LEGAL

Can the law keep up with technology?

Rapid technological advances mean that industry specialists have to keep ahead of the game. Innovations like the second screen and smart TVs bring with them a whole host of commercial and legal questions, many of which are discussed during the MIPCOM legal track of conferences organised in conjunction with IAEL. Bob Jenkins examines the latest developments with some leading industry executives

THE advance of technology is creating many new questions and opportunities for producers and distributors alike. The key business and legal issues facing the industry will be addressed during a MIPCOM session whose panel includes Jeff Liebenson, president of the International Association of Entertainment Lawyers (IAEL), and principal of Liebenson Law. Liebenson sees the current era as a golden age of media. Dealmakers are currently in the middle of a period of significant change and, he says, as a result they need to be both more creative, and better informed than ever before — both from a business and technological perspective. "In an era of multiplatform agreements it is crucial to determine and understand whether the goal is to maximise revenue, tapping as many streams as possible, or whether the purpose of the agreement is to enhance the storytelling and viewing experience," he says. "Whichever the goal is will play a crucial part in determining strategy on windows, hold-backs and payment terms."

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> **Jeff Liebenson**

One key dealmaker, Jamie Lynn, executive vice-president EMEA sales at FremantleMedia International, agrees that windows remain the best way to maximise value for a piece of IP. "This has been the case since the advent of home entertainment," he says. "But the way we window is in constant evolution. We're now seeing increasing value throughout the chain. It is interesting that some programmes that premiere on pay TV can still find an entirely new audience on free-to-air." Lynn says he has even seen examples where the free-to-air window actually drives viewers back to the pay-TV channel when a new series premieres, thereby growing the total audience for the series. "In the transactional space we find there is less of a protective concern from linear partners who realise this is a different space which is, largely, not competing with either their audience or their rights," he says.

Epix's Doug Lee: "Negotiation is a better option than litigation"

For Gary Marenzi, founder and president of Marenzi & Associates, the key issue behind windowing is the same as it always was. Marenzi says that in the end it boils down to leverage and money: "If the licensor does not have other active bidders for the content, then it is more likely to accept tougher terms from the licensees who will, inevitably, push for more rights. Equally, if the license fee on offer is large enough, the licensor might part with rights it would normally hold back and seek to license to other clients in sequential windows."
Windowing is not the only issue affected by the rapid evolution of technology and there are many other legal and technical considerations on which Liebenson will touch. He says it is important that dealmakers keep

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firmly in the front of their mind that, while deals are increasingly global, legislation is not. "In the US it is relatively easy to grant, should the licensor wish, all rights whether now known or hereinafter invented," he says. "But in many European countries if a technology or a platform is not specifically granted in an agreement then it is deemed to have been withheld to the benefit of the producer."

Of newly emerging technologies, Liebenson says that two in particular will have a significant effect on the business: the second screen and smart TVs. He says the second screen raises some profound and, as yet, unresolved issues surrounding privacy, and ownership of data the devices are capable of generating. "The second screen opens up new entertainment and media business opportunities," he says, "but it also presents new legal challenges as it opens up a battle to control the end user and to determine how advertising is sold." Nor are these the only questions raised by the second screen. This technology generates a powerful database of viewing habits, revealing who is watching what content, where they are watching it, and what they have previously watched. Liebenson says this raises a key question as to who owns this database. "These are powerful advertising opportunities and they are opportunities not controlled by the main broadcaster," he says.

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While acknowledging that the law's view on the answers to these questions is not yet clear, and in any case will almost certainly vary around the world, he suggests that ownership of the database of the fingerprints of the broadcast programmes can depend on how the fingerprints are generated. "If they are generated from recorded programming then there might be an issue of copyright infringement, but if it is generated on the fly, as most are these days, then the common opinion is that there is no infringement of copyright," he says.

IAEL's Jeff Liebenson: "Dealmakers must have a thorough understanding of current technologies"

It might well be the case however that the law is not required to resolve these issues as companies might decide it is preferable to deal with them by negotiation rather than litigation. FremantleMedia International's Lynn says, for the most part, he envisages shared ownership of any captured data. "In many cases we will create and own second-screen services which we launch in co-operation with our broadcast partners," he says. Lynn does not dispute the value of such data, and believes it is of particular interest to producers and broadcasters looking into viewer habits. Analysis of this data has become more and more important as it can enrich the broadcaster's ability to market more products and services.

Lynn cites an interesting example of such co-operation in action. "If you use a platform like Facebook or Twitter to interact with fans then the data on that interaction will be owned by the platform," he says. "We understand that we wouldn't be given access to all of that data." Lynn says that with many productions, however, there is significant access to very useful information. "On shows like Merlin we had a very co-operative relationship with Facebook that provided us with an amazing picture of the dedication of the global fan base, a picture that ratings alone would not have revealed. This information was incredibly useful to our business and how we nurtured the brand in those markets."

Doug Lee, executive vice-president programming at Epix is another who thinks this is an area in which negotiation is better option than litigation — although he believes the producer is probably in a stronger position in any such negotiations than is the broadcaster. "There is no question that this is a valuable database," Lee says. "Probably the producer can make it a condition of its underlying licence to obtain viewer preference and habit information."

Another recent technological development throwing up legal issues, which in this case have been litigated, is ad-skipping. Liebenson believes case law in this area is not yet well developed because cases on ad-skipping have been superseded by specific legislation, or because the company concerned went bust before a ruling was obtained. However he does point to one recent and specific case, in which Fox challenged Dish Network's Hopper device. The US Court of Appeals for the Ninth Circuit ruled in favour of Dish Network on the grounds that the customer had to affirmatively enable the technology and that this was a non-infringing fair use. "Many contend this ruling elevated form over substance since Dish not only provided the ad-skipping technology but it facilitated the storage, delivery and commercial free viewing of the programmes and so this might not be the final ruling on the issue," he says. "We also need to determine how this may be applied in the second-screen context."

Generally these issues are not genre-specific, although Liebenson makes the point that there is a difference between live events and recorded programmes. "During a live event, the emphasis is all on making the money during the live performance," he says. "So a producer has to decide whether or not they wish to maintain strict exclusivity." Liebenson says increasingly the decision is 'or not', with the producer choosing some kind of social media or backstage option. If they do this, he says, they have to decide whether they want to simulcast this content or hold it back. "Increasingly, viewers want a second-screen experience, especially if it involves major talent in a backstage exclusive," he says. "But at the same time a producer has to balance the danger of cannibalising income from the main feed. Often the key to these questions is who sells advertising."

How best to deal with the often complex issues raised by the rapid evolution of technology will vary from case to case and differ according to the needs of each client and programme. "There is no guiding light here," Liebenson says. "The crucial element is that all dealmakers must understand the needs of their client, and have a thorough understanding of current technologies, as well as those that are waiting to be launched — potentially during the lifetime of any agreement contemplated."