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# Deal Points for Gaming Negotiation

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Often pitted against robust publishing companies, independent video game development studios face many challenges when entering into negotiations for video game development and publishing deals.

This article will identify some of the elements pertinent to a gaming development contract, such as financial considerations, intellectual property ownership, and contract termination and breach, and describe some of the differences between what publishers seek to impose in a contract and what developers seek to gain.

Monetary advances and royalties are typically the driving force behind a contract, especially for developers, because they generally rely on an advance from the publisher to cover expenses incurred while producing a game. Once the game is on the market, developers then hope to generate a profit through the realization of royalties. Advances are like loans provided by a publisher to fund the development studio's ability to create a game. As such, the value of the advance is deducted from the royalty stream that a developer would otherwise earn. When the game goes to market, only after the publisher recoups the value of the advance will it issue royalty payments to the developer. If a game is not popular, then the advance money may be the only money a development studio ever receives. Thus developers should be wary of attempts by publishers to dictate the terms under which advances should be used. Publishers may demand that advances be used strictly for costs related to the production of their specific game. This restriction can thwart the developer's ability to be the master of its own finances in covering general studio overhead. A provision like this could leave a studio's hands tied and it may have trouble meeting its general operating expenses while producing the game. On the other hand, a publisher may want to ensure that the funds it provides to a developer will be used for the game that the developer and publisher are working on together and for no other purpose. Developers often try to negotiate for terms that are as flexible as possible with regard to how it may utilize its advance, and attempt to build in coverage for overhead as well as a measure of profit into the advance figure. Milestone provisions also factor into this complicated calculation. Milestones are essentially timelines built into a contract whereby a publisher breaks down the amount of money that a developer is to receive at various points throughout the game development process based on the developer completing pieces of the project. When a developer meets a milestone and produces some agreed-upon output to the publisher, the publisher then goes through a process called acceptance, whereby it verifies that this deliverable has been completed in accordance with a certain standard and thus merits giving a portion of the advance money to the developer. Milestones are generally staggered such that the money between each milestone is sufficient to enable the developer to get the work done before reaching the next milestone.

Royalties are inextricably bound to advances and vice versa. Royalty amounts vary greatly based on a number of factors, including the developer's experience and reputation, the advance amount a developer requests (a greater advance can mean a smaller royalty), and the game's genre. Developers generally want to ensure that royalties are based on the wholesale price of a game, which can be the amount of revenue a publisher gets for the game whether selling directly to a retailer or to a distributor. Often the suggested retail price of a game bears no relevance to what the publisher actually receives in income. Royalties based on publisher profits may also take into account deductions for various expenses such as marketing, advertising, promotional giveaways, and inventory. Publishers and developers will negotiate which deductions are acceptable and make it into the final agreement. That said, one reasonable expense that publishers will often seek to deduct and that developers often agree to is the cost of goods. This is an amount that includes the cost of the game box, manual, and the CD or DVD of the game itself.

When negotiating the calculation of royalties, if publishers contest a developer's refusal to consider the marketing and distribution expenses and risk that a publisher takes when putting a game on the market, developers may want to turn to the idea of escalating royalties as a potential compromise where once the costs of marketing and distribution are recovered, the developer's royalty is increased when the game meets agreed-upon sales milestones. Utilizing the concept of escalating royalties as a compromise strategy could both incentivize the developer during the production of the game as well as comfort the publisher when it assumes the risk of marketing the game.

The process of getting a video game into the hands of consumers is a joint effort between developers, who are the creative and technical force behind the game, and publishers, who have the resources to distribute a game en masse. First, developers should always retain intellectual property ownership of the code, tools, and technology used in the creation of the game. This is an efficient way to enable developers to reuse code and tools for other development projects and consequently help reduce on overall development costs. Rights to elements such as a game's name, characters, storyline, and logos generally belong to the publisher.

Sequel rights may be considered to be tangential to intellectual property ownership issues, and are another deal point that will likely result in a compromise between the developer and publisher. Ideally, negotiations may yield an agreement between the parties that would enable either one to call for the creation of a sequel and give the other party the opportunity to participate financially. However, in general publishers retain the right to pursue sequel and porting opportunities because of the fact that they retain intellectual property ownership in the completed game. Often the best strategy for developers is to try to reach a compromise whereby the developer would be given "first right of refusal" in choosing whether to participate in future development projects based on the original game.

Contracts may be terminated for cause or convenience. Terminations for cause seek to return the non-breaching party to the same position it would have been in had the contract not been breached. In contrast, terminations for convenience seek to put the non-terminating party in the position it would have been in had the contract not been terminated.

A party may terminate a contract for cause when the other party fails to meet the obligations it agreed to under the contract. One area that is ripe for termination for cause is developer's failure to meet a milestone deadline. At a minimum, a gaming contract should include a cure period for termination for cause. In the event of termination for cause by a publisher, a developer could negotiate to receive a pro-rata portion of royalties based upon the percentage of the game that was completed by the developer before the contract was terminated if the publisher is able to complete the game on its own.

Often smaller developers only work on one or two projects at a time. Because a publisher's termination for convenience imposes financial hardship on a developer by immediately cutting off the developer's source of revenue, publishers will often agree to contract terms that will help lessen this economic impact. When negotiating over a publisher's right to terminate for convenience, developers should ensure that they are provided with payment in full for all the milestones met thus far, as well as a cushion of the payment they would have received for the next milestone or two. This amount is often referred to as a "kill fee", and it helps to lessen the detrimental impact to a developer who has counted on doing the project and will need to cover its overhead and staff salaries while it shops around for a new project. Furthermore, if this has not already been provided for, all intellectual property rights could revert back to the developer if they had been conveyed to the publisher, so that the developer will retain all control over the game and its status at the date that the publisher terminated for convenience. This may allow the developer to shop the game to another publisher and pick up where it left off.

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