ASIA VIDEO INDUSTRY ASSOCIATION

Hong Kong
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Submission by the Asia Video Industry Association to the IMDA on the Proposed Converged Competition Code

Introduction

The Asia Video Industry Association (AVIA) thanks the IMDA for its publication of the consultation paper on a proposed converged competition code, Draft National e-Commerce Policy, and for the related request for public comments. We welcome the opportunity to submit the international video industry's views on the Draft Policy document. As will be seen in the remainder of this paper, our comments are primarily concerned with the possible extension of the cross-carriage mechanism (CCM), and we are grateful for the opportunity to comment on this subject in a deliberate and thoughtful manner. IMDA's launch of this issue in an open, public consultative process is to be warmly welcomed

The Asia Video Industry Association (AVIA) is the trade association for the video industry and ecosystem in Asia Pacific. It serves to make the video industry stronger and healthier through promoting the common interests of its 90 member companies. Our member companies operate and invest in 17 different Asian markets, and many of them are substantial cross-border investors; those that are not international investors themselves are the business partners of foreign investors. The members of AVIA have extensive experience in building and creating television and streaming video infrastructure and quality, curated programming to meet the needs of this region's more than 600 million multichannel TV households and an exploding population of video on demand consumers. A very large percentage of our members have based their Asian (or Southeast Asian) operations in Singapore, and they form an essential part of Singapore's media ecosystem.

The CCM

IMDA will no doubt be aware that our predecessor organization (CASBAA) and your predecessor organization (MDA) had detailed discussions during the period after the cross-carriage mechanism was imposed. While we disagreed then (and still disagree now) with the justification for, and effects of, the cross-carriage mechanism, we hope that our constructive comments helped the then-MDA shape the system in a way that would minimize the negative effects of this market intervention on industry.

The CCM has provided authority for MDA/IMDA to involve itself in ongoing contractual dealings between wholesale buyers and sellers of a wide range of pay-TV content, but the actual experience of the intervening years shows that MDA/IMDA have in fact been restrained in using those authorities. At the time, we argued, among other things, that the scope of the measure was too broad, and that there was no reason to ensnare the entire content industry in a web of regulation when the real problem was focused on only certain kinds of sporting content. And indeed, in practice IMDA/MDA have enforced cross-carriage obligations only on a limited array of sporting

content, so while it left the broad scope of the measure intact in theory, in practice it has limited the scope of its interventions. That is to be commended.

That said, we also predicted that a practical effect of the CCM would be to dissuade content buyers and sellers from signing exclusive carriage contracts. That has, indeed, come to pass. In Singapore's TV industry today there are very few exclusive contracts being signed – and only for the topmost expensive content. In that respect, the CCM has indeed had a chilling effect on contract negotiations throughout the TV industry. We also note that Singapore's intellectual property policymakers seek to maintain rights of legal action only for exclusive licensees of TV content (because that is the indeed the general international approach for copyright legislation) even while IMDA seeks to maintain a regulatory system that is contrary to the general international approach, and which means the vast majority of TV content in Singapore has no exclusive licensee. The effect of this bureaucratic dichotomy is to deprive Singapore's own pay-TV operators of the ability to take legal action in defence of the (non-exclusive) rights they do acquire.

II. Scope of the CCM

Returning to the provisions of the CCM: in the intervening years, market players have adapted their contracting policies, but we still believe that the broad scope of the CCM – applicable to all types of content – is not warranted by any demonstrated problem in Singapore, and that a much more targeted approach could have avoided a massive infringement of contracting rights of buyers and sellers in the TV industry.

The consultation paper indicates that IMDA is not intending to reduce the scope of the CCM. We submit (as our answer to question 9.1) the view that this constitutes unnecessary regulation that is without substantive justification. The three-year old data provided in the consultation paper which shows that pay-TV dramas and movies are important to consumers does not indicate they have any problem in obtaining dramas and movies, and there is no reason to continue a regulatory approach that burdens and skews the natural course of content negotiations for all pay-TV content. Indeed, the data – and the regulatory proposal – take no account of the indisputable fact that since 2016 online content supply has become a huge part of the Singapore media ecosystem, and that consumers now have far more ways to obtain content of their liking than simply subscribing to a traditional pay-TV package.

In that competitive environment, for almost every type of content, a consumer has alternative channel suppliers for the genre of content he/she wishes to watch. If a consumer does not have access to factual channel A, or Chinese movie channel A, or kids' channel A, they can typically watch factual channel B, or Chinese movie channel B, or kids' channel B. (This is not true of sport, where there are established global brands which have no substitute – a customer who wants to watch Spanish football is unlikely to accept basketball or rugby as a substitute.) This illustrates an analytical weakness in IMDA's data and its analysis – there is no consideration of whether consumers will accept an alternative channel within the same genre.

A key justification for the CCM was a phenomenon that IMDA called "content fragmentation" – availability of a number of TV channels and content packages on only one of Singapore's pay-TV networks. We note that the present consultation paper expresses the view that there has been a decline in "content fragmentation," but sees this as a reason that the CCM "remains relevant." This is curious, as the main justification for the imposition of the CCM was that "fragmentation" was such

a problem that steps needed to be taken to deal with it. Now, the argument seems to be that fragmentation is reduced, so the measure needs to be continued. No matter whether fragmentation is growing or declining, the proposed result – regulatory intervention – is the same.

For our part, we continue to see the question of content fragmentation differently. We predicted (in our appeal to the MICA Minister against the CCM, dated July 8, 2010) that fragmentation was bound to decline in any case, because of the ongoing maturation of Singapore's pay-TV market into a competitive environment. Even without a CCM, we noted that, "(Market) maturity and (Singtel's) large base of subscribers will provide the inflection point seen in other analogous markets where exclusive content agreements have declined over time." That has, indeed, come to pass. The observed reduction in fragmentation, we submit, would have happened with or without the CCM, as Singapore's market matured. Similarly, the fact that (in IMDA's words) "there is greater service differentiation and innovation in the Pay-TV markets and consumers now have wider content choices as part of their pay-TV subscriptions" is in our view a result of the competitive market and technological innovation, and not a result of regulation.

Moreover, for the avoidance of any doubt, we wish to underline that the content industry continues to believe that the CCM does not satisfy Singapore's obligations under the Berne Convention and the TRIPs agreement, which require that any measures limiting a content owner's right to conclude an exclusive supply contract must meet a 3-step test for compliance with the treaties: "Members shall confine limitations or exceptions to exclusive rights to <u>certain special cases</u> which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder."[1]

Under the CCM, owners of copyright are denied the ability to authorize or prohibit certain parties (in this case the RQL or RQLs) from exercising certain exclusive rights (such as the communication right) which are the domain of the copyright owner. The broad scope of the CCM means that it is not, by definition, limited to "certain special cases," and it cannot avoid conflict with the normal ways owners of rights exploit their programs in Singapore or safeguard right holders' legitimate interests in their programming.

Of course, further extension of the CCM can only worsen this denial of content owners' rights. While none of Singapore's trading partners has yet chosen to challenge the CCM in WTO dispute settlement procedures, this remains a possibility in the future.

III. <u>Extension of CCM Obligations to Certain Online Content Supplies</u>

IMDA also asks (in Question 9.2) for views on extending the CCM further, to encompass content that is supplied in the online services of qualified licensees. Again, we see this as a solution in search of a problem.

a) There is no documented consumer dissatisfaction with the multiple offerings of qualified content, on pay-TV platforms and their associated OTT services. IMDA's consultation paper presents no evidence of such unhappiness.

b) The very nature of online content supply is that it is available to all consumers having an internet connection. Unlike traditional pay-TV where content supply and operation of network

[1] TRIPS Agreement, Article 13

infrastructure are bundled, a consumer is not restricted by his building's physical connections from accessing online content from all sources. Therefore, there is no need for a "competition" mechanism that would allow consumers to obtain access to online content – they are already free to contact any online content platform and arrange to purchase the content they desire. Starhub and Singtel both offer OTT services that are available to all broadband customers – fixed and mobile – in Singapore; for example, StarHub Go and Singtel CAST. Specifically, the CAST Sports Plus Pack which currently houses Premier League content is available to anyone in Singapore with a credit or debit card. No existing relationship with Singtel is required. Equally StarHub Go is available to anyone irrespective of any existing subscription with StarHub. Content is open and readily available to all. So, we see no need for this extension of regulation. And we note that like all regulatory solutions, it will impose costs on the qualified licensees.

Those costs are quantified, in fact, within the existing CCM, where the SQL must pay the RQL for carriage of the content on the RQL's network. This would be totally illogical within the OTT content supply ecosystem.

However, there is one additional aspect of this proposal which should be considered: the balance of regulation between "onshore" and "offshore" operators. The language contained in IMDA's consultation paper indicates that the newly extended regulation applies only to Singapore's domestic "Qualified Licensees." This potentially leaves an offshore operator free to acquire exclusive content rights and supply them to Singapore consumers without being subject to the CCM. It is a reversion to regulatory reflexes which result in burdens imposed only on domestic operators, even though they find themselves now in a highly competitive environment which includes both legal and illegal offshore operators. This is not a far-fetched scenario at all – we note that in June 2018, Facebook was widely reported to have agreed to acquire streaming rights for EPL matches in several Southeast Asian markets (though not Singapore). While that deal seems now unlikely to be finalized[2] it is a clear indication that the scenario of offshore online platform acquisition of key rights for Singapore is a realistic one. (For the avoidance of doubt: we are not arguing for extension of the rules to offshore content services, which would be impractical and unenforceable. Rather, we think IMDA should strive for balance as between onshore and offshore services by adjusting regulatory burdens down – which in this case means, at a minimum, not attempting to extend the CCM to onshore OTT services.)

Finally, we would note that in all other aspects, Singapore's emerging regulatory environment for online curated content (OCC) services – as it has developed over the last 3 years – has been commendably well-reasoned and relatively light-touch. Extension of the CCM to online content would be a blemish on that record, and not meet the criteria of a well-thought-out approach to an increasingly internationalized content supply environment.

IV. Coverage Obligations for Singapore's List of Programs of "Public Interest and National Significance"

IMDA proposes to introduce an obligation for FTA licensees who obtain privileged access to content through operation of the Essential Content List to broadcast that content live (for Category A programs) or within 48 hours (for Category B programs.) This strikes us as a reasonable requirement; where regulatory provisions adopted in the public interest favour a certain set of

[2] https://www.midiaresearch.com/blog/why-did-facebooks-epl-rights-deal-collapse/

broadcasters in their content acquisition, it is only fair that they be required actually to broadcast that content to the public promptly, and not be allowed to "hoard" the rights. IMDA is probably aware that this same issue has been considered in Australia, and specific legislative provisions against hoarding have been adopted.

On a tangential note, we would like to again suggest that IMDA cease using the term "antisiphoning list" for its list of Programs of Public Interest and National Significance. "Antisiphoning" is not a term in common use through most of the English-speaking world; it was adopted some years ago only in Australia as a result of specific political battles there. (And, it should be noted, the result of the Australian battles was to saddle that country's TV sector with a lengthy and sweeping list of sports content so broad that the FTA broadcasters have been unable to make use of the rights they were gifted. Singapore's list, by contrast, has been developed in an apolitical and consultative manner – we have frequently commended it to other governments as being transparently formulated and not excessively long.)

Our request in this regard also is made in light of the fact that the term "antisiphoning" has invidious connotations, and that on behalf of the pay-TV industry we would prefer that governments avoid use of a term that implies that our business is characterized by attempts to somehow steal away content from other players. Sports content, in particular, is bought and sold in an international market where players utilizing many different business models are active and competitive.

We therefore urge that in the future IMDA begin following the vocabulary choices of the United Kingdom, the European Commission, and other non-Australian governments which deal with this issue, and refer to the list either by IMDA's own words ("List of Programs of Public Interest and National Significance") or by the shorter title "List of Essential Content."

About AVIA

The Asia Video Industry Association (AVIA) is the trade association for the video industry and ecosystem in Asia Pacific. Formerly known as CASBAA, AVIA is changing as the video industry adjusts to technological and commercial change, relying on traditional means as well as new forms of delivery to consumers. AVIA serves to make the video industry and other parts of the ecosystem – such as satellite transmission networks and technology support firms -- stronger and healthier through promoting the common interests of its members. AVIA is the interlocutor for the industry with governments across the region, leads the fight against video piracy and provides insight into the video industry through reports and conferences aimed to support a vibrant video industry.