Hong Kong
October 4, 2010

Ms. Eileen Ang
Head (Competition & Market Access)
Media Development Authority
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Email: ruth_wong@mda.gov.sg

Dear Ms. Ang:

As you know, the announcement of Singapore's "cross-carriage measure" has caused great concern among CASBAA member content providers and rights-holders (together, ***Content Providers***) [1]. CASBAA has submitted formal comments to both MDA and MICA on behalf of the Content Providers, containing extensive explanation as to why the mandatory cross-carriage system is unacceptable.

Following MDA's latest clarifications, the Content Providers continue to believe that the proposed system violates the basic rights of Content Providers, fails to include mechanisms to safeguard their intellectual property, is unworkable in practice and is a backward step for Singapore to the ultimate detriment of Singaporean pay TV consumers. In addition, we note that the measure is unnecessary when a simple technical solution will soon become available in Singapore. IDA is even now tendering for the creation of single set-top boxes which will largely address the "consumer convenience" issue of requiring multiple set top boxes[2].

The Content Providers' views are summarized below:

- Breach of International Rights: The measure encroaches upon the internationally-guaranteed intellectual property rights of content owners to authorize and control communication to the public of their works. We attach a copy of the international law brief by noted intellectual property specialists and counsel to the

[1] As with CASBAA's other communications on behalf of the content industry, these comments do not incorporate the views of Singapore's two pay-TV providers, who have their own ongoing dialogue with MDA, and who provide their views to the government directly.
[2] See article from the *Straits Times* attached as Appendix A.

International Intellectual Property Association, Greenberg Traurig. **They conclude that the cross carriage system is not consistent with Singapore's international obligations**. The arguments set out in briefs produced at MDA's request by Singapore law firms (that claim such rights are not infringed) are, with respect, not accepted. The Content Providers maintain their position (and we agree) that what is proposed amounts to a compulsory license or other unjustifiable interference with the intellectual property of Content Providers. This sets a very poor precedent in a market that has until now made progress in developing a reputation for protecting the rights of intellectual property owners. We also attach a copy of a brief by consulting firm Charles River Associates, noting that the measure is a regulatory adventure unprecedented in any developed market[3].

- <u>Backward Step for Singapore</u>. Singapore has promoted itself as a "content hub" and has devoted major efforts to attract the international content industry to establish regional offices. Yet the cross-carriage initiative, in setting a highly negative international precedent for "commoditization" of content, is at odds with Singapore's interests. If other Asian governments follow Singapore's example and adopt measures damaging the content industry, this will also impair employment and economic activity in Singapore. The injury to Singapore, therefore, will be two-fold: The measure risks irretrievably damaging Singapore's reputation and attractiveness as a destination for media investment, and in addition the economic prospects of the industry it has chosen to anchor will decline.
- <u>Fatally Flawed</u>. Too many aspects of the measure are unworkable. It will necessitate sustained regulatory micromanagement and unacceptable interference with rights. The measure will produce constant regulatory "fine tuning" and a significant enlargement of state involvement in the economic interactions within the pay-TV industry. The very essence of pay-TV marketing – bundling of channels into groups that facilitate consumer choice – comes under severe regulatory pressure.
- <u>Bad for Singapore consumers</u>. The measure will damage the business case for providing "marquee" programming (which by its nature is expensive to produce or acquire) to Singapore and suppress content innovation, to the detriment of Singaporean consumers. In the medium term, consumers will have fewer content options under cross-carriage than in a free market. Consumers will also be disappointed when they are faced with continued high content prices (e.g. for international football) that they had expected the cross-carriage measure should deter.

[3] Theses documents were previously provided to MICA; they are being attached here to complete the record of this public MDA consultation.

Once again, the Content Providers and CASBAA urge the Singapore government to revoke the changes in the Media Conduct Code that imposed the cross-carriage system. The Content Providers and CASBAA remain ready to continue discussions with MDA, both at the level of the Association and the individual member companies.

Sincerely yours,

Simon Twiston Davies
CEO
CASBAA

About CASBAA

CASBAA is the apex industry association in Asia for participants in the pay-TV industry. A non-profit association detached from individual national interests, it is dedicated to the development of the multi-channel pay-television industry across the Asia-Pacific region. Our 125 member organizations include leading pay-TV operators, international content and technology providers, and telecom companies. They are major investors with substantial experience in developing communications industries that now serve 360 million pay-TV households in Asia. CASBAA works to promote free and fair markets, the protection of intellectual property rights and the development of thriving and competitive national communications industries in the belief that the ultimate beneficiaries will be hundreds of millions of consumers across our region.

APPENDIX A

STRAITS TIMES. DIGITAL:HTML

September 21, 2010 Tuesday

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THE STRAITS TIMES BREAKING NEWS

Prime News

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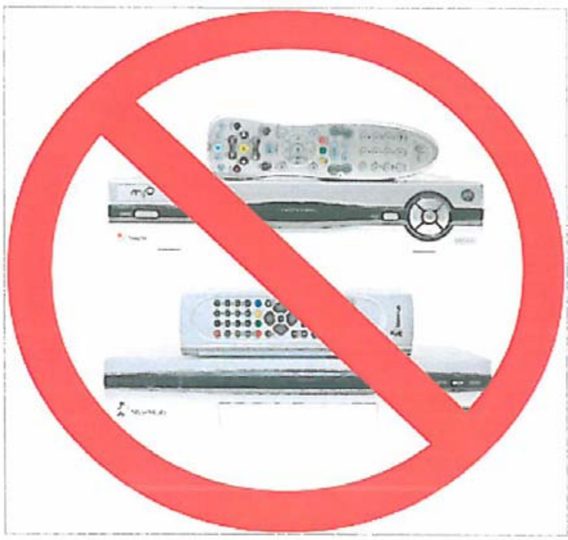
Sep 21, 2010

Soon: An end to multiple set-top boxes

Search starts for system that can carry content from different providers

By Chua Hian Hou



THE Government has launched a formal search for a supplier to develop and roll out a nationwide video delivery system that would eliminate the need for multiple set-top boxes to watch programmes from different pay-TV providers.

This confirms that eventually, consumers will not need to have multiple set-top boxes to receive pay-TV signals from SingTel and StarHub.

Announcing this yesterday, Infocomm Development Authority of Singapore (IDA) chairman Yong Ying -I said the new system would allow consumers to seamlessly access interactive video services and applications offered by the two existing players as well as future players.

The Web-enabled system would also allow consumers to access non-pay-TV services such as government e-services and online games, she said.

The move closes the chapter on a contentious issue that arose with the entry of SingTel into the pay-TV market.

Consumers found they had to install two different set-top boxes if they wanted to receive both SingTel's mioTV service and StarHub TV.

Soccer fans, in particular, have had to do this after SingTel's mioTV wrested the rights to broadcast English Premier League soccer from StarHub just under a year ago.

Some pay-TV customers complained bitterly, in letters to the media and online, about the inconvenience and needless cost of having multiple set-top boxes.

The issue was even debated in Parliament, and in March, the Government decided to require pay-TV operators to make exclusive content available on a rival's set-top box.

It also said it was studying making all pay-TV content available on a common, shared set-top box, an idea it first mooted as early as the middle of last year.

According to industry sources, the IDA will release details of the request for proposal wit-hin the next few months.

The appointed company will be tasked with working with existing service providers such as MediaCorp and StarHub to make sure their video signals can be carried on this delivery system.

The system will be designed to be used on the new fibre-based broadband network that already covers more than half the island.

The company will also work with various hardware makers to come up with options for consumers. Instead of a set-top box, one option might be to have the system built into television sets.

The Straits Times understands that the actual system will materialise only late next year, at the earliest.

At an earlier pre-qualification exercise, at least 15 companies indicated interest in building this system, including SingTel and StarHub, as well as technology giants such as IBM and Huawei.

A final qualification exercise is currently under way to allow other players still keen to participate to throw their hats into the ring. This exercise will end on Oct 4, after which the IDA will release the details of the request for proposal.

The winning bid will enjoy a government grant that has yet to be disclosed.

StarHub chief executive Neil Montefiore said such a system 'will benefit consumers'.

'I know that in my own home, I am fed up with too many set-top boxes,' he said, adding that cost, however, could be an issue.

Consumers would baulk at paying more than 'a few dollars a month' for the device, said Mr Montefiore.

SingTel chief executive for Singapore Allen Lew said the problem is that, in the light of Singapore's relatively small market of just one million households, the developer will probably have to pick an existing standard from a slew of 'very fragmented market interactive TV technologies, all of which have their particular pluses, minuses'.

This is because trying to come up with a customised solution would be too costly without the economies of scale a bigger market would enjoy.

Even so, said Mr Lew, 'it is a great ideal to aim towards...We are certainly very interested in it.'

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SINGAPORE'S CROSS CARRIAGE REGIME: COMPARISON WITH INTERNATIONAL PRECEDENT

Charles River Associates was engaged by CASBAA to prepare this appendix analysing the similarities and substantial differences between the Cross-Carriage regime and frequently-cited international precedents.[1]

MDA has argued that there is significant international precedent for the Cross-Carriage regime. Examples of such precedent are held to be the UK, the US, Italy, France and Sweden. We conclude, for reasons explained below, that this view is mistaken and that there is no relevant precedent.

We have closely followed the Cross-Carriage proceedings in Singapore and are familiar with the relevant documents. We are also familiar with the rules governing exclusivity and program access in the five countries mentioned. In the interest of brevity, we make our points with reference to the UK and the US. The UK, France and Sweden, are governed by the EU Framework for Regulation of Electronic Communications and as such, the types of regulation applying in these markets are similar.

The major differences fall into four categories:

- Rationale: rules governing access and exclusivity in the countries mentioned have focused predominantly or entirely on vertically integrated broadcasters with the objective of preventing discriminatory terms for wholesale access. This is in stark contrast to the Cross-Carriage rules, which was not designed with vertical integration but to deal with "content fragmentation";
- Scope: the scope of the rules in the countries mentioned focuses only on key premium content deemed essential for a competitive market to work effectively. In Singapore, however, the scope of the Cross-Carriage rules is much broader and covers all exclusive content acquired after 12 March 2010;
- Who bears the obligation: in the countries mentioned, the access rules are an obligation on the dominant, vertically integrated broadcaster. However, Cross-Carriage is not a limited wholesale obligation but a broad and all-encompassing consumer right, (which profoundly affects wholesale supply);

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[1] Author: Barney Lane, Head of Communications, Media and Technology, Charles River Associates, Asia.

The views expressed in this report are those of the author and do not necessarily reflect the views of other CRA staff.

- Degree of intrusiveness: Cross-Carriage is likely to be seen as markedly more intrusive than the regimes in all the countries mentioned. Although it set out to be a "light touch" form of regulation, the reality is that it is unlikely to deliver the objectives envisaged without a substantial revising and strengthening of the rules, which will likely involve government determination of pricing and packaging.

All these differences are material to a degree that undermines any case for them to be considered relevant as precedent for Cross-Carriage.

CROSS-CARRIAGE IN SINGAPORE

Singapore's Cross-Carriage policy is intended to:

> *"allow one retailer to leverage on another retailer's platform to widen the distribution of the former's channels. For example, if StarHub signs up an exclusive contract, the remedy is akin to requiring StarHub to lease network equipment and infrastructure from SingTel, to deliver StarHub's TV content to consumers who prefer to receive it through SingTel's infrastructure, and vice versa."*

Cross-Carriage applies to all content acquired on an exclusive basis since March 12 2010. Its purpose is to address alleged "content fragmentation" in Singapore. Cross-Carriage is one of four options examined by MDA to address content fragmentation, the other three of which were as follows:

- Prohibit exclusive carriage agreements (rejected on the grounds of being too interventionist);
- Mandatory Resale (rejected on the grounds of being interventionist and having security and branding concerns);
- Mandatory Unbundling (rejected on the grounds that it does not resolve content fragmentation and removes bundling efficiencies)

UK WHOLESALE ARRANGEMENTS

Mandatory access was first introduced in 1996, after the cable operators won a competition complaint against BskyB. The Director General of Fair Trading agreed that premium programming rights conferred a powerful position on Sky in the wholesale pay-TV market and that its acquisition of premium programming acted as a barrier to entry. The Director also concluded that Sky was dominant in the supply of sports and movies channels in the UK pay-TV market. To meet the Director's concerns, BskyB offered undertakings in 1996 to supply certain channels according to a "rate-card" showing its wholesale prices, with an approved discount structure. The channels provided pursuant to this proceeding, only apply to cable companies.

In March 2010, Ofcom published its final statement following its investigation of a complaint by four complainants (BT, Setanta, Top UP TV and Virgin media) relating to the terms on which Sky sells the rights it possess to other platforms.

The statement concluded that Sky:

> *"exploits its market power by limiting the wholesale distribution of its premium channels, with the effect of restricting competition from retailers on other platforms. This is prejudicial to fair and effective competition, reducing consumer choice and holding back innovation by companies other than Sky."*

Ofcom's findings were centred on the two major premium sports channels, Sky Sports 1 and 2 and based on a concern of "vertical leverage": that Sky has the incentive to favour its downstream business at the expense of its rivals. Accordingly, Ofcom issued a ruling that BskyB must supply Sky Sports 1 and 2 to its rivals at a price set by Ofcom.

The UK regulations do not provide a valid precedent for Singapore's actions because the UK regulations are linked to specific market power concerns and their scope is carefully limited and defined.

US Program Access Rules

The regulation of broadcasting access in the United States embodies the principle that exclusivity provides incentives for competing multichannel providers, allowing them to develop unique video services that distinguish them from one another in the marketplace. Indeed, it is typically seen as a pro-competitive measure whereby (for example) competitors to cable TV differentiate their service offerings. As an example, DIRECTV has exclusive distribution rights to the NFL "Sunday Ticket" package, which is not available to cable TV, Dish Network, Verizon or AT&T customers.

Similarly, broadcasters are permitted to force cable operators to "black out" network and syndicated programming in order to protect the broadcasters' exclusive territorial rights.

This approach is generally in line with US industrial policy, which adopts a laisser-faire approach to contracting. Indeed, most television programs and, in particular, sports programs, are licensed to broadcasters and cable networks on an exclusive basis.

As part of the Cable Act of 1992 – which was intended to spur competition in the multichannel video marketplace – Congress enacted temporary program access requirements that represented a limited departure from the general policy of favouring freedom of contractual rights. These program access rules were designed to ensure that cable companies with an ownership interest in upstream content providers – i.e. vertically integrated operators – were unable to discriminate against competitors by providing access to them on different terms, thereby inhibiting competition.

Under the program access rules, a very limited group of content providers are required to make a limited subset of their programming available to additional pay-TV retail platforms. However, it does not affect the vast majority of pay-TV programming in the US, including channels provided by content groups such as Disney, Fox, HBO, Turner, AETN and Discovery among others. These companies are not subject to the FCC's rules because they do not own a retail pay-TV business.

Similarly to the UK, the US regulations do not provide a valid precedent for Singapore's actions because the US regulations are linked to specific market power concerns and their scope is carefully limited and defined.

Comparisons Between Cross-Carriage and Wholesale Regimes in the UK and the US

The Cross-Carriage regime has one obvious similarity with the rules applied in the UK and the US, in that in the latter two countries, rules have been implemented that require the holders of certain content rights to provide access to their rights over retail platforms other than their own.

This, however, is the limit of the similarities. Few if any other significant similarities exist.

Most importantly, there are important differences in:

- The rationale for the regimes;
- The scope of the regimes; and
- On whom the relevant obligation falls.

Furthermore, there are differences in the extent to which the various regimes can be considered "light touch".

Each is detailed in turn below.

Rationale

In the case of the UK and US wholesale regimes, mandatory access obligations were designed to address competition issues arising from vertical integration. In the UK and the US, mandatory wholesale access was introduced in order to prevent a vertically integrated retailer from vertically leveraging its ownership of key content rights in order to favour its downstream retail business versus its competitors.

In the UK, for example, BskyB was required to sell two of its premium sports channels at regulated prices to other retail players in order to prevent BskyB from using them to gain an unfair competitive advantage in the downstream market.

Cross-carriage, by contrast, is not designed to address vertical leverage or market power issues. Indeed, unlike the UK and the US, the Singaporean Pay-TV market is not vertically integrated.

The lack of vertical integration in Singapore and the absence of any attempt to justify Cross-Carriage on the basis of market power concerns, implies that the rationale for implementing wholesale access in the UK and the US cannot be used as precedent to justify an access remedy in Singapore.

The UK and US interventions, being grounded in market power analysis and far more limited in scope than the Cross-Carriage regime, are not comparable to Singapore's actions; Singapore has not alleged that there was a market failure, and therefore, there is no useful precedential value to be found.

Scope

Cross-Carriage applies to all content obtained on an exclusive basis after 12 March 2010. This is a much broader obligation than applies in the UK, and the US. For example, the rules governing access in the UK:

- apply only to two sports channels that are held by downstream rights owners that are believed to confer a competitive advantage in downstream markets. These are Sky Sports 1 and 2. In both cases, the key premium content is English Premier League football;
- do not apply to high definition content. (BskyB is not required to offer its HD versions of Sky Sports 1 and 2 on a wholesale basis).

By contrast, Cross-Carriage applies to all exclusive content acquired since 12 March 2010. The difference in scope is one of the consequences of the difference in rationale – unlike the UK and the US, no attempt was made to limit the content to which the obligation applies to any "key content" that, for example, is seen to confer a market power advantage.

The significant difference in scope is another reason why precedent from the UK and US cannot be considered valid precedent for the Cross-Carriage obligation in Singapore.

Who bears the obligation

The subject of the mandate is materially different in the UK and the US compared with that in Singapore. In the UK and the US, the relevant rules can be correctly termed "wholesale obligations". However, Cross-Carriage is not a limited wholesale obligation, but a broad and all-encompassing consumer right, (which in turn, profoundly affects wholesale supply). If the consumer so desires, under Cross-Carriage, he may request content supplied by one retailer over another retailer's platform. In this case, the retailer must provide the content and the platform must provide network and STB access.

The difference in the identity of those with rights and obligations is likely to have a significant effect in the nuances of implementation, which will be particularly significant in cases where neither the retailer, nor the platform owner have a commercial incentive for content to be delivered in this manner. This implies that any lessons learned in the UK and the US in terms of, for example, incentives to cooperate to the maximum extent and see the rules succeed, cannot be transferred to Singapore.

Light touch regulation

The MDA has held that Cross-Carriage is a lighter form of intervention than the wholesale access regimes applying in the UK and the US. However, we believe this view to be mistaken.

First, the Cross-Carriage regime involves all exclusive content (acquired since 12 March 2010). In the UK for example, it applies only to two sports channels and standard definition only. Cross-Carriage therefore involves a much broader scope than the rules applying in the UK, amounting in itself to a more intrusive intervention. Program access in the US is similarly limited in scope.

Second, it has been held to involve a lighter touch because it involves no controls over exclusivity. In the US, restrictions on exclusivity have been applied (although this is the exception rather than the rule). In the UK there is scope for applying restrictions on exclusivity under general competition law, (although it has not in fact been applied). It must, however, be observed that all such regimes – including Cross-Carriage – (by definition) involve de facto limitations on exclusivity because the content is no longer tied to the holder's platform. Therefore, the claim that Cross-Carriage does not interfere with exclusivity rests entirely on a technical or semantic interpretation of the term that has no meaning in reality.

Indeed, the far broader scope of Cross-Carriage compared with the other regimes we have considered, forces us to conclude that it interferes with exclusivity to a significantly greater extent than these other regimes.

The de facto end of exclusivity is likely to have a profound effect on contract negotiations, as platform operators will see no need to bid for exclusive carriage. This will have two far-reaching impacts on the content market:

(i) It will deny the retailers with a powerful pro-competitive tool. This will limit the ability for new entrants to gain market share quickly and to showcase their platforms;

(ii) It will reduce the funds available for investing in and developing their platforms and local content. We understand that MDA has argued to the contrary, that Cross-Carriage will increase investment and innovation in platforms as retailers will be forced to find other ways besides content, to differentiate their products. However, this ignores the reality of how retail competition works in the broadcasting sector. The "platform", which comprises the infrastructure and hardware is almost never a profitable standalone business. Typically, market forces require the platform to be sold at a loss that is recovered via content revenues. The breaking of the link between platform losses and content revenues that cross-carriage will entail, will reduce the ability and incentives of the retailers to invest in their platforms.

Third, it has been held that Cross-Carriage involves a lighter touch form of regulation because it does not specifically require channel unbundling or price control. The UK involves a degree of channel unbundling (in the sense that the two Sky Sports channels are unbundled from Sky's sports pack) as well as price control.

This is one respect in which – as it currently stands – Cross-Carriage involves a lighter touch than in the UK. However, for reasons expressed elsewhere, there are strong doubts about whether Cross-Carriage will be able to survive without a degree of intervention in channel packaging and channel pricing. In summary, the reasons for this are:

- Customers purchasing bundles under the Cross-Carriage rules but paying the same price as those purchasing the bundle on the native platform, will pay the same price but receive fewer channels because they will not receive channels to which the Cross-Carriage rules do not apply. This may lead to Cross-Carriage becoming an unpopular measure, leading to a temptation to introduce controls over retail pricing.

- Customers purchasing bundles under the Cross-Carriage rules will obtain channels that are close substitutes for the premium channels that they already access. This is likely to lead to Cross-Carriage becoming unpopular with the owner of the platform over which the channels are accessed, who will cease to promote it actively unless their customers are able to obtain unbundled channels. This is likely to lead to pressure to force unbundling, which also carries an implicit threat of retail price controls to ensure that the price of the individual channel is lower than the price of the bundle.

Consequently, although in this respect, Cross-Carriage appears "lighter touch" than the UK regime, there are significant doubts about whether it will be able to remain so if there is a strong desire to ensure the measure is widely used.

MDA has argued that there is significant international precedent for the Cross-Carriage regime. Examples of such precedent are held to be the UK, the US, Italy, France and Sweden. As we have explained here however, we conclude for the reasons given above, that this view is mistaken and that there is no relevant precedent.

Charles River Associates ("CRA") is a leading global consulting firm that offers economic, financial, and business management expertise to major law firms, industries, accounting firms, and governments around the world. With proven skills in complex cases and exceptional strength in analytics, CRA consultants have provided astute guidance to clients in thousands of successful engagements. We offer litigation and regulatory support, business strategy and planning, market and demand forecasting, policy analysis, and risk management consulting. Our success stems from the outstanding capabilities of our consultants, many of whom are recognized as experts in their respective fields; our close relationships with a select group of respected academic and industry experts; and from a corporate philosophy that stresses interdisciplinary collaboration and responsive service. Headquartered in Boston, the firm has offices throughout the United States, Canada, Europe, the Middle East, and Hong Kong.

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July 7, 2010

Mr. Simon Twiston Davies
CEO
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Central, Hong Kong

Re: Compatibility of the Media Development Authority of Singapore's *Code of Practice for Market Conduct in the Provision of Media Services* (2010) with Singapore's International Obligations

Dear Mr. Twiston Davies:

You have asked us to review the compatibility of the Media Development Authority's *Code of Practice for Market Conduct in the Provision of Media Services* (2010) with Singapore's international obligations.[1] We conclude that the relevant provisions of the *Code* violate Singapore's international obligations. The provisions on their face restrict the exercise of certain exclusive rights guaranteed by the Berne Convention and the TRIPS Agreement (the Treaties).

In particular, and just as an example, the rights in cable-originated programming may not under the Treaties be subject to conditions limiting exclusivity such as those imposed by the *Code*. To the extent there is programming which constitutes free and clear broadcast or transmission which is merely rebroadcast or retransmitted, respectively, such programming may be subject to conditions on the exercise of rights (under Berne Article 11bis(2)), but any such conditions still must satisfy the relevant provisions of the Berne Convention which allow for such conditions, as well as satisfy the three-step test. We conclude that in either case, the *Code* on its face does not satisfy Singapore's international obligations. In the latter scenario, while it may be possible to impose conditions other than

[1] This is an analysis of the *Code of Practice for Market Conduct in the Provision of Media Services*, No. S 148/2010, (Published in the Government *Gazette*, Electronic Edition, on 12th March 2010) (*Code*) in light of our knowledge and expertise regarding international obligations adhered to by Singapore. We are not licensed to practice law in Singapore, so to the extent relevant, our analysis herein is based on our best understanding of the laws, but should not be relied upon as formal legal advice concerning the meaning and interpretation of the law in Singapore. We are grateful for the comments of Eric Smith in the preparation of this memorandum. Please note that this memorandum does not opine on the possible antitrust implications of the current levels of exclusivity existing in contracts between the channels and cable providers in Singapore. We do note that in this case, there does not appear to be vertical integration in Singapore that would give rise to significant concern, e.g., the channels are not also serving as cable providers. Please note that this memorandum does not address consideration by the Singapore government of exempting local channels from the cross-carry requirement, and the extent to which such an exemption might violate Singapore's national treatment obligations.

pure exclusivity (e.g., compelling carriage by a competitor), it is up to the government of Singapore to demonstrate that such conditions meet the test of Article 11*bis*(2) and the three-step test.

LEGAL BACKGROUND

The Media Development Authority (MDA) of the government of Singapore has promulgated, pursuant to the *Media Development Authority of Singapore Act* (Cap. 172), the *Code of Practice for Market Conduct in the Provision of Media Services*, No. S 148/2010, (Published in the Government *Gazette*, Electronic Edition, on 12th March 2010) (*Code*).[2] Sections 2.1.5 and 2.7 of the *Code* create an "Obligation to Cross-Carry Content," i.e., an obligation on the part of licensees of content supplied over their pay television services in Singapore to "make their [content] available for transmission and reception on" competing services. The entirety of Section 2.1.5 of the *Code* reads as follows:

> **"2.1.5 Obligation to Cross-Carry Content** Regulated Persons who are Supplying Qualified Licensees must make their Qualified Content available for transmission and reception on Receiving Qualified Licensees' services. Correspondingly, Regulated Persons who are Receiving Qualified Licensees must carry on their respective services all Qualified Content made so available by Supplying Qualified Licensees."

This amounts to a broad statutory denial of exclusivity for owners of rights in all programming, and does little to avoid conflict with the normal ways owners of rights exploit their programs in Singapore, or to safeguard right holders' legitimate interests in their programming.

Included among (but not necessarily exhaustive of) the rights under the *Copyright Act* (Cap. 63 2006 Rev Ed) which may be affected by this "Obligation to Cross-Carry Content" are the exclusive rights:

"in the case of a literary, dramatic or musical work" or "in the case of an artistic work"
- the "exclusive right" "to communicate the work to the public" (Section 26(1)(a)(iv) and 26(1)(b)(iii)).

"in relation to a cinematograph film"
- the "exclusive right" "to communicate the film to the public" (Section 83(c)).

"in relation to a television broadcast or sound broadcast"
- the "exclusive right" to "re-broadcast it or to otherwise communicate it to the public" (Section 84(1)(d)).

[2] Pursuant to Section 1.9 of the *Code*, the "Effective Date" of the Code is "12th March 2010 at 8.30 am."

"in relation to a cable programme"

- the "exclusive right" to "communicate it to the public" (Section 85(1)(d)).

Included among the key definitions in Section 7 of the Act are the following:

> "'communicate' means to transmit by electronic means (whether over a path, or a combination of paths, provided by a material substance or by wireless means or otherwise) a work or other subject-matter, whether or not it is sent in response to a request, and includes —
> (a) the broadcasting of a work or other subject-matter;
> (b) the inclusion of a work or other subject-matter in a cable programme; and
> (c) the making available of a work or other subject-matter (on a network or otherwise) in such a way that the work or subject-matter may be accessed by any person from a place and at a time chosen by him, and "communication" shall have a corresponding meaning."
>
> "'broadcast' means broadcast by wireless telegraphy, and "broadcasting" shall have a corresponding meaning"
>
> "'cable programme' means a programme which is included in a cable programme service."
>
> "'cable programme service' means a service which consists wholly or mainly in the sending by any person, by means of a telecommunication system (whether run by him or by any other person), of sounds or visual images or both either —
> (a) for reception, otherwise than by wireless telegraphy, at 2 or more places in Singapore, whether they are so sent for simultaneous reception or at different times in response to requests made by different users of the service; or
> (b) for reception, by whatever means, at a place in Singapore for the purpose of their being presented there either to members of the public or to any group of persons."

RELEVANT INTERNATIONAL OBLIGATIONS

Singapore is an original member of the WTO,[3] and must abide by the Trade-Related Aspects of Intellectual Property Rights Agreement (TRIPS Agreement).[4] Singapore is also a

[3] *See* World Trade Organization, Members and Observers, <www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm>.
[4] The Agreement on Trade-Related Aspects of Intellectual Property Rights is Annex 1C of the World Trade Organization (WTO), Agreement Establishing the World Trade Organization, opened for signature, Marrakesh, 15 April 1994, 1869 UNTS 299, 33 ILM 1197 (1994). For text, see *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations* (Cambridge UK/ New York NY, CUP, 1999), p. 320.

member of the Berne Convention (Paris 1971 text) since December 21, 1998,[5] and joined the WIPO Copyright Treaty (WCT) on April 17, 2005.[6] The key international obligations relevant to the measure imposed by the *Code* include:

- the obligation to provide exclusive rights of "communication to the public" under Articles 11(1)(ii), 11*ter*(1)(ii), 14(1)(ii), and 14*bis*(1) of the Berne Convention.[7] In particular:

  - Article 11(i)(ii) provides, "Authors of dramatic, dramatico-musical and musical works shall enjoy the exclusive right of authorizing … any communication to the public of the performance of their works."

  - Article 11*ter*(1)(ii) provides, "Authors of literary works shall enjoy the exclusive right of authorizing … any communication to the public of the recitation of their works."

  - Article 14(1)(ii) provides, "Authors of literary or artistic works shall have the exclusive right of authorizing … the public performance and communication to the public by wire of the works thus adapted or reproduced."

  - Article 14*bis*(1) provides, "Without prejudice to the copyright in any work which may have been adapted or reproduced, a cinematographic work shall be protected as an original work. The owner of copyright in a cinematographic work shall enjoy the same rights as the author of an original work, including the rights referred to in the preceding Article."

- the obligation to provide exclusive rights of "broadcasting and other wireless communications" and "public communication of broadcast by wire or rebroadcast" (e.g. cable retransmissions and rebroadcasting of original broadcasts) under Article 11*bis* of the Berne Convention.[8]

[5] Berne Convention for the Protection of Literary and Artistic Works Berne Convention (1886), completed at Paris (1896), revised at Berlin (1908), completed at Berne (1914), revised at Rome (1928), at Brussels (1948), at Stockholm (1967) and at Paris (1971), and amended in 1979 (Berne Union), <www.wipo.int/export/sites/www/treaties/en/documents/pdf/berne.pdf>.
[6] WIPO Copyright Treaty, S. Treaty Doc. No. 105-17 (1997) 36 ILM 65 (1997) (entry into force March 6, 2002) (WCT) <www.wipo.int/treaties/en/ip/wct/pdf/trtdocs_wo033.pdf>.
[7] *See* World Intellectual Property Organization, Guide to the Copyright and Related Rights Treaties Administered by WIPO and Glossary of Copyright and Related Rights Terms, WIPO Publication No. 891E (2003) ("WIPO Guide").
[8] "Authors of literary and artistic works shall enjoy the exclusive right of authorizing … the broadcasting of their works or the communication thereof to the public by any other means of wireless diffusion of signs, sounds or images … [or] any communication to the public by wire or by rebroadcasting of the broadcast of the work, when this communication is made by an organization other than the original one." As noted below, these rights are subject to Article 11*bis*(2), which indicates that countries may "determine the conditions under which the rights mentioned … may be exercised." This has been interpreted to allow for either a non-voluntary license or possibly other "conditions" (such as the maintenance of exclusivity "with the condition, however, that it may only be exercised through collective management organizations"). *See* WIPO Guide, at BC-11*bis*.22, p 79.

- the obligation under the TRIPS Agreement to provide these exclusive rights referred to above, by virtue of their incorporation by reference; Article 9 of the TRIPS Agreement, entitled "Relation to the Berne Convention," provides that "WTO members shall comply with Articles 1 through 21 of the Berne Convention" (except for Article 6bis on moral rights).

- the obligation under the TRIPS Agreement (Article 13) that "Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder." As has been noted by leading scholars (Ricketson and Ginsburg), as to rights under the Berne Convention, such as those discussed herein (and which are limited or denied by the *Code*), not only the three-step test but also the "non-derogation article 2.2 of the TRIPs Agreement and Article 20 of the Berne Convention" must be referenced when considering any new exceptions or limitations.[9] As such, they note, "any exceptions or limitations in relation to these rights will need to be consistent with what is already allowed under Articles 1 to 21 of Berne."[10]

  - Article 2,2, of TRIPs provides in relevant part, "Nothing in … this Agreement shall derogate from existing obligations that Members may have to each other under … the Berne Convention…."

  - Article 20 of the Berne Convention provides in relevant part, "The Governments of the countries of the Union reserve the right to enter into special agreements among themselves, in so far as such agreements grant to authors more extensive rights than those granted by the Convention, or *contain other provisions not contrary to this Convention*…."

- the obligation under the WCT Article 8, that "Without prejudice to the provisions of Articles 11(1)(ii), 11*bis*(1)(i) and (ii), 11*ter*(1)(ii), 14(1)(ii) and 14*bis*(1) of the Berne Convention, authors of literary and artistic works shall enjoy the exclusive right of authorizing any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them."[11] The following are important to note in regard to the relationship between the WCT and the Berne Convention, and exceptions and limitations allowed thereunder:

  - The "communication to the public"/"making available" right under the WCT is subject to Article 10, which confirms the applicability of the three-step test. Specifically,

[9] See Sam Ricketson & Jane Ginsburg, *International Copyright and Neighbouring Rights: The Berne Convention and Beyond*, Oxford University Press, 2nd Edition, 2006, Sec. 13.107.
[10] *Id.*
[11] The United States-Singapore Free Trade Agreement (entry into force January 1, 2004) provides essentially the same exclusive right of "communication to the public" under Article 16.4.2(a) of that Agreement.

Article 10(1) of the WCT provides, "Contracting Parties may, in their national legislation, provide for limitations of or exceptions to the rights granted to authors of literary and artistic works under this Treaty in certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author."

- In addition, the cumulative nature of the three-step test, and the applicability of the test, is also confirmed with respect to rights granted under the Berne Convention. Specifically, Article 1(2) of the WCT provides, "Nothing in this Treaty shall derogate from existing obligations that Contracting Parties have to each other under the Berne Convention for the Protection of Literary and Artistic Works." Article 10(2) of the WCT provides, "Contracting Parties shall, when applying the Berne Convention, confine any limitations of or exceptions to rights provided for therein to certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author."

ANALYSIS

Denial of Exclusive Rights Guaranteed by the Berne Convention and TRIPS

The *Code* requires that licensee-pay TV service A (referred to as Supplying Qualified Licensee), which has licensed content from a right holder, must "make [the content] available for transmission and reception on" pay TV service B (referred to as Receiving Qualified Licensee).[12] As noted, this amounts to a broad statutory denial of exclusivity for owners of rights in all programming, which cannot avoid conflict with the normal ways owners of rights exploit their programs in Singapore or safeguard right holders' legitimate interests in their programming. As such, owners of copyright are denied the ability to authorize or prohibit certain parties (in this case the Receiving Qualified Licensee) from exercising certain exclusive rights (such as the communication right) which are the domain of the copyright owner. This denial, which applies regardless of the type of content or the manner in which the content is delivered, stands in violation of one or more of the minimum exclusive rights guaranteed by the Berne Convention and the TRIPS Agreement (which incorporates the relevant Berne articles by reference).

We understand that Singapore's Media Development Authority has asserted that its cross-carriage requirement does not deny exclusivity, since it does not prohibit content providers from entering into exclusive content agreements with cable providers. However, the *Code* statutorily alters such agreements in a fundamental way by requiring that providers make the exact content available to competitor cable providers. Thus, the *Code* has the effect of

[12] Even more specifically, "Supplying Qualified Licensees" mean cable networks which are licensed by the Singapore authorities to provide subscription television services, and which are also licensed by owners of rights to distribute programs. "Receiving Qualified Licensees" are those which are licensed by the Singapore authorities to provide subscription services, but which are not licensed by the owners of rights.

changing such agreements from exclusive carriage agreements to non-exclusive carriage agreements. The requirement fundamentally alters the copy*right* – which is the right of the content provider to authorize another to engage in certain acts, to the exclusion of others. By imposing the mandatory cross-carriage, the MDA imposes a severe condition under which rights of copyright owners may be exercised, and which as to cable-originated programming or primary distributions by cable providers is not permitted under TRIPS and the Berne Convention.

Specifically, the Berne Convention obliges Members to provide exclusive rights of "communication to the public" under Articles 11(1)(ii), 11*ter*(1)(ii), 14(1)(ii), and 14*bis*(1), and incorporated by reference in Article 9 of TRIPS. These rights are not subject to any possible compulsory license (much less any statutory royalty-free cross-carry mechanism as that which is imposed by the *Code*). The WIPO Guide as well as the 1986 Report of the WIPO/UNESCO Committee of Governmental Experts on "Audiovisual Works and Phonograms" confirms this point.[13] The WIPO Guide provides in relevant part,

> "while under Articles 11(1)(ii), 11ter(1)(ii) and 14bis(1), exceptions to the exclusive right of authorization *must not go beyond the – very limited – possibilities on the basis of the marginal system of 'minor reservations,'* in respect of the exclusive right provided for in paragraph 1(ii) of Article 11bis, paragraph (2) of the same Article allows the application of non-voluntary licenses." [emphasis added]

The World Intellectual Property Organization adopted as early as 1983 a set of "Annotated Principles of Protection of Authors, Performers, Producers of Phonograms and Broadcasting Organizations in Connection with Distribution of Programs by Cable," Principle 9 of which states the general rule:

> "Principle 9 *(Exclusive Right of Authorization)*"
>
> "The author or other owner of the copyright has the exclusive right of authorizing the distribution of his work protected by copyright in the framework of a cable-originated program."

The 1986 WIPO/UNESCO Committee of Governmental Experts Report notes Principle AW 27, which echoes the 1983 Principle, providing the identical language,

> "The author or other owner of the copyright has the exclusive right of authorizing the distribution of his work protected by copyright in the framework of a cable-originated program."

[13] *See* WIPO Guide, BC-11bis.16, p. 78 and WIPO/UNESCO Committee of Governmental Experts Report on "Audiovisual Works and Phonograms," 1986.

Principle AW27 and the notes to it state the obvious point that, in the case of cable-originated transmissions of audiovisual works, exclusive rights are applicable under Berne Article 14(1)(ii) and 14*bis*(1) without the possibility of applying non-voluntary arrangements or compulsory licenses, in contrast to the case of broadcasting and cable retransmission, which may fall under Article 11*bis*(2).

We understand that there are several different methods by which the content is provided to the Supplying Qualified Licensee for onward delivery to subscribers, and that there are different extents to which content distributed by the cable providers remains unaltered or is altered to varying degrees. To the extent Supplying Qualified Licensees engage in primary distribution or cable-origination of audiovisual works, cinematographic works, etc., the cross-carriage requirement without payment or authorization violates the Berne Convention. As one example, Article 14(1)(ii) provides for an exclusive right of authorization of communication of cinematographic works and other audiovisual works to the public by wire. To the extent the Supplying Qualified Licensees distribute via their services cinematographic works or audiovisual works as primary cable distributions or "cable-originated programs,"[14] the cross-carriage requirement would violate Article 14(1)(ii) of the Berne Convention. Such works can be understood to include those which are *not accessible to the public* when they are delivered to the cable provider (which we understand is often the case in Singapore), and WIPO indicates that such content should be considered cable-originated.[15] The same analysis holds for other

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[14] The WIPO/UNESCO Committee of Governmental Experts Report notes to Principle AW 27 define "Cable-originated program" as

> A program that is distributed by cable and where the program is not originating from a broadcast or where, although it originates from a broadcast, the distribution by cable is not simultaneous with the broadcast, or even where it is simultaneous with the broadcast, sounds or images or both not contained in the broadcast are superimposed on the broadcast when it is distributed by cable.

An almost identical definition was included in Annotated Principles of Protection of Authors, Performers, Producers of Phonograms and Broadcasting Organizations in Connection with Distribution of Programs by Cable, which were adopted by a 1983 Subcommittee of the Executive Committee of the Berne Convention on Cable and the report of the subsequent session of the Executive Committee of the International Union for the Protection of Literary and Artistic Works (Berne Union) that approved the conclusions of the Subcommittee. The definitions included the following:

> **cable-originated program** or **cable-originated program item** means a program or a program item that is distributed by cable and where the program or the program item is not originating from a broadcast or where, although it originates from a broadcast, the distribution by cable is not simultaneous with the broadcast or, even where it is simultaneous with the broadcast, sounds or images or both not contained in the broadcast are superimposed on the broadcast when it is distributed by cable.

See World Intellectual Property Organization, *Distribution of Programs by Cable*, in *Copyright*, April 1984. *See also* World Intellectual Property Organization, *Executive Committee of the International Union for the Protection of Literary and Artistic Works (Berne Union)*,Twenty-Second Session (8th Extraordinary), Geneva, December 12 to 16, 1983, in *Copyright*, February 1984.

[15] *Id.* As one example of trying to discern whether an item originates from a broadcast, the discussion of "satellite" transmissions of programming is instructive. In describing the various considerations as to whether programming is considered primary, thus subject to unconditional exclusive rights, or secondary, which could be subject to conditions under Article 11*bis*(2) of the Berne Convention, the Principles on "Distribution of Programs by Cable" state in relevant part,

exclusive rights of "communication to the public" under Articles 11(1)(ii), 11*ter*(1)(ii), and the application of rights to cinematographic works through Article 14*bis*(1).[16]

Potential Applicability of Berne Article 11bis(2) Compulsory License

As has been demonstrated, by imposing a non-voluntary denial of exclusive rights (i.e., the exclusive right to authorize or prohibit certain acts such as "communication") in certain content for which such non-voluntary conditions may not be imposed, the *Code* runs afoul of Singapore's international obligations.

Here, the analysis could end. However, one question related to the cross-carriage mandate is whether Singapore may be entitled to impose compulsory conditions with respect to some of the programming being distributed by Supplying Qualified Licensees, specifically, under Article 11*bis*(2) of the Berne Convention.[17] As noted, the exclusive rights granted in Article 11*bis* – "broadcasting and other wireless communications" and "public communication of broadcast by wire or rebroadcast" – are subject to Article 11*bis*(2), which indicates that countries may "determine the conditions under which the rights mentioned … may be exercised." This provision allows for other "conditions" (such as either a non-voluntary license or the maintenance of exclusivity "with the condition, however, that it may only be exercised through collective management organizations").[18] However, the "conditions" of such a license may not "prejudice" the "right to obtain equitable remuneration." The WIPO Guide notes that "remuneration may only be regarded as equitable if it corresponds more or less to the payment that the author might be able to agree upon through negotiations in the absence of a compulsory license."[19]

To the extent any of the activities undertaken by the Supplying Qualified Licensee include those covered by Article 11*bis*, Article 11*bis*(2) would in principle be applicable. However, from the facts presented, and as discussed above, there is strong, if not irrefutable evidence, that cable providers in Singapore are not engaged in mere cable retransmissions of

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> "If the transmission via satellite was effected *in a way not accessible by the public*, both simultaneous and deferred distribution by cable of the sounds or sounds and images received via satellite should be considered as being effected without intervening broadcast. If, however, the distributor picks up, and distributes by cable, simultaneously and without change, sounds, images or both, transmitted via direct broadcast satellite for public reception, this operation should be regarded as distribution by cable of a broadcast." [emphasis added]

[16] Since this memorandum roundly demonstrates that the *Code* unduly impinges on the exercise of exclusive rights of owners of content, there is no need to engage in an exhaustive review of rights or specific content or distribution methods which fall under the application of the *Code*.

[17] The Berne Convention contains two provisions, Article 11bis(2) and Article 13(1) (the latter as to sound recordings of musical works) that permit the application of "conditions" such as a compulsory license or such a total limitation on exclusivity of rights. It does not appear we are dealing with an Article 13(1) scenario, so Article 11bis(2) is the only mechanism by which Singapore could possibly impose "conditions" such as a compulsory license or denial of exclusivity in this fact scenario.

[18] *See* WIPO Guide, at BC-11*bis*.22, p 79.

[19] *See* id. at BC-11bis.23, p, 79 (citing Wilhelm Nordelmann et al, *International Copyright and Neighboring Rights*, VCH Verlagsgesellschaft, Weinheim, 1990, p. 128, and Sam Ricketson, *Berne Convention for the Protection of Literary and Artistic Works:1886-1986*, Kluwer, London, 1986, p. 520).

broadcasts or the rebroadcasting of the broadcast of a work,[20] but in fact are engaged in originations of cable programming which are not subject to Article 11*bis*(2). If any of these transmissions could be considered as cable retransmissions or rebroadcasts, then, while it may be possible to impose conditions other than pure exclusivity, the burden rests on the government of Singapore to demonstrate that such conditions meet the test of Article 11*bis*(2) and the three-step test. For example. it may be difficult to show that the *Code* meets the requirements of 11*bis*(2) since there does not seem to be any mechanism by which equitable remuneration would be guaranteed.[21]

For example, the *Code* expressly prohibits the Receiving Qualified Licensee from imposing "any form of charge on any Subscriber who subscribes to any Qualified Content made available to the Receiving Qualified Licensee by a Supplying Qualified Licensee."[22] While does not foreclose the possibility of some form of payment by the subscriber to the Supplying Qualified Licensee (i.e., the recipient of the cross-carried programming would have to subscribe and pay for the content), it does not follow from this that the content provider would be in any position to receive payment for the programming thus cross-carried. It is difficult to imagine any scenario under which the content owner would be in a position to demand payment from the Supplying Qualified Licensee for the required cross-carriage which "corresponds more or less to the payment that the author might be able to agree upon through negotiations in the absence of a compulsory" arrangement. Due to the lack of exclusivity on the part of the Supplying Qualified Licensee, the opposite effect may emerge, i.e., a disincentive under the new cross-carriage requirement which may result in even lower

[20] Here it is also useful to refer to the 1986 Report of the WIPO/UNESCO Committee of Governmental Experts on "Audiovisual Works and Phonograms" regarding fixed service satellite to cable programs, which at the moment of the reception of a program received by the cable distributor has not yet been broadcast or communicated to the public. The *primary* communication *to the public* is only made (or as a minimum, completed) by the cable distributor. Principle 35 in the Report provides,

> If an audiovisual work transmitted through a fixed service satellite – in the final phase of the communication to the public – is distributed by cable, such distribution should be considered as a distribution of the work in the framework of a cable-originated program. Consequently, Principles AW27, AW28, AW31 to AW33 and AW34(ii) should be applied.

Thus, as Principle AW35 confirms, the nature of the satellite-cable-subscriber activity is a cable originated program. In these cases, compulsory licenses are simply excluded.

[21] As noted, Receiving Qualified Licensees are prohibited from asking for any payment from their subscribers for such programs made available through their system by the Supplying Qualified Licensees. There is nothing in the Code, Section 2.7.2(d) or otherwise, that expressly prohibits the owners of rights from modifying the amounts of license fees to be paid by the Supplying Qualified Licensee, i.e., to make such license fees higher in proportion of the number of subscribers receiving the program. Such a system would be similar to the compulsory license under Article 13(1) of the Berne Convention for the recording of musical works, in the sense that Article 13(1) is only applicable if the owner of rights has already authorized a record producer to record his work (in this case, the other producers may get a compulsory license). However, even if such payments could be negotiated, which is quite dubious, since the owner of rights has no bargaining power over the Supplying Qualified Licensee since exclusivity has been stripped, such a compulsory licensing model would not be applicable to films, since, absent equitable payments, the *Code* violates the three-step test, and as noted, to the extent the activities of the cable provider are not covered under a permissible compulsory license under the Berne Convention (Article 11*bis*(2)), no compulsory license is permitted.

[22] *Code of Practice for Market Conduct in the Provision of Media Services*, No. S 148/2010, (Published in the Government *Gazette*, Electronic Edition, on 12th March 2010) (*Code*), Section 2.7.2(d).

payments by Supplying Qualified Licensees to channels and other owners of rights. In this case, the *Code* would fail the terms of Article 11*bis*(2) on their face. In addition, in these circumstances, the *Code* cannot satisfy the three-step test as discussed immediately below.

Applicability of the Three-Step Test

The three-step test, first introduced in the 1967 Stockholm text of the Berne Convention as an exception to the reproduction right included therein, was adopted as well in Article 13 of the TRIPS Agreement (and thereafter in, e.g., Article 10 of the WIPO Copyright Treaty). The test as adopted in the TRIPS Agreement, and applicable to exclusive rights, reads as follows:

> Members shall confine limitations or exceptions to exclusive rights to *certain special cases* which *do not conflict with a normal exploitation of the work* and *do not unreasonably prejudice the legitimate interests of the right holder*. [emphasis added]

Ricketson/Ginsburg and Ficsor confirm the applicability of the Article 13 three-step test to exclusive rights (including all of the above-referenced rights) under the Berne Convention.[23]

As the one WTO Panel to rule on the three-step test in the area of copyright (the case brought by the EU against the United States challenging Section 110(5) of the U.S. Copyright Act which exempts payments for uses of music principally in retail establishments and restaurants) indicated, the test is cumulative, i.e., "a limitation or an exception is consistent with [the three-step test] only if it fulfils each of the three conditions."[24]

It is clear as well that the three-step test applies to any compulsory license permissible under the Berne Convention. The 110(5) Panel cited the Main Committee I of the Stockholm Diplomatic Conference (1967) which noted that only if the second and third tests were met "would it be possible in certain special cases *to introduce a compulsory license*, or to provide for use without payment."[25]

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[23] Sam Ricketson & Jane Ginsburg, *supra note* 9, Sec. 13.105. Mihály Ficsor, *The Law of Copyright and the Internet The 1996 WIPO Treaties, Their Interpretation and Implementation*, Oxford University Press, 2002, Secs. 5.75 and 5.76.

[24] *See e.g.*, World Trade Organization, *United States – Section 110(5) of the US Copyright Act*, WT/DS160/R, 15 June 2000, Section 6.74 (110(5) Case).

[25] Records of the Intellectual Property Conference of Stockholm. June 11 to July 14, 1967. Report on the Work of Main Committee I (Substantive Provisions of the Berne Convention: Articles 1 to 20). As reproduced in the Berne Convention Centenary, p. 197. Dr. Mihály Ficsor points out that compulsory licenses are limitations of exclusive rights, subject both to specific provisions of the Berne Convention (and the TRIPS Agreement and the WCT) and to the three-step test (Berne Article 9(2), TRIPS Article 13 and WCT Article 10). The three-step test in this regard is also important, since, under Article 13 of the TRIPS Agreement and Article 10 of the WCT, even Article 11*bis*(2) is only applicable if the proposed license corresponds to the three conditions of the test. This is particularly relevant from the viewpoint of audiovisual works in respect of the application of Article 11*bis*(2) concerning primary broadcasts. Even without the extension of the three-step test to the right of broadcasting by the above-mentioned TRIPS and WCT provisions, national laws normally do not apply compulsory broadcasting licenses for audiovisual works. With the application of the three-step test, however, this is not only a reasonable way of using the freedom granted by Article 11*bis*(2) but avoiding a conflict with the three-step test, since the application of compulsory licenses to primary broadcasts of audiovisual works would obviously conflict with the normal exploitation of those works through the various release windows.

It is our opinion that, to the extent the *Code* denies owners of copyright the ability to authorize or prohibit the exercise of rights exclusively as guaranteed by the Berne Convention, and as incorporated by reference in the TRIPS Agreement, including, *inter alia*, in the case of primary cable distributions or cable-originated programming, the *Code* violates the three-step test. Even as to any possible activity by the Supplying Qualified Licensee that may qualify for conditions to be imposed as to exclusivity of rights under Article 11*bis*(2), it will be very difficult for the government of Singapore to demonstrate that it meets the three-step test, The following provides very brief discussion of the three steps, one or more of which arguably are not satisfied by the *Code*.

Certain special cases…

The 110(5) panel defines "special" in "certain special cases" (the first step of the three-step test) in part as follows:

> The term "special" connotes "having an individual or limited application or purpose", "containing details; precise, specific", "exceptional in quality or degree; unusual; out of the ordinary" or "distinctive in some way".[26] This term means that more is needed than a clear definition in order to meet the standard of the first condition. In addition, an exception or limitation *must be limited in its field of application or exceptional in its scope*. In other words, an exception or limitation should be *narrow in quantitative as well as a qualitative sense*. This suggests a narrow scope as well as an exceptional or distinctive objective. To put this aspect of the first condition into the context of the second condition ("no conflict with a normal exploitation"), an exception or limitation should be the opposite of a non-special, i.e., a normal case.

As to either primary cable distributions or cable-originated programming, or any possible activity by the Supplying Qualified Licensee that may qualify for the imposition of conditions as to exclusivity of rights under Article 11*bis*(2), an entire class of programming is stripped of exclusivity. By contrast, for example, the *Code* contains sections dealing with so-called "Events of National Significance" (*see Code,* Section 2.1.1), which are also to be cross-carried. The scope of "Events of National Significance" is far narrower in its "quantitative as well as a qualitative sense," and far more "limited in its field of application or exceptional in its scope" than the scope of the cross-carriage requirement under Section 2.1.5 and 2.7, which applies to all "Qualified Content" – essentially, all exclusively licensed content to cable providers in Singapore.[27] Moreover, the *Code* on its face covers a broad range of content

[26] *See 110(5) Case*, n. 112 (citing The New Shorter Oxford English Dictionary, Oxford (1993), p. 2971).
[27] Section 2.3(d) of the *Code* provides the following definition of "Qualified Content":

> ''Qualified Content'' means all channels and programming content (including linear and non-linear channels, and content packaged in video-on-demand format), acquired or otherwise obtained on or after the Effective Date by a Supplying Qualified Licensee on the basis of the Supplying Qualified Licensee having the exclusive right to broadcast such channels or programming content. For the avoidance of doubt, Qualified Content excludes any

which defies the definition of "certain special cases" and whose overall effect, along with content already cross-carried, is by no means limited in its scope of application.

Conflict with a normal exploitation of the work…

The 110(5) panel interpreted "normal" exploitation as "something less than full use of an exclusive right,"[28] since otherwise any exception would be in violation of TRIPS, and that "whether a limitation or an exception conflicts with a normal exploitation of a work should be judged for each exclusive right individually."[29] It is instructive that the U.S., which was defending the claim for what the EU argued was an over broad exception to payments for music piped into retail establishments and restaurants, argued with respect to "normal exploitation," that "the essential question to ask is whether there are areas of the market in which the copyright owner would ordinarily expect to exploit the work, but which are not available for exploitation because of this exemption."[30] The Panel went on to note the "persuasive guidance" of the Swedish Government and the United International Bureaux for the Protection of Intellectual Property ("BIRPI"), which was set up to prepare for the Revision Conference at Stockholm in 1967 ("Swedish/BIRPI Study Group"). In relation to the reproduction right, this Group suggested to allow countries:

> [to] limit the recognition and the exercising of that right, for specified purposes and *on the condition that these purposes should not enter into economic competition with these works*" in the sense that *"all forms of exploiting a work, which have, or are likely to acquire, considerable economic or practical importance, must be reserved to the authors.* [emphasis added][31]

The *Code* clearly interferes with an area of the market in which the copyright owners involved would ordinarily expect to exploit the work, but which are not available for exploitation because of the cross-carriage requirement. Exclusivity with respect to licensing of broadcast content for cable service delivery is not uncommon in the Singapore market, as well as in other markets around the world (and constitutes a "normal" manner for licensing the right of cable systems to originate programs). It can also be anticipated that the adoption of the *Code* will have a significant negative effect on a market for which they are already exploiting, since

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channels or programming content where the exclusive rights to broadcast such channels or programming content were acquired or otherwise obtained before the Effective Date, but includes any extension, renewal, or otherwise re-contracting of existing exclusive rights over such channels or programming content on or after the Effective Date.

[28] Id. Para. 6.167

[29] Id. Para. 6.173

[30] Id Para. 6.177. The Panel indicated,

> this test seems to reflect the empirical or quantitative aspect of the connotation of 'normal', the meaning of 'regular, usual, typical or ordinary'. We can, therefore, accept this US approach, but only for the empirical or quantitative side of the connotation.

Id. Para 6.178.

[31] Id. Para. 6.179 (citing Document S/1: Berne Convention; Proposals for Revising the Substantive Copyright Provisions (Articles 1-20). Prepared by the Government of Sweden with the assistance of BIPRI, p. 42).

there is no mechanism in place for owners of content to achieve economic value or payments for the rights which are usurped as a result of cross-carriage. Not to be able to exclusively control this important release window, or obtain fair payments for the cross-carriage, would conflict with a normal exploitation of works. In addition, to the extent there is a diminution in value to the provision of content to the Supplying Qualified Licensee due to the total lack of exclusivity, this can also be said to conflict with a normal exploitation of the rights in programming affected.

Unreasonable prejudice of the legitimate interests of the right holder

Given that the *Code* fails either or both of the first two steps of the three-step test, and given the cumulative nature of the test, there is no need to proceed with evaluating the third step. Even doing so, it is likely the *Code* cannot comport with this aspect of the test. The 110(5) Panel indicated that to evaluate the third step of the three-step test, one has to "define what are the 'interests' of right holders at stake and which attributes make them 'legitimate,'" and then "develop an interpretation of the term 'prejudice' and what amount of it reaches a level that should be considered 'unreasonable.'"[32]

Just as in the 110(5) case, it is our view that there is no dispute that owners of copyright have a legitimate interest in obtaining financial gain for their intellectual property.[33] To determine whether the "prejudice" is unreasonable, following the 110(5) Panel, one would have to evaluate whether "prejudice to the legitimate interests of right holders reaches an unreasonable level," which the panel said occurs "if an exception or limitation causes or has the potential to cause an unreasonable loss of income to the copyright owner."[34] We do not believe we have sufficient factual information or empirical data to determine whether the *Code* fails the third step, but we assume that in future negotiations, the Supplying Qualified Licensee would have no incentive to pay a premium for exclusivity, since it is then required to turn around and make available for transmission or distribution the programming to the Receiving Qualified Licensee. If this is the case, then the copyright owner would clearly lose income and this would be significant evidence that the *Code* cross-carriage requirement unreasonably prejudices the legitimate interests of the owners of copyright supplying content to the Singapore cable providers.

CONCLUSION

The foregoing has provided a non-exhaustive explanation as to why the Singapore measures do not comport with Singapore's international obligations under the TRIPS Agreement. We conclude that the relevant provisions of the *Code* place Singapore outside the

[32] Id. Para. 6.222.
[33] *Cf.* id. Para. 6.226 ("Given that the parties do not question the 'legitimacy' of the interest of right holders to exercise their rights for economic gain, the crucial question becomes which degree or level of 'prejudice' may be considered as 'unreasonable'.")
[34] Id. Para. 6.229.

confines of its international obligations. This is so since the *Code* effectively denies copyright owners the ability to exercise their rights to authorize or prohibit certain uses of their content for which exclusivity is guaranteed. This in turn denies rights which copyright owners are guaranteed under the Berne Convention, incorporated by reference into the TRIPS Agreement. We also conclude that the *Code* in its current formulation does not comport with the three-step test.

Notwithstanding the attempt by the government of Singapore to argue that "exclusive carriage" is retained since content providers are technically permitted to enter into exclusive distribution agreements, this argument falls short in two key respects. First, notwithstanding the possibility of concluding such an "exclusive" agreement, the cable provider's obligation under the *Code* to communicate the content with its subscribers without the copyright owner's authorization strips the essence of exclusivity – the right to authorize or prohibit – from the content owner. To the extent the types of content and/or distribution methods may not be subject to a compulsory arrangement (for example, all cable-originations and primary distributions by cable), the *Code* violates TRIPS and the Berne Convention. Second, this denial of exclusivity will render negotiations for future deals far less fruitful for content owners, since the purported licensee will no longer have any incentive to pay a premium for exclusive rights to the content. This conflicts with a normal exploitation of the work, and cannot therefore pass the second step of the three-step test. Even for any content (rebroadcast or retransmitted) for which compulsory conditions may be imposed, the government of Singapore has yet to demonstrate how it will be able to provide for conditions ensuring that copyright owners can obtain remuneration which "corresponds more or less to the payment that the author might be able to agree upon through negotiations in the absence of a compulsory" arrangement.

Thank you for the opportunity to provide you with this brief opinion. We are pleased to discuss this with you and answer any questions you may have.

Best regards,

Michael Schlesinger