

## Future Proofing IPTV Content Agreements: The Darling Buds of May

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Rapidly changing technology and commercial drivers make it challenging to agree future-proofed licence terms for online and IPTV content. A case involving The Darling Buds of May illustrates the need to think about future-proofing.

### Broadcast “Windows”

Content distributors (such as production houses and studios like Fox, Disney, etc) make their money by licensing a variety of broadcast “windows”. In earlier days, these windows included free-to-air TV, Pay TV, DVD release through bricks-and-mortar video shops, and so on. Window releases are timed to optimise revenues. They vary according to the content (sport, movie, TV series, etc).

### “Windows” online

Now with online content and IPTV, we have other windows too such as streamed content, archived (i.e. older content such as re-runs); ad-funded or subscription funded content, online video “shops”, and so on.

The online models are evolving but not yet settled. Buying a “window” now, based on one commercial/technology platform, may not suit the online provider down the track.

### Streamed v downloaded content

Take streamed content as an example. This is content that is not stored on the PC except on a transient basis. It's a very common online offering by telcos, TV companies and others. How it works is illustrated by YouTube.



You can only watch it while connected to the remote server. The PC buffers the content so you can get a seamless experience. But, critically, you can't save the content to watch later (unless someone has pirating software).

A big advantage, from a content owner's perspective, is that it is much harder to pirate this material, or use it in a way that is outside the “window” licensed by the owner. That's an aspect of what is often called Digital Rights Management (DRM). DRM responsibilities for example can contain the content to a particular region (geo-fencing) which is a critical part of most licensed “windows”.

However, an increasing problem is that a high proportion of streamed content is viewed during online peak times. As such online video on demand (VOD) traffic exponentially increases, this has major cost implications for telcos and for content providers such as TV companies.

If the content can be sent outside peak hours, for viewing later, considerable cost savings are possible. But the viewer gets a copy of the content on her PC raising DRM concerns.

This involves juggling watching “on demand” (VOD), delayed viewing after download, and DRM issues. But one option emerging is downloading during off-peak periods when telcos have plenty of unused capacity.

This is the kind of issue that those licensing content can consider from a future-proofing perspective. Is it enough just to get the streaming rights?

Unexpected technology developments can be challenging too.

### Darling Buds of May



There's a great example of the need to future proof from a UK High Court case over "Darling Buds of May" and two other well-known TV series.<sup>1</sup>

Excelsior, the production company with the rights to those series, sued the TV company (now effectively called ITV<sup>2</sup>) which had broadcast rights in the UK, under agreements signed around 1990.

For certain types of free to air broadcasts of The Darling Buds of May,<sup>3</sup> ITV had to pay a fixed fee per screening under a so-called a residuals clause. For other screenings it had to pay a % royalty. The royalty fee was much less than the fee payable under the residuals clause.

At the time, all TV was analogue. Digital channels weren't on the scene.

In addition to its analogue channel, ITV1, ITV, in 1992, started digital channels, ITV2 and ITV3.

For screenings on the digital channels. ITV1 and ITV2, did ITV have to pay the higher residuals charge or the lower royalty charge?

The court relied on a general principle that contracts are interpreted according to the understandings at the time the contract was

signed.<sup>4</sup> Subsequent changes – such as technology changes – generally aren't used to interpret the agreement.

On that basis, and, therefore, in light of the limitation of the residuals clause to only analogue channels, Excelsior lost its claim for higher payment. Digital transmission was outside the residuals clause as this was not contemplated when the agreement was signed.

While this case is about a particular set of facts, it does show how easily an agreement becomes outmoded by technological and commercial change. The contract terms here were industry-standard at the time, so many other production houses have been caught out too.

## Conclusion

The case is a reminder to try and future-proof IPTV and online contracts as much as possible. This is challenging when the commercial and technology models are evolving so quickly and unpredictably. But there are ways to minimise the risk of agreements being overtaken.

## Analogue Switch-off

Finally, another facet of the Darling Buds issue, as we approach analogue switch-off (ASO or DSO), and TV channels move from analogue to digital, is the possibility that some agreements don't work well, for TV station or production house, for the new digital environment.

<sup>1</sup> Excelsior v Yorkshire Television [2009] EWHC 1751 (Comm).

<sup>2</sup> Initially Yorkshire TV. There was some debate in the judgment about the relationship between Yorkshire TV and ITV companies. For the purposes of this note we treat them as largely one entity.

<sup>3</sup> The case deals with 3 programmes but we'll deal with only one to illustrate the point.

<sup>4</sup> There are some exceptions.

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*We welcome your feedback on this article and any enquiries in relation to its contents. This article is intended to provide a summary of the material covered and does not constitute legal advice. We can provide specialist legal advice on the full range of matters contained in this article.*

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