



NEGOTIATING DEALS WITH “NEXT GENERATION” DISTRIBUTORS

Alexander Hecker (McNaul Ebel Nawrot & Helgren PLLC, Seattle)
Ryan J. Black (McMillan LLP, Vancouver)

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MCNAUL EBEL
NAWROT & HELGREN PLLC

mcmillan



ABOUT THE PANELISTS



Alex Hecker

- Attorney at McNaul Ebel in Seattle, Washington
- Represents video game developers and content creators
- Advises on:
 - Publishing and Development
 - Digital Privacy
 - Tech Transactions / Licensing
 - Intellectual Property



Ryan Black

- Attorney at McMillan LLP in Vancouver, BC
- Chair VG/Esports; @RyanJBlack
- Advises on:
 - ... OK, mostly the same stuff, but in a Canadian way. Sorry!



QUESTIONS WE'LL TRY TO ANSWER

- Who are “next-generation” distributors?
- What are key considerations during early negotiations?
- What are common terms in distribution deals and tips for negotiating them?
- How are funding deals different from non-funding deals?
- Your questions!



OBLIGATORY/OBVIOUS CYA

- We are not your lawyers.
- The statements we make and views we express are for information purposes only. They are neither legal advice nor the opinions of our respective law firms.
- If you have a specific situation in mind, we'd ask that you speak generally or use hypotheticals.
- Please respect PAX Dev's "no media" policy. Abiding by this policy will help us have an open and candid conversation.



NEXT-GENERATION DISTRIBUTORS

- Alternatives to Steam have emerged in the past couple of years:
 - GOG
 - itch.io
 - Origin
 - Battle.net
 - UPLAY
 - Windows Store
 - Twitch
 - Discord
 - Netflix(?!)
 - Epic Store
 - Game Pass
 - Stadia
- Epic Games Store launched in Dec 2018 – advertises a more developer-favorable revenue share than Steam.
- Stadia announced in 2019 – enables streaming of games.



KEY CONSIDERATIONS DURING INITIAL NEGOTIATIONS

- Non-disclosure agreements (NDAs)
- Bargaining power – who has it and why does it matter?
- Fundraising strategies
 - Bootstrapping vs. equity vs. publishing deals vs. debt



COMMON TERMS IN “NEXT GENERATION” DISTRIBUTION DEALS AND TIPS FOR NEGOTIATING THEM



DISTRIBUTION MODEL

- Certain platforms enable both transactional and subscription distribution models
- Benefits of subscription model:
 - May offer more consistent revenue
 - Exposure for older games to new audiences
- Risks of subscription model:
 - Cannibalize business from transactional model
 - Less clarity concerning timing of recoup, reliant upon information not in your control
- Tip: Understand whether contract permits distribution through subscription model and consider pushing back if that distribution model poses business risks



PRICING (US)

- Next-generation distributors frequently self-identify as “independent resellers”
- Vertical agreements may violate US state and federal antitrust law if developer sets resell price
- Distributors argue that, as “independent resellers”, they must dictate price
- Tips:
 - Demand contractual assurances that require distributors to take developer recommendations into account when determining pricing
 - Leverage mechanics of “wholesale price” concept to align economic interests of developer and distributor vis a vis pricing



PRICING (CANADA/ROW)

- Throw a border in there, and now you're dealing with more than one antitrust regulator
- Sales taxes are federal AND provincial in Canada
- Mandatory withholdings for services rendered in Canada
 - Can be very complicated when the distribution services are being paid on your behalf by the distributor



CALCULATING REVENUE

- Royalties/recoupment may be based on either “net revenue” or “gross revenue”
- Gross revenue = total receipts – chargebacks, taxes, refunds, etc.
- Generally speaking, net revenue = gross revenue – costs of goods sold (COGS)
- If there’s a recoup (discussed later), how net revenue is calculated will determine how quickly developer will begin to see upside



TIPS FOR CALCULATING REVENUE

- Push for economic transparency (*i.e.*, robust audit rights)
- For gross revenue, ensure that deductions are limited and don't include expenses that would typically be considered COGS
- For net revenue –
 - Push for cap on certain types of COGS, particularly internal assets that the distributor is allowing developer to use
 - Make sure that COGS are product-specific (*i.e.*, don't allow deductions for costs that are associated with promoting the platform as a whole)



POST-LAUNCH OBLIGATIONS

- Agreements with distributors always include some post-launch covenants; however, next-gen distributors have introduced innovations in this department
- Next-generation distributors may require ongoing compliance with clickthrough policies that the distributor can change at any time
- Tips:
 - Contract should require advance notice of changes to policy documents and opportunity to opt-out
 - Ensure no support obligations for, where applicable, platform-related issues
 - Understand post-launch obligations *before* signing a deal
 - Memorialize policies if possible as schedules to agreement



PRIVACY

- Distribution agreements usually impose data privacy obligations on developers
- GDPR, Canadian privacy law and, soon, CCPA require companies to obtain commitments from service providers about how they handle personal information
- Most of these commitments are listed in applicable laws (*e.g.*, GDPR, CCPA)
- Tips:
 - Push back on requirements that are not imposed under applicable laws
 - Ensure developer can comply with any specific security requirements that are listed in the agreement (*e.g.*, physical premises security, certifications, etc.)
 - Privacy obligations are often non-negotiable, so understand contractual and regulatory requirements before signing
 - Carefully consider against liability restrictions and indemnity obligations



TERM AND EFFECTS OF TERMINATION

- Typical grounds for termination: breach, bankruptcy, convenience
- Distributors may have post-termination rights to use developer IP
- Tips:
 - Scope distributor post-termination rights to exploit developer IP
 - Understand circumstances that enable developer to terminate and push for right to terminate for convenience, particularly where platform doesn't work or is incompatible
 - Consider timing of payments



DIFFERENCES IN FUNDING DEALS

- New digital distribution platforms often offer funding to developers to incentivize adoption
- Non-dilutive of equity (nice!)
- What's the catch?
 - Recoup + premium
 - Non-economic commitments
 - Restrictive covenants (*e.g.*, exclusivity), rights of first negotiation, etc.
 - Minimum guarantee against revenue share discretion



FUNDING DEALS – TIPS FOR NEGOTIATING SELECT TERMS

- Recoup + premium usually between 120%-130% of initial investment
- Tiers of revenue share prior to recoup are typically negotiable
- Fight for “what is net revenue” – even if gross revenue, SOMETHING is netted off
- Fight for your IP
 - Generally applicable assets and developments
 - The whole damn game
 - Common “gotchas”: “Confidential Information” and “Background/Foreground IP”
- Exclusivity should end on a specific date
- If distributor terminates for convenience (*i.e.*, not for breach):
 - Right to self-publish
 - Termination for convenience fee – particularly if minimum guarantee



FUNDING DEALS – TIPS FOR NEGOTIATING SELECT TERMS

- Conditions for acceptance/rejection of milestones should be objective and provide for auto-acceptance when no rejection
- Retain creative control and limit oversight
- Right of first offer:
 - Don't limit ability to finance through traditional means
 - Limit term of ROFO, deem non-offer if right not exercised
- Non-compete shouldn't exclude work on entire genres and should be tailored to key gameplay mechanics
- Bonus points: representations and warranties/indemnification from distributor



QUESTIONS?