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Drafting the Next New Media Contract –
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panelists
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KENNEALLY: On behalf of everyone at Digital Hollywood, welcome to the program we call Drafting the Next New Media Contract. My name is Chris Kenneally. I'm the director of author relations for Copyright Clearance Center at copyright.com. I'm also the producer and host of a podcast series we call Beyond the Book, and we do hope you'll check out all of that at beyondthebook.com.

We're very lucky to have here a panel that's going to introduce me to some very interesting information. I should say first of all that at copyright.com, we are specialists in licensing of text, but we are learning a great deal more about the licensing of all media, new and old, and I'm looking forward to hearing from our panel about that today.

It's especially important for me coming from Boston – and I know it's hahd to tell, but that is where I'm from – to hear the Hollywood perspective on things. I got a bit of a taste of that yesterday when I went to see someone – an agent – and I came into his office and he said to me, my God! What are you wearing?

And I said, Dick, it's called a suit and tie. But in Boston, that's pretty much par for the course, less so out here.

I'm also interested in the way that Hollywood treats contracts, again, steeped in the sort of white-shoe law firm tradition of the East Coast. I remember the line from Samuel Goldwyn about a verbal contract isn't worth the paper it's written on, and I think that summarizes at least the old style of contracts in Hollywood.

So with all of that, let me introduce our panel, moving here from my right out. Alan Friel is a partner in the intellectual property department of Wildman Harrold. He counsels his clients on contractual transactions, intellectual property, regulatory compliance and many other issues. Those clients span a number of industries including advertising and promotion, film, television, animation, music and so forth. He is widely published and a member of the entertainment, intellectual property, technology and advertising sections of several bar associations. Welcome, Alan.

Beside Alan is John Gatti. He's a partner at Stroock & Stroock & Lavan. John has more than 20 years of litigation experience in state, federal and bankruptcy courts and his practice includes representing individual corporations in complex business and commercial disputes. He's had extensive trial experience in a variety of industries and *Hollywood Reporter* named him one of the nation's 100 most influential entertainment attorneys in the country over the last several years. Welcome, John.

GATTI: Thank you.

KENNEALLY: Beside John is Virginie Parant. She is a partner of the Artist Law Group. Her practice encompasses all aspects of the entertainment and media industry with a focus on the convergence of content and technology. Prior to co-founding Artist Law Group, Virginie was vice president of business affairs for XingMail, an online music marketing company. Welcome, Virginie.

And finally, we have beside her Cindy Charles who is the senior vice president and general counsel for MediaNet. Cindy is responsible for MediaNet's business and legal affairs, which include overseeing content licensing, partner contracts and government relations. Among her previous positions includes a number of posts at MTV Networks, including vice president of law and business affairs, and she also has served in various legal positions at World Vision Enterprises, the Screen Actors Guild and several law firms. Finally, welcome, Cindy.

CHARLES: Thank you very much.

KENNEALLY: And welcome to all of you.

So with all of that by way of introductions, I'd like to get started by chatting with Alan briefly because your position in sort of preparing all these contracts is probably a good way to set the table for the discussion.

The first question I have though is one which I asked all of the panelists before we gathered today, and that is your own definition, Alan, of new media. New media could cover a multitude of sins and I think you prefer a different term.

FRIEL: Yes, well, it's not so new anymore, is it? So I prefer the term evolving media. We were just talking before the session about all being from the days of Dictaphones and hand redlining, so technology clearly has changed a lot during the course of our careers. Indeed, it's changed a lot in the last 12 months, the last 18 months, and it continues to evolve. And so, thinking of it not necessarily as something new, but something that's evolving, I think is not only a more accurate description, but also I think it keeps our eye on the ball when it comes to contracts.

If something is evolving, you don't necessarily want to lock yourself in for a five-, 10-year term. Indeed, you probably don't want to be locked in for much more than a year when there's not a business model yet, when you're not sure what all the technology platforms that you may be able to exploit the content are on. And to the extent that you're going to have a longer term, we can talk a little bit about some of the things that I think are important to consider whether you're a licensor or a licensee, such as scope of grant, exclusivity, minimums, renewals, things like that.

KENNEALLY: Before we talk about some of those details, let me ask you how comfortable the people you work with are with hearing you say such a thing. It's one thing to say we're flying this plane while we're building it. It's another thing if there's money on the line here and reputations and so forth. Do people accept that, and if they do, how do you – or if they don't, I should say – how do you help them accept that kind of a situation?

FRIEL: Well, a lot depends upon who your client is. If you are the party that is either the licensee or you are acquiring all rights or some category exclusive rights in content, then you're going to want as long a term as possible, as broad a definition of the scope of rights as possible, and so it behooves you to go for a land grab.

But to the extent you are the creator or you are the licensor, unless you're getting just a ton of money and you're comfortable with that as a buyout, then it behooves you to carve things up very narrowly, avoid exclusivity and to have a short term or to have a term that only renews subject to certain economic or other milestones being hit.

KENNEALLY: We have spoken about how it's all new media today, but there are some parallels with prior situations, and you mentioned one, Alan, to me, which was the advent of television. What is familiar to you with that history and how have you applied some of the lessons learned there?

FRIEL: I actually teach a graduate course at UCLA on the history of television and the evolution of multi-platform media, and it's mindboggling for some of the students that were literally born in the '90s or late '80s to go back and look at the history of the transformation from radio to television and from television and theatrical motion pictures to home video.

In each of those points in time, there's a lot of interesting things we can talk about such as how quick was adoption, how quick was it for commercial viability, but from a pure contract point of view, at each point in time where there has been a disruptive technology, people have had to go back and look at their contracts and say, what exactly did I give away? Or what exactly did I acquire?

Notwithstanding that one of the big lessons learned when television and home video created the disruption and people started using the language of all media now and hereafter known, ever devised throughout the universe and in any other universe ever discovered, that's not necessarily – people don't always get all of the full scope of rights.

So you still see in contracts – we go back for our clients all the time and look at old chain of title on library acquisitions – things like a grant of all television rights. Well, what does that mean? What does that mean today, particularly with IP TV and mobile TV?

To me, the biggest lesson learned looking back at prior disruptive technologies, is to keep in mind that the speed of which we have new disruptive technologies today is vastly quicker than what it was and I think it will continue to be. So we have to keep in mind that – how many people in the room would have contemplated Twitter as a commercial platform even 18 months ago?

We just don't know what the future holds and so we have to think about that when we're either acquiring rights or conveying them away.

F: I have a questions for Alan. What would you recommend then in terms of a very broad grant of rights? Would you say that all media now known or hereafter devised throughout the universe is not broad enough?

FRIEL: Oh, no. I think that's broad enough.

KENNEALLY: I hope so.

(laughter)

FRIEL: It's just that you don't always get a complete buyout, right? You don't always get everything. In fact, more likely than not, you're acquiring on a territory basis or a type-of-media basis.

A good example is with the publishing industry. I know you're going to talk about that, or someone is going to talk about the electronic books and vooks – the video books – and the problems the publishers are having with their electronic book rights grants from contracts going back over the last couple decades or more and whether they have those rights or not. That's going to continue to be a problem unless people are very, very careful at how they define those rights, knowing that they're not going to necessarily know what all the future holds.

Unless of course you have the luxury of acquiring everything, but that's not always the case.

KENNEALLY: And if I may, I think I can say at least one thing certain, that if we ever do have visitors from another universe not yet discovered, they're not coming here for the TV and film rights, would be, I think, almost a given.

F: They want the Twitter rights.

KENNEALLY: They want the tweeting rights, absolutely.

Well, Alan, your experience has acquainted you with the concerns of the various guilds here, which is a whole subject area that I'm still learning about. So if you could, talk a bit about the three guilds and how they're concerns as new media is evolving are coming to the fore.

FRIEL: Sure. You're always going to have a tension between the creative community and the financiers and distributers. We are in a capitalist economy where we give a little bit greater balance of weight to the financiers and the distributers than some other countries do. A lot of countries like France have certain inherent creative rights that can't be conveyed away.

KENNEALLY: Are you speaking of moral rights?

FRIEL: As an example, right. Rights of attribution, rights of integrity. That is not the case in the United States excepting to the extent that there are contractual agreements made between the creative community and the producer community.

So, throughout the history of our entertainment industry, we've had guild – the primary guilds, the above-the-line guilds being for the writers, the actors and the

directors, and they have served two purposes. One is to deal with creative rights – credit, particularly for directors, certain amount of integrity and compensation. And the compensation is as if not more important for the creative community than some of the creative rights.

If anyone's ever tried to wade through the morass that is separated rights, that's another example of creative rights that the writers have been able to get that sort of does an end run around copyright by providing television writers some certain reserved rights under certain circumstances that they wouldn't otherwise normally have.

So as new media has started to evolve, notwithstanding that we're still talking about – maybe we're not in digital pennies anymore, we're in digital dimes as compared to analog dollars. But it's still a blip on the economic screen compared to the traditional distribution mediums.

That notwithstanding, if anyone followed the guild negotiations recently, we had 100-day strike, the WGA. We had very contentious at SAG negotiations. And part of that was because the creative community got a little burned with home video and to a lesser degree, cable television. So there is a hesitancy –

I don't represent the creative community. I represent the financiers and the distributers and the producers, but that notwithstanding, I can understand the viewpoint of some in the creative community that, hey, they took a hit on home video getting a piece of a piece of the pie as opposed to a piece of all of the pie, so most compensation and back end and royalties and such on home video are based on 20 percent of the home video dollar, not 100 percent of the home video dollar. And cable rates were significantly lower than broadcast rates.

All that was when these new mediums were in their infancy. And you've watched home video basically go through its growth and starting to go into decline. Well, that model's not going to change now that it's in decline, and the creative community kind of missed the boat when it was at its peak. So they have some concerns about whether or not they're going to miss the economic boat in new media.

So if anyone's interested, if we get – I don't want to take up all the time and other people here want to speak. In Q&A, I'll be glad to talk about some of the details of the guild arrangements, but for the most part, they break into a few categories. There are certain creative rights, there's all the workplace rights. It gets the unions their foot in the door with signatory status in this medium. And there is some minimum compensation both for new, original, made-for-Internet productions for SAG. WGA, it's negotiated on a per-deal basis. And then also reuse compensation, compensation

in an event something was made for the Internet but then it really gets broadcast on television first, and then finally, some greater definition of what is promotional use, to what degree promotional content can be used and on what platforms that is truly promotional and not commercial.

And importantly, to the point that this is still in its early growth period, these agreements sunset in June of 2011, so notwithstanding the pain that the industry went through to get there, we're going to be quickly revisiting it.

KENNEALLY: Thank you for that heads-up. Alan Friel from Wildman Harrold.

I'd like to move now in our discussion about drafting the next new media contracts to Cindy Charles. To Alan's point about new media and evolving media, you're from a company that has evolved itself, right? You're MediaNet now but you were MusicNet before.

CHARLES: Right. Our company was formed about 10 years ago. It was formed by three of the major record labels, Warner, EMI, BMG and RealNetworks as a technology company and the concept was, how do we combat piracy? Napster was in full bloom and the record labels were at a complete loss as to what to do, so their concept was, let's form a company where we can try to come up with a legitimate, legal marketplace for the sale of music.

So we were formed, as was another company, pressplay, which was a Universal and Sony venture, which ultimately was sold and then morphed into the new Napster.

So we were founded prior to Apple coming out with the iPod. The labels wanted to sell music on a subscription basis and we sold subscriptions or offered subscriptions through AOL and RealNetworks at the time and we offered – I think it was $9.95 for all the content you can access on a monthly basis. You'd pay $9.95 a month. You'd get the songs on your computer. If you didn't continue to pay, the songs would expire.

Early on, we bundled in downloads but the labels wouldn't let us sell songs on an a la carte basis because they didn't want to move into the singles business so they sold them as packages. So that was a very interesting concept, which then Apple turned on its head when Apple started offering songs on an a la carte basis. What it did was it transformed the CD business into the singles business, so the record labels have now – there's a long history here, but the point that you want me to make is –

KENNEALLY: Yes, please.

CHARLES: We've come around now to looking at subscription businesses again as a viable business model, and there were a host of reasons why that could not happen prior to now. One is the fact that there was digital rights management on content. Now, everything, all music is offered on an MP3 basis so there are no restrictions. That's one thing.

The technology has evolved. There's the capability now for mobile phones to access streams so consumers can have streams through their mobile devices.

So now we can once again look at subscription models in a new way, similar types of offering, all you can eat, now seven million songs as opposed to 70,000 songs.

KENNEALLY: And I think the point there is the unpredictability of the market. And it took several permutations before you, if you will, have come back to where you were. The subscription model was, if not a non-starter, a difficult start because it was tied to the desktop. But now we're in an environment where the streaming becomes a practical application, given the adoption on mobile phones.

CHARLES: That's right. There was a history also of what was called conditional downloads, which were – you can transfer a song through your computer to a device, which would also time out. But the experience was very clunky and consumers didn't really understand the experience. And now there's a simple marketing message around streaming through devices that did not exist prior to that.

KENNEALLY: Right. So in lining people up to be able to provide their product to a consumer, and taking Alan's point about sort of building the plane while we're flying it, have you got any hints around the best provisions in such contracts or the way to be thinking about it before you sit down to write?

CHARLES: It's been very difficult because what we were dealing with and what the entire music industry has been dealing with is competing with free. So we had a situation with piracy that none of the other media – no other media – although now, film and TV because of bandwidth, is experiencing a similar issue. But the music was out there and it was free, so we had to come up with business models and continue to try to do that with the labels where we can offer something to the consumer that they will be willing to pay for.

And Apple has created a model where they offer songs for a dollar – 99 cents or $1.29 – but what they're really doing is they're selling – where they generate their revenue is from devices, not from content. So we're also, as a B-to-B provider of digital music, we're also competing with entities that are really selling something else and using content as almost a loss leader.

KENNEALLY: Right. And the music industry – just to take them as an example, but it applies, I'm sure across the board – was accustomed at one point to being in the driver's seat and now that's not the case. How, when you're trying to structure a deal, does that matter? How difficult is it?

CHARLES: It's very difficult because if you have all the leverage, like Apple. Because now Apple owns this market, they dictate to the record labels, here's what we're going to do and basically take it or leave it.

In our situation now after many years, the labels have come to the conclusion that they need to develop a robust marketplace, so there is a lot more – I find a lot more flexibility in these negotiations in terms of pricing, the economics around subscriptions, downloads, bundling subscriptions into other products and services.

Because the goal in our business – and I think this also relates to all businesses – is to create a viable marketplace and not let – in the case of e-books, Amazon, or Apple – own the market, because otherwise, the entire business is going to suffer as a result of one entity, like Apple in the case of music, owning the entire marketplace.

So in my case, I'm always trying to negotiate for the best deal I can. We're not Apple. We don't have a lot of leverage. I did work at MTV where I had a lot of leverage, so it's the flip of that.

KENNEALLY: But nevertheless, there's a case to be made to the providers that having more than just Apple as their channel is in their interest.

CHARLES: Absolutely. It's key. So what we've been struggling with is how can we convince the labels. Because we have to offer everything. It's not like the film business or television business where you can get a few of the providers and you can made an offering. If we are offering a subscription model or even a permanent download model to consumers, they want to know they have access to millions and millions of songs, not just songs from Warner Music World.

So we have to manage each one of the major labels and then all of the independent labels who are onto the major label deal. So it's very challenging.

But the provisions that we focus on – there are no exclusivity provisions. It's really about economics. It's about pricing more than anything.

KENNEALLY: And one of the themes of our discussion today is about the lessons learned and how since new media has now sort of evolved to become all media, there are some

lessons, some hard lessons and others learned from the music business's experiences that apply to, for example, the book business, which, even though we're here at Digital Hollywood, we know that there's a strong relationship between the two.

And in fact, what's interesting is the way that Apple has kind of flipped. When they moved from iTunes to the iPad and starting to have the iBookstore, they did some jujitsu on Amazon, who tried to sort of work the same magic with books that Apple had worked with music.

Talk about that. And we should perhaps fill people in. There was the Amazon model, which was setting a price, and this new so-called agency model that Apple has agreed to.

CHARLES: Right. The parallel in the music business is Sony had – none of the other labels except for Sony had decided they want to be the merchant of record selling downloads, what they call the agency model. So the distributer is the agent and then the agent takes a fee but Sony gets the full retail price. They set the retail price and then –

The way it typically works is we get a wholesale price from the labels. We then are allowed to mark it up as we want and sometimes they get a percentage of the overall price if it's higher than the wholesale price.

But Sony felt adamantly that they did not want downward pricing pressure and so they wanted to be able to dictate the price. They didn't want music to be given away for free as promotion so they're requiring all of the distributers to abide by these restrictions where they are setting the retail price and they're the retailer.

So the book publishing business apparently has taken up that charge as a result of Amazon putting downward pricing pressure. What Amazon was doing because they wanted to own the market because it's a closed system with Kindle, is gain market share and then – so they reduced the price of the books so the books became I think it was $9.99 rather than you go to a bricks and mortar store and it's $20 or $28 or whatever.

And then they would pay the publisher their wholesale price, which, let's say is $13. So basically, they were taking a loss on every book in order to sell.

KENNEALLY: Amazon was taking a loss.

CHARLES: Amazon was taking a loss on every book in order to sell the Kindle, and they had no competition.

What happened was, Apple came in and Jobs had discussions with each of the publishers and they were furious about that. And the publishers said they want to be the merchant of record. They want to be the retailer and they want to dictate the retail price because if the perception in the marketplace is that books are $10, they're dead. Because you go into a bookstore, my e-book is $10. Why is my hardcover $25? So it's a real killer.

So they insisted and Jobs accepted the agency model and I think he basically said, you have one year to figure this out. And so then Amazon was forced to accept the agency model as well.

So currently, I think most of the major publishers are dictating retail price, but they have one year. My advice to the publishing community is, that's fine, but you need as many distributers as possible because otherwise, after the year, when Amazon and Apple own the market, you're in the same place the music business is.

KENNEALLY: Yes. And we just read in the *Wall Street Journal* earlier this week that Google is about to get into the book business, so that is beginning to evolve there. What's interesting – and we don't have to do the math right now – but in that switcheroo, the book publishers end up getting less.

CHARLES: But they're happy to do that.

KENNEALLY: But they're happy to because they're preserving the price on the print side.

CHARLES: That's right.

KENNEALLY: Cindy, thank you for that, Cindy Charles.

I want to move now to Virginie Parant, who has an interesting perspective, I think. Virginie, in your previous background, but as the co-founder of the Artist Law Group, you are sort of interacting between Silicon Valley and Hollywood. Talk about that experience and specifically how it applies to some of the clients that you work with.

PARANT: Sure. I started my career in the Silicon Valley representing startup companies, then moved down here and moved into more of the entertainment realm, but still with a new media kind of bent to my practice.

What I find interesting more so than new media, as said Alan, which really doesn't mean anything these days because everything is evolving so everything is new to some extent. But what I find really interesting in my practice is the interplay between

startup companies and talent, or the Silicon Valley and Hollywood, if you will, because these are two very different cultures and their approach to contractual relationships are also very different.

So representing a startup company, usually you have a small company with a novel business model, which hopefully is interesting. They don't necessarily have proprietary technology. They have a good idea and so what they need to do is corner the market and if they're dealing with content, sign as many artists as possible as quickly as possible to corner that market before competitors decide this is a good idea and we're going to do the same thing. So their approach to contracts is, again, a land grab, as Alan was saying, and a quick one.

So from an artist's perspective, a lot of artists are looking these days for new revenue streams because all the revenue streams are shrinking so they need to expand the scope of their revenue streams. So artists generally are interested in those new business models but they're also wary, because when you're dealing with a new company, you don't know where they're going. There's no standard model to deal with when you're doing a record deal. You get a buck 25 penny rate, you're happy with that standard and you're good to go.

When you're dealing with a new model, you don't really know what everybody else is getting. There's no standard, so that's a concern.

So moving from different provisions, looking at a royalty provision, what's important to know from the artist's perspective is that you're getting a deal that – dealing with the uncertainty, what I try to do when I represent a talent is to get a most favored nation provision so that I know that whatever they're offering us is going to be standard across the board, at least the best deal that the artist can get, not only with respect – if you're dealing with a royalty structure, not only with respect to the royalty rate but also the capitalization model, if you're dealing with net. If you're dealing with gross, watch out for deductions. That can be really aggressive. So from a royalty standpoint, that's what I'm concerned with.

From a term standpoint, as you were saying, you want to minimize the term from the artist's perspective, because you don't know what their market's going to look like in a year. Obviously, from the startup perspective, you're trying to get as long a term as possible.

Termination provisions are important from the artist's perspective. If the startup stops doing business in the normal course – for instance, some of them go dormant because they're looking for funding and things like that – you don't want to be tied up with them. If there's any bankruptcy proceedings that are started against them, that's

also important to have a termination provision for that type of situation. And again, minimize the term.

Exclusivity is something that the startup is going to try to go after, again, to counter any possible competition once they launch and everybody decides this is a really good idea and they want to start signing talent. As an artist, if you represent the talent, you're going to try to avoid exclusivity to the extent possible. If that's not possible, then you try to make sure there are parameters around it, some benchmarks that have to be met or the exclusivity goes away, or the agreement terminates.

Scope of rights, as we were talking about that, that's also very important. When I represent the licensee, the startup that's getting content in, what I try to do these days because it's really hard to anticipate what kind of media you're going to need and what kind of business you're going to be in in a year, I try basically to have a catch-all provision, all media now known or hereafter devised. And if it's a concern from the other side, then what I suggest is just carve out – you go to the licensor and say, OK, what medium are you concerned about? Is it TV? Let's cover the sound. Is it theatrical? Let's cover the sound. But let's make sure we have a – from the startup perspective, let's makes sure we have a catch-all.

Assignability is also very important for a startup company. If you're going to start signing talents or you're aggregating content and you have an exit strategy that might involve merger or acquisition, you want to make sure that the content goes with you if you get acquired so that you're not held hostage by a bunch of artists who are going to ask for payment or try to get out of their contract once you get bought.

From the artist's perspective, the concern – I've had that happen. Actually, yesterday, I was working on a deal on the artist's side, and the artist tells me – she keeps talking about Darren, Darren, the CEO. She's friends with the CEO. Great. She's like, no concern. He's a great friend. I trust him completely. Well, yeah. When Darren gets bought out in a year, what's going to happen?

So from the talent perspective, if you sense that your artist is really going from a relationship perspective into this agreement, then maybe try to use a key man provision, which is very entertainment based. Silicon Valley people don't know what that – they're not used to this, but why not throw it at them and see what you can get from that perspective? That might come in very handy in case of an acquisition.

The most important advice I would say I have for a startup company going into the entertainment realm and trying to sign as many artists as possible – presumably they have no money to throw at the artists, and what's really tricky is to get people's attention, get management and legal to actually look at the contract and spend the

time. And if you come to them with a 30-pager for simple name and likeness type of deal, which is something I was working on recently, again, on the talent side – they throw at us – it's like a 13-page contract for a name and likeness. And you could tell it was a big New York lawyer who was trying to throw everything in but the kitchen sink.

And looking at this, the company is trying to reach critical mass and what difficulty they're going to encounter is that when a lawyer sees that there's no money in, the manager doesn't care, there's no advance. This is no rush. It might be interesting, it might be incremental revenue, but who knows? But if you make the deal very difficult and very complex, you're going to go to the bottom of the pile and this is really going to hurt you in terms of building critical mass.

It sounds like very simple advice, but I would say, having worked at a startup that needed to achieve critical mass very quickly, that's the first thing that I looked at as general counsel. Let's get a licensing agreement that is simple and that will go through very easily. I came up with a three-pager that was solid and that's really –

Oftentimes, young entrepreneurs, they want to get the big lawyer and the more language and the more complicated the agreement looks, the better it probably is, because they don't really understand all that stuff. What I learned working in the Silicon Valley is that it's very difficult to make a contract simple and still tight and something that works, and that's really key working with a young company that is trying to, again, build critical mass.

And that's my first piece of advice when I have a client. Let's do something that's simple, tight, that works, that will stand up in court, but that is going to make it easy for you guys to sign people quickly and easily.

KENNEALLY: Some great ideas there for drafting this new media contract that we're talking about. And I want to focus again on this point about your experience with Silicon Valley and Hollywood. We're here at something called Digital Hollywood, which isn't quite the oxymoron that, say, the newspaper business is now, right? But it's still in a struggle, I think, to understand each other. Does that make sense? And that there's contractual baggage that both what I'll call the legacy companies and the startups are coming to the table with. Can you talk about that?

PARANT: Sure. I have to say that it's gotten much better. There's a huge difference. About 15 years ago, when I was in the Silicon Valley, we were all starting, trying to figure things out. Everybody was running around. Young CEOs didn't know what they were doing. I was a baby lawyer. I didn't know what I was doing. It was just

complete craziness trying to deal with the entertainment business and trying just to get content signed up with our startup companies.

I remember a partner came to me and we were working with some music company, music startup. They were signing artists. And the partner comes to me to discuss the agreement, the template that we're going to work on for that startup. And the first thing he says is, well, we're dealing with musicians so I think we should put color in the contract. That'll attract them.

(laughter)

PARANT: And that's the kind of disconnect that you were dealing with. The tech people looked at the artists as those crazy people, not so smart, that didn't know what they were doing, and then the entertainment industry was looking at Silicon Valley with some arrogance, having worked in the music business. So there was a massive disconnect. And now I have to say, it's much better. I don't see that much of a disconnect anymore dealing. We've learned to speak with each other. At least I've learned to make them talk to each other in a similar language, at least.

KENNEALLY: All right. But nevertheless, there will be problems. There are contracts. That means there will be problems, which brings me to John Gatti here. John's here to talk about the problems. If you don't want to hear about the problems, I guess you have to leave now.

But John Gatti is a partner at Stroock & Stroock and a litigator, so you are the person who deals with the consequences of all of this. Talk about that perspective when it comes to new media contracts, again, bearing in mind what we've been hearing, which is this is all so much evolving as we are speaking, really.

GATTI: Thank you. And that is true. It is all evolving and guess what? When it's evolving, there are problems.

KENNEALLY: There are crashes on those planes that we're building in the –

GATTI: There are a thousand issues. Alan spoke earlier of disruption. I'm on the side of the ledger, I guess, where disruption means opportunity in some respects. And what we're doing is really managing that. We do get involved on the front side in the deal making because people are now, I think, in tune with it and looking at how is this going to play out at the end of the day.

We're still in the legal system, so you're talking about contracts and you're talking about what was the intent of the parties and what was the meeting of the minds. Was

there a meeting of the minds? And I come from the end of things where I have to take that situation, that agreement, which may have been done in a shorthand basis, may have been done with startup companies that were not as established in whatever business model they were going to apply going forward. And maybe the business model changed.

And now we're telling this story and we're in front of 12 individuals who are the jurors who – some may be as sophisticated as people in the room. Others don't know from anything about new technology, evolving technology. And a lot of the judges, by the way, who are making determinations on the contracts that people are putting together, are not that well-versed in it at all themselves.

So I guess my point would be, eventually, you have to look at the end game there if there is going to be litigation. And the advice is to make things as clear as possible because that is going to be what will – that contract, at the end of the day, is going to be on trial itself, and to be clear is the best, obviously, advice you can give.

The types of issues that definitely come up in the litigation area are, as others on the panel have mentioned, business models change. Parties that are going into a contract may believe they're going down a particular model and then guess what? Six months later, that model changes. However, the parties to the contract may not be provided for in the situation where a model changes.

KENNEALLY: Right. And just to say, the change is being made in the interest of one or the other. It can't necessarily benefit all.

GATTI: Correct. And so, when we look at agreements on the front end, we try to work with our transactional attorneys and look for the different alternatives. And you try to think of what you can and you try to build in language that provides for changes in the landscape as things go forward.

It becomes especially true when, as Alan was talking about, many – there's repurposing of entertainment projects that deal with contracts that went back to the '50s, '60s, '70s, '80s, and even contracts in the '80s and '90s don't necessarily provide as well as you would like them to with the new technologies and the evolving technologies.

So you will have situations that there will be conflict there. And how are those rights interpreted and was the contract in 1960, 1970 providing for the type of technology we're talking about today? So when you're looking at contracts today, trying to avoid the litigation down the road, as others have mentioned, is you want to be as expansive as possible, try to be as inclusive as possible.

With respect to the changing business models that people are faced with, I believe sometimes building in benchmarks for performance is a good way to provide for an out for a party if they need to. If things are not going the way they thought and things are not progressing the way they anticipated, they have an out built into it so that in litigation or trying to thwart litigation, you have specific exit procedures so that you're not deemed to be in breach when the game plan has changed on you. So I think that's one of the ways to try to anticipate those type of problems.

In today's environment, obviously – and Virginie was talking about dealing with startups, and obviously, you always will be dealing with startups in this area. Startups, some go on to be Google, some end up on the roadside, and if you're somebody coming in and providing content, one of the more important things you want to look at is, if we have to enforce our rights against a company that is not viable, what do we do? What do we provide for?

Some of the provisions you can obviously look at are the various indemnity clauses, various default issues. Companies may end up in bankruptcy, so you want to be able to, on the front end of things, try to as best you can put into the agreements how things will be treated. Those come in with reversion rights. If certain things are happening at the company where your rights are going to – the last thing you want as somebody who's providing rights, let's say, to a particular entity, is to have your rights caught up in a litigation and bankruptcy or other – there are issues that aren't as – you're not quite at bankruptcy, but for the rights holder or the person who's granted the rights, it may as well be bankruptcy because your rights are tied up. You can't get to them.

And so provisions such as reversion rights. We have, again, benchmarks as to if things are happening or not happening, then those rights revert back to you and you're free to take it down the road. Those are all obviously negotiation points, but those are points that are very important from a litigation standpoint just to protect yourself on the front end to see what you may be faced with in litigation.

And again, getting back to many people in the industry, when you're talking about new technologies, tend to speak sometimes in shorthand or industry usage of terms, and everyone around the table at that particular time understands 100 percent what everyone is talking about. However, once you get into litigation, you start to learn how much people don't remember that that's exactly what everyone meant and give a different definition to it, and you're having to give a definition to, again, as I say, 12 people in a jury box that are going to eventually make the decision.

That's scary and that's why many people will – parties will try to avoid litigation or build in arbitration provisions so that at least they have a little more control over the process if they can, because it can be a scary proposition that something such as who holds the rights to a particular – either rights or technology and how it's going to be applied may be – end up being that the company type of litigation, and it's a scary proposition when you're putting that decision with some individuals who may not be as well-versed.

KENNEALLY: Right. And John, that warning about the possible consequences of not clearly defining jargon sort of strikes me as related to what Virginie was saying before about plain, simple and all of that, and is a great cautionary note.

So, when we talk about new media, many of these issues are really old issues, but when we were chatting before the program, you brought up a scenario that I thought was interesting, particularly in light of this notion that there are jurors and judges who might not be fully acquainted with e-mail, so if you bring up with them something like virtual realities and Second Life and so forth, that's going to take them to a world beyond, maybe to that other universe that we were chatting about before.

Can you just bring up what that's like as a litigator? You've got someone who may feel that they've been defamed in Second Life, for example.

GATTI: Sure. I guess the old adage applies, follow the money. And in social networking sites and Second Life, those sorts of sites, there's real commerce being conducted there and it's now millions, tens of millions, hundreds of millions of dollars of real commerce. So when there is that economic opportunity, the old rules apply and you're still working within the legal system, so can you defame somebody in Second Life? Those cases are now in front of the courts and determinations are being made that, yes, you can.

Can you interfere with the business relationships of this make-believe world? Well, when you're paying real dollars in the make-believe world, yes, you can be sued for interfering with contractual relations.

And how it's really coming up is somebody will create a business on, let's say Second Life, where they are generating economic dollars, real dollars, and somebody is badmouthing that business for the benefit of their business that they're operating in the virtual world, and it has a real economic damage. And if there's real economic damage, there can be a real case in the legal system, and those cases are starting to work themselves through the system. So when you're in that area, there are the real concerns that you have as you would be in the actual world we all live in.

And that goes for right of privacy, defamation. We've represented companies such as Cartier, who have had their trademarks infringed in the virtual world with people creating designs that are a copy of Cartier and others like that, and they're bringing infringement actions and piracy actions in the virtual world because there's money being generated. From their perspective, if there is money being generated off of their rights, they will pursue them.

KENNEALLY: John, I wonder if we can expect virtual courtrooms then at some stage?

GATTI: I'm sure people are hoping. They're probably attorneys.

KENNEALLY: Absolutely. With a virtual bill at the end, yes.

FRIEL: If I could add to what John said. I guess about 15 years ago, other than the application of then-existing intellectual property law to the medium, everything was a clean slate. There were no laws. There was no regulatory overlay.

That IP overlay is not insignificant. It's very complex and there's a lot to think about there. But we now layer on top of that a whole set of laws, some of which would provide potential protections to those websites that you just talked about, the Communications Decency Act, the Digital Millennium and Copyright Act. And the contours of those are being challenged and fleshed out by those judges that you mentioned that have no idea what the technology is or what the business models are.

But on top of that, we now have really intense regulatory schemes that relate to the use and the medium. And with the Obama administration and the new FTC, we're going to see that, I think, drastically increase. In fact, if was just this week that the FTC announced that they are completely revamping the privacy scheme, which is to date then a basically notice and kind of consent, not really a scheme.

And yesterday, Boucher introduced his draft bill for a vastly re-regulated privacy scheme for all data, both on and off line. You've got an opt-out scheme for e-mail. You have an opt-in scheme for mobile. So for the business people and the technologists, it has gone from a Wild, Wild West where you could pretty much do anything you want and the law will catch up to you, to where the law is really ahead of the technologists now in many ways, and not necessarily in the right ways. So the level of complexity to exploiting the medium has certainly grown.

KENNEALLY: I want to thank the contributions of everybody on the panel today, and then turn it over to you in the audience here for some questions.

But first of all, thank you, Cindy Charles from MediaNet, Virginie Parant from Artist Law Group, John Gatti at Stroock & Stroock, and finally, Alan Friel from Wildman and Harrold. Thank you all for a great discussion. Appreciate it.

(applause)

END OF PROGRAM