**Podcast Transcript**

# 2024 DSIR Deeper Dive: The Use of AI in Interactive Entertainment and Videogames

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Kattman: On April 23, BakerHostetler's Digital Assets and Data Management Practice Group released its annual Data Security and Incident Response, or DSIR, Report. This year marks the tenth anniversary of the report, which is now widely used by businesses all over the world to help develop their cyber security measures, incident response plans, and information governance practices. I'm Amy Kattman, and you're listening to BakerHosts.

On today's episode, we're joined by Carolina Alonso, an associate at BakerHostetler and a key member of the firm's Media and Telecommunications Industry team, with a focus on interactive entertainment and video games. Carolina will walk us through how AI is playing a larger role in game development and what legal issues companies should consider. Welcome to the show, Carolina.

Alonso: Thanks so much, Amy. I'm so excited to be here. I'm a huge gamer. So, I think about these topics all the time.

Kattman: Carolina, let's start with how are video game development companies and publishers currently using AI, and is this a growing trend in the industry?

Alonso: So, this is a really great question because AI has been used in video games from the beginning of video game development. AI now has turned into a buzzword that encapsulates a lot of types of different automated decision making and

processes, and it is important to think about what type of AI we're talking about, what the definition is. I think of it in four buckets just to start with. The first bucket is I think of gameplay. So, this is where AI can be used to demonstrate to the player behavior from characters that you interact with in games. Certain characters can be called non-playable characters. These are characters that are not other players. They are characters that a player interacts with, and the behavior of those non-player characters could depend on the choices that a gamer has within the story of the game. Additionally, gameplay can be changed based on the player's decisions. It is also, gameplay can be affected by AI capabilities, where speech to text is translated, and accessibility tools, as well as how to control gameplay, such as body measurement calculations to use your hands as a controller, such as in a VR context, or even voice recognition to command the game to do certain things.

The second bucket is creating an immersive and creative experience for the gamers. So, this is where AI can be used more in degenerative AI context, which is the hot topic right now. Graphics can come out of nowhere as someone interacts with the game, maybe going into a new level, where that level will always be different. It is not a level that is designed, or world that is designed, that is premade, an AI is creating that content for the player to interact with live.

There is also the third bucket, which is moderation. This is where, depending on in the video game industry, what type of entity you are, you're either moderating player-to-player interactions through text and voice, or even gameplay. You're moderating what players upload to the game, user generated content, or if you are a developer, you are moderating the type of content that game developers are actually uploading to your platform to develop games.

And the last bucket I think of using AI is monetization, where video games can offer different in-game items based on gameplay, a For You page, if you will, of, based on preferences of the gamer. If they tend to like to use swords in their game play, there could be discounts of in-game items that look like swords versus bows and arrows. So, there is a lot of ways that you can use these automated data processing tools, whether it is a very simple algorithm that is a basic logic where you say if the gamer goes this way an NPC will come this way and interact with the player or something more along the lines of profiling where you're really getting to know the gamer, their preferences, and offering something in the game to elevate their experience.

Kattman: Thanks for that great description. Could you tell us why it is so important for these companies that use AI tools to monitor what data is being processed, and how are the players being profiled?

Alonso: Right. So, we talked about how these technologies have been in games for quite a while, but a lot of these technologies are evolving and the issues that these technologies bring are still being explored, especially within moderation and profiling. So, for example, there are new laws coming out now, especially around children's online safety, that do apply to video games in social settings. Allowing players to interact with each other, friend each other, go out and take on bosses

together, does bring about issues of whether there are bad actors in the gameplay. Trolling, bullying, and other type of issues when you have multiple people talking to each other in very stressful situations like trying to defeat a boss or trying to solve a puzzle. These laws specifically target how data is used, default settings, and this is for minors under the age of 18, so not just small children, up until teenagers. There is other considerations that these tools have had issues with and that goes beyond the law. For example, these moderation issues is that you do not want your players to have a bad experience. So, even setting aside these laws that are coming out, governing this issue, developers want to have a way of being able to give players an outlet while also mitigating bad behavior.

Separately, when it comes to profiling, moderation can lead to profiling, so a lot of game developers actually have a back-end profile based on your behavior. They give you a score. So, if you have been a troll three times, that might lead to some type of punishment. Maybe you can't play the game for a week. Maybe you get kicked off the game for a long time. Maybe you get a full-time lifetime ban. This is profiling where it can be difficult to assess what the impact could be for those players. There is usually an appeals process. But separately, profiling can also mean something that can be monetized. Something where you can tell the behavior of the player and then offer them something. This could lead to targeted advertising within the games to make sure that if you do have targeting, advertising placement within a game that you are really being efficient with what someone sees while they're interacting with the game. However, this also comes with a lot of other legal considerations, such as consent, opt in and opt out, as well as what automated decision making means.

I do want to highlight something that recently happened. The Consumer Financial Protection Bureau, the CFPB, actually published a report on financial transactions and privacy in video games, and you would think that this is a very unique report because it is coming from an agency that you wouldn't think is actively thinking about video games. But the report really highlights their worry about the loss of real monetary value where items that are paid for within the game, that value of real life money is lost if in the game that sort, those sorts of digital assets are also lost, whether it is taken away from you because you had bad behavior or it is lost because the video game is no longer supported or it is a temporary item, but the pricing of it was very, very high. This is not a new struggle in the video game industry and has been litigated before, but now we have additional layers of what AI can do in that space when it comes to the automated decision making and profiling, offering those specific digital assets to maximize the ROI and what that means when it comes to consumer protection.

Kattman: Carolina, could you tell us how is automated decision making interpreted in this industry?

Alonso: Sure. So, automated decision making is still a fairly new legal term. It was first introduced in the GDPR in 2016. The definition across the board, it is also in state laws such as the CCPA, Colorado, and other state laws, and it is usually defined as automated decision making that leads to a legal or substantially

similar effect, or similarly significant effect. The definition can also be profiling. It depends on the type of law that you're looking at, but the focus in the video game space is, the easy examples of what this looks like are things like effects on healthcare services, access to essential goods, whether the automated decision leads to lost opportunity, job employment, or housing. But in the video game space, that similarly significant effect part of the definition is something that is still being interpreted right now, especially when it comes to games that are free, but you can purchase a lot of digital assets and what it means, for example, we talked about moderation, where if you kick someone off a game because they are posing bad behavior to other gamers but they invested a lot in that game and they can no longer play that game and they invested a lot of monetary value, is that a similarly significant effect because now you are closing them off from a service that they have invested a lot in.

The other aspect of this is that depending on the law, there is a level of human review that could negate the effect that it has on consumers. So, for example, if there is a human reviewer that sees that this player was especially egregious, in some regimes that would not be considered automated decision making. However, in other regimes, it only takes a certain amount of human review before it is not considered automated decision making, so this goes back to this idea of what are algorithms being programmed to do. What is the effect on the players? And if there is some way for a human review to make sure that the players are having a good experience with whatever tools are necessary to keep the game going.

Kattman: Carolina, that was really very interesting for moderation, but what about profiling, such as targeting?

Alonso: Right. For targeted advertising, the similarly significant effect definition, what does that mean? What is something that is similarly significant to a legal effect does also come into play because we are having more and more laws govern targeted advertising, where in a lot of these laws you have to get opt-in consent for targeted advertising, especially if it is a minor or if there is a processing of sensitive personal information, which can be useful for profiling when you're trying to profile particular type of people for certain types of ads. When it comes to automated decision making and targeted advertising and whether something is similarly significant to a legal effect, it is something to consider where if, it seems like the stakes are low, to be honest, but when you're a gamer like me, we get really into it. And if I'm playing a game and I'm trying to defeat a level or a boss, and if I'm getting profiled in the game where I'm getting discounts for certain items based on my gameplay and maybe my gameplay is the problem with me not being able to beat this level or boss and these items that are being discounted aren't necessarily helpful to my specific position in the game, to continue being able to play the game, to continue to progress, it is something to consider on gameplay balance. And this goes back to gameplay design. If you are having tools that are profiling players, to what degree is that really helping the player while also balancing, helping drive monetary profit from that player where they are achieving progress in the game in a way that doesn't take the game away from them, where the player keeps having to put in a bunch of purchases

just to go to next level, that is something to think about and again, I want to reiterate, the regulators are thinking about this. They're thinking about the monetary impact, the loss of monetary value when it comes to gameplay and when you pair that with targeted advertising and profiling, where it really comes down to is what are the digital assets that are being provided to gamers within the play that is balanced enough where the investment they're putting in isn't being degraded.

Kattman: So, it really is a delicate balance. Carolina, as my final question, would you explain why developing internal AI policies is a crucial step for businesses?

Alonso: Right. So, we kept a very high level this whole time during this conversation, but I will say all of this comes down to some very baseline legal requirements. When it comes to profiling, automated decision making, and even targeted advertising, a lot of these processes of using data require certain disclosures to the consumer as well as back end requirements such as conducting a data processing impact assessment. The use of AI can affect you more than you can think in many different ways.

So, for example, by having an AI policy, your company can really understand, from when we were talking at the top of the conversation, where what is AI? What are we really talking about? Are we talking about a simple logic algorithm that is reacting, having an NPC react in a certain way based on specific inputs? Or are we talking about something more complicated? Maybe generative AI or something that is more of a predictive model, changing the gameplay or changing what is advertised to players depending on their gameplay and inferences about that consumer's preferences. This is going to affect your advertising strategy. It is going to affect your gameplay design since we just talked about balancing the gameplay with the tools and the offers. It could affect the player experience and the reputation of the game. It affects moderation strategies between players and between content that gets uploaded into games, monetization, as well as it comes back down to compliance with the laws and contracts. I see a lot of contracts recently where, since AI is the new buzzword, that AI as defined in the contract is being outright prohibited from use.

Now, if you're a game developer, this is nonsensical. Absolutely nonsensical. So, when it comes to defining what AI is that helps you build the relationships with your vendors that are helping contribute to the game, whether it is they're developing it from scratch, whether they are a content moderator, that because you do not have the right resources internally, or you are a publisher and you are outsourcing all of these different roles. It is important to understand what the high-risk AI tools are and which ones have been around for a while, since the beginning of video game development, and which one should be managed from that contractual perspective because of all the verticals we discussed, advertising strategy, gameplay design, monetization, that go back to the requirements of data processing. And it is important to remember that personal information is being processed through AI, through these tools, for these use cases, because if it wasn't clear maybe five years ago, because privacy is still a very young area of law, it is very clear now that something as simple as an IP address, a device ID,

an advertising identifier, that is all personal information. So, it is necessary to consider what that data is, what the use purpose is, and that balance that we discussed when it comes to the consumer expectations and the requirements.

Kattman: Carolina, thank you for this really informative discussion.

Alonso: Of course. I'm very excited about it. I would love if my video games were extremely tailored and immersive, so I think something else to think about is to what degree these tools can make these games even better, and how to balance that with these very important issues.

Kattman: Thanks so much for joining us today, Carolina. If you have any questions for Carolina, their contact information is in the show notes. As always, thanks for listening to BakerHosts.