
GAMES INDUSTRY LAW SUMMIT 2017Presented by

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Charlie Oscar Lima Tango Interactive Entertainment UAB

Wargaming presents:

GAMES INDUSTRY LEGAL CHALLENGE 2017

CHALLENGE:

In the document below, you will find the facts of the 2017 case. Please note that while all the names, countries, and other personal circumstances have been replaced to protect the privacy of the participants, the substantial details of this case are based on the actual disputes that recently happened, have been litigated in a court of law, and ended with a number of rulings that came into force. As such, this case requires a practical approach that you would normally display when working on a real case under similar circumstances.

ENTRIES:

To enter the challenge, you must submit a document (.DOC, .DOCX) that answers the question posed at the end of the summary of the facts of the case. The document should be written in ENGLISH. The minimum volume is 10,000 characters (with spaces), the maximum volume is 25,000 characters (with spaces). Submissions must be sent using the submission form on <https://gameslawsummit.org/games-industry-legal-challenge-2017/>. Submissions that do not fit the requirements of volume / format are rejected.

PRIZE FUND:

- 1ST PLACE: €1,000 (bank transfer) plus the entry ticket to the Summit (non-transferable).
- 2ND PLACE: €500 (bank transfer) plus the entry ticket to the Summit (non-transferable).
- 3RD PLACE: the entry ticket to the Summit (non-transferable).
- 4TH PLACE: the entry ticket to the Summit (non-transferable).
- 5TH PLACE: the entry ticket to the Summit (non-transferable).

DATES:

The case is published on February 15, 2017.

The submissions are accepted from February 15, 2017 and through April 1, 2017.

The winners (top 5 places, without specifying exact place taken) will be announced on April 15, 2017.

The actual places taken will be announced at the Summit on April 27, 2017.

The prize amounts will be paid by May 15, 2017, subject to the winners providing their payment details.

JURY:

Greg Boyd (FKKS)

Greg Pilarowski (Pillar Legal)

Katya Nemova (Wargaming)

Paul Gardner (Osborne Clarke)

Roman Zanin (Wargaming)

Tobias Schelinski (TaylorWessing)

TERMS OF PARTICIPATION:

You must be 18 years or older, and considered an “adult” according to the country of your residence. You must be a student of law or have a law degree. Members of the jury as well as organizers of the Summit cannot participate. You must participate under your own full name, anonymous submissions will not be accepted. By submitting your entry, you give the organizers of the Summit the right to make your work public, attributing such entry to your own full name.

ORGANIZER:

Charlie Oscar Lima Tango Interactive Entertainment UAB

PRESENTED BY:

Wargaming

FACTS OF THE CASE:

All personal and company names are a work of fiction. Nothing here represents any specific individuals.

1. Creative Development Interactive Ltd. (the “**CDI**”) is a rather well-known studio in the industry: one of their early games is regularly mentioned in the “Top 100 games of all times” lists in the international media, several of its developers are held in high esteem by their local game developer association, some frequently present at industry events such as GDC, and the studio’s brand has an established community with a steady following in both the US and the EU.
2. In 2011, CDI started the production of two new games: “**Spies & Secrets**”, based on the existing IP of the studio and in a genre where CSID felt at home; and “**Ships & Guns**”, based on the new IP and in a new genre.
3. Since CDI did not have anyone internally who could take care of business development or marketing (CDI has always worked with publishers before, and relied on them to provide such services), CDI hired an experienced professional from abroad: an individual from Belgrade, **Branko Milanovic**, who throughout his career held a successful track record of working in the capacity of Director of Business Development at both small and large games companies, and who spoke not only Serbian and English, but also German and Japanese (which sounded really impressive).
4. Branko started to work with CCDI from September 2012. Branko was focused solely on Spies & Secrets and Ships & Guns, dropping any other side projects from his agenda.

5. During his work with CDI, Branko negotiated and completed multiple digital and retail distribution deals for the upcoming games, as well as re-launched CDI's back-catalogue titles (under the title, collectively, "**Kings & Thieves**"); additionally, he organized several media events at the major trade shows (E3, Gamescom, GDC), developed marketing strategy and market positioning of both games in development, negotiated retainer agreements with several PR agencies internationally, and, overall, improved CDI's presentation, including preparing an update studio brand. Throughout this period, the Founder & Managing Director of CDI (**Eric Kleinherz**) was very happy with the work performed by Branko. Eric sent multiple emails to Branko asserting that he holds Branko's performance in high esteem, and several times celebrated the success of the collaboration by throwing dinners for Branko and CDI's major shareholders.
6. In June 2013, things started to get sour between Eric and Branko. Both of the games in development were delayed, the budgets were running out, the team got stressed, and tempers flared. Following a string of creative disagreements, it became evident that working together was no longer an option for Eric and Branko. At the same time, Branko found himself in a situation where he still had no formal contract with CDI: at the initial stage, this formality was not of the highest priority, while other business issues were burning hot and required immediate attention. Also, the exact structure of the cooperation (employment? independent contractor agreement? partnership between Eric's and Branko's companies?) kept changing based on this or that idea of tax-efficiency (different accountants recommended different things to Eric and Branko). At the same time, both Eric and Branko had a rough idea of the main terms of their cooperation, which were outlined in a number of emails exchanged throughout the months (such as participation in profit, approximate size of such participation, and so on).
7. Additionally, Branko was not yet paid for a single month of his work, since he was quite well off and did not need the compensation immediately – while CDI struggled to fit the production budgets. As the personal conflict escalated, Branko realized that he has to get *something* signed before he stops working with CDI, and started to push Eric to actually sign at least a simple document that would be based on the terms previously discussed via email. This resulted in Eric and Branko having a quite intensive email exchange regarding such document – with conditions proposed, amended and accepted or rejected almost every hour during those days.
8. In September 2013, Eric and Branko had their final meeting where Eric presented Branko with a document drafted by Eric alone, overnight, and where Eric told Branko that Branko can sign this document now – or he can refuse to sign it, and just leave the premises; in Eric's view, this was the end of any negotiations, and no changes to his document were allowed to be introduced. Having little choice, Branko signed the document, which was entitled "**Letter of Intent**" ("**LOI**" – attached here as an exhibit), left his studio keys and took the first flight to Belgrade.
9. After the LOI was signed, CDI paid Branko **the retainer for his work done** (as described in the LOI). It wasn't a perfectly smooth process – Branko had to send a few payment reminders – but the whole amount due in October 2013 was eventually paid by the end of December 2013.
10. Starting from January 2014, CDI also started to report and to pay Branko the revenue share due on the sales of **Kings & Thieves** (as described in the LOI). The payments were not monthly, but rather once every few months, when enough money accumulated to warrant Branko to issue an invoice.
11. In the second half of 2014, CDI also started to report to Branko on **Ships & Guns**, which was finally released into the market in June 2014. As the game wasn't doing very well, it seemed like Branko will never earn any money there since the revenue generated by the game wouldn't exceed the deductible development costs.
12. Around the same time, in late 2014, the production budget of **Spies & Secrets** was fully exhausted and CDI decided to proceed with a Kickstarter campaign. To launch it, the studio registered a 100% owned subsidiary in the US, which collected all the Kickstarter money and, having sent out the physical rewards to the backers (posters and t-shirts), transferred the rest of the revenue back to the original CDI studio. The Kickstarter campaign was highly successful, and CDI collected USD 1 million (after all the deductions).
13. Stimulated by the funds received via Kickstarter, **Spies & Secrets** was released on Steam under the Early Access program in March 2015, where it proceeded to earn another USD 1 million before its full release in

December 2015. The full release of the game has been a runaway success, with over USD 10 million earned just in the launch month alone.

14. In January 2016, Branko contacted CDI about reports and expected payments for the now released Spies & Secrets. Following such request, CDI stopped all and any reporting to him, including on the previously reported properties. Faced with the prospect of paying to Branko hundreds of thousands of dollars in revenue share under LOI, CDI decided to cut all and any communication with him.
15. Since the law of the LOI was German (neither Eric's, nor Branko's home jurisdiction), Branko contacted a German law firm, which in turn brought on board a second law firm (based in CDI's home jurisdiction). CDI also hired a law firm locally, which in turn brought on board another German law firm to consult Eric/CDI. After just a few weeks, the settlement negotiations fell through. Branko filed a lawsuit. The formal litigation began, with the parties exchanging formal submissions, and the date of the first court hearing was set.
16. CDI's position is that CDI does not owe Branko anything, based on the following arguments:
 - a) The party to the LOI is Creative Development Interactive Ltd., but the revenue from the sales of Spies & Secrets has been collected by an entity called "**Creative Publishing Interactive Ltd ("CPI")**", which Branko himself acknowledged in the text of the LOI that he signed. CDI should, then, only report and pay based on the revenue sent by CPI to CDI, which is way less than the threshold in the LOI.
 - b) Branko is only entitled to receive the revenue share out of sales of the **Windows-based versions** of all games, as the LOI refers to "PC", therefore excluding Mac and Linux sales. This further minimizes the revenue to be accounted for, by 30%.
 - c) The revenue from the **Kickstarter campaign** is not subject to the LOI as such receipts do not fall under the definition of "Net Revenue" (Digital or Retail) under the LOI. CDI's position is that the Kickstarter funds are the voluntary donations of players, and not the sales.
 - d) The revenue that CDI received from Steam for the **Early Access sales** of Spies & Secrets is not subject to the LOI as well, since the LOI uses the term "first release", and Early Access cannot be considered to be a "release" per se.
 - e) Furthermore, the revenue that CDI received as **Advances/Minimum Guarantees** before the full release of Spies & Secrets, shall be excluded from the LOI, too, since this revenue was received before "full release" and thus should not be accounted for.
 - f) Finally, as the LOI does not contain any specific payment terms, it is up to CDI to choose when to pay. It is CDI's position, then, that **only after the expiration of the LOI** in 4 years after release of the game, can CDI truly understand the amounts of marketing expenses as well as returns and chargebacks, and not at any time before then can CDI make any accurate calculation in this regard.
17. When asked about why CDI reported and paid to Branko revenue shares of Kings & Thieves as well as Ships & Guns, for many months before the dispute about Spies & Secrets arose, CDI stated the following:
 - a) It is by mistake, that CDI reported and paid the revenues that were actually collected by all the companies in the CDI group (including CPI, etc. – please refer to the LOI); it is also by mistake that CDI accounted for the revenue from the Mac and Linux sales, which should have been excluded from the calculations.
 - b) After the release of Spies & Secrets, and the following dispute, CDI hired a proper accountant who revised all prior reports; CDI is happy to share these reports, which actually show that Branko was overpaid and must pay back a portion of the money previously received from CDI.
18. A quick review of the revised reports delivered by CDI to Branko revealed that while all the revenue being reported has decreased, the marketing expenses deducted were left unchanged, and include charges borne by CDI, CPI, CRI, and CDII. Moreover, certain expenses shown were in fact the costs of manufacturing and sending to the backers the physical rewards of the Kickstarter campaign for Spies & Secrets.

PLEASE RESPOND TO THE FOLLOWING QUESTION:

What is the scope of the revenue share (if any), that Branko Milanovic is entitled to under the LOI signed by CDI and Branko from the revenue generated by (1) Kings & Thieves (2) Ships & Guns (3) Spies & Secrets? Please substantiate your opinion based on the general legal principles and the common games industry business practices.

EXHIBITS:

1. Letter of Intent between CDI and Branko Milanovic executed on September 20, 2013.

- END OF EXHIBIT LIST -

LETTER OF INTENT
(LEGALLY BINDING)

September 20, 2013

(1) Branko Milanovic, residing in Belgrade, Serbia, hereinafter referred to as “**Business Development Manager (BDM)**”, and (2) Creative Development Interactive Ltd., a company incorporated in London, UK, and referred to as “**Development Studio**”, hereby agree as follows:

1. BDM will be responsible for the following work:
 - a. Originate, negotiate and execute distribution deals in relation to the games of the Development Studio worldwide.
 - b. Supervise relationships with publishing/distribution partners worldwide in order to ensure high revenue, guaranteed payment collection, correct reporting.
 - c. Provide business- and publishing-related professional feedback internally at Development Studio, as required, on all aspects of game development-related work.
 - d. Supervise efforts to, and define positioning of, the games worldwide (description, cover art, USP, SKU, pricing).
 - e. Review and direct all local publishing plans and strategies developed and executed by local publishing/distribution partners worldwide.
 - f. Coordinate worldwide promotional strategy, direct external PR agents/agencies.
 - g. Coordinate and direct creative and publishing (but not technical) aspects of video production, web design, in-house communication.
 - h. Participate in, and lead, promotional events worldwide (e.g. local events in London, Berlin, Paris; as well as global as in E3, GC, PAX).
2. Development Studio will pay BDM as follows:
 - A one-time retainer of €60,000 (12 * €5,000) payable before October 15, 2013;
 - 5% of Adjusted Net Revenue (as defined below) above €100,000 for the digital and retail PC release of Kings & Thieves and any other re-releases of games previously developed and released by Development Studio for a period from May 1, 2013 through April 30, 2017.
 - 3.25% of Adjusted Net Revenue (as defined below) above €1 million for the PC release of Guns & Ships (currently in development) for a period of 4 years from the first release date of Guns & Ships.
 - 2.4% of Adjusted Net Revenue (as defined below) above €2 million for the PC release of Spies & Secrets (currently in development) for a period of 4 years from the first release date of Spies & Secrets.
3. The distribution of the PC versions of Kings & Thieves, Guns & Ships and Spies & Secrets is organized via the companies Creative Development Interactive Ltd., Creative Publishing Interactive Ltd., Creative Research Interactive Ltd. and/or Creative Development Interactive International Ltd. (“**Companies**”).

BDM is aware of the structure of these companies. Development Studio will monthly report to BDM from October 10, 2013 and onwards listing Gross Revenue received, deductions made and showing the resulting Adjusted Net Revenue for each game listed in this agreement. Development Studio will ensure

that BDM has audit rights with Companies fully sufficient to verify that the amounts reported due are correct.

4. The remuneration specified in the previous paragraphs will happen through Companies. BDM will invoice Companies as instructed by Development Studio. Development Studio will be deemed to have fulfilled all of its obligations under this letter if the cumulative total of payments by Companies to BDM equals the amounts due under this letter.
5. Definitions that shall apply to this contract:

Retail Net Receipts shall mean all amounts received by Development Studio for sales of units of the games incorporated in physical medium in the retail channel of distribution (excluding, where not previously excluded, all relevant taxes, such as VAT and sales tax).

Digital Net Receipts shall mean all amounts received by Development Studio for sales of electronic copies of the games to customers through any online platform (excluding, where not previously excluded, taxes).

Cost of Goods (COG) shall mean the amounts invoiced by printing/manufacturing facilities to Development Studio for (a) production of the physical stock units of the games (including, but not limited to costs of manufacturing of CD-ROMs and DVD-ROMs, packaging and printed parts of manual, cover, plastic boxes, and any value added items to be included into the packaging); (b) assembling and shrink-wrapping services; and (c) logistic costs of delivery of the produced stock of units of the games to/from distributors.

Marketing Costs shall mean all amounts invoiced to Development Studio by third parties with regard to promotion, marketing and advertising of the games (specifically) and shall be limited to 10% of combined Retail Net Receipts and Digital Net Receipts.

Partner License Costs shall mean the revenue share that Development Studio is contractually obliged to pay to third parties under relevant licensing and service agreements.

Adjusted Net Revenue shall mean Retail Net Receipts plus Digital Net Receipts less Cost of Goods less Marketing Costs less Partner License Costs less any applicable taxes.

Development Studio and BDM further agree that:

- They will at all times seek to act in good faith with one another.
- They will seek to draft full contracts to replace this binding letter of intent by January 15, 2014. In the absence thereof, this letter will remain valid for a term of 4 years.
- This letter shall be construed and interpreted pursuant to the laws of Germany.

Signatures:

(E.K.)

Eric Kleinherz
Development Studio
September 20, 2013

(B.M.)

Branko Milanovic
Business Development Manager (BDM)
September 20, 2013