

WIG-INDIES – A DEVELOPER’S GUIDE TO NEGOTIATING PUBLISHING DEALS

As part of our **Wig-Indies** initiative, we’ve prepared a short, practical guide for developers on negotiating games publishing deals. You can find more details about Wig-Indies – including our completely free weekly drop-in clinics - [here](#).

A publishing deal is potentially one of the most important contracts a developer will ever enter into regarding their game. A good one can see long-term partnerships thrive and successful games brought to life, whereas a bad one can lead to disputes about royalties, deadlines and even game / IP ownership.

Publishing deals are often fairly complex and unless you’ve been through the process several times before, there’s little substitute for getting a professional advisor involved (e.g. a lawyer, consultant, business advisor, veteran indie dev etc). However, we wanted to put together this guide to help identify *some* of the things which you might want to think about when negotiating a publishing deal.

Important note: this guide is for informal guidance purposes only and does not constitute legal advice.

PRE-CONTRACT

Why do you want a publisher? Before thinking about partnering with a publisher, it’s important to be clear on what you actually want out of the relationship. To answer that, it’s important to know what publishers typically do. This varies from publisher to publisher, but can include:

1. Finance (potentially for the initial game, completion funding and/or ports);
 2. Distribution (getting physical copies on shelves and good digital store visibility);
 3. PR / Marketing (including attendance at industry events);
 4. Business Development (e.g. securing platforms deals and platform featuring);
 5. Contacts (business, production, social media, influencers etc);
 6. Manufacturing (actually producing the physical boxed copies of a game);
 7. Development (co-developing ports);
 8. Localisation (translating and adapting your game’s content to other territories);
 9. QA;
 10. Platform Submission;
 11. Age Ratings and Legal Compliance; and
 12. Providing Dev Kits.
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Do you need a publisher? Once you've decided what you want, the next step is to ask yourself if you actually need a publisher to achieve these things – i.e. is there some alternative means out there which doesn't involve giving away royalties/rights in your game. For example, are there any alternative funding options available (e.g. crowdfunding, the UK Games Fund, tax credit loans etc)? Do you actually need a distribution partner if you're only creating a digital-only Steam/console game? Which countries are you actually releasing in – do you need expertise in territories like Asia which are notoriously difficult – or in some cases legally impossible – to pursue alone? Do you need a publisher's skill set for marketing and PR or are there any social media/PR agencies that could work equally as well? Could you even do some of these things yourself?

That last point is an important one. While it's certainly possible to do some of these things yourself, remember that this is going to take time. Time which is keeping you from actually working on your game. And remember, a good publisher will have done this all multiple times before which should minimise mistakes and hopefully keep things as efficient as possible. Self-publishing can look financially beneficial on the surface, but also be incredibly hard work – always think carefully about whether or not you can realistically achieve everything (including the business / admin side of things) that needs to be done without it coming at a cost to the game itself.

If so, which publisher? If you've decided to look for a publisher, the next step is finding the right publisher for you and your game. Publishers come in all shapes and sizes and finding the right one can take a lot of work. First off, you'll want to make sure that the publishers you're actually targeting are known for offering the things you've decided you need – e.g. does that publisher actually offer completion funding? Do they actually have partners and connections in the foreign territories you want to reach? Do they fund games of your size? Do they have experience in the formats (physical/digital) on the platforms (consoles, PC etc) that you want to launch on? What have their previous marketing efforts looked like – were you impressed? Does their existing catalogue of titles and general reputation match up with the type of game you're making?

You can sometimes find information about publishers online, whether through the publisher's own websites (which often include "pitching" tips related to what that specific publisher is looking for), dev blogs, post-mortems, generally Googling etc. Also, don't be afraid to reach out to previous developers who have worked with that publisher in the past – particularly those whose games may not have been the biggest sellers or that had troubled development cycles (those developers will give you a better insight into what the publisher is like when things aren't necessarily going perfectly).

THE CONTRACT

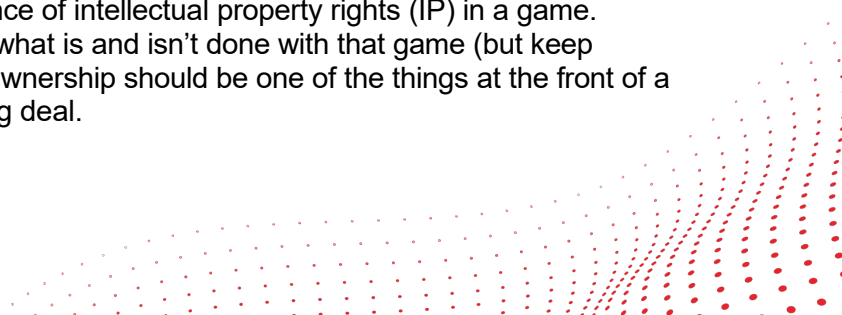
Once you've piqued the interest of a couple of publishers, it's time to start getting into the details of the deal on the table. When it comes to publishing agreements, four of the most important areas to think about are: (1) Intellectual Property Rights; (2) Financials; (3) Milestones; and (4) Termination Rights and Consequences.

1. Intellectual Property Rights

"If a game is your baby, the intellectual property is its soul"

Nigel Lowri, Devolver Digital

This quote perfectly encapsulates the importance of intellectual property rights (IP) in a game. Whoever owns the IP largely has control over what is and isn't done with that game (but keep reading for exceptions to this). As a result, IP ownership should be one of the things at the front of a developer's mind when negotiating a publishing deal.



The common (but not universal) position in indie deals is that developers will retain full IP ownership in the game that is created. However, there are no hard and fast rules here. If you're faced with retaining IP ownership but not being able to secure funding on the one hand, but giving up IP ownership and securing a substantial development budget, a fair rev share across all income streams from a proven publisher, it's at least worth being open to the deal on the table. A lot comes down to your own personal circumstances (e.g. do you need this deal to keep the studio afloat), how important this game is to you (maybe it's not one you see becoming your primary franchise) and importantly, what other rights you get/give away in the rest of the publishing agreement.

Even if you retain IP ownership, what should you look out for?

Even if you retain IP ownership in the game, there are still a number of ways you could accidentally give away more than you intend to, which can drastically limit your control over your own game. And that's because even though you own your game, you'll need to grant the publisher a 'licence' over this in order to legally permit the publisher to do all the good things they're meant to do. Problems can arise when the conditions of that licence are ambiguous or overly wide – the precise wording of a licence is important and single words can make all the difference. When it comes to looking at licences, some of the things developers should look out for include:

1. **Platforms**: which platforms does the licence cover? Even if you're only actually creating a console version for release, you can still tie-up rights for other platforms (PC, VR, TV etc) that you might want to create later down the line and give to a different publisher (or even self-publish). Also, be as specific as possible – if you're just giving iOS mobile rights, don't agree to giving away all "mobile" rights. If it's just Xbox X/S and PS5, don't agree to all "consoles". Where a publisher is funding a game from scratch, it is not uncommon for publishers to want to secure rights to all future platforms for the duration of the deal.
2. **Exclusivity**: are the rights you're giving away exclusive or non-exclusive? In most cases it'll be the former, which means that no one else can do those things which you're exclusively granting to the publisher – this includes the developer themselves. So if you're making a mobile game but also give away exclusive PC publishing rights to the publisher, you technically can't self-release a PC version later down the line – you can only do so with that publisher.
3. **Territory**: in most cases the publisher will ask for a 'worldwide' licence over the game. However, it's not uncommon for developers to look to carve out certain territories from the scope of a licence (particularly in relation to Asia where having a local publishing partner can be more essential). This can be valuable to developers for a number of reasons, including where the current publisher doesn't actually have any experience publishing in those foreign territories.
4. **Duration**: licences to a publisher should only last for as long as the actual publishing agreement remains in effect (for which there will normally be a minimum term which automatically renews until terminated). This should be written clearly and words like 'perpetual', 'indefinite' etc removed. There may also be some limited, post-termination sell-off period in order to facilitate a sensible transition of the game back to the developer.
5. **Future Works (sequels etc)**: does the licence to the publisher only cover this single game, or does it also include future works like spin-offs, sequels, prequels, derivative works, games 'based on' the first, DLC, cosmetics, etc? This can be dressed up in a number of ways, so it's important to read the wording carefully. As with platforms, the important thing is to make sure you're not unintentionally locking away rights to future projects.

6. **Ancillary Rights / 'Exploitation'**: in addition to game publishing rights, are you giving away any other 'exploitation' or 'ancillary' rights (which means non-game products such as merchandise, comics, TV, film, books etc). Before giving these away, make sure to ask if the publisher actually plans on (and has experience) producing these non-game products. If they don't, be cautious before locking up these potentially valuable rights on an exclusive basis.

If you give up IP ownership, is there anything you can do to improve your position?

If you decide to part ways with the IP ownership, there are still a number of things you can look to negotiate which could give you some level of involvement in future projects in the franchise. For example:

1. **ROFO / ROFR / ROLR / ROLO**: these stand for right of (i) first offer, (ii) first refusal, (iii) last refusal and (iv) last offer. These terms all mean subtly different things (which can be very important), but the one you'll come across most often is a right of first offer (ROFO). If you give up your IP but you negotiate a ROFO, this will normally mean (though it depends on the exact wording in the contract) that if the publisher wants to publish a sequel/other product based on that game IP, they must first offer the development work to the developer. The contract will normally say that the parties must enter negotiations with each other for a certain period of time (e.g. 30-90 days) to try and reach agreement on development terms. If no agreement can be reached, the publisher is free to take the IP elsewhere. In other words, a ROFO isn't a guarantee that a developer will be involved in future projects or even get a rev share for those, but it normally means that they will at least be consulted.
2. **Reversionary Rights**: slightly less common, but a reversionary right normally means that if a developer gives up their IP but the publisher hasn't made a sequel within a certain period of time (e.g. 3-5 years), then the IP ownership reverts back to the original developer. The idea here is to try and prevent the warehousing of IPs when they are not being used.

Summary: IP ownership is an important topic and a developer's default position will often be that they should retain this. However, hopefully the above demonstrates that while IP ownership is important, there are a number of ways in which you can (i) unintentionally lose control of your IP even if you own it, and (ii) gain some future involvement with the IP, even if you give up actual ownership. In other words, it's important not to tunnel-vision on the idea of IP ownership alone, since everything else in the contract can have a major impact on how that IP ownership actually works in practice – always read the contract as a whole.

2. Financials

The financial terms are the next aspect that should be given your close attention. Things you'll want to think about here include:

1. **Revenue Share**: what split of revenue do you keep and what does the publisher keep? A question we are often asked is "what's a typical publisher rev share", but the answer to that is so deal-specific and depends on a huge number of factors like the developer's experience, the publisher's experience, the project budget, the development time, the point at which a publisher is getting involved, the additional publisher services being provided and so on - you could be looking at giving up anywhere between 20-70% of your revenue, with this potentially varying pre and post recoup.



2. **Revenue Streams**: so, you've agreed the rev split in relation to game sales, but what about revenue that is generated from elsewhere, such as DLC, cosmetic IAPs, sequels, t-shirts, books, tv shows, movies etc? Whatever rights a developer is giving up, it needs to be clear how revenue made from the exploitation of these is handled – sometimes this can all be wrapped up into a single % figure, or different percentages can be negotiated for different revenue streams.
3. **Gross / Net**: once a developer has worked out what share it is keeping, it's important to discuss what that's actually a % of. Is that gross revenue or net? If it's net, how is 'net' defined in the agreement – i.e. what 'deductions', 'recoupments' or expenses are getting taken off by the publisher before your % is calculated? Importantly, where in the flow is any development funding being recouped from – all gross revenue, all net revenue, or maybe even just the developer's share of net revenue. Look at these carefully, ask for ambiguous terms such as "other costs" to be clarified, capped, narrowed or removed as needed.
4. **Payment Periods**: when do you actually get paid your rev share? On a monthly or quarterly basis? Within 30 days of you submitting an invoice to publisher? When can you actually submit an invoice – only upon receipt of a royalty report from the publisher? If so, when will the publisher give you royalty reports? Depending on the payment period wording and what costs are being recouped, it's possible that you might not see any money at all until 3-6 months post-release, even if the game sells well. Prepare for this and don't hinge survivability on receiving royalties on day 1, because this will not happen.
5. **Royalty Reports**: make sure you get these *and* that you understand them. A royalty report should at least detail how many units were sold on which platforms, in which regions and give you a breakdown of gross revenue, deductions/recoupments and the division of net rev share between dev and publisher. If you don't understand something here, don't be afraid to ask.
6. **Audit Rights**: having an audit right gives you the ability to send in a professional firm of auditors to check the publisher's books/accounts to make sure it has been paying you the correct royalties. It's normally only used as a last resort, but having the power written into the contract can be advantageous if things unfortunately start to go wrong.

3. Milestones

The Milestones set out the development and funding timeline for a game and are normally found towards the back of a publishing agreement in its 'schedules'. Checking details here is crucial to make sure this section clearly sets out:

1. **Exactly what has to be delivered at each milestone**: what actually constitutes an alpha, beta, first playable, submission build etc? What level of bugs is acceptable at each stage? What game features/assets should be present – multiplayer, save systems, full UI, voiceover etc? Although it's less common nowadays to set these things out in massive detail, it's still in the developer's interest to do so as this reduces scope for arguments in the future – particularly re what features the final game will actually include. Developers should also look to include a "material change" clause, which basically means if the scope of the game drastically changes at any point, that timeframes/milestones/payments etc should be renegotiated.



2. **When developers get paid for each milestone:** milestone payments could be tied to static dates (e.g. 15 March) or to 'acceptance' by the publisher of a milestone's 'deliverable' (i.e. the game build). It's important for developers to make sure that these payment time frames actually work for them from a cash flow perspective – if they need advance funding (i.e. on signing) in order to hire staff/buy equipment and software, make sure the first payment isn't all the way at acceptance of the first milestone - otherwise they won't have enough to get started. Also, re timings in general, always remember to build yourself in some leeway – staff get sick, things go wrong or take longer than expected, ideas get scrapped and added in etc.
3. **What the publisher's submission / acceptance procedure is:** for those milestones where payment is tied to 'acceptance' of a deliverable, what does 'acceptance' actually mean? What does the general submission / acceptance process look like? When can a publisher reject a milestone – lack of a particular feature / too many bugs (this is why it's good to go into as much detail around what's due at each stage)? How long does the publisher have to review each deliverable? Does this time eat into your next milestone?
4. **What happens if there's rejection:** if the publisher rejects a deliverable, what happens next? Does the publisher have to give detailed reasons for the rejection? How long/how many chances does the dev get to remedy these problems? A developer may want to add a clause saying that if the publisher causes delay (e.g. taking a long time in reviewing deliverables) then the remaining milestones are extended by the amount of delay incurred.

4. Termination Rights and Consequences

Although it sounds negative to be thinking about termination rights/consequences at the start of a hopefully positive working relationship, don't let that stop you from being forward thinking. After all, one of the main purposes of contracts is to set out what happens when things go wrong.

In the majority of publishing agreements, termination rights will be weighted in favour of the publisher, particularly where it is providing development funding (which makes sense since the publisher assumes a lot of the up-front risk in investing in the developer/game). That said, there are some termination rights which a developer should always try to obtain, such as for serious breaches by publisher (e.g. payment defaults, misuse of IP etc) and if the publisher goes into liquidation.

Make sure to read the publisher's termination rights carefully as well as your own – does the publisher have additional termination rights prior to the commercial release of the game? Does the publisher have any 'termination for convenience' rights (i.e. it can terminate at any time for any - or no - reason)? Can the publisher terminate if you fail to submit a milestone on time or if it rejects a deliverable multiple times?

But it's not just *when* either party can terminate that's important – a good publishing agreement should set out clearly *what happens* in the event of termination. Things to think about there include:

1. Can you take the IP to another publisher/keep working on it yourself?
2. Do you have to repay any of the development funding to date?
3. If you're part way through a milestone when the agreement terminates, do you get paid that milestone (in part or in full)?
4. If you originally gave up the IP, does this revert back to you in the event of termination?

5. Does the publisher continue to receive royalties for any period after termination?
6. Does any of the above vary depending on which party terminates the agreement?

There are no hard and fast rules here and a lot of these points will be open to negotiation – don't be shy to negotiate and remember that now is the time to be thinking about these things, not later. This is one of the areas where getting a professional advisor like a lawyer involved can be helpful – they're there to point out the tricky questions which can easily slip your mind while everything else is going on and to fight your corner as hard as possible.

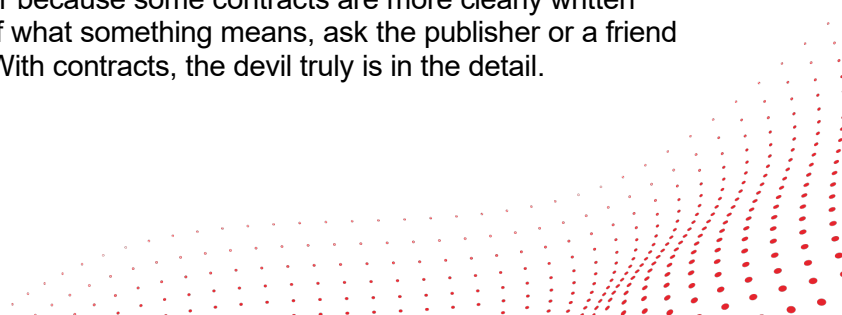
THAT'S IT?

Not yet. Most contracts are softly divided into two halves – one that deals with the 'commercial' terms (like those above) and one that deals with all of the legal matters like confidentiality, 'indemnities', 'liabilities', 'warranties and representations', governing law and jurisdiction etc. Unfortunately there's no simple way around having these reviewed by someone who's familiar with the terminology. But both parts are equally important and the legals should be given as much attention as the commercial parts of a deal. After all, in the event that something goes wrong, it's often the legals that will dictate how risk/liability is divided between the parties.

RECAP TIME

1. Always think carefully about what you *want* from a publisher, whether you actually *need* a publisher and, if so, *which* publisher is right for you.
2. Four of the most important areas to think about when negotiating a publishing agreement are (a) Intellectual Property, (b) Financials, (c) Milestones and (d) Termination Rights and Consequences.
3. IP ownership is important. If you're keeping your IP, don't accidentally lose control of this through widely drafted licences. If you're giving up your IP, try and negotiate some involvement over future exploitations (ROFOs etc).
4. For the financials, make sure there's clarity over *what* and *when* you're actually getting paid.
5. Be as detailed as possible when it comes to setting out the milestones and acceptance procedure, particularly regarding what's due at each milestone, when you actually get paid, when the publisher can reject and what happens then.
6. Think carefully about not only *when* either party can terminate the agreement, but what the *consequences* of termination actually are.
7. There's always a lot of legalese in a contract which is just as important as the commercial terms (particularly in the event something goes wrong in the future).

TIPS TIME

1. **Read your contract.** There's never any excuse for not doing this.
 2. **Understand it.** This one's a little harder because some contracts are more clearly written than others, but if you're ever unsure of what something means, ask the publisher or a friend or family member to help explain this. With contracts, the devil truly is in the detail.
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3. **Get it in writing.** Not in emails, skype, DMs or anything else – if you've requested a change/clarification, make sure this ends up in the contract you eventually sign.
4. **Give yourself enough time.** Always leave enough time for proper review and negotiation of a publishing agreement – this can range anywhere from a couple of weeks to several months.
5. **Separate needs from wants.** You'll never get everything you want in the contract, so it's important to focus on what's important to you and being prepared to compromise on other points.
6. **Work together.** Negotiating a deal is a two-way street – keep things civil, realistic, listen to the publisher's side of things and balance that with what you're asking for.
7. **Tunnel Vision.** Don't tunnel vision on any particular point and always read and understand the deal/contract as a whole.
8. **Be prepared to walk away.** This isn't always easy to do, but giving yourself enough options so that you actually have the power to say no is really important.
9. **Get help.** Whether this is from friends, family, other developers, consultants, advisors or lawyers – don't be embarrassed to look for external help; any cost associated with this will likely be marginal in comparison to what you could be putting on the line with a bad contract.

ABOUT WIGGIN

Wiggin is a specialist entertainment law firm headquartered in London. We provide legal and business advice to growing and industry-leading interactive entertainment businesses around the world, including studios, publishers, platform operators and tech businesses. Our games team is one of the largest in the UK & Europe and has over 60 years combined industry experience.

If you'd like to book a drop-in, check out our [Wig-Indies page](#). Or if you'd like to chat more generally, please feel free to get in touch via peter.lewin@wiggin.co.uk.

You can also sign up to our monthly legal / biz games-focused newsletter [here](#) - it's not boring – promise!

