

# Level Up

Legal issues facing software, app, and video game entrepreneurs.

BY **JIM CHESTER**

An increasing number of Texas companies are creating electronic medium products: software, mobile applications, and video games. Software, app, and video game entrepreneurs—which I have coined SAVaGEs—include digital arts and entertainment product developers, investors, resellers, publishers, and distributors, as well as the consultants and technicians who help create, deploy, market, and maintain these products.

Such companies face many of the same challenges as traditional businesses but also must address additional legal issues because of the mercurial, non-physical nature of digital assets and operations.

## Entity Structure

SAVaGEs should consider forming a legal entity, such as a corporation or limited liability company, as soon as possible, which will provide personal asset protection for the owners and managers from business debts and offer a more palatable structure for potential investors. No single entity type or jurisdiction is ideal for all software, app, and video game entrepreneurial companies and the choice should be made only after discussion with legal and tax counselors.

## Funding

Like all businesses, cash is critical for these enterprises. Many are initially self-funded but often need outside financing moving forward. Financing options include selling equity, loans, and royalty-based financing.

Selling equity is a common source of capital for early stage ventures, but SAVaGEs must follow all securities laws and be careful to retain control. This caveat applies to both cash investors



and “equity for service” arrangements with developers and partners. Debt and royalty-based financing can be difficult to obtain for early stage companies except at outrageous interest rates. Regardless of the source of funding, companies will want to ensure that all transactions are well documented using comprehensive agreements prepared by experienced legal counsel.

## Taxes

Software, app, and video game products can be sold, licensed, and accessed from virtually anywhere, which means a variety of governments may have an interest in taxing these transactions. It is important that the companies discuss the tax implications of where and how they make money.

## Intellectual Property

Since intellectual property will represent virtually all the value of the company, SAVaGEs must appreciate the importance of comprehensive IP

protection, which includes copyrights, patents, trademarks, and trade secrets. The companies will typically need to protect all four types of IP to adequately protect their assets. A well-focused strategy identifies, secures, and enforces all assets—both in the U.S. and abroad.

Clearly addressing all issues regarding IP ownership during the development process and limiting trade secret exposure from the competition are vital. In some instances, legal entity documents can directly address IP rights, confidentiality, or non-competition (e.g., in the LLC company agreement). Additionally, all owners, investors, directors, advisers, officers, employees, and contractors should sign agreements to protect against the loss of trade secrets and to transfer the ownership of any IP developments to the company.

## eCommerce

Prior to accessing or using a SAVaGE product or website, users should first agree to a license, often called the “terms of use” or “end user license agreement.” The agreement outlines the rights and responsibilities of the company and the user and should address all areas of concern and vulnerability for the company. Users must also agree to a privacy policy that outlines what data will be collected and how it will be used. Such data can be a valuable asset to SAVaGEs, but they must ensure not to violate myriad state, federal, and even foreign data privacy laws.

Software, app, and video game entrepreneurs represent a growing industry segment, and it is important they consult with legal counsel and business and tax professionals who are experienced in handling the special issues and challenges they are sure to face. **TBJ**



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