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Gamer Technology Law

Buying and Selling Game Titles and Studios: M&A Transactions

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Introduction

- Not a session on how M&A transactions are structured or work, but rather what are some of the unique issues that arise in *video game* sale and purchase transactions

Pre-Deal Considerations

- What is the genre, platform and target demographic of game is being sold?
 - E.g., casual vs. role playing vs. first person shooter
 - E.g., PC/Mac-based, console (xbox, PS2/3, Wii, PSP, Nintendo DS, etc.), mobile phone;

Pre-Deal Considerations

- Where in the game development process is the game?
 - E.g., version 1 commercially released, first expansion pack What are the planned future releases?
- Content-wise (e.g., new versions, expansion packs, ongoing/episodic content)
 - Platform-wise (e.g. cell)
 - Geography-wise
- Was the game originally created by, or based on third party content licensed to, the seller?

Pre-Deal Considerations

- If the game has a massively multiplayer online game play component:
 - Does the game permit in-game transactions (e.g., buying and selling swords) and, if so, how are those transactions processed and by whom?
 - Is the seller hosting the game or does the seller outsource this function to a third party?
 - Does the game carry dynamic in-game advertising that is served in response to player and game play data?
 - Does the game permit users to post content (e.g., machinima)?

How does the seller make money from the game today?

- Box sales through brick and mortar retailers (i.e., Wal-Mart, Best Buy)
- Online subscriptions
- Online downloads
- In-game advertising
- Licensing for other forms of media exploitation
 - Motion picture
 - Television cartoon
 - Comic book/print publishing
 - Music
- Merchandising rights
 - Clothing

Assumptions for Purposes of this Presentation

- PC-based
- Massively multiplayer online game play component
- Version 1 released, Expansion pack 1 released, developer is considering on-going episodic content

The Form of the Deal

- Video game “sale” transactions can take the form of an exclusive license rather than an outright sale

Some advantages of license over purchase/sale

- May lessen effect of no assignment/change of control provisions in inbound licenses
- May lessen challenges of transferring databases of personally identifiable information

Some disadvantages of license over purchase/sale

- Subjects purchaser/licensee to risk of losing license if seller/licensor enters bankruptcy
- Requires purchaser/licensee to register iterative versions of the work and exclusive license at the Copyright Office to avoid bona fide subsequent purchaser risk

Buyer Considerations: IP Diligence

- Does the seller own what it says it owns?
- Can what the seller owns be sold and thereafter exploited without ongoing payments to third parties?
- Will the purchaser be able to exploit the game in any way it wants, on any platform it wants any where in the world it wants, in perpetuity?
 - Watch out for copyright license and transfer termination rights for “older” works
 - Be mindful of “Rear Window” problems

Buyer Considerations: Logistics

- How will the current distribution arrangement and online hosting and support of the game be transitioned to the buyer?

Buyer Considerations: Regulatory Issues

- Does the database of user data comply and use of that database with all applicable laws and company promises (e.g. posted policies)?
 - What law governs – is it an opt in or opt out regime?
 - COPPA, PIPEDA, EU Privacy Directive, etc.
 - Does the seller qualify for the ESRB COPPA compliant certification? EU Privacy Directive safe harbor?
 - Asia regulatory efforts

Buyer Considerations: Information Technology Issues

- Does the online component's database architecture give the buyer flexibility for new uses, responding to problems, etc.?
- Can data in the data base be matched to the time it was collected, where it came from, and the privacy policy, terms of service and end user license agreement that were in place at that time?

Seller Considerations

- Getting full value for the game: who is the right buyer?
- Earn-out? Will existing and new revenue streams be fully realized and rewarded?
- Allocating risk for new uses, changes to the EULA, terms of use, privacy policy, etc.
- Avoiding retaining the risk of liabilities without the means of controlling or avoiding them.

Suggested Guidance

- When representing the buyer
- When representing the seller

Questions
