MOTION PICTURE ASSOCIATION

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

MOTION PICTURE ASSOCIATION
Audiovisual Entertainment
For Global Audiences

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By Email

Ms Eileen 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

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 March 23rd consultation paper entitled "Implementation of the Cross-Carriage Measure in the Pay TV Market".

We thank you for the further opportunity to have participated in the legislative process and remain committed 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 IMPLENTATION OF THE CROSS CARRIAGE MEASURE IN THE PAY TV MARKET

MEDIA DEVELOPMENT AUTHORITY
THIRD CONSULTATION
ISSUED ON: 23 MARCH 2011

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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 and 27 September 2010 MPA submitted response comments to the Media Development Authority's ("MDA") Consultation Papers dated 12 March and 1 September 2010, respectively, on the "Proposed Implementation Details of Remedy to Competition Issues in the Pay-TV Market" (the "First Consultation") and on "Cross-Carriage Measures in the Pay TV market.

In its first 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").

In its second response ("Second Response"), MPA reiterated concerns regarding the sanctity of intellectual property rights and the effect the proposed Measure might have on Singapore's aspirations to be a "media hub" and intellectual property role model for the Asia Pacific.

The MPA is now pleased to respond as follows:

2. SUMMARY OF MAIN POINTS

The MPA notes that in the second consultation paper issued in September 2010, the MDA confirmed its intention to proceed with the implementation of the Measure, notwithstanding 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.

MPA remains disappointed that not only were its concerns raised in its earlier submissions not adequately addressed, the second consultation paper further raised additional, fresh issues which were highly controversial and 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 repeat specific points already addressed in its two prior submissions.

However, because the MPA remains concerned that the proposed Measure is an unjustified interference with copyright owners' rights at law, which is also incompatible with Singapore's obligations under various international treaties, we cannot support its present implementation and shall instead focus its remarks primarily on the so-called "other implementation suggestions" referenced in paragraphs 3.13 of the third consultation paper.

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.

The member companies of the MPA are not primarily involved in Singapore with other aspects of pay-television delivery, such as network management or the operation of platform systems. As such, our comments are necessarily limited to those issues directly confronting MPA member companies and do not extend to more general concerns affecting the continued growth and development of the pay-TV sector

4. COMMENTS

4.1 Preliminary

As with the First and Second Responses, MPA's member companies are mindful that the third consultation paper has called for responses on the manner in which the Measure ought to be implemented. Indeed, MPA's member companies remain concerned that the proposed Measure is both unnecessary and premature at this time.

Generally speaking, MPA member companies believe that free-market principles supported by light regulatory oversight are most conducive to the continued growth and development of a healthy and mature television market. Correspondingly, MPA member companies are dubious towards perceived over-regulation that mandates or significantly proscribes market behaviour.

MPA's member companies remain therefore unable to support the proposed Measure as presently constituted, and would respectfully submit that the Singapore Government give due consideration to certain alternative measures, including so-called "mandatory open platform access" as a more viable solution supported by industry.

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

4.2 Incompatibility With the Copyright Act

In its First and Second Responses, MPA highlighted that the proposed Measure effectively constitutes compulsory licensing for the reasons set forth in those communications. We reiterate that sentiment in principle, if not in detail, here.

Our arguments were further buttressed by an independent submission provided by Dr. Mihaly Ficsor, former Assistant Director General of the World Intellectual Property Organization and arguably the world's leading expert on intellectual property policy, who concluded that the MDA's proposed Measure runs afoul of internationally accepted norms.

We also provided further refutation of what MPA considered to be a mis-characterization of the issue (from an intellectual property rights perspective) in its second consultation paper. Our opinions remain unchanged in light of the MDA's further comments.

4.3 Incompatibility with International Treaty Obligations

We reiterate the substance and principle of our two prior submissions in respect of the proposed Measure's compatibility with Singapore's international treaty obligations, which only provide for limitations or exceptions to right owners' exclusive rights in very limited circumstances, i.e., in certain special cases[1], where they do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the rights owners.

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

As stated in our previous submissions, even if for argument's sake the proposed Measure is a limitation or exception which may apply under the Berne Convention, the TRIPS Agreement and the WIPO Copyright Treaty (for the reasons set forth in the preceding section it is not), the proposed 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.

"Special Cases"

A World Trade Organization ("WTO") panel has 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 proposed Measure will be limited in any field of application nor be "exceptional" in its scope.

"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

[1] 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

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 noted in his remarks included as an annexure to our September 27th Second Response comments, the proposed Measure has the potential to interfere with the release "windows" and thus infringes this limb. Further, it will impact upon the premiums pay TV operators may be prepared to pay if they wish to seek content exclusivity, since with the proposed Measure, there will never be true exclusivity in the Pay TV market.

4.5 The Proposed Measure is Unduly Intrusive and Over-Regulatory

There are a number of concerns presented by the proposed Measure in its present iteration that MPA member companies believe are over-regulatory and may hinder the continued growth and development of Singapore's pay TV sector, and which seem to be in stark contrast with Singapore's aspirations to be a regional media hub attracting new investment.

For example, MPA objects in principle to the proposed criteria identified in paragraphs 3.3.1.16 through 3.3.1.18 of the third consultation paper concerning the determination of the MDA's proposed authority to overrule arrangements which it deems ***likely*** (emphasis added) to prevent or restrict regulated persons from acquiring channels or programming content. Such unqualified and subjective authority seems overly restrictive, unclear on its face, creates uncertainty, and contrary to Singapore's aspirations to attract further investment for the establishment of regional operations.

MPA also objects in principle to the MDA's oversight into pricing arrangements and its reserved (and undefined) unilateral discretion to foist particular (and otherwise non-exclusive arrangements) within the ambit of the proposed Measure as referenced in paragraphs 3.3.1.24 and 3.3.1.25 of the third consultation paper. It is again difficult to reconcile Singapore's imposition of such severe regulatory oversight with its regional aspirations to attract foreign investment. MPA would respectfully submit that such regulatory uncertainty is contrary to such a purpose.

Likewise, requirements for key appointment holders of pay-TV retailers to provide statutory declarations (as discussed in paragraphs 3.3.1.30 through 3.3.1.32 and 3.11.2.4 and 3.11.2.5 of the third consultation paper) may well have a chilling effect on companies' decisions to do business (or not) in Singapore when combined with the MDA's unilateral authority to interpret commercial arrangements from the perspective of an anti-competition regulator[2].

4.6 Other Comments

MPA would further comment on other aspects of the third consultation as follows:

(a) Mandatory Open Platform Access

[2] It seems particularly ironic for the MDA to impose such a requirement for statutory declarations on legitimate pay television operators who have made significant investments in Singapore's infrastructure while at the same time rejecting MPA's long-standing request to impose and follow through such a requirement on so-called "parallel importers" of audio-visual products. MPA requests for such a requirement, dating back to 2004 in response to litigation initiated and successfully concluded by the association against parallel importers of pirated product, seem to have been ignored.

MPA and its member companies see merit in the so-called "alternative" measures discussed in paragraphs 3.13 of the third consultation document, and in particular the proposed consideration of the so-called "mandatory open platform access" provisions discussed in paragraphs 3.13.1.6 and 3.13.1.7 of the third consultation paper. In fact, this represents a compromise position already implemented in other jurisdictions, which MPA and its member companies can largely support in this context.

Mandatory open platform access would allow channel providers and retailers to jointly determine whether to offer content (whether exclusive or non-exclusive) to a secondary retailer's customers by allowing access to the primary retailer's platform's electronic program guide and conditional access infrastructure.

The approach, in short, would follow the basic guidelines of the MDA's cross-carriage proposal, including the twin goals for consumers of reducing fragmentation and the need for two set top boxes. Importantly, however, this approach would ensure that the channel providers are a party in the decision of whether or not to allow cross supply of a particular channel(s), and whether or not a channel(s) would be supplied independently or as part of the "bundle" of services on the originating platform.

This choice would ensure that the channel providers are directly involved in the decisions surrounding the pricing of such services supplied and whether to provide their channel(s) to the receiving platform. The channel providers would also have the opportunity to negotiate other important contractual terms involved in the cross supply including content protection conditions.

In addition to advancing MDA's goals, this "simultaneous access" approach would have the benefit of being consistent with Singapore's intellectual property obligations under the WTO, WIPO and the US-Singapore Free Trade Agreement and would not mandate unbundling, which as noted above are both conditions for implementation set for the MDA in the Minister's January appeal.

Unlike cross carriage, variations of the mandated open platform access, or so-called "simultaneous access" concept has been adopted and tested in Germany, France, Italy, the UK, and to some extent in Australia[3]. Those models all share a common characteristic that is of critical importance to rights owners: they do not threaten the exclusivity of intellectual property rights.

In summary, the simultaneous access, or mandatory open platform approach, could advance the government's goals without threatening significant negative effects on our business and intellectual property rights.

(b) Next Generation Interactive Multimedia Application and Services Project

MPA is gratified by the MDA's assurance in paragraph 3.13.2.1 through 3.13.2.6 of the third consultation paper that the proposed Measure and the so-called "NIMS" project are in fact compatible and complimentary. MPA has participated in the NIMS project since its inception and supports it in principle.

On a more practical level, we recall from previous discussions the MDA's concern regarding insufficient national take-up of the next generation broadband network capabilities in which Singapore has invested considerable resources. We again assert that rather than contemplating the two issues in isolation, the Singapore Government should instead seek to

[3] We are mindful of the MDA's assurance that such alternative approaches have indeed been considered and steer the authority's attention to the attached annexure documents from the UK and Australia for further reference.

better coordinate them in terms of timing and implementation. It is difficult to reconcile the Government's aspirations to resolve perceived deficiencies in the pay-TV market during the third quarter of the year when it is, at the same time, devoting considerably greater investment into a larger infrastructure investment which is proceeding on a considerably slower track. It seems intuitive for the two initiatives to proceed in a co-terminus and complimentary fashion that might serve to accommodate mutual interests. We see no compelling justification for mandating implementation of the proposed cross-carriage Measure during the third quarter of 2011 in advance of the larger NIMS initiative, which could in some respect facilitate open platform access as discussed above. We suggest that the Government reconsider the implementation of the proposed Measure accordingly and impose a further delay on its implementation until at least the end of the year.

5. CONCLUSION

For the reasons set out above, and in its First and Second Submissions, the MPA and its member companies remain unable to support the Measure in its present iteration.

We continue to have grave concerns with the proposed cross-carriage regime, as set forth in all the Media Development Authority's (MDA) consultation documents, including its most recent version issued on 1 September 2010 entitled "*Consultation on the MDA's Preliminary Policy Positions.*"

These concerns include the view that MDA's approach, as framed in its consultation papers to date, violates Singapore's obligations under the World Trade Organization (WTO) and World Intellectual Property Organization (WIPO) agreements as well as the US-Singapore Free Trade Agreement. Moreover, we believe the MDA's stated approach for implementation will disrupt materially the means by which content providers and channels are compensated in the market. In addition, we remain on alert that the MDA's plan includes insufficient consideration of its effect on our ability to exert sufficient control over the content protection conditions that prevent our content from illegal abuse.

We are, however, prepared to lend support for the alternative Mandatory Open Platform Access proposals as an acceptable alternative. We also think the initiative would benefit from closer coordination with the NIMS initiative and recommend that their respective implementations be co-terminus.

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