

### Analysis of the IPR policy of W3C

This analysis is a supplement to *A study of IPR policies and practices of a representative group of Standards Developing Organizations worldwide*, prepared by Rudi Bekkers and Andy Updegrave. See <http://home.tm.tue.nl/rbekkers/nas>

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This analysis has the following parts:

Part A: Adoption and general aspects of the IPR policy

Part B: Formal aspects and principles of the IPR policy

Part C: Patent disclosure

-- general

-- relating to the knowledge of the party about its IPR

-- relating to standard

-- relating to patent identities

-- other

Part D: Licensing commitments

Part E: SDO procedures and public

Part F: Conflicts and enforcement

Part G: Other

This analysis has the format of a structured survey, with numbered questions. Text in **green** indicates our own conclusions and observations. All the SDO's we analyzed were given the opportunity to review this document and comment on it. Text in **orange** are comments, complimentary explanations and corrections received by representatives of the SDO.

Note: this analysis has been performed to the best of our knowledge, using the various public documents concerning the IPR policy of your SDO. See also the disclaimers in the main report.

Note: in this analysis, the work 'policy' generally refers to the whole set of binding rules, not necessarily only to the document which is titled 'policy'. An exception is where we make specific references to documents.

### Part A: Adoption and general aspects of IPR policy

A1. What is the most version of or a reference (internet) to the formal, current IP policy of your SDO? What are relevant to additional documents such as guidelines, explanations, forms, and so on?

W3C Patent Policy, dated 5 February 2004, available at <http://www.w3.org/Consortium/Patent-Policy-20040205/>. Also the link to the 'latest version' <http://www.w3.org/Consortium/Patent-Policy/> refers to the same document.

World Wide Web Consortium Process Document, dated 14 October 2005. Available at <http://www.w3.org/2005/10/Process-20051014/>. Also the link to the 'latest operative version' <http://www.w3.org/Consortium/Process/> refers to same document.

International World Wide Web Consortium ("W3C") Member Agreement. Note that This document is tagged "\*\*\* DRAFT \*\*\*" and is undated as such, though the URL at which it is made available suggests it is from December 2009. Found at <http://www.w3.org/2009/12/Member-Agreement>

The appendix to the Membership agreement, <http://www.w3.org/2009/12/Appendix>. Also the

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link to the most current version <http://www.w3.org/Consortium/Agreement/Appendix.html> refers to this version.

Additionally, there are several resources at the Patent Policy Working Group web page: <http://www.w3.org/2001/ppwg/>

1. Overview and Summary of W3C Patent Policy (undated but summarizes 5 February 2005 policy). Available at <http://www.w3.org/2004/02/05-patentsummary.html>
2. W3C Patent Policy Transition Procedure (undated but refers to 5 February 2005 policy). <http://www.w3.org/2004/02/05-pp-transition>
3. Business Benefits of the W3C Patent Policy. <http://www.w3.org/2004/03/pp-points-20040210.html>

There is a Frequently Asked Questions (FAQ) about the W3C Patent Policy, at <http://www.w3.org/2003/12/22-pp-faq.html>

Specifically for non-members, W3C offers a "Licensing commitments from non-W3C Members" available at <http://www.w3.org/2004/01/pp-impl/35520/nmlc>

Finally, there is the Invited Expert and Collaborator Agreement, <http://www.w3.org/Consortium/Legal/2007/06-invited-expert.html>

A2. What changes to the policy have been made over time, and have there been additional clarifications or additions? What prompted these changes?

The current policy is from 2004 and replaced a 2003 version. There were very little differences between these policies. An overview of all previous versions:

20 May 2003 (W3C Patent Policy)  
19 March 2003 (W3C Proposed Policy)  
14 November 2002 (working draft)  
26 February 2002 (working draft)  
16 August 2001 (working draft)

Previous to this policy, there was a the 'Current Patent Practice W3C Note 24 January 2002' <http://www.w3.org/TR/patent-practice>.

### Sources and additional details:

This is the 5 February 2004 version of the W3C Patent Policy. The W3C Patent Policy Transition Procedure describes how W3C is implementing this patent policy. (IPR Policy, at "status of this document")

The only differences between this version and the 20 May 2003 version that was reviewed by the W3C Membership are updated links to the W3C Process Document [PROCESS] and a change to one administrative detail (allowing the Team to use other mechanisms than email for disclosures). (IPR Policy, at "status of this document")

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A3. What are current discussions going on in this SDO concerning the IP policy? What is being discussed, and what prompted these discussions?

I have no information on this.

### Part B: Formal aspects and principles of the IPR policy

B1. What is the legal foundation of the IPR policy (statutes, undertaking, contract, etc.)? What is the legal status of those that are involved (e.g. member, participant)?

By signing a Membership Agreement, the parties are bound to the so-called Process Document. The W3C Patent Policy is incorporated by normative reference as a part of the Process Document, and is thus equally binding.

#### Sources and additional details:

W3C does not have a typical organizational structure, nor is it incorporated. (<http://www.w3.org/Consortium/facts>)

#### Relation of Process Document to Patent Policy

W3C Members' attention is called to the fact that provisions of the Process Document are binding on Members per the Membership Agreement [PUB6]. The Patent Policy W3C Patent Policy [PUB33] is incorporated by normative reference as a part of the Process Document, and is thus equally binding.

The Patent Policy places additional obligations on Members, Team, and other participants in W3C. The Process Document does not restate those requirements but includes references to them. The Process Document and Patent Policy have been designed so that they may evolve independently.

In the Process Document, the term "participant" refers to an individual, not an organization. <http://www.w3.org/2005/10/Process-20051014/>

B2. What is the nature of SDO membership (companies, individuals)? How does this relate to the rules on disclosure and/or commitments?

Members can be companies, organizations, or individuals.

#### Sources and additional details:

Membership in W3C is open to all types of organizations (including commercial, educational and governmental entities) and individuals. Any entity that can sign the Membership Agreement can become a Member. Members may be either for-profit or not-for-profit organizations. Most Members invest significant resources into Web technologies. They may be developing Web-based products, using Web technologies as an enabling medium, conducting research on the Web, or developing specifications based on W3C work. (at <http://www.w3.org/Consortium/membership-faq.html>)

B3. Are the specific rules on firms that are subsidiaries? Do obligations that follow from the IPR policy also apply to parent companies?

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This depends on the exact relationship between the entities in question, as further explained in Clause 2.1.2 of the IPR policy and in the FAQ, item 21.

### Sources and additional details:

In the Process Documents, a clause on related members is included.

#### 2.1.2 Related Members

In the interest of ensuring the integrity of the consensus process, Member involvement in some of the processes in this document is affected by related Member status. As used herein, two Members are related if:

1. Either Member is a subsidiary of the other, or
2. Both Members are subsidiaries of a common entity, or
3. The Members have an employment contract or consulting contract that affects W3C participation.

A subsidiary is an organization of which effective control and/or majority ownership rests with another, single organization. Related Members must disclose these relationships according to the mechanisms described in the New Member Orientation [MEM4]. (Process Document, at 2.1.2)

FAQ 21. Suppose A and B are Related W3C Members and one of the organizations is a group Participant. What are the licensing obligations on the other Member?

That depends on the nature of their relation (see section 2.1.2 of the Process Document for the various relations possible). The Patent Policy does not mention Related Members explicitly but does state in section 3.1:

This [licensing] requirement includes Essential Claims that the participant owns and any that the participant has the right to license without obligation of payment or other consideration to an unrelated third party.

Therefore, if Member A (related to Member B) joins a Working Group, then the licensing commitment would extend to patents held by Member B to the extent that the relationship between the related members is not a barrier to such licensing. Of course, regardless of the licensing relationship between the related Members, Member A continues to have a disclosure the obligations described in section 6 of the Patent Policy. (FAQ, at 21)

## Part C: Patent disclosure

### Patent disclosure, general

C1. What is the nature of disclosure rules? (E.g. obligation vs. invitation / encouragement)

Disclosure obligations arise when an individual in a member organization receives any version of a (draft) recommendation that reaches a new maturity level. These documents include a 'disclosure request'. Disclosure is required – with defined exceptions, the most important one being that if a party commits to RF it does not need to disclose (see Question C2).

*A W3C representative clarified: "A disclosure request goes out to all W3C WG participants, including Members, Team, and invited experts, putting on them the obligation to disclose relevant patents. People writing to or reading a list (whether archive or by subscription) do not incur obligations merely through that action; their obligations derive from agreements."*

Additionally, W3C may request a member or non-member to disclose if it suspects that party owns essential IPR. For members, such disclosure is required (again with defined exceptions), for non-members it is not.

Finally, disclosure is required when a member elects to exclude certain of its essential patents

from RF licensing (see Question D7.)

### Sources and additional details:

**Disclosure Requirements:** Disclosure is required when both of the following are true:

1. an individual in a Member organization receives a disclosure request as described in section 6.3; and
2. that individual has actual knowledge of a patent which the individual believes contains Essential Claim(s) with respect to the specification for which disclosure is requested.

Anyone in a Member organization who receives a disclosure request and who has such knowledge must inform that AC Rep. Where disclosure is required, the AC Rep will do so. (IPR Policy at §6.1).

**Disclosure Requests:** Disclosure requests will be included in the "Status of This Document" section of each Recommendation track document as it reaches each new maturity level (Working Draft, Last Call Working Draft, Candidate Recommendation, Proposed Recommendation, Recommendation). Separate requests may be issued by the W3C to any party suspected of having knowledge of Essential Claims. Such disclosure requests will instruct the recipient to respond through their AC Rep (in the case of Members) or a W3C contact (in the case of non-Members). Disclosure requests other than those that appear in the specification itself should be directed to the AC Rep. (IPR Policy at §6.3).

Under the following conditions, Working Group participants may exclude specifically identified and disclosed Essential Claims from the overall W3C RF licensing requirements: [...] (IPR Policy at §4).

**Disclosure Obligations of Invited Experts:** Invited experts or members of the public participating in a Working Group must comply with disclosure obligations to the extent of their own personal knowledge. (IPR Policy at §6.10).

An W3C representative clarified: "Invited Experts sign an invited expert agreement, which includes an assertion of authority to make patent commitments, prior to participating in the WG."

C2. Are there any exemptions to the disclosure rules? (For instance, a policy could specify that if a company makes a RF / RAND-z commitment, there is no more requirement for specific patent disclosure).

Members do not need to disclose patents when they satisfy the RF licensing commitment that is sought by W3C.

In the document 'Business Benefits of the W3C patent policy' it is explained that this substantially decreases the burden upon parties that otherwise would need to disclose. In the FAQ, it is called a 'Light weight' disclosure model, compared to W3C's older policy.

### Sources and additional details:

**Disclosure Exemption:** The disclosure obligation as to a particular claim is satisfied if the holder of the claim has made a commitment to license that claim under W3C RF licensing requirements and the claim is no longer subject to exclusion under section 4. An Essential Claim is no longer subject to exclusion if a patent holder has affirmatively agreed to license the Essential Claim (effectively waiving its right to exclude such patent under section 4) or if the relevant exclusion period under section 4 has lapsed. (IPR Policy at §6.2).

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C3. At what point in time are parties required to disclose essential patents? Is it related to when a standardization activity reaches a particular state of advancement, and/or events relating to the specific member (joining the SDO, joining a WG, etc)?

See Question C1.

Additionally, it is mentioned that disclosures should be done as soon as practically possible, where it is understood that this may only be possible when the recommendation is in a more advanced stage.

**Timing of Disclosure Obligations:** The disclosure obligation is an ongoing obligation that begins with the Call for Participation. Full satisfaction of the disclosure obligation may not be possible until later in the process when the design is more complete. In any case, disclosure as soon as practically possible is required. (IPR Policy at §6.8).

C4. How is dealt with disclosure of patents owned by other (third) parties (non-members / non-participants)?

W3C may send out requests to non-member organizations to disclose essential IPR. They are not obliged to disclose.

Members may disclose that third parties own essential IPR, but they are only required to do so when the member has been 'made aware that the third party patent holder or applicant has asserted that its patent contains Essential Claims'.

*A W3C representative clarified: "Disclosure of third party patent claims is required when a participant learns of the third party's assertion. The disclosure is required until such time as the third party has made an agreement with W3C to license RF. Unwillingness to license does not affect the disclosure obligation."*

### Sources and additional details:

**Disclosure Requests:** Disclosure requests will be included in the "Status of This Document" section of each Recommendation track document as it reaches each new maturity level (Working Draft, Last Call Working Draft, Candidate Recommendation, Proposed Recommendation, Recommendation). Separate requests may be issued by the W3C to any party suspected of having knowledge of Essential Claims. Such disclosure requests will instruct the recipient to respond through their AC Rep (in the case of Members) or a W3C contact (in the case of non-Members). Disclosure requests other than those that appear in the specification itself should be directed to the AC Rep. (IPR Policy at §6.3).

Disclosure of third party patents is only required where the Advisory Committee Representative or Working Group participant has been made aware that the third party patent holder or applicant has asserted that its patent contains Essential Claims, unless such disclosure would breach a pre-existing non-disclosure obligation. (IPR Policy at §6.7).

### Patent disclosure, relating to the knowledge of the party about its IPR

All the following items are about the knowledge the claimant has about its patents, or should have about its patents.

C5. Are the disclosure rules limited to patents (1) covering its own contributions, (2) standards developed in the working group the party is participating in, (3) any standard developed in the SDO?

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The disclosure obligation holds for individuals that receive a (draft) recommendation that includes a request to disclose.

C6. Does the policy refer to patents that 'are' essential, 'believed' to be essential, 'may' be essential, etc?)

The policy provides no specific working here, although the definition of essentiality refers to patents that are actually essential.

C7. What knowledge is assumed to be known to the party and/or its representatives in meetings?

Disclosure obligation (as arising from request for disclosure in (draft) recommendations) is conditional on the knowledge of the individual within a member organization about essential patents. Also, the FAQ explains that a recipient of a draft recommendation is not required to read it and if he or she indeed did not do so he or she might not be aware, so has no licensing obligation. In addition, the FAQ explains that the individual is not required to contact any other colleagues at his or her firm that might be knowledgeable

Specific, individual requests to member organizations (when suspect to own essential IPR) are sent to the defined contact person. Again, it then depends on whether that contact person has knowledge on essential patents.

Disclosures must be made in 'good faith'.

### Sources and additional details:

Disclosure is required when both of the following are true:

1. an individual in a Member organization receives a disclosure request as described in section 6.3; and
2. that individual has actual knowledge of a patent which the individual believes contains Essential Claim(s) with respect to the specification for which disclosure is requested.

Anyone in a Member organization who receives a disclosure request and who has such knowledge must inform that AC Rep. Where disclosure is required, the AC Rep will do so. (IPR Policy, §6.1)

Disclosure requests will be included in the "Status of This Document" section of each Recommendation track document as it reaches each new maturity level (Working Draft, Last Call Working Draft, Candidate Recommendation, Proposed Recommendation, Recommendation). Separate requests may be issued by the W3C to any party suspected of having knowledge of Essential Claims. Such disclosure requests will instruct the recipient to respond through their AC Rep (in the case of Members) or a W3C contact (in the case of non-Members). Disclosure requests other than those that appear in the specification itself should be directed to the AC Rep. (IPR Policy, §6.3)

In the case of laid-open or published applications, the Member's good faith disclosure obligation extends to unpublished amended and/or added claims that have been allowed by relevant legal authorities and that the Member believes to be Essential Claims. To satisfy the disclosure obligation for such claims, the Member shall either: (IPR Policy, §6.5)

6.7. Good Faith Disclosure Standards. Satisfaction of the disclosure

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requirement does not require that the discloser perform a patent search or any analysis of the relationship between the patents that the Member organization holds and the specification in question. (IPR Policy, §6.7)

The appearance of such a disclosure request in a document status section does not obligate any individual to read or become informed of the contents of the document. However, if a person who receives such a request is aware of claims on a technology and is, through whatever means (e.g., as a result of reading the document or having a conversation), sufficiently aware of the contents of the W3C document to believe that a claim is essential, then that person has the obligation to disclose that information. Recall also that per section 6.7, no patent search is required. (FAQ, at 20)

If an individual in a Member organization receives a disclosure request and does not have actual knowledge, does he (or the Member with which he is affiliated) have any obligation to advise other individuals associated with the same Member of the disclosure request?

No. Section §6.1 states:

"Disclosure is required when BOTH of the following are true:

an individual in a Member organization receives a disclosure request as described in section 6.3; and

that individual has actual knowledge of a patent which the individual believes contains Essential Claim(s) with respect to the specification for which disclosure is requested."

See also exemptions (§6.2). (FAQ, at 48)

C8. Are patent searches required, encourage, or not required?

It is explicitly states that patent searches are not required. Nevertheless, members must disclose in 'good faith'

### Sources and additional details:

The good faith requirement is, surprisingly, only mentioned as a *title of a clause*.

6.7. Good Faith Disclosure Standards. Satisfaction of the disclosure requirement does not require that the discloser perform a patent search or any analysis of the relationship between the patents that the Member organization holds and the specification in question. (IPR Policy, §6.7)

### Patent disclosure, relating to standard

C9. How exactly is 'essentiality' defined and/or to be interpreted? Is it 'purely' technical essentiality or are there elements of commercial essentiality?

The policy is about technical essentiality- there being no alternative available.

### Sources and additional details:

"Essential Claims" shall mean all claims in any patent or patent application in any jurisdiction in the world that would necessarily be infringed by implementation of the Recommendation. A claim is necessarily infringed hereunder only when it is not possible to avoid infringing it because there is no non-infringing alternative for implementing the normative portions of the Recommendation. Existence of a non- infringing alternative shall be judged based on the state of the art at the time the specification becomes a Recommendation. (IPR Policy, §8.1)



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C10. Do disclosures have to specify for which standard(s) the patents are believed to be essential? How specific is this information required to be? (e.g. WG/SC/TC, specific standard, version of the specific standard / year).

Disclosures require to indicate the Working Group and/or Recommendation to which they apply.

Specifically for excluded pending, unpublished applications, there is a requirement for providing certain detail (see question C14, below).

### Sources and additional details:

**Disclosure Contents:** Disclosure statements must include:

1. the patent number, but need not mention specific claims
2. the Working Group and/or Recommendation to which it applies (IPR Policy, §6.4)

C11. How should the submitter deal with mandatory vs. optional portions of the standard, or with informative portions / informative references in the standard, etc.?

Disclosure is only obliged for normative portions of the standard. These include optional features.

Enabling technologies are excluded.

### Sources and additional details:

**Definition of Normative, Optional and Informative:** For purposes of this definition, the normative portions of the Recommendation shall be deemed to include only architectural and interoperability requirements. Optional features in the RFC 2119 [KEYWORDS] sense are considered normative unless they are specifically identified as informative. Implementation examples or any other material that merely illustrate the requirements of the Recommendation are informative, rather than normative. (IPR Policy, §8.3)

"Essential Claims" shall mean all claims in any patent or patent application in any jurisdiction in the world that would necessarily be infringed by implementation of the Recommendation. A claim is necessarily infringed hereunder only when it is not possible to avoid infringing it because there is no non-infringing alternative for implementing the normative portions of the Recommendation. Existence of a non- infringing alternative shall be judged based on the state of the art at the time the specification becomes a Recommendation. (IPR Policy, §8.1)

Limitations on the Scope of Definition of Essential Claims

The following are expressly excluded from and shall not be deemed to constitute Essential Claims:

1. any claims other than as set forth above even if contained in the same patent as Essential Claims; and
2. claims which would be infringed only by:  
portions of an implementation that are not specified in the normative portions of the Recommendation, or enabling technologies that may be necessary to make or use any product or portion thereof that complies with the Recommendation and are not themselves expressly set forth in the Recommendation (e.g., semiconductor manufacturing technology, compiler technology, object- oriented technology, basic operating system technology, and the like); or the implementation of technology developed elsewhere and merely incorporated by reference in the body of the Recommendation.
3. design patents and design registrations. (IPR Policy, §8.2)

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C12. How should the submitter deal with elements of the standards that only affect certain product categories (terminal vs. base stations, or encoders vs. decoders)?

The policy provides no information on this.

### Patent disclosure, relating to patent identities

C13. Are blanket disclosures (general declarations) allowed and, if relevant, under what circumstances?

There are no general disclosures as such.

A participant either goes with the default which is to grant licenses on RF terms and then it does not need to disclose. Or it decides to exclude its patents from RF terms (following appropriate procedures) and then it needs to make specific disclosures.

C14. Do disclosure rules only apply to granted patents, or also to (published / unpublished) patent applications? Do other types of IP (copyright etc.) need to be disclosed?

The policy states that if a W3C Member includes claims in a patent application and such claims were developed based on information from a W3C Working Group or W3C document, the Member must disclose the existence of such pending unpublished applications.

*A W3C representative clarified: "The patent policy states that if a participant files for a patent based on W3C work, it must disclose that application earlier than disclosure would otherwise be required. It makes no legal assertions about the validity of such applications."*

Some other parts on exclusion procedures (non-willingness to license) provide information about patent applications and about unpublished in particular.

Interesting, W3C developed specific requirements for parties that chose not to license certain IPR: if this IPR is an unpublished publication, they must either provide the text of the filed application, or indicate exactly which part of the standards' specification would require the use of the applied patent (and in the latter case the exclusion is limited to that part only).

The policy only talks about patents. Copyrights are not mentioned at all and are not required to be disclosed.

#### Sources and additional details:

**Disclosure of Pending, Unpublished Applications:** If a W3C Member includes claims in a patent application and such claims were developed based on information from a W3C Working Group or W3C document, the Member must disclose the existence of such pending unpublished applications. (IPR Policy at §6.6).

The participant follows the same procedures specified in this section 4 for excluding claims in issued patents, published applications, and unpublished applications. Participants resigning from a Working Group are still subject to all disclosure obligations described in section 6. (IPR Policy at §4.3).

Exclusion of Essential Claims in pending, unpublished applications follows the procedures for exclusion of issued claims and claims in published

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applications in section 4.1 through 4.3, except that the final deadline for exclusion of unpublished claims is at Last Call plus 60 days for any material, regardless of whether or not it was contained in the documents referenced in the Call for Exclusion document. Nevertheless, participants have a good faith obligation to make such exclusions as soon as is practical after the publication of the first Working Draft that includes the relevant technology.

Any exclusion of an Essential Claim in an unpublished application must provide either:

1. the text of the filed application; or
2. identification of the specific part(s) of the specification whose implementation makes the excluded claim essential.

If option 2 is chosen, the effect of the exclusion will be limited to the identified part(s) of the specification. (IPR Policy at §4.4).

C15. Are there requirements for disclosing equivalent patents in different patent legislations? (i.e. patent family members)

Although 'essentiality' is defined in terms of any patent in any jurisdiction in the world, the policy is not explicit in whether all these identities need to be disclosed.

### Sources and additional details:

"Essential Claims" shall mean all claims in any patent or patent application in any jurisdiction in the world that would necessarily be infringed by implementation of the Recommendation. A claim is necessarily infringed hereunder only when it is not possible to avoid infringing it because there is no non-infringing alternative for implementing the normative portions of the Recommendation. Existence of a non-infringing alternative shall be judged based on the state of the art at the time the specification becomes a Recommendation. (IPR Policy, §8.1)

### Patent disclosure, other

C16. Does the SDO make available specific (paper or electronic) patent disclosure forms? If so, is the use of these forms mandatory?

There are no publicly available forms, though the policy indicates that W3C, where applicable, provide administrative details for making disclosures.

W3C provides an online form through which disclosures can be made. Many patent-policy-related actions can be taken through Web forms, <http://www.w3.org/2004/01/pp-impl/>

### Sources and additional details:

Disclosure requests will provide administrative details for making disclosures. (IPR Policy at §6.3).

C17. Are there provisions concerning updating of disclosures in case of changes in the (proposed / final) standard or the (applied / granted / rejected / expired) patent, or updated information concerning the patent identities?

The policy provides no information on this.

C18. Are there requirements to withdraw disclosures when patents 'lose' their essentiality (e.g. due to the surfacing of a new, alternative implementation that can also fulfill the required element of the standard in question)

The existence of a non- infringing alternative shall be judged based on the state of the art at the time the specification becomes a Recommendation.

**Sources and additional details:**

"Essential Claims" shall mean all claims in any patent or patent application in any jurisdiction in the world that would necessarily be infringed by implementation of the Recommendation. A claim is necessarily infringed hereunder only when it is not possible to avoid infringing it because there is no non-infringing alternative for implementing the normative portions of the Recommendation. Existence of a non- infringing alternative shall be judged based on the state of the art at the time the specification becomes a Recommendation. (IPR Policy, §8.1)

C19. In addition to the formal, written disclosure statements, what information on potentially essential patents do participants need to provide during standardization meetings? Is it different for own proposals vs. proposals by others? Is this information (oral statements?) recorded, and to whom is it available?

The policy provides no information on this. However, the FAQ explains when a contribution is being considered for actual inclusion in a document intended to become a Recommendation, the Chair should ask the Contributor to disclose any essential claims, and if there are any, the terms under which those claims would be licensed.

**Sources and additional details:**

When a contribution is being considered for actual inclusion in a document intended to become a Recommendation, the Chair should ask the Contributor to disclose any essential claims, and if there are any, the terms under which those claims would be licensed. Lack of a response to this request is a red flag. (FAQ, at item 6)

C20. Are all patent disclosures being made public? Where and in what form? Is there any information in the disclosures that is not made public?

Patent disclosure information for each specification on the Recommendation track will be made public along with each public Working Draft issued by the Working Group.

**Sources and additional details:**

**Disclosures to Be Publicly Available on Recommendation Track:** Patent disclosure information for each specification on the Recommendation track will be made public along with each public Working Draft issued by the Working Group. (IPR Policy, §6.11,)

All Working Group participants are encouraged to provide a contact from which licensing information can be obtained and other relevant licensing information. Any such information will be made publicly available along with the patent disclosures for the Working Group in question. (IPR Policy, §5, at

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C21. How does the SDO deal with situations in which a party claims that a disclosed patent is not in fact essential or not any longer essential? Have such situations occurred?

The policy provides no information on this.

### Part D: Licensing commitments

D1. What best characterizes the commitment model? For instance, (1) Parties are committed to license by default and do not have to make a commitment statement (or make a general statement when joining the SDO); (2) Parties are *required* to issue a commitment statement (even if it's a statement of refusal to license) or (3) Parties are *invited* to issue a commitment statement.

Licensing obligations arise out of working group participation. By signing the Membership Agreement, Participants of a Working Group are obliged to license their essential patents according the specified RF conditions. (There are opt-out options, see Question D7.)

Licensing commitments can also arise if submitters chose to include a licensing commitment to their submission: member submissions, which are documents prepared outside the W3C process, are required to have a statement on whether or not all submitters are willing to license their essential patents according the specified RF conditions.

Other members (non-participating members, not submitters) do not have a FR licensing obligation, but are nevertheless encouraged to give such a commitment (since W3C seeks RF commitments for any of its recommendations).

A W3C representative clarified: 'W3C asks Members to "join" the group but not nominate any participants.'

Non-members may make a commitment if they wished (or asked for by W3C).

Finally, the FAQ document states that implementers (whether or not they participated in the Working Group that produced the Recommendation) may incur – indirect - licensing obligations through reciprocal licensing terms as permitted by section 5 of the Patent Policy. If they do not wish to license at RF terms, they might need to give up the ambition to implement W3C standards.

#### Sources and additional details:

**W3C RF Licensing Requirements for All Working Group Participants:** As a condition of participating in a Working Group, each participant (W3C Members, W3C Team members, invited experts, and members of the public) shall agree to make available under W3C RF licensing requirements any Essential Claims related to the work of that particular Working Group. This requirement includes Essential Claims that the participant owns and any that the participant has the right to license without obligation of payment or other consideration to an unrelated third party. With the exception of the provisions of section 4 below, W3C RF licensing obligations made concerning the work the particular Working Group and described in this policy are binding on participants for the life of the patents in question and encumber the patents containing Essential Claims, regardless of changes in participation status or W3C Membership. (IPR Policy at §3.1).

**Licensing Commitments in W3C Submissions:** At the time a W3C Member

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Submission [PROCESS, section 11] is made, all Submitters and any others who provide patent licenses associated with the submitted document must indicate whether or not each entity (Submitters and other licensors) will offer a license according to the W3C RF licensing requirements for any portion of the Submission that is subsequently incorporated in a W3C Recommendation. The W3C Team may acknowledge the Submission if the answer to the licensing commitment is either affirmative or negative, and shall not acknowledge the Submission if no response is provided. (IPR Policy at §3.3). See also Section 11 of the Process Document on submissions.

**Limitation on Licensing Requirement for Non-Participating Members:** Only the affirmative act of joining a Working Group, or otherwise agreeing to the licensing terms described here, will obligate a Member to the W3C RF licensing commitments. Mere Membership in W3C alone, without other factors, does not give rise to the RF licensing obligation under this policy. (IPR Policy at §3.2).

Recall, however, that implementers (whether or not they participated in the Working Group that produced the Recommendation) may incur licensing obligations through reciprocal licensing terms as permitted by section 5 of the Patent Policy. (FAQ, at 11).

In general, other parties have not made the same commitment for those same deliverables, although they MAY make this commitment if they wish. Similarly, W3C may request that they make such a commitment (see instructions for licensing commitments from non-W3C Members). (FAQ, at 6).

D2. If licensing statements are used, when must they be made? For instance: (1) Upon joining the SDO, (2) when a patent disclosure is made, (3) when a draft standard reaches a particular state of advancement, (4) when requested by the SDO.

For participants, no licensing statements are made, they arise out of participation.

For [non-participants] parties that submit proposals, a licensing commitment must be made along with the submission. See Question D1.

For commitments by other members (non-participant, not submitter) not much information is provided in the policy, but assumingly the timing is identical to that of disclosure (not that disclosure as such is only required when no RF commitment is taken).

Non-members may be asked, for instance by a WG chairman, to make a licensing commitment declaration. There is a specific form for this (see Question D4).

D3. Are there differences between licensing commitment policies between working groups or standardization activities? To what degree do the commitment requirements depend on whether a member/participant is actually participating in a working group (or standardization activity) or not?

There are no differences between working groups.

Commitments do depend on whether a member is a participant, or a submitter. See Question D1 and D2 above.

D4. Does the SDO make available specific (paper or electronic) licensing commitment forms? If so, is the use of these forms mandatory?

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For participants, no licensing statements are made, they arise out of participation.

For [non-participants] parties that submit proposals, a licensing commitment must be made along with the submission (See Question D1). For this group there does not seem to be a specific form.

For non-members, W3C offers a "Licensing commitments from non-W3C Members" available at <http://www.w3.org/2004/01/pp-impl/35520/nmlc>

### Sources and additional details:

**Licensing Commitments in W3C Submissions:** At the time a W3C Member Submission [PROCESS, section 11] is made, all Submitters and any others who provide patent licenses associated with the submitted document must indicate whether or not each entity (Submitters and other licensors) will offer a license according to the W3C RF licensing requirements for any portion of the Submission that is subsequently incorporated in a W3C Recommendation. The W3C Team may acknowledge the Submission if the answer to the licensing commitment is either affirmative or negative, and shall not acknowledge the Submission if no response is provided. (IPR Policy at §3.3). See also Section 11 of the Process Document on submissions.

D5. Are issued licensing commitments binding to other members of the SDO only, or to any implementer of the standard requesting a license?

Licenses should be available to any implementer of the standard, member or not.

### Sources and additional details:

[licenses] shall be available to all, worldwide, whether or not they are W3C Members; (IPR Policy, §5, at 2)

D6. Is there a specific or 'minimal' commitment type required or requested by the SDO? (e.g. FRAND, FRAND-z, RF, non-assertion ) If so, does this specific or 'minimal' commitment type depend on the working group or standardization activity?

The policy seeks to have RF commitments from any patent holder. Only in very specific cases, exceptions can be made (see question E2).

### Sources and additional details:

The goal of this policy is to assure that Recommendations produced under this policy can be implemented on a Royalty-Free (RF) basis. (IPR Policy, at Abstract)

In order to promote the widest adoption of Web standards, W3C seeks to issue Recommendations that can be implemented on a Royalty-Free (RF) basis. Subject to the conditions of this policy, W3C will not approve a Recommendation if it is aware that Essential Claims exist which are not available on Royalty-Free terms. (IPR Policy, at §2)

[licenses] may not be conditioned on payment of royalties, fees or other consideration; (IPR Policy, §5, at 6)

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D7. Is there any 'opt-out' option for patent holders (indicating it is not willing to license certain patents), or any 'opt-down' option (e.g. from RAND-z to RAND)? How does it work and when does it need to be exercised? What are the consequences of such a choice?

Under a specific, well-defined procedure, participants can chose not to license essential IPR at RF terms. When doing so, they can remain participants of the Working Group, or decide not to. In any case, they need to disclose their IPR in detail.

Submitters can indicate in a declaration along with their submission that they are not willing to license at RF terms, but by doing so, that can be almost sure that the working group will not incorporate their submission as working groups seek to adopt recommendations only if RF license are available.

Members that are neither participants nor submitters can chose not to license at RF terms. In that case, they are required to disclose their patents.

### Sources and additional details:

Specific Essential Claims may be excluded from the W3C RF licensing requirements by a participant who seeks to remain in the Working Group only if that participant indicates its refusal to license specific claims no later than 150 days after the publication of the first public Working Draft [PROCESS, section 7.4.1] by specifically disclosing Essential Claims that will not be licensed on W3C RF terms. A participant who excludes Essential Claims may continue to participate in the Working Group.

If any claims are made essential by the final Recommendation [PROCESS, section 7.1.1] as a result of subject matter not present or apparent in the latest public Working Draft [PROCESS, section 7.1.1] published within 90 days after the first public Working Draft, the participant may exclude these new Essential Claims, and only these claims, by using this exclusion procedure within 60 days after the publication of the Last Call Working Draft [PROCESS, section 7.4.2]. After that point, no claims may be excluded. (Note that if material new subject matter is added after Last Call, then a new Last Call draft will have to be produced, thereby allowing another exclusion period for 60 days after that most recent Last Call draft.) (IPR Policy, at §4.1. See also 4.2 and further on the exact conditions for withdrawal)

D8. Does the policy require, allow or forbid parties to include specific licensing terms as part of their commitment (such as conditions of bilateral or universal reciprocity, scope of use, etc.)? Does the policy (or the forms) explicitly specify such options, or does it simply tolerate it in practice?

Licenses may require universal reciprocity.

They may also reasonable, customary terms relating to operation or maintenance of the license relationship, which brings in some RAND elements.

This reciprocity condition seems to include any essential claims owned by the licensee in question, not just those for the specific Recommendation in question. A W3C representative clarified, however: "Since "Essential Claims" are scoped to "the Recommendation," the reciprocity applies within a Recommendation, not across all W3C Recommendations (in contrast to suspension (5.6), which is available against a suit on "claims essential to implement any W3C Recommendation")."

There might be another difficulty here: if a patent owner (1) is a member and has properly followed an exclusion procedure, or (2) in an exception handling it has been decided that an essential patent holder is allowed to require and RAND fee or (3) is a non-member not willing to



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license at RF, this party would not be in breach with the policy, yet could be effectively be excluded from getting licenses to implement the W3C standard itself. In this sense, the W3C policy differs from that of some other SDO's, where reciprocity is allowed in the sense that if a patent holder is committed to RF, it may still demand a RAND fee if the licensee is demanding a royalty bearing RAND for its own essential patents.

A W3C representative clarified: 'I'm not aware of any time this situation has arisen in practice. Because a patent commitment may be conditioned on a reciprocal RF license, a contributor unwilling to license RF might find himself unable to get a license to implement.'

### Sources and additional details:

[licenses] may be conditioned on a grant of a reciprocal RF license (as defined in this policy) to all Essential Claims owned or controlled by the licensee. A reciprocal license may be required to be available to all, and a reciprocal license may itself be conditioned on a further reciprocal license from all.; (IPR Policy, §5, at 4)

[licenses] may not impose any further conditions or restrictions on the use of any technology, intellectual property rights, or other restrictions on behavior of the licensee, but may include reasonable, customary terms relating to operation or maintenance of the license relationship such as the following: choice of law and dispute resolution; (IPR Policy, §5, at 7)

D9. Does a commitment (1) cover any patents that are essential to the developed standards, (2) only cover those patents that are actually disclosed, or (3) only cover patents relating to the own contributions of the patent holder?

Commitments cover all patents essential patents for the given deliverable (unless there is a proper exclusion). It also covers future patents, as explicitly stated in the FAQ.

### Sources and additional details:

[licenses] shall extend to all Essential Claims owned or controlled by the licensor; (IPR Policy, §5, at 2)

26. Does my licensing obligation in a given group extend to future patents I may own?

Yes. Section 3.1 of the W3C Patent Policy states:

As a condition of participating in a Working Group, each participant (W3C Members, W3C Team members, invited experts, and members of the public) shall agree to make available under W3C RF licensing requirements any Essential Claims related to the work of that particular Working Group. This requirement includes Essential Claims that the participant owns and any that the participant has the right to license without obligation of payment or other consideration to an unrelated third party.

Note that if this were not the case, one could easily subvert the intention of the policy by, for example, joining a Working Group and filing for a patent the following day. (FAQ, item 26)

D10. Is a patent holder still bound to a licensing commitment should an earlier disclosed patent eventually turn out not to be essential? (e.g. differences in adopted standard, differences in granted patent)

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No, commitments are only binding for those patents that are actually essential.

### Sources and additional details:

[licenses] shall extend to all Essential Claims owned or controlled by the licensor; (IPR Policy, §5, at 2)

D11. What is the geographic scope of the commitments? Relatedly, do commitments relate only to the disclosed patents, or also to all equivalent patents in other jurisdictions (i.e. patent family members)?

License should be available worldwide.

### Sources and additional details:

[licenses] shall be available to all, worldwide, whether or not they are W3C Members; (IPR Policy, §5, at 2)

D12. Are commitments limited to the use of these patented technologies only in order to produce products that comply to specific standards? Or all standards developed by the SDO, or not limited at all?

Indeed, commitments may be limited to the implementation of recommendations.

### Sources and additional details:

[licenses] may be limited to implementations of the Recommendation, and to what is required by the Recommendation; (IPR Policy, §5, at 3)

D13. Does the policy specify any legal restriction concerning commitments? (For instance, a policy may specify that a FRAND commitment implies that an injunctive relief may not be sought.)

The policy provides no information on this.

D14. Does the policy explicitly require that commitments are irrevocable? If so, does the policy mention allowable exceptions (such as defensive suspension, or if the licensee refuses to offer a reciprocal license)?

The licensing commitment is irrevocable, unless the relevant Recommendation is no longer in effect. The policy notes that licenses must be for the lifetime of the patent(s), which is remarkable because it is common practice in many industries to issue licenses for shorter periods (e.g. 5 years) and negotiate the licenses afterwards. However, for RF patents this might be different.

*A W3C representative clarified that "W3C's RF licensing commitments extend for the lifetime of the patents. That helps to give implementers stable expectations about the continued availability of licenses essential to their work."*

Including a licensing condition for defensive suspension is allowed.

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### Sources and additional details:

The RF license conforming to the requirements in this policy shall be made available by the licensor as long as the Recommendation is in effect. The term of such license shall be for the life of the patents in question, subject to the limitations of 5(10). (IPR Policy §5 at 9).

If the Recommendation is rescinded by W3C, then no new licenses need be granted but any licenses granted before the Recommendation was rescinded shall remain in effect. (IPR Policy §5 at 10).

**W3C RF Licensing Requirements for All Working Group Participants:** As a condition of participating in a Working Group, each participant (W3C Members, W3C Team members, invited experts, and members of the public) shall agree to make available under W3C RF licensing requirements any Essential Claims related to the work of that particular Working Group. This requirement includes Essential Claims that the participant owns and any that the participant has the right to license without obligation of payment or other consideration to an unrelated third party. With the exception of the provisions of section 4 below, W3C RF licensing obligations made concerning the work the particular Working Group and described in this policy are binding on participants for the life of the patents in question and encumber the patents containing Essential Claims, regardless of changes in participation status or W3C Membership. (IPR Policy at §3.1).

Of course, for the life of the patents is not exactly identical to whether a commitment is irrevocable (it may be revoked, but still for the life of the patent for those that took a license before the commitment was revoked).

[licenses] may be suspended with respect to any licensee when licensor is sued by licensee for infringement of claims essential to implement any W3C Recommendation; (IPR Policy §5 at 6).

D15. What does the policy specify about the eventual transfer of patents for which commitments have been made?

The policy provides no information on this.

There is, however, a statement in a FAQ that in the case of the acquisition of an entity that is subject to licensing obligations, the obligations will continue to exist. To ground its line of arguments, the FAQ refers the policy, which specifies that commitments are made 'for the life of the patents in question'. We are not convinced that this approach is very solid that that this mere clause will effectively bind future owners of patents to a commitment as such.

39. When Member A, which participates in a Working Group, is acquired by Member B and Member A ceases to exist as an independent entity, what is the impact on licensing commitments?

The Patent Policy commitment of Member A is given for the lifetime of the patent as described in section 3 and section 5 of the Patent Policy. Consequently, Member B inherits Member A's Royalty-Free licensing commitments.

Member B is not considered a Working Group Participant by virtue of its acquisition of Member A. Thus, unless Member B joins the Working Group (or is already participating), it does not have any additional licensing obligations as of the termination of Member A's contract with W3C. If Member B joins the Working Group, other sections of the Patent Policy govern new licensing commitments and exclusion opportunities. (FAQ, at item 39)

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D16. Does the policy specify anything about ex-ante disclosure of most restrictive licensing terms? (e.g. forbidden, voluntary, mandatory, recommended, endorsed)

The policy provides no information on this.

D17. Is there any link between the IPR policy – or the SDO in general – and a patent pool or other licensing programs? Can you describe this link?

No such link is known to me.

D18. Are all licensing commitments being made public? Where and in what form? Is there any information in the disclosures that is not made public?

Licensing requirement coming out of participations do not require a statement or letter.

Public information is made available on which parties of a WG carry a licensing obligation because of participation. An example is:

<http://www.w3.org/2004/01/pp-impl/46884/showCommitments>

Public information is also made available on the licensing commitments made by other members (not participating nor submitting), and invited experts. An example is:

<http://www.w3.org/2004/01/pp-impl/46884/showCommitments>

The licensing commitments made by submitters alongside their submission are not available. A W3C representative clarified that *“We do not track commitments by submission, as that is not necessary under the policy”*)

Finally, licensing commitments made by non-members are not yet available. . A W3C representative clarified that *“[These are tracked but not yet integrated into the same table of commitments. We are actively working to integrate them into the showCommitments page.]”*

### Part E: SDO procedures and public

E1. What are the remedies available to SDO in case of non-compliance with the policy (e.g. failure to disclose, failure to provide licensing commitments, other violations of the policy)?

The IPR policy itself provides no information on this. Perhaps other binding documents do.

E2. How does the policy deal with companies that chose not to enter into licensing commitments (insofar as the policy allows such a choice)?

W3C has an advanced and pragmatic procedure in case patent holders are not willing to license on the sought RF terms. In such a case, a Patent Advisory Group (PAG) is established who will study the matter.

Whereas design around is the preferred option, W3C may eventually come to the conclusion that

accepting an alternate licensing terms (such as royalty bearing RAND) might be accepted, if this is 'consistent with the W3C mission, the interests of the Web community, and is clearly justified despite the expressed preference of the W3C Membership for RF licensing'.

There seem to have been at least four PAG charters in W3C's history:

<http://www.w3.org/2009/03/widgets-pag-charter>

<http://www.w3.org/2009/11/widgets-pag-charter>

<http://www.w3.org/2011/02/xmlsec-pag-charter.html>

<http://www.w3.org/2012/01/touch-pag-charter>

On the outcome of several PAG processes, a W3C representative clarified: "

The PAG concluded that a patent was likely invalid, and recommended continuation of work on the Widgets Access Request Policy Specification. <http://www.w3.org/News/2011#entry-9270>

The PAG concluded that patent claims were non-essential, and recommended continuation of work on the Widgets 1.0: Updates Specification <http://www.w3.org/News/2009#entry-6537>

The PAG recommended that work be stopped on a specification, Remote Events for XML (REX 1.0) <http://www.w3.org/News/2007.html#entry-7043>"

### Sources and additional details:

In the event a patent has been disclosed that may be essential, but is not available under W3C RF licensing requirements, a Patent Advisory Group (PAG) will be launched to resolve the conflict. The PAG is an ad-hoc group constituted specifically in relation to the Working Group with the conflict. A PAG may also be formed without such a disclosure if a PAG could help avoid anticipated patent problems. During the time that the PAG is operating, the Working Group may continue its technical work within the bounds of its charter. (IPR Policy, §7.1. See also §7.2 thru 7.5.3 on this matter).

#### 7.5.1. Possible PAG Conclusions

After appropriate consultation, the PAG may conclude:

- The initial concern has been resolved, enabling the Working Group to continue.
- The Working Group should be instructed to consider designing around the identified claims.
- The Team should seek further information and evaluation, including and not limited to evaluation of the patents in question or the terms under which W3C RF licensing requirements may be met.
- The Working Group should be terminated.
- The Recommendation (if it has already been issued) should be rescinded.
- Alternative licensing terms should be considered. The procedure in section 7.5.3 must be followed. (IPR Policy, §7.5.1).

#### 7.5.3. Procedure for Considering Alternate Licensing Terms

After having made every effort to resolve the conflict through options 1, 2, and 3 under 7.5.1, the PAG, by consensus [PROCESS, section 3.3], may propose that specifically identified patented technology be included in the Recommendation even though such claims are not available according to the W3C RF licensing requirements of this policy. The PAG Proposal must explain: why the chartered goals of the Working Group cannot be met without inclusion of the identified technology; how the proposed licensing terms will be consistent with widespread adoption.

The PAG Proposal must include:

a complete list of claims and licensing terms of the proposed alternative arrangements; and, a proposed charter for the Working Group, unless the Recommendation has been issued and no new work is required.

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If the Director determines that the PAG Proposal is the best alternative consistent with the W3C mission, the interests of the Web community, and is clearly justified despite the expressed preference of the W3C Membership for RF licensing, then the Proposal shall be circulated for public comment and Advisory Committee review. The Director may also circulate the Proposal for Advisory Committee review without such endorsement. Should the PAG Proposal be rejected, then either sub-paragraph 4 or 5 of section 7.5.3 will apply as appropriate, without further action of the Advisory Committee. Members of the Working Group who are bound to RF terms are not released from their obligations by virtue of the PAG Proposal alone. As with any newly chartered Working Group, new commitments must be made, along with possible exclusions. In order to expedite the process, the PAG Proposal should consider whether additional claims would be excluded under the new charter and include such information in the PAG Proposal. (IPR Policy, §7.5.3).

E3. How does the SDO deal with non-members (third parties), for instance when it is brought to the attention of the SDO that such a third party owns IPR essential to one of its standards?

Third parties (nonmembers) that are suspected to own essential IPR are contacted and requested to disclose their patents. No information is provided on whether and how such parties are asked to provide licensing statements (note that §6.1 is for members only).

### Sources and additional details:

**Disclosure Requests:** Disclosure requests will be included in the "Status of This Document" section of each Recommendation track document as it reaches each new maturity level (Working Draft, Last Call Working Draft, Candidate Recommendation, Proposed Recommendation, Recommendation). Separate requests may be issued by the W3C to any party suspected of having knowledge of Essential Claims. Such disclosure requests will instruct the recipient to respond through their AC Rep (in the case of Members) or a W3C contact (in the case of non-Members). Disclosure requests other than those that appear in the specification itself should be directed to the AC Rep. (IPR Policy at §6.3).

E4. What are the policy and practices about (1) handling and possible rejection of incomplete disclosure or licensing statement, (2) correction of clerical errors (including patent identities), (3) resubmission of statements in any of the above cases?

The policy provides no information on this.

## Part F: Conflicts and enforcement

F1. Can you please describe the main disputes (if any) that have arisen in terms of respecting or interpretation the IPR policy?

The policy provides no information on this.

## Part G: Other

G1. Is the content of meetings of Technical Committees, Technical Bodies or similar groups considered to be public information? This is especially relevant for patent examiners, who need

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to consider whether such information should or should not be considered when examining prior art in (new) patent applications.

The policy provides no information on this.

G2. Are there any specific provisions on software / copyright when that software is part of the content of the standard? (This question does not concern the copyright on the text of the standard as such.)

The policy only talks about patents. Copyrights are not mentioned at all.

G3. Are there any rules in relation to IPR in standards of other SSOs that are normatively referenced in a standard?

Referenced standards developed elsewhere are excluded.

### Sources and additional details:

#### Limitations on the Scope of Definition of Essential Claims

The following are expressly excluded from and shall not be deemed to constitute Essential Claims:

1. any claims other than as set forth above even if contained in the same patent as Essential Claims; and
2. claims which would be infringed only by:  
portions of an implementation that are not specified in the normative portions of the Recommendation, or enabling technologies that may be necessary to make or use any product or portion thereof that complies with the Recommendation and are not themselves expressly set forth in the Recommendation (e.g., semiconductor manufacturing technology, compiler technology, object-oriented technology, basic operating system technology, and the like); or the implementation of technology developed elsewhere and merely incorporated by reference in the body of the Recommendation.
3. design patents and design registrations. (IPR Policy, §8.2)

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