

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

Kellen Voyer | Video Game Lawyer | @ Voyer Law

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

Audie

**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

Publisher including its internal costs as a recoupable expense

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
agree to a marketing plan**

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be spent on marketing**

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**Developer should own publisher
created assets once publisher
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OR

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

Developer owns IP

Q&A

**Contact info:
Kellen@voyerlaw.com**