

# Negotiating Electronic Publishing Agreements

By Mark Litwak

## The terms of the producer-distributor agreement are critical.

Many producers of multimedia programs do not distribute their own works. They enter into agreements with publishers and/or distributors. The arrangements vary greatly depending on how the parties want to share the financial risks and rewards of creating and selling the program, and how they divide marketing and distribution responsibilities.

For purposes of this discussion, a publisher packages the product, conceives a marketing strategy, creates a marketing campaign and materials, determines the optimal suggested retail price, and arranges for distribution of the product. A distributor warehouses the product and ships it to retailers. Companies may perform more than one function. The publisher takes the risk of the product not selling since retailers usually have 100 percent return privileges. Essentially the retailer is taking the product on consignment. If it doesn't sell quickly, it may be returned to the publisher.

This article describes and analyzes the key provisions that an attorney negotiating a publishing deal for a producer needs to be concerned with. Whether you have negotiated a number of these deals or are preparing your first, the discussion contained herein should prove helpful to your practice.

### Conflict of Interest

When a publishing company develops some of its own products, it may favor those products developed in-house over those acquired outside. Outside developers should be aware of this inherent conflict of interest, which may become pronounced if the internally developed product is more profitable to the publisher than the outside-acquired product. A developer should not enter into an agreement with a publisher who is primarily motivated by a desire to fill out a product pipeline and amortize marketing costs.

The contract can state that the publisher will use its "best efforts" to market the product. Alternatively, the publisher could agree to promote the program on a no-less-favorable basis than its other programs, or it could agree to spend minimum monies to advertise and promote the product. If the latter course is chosen, the agreement must carefully define advertising and marketing expenses to exclude the publisher's general overhead expenses, such as legal fees and office rent. It is best to limit advertising expenses to direct out-of-pocket expenditures made to promote the particular product.

If a large advance against royalties can be obtained, the publisher will aggressively sell the product. If a large advance cannot be secured, a provision for minimum royalty payments is a good alternative.

### Grant of Rights

The developer of a program can license limited rights to the program to a publisher or he or she can assign (transfer) all rights to the program. If the program is a custom-made program, the company that commissions it will usually insist on copyright ownership. In this case, the developer may only be entitled to receive a fee for creating the program. Agreeing to forego copyright ownership may not be a significant concession if the program is so specialized that there is no outside market for it.

Developers who use their own resources to create a program, do not want to sell all rights to one publisher. Rights granted can be limited in time, by platform, or by geography. Some publishers simply do not have the ability to market the product in all platforms, media, and territories. A developer may be willing to grant a publisher the right to distribute by CD-ROM and computer disks, but reserve game cartridge and all other rights, including the right to distribute over online networks. Publishers usually want a broad grant of rights. Because the marketplace is still developing, they want the right to distribute the program on new platforms that may be developed.

**Related Rights.** Merchandising and book publishing rights should also be considered. Products spun off from a popular video game, such as toys based on a character, could generate substantial revenue. The right to make a sequel is another potential source of income. If the publisher helps make the program a hit, it will want to continue to reap the rewards by publishing sequels. The developer, on the other hand, may want to reserve these rights or give the publisher only a right of last refusal that would grant the publisher the right to match the best offer made by a third party.

**Exclusivity.** Publishers will usually insist on an exclusive agreement for whatever markets and media are covered. Otherwise, there could be a great deal of confusion among retailers and consumers as to the identity of the programming. Moreover, publishers will want developers to agree not to develop any products that are directly competitive. Distributors, on the other hand, may be willing to accept products on a non-exclusive basis, and may be willing to distribute similar products by different publishers.