A Game Developers' Bill of Rights

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Introduction

It is common knowledge among game developers that our industry is in something of a "creative crisis." Every week there is a new journalistic expose about how game business models squeeze out new ideas, or another blogged rant about how the increased scale of next-generation games is going to kill game design experimentation.

A Game Developers' Bill of Rights is part of this ongoing discussion, a provocation that draws attention to a set of important issues and challenges facing our industry. It highlights some of the problems that developers face as they try to create games and grow our industry, both creatively and commercially.

A Game Developers' Bill of Rights was directly inspired by A Bill of Rights for Comics Creators, a document that was meant to address some of the inequities that comics creators face as they work with comics publishers to get their creations out into the world. In reading it, I was struck by the common ground that game developers and comics creators share. Many articles in my Bill of Rights are inspired directly or indirectly from the Comics Creators Bill of Rights.

A Game Developers' Bill of Rights is not meant to be a strictly practical document. I did not write it as a guide for contract negotiation, nor as a set of legal standards for developer/publisher agreements. But I do believe that the positions represented by the articles in the Bill of Rights are absolutely the correct and proper ethical positions to take. And generally, game developers simply do not have these rights in the arrangements they make with publishers. It is possible that in the current climate of the game industry, with the current power relations between developers and publishers, game developers will simply never be able to exercise these rights fully. (More about that at the end of this document.) But first, onto the bill itself.

A Bill of Rights for Game Developers

1. The right to full ownership of what we fully create.

2. The right to be billed as the game creator in marketing and on game packaging at least as prominently as any mention of the game publisher.

3. The right for every individual involved in creating the project to be given accurate and prominent credit within the game.

4. The right to move freely between publishers on new game projects.

5. The right to a fair and equitable share of profits derived from a game.

6. The right to full and accurate accounting of any and all income and disbursements relative to our work.

7. The right to promote and the right of approval over any and all promotion of our games and ourselves.

8. The right of approval over means for distribution, as well as for licensing, merchandizing, and other derivative versions of our games.

9. The right to a publishing arrangement that reflects the iterative nature of game development; one that recognizes that changing a game as it is developed is part of creating a game.

10. The right to a publishing arrangement that results in a process that conforms to accepted standards regarding work hours, compensation, and labor practices.

11. The right to acquire publishing rights to a game if the publisher has stopped distributing the game.

12. The right to employ legal representation in any and all business transactions.

13. The right to final say in creative disputes regarding the game.

Notes on The Bill

1. The right to full ownership of what we fully create.

This is the most fundamental statement in the Bill, and is taken directly from A Bill of Rights for Comics Creators (as I mentioned, many of the items in the Bill are direct or indirect translations of articles in that document). Conceptually, most of the rights in the Bill of Rights for Game Developers follow from this one.

The prevalent argument against game creators owning what they create is that since a publisher is paying for the work to be done, that gives publishers the right to own the created work. However, there are plenty of counter-examples from other creative media, such as the book industry, in which paid authors retain copyright. Similarly, in the legal systems of some countries, such as much of Western Europe, a game publisher does not

typically retain ownership of what it funds. Because a game production budget is often some sort of advance on royalties, it cannot be considered merely a work for hire arrangement, and is more akin to a loan or investment.

Beyond these arguments, there is a more basic principle at work here, which is as much an ideological question as anything else. To quote Greg Costikyan from an argument he was having with a game publisher at a conference reception a few years ago, a developer should retain the rights to a game "because they fucking should, that's why." I agree with Greg, but if you don't, you might not agree with many of the other articles in the Bill.

2. The right to be billed as the game creator in marketing and on game packaging at least as prominently as any mention of the game publisher.

3. The right for every individual involved in creating the project to be given accurate and prominent credit within the game.

These are two straightforward items having to do with the credit and billing that a game developer and individuals should receive for making a game. It is common in many creative industries, such as the music industry, for the creators of the media to receive top billing. This is very often not the case with games.

4. The right to move freely between publishers on new game projects.

This item is a good example of what I call below "alienable" rights. In other words, it is fine with me that a developer might decide, in the course of negotiating an agreement, to work exclusively for a publisher for a period of time. That said, this right should not be taken for granted – for example, it should not be a presumed part of a publisher's standard agreement.

5. The right to a fair and equitable share of profits derived from a game.

Defining this article in concrete terms would mean a different kind of industry than what we have today – one in which a set of standard industry rates are publicly agreed upon, in which standard deals are shared publicly, or where game developers have some kind of collective bargaining. Such scenarios are very unlikely to happen in the current state of the industry. But that reality does not diminish the principle of this article.

6. The right to full and accurate accounting of any and all income and disbursements relative to our work.

This is a simple legal point, but one that is often overlooked in development contracts. Like several of the other articles, this one comes from A Bill of Rights for Comics Creators.

7. The right to promote and the right of approval over any and all promotion of our games and ourselves.

8. The right of approval over means for distribution, as well as for licensing, merchandizing, and other derivative versions of our games.

These two articles are potentially the most controversial (or the most onerous, depending on your point of view). In essence, they give the game developer some rights over the kinds of activities that typically fall under the purview of a publisher. So I understand that they are somewhat radical assertions.

The intention is not that developers should micromanage the publishing process. But if you agree with the first article – that developers should fully own what they fully create – then it makes sense that the owner of an intellectual property should have such rights. A game developer should be able to decide, for example, if and how a cell phone port or a licensed plush toy of their original game creation should be brought into being.

9. The right to a publishing arrangement that reflects the iterative nature of game development; one that recognizes that changing a game as it is developed is part of creating a game.

10. The right to a publishing arrangement that results in a process that conforms to accepted standards regarding work hours, compensation, and labor practices.

These two articles concern the process of making a game. The first is quite a tricky business, and I know many contracts that have become tangled webs of approval periods and renegotiation clauses in order to accommodate the iterative nature of making games. Even worse are closed agreements that simply treat games as static media that are designed and scheduled in advance. I have recently heard of innovative funding schedules, such as regular monthly payments instead of milestone-based payments, which point to possible solutions for these dilemmas.

The second article above certainly is as much the responsibility of the developer as the publisher, and there has been much attention to quality of life issues in the IGDA over the

last few years. Ideally, an expanded version of this Bill would outline specific labor practices, such as those recommended by the International Labor Organization.

11. The right to acquire publishing rights to a game if the publisher has stopped distributing the game.

This is another important right for the owner of an intellectual property, given the fickle nature of the marketplace and the rapidity with which game companies come and go. Because of the ease of digitally distributing games for sale over the internet, developers should have the ability to make use of these and other avenues when publishers are no longer selling their games. However, defining exactly when a publisher has reached this state will be a tricky business.

12. The right to employ legal representation in any and all business transactions.

A simple and straightforward article that has sometimes been overlooked by eager young game development companies that eschew the need for attorneys, resulting in agreements that violate many of these articles.

13. The right to final say in creative disputes regarding the game.

This article, as aggressive as it may seem, is included for important reasons. Game developers should be considered the authority on creating games, and therefore should be seen as the authorities when it comes to the art, craft, and science of what they do. It is important that publishers also have strong input on the design and content of games, but the prevalent situation, in which publishers all too often are the creative directors of games by fiat, needs to be reversed.

Some Problems

A Bill of Rights for Game Developers is certainly a work in progress. There are many problems with the Bill as presented here, and I am happy to mention a few of the more obvious ones. First, there is a difference between individual game developers and game development companies. Most game development companies create their intellectual properties through a mix of in-house employees, freelancers, outsourcing, partnerships, etc. It is not clear how the principles expressed in the Bill would apply once we move below the level of considering a game development company as a single entity.

Along similar lines, there are many developers that are also publishers, in whole or in part (such as the online developer/publisher PopCap Games), and many developers that exist within larger publishing companies (such as Maxis, which is one of many EA studios). In these cases, it is not clear how the principles of the Bill would apply.

Games are created in many different contexts, and often the difference between a “work for hire,” the use of licensed content, and an original creation can be fuzzy. With this in mind, it might be more productive to think of the rights expressed in the Bill as “alienable” rather than “inalienable.” In other words, developers might feel free to give up some of these rights in particular contexts, as appropriate to the situation. However, this would certainly not diminish the importance of these rights in the first place.

Lastly, the specifics of the Bill are very much the result of my American-centric experience in the retail and online game industries. In much of Europe, for example, creators retain ownership of their work by default, and the laws regarding their creations are much more favorable to the creators than in America, in which they do not automatically retain ownership.

Next Steps

Despite these problems and challenges, however, I do believe that A Game Developers' Bill of Rights has important uses. As a document that begins to outline the ways in which developers often compromise their rights, it could be the starting point for a larger discussion of how the industry works and how we might change it. I challenge the IGDA to take up the Bill of Rights and modify it into a document that could serve a more practical purpose. I believe the IGDA should fight for the rights of game developers everywhere, and perhaps the Bill could become a tool in this process.

Many who have given me feedback on the articles in the Bill have scoffed at the document as hopelessly idealistic. There is a difference between idealism on the level of ethics and idealism on the level of implementation. I wholeheartedly believe in A Game Developers Bill of Rights in principle. However, in the current state of the game industry, I also think that these principles are unlikely to be implemented. Until some kind of shakeup occurs, shifting the roles of game developers and publishers, then developers will be hard pressed to retain all of the rights expressed in the Bill. However, if you agree with me that the articles of the Bill are a proper set of ethical goals, then the question is: How can we change the game industry to make it a climate where developers could in fact retain these rights?

There is hope. Even as game budgets balloon, there are new ways that games are being played and sold over the Internet. Independent studios making small-scale games are thriving. New funding models for games continue to appear. Digital distribution of games will inevitably change the game industry. It is only a question of when.

I love games. And presumably you do too. My heart's desire is simply to see computer and video games realize their creative and cultural potential. The danger is that we will become mired in a conservative industry that is too expensive and risk-adverse to support experimentation. But the potential is that games will reach new audiences, create new experiences, tell new stories, express new ideas, and bring people together to play with each other in new ways – as only games can. Acknowledging and granting the rights of game developers is one part of this process. The rest is up to you.

Notes and Acknowledgements

I first presented A Game Developers' Bill of Rights at a keynote presentation at the Montreal International Game Summit in November 2005. The Bill of Rights was part of a larger talk called *Making and Breaking Rules: Game Design as a Critical Practice* , which touched on issues of game design and the culture of games, as well as the business of the game industry.

A Bill of Rights for Game Developers would not be possible without lots of support and advice from many smart people. First, I would like to thank Scott McCloud for making A Bill of Rights for Comics Creators available online, and also all of the thought that went into the document from its many authors. Next, I owe a great debt to Loren Chodosh, my legal mentor, who has shaped much of my thinking about how game companies should do business. Also, thanks to all who read the document and gave me crucial feedback, including: Sean Barret, Charles Bloom, Naomi Clark, Greg Costikyan, Nick Fortugno, Gus Hemstad, Tom Hubina, Guido Henkel, Matt Mihaly, Peter Nicolai, Brian Robbins, Jason Della Rocca, Phil Steinmeyer, John Szeder, and Harry Teasley.

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