

19 November 2019

Dear Broadcasters

Application of the Broadcasting Act to Internet Content

1. In light of the increasing use of internet platforms for distribution of content in New Zealand, this paper has been prepared to enable content providers to understand the BSA's approach to the application of the Broadcasting Act 1989 (the **Act**) to content transmitted over the internet, and our views on who is subject to the classification and standards requirements in the Act.
2. We have been undertaking this review over the last year and have appreciated the conversations we have had so far with content providers on this topic. We now wish to engage with content providers to identify their views on the Act's coverage in light of the approach outlined in this paper. We have always operated within a co-regulatory framework (where we work with broadcasters to develop and apply appropriate standards and guidelines) and it is in this spirit that this paper has been developed.
3. Our key objective is to work with broadcasters to put in place the necessary frameworks and a code of broadcasting practice which is suitable for internet broadcasters that fall within the scope of the Act, and which is suitable for technologies that exist now and that may develop in the near future.
4. Working together, we hope to reach an agreed approach to achieving this objective (even if we disagree on aspects of the Act's interpretation). While we prefer to avoid litigation, if legislative interpretation issues prove too much of a barrier, we will consider seeking a declaratory judgment on notice to those who wish to participate in the process to clarify any issues we cannot agree upon.

Overview

5. The BSA is responsible for overseeing broadcasting standards in New Zealand. Traditionally broadcasting has been seen as capturing free-to-air television, pay television and radio broadcast in New Zealand. Over the years BSA's jurisdiction over internet content has been recognised where the content has been broadcast on television or radio and is also made available on demand, and where the content is simulcast on the internet and television and/or radio at the same time. This is justified as the Act defines broadcasting to include transmission of programmes by 'any other means of telecommunication' for reception by the public.
6. We have also recognised that the Act does not apply to content which is provided purely on demand, as this is excluded from the definition of broadcasting in the Act. We have, however, had oversight of some on demand content for a particular provider through a memorandum of understanding arrangement, which was accepted as consistent with the performance of our functions under the Act.

7. Our approach to the application of the Act to online content is discussed in a recent interlocutory decision released by the Authority in September this year.¹
8. Over recent years methods of broadcasting have developed rapidly. The on demand broadcasting sector in New Zealand has grown with the introduction of free video on demand (FVOD) services offered by television broadcasters, transaction video on demand (TVOD) and subscription video on demand (SVOD) provided by local and off-shore broadcasters and content providers. As noted above, on demand services (that transmit programmes on the demand of a particular person, for reception only by that person) are regarded as outside of the BSA's jurisdiction, due to an express exclusion in s2 of the Act, and are therefore not subject to the standards and classification requirements overseen by the BSA.
9. New forms of internet broadcasting delivered to audiences in New Zealand, which are not typical on demand services, have also developed. In light of these emerging services, the BSA has undertaken a review of the definitions in the Act and the nature of online content, to assess which online services fall within the definition of 'broadcasting' and are subject to the classification and standards requirements under the Act.
10. Our preliminary conclusions are that:
 - (a) Programmes that are transmitted online in a linear form (ie playing continuously) are broadcasting and not on-demand. An example of this is Edge TV.
 - (b) Programmes that are livestreamed by a company over the internet for reception by the general public in New Zealand (including auto-play, where a video plays unless a user stops the stream) fall within the definition of broadcast. An example is Spark Sport live streamed content.
 - (c) Consistent with our existing practice, content that is simulcast on the internet and also on radio and/or television is broadcasting.
 - (d) Entities which transmit content to the public (including those who acquire content pursuant to a licence to rebroadcast that content, eg the rebroadcast of BBC), whether over the internet, satellite, or waves and who are in a position to control that content are broadcasters. For some content, the on demand exclusion may apply. Where that exclusion does not apply, the content will be a broadcast programme and subject to the requirements of the Act.
 - (e) Entities which provide a platform to a company for the transmission of linear or livestreamed content to the public are broadcasters where they are in the position to control the content (eg they exercise editorial control or they can remove the content from the platform should they choose to do so). This includes social media platforms and websites which provide live streamed content to New Zealanders.
 - (f) The Act does not have an express territorial limit and has provisions that make it clear it was intended to apply to overseas entities. Its purpose is to apply standards to content that is received by New Zealanders in New Zealand. The Act and its requirements apply to those broadcasters, and those programmes which are broadcast to and received by New Zealanders, irrespective of whether the broadcaster has a place of business in New Zealand or not.

¹ See [Phillips and Racing Industry Transition Agency](#) ID2019-044 (17 September 2019)

11. The Act came into force when the content technologies now available were not in use. However, as set out in s6 of the Interpretation Act 1999, legislation applies to circumstances as they arise. We must therefore ensure that we apply the Act to modern technologies, not just those that existed in 1989.
12. We consider that our interpretation is consistent with the purpose of the Act and the broadcasting standards regime which is to provide community safeguards through the application of standards and classifications that mitigate against potential harm to New Zealanders from content which is broadcast, through whatever means. verb 'to broadcast' is not limited to casting through radio and television; it is a broad term which refers to the conveyance of information to a wide range of recipients². The Act does not limit the definition of broadcasting to television and radio only, and so it is incumbent on the BSA to ensure we take a purposive approach to the interpretation of our responsibilities under the Act.
13. We consider that the application of the definition of broadcasting to livestreaming and linear online content is consistent with Parliament's expectation that there be standards and, in certain scenarios, classifications for content that is made readily available to a wide public audience.

Summary of our Analysis

14. The BSA's jurisdiction is determined by the definitions in the Broadcasting Act 1989, particularly:
 - **broadcasting**, which is defined as "*any transmission of programmes, whether or not encrypted, by radio waves or other means of telecommunication for reception by the public by means of broadcasting receiving apparatus*"
 - **programme**, which is defined as sound or visual images or a combination of these intended to inform, enlighten, entertain, promote the interests of any person or promote any product or service.
 - **broadcasting receiving apparatus** is not defined, and we do not consider that it is limited to televisions and radios (or other devices that have a tuner). Rather it captures any device that is capable of receiving a broadcast of a programme – this may include a smart television, radio, computer, smart phone, tablet (and such other devices that may be developed in the future).
15. The Act, which notably came into effect at the same time that the internet began to gain popular use, also contains some exceptions:
 - **On demand broadcasting:** Broadcasting does not include: "*such transmissions of programmes made on the demand of a particular person for reception only by that person*".
 - **Transmission service supplier without control is not a broadcaster:** A person who supplies transmission services to a person who broadcasts programmes is not a broadcaster, **unless they are in a position to exercise control** of the operations of the broadcaster (where the person who broadcasts programmes is a

² <https://whatis.techtarget.com/definition/broadcast>: In general, to broadcast (verb) is to cast or throw forth something in all directions at the same time.

company) or the management of programmes broadcast by that company or selection or provision of programmes by that company.

On demand Broadcasting

16. Any pre-recorded content accessed at the request of an individual for their personal viewing via an FVOD, TVOD or SVOD service and where the content is, for example, played once or downloaded could be characterised as on demand broadcasting and excluded from the definition of broadcasting under the Act. We note that there may be exceptions to this, for example where such content is intended to be accessed and played by many at any time and potentially simultaneously.
17. If the on demand programme has also been broadcast on television or radio and the complainant can point to that broadcast within the last 20 working days, the BSA may consider a complaint, and the Code which relates to the television or radio programme will apply.

Simulcast, linear and livestreamed internet broadcasting

18. Simulcast, linear and livestreamed content falls within the definition of broadcasting. It is content that is transmitted, often by means of telecommunication for reception by the public. Such content that is delivered through a social media platform for a company, where the platform has the ability to control that content (including to remove it) is also captured, and the platform provider and the company that provided the content will be broadcasters for the purposes of the Act.
19. The on demand exception does not apply to simulcast, linear and livestreamed content. We have considered the way that such content is accessed and note that:
- (a) The fact that a person chooses to visit the website or platform to access the linear feed, livestreamed or simulcast content does not render the programme on demand. Accessing the site and selecting the linear/simulcast (eg 'watch now') or livestream option is like switching on a television and selecting the channel. The Act is intended to capture content that is made available to the public who choose to access it.
 - (b) The fact that data may be transmitted in data files via a server, does not render the content on demand. It will be received by the viewer in real time in progress. It cannot be fast forwarded or downloaded in full at the time of access. The requirement to have an account, to sign into an account or to pay a fee to access the linear, livestream or simulcast on the website or platform does not preclude content from falling within the definition of broadcasting. That may be a barrier to access, but it does not make the content on demand.
 - (c) Once logged in, the individual will receive the linear, simulcast or livestream programme which is in progress and identical to what other members of the public are watching at the same time. It is not a private transmission for one person alone; it is transmitted to all linear, livestream or simulcast viewers.
 - (d) Content which is simulcast has traditionally been considered under the Code which applies to the television or radio broadcast.
 - (e) If the content is subsequently made available for audiences to access after the livestream, it may be on demand and only subject to BSA's jurisdiction, if the complainant can point to the livestream within the last 20 working days.

- (f) The ability to manipulate the content stream (ie pause, rewind or fast-forward up to live) does not make it on demand (and excluded from the definition of broadcasting), as users are still limited in their access to content that has already played, and these functions already exist through TV platforms.
- (g) Content that is livestreamed through social media platforms by a company is a broadcast programme and within the scope of the Act.

Practical implications

20. This means that those who fall within the definition of broadcaster must meet the obligations in the Act, which includes:
- (a) Ensuring that broadcasts comply with broadcasting standards and classification requirements;
 - (b) Having a proper process for dealing with complaints and referring any complainants to the BSA if they are not satisfied with the response to their original complaint;
 - (c) Retaining copies of broadcasts for at least 35 days in case a complaint is made;
 - (d) Broadcasting notices that advise audiences of their right to complain if they think a programme has breached standards; and
 - (e) Filing a levy return with the BSA, and if applicable paying a broadcasting levy to the BSA.
21. We intend to work with internet broadcasters to prepare an internet broadcasting code that will contain guidelines applicable to the internet broadcasting environment. We intend to commence work on that Code in January 2020 and invite those who broadcast over the internet to work with us on that Code. In the meantime, the standards that are referred to in sections 4 and 21 of the Act apply and we encourage those who are subject to the Act to refer to the free-to-air and pay television codes as guidance for how the standards apply. We consider that the classification labels in the Pay Television code are the most suitable for the internet environment. Aside from broadcasting standards, we intend to take a pragmatic approach to other requirements of the Act imposed on broadcasters.
22. We are conscious that the Act establishes a set formula for the calculation of levies which has not been reviewed since 2007 and recognise there may be a need for further policy work surrounding the application and calculation of levies in light of current circumstances.

Your Feedback

23. We welcome your feedback on the matters raised in this paper. Given the pending general election and the application of the Act to election programmes we need to address any issues as soon as possible. We want to ensure that internet broadcasters know what standards apply to election related materials online and that the public know who to approach with relevant election related complaints.
24. Accordingly, we request any feedback you may have on the interpretation of the Act set out in this letter by **13 December 2019**.
25. We are happy to arrange a meeting either with individual entities or collectively in November or early December 2019 to discuss and resolve any issues you may have.

26. If you have any questions on the paper, please contact Belinda Moffat or Helen Cruse on 0800 366 996 or email us on info@bsa.govt.nz.

Yours sincerely

Signed

Judge Bill Hastings
Chair
Broadcasting Standards Authority

Signed

Belinda Moffat
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