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**OPEN SOURCE CHECKLIST FOR
IN-HOUSE COUNSEL**

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Note: The views expressed in this document are those of the author and are not meant to be construed as the statements of either Digidesign or Avid Technology, Inc.

Biographical Information

Heather Dembert Rafter is the General Counsel of Digidesign, a division of Avid Technology, Inc. Ms. Rafter is responsible for managing Digidesign's legal affairs. The company's hardware and software is used worldwide by individuals and companies who create digital audio content, from home music hobbyists to editors of feature films in Hollywood. Digidesign has received numerous industry awards, including a Grammy® award for Outstanding Technical Achievement and, more recently, an Oscar® statuette representing the 2003 Scientific and Technical Award for the design, development, and implementation of the Digidesign Pro Tools digital audio workstation.

Prior to joining Digidesign in 1994, Ms. Rafter was an associate at Gibson, Dunn & Crutcher in its San Francisco office and a member of its litigation department. While at Gibson, Dunn & Crutcher, Ms. Rafter represented a variety of media and high technology companies, including Accolade in *Sega Enterprises v. Accolade, Inc.*, 977 F.2d 1510 (9th Cir. 1992).

Ms. Rafter is active in the American Bar Association and is the Immediate Past Chair of the ABA's Section of Science & Technology Law. She is also past Chair of the Barristers' Intellectual Property Committee of the Bar Association of San Francisco. Ms. Rafter frequently lectures and writes on intellectual property, Internet and computer law issues.

She received her undergraduate degree from Princeton University, *magna cum laude*, and her J.D. from Columbia Law School, where she was a Harlan Fiske Stone Scholar. She is admitted to the bars of the State of California, the Northern District of California and the Ninth Circuit Court of Appeals.

Overview: This checklist provides an overview of procedures and issues that in-house counsel might want to consider with respect to use of open source code. It is not meant to be exhaustive and, in the event your company is considering use of open source code, independent consultation with counsel, particularly those who are specialists in this area, is highly recommended.

Attached to this checklist is sample attribution and license agreement language for use in connection with licensing of open source code.

1. Establish a policy regarding use of open source code
 - a. Is it permissible? Note: As a practical matter, it may be impractical or unwise to ban all use of open source code; however, the determination should be made on a case-by-case basis in consultation with engineering and the legal department, which should be aware of and have to approve all uses of open source code.
 - b. If an engineer intends to use open source code, who is the person within the legal department to be contacted?
2. Routinely audit to ensure that the in-house legal department is aware of ALL uses of open source code, either as a development tool or in the code base of a product used internally or shipped to customers.
3. Educate the engineering and IS departments regarding open source code and the need to apprise legal of any use. Engineers should keep a log of each open source software module used and print a copy of the license agreement that applies to it at the time of download. This information, in turn, should promptly be disclosed to the legal department.
4. If open source code is being used, need to determine:
 - a. How is the code being used?
 - i. If in development environment, less likely that there are “flow-down” (i.e., relicensing) requirements
 - ii. If used within product, is open source code used directly in code base or linked?
 - iii. Some development tools include code libraries that are incorporated into products created with them.

- b. How reliable is your licensor?
 - i. Some open source licensors are not in the business of licensing software, so they may not adhere to professional standards in clearing the rights to their code.
 - ii. Beware of authors who have authored code that might be a work for hire (moonlighters, university employees, etc.).
 - iii. Be as careful with clearing rights in open source code as you are with other, proprietary components that you get under inbound licenses.
- c. What are the license requirements?
 - i. It's helpful to first classify type of license to understand general rules. License types may include: Apache, BSD, GNU Lesser General Public License (LGPL), GNU GPL 2.0 (also referred to as the "Greater GPL") and other variations.
 - ii. Next step is to review license and understand specific rules governing each license.
 - 1. Are there "flow down" (relicensing) requirements?
 - 2. Is there potential for any viral impact (more likely with the "greater" GNU GPL)?
 - 3. What attribution or other marketing requirements exist?
 - 4. If you are a software company, does use of the open source code require changes to end user license agreements?

Note: Each and every license accompanying use of the open source code should be carefully reviewed to ensure full understanding and compliance with its terms. However, the meaning of commonly used open source agreements may be affected by custom and practice in the industry, so consult an expert.

Sample Attribution Language to insert in marketing materials or the product “About Box”:

© 2003 [insert your company name]. All rights reserved.

This product includes software developed by the Apache Software Foundation (<http://www.apache.org/>). Those portions © 2000-2003 The Apache Software Foundation. All rights reserved.

Portions of this product are covered by the GNU Lesser General Public License. Those portions © 1991, 1999 Free Software Foundation, Inc.

This product includes software developed by the Open SSL Project for use in the OpenSSL Toolkit. (<http://www.openssl.org/>). Those portions © 1998-2003 The OpenSSL Project.

The language above combines a copyright notice for your company’s product (first line) with examples of flow-down notice requirements for several popular open source agreements.

Sample paragraph to add to your End User License Agreement (“EULA”):

Open Source Portions. Certain portions of the Software (“Open Source Components”) are not licensed under the terms of this Agreement, but are instead licensed under the terms of applicable open source licenses, such as the BSD License, Apache License or the Lesser GNU General Public License. Company grants you no right to receive source code to the Open Source Components; however, in some cases rights and access to source code for the Open Source Components may be available directly from Company’s licensors. **[Upon request, Company will identify the Open Source Components and the licenses that apply to them.] [Information identifying the Open Source Components, and the licenses that apply to them, is available on Company’s Web site at _____].** Your use of each Open Source Component is subject to the terms of each applicable license. You must agree to the terms of each such applicable license, or you should not use the Software.

This language represents a pass-through of rights to open source components. Keep in mind that although you may pass through different licensing terms, there may be an expectation that you, as the Company, will stand behind the entire product when you license it to customers or if you sell the rights to an acquiring entity. In-house counsel should be aware of this potential risk and consider ways to minimize it, such as through due diligence (see Section 4(b) above) and careful consideration of any implied or actual warranties you may be providing.