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BY EMAIL

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Dear Ms. Ang:

Enclosed you will find the submission of CASBAA, representing the international pay-TV industry, in response to MDA's Third Consultation on "Implementation of the Cross-Carriage Measure in the Pay-TV Market." dated 23 March 2011.

Sincerely Yours,

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IV. Statement of Interest

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 130 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 370 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.

All of the members of CASBAA have a direct interest in Singapore's actions with regard to exclusivity of pay-TV content. Singapore had in the past been regarded as a model for other regulators in Southeast Asia, and for that reason the actions it takes resonate throughout the region and affect the interests of all our members everywhere in Asia.

CASBAA's content-supplying members who are involved in the Singapore market have particular interest in this matter. So do the two major pay-TV platform operators in Singapore. The two platforms have an ongoing dialogue with MDA and they prefer to communicate their views directly to the Singapore authorities. Thus, while they are both valued members of CASBAA, this submission does not represent their interests, and they will communicate their views directly.

Submission

CASBAA thanks the MDA for the opportunity to provide input on the implementation of the cross-carriage system (for our view of the cross-carriage regime as a whole, please see at Section 5 below). We wish to offer MDA reactions to several specific issues discussed in the Third Consultation Paper and draft revisions to the Media Market Conduct Code.

1. Definition of Qualified Content

We urge MDA to reconsider its definition of Qualified Content, specifically with respect to the criteria that are to be adopted by MDA in determining whether it should exercise its powers to intervene and require that content (not otherwise falling within the definition of Qualified Content) be subject to the Measure.

The Consultation Paper restates MDA's principled view that it should not intervene in commercial negotiations over the terms at which channels and/or programming are sold, and we applaud that principle. However, in order to give this principle any meaningful life, MDA needs to exercise restraint. Creation of a system whereby the regulator oversees every contract and decides by its own (non-disclosed) criteria which ones are "likely" to have certain effects does not preserve a meaningful scope for commercial negotiations and is not consistent with a system of rule of law. Rather, it hangs a "sword of Damocles" over every negotiation and subjects every contract to the subjective *ex post facto* judgment of officials as to its commercial impact and legal acceptability.

The very subjective approach contained in the current regulations will of course lead to contracts being written with clauses that re-open them if the content is deemed to be "Qualified Content." This creates additional negotiating uncertainty and makes it more difficult to bring content to market.

We urge MDA to revert to its previous approach to this issue, expressed in the September 1, 2010 "Consultation on Preliminary Policy Positions," which stated that the regulations would affect "an arrangement that prevents or restricts" others from transmitting the programming. Broadening this to any arrangement "*likely* to prevent or restrict" another Regulated Person from acquiring the content, as MDA proposes to do in the current Consultation Paper, creates a dangerous degree of uncertainty in contract negotiation.

2. Compensation to Content Owners for Cross-Carriage

MDA appears to envision (paragraph 3.3.1.7) that when content is cross-carried, compensation should be received by content owners for the additional audience viewing their content. However, MDA appears to assume that this will happen automatically, and that since the SQL is

entering into a contractual relationship with the customer, the SQL will provide appropriate compensation to the content provider.

Certainly, any content provider knowingly negotiating an exclusive carriage agreement with an SQL would ensure that appropriate mechanisms are negotiated to provide such compensation. However, compensation arrangements in industry contracts take many forms; per-household payment is not the only structure utilized. MDA's creation of a category of "deemed" exclusive content raises the possibility that a contract could be negotiated with a different compensation arrangement, and then "deemed" to be exclusive by the operations of MDA's *ex post facto* review. In that event, it is possible that the negotiated compensation arrangements would not provide appropriate remuneration to the content provider for the expanded distribution of his content, which he will not have knowingly authorized.

We urge MDA to make regulatory provision for such eventualities, and to provide that in any case where the contract is "deemed" in such a way as to subject the content to cross-carriage, MDA will make no order actually requiring cross-carriage unless the content provider certifies that it is receiving satisfactory negotiated compensation for the wider-than-anticipated distribution of its works.

3. <u>Packages and Bundles</u>

Our previous submissions to MDA on cross-carriage observed that the regime would put great pressure on the structuring of commercial offerings by the pay-TV industry. This is now codified; the draft amendments to the MMCC make it clear that this pressure will be felt most keenly by the pay-TV platform operators, who will in practice be faced with three unpalatable options:

a) Engage in a long and complicated series of negotiations with content providers to allow bundles "poisoned" by the presence of Regulated Content to be passed in their entirety for cross-carriage. Content providers will in turn have to engage in a potentially even more long and complicated series of negotiations with upstream rights owners to secure the rights necessary to permit this "voluntary" cross-carriage of the content on all "relevant platforms." *This would permit cross-carriage of bundles by obtaining all the necessary consents.*
b) Split out the Regulated Content from the bundles, and establish a-la-carte prices for Regulated channels. Such prices would have to be available to consumers on all platforms. *This would avoid the necessity for cross-carrying bundles, as the individual Regulated Content alone could be cross-carried.*
c) Totally restructure their retail commercial offerings to end their reliance on bundles and packages. *This would avoid the necessity for cross-carrying bundles by totally changing the commercial offering of the industry immediately.*

MDA states that the cross-carriage regime "does not seek to interfere with pay-TV retailers' existing channel bundling strategies nor force any change to their contractual arrangements with content providers." However, it is clear that, in a situation where some bundled content *must* be cross-carried, and other content in the same bundles *may not* be cross carried without upstream

content negotiations, something has to give. MDA has left it to the pay-TV platform operators to sort out the mess, and this is what it means when it says "Industry players are free to decide on the commercial model…"

We submit that the likely practical effect of this pressure on the operators will be a major chilling effect on signature of exclusive carriage contracts. Operators will not have to restructure their commercial offerings, nor engage in a lengthy series of negotiations with "grandfathered" content providers if they simply avoid exclusive carriage. These pressures are already being seen in the marketplace, as pay-TV platforms are implementing "non-exclusive" policies for content.

"Non-exclusive" does not mean "effectively available on all platforms," however, as there is no indication that all relevant platforms really have the desire or the commercial strategy to acquire all content. We warn (as we have from the beginning) that this outcome will not please consumers, who will find themselves told "no, you cannot really get all of Platform A's content through Platform B's box." The risk of unmet expectations and consumer complaints remains very high.

4) <u>Possible Alternative: "Open Access" System</u>

The Consultation Paper makes reference to a system akin to those in use in several European countries, which has been variously called "Simultaneous Access" or "Mandatory Open Platform Access" and which we will refer to as the "Open Access" system.

Such a system would involve creation of the regulatory and technical infrastructure to *permit* cross-carriage of content from one platform to another. Content would be cross-carried where a content provider, or a platform, saw advantage in accessing the broader viewer base available on multiple platforms. However, content providers note that, unlike MDA's proposed cross-carriage regime, "Open Access" would require that they consent to carriage of their channels on the relevant platforms, and this makes "Open Access" a substantially better and more acceptable alternative.

We view such a system as a far preferable alternative to MDA's mandatory cross-carriage regime, for the following reasons:

- It is already in use (with different variations) in several other countries. Singapore can therefore rely on the experience acquired in those places rather than trying to "re-invent the wheel" itself.
- It provides for the consent of content rightsholders to the enhanced public distribution of their content and therefore is consistent with Singapore's international obligations.
- It uses market incentives (more "eyeballs") rather than regulatory fiat to accomplish greater content availability.
- It will require a much smaller ongoing regulatory burden, with no need for constant decision-making on exemptions, "deemed exclusivity," and other content supply questions.

"Open Access" would work by materially changing the pay-TV environment in Singapore, and creating incentives for market players. It would create, for the first time, a "bridge" for content sold to one platform to become available across others, simultaneously. These incentives would apply to platforms as well as rightsholders, since – as with MDA's cross-carriage proposal – it could be required that content using the "Open Access" system be carried intact, with all of a platform's branding and advertising. (Content providers have always been able to negotiate supply contracts with multiple platforms, but until now, there has been no infrastructure that would permit platforms to access each others' platforms.) European examples (e.g. Germany and the UK) have shown that platforms and content providers willingly make use of such systems, when they are put in place.

The key to any such system is that it is consensual – a content owner and/or supplying platform would have to consent to cross-carriage – and they would have an incentive to do so from the additional audience that could be accessed. (It should be noted that this incentive is growing for market reasons, as the Singtel platform has grown substantially from its inception, and now has a market "weight" that makes it attractive to content owners seeking greater exposure.)

We believe that, in terms of dealing with what MDA calls the "content fragmentation issues," an Open Access system would be at least as good as – and probably better than – the mandatory cross-carriage regime. As noted in 3) above, the mandatory cross-carriage regime will not resolve content fragmentation issues – it will create huge disincentives to signature of exclusive carriage agreements, but that is not the same thing as making the content available in practice to consumers on all relevant platforms. "Open Access" will reduce content fragmentation by providing the means and market incentives for players to actually make their content available to consumers on multiple platforms.

It is worth noting that in its submission to the MDA during the Second Round of consultations, the Football Association Premier League endorsed cross-carriage because of its belief that cross-carriage would "potentially have the positive effect of increasing viewership of the Competition…" It can therefore be inferred that the FAPL would be one of the content providers making use of an "Open Access" system, if one were in place, to ensure that its sporting events are available to all consumers in Singapore. Availability of this premium content on multiple platforms would remove the single largest source of consumer "fragmentation" complaints that led to creation of the mandatory cross-carriage regime.

MDA's Consultation Paper posits that "Open Access" might be a complement to mandatory cross-carriage. We view it as an alternative. "Open Access" is a means to avoid creating the weighty regulatory mechanism and sweeping government intervention in the marketplace that mandatory cross-carriage represents. As noted, one of the advantages of "Open Access" is that it would fully comport with all of Singapore's international IPR obligations, unlike mandatory cross-carriage.

That said, if it institutes "Open Access", we recognize that MDA may wish to retain powers in reserve to deal with exceptional cases, where particular content is of great public interest or subject to competition concerns. Such powers could be a complement to "Open Access," for use in the rare cases where documented competition concerns or public policy goals require more

robust action. (This is the case in the European countries which are using an Open Access system.) Creation of the "Open Access" infrastructure in Singapore would have the added corollary benefit of ensuring that, if MDA were to exercise its additional powers, the means would be pre-existing to ensure quick implementation and passage of the content among pay-TV platforms.

5) Position on Mandatory Cross-Carriage

In this paper, we have provided various views on how selective improvements could be made in the mandatory cross-carriage regime. We recognize that MDA seems intent on proceeding with instituting this system, and we share an interest in reducing its burdens insofar as that is possible. However, for the avoidance of any doubt, we wish to restate our core position on mandatory cross-carriage: While the year-long series of discussions have produced substantial and important clarifications and improvements in MDA's approach to the mandatory cross-carriage system, we remain unconvinced that the cross-carriage approach envisioned in the draft MMCC amendments will benefit consumers, or the industry. This approach is not market-friendly; it seeks to substitute the micromanagement of regulators for market incentives. And it is not protective of the intellectual property rights of content owners; the content providers continue to believe that the requirement under cross-carriage that their content be shared across platforms without their consent violates Singapore's international treaty obligations, and shows an unhealthy disregard for the interests of content producers and rightsholders everywhere.