

DVB's Fostering of early Formation of Patent Pools

Note to DVB's Liaison Partners and to Standards Bodies that author Materials normatively referenced by DVB Standards

One distinctive feature of DVB's policy governing intellectual property rights is the fostering by DVB of the formation of voluntary joint licensing programs ("patent pools"). This pre-commercial activity has resulted in the completion of a number of pools covering patents essential to DVB standards. For over two decades, DVB has developed a number of tools to encourage patent holders to form pools. Pooling has many benefits as a licensing framework. DVB's fostering of pools soon after standardization often provides more timely market certainty of the availability of the technology and the royalties to be borne by implementers.

Early fostering of pool formation has served DVB standards well. But DVB standards are not used in isolation; they are implemented with technologies standardized in other bodies, most of which do not foster patent pools. So while there may be timely certainty, thanks to early pooling, of the licensing costs of DVB-authored standards, the broadcaster or device manufacturer may not know the costs of other key standardized technologies until years later. DVB members have expressed the view that the delay in completion of pooling for non-DVB standards (and the comparatively later disclosure of licensing terms) has become a DVB concern because often these standards are normatively referenced by DVB's own standards.

For this reason, this Note is intended for DVB's liaison partners and those standards bodies whose standards are normatively referenced in DVB standards.

One key for successful implementation of standards is market certainty – early on – of the availability of the standardized technology and of the associated royalty costs. Implementers do not want to be surprised – significantly after investing in product design and development, market launch and after pricing of devices and services – by a royalty burden markedly higher than their assumptions. And patent holders want to be sure that royalty levels reflect their R&D costs and other investments in a DVB technology. DVB reduces these risks by fostering the early formation of licensing programs covering its specifications. This has worked well across DVB's core specifications.

There are multiple other benefits that accrue to a specifications developer like DVB (and more generally to any specifying body) when it fosters pools covering its specifications. By fostering, it provides a life cycle service in support of its specification. This encourages greater adoption of its specifications. For implementers of the specifications, the activities leading to pool formation create a mechanism for convenient licensing of essential patents at presumably a lower aggregate royalty rate. This is particularly true when the pool offers a "one-stop shop" bringing together a critical mass of essential patents. Fostering speeds overall pool formation, thus providing to the market an earlier view of licensing terms. Holders of essential patents also find that a pool offers administrative convenience and the lower overall royalty encourages greater market take-up. The threat of (and need for) litigation is reduced.

A voluntarily agreed joint licensing program is by now a well-recognized structure for the licensing of patents, held by multiple licensors, essential to a standardized technology, for example telecommunications and audiovisual standards. A pool has two phases: its **facilitation**, when patent holders come together to agree terms for a licensing program of essential patents and for distribution of program royalties; and **administration**, when a third party administrator manages the licensing program, signing licensees, collecting and distributing royalties, and other tasks.

To this two-step process DVB has added a prior, pre-commercial phase: pool **fostering**. Fostering is the process of encouraging patent holders to consider the formation of a pool covering a specification. (The activity is pre-commercial because it does not include matters handled in pool facilitation, including setting royalty rates and other terms and agreeing the fee for the pool administrator.) Over the past twenty years DVB has experimented with a number of tools to foster the formation of patent pools. Today DVB's typical process has several steps:

- In the initial call for technologies, DVB asks each contributor to a draft standard to confirm that, if its technology is chosen for the DVB specification, it will participate in a meeting to consider pooling as DVB completes its technical development work.
- Shortly after the specification is completed, DVB calls a meeting of those who have made such a confirmation and makes a broader call for participants, including those outside DVB. As authoring standards body, DVB is aware of the lead technology contributors and their amenability to pooling. Each participant must have a well-founded belief that it holds one or more patents essential to the DVB specification. The meetings are subject to confidentiality and to compliance with competition / antitrust rules.
- At the meetings, DVB leads the discussion with patent holders on whether the time is right to begin a pooling effort; whether the right companies are participating in the patent holders' process; and whether DVB's continued activity is useful for the pool's progress. It leads the process for determining the criteria for the choice of a commercial pool facilitator. In this phase, DVB's fostering is finished when the participants select a facilitator.

Experience has shown that the DVB process can considerably speed pool formation and thus market certainty for implementers and developers.

In addition to acting as convenor, DVB can call upon further tools such as information sessions on fringes of technical meetings; collection of information and targeted communications; and monitoring of pool formation and when required provision of technical support. At the end of facilitation, when the pool program is ready to be commercialized, DVB can provide a forum for exchange of views on the licensing terms, bringing together the licensing administrator (and pool members) and potential implementers. But throughout pool fostering and these other pre-commercial activities, DVB is not involved in licensing negotiations.

Patent pools are now a well-recognised licensing structure for standardised technologies. Indeed, in pool fostering, DVB is not unique among standards developers. Early in the recent history of pooling, CableLabs encouraged the formation of the MPEG2 pool (and created the entity to administer the pool). More recently IEEE has undertaken a variety of activities to foster pools and actively considered its participation in the facilitation and administration of pools covering its standards. Other bodies could adopt DVB's pool fostering process or these other approaches that are beneficial to patent holders, implementers, standards bodies and indeed end-users.

Notes

Further information on DVB's experience in fostering the formation of patent pools can be obtained from the Legal Director DVB, Carter Eltzroth, eltzroth@dvb.org.

The IPR policy of the DVB Project is set out in its Memorandum of Understanding, Article 14. Art 14.9 is the basis for pool fostering. The multiple approaches that DVB took in pool fostering through 2005 are described in a commentary on its IPR policy, Eltzroth, *IPR Policy of the DVB Project, Negative Disclosure, FR&ND, Arbitration unless Pool*, Part 2, notably pages 1 – 6 (pages 30-35 of continuous pagination). The MoU, the commentary and other materials can be found at www.dvb.org/members/iprpolicy.