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# HOW PUBLISHING AGREEMENTS GO WRONG (and how to fix them)

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#GDC23

**Who Am I?**

**Video game lawyer**

**Practice focused on representing  
indie studios**

# **Frequently reviewing and negotiating Publishing Agreements**

**Realized**

# **Informational Disadvantage**

# **Negotiations**



**Publisher**

**Developer**

**Publisher's own Agreement**

# **Developer's First Agreement**

**No Strong Grasp**

# **1. Key Clauses**

## **2. Where Problems Can Occur**

# **Aim of the Presentation**



# **Leverage Experience**

# Reviewing

# **Negotiating**

**50+**

# **Witnessing Break Down**

**Publisher**

**Developer**

**Educate on Risks**



# **Real Developer – Publisher Disputes**

**Avoid Repeating**

**Does not Stand Alone**

# **2020 Publishing Agreement Market Report**

# **Data on Publishing Terms**

**Average Advance?**

**\$516,823.08**

**Advance Recouped**



**In 80% of deals**

# **Average Revenue Share**

**59%**

**Videogamepublishing.com**

# **5 Key Clauses**

# **1. LICENSE**

## **2. ROYALTY**

# **3. MARKETING**



## **4. DLC + ADD-ONS**

## **5. IP OWNERSHIP**

**Before we dive in...**

**Recap at end**

**Also on the GDC Vault**

# **1. LICENSE**

**Grants rights in the game (and related content) to publisher**

**Exclusive**



**No-one other than publisher can  
use**

**Non-exclusive**

**Developer and others can use**

**What does the license look like?**



Developer grants Publisher an exclusive license to publish and distribute the Game, including but not limited to **characters, character names, catch phrases, locations, concepts, game play elements, animation, musical compositions, design documents, animation, music, game play elements, audio, visual assets, patents, copyright, trademarks etc.** ("Intellectual Property") created by developer under the agreement.

**Where did it go wrong for the  
developer?**

# **Exclusivity Scope**



**Too Broad**

# Characters

# **Locations**

# **Catch Phrases**

# **Game Play Elements**

**Audio**

**RESULT?**

**Developer was unsure whether  
it could make any games in the  
universe**



**Not only gave a license to the  
game...**

**Inadvertently gave publisher  
exclusive rights in all future  
titles**

**Because if the publisher has  
exclusive rights to these things**

**Developer can't use them**

**~~Characters~~**

**~~Locations~~**

**~~Catch Phrases~~**

**~~Game Play Elements~~**



**~~Audio~~**

**Not only preventing sequels, but  
also similar games**

# **Other Common Exclusive License Issues:**

**Exclusive license to game name**

**Developer can't even use its own  
game name!**

**Even in marketing!**

**Exclusive license to Game code**

**Developer can't even use its own  
code!**



**Even to keep the game updated**

**Although the publishing  
agreement requires developer to  
keep code up to date!**

**How to Fix?**

**Focus on:**

# **1. Removing overly broad terms**

**~~Characters~~**

**~~Universe~~**

## **2. Narrow what is Exclusive**



**To the game? Okay.**

**But be careful it does not extend  
too far beyond the game**

**These other rights can be Non-  
Exclusive**

**OR, have exceptions**

**For example, if game code  
licensed exclusively to publisher**



***Developer may use Game Code  
to perform its obligations under  
this Agreement***

**Developer X's fix?**



**Spent 5 years, 3 lawyers**

**Eventually negotiated a  
settlement with publisher**

## **2. Royalty**

**Splits revenue between  
publisher and developer**

**50 / 50**

**Developer receives 50% of game  
revenue**

**Publisher receives 50% of game  
revenue**

**What does the royalty clause  
look like?**





***After Publisher receives payment for all  
advances made to Developer (which  
shall be fully recoupable), Publisher will  
pay Developer 50% of all Net Game  
Revenues actually received***

**Where did it go wrong for the  
developer?**

**Royalty only paid**

**AFTER**

**Publisher recoups advance**

**Seems okay?**

**No, creates risk**



**Developer had a large advance**

**Six figures**

**Meaning**

**Until those six figures paid back**

**No money paid to developer**

**That meant**

**No money coming in to pay:**

**Team**



**Office rent**

# **Software licenses**

**And although no money was  
coming in**

**Continued game development  
required by the publishing  
agreement (ex. updates, customer  
service)**

**If the game was not successful**

**Or took time to generate  
revenue**

**Developer could go bankrupt**

**As until advance repaid to  
publisher, no money paid to  
developer**



**And no guarantee that advance  
is ever recouped**

**What happened to the  
developer?**

**Game tanked, studio was  
acquired.**

# **Other Common Royalty Issues:**

**What constitutes a recoupable  
expense**

**Recoupable expenses are paid back, like the advance, before the royalty paid to developer**

**Publisher including its internal costs as a recoupable expense**

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# **Internal QA**

# **Internal marketing**

**External - yes**

**Internal - no**

**Platform royalty**

**Even though publisher owns the  
platform**

**Common on smaller platforms**

**Publisher's platform takes a %**



**Publisher takes an additional %  
on top through the publishing  
agreement**

**Double dipping**

**Not including an audit right**

**Audit right is the developer's  
right to confirm the royalty  
calculations (and deductions)**

**How to Fix?**

**Royalty should be paid during  
recoup**

**Perhaps at a lower %**

**80/20 during recoup**



**Then 50/50**

**Negotiating for development  
costs to be paid during recoup  
period**

**Limit recoupable publisher  
internal costs**

**Exclude publisher owned  
platforms**

**Demand an audit right**

# **3. MARKETING**

**Sets out one (or both) party's  
obligations for marketing the  
game**





***Publisher shall market the game  
on the Platforms in the Territory***

**Where did it go wrong for the  
developer?**

**Silent on two key points**

**Silent on how game marketed**

**Marketed using the wrong  
tone/image**

**Silent on marketing spend**

**Verbal agreement that \$X to be  
spent on marketing**

**In reality, less than promised  
spent on marketing with little  
tracking of how spent**



**How to Fix?**

**Put it in writing**

**That the parties shall mutually  
agree to a marketing plan**

**Put it in writing**

**If publisher promises money to  
be spent on marketing**

**Even as a minimum spend**

## **4. DLC + ADD-ONS**

# **Each party's obligations concerning DLC and Add-On Development**





***The Parties shall agree in writing on the terms for development of any additional Ports or DLC.***

**Where did it go wrong for the  
developer?**

**No firm commitment for DLC**

**Even though DLC funding  
verbally promised**

**Challenge for the developer**

**Counting on DLC funds to keep  
the studio afloat until royalties  
paid**

**Faced with laying off entire team**



**Put publisher in control of DLC  
discussions**

**LEVERAGE**

**Developer agreed to a worse  
DLC deal than originally  
promised**

**Let's look at another  
problematic clause**



***Developer shall develop DLC post-launch as detailed on Schedule A***

**Where did it go wrong for the  
developer?**

**No additional payments for DLC**



**Same royalty as the game**

**Yet developer is not being paid  
any additional amounts**

**All the risk is now placed on  
developer without a higher  
reward (royalty)**

**Compounded where developer is  
not paid a royalty until the  
advance is fully recouped**

**How to Fix?**

**Put it in writing**

# **Specific payment obligations for DLC**

**OR**



**If developer is to bear cost of  
DLC entirely**

**Different royalty for such DLC**

## **5. IP OWNERSHIP**

**Sets out who owns the game  
and related assets**



***As between the parties all Intellectual Property Rights in the Game shall belong to each party in the following shares: 50% to Developer and 50% to Publisher***

**Where did it go wrong for the  
developer?**

**Publisher should never own  
game IP**



**Game IP should always be  
owned by the developer**

**Otherwise loses control of the  
game, forever.**

**Loses control of IP derivatives**

**Film, TV, comics, merchandise  
etc.**

**IP is a huge part of the value  
created by the developer**

**Needs to be owned at all costs**

**What about 50%? Sounds  
reasonable...**

**50% ownership actually  
means...**



**100% ownership**  
**(in North America)**

**Each 50% owner can exercise  
the same rights as if a 100%  
owner**

**As a result, Publisher could  
exercise these rights as if a full  
owner**

**Create other games, DLC etc.**

**Without an obligation to  
compensate developer**

**Another common problem**



***Developer shall own the Game.  
Publisher owns all publisher created  
assets***



**Where did it go wrong for the  
developer?**

**Publisher made all**

# Trailers

# **Marketing materials**

# Ports

# **Localizations**

**As a result, at the end of the  
publishing agreement**

**Developer would be forced to  
create all these again**



# Trailers

# **Marketing materials**

# Ports

# **Localizations**

**From scratch**

**How to Fix?**

**Developer should always own  
the game**

**Developer should own publisher  
created assets once publisher  
recoups cost**



**Then developer should own as  
publisher's costs have been  
repaid**

**OR**

**If publisher's costs not repaid,  
developer can repay them and  
receive ownership**

**Let's recap**

# **5 Key Clauses**

# **1. LICENSE**

**Removing overly broad terms**

**Narrow what is Exclusive**



## **2. ROYALTY**

**Royalty should be paid during  
recoup**

**Negotiate for development costs  
to be paid during recoup period**

**Exclude publisher owned  
platforms**

**Demand an audit right**

# **3. MARKETING**

**Put it in writing**

**That the parties shall mutually  
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**Put it in writing**

**If publisher promises money to  
be spent on marketing**

**Even as a minimum spend**

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**Developer should own publisher  
created assets once publisher  
recoups cost**

**OR**

**If publisher's costs not repaid,  
developer can repay them and  
receive ownership**

**Developer owns IP**

# **Q&A**

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