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## Acquisitions in the Games Industry: Some Legal Issues

This year (2022) has seen two mega deals involving Computer Games Developers, and these transactions have shown the importance of the need to have a proper appreciation of the legal issues underpinning these transactions.

The recent announcement by the UK Competition and Markets Authority (UK CMA) looking into the competition law / antitrust aspects of the proposed acquisition of Activision Blizzard (“Activision”) by Microsoft is but a good illustration of how legal regulatory issues can delay the completion of a transaction, and how important it is to know how to anticipate and to navigate such obstacles. In this article, we highlight some legal issues that can affect transactions within the Games Industry and how to overcome them.

### Employment issues

Quite often, the acquisition of an entity is premised on a star performer within the target company. This is an important consideration especially in the Games Industry. An entity with a good track record of developing a suite of successful games usually has a team behind them. Long term continued employment should be secured for that team, and that is where a moratorium on their exits should be incorporated into the conditions of acquisition.

### Anti-trust and Competition Law issues

Anyone seeking to acquire a target company must ensure there are no anti-competition concerns or that any anti-competition concerns have or would be resolved.

For their acquisition of Activision, Microsoft is obliged to obtain regulatory approvals from Competition Law authorities in every relevant jurisdiction. Activision and Microsoft are said to be working with US Government agencies, such as the Federal Trade Commission (FTC), on supplying the necessary information to seek approval, and also is working on the relevant submissions and notifications for the United Kingdom, the European Union and China. That is why the UK CMA in July 2022 and the FTC have already begun investigations into any potential anti-competition aspects of this transaction within their jurisdiction.

For such issues, the scrutiny from the regulators is only one aspect. You can be sure that parties who have a vested interest in the success (or failure) of the transaction would also seek to get involved. In March 2022, a group of organisations urged the FTC to closely monitor Microsoft's purchase of Activision.



## IP Due Diligence

The impact of good IP due diligence and the legal implications flowing therefrom in the acquisition of a Games Developer cannot be overemphasised.

### a) Original v Adapted Content

Investors would usually look out for a good storyline and gameplay.

Where there is original content, establishing a good root of title and ownership of the underlying intellectual property rights is paramount.

Similarly, where the content is adapted from existing source material created by others, then it is important to obtain all intellectual property rights clearances and approvals of all the relevant rights, including image rights, and or copyright that constitute the storyline and gameplay. The Witcher, an extremely popular game from CD Projekt Red offers a cautionary tale in this regard, and is set out below.

### b) Recognising Transmedia Potential

The need for comprehensive clearance of IP and other rights becomes even more acute where the investor believes the game has good transmedia potential. It would be apposite to ensure all kinds of publishing and broadcasting rights in all media should be secured.

This was illustrated when the Witcher was being contemplated for its television series, with the second season recently broadcast in early 2022 on NetFlix.

There was a disagreement between the original author of the book upon which the computer game was based, and CD Projekt Red, the developer of the successful computer game, on the validity of his original transfer of ownership of his IP rights to the storyline. Happily

it has reportedly been resolved in 2019 through a licensing agreement, and it cannot be a coincidence that all of this arose once the decision was made to convert this computer game into a television series.<sup>1</sup>

### c) Ancillary or Adjacent Rights

Beyond the transmedia potential, there is also the consideration of adjacent or ancillary rights.

Wizards of the Coast (“Wizards”) acquired Dungeons & Dragons Beyond (D&D Beyond), the digital toolset, from current owner Fandom. Wizards is owned by Hasbro, who owns D&D. This digital toolset came out of a partnership Wizards announced in 2017 with Curse, a gaming company that was then best known for its World of Warcraft add-on manager. In 2018, Curse, following its 2016 acquisition by Twitch, sold D&D Beyond, among other media assets, to Fandom.

Beyond that, the acquisition also makes a lot of practical sense for Hasbro.

- the royalties Fandom paid to operate D&D Beyond represented “a significant contribution” to the revenue it was making from Dungeons and Dragons.
- the deal is a natural progression where Hasbro was already heading. In 2021, more than 80 percent of D&D fans played the game virtually, according to the company.

Of course, with the benefit of hindsight, a symbiotic (and profitable) add-on should naturally be included in any deal, and should be identified in any proper IP due diligence.

<sup>1</sup> <https://www.polygon.com/2019/12/20/21032021/the-witcher-author-cd-projekt-legal-battle-royalties-new-contract>



### Having a Harmonious Team is more important than you realise

Any issues concerning the harassment or ill-treatment of employees in the target company would be of concern. The abuse of employees and other similar issues could be another obstacle to any acquisition, and investors would do well to address and resolve such issues.

Activision has had to deal with discrimination and other similar lawsuits from several Federal regulators in the US. In March 2022, Activision received approval of their settlement agreement by the Equal Employment Opportunity Commission resulting in a USD18 million fund being created. However, they still face other lawsuits, including another federal gender discrimination lawsuit brought by the California Department of Fair Employment and Housing.

It would be prudent to investigate and identify if there are such claims and or liability in the underlying target, and this potential liability has to be addressed in the commercial transaction, but more importantly a resolution mechanism to resolve the issue should be in place.

## Conclusion

Investment in the Games Industry, like any other industry, should not be carried out without an appreciation of the various legal and regulatory concerns. This article should provide a snapshot of some of the more important legal issues to be aware of.

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