

OpenID Foundation IPR Policy and Process Document Rationales

1 Why is the OpenID Foundation adopting new policies and procedures?

The OpenID Foundation has existed to date without formal policies or procedures. During this time, the OpenID community has begun to develop exciting new standards for digital identification, and these early standards have been well received by early adopters. These early standards have not yet been widely implemented, however, and even a perfect standard that is not broadly adopted is no “standard” at all. To encourage adoption, OpenID is instituting new policies to verify that individuals and companies that want to implement OpenID standards will have the legal right to do so. These policies are set out in the new document entitled “*OpenID Intellectual Property Rights Policy*.” To assist the community to implement these new policies, the OpenID Foundation is also instituting new procedures, which are set out in the new document entitled “*OpenID Process Document*.”

2 Has the OpenID Foundation already adopted these new policies and procedures?

No. Although the OpenID Foundation has been working with various stakeholders to develop these policies and procedures for several months, the *OpenID Intellectual Property Rights Policy* and the *OpenID Process Document* are still in draft form and have not yet been formally adopted. The OpenID Foundation Board has reviewed the current draft of the Intellectual Property Rights Policy, however, and has voted to make both the *OpenID Intellectual Property Rights Policy* and the *OpenID Process Document* available for public review and comment. Everyone involved in the creation and review of these drafts feels that, although they are not yet perfect, they are about “95% there.” We look forward to your feedback!

3 Does an intellectual property rights policy assert ownership of OpenID?

No – exactly the opposite. Brad Fitzpatrick, the father of OpenID, said that nobody should own this. And the OpenID Foundation website states that “[n]obody's planning on making any money from this” and “[t]he goal is to release every part of this under the most liberal licenses possible.” The goal of the *OpenID Intellectual Property Rights Policy* is to make Brad Fitzpatrick’s statement, and the statement of the OpenID Foundation, a reality.

Without an intellectual property rights policy, there is no guarantee that the individuals and companies participating in the development of OpenID specifications will actually license their necessary intellectual property to implementers and users. The *OpenID Intellectual Property Rights Policy* requires these contributors to promise not to assert their necessary intellectual property against implementations of approved OpenID specifications, subject only to narrow exceptions. This is further described further below.

4 How were the draft intellectual property rights policy and process document developed?

In early 2007, a number of OpenID community leaders formed an IPR taskforce to develop an intellectual property rights policy. This taskforce enlisted help from a number of

technology stakeholders (including [Yahoo!](#), [America Online](#), [Symantec](#), [VeriSign](#), [Sun](#), and [Microsoft](#)) to help draft and review the policy and related documents.

The IPR taskforce and these stakeholders met several times, both telephonically and in person, in the second and third quarters of 2007. The primary goal of this group was to reach consensus on policies and procedures that would ensure that “nobody owns” OpenID specifications and that OpenID specifications will be liberally available, while broadly encouraging implementation and minimizing disruption to the OpenID community. This group also sought – wherever possible and applicable – to borrow concepts from long established standards setting bodies, such as the [W3C](#) and [OASIS](#). The draft *OpenID Intellectual Property Rights Policy* and the *OpenID Process Document* that were recently circulated reflect these meetings, the consensus of the participants, and – hopefully – the values of the OpenID community.

5 How does the *OpenID Intellectual Property Rights Policy* keep OpenID specifications free and broadly available?

The general concept behind the *OpenID Intellectual Property Rights Policy* is that, while no individual or company is obligated to join an OpenID “work group,” if an individual or company wants to join, it must be willing to make a certain “necessary” amount of its intellectual property available – free of charge – for use in compliant products and services that implement specifications that that work group produces.

With this general goal as a backdrop, the *OpenID Intellectual Property Rights Policy* tries to balance the rights of all competing stakeholders. On one hand, the contributor should have the right – *if it wants to do so* – to limit the use of its intellectual property to a particular field of use, or “scope.” Implementers and users of compliant products and services, on the other hand, should have sufficient comfort that they are free to use such intellectual property – free from law suits and without royalties – within this limited scope, but not necessarily outside of it.

The *OpenID Intellectual Property Rights Policy* attempts to strike this balance by requiring (with *very* few exceptions) each contributor to promise not to sue anyone else on the basis that a compliant implementation of an OpenID specification infringes on that contributor’s “necessary” patent claims. A contributor is, of course, free to refrain from filing a law suit on an even broader basis, but the contributor is not required to do so. To further understand the specific patent obligations of contributors, and the patent rights of implementers and users, please carefully review at least Section VI (Patents) and the definitions of “Compliant Portion,” “Implementation,” and “Necessary Claims” in the *OpenID Intellectual Property Rights Policy*.

6 What are “Necessary Claims”?

Speaking *very* generally, “Necessary Claims” are patent claims that a contributor has a right to license to others and that are necessarily infringed (i.e., there is no commercially reasonable non-infringing alternative design) by a compliant implementation of an OpenID specification. By joining a work group, contributors promise to make their Necessary

Claims, if any, available – free of charge – for use in compliant products and services that implement specifications that the work group produces.

“Necessary Claims” are the *only* intellectual property that an OpenID contributor must make available under the *OpenID Intellectual Property Rights Policy*.

7 Why does the *OpenID Intellectual Property Rights Policy* require a “Scope” statement?

Each OpenID work group must have a defined “scope.” The “scope” is intended to provide a broad statement of the subject matter that will be in – and will not be in – the work of a particular work group. It is not intended to provide a granular specification of particular features and functions of a specification. Although contributors’ patent obligations are not stated in terms of the scope, contributors may appeal actions taken by the work group on the basis that they are outside of the work group’s stated scope, and this appeal may affect intellectual property rights and obligations.

8 Why does the *OpenID Intellectual Property Rights Policy* use a “promise not to sue” as opposed to requiring a written license?

One of the goals of the OpenID Foundation is to make OpenID specifications broadly available without any formal licensing requirement. To make this happen, the *OpenID Intellectual Property Rights Policy* requires contributors to promise not to sue over the use of their intellectual property in compliant implementations of OpenID specifications, rather than affirmatively to grant a license for such use. There is a practical distinction between these approaches. With a promise not to sue, an implementer need not take any steps to arrange a written license for any “Necessary Claims” in an OpenID specification; rather, the implementer simply needs to create a compliant OpenID implementation. Were each contributor required to grant a formal, written license, an implementer would need to enter into such a license with each contributor, which would burden the implementer without providing any clear benefit to the OpenID community.

9 When can a contributor break its “promise not to sue”?

The *OpenID Intellectual Property Rights Policy*’s “patent promise” applies to any “Compliant Portion,” and, generally, there is no way to withdraw the promise once made. There is, however, one significant exception: a contributor may – but is not required to – condition its promise on beneficiaries of the promise making a “reciprocal promise.” What this means, practically, is that if an implementer has received the benefit of a patent promise from an OpenID contributor, but the implementer then claims that an OpenID implementation infringes on the implementer’s own necessary patent claims and files suit (i.e., the implementer is not willing to make a reciprocal patent promise), then contributors may be able to withdraw their patent promises, but only as to any individual or company that is not making, or that suspends, its own patent promise.

10 What does “reciprocity” mean under the *OpenID Intellectual Property Rights Policy*’s “promise not to sue,” and why was this language selected?

Early drafts of the *OpenID Intellectual Property Rights Policy* allowed a contributor to defensively “break” its patent promise on the occurrence of certain conditions. There was no consensus, however, regarding whether a contributor could suspend “asymmetrically” (i.e., if an implementer sues *the contributor or anyone else* over an Implementation of the applicable OpenID specification) or only “symmetrically” (i.e., only if an implementer sues *the particular contributor* over an Implementation of the applicable OpenID specification).

There are legitimate rationales for both viewpoints, and the group decided to allow contributors to pursue either option. Thus, as currently drafted, a contributor may condition its patent promise on the grant of a “reciprocal” promise from others. “Reciprocal” is not defined, however, and contributors may interpret it as either “asymmetrical” or “symmetrical.” If there is legal action between contributors and implementers at a later date, and the promise is relevant, the Court will interpret what “reciprocal” means.

Although this may at first seem less certain, it is not. The lowest common denominator (i.e., the promise most easily suspended by a contributor) will be asymmetrical, and an implementer can rely on this (although a contributor may certainly interpret reciprocity more broadly and thus make a patent promise that is more difficult to break). For reference, this is the approach that is taken by many major standards organizations, including the [W3C](#).

A contributor is also free to make an even broader promise, such as a patent promise without any reciprocity condition. The contributor just cannot require others to make such a broader promise.

11 If a work group tries to include technology in an OpenID specification that one of its contributors does not want to contribute, can the contributor exclude it?

The *OpenID Intellectual Property Rights Policy* does not allow “exclusion” of intellectual property, as this can make specification development more difficult (e.g., a contributor can exclude its “Necessary Claims” right before a specification becomes final, without any consequences). To protect the intellectual property rights of contributors, the *OpenID Intellectual Property Rights Policy* allows a contributor to withdraw – *without making the patent promise* – under certain, limited circumstances.

First, the development cycle of a specification typically involves multiple working drafts, one or more “Implementers Drafts,” and a “Final Specification.” The patent promise applies only to Implementers Drafts and Final Specifications, and there will be notice before any working draft is considered for approval as an Implementers Draft and before any Implementers Draft is considered for approval as a Final Specification. This notice will trigger a review period, during which contributors can consider whether the proposed Implementers Draft or Final Specification includes any Necessary Claims.

If the proposed Implementers Draft or Final Specification includes Necessary Claims, and the contributor does not want to make the patent promise for these claims, the contributor may either withdraw or appeal to the OpenID “Specifications Council.” If the OpenID Specifications Council confirms that the proposed Implementers Draft or Final

Specification is proper (e.g., not operating outside of the bounds of its Scope), and if the contributor's claims would still be Necessary Claims if the Implementers Draft or Final Specification is approved, the contributor's only option to avoid making the patent promise will be timely to withdraw from the work group.

If the contributor timely withdraws, the patent promise *will not* apply to the particular Necessary Claims. The patent promise *will*, however, apply to any patent claims that were Necessary Claims in a particular Implementers Draft or Final Specification if the contributor does not timely withdraw. Thus, for example, if claims 1 and 2 are Necessary Claims for an Implementers Draft, and the contributor does not then withdraw, and claim 3 becomes a Necessary Claim due to changes that arose between the Implementers Draft and the Final Specification, and the contributor then does timely withdraw, the contributor will continue to be bound by the patent promise after withdrawal for claims 1 and 2, but is not bound by the patent promise with regard to claim 3.

12 Why does the OpenID Intellectual Property Rights Policy address copyrights?

Many jurisdictions recognize different forms of intellectual property, including patents, copyrights, trade secrets, and trademarks. The development of OpenID Specifications is not confidential, and thus trade secrets are not an issue. Moreover, trademarks will be addressed, if at all, by a separate agreement. This leaves patents and copyrights.

Speaking generally, patent rights are necessary to develop and market a product or service if that patent's claims "read on" that product or service. Patent rights are addressed expressly by the "patent promise" included in the OpenID Intellectual Property Rights Policy. Although copyrights may not be necessary to create a product or service that implements an OpenID specification, there is copyright in the OpenID specification itself. Moreover, the OpenID Foundation wants to make sure that not only products and services that implement the specification, but the specification itself, may be made broadly available. As such, the OpenID Intellectual Property Rights Policy requires that each contributor grant a broad license in any copyrights in its contributions to the OpenID Foundation so that the Foundation will have a broad license to all copyrights in the specification and can be a single point of contact to "clear" copyrights in the specification. In other words, a single organization – the OpenID Foundation – will have sufficient rights to grant copyright licenses to OpenID specifications.

13 Why are there different classifications for becoming a work group contributor?

There are different classifications for becoming a work group contributor simply because different types of individuals have different legal capacity to contribute to OpenID. At one end of the spectrum, an independent contractor, with no employment or contractual obligations to third parties, may be free to commit his or her intellectual property without any third-party approval. At the other end, however, an employee who was hired to develop digital identification technology likely needs his or her employer's permission to join an OpenID work group and thereby commit intellectual property. To maximize the likelihood that OpenID specifications remain broadly available, a membership structure must be put into place that tries to verify that each individual or company that joins a work group actually has the right to make the patent promise.

14 Why will the OpenID Intellectual Property Rights Policy have retroactive effect (and why must existing, legacy members of the OpenID community agree to this to continue to participate)?

For the reasons discussed above, the OpenID Intellectual Property Rights Policy is necessary to make sure that nobody owns OpenID specifications. Because it is necessary, and it was not previously in effect, the OpenID Foundation needs to make sure that contributors to early OpenID specifications agree to the policy, both prospectively and as applied to any prior contributions. Although current members of the community are not obligated to (or indeed may not even be eligible to) agree to the new policy, if a given legacy community member does not agree, and if the OpenID Foundation cannot otherwise verify that this member has committed any rights necessary to make the current OpenID specifications broadly available and free from onerous licensing terms, the OpenID Foundation may need to remove the contributed technology and revise the applicable OpenID specification(s) accordingly.

15 What is the purpose of the OpenID Process Document?

For the reasons discussed above, the OpenID Intellectual Property Rights Policy is necessary to maximize the likelihood that OpenID specifications remain broadly available. To be useful, however, these policies must still be implemented and adhered to. The OpenID Process Document sets out processes for implementing the OpenID Intellectual Property Rights Policy. Any administrative process is subject to attack to the extent that it is arbitrary, and these processes are no exception. For example, the OpenID Process Document provides that the “Specifications Council” will include two members of the OpenID Foundation Board, but it certainly could have been three or one or something else entirely. There are pros and cons to any such decision. Although reasonable minds could differ on any such issue, the OpenID Foundation’s IPR taskforce believes that the current draft of the OpenID Process Document is fair, strikes a reasonable balance, and reasonably reflects values that have, to date, typified the OpenID community.

16 What is the purpose of this “rationale document”?

This rationale document attempts to distill and explain – hopefully in plain English – certain concepts in the OpenID Intellectual Property Rights Policy or in the OpenID Process Document. As an explanation or distillation of fairly complex legal concepts, this document is **not a substitute for** the actual text of the OpenID Intellectual Property Rights Policy or the OpenID Process Document. The applicable language of the OpenID Intellectual Property Rights Policy and the OpenID Process Document will control over any inconsistencies in this rationale document.