

2 April 2015

**To**

The Directors  
Bypass Network Services Limited

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

**From**

Graeme Hall  
Anita Birkinshaw

**By Email and Delivery**

**Global Mode**

1. We act for Sky Network Television Limited, Television New Zealand Limited, Lightbox New Zealand Limited and MediaWorks TV Limited (together "**our clients**"). Julian Miles QC has been engaged to act as counsel for our clients on this matter.
2. We are writing in respect of the Global Mode product developed and Global Mode services offered by Bypass Network Services Limited ("**BNSL**") to internet service providers ("**ISPs**"), which we consider to be unlawful.
3. Our clients hold exclusive rights within New Zealand to make various copyright works available to the public for viewing via distribution platforms and video on demand services (the "**Copyright Works**").
4. Offshore providers such as Netflix US, Hulu, Amazon Prime and BBC iplayer ("**the offshore providers**") do not have any right to exploit the Copyright Works in New Zealand. Any licences that they might have apply only to specific overseas jurisdictions (such as the USA or UK). Accordingly, the terms and conditions of those offshore providers (see **Appendix**):
  - (a) require that their customers are located in territories for which the offshore providers are licensed; and
  - (b) prohibit customers from circumventing geo-blocking measures and other content protections.
5. The Global Mode service pro-actively marketed by BNSL and provided to internet service providers, including Slingshot, Orcon, MyRepublic, Flip, EvolutionWireless, Gisborne Net, Unlimited Internet, Mynx Net, Netspeed, EOL, Primo Wireless and Lightwire, is designed to enable users within New Zealand to overcome such territorial restrictions and circumvent geo-blocking measures specifically designed to protect territorial copyrights. Global Mode acts as an intermediary system between a subscriber's internet-capable device and the offshore provider's website to mask the user's true IP address and substitute a different one. It misleads the offshore provider into believing that the user

is located in the required jurisdiction (such as the USA), thereby circumventing that provider's geoblocking measures.

6. In our view the Global Mode service is unlawful in the following respects (among others):
  - (a) **Copyright:** BNSL's conduct in relation to Global Mode amounts to an infringement of the Copyright Act 1994, either directly or as a joint tortfeasor;
  - (b) **Misleading representations:** BNSL's representations about Global Mode are misleading to the extent that they state or imply without a proper basis that:
    - (i) it is lawful for users located in New Zealand to use Global Mode to access content from the offshore providers; and
    - (ii) circumvention of geo-blocking measures in this way is permitted by New Zealand law (just like parallel importing of DVDs);
  - (c) **Contractual breaches:** Use of Global Mode for the abovementioned purposes constitutes a clear breach of the terms and conditions of the offshore providers.
7. BNSL's conduct has caused damage to our clients and, if it continues, will continue to do so. In particular, BNSL's conduct materially undermines the value of the exclusive rights which our clients have paid for to make certain copyright works available to the public for viewing via distribution platforms and video on demand services within New Zealand. BNSL's actions have also undermined our clients' reputation and integrity as the sole legitimate providers of those works in New Zealand.
8. Given this position, our clients require BNSL to confirm in writing by **5pm on 15 April 2015** that it undertakes to:
  - (a) cease selling the Global Mode product and providing the Global Mode service or any similar service, whether directly or indirectly to any ISP;
  - (b) cease representing in trade (whether expressly or by implication) that it is lawful for users located in New Zealand to use Global Mode (or any similar service) to access content from the offshore providers; and/or that circumvention of geo-blocking measures in this way is lawful because it is permitted by New Zealand law; and
  - (c) take appropriate steps to reverse the effect of BNSL's misrepresentations to this effect on consumers, including by informing them that the Global Mode service is being withdrawn from BNSL's service offering because it is unlawful.
9. If you do not fulfil these requirements by the stipulated time, then we have been instructed to immediately commence legal proceedings. For that reason please advise by the same deadline if BNSL instructs solicitors/counsel on this matter, and (if so) whether that solicitor is authorised to accept service.

10. Should you wish to meet to discuss our clients' concerns, they would be willing to do so, provided that any such meeting enables an acceptable resolution to be achieved prior to **15 April 2015**.

Yours faithfully  
**Buddle Findlay**



**Graeme Hall / Anita Birkinshaw**  
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**Appendix : Contractual terms of offshore providers (as at 25 March 2015)**

1. **Netflix:** The use of the Netflix service is subject to terms and conditions (<https://signup.netflix.com/TermsOfUse> ). The Netflix Terms of Use state:
  - 4.3 You may view a movie or TV show through the Netflix service primarily within the country in which you have established your account and only in geographic locations where we offer our service and have licensed such movie or TV show. The content that may be available to watch will vary by geographic location and will change from time to time. ...
  - 4.5 ... You also agree not to: circumvent, remove, alter, deactivate, degrade or thwart any of the content protections in the Netflix service;...
  
2. **Hulu and Hulu Plus:** Hulu and Hulu Plus are currently only available in the United States and Japan (<http://www.hulu.com/support/article/171122>). The Hulu Terms of Use ([www.hulu.com/terms](http://www.hulu.com/terms)) state:

**14.1 International Use.** We are a company based in the United States. Hulu's goal is to bring you as much Content as is legally available. That said, we are limited by the rights that our content licensors grant to us. Using technologies to access the Content from territories where Hulu does not have rights or does not offer services is prohibited. Hulu Plus is not accessible through any devices from outside the United States.
  
3. **Amazon Prime:** Users of Amazon Prime to view video content must comply with, amongst other things, the Amazon.com Privacy Notice, the Amazon Instant Video Conditions of Use and the Amazon.com Conditions of Use ([http://www.amazon.com/gp/help/customer/display.html/ref=amb\\_link\\_373730582\\_3?ie=UTF8&nodeId=13819201&pf\\_rd\\_m=ATVPDKIKX0DER&pf\\_rd\\_s=cent](http://www.amazon.com/gp/help/customer/display.html/ref=amb_link_373730582_3?ie=UTF8&nodeId=13819201&pf_rd_m=ATVPDKIKX0DER&pf_rd_s=cent)). The Amazon Instant Video Conditions of Use provide in clause 3 that the service is only available to customers located in the United States. Moreover, clause 5(h) provides as follows:

You may not transfer, copy or display the Digital Content, except as permitted in this Agreement. In addition, you may not: ... ii. remove any proprietary notices or labels on the Digital Content; iii. attempt to disable, bypass, modify, defeat, or otherwise circumvent any digital rights management system used as part of the Service; or, iv. use the Service or Digital Content for any commercial or illegal purpose.
  
4. **BBC iplayer:** Users of BBC Online Services to view video content must comply with the Terms of Use of BBC Online Services (<http://www.bbc.co.uk/terms/personal.shtml>). Clause 3.2.1 of the Terms of Use provides as follows:

You may not access, view and/or listen to certain parts of BBC Content (such as video or live television services) using BBC Online Services if you are outside the UK, although you may, in accordance with the Terms, access and view [bbc.co.uk](http://bbc.co.uk) or other websites and listen to some (but not all) BBC radio content. The types of BBC Content that may be available outside the UK will usually depend on the BBC's agreements with the persons who own rights in such content.