

Entertainment Contract Drafting Workshop

Legal Challenges, Business Opportunities and
Practical Strategies in Digital Media Transactions.



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Or, as we see it, a “Contract Drafting Bonanza”

- Introduction
- The Players (Know the Parties)
- The Business (Know the Industry)
- The Contract Terms (Know the Deal)
- Final Insights
- Questions

The Players

**“Justin” SVP New Media
for Apricot Music, Inc.**



Represented
by Joleen

**“Maki”
Creator of the game
“Internmanator”**



Represented
by Hillery

Know The Parties

It is critical to know who your client is...

- Who exactly is YOUR client?
- What are your client's business operations?
- What are their present and future plans and priorities?
- What is their history?
- What is the client's negotiation experience?



It is critical to adapt to your client's needs...

- What are the business customs?
- Don't rock the boat unnecessarily – you are on the same team!
- Don't try to push your point of view unless you have persuasive reasons.

Know Your Client

Draft and negotiate in accordance with client needs.

- If your client's contract formats are familiar and work reasonably well - try to conform your drafts in future transactions.



- ▶ Some clients work better with long-form integrated documents.
- ▶ Some clients would rather put variable deal points on short agreements followed by the more meaty "Terms of Use" or "Standard Operating Procedures" documents.
- ▶ Your goal is to provide good legal drafting, and keep the focus on negotiations for key business terms.

Player #1

"Justin"

SVP New Media, MTLG Records

Justin was recently hired as SVP for the newly created "New Media" division at Apricot Music. His last job was in A&R at a major record label, and this experience endeared him to many new online music service companies. He had his pick of companies, and decided on Apricot Music. Apricot is a very popular service with teenagers, and the executives hope to gain more market share by licensing the biggest music catalog around. Labels are skeptical because of how new Apricot is, and they are still wary of working with unproven distribution companies, especially digital distribution. Justin who keenly understands technology and is a music aficionado, is excited to negotiate his first deal for Apricot but has never directly gone head to head with a major record label.



Player #2

“Maki”

Creator of the game “Internmanator”

Maki spends his days creating cool video games in his basement. He used to head up the IT department at a major media company, but found that he could make more money distributing simple online games. His latest animated game, the “Internmanator” features an intern completing various tasks, and has 50 levels. Due to the high sales of his last game, many online game distribution companies want to license his game and are willing to negotiate with him. Aaron is a savvy businessman, and he refuses to license his material exclusively, as he prefers to allow all online game distributors equal opportunity for him to make more money. If Internmanator sells 20,000 units, he will be able to open his own office and hire a couple of other developers to create his game empire.



Know the Other Side

It is critical to learn as much as possible about the other party or parties.



- Don't be lazy: most attorneys wait until the actual negotiations to learn about the other side.
- Look at the other party's website: it may reveal loads of info about the business it is in, its marketing plans, consumer products and services & key staff members.
- Do a web search or look in Lexis or Westlaw: you could uncover useful information about its business operations and products, litigation history, and in consumer/business blogs.
- The more you know in advance about what the other party expects the better tactical advantage you have.

Other Side #1

“Wendy”

SVP New Media, MTLG Records

Wendy has been tasked for developing a new media strategy for MTLG Records, because they are losing market share. MTLG Records believes this is because they have been slow to warm up to new distribution models. They are excited, but nervous to work with Apricot. They hope to appeal to teenagers by being perceived as more “hip.” Wendy has a mandate to use the MTLG standard distribution form, but it doesn’t account for nearly any of the realities of the digital distribution business. Moreover, while Wendy understands the technologies for making music available on a wide variety of platforms, she has to convince her bosses that the music content will 100% protected, no matter what the platform.



Other Side #2

“Anndreya”

Content Manager for Games.com

Anndreya is responsible for negotiating Games.com template agreements for game acquisitions. She doesn’t have a ton of experience negotiating deals, and won’t veer from the form without consulting her immediate supervisor. The standard agreement includes an exclusivity provision for three months, and so far has been reluctant to waive this requirement for Maki and reluctant to uplevel this issue because it is so hard for her to get time to discuss these matters. Mainly, though, she is of the opinion that it is just plain easier if game developers who work from their basement would just agree to Games.com standard terms, because it would make her job that much easier.



Know the Business

What are modern entertainment transactions?

- The Business models are constantly reinvented.
- Alliances form between disparate industries to create efficiencies, synergies and meet consumer demand.
- Result is complex deals and potentially protracted negotiations:
 - Evolving and experimental revenue models
 - Unknown and unquantifiable risk
 - Conflicting goals and "cross-cultural" negotiations
 - Deadline-driven business choices



What, exactly, are you trying to accomplish?

- What is the content to be licensed?
- What are the underlying technologies, platforms and formats?
- Are there particular issues associated with the business (music v. gaming v. sports).
- Is this B to B or B to C business?. What issues are associated with each?
- Are there third party licenses that will be needed?

Know the Business

Some Types of Businesses

- **Content:**
 - Studios
 - Games
 - Labels
 - Independent owners/aggregators
- **Enabling Technologies:**
 - Internet Delivery Technologies
 - Internet Service Providers
 - Servers and other backend technologies
 - Client-side applications
- **Platforms:**
 - PC
 - Mobile
 - Online
 - Third Party Distributors (cable, aggregators)



Know the 3 “C’s”



Critical: Without these rights, the deal cannot go forward.

- EX: For a film based on a popular novel, rights to the screenplay.

Crucial: Without these rights, the deal can go forward but will not be as lucrative.

- EX: Rights to include well-known music in a documentary about a musician.

Coveted: Having these rights will enhance the project, but won’t affect success one way or the other.

- EX: The right to include certain photos of a sports figure in a biography.

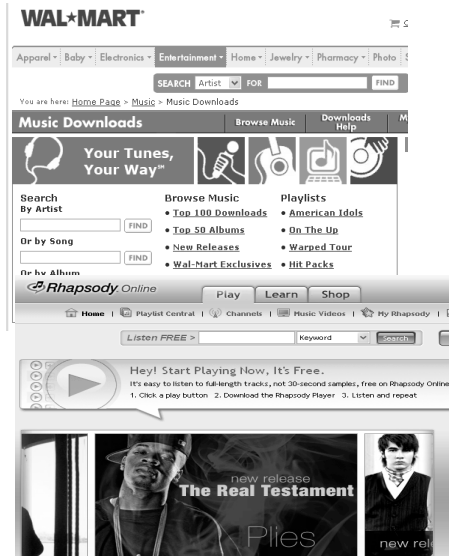
Gaming Business



- Today there are many different devices or “platforms” on which games may be played.
- Games are not ordinarily interchangeable between platforms:
 - Xbox games will not work in your PC.
- Many developers create versions for more than one platform.
- Platforms:
 - Arcade
 - Personal Computers
 - Consoles
 - Handheld
 - Online Games



Music Business



- Here are four (4) different types of royalties, each derived from a separate and distinct copyright.

- Mechanical Royalties
- Public Performance Royalties
- Synchronization Fees
- Print

- All of these royalties must be kept in mind when negotiating for different music services!



Know the Deal

- **Home Teams and Visitors**
 - Represented countries
 - Cultures and culture clashes
 - Creating a common language



- **Avoiding avoidable conflicts**
 - "Battle of the Forms"
 - Examples: NDA forms v. deal substance
 - Institutional gridlock v. strategic relationships
 - Unsportsmanlike behavior
 - Following the Rules of Engagement



Key Points in Entertainment Agreements



See our sample agreements!

- Effective Date
- Recitals
- Definitions of Key Terms
 - Parties
 - Products/Services
 - Terms of Art
- Territory
- Royalties
- Grant of Rights/Reservation of Rights/Restrictions
- Advertising and Marketing
- Specific Obligations of each Party
- Technical Specifications
- Legal Clauses
 - Warranty/Indemnity
 - Limitations on Liability
- Term and Termination, General Provisions
- Exhibits

Know the Deal: Content

- What is the content?
- Is the content original?
- What portions of content owned by others?
- Is the content itself based on a preexisting work?
- What are the underlying sources?
- What is copyright status.

“Content File” means each digital file containing a single-track sound recording or multi-track album of LICENSEE Content, applicable Artwork (if any), parental advisory notices (if any), copyright notices (if any), videos (if any, provided by LICENSEE and used by COMPANY at LICENSEE’S discretion), and associated metadata, e.g., core track data and editorial content data (if any).

“Program(s)” means the object code, including all Updates thereto, of each of Licensor’s software game program(s) listed on Exhibit A, together with all Licensor documentation and related files. As used herein, “Program(s)” includes Demo Versions, Full Versions, and all Program Enhancements. The parties may modify the list of Programs pursuant to the procedure set forth on Exhibit A.



Know the Deal: Content



Games.com is a web portal where we distribute hundreds of games in the "casual" gaming industry. Our target is women from 18-45, and the best games for us are those controlled only by a mouse. We work with hundreds of game developers, and generally like to make sure we have the most choices of online casual game content around.



Internmanator is a great animated game with nearly 50 levels of fantastic action. The game is operated by a mouse, where the player clicks on the intern and helps him complete various tasks such as fetching coffee for the bosses, filing papers, running errands and distributing mail. Bonus points are awarded for speed and accuracy!



Know the Deal: Licenses



Licensor hereby grants to COMPANY the worldwide right and license to, directly and through Wholesale Program Distributors, reproduce, distribute and market the Programs: (a) through electronic distribution via Internet Protocol; (b) as part of any bundle with COMPANY software products or services whether distributed electronically via Internet Protocol; or (c) through tangible media such as CD-ROMs, DVDs, diskettes, or hard disc drives. COMPANY is not obligated in any way to market or distribute the Programs and may discontinue such activities at any time.

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Licensees generally prefer comprehensive grants.
 Licensors generally prefer narrowly defined grants.
 Avoid terms of art and industry slang unless defined or commonly known.
 Capsule of the most important issues:

- What rights do you actually need?
- For what purpose(s)?
- Exclusive?
- Territory?

Know the Deal: Licenses



Our artists are the most talented musicians, with the most original music out there. We own the sound recording, but cannot guarantee rights to the underlying musical composition. We expect that Apricot will ensure that our content is secure whether distributed online or on mobile platforms.



We have the coolest service around, but need good content to keep it fresh. MTLG has some of the hottest artists out there, but I've got to make sure that any music I get from them is cleared. I don't want to have to get rights from anyone else to use the songs they give us.



Know the Deal: Royalties

- **With Royalties, you are usually not dealing with a flat fee.**
- **Some licenses vary the royalty rate, or the guaranteed minimum amount, or both each year.**
- **Structure of royalties can vary drastically.**
- **If the Territory is multinational, are there different royalties for different countries?**
- **If the term is longer than a two or three years, parties should consider the effect of inflation on any guaranteed royalties or minimum sales numbers negotiated.**

"COMPANY will pay to Licensor the percentages listed on Exhibit A of Net License Fees attributable to the sale of a Program hereunder.

LICENSEE shall be responsible for and timely pay: (i) all record royalties to artists, producers, and other record royalty participants from sales of eMasters, (ii) all mechanical royalties payable to publishers of copyrighted musical compositions embodied in eMasters from sales of eMasters, (iii) all payments that may be required under collective bargaining agreements applicable to LICENSEE or third parties other than COMPANY, and (iv) any other royalties, fees and/or sums payable with respect to the sound recordings, Artwork, metadata and other materials provided by LICENSEE and/or COMPANY's use thereof hereunder.



Know the Deal: Royalties



Generally speaking, we pay a simple percentage of the retail price to the game developer each quarter, but we will pay monthly if the developer insists.



I like to get a percentage of the retail price, but also a percentage of any advertising that is placed around my game. If my game does well and sells ads, I should get a piece of that action!



Know the Deal: Royalties



People are lucky to have access to our artists' music, and should be willing to pay a large royalty to us directly. We have margins to meet, and recording and releasing records is an expensive business. I don't know why these new media companies think we are in a position to pay royalties to music publishers and public performance entities. We have never done that!



Our business margins are so slim, the record label takes a large royalty depending on what format we distribute in. We also have to pay mechanicals. ASCAP and BMI are calling to get a website public performance licenses. How do I stop the madness?



Ask us Anything!

We'll pretend to know the answer!



Thank you!

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