MOTION PICTURE ASSOCIATION

(a limited liability corporation incorporated in the United States of America)

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Ms Elieen Ang
Head (Competition & Market Access)
Media Development Authority
3 Fusionopolis Way
#16-22 Symbiosis
Singapore 138633
(Attention: Ms Ruth Wong)
Email: ruth_wong@mda.gov.sg

By Email

Dear Ms Ang,

On behalf of the Motion Picture Association – International and its six member companies I am pleased to provide the attached comments in response to the Media Development Authority's September 1st consultation paper entitled "Cross Carriage Measures in the Pay TV Market".

We thank you for the opportunity to have provided these comments and look forward to continued engagement with your good offices and others on this important issue going forward.

With kind regards,

Frank S. Rittman

Attach.

MOTION PICTURE ASSOCIATION – INTERNATIONAL

COMMENTS IN RESPONSE TO CROSS CARRIAGE MEASURES IN THE PAY TV MARKET

MEDIA DEVELOPMENT AUTHORITY
INDUSTRY CONSULTATION
ISSUED ON: SEPTEMBER 1 2010

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1. INTRODUCTION

The Motion Picture Association ("MPA") is a trade association representing the interests of six international producers and distributors of filmed entertainment, including television programming.

On 6 May 2010 MPA submitted a response to the Media Development Authority's ("MDA") Consultation Paper dated 12 March 2010 on the "Proposed Implementation Details of Remedy to Competition Issues in the Pay-TV Market" (the "First Consultation").

In its response ("First Response"), MPA highlighted the grave concern of MPA's member companies over the Singapore Government's proposed amendments to the Code of Practice for Market Conduct in the Provision of Mass Media Services ("the Code") in mandating that pay-TV operators make available channels/content which they have acquired on an exclusive basis for carriage by other nationwide subscription television service licensees not originally licensed by the content owner ("Measure").

MDA has on 1 September 2010 issued a further consultation paper "Cross Carriage Measures in the Pay TV Market", inviting comments from the public on its preliminary policy positions set out therein (the "Second Consultation").

The MPA is pleased to respond as follows:

2. SUMMARY OF MAIN POINTS

The MPA notes that in the Second Consultation, the MDA has reiterated its intention to proceed with the implementation of the Measure, notwithstanding the concerns raised by MPA and its member companies, amongst others, that this would effectively constitute compulsory licensing, and be inconsistent with Singapore's international obligations under various intellectual property rights treaties.

Further, MPA is also disappointed to note that not only have its concerns raised in its earlier submissions not been addressed, the Second Consultation has further raised a number of fresh issues which are highly controversial and would once again have the potential to undermine Singapore's efforts at becoming a regional media hub and intellectual property role model for the Asia Pacific.

The MPA does not intend for this response to address the Second Consultation on a point-by-point basis – the MPA has already stated its position in its previous submissions in its response to the First Consultation, and respectfully, the Second Consultation has not substantively addressed the same.

The MPA would in this response instead focus on its core concern that the Measure is an unjustified interference with copyright owners' rights at law, and which is also incompatible with Singapore's obligations under various international treaties.

MPA also notes that there were a number of incorrect assumptions and observations which in turn calls into question the entire basis of the Measure, which it will also further discuss below.

3. STATEMENT OF INTEREST

The MPA represents the interests of major international producers and distributors of theatrical films, home video products and television programming, namely:

(a) Paramount Pictures Corporation

(b) Sony Pictures Releasing International

(c) Twentieth Century Fox International Corporation

(d) Universal International Films

(e) Walt Disney Studios

(f) Warner Bros Pictures International

The members of the MPA are primarily the content providers of filmed entertainment and television programming for more than one hundred fifty different markets around the world. Some member companies of the MPA or their affiliates also own or operate television channels carried by major pay television operators in Singapore.

4. COMMENTS

4.1 Preliminary

As with the First Response, the member companies of the MPA are mindful that the Second Consultation Paper has called for responses on the manner in which the Measure ought to be implemented. The members of the MPA consider that discussion on the implementation details of the Measure is still premature at this time.

At a more fundamental level, the member companies of the MPA are unable to support the Measure, and would respectfully submit that the Singapore Government should reconsider its decision to implement the requirement.

The MPA has in its First Response already set out a number of grounds upon which it objects to the Measure and would supplement its comments as follows:

4.2 Incompatibility With the Copyright Act

In its First Response, MPA highlighted that the Measure effectively constitutes compulsory licensing.

The Measure unjustifiably interferes with the freedom of the copyright owner to fully and initially determine the manner in which its content may be exploited -- this right of the owner is *the* fundamental premise behind all forms of intellectual property rights protection.

In the context of pay television content, this right extends to the copyright owner of the content having the exclusive right to communicate such content. Accordingly, only that owner may determine how, by whom, and on what terms it would allow for such communication – which extends of course to the choice of pay television operator on which the owner's programming may be carried.

MDA has in the Second Consultation in essence sought to defend the measure as being one of carriage -- i.e., insisting that Qualified Content is not resold by the SQL to the RQL but is merely carried on the RQL's platform by the SQL, and that the Measure only provides for "an extended infrastructure for the distribution of content which accords with the rights holder's normal exploitation of its rights in the Qualified Content. Therefore, it cannot be said that the content rights holder is deprived of its rights or that it has been prejudiced."

With respect, this characterization of the issue is severely flawed. The fact of the matter is that the content owner in granting its copyright license to the SQL **never** agreed to the communication of its content over the RQL. Yet the effect of the measure is that the RQL can communicate that copyright owner's content via its RQL's network. The practical result is that the RQL now has the ability to offer on the RQL's network content which had only been licensed to the SQL and not to the RQL.

This strikes at the very core and wholly undermines the content owner's rights of copyright, as under the Singapore Copyright Act, the content owner's copyright includes the exclusive right to communicate the material[1]. **The Measure is fundamentally in conflict with the copyright owner's exclusive rights because it renders nugatory the owner's exclusive right of communication.**

The fact that the content is still branded as being carried via the SQL is irrelevant -- the intended end result of the Measure is for the RQL to have the option to pick and choose amongst the exclusive content offerings of the SQL to decide what it wishes to carry. For all practical purposes, the RQL can offer its subscribers content which was originally exclusively licensed to the SQL, without reference to the copyright owner of the content. Exclusivity has been defined out of existence in the Singapore Pay TV market (which has also been stated as the policy objective of the Measure).

As such, the Measure is either a compulsory license, or if MDA insists it is not, then the Measure may be *ultra vires*, since it is a Ministerial directive which seeks to interfere with statutory rights conferred upon copyright owners by the Singapore Legislature under the Copyright Act.

4.3 Incompatibility with International Treaty Obligations

Under Singapore's treaty obligations, it may only provide for limitations or exceptions to a right owners' exclusive right in very limited circumstances, i.e., in certain special cases[2], where they do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the rights owners.

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1 Pay TV content falls to be protected under Singapore Copyright Act as "cinematograph films". Section 83 of the Copyright Act provides: "… copyright, in relation to a cinematograph film, is the exclusive right to do all or any of the following acts: (a) to make a copy of the film; (b) to cause the film, insofar as it consists of visual images, to be seen in public; (c) to communicate the film to the public."
Section 7 of the Act in turn defines "communicate" to mean "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"
This definition of copyright is consistent with international treaty requirements -- for example, Art 11*bis* of the Berne Convention provides that contracting states must provide that owners of artistic works (which extends to films) "shall enjoy the exclusive right of authorizing: (i) the broadcasting of their works or the communication thereof to the public by any other means of wireless diffusion of signs, sounds or images; (ii) 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; (iii) the public communication by loudspeaker or any other analogous instrument transmitting, by signs, sounds or images, the broadcast of the work."

2 Generally understood to mean limited in its field of application or exceptional in its scope", and narrow in both a quantitative as well as in a qualitative sense, or "a narrow scope as well as an exceptional or distinctive objective" - WTO Panel on *United States–Section 110(5) of the US Copyright Act*, June 15, 2000

These principles are provided for in Article 9(2) of the Berne Convention, Article 13 of the Agreement on Trade Related Aspects of Intellectual Property Rights ("TRIPS") and Article 10 of the WIPO Copyright Treaty ("WCT").

Quite apart from the issue of domestic compatibility of the Measure with Singapore Copyright Law, which MPA calls into question (as discussed above), the Measure in being an exception or limitation to the required copyright norms which Singapore is obliged to comply with must also be considered against its treaty obligations.

MPA has sought the views of Dr Mihaly Ficsor, former Assistant Director General of the World Intellectual Property Organization, on the proposed Measure, and has on 16 August 2010 shared these with the Minister. MPA wishes as part of the present consultation to re-submit the views of Dr Ficsor, appended hereto as Annex A.

Dr Ficsor confirms that the Measure is inconsistent with international copyright norms and also conflicts with Singapore's international treaty obligations. He concludes that the Measure effectively constitutes compulsory licensing since the copyright owner has no mechanism by which it may refuse communication of its copyright content on a communication network which the copyright did not originally authorize.

Further, he notes that for compulsory licensing of cable-originated programs, communication to the public of works by wire originating by cable operators the Berne Convention — and thus also the TRIPS Agreement[3] and the WIPO Copyright Treaty ("WCT") - do *not* allow the introduction of compulsory licenses[4].

4.4 The Measure will Fail to Meet the Requirements of the 3-Step Test

For argument's sake, even if the Measure is a limitation or exception which may apply under the Berne Convention, the TRIPS Agreement and the WCT (for the reasons set forth in the preceding section it is not), the Measure must be clearly defined and narrow in scope and reach and meet the requirements of the "three-step test", recognizing that it is only in rare and exceptional cases that exceptions to copyright protection may be permitted.

The requirements of the three-step test are that the Measure must
(a) apply only in certain special cases

(b) where it does not conflict with a normal exploitation of the work; and

(c) does not unreasonably prejudice the legitimate interests of the rights owners.

"*Special Cases*"

A World Trade Organization ("WTO") panel has in held in a reference arising from certain U.S. copyright exemptions allowing restaurants, bars and shops to play radio and TV broadcasts without paying licensing fees, that "special cases" refer to the exception or limitation being "limited in its field of application or exceptional in its scope", and narrow in both a quantitative as well as in a qualitative sense, or "a narrow scope as well as an exceptional or distinctive objective".

MDA recognizes that 90% of Pay TV content will subject to the Measure. It can hardly be said that the Measure will be limited in any field of application nor be "exceptional" in its scope.

3 Agreement on Trade Related Aspects of Intellectual Property Rights

4 Dr Ficsor notes that Article 11bis(2) of the Berne Convention does not apply to the Measure as it applies only in respect of the right of broadcasting (i.e., by wireless means), rebroadcasting and communication to the public by wire (cable) of *broadcast works*, i.e., programming originating from free-to-air television networks.

"Conflict with Normal Exploitation" & "Unreasonable Prejudice"

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

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

As Dr Ficsor notes, the Measure has the potential to interfere with control of release windows and thus infringes this limb. Further, it will impact upon the premiums pay TV operators may be prepared to pay if they wish to seek content exclusivity, since with the Measure, there will never be true exclusivity in the Pay TV market.

4.5 Flawed Assumptions Underpin the Measure

In its First Response, MPA highlighted that there was no market justification offered for the Measure and in particular that it should extend to all content.

In the Second Consultation, MDA has relied on a survey carried out by Analysys Mason (commissioned by MDA) in 2008. It is worth noting at the outset that Singapore's second pay-TV operator, SingTel Mio, only commenced its initial operations that same year. It is therefore unsurprising that market segmentation or "inefficiency" perceived at that time might have naturally reflected the relative nascency of the second operator's entry into the market. Given that SingTel Mio's content acquisition and subscriber count has grown steadily and significantly over the past three years, MDA should perhaps not base a 2010 policy recommendation on seemingly outdated 2008 market research.

A further concern was that the survey methodology and questions posed have not been disclosed[5]. However, even if a survey has established a preference amongst the surveyed individuals for content to be on a single platform, this does not establish that the Measure is an appropriate response -- for example, having a single pay TV operator could more directly address the preference.

If MDA's only concern is one of sparing customers the use of multiple set top boxes, then there are technical solutions which can achieve this without the need to interfere with content owners' rights -- it can for example encourage the introduction of multi-smart card set-top boxes or mandate common standard set top boxes accepting access control smart cards from multiple operators[6]. The development of the Common-featured Set-Top Box ("CF STB") is another alternative. Indeed, the recent announcement by the Infocomm Development Authority ("IDA") reported in the Straits Times[7] concerning plans to develop and roll out a nationwide video delivery system, eliminating the need for multiple set-top boxes to watch

[5] There are for example conflicting views on consumer sentiment presented by MDA. In paragraph 2.7.3, MDA clarified that concerns are not confined to sports content alone and inserted data which reflected consumers ranking sports in fifth after movies, news, television series and documentary in that order. This led to MDA's conclusion in paragraph 2.75 that consumer concerns over content fragmentation are not restricted to channels containing sports content alone and in particular non-sports fans have expressed a strong preference for having all content on one platform. However, on the contrary in footnote 6 of the Second Consultation, MDA cites the primary source of consumer indignation to be the need to subscribe to both pay TV operators in order to access all popular football content. This highlights the need for full disclosure of the data that MDA is relying upon as it is the foundation on which the Measure and the entire cross-carriage policy has been devised.

[6] This differs from the Measure in that the subscriber will then be directly subscribing for each Pay TV operator's services as a direct customer.

[7] Chua, Hian Hou (2010, September 21). Soon: An end to multiple set-top boxes. *Straits Times*, p. 2

programmes from different pay-TV providers, is welcome news. MPA again suggests that the MDA not implement the Measure independently of the IDA's corollary initiative, and that the two regulators instead work cooperatively, on the basis of a more realistic timetable, to address perceived concerns about multiple set-top boxes.

As for the observation that there is content fragmentation[8], we would highlight that whilst MDA's analysis has been based on a survey of channels available on each pay TV operator's channel line-up in concluding that content is available on only one platform but not the other, this is too simplistic a view.

Leaving aside sports programming where a premium attaches to live broadcasts and is available only on specific sports channels, the position is very different for other genres.

Whilst channel banners may be different, this does not mean that the same programmes cannot be found on both networks. For example, a survey of both MioTV and StarHub Cable TV's schedules will show that the vast majority of popular US blockbuster dramas and movies are available on both platforms. The Analysis Mason report in concluding that there is a high degree of content "locked-up" on one network is incorrect.

Further, the present market situation has in fact led to the type of service innovation and differentiation which MDA asserts will not arise if the Measure is not implemented. The experience in Singapore has been the contrary. Despite MDA having found that there is a high degree of exclusivity of channels carried on the incumbent network, MioTV has innovated its service offerings -- by offering same day DVD release movies and showing TV series very shortly after the initial showing in the source country, often even before the pay TV windows.

These approaches to programming have in fact given Singaporean customers more choice, rather than being confined to what pay TV channels carried on SCV carry.

Conversely, the implementation of the Measure will result in there being no incentive on the part of content providers to innovate, as there will be no content differentiation between channels.

This is not to say that MDA cannot step in to intervene if there is indeed a market justification -- its existing competition code already provides it the necessary reserve powers to do so in situations where market dominance has become anti-competitive. The application of the Measure, however, to all exclusive content without regard to an actual analysis of the market position however is not justified.

4.6 Other Comments

MPA would further comment on other aspects of the Second Consultation as follows:

(a) Reviews without statements of criteria

In paragraph 3.11 of the Second Consultation, the MDA stipulated that a review of the Measure would be carried out every three years as part of the triennial review of Code.

However no criteria have been identified by which a review would be conducted.

8 We note the Second Consultation uses this term inconsistently -- in some parts of the paper it refers to the inconvenience and costs of having multiple set-top boxes, in others it describes many programmes being carried on only one platform. We adopt the former usage in this response.

What sort of performance indicators will the Singapore Government into account? Will the entry of more SQLs and RQLs mean that the market correction has worked? What assurances will the industry have as to when the Measure will be lifted?
The Second Consultation has failed to shed any light on such issues and the review process will further affect business certainty for content owners in Singapore.

(b) Draconian and over-reaching measures

The difficulty of implementing the Measure which runs counter to international norms have led to the imposition of inappropriate conditions in order to protect MDA's position.

In paragraph 3.2.5, MDA envisages that a statutory declaration must be made under the Oaths and Declarations Act by the pay TV retailer's Chief Executive Officer ("CEO") to declare that relevant channels/programming content are not "Qualified Content" as defined by MDA.

The same requirement of a statutory declaration is also imposed upon the pay TV's operator's CEO when the relevant pay TV retailer is unable to secure the intellectual property rights to access the other pay TV platform aside from its own and requires an exemption from the Measure with regard to platform rights acquisition.

It is noted that in order to qualify for this exemption, the SQL must demonstrate it does not have the relevant broadcast rights for Singapore *as well as other neighboring countries*. In light of MDA's assertion that this is a uniquely Singaporean issue and the Measure is aimed only locally, the basis of the neighboring country reference as content in other countries is therefore not relevant. MPA submits that this is over-reaching by the MDA and that such a reference should be reviewed and deleted.

This will place an unjustified administrative burden not imposed by any other market in the world, and coupled with the draconian results of such a requirement personal to the CEO, even if there was no intention to deceive, it may well result in the perception that it is difficult to do business in Singapore, and/or perpetuate perceptions that Singapore wields tight controls over the media, all of which cannot contribute positively to Singapore's global standing.

MPA is also surprised at the casualness at which it is proposing that CEOs now be compelled to provide Statutory Declarations in the context of the Measure.

For years, in response to the recognized problem of pirated DVDs being imported into Singapore under the guise of parallel imports, the MPA has asked that MDA as a condition of receiving movies for censorship from parallel importers to furnish statutory declarations as to the origin of these DVDs. MDA has consistently refused the MPA's requests on the basis that it will place too much administrative burden, and further, it has no jurisdiction to seek such statutory declarations. MPA is severely disappointed that MDA has not applied similar considerations when now requiring Statutory Declarations from CEOs as part of the Measure.

(c) Unjustified Tag Along

In paragraph 3.8.2 of the Second Consultation, MDA proposes that so long as a bundle, package or channel contains Qualified Content, it will be subject to the Measure and be cross-carried on the RQLs' platforms in the same form and at the same price.

The implication of this is that any exclusive content that is not Qualified Content due to signing of the exclusivity agreement before the effective date of 12 March 2010 will be subject to the Measure simply due to the fact that it is in the same bundle, package or channel as the content which falls within the definition of Qualified Content.

This is a further example of how content right owners' rights will be arbitrarily interfered with on account of the Measure, and how the certainty of content right owners' proprietary and contractual rights will be undermined.

The position is even starker in paragraph 3.9.4 which deals primarily with the issue of loss due to negligence of the RQL. MDA deals with the issue of indemnity vis a vis SQL and RQL but fails to deal with the loss of the content rights owners. This clearly indicates a lack of protection for the intellectual property rights of content owners and MPA submits that content owners should be indemnified against any losses resulting from the measure by both the SQL and RQL.

In addition, there may be further contractual commitments between the content right owner and the SQL such as provisions on security and other obligations. It is unclear whether these obligations shall be statutorily imposed on the RQL as well and an indemnity is statutorily provided for in the event of a breach of any of these conditions. MPA submits that there remain a plethora of issues which require consideration as a consequence of the Measure.

4.7 Impact on Singapore as a Media Hub

MPA notes that the Second Consultation dismisses concerns raised amongst respondents to the First Consultation that Singapore's reputation as a media hub will be affected by the Measure.

It quotes Professor Lim Yee Fen who suggests that with greater competition, content providers will not withdraw from the Singapore market, and also Ng Kuo Pin, Accenture's Head of Communications and High Technology comment that "successful media hubs require talent, the presence of a creative media and content eco-system, as well as good regulatory, business and living environments. If you look at it objectively, these factors have not really changed as a result of the new ruling".

MPA would disagree. For the reasons stated above, the Measure is an interference with business certainty and also does not give effect to statutory rights of copyright. It is in breach of Singapore's international treaty obligations.

It undermines contractual arrangements which have been entered into between willing parties. It introduces an interventionist policy, with no clear solutions being offered for such fundamental issues such as how SQLs are to be remunerated and held harmless against loss. It imposes administrative burdens and unusual business requirements.

In one fell swoop, the Measure threatens to attack, at every level and every factor, that which has contributed to Singapore's growth as a media hub to date. MPA has long been supportive of the pro-business stance the Singapore Government has always adopted, and is very concerned that this Measure will now send the wrong signals to content owners.

5. **CONCLUSION**

For the reasons set out above, and the First Submission, the MPA and its member companies are unable to support the Measure. We and our member companies would respectfully submit that the Singapore Government reconsider its decision to implement the Measure.

Annex A

Dr. Mihály Ficsor
former Assistant Director General of WIPO[9]
Budapest, Hungary

July 24, 2010

To: Mr. A. Robert Pisano
President and Interim Chief Executive Officer
Motion Picture Association of America (MPAA)

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

Dear Mr. Pisano:

You have asked me to express my opinion on the question of compatibility of the Media Development Authority of Singapore's *Code of Practice for Market Conduct in the Provision of Media Services* (2010) with the international copyright norms.

First of all, I would like to mention that I have had a long association with the issues surrounding copyright in Singapore, particularly during my tenure as Assistant Director General of the World Intellectual Property Organization (WIPO). In that role, I have had the chance over the years to discuss copyright matters with many key officials of the Singaporean government, and I have witnessed the astonishing success story in Singapore, including the development of one of the most modern copyright systems in the region, and indeed, around the world. The quality of the copyright legislation is certainly also due to the contribution of the outstanding copyright experts of the country both in the academia and the administration whom I have had the pleasure to get to know. (It is also worthwhile noting that, at WIPO, the Singaporean Geoffrey Yu became my successor as Assistant Director General in charge of copyright; he made a great job; then, when he also retired from WIPO – already in the rank of Deputy Director General – he was appointed to an important post in the administration of his country in the field of IP policy.)

In view of this, my expectation was that the provisions of the above-mentioned *Code* would certainly be in accordance with the international copyright norms. It is with regret that I have to say that this does not seem to be the case.

The way I read and understand the *Code*, I have the impression that, in its present form, it conflicts with certain provisions of the international copyright treaties to which Singapore is party. This is due to those provisions of the *Code* which create a compulsory – and possibly, even a statutory – license for Pay TV cable operators to communicate to the public the works of copyright owners to their competitors' subscribers (which means that the works are communicated in a way and to an extent that is not authorized by the owners of copyright). I do understand the government' intentions to make exclusive cable programs available to a greater numbers of subscribers but the provisions of the *Code* try to achieve this through a limitation of the exclusive right of communication to the public that, in my view (but this view is also reflected in a number of WIPO documents and publications), is not allowed under the Berne Convention (and thus it is

[9] Member of the WTO roster of experts for IP disputes; President, Hungarian Copyright Council; Chairman of the Central and Eastern European Copyright Alliance (CEECA) with permanent observer status at WIPO; Director, Center of Information Technology and Intellectual Property (CITIP). Honorary Professor of University of Alcalá, Spain .

equally not allowed under the TRIPS Agreement and the WIPO Copyright Treaty which incorporate by reference the substantive norms of the Convention).

Sections 2.1.5 and 2.7 of the *Code* create an "Obligation to Cross-Carry Content," that is to say, an obligation of cable providers to "make their [licensed content] available for transmission and reception on" competing services. Nothing in the *Code* seems to preserve the ability of copyright owners and/or their licensees to refuse the communication to the public to the competitors of the cable providers/licensees' customers. Thus, these sections provide in essence at least a compulsory license to communicate to the public the content owner/licensor's works, but since the *Code* does not seem to foresee a separate licensing mechanism, it may also be regarded as a statutory license.

The Berne Convention – and thus also the TRIPS Agreement and the WCT – however, limits the possibility of national legislation to introduce compulsory licenses to certain exclusively determined cases; namely to those covered by Article 11*bis* (2) and 13(1) (and for developing countries, translation and reprint of works for educational and research purposes). It follows from the consistently applied *a contrario* principle of interpretation of legal norms that, in other cases, national legislation does not have freedom to limit exclusive rights in such a way. Since Article 13(1) is about recording of musical works, it is only Article 11*bis*(2) which may be considered as a possible basis for the compulsory license foreseen in the *Code* since it allows such a limitation in respect of the right of broadcasting (communication to the public by wireless means), rebroadcasting and communication to the public by wire (cable) of broadcast works.

At the same time, in the case of "cable-originated programs" – that is, in the case communication to the public of works by wire originating by cable operators (and not just a retransmission of broadcast works by cable), the Berne Convention – and thus also the TRIPS Agreement and the WCT (and the WCT in an even broader scope of cases than those covered by the Convention) – do not allow the introduction of compulsory licenses.[10]

The *Code* is about Pay TV programs that are made available through cable networks on an exclusivity basis. This, "by definition," means that the works included in those programs are not communicated to the public by wireless means directly to the public. (I presume that they are made available typically through satellite signals that are only intended for, and are receivable by, the exclusive cable operators authorized to transmit the signals to the public). Thus, these are not broadcast programs but cable-originated programs covered by exclusive rights of copyright owners in respect of which the international treaties do not allow the introduction of compulsory licenses.

Nevertheless, the idea might emerge to base this limitation on the concept of "minor reservations" – or with a more correct expression, "minor exceptions" – identified in the records of

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[10] Article 11(1)(ii) in respect of dramatic, dramatico-musical and musical works as performed and Article 11*ter*(1)(ii) in respect of literary works as recited, provide for an exclusive right of authorization for any communication to the public other than the specific cases of communication mentioned in Article 11*bis*. Articles 14(1)(ii) and 14(1) provide for an exclusive right of authorization of the communication to the public by wire (cable) of works adapted for audiovisual works and audiovisual works themselves. The Convention, and thus also the TRIPS Agreement and the WCT, do not allow for any of those rights the application of compulsory licenses the way it does in the case of the rights covered by Article 11*bis*(2). Article 8 of the WCT, in the framework of the so-called "umbrella solution," has extended the application of the exclusive right of authorization of communication to the public to all categories of works in any form both by wire (cable) and by wireless means (broadcasting), but an agreed statement has clarified that compulsory licenses may only be applied in the cases mentioned in Article 11*bis*(2). (In view of Article 20 of the Berne Convention – which is equally applicable under the TRIPS Agreement and the WCT – in fact, it would not have been possible by the 1996 Diplomatic Conference to allow the application of such limitations where the Convention does not provide so.)

Berne revision conferences However, those minor exceptions relate to musical works, and thus their application may only emerge in respect of the communication to the public right in such works under Article 11(1)(ii), and not, for example, in respect of the right of original cable communication of audiovisual works under Articles 14(1)(ii) and 14*bis*(1). Furthermore, as it has been clarified in the report of the WTO panel in the dispute concerning Section 110(5) of the US Copyright Act (WTO document WT/DS160/R), the application of such minor exceptions are also subject to the three-step test under Article 13 of the TRIPS Agreement (the same applies under Article 10 of the WCT). It seems quite obvious that simply reducing the exclusive right to authorize cable-originated communication to a mere right to remuneration could hardly be characterized as only covering a limited special case which is the first basic condition of the test for the applicability of exceptions and limitations. Even if we disregarded this (although it cannot be disregarded since, if an exception or limitation fails a condition of the three-step test, it fails the test in general[11]), the limitation would still fail the second condition of the test according to which there must not be a conflict with a normal exploitation of works. The *Code*'s compulsory license would not fulfill this condition since, in the case of audiovisual works and other valuable components of cable-originated programs, the possibility of controlling the subsequent release "windows" – and exclusivity-based Pay-TV distribution is such a window – is an indispensable condition of normal exploitation of such works.

Let us presume, however, that the *Code* would also be applicable for certain Pay TV programs that are not cable-originated but broadcast programs (for which they would have to be directly receivable by the public), just also retransmitted by cable (although I do not know whether such a situation might truly emerge, and if it might, how). In such a case, and only in such a case, a compulsory license might be applied on the basis of Article 11*bis*(2) of the Berne Convention.

However, three remarks should be added to this. First, that this provision of the Convention foresees a compulsory license, presuming a negotiation about the equitable remuneration to be paid by the users (in the context of the *Code*, by cable operators) and the intervention of a competent authority is foreseen only where there is no agreement on such a remuneration between owners of rights and users. In contrast with this, the *Code* provides for what seems to be a statutory license; it does not foresee any involvement of the owners of rights and only pays attention to the relationship between cable operators authorized by the owners of rights and their competitors not authorized by the owners of rights. Secondly, it does not seem to be clear how the remuneration is received by the owners of rights for the use of their works in the cable systems with which they have not made any agreement (this question, of course, would emerge with even more emphasis in the case of cable-originated programs in respect of the remuneration for the use of works transmitted by cable systems not authorized by the owners of rights). Thirdly, and most importantly, even in such a case the communication to the public of audiovisual works and other exclusive contents in Pay TV programs, in general, would qualify as primary communication, in the case of which the limitation of the exclusive right of authorization to a compulsory – or even statutory – license would conflict

[11] There is an isolated group of academics who recommend (see the so-called „Munich Declaration") an application of the test in a way that to should allow the application of exceptions and limitations also where one of the three conditions of the test is not met. This, however, is only a *de lege ferenda* suggestion with a dubious justification. The text of the test in Article 9(2) of the Berne Convention, in Article 13 of the TRIPS Agreement and in Article 10 of the WCT, the agreed statement adopted in connection with its first adoption under the Berne Convention and the related preparatory work make it clear that *de lege lata* it cannot be questioned that the three-step test must be applied in prioritized steps in a way that if a proposed exception or limitation fails a „step," it necessarily fails the entire test. This position is reflected in the various WIPO documents and publications and also in the two findings of the two WTO panels that interpreted it in 2000 first in its adapted version included in Article 30 of the TRIPS Agreement for exceptions to patent rights (see WTO panel report WT/DS114/R, where I happened to be the IP expert member of the panel) and then – as mentioned above – as provided for copyright exceptions and limitations in Article 13 of the Agreement (WTO panel report WT/DS160/R).

with a normal exploitation through an important release "window" of such works and other contents, and thus it would not be acceptable on the basis of the three-step test.[12]

As I understand, the justification of the compulsory license system foreseen in the *Code* is to eliminate market fragmentation and to broaden access to Pay TV programs. However, this kind of market situation and conditional access follow from the very nature of the exclusivity of Pay TV services based on the exercise of exclusive rights of copyright owners. Furthermore, it should also be seen that this is not an uncommon phenomenon limited to this form of using protected works. Similar situations emerge also in other cases of exercising exclusive rights which allow owners of rights to authorize the use of their works where it is in accordance with their interests, and not to do so where this is not the case. It is on this basis that the owners of copyright are in the position to determine the terms under which primary distribution of their works will occur through Pay TV mechanisms as one of the fundamental ways to derive commercial benefit from their copyright. The *Code*, by eliminating the ability for copyright owners to negotiate exclusive carriage, curtails their "normal exploitation" practices and can hardly be sustained. Therefore, it would seem to me advisable to try to address the competition issues and consumer expectations in some other way preserving copyright owners' ability to exploit their works and upholding their legitimate interests in due accordance with the international treaties.

I trust my Singaporean colleagues that they will recognize this and will choose a regulation on the basis of which they may avoid conflicts with the international copyright norms.

Sincerely yours,

Mihály Ficsor
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[12] It should be noted from this viewpoint, that in respect of the specific exceptions and limitations provided in the Berne Convention (the provisions on which, along with those on the relevant rights are incorporated in the TRIPS Agreement and the WCT), the three-step test as provided in Article 13 of the TRIPS Agreement and Article 10 of the WCT is to be applied as an interpretation tool in the sense that those exceptions and limitations are also only applicable if, in the concrete cases, they fulfill the three conditions of the test.