



MAYER | BROWN

KEY REPRESENTATIONS AND WARRANTIES IN TECH M&A: CRITICAL SAFEGUARDS FOR DEAL SUCCESS

Julian Dibbell and Nina Flax

SPEAKERS



JULIAN
DIBBELL
CHICAGO



NINA
FLAX
NORTHERN
CALIFORNIA

AGENDA

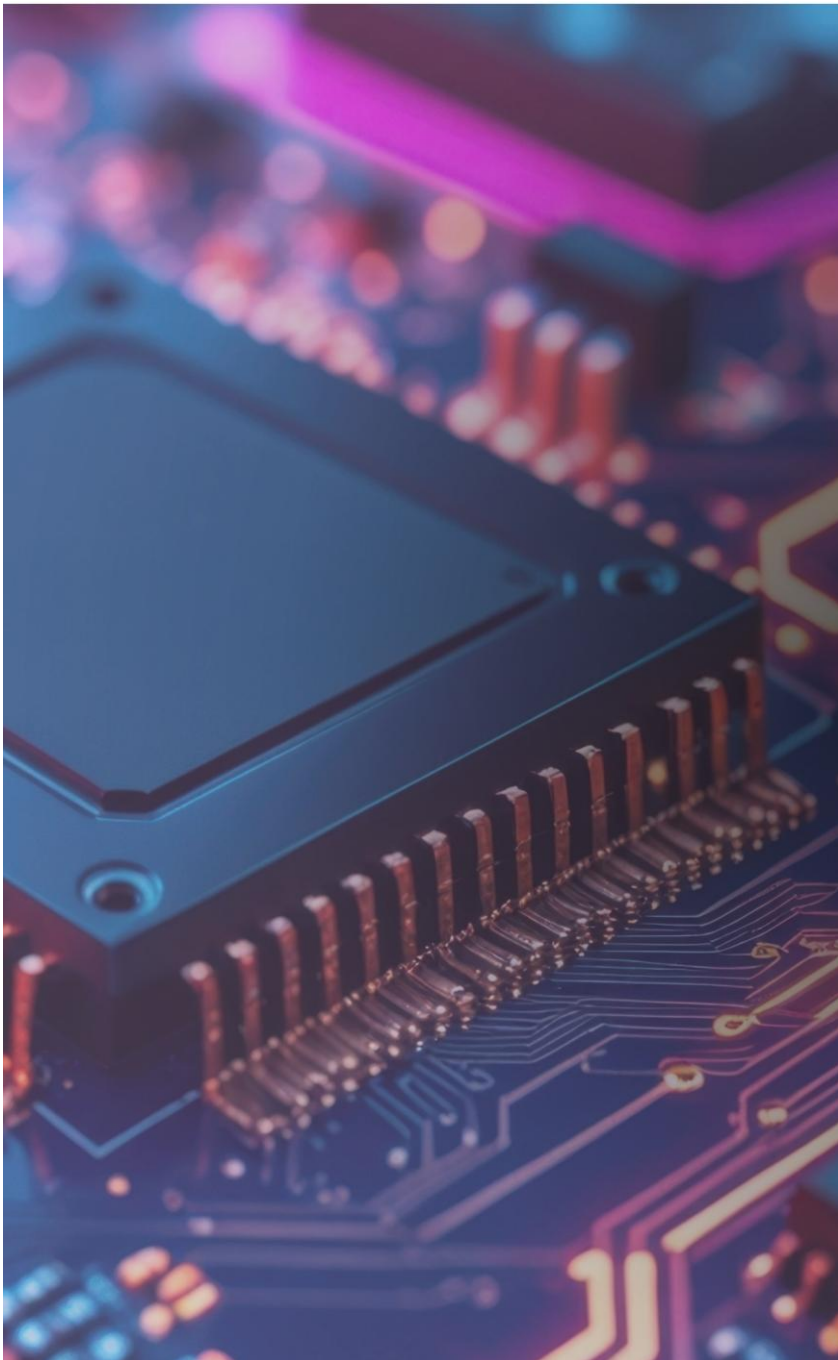
1. Role of Representations and Warranties
2. Core IP Representations in Tech Deals
3. Other Key Representations
4. Strategic Considerations
5. Best Practices in R&W Negotiations





01

ROLE OF REPRESENTATIONS AND WARRANTIES



REPRESENTATIONS & WARRANTIES

- Foundation for confirming due diligence
- Allocates risk between the parties
- Provides legal recourse if disclosures are inaccurate or incomplete

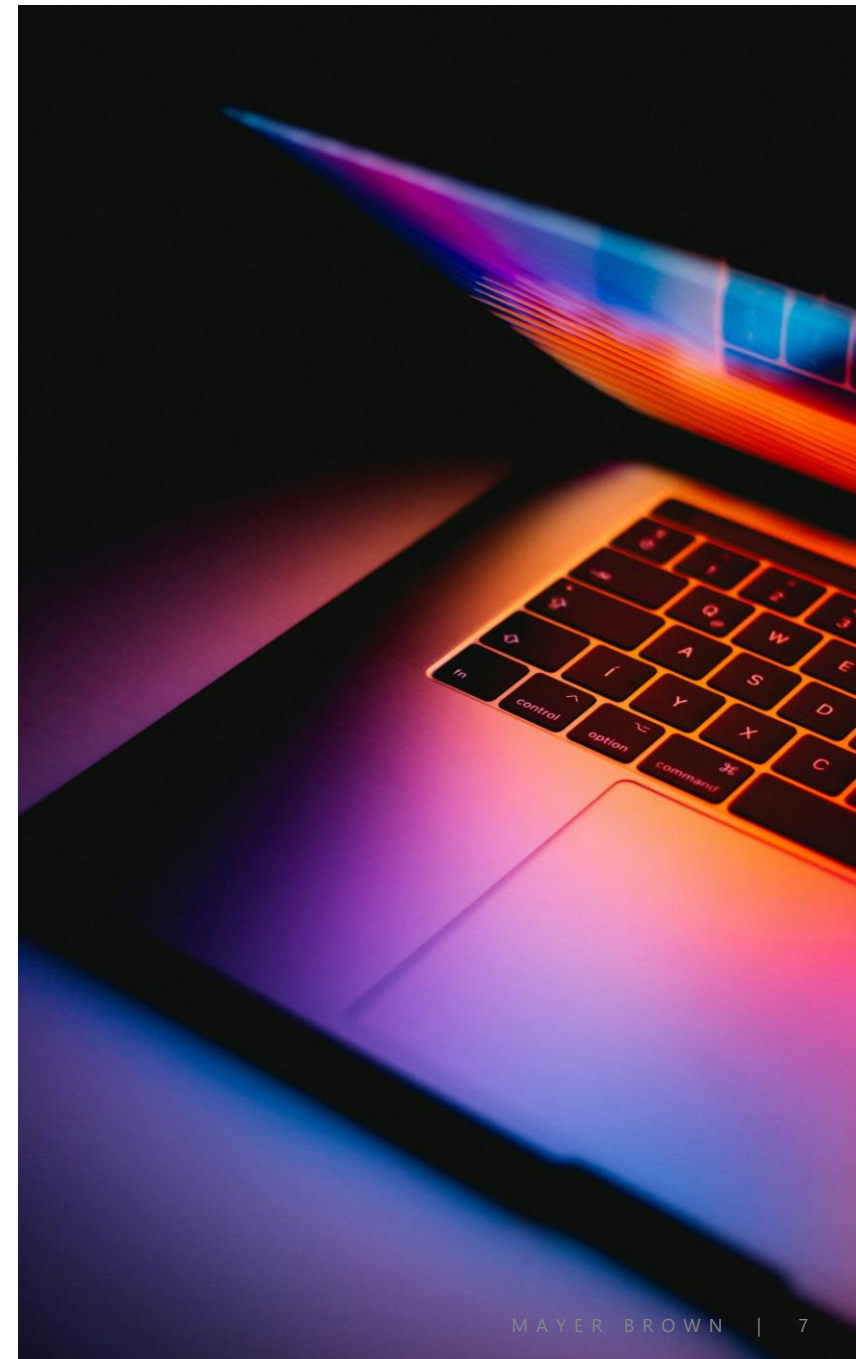


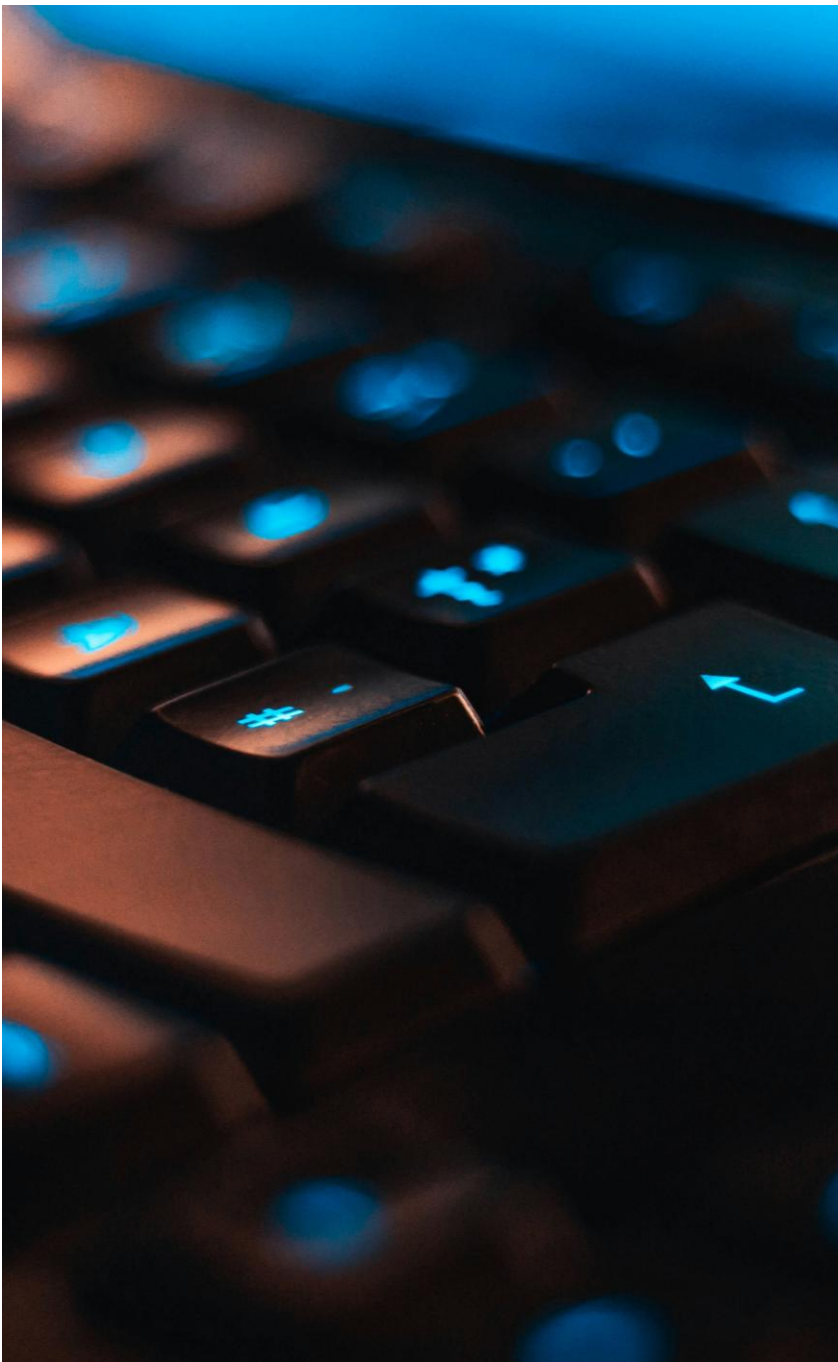
02

CORE IP REPRESENTATIONS

CORE IP REPRESENTATIONS

- Ownership and Title
 - Target has sole and exclusive ownership of IP assets
 - Employees and relevant contracts have assigned IP rights to the target
 - Third parties do not have rights that limit target's/buyer's use of IP





CORE IP REPRESENTATIONS (CONTINUED)

- Non-Infringement and IP Litigation
 - No pending or threatened infringement claims
 - Necessary third-party licenses are in place
 - Watch out for knowledge qualifiers and carve-outs

CORE IP REPRESENTATIONS (CONTINUED)

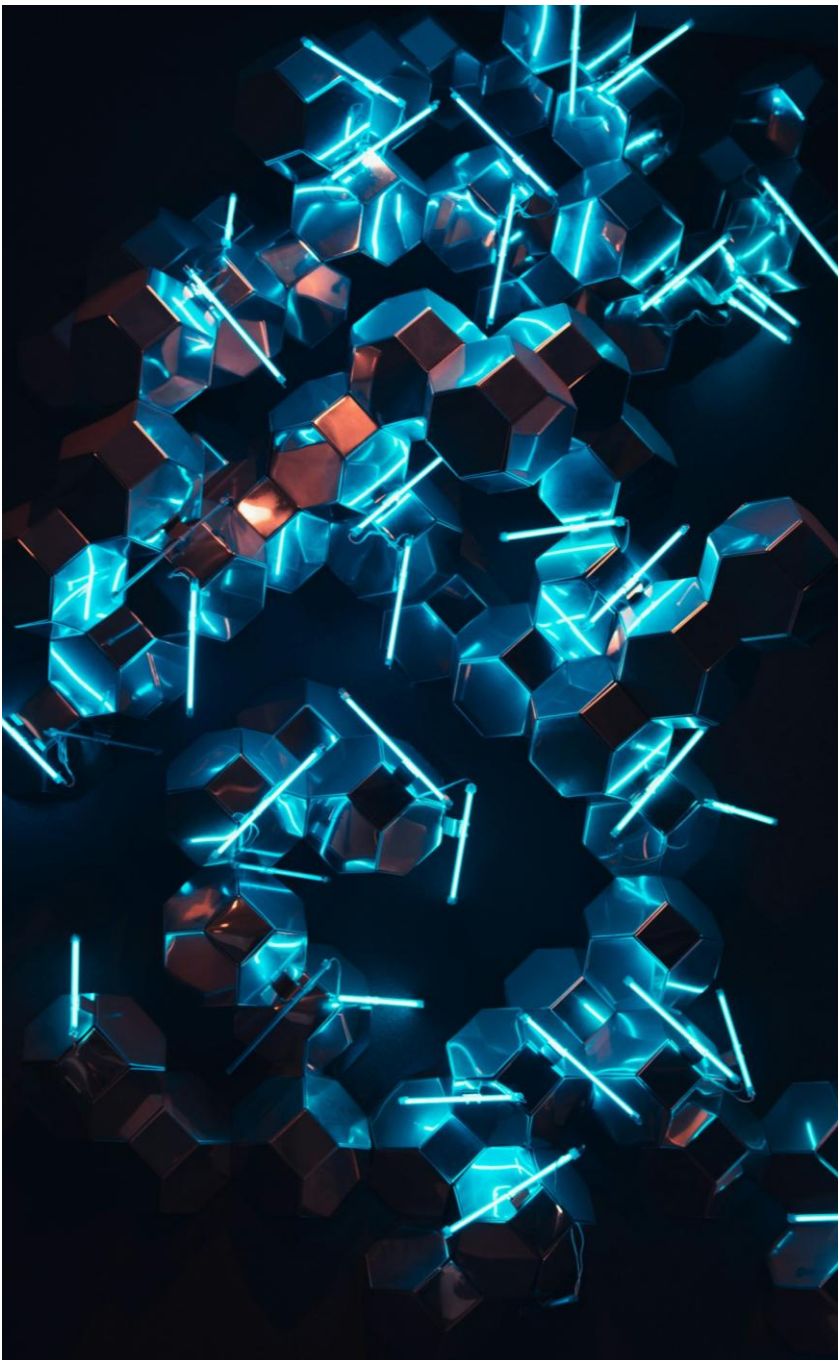
- Sufficiency of IP Assets
 - All IP required to operate business as currently conducted (and sometimes as planned)
 - Target may try to exclude non-material IP and off-the-shelf/open-source software
 - Buyers may seek to make this a fundamental representation





03

OTHER KEY REPRESENTATIONS



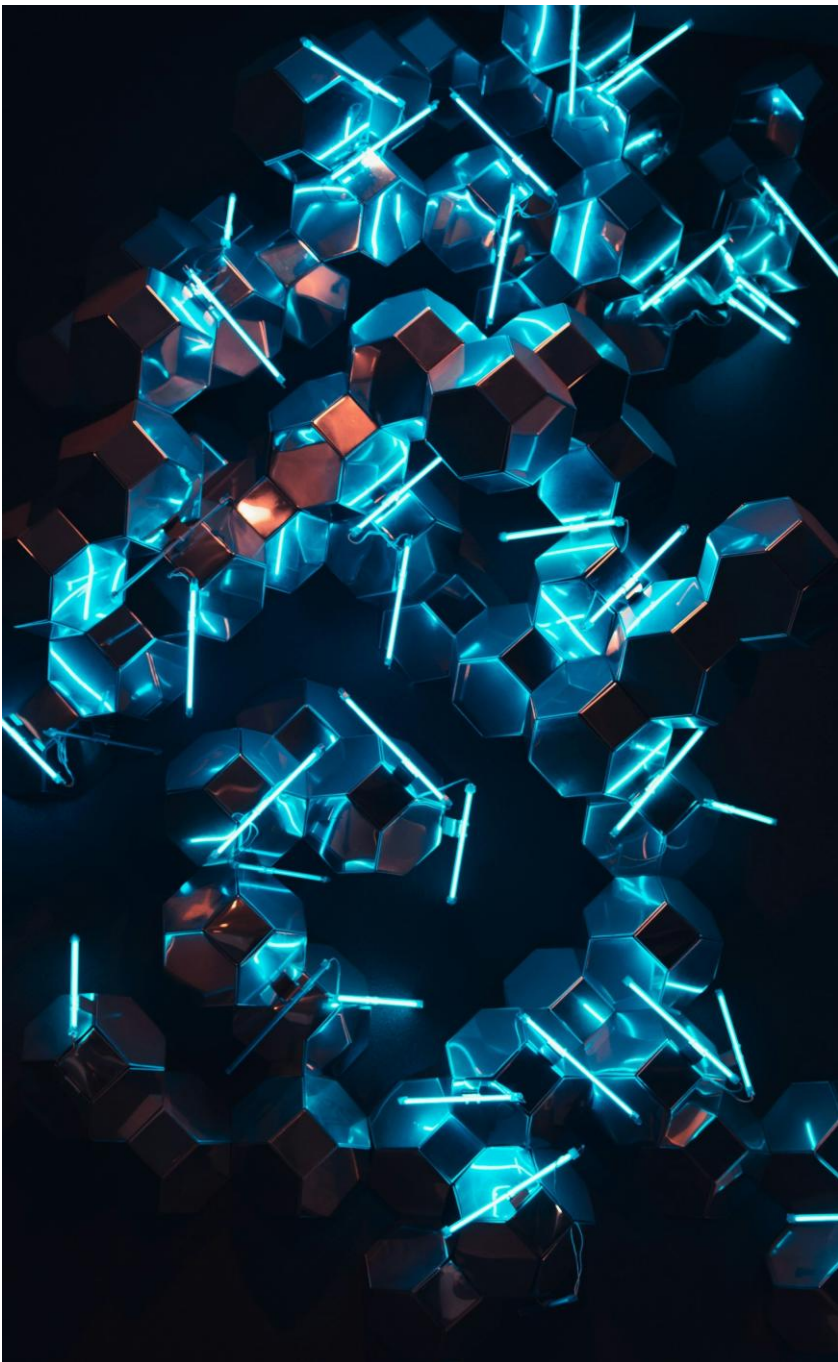
OPEN-SOURCE SOFTWARE USAGE

- Due diligence around open source can directly influence escrow amounts, price adjustments, or pre- and post-closing remediation
- Targets seek to limit to compliance with internal policies
- Buyers increasingly insist on representations covering:
 - Full disclosure of open-source components
 - Compliance with applicable open-source license terms
 - Confirmation that proprietary IP is not compromised by open-source code

DATA PRIVACY AND PROTECTION

- Compliance with privacy laws (e.g., GDPR, CCPA, GLBA, HIPAA)
- Adherence to target's privacy policies and contractual obligations
- Rights to use and transfer personal data
- No pending regulatory claims or inquiries





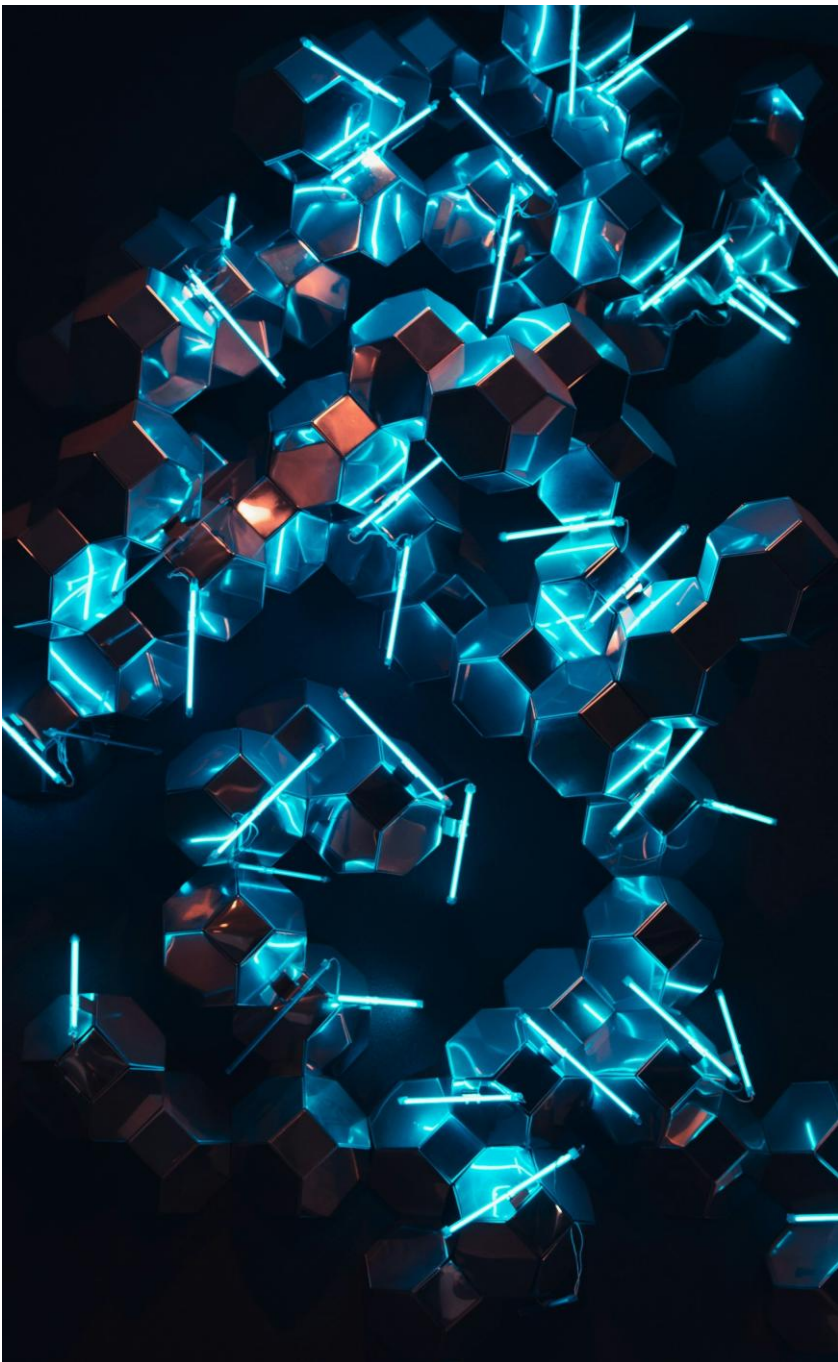
CYBERSECURITY AND IT SYSTEMS

- Reasonable security measures implemented
- Up-to-date security policies and procedures
- No breaches or security incidents requiring notification
- Sufficient IT systems for business needs

ARTIFICIAL INTELLIGENCE REPRESENTATIONS

- Representations should address risks such as:
 - Lawful use of training data, including proper licenses and consents
 - Use of open-source tools
 - Algorithmic accountability and reproducibility of outputs
 - Compliance with evolving AI regulations
 - Security of AI models, particularly if model is accessible via API





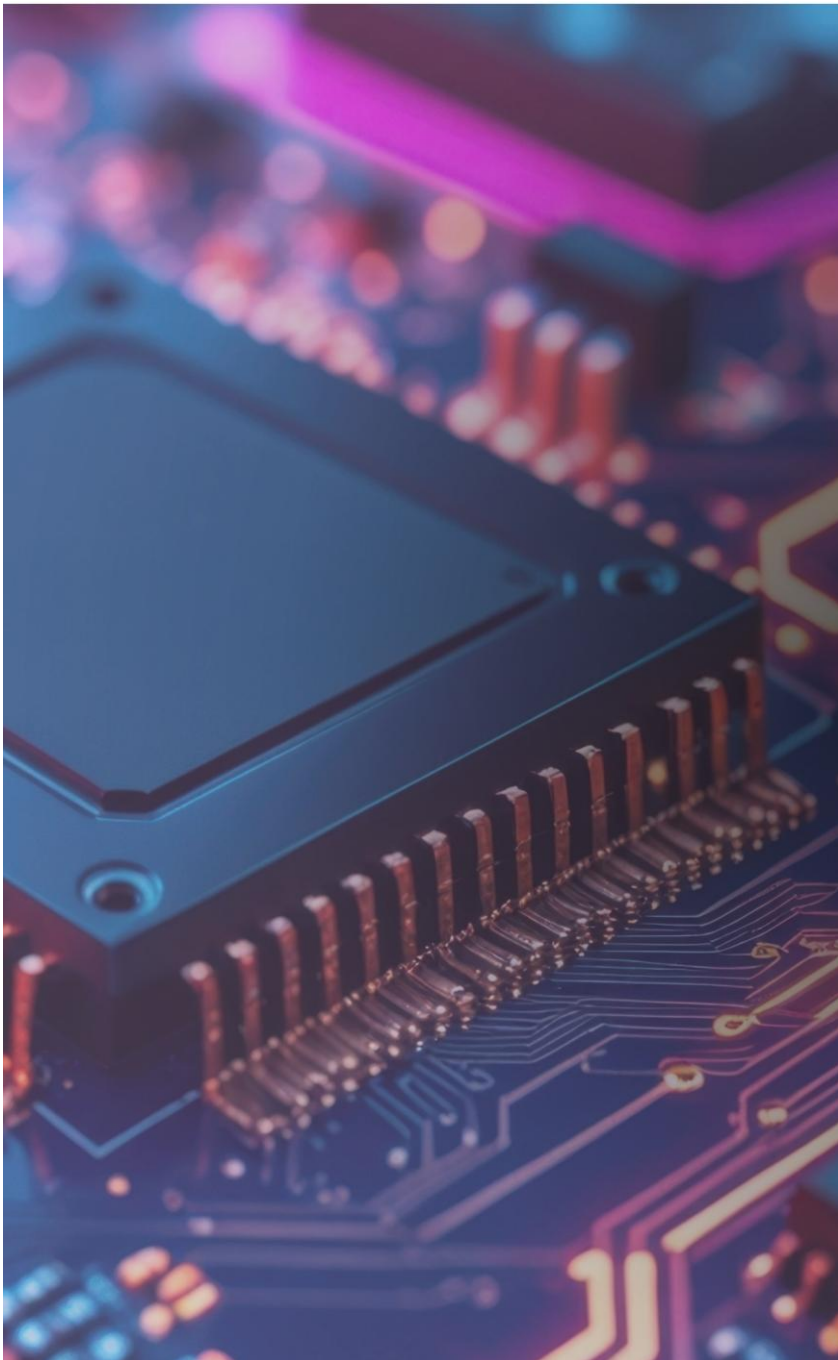
ARTIFICIAL INTELLIGENCE WARRANTIES

- Representations should warrant that the company:
 - Has rights to all training data
 - Complies with data use laws and restrictions
 - Has implemented measures to prevent manipulation or exploitation by third parties
 - Has not used generative AI to adversely affect ownership, validity or protection of any of its IP
 - Not marketed AI capability in a manner that is false or misleading
 - Not subject to any restrictions on its ability to retrain or commercialize its AI model



04

STRATEGIC CONSIDERATIONS AND BEST PRACTICES



STRATEGIC CONSIDERATIONS FOR BUYERS

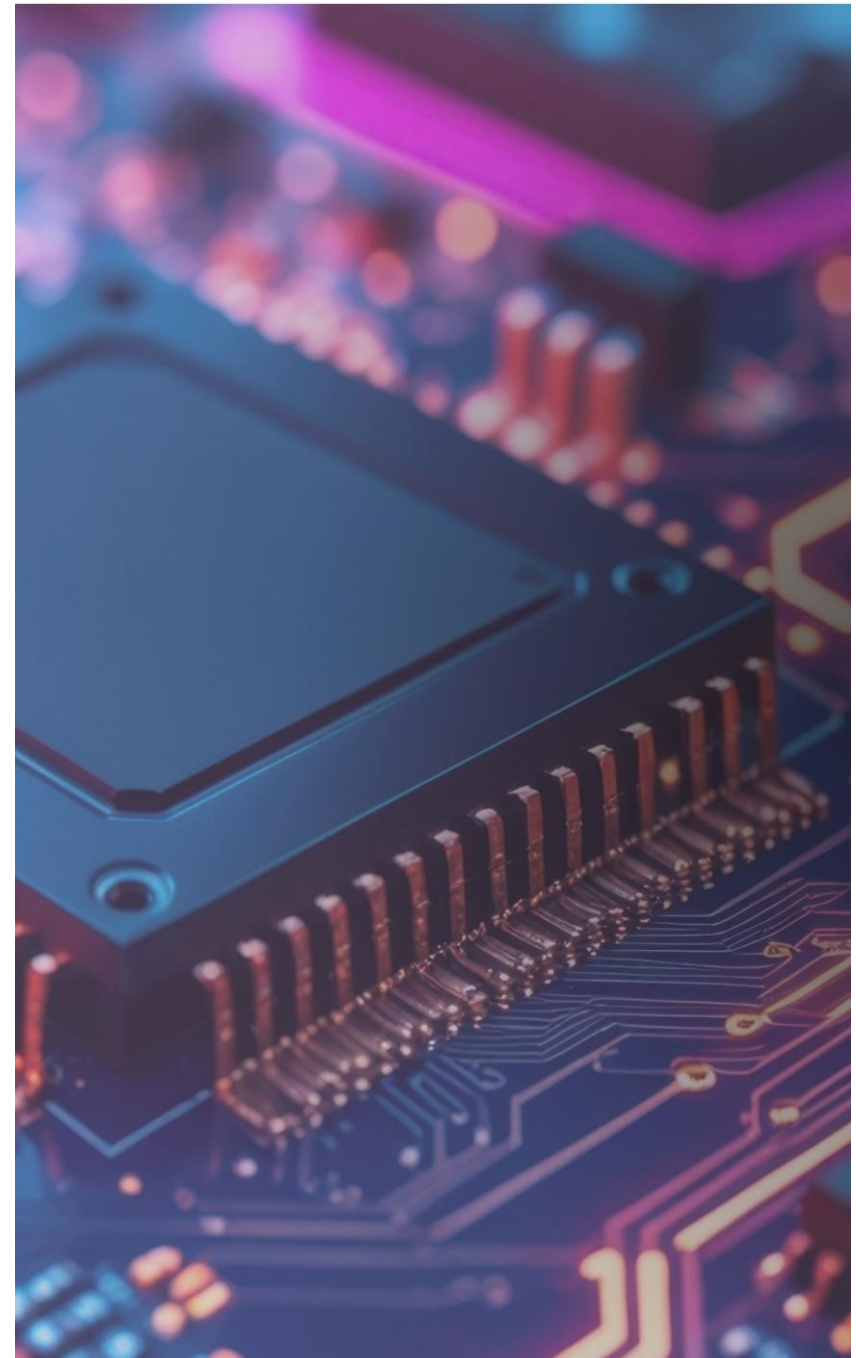
Protect against core risks such as IP ownership, technology functionality, data privacy and security

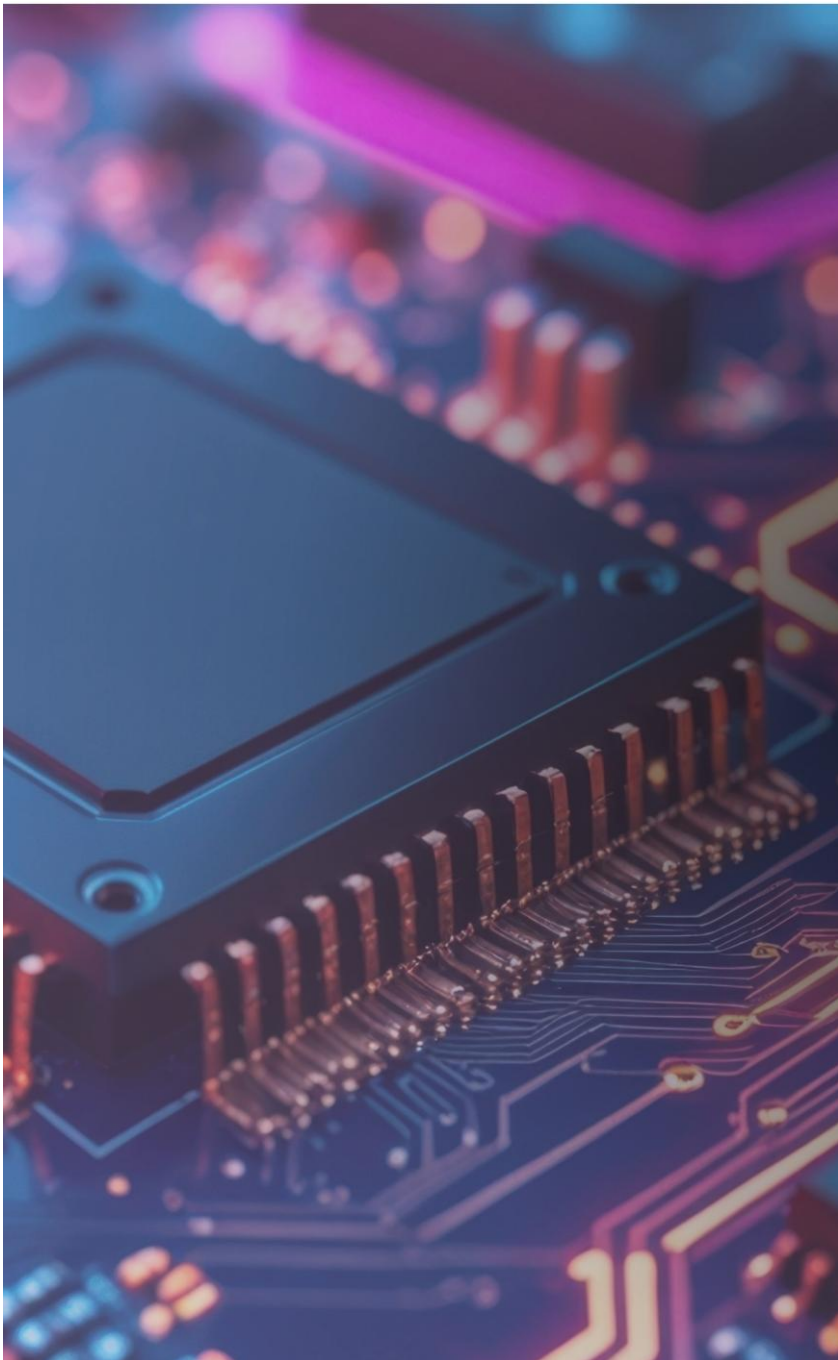
- Maximize diligence
- Ensure known issues are addressed pre-closing
- Secure strong protections for unknowns
- Seek extended survival periods

STRATEGIC CONSIDERATIONS FOR SELLERS

Minimize Exposure

- Conduct self-audit to identify gaps and shape disclosures
- Seek no-recourse or limited recourse deals
- Limit post-sale liability via survival periods, special indemnities, and financial caps and baskets





BEST PRACTICES IN R&W NEGOTIATIONS

- Prioritize real risks (e.g., ownership, rights, compliance)
- Align representations with diligence findings
- Factor in insurance
- Define terms clearly to avoid gaps and disputes
- Use qualifiers strategically



MAYER | BROWN

Mayer Brown is a global services provider comprising associated legal practices that are separate entities, including Mayer Brown LLP (Illinois, USA), Mayer Brown International LLP (England), Mayer Brown (a Hong Kong partnership) and Taull & Chequer Advogados (a Brazilian law partnership) (collectively the "Mayer Brown Practices") and non-legal service providers, which provide consultancy services (the "Mayer Brown Consultancies"). The Mayer Brown Practices and Mayer Brown Consultancies are established in various jurisdictions and may be a legal person or a partnership. Details of the individual Mayer Brown Practices and Mayer Brown Consultancies can be found in the Legal Notices section of our website. "Mayer Brown" and the Mayer Brown logo are the trademarks of Mayer Brown. © Mayer Brown. All rights reserved.