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Hot Topics in Technology Company Due Diligence: Open Source Issues

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Due Diligence: Preparing the Seller

Seller assess:

- Scope of usage of open source software (OSS), types of license agreements
- Compliance with license agreement terms
- Seller's OSS usage policies
- Internal use vs. redistribution
- Complaints, enforcement actions received
- Other questions in buyer's diligence list

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Due Diligence: The Buyer's Perspective

Buyer concern over

- So-called "viral effect"
- Derivative work and other copyright issues
- Patent licensing implications

Buyer consider

- Vigorous due diligence inquiry
- Manual review by buyer engineers or outside consultant
- Automated tools (Black Duck, Palamida)

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Deal Negotiation: Assessing Diligence

Buyer assess:

- Pervasiveness of OSS in Seller
- Actual use to which OSS is put
- Internal tools vs. distribution code
- Core functionality vs. edge or fringe use
- Ease of code replacement
- Expense of alternatives, short and long term
- Overall benefit vs. practical risk

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Deal Negotiation: Value Considerations

Buyer:

- Cause for reassessment of Seller value?
- Use as bargaining chip
- Consider strengths as well as weaknesses

Seller:

- Be proactive in disclosing, discussing
- Defend decisions to use OSS
- Demonstrate non-viral architecture
- Be prepared to remediate

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Deal Negotiation: Reps and Warranties

Buyer:

- Insert separate OSS reps/warranties
- See materials for sample language
- If concerned, create special indemnities, basket carveouts

Seller:

- Fully disclose OSS content, usage
- Negotiate reasonable exceptions, carveouts to reps/warranties

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Post-Closing: Integration

- **Assess usefulness, risk of OSS components**
- **Assess expense of code replacement (to extent not remediated pre-closing)**
- **Design and implement OSS plan and policies**
- **Beware differences in engineering cultures**
- **If necessary, delay R&D integration until viral issues resolved**
- **Audit OSS usage going forward**
- **Goal is not necessarily to eliminate OSS; goal is to understand and manage it**

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Post-Closing: Preparing the Seller

- **The buyer could be a seller some day!**
- **Conduct the integrated business with the expectation that OSS will be an issue in the next transaction**
- **Plan ahead**
- **Educate the technical work force**

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