

**HUGOTAVOCATS**

## M&A in FOSS

### A Practical Approach



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## OVERVIEW

- Intellectual Property: main value when acquiring a software or an internet company (along with the people)
- Purchaser wants to have the best price with the lowest risk
- Risk management from a legal standpoint:
  - Due Diligence
  - Representations and Warranties



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## OVERVIEW: DEAL SCHEDULE

- Negotiations between the parties (main structure of the deal and price)
- Drafting and negotiation of a term sheet
  - outline the deal
  - Set forth an exclusivity period
- Due Diligence



## OVERVIEW: DEAL SCHEDULE

- Negotiating the long form agreements (during or after the due diligence):
  - Shares purchase agreement
  - Warranty deed
  - Disclosure letter
  - Corporate documentation



## DUE DILIGENCE: BASIC PRINCIPLES

- Purchaser requests as much information as possible in various field (corporate, tax, labor, IP, etc.)
- Information could be divided into two categories:
  - Specific information
    - E.g. « *list of all open source software* »
  - Catch all information
    - E.g. « *any information that could materially affect the value of the operation* »



## DUE DILIGENCE: BASIC PRINCIPLES

- Seller is solely responsible for providing complete, truthful, accurate, clear, non-misleading information
  - M&A is the perfect information world (from the Purchaser's perspective)
- Rationale: information provided by Seller must confirm the valuation agreed upon or more generally the deal itself
- Bottom line: M&A are based on the assumption that no information is lacking, even though such information is not identified



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## REPRESENTATIONS & WARRANTIES

- Seller will be asked to make various representations, i.e. basically state that everything is in order, everything has been done lawfully since the incorporation of the company, etc.
- Seller will be asked to warrant said representations are truthful and accurate and will be liable (i.e. payment) for any damages arising out of said representations





## REPRESENTATIONS & WARRANTIES: WAY OUT

- Disclosure letter: a way for Seller to avoid (or limit) its liability is to disclose (i.e. inform the Purchaser) anything that is not in line with the broad representations requested by Purchaser
- Good for both parties:
  - Purchaser knows what it is buying;
  - Seller limits its liabilities



## INTERMEDIATE SUMMARY

- Due Diligence: identify possible issues
- Representations & warranties: state that everything is in order
- Disclosure: limit Seller's liability (based upon the due diligence)



## APPLICATION TO FOSS: GENERAL COMMENTS

- Many legal documents are not adapted to FOSS but only to proprietary software (although less and less the case)
  - Many lawyers are not either!
- Paramount for the Seller to understand, identify, disclose FOSS
- Paramount for the Seller to adapt the legal documentation



## DUE DILIGENCE & FOSS

- Two main categories
  - Software licensed to the Seller;
    - E.g. Development software, operating systems, etc.
  - Software licensed by the Seller
    - E.g. the product actually « sold » by the Seller
- Purchaser usually requires that Seller (FOSS and non-FOSS):
  - List all software used by the Company
  - Provide the corresponding licenses



## DUE DILIGENCE & FOSS

- Analyzing FOSS and non-FOSS licenses is different:
  - Non-FOSS: mainly verify if the fees are paid and if the use is conform with the license (e.g. number of copies used, on site / off site restrictions, etc.)
  - FOSS: fees are not an issue! But need to verify the type of licenses, the use made, and the compatibility, etc.



## DUE DILIGENCE & FOSS

- My recommendation: Seller must make its own FOSS list and analysis:
  - Seller must know its code (*what* is used and *how* it is used)
  - It should be requested by Purchaser (not always the case)
  - It will have consequences on the representations and warranties (and any disclaimer)



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## DUE DILIGENCE & FOSS

- For each FOSS, proposed list of data:
  - Name and version of software
  - Name and version of license(s) (and URL)
  - Author(s) and project website
  - Type of user interaction (internally used, SaaS, installed on client premises, etc.)
  - Software programs with which it interacts
  - Type of modifications to the Software



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## DUE DILIGENCE & FOSS

- Purpose:
  - Ensure that the common basic requirements are met for all FOSS programs (no warranty, access to code & license)
  - Identify which software is copyleft
  - What triggers the copyleft clause (mere interaction or distribution)
  - How strong is the copyleft (extent only to the covered program or to any derivative / linked program)
- In other words: identify any license violation
  - usually, there are violations!





## SELLER'S REPRESENTATIONS & FOSS

- Sometimes still see broad representation clauses such as:
  - « *Seller warrants that it owns all intellectual property rights in software programs used by Seller* »
- Or worst clauses:
  - « *Seller warrants it does use any free or open-source software program* »



## SELLER'S REPRESENTATIONS & FOSS

- Such clause are bad for two reasons:
  - They make no sense at all in today's world;
  - They may have a vicious effect:
    - Purchaser might be happy to have the widest representations as possible, but
    - This does not compel the parties to identify any violation of a free or open-source license (and incidentally, Seller gives a representation that is not true)
- M&A are the last chance for the Seller to identify any FOSS issue (should have been done before though)



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## REPRESENTATIONS & FOSS: WHAT TO WRITE

- Always write something that is truthful
  - Well done due diligence is the key
- What the Seller can state is that:
  - « *FOSS (including derivative works) are used pursuant to their respective licenses* »
  - « *There are no incompatibilities between FOSS programs as used by Seller* »



## FIXING VIOLATIONS

- Once a violation has been identified:
  - The Seller must disclose it
  - The Seller (usually in accordance with the Purchaser) must fix it
- How to fix it depends on the license, in all events:
  - Immediately stop any non-compliant use
  - Pay for the commercial license (if available)
  - Contact the project manager / author



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## TO CONCLUDE: A FEW PERSONAL THOUGHTS

- If you own a software company: don't wait for due diligence to identify violations:
  - Set up the appropriate open source governance (be sure it is way cheaper to do so than to fix violations)
  - Ensure the developers know what can / cannot be done
  - Ensure all relevant information flows between the members of your team
  - Involve your lawyer / legal team in your compliance process



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## TO CONCLUDE: A FEW PERSONAL THOUGHTS

- Cost of being compliant is much lower than the cost of developing the corresponding free software
- Don't be scared, FOSS is good: it is an opportunity, not a liability

BE FAIR WITH THE AUTHORS  
DON'T HIDE IT, FIX IT!



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**THANK YOU  
FOR YOUR ATTENTION**

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**HUGOTAVOCATS**  
4, place André Malraux  
75001 Paris France