



# Consultation Paper

## Broadcasting and New Digital Media: Future of Content Regulation

JANUARY 2008

New Zealand Government

Te Kāwanatanga o Aotearoa



**SUBMISSION FROM THE SCREEN PRODUCTION AND DEVELOPMENT  
ASSOCIATION (SPADA)**

**TO**

**THE MINISTRY FOR CULTURE & HERITAGE**

**ON**

**REVIEW OF BROADCASTING and DIGITAL MEDIA: FUTURE OF CONTENT  
REGULATION**

**04 April 2008**

## INTRODUCTION

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Preliminary

1. The Screen Production and Development Association (**SPADA**) welcomes the opportunity to respond to the *Broadcasting and Digital Media: Future of Content Regulation* (**Discussion Paper**) issued by the Ministry of Culture and Heritage (**MCH**) in late January 2008 ([www.mch.govt.nz](http://www.mch.govt.nz)).
2. SPADA has no objection to the release of its submission in its entirety.

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## **Background on SPADA**

1. Formed in 1982, SPADA is a non-profit, membership-based organisation with three full-time staff.
2. SPADA's membership base currently stands at 360; representing businesses involved in screen production and post-production, broadcasting, distribution, lawyers, and service providers. Members include WingNut Films, TVNZ, Buddle Findlay, Maori Television, South Pacific Pictures, Sticky Pictures, Park Road Post Production, Great Southern Television and Gibson Group.
3. SPADA's commitment is to the screen production industry's commercial and cultural "health", with a continued focus on the importance of content creation as the industry faces the challenges and opportunities a digital environment presents practitioners.

## Questions And Responses

### **Questions of scope**

In New Zealand it is possible to make complaints about broadcast content – to broadcasters and then, if unsatisfied, to a regulatory agency. The first set of questions asks about the scope of content regulation: what regulation should be concerned with, and whether it should extend beyond conventional broadcasting. It also asks whether different levels of regulation should apply to content delivered in different ways – for example content that we choose to receive at our demand, compared with content broadcast generally.

### **What the regulation of content should be concerned with**

In regulating broadcast content, certain concerns are common internationally. These include the protection of minors, the portrayal of violence, accuracy in reporting, the protection of privacy, and the fair treatment of people who are the subjects of programmes.

**Q 1:**

**What concerns are appropriate to be addressed through content regulation?**

*SPADA believes the current list of content regulations adequately balances the right of freedom of expression with the public good. The definitions do not need to be significantly widened.*

## **A single regime?**

At present the content regulation regime in New Zealand established under the Broadcasting Act 1989 only applies to conventional, scheduled television and radio broadcasts. But internationally, broadcasters are increasingly using digital technology to make their content available in other ways (such as over the internet or on mobile devices), at the demand of individual viewers and listeners. Some content providers are only operating on these newer platforms (for example, radio stations that only podcast, TV stations that operate only over the internet, telecommunications companies that provide content only on mobile devices).

**Q 2:**

**Should a single regulatory regime apply to all broadcasting-like content no matter how it is distributed?**

Yes / No

Please give reasons for your answer.

*The paper sets out clearly the potential for confusion and inconsistency.*

*In the future world of integrated content, a 'publisher' such as a broadcaster, newspaper or a telecommunications company will be distributing substantially the same content via different media channels.*

*For example, TV channels not only broadcast on Free To Air using a fixed schedule, they will also be text-publishers on the web, and provide audio-visual content that can be accessed on demand. Traditional newspapers are now available online, with audio-visual content attached, and may in future run their own IPTV or niche channels.*

*This vertical integration of content makes it anachronistic to continue to regulate as though print, broadcasting and the internet are separate.*

*We do argue that 'self-regulation' should always be the first line in the sand, as current systems allow in broadcasting, print and advertising. (Although a formal self regulation of internet content is missing).*

*However, vertical integration may in the future create complicated scenarios (for example) where a complaint against (say) a television broadcast is upheld, but a complaint cannot be pursued against the same material appearing on the internet, even though many more people saw it there.*

*Or for example, a separate agency could apply different standards to one media, when exactly the same facts or footage has been used in another.*

*Not only is this confusing for the public or people who may wish to complain, it is a nightmare for major content 'publishers'.*

*So while self-regulation is the first line, there may be a need in the future to work towards a single agency (like the BSA) providing the backstop that deals with substantive complaints not addressed adequately by the publisher or industry sector, and this standards regulator should be a single body applying consistent standards for complaints that cannot be dealt with by industry self regulatory mechanisms.*

**Q 3:**

**Should the same general regime apply, but with a less strict or detailed code for content received on the demand of individuals than for content broadcast conventionally?**

Yes / No

Please give reasons for your answer

*The ability to choose is the relevant factor here.*

*For example, if an on demand news clip purports to be or has the hallmarks of unbiased news reporting, it should then be judged against the same standards for material that is widely publicly available through a scheduled broadcast, as the practical effect on viewers is the same.*

*The 'reasonable person' test may be applied. If a 'reasonable person' has not been adequately informed or warned that content is graphic or biased, and they are offended or misled as a result, then that may constitute a breach.*

**Q 4:**

**Publicly-owned broadcasters have special mandates to set standards of quality (such as the Charters of TVNZ and Radio New Zealand or the legislation of Maori Television).**

**Should their content be regulated differently from the content of private-sector broadcasters or the same?**

Differently / **The same**

Please give reasons for your answer.

*The same.*

*This is not an issue of 'quality', it is an issue of social norms and the Bill of Rights. Public broadcasters broadcast to the same public, and compete for the same audience as private sector broadcasters.*

*90% of TVNZ's funding is commercial, and Maori Television also sells advertising. Public broadcasters should not be forced by regulation to give away any commercial advantage to competitors.*

*Nor would it be possible to use the same standards, but apply them 'more' to a public sector organisation. How much more 'fair' would RNZ need to be than TRN – 15% more? 20% 'more'? How could this be judged, and why should the commercial network get-away with a lower standard?*

## **Broadcasting-like material provided from outside New Zealand**

While an increasing variety of broadcasting-like content is being made available through various media from New Zealand sources, much else is available to New Zealanders directly from overseas sources, especially via the internet. Of this content, some would not meet New Zealand's broadcast standards if it was broadcast from here. Some may violate other laws, such as the Crimes Act or the Film, Videos and Publications Classification Act (for example, material which encouraged the commission of crimes or incited racial hatred).

It is difficult to regulate such overseas-sourced content. Some measures that have been used in other countries include: instructing local internet service providers not to provide access to certain content; or requesting regulatory authorities in other countries to take action to prevent certain content being provided in the country of origin. Other regulatory approaches overseas have included the subsidised provision of internet filtering software to the public, and an increased emphasis on media literacy, so that people are better enabled to identify and avoid undesired content.

If overseas-sourced content were not regulated at all, it could be argued that New Zealand broadcasters and other providers of content would be disadvantaged. Alternatively, however, there may be an advantage to a local provider's reputation in being seen to uphold standards which other sources cannot be relied on to follow.

**Q 5:**

**Should broadcasting-like content provided to audiences from overseas be subject to New Zealand's regime for content regulation?**

**Yes** / No

Please give reasons for your answer.

*While this will be difficult to enforce in many cases, it is a simple principle to say that if a New Zealand company could not get away with it, neither should a foreign one.*

**Q 6:**

**If you answered yes, what form should regulation take, and who should regulate such content?**

*If the same standards are applied, then those standards already exist and are judged through the BSA, so such a regulation would simply expand the scope of the BSA.*

*What is missing from the total system, is the formal self-regulation by internet companies to deal with the first line of complaints. Although informal self-regulation through user feedback and objections made to individual websites does constitute a form of self-policing, this media probably requires more formal processes.*

## **The role of a regulator**

New Zealand's regulatory regime is mainly reactive – that is, it is mainly concerned with assessing complaints. This next group of questions is about the role an agency involved in regulation might

play. It asks how far an agency should be involved in activities other than ruling on complaints – such as monitoring the broadcasting environment or promoting media literacy. But it starts by asking whether there should be a regulatory agency at all.

## **A regulatory agency vs. self-regulation**

Like several countries, New Zealand has a state agency, independent of government, to determine complaints, when complainants are dissatisfied with a broadcaster's response, and to approve the codes of practice that must be followed by broadcasters. Broadcasters are involved in devising the codes and receive complaints in the first instance. An alternative to this system is for broadcasters to regulate themselves, though still in accordance with legislation. (Self-regulation is already practised in the case of advertising.)

**Q 7:**

**a) Should there continue to be a state agency available in New Zealand to operate a system of content regulation?**

Yes / No

Or

**b) Should broadcasters be able to regulate themselves, within the requirements of legislation?**

Yes / No

Please give reasons for your answer.

*The current, limited form of self-regulation is the appropriate system. The bulk of complaints can and should be dealt with by broadcasters,*

*and if the response is considered unsatisfactory, then the more serious complaints are dealt with by the BSA.*

*This system creates the appropriate balance. It does not unnecessarily increase the size and scope of the BSA to that of a costly bureaucracy, by overburden it with relatively trivial or easily answered complaints.*

### **A broader role for an agency?**

The government receives advice on broadcasting policy and on trends in broadcasting from its officials. Government departments monitor the performance, against their statutory objectives, of the public broadcasters. There is no body *independent* of government in New Zealand charged with the oversight of public broadcasting, or with monitoring whether public broadcasting objectives are being met. New Zealand also does not have the media ownership laws that, in other countries, are used as a means of encouraging diversity or quality in broadcast content.

**Q 8:**

**a) Are the current arrangements for monitoring public broadcasting and the broadcasting environment adequate?**

Yes / No

Please give reasons for your answer

*Largely they are.*

*New Zealand is neither large enough, nor diverse enough to require support the wholesale reform that would be required to create a converged regulator. We consider any approach to create a super-regulator to be dangerous, unwieldy and unnecessary.*

*The problems of a single, Ofcom-style monolith include:*

- *High cost of establishment and a very significant period of uncertainty/destabilization within our industries while it is established*
- *Integration of wildly divergent skills sets, as the skills required to understand and oversee standards (morality and ethics), spectrum (technical and engineering), competition (legal and business) and content funding (creative and policy) are very divergent and each is its own specialist area.*
- *Power-consolidation, as a large single agency would wield enormous and unwarranted power over broadcasting (or “broadcasting like”) businesses, making the regulator the most dominant force in a commercial market*
- *Increased indecision and slower decision making, as a single unit struggles to balance multiple goals; and*
- *Capture of one part of the agency by another part, as one set of goals or policies over-ride others.*

*We refer to SPADA’s response to the Digital Broadcasting: Review of Regulation Papers, in which we argue strongly that policy directions are appropriate for Government to set through a Ministry, but that independent bodies such as the BSA and New Zealand On Air are already established that can deal efficiently and expertly with the independent regulations that are required. While some roles need clarification and adjustment to take into account the changing media environment, content standards is the most untidy area.*

**b) Are there any gaps in the current arrangements?**

**Yes** / No

Please give reasons for your answer.

*This question is largely answered already. There are many potential gaps and inconsistencies in the regulation of content standards, that should be tidied by giving the BSA oversight (as a backstop to self-regulation) of standards in ‘broadcasting like’ content across different media.*

An idea raised in the government’s broadcasting Programme of Action is for an independent agency to play a “watchdog” role in relation to broadcasting in ways that go beyond content standards. Such an agency could, for example, comment on the state of the broadcasting and wider

media environment, conduct research more widely, and make reports to government.

**Q 9 :**

**If you believe that there are gaps in the current arrangements, would such an agency play a useful role?**

Yes / **No**

Please give reasons for your answer.

*We refer to our answer for question 8, and in more detail to SPADA's response to section A – Cross Chain Regulatory Framework, in the response to the Digital Broadcasting: Review of Regulations.*

*A super-agency is an unnecessarily large and heavy-handed reaction to quite limited problems in the sector, which agencies already exist to deal with. An extension of some powers, and consolidation of others, will be quite robust and adequate.*

*In our view, the sector does not need a publicly-funded gatekeeper which will simply compete for power and influence with the broadcasters and telecommunications companies who are engaged in a fast-moving, creative business.*

*New Zealand has a light-handed regulatory regime that is cost effective, and internationally recognised. A super-agency is in our view, entirely a step in the wrong direction.*

**If you answered “no”, what other ways of monitoring the broadcasting environment could be explored?**

*Again we refer to our answer for question 8, and in more detail to SPADA's submission to section A – Cross Chain Regulatory Framework, in the response to the Digital Broadcasting: Review of Regulations.*

*In summary, we believe that policy frameworks and network / spectrum regulation issues are a ministry function.*

*However:*

- *content standards,*
- *content funding*
- *and competition regulation*

*are all very separate, specialist roles that require 'independent government entities' to keep them at arm's length from regular political interference.*

*Bringing them together into a super-agency creates more problems than it solves. In SPADA's view it is likely to:*

- *increase indecision and slow decision-making, as a single unit struggles to balance multiple goals*
- *risks capture of one part of the agency by another part, as one set of goals or policies over-ride others*
- *if it is closely aligned to a ministry, will be accused by media of censorship and political interference in content and moral issues*
- *could easily make 'tit-for-tat' decisions about content distributors, who while arguing about one sphere (eg breaches of content standards) may then fall out of favour in other areas as well.*

## **Media literacy and education**

The current content regulatory regime in New Zealand is essentially protective, although the Broadcasting Standards Authority is also involved in projects to promote media literacy initiatives and education. Some take the view that the way to respond to the greater variety of ways of transmitting content is to place more responsibility in the hands of individuals to make informed choices about what they watch and listen to. Promoting media literacy – an awareness of how broadcasting and other media work and the effects they can have on audiences – can be a way of helping people to make such choices.

**Q 10:**

**Do you favour a stronger role for a state agency in encouraging media literacy?**

Yes / No

Please give reasons for your answer

*At this stage of the review process, SPADA takes no firm view on the need for a media literacy programme.*

*In general, it seems a reasonable idea. We do however take the view that if a programme of media literacy is to be designed and implemented it should be created by an independent agency for public-good content creation (such as NZ On Air). It should not be created/run by the Ministry or a standards agency (eg the BSA) which could later be accused of either political motivation, or trawling for complaints.*

**Q 11:**

**Would a greater emphasis on media literacy be useful to New Zealand audiences in order to identify and avoid undesired content sourced directly from overseas?**

Yes / No

Please give reasons for your answer

*Possibly.*

**Are there any other measures that should be considered?**

## **Media education and violence**

The 2004 Working Group report on TV Violence recommended that the Broadcasting Standards Authority's role be widened to mandate it to undertake an educative and collaborative role with relation to violence on television.

**Q 12:**

**Should these roles be part of the mandate of New Zealand's broadcast content regulator?**

Yes / No

Please give reasons for your answer

*This may be useful to a limited degree. Please refer to Question 13.*

**Q 13:**

**Should it have a similar educative and collaborative role in relation to other matters, such as, for example, the interests of children and young people?**

Yes / No

Please give reasons for your answer

*Again, this may be useful, but to a limited degree. SPADA does not see the need for major changes in this area, as the interests of children and young people are often discussed within the broadcasting sector already. We do believe the BSA has a core function that is appropriate*

*(judging complaints) and that it not should start growing in size to add significant research functions.*

## **The concepts guiding broadcast standards**

Any system of content regulation, whether operated by an agency or through self-regulation, needs to be based on some principles or concepts, to determine *what* is regulated and for what reason. The Introduction to this paper quotes the concepts that the Broadcasting Act requires broadcasters to take into account in maintaining standards: “the observance of good taste and decency”; “the maintenance of law and order”; “the privacy of the individual” - and the principle of balance, by which differing points of view on controversial issues should be aired within the same programme or “within the period of current interest”. The following set of questions seeks your views on these concepts – or alternatives to them.

### **A single set of concepts?**

As noted in the Introduction, broadcasting-like material is appearing in different media, under different regulatory regimes. The first question to answer, then, is whether we want a single set of regulatory concepts to apply, and how *far* it should apply.

**Q 14:**

**Are a single set of broad concepts as a basis for content regulation more, or less, important in an era of increased choice in content and in the ways of receiving it?**

Please give reasons for your answer.

*It has the same importance. Consistent application of standards is important. The widening media choices create a challenge for the system to adapt, but the principles on which the system is based still hold true.*

**15:**

**a) Should the concepts currently guiding the standards applying to broadcasting continue to apply to broadcasting?**

**Yes** / No

**b) If yes, should they apply more widely across the scope of content regulation, - that is, beyond conventional broadcasting?**

**Yes** / No

Please give reasons for your answers.

*The answers are yes, and for reasons we refer to our comments on Questions 2 and 3.*

**c) Are there different concepts that should be added or substituted for those in the Act, and applied either to broadcasting or to a wider range of content?**

*Again with reference to our answers for Questions 2 and 3, the same basic concepts of what constitutes a 'standard' are adequate. The method of delivery of that content should now have a limited effect on decisions about whether the standard has been breached – i.e whether it is 'push' or 'pull' content.*

*However the push/pull decision is also not a fixed line on which a breach of standards can be judged. This will depend on issues that the BSA already takes into account when making broadcasting judgements – how much warning was given about the content, so that people can be informed about whether it is appropriate for their viewing, whether the content is clearly ‘authored’ or is representing itself as objective.*

*If the general public are encouraged to ‘pull’ content, and it breaches standards, then we consider that no different to a breach as though they had watched it free-to-air. If a niche audience is pulling down niche content, fully aware of its contents, that is likely to mitigate against what would otherwise be a standards breach.*

## **Particular concepts**

The concepts in the Act include “good taste and decency”, meaning what people currently think is decent or indecent, or in good taste. An alternative concept might be that of actual social harm, where the concern would be with the likely effect of content on the audience or society at large. (Such a concept, of content that is “injurious to the public good”, is a guiding idea in the Films, Videos and Publications Classification Act.)

**Q 16:**

**Do you have a preference between these two possible approaches?**

Yes / No

Please give reasons for your answer.

*The distinction is appropriate, and reflects the differing level of ‘choice’ – the informed consent implied by buying content (purchasing a book or attending a film) versus the more general acceptance that content will be delivered into your home where it is easily accessible by minors or other vulnerable audiences .*

The current Act includes a principle of balance: “the principle that when controversial issues of public importance are discussed, reasonable efforts are made, or reasonable opportunities are given, to present significant points of view either in the same programme or in other programmes within the period of current interest” (Section 4(1) (d)).

**Q 17:**

**Does this principle, as currently expressed in the Act, remain important in an era of an increasing variety of outlets for information?**

Yes / No

Please give reasons for your answer.

*The current Act guards against media outlets pretending that they have presented an entire picture when they have not. In print also, there is a clear distinction between reportage and editorial, which is entirely clear and appropriate.*

*The issue arises when it is not clear whose views are expressed, or what their motives might be. It is perfectly acceptable to editorialise, or to present an authored view, providing the viewers are clear that this is what they are receiving.*

*There is no reason for that principle to be changed for the online space – if you present your view as objective, then in all fairness, it must be.*

**Q 18:**

**If the principle of balance remains important in conventional broadcasting, should it apply**

**more widely if the scope of regulation is widened  
beyond conventional broadcasting?**

**Yes** / No

Please give reasons for your answer.

*This question is answered in comments on Question 17.*

**Q 19:**

**To what extent is the achievement of  
accuracy dependent on the availability of a balance  
of views**

**a) within a broadcast programme, or other  
audio-visual content?**

*The question of a balance of views relies on the context in which the material is provided. There is no need to change the requirements as they currently relate to broadcast programmes. It should be clearly understood that a news or current affairs programme, or documentary, should acknowledge or specifically report, alternative views.*

*The exception will be for documentaries that are clearly authored, and declare openly they represent the opinion of a presenter or director.*

*In other light-entertainment programming, there are requirements to make it clear if content is commercially funded.*

*These distinctions mirror the requirements in print media that news, editorial opinion, and advertorial are clearly delineated and interests are declared.*

*Other audio-visual content must surely be held to similar standards. If a piece of media suggests by context or statement, that it is a true or full account, then it must fit the same standard.*

*If it is clearly labelled as editorial or advertorial, then different standards may apply.*

*The context is highly important, and probably should pass the 'reasonable person' test. Would a reasonable person have cause to view this material without realising what it is, and be misled?*

*Clearly, the easiest way for content creators to avoid confusion (or censure) is to acknowledge different viewpoints within their programme or audio-visual content.*

**b) across broadcast programmes, or other content,  
by the same provider of content?**

*This may be considered adequate in certain circumstances but should not constitute an absolute defence. Content providers who have not declared themselves either editorial or advertorial in nature, should always be mindful of presenting balance in a manner that is easily accessible to viewers of the first programme or piece of media.*

**c) across the media as a whole?**

*In reference to (b) this is probably not an adequate defence if the programme or content is presented as objective.*

*There may be an exception for short-form factual content (for example current affairs clips provided for mobile downloads) provided that the viewer is clearly aware they are seeing a portion of the 'story', and where they can find either opposing views or a total report.*

## **Other ideas and comments**

**Q 20:**

**Do you have comments on aspects of content regulation that are not covered by the questions above? If so please include them here.**

*SPADA's only comment would be, standards change over time, and are affected by changes in media; however, standards should be maintained regardless of those changes.*