



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

TO

**THE MINISTRY FOR CULTURE & HERITAGE AND THE
MINISTRY OF ECONOMIC DEVELOPMENT**

ON

DIGITAL BROADCASTING: REVIEW OF REGULATION

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INTRODUCTION

Preliminary

1. The Screen Production and Development Association (**SPADA**) welcomes the opportunity to respond to the *Digital Broadcasting: Review of Regulation (Discussion Paper)* issued by the Ministry of Culture and Heritage (**MCH**) and the Ministry of Economic Development (**MED**) in late January 2008.
2. SPADA's submission details its general comments on the main themes of the Discussion Paper followed by its response to individual questions.
3. 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 and represents businesses involved in screen production and post-production, broadcasting, distribution, lawyers and service providers. Members include WingNut Films, TVNZ, Buddle Findlay, Māori Television Service, 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 focus on the importance of content creation as the industry faces the challenges and opportunities of a multi-platform digital environment.
4. Improving terms of trade is one of SPADA's key policy objectives, as strengthening the economic conditions of New Zealand screen production companies contributes to building sustainable business models. In April 2007 SPADA successfully negotiated new terms of trade with NZ On Air: the Producer now retains 75% of programme sales income with NZ On Air retaining 25%. This represents a 100% reversal of NZ On Air's previous recoupment position. SPADA is currently engaged in terms of trade discussions with broadcasters.
5. SPADA believes a strong, sustainable independent screen industry is essential in order to generate quality ideas for new programming for New Zealanders. While most of the discussion paper is written from a viewer perspective, SPADA believes that what is best for New Zealand viewers is also best for the independent screen industry.
6. SPADA believes New Zealand viewers want to hear their own voices and see their own stories and experiences on New Zealand screens, regardless of the technology. A vibrant independent production sector is essential to ensure that this continues to happen across all viewing platforms.

RESPONSE IN PRINCIPLE TO KEY THEMES

(Addresses Questions 1.0 through to 3.2)

Local Content

1. SPADA supports the Diversity Scenario as described in the Discussion Paper:

*“The strength of plural, effective broadcasting and telecommunications markets in the ‘diversity’ scenario supports a **strong presence for local content**¹ that meets the needs of diverse social and cultural groups” (Page 6).*

2. SPADA’s interests are in the creation of diverse, new local content through a combination of economic regulation and contestable funding mechanisms.
3. Incentives to screen and invest in local content need to be addressed. The current contestable funding mechanisms designed to assist the creation of local content, through NZ On Air and Te Māngai Pāho, need to be retained, strengthened, updated and extended.
4. NZ On Air’s contestable funding model (as mirrored by Te Māngai Pāho with respect to Māori content) is extremely successful. International policymakers agree it is an effective policy tool for funding, as it ensures the viability and sustainability of local and public service content on screen. Therefore, SPADA believes it would be preferable structurally for NZ On Air to administer TVNZ’s direct government funded Charter money to ensure:
 - (a) transparency in the application of these funds
 - (b) efficient use of these funds
 - (c) the widest “pool” of ideas for Charter-funded programming is accessed and considered
 - (d) increased diversity and depth of subject matter is made available to New Zealand audiences.
5. SPADA also thinks it is inappropriate (structurally) for a government ministry to administer funding direct to a broadcaster, as the arm’s length principle between government and broadcast funding needs to be maintained.
6. SPADA is opposed to a single or converged funding entity for the funding of new content for the audio-visual sector. Experience demonstrates that different “gate-keepers” to funding creates greater diversity of content.

¹ Reference in this submission to “content” refers to broadcast-like content that is potentially available to viewers on a multiplicity of platforms.

Regulation

7. SPADA believes economic regulation mechanisms need to be linked to content regulation in a converging digital environment in which no tangible obligations on broadcasters exist to screen local content.
8. However, SPADA does not support the establishment of a single regulator, as the integration of economic and cultural regulation may cause tension due to the requirement to perform and deliver on divergent outcomes. Historically, due to New Zealand's lack of regulation, commercial imperatives have won out when up against cultural outcomes.
9. SPADA agrees that any change in regulatory mechanisms should:
 - (a) involve the minimum intervention necessary to achieve desired objectives
 - (b) be open and transparent
 - (c) be technology neutral, sustainable and adaptable to technological and other changes
 - (d) deliver benefits to as many New Zealanders as possible.

Public Service Broadcasting

10. The role of public service broadcasters is vitally important to this discussion and yet it is not specifically covered in the paper. SPADA regards this as problematic and wishes to comment upon its role, as well as "public broadcasting" per se, a concept which cannot necessarily be equated with local content.
11. SPADA believes it is timely to consider ways in which NZ On Air and Te Māngai Pāho can provide further incentives for, and obligations on, broadcasters to ensure a commitment to commissioning and broadcasting local content across all platforms. If content is king in the digital age, mechanisms must be found to encourage New Zealand content to be a central focus for our publicly funded broadcasters.
12. Therefore, SPADA would support the re-introduction of a licensing system for broadcasters, in addition to the existing spectrum management and leasing system. Provision of "public good" services by pay platforms on all electronic media should be explored, as New Zealand is unique (and it is suggested, not in a positive way) by international standards in allowing Pay TV operators to "free ride" due to the lack of obligations around local content in return for licences.

Networks

13. Finally, SPADA believes access to networks is crucial. At present, funding is dependent on a broadcaster's commitment to broadcast the proposed programme. Whilst this makes commercial sense, without any regulatory requirement for the broadcaster to screen local content, there is an increasing tension and imbalance between the cultural imperatives of NZ On Air and Te Māngai Pāho and the commercial imperatives of broadcasters.

(A) REGULATORY FRAMEWORK: CROSS-VALUE CHAIN ISSUES

General Comments

1. SPADA supports a degree of consolidation and updating of current functions with regard to some agencies, however, it does not support the creation of a single regulator. Some of the disadvantages would be:
 - i) High cost of establishment
 - ii) Potential uncertainty within the industry and marketplace during the establishment of the new single regulator. This period of uncertainty could be quite lengthy as new legislation will have to be passed to allow for this type of regulatory reform
 - iii) Integration of economic and cultural responsibilities may cause tension due to the requirement to perform and deliver on divergent outcomes. Historically, due to New Zealand's lack of regulation, commercial imperatives have won out when up against cultural outcomes.

2. However, SPADA believes measures need to be introduced to protect and encourage the broadcasting of diverse local content in a digital environment; measures that obligate or encourage network operators to (whether owners or licensees) deliver cultural outcomes.

3. Due to New Zealand's lack of regulation in the broadcasting sector, market distortions have occurred in the imbalance between commercial and cultural imperatives. There are two main factors that have created this imbalance:
 - i) Pay TV companies operating in the market with no obligation to screen local content; and
 - ii) the public service broadcaster being obligated to return a dividend to government.

SPADA believes government intervention is required in this area to protect the delivery of local content to New Zealanders.

4. Therefore, while SPADA believes a single regulatory agency is unnecessary, we do support the introduction of effective measures to ensure New Zealanders have access to a diversity of local content in a digital environment, and that there is some certainty around levels of local content, particularly in high risk, high cost genres.

Regulatory Functions

1. SPADA believes four distinct areas exist (outlined below) in the broadcasting regulation environment. At present some of these areas have a self-regulatory lever in place (e.g. ASA, Press Council). However, if these self-regulatory levers are not functioning effectively, or further recourse is sought, SPADA believes they should be backed up by the existence of a single regulatory body, which enforces areas of standards of broadcasting and “broadcasting like” content and behaviour.

3. SPADA sees regulatory functions operating in four areas:

- (i) **Spectrum Regulation/Licensing**
- (ii) **Content Funding**
- (iii) **Content Standards**
- (iv) **Competition/Monopoly Regulation**

(i) **Spectrum Regulation/Licensing**

The technical and administrative functions of allocating broadcasting and telecommunications ‘space’ are best carried out at a ministry level in accordance with long term government policy.

SPADA believes the process for granting rights to network owners and “broadcasters” should include mechanisms for requiring cultural outcomes. The State broadcaster is still accountable to its government shareholder to provide local content, although there are no fixed rules or penalties, and the company must also return a dividend. There is no obligation on other free-to-air or Pay TV operators to provide any element of a “public good” service or to provide local content. This regulatory regime – or lack of it – is out of step with most other countries and should be addressed.

Pay TV operators in Australia must spend 10% of their total acquisitions budget on Australian drama production. SPADA believes similar mechanisms are needed in New Zealand (for factual and non-factual programming) to ensure locally sourced and inspired content is easily accessible to all New Zealanders.

We also note that in comparison with Australia, Pay TV penetration is higher (44% compared to 25%) and more profitable (Sky TV has been in profit since 1997, Foxtel’s maiden profit was in 2006).

However, the oversight of content is a specialist area that rightly belongs with a separate agency.

(ii) Content Funding

As stated previously, SPADA supports the contestable, independent funding model, which is (as the paper notes) positively regarded around the world. It is a robust and proven model that generates good outcomes for New Zealand audiences.

Both NZ On Air and Te Māngai Pāho have well established roles in the broadcasting environment. Their existence creates a healthy buffer between:

- the competitive and commercial imperatives of most broadcasters
- the cultural and social goods that are required by Government; and
- the creative and business concerns of content producers.

The recently introduced Copyright legislation, which broadens NZ On Air's definition of broadcasting to include funding for new platforms is welcomed. However, SPADA believes that funding for local content programming with multiple platforms should always give priority to free-to-air broadcasting outcomes.

In this area of regulation, where creative and cultural concerns are at play, it is important to ensure decision-making processes are at arm's length from ministry level government.

In addition, TVNZ's charter funding and Radio New Zealand's programme production funding have substantially similar aims to that of NZ On Air and the audit and oversight of those should be returned to NZ On Air, for the sake of efficiency, transparency and independence.

Consideration should be given to making NZ On Air (currently an autonomous crown entity) more independent from Government (as an independent crown entity) to further ensure the clarity of the arm's length principle from government.

(iii) Content Standards

A number of organisations apply different standards to information distributed in different media; therefore SPADA agrees that convergence of media (where the same story is told via multiple channels – broadcasting, mobile, internet, print) will lead to consumer confusion about where to go to lodge a breach of standards complaint. SPADA believes that this area requires a clearer framework than currently exists.

SPADA also takes the position that the first point of contact for a complaint should always be the distributor. That means that self-regulation is the starting point. This is because many complaints are effectively dealt with by industry sector organisations, reducing both the requirement on Government funds and the size of the bureaucracy. It

also frees up Government funded regulators to deal more effectively with the more substantive complaints and standards breaches.

Where substantive complaints are being laid however, it makes little sense for there to be separate mechanisms for different media, as the company or person that generated the offending material will often (and already do) distribute the same content through many channels.

For example a traditional television broadcaster will now generate not only a television signal, but also text reports and web-based video streams, from the same content. Newspapers, traditionally a print medium, are now web products that often come with audio-visual content. Technology advances (including PVRs, VOD, mobiles and soon IPTV) mean that television classifications based on evening “watershed” time zones are anachronistic.

A more coherent system for classification and content standards is needed, and appropriate, if for no other reason than (for example) a breach of privacy complaint should be measured by the same standards whether it occurred in print, on the web, or on an audio-visual platform.

SPADA does not have a firm view as to whether the functions of a standards regulator for all media should be rolled up inside the BSA, but agrees that standards and classifications is an area where consolidation is required. SPADA believes the regulator in this area must be statutorily independent of government and divorced from network regulation to ensure it is protected from undue political or lobbying pressures.

(iv) Competition/Monopoly Regulation

SPADA believes it is both sensible and desirable to keep competition/monopoly regulation completely separate from other functions, and in general, there is a good case for leaving it with the Commerce Commission. There is no compelling reason for mirroring those functions and costs in a new organisation.

Also, structurally, SPADA asserts that the independence of monopoly regulation is vitally important. In the case of an Ofcom style agency or another super-regulator, the constant contact and lobbying of major broadcasting or telecommunications companies with the regulation body could lead to industry capture, or disagreements in one policy area affecting the functions of another. At the least it may impair the independence of decisions on monopoly practices if quasi-judicial judgments are made in the same corner as regulations are being formulated.

Having said that, we see a statutory requirement for the Commerce Commission to consult with the regulation, standards and content authorities in any case of anti-competitive practice, or abuse of a dominant position, as the broadcasting industry delivers cultural benefits that are not recognised by a purely economic terms of reference. The expansion of the role of the Telecommunications Commissioner may be the most effective, and logical approach.

Question 4.1: Should New Zealand consider one of the three options for revised institutional arrangements?

1. New arrangements are needed, but as outlined above, SPADA believes the four main functions of Spectrum/Licensing, Content Standards, Content Funding and Competition Regulation are distinct and should be kept separate. Content Standards and Content Funding must be kept independent from ministerial or government influence.
2. However, it does seem logical to consolidate all regulators/agencies within each of the four functions so that rules and regulations applying to multiple media platforms are streamlined, and that “broadcast like” content and services are treated consistently regardless of the delivery device (mobile, computer, television etc.)
3. Also, diversity of content in a small domestic market is more likely to be achieved by monetising the supply of diverse content and services by funding content makers. Diversity is not created by adding more and more competition in distribution, where smaller and smaller niche audiences are carved off and served with ever-cheaper content.
4. SPADA also believes a regulatory regime that rewards broadcasters for use of local content (particularly high-risk, high-cost genres such as drama, children’s and documentary) either with access to additional funding or some form of rebate/tax offset is desirable. An incentive of this kind, in conjunction with a penalty (time-off air or enforced “public service” content screening for a number of hours if targets are not met) mirrors an Australian model designed to ensure the survival of this type of at risk content.

Question 4.2: Which of the above roles would fit within the responsibility of a converged regulator or a single regulator?

1. As above, SPADA does not support a single regulator. Some convergence is likely to be needed to deal with cross-platform regulations, but we disagree with some of the options outlined in the discussion document.

2. Specifically:
 - Content Standards should not be part of a Government controlled regulatory body's functions, it must sit separately, for reasons stated above.
 - Media literacy is a function for those with particular concerns, such as copyright infringement, on behalf of content creators (eg Copyright Council and the education sector). A media literacy campaign run by either a ministry or complaints/standards agency runs the risk of making complaint processing the primary focus, rather than the final back-stop it should be.

Question 4.3: Would it be appropriate for a single regulator to have both economic and cultural responsibilities?

1. No. SPADA believes economic and cultural responsibilities are distinct, with different aims, and different levels of intervention from government.

Question 4.4: If approach A were adopted, should an extended BSA and Telecommunications Commissioner have additional roles and responsibilities?

1. In accordance with our general comments, there is likely a need for additional roles, some consolidation of agencies and rationalisation of functions.
2. SPADA believes the Telecommunications Commissioner should include regular market reviews as input to competition determinations made by the Commerce Commission. All agencies should be communicating areas of common interest. The content standards agency (BSA) and the government funding agency (NZ On Air) should keep the licensing/spectrum agency informed of content distributors' performance, as commitments to local content levels and broadcasting/media standards should have a bearing on regulation and licensing.
4. Few formalised checks and balances are currently in place to ensure cultural responsibilities are taken seriously by network owners/licensees. In the absence of a quota, this anomaly needs urgent attention. Once again though, SPADA does not believe this necessitates the establishment of a single agency - simply enhanced reporting between agencies.

Question 4.5: How could the relationship between a single regulator and the Commerce Commission be defined and managed?

1. SPADA does not support the notion of a single regulator or super-agency.

2. The question also asks whether the two (a single regulator and the Commerce Commission) would be required to work together, or could investigate breaches separately?
3. The very question highlights the problem – why create a new agency to do the same job as an existing one? There is no need to confuse the market by having two agencies either administering their own competition regulations, or approaching the same regulations from different angles.
4. However, the question further asks who should have “primacy” and could an agency “refer” issues to the Commerce Commission. In our view, the ability of the regulation agencies to refer cases to the Commission, and the requirement of the Commission to take account of/consult with the other broadcasting agencies, is an important inclusion in a system updated as we propose.
5. We note the Telecommunications Commissioner already has powers to investigate issues as he sees fit, and that one of the Commerce Commission’s functions is to ensure that “regulated industries are constrained from earning excess profits, face incentives to invest appropriately and share efficiency gains with consumers”.
6. We note further that the separation of Kordia (formerly Transmission Holdings) from TVNZ and the structural separation of Telecom, have likely dealt with the biggest issues of access to transmission networks. Future competition issues, or abuses of a dominant position, will likely lie in access to electronic programme guides, set-top boxes, and contracts between network owners or content aggregators, and their suppliers (this area is discussed further in Question 7.1). These are useful areas for someone like the Telecommunications Commissioner to oversee.

Question 4.6: Some overlap of responsibilities does exist in other countries, such as the US and UK? Should an overlap be contemplated if a single regulator were established? If so, how might it be made workable?

1. In comparison New Zealand has a smaller population, audience and tax base. For the sake of efficiency, the overlap of functions is precisely what New Zealand needs to avoid.
2. SPADA sees no value in spending time and energy making an overlap *work*, when it is far more efficient not to create one.

Question 4.7: Which of the options for dealing with market definitions should be considered in New Zealand?

1. In support of Approach C, SPADA thinks it unwise for a country the size of New Zealand to entirely trust market forces to supply sufficient range and choice of content, or content of national and cultural importance.
2. This is recognised in current government ownership of viable, independent and chartered broadcasting services (e.g TVNZ and Radio NZ).
3. SPADA agrees with the introduction of media ownership rules by introducing levers in content regulation or formal competition requirements that protect against single ownership of the major information channels.

Question 4.8: Should changes to media ownership (including cross-platform or foreign investment) laws be considered to ensure plurality of news / key genre provisions?

1. As outlined in this section's general comments, SPADA believes a regulatory regime that rewards broadcasters (on all platforms) for use of local content (particularly high-risk, high-cost genres such as drama, children's and documentary) either with access to additional funding or some form of rebate/tax offset is desirable. An incentive of this kind, in conjunction with a penalty (time-off air or enforced "public service" content screening for a number of hours if targets are not met) mirrors an Australian model designed to ensure the survival of this type of at risk content.

MEDIA LITERACY

Question 4.9: Should New Zealand establish a national, coordinated media literacy programme? If so, what form should it take, and who should be responsible for its implementation?

and

Question 4.10: To what extent would it be appropriate for a media literacy programme to address issues of internet safety?

1. At this stage SPADA takes no firm view on the need for a media literacy programme. However, it may become more of an issue in an ever-expanding digital environment in which viewers derive more content from on-line sources.
2. In which case, SPADA believes the media literacy programme should be initiated by an organisation with a focus on content creation (such as NZ On Air) in conjunction with New Zealand educators. It should not be created/run by a ministry or a standards agency (eg BSA), which could later be accused of either political motivation, or trawling for complaints.

(B) CONTENT ISSUES

STANDARDS

Question 5.1: To what extent would it be appropriate for administration of the separate content standards functions of the Broadcasting Standards Authority, the Advertising Standards Authority, the Office of Film and Literature Classification and the Press Council, as they relate to broadcasting-like content, to be amalgamated within a single body?

1. SPADA believes, due to the different institutional arrangements of the New Zealand Press Council (NZPC), Broadcasting Standards Authority (BSA), Office of the Film and Literature Classification and the Advertising Standards Authority (ASA), it is inappropriate to amalgamate these entities into a single body.
2. The distinguishing features of these organisations are the statutory basis upon which the BSA and the Office of the Film and Literature Classification Office were established versus the self-regulation of the NZPC and the ASA. The latter two organisations are 100% self-funded by the industry they regulate. A self-regulation arrangement seems to work very well in these areas, and does not appear to necessitate regulatory intervention.
3. However, as outlined in our previous section, although SPADA supports self-regulatory levers where appropriate (e.g. ASA self-funded through the industry and the NPC), a single regulatory mechanism could be explored as an option to ensure there is a “next level” if further recourse is sought.

CONTENT DIVERSITY

Question 5.2: Which of the above options for change do you consider would best ensure diversity and visibility of local content in a digital age? Please give reasons for your views.

1. SPADA supports – in part - Update Existing Arrangements (Approach A) and Restructure (Approach B).
2. SPADA supports the updated Copyright Act allowing funding for broadcasting content on new platforms. It also supports the review and extension of the level of direct and contestable funding to the market. In addition, SPADA would like to see the introduction of mechanisms (e.g. conditional funding incentives, access to content funding to “reward” commissioning and scheduling) to ensure sufficient broadcaster or platform provider investment in local content.

3. As stated in the report, “A key way governments can protect a commitment to New Zealand audiences is by ownership of public broadcasters that have statutory responsibilities to meet the needs of citizens” (p.23 Volume Two).
4. The New Zealand government does have a stake holding in two public television broadcasters: Māori Television Service and Television New Zealand, which in turn have statutory responsibilities. For example, TVNZ is a Crown Company established under its own Act that functions as a public free-to-air broadcaster. Television New Zealand Act (2003) states: “In carrying out its functions, TVNZ’s principal objective is to give effect to its Charter (set out below) while maintaining its commercial performance”.
5. However, as there are no regulatory mechanisms in place to enforce this principle objective, commercial imperatives take hold and dominate the programming and commissioning landscape.

Question 5.3: Do funding bodies require any mechanisms (e.g. incentive-based or obligation-based) not currently available to them to promote diversity, maximum visibility and accessibility of funded programmes?

1. Although SPADA supports self-regulatory levers where appropriate (e.g. ASA self-funded through the industry and the NPC), the self-regulatory lever for local content, The Television Local Content Group (comprising TVNZ, Māori Television Service, TV3, Prime TV, SPADA and NZ On Air) is not working to increase local content levels. Without a regulatory mechanism in place to police or provide sufficient incentives for commercial or public service broadcasters to carry adequate levels of local content this group has no incentive to carry, apart from the commercial and brand value they see in local content. In turn this poses a threat to the health and sustainability of the domestic screen production industry, and to viewer choice and access to local content.
3. Moving into an increasingly competitive environment of digital broadcasting increases the pressure on sustaining high end local production (such as drama, documentaries and children’s programming). These genres are more expensive to produce, and are therefore more vulnerable if commissioning broadcasters are focussed on delivering an audience to advertisers to ensure commercial positioning in a multiple platform, multi-channel environment.
4. SPADA therefore supports the introduction of a mechanism in lieu of a quota on certain types of content (e.g. local and independent productions) and the introduction of content obligations into broadcast licences to create consistent annual levels of local content.

Question 5.4: To what extent would the blurring of boundaries between different segments of the audio-visual sector justify changes to the current structure of funding

bodies (e.g. to avoid the risk of gaps or duplication)? If a converged funding body were established, what might its role be?

1. SPADA does not support Approach C, which proposes establishing a converged funding body to promote streamlined contestability, effectiveness and transparency; however, SPADA supports converging all contestable funding.
2. SPADA believes NZ On Air and Te Māngai Pāho should receive all government funding for local content i.e. re-direct the \$15.1m currently allocated to TVNZ as direct funding to NZ On Air.
3. SPADA supports updating existing arrangements, and extending the level of direct and contestable funding to NZ On Air and Te Māngai Pāho . International regulators have highlighted the efficacy of New Zealand's current contestable funding model as a policy tool, which minimises market distortion and encourages competition for quality.

Question 5.5: What would be the implications of the changes you support for the amount of funding required? How could a significant commitment to private investment in local and other content of public value also be encouraged?

1. SPADA believes the changes supported do not necessarily imply increased funding for local content, but that it would definitely be desirable. SPADA is also lobbying for better terms of trade (currently being negotiated with TVNZ) and for the introduction of a similar producer offset scheme as per the recently introduced Australian model.
2. SPADA believes by increasing the revenue share for producers, and through accessing 20% (for TV) and/or 40% of funding (for film) that production companies will be in a stronger position to attract offshore finance, as well as domestic private finance.
3. **Also see SPADA's response to Question 7.11.**

PUBLIC SERVICE BROADCASTING IN A DIGITAL AGE

General Comments

1. Public service broadcasting has social and cultural objectives in a largely commercial broadcasting environment. However, there has been a tendency in recent years to equate local content with public service broadcasting in the television environment in New Zealand.
2. Until the launch of the Māori Television Service in 2004 New Zealand lacked a true public service television broadcaster as understood in other countries, as TVNZ is largely a commercial broadcaster with public service broadcasting objectives,

approximately 90% funded out of commercial revenues². Increasingly, in a more highly competitive environment its programming, particularly in prime time, has become more commercially driven to the extent that many observers, including SPADA, question whether the so-called “mixed model” of commercial and public service objectives is working or can work.

3. It is true that in most countries the level of funding for public broadcasters is higher than in New Zealand and there is also regulation and/or close monitoring of their public service obligations. TVNZ’s Charter, in which the intention of its public service mandate towards programming is encapsulated, does not impose any tangible obligations on the broadcaster, and its legislation requires it to give effect to its Charter, as its principle objective while maintaining its commercial performance.
4. The NZ On Air commissioned report “*The Future of Public Broadcasting: The Experience in 6 Countries*” (November 2003) concluded: “*Commercial or part-commercial broadcasters are unlikely to broadcast other than commercial programmes unless they are required to by legislation*” (p.8).
5. The report also concluded it was “abundantly clear” the achievement of social and cultural objectives requires intervention and regulation. “*These objectives will not be achieved without such measures, indeed they are likely to be seriously undermined by a broadcasting market left to pursue its own commercial imperatives*” (p.8)
6. SPADA believes that this is a major issue in the current New Zealand television broadcasting market (Māori Television Service being the notable exception); which is likely to become exacerbated in an increasingly commercial, fragmented and globalised media environment.
7. More than 10 years ago, Pay TV and other fully commercial operators gained access to New Zealand’s market without any social good or local content obligations. This was the catalyst for an increasingly competitive commercial environment for TVNZ and other broadcasters. This competition imperative increased commercial programming, which in turn undermined the broadcaster’s public service objectives. As at 31 December 2007 Sky TV was in 44.5% of New Zealand homes and had 720,915 subscribers.
8. As opposed to nearly every other western country, Pay TV operators in New Zealand are able to retransmit free to air channels without paying a cent to copyright owners. For example, in 2001 in Australia, Pay TV operators have to pay copyright owners for the commercial benefit they receive for carrying the free to air channels. It should be noted that TV networks do not own a lot of the content that they broadcast.

² P.26 of Discussion Paper

9. Even after the introduction of TVNZ's Charter objectives in 2003 this commercial imperative continued; although in 2004/05 there was a period of increased investment by TVNZ in Charter funded programmes that had public service outcomes.
10. This domestic environment, vulnerable to international market forces, dominated by cheaper foreign programming, with no tangible local content obligations on any broadcaster, is also one of the most difficult challenges for public broadcasting in New Zealand in a digital environment. Internationally audience behaviour, with the penchant for soaps and reality shows, has made public service objectives much harder to achieve and key high cost, high production value genres, such as drama and documentary have suffered as a result. These trends are even more marked in New Zealand where there are no minimum levels for genres or overall local content quotas.
11. However, the size of New Zealand's population relative to the costs of funding a mainstream, non-commercial, fully public service channel have always been cited as being prohibitive. Therefore TVNZ is required to fulfil dual objectives: maintaining its commercial performance and acting in accordance with its Charter objectives.
12. In the past few years TVNZ's commercial revenues have been increasingly challenged, largely due to the advertising market³, and, TVNZ's commissioning of local content has slightly decreased as it derives most of its operating revenues from commercial sources, and the cost of acquisition of premium international content has increased. The added funding mix of direct government funding for Charter objectives (\$15.1 million in 2007) plus access to contestable funding from NZ On Air (\$47.6m in 2006) TVNZ Annual Report 2006 has not had the effect of increasing or even maintaining TVNZ's first run local content or public service programming. During this period the cost of making programmes has also increased.
13. This has impacted on both viewer choice and on the health of the independent production industry, which has taken a hit in an environment in which the largest New Zealand domestic broadcaster is commissioning less than it previously has been, despite receiving more public funding. In addition much of the local content that TVNZ is commissioning, especially for prime time, is more commercial programming in order to maintain its commercial performance. Unlike in other countries, New Zealand audiences therefore do not have access to a mainstream dedicated public service broadcaster and this curtails their viewing choices.
14. The declining advertising market has exposed the inherent problems in the mixed mandate model, which is most unusual internationally. The inherent flaws in the model

³ ...the decline in some commercial demographics has been cause for concern. Source: Page 4, TVNZ Interim Report 2008.

combined with the relatively low level of funding committed by the government to public broadcasting have led industry stakeholders to question whether the current approach to investment in public broadcasting is having sufficient impact in New Zealand (p27 Discussion Paper). Indeed if the mixed model continues to be a financial necessity for TVNZ, SPADA believes that a focus needs to be on stimulating increasing public broadcasting outcomes across a variety of broadcasters, as well as strengthening the public service broadcaster.

Question 5.6: Which of the options for supporting and promoting public service broadcasting in a digital age do you support and why?

1. Public service broadcasting is one area in which SPADA would support a degree of reform as current arrangements are problematic and not leading to desired outcomes for public broadcasting. SPADA makes the following recommendations:
2. Direct funded government money for TVNZ Charter objectives would be more appropriately administered by NZ On Air as the contestable funding agency. Not only does NZ On Air have the appropriate experience in administering television funding, but its mandate is to ensure diverse, quality programming that reflects New Zealand culture and identity and is seen by as many New Zealanders as possible.

Question 5.7: Would a greater focus on the role of public broadcasters be a more effective means of ensuring the continued accessibility of public service content than spreading content across numerous providers? If so, how might this be achieved?

1. Levels of public funding should be reviewed and increased so that public service broadcasting is strengthened, but not at the expense of contestable levels of funding for local content. Consideration should be given to introducing a regulatory regime that rewards “broadcasters” (whatever the free to air platform) for use of local content and particularly high cost, high risk content (e.g. drama, children’s and documentary) either by means of access to additional funding or some form of rebate/tax. This incentive, in conjunction with some form of penalty (loss of broadcaster licence or enforced “public service” content screening for a specified number of hours if local content targets are not met) would help protect “at risk” content.
2. SPADA believes the government’s requirement for a shareholder return from TVNZ needs to be reviewed. We believe that this is a factor constraining TVNZ’s expenditure on commissioning of local content and in fulfilling its public service broadcasting mandate, particularly in prime time.
3. SPADA acknowledges that investment has been made by the Government in TVNZ’s new Freeview Channels TVNZ 6 and TVNZ 7, which do feature local content and public service content in prime time. However, in acknowledging the opportunities these new

digital channels present to the independent production industry; SPADA would not want TVNZ's Charter objectives to be 100% fulfilled through broadcast on these platforms.

4. TVNZ should move to operating as a "publisher" rather than a producer/broadcaster, i.e. all content other than news and current affairs is produced by independent production companies. This would ensure access to the best ideas and effective financial management of TVNZ including increased transparency as it would need to publicly account for all programming expenditure.

Question 5.9: As viewing patterns change with the proliferation of platforms, and access is often conditional (pay per view or subscription), what expectations should there be for the delivery of publicly funded content through pay platforms?

1. For public policy reasons, given the "free-riding" of Pay TV operators in New Zealand's broadcasting market, public funding for local content on pay platforms should continue to be inaccessible unless programming has a free to air broadcast outcome first.
2. SPADA recommends reviewing the lack of obligation on pay "broadcasters" to provide any element of "public good" service or to provide local content. This would correct a major flaw and inequity in the broadcasting market that has been central to the difficulty in achieving public broadcasting outcomes (see Question 5.7). If local content obligations were imposed on pay TV operators then access to contestable public funding may need to be reviewed, and this could be problematic – in public policy terms – as viewers are required to pay for services. Increased government funding would be needed for NZ On Air in particular.
3. Similarly the question of access to public funding for digital free-to-air platforms other than those operated by TVNZ would need to be considered if some local content obligations were to become a condition of access to public funding.
4. SPADA has said previously that the retransmission of free to air broadcasts should be compensated as in nearly every other western country including Australian, the USA, Canada and Europe.

(C) DISTRIBUTION ISSUES

ACCESS TO CONTENT: DISADVANTAGED VIEWERS

(Questions 6.1-6.4)

1. SPADA believes NZ on Air's funding to support access services (notably captioning services for the deaf and hearing impaired) should be increased to reflect the production of more programming for new platforms.
2. SPADA does not believe it is satisfactory that broadcasters are not subject to any mandatory obligations to provide access services. SPADA believes New Zealand should adopt similar measures or goals (as per international trends) to increase the percentage of programming carrying subtitling by an agreed date (e.g. 2012).

AVAILABILITY OF CONTENT: PREMIUM CONTENT AND SERVICES

Question 6.5: Which of the options (maintain/update/restructure/reform) for ensuring the availability of certain types of content and services across platforms do you support?

1. SPADA supports reform in this area. Anti-competitive behaviour appears to be increasing and the primary mechanism for keeping this in check is by legislative means.
2. SPADA believes New Zealand audiences should have access to events of national importance and cultural significance, by giving priority to free-to-air television broadcasters in acquiring the broadcast rights to premium content.

Question 6.7: If broadcasters or platform providers were required to carry a minimum percentage/amount of certain types or genres, what services or genres should be prioritised? How would such a requirement be workable in a multi-channel environment?

1. As outlined in Questions 5.6 and 5.7, high end, high risk, local content genres such as drama, documentaries and children's programming warrant special attention and should be prioritised. A regulatory regime that rewards broadcasters for commissioning this content and penalises them for not screening a certain amount of new programming in these genres should be examined. This would be related to broadcasters licence conditions.

Question 6.11: Which of the options for dealing with "orphan works" do you support (maintain/update/restructure/reform)? Please give reasons for your views.

1. SPADA's believes the current volume of orphan works does not warrant government intervention.

2. The principle of free and open access of information should be applied here – it is far better that relevant ‘orphaned’ material be re-used than locked away from the public. In a small country with limited yearly production it is usually possible to find the copyright holder.
3. An industry-driven solution is already being discussed for archival content where clearances and chain of title are difficult to establish. This discussion may lead to the establishment of an industry steering group to help recompense rights holders (the most complicated will be actors and musicians) where they have residual rights to broadcast revenues.
4. Some of TVNZ’s archived catalogue cannot be released because of chain of title and clearance issues. If an industry solution to this problem is found, it should not require the establishment of a new agency, but may require some Government funding to compensate rights holders, supported by changes to the Copyright Act.
5. Benefits could be gained by updating the Copyright Act to reflect the principle that a reasonable search for a copyright holder is an adequate defense for a new ‘publisher’. If the copyright holder subsequently emerges, in all-but exceptional circumstances, their entitlements would be limited to those paid to similar content providers. So if – for example - a producer cannot be found to clear an archive clip, but that work is included in a programme, s/he would later be entitled to a fee similar to those paid to other providers of similar standing and similar vintage.

Question 6.12: Would the establishment of a collection agency as an aspect of the regime be workable in New Zealand?

1. SPADA has responded to this question in 6.11. This is a simple area of self-regulation with a legal back-stop.

(D) NETWORK ISSUES

OPEN ACCESS REGULATION

General Comments

SPADA would support the following reform in this area:

- a) Address the current ability of Pay TV operators to bundle channels as a total package for consumers
- b) Explore a mechanism to ensure Pay TV operators “must carry” New Zealand generated local content
- c) A copyright regime to compensate copyright owners for the retransmission of their programmes broadcast on free to air by Pay TV
- d) Pay TV operators “must pay” and should be required to reinvest a percentage of their gross annual broadcasting revenues into the creation of new local content programming (as in the 5% reinvested under the Canadian model or 10% under the Australian model)
- e) EPG providers should have “must list” obligations for public service broadcasters and shouldn’t be able to charge them for the listing.

Question 7.1: Which of the options for ensuring fair access for service providers to digital platforms do you support? Please give reasons for your views.

1. SPADA agrees the dominance of a few players in the broadcasting, Pay TV and telecommunications markets can be problematic.
2. SPADA supports some reform in this area and the development of a formal open access regime for service providers to digital platforms.
3. As noted previously, Kordia has been separated from TVNZ, and Telecom is also being structurally separated.

However, the issue remains of the dominance of the one Pay TV operator in the New Zealand market, which acts as a gatekeeper to new channels. This is because the set top box through which digital signals have to pass controls access and payment for services and consumers are usually only willing to pay for one set top box, therefore new digital channels need to pass through the one gateway to reach an audience.

4. However, the introduction of Freeview is a good move; and it will be interesting to monitor its uptake and see if it arrests the increasing dominance of this operator.

5. SPADA believes this is an area of concern as the dominant Pay TV operator acts as both a network and a content aggregator. Depending on the market penetration of Freeview, SPADA believes this issue may need to be addressed through separating operations, as undertaken with TVNZ and Telecom; potentially offsetting the growth of market dominance by sole operators.

Question 7.3: If must carry provisions were introduced, to which platforms would the obligations to carry services apply (e.g. all pay, cable, satellite, IPTV)? What services should qualify for must-carry status (e.g. public service broadcasters, regional channels?)

1. Pay TV operators should be obliged to carry New Zealand generated local content as previously discussed. The current situation is anomalous.
2. Public service broadcasters and some regional channels should qualify for must-carry status. Concurrently with this must carry provision there needs to be a legislative regime introduced to reward underlying rights holders for retransmission of their work on Pay TV to resolve New Zealand's anomalous situation internationally. See Annex I for SPADA's position paper on this issue: "Retransmission of Free to Air Broadcasts" which relates to s88 of the Copyright Act.

Question 7.4: Should "must pay" obligations be introduced, either in addition to, or instead of "must carry"? If so, how might this work? Which services would it apply to? Would the Canadian version of "must pay" be appropriate in New Zealand?

1. SPADA supports the introduction of either the Canadian version of "must pay" in New Zealand in which cable and satellite television operators must contribute at least 5% of their gross annual broadcasting revenues to the creation and presentation of local programming or the Australian version whereby they contribute 10% of acquisitions budget. This should, as in the Canadian system, be independently administered (possibly by NZ On Air) and dedicated to new independent programming. In the absence of obligations imposed by regulation, Pay TV operators are unlikely to initiate moves to commission local content, especially in high risk genres such as drama and documentary.

Question 7.5: If a "must list" requirement for electronic programme guides were introduced, should this be in addition to or as an alternative to "must-carry". How would such a requirement work in a multi-platform and multi-channel environment?

1. EPG providers should have "must list" obligations for public service broadcasters and shouldn't be able to charge them for the listing. This should be in addition to "must carry".

Question 7.6: Which of the options for ensuring minimum agreed technical standards do you support? Please give reasons for your views?

1. SPADA supports updating existing arrangements by encouraging the industry to co-operate on technical standards in order to promote inter-operability.

Question 7.7: Would the interests of audiences and industry be best served by industry-wide adoption of agreed technical standards?

1. SPADA believes this should be an industry-led issue, due to the speed at which technology advances and New Zealand's dependence on technology developed offshore. However, network inter-operability is desirable and could be encouraged by the government.

Question 7.10: If any new regulatory measures (such as an open access regime) were introduced, would the option of licensing broadcasters, multiplex and/or other platform operators be an appropriate means of monitoring compliance?)

1. Protecting spectrum allocation post-analogue switch off is an important issue. Developments in other countries need to be closely monitored. As previously stated SPADA would like conditions around local content to be embedded in licenses whether it is multiplex licensing or licences specific to a broadcaster. Spectrum allocation for public service broadcasting needs to be protected as a priority, for example in Australia only the ABC and SBS have been committed to use their digital spectrum for additional channels⁴.

Question 7.11: Which of the options to encourage investment in digital content and infrastructure and to ensure the digital broadcasting industries are yielding an optimal economic return to New Zealand, do you support?

1. SPADA believes Approach A should be undertaken.
2. Access to broadband is currently one of the biggest barriers to investment in digital content. Although Telecom has recently committed to rolling out a next-generation high speed broadband network by 2012, SPADA believes this is too late given the rapid developments occurring internationally.
3. SPADA also sees the urgent introduction of a producer incentive scheme - similar to the Australian producer offset⁵ - as a means of encouraging further investment in digital content and the sector's infrastructure. The Australian offset was aimed at "encouraging greater private sector investment in the industry and improving the market

⁴ The Future of Public broadcasting – NZ On Air, p.8

⁵ The offset is a tax rebate on Qualifying Australian Production Expenditure (QAPE). The rebate offered is 40% for feature films provided minimum QAPE is AUD1million, and 20% for television and new media with QAPE thresholds dependent on format or genre.

responsiveness of the industry”, and SPADA is aware of some production companies considering relocating to Australia to take advantage of its producer offset.

4. It is anticipated the introduction of a producer incentive scheme, such as the Australian producer offset, will attract more private sector finance into the industry. Currently New Zealand is potentially missing out on equivalent private sector funding into New Zealand productions.

8.0 CONCLUSION

1. SPADA once again thanks the Ministry for Culture and Heritage and the Ministry of Economic Development for the opportunity to comment on its digital broadcasting regulation review.
2. SPADA believes a balance must be struck between cultural and commercial imperatives and market forces and regulation - to provide an environment in which the best ideas can be developed, made and distributed across all technologies.
3. New Zealand viewers will be the ultimate beneficiaries of a New Zealand focused content creation system - regardless of whether it is accessed on their TV, mobile phone, PC or whatever new technologies may emerge in the future.
4. SPADA reiterates its belief that a strong production sector is a prerequisite for diverse and creative content. It also believes that public service broadcasting needs to be protected, strengthened and advocated for, as the independent screen production sector moves into the highly competitive, fragmented, commercial digital environment.
5. New Zealand content has to be the first thought and not an after thought of any regulatory regime.

Presented on behalf of SPADA by:

Penelope Borland
Chief Executive Officer
09 April 2008

Retransmission of Free-to-Air Broadcasts International experience

Legal History of Retransmission

Berne Convention and TRIPS

Retransmission has a long history in international law. Retransmission was specifically introduced into the Berne Convention for the Protection of Literary and Artistic Works ("Berne Convention") at the Brussels Revision Conference in 1948 which inserted Article 11*bis*(1)(ii):

"Authors of literary and artistic works shall have the exclusive right of authorizing... any communication to the public, by wire or by rebroadcasting of the broadcast of the original work, when this communication is made by an organization other than the original one."

The retransmission right is regarded as separate from the broadcasting right in Article 11*bis*(1)(i).

In addition, the Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS") requires that contracting parties comply with the Berne Articles including the relevant retransmission provisions.

Who are the underlying rights holders?

The underlying rights holders in copyright include producers, writers, composers and publishers.

North America

Cable retransmission has occurred in the USA since the 1960s. In 1976 section 111 of the US Copyright Act was introduced to cover remuneration for cable retransmission. In 1988, section 119 was introduced to cover satellite retransmission.

Europe

A European Council Directive in 1993 harmonised EU law on retransmission. (Council Directive 93/83/EEC).

Article 9 of the Directive facilitates collective administration of rights for the purposes of licensing retransmission.

Australia

Pay television began retransmitting without remunerating rightsholders under a loophole in Australian law designed for self help as opposed to commercial retransmission.

In 1995, the (then Opposition) Coalition Arts Policy, *Arts for All*, included a promise to bring Australian law in line with international experience and require equitable remuneration for retransmission by pay television.

In 2001, the Copyright Act was amended to create Part VC which is a remunerated exception for retransmission via all media (with the sole exception of the Internet which is not covered by the exception). Payment must be made by Pay TV networks to retransmit free-to-air TV networks, the actual figure to be set by the Australian Copyright Tribunal.

In May 2006 the Copyright Tribunal released a judgment providing that Australian pay TV operators, including Foxtel, Optus, Vision and Austar, would have to pay A\$3.5 million a year for retransmitting five free-to-air channels on their platform. This was calculated at the rate of 23.39 Australian cents per subscriber per month for five network channels. The Chief Executive of Screenrights stated, following the judgment, that the payment of a copyright fee in these circumstances was "common practice in the US, Canada, Europe and Japan and an obligation imposed by the World Trade Organisation."

Collections to Rights Holders

Collective administration

In practice, to lower transaction costs, retransmission is administered collectively by rights holders. This is also important to the retransmitters as there is not always an existing commercial relationship between the retransmitter and the underlying rights holders in the retransmitted free to air broadcasts.

AGICOA

Although the individual fees for retransmission tend to be low, in aggregate the amounts are substantial and represent a significant input to the production sector.

Producers are represented in Europe by AGICOA a non-profit copyright society based in Geneva.

AGICOA represents more than 6,000 rights holders across 44 countries.

In 2005, AGICOA distributed 97.3 million Euros to rights holders for retransmission in 33 countries in Europe.

New Zealand's Position

Current Law

Section 88 of the Copyright Act 1994 provides a limited copyright exception for retransmission over cable systems.

Importantly, the exception does not operate if there is a licence available for the retransmission. In other words, this "use it or lose it" style provision allows rights holders to license their works if they wish to. Equally, in the absence of a licence retransmission is not held up by unwilling or absent copyright owners.

S88 does not cover satellite retransmissions. A retransmission by satellite would theoretically require the permission of all the relevant copyright owners. The vast majority of retransmission is by satellite (Sky).

Broadcasters may have licensed the retransmission of the broadcast signal in return for remuneration or other consideration such as channel position, program guide rights, etc.

To SPADA's knowledge, underlying rights holders have not directly licensed retransmission, and have not received remuneration for the retransmission.

Uniquely in the developed world, producers have not received remuneration for retransmission in New Zealand under the current legal regime.

Based on the Australian figure of 23 cents per subscriber per channel per month, the royalties that Sky would need to pay in New Zealand under a legislative regime would be in the order of \$1.2 million per year.

Proposed amendment

The Copyright (New Technologies) Amendment Bill proposes to delete section 88.

This would leave the Act silent on retransmission.

Initially this may seem to favour copyright owners' interests over Pay TV retransmitters' interests. However, such an amendment will do nothing to address the anomaly in New Zealand whereby this is the only territory in the developed world where rights holders are not being remunerated for retransmission of their copyright works.

If the Copyright Act is to be reviewed the anomaly of New Zealand rights holders not being paid for the retransmission of their works needs to be addressed.

Recommendation

SPADA recommends that New Zealand Law is brought into line with international experience and requires equitable remuneration to rights holders for retransmission by pay television.

There are two possible means of achieving this outcome:

1. Retain section 88, extending it to permit satellite retransmission, but at the same time providing for an enforced/ compulsory payment regime to rights holders by pay TV operators for retransmission.
2. Delete section 88 from the current copyright legislation, leaving it silent on retransmission, while committing to working towards a legislated regime for royalty payments to underlying rights holders in New Zealand.

SPADA is of the view that the second alternative would be preferable, from both a legislative and pragmatic point of view, and therefore recommends commitment towards a legislated regime of royalty payments to rights holders for retransmission on pay TV.

Penelope Borland
Chief Executive
SPADA