STUDY ON THE AUDIOVISUAL LEGAL FRAMEWORK IN LATIN AMERICA

PART 4: CONTRACTUAL PRACTICES IN THE LATIN AMERICAN AUDIOVISUAL SECTOR IN THE DIGITAL ENVIRONMENT

prepared by Mr. Bertrand Moullier and Ms. Alexandra Galvis

Pilot Project on Copyright and the Distribution of Content in the Digital Environment
Committee on Development and Intellectual Property
World Intellectual Property Organization
2021

DISCLAIMER

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[1] Studies available at: : https://dacatalogue.wipo.int/projects/DA_1_3_4_10_11_16_25_35_01

1. INTRODUCTION

The present work forms an integral part of a set of interlocking WIPO studies commissioned as part of the CDIP *Pilot project on copyright and the distribution of content in the digital environment* [CDIP/22/15 REV.][2]. This WIPO work stream is concerned exclusively with the Latin American region, with six beneficiary countries singled out for particular focus[3]. It is designed, in particular, to complement parallel studies on the copyright legislative and regulatory framework and on the market for online digital filmed entertainment and video services in those countries and the region at large.

Although the present study makes passing references to the legislative and regulatory undergirding and to general digital market trends in the region, its primary focus is on the actualities of contractual custom and practice and its recent evolutions in the light of game-changing developments in digital distribution technologies, markets and business models.

The particular aspects of Latin American audio-visual sector contractual practice covered in this study specifically concern transactions between parties regarding the transfer/license/ assignment of copyright and related rights and dispositions regarding fees, remuneration and revenue-sharing. It looks primarily at distribution and licensing contracts and contracts between professional audiovisual content producers and the entities – such as local, regional or worldwide distributors, international sales agents, broadcast and VOD platforms – that bring the content to the consumer marketplace. It homes in on the changing dynamics brought on by new forms of digital uses that have made the audio-visual value chain substantially more complex in recent years, from a producers' perspective. The study investigates contracts in the professional, commercial audio-visual content industry only.

1.1. METHODOLOGY

Material for the present study was generated chiefly through one-to-one in-depth interviews with a range of currently active players in the audio-visual creative and economic ecosystems in the six Latin American countries selected. Whilst the majority of interviewees were individual creative or business people, there were also executives and contract managers in trade associations, and individual contract lawyers. These interviews were augmented by material already held by the authors, as well as new desk research. Abbreviated material from the second edition of Bertrand Moullier's WIPO publication *Rights, Camera, Action* was also inserted and adapted where expedient, as part of Section 2 below, which summarises general key features of audio-visual distribution and sales contracts as extant throughout the world.

Where relevant, the authors also interviewed professionals in Latin American countries other than the six selected for this study. This was a logical choice, dictated by the reality of a fluid marketplace in which cooperation between producers and creators across national boundaries is frequent. In particular, there is an established practice of multi-party co-productions between producers and platforms in different Latin American countries, as a means of attaining larger budgets and ensuring broader intra-Latin circulation of the resulting films or TV/streamer programming. It seems the advent of VOD has introduced greater flexibility in this respect and increased the market for content imported from other Latin American countries by local distributors and/or platforms buying licenses for several territories at once.

Generating original facts and data on the study's topic was inevitably challenging, owing to the understandable commercial business custom and practice of keeping strictly confidential the nature of individual negotiations and the use of contracts that often contain enforceable non-

[2] CDIP Recommendations 1, 3, 4, 10, 11, 16, 25 and 35
[3] Argentina, Brazil, Costa Rica, Ecuador, Peru and Uruguay

disclosure or confidentiality provisions. As deontology demanded, the results have been laid out in broad categories of observations, a pattern designed to protect anonymity and avoid facilitating the identification of specific contractual practices by specific platforms, broadcasters, producers and other participants in the audio-visual creation, production and distribution chain. Where specific individuals and corporations gave express consent to disclose certain information regarding particular contracts, or portions of the contracts, these are referred to directly, at a level of detail pre-agreed.

1.2. DIGITAL RIGHTS – A WORKING DEFINITION

The most important methodological hurdle that was necessary to clear at the outset concerned the delineation between 'digital' licensed rights and other sets of licensed rights in audio-visual contracts. This clarification is challenging, in large part because the border between what may be credibly construed as 'digital rights' and what lies outside of its scope, is a constantly fluctuating one, driven by the fast pace of change in technologies and the business models they help adopt, develop and maintain.

In drawing this boundary, the authors were guided by the prescribed editorial ambit of the present study, namely to shed light on what forms of contractual custom and practice prevail currently in some Latin American countries for establishing chain of title of copyright and licensed distribution concerning rights to audio-visual content on non-linear platforms: 'digital rights' have therefore been taken to mean specifically (and, perhaps, restrictively) those rights that concern audio-visual uses involving a decision by the individual consumer to lawfully access a unit of audio-visual content at a place and time individually chosen by her. The content requested is instantaneously available via streaming to subscribers utilising high speed communication systems to their home, office or mobile devices. Commonly known as "on demand" or "video on demand', this category of usage corresponds normally to the communication right and/or its specific subset – the right of making available – which were established in the WIPO 'Internet Treaties' of 1996 and subsequent binding international instruments in the copyright field.[4] For the purpose of this study, therefore, the authors have not included other forms of delivery of audio-visual content to an audience which also happen to use digital technology: linear broadcast television, whatever its technological means of delivery is deemed to sit outside this boundary, as does packaged DVD and Blu-ray. And while most cinemas today project films for public performances from digital high-resolution prints rather than celluloid "film reels", this form of usage also lies outside the scope of the present study. In essence, this study is focused on the range of rights that pertain to the various video-on-demand (VOD) windows in the audiovisual marketplace of Latin America.

1.3. 'DIGITAL PRODUCTION'

A frequent misconception is that there is such a thing as specific digital production and distribution pathways somehow distinct from other processes in the audio-visual ecosystem. At this particular juncture in the development of the medium, there are no such 'silos' and the modes of financing, production, distribution and commercial exploitation of films seen on digital platforms are no longer distinctive from more legacy forms of production and distribution. From video capture all the way to the post-production workflow and the delivery of master material for distribution on a variety of media and platforms, digital technologies are now the globally dominant norm. Analogue options have all but vanished from the process worldwide and the use of celluloid film either for capture or display is now an option chosen only by a fast-diminishing cohort of auteur filmmakers as part of their commitment to very specific aesthetics and effects.

[4] In particular the WIPO Copyright Treaty (1996), WIPO Performances & Phonograms Treaty (1996), the Beijing Treaty on Audiovisual Performances (2012)

Another common misconception concerns the place and status of online digital forms of content exploitation in the audio-visual value chain. Whilst VOD was originally treated as an 'ancillary' or tertiary media at the outset of the digital and technological revolutions that allowed for licenced distribution which provided on demand access to its subscribers, this part of the ecosystem has since grown spectacularly in commercial stature and consumer reach to the extent it is now characterised as primary to the exploitation cycle of almost all forms of audiovisual content, from single features to long-form TV serials, short films, videogames and so-called web-series, etc. Whilst Latin America may have been initially slower in embracing the technologies that support non-linear offer of content, it has been catching up with North America, Asia and Europe at a frantic rate: OTT audiovisual services had total revenue of USD 6.3 billion in 2019 and are forecast to reach 90% of fixed broadband households in the Region by 2023, while SVOD platforms' revenues alone will grow 9.5% per annum.[5]

Although the present study concentrates on contractual features and negotiating points for contracts that pertain to filmed entertainment content made to a professional standard and aimed at the wider consumer market, these are by no means the only existing forms of digital content available online. So-called 'user-generated content' or 'UGC' made very often by non-professionals, noncommercial endeavours, or for purposes such as parody comment, or criticism, is a growing phenomenon. UGC has grown exponentially as technologies for video capture, editing and post-production have become increasingly available and accessible to most people[6]

2. AUDIOVISUAL CONTRACTS – GENERAL CONSIDERATIONS

The research mandate was to focus on the treatment of licensed digital rights in the region's contractual practice. In shedding light on – and illustrating – such practice, it is necessary to also convey introductory notions about audiovisual contracts, the general morphology of which shows only limited variations in the detail according to different regions and national regulations, with certain common principles having almost universal application.

Financing, producing and distributing almost any commercial standard film or television content normally involves a wide array of contracts and legal agreements. Many of these agreements have copyright at the core, especially those related to acquisition of the underlying, copyrighted works, the clearance of rights pertaining to music and other copyright protected elements of the production, and any copyright or name and likeness rights of those performing services in the production, as well as any licensed distribution rights, or assignment of copyright necessary for financing the production or enabling the exploitation of the distribution rights.

However, not all of these agreements entail copyright and related rights, or other forms of IP rights,. For instance, national film agencies (e.g. Brazil' Ancine, Argentina's INCAA, Costa Rica's Fauno) may provide soft loans or grants that – whilst requiring specific warranties – do not involve the licensing, transfer or assignment of IP rights in the project, even though the conditions for approval of such grants/loans may include the applicant having to show that such rights have been properly and legally transferred and/or the authors paid in part, according e.g. to statute or collective agreements as they may exist in a specific jurisdiction. This is the case also, with the numerous employment contracts involved in hiring production workers with no statutory or contractual rights over the IP contained in the project, e.g. production technicians and companies providing professional services to a production (e.g. camera hire, transportation, catering). The growing trend is towards contracts to include standard IP transfers of rights for a wider range of production workers e.g. for cinematographers, who are normally considered to

[5] For more information please refer to Part 1 of the present study titled "Audiovisual OTT business models in Latin America: Recent trends and future evolution" that is published together with the present document.

[6] See also the CDIP Study, Part 2: *Legal Study on the Digital Audiovisual Legal Framework in Latin America*, prepared by Mrs Marta Garcia León for additional detail on UGCs and other forms of audiovisual digital content.

be technicians. Agreements with loan-out companies that provide the services of individual artists also contain the necessary assignment of rights from the company.

The sub-range of contracts that engage IP rights is diverse. Because a single film or television/streamer drama episode generally contains a large number of underlying, accessory or incidental works that are subject to copyright and/or other forms of IP (e.g. trademarks appearing in the frame), the producer can only proceed with a project once he/she has secured legal chain of title with transfers, licenses or assignments for the use of each particular item to which IP is attached.

Audiovisual contracts can be categorized very broadly into upstream (talent and performers, including authors of underlying works or works such as pre-recorded music included in the film and rights in the screenplay(s)) and downstream (financiers, distributors, platforms). The present study focuses on the type of contractual features and negotiation issues in contracts situated in the downstream, e.g. content commissioning, sales, broadcast TV and VOD licensing, distribution deals, etc. For material on agreements governing talent and performers, we refer readers to the comprehensive study which forms Part 2 of the current suite of studies and entitled *Legal Study on the Digital Audiovisual Legal Framework in Latin America*, by our colleague Marta Garcia León, which presents a thorough, country-by-country analysis of the custom and practice in the Latin American Region and how it intersects with copyright statute.

2.1. DISTRIBUTION, PRE-SALES AND SALES CONTRACTS - GENERAL FEATURES

The distribution agreement defines the deal terms of the legal and business relationship agreed upon between a film distributor and the producer. In the process, the producer will license or assign rights acquired by him/her, against remuneration and the prospect of the film being exploited in as many media and territories as possible.

Though there may be common deal terms and provisions used by distributors of all sizes, there is no such thing as a standard deal and agreement, or a one size fits all approach to a producer's relationship with a distributor. A producer may be dealing with an integrated company able to release the film in cinemas locally, to release on TVOD and DVD, license it to local television and/or SVOD platforms, sell it to foreign buyers at markets and festivals, etc. On the other hand, she may be dealing with different distributors, each active in one or two market segments (e.g. cinema or video) or territories (e.g. Latin American Region or France) and may need to license those rights separately. Whatever the format, here are some of the key points which a negotiation will be likely to throw up:

Type and scope of rights assigned or licensed to the distributor

As a matter of course, most distributors will expect the producer to assign or license all available rights in the authorized languages and formats. In this matter, the producer's room for maneuver may be limited.

As a matter of principle however, the producer may try as much as possible to keep to himself ("reserve") those rights which are either less important to the distributor's business and/or which the distributor has no solid expertise in exploiting but which can make a difference to the production company's revenues over time. In parallel, or alternatively, the producer may elect to limit the duration (term) of the license, so as to be able to exploit their residual value in other markets once the license is expired. These may include airline screening rights and extend to the so-called "non-theatrical" rights which include public performances of a non-commercial nature (educational institutions, conferences, etc.) and of a commercial nature, the most visible of which are airlines and other transportation media, which may help bring added visibility to the film in the long run.

The key strategic rights which an all-rights territory film distributor will generally insist on obtaining are:

- Theatrical – meaning the rights relating to the exploitation of the film in commercial cinemas. Theatrical is still seen as the strategic launch market for most films, the success or failure of the film in the cinemas having an important knock-on effect on performance (and therefore pricing) in subsequent windows of rights' exploitation – however, the theatrical market is almost always a loss-leader for the distributor, which creates all the more pressure for his investment to be recovered in subsequent segments of the value chain

- Video rights (or "videogram" rights) – refer to all rights of duplication (and exploitation thereafter) of the film on analogue or digital video and optical disks including compact disk, VCD, DVD and Blu-ray. The rights generally encompass rental and sell-thru uses and are not to be confused with VoD or pay-per-view (below);

- Pay Per View rights – can relate to traditional forms of content delivery as well as to Internet 'VOD'. In traditional form, the viewer may only consume the film – which is transmitted by a broadcaster, under encryption, at a specific time. Contracts sometimes distinguish between 'residential pay per view' which involves the consumer viewing at home, and 'non-residential' for pay per view uses in hotels or other non-domestic settings

- Pay-television – refers to television offered to the public against subscription payments and requiring the use of a decoding device to read the encrypted signal which protects the broadcast signal from unauthorised uses. Coming before the explosion of the DVD in Western markets, Pay-TV was a considerable force in the exploitation and financing of films from late 1980s to the early 2000s. Pay TV rights may be differentiated depending on the means of transmission, e.g. terrestrial, satellite or cable;

- Free-to-air television (or free television) – refers to television services received by the audience free of subscription charges and not normally requiring a decoding device to be viewed. These services are usually supported through income sources such as advertising, sponsorship and state aid or a specific annual tax or levy on each household with a capacity to receive those services;

- Satellite television – refers to television services available to the audience direct-to-home and requiring the installation of a satellite reception dish. These rights may sometimes replace or extend those of free-to-air television in countries where free-to-air broadcasting is limited due to geography and/or economic factors; they may also be part of the pay-TV rights category, in situations when the satellite signal is delivered direct-to-home in encrypted form to an individual subscriber using a licensed decoding device

- Video On Demand (VOD) rights – Video-on-demand (VOD) as an umbrella term describes the making available to the public, by an operator, of an audiovisual work according to a digital telecommunication process that permits members of the public to access the work in a place and at a time individually chosen by them. Although barely a decade old as a widespread mode of consumption, VOD is available in a variety of modes of delivery and business models. In audiovisual contracts, typically, VOD rights break down into four distinct sub-sets: transactional VOD (TVOD), free VOD (FVOD), subscription VOD and advertising-supported VOD (AVOD). Near-VOD (NVOD) also features in many contracts.

    - Transactional VOD (TVOD) implies the making available to the public of an audiovisual work according to a digital telecommunication process that permits members of the public to access the work in a place and a time individually

chosen by them, against an individual payment for the individual use/consumption of a specific film or other form of audiovisual work.

- Subscription VOD (SVOD) entail the making available to the public, subject to payment of a periodic individual subscription (typically, monthly), of a range of audiovisual works, according to a digital telecommunication process that permits subscribers to access the work in a place and a time individually chosen by them.

- Advertiser-supported VOD (AVOD) implies the making available of audiovisual works without either an individual transactional payment per content or a subscription fee. These services rely on advertising for revenue instead.

- Free VOD (FVOD), also sometimes described as 'catch-up TV' describes the making available by a linear broadcast TV operator - either a free-to-air channel (e.g. European public broadcasters) or a pay-TV channel) of an audiovisual work without payment (or additional payment in the case of a pay-TV operator) being due by the consumer.

- Near VOD (NVOD) is a form of pay-per-view that enables the communication of the work to the public in successive intervals at staggered times scheduled by the NVOD operator itself.

An emerging new sub-category of on demand is Premium VOD with various definitions being considered and often times tied to either an SVOD initial release, or a transaction window very close to the exploitation of the theatrical rights.

Minor and technical adaptation - Distributors' agreements will generally contain clauses ensuring that they will have the ability to make lawfully certain changes to the film for the purpose of distribution. These may include changes to the title, cuts designed to comply with film classification/censorship requirements, dubbing and sub-titling, etc. To that end, the producer will have obtained the written consent of the authors/ creative contributors to the work.
Advances and minimum guarantees

Some film distributors have the financial wherewithal to participate in the financing of films by investing in them at development or early production stage. This takes the form of financial advances against future revenue projections from the distributor's exclusive exploitation of the distribution rights in the licensed territory. Films that do receive distributor finance tend to come from established producers, attached to projects driven by the popularity of the lead actors.

As a general rule, most independent low-budget filmmakers wherever in the world they live and work, will find it very difficult to attract a distributor into their financing plan before the start of production. In many cases, budgets are raised by producers through a mix of local public sector incentives, grants or soft loans, TV license fees and some equity participation by media-related or external investors. Most successful films in this section of the worldwide film market are picked-up by distributors after completion (festivals, film markets or preview screenings organised by the production or sales company) or towards the tail end of production, when a "rough cut" of the film may be presented to potential buyers. A rough cut is a version of the film in which most of the scenes are in the right order, where dialogue has been synchronised but which lacks elements of post-production finish such as digital effects, music soundtrack, etc.

In cases when a distributor has decided to pre-purchase some/all rights to a film or TV series before completion, the contract will normally include a specific financial commitment by the distributor.

A dominant practice is for the distributor to commit to a '**Minimum Guarantee** or 'MG' - Under this type of contract, the distributor guarantees to the producer the payment of a set amount

which will be paid regardless of whether or not the distributor generates enough revenues from the eventual exploitation of the finished film to cover the agreed sum. The distributor is therefore at risk. In some cases, the distributor may agree to advance the entire MG to help the producer make the film; in many cases also, the distributor will only provide an initial deposit (a negotiated percentage of the MG) and pay the balance on delivery. In countries where banks offer such facilities, producers may then be able to borrow the balance, using the MG contract as collateral, (for which banks will often require a letter of credit). The reputation of the distributor will be a factor in a bank's decision to provide such loans.Access to bank financing (discounting of MG contracts) remains scarce in Latin America, so distributors often agree to cash-flow a high proportion or the entirety of the MG.

Depending on the written agreement between the producer and distributor, the MG is most often recoverable by the distributor out of first income from the film's commercial exploitation, sometimes with interest charged on top, before the financiers and the producer can share in revenues. MGs can be obtained from a single distributor for the territory or the language area in which it operates. Alternatively, international sales agents and international distributors may offer MGs covering a part of the anticipated value of unsold territories. Whilst MG contracts nowadays tend to cover all rights in all media for a given territory or language group, there are accommodations, e.g. in cases of international co-productions in which some rights such as terrestrial or pay-TV may already have been pre-sold by the producers upstream, as part of their efforts to get the film or TV series financed.

The complex contractual agreements governing the share-out of income between the various investors in the film from the exploitation in various media and territories is sometimes called the 'revenue waterfall'. Every dollar recovered net after taxes, levies, bank loan repayments and distributors' advances and costs, is typically shared *pro-rata* and *pari-passu* between those with equity in the film. However, in many cases, some investors may be placed in a more advantageous position, e.g. through priority income 'corridors' whereby they may receive a larger percentage than their equity share would normally entitle them, generally until they reach an agreed threshold percentage of recovery of their equity. Revenue waterfall agreements are sometimes managed and executed by private sector collection agents acting on behalf of the parties to the agreements. These intermediaries possess highly specialized skills required to navigate complex parameters, e.g. it is not uncommon for a net revenue surplus (also known as 'overages') achieved by one distributor in a specific territory being offset against losses registered in another territory. If negotiated and in the agreement, this practice of 'cross-collateralizing' will still require complex auditing and accounting.

In independent film production, it is common practice for producers and, sometimes, directors, to defer a percentage of their budgeted fees and attempt to recover the difference from future income from the exploitation of the rights in the film. They may consent to receiving compensation in the form of profit participation when the film's budget is proving challenging to finance to the aimed-for figure and a gap needs to be closed, or because they believe that the compensation may more lucrative if they share in the gross or net profits. In such cases, the deferred element of their fees are included in the revenue waterfall, though not necessarily alongside equity investors with their position negotiated in their talent service agreements. "Bankable" actors, and established directors and writers may routinely negotiate with the producer for a small percentage (or "points") on the profits . Their status in the industry will determine the placement in the revenue waterfall, but only occasionally will these above the line talent be in first position before investors. If a collection account manager is used to collect and disburse the revenues under the "CAMA" (collection account management agreement) to the various companies and individual in the waterfall, their fee to do so is usually negotiated to first position.

<u>Share-out of distribution revenues</u>

The standard approach worldwide is for the producer to receive a share of the net income the distributor receives from sales and/or direct exploitation. This is received by the producer from the point after which the distributor has recovered its distribution commission (between 15% to 35% is the worldwide film industry norm though percentages vary according to each set of rights exploited – see Table 1 below), distribution expenses and – if applicable – the value of the advance. The recovery of the advance may also be with interest and the distributor may further insist on a share of the net profit if the advance was a sizeable one.

Table 1
Example of Licensed rights and Distributor's commission
(Peruvian feature film – title withheld)

Licensed rights (inc. Internet rights)	Distribution commission %
Theatrical (cinema release)	**15%**
Non Theatrical (special screenings):	**15%**
TVOD - Non Exclusive TVOD platform Perú:	**15%**
Other Internet Rights - Non Exclusive (VOD, TVOD DTR, EST y DTO) :	**30%**
Internet Right(s) Exclusive (SVOD) :	**30%**

The table is illustrative only. In effect, the distributor's commission's percentages are variable depending on the territory and its perceived value as well the local contractual custom and practice. As far as VOD is concerned, it is important to distinguish between a straight sale of a finished film/TV product to a platform on the one hand, and, on the other, a commission of new content directly by the VOD platform as a result of the producer's effort to get the project made. In the case of a straight sale or presale of a finished film/TV series, to a VOD service, the distributor will charge costs and sales commissions as normal. In the case of the platform commissioning the content, it is involved directly with the producer at development stage and leads in budget negotiations which, typically, it will agree to fully finance or part finance. In this case, there is no distributor involved and the platform and producer agree financial terms, including any premium, fees or back-end revenue participation, on a case-by-case basis[7].

From the exhibition of the film in the theatrical market, the distributor receives a percentage which varies across the world and depending on the stature of the film typically between 25% and 50% of the film exhibitor's gross after deduction of local taxes (e.g. VAT). The balance is usually retained by the cinema to cover its overhead costs, i.e. the costs of operating the cinema. Thereafter, the split between the producer and the distributor will vary according to each agreement.

On packaged video revenue (DVD and Blu-ray), the deals vary between countries and it is not possible to cover those in the appropriate level of detail within the scope of this study. In general, the distributor will pay for and recover its manufacturing and marketing costs upfront; the distribution company will then tend to retain the lion's share of the revenue and pay a straight royalty back to the producer (or sales agent). The royalty percentage is variable

[7] For an example of the commissioning relationship between independent producers and VOD platforms, see CDIP Case Study 1: The Experience Of A Brazilian Independent Producer With Online Distribution also Of Audiovisual Content

according to the circumstances of the local market and local practice but would typically set at between 10 and 30% of the price.

Assignment of the copyright in the film

The film's distributor may try to negotiate a full transfer or assignment of the copyright in the film on a worldwide basis. The distributor's reasoning may be that control over the copyright will enable him/her to exploit the film fully in all markets (if he/she has obtained worldwide exploitation rights) without impediment and to take direct legal action in the event of the film being unlawfully copied and distributed by a third party. Producers will routinely negotiate to maintain any distribution, territorial, or language rights that they believe will be better served and exploited by other distributors in order to maximize revenues and potential profits.

Size and apportionment of distributor's expenses

Every distributor will need to incur marketing and physical print costs in order to give the film its best chance in the marketplace. In negotiating the distribution agreement the producer will invariably try to ensure both that there is a sufficient commitment to print and advertising spend ('p&a') on the part of the distributor (otherwise the film is more likely to fail) and that these expenses are capped - i.e. that the distributor may not proceed to spend over and above the pre-agreed budget without the producer's consent (the more the spend, the less likely it is that the producer will recover any income from net profit, so she/he will want to ensure that the over-spend is justified).

Term of assignment or licence

There is no specific rule of thumb for the term of an assignment or a licence, with distributors trying to obtain long terms (between 15 years to perpetuity) and producers often attempting to negotiate shorter periods.

With very few exceptions, distributors are in a strong position to impose terms and a producer's insistence on a limited number of years carries the risk of the distributor reducing his financial offer commensurately.

In some cases, term may be variable and linked to certain performance expectations. At its most basic, this means that agreements protect the producer against the distributor making no effort to release or exploit the film in other media and ensures that rights revert to him after a period of time during which no exploitation of the rights has taken place. The agreement may also provide for a more sophisticated approach. If, after an initial term, the distributor has recovered the advance paid to the producer and the agreed marketing costs, the contract may entitle her/him to a series of extension periods to the license.

Producer's warranties

A distribution agreement will invariably contain clauses stipulating that all IP rights entering in the making of the film have been cleared by the producer and that the distributor will face no outstanding clearance charges or liabilities for underlying material to which the producer may have failed to acquire or license the rights. In order to back-up such warranty, the producer will need to hold the full set of legal agreements and contracts sometimes described as 'chain of title'. Together, these constitute indispensible legal evidence that the producer has obtained all the necessary consents, licenses or assignments from any IP owner in the development chain and that the titles are legitimate and will stand up in court in the event of litigation.

The constitution of chain of title is still too often a neglected aspect of the film production process, especially in countries where written contracts may not yet be a developed practice. The absence of chain of title has negative consequences for prospects of local and international financing and subsequent international distribution opportunities of films: in essence, no distributor will agree to pick up a film unless she/he is satisfied that the legal documentation is in place. Without these, distributors may not be able to arrange the errors and omissions insurance coverage which they need in order to license the rights in the film to platforms and other media.

2.2. EXPLOITATION WINDOWS

Film and audiovisual contracts are shaped by custom and practice in the commercial environment. A fundamental aspect of this practice is the sequential releasing of an audiovisual work across different exploitation media listed on pages 5 and 6, in a system commonly known as 'windows'.

TABLE 1 – Film Exploitation Windows

Old Windows		***Evolving windows***	
1. Medium of exploitation	***2. Window***	***3. Medium of exploitation***	***4. Window***
5. Theatrical release (cinemas)	*6. 4 to 24 months* *7. exclusive*	*8. Theatrical release*	*9. Varies from single week to 4 months* *10.*
11. Video & DVD rental and sales (or VCD) + Pay per view	*12. 4 to 24 months after theatrical release*	*13.* ***Transactional VOD 'TVOD:*** *& Electronic sell-through (EST) + DVD/****Bluray*** *sales/ rental* *14.*	*15. A few days (exceptionally) to 6 months after theatrical – sometimes offered during theatrical release at premium pricing* *16.*
17. Pay-Television	*18. 12 to 36 months after theatrical*	*19. Pay-Television &* ***Subscription Video on demand (SVOD)*** *20.*	*21. Varies from single week (operator commissioned the film for its platform and supports a small initial theatrical run for marketing purposes) to 12 months after theatrical*
22. Free Television	*23. 12 to 24 months after theatrical*	***24.*** *Free Television &* ***free VOD (e.g. 'cath-up' TV)*** *25.*	*26. Varies from single week (Broadcaster financed the film and agrees to limited cinema*

			release) to 36 months after theatrical.
27.	*28.*	***29. Advertising-supported Video on demand (AVOD)*** ***30.***	*31. After free TV though some new AVOD platforms in US are also in the TVOD space (above)*

Windows are a methodology for managing the commercial career of a work in a manner that gives the consumer a wide variety of choices across a timeline whilst also avoiding each segment of the marketplace cannibalising each other's potential return on investment.

Table 1 above illustrates the window system for single feature films conceived for an initial theatrical release. The table compares the 'old windows' system with current evolution ('evolving windows'). The table is illustrative only and offers a range of timelines for the period of exclusive exploitation in each market, based on the fact that these periods vary in each country according to local contractual custom and practice, framework agreements between the parties and/or statute.

Audiovisual content made directly for a television broadcast premiere – or for a premiere on a streaming platform – obey a different order of exploitation and set of windows which vary according to whether or not the content is wholly-financed by the operator in the premiere market or is simply acquired for limited rights over a limited time (and limited number of linear transmissions, in the case of broadcast television). Window and holdback arrangements establishing an order of exploitation between, say, first and second pay-TV windows (which now include SVOD platforms) and free-TV are an important part of both feature film and made-for-TV content distribution contracts.

Until recently, the predominant practice consisted in a producer licensing all rights to a distributor for a specific country or region, granting territorial exclusivity: in what is sometimes referred to as a 'full service' distribution agreement, this distributor would then be responsible for attempting to license those rights to buyers across the various commercial exploitation windows, from theatrical exhibition to free TV and through the various other rights' markets' iterations, including DVD, TVOD, SVOD, traditional pay-TV, etc (see rights' definitions on pp 4-6 above).

Whilst full-service distribution is still widespread in Latin America and the rest of the world, it is getting more difficult for new projects and finished works to secure such contracts. With the rise of the VOD market, the OTT platforms in particular, deals and attendant contracts are becoming more diverse: not all film projects or finished films are licensed to a single territorial or regional distributor on an all rights' basis. Inside his /her own market, the producer may have no choice but to approach the different operators in each segment of the film value chain directly in a specific territory, when trying to raise funds for a project in development or pre-production. This would be the case, for instance, with a project seeking pre-sales and finding no takers amongst local all-rights distributors who may not be willing to take the risk, as is increasingly the case in some Latin American countries for single feature drama films originally made with a cinema release as the primary launch market.

Up until recently, linear broadcast television channels were important strategic financiers in the film industry in mature markets such as Europe, Canada, the US and parts of Central and South America (e.g. Televisa, Globo), being both stable entities (TV channels go out of business far less seldom than film distribution companies) and generally well-resourced financially. Whilst these traditional players remain important, the rise of the large global VOD brands (SVOD streamers in particular) has brought about a more complex competitive picture: not only have these platforms introduced new competition in the market for traditional TV rights at local level,

but some of them have also developed a multi-territory global rights acquisition approach that was once the preserve of the Hollywood studios. The rapid rise of Netflix and other US-owned streaming brands in Latin America in the past five attests to that trend.

2.3. CONTRACTUAL FEATURES REGARDING NON-LINEAR USES/RIGHTS

Non-linear uses are rarely bundled together under one single heading in sales or distribution contracts. It is customary for each use to be specified and separated out, with negotiations on the value of each sub-set rights licensed in the process. As detailed on Page 5 of the present study, those rights currently fall broadly into the four categories of transactional VOD (TVOD), subscription VOD (SVOD), advertising-supported VOD (AVOD) and 'Catch-up' TV or Free VOD (FVOD), with non-linear rights granted for a limited time around the linear broadcast of an audiovisual work.

Section 2.1. (page 6) above breaks down the VOD ecosystem into its various sub-sets of rights as they appear in a standard audiovisual contract. These sub-sets reflect the variety of business models that are deployed using available digital technologies. Sales and distribution contracts throughout the world vary in their level of detail about the specific rights and uses granted or licensed as part of non-linear uses. These inventories of rights and uses are also reflective of the relative commercial value ascribed to each form of VOD as markets, consumer preferences and technologies evolve. These values also vary according to a country or region, its level of attainment in the adoption of broadband technologies and the range of sustainable VOD-related offers available.

> *When all these new (non-linear) windows started to appear, we did not mind that much, as we felt that our main business was theatrical (cinema release) and Pay TV. Digital rights were more like an "extra" and not really considered a source of strong income or a substantial part of a business model*."
>
> Latin-american distributor

Whilst the global trend today is towards the dominance of the SVOD model, this is not necessarily a fixed proposition. Arguably, the most conspicuous trend in the US marketplace over the period 2019-2020 has not been the consolidation of SVOD dominance so much as the spectacular rise of AVOD, possibly fuelled by early signs of saturation in the subscription marketplace. A March 2020 study predicted solid growth for the SVOD segment in Latin America in the 5 years[8], with the region reaching 81 million SVOD subscriptions by 2025, or almost double the 42 million recorded at the end of 2019. However, the prediction pre-dates a full-blown assessment of the COVID 19 pandemic's impact on the region's already beleaguered economies, which has made forecasting of VOD market growth overall less dependable.
3. Audiovisual contracts and the treatment of digital rights in Latin America

3. VOD IN LICENCING, SALES, PRE-SALES AND DISTRIBUTION CONTRACTS

3.1. THE BIRTH OF LATIN AMERICAN VOD

Digital rights as specific features and negotiating points in audiovisual contracts are a relatively recent development in Latin America, as they have been in other regions. The general professional consensus is that relevant contractual clauses dealing with non-linear uses and commercial exploitation windows began to appear regularly in contracts less than a decade ago.

[8] *Latin America OTT TV and Video Forecasts report*, March 2020, Digital TV Research

At the outset, the emergence of a limited number of film and video platforms in the non-linear space and the limitations of a nascent broadband infrastructure meant they were generally treated as ancillary forms of exploitation. At a time when revenues from such uses were often very modest and the new emergent non-linear platforms were still unable to compete for premium content against the rights' acquisition power of dominant legacy broadcasters, those rights were not deemed strategic by producers, distributors and talent working in audiovisual.

This evolutionary stage was not specific to Latin America, with other world regions also experiencing initially a slow accretion of non-linear services, as the technology became more reliable and its speed brought access and consumption closer to the standard already achieved historically by traditional pay-television services in the region.

Feature films made in Latin America in those early years of online video offers were still predominantly made with the cinema release as the primary market in which to launch a film's career. The second most strategic segment (window of exploitation) was the then still buoyant packaged video (DVD) market before it began to experience a historic decline as online offers became more abundant and effective in reaching the consumer.

The third strategic market for audiovisual content was in television broadcasting licenses, with private sector national and regional pay-TV operators especially important as outlets for domestic content and regional co-productions involving producers in two or more Latin American countries. Non-linear rights were generally positioned at the tail end of the inventory of rights specified in a contract or its annex. In keeping with trends in the rest of the world at the time, these were often placed in contracts as sub-sets of a broadcasting license, due to the fact that the traditional pay-TV operators were frequently the first to add a non-linear window, initially as an extension of their scheduled linear broadcast premiere.

The contractual negotiations regarding this then new 'catch-up' or 'free VOD' (FVOD) sub-window, appended to the main broadcast were in most cases not separated out from negotiations over the broadcast license itself, since it was conceived as a mere extension thereof. One Latin American distributor sums up the contractual order of priority of those times from a licensor's point of view: "*When all these new (non-linear) windows started to appear, we did not mind that much, as we felt that our main business was theatrical (cinema release) and Pay TV. Digital rights were more like an "extra" and not really considered a source of strong income or a substantial part of a business model*." Contractual trends regarding these non-linear 'catch-up' uses do not appear to have evolved significantly as this form of consumption has developed. Licensors approached for this study generally report that most broadcasters in Latin America insist on a single negotiation covering both the linear and non-linear elements within a single license. In some cases, the value of the non-linear use is specified in the contract.

3.2. IMPACT OF THE GROWTH OF VOD PLATFORMS ON LATIN AMERICAN AUDIOVISUAL CONTRACTS

The re-orientation of the film and TV content value chain in the Latin American region over the past five years has been little short of spectacular. Of the larger US-owned VOD streaming companies, Netflix was the first to establish a market lead with its SVOD service offering predominantly (at the outset) a choice of American series and films. Amazon Prime soon followed, first rolling out its dual SVOD/TVOD Prime Video service into Brazil in 2016, before developing its offer in other territories. AppleTV entered this market in 2019 and Disney+ was just beginning to deploy in the region in November 2020. Other US-owned services are also competing, including the recently launched HBO Max VOD service. Global content hosting site YouTube's premium offer also represents an important and growing outlet for professional audiovisual content as well as user-generated material. Regional competition includes Latin American television and multimedia behemoths Globo (Brazil) and Televisa (with a central corporate base in Mexico but service offers in the many other Spanish-speaking countries) and

the Spanish technology and communications group Telefonica, whose Movistar suite of VOD and TV services has gained substantial ground, as have Claro Video Play, owned by the telephony group América Móvil and Mexico's Cinepolis Klick.

As the Latin American VOD market becomes progressively more crowded, competition is intensifying between global and regional/local platforms for access to talent and the control of IP on premium film and TV projects in local languages (Spanish and Portuguese). Having been a peripheral form of exploitation, VOD is now strategic for all the various media groups competing for consumers' attention in the region and its expansion is only checked by the varying rates of development of fixed and mobile broadband delivery infrastructures in individual countries.

Over the past few years, bespoke Spanish language services developed in the US have been targeting both the US Latino *diaspora* and the Latam region, e.g. Pluto TV, now owned by the US media group Viacom offers a mix of TVOD and IPTV channels.

The success of VOD platforms and their evolution from the margin of the value chain to a position of centrality, has dented the willingness of local distributors to give films from the region theatrical exposure before releasing them onto other consumer platforms.

As it has in other parts of the world, the rise to prominence of VOD services in the region has created novel challenges in contract negotiations for the acquisition and licensing of rights to local/regional feature films. Until recently, local film distributors would typically sign agreements with producers or sales agents covering all local rights, which would have included theatrical, pay-TV, free-TV, packaged DVD and ancillaries which – for a time – included limited VOD offers, generally licensed on a non-exclusive basis. Paradoxically, the success of VOD platforms and their evolution from the margin of the value chain to a position of centrality, has dented the willingness of local distributors to give films from the region theatrical exposure before releasing them onto other consumer platforms. For producers and/or the sales agents promoting their films to local buyers, across national borders inside Latin America, so-called 'full service' distribution contracts covering all rights markets are therefore becoming more arduous to obtain. Instead, there is a growing trend of distributors making offers for contracts limited to transactional VOD (TVOD) exploitation only.

Producers and sales agents considering such contractual offers may be concerned that the absence of a theatrical release, or the offer of a reverse release pattern in which the film will be available on demand in a very short window prior to the theatrical release removes an opportunity to give the film a strong profile in local media and that the subsequent performance on TVOD and/or other VOD platforms will be adversely affected as a result. It is important to note that – as in other regions of the world, theatrical premieres have been – and continue to be – where press and media attention will tend to concentrate; the theatrical release is therefore an important plank of the marketing of a feature film and theatrical box office performance has been used traditionally as a yardstick to measure and determine the value of the rights in the rest of the exploitation windows' ecosystem. Although the practice is not widespread, some broadcasters and streaming platforms in the Latin America have so-called 'escalator' clauses in their rights acquisition contracts whereby they agree to pay additional premium on the negotiated license fee if the film reaches certain pre-defined thresholds in its theatrical box office performance.

It is important to note that this trend towards the narrowing down of contractual opportunities for films made in the region does not affect all films. Principally, in a regional industry that admits to low levels of integration, it concerns non-national films without local stars and/or films written and directed by committed film authors and originally profiled in regional or international film festivals. These so-called 'difficult' films have always presented challenges to local film distributors. VOD's rise to preeminence has not - in and of itself - compounded the trend:

releasing a film in film theatres is an expensive and high-risk proposition for any theatrical distributor, as it requires a substantial upfront expenditure for prints and marketing, without any guarantee that box office returns will cover those costs. However, as the cost of releasing films theatrically continues to increase, and with the rise of VOD offers, both local and international, it is tempting for local distributors to reconsider their strategies. From their perspective, going straight to VOD has the advantage of minimizing upfront financial exposure (marketing and print costs) whilst ensuring the films thus packaged are potentially available to a wider audience. However, the absence of a theatrical release also means fewer revenue opportunities for the films concerned and the impact of no theatrical exposure on the pricing of the other rights in other windows is often negative.

Another set of issues the development of VOD platforms in Latin America has introduced is in the area of competition between different VOD rights usages and corresponding business models. In practice this means that licensors are being frequently being presented with a licensing dilemma. Typically, an operator offering to acquire or pre-acquire, say, SVOD rights for its territory (which may include several countries or the entire region) may insist that the licensor should not in parallel license the TVOD rights to a third party (Note: TVOD rights are still generally licensed across different platforms on a non-exclusive basis, in the same window, also alongside the DVD release, which is extremely limited nowadays). Alternatively, the SVOD platform may insist on a shorter TVOD exploitation window. For feature films, the TVOD window normally follows (or, more seldom, is coincidental with) the theatrical window, with SVOD (and/or pay-TV) placed after it. SVOD platforms' contractual clauses that preclude the TVOD window may sometimes be attractive enough to a licensor, if the SVOD contract includes a substantial offer from the SVOD platform, to compensate for the potential TVOD revenue foregone. There is a range of experiences in this respect, with some licensors observing that they are receiving a fair compensation, whilst others talk about a worrying evolution towards a "take it or leave it" contractual culture and practice.

> Across the world, for all but a small number of local and international blockbusters, the theatrical market tends to be a loss leader for distributors, who may accept the risk if they believe that a theatrical release will enhance the value of the film in the rest of the exploitation chain…

The other trend in Latin American VOD contracts sees competitors in the SVOD platform market acquiring all rights to a film or TV series at project stage, against full or majority finance. Whilst this involves a higher financial risk exposure for the distributor, it also means the platform has the negotiating power to require complete exclusivity in the licensed territory (or territories). This model is dynamic and suits many content production companies whose priority is to simplify the financing process, not to control the IP on the work and/or negotiate a favorable position on potential financial upside from the exploitation of the rights in other markets. It also presents other production and distribution entities with a dilemma. One entrepreneurial producer who makes audiovisual content (film, TV and web series) for consumers in the Spanish speaking world expressed it thus: "*I learnt what it meant to have a film for three years exclusively on one platform and not being able to negotiate any other specific deals in other territories or windows during that time*. *Later on, I chose as much as possible to separate the rights on a project and pre-sell them to a variety of licenses and across a range windows, so as to secure more returns for the company on the exploitation of the rights*."

Other incidental factors shape the Latin American contractual custom and practice with respect to the licensing of VOD rights: there are discernible knowledge gaps in the production communities of the six countries included in this study regarding how contractual provisions on digital rights are meant to be approached: whilst the more experienced producers understand the difference between different sets of digital rights, many lack current knowledge of how the hierarchy of different VOD windows is supposed to operate and the often complex technical delivery requirements (e.g. encoding formats, metadata, etc) required by VOD platforms.

Producers who are able to attach a sales agent to the promotion of their films rely on these companies' advanced knowledge of the VOD rights marketplace and its range of diverse technical specs as far as distribution outside their home country is concerned.

3.3. VOD AGGREGATORS – MARKET FUNCTION AND TYPES OF CONTRACTS

The rise of VOD and the complexities of licensing and delivery specs in this particular segment of the audiovisual rights' marketplace has given rise in recent years to VOD content 'aggregators'. Occupying an intermediary position between the traditional distributor (or the producer, directly) and the VOD platforms, the integrator is especially (though not exclusively) active in the TVOD and AVOD marketplace, where licensing contracts are generally non-exclusive, creating the opportunity for the integrator to offer the content to a variety of platforms and deliver across a range of technical specs. The specialised nature of this marketplace, both in terms of the licensing and technology explains why content makers or their distributors now make frequent use of this additional intermediary. This phenomenon had added a layer to contracts in the licensing and distribution chain for audiovisual.

VOD platforms that offer a large selection of content on their online storefronts often prefer to deal directly with those integrators, because of their skills in packaging and delivering a large number of titles at once. It spares them the more labor-intensive approach of considering offers from a plethora of individual content makers or distributors at a time when the sheer volume of new productions competing for space on these platforms is increasing year on year. Aggregators are characterised by bulk supply agreements with one or several VOD brands, be they local or global. The boundary between a traditional distribution company and an aggregator is often blurred, as some aggregators also operate as distributors for the some of their VOD aggregation titles, e.g. opening films in film theatres and/or licensing for linear television and the DVD market, etc. For instance, Warner Bros, one of the six larger-scale Hollywood studios and global distributors is also one of the world's largest aggregators. Aggregators have also gained a foothold in the Latin American market in recent years, with companies such as BitMax (based in the US), Juice (Canada), Sofa Digital (Brazil), Promovere (Argentina), Under the Milky Way (Brazil), etc. These not only license Latin American film and TV content within Latin America but also look for VOD sales opportunities for Latin American content globally.

Contracts between the original licensors (production or distribution company) and the aggregator have some features in common with sales and distribution contracts regarding the disposal of the rights, allowable expenses and the revenue sharing. Some aggregators agree specific charges and fees for the onboarding and platform delivery process, then account for the licensing revenue which they pass on integrally to the producer or distributor. Others may not charge costs and fees upfront and recover those instead from licensing revenue. The more widespread contractual mode however, involves a mix of upfront charges and an agreed back-end revenue percentage.

Across Latin America, there are frequent challenges regarding producers or distributors' capacity to supply the aggregator or the platform (in the event of a direct sale) with the digital delivery requirements that meet the requisite standard. This issue is not confined to the region, with aggregators reporting such difficulties in markets in the North America and Europe also. Although some VOD operators have proven less demanding than traditional broadcasters regarding evidence of copyright chain of title (see P.10 for definition), there are observable knowledge gaps regarding the preparation and delivery of digital masters, the tagging of metadata, the supply of close-captioning, subtitles, language versions and artworks to be used for marketing and platform display, etc. Some aggregators use external service companies to handle the critical mass of digital files, data and metadata required for delivery to the VOD platforms and use their expertise to improve the deliverables and ensure the files meet the onboarding requirements of their VOD clients.

The relationship between sales agents and aggregators operating in the region is complex: some sales agents prefer to avoid trading through aggregators either because they have direct relationships with VOD platforms and/or are anxious to avoid the relatively high commissions charged by aggregators for their services.

Aggregators arose in the audiovisual ecosystem as an evolutionary response to fundamental changes to the cost/revenue equation: many new platforms, such as niche operators in the VOD space cannot justify a title-by-title approach to content acquisition, curation and marketing because the individual on-boarding costs for new content are often not matched by the revenue generated per unit of content. In other words, as the number of media platforms multiplied, a need emerged for new specialist wholesalers and the aggregators arose to meet this demand. Many aggregators license more broadly than in the VOD ecosystem alone. Some operate across the value chain and directly monitor and manage the windows between the various operators and media they license to.

3.4. MINIMUM GUARANTEE OFFERS STILL SCARCE IN LATIN AMERICAN VOD CONTRACTS

Professionals approached as part of this study report that many VOD platforms operating in the region are not yet in a position to offer a minimum guarantee ('MG' – see P6-7. for definition) as part of a rights licensing contract. The flat fee or revenue-share models are predominant, which means that this part of the Latin American licensing ecosystem is not as yet a significant contributor to the financing of new productions[9]. There were some 400 VOD storefronts available to consumers in the Latin American market in 2019, but very few have the scale required to be in the rights acquisitions market on a competitive basis by putting down MGs. At this juncture, the relatively low fees and/or low back-end revenue for local and regional content, combined with the high encoding and onboarding costs make the Latin American market challenging for all but the high-profile productions, including high-end local drama series and feature films for which the licensor managed to arrange an initial theatrical release. In the VOD segment, distributors and aggregators are under pressure therefore to close as many licensing contracts as possible in order to make this part of their activity sustainable[10].
The rise of VOD in Latin America is resulting in the current contractual custom and practice being put under pressure to change as a result of market forces which are rapidly reshaping the system of exploitation windows and holdbacks. In particular, there are increasing demands for the SVOD release to take place 3 months or less after the cinema release. The demand creates attendant pressures on the TVOD window (3 months to exploit TVOD rights is considered too short by some distributors) and may also curtail initial exploitation in other rights' markets that normally open before the pay-TV/SVOD windows (e.g. DVD). SVOD platforms also generally demand a holdback of at least 6 months after the release in SVOD before the free TV window. In some SVOD contracts, the holdback may be more extensive, e.g. when the SVOD operator has put up a significant license fee as a pre-sale, making it a co-financing stakeholder in the project against a longer period of exclusivity on its storefront.

3.5. CONTRACTUAL DISPOSITIONS ON SVOD

Producers and distributors approached for this study report being sometimes in a position to negotiate a minimum guarantee or 'MG' (see definition on Page 6) as part of a licensing contract with local or international SVOD platforms. For feature films, rates and conditions

[9] MG contracts may be used as collateral to raise funds from a bank to contribute to the production budget – this form of financing, based on the pre-sale of exclusive rights, is a strategic component in the financing of independent productions and some forms of high-end TV projects also in North America, Europe and Asia.
[10] As a illustration: a leading aggregator based in the US and supplying independent films to VOD platforms worldwide reports that on average, a minimum of 20 licensing deals were needed for each title just to cover the encoding costs.

governing such MGs are sometimes linked to performance in the theatrical market, which precedes the SVOD premiere by several months (see page 9, Table 1). In such cases, the contract may feature clauses establishing additional premiums on the base price of the license, each time the theatrical box office goes over a pre-defined threshold. This type of contractual provision is also found frequently in contracts in the Anglo-American independent film industries.

Latin American practitioners also observe that exclusive commissioning contracts with SVOD platforms don't generally contain license fee premiums linked to the performance of the audiovisual work on the service. SVOD platforms are not in the habit of sharing consumer performance data with licensors and this practice is not confined to the Latin American region. License fees tend to be negotiated on a fixed price basis. For films and TV series commissioned and fully financed by the SVOD operator, the contract generally provides for an additional premium for the producer/production company. This payment is generally calculated as a fixed percentage of the production budget. For TV series, producers in the region – as they do elsewhere – report that these premium payments can be increased in cases when first series/seasons are renewed.

Exclusive vs. Non-exclusive

The nature of SVOD licensing contracts in the Latin American region also vary (as they do elsewhere in the world) according to whether the license is exclusive or not. Non-exclusive licenses appear to be the current regional norm for already completed and back-catalogue films as far as demand is concerned from local SVOD platforms seeking licenses only for the territory they operate in. Non-exclusive deals generally attract fixed license prices with no specific performance-related hikes.

SVOD don't generally contain license fee premiums linked to the performance of the audiovisual work on the service.

In a non-exclusive SVOD license contract, (the same applies to TVOD), not only is non-exclusivity specified but the reserved rights clause also specifies that reserved rights may be licensed simultaneously to other platforms. Below is a quote from a non-exclusive contract between a local distributor and an SVOD platform, covering Peru, one of the territories designated for this study:

[..] Licensee acknowledges that with respect to the Programs and the literary, dramatic and musical material included in each and upon which each is based, Licensor hereby expressly reserves any and all rights not herein specifically granted to Licensee and that such reserved rights may be exercised and exploited by Licensor concurrently with and during the term hereof, freely and without limitation or restriction.

There is, quite logically, a direct correlation between degrees of exclusivity or non-exclusivity, and the price quoted for a license. Exclusivity is normally associated with premium license prices as it tends to apply to new audiovisual content not yet seen elsewhere.

3.6. CONTRACTUAL DISPOSITIONS ON TRANSACTIONAL VOD (TVOD)

The transactional VOD market (TVOD) in Latin America is dominated by telecommunications and cable companies, with Movistar and Claro as the current market leaders in the region. These regional operators are generally more nimble in attracting consumers than competitors who rely on a credit-card-dependent micro payment infrastructure and consumer interface.

Video entertainment uses added to a monthly phone and Internet bill paid through more traditional means is an easier proposition in a Continent where large numbers of consumers do not as yet own a credit card account.

These operators tend to acquire or license audiovisual content on a regional, or multi-country licenced territory basis, taking advantage of the integrating factor that a common language (Spanish, with the exception of Brazil) confers. Although these companies' TVOD offers contain a vast choice of international films and TV series, predominantly from US sources, they are also aggressively purchasing those online rights on local content. This dual approach is by no means exclusive to Latin American communications conglomerates. Success in branding their local offers at national level is in part fueled by having content of local cultural relevance.

Unless the content was fully-financed and commissioned by a single individual platform, or unless the platform is of sufficient scale and size, the TVOD window is a non-exclusive space, allowing distributors and 'aggregators' (see Page 17 for definition) to issue licenses to different operators in the same timeline.

TVOD license contracts in Latin America are most often based on a revenue share model, typically a 50/50 share-out of net receipts from individual transactions after deduction of certain costs (e.g. marketing, encoding costs in cases when these are incurred by the platform, etc).

Premium TVOD, a short window that runs whilst the theatrical release window is still open, is not a current proposition in Latin America, though developments in this parallel window elsewhere in the world suggest it won't be long before it begins to be available as a new option for consumers in some Latin American countries in the near future (see also P 23 for recent LatAm experiments with 'virtual theatrical'). Like their colleagues in Europe or North America, theatrical exhibitors are not generally in favour of the introduction of premium TVOD because they are concerned it will dent theatrical box office. However, the prolonged cinema closures ordained by governments in the Region as a response to the COVID-19 pandemic, may have begun to alter consumer expectations and patterns of use in this respect, though, the development of premium TVOD offers will require careful negotiations involving licensors, licensees and the cinema owners, as it does elsewhere in the world.

Some contracts with telecom operators and platforms in the region also include the acquisitions of relevant near-VOD rights (NVOD – see P 6 for definition) which some pay-TV operators continue to offer as a service to subscribers. However, this form of use is being replaced steadily by straight VOD offers.

3.7. COMPETITIVE DYNAMICS BETWEEN TVOD AND SVOD AND ITS OUTCOMES IN LICENSING CONTRACTS

It has been common practice in the sector in Latin America so far to allow for a window of 90 days after the theatrical release before the SVOD window opens. During those three months, typically, the film may be exploited through a range of transactional VOD offers alongside the start of DVD and Blu-Ray sales. However, a recent trend has seen some SVOD platforms contracts with licensors specify that the SVOD platform may start promoting its future premiere a full 30 days before the date of the actual premiere on its service. This becomes an additional tactical consideration for the licensor, who may have concerns that such a disposition may diminish the value of the relatively short (90 days) TVOD first window with attendant loss of licensing opportunities, shrinking it, arguably, to 60 days only. This consideration has to be weighed in contractual negotiations against the value of the earlier publicity for the SVOD premiere and the possibility that the content may aggregate more audience in that window as a result. Although this evolving feature of local contracts does not *strict-senso* relate to the rights' transaction aspects, it is clear that the careful balance that the licensors strive to obtain to

ensure the value of each set of exploitation rights is maximized, is set against the inevitable competitive dynamics between licensees in the different windows.

For the licensor's end of the SVOD contract negotiation, the fact that any "virtual theatrical" release see (p 23 for definition) in a premium VOD offer is sometimes also deemed by the SVOD licensee as a TVOD window start date, carries the additional challenge of further reducing the actual TVOD window by another month or so. Whatever the choice of bargaining options, licensors facing this dilemma will feel some pressure to try and negotiate new start dates for the SVOD premiere.

The inevitable tension between the TVOD and first SVOD windows has become more palpable during the prolonged COVID lockdown period, due to many in-venue, theatrical releases being cancelled for health and safety reasons.

Exclusivities have also shortened the duration of contracts for the second pay-TV window. Whereas legacy linear pay-TV operators are still active in the marketplace, they now see OTT SVOD operators competing in the same windows of exploitation. Prior to the rise of VOD platforms, licensors in the region could look forward to licensing a film for Pay TV for periods up to several years. Today, the trend is towards this window of rights exploitation becoming shorter, typically one year to 18 months of exclusivity. Once the exclusive license is at an end, licensors have the option to sell the second PAY TV – normally at a lower price - but the second window nevertheless represents an opportunity for a further income stream.

3.8. AVOD – A NEW LICENSING HORIZON

As a matter of global trends, professionals in the video content distribution and aggregation sector report gradual changes to the once established VOD release patterns which had TVOD as the entry point, followed by SVOD, with AVOD normally at the end of the online exploitation cycle. AVOD's spectacular growth in the past two years, especially in the US and Asia, may come to transform the value proposition in the VOD rights' transaction chain. Whereas independent films made on low budgets with no stars have found their value declining on TVOD in the US, this type of content has found new licensing opportunities on AVOD platforms that have been growing at fast pace and tend to occupy specific niches in the audiovisual media marketplace.

Whilst AVOD remains less significant in Latin America, it is also a growth segment and its impact has been boosted by the arrival in the region's marketplace of AVOD operators owned and operated by US companies, sometimes with a mixed offer consisting in linear TV and AVOD (e.g. Vix/Pongalo, Pluto TV).

AVOD contracts in Latin America as is the case in other markets, tend to be non-exclusive and based on revenue-sharing rather than a license fee paid upfront. As the competitive picture in the VOD market evolves, the more successful AVOD brands may come to change their business practices and offer minimum guarantee contracts to licensors for some premium content.

4. CO-PRODUCTIONS

A different set of contracts is necessary in the event of production companies co-producing original content with VOD platforms, a practice that is only just beginning in the Region.

An example from 2019-20 involved a local production company in Argentina and a branded VOD platform operating in several markets in the Latin American region. The production company developed independently a concept for an eight-part series and felt confident enough to put the first four episodes into production before they had pre-sold (a) license(s) in place to cover their risk. The production company was then able to use the four completed episodes as part of its pitch to the VOD platform. The platform agreed to fully finance the missing four episodes and also agreed to a budget hike for those episodes.

The contract between the independent production company and the VOD platform split all reserved rights (domestic and foreign) to the eight episodes into equal 50% shares. The platform had the advantage of getting a series at a price well below the overall cost of production as it had only financed the second batch of four episodes against an exclusive license for the entire series of eight. The production company got the advantage of converting its investment in the first four episodes into an entitlement over the proceeds from the exploitation of the rights in the entire series in other markets, on a *pro rata, pari passu* basis.

The VOD operator's license committed to an initial exclusive airing on the operator's global Latin American footprint, for subscribers to its mobile content offering and on connected TVs, with both partners subsequently sharing on a 50/50 basis in any net proceeds from further licensing to third parties inside Latin American and in markets outside the region.

As competition between platforms in the non-linear space continues to intensify in the region in the coming years, it is reasonable to predict than the trends towards co-ventures and co-productions of this nature, with a share-out of rights and exploitation revenues, is highly likely to develop. It offers a good risk/reward balance for both the development/production companies and their licensees, enabling the latter to contract for an exclusive license for content whilst reducing their financial exposure.

5. VOD DELIVERY REQUIREMENTS AND RELATED COSTS

Even though VOD consumption is trending towards concentration on a small number of global and local brands in each national market, platforms offering content on VOD have been growing in sheer numbers and the diversity of their business models. This is true of the US as the leading market for VOD consumption, with Latin America's market developing in a comparable direction.

As a result of such diversity, there are considerable variations in the delivery requirements and attendant costs. On average, the cost – in the US market - of getting an independent film title ready for release on a range of media, is reportedly around $10,000 as a median figure. Aggregators frequently report also that original delivery materials may need repurposing in order to meet buyers' requirements, thus adding to the delivery costs (e.g. trailers to be re-cut to under 2 minutes to fit social media requirements, etc).

One of the complicating factors in VOD contracts is the sheer diversity of delivery standards[11]. Each platform has its own specific on-boarding requirements which must be met as per the terms of the licensing contract by the producer or the designated intermediary (sales agent, aggregator or distributor). For the Latin American market, the preference is for dialogues in foreign content to be dubbed in Spanish; this is not due to issues with literacy (with 93%, Latin America has one of the world's highest literacy rates) or to cultural preference only but, rather, to the fact that a large proportion of VOD consumption in on mobile phones where subtitles make consumption significantly less comfortable. Responsibility for producing and covering the costs of dubbed versions vary according to contracts, between the producer, the sales agent, and the regional or local distributors. For foreign content not made originally in the Spanish

[11] For more information on identification on metadata please refer to Part 5 of the study: Identification and metadata in audiovisual works.

language, the current commercial and contractual practice is for rights to be licensed for the entire region; this fact needs to be considered when looking at amortization of dubbing costs.

6. 'VIRTUAL THEATRICAL' – A NEW HYBRID FORM OF VOD

During the acute period of the COVID-19 pandemic in 2020-21, the region saw the appearance of a new, experimental type of digital rights exploitation, effectively a hybrid between the theatrical release and premium VOD. 'Virtual theatrical' as it is referred to, consists in making a new film available online during the theatrical window through a secure platform. Contrary to more common forms of premium VOD offers, the film is made available through a virtual box office operated by the cinema chain and the film is available during a specific time window (e.g. 5pm till 8 pm), this imitating the time constraints of the theatrical experience.

As part of the research for the present study, virtual theatrical experiments were observed in Argentina and Chile and one was underway in Peru at the time of writing the present study. The pricing for this form of use is premium, as would standard premium VOD be; however, the admission price is normally lower than a ticket for a physical cinema experience would be, in order to avoid compromising the value of the theatrical experience in the long run, when health and safety conditions will again be favorable to cinema-going as a result of the COVID-19 pandemic being under a sufficient degree of control.

In some cases, the virtual theatrical offer may co-exist with a physical release in a limited number of cinema venues. In other cases, consumers may be offered both options in the capital and larger cities, with the virtual theatrical offer literally replacing cinema bookings in mid-size and small towns. The revenue from virtual theatrical uses is shared between the participating cinema chain which manages the bookings, and the distributor. In the case of Chile, the exhibitor retains 50% of the revenues with the distributor funding the marketing and delivery costs from their own 50% share.

7. FILM FESTIVALS

Having been programmed in a so-called Category A international film festival[12] will often have a galvanizing effect on the type of rights acquisition contracts and prices offered by film distributors in Latin America. Some distribution contracts even contain so-called 'escalator' clauses whereby the licensee will commit to paying an additional fee (expressed either as a percentage of the initial license fee or as fixed bonus), should the film be the recipient of one of several specified festival awards. Success in being selected for a major festival also results in a more likely theatrical exposure, with the SVOD platform seeing the advantage of thus giving the film additional profile before premiering it online.
Whilst the impact of festival selection and awards on broadening a film's contractual options is a worldwide phenomenon, it concerns Latin American films also: as the global SVOD streaming platforms have grown in marketing savvy and sophistication, they have learnt to leverage the promotional effect and free marketing windfall that selection and/or a major win at a high-profile film festival can deliver them. Whilst their interest in festivals is especially acute where films fully financed and owned by them are concerned, the global streamers have also raised their own profile as buyers of regional or worldwide rights for third party theatrical feature films that garner strong reviews and press attention at key festivals.

[12] 'Caterory A' is a term coined by the trade press: it designates the major flagship international film festivals, whose selections attract global coverage and social media interest, and are obligatory whistle stops in the annual business calendar for international sales companies, local distributors and producers.

8. IMPACT OF PUBLIC FUNDING RULES ON LATIN AMERICAN VOD LICENSING

National film agencies play an important (and growing) part in incentivizing the development, production and dissemination of local audio-visual content in the countries surveyed for the present study. Since the start of the millennium, many countries have developed local film production incentives in the form of direct grants or conditionally repayable 'soft' loans from public sector agencies and/or other fiscal measures in the form of tax credits on production expenditure or tax relief on film investment. Whilst many of these national policies are designed to attract filming activities from foreign producers by creating a propitious service environment and fiscal incentives, they also emphasize support for indigenous independent film production. In some countries national film agencies operate non-profit public sector TVOD/FVOD platforms: the multi-territory VOD service Retina Latina, is operated by the Colombian film agency on behalf of a coalition of six other national agencies in the region[13]. The Argentinian film agency INCAA currently owns and operates the online platform CINE.AR Play. This OTT platform offers a selection of feature films, documentaries and other forms of audiovisual content. It is geo-blocked, with access limited to Argentina and the content is predominantly films that have received funding from INCAA. Some national film agencies also have institutional connections with the national public television station(s). This is the case in Costa Rica, where FAUNO, the national audiovisual sector agency is linked to the public TV operator Sinart.

The presence of these institutional players in the Latin American TV and VOD ecosystems can have an impact on contractual options for VOD exploitation of films from a licensor's perspective, albeit a limited one; e.g. in the case of CINE.AR Play, INCAA's contractual terms and conditions for local production financing includes an obligation on the part of the producers to grant a limited, non-exclusive, non-profit license to the platform. However, INCAA is flexible, taking due care not to interfere with other license contracts that the producer may have negotiated with commercial operators in the the VOD space and will fit its own non-exclusive offer within the contractual agreements governing these commercial options in order not to curtail opportunities for the end product to generate revenue in the VOD marketplace.

In Costa Rica, production funding to local producers by FAUNO incorporate a pre-purchase of rights to one transmission on the public service channel Sinart. Much like INCAA, the agency is mindful of the potential impact on other contractual opportunities and other windows in commercial TV and VOD and is committed to avoiding interference with the normal exploitation of the work. Its own TV window opens only two years after the theatrical release of the film, a period of time which preserves the ability of the producer to license commercially to other operators, including on an exclusive basis. However, revenue from such license fees must be shared with FAUNO pro rata of their public sector investment in the film. The same goes with revenues from all forms of commercial rights exploitation worldwide, although the public agency's share kicks in only after the recovery of production costs by the producer and his/her private sector investors.

9. CONCLUSION

The present study aimed to illuminate audiovisual contracts in Latin America from the particular perspective of 'digital rights' licensing to/by producers and platforms operating across the range

[13] Agencia del Desarrollo del Cine y Audiovisuales Bolivianos (Adecine) – BOLIVIA, Instituto de Fomento a la Creatividad y la Innovación IFICI – ECUADOR, Dirección del Audiovisual, la Fonografía y los Nuevos Medios del Ministerio de Cultura del Perú -PERÚ, Instituto Mexicano de Cinematografía de México- IMCINE – MÉXICO, CAU-Dirección del Cine y Audiovisual Nacional del Uruguay -URUGUAY, Dirección de Cinematografía del Ministerio de Cultura de Colombia, a cargo de la coordinación y secretaría técnica – COLOMBIA

of VOD offers, technologies and business models. That it has proven difficult to discuss these particular aspects of contracts without also examining other forms of licensing and distribution (e.g. full-service distribution contracts, theatrical, free and pay-TV agreements, etc) testifies to the highly integrated nature of the audiovisual distribution value chain. In the film and TV/streamer content ecosystem, contract negotiations on each window affects negotiations across the entire chain. This is as true in Latin America as it would be anywhere else in the world. And whilst the spectacular rise of VOD offers in the Region has transformed this segment of the value chain from a marginal form of rights exploitation to a primary one, it is not as yet so dominant as to have eclipsed other rights' markets in strategic importance.

At the core of future contractual developments in VOD licensing in the Region is the growing tension between exclusive and non-exclusive options. Latin America shows considerable diversity in this regard, along with fast-paced change. As international streamers and local branded VOD platforms compete for market share in a vast regional market, it is not unrealistic to predict a rise in exclusivities on original, local language content, generated by the growing ability of market leaders to pre-buy or commission projects at concept or script stage and to secure strong contractual terms in the sharing of IP and ancillary revenues from its exploitation in secondary and tertiary markets.

One of the key issues in the Region to date has been the perceptible knowledge gap in the professional audio-visual sector. Whilst a growing number of content producers have become VOD savy, many report a degree of confusion about this part of the rights ecosystem when negotiating contracts. Many admit to not having sufficient knowledge of the strategic importance of those rights and/or the ways in which the VOD marketplace breaks down into subsets based on licensed rights and languages and how that may correspond to distinct revenue opportunities, or how new non-linear offers such as SVOD interact with legacy offers such as traditional pay-TV, competing in the same windows.

Looking ahead, we forecast a rapid diversification of contractual options in Latin American VOD licensing, as the sector itself diversifies and becomes more competitive. Progress by WIPO Member States in the implementation of relevant international Copyright norms would assist in this development, by deploying an enabling legal infrastructure for the use and protection of exclusive rights linked to the range of VOD uses and windows and offering legal certainty to all parties to licensing agreements and contracts. More resources, both local and regional, for professional training and education will help fully acquaint professionals in the sector to the range of legal options available and will help support a dynamic VOD ecosystem and a level playing field.

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