

INTELLECTUAL PROPERTY IN ELECTRONIC GAMES UNDER BRAZILIAN LAW AND THE FOSTERING OF INNOVATION, DEVELOPMENT, AND FAIR COMPETITION: THE *NINTENDO V. POCKETPAIR* CASE AS ANALYTICAL SUBSTRATE

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Abstract: This article examines the regulation of intellectual property rights in electronic games under Brazilian law, focusing on the gap created by Law No. 14,852/2024. Although the statute authorizes the Brazilian National Institute of Industrial Property (INPI) to register electronic games, it does not define the nature or effects of registration. Through a hypothetical-deductive approach and qualitative legal research, the study assesses the composite nature of games and the competing interests of innovation and fair competition. The dispute between Nintendo and Pocketpair over *Palworld* illustrates the limits of protecting gameplay mechanics through intellectual property. The article argues that a constitutive *sui generis* registration for an integrated game, encompassing its computer program and Game Design Document, could improve legal certainty. Any resulting exclusive right, however, would require legislative definition and safeguards against overbroad protection.

Keywords: intellectual property; electronic games; constitutive registration; fair competition; *Nintendo v. Pocketpair*.

INTRODUCTION

The electronic games industry has emerged as one of the most dynamic sectors of the creative economy, combining technological innovation, cultural production, and the commercialization of intangible assets. A study by the World Intellectual Property Organization describes the sector as a field of rapid transformation, in which the strategic use of intellectual property supports innovation in *hardware*, *software*, and player experience¹. The sector's economic significance reflects this growth, with global games-market revenue estimated at US\$188.8 billion in 2025 and Latin America and

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¹ Prince C. Oguguo, *Innovation and Intellectual Property Use in the Global Video Game Industry* (World Intell. Prop. Org., Econ. Rsch. Working Paper No. 85, 2024).

Brazil among the markets contributing to its expansion². At the intersection of technology, culture, and markets that intellectual property law encounters one of its most complex objects.

The legal difficulty lies in the fact that the electronic game cannot readily be classified under a single legal category. It encompasses multiple assets, including the source code, graphic art, soundtracks, scripts, characters, and distinctive signs, each potentially protected under a different legal regime³. Law No. 14,852/2024 itself, by defining the electronic game as an interactive audiovisual work developed as a computer program, underscores this dual character, placing it within the scope of both copyright and software protection⁴.

The issue became more concrete with Law No. 14,852/2024, which established the Legal Framework for the Electronic Games Industry and, in its Article 20, authorized the Brazilian National Institute of Industrial Property (INPI) to register electronic games, without specifying the registration's legal nature, requirements, or effects.⁵ This regulatory gap gained institutional prominence in 2026, when INPI opened a Public Call for Contributions (Tomada Pública de Subsídios) to inform the development of a regulatory framework. The central question, therefore, is how this authority can be exercised consistently with the hybrid nature of the asset and with the role of intellectual property in fostering innovation, development, and free competition?

This article critically examines the gap opened by Article 20 of Law No. 14,852/2024 and the alternatives for filling it, in light of intellectual property's role in promoting innovation. Specifically, it examines the structure of the legal framework and the resulting gap, to distinguish the constitutive and declaratory registration models and situates within them the hybrid nature of the game, to organize the regulatory alternatives under construction at INPI and to define the subject matter of protection, to analyze the Palworld dispute in relation to the potential appropriation of game

² Cf. Instituto Nacional da Propriedade Industrial [INPI], *Nota Técnica SEI No. 3/2026/INPI/DIPTO/CPCTR/DIRPA/PR* § 4.3.3 (2026) (Braz.) (reproducing data from Newzoo, *Global Games Market Report* (updated Nov. 2025)).

³ Gaetano Dimita, *Understanding Intellectual Property in Video Games* §§ 3.3–3.6 (World Intell. Prop. Org. 2023).

⁴ Lei No. 14.852 de 3 de maio de 2024, art. 5º, I, Diário Oficial da União [D.O.U.] de 6.5.2024 (Braz.). The provision defines an electronic game as “a obra audiovisual interativa desenvolvida como programa de computador, conforme definido na Lei nº 9.609, de 19 de fevereiro de 1998, em que as imagens são alteradas em tempo real a partir de ações e interações do jogador com a interface”.

⁵ *Id.* art. 20. *In verbis*: “Art. 20. O caput do art. 2º da Lei nº 9.279, de 14 de maio de 1996, passa a vigorar acrescido do seguinte inciso VI: ‘Art. 2º [...] VI – concessão de registro para jogos eletrônicos.’ (NR)”.

mechanics, and to articulate fair competition and innovation as foundations of a possible constitutive registration.

The article uses a hypothetical-deductive approach to test the proposition that protecting the game as a unitary work, integrated by the computer program and the *Game Design Document* and secured by a constitutive registration of a *sui generis* nature, offers greater legal certainty in addressing the identified gap. The study is qualitative and exploratory, combining bibliographic and documentary research, drawing on legislation, official documents (particularly INPI's Technical Note), Brazilian and international scholarship, relevant case law, and a case study of the *Nintendo v. Pocketpair* dispute concerning the game *Palworld*.

The article comprises five substantive sections, followed by a conclusion. The first examines the legal framework of Law No. 14,852/2024, situates the promotional reach of the statute, and identifies the gap opened by Article 20, which vested INPI with the power to register electronic games without establishing substantive or procedural rules. The second reconstructs the Brazilian registration design within the intellectual property system, distinguishes the constitutive and declaratory regimes, and situates, within that framework, the hybrid nature of the electronic game. The third characterizes the game as an asset of hybrid nature, defines the protected subject matter as the combination of the computer program and the *Game Design Document*, and systematizes the regulatory alternatives under construction at INPI based on the Public Call for Contributions. The fourth analyzes the *Nintendo v. Pocketpair* substrate, examines protection for individual game mechanics and the risk of overly broad patent exclusivity. The fifth articulates fair competition and innovation as foundations of the protection of the *Game Design Document* through constitutive registration, designed to protect the game as an integrated work. The conclusion summarizes the findings and their implications.

I. THE LEGAL FRAMEWORK FOR ELECTRONIC GAMES (LAW NO. 14,852/2024) AND THE GAP INHERENT TO INTELLECTUAL PROPERTY

Law No. 14,852/2024 established the legal framework for the electronic-games industry and regulated the manufacture, importation, commercialization, development, and commercial use of these goods⁶. The statute is principally aimed at promoting the sector, for, alongside the definitions and the safeguards intended for children and adolescents, the legislature recognizes of innovative entrepreneurship in electronic games as

⁶ Lei No. 14.852 de 3 de maio de 2024, art. 2º, D.O.U. de 6.5.2024 (Braz.) [Marco Legal da Indústria de Jogos Eletrônicos]: “Art. 2º A fabricação, a importação, a comercialização, o desenvolvimento e o uso comercial de jogos eletrônicos são regulados por esta Lei”.

a driver of economic, social, environmental, and cultural development, as well as greater productivity and competitiveness of the Brazilian economy⁷. Similarly, the text equated investment in the development of games with investment in research, development, innovation, and culture, and recognized the segment as cultural for the purposes of promotion⁸. The statute thus primarily promotes economic and technological development rather than establishing a comprehensive substantive and procedural intellectual property regime.

Despite this, Article 20 of Law No. 14,852/2024 added item VI to Article 2 of Law No. 9,279/1996, so as to include therein the granting of registration for electronic games⁹. The amendment merely inserted this new category into the list of protections administered by industrial property, without establishing the legal nature of the registration, the substantive requirements for obtaining it, the applicable procedure, or the effects arising from it.

This omission contrasts sharply with the other categories listed in Article 2 of the Industrial Property Law, for, alongside established forms of protection such as patents, trademarks, and industrial designs, each endowed with its own substantive and procedural discipline, the legislature added a sixth category without corresponding implementing rules.

In this regard, Del Nero *et al.*¹⁰ point out that the legal framework does not establish a new form of protection for the elements of the game, such as the art, the soundtrack, the story, and the code, instead establishing a specific legal regime for the industry and to recognizing that these are products composed of elements whose rights are already regulated by existing laws, notably the Copyright Law and the *software* legislation, to which the new text adds the possibility of registration under the parameters of the Industrial Property Law.

⁷ *Id.* art. 6º, I e II: “Art. 6º São princípios e diretrizes desta Lei: I – reconhecimento do empreendedorismo inovador em jogos eletrônicos como vetor de desenvolvimento econômico, social, ambiental e cultural; II – fomento ao empreendedorismo inovador como meio de promoção da produtividade e da competitividade da economia brasileira e de geração de postos de trabalho qualificados”.

⁸ Lei No. 14.852 de 3 de maio de 2024, arts. 11 e 12, D.O.U. de 6.5.2024 (Braz.): “Art. 11. Aplica-se às empresas desenvolvedoras de jogos eletrônicos, constituídas na forma do art. 7º desta Lei, o disposto na Lei nº 8.685, de 20 de julho de 1993. Parágrafo único. Para fins do disposto no caput deste artigo, o investimento em desenvolvimento de jogos eletrônicos é considerado investimento em pesquisa, desenvolvimento, inovação e cultura. Art. 12. O desenvolvimento de jogos eletrônicos é considerado segmento cultural para fins da Lei nº 8.313, de 23 de dezembro de 1991”.

⁹ Lei No. 14.852/2024, art. 20, *supra* note 5.

¹⁰ Patrícia Aurélio Del Nero, Cintia Agnelli da Silva & Caio Augusto Filoni Del Nero Jones, *Considerações Acerca da Propriedade Intelectual para o Desenvolvimento dos Jogos Eletrônicos*, 5 Revista Rede de Direito Digital, Intelectual & Sociedade No. 9, at 39–40 (2025) (Braz.).

The novelty would be one of organization and public policy, and not of dogmatic substance, with individual game components continuing to be protected under their respective regimes. Del Nero *et al.*¹¹, along these lines, understand the matter to concern an asset of hybrid nature, and recognize that the legal order accommodates *sui generis* regimes conceived for objects that the traditional frameworks do not accommodate, as in the case of the protection of integrated-circuit topographies.

A contrasting analysis is offered by Peralta and Nogueira¹², who identify a tension between the definition of the electronic game as an interactive audiovisual work developed as a computer program, which brings it close to the *Software* Law and the Copyright Law, and its simultaneous formal insertion into the industrial property system.

The authors¹³ assert that the law is correct in affirming the hybrid nature of the asset and its relevance as an economic and cultural asset, but argue that the legislative choice creates uncertainty by introducing into industrial property a category whose implementation depends on rules that is clear and systematically compatible with copyright, with the protection of software, and with the remaining industrial property rights.

The comparative contribution brought by Peralta and Nogueira¹⁴ highlights the distinctive character of Brazil's approach. In examining the experiences of the United States, the European Union, and Asia, the authors¹⁵ observe that the United States combines the strategic use of *copyright* and patents with a central role for judicial interpretation, that the European Union emphasizes regulatory harmonization and by the classification of the game as a complex creative work, and that China and South Korea emphasize regulatory governance and the *e-sports* ecosystem.

None of these jurisdictions, however, instituted a registration specific to the electronic game such as the one provided for in Brazilian law, which is why the INPI Technical Note itself qualifies this registration as an exclusive creation of national law¹⁶. This distinction has two consequences, for, if it confers on Brazil a position at the forefront, it also means that no ready-made foreign framework can simply be transplanted, which accentuates the need for the autonomous construction of the regime.

¹¹ Del Nero, Silva & Del Nero Jones, *supra* note 10.

¹² Patrícia Pereira Peralta & Marcelo Nogueira, *Jogos Eletrônicos e Propriedade Industrial: Análise Crítica da Lei nº 14.852/2024*, 28 Revista Direito e Liberdade No. 2, at 1–2 (2026) (Braz.).

¹³ Peralta & Nogueira, *supra* note 12.

¹⁴ Peralta & Nogueira, *supra* note 12.

¹⁵ Peralta & Nogueira, *supra* note 12, at 13.

¹⁶ INPI, *Nota Técnica SEI No. 3/2026*, *supra* note 2, § 4.3.3 (noting that the registration of electronic games is an exclusive creation of Brazilian law and that there is no specific protection in treaties or in foreign legislation).

INPI Technical Note SEI No. 3/2026, which supports the Public Call for Contributions on the registration of electronic games, acknowledges that, although the legislation expanded the institutional powers of the agency, it did not define an instrument, an administrative procedure, or technical criteria to regulate that protection¹⁷.

The document locates the regulatory problem in the absence of normative instruments and administrative procedures capable of allowing the clear, predictable, and legally certain, the granting of the registration, and concludes that there is a regulatory gap between the legal attribution conferred upon INPI and the mechanisms necessary for its effective implementation¹⁸.

As evidence of the problem, the agency notes that the currently existing intellectual property mechanisms deal only with isolated assets, since the registration of a computer program protects exclusively the source code, the trademark registration identifies distinctive signs, the industrial design bears on ornamental aspects, and patents fall upon inventions that meet the legal requirements, so that none of them allows the game to be represented as a complex product composed of several assets¹⁹.

It should also be noted that the authority granted to the INPI for registration does not necessarily imply authorization to create a new intellectual property right. The problem lies in the fact that such registration may create new protection, which would require defining what would be protected, the requirements, limits, duration, and those entitled to such protection. This becomes problematic when it is argued that the establishment of these parameters must be reserved for the law in the strict sense.

It adds, moreover, that the absence of specific protection finds a parallel at the international level, since a study by the World Intellectual Property Organization does not identify a protection proper to games in treaties or in foreign legislation, which reinforces the unprecedented character and the requirement of systemic coherence of the Brazilian solution²⁰.

Together, these scholarly positions and INPI's acknowledgment indicate that the power to register is already attributed, while the regime that would render it enforceable, however, remains to be constructed. The persistence of this void is not indifferent to the sector, inasmuch as normative clarity would tend to reduce historical vulnerabilities related to undue appropriation, to the loss of commercial exclusivity, and to contractual fragilities²¹. The next step

¹⁷ INPI, *Nota Técnica SEI No. 3/2026*, *supra* note 2, § 4.3.1.

¹⁸ *Id.* § 4.3.2.

¹⁹ *Id.* § 4.3.3.

²⁰ INPI, *Nota Técnica SEI No. 3/2026*, *supra* note 18.

²¹ *Id.* § 4.3.3 (citing Pedro Santoro Zambon & Ana Heloiza Vita Pessotto, *Oportunidades de Desenvolvimento após o Marco Legal de Games*, at 10 (Ministério da Cultura 2026) (Braz.)).

is to examine how the Brazilian legal order structures its intellectual property registrations, in order then to inquire which configuration best suits the object that one now intends to protect, an examination to which the following section is devoted.

II. THE DESIGN OF INTELLECTUAL PROPERTY IN THE BRAZILIAN LEGAL ORDER: CONSTITUTIVE AND DECLARATORY REGISTRATION

Brazilian law recognizes the coexistence of two registration models in matters of intellectual property, which differ in the legal effects of registration. Under the industrial property regime, registration has a constitutive, or attributive, nature, whereas ownership of the trademark and of the industrial design is acquired through the validly issued registration, and the exclusivity right over the invention derives from the granting of the patent²².

By contrast, copyright generally follows a declaratory model, since protection is independent of registration, the author being at liberty to register the work solely for purposes of proof and publicity²³. The computer program, although subjected to the regime of literary works, follows the same declaratory logic, given that its protection likewise is independent of registration, whose deposit with INPI is carried out at the discretion of the holder²⁴.

In the attributive regime, the administrative act is the source of the exclusivity right itself, so that, before registration, there is no exclusive right enforceable erga omnes, and it is therein that lies the trait which scholarship customarily points to in order to separate industrial protection from copyright protection²⁵. In the declaratory model, the right arises with the creation of the work, and registration merely recognizes it and confers upon it documented priority, without constituting it.

²² Lei No. 9.279 de 14 de maio de 1996, arts. 6º, 109 e 129, Diário Oficial da União [D.O.U.] de 15.5.1996 (Braz.) [Lei da Propriedade Industrial]. Article 129 provides: “A propriedade da marca adquire-se pelo registro validamente expedido, conforme as disposições desta Lei, sendo assegurado ao titular seu uso exclusivo em todo o território nacional [...]”; and Article 109: “A propriedade do desenho industrial adquire-se pelo registro validamente concedido”.

²³ Lei No. 9.610 de 19 de fevereiro de 1998, arts. 18 e 19, D.O.U. de 20.2.1998 (Braz.) [Lei de Direitos Autorais]. Article 18 provides: “A proteção aos direitos de que trata esta Lei independe de registro”.

²⁴ Lei No. 9.609 de 19 de fevereiro de 1998, art. 2º, *caput* e § 3º, e art. 3º, D.O.U. de 20.2.1998 (Braz.) [Lei do Software]. Article 2, § 3, provides: “A proteção aos direitos de que trata esta Lei independe de registro”; and Article 3 renders the registration of the program optional, “a critério do titular”.

²⁵ Denis Borges Barbosa, *Uma Introdução à Propriedade Intelectual* (2d ed. 2003) (Braz.).

This distinction has practical consequences, for while the holder of a trademark or a patent has a public title that defines, with precision, the object and the initial term of the exclusive right, the holder of copyright depends, in litigation, on demonstrating authorship and priority by other means, with the burden and the uncertainty that follow therefrom.

The elements of the game that are today protected by constitutive registration, such as the trademark of the title and any industrial designs of the interface, enjoy certainty as to the object and the term of protection. In turn, those protected by copyright, such as the code, the script, and the soundtrack, depend, in the controversy, on proof of authorship and priority. The coexistence of the two regimes over one and the same product, without an instrument that articulates them, is the root of the legal uncertainty and exposes that the mere sum of the available protection is not equivalent to the protection of the game as a unit.

It is also necessary to define the material scope of copyright protection, because this reveals a central limit to the protection of the game. The Copyright Law excludes from its ambit ideas, procedures, systems, and methods, as well as the schemes, plans, or rules for performing mental acts, games, or business²⁶. The game rule, as such, does not constitute protectable expression, but rather an idea or method of free appropriation.

The provision parallels, in Brazilian law, the dichotomy between idea and expression enshrined in § 102(b) of Title 17 of the *United States Code*, which likewise excludes from copyright protection any idea, procedure, process, system, or method of operation²⁷.

The computer program lies at the core of the game the computer program, whose protection the specific legislation confers under the regime of literary works. Atihe²⁸ observes that *software* bears a *sui generis* nature, since it cumulates characteristics of the literary work, on the plane of expression, with a functional dimension that brings it close to technique, which is reflected in the difficulty of defining its regime and admits, in certain instances, the protection by patent of inventions implemented by *software*. In this context, the protection of the code, although it secures the protection of the program's form of expression, does not reach the functional architecture

²⁶ Lei No. 9.610 de 19 de fevereiro de 1998, art. 8º, I e II, D.O.U. de 20.2.1998 (Braz.). *In verbis*: “Não são objeto de proteção como direitos autorais de que trata esta Lei: I - as idéias, procedimentos normativos, sistemas, métodos, projetos ou conceitos matemáticos como tais; II - os esquemas, planos ou regras para realizar atos mentais, jogos ou negócios”.

²⁷ 17 U.S.C. § 102(b) (2018). On the parallel between § 102(b) and the exclusion of game mechanics from the copyright ambit, see Alek Gieciwicz, *Navigating the Game: Balancing Innovation and Intellectual Property Rights in Video Game Development*, 29 Marq. Intell. Prop. & Innovation L. Rev. 93 (2024).

²⁸ Lucas Atihe, *Considerações sobre a Proteção Jurídica do Software no Direito Privado* (2021) (M.A. thesis, Universidade de São Paulo) (Braz.).

or the rules that the *software* executes, which are referred, at most, to the industrial field.

Software's dual character also affects ownership and overlapping rights. On the one hand, the copyright protection of the program arises with creation and dispenses with registration, although deposit with INPI is usually sought for conferring evidentiary efficacy and international reach upon the protection. On the other hand, the same creation, when incorporated into equipment or when it satisfies the requirements of patentability, may attract industrial protection, as occurs with consoles and other devices that embed *software*²⁹. This possibility of cumulated exclusivities over the executable core of the game, rather than resolving the problem of integrated protection, multiplies the regimes bearing on one and the same asset and aggravates the fragmentation that one seeks to comprehend.

Romão e Silva³⁰ characterize electronic games as complex works of authorship, an amalgam of multiple forms of creation whose common element is the computer program executed on specific *hardware*. Within this frame, the audiovisual elements may fall within the category of work subject to the Copyright Law, the code may be subject to the software law, the distinctive signs to the trademark discipline, and the ornamental aspects to the industrial design.

Thus, the very triad that structures the game disperses across heterogeneous regimes, for the plot and the setting gravitate toward copyright, the engine toward the protection of *software* and, when patentable, toward the industrial, and the interface now toward the industrial design, now toward the repression of unfair competition.

Similarly, Giecewicz³¹ describes, in United States law, a twofold protection of the game, in which the *software* is protected as a literary work and the art and the soundtrack as an audiovisual work, whereas the mechanics, by their functional character, remain at the margin of *copyright*, when not displaced to the patent domain.

The foregoing analysis shows that each layer of the game finds shelter in a regime of its own, but none of the existing registrations bears on the game considered in its unity. The available protection is, so to speak, distributive, and not integrative, because it protects the components without addressing the integrated work. It is therefore necessary to consider to what extent the

²⁹ Del Nero, Silva & Del Nero Jones, *supra* note 10, at 53–54 (noting that the registration of software with INPI confers international validity upon the protection and that patents are admitted for equipment with embedded *software*, as in the case of consoles).

³⁰ Carolina Brasil Romão e Silva, *A Indústria dos Jogos Eletrônicos: Novas Tecnologias, Propriedade Intelectual e Cenário Mundial e Brasileiro*, 5 Rev. de Direito, Inovação, Propriedade Intelectual e Concorrência No. 1, at 1 (2019) (Braz.).

³¹ Giecewicz, *supra* note 27.

hybrid nature of the asset and the regulatory alternatives currently under construction admit a registration that takes the game as a unitary work.

III. THE HYBRID NATURE OF THE GAME, THE MATERIAL ASPECTS OF PROTECTION, AND THE REGULATORY ALTERNATIVES

In a study prepared for the World Intellectual Property Organization, Ramos *et al.*³² record the absence of specific protection for electronic games in international treaties and identify three approaches adopted by jurisdictions: (i) predominant protection as *software*, given the dependence on the code for execution; (ii) fragmented protection, through various intellectual property assets; and (iii) protection as an audiovisual work, by reason of the predominance of that element. The comparative panorama thus reveals that the classification of the game oscillates according to the layer that each legal order elects as preponderant, without a unitary characterization having been consolidated.

This uncertainty arises from the composite nature of electronic games. Dimita *et al.*³³ describe electronic games as complex digital creations, which combine diverse forms of artistic expression and whose complexity challenges traditional legal categories, to the point that there is currently no universal approach for the protection of works of that nature. In the same vein, Mac Síthigh³⁴ examines the tensions between the priorities and the perceptions of the various agents of the industry, evidencing how the fragmentation of rights accompanies the fragmentation of the very interests in dispute. The game is situated, thus, at the intersection of law, technology, and culture, refractory to the molds conceived for individualized intellectual objects.

Scholars disagree as to the sufficiency of the existing categories. Stein, starting from the multimedia nature of the game, examines the proposal of defining it as a unitary multimedia work and concludes that an autonomous category is unnecessary, deeming sufficient the classification system in force

³²Andy Ramos, Laura López, Anxo Rodríguez, Tim Meng & Stan Abrams, *The Legal Status of Video Games: Comparative Analysis in National Approaches* (World Intell. Prop. Org. 2013). In the same sense, synthesizing the three approaches, INPI, *Nota Técnica SEI No. 3/2026*, *supra* note 2, § 4.3.3.

³³Gaetano Dimita et al., *Introduction: From Code to Culture — Understanding Games and Interactive Entertainment as Complex Intellectual Property Works*, in *Research Handbook on Interactive Entertainment Law* (Gaetano Dimita et al. eds., Edward Elgar Publ'g 2026).

³⁴Daithí Mac Síthigh, *The Game's the Thing: Properties, Priorities and Perceptions in the Video Games Industries*, in *Research Handbook on Intellectual Property in Media and Entertainment* 344 (Megan Richardson & Sam Ricketson eds., Edward Elgar Publ'g 2017).

in copyright³⁵. By contrast, Lastowka³⁶ emphasizes that the interactive nature of the game constitutes the central problem for copyright, since the player experiences and, at one and the same time, executes the work, which brings the player close to the figure of the author and, to that extent, weakens the authorial status of the game's creator.

To address this regulatory gap, INPI published Technical Note SEI No. 3/2026, which grounds the holding of a Public Call for Contributions on the registration of electronic games, open to society, academia, and the productive sector for a period of sixty days and accompanied by a questionnaire intended to inform the future Regulatory Impact Assessment³⁷.

The document presents alternatives for public consultation, identifying two variants of a single model, both grounded in the recognition of the game as an autonomous asset: (i) a *sui generis* registration of a constitutive nature, in which the right arises with the granting of the certificate; and (ii) a *sui generis* registration of a declaratory nature, in which the certificate merely recognizes and publishes an already existing right³⁸.

In the scholarly literature, Corrêa³⁹ systematizes three regulatory paths: an integrating registration mechanism, apt to consolidate in a single instrument the distinct assets of the game; the issuance of specific technical guidelines for the examination of the sector's industrial designs and patents; and the construction of a dedicated constitutive right of its own, of a *sui generis* nature, which the author regards as best suited to the functional, economic, and interactive singularity of the asset, akin to the protection of integrated-circuit topographies.

The constitutive modality, which the Technical Note⁴⁰ describes in greater detail, would involve an administrative procedure organized in two or more stages. The first would consist in the verification of the formal requirements of the application and in the identification of the minimum elements for the characterization of the game; the second, in the substantive analysis of compliance with the technical criteria, with institutes such as third-party opposition, appeal against refusal, and administrative nullity being admitted.

Upon approval of an application, the certificate would establish the *sui generis* right over the game, whose existence would be conditioned upon the

³⁵Julian Simon Stein, *The Legal Nature of Video Games — Adapting Copyright Law to Multimedia*, 2 Press Start No. 1, at 1 (2015).

³⁶Greg Lastowka, *Copyright Law and Video Games: A Brief History of an Interactive Medium* (2013) (unpublished manuscript).

³⁷INPI, *Nota Técnica SEI No. 3/2026*, *supra* note 2, §§ 3, 4.1, and 5, and Annex I.

³⁸*Id.* §§ 4.5.1–4.5.2.

³⁹Érica Guimarães Corrêa, *Jogos Eletrônicos e suas Opções Regulatórias no Brasil*, GEDAI/UFPR §§ 3.2–3.3 (2026) (Braz.).

⁴⁰INPI, *Nota Técnica SEI No. 3/2026*, *supra* note 2, § 4.5.1.

act of granting, without this substituting for or interfering with the regimes applicable to the individually considered assets, which would remain subject to their respective specific legislation⁴¹.

The declaratory model, by contrast, would dispense with the substantive analysis and would limit the procedure to the formal examination, which would reduce time and cost but provide less certainty as to the protected object.

Importantly, both in the constitutive modality and in the declaratory one, the Technical Note⁴² conceives the electronic game as the integration between the computer program and the *Game Design Document* (GDD), understood as a functional unit resulting from the structured combination of its technical, narrative, artistic, and interactive elements.

Under this approach, the game is no longer analyzed as a mere set of isolated assets and comes to constitute a single legal asset, whose identity derives from the articulation of these elements, with the GDD holding the role of the structuring element of the unit and the computer program that of its computational implementation.

The GDD consists, in the technical literature, of the production document that describes the aspects of the game before and during its development⁴³. Daiger⁴⁴ observes that the document is written in narrative format, is maintained across successive versions, without the earlier ones being overwritten, and circulates repeatedly between the studio and the publisher, which relies on it, indeed, to decide on the continuity of the production. The GDD functions, in this sense, as the structured record of the architecture of the game, that which confers a sense of the whole upon the assets that compose it.

Colby and Colby demonstrate, in an empirical study conducted with four independent studios, that the exhaustive GDD, once practiced by the large studios, has become rare, although the functions of the document, that of communicating and that of mediating design decisions, are preserved in a variety of forms⁴⁵. The GDD thus presents itself as a descriptive project of variable specificity, and not as a piece of standardized content. The observation reverberates in the Brazilian literature, which documents the

⁴¹ INPI, *Nota Técnica SEI No. 3/2026*, *supra* note 2, § 4.5.1.

⁴² INPI, *Nota Técnica SEI No. 3/2026*, *supra* note 2, § 4.5.1.

⁴³ Marcelo Simão de Vasconcellos & Flávia Garcia de Carvalho, “GDD-Sério”: *uma Proposta de Game Design Document (GDD) para o Desenvolvimento de Jogos Sérios*, in *Anais Estendidos do SBGames 2023* (Sociedade Brasileira de Computação 2023) (Braz.).

⁴⁴ Katy Daiger, *The Documents and Assets Created During the Video Game Production Process* (2011) (arXiv:1101.5833).

⁴⁵ Richard Colby & Rebekah Shultz Colby, *Game Design Documentation: Four Perspectives from Independent Game Studios*, 7 *Communication Design Quarterly* No. 3, at 6 (2019).

coexistence of lean and compact documentation models, adapted to the size and the genre of the game, and records that the very debate on GDD models is constant and without consensus, so great is the diversity of meanings of the term over the last decade⁴⁶.

Since the format of the GDD is variable, the documentary requirement to be established by INPI must capture the functions that the document performs, and not a monolithic model, lest it exclude from protection precisely those games whose documentation does not conform to the chosen standard. Significantly, the questionnaire of the Public Call for Contributions asks which type of documentation would be most appropriate to present to INPI and whether the full presentation of the GDD could represent a risk to strategic or confidential information, which leads the problem back to the tension between registrational publicity and the protection of the secret, detailed further on⁴⁷.

Finally, it is fitting to situate the problem within its economic-institutional frame. The report of the *Joint Research Centre* of the European Commission, assessing the future competitiveness of the European games-*software* industry, evidences that the design of the protection instruments is not neutral from the competitive standpoint, but conditions the sector's capacity to innovate and to compete in markets⁴⁸. The regulatory choice therefore extends beyond registration procedure, for it projects effects upon innovation, development, and fair competition.

IV. PALWORLD: THE NINTENDO V. POCKETPAIR CASE AND THE PROTECTION OF THE ISOLATED MECHANIC

The limits of copyright protection for game mechanics are illustrated in the dispute between Nintendo and developer Pocketpair. In an official communiqué of September 19, 2024, *Nintendo*, together with *The Pokémon Company*, reported having filed, before the Tokyo District Court, an action against Pocketpair, in which it seeks injunctive relief and damages, on the ground that the game *Palworld* infringes multiple patent rights⁴⁹. The case illustrates the effects of copyright protection failing to cover certain aspects of gameplay; the focus here is not its outcome, but the reliance on patent law.

Boyden⁵⁰ situates games among the systems not protectable by copyright,

⁴⁶ Vasconcellos & Carvalho, *supra* note 43.

⁴⁷ INPI, *Nota Técnica SEI No. 3/2026*, *supra* note 2, Annex I, questions 14 and 15.

⁴⁸ Marc Bogdanowicz, Giuditta De Prato, Daniel Nepelski & Jean Paul Simon, *Born Digital / Grown Digital: Assessing the Future Competitiveness of the EU Video Games Software Industry* (Eur. Comm'n, Joint Rsch. Ctr., EUR 24555 EN, 2010).

⁴⁹ Press Release, Nintendo Co., Ltd. & The Pokémon Company, *Filing Lawsuit for Infringement of Patent Rights against Pocketpair, Inc.* (Sept. 19, 2024).

⁵⁰ Bruce E. Boyden, *Games and Other Uncopyrightable Systems*, 18 Geo. Mason L. Rev.

alongside recipes and methods, in the wake of the reasoning, long settled in the literature, that *copyright* excludes from its ambit systems and processes. Thus, the rules and mechanics that structure the functioning of a game, as elements of a functional nature, are not, in themselves, protectable by copyright, although the expressive elements that give them concrete form may be so.

In the same sense, Seaman and Tran⁵¹ demonstrate that intellectual property regimes protect distinct aspects of the game and leave free, for reuse and improvement, the mechanics and the rules, whose permanence in the common domain is a condition of the very advancement of the sector.

United States case law, in applying the dichotomy between idea and expression, offers practical confirmation of this premise. In *Tetris Holding v. Xio Interactive*⁵², the United States District Court for the District of New Jersey distinguished the protectable audiovisual expression, such as the shape of the pieces, the playing field, and the animations, from the rules and the functional elements essential to gameplay, which it deemed unprotected, so that liability rested on the copying of the expression, and not on the appropriation of the mechanic, the latter remaining in the free domain.

In the same sense, in *Spry Fox v. LOLApps*⁵³, the continuation of the copyright claim was admitted as to the expressive whole, the *look and feel*, but it was reaffirmed that *copyright* does not protect the ideas underlying the work, nor the procedure, the system, or the method of operation, in the wake of § 102(b). And, in *Atari v. Amusement World*⁵⁴, twenty-two similarities were recognized between *Asteroids* and *Meteors*, but it concluded that most of them were unavoidable, as they necessarily derived from the idea of a space-combat game, applying the doctrine of *scènes à faire* to exclude from protection the forms of expression indispensable to the theme.

Taken together, these precedents show that copyright protection does not reach the rules and mechanics of a game as functional elements, by reason of the dichotomy between idea and expression. The merger doctrine reinforces this limitation by setting aside protection when an idea has few possible forms of expression, so that protecting these would in practice imply the appropriation of the idea itself. In turn, the *scènes à faire* doctrine excludes from protection the elements that constitute necessary or conventional derivations of the theme or genre of the work.

439 (2011).

⁵¹ Christopher B. Seaman & Thuan Tran, *Intellectual Property and Tabletop Games*, 107 Iowa L. Rev. 1615 (2022).

⁵² *Tetris Holding, LLC v. Xio Interactive, Inc.*, 863 F. Supp. 2d 394, 400–02 (D.N.J. 2012).

⁵³ *Spry Fox, LLC v. LOLApps, Inc.*, No. C12-147RAJ (W.D. Wash. Sept. 18, 2012); cf. 17 U.S.C. § 102(b) (2018).

⁵⁴ *Atari, Inc. v. Amusement World, Inc.*, 547 F. Supp. 222 (D. Md. 1981).

Applied to the game mechanic, the three filters converge upon an identical result, namely, the impossibility of reserving, by copyright, the manner of playing, while at the same time preserving the protection of the expressive form that clothes it, such as the animations, the color palette, and the composition of the interface.

Faustina⁵⁵, in a dissenting sense, maintains that the belief in the absolute ineligibility of rules under § 102(b) would be mistaken and that the majority of game rules would admit a thin copyright protection. The persistence of this debate reinforces rather than undermines the inference here gathered, since it is precisely the uncertainty as to the reach of copyright protection that induces the holder to seek, in the patent, the security that copyright does not assure it.

Wang⁵⁶, in examining the case law relating to game clones in the United States, Japan, and China, demonstrates that the characterization of unlawful copying and the criteria employed for its assessment vary according to the applicable intellectual property regime. This comparative perspective is especially relevant to the *Nintendo v. Pocketpair* case, since the controversy unfolds in Japan and is not linked to copyright protection, involving, in truth, rights arising from patents.

Peralta and Nogueira⁵⁷ record that, on the comparative plane, the patent tends to be the instrument chosen to safeguard the functionality and the mechanic of the game, precisely because copyright does not reach them. Nintendo's procedural conduct, in founding the claim on patents, and not on *copyright*, materializes, in the concrete case, the exact tendency that scholarship describes in the abstract.

In the Palworld dispute, the mechanic being unreachable by copyright and the criteria for assessing copying being variable among legal orders, patent exclusivity comes to bear on an elementary mechanism of a genre, apt to exclude from the market a game merely similar to, and not identical with, that of the holder.

The potential disproportionality is evident, for a functional detail of reduced inventive contribution is reserved at the cost of narrowing an entire genre. Giecewicz⁵⁸ warns, precisely, that the protection of mechanics, when excessive, may hinder the growth of the industry and stifle creativity, to the detriment of the imperative of fostering continuous innovation in the sector.

⁵⁵ Aidan Faustina, *Rules of the Game: Are the Rules and Mechanics of Video Games Copyrightable?* (2024) (unpublished manuscript, SSRN).

⁵⁶ Xiao Wang, *Game Clones and Copyright Infringement: A Comparative Study of Judicial Practices in the US, Japan and China* (2022) (Ph.D. dissertation, Maastricht University) (Neth.).

⁵⁷ Peralta & Nogueira, *supra* note 12.

⁵⁸ Alek Giecewicz, *Navigating the Game: Balancing Innovation and Intellectual Property Rights in Video Game Development*, 29 Marq. Intell. Prop. & Innovation L. Rev. 93, 93–94 (2024).

This illustrates the tension between the protection of the holder's investment and the preservation of fair competition, which the following section addresses on the basis of the proposal of a registration that takes the game as a unitary work.

V. FREE COMPETITION AND INNOVATION AS FOUNDATIONS OF THE
PROTECTION OF THE GAME DESIGN DOCUMENT
THROUGH CONSTITUTIVE REGISTRATION

The theories of dynamic competition, examined by Fernandes⁵⁹ with respect to digital platforms, evidence that the legal protection of technology markets must preserve the incentives to innovation, and not only static efficiency, lest it compromise the very process of renewal that characterizes these sectors. This approach distinguishes static efficiency, oriented to the optimal allocation of existing resources, from dynamic efficiency, which is realized in the creation of new products and processes, the latter, and not the former, being what the protection of innovation must primordially safeguard.

Applied to electronic games, the protection that one seeks to design cannot be assessed solely by its aptitude to repress copying, but also by its contribution to fair competition and to the dynamism of the market, which shifts the axis of the analysis from repression to incentive.

From this perspective, the Industrial Property Law⁶⁰ defines as a crime of unfair competition the employment of a fraudulent means to divert, to one's own benefit or that of another, the clientele of another. The repression of parasitic free-riding makes it possible to protect the whole of the asset against the undue capture of another's effort, even outside the formal exclusivities⁶¹.

In the electronic games sector, the application of this provision is difficult, for such protection operates in a repressive and case-by-case manner, without conferring on the agents a prior title that delimits, with certainty, the protected object. The difficulty finds an instructive parallel in the protection of *trade dress*. Gomes *et al.*⁶² observe that the institute, although recognized, lacks specific regulation in the Brazilian legal order, which generates legal uncertainty.

⁵⁹ Victor Oliveira Fernandes, *Plataformas Digitais entre Abuso de Posição Dominante e Inovação: Perspectivas a partir das Teorias de Concorrência Dinâmica do Antitruste* (2021) (Ph.D. dissertation, Universidade de São Paulo) (Braz.).

⁶⁰ Lei No. 9.279 de 14 de maio de 1996, art. 195, III, D.O.U. de 15.5.1996 (Braz.). *In verbis*: “Art. 195. Comete crime de concorrência desleal quem: [...] III - emprega meio fraudulento, para desviar, em proveito próprio ou alheio, clientela de outrem”.

⁶¹ Barbosa, *supra* note 25.

⁶² Alex Santos Gomes, Samuel Norbertino Conga & Thomas Kefas de Souza Dantas, *A Proteção do Trade Dress como Instrumento de Combate à Concorrência Desleal no Brasil*, 2 Revista Brasileira de Desenvolvimento e Inovação No. 5 (2025) (Braz.).

They therefore advocate its express recognition as an independent legal category, in order to guarantee legal certainty and to stimulate innovation⁶³. As with games, the core of the discussion is located in the finding that the protection of a whole that is not reducible to the sum of the parts depends, in the absence of a proper registrarial framework, on case-by-case and burdensome assessment.

The case law provides further examples, one observes the cornstarch case, in which the São Paulo Court of Justice (TJSP) recognized the parasitic free-riding of the trade dress of a traditional product by a competitor operating in a distinct segment, with the award fixed as a percentage of revenue⁶⁴.

In another instance, involving the use of another's trademark in advertising on an electronic-commerce platform, the same court recognized parasitic conduct in the digital environment and the duty to indemnify⁶⁵.

These judgments reveal that the protection of the whole depends on a factual examination as to confusion and unfairness, variable according to the case, without there existing a registration apt to confer certainty *ex ante*.

This helps explain why the protection of the game requires reaching its whole, and not only the parts already protected. In this regard, Gurau⁶⁶ maintains that games of pure mechanics tend to remain unprotected by copyright and proposes an alternative regime that considers the game as a coordinated audiovisual whole, and not as a sum of isolated elements. Similarly, Yüce⁶⁷ analyzes the game in its entirety, by means of the logic of selection and arrangement, corroborating the assessment of the asset as a coordinated whole whose protection is not reducible to that of the parts. The functional core of this whole, in the design proposed by the Technical Note,⁶⁸ is the *Game Design Document*, precisely because it describes the architecture that confers identity upon the game.

A useful structural analogy is the *sui generis* regime of integrated-circuit topographies. In United States law, the *Semiconductor Chip Protection Act* instituted an autonomous registrarial protection for the *mask work*, defined as a series of related images, outside *copyright* and with its own requirements, registration, and term⁶⁹. In Brazil, Law No. 11,484/2007 established an

⁶³ Gomes, Conga & Dantas, *supra* note 62.

⁶⁴ T.J.S.P., Apelação Cível No. 1093251-56.2017.8.26.0100, Relator: Des. Ricardo Negrão, 2ª Câmara Reservada de Direito Empresarial, 10.09.2018 (Braz.).

⁶⁵ T.J.S.P., Apelação Cível No. 1014922-92.2018.8.26.0068, Relator: Des. Manoel de Queiroz Pereira Calças, 1ª Câmara Reservada de Direito Empresarial, 04.12.2020 (Braz.).

⁶⁶ Elena Gurau, *The Dimensions of Gameplay: Presenting an Alternative to Video Game Copyrights for Games Without Narratives*, 19 J. Bus. & Tech. L. 455 (2024).

⁶⁷ İlay Yüce, *Video Games and Video Game Elements as Copyrighted Works* (2022) (unpublished manuscript).

⁶⁸ INPI, *Nota Técnica SEI No. 3/2026*, *supra* note 2, § 4.5.1.

⁶⁹ Semiconductor Chip Protection Act of 1984, 17 U.S.C. §§ 901–914 (2018). § 901(a)(2)

equivalent regime for integrated-circuit topographies, whose protection depends on the registration effected by INPI, with its own term of ten years⁷⁰.

The protection bears on the original topography, understood as that which results from the intellectual effort of the creator itself and is not common or commonplace to the technicians, specialists, or manufacturers at the moment of its creation. The creator is presumed to be the holder, save proof to the contrary, and the protection, which is independent of fixation, depends on the registration effected by INPI and is in force for a fixed term⁷¹.

Transposed to the game, these elements suggest a design in which the originality of the combination between the program and the GDD, and not that of each isolated asset, would operate as the criterion of protection, with ownership defined in the registral act and a term compatible with the life cycle of the asset.

This model nevertheless raises difficulties, and the most acute of them concerns disclosure. Submitting the full documentation of the game to registration may expose strategic information, which leads the problem back to the regime of the trade secret, protected by the Industrial Property Law against the unauthorized exploitation of confidential knowledge or information⁷².

Significantly, the questionnaire of the Public Call for Contributions itself asks whether the full presentation of the GDD would represent a risk to confidential information, which suggests that the registral design must reconcile the publicity necessary for legal certainty with the safeguarding of the secret, by means of techniques of procedural secrecy or of partial deposit.

The application of an extensive copyright term to games⁷³ must also be analyzed, whether to propose its reduction in view of the short life cycle of

defines *mask work* as “a series of related images [...]”.

⁷⁰ Lei No. 11.484 de 31 de maio de 2007, arts. 27, 30 e 35, D.O.U. de 31.5.2007 (Braz.) [protection of integrated-circuit topographies]. Article 30 provides: “A proteção depende do registro, que será efetuado pelo Instituto Nacional de Propriedade Industrial – INPI”. In the same sense, as to the constitutive character and the analogy, Érica Guimarães Corrêa, *supra* note 39, § 3.3, and Patrícia Aurélia Del Nero, Cintia Agnelli da Silva & Caio Augusto Filoni Del Nero Jones, *supra* note 10, at 55.

⁷¹ Lei No. 11.484 de 31 de maio de 2007, arts. 27, 29, 30 e 35, D.O.U. de 31.5.2007 (Braz.). Article 27 secures registration to the original topography; Article 29 presumes the creator to be the holder, save proof to the contrary; Article 30 conditions protection upon registration with INPI; and Article 35 fixes a term of ten years.

⁷² Lei No. 9.279 de 14 de maio de 1996, art. 195, XI, D.O.U. de 15.5.1996 (Braz.). On the subject, Flávia Parente, *Concorrência Desleal e Segredos de Fábrica e de Negócio: Análise do Art. 195, XI, da Lei da Propriedade Industrial*, Revista de Direito Mercantil, Industrial, Econômico e Financeiro No. 139, at 177 (2005) (Braz.); and INPI, *Nota Técnica SEI No. 3/2026*, *supra* note 2, Annex I, question 15.

⁷³ INPI, *Nota Técnica SEI No. 3/2026*, *supra* note 2, Annex I, question 9.

the product, as Xiang⁷⁴ does, or to consider licensing mechanisms that preserve access and secure income for the holder, along the line proposed by Gonçalves⁷⁵.

From the set of these considerations it is inferred that the protection of the game as a unitary work, with defined ownership and term and with the safeguarding of the secret, articulates coherently with fair competition and with the fostering of innovation, as Corrêa⁷⁶ maintains in advocating the constitutive registration of the game as an integrated asset.

CONCLUSION

This study has shown that, by reason of the legislative technique employed in Law No. 14,852/2024, it is not possible to conclude, on its own, whether the registration provided for under the Industrial Property Law constitutes an autonomous instrument of protection or whether it corresponds to the use, for electronic games, of protection regimes already contemplated by intellectual property legislation. The gap assumes special relevance because the constitutive or declaratory nature of the registration, as well as its legal effects, depends precisely on the definition of the applicable protection regime.

Accordingly, the Brazilian legal order knows two registration models, the constitutive and the declaratory, without either of them bearing on the game in its unity. The hybrid nature of the asset, recognized in comparative law and in scholarship, causes the available protection to be distributive, and not integrative, for it recognizes the code, the art, the soundtrack, the distinctive signs, and the ornamental aspects, each in its own regime, without reaching the work as a coordinated whole.

The *Nintendo v. Pocketpair* dispute revealed that, where copyright does not protect the mechanic, this being an idea, method, or rule excluded from protection by Article 8 of the Copyright Law and by § 102(b) of United States law, protection tends to migrate to the patent field. This displacement, by converting into intense exclusivity that which innovation deemed free, gives rise to concern as to innovation and fair competition, inasmuch as the reservation of genre mechanics may narrow the space of creation of competitors.

The protection of the game as a unitary work, integrated by the computer program and the *Game Design Document* and secured by a constitutive registration of a *sui generis* nature, finds in the Brazilian legal order a direct

⁷⁴ Miaohua Xiang, *Rethinking the Term of Protection for Video Games* (working paper).

⁷⁵ Lukas Ruthes Gonçalves, *Mechanical Licenses for Video Games*, 14 Am. U. Intell. Prop. Brief No. 1 (2022).

⁷⁶ Érica Guimarães Corrêa, *supra* note 39, § 3.3.

structural precedent in the protection of integrated-circuit topographies, whose protection depends on registration before INPI. Such a design, by conferring a public title that delimits the object and the ownership and fixes the term of protection, responds to the legal uncertainty that fragmented protection and the case-by-case repression of unfair competition do not succeed in overcoming.

To this end, and as the analysis indicates, the registration will have to capture the functions of the GDD, and not a monolithic format, safeguard the trade secret by means of secrecy techniques, and define a term compatible with the life cycle of the asset, matters that the Public Call for Contributions submitted to debate.

The analysis acknowledges that the constitutive avenue entails costs, among them compatibilization with foreign legislation and the risk of overlapping of rights. In this context, it is not maintained that the constitutive registration renders dispensable the regimes in force, which will continue to protect, in isolation, the code, the trademark, the industrial design, and the copyright works incorporated into the game. Instead, the article proposes a regime of ordered overlapping, in which the registration of the whole coexists with the protection of the parts and confers upon the ensemble a legal identity that it today lacks.

In this context, the constitutive avenue does not unduly expand exclusivity, but organizes that which already exists, by delimiting, in a public certificate, the object, the ownership, and the term of protection of the game as a unit, which tends to reduce the transaction costs and the uncertainty that burden, above all, the smaller studios.

The choice cannot be resolved through registration procedures alone, for, in taking the game as a unit and in conferring legal certainty upon it, the constitutive registration realizes the social function of intellectual property, which consists in fostering innovation and development without sacrificing fairness among competitors. Thus, beyond filling a legislative gap, this movement tends to convert the power attributed to INPI into an effective instrument for the development of the national electronic-games industry.

Finally,, even if the *sui generis* constitutive model is recognized as the most appropriate from a normative standpoint, its effective implementation requires defining the scope of exclusivity. Defining the scope of a new exclusive right is a matter for legislation rather than administrative regulation alone.

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