



## 2023 CASE

This case focuses on a dispute between two video game publishers. The case addresses intellectual property infringement, bankruptcy law, conflict of laws, license termination, and derivative works.

Many years ago, Oryx acquired all rights to *Crimson Cove*, a video game developed by Techtonic. At the time of the acquisition, *Crimson Cove* was licensed to Jetsam, a third-party publisher. Techtonic and Oryx agreed that the license to Jetsam should survive the acquisition. Techtonic was dissolved soon after they sold *Crimson Cove*. Five years after the acquisition, Oryx realized that they owned *Crimson Cove* and that it was still published and monetized by Jetsam. Oryx never received any royalties or financial statements from Jetsam. Oryx approached Jetsam with a request for royalty statements, but despite a few reminders, Jetsam never replied.

Oryx filed a lawsuit against Jetsam, claiming that they should pay publishing royalties to Oryx for the period starting from the dissolution of Techtonic and up to the present date.

### CLAIMANT & RESPONDENT

**Claimant:** Oryx a video game publisher and the owner of *Crimson Cove*.

**Respondent:** Jetsam, the publisher of *Crimson Cove*, as per the publishing agreement with the now defunct developer, Techtonic.

## TIMELINE

1. Techtonic was a very famous video game development studio organized under the law of Obliland. Techtonic developed more than 10 AAA titles, including *Crimson Cove* (the "**Game**").
2. *Crimson Cove* was in development for over three years. The copyright to the Game was registered on January 10, 2014 in Terryland, with Techtonic indicated as the rightsholder. Even though *Crimson Cove* was praised for being plot intensive and innovative, it never gained popularity, mainly due to the multiple glitches that plagued the Game.
3. On October 31, 2015, Techtonic signed a publishing agreement with Jetsam, granting Jetsam the exclusive right to publish and distribute *Crimson Cove* on Steam in perpetuity (the "**Publishing Agreement**").
4. Jetsam is a veteran video game studio, founded under the laws of Terryland in the late 80s by a team of industry legends. Jetsam currently employs around 1500 people, many of whom have stayed with the company for over three decades. Jetsam, having been strongly hit by the COVID-19 recession, is going through hard times and currently survives on the revenue generated by *Crimson Cove*.
5. On November 27, 2017, Techtonic's CEO John Beauregard wrote an email to his old friend and Jetsam's publishing director, Arthur Stalter, informing him that Techtonic is going through financial hardship and that it is very likely that the company will not survive. John double-checked that no payable royalties had accrued and mentioned that Jetsam should probably not be required to ever pay royalties for *Crimson Cove* because "the company will dissolve" soon.
6. Jetsam stopped sending financial statements to Techtonic immediately after Arthur's exchange with John and kept all accounting records internally. Arthur started investing more in in-game advertisement, hoping to maximize revenue generated from the Game. Jetsam's team also significantly debugged the Game, since *Crimson Cove's* constant glitches were detrimental to its popularity, with the Game's day-1 retention rate being only around 10 per cent.
7. Oryx is an industry giant, a famous video game platform and a publisher with a massive portfolio of video games, with more than twenty development studios worldwide. On December 10, 2017, Techtonic assigned all its IP—including the copyright to *Crimson Cove* and all relevant trademarks—to Oryx (the "**Asset Purchase Deal**"). However, Techtonic's Publishing Agreement with Jetsam was specifically excluded from the list of assets and contracts assigned to Oryx under the Asset

Purchase Deal.

8. Jetsam was not directly informed about the assignment of *Crimson Cove*, but the deal between Techtonic and Oryx received extended game industry media coverage from January to March 2018. Two years later, Techtonic defaulted on multiple obligations, fired almost all its staff, and was left to collapse by the company management.
9. Oryx never published or otherwise used its IP rights to the Game and, in 2018, failed to renew *Crimson Cove's* trademarks. Neither did Oryx update the Game's copyright record, which still indicates Techtonic as *Crimson Cove's* rightsholder.
10. Almost five years after closing the deal with Techtonic, Oryx's recently appointed CEO, Marion Elwood, decided to go through a pile of papers sitting on her desk. During this process, Marion discovered an annex to the Asset Purchase Deal with Techtonic, which listed the transferred assets. This list of assets included the Game.
11. Marion had never heard of *Crimson Cove* and was surprised to see it on the list—she had a vague recollection of that deal and recalled the two companies discussing the Game. Marion googled *Crimson Cove* and saw that it was available on Steam and published by Jetsam.
12. Marion immediately contacted Oryx's business team and asked whether Oryx had ever received any revenues or royalty statements from the Game and was told that it had not. The business team also mentioned that, according to the Asset Purchase Deal between Oryx and Techtonic, the Publishing Agreement between Techtonic and Jetsam was not transferred to Oryx and fell under the definition of Excluded Assets in the Asset Purchase Agreement.
13. The next day, on August 11, 2022, Marion contacted Jetsam and asked them to clarify the situation and provide a legal basis for publishing *Crimson Cove*. Jetsam cited the Publishing Agreement and Arthur's correspondence with John before Techtonic's dissolution.
14. After the two companies exchanged phone calls, Oryx demanded Jetsam to share royalty statements for the period during which *Crimson Cove* was published (after the dissolution of Techtonic) and payment of the royalties, which should have been paid under the Publishing Agreement to Techtonic. Jetsam refused to make any payments or to cease publishing the Game.
15. After a month of intense negotiations, Oryx contacted Steam and submitted a copyright infringement claim, asking the platform to take

down *Crimson Cove*. Oryx's business team also discovered that Jetsam had requested and obtained Steam keys for *Crimson Cove* and made the Game available on several other distribution platforms, such as the Humble Store, Green Man Gaming and Fanatical. Following this discovery, Oryx emailed Jetsam demanding royalty statements regarding such other platforms. Marion also demanded that Jetsam share *Crimson Cove's* code with them because Oryx had never received the Game's code from Techtonic. Jetsam refused to provide *Crimson Cove's* code, stating that they have debugged and significantly modified the Game's code, that this debugged Game is theirs, and that they are not going to share it with Oryx.

16. Enraged by Jetsam's response, Marion instructed Oryx's development team to go and "get me that game code by any means. It is our IP, and we are entitled to get it back". Oryx's team purchased the Game via Green Man Gaming and decompiled its code. Having gained access to the Game's code, Oryx modified certain aspects of *Crimson Cove* and removed Jetsam's trademarks and logos, replacing them with their own.
17. Shortly afterwards, Steam removed *Crimson Cove* from its store, as published by Jetsam, and Oryx published their version of the Game on Steam and Oryx's platform.
18. On November 10, 2022, Oryx filed a lawsuit in the district court of Terryland (where both companies and the copyright to *Crimson Cove* is registered) against Jetsam, claiming the following:
  - A) Jetsam shall pay Oryx any Game publishing royalties for the period starting from the dissolution of Techtonic and up to date.
  - B) Alternatively, Jetsam shall pay royalties generated by distributing *Crimson Cove* beyond the scope of the original Publishing Agreement with Techtonic.

Jetsam filed a counterclaim alleging that Oryx's decompiling and publishing of the debugged Game amounted to software piracy and constitutes copyright infringement.

19. During the discovery, Jetsam provided a letter sent by the administrator of Techtonic's bankruptcy proceedings, stating that the company had been dissolved and the Publishing Agreement with Jetsam was terminated. This letter was sent to Jetsam's old address and was forwarded to Jetsam only three weeks before Oryx filed the lawsuit against them. It was also revealed that according to the accounting records provided by Jetsam, the total generated net proceeds<sup>1</sup> from the distribution of *Crimson Cove*, as of

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<sup>1</sup> Net proceeds here correspond to "Net Proceeds" under the Agreement.

November 1, 2022, on Steam amounted to 25 million USD, and on other platforms—via distributing Steam keys—to 15 million USD.

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\* Please note that procedural issues are out of the scope of the case, and the parties shall only dispute the merits of the case.

\*\* Please note that while Obliland's and Terryland's laws and judicial system heavily rely on US jurisprudence, precedents and legal principles from other jurisdictions may also be used to support, further and/or strengthen a position.

## Exhibit A

### Game Publishing Agreement

This Game Publishing Agreement (the "**Agreement**") is entered into on October 31, 2015 (the "**Effective Date**") by and between:

- (1) Techtonic Limited, a company registered in Obliland under number 110893, with registered office at 579 Candlewood Drive, Alcot Cove, Obliland ("**Licensor**"); and
- (2) Jetsam Limited, a company registered in Terryland under number 150329, with registered office at 765 Baker Street, Cawthorn Hill, Terryland ("**Licensee**")

Claimant and Respondent are each individually referred to as the "**Party**" and jointly as the "**Parties**".

[...]

#### 1. Definitions

[...]

"**Derivative Works**" means any videogame that is either a new version of, based substantially upon, substantially adapted from, or substantially modified from the content of the Game, including, without limitation, sequels, expansion packs, add-ons or levels sold through electronic distribution.

"**Game**" means the video game Crimson Cove, developed by Licensor, including all enhancements thereto created by the Licensor during the Term, but expressly excluding any Derivative Works.

"**Intellectual Property Rights**" means any and all intellectual property rights of any nature anywhere in the world, including patents, utility models, rights to inventions, copyright and related rights, rights in computer software, database rights, trademarks and service marks, logos, business names and domain names, rights in get-up and trade dress, goodwill, rights in designs, rights to use and protect the confidentiality of, confidential information (including know-how and trade secrets), moral rights, publicity rights, performance rights, synchronization rights, mechanical rights, publishing, rental, lending and transmission rights and all other intellectual property rights, in each case whether registered or unregistered and including all applications and rights to apply for and be granted, renewals or extensions of, and rights to claim priority from, such

rights and all similar or equivalent rights or forms of protection which subsist or will subsist now or in the future in any part of the world.

**"Platform"** means the Steam digital distribution platform through which the Licensee is authorized to distribute, monetize, and/or offer the Game for purchase or download to End Users.

**"Territory"** means worldwide.

[...]

**"Licensor IP"** has the meaning set forth in Section 4 ("Licensor's Ownership").

## 2. License Grant

2.1. License. Licensor hereby grants to Licensee a perpetual, exclusive, non-transferrable, non-sublicensable (except as contemplated by this Agreement) license throughout the Territory to reproduce, publish, distribute, publicly display, promote, market, advertise and operate the Game, and sublicense the Game to End Users for their personal, non-commercial use on the Platform.

[...]

## 3. Licensee Obligations

3.1. Advance Royalties. In order to help fund the Licensor's development of the Game, Licensee has agreed to, and shall, make two advance royalty payments ("Advances") to Licensor: (a) 5 (five) million USD within 30 (thirty) calendar days from the Effective Date; (b) 5 (five) million USD within 120 (one hundred twenty) calendar days from the Effective Date. Except as expressly provided below to the contrary, all Advances shall be deductible from any and all Royalties (as defined in Section 3.2 below) that become due and payable to Licensor from Licensee. Licensee shall recover and recoup all paid Advances by withholding Royalties earned by Licensor until the full aggregate amount of all Advances has been recouped. All Advances shall be recouped before any payment of Royalties shall become due and payable to Licensor under this Agreement.

3.2. Royalties. For and in consideration of the licenses and other rights granted hereunder, Licensee shall pay to Licensor royalty fees ("Royalties") at the rate of 25% of Net Proceeds from sales of the Game.

3.3. Royalty Payments and Statements. Royalties shall be computed in U.S. Dollars and shall be paid in U.S. Dollars. Royalties shall be paid by Licensee to Licensor within 30 (thirty) calendar days after the end of each fiscal

calendar quarter of Licensee. Licensee shall submit a written (electronic or paper) report to Licensor ("Royalty Statement") with each payment of earned Royalties, detailing the calculation of the Royalties earned and paid for the preceding fiscal quarter, including any credits taken for recouping Advances.

[...]

3.11. Derivative Works. Licensee hereby acknowledges and agrees that Licensee shall not develop, create, make use of, publicly display, publish, distribute, market, advertise or make available to End Users any Derivative Works without the Licensor's prior written approval.

[...]

#### **4. Ownership of Intellectual Property**

4.1. Licensor's Ownership. Licensor owns and shall own all of the Intellectual Property Rights in and to the Game and all components thereof and any Derivative Works thereof (collectively, the "**Licensor Property**").

[...]

4.4. Derivative Works. In the event that Licensee creates any Derivative Works, Licensor shall own the rights to any such Derivative Works from the moment of creation. Licensee undertakes to ensure that Licensor receives all Intellectual Property Rights to any Derivative Works without any encumbrances and free from any third parties' rights. Licensee will properly inform Licensor about any creation of Derivative Work and will ensure the transfer of the Derivative Works to Licensor in the manner agreed between the Parties. Upon Licensor's request, Licensee will execute such documents (e.g., acts of acceptance) as may be needed for proper transfer of Intellectual Property Rights to Derivative works to the Licensor.

#### **5. General**

[...]

5.1. Amendments. This Agreement shall not be modified or amended except by written agreement between the Parties (electronic mail will suffice).

5.2. Governing Law. This Agreement and any dispute or claim arising out of or in connection with it or its subject matter or formation (including non-contractual disputes or claims) shall be governed by Terryland law.

[...]



5.5. Notices. Except as otherwise expressly provided in this Agreement, all notices sent by either Party to the other Party under or in connection with this Agreement shall be in writing and shall be deemed to have been sufficiently given and received for the purposes of this Agreement if sent to the other Party at the email address for such party and upon confirmation of receipt.

[...]

**IN WITNESS WHEREOF**, the Parties have executed this Game Publishing Agreement through their duly authorized representatives on the Effective Date.

**Licenser**

*John Beauregard*

**By:** Techtonic

**Name:** John Beauregard

**Title:** CEO

**Licensee**

*Eric Donoghue*

**By:** Jetsam

**Name:** Eric Donoghue

**Title:** CEO

**Exhibit B**

**Excerpt from Obliland Insolvency Act**

**Section 63**

**Option to be exercised by insolvency administrator**

- (1) If a mutual contract was not performed or not performed in full by the debtor and the other party on the date when the insolvency proceedings were opened, the insolvency administrator may perform such contract instead of the debtor and claim the other party's consideration.
- (2) If the administrator refuses to perform such contract, the other party is entitled to its claims for non-performance only as an insolvency creditor. The administrator is to state his or her intention to claim performance or refuse performance of the contract without negligent delay.

**Section 74**

**Intellectual Property**

- (1) Where the applicable intellectual property assets that are the subject of a license agreement are sold during bankruptcy proceedings, the license agreement will be transferred together with the intellectual property assets.
- (2) The assignee of the intellectual property asset replaces the debtor in such license agreements and undertakes all obligations, liabilities and rights of such debtor.

**Exhibit C****Excerpt from Terryland Bankruptcy Code****Section 746****Licenses**

Upon the bankruptcy of the licensor of a right to intellectual property, the Licensee may:

- (1) treat license as terminated; or
- (2) elect to retain its rights to use the licensed intellectual property (including exclusive rights) as such rights existed immediately before commencement of the licensor's bankruptcy case, for the duration of contract. A licensee that elects to retain its rights under an applicable license must continue to pay royalties due under the contract for the duration of the license.

**Section 769****Actions to avoid acts detrimental to creditors**

- (a) The court may grant relief under petition for recognition of a foreign insolvency proceedings, or may modify or terminate relief, only if the interests of the creditors and other interested entities, including the debtor, are sufficiently protected.
- (b) The court may, at the request of the foreign representative or an entity affected by relief, or at its own motion, modify or terminate such relief.
- (c) The court should balance the relief granted to the foreign representative and the interests of those affected by such relief, without unduly favoring one group of creditors over another.

**Section 801****Recognition of foreign insolvency proceedings**

In the proceedings for the recognition of a foreign insolvency proceedings that relates to assets that, under Terryland law, should be administered under Terryland law, the court shall not grant relief recognizing foreign insolvency proceedings where:

- (a) such relief would be manifestly contrary to the public policy of Terryland, or
- (b) the application of foreign law or the recognition of foreign proceedings would severely impinge the value and import of a Terryland statutory or constitutional right, such that granting comity would severely hinder Terryland's courts' ability to carry out the most fundamental policies and purposes of these rights.

**Exhibit D**

**From:** Marion Elwood <m\_elwood@oryx.com>

**Date:** Friday, Nov 04, 2022, 9:22 AM

**To:** Eric Donoghue <e\_donoghue@jetsam.com>

**Subject:** RE: Crimson Cove

Hi Eric,

We see that our negotiations got utterly derailed. We tried in good faith to resolve this conflict amiably, but honestly, we do not think you are willing to make any concessions. You were blatantly infringing our rights for several years, and when we offered you to pay us the royalties that were due to us instead of litigation, you rejected this idea as "absurd".

Today, we found out that you published the Game not only on Steam but also requested Steam keys and made the Game available on the Humble Store, Green Man Gaming and Fanatical.

We give you the final opportunity to settle this dispute by paying us the royalties generated through all platforms. Additionally, we request that you share all the accounting records and the game code with us.

Thank you for your anticipated cooperation, and I hope to settle this dispute amicably.

Of course, all of our rights are reserved.

Best,

Marion Elwood

**Exhibit E****Excerpt from Terryland Copyright Code****Section 567. Definitions**

A "derivative work" is a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a "derivative work"

"Distribute" means to sell, lease, or assign a product to consumers in Terryland, or to sell, lease, or assign a product in Terryland for ultimate transfer to consumers in Terryland.

**Section 673****Exclusive rights in copyrighted works**

The owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

- (1) to reproduce the copyrighted work in copies or phonorecords;
- (2) to prepare derivative works based upon the copyrighted work;
- (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
- (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;
- (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and
- (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

## **Section 680**

### **Limitations on exclusive rights: fair use**

Notwithstanding the provisions of Section 673, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that Section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

## **Section 682**

### **Other limitations to exclusive rights**

[...]

- (3) In the absence of specific contractual provisions, the acts referred to in Section 673 shall not require authorisation by the owner of copyright where they are necessary for the use of the computer program by the lawful acquirer in accordance with its intended purpose, including for error correction.

[...]

## **Section 695**

### **Termination of licenses in bankruptcy proceedings**

- (a) Bankruptcy of the licensor does not automatically terminate the license agreements entered into by a debtor-licensor;

- (b) Rejection of a license under the Bankruptcy Code by a debtor-licensor does not rescind the license or terminate the Licensee's right to continued use of the intellectual property as provided under Section 746 of the Bankruptcy Code.



### CLARIFICATIONS

**1. Did the Publishing Agreement between Jetsam and Tectonic specify email addresses or designate individuals for each Party where notices should be sent?**

No, the agreement was silent on where or to whom the notices should be sent.

**2. Was Beauregard's statement to Stalter that "Jetsam should probably not be required to ever pay royalties for Crimson Cove" also part of the Nov. 27, 2017 email?**

Yes, as indicated in para 5 of 2023 Case, John Beauregard mentioned this in his e-mail to Arthur Stalter.

**3. Aside from fixing issues or glitches that were preventing Crimson Cove from performing in accordance with Tectonic's design, did Jetsam make any other changes to the Game after the Nov. 27, 2017 email?**

Jetsam only fixed performance issue and glitches.