

# Legal Issues in the Video Game Industry

Colorado Bar Association

October 4, 2023



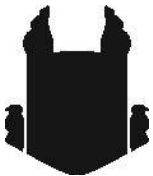
# Who are we?



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# Brandon's Disclaimer

All statements are for educational purposes and not legal advice, and are not to be attributed to their companies, firms or clients.

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# Outline

- I. Game Development Process
- II. Games Ecosystem & Economy
- III. Specific Video Game Legal Considerations
  - A. Games & Law History
  - B. IP Basics
  - C. Rights & Licensing
- IV. Questions



# How Do Games Get Made?



# How Games Get Funded

- **Business Development**
  - Conceptual and technical R&D
  - Seeking internal approval
  - Seeking funding (often externally)
- *Game Development*
- *Game Publishing*



**Key Point:** If you want money, you need to spend money first. Step 1 is almost always to build something.



# How Games Get Developed

- *Business Development*
- **Game Development**
  - Prototype, Vertical Slice
  - Blockout, Pre-Alpha
  - Alpha, Beta, Gold Candidate / Master
- *Game Publishing*



**Key Point:** Gamemaking is like filmmaking, except you do it at a computer in an office for 4-5 years. So why do it?



# How Games Get Published

- *Business Development*
- *Game Development*
- **Game Publishing**
  - Pre-Launch: Loc/LQA, QA, Certification
  - Launch: Marketing, Distribution
  - Support: Sales, Merch, Licensing, Porting

**Key Point:** There are infinite ways to handle a game launch, and a publisher's job doesn't end there.





# Defining Features of Game Development

So, what are some defining features of the video game industry?

- Games almost never get funded off scripts or decks; they need prototypes. Plus, every game is different; no two pipelines are the same.
  - = **Games need significant, long-term R&D**
- Games have a protracted timeframe and diverse skill needs. Every project requires artistry, design, programming, production – and lots of time.
  - = **Games need lots of people and time (read: money)**



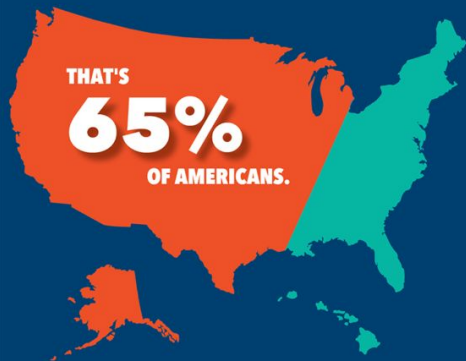
**Overall:** Even though game dev is a project-based industry (similar to film), game studios also require consistent long-term funds and strategy in order to generate and execute on new business (similar to software development).

# Games Ecosystem & Economy



# Consumer Overview

**212.6 MILLION AMERICANS PLAY VIDEO GAMES AT LEAST ONE HOUR A WEEK.**



62% of adults (18+) play video games.

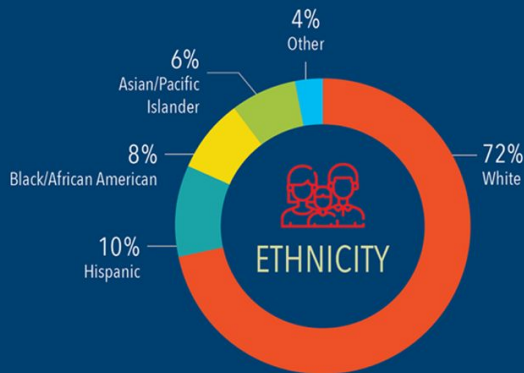


76% of kids under 18 play video games.

**53%** Male

**46%** Female

1% selected "Other" or chose not to answer



The average video game player is

**32**  
and has been playing for **21 years.**

**TOTAL U.S. CONSUMER SPEND ON VIDEO GAMES IN 2022**

**\$56.6 BILLION**

Console: \$6.6 billion, Content: \$47.5 billion,  
Accessories: \$2.5 billion

**YEAR-OVER-YEAR SPEND IN BILLIONS**



Source: Circana

All info and graphics taken from the [ESA 2023 Essential Facts Report](#)

# Industry Overview - Funding

Across the spectrum of large developer/publisher studios, smaller indies, and solo devs, **most funding comes from the company's coffers or personal funds.**

However, **when there is external funding, it usually comes from publishers and platforms.**



## Where does your funding come from? (Choose all that apply)

Company's existing funds 51%

Personal funds 30%

External publisher 17%

Venture capital 10%

Government funds 9%

Angel investors 9%

Crowdfunding 6%

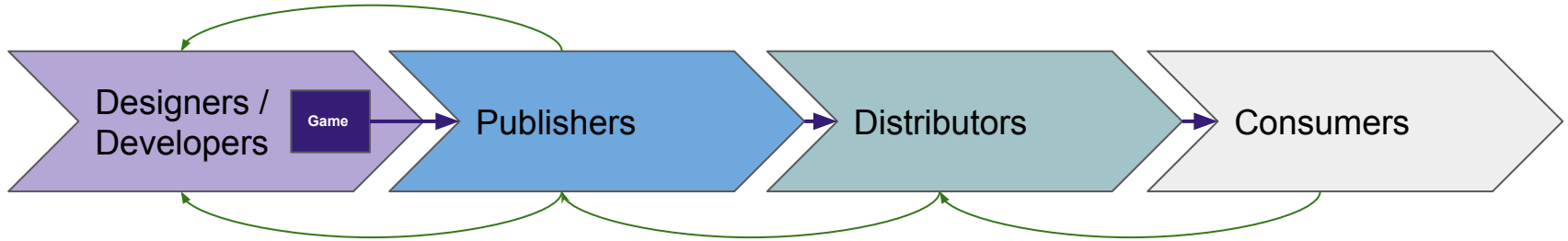
Video game platform holder (e.g. Apple Arcade, Xbox Game Pass) 6%

Alpha funding (e.g. Steam early access) 4%

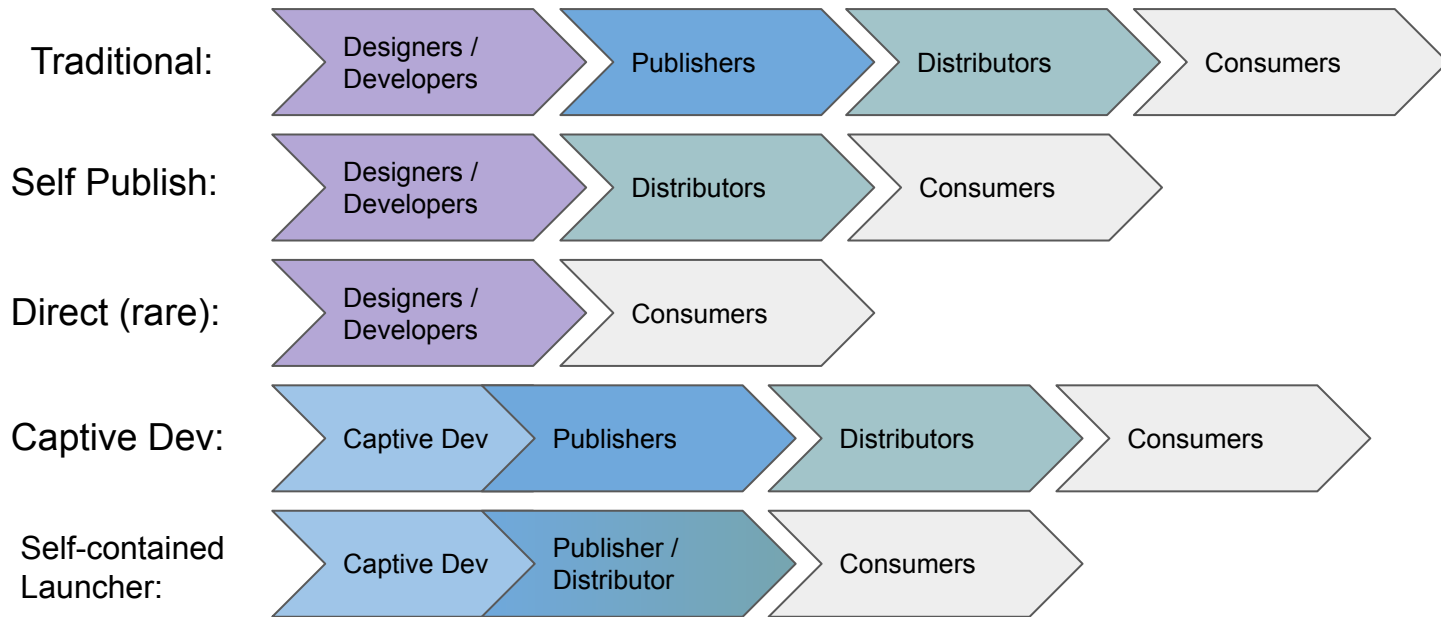
Other 10%



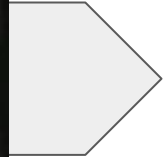
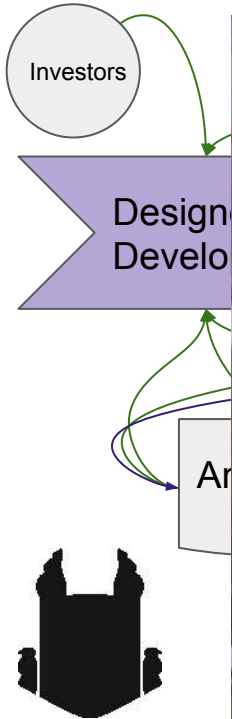
# Traditional Process



# New Processes



# Variations on the Themes





# Specific Video Game Legal Considerations



# Games & Law History

- 1958 - First video game. Similar to *Pong*
- 1977 - Atari 2066 - in home console
- 1983 - NES
- **1988 - *Magnavox v. Activision***
- 1989 - Sega Genesis
  - Arguably beginning of console wars
- 1989 - Game Boy
  - First *popular* mobile video game console
- 1992 - Mortal Kombat (more on this later)
- **1992 - *Sega v Accolade***
- 1994 - Formation of the ESA & ESRB
- 1997 - Grand Theft Auto
- 2003 - Second Life
  - The Metaverse
- 2003 - Launch of Steam (distribution)
- 2007 - First iPhone (not first smartphone)
- **2011 - *Brown v. EMA***
- **2013 - *Hart v. EA; NCAA v. EA; O'Bannon***
- **2019 - *Valve v. Fed. Un. of Consumers***
- **Ongoing - *Epic v. Apple***



# 1988 - Magnavox v. Activision

- Activision made 'ball and paddle' games (*Pong*) covered by a patent
- Failed to obtain a license from Magnavox, holder of the patent.
- Court held Activision liable.
- Activision asked to limit the decision to then-current tech.

The court:

- *“the use of currently available technology to implement television games does not alter the basic nature of those games or avoid [Magnavox’s] patent.”*
- The nature of games is more than the technology underlying them.



# 1992 - Sega v Accolade

- Sega Genesis was released.
- Developers needed to get licenses from Sega to develop for it.
- Accolade reversed engineered the Genesis and made unlicensed games.
- *Ninth Circuit*:
  - Protected under the *fair use* doctrine of copyright law.
  - Sega held responsible for using its security system to place its trademark on Accolade's games and ordered to pay costs.



# 2011 - Brown v. EMA



# 2011 - Brown v. EMA

- Industry groups sued to invalidate the law.
- U.S. Supreme Court decided in 2011.
- Significance: First case to say that video games unquestionably qualify for First Amendment protection.
  - Violent video games are not “obscenity”.
  - California did not have a compelling interest in the regulation.
    - Argued it would prevent psychological or neurological harm to minors and assist parents in control.
    - Evidence of clinical studies was shoddy.
    - ESRB reduced necessity of regulation to assist parents in making sound choices.
  - Even if the state had a compelling interest, the law was not narrowly tailored:
    - Over-inclusive: Not all children forbidden needed to be forbidden. Parents have abridges the rights of young people whose parents don't care.
    - Under-inclusive: Allowed parents to opt out. Allowed non-video game media.



# Court has changed since Brown v. EMA



Plurality	Concurrence	Dissent 1	Dissent 2
Strict Scrutiny, Content Based, Fails	Strict Scrutiny, <i>could</i> pass	NO Protection	

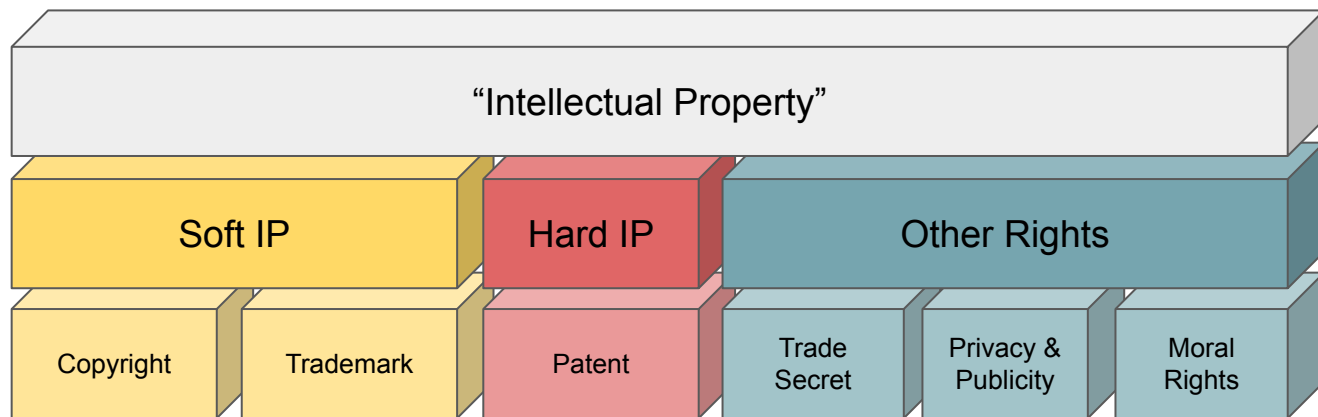


Strict Scrutiny, Fails

Strict Scrutiny, *could* pass

NO Protection

# IP Basics





# © Exclusive Rights (17 USC § 106)

- (1) to **reproduce** the copyrighted work in copies or phonorecords;
- (2) to prepare **derivative works** based upon the copyrighted work;
- (3) to **distribute** copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
- (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to **perform** the copyrighted work publicly;
- (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to **display** the copyrighted work publicly; and
- (6) in the case of sound recordings, to **perform** the copyrighted work publicly by means of a **digital audio transmission**



# Video Game Copyrights

Videogames are both computer programs as well as audiovisual works. You have copyrights in both the software code and the audiovisual displays on the screen.

Games often depend on copyrighted works of others (licensed engines, plugins, music, etc.). – CLEARANCE is key.



# Video Game Copyrights - Copycats

Mechanics/Rules not protectable.



They're the same picture.

# Trademark and Games

Game names, studio names, other branded content brands

Rockstar v. Pinkerton (Red Dead Redemption)

AMG v. Activision (Humvees in CoD)



# Patent in Games

Not a patent lawyer on this presentation



# Trade Secret in Games

EG:

Code

Optimization

Magic



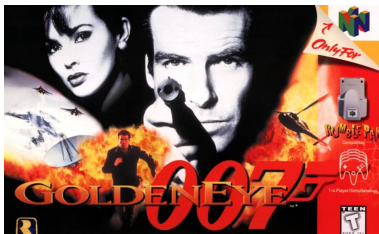
# Rights and Licensing

- Publishing/Distribution. (more later)
- End Users.
  - EULA, Terms of Service
  - Videogames are typically **licensed** to consumers
  - The license **restricts** what the consumer end user can do with the game
  - Two of the more noteworthy effects of the license is that typically it is revocable and the user does not have ownership of in-game virtual goods
- Users→Creators (UGC)
- Broadcasting; Esports.



# Rights and Licenses - Inbound

- Dev Tools
  - Off shelf licenses
  - Negotiated licenses
  - Open Source
  - Game Engine is main one
  - Lots of art tools and other tools as well
- In-game Branded Content License Agreements (movie IP, celebrity, TMs)
- Development Agreements
  - Entire licensed IPs





# Rights and Licenses - Outbound

- Publishing Agreements / Development Agreements
- Fan / Community Licenses
- Tournament Licenses (Professional, Community)
- Media Rights Deals



# Rights and Licenses - Publishing

- Publishers can be invaluable resources
  - Knowledge
  - Connections (e.g. to platform publishers)
  - Marketing strategy, spend, reach, discoverability
  - People
  - Back-end resources
- Frees developer to focus on making a great game



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# Rights and Licenses - Publishing - Key Terms

- Scope
- Term & Termination
- Economics
- Rights
- Contracts 101 stuff: risk shifting, indemnity, dispute resolution, etc.



# Publishing - Key Terms - Scope

- Platform
- Territory
- Term
  - Perpetual?!
- Exclusivity
- Clawbacks



# Publishing - Key Terms - Term & Termination

- Duration can be decoupled from exclusivity
- Consider renewal rights/obligations and conditions of renewal.
  - How will renewal rights affect re-negotiation?
- Termination is heavily negotiated
  - Cause - what triggers?
    - Cure?
  - Convenience
- Ensure logistics of termination work
- Effects
  - What survives?
  - Are there specific provisions for different terminations? Should there be?



# Publishing - Key Terms - Term & Termination

- For convenience?



# Publishing - Key Terms - Economics

- Dev Costs / Advances
  - Milestones
  - Acceptance / Rejection criteria
    - Breach triggers?
- Spend Commitments
  - Marketing
  - Localization
- Distribution model
  - Premium
  - F2P - Ads, IAP
  - Subscription
- Recoup
- Royalties
  - Audit Rights
  - Black Boxes - Subscriptions, Bundles, etc.





# Publishing - Key Terms - Game Rights

- Work-for-Hire Development Agreement = Publisher will own
  - Carve out pre-existing tools or other things you want to reserve
  - Developer will often push to get listed in credits for visibility
  - Even if publisher owns game TM, they'll still want to grow their developer brand so one option is to require developer brand to be shown on 'packaging'
- Other relationships = Developer typically owns
  - What licenses to Publisher?
    - Media, Platforms, Territory
    - Duration, Termination, Survival
    - What's exclusive?



# Publishing - Key Terms - Other Rights

- Sequels, Prequels, Derivatives
- Merchandise
- Co-branding, product placement
- Television/Film
- Negative Rights:
  - Good behavior clauses
  - Key team member provisions
  - Prohibition on additional game announcements
  - Prohibition on competition



# Publishing - Key Terms - Other Rights - Acquisition

- ROFR/ROFN gaining popularity



# Rights and Licenses - Publishing - Leverage

- Relationship – One-off or repeat?
- Pre-agreed terms (Term Sheet, MOU, LOI, Negotiations)
  - Negotiation pre-loi v post
  - Binding v. non-binding
- Relative need of the parties for each other's services, money, etc. – and (and BANTA)
- Transaction size and scope
  - \$\$
  - Licenses: territory, exclusivity
  - Games: platforms
- Relative reputations
- Risk tolerance
- Likelihood of breach and potential damages to each party
- Antitrust considerations – Consider price fixing as leverage
- Standardization (often BS)
- Dominoes



# Rights and Licenses - Publishing - Leverage



Questions?



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