A-Z A.263

The [Licensee] agrees and undertakes to the [Licensor] to:

1.1 Act in good faith and disclose any errors and/or omissions in the accounts and/or payments as soon as they are noticed.

1.2 To ensure that professional accounting practices according to [specify institute] are followed by the [Licensee] in respect of the calculation of any sums due to the [Licensor] under this Agreement.

1.3 To ensure prompt payment of any sums due to the [Licensor] and agree that failure to do so shall be considered a breach of this Agreement.

ACT OF GOD

- **Act of God** in the **A-Z** is from **A-Z A.386** to **A-Z A.409** under the sub-heading General Business and Commercial.
- This section should be read in close conjunction with **Force Majeure** in the **A-Z**. Other main clause headings in the **A-Z** that you may wish to consider include **Adverse Change**, **Break clauses**, **Cancellation**, **Default**, **Disclaimer**, **Force Majeure**, **Indemnity**, **Insurance**, **Liability**, **Loss**, **Product Liability**, **Suspension** and **Termination**.

What is meant by an Act of God and how is the term used?

- The term Act of God is not used so often on its own but falls with the drafting of clauses for force majeure. It does help however to understand this term and what it means as its use will have consequences which affect other clauses under the agreement.
- The term Act of God, drafted in its most basic form and narrowly, relates to extreme natural events of such a force and so unforeseeable as to be unpreventable and beyond the reasonable control of both or either parties. The intervening Act of God has not been predicted and is unexpected but nevertheless has an impact on the fulfilment of the agreement.
- However an Act of God can be drafted to cover a much wider range of circumstances if both parties agree that those facts can fall within the ambit of either an Act of God or other circumstances which were beyond the control of the parties.
- An Act of God is often defined to be limited to certain unexpected and not predictable situations relating to extreme weather conditions such as lightening, thunderstorms, monsoons, hurricanes, snow and related consequences such as floods or seismic movements of the earth and sea such as volcanoes, earthquakes and tsunamis'.
- However an Act of God can be drafted to include a much wider scope of events which are unexpected and which affect and interrupt an agreement. These include:
  - Fire, military invasions, declaration of war, war is taking place, terrorism, riots

- Industrial action, strikes, national power failures and failures of other services which may arise from such actions resulting in no electricity, power, heat, light or transport
- Interruption of freight, supplies, work or services from third parties caused by any of the above
- Defects and failures of machinery, equipment and computer software
- Human-related errors, omissions, accidents and other intervening circumstances

These type of actions or events are, preferably, specifically included or excluded from the agreement.

- The Act of God is not then caused directly or indirectly through any fault, negligence or failure of any of the parties to the agreement. The Act of God must have been totally beyond their control and must not have been expected or known to have been predicted by them as likely to take place.
- That does not mean that the parties cannot consider the likelihood of an Act of God or other factor affecting the completion of the terms of the agreement. An insurance policy to cover such events may be considered by the parties.
- The primary function of a clause which includes the words Act of God is to absolve one party from the consequences of its inability to perform or carry out all or part of its responsibilities under an agreement if there are intervening extreme acts beyond their reasonable control which prevent the contract being performed or fulfilled.
- An Act of God is often referred to in Force Majeure and other provisions and drafted so that if an Act of God shall take place. As a result of such an Act of God affecting the ability of one party to carry out their duties under the agreement. One party, A, will not be liable to the other, B, either for a short period of time or indefinitely so that the agreement can be terminated by one or both parties.
- The scope of how the Act of God or Force Majeure clauses are drafted will affect what happens after an Act of God has taken place. This may include whether or not you will get paid for your work which has been completed or a service which has been supplied or costs and expenses which have been incurred.
- Often it is assumed that only one party in an agreement can benefit from the use of Act Of God clauses or Force Majeure clauses. There

is no reason why both parties should not be permitted to rely on such clauses under an agreement.

- The words are used to exclude responsibility under an agreement either to pay the full sums due for products, work or a service and also to exclude responsibility for any damages, losses, costs and expenses or additional sums due which arise for any delay or other consequences. Here it is also relevant to consider the other main clause headings in the **A-Z Liability, Risk, Losses** and **Damages**.
- The exclusion of responsibility and liability is based on the actual words drafted in the clauses and so it is important to consider potential situations and facts that may arise or any potential consequences that may be suffered either just directly or both directly and indirectly.
- The words Act of God can appear in a many types of agreements from household insurance to mobile phone contracts, publishing agreements, supply or distribution agreements or sponsorship of an event.
- In **A-Z A.386** the clause relates to both parties. So if either party A or B or both cannot fulfill their obligations under the agreement for any reason beyond their reasonable control. Then the failure to perform or carry out their obligations shall not be considered a breach of the agreement. In this case examples of reasons include war, industrial action, floods and Acts of God.

A-Z A.386
In the event that this Agreement cannot be performed or its obligations fulfilled for any reason beyond the reasonable control of either party to this Agreement, then such failure to perform or fulfil the obligations required under this Agreement by any such party shall accordingly be deemed not to be a breach of this Agreement. The reasons may include, but are not limited to, such events as war, industrial action, floods or Acts of God.

- It is still quite common to come across the term Act of God in both old and new contracts and it is helpful to know ways in which it can be amended to suit your needs which is always a smarter way of proceeding rather than seeking to delete it.
- Great care must be taken to ensure that both parties have the same expectations not just of the meaning but the consequences of an Act of God clause or reference in a contract.

- The meaning and consequences to party A in an agreement as a result of Act of God or Force Majeure clause may not be the same as in a completely different agreement to party B. You really need to discuss and address the scope of the meaning for each of the parties and examine the consequences which would apply if that clause was used as a result of the Act of God clause being relied upon by the other party.
- This type of attention to detail does not take often place and these clauses are commonly added at the end of an agreement and dealt with as having a low level of significance. This is a serious mistake. The exit routes out of an agreement and who is liable at any stage for any consequences are important.
- Here the other main clause headings in the **A-Z** of **Termination**, **Cancellation**, **Suspension** and **Indemnity** are also relevant.
- Therefore the challenge is to take the opportunity whether drafting or responding to existing wording to make effective deletions or alterations which fundamentally shift the meaning and consequences to what you intend the term to mean and also to have the effect intended.

Potential consequences of Act of God

- Although both parties may have a general understanding of the purpose and function of Act of God. It is worth setting out the alternative consequences in broad detail as to what steps could be included in a clause. Choices available may include:
  - Prompt written notice of the fact there has been an Act of God that effects fulfillment and an explanation of the facts and an estimate given of how long it will take to be remedied if at all and when the contract can continue
  - Suspension of the agreement for an unlimited or maximum agreed period of time
  - Grounds for termination
  - Period of time in which one party may be permitted to remedy problem
  - Notice to terminate by either or both parties
  - Negotiation to resolve the matter
- In **A-Z A.395** if the institute is unable to carry out either all and/or part of the agreement which are due to circumstances beyond its control

which were not reasonably foreseeable and are due to an Act of God. The parties have agreed that the agreement shall be suspended for a maximum of one year. After the expiry of one year either party may serve notice on the other to terminate the agreement. The parties will then seek to negotiate a resolution to any outstanding problems.

- In this clause there could be added a clearer date for the start of the suspension as to when the commencement date for the one-year period starts.
- The Act of God can also be drafted very widely so that it includes not only very bad weather such as lightning, floods, hurricanes but also defects in equipment, accidents, acts of terrorism, war, national power failures and those events which have the effect of interrupting the supplies, services or work of any third party associated with the institute or a project.

A-Z A.395
Where the [Institute] is unable to fulfil the terms and conditions of all and/or any part of this Agreement due to circumstances beyond its control which were not reasonably foreseeable and are due to an Act of God including, but not limited to, lightning, floods, hurricanes, extreme weather conditions, defects in equipment, accidents, acts of terrorism, war, national power failures and/or has the effect of interrupting the supplies, services and/or work of any third party associated with the [Institute] in respect of this Agreement. Then the Agreement shall be suspended until such time as it can be fulfilled by the [Institute] provided that it shall be for no more than a period of [one year]. Thereafter either party shall be entitled to serve notice to terminate the Agreement and for the parties to negotiate a settlement to resolve any outstanding matters.

Notice that an Act of God has taken place and termination

- One of the immediate consequences to be addressed is the estimated time it would take to remedy the failure to carry out either all or part of the agreement whether due to an Act of God or some other reason.
- **A-Z A.393** requires that any party must give prompt written notice to the other and explain the facts and reasons for the delay and give an estimated time for the situation to be remedied. This clause would be in addition to any Act of God or Force Majeure clause.

A-Z A.393
Any party which is unable in whole or part to carry out its obligations under this Agreement shall promptly give written notice to that effect to the other party stating in detail the circumstances and the estimated time it is believed will be needed to remedy the situation.

- There is an important question as to whether or not the Act of God would even give rise to a right to one or more parties to terminate the agreement.
- In **A-Z A.401** this clause only relates to specific terms in the agreement. The Act of God is not directly referred to and is used within the context of Force Majeure. The licensee must have been unable to fulfil the agreement for a fixed agreed period which was beyond their control. After that first period of time they must notify the licensor of the nature of the force majeure and the clauses under the agreement that the licensee cannot carry out and how long it is expected that the problem will continue before the licensee can carry out its obligations. Here the licensor shall have an absolute discretion and the right to just terminate the agreement on receipt of this notice and does not have to allow any additional period to help the licensee carry out its obligations. This clause then leads directly to the termination clauses in the agreement.

A-Z A.401
Where the [Licensee] is unable to fulfil and/or perform any and/or all of [Clauses/specify] for [number] [days/months] due to circumstances beyond the [Licensee's] reasonable control which are due to force majeure. Then the [Licensee] shall be obliged to notify the [Licensor] of the nature of the force majeure and the terms which the [Licensee] is unable to perform and/or fulfil. At the same time the [Licensee] must provide an estimated date by which the matter is expected to be remedied. In any event upon receipt of any such notification from the [Licensee] the [Licensor] shall have the right to terminate the Agreement by notice is writing. It shall be entirely at the [Licensor's] discretion as to whether the [Licensee] is permitted the opportunity to remedy the situation. In the event that the Agreement is terminated by the [Licensor] then the termination provisions in Clause [–] shall apply.

- You should define what you mean by an Act of God and include or exclude problems created by human actions and failures or software, machines or equipment.

- The crux of the issue from a drafting perspective is to take the opportunity to be clear as to what is – and as equally important what is not, an Act of God. In the context of contract interpretation the question is not what does Act of God mean? – whether you view the interpretation from a historical, theological or academic sense but what does the agreement actually state as agreed between the parties. What does this term mean in the whole context of the full agreement?
- There is a clear distinction between a narrow view of an Act of God and those matters which are caused as a result of the actions, default, failures and work or services of any third party whether an individual, members of the public, a company or consortium or an inanimate object or an animal.
- In **A-Z A.389** the clause is drafted so that accidents, defect in equipment and power failures are included as examples accepted as beyond the control of the parties. However negligence or omissions by employees and third parties and industrial action are not.

A-Z A.389
The term 'Act of God' shall be defined as those acts or circumstances which could not reasonably have been predicted or guarded against which are beyond the control of the parties. Examples include, but are not limited, to lightning, floods, extreme weather conditions, defects in equipment, accidents, terrorism, war, violent outbursts, nation-wide power failures.

The following types of acts or omissions are not applicable:

1.1 negligent acts or omissions by employees, consultants or sub-contractors or other third parties engaged to carry out work.

1.2 industrial action.

1.3 wanton acts by trespassers or visitors.

- In **A-Z A.396** the whole clause is dedicated to making clear what failures, defects and other matters cannot be relied upon under the agreement within the heading of Act of God and are excluded.

A-Z A.396
Both parties agree that the following acts, failures, defects and matters are specifically excluded and are not an Act of God:

1.1 Defects in any equipment provided by either party.

1.2 A major product recall of its goods and services for health and safety reasons.

1.3 Technical failure of the [Work/Website/Product].

1.4 The suspension of the [Company] on the [Stock Market/other].

1.5 Hackers, spam, viruses and computer hardware and software failures and problems unless due to a national power failure.

1.6 Malicious, deliberate, negligent acts, omissions and errors by employees, consultants, sub-contractors, agents, licensees, directors, trustees or other third parties engaged to carry out work and/or who provide services.

1.7 Strike, industrial action and protests.

1.8 Malicious, deliberate, negligent acts, omissions and errors by trespassers and/or visitors.

- In addition to excluding events, defects and failures which arise through the actions of humans, machinery or their equipment or software. A clause may be drafted to specifically exclude what might be interpreted as an Act of God as it relates to weather, but which has either been predicted given the local climate and its history or which one party wants excluded.
- In **A-Z A.403** the clause is drafted to relate to force majeure as opposed to an Act of God. The point is expressly made under sub-clause 1.1 of **A-Z A.403** that 'snow and strong winds' will not absolve a party from the contractual consequences of non-performance.

A-Z A.403
The [Licensor] and the [Licensee] agree that the following circumstances shall not be deemed and/or accepted as grounds for force majeure:

1.1 Snow, strong winds.

1.2 Defects in any equipment, material and/or packaging.

1.3 Technical failure of the website of the [Licensee].

1.4 Suspension and/or exclusion of the [Licensee] from the [Stock Market/Institute].

1.5 Computer hardware and software failures.

1.6 Malicious, deliberate, negligent acts, omissions and errors by employees, consultants, sub-contractors, agents, directors and/or other third parties engaged to carry out work and/or to provide services by the [Licensee].

1.7 Protests, marches, arson, and/or criminal acts.

1.8 Malicious, deliberate, negligent acts, omissions and errors by trespassers and/or visitors.

- The point of both this **Act of God** and the **Force Majeure** sections should therefore be clear once these issues have been addressed or taken on board:
  - What the clause states clearly to be the case is what matters, not any party's pre-existing perception or understanding of the terms
  - The period of time the 'problem' may continue
  - What happens after an agreed period of time
  - Whether the continuing intervention can give rise to serve notice to terminate
  - Whether specific events which may seem natural are by history alone foreseeable and possibly preventable such as those caused by snow, strong winds, floods, heavy or persistent rain or storms
  - Whether specific occurrences such as a mechanical or electrical failure, power failure, war, terrorism and industrial action – however they come about are to be included in the Act of God provision
  - How far the clauses relate to third parties who are agents, sub-licensees, suppliers and distributors or whether they are excluded
- It is crucially important to consider such matters in the context of personal and business insurance, particularly the detailed wording and exclusion provisions of any cover and to check that there are no unknown areas of liabilities that you may be responsible for which are not covered you need to be able to evaluate the risk and the potential financial consequences.

A-Z C.604
The [Assignee] undertakes and agrees that it shall be entirely responsible for all payments due or which may become due in respect of the performing rights in any music and the mechanical reproduction of the [Film/Recording/DVD].

- The same issue may also apply in film and television as in **A-Z C.641**. The assignor of the series has agreed that all copyright and any other rights shall be cleared for use in all media.
- The assignor has agreed to pay the costs and any sums due for performing rights and the mechanical reproduction of the series.

A-Z C.641
In respect of the [Series] the [Assignor] undertakes that all copyright and any other rights including footage, stills, music, and performances and consents required shall as far as reasonably possible be obtained and cleared for use in all media. The [Assignor] confirms that it shall be responsible for any payments in respect of the exploitation of the [Series] including any sums due in respect of the performing rights in any music as are controlled by the Performing Rights Society or a society affiliated to it and any sum due in respect of the mechanical reproduction of the [Series].

- The clause in **A-Z C.595** in DVD, Video and Discs is much broader and more detailed and covers the clearance and cost of:
  - all clearances, consents, permissions, contracts, copyright and intellectual property
  - artists, performers, contributors, employees, locations
  - musicians, music, lyrics
  - products
  - collecting societies
- The company has agreed to clear and pay for the cost of any use of the Work which could be a film, programme or footage which is owed to third parties in connection with the Work which is produced, recorded or reproduced in the DVD or any part which is manufactured, distributed,

sold, rented or supplied. You could also add word exploited to make it wider.

- If the company is the licensee then the licensor is not responsible for any clearance or costs and that fact should be stated in the agreement.

A-Z C.595
The [Company] shall be solely responsible for all arranging, obtaining and bearing the costs of all clearances, consents, permissions, contracts, copyright and intellectual property, artists, performers, contributors, employees, locations, musicians, music, lyrics, products and collecting societies or trade organisations, for production or post-production required, due or arising to third parties arising out of or in connection with the [Work] produced, recorded or reproduced on the [DVDs/Videos] or any part created, manufactured, distributed, sold, rented or supplied under this Agreement.

- In contrast in **A-Z C.600** in DVD, Video and Discs the licensor must be responsible for clearing and paying for:
  - all consents, clearances, waivers, licences and payments
  - in respect of all copyright, intellectual property, contract and other rights and obligations
  - owed to third parties – arising directly or indirectly – from any material
  - reproduced in the DVD of the film
- Note the words – including but not limited to – where it then lists the type of rights, clearances and consents that may be required.
- The licensor is supplying a copy of all the consents and clearances and contract obligations to the licensee
- The licensee is not paying for any clearances or consents and if it has to pay any can deduct the cost from sums due to the licensor.

A-Z C.600

The [Licensor] shall be solely responsible for the consents, clearances, waivers, licences and payment in respect of all copyright, intellectual property, contract, and other rights and obligations due or owed to third parties arising directly or indirectly from any material reproduced in the [DVDs] of the [Film] in respect of the exercise of the rights granted hereunder including but not limited to artistic, musical, literary works, sound recordings, films. The [Licensor] shall supply to the [Licensee] at the [Licensor's] cost and expense upon request by the [Licensee] copies of all consents, clearances, waivers, licenses and details of contract obligations. In the event that the [Licensee] shall be required to make any payment to any third party for any reason due to the failure of the [Licensor] to obtain clearance or consents then the [Licensor] agrees to reimburse in full the Licensee together with an additional fee of [ten per cent] of such amount which shall be paid within [28 (twenty eight) days] of receipt of any invoice by the [Licensor]. In the event that the [Licensor] should fail to pay any such sums then the [Licensee] shall be entitled to deduct them from any sums due to the [Licensor] under this Agreement.

- In **A-Z C.622** in DVD, Video and Discs the clearances arise in respect of a film or recording or pilot. The assignor has agreed to pay for the clearances and consents as well as the payments due for a fixed period for a specific country and certain rights.

A-Z C.622

The [Assignor] confirms that it shall be responsible for the clearance, acquisition of rights, consents, releases, permissions, waivers, contracts, and payments of all costs, fees, royalties and other sums due in respect of the following matters in the [Film/Recording/Pilot] in respect of the use, reproduction, performance, mechanical reproduction, performing rights, transmission, distribution and licensing of the [specify] Rights in [country] from [date] to [date]:

1.1 Artistes, musicians, production, technical and editing personnel and companies, consultants, services, promotional and marketing persons and companies.

1.2 Music, lyrics, stills, films, products, ringtones, sounds, computer generated material, images, graphics, text, slogans, service marks, trade marks, domain names, artwork, sound recordings, internet material and [other].

- Where there are products which are being licensed and exploited then the clause may focus on different aspects as in **A-Z C.763** in Purchase and Supply of Products
- The supplier is responsible for all the clearances and consents and payments – which includes copyright, patents and designs and any collecting society for the licence granted for the product and all the packaging and marketing.
- In 1.2 the company agrees to notify the supplier of any claim and in 1.3 to assist where the supplier makes a decision to remove any material.

A-Z C.763

1.1 The [Supplier] shall be responsible for all clearances, consents, design, patent, copyright and performance and reproduction payments and any other fees that may be due to any third party and/or collecting society for the design, development, production, manufacture, distribution, sale, supply and marketing and promotion of the [Product] and its packaging by the [Company] in [country] from [date] during the term of this Agreement.

1.2 The [Company] agrees to notify the [Supplier] in the event of any allegation and/or claim being brought to its attention in respect of 1.1 above.

1.3 The [Company] agrees that where the [Supplier] decides to change, adapt, alter and/or delete any part of any material as a result of a decision by the [Supplier]. That the [Company] shall assist the [Supplier] and at the [Suppliers'] cost add, remove and/or delete material provided that such actions would not create a threat of criminal and/or civil proceedings against the [Company] for any reason.

- The clearance may also be more related to the ownership of a name of a product, company name, slogan or trade mark. You can have assurances provided as to ownership, consent and permission within the agreement. Please look at the main clause heading **Title** in the **A-Z** for further clauses.
- In **A-Z C.671** in Film and Television in 1.3 the sponsor agrees that:
  - it is the sole owner of and controls all copyright and any other rights
  - in the Sponsors Logo which is described and a representation of which is attached to and forms part of the agreement
- The association makes a similar assurance in 1.4.

A-Z C.671
The [Sponsor] and the [Association] agree to the following:

1.1 That all copyright and any other rights including but not limited to the Satellite, Cable, Digital, Terrestrial Television Rights, the Theatric Rights, the Non-Theatric Rights, the internet, Computer, Television and Gadget Games, Merchandising and Telecommunication and Telephone Rights] in the [Recordings] shall be the sole exclusive property of the [Association].

1.2 The [Association] shall be entitled to retain all sums received at any time from the exploitation in any nature, format, process or method in whole or part or derived directly or indirectly from the [Recordings].

1.3 That the [Sponsor] agrees it is the sole owner of or controls all copyright and any other rights in the [Sponsor's Logo] and the use of the [Sponsor's Logo] by the [Association] and the [Television Company] under this Agreement will not expose the [Association] and/or the [Television Company] to any criminal or civil proceedings.

1.4 That the [Association] agrees it is the sole owner of or controls all copyright and any other rights in the [Promotional Logo] and that the use of the [Promotional Logo] under this Agreement will not expose the [Sponsor] to any criminal or civil proceedings.

- A website, app, software and downloads raise further areas of clearance and costs which would not apply to a product. There is likely to be an interactive element, films, blogs, and a whole array on connections between the website, mobiles, the retail shops if any and all the associated competitions, marketing and promotional material and events. The scope could therefore be only really understood based on the facts in each case and adapted to work with the parties as to their potential use of the website.
- In **A-Z C.711** under Internet and Websites the company has agreed to be responsible for the costs and clearance of a wide range of types of rights and material from the launch date. Prior to that date all the costs regarding clearances and rights should have been stated in the designers report and paid under the payment schedule.

A-Z C.711
The [Company] agrees that it shall be responsible for all copyright, consent, and other fees due to third parties arising from the operation of the [website] from [date/launch date] for all the materials of any nature whether comprising of text, images, whether visual or subliminal internal or external, whether graphics which are static, interactive or moving, photographs, drawings, plans, sketches, electronically generated material, sounds, sound effects, music, logos, trade marks, design rights, background, banners, bookmarks, borders, tables, captions, characters, clip art, cartoons, computer generated art, maps, image map links, common gateway interface script, date, domain names, footnotes, headings, hypertext, video, DVD, CD-Rom, material for telephone, mobile, telecommunication system or other device for transferring, downloading supplying or distributing sound, vision, text and icons or any other development and any and all combination of such elements, software and information. Prior to that date all such costs shall have been included in the report of the [Designer] and paid under the Payment Schedule.

- In **A-Z C.723** in Merchandising the licensee has agreed and acknowledged that it must pay for all costs incurred in the commercial exploitation of the licensed articles.
- Note the list includes development, production, manufacture, packaging, storage, distribution, supply, selling, advertising and promotion costs.
- The costs could be a direct cost or owed to a third party or for services – and anything else. Please note the words – or otherwise – at the end which widen the clause still further to cover other examples.

A-Z C.723
The [Licensee] acknowledges that it is solely responsible for all costs incurred in the commercial exploitation of the [Licensed Articles] including development, production, manufacturing, packaging, storage, distribution, supply, selling, advertising, promotion whether incurred as a direct cost or owed to a third party for clearance of any rights of any nature or for services or otherwise.

- Where you are allowing a licensee the right to sub-licence. Then you must also consider who will bear the cost of any payments which arise if the sub-licensee does not pay any clearance and consent fees and other payments.

- In **A-Z C.726** in Merchandising the licensee has agreed that if any sub-licensee either fails or is unable to pay any sums which fall due from the exercise of the rights that the licensee has to make such payments. In addition, the licensee must also pay any sums due to the licensor which the sub-licensee does not pay for any reason.

A-Z C.726
Where the [Licensee] grants any sub-licence to a third party then the [Licensee] shall bear the cost of any sums that may fall due arising from the exercise of the rights which have been granted where such sub-licensee fails and/or is unable to pay. The [Licensee] shall ensure that any such sub-licensee is solvent and capable of paying any sums due prior to the conclusion of the Agreement. The [Licensee] shall be responsible for all sums due to the [Licensor] which any sub-licensee fails to pay.

- The issue of clearances and consents can also be expanded to cover compliance with policies, health and safety, alcohol licences and legal costs as in **A-Z C.797** in Sponsorship. Here the sponsor for an event has agreed to pay for a long list of matters that may be incurred by the company or any third party appointed by them which may be required for the event.

A-Z C.797
The [Sponsor] agrees to bear the cost all clearances, consents, waivers, releases, trading, alcohol, licences, agreement, reproduction, marketing, advertising, health and safety compliance and certificates, administration and legal costs and expenses that may be incurred by the [Company] or any third party appointed by them in using the [Sponsors Logo] and [Products] for the [Film/Event/other] whether this involves trade or government bodies, local authorities, television companies, owners of premises, other sponsors or advertisers or any other person, body or company.

Fair Dealing – do not presume clearance is not required

- Often the most difficult judgement to make is whether any form of clearance is required at all. There is an understandable reluctance to avoid creating issues where none may exist and a fear that alerting third parties to a potential claim or rights may create problems. But it is

a counter-productive and somewhat naive strategy to think that rights of third parties are more easily addressed later rather than earlier. It can also be a great deal more expensive to resolve a problem after a product has been manufactured or published or broadcast or made available in shops.

- There are a few accepted circumstances where clearance is not necessary, but these are extremely limited and if there is any doubt the parties are best advised to be cautious and to seek prior consent. So you are advised to seek clearance on a pro-active basis rather than make your own assessment.

- Copyright in the United Kingdom is not infringed unless the copying is of a substantial part of an original work.

- Do not assume that the word 'substantial' in law means that you cannot be found to have infringed the original work of the copyright owner if your use is of a relatively small amount of material.

- There have been many situations where the use of a small amount of material of an original work has been found to be an infringement.

- So do not fall into the trap of thinking that you can therefore copy and reproduce a small amount of material belonging to a third party and it will not be found to be an infringement. This is one of the most commonly misunderstood legal principles – it will be found to be an infringement in most cases.

- The word 'substantial' is very misleading as it has a very narrow judicial interpretation over the years. The end result being best encapsulated in the quote: 'if it is worth copying it is worth protecting'.

- In other words if there is copying to any extent, it is optimistic and naive and likely to fail if you rely on the technical defence of substantiality. The courts traditionally interpret the word substantial in a qualitative sense and not a substantive one.

- The best course of action to take, if the view is that the use is or will be minor and possibly not substantial, is to make a good faith and open approach to the copyright owner disclosing the precise nature and extent of the proposed use and to seek permission.

- A person or company may also seek to try to give themselves comfort by asserting that the use by them is fair dealing.

- The legal defence of fair dealing is very narrow and applies only to purposes for review or criticism or research for non-commercial

purposes where there is a sufficient acknowledgement of copyright ownership and the work has been made available to the public.

- The defence will not apply if the original work is not available to the public – or if there is no reference at all to the original copyright owner.
- If in doubt of the narrow extent of fair dealing look at the actual wording in sections 29 and 30 of the Copyright, Designs and Patents Act 1988 as amended which provide different defences in the United Kingdom.
- Note the defence of fair dealing only applies to a literary, dramatic, musical or artistic work.
- Section 29(1) of the Copyright Designs and Patents Act 1988 as amended

  'Fair dealing with a literary, dramatic, musical or artistic work for the purposes of research for a non-commercial purpose does not infringe any copyright in the work provided that it is accompanied by a sufficient acknowledgement.'
- Section 30(1) of the Copyright Designs and Patents Act 1988 as amended

  Fair dealing with a work for the purpose of criticism or review, of that or another work or of a performance of a work, does not infringe any copyright in the work provided that it is accompanied by a sufficient acknowledgement and provided that the work has been made available to the public.
- It should be apparent that these defences are very narrow in scope and the legal defence of fair dealing is a long way removed from the colloquial expression of dealing with something fairly. Fair dealing is a very specific statutory defence not a matter of personal discretion as to what is fair in the circumstances.
- Care should always be taken to take full cognizance of the obligation to give a sufficient acknowledgement. If in doubt as to whether the acknowledgement is enough then it is better to follow the copyright notices, title and ISBN, name of the author and publisher and be generous than make this information too short. The information must be in a position and size where it can be easily read in relation to the material which has been copied.
- There are two very different attitudes to dealing with the issue of whether there is a sufficient acknowledgement. In the first you make a personal decision which may be challenged at a later date or alternatively you make direct contact with the copyright owner and ask whether your proposed acknowledgement is acceptable and that they have no objection to the use which you have disclosed to them.

Public domain and out of copyright are not the same – do not presume clearance is not required

- In this part we address in the context of copyright clearance the reason why it is so necessary to avoid the most common and often costly misconceptions that arise. We try to highlight the dangers of accepting the optimistic view that copyright clearance is too much of a hassle, not needed or a waste of time as no one will notice.
- It is fundamental to any project and failure to take it seriously can lead to very high costs at a later date for material which could have been either left out because it was too expensive or for which an alternative could have been found which fell within the budget.
- Copyright in any particular form does not last forever. In all circumstances there are limitations and the most common one is that in the United Kingdom copyright only subsists for a period of 70 years following the end of the calendar year in which an author dies.
- This 70-year period is the general rule although there are exceptions and the rule does not have universal application in every jurisdiction throughout the world.
- One of the most common and serious misjudgements made is the confusion and misuse of the terms – out of copyright – and – public domain – they are two very different concepts.
- If a work in which there is copyright can be accessed on the internet then the material is as a matter of fact in the public domain. That does not mean however that because the work is in the public domain that it is also out of copyright.
- There are limited circumstances where consent has clearly been given to the use of the material. If someone writes a letter to an editor for a letter column at a newspaper they cannot object if the letter is printed. It would of course be another matter if the letter was headed 'private and confidential' or 'not for publication' but the point is obvious.
- If the circumstances clearly imply a licence to publish or otherwise exploit a work. Then there is no infringement because consent – either expressly or by implication – has been given.
- But great care must be taken in taking this principle too far. It is one matter for a newspaper to print an open letter; quite another for a freelance journalist to think they can publish a book of letters on the presumption that all the text is available for use because it has appeared in a newspaper.

1.4 The removal and/or suspension of [Name].

1.5 Breakdown and/or maintenance of equipment.

1.6 Failure to comply with health and safety legislation.'

- This approach may be very helpful in ensuring that there is no debate as to whether an intervening act should or should not have been reasonably foreseen and also to ensure that specific acts or omissions are not retrospectively argued to be have been covered.
- A clause such as **A-Z F.081** in DVD Video and Discs may also be used to exclude other matters which neither party wishes the other to use as an excuse for a delay or failure to comply with a delivery date. This type of clause makes it clear that there are some events for which the other party must find, or pay for, a solution if they can be resolved. These excluded issues relate to competent administration and effective planning for a project.
- Therefore this clause excludes:
  - failure to obtain copyright clearance and other consents and licences
  - maintenance and security
  - lack of compliance with legislation
  - postal strikes, internet service, telephone service
  - heavy snow

A-Z F.081
The parties both agree that the following matters shall not be considered force majeure under this Agreement:

1.1 The failure to clear and/or pay for the necessary copyright, moral rights, waivers, licences and/or any other contracts and/or consents required from third parties.

1.2 Any failure due to poor maintenance, lack of security, non-compliance with any legislation and/or inadequate planning.

1.3 Postal strikes, slow and/or suspended internet service, failure of the telephone system and/or heavy snow.'

- Where software or technology such as computers and mobiles is involved as in **A-Z F.121** in Internet and Websites the parties may make it clear that a virus or hacker causing a site to crash is not a ground to rely upon within force majeure.

A-Z F.121
Force majeure shall not include:

1.1 Viruses, hacks and security breaches by third parties.

1.2 Failure to renew and/or register any domain name, copyright, trade mark and/or other rights held by [Name].

1.3 Failures and/or delays due to failure to comply with custom, border control and other duty, taxes and government legislation, regulation and policies.

- In a sponsorship agreement a sponsor may want to make sure that an organiser cannot use a failure to complete administrative tasks or to organise transport or to comply with health and safety legislation and policies as a ground for force majeure. So these topics are excluded in **A-Z F.164** in Sponsorship.

A-Z F.164
The parties both agree that the following facts and circumstances shall not be considered force majeure:

1.1 The suspension and/or failure of the electricity, gas, water, sewage, drainage, and/or heating for the [Venue] provided that it is for less than [number] hours.

1.2 The failure to obtain a licence from the local authority to sell and/or supply alcohol.

1.3 The disruption, suspension and/or blockade of the local roads, motorway, rail, airport and/or transport links.

1.4 The identification of a health and safety hazard at the [Venue] which is being investigated by the local authority and/or government agency.

FORMAT

- In the **A-Z** there are 18 clauses relating to **Format** from **A-Z F.171** to **A-Z F.188** under the sub-heading of General Business and Commercial.
- Note that the subject of formats and rights is also addressed within the main clause heading **Rights** in the **A-Z**.
- This topic can also be cross referenced with the main clause headings in the **A-Z** of **Assignment**, **Confidentiality**, **Exclusivity**, **Films**, **Indemnity**, **Material**, **Quality Control**, **Recordings**, **Sub-Licence**, **Sound Recordings**, **Rights**, **Third Party Transfer** and **Title**.

The background to format

- You will not find any definition in any copyright or media related legislation in the United Kingdom which describes format rights.
- That does not mean however that such format rights cannot be defined in an agreement between two parties nor does it mean that a format cannot be protected.
- The failure of the legislation to recognise it as an independent right does not mean that, as a matter of principle, there cannot be any grant of rights in a format or a licence for the exploitation of a format.
- It is not in fact much different from those rights which are defined in legislation. As in any agreement it is unlikely that the best wording to choose to use is the wording of the legislation. Such wording may either be too wide or not have the intended meaning which you want to achieve for the purpose of the agreement.
- Formats for television programmes and quizzes have been exploited for many years worldwide. Despite the fact that there was a strong argument that the existence of such rights has not at any time received legal recognition.
- There have been many successful programmes, series, films, radio, books, talent competitions, events and other projects for which the format rights have been licensed for exploitation in another medium or in another jurisdiction worldwide.
- The point here is that one party may choose for instance to acquire a licence to use a format rather than be sued for the passing off of another programme which was very much the same or similar as their

own. Especially when it would be quite clear that the new programme had copied a format from another programme.

- Successful television programmes, particularly game shows, international competitions, sitcoms and numerous magazine type programmes, will have a defined structure. The detail may apply to for example to:
  - the title
  - the music and lyrics
  - the colour and layout of the set
  - the presenter
  - a competitive team element
  - public or celebrity participation
  - telephone voting by the public
  - elimination rounds
  - achievable target scores with rewards
  - the costumes worn by participants
  - the scoring system
- The combination of a number of original factors creates a successful format which can be repeated with adjustments in different countries and languages worldwide. The exploitation of formats is a very lucrative market – the programmes can be broadcast on a weekly basis or can be redesigned and updated to take place on an annual basis or as a series for a reason.
- The scope of a format is a combination of factors but starts with a strong title.
- The title of a programme or project and the structure may be adjusted and changed from one country and market to another. This is needed to ensure that there are no issues with the translation of the language but also to broaden the appeal and improve the ratings of the programme or project.
- For example the United States version of the United Kingdom show 'Strictly Come Dancing' is known as 'Dancing with the Stars'. However the title 'The Apprentice' was used both in the United Kingdom and United States and even adapted for a celebrity edition.
- There have been a number of disputes where one party has sought to create a programme based on a format used in another, older, programme. It then becomes a matter of expensive litigation and evidence as to the originality of the new format and the differences and similarities which exist between the new and old formats.

- It will be crucial as to whether there is evidence to prove that the format for the older programme was not original in the first place but a copy or series of copies of elements from elsewhere.
- Note that the issue of originality here in relation to formats is not based on any relevant legislation in the United Kingdom. Any claim, if it were to be made and a legal action pursued, would have to be grounded on a case for passing off.
- Where you clearly realise that the format for your new programme or project is derived from an earlier programme. Then the smart course of action is to seek a licence – not to take a chance that the other party will not take any legal action.

Drafting clauses relating to formats

- The challenge when drafting a clause relating to a format in an agreement is to capture and define exactly what is meant by the term 'format' in the context of that agreement.
- The definition of the format will have some of the same basic principles to cover but will not always be the same as regard content.
- The scope of a format and the amount of detail which is copied when a format is adapted will vary. In any agreement you would describe and define the original format which is due to be reproduced and adapted by the other party.
- You would also set out in the agreement as to how the format may be used and adapted and describe the intended new programme or format that will be developed.
- You may wish to limit and ring-fence the scope of what the other party is permitted to do with the new adapted format.
- Here the issue of protecting the brand and integrity of the original format may apply. To prevent a third party adapting the format in such a way as to have a negative impact on future forms of exploitation of the original format.
- There will also need to be clarification in the agreement as to which party owns the new adapted format or whether the licensee acquires any rights or interests in the new adapted version.
- The parties may acknowledge that there is no recognised legislation which applies to formats in the United Kingdom or any other specified country or jurisdiction as in **A-Z F.177**.

- Despite this fact the parties may still wish to enter into a commercial arrangement. In this clause there is an exclusive licence to exploit the game show which is likely to have a very specific format.
- The licensee is acquiring the exclusive right to produce, reproduce, distribute, sell and exploit certain rights relating to television, DVDs, merchandising, and publishing.
- Note there is no mention of the consideration and payment in this clause, but there is likely to be an advance and royalties set out in another clause.
- Note the rights do not cover the internet, websites, gambling, musicals and theme parks directly – but the merchandising rights could be extended to cover them or a new rights definition added.
- For more on clauses relating to rights definitions and exploitation please look at the man clause heading **Rights** in the **A-Z**.

A-Z F.177
The [Licensor] and the [Licensee] both acknowledge that although there is no recognised copyright in the Format of the [Game show] which is acknowledged in law in this country, they wish to transfer the right to exploit such elements of such rights as do exist or may be created in the future. The [Licensor] grants to the [Licensee] the exclusive right to produce, reproduce, distribute, sell and exploit the [Television Rights, the DVD Rights, the Merchandising Rights, the Publishing Rights] in the [Game show] throughout the [world] for the duration of the Term of this Agreement.

- The original format would be defined in an agreement. There is no single definition that would suit all circumstances and it must be drafted to fit the facts.
- There may be a very detailed description drafted of the important elements which contribute to the format. These details are then attached and form part of the agreement as in **A-Z F.175**.
- This is a useful tool as it clarifies the basis of the format. Examples could also be provided including text, images and photographs of existing uses of the format.

A-Z F.175
'The Format' shall be the original concept and novel idea for and structure of a [Television Programme] which is briefly described as follows [specify]. Full details of which are attached to and form part of this Agreement.

- In **A-Z F.172** the format is defined widely for a series for television to include not only the description but also the rights to the music, sound recordings and intellectual property rights if any and the goodwill.
- 1.3 the basic idea could be expanded to set out a description and to attach documents with further details to form part of the agreement.

A-Z F.172
'The Format' shall mean in respect of the [Series] the following:

1.1 The goodwill and reputation.

1.2 The title, slogan, logo and image.

1.3 The basic idea.

1.4 The original manuscripts, drafts, scripts, characters, plots and storylines of the Series including the general location and dramatic sequences.

1.5 The music, sound recordings, advertisements and promotions, jingles or otherwise.

1.6 All intellectual property rights of whatever nature in any media at any time.

- There is a different approach in **A-Z F.173** where the format relates more to how the format may be exploited under an exclusive licence. Here the licensor will grant the licensee an exclusive licence to produce, reproduce and distribute a new series based on existing films.
- The licence is limited by territory and the countries which are covered are defined it is also lilmited by the term of the agreement – the period for which the licence will exist.
- For other clauses on these topics please look at the main clause headings **Territory**, **Licence Period** and **Term of the Agreement** in the **A-Z**.
- The exclusive licence for the format includes the right in association with the series to:
  - make trailers and advertisements and publicity
  - use the title and any associated logo and mark and artwork
  - reproduce the set and any signs and equipment
  - use any questions and answers, rules and catchphrases
  - reproduce costumes and outfits

- 1.7 and 1.8 are more unusual clauses as the licensee gets the opportunity to exploit any goodwill and copyright, design rights, trade mark, logo, literary, musical, dramatic, artistic and all other intellectual property rights in the series based on the original films.
- It is to be expected that the licensor would be remunerated and paid a share of any revenue. Please look at the main clause headings **Payment** and **Royalties** in the **A-Z** for more on this subject.
- The agreement may also make it clear that at the end of the licence period the licensee cannot produce or reproduce any new series without an additional licence.
- If there is no agreement that the licensor will share in any revenue from the exploitation of the new series. It would be advisable to include an assignment clause between the licensor and the licensee for any rights the licensor may hold in the new series. So that the licensee owns and controls the new series and that the licensor agreees that the licensee retains all sums from any form of exploitation.

A-Z F.173
'The Format' shall mean the exclusive rights granted by the [Licensor] to the [Licensee] to produce, reproduce and distribute another [Series] based on the [Films] in the Territory for the Term of the Agreement and to appoint third parties to do so as sub-licensees and sub-distributors. The format shall include, but not be limited to:

1.1 The right to copy, reproduce and exploit the [Series] and any associated trailers, advertising, publicity and other material.

1.2 The right to use the title known as [specify] and the associated trade mark, logo and artwork.

1.3 The right to reproduce the design, layout, colour, signs, scoreboards, and equipment of the studio set.

1.4 The right to use and reproduce both in the studio and for distribution the rules, procedures, catchphrases, slogans, questions and answers.

1.5 The right to use and reproduce the costumes and outfits.

1.6 The right to reproduce and exploit copies of all running orders, scripts and other written material.

1.7 The right to exploit the goodwill and reputation.

1.8 The right to exploit the copyright, design rights, trade mark, logo, literary, musical, dramatic, artistic and all other intellectual property rights.

- Another version of a format clause is set out in **A-Z F.180** where a detailed description and even examples would be attached to the main agreement. The description would cover all the topics listed in the definition clause as were relevant and those that were not would be deleted. This type of clause would be appropriate for a game show format.

A-Z F.180
'The Format' shall be the original concept and novel idea for and structure of a series of films which is briefly described as follows [specify] full details of which are attached and form part of this agreement in Appendix [–]. [Title, script, characters, plot, storyline, location, intellectual property rights, running order, sequence, design and layout of set, presentation of questions and answers, score system, prizes, slogans, graphics, costumes, advertising, publicity, trade marks, service marks, logos, icons, domain names, credits, copyright notices, music, photographs, stills, images, graphics, text, computer generated material, interactive website and telephone line material].

- A substantial attempt at capturing every single detail of a format down to the precise lighting directions and the exact synchronicity of music and sounds to minute gestures and cues could be described if that degree of detail is relevant. Normally however it is usually limited to an analysis of the basic structure which is consistent as to the running order, the layout, the design of the set, music, questions and system of scores.
- The point to realise that, when you are attempting to define the format, is that you are describing all the elements which you claim are the subject of protection which you own.
- For some quiz formats there may be interaction between the public and a company via a website as well as through a premium line telephone which incurs charges for an additional prize as in **A-Z F.184**.

A-Z F.184
'The Quiz Format' shall mean the original concept and idea for a [Quiz]. The material shall include the title, logo, slogan, scripts, design and layout of the set structure, presentation of questions and answers, list of prizes, graphics, images and text, score system and charts, running order, music, sound effects, sound recordings, gadgets, advertising and publicity campaign and promotional material, [trade marks, service marks, icons, domain name] credits, copyright notices, computer generated material, [interactive website], premium rate telephone line questions and answers, [and call centre plan] and contributions by presenters. Full details of which are attached and form part of this Agreement in Appendix [A].

- A licensor is often concerned that a licensee will seek to exploit or register a domain name or trade mark or logo or any copyright. So it is useful to include a clause in the agreement that the licensee agrees they are owned by the licensor and that the licensee has no such rights as in **A-Z F.186**.

A-Z F.186
The [Licensee] agrees and acknowledges that it shall not register and/or attempt to register the domain name, trade mark, service mark, community mark, logo, slogan, music, sound recordings, copyright and/or any intellectual property rights in respect of any part of the [Format] with any company, trade organisation, collecting society, copyright organisation and/or otherwise. The [Licensee] agrees that all such rights are owned and/or controlled by the [Licensor].

- There may be situations where an agreement requires that it is made clear that:
  - no format rights granted
  - no rights that can be transferred or sub-licensed to or exploited by a third party
  - no rights created in the new version of the format are transferred and that all rights must be assigned back to the licensor
- In **A-Z F.187** it is made clear that no format rights or the right to adapt, distort or reproduce the film or work is granted by the licence.
- Note that the clause is drafted to include any character, name, logo, image or text.

A-Z F.187
No format rights and/or right to adapt and/or distort and/or to authorise the reproduction and/or to licence any characters, logos, names, images and/or text in respect of this [Film/Work] are granted under this licence.

- **A-Z F.183** states that no format rights to appoint or authorise any third party at any time are granted.

A-Z F.183
There is no right granted to license, appoint, authorise or to engage any third party to exploit the [Format] at any time.

- A licensee may also confirm as set out in **A-Z F.178**:
  - that it has not acquired any interest in the format
  - that it can only exploit the rights granted
  - that all new adaptations or developments of the format must be assigned by the licensee to the licensor
  - that the licensee shall not have any claim, interest or rights

A-Z F.178
The [Licensee] agrees and undertakes that it shall not acquire any rights or interest in the concept or [Format] owned or controlled by the [Licensor] whether in existence now or created in the future. The [Licensee] shall be limited to the exploitation of the rights specifically granted in this Agreement for the Licence Period. Further, in the event that there are any adaptations, translations, variations or developments or alterations of the [Format] created or commissioned by the [Licensee] pursuant to the exercise of the rights granted the [Licensee] agrees to assign and transfer all such rights in any such adaptation, translation, development, variation or alteration back to the [Licensor] entirely and the Licensee shall have no claim or interest or rights and shall not seek to register any rights.

- It is essential that marketing and promotion as well as packaging, competitions, use of premium rate phone lines and use of extracts of licensed material for that purpose are discussed in advance.
- Raise the issues in advance and find the parameters of what one party thinks is going to happen as opposed to your presumption that any sort of marketing must be good and must be allowed under the agreement.
- This is often not the case and a supplier or author or distributor may be quite specific as to what form of marketing is permitted and what is not allowed and is prohibited.
- Marketing can take many different forms and examples include:
  - Direct marketing through emails and mailshots using a brochure, catalogue or flyer
  - Trade exhibitions, festivals, events, performances and street promoters
  - Marketing to persons who have signed up to a free newsletter or website contact email
  - Sponsorship, product placement
  - Radio, television and online advertising
  - Merchandising such as free give-aways, competitions and premium rate phone lines, tour fan material and licensed products for characters and names, soundtrack music for CDs and downloads
  - Merchandising in the form of a licence with a third party for exploitation by means of branded clothing, confectionary, toys, stationary and other items
  - Cross-promotion partnerships with specific companies or organisations
  - Branded posters, mugs, key rings, sweat shirts, arm bands, balloons, bags, cards, flags and banners, signs and billboards
  - Listing and adverts on websites, directories and search engines on the internet
  - Online films, videos, forums, blogs, free and paid for apps, website promotions, links and paid for banner advertisements
  - Paid-for articles, interviews, reviews, blogs, quotes and appearances
  - Book covers, record sleeves, packaging and in store displays

- Other forms of marketing and promotion can be found in the main clause headings **Marketing**, **Publicity** and **Rights** in the **A-Z**.
- Just because you want to use one of the above forms of marketing does not mean that you necessarily have the right to do so. There is no automatic right acquired to be able to market extensively.
- Most companies and distributor have a planned campaign of advertising and promotion for both the company and their products or services.
- They may have a formula which they follow which is either personal to the product or service or which is generic and follows the same pattern regardless.
- A company or distributor may be restricted by trade organisation guidelines or the policy of a government body regarding the suitability and use of material. For more on the topic please look at the main clause heading **Compliance** in the **A-Z**.
- If you are licensing a third party to exploit a product or service on your behalf then the detail of their intended marketing campaign is crucial – as is the budget they intend to spend.
- It is quite common for a company not to be willing to commit to a specific budget for a marketing campaign, rather they will try to show the level of personnel involved and the experience they have had with other products or services.
- Even if there is not a commitment to a specific budget to be spent on the marketing for the project. That does not prevent you from specifying methods of advertising which will be used as a minimum.
- You may also set performance targets or preferred magazines or television companies or newspapers in which the product or service will be promoted.
- If a marketing budget is to be agreed and incorporated in the agreement then it should be made clear how the budget should be spent and who is liable if for any reason the budget is exceeded. For more on this subject please look at the main clause heading **Budget** in the **A-Z**.
- The packaging, marketing and promotional costs for a project may be significant. The agreement should state which person or company is responsible for all such costs and expenses.
- It needs to be stated unequivocally whether or not such costs and expenses can or cannot be recouped and set off against any gross receipts, net receipts or royalties due.

- If the marketing costs and expenses are permitted to be recouped then you should consider whether there should be a limit on the amount in total which can be recovered. This may either be in each accounting period or in total for the duration of the agreement. For more on this topic please look at the main clause headings in the **A-Z** of **Costs**, **Expenses** and **Distribution Expenses**.
- There is also the question of the liability and responsibility for the marketing costs and expenses. If the licensee or distributor is engaging third parties to market and promote the product, service or project under the agreement, then in whose name are these new additional charges made and to whom will an invoice be addressed? If you do not wish to accept any liability then a clause to that effect must be included in the agreement which you can then rely upon at later date. Otherwise if the licensor and licensee work together on a project and fail to address this issue in the agreement. There may be ambiguity as to how the costs and expenses incurred may be paid. For more on the topic of **Liability** please look at the main clause heading in the **A-Z**.
- It is quite often the case that the company or person who is paying for the marketing costs and expenses has final editorial control both as to the content of the marketing and the methods. Despite this fact it is perfectly possible to have a right of approval or consultation over the draft material whatever the medium in which it will appear before the material is finally distributed and used. For more on these subjects please look at the main clause headings in the **A-Z** of **Editorial Control**, **Consultation** and **Quality Control**.
- There are clear benefits to both parties in supplying marketing material for approval or consultation as it allows the author or creator to correct errors and omissions but also add new ideas and content which may enhance the final version.
- Where it is agreed that material may not be used unless it has been approved by the licensor or author. Then additional words may be added that approval shall not be unreasonably withheld or delayed.
- It is also possible to set a time limit for approval after which approval is deemed to have taken place if there has been no reply.
- There are different types of costs which may be incurred for marketing the cost of:
  - reproducing and delivering original material
  - creating a new logo, name and other artwork
  - developing and supplying a sample or prototype
  - reproducing the approved product or service

  - designing, creating and producing new formats of marketing in different medium
  - copyright clearance and other intellectual property payments
  - fees for any contribution by a third party
  - fees due for the creation, supply, reproduction or adaptation of any music or sound recording
  - sums due to any collecting society
  - sums due for any waiver
  - sums due as a result of a contractual obligation and
  - payments due to assignment of copyright and other intellectual property rights or computer software rights created
- The same issues arise with marketing material as arise in the main clause heading **Material**. Here again the question of the ownership and title and clearance must be looked at separately from physical possession or control of the marketing.

  You must address in any agreement the following issues:
  - Which party is supplying any marketing material?
  - At whose cost is the marketing material reproduced, supplied and delivered?
  - Who owns the material to be used and has full title to the copyright and intellectual property rights and can provide authority for its use?
  - Which person or company is paying for any sums due for copyright clearance and other intellectual property rights?
  - Where new marketing material is created who will own that material?
  - If an assignment is required to transfer the ownership and title to the licensor as required under the agreement. Then who makes the arrangements and pays the fees, costs and expenses due for the assignment?
- If more than one designer or artist is involved in the creation of many different forms of new marketing material. Each person will need to conclude an assignment for even a nominal sum in order to assign and transfer the copyright and intellectual property rights to the company for their work and all the rights to it in all media. You would want to include an obligation to make the assignment in the main agreement.

- Failure to ensure an assignment of all new material which is created in any form creates problems for any company.
- As you do not own those rights even though you have commissioned the work to be created. You will be unable to register any logo as a trade mark. If there is no assignment then you have not acquired copyright and intellectual property rights and are not the owner and you do not have legal title.
- An exchange of emails expressing a view that such a term is acceptable is insufficient. An assignment must be in writing and signed by the person or company making the assignment. For more on the main clause headings **Assignment** and **Buy-Out** please look at the **A-Z**.
- It is essential that the question of the ownership and copyright clearance of the material is considered in some detail. New and separate licences may be needed for the exploitation in the form of marketing for a project. For more on these subjects please look at the main clause headings **Title** and **Copyright Clearance** in the **A-Z**.
- In the same way that material has to be cleared for use so does marketing material. This is often forgotten and decisions are made to use material for which permission has either not been obtained or which is outside the use for which it was originally authorised.
- Where the licensor is supplying material and content for the marketing. The licensor may agree that the material and content is cleared and no further sums are due for authorised marketing. Alternatively the licensor may charge an additional payment for exploitation of the material and content for marketing.
- Many companies limit the extent to which original text, photographs, images, film, music and other material can be used and adapted for marketing material related to a project.
- A distributor may only be allowed to use the same limited duration of minutes of film for an advertisement or trailer.
- A distributor may only be permitted to reproduce certain limited quotes from a text in any marketing material.
- The whole aim is to protect the original film, book or product so that it is not exploited extensively with an impact on sales and revenue.
- There may be a number of persons or companies which have created new material and contributed to the development of a project. Dependent on their agreement and their contribution they may or may not have negotiated a right to a credit or copyright notice for their work and role in the project.

- This may also extend to any marketing material and so you should always check contractual obligations in terms of the marketing and credits and copyright notices. For more on these subjects please look at the main clause headings **Credits** and **Copyright Notice** in the **A-Z**.
- If one company or licensee has paid for the cost of the creation of a blog or app or website. Unless there is a clause in the agreement as to ownership and title of such new material it is difficult to argue that the ownership and title belongs to the licensor or that it is shared between the parties.
- The presumption will be that the company who paid for the new material and content for marketing has concluded an agreement for its use. Even the company which has commissioned the work may not own the title and rights if there has been no assignment from the creator or author who has been commissioned.
- Where moral rights have been asserted or where they have not but material is being changed and adapted. The issue of whether the author or director needs to receive a credit or should provide approval to the proposed changes in any marketing of the original text or film should be investigated.
- Moral rights should be considered in relation to any marketing material which may be created. You will need to look at the original agreement and establish whether there was any assertion of moral rights or if they were waived and whether the obligation to provide a credit extended to marketing material. For more on these subjects please look at the subjects **Moral Rights** and **Waiver** in the **A-Z**.
- In many agreements, contributors, authors and performers provided their consent to the use of their name, image, photograph and sometimes signature in relation to any marketing.
- This consent may only be in relation to certain formats and does not mean that there is the right to licence these images and the name for merchandising agreements to third parties.
- Marketing in relation to a product or service is not the same as merchandising and the exploitation of copyright and other intellectual property rights by means of a licence to a distributor.
- Free samples may be required to be provided to a licensor or person under the agreement of each and every format of the finalised marketing material.
- Equally, in contrast, some companies do not provide copies of any marketing material except the brochures and catalogues generally available to the public.

- A person or company may also seek to restrict the addition of any new content to any marketing material by a third party.
- A company may for instance specify that there should be:
  - No other products or services promoted and marketed in any marketing material and content
  - No product placement in other third party advertisements, events or programmes
  - No sponsorship or funding of any marketing material or content by a third party or any event, programme or festival associated with it
  - No sub-licence granted to any third party or any rights transferred at any time
- A licensor or author may in fact encourage extensive marketing and promotion and find it perfectly acceptable that every means of creating additional attention should be exploited. There may for instance be numerous cross promotions with other retailers or products or services. In addition there may be product placement agreements arranged for major feature films, national television series or for significant events and exhibitions.
- Sponsorship agreements could be concluded with major sporting organisations for both events and with individuals. As well as for festivals and conferences which would develop the brand image and create press, radio and television coverage.
- A major part of any campaign is the brand, the logos, images and trademarks associated with the original service or product or film or book. The title and characters and the associated logo and slogan may be reinvented in different formats and stylised in many different ways. For more on these subjects please look at the main clause headings **Brand**, **Goodwill**, **Logo, Trade Marks** and **Domain Name**.
- Where in an agreement you are agreeing for the use of certain extracts of a work whether text, images, photographs or otherwise. It is best to treat this consent and agreement as if you are issuing a licence for the marketing of such limited content.
- Limit the purpose and use of the licensed extracts to the licensed use under the main agreement. If you wish you can set out the licence period or term of the agreement. The particular methods by which the extracts can be used in the marketing content. As well as the territory in which the marketing of the extracts may take place.

- If marketing is allowed on the internet then automatically it is a global market.
- There may also be an issue as to whether any translations or other language versions are authorised of the extracts for marketing purposes.
- For more on these subjects please look at the main clause headings **Assignment Period**, **Exclusivity**, **Licence Period**, **Term of the Agreement**, **Territory** and **Rights**.
- An additional contractual restriction may be that the other party shall not seek to register any rights to any copyright, intellectual property rights or trader marks or any other rights at any time.
- A person or company may require a clause in which a licensee confirms that they will not use any original extracts or create any new marketing material which is likely to lead to a civil or criminal action or which is offensive, obscene, derogatory or defamatory.
- In the United Kingdom under the legislation marketing is defined in a rather limited way as meaning in relation to products or articles that it is being sold, let for hire or offered or exposed for sale or hire in the course of business.
- In the present existing global markets this is an inadequate description which fails to address any core issues of marketing.
- Where you are appointing a distributor or licensee you do not want to be in a position where a book or product is not published or distributed or sold and there is no clause upon which you can rely to show that there has been a breach.
- The more specific you are in an agreement then the more clauses you have to rely on at a later date to show that the other party did not comply with the terms of the agreement.
- You may, as a part of the agreement, also require a licensee or distributor to arrange meetings and regular update reports on the marketing and sales. As well as providing samples of all the material for your own records.

Drafting clauses relating to marketing

- There may be a clause where an agent agrees to use its best endeavours to promote and market and obtain orders as in **A-Z M.164** in Services.
- Note this is much more onerous than reasonable endeavours.

- Note there is no performance sales target which would be more effective. If the target was not achieved then this failure could be linked to the termination of the agreement.

A-Z M.164
The [Agent] agrees that it shall use its best endeavours to promote, market and obtain orders for the [Product] based on the [Samples] throughout the Territory for the Term of this Agreement.

- In **A-Z M.038** in Film and Television the licensee B confirms rather than undertakes that it will use its best endeavours.
- Here the focus is on the exploitation of the rights granted and the money. That is to achieve the maximum defined gross receipts.

A-Z M.038
The [Licensee] confirms that it shall use its best endeavours to exploit the rights granted under this Agreement and to achieve as far as possible the maximum Gross Receipts.

- In **A-Z M.070** in General Business and Commercial the record company has agreed that there is a minimum marketing budget in respect of each product in this case an album.
- A minimum budget could be set for each type of format.
- Note there is no detail on how the marketing budget will be actually spent.

A-Z M.070
The [Record Company] agrees that the minimum marketing budget with respect to each [Album] shall not be less than [figure/currency].

- There may be specific targets set as in **A-Z M.097** in Merchandising. Here the licensee undertakes to use its best endeavours to achieve a fixed sum of defined gross receipts.
- There is also an undertaking that the marketing budget for the first calendar year shall not be less than a fixed sum.

A-Z M.097
The [Licensee] undertakes that it shall use its best endeavours to exploit the rights granted under this Agreement and as far as possible to achieve a level of Gross Receipts of not less than [figure/currency] with a marketing budget for the first calendar year of not less than [figure/currency].

- It is far less onerous to agree to reasonable endeavours as in **A-Z M.117** in Publishing.
- In this clause it is set out what is expected of the publisher and what they must do rather than a general reference to marketing and promotion.
- This clause is not usual but by raising these issues in negotiations it forces the publisher to disclose the marketing plan and strategy to you even if it not adopted in an agreement.
- The publisher shall use its reasonable endeavours to:
  - Distribute a flyer to a minimum number in 1.1
  - Ensure the work is accurately described in its marketing in 1.2
  - Distribute review copies to a minimum number in 1.3
  - Advertise in specific newspapers or magazines in 1.4
  - Promote the work on all trade stands and produce major promotional material in the first year in 1.5
  - Have a minimum first print run of copies for sale in 1.6
  - Ensure the content and cover of the work is of a high professional standard in 1.7
  - Ensure any quotes and statements regarding work from third parties are approved by the author in 1.8
  - There is a minimum marketing budget in 1.9
  - There are a minimum number of review copies for author to distribute in 1.10
  - That marketing shall be in agreed specified media and formats in 1.11
  - Specified release or publication dates in different formats or countries in 1.12

- In an assignment in **A-Z M.073** in General Business and Commercial. Assignor A acknowledges that assignee B shall have the sole discretion in respect of the manner and method of marketing. Assignee B will therefore make all the decisions and is not required to consult with assignor A.
- The clause is deliberately wide to include the rights assigned and the product or service.
- The clause applies to all forms of marketing, promotion advertisement and distribution.

A-Z M.073
The [Assignor] acknowledges that the [Assignee] shall have the sole discretion as to the manner and method to be used in marketing, promoting, advertising and distributing the [Product/Work/Services] in respect of the rights assigned under this Agreement.

- Where a distributor is selling DVDs as in **A-Z M.010** in DVD Video and Discs.
- Then the focus is on the fact that it is the distributors' decision to decide the:
  - production schedule
  - release dates
  - subscription rental and sale prices
  - discounts and promotional offers
  - marketing

A-Z M.010
The [Distributor] shall at all times have the right at their sole discretion to decide upon the production, schedule, the release dates, the supply, subscription, sale, rental, and distribution prices, discounts, and price reduction strategy and promotional offers and the marketing of the [DVDs/Discs].

- In an agreement for a project as in **A-Z M.204** in University Library and Educational.
- Contributor A has agreed that institute B has sole control of the project and sole discretion to make all the decisions for all the following matters regarding the project, work or event to be created:

  - management
  - production
  - budget
  - development
  - design
  - publication
  - launch date
  - advertisement
  - promotion

A-Z M.204
The [Contributor agrees that the [Institute] shall at the [Institutes] sole cost have the entire control and discretion as to the management, production, budget, development and design, publication, launch date, advertisement and promotion of the [Work/Service/Event].

- In an agreement one company may agree to incur all the marketing costs as in **A-Z M.053** in Film and Television.
- In this clause in 1.1 production company B has undertaken that it shall be solely responsible for all costs incurred not just in marketing but in the development, production, distribution, marketing and exploitation of the film and any parts in any form.
- The addition of the words any parts means that this also applies to extracts.
- The addition of the words any form means it applies to any medium.
- The production company has agreed in 1.1 that the author A is not and will not be liable for any such payments.
- Note that in addition in 1.1 the production company cannot deduct such sums from the gross receipts and try to recoup the sums.
- In 1.2 production company B agrees to provides copies and samples at the production company's sole cost to author A.
- Samples include publicity, promotional, advertising and packaging material which is much wider than just marketing.
- In 1.3 there is an obligation on production company B to update author A on production, exploitation and release dates.

A-Z M.053

1.1 The [Production Company] undertakes that it shall be solely responsible for all costs incurred and sums due in respect of the development, production, distribution, marketing and exploitation of the [Film] and parts in any form. That the [Author] is not and will not be liable for any such payments and that the [Production Company] shall not be entitled to deduct them from the Gross Receipts.

1.2 The [Production Company] agrees to provide copies and samples at its own cost of any publicity, promotional, advertising and packaging material in respect of the marketing and commercial exploitation of the [Film] when requested to do so by the [Author].

1.3 The [Production Company] agrees to keep the [Author] informed of the progress of the production and exploitation in any media. The [Author] shall be advised of all proposed release dates in any media at any time in the Territory.

- In **A-Z M.160** in Services the company has agreed to provide samples of proposed publicity, promotional, advertising and packaging material if they are requested by the agent.

A-Z M.160

The [Company] agrees at its own cost and expense to provide copies and samples of any proposed publicity, promotional, advertising and packaging material in respect of the [Product/Work/Services] upon request by the [Agent/Artist].

- In **A-Z M.206** in University Library and Educational the consortium has agreed that it shall be liable for the cost of:
  - marketing and promotion
  - administration
  - copyright, contract and intellectual property rights clearances and payments
- Note the liability is to pay those costs incurred by the institute for the conference.
- The clause implies or is ambiguous as to whether the consortium is accepting liability for other costs such as insurance, venue costs and hospitality.

A-Z M.206

The [Consortium] agrees that it shall be liable for the cost and expenses of any marketing and promotion and administration and copyright and contractual and intellectual property rights clearances and payments which may arise in respect of the [Conference] which are incurred by the [Institute].

- In a publishing agreement with an author as in **A-Z M.112** in Publishing.
- Publisher A may agree that it will have entire control of the:
  - format, paper, binding, typography, layout and design, including the jacket
  - production, publication, distribution and advertising
  - price and terms of sale
- There is no mention of the cost in this clause and whether such sums can be deducted under sums due to the author or whether they are incurred at publisher A's sole cost.
- Publisher B has also agreed to send a copy of the proposed jacket, biographical material and any marketing quotes to author A before publication in order to consult with author A.

A-Z M.112

1.1 The [[Publisher] agrees that it shall be solely responsible for all costs incurred in developing, printing, binding, publishing, distributing, advertising, promoting, marketing and exploiting the [Work] including all associated material and that no sums shall be deducted from the payments due to the [Author] under this Agreement.

1.2 The [Publishers] shall send a copy of the proposed jacket, biographical material and any marketing quotes to the [Author] in advance of publication of the [Work] for the purpose of consulting with the [Author].

- A company may agree to be responsible and liable for all the costs incurred in order to create, market and sell a product as in **A-Z M.098** in Merchandising.
- Company B undertakes that it shall be solely responsible and pay the costs for development, production, manufacture, distribution, marketing, promotion, advertising and exploitation of the products.