



# M&A IP Products

Insurance and Risk Management Solutions  
for M&A Transactions

# M&A: IP opportunities and challenges

M&A transactions can be an attractive and necessary means for an acquiror to grow or obtain key technologies and intellectual property (IP) assets, but they also pose significant risk.

Many acquirors conduct basic due diligence to identify historic litigation and identify registered and licensed IP, but what about the competitor IP landscape beyond that? How do you guarantee that the target and IP is being acquired with clean title and that a future challenge does not lay ahead which invalidates that IP or presents show stopping infringement risk? What if the seller has failed to answer the due diligence enquiries fully and honestly or has not managed their IP assets and risk effectively?

Icen Risk has developed a range of specialist, market-leading and technology driven M&A IP products to help parties to transactions involving technology, creative and consumer brand businesses protect value and offer insurance solutions for the uncertain and emerging risks that such businesses face.

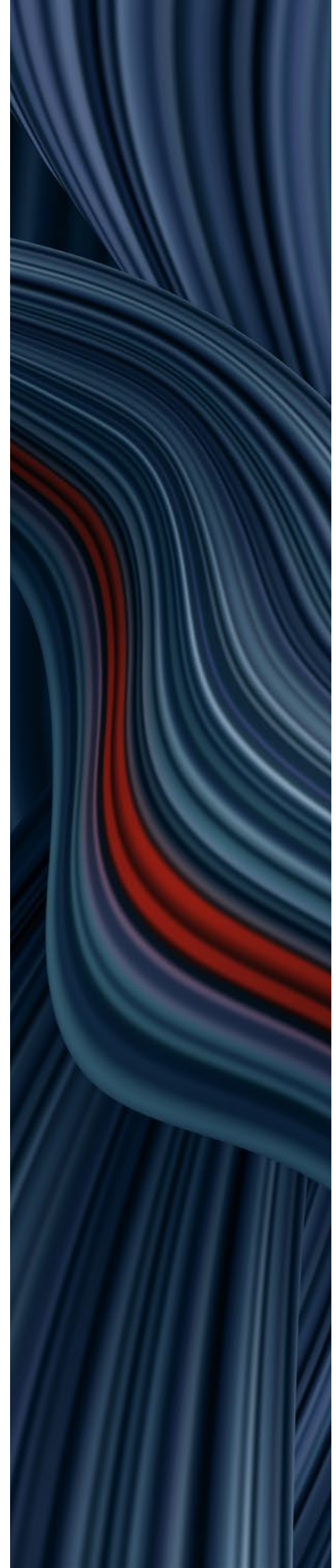
# What are we doing differently?

Our M&A IP products are built on three principles:

- 1. Understanding the big picture when assessing your risks:** with our in-house expertise, we are able to draw upon the latest technology to create an accurate map of a businesses' products, IP assets, IP risks and competitor landscapes across all territories in a flash. We can look back to where the target and its competitors have had disputes in the past and look forward to predict future flash points. And when we say IP, we mean all types of IP, from patents to know-how and branding assets to domain names.
- 2. Providing certainty with affirmative and special coverages:** our goal is to assess risk and offer peace of mind by affirmatively covering low to medium known risks discovered through due diligence and underwriting. Such risks may include missing IP assignment agreements, the identification of patents of concern owned by third parties, through to open-source code use and compliance. We aren't prescriptive and will consider most types of problem. We can also look to offer contingent risk cover for IP matters and help unlock tough negotiations.
- 3. Resolving Claims:** when the worst happens and claims occur, we are here to help resolve the situation. Our in-house expertise enables us to understand your claim and provide assistance.

# Product highlights

- IP Warranties (including in W&I): against suitable due diligence and disclosure, we aim to cover the usual range of IP warranties agreed between the parties to cover unknown risks and may provide cover without qualifications and for forward looking statements;
- Synthetic IP products: for transactions involving the acquisition of businesses/assets out of insolvency or where agreements are silent on IP, we can provide a fully synthetic solution;
- Special IP insuring clauses; if the risk calls for it, we can provide special IP insuring clause for the broadest possible coverage for risks including infringement;
- Contingent risks: for matters identified through due diligence and underwriting which may be excluded under a standard W&I policy, we can provide bespoke coverage solutions;
- Specific tax risks: we can provide cover for tax risks relevant to businesses that invest heavily in their IP such as R&D tax credits and entrepreneurs relief.





## What type of transactions do we insure?

Our M&A IP products are best suited to transactions involving businesses or assets with a value

ranging from **£5,000,000** up to **£250,000,000**

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## What limits can we offer?

Icen Risk is able to offer limits of up to **£100,000,000 / €110,000,000** per transaction

### Who should consider using Icen Risk's M&A IP products?

- Private equity and venture capital – buying and investing in businesses where IP value and risk is of key importance;
- Corporate acquirors of businesses and IP assets – wanting to de-risk bolt-on acquisitions;
- Sellers – wanting to protect value by offering robust warranties backed by insurance;
- Insolvency practitioners – disposing of IP assets and businesses where IP was a key component;
- Corporate, M&A and IP practitioners – looking for solutions to help their clients de-risk investments.



## Sale of a design software suite from a distressed business

### Issue:

The buyer of a design software asset from a financially distressed seller asked us to provide it with an insurance solution to cover a full suite of intellectual property warranties and an associated indemnity in the asset purchase agreement.

### Background:

A financially distressed, European manufacturing business was selling its proprietary design software assets. The acquiring fund was not willing to proceed with the transaction without a number of assurances, including that the seller owned the software code and that it did not infringe third party intellectual property rights.

Due to time and budgetary restraints, neither party had commissioned independent expert intellectual property due diligence. The buyer was particularly concerned with protecting itself against the risks arising out of using and integrating the software package with its systems; the risk of the software infringing third party intellectual property rights; use of open source code in non-compliance with license requirements; challenges to ownership of the code and validity challenges to registered/ granted intellectual property rights, including trade marks. Without the financial covenant of the insurance policy, the sale would not proceed.

### Solution:

In the absence of either sell or buy side intellectual property due diligence, using our in-house intellectual property expertise and sophisticated data driven underwriting systems, we worked with the buyer to develop a deep understanding of the intellectual property risks associated with the assets and the additional information required from the seller in order to provide a risk transfer solution. An insurance policy was issued to the acquiring company, covering the intellectual property indemnity given by the seller thereby giving the buyer the comfort it required to be able to use and integrate the software with its own solutions. In addition, the seller was able to cap its liability at €25,000 and use the sale proceeds to fund its core business. Our policy was for a period of 6 years and provided €3m of cover. Further, as we undertook the diligence in-house, and provided guidance to the buyer and seller as to what information to look for, we saved the parties valuable time and expense, enabling them to focus on closing the deal.



### Purchase of coatings technology

#### Issue:

A large European domiciled paints and coatings manufacturer with a conservative risk appetite and experience of patent infringement litigation was purchasing hydrophobic coatings technology for use in the renewables and marine sectors. The main assets of the target business were paint formulations, trade secrets and know how and the purchaser wanted stronger covenants to protect them than those offered in the asset purchase agreement in the event of loss arising out of IP ownership and infringement challenges post completion.

#### Background:

The buyer had conducted robust IP due diligence, including commissioning a patent attorney to produce a freedom to operate opinion to map out potential infringement risk. The buyer was proposing to seek licenses to mitigate the highest areas of risk, but wanted coverage for infringement risk arising out of lower-medium risk patents on a forward looking indemnity basis. The buyer's main concern was to mitigate potential losses it would incur if such risks crystalized post completion after having invested in developing, manufacturing and distributing coatings based on the acquired technology.

#### Solution:

Using the buyer's freedom to operate opinion as a starting point, we conducted a thorough risk mapping exercise to understand the extent and scope of the potential exposure across all territories which the buyer was proposing to develop, market and sell the coatings. We also considered the buyer's post completion plans and overlayed these into the our model of the future looking risk landscape in order to assess the risk and agree an appropriate risk management approach.

In addition to providing cover for the warranties agreed between the parties, we offered to cover forward looking infringement risk on an indemnity basis with the options to disapply buyer's actual knowledge of matters disclosed in the disclosure letter and diligence documents under the policy, with requested limits up to £10,000,000. Further, we offered to cover the seller's obligations under the APA for a period of four years to match the agreed post completion project plan.



### US corporate purchase of UK software business

**Issue:**

A sophisticated US corporate buyer was acquiring a UK software business which operated in the supply chain and logistics sectors with plans to integrate the two companies' solutions and had identified two IP issues during due diligence.

**Background:**

The US buyer had been courting the UK target business for some time and saw an opportunity to acquire its technology, in the form of a machine learning solution to speed up and remove human touch points in supply chain and logistics processing.

As is typical in many software businesses the target had relied heavily on independent contractors to develop software code with limited formalities and did not obtain IP assignment agreements. In addition and as is also common, these independent contractors had used a large amount of open source programs as part of the target's solution; such use potentially in breach of open source licenses.

The key concerns of the buyer which it sought cover for under were concurrent ownership and infringement challenges by former contractors and infringement and copyleft risk posed by the use of open source code.

**Solution:**

In addition to the standard W&I coverage and having agreed a retention structure and mitigation approach, we agreed to cover the known issues under the W&I policy by scraping seller's knowledge from the SPA and disapplying buyer's knowledge of the identified issues from the disclosure letter and due diligence.





### Acquisition of luxury hotel with branding issues

#### Issue:

A purchaser of a luxury boutique hotel received limited disclosure concerning the ownership of brand and design assets created by a single designer and was concerned about the risk of challenges to ownership and infringement allegations by the designer post-closing.

#### Background:

The purchaser was acquiring a high end, design led, luxury boutique hotel in central London. Part of the hotel's appeal was its distinctive branding and design, having been created by a renowned hotel designer.

Initially there was limited disclosure by the seller of the creation and protection of the branding and design save for providing a list of registered trade marks. At the 11th hour of the transaction numerous disclosures filled in a complicated narrative and highlighted gaps in agreements to transfer key IP assets. The purchaser wanted an indemnity for losses arising out of any claims that could be made by the designer, including claims over ownership to and infringement of their intellectual property rights.

#### Solution:

We reviewed the trade mark registries to assess the assets to be transferred to the purchaser and mapped out the gaps in proof of ownership and potentially defective assignments concerning unregistered IP assets. We also carried out a risk mapping exercise concerning the designer and their history, including trade mark and design right filings and past disputes.

In addition to the coverage under a standard W&I policy, we offered contingent coverage for an intellectual property indemnity requested by the purchaser to cover up to £2m of losses, costs and expenses arising out of a challenge to the buyer's ownership of IP assets, namely copyright and design rights subsisting in the branding and aspects of the hotel and its fixtures' design and allegations of IP infringement.



### Fintech software investment and licensing deal

#### Issue:

A highly regarded European financial institution had developed its own distributed ledger technology (DLT) solution based on various open source platforms for use with fund transaction processing.

The institution spun out this solution, transferred the IP into a new company and entered into investment and licensing agreements with a number of funds who would use the service.

#### Background:

The deal required the insuring of two agreements, an IP transfer agreement and an investment agreement both of which contained a full suite of IP warranties, protecting the institution. One of the warranties concerning non infringement of the solution had forward looking effect.

Being a sell-side like transaction we did not have the benefit of any buy side diligence and no third party vendor diligence was prepared for the transaction. We conducted an initial patent risk landscape and IP litigation review of the target's DLT solution, with a focus on Europe. We also worked with the technical specification provided by the developers to map out potential open source risk.

#### Solution:

Using our technology solutions in lieu of the parties' diligence, we became comfortable with the risk profile of the technology solution and the high caliber of the parties to transaction, including their generally conservative appetite towards risk. We were able to offer full back to back coverage for the IP warranties in the IP transfer agreement and investment agreement, including those which had forward looking effect, without the parties having to engage third party diligence providers.

# FAQs

- Q** We have not undertaken IP due diligence beyond confirming the existence of registered IP assets such as trade marks and patents, can we still get a quote?
- A** Yes, provided the target has some registered IP, our processes and technology enable us to work from as little information as a target's name in order to develop a complex and sophisticated risk analysis. We can still provide a quote where the target has not registered IP, but we may require some additional up front information.
- Q** What is the earliest point at which Icen Risk could be contacted to obtain an indication on potential solutions and terms?
- A** At any point in the transaction process, although given the complexity often associated with IP issues, earlier is often better. Provided we have some basic information about the target assets or business, we can provide a free indication of potential solutions or consider bespoke requests via your broker.
- Q** We are not sure which of the menu of IP enhancements is most suitable for the transaction and the pricing implications, how do we find out more?
- A** We are happy to have a confidential discussion with you and your broker about the transaction and the problems you are hoping to solve with our insurance product at any stage. We can provide cover and price illustrations without commitment and charge to assist you. If the problem is highly technical in nature we are also happy to discuss the details and possible solutions with your patent/trade mark attorney or other advisor.
- Q** If a company is headquartered in the UK but has operations in the US and China, will you consider offering terms?
- A** Yes, but certain limitations may apply if most activities and/or revenues are generated in the US or China.
- Q** Do you insure US buyers?
- A** Subject to the governing law of the agreement and policy, we often provide our products to US buyers.
- Q** Can you cover loss on an indemnity basis?
- A** Yes. In addition we can offer separate insuring clauses for IP issues.
- Q** Are there additional fees for your IP services and products?
- A** For more complex solutions and in areas where a high degree of specialism is required, there may be an additional diligence fee, but this will always be set out clearly at the quote stage.
- Q** Is there an additional process to the W&I placement in order to obtain the additional IP coverages?
- A** No, the IP underwriting process runs seamlessly with the W&I process and at a pace to suit the parties' needs.
- Q** The target business is currently engaged in a live IP dispute, can you offer coverage for such issues?
- A** Typically, we cannot offer cover for live litigation, including on-going pre-action disputes, however there maybe aspects that could be considered contingent risks that we may have appetite to offer a solution for.

## Claims

We have an agreement with the Lloyd's Managing Agency of NYSE listed Travelers insurance company (NYSE: TVR), our lead capital provider, to provide a unique, client focused and collaborative approach to claims handling to ensure a responsive and prompt service. This ensures that the team involved in underwriting the risk, is also heavily involved in the claims process.

Travelers is a leading insurer with over 30,000 employees and in 2023 generated revenues of c\$41 billion providing exceptional, financial covenant strength.

## Who are Icen Risk?

We are a specialist M&A insurance solutions provider with some of the most experienced underwriters in the transactional risk market. Our expertise spans M&A, corporate, litigation, accounts and finance, tax and IP, covering many sectors and territories.



## Icen Risk M&A IP Product Key Contacts



**Robert Brown**  
Managing Principal

+44 (0)7718 306 372  
robert.brown@icenrisk.com



**Simon Chalkley**  
Senior Principal - Intellectual  
Property

+44 (0)7880 613 380  
simon.chalkley@icenrisk.com



**Jack Mendelssohn**  
Principal - M&A

+44 (0)7760 929 247  
jack.mendelssohn@icenrisk.com



**Stefanie Maurer**  
Underwriter - M&A

+44 (0)7787 413 034  
stefanie.maurer@icenrisk.co



**Fergus Croft**  
Underwriting Associate

+44 (0)7407 644 887  
fergus.croft@icenrisk.com



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Icen Risk GmbH is a company registered in Austria with company number 615422h, whose registered address is Gonzagagasse 19/3, 1010 Vienna, Austria, and is authorised by the Austrian Financial Market Authority (FMA).

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