Explanatory Note

Certain Terms governing

the Distribution Agreements

of the Common Scrambling Algorithm

 This note sets out a brief background to the drafting process for the distribution agreements for the specifications, approved by the DVB Project, for the Common Descrambling System and Scrambling Technology. It also responds to some issues that have been raised about the agreements.[[1]](#footnote-1) In this note, the capitalized terms have the same meaning as in the DVB Descrambling Custodian Agreement. The "Common Scrambling Algorithm" means the Common Descrambling System and the Scrambling Technology, taken together.

 Background. The distribution arrangements for the Common Scrambling Algorithm are the result of a prolonged drafting and review process within the DVB Project. The four Companies which developed the algorithm were given the task of drafting the distribution agreements. The drafting process has kept pace with the work of encryption specialists who were preparing the final version of the Common Scrambling Algorithm. The initial round of the distribution documents, covering the Common Descrambling System, was being completed at the time of adoption by the European Union of the Directive on Television Transmission Standards.[[2]](#footnote-2) That directive requires that all consumer equipment capable of descrambling digital television signals shall possess the capability to allow the descrambling of such signals according to a common European scrambling algorithm administered by a recognized European standardization body.

The DVB Descrambling Custodian Agreement and the Scrambling Technology Custodian Agreement specify the terms of administration as referred to in the directive.

 This drafting process for the Common Descrambling System lasted over a year. In addition to the four Companies and the European Telecommunications Standards Institute, state ministries and agencies sat in some drafting sessions. Periodic progress reports were made to the Steering Board of the DVB Project, to the Ad-hoc Group on Conditional Access and its Conditional Access Specialists Group and to assemblies of ETSI. Copies of the draft documents were made available to the members of the Steering Board and to those, notably manufacturers, expressing interest. Detailed comments were received from several DVB members and these comments were, where appropriate, worked into the draft documents.

 The DVB Descrambling Custodian Agreement became effective in August 1995 and the Scrambling Technology Custodian Agreement in January 1996.

 Nominal royalties. The distribution process for each of the Common Descrambling System and the Scrambling Technology is comprised of two central documents: a custodian agreement and a licence agreement. (The Scrambling Technology Licence Agreement also contains, as an annex, the form of Scrambler Licence Agreement for sales of Scramblers to End-Users.) A summary of the licensing process is contained elsewhere in this document of the DVB Project.

 The custodian agreements were prepared with a view to ensuring the distribution of the Confidential Information,

 under the supervision of a neutral Custodian,

 to licensees approved by the Custodian and the Companies based on ability to use the Confidential Information (and which have not engaged in audiovisual piracy),

 while recognizing that such a distribution may give rise to review by export control authorities.

 The most notable feature of the licence agreements is the nominal royalty charged to each licensee. The nominal royalty is designed to hold down the price of equipment needed by the consumer to receive digital video broadcasting.[[3]](#footnote-3) Related to this low royalty is a shifting of the burden to the licensees for the defense of the Confidential Information. As the recitals to the licence agreements make clear, the nominal royalty is a contribution by the Companies to the work of the DVB Project

 with the hope that other holders of rights in technology incorporated in DVBS will make a similar contribution and as part of the implementation of the conditional access package of the EP-DVB adopted by the Steering Board of the EP-DVB on 27 September 1994.

The nominal royalty could be modified upon the occurrence of certain regulatory changes.

 Repriced royalties. As noted above, one of the signal contributions to the DVB Project by the Companies has been their agreement to license, for a nominal royalty, the Common Scrambling Algorithm. This contribution is part of the conditional access package adopted by the Steering Board of the DVB Project in September 1994. After the initial drafting of the distribution agreements, the Companies concluded that the careful consensus worked out for the conditional access package could be undermined. Under these circumstances, it would be unjust, in their view, that they would remain bound to this royalty structure while their competitive position is significantly undercut.

 For this reason, the notion of "Repriced Royalties" was introduced (Article 2.2 of the licence agreements), allowing generally the Companies to assess a different royalty under the respective licence agreements. The provision makes clear that this different royalty would however fall under any pooling arrangements for DVBS.

 Uniformity of Licence Agreements. The distribution agreements were drafted with the objective of creating a standard low-cost system, administered by a neutral Custodian, for licensing the specifications related to the Common Scrambling Algorithm. The terms of the licence agreements are the result of the drafting and review process outlined above, including consultations with manufacturers, ministries and agencies and review by the Steering Board and ETSI. In addition, the drafting was contemporaneous with the legislative process which produced the Directive on Television Transmission Standards.

 For these reasons -- ease of administration, extensive prior review -- the same terms for licensing the Common Scrambling Algorithm are offered to all proposed licensees; no variation is permitted in the text. In other words, the licence agreement for each licensee contains terms which are identical to every other licence agreement.

 Burden-shifting. Articles 3.5 and 3.6 of the licence agreements call upon the licensee to assist in the defense of the intellectual property rights contained in the Common Descrambling System and Scrambling Technology and to assist in the fight against audiovisual piracy. These articles were drafted under the principle of burden-shifting noted above. In other words, in view of the nominal royalty, it was judged reasonable (and the Steering Board accepted) that the licensee assume the burden for defense of the Common Scrambling Algorithm and Scrambling Technology.

 Some proposed licensees from countries which experience a higher level of litigation than in Europe have expressed the concern that the licensees would be called upon to assume a potentially unlimited liability. In the view of the Companies this is highly speculative and in any event is not a basis for overturning the basic principle of burden-shifting. Moreover, there are explicit qualifications to the licensee's duty under Article 3.5: it will furnish assistance "to the extent it would take action in respect of its own valuable patent". In addition, the Custodian and the licensee will coordinate any such action, including bringing in other parties. Some concern has been expressed that section 3.6 does not contain a similar limitation. We understand that a French court would apply a standard of reasonableness to the Licensee’s obligations under this section.

 French export control. One concern has been that French companies will enjoy an unfair competitive advantage because only companies from outside France will be required to submit to a French export control. The decision by the DVB Project to accept the distribution arrangements in their present form indicates that the non-French member companies found these arrangements to be suitable. (Indeed, French companies are also obliged to obtain a governmental licence for use within France.)

 Full implementation. Article 2.1 of the Licence Agreement limits the scope of the grant of licence to an activity only in respect of full implementation of the Common Descrambling System as described in the Confidential Information.

A Licensee producing an intermediate product is not itself directly responsible for “full implementation” if it delivers its product to another Licensee for incorporation. In other words, full implementation of the Common Descrambling System must be achieved by the final Licensee before the Decoder is put into commercial operation or released into the consumer market. A Licensee supplying to the final Licensee or to intermediaries must be certain that its customer is a Licensee.

1. *The Custodian and the Companies are of course available to discuss these and other issues with proposed licensees and other interested parties.* [↑](#footnote-ref-1)
2. *Directive 95/47/EC of the European Parliament and of the Council of 24 October 1995 on the use of standards for the transmission of television signals, O.J. L 281/51 (23 Nov. 1995).* [↑](#footnote-ref-2)
3. *In addition to an initial royalty, the Scrambling Technology Licensee is called upon to pay a further royalty of 30 ecus for each Scrambler sold or otherwise disposed of. This additional royalty is designed to ensure that the sale of a Scrambler also includes a sublicence of Scrambling Technology (and, with it, the duties incumbent on a sublicensee with respect to proprietary technology).* [↑](#footnote-ref-3)