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Legal and Business Issues in the Video Game Industry: Talent Deals

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**LEGAL AND BUSINESS ISSUES IN THE VIDEO
GAME INDUSTRY: TALENT DEALS**
**CO-SPONSORED BY LOYOLA LAW SCHOOL &
SOUTHWESTERN LAW SCHOOL**

SATURDAY, OCTOBER 21, 2006

*Richard Thompson, Moderator**

*Cody Alexander, Panelist***

*Daniel O'Connell Offner, Panelist****

*Daniel M. Siegel, Panelist*****

MR. THOMPSON: The next panel is the talent deals panel, and last week in the New York Times, there was a long piece about new technology—to create animated actors, basically.¹ I have a little video here that I think will work from the New York Times article, demonstrating this pretty amazing technology that's the next step past motion capture. I thought you might find that interesting while the group is getting set to go.

[Video Plays]

MR. THOMPSON: So, without any further ado, our next panel. I just need to point out, it said up on the screen there, we could put Marilyn Monroe alongside Jack Nicholson and it would add to that, but only if you make a deal with our panelist Daniel Siegel, here today. So, I'm Richard Thompson and I work at the law firm of Bloom, Hergott, Diemer, Rosenthal & LaViolette, and we are a firm in the motion picture and television business, primarily representing talent clients. I do all the

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1. See Sharon Waxman, *Cyberface*, NY TIMES, Oct. 15, 2006, at FILM 1.

technology related work there, the video game deals, and I actually have, in my day, represented publishers, so I'll try to stand up for their side a little bit today in this panel. To my immediate left is Dan O'Connell, who you've already met, who is one of the leading private practice lawyers in Los Angeles working in the game business. Next to him is Cody Alexander who runs the videogame business for the William Morris Agency, a company who I'm sure all of you have heard of, representing many, many talented people in the motion picture and television business. Then, beyond him on my far left is Daniel Siegel, who is the vice president of new business development legal counsel at a company called CMG Worldwide, which I think I would not offend too many people by saying it is the leading company in representing estates and deceased celebrities in licensing rights for post mortem deals for movies, television, entertainment, licensing of all kinds. I think the topic of our panel here is talent deals, and I think we're meant to take that in sort of the broadest possible sense of, what are the different deals with different kinds of people who get involved as individuals contributing their abilities to making a videogame and then sort of focusing as well on sort of the higher end of that, where deals are done for celebrities or famous actors, writers, directors, producers from the motion picture business who get involved in the motion picture business, and what those deals look like. So, let's just have each person on the panel speak for a few minutes about what they do in the talent business for games and what their perspective on this is, starting with you Dan A.

MR. O'CONNELL: I was actually hoping that we could start with Daniel, the talent-friendly side.

MR. THOMPSON: Okay, go the other way.

MR. O'CONNELL: Go the other way, then you get to the curmudgeon.

MR. SIEGEL: Hi, everybody. I'm Daniel Siegel. Richard pretty much told you who I am and what we do. We represent about 200 different estates of famous American icons—international icons. Everyone from Marilyn Monroe's estate, to James Dean, to Babe Ruth, to Malcolm X, Lou Gehrig, Jackie Robinson, Bette Davis, to name a few. How we get involved in video games, is simply, we are the licensing agent for these various entities. And, when publishing companies come to us to create games, they need our personality, so, in a baseball game, if you want to have Pedro Martinez pitch against Babe Ruth, the only way to do that is to get Babe Ruth from us. We have some professional wrestling clients.

2. See THQ.com,

<http://investor.thq.com/phoenix.zhtml?c=96376&p=irol-homeProfile&t=&id=&> (last visited Feb. 15, 2007) (THQ is a video game publishing and development company).

World Wrestling Entertainment has a pretty big program with THQ.² They wanted to create fantasy match-ups with some of the wrestlers of today with wrestlers of the past. So, we have Andre the Giant—we actually licensed him into two different games. You saw me flashing around—I brought some visual aids for everybody. This is the *Sims* game I flashed earlier when Patrick O'Brien was up here from EA, and here's one of the wrestling games front and back. I brought an MLB game because, as I mentioned before, Babe Ruth. I think we're up to about forty different players right now in the MLB game. I think that's a good enough summary.

MR. ALEXANDER: I'm Cody Alexander. As Richard said, I'm at William Morris Agency. Before we started the panel, I was joking with Daniel that a lot of the clients at William Morris Agency—we were founded in 1898—to some degree, when they die, I guess they move over to your agency. We certainly have our share of older talent as well.

MR. THOMPSON: There are many famous stories of agents at William Morris trying to sell people after they were dead without remembering that they'd died.

MR. ALEXANDER: However you can make a buck. So, we at William Morris, we're in all areas of entertainment. About four years ago, we became more formal with what we do in the practice of interactive. What I do in that area is I focus specifically on video games. In a very broad sense, the way to remember how we operate there is that we help connect the dots between a lot of the talent in the traditional media worlds with this new emerging world of interactive. Specifically for me, that means on the talent side, I or some of my colleagues will be the conduit for doing any kind of consulting arrangement that writers, directors may want to do, connected to game properties that an EA or Activision may be working on, a property that originates at the game publisher. Or, it may be working with actors or musicians, or other talent that are sort of traditional on-camera talent and doing those agreements for voiceover, likeness, things like that. Or, in some situations, it's also working with our talent when it comes to new ideas, new properties that they want to approach that may be connected to a script or a property they're developing outside of games, or it may be completely original to games. We work in all those areas and make sure that we provide the best value for our clients that are trying to get into that new market.

MR. O'CONNELL: You heard my synopsis before. I'm Dan O'Connell, a partner in O'Connell and Anderson. We primarily deal with talent issues. Richard provided a wonderful summary and I'll crib from that in three or four areas. One area is when someone starts a studio and

comes to me and says, "I want to hire this programmer, I want to hire this CTO, I want to hire this art director." That's a form of talent. The other area that we run into with talent all the time is when WebZen wanted to hire a significant composer to do the music soundtrack for its game, SUN. And, we did that music deal. That's a form of a talent deal. It was original music and structured much like a music deal on a movie. Another example is when one of my clients hired David Duchovny; another one hired a dead person, Marilyn Monroe, to go into a game from Daniel Siegel; I think my partner has dealt with Cody on a couple of deals. Those sort of break into two categories: you're looking for talent to come in in a creative capacity, whether it's writing, directing, making a significant content contribution to the game; or, you're looking to them to be a performer in the game. That's increasingly happening. I didn't bring in the article from the Hollywood Reporter (and violate anyone's copyright), but I think there was an article—or, from GameSpot³ about one of the latest games—it may be an EA game where they basically had a crew that did live action and also motion capture for a game and they shot it like a movie. Those are really the three areas we encounter for talent. That's the serious comment. The not so serious comment is dealing with technical talent that's coming into a studio, they're fine. Dealing with dead people, they're sort of okay. Dealing with live talent is a complete and utter blankety-blank pain in the That's Cody's department.

MR. ALEXANDER: It's more a part of it than I wish it would be sometimes.

MR. O'CONNELL: Yes, so now you know the prejudice of the developer-publisher-lawyer.

MR. THOMPSON: So, hopping in to the meat of the topic, let's start off with Dan, talking a little bit more about the technical talent. In the movie and television business, you have teams that come together and dissolve on a project-by-project basis, but, generally in the game business, as I think you heard from the earlier panel, you generally have people who work on an ongoing basis for developers and publishers and usually are employees or long-term contractor consultants. So, Dan can you talk a little bit about what it's like for some of these technical people? What are the deals like? What are their salary ranges? What are the compensation arrangements for them?

MR. O'CONNELL: I think there are two different models, again, if you

3. See Gamespot.com, <http://www.gamespot.com/> (last visited Feb. 11, 2007) (GameSpot is a popular website featuring video game reviews, news, previews of upcoming games, and forums).

go back to the independent developer versus the publisher and you also go to what do people do. First of all, the people working in the videogame business—outside of the true entertainment talent that are represented by the guilds—and there now are some guild agreements coming into place for talent. The people who are programming, the people who are doing artwork internally and working in Photoshop and the people who are doing level designs and doing game production, all of those are employees. If you're at a publisher, you're an employee, and if you're at a good publisher, there's a stock option plan and that's your upside. There's bonus for the team, and there's also sometimes some type of revenue, profit-share, internal royalty pool. It varies for internal teams at certain publishers. For example, Sony has a specific type of deal with the team that they picked up when they bought Naughty Dog, which had made a lot of best-selling games. They preserved those kinds of rev-share, royalty-sharing deals with the team. If you're at a developer, an independent developer, again it varies all over the map. You're going to have some type of base salary, hopefully some type of bonus if the game hits. There may or may not be a royalty pool that you can participate in. And, whether you participate in the ownership of the company in the event that it sells, that can be anybody's guess. David Rosenbaum would be better to talk about that. I think those are the kinds of models. It is a non-union business. People who work in this business are viewed as professionals, although certain people at EA—Patrick's left now, so I can really bash him. If you look at what happened with EA and the labor standard and what's going on, that's an area that, as a practitioner in the field, I feel less and less comfortable about what's going on there and what I can advise clients about, because you have people working incredible hours to make games. Should they be paid overtime or are they professionals? It's a huge question. They are not unionized right now, and that's a really, really big question. I defer to my colleagues to talk about the guild issues and guild arrangements that are now being struck between the publishers and talent.

MR. THOMPSON: And, Dan, what about salary ranges, say, for programmers? What does a low-end programmer make versus a high end programmer?

MR. O'CONNELL: I used to know. I actually just looked at a business plan about a month and a half ago as far as a budget on salaried programmers. Forgive me, I cannot remember. They're well-paid software engineers. That's my general reaction. They're not probably as well-paid as people at Raytheon, because they're looking for the upside, but they're well-paid.

MR. ALEXANDER: I'd like to add a little bit to what Dan was saying

about the compensation structure for individuals working with game developers and publishers. Over the last year or so, we've been doing a fair amount of that with some of our clients specific to the game area that are getting in to that space. It seems pretty consistent, yes, that employees that are fulltime employees for companies will get their salary structure, they'll get the bonus payments based on how well the game sells from the team they were a part of, as well as, over all, how well the company does through stock options. But, there's this ongoing debate about individual talent. How many people here actually follow to some degree the games business or interactive business? Read about it in the paper and things like that? Okay, so a few sort of know this broad stroke that I'll give you. It's very analogous to the studio model of the 50s. This is something a lot of us in the games business reference quite often—

MR. O'CONNELL: There was nothing wrong with that model. A lot of people made a lot of money.

MR. ALEXANDER: Studios made a lot of money. Talent could make a lot of money as well, but there wasn't room for a lot of individual growth and exchange of ideas from other areas. It was a very sort of buttoned down method. This new model that we see developing—slowly, but it is developing—is where there's more individuals that are doing better in the games business because they had the ability to work with other developers or other game companies. It's still very rare and you can see the publishers pushing back on it quite a bit. I think that's where we probably operate quite a bit, because we understand that there are a lot of individuals that are very talented and need a better lay of the land of what's going on in the business. That's one of the primary things that we see changing in the business. Publishers, developers moving away somewhat from more traditional 1950s studio model ideals where they own all the talent internally.

MR. THOMPSON: Well, Cody, there's certainly one area outside of performers and big name talent where there's a fair amount of freelance deals. I know you do some of those, and that's writers, either deals with people who are movie and television writers who get brought into work on games, or sometimes people who sort of specialize in being game writers and are still freelancers and move from project to project. Can you talk a little bit about what those deals look like? What people get paid? What the deal structures are?

MR. ALEXANDER: Sure. I'll keep it relevant to what you guys might be doing if you're going into the representation side of writers, individuals or directors that work in the interactive space. Just very basic money ranges, I mean, compared to the film and television industry, it's much

smaller. It's anywhere a low as 15,000, 20,000 dollars for a particular job, maybe even less than that. But, it could be somewhere around that for a few weeks, or a couple of months of work. Or, on a higher end, it could be on a range that approaches, let's say, half a million dollars. Now, you rarely will see something that goes above that. There's very few examples of where that's actually happened. Usually, it's connected to an individual that has already had—or individuals. There's a pair that we represent that are the highest paid writers in games today and they're certainly beyond what I just referenced as the higher end of the scale, because they have quite extensive experience in writing for games and they're in demand, so there is sort of a market you create. But, right now, it's hard to have movie-like or television-like paydays for individuals that are talented because there really isn't that market developed yet where writers are seen as absolutely essential to sales of a product. Once that becomes more established and you can reference the fact that X writer contributed to Y sales because they have this particular talent—that will change. You're seeing that slowly. But, it's pretty common, fifteen, twenty on the low end, going up to as high as maybe half a million. I'd say the sweet spot is probably around 80, 125, something like that, for most writers. It's very different with directors. Writers are what I'm speaking of. The only thing I would add to that, in terms of the process for it that you asked, is it comes down to three basic components. That's how we look at it when you're hiring somebody that wants to work in a game property that's an established talent. Most of the time we look at three factors. We look at, one, what's the idea itself? Is it something the client will respond to? Are they passionate about it? It's really got to start with that more than anything else. Then, two, what's the time frame? That's the big thing we look at more than anything else. We don't care how much money really it will throw off. We really look at the time issue. How many weeks? Where are they located? How much time over the range of the project will it take? Then, third obviously, is the deal itself, how much money are we looking at here? Most of the time the driver there is the passion and the time, not the money.

MR. THOMPSON: What about back-ends? Do any of your writer clients get royalties or bonus structure of any kind, and how are those based?

MR. ALEXANDER: Some do, absolutely. Most don't right now. Most writers are straight work-for-hire on properties that are owned by a publisher. Where you do see back-end is the example I gave earlier of writers that have been established in the games business, and they're starting to see something that approaches a back-end—,

MR. THOMPSON: Do they actually get a percentage royalty, or do they just get bonuses based on sales or ratings?

MR. ALEXANDER: Well, I'd be curious if you guys have any history with this with publishers and bonus payments and royalties, but most of the time they want to simulate it to what employees would get on a team, and they want to call it bonus payments based on unit sales, how well the title performs. They don't want to call it royalties. So, they'll give a hard dollar figure for every X amount of units that have been sold through on the property, versus 1 percent, 2 percent whatever percent of the adjusted gross, if you will.

MR. THOMPSON: I've been more successful for writers in getting actual royalties by doing a deal with a developer that gets a royalty and getting him to share some of that royalty with the writer, particularly if I've got a writer, somebody who's got a couple of movies that have been made and so the developer thinks he's somebody and is happy to be in business with him. How about credit? In movies and television, that's very important to get credit. Do writers in the games business get credit arrangements in their deals?

MR. ALEXANDER: Absolutely, always. They do. Most games, if anyone plays games, you'll see how they have rolling credits in a separate section of the game that you can access on the front menu. You can pull it up that way. You don't really get box placement on games. That doesn't really happen, so it's not that kind of credit, and most of the time it's not going to roll in the front of the game itself, so it's not what most people see as traditional from film and TV, but yeah, absolutely.

MR. THOMPSON: How about the right to be involved in sequel games, or in movie or television projects that may spin off of the game?

MR. ALEXANDER: Case-by-case basis. Again, it comes down to their degree of success in games and how much leverage you have over them with a particular game publisher. If it's an individual that does not have game experience, but they're well-known as a writer or filmmaker, absolutely. In fact, it's usually the other way around. The publisher wants to give them that. They want to give them the opportunity, or first right, to write the adaptation for film or television.

MR. THOMPSON: And, before we move on to the next topic, for writers in the game business, what's the deal with guild protection? Is there a Writers' Guild deal? What does it do for you, if anything?

MR. ALEXANDER: Not much. Not much right now.

MR. THOMPSON: Here, I'll give you a little bit more detail on that. The deal is that in theory, the Writers' Guild says if you're a member of the Writers' Guild and you write games, you're supposed to work under the

Writers' Guild agreement. The Writers' Guild agreement for games is one page long.⁴ It says nothing other than that the game publisher agrees to make the 14 percent pension and welfare contribution on the game writer's salary. There is no residuals, no credit requirements, there's no arbitration of disputes, there's no separation of rights. There's none of the goodies you get if you're a movie and television writer. And, the 14 percent, although technically in addition to the writer's salary, is typically calculated by determining what the publisher will pay and subtracting 14 percent if the writer wants to seal the deal. So, on the other hand, as opposed to SAG—which we'll talk about a bit, where there's a lot of contention and publishers hate SAG and hate dealing with SAG and look for opportunities to use non-SAG writers—the Writers' Guild has been more successful in getting more penetration into the game business, because the requirements are, essentially, zero. So, in that sense, it's actually been good and smart. Now, let's move on and talk about performer deals. Cody, I think I'm going to stick with you for a bit here, although Dan, you may have things to contribute here. I want to talk first about the lower end kind of deals, where somebody's being engaged to come in mostly to do voiceover stuff. There may be other components, motion capture, publicity services. But, where somebody is just sort of a journeyman actor who's coming in to do voices, maybe somebody who has some name recognition, but not a big movie star. What do those deals look like?

MR. ALEXANDER: As I was saying earlier, there's the formula that I sort of instituted with the other colleague that I worked with that does the different interactive agreements. As far as the interactive area, talent participation is a specific area. There's other areas that we operate in, where we're very proactive. We're more right now in more of a reactive position with a lot of our talent deals. There's not necessarily—there's individual cases here and there, certainly, but we're not in a position where we're going out and pursuing these deals for clients, but they're valuable to these clients that we represent if they're actors or musicians or recognizable talent. They may want to do this. If there's the first of the three I mentioned, that interest, then we figure it out. Those fees are very low for voiceover participation. We have an entire department within commercials that I work with that does the voiceover stuff for us, for, let's say, no name talent. Recently, *Scarface* the videogame—some of you may have heard

4. Writer's Guild of America, *Interactive Program Contract*,

http://www.wga.org/uploadedFiles/writers_resources/contracts/Interactive_Contract2004.doc
(last visited Mar. 4, 2007).

about this on the news. There was a big brouhaha about making a videogame out of the movie *Scarface*.⁵ It featured a lot of the original talent out of the movie, except for Al Pacino, and then, other people, including a guy who could do a perfect Al Pacino as Tony Montana. Those talent fees were relatively small: scale, double-scale, or maybe a little more than that. So—

MR. THOMPSON: Scale being how much?

MR. ALEXANDER: Scale being approximately . . . what is that?

MR. THOMPSON: Like 700 bucks a day? Something like that?

MR. ALEXANDER: 737? Okay. Like I said, I don't do the scale deals or the double scale deals. Those are done by two other colleagues of mine. But, they're obviously very small. It just comes down to a question of casting a wide net to talent that we represent out there and, again, reacting to the position that we're in.

MR. THOMPSON: How much work is usually involved in these deals?

MR. ALEXANDER: How much work with respect to the talent or doing the deal?

MR. THOMPSON: For the talent.

MR. ALEXANDER: For the talent, it's going in four to six hours, typically one day voiceover service—

MR. THOMPSON: So it's not too much. So, if you get paid 10,000 dollars for that, it's sort of a more than tiny deal. That's not terrible for some people.

MR. THOMPSON: And, do these deals change when they involve additional services like 'doing motion capture, or shooting some kind of video component of the thing? Does that put more money into it or make it a different consideration?

MR. ALEXANDER: Absolutely. The moment you're engaging their likeness, motion capture, anything like that, entirely different animal, no question. It requires more time and certainly, in most situations more money. Plus, the big issue with likeness, from a legal perspective—most of your clients are going to really look at this too—is how is it going to affect your reputation? Is it worth getting, well, an enormous amount of money in the game world, fifty thousand dollars, if it's going to put Samuel L. Jackson in a negative light, who makes several million dollars a picture? No. Of course not. No amount of enormous money in the games business if the game publisher wants their likeness is really going to make much of a difference once you get into the likeness area. That's one thing to be

5. See, e.g., Terence Keegan, *Licensing Impact Players: Beth Lauren Gross*, DAILY VARIETY, June 20, 2006, at A8.

cognizant of.

MR. THOMPSON: What about publicity services? Normally in movie and TV deals, actors are expected to show up and promote the film for nothing beyond their salary. What's the obligation—

MR. ALEXANDER: Back-end. There's bonus payments or some kind of incentive—that's something that we look at. Again, it comes down to the level of interest. Typically there's two types of client that will pursue voiceover and likeness deals unknown and known. The unknown, obviously, they want to have food coming in and be able to pay their bills and things like that, so obviously, money is a driving factor. But, when it comes to recognizable talent where we see a lot of deal flow coming in that's got some back end participation, that's where it's usually connected to marketing, performing services where you're actually promoting the product.

MR. THOMPSON: Although I think I've seen other deals where they want you to show up at the booth at E3⁶ or something like that, and then there's usually some additional cash that gets paid for those kinds of services as well. Is that your experience?

MR. ALEXANDER: Yes, there are services fees. There could be straight out—

MR. O'CONNELL: That varies.

MR. ALEXANDER: —straight out fees for showing up at E3 for a promotion, or some other event around the launch of the title, the game title. Or, there could be some kind of bonus payment arrangement that you can work out with talent for their participation in that.

MR. THOMPSON: And, in your experience, Cody, are most of these things done as guild deals, or is there a lot of it that's done on a non-guild basis?

MR. ALEXANDER: Non-guild.

MR. THOMPSON: Actually, I'd comment on that. My experience is that pretty much all the time when our clients do these things, they want them to be guild deals, but everybody always forgets to ask and set it up, so I get this contract that shows up on my desk the day before they're supposed to go and do the voiceover work, and I ask them whether they're signatories for the Guild or not, and, of course they're not. Then, I have to go and have the difficult conversation with the client well, you know, you're not supposed to be doing this and you just better hope you don't get

6. Entertainment Software Association, <http://www.e3expo.com/> (last visited Mar. 4, 2007) (E3 is an annual videogame industry media and business summit where new games and technology are demonstrated).

caught. It is just your voice and you may get away with this. Also, I should probably comment briefly on what the guild deal is for actors. The Screen Actors' Guild (SAG) and AFTRA⁷ both have interactive agreements—in fact it's the same agreement. They had a big controversy last year where they were very upset about it and wanted to get residuals and they were threatening to strike. Fortunately, the Guild caved, because in my view it would have been disastrous for actors. If they tried to strike the game companies, they would have just said “we don't care,” and gone to non-Guild talent. And, you know, there are these scale payment. Basically, there are a couple of additional payments that actors can get for certain kinds of uses of their material, but they can be bought out very easily, so there are essentially no residuals. There are working rule protections that exist to make sure that they get paid overtime and don't work 80 million hours a day, but it's all fairly easy to comply with. They even let you, if you're just making your first game with SAG talent, sign up on what they call an “OPO” —one production only basis—where you don't have to commit to do every single production with only SAG talent forever into the future. SAG is a little bit tougher than the Writers' Guild is, but there is a union agreement and it is supposedly mandatory for SAG actors and AFTRA actors to work under the union agreement. Most of the time, as long as you have more than 24 hours warning to do it, you can talk the companies into doing the deals under the union agreement as long as it's important to the client.

MR. ALEXANDER: And one thing, aside from the online resources for SAG, WGA, etc, you can call them. You can call SAG, or the Writers' Guild and there are people there to answer the phone that will really give you a lot of helpful advice and answer a lot of the questions you have. They're very accessible, so that's always a resource for you.

MR. THOMPSON: Okay, so now we'll move on to the more brand name deals where a lot more stuff gets negotiated and the money gets bigger. Since we're lucky enough to have Daniel with us, we'll start out in his area of expertise. Dan, can you talk a little bit about the deceased celebrity deals for games and what the different type of deals are and some of the ranges and deal structures you deal with?

MR. SIEGEL: Like I was mentioning when I just gave my intro for myself, deceased celebrities, in my mind, really work the same as living celebrities. The only difference would be, especially when you get into

7. American Federation of Television and Radio Artists,

<http://www.aftra.com/aftra/whatis.htm> (last visited Mar. 4, 2007) (“The American Federation of Television and Radio Artists (AFTRA) is a national labor union representing over 70,000 performers, journalists and other artists working in the entertainment and news media.”).

sports, you don't have the players' associations that govern the rights of our particular clients. So, as opposed to a collectively bargained agreement that EA or THQ happens to make with a particular league, when it comes to the deceased celebrities like a Babe Ruth in baseball, Joe Louis in boxing or Andre the Giant in—well, those aren't players' associations, but you know what I mean. When they want those names and they want those likenesses incorporated into the games, they have to come to us individually. They negotiate individual deals for each individual player, which sometimes gets a little bit burdensome because of the paperwork involved. There's a different estate for each of the different personalities, and sometimes the companies don't like to execute fifty different contracts that basically say the same thing—just with different names and different numbers. In addition to being in the game, there's also rights to be negotiated for use of the likeness or the name on the cover of the games. That tends to be an important area of real estate for both the publisher and for us.

MR. THOMPSON: So, you actually negotiate a specific separate payment for cover rights, or you just negotiate for more money if they want that right?

MR. SIEGEL: That's right, and we would write in the agreement that they have the right to use the image or the name on the cover. Even on some of the games that I brought—in this one, it's a wrestling game. You have Hulk Hogan who's predominantly featured on the cover, so he's going to get a lot more money than the other six people or seven people on the cover. He's probably going to have to do a lot more promotional activities, like Cody was talking about, in terms of showing up at E3 or other trade shows to help promote the game because he has such a prominent placement on the box and in the game.

MR. THOMPSON: So, for the prominent kind of usage where they're really the star of the game and expect it to sell some units, what kind of compensation deals do you get? What is the range?

MR. SIEGEL: Something like this is different than, let's say, "Derek Jeter baseball."⁸ When it's his brand, fees are going to go way up. You know, Brian probably knows a little bit more intimately than I do, what's being paid, but certainly it's not uncommon, I know, from stories that have been told, to see upfront fees in the low to mid six-figure range, sometimes even higher. In the case of a "Derek Jeter baseball," I don't know that

8. See, e.g., Amazon.com, http://www.amazon.com/2K-Games-710425279379-League-Baseball/dp/B000E260KI/sr=1-1/qid=1171433842/ref=pd_bbs_1/002-5586531-2984867?ie=UTF8&s=videogames (last visited Mar. 4, 2007) (Derek Jeter, shortstop for the New York Yankees, was featured on the cover of *Major League Baseball 2K6*).

particular deal, but I would be very surprised if there wasn't a back end royalty associated there to recoup against whatever upfront or backend guarantee was negotiated. In a case like this, where you have a lower-end game, the other people on the cover certainly aren't going to be paid a royalty. I did the deal for Andre the Giant. He wasn't compensated for his placement on the front or the back of the cover. At the time, he was a brand new client and we were looking for maximum exposure for him. I would have given that away because the value of having him there. Having him exposed at the time was more than any little bit of money I was going to be able to negotiate on top of the deal. So, it's all about leverage. As Cody was saying, it's a matter of opportunity, it's a matter of what value your band has currently when you're negotiating. Obviously, the more leverage you have, the better deal you're going to strike.

MR. THOMPSON: Okay, come on, name some figures for us. Give us some types and kinds of usage, what kind of range you might be able to expect to get without naming names.

MR. SIEGEL: Without naming names. Well, I know on the cover of MLB, I've been involved with a couple of those deals with Sony, and I think it's fair to say that the person on the cover, depending on who they are and the timelines, you're probably looking at a figure in the high five to low, mid six figure range just to appear on the cover and these change every year. There's always a demand to re-brand it, repackage it, give it a little bit more freshness. You have the reigning league MVP, or you have somebody that accomplished something really spectacular. So, Shaun Alexander is on the cover of the *Madden* game⁹ this year. Some may think that's a curse because they have the history of injuries on that game, so maybe they're paying a little bit more to the guys on their cover.

MR. THOMPSON: And, when you can get a royalty or a back-end, is it a bonus at unit sales, or—

MR. SIEGEL: Royalties are very rare. Royalties are very rare in games like this. The leagues may be getting the royalties, but the players are not. So, those are almost exclusively—as far as I've seen—the buyout deals.

MR. O'CONNELL: The players' association—if you're going to do a game where you need a league license, you're going to have to also go to the players' association to get a license to use the players, and that's where you have to pay a royalty to the players' association and they distribute it

9. See generally EA Sports, <http://www.easports.com/madden07/> (last visited Feb. 11, 2007) (Madden NFL is a videogame series named after color commentator and former NFL coach John Madden).

out to the players. Then, if you want a specific person on the cover, then you're going to go and try and get that person. As a standard policy, publishers do not pay royalties for people being on the cover. They'll just play a flat fee.

MR. SIEGEL: That's right. Unless you get someone who's not in the players' association, like you get a Barry Bonds who opted out of the players' association. So, to the extent he's not going to be part of that and has his own game, it's sort of a free for all at that point.

MR. THOMPSON: Daniel, when I'm coming to you to get rights on one of your clients, give me a description. What rights do you control and don't control? Are there certain kinds of things where I have to go to somebody else for certain kinds of usage? What do you have and what do you not have?

MR. SIEGEL: In terms of what we have, we have everything that's associated with the personality, name, likeness, image, autograph, voice, distinctive appearances.

MR. THOMPSON: If I want to license Babe Ruth from you and I want to put on the cover of my game, the picture of the Babe calling his shot, do you control that image that you can license that to me?

MR. SIEGEL: We don't own the copyright of that image. We also don't own the trademarks or logos of Major League Baseball. So, to the extent you wanted to feature the trademarks and logos of Major League Baseball on the cover, you're going to have to go get that license. We've had various creative video game and non-video game companies brush out those logos to save themselves the cost, expense, and burden of having to work with Major League Baseball. There was a dispute about fifteen years ago over whether we could use him just with his number. I think that was touched on a little bit earlier by Professor Dougherty. We actually invoked the case of the NASCAR driver with the number on the car¹⁰ in terms of being able to justify why the number three in association with a baseball player from New York pointing to center field with a bat over his left shoulder could not be anybody other than Babe Ruth.

MR. THOMPSON: And, what kind of approval rights do you get in your deals?

MR. SIEGEL: It's pretty limited, to be honest. When they're on the cover, it's a little more, but when they're in the game, historically what we get is a rendering—a facial rendering—of what the player is going to look like in the game. They're normally pretty easy to work with. If there's a problem with an image and we don't think it looks close enough, we'll give

10. See *Motschenbacher v. R.J. Reynolds Tobacco Co.*, 498 F.2d 821, 827 (1974).

them a request basically to try again, and when they try again, they generally do it a lot better. If they still don't do it better, we try again. We're sensitive to the fact that these technologies have some limitations at these times, that these people aren't around to scan and you don't have the technology—beyond just 2D images—to work from. So, if they get close, we're generally pretty happy. When they're really far off, we make some exceptions, but that's pretty much the extent of the approvals.

MR. THOMPSON: And, what's the extent of rights that you grant? Is it one game? Is it all platforms? Is it perpetuity? Are there marketing days they have to get the things out by?

MR. SIEGEL: In the case, where we're just one player or thirty or forty players, out of hundreds or thousands, we're not going to be able to control their marketing dates because we're simply a component of the game as opposed to maybe Derek Jeter's baseball, he probably has a little more of an influence on those factors. Because we don't have that kind of leverage, we're not going to be able to force that. I missed the first part of your question. What was it?

MR. THOMPSON: Single game or multiple games—

MR. SIEGEL: Oh, that's actually a really important question, which comes up a lot in our deals—what are they getting. Some companies will force a deal where they have a term during which they can sell as many games as they want. Other companies do it by title. From the company perspective, you're silly to do it by title, because if you have more time, for some reason, to do another game, you're going to have to come back and pay us again if you only have a per game deal. That actually happened—

MR. THOMPSON: You're basically open to either way of doing it?

MR. SIEGEL: Yeah, it depends on who it is.

MR. THOMPSON: You don't give unlimited games in perpetuity.

MR. SIEGEL: No, I mean, generally, we're going to have a two or three-year window to incorporate these players in and we ask them to renew after two or three years just to see how it turned out, to see what the value of these players are. Normally—well, a lot of this is brand new. The first baseball deal that I did was back in 2002 with Sony. That was a three-year deal that just came up for renewal and we actually re-did it for a lot more money this time. Some of the boxing games are a little bit different. Some of the baseball games with some of the other companies are different as well. We're pretty open when it comes to this stuff. A lot of times other players are bringing quantity to the game. A Babe Ruth or a Joe DiMaggio is going to give you the quality that people want. They want to see how these older players are going to interact with the more contemporary ones. But then you get more obscure—they're not obscure for baseball fans, but

for the general player—you add a Honnis Wagner, a Ty Cobb, or a Satchel Paige, that gives it a lot more authenticity. We talked about that earlier today in terms of the overall game experience. But, I don't think anyone's buying the game for Satchel Paige or Ty Cobb or Honnis Wagner. So, the leverage there is a lot more.

MR. THOMPSON: So, Cody, for some of these things we talked about with Daniel, focusing on deals for living celebrities and looking at the high end when it is really based on the person and looking at the maximal deal, how do those deals compare to the kind of things that Daniel's been talking about? What's the compensation range? What kind of controls and approvals do you get? What kind of rights do you grant?

MR. ALEXANDER: Fortunately, if it's not sports-related talent, unless it's connected to a film property or television property, you have all the freedom in the world. I actually wanted to segue off something Daniel said on the sports side, because we have some sports now that we represent at William Morris and I've been involved in some of those deals. And, one thing that's very different about the players' associations that you didn't bring up is that game publishers like EA, Activision, etc., can't approach talent directly, like Kevin Garnett, to be in a title, or on the cover of a title. They have to go through the players' association. Or, if you're representing sports talent, technically you can go to the publisher and say, "FYI, my sports client wants to be involved in this game." Then, the publisher will then go around and go to the players' association. There's this formal process for it. With an actor or an actress, if it's for their participation in a game property that's not connected to a film or a likeness that has not already been pre-assigned, there's all the room in the world. If it's a recognizable talent, likeness rights, that's where it gets into significant money for games. I would say the majority of time, those deals do not happen. It comes down to an issue of—I don't even know what percentage it is—I would say seventy percent. Conservatively, seventy percent of the time when offers come in for talent that's got likeness attached to it, seventy percent of the time it doesn't happen because it's just not enough money and worth the risk to their reputation. Do you want a range?

MR. THOMPSON: Yeah, give me a range.

MR. ALEXANDER: Well, I'll tell you what. I'll tell you what I know is the top deal, the top deal that's been done for voiceover and likeness. It's connected to a license that this person is very well known for. And, that was two million dollars advance guaranteed against a fair percentage of net revenue for sales of the game. So, two million dollars against a certain percentage. Pretty good. Pretty outstanding for voiceover, several

days of services. But, very realistic in terms of the services.

MR. SIEGEL: Now, is that a game that the person is on the cover of? Is it called that person's game?

MR. ALEXANDER: It's not called that person's game, but that person's very much associated with the brand.

MR. THOMPSON: Dan, from the publisher's perspective, what are some of the gripes and difficulties of making these deals and what are the deals that the publishers like to make in these areas?

MR. O'CONNELL: I think you need to take sort of a step back. We sort of jumped straight into bringing talent into games. There are sort of two types of publisher deals. One is you're buying a movie license. You're buying a license to a movie coming out from Sony Pictures Entertainment. The first question you ask is whether Sony is delivering up the talent on that game license. In the royalties that you're paying to Sony and the advance that you're paying to Sony, is Sony basically going to take care of clearing it all with talent?

MR. THOMPSON: Do they ever?

MR. O'CONNELL: Yes, they do. The studios do. It varies from studio to studio; it varies from property to property; it varies from project to project. That's the first question any publisher asks when they start moving from do we want to go and get this Christmas movie license. They immediately start, as they do their due diligence, trying to figure out with the studio whether the rights were cleared, because that goes into the publisher's bottom line. You know, people have heard about development budgets today. Once you've made the game, you still have to buy the disk from Microsoft and Sony and you have to put up letters of credit to do that, or you have to pay COD, (cash on demand), upfront. So, making these things is capital intensive. If you're buying a disk at ten bucks a pop and you do a run of a million disks, do the math. If you have a fifteen million dollar development budget, then you throw in another five to ten in marketing budgets, it's just like making a movie. These things are expensive—

MR. ALEXANDER: It's worse than making a movie because you have no ancillary to make up for it.

MR. O'CONNELL: Right, and if you're buying a brand—it is worse than making a movie in some ways. If you're buying a brand from a studio, i.e., a movie or a TV program, you're not then interested in having X percent of that dollar that comes in all of a sudden having to go to one of Cody's clients. It doesn't exactly help your ROI [return on investment]. So, the first question is on branded entertainment from an entertainment company, a studio, whomever, is whether the talent is cleared. If the

talent's not cleared, then the question is, "what is the cost of the talent?" That's one type of deal, and you've heard those models. The other type of deal is where someone says, "I'd like to make a game around Marilyn Monroe. I'd like to create a program of entertainment around Marilyn Monroe, interactive entertainment. I'm going to go to Daniel Siegel and I'm going to negotiate certain rights from him. Another type of deal is "I want to make a game with Robert DeNiro." Let's say for the sake of argument, he's a client of yours. I'm going to create a game—this is something that's coming about quite a bit now on the publisher side. I'm going to create a game in which Robert DeNiro will play the central role, and we'll cast him and it will be his game. Because it's going to be a Robert DeNiro game or a Vin Diesel game, it will be a game that will sell a lot of units, just by virtue of having this person in this role. We're going to create a brand and a property and we're going to try to do what EA did with *Madden*, but we're going to do it with talent. Once the publisher makes the decision to go in that direction, they're talking to Cody, they're talking to Endeavor, they're talking to CAA, that's an expensive deal, because we're saying we want the person involved for voice, for likeness, for performance. We want the person involved in promoting the game. Those deals are starting to come about. That's what Cody was alluding to with one of the larger deals. They made a decision. They wanted this person for whatever reason, so it cost a lot of money. In between that, there are all sorts of deals that are emerging in terms of bringing in talent—sometimes branded talent—to be in games for different types of roles. I think the core question for every publisher and any developer that wants to bring in talent, is "will that talent and will that talent's contribution sell more games?" You know, UBISoft got a lot of press out of buying David Duchovny's voice and having a voiceover on the *XIII* game.¹¹ I don't think it sold any more games.

MR. THOMPSON: I think it's safe to say that the talent almost always thinks they'll sell a lot more than the publisher thinks they'll sell.

MR. ALEXANDER: Anyone who's representing individuals where they're approached for that, we should be aware, honestly speaking, whether or not they are valuable. Then, you're going to make smarter decisions faster and spend less time on something you know in the end will never happen. So, don't bother pursuing something unless you know the end result is really plausible. All these cases like I was talking about earlier, and David Duchovny—I don't know about David Duchovny. I'm

11. See, e.g., Gaming-Age.com, <http://www.gaming-age.com/news/2003/7/22-39> (last visited Mar. 4. 2007).

curious—

MR. O'CONNELL: Why he did it, or what he got?

MR. ALEXANDER: What he got.

MR. O'CONNELL: I think it was a good deal for David Duchovny but it didn't sell any more games. And, when WebZen went and got a very high profile composer and he composed an original score for SUN, it didn't sell and it didn't bring in any more users on that MMO.¹² So, the publisher always has to come back to that fundamental question.

MR. SIEGEL: That comes up also in our context, when I was saying about quantity and quality. Maybe each one of my individual clients aren't going to sell more games, but that fantasy component that I keep going back to, that can't happen without my critical mass of clients. Babe Ruth probably sells a few more games and Ty Cobb doesn't, but when you start taking out onesies, twosies, here, all of a sudden you'll look down and it's just four or five guys and that's not really much of a component to really offer the public. So you need to show them that, "hey, with this game, you can have fifty guys that played in the 50's, 40's and 30's, as opposed to just four guys." That critical mass does sell more games. That's where our leverage does come in.

MR. THOMPSON: Of course, I've got a half an hour of extra material we didn't get to here, but, of course, I've run over already. We're just getting to the good part. I think, maybe, we have time for a couple of questions, then we've got to stop.

AUDIENCE: I'm trying to get a sense of, for games based on movies, what rights need to be obtained and from whom. I'm trying to think this through. Obviously, if you want the actor, the star of the film, to do more work, to do motion capture, to create that kind of activity, then obviously, you've got to make a deal for that.

MR. ALEXANDER: Maybe yes and maybe no. It may be in the actor's deal with the movie studio that they've already agreed—

MR. THOMPSON: It's very rare, but I'm seeing those now. Maybe five percent of the time I'll see a clause in the actor's contract that says they have to come back and do the voiceover for the game.

AUDIENCE: And, okay, putting that aside, we talked about games as being merchandise from the point of view of the movie company—

MR. O'CONNELL: Wait, what model are you talking about?

12. See Benjamin Golze, *Webzen Scores the Lord of the Rings Composer*, GAMESPOT.COM, Aug. 6, 2004, <http://www.gamespot.com/pc/rpg/sunsouloftheultimatenation/news.html?page=1&sid=6104295> (last visited Mar. 4, 2007).

AUDIENCE: Well, earlier today, we talked about games being basically an exercise in merchandising rights vis-à-vis film.

MR. O'CONNELL: I think that model's about ten years old. I don't mean to be critical. What I'm saying to you is when I started my firm eleven years ago, I would have agreed with you that games were viewed as a subset of merchandising or ancillary rights. I don't think they're viewed that way at all now. Take a look at Warner Brothers. They set up a division to capture those ancillary rights. Take a look at the Supreme Court and the other decisions as to how games are viewed. They are viewed as works of authorship and they are viewed as literary work, which is very important for First Amendment purposes. So, if you try to put them in that box, that's nice, that's fine. That's very much a studio-centric viewpoint that I would say that's about ten years old. I think they're now viewed as something that is part and parcel of this whole bundle of rights with media, whether you're creating a film or whether you're creating a movie, or film, TV series, or, now, something from the web.

AUDIENCE: Let's assume the actor cuts a deal with the studio that permits the studio to do merchandising, use their likeness in merchandising. Obviously, with a high level actor, they're likely to have approval rights over all but a few categories of things.

MR. O'CONNELL: They may or may not have approval rights.

AUDIENCE: And, they're likely to have a royalty for merchandising.

MR. THOMPSON: Yeah, five percent or fifteen percent of what the studio gets from the game company. Reducible to two and a half percent.

AUDIENCE: Where I'm going with this is basically, if it's merchandising, I would have thought that the studio, if they have merchandising rights, would have the rights to use the actor in character as a character in a video game as a merchandising exercise, subject to a royalty. If it's not merchandising, so my premise is wrong, then there's no deal and you have to go back to the talent.

MR. THOMPSON: It's merchandising in the actor's contract. Whether it's merchandising in the business, or conceptually, or in the eyes of the publishers, that's something that's a totally different question. In the actor's contract, it's merchandising.

MR. O'CONNELL: Or, in the actor's contract, some of the deals we've gone over for due diligence purposes, it's not referred to as merchandise at all. It goes into the net profits definition and in return for their overall fees, or whatever they're getting on the film, they have to cooperate and be supportive of whatever's done with the game.

MR. ALEXANDER: Money changes everything in business. If you want to look at it from a financial point of view, I was reading this Bear

Stearns report¹³ and it was talking about profit margin for media businesses, like Sony or Disney, MGM, etc. You know, for a successful franchise in film, profit margins can be fourteen percent, whereas in games, if it does well, like an EA franchise profit margin can be twenty-two percent. So, there's more revenue that can be made for a successful franchise in a games business. Granted it's harder to get off the ground initially with that first title. So, people are looking at this stuff much more closely. Studios and talent are wanting to have separate buckets for revenue participation on game deals and they're going to want to have more control over their likeness rights. Most of the time, likeness rights, I've found, are pretty much baked into the deals with studios. However, what is different to point out, and this is where we are seeing more activity, probably—certainly, I do—is with the participation of the talent, the services they're doing. If they don't perform the voiceover, it almost doesn't make sense to have Elijah Woods' likeness from *Lord of the Rings* without his voice as well in the game.

MR. O'CONNELL: One of the things we negotiate for is the right to use sound-alikes, and the right to use—remember, we're creating something with polygons, often. We're not necessarily creating something where we actually need someone's motion capture or visual images. We need the right to use Elijah Woods' likeness. We can take a sound-alike and drop it in. So, you're right that you want to make sure, if you're on the talent side, that it's merchandised and you get a royalty or however Cody wants to structure it. But, from our perspective as a publisher, what we want to know with the studio if we're trying to get *Lord of the Rings*, is that all the rights were cleared with the actor so we can use the actor, we can use the sound-alike, etc., that we aren't going to be held hostage and have to go back and negotiate with Cody for Elijah Woods because he was smart enough to get a deal in his clause that whatever game publisher got the rights had to use Elijah Woods for voiceover.

MR. THOMPSON: One more question, then we've got a break.

UNKNOWN: Do you know who represents Betty Paige?

MR. SIEGEL: We represent Betty Paige, so, we represent her rights of publicity and her trademarks. So, if somebody wanted to put an animated Betty into a game—and please call me if you do, anybody—

She doesn't own the copyrights. So there are multiple photographers out there that own copyrights to her image, and when those get

13. See BearStearns.com, *Our Firm*,

http://www.bearstearns.com/sitewide/our_firm/index.htm (last visited Feb. 11, 2007) (Bear Sterns is “a leading global investment banking, securities trading and brokerage firm.”).

merchandised, there generally will be two licenses. There will be a license between us for Betty Paige and a license with the photographer. What that forces us to do, just as a business, is to start representing photographers now so that we can control both sides of the deal. Because, often times, what happens is the photographer thinks their rights are more valuable than Betty's rights, which we strongly disagree with because there are so many different pictures of Betty that unless the licensee wants that image, we feel that the leverage is way more on our side for Betty as opposed to just that photograph. Even still, we prefer to make things easy and we've decided to sign photographers as well, of Betty Paige and Marilyn Monroe.

