

**Ten years after:  
whose rights are they anyway?**  
Peter McNerney



Ten years after: whose rights are they anyway? How to walk the tightrope between the legitimate desire of originators to receive proper payment, and the equally powerful opportunities afforded by advances in technology.

We long-suffering Wales rugby fans are accustomed to concentrating on the short-term. The only time we go in for a bit of futurology is at the start of every Six Nations, when we wonder if the boys in red will beat England this year. And if you're unlucky (or masochistic) enough to follow the fortunes of Watford Football Club, then there is only one question about the future that matters, which is whether we will survive the drop again. I'm also a lawyer and don't forget that we're constitutionally forbidden to give a straight answer to a straight question. Rather than looking boldly into the future, we prefer to go delving into the past, excavating through numerous layers of case law in search of a precious precedent.

Therefore I have no firm predictions for 2014 other than feeling confident that Dame Jade Goody will be appointed Chairman of Ofcom and that Betty's hotpot will still be on the lunchtime menu at the Rovers Return. And Carol Vorderman, like God, will be everywhere. Such is the pace of technological advance that even Mystic Meg is having to polish her crystal ball extra hard to forecast how the television landscape will look in ten years' time.

The future of copyright is an obvious area of concern. When copyright material can be downloaded at the flick of a mouse to individual screens without a penny going to the rights holders, then the extensive litigation waged by the film and music industries against such acts of piracy is understandable. But the laws of copyright in some form or another have existed for more than 200 years and seem to have survived enormous technological changes, from the quill pen to DVD, relatively unscathed. It is, however, extraordinarily difficult to predict both the direction which technology will take and the business models that will evolve to deal with what new technology achieves. Clearly, a balance has to be struck between the legitimate desire of originators to receive proper payment for the results of their creativity and the equally powerful argument that the freedoms afforded by the advances in technology should not be hamstrung by outmoded regulation. In any event, one should be in no doubt whatsoever that piracy is a crime. Some 50 per cent of Hollywood's revenue is generated by sales of DVDs and videos. Piracy costs the US film industry \$8 billion each year and 300,000 films are said to be downloaded illegally from the Internet every day. The TV business is only just beginning to experience such damaging effects but it won't take long to gather momentum. Yet it is equally true that society at large does not regard such filching of material as much of a misdemeanour. Indeed, most parents seem to tolerate such behaviour from their offspring and many of us may have a sneaking regard for these latter-day Robin Hoods, downloading from the rich to disseminate among the poor. Polls conducted in the US indicate that the majority of Americans do not think of copyright theft as a crime and questions have been raised

from both libertarians and free-marketeers about the principle of infringing individual privacy in the monopolistic interests of huge and bloated entertainment corporations.

However, technology itself may soon have the answer. In Europe the VERDI project (nothing to do with the composer of *Aida* but an acronym for Very Extensive Rights Data Information) is seeking to build an effective infrastructure for the licensing of multimedia content. In addition, bodies such as SESAM in France, CEDAR in the Netherlands and CMMV in Germany have ambitions to act both as huge rights databases and as automated licensing engines. It is surely desirable for all concerned as well as technologically feasible to devise a system whereby users of copyright material can obtain the rights they need swiftly and efficiently without infringing copyright. Undoubtedly in the future there will be more compulsory licences and much greater automation used in the granting of permissions. Nevertheless, I would still maintain that as a means of ensuring financial compensation for creators and of organising matters in general, copyright is still the best system we have and it is likely to remain so for the foreseeable future.

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Proliferation in the means of accessing TV programming, from television screens to PC monitors and from PDAs to mobile telephones, has rendered the whole question of rights ownership and licensing ever more complex. And if I could wave a magic wand and realise at least one of the traditional three wishes, I’d hope that by 2014 we would at last have a clear idea of the rights we have and the rights we aspire to having. I’d certainly be looking for greater conformity in the use of rights definitions. Without that support, distributors and their hapless lawyers still have to navigate their way through a mass of inconsistent expressions and uses. Yet there is no reason why most definitions cannot be standardised. As long as one gets the elements of the definitions (or, if you like, building blocks) right, then deal-makers should be able to apply those same building blocks to any use of the material that is likely to arise. Linked to this development is the need for effective rights management and a more efficient means of simplifying the process of rights acquisition. If the deal struck by producers and distributors when acquiring rights from the rights owners is in any way confused and complicated then it is hardly surprising that there is going to be a lack of clarity when they are approached for a licence of rights in the resultant programme. Do they always know if the rights are theirs to dispose of? If so, how much should they charge for the licence of

those rights? In the future there must also be much greater flexibility in the sort of deals that need to be struck with the creative talent for use of their rights or performances. The exploitation of television programming outside the primary use is still dominated by the question of the residuals or royalties that need to be paid to the creative talent. We are bound to move ever closer to a system whereby all the contributors get to share in the spoils of success and that success could be all the more substantial if UK programmes became as straightforward as possible to exploit internationally. The PRA and its counterparts are doing sterling work, but these things take time.

Undoubtedly there will be a move towards much greater subdivision of rights over the next ten years. I have no doubt that video on demand (VOD) is the future and we are already seeing a whole variety of VOD applications including transactional VOD, subscription VOD and of course, near video on demand. The demarcation of VOD and other pay-per-view services is rapidly becoming one of the most contentious areas of my business and is an increasing source of anxiety for clients. In ten years’ time, I fervently hope that the question of licensing will be much less of a hit-or-miss affair. Whereas the number of subdivided media will have increased, I’m still optimistic that everyone in the industry will bargain up front for the relevant rights and that they will be fully aware of their expectations. If recent announcements are to be trusted, in ten years’ time analogue should have little relevance in this business as we would be two years past switch-over. Instead we shall all have to face a series of alternatives: pay-per-view or not, terrestrial or not, wired or wireless, in private or in public. In 2014, the boxes to be ticked are sure to have multiplied tenfold. Even now, when acquiring rights, one would be expected to have cleared for multiple uses on television, video sales, merchandising, interactive media and maybe even the musical ring tone on your mobile. However, the fact remains that few media companies have the logistics in place to manage such a complex portfolio of rights and not every broadcaster or producer gives sufficient thought to the wider exploitation of rights after the initial transmission. It is incumbent on all of us, client and lawyer alike, not to wait for potential legislation in this area but to attempt to anticipate usage in ways that are still just a gleam in the eye of some Silicon Valley techie.

It may not be a fashionable position to adopt but I am guardedly optimistic about the future of our industry over the next decade. After all, we have a fantastic collection of assets: the English language and our geographical position, strategically placed to act as a gateway to Europe for other English-speaking countries from around the world. In addition, I fully expect that the independent sector will be newly invigorated by its development of funding skills that before now have been more traditionally associated with the financing of movies.

When this expertise is added to the ability to produce cost-effective programming accumulated during the boom in reality television then I can only see an independent sector in robust health.

I'd like to urge producers, distributors and broadcasters to grasp the considerable opportunities of 360-degree commissioning. We need ideas that can be used across as many platforms as possible, including television, publishing, merchandising, radio, interactive television, on the Internet and ideally have a worldwide application as a licensed format. Speaking of formats, I'm happy to make the bold prediction that by the year 2014 we'll be wondering what all the fuss was about in relation to the ownership and protection of format rights. What makes me so certain? I simply point to the fact that the concept of protection for formats is emerging in legal systems around the world. The US judgement delivered in the *Survivor* litigation is a masterpiece of clarity. A recent judgement in the Brazilian courts is a further case in point and probably counts as the first clear reference in legal proceedings to a format as a distinct work. Of course, certain criteria have to be satisfied to qualify for protection but, come 2014, I'm confident that the system for protection will be as established as it is for other copyright works. That system is already in place, but by 2014 I feel sure that the rules that need to be observed will be better understood and will form part of the custom and practice of the business. Whether or not the interest in reality shows will be as strong as it is at the moment must be open to doubt. But clearly the genre will have developed in ways we can only guess at.

Will we recognise the television landscape in 2014? Will all the old, familiar landmarks have gone? Or will we feel like the pampered media folk dropped into the Australian rainforest without their bearings in *I'm A Celebrity, Get Me Out of Here!*? I certainly expect - and very much hope - that indies will have built on the opportunities they have been given. But in order to achieve this happy state, they need to know more about the international markets they are supplying. I'd recommend that they become better acquainted with the overseas buyers of their programmes and be much more aware of the demands and tastes of the international market at any given moment.

However, this does not mean that I think that TV distributors will be rendered obsolete by closer ties between independent producers and their overseas markets. I'd argue that there are still a host of untapped opportunities for the distribution business, especially if they fully explore the potential of the 360-degree approach. It is still relatively rare to find an independent television distributor equally at home with merchandising and publishing deals. There is also a role for distributors in helping to manage the cycle of rights exploitation, particularly if they arm themselves with a real knowledge of the different rights definitions and how they all interact. It would be great to see producers and distributors alike sharing

a new breed of standardised and cost-effective rights management systems. Equally it is extremely surprising that distributors are not involving themselves more closely in local interactive deals for programming. The income generated by reality and game-show licences will certainly come from red-button and SMS deals and distributors need to get much closer to those sources of money both in the domestic and the international markets.

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There is bound to be some blurring of the distinction between the function of producer and broadcaster by 2014. Such a development is the likely consequence of the decrease in the 'costs of entry' for broadcasting, especially with the use of broadband or white-label broadcasting via the likes of DITG or Enteraction. Producers are going to become more sparing in the rights they grant to third parties to exploit, when they can broadcast the programme themselves, should they choose to do so.

At the moment, it's hard to quantify the changes that will follow the likely arrival of 'new' or City money into the industry. There is certainly the perception in the air that there will be definite money-making opportunities in the post-Communications Act era. Many City investors sense that there is distinct potential in this market but they are not as yet certain about where the treasure is buried. Many of these newcomers might think twice about taking a closer interest if they were aware of the confusion that exists over rights in new media and if they knew that many rights owners are still in a state of blissful ignorance about which rights belong to them and which do not. In addition, some of these new players from the City, accustomed to dealing with a more straightforward set of assets, might not take too kindly to the convoluted process of referring to the owners or even to the creative talent after a certain period of time before some rights can be cleared. Nevertheless, in the words of the old adage, nothing ventured, nothing gained. Provided those with the ambition and the skills to extract maximum value from these assets thoroughly organise their rights exploitation, they can only end up on the winning side. However, before anything can be exploited, the television programmes themselves have to be funded and produced. Will the task of funding television programmes become easier or more difficult with the coming of 2014? We have to weigh up a number of different factors. Let's begin with the bad news.

Sadly, those television rights owners who lived through the boom years made possible by the Sale & Leaseback structure for television programming are unlikely to see such halcyon days ever again. Sale & Leaseback meant that television rights owners who had been largely reliant on the finance advanced to them by their local broadcaster suddenly had up to a further 15 per cent of their programme budget available to them. They therefore started to structure their deals in a way familiar in the film industry, using pockets of finance from a variety of territories scattered around the world. The 15 per cent they had available to offer as their contribution to the financing was a catalyst for this activity. Sale & Leaseback is now history as far as television is concerned, but it is becoming apparent that some of the habits developed in those boom years remain. I believe that we are seeing the emergence of a new breed of TV producer-cum-dealmaker along the lines of the Canadian model. This new player is having to get accustomed to the idea of raising finance by sewing together a patchwork of co-producers wherever they can be found.

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In time this development will undoubtedly lead to an upturn in the number of international co-productions. But if this movement is to gain the required momentum, much more work needs to be done to facilitate ‘official’ co-production. Within the next few months, the DCMS’s Film Co-Production Review should be reporting on the shape of the official co-production of the future. Advance reports of the review’s findings suggest that it is more concerned with feature films for theatrical release than television and I think that TV co-productions are in real danger of being left behind. Some in our industry seem to assume that official co-productions for TV have little relevance after the demise of Sale & Leaseback for television. At the moment official television co-production is only possible with Canada, Australia or New Zealand. If we are to gain any inspiration from the Canadian model (and I think we should) then much more needs to be done to establish new co-production treaties and to make it a more attractive proposition for overseas co-producers to link up with their counterparts in the UK. Currently the only benefit of any substance for an overseas co-producer would be for their co-produced programme to qualify as a European work and/or as a UK originated work under the terms of the Communications Act.

There needs to be the same kind of incentive to attract overseas co-producers as exists in the film industry. The proverbial baby was thrown out with the bathwater when Sale & Leaseback was abolished for television. It is still unclear how the UK independent sector will make the new terms of trade work for them but I feel strongly that the whole project cannot be allowed to fail. It is surely our duty to ensure that creative ways are found to make the fact that independents do now retain certain rights works for the industry as a whole.

By 2014 the passage of time will undoubtedly have robbed us of some of our favourite characters in long-running media soaps. Neither fabulous wealth nor infinite power can deter the Grim Reaper. So who will be the leading players in 2014? Before Lord Puttnam introduced the notion of a Public Interest Test into the Communications Act, I had expected a surge of interest from foreign media in snapping up the UK’s available supply of television and radio broadcasters. Now I am equally certain that many prospective suitors have been discouraged from going down on one knee in the traditional pose by the need to overcome hurdles that are still too high, albeit in a different way. The prohibition on foreign ownership has been replaced by something much more complicated but just as much of a deterrent. Equally, the Communications Act also relaxed the ban on advertising agencies and religious organisations owning broadcasters and I am confident that in the fullness of time these opportunities will be taken up by interested parties.

But what of my own profession? Can lawyers remain aloof and immune from the seismic changes taking place elsewhere? What role will the lawyer play in the television industry of 2014?

I am certain that there will be greater specialisation in legal practice. Assuming that there can be greater standardisation in both definitions and the terms and conditions for exploitation, there will be a shift in focus. Lawyers will be deployed much more in relation to the structuring of deals, something which I have been doing since moving to private practice nearly 20 years ago after an in-house stretch at Thames Television, and in handling the deal internationally. In the UK we can now boast a string of internationally ground-breaking reality formats and game shows. In my view the time has now come for us to smarten up our act in our international dealings. For far too long all of us in the UK industry - producers, distributors and lawyers - have been content to draw a line in the middle of the Atlantic and become reliant upon local partners when a show or a property format has been relocated to the US. Why have we meekly accepted the fact that things are done differently over there and not insisted on stretching our own production legs in the US (subject only to a few honourable exceptions)? At a recent industry event, Andrea Wong, ABC’s reality TV supremo, encouraged owners to pitch projects directly to her rather than encumber themselves

with US production partners who do not necessarily fit ABC's criteria, thereby weighing down projects that might otherwise have potential. Needless to say, I am not talking about the major studios here who will always have a lot of benefits to bring to most deals. Having said all of this about the need to play these overseas opportunities in a different way, I doubt that many UK lawyers will want to imitate their American counterparts and agree to be paid with a percentage of the sums received by the client or generated by the deal. Yet I still believe that there is bound to be much more flexibility over the question of lawyers' fees. I would argue that the cost of independent legal advice is still too high and that it deters many people from seeking legal advice at an early stage of the transaction. This situation has got to change. Some of us have long recognised the need for a change but there are still too many UK lawyers clinging desperately to the system of hourly rates without taking any account of the deal at hand. It should be much more about giving value for money and we should all be much more conscious of the needs of the marketplace in which we are all operating.

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The future's bright, as one well-known, colourful telecommunications company was wont to say, and I'm inclined to agree with them. What will we be watching in 2014 when there are predicted to be hundreds of channels and Davina McCall and Dale Winton will be appearing on all of them? Will *Corrie* and *EastEnders* still be the mainstay of the terrestrial schedules? Will *Big Brother 15* still be dominating the talk around the water-cooler? Will Richard Whiteley have been counted out on *Countdown*? Will we all have turned into gigantic couch potatoes when our only form of exercise is channel-hopping with the remote and our only pleasure is receiving a colonic irrigation on *You Are What You Eat*? I hope not, but if Watford become Premiership Champions and Wales win the Grand Slam, I can live with all the rest. Here's to the future!