



Guidance regarding the
licensing position on the 'provider
of a service' and the 'sub-letting'
of capacity

Statement

Publication date:

21 May 2010

Guidance regarding the licensing position on the 'provider of a service' and the 'sub-letting' of capacity

Introduction

- 1) This guidance is about who Ofcom regards as the person¹ who is the provider of a broadcasting service and should therefore hold a broadcasting licence to provide the service.
- 2) It is important that the provider of the service, rather than any other person, holds the relevant broadcasting licence. It is up to service providers to ensure that they are appropriately licensed. Providing a broadcasting service without a licence is a criminal offence.

Statutory Definition

- 3) Section 362(2) of the Communications Act 2003 defines the provider of a service as:

'the person with general control over which programmes and other services and facilities are comprised in the service (whether or not he has control of the content of individual programmes or of the broadcasting or distribution of the service)'.

- 4) This definition applies to all of the following services (with the exception being the provision of television and radio multiplex services):
 - A television broadcasting service or sound broadcasting service,
 - The public teletext service,
 - A television licensable content service or radio licensable content service,
 - A digital television programme service or digital sound programme service,
 - A restricted television service,
 - An additional television service or additional radio service,
 - A digital additional television service or a digital additional sound service.

¹ In this context, "person" means an individual or a company.

- 5) Under this statutory definition, 'general control' includes control over what programmes are included in the service and what other services and facilities (for example through the inclusion of a link or facility to interactive features) are included in that service – but does not necessarily mean the provider has control of the content of individual programmes.
- 6) Ofcom considers that a person will normally have general control if that person exercises effective control over the selection of programmes that comprise the service and their organisation into a programme schedule. It is that person who will normally be treated as being the provider of the relevant service and who will need to hold a broadcasting licence authorising its provision.
- 7) As the licensee, that person will be obliged to comply with all the relevant licence conditions and will be responsible for putting in place adequate compliance arrangements, including retaining recordings of programmes, and for ensuring that the service as broadcast, complies with all the relevant Ofcom codes and other requirements. This is the case even if the day to day activities to ensure compliance of individual programmes are carried out by a third party.
- 8) In determining who has general control of a service (and therefore who should hold the appropriate licence), Ofcom will apply the above statutory definition on a case by case basis, taking into account all relevant circumstances. This guidance is intended to help service providers understand the approach that Ofcom is likely to take when considering who the provider of a service is. It does not set out an exhaustive list of the types of arrangements which will, and will not, constitute 'general control'².

Specific examples

- 9) The ability (on its own) to stop broadcasts continuing, in specific or non specific circumstances, does not by itself constitute general control within the meaning of the

² Ofcom has published separate guidance which relates to who the provider of a service is in relation to the provision of an on-demand programme service (<http://www.ofcom.org.uk/tv/ifi/vod/obligation/>)

statutory provisions. Accordingly, a person who has the power to stop broadcasts of a service continuing, but does not exercise general control over the selection of programmes comprising the service and their organisation into a programme schedule or listings, would not be regarded as the provider of the service, and would therefore not be the appropriate person to hold the broadcasting licence for that service.

- 10) A person who has acquired capacity on a broadcasting platform for the purpose of providing access to that capacity and/or to an electronic programme guide slot to other service providers, but does not actually provide a service on that capacity themselves, cannot hold the broadcasting licence for any service(s) provided on that capacity. In such instances those responsible for providing the service should ensure that they are appropriately licensed themselves to provide the service and comply with all the necessary licence obligations in relation to that service.
- 11) The issue of determining who the provider of a service is can arise in particular in cases where a person has access to capacity on a broadcasting platform and enters into an agreement with another person to 'sub-let' that capacity. **A broadcasting licence cannot be 'sub-let'**. If the 'sub lessee' of platform capacity is the provider of the service, they need to hold a licence themselves (i.e. they are not 'covered' by any other person's licence).
- 12) If a licensee intends to enter into an arrangement to sub-let capacity, then before doing so, the licensee and prospective 'sub-lessee' should carefully consider who the provider of the service is to be. Where the service to be provided on the sublet capacity is a simulcast of an existing licensed service, the same person will normally be expected to be the provider of the simulcast service and their licence should reflect this. Where a licensee has already entered into an arrangement to sublet without consideration having first been given to the relevant statutory criteria, urgent attention should be given to the question of who is the provider in light of this note and the statutory definition. In light of the statutory definition (referred to above), it may be that it is the 'sub lessee' (rather than the person sub-letting the capacity) who is the provider of the service for licensing purposes and so should hold the broadcasting licence themselves. In these circumstances the 'sub lessee' should apply to Ofcom for the appropriate broadcasting licence.
- 13) Where a licensee has already entered into an arrangement to 'sub-let' capacity, then before doing so, the licensee and prospective 'sub-lessee' should carefully consider who

the provider of the service is to be. Where the service to be provided on the 'sub-let' capacity is a simulcast of an existing licensed service, the holder of the existing licence will normally be expected to be the provider of the simulcast service on the 'sub-let' capacity, and their licence must be amended accordingly before the arrangement is entered into.

- 14) If capacity is being shared between two or more service providers (so that, for example, one provider's service is broadcast for 20 hours a day, and another provider's service is broadcast for the remaining 4 hours), both will need a broadcasting licence. And, it is extremely important that each provider's licence accurately records the hours of broadcast, so that Ofcom can identify which provider is responsible for the output at any given time. Any licensee in this position should check that their licence accurately reflects the hours of broadcast of their service(s), and should contact Ofcom if any variation to the licence is needed (tv.licensing@ofcom.org.uk)
- 15) This guidance does not cover licences issued under the Wireless Telegraphy Act 2006.