

INITIAL LEGAL ISSUES

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In the beginning...

So, you and a group of your talented friends have come up with an idea for the best computer game ever. You have the concept, you have the talent, and you're ready to rock. You begin with a really great story line, amazing 2D renderings from a local artist friend of yours and you use your substantial talents to transform these 2D renderings into some of the most awesome 3D characters and creatures that anyone has ever seen. A friend of your brother is a hot-shot programmer and he has done all the programming you need to make your game go. You even put some really rocking music which you downloaded off the net into the program. So, now your demo is all ready to be presented to publishers to land that development deal you have all worked for, right?

No!

The above scenario may not be very far from the truth in many start-up development teams. But it is full of problems that could make it impossible to get the game to the public. (This article deals with the first two issues below. The rest will be addressed in future installments).

The following questions come to mind (Remember - This is a Lawyer's mind. So, don't try this at home!):

What legal entity will the publisher deal with?

Who on the team gets what if the team succeeds?

Who owns the assets in the game?

Are there any problems with the assets that would prevent the game from being taken to market?

But, of course, you say, "I don't want to deal with all that legal mumbo jumbo crap, we can figure it out later. Let's just get this demo together so we can make our killer game." Famous last words! To a publisher (or a lawyer or businessman) how you address these basic questions at the beginning of your project reflects on whether this team is "together" enough to come through with the finished product. Why? Because, a lack of realistic planning in the formation of your own team may reflect a lack of foresight in general which could result in problems later on in the developer/publisher relationship. The failure to have dealt with the more mundane legal issues of forming a company, deciding shares first and securing Intellectual Property rights to the game assets may be just a lack of business experience. But to business heads like publishers there will be little sympathy.

Publishing is a hard business. And publishers are hard core businessmen. That means that publishers don't even know how to spell sympathy! To them this will just be considered a lack of understanding and proper planning on your part. In short, they will think you are either dumb or lazy, maybe both. At best, a

publisher may merely use this lack of planning to overpower a rookie developer with BS like the old "standard in the industry" provisions in the contract negotiations. At worst, they may trash the project completely because of a lack of belief in the team's ability to meet milestones or because the ownership of the assets is uncertain. Being naive is not cute or endearing. It is just naive!

So, here are some basics that will give you an idea of the things you should take care of on the front end so they don't become a hassle initially, or much worse, later in the process. The first is the formation of a legal entity -- your company!

BUSINESS MODELS

Please don't be offended, but game development is a business. If you want to treat games as "art" then make them for their own sake and give them away. Maybe, in the tradition of great artists, your true genius will be recognized after you're dead! However, if you want to make and sell games then, whether you know it or not, you want to start a business. And you need to think of yourself, at least in some small part, as a businessman and act accordingly. Issues like legal entities (Corporations, Limited Liability Corporations and Partnerships) provide many useful advantages. Some regarding taxes and expensing of capital investment, others like health insurance and even retirement benefits. But the most important benefit to a corporate form is the ability to assign specific ownership interests in customized proportionate amounts.

Sure, in the beginning when everything is all work and no money, who cares? After all, game development is based on vision and passion. Great games leap from the imagination into being, often burning out the few talented enough to make them a reality. But waiting until there is a financial benefit to determine who gets what is a really bad idea. At that point, a falling out among team members can be potentially catastrophic. "Don't worry guys, we are all friends here and if this game gets sold we'll all get paid" may sound good at the beginning, but after some have worked months, while others have worked only weeks, an even split is inherently unfair and demoralizing to those who put in all the hours. Similarly, the key member(s) who maintains the vision and makes things happen may deserve to own the whole company. But if they didn't bother to let the other members of the team know that they are not going to own part of the company they are at least inadvertently taking advantage of, or at worst intentionally misleading, their team members. After the project succeeds is not the time to tell your team that you own the company and that their hard front end work only entitles them to a job there. Make this stuff clear from the beginning and you will avoid real problems later.

One of my first game related clients was an artist and itinerant game designer. He learned of me through my involvement with the online gaming community and came to me with this problem. He had accepted a position with a rookie studio and even relocated himself and his wife to a new city to work on their demo. The demo was a mod based on the Quake engine in a variation on the movie

Starship Troopers, an FPS bug killing adventure. According to him he was a key team member and had spent months working on this project including doing the textures and skins for the models, also assisting in the development of the game concept and design. It was *his* understanding that, as a committed member of the team, he owned a part of the company. Unfortunately, the rest of the team, including the head of the company, thought otherwise. Did anyone intend to take advantage of the artist? I doubt it. Was he being unrealistic in his expectations - probably. But that is not the point, is it? The point is that the head of the studio, probably just because he did not focus on the issue, allowed the artist to operate under a serious misconception of their deal. And everyone was too busy working on the mod to get some sort of written agreement done showing who owned what part of the studio. Quite simply, everyone was much too busy to deal with these "mumbo jumbo legal" matters.

Well, as luck would have it this demo (based on "free" work, unlicensed code and an unlicensed subject matter) was good enough to win the developer a contract for an expansion pack for a soon to be released major FPS. Now, with the development contract in hand, the artist wanted to know what his share of the company was. The studio head was floored, since equity in the company was not something that he had ever offered. So the studio head explained that like all of the other employees, "You may be able to share in some of the back-end royalties." Obviously, this is not the deal that the artist believed he was operating under. But his understanding of the relationship between himself and the company was never fully discussed and certainly never put down in writing and all he had was a bad taste in his mouth. This was a bad situation for everyone and resulted in the artist leaving the team and seeking legal counsel.

Fortunately for the developer the expansion pack that they were successful in obtaining did not relate to any of the original work that the artist had done for the company. Because if it had, since none of this was "work for hire" (more on the "work for hire" concept in the next article) the artist would have had sufficient intellectual property rights to, at minimum, pull his work out of the project. The only thing that saved the developer's bacon was the fact that the publishing contract they acquired had absolutely nothing to do with the demo they had made.

So all's well that ends well. All the developer lost was one of the founding members of the team responsible for him getting that first development contract in the first place. This was certainly not an ideal way to launch a developer's first real deal. And it was an unfortunate end to the relationship for both the developer and the artist. And all because they did not treat the business they were in as a business from the beginning! By the way, the developer went on to complete the successful Expansion Pack and is now doing its own titles. Unfortunately, I haven't heard anything from the artist in several years.

So, remember, game development is the best business on earth. You get to do what you love and get paid for it -- a real blessing. But it is a business and needs to be treated as such. If you have to, learn this stuff and do it yourself. If you can,

hire a professional. At the least, make sure everyone has the same understanding of the "deal" and memorialize it in a written document so no one can cry foul later!

Next time we'll take a look at the development company's assets. No, not the furniture and computers - the Intellectual Property that is the essence of the games we make.