

## Third Party Agreements

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## Introduction

- **What is a third party agreement?**
  - Agreement governing the “outsourcing” of a product by Publisher to independent Development studio.
  - Publishers outsource due to bandwidth, specific Developer expertise, or overhead risk
- **Basic structure of third party agreements**
  - Advance & Milestone structure ~ Publisher fronts development cost based on agreed-upon set of deliverables.
  - Subsequent royalty to Developer if/when Publisher recoups Advances
- **Generally one-sided in favor of the Publisher**
  - Common Developer myth of “evil” Publisher is incorrect...just “risk averse.”



## Overview

### Developer concerns:

#### 1. During Development

-milestone compliance, development restrictions

#### 2. Finances

-net sales, ancillary channels, reserves, cross-collateralization, audit rights

#### 3. Future Rights

-IP, sequels, marketing, non-compete, key personnel, game engine

#### 4. Liability & Boilerplate

-termination, reps & warranties, indemnification, limitation of liability, employee issues, attorney fees

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## During Development

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## Agreement

1. Developer will develop Pong (the “Game”).
2. The game will contain cutting-edge 2-bit technology and real-time 2D rendering.
3. Publisher will give Developer a case of beer when the Game is completed.
4. Publisher can choose the brand of beer in its sole discretion.

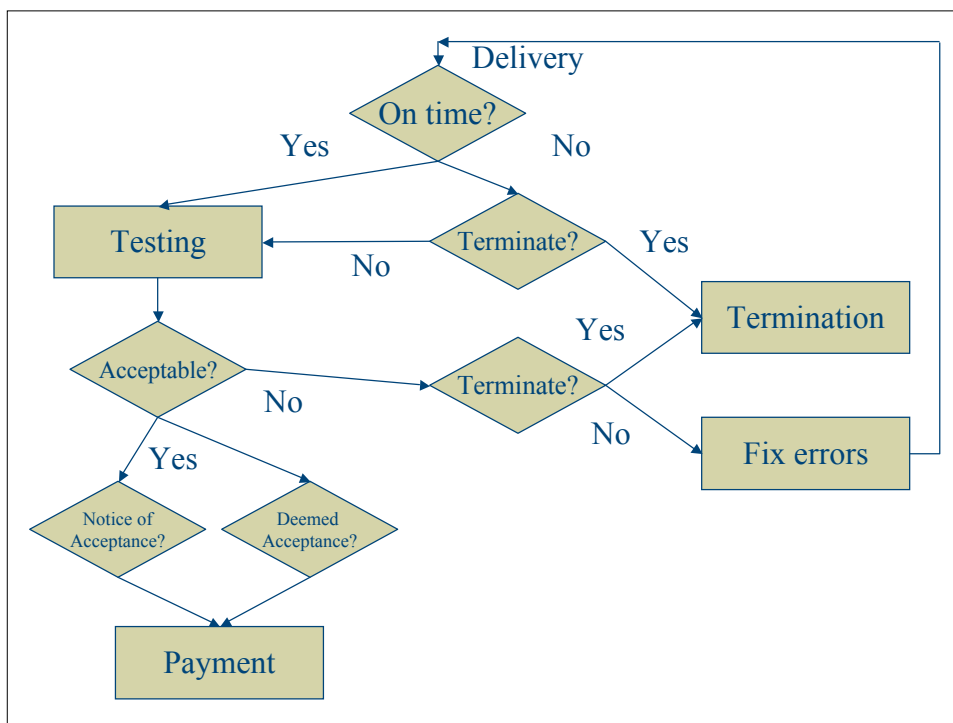
## During Development

- Milestones
  - What they are
  - Examples
    - Execution of Agreement
    - Design Docs
      - GDD
      - TDD
    - First Playable
    - Alpha
    - Beta
    - Gold master
  - How Often?
  - Cushion

## During Development

- Milestones
  - Vague vs. clear
    - e.g. demos, localizations
  - Compliance
    - sole discretion vs. specifications
  - Failure to comply
    - material breach? cure? publisher's fault?
- Changes
- Force Majeure

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## During Development

- Prohibited Content
  - Easter Eggs
  - Open Source
  - Other

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## During Development

- Easter Eggs
  - Undocumented, hidden feature
  - Pros: customers like them
  - Cons: Liability, quality control

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## During Development

- Open Source
  - Infringement
  - Viral

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## During Development

Red Cross



- Statutory protection
- Generic?
- Use?

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## Finances



## Finances

- Advances
  - Fully recoupable by Publisher
  - Advance is *best estimate* of development costs relative to Publisher sales projections
  - Shell Game ~ Challenge in striking correct balance between proposed budget proposed vs. Publisher's "risk-free" Advance amount / Sales forecast
- Royalties
  - Based on "Net Sales"
  - Penalties for late delivery
  - Cross-collateralization ~ Can be overly broadened to cover "other" Agreements.
  - Ancillary Channels ~ Generally, a 50/50 split of third party licensing revenues.
  - Reserve Clauses~Portion of royalty withheld to offset future returns.



## Finances

- Definition of “Net Sales”
  - Generally gross sales (amounts actually received by Publisher), less:
    - Cost of goods;
    - Freight
    - Specified marketing expenditures (Coop/MDF)
  - Generally does **not** include **all** marketing costs, or Publisher overhead



## Finances

- Royalty payments to Developer (after recoupment) generally made 30-90 days from the end of the quarter
- Audit rights for Developer to ensure proper payment amount (generally unused and not highly negotiated...could be better utilized by Developer)



## Future Rights

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## Future Rights

- The Game
  - Ownership
    - By Publisher
    - By Developer
  - License
    - Exclusive license to publish

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## Future Rights

- The Game Engine
  - Ownership
    - Pre-existing tools
    - New tools
  - License
    - Developer needs if publisher owns
    - To publisher (for *any* games? Sequels?)
      - License fees (for other games?)
  - Non-comp

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## Future Rights

- Sequel Rights
  - Future royalties
  - Future development
- Negotiation/first look rights
  - Negotiate in good faith
- Rights of refusal
  - First
  - Last

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## Future Rights

- Non-Compete
  - Usually required for 3<sup>rd</sup> party developers
  - Publisher investment / developer need to work
  - Enforceability
  - EA vs. Ubisoft

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## Future Rights

“At EA, we firmly believe that the continued growth and development of our craft is dependent on the ability of creative people to choose the company they want to work for. As long as the competition remains fair and the employees respect their obligations of loyalty and confidentiality, this is something that all companies in our industry should support.”

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## Liability & Boilerplate



## Liability & Boilerplate

- Termination at-will by Publisher
  - Kill fee (flat fee or Milestone “plus one”).  
Regardless of structure, amount should be large enough to give Developer adequate “reserves” to find a new Publisher
- Limitation of Liability
  - Be sure to exempt indemnity, confidentiality & IP misuse



## Liability & Boilerplate

- Reps and warranties of Developer
  - Right to enter agreement
  - No breach of other agreements
  - Qualifications, skill & diligence
  - Compliance with laws
  - Originality of content / non-infringement
  - Employee/contractor ownership issues



## Liability & Boilerplate

- Reps and warranties of publisher
  - Right to enter agreement
  - No breach of other agreements
  - Compliance with laws (specifically, marketing and pricing laws)
  - Non-infringement re: publisher content
  - Right to grant licenses



## Liability & Boilerplate

- Employee issues
  - Wage/hour for internal staff
  - Work-for-hire agreements for each member of the team
- Attorneys fees
  - Although clause is mutual, usually works to the detriment of the Developer as the party more likely to be in breach



## Thank You

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