

**Protecting the integrity
of the
classification system**

**by Former Director,
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**Submission to the House of Representatives
Standing Committee on Legal
and Constitutional Affairs inquiring into
The enforcement of copyright in Australia**

Introduction

The Committee has been asked “to inquire into and report on issues relevant to effective enforcement of copyright in Australia.”

Having read the more detailed terms of reference which follow, I understand that the thrust of the Committee’s inquiries are directed to measures dealing with enforcement and infringement.

My concern is that in any major revision of the area, the Committee may entertain suggestions that to promote competition and to lower prices, that the importation of films, videos, DVDs and computer games may be given the kind of unfettered treatment recently accorded to CD’s.

I would like to put to the Committee the view that not only should a sharp distinction be made between two sets of products the products but that to extend such a system would severely undermine the existing classification system we have in Australia

Interest.

I am making this submission to the Committee because of the interest I have in the classification area in the past. From 1988 to 1995, I was the Chief Censor of what was then the Film Classification Board and from 1996 to 1998 I was the first Director of the Office of Film and Literature Classification.

My attention was drawn to the terms of inquiry by associates in the industry who worked closely with the OFLC to ensure the classification system worked properly. The film, video and computer games industry co-operated in the enforcement of that legislation to the extent that they voluntarily made available time and substantial contributions by way of free time with their products to help in the public education aspects of it.

Even though I have been away from classification work for over a year, I have an interest in seeing one of the leading edge classification systems in the world not being undermined by proposals which are driven by competition policy to the detriment of other public policy.

I have not addressed some of the issues which make up the competition argument, particularly on pricing and the effect on the Australian industry. I seek to put my views about the effect any such change, particularly one which would bring about parallel importation, would have on the existing system.

The Classification System

For the sake of clarification, it is worth setting out the existing scheme and how it operates.

Censorship and classification in Australia is a joint enterprise by the Federal, State and Territory Governments.

The arrangement was formalized as recently as 1996 when the Classification (Publications, Films and Computer Games) Act 1995 came into effect.

This Act formalized for the first time in substantive legislation the Federal Government's role in the classification and censorship process. Previously the role had been garnered from legislative assortments such as Australian Capital Territory Ordinances, Customs Regulations and delegated legislation by the States and Territories.

The Classification Act spells out the Federal Government's role.

Essentially this is to:

- ◆ classify the material submitted to it by importers or by Australian distributors,
- ◆ assign consumer advice or any other conditions which might apply

- ◆ collect the fees for the classification process
- ◆ examine advertising associated with either the film, video, publication or computer game
- ◆ decide whether material should be exempt, and
- ◆ make distinctions about which category a submitted piece of work falls into.

The Act also details how the Classification Board should be made up, how the appeal process should work and how the Classification Board should be administered.

In short, the Federal Government is responsible for seeing that the material is properly classified and for providing the means to get this done.

Role of States and Territories

The States and Territories on the other hand have the responsibility of seeing that the decisions of the Classification Board are upheld.

Enforcement legislation locking the Classification Act into place has been passed by each of the States, the Australian Capital Territory and the Northern Territory.

The enforcement legislation ensures that material which has been classified as unsuitable for those under the age of 18 is not made available to them by attaching penalties to such behavior. The States and Territories also bring prosecutions which arise from breaches of the Classification Act.

Essentially therefore, the States and Territories uphold in the marketplace the decisions made by the Classification Board or the Classification Review Board. Some States retain the power to review Board decisions but this is a rarely used power these days.

Appointments

A further indication of the integral role of the States and Territories is that they take part in the selection of the statutory officeholders on both the Classification Board and the Classification Review Board.

The Classification Board is made up of the Director of the OFLC, the Deputy Director, the Senior Classifiers and the other Classifiers. The size of the Board is limited to 20

Classifiers are appointed for a fixed term by the Governor General, normally for a term of three years. In some cases they are re-appointed for a further three years. The periods of appointment for the Director or the Deputy Director are generally longer. The 1995 legislation limits the amount of time anyone can spend on the Board to seven years.

The practice was initiated some years ago that the States and Territories nominated a representative to sit on the selection panel when new members were being chosen for the Classification Board and before it, the Film Censorship Board.

The procedure, adopted by successive Federal Government was to advertise nationally seeking applications from those wanting to serve a term on the Board. It was normal to attract over 700 applicants although in one selection process, the number of applicants reached 1200.

Applicants were interviewed by a panel with representatives from the Attorney-General's Department, the OFLC, a representative of the States and Territories and an outside member. Generally the person from outside was familiar with selection processes.

After the interview process, which included in the final stages view of material which regularly came before the Board, a list of names was submitted to the Attorney-General who then took a merit based list to the Cabinet for appointment.

In more recent years, the Attorney-General circulated the list to the Censorship Ministers from the States and Territories for comment before putting the list of names forward for Cabinet approval.

This process was formalized in the 1995 legislation. Section 48 provided:

“ (2) In appointing members, regard is to be had to the desirability of ensuring the membership of the Board is broadly representative of the Australian Community

(3) The Minister must, before recommending the appointment of a member (other than a temporary member), consult with participating Ministers.”

At the conclusion of this process a list of names based on merit was passed to the Attorney-General who then made the decision on which names would then be submitted to the Cabinet.

International Reputation of Australian system

The quoting of the these parts of the legislation and of the practices which have developed over the years are set out to emphasize the collegiate and participative role the States and Territories have in the process. It is one of the more distinguishing features of the Australian classification system when compared with the way the classification, and in many cases, censorship, process is carried out overseas.

In the United Kingdom, the British Board of Film Classification is a private organization set up by the film industry for the classification of films. It also

performs classification of videos under legislation, having been delegated by the Government to do so. There is no public input into the selection of a Director or any other member of the Board. The Board is not publicly accountable for film classification other than to the film industry through the Board of Governors. It is required to report to the parliament on its video classification work.

The classification work in the United States is done by the Classification and Ratings Administration (CARA) and is wholly funded by the Motion Picture Association of America. Its President and vice-president are chosen by Jack Valenti who also approves the appointments of those who do the ratings work. Apart from the President and the vice-president, the members of the Administration are not named and the qualification for serving with the Administration is that the person must be a parent.

Canadian classification is carried out by each of the Provincial Governments though there are moves to have a national agency created to do the work.

The New Zealand Government modelled its system on the Australian scheme. This followed the amalgamation of the film and literature classification into a single office in 1988. Indeed, the first New Zealand Chief Censor under the new legislation is now the current Director of the Australian Office of Film and Literature Classification.

New Zealand relies heavily on the Australian classification system. All films and videos which are classified up to the M category in Australia automatically receive the same rating in New Zealand. Films and videos which are in higher categories are examined by the New Zealand OLFC and awarded classification categories under their own legislation.

The French Consul Superior de l'Audiovisuel has adopted aspects of the Australian classification system, particularly its system of consumer advice, for its television classification service after studying its success in Australia.

Apart from the initiatives in relation to films and videos, Australia led the way in the classification of computer games, particularly with consumer advice on the games directed towards younger children.

Although there are industry ratings agencies in the United States for computer games, Australia and New Zealand are still the only two nations which require a mandatory scrutiny and classification of computer games before they go on the market.

In classification terms therefore, Australia is right at the cutting edge.

Community Assessment Panels

From time to time there is disagreement and sometime anger about Board decisions accompanied by claims that the decisions are not in keeping with community views and attitudes.

In December 1996, the Attorney-General, Mr Daryl Williams announced the formation of Community Assessment Panels which would view selected films already classified by the OFLC and make their own decision about the appropriate classification category.

The purpose was to provide a “snapshot audit” of material passing through the OFLC to see whether the decisions which were being made under the Guidelines conformed with the views of another representative group from the community. The groups were assembled in Sydney, Brisbane and regional New South Wales.

The panels were organized and conducted by an independent research organization and the Report to the Attorney-General was released in January this year.

The groups were shown nine films. In six of the nine films shown to them, the panels gave the same classification as the Classification Board. In two other cases, the panels gave a lower classification than the Board had. On the last film, the panels gave a higher classification than the Board had.

Integrity of the System

All Governments participating the national classification scheme have consistently told parents of young and early teenage children, that if they wish to play some part in the regulation of their children's viewing or reading regimes that they can rely on the integrity of the classification system.

They do not claim, nor could anyone associated with the scheme, that it works perfectly all the time. But as the findings of the Community Assessment Panels show, the classifiers get it right most of the time and when they do differ, it is on the side of caution.

Ministers can and do say to parents that they should make use of the different categories which are age related. For further fine tuning they can use the consumer advice which applies to all material classified beyond the G category.

In view of the community's reliance on the scheme, Ministers controlling the legislation have been loathe to grant exemptions because of the effect it has upon the universality of the classification system. Not only parents but others with children in their care, such as teachers and leaders of recreational groups, rely on the classification categories to ensure that unsuitable material is not shown to younger children.

The more material which is outside the system the less effective the system becomes.

An indication of the material classified annually can be gauged from the last Annual Report of the OFLC (1997-1998). The Office classified 354 cinema films, 3087 videos, 591 computer games and 2281 publications.

Compliance

When the new legislative arrangements were put in place 1996, Ministers agreed to implement a Community Liaison Officer scheme. The purpose of this arrangement was that an officer attached to the OFLC would assist video retailers, newsagents and seller of computer games to become familiar with the new laws.

This awareness campaign has now been extended to all of the States and Territories participating in the classification scheme.

The Community Liaison Officer scheme has now also been extended and expanded. In addition to the educational role, the Community Liaison Officers assist with the enforcement of the legislation by working with State and Territory enforcement officers if persistent breaches are uncovered.

In addition to the State and Territory enforcement officers, the Community Liaison Officers work from time to time with the industry bodies in areas where their work coincides. The point where their work often coincides is the uncovering of pirated material.

The interest of the CLOs is whether the version on the tape is the same version as that which has been classified. The industry organisation is primarily interested in the breaches of copyright which have occurred.

Invariably this material on the pirate tape is not submitted for classification.

However this does not stop this kind of material being circulated through dubious outlets. Any distribution of this kind must be deleterious to the classification system.

The exception to this is some sexually explicit material. Often copyright owners of this material complained to the OFLC that some of the footage included in different compilations submitted by competitors was unlawfully used.

Under the legislation, the OFLC has no power to determine any of the copyright issues and is required to classify the material before it.

It is clear however, that since the introduction of the Community Liaison Officers and licensing legislation in the Australian Capital Territory that there has been a substantial increase in the compliance rate of material being submitted.

Trailers and advertisements

If changes were made to the Copyright Law which allowed material into Australia, particularly on video, DVD or computer games, to circumvent the classification process, then I believe it would seriously undermine the integrity of our present classification system

Videos and DVDs made in Australia have to conform not only to the requirements to notify the public of the classification category and the consumer advice but also comply with local requirements about the suitability of advertisements.

For instance, a video or a DVD which has an M rating must not feature any trailer or advertisement for a film which is classified higher than the main feature. Thus a trailer for an MA film would not be permitted on the video with a main feature rated M.

Without straying too far from the videos, there are some laser disc manufactures overseas which purport to comply with local regulations. If

trailers are included on such discs, it is almost impossible for these to comply with the local classification requirements for trailers. Much the same can be said about the import of DVDs not made in Australia.

Moreover, if a tape or a disc is brought into Australia claiming to be a particular film or computer game, there is no certainty that it is the same version which has been classified in Australia.

Several versions

When material is classified in Australia it has to be submitted in the form in which it is to be shown, sold or hired. In some cases, exceptions might be made, for instance where a film is in the final stages of production and the distributor seek an indication of classification by submitting the film in video form. Nonetheless, the film would have to be submitted in its final form before a classification was given.

There are often different versions of films tailored to the requirements of the country in which it is being shown. In the United States, there is often a domestic version of the film while there is another version which is made for international distribution.

Particularly with films involving violence at the top end of the classification scale, this can result in the film either being classified MA or R. In some cases, but admittedly not often, it can result in the difference between an R classification and a RC (Refused Classification) if there is sexual violence involved.

An instance while I was at the OFLC concerned the film version of *Henry: Portrait of a Serial Killer*. This film had been imported into Australia on celluloid and was submitted for classification. It was refused classification. The distributor sought advice about what had brought about its refusal and

then made cuts before submitting it again. This happened on several occasions until a version was submitted which was given an R classification.

A laser disc version of the film was later submitted to the OFLC to determine whether that version of the film had been brought into Australia unlawfully. The laser disc version was the original version of the film which was refused classification.

There have also been films, submitted by the Federal Bureau of Customs, where films have been brought in bearing innocuous titles but containing material not even approximating the title. An example was a tape called "Exciting Fishing in New Zealand" which showed images of a boat leaving the harbour and then went on to feature sexually explicit activity for the rest of the tape.

There have also been some tapes referred to the OFLC where sexually explicit material appeared at the end of a G rated tape. Apparently tapes which had previously contained sexually explicit material had been recorded over with the more innocuous material. It is not common but it does happen.

Films and videos which have been given a classification do not have to be submitted again. Discs and tapes of videos and computer games which are manufactured in Australia are required to comply with Australian law concerning content before they go on sale

The regime has been rigorously worked out by Censorship Ministers from the Federal, State and Territory Governments so that the Australian public can have confidence in the scheme.

If material is brought into the system which fails to comply with those requirements, the guarantees inherent in the present system lose their effectiveness.

The danger as I see it is that if the present tight controls on incoming product are in any way relaxed, the imported product will attempt to avoid the regime by claiming that the product should not be submitted because it has already been classified.

As enforcement officers have found, material manufactured to avoid the system can be disposed of quickly and efficiently through a whole variety of outlets

Parallel Imports

In recent times, restrictions have been lifted to allow the importation of music discs to compete with material manufactured in Australia.

Whatever the merits of that decision, a clear distinction should be made. Audio material without visuals has not been subject to regulation other than that which was broadcast. There is now an industry-run system which deals with complaints and appropriately labels offensive recordings.

Films, videos and computer games in Australia have always been the subject of some kind of regulation. In the past it was under a censorship regime, but is now under a classification regime. The community relies on the system and has invested a great deal in educational terms on making it part of our society.

There are improvements which can be made to it and modifications to make it more effective.

However, any change to the Copyright legislation which undermined it by allowing one set of requirements for Australian product and not the same requirement for directly imported material would cause our existing system irreparable harm.

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