



Effective Preparation

- Identify interests
 - Shared/Compatible/Conflicting
- Invent options for mutual gain
- Use objective criteria
- Best Alternative to A Negotiated Agreement (BATNA)
 - Know yours
 - Know the other side's



Scenarios

- Computer Game
 - Chinese computer game publisher seeks to develop computer game in US
 - Development team of hit game has left their employer and wishes to establish their own company
- Operating System
 - Microsoft plans to add a feature set to the OS that would infringe patent portfolio
 - Patentee wants to make maximize revenue from patent assets

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Identify Interests

- Focus on interests, not positions
 - Put yourself in the other guy's shoes
 - Make a list
 - Shared/compatible interests
 - Identify conflicting interests
- Communicate your interests to the other side
 - Establish the legitimacy of your interests
 - Be specific
 - Why
 - Establish magnitude of importance
- Acknowledge the other side's interests

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Computer Game Interests

- US Developer
 - Control own destiny/Creative freedom
 - Develop hit game, become millionaires
- Chinese publisher
 - Diversify
 - Establish new distribution channels and relationships
 - Publish hit game, become billionaires
- Shared interests: Develop/publish hit game
- Compatible: New distribution channels
- Conflicting: Freedom v. Control from China

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Operating System Interests

- Microsoft
 - Obtain broad license that permits third party developers to build to feature set
 - Protect/extend monopoly, certainty
 - Lowest cost
 - Confidential
- Patentee
 - Maximize revenue from Microsoft
 - Preserve rights to license to other parties
 - Publicly known
- Shared/Compatible interests
- Conflicting interests

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Communicate Interests

- Communicate your interests to the other side
 - Be specific
 - Why
 - Establish magnitude of importance
- Computer Game
 - Publisher
 - Most important: Expand beyond China
 - Less important: Protect investment
 - Developer
 - Most important: Creative freedom
 - Less important: Money

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Communicate Interests

- Operating system
 - Microsoft
 - Most important: Broad license, certainty
 - Less important: Cost
 - Patentee
 - Most important: Money
 - Less important: Preserving rights to license to others

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Options for Mutual Gain

- Invent options for mutual gain
 - Separate inventing from deciding
 - Play off of shared interests
- Computer game
 - Serving shared interests:
 - Set up US development company for developers
 - Initial funding by publisher
 - Pay to develop initial game
 - Conflicts:
 - Publisher takes large equity stake in US company
 - Development team must work exclusively on publisher's game

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Preparing for Negotiation

- Operating System
 - Conflicts:
 - Payment
 - ⌘ Single, upfront payment
 - Broad license for third party developers
 - ⌘ Carve outs
 - Confidentiality
 - ⌘ May disclose to present and prospective investors under NDA

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Preparing for Negotiation

- Insist on using objective criteria
- Computer game
 - Projected game revenues
 - Hit can be very lucrative
 - Bonus if revenue targets are reached
 - Likelihood of success with game
 - Most games are not successful
- Operating system
 - Likelihood of validity/infringement of patents
 - Value of damages and injunction
 - Likelihood of suit by patentee or new owner
 - Value of feature set to Microsoft

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BATNA

- Develop your Best Alternative To a Negotiated Agreement (BATNA) and understand the other side's
- Computer game
 - Developer: Go to another publisher
 - But unemployed and burning through savings
 - Publisher: Find another developer
 - Miserable track record of in-house development
 - When a conflicting interest isn't conflicting: Minimal Chinese control over US developer turns out to be a shared interest between publisher and developer

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BATNA

- Operating System
 - Microsoft: Deploy feature set, begin infringing, wait for other shoe to drop
 - Patentee: Obtain additional investors to avoid bankruptcy and fire sale of patents

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Outcomes

- Computer Game
 - Deal collapses because developer demand huge upfront payment, refuse to commit to exclusively develop publisher's game, demand unusual ownership stake in game and development tools
- Operating System
 - Microsoft obtains broad license for large, one-time upfront payment
 - Patentee saves company from bankruptcy, is hero and then is fired by board

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