The Art of the Deal

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Zack Karlsson
Patrick Sweeney

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The Art of the Deal

SYMPOSIUM PANEL V

Panelists
Mr. Scott Ticer, Lone Star Angels
Mr. J. Holt Foster, Thompson & Knight, Partner
Mr. Zack Karlsson, Capcom
Mr. Patrick Sweeney, Reed Smith

Professor Xuan-Thao Nguyen:
I am so pleased to introduce Scott Ticer, who will be moderating today’s panel on The Art of the Deal. Scott is with Lone Star Angels and is a well-known executive in the communication and digital area. His previous experience ranges from working at Dow Jones to McGraw-Hill. I will now turn it over to Scott so that the panel may begin.

Mr. Scott Ticer:
Thank you very much. I am here representing an organization called Lone Star Angels, which is a nonprofit, non-pay-to-play group of angel investors. Personally, I have been lucky enough to be part of three successful exits; I would describe myself as a serial entrepreneur. My last major exit involved the sale of a digital media company to Dow Jones. Unfortunately,
sometimes as an angel investor we have illiquid investments, which is equity in a filing cabinet that is waiting for something to happen. I only had a funeral or moment of silence for one company, which means the rest of them are still alive and kicking and making some traction or headway. However, we are here not to talk about me, but rather the art of the deal.

In my heart of hearts, my passion is making deals. I deal in partnerships, alliances, and joint ventures. Making and closing deals can really make the difference with a startup or even an established company. Putting the deal together is good, but it means nothing if the deal cannot get done. So, we are going to discuss the art of putting together the right deal. We are going to look at terms and conditions as well, and we are going to look at some personal failures. More importantly, however, we are going to look at some successes and how to do it right.

This is not the first rodeo for the people on the panel. In fact, Zack Karlsson just told me this is his fifth time as a panelist here. To be a panelist so many times, he must be doing something right. Zack is the Vice President of Business Development and Digital Platforms at Capcom, which is the sixth or seventh largest interactive entertainment publisher in the

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world. Zack is a guy who has never let school interfere with his education—he is a high school graduate, and he is a Vice President of Business Development and a senior executive at a leading company without a college degree. Zack worked his way up from ground zero, starting as a nine-dollar-an-hour temp with a company acquired by a little consumer electronics player called Sony. He was lucky enough to have a passport when the CEO came down and said, “I need somebody to go overseas.” Zack raised his hand; for him, it was “Carpe Diem.” I do not want to say the rest is history—the rest is Zack’s career. He worked his way up at some of the leading entertainment gaming publishers in the country, proving himself at places like Double Fine Productions and Bandai Games. His work includes titles like EverQuest, PlanetSide, and Star Wars Galaxies. In a previous life he was an IT guy at Boeing, although he promised me he had nothing to do with the Dreamliner project.

Mr. Zack Karlsson: That was a long time ago.


14. See Zack Karlsson, supra note 10 (indicating that Zack Karlsson is senior executive at Capcom); see CAPCOM, supra note 13 (indicating that Capcom is a leading company in the industry).


Mr. Scott Ticer:

Okay, well we have that on the record now. Just to Zack’s right, is Holt Foster. Holt is a guy who did not let his law career get in the way of being an entrepreneur. He was part of a founding team that put together a company called Gathering of Developers, also known as Godgames.com. He participated in a $40 million exit with that company; that is what I call a really successful exit.

In his spare time, when he is not an entrepreneur, Holt is a partner at a law firm called Thompson & Knight. Among his many clients for the past twenty years are video game developers and publishers. He does everything from helping the companies form to getting them financed; he helps them get intellectual property protection as well as negotiates international publishing and development agreements. His clients have a really impressive list of hits behind them, with games such as Medal of Honor, James Bond, Tiger Woods, Half-Life, Quake, and Brothers in Arms. He has negotiated licensing agreements in Hollywood, as well. These titles include both television and film hits such as Project Runway, Sin City, Conan the Barbarian.


25. See id.


34. SIN CITY (Dimension Films 2005).
This is not the first rodeo for our other panelist either—he is a repeat participant in this games conference, and SMU keeps bringing him back. He is with a firm called Reed Smith, LLP. Patrick may be one of the real fathers of what we call “gaming law.” He was the founder of the Video Game Bar Association. However, he is a deal guy first and foremost, in that he lives and breathes deals for a living. He tells me that he gets his kicks from making deals happen, which means not just negotiating the deal, but also getting the right deal done. Patrick represents various publishers, independent developers, intellectual property owners, and technology middleware providers. His involvement in game development agreements spans more than 250 game titles, and these agreements are a who’s-who list of the kinds of successful agreements we are talking about in the industry.

In addition, Patrick works the other side of the house by helping content owners license their properties to video game companies. These titles include big hits like Superman, Zumba, Madagascar, and World of Warcraft.

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40. JACKASS: THE MOVIE (MTV Films 2002).
44. VIDEO GAME BAR ASSOCIATION, http://vgba.org/ (last visited Mar. 27, 2013); see also Patrick Sweeney, supra note 42 (identifying Patrick Sweeney as “a founding member and co-President of the Video Game Bar Association”).
47. MADAGASCAR (Pixar 2008).
Chronicles of Riddick,49 and Age of Empires.50 I now ask each panelist to take a moment to tell us something that we might only find out if we were to give his life partner three or four drinks in a row at a party—something about yourself that does not necessarily show up on your résumé or bio, starting with Zack.

Mr. Zack Karlsson:

Well, my retirement plan is to not work in games. I am going to teach fat tourists how to scuba dive in a small Central American country.

Mr. Scott Ticer:

That is very cool.

Mr. Zack Karlsson:

I am a lazy man by trade—I value my laziness. I work so that one day I will not have to work. And, when I do not have to work anymore, I will have seven hooks in a row with seven bathing suits, one for each day of the week. That is my retirement plan.

Mr. Scott Ticer:

Sounds like a plan. Holt, what would your partner maybe tell us about you?

Mr. J. Holt Foster:

Being a fat American, I think I will be one of Zack’s first customers when he resigns. Scuba diving is one of my favorite things to do. I have been diving all over the world, and I will come to your place to scuba.

Mr. Zack Karlsson:

I am doing a trip for games industry people. You should talk to me later.

Mr. J. Holt Foster:

I will definitely do that. I was pretty busy early in life, so I waited a long time before marriage. So, now at forty-four, I have a twenty-one month-old and a nine-week-old. So, I came at this from a backward angle. The nice thing is that I will be sixty when my first kid graduates from high school. However, since I know games, his friends will think I am cool.

Mr. Patrick Sweeney:

Well, I do not know how to top both of those panelists. I do not scuba dive, but one of the things that attracts me to my profession and the clients that I represent, is that I am a sports fan. What I really like about sports is rooting for your favorite team. One of the things I really enjoy about working in games and working with my clients is getting to root for their product and for my employer when I was in-house, in a way that, for example, somebody who works at a Dunkin’ Donuts51 does not necessarily get to root for sales. It

49. CHRONICLES OF RIDDICK (Universal Pictures 2004).
is very gratifying work; I love when my clients’ games come out and they are well received. This is especially true when the game is their pet project. So, it is personally gratifying to be a part of some of these things, even in the non-creative sense of providing legal services.

Mr. Scott Ticer:
Patrick, it seems only fair to start with you on this question. What are the two, three, or four things we really need to know about crafting and executing a good deal?

Mr. Patrick Sweeney:
Well, I think at the outset we should realize that what is a good deal for one client or project is not necessarily a good deal for somebody else. Therefore, it is really important to come to an understanding of what is important to your client. For example, getting to a good deal for a small independent company might be simply getting any deal closed and getting some funding, whereas getting a good deal for the movie rights to a big movie like Madagascar,52 for example, is less about the money and more about the creative control and oversight. So, understanding what your client’s motivations are at the outset is tantamount to getting a good deal.

Mr. J. Holt Foster:
I would echo that. I do not know that any one particular thing is more or less important. Rather, there are so many things that go hand-in-hand. First, it is important to know the market. It is also imperative to realize the significant paradigm shift in the market over the last four or five years.53 There are many more people in the market, and there are many ways of doing gaming other than the big TripleA’s54 that you see on end caps in Best Buy55 or other stores. For a while, it seemed like games were created in somebody’s garage, and then people got famous. Then, it became impossible to get a big game

52. MADAGASCAR, supra note 47.
53. See, e.g., Sheppard Mullin, Trademarks for Social Games—A Recipe for Success, LAW OF THE LEVEL (Aug. 27, 2101), http://www.lawofthelevel.com/2010/08/articles-1/intellectual-property/trademarks-for-social-games-a-recipe-for-success/ (positing that, “[wjith lower barriers to entry than traditional game development, new titles are launching essentially non-stop, not only from larger companies, but from a multitude of start-ups as well . . . [a]s a game developer, you are creating a product that you believe is innovative and compelling. But how do you make your game stand out in this throng?” and suggesting the use of trademarks as one response to the paradigm shift due to low barriers of entry).
54. TRIPLEA, http://triplea.sourceforge.net/mywiki (last visited Mar. 9, 2013) (describing itself as “a turn based strategy game . . . [that] comes with multiple games and over 100 more games can be downloaded from the user community”).
working out of a garage. Now, it is possible again because there are low barriers to entry.\textsuperscript{56}

Keep in mind there is a lot of product out there, so it is important to know what the business terms are, who the other side is, what is important to them, and what is important to the client. Also, sometimes lawyers have a hard time not messing up a deal. There are jokes out there about having a business deal that is nearly done when along comes a lawyer to mess it up. Many lawyers' big problem is that law school conditions them to want to point out every single flaw on every single issue—they want to show everyone they are the smartest guys in the room. However, it is not serving your client to leave without getting a deal done or to get in the way of the deal by causing the other side to walk away after making them mad. Therefore, one of the important things to do as a businessman, and as a lawyer, is to make sure to understand where the legal contract and the business practicalities meet. Part of the job is to be an advisor, and part of that is knowing when to push down on the throttle and when to pull back. The lawyers involved must recognize that every business issue is not a battle, nor is it necessary to go through every single line and make a battle of it. Instead, it is their job to make sure that both people are shaking hands at the end of the day and to be excited about the project going through. Again, what lawyers do not want is someone saying, "I just cannot wait to get out of this contract."

Mr. Zack Karlsson:

I am going to tell a story because I agree with the two of them. How many people in the room are either second-year law students or have been one at some point in their career? Not everybody here is a lawyer, myself included, but my sister did live with me while she went through law school, so I kind of feel like I did it. I even feel like I studied Barbri\textsuperscript{57} with her. At any rate, at the end of the second year of law school, just after students have taken torts, they see a tort everywhere they look. It permeates their entire view, and they get really scared that the world is out to get them. Over time, this feeling fades.

Well, the same thing happens with transaction and contract lawyers. There are these people that come out of school or who practice in a sort of echo chamber of a firm. They think they have to fight over every single line to get exactly the right deal that is right for their client, and they think every single piece of the deal has to be litigated. The truth is that it does not, and this practice upsets the businesspeople.

I told this story to Patrick the other night, and he told me I should tell it today. I had a deal that I walked away from a couple of weeks ago. In it, a company requested some of my content. My company celebrates our thirty-fifth anniversary this year, and we have a back catalog of intellectual prop-

\textsuperscript{56} See Mullin, supra note 53.

We had a company that wanted to distribute some of that content in a very specific territory and in a very specific way. We are fairly agnostic about people who distribute our content. That is to say, I am going to approve that deal, most of the time, as long as you can meet the minimum guarantee. We have a minimum guarantee that we require, but, as long as a company can meet the minimum guarantee, I am going to let that company take a swing at it. If, by chance, it is the next big thing—say, if it were Steam and I just do not know it yet, then I get to be there early; I will help that company grow and that is good for the ecosystem.

As it was, when I sent over our standard license agreement, which I have had people sign unchanged probably 150 times, I got back what was originally an eight-page agreement that had transformed into a twenty-page redline. Let me reiterate: I got back twenty pages. This was for a five-figure agreement. This was not a six-figure agreement. Ultimately, it is not worth my time. I opened it up then just closed it and said, “No, I am not even going to review your changes. I do not care what they are. I just do not have the time.” So, I sent it back and said, “No, we are not doing it,” and our company walked away. This was an example of a lawyer who really wanted to prove how smart and how diligent he was in this transaction, but I am just not that interested. They lost the deal because I do not have time for that.

Mr. Patrick Sweeney:

I think that is a function of experience too. Lawyers can fight about the wording of every line of every contract of a deal with, say, Microsoft. A lawyer can certainly tear into that contract as much as he wants, but it may not be fruitful or helpful to getting the deal done.

Mr. J. Holt Foster:

A good example of this is when we acquired the right to do standard arcade games for Tiger Woods and the PGA of America. Because no one deals with him directly, Tiger’s people sent us the terms, and we took a pass at it. It was not the bloodletting like some of the other stories mentioned. However, we took a pass at it and tried to put it in the fairway of business deals. They looked at it, called us and said, “I must tell you, you clearly know what you are doing. You clearly know the industry standard terms, and

58. See TRIPLEA, supra note 54 (referring, for comparison’s sake, to TripleA’s famously large catalog of games and the accompanying intellectual property).
I agree with every single one of your comments. However, we are not signing this. There are twenty other gaming companies that would like to get a deal with Tiger Woods, and they will sign any document. So, we will resend our original to you. If you would like to sign it, we are more than happy to work with you. If not, then there is neither harm nor foul and we will just move on.”

He was not being rude, nor was he being smarmy. Keep in mind that what I sent back to him was not three times as long as what he had sent me. Nevertheless, some people are just in different positions, and it is the lawyer’s job to advise his client when a situation like this arises.

My client was very upset. He said, “That is ridiculous!” I told him to take a deep breath, then I asked him, “Do you want the king of golf or not? Do you want to launch your company or not? Do you want to be known as the folks who created the arcade game that everybody will know or not?” Even if the game is not that great, it was going to be a hit because of who Tiger was at that time. Ultimately, they got it sold and ended up doing well, but the lawyer simply cannot be an obstacle to the deal. It is not about lawyer; it is not about how strong the lawyer is or how much he knows. Rather, it is about getting the right deal for the client.

Mr. Zack Karlsson:
This is mildly entertaining to me. I once had a deal that I did with a Hollywood celebrity. He is a very well-known celebrity who curses a lot and talks about snakes on planes. So, I am about to do this deal with his people, and he shows up only at the very end. He had a lawyer who did not even understand the basics of the math of how a game is built. This worked out to her client’s detriment, as she was not trying to extract too much from me. I gave her an offer, and she countered with an offer that was less favorable to her own client.

Mr. J. Holt Foster:
Done! “Oh boy, you took me through the wringer!”

Mr. Zack Karlsson:
Right! She said, “This is ridiculous, and I demand a change.” She yelled at me, called me names, and cursed at me, and then she gave me back the contract. I was sort of traumatized, and then I actually read what she sent over. Then, I thought to myself, “Okay.”

So, getting a good deal for the client requires an understanding of the business. Patrick touched on it when he said that it is one thing if a lawyer has experience and has been doing this for a long time. But, lawyers should not try to wing it. If a lawyer does not understand how the model works, he should ask me. I will tell him. There is no shame in asking how something works. Lawyers are not in all cases supposed to know how everything works

when new at this or beginning a career in this industry. I do not mind explaining how the math works and why this is a good deal; I can tell you, “Here are the levers that I can turn, and here are levers that I cannot turn.” I do not mind having that conversation. But, it bothers me when I get people who saber-rattle just because they charge by the hour, and they need to prove to their client that they are worth the value. It is very frustrating.

Mr. J. Holt Foster:

An open dialogue is also very important. A lawyer does not have be heavy just because he is a lawyer, nor does he have to be mean or a jerk, give ultimatums, or even threaten to walk away. A lawyer should never threaten to walk away unless it is time and he is really willing to use it. Make sure the client knows and wants to use the threat before doing so. Also, there is something I learned early in my career by watching someone else do it in the dotcom industry: during negotiations, if someone presented a term, they would not get offended, outraged, or shake, rattle and roll. Rather, they would just say, “That seems a little bit unfair to me. I understand why you are asking for it from your perspective, but, putting yourself in my shoes, why would I accept that?” and, “How do we get somewhere?” or, “What is the issue you are looking at?” Maybe they will send a comment about one thing, and they are really worried about something else.

Obviously, do not go “open kimono” on every single issue. Still, having some transparency and open dialogue builds up trust. The lawyers have worked together on deals and can talk back and forth, giving each other a heads up. For example, a lawyer might say, “I am sending something over. Let us discuss it before you come out of your shoes,” or ask, “What are you guys getting at? Is there a deal to be had here?” There can be open discussions here, but it is 99% sure to fail if the lawyers set a paradigm of distrust from day one.

Mr. Zack Karlsson:

The only caveat I will add to that is that lawyers need to saber rattle with Hollywood. Dealing with a person in the games industry is one thing and all of this applies. However, when dealing with Hollywood, it is totally different. But that is for another conference.

Mr. Patrick Sweeney:

I would fully agree.

Mr. Zack Karlsson:

Again, Hollywood is a special thing. This advice does not apply when trying to do deals with movie studios or talent.

Mr. J. Holt Foster:

Right. As an aside, one agent I worked with made sure to have his assistant call me every time we negotiated a deal. I would answer, and the assistant would say, “Please hold for so-and-so.” This happened every single time we negotiated a deal.

Mr. Zack Karlsson:

You know what I do when that happens? I just hang up.
Mr. J. Holt Foster:
Exactly. That is what I started doing.

Mr. Zack Karlsson:
Yes. I tell the assistant to have him call me when he is ready to talk, and I just hang up the phone.

Mr. J. Holt Foster:
Bingo. I will either do that or, when they say, “Hold for so-and-so,” I will get my secretary on the phone. Then I hang up, and she gets on the phone. When the agent gets back on, my secretary will say, “Please hold for Mr. Foster.” It is really annoying but Hollywood is a totally different world.

Mr. Patrick Sweeney:
Yes. Again, that is a whole different panel.

Mr. Scott Ticer:
So, back to contracts in gaming. How do you get beyond the dueling redline versions? One of the things I have always done with deals is to find out the intent of the party. I will give you my own example. People throw around the term, “I want an ‘exclusive,’” all of the time. The lawyer may need an exclusive, but when someone wants an exclusive, most of the time that sends the business side packing into the Hill Country. I have found that lawyers can get beyond that point by asking the other party, “Help me understand—what sort of exclusive do you need, and what are you really afraid of?” It may come to light that they actually want to be exclusionary, not exclusive. They might want to preclude the client from doing business with three or four people, rather than being exclusive in perpetuity. Give me some techniques that you use as dealmakers to get beyond this type of situation.

Mr. Zack Karlsson:
I will start with two tips. First, it is the responsibility of the lawyer who did not draft the contract and is going to make changes to the language of it to explain why those changes are necessary. Do not just redline the contract without adding comments. Second, if there are more than three drafts going back and forth and the lawyers are still far apart, then it is time to meet with the other party. Do not just keep going back and forth. Instead, get in a room, sit down, and hash it out.

Mr. J. Holt Foster:
I would agree with that, but I would also add caveats. First, it depends on whether or not it is appropriate for the deal. If it is a five-figure deal, it should not be an issue.

Term sheets are helpful, even if the term sheet is bullet points of key issues. This is to determine if the parties are on the same page. Second, when you receive a document, do not return to the sender a thirty-page blackline that basically rewrites the document. It is better to call the person who sent the document and say, “I might have misunderstood, but can we discuss this document to determine where we are going? Because my understanding is this . . . .” The lawyer on the other end may respond, “That’s the deal. My hands are tied on that, and you either want it or not.” This is similar to the
Tiger Woods’s game contract,64 in that lawyers will offer either the contract as it is or no deal. However, it may be a situation where the person who sent the document made a mistake and has the receiving lawyer correct it. When the sender gets the document back he is already prepared for the changes and has negotiated the major issues.

Mr. Patrick Sweeney:

When Zack was telling the story about the deal he just opened, saw the redline, and shut it down, we were laughing. It is a mix of bedside manner and context. If I were going to redline a document profusely and intensely, I would call Zack first. If a lawyer knows the person on the other side of the deal, he may say, “You are going to see a lot of red. Do not panic, do not ignore it, do not walk away from the deal, and we need to talk about it.” This can be very useful to add context to the changes. However, when the lawyer does not know the other side, there is a language barrier, or a cultural difference with the other party, this may not work as well. It is very helpful when a lawyer can provide his own context.

I never go more than two redlines before meeting with the other party. I think three redlines are one too many because the parties begin to get deal fatigue and people start to become intransigent on specific topics.

Mr. J. Holt Foster:

Be aware of deal fatigue. Even with the best deals, parties can get deal fatigue. People become obstinate and would much rather be doing something other than negotiating the deal.

Mr. Zack Karlsson:

The only way to get through deal fatigue is by having a personal relationship. I hope my reputation within my industry is that I can close deals that most people do not, or cannot, close. I have closed deals that have taken a year to close that people said were impossible and that the other party would never do the deal. As an example, I did a Star Wars65 deal where I put Darth Vader66 and Yoda67 in Soul Calibur IV.68 That was the very first time Star Wars characters had ever left the Star Wars universe; it had never happened in the history of Lucas’s Star Wars. Lucas is a challenging organization to deal with because it is has that Hollywood DNA and it knows the value of its intellectual property. It is one of the most valuable entertainment intellectual properties ever, and those negotiating with it have zero leverage.

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64. See Tiger Woods, supra note 61 and accompanying text.


66. Id.

67. Id.

I had conversations with Lucas's general counsel,69 and I said, "That is really unreasonable." A precondition to negotiation is that both parties are reasonable. I told the general counsel that I did not know how to deal with this contract because it was unreasonable, and he said, "You are right. It is; sorry." However, he did not say that he would change it. Lawyers still have to find their way through that deal. They cannot say, "You are unreasonable," and walk away. I invested a year of my life in that deal. I know it sounds silly for two intellectual property characters.70 I was not the only person working on this deal. The lawyer on my side,71 the business development person,72 and the lawyer from Lucas73 were also involved in the deal, and we are still friends. In fact, I went to their Christmas party this past year.

The deal was forged in a foxhole. My point is that deal fatigue happens, but it can be cured, or at least ameliorated, through personal relationships. It is about having your eye on the goal and not purely on the deal.

Mr. Scott Ticer:
Great advice. Zack is really underplaying Lucas. I have had the opportunity to live in both San Francisco and Los Angeles. If you had a scale for arrogance of content companies, Lucas is at the very top.

Mr. Zack Karlsson:
Marvel74 is at the top.

Mr. Scott Ticer:
Just as an outsider looking in, they created this in San Francisco and not Los Angeles. Holt, tell us about one of your success stories.

Mr. J. Holt Foster:
I pull for the entrepreneur who creates a company and becomes successful. I was very proud of The Gathering of Developers,75 which was a video game publishing company, and its best-known game was Max Payne.76 We

69. See, e.g., Executive Profile: David J. Anderman, BUSINESSWEEK.COM, http://investing.businessweek.com/research/stocks/private/person.asp?personId=49437846&privcapId=902479&previousCapId=902479&previousTitle=Lucasfilm%20Ltd. (last visited Mar. 27, 2013)
70. See LUCASFILM, supra notes 65–67 and accompanying text.
73. BUSINESSWEEK.COM, supra note 69.
75. GATHERING OF DEVELOPERS (GOD GAMES), supra note 24.
had some controversial characters from the video game industry that formed a company based upon United Artists approach. There were several individual founders, and then there were three or four companies who were video game developers that had some success. We signed agreements with the video game developers for the next five years, and this gave the company first option for all of the developers’ games, except for Duke Nukem.

Instantly, the company had credibility and a pipeline of upcoming games. The developers still received normal publishing terms that were in accordance with the industry, and they were wealthier in the industry because of the revenue sharing. It was an interesting learning experience. The ultimate exit could have been much more successful than it was, but it was interesting to see the incorporation of the developers. Realize that, in most instances, developers are artists. They are just as passionate about what they are creating onscreen as someone is about a composition he makes or picture he paints. They are true artists. They may become a little more frustrated in negotiations, so that is something that a lawyer may want to realize. That is to say, they may need additional support through negotiations. Lawyers need to understand that there is the artist’s temperament, or artist’s possession, of his product.

After a period of years, we ended up selling the company in order for it to be taken to interactive, and it was a very successful exit. The principal game, Max Payne, declined because the company reworked the game’s technology, but it was a great game that was released. However, the game was not released on time, which shows you what one game can do. Had this one game been released on time, we would have sold the company for $600 million instead of $40 million.

One of my clients is Gearbox Software. I remember when I started representing them before the games Borderlands and Borderlands 2.

81. Take-Two Interactive Software, Inc., supra note 79.
82. Max Payne, supra note 76.
started representing Gearbox when it formed a company called Rebel Boat Rocker.86 There was one person in the company that did not work well with the other employees, so the employees restructured without that person and became Gearbox. This company was only doing add-on packs; Gearbox did quality work. It is about knowing who the client is and where it wants to be.

Some clients want to swing for the fences, whereas Gearbox smartly wanted to take the process one step at a time by learning its craft, having good relationships, and making good products. They knew that if they were doing *Half-Life*87 or *James Bond*,88 they would sell units, assuming it was a good game. That started getting them buzz. Now, Gearbox has been around for ten years and is very successful. It is one of the two largest independent video game developers in the country, and based in Plano.89 That is an extreme example of success, but it is nevertheless a wonderful experience watching good people who have good hearts, are not arrogant, and want to share their wealth with their employees. That is really fun for me.

**Mr. Patrick Sweeney:**

I am fortunate that many of my clients are very creative people. The more gratifying deals, and the bigger success stories, are the ones in which I am able to help a client’s project get to market that might otherwise die without this deal happening. One of the first deals I was able to do was a game called *Supreme Commander*.90 It was going to be cancelled by EA,91 but I was able to help the company get out of EA, get the intellectual property back, and become part of THQ.93 Ironically, this was when THQ was viable and had money.94

87. *HALF-LIFE* PLATINUM PACK, supra note 30.
88. JAMES BOND 007, supra note 28.
94. See Ryan McCaffrey, *What’s Next for THQ’s Games?*, IGN (Feb. 4, 2013), http://www.ign.com/articles/2013/02/05/whats-next-for-thqs-games (alluding to the dissolution of THQ in that “[t]he dust mostly settled on the THQ bankruptcy proceedings—that is, all of its active franchises and studios have found new homes”).
Mr. Zack Karlsson:
A moment of silence for THQ.

Mr. Patrick Sweeney:
Next year we will do the same thing for Atari. Ultimately, the company might have shut down if it had not been for this deal. For the CEO of the company, this project was his baby. He had a very passionate take on his creations and on his intellectual property, even helping on a small level by moving them from EA into THQ. It was about putting the company into a better deal and not just any deal. This was personally gratifying.

I have been fortunate to be involved in a handful of projects that were either dead or near death, were placed somewhere else, brought back to life, and, ultimately, back to the market. Those tend to be more gratifying than navigating through an unrealistic licensing agreement. That is good work, too. However, it does not have that creative slant, nor does one feel that sense of pride in getting those types of deals done.

Mr. Zack Karlsson:
The other part of that is not just understanding your client’s goals, but also understanding your client. The others touched on something that is very interesting when they talked about the joy of working with creatives. I want to be clear that working with a creative is not the same as working with someone who has an artistic temperament. The most creative people typically do not have this artistic temperament, such as Jim Henson. An artistic temperament is a disease that affects only amateurs.

As legal advisor to a client, realize his predilections. Sometimes people, even CEOs of creative companies, cannot handle being exposed to the negotiation process. When the other party sends a draft of a contract, do not automatically forward it to the client without context if the client has never been exposed to the negotiation process and does not understand that it is a process and not an instantaneous act. Part of the lawyer’s responsibility is to shield the client from that exposure and act as an advisor by adding context. Otherwise, the deal is not completed and the client does not achieve his goals. It is not just about forcing the deal through; rather, lawyers must also play the mediator role within the context of the deal. It depends on the client.

Mr. Patrick Sweeney:
Some clients want to manage the deal, and some clients want to know when the contract is ready to sign. Again, knowing the client and knowing


your role with that client is very important. I have some clients who bring me in at later stages of the deal and just want me to make sure there are no legal issues because the client plans on signing the contract in twenty-four hours.

**Mr. Zack Karlsson:**

At my former company, I hired Patrick several times. I am fairly comfortable with negotiating my own deals because I have been doing my own deals for a long time, so I can work on the contract to the end. I have even negotiated the entire contract myself. I do my own drafting and then I send it to Patrick, and he makes sure there are no legal issues or problems that I have missed. Other clients employ him not just as a lawyer, but also as a business development person because he knows people in the industry.

**Mr. Scott Ticer:**

That would be my advice. If a developer can write his own documents and do his own term sheet, then he should do it and use his lawyer efficiently. If a developer cannot do this, then he should find a business counselor who also has a law degree.

Some of these deals we are seeing are not negotiable. Many of the panelists mentioned that earlier. What do we need to know as an application developer interested in selling the application in the App Store at Apple? Patrick, the application developer does not have an opportunity to negotiate that deal. What are the risks associated with not negotiating the contract with Apple?

**Mr. Patrick Sweeney:**

Just do the deal. Apple is the retail space or the shelf space. If a developer does not like it, he needs to find another way to distribute his product. There is no risk relative to Apple; it is effectively consignment, and Apple can end the contract at any time. Rather, the risks are everywhere else other than with Apple; specifically, where there is the question of whether a developer still owns his intellectual property versus the potential that someone is going to say that the developer infringed on his intellectual property.

**Mr. Scott Ticer:**

Pull the contract from the website, sign it, and submit the application.

**Mr. J. Holt Foster:**

Often Hollywood content owners want final approval rights because the content is their baby. If the Hollywood content owner does not like something at any point in the process, he can end it. Realize that it is the nature of the beast for many Hollywood franchises.

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98. **DOUBLE FINE PRODUCTIONS, supra** note 16.


Mr. Zack Karlsson:

The only real risk I will touch on with Apple is when it changes its mind. Apple has the right to amend its contract at any time and in any way it sees fit. If the developer does not like it, he can leave. Apple does amend the contract from time to time and changes the rules, and sometimes content that has been legal until that point then becomes a violation of Apple’s terms of service. That content must be removed.\footnote{See, e.g., Katie Marsal, Apple’s Updated App Store Terms Could Kill App Promotion Services, \textsc{AppleInsider.com} (Oct. 1, 2012, 9:44 AM), http://appleinsider.com/articles/12/10/01/apples-updated-app-store-terms-could-kill-app-promotion-services (highlighting a change in Apple’s terms and conditions that “appear[ed] to give Apple carte blanche to put any app that promotes titles from a different developer out of action”).} This may be the entire lifeblood of the developer’s company, but he has no recourse.

Mr. Patrick Sweeney:

That is a business risk and not a legal risk. Nobody is going to get Apple to change the fact that it can change its mind. Developers, like everybody, just have to deal with that from a business perspective.

Mr. Zack Karlsson:

It is Apple’s world and we are just living in it.

Mr. Patrick Sweeney:

There are a handful of players that way such as content licensors, like Marvel\footnote{\textsc{Marvel}, supra note 74.} or Lucas,\footnote{\textsc{LucasFilm}, supra note 65.} or distributors like Apple.

Mr. Mr. Karlsson:

I do not want to single out Apple, but Google, Microsoft, Sony, and Nintendo\footnote{\textsc{Nintendo}, http://www.nintendo.com/?country=US&lang=en (last visited Mar. 27, 2013).} are similar to Apple. My company\footnote{\textsc{Capcom}, supra note 12.} does hundreds of millions of dollars in revenue through these channels and our deal looks exactly the same as yours.

Mr. Scott Ticer:

I am working with a content company right now, and it is a startup. We needed capital to secure licensed content, so we offered the licensor equity in the company instead of an upfront or minimum payment that would have been completed in a year. Ten years ago, I do not think most people would have done that. Perhaps they would have done this in the Internet dotcom days, but I am seeing some receptivity to creativity that I have not seen before. Is that something you are seeing as well? Is there more creativity in deals?
Mr. Patrick Sweeney:

The barriers to entry have come down in many ways with mobile games and with other similar types of games. There is more content being brought to market in a different way, and there is receptivity to some creative solutions. The deals are not cookie cutter; they have to be done in a different way than they probably were done five or ten years ago. These deals depend on the content and partners involved.

A deal like this could not be done with Marvel because it expects a cost of entry as a minimum guarantee. It depends on the other side. At any rate, there are more opportunities now in the gaming world.

Mr. Scott Ticer:

Zack, how have things changed in the industry over the last five years in terms of deals?

Mr. Zack Karlsson:

It is very different. Notably, the math has changed. I went to an event called Game Connection, which is like speed dating for developers and publishers. Developers pitch ideas at thirty-minute meetings, and there are sixty meetings in three days. Three or four years ago, fifty-five out of sixty pitches were console pitches; last year, I saw three console pitches. The rest were all mobile, digital, PC, streaming, and free-to-play. The nature of what we are seeing and doing deals around is different, and with that comes a change in the economics. Specifically, publishers are no longer providing value by providing distribution. It could be through quality assurance and submitting the game to the store, but that is not the value of the publisher. The value of the publisher is bringing consumers to your product, not distributing it to a retailer. It is no longer about a deduction for $0.55 per unit in order for the publisher to ship the game from the warehouse or 1.5% sales commission. We do not do that math anymore unless it is a retail title, which is rare.

Publishers are looking at the cost of acquisition and key metrics for measuring the game in the beginning phase, growth phase, maturity phase, or the death phase. As a game starts to lose consumers and is no longer making money, the publisher tries to minimize costs. The metrics are different for each phase. Not only are the measurements different, but also the things that we are measuring are different, with a new focus on retention rates and monetization rates.

It used to be that there was an advance on royalty. Someone ships a game, advancing a royalty rate that was earned over time. We do not do these types of deals anymore because there is a live team. Every month that we

106. See Law of the Level, supra note 53.
107. Id.
continued to spend money, they effectively never earn out. The entire structure of what we are doing has changed.

**Mr. Patrick Sweeney:**

In the past, probably fifty of those sixty pitches needed to be funded 100% for a $15 million project.

**Mr. Zack Karlsson:**

Many of these deals are fully funded, 50% funded, angel funded, friends-and-family funded for 15%, or have sweat equity. These deals just need another $2 million, and they are going to go with a Minimum Viable Product (MVP) and start monetizing their content. These deals are going to go into a limited beta where they release it on Facebook\(^{109}\) or iOS,\(^{110}\) It is a very restricted limited beta, but they are going to start charging money for it. They are going to have monetization, and that is going to give them the cash flow to continue to do their development deal. In the past, deals were not done like that. The market has shifted completely.

**Mr. Patrick Sweeney:**

It changes the leverage of the two parties and the deal terms because of the leverage of being funded.

**Mr. Zack Karlsson:**

It used to be that if a publisher funds a company, then the publisher takes the intellectual property, effectively saying, “I know it is the most valuable thing in the world, and it is the best idea that anyone has ever had in the history of anything, but I am taking it because I am funding it. It has no intrinsic value.” Creative people hate this, but it has no value until we market it or bring it to market. I knew a literary agent, Russell Galen,\(^{111}\) who used to say that there are hundreds of thousands of brilliant books written every day and there are not many published. It is not about your idea—it is about bringing the idea to market.

In the old days when we were funding, we took the intellectual property because that was just the nature of the deal given that we had to amortize our investment across multiple products in order to make the math work. Today video game developers are coming fully funded and looking for consumers. The leverage is different. If they come 50% funded, the publisher may still take the intellectual property.

**Mr. Scott Ticer:**

What kind of terms and conditions are you going to put in an agreement like that? What can we expect in terms of a revenue share? Who is going to do what in a deal like that, assuming you are the publisher?

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Mr. Zack Karlsson:

It depends on the leverage and how much money has been invested. If I am funding the whole project, maybe the revenue share on the backend will only be 10% to 15%. As long as I cover my weighted average cost of capital, then I am satisfied. Or, as long as I make more than investing in a treasury bill, then I am satisfied. It just depends on the facts of the situation. People need to focus on where the money is coming from, who is bearing the risk, and who is bringing the consumers. Those are the big levers. Costs such as development funding, marketing funding or brand awareness, consumers, server operation, and an ongoing live team need to be reviewed for this type of question; depending on how much money goes in and how much money comes out, that is what dictates the ebb and flow of the waterfalls.

Mr. J. Holt Foster:

It is whether or not you have social games or TripleA titles. Those are two totally different things.

Mr. Zack Karlsson:

Absolutely. They are starting to converge. Even TripleA games have live teams, and they have teams that are generating content for provision post-launch. There is content for games that have been out for a year, two years, or longer. Even though, historically for MMOs, or Massively Multiplayer Online, and social games, there were reviews in one-week, one-month, and quarterly patches; live teams are now involved in console development and I am expecting in the future that there will be more of this. There will continue to be more convergence between these discrete products and the products that live in an online and live environment.

Mr. Patrick Sweeney:

I think that has actually been a really great thing for the independent development community because it used to be, “Here’s your project, and here is the end date. We are going to ship you the golden master.\(^\text{112}\) It goes in the box and, boy, do we need a new project. We need to find something else to do.” Now, you can repurpose 10% or 15% of your team to do that ongoing content and live services component. There is ongoing revenue for a portion of a development studio that was not there five or six years ago.

Mr. Zack Karlsson:

I actually think it is a bit of a negative, and it has had a bit of a chilling effect on the industry. What used to happen was that all of the money as a developer was made up front. The money has been put in, the man-month\(^\text{113}\) rate set, and, hopefully, the royalty and whatever else have been earned on

112. *Golden Master Definition*, TECHTERMS.COM, http://www.techterms.com/definition/goldenmaster (last visited Mar. 28, 2013) (defining the “golden master” as “the final version of a software program that is sent to manufacturing and is used to make retail copies of the software”).

the back end. But, once the game has shipped, that team is no longer responsible for it. With the way the profits and losses are structured, the revenue that the publisher is expecting only starts coming in once the game launches; that is the beginning of the work. There is all of this prep work, and then the real work of a live team, monetization, and optimization really begins.

So, from a publisher's perspective, the revenue expectation begins not with the discrete product, but with all of the content patches. What ends up happening is that, as an independent developer who has created a product for us, we take up 50% of your studio. If my next twelve months of revenue are gated by that developer's engagement on that live team, I cannot allow him to be independent. If I do, my competitors are going to come in, scoop him up, and now all of the revenue is gone from my profits and losses. Because he is no longer available, they cannot buy him or take up all of his bandwidth. So, when I get into these deals, unfortunately, I have to lock the developer down.

Mr. J. Holt Foster:
Key man provisions.114

Mr. Zack Karlsson:
No, not just key man provisions, but exclusivity, or . . .

Mr. Scott Ticer:
Rights of first refusals?115

Mr. Zack Karlsson:
All kinds of clauses are necessary. I have to be draconian about it because I cannot let the developer walk away with the revenue. We are at a point where we have invested all of this money up front and cannot sell a discrete product. These games are free to play; a monetization event does not occur until we start doing the live team. So, I get stuck in a situation where I have to own the developer; if not actually, then figuratively. It is unfortunate, but that is just the way the model works at the moment.

as a "[u]nit of work representing the productive effort of one person in a [four]-week period").

114. Key Man Clause, GLOSSARY — VCEXPERTS.COM, https://vcexperts.com/encyclopedia/glossary/key-man-clause (last visited Mar. 28, 2013) (defining “key man clause” as “[a] contractual clause stating that if a specified number of key named executives cease to devote a specified amount of time to the Partnership then . . . the manager of the fund is prohibited from making any further new investments until such a time that new replacement key executives are appointed").

Mr. Patrick Sweeney:
That certainty has to be somewhat refreshing for a lot of studios, right? They love the fact that you effectively own them.

Mr. Zack Karlsson:
Yes. However, the big problem with that is they are small. A lot of the fun of this business happens when developers have a nice, big hit, and they have made a whole bunch of money; then, they can have a really nice exit for three, four, or five hundred million dollars. Once a team has been successful and has had a hit, then it is already bought. So, those kinds of teams are not going to see the three, four, or five hundred million dollar deals. They are going to see twenty, thirty, or forty million dollar exits; which are certainly not bad, but could have been a lot better. The opportunity is not quite there like it used to be.

Mr. Scott Ticer:
So, one of the biggest mistakes I see dealmakers make is selling themselves too soon or allowing somebody to have a 10% or 20% stake. Essentially, they are already sold; they are off the market. To be fair to the startup, is there another, perhaps more creative way to approach that? In the old days, we used to do earn-outs. I have done one of those, and I was an indentured servant for only 365 days.

Mr. J. Holt Foster:
There can be strategic relationships. Under the old model, it used to be that the publishers would have all of the cards because they would dole out the milestone payments, making everyone wait in the process. But, when the participants in the deal become so reliant on the money from those strategic relationships, then that too can become almost as bad as ownership.

I think it is important to figure out how to structure it. Some people also need to realize that, if this is a dealmaker’s third time around, he is a well-known name, and someone who is successful can dictate different terms. Maybe he does not want to have 20% or 30% of ownership with negative controls so that he is effectively owned and taken off the market. With a first gig, maybe having a viable video game company is the dream. And that is okay—to hit a single or a double the first time, while learning the business and getting a name out there. Then, after selling this company, and after the indentured servitude goes away, there is a compelling story there.

Mr. Zack Karlsson:
Indeed, it is a lot more fun the second time. The golden handcuffs thing certainly kept us from making very much money the first time when we


sold to Sony. I was a peon and did not make squat—maybe a Starbucks\textsuperscript{118} coffee and a sandwich. But, then we went off and did it again, and, after the golden handcuffs came off,\textsuperscript{119} we went and started another company and sold that one back to Sony. We did a lot better that time because it was a better story.

\textbf{Mr. Patrick Sweeney:}

I think that is part of the strategic thinking, too. There are a lot of developers that get stuck in that same rut, saying, "I just need my next project. I don't care what it costs; I don't care what anyone takes." Then they get stuck, and the second deal is the exact same thing. They are not starting to think progressively.

\textbf{Mr. Zack Karlsson:}

Right.

\textbf{Mr. Patrick Sweeney:}

Developers have to learn from each deal as they go forward, and ask, "Am I going to start retaining ownership of my intellectual property? Am I going to start getting a better deal? Am I going to start doing things a little differently?"

\textbf{Mr. Zack Karlsson:}

Then there are deals that make me sad. I will refrain from naming the company, but there is one that did three rounds of financing and gave up 90% of the equity in their company. So when there was an exit—and there was in this case—the people who had built the company did not get very much for it because they had given it all away. It just made me sad.

\textbf{Mr. J. Holt Foster:}

It is a fine line to walk. When looking for money, the initial thought is, "Let's get a whole bunch—as much as we can; now." But money is much more expensive early than it is later. Developers want to make sure that they get enough money in the door initially so that they are not always scrambling to get money. The idea is to get some money in, have some comfort, and focus on what it is that they are doing. Venture capitalists, angels, private equity—whatever it is we are going to call them—are in the business of making money. They are not as emotional about the product as the developer, and he needs to realize that. He should also realize that timing is everything, but when he throws himself at their mercy, it is a bottom line. Those investors got money from other people and it is their job is to maximize their return in a certain amount of time.


\textsuperscript{119} \textit{See VCEXPERTS.COM, supra} note 117.
Audience Member 1:

Say a dealmaker has intellectual property that he believes in and maybe some money, but most importantly, he actually has a deal working. Then, it starts not working out very well. How does he recognize the opportunity to change the deal? How does he go about it? What is the groundwork he has to lay to say, “Hey, this is not working out for us, but I still believe in the intellectual property and have a great team?”

Mr. J. Holt Foster:

First of all, realize that he is probably locked up with some sort of confidentiality agreement with respect to whoever he is in bed with currently. If the relationship is looking like it is becoming toxic, falling to their backburner, or they have moved on or feel the technology is old; then maybe it is okay to sit down with them and have a come-to-Jesus talk. Perhaps it is fine to say, “Hey, look guys, don’t take this the wrong way,” because you have to be very delicate. It is entirely possible that they are trying to figure out how to get out of it just as much as he is, but everyone is afraid to say anything. So, the deal just languishes and dies a slow death.

It is not wrong to sit down and say, “We should take a step back. Are we still seeing eye-to-eye on this? Are you a little bit disappointed? Are we a little bit disappointed? Is this still a good, optimal relationship? Should we try something else? With your authority, would you be willing to let us see if we can get someone else to take this off your hands? My goal is not to screw you over. My goal is to try to get you to recoup all, if not more than, the money you made. Would you be willing to do that?”

Oftentimes, they will say, “Yeah, please do. Keep it confidential though. We don’t want it known that this product is on the market.” But, if instead they say, “I don’t like you, big publisher, because you are mean and make me cry,” then that is not what you are looking at. Rather, that is typically creative differences or they have just moved out of that space.

Mr. Patrick Sweeney:

Definitely do not approach the situation by saying, “You need to let me out of this deal because I cut a deal on the side with Zack at Capcom, and I’m ready to step into a better deal.”

Mr. Zack Karlsson:

I am going to take a slightly different stab at this, perhaps because I am not a lawyer, and I will be very specific. The way to set it up is by asking for, what the lawyers would call, a demand for performance. Typically, a developer is unhappy with the deal because they are not doing something as well as he wants. Maybe there are no legal grounds or causes of action, but they are not sufficiently marketing the title or are not investing in it. Call them a lot. Ask them to do better. They are going to get really annoyed, and they certainly will not want to hear from you anymore. “God, that guy is on the phone again. It is that stupid whatever-game-it-is. Could somebody just make him go away?” That is when the developer should say, “Hey, I would be happy to go away. Here is how I am going to make you whole.” Then, take it away.
I did this with Psychonauts\textsuperscript{120} while I was working at Double Fine.\textsuperscript{121} Psychonauts was published by Majesco,\textsuperscript{122} and we just really got in Majesco’s business. We asked them to do more, over and over again, but not in a bad way. We just wanted more because it is a cool property and we really loved it. They eventually got tired of hearing from us, so we negotiated how we were going to separate away from them and them from us. It was good for both parties; they did better than they were expecting, while we got to walk away with the intellectual property disencumbered from their distribution. It was a win-win situation.

Approach the situation understanding what the other party wants. If the reality is that the other party is happy with its performance, but the developer is just not happy with how happy they are with that performance, then there is a real problem. That is harder. There is no choice there but to live with the deal that was struck. On the other hand, if they are not happy with the performance, then there is a chink in the armor and thus a place to go.

\textbf{Audience Member 2:}

I have a question for Zack. I recently attended a seminar at which you spoke, and you indicated that there substantial growth happening in China, Korea, and several other countries. Are you seeing any competition from them?

\textbf{Mr. Zack Karlsson:}

No. They are doing deals without ownership of intellectual property, but they are typically not the nature of the deals that happen here. Specifically, there is a large Chinese publisher that requires that developers do all of their games with this publisher’s monetization model and technology. To do a deal with them—and it does not matter how far along it is—developers are going to have to scrap what has already been done and do it this way instead. Some people do not like that. The hooks they have are different, but just as profound.

\textbf{Audience Member 2:}

But that is a specific company, though, correct? Because you also talked about other gaming companies that are willing to give away money.

\textbf{Mr. Zack Karlsson:}

If you have somebody that is going to give you free money, take it.

\textbf{Audience Member 2:}

So what are the hooks?


\textsuperscript{121.} Double Fine Productions, supra note 16.

Mr. Zack Karlsson:

Well, I cannot answer that question without knowing about whom we are talking. It has been my experience that, for whatever that is worth, there is no such thing as free money. There are always hooks, and some of those hooks are more palatable than the other ones. The thing about intellectual property ownership that makes the hair on the back of the creatives' necks stand up, is that it is not really not about intellectual property ownership so much as control. So, when talking to someone who wants intellectual property ownership, it is imperative to find out what they really want. What is the issue here? Is it about control? Is it about exploitation? Or, is it that they do not want it to become some animated series that they are embarrassed to show to their children? What is it that they are trying to prevent from happening? Or, to turn the question around, if the publisher wants intellectual property ownership, what are they really asking for? Are they asking for the ability to do sequels? Are they asking for the ability to have some level of creative control? Do they want merchandising? Do they want ancillary rights or derivative works? What is it really that they are trying to get? Try to solve that issue without the word ownership because it is charged. It has an emotional connotation, particularly to creatives. My point is, simply, figure out what are those hooks.

Mr. J. Holt Foster:

One quick note that stirred something in me is, as a lawyer for smaller companies, startups, entrepreneurs, or anyone else who is not a behemoth, make them also realize that, no matter what the contract says and whether things are going the way of the contract or not, it is probably unwise to file suit against a large publisher because they have the ability to just destroy these smaller entities out of business. There is a well-known publisher that is famous for having contracts and then running the show the way they want when they know they have the developer against the ropes. The fact is that the developer cannot do anything about it. They cannot hire a lawyer; neither can they file a lawsuit.

Mr. Zack Karlsson:

I will share a very specific story without naming any parties. There is a big publisher who would never pay the last milestone payment because the last milestone payment is only $150,000, $200,000, or $250,000; and it costs $250,000 to litigate. So, they just do not pay it—every single time. It has happened to five or six developers in a row. Patrick knows whom I am talking about because that developer is not quiet about it. One or two of those developers that have had that happen to them have talked about it a lot, fairly publicly. It is a really big problem. When I was at Double Fine, I was preparing to do a deal with that particular company, and I said, "Look, you are going to have to frontload this money in a particular way because you do not pay your developers their last milestone." The company responded, "That is ridiculous! I cannot believe you would say such a thing." To which I said, "I have done deals with people. I know. This is not my first trip to the rodeo. I know that you guys do this." They were insulted, but, sorry—I need that
money. I actually offered to increase the budget by $250,000 so that they could not pay the last milestone and feel good about it.

**Audience Member 3:**

How does a developer know when to stop? Basically, when should he be comfortable with the deal terms that are in front of him?

**Mr. J. Holt Foster:**

Students come out of law school like a gladiator, ready to kick everybody’s asses. Then, they realize that often failure comes first, and not everybody wants to be with them. It is an acquired finesse and feel. That is why, more often than not, someone with a little bit more gray hair is making the deal. Truthfully, it is probably someone a little bit better than those freshly graduated students. After a few years, they will be better than the first person to come out.

Also, as we have all already said, it is imperative to know the parties involved. Remember that, when going against someone in Hollywood, for example, it may be necessary to be a jerk. At times like those, put on that gladiator outfit. Know that, when up against LucasArts,\footnote{LUCASARTS, http://www.lucasarts.com/ (last visited Mar. 28, 2013).} or whatever the case may be, they are not really going to move off of their terms. Part of that is educating yourself, and you cannot always find that in a book, though some of it is there. According to the saying, law school teaches students, “This is a hammer. This is a saw. This is a nail.” Then they walk into a law firm and are told, “Alright, build me a house.” And most will say, “I have no clue how these things work. I can just tell you what they are.” The point is that a lot of this is just experience. Realize that it is not always necessary to be the guy or gal who is the meanest, loudest, biggest, smartest, or most threatening person in the room.

**Mr. Zack Karlsson:**

To put it very succinctly, that’s why this panel is called “The Art of the Deal” and not “The Science of the Deal.”

**Mr. Patrick Sweeney:**

I teach a law school course on video game agreements in Los Angeles.\footnote{Drafting and Negotiating Video Game Law Agreements, SOUTHWESTERN LAW SCHOOL—COURSE DETAILS, http://www.swlaw.edu/academics/course_listings/course_details/LAW_674 (last visited Mar. 28, 2013).} Inevitably, after the class is over, my students say, “Great! Now I can do more of these.” Again, I would proffer the saw and hammer analogy. Yes, they are now familiar with these types of agreements and could probably navigate through some of them. But it does not mean that they can navigate that art. At its core, law school teaches you how to pass the bar; it does not teach you how to practice law.
Mr. Patrick Sweeney:

It takes time, some seasoning, and some experience to figure it out. Everybody learns that on the fly. Students do not come out of law school knowing when to push and when to hit the brakes.

Mr. Zack Karlsson:

Oftentimes, the other guy will say something. If a new lawyer goes too far, he will let you know.

Mr. J. Holt Foster:

But, the risk is that he will only say something once he is also saying, "We are not interested in doing the deal." That is when it is way too late.

Mr. Scott Ticer:

I have had lawyers screw up deals, but the biggest screw-up story I have is not managing a CEO. For the first time in history, we had actually successfully arranged for competing telecommunications carriers to play in the same sandbox by investing money, buying services, and allowing us to buy services from both carriers. The CEO was so nervous that he came in earlier than the deal team. We could have had AT&T and MCI as strategic partners, which would have locked out our competition. Instead, the CEO took the paperwork from AT&T, signed it, and sent it back to them. Then he gleefully came over to tell us what he had done and that he had executed the deal. Well, what he had actually accomplished was to make sure that MCI went into the hands of the competition. My lesson was learned, as I did not manage the CEO. Manage the lawyer; manage the CEO. This is a must.

Mr. Patrick Sweeney:

The dynamic between an in-house attorney and an external counsel is an interesting one. The way each manages the client is also very different. Internal counsel can say and do things to its management that external counsel probably cannot or would need to approach differently. I have been on both sides of that, and managing your client, or being managed by your client, is also somewhat artful.

Audience Member 4:

What should we look for when feeling out the marketability of a story?

Mr. Scott Ticer:

I am not sure I understand the question. I want to be able to repeat it to the audience.

Audience Member 4:

I believe Zack said something about being able to sell his second superior story and, therefore, being able to walk away with a better sales price at the end of the day. Maybe I misunderstood the metaphor, but I think that is what he said.


Mr. Scott Ticer:

Right. I think what he was saying is that it is a lot more fun the second time around and you have a heck of a lot more leverage as a proven developer and proven entrepreneur.127

Mr. Zack Karlsson:

Correct. Basically, developers make a promise that they are going to continue to provide value to the company that is buying them. When a developer has built a company that has been able to do that previously, then he does not have to sell anything. The record is the sales pitch. “Do you see what I have done? Do you see what we did as a team? This is where we came from. This is the value that company built for the company that bought them. In this case, it was you. Do you not want to do that again?”

Mr. Patrick Sweeney:

There is a credibility factor based on that track record. There is not as much of a need to sell as there is to say, “Look what we are capable of. We have done it before, and we are going to do this for you.”

Mr. Scott Ticer:

So, our time is up. I really appreciate you guys coming to the party and sharing your insight.

127. See generally supra notes 120–22 and accompanying text.