

IGDA IP White Paper

IP contracts that Independent Developers Sign

by Thomas H. Buscaglia, Esquire

Independent game developers create games from code, art and imagination. They work in teams and use various tools to accomplish that task. Virtually every aspect of this process, from the creation of the various assets by team members to the "sale" of the finished product, involves Intellectual Property agreements of one type or another. These agreements will help the developer acquire ownership of the game assets, license the tools and technology necessary to make the game, acquire licensed IP to make the game about and convey ownership of the game, or license the game to the publisher who takes it to market.

IP CONTRACT TYPES

These different types of IP agreements used in this process fall into three basic classes. First, there are the IP agreements used in conjunction with the contribution of assets to the developer. Second, there are the IP agreements involved in conjunction with the software tools and technology used to facilitate the creation of the game assets. Third, the IP agreements with the publisher or distributor through which the developer "sells" the finished product. In addition, in some cases there are separate IP agreements involving the licensing of the IP upon which the game is based such as a film or novel.

CONTENT ACQUISITION AND RETENTION AGREEMENTS

The initial set of IP agreement any independent developer needs to consider are those between the team members and the developer itself. These sometimes overlooked initial agreements convey the IP rights of those contributing their work to the game to the developer. Under traditional principles of intellectual property law the creator of a "work" owns that work. So, for example, an artist owns the image he creates. If that image is a part of the game, the artist still owns it unless it was done while being paid as an employee. In that case it is considered "work for hire" and is owned by the employer instead. But at the early stage of many projects the team members are not yet employees, they are merely contributing their work to the project in hopes that funding will be obtained to make the game. So, the first IP agreement most independent developers should sign is one with the contributors conveying all right title and interest in the contributed "works" to the developer. Otherwise the developer may not own some of the assets, a serious potential problem later on.

THIRD PARTY IP AGREEMENTS

Many of the software tools used to create the game assets will be licensed from third party software companies. Some, like the license to use the operating systems in the workstations, are pretty straightforward and simple. Others, such as the high-end seat licenses for the graphics and animation tools are more complex. And the ever-increasing reliance on the licensing of third party game engines creates an even more complex set of IP licenses to deal with. If the developer creates its own engine, then it may end up licensing its engine to other developers for use in their games through another IP agreement.

Other licenses with third parties may be subject to extensive and detailed negotiations relate to IP licenses of non-game content that will form the basis for the back story to the game. Though often these licenses are acquired by the publisher and then assigned to the developer as part of the publishing contract. However, at times a developer may enter into an agreement to an IP license relating to a game. A strong third party IP can drive game sales and such an association can be a big help in getting the publisher to fund a game. Moreover, it may be possible to acquire a license to third party IP based on a share of revenue or royalties. These agreements are pretty much one off contracts that are negotiated and custom drafted for each specific deal.

Third party content contributors will have IP agreements is associated with them as well. It is common for developers to use an independent third party source to supply some of the game assets. The most common third party contributors involve sound design and music. Contributions of code into the design are usually accompanied by a "work for hire" type of agreement. Original music incorporated into the game will often be secured with a license agreement.

PUBLISHER RELATED IP AGREEMENTS

Of course, the main IP agreement that an Independent Developer signs is, of course, the Publisher agreement. [The section will not go into a great deal of detail in this here since the IGDA business and legal committee has released and is in the process of updating a White Paper detailing developer publisher agreements. So, those with interest in these agreements can get a great deal of information there [\[insert link here\]](#).] But the developer/publisher agreement actually has several IP agreements associated with it. The first in the process is the mutual Non-Disclosure Agreement (NDA) that should be executed by both the developer and the publisher prior to the developer presenting its project to the publisher for consideration. If the publisher is willing to sign the game and the developer and publisher come to an agreement as to the basic terms of their relationship, these terms are set out on the second IP agreement between them - the Letter of Intent (LOI). Though not necessary, a LOI can assist in confirming the core agreement terms prior to the entry into the formal agreement without getting too bogged down in the minutia that often fills the more formal final agreement.

MISCELANIOUS IP AGREEMENTS

The final formal developer/publisher agreement is, at its core, all about IP. The IP ownership might be retained by the developer and licensed to the publisher. It could be transferred to the publisher in its entirety. It might revert back to the developer if the project is terminated. Or, the IP may be a licensed property owned by a third party and the publisher agreement will deal with the remaining IP created and associated with the game IP.

If the developer retains ownership of the IP in the game, and the game is a smash hit, there may even be post release IP agreements such as movie, comic or even "action figure" licensing agreements. And then there are the expansion packs and sequels. Now that's something we can all hope for!