

OPEN MEDIA COMMONS WORKSHOP – LEGAL FRAMEWORK

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Recap OMC Principles

- Innovation flourishes through openness - open standards, reference architectures and implementations
- All creators are users and many users are creators
- Content creators and holders of copyright should be compensated
- Respect for users' privacy is essential
- Code (both laws and technology) should encourage innovation

OMC Legal Framework – Goal is to Facilitate OMC Objectives

- Commitment to Ideal of Open Royalty Free DRM Solution
- Open, Transparent, Community Driven Process
- Streamlined Specification Development
- Parallel Open Source Reference Implementation Development
- Public Forum or “Commons” to address IP

Interim Legal Framework

- Sun initial OMC host
- Specification available under OMC Terms
- Plan to release implementation code as open source under CDDL
- Online public forum to be used for feedback on draft specifications and other aspects of OMC

Aspiration – To Lessen Overhead and Increase Openness of Spec Development

- Minimize traditional formal standards body processes and agreements
- Consider feasibility of a more community oriented web based “open source” type process
- Encourage open source development of reference implementation code in parallel
- Encourage vetting of hurdles to royalty free open standard in public online forum
- Explore possibility of using patent commons approach to publicizing non-assert commitments

Reality – There are Challenges to Alternative Spec Development Approaches

- Creating trust among participants that their objectives are in line
- Addressing legal requirements with minimal process formality
- Perceived risks of comments in public forum
- Coordination of activities such as finalization of specs and IP due diligence
- Agreeing on IPR framework to achieve OMC objectives

OMC Organizational Framework Options

- Very Informal—One End of Spectrum
 - > Loosely organized initiative; no OMC legal entity
 - > Spec released to “community” for review and feedback using online public forum
 - > Minimal commitments/agmts or formal structure
- OMC Non-Profit Entity
 - > OMC legal entity with minimal central administration
 - > IPR policy and member/contributor agreements
 - > Online forum to finalize spec and hand off to SDO
- Existing Consortium Drives Effort
 - > Leverage existing IPR policies, processes & agreements

Possible Intellectual Property Rights (IPR) Framework

- Ideal:
 - > open, RF standard
 - > minimal administration and overhead
 - > Sufficient IPR certainty
- Plan to use creative approaches
- A range of options exist to answer IPR questions:
 - > What IPR commitment is requested/required?
 - > How?
 - > When?

Possible Intellectual Property Rights (IPR) Framework--What

- Spectrum of options exist
 - > Royalty free license vs covenant not to sue
 - > All patent claims vs “essential” claims
 - > As applied to your contribution only or whole spec
 - > Subject to reciprocity
 - > Terminates if other party files patent suit against:
 - Any implementer of spec
 - Specific contributor to spec

Possible Intellectual Property Rights (IPR) Framework—What

- One End of Spectrum:
 - > Blanket Waiver or “No First Strike”
 - > Covenant not to assert any patents held by covenanting party against implementation of spec
 - Not limited to “essential” patent claims
 - Point is to eliminate uncertainty and burden of identifying patents
 - > Subject to other party not filing patent infringement suit against any spec implementation
 - Allows use of patents to protect all users of the spec

Possible Intellectual Property Rights (IPR) Framework—What

- One End of Spectrum (Cont'd):
 - > Sun Open Document Format (ODF) Example:
 - > “Sun irrevocably covenants that, subject solely to the reciprocity requirement described below, it will not seek to enforce . . . patents against any implementation of [ODF] v1.0 Specification, or of any subsequent version thereof . . . in which development Sun participates to the point of incurring an obligation, as defined by the rules of OASIS, to grant (or commit to grant) patent licenses or make equivalent non-assertion covenants.”
 - > “Notwithstanding the commitment above, Sun's covenant shall not apply and Sun makes no . . . commitment not to assert . . . its patent rights against any . . . entity that . . . seeks at any time to enforce . . . patents . . . against any [ODF] implementation.”

Possible Intellectual Property Rights (IPR) Framework—*What*

- More Traditional Models for RF Spec Development
 - > Unless participant withdraws (or where RAND is an option unlike here, identifies patents not offered RF) by certain trigger event, commit to
 - > RF license of essential claims, or
 - > Non-assertion covenant
 - > Examples
 - > W3C Patent Policy; Draft UN/CEFACT IPR Policy
 - > OASIS IPR Policy January 20, 2005
 - Disclosure of known essential claims is mandatory for Tech Comm
 - In addition, obligation to license essential claims RF or covenant not to sue, with reciprocity optional, unless timely formal withdrawal

Possible Intellectual Property Rights (IPR) Framework--How

- Unilateral Pronouncements
 - > Encourage voluntary patent statements like Sun's for Open Document Format (ODF)
 - > Encourage consideration of “patent commons” approach (e.g., OSDL Patent Commons Project)
 - > Patent pool and/or clearinghouse for broad non-assertion covenants to protect implementations of spec
 - > e.g., IBM's donation of 500 patents for use with OSI approved open source software
- Traditional IPR commitment in member agreements
 - > To license essential claims RF or covenant not to sue

Possible Intellectual Property Rights (IPR) Framework--When

- Range of options exist
 - > Highly informal: spec is vetted in community forum with no formal commitment to royalty free licensing or non-assertion covenants until end of process
 - > Moderately informal: feedback and contributions accepted at any time once there is agreement to grant RF license in essential claims in party's contributions
 - > e.g. OASIS feedback grant: “You covenant to grant a patent license under any patent claims . . . that become Essential Claims because of the incorporation of such Feedback into the [OASIS Standard] on terms consistent with [OASIS RF Mode license requirements].”
 - > e.g., Apache Individual Contributor Agmt V2.0

Possible Intellectual Property Rights (IPR) Framework--When

- Range of options exist (Cont'd)
 - > Traditional Consortium Model
 - > Up front commitment to royalty free licensing of essential claims in party's own contributions (at least for spec development purposes) as a condition of participating in spec dev committee
 - > Even broader commitment to RF licensing of all essential claims—not limited to your contributions—may be required:
 - Up front to participate
 - At some later point—e.g., when spec declared final if proper withdrawal not made before that time
 - > Formal member, participation or contribution agreements necessary

Possible Intellectual Property Rights (IPR) Framework—Copyright Grant

- Primary focus of IPR policy is patents
- In addition, copyright in contributions to specification must be addressed by either:
 - > Broad license to modify and incorporate into spec and publish and distribute spec
 - > Sample code contributions as part of spec must be properly licensed for use in implementing spec
 - > Assignment of joint ownership interest may be considered if spec is to be donated to consortium or standards body when final
- Permissions from all copyright owners required

Open Source Reference Implementations

- Sun is making certain Project DReaM code available as open source under Sun's Common Development and Distribution License (CDDL)
 - > Mozilla Public License 1.1 Derivative
 - > OpenSolaris licensed under CDDL
 - > Broad copyright license to copy, modify and distribute
 - > Modified CDDL source must be made available under CDDL if the modified CDDL binaries are distributed externally
 - > Bundled code not derived from CDDL code may be distributed under a different license

Open Source Reference Implementations

- CDDL (cont'd)
 - > Includes an express patent license
 - > To the Original Software from the Initial Developer
 - > To modifications from the Contributor who made the modifications
 - > Requires patent peace reciprocity
 - > License terminates if licensee asserts patent infringement claim against Initial Developer or Contributors relating to relevant CDDL code and does not withdraw claim within 60 days of notice of intent to terminate license
 - > CDDL is OSI approved, commercial friendly and addresses need for greater patent certainty

Antitrust Considerations for Industry Initiatives

- Tension between
 - > Selection of one standard over other standards, and
 - > Competitive benefit of standardization (e.g., lower cost, more vendors)
- “Rule of Reason” applies, which means the pro-competitive argument should be more persuasive
- Open participation and maximum transparency should be encouraged
 - > All voices heard
 - > Objective bases for decision making

Antitrust Considerations for Industry Initiatives (Cont'd)

- Not a forum for discussion of prohibited topics among competitors such as:
 - > Pricing
 - > Costs
 - > Market segmentation
- No express targetting of competitors
- Follow guidelines for appropriate information sharing—reasonably required for purposes of org
- Certain IPR policies may require legal review such as patent pooling arrangements

We Want Your Feedback

- Submit feedback to
 - > <http://www.openmediacommons.org/forums/>
- We'd like your feedback on the proposed:
 - > Framework
 - > Governance Models
 - > Participation and Contribution Agreements and Terms

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