

sequence, the number of patent pools created in the United States indicatively dwindled away to almost nothing until after World War II.

Fortunately, the situation improved in 1995, after the US Department of Justice and the US Federal Trade Commission jointly issued their “Antitrust Guidelines for the Licensing of Intellectual Property”,<sup>126</sup> amending the previous misconception condemning those kinds of agreements while openly recognizing that “cross-licensing and pooling agreements may provide pro-competitive benefits”. This positive approach was welcomed as an encouragement for the formation of new patent pools and opened the way to the establishment of those kinds of practices, especially flourishing within the new emerging video and entertainment industries.

## VII. Video

A patent pool was then formed in 1997, by the Trustees of Columbia University, Fujitsu Limited, General Instrument Corp., Lucent Technologies Inc., Matsushita Electric Industrial Co., Mitsubishi Electric Corp., Philips Electronics N.V. (Philips), Scientific-Atlanta Inc., and Sony Corp. (Sony) to jointly share royalties from patents that are essential to compliance with the MPEG-2 compression technology standard. The MPEG-2 standard patent pool comprises a number of essential patents put into the hands of a common licensing administrator empowered to grant licenses on a non-discriminating basis, collect royalties and distribute them on a pro-rata allocation based on each licensor's contribution. The terms of the arrangement were negotiated with and approved by the US Department of Justice.

In 1998, Sony, Philips and Pioneer entered a patent pooling agreement for inventions that are essential in order to comply with certain DVD-Video and DVD-ROM standard specifications. In 1999, another patent pool was created by Toshiba Corporation, Hitachi, Ltd., Matsushita Electric Industrial Co., Ltd., Mitsubishi Electric Corporation, Time Warner Inc., and Victor Company of Japan, Ltd. for products manufactured in compliance with the DVD-ROM and DVD-Video formats.<sup>127</sup> There are presently about 80 US Patents for DVD-ROM drives, DVD-Video players and DVD decoders, and 96 U. S. Patents for DVD-ROM discs and DVD-Video discs.<sup>128</sup> The royalties under the joint license for DVD-Video players and DVD-ROM drives are 4% of the net selling price of the product or US \$4,00 per product, whichever is higher. Royalties for DVD decoders are 4% of the net selling price of the product or

126 US Department of Justice and Federal Trade Commission, “Antitrust Guidelines for the Licensing of Intellectual Property (IP Guidelines)”, April 1995, available at: [www.usdoj.gov/atr/public/guidelines/ipguide.htm](http://www.usdoj.gov/atr/public/guidelines/ipguide.htm)

127 See Letter from Klein J., Assistant Attorney General, Department of Justice, Antitrust Division, to Carey R. Ramos, Esq., available at: <http://www.usdoj.gov/atr/public/busreview/2485.htm>

128 For more information on the VD6C Licensing Agency, see the DVD Licensing Site at: <http://www.dvd6cla.com/faq.html>

US \$1,00 per product, whichever is higher. Besides, the DVD joint Patent Licence requires licensees to grant each of the licensing companies of DVD6C, as well as their licensees, a non-exclusive licence on fair, reasonable and non-discriminatory terms to use any of their patents that are deemed essential for the manufacture, use or sale of DVD Products. This grant-back is restricted only to those DVD products actually licensed to the licensee.

## **B. Discussed Patent Pools' Examples**

### **I. The Debated Case of Software: The “Open Innovation Network” Initiative**

#### **1. Targeting Collective Free “Open Source” Access to Software Patents**

Leaving aside for the moment the most targeted branches of the telecommunication industries,<sup>129</sup> we should now say a few words about the issue of patent pools that include software technology, which surely represents a much-debated subject when it comes to IP protection.<sup>130</sup> Confronted with this new prospective scenario, an argument of Bruce Perens, the well-known leader of the Free Software and Open Source community, in favour of Linux having a patent pool is that it would in fact be “a means of defence”.<sup>131</sup> Indeed, the basic idea behind the platform “OpenPatents.org”, which was consequently constituted, is to change the rules of the patent game and to help solve the problems of mutual blocking of software patents to the benefit of the participants.<sup>132</sup> The resulting Open Patent License can in effect be defined as a cooperative community convening around a reciprocal non-aggression pact, whose features can be further specified as follows: the participating parties may consent to be mutually non-confrontational with respect to: (1) only a specific set of patents; (2) all their software patents; or (3) all their patents. Besides, the concluded agreement would require that companies wishing to obtain the full advantag-

129 For an overview on patent pools for the telecommunication sectors, see: Aoki R. *et al.*, “Coalition Formation for a Consortium Standard through a Standard Body and a Patent Pool: Theory and Evidence from MPEG2, DVD and 3G”, Institute of Innovation Research Working Paper, 2005.

130 For a study on the merits of IP protection for software, see i.a.: Lehmann M., “Protecting Software? The Benefit of Exclusive Rights in Intellectual Property” In: Publikationen des Europäischen Patentamts (EPA), 2006, p. 1 *et seq.* For a wider perspective, including a comprehensive examination of the EC Council Directive on the Legal Protection of Computer Programs, see also: Lehmann M. and Tapper C., “A Handbook of European Software Law”, Oxford University Press, 1993.

131 For the official website, see: <http://www.openpatents.org>

132 For an investigation on the debated merits of software patents, see i.a.: Hilty R. and Geiger C., “Patenting Software? A Judicial and Socio-Economic Analysis”, In: IIC, 2005, vol. 6, p. 615 *et seq.*