INFORMATION SHEET

# COMPUTER GAME DESIGN AND DEVELOPMENT

## INTRODUCTION

The video game industry became larger than the film and television industry sometime in the 1990's. Since that time gaming technology has evolved from console or personal computer gaming models to include games apps or mobile apps played online or on mobile platforms.

See the Arts Law information sheet Cross platform creativity – online and digital media.

The ongoing development of hand-held gaming platforms (think smart phones and tablets) in conjunction with traditional platforms, such as games consoles and computer software, means the interactive games and entertainment industry continues to expand and game creators are enjoying greater opportunities to develop, finance and distribute their games outside the traditional business models. This rapidly growing industry offers opportunities for a range of creators, whether as developers, animators, visual artists, musicians, filmmakers, graphic artists, writers (story tellers), computer programmers or software engineers.

New business models are constantly emerging. 'Real Racing 3', by Australian game developer Firemonkeys Studios, was released in February 2013 using the freemium business model – it was free to download and play, however enhancements were available through in-app purchases. In Real Racing 3, users can enjoy the game for free and can undertake car maintenance and repairs or purchase new cars using in-game currency that is earned by completing races. Alternatively, users can purchase the in-game currency using real-world money in the in-app store. 'Freemium' games usually dominate the top 10 highest grossing apps on Apple's App Store.

Of course, first and foremost, games are developed by creators for the love of it. But it is also good to know there is a strong market in which to get your games product out there!

As video games are made up of many different component parts, are usually the product of collaboration, and take up a great deal of time, money and effort, there are a number of legal and business considerations to be tackled in the early stages of any project. Generally creators understand they hold certain rights in respect of their works i.e. copyright, but they may not be aware of the rights other people involved in the project may hold nor how to acquire all the necessary rights in order to fund, market and exploit the final product. The golden rule is the sooner you address these considerations, the better!

This information sheet outlines the legal issues that can arise for game creators and provides necessary information concerning what steps can or should be taken to protect and secure rights.

# YOUR GAME CONCEPT

You and your mate are indie game developers and you have come up with a great idea for your next game (you think it could be the next 'Angry Birds'). You both want to get straight into creating a prototype and pitching your game to whoever may be interested so you can get some funding to develop the game and get in online... STOP RIGHT THERE!! Before you go any further, take the time to think about how you are going to run the project as a profit-making venture, who you are going to need to assist you with your project and what rights issues may have to be considered upfront. Importantly, at this stage, don't assume that the law will protect your 'ownership' of your idea or concept when you're talking to others. Unless you have confidentiality arrangements in place, anyone you share your idea or concept with can probably take it and try to develop it without you. See below for more information about how to protect your Confidential information.

# WHAT'S YOUR BUSINESS STRUCTURE?

So you've got your game concept – now you need to consider how you are going to run this project from a business perspective and that involves thinking about what business structure works best for you. Do you want to retain overall ownership and creative control of the game and manage the development so that it realizes your particular vision? Or do you want to develop the concept just to the stage where you can sell it to an established developer and then sit back and watch it happen? Who's in this with you? Who's the boss? How much of your own money are you risking and what's the exposure to you personally if it all goes pear-shaped? The answers to these questions will help you decide what operating structure is going to work best for you - whether you want to be a sole trader or whether you should establish a partnership with other creators on an equal footing? Then you should consider entering into a partnership agreement with those people. Maybe you need to consider establishing a company so you are not personally liable for the debts if the project stalls, misses a deadline, loses funding or, god forbid, falls over.

The following is a brief summary of the different options – for more information on particular structures, see Arts Law's Business Structures and Governance: A Practical Guide for the Arts.

## Sole Trader

### *Who is a sole trader?*

A person conducting a business, as an individual operator of that business, is described as a 'sole trader'. Some projects, after an assessment of the risks, may be viewed as suitable for production as a sole trader, such as a where the writer is selling the developed concept to a larger developer for production and marketing and then being contracted as creative director, or a where the same person is responsible for all the development stages of a very simple low budget game.

A sole trader operates the business either using their own name or under a business name (which must be registered with the Australian Securities and Investments Commission (ASIC)). A sole trader takes direct responsibility for the conduct of the business and enters into contracts under their own name; although where they trade under a business name it is usual practice to sign under their "[legal name] trading as [XYZ]".

### *Advantages and disadvantages of operating as a sole trader*

Operating as a sole trader has a number of advantages. A sole trader's only ongoing reporting obligations are via their annual tax returns and their quarterly Business Activity Statements (assuming

 

that they are registered for GST). A sole trader is not required to maintain or submit formal financial statements such as profit and loss statements and balance sheets. Accordingly, a sole trader does not have the accounting and ASIC registration costs to which companies are subject. In summary, establishing a business as a sole trader is generally cheaper than establishing a partnership or a company and easier to operate.

The principal risk with running a business venture as a sole trader is that the individual is personally responsible for any debts of the business and is directly exposed to the risks of whatever unforeseen events that may occur in the conduct of the business. The sole trader has an unlimited exposure to legal action arising from those unforeseen events and will be responsible for the negligence of any employees and contractors working in the business. The unlimited personal liability of the sole trader means that any assets they own (including those unrelated to the business such as a house, car, computer or pet goldfish) could be claimed for the purpose of meeting any successful legal claim. It is possible to insure against some of those risks, however insurance cover doesn't generally extend to business failure. For more information, see Arts Law's Information sheet: Liability and Insurance.

You will need to carry out a risk assessment to determine whether you should operate as a sole trader. Some funding entities will not provide finance to a sole trader. There are also some tax incentives that may not be available to sole traders – such as the Research and Development Tax Incentive program administered by the Australian Taxation Office (ATO) and AusIndustry. For more information about the program see the ATO website.

## Partnership

### *What is a partnership?*

A partnership is established when two or more persons carry on business in common, with a view to sharing any profit or loss between them. A common partnership for games development might involve two creatives or might be a partnership between one person with more creative/game design skills and one with more project management, programming or marketing skills. The partners want to own all the intellectual property in the game jointly and the partnership provides a possible ownership structure.

A group of people working together to develop a computer game may actually be operating as partnership even if the members of the group have never in fact discussed, or thought about, partnerships. The partnership legislation of each State or Territory sets out for rules to determine whether a partnership does or does not exist[1].

### *Advantages and disadvantages of operating as a partnership*

A partnership enjoys most of the advantages of a sole trader and is an effective means of operating when there are more than one business owner. Having said this, partnerships do have more substantial ongoing compliance costs than sole traders in terms of the taxation and financial reporting obligations necessary to ensure that the partners satisfy the obligations of good faith to each other.

If the partnership operates under a business name (e.g. Raider Games), that name must be registered.

There are no costs to setting up a partnership although Arts Law recommends preparing a formal partnership agreement otherwise the law may imply terms and conditions which do not reflect

[1] s.2 Partnership Act 1892 (NSW); s.2 Partnership Act 1891 (SA); s. 6 Partnership Act 1958 (Vic); s.7 Partnership Act 1963 (ACT); s.6 Partnership Act 1997 (NT); s.6 Partnership Act 1891 (Qld); s.7 Partnership Act 1891 (Tas); Partnership Act 1895 (WA).

 

expectations. Entering into a formal partnership agreement allows the partners to set out clearly the terms and conditions of their relationship including how ownership of the game will be managed, profit shares and the responsibilities of each partner. An important function of a partnership agreement is to allow the partners to set out limits to the authority of each partner to act for the whole partnership.

Arts Law is working on a template Games Development Partnership Agreement (in development).

As with sole traders, the principal issue with running a business venture as a partnership is that each partner will be personally liable for the whole of the debts of the partnership - even if one of the other partners incurred the debt! Unlike a company, a partnership is not a separate legal entity offering a "corporate shield" to its members. Most Partnership Acts do provide for the establishment of "limited partnerships" which divide the partners between those with unlimited liability (of which there must be at least one) and those with a published level of limited liability.

### *What is a limited liability partnership?*

In Queensland a limited liability partnership (LLP) can be created under the *Partnership Act 1891 (Qld)*. An LLP:

- must be formed to conduct business in Queensland;
- only exists in law after registration with the Queensland Office of Fair Trading; and
- must have a registered office address in Queensland.

The LLP is a business which limits the liability of some of the partners to a specific amount. It must have at least 1 general partner and at least 1 limited partner. The general and limited partners can be an individual or a legal entity (such as a company). The partners can live outside Queensland. The *Partnership Act 1891 (Qld)* also allows for incorporated limited partnerships (ILPs) for entities engaged in venture capital activities.

See the Queensland government information on Limited liability partnerships.

## Company

### *How do you form a company?*

Another way for a group of game creators to conduct their activities is through a company. This is also a useful structure for a solo game developer who wants to reduce the risks of personal liability associated with operating as a sole trader. A company is a legal entity incorporated under the *Corporations Act 2001* (Cth) which can enter into contracts in its own name. The Australian Securities and Investments Commission (ASIC) is responsible for the administration of the Corporations Act and regulates the activities of companies, including compliance with accounting standards and the financial reporting obligations. The rules for a company are usually set out in its 'constitution', a document that may limit the company's powers and set out objects of the business of the company.

A 'public company' means a company that is not privately owned (identified by 'Ltd') in which shares are usually owned by members of the public and may be traded on the stock exchange. A company limited by guarantee is a non-profit corporate structure and not generally relevant to game development businesses.

 

### *Advantages and disadvantages of operating as a company*

The costs associated with setting companies up and with the ongoing compliance and reporting obligations are generally higher than the costs of operating up a partnership or sole trading business and this must be factored into any business plan involving the use of corporate structures. On the other hand, companies enjoy taxation rates that are lower than the marginal rates for individuals so that there will be an earnings threshold at which those tax savings exceed the ongoing compliance costs. This threshold will vary from situation to situation and detailed advice in this regard should be obtained from a taxation or financial professional.

Most companies established to make games are privately owned or 'proprietary companies' (identified by 'Pty Ltd'). They are separate legal entities in their own right and, as such, can own property and sue and be sued. Companies offer the protection of a "corporate shield" that protects the members/shareholders from being personally liable for the debts of the corporate entity. However, the directors and officers of companies have duties under both the Corporations Act and under general law, and can become personally exposed for their actions or failure to act to meet the standard of behaviour expected of a director[2]. The *Income Tax Assessment Act* also places duties on directors regarding the payment for tax and other obligations of a company. Directors also have obligations under Workplace Health and Safety legislation and other statutes.

### *A holding company, subsidiary company and a special purpose vehicle (SPV)*

The same person or group may work on several different games. It is possible for a single company to carry out the various projects through internal divisions of that company, with each division having a separate business name. A more complex company structure can involve a 'holding' company owning a number of 'subsidiary' companies through which it operates. The role of each subsidiary company may be to carry out some aspect of the business, for example there may be a separate subsidiary company for each game project. This can be useful to separate the financial liabilities and successes of each project.

Such a wholly owned subsidiary is sometimes called a 'special purpose vehicle' (SPV) which is a company specifically set up to produce the game.

### *What is a joint venture?*

A 'joint venture' is a contractual arrangement between the participants in a business venture. A joint venture may take the form of a joint venture partnership, however joint venture agreements often contain a provision that asserts the arrangement is not a partnership or an agency relationship in order to attempt to limit the authority of each participant to commit the other participants in the joint venture and thus to avoid the negative effects of liability between partners in a partnership.

For more information on SPVs and Joint Ventures see Arts Law's information sheet Business structures for filmmakers.

## BUSINESS NAMES

There are differences between business names, company names, and trademarks. The company name is the legal name of the company registered with ASIC. Where any business (whether a company, partnership or sole trader) trades under different name to their legal name, that name is called the

[2] Chapter 2D, Part 2D.1, Corporations Act 2001 (Cth) – Officers and employees - Duties and powers.

'business name'. The ASIC database of names can be searched in order to determine whether a business or company name is available. The choice of a business name is subject to the approval of the ASIC.

For more information, see Arts Law's Information Sheet Protecting your professional name.

# INTELLECTUAL PROPERTY RIGHTS

The single most important legal issue for any game development project is how to secure the ownership of the intellectual property in the completed game so that it can be commercialised, promoted and marketed and, if successful, used as a springboard for further iterations of the game across other platforms and media. There is no simple legal concept of copyright or intellectual property in a 'game'. Like a film (but even more complex), a game comprises a multiplicity of elements each with different intellectual property characteristics. The only way to secure 'ownership' is through careful structuring of the business relationships between the various contributors and by using contracts.

## Copyright

Copyright is the most important source of legal rights for artists and other creators. In Australia, copyright law is provided for in the *Copyright Act 1968* (Cth) and protects specific types of creative output including:

- works (artistic, literary, dramatic or musical works); and
- subject matter other than works (films, sound recordings, broadcast and published editions).

Copyright does not apply to a video game in its entirety; rather it applies to the individual game components including:

- the software (defined by the law as a computer program and protected as a literary work);
- the graphics, game-specific fonts, images of characters and concept artwork (protected as artistic works);
- the script (protected as a dramatic work);
- the animated visual elements of the game which are seen as a moving picture (protected as a film);
- the composition of the sound effects and in-game audio (protected as musical works); and
- the sound samples (protected as sound recordings).

'Jetpack Joyride', by Australian developer Halfbrick Studios, is a side-scrolling endless runner/action video game which was released in 2011 and has won several awards. The intellectual property in the game is in various component elements protected by Australia's copyright laws. The graphics, such as the images of main character Barry Steakfries, the terrified scientists and the unique vehicles are protected as artistic works. The animations, including the fire from Barry's jetpack and the screaming missiles would be protected as cinematograph films. The musical compositions are protected as musical works and the recorded performance of that music as well as the sound effects would be protected as sound recordings. Any written story line which formed the blueprint for the game would be protected as a literary work. And the programming code which operates in the background to unify all these elements into what the consumer experiences as 'the gaming experience' is itself protected as a type of literary work. The studio needed to obtain rights to all these separate copyright materials in order to create and market the game.

 

The Copyright Act identifies different owners for each type of work or subject matter. To secure ownership of the rights in the whole game, the developer needs to have clear written contracts with each of these legal owners which either assign or licence copyright to the developer.

While copyright can protect specific elements of the game and probably also the overall audio-visual look and feel, it does not protect the idea or underlying concept of the game.

The limitations of using copyright to prevent game clones are illustrated in two decisions in the United States. In 1982, a US court compared the popular Galaxian and Space Invaders video games and observed that *"the only similarity between Galaxian and Space Invaders is in the idea of the underlying games, i.e., outer space games wherein a defendant base or rocket ship, controlled by the player, attempts to fend off attacking hordes of aliens… When the expressions of the Galaxian and Space Invaders works are compared, it is clear there is no similarity beyond that of idea*."

A finding of copyright infringement requires more than just copying the idea or game concept – the games must appear almost identical visually to the user as was the case in a 2012 decision in the US concerning Tetris, a very successful simple tile based video game developed in 1984, which has been described as one of the most successful video games of all time, selling over 200 million units worldwide. Its success has generated many similar games, most of which Tetris has left alone, no doubt because of the limitations of establishing copyright infringement rather than just copying the rules or functionality to make a similar but different game. But when Xio Interactive brought out 'Mino', Tetris successfully brought copyright infringement proceedings. Xio Interactive admitted copying the rules, function and expression of Tetris but said these were not protected by copyright. The US Court confirmed that copyright did not protect the rules or the game mechanics. It did not protect the abstract underlying idea of a game where *"a user manipulates pieces composed of square blocks, each made into a different geometric shape, that fall from the top of the game board to the bottom where the pieces accumulate and the user is given a new piece after the current one reaches the bottom of the available game space, where while a piece is falling, the user rotates it in order to fit it in with the accumulated pieces, where the object of the puzzle is to fill all spaces along a horizontal line and if that is accomplished, the line is erased, points are earned, and more of the game board is available for play but if the pieces accumulate and reach the top of the screen, then the game is over."* However the Judge went on compare 'the audio-visual aspects' of the two games. He concluded that screenshots of the two games showed only slight and insignificant differences. Videos of the two games showed that they had identical overall look and feel visually. Although Xio Interactive had not copied the source code and exact images, it copied almost every visual element of Tetris, including the look, colour, shape, number and movement of the game pieces, the colour changes, and the playing field. 'Mino' was found to have infringed the copyright in 'Tetris'.

For more information see Arts Law's information sheets Copyright and Computer games - legal issues for creative designers.

## Moral rights and computer games

If you make a creative work, the Copyright Act gives you certain 'moral rights' as the 'author' of that work whether you created it as an employee or a contractor. There are three moral rights:

- Right of attribution: you can make sure that you are named and acknowledged for your work.
- Right against false attribution: you can stop other people from claiming that they created your work.
- Right of integrity: you can stop your work being used in a way that harms your honour or reputation.

 

The meaning of an "author" with regard to moral rights extends to the creative work in all elements of the computer game including the work of computer programmers, script writers, graphic artists and animators.

Game developers need to ensure that the way they use content generated by an employee or contractor doesn't breach that person's moral rights. This means taking care to attribute each 'author' in the game credits – or getting written consent that it is not necessary to do so – and making sure that the employment or contractor agreement confirms the developer has the right to change or modify that author's work to the extent necessary to create the game.

For more information, see Arts Law's information sheet – Moral rights.

## Confidential information and trade secrets

Often game developers will need to communicate their original idea or creative concept for the game to potential partners or investors. If that idea or concept isn't protected by copyright, how do you stop that person appropriating your concept? In many cases, business ethics and commercial common sense mean that someone who listens but then decides not to get involved in business with you will not do anything further with the information and ideas you disclosed to them. However, this is not always the case and if you believe that your concept has commercial value then you need to take positive steps to protect that value. This means that in any meetings or discussions with potential partners, associates or investors, you need to think about the risk the third party might copy your ideas or pass them on to others without your permission or providing payment to you.

Copyright might protect written concept outline but it only protects the written words not the ideas or information behind them. Your best chance of preventing another person taking and using your ideas or creative concepts is through the law of confidential information. To establish that the person to whom you disclosed your ideas or information is under a legal obligation not to take or use that information for their own purposes, you need to actively do a few things:

- Don't disclose precious or valuable information to anyone without first identifying it as 'confidential' and seeking an undertaking that they will respect that confidentiality and will not use or disclose it to anyone else without your consent.
- Mark all documents which contain confidential information "CONFIDENTIAL". If copyright subsists in your documents, also include the copyright owner's notice. You can go further and mark each document with this notice:

  > "The information in this document is confidential and must not be used without first obtaining [name]'s written consent."

- Most importantly, ask the person or organisation which is receiving the information to sign a formal non-disclosure or confidentiality deed before you provide them with that information or content. This creates a written confidentiality contract. A sample written confidentiality deed is included in Arts Law's information sheet Protecting your ideas.

Confidential information is still valuable even after the initial creative pitch. Once you enter the development process it may be that some of the confidential information you create can be classed as 'trade secrets' namely confidential information of a type that would enable one business to exert a competitive advantage over another. A trade secret is particularly important when competitors are trying to replicate a particular element of a game without knowing the source code. It may be a client list or database or a marketing strategy. All your employment contracts and service contracts should contain confidentiality clauses preventing the employee or contractor from using the information learned or

 

created in their work for you outside of your project. Protecting trade secrets is important to consider in situations where former employees of a company go and work for a different company in the same industry.

Essentially, protecting valuable in-house information requires you to take active precautions to keep that information confidential. Non-disclosure or confidentiality agreements allow the owner of a trade secret to take legal action against anyone who violates the terms of the agreement. A non-disclosure agreement is a critical agreement for a developer, particularly as a strategy to allow adequate time from conception to completion of a game.

## Patents

Another type of intellectual property right is a patent - an exclusive statutory right conferred by the *Patents Act 1990 (Cth)* to exploit and control the use of an invention. Unlike copyright, patents are not automatic and are only granted after a lengthy (and relatively expensive) registration process. There is no precise definition of what is an "invention". It can be a device, substance, method or a process. In a computer game, there are several possible elements that might be patentable if they were sufficiently new and inventive such as a particular user interface communication technologies, game play methods, graphics techniques, storage media forms. A new type of game playing device might also be patentable. For example, Sony holds numerous patents including patents for the original PlayStation console, as well as handheld controller devices in which colours illuminating the controller correspond to colours in the game being played, systems for downloading game samples, and systems that manipulate game avatars in response to real life player actions.

To qualify for patent protection an invention must meet the threshold requirements of 'novelty' and 'inventiveness' in that it must be new when compared with the previous state of knowledge in the relevant area. It must also demonstrate the exercise of inventive ingenuity when judged against that state of knowledge. Something may be novel, but still lack inventiveness if it is the obvious next step in a particular field of knowledge.

It can be difficult to establish that a software or computer based innovation is patentable; merely to use a computer program to implement an abstract idea, scheme or method does not necessarily qualify the innovation for patent protection. To work out if an innovation is patentable will usually require advice from a Patent Attorney or a lawyer with experience in patent law.

For further information, refer to Arts Law's information sheet – Patents.

For information about applying for a patent in Australia visit IP Australia.

## Trade Marks

Copyright won't protect the name of a game or character; however these can usually be registered as trade marks. A trade mark is a brand or logo used in business to indicate that goods or services come from a particular source – this isn't just any smartphone, it's a Blackberry ™! A trade mark can be a phrase, word, letter, name, signature, numeric device, logo, colour, symbol, picture, aspect of packaging or shape, and even a scent or sound. It can consist of words or images alone or any combination of the above signs.

A business may own several trademarks which could include the business name and the brands of particular products such as particular films or film production services. The *Trade Marks Act 1995* (Cth) provides for the registration of trade marks.

 

Trade mark registration gives the owner the exclusive right to use a trade mark in commerce and in connection with a specific class of goods or services. The purpose of a trade mark is to prevent confusion amongst consumers to ensure that the purchaser can be confident in the origin of the product they are buying – examples of valuable trade marks are Nintendo, Apple, Super Mario, and Tomb Raider. Trade marks also protect owners against the loss of sales and damage to reputation that might occur if others are permitted to use a confusingly similar trade mark.

The primary uses of trade marks in games are the names and logos associated with the game, the publisher and the developer. These logos generally appear on the packaging and within the game itself in splash screens during the introduction. The names of images of specific characters in games can also be trademarked such as 'Mario' and 'Lara Croft'. Games which evolve from other entertainment properties may need to secure rights to a trade mark through licensing, for example where a film is developed into a video game such as 'Star Wars'.

In addition, many games contain third party trade marks on in-game billboards or on products appearing in the game. This is done to heighten the accuracy of a game or as advertising for those real-life sponsors. For example, in Real Racing 3, over 70 different car models appear licensed from nineteen different car manufacturers including Porsche, Lamborghini and Audi. Although the use of real-life registered trademarks in games can add authenticity and may even be a source of sponsorship opportunities, some trade mark owners will not want to licence their brand for reproduction in a game and if they do, it will be under strict conditions.

For further information, refer to Arts Law's information sheets – Trade Marks and Using Brands or Products in Film.

## LEGAL ACTIONS RELATED TO UNFAIR COMPETITION

You do not need to register a trade mark to use it. In a situation where a third party uses the same or a similar trade mark (such as the name of a game) to yours, you may have rights under common law, and under the *Australian Consumer Law* (See the Arts Law information sheet Australian Consumer Law and creators. You will be required to prove that your mark has developed a reputation in the market and show the other party's use of your mark misrepresents a connection between their goods and your business (also known as "passing off"). Proving this can be difficult unless you are well-established in the market so for this reason, it is advisable to secure trade mark registration for any valuable name, brand or logo.

## GAMES DEVELOPMENT AND PRODUCTION

Designing a video game and bringing it to market involves working with a range of different businesses and creators to develop the various component elements that come together in the creation of the game. It is rare for one person to possess all the skillsets needed – graphic artist, animator, sound engineer, software programmer, scriptwriter etc. Game development teams can range from a one or two person team to a team of hundreds. The ending credits to Assassins Creed 3, a AAA title, run for almost 20 minutes and list a massive range of people, skills and expertise. Typically there will be a number of collaborators or creative contributors, each likely to have certain rights in the work they do and the content they create. All of those rights need to be aggregated or bundled together and held by one entity for effective marketing and distribution. Under the traditional model, it is usually the publisher who needs to end up owning the game's intellectual property rights. This may not be the case for indie game developers, but they will also need the different rights sorted in order to distribute their game. Either way, it's essential to have a system of contracts and licences which have the legal effect of bringing all those rights into one place.

 

The next section takes you through the different stages of development, the different types of contractual relationships and the different contracts you might need to establish title in the final game.

## What type of working relationship do you want?

One preliminary question relevant throughout development is the type of legal relationship you will have with the various people who work on the game's design and development. In the section above on Business Structures, some of the different options available for you and people with whom you want to share management or overall responsibility and ownership are discussed. Here we are concerned about people you want to pay (whether upfront or with a royalty share) to produce some essential element of the game for you. They are not partners or co-owners – indeed you want to make sure that the IP rights in what they create is brought into the ownership structure of your business. You will need those rights to bring the game to market. This is a threshold question and should be considered each time you engage someone to create or contribute any aspect of the game. The question is whether that person or business is an employee or a contractor. There are serious legal consequences for the ownership of the intellectual property flowing from the answer.

## Employees, Contractors and Interns

Generally, the intellectual property rights (including copyright) in the work performed by an employee are owned by the employer unless there is an agreement to the contrary. However, if that person is not employed but is instead engaged as a contractor or works as an unpaid intern or volunteer, they own the copyright in the work they produce unless there is a signed contract that clearly states otherwise.

The difference between employees and contractors is not resolved by simply calling someone an employee or contractor. The law will determine whether someone is in fact an employee. The employment relationship will typically involve some form of salary with potentially some additional "bonus" or similar arrangements in lieu of up front salary. Employment of individuals will attract a number of legal and administrative obligations for the employer including liabilities and responsibilities in respect of payment of superannuation, worker's compensation insurance, work health and safety obligations, payroll and employment related taxation, and restrictions on termination.

For more information see Arts Law's information sheets – Employment Issues and Superannuation and contract for services.

Whatever the relationship, Arts Law recommends that the question of IP ownership be clearly dealt with in writing:

- By confirmation in the employment contract that the employer owns all IP created in the course of the employment; and
- By including in each agreement with a contractor a clear assignment (or licence) from the contractor to the game developer of all relevant IP created in the course of performing the contracted services.

## Design, concept, story

The 'game design' is the art, science and story of the game rather than the actual code or graphics. Game design is usually contained in a 'design document' which typically records details of the ideas, stories, worlds, characters and gameplay mechanics. There is copyright in the 'design document' by virtue of it being written down. However copyright protects the words used in that document to express the 'game design' rather than the ideas, concepts or stories it describes. If a competitor with access to that 'design document' built the game precisely as described in that document – characters with same

 

names, same dialogue and sequences, same levels and rewards – the owner of copyright in that design document might have a claim for copyright infringement. But if the competitor took the storyline approximately, added lots of detail, fleshed out the characters, left some out and added others, changed the structure – it is likely to be much harder to argue that the final game infringed the copyright in the design document as opposed to merely taking a great idea and getting in first.

This is why non-disclosure agreements and confidentiality deeds are absolutely vital at the early stages. You should have non-disclosure agreements between you and all your collaborators, any new or potential partners, investors, publishers, employees or contractors. See the sample written confidentiality deed in Arts Law's information sheet Protecting your ideas.

### Platforms

Early in the game development process, and certainly before any coding is done, it's necessary to decide what platform the game will operate on. A platform is the operating system used by the hardware that the game will be played on, such as Nintendo, Xbox or Android.

A platform licence must be sought from the game console (hardware) manufacturer in order to commence coding. The game must be coded to operate with the chosen platform and that requires access to the platform's authoring program which is only available under licence. Usually the platform licence requires a royalty payment calculated as a percentage of the income of the finished game. Often a licence will only be granted if the manufacturer approves the game concept. In some cases, the negotiations for the platform licence create opportunities for further collaboration with the manufacturer – it may invest in the game development or seek to have input into creative aspects.

Generally the platform licence will be prepared by the licensor and may be standardised. For that reason, Arts Law has no templates for this type of contract. You can obtain legal advice about a platform licence offered to you through our Document Review Service.

The relationship developed between the game developer and the platform licensor is one of the most important business relationships of the development process.

## FINANCING THE DEVELOPMENT AND PRODUCTION OF GAMES

A critical concern is always money – how to pay everyone associated with the development process. Typical potential avenues of financing include: (a) friends and family; (b) loans from financial institutions; (c) grant funding; (d) venture capitalists; (e) games publishers; and (f) crowdfunding.

### Funding agreements

Where you receive funding from friends or family, you should always have a written agreement setting out the precise terms of the arrangement. These include the amount being loaned; timing of repayment; interest (if any); and any rights that may be granted in respect either of the developed game itself or any profits generated by that game. See Arts Law's sample agreement – Game Loan Agreement (coming soon).

If you obtain funding from a funding body, financial institution, venture capitalist or corporate games publisher you will find that they will generally present you with their own standard terms and conditions which may not be negotiable. It is critical that you read these terms and conditions very carefully and obtain a clear understanding of exactly what you are giving away. Some venture capitalist agreements will grant the funders some level of participation in the management of your project and these will often

 

include "step in" rights allowing the funder to take over the control and (even) ownership of your project in certain circumstances. You can obtain legal advice about a platform licence offered to you through our Document Review Service.

## Crowdfunding

Crowdfunding has emerged as a viable source of funding for game development projects. Crowdfunding is using the Internet to facilitate the pooling of small contributions of money by a network of individuals in order to finance particular activities or projects.

Arts Law's information sheet Crowdfunding, discusses legal issues that are created by the use of fan fund/crowdfunding websites to access an international pool of potential supporters of the project.

> Although the Australian Securities and Investment Commission has said "crowdfunding, as a discrete activity, is not prohibited in Australia, nor is it generally regulated by ASIC"[3] it is clear that some types of crowdfunding could involve offering a financial product, fundraising through securities, or a managed investment scheme all of which are regulated by ASIC and non-compliance can involve substantial penalties (up to two years imprisonment for operating a managed investment scheme without a licence). It is possible to have a crowdfunding rewards program that complies with the *Corporations Act*. Thus, a promise to deliver a specific product or service as the reward is outside the regulatory scope of the *Corporations Act*; for example, including a character that looks like the pledgor or contributor, receiving a copy of the finished game, or invitations to the game's launch party. However, the offering of shares, or direct financial rewards or profit sharing may be viewed differently.

Using the IgnitionDeck crowdfunding site, video game creator Chris Roberts raised $4,104,189 in just over 5 weeks in October-November 2012 to fund the development of his Star Citizen space combat video game. The crowdfunding campaign included a secret members' area to build excitement, rewards of in-game items, t-shirts, boxed editions and special Golden Tickets. All this for a game with a launch date in 2014!

The Australian Securities and Investment Commission (ASIC) has provided guidance as to how donating money to crowdfunded projects is regulated by ASIC under the *Corporations Act 2001* (12-196MR ASIC guidance on crowdfunding).

Australian creators using crowdfunding need to comply with Australian law, including:

- **Corporations Law**: The Australian Securities and Investment Commission (ASIC) has provided guidance as to how donating money to crowdfunded projects is regulated by ASIC under the *Corporations Act 2001* (12-196MR ASIC guidance on crowdfunding).

- **Tax Law**: Game developers should be aware that any financial contributions they receive through crowdfunding may be subject to income tax as assessable income. This will depend whether their game development activities are considered to be part of a business they are carrying on, as distinct from merely a hobby. To assist you work out if you are operating a business or not, see the Australian Taxation Office website.

- **Australian Consumer Law**: See the Arts Law information sheet Australian Consumer Law and creators).

- **Privacy Law**: see Arts Law's information sheet Privacy and the private sector.

[3] 12-196MR ASIC guidance on crowdfunding, 14 August 2012.

Using crowdfunding necessarily involves posting a short description or treatment of the game project requiring financing. Few crowdfunding sites offer copyright or intellectual property protection so there is always the risk that ideas for games might be copied or exploited by others. For more information on the risks in putting up a teaser video, see Arts Law's information sheet Putting your film or photo online.

Arts Law recommends that you read the terms and conditions of each crowdfunding website carefully in order to understand which platform is the best to use for your particular project. There are fundamental differences in the services provided by many crowdfunding platforms.

# THE CONTENT OF GAMES

## Graphics, animation, special effects

A computer game usually involves visual images, sounds (sound effects, music, dialogue and sound recordings of all these) and animation. Each person contributing to these should either be employed by you under a written employment contract or be contracted through a written contractor agreement so that the intellectual property in what they create is either owned by, or licensed to, the game developer.

For a suggested services contract for contractors working on these aspects of the game development, see Arts Law's sample agreement – Game Development Services Agreement (coming soon).

Often the visual images will be completely fictitious and created purely for the game but they may also draw upon existing images – photos of actual buildings, cars and streetscapes for example. That requires another layer of licensing – it would be a shame to have to withdraw the game from market because the permission of the relevant photographer, architect or car manufacturer wasn't obtained and you are being sued for copyright infringement or passing off.

If you need a copyright licence from a third party to use or adapt an existing image, see Arts Law's sample Copyright Licensing Agreement.

## Music

Generally the music in a video game is either commissioned or written especially for the game or is existing music. Either way, it's important to understand that the musical composition, the lyrics (if any) and the sound recording which is synchronised with the video animation are all separately owned and have separate copyright. In other words, the game developer needs permission from the owner of the copyright in the musical composition, from the owner of the copyright in the lyrics and the owner of the copyright in the sound recording. This could all be the same person – or they could all be different.

For more information about how copyright works in respect of music, see the Copyright Council's information sheet Music & Copyright.

It is possible to get stock music from a stock library and this is probably the simplest way. APRA/AMCOS have a production library of music specifically written and recorded for synchronisation and dubbing in audiovisual productions such as online games. However, you can't always find what you want and many developers have very specific music in mind that can't be found in a stock library.

### *Commissioning music*

If you pay someone to compose, perform and record original music specifically for the game, you automatically have ownership of copyright in the sound recording although probably only a licence of

the musical composition. A written commission agreement is essential here to ensure clear title to all the rights needed for the game. In many instances, a publisher will require you to guarantee that you have executed all the necessary commission agreements for all of the people who have contributed to a game before they will enter a publishing agreement.

See Arts Law's sample agreement – Game Music Commissioning Agreement.

If you know the music you want and decide to pay someone to perform and record it, you will need to obtain a licence in the underlying musical composition and then commission the sound recording. Licences to record can be requested online through APRA/AMCOS. Once you have a licence to record, you could adapt Arts Law's sample Game Music Commissioning Agreement to cover just the making of the sound recording.

### *Licensing music*

If you want to use an existing sound recording, you will need a licence to both the sound recording and the musical composition (and also the lyrics, if any).

The copyright in sound recordings of established bands and artists are typically owned by record labels rather than the musicians who made them. The rights to musical compositions (and lyrics) are sometimes owned by a completely different business to those that own the rights in the sound recording.

To identify who owns the rights in the musical composition and lyrics, try APRA/AMCOS Licensing Services on 1300 852 388 or licence@apra.com.au or the band's Facebook page. To find out who owns the rights in a sound recording try the Australian Recording Industry Association: telephone 02 8569 1144 or visit their website at www.aria.com.au.

Arts Law has a sample Game Music Licence.

## Writing the Code

The critical function of turning the visual and audio elements into a product which brings the original concept and story to life as a computer game is writing the code that operates the game on the chosen platform in response to the players' actions. Often this might be a function that the game designer/developer (or one of the partners/collaborators in the business) does. In other cases, the developer will work with a computer programmer or software engineer with games expertise to do this. Critical aspects of these arrangements will be agreeing (preferably upfront): (a) each party's obligations with respect to confidential information; and (b) the terms of any licences of intellectual property granted to these parties to enable them to do what they have promised to do. Essential to writing the game code will be having the necessary platform licence in place so that the person writing the code has access to the tools, information and systems to ensure that the finished game can be played on that platform.

The production of a computer game will usually involve the use of one or more authoring programs which provide the tools to create all elements of the game including the characters and the character animation and the interactive elements of the world of the game. These authoring programs may be part of, or in addition to, the platform licence. They may even allow creative designers to work on games development without having to be involved in computer programming. The terms of the licence to use the authoring program provide the scope of the permission to use the computer code of that authoring program.

 

A creative designer with programming skills may also be the author of specific routines or modules of code that augment or improve the operation of the authoring program. When the creative designer is contracting with the producer of the computer game, the designer may wish to claim proprietary rights in those routines or modules of code so that the designer can use those routines or modules of code in future projects. Care should be taken in defining exactly what is being assigned or licensed by the creative designer to the game producer. It may be that the designer prefers to licence the game developer the right to use the routines or modules of code that may be reproduced in the completed game while retaining copyright ownership of the routines or modules of code.

If you are contracting someone to write the code, you can use Arts Law's sample agreement – Game Development Services Agreement (coming soon).

# DISTRIBUTION

Video game distribution has changed considerably throughout the decades from floppy disks and cartridges, to CD-ROMs and online downloads. Despite this, most games are still distributed through the traditional networks operated by:

- **Publisher**: typically funds the development and has the rights to manufacture and market the video game; and
- **Distributors, retailers and online stores**: with whom the publisher (or indie developer) will enter retail and wholesale distribution arrangements to release and sell the video game.

## Publishers

Some games are developed without involving a publisher – usually smaller indie games designers who have a do-it-themselves approach to manufacture and marketing which can be very successful. However many games still involve a publisher who:

- Gets an assignment or licence of the completed game from the developer;
- undertakes the manufacture of any 'hard copy' DVD, Blue-Ray and boxed versions; and
- advertises, promotes, markets and distributes the game in store and online.

If you are working, or looking to work with a publisher, then there will be a number of issues to consider and you will need to think carefully about how the terms of the agreement will ultimately affect your business. Some common issues in publishing agreements include ownership of IP rights, merchandising rights, payment and royalties, support services, license for manufacture and distribution, indemnification clause, termination clause and delivery milestones. The publisher may also invest in, or provide finance for, the development of the game.

There are a number of different ownership scenarios that may occur including:

- ownership of IP created for the game might be retained by the developer and licenced to the publisher; or
- some or all of the IP may be owned by the publisher.

These scenarios vary depending on the circumstances. For example this information sheet has largely assumed that the game designer/developer conceived the game concept. However, it may also be the case that a publisher may want to commission a game designer/developer to create a new game based

 

on a concept emanating from the publisher's design in which case the publisher is likely to want ownership of the IP in the finished game.

Game developers often have less leverage when bargaining with a publisher since it is the latter who are taking the game to market (see below). This is not so for indie game developers who market their games without the involvement of publishers.

### Digital Distribution

With the advent of the digital age, video game content can be delivered and played online, thereby eliminating the more traditional experience of exchanging or purchasing new physical media. Online distribution of video games has led to a rise in the number of independent game developers in the market who can now sell and distribute their games without having to negotiate deals with publishers. In many cases, games are only sold in digital form eliminating altogether the cost of manufacturing hard copy game units. This decentralised distribution model has resulted in many games being sold by developers direct to consumers over the internet. These types of direct to consumer sales not only allow games developers to take control over pricing and availability, but also allow independent developers to sell games that publishers are unlikely to distribute.

Online distribution platforms for both consoles and PC include Valve's Steam, Electronic Arts' Origin, Ubisoft's uPlay, Nintendo's eShop, Microsoft's Xbox Live Marketplace and Sony's PlayStation Store.

For mobile platforms such as iOS devices and Android, digital distribution is the primary method of delivering content and these platforms typically have significantly lower barriers to entry allowing a wider range of developers to distribute games. Although the benefits of cutting out the middle man are plentiful, there are also advantages to the promotional and media machine of the big publishers.

The distribution of games apps or mobile apps played on smart phones and tablets is dominated by online sales services such as the iTunes store, the Windows Store and Google Play. These online sales services publish terms of use (TOU) or terms of service (TOS) and other policies that describe the operation of the online sales service and the responsibilities of the developers of games apps or mobile apps.

For further information see Arts Law's information sheet Website development.

## READY FOR MARKET

Whether you are working with a publisher or marketing the game yourself, there are several issues to be resolved before your game can be released.

### End User Licence Agreements

Before the game goes to market, the terms of the licence that the purchaser/consumer must accept in order to play the game need to be considered and incorporated into the finished game through an 'End User Licence Agreement' (EULA).

For further information on End User Licence Agreements see 'Computer Games – Legal Issues for Creative Designers'.

 

## Game apps: in-app purchases & in-app advertising

The Australian Competition and Consumer Commission (ACCC) has worked with consumer protection agencies around the world to identify smartphone and tablet apps that may mislead young children into making unauthorised in-app purchases. The investigation focused on games apps that are presented as being free (as they may be free to download), but do not disclose that in-app purchases will be necessary for the user to obtain the full experience provided by the games app.

The Office of Fair Trading (OFT) of the United Kingdom has published *The OFT's Principles for online and app based games* (OFT1519), which set out guidelines for the implementation of in-app purchases that developers can follow to avoid breaching consumer protection law of the United Kingdom. The ACCC has endorsed the OFT's statement of principles, which include:

- Consumers should be told upfront about any possible in-game costs or in-game advertising;
- Consumers should be told upfront whether their personal data is to be shared with other parties for marketing purposes;
- Important terms should be prominently disclosed prior to download;
- An account holder, such as a parent, needs to give his or her express, informed consent to payments – otherwise the payments are not authorised.

### Privacy Policies

"Privacy policies" or "privacy statements" provide detailed information to users on how the personal information of consumers collected by the game developer/publisher can be used. A privacy policy will typically include terms concerning the collection, use, control and security of your personal information. For more information on how the *Privacy Act 1988* (Cth) might apply to information collected by game developers/publishers, see Arts Law's information sheet Privacy and the private sector.

### Digital Rights Management

"Digital rights management" or "technological protection measures" enables the way in which consumers can use a video game to be controlled. It works by restricting the things a consumer can do with the game such as limiting the number of times it can be installed or the number of different consoles or computers the game can play on.

For further information on TPMs see 'Computer Games – Legal Issues for Creative Designers'.

### Classification

The regulation of content of computer games in Australia is covered by the *Classification (Publications, Films and Computer Games) Act 1995* (Cth). This Act, amongst other things, establishes the Classification Board which is a statutory body independent from government that makes classification decisions for computer games according to the permitted age of users and permitted circumstances of use.

These classifications currently mirror those used for films. State and Territory laws may require your computer game to be classified before it can be sold or made available to the public. If the developer/producer or distributor has to submit the game for classification, classification fees must be paid. There are three different fees, and the level of fees will depend on whether the Classification Board requires you to demonstrate your game in order to obtain classification.

 

Recent amendments to the *Classification (Publications, Films and Computer Games) Act 1995* (Cth) are aimed at making the process of obtaining classification substantially easier and more affordable. Commencing 10 March 2015, games will be able to be classified using simple, accessible, and low cost classification tools that have been approved by the Minister. For example, the International Age Rating Coalition (IARC) has been developing a tool which simplifies the classification process by which developers of digitally distributed games can obtain ratings. Game developers answer a questionnaire concerning their product's content. The responses generate a classification rating for a range of jurisdictions including the US, Europe and Australia, in accordance with the standards of those jurisdictions which the developer can then rely on.

Computer games created for business, accounting, professional, scientific or educational purposes may be exempt from classification unless they would, if classified, be classified M15+ or above. The new legislation will also remove the need for reclassification when minor changes are made to computer games, such as software updates or bug fixes.

Once classified, the appropriate classification information must be displayed on the game.

For further information on classification see Arts Law's info sheet - 'Classification and Censorship'.