IPR Policy of the DVB Project: Negative Disclosure, FR&ND Arbitration unless Pool Rules OK, Part 2
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ABSTRACT
The DVB Project is a European-based standards forum that for over 15 years has been developing specifications for digital video broadcasting, many now implemented worldwide. Its IPR policy has several novel elements. Part I of this article describes “negative disclosure,” the obligation of each member to license IPRs essential to DVB specifications unless it gives notice of the unavailability of the IPR. This approach contrasts with the more common rule (e.g., within ANSI accredited bodies) calling for IPR disclosure and confirmation of availability on FR&ND terms. Other notable features of the IPR policy of DVB are arbitration and, discussed in this Part II, fostering of patent pooling. This article provides a commentary on the DVB’s IPR policy and on its application. This Part II also describes the work of the DVB in resolving IPR “gateway” issues when the perceived dominance of technology contributors, notably through control over IPRs, risked, in the view of some members, distorting new digital markets. In two cases, DVB has created a licensing mechanism to dispel these concerns. In addition to the quality of its technical work, DVB’s success lies in its novel IPR policy and its ability to achieve consensus to resolve gateway issues.  

Keywords: Competition; DVB; Intellectual Property Rights; IRP; Patents; Standardization; Standards

FOSTERING PATENT POOLS
One key innovation in DVB’s rules governing IPRs is the encouragement it offers to the formation of voluntary licensing programmes covering patents essential to DVB specifications. The benefits of a pool of IPRs essential to a technology are manifest, including a collective royalty likely to be lower than the aggregate of the royalties individually chargeable by rights holders, and a reduced burden to implementers to discover rights holders and administer payment and compliance. However at the time of DVB’s formation in 1993 it was rare for a standards forum with objectives, and a membership, as broad as DVB’s to tie its technical work with licensing regimes. This was due in part to a prevailing notion based on competition law against a link between standards setting and IPR licensing, and a general ambivalence towards collective licensing regimes.
DVB’s explicit reference to voluntary licensing regimes was then a relative novelty. This section discusses the text on pooling set out in the MoU. It then presents the principal tools used by DVB to foster pools: the patent declaration process, forum for exchange of views on terms and some recent developments. It also describes briefly the resulting pools.

MoU’s Text on Voluntary Joint Licensing Programmes

Article 14 establishes criteria for the elements of a licensing regime covering IPRs essential to a DVB specification. Section 14.9 of the MoU provides,

14.9 For any specification approved by the Steering Board clause 14.7 of this Article shall come into force two years after the notification referred to in clause 14.1 unless by such date at least 70 percent of all Members or their affiliated companies holding IPRs which have been identified as being necessarily infringed when implementing such specification and subject to the undertaking for licensing pursuant to clause 14.2 (but excluding Members or their affiliated companies, all of whose IPRs were subsequently unavailable under clause 14.3) have notified the Steering Board of a voluntary agreed upon joint licensing programme regarding their identified IPR for such specification.

This provision defines the elements of a patent pool acceptable within DVB. These are conditions which rights holders are held to satisfy in order successfully to avoid arbitration under article 14.7. A pool is a “voluntary agreed upon joint licensing programme”, confirming the voluntary nature of participation by generally commercial actors in its formation, setting of terms, and functioning. To satisfy DVB’s criteria, the pool must include “at least 70 percent of all Members or their affiliated companies holding [essential] IPRs”. This was intended to ensure that the patent pool had a “critical mass” of patents available for licensing, making the pool attractive as a “one-stop shop”.

Article 14.9 speaks of “70 percent of all Members or their affiliated companies”. The calculation of the 70 percent is to be undertaken without regard to the “Members or their affiliated companies ... whose IPR were subsequently unavailable under clause 14.3”. This is meant to address the concern that the pool could be completed, while the second window, under article 14.3, for notice of IPR unavailability is still open. The parenthetical text makes clear that under the circumstances where IPR previously identified has been withdrawn during the second window, its holders are not be to included in the calculus of whether the 70 percent has been satisfied.

It could be argued that a more effective provision would have required a threshold based not on a percentage of participation by members but on a number of IPRs. There are, however, several reasons favouring DVB’s approach. Most notably, a “percentage of members” would be far more easily measured than a number of IPRs. Discovering the universe of IPRs would require a patent search and its results may not be certain. The search may reveal holders who are not members of DVB and not willing to join a pool. As a result an outside actor could frustrate a good-faith attempt by members to form a pool. Overall, the MoU’s criterion offers a more acceptable bright-line test for deciding whether the right to arbitration has expired.
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