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Videogames and intellectual and industrial property



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Introduction to the **Guide**

Video game developers express their originality and creativity through pixels and lines of code. Therefore, the protection of these assets through intellectual and industrial property rights (known in the industry as the company's "IP") is key.

With this guide, aimed at video game developers and publishers, we seek to provide general guidelines on the optimal way to protect these assets, which is essential to develop a robust IP portfolio that provides greater value to the company and to ensure that the video game can be placed on the market with total confidence, avoiding infringements of third-party rights.

Specifically, this guide will be useful regarding the following:

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- Understanding the differences between Intellectual Property and Industrial Property: *What does each protect?*
 - Understanding the impact of Intellectual and Industrial Property on the video game sector: *What elements of a video game can I protect?*
 - Ensuring the protection of video games: *How can I protect these elements?*
 - Avoiding the infringement of the rights of third parties: *How can I use third-party elements in my video game?*
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1. What is Intellectual and Industrial Property?

⚠ Firstly, it is important to bear in mind that, in English, the term **IP** (*intellectual property*) includes two concepts that in Spanish law are considered distinct: (i) copyright and related rights, known as *copyright* (intellectual property, in the strict sense), and (ii) industrial property.

The main difference lies in the type of works they protect. Industrial property deals with inventions, distinctive signs and designs, mainly in the form of patents, trademarks and industrial designs, while copyright and related rights mainly protect artistic and literary expressions, as well as other types of services related to them (such as recordings, and artistic performances, among others). As we can see, the key issues for a study of video games will be copyright and related rights.

Concept	What does it protect?	Legislation
Intellectual property (copyright and related rights)	Expressions, by whatever means, of an original idea and, in particular, literary, artistic and scientific creations. It also protects artistic performances, phonograms or audiovisual recordings.	• Royal Legislative Decree 1/1996, of 12 April 1996, approving the revised text of the <i>Law of Intellectual Property</i>, regularising, clarifying and harmonising the legal provisions in force on the matter (the "LPI").
Industrial Property	Inventions, distinctive signs or industrial designs. In Spain, the main industrial property rights are: • Patents and utility models: these protect inventions, i.e. solutions to technical problems in any field of technology, provided that they are new, are the result of inventive activity and have industrial application. • Trademarks: these protect signs, whether words, figurative marks, or three-dimensional shapes, among others, which serve to distinguish goods or services on the market from others that are identical or similar. • Industrial designs: these protect the external appearance of the products. • Trade secrets: these protect any information or knowledge that is of commercial value to a natural or legal person and that is not generally known or easily accessible to third parties because it has been kept confidential. Of the above, trademarks are the most important in the video games sector, closely followed by industrial designs.	• Law 24/2015, of 24 July, on Patents. • Law 17/2001, of 7 December, on Trademarks. • Law 20/2003, of 7 July, on the Legal Protection of Industrial Design. • Law 1/2019, of 20 February, on Trade Secrets.

2. What are copyright and related rights?

Copyright grants authors, as creators of original works, exclusive rights over their creations, giving them control over how to exploit them. Although copyright varies according to jurisdiction and type of work, Spanish law recognises two types of rights:

- (i) **Moral rights:** these are inalienable and unwaivable rights, i.e. they cannot be transferred or assigned to another person, and include the right to be recognised as the author of a work, as well as to have the integrity of the work respected.
- (ii) **Exploitation rights:** these are rights that allow economic benefit to be obtained from the different forms of use of their creation. They are divided into simple remuneration rights and exclusive rights, although the latter are the most important for video game developers, and include:

A

The right of reproduction

The right of reproduction allows the fixation of the work in order to obtain **copies** of it or to communicate it, such as printing, recording or digitising it.



For example, downloading a digital copy of a video game.

B

The right of distribution

This consists of making the original or copies of the work available to the public, on a **tangible medium**, including the sale, rental or lending of the work.



For example, selling the video game in physical format.

C

The right of public communication

This consists of any act whereby a number of people can access the work **without the prior distribution of copies** to each of them, including, for example, live performances (of the work), an exhibition or streaming (technically referred to as the right of making available).



For example, making a video game available to the public through a platform.

D

The right of transformation

This is the right to **modify or transform** a work, thereby acquiring ownership of that transformation.



For example, translating the game into another language or creating mods that change the gameplay.

The duration of these rights varies depending on the type of work, the form of creation and the jurisdiction, but in general, copyright lasts until **70 years have elapsed following the author's death**, unless it is considered a “collective work”, which is common in the world of video games, in which case the duration is 70 years from its disclosure. From then on, it enters the public domain and can be used freely.

Neighbouring rights protect performances, such as performances by musicians and actors, sound and audiovisual recordings and even photographs. The LPI grants more or less the same rights over these benefits as over works (mainly exclusive rights of reproduction, distribution and public communication), although for a shorter duration (generally 50 years).

3. Which elements of a video game can be protected by Intellectual and Industrial Property rights?

Generally speaking, each element of the video game is protected individually. In other words, each part can be protected separately to the extent that it meets the requirements of the LPI. A video game is a complex work of authorship that comprises a multitude of elements, including software, usually middle-ware from companies such as Unity or Unreal, graphic elements, and music, among others.

By analysing the anatomy of a video game, its scope and its implications, it is possible to achieve an adequate level of protection for the entire game while avoiding the infringement of third-party rights.

Most video games have three categories of essential elements that are protected in different ways: (i) **game content**; (ii) **the graphical user interface** ("GUI"); and (iii) **its code and architecture**.

By breaking down these categories, we can identify the elements of a video game that can be protected by Intellectual and Industrial Property. These elements are as follows:

Content of the Game	Artistic and creative elements	The following elements can be protected by intellectual property rights, without the need for registration: • Script, plot and dialogue. • Soundtrack. • Recording of the soundtrack and sound effects. • Music videos included in a video game. • Dubbing of characters and execution of choreographies.
	Name of the video game	• If registered, it can be protected as a word trademark.
	Logo	• If registered, it can be protected as a figurative trademark.
	Character name	• If registered, it can be protected as a word trademark.
Graphical User Interface -GUI-	Design of the character, object or setting	• If they are original, they can be protected by copyright. • If they are registered, they can be protected as an industrial design.
	Graphic or visual elements	• Graphics, levels, maps and other visual designs. • Cinematics.
Code and architecture	Source and object code	• Middleware and game engine solutions for video games. • Subroutines created specifically for the game. • APIs (application programming interfaces).
	Databases	• A dataset in a video game. • A catalogue of <i>skins</i>.

Game studios must analyse which of these elements are included in their game and look for appropriate protection to have robust IP.

Furthermore, the legal protection of **game mechanics** is always complex since abstract ideas and functionalities cannot be protected by intellectual property rights, unless a competitor copies the way in which such mechanics have been artistically expressed.

 **It must be noted that copyright protects artistic expressions and code in a literal sense, and not the ideas underlying them.**

4. How is a video game protected through Intellectual Property?

Copyright and related rights are generated automatically with the creation of the work, without the need for any formal action, although it is possible to go to the [General Registry of Intellectual Property](#) to demonstrate ownership of the rights over the video game or its elements.

4.1 Is the video game studio the owner of the IP related to the contributions of employees and collaborators?

By default, graphic artists and programmers hold the rights to their developments, so if a video game studio wants to exploit them, there must be a written assignment in the studio's favour. However, there are a variety of special regimes depending on the work in question:

- (i) **Works developed by employees:** unless the creation can be considered a "collective work", the LPI contemplates two different regimes:
 - » Computer programs: the LPI establishes that computer developments (source code) created by workers will be the property of the company, unless otherwise agreed.
 - » Other protected works or performances: the LPI presumes that the rights are assigned to the company only to the extent necessary for the exercise of the business activity, and this assignment is limited rather than absolute. Therefore, it is advisable for video game studios to have the assignment of rights of their employees well regulated by contract (see point 4.2) so that there is no doubt about their scope.
- (ii) **Collective works:** these are created by multiple authors, although on the initiative and under the coordination of a natural or legal person (developer) who edits and disseminates them in their name, and who will hold the rights. In this sector, due to the way in which titles are developed, most video games can be considered collective works, and therefore, the developer or publisher will be the exclusive owner of their rights.

- (iii) **Works created by collaborators or freelancers:** in the absence of an express assignment, the LPI presumes authorisation for their limited non-exclusive exploitation, and therefore a written transfer is recommended to guarantee their unrestricted exploitation.

⚠ In short, since in Spanish law there is no *work-made-for-hire* regime, which is so common in the Anglo-Saxon sphere, it is essential to correctly regulate the assignment of intellectual property rights in writing.

4.2 How are exploitation rights assigned?

This must be carried out either through an assignment clause in the employment or service contract or through a contract prepared for this purpose. Article 43 of the LPI requires certain conditions in the contract, which must specify:

- » The rights expressly assigned, which must be sufficient to guarantee the exploitation of the video game (reproduction, distribution, public communication or transformation);
- » Whether the assignment is exclusive or non-exclusive;
- » The forms of exploitation through which the exploitation of the transferred works is allowed;
- » The duration of the assignment, which will generally be until the rights pass into the public domain, and if not regulated, will be limited to five years; and
- » The territorial scope, generally worldwide, unless otherwise stated, which limits the LPI to the country in which the assignment is made.



5. How are the elements of a video game protected as a Trademark?

Distinctive signs must be registered in a public office in order to obtain a trademark over them. The registration of a trademark is valid for 10 years from the filing of the application, and, provided the registrations are renewed, its validity can be indefinite. This protection is obtained in a number of different ways, which will determine the scope of application of the trademark:

- (i) **Spain:** the application is submitted electronically to the [Spanish Patent and Trademark Office](#) (*Oficina Española de Patentes y Marcas*) (the “**OEPM**”) or, preferably, through an industrial property agent, who guarantees the monitoring of renewals and their deadlines. Once granted, protection covers the entirety of the national territory, but not abroad;
- (ii) **European Union:** A trademark valid throughout the European Union can be applied for in a single application, filed electronically or through an industrial property agent at the [European Union Intellectual Property Office](#) (“**EUIPO**”).

6. How are the elements of a video game protected as an Industrial Design?

In the European Union, the GUI of a video game can be protected as an industrial design if it constitutes the external appearance of the game; this protection lasts for 5 years from its application, and can be renewed every 5 years, up to a maximum of 25 years.

National protection can be applied for through an electronic or face-to-face application to the OEPM, to obtain protection solely in Spain, or through the EUIPO for the entire EU territory.

7. How are the elements of a video game protected as a Trade Secret?

A video game developer may not protect visible elements of a video game, such as the GUI or character design, as a trade secret. However, a developer can protect information that is not easily discernible or deducible and, especially during the development phase, a developer can protect valuable information such as the game’s storyline, novel mechanics, strategy and the release date, among others.

All this information must be protected through a combination of steps, including the signing of confidentiality agreements (also called NDAs-Non-Disclosure Agreements), as well as by implementing well-defined technical and organisational measures to maintain the secrecy of such information.

8. How can I use third-party elements in my video game?

As we have seen so far, Intellectual and Industrial Property law gives exclusive rights to its holders, so any use of a protected asset must be authorised as discussed in section 4.2.

However, Intellectual and Industrial Property legislation provides for some circumstances or exceptions in which it may not be necessary to obtain authorisation. Taking advantage of these exceptions can reduce game development costs, but also entails higher risks. Some of these alternatives include:

- » **Public domain:** content for which the exploitation rights have expired can be used freely, provided that the moral rights of the author are respected.
- » **System of limits to copyright:** this aims to strike a fair balance between the rights and interests of the different categories of rightholders. Depending on the jurisdiction, it may include exceptions for, for example, quotations, parody, and works permanently located on public roads.
- » **Fair use:** this is typical of Anglo-Saxon systems and allows the use of third-party works provided that four factors are considered. Strictly speaking, the European Union does not recognise *fair use*, so a Spanish developer cannot invoke this doctrine in order to be able to use third-party content in their game.
- » **Use of third-party trademarks:** this is a much more limited exception than the previous ones, although it is widely used by certain publishers, especially in Anglo-Saxon jurisdictions. Third-party trademarks may only be used without authorisation if it is for descriptive purposes (i.e. to identify the trademark itself) and in a reasonable manner.

→ Applying these exceptions is always complex and must be analysed on a case-by-case basis, meaning that if a studio wants to use third-party rights without an authorisation, we recommend that an Intellectual Property lawyer be consulted.



Summary

Essential checklist



What elements does my video game have? Identify and document how many of these elements are internally created and how many are from third parties.



How is each element protected? Identify and document elements that may be protected by copyright or related rights, patents, trade secrets, industrial designs and trademarks.



Have all of the agents involved in the development assigned their rights to the lead developer? Identify and document each creator of each element of the video game and whether they have correctly and, to a sufficient extent, assigned their rights.



Are there measures in place to maintain the confidentiality of the development process of the video game? Check that all of the agents involved have signed an NDA to ensure confidentiality.



What third-party elements have I used in the video game or in its development process? Identify these elements and document all necessary authorisations or the application of any exceptions, with supporting reasons.



Glossary of definitions

Intangible assets	These are non-tangible goods that have economic value and can be commercialised. These include patents, trademarks, copyright and related rights, industrial designs and trade secrets.
Related rights	These are the intellectual property rights held, inter alia, by actors, dubbing artists, audiovisual producers, record companies in relation to their performances, recordings and phonograms, respectively (technically called performances).
Copyright	These are the rights that creators have over their original works and are composed of exploitation rights and moral rights.
Right of public communication	Exploitation rights allow the owner of a work to authorise or prohibit access to it by a number of persons. This right includes the transmission of a work by means such as broadcasting, television, the Internet, and any other medium that allows remote access.
Distribution rights	This refers to the exclusive right to make the original or copies of a work available to the public through sale, rental, lending, or any other means.
Right of exploitation	This refers to the economic rights that authors have over their work and consists of simple remuneration rights and exclusive rights. Exclusive rights confer on the author the exclusive right to exploit their work in any form and, in particular, the rights of reproduction, distribution, public communication and transformation.
Image rights	The right of an individual to control the use of his or her image, name or voice in the context of the commercial exploitation of his or her image, name or voice.
Reproduction rights	Exploitation rights that allow the owner of a work to authorise or prohibit the making of copies of the work.

Glossary of definitions

Transformation rights	Exploitation rights that allow the owner of a work to authorise or prohibit its modification, adaptation or any other form of alteration that generates a derivative work. The activities covered include translations, adaptations, dramatisations and any other transformation involving a change to the original work.
Moral rights	These are the inalienable and unwaivable rights of an author over their work, which are different from purely economic rights. They include the right to be recognised as the author, to object to modifications that would be prejudicial to his or her honour or reputation, to decide on the disclosure of the work, to modify it and to withdraw it from the market.
Developer	A person or company responsible for the creation and programming of a video game, including design, coding, graphics, sound production, and the implementation of game mechanics.
Public domain	This refers to the set of works and performances that can be freely used by anyone once the term of the exploitation rights has expired.
Collective work	This is a work created on the initiative and under the coordination of a natural or legal person who publishes and disseminates it under their name and is made up of contributions from different authors whose personal contributions merge into a single, autonomous creation, for example, a video game.
Natural persons	Natural persons are human beings who each have legal rights and obligations.
Legal persons	Legal persons are entities created by law, such as companies, associations or foundations, which have rights and obligations of their own and can act in business and legal matters as if they were natural persons.
Publisher	A company or entity responsible for financing, distributing and marketing a video game and which generally holds its IP.

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