

MPA Response to Consultation for Converged Competition Code

The Motion Picture Association (“MPA”) represents the interests of six international producers and distributors of film and television content:

Walt Disney Studios

Netflix Studios, LLC.

Paramount Pictures Corporation

Sony Pictures Entertainment Inc.

Universal City Studios LLC

Warner Bros. Pictures International

We appreciate the opportunity to provide a submission in response to IMDA on the *Consultation Paper Issued by the Info-Communications Media Development Authority on a Converged Competition Code for the Media and Telecommunication Markets*. The film and television industry creates, licenses and distributes content in a rapidly evolving marketplace.

We understand that IMDA desires to “ensure that a consistent regulatory framework is applied across both the telecommunication and media markets, to the extent possible”, to make it easier for businesses to grow. The proposed competition related policy changes put forward in the consultation document may raise questions about whether it helps or stifles business growth. We are still in the midst of analyzing the impact of the proposed competition policy changes on the film and television industry and will file a more detailed submission during the second public consultation.

In this submission, we will focus on the Cross-Carriage Measures.

Questions on Part IX Public Interest Obligations

Question 9:1: IMDA invites views and comments on continuing to apply the CCM to content of all genres.

Question 9:2: IMDA invites views and comments on the proposal to require the SQL to offer the cross-carried subscribers access to the QC on its OTT platforms, if part of the QC is on the Relevant Platform, on non-discriminatory basis i.e., on the same price and terms offered to the SQL’s customers.

Uncertain objective

We refer to paragraphs 9.2 to 9.6 of the Consultation Paper on Cross-Carriage Measures (CCM) and note that IMDA would require the SQL to offer the cross-carried subscribers access to the QC on the SQL's OTT platform on the same price and terms as those offered to the SQL's customers. MPA and our member companies remain concerned that to extend the scope of CCM to OTT platform is unduly intrusive, unwarranted, and inconsistent with Singapore's international obligations. Therefore, we remain unable to support the CCM and would respectfully submit that IMDA adopt a more narrowly targeted approach, and in fact take this opportunity to remove CCM.

IMDA has stated at paragraph 9.3 that since the CCM introduced in 2010, it was imposed only on a handful of sports properties and moreover, "content fragmentation has abated" and "there is greater service differentiation and innovation in the Pay TV markets and consumers now have wider content choices as part of their Pay TV subscriptions". With this in mind, MPA believes that IMDA's proposed intervention in the marketplace is even further unwarranted and unjustifiable and MPA questions the purpose and benefit of doing so.

It is important that the Pay TV market provides choices for consumers. The suggestion that the CCM continue to be applicable to Pay TV content of any genre, where the relevant conditions for applying the CCM are met, is not borne out by research evidence since "the number of common channels that can be found on the current Pay TV platforms increased from seven to more than 100"¹. The paper noted that content fragmentation has declined which in reality presents a good opportunity for IMDA to consider removing CCM. We therefore do not see the particular "concern" that IMDA wants to address.

We are also concerned that the survey data obtained by IMDA dates from 2016 and is less applicable today, with the rapid changes in technology and the ways in which content is consumed. We are of the view that maintaining the current scope of the CCM will further put downward pressure on Pay TV subscription and is unwarranted, as it will not serve to increase service differentiation and innovation in the Pay TV market.

In addition, if CCM is extended to OTT platforms, it sends the wrong message that this is another attempt to interfere with the normal commercial transaction of Pay TV and OTT platforms. IMDA should ensure that the CCM does not create uncertainties for foreign investment and have the unintended effect of negatively impacting Singapore's reputation as the regional media hub.

Importance of the Free Market

MPA member companies believe that free-market principles, supported by pro-business regulatory framework, are most conducive to the continued growth and development of a healthy and mature television market. Correspondingly, MPA member companies are concerned about perceived over-regulation that proscribes market behavior. We believe

¹ Para 9.3 of the Consultation Paper.

that there is no justification for maintaining the CCM let alone extending it to the Internet when content remains available to Pay TV retailers, when channel providers constantly provide innovative services under different channel branding, through on-demand delivery and season pass offerings.

Incompatibility with Copyright Act

Under the provisions of the Singapore Copyright Act, exclusive rights are granted to copyright owners to enable them to fully exploit the works they create through assignments, exclusive or non-exclusive licenses. MPA had earlier submitted in public consultations conducted by MDA that CCM amounted to compulsory licensing of films and television programmes, as it compels copyright owners to grant non-exclusive licenses to *both* Pay TV operators for the transmission of their content. This negates a copyright owner's right to grant an exclusive licence under the copyright law. We would reiterate that expanding the scope of the CCM to cover *all* Pay TV content means that copyright owners are compelled by regulation to license the transmission of the works through all Pay TV operators. Furthermore, as copyright owners often enter into third party contracts with film and TV independent producers on the transmission of the works, the mandated CCM to all genre may put our members in breach of such agreements. In such a situation, the IMDA must consider whether or not it could inadvertently be causing such contractual breaches.

Incompatibility with International Treaty Obligations

Under Singapore's international treaty obligations, limitations or exceptions to right owners' exclusive rights are provided in very limited circumstances and must comport with the internationally recognized three-step test.

As stated in our previous submissions, we believe that the existing and proposed extended CCM is incompatible with Singapore's obligations under the Berne Convention, the TRIPS Agreement, and the WIPO Copyright Treaty, as well as its bilateral trade obligations.

The CCM continues to Fail to Meet the Requirements of the 3-Step Test

The "three-step test" provides that an exception must be limited to certain special cases, which do not conflict with a normal exercise of the rights to the copyright material, and which do not unreasonably prejudice the legitimate interests of the rights holders².

"Special Cases"

The term "special cases" refers to the exception or limitation being "limited in its field of application or exceptional in its scope", and narrow in both a quantitative as well as in a qualitative sense, or "a narrow scope as well as an exceptional or distinctive objective"³.

² The Berne Convention for the Protection of Literary and Artistic Works, Article 9(2).

³ *United States — Section 110(5) of US Copyright Act*, available at https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds160_e.htm

With the addition of *all genre of Pay TV content* to the CCM, it cannot be said that the proposed Measure will be limited in any field of application nor be "exceptional" in its scope.

"Conflict with Normal Exploitation"

The second limb of the test is concerned with measuring conflicts of the CCM against normal exploitation of the work, and in addition to those forms of exploitation that currently generate significant or tangible revenue, "those forms of exploitation which, with a certain degree of likelihood and plausibility, could acquire considerable economic or practical importance".

"Unreasonable Prejudice"

The third limb recognizes that prejudice to the legitimate interests of right holders is unreasonable if an exception or limitation causes or has the potential to cause an unreasonable loss of income to the copyright owner.

The proposed broadened CCM has the potential to interfere with the release "windows" and thus infringes this limb. Further, it will impact upon the premiums Pay TV operators may be prepared to pay if they wish to seek content differentiation through exclusivity, since with the proposed broadened CCM, there will never be true exclusivity in the Pay TV market.

Consistent with international norms, exclusive contracts have specifically defined rights and different holdback periods. In a mandated and expanded CCM where copyright owners and channels have not entered into mutually agreed carriage contracts with Pay TV operators, CCM undermines commercial business models, devalues the content and exposes the content to unknown risks, including copyright infringement.

MPA maintains that the proposed broadened CCM is intrusive and over-regulatory and seems to be in stark contrast with Singapore's aspirations to be a regional media hub attracting investments.
