

shares in Independent Newspapers Ltd. or any subsidiary thereof either directly or indirectly and;

(ii) Independent Newspapers Ltd. does not take any shares in Metropolitan FM Broadcasting Ltd. either directly or indirectly and;

(iii) the ownership or control of Metropolitan FM Broadcasting Ltd. does not change to the extent that any shareholder which is a news company (as defined in the warrant) gains a prescribed interest in that company.

5. The Tribunal consents to Mr T. C. Egerton becoming a director of Independent Broadcasting Company Ltd. and of Waikato-Bay of Plenty FM Ltd. in addition to his being a director of the following warrant holders:

Metropolitan FM Broadcasting Ltd. and XS Corporation Ltd.

Signed for the Tribunal:

B. H. SLANE, Chairman.

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Decision No. 5/88

Reference No.: BRO 87/87

Before the Broadcasting Tribunal

In the matter of the Broadcasting Act 1976, and in the matter of an application by **Noel Wesley Communications Ltd.** for a sound-radio warrant in Christchurch:

Chairman: Judge B. H. Slane.

Member: Robert Boyd-Bell.

Co-opted Member: Maurice Sheehan.

Hearing the 7th day of December 1987.

Interim Decision

The 15th day of March 1988.

The applicant is wholly owned by shareholders of Instant Music Ltd., a company that compiles background music tapes and makes them available to subscribers nationwide through Telecom landline circuits. In Christchurch, Instant Music Ltd. operates the service to subscribers itself. In other centres it offers the programmes through franchise agreements with local business concerns associated with the electronics field. Instant Music Ltd. is also involved in other business activities.

In Christchurch, Instant Music Ltd., proposes to transfer its Christchurch subscribers to the applicant company. Instant Music Ltd., will continue to supply the background music tapes.

The applicant intends to distribute the programme in Christchurch by broadcasting a high quality stereophonic signal on an unpublished frequency in the ultra high frequency (UHF) band which is not used for sound-radio broadcasting. It will be received by a special receiving apparatus which will remain the property of the applicant. The band chosen would not be receivable by members of the public using conventional radio receiving sets. It would however be possible for those with technical knowledge to tune a receiver to receive the music service. The applicant believes there are legal remedies to prevent the music being used for any illegal public performance.

The music service is at present delivered by means of Telecom landlines which are monophonic and the programme circuits are said to have very limited frequency responses—some less than 5kHz. The applicant has encountered distortion, cross-talk, frequent losses of level, long waiting times to have breakdowns restored and a rapid deterioration of service because of increases in other telephone activity.

The applicant is concerned about meeting competition from compact disc players which provide a high quality background music for such customers as hotels and restaurants. Overseas, quality satellite channels and cable are the preferred carriers for background music services.

The applicant made an application for a sound-radio warrant not because it wished to broadcast to members of the public or because it wished to carry advertising programmes but because it believed that the service offered constituted broadcasting within the meaning of the Broadcasting Act 1976.

The Broadcasting Act section 2 reads:

“Broadcasting” means—

(a) The dissemination of any form of communication by the wireless transmission of writing, signs, signals, pictures, images, and sounds of all kinds by means of Hertzian waves intended to be received by the public either directly or through the medium of relay stations; and

(b) Includes the dissemination of any form of communication by the wireless transmission, by means of Hertzian waves, of an encoded signal that is intended to be received by members of the public or of a section of the public but which can be received in an intelligible form only by those members of the public or of that section of the public whose receiving sets are equipped with a decoding device;

“Diffusion Service” means a service whereby sounds or visual images are transmitted by the person operating the service to subscribers of the service over wires or other material substance for reception by apparatus designed to receive the transmissions.”

Broadcasting Act, section 70 (2) provides that, subject to the Act, no person shall establish or operate a broadcasting station otherwise than in conformity with the terms and conditions of a warrant or authorisation issued by the Tribunal under the Act and for the time being in force. A diffusion service does not require a warrant.

The applicant would cease using a diffusion service using Telecom lines but is not endeavouring to avoid any payment at all. The company is prepared to undertake to pay levies on its revenue at the same rate as those payable by private broadcasting stations.

The New Zealand Government is considering its policy about multi-point distribution service.

Section 78 provides that no application for a warrant should be granted until the application has been certified as complying with the technical requirements of the New Zealand Radio Frequency Service and the Radio Regulations.

The New Zealand Radio Frequency Service has not certified the application yet, stating that it is carrying out planning regarding the frequency.

Nevertheless the Tribunal considers that it is appropriate that it indicate its present position.

Decision

The Tribunal is prepared to grant the application on conditions when it has been certified.

The Broadcasting Corporation has raised the question of whether the signal is to be “encrypted”. As the applicant has pointed out, it is not intended to scramble the signal in the sense that special equipment would be required to unscramble it for use. It is, however, intended to broadcast the signal on a frequency which is not generally used for the reception of broadcast programmes by members of the public.

Nevertheless it would appear that the application may be covered by the definition set out in the Broadcasting Act because members of the public would receive the service when using the premises to which the service is provided.

The second more particular definition relating to encoded signals may not apply in this case since it is not intended to encode the signal.

We have not had the benefit of legal argument on the definition under the Act as the applicant has been prepared to