status. However, this definition has not been tested significantly outside of the literary setting in Canada. Thus, it is difficult to say whether this definition could apply to a video game where such contributions are in any event merged in a source code.

A more likely application of the collective work scenario would occur where players involved in interactive online gaming contribute significantly to a storyline by creating original characters or providing original text. Where such contributions are not from a closed environment of rules produced by the maker of the game but involve the independent creativity of the players, it becomes more likely that the distinctness criterion of the statutory definition will be met.

55. On the other side, the “work of joint authorship” category under Canadian law is critical to the video game setting. By definition, a work of joint authorship means a “*work produced by the collaboration of two or more authors in which the contribution of one author is not distinct from the contribution of the other author or authors.*”⁴⁶ This will be the case in many video games produced in larger studios where teams of contributors work on the many aspects of the final game.

Under the case law in Canada, in a work of joint authorship the contribution of each joint author need not be equal and different portions of the work may be the sole production of either one. The crucial question is whether the creative contribution of a claimed author is “significant or substantial”, although there is no strict test for what constitutes a significant or substantial contribution. Rather, the test includes both quantitative and qualitative considerations of the contribution of the joint authors. For example, under Canadian law, one must look at the amount and importance of the expressions to the work as a whole. Moreover, while a claimant need not contribute a major part of the work to be considered a joint author, “*someone who tinkered with and improved the work of another might not have done enough to show joint authorship.*”⁴⁷ A putative joint author must establish that he or she has made a contribution of significant original expression to the work at the time of its creation.

Some courts in Canada have also held that there is a second requirement of some form of shared intent between joint authors. In their view, the requirement of mutual intent is aimed at ensuring that true collaborators in the creative process are accorded the perquisites of co-authorship and to guard against the risk that a sole author is denied

⁴⁵ *CCH Canadian Ltd. v. Law Society of Upper Canada*, 1 S.C.R. 339 at paragraph 25 (2004).

⁴⁶ Section 2 of the Canadian *Copyright Act*.

⁴⁷ *Neudorf v. Netzwerk Productions Ltd.* (1999) 3 C.P.R. (4th) 129.

exclusive authorship status simply because another person (such as an editor or researcher) rendered some form of assistance.⁴⁸ It should be noted that the requirement of mutual intent is controversial, with at least one court concluding it is not part of the statutory scheme.⁴⁹ This dispute has a significant bearing on authorship in video games, as the one view of mutual intent would likely result in fewer and more centralized authors, with the other view resulting in more authors with potentially conflicting claims.

56. Regarding the issue of whether employees can be authors, Canadian law does not consider corporations or other artificial persons to be “*authors*” of a work. Therefore, to claim rights over a work, a corporation must either (i) employ the human author or (ii) obtain an assignment to the work from the human author.

Under Section 13(3) of the Canadian *Copyright Act*, authors who are employees of another person are deemed not to own such works in the absence of an agreement to the contrary.⁵⁰ In the creative industries, employment contracts typically provide for assignments or exclusive licenses of intellectual property in the event that the relationship does not amount to an employment relationship in the meaning of the case law. Employment contracts also typically include an agreement to waive any moral rights in respect of copyright works, which is valid as per Section 14.1(2) of the Canadian *Copyright Act*.

On the other hand, when a video game studio hires an independent contractor, an agreement is essential for controlling and exercising rights in works created by the contractor.

57. Other authors can be involved in a given video game, especially in online games with creative features, where gamers contribute to the expansion of the game. If the contributions of such players are from a closed environment of rules produced by the maker of the game, they are less likely to involve the original skill and judgment required to claim a copyright under the Canadian *Copyright Act*. However, if the contributions involve independent creativity, it is possible that players may create original works that are then incorporated in the game environment as part of a collective work.

Case law suggests that, although the players’ contributions may be independent works under Canadian law, they cannot prevent the operator of the game from using such works as part of the continuing landscape of the game.⁵¹ In any event, it is probable that consent to broad use of such contributions would be obtained via the terms of service for any such collaborative game.

⁴⁸ *Ibid.* at paragraphs 46, 71, 95 (B.C.S.C.); *New Brunswick Telephone Company, Limited v. John Maryon International Limited* (1982), 141 D.L.R. (3d) 193 at 244 (N.B.C.A.); *Neugebauer v. Labieniec* (2008), 75 C.P.R. (4th) 364 at paragraphs 36-39 (F.C.).

⁴⁹ *Neugebauer v. Labieniec* (2008), 75 C.P.R. (4th) 364 at paragraphs 45-52 (F.C.).

⁵⁰ Section 13(3) of the Canadian *Copyright Act*: “Where the author of a work was in the employment of some other person under a contract of service or apprenticeship and the work was made in the course of his employment by that person, the person by whom the author was employed shall, in the absence of any agreement to the contrary, be the first owner of the copyright, but where the work is an article or other contribution to a newspaper, magazine or similar periodical, there shall, in the absence of any agreement to the contrary, be deemed to be reserved to the author a right to restrain the publication of the work, otherwise than as part of a newspaper, magazine or similar periodical.”

⁵¹ In *Robertson v. Thomson Corp.*, 2 S.C.R. 363 at paragraph 34(2006), the Supreme Court found that it was not an infringement for a newspaper publisher to reproduce a substantial part of the collective work in which it had a copyright (i.e., the newspaper in its integral electronic form), but it was an infringement for the newspaper publisher to reproduce freelancers’ individual contributions in a different form (a decontextualized database).

58. Lastly, moral rights are recognized in Canada for works such as computer programs and, generally, for all other works in which copyright subsists. Moral rights may not be assigned and will therefore continue to reside with the author of a work unless they are waived in whole or in part. Under Canadian law, an assignment of copyright in a work does not by that act alone constitute a waiver of moral rights. As such, unless such rights are waived, an author of video game content may remain capable of asserting their moral rights in a video game product, even where all other copyrights in such content have been assigned.

TRANSFER OF RIGHTS AND COMPENSATION

59. Under the Canadian *Copyright Act*, there are rules pertaining to first ownership of copyright which apply in defined instances. For example, as described above, where the author of a work was in the employment of another person under a contract of service or apprenticeship and the work was done in the course of their employment by that person, the employer shall be the first owner of copyright, in the absence of any agreement to the contrary.

Apart from the foregoing situation of employment, in Canada the author of a work is deemed to be the first owner of copyright therein pursuant to the Canadian *Copyright Act*. Also, in respect of a performer's performances and sound recordings, the Canadian *Copyright Act* respectively deems the performer and the maker thereof to be the first owners of copyright in such subject matter. In all other instances, ownership of copyright in video games must be acquired by express contractual transfer.

60. The transfer of these rights implies, for employees, a compensation that typically has the form of a salary in Canada. For independent contractors, the typical compensation may be a lump sum where copyright has been wholly assigned; however, where copyright has instead been licensed by the independent contractor who is a first owner of the copyright, the compensation must be proportional, either alone or in combination with a lump sum. In any event, the compensation that authors shall receive is not statutorily established, but will depend on the negotiation between the parties implicated in a particular video game.
61. Therefore, the Canadian *Copyright Act* follows the basic European principles of authors' rights, as video game studios cannot attain the status of authors, and moral rights are not assignable, although they may be waived. Video games may have a distributive classification in Canada, via the protection of software, cinematographic works or musical works. This is why some Canadian experts have asserted that video games could be protected as "compilations" and as "collective works". Finally, authors shall have, in principle, all the rights in the created work, unless there is an agreement between them and a third person, such as an employment agreement.

CHINA

62. China has made enormous efforts to improve its legislation on the protection of intellectual property rights. Thus, any works of literature, art, natural sciences, social sciences, engineering and technology are protected through the *Copyright Law of the People's Republic of China of 2010* (hereinafter, the *PRC Copyright Law*), promulgated in 1990 and amended in 2001 and 2010. Although China's intellectual property law does not specifically refer to video games, protection is available for software programs under copyright law. In accordance with Article 3 of the *PRC Copyright Law*, copyright protection is available for a variety of works, including written works, computer software,

photographic works, musical works and drawings. Therefore, and although there is no specific reference to video games, these may be works that combine all those elements.

CLASSIFICATION OF VIDEO GAMES

63. The closest reference to video games in Chinese law is to “online games”. In accordance with the *Interim Measures on Administration of Online Games* (the “*Measures*”) enacted in March 2010 by the Ministry of Culture, “online games” refer to game products and services consisting of software programs and information data which are provided via information networks such as the Internet and mobile communication networks.⁵² Therefore, online games are classified as “computer software” or “software”.

Furthermore, under the *Regulations for Computer Software Protection of 2002* (hereinafter, the “*RCSP*”), “computer software” is defined broadly to include all types of computer programs and related documentation.⁵³ Within that definition, “computer programs” means a sequence of code-based instructions that can be run by devices having information processing capacity, such as computers, for achieving a certain result, or a sequence of symbol-based instructions or expressions that can be automatically converted into a sequence of code-based instructions. “Related documentation” means all relevant written materials and diagrams, such as the program design specifications, flow charts and operating manual that are used to describe the contents, elements, design, functions and specifications, development, testing results and operating method of the program.⁵⁴

64. Therefore, video games are not only granted protection under the *RCSP* but also, as with all other software programs, may be classified as copyrighted works under the PRC *Copyright Law*.

RIGHTS HOLDERS AND TRANSFER OF RIGHTS

65. Viewing video games as software means a “software developer” (roughly equivalent to the concept of *author*, referring to those individuals or entities that develop or organize the software development)⁵⁵ owns the copyright in the resulting video game.⁵⁶ Video games are often complex technical creations completed by a group of people with different roles, which may involve many individuals in the value chain such as content providers, programmers, designers, scriptwriters, music composers and artists. In this case, the collective efforts of the development team mean that these contributors are considered co-developers. Each co-developer enjoys the copyright in the work it creates, and co-developers shall jointly own the copyright, as per Article 10 of the *RCSP*.⁵⁷
66. Publishers, who are usually also the developers in the video game industry, play a key role in organizing video game development as well as placing the video game onto a storage medium for distribution. In contrast to traditional publishers of a book or a CD, video game publishers are responsible not only for publishing a video game, but also for the administration and upgrading of the video game. The importance of publishers in the industry is shown by the fact that, to date, all video game copyright litigation in China – particularly those disputes involving China’s biggest video game publisher, Shanda – has been initiated by and against video game publishers.

⁵² Article 2 of the *Interim Measures on Administration of Online Games*.

⁵³ Article 2 of the *RCSP*.

⁵⁴ Article 3 of the *RCSP*.

⁵⁵ Article 3 of the *RCSP*.

⁵⁶ Article 9 of the *RCSP*.

⁵⁷ Article 10 of the *RCSP*.

On the other hand, “*produce*” is not a specific legal term under Chinese law. It may refer to the originators of concepts and ideas, the investor or the manufacturer of software products. Generally speaking, without a copyright transfer agreement from the developer, covering the creation of concepts, investment or manufacturing, copyright will not be deemed to have been vested automatically.

67. As defined by the PRC *Copyright Law*, an author of a work may be either an individual creator or an entity responsible for organizing the work that publishes the work under its name and assumes all liabilities. Accordingly, Article 11 of the PRC *Copyright Law* states the following:

“The author of a work is the citizen who creates the work.”

“Where a work is created under the auspices and according to the intention of a legal entity or other organization, which bears responsibility for the work, the said legal entity or organization shall be deemed to be the author of the work.”

“The citizen, legal entity or other organization whose name is mentioned in connection with a work shall, in the absence of proof to the contrary, be deemed to be the author of the work.”

Therefore, where an employer-employee relationship exists, the real contributors to the video game do not fall within the category of author, as these vest in any case in the employer.

68. In the case of multiple creators, co-authors may exist as long as they have participated in the creation of the work. If a work of joint authorship can be separated into independent parts and exploited separately, each co-author may be entitled to independent copyright in the parts that he/she created, provided that the exercise of such copyright shall not prejudice the copyright in the joint work as a whole.⁵⁸
69. Any individual developer/creator employed to create the work, particularly where the work is undertaken in the course of employment and mainly using the material and technical resources of the employer, will be considered subordinate to the employer who is considered the developer. In such a case, the employer, instead of the individual developer/creator, will be legally considered the author;⁵⁹ however, the creator will be entitled to attribution.
70. Additionally, it is possible for a player of an online game to become a “software developer” under the PRC *Copyright Law* as modifications for personal enjoyment and research purposes would not constitute copyright infringement and other modifications may be possible depending on the terms and conditions set out by individual game operators. However, given the complexity of video games and the restrictions put in place by most operators, contributions by players would be limited.
71. The copyright license and/or transfer are contractual and must be in writing, as per Articles 24 and 25 of the PRC *Copyright Law*. A license agreement is generally required for exploitation of another person’s work, although some exceptions – such as installing,

⁵⁸ Article 13 of the PRC *Copyright Law*.

⁵⁹ Article 16 of the PRC *Copyright Law*.

displaying, transforming or storing software for study and research purposes – may exist.⁶⁰ Such license agreements should include the following information:

- “(1) the category of the right to exploit the work covered by the license;*
- (2) the exclusive or non-exclusive nature of the right to exploit the work covered by the license;*
- (3) the territory and the term covered by the license;*
- (4) the rates of remuneration and the means of payment;*
- (5) the liabilities in the case of breach of the contract; and*
- (6) other matters which the parties consider it necessary to agree upon.”*

However, where, instead of a license, the author decides to transfer his or her copyrights, the following points should be included in the transfer contract:

- “(1) the title of the work;*
- (2) the category of the right to be transferred and the territory covered by the transfer;*
- (3) the rates of the transfer fee;*
- (4) the date and the means of payment of the transfer fee;*
- (5) the liabilities in the case of breach of the contract; and*
- (6) other matters that the parties consider it necessary to agree upon.”*

72. Finally, regarding the compensation to which authors are entitled, for employees who create a work in the course of employment using the material and technical resources of the employer, compensation may be paid by way of salary and bonus or may be separate from the remuneration package, as set out by agreement between the employee and the employer. For an independent contractor, the compensation amount is subject to agreement by the parties.

Nonetheless, according to Article 28 of the PRC *Copyright Law*, the rates of remuneration for the exploitation of a work may be agreed upon by the parties and may also be paid in accordance with the rates fixed by the administrative department for copyright under the State Council, in conjunction with the other departments concerned. In the absence of an explicit agreement in the contract, the remuneration shall be paid in accordance with the rates fixed by the said department under the State Council, in conjunction with the other departments concerned.

RECENT DEVELOPMENTS

73. The first copyright dispute involving online games in China took place in 2007 between Nexon, a video game publisher from the Republic of Korea, and Tencent, a domestic video game publisher, before the Beijing No. 1 Intermediate Court. The court was provided with comparative studies on the background drawings and display layouts of the video games, as well as the names used for specific in-game items. The court concluded that a general concept is not copyrightable and that the existing similarities between the video games did not rise to the level of copyright infringement or unfair competition. This landmark case indicates that courts shall examine each copyrighted aspect of a video game, and that a similar video game created subsequently may be considered an infringing work only if substantial and overall similarities exist between the two.
74. The proposed Amendment to the PRC *Copyright Law* (released for public opinion in March 2012) confirms that all authors of a video game are entitled to circulate their

⁶⁰ Article 22 of the PRC *Copyright Law*.

creation via the Internet.⁶¹ However, because all copyrights incorporated within a video game, except the moral rights, are usually transferred to the publisher, this regulation does not create significant additional protection for individual authors.

DENMARK

75. Although the importance of video games has increased in the last decade, there is still a legislative and jurisprudential void with regard to the legal classification of video games in Denmark. Creative works of authorship are protected in Denmark under the *Consolidated Act on Copyright of 2010*⁶² (hereinafter, the Danish *Copyright Act*) and, depending on the nature of a specific video game, it may be classified as software, an audiovisual work, it may have a distributive qualification, or become a collective work. The classification is derived directly from the Danish *Copyright Act*, Section 1, which states that:

“(1) The person creating a literary or artistic work shall have copyright therein, be it expressed in writing or in speech as a fictional or a descriptive representation, or whether it be a musical or dramatic work, cinematographic or photographic work, or a work of fine art, architecture, applied art, or expressed in some other manner.”

“(2) Maps and drawings and other works of a descriptive nature executed in graphic or plastic form shall be considered as literary works.”

“(3) Works in the form of computer programs shall be considered as literary works.”

76. Although we are not aware of any Danish jurisprudence involving legal qualifications for video games, the fact that Section 1 includes an open list of works of authorship (“(...) *expressed in some other manner*”), suggests that video games are unquestionably protected under this law. That said any borderline issues regarding the classification may also rely on jurisprudence on software and related copyright cases as, under Danish law, video games could bear a distributive qualification, with a fragmentary protection of all the elements embodied in the work (including graphics, musical works, computer code and audiovisual works).

STAKEHOLDERS INVOLVED IN THE VALUE CHAIN

77. Considering the complexity of video games, there are a great number of people involved in the creation and exploitation of such works of authorship, including, game developers, the studio, concept artists, scriptwriters, game directors and producers, game designers, level designers, character designers, set designers, animators, music directors, composers of original music, actors, translators and code programmers. The outcome of their work will be protectable only if it fulfills the requirements of the Danish *Copyright Act*, which explicitly states that the work must be creative and original.

Therefore, and unlike other jurisdictions that specify who the authors of an audiovisual work are (generally, the director, scriptwriter and the composer of the soundtrack),

⁶¹ Article 11(1)viii of the proposed Amendment to the PRC *Copyright Law*.

⁶² Consolidated Act No. 202 of February 27, 2010. The official English translation of the Danish *Copyright Act* may be found here: <http://www.kum.dk/Documents/English%20website/Copyright/Consolidated%20Act%20on%20Copyright%202010%5B1%5D.pdf>.

Denmark does not facilitate such a closed list.⁶³ This means that a case-by-case analysis is required in order to conclude which of the people involved in making a particular video game have created original content for that work.

78. Additionally, other stakeholders include the publisher and the distributor of a given video game, although these entities have been losing prominence as a result of the increase of online platforms. Finally, other interested parties are the owners of the platform – e.g., Sony (PlayStation), Windows (Xbox Live), Apple (AppStore) or Google (Play) – or marketing companies.

Online distribution has changed the industry in additional respects. Studios distribute their games directly on Apple's AppStore or similar marketplaces, bypassing the traditional distribution channels and thereby allowing studios to maintain ownership of intellectual property rights. The role of the major platforms, online markets and social websites as major stakeholders in the video game industry is increasing rapidly.

AUTHORSHIP

79. In principle, under Danish law all contributors listed above under *game developers* may qualify as authors (excluding the actor, who shall own neighboring rights), depending on the specific nature of their contribution to the game. Hence, in order to qualify as an author, any person involved in the development of a video game must *create* a literary or artistic work, which must be original as well.⁶⁴
80. Recent tools and means of communication, especially the Internet, have enabled gamers to become contributors to video games, by developing new sets, scenes, music or levels. Contributions by players may, under some circumstances, qualify as copyrighted material under Section 1 of the Danish *Copyright Act*, provided the contribution is considered a "*creation of an artistic work*". Online games often offer a toolbox for players to create their characters, buildings, etc., and a contribution may be copyrighted even if the contribution is created solely using the toolbox.

If the contribution is protected under the Danish *Copyright Act*, the player holds the exclusive rights to the contribution in accordance with Section 2 of the Act. In addition to this, interactive online gaming gives rise to numerous issues in respect of which law applies when considering contributions by players. Does the law of the player's residence, the law of the country in which the server is located, or in which the game is run, or the law of the registered office of the online game provider apply? These questions may have different solutions depending on the relevant jurisdiction.

81. In order to avoid disputes with respect to the producers'/studios' right to distribute, license and otherwise exploit video games, these stakeholders must ensure that any rights of all contributors are transferred to them, with the exception of contributors' moral rights, which are unwaivable in accordance with Section 3 of the Danish *Copyright Act*.⁶⁵ The same conclusion is applicable to contributors involved in online gaming, whose rights must be assigned to the studio in writing, generally through the "terms of use" of a given online platform.

⁶³ This is true at least explicitly, because Section 58 of the Danish *Copyright Act* establishes that an agreement to take part in the recording of a film shall imply that the author shall have no right to oppose certain exploitation rights, with the exception of scriptwriters, composers and the principal director of the film, implying that they are, at least, the basic authors of a moving picture.

⁶⁴ Section 1 of the Danish *Copyright Act*.

⁶⁵ There is an exception to this unwaivable right, where *a use of the work is limited in nature and extent*.

WHO OWNS THE RIGHTS

82. With respect to the transfer of rights, Section 53 of the Danish *Copyright Act* establishes that any copyright holder may wholly or partially assign his or her rights under this law, with the exception of the above-mentioned moral rights. Accordingly, a given assignee shall not have the right to exploit a work in a manner or means not initially contemplated in the assignment agreement. Significantly, the Danish *Copyright Act* obliges assignees to exploit the assigned rights; authors *may cancel the agreement with six months' notice if the assignee has not exploited the rights within three years after the date on which the agreement was fulfilled by the author.*⁶⁶ Therefore, if a studio or video game producer holds certain rights as a result of a transfer agreement and that copyright holder does not exploit the work during the period of time since its delivery, the author shall have the right to cancel the assignment agreement.
83. The Danish *Copyright Act* establishes a specific regime for computer programs produced in the course of employment, holding that where a computer program is created by an employee in carrying out his or her duties or following the instructions given by the employer, the copyright in such a computer program shall pass to the employer.⁶⁷ Therefore, unless otherwise agreed between the parties, the author of a computer program developed within an employer-employee relationship shall have no copyright in the outcome of that work as the Danish *Copyright Act* establishes an automatic assignment of rights in favor of the employer. Considering the bargaining power of each of the parties involved in this industry, it is reasonable to assume that, in most instances, video game studios and producers will own the copyright in the software developed by their employees.
84. Therefore, the Danish *Copyright Act* does not create differences in the transfer of rights regime governing authors and producers with respect to their contractual relationship, as, in all of these cases, the law demands an explicit transfer of rights, the only exception being computer programs developed under a labor relationship, where an automatic assignment of rights exists.

FINANCIAL COMPENSATION

85. The Danish *Copyright Act* does not establish a fixed regime governing the compensation of authors, thereby providing flexibility to the industry. As a consequence, in general terms, where an employer-employee relationship exists, the remuneration for the assignment of rights is included in the salary. Nonetheless, in Denmark, incentive schemes in the form of bonuses and distribution of shares to employees are also prevalent, especially at smaller studios.

On the other hand, for independent contractors in Denmark, in most circumstances the compensation is a lump sum. However, some small video game studios offer independent contractors a proportional remuneration, in some cases combined with a moderate lump sum in order to keep the production and development costs to a minimum.

86. Therefore, Denmark does not have a mandatory scheme governing the compensation of authors of video games (or any other work of authorship); however, authors generally receive a lump sum for their creations. In this regard, and considering that other issues such as the legal qualifications of video games are still unresolved, a legislative solution would be useful in order to bridge these gaps in the law.

⁶⁶ Section 54 of the Danish *Copyright Act*.

⁶⁷ Section 59 of the Danish *Copyright Act*.

EGYPT

87. Part III of Law No. 82 of 2002, *Pertaining to the Protection of Intellectual Property Rights* (hereinafter, the *Egyptian Copyright Act*), provides legal protection to *any innovated work, in the literary, artistic or scientific domain whatever the type, manner of expression, significance or purpose of classification thereof*.⁶⁸ Although Article 140 offers an open list of works that can be copyrighted in Egypt (including books, computer software, musical works, audiovisual works, etc.), there is no specific mention of video games in this list or in any other section of this law.

Nonetheless, it is unquestionable that, while this type of modern work is not expressly contemplated in the *Egyptian Copyright Act*, video games can find protection under several of the categories of works mentioned in Article 140 or, generally, in Article 138.1. Consequently, video games can be afforded copyright protection through two means: (i) protecting the computer program necessary to execute the audiovisual parts of the work; and (ii) seeking protection of the user interface, as a whole in part, including characters, musical works, scenes, settings, etc.

Therefore, considering this distributive classification, a video game is a complex work that does not fit into a unique category. Accordingly, stakeholders and rights holders will have to protect each creative element of a given video game individually, based on the nature of the element.

AUTHORSHIP AND STAKEHOLDERS

88. The *Egyptian Copyright Act* establishes that the author of a work is the *person who creates the work*. However, video games are usually created by more than one author, usually in an employer-employee relationship with a legal person who takes the initiative and the risk to develop the work. In this case, the *Egyptian Copyright Act*⁶⁹ establishes that video games are therefore “works of collective – authorship”, defined as follows:

“The work made by more than one author under the guidance of a natural or juridical person, who shall undertake publishing the work in his name and under his supervision. The works of such authors shall be incorporated in such work, for the general purpose aimed by such person, such that the works of each author may not be separated or distinguished independently.”

89. Accordingly, the *Egyptian Copyright Act* provides protection to authors, who shall enjoy, in respect of their work, permanent moral rights⁷⁰ and exclusive rights in granting licenses or preventing any exploitation of their works in any manner.⁷¹ However, and like in any other jurisdiction, economic rights can be transferred or granted to any third party, for example in works of collective authorship, as described above.
90. In addition to publishers, distributors or retailers, other stakeholders in the industry are the performers who dub the voices of video game characters, performers on the soundtrack or, in general, anyone who performs any creative works in any manner. These performers are also entitled to receive protection for their performances, although the economic rights are usually transferred to the producer of the video game.

⁶⁸ Article 138.1 of the *Egyptian Copyright Act*.

⁶⁹ Article 138.4 of the *Egyptian Copyright Act*.

⁷⁰ Article 143 of the *Egyptian Copyright Act*.

⁷¹ Article 147 of the *Egyptian Copyright Act*.

TRANSFER OF RIGHTS AND COMPENSATION

91. As anticipated above, authors can transfer their economic rights in their works to any third party, either a natural or a legal person. According to Article 149 of the Egyptian *Copyright Act*, such transfer must be in writing and each right granted must be determined in detail, including the scope, purpose, period and place of exploitation. If a given economic right has not been properly transferred, then the author will keep it for him or herself.
92. In exchange for the transfer of rights, the author should receive fair and equitable compensation, which should be in the form of a percentage of the income generated by the exploitation, in a lump-sum amount or a combination of both. Finally, Article 151 of the Egyptian *Copyright Act* establishes a mechanism of protection for authors whose remuneration with respect to a work is unfairly low:

“Where it appears that the agreement referred to in Article 150 is prejudicial to the author’s rights or became so due to circumstances that arose after the agreement, the author or his successor may request the court of first instance to reconsider the value of remuneration agreed upon, without prejudice to the rights and interests of the assignee.”

93. Egypt has established a system of compulsory licenses for educational purposes, which has been developed based on *Prime Ministerial Decree No. (497) of 2005 On Issuing the Executive Regulations for Book III of Law No. (82) of 2002 on the Protection of Intellectual Property Rights*. According to this license, described in Article 170 of the Egyptian *Copyright Act*:

“Any person may demand the competent Ministry to grant such person a personal license for reproducing and/or translating any protected work pursuant to the stipulations of the law herein, without having the author’s permission, for the purposes set forth in the following paragraph. The grant of such license shall be against payment of fair compensation to the author or his successors. Such license shall not be in contradiction with the normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author or the copyright holders.”

“Licenses shall be granted, pursuant to a justified decision in which the time and place limits thereof are specified; and for the purposes of fulfilling the requirements of all kinds and levels of education.”

“The executive regulations of the law herein shall define the conditions and terms stipulated for granting licenses, as well as the categories of the due fees, which shall not exceed one thousand Egyptian pounds for each work.”

As per Article 5 of *Prime Ministerial Decree No. (497) of 2005*, the conditions are as follows:

- “(a) The author has not withdrawn all the copies of his work from circulation.*
- (b) The license is not eligible to be assigned by the licensee to any other party.*
- (c) The license does not prevent issuing a license to anyone other than the licensee, unless the license is for translating the work into a certain language, if the translation is published in this language.*
- (d) The name of the author and the title of the work, or a certified translation thereof are mentioned on each copy.”*

94. The application should be accompanied by a justification that proves that the applicant attempted to reach the author or its legal representatives; that a reasonable negotiation period lapsed without reaching an agreement; or that the rights holders did not make enough copies available at a reasonable price. Finally, in order to be eligible for this license, *“the application shall be accompanied by sufficient evidence that proves that the license is required for the purpose of fulfilling the requirements of any kind or level of education, whether at a university, institute, training center, or through scientific research, etc.”*⁷²

Consequently, only those involved in an education program will be eligible to obtain such a license. Although this system is not specifically designed for video games, it may be applicable in this area considering the broad application of video games, which may include educational or juvenile games.

95. Finally, and as in other jurisdictions, the Egyptian *Copyright Act* protects video games in a distributive manner, offering protection through different ways, including as software, audiovisual works, or for scripts and characters. However, and considering the undeveloped status of the video game industry in this country, a regulation to explicitly protect this kind of work is highly recommended.

FRANCE

CLASSIFICATION OF VIDEO GAMES

96. French law, specifically the *French Code of Intellectual Property (Code de la Propriété Intellectuelle)* (hereinafter, the “*CIP*”), neither provides a legal classification nor a special regime for video games. Nonetheless, video games can find protection in the *CIP* as per Article L112-1, which states that *“the provisions of this Code shall protect the rights of authors in all works of the mind, whatever their kind, form of expression, merit or purpose.”* Accordingly, Article L112-2 includes an open list of works that can be protectable under the *CIP*, including books, musical compositions, graphical works and software, among others (as the *CIP* specifies that these can be, *in particular*, works of the mind).

In this sense, French case law has confirmed that video games can be considered works of the mind (*oeuvre de l'esprit*) and, as such, are protected under the general regime of copyright (*droit d'auteur*).⁷³ Moreover, jurisprudence recently held that a: *“[...] video game is a complex work that cannot be reduced to its sole software dimension, however significant it may be, so that each of its components is governed by the legal framework applicable to it according to its nature [...]”*⁷⁴

Under this distributive approach, a video game is considered a complex creation which is impossible to categorize in one sole pre-existing category, and for which each component must be subject to the legal status applicable to it (e.g., software, music, script or graphics).

⁷² Article 6 of Prime Ministerial Decree No. (497) of 2005.

⁷³ Cass. Ass. Plén., 7 mars 1986, *Atari Inc. c/ Valadon*, pourvoi n°84-93509.

⁷⁴ Cass. 1re civ., June 25, 2009, *Lefranc c/ Sté SESAM*, pourvoi n°07-20387; CA Paris, September 26, 2011, Pôle 5, Chambre 12, *SARL AAKRO PURE TRONIC et a. c/ NINTENDO*, RG n°10/1053.

97. A recent study⁷⁵ on video games, commissioned by the French National Assembly, concluded that video game litigation is rare and that such a fragmented legal status does not call for the creation of a special definition and regime for video games in France. The study also suggested that copyright rules (*droit d'auteur*) should be modified, after discussing the relevant changes with rights holders and stakeholders, to take into account the specificity of these modern works.

RIGHTS HOLDERS AND STAKEHOLDERS

98. Therefore, it is also necessary to determine who can be deemed the *authors* of a video game and the stakeholders involved in this growing industry in order to consider the legal nature of this kind of work. According to business practice and law, the main stakeholders are the publishers (*éditeurs*), the development studios (*studios de développement*) and the authors (*auteurs*, i.e., individuals working as employees or as freelancers/independent contractors for development studios or publishers). In this regard, there are different elements implied in the process; hence the question of which of these contributors can be qualified as authors must be addressed.

In France, any natural person who contributes, totally or partially, to the creation of a video game can be qualified as an author, as long as his/her contribution is creative and original, as defined by relevant jurisprudence (i.e., stamped with the personality of its author). Inevitably, this requires a case-by-case analysis, as courts have ruled that, based on the context a sound designer can be considered the author of various sounds and music created specifically for an online video game.⁷⁶

99. According to the above-mentioned study on video games by the French National Assembly, experts and stakeholders consider that the lead game designers, art directors, sound designers and scriptwriters are the contributors most likely to be considered authors due to their involvement in the creative process.⁷⁷ Nevertheless, many other individuals can be involved in the creative process of a video game and thus generate copyrights, including the character and setting designers and the programmers.
100. Additionally, people not directly involved in the creation of the video game may become authors of part of the video game or of its elements. This is the case with players involved in interactive online gaming, which can create, in certain games, settings, characters, cars or any other element that could also become available for other players. Such interactivity has become very popular in recent years; however, the laws of different countries have not yet captured this development.

In France, the legal status of the contributions by players involved in interactive online gaming is neither specifically defined by law nor by case law. Potentially, such players could be considered authors of their own contributions (e.g., customized items in the game environment) and, therefore, vested with the copyrights (*droit d'auteur*) in such contributions, provided that these qualify as works of the mind (*oeuvre de l'esprit*), i.e., show "originality" as defined by case law by the mark of the author's personality or his/her personal intellectual or artistic contribution, as well as by the existence of a creative effort. Any exploitation of this user-generated content would require proper authorization, which, in these virtual scenarios, is usually obtained through an end-user license agreement that the player must accept when opening an account on the system.

⁷⁵ "Mission Parlementaire sur le Régime Juridique du Jeu Vidéo en Droit d'Auteur", report by M. Patrice Martin-Lalande, November 2011, Ref. 114000733.

⁷⁶ Cf. TGI Paris 3ème ch. 3ème section, September 30, 2011, *Julien F. c/ Prizee.com*, Believe).

⁷⁷ "Mission Parlementaire sur le Régime Juridique du Jeu Vidéo en Droit d'Auteur", report by M. Patrice Martin-Lalande, November 2011, Ref. 114000733.

THE QUESTION OF THE RIGHTS

101. Considering the complexity of this kind of work of authorship, the question of who owns the copyright in the final game, and in each and every one of the elements that are part of the work, is not trivial. Among all the elements concerned in the process, some can be regulated by a labor relationship, which raises the issue of who is considered the author in an employer-employee relationship, while others are created by freelancers or third-party companies.

In this regard, according to French law, an employee can be considered an *author*, even though he/she is acting under the authority of an employer.⁷⁸ Another essential aspect of the creative process concerns the different regimes applicable to the transfer of rights between them, in particular between authors, producers and publishers.

In light of the distributive approach (see *the second paragraph of this section*), all different regimes outlined below may be applicable to the transfer of patrimonial rights between authors, publishers and development studios.

102. The general rule is that the transfer of such copyrights must be done through a contract between authors, development studios and publishers, in which specific elements must be included in contracts with authors. In this sense, Article L.131-3 of the *CIP* requires that:

“Transfer of authors’ rights shall be subject to each of the assigned rights being separately mentioned in the instrument of assignment and with the field of exploitation of the assigned rights being defined as to its scope and purpose, the territory and the duration.”

As an exception, the transfer of copyrights is automatic for software (a component of video games) between an employee, legal author of such software, and his or her employer. Accordingly, Article L.113-9 of the *CIP* provides that:

“Unless otherwise provided by statutory provision or stipulation, the economic rights in the software and its documentation created by one or more employees in the execution of their duties or following the instructions given by their employer shall be the property of the employer and he exclusively shall be entitled to exercise them.”

Another exception is for collective works (*oeuvre collective*),⁷⁹ where the producer or the publisher is deemed the original owner of the copyrights in such works, as established in Article L113-5 of the *CIP*:

“A collective work shall be the property, unless proved otherwise, of the natural or legal person under whose name it has been disclosed. The author’s rights shall vest in such person.”

One final exception concerns audiovisual works,⁸⁰ where a presumption of authorship exists for a list of persons (i.e., the scriptwriter, director and author of the musical

⁷⁸ This principle is contained in Article L111-1, paragraph 3, which states that: *“The existence or conclusion of a contract for hire or of service by the author of a work of the mind shall in no way derogate from the enjoyment of the right afforded by the first paragraph.”* (This paragraph refers to the exclusive incorporeal property right of authors.).

⁷⁹ According to Article L113-2: *“collective work” shall mean a work created at the initiative of a natural or legal person who edits, publishes and discloses it under his or her direction and name and in which the personal contributions of the various authors who participated in its production are merged in the overall work for which they were conceived, without it being possible to attribute to each author a separate right in the work created.*

composition) and a presumption of transfer of their patrimonial rights exists for the producer, as per Article L.132-24 of the *CIP*:

“Contracts binding the producer and the authors of an audiovisual work, other than the author of a musical composition with or without words, shall imply, unless otherwise stipulated and notwithstanding the rights afforded to the author by Articles L111-3, L121-4, L121-5, L122-1 to L122-7, L123-7, L131-2 to L131-7, L132-4 and L132-7, assignment to the producer of the exclusive exploitation rights in the audiovisual work.”

“Audiovisual production contracts shall not imply assignment to the producer of the graphic rights and theatrical rights in the work.”

“Contracts shall lay down the list of those elements that have served to make the work which are to be conserved as well as the conditions of conservation.”

103. Finally, moral rights (such as the right of publication, the right to be named as author and to prevent modification/alteration of the work) are always retained by the authors and cannot be transferred or waived, regardless of the contractual relationship between the parties. Moreover, while patrimonial rights apply only for a limited time (until 70 years after the death of the author), moral rights are perpetual and are transferred to the heirs of the author after his or her death or to the persons listed as beneficiaries in the will.⁸¹
104. Consequently, while it is customary in the video game industry to expressly state in licenses and/or written agreements the transfer of rights for any contribution to the video game, the effectiveness of the transfer will depend on the regime applicable to the part of the video game at stake.

COMPENSATION

105. Another substantial aspect of the transfer of rights concerns the different kinds of financial compensation available for authors of video games. The general rule applicable in France is, with respect to the assignment of copyrights, that authors (whether an employee or independent contractor/freelancer) are entitled to compensation in the form of proportional remuneration, unless they fall under one of the exceptions to the general rule where a lump sum is permissible, per Article L.131-4 of the *CIP*, namely, in the following cases:

“1°. The basis for calculating the proportional participation cannot be practically determined;

2°. The means of supervising the participation are lacking;

3°. The cost of the calculation and supervising operations would be out of proportion with the expected results;

[Footnote continued from previous page]

⁸⁰ The *CIP* establishes that an audiovisual work shall be a *work of collaboration*, as only natural persons can claim authorship in such works, and the creators of such films shall be *joint authors*, as per Article L113-6 of the *CIP*. Finally, based on Article L113-2: *“work of collaboration” shall mean a work in whose creation more than one natural person has participated.*

⁸¹ According to Article L.121-1 of the *CIP*: *“An author shall enjoy the right to respect for his name, his authorship and his work. This right shall attach to his person. It shall be perpetual, inalienable and imprescriptible. It may be transmitted mortis causa to the heirs of the author. Exercise may be conferred on another person under the provisions of a will.”*

- 4°. *The nature or conditions of exploitation make application of the rule of proportional remuneration impossible, either because the author's contribution does not constitute one of the essential elements of the intellectual creation of the work or because the use of the work is only of an accessory nature in relation to the subject matter exploited;*
- 5°. *Assignment of rights in software;*
- 6°. *In the other cases laid down in this Code."*

Conversion, at the author's request and between the parties, of the rights under existing contracts, to lump sum annuities for periods to be determined between the parties shall also be lawful.

- 106. Given the particular nature of video games, the number of people involved in their creation, the partial contribution of each author and the business practices in this industry, one can conclude that a remuneration scheme based on royalties should be withdrawn. Nevertheless, if the compensation received by the author is manifestly low, the affected creator could demand a review of the price conditions as per Article L131-5 of the *CIP*.⁸²
- 107. Therefore, questions as to the legal classification of video games, the regimes applicable to the transfer of rights and the different kinds of financial compensation available for authors must still be addressed by French legislation. In this regard, it is important to note that the French National Assembly recently discussed these questions; however, this work has not progressed further since the last national elections.

⁸² Article L131-5 of the *CIP*: *"If the exploitation right has been assigned and the author suffers a prejudice of more than seven-twelfths as a result of a burdensome contract or of insufficient advance estimate of the proceeds from the work, he may demand review of the price conditions under the contract. Such demand may only be formulated where the work has been assigned against lump sum remuneration. The burdensome contract shall be assessed taking into account the overall exploitation by the assignee of the works of the author who claims to have suffered a prejudice."*

GERMANY

108. The *Gesetz über Urheberrecht und verwandte Schutzrechte – Urheberrechtsgesetz* – (Law on Copyright and Neighboring Rights – Copyright Law) (hereinafter the “*UrhG*”), was enacted in 1965 and has been modified several times since, with the last major amendment in 2008. As in other jurisdictions, this law provides protection to authors of literary, scientific and artistic works (§ 1 of the *UrhG*), which include works of language and computer programs,⁸³ musical works,⁸⁴ works of fine arts, architecture and plans of such works,⁸⁵ photographic works, including works produced by processes similar to cinematography,⁸⁶ and drawings, plans, maps and sketches.⁸⁷ There is no reference to video games *as such* in this law; nonetheless, the list of works provided by § 2 of the *UrhG* is *numerus apertus* and, as a consequence, other works like video games and multimedia works can also find protection within the law. Finally, this section ends by stating that: “*personal intellectual creations alone shall constitute works within the meaning of this law*” (§ 2 II of the *UrhG*).

CLASSIFICATION OF VIDEO GAMES

109. Considering that the *UrhG* establishes no specific rules for classification of video games, legal doctrine considers them to be multimedia works. Therefore, different classifications apply to the protection of video games within the *UrhG*. The computer program that controls the game and underlies the audiovisual work is categorized as a *speech work* (§ 2 I Nr. 1 of the *UrhG*). In this regard, and as all video games are constructed with computer code that enables their execution in a computer system, Section VIII of Part I of the *UrhG* applies.

Generally, §§ 69a ff. of the *UrhG* establishes the legal regime of computer programs, protecting exclusively “*the expression in any form of a computer program*”, where this is original. Consequently, “*ideas and principles that underlie any element of a computer program, including those which underlie its interfaces, shall not be protected*”.⁸⁸

110. The audiovisual presentation of the video game is treated as a *film work* (§ 2 I Nr. 5 of the *UrhG*), the regime for which is further developed in Section I of Part III of the *UrhG*.⁸⁹ In order to benefit from the protection granted, film works shall be personal intellectual creations according to the terms of § 2 II of the *UrhG*. Personal intellectual creations require that the collective work of all contributors (e.g., game designers, animation and graphic artists and sound engineers) using film-like methods achieves a certain level of artistic creation. If the work does not attain this level of originality and creativity, jurisprudence protects the audiovisual presentation of a video game at least as “*moving images*”,⁹⁰ which do not require proof of personal intellectual creation.⁹¹

RIGHTS HOLDERS AND STAKEHOLDERS

111. These two different approaches (“*film works*” and “*moving images*”) require analysis of complex scenarios involving the stakeholders and rights holders of video games.

⁸³ § 2 I Nr. 1 of the *UrhG*.

⁸⁴ § 2 I Nr. 2 of the *UrhG*.

⁸⁵ § 2 I Nr. 4 of the *UrhG*.

⁸⁶ § 2 I Nr. 5 of the *UrhG*.

⁸⁷ § 2 I Nr. 6 of the *UrhG*.

⁸⁸ §§ 69a [2] of the *UrhG*.

⁸⁹ §§ 88 ff. of the *UrhG*.

⁹⁰ §§ 95 of the *UrhG* § (2008) affirms that: “*Articles 88, 90, 91, 93 and 94 shall apply mutatis mutandis to sequences of images and to sequences of images and sounds which are not protected as cinematographic works.*”

⁹¹ OLG Hamm NJW 1991, 2161 and BayOBLG GRUR 1992, 508.

Accordingly, when analyzing the different owners of copyrights in a video game, one must first review who has contributed to the creation of the work by providing original and creative elements. Consequently, there can be innumerable contributors to a video game, including concept artists, character designers, scriptwriters, argument writers, game directors, set and plans designers, music composers, programmers and actors. Therefore, all of these parties, and any others whose contribution can be deemed original and creative, may have rights in the final work.

In this regard, if several persons contribute equally to the creation of a video game, they are co-authors and their respective contributions cannot be separately exploited.⁹² Therefore, the rights of publication and of exploitation of the work shall belong jointly to the joint authors or the person who has acquired their exploitation rights by law or contract, as described below.

112. Concerning computer programs, the authors are the persons who make a creative contribution to the process of software engineering. The *UrhG* affirms that, where software is created by an employee in the execution of his or her duties, the employer (i.e., the producer) will own the economic rights in the work on an exclusive basis. This rule can be modified in the employment contract and applies, *mutatis mutandis*, to commissioned work or freelancers.⁹³ Accordingly, moral rights remain with the authors.⁹⁴

On the other hand, authors of audiovisual presentations are those who contribute in a creative manner to the design, and whose contribution is inseparable from the completed work and unable to be exploited separately. The game designer is an author, and the “virtual cameramen” or animation artists can also be co-authors. The latter are often already directly involved in the software engineering, so that they can also be the author of the software.⁹⁵ Creators of game-independent work, like novels or films, are not considered *authors*, pursuant to § 8 I of the *UrhG*.

113. In this sense, and regarding the duration of copyright, the *UrhG* establishes that for works:

*“produced in a way similar to cinematographic works, copyright shall expire 70 years after the death of the longest living of the following persons: the principal director, the author of the screenplay, the author of the dialogues, the composer of the music composed for the cinematographic work in question”.*⁹⁶

This does not mean that only these contributors will be considered *authors*, but that these individuals will be the reference when calculating the duration of the copyright protection period with respect to video games.

In contrast, regarding film-like work⁹⁷ there is no general rule stating that exploitation rights shall be transferred by contract. § 88 of the *UrhG* stipulates a legal presumption that, in case of doubt, a transfer of exploitation rights shall be exclusive.

114. Therefore, the *UrhG* does not prevent a person from being considered an *author* even if a contractual relationship exists with a video game producer, so that both employees and freelancers will be entitled to generate intellectual property rights if they create original works of authorship.

⁹² § 8 of the *UrhG*.

⁹³ §§ 69b II of the *UrhG*.

⁹⁴ OLG Hamm GRUR-RR 2008, 154.

⁹⁵ Katko/Maier MMR 2009, 306.

⁹⁶ §§ 65 II of the *UrhG*.

⁹⁷ § 2 I Nr. 6 of the *UrhG*.

Additionally, there are other persons and entities that, although they cannot be considered authors in the terms established in the *UrhG*, contribute to the video game industry, whether by investing funds and arranging all the elements to develop a video game (such as the producer); publishing and distributing the video game physically or through online platforms (such as the publisher); testing the video game before launching it; or marketing (such as by marketing companies) the final product, to attract consumers. All of them are *players* in the lucrative video game industry, although only the authors, and in certain cases also the producers, can be original copyright holders of the final work.

115. Finally, regarding the contributors to a video game, some modern console and PC games permit users to build new levels, settings, characters and even functionalities and amendments to the code, creating a richer game experience. Where these complex scenarios occur, there is a need to analyze the terms of use or the user agreement between the producer or the owner of the online platform and the user, as the user needs authorization from the producer or owner to alter the computer program or to create derivative works based on the original video game. Consequently, the gamer can have editor-copyrights⁹⁸ if his or her contribution constitutes a personal intellectual creation in programming or in design.
116. Regarding the remuneration received by the authors, German law generally presumes that the employee's author benefits are compensated by salary, which is also usually stipulated in employment contracts. However, where there is significant disparity the employee might have the right to seek modification of his or her salary per § 32a of the *UrhG*. This remains a theoretical possibility favored in legal literature but has yet to be tested.⁹⁹

For independent contractors, § 32 of the *UrhG* stipulates that the author is entitled to claim equitable remuneration for the exploitation of the work. Where there is significant disparity, the employee can seek modification of the contract. Equitable remuneration is to be adopted according to a value forecast for the entire duration of the contract.¹⁰⁰ According to this condition, lump sums are possible as well as proportional remuneration, as long as the remuneration is considered equitable.

INDIA

LACK OF A SPECIFIC CLASSIFICATION

117. There is no regulated video game classification or censorship in India. Since gaming law in India is not fully developed, the legal classification derives from business practice and is based on the technicalities of each specific case.¹⁰¹ Moreover, the Indian *Copyright Act of 1957* (hereinafter, the Indian *Copyright Act*) establishes, at its Preliminary section, the different definitions and interpretations according to which "*artistic work means: (i) a*

⁹⁸ § 69c Nr. 2 S. 2 of the *UrhG*.

⁹⁹ Schricker/Loewenheim, Urheberrecht § 69b Nr. 17.

¹⁰⁰ Schricker/Loewenheim, Urheberrecht § 31 Nr. 27.

¹⁰¹ As the study on "Creating Virtual Wealth: Importance of Intellectual Property in the Animation & Gaming Industry" by Symbiosis Law School, Noida and Scriboard, New Delhi, explains that the Indian animation and gaming industry has played a seminal role in developing India's domestic entertainment and media industry. In 2011, it was estimated that the Indian animation industry would grow at a compound annual growth rate (CAGR) of 49 per cent by 2012. Moreover, this growth rate should be accompanied by an investor-friendly regulatory environment that will help fuel the required investment in the sector. Weak intellectual property regulation discourages animation and gaming companies in India from producing their own intellectual property, although the Indian laws governing intellectual property rights are compliant with world standards.

*painting, a sculpture, a drawing, an engraving or a photograph, whether or not any such work possesses artistic quality; (ii) a work of architecture; and (iii) any other work of artistic craftsmanship.*¹⁰²

118. It is unknown whether video games can be qualified as “*cinematograph works*” under the Indian *Copyright Act*, as there is no jurisprudence in this regard. Section 2 of the Act establishes that “*cinematograph film*”:

“means any work of visual recording on any medium produced through a process from which a moving image may be produced by any means and includes a sound recording accompanying such visual recording and ‘cinematograph’ shall be construed as including any work produced by any process analogous to cinematography including video films.”

Presumably, this reference to any “*process analogous to cinematography*” could lead to the conclusion that video games can fall within this definition, but without relevant precedents, this opinion remains uncertain.

In this same context, the legal definition of an *author* is: “(d) (vi) in relation to any literary, dramatic, musical or artistic work which is computer-generated, the person who causes the work to be created.”¹⁰³ In addition, the law clearly states that a “*literary work*” includes computer programs¹⁰⁴ and, therefore, the source code of video games can be protected as software/literary works. Major changes were introduced to Indian *Copyright Act* in 1994 to clearly explain the rights of software programmers.¹⁰⁵

KEY STAKEHOLDERS

119. The development of a given video game is undertaken by a game developer, which might be a single person or a large enterprise. The main stakeholders involved in the value chain and the development process include:
- a. **Producer:** A producer’s responsibilities include management of the development team, maintenance of budget and quality assurance.
 - b. **Publisher:** A company that publishes video games that it has itself made, or for which it has procured development or acquired the distribution rights.
 - c. **Development Team**, which may include:
 - i. **Artist:** The art director manages the art team comprising visual artists who create video game art.

¹⁰² Chapter 1, Section 2(c) of the Indian *Copyright Act*.

¹⁰³ Chapter 1, Section 2(d) Indian *Copyright Act*.

¹⁰⁴ Chapter 1, Section 2(o) of the Indian *Copyright Act*: “*literary work includes computer programmes, tables and compilations including computer databases*”.

¹⁰⁵ *Copyright (Amendment) Act*, June 9, 1994. This amendment introduced particularly the modification of Section 14, clause (b), for subclause (ii): “*to sell or give commercial rental or offer for sale or for commercial rental any copy of the computer programme: provided that such commercial rental does not apply in respect of computer programmes where the programme itself is not essential object of the rental*”. Certain clauses in Section 52 concern the acts not considered an infringement of the copyright, in particular clauses, (ab), (ac) and (ad): “(ab) the doing of any act necessary to obtain information essential for operating interoperability of an independent created computer programme with other programmes by a lawful possessor of a computer programme provided that such information is not otherwise readily available; (ac) the observation, study or test of functioning of the computer programme in order to determine the ideas and principles which underlie any elements of the programme while performing such acts necessary for the functions for which the computer programme was supplied; (ad) the making copies or adaptation of the computer programme from a personally legally obtained copy for non-commercial personal use.”

- ii. Programmer: the software engineer who writes or develops the game's codebase
- iii. Level designer: A person who creates levels, challenges or missions for the video games using a specific set of programs
- iv. Sound engineer: Technical professionals responsible for sound effects and sound positioning and composers of the game's musical score
- v. Tester: A game tester analyzes video games to document software defects as part of quality assurance.

The video game therefore contains several parts that, when combined, constitute the final product: the game code, the characters, the dialogue, audio/music, the video and the storyline. All those elements are individually copyrightable according to the Indian *Copyright Act*.¹⁰⁶

AUTHORS AND THE TRANSFER OF RIGHTS

120. In mobile or online gaming, the producers typically have full rights and therefore do not share most of the revenue. The main content developer can qualify as an author, along with the team responsible for setting up the theme of the game. Section 2 (d) (vi) of the Indian *Copyright Act* enunciates the meaning of an “*author*” in relation to any literary, dramatic, musical or artistic work that is computer-generated, as the person who causes the work to be created. Therefore, in the case of video games, authorship will vest in the producer or publisher (as the case may be) that causes the game to be created, even if that development includes creative contributions from employees or third-party contractors.

This principle is reinforced by other provisions of the Indian *Copyright Act*. Chapter IV – “*Ownership of Copyright and the Rights of the Owner*” – establishes that in certain cases (*employment by the proprietor of a newspaper, magazine or similar periodical under a contract of service or apprenticeship; photograph taken, or a painting or portrait drawn, or an engraving or a cinematograph film; or a work made in the course of the author's employment under a contract of service or apprenticeship*), the person who arranged all the elements to obtain the creation of such a work shall be its author and, thus, the first owner of the copyright in the work.¹⁰⁷

Nonetheless, this principle applies in the absence of any agreement to the contrary, as per Section 17 of the Indian *Copyright Act*. In this regard, in the absence of a contract of employment, the original creators (i.e., the development team) who conceived the basic idea and transformed it into an entire game would qualify as “authors” under the Indian *Copyright Act* and would be entitled to authorship rights.

121. In order to determine whether a person is engaged in “a contract of service” or “contract for service” it is necessary to consider whether that person is rendering the services as a person in business on his or her own account. If the answer is affirmative, then the contract is a contract *for* service; if not, the contract is a contract *of* service. The proper test to ascertain if such a relationship exists is whether or not the employer has the right to control the manner of execution of the work. However, *control* in itself is not always conclusive and factors like the degree of control, opportunities of profit or loss, investment

¹⁰⁶ Study on “Creating Virtual Wealth: Importance of Intellectual Property in the Animation & Gaming Industry”, by Symbiosis Law School, Noida and Scriboard, New Delhi.

¹⁰⁷ Section 17 of the Indian *Copyright Act*.

in facilities, permanency of relations and skills required in the claimed independent operation also play a significant role.¹⁰⁸

122. Section 18 of the Indian *Copyright Act* affirms that a copyright owner may assign the rights in an existing work to any person, either wholly or partially, generally or subject to limitations, and for the whole term of the copyright or any part thereof. As per Section 19, only written, signed assignments are valid, and they must also include the identification of the work, the duration and the territorial scope of the assignment; therefore, verbal or unsigned documents are null according to the Indian *Copyright Act*. In the absence of a time period or territorial scope, the assignment shall be limited to a term of five years within the geographical area of India.
123. As video games have become more sophisticated, a new problem has arisen involving contributions by online game players. Indian law has yet to address the specific legal issues of interactive online gaming. However, as the behavior of avatars becomes more realistic, sophisticated and intelligent, the question regarding the legal status of the contributions made by players may give rise to disputes. Conferring on the players exclusive rights to their creations and contributions in a game might add a new dimension to the world of gaming. The players' contributions would then become their property that can be bought, sold or licensed like any other property.

ECONOMIC COMPENSATION FOR AUTHORS

124. Compensation for authors by copyright owner employers is governed by the employment agreement and the organization's/employer's company rules, and may include a bonus or another form of payment as agreed upon by the parties. Here again, it is pertinent whether the developer of the video game is an individual working as a sole proprietor or an employee bound by an employment contract.

In India, royalty payments are, in most cases, not a part of the financial compensation paid to video game creators, even though Section 19.(3) of the Indian *Copyright Act* states that the assignment of copyright in any work shall also specify the amount of royalty payable, if any, to the author or his or her legal heirs.

125. Currently, producers of cinematographic works hold all rights, while contributors like music composers do not receive royalties once a song or music has been incorporated in the work. This is the position following the decision of the Supreme Court in its landmark judgment in *Indian Performing Rights Society Ltd. v. Eastern India Motion Pictures Association* (the *IPRS Case*).¹⁰⁹ In the *IPRS Case*, the Copyright Board initially decided that composers and lyricists retained copyright in their musical works incorporated as soundtracks in cinematograph films and thus could collect fees, royalties and charges with respect to those films. On appeal, the High Court set aside the decision of the Board. Finally, the Supreme Court held that interpreting Section 17(b) and (c) in terms of Section 13(4) meant that the rights of the music composer and lyricist were defeated by virtue of the producer becoming the first owner of the copyright. If the author of a lyric or musical work authorized a film producer to make a cinematographic film using the author's composition, the author cannot later claim copyright infringement.

However, the recent proposed amendment to the Indian *Copyright Act* is directed towards providing exclusive rights to authors/performers and introduces moral rights for them additionally. The Bill proposes to insert Section 38A and 38B, replacing Section 38(3) and

¹⁰⁸ As held by the Supreme Court in *Silver Jubilee Tailoring House and Others v. Chief Inspector of Shops and Establishments and Another*, 1974 AIR 37, 1974 SCR (1) 747.

¹⁰⁹ 1977 AIR 1443, 1977 SCR (3) 206.

(4), to establish that once the performer has consented to the incorporation of the performance in a cinematograph film (work), the performer cannot object to the enjoyment of the performer's rights by the producer.¹¹⁰ However, the performer will still be entitled to royalties from the commercial use of the performance.

It is unclear whether this new provision will affect video game authors due to the lack of qualification of this kind of work of authorship; this amendment to the Indian *Copyright Act* must therefore be further interpreted in this context. Additionally, India follows an Anglo-American tradition, permitting that non-natural persons can become *authors*; therefore, video game studios will generally be the authors and copyright owners of such works of authorship. Nonetheless, the new *Copyright (Amendment) Act of 2012* must be interpreted by Indian courts in order to determine if it will apply to video game contributors and whether they shall have the right to receive royalties for the exploitation of their works.

ISRAEL

126. The legal standards regarding video games in Israel stem from court judgments. However, to date these judgments have been somewhat inconsistent and appear to be heavily influenced by the particular merits and circumstances of each case. Furthermore, the fact that certain judgments have been rendered by split decisions of judicial panels emphasizes the complexity of the issues under Israeli law.

CLASSIFICATION OF VIDEO GAMES

127. According to the *Copyright Law of 2007* (hereinafter, the Israeli *Copyright Act*), copyright shall subsist in original works that are literary works, artistic works, dramatic works or musical works, fixed in any form; and in sound recordings.¹¹¹ The Israeli *Copyright Act* does not offer, like the law in other countries, an open list of works that deserve protection under this law; however, video games can be copyrighted in Israel pursuant to the above-mentioned Section 4.

The Israeli *Copyright Act* does not offer a separate and specific regime for audiovisual works, nor for audiovisual recordings, as it only mentions cinematographic works in the first section ("Definitions"), in defining "dramatic works" as follows: "*including plays, cinematographic works, musical-dramatic works, choreography, and pantomime,*" after which it specifically identifies the term "cinematographic works" as "*including a television work and any work which is substantially similar to a cinematographic work or a television work.*"

Therefore, video games are protected in Israel mainly as computer programs, which are considered "*literary works*". The definition of "computer program" is also brief, including "*computer program in any form of expression.*" However, the *Computer Act of 1995* defines a program as a group of orders in computer language that is able to cause the functioning of a computer or to prompt a computer action, and that is embedded, incorporated or marked in an apparatus or object by electronic, electromagnetic, electrochemical, electro-optical or other means, or is incorporated or integrated in a computer in any way or that is separate from a computer.

128. In light of the above, video games, as a whole, are mainly protected as computer programs in Israel, although one can seek protection of the individual elements of a given

¹¹⁰ Section 38A(2) to be inserted by the *Copyright (Amendment) Act of 2012*, available at <http://164.100.24.219/BillsTexts/RSBillTexts/PassedRajyaSabha/copy-E.pdf> (accessed in October 2012).

¹¹¹ Section 4 of the Israeli *Copyright Act*.

video game as a dramatic work, provided it fulfills the requirements of Section 4 of the Israeli *Copyright Act*.

RIGHTS HOLDERS AND STAKEHOLDERS

129. The Israeli *Copyright Act* does not define an “author/creator” nor does it define what could be considered a creation. Even where *authors* are mentioned in the law (e.g., in relation to joint works), the text does not offer a definition of this concept, nor does the law specify in which circumstances a natural (or a legal) person can be deemed an *author*.

Therefore, in the absence of a proper legal framework, one must seek answers in the context of business practice and in the courts. The stakeholders involved in the value chain or in the chain of rights are defined differently by the courts in certain cases, taking into account the circumstances and merits of each case. The courts base their decision on two main criteria:

- i. a creator must have made a significant contribution to the creation; and
- ii. the quality of the contribution must be significant.

The decisions of Israeli courts in this area of law are not entirely consistent. In certain cases the courts have held that a significant contribution to the creation is required in order to recognize someone as a stakeholder in the value and/or rights chain, even if the contribution is not a significant technical one. However, in other cases the courts have insisted that the significant contribution must include a technical contribution.

130. Finally, as the legal status of contributions by video game players has yet to be defined in the Israeli *Copyright Act*, this issue has to be agreed upon contractually, on a case-by-case basis or, with respect to online platforms, according to the terms and conditions set forth by game operators.

In light of the apparent inconsistencies in the court decisions, it is not possible to provide a clear answer to the question of authorship given that, in Israel, this must currently be determined on a case-by-case basis.

TRANSFER OF RIGHTS

131. According to Section 33 of the Israeli *Copyright Act*, the “*author*” is the first owner of the copyright in the work, while the producer of a sound recording is the first owner of the copyright in a sound recording. According to Section 34 of the Israeli *Copyright Act*, an employer is the first owner of a copyright related to a work created by an employee through the services rendered by that employee in the course of employment. The employee is the original creator of the work, although the law presumes that ownership of the exploitation rights will vest in the employer unless it has been otherwise agreed upon between the parties.

Nonetheless, when a video game studio hires a freelancer to develop specific elements of a given video game, the law presumes that the first owner of the copyrights will be the author, unless otherwise so agreed between the commissioning party and the author, expressly or impliedly.¹¹² Therefore, there is no automatic transfer of rights between the company and the author, and any right shall be transferred either expressly through a written assignment, or impliedly, in a similar agreement.

¹¹² Section 35 of the Israeli *Copyright Act*.

132. In this same regard, the Israeli *Copyright Act* recognizes certain moral rights of authors, emphasizing that they are personal and non-transferable, which vest in authors even when he or she has transferred his or her rights to a third party.¹¹³ Nonetheless, regarding infringement of moral rights, Section 50 of the Israeli *Copyright Act* specifies that certain acts: “*shall not constitute an infringement of the said moral right where the act was reasonable in the circumstances of the case, including that the work had been made by an employee in the course of his employment or pursuant to commission.*” This does not necessarily mean that where an employer-employee relationship exists, or in cases of service agreements, moral rights can be infringed, but that the particular circumstances of the case must be analyzed by the courts.
133. The transfer of rights from the aforementioned rights holders is outlined in Section 37 of the Israeli *Copyright Act*, which sets forth the conditions applicable to the transfer of rights, *inter alia*, as follows:
- a. Copyrights may be assigned by contract or under a legal obligation, and the owner may grant an exclusive license or a non-exclusive license with respect to the copyrights.
 - b. Assignment of the copyrights or the grant of a license, as stated in subsection (a), above, may refer to the copyright in whole or in part, and can be limited to a certain territory, period of time or to specific acts with respect to the work.
 - c. A contract for the assignment of copyright or the grant of an exclusive license therein shall require a written document.
134. Regarding remuneration, the Israeli *Copyright Act* is also brief in this sense, making no mention of remuneration or royalties in favor of authors or producers. In certain cases, courts have held that the employee was entitled to royalties or another form of compensation in respect of the contribution/creation.
- Therefore, compensation arrangements may vary on a case-by-case basis. The employment agreement may provide that the salary includes any compensation with respect to creation of copyrights and intellectual property rights. This provision must be drafted carefully according to the guidelines set forth in the decisions of the labor tribunals. If the employee makes a creation “*in the course of his service and during the period of his service*” (Section 34 of the Israeli *Copyright Act*), the employee’s salary may be considered financial compensation for the waiver of rights.
135. With respect to creations by independent contractors, according to Section 35 of the Israeli *Copyright Act*, compensation should be agreed upon in the contract between the parties and may comprise compensation in a fixed amount, royalties, a combination of both or any other form of compensation.
136. The Israeli *Copyright Act* is not detailed with regard to the protection of works of authorship. Video games are not specifically referenced, nor does the Israeli *Copyright Act* establish a specific regime for audiovisual works, protection for which is applicable in the case of video games in other jurisdictions in the absence of a tailored system. Therefore, in order to develop a legal regime for creative works in Israel, including new types of works like video games, the Israeli *Copyright Act* will require amendment.

¹¹³ Section 45 of the Israeli *Copyright Act*.

ITALY

137. To date, there is no specific regulation for or definition of video games under Italian law. In Italy, multimedia works were not expressly defined by the *Copyright Act of 1941*, amended in 2003 (hereafter, the *Italian Copyright Act*); however, they are mentioned in Article 171-*ter f bis* regarding criminal infringement and Article 181-*bis*, which provide for the obligation to affix an SIAE¹¹⁴ label to both software and multimedia works in order to guarantee their originality. The construction of the legal status of video games has been created by jurisprudence and doctrine.

CLASSIFICATION OF VIDEO GAMES

138. Video games were defined for the first time in an Italian jurisdiction as “*gadgets created to relieve idle people from boredom*” (Turin Magistrate Court, May 25, 1982), the classification as software fell outside of copyright protection at that time.¹¹⁵ However, copying was prevented under the *Unfair Competition* law. A subsequent judgment by the Turin Court (“Atari” Judgment, October 17, 1983) focused on the “images in motion” element that characterizes any video game, classifying it as an audiovisual work, thus opening the door for copyright protection and its applicable regime regarding infringement and illegal copying. The case law alternated between classifications as software¹¹⁶ and as images in motion when seizing unauthorized copies for sale,¹¹⁷ although the copies did not bear the SIAE label.
139. The Italian Supreme Court, aware of the gap in the legislation and of the fact that the concept of “images in motion” was not sufficient to encompass the complexity of video games, finally classified them as multimedia works in the noteworthy Dalvit Judgment of May 25, 2007.¹¹⁸ This legal status has been confirmed by subsequent case law.¹¹⁹ It must be noted, however, that the rationale for this Judgment was limited to a criminal approach, in that the judges, after classifying video games as multimedia works, consequently applied criminal sanctions regarding infringing copies pursuant to Article 171 *ter f bis* of the *Italian Copyright Act*.

THE DOCTRINE QUALIFICATION

140. Italian doctrine has thus created a definition of the multimedia work: “*a product that combines simultaneously, in a digital form, text, graphics, sounds, images and software.*”¹²⁰ The distinctive feature of these new media is their interactivity, which allows the user – through the use of software – to combine different media by linking them at the same time. Therefore, video games seem to fall within this category, because the player can interact with the story by repeatedly choosing the path, the scene, the sounds and the characters.

Part of the doctrine suggests that, due to their nature, video games should fall within the category of collective works (Article 3 of the *Italian Copyright Act*), as collections of

¹¹⁴ Società Italiana degli Autori ed Editori, which is the Italian Authors and Publishers collection society.

¹¹⁵ Judgment of the Italian Supreme Court, November 24, 1986, which expressly recognized copyright protection for software on the grounds that its technical-conventional language could be analogous to the alphabet or the seven musical notes.

¹¹⁶ Supreme Court, Crim. Div., July 4, 1997.

¹¹⁷ Supreme Court Crim. Div., December 15, 2006.

¹¹⁸ This case was related to violation of digital rights management (DRMs) where the defendant was charged with making an infringing chipset.

¹¹⁹ Supreme Court Judgments, January 14, 2009, and March 4, 2011.

¹²⁰ Cunegatti, *Aspetti legali dell'opera multimediale*, Guerini, 2000; Guglielmetti, *Le opere multimediali*, AIDA, 1998, 132.

autonomous works under the supervision of an editor, which are protected *per se* and independently of the protection of the individual works.

According to another doctrinal trend, emphasis is given to the audiovisual nature of video games, which could therefore be considered cinematographic works (implied by the Atari Judgment, 1983), due to the involvement of a plurality of authors as provided by Article 44 of the Italian *Copyright Act* (with respect to script, screenplay and music, in addition to the director) and the exercise of all economic rights of exploitation by the producer.

The issue thus remains open for a clear classification of video games. In general, however, it could be concluded that the case law, in the absence of a legal definition, has moved from a simplistic approach to video games as mere software works regulated by Article 64 *bis et seq.* of the Italian *Copyright Act* (which could only apply to some basic examples of video games¹²¹) towards construing them as multimedia or cinematographic works.

Once the existence of video games has been recognized by the legal system, the second essential aspect is the determination of the different authors involved in the creative process.

AUTHORS

141. Identification of the authors of a video game necessarily follows from their legal classification.

If a video game is construed as a collective work, all authors of a creative contribution to the video game may be considered authors of their individual contribution, while the editor would own the copyright in the video game as a collective work.

If a video game is treated as a cinematographic work, as seems to be the current trend in Italy, co-ownership could be deemed to exist between the authors of the script, of the screenplay and of the music, as well as the director (considered the person coordinating the different contributions). In light of the particular features of video games, the graphic designer and the author of the software could also be considered co-authors of the video game. The issue, however, does not appear to have been resolved in Italian case law and needs to be considered on a case-by-case basis.

142. A new problem that has arisen as the video game industry has evolved, concerns the contributions by players involved in interactive online gaming. In principle, all creative contributions to an existing work are protected as autonomous works. However, exploitation of the new work requires authorization by the owner of the rights in the original work. In the absence of such authorization, copyright infringement could be established. However, this has been disputed in academic legal writing, a stricter view being that modification of a digital work – implying its reproduction – would always require the consent of the rights holder, irrespective of its economic exploitation and whether or not the reproduction is made for private use.

The issue should therefore first be addressed by the video game industry in determining how far it should embrace players' contributions in creating new material, either through encouraging mod-communities or enclosing video games in heavily policed copyright regimes.

¹²¹ “*Videogiochi in cerca di diritto di autore*”, by Dario Reccia, November 14, 2011 (in English: “Video games looking for copyright”).

STAKEHOLDERS

143. The main stakeholders involved in the value chain are:
- a. the manufacturers of the hardware (PCs, game consoles, smartphones and tablets), that is, the devices on which the game is played; the manufacturer of the medium on which the video game is fixed (e.g., CDs and DVDs) or of software platforms (virtual storage);
 - b. the original developers of the idea and the software; the authors of the musical composition and the author of the images/audiovisual work (designers, artists), game testers;
 - c. the engineers in charge of assembling contents of the multimedia work (so-called “production tools”, middleware);
 - d. the producer investing the money required to implement the idea;
 - e. the publisher involved in marketing (i.e., catalogues of games) for retail and online distribution; and
 - f. end-user consumers or players (modifiers).
144. In the chain of rights, in addition to the authors, publishers and producers mentioned above, there are the licensees for derivative works (e.g., movies, comic books and merchandising), licensors for previous rights of the content (e.g., sports games, books and movie characters) as well as of the software/hardware content; online or rental distributors; online game equity investors¹²² such as broadband providers, advertisers and mobile phone operators.

RELATIONSHIP BETWEEN AUTHORS AND DEVELOPMENT STUDIOS

145. First, authors can be considered employees where they are hired as part of the in-house department by development studios/firms/enterprises.

The second fundamental point is the transfer of rights, which applies only to rights of economic exploitation of the video game, as the author’s moral rights (including the right of paternity and the right to oppose modifications causing damage to his/her honor and reputation) cannot be transferred.

The general principle is that the transfer of the rights of economic exploitation in a creative work must be in writing.

146. If the author is an employee and creates the work while performing duties contained in the employment contract, or upon the instructions of the employer, the rights of economic exploitation in those creative works pertain to the employer (Article 12 *bis* of the Italian *Copyright Act*). The general application of this principle, which could also be extended to works made for hire under the same rationale, is however disputed in case law and legal writing, as the law expressly provides for this only with respect to software and industrial designs created by employees. For this reason, it is always advisable that the issue be settled by the parties in all relevant labor and work-for-hire contracts by providing for the contractual transfer of rights to the employer or to the entity commissioning the work.
147. If video games are treated as cinematographic works, the producer is the only person entitled to exercise the rights of economic exploitation (Article 45 of the Italian *Copyright Act*). This implies, unless provided otherwise by the parties, that the producers also acquire ownership of the relevant rights through contracts with the authors. Certain

¹²² More information is available at: http://www.tuck.dartmouth.edu/digital/assets/images/05_shah.pdf page 20.

opinions in case law and academic legal writing, however, are in favor of the automatic ownership of those rights by the producer, as implied by the above rule.

148. Insofar as a video game is considered a simple collective work, the publisher that organizes and coordinates the different contributions is the owner of the work as a whole, independent of the ownership of each author with respect to his/her contribution (Article 7 of the Italian *Copyright Act*).
149. Finally, the form of financial compensation available to the authors, whether as a lump sum or royalties on the proceeds, is left to the parties' freedom of contract.

Specific rules have been laid down with respect to cinematographic works and could therefore apply to video games, giving authors certain rights to an additional equitable remuneration, which cannot be waived, for the case of rental and for each separate use of the work by third parties which may have not acquired ownership of the relevant rights (e.g., licensees). The rules applicable to cinematographic works establish a specific system of remuneration.

Article 46. *bis* of the Italian *Copyright Act* provides that, in the case of a transfer of distribution rights to the producer, authors of audiovisual works and assimilated works have the right to fair compensation to be paid by broadcasters for each use of these works by any means of communication to the public, either by air, cable or satellite. This Article also provides that for every use of cinematographic or assimilated works different from that provided in paragraph 1 and Article 18*bis*, paragraph 5, the authors of the works themselves are entitled to fair compensation payable by those exercising the exploitation rights for each separate commercial use.¹²³

POSSIBLE SOLUTIONS

150. There is a legislative void with regard to the status of video games in Italy, and not all traditional norms created for particular categories of collaborative works (i.e., cinematographic or collective works) can be applied to them by analogy.
151. For this reason, possible solutions could include:
 - a. creation of an applicable law *sui generis* for video games; or
 - b. adaptation of the law governing cinematographic works.
152. In the opinion of some Italian experts, legislators should propose a specific *sui generis* legal framework for video games. Indeed, Italy is one of the major consumers of video games in the EU and, although it only has four or five national video game development studios, the market is growing steadily. According to these experts, legislators should propose adequate protection for all people involved in the creation of video games.

JAPAN

153. Japan protects created works through the *Copyright Act* (Act No. 48 of May 6, 1970) (hereafter, the Japanese *Copyright Act*), which protects authors and performers while guaranteeing the fair exploitation of these cultural products and the development of culture.¹²⁴ However, as in many other jurisdictions, Article 10 of the Japanese *Copyright Act* does not specifically define or refer to video games, although their protection under

¹²³ *Proroga dei termini per la protezione delle opere dell'ingegno e dei prodotti tutelati dalla legge 22 aprile 1941. N 633.*

¹²⁴ An English translation of the Japanese *Copyright Act*, by Yukifusa Oyama *et al.*, Copyright Research and Information Center (CRIC), can be found at: http://www.cric.or.jp/cric_e/clj/cl2_1.html#cl2_1+SS4

the Japanese *Copyright Act* is unquestioned, because the list of works in Article 10 is not exhaustive. In this sense, Japanese law in this area has been derived from judicial precedent beginning in the 1980s.

CLASSIFICATION OF VIDEO GAMES

154. In the absence of a direct reference to video games in statutory law, case law has recognized video games as “cinematographic works” in accordance with Article 2(3) of the Japanese *Copyright Act*, which includes works “*expressed by a process producing visual or audio-visual effects analogous to those of cinematography and fixed in some material form.*”¹²⁵
155. The varied judgments of lower courts were harmonized by the Supreme Court in 2002 (Supreme Court Case No. H13-ju-952) when the Court affirmed that video games should be classified as cinematographic works. The court’s ruling specified that the video game in dispute was expressed through a process producing visual or audiovisual effects similar to those of cinematography, and furthermore that such expression was fixed in an object and thus rightly classified as a cinematographic work in accordance with Article 2(3) of the Japanese *Copyright Act*.

However, not all video games qualify as cinematographic works under the Japanese *Copyright Act*. For example, a game’s audiovisual effects might not be considered sufficiently similar to those of traditional cinematography if its game screens are still images as opposed to animation.¹²⁶

156. Despite this limited application of video games as cinematographic works, protection for games varies from treatment of traditional cinematographic works in certain aspects. For example, while distribution rights associated with traditional cinematographic works may not exhaust under the first-sale doctrine, the Supreme Court has ruled that such rights for video games may be exhausted.

Additionally, the computer code used to execute the audiovisual elements of a given video game can be also protected under the Japanese *Copyright Act* as a literary work. Nonetheless, Article 10 specifies that such protection does not cover the programming language, the rules and algorithms of a computer program, and that only the source code shall enjoy protection, provided it is creative and original.

157. Therefore, video games can have a distributive qualification in Japan, although before determining whether a particular video game can be protected as both a computer program and a cinematographic work, an analysis must be performed in order to determine the specific characteristics of the work.

RIGHTS HOLDERS AND STAKEHOLDERS

158. As with traditional cinematographic works, the determination of authorship is the key to establishing ownership of video games. As set forth in the Japanese *Copyright Act*, creators, producers or publishers may all be considered authors:
- i. Creators are presumptive authors: A person whose name or appellation (hereinafter referred to as “true name”), or whose generally known pen name, abbreviation or other substitute for his or her true name is indicated as the name of the author in the

¹²⁵ Tokyo District Court Case No. S56-wa-8371; 1984/9/28; Tokyo District Court Case No. H4-wa-19495; 1994/1/31; Osaka High Court Case No. H9-ne-3587; 1999/4/27; Supreme Court Case No. H13-ju-952; 2002/4/25.

¹²⁶ Tokyo High Court Case No. H7-ne-3344.

customary manner on the original of the work or where the work is offered to or made available to the public, shall be presumed to be the author of that work;¹²⁷

- ii. Creative contribution by producer: Where one or more producers contribute to the creation of the work as a whole, the producers are qualified as authors. The authorship of a cinematographic work shall be attributed to those who, by taking charge of, for example, producing, directing, filming or art direction, have contributed to the creation of that work as a whole, excluding authors of novels, scenarios, music or other works adapted or reproduced in that work;¹²⁸
- iii. Authorship of a work made by an employee in the course of his or her duties: However, authorship can be attributed to a publisher (legal person) where the work is made by its employee(s) on the initiative of the publisher.¹²⁹

The employee may maintain independent authorship rights:

- a. if the work is not created on the initiative of the employer;
- b. if the work is not created in the course of the employee's duties;
- c. if the work is not made public under the name of the employer; or
- d. if the employment contract stipulates specifically that the employer will not be an author of the employee's creation.

Therefore, in the case of a video game created by an employee in the course of his or her duties, the copyright shall be originally attributed to the publisher with no transfer of rights from the creator. Any other transfer of rights from the authors would require a written or verbal contract and could be made in whole or in part.

REMUNERATION

159. For employees whose creative contributions are made during the course of their duties, because there is no transfer of copyright from employee to employer, no additional compensation other than salary is required. In all other cases, the original contributor would be considered a creator/publisher and would be compensated according to the terms and conditions of the contract, which may include a lump sum or proportional compensation, depending on the agreement reached by the parties.
160. The Japanese *Copyright Act* includes a system for exploiting works under compulsory license, specifically for those works whose rights holders cannot be found because they are unknown or for similar such reasons.¹³⁰ Video game enthusiasts have coined the term "*abandonware video game*" for older games for which copyrights are unclear for various reasons and that are no longer available for purchase. In legal terms, they would be "*orphan works*". Therefore, under Japanese law, any person willing to exploit a particular video game may require a license from the Commissioner of the Agency for Cultural Affairs, provided that the following requirements are fulfilled:
 - a. The video game was made public or made available to the public for a considerable period of time;
 - b. After due diligence, the copyright owner cannot be found; and
 - c. The solicitor shall deposit, on behalf of the copyright owner, compensation fixed by the Commissioner.

¹²⁷ Article 14 of the Japanese *Copyright Act*.

¹²⁸ Article 16 of the Japanese *Copyright Act*.

¹²⁹ Article 15 of the Japanese *Copyright Act*.

¹³⁰ Article 67 of the Japanese *Copyright Act*.

161. Therefore, according to the Japanese Supreme Court, video games can qualify as cinematographic works where they produce visual and audiovisual effects similar to those of movies and other audiovisual works, although this might simply be an attempt to accommodate these modern works within an existing category. A new legal regime is needed in Japan that is more suitable to video games and that takes into account their specific elements (e.g., interactivity, complexity and the number of potential authors involved).

KENYA

162. The *Copyright Act*, Chapter 130 of February 1, 2003, and the *Copyright Regulations of 2004* are the main regulations governing copyright in Kenya (hereinafter, collectively the *Kenyan Copyright Act*). Indeed, the *Kenyan Copyright Act* establishes that “artistic work” means, irrespective of artistic quality, any of the following or works similar thereto: paintings, drawings, etchings, lithographs, woodcuts, engravings, prints; maps, plans and diagrams; works of sculpture; photographs not comprised in audiovisual works; works of architecture in the form of buildings or models and works of artistic craftsmanship, pictorial woven tissues and articles of applied handicraft and industrial art.¹³¹

The preliminary section also contains a specific definition of “*audio-visual works*” which, in the opinion of some experts, could include video games, as there is no specific mention of this kind of work in the *Kenyan Copyright Act*.

CLASSIFICATION OF VIDEO GAMES

163. The *Kenyan Copyright Act* defines audiovisual works as “*a fixation in any physical medium of images, either synchronized with or without sound, from which a moving picture may by any means be reproduced and includes videotapes and video games but doesn't include a broadcast.*”¹³² This is a statutory definition derived from the *Kenyan Copyright Act*, but there is no case law that completes this legal definition with respect to video games.

According to this definition, the protection given to audiovisual works would also be applicable to video games. In this regard, Section 22 of the *Kenyan Copyright Act* establishes the works eligible for copyright, including what appears to be an exhaustive list of items: literary works, musical works, artistic works, audiovisual works, sound recordings and broadcasts.¹³³ As there is no specific mention of video games, they must be classified in one or more of these categories, i.e., as artistic or audiovisual works.

164. The specific protection for audiovisual works is defined in Section 26 of the *Kenyan Copyright Act*, which establishes a list of acts protected by the law and others expressly excluded from such protection, constituting the exceptions of exclusive rights.¹³⁴

In general terms, video games can be qualified as *audiovisual works* based on the *Kenyan Copyright Act*. However, given the complex nature of this type of work of authorship, other creative elements can be found, including characters, graphics and computer code; all of them enjoying protection under the *Kenyan Copyright Act*. Regarding the computer program underlying a given video game, the *Kenyan Copyright*

¹³¹ Preliminary 2(1) of the *Kenyan Copyright Act*.

¹³² Preliminary (2) of the *Kenyan Copyright Act*.

¹³³ Part III Copyright and Other Related Rights, Section 22(1) of the *Kenyan Copyright Act*.

¹³⁴ Section 26 (1) of the *Kenyan Copyright Act*.

Act defines it as “a set of instructions expressed in words, codes, schemes or in any other form, which is capable, when incorporated in a medium that the computer can read, of causing a computer to perform or achieve a particular task or result.” The computer program embedded in a video game falls, without any doubt, within this definition.

Therefore, Kenya compares video games with audiovisual works, providing to video games the same legal protection as to films or movies. Nonetheless, other elements of video games, like the computer code, can enjoy independent protection, although covering only the protected work (that is, the software) itself.

RIGHTS HOLDERS AND STAKEHOLDERS

165. Protection of authors' rights differs in Kenya depending on the created work. Thus, according to the Kenyan *Copyright Act*, the *author* of a literary, musical or artistic work is the person who first makes or creates the work. However, the *author* of an audiovisual work is the person who made the arrangements for the making of the work.¹³⁵ Therefore, authors of a script, characters or creative content will retain such status, while the contributors to an audiovisual work (e.g., a video game) will not retain such rights in favor of the studio or producer which arranged all the elements to create the work.
166. Although the copyright vests automatically with the initial author,¹³⁶ where a literary, musical or artistic work is commissioned by a person who is not the author's employer under a contract of service¹³⁷ or, not having been so commissioned, is made in the course of the author's employment under a contract of service,¹³⁸ the copyright shall be deemed to be transferred to the person who commissioned the work or the author's employer, subject to any agreement between the parties excluding or limiting the transfer.¹³⁹ In this case, the author shall retain the moral rights, but the patrimonial rights are deemed transferred to the commissioner.
- Therefore, under the Kenyan *Copyright Act*, the rights regime is quite complex and confusing, because original creators of a literary, musical or artistic work will be the *authors* of the work, maintaining all copyrights in the work (unless it was commissioned or where an employment contract exists). However, if the work has an audiovisual character, the original contributors will not be the *authors* but the person making the arrangements for the making of the film will be the author. As a result, with regard to video games it is essential to ascertain the legal nature and classification of this type of work in order to determine the applicable rights regime.
167. However, video games can be created by one or more authors; where this is the case, joint authorship can exist, which is defined by the law “as a work produced by the collaboration of two or more authors in which the contribution of each author is not separable from the contribution of the other author or authors.” In this case, the copyrights in the work shall vest jointly in the co-authors, who must authorize any exploitation of the work.
168. Video game rights are transmissible by assignment, by license, testamentary disposition or by operation of law as movable property.¹⁴⁰ An assignment or testamentary disposition

¹³⁵ Preliminary (2) – (d) of the Kenyan *Copyright Act*.

¹³⁶ Section 31 of the Kenyan *Copyright Act*: “First Ownership of Copyright” (1) Copyright conferred by Sections 3 and 24 shall vest initially in the author.

¹³⁷ Section 31(1)(a) of the Kenyan *Copyright Act*.

¹³⁸ Section 31(1)(b) of the Kenyan *Copyright Act*.

¹³⁹ Section 31(1) of the Kenyan *Copyright Act*.

¹⁴⁰ Section 33(1) of the Kenyan *Copyright Act*.

of video game rights may be limited as to scope, timing or geographical area.¹⁴¹ No assignment or license shall be effective unless it is in writing, signed by or on behalf of the assignor, or by or on behalf of the licensor, as the case may be, and the written assignment of copyright shall be accompanied by an appropriate letter of verification in the event of an assignment of copyright works from outside Kenya.¹⁴²

169. A non-exclusive license may be in written or oral form, or may be inferred from conduct, and may be revoked at any time; however, a license granted by contract shall not be revoked, either by the person who granted the license or his or her successor in title, except as the contract may provide, or by further agreement.¹⁴³ An assignment, license or testamentary disposition may be effectively granted or made in respect of a future work, or an existing work in which copyright does not yet subsist and the prospective copyright in any such work shall be transmissible by operation of law as movable property.¹⁴⁴
170. Compensation for the creative contribution to a video game work shall be provided for in the salary, in the case of an employee, or subject to any agreement that may have been entered into by the parties. In any case, the Kenyan *Copyright Act* makes no mention of the compensation that authors (whether employees or independent contractors) shall receive; therefore, any remuneration or royalty scheme must be contractually established between the contributor and the assignee of a given video game.

FOLKLORE AND THE PUBLIC DOMAIN

171. Finally, the Kenyan *Copyright Act* establishes a specific legal framework for folklore as part of the national culture and heritage. Therefore, if a video game author or studio includes any work of Kenyan folklore in a given video game, they will have to respect Section 49 of the Kenyan *Copyright Act*.

The specific definition of folklore is a literary, musical or artistic work presumed to have been created within Kenya by an unidentified author, and which has been passed on from one generation to another and constitutes a basic element of the traditional cultural heritage of Kenya. Such works include: folktales, folk poetry and folk riddles; folk songs and instrumental folk music; folk dances and folk plays; and the production of folk art, in particular drawings, paintings, sculptures, pottery, woodwork, metalware and jewelry.¹⁴⁵ Considering its national interest, the Government of Kenya may issue further implementing regulations with respect to copyright protection of folklore, including the authorization and prescription of the terms and conditions governing any specified use of folklore, except by a national public entity for non-commercial purposes, on the importation of any work made abroad that embodies folklore.¹⁴⁶

172. In conclusion, Kenya has legislation that protects authors and the creation of original works of authorship, although video games do not easily fit within Kenya's current legal framework. Moreover, no video game case has so far been decided by the Kenyan courts. An amendment to the Kenyan *Copyright Act* is therefore needed to clarify the unresolved issues described above.

¹⁴¹ Section 33(2) of the Kenyan *Copyright Act*.

¹⁴² Section 33(3) of the Kenyan *Copyright Act*.

¹⁴³ Section 33(4) of the Kenyan *Copyright Act*.

¹⁴⁴ Section 33(5) of the Kenyan *Copyright Act*.

¹⁴⁵ Preliminary Section of the Kenyan *Copyright Act*.

¹⁴⁶ Part VII Miscellaneous (49) of the Kenyan *Copyright Act*.

REPUBLIC OF KOREA

CLASSIFICATION OF VIDEO GAMES

173. Although the Republic of Korea has a highly developed video game industry, there are no provisions in the relevant Republic of Korea laws that define or classify *video games*. However, video games are undisputedly considered to qualify as computer programs, and they have been protected as such from the time of earliest production. Computer programs are protected in the Republic of Korea through the *Computer Programs Protection Act* of 1986, which embodies “*creative works expressed as a series of instructions and commands used directly or indirectly in an apparatus having data processing capacity such as a computer, etc. (hereinafter referred to as “computer”) for the purpose of obtaining a certain result.*”¹⁴⁷

As the video game industry has been developing rapidly in recent years in the Republic of Korea, there has been much discussion about effective means for protecting video games. As a result, jurisprudence and doctrine have begun to recognize video games as audiovisual or cinematographic works in cases where they satisfy the prerequisites established in the Republic of Korea *Copyright Act* of 2009 (hereinafter, the Republic of Korea *Copyright Act*).

The Republic of Korea *Copyright Act*, Article 2 (13), defines a “cinematographic work” as “*the creative production in which a series of images (regardless of whether or not accompanied by sound) are collected, and which can be played by mechanical or electronic devices and can be seen, or both seen and heard.*” In this regard, secondary protection of cinematographic works by trademarks and publicity rights of professional gamers has also recently come under discussion.

In the case of a video game that falls within the definitions of both computer programs and cinematographic works, the author or owner of a video game generally seeks to protect it as a cinematographic work under the Republic of Korea *Copyright Act*, as they are afforded much stronger protection.

174. Finally, some theories suggest that video games qualify as “collective works”, although there is no provision that specifically defines a “collective work” under Republic of Korea law.

AUTHOR-RELATED ISSUES REGARDING VIDEO GAMES

175. In the case of video games that qualify as cinematographic works, “*a corporation or organization*”, that is, game producers, are presumed to be the *author* where a labor relationship exists.¹⁴⁸ This is because numerous people are involved in the production of cinematographic works, making it very complicated and difficult to determine authorship, in addition to giving rise to many problems with regard to exploitation rights. However, where employees of video game studios have virtually created video games or contributed significantly to the creation of such video games,¹⁴⁹ and in the case where the “employee

¹⁴⁷ *Computer Programs Protection Act*, Act No. 3920. December 31, 1986, last amended by Act No. 5605. December 30, 1998.

¹⁴⁸ Article 9 of the Republic of Korea *Copyright Act (Authorship of a Work Made by an Employee in the Course of His Duties)*: “*The authorship of a work which is made by an employee of a legal person, etc. during the course of his duties and is made public under the name of such a legal person, etc. as the author shall be attributed to that legal person, etc., unless otherwise stipulated in a contract, work regulation, etc.: provided that being made public is not a requirement for computer program works.*”

¹⁴⁹ The phrase “virtual creation or most significant contribution to the creation” means that a person has created distinctive elements unique to the video game or has designed the overall structure of the video game.

rules of the company” provide for the recognition of the person who virtually created such video games as the author, the employee may qualify as the author. The same principle applies, *mutatis mutandis*, to computer programs, as per Article 7 of the *Computer Programs Protection Act*.

176. In the case where there is no employee rule recognizing employees as authors, the Republic of Korea *Copyright Act* provides “Chapter V Special Cases Concerning Cinematographic Works” in order to clarify the relationship of the rights and duties in relation to cinematographic works and to encourage the active use of these works. Under Article 100 of the Republic of Korea *Copyright Act*, where a producer of a cinematographic work and a person who agree to cooperate in producing such a work have obtained a copyright in the said work, the rights necessary for the exploitation of the work shall, unless there exists a special agreement to the contrary, be presumed to have been transferred to the producer of the cinematographic work. However, the copyright of the authors or owners in the original works (e.g., the novel, play or musical work) for the production of the cinematographic work shall not be affected by the said provision.

LEGAL STATUS OF PROFESSIONAL GAMERS

177. The status of video game players has never been the subject of a dispute in the Republic of Korea; nonetheless, jurisprudence and scholars concur that video games played by players are not recognized as copyrightable works *per se*. According to some theories, players may qualify as performers. However, their share in the copyright in the works has not, as yet, been recognized, and there has been no reported legal dispute concerning their performance.

The cash prizes awarded by video game companies or organizers of video game competitions are the main source of income for players. However, star players who become professionals enjoy press attention and popularity equal to that of other celebrities in the Republic of Korea, and they can earn additional income, for example, by appearing in advertisements. In this case, players’ publicity rights can be the subject of disputes against contest organizers and video game producers.

STAKEHOLDERS IN THE VALUE CHAIN OF VIDEO GAMES

178. Considering the growth and development of the Republic of Korea video game sector, many stakeholders have emerged, not only those involved directly in the production and commercialization of video games, but also other persons, such as contest organizers, professional gamers and television networks that broadcast such events. This scenario implies that the Republic of Korea is one of the most regulated countries in this regard, including the establishment of a public entity with oversight responsibility for video games and the companies involved in this sector.¹⁵⁰

Therefore, the main stakeholders involved in this sector in the Republic of Korea are:

- a. The producer of a video game is the most important stakeholder in the value chain where a video game falls under the definition of a cinematographic work, because the producer is properly entitled to its exploitation;

¹⁵⁰ This entity is the “Game Rating Board” (GRB), established in 2006 under the *Game Industry Promotion Act* as a public organization for fostering the sound game culture and developing the game industry in the Republic of Korea. The GRB is independently administered for the classification of game contents manufactured and distributed in the Republic of Korea. The Rating Board also reviews illegally distributed game websites, arcade game machines and gambling games in order to protect the public from such negative influences as illegal gambling, excessive violence and nudity. More information is available at: <http://www.grb.or.kr/english/about/overview.aspx>.

- b. The authors/owners of the original copyrighted works, such as a novel or play, used in creating the video game;
- c. Every participant who has made a creative contribution to the completion of the video game as a cinematographic work, such as editors, graphic designers, game testers and software engineers;
- d. The broadcasting companies with the equipment to broadcast popular video games played publicly by professional gamers (players);
- e. Organizers of popular video game competitions;
- f. Professional gamers (the professional players of famous video games).

EMPLOYEE-RELATED ISSUES IN THE CREATION OF VIDEO GAMES

179. As described above, the Republic of Korea has determined that, in an employer-employee relationship, and in the absence of a written agreement, the copyrights in the work shall vest with the company, as shall the qualification as the *author*. Furthermore, if the author is an employee, he or she may be compensated in any way that is determined by the employee rules or agreement, regardless of the fact that he or she is entitled to be known as the author of the video game.

However, where a video game is produced by independent contractors, compensation may be awarded according to the terms and conditions agreed upon by the parties. In all cases, should the compensation awarded to the author be so unsubstantial as to be unfair even though the amount of the remuneration was paid according to the agreement, the courts can waive the agreements or employee rules and order compensation in a reasonable amount.

TRANSFER OF RIGHTS

180. In the case of video games that qualify as cinematographic works, the author, having produced the game, is presumed to have the rights to broadcast, publicly present, transmit, reproduce, distribute and create derivative works thereof.¹⁵¹ This stipulation is particularly important in a country like the Republic of Korea, where there exists a secondary market for the exploitation of video games (e.g., in competitions and merchandising). If a person who has an agreement with a producer of a cinematographic work regarding cooperation in the production of such a work has obtained the copyright in the work, it is presumed that the rights necessary for the use of the work are transferred to the producer, unless provided otherwise under the Republic of Korea *Copyright Act*, Article 100.

However, in the case in which the person who consents to cooperate in the production of a cinematographic work agrees to transfer his or her copyright to the video game producer, such agreement takes precedence over the above presumptive provisions of the Republic of Korea *Copyright Act*.

¹⁵¹ Article 99 of the Republic of Korea *Copyright Act*.

RIGHT TO BROADCAST GAMES PLAYED BY PROFESSIONAL GAMERS

181. With regard to video games, the most contentious issues in Republic of Korea courts have been whether the video games at issue involve sufficient creativity to be protected as copyrighted works. Thus, video games that qualify as cinematographic works in the Republic of Korea enjoy as much copyright protection as they would in any other country. In the case of video games that do not satisfy the standards of cinematographic works, these works enjoy protection as computer programs.
182. The growing popularity of video games has led to the live broadcasting of video game competitions on sports or game channels and, in return, such activities have contributed to further developments in the video game industry and the games' increasing popularity. At the same time, this growing popularity has entailed, as a result of the live broadcasting of video game competitions, disputes between game producers, i.e., the copyright owners of video games, and broadcasters, over the performance and broadcasting rights in the video games played by the players.

Video game producers are fully protected under the Republic of Korea *Copyright Act* as authors of video games, i.e., cinematographic works. In contrast, broadcasters bear the burden of justifying allegations of infringement through specific reasoning, such as: (i) counter-statements based on a "quotation from works made public", allowed under the Republic of Korea *Copyright Act*; (ii) the principle of fair use; and (iii) counter-statements grounded in other laws (e.g., freedom of expression or the rule of good faith).

With respect to the "principle of fair use", this has not been, until recently, included as a general clause in the Republic of Korea *Copyright Act*. Thus, the jurisprudence was reluctant to recognize instances of fair use that were not among those specifically set out and limited in number in the Republic of Korea *Copyright Act*. However, as a result of the incorporation of "U.S.-Korea Free Trade Agreement" clauses into Republic of Korea laws, the principle of fair use is now included as a general clause in the amended Republic of Korea *Copyright Act*.¹⁵² Accordingly, when copyright infringement disputes over performance or broadcasting rights in video game competitions arise between the author of a cinematographic work and a broadcaster, such disputes may be resolved pursuant to the newly-added provision on fair use.

183. Therefore, the Republic of Korea probably has the most developed video game industry in the world, including professional gamers and parallel industries that generate important revenue from video games. However, the legal classification of video games is not entirely settled, as it is not clear whether video games have a distributive classification or are compounded by a single object. These issues will require clarification in the future, particularly with regard to the legal status of the video and images that result from a specific execution of a video game.

RUSSIAN FEDERATION

184. The *Civil Code of the Russian Federation* (hereinafter, the Russian Federation *Civil Code*), in particular its Part 4, is the principal law regulating intellectual property in the Russian Federation.¹⁵³

¹⁵² The U.S.-Korea Free Trade Agreement entered into force on March 15, 2012.

¹⁵³ *Civil Code of the Russian Federation*, passed by the State Duma on November 24, 2006. Particularly Part IV: *Rights to the Results of Intellectual Activity and Means of Individualization* and Articles 2, 8, 18, 26, 64, 128, 129, 256, 769, 773, 772, 855 and 1028 of Parts I, II and III.

CLASSIFICATION OF VIDEO GAMES

185. Article 1.225 of the Russian Federation *Civil Code* establishes that the results of intellectual activity and means equated to them of individualization of legal entities, goods, work, services and enterprises that are granted legal protection (intellectual property) include: works of science, literature and art,¹⁵⁴ and computer programs.¹⁵⁵ Article 1.259 defines the objects of copyright as “*works of science, literature and art, regardless of the value and purpose of the works as well as the mode of their expression*”, including, in a non-exhaustive list, literary works, audiovisual works and computer programs, which are protected as literary works. Nonetheless, Russian law does not specifically define video games as being a particular kind of intellectual property, and therefore we shall analyze their classification in other systems, for example as computer programs or audiovisual works.
186. It is also noteworthy with regard to video game protection that: “*copyright extends to part of a work, to its name, and to a character in the work if by its nature it can be recognized as an independent result of the creative work of the author and it satisfies the requirements established by paragraph 3*”¹⁵⁶ of the same Article. Therefore, individual elements of video games, such as the characters, set-ups and graphics, may also be eligible for copyright protection, provided they are creative and original.

Judicial practice is also not widely developed in this area.¹⁵⁷ However, there have been some cases in which the legal nature of video games was analyzed for the purpose of legal protection against counterfeiting.

187. Generally, video games should be considered software, which is copyrightable under Russian law. The Russian Federation *Civil Code* also considers that computer programs are copyrightable and protected as literary works¹⁵⁸ and that, according to Russian law, copyright in all types of computer programs (including operating systems and program combinations), which may be expressed in any language and in any form, including source code and object code, shall be protected in the same way as copyright in literary works.¹⁵⁹

However, a video game is a so-called “complex” copyright object which includes different kinds of copyright-protectable items, such as software, audio elements and images. Complex works are defined as copyrighted objects containing several protected elements that result from intellectual activity, such as cinematographic works, other audiovisual works, theatrical audience presentations and multimedia products.¹⁶⁰ This description

¹⁵⁴ The Russian Federation *Civil Code*.

¹⁵⁵ Article 1225(1)2 of the Russian Federation *Civil Code*.

¹⁵⁶ Article 1259, paragraph 3 of the Russian Federation *Civil Code*: *Copyright also extends to works that have been made public and to works that have not been made public that are expressed in any objective form, including in writing, orally (a public speech, public performance or in another form), in the form of a depiction, a sound or video recording, or three-dimensionally.*

¹⁵⁷ Presently, intellectual property (IP) disputes in the Russian Federation are considered by state courts, in particular civil courts (courts of general jurisdiction) and state arbitration courts, depending on the parties to a particular dispute. However, as of December 2011, two federal constitutional laws¹⁵⁷ were enacted in the Russian Federation, according to which a new specialized IP court will be set up for the first time. The creation of the IP Court was necessitated by an increasing number of IP disputes in the Russian Federation. It is hoped that it will enhance the Russian system’s effectiveness in protecting IP rights in accord with international standards and that a specific case law classification for video games may be developed. The IP Court will be set up by February 1, 2013, and will entail a number of substantial changes to dispute resolution procedures in the Russian Federation.

¹⁵⁸ Article 1259 of the Russian Federation *Civil Code*.

¹⁵⁹ Article 1261 of the Russian Federation *Civil Code*.

¹⁶⁰ Article 1240.1 of the Russian Federation *Civil Code*.

seems to correspond to the nature of actual video games; however, there is no statutory case law or doctrine that bears this out.

AUTHORS

188. The legal definition of an author of a work of science, literature or art is the person by whose creative labor the work was made; in this sense, the person indicated as the author on the original or other copy of a work shall be considered its author, unless provided otherwise.¹⁶¹

The Russian Federation *Civil Code* considers that the exclusive right to a result of intellectual activity shall belong to one person or to several persons jointly. Where the exclusive right to the result of intellectual activity belongs jointly to several persons, each rights holder shall have the right to exploit the work at his or her discretion, unless the Russian Federation *Civil Code*, or an agreement between the rights holders, provides otherwise. The relationship of the persons jointly possessing the exclusive right shall be determined by agreement among the parties. The income from the joint use of the result of intellectual activity shall be shared equally among all rights holders, unless they have agreed otherwise in writing. The use of the exclusive right to the result of intellectual activity or to means of individualization shall be determined jointly by the rights holders, unless otherwise provided for in the Russian Federation *Civil Code*.¹⁶²

189. Co-authorship is also regulated by the Russian Federation *Civil Code*,¹⁶³ which establishes that the persons who have jointly created a work are the co-authors, regardless of whether the work forms a single, inseparable whole or consists of parts each of which has independent significance. A work created in co-authorship shall be jointly used by co-authors, unless otherwise agreed by them in writing. When such a work forms an inseparable whole, no co-author shall have the right to prohibit the use of the work without sufficient grounds for doing so. Part of a work that can be independently used, i.e., a part having independent significance, may be used at the author's discretion unless the co-authors have agreed otherwise in writing. Lastly, each co-author shall have the right to take measures to protect his or her rights independently. The Russian Federation *Civil Code* contains nothing definitive with regard to the status of players involved in online interactive gaming. Neither statutory law nor judicial practice recognizes the contributions of online players as any sort of legal object.
190. However, where the video game is considered a complex object, the person or entity (i.e., a video game studio or producer) that organizes the creation of such an object containing several protected results of intellectual activity shall obtain the right to use these results through a contract giving them exclusive rights or through a license concluded with the holders of the exclusive rights¹⁶⁴. If the person who organizes the creation of a complex object obtains the right to use the result of intellectual activity specially created, or to be created, for inclusion in such a complex object, the contract shall be considered to be a transfer of the exclusive right, unless otherwise agreed by the parties.
191. The license to use a result of intellectual activity as part of a complex object shall be concluded for the whole time period and with respect to the whole territory of the validity of the respective exclusive right, unless provided otherwise by the contract.

¹⁶¹ Article 1257 of the Russian Federation *Civil Code*.

¹⁶² Article 1229 of the Russian Federation *Civil Code*.

¹⁶³ Article 1258 of the Russian Federation *Civil Code*.

¹⁶⁴ Article 1240 of the Russian Federation *Civil Code*.

192. It is important to note that a licensing contract that restricts the use of a result of intellectual activity which forms part of a complex object shall be considered invalid. In the use of a copyrighted work, the creator shall retain the right of authorship and other personal non-proprietary rights to such a result; however, the person who organizes the creation of the object shall have the right to indicate his or her name or designation thereon or to demand such an indication.
193. The Russian Federation has restrictive labor laws, which means that issues relating to employer-employee relationships dominate in many markets, including interactive entertainment. In that regard, although an author may not only be considered an employee, this would generally be the case. This affects the author's legal status as such authors create video games as part of their employment duties, but act in both employee and author legal capacities.

TRANSFER OF RIGHTS

194. The Russian Federation *Civil Code*, Article 1295, provides that the copyright in a work of science, literature or art created within the employee's (author's) labor obligations shall belong to the author. The exclusive right in an employee's work shall belong to the employer (e.g., a video game studio) unless a labor contract or other contract between the employer and author provides otherwise. If, within three years from the date on which the employee submits the work to the employer, that employer does not begin to use the work, transfer the exclusive right in it to another person or inform the author that the work is to be kept secret; the exclusive right in the employee's work shall belong to the author.

Additionally, if, within the term specified above, the employer begins using the employee's work or transfers the exclusive right in it to another person, the author shall have the right to demand remuneration. The author shall also have the right to demand remuneration in cases where the employer decides to keep the employee's work secret and, for this reason, does not begin to use the work within the above-mentioned term. The amount of remuneration, and the conditions and procedure for its payment by the employer, shall be defined in the employer-employee contract or, in case of dispute, by a court.

195. Where, according to the employment agreement, the exclusive right in an employee's work belongs to the author, the employer shall have the right to use the work for purposes related to the employment task or within the limits deriving therefrom, as well as to make the work public unless otherwise provided for in the employer-employee contract. In this case, the right of the author to use an employee's work for purposes not related to the employment task, or for purposes related to the employment task but beyond the limits deriving therefrom, shall not be limited. Lastly, the employer may, in using an employee's work, indicate his or her own name or designation or require such an attribution.¹⁶⁵
196. Should the video game be considered a computer program, the provisions contained in Article 1296 of the Russian Federation *Civil Code* should be respected. This Article establishes, among other things, that, where a computer program or database is created under a contract, the subject of which was its creation (on order), the exclusive right in such a computer program or database shall belong to the customer, unless otherwise provided by an agreement between the contractor (the performer) and the customer. The author of a computer program created on order, to which the exclusive right in the

¹⁶⁵ Article 1295 of the Russian Federation *Civil Code*.

program or database does not belong, shall have the right to demand remuneration in accordance with the third subparagraph of paragraph 2, Article 1295, of the *Civil Code*.¹⁶⁶

ECONOMIC COMPENSATION FOR AUTHORS

197. Generally, in the video game industry, where companies (video game studios) are responsible for the development of a game, compensation to authors is usually in the form of salary. In the case of independent contractors, the language of the agreement prevails. This usually involves a flat fee; however, other schemes, such as royalty payments or a combination of both, can exist.
198. Therefore, video games are mainly protected as software in the Russian Federation, although experts consider them to be complex works that can be protected through different means. This complexity means that the legal regime applicable for video games is not clear, especially in terms of the transfer of rights, authorship and remuneration.

RWANDA

199. Law N° 31/2009 of October 26, 2009, the *Law on the Protection of Intellectual Property* (hereinafter, the *Rwandese Law on the Protection of Intellectual Property*), establishes in Article 1.6 that this regulation aims to protect “*authors of literary, artistic and scientific works, performers*”, and (Article 1.8) “*any other author of an original intellectual creation.*” The scope of this law is certainly broad, including the protection of inventions, innovations and trademarks and “*copyrights and related rights which apply to literary, artistic and scientific works, to performances of performing artists, phonograms, and wireless broadcasting.*”¹⁶⁷

In this regard, according to Article 6 only natural persons can be considered authors of a work, holding both the moral rights and the economic rights.¹⁶⁸ Accordingly, while the patrimonial rights are transmissible, Article 216 of the *Rwandese Law on the Protection of Intellectual Property* establishes that moral rights can only be “*transmissible to the author’s heirs after his death or conferred to a third person by testamentary disposition.*”

200. In Rwanda, Article 195 of this law holds that literary and artistic works that are original intellectual creations in the literary and artistic domain are subject to protection granted by this law, including an open list of creations, such as: works expressed in writing (books, pamphlets and other writings), including computer programs;¹⁶⁹ musical works with or without accompanying words;¹⁷⁰ audiovisual works;¹⁷¹ photographic works, including works made by means similar to photographic process;¹⁷² and illustrations, maps, plans, sketches and three-dimensional works relating to geography, topography, architecture or science.¹⁷³

¹⁶⁶ Article 1295, p. 2 –3rd of the Russian Federation *Civil Code*: “*If the employer, within the term provided in the second subparagraph of the present paragraph begins to use an employee’s work or transfers the exclusive right to another person, the author shall have the right to demand remuneration. The author shall obtain the above-mentioned right to demand remuneration also in the case when the employer has taken the decision to keep the employee’s work secret and, for this reason, has not begun to use the work within the above-mentioned term. The amount of remuneration, the conditions and procedure for its payment by the employer shall be defined by the contract between him and the employee and, in case of dispute, by a court.*”

¹⁶⁷ Article 4.2 of the *Rwandese Law on the Protection of Intellectual Property*.

¹⁶⁸ Article 222 of the *Rwandese Law on the Protection of Intellectual Property*.

¹⁶⁹ Article 195.1 of the *Rwandese Law on the Protection of Intellectual Property*.

¹⁷⁰ Article 195.3 of the *Rwandese Law on the Protection of Intellectual Property*.

¹⁷¹ Article 195.6 of the *Rwandese Law on the Protection of Intellectual Property*.

¹⁷² Article 195.9 of the *Rwandese Law on the Protection of Intellectual Property*.

¹⁷³ Article 195.11 of the *Rwandese Law on the Protection of Intellectual Property*.

CLASSIFICATION

201. The Rwandese *Law on the Protection of Intellectual Property* makes no specific mention of the legal protection of not only video games, but also audiovisual recordings. The video game industry is undeveloped in Rwanda and video games have yet to be given a legal classification. There is no law related to management of the industry and the jurisprudence or business practices are almost non-existent. Therefore, one cannot talk about a value chain or authors, producers, publishers and, in general, stakeholders regarding video games in Rwanda.

On a more theoretical level, any person that has created an original work, in any form or shape, will be deemed the *original owner of moral and economic rights*.¹⁷⁴ Consequently, and as mentioned above, any person that has created a work that, further on, has been incorporated in a video game can be a contributor to the final work and, hence, become a co-author of the work. In Rwanda there is no specific regime for contributors to video games; therefore, the general rule shall apply in this sense.

CONTRIBUTORS

202. Accordingly, video game authors can be freelance contributors or employees of the person or entity that is developing this type of original work. In respect of a work created by an author employed by a natural person or legal entity in the course of his/her employment, the original owner of the moral and economic rights may be, unless provided otherwise in a contract, the employed author. Nonetheless, the law is contradictory on this point, because it states that, in this case, the economic rights may be considered assigned to the employer or his/her representative to the extent necessary for the customary activities of the employer.¹⁷⁵

Therefore, where a labor relationship exists, there is a presumption that the employee [second] has transferred certain rights to the employer for its customary activities, unless otherwise negotiated and established in a contract. Finally, the law clarifies that “*the rights that the author does not mention in the contract are expressly reserved to him or her.*”¹⁷⁶

In any case, the assignment contract shall be valid only if it is made in writing and signed by the parties.¹⁷⁷

203. The Rwandese *Law on the Protection of Intellectual Property* law is silent on the different kinds of financial compensation available to authors, holding solely that “*the assignment contract shall contain the mode of remuneration for the author in accordance with the use made to his work.*”¹⁷⁸

¹⁷⁴ Article 222 of the Rwandese *Law on the Protection of Intellectual Property*.

¹⁷⁵ Article 226, paragraph 1 of the Rwandese *Law on the Protection of Intellectual Property*.

¹⁷⁶ Article 230 of the Rwandese *Law on the Protection of Intellectual Property*.

¹⁷⁷ Article 229 of the Rwandese *Law on the Protection of Intellectual Property*.

¹⁷⁸ Article 230 of the Rwandese *Law on the Protection of Intellectual Property*.

FOLKLORE AND THE PUBLIC DOMAIN

204. Like in Kenya, an important area of Rwandese *Law on the Protection of Intellectual Property* concerns the treatment of folklore and the public domain. This legislation considers folklore and the public domain as part of the national culture and heritage. Therefore, in this jurisdiction, the use, for profit, of work in the public domain, or derived from Rwandan national folklore, shall be made in return for payment of royalties according to the conditions determined by the empowered authority.¹⁷⁹

This scheme applies to any use of folklore and public domain works, including video games; therefore, a producer who wishes to incorporate any of these works (e.g., a traditional song or story) into a video game, shall pay a royalty to the relevant authority according to the conditions determined by that entity. Finally, that authority shall allocate a part of the funds collected (25 per cent) to the promotion of creativity activity.

205. In conclusion, Rwanda has legislation that protects authors and the creation of original works (the Rwandese *Law on the Protection of Intellectual Property*), but this law does not establish a specific regime for video games, as this industry does not yet exist in Rwanda. Therefore, the protection of video games in this jurisdiction shall follow the general rules stated in the above-mentioned law.

SENEGAL

206. Law No. 2008-09 of January 25, 2008, on *Copyright and Neighboring Rights* of Senegal (hereinafter, the *Senegalese Copyright Act*) establishes, in Article 1, that “*the author of a work of the mind shall enjoy in that work an exclusive incorporeal property right that shall be enforceable against all persons.*” Article 12 affirms that “*the author of a work shall be the natural person who created it,*”¹⁸⁰ which author shall have both moral and economic rights. The *Senegalese Copyright Act* fulfills the principle of formality-free protection reflected in the Berne Convention when establishing in Article 2 that “*copyright shall arise from the mere fact of creation; a work shall be deemed to have been created, irrespective of any public disclosure or physical fixation, by the mere fact of realization of the author’s concept, even if incomplete.*”

Another aspect recognized by *Senegalese Copyright Act* is the irrelevance of form of expression, merit or purpose, as Article 5 determines that “*the provisions of the present Law shall protect the rights of authors in all works of the mind, whatever their form of expression, merit or purpose.*”

In this regard, and like in the other jurisdictions, there is no specific mention of video games in the list of protected works of the mind contained in Article 6, although the general description would suffice to provide protection under this law:

“Intellectual creations of a literary or artistic nature shall be considered works of the mind within the meaning of the present Law (...).”

The law establishes a non-exhaustive list of creations that are protected, such as: works using language, whether literary, scientific or technical, including computer programs, and whether written or oral; dramatic works and other works intended for stage presentation and productions, choreographic works, circus acts and feats and dumb-show works; musical works with or without words; works consisting of consequences of moving

¹⁷⁹ Articles 201 and 202 of the Rwandese *Law on the Protection of Intellectual Property*.

¹⁸⁰ The *Senegalese Copyright Act*.

images, with or without sound, known as audiovisual works; works of the visual arts (drawings, paintings, sculpture, architecture, photographic works) and geographical maps and plans, sketches and three-dimensional works relating to geography, topography, architecture and science.

CLASSIFICATION

207. As noted above, the Senegalese *Copyright Act* offers no classification for video games. Additionally, case law is silent on the issue simply because the courts have not been faced with disputes involving video games. This can also be explained by the fact that the video game market in Senegal remains in an embryonic stage, so the question of the classification of video games has not yet arisen.
208. According to the Senegalese *Copyright Act*, video games may receive multiple classifications. Depending on the number of persons contributing to the creative process, the games can be defined as collective or individual works according to the legal nature of the relationship between the different parties involved (e.g., cooperation contract, employment contract or service agreement). Where more than one person is involved in the creation process of a given video game, a work of joint authorship would exist,¹⁸¹ and the question of different contributors and their respective rights arises.

CONTRIBUTORS AND TRANSFER OF RIGHTS

209. The Senegalese *Copyright Act* recognizes certain moral and economic rights of authors. Indeed, Article 12 determines, as explained above, that the author of a work shall be the natural person who created it, while Articles 17 and 18 explain the special situation of the works created by an employee. Concerning initial ownership, the existence of an employment agreement shall in no way derogate from the enjoyment of copyright,¹⁸² nevertheless, there is a presumption of assignment to the employer.¹⁸³
210. The economic rights in a work created by an employee in the context of his or her employment shall be presumed to be assigned to the employer under the employment agreement, insofar as the employer's usual activities at the time of creation give grounds therefor. An employer that exploits the rights thus assigned shall pay remuneration separate from salary to the employee. In the absence of an agreement between the parties, the amount of such remuneration shall be determined by the competent court.
211. With regard to the transfer of rights, different situations can exist:

Independent authors

Article 65 of the Senegalese *Copyright Act* determines that an assignment of rights may be granted free of charge or for consideration. Where assignment is granted for consideration, it shall include for the author a proportional share of the revenue from exploitation of the work.¹⁸⁴ However, the author's remuneration may be calculated as a lump sum in the following cases: where a basis for calculating the proportional share cannot be practically determined, where the control cost would be disproportionate to the expected results, and where the use of the work is only of an accessory nature in relation to the object exploited.¹⁸⁵

¹⁸¹ Article 23 of the Senegalese *Copyright Act*.

¹⁸² Article 17 of the Senegalese *Copyright Act*.

¹⁸³ Article 18 of the Senegalese *Copyright Act*.

¹⁸⁴ Article 65.2 of the Senegalese *Copyright Act*.

¹⁸⁵ Article 65.3 of the Senegalese *Copyright Act*.

Audiovisual Works

Some experts consider that video games could be protected as cinematographic works, given the prevalence of this kind of audiovisual work and its similarities to film. In this regard, Article 81 of the Senegalese *Copyright Act* offers a definition of *Audiovisual Production Contracts*, as those “under which several natural persons undertake, in return for payment, to create an audiovisual work for a natural or legal person called the producer, who or which takes the initiative and has the responsibility for creating the work.” There is also a specific mention of the producers right in Article 82, which establishes a presumption of assignment according to which a contract binding the producer and the authors of an audiovisual work, other than the author of a musical composition with or without words, shall, unless otherwise stipulated, imply the assignment to the producer of exclusive exploitation rights in the audiovisual works.¹⁸⁶

Joint authorship

The Senegalese *Copyright Act* affirms, at the Explanatory Statement,¹⁸⁷ an important aspect of the spirit of this law. Indeed, in contrast to the philosophy underlying Anglo-American copyright, the interested parties are placed at the center of the legislation through a clear statement that they are the source of the intangible wealth which society will then enjoy. Hence, the choice to enshrine the rights of employed authors and officials; to relinquish the category of collective works, which, by granting rights to a legal entity, is incompatible with the personalized approach; to confirm the existence of strong and perpetual moral rights; to provide a broad and synthesized definition of the economic prerogatives granted to the various right owners (eliminating any doubt as to whether such a definition includes digital exploitation); and to elaborate a contract law that can compensate for the financially disadvantaged position of authors and performers in comparison with those who exploit their work.

The legal framework of works of joint authorship is contained in Articles 23 to 26 of the Senegalese *Copyright Act*, holding that *a work that is the product of collaboration between two or more authors shall be deemed a work of joint authorship, irrespective of whether it constitutes an indivisible whole or consists of autonomously created parts*. The economic rights and moral rights in such works shall be owned jointly by all the authors, and the authors shall therefore exercise those rights by common accord and, in the event of failure to agree, the courts shall decide. Another important aspect is that each of the joint authors shall be free to prosecute, on his or her own behalf, and without the intervention of the others, any infringement to his or her economic or moral rights.¹⁸⁸

FOLKLORE AND THE PUBLIC DOMAIN

212. Lastly, it has been deemed necessary, for the sake of consistency, to devote a separate part of the Senegalese *Copyright Law* – part four – to the protection of folklore and the “*domaine public payant*”, which, from a legal point of view, are issues on the margins of copyright but which to date have been considered sufficiently closely connected to the subject of copyright to be dealt with in the same legal framework.

Currently, many video game producers that are unwilling to obtain licenses to exploit protected works of authorship decide to use folklore and public domain works in order to develop a given video game. The Senegalese legislation considers folklore and public domain to be part of the national cultural heritage. The specific definition considers

¹⁸⁶ Article 82 of the Senegalese *Copyright Act*.

¹⁸⁷ Section 3, Explanatory Statement of the Senegalese *Copyright Act*.

¹⁸⁸ Article 24.4 of the Senegalese *Copyright Act*.

folklore all literary and artistic productions created by authors deemed to be of Senegalese nationality that are passed from generation to generation and constitute one of the basic elements of the traditional cultural heritage of Senegal.¹⁸⁹

Therefore, in this jurisdiction, the use, for profit, of works in the public domain or derived from Senegalese national folklore, shall be made in return for payment of royalties according to the conditions determined by the relevant authority.¹⁹⁰ The amount of the royalty is determined by the Minister for Culture, and it shall not exceed 50 per cent of the rate usually paid to authors in accordance with current contracts or practices.

This scheme applies to any use of folklore and public domain works, including video games. Therefore, a producer who wishes to incorporate any of these works (e.g., a traditional song or story) in a video game shall pay a royalty to the [relevant] [empowered] authority, according to the conditions determined by that entity. Finally, that authority shall allocate a part of the funds collected (25 per cent) for social and cultural purposes.

213. In conclusion, although Senegal has legislation that protects authors and the creation of original works, Law No. 2008-09 of January 25, 2008, on *Copyright and Neighboring Rights*, does not establish a specific regime for video games, as this industry is almost non-existent in Senegal. Therefore, the protection of video games in this jurisdiction shall follow the general rules stated in the above-mentioned law.

SINGAPORE

214. The *Copyright Act* (hereinafter, the Singaporean *Copyright Act*) (Chapter 63)¹⁹¹ does not establish any specific definition for video games, but the *Copyright (Excluded Works) Order* of 2008, in force until December 31, 2012, which deals with works excluded from the Singaporean *Copyright Act*, determines the works to which Section 261C(1)(a)¹⁹² of the Singaporean *Copyright Act* (regarding the circumvention of technological measures) shall not apply. At its point 4(b), this Order excludes the application of Section 261C(1) to “any computer program or video game- i. which is distributed in an obsolete format and ii. to which access may be gained only by means of the original medium or hardware in or with which it was designed to be used or operated.” Such exclusion of protection seems to refer only to the relationship between video games and technological protection measures and, in our opinion, it would literally mean that, except for such cases, video games should enjoy the same protection afforded to computer programs.

CLASSIFICATION OF VIDEO GAMES

215. According to the Singapore *Copyright Act*,¹⁹³ any “literary, dramatic, musical or artistic” work under this law deserves copyright protection. Additionally, the Singaporean *Copyright Act* also differentiates “artistic works”, which are paintings, sculptures, drawings, engravings or photographs, whether the work is of artistic quality or not; and a building or

¹⁸⁹ Article 156 of the Senegalese *Copyright Act*.

¹⁹⁰ Articles 157 and 158 of the Senegalese *Copyright Act*.

¹⁹¹ *Copyright Act*, Chapter 63, approved on 1987 and current version from 2006.

¹⁹² Circumvention of technological measures 261C.—(1) *Subject to sections 261D and 261E, where a technological measure is applied to a copy of a work or other subject-matter by or with the authorization of the owner of the copyright in the work or subject-matter in connection with the exercise of the copyright, or to a copy of a performance by or with the authorization of the performer of the performance in connection with the exercise of any right in the performance, no person shall, without the authorization of the owner of the copyright or the performer of the performance, as the case may be - (a) if the technological measure is a technological access control measure, do any act which he knows or ought reasonably to know circumvents the technological measure.*

¹⁹³ Article 7 of the Singaporean *Copyright Act*.

model of a building, whether the building or model is of artistic quality or not. Finally, the law also offers protection to computer programs, which means:

*“an expression, in any language, code or notation, of a set of instructions (whether with or without related information) intended, either directly or after either or both of the following: (a) conversion to another language, code or notation; (b) reproduction in a different material form, to cause a device having information processing capabilities to perform a particular function.”*¹⁹⁴

All of these types of works (e.g., scripts, models of buildings, paintings, characters, and computer code) can be found in video games, and all of them, individually, are protected under the Singaporean *Copyright Act*.

Nonetheless, video games, as a whole, are mainly computer programs according to the Singapore legislation. When developing software, the starting point is usually to identify the problem or task that the program is to solve or perform. In doing this, the programmer prepares written documentation – notes, flow charts and algorithms – which constitutes the source documents of the final work. These source documents enjoy copyright protection, according to the Singaporean *Copyright Act*, as a type of artistic or literary work, where they fulfill the requirements of the law.

216. Once these source documents are prepared, the programmer will then write a program in a high-level language (i.e., Basic, Cobol, Fortran or Java);¹⁹⁵ computer programs are considered “*literal expressions*”, and in the copyright system will therefore fall under Section 7A of the Singaporean *Copyright Act*, which includes computer programs in the definition of “*literary works*”. According to *Halsbury’s Laws of Singapore*, a computer program is eligible for copyright and is protected as a literary work. Both the source and object codes are entitled to copyright protection.¹⁹⁶
217. Computer programs are therefore accorded copyright protection where the form of expression is original, which is the author’s original (intellectual) creation. Nonetheless, video games can also be classified as “audiovisual works” where they comprise both audio recordings and artistic renditions. Accordingly, audiovisual works “*means a sound recording, a cinematograph film, a sound broadcast, a television broadcast or a cable programme*”,¹⁹⁷ and cinematograph films means:
- “the aggregate of visual images embodied in an article or thing so as to be capable by the use of that article or thing (a) of being shown as a moving picture; or (b) of being embodied in another article or thing by the use of which it can be so shown, and includes the aggregate of the sounds embodied in a sound-track associated with such visual images.”*
218. Therefore, in accordance with the Singaporean legislation, one needs to analyze the specific elements of a given video game in order to ascertain its legal classification, as this will depend on the computer program and the audiovisual (and cinematographic) components included in the game.

¹⁹⁴ *Ibid.*

¹⁹⁵ *The Law of Copyright in Singapore (Second Edition)* by George Wei.

¹⁹⁶ *Creative Technology Ltd v. Aztech Systems pte Ltd* [1997] 1 SLR 621; *Creative Purpose Sdn Bhd v. Integrated Trans Corp Sdn Bhd* [1997] 2 MLJ 429; *Ibcos Computers Ltd v. Barclays Mercantile Highland Finance Ltd* [1994] FSR 275.

¹⁹⁷ Section 102 of the Singaporean *Copyright Act*.

RIGHTS HOLDERS AND STAKEHOLDERS

219. The main stakeholders include the computer programmers, the producer/investor funding the development of the video game, the artistic and creative talent involved in the project and the publisher.

The Singaporean *Copyright Act* provides a narrow definition of an author. Throughout the text, it determines that copyright shall subsist in an original literary, dramatic, musical or artistic work that is unpublished and of which the author was a qualified person at the time when the work was made; or, where the making of the work extended over a period of time, the author was a qualified person for a substantial part of that period.¹⁹⁸

220. With respect to video games, the author will be the person/s who originated the expression of the work, including all its elements (e.g., computer software, graphics and sounds). However, most video games currently being developed are created by more than one person, or commissioned by one studio. In many cases, these are works of joint authorship, which means “*a work that has been produced by the collaboration of two or more authors and in which the contribution of each author is not separate from the contribution of the other author or the contributions of other authors.*”
221. Another question that has arisen due to the development of modern technologies is the issue of the works created by gamers involved in online gaming. Users may have been given rights to modify the underlying code or to create a new work from the original work, in which case the new creation is a derivative work and the new program content may be exclusively owned by the user/player, which excludes the original content or work. The new work must be original, recorded and a product of effort. However, the Singapore courts have not yet come across cases involving the legal rights and limitations of player-characters/user-creators. Players’ rights are generally set out in the End-User License Agreement between the game provider and the gamer. Additionally, it is common to see a term that provides for game providers to own everything in the virtual world.

RIGHTS REGIME

222. Concerning the ownership of copyright in original works where they have been created under an employment relationship,¹⁹⁹ there is no highly developed regime in Singapore. Thus, generally, where a literary, dramatic or artistic work (including computer code and musical works) is made by the author in pursuance of the terms of his or her employment by another person under a contract of service or apprenticeship, that other person shall be entitled to any copyright subsisting in the work by virtue of this part.
223. In any other case, copyright shall be transmissible by assignment; however, no assignment of copyright (whether total or partial) shall have effect unless it is in writing and signed by or on behalf of the assignor. Therefore, where a Singaporean video game studio hires an independent contractor to develop certain elements of a video game, there is no a presumption that rights are assigned to the producer, which, therefore, shall act diligently and include in the service agreement the assignment of the copyrights in its favor.

ECONOMIC COMPENSATION

¹⁹⁸ Section 27 of the Singaporean *Copyright Act*: “Original works in which copyright subsists.”

¹⁹⁹ Section 30 of the Singaporean *Copyright Act*.

224. For an employee, compensation for a creative contribution may be included in the salary, as the work is done in the course of employment, or may be alternatively structured as contractually agreed upon between the employer and the employee. Singapore law is silent on the case of independent contractors and, therefore, compensation, a purely commercial decision, would be subject to an agreement between the parties.

SOUTH AFRICA

225. The main source of copyright law in South Africa is the *Copyright Act* as amended (hereinafter, the South African *Copyright Act*), which regulates all aspects of copyright in the country, including the rights to compensation, acknowledgement, authorship, usage and distribution of works.²⁰⁰ This legislation follows broadly the United Kingdom and Commonwealth copyright traditions. Furthermore, South Africa is party to the *Berne Convention for the Protection of Literary and Artistic Works*²⁰¹ as well as to the *Agreement on Trade-Related Aspects of Intellectual Property Rights*²⁰² (TRIPS Agreement).

CLASSIFICATION OF VIDEO GAMES

226. There is no specific mention of video games in South African *Copyright Act*, more precisely in Article 2 regarding works eligible for copyright. Nonetheless, video games are legally classified as “cinematograph films” in South Africa,²⁰³ as was decided in the Supreme Court of Appeals case of *Golden China TV Game Centre and Others v. Nintendo Co Ltd.*²⁰⁴

A “cinematograph film” is defined by the South African *Copyright Act*²⁰⁵ as:

*“any fixation or storage by any means whatsoever on film or any other material of data, signals or a sequence of images capable, when used in conjunction with any other mechanical, electronic or other device, of being seen as a moving picture and of reproduction, and includes the sounds embodied in a sound-track associated with the film, but shall not include a computer program.”*²⁰⁶

Nonetheless, given the complexity of video games, other elements can also be copyrighted, including the computer program used to run the work. Such software is also protected under the South African *Copyright Act*, which includes (i) a version of the program in a programming language, code or notation different from that of the program; or (ii) a fixation of the program in or on a medium different from the medium of fixation of the program.

AUTHORS

²⁰⁰ Act 98 of 1978.

²⁰¹ *Berne Convention for the Protection of Literary and Artistic Works* of September 9, 1886, completed at Paris on May 4, 1896.

²⁰² The TRIPS Agreement is Annex 1C of the *Marrakesh Agreement Establishing the World Trade Organization*, signed in Marrakesh, Morocco, on April 15, 1994.

²⁰³ “New technologies and old copyrights: the protection of video games as cinematograph films” (1995) 7 *South African Mercantile Law Journal* 112–120.

²⁰⁴ 1997 (1) SA 405 (SCA).

²⁰⁵ The South African *Copyright Act*.

²⁰⁶ Article 1 of the South African *Copyright Act* at “Definitions”.

227. According to the South African *Copyright Act*, the “*author of a cinematograph film is the person by whom the arrangements for the making of the film were made.*”²⁰⁷ Generally, video game studios arrange all the elements necessary (including financial) to produce video games; in such a case, the studio shall be the author in accordance with the Act.

In order for an author or authors to copyright their work, he or she needs to be what is defined as a “qualified person”, which is, in the case of an individual, a person who is a South African citizen or who is domiciled or resident in the country; or, in the case of a legal person, a body incorporated under the laws of the country.²⁰⁸ Regardless, works copyright-protected in other Berne Convention countries are copyright-protected in South Africa and *vice versa*.

228. Where an employer-employee relationship exists, the South African *Copyright Act* provides that, as a general rule, the ownership of the copyright vests in the author, except where a person commissions the making of a cinematograph film and pays for it pursuant to the commission, in which case the owner of the copyright subsisting in the work so made will be the commissioner (in other words, the employer).²⁰⁹ In this context, the employee would be considered the author, while the employer is considered the owner of the copyrights. The same rule applies for works made in the course of an employment agreement, in which case the employer will be the copyright owner, while the employee will be considered the author.

STAKEHOLDERS AND TRANSFER OF RIGHTS

229. Only a person who is the owner of the copyright in the cinematograph film may submit a copyright application to the Registration of Copyright in Cinematograph Films, and only owners and their successors in title have the right to authorize or to prohibit the commercial sale or rental to the public of originals or copies of their copyrighted works. In South Africa, the owner of the copyrighted video game would depend on the contractual nexus between the developing parties and their local subsidiaries, including whether such contracts allow for a cession of ownership and/or enforcement rights.

South African copyrights are governed by a legislative regime. As mentioned above, the South African *Copyright Act*, the *Berne Convention*, the *TRIPS Agreement* and other international treaties to which South Africa is a member provide the framework for the administration and regulation of copyrights.

230. However, there are contractual, automatic and presumptive regimes that govern the way owners, distributors, retailers and end-users use copyrighted works. In order to distribute and market the works copyrighted by and belonging to the owner, the parties along the chain of supply will set up agreements that entail copyright transfer to the other parties, in part or completely. This may be in the form of a:

- a. “Non-exclusive” license: this can be in a written or verbal format. It can be revoked, and more than one license is possible.²¹⁰
- b. “Exclusive” license: this must be in writing and for a prescribed term. It precludes use by anyone else without written consent.²¹¹

²⁰⁷

Ibid.

²⁰⁸

Section 3(1) of the South African *Copyright Act*.

²⁰⁹

Section 21(1)(c) of the South African *Copyright Act*.

²¹⁰

Section 22 of the South African *Copyright Act*.

²¹¹

Ibid.

231. Despite these contractual arrangements, the author always retains the moral rights, which cannot be transferred. These give the author the right to be named as the author of the work. Moral rights are aimed at protecting the author's work from distortion, mutilation or other circumstances that could harm the author's reputation.²¹²
232. Copyrights are furthermore transferred by testamentary disposition, automatically passing to an heir's estate by inheritance in the same way as an asset does. When an unpublished work is inherited, the copyright, including the protection of moral rights, is inherited as well. Transfer occurs by operation of law if the copyright holder becomes insolvent in order to service his or her other debts.²¹³

FINANCIAL COMPENSATION AVAILABLE FOR AUTHORS AND OWNERS

233. The owner (or author, if he or she is also the owner of the copyrights) is entitled to equitable remuneration for the use of the work belonging to him or her by others, for example through royalties, which are typically agreed upon between the parties. A license agreement defines the terms under which the copyrights are licensed by one party to another, and the remuneration will depend on the type of license and the restrictions on that license, as agreed upon by the parties.
234. In essence, the manner in which the employee is remunerated will depend entirely on what was agreed upon in an employee's contract of employment, or in the service agreement. However, according to the *Basic Conditions of Employment Act*, an employer must pay to an employee any remuneration that is paid in money.²¹⁴ A true independent contractor will be paid in a lump sum once performance is complete or in proportion to the stage of completeness, as set out in the contract between him or her and the contractor. In the latter case, the contractor will invoice the employer at intervals and will be paid accordingly. No mandatory royalties are required by the South African *Copyright Act*.

CONTRIBUTIONS BY PLAYERS INVOLVED IN INTERACTIVE ONLINE GAMING

235. This is an area of law that may be problematic in the South African context. According to the South African *Copyright Act*, the ownership of any copyright in a work shall vest in the author or, in the case of a work of joint authorship, in the *co-authors* of the work.²¹⁵ A "work of joint authorship" means a work produced by the collaboration of two or more authors in which the contribution of each author is not separable from the contribution of the other author or authors. It could be argued in these circumstances that the contributions of an online gamer could be considered a collaboration or contribution. Furthermore, the copyright shall be conferred on every work eligible for copyright, of which the author or, in the case of a work of joint authorship, any one of the authors is a person who is a South African citizen or is domiciled or resident in the country.²¹⁶

However, most online gaming platforms will be the subject of terms and conditions for use, which may, *inter alia*, take the form of an End-User License Agreement or Software License Agreement, enforceable by the South African courts. An end-user license agreement or software license agreement is a contract between the licensor and purchaser, establishing the purchaser's right to use the software. It is this contract that will determine the status of interactive online players.

²¹² Section 20 of the South African *Copyright Act*.

²¹³ Section 22 of the South African *Copyright Act*.

²¹⁴ Act 75 of 1997.

²¹⁵ Section 21(1)(a) (*supra* note 16) of the South African *Copyright Act*.

²¹⁶ Section 3(1)(a) of the South African *Copyright Act*.

For example, the End-User License Agreement for PlayStation 3,²¹⁷ one of the most popular online interactive gaming platforms in South Africa, provides that all titles, content, publisher names, trademarks, artwork and associated imagery are the trademarks and/or copyright material of the owners, that being, in this case, Sony Entertainment Limited. The agreement provides that an online gamer may not lease, rent, sublicense, publish, modify, adapt, translate any portion, broadcast, reverse engineer, decompile or disassemble any portion of the game software, or create any derivative works therefrom. Furthermore, the gamer may not resell the game software. The agreement clearly provides that the online gamer does not have any ownership rights or interests in the system software.

236. In South Africa, contracts wherein a user does not sign, but accepts the terms and conditions by accessing the software, are enforceable according to Sections 11, 12 and 13 under the *Electronic Communications and Transactions Act*.²¹⁸ Section 13 in particular provides that, where an electronic signature is not required by the parties to an electronic transaction, an expression of intent or other statement is not without legal force if such person's intent or other statement can be inferred. This provides for so-called "click" agreements, where a user simply indicates acceptance of terms and conditions as binding.

Therefore, in order to determine who will own the copyrights in a work created by a gamer, one must first analyze the end-user license agreement imposed by the platform owner to determine if there is a transfer of rights from the gamer/author to the video game studio, and its validity according to South African law.

237. As in other jurisdictions, South Africa affirms the distributive classification of video games, offering protection through different means, including software, cinematograph films and characters. Nonetheless, certain issues relating to authors' and contributors' rights under the South African *Copyright Act* remain unclear, such as where it affirms that the author of a cinematograph film is the person who made the arrangements for making the film, but afterwards establishes that, in employment relationships, the employee is the author while the employer is the owner of the copyrights. Therefore, gaps still remain that could be addressed by future legislation.

SPAIN

CLASSIFICATION OF VIDEO GAMES

238. Intellectual property is regulated in Spain mainly through the *Royal Legislative Decree 1/1996* of April 12, 1996, which approves the *Consolidated Text of the Law on Intellectual Property*, regularizing, clarifying and harmonizing the applicable statutory provisions, which has undergone many amendments in recent years (hereinafter, the Spanish *Copyright Act*). As is the case in other jurisdictions, Spanish law protects "*all original literary, artistic or scientific creations expressed in any manner or medium, whether tangible or intangible, that is known at the present or may be invented in the future.*"²¹⁹ The text also provides a non-exhaustive list of works that can be protected under this law and, although video games are not specifically mentioned, musical compositions, cinematographic and other audiovisual works, plans, models, drawings and computer programs are (among others). Therefore, there is no reference to video games *per se* in

²¹⁷ PlayStation 3 End-User License Agreement, available online at http://www.scei.co.jp/ps3-eula/ps3_eula_en.html [last accessed: July 6, 2012].

²¹⁸ Act 25 of 2002.

²¹⁹ Article 10 of the Spanish *Copyright Act*.

the Spanish legislation neither does it provide a legal classification or a defined list of their characteristics.

239. Nonetheless, since the Spanish *Copyright Act* considers that any original artistic work is eligible for copyright protection, this kind of modern work certainly does not lack protection. The issue then relates to the specific nature of that protection for video games and the applicable legal regime.

In this sense, video games are a new kind of work that, in general terms, comprises multiple elements, e.g., graphs, maps, photographs, audiovisual works, musical works, choreographies, characters and scripts. In this context, the Spanish *Copyright Act* protects any individual element of a video game, as long as it is original and creative. The question here concerns how a video game should be protected as a whole, sole work of authorship. Some scholars think that video games are, essentially, *multimedia works* (which are not defined by the Spanish *Copyright Act*) running on a computer program,²²⁰ while others hold that these multimedia works are essentially framed within the category of audiovisual works, following the majority of international doctrine and jurisprudence.²²¹

240. According to Article 86 of the Spanish *Copyright Act*, cinematographic and other audiovisual works are “creations expressed by means of a series of associated images, with or without incorporated sound, that are intended essentially to be shown by means of projection apparatus or any other means of communication to the public of the images and of the sound.” Some authors, including Francisco Javier Donaire Villa and Antonio José Planells de la Maza, have considered that this definition excludes the qualification of video games as audiovisual works, as they do not fulfill one of the basic requirements of the article, which is that these works essentially are not intended to be shown by means of projection apparatus, but to be played in an interactive way.²²²

241. Spanish jurisprudence has not yet addressed the question of the classification of video games. Most of the judicial cases involving video games have been in criminal courts, regarding piracy (in terms of both the video games themselves and the relevant technological protection measures). When analyzing these issues, criminal courts (which are not copyright specialists) have treated video games as software, applying the specific regime for this kind of work of authorship,²²³ although this may be because technological protection measures are usually aimed at protecting the game software.

In 2003, the *Audiencia Provincial de Barcelona* (Civil Court of Appeal)²²⁴ heard a case regarding the infringement of the rights of the developer of the famous video game *Tomb Raider*, by a magazine publisher that had issued an article which included a model portraying the famous video game character, even with erotic connotations. The ruling said that Article 10 of the Spanish *Copyright Act* includes, as a matter of example, a *numerus apertus* list of protectable works, including audiovisual works, software or drawings although it did not clarify whether the mention of these three types of works indicated that the tribunal considered that video games contained these specific elements rather than others. In any case, the court ruled against the defendant, holding that the

²²⁰ “*Manual de propiedad intelectual*”, by Rodrigo Bercovitz, p. 279.

²²¹ “*La Protección Jurídica de los Derechos de Autor de los Creadores de Videojuegos*”, by Francisco Javier Donaire Villa and Antonio José Planells de la Maza, pp. 113-117.

²²² “*La Protección Jurídica de los Derechos de Autor de los Creadores de Videojuegos*”, by Francisco Javier Donaire Villa and Antonio José Planells de la Maza, p. 118.

²²³ For example, the sentence of the Court of Appeal Audiencia Provincial de las Islas Baleares of March 31, 2001, and of the Court of First Instance Juzgado de lo Penal nº 4 de Barcelona, of January 28, 2004.

²²⁴ Sentence of the Audiencia Provincial de Barcelona of May 28, 2003.

publisher infringed the rights (both the moral and the patrimonial) of the video game studio when the popular video game character was depicted by the model.²²⁵

242. Therefore, and although most of the criminal courts analyzing cases regarding video games have considered these to be mainly computer programs, the question of their legal classification remains unanswered. One school of thought holds that video games should be protected as a whole, not as an audiovisual work of individually-protected elements (e.g., software, images, graphics, sounds, characters and script).

STAKEHOLDERS, AUTHORS AND CONTRIBUTORS

243. A video game is a work that requires the involvement and participation of a great number of professionals, including, from the creative or technical side, sound engineers, software programmers and animators, and from the business side, producers, marketing specialists, publishers and online platform operators. All of them contribute to the game although, in principle, only those that develop a creative and original work are entitled to receive copyright protection.

According to the Spanish *Copyright Act*, Article 5, “*the natural person who creates any literary, artistic or scientific work shall be considered the author thereof. Nevertheless, the protection that this Law confers on the author may be enjoyed by legal entities under the circumstances expressly provided for therein.*” Therefore, legal entities cannot become authors, but can acquire almost all of the exploitation rights (excepting the unwaivable remuneration rights), on an exclusive basis, and with almost no limitation.

244. Where a video game is created by more than one author (which is customary in this industry), there are two possible rights regimes to consider: (1) Works of Joint Authorship; and (2) Collective Works. Regarding the first category, Article 7 of the Spanish *Copyright Act* establishes that the rights in a work that is the unitary result of the collaboration of two or more authors shall belong to all of them, in proportions determined by them. In contrast, a collective work is created at the:

*“initiative and under the direction of a person, whether natural person or legal entity, who edits it and publishes it under his name, and where it consists of the combination of contributions by various authors whose personal contributions are so integrated in the single, autonomous creation for which they have been made that it is not possible to ascribe to any one of them a separate right in the whole work so made.”*²²⁶

In this case, the rights in the collective work shall vest in the person who publishes it in his or her name, which can be a natural person or a corporation.

Indeed, corporations usually assume such a role in the video game industry, that is, they take the initiative and direct a group of persons and resources to create the video game. The issue here is that, if one considers that video games are *audiovisual works*, then they cannot be considered collective works, as the Spanish *Copyright Act* imposes (with the aim of protecting authors) that audiovisual works are *works of joint authorship* and not collective works.²²⁷ Therefore, the classification of video games is also important when analyzing whether they are, according to Spanish law, collective works (which seems to

²²⁵ This conclusion was quite controversial in Spain, since Article 5 of the Spanish *Copyright Act* holds that only natural persons can be authors, so only they can have moral rights, and since the plaintiff in this case was a corporation with, in principle, no moral rights.

²²⁶ Article 8 of the Spanish *Copyright Act*.

²²⁷ Article 87 of the Spanish *Copyright Act*.

be a suitable category based on the way in which video games are usually developed) or works of joint authorship (which is more favorable to authors).

In any event, an author will always be the natural person who has created a work, pursuant to Article 5 of the Spanish *Copyright Act*, while what will vary is the rights regime in either case.

245. Regarding individuals/gamers involved in online or offline gaming, creating new works for a given video game by using the tools provided by the game developer (for example, the popular game *Little Big Planet*, in which user creation of levels and settings is one of its essential elements), the rights regime is described below. In such cases, the new work can be considered an independent work²²⁸ (where it constitutes a new creation) or a derivative work (where it transforms a previous artistic work, which can be a stage of the game).
246. In that case, gamers will be entitled to copyright protection as long as they create an original work of authorship. The copyright in such works will vest initially in the creator, unless there is a contractual relationship between the gamer and a third person (generally, the video game studio or the owner of the online platform). Gamers involved in online gaming usually have to accept certain terms and conditions in order to play in an online environment or to share their creations with the gaming community (so-called “End-User License Agreements”). Therefore, the game studio shall determine who owns the copyright or what kind of license is granted when uploading a certain creation to an online platform.

WHO OWNS THE RIGHTS

247. According to the Spanish *Copyright Act*, in principle the author is the owner of the copyrights in the work created by him or her; however, in the event of a work of joint authorship, the rights belong to all of the authors (unless they have agreed otherwise), and where a collective work exists, the person who took the initiative and coordinated the work is the holder of the copyrights.

The Spanish *Copyright Act* regulates the transfer of rights, holding that “*the exploitation rights in the work may be transferred by inter vivos transaction, the transfer being limited to the right or rights transferred, to the means of exploitation expressly provided for and the time and territorial scope specified.*”²²⁹ Therefore, any transfer of rights must be evidenced in writing, and if the parties fail to establish the scope of the transfer, Article 43 deems that the duration of the transfer shall be five years, the territorial scope is the country in which the transfer is effected, and the exploitation rights those necessarily deduced from the contract itself and that are essential to fulfilling the purpose of the contract.

248. As a consequence, where a video game studio hires a freelancer to develop certain elements of a game, the company must acquire the exploitation rights of the original author of the content they will include in the video game by signing a license agreement or a service agreement stipulating the transfer of rights therein. In such documents, the video game studio must ensure that the scope of the transfer is properly reflected, including the exclusivity of the granting, the unlimited territorial and temporal extent, and the rights (e.g., reproduction, distribution and communication to the public) expressly

²²⁸ Article 9.2 of the Spanish *Copyright Act*: “A work that constitutes an autonomous creation, even if published in conjunction with other works, shall be considered an independent work.”

²²⁹ Article 43 of the Spanish *Copyright Act*.

granted. In the event the parties do not include this information in the agreement, the rights described above will apply.

Nevertheless, the rights regime is different for salaried authors, as the Spanish *Copyright Act* establishes that, in the absence of an agreement in writing between the author/employee and the employer, *“it shall be presumed that the exploitation rights have been granted exclusively and with the scope necessary for the exercise of the customary activity of the producer at the time of the delivery of the work made by virtue of the said employment relations.”*²³⁰ However, in this sector, video game studios usually include in their employment agreements a stipulation by which the authors transfer their rights, without limitation, to the company; therefore, only on rare occasions when studios do not include such clauses would the above-mentioned presumptions apply.

249. With respect to the computer software included in a video game, the presumption of ownership of the rights is different, as Article 97.4 of the Spanish *Copyright Act* establishes that:

“where a salaried worker creates a computer program in the course of duties entrusted to him or on instructions from his employer, the ownership of the corresponding exploitation rights in the computer program so created, including both the source program and the object program, shall belong exclusively to the employer, unless otherwise agreed.”
The difference between software and other types of works is, therefore, the scope of the rights presumably transferred being limited in the case of artistic works, and unlimited for software.

250. Thus, under Spanish law, it is highly recommended to include in the agreement between video game studios and authors the transfer of rights between the latter to the former. However, most video games are created at the initiative and under the direction of a legal person, so they can be considered collective works; in that case, and in the absence of an agreement to the contrary, the rights in the collective work (not in the individual elements that are part of it) will vest exclusively in the producer.

COMPENSATION

251. The Spanish *Copyright Act* is especially protective of authors, as it considers them the weakest part of the value chain. Following this premise, regarding compensation Article 46 states that *“the transfer granted by the author for a consideration shall entitle him to a proportional share in the proceeds of exploitation, the amount thereof being agreed upon with the transferee.”* However, the Act²³¹ acknowledges the difficulty in determining the amount in certain cases, as it authorizes the payment of a lump sum to the author:

- When, on account of the manner of exploitation, there is great difficulty in calculating the proceeds, or where their verification either is impossible or would incur costs out of proportion to the eventual rewards; and
- Where the work, being used with others, does not constitute an essential element of the intellectual creation in which it is embodied.

252. Therefore, any of these could be used by a video game studio to justify the payment of a lump sum instead of a royalty, as either could be perfectly applicable to a video game, where the contribution of a single author usually is not an essential element of the game or when it is difficult to calculate the royalty.

²³⁰ Article 52 of the Spanish *Copyright Act*.

²³¹ Article 46 of the Spanish *Copyright Act*.

253. In conclusion, Spain does not have a specific legal framework for video games and, unlike many other countries, scholars are skeptical about the applicability of the audiovisual works regime for this kind of work. In any case, the Spanish *Copyright Act* is quite developed with respect to the transfer of rights, which can be perfectly applicable to video games.

URUGUAY

CLASSIFICATION

254. The applicable legislation regarding copyright protection in Uruguay is contained in one statutory law, *Law No. 9.739 of December 17, 1937, on Copyright* (last modified by Law No. 18,046 of October 24, 2006) (hereinafter, the *Uruguayan Copyright Act*). Nevertheless, copyright protection is also provided for in the *Constitution of the Oriental Republic of Uruguay*, of 1997, in which Article 33 establishes that “*intellectual work, copyright, inventors and artists, will be recognized and protected by law.*”
255. Although video games are not specifically foreseen in the *Uruguayan Copyright Act*, these works have been protected as copyrighted works since the adoption of an open legal definition according to Sections 1 and 5 of the *Uruguayan Copyright Act* (as amended by Law 17.616 of January 10, 2003). This amendment includes a more detailed list of works that may be protected under copyright. As mentioned above, video games are not included in this list, which includes new works such as:
- a. Audiovisual works, including cinematographic works, produced and expressed by any means or process.
 - b. Computer programs, whether in source or object code; compilations of data or other material, in any form, which by reason of the selection or arrangement of their contents constitute intellectual creations.²³²
256. A specific legal classification within copyright applicable to video games has neither been included in statutory law nor has the matter been addressed by Uruguay’s courts or by legal scholars (with the exception of certain piracy cases). Nevertheless, and in the absence of specific legal guidance, business practice has shown that video games are actually protected under copyright, because the National Registry of Copyrights recognizes such intellectual works as it is not necessary, upon registration, to identify the nature of the work.

Hence, the issue remains unclear as to whether video games should be regulated as audiovisual works or as software. However, due to the nature of video games and the particularities of the industry, a strong argument can be made in favor of these works being regarded as software under Uruguayan law.

One of the arguments for placing video games under software protection was mentioned during the third regional seminar on Intellectual Property for Judges and Prosecutors of Uruguay in 2004. During the seminar, criminal and piracy cases regarding software were studied and video games were specifically mentioned. A judge of the Criminal First Instance Court found liability with respect to parties “*who reproduced software processes (software and video games) without permission of the authors and/or assignees.*”²³³

²³² Section 5 of the *Uruguayan Copyright Act*, as amended by Law 17.616 of January 10, 2003.

²³³ The cases listed are for the Legal Court of First Instance in Criminal Shift Sixth:

THE BUSINESS REALITY IN URUGUAY

257. In recent years, Uruguay has become a fast-growing market for video game production, mainly due to important tax incentives for the development of software and Free Trade Zones that allow companies to provide services such as programming, with no tax in Uruguay to third parties outside the country.

The main stakeholders involved in the recent development of the video game industry are national freelance programmers that sell their content to third parties outside Uruguay, and small and medium-sized local companies that produce content at the request of foreign companies.

The Ceibal Plan, a governmental entity responsible for the “One Laptop Per Child Program”, which provides every student in public education and some private institutions with a laptop for educational purposes, is also heavily involved in the production of educational video games. This institution frequently organizes contests in which freelance programmers, small local companies and even students develop video games for their use at the “Ceibalitas” (the name given to the laptops of the Ceibal Plan).

RIGHTS HOLDERS AND STAKEHOLDERS

258. The Uruguayan *Copyright Act* does not provide a legal definition of *author*, although considering the continental tradition of this country and the concession of profound moral rights, it is understood that only natural persons can become authors. Therefore, legal persons can acquire exploitation rights from individuals, as well as the exercise of moral rights, although they will never be considered *authors* in this jurisdiction. Authors of a video game will be those individuals who contribute to the work, creating original elements of any nature (literary, scientific or artistic).

In this regard, other persons can create original works that could be incorporated into a video game, for example online gamers using the toolbox provided by the video game studio. The original contributions by players or users of a video game should be studied on a case-by-case basis to analyze the level of authorship of the specific contributions and to determine whether they can be the subject of protection. Either way, an assignment clause incorporated within the terms and conditions of the video game is crucial to ensuring the full exploitation rights for the video game producer.

259. As noted above, video games in Uruguay are more likely to be treated as software, and this analysis therefore focuses on authorship and the rights holders, as established for software creations under the Uruguayan *Copyright Act*. Nevertheless, and for the sake of a possible future consideration of a distributive classification, authorship and the rights holders of an audiovisual work are also briefly analyzed below.

A. Software

Software can be developed in Uruguay by one or several authors; therefore, the creation may be a collective work, and the rights equally shared by the authors involved in the development of the software.²³⁴ Nonetheless, the Uruguayan *Copyright Act* presumes that the authors of software have assigned their economic

[Footnote continued from previous page]

(a) Mariño Gonzalez, Hugo Daniel, Sheet S 48/93;

(b) Natalevich, James Daniel, Tab S 244/94;

(c) Nappa Pozzi, Raul and others, Sheet S 46/95.

²³⁴ Sections 27 and 28 of the Uruguayan *Copyright Act*.

rights to the producer in an unlimited and exclusive manner, which also implies authorization to make decisions regarding disclosure and exercise of moral rights. Moreover, and unless otherwise agreed, authors may not oppose changes or successive versions of such creations made or authorized by the producer.²³⁵

In Uruguay, the authors of a software creation can be employees of the producer; in addition, the employment relationship can be public or private, and the author/employee can be responsible for the entire software program or just a portion of it. The presumption for employees is identical to that of authors with respect to the producer; therefore, unless otherwise agreed, it is presumed that the employee has *authorized* (as opposed to assigned) the employer or the person commissioning the work to exercise, in an unlimited and exclusive manner, the economic rights and the moral rights in the work.²³⁶

B. Audiovisual works

Uruguayan law establishes that an audiovisual work is a collective work, and it is therefore presumed, in the absence of proof to the contrary, that audiovisual works have the following co-authors: the director, the screenwriter and the composer, if any, and the animator in the case of animation. It is also presumed that the authors of the audiovisual work have assigned their economic rights exclusively to the producer, who furthermore retains ownership of the right to change or alter the work, as well as being authorized to make decisions concerning its exploitation. Moreover, the producer of the audiovisual work may defend the moral rights in the work without prejudice to the rights of the authors.²³⁷

The difference between the regulation of software and audiovisual works is that the Uruguayan *Copyright Law* does not include a specific provision regarding the employment relationship between the producer and the authors of an audiovisual work. There is thus no presumption regarding the assignment or authorization of the employees' intellectual work.

260. Bearing in mind the lack of clarity discussed above regarding the application to video games of the regulatory provisions on software or audiovisual works, in Uruguay it is strongly recommended to include a specific assignment of the author's intellectual property rights in the labor contract to avoid any risks regarding the real transfer of rights to the producer.

COMPENSATION

261. Compensation for creative contributions is determined on a contractual basis between the producer and the independent contractor or employee. Due to the legal provisions described above, in the case of software it is understood that compensation is included in the salary as long as the creative activity: (i) is directly related to the scope of employment; and (ii) is produced by the employee during the course of work for the employer. In such a case, contractual clarification would be unnecessary.
262. In the case of audiovisual works, there is no legal provision regarding the creative activities of employees, and it would therefore be advisable to include a stipulation in the work contract to establish that all creations taking place in the course of work are deemed to be compensated by the agreed salary and that the rights shall be deemed as

²³⁵ Sections 29.7 and 29.8 of the Uruguayan *Copyright Act*.

²³⁶ Section 29.9 of the Uruguayan *Copyright Act*.

²³⁷ Sections 29.2 and 29.3 of the Uruguayan *Copyright Act*.

automatically transferred to the producer pursuant to Section 29.3 of the Uruguayan *Copyright Act*. This same consideration applies to independent contractors.

263. In conclusion, there is currently no specific legislation in Uruguay applicable to video games, although business practice has confirmed the availability of protection via public registries as software and computer programs. Recent trends in video games and the evolution of their graphical quality may also lead to their protection as audiovisual works, making it likely that Uruguay will move towards a distributive classification.

SWEDEN

CLASSIFICATION OF VIDEO GAMES

264. Sweden protects works of authorship through the “*Lag (1960:729) om upphovsrätt till litterära och konstnärliga verk*” (*Act on Copyright in Literary and Artistic Works* – hereinafter, the *Swedish Copyright Act*) of 1960, which has been amended numerous times.²³⁸ In this regard, Article 1 of the *Swedish Copyright Act* establishes that:

“anyone who has created a literary or artistic work shall have copyright in that work, regardless of whether it is 1. a fictional or descriptive representation in writing or speech; 2. a computer program; 3. a musical or dramatic work; 4. a cinematographic work; 5. a photographic work or another work of fine arts; 6. a work of architecture or applied art; or 7. a work expressed in some other manner.”

Although Article 1 of the *Swedish Copyright Act* does not expressly mention video games, such works can definitely be protected within several of the categories of works described above, or under the general clause of point 7.

Accordingly, video games or computer games can be afforded copyright protection under Swedish law in two ways. First, the code constituting the underlying computer program can be protected as a literary work, its categorical definition being a computer program in accordance with Section 1(1) paragraph 2 of the *Swedish Copyright Act*. Second, the graphic user interface or parts of it produced by the computer program (i.e., the visual output of the screen images of the video game) can be protected, for instance, as a cinematographic work if it meets the required level of originality. The issue of whether a graphic user interface can be protected by copyright is, however, ambiguous and Swedish case law on the subject is sparse.

265. In Case C 393-09 the EU Court of Justice (the “EUJ”) ruled that a graphic user interface is not a form of expression of a computer program within the meaning of the *Computer Program Directive*²³⁹ and therefore cannot be protected by copyright as a computer program under that directive.²⁴⁰ Nevertheless, such an interface can be protected under the *Copyright Directive*²⁴¹ if it is the author’s own intellectual creation.
266. An earlier ruling by the Swedish Supreme Court suggests that a specific video game can be protected as a computer program in accordance with the *Swedish Copyright Act* but not as a cinematographic work.²⁴² The video game in question included moving picture

²³⁸ Swedish *Code of Statutes*, SFS 1960:729, with a number of subsequent amendments.

²³⁹ Article 1(2) of Council Directive 91/250/EEC of May 14, 1991, on the legal protection of computer programs.

²⁴⁰ Judgment of the Court (Third Chamber) on December 22, 2010, in Case No. C 393-09, pp. 42, 46.

²⁴¹ Directive 2001/29/EC of the European Parliament and of the Council of May 22, 2001, on the harmonization of certain aspects of copyright and related rights in the information society.

²⁴² See NJA 2000 p. 518.

sequences and sound. It should, however, be noted that the ruling does not exclude the possibility that video games *per se* could enjoy copyright protection via the graphic user interface. The Swedish Market Court recently concluded, in its ruling MD 2011:29, that a PlayStation 3 video game attained copyright protection both as a *cinematographic work* and as a *computer program*. It should be stressed that the Swedish Market Court does not usually extend its ruling to include such copyright categorizations and that this ruling should be regarded as an exception.

267. It can be argued that the arrangement of information in a video game may be eligible for protection by neighboring rights, so-called *sui generis* protection for databases, provided that the compiled information meets the criteria for substantial investment in the obtaining, verification or presentation of its contents.²⁴³ Additionally, specific details displayed on the gaming screen – such as the shape and design of computer icons, images, music, animation and text – may also be protected as literary and artistic works subject to individual copyright protection, provided that the work is the result of an author's own personal intellectual creativity within the meaning of the Swedish *Copyright Act*.²⁴⁴

The impact of video games being classified as different types of works is that different rules in the Swedish *Copyright Act* may apply depending on the classification.

RIGHTS HOLDERS AND STAKEHOLDERS

268. Considering the complexity of this kind of work, the number of rights holders and stakeholders will vary depending on the video game in question. The number of persons involved in the creation, development and marketing of a video game made, for example, for a mobile platform such as Android or iOS, will be far fewer than in the case of a video game for a console, like PlayStation 3 or Xbox 360. As a consequence, in general, the main stakeholders involved in the value chain and in the chain of rights for video games on the Swedish market are the following:²⁴⁵
- a. Hardware manufacturers (such as console manufacturers and gaming platform owners);
 - b. Game development studios (including in-house and subcontracted suppliers of graphics, sounds and computer code);
 - c. Publishers;
 - d. Distributors/retailers; and
 - e. Consumers.
269. Only those persons in the value chain, who create a literary or artistic work according to the terms of Section 1 of the Swedish *Copyright Act*, can be qualified as an *author*. Under the *Swedish Copyright Act*, the author is any physical person who has created a literary or artistic work.²⁴⁶ Thus, a video game production may include copyright-protected works by, *inter alia*, screen writers, game designers, graphic designers, sound designers, composers, motion capture actors, voice actors and game engine programmers.²⁴⁷

²⁴³ Section 49(1) of the Swedish *Copyright Act*. See also Karnell, Gunnar, Videospelet – en upphovsrättslig treenighet, Papers dedicated to Ole Lando, 1997, p.190 f.

²⁴⁴ Section 1(1) of the Swedish *Copyright Act*. See also Wolk, NIR 2011 p. 301 *et seq.*

²⁴⁵ Sandqvist, Ulf, *Digitala drömmar och industriell utveckling. En studie av svenska dator- och tv-spelsindustrin 1980-2010*, Institutionen för ekonomisk historia, avhandling Umeå universitet, 2010, s. 7 and Starbreeze Studios, Inbjudan till teckning av aktier i Starbreeze AB (publ), prospekt maj 2012, p. 16, http://www.starbreeze.com/media/16786/starbreeze_ab_publ_prospekt_120525_556551-8932.pdf.

²⁴⁶ Sections 2(1), 45(1) and 49a(1) of the Swedish *Copyright Act*.

²⁴⁷ "Nordiska Datorspel", Erik Robertson, 2004, rapport för Nordiska ministerrådet, s. 30–32.

Some aspects of the statute of co-ownership of copyright in Sweden are regulated under the Swedish *Copyright Act*. For works with two or more authors, the copyright shall belong to the authors jointly, according to Section 6 of the Swedish *Copyright Act*. Each co-author, or anyone to whom the rights have been transferred (a “co-owner”), may enforce the copyright against infringers without the consent of the other co-owners.²⁴⁸

Apart from the copyright protection itself, performing artists, e.g., musicians, singers, the musical director and others who perform literary or musical works, as well as producers of recordings of sound and moving images, are afforded certain exclusive rights, so-called neighboring rights.²⁴⁹

270. Under Swedish copyright law, the rules concerning initial ownership of a copyrighted work are based upon the general principle of copyright in a *droit d’auteur* tradition, meaning that the author of the work is to be the first owner of the copyright in the work. Considering that only a physical person can become an *author* under the Swedish *Copyright Act*, employees of a video game studio or freelancers will be afforded such a qualification, but never the employer or another non-physical person. Sweden does not have special regulations concerning works created during employment, except regarding computer programs.
271. A controversial issue relates to contributors who have no labor or commercial relationship with a video game studio, such as players involved in interactive gaming or those who create sets, maps or characters using a toolbox provided by the game manufacturer, which the studio then exploits. Under the Swedish *Copyright Act*, the protection of literary and artistic works includes products of all intellectual creativity, regardless of the way in which they are expressed.²⁵⁰ The affirmative scope of copyright protection to a work extends not only to permanently fixed works but also to non-tangible works. For a product to be considered a work, it must be the result of an author’s own personal intellectual creativity.

With regard to the aforesaid, it could be stated that user-generated digital creations and virtual works in an online environment might meet the criteria to be considered a work under the Swedish *Copyright Act*.²⁵¹ Virtual works may also be considered co-owned works according to Section 6 of the Swedish *Copyright Act*.

272. The consequence of a limited scope of creative opportunity given to players involved in online games may, on the other hand, suggest that the subject-matter should not be considered the players’ own intellectual creations.²⁵² Furthermore, the players’ rights – if any – may be subject to the Terms of Service or the End-User License Agreement, which may require that any rights which might be created by activity in that environment are to be assigned to the platform as a condition of using the platform.²⁵³

²⁴⁸ Compare Sections 45 and 47-49 of the Swedish *Copyright Act* with regard to neighboring rights.

²⁴⁹ Sections 45 and 46 of the Swedish *Copyright Act*.

²⁵⁰ Section 1(2) of the Swedish *Copyright Act*.

²⁵¹ While argued from a U.S. law point of view, the following example provided by Farley (Farley, Matthew, *Making Virtual Copyright Work*, Golden Gate U. L. Rev., Vol. 41, Iss. 1 (2010), Art. 4 p. 9 on note 58) can illustrate the Swedish copyright-ability criteria in an online environment: “A player in an online game who creates a dance to be performed by his or her avatar exclusively in the virtual world may give rise to the copyright of the actual choreographic arrangement of such dance. In the absence of any contractual provisions, the player’s permission would then be required to (1) use the underlying code to reproduce the dance in another avatar, (2) take a screenshot or make a movie of the dance occurring or (3) perform the dance in real life.”

²⁵² Compare the Judgment of the Court (Fourth Chamber) on 16 July 2009 in case No. C-5/08. See also Lastowka, Greg, “User-Generated Content and Virtual Worlds,” *Vanderbilt J. Of Entertainment and Tech. Law*, Vol. 10:4:2008 p. 909.

²⁵³ “Fostering Creativity in Virtual Worlds: Easing the Restrictiveness of Copyright for User-Created Content”, by Todd David Marcus, N.Y.L. Sch. L. Rev. Vol. 52 (2007 p. 79 *et seq.*).

TRANSFER OF RIGHTS

273. Accordingly, Section 27(1) of the Swedish *Copyright Act* regulates the transfer of copyright in general terms, the general rule being that copyright may be transferred in whole or in part with the limitations of Section 3 regulating moral rights. This means that only the economic rights may be transferred. The moral rights – such as the right to having the name of the author stated, to the extent and in the manner required by proper usage, and that a work may not be changed in a manner which is prejudicial to the author's literary or artistic reputation – can only be waived to a certain, limited extent. In this sense, Section 28 of the Swedish *Copyright Act* states that the transferee may not alter the work or transfer the copyright to a third party without the consent of the author.

Copyright transfer agreements are to be interpreted in accordance with the non-statutory *principle of specification*. This means the transfer of rights to the transferee is limited to what explicitly follows from the transfer agreement. Furthermore, transfer agreements that are unclear should be interpreted to the benefit of the copyright owner.

274. The issue of employees' rights to copyright is difficult, with two legal areas overlapping each other: labor law and intellectual property law. The general principle in an employee-employer relationship is, if not otherwise agreed, that the employer has the right to freely exploit the copyright of an employee's work, created either as a result of fulfillment of the employment agreement or works created upon direct instruction to the extent necessary in the course of normal work activity. This principle is regarded in Sweden as the *Rule of Thumb*.²⁵⁴ Exceptions to the Rule of Thumb apply in certain areas.

275. Section 40(a) of the Swedish *Copyright Act* deals specifically with the copyright in computer programs created within the scope of employment, or when following instructions given by an employer. In principle, the copyright in such computer programs is transferred automatically to the employer, unless otherwise agreed.²⁵⁵ In Sweden, contrary to Article 2(3) of the *Computer Program Directive*,²⁵⁶ the moral rights are also transferred to the employer. Thus, according to Section 40(a) of the Swedish *Copyright Act*, the employer holds both the economic and moral rights to the program, in contrast to the general rule of transfer in Section 27. The employer may transfer the economic but not the moral rights. The moral rights may only be waived.

276. Video game development companies usually have both employees and hired commissioners for individual projects.²⁵⁷ In Sweden, the rules and principles governing employees' rights are not applicable to hired commissioners. Consequently, in the absence of contractual agreements covering the transition of copyright in the works created, the hired commissioner will own the copyright in the work.²⁵⁸

277. Provisions governing publishing contracts are included in Sections 31–37 of the Swedish *Copyright Act*. Those provisions only apply, however, in the absence of an agreement to the contrary.²⁵⁹ Section 31(1) of the Swedish *Copyright Act* stipulates that "the author" transfers to the publisher the right to reproduce a literary or artistic work by printing or a

²⁵⁴ Wolk, Sanna, *Arbetstagares immaterialrätter. Rätten till datorprogram, design och uppfinningar m.m. i anställningsförhållanden*, p. 120, 2006 and the Swedish Labour Court ruling, AD 2002 No. 87.

²⁵⁵ This provision only applies to computer programs within the scope of employment; see Swedish Government Bill 1992/93:38 p. 116.

²⁵⁶ Directive 91/250/EEC.

²⁵⁷ "Nordiska Datorspel", Erik Robertson, 2004, rapport för Nordiska ministerrådet, p. 32.

²⁵⁸ Wolk *et al.*, p. 5.

²⁵⁹ Section 27(3) of the Swedish *Copyright Act*.

similar process and the right to publish it. The provisions of Sections 31-37 regarding the content of publishing contracts apply unless otherwise agreed between the parties.

278. Finally, and regarding the means to compensate authors for their work incorporated in a video game, there is currently no existing so-called collective agreement in the video game industry.²⁶⁰ The position regarding the financial compensation available for those involved in the production of a video game is therefore determined in the contractual employer–employee relationship and the employer–commissioner relationship. The methods of financial compensation for employers in the video game industry differ depending on the terms of employment for each particular game development company.

Game development companies tend to allocate parts of their production to independent contractors. The general principle of freedom of contract applies; therefore, the assignment of rights could be made in exchange for a fixed amount of money, or even free of charge, if the freelancer accepts this, because he or she deems that remuneration is obtained through other means (e.g., reputation or attribution).

279. Consequently, and although video games can be copyrighted in Sweden as software and/or cinematographic works, there is still a need to clarify the legislative void regarding the real qualification of these modern works of authorship and their rights regime, compensation, and potential management by collective rights societies.

UNITED STATES OF AMERICA

280. Section 102 of the United States *Copyright Act*, 17 U.S.C (hereinafter, the US *Copyright Act*) (entitled “*Subject matter of copyright: In general*”) establishes that:

“copyright protection subsists [...] in original works of authorship fixed in any tangible medium of expression [...] from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device, including, among others, the following categories: (1) literary works; (2) musical works; (5) pictorial, graphic, and sculptural works; (6) motion pictures and other audiovisual works; and (7) sound recordings.”

Therefore, even though video games are not enunciated as such in this section, this kind of work can comply with the requirements established in the U.S. *Copyright Act*, where they are original, fixed in a medium (whether analog or digital) and can be perceived and reproduced.²⁶¹

281. The United States of America has the largest video game industry in the world, which is reflected in the number of judicial cases involving this particular work of authorship. However, there is no clear classification of video games and their protection will vary depending on each particular game and the elements that are part of it. In this sense, video games can be treated as computer programs and, thus, are classified as works of authorship; in that case, the source code for a video game is classified as a literary work. If pictorial or graphic authorship predominates, a video game may be classified as a visual arts work. Similarly, if motion picture or audiovisual authorship predominates, a video game may be classified as a motion picture/audiovisual work. Therefore, it is essential to

²⁶⁰ The Swedish *collective agreement* is an agreement between employers and employees that regulates the terms and conditions of employees in their workplace, their duties and the duties of the employer. The collective agreement automatically binds both the members of the trade union and the companies that are members of the employers' organization concluding the agreement.

²⁶¹ *Williams Electronics, Inc. v. Artic International, Inc.*, 685 F.2d 870 (3rd Cir.1982).

analyze the characteristics of a given video game in order to determine its legal classification.

282. In the early days of video game creation, their rudimentary composition made the narrow line between idea and expression almost indistinguishable. One of the first cases involving video games was *Atari, Inc. v. Amusement World, Inc.* in 1981 regarding the similarities of *Asteroids* (developed by Atari) and *Meteors* (created by the defendant).²⁶² In this case, the court reaffirmed the principle that ideas are not protected by copyright, but only the expression of an idea, confirming that video games can be copyrightable as audiovisual works (and, incidentally, as motion pictures). In this case, Atari sought the protection of its video game by registering it as an audiovisual work (instead of depositing the literary work), through a videotape. The court accepted such protection, holding that what the plaintiff sought to protect was not the computer program but the visual presentation of the game.

However, the court finally ruled in the defendant's favor based on the idea/expression dichotomy, holding that there were forms of expression that were inextricably associated with the idea of such a video game. According to the court, they "*were inevitable given the requirements of the idea of a game involving a spaceship combating space rocks and given the technical demands of the medium of a video game.*" Thus, the court concluded that the similarities did not constitute copyright infringement, because the similarities were just the plaintiff's ideas, which cannot be copyrighted.

Another landmark case was *Atari, Inc. v. North American Philips Consumer Electronics Corp.*, in which the plaintiff accused the American branch of the Dutch company of copyright infringement for creating a video game (called *K.C. Munchkin*) very similar to the famous *Pac-Man*.²⁶³ The court granted a preliminary injunction in favor of Atari as it concluded that Atari had a likelihood of success on the merits, because it held that while a game is not protectable by copyright *as such*, this kind of work of authorship is protectable "*at least to a limited extent as long as the particular form in which it is expressed provides something new or additional over the idea*". The court noted that there were many differences between the visual parts of both games, but confirmed that "*it is enough that substantial parts were lifted*", concluding that "*no plagiarist can excuse the wrong by showing how much of his work he did not pirate.*"

THE U.S. COPYRIGHT OFFICE

283. Registration of creative works is still very important in the U.S. copyright system. The criterion applied by the U.S. Copyright Office is that a single registration may be made for a computer program and its screen displays. According to the Copyright Office, when answering the "Type of work being registered" question on the application form, the copyright holder shall "*choose the type most appropriate to the predominant authorship*".²⁶⁴ The Copyright Office states that:

"because computer programs are literary works, registration as a "Literary Work" is usually appropriate. However, if pictorial or graphic authorship predominates, registration as a "Visual arts work" may be made. Similarly, if motion picture authorship or audiovisual material predominates, registration as a "Motion picture/audiovisual work" may be made. The registration will extend to any copyrightable screens generated by the program, regardless of whether identifying material for the screens is deposited."

²⁶² 547 F.Supp. 222 (D. Md. Nov. 27, 1981).

²⁶³ 672 F.2d 607, 617 (7th Cir.1982).

²⁶⁴ "Copyright Registration for Computer Programs", available at <http://www.copyright.gov/circs/circ61.pdf>.

The Copyright Office is aware of the dispute over the protection of screen displays of computer programs, and thus has established that “*a single registration is often sufficient to protect the copyright in a computer program and related screen displays, including video games, without a separate registration for the screen displays or a specific reference to them on the application for the computer program.*”²⁶⁵

284. Finally, under U.S. law, portions of video games that are not made public may be protected as trade secrets where the requirements of the applicable trade secret law (e.g., *U.S. Uniform Trade Secrets Act*) have been met. Other means for protecting certain elements of video games are patents (for the functional aspects of the game) and trademarks (e.g., the title of the game and the names of the characters).

As a consequence, video games have a complex legal classification in the U.S. As a result, while there is abundant jurisprudence and legal literature on this matter, the legal protection of video games is still fragmented and will depend on the elements and characteristics of each particular work.

AUTHORS AND RIGHTS HOLDERS

285. The uncertainty concerning the means for protecting video games (i.e., as a computer program, audiovisual work or visual work) also affects the number of rights holders that could have rights in a given video game. In general, and among all the parties involved in the development and commercialization of a video game (e.g., authors, online platforms and stores), producers and publishers usually assume the commercial risk of the project and are, therefore, the main stakeholders in the value chain. Consequently, these publishers and producers are 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 that actually develop the game. Ownership of intellectual property rights in a video game is not transferred automatically simply because a person or entity (whether employee or contractor) is paid for his, her or its efforts. Even though most publishers or producers insist on owning all intellectual property rights in a video game, as new platforms are introduced to distribute and exploit such games, and with more small studios involved in the industry, new contractual arrangements in which authors may maintain a stake in the value chain allow them to keep certain intellectual property rights.
286. In this sense, an author can be any person who contributes original authorship to the video game, or the employer or another person for whom the work was prepared, as work made for hire, as is discussed below. Therefore, and unlike in European countries, 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 the U.S., moral rights are limited to works of visual arts, 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 video games 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.
287. Ownership of contributions can only be transferred in writing. Regarding people involved in online gaming that create new sets, characters or levels with the tools provided by the video game producer, unless an individual transfers the rights to his or her contributions in

²⁶⁵ Ibid.

writing, ownership remains with that contributor. 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, of course, dictated by the language of the agreement. If there is no written agreement, a license is likely implied, for example, 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.

TRANSFER OF RIGHTS

288. Under U.S. law, a work like a video game can be owned by a sole proprietor or by a group of persons. Where a work is created by two or more persons, two scenarios can exist: (1) A “collective work”, which “*is a work containing contributions that have been assembled into a collective whole*”; and (2) A “joint work”, “*which is a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole*”.²⁶⁶ The main difference between them is that the author of a collective work only owns the copyright in the content created by him or her, while the authors of a joint work share the copyright in the entire work.
289. As per Section 201.d of the U.S. *Copyright Act*, the copyrights in a given work may be transferred in whole or in part by means of an assignment or license. Other than one type of statutorily defined “*work made for hire*”, created by an employee, a transfer of rights (as opposed to a license) can occur only by way of a written, signed agreement.²⁶⁷ 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) a contribution to a collective work, (2) a part of a motion picture or other audiovisual work, (3) a translation, (4) a supplementary work, (5) a compilation, (6) an instructional text, (7) a test, (8) answer material for a test, or (9) an atlas, provided the parties expressly agree in a written agreement that the work will be considered a work made for hire.”

The particular meanings of the classes can be important, but those meanings are not addressed in detail here, other than to note that a video game may qualify as an audiovisual work, as mentioned previously and discussed below.

If a work qualifies as a work made for hire, the author of the work is the employer or entity that employs the creator or with whom the creator has contracted, and not the individual person who materially created the work.

290. In cases where a business contracts with a vendor to create a deliverable, the vendor is, in general, an independent contractor and not an employee. As a consequence, the deliverables of the vendor will not qualify as a work prepared by an employee. In such circumstances, the statutory work-for-hire rule applies only if the work falls into one of the nine classes and the parties enter into a written contract. While “software” is not explicitly

²⁶⁶ Sections 101 and 201 of the U.S. *Copyright Act*.

²⁶⁷ Section 204 of the U.S. *Copyright Act*.

listed in the statute, certain software and portions of a video game might be classified as audiovisual works. However, other software may not qualify for any of the statutory classes. So, the “work-for-hire” provisions may not always be applicable for use with contractors.

291. Finally, and with respect to the financial compensation of authors and contributors of video games, the U.S. *Copyright Act* does not establish a fixed regime about the kind of remuneration they should receive, if any. Therefore, compensation may be a lump sum or royalties, although in many instances, remuneration will simply be salary. The same scenario is applicable for freelancers, who could receive remuneration based on the ultimate distribution of the video game, but usually receive a previously agreed-upon amount.
292. Consequently, in the U.S. legal system, video games are not automatically considered audiovisual works, but a case-by-case analysis must be made in order to determine which elements predominate in this kind of work of authorship. In any case, computer code always underlies video games and, therefore, this will imply that a distributive classification will be applicable to video games. The particularity in the U.S. is that the real contributors to the work can lose their status as *authors*, if they are involved in a work-for-hire relationship or if they are independent contractors and accept in the service agreement that such relationship exists. Nonetheless, the vast majority of disputes regarding video games involve patents (and not copyright) on computer code or other related inventions and, in many cases, the parties have settled out of court.

CONCLUSIONS

293. Throughout this study, we have attempted to analyze the different approaches that many countries have taken in the legal protection of video games, the creators involved and the transfer of rights regimes. We observe that, on the side of a legislative (and sometimes doctrinal) void, the majority of jurisdictions tend to protect these works of authorship as software; this is so because practically the only common element of every video game is its underlying computer program. However, considering the latest developments in technology, it is important to stress that, in many cases, different video games will share similar source codes or “game engine” when developed using the same software (*middleware*). This element needs to be taken into account when analyzing the legal nature of video games. Answers to questions on legal protection may be different from those applicable 20 years ago. It is clear that as the industry continues its stable evolution, solutions for the legal protection of video games may continue to vary in the upcoming years.
294. It is our opinion that video games are complex creations, composed by multiple copyrighted works (e.g., literary works, graphics, sound, characters and software) which deserve independent legal protection. Although the majoritarian trend considers that software is the prevailing element of video games, we believe that the distinguishing element of one video game from another will not be the underlying software only, but also the various audiovisual and literary elements created for each video game. Those may also include performances by actors and musicians. In parallel, given that this is an ever-changing industry, we acknowledge that some video games (for example, those simple games developed for social networks or for *smartphones*, such as popular card games or bubble shooter games) do not stand out for their audiovisual elements and would need to seek copyright protection through their software. Therefore none of the elements neither the software nor the audiovisual, would necessarily prevail; a distributive approach seems to be appropriate, insofar as a video game is made of both elements.

295. At the international level, although the TRIPS Agreements and the WIPO Copyright Treaty (the “WCT”) include references to software and audiovisual creations, multilateral treaties provides little specific guidance regarding the protection of video games. Given the complexity and the economic significance of video games, the international community may take into account the opportunity of discussing and analyzing this topic. The authors of this study envisage the possibility of establishing a special regime of protection for video games as a whole in a similar fashion that many countries have done for audiovisual works. That could perhaps also introduce specific contractual rules in order to regulate the relationship between the different stakeholders involved.
296. It is extremely hard to draw precise normative recommendations; nevertheless the following elements could be taken into account in pursuing an international debate on the protection of video games:
- A. An international legal framework solution, whether binding or non-binding, should consider the establishment of a special regime or a *sui generis* legal protection for video games.
 - B. Considering that video games are mostly developed by medium-sized and large companies, a discussion on the legal regime of video games should address the role that these entities play and the rights they require to obtain in this process. Such companies usually take the initiative and the risk, and provide the necessary resources, both financial and human, to create the work; thus they should have, at least, all the exploitation rights in the resulting work. This can be achieved by establishing a presumption of transfer of rights in favor of the video game producers, unless agreed otherwise via contract.
 - C. As for other subjects involved in such creations (e.g., scriptwriters, designers and animators), considering the complexity of these works of authorship, it is not feasible to determine *a priori* who are the subjects that deserve being qualified as authors. For instance, in the context of cinematographic works, Article 14bis of the Berne Convention provides for a special regimen of ownership of copyright allowing, inter alia, legal transfer and presumption of transfer. Accordingly, some jurisdictions have specified which individuals are to be considered the authors of a cinematographic work (generally, the scriptwriters, the director and the composer of the original soundtrack). However, we do not recommend that a similar regulation be applied to video games, as given the above-mentioned complexities, the persons who may contribute creative and original elements to the work may vary in each case. Therefore, a case-by-case analysis should be undertaken in order to determine which contributors to a video game should qualify as the authors, which will depend on the type of game, the creative contributions of the individuals and other relevant factors.
 - D. Finally, as discussed in the introduction, there are other stakeholders in the value chain of this industry, including publishers, marketing experts and quality assurance testers. These are important players in the industry, with essential roles; however, they do not contribute to the creation of the work itself. Their endeavors can guarantee the commercial success of the video game, but this does not indicate that they have contributed creative elements to the work.
297. Given the continuing evolution of technology, it is now possible to record a gameplay and broadcast it. Indeed, television programs that report on video game news are common in developed countries and in nations like the Republic of Korea video game championships

are also broadcasted live. Internet live-streaming of gameplay is even possible with some game consoles.²⁶⁸ It is not unrealistic to expect that, in the future, video game tournaments or seasonal leagues will be aired and gameplays will be narrated as sporting events are today. Therefore, according to this scenario, lawmakers might also need to address the issue of which rights should be obtained by television networks or Internet websites that air a given gameplay, and who shall benefit from such exploitation.

We think it is understandable that video game producers should own the right of authorizing the exploitation of any image generated by a video game. Thus a legal instrument on the legal protection of video games could also guarantee the producer's right to authorize any exploitation of the game, including audiovisual elements. Consequently, in order to concede a fair and reasonable copyright protection to video game developers, legislation should expressly address this issue by granting rights holders the exclusive right to authorize any reproduction, distribution, communication to the public or transmission of video games.

Whether other individuals, such as the authors, should or not also have certain rights on these kinds of exploitations is more controversial and will depend on the discussions held at an international level. Indeed, those national legislations that are very protective of authors, including many European countries, might consider granting a remuneration right to them, in terms similar to the rights that audiovisual authors currently enjoy. On the other hand, other countries, such as the United States of America, are likely to prefer the opposite solution.

298. Finally, considering the current "*contractualization*" of copyright, many aspects of the relationship between video game producers and authors, independent contributors or even game players, ultimately are regulated by contractual agreements. Aspects like the salary authors shall receive for their contribution to a game, whether fixed, variable or a combination of both; or the legal status of the creative elements made by players involved in interactive online gaming, will be resolved, in the first case, by employment agreements and, in the second, by user contracts.

In order to prevent possible abuses, it is recommended to enact rules that guarantee a fair compensation to authors who have contributed significantly to the success of a video game or have created original elements that permitted the video game producer to obtain substantial profits, whether these authors are employees, independent contractors or mere online gamers.

²⁶⁸ On November 8, 2012, Activision Blizzard Inc. announced a partnership with Google's YouTube, to permit "League Play" network players to live-stream multiplayer gameplays of the video game "Call of Duty: Black Ops 2", to promote the competitive and sporting aspects of the game.

299. In conclusion, in light of the importance of the video game industry and the uncertainties due to a normative void, it is suggested to consider the opportunity to undertake an international debate that could potentially lead to a regulation on the protection of video games. This would allow addressing unresolved issues, including the protection of video games as singular works of authorship, the relationships between authors and producers, the question of who can qualify as an author and an enumeration of those authors' rights. Insofar as it seems that no country in the world has regulated this matter in detail, now is the perfect time to approach a harmonized, international solution for an eventual implementation in domestic legal regimes.

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