Chapter 14
IPR Policy of the DVB Project:
Negative Disclosure, FR&ND Arbitration
Unless Pool Rules OK
Part 1

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ABSTRACT
The DVB Project is a European-based standards forum that for close to 15 years has been developing specifications for digital video broadcasting, many now implemented worldwide. Its IPR policy has several novel elements. These include “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 fostering of patent pooling. This article provides a commentary on the DVB’s IPR policy and on its application. It 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.

INTRODUCTION
The DVB Project is a standards forum that has successfully developed a number of technical specifications for digital video broadcasting. Many of these have been adopted throughout the world. In Europe, the standards are at the core of digital television, and many have been mandated by the European Union. Within the United States, DVB’s specifications are used by satellite
broadcasters and the U.S. cable industry and for mobile broadcasting. One of the reasons for the success of DVB has been a policy governing the intellectual property rights (IPRs) essential to its specifications. It contains a number of elements that were novel at the time of DVB’s formation. The most notable is the commitment by all members to grant licences to IPRs on terms fair, reasonable, and nondiscriminatory (FR&ND) unless the holder gives notice of its unavailability. This rule on “negative disclosure” turns on its head the duty found in most standards bodies: affirmative disclosure of IPRs essential to a specification together with confirmation of a willingness to license on FR&ND terms. Other unusual terms in DVB’s policy included arbitration to settle IPR disputes and encouragement of patent pooling. This article examines the terms at length in the next section.

DVB’s experience with “negative disclosure,” the fostering of patent pools, and the other features of its IPR policy have served as a significant distinguishing factor of DVB specifications and have contributed to the widespread implementation of its technology. DVB’s successful IPR policy is an important complement to the strength of the technology captured in its specifications. It is a central argument of this article that when making a choice among competing technologies, implementers have generally greater certainty of the extent of their exposure to costs—no more than FR&ND, even in the absence of disclosure—to be imposed by participating rights holders relevant to DVB specifications. This article argues that other standards bodies do not provide the same measure of certainty for implementers.

At the same time, DVB’s policy has been subject to reassessment in light of the success or difficulties of practical application of its IPR rules. These difficulties have included problems associated with two licensing programs covering DVB standards; they have prompted the European Commission during 2007 to express its concerns directly to the DVB Project. The IPR policy is also assessed in an environment colored by concerns over “submarine patents,” “patent ambushes,” and doubts about the level of duty of care expected of participants in the standards process and where the policy framework is evolving to accommodate changes in regulation, judicial decisions, academic and scholarly literature, and other sources. This article discusses elsewhere the impact of developments such as the work of U.S. government agencies and the European Commission on the relationship between laws governing IPR and competition rules, the Rambus litigation, cases before DG Competition of the European Commission, and the work within ETSI in improving its own IPR policy.

These changes have an impact throughout the standards process and the introduction of new technologies, and there is an abundant and growing literature on standards, IPR, and competition rules. A selection, undoubtedly unrepresentative, includes articles on the relationship between standard-setting and antitrust (Dolmans, 2002; Morse, 2003), the value vel non of a regime encouraging ex ante disclosure of essential IPR and licensing terms (Geradin et al., 2007; Ohana et al., 2003; Skitol, 2005; Updegrove, 2006), the analysis to be applied to patent pools (Raymond, 2002), the methodology for determining FR&ND (Einhorn, 2007; Layne-Farrar, 2006; Stoner, 2006; Swanson et al., 2005).

This article recounts the novelty and success of DVB’s approach to IPR licensing. It seeks to demonstrate the following:

- DVB’s policy of “negative disclosure,” coupled with its fostering of patent pools, often provides to implementers of its specifications greater commercial certainty than other policies.
- This policy, in contrast with the more commonplace regime of affirmative disclosure, has been shown, perhaps paradoxically, to offer a greater level of accurate disclosure of IPRs essential to specifications.