GETTING IT OUT THERE – THE NEW CONTRACTUAL LANDSCAPE FOR FILM DISTRIBUTION

1. INTRODUCTION

Predicting the future has always been fraught with risk, but never as much as today. The ever quickening pace of technological change is forcing businesses across the modern communications landscape to think how to respond to the myriad of threats and opportunities. Nearly a decade ago, Bill Gates warned that amid the rush there is a "real tendency to over-estimate how much things will change in the next two years; but also and dangerously, a tendency to under-estimate how much things will change in 10 years".

Technology is moving at an incredible pace and the Hollywood studio system is now preparing for it. After the changes imposed to its business model by the US antitrust authorities in the late 40's, the rapid take up of television in the early 60's, VCR's in the 80's and DVD's in the 90's, it is now the turn of "digital technologies" in the production and distribution segments of the movie value chain.

This current change could arguably be the most dramatic as the impact of digital technology threatens a shake up not only in the studios' prospects but also those of their associated partners and stakeholders – indeed the entire film and TV industry. It, together with the proliferation of broadband and multimedia devises on the consumer side, will enable more dynamic and cost-effective methods of film financing, production and distribution.

Does this dynamism mean the end of the studio systems as has been predicted by some? Will the studios be replaced by new giant media players such as Google and Yahoo? How will the business model change and develop? I will look at recent developments in the film distribution landscape, examine the latest technology developments, and consider the implications for the industry from both the distributor and producer perspective. I will then consider the legal implications and discuss what issues will need to be reflected in distribution deals.

2. TECHNOLOGICAL INFRASTRUCTURE AND RECENT DEVELOPMENTS

The major development that is the catalyst for the dynamic change is the exceptional expansion in recent years of the number of broadband connections in the developed world and the increasing levels of downstream speeds. In the UK the number of broadband connections exceeded dial up connections for the first time and it is predicted that over 11 million UK homes will have access to broadband . Broadband penetration for 2006 is estimated in the UK at 50% growing at a level of 8% per annum. The number of broadband connections worldwide rose by 37% last year to approximately 300 million at the end of 2006. Reports estimate that almost two thirds of consumers in Western Europe will have adopted broadband by early 2008.

At the same time downstream speeds have also increased. Two years ago it would have taken 2 hours to download a 2 hour film .Today it takes 40 minutes and the user can stream the content at the same time as the download.

The availability of broadband coupled with increasing downstream speeds and compression technology have combined to make video on demand a much more accessible product. The message is clear – there is an incredible appetite for broadband-enabled services and the infrastructure is in place. The Question is how will the market evolve?

3. OPPORTUNITIES

There are clearly huge opportunities for rights owners in the digital area. Here are just a few of the obvious ones:

(1) The arrival of broadband film distribution channels is as Chris Anderson wrote in Wired “the start of a long tail”. Content owners will, in theory, be able to exploit their entire libraries on digital platforms, which will create infinite shelf space for their product.

(2) As a consequence of the data compiled from end users the creative community will have intimate knowledge of their customer base – they will know who they are, where they live and what their tastes are. With greater knowledge the level of service will improve in terms of both product and efficiency

(3) new platforms provide additional exploitation markets for content owners. Until 2005 the distributors principal access to the home market came through pay TV, free television, video rentals, and DVD sales. Now there are new products such as HDVD, Blue Ray, apple video ipod, Microsoft X-Box 360, which will add further IP distribution networks. Added to these are portable devices such as 3G mobile phones, ipods, play station devices and pda’s that also provide opportunities for content exploitation to the masses.

4. SEIZING THE MOMENT

Are rights holders jostling for position to deliver their content on the new delivery systems?

The answer is that the studios have until recently been a bit slow. Perhaps this is due to the concerns over piracy, the fact that the technology has not been widely available as yet and also having to recalculate its business model. The main motivation to date has been less about the desire to enhance its revenues, but fear about repeating mistakes of the music industry; the fear of being beaten to it by services which allow for widespread copyright infringement. However, this year there has been a shift in the mindset of the studios and an increase in the level of digital distribution services .

5. DEALS IN THE LAST 12 MONTHS – CURRENT LANDSCAPE

There has been a flurry of new deals and services in the last 12 months which are the beginnings of a new business arena.

Let's look at the UK first

1. U.K

Video on demand services are rapidly growing. The OFCOM 2007 report estimates the total video on demand industry to be worth £66 million for 2006 and is currently growing at 50% per annum.

Video on demand can be broken down into 2 types:-

(i) TV VOD delivered across multichannel TV platforms (service providers); and

(ii) Internet VOD delivered across internet platforms facilitated by the rapid broadband uptake (broadband video). Some operators such as Sky offer VOD across both TV platforms and across its internet platforms.

Lets consider the progress of each type of service in the UK.

A - TV VOD

Digital TV platforms or service providers offer a walled garden service. The user is confined to the choice of channels and on demand services that are offered and the services may only be available to subscribers of the service. Such services now reach the overwhelming majority of all homes and are continuing to grow. In particular the digital terrestrial television (DTT) platform has enjoyed considerable success – 7.3 million homes now have digital multichannel TV.

Digital cable (Virgin Media, IPTV (Homechoice and BT Vision) and terrestrial (Top Up TV) all offer some form of TV VOD service. Subscribers can view a variety of content on demand, including music videos, TV shows and movies on a pay per view basis for limited access.

Digital cable

Virgin Media

Virgin Media launched to much fanfare in March 2007 offers over 500 movies on demand and ranks as the UK largest provider of on-demand content with 3 million video on demand customers. The Virgin On Demand Service allows customers to stream programmes and films when they want to watch them from the use of Virgin's servers. The film pay per view service is called Film Flex and provides over 500 movies from all sources including all the James Bond movies.

Prices vary from 99p to £3.00 a movie. Once a movie has been ordered it can be viewed any time within the next 24 hours.

BT Vision

The hybrid digital TV service was launched by BT on 4 December 2006. BT Vision has signed deals with all the major studios (with the exception of Fox). It offers viewers Top Up TV and access to on demand films.

BT Vision also offers a download to own service for a select content library similar to the Love Film model. The user will receive a file for use on portable media devices. In addition some titles also come with a DVD. The price of films is equivalent to purchasing a DVD, for example a copy of Harry Potter and the Order of the Phoenix will cost £19.00.

Sky

In the U.K. last year Sky launched its broadband service to allow sky subscribers to legally download films from Sky Movies back catalogue for no additional charge. "Sky Broadband" allows a subscriber 30 days to view a film as many times as they like, but it is only possible to play the film on the PC which the film was downloaded and items cannot be downloaded or transferred to DVD or any other permanent storage mechanism.

B- IPTV

The biggest provider of digital film distribution services in Europe is Arts Alliance Media. Through its company Vizumi Network, it provides ISPs; media companies and e-tailers with turn key solutions for securely distributing digital video content over the internet.

It provides the backbone and structure which allows distribution companies such as Lovefilm, Empire, AOL and Fremantle Media to exploit VOD through their own websites. Its own distribution network Vizumi carries content from all the Hollywood studios other than Disney and MGM and at present carries over 2,600 video titles. Customers using the download to own services pay for a film which is provided in three formats:

- Two digital files for instant download – one for a PC or laptop and one for a Windows "play4sure" certified portable video device; and

- A physical DVD of the same material sent through the post (subject to the title of the DVD).

Kangaroo

Last week it was announced that a new platform under the working title "Kangaroo" will launch with more than 10,000 hours of archive material from the BBC, ITV and Channel 4 as well as a 30 day catch up service. It will also license content from other channels, US production houses and anyone who owns rights of value to the public. This is clearly an historic initiative and is aimed at eliminating the service provider or broadband aggregator. For users instead of having to download separate media players or surf different web sites this provides a simple one stop shop. What is in it for the indies remains to be seen and may be the subject of complicated negotiations.

2. US

The main IPTV – VOD services in the States are Netflix, CinemaNow, Movielink and Amazon's Unbox.

Netflix

Netflix is the world's largest on-line movie service providing more than 6 million subscribers access to move than 85,000 DVD titles. It has a growing library of more than 4,000 titles that can be downloaded to a PC. The phased rollout of IPTV began in January of this year and by August there were over 10 million viewers. This is a dramatic uptake, however, when considering that Netflix ships 1 million DVDs per day it is clear that downloads have a long way to go to catch up with DVD.

CinemaNow

CinemaNow has now signed deals with most of the studios. It offers a three tier service of download to own (from $9.99 to $19.99), available on up to three devices including portable media players, pay per view over a 24 hour period and burn to DVD.

Movielink

Movielink was this year bought by Blockbusters which provides the company with an expanding VOD business and access to movies from all the

Hollywood Studios with the exception of Disney and Fox. The user can buy movie downloads which can be viewed on up to 3 PC's, transferred to a DVD and streamed around the home via home networking. However, the DVD can only be played on a computer and not a set-top DVD player and copies cannot (yet) be transferred to portable media devices. It is also not based upon a subscription model.

BitTorrent

Perhaps the most interesting and groundbreaking of the IPTV VOD distributors is BitTorrent.

BitTorrent is a peer to peer file sharing protocol which allows it to distribute large amounts of data without incurring the costs of hosting and bandwidth. Some interesting facts about BitTorrent. One it has 45 million users. Another is that BitTorrent – related activity accounts for an estimated 18% of all internet traffic – more than all other P2P networks combined. Its popularity is due to the fact that it is possible to download copies of large files such as TV and movie files in a fraction of the time it takes on regular P2P networks.

The service has been described as follows; downloads of films and TV programmes will be made available on the same day the film or programme becomes available on DVD. The price for a film download will be approximately the same as a DVD and a TV programme as low as $1. However, there are several restrictions: downloads will only play on the actual computer used to make the download; it will not be possible to make copies or burn the file onto a DVD; and the file will not be transferable to other PC's or standard DVD players. The other restriction is that by downloading the BitTorrent software the user could be exposing their computer to risks of attack.

Other Developments

Apple launched its ITV gadget. The gadget allows the user to apply movies and other media bought from the iTunes store via the PC to be screened on other devices around the home including the TV. Itunes now offer over 500 feature length movies to US customers. From 25 August UK customers are able to download TV shows. With its history or success with the music industry its VOD service will be a force to reckon with.

Microsoft now offers movies and episodes of TV shows for downloading through its Xbox live online service which started in the US on 22 November 2006 and in the Uk and other countries in western Europe on 11th December 2007. What makes this opportunity exciting is that the Xbox connects direct to the TV – there is no computer and no downloading. Microsoft has negotiated the rights to rent or sell more than 1000 hours of material from CBS, MTV, Networks, Paramount, Warner Bros and Turner Broadcasting. The video store will work similar to Apple iTunes, but with some important differences. While users will be able to keep TV shows, movies can be rented for only a limited period. The videos will not be playable on other devices and cannot be burned onto DVD's.

6. CHANGES TO THE BUSINESS MODEL

What is the impact of digital technology to the business model?

Release Windows

Over the past 18 months release windows have already compressed significantly, initially because of the pressure to ensure the success of the DVD's which account for a significant proportion of revenues and profits and to optimise marketing budgets; more recently the emphasis has been on combating piracy. What the studios were doing was pouring money into the theatrical release of a picture creating enormous consumer demand for a product that was not legally and commercially available to satisfy demand, either because the consumers could not afford to go to the cinema or because they live in territories where the film will not be available on any platform for months.

In January of last year, 2929 because the first distributor to experiment with a day and date release across platforms in the U.S. with “Bubble” a low budget digital film directed by Steven Soderberg. One problem “Bubble” had in its release is that most of the larger exhibitors refused point blank to screen the movie on the basis that date and date model ultimately threatens their livelihood. Since that date there have been very few exceptions. In March 2006 the Road to Guantanamo directed by Michael Winterbottom was shown theatrically simultaneously with television and internet download.

Whether we will eventually see the demise of all windows is unlikely. We will see a virtual window release with different price points set across the timing of a release. For example the first VOD window will run concurrently or even before the theatrical release and will be available at a premium price and may be not to own or shift to a separate device. When compression improves, the first premium download could be high definition.

Digital Cinema

Simultaneous global releasing is the other logical inevitable trend in release patterns. Studios have felt pressure to go in this direction for a number of years because of the DVD piracy but at present the prohibitive costs of prints have limited this strategy to all other than the biggest blockbuster titles such as Lord of the Rings and The da Vinci Code. With the advent of digital cinema the prohibitive cost barrier will no longer be relevant and global releases will be the norm.

Digital Cinema has advanced significantly in the past 12 months. The UK Film Council has completed the installation of the 240 screen Digital Screen Network and in June Arts Alliance Media announced Europe's first virtual P&A

deals with Fox and Universal. One of the key questions of Digital Cinema seems who is going to pay for it. The solution introduced by Arts Alliance Media is the Virtual Print Model which involves exhibitors and distributors contributing to the cost of the equipment. The way it works is Digital prints are delivered to cinemas on hard drives and the content is loaded onto a server.

This has two advantages:

- The central server can hold many films meaning films can be changed very easily.

- The prints do not need to be returned after the run so holding-over successful films is always possible.

The impact of digital cinema will mean that the exhibitor will no longer be the slave to the film distributors. The exhibitors will have detailed knowledge of their audience and be able to serve micro audience's tastes for non-film experiences such as the New York Met opera beamed over to cinemas or the ability to watch a live sporting event. In addition, release of past classics will be the norm. City Screens is currently conducting an experiment or re-running classics such as Lawrence of Arabia and Casablanca.

Examples of how the flexibility of digital cinema can be used to benefit distributors, exhibitors and audiences are:-

- Pan's Labyrinth was first released in the UK in November 2006. Thanks to the ease of digital the film ended up playing for much longer and on more screens than originally anticipated.

- Dirty Dancing was re-issued to celebrate its 20t anniversary. The release on Valentine's Day 2007 was the widest ever UK digital release at the time on 79 screens. 90% of the total prints distributed were digital and the film was 12^th^ in the charts for 14 February.

7. IMPLICATIONS

What does that mean for distributors, sales agents and in the independent film world.

Distributors

The introduction of digital technology including the advent of digital cinema will have dramatic implications for film distributors. At a recent industry event Josh Berger SVP of Warner Brothers Europe predicted that US studios would be "less distributors and more focused on marketing and advertising in the next ten years". The advent of digital exploitation means that film producers will have access to distribution channels at little cost.

However, to make any projections one has to look at the economic reality.

Currently approximately 50% of worldwide film revenue is coming from DVD, 23% from various forms of television, 21% from theatrical releases and the balance from other sources.

Most of the analysis I have seen projects that while internet delivery will slowly start to grow and will slowly start to supplant the current forms of television over the next few years, DVD will continue to be the most dominant single revenue source for quite some time. For example some figures I have seen project DVD at 46% of all worldwide film the revenue in 2014. Presumably this will be buoyed partly by the roll out of high definition DVD formats but it's also a consequence of the enormous worldwide DVD player penetration rate which is currently estimated at almost 30%. Over the next ten years the DVD industry will continue to grow but the turnover will soon peak. The cost of DVDs is coming down dramatically and the DVD rental business will also have to come down.

The impact of download will soon be upon us, Informa Media Group predicts that one third of the worlds homes will be buying films on demand by 2010. The number of movie buying VOD households will reach 327 million worldwide by 2010 and the VOD market will be worth £6.45 billion in four years time! I am not sure that such figures are accurate. It will probably be quite some time before broadband uptake is at that level considering in many territories sufficient networks are still a long way from even being available. *At the moment for example, even Australia only has a10.9 % broadband penetration with leading markets in the world like Korea at 25.5%*.

However, I am confident that in the longer term the projections that approximately 75% of the total revenue pie for feature films, will come from internet delivery via its various virtual windows is accurate.

In terms of what this means for sales agents and distributors I envisage that in the short term as long as DVD and video revenues continue to dominate it will mostly be business as usual.

As Nigel Palmer has pointed out earlier, financing of independent films will continue to be secured on territory by territory revenue projections largely based on the value of locally DVD and television rights and sales agents will continue to sell films on a territory by territory basis. There will be increasing disputes about who gets to own the internet rights but in most cases they will sold to territorial distributors along with everything else and distributors will make deals with the content aggregators as they believe is appropriate to maximise revenue.

There have already been a few exceptions to this in the independent world. For example Morgan Freeman's film "*Ten Items or Less*" was financially driven by Clickstar, the deals were structured so that Clickstar retained worldwide internet rights with only the remaining rights available for territory by territory sale. It would be interesting to know what this restriction does to the value of sales achieved considering the non-internet rights represent most of the potential revenue that will ever come from that movie considering the infancy of the internet market. However, I anticipate that most Distributors will insist upon the internet rights are available. Like everything it no doubt depends on the price (and the movie).

Once the internet delivery market starts to mature things are likely to evolve. As the online delivery platform eventually supersedes DVD and television, which will occur at different rates in different places, it should be possible for producers and sales agents to secure financing for films based on the internet revenue projections for those territories. In such an environment sales agents will enter into deals with service providers directly for selling internet rights in those territories. As the internet market continues to mature territorial distinctions for internet delivery will become less relevant and sales agents will extend to become global distributors. The local distributors role may be more limited and more adapted to more of a marketing services role supporting a release campaign which will be coordinated at a global level by the worldwide distributor.

The future of film distribution for the high profile films will require a globally coordinated marketing campaign to support day and date releasing across platforms and territories using local expertise for marketing and other services in the manner I have described. Of course the internet delivery market is going to mature in different territories at different rates so the current form of local distribution will continue to be relevant in some territories for a long time. I suppose inherent to the model is that the worldwide distributor will bear the brunt of marketing and release costs in each territory.

The role of producers

There has been a lot of speculation that in the new world of distribution, producers will now finally be able to make some money by distributing from their own websites and by making deals with service providers directly cutting out the distribution middle people. This may be true but only to a point. It is only going to be viable or make sense for certain types of content or certain content owners who can afford the costs of implementing the infrastructure.

For example, where a film has a particularly unique and strong marketing hook or an existing strong brand which will ensure that word of mouth creates all the publicity that will be needed for success. For example the film "The Secret" which offers an insight into the secret laws of the universe was extremely successful in its streaming.

For the majority of independent movies it is a lot more difficult to stand out in the marketplace. It will still be essential to appoint a distributor who can coordinate a systemised release marketing campaign and strategy providing the expertise to hopefully ensure that revenue for the film will be maximised.

The other instance in which it is going to make sense for a producer to go direct to a service provider where a film does not otherwise have distribution. There are already companies which are set up to do this for example. At Cineclix, a Canadian company which sells video downloads of feature films internationally, films must have been screened in an international film festival. Other aggregators are much more flexible. With google video for example, currently still in the beta testing phase, anyone can upload content to the site for sale. The content owner set their own price with google taking a share of any revenue estimated at 30%. It's designed to be a completely open marketplace. This provides opportunities for filmmakers who otherwise would not get a look in to make money from their content and hopefully to find their audience however small.

With the increased ability to know and access the customer companies such as Netflix are already commencing the production of films to target their audiences. It is anticipated that as a consequence of digital theatres there will be more opportunities for filmmakers to appeal to constituent audiences such as the Bollywood film community or sci fi. There will be an emphasis on low budget high quality films which will be able to sustain commercial success. There will be no room for low quality product.

8. RIGHTS MATRIX

How does this impact on the deal and negotiations with distributors and content aggregators or service providers.

When considering the key components for licensing in a digital world it is important to consider the following questions:

- What delivery system and service will be used?
- What will need to be delivered to the distributor?
- What is the nature of the content?
- What are the commercial deal points?
- How can content be properly protected?

Let us consider these in more detail.

A. What delivery system and service will be used?

Convergence is a bit of a misnomer perhaps the better expression is fragmentation: We have currently the following available platforms:

- Theatrical
- Non-theatrical
- Imax
- Free to air analogue broadcast
- Digital terrestrial television
- Analogue and digital cable
- Analogue and digital satellite
- Hi definition TV
- Internet Protocol TV (IPTV)
- Mobile Phone Networks – GSM/GPRS/3G Network
- WiMax
- ADSL
- Video
- DVD

- HD (DVD) / Blue Ray
- Consoles – PSB / Xbox 360
- Portable Media Players
- PDA
- Apple ipods/Itunes
- VCD

The rights can be defined by reference to carriage on all or any of these platforms. Most distributors will insist upon acquiring as many of the above platforms as possible. However, in the new business model all have detailed it may be possible for producers to be able to fund their movies by pre-selling certain platforms such as TV and theatrical and be able to appoint or even exploit other platforms independently.

When licensing product it is important not only to consider the delivering system but also the reception equipment. You may need to state whether the receptor device is limited to TV screen, VDU, ipod or mobile telephone handsets or PDA's or any combination of the above. It may be possible to make the delineation in the distribution agreement by referring specifically to the end user device but when separate devices merge into one it may become too complicated.

A major issue will be when some of the above platforms go head to head. For example the French Government have introduced draft legislation to encourage inter-operability between digital musical systems. The aim would be to remove the "lock and key" on all systems which allow users of itunes content to be solely played on ipod devices.

B. What are the delivery requirements?

The next matter to consider will be what content the distributor requires in order to exploit the content on its particular media. The long list of delivery materials is going to be replaced by different forms of delivery requirements, probably on a computer file. However, the new digital world requires delivery of more than just the Film. In order to properly market the Film, the film producer will have to consider providing additional shots, behind the scenes footage, making of, digital biographies and content that can service the fan's websites.

Sony has just launched the Blue Ray technology. With this technology there are two separate viewing plains for the high definition disc. One for hi definition movies, the second for scene specific features such as commentaries, music videos, and games. This opens the door to creating parallel universes, which the viewer can navigate. Disney for example plan to introduce scene specific education lessons on children's movies while Sony plans scene specific games. The Internet would provide further interactive material including altered endings to tradition action sequences, which can be loaded on the re-writable layers of the disc.

Budgets will need to be enhanced to develop these market strategies and producers will need to develop more complex offerings to satisfy distributors requirements. The new digital age will mean that viewers will be considered more like consumers therefore more information and enhanced products will be necessary to strengthen and develop the commercial relationship.

Each studio now has its own new media department specifically assigned to create viral campaigns targeting everything from the internet to I pods to X boxes.

C. Grant of Rights

In terms of rights the specific rights that a service provider requires clearly depends on exactly what it intends to offer the consumer. I have touched on the different types of services that have been launched in the market place. In general terms, it is important for the service provider to negotiate the widest rights possible including the following (i) right to offer the content for permanent download, (ii) to allow users to burn the download content more than once to a DVD or other storage disc and (iii) the right to share the content download with other PCs or portable media players. The service provider may negotiate the right to make material available to the user on the same day and date as it is released on DVD.

Will the service allow the end user to adapt or modify the content and polymorph the product? In such scenarios there may well be intellectual property issue relating to such adaptations which require planning.

D. What is the nature of the content?

The Producer will need to examine exactly what content will be exploited. Will it be the audio visual, audio, still pictures, or text or some combination? Will the still images for example is used for wallpapers, screen savers or ecards? If so, do the Artist/ Performer agreements allow the Producer the right to exploit name and likeness?

E. What means of charging will be used?

The means of charging will need to be carefully considered and negotiated. The content owner will need to determine how payment is to be made, i.e. via subscription, pay per view or pay per period or indirectly through advertising or sharing telecoms revenue. Will you negotiate on a royalty basis or by way of net receipts? Will you have access to important ancillary products such as the database for the fan club or end users? It is extremely unlikely that in the digital distribution world that there is going to be a one-off licence fee.

F. Will your content be properly protected?

As a rights owner it is important that you ensure that the licensor has implemented an effective Digital Rights Management (DRM) system. For example, both the Cinema Now and LoveFilm services are based upon Windows Media Centre Version 10 software, that contains DRM tools that can be programmed to ensure that the EST content cannot be duplicated, burnt to disc, uploaded to the web or emailed in anyway shape or form. This should provide for on-line real time reporting system that enables the licensor to track the operation of the distribution rights. The licencee should allocate and create a dedicated directory from those licensees Internet server and map all necessary domain and sub-domain uses for the distributors content.

Clearly the licensor must be able to satisfy that the licencees DRM systems prevent illegal and all unauthorised copying. As an example with the Apple ipod, one of the primary obstacles to redistribution of files is that the name and apple id of the person who purchased the music are embedded in each purchased song. The fingerprinting discourages redistribution of songs since if a song finds its way onto a Peer 2 Peer system songs can be traced back to the person who purchased the song.

9. OTHER CONSIDERATIONS AND RESERVATIONS

A. ***Technology***

With new technology there are always going to be technical hurdles to overcome. As a rights owner it is important that you grant your rights to a service, which is capable of performing the function it set out to achieve, and there is sufficient back up for when the technology breaks down. A TV audience is far less patient with technological error than a computer user. Therefore it is important to check that the licensee has sufficient computer back up to deliver the service. You should impose speed provisions for the streaming and make sure there is sufficient . It is important to check the service provider's track record. The initial launch of Movielink was fraught with problems which caused customers to look elsewhere.

B. ***Future Technology***

In a fast changing world with the introduction of new technology arriving at a prodigious pace, distributors will no doubt try to negotiate "catch all" provisions and try to negotiate a disposition of rights that include:

"in all media known or hereafter devised"

This kind of wording is most common where you are acquiring <u>all rights</u> in exchange for fully financing the project, rather than on a limited licence of rights.

It is also worth inserting a word of caution here. Laws in some jurisdictions, like Germany, do not consider this sort of provision as binding on parties in respect of rights, which could not have been in their contemplation at the time of contract. If you are doing a deal in Europe where German law may be relevant, you should take appropriate local advice.

<u>**C. *Define your terms*:**</u>

One issue is whether you should even try to define the rights granted extensively or whether you might get away with using the headline description like "video-on-demand" or "online" as a term of art, and postpone an argument as to what exactly you meant to a later date should a problem actually arise.

This is certainly likely to be a cheap option for the 99% of contracts, which expire uneventfully. It is not a cheap option if there is a problem. Nevertheless some lawyers are quite happy to support that approach and the alternative method, of defining terms at length, it not free of problems either.

Personally I think it is difficult for anyone to advocate a policy of not defining rights as being in their best commercial interests.

<u>***D. Risk management***</u>

Next, as a licensor in the digital world you are likely to find yourself in new markets where you lack the confidence you have been used to in the old markets to be sure you are getting the best deal. One of the key issues then is to find a way of increasing your “comfort zone” with these deals. There are a few suggestions that may add to this;

Short term licences: The trend in the new digital era especially for 3G exploitation is to see licence periods becoming increasingly shorter. With such rapid changes in the market place producers are not comfortable with the old 3 – 5 year terms, and are more willing to grant a licence of 12 months with an option to renew three (3) months before the expiry of the Term.

Most favoured nation (MFN) provisions: MFNs are also becoming increasingly sought after because they give the licensor comfort that nobody else is going to steal a march over them and get a better deal with the licensee. These clauses are often resisted because they can cause havoc for licensees not only because the licensee would prefer not to have any, but also because it can be difficult for licensees to maintain the same form of MFN between different suppliers.

- *Consider non-exclusivity*: Next consider non-exclusivity as a way of avoiding tying your hands in particular markets

10. CONCLUSION

To wrap up I want to distil a list of key questions from points I have made, to act as a checklist when you frame your licences. Here goes:

- What delivery systems can be used to transmit the service?
- What service can the rights be exploited on?
- Can the licensee adapt the content?
- Will the licensor have obligations regarding the content after delivery?
- Can the viewer interact with the content?
- How will the viewer be charged for receiving it?
- What comfort can you get that no one else is getting a better deal than you? (short term agreements, MFNs, statistics, etc)?