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SPADA'S RESPONSE ON NZ ON AIR'S ONLINE RIGHTS AND PUBLIC ACCESS DISCUSSION PAPER

INTRODUCTION

The Screen Production and Development Association (SPADA) is a non-profit, membership based organisation that represents the interests of producers and production companies on all issues affecting the commercial and creative aspects of independent screen production in New Zealand. Its members include film and television production companies, post production houses, production accountants, entertainment lawyers and other film industry related service providers.

SPADA appreciates NZ On Air's commitment to ongoing consultation and discussion with SPADA and the screen production industry on key policy issues. In light of that this paper represents an initial response from SPADA to the NZ On Air Online Rights and Public Access Discussion Paper (the "Proposal").

New Zealand's television environment is unusual in that it lacks a public broadcaster and a regulatory regime to support local content by means of a local content quota or obligation for PAY TV to contribute to the creation of new local content. NZ On Air is the only entity charged with public service type responsibilities, yet it has no ability to compel (unlike

legislated quota for example) networks to commission such programming. NZ On Air is therefore charged with 'public good' objectives in a way which none of our broadcasters are, particularly since the demise of the TVNZ Charter. This situation inevitably leads to tension between realizing public good objectives and the delivery mechanisms for distributing programming to New Zealand audiences.

Whilst the Proposal may be an attempt to realize a perceived public good objective, it would have serious negative implications for the production industry and for broadcasters: we will go on to outline those implications.

SPADA wishes to state at the outset that it is not convinced that the demand exists for a permanent online home for NZ On Air funded programmes, furthermore that there is no research provided to substantiate this 'demand'.

1. A conversation starter or a proposal for a solution without a problem?

SPADA has no issue with embarking on a conversation about accessibility to content as it shares the idea of taxpayer funded television being available to as large an audience as possible. However, SPADA is concerned that this Proposal appears to be based on questionable premises; as access for audiences and sustainability for content producers are not mutually exclusive.

Notwithstanding the desire from all for programmes to reach the largest audience possible, access must take into account intellectual property rights.

The Proposal is premised on the amount of taxpayer money that NZ On Air invests in programmes, without which we acknowledge they would simply not be made. While the role and degree of investment is greatly appreciated by the independent production industry, SPADA is concerned that this Proposal:

- undervalues the significant investment that producers and other creators invest in the development and production of programmes;
- takes insufficient account of the way that content is actually more accessible now than it has been before, even of a few years ago;

- would limit the ability to attract international investment and distribution of our programmes;
- would stymie the introduction of new business models to ‘monetise’ content for online distribution in New Zealand with the roll out of ultra fast broadband.

2. Investment in the Creation of Intellectual Property (IP)

As the Proposal points out, very few programmes are 100% NZ On Air funded. The Proposal suggests establishing a sliding scale of expectations regarding availability of programmes online after the initial license period expires. This sliding scale would be based on the proportion of NZ On Air funding received and in recognition of investment in such programmes by other parties and in particular the broadcaster. However the Proposal does not take into account investment by the producer and other creators. This is a significant omission in the logic of the Proposal from an industry and intellectual property perspective.

Investment by the producer and other creators lies at the heart of the intellectual property rights in programmes. Investment occurs right throughout the production process and includes:

- formulating the concept, developing, pitching and proposing often multiple programme ideas before getting the green light for one from a network, making it eligible to then compete for NZ On funding;
- producing the programme, where producers are often required to invest significant resources (both time and money) into the programmes so as to get them across the line;
- managing the rights so to achieve the best possible financial outcome for the NZ tax payers and the programme’s other investors and participants from the distribution and exploitation of the programmes. This area requires a long term commitment from producers over the life of the programmes and one in which they are becoming increasingly skilled at with the rapid advent and introduction of new technologies and distribution platforms.

The assumption behind the heading “Rebalancing Rights” needs to be challenged. In New Zealand the imbalance is definitely not in favour of the producer and yet the entire premise

of this Proposal is based on producers giving up further rights, rights which would be detrimental and counterproductive to empowering a successful independent screen production industry. It also needs to be challenged because the assumption appears premised on personal opinion versus actual research or understanding as to how content is produced and distributed.

3. Need for a clear rights ownership model

Fundamentally, in order to have content, there needs to be a viable screen production industry that is able to keep producing quality content. A clear rights ownership model that allows for access and distribution on appropriate terms is key to this; a premise that SPADA does not think this Proposal takes sufficient account of.

Internationally viable screen production industries rely heavily on an income model for secondary rights after the initial broadcast window. This Proposal seeks to abrogate and limit the ability to monetise these secondary rights even though it states that this is not the intention. It is the producers' ability to derive income from these secondary rights that separates a healthy screen production industry from a cottage industry. Access is not incompatible with ownership however, like any industry if it is to grow and prosper, the ability to monetise secondary rights should not be curtailed. Attempting to limit the distribution model in the way that NZ On Air proposes undermines producers' independence, and removes the decision making process from them about their own IP, as well as stymieing the evolution of new business models for online distribution in New Zealand with the advent of ultra fast broadband.

There are multiple references throughout the Proposal along the lines of "*not overly impinging on the rights of producers to exploit their intellectual property*". However, the entire Proposal does just that because of its intervention in the producers' ability to monetise online content. The assumption that programmes will be of little value to the producer in the future e.g. that in ten years time a project with more cultural value than commercial value at the moment will have little meaningful sales income (para 5), just cannot be substantiated.

The Proposal asserts that the commercial value of programmes diminishes over time. This assertion is counter to the advent of multi-platform distribution options, and the potential to monetise content; monetising the “long tail” of ones back-catalogue.

Never has there been so many new means of distribution to make content available to a wider audience (Net Flix, iTunes) and many of them involve micro-payment systems. With the roll out of ultra fast broadband in New Zealand, funded by the taxpayer, this will become an ever increasing source of secondary income for producers. This coupled with new distribution platforms springing up and the continuing enhancement of others, principally pay-per-view or subscription service (SVOD, subscriber video on demand) and time shifted viewing, further emphasises the long term exploitation value associated with programmes.

Free online access to the public comes at a cost to producers. It means forgoing income in the midst of this online distribution revolution. In addition, with digital switchover, new channels are likely to emerge in New Zealand that will prolong the life of programmes and pay a licence fee. Producers already grant NZ On Screen licence for programmes on a goodwill basis and SPADA believes that this is what needs to be explored further, rather than the introduction of a compulsory regime which undermines IP creation and ownership.

4. Proposal in contradiction to Government policy and discourages international investment and distribution

NZ On Air has the autonomy to propose its own policy moves however SPADA is perplexed as to why it is putting forward this Proposal when the implications for the industry are in contradiction to government policy. “*The Business Growth Agenda*” has a focus on encouraging business innovation, improving intellectual property settings and building international linkages among its key drivers. NZ On Air’s Proposal would limit each one of these priorities for the New Zealand screen sector.

SPADA has already touched upon how the Proposal as it stands would limit innovation and intellectual property rights and it will also have a dampening effect on producers’ ability to partner with and raise finance from international sources. Increasingly New Zealand producers are raising funding from offshore partners, as well as NZ On Air and New Zealand and international broadcasters, particularly for drama and documentary. This Proposal to

make programmes available online in perpetuity for free would act as disincentive to partner with New Zealand producers and invest in New Zealand made programming, as it could limit the ability to continue to derive income over the life of programmes and is counter to accepted practice in other countries, e.g. the average window for free on-line on demand catch up screening in both Australia and the UK is 14 days.

The Proposal does attempt to address the issue of avoiding revenue generating opportunities for producers being compromised (e.g. para 42) with a series of proposed exceptions. However, the very existence of the scheme for putting content online for no compensation would act as a disincentive for revenue generating opportunities in general from the outset. It would be a disincentive for international distributors to pick up New Zealand programmes and no amount of trying to communicate such exceptions is going to counter the general perception that New Zealand television programming is going to go online for no compensation within some years of the initial licence period ending. This is contrary to international market practice and New Zealand producers already have to work very hard to get their programmes picked up internationally without this added burden.

Geo-locking should be the usual practice by NZ On Screen and indeed most producers thought that programmes were currently geo-locked so as to not undermine potential secondary sales. It has come as a surprise to many that they are not and that the preference by NZ On Air and NZ On Screen is to not geo-lock. Producers granted NZ On Screen the right to put their programmes online on a purely voluntary goodwill basis with no compulsion, recognising that there was an element of public good but on the understanding that this was not going to compromise potential international or other sales and secondary revenues. The introduction of such a compulsory regime by NZ On Air would be damaging for NZ On Screen's relationship with the production industry and undermine that goodwill.

The Proposal quite rightly refers to the issue of copyright content such as music and purchased footage as well as sensitive material making the material unsuitable for online access. This is a major issue and all of these matters require considerable time and energy from producers. There is no suggestion of compensating producers for either the time or additional clearances that this proposal would entail.

New Zealand producers have already faced this when broadcasters wanted more rights to play content on supplementary and Pay channels for no further compensation for additional usage or for the extra rights clearances that this might entail for use of music, archival footage or other permissions. This would not be acceptable elsewhere and more than likely subject to intervention by a regulator. It is not acceptable practice for a government agency, especially with current government economic policy settings.

Paragraph 20 of the Proposal refers to broadcasters trying to secure online rights without attracting a licence fee premium, given the comparatively low level of online revenue and broadcasters trying to secure online rights in perpetuity. Firstly, producers cannot grant rights in perpetuity and secondly the basis of the initial arrangement in relation to online rights without a licence fee premium with TVNZ was on the understanding that compensation for producers would be revisited once the business model improved for online and that in the meantime in compensation producers gained an improved share of back end income from secondary sales in particular for fully funded commercial programmes. The firm understanding was that once sufficient revenues were being attracted online producers would get a share in that revenue. There will be an increasing ability to monetise online content over time particularly with the introduction of ultra fast broadband but this proposal would undermine the evolution of that business model in New Zealand.

5. Current Opportunities to View Content

One of the other premises of the Proposal is that: *“As audiences fragment with the increase in media 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.”* (Para 2). NZ On Air wants all publicly funded content initially to play on at least two channels, which it says is currently met by FTA broadcast then uploading to an on-demand site.

SPADA believes that the thinking behind the Proposal needs to take more account of the myriad of ways in which audiences can now view content:

- 3-5 plays over 5 years on FTA commissioning channel
- Timeshifted viewing off FTA channel

- TV1 and TV3 Plus One
- On demand catch up
- Between 6 and 10 play days on Pay TV channels in which the FTA broadcaster is a partner (SPADA is not necessarily comfortable with this practice and we await the outcome of the Commerce Commission inquiry in to the market for broadcast and Pay rights, which includes VOD and SVOD)
- DVD purchase
- NZ On Screen (on a voluntary basis by the producer where appropriate)
- Film and TV archives

This adds up to substantially more access and availability to audiences than even a few years ago. Further advances in online availability are almost certain to happen with the introduction of ultra fast broadband.

SPADA does not understand how NZ On Air can state that: *“From an internet perspective online availability is not necessarily detrimental to sales.”* (Para 44). We understand that the basis for the subsequent statement that *“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...and broadcast sales are still made when content is available online,”* is based on anecdote, from some phone calls by the public to NZ On Screen. SPADA does not believe that this would be in line with production company and broadcaster experience.

6. CONCLUSION

SPADA is concerned that given the substantial changes to the broadcasting landscape suggested by this Proposal it does not rely on credible research, provides little in the way of evidence for assertions in the Proposal, and appears to be overly reliant on unsupported assumptions and propositions.

SPADA also suggests that the substantial further investment required for the NZ On Screen platform for implementation of this Proposal, as well as by NZ On Air in time, resources and administration would not be a demonstration of value for taxpayer dollars and would also undercut new business models. Those extra funds that would be required would need to be diverted from being directed into the creation of new content in an environment of fiscal

constraint and also substitute for private sector funding which would go into the creation of new S/VOD services.

SPADA is concerned by the suggestion in ***NZ On Air An Evaluative Study 1989-2011 by Paul Norris and Brian Pauling*** that NZ On Air should set up an on demand service either through an expanded NZ On Screen or a separate site under the banner NZ On Air On Demand. *“This would offer opportunities for branding and marketing. If cost is an issue, solutions may lie either in some form of advertising, or in a system of micropayments. Rights issues should be dealt with at the time of funding.”* (page 151). This would in effect be a taxpayer supported rival business rather than a VOD archive competing with broadcasters and producers who are trying to expand their own SVOD capability and income from these services with the rights taken by NZ On Air at the time of funding.

If one of the motivations for this Proposal is NZ On Air attempting to demonstrate value for money when public funding is used to create content (para 8) SPADA’s response demonstrates that it actually limits the value of this content, discourages investment, innovation, undermines intellectual property rights and muddies the waters of expectations and understanding of the rights ownership model that is internationally accepted.

Paragraph 16 acknowledges the need for balance with the interests of producers and broadcasters in a way that does not adversely impact creativity and market investment but doesn’t recognise how this whole proposal inherently does just that.

NZ On Air is an effective mechanism that is unique to New Zealand and a key intervention that works in lieu of not having quota mechanism for local content and/or a public broadcaster. With a legislative quota there would less need for public funding as there would be compulsion for networks to commission and screen local content as part of their licence conditions. However the size of the audience and potential revenue streams would still necessitate considerable public funding for the expensive genres such as drama and documentary. The New Zealand government chose this setting and it creates an environment in which more public funding goes into creating local content than would otherwise be the case. NZ On Air is an effective and efficient funder of local content but it should leave distribution of that content to the broadcasting and production industries.

SPADA endorses and recommends Screenrights submission to NZ On Air which outlines the current online streaming services for educational institutions. That submission outlines how the Screenrights licence is facilitating permanent online availability of broadcast content for educational purposes and how that licence is creating a permanent online home for broadcast content on a licensed, remunerated basis for copyright holders. In contrast, NZ On Air's paper appears to assume that such a commercial model either does not exist or cannot be created.

SPADA works closely with Screenrights and also recommends that NZ On Air takes up Screenrights suggestion to share their understanding of the rights framework for international distribution of online rights.

SPADA has also seen and agrees with Mediaworks and Gibson Group's submissions to NZ On Air.

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