

## GUEST COLUMN

## For social gaming companies, protecting innovation from litigation is key

Facebook and smartphones have rapidly increased the popularity and prosperity of the social gaming industry. Games such as Zynga's Farmville and Rovio's Angry Birds have become household names. Although the games are often free or very inexpensive, they are big business. In 2010, the industry generated over \$800 million of revenue, with a large percentage from selling "virtual" goods or other in-game purchase options.

Small companies founded by a team of young entrepreneurs develop many of these games. In fact, the market share of small and medium-sized companies is on the rise, compared to more established industry players. Founders of these small gaming companies usually share passion, vision and a belief that together they can create a great product. As a result, like most small companies, they often do not spend enough time thinking about how to avoid crippling intra-company disputes. After all, if they succeed, isn't fighting over the spoils a good problem to have? Not when they could have avoided those problems with some foresight and planning.

Here are some steps small- to medium-sized social gaming company can take to avoid intra-company litigation.

*Consider the risk of becoming competitors.* Social gaming companies require talent and vision, but as far as capital expenditures, all it takes is a couple high-powered computers and a dining room table. A good idea and an innovative code can easily walk out the door, and your employees or even co-founders can quickly become competitors. Founders of social gaming companies should take the usual precautions when it comes to trade secret theft. For California gaming companies, it makes sense to avoid draconian non-compete clauses that are not likely enforceable. Instead, these companies should take reasonable precautions, and make sure they seek competent legal advice at the time they form their company about how to keep the family jewels within the company. It is never too early for a company to think of its games as valuable intellectual property.

*Consider hiring a part-time general counsel.* Before creating a hit game, most social gaming companies do not have much cash to spare. And they are more likely to spend the money on game-related expenses, not "overhead." Therefore, hiring a full-time general counsel is often not a

viable option for a small social gaming company. Nor do they usually need a full-time general counsel. But that does not mean that these companies do not need legal help, or that they will somehow magically avoid the inevitable legal problems that seem to follow success.

A potential solution for these small gaming companies is to hire a part-time general counsel. A savvy part-time attorney with experience in the industry can end up saving these companies lots of money, headache and heartache. She can provide strategic advice, sometimes without the need to engage outside counsel, and can also partner with your outside counsel to ensure that these companies receive the type of focused legal services that they need. A part-time general counsel can help a small or medium sized gam-

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ing company negotiate contracts, negotiate with lawyers and provide the type of business advice that you would expect from someone within the industry, often for less than it would take to use outside counsel for these tasks.

*Avoid adding a partner to solve a short-term problem.* A problem faced by founders of small gaming companies is finding certain talent to make the innovative game they have designed a reality. For example, some of these companies are founded by engineers who initially lack the resources to pay market rates for top graphic design talent. With little cash to offer graphic designers and a desperate desire to launch the product, some of these companies will offer significant equity or partnership (depending on the company's structure) to part-time, mediocre designers. While this may solve the short-term problem, in small social gaming companies where much of the value is found in the game concept and engineering, a mediocre graphic designer who suddenly finds himself with a large equity stake may engender resentment from the founders, particularly if the company succeeds and outgrows out the part-time designers' talents.

These young founders should avoid the temptation to share control in exchange for a

short-term fix. Rather, they should offer stock options or even the possibility of significant bonus compensation. That way, the founders can meet their short-term needs without making long-term commitments to individuals who may not make the grade once the company achieves the success they expect.

*Do not fire anyone without consulting your new part-time general counsel.* Chances are, a small social gaming company does not have a human resources director on staff. After all, they can barely hire enough engineers and designers to develop their games. Here is where the part-time general counsel can provide some employment-related advice, or at least direct a small social gaming company to competent outside counsel who can provide specific advice on how to handle termination in a way that minimizes the risk of subsequent litigation. Firing someone the right way does not ensure that the company will avoid a legal battle, but it often goes a long way.

Extensive litigation is rarely a good option. Most successful companies do not like to litigate, but some can tolerate and survive it. A small social gaming company probably cannot. Extensive litigation with a co-founder or employee can destroy a social gaming company, where engineers often sit side-by-side, working day and night in an intensely competitive market. Even a minor distraction to this full throttle effort can mean the difference between success and failure, or at a minimum prevent the company from reaching its full potential.

Social gaming companies should generally resist the temptation to engage in a full-fledged legal battle with a former colleague or partner. Even if the company prevails, it may not be around long enough to reap the benefits of victory, which usually takes several years. These companies should instead focus on quick, practical resolution, so that they can go back to doing what they do best: making games we can't stop playing.



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