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An overview of due diligence process Executed Before Open Sourcing Proprietary Source Code

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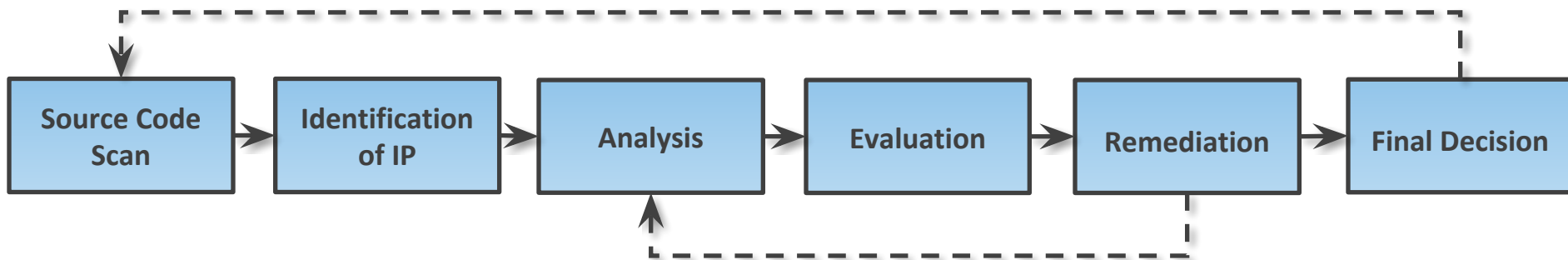
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Description

This presentation provides a generic process to follow when analysing proprietary source code that will be open sourced, in addition to offering some best practices in relation to the process itself.

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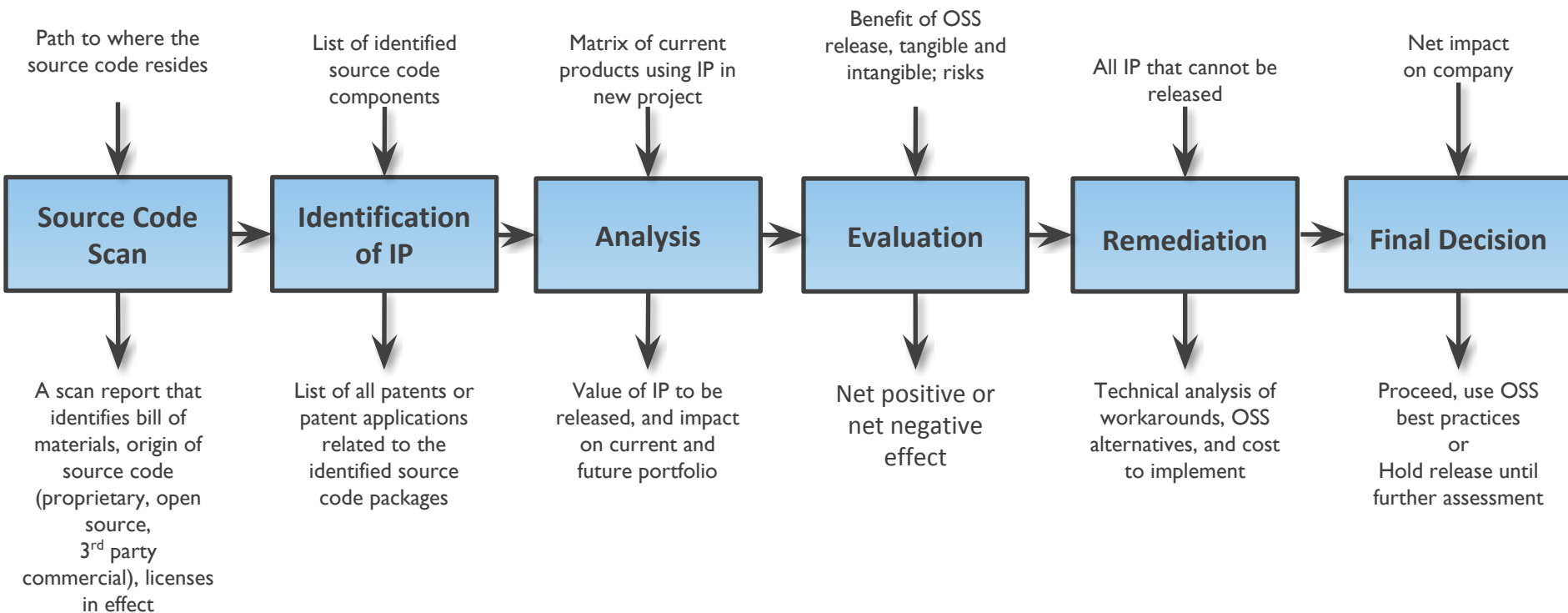# Standard Disclaimers

› I am not a lawyer and none of the material discussed or presented should be considered as legal advice.
› Please consult with your company's lawyers for your specific situation.

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Sample IP Due Diligence Process

Inputs and Outputs

Path to where the source code resides	List of identified source code components	Matrix of current products using IP in new project	Benefit of OSS release, tangible and intangible; risks	All IP that cannot be released	Net impact on company
↓	↓	↓	↓	↓	↓
Source Code Scan →	**Identification of IP** →	**Analysis** →	**Evaluation** →	**Remediation** →	**Final Decision**
↓	↓	↓	↓	↓	↓
A scan report that identifies bill of materials, origin of source code (proprietary, open source, 3rd party commercial), licenses in effect	List of all patents or patent applications related to the identified source code packages	Value of IP to be released, and impact on current and future portfolio	Net positive or net negative effect	Technical analysis of workarounds, OSS alternatives, and cost to implement	Proceed, use OSS best practices or Hold release until further assessment

Characteristics of the Process

› Must be a methodical, well-planned, and thorough process
› First time setup may be time- and resource-intensive
› Incremental due diligence requires less resources / time
› If the company goes through such a process periodically, it is a good idea to invest in some tools to make the process easier to manage

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Identify Origin and Licenses of Source Code

› Scan all source code packages
  › Proprietary
  › Licensed from a 3rd party
  › FOSS
› Produce a report that identifies origins and licenses of each source code packages
› The primary executor of this step is the Open Source Compliance Officer
› Ideally, the company maintains proper FOSS compliance practices and records and would generate an existing report, versus a full platform scan

Identify all IP in the Source Code

› The goal of this step is to identify all IP used in the source code components intended for open sourcing
› Not an easy process as it involves surveying all patents and patents applications and mapping them to the identified source code components
  › Manual and time consuming
  › Some COTS tools exist to facilitate this exercise
  › Companies that go through this process often develop their own supplemental tools to enable more automation into the process
› This step in the process is driven by the Legal team responsible for patent portfolio

Legal, Technical and Business Analysis

Technical Analysis

› Identify difference between current technology and patented technology to understand the type and value of patents to be made available

› Technical / Engineering leads drive this analysis

Legal Analysis

› Identify pending and resolved IP lawsuits related to patents in question

› Identify companies involved, and current claims that did not make it to court yet

› Identify the need in current products for IP protection from these patents

› Legal team drives this analysis

Legal, Technical and Business Analysis

› Identify potential market for products / services that could come out of the patents in question
› Identify current royalties, if any
› Identify the business risks from making the patents in question available; Identify how could competitors exploit that

Business P&L owner drivers this analysis

IP Remediation

› If IP is identified as a No-Go, evaluate the costs of working around it so that released code remains functional
› Common issues and remediation
  › **3rd party IP is licensed under a commercial license**
    › Re-negotiate terms of license to allow open sourcing
    › Clean-room implementation to work around IP
    › Locate an existing open source component that provides similar functionality
  › **Internal IP not suitable for redistribution**
    › Clean-room implementation to work around IP
    › Locate an existing open source component that provides similar functionality

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Final Decision

› If the decision is to open source, proceed according to best practices
› If the decision is to not open source, evaluate the extent of changes required and either terminate process with a NO-GO decision or proceed with remediation plan

Conclusion

› IP due diligence is a must-do step, and requires a well defined process and fast decision making

› It requires collaboration between Legal, Business and Technical teams

› It depends on:

  › Availability of a solid compliance program as a starting point to allow identification of software components, origin and licenses

  › Availability of proper IP inventory

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