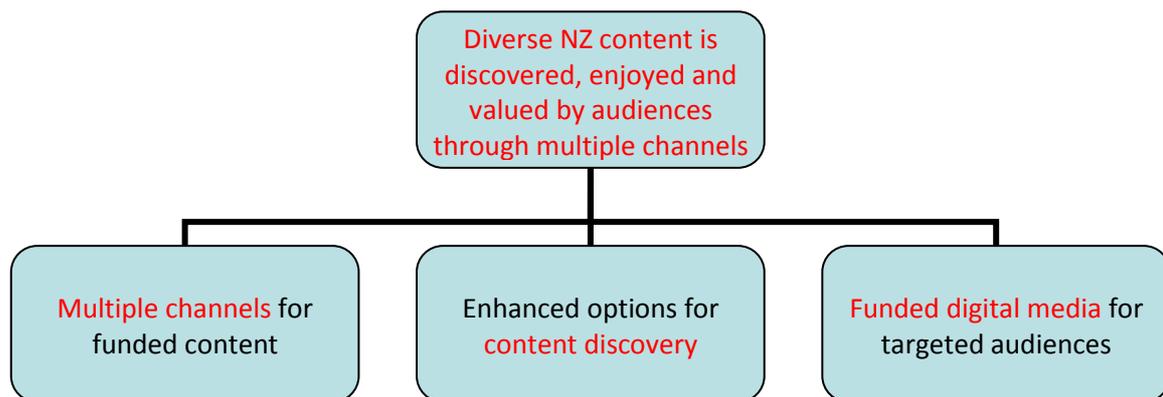


Online Rights and Public Access: A Discussion Paper

A: Introduction

1. NZ On Air’s Digital Strategy, published in June 2012, has three aims:



2. One of these aims is to ensure publicly funded content is available on multiple channels. As audiences fragment with the increase in media channel options, a first broadcast will mostly reach fewer people than may have previously been the case. Subsequent viewing of publicly funded content needs to be easily accessible.
3. As a first step, to maximise value and audience reach, NZ On Air wants all funded content initially to play on at least two channels. This is already largely achieved by free to air broadcast and consequent uploading to an on-demand site.
4. As a second step, the strategy also envisages that publicly funded content will have at least one permanent and accessible home online when initial rights expire.
5. NZ On Air does not take rights to funded content (apart from a temporary right to secure delivery in cases of funding over one million dollars). Contracts with producers typically reflect the rights negotiated between the producer and the broadcaster. It is only in the rare cases where NZ On Air provides 100% funding that expectations are placed on the producer to make content available to other free to air broadcasters and NZ On Screen. A window of 12 months was established in 2009 in order to make a fully-funded programme available to a broader audience while topical, yet not overly impinging on the rights of producers to exploit their intellectual property.
6. Broadcasters pay licence fees to secure exclusive screening rights for a period. Most also take online rights through all or some of the licence period. Some producers are relaxed about this, particularly for projects with more cultural than commercial value. In these cases the value of a programme is mainly in its domestic screening, and the potential for meaningful sales income is relatively low.

7. For other programmes which have good sales potential (eg drama) producers are more conservative about online rights, fearing online availability will threaten overseas, pay-per-view and DVD sales. Sales agreements normally require exclusive rights in defined territories.
8. The main issue is finding the right balance between public access for publicly-funded content, respect for the intellectual property rights of content creators, and the rights purchased by commissioning broadcasters. Neither of the latter two parties should be presented with strong disincentives to create or invest.
9. This paper outlines the current situation with regard to rights for television programming, considers how the position of the taxpayer and audience could be evaluated, and explores an option for potential change.

We are seeking feedback from broadcasters and the production industry on the ideas for change set out in section E of this paper. We welcome alternative or additional proposals for enhancing online public access to funded content. Please email feedback to NZ On Air - fiona@nzonair.govt.nz - by 31 January 2013. We will discuss further with SPADA and broadcasters in the new year.

B: Background

10. NZ On Air's primary task is to increase the diversity of local content available to New Zealand audiences by funding certain types of programmes. We invest public funds to help offset the difference between the cost of production and the likely revenue that the production will generate in a small market.
11. Funded content generally screens on television once or twice, sometimes more. On-demand viewing levels are increasing.
12. NZ On Air does not hold any underlying rights to the intellectual property of funded programmes; neither do fellow funding bodies Te Māngai Pāho, the NZ Film Commission or Creative New Zealand.
13. However NZ On Air takes a minority share of any subsequent programme sales revenue, viewing revenue, in effect, as a retrospective subsidy adjustment. Namely, most funding is an investment, not a grant.¹
14. In 2011 Te Māngai Pāho (TMP) published a discussion document proposing a shift in emphasis for the consideration of rights by TMP. The document suggested that funding provided by TMP should be considered as a purchase of New Zealand rights on all platforms in perpetuity. In this way TMP would ensure that the programmes would be consistently available to the New Zealand public on a range of platforms. Any sales or licensing revenue would still go to the producer. Key differences between TMP and NZ

¹ All funding bodies, except Creative New Zealand, base funding around this investment model. Creative New Zealand allocates funding as grants, a model used worldwide by arts funding entities.

On Air are that TMP regularly provides 100% funding and that funded content is primarily in te reo, meaning offshore sales in particular are unlikely.

15. As a general principle it is not unreasonable to suggest that content primarily funded by taxpayers should be made freely available to the public for as long as practicable and on a range of viewing platforms. This provides increased value for money to the taxpayer and benefit to audiences. Cost of storage and delivery of digital material continues to reduce, increasing the feasibility for making content available long term.
16. However NZ On Air also recognises the need to balance this with the interests of producers and broadcasters in a way that does not adversely impact creativity and market investment.

C: Current situation

17. There are several scenarios currently in use for programmes funded by NZ On Air.

Television broadcast rights

18. There is some variation but a typical example would be a commissioning broadcaster holding broadcast rights to a programme for around 3-5 broadcasts over an initial five year period. The rights will be exclusive for 1-3 years after which the programme may be aired elsewhere with permission from the commissioning broadcaster. In return for these rights the broadcaster pays a licence fee. Typically the licence fee is small compared to the cost of production.

Online rights

19. Broadcasters have been seeking more extensive online rights, in some cases seeking online rights in perpetuity. There are a range of scenarios for what happens with this content on broadcaster sites. Primarily content remains on the broadcaster on-demand site for a period of time after broadcast, after which it is removed but returned if the programme re-screens. In between these times it is often unavailable. On expiry of the licence period it is taken down.
20. The terms of granting online rights vary. Broadcasters are increasingly looking to secure these rights to extend audience reach. Generally these rights are not attracting a licence fee premium, given the comparatively low level of online revenue. As increasing numbers of people access programmes via broadcaster on-demand sites the argument that these audiences cannot be monetised may weaken in time.
21. Content is streamed and may not be legally downloaded. Online rights are sometimes granted with a requirement that they are geo-blocked (i.e. able to be viewed only in NZ). This is often a producer requirement as they seek to protect any income potential or comply with rights arrangements for the content within programmes. From a public good perspective, geo-blocking is not an optimal process.
22. Streaming is primarily advertiser-supported, not pay-per-view. The latter model has not worked well in NZ to date.

Production investment

23. In most cases, broadcasters pay a licence fee set by negotiation with the producer (NZ On Air requires a minimum fee level). This purchases exclusive screening rights and is

notionally based on the anticipated advertising revenue a programme is likely to generate for the broadcaster. This licence fee contributes to the overall cost of production and is incorporated into the programme budget alongside any other investment. This means NZ On Air is not providing 100% funding.

24. In the few cases where NZ On Air provides 100% funding, primarily for off-peak special interest programming, 'Extended Broadcast Rights' apply. In these cases the commissioning broadcaster secures an exclusive first play, after which programmes must be available to any free-to-air broadcaster, and must also be made available to NZ On Screen for a period of 12 months following first television broadcast.

The value of online content

25. Revenue potential for online content is difficult to quantify. It is relatively early days in the world of monetising online video, and while there are a number of models in place around the world, there is little information about what is actually working.
26. Many models are based on advertising revenue. Online pay-per-view models have historically been unsuccessful in New Zealand.
27. On-demand aggregator Quickflix entered the local market in 2012 and runs both subscriber and pay-per-view options. Public data about its progress is not yet available but problems with the business have already been reported. Local producers have so far been unable to get local television content made available through the NZ iTunes store.
28. Other online sites have recently trialled short-form content in different formats. For example Stuff has run successful short film festivals in the last two years in collaboration with the NZ Film Commission and NZ On Screen.
29. Closer to home NZ On Air has just begun receiving returns from online income. Online value was placed at a price per view. Returns at this stage are small.
30. The value of online content is far greater than simply project revenue. Public value must also be considered: cultural value, audience convenience, ease of access, availability on demand, research, reference, and entertainment.

Other NZ On Air funded content

31. Regional TV – similar funding agreements to standard television funding. There is no separate mention of rights: content is usually created and owned by the broadcaster.
32. Access Radio – NZ On Air does not fund content but provides operational funding. All stations have or share an on-demand website where content is available by podcast.
33. Radio programmes – funding contracts do not cover rights but online access is expected.
34. Making Tracks music video and recording funding agreements:
 - copyright is owned by producer
 - non-exclusive rights in perpetuity are granted to NZ broadcaster and NZ On Air
 - the producer must make video available to NZ On Screen on request.

D: Discussion

35. The study of audience behaviour, in terms of where and how they view content, is ongoing. Television continues to be the main audience driver, but online ('second screen') audiences are growing exponentially.
36. The main focus of this discussion paper is on the issues around securing a permanent online home for NZ On Air's publicly-funded content. Technology options are constantly changing, but already there are multiple ways in which content can be made available to the public after broadcast.
37. When NZ On Air's funding system was developed, broadcast was the only platform option. While rights of producer, broadcaster and taxpayer should be balanced, the interest of the taxpayer may need to be reconsidered as screening options expand.
38. NZ On Air is not always the majority investor and this should also affect policy. The proportion of NZ On Air funding might provide a basis for a 'sliding scale' of influence over availability. Currently there is '100%' or 'other': it may be that a more graduated approach would be more appropriate.
39. A further issue is that once the initial licence period has expired, online availability of content is often not handled in coherent manner. Namely, once the broadcast rights have expired there is not always a clear plan for what happens next.
40. Audiences expect to be able to access content when and where they want. From a **taxpayer perspective**, most publicly-funded material should be freely and legally available on-demand, in a coherent and accessible way, beyond the licence period.
41. It is taxpayer funding, in the main, which has enabled the content to be created and this aspect needs to be clearly considered when assessing public access options after the broadcast period.
42. From a producer's **intellectual property perspective**, revenue-generating opportunities should not be unduly compromised. For example, while a programme has clear sales potential any online home should not be mandatory (or may need to be geo-blocked) if streaming would compromise sales. As well, the programme may contain copyright content (e.g. music or purchased footage not licensed for further use) or include sensitive material that may be unsuitable for online access.
43. A considerable amount of content funded by NZ On Air does not fall into those camps as the material has a stronger cultural, and social, rather than commercial value.
44. From an **internet perspective**, online availability is not necessarily detrimental to sales (although we do not underestimate the business model difficulties). For example physical copies are still sought for private use even when content is available online. NZ On Screen reports a significantly higher number of requests for DVD copies when content is available online in full, rather than when there is just an excerpt to view. Likewise, broadcast sales are still made when content is available online. Namely broadcast and online audiences do not always overlap: audiences can and do watch the same content more than once in a cinema, or on television, or online.
45. NZ On Air has considered the scenario proposed by Te Māngai Pāho (TMP), in which the public funding of content would assign NZ rights to the NZ taxpayer in perpetuity. While

there is may be merit in the idea for TMP-funded content, we feel that it is not a suitable general policy for NZ On Air because:

- NZ On Air supports a broader range of content than TMP
- There are typically more revenue opportunities for NZ On Air-funded content, particularly for international sales
- Relatively few programmes receive 100% funding from NZ On Air

46. However we suggest that NZ On Air's status quo does not always provide the best value to the taxpayer. While much publicly-funded content is online during the licence period, it is not always available and there is no consistent plan for what happens when the licence expires. An additional issue is if content becomes exclusively accessible behind a paywall after initial broadcast. The policy issue is if, and how, an exclusive arrangement should operate when content is publicly-funded.
47. We suggest that public funding needs to be better aligned with enabling public access. Below we present a potential scenario for change that attempts to balance the competing rights at stake

E: Rebalancing rights: a proposal for change

48. NZ On Air is therefore considering clarifications to funding policy to:
- ensure funded content is available online during the license period
 - establish a sliding scale of expectations for availability online after the license period expires, based on the proportion of NZ On Air public funding received
 - assess non-exclusive options for a 'permanent home online'

Fully funded by NZ On Air: 100%

49. Programmes are fully publicly funded when they have a strong cultural value but no commercial value.
50. We propose that existing Extended Broadcast Rights are changed to remove the 12 month limit and require programmes to be made available to NZ On Screen and/or an alternative site indefinitely.
51. If NZ On Screen does not accept a programme, or only seeks selected episodes of a long-running series, an alternative free-access online site should be secured. See section F below.

Partially funded by NZ On Air: 60% - 99%

52. For the majority of investments, NZ On Air contributes more than 60% of the production budget. The balance comes from broadcaster licence fee, third party investment and/or producer's contribution.
53. In cases where NZ On Air has contributed 60% - 99% of the production budget, we propose that -

Within the broadcaster license period:

- Programmes must be freely available on demand on the commissioning broadcaster website during the license period.
- A maximum of three years after first broadcast, funded programmes should also be made available on a non-exclusive basis to NZ On Screen. This may be earlier if the programme is removed from the broadcaster website.

Out of first broadcaster license period:

- A permanent online home will be secured within seven years of first broadcast.

Partially funded by NZ On Air: 1% - 59%

54. In cases where NZ On Air has contributed less than 60% of the production budget, we propose that -
- Programmes must be freely available on demand on the commissioning broadcaster website for a reasonable period of time (say, one year)
 - A maximum of five years after first broadcast, funded programmes should be made available on a non-exclusive basis to NZ On Screen. This may be earlier if the programme has not been sold or is removed from the broadcaster website
 - A permanent online home will be secured within 10 years of first broadcast
55. **Exceptions** to the policies proposed above might include when -
- A programme is bound by distribution agreements for a period
 - Being online is likely to compromise a programme's realistic ability to generate revenue
 - A programme contains highly sensitive material that cannot or should not be viewed in a context outside the original broadcast
 - A programme contains archive footage and the appropriate footage clearances have not been obtained
 - Music rights have not been cleared
 - Costs of uploading or hosting cannot be met
56. Exceptions would be dealt with case by case, but the expectation would be that a permanent online home would be able to be secured within a reasonable timeframe in most cases.
57. If NZ On Screen does not select the content, other online options are available as discussed in section F below.
58. A short summary of the pros and cons is below. In short, NZ On Air is not seeking radical change, but is looking to clarify expectations - and demonstrate value for money - when public funding is used to create content.

Pros	Cons
<ul style="list-style-type: none"> • recognises the ongoing interest of the taxpayer in content they have substantially paid for • public has access to funded material on a range of platforms • does not have a significant impact on the broadcaster • producers continue to receive revenue from sales • provides an appropriate balance between competing interests 	<ul style="list-style-type: none"> • if an online destination is a requirement, there needs to be options for producers to use • audience demand for content viewing beyond the licence period is unknown • the number of exceptions likely to arise is unknown and there are still details to be clarified • additional administration requirement for contract management within NZ On Air

F: Options for an online home

Broadcaster websites

59. All national broadcasters except Prime run a freely-available on-demand service for catch-up views of recent programmes. Programmes are usually removed from the site once viewer numbers tail off. Broadcaster on-demand sites are also fed by their own broadcast archives, but none has a separate archives site.

NZ On Screen

60. A non-commercial online showcase of selected NZ television, film and music video. Content is licensed with the permission of the producer (and sometimes commissioning broadcaster). The site adds value to audiences and programme makers by including contextual information. NZ On Screen does not need content to be available exclusively. It has the option to geo-block for NZ but would prefer not to. Full length rather than programme excerpts are preferred where possible. Not all NZ content will be selected.

YouTube / Vimeo

61. Global video upload sites. Limited time or file size options for video. Not possible to geo-block or protect the video files unless part of the Partner Program. Not possible easily or tidily to curate a collection of any kind outside of a user channel. No control over the longevity of the system.

Producer websites

62. Production companies can stream programmes from their own websites. To date, few do.

Archival websites

63. The Film Archive (which has recently assumed management of the Sound Archives) streams historic content.
64. Archives New Zealand and the National Library also stream historic content. The presence of multiple websites with different purposes, that have some cross-over of content, is common worldwide.

TV Online

65. Ziln provides internet-based channels for content providers.
66. Quickflix provides opportunities for local content online through a commercial subscription model. The model remains uncertain.
67. Other options will doubtless emerge over time. If a significant number of projects cannot find an existing channel that provides a coherent solution to the need for an online home, NZ On Air will evaluate alternative options.

G: Summary

68. One of the main aims of NZ On Air's Digital Strategy is to enable multiple viewing channels for funded content. NZ On Air seeks to ensure that all funded content plays on at least two channels to optimise value to audiences and value for money. Commonly this involves free to air broadcast and streaming .
69. NZ On Air is also proposing that most funded content secures at least one permanent, freely-accessible home online when initial rights expire.
70. We are considering changing the way rights are managed within the existing system. We are proposing that a sliding scale is introduced, where the level of public funding from NZ On Air influences arrangements to get funded content made available online.
71. Clear guidelines for when, and how, material is required to be published online will need to be developed by NZ On Air in consultation with producers and broadcasters. These guidelines will also address consideration of geo-blocking and streaming requirements, commercial interests, footage and music clearances, and sensitive content issues. NZ On Air intends to work constructively with producers and broadcasters to ensure their interests are respected.
72. In short, public funding needs to be better aligned with enabling public access on multiple platforms. This discussion document outlines a potential way forward with relatively small adjustments to the status quo: to provide clarity for producers and broadcasters, to balance the competing rights issues, and to improve service to New Zealand audiences.

NZ On Air

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