

# IP Due Diligence Issues in M&A Transactions Checklist

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## A Checklist for buyer's counsel to use when conducting a legal due diligence review of intellectual property and information technology matters as part of a merger or acquisition (an M&A transaction).

This Checklist covers typical areas of legal due diligence concerning intellectual property (IP) and information technology (IT) matters in connection with a merger or acquisition (an M&A transaction). It does not cover:

- Financial due diligence or valuation issues, which are typically handled by accounting firms or specialized IP valuation consultants.
- Substantive patent due diligence (such as validity, enforceability and freedom to use), which must be conducted by specialized patent counsel.
- Technical or operational review of software and IT systems, which is typically handled in a parallel diligence process by the target and buyer's IT personnel.

### PRELIMINARY CONSIDERATIONS

This Checklist is intended to provide comprehensive coverage of IP and IT due diligence issues in connection with an M&A transaction. Following consultation with the buyer and the corporate due diligence team, as applicable, IP specialists should tailor this Checklist to the scope of IP and IT due diligence for the particular transaction, taking into account various factors, including:

- The type of M&A transaction and identity of the buyer (see *Transaction Structure and Nature of Buyer*).
- The target's industry and geographic scope of operation (see *Nature of Target's Business*).
- The materiality of IP and IT to the target's business (see *Materiality of IP*).
- Any process constraints, including:
  - an expedited transaction timeline;

- limited access to target personnel or documentation; or
- buyer's budget limitations.

### TRANSACTION STRUCTURE AND NATURE OF BUYER

- Before getting started, identify the transaction structure of the acquisition, that is, whether it is:
  - an asset purchase;
  - a stock purchase; or
  - a reverse merger or forward merger.
- Determine which entity in the seller's corporate group is consummating the transaction. For example, is the target an operating company that is party to IP-related agreements, or is the target the ultimate parent holding company?
- If the transaction is an asset purchase, keep in mind that:
  - asset purchases require more detailed schedules of IP to help ensure that no IP assets are left behind; and
  - asset sales and forward mergers are more likely to trigger anti-assignment clauses in the target's license agreements (see *IP-Related Agreements*).
- Carve-out transactions (where the buyer is acquiring a subsidiary, division or other discrete part of a larger business enterprise, such as a product line) may raise shared IP and IT issues (see *Practice Note, Carve-out Transactions: Intellectual Property* (<http://us.practicallaw.com/7-504-1544#a986850>) and *Information Technology* (<http://us.practicallaw.com/7-504-1544#a993486>)).
- Consider whether the buyer is a strategic buyer as opposed to a private equity (PE) buyer or investor, as well as the industries in which the portfolio companies of a PE buyer or investor operate. The nature of the buyer may affect the analysis of change of control or anti-assignment provisions, or non-compete or other restrictive covenants.

### NATURE OF TARGET'S BUSINESS

- Consider the nature of the target's business and the industry in which it operates. Specific additional diligence may be necessary depending on the target's industry.



- For additional diligence considerations for an M&A transaction involving:
  - a consumer or retail brand business, or other businesses where trademarks are key assets, see *Trademark Due Diligence in Mergers and Acquisitions Checklist* (<http://us.practicallaw.com/1-508-3551>); or
  - an online marketplace or other e-commerce business, a health care provider, a banking or financial services company or other business that relies on the collection and use of personal information, see *Practice Note, What's Market: Privacy and Data Security Representations and Warranties in M&A Agreements, Privacy and Data Security Due Diligence* (<http://us.practicallaw.com/9-544-5025#a497828>).
- Transactions involving a target or seller in a regulated industry, such as pharmaceuticals or financial services, defense, or a field where government-funded research is involved, raise unique issues and often require additional input from regulatory specialists and a separate diligence review.

#### MATERIALITY OF IP

- Consider how material IP is to the target's business to determine the level of detail and the areas of particular focus for the IP due diligence review. The materiality of IP owned or licensed by the target may be based on one or more of the following factors:
  - current revenue generated from products or services covered by the IP, or anticipated revenues from planned areas of expansion, for example, new territories, new distribution channels, new product lines or product line extensions;
  - dollar amount of royalties or license fees (payable or receivable) from licensing the IP;
  - competitive advantage that the IP provides, for example, trade secret or patent protection that excludes competitors from the market;
  - lack of commercially available alternatives for the IP, for example, software heavily customized for the target's business; and
  - replacement cost of the IP, including time, expense and level of effort.
- If the target has an international IP portfolio, consider assessing materiality of the IP on a country-by-country basis.

#### IDENTIFYING WHO KNOWS ABOUT IP AND IT ISSUES

- Identify the relevant sources of information on IP and IT matters (which may include in-house counsel, officers or senior members of management and outside counsel). For example:
  - the target's outside IP counsel may be best able to generate schedules of IP registrations and applications or address pending litigations;
  - an assistant counsel or human resources manager may know about any confidentiality and invention assignment agreements with employees and may be able to provide information about corporate policies and their implementation; and
  - the target's chief information officer (CIO) may know the most about proprietary software development and software licenses.
- In some transaction scenarios, such as the pre-bid stage of an auction, the seller or target may provide only limited access to its personnel, for example, a brief diligence call with the target's general counsel, who may only be able to address big picture issues. In this case, IP specialists should tailor this Checklist to focus diligence inquiries on the key IP and IT issues for the particular transaction.
- If the target has an international IP portfolio, consider whether and to what extent to involve local counsel from relevant jurisdictions to review the target's foreign IP rights.

#### CONDUCTING IP DUE DILIGENCE

This Checklist does not distinguish between inquiries that can be satisfied by reviewing the target's documents or written responses to due diligence requests and those that are more efficiently handled by oral discussions (for example, a management interview). Most IP diligence projects require a combination of both to satisfactorily cover the issues.

For a model IP and IT due diligence request list, see *Standard Document, Due Diligence Request List: IP and IT* (<http://us.practicallaw.com/7-509-4132>).

#### IDENTIFYING THE IP ASSETS

- Request a list of all of the following types of IP assets owned or used by the target:
  - patents, patent applications and patent-type filings such as certificates of invention;
  - trademarks, service marks and certification marks, both registered and unregistered;
  - fictional name filings, such as registered "doing business as" (DBA) names;
  - internet domain names;
  - other source identifiers, such as slogans, vanity telephone numbers, Twitter handles and commonly used hashtags;
  - software and databases;
  - registered and material unregistered copyrights;
  - mask works (semi-conductor chip products) registered under 17 U.S.C. 901, et seq.;
  - European Community designs;
  - trade secrets and proprietary know-how, technology or processes (that is, a description of their general nature); and
  - rights of publicity, such as the right to use celebrities' names and likenesses.
- For each item of IP that is covered by a federal, state or foreign registration or pending application, request the following information:
  - each current owner of record and beneficial owner, if different;
  - each jurisdiction covered by the registration or application or, for domain names, the registrar;
  - patent, registration and application serial numbers;
  - filing and registration or issue dates; and
  - upcoming deadlines for maintenance or renewal for a reasonable period (for example, 90 to 180 days) following the closing.

- If any of the identified IP is owned by a third party or jointly owned with a third party, include a specific request for any license or other agreement relating to the target's use or joint ownership of the IP asset (see *IP-Related Agreements*).
  - If the transaction is a **carve-out**, inquire whether the IP is owned or used by the seller or any affiliate of the target not being acquired. If so, determine whether the IP will be transferred or how the target will continue to use the IP following the closing (see *Practice Note, Carve-out Transactions: Intellectual Property* (<http://us.practicallaw.com/7-504-1544#a986850>)).
  - Conduct searches of the records of IP registries that are publicly available online using the target's name (or seller's name, for an asset purchase) and the name of any subsidiaries being acquired. Keep in mind that:
    - IP searches by an owner's name will not reveal registrations or applications that are still standing in the name of a predecessor-in-title where the assignment records have not been brought up-to-date. Likewise, owner searches will reveal items that have been transferred by the target but where the target's name still appears as the current owner or elsewhere in the chain of title.
    - For carve-out transactions, searches for all IP registrations and applications standing in the seller's name may reveal IP that is intentionally not included in the transaction. Owner searches, therefore, may not be practicable if the divested business is small compared to the retained businesses.
    - Not all countries' IP registry records are available online or are up-to-date on ownership and status. If a material country's IP registration database is unavailable or unreliable, consider engaging local counsel to conduct searches manually.
    - US patent applications are not made public until 18 months after their filing date and so will not be revealed in a search conducted before that time.
  - Confirm whether any IP identified in the searches as standing in the name of the target that has not been identified by the target will be acquired as part of the transaction and add it to the transaction agreement schedules if appropriate.
  - If the buyer has any plans for expansion of use or registration of key trademarks, consider whether to conduct trademark clearance searches to identify any potential barriers due to third party marks. For more information on trademark searches, see *Practice Note, Trademark Searching and Clearance: Full Trademark Searches* (<http://us.practicallaw.com/4-507-2834#a995999>).
- status of each item (registered or active versus abandoned or expired);
  - expiration dates for issued patents; and
  - upcoming renewal dates for trademark registrations or maintenance payment dates for issued patents.
  - Note that the expiration, renewal or maintenance payment dates may not be evident from the search reports and may have to be calculated based on local law.
  - If any gaps in chain of title or unreleased security interests are discovered:
    - request copies of appropriate documentation (for example, IP assignments, releases or loan pay-off documentation); and
    - confirm that the appropriate documentation will be recorded with the applicable registry on or prior to the closing to ensure that the buyer acquires the IP with a clear chain of title, without encumbrances or title defects.

#### DEVELOPMENT AND ACQUISITION OF IP

- Request information and documents to understand how the target's IP has been developed or acquired, including:
  - whether the target engaged consultants or independent contractors to develop IP, or whether the target's employees developed all of the target's IP;
  - whether the target has invention disclosure, work for hire and invention assignment policies and details of the target's implementation of the policies, including monitoring of compliance;
  - whether any IP has been developed jointly with third parties; and
  - whether any IP has been developed with funding, resources or personnel of any government entities, academic institutions or research centers, as these entities may retain rights in the IP.
- Request information and documents to confirm the target's ownership of any IP developed by or with, or acquired from, employees, consultants or independent contractors or other third parties, including:
  - copies of any representative forms of employee invention assignments and confidentiality agreements, and details of the target's use of these forms (for example, time periods of use and whether any employees failed to sign them);
  - copies of any agreements with consultants or independent contractors that contributed to the development of the target's IP;
  - copies of any assignment or other agreements by which target IP may have been acquired from any other third party (which may be contained in an asset purchase agreement or other principal transaction agreement); and
  - copies of any collaboration or joint venture agreements under which IP developments may be jointly owned or allocated to one party or the other.
- Review the IP assignment provisions of these agreements to ensure that:
  - the transfer of ownership is complete; and
  - no conditions on the target's ownership, use or exploitation of the IP exist.

#### OWNERSHIP AND STATUS OF IP

- Review the IP search reports (see *Identifying the IP Assets*) to confirm the following for each item of registered IP identified by the target:
  - accuracy of the disclosed information, including that the target is the current record owner of the IP it purports to own (for example, that IP is not held in the name of a previous owner or related company);
  - whether there are any gaps in the chain of title (for example, where a previous assignment, merger or name change was not recorded);
  - whether any unreleased security interests have been recorded in the relevant IP registry;

**IP-RELATED AGREEMENTS**

- Request copies of all material license agreements and all other material IP-related agreements to which the target is a party.
- Keep in mind that licenses of IP and other material IP terms (for example, IP ownership and assignment provisions) can appear in agreements that are not necessarily identified as "license agreements." For example, the following types of agreements often include licenses and other material IP terms:
  - research and development agreements;
  - collaboration, strategic partnership or joint venture agreements;
  - consulting agreements;
  - co-marketing agreements;
  - manufacturing, supply or distribution agreements;
  - intercompany services agreements;
  - sponsorship or endorsement agreements; and
  - settlements, covenants not to sue and consents to use (see *IP-Related Disputes*).
- Important terms to look for in IP-related agreements include:
  - parties to the agreement, and whether the target is licensee or licensor, or assignee or assignor;
  - IP involved;
  - territory;
  - field of use and other restrictions on the scope of permitted use;
  - exclusivity;
  - grantback licenses or assignments of improvements;
  - non-compete or other restrictive covenants;
  - royalties (payable or receivable), sales milestones and other financial terms;
  - right of first refusal (ROFR), right of first offer (ROFO) or option provisions relating to future IP licensing, development, exploitation or acquisition;
  - most favored nation (MFN) (also called most favored customer (MFC)) provisions;
  - term or expiration date and any renewal and termination rights;
  - assignment or change of control provisions;
  - whether the target is providing or receiving any indemnities or guarantees (for example, for infringement based on use of the licensed IP);
  - governing law and jurisdiction; and
  - any other provisions that could be implicated by or adversely affect the proposed transaction or the operation of the target's business following the closing.
- For a summary template to be used when reviewing and summarizing license agreements as part of legal due diligence for an M&A transaction, see *Standard Document, Due Diligence Summary Template: License Agreements* (<http://us.practicallaw.com/0-508-1915>).
- A key issue to consider in reviewing IP-related agreements is whether any material IP rights acquired by or licensed to the target will be adversely affected by the transaction (see *Practice Note, IP*

*Licenses: Restrictions on Assignment and Change of Control* (<http://us.practicallaw.com/3-517-3249>)). For example:

- if the transaction is a stock purchase, forward merger or reverse merger, provisions that terminate the agreement on a change of control are relevant;
- if the transaction is an asset purchase or a forward merger, it will likely trigger an anti-assignment clause; and
- if the transaction is a reverse merger, it is less likely, but possible, that it could trigger an anti-assignment clause, depending on the circumstances, the wording of the provision, the governing law and even the equities, including whether the buyer is a competitor of the licensor.
- Keep in mind whether the party to the potentially non-assignable agreement is the target itself or a subsidiary, as it can affect the analysis of whether the anti-assignment clause will be triggered by the transaction.
- If the licensor's consent is needed for license rights to continue post-closing, request information from the target about the relationship between the licensor and licensee. For example:
  - Could the target easily get consent without additional fees or other consideration?
  - Is the licensor a competitor of the buyer, or of a portfolio company of a PE buyer, therefore posing a challenge to obtaining that licensor's consent?
- Consider whether any license obligations, restrictive covenants or other provisions in the IP-related agreements could adversely affect the buyer or its affiliates (including any portfolio companies of a PE buyer) following the closing.
- If the target has any exclusive licenses of US copyrights, inquire whether the target has recorded the licenses in the US Copyright Office.
- If the target has any licenses of foreign IP, consider whether and to what extent to involve local counsel from the relevant jurisdictions to confirm whether license recording requirements exist and have been met. For example:
  - the IP laws of some countries (not the US, except as to exclusive copyright licenses) require that IP licenses be recorded against the registrations that are being licensed in order to bind third parties who acquire the licensed IP without notice of the license; and
  - a few countries (not the US) have "registered user" laws that require the recordation of trademark licenses in the local IP registry to maintain the enforceability of the licensed mark.

**IP PROTECTION AND ENFORCEMENT**

- Request information and documents regarding the target's approach to IP protection and enforcement, focusing on the types of IP that may be material to the target's business. For example:
  - Does the target register every mark (or variations of that mark) or apply for all patentable inventions, or only the most material ones? Does the target seek copyright registration for material copyrightable works?
  - In what countries is patent protection or registration sought and why?

- Does the target register marks across many classes of goods in contemplation of line expansions?
  - What diligence is done before adopting or applying for new marks? Are clearance searches performed?
  - Are freedom to operate searches done before introducing new products of a technical nature?
  - How aggressively does the target protect its IP?
  - Does the target subscribe to any "watch services" that identify potentially infringing trademark applications filed by third parties or uses of its marks on the internet?
  - Does the target readily send out "cease and desist" letters or only in the most extreme instances?
  - Does the target monitor the quality of its trademark licensee's products and if so, how? Does the target have written trademark usage guidelines, including maintaining trademark use and preferred practices?
  - What are the target's policies and practices for marking patent numbers on patented items or using other IP designations (for example, using ® for registered trademarks and © for copyrighted works)?
  - What are the target's policies and practices for protecting its trade secrets? Does the target routinely use confidentiality agreements when disclosing secrets to third parties? Does it limit access to its confidential information physically or electronically?
  - Has the target ever experienced loss of trade secret protection or unauthorized disclosure or use of a trade secret by a current or former employee?
  - Has any key current or former employee left to join a competitor? Conversely, has the target hired any key employee from a competitor? Does the target have enforceable confidentiality or non-compete agreements with these employees? Does it monitor the activities of these employees to ensure no unauthorized disclosure or use of the target's or its competitor's trade secrets is made?
- the products or services affected and associated revenues;
  - the stage of the litigation or other proceeding;
  - the damages and other remedies sought;
  - any settlement offers and negotiation status;
  - the worst case scenario and likely outcome; and
  - the target's contingency plans (such as design-arounds) to deal with the worst case scenario.
  - If material IP disputes are pending or threatened, consider consulting IP litigators to assist with the investigation.
  - To the extent that legal opinions have been rendered to the target regarding infringement, consider whether it would be useful for the buyer to review them. However, the desire to review legal opinions must be balanced against the possible waiver of attorney client privilege that may occur.
  - It is also important to inquire about any:
    - settlement agreements;
    - consents to use (for example, co-existence agreements);
    - covenants not to sue; and
    - releases.
  - A key issue to look for in settlement and other IP dispute-related agreements is whether any provisions could be implicated by the proposed transaction or adversely affect the operation of the target's business following the closing.
  - Consider also whether any license obligations, restrictive covenants or other provisions in these agreements could adversely affect the buyer or its affiliates (including any portfolio companies of a PE buyer) following the closing.

#### SOFTWARE AND IT SYSTEMS

#### IP-RELATED DISPUTES

- Request information and documents (including copies of relevant pleadings, decisions or orders and correspondence) regarding any pending, threatened or potential litigation, cease and desist letters and registry proceedings concerning IP assets.
  - Depending on the target's industry, request information and documents regarding any audits or claims by royalty-auditing agencies (for example, Copyright Clearance Center (CCC), Business Software Alliance (BSA) or American Society of Composers, Authors and Publishers (ASCAP)).
  - In reviewing these materials, consider:
    - the identity of the parties to the dispute or action (for example, in a patent litigation filed against the target, whether the plaintiff is a competitor of the target or the buyer, or is a non-practicing entity);
    - the nature of the claims;
    - the materiality of the IP involved;
- Keep in mind that software and IT systems are used in the conduct of every business, regardless of industry. Even if the target has no patents or other registered IP, the target likely uses software for:
    - "back office" administrative functions, such as accounting, human resources, project management, IT systems management or regulatory compliance;
    - "front office" functions, such as sales, marketing, or customer relationship management (CRM); or
    - design, development or manufacture of the target's products or the performance of services, such as process control software or computer-aided design (CAD) software.
  - Request the following information and documents regarding software and databases used in the target's business:
    - identification of any proprietary or customized software or databases owned by or licensed to the target;
    - identification of any third-party software or databases (including any off-the-shelf software or open source software) that is material to the target's business;
    - how the material software or database is used in the target's business;
    - if any material software or databases are licensed from third parties, copies of related license, hosting (for example, software

as a service (SaaS) or platform-as-a-service agreements), maintenance and support agreements;

- any source code escrow agreements;
  - any other agreements with third-party service providers relating to the target's use of software and IT systems, such as co-location, back-up, disaster recovery or other services;
  - copies of software development or systems integration agreements relating to current systems;
  - the target's policies and procedures (for example, internal or external audit) for monitoring compliance with the terms of software licenses, including the number of licensed users;
  - any significant software or IT systems upgrades in progress or in the near-term planning stage, the status of completion or negotiation of related agreements and an estimate of the associated capital expenditures;
  - any recent failures or interruptions of the target's IT systems and details of the actual or expected impact on the target's business; and
  - the target's business continuity and disaster recovery plan and facilities.
- In reviewing software and IT-related license and service agreements, keep in mind that:
    - For the sake of efficiency, IP specialist legal review typically excludes any shrink-wrap or click-through agreements for commercially available, off-the-shelf software with an annual license fee or replacement value of less than a certain amount (for example, \$15,000), depending on the value of the target's business, unless otherwise material.
    - IP specialist legal review of material software license and service agreements relating to "back office" or "front office" functions is typically more limited than review of agreements for third-party software used in connection with the target's key products or services.
    - IP specialist legal review of material software license and service agreements relating to third-party software used in connection with the target's key products or services should cover the same key terms as in diligence review of other material IP license agreements (see *IP-Related Agreements*).
  - If the transaction is a **carve-out**, inquire whether the software or IT services are provided by or shared with the seller or any affiliate of the target that is remaining with the seller. In addition, a software licensor may have granted an "enterprise license" to the seller and its subsidiaries. If this is the case, address how the target will continue to use the software or IT services following the closing (see *Practice Note, Carve-out Transactions: Information Technology* (<http://us.practicallaw.com/7-504-1544#a993486>)).
  - A buyer may be less concerned about the target's software, or the terms and assignability of the target's software and IT agreements, if the target will be migrated onto the buyer's (or its portfolio company's) existing IT systems for those functions following the closing.
  - Technical due diligence review of the target's software and IT systems is typically handled in a parallel diligence process by

the target and buyer's IT personnel or external consultants. Such matters could include performance levels, whether the software is up-to-date and conforms to its specifications, the adequacy of the documentation, scalability, susceptibility to viruses and hacking, and compatibility with buyer's IT systems, among other things.

## WEBSITES AND SOCIAL MEDIA

- Request information and documents to evaluate the target's use of websites and social media, including:
  - a list of the target's active websites and social media accounts;
  - identification of the type of interactive communications conducted through its websites and social media pages, for example, for purposes of marketing, customer support or other interactive communications, or e-commerce;
  - whether the target authorizes employees to post content on websites or social media pages on behalf of the company;
  - whether the target allows users to upload content or comments to its websites or social media pages;
  - copies of any written internet or social media policies, for example, policies relating to employee posting of content, and details regarding their implementation, including monitoring of compliance; and
  - whether the target's websites or social media sites have been subject to hacking, viruses or other attacks (see *Privacy and Data Security*).
- If the transaction is an asset purchase, review the terms and conditions of the relevant social media sites to determine whether any prohibitions on transfer of the relevant accounts exist. If the target's social media accounts cannot be transferred, confirm whether the content can be migrated to new social media accounts following the closing.
- If the target permits users to upload content or comments to its websites or social media pages, request information and documents regarding the target's policies and practices relating to user uploads. For example:
  - Is the user content made public?
  - What are the target's guidelines, if any, for users' uploading of content? Are these guidelines posted on the target's websites or social media pages?
  - Does the target have a process for review of user content before it is posted for public view?
  - Has the target routinely not posted or taken down user content of certain types?
- Also inquire about any agreements relating to the target's websites or social media accounts, for example:
  - content development;
  - content delivery or distribution; or
  - website hosting.
- Key issues to look for in reviewing website or social media-related agreements are ownership of the content that is developed or posted on the relevant sites or pages and liability for infringement of third party intellectual property by the content.

## PRIVACY AND DATA SECURITY

- Although privacy and data security diligence is not necessarily IP-specific, the IP legal team is often tasked with covering these areas.
- Request information and documents to evaluate the impact of privacy and data security matters on the seller's or target's business and identify any related issues, including:
  - the extent to which the seller or target collects, uses and discloses customers' or other individuals' information, including any personal information;
  - the target's privacy policies, including its current and past website privacy policies, and whether the target has complied with its privacy policies;
  - the target's internal procedures with respect to its collection, use and protection of personal information, if applicable;
  - whether there have been any data security breaches or unauthorized use of or access to the seller's or target's computer systems or other data;
  - whether the target has audited its IT and data collection and storage practices to evaluate security measures; and
  - whether the target has internal plans and procedures with respect to reacting to a security breach.
- For transactions where the target's business relies on the collection and use of personal information (for example, an online marketplace or other e-commerce business, a health care provider, or a banking or financial services company), see *Practice Note, What's Market: Privacy and Data Security Representations and Warranties in M&A Agreements, Privacy and Data Security Due Diligence* (<http://us.practicallaw.com/9-544-5025#a497828>).

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