

Source: ETSI (Legal Advisor)

Title: Consolidated Comments on the OMA Co-operation Framework

Agenda item: 8

Document for:

Decision	
Discussion	X
Information	

1 Introduction

Under Action OP12/4 the Organizational Partners legal representatives were requested to provide their comments on the draft Framework Co-operation document prepared by OMA [3GPP/OP#12(04)08r1].

Whilst it was noted that the Co-operation framework document:

- main objective is “to presents guidelines to serve as the basis for establishing the cooperative efforts” between the Open Mobile Alliance Ltd. (“Open Mobile Alliance”) and the 3rd Generation Partnership Project (“3GPPTM”) and,
- is intended to be a unilateral document to assist OMA and not intended to place any obligations on 3GPP,

the 3GPP Organizational Partners delivered comments mainly highlighting lack of specificity in drafting.

These comments have been consolidated in the table below.

**3GPP/OP#13 Meeting
Cancun, Mexico
22 April 2005**

3GPP/OP#13(05)09
31 March 2005
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1. DEFINITIONS	No Comments
<p>(a) "Work Areas" mean the agreed work areas noted in Exhibit A, and as modified from time to time by mutual decision of the parties.</p> <p>(b) "Contact Persons" mean the persons noted in Exhibit B, as may be modified from time to time by either party through notice to the other party.</p> <p>(c) "Contributions" mean any work, whether pre-existing or newly created or prepared within a Work Area under the auspices of the host organization, which may be encumbered by Intellectual Property Rights ("IPR"), as defined below.</p> <p>(d) "Documents" mean copies of working documents and drafts within the Work Areas as defined above, the method of access which is noted in Exhibit C, and which may be modified from time to time by either party by notice to the other party. This Co-operation Framework will apply to all documents exchanged even if accessed in a manner other than as noted in Exhibit C.</p> <p>(e) "Partners" mean the present and future organizational partners of 3GPP. The present organizational partners of 3GPP are described in section 2 (a) below.</p> <p>(f) "Intellectual Property Rights ("IPR")" mean the patents and pending patent applications, copyrights covering software or firmware, and mask works on integrated circuit mask sets, whether in existence now or created, invented or developed in the future.</p> <p>(g) "Specification" means a document, in any form or media including but not limited to paper or an electronic file, containing a set of detailed technical specifications as specifically defined by the organization that produced the same.</p>	

2. INTRODUCTION	ATIS' COMMENTS
<p>(a) 3GPP is a collaborative agreement, established in 1998, presently consisting of the following telecommunications standards bodies:</p> <ul style="list-style-type: none"> ARIB Association of Radio Industries and Businesses (Japan) CCSA China Communication Standards Association (China) ETSI European Telecommunications Standards Institute (France) ATIS Standards Committee T1 Telecommunications (US) TTA Telecommunication Technology Association (Korea) TTC The Telecommunication Technology Committee (Japan) 	<p>Paragraph 2 (b) provides that the “Co-operation Framework presents guidelines to serve as the basis for establishing the cooperative efforts in the Work Areas [as defined]” between the 3GPP and OMA, “with the objective of securing timely development of technical specifications.”</p> <p>Paragraph 2 (c) further states that “the parties [presumably 3GPP and OMA, but it is not clear and it should be defined] shall endeavor to exchange, upon request , as mutually desired and free of charge, information on relevant work programs in the Work Areas.”</p> <p>These sections raise a number of questions regarding exactly how “the cooperative efforts in the Work Areas” will be undertaken, and what the obligations of both the 3GPP and the OMA will be. For example, it is not clear exactly what the “cooperative efforts” are intended to include. Similarly, the language does not make it clear how “technical specifications” will be developed.</p> <p>First, confusion may arise regarding what constitutes a “technical specification.” Paragraph 2(b) suggests that a “technical specification” will be a deliverable developed by either OMA or 3GPP pursuant to the co-operative efforts. In paragraph 1(g), however, “specification” is defined to mean “a document, in any form or media including but not limited to paper or an electronic file, containing a set of detailed technical specification as specifically defined by the organization that produced the same.” This could mean a “contribution,” which is defined in paragraph 1(c), or some other type of document that is not a deliverable of either OMA or 3GPP. This is an example of the lack of specificity in drafting.</p>
<p>(b) This Co-operation Framework presents guidelines to serve as the basis for establishing the cooperative efforts in the Work Areas between the Open Mobile Alliance and 3GPP with the objective of securing timely development of technical specifications.</p>	<p>We think that greater clarity is also necessary in connection with how technical specifications will be developed. We understand that it is not intended that 3GPP and OMA will jointly develop specifications, and that would be consistent with the statement in paragraph 7(c) that the OMA and 3GPP do not intend to co-develop any materials. Yet, how the “cooperative efforts” will lead to the development of technical specifications is unstated in the draft and a clear statement in the Introduction would be of great use. In addition, as now drafted the parties will only “endeavor” to exchange information, and only as “mutually desired.” Is this sufficient to achieve the desired goals of the cooperative venture?</p>
<p>(c) The parties shall endeavor to exchange, upon request, as mutually desired and free of charge, information on relevant work programs in the Work Areas.</p>	<p>We note also that language in 2(a) should be reviewed. For example, identifying 3GPP as a “collaborative agreement” is not accurate, and a better definition could be supplied. In addition, ATIS, as a result of its reorganization, should be identified as the Alliance for Telecommunications Industry Solutions, rather than Standards Committee T1 Telecommunications.</p>

3. DOCUMENT SHARING	ATIS' COMMENTS
<p>(a) Each party encourages the sharing of Documents to all of its respective members provided that Contributions should be made pursuant to sections 5(b) and 5(c) of this Co-operation Framework.</p> <p>(b) Documents from one party which are made available to the other party are intended to be accessible on equal terms to all members of the other party.</p> <p>(c) If either party wants to make a normative reference to the Specification of the other party, such reference should be publicly available and should be in line with the referencing policy, guidelines or practice of the referencing organization.</p>	<p>Clarifying the scope of the cooperative efforts will also be useful for addressing issues raised in Sections 3 and 4 of the draft.</p> <p>Specifically, paragraph 3(a) address two separate issues, each of which requires clarification.</p> <p>First, it says that “[e]ach party encourages the sharing of Documents [as defined] to all of its respective members.” We are interpreting this to mean that OMA will encourage its members to access the 3GPP website to review relevant documents there, and for 3GPP to encourage its members to visit the OMA website to review relevant documents there.</p> <p>If this understanding is correct, then it may be a better approach to state in this paragraph that each party’s members will be granted access to and be encouraged to review the other’s website as it contains information or documentation relevant to the Work Areas.</p> <p>An affirmative obligation may also be considered for each party to identify to the other the materials on its site that are relevant.</p> <p>Paragraph 3(a) further states that “Contributions [as defined] should be made pursuant to sections 5(b) and 5(c) of this Co-operation Framework.”</p> <p>- Whether this is intended to be a mandatory provision (“shall” being intended rather than “should”) or permissive (“should” as drafted) needs to be addressed.</p> <p>- In addition, and whatever is intended, Paragraphs 5(a) and (b) create many questions.</p> <p>In essence, they appear to state that Contributions may be made to the OMA only by members of the 3GPP who are also members of the OMA, and to the 3GPP only by members of the OMA who are members of the 3GPP, and that the contributions will be made by the member in its capacity as a member of the receiving organization.</p> <p>What if a member of 3GPP who is not a member of the OMA wishes to make a Contribution to the OMA, and vice versa, because it wants to have its IPR recognized and licensed?</p> <p>In addition, since Contributions are by definition works encumbered by IPR, is it not permitted that materials be contributed that are free of IPR?</p> <p>These same questions exist in connection with the last sentence of paragraph 4(b), which provides again that Contributions shall only be submitted pursuant to paragraph 5.</p>

<p>4. PARTICIPATION IN MEETINGS</p> <p>(a) At either (i) the invitation of the Contact Person of the hosting party or (ii) if, at the request of the other party, the Contact Person of the hosting party so agrees, the Observers may attend and, subject to the limitations set forth below, participate in the other party's meetings. Either party may designate any part(s) of its meeting as "closed". Observers may not attend or participate in such "closed" sessions.</p> <p>(b) Observers may submit technical proposals to the chairperson of the group/body in which they are participating, provided, however, that Contributions shall only be submitted pursuant to the terms set forth in section 5 of this Agreement.</p> <p>(c) In the event that an Observer is a member of both the Open Mobile Alliance and 3GPP, the Observer will inform the chairperson of the group/body in which he or she is participating of the affiliation being represented, which should remain consistent during the course of that meeting.</p>	<p><u>ATIS' COMMENTS</u></p> <p>Section 4 raises additional issues.</p> <ul style="list-style-type: none"> - First, the concept of "Observers" is introduced, but there is no definition of this term. - Second, paragraph 4(b) states that "Observers" may submit technical proposals, but Contributions "shall only be submitted pursuant to the terms set forth in section 5 of this Agreement." What if the technical proposals implicate IPR? This language also indicates an intent that the Framework document be more than mere guidelines.
<p>5. INTELLECTUAL PROPERTY RIGHTS</p> <p>(a) The Open Mobile Alliance and the Partners have similar principles in respective membership policies regarding declaration of IPR and regarding licenses to Essential IPR being made available on fair, reasonable and non-discriminatory terms and conditions.</p> <p>(b) Contributions may be made to the Open Mobile Alliance by members of 3GPP who are also members of the Open Mobile Alliance only in their capacity as Open Mobile Alliance member(s) under the Open Mobile Alliance membership rules, including its IPR policy.</p> <p>(c) Contributions may be made to 3GPP by members of the Open Mobile Alliance who are also members of 3GPP only in their capacity as 3GPP member(s) under the 3GPP membership rules, including its IPR policy.</p>	<p><u>ATIS' COMMENTS</u></p> <p>A number of issues exist regarding the draft's treatment of IPR.</p> <p>First, the draft, in paragraph 1(f), defines "Intellectual Property Rights" consistent with Section 5.12 of OMA's Application Form, to include not only patents, but also "pending patent applications, copyrights covering software or firmware, and mask works on integrated circuit mask sets, whether in existence now or created, invented or developed in the future." This definition goes far beyond ATIS' policy, which covers only issued patents. As Stephane observes, whose policy will apply?</p> <p>The importance of this issue is illustrated by paragraph 5(a), which states that the OMA and 3GPP "have similar principles in their respective membership policies regarding declaration of IPR and regarding licenses to Essential IPR being made available on fair, reasonable and non-discriminatory terms and conditions." As commented, ATIS does not have a policy that addresses anything other than existing published patents, and its policy does not compel disclosure of any IPR. It encourages disclosure of issued patents, but does not impose an obligation on members to do so. Thus, there may be some similarities among the OMA IPR policy and the IPR policies of 3GPP members, there remain important differences that we believe should be addressed expressly and reconciled in the Framework.</p>

	<p>Some other differences also exist that should be addressed:</p> <ul style="list-style-type: none"> • Section 5.8 of the OMA Form provides that licenses need not be provided to others if such other party (or its parent, subsidiaries and other affiliates) do not agree to license reciprocally. This may be acceptable, but at least ATIS' policy does not contain such a provision, and ATIS' policy does not seek to reach related affiliates of its members. • Pursuant to Section 5.9 of the OMA Form a member must use "reasonable endeavours" to inform of Essential IPR. No such obligation exists under ATIS' policy, although such disclosure is encouraged. • Section 5.10 of the OMA Form imposes an obligation to immediately notify the OMA of an intent not to license, and if asked a written explanation of the reasons for refusing to license. Section 5.10 then states that "a valid reason for such a refusal is that such IPR is not an Essential IPR." The ATIS policy does not include such an obligation. Indeed, licensing statements of this type are not contemplated as necessary until a standard is developed and submitted for approval to the American National Standards Institute. Moreover, under ATIS' policy a patent owner is not compelled to make any declaration, although it is encouraged to do so at as early a time as possible. This aspect of the OMA policy may also create issues in defining what a valid reason may be for refusing to license. Must it be something of the nature indicated – the lack of Essential IPR? Under U.S. patent law, a patentee may decline to license for no reason whatsoever. Would that be considered valid? <p><u>ETSI'S COMMENTS</u></p> <p>Clause 5 c) is ill defined since 3GPP as such does not have an IPR Policy.</p> <p>The principles of Clause 5 and 7 are OK but these clauses do not cover all the aspect of IPRs. In brief, these clauses say "what is mine" is mine" and what is "yours is yours" but does not foresee what to do once we have integrated another party doc/spec with IPRs.</p>
<p><u>6. CONFIDENTIAL INFORMATION</u></p> <p>It is the intent of the parties that no confidential information will be disclosed.</p>	<p>No comments</p>
<p><u>7. COPYRIGHT OF MATERIALS</u></p> <p>(a) A technical body/group of one of the parties may incorporate text and/or graphics in documents (whether published or not) provided from the other party ("Submitted Materials") where the copyright in such text</p>	<p><u>ATIS' COMMENTS</u></p> <p>Section 7 raises other issues. Paragraph 7(a) seems intended to have one party that submits materials to the other party grant to a "technical body/group" of the other party the right to incorporate</p>

<p>or graphics is solely owned by that other party.</p> <p>(b) With the source of such material acknowledged fully, it is the intent that each party through the participation under this Co-operation Framework grant to the other party a free, irrevocable, perpetual, non-exclusive, world-wide license to incorporate text or other copyrightable material contained in the Submitted Materials and any modifications thereof in the creation of the parties' respective publications; to reproduce, distribute, display and perform such material as part of the publications; to register the copyright in the publication and to distribute in its own name any standards publication even though it may include portions of the other's contributions (subject to the inclusion of appropriate acknowledgements); and at the party's sole discretion, to permit others to reproduce in whole or in part such Submitted Materials as part of the resulting standards publications.</p> <p>(c) The Open Mobile Alliance and 3GPP do not intend to co-develop any materials.</p>	<p>copyrighted works of the submitting party in documents.</p> <p>If this is a correct interpretation, it should be explicitly stated what is being licensed, to whom, and under what conditions. For example, what will comprise a technical body/group? What limitations on use will exist? Will a technical body/group be permitted to duplicate a submitted work in its entirety and use and distribute it as its own? Will attribution be required? Further, even if the submitting party does not solely own the copyrighted work, but has the authority to license it, should not that also be subject to the license that is intended?</p> <p>In addition:</p> <ul style="list-style-type: none"> • Paragraph 7(b) states merely an intent. If a license will be granted it should be stated affirmatively. • It provides the right of the receiving party to "incorporate text or other copyrightable material" without imposing any limitation. Thus, the receiving party could fully copy the materials and claim it as its own. This is particularly a problem because 7(b) provides that the grant includes the right of the receiving party to register and distribute the work in its own name, even though it may include portions [or the entirety] of the other's contributions, merely subject to the inclusion of an appropriate acknowledgement. In addition, the receiving party would be free to permit others to reproduce, in whole or in part, the submitted materials. Finally, paragraph 7(b) could be interpreted to allow the receiving party to modify the copyrighted work as it pleases. In other words, the submitting party will lose complete control over and rights in the submitted work. • We also echo the points raised in Stephane's e-mail concerning the lack of clarity of the word "text," which we believe apply equally to paragraphs 7(a) and (b). <p><u>ETSI'S COMMENTS</u></p> <p>Clause 7 (a) refers to the inclusion of text and graphic in each other parties' documentation. Is the word "text" understood to apply source code? (i.e. a reference implementation in the form of source code?).</p> <p>This drives us to a second question: How to deal with cases where the incorporated text and graphics in fact form the basis of an IPR (e.g. source code, software patent), are we bound by the OMA Policy or the ETSI IPR policy, what should be the obligations concerning the Information Statement and Licensing</p> <p>Declarations?</p>
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	<p>The principles of Clause 5 and 7 are OK but these clauses do not cover all the aspect of IPRs. In brief, these clauses say "what is mine" is mine" and what is "yours is yours" but does not foresee what to do once we have integrated another party doc/spec with IPRs.</p>
<p><u>8. DETAILED PROCEDURAL GUIDELINES</u></p> <p>The parties will develop detailed procedural guidelines for cooperation as needed during the course of their collaboration.</p>	<p>No Comments</p>
<p><u>9. TERM AND TERMINATION</u></p> <p>This Co-operation Framework is offered to guide cooperation efforts between the parties, and should be put into use inasmuch as it is applicable to the cooperation efforts. In the event that either party finds the Co-operation Framework inapplicable, then the party may notify the other party so that the Co-operation Framework may be modified or withdrawn.</p>	<p>No Comments</p>
<p><u>10. PUBLICITY</u></p> <p>It is the intent of the parties to work together in the review and final decision prior to the release of any press and other public announcements regarding this Co-operation Framework.</p>	<p>No Comments</p>