

WHITEPAPER

The Next Generation of In-House Counsel: Emerging Legal Responsibilities Across Product and Digital Transformation

FOSSA

TL;DR

Open source programs are an emerging and critical part of a company's software strategy. Industry leaders in tech like Microsoft, Google, Twitter and Netflix, as well as industry leaders in more established industries like Samsung, Comcast, and Intel have all established open source program offices (OSPOs). Outside of these giants, over 50% of "large" companies across tech, consumer electronics, financial services and telecom are establishing or planning to create an OSPO.

The key pillars of a successful OSPO are:

- **COMPLY**
Be a responsible member of the open source community.
- **CONTRIBUTE**
Build in a process for your engineering team to contribute to current open source projects.
- **CARE**
Give back to the community, whether it is through publishing open source projects, sponsoring open source developers, or hosting open source events.

The rapid evolution of software development and technology across industries has changed corporate legal functions—especially the shape and responsibilities of the in-house counsel. Areas requiring legal review have grown and increased in-house counsel responsibilities, but also offers the opportunity for Legal to have a more leveraged business impact. This increase in scope of role and responsibility is often spread across the legal team, which means that increased efficiency and new skill development are crucial for continued success.

Understanding the specific (and different) needs, tools and methods of IT, DevOps, Design / UX, Software Engineers and Product Managers is essential to the success of the Product Counsel.

One of the emerging domains the General Counsel (GC) must support is engineering and product development. Not only is the GC focused on bringing efficiency into the legal organization, but he / she is also embedding a "Product Counsel" within Engineering, IT, Product, and Design teams to help make crucial, risk mitigating decisions that shape the strategic direction of the company's product.

Why does legal need to focus on a partnership with your internal tech teams?

Regulations Are On the Rise

Laws around IP, Privacy, and Security are finally catching up to the previously uncharted waters of the still vastly unregulated tech industry. New laws such as GDPR and precedents in IP litigation that favor open source licenses over commercial practices—combined with an increase in security policies (SOC II, ISO 20071, etc.) in light of data breaches—expands the subject matter expertise legal teams must have to properly advise their internal clients. Not only that, but this rise in regulations means in-house counsel’s internal clients have extended beyond finance, HR, and sales to go deep into product, design, and engineering.

“Product lawyers work with clients to create compelling risk-managed user experiences”

General Counsel | Global Product at eBay

Embedded Legal Teams

This increase in responsibilities and subject matter expertise, as well as an increase in internal clients are leading to the decentralization of legal teams. Legal strategy is a crucial element to adopting the correct business strategy—from emerging legal disciplines that include how to designing a user experience that

includes appropriate disclosures, to contributing to the open source strategy, to informing what types of customer data to store—all in addition to staying current in the more “traditional” realms of due diligence, mergers, and sales contracts. This means legal teams are increasingly partnering with other business units, serving to shift the perception of legal from a cost center to a profit-generating center.

In some companies, the in-house legal teams are no longer a centralized unit but are instead integrated amongst key business units (including sales, marketing, and engineering). In companies with large enough legal teams, the general counsel is leading teams who specialize in different internal clients and that increasingly includes a “Product Counsel” focusing on Engineering, Product and Design teams. The best description of this “new type of lawyer” and their responsibilities are well described by Adriene Go (General Counsel, Global Product at eBay) who wrote that “Product lawyers work with clients to create compelling risk-managed user experiences.”¹ This is key in shifting legal efforts from a reactive approach to risks, emergencies, and litigation efforts to a proactive and preventative approach—steering the company towards a more strategic risk profile.

Everyone Is a Software Company

Let’s look at a few examples: McDonald’s, L’Oreal,

¹ Go, Adrienne. “Product Counsel: How to Manage Risk AND Create a Delightful Customer Experience.” LinkedIn, 7 June 2017, www.linkedin.com/pulse/product-counsel-how-manage-risk-create-delightful-customer-go/.

and JetBlue.

Not names you would associate with software, yet both L'Oréal and McDonald's have made strategic tech acquisitions to improve their personalization strategies. Taking it one step further, JetBlue has launched their own VC firm in order to help fund further technological advancements in travel.

If your answer is “no” when someone asks if you are a software company, consider your answers to the following questions:

- Does your company have an app that is used by either your customers, partners, or your employees?
- Does your company have a software or engineering team in-house? Outsourced?
- Does your company have an IT team with a software development skillset?
- Do you have an internal portal you log in to in the course of your work day?
- Do you have your own internal database?
- Do products you build (cars, radios, toys, refrigerators, etc.) have any software on them?

If the answer is yes to any of these questions, you are indeed a software company.

Taking this one step further, you are likely also distributing software. Let's go back to McDonald's. It is a franchise, so the point-of-sale system they distribute to each franchise to take orders on is

(hypothetically) distributed software—even if it never leaves their company. They might not have done the initial development of the software themselves—but even so, it was likely customized for their use and then distributed.

Apps and partner portals are other great examples. Consider the McDonald's apps on the various application stores and platforms, distributed to their customers. Or any portals their suppliers might use to handle logistics and ordering or billing. In addition to selling Big Macs, McDonald's is in the software business.

“Partnering with a tech team requires a different approach, and traditional processes need to be examined in order to get the desired risk and compliance outcomes.”

Increase of Technology Adoption

In order to embrace this myriad of responsibilities as well as improve efficiency, more and more legal teams are leveraging technology to help streamline processes and workflows. Legal operations teams are becoming more prevalent, and technology to help automate workflows from contract management to e-discovery to open source management are increasingly adopted by legal teams. This empowers legal teams to focus on the 80 / 20 and help leverage their expertise in influencing business strategy instead of managing manual processes.

What makes partnering with tech teams different?

Frequently working with tech teams can present a challenge to people without engineering backgrounds. Unlike departments like sales where motivations are clear and predictive of behavior, engineering teams are often motivated by intangibles—like understanding a new challenge. Sometimes the approach to solving technical challenges can be largely academic, so understanding (or caring about) legal risk is not a priority. Also, unlike sales or M&A teams who need legal approval for contracts (indicators of success), engineers do not always feel as though they need legal counsel in order to succeed.

Traditionally (though admittedly a generality), engineers are more motivated by the technological challenge than the business challenge. Completing process checkboxes to signing new customers and entering new partnerships are less interesting and passing security certifications is less compelling than building a new feature or product.

Additionally, engineering teams are often held to different standards. Engineering and technical teams often work on a different schedule than other business units. Finance, Sales, and Marketing are often focused on quarterly goals. Technical teams, on the other hand, may have quarterly goals and deadlines especially at larger organizations, but often are working in sprint cycles where their goals and

priorities can shift on a more regular basis.

This difference in motivations and working style means partnering with a tech team requires a different approach, and traditional processes need to be examined in order to get the desired outcome when partnering with a technical team.

How to be a Good Partner

Understanding the Priorities and Pains of Your Potential Partners

Know who you're working with, and the types of problems each team deals with. Partner with specific teams to get internal champions to advocate for any product changes or processes deemed necessary in order to comply with legal standards or mitigate risk. This shifts the perspective of legal from being a reactive roadblock to a proactive partner.

- **IT**
IT can own everything from ensuring your network is up and running to fixing that annoying problem with your computer. Most likely, they're the ones ensuring security compliance across the organization. If you are advising engineering on complying with data security measures, this might be the team you need.
- **DevOps**
DevOps can also own security. Their number one priority is compliance with security, privacy,

and legal policies while ensuring developer productivity. They are optimizing workflows and processes across developer teams.

- **Design / UX**

Design and UX create the user's experience. If you are trying to figure out where is the best place to disclose information like GDPR, for example, they're the team you need to partner with.

- **Software Engineers**

Software engineers or developers are building the technology that powers your company whether it's your product, internal tools, or the infrastructure that keeps the digital assets of your company running.

- **Product Managers**

They are the ones that help organize and QB all the product development initiatives at your company. They help prioritize what problems get solved and when and are likely to be one of your biggest allies. They share more business context and can help you prioritize initiatives to tackle key legal objectives like open source due diligence reports.

Emerging Trends in Corporate Legal Service Delivery

- 1** A shift in the perception of the legal function from a cost center to a profit driver
- 2** De-federalization of the central legal department into the business
- 3** Greater collaboration with other functions, with some legal departments merging with other functions
- 4** Growth of competency centers for particular legal specialization for business / industry
- 5** Re-structuring the legal department to reflect the needs of the different parts of the business, rather than the company's structure itself
- 6** Greater, smarter use of technology

Source: DELOITTE CONSULTING LLP. "The Legal Department of the Future: How Disruptive Trends Are Creating a New Business Model For In-House Legal." 24 May 2017.

Know the Product, Know the Space

The better you understand the product, the market, and your customers the easier the "why" becomes. Understand why your customers want your solution, what competitors are doing, who the big players are, and who is new in the playing field. Being well acquainted with the market and understanding the effect of legal obligations on different teams can help you appropriately measure risk and trade-offs about key product decisions, and communicate the cost of

different tradeoffs between risk, agility, and market pressures effectively.

“Understanding the tech teams’ process helps you design policies that are compatible with their working style.”

Understand Their Workflow

Understand how technical teams work. They move fast and don't want to put development on hold to create an inventory of open source components or audit their database for Personally Identifiable Information (PII) exposure. There are a few key concepts and ideas you should be familiar with in order to best work with technical teams:

- **The Agile Method**

Most technical teams today operate using Agile Methodology. Instead of planning an entire project's trajectory up front (the waterfall method), teams are now operating in sprints (brief periods as short as 2 weeks). Each sprint cycle allows new information (from customers, the market, technical issues) to be incorporated into the evolving product design in order to hit the end project goals in the best way possible. This adaptability (or agility) can be a great method for delivering the best product in a timely manner. However, it does make it hard to incorporate legal advice far in advance.

- **CI / CD**

CI/CD means continuous integration/continuous deployment or continuous delivery. Essentially it means that engineering teams are continuously shipping code into production (publishing new updates to your customers). Amazon Web Services (AWS) has stated they deploy code to production every 11.7 seconds, and online marketplace ETSY makes more than 50 deploys a day¹. Understanding the tech teams' process helps you design policies that are compatible with their working style. Something like developing a list of open source dependencies by hand to ensure compliance with their licenses becomes a near-impossible ask when you understand that new components may be added as frequently as every 11.7 seconds!

“In a recent study done by Red Hat, over 90% of companies stated open source software was of some importance to their company. Open source software is used on average in 92% of software projects today.”

Understand the Projects they are Working on

Part of being a good partner is understanding what your teams are working on. Here are some concepts that are good to be aware of, especially because

¹ Null, Christopher. “10 Companies Killing It at DevOps.” TechBeacon, TechBeacon, 22 Jan. 2019, techbeacon.com/devops/10-companies-killing-it-devops.

they contribute to your understanding of who to partner with to deliver a high quality, risk-managed user experiences.

Backend / Frontend

When engineering teams reference front-end development, they are typically discussing portions of your products / apps that are user-facing. Backend generally refers to the behind-the-scenes hardware and software components. Things like infrastructure and databases frequently fall into this category.

Legal support of front-end engineers can look like:

- Understanding and advising when to disclose what information you are tracking based on GDPR policies
- Understanding the legal requirements of capturing payment information and processing payments
- Understanding product stability and helping to craft SLAs for enterprise agreements
- Understanding the obligations of the open source components that are being leveraged

Legal support of backend engineers can include things like:

- Storage and deletion of Personally Identifiable Information
- Data Processing Agreements
- Understanding the obligations of the open source

components that are being leveraged

Open Source

Open source is a category of software that is publicly available. In a recent study done by Red Hat, over 90% of companies stated open source software was of some importance to their company². Open source software is used on average in 92% of software projects today³. Unlike proprietary software, there is not usually a price tag associated with its use. Instead, open source software is licensed to include obligations for use, especially when it comes to software distribution. Legal teams should be aware of the open source components being leveraged and ensure the legal obligations of the licenses to remove risk around IP infringement. New licenses are constantly being authored, so keeping up-to-date with the obligations around licenses can be a full-time job! Companies like Cisco are opting to hire legal experts whose primary function is to serve as Open Source Counsel. Many engineers also contribute to open source projects, so ensuring they are contributing correctly (without sharing any of your company's IP) is also a key legal objective.

2 "Enterprise Open Source Report 2019." Enterprise Open Source Report 2019, RedHat, 15 Apr. 2019, www.redhat.com/it/enterprise-open-source-report/2019.

3 Tidelift. "The Tidelift Guide to Managing Open Source." Feb. 2019. https://cdn2.hubspot.net/hubfs/4008838/Resources/The_Tidelift_guide_to_managing_open_source.pdf

Application Programming Interfaces (APIs)

APIs are methods of connecting different software interfaces with each other. An API may allow you to pull data from one software platform or component or integrate two different tools together. They help build more efficient workflows, connect multiple tools together, and often provide data from one system to another. Legal teams should be aware of APIs, especially when they are built to access PII. When armed with an understanding of technology, particularly software developed by your company, in-house counsel is in a unique position to help drive product innovation while also proactively mitigating the company's risk profile. Helping build processes into the engineering development processes to ensure compliance with open source software and data security and processing empowers your team to gain a competitive edge—whether it's being able to get to market with new products faster or ensuring risk is not a limiting factor in your company's valuation.

About FOSSA

FOSSA can help to achieve all of these best practices. By providing automated, real-time licensing and vulnerability management for open source code no matter where it exists within your software stack, FOSSA helps organizations minimize the risk and maximize the benefit of open source. Request a demo to learn more, or import FOSSA from GitHub to start analyzing your open source dependencies today.