Media

The Video Appeals Committee

by John Wood

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Few people outside the video industry have heard of the Video Appeals Committee and its work. The Committee was formed in 1985 following the passing of the *Video Recordings Act* 1984 and hears appeals from makers of videos from decisions of the British Board of Film Classification, to refuse certificates or to grant certificates in respect of video works, with which they disagree. The Committee is small and does not sit very often, but in the last 12 months its work has substantially increased.

VIDEO RECORDINGS ACT

The *Video Recordings Act* 1984, s. 4 gives to the British Board of Film Classification the difficult and sometimes controversial task of determining whether a video work should be granted a certificate and, if so, what classification of certificate should be granted. The categories of certificate are the same as those for films save that an additional category – R18 – enables certain works to be sold from sex shops. Section 4 (3) states:

'The Secretary of State shall not make any designation under this Section unless he is satisfied that adequate arrangements will be made for an appeal by any person against the determination that a video work submitted by him for the issue of a classification certificate:

(a) is not suitable for a classification certificate to be issued in respect of it; or

(b) is not suitable for a viewing by persons who have not attained a particular age,

or against the determination that no video recording containing the work is to be supplied other than in a licensed sex shop'.

As a result, the Video Appeals Committee was created as an independent appellate body which gives video distributors the right to appeal against decisions of the Board which they feel are not correct. It is to be noted that the public has no right of appeal against a decision of the Board, however controversial it may be. Unsuccessful efforts have been made to give such a right.

The Appeals Committee consists of no more than 12 persons of distinction and integrity, wholly independent of the Board and the video industry, some of whom have legal experience. The president is a lawyer and at the moment is supported by one other lawyer. Not less than three members may hear an appeal but, in practice, an effort is always made to have five members sitting. The work of the Committee is governed by the *Video Appeals Committee Provisions* 1985. In practice, a notice of appeal against the Board's decision is submitted to the Committee's Secretary, and both the Board and the appellant are given the opportunity to make written submissions. In addition, the Committee has the discretion to accept any written representations or documents submitted to it by any other interested party, that is to say a party who has a clear interest in the outcome of the appeal.

Rule 7 (1) of the 1985 Provisions reads:

'The panel shall conduct the hearing in such manner as it considers most suitable to the classification of the issues before it and generally conducive to the just handling of the proceedings; it shall so far as appears to it appropriate seek to avoid formality in its proceedings and it shall not be bound by any enactment or rule of law relating to the admissibility of evidence before Courts of Law'.

Thus the Appeals Committee is entitled to consider hearsay evidence and written evidence but, of course, must be careful to give to that evidence only such weight as is appropriate in the circumstances. The Committee does try to avoid formality but has found that its effectiveness is enhanced by adopting the practices and procedures that are present in other statutory tribunals. The decision of the Committee must be given in writing within 21 days from the final day of the hearing; not an easy task where the tribunal normally consists of five persons, all of whom have other occupations and lead busy lives.

NATURE OF APPEALS

The Committee has received only 14 appeals during its history but it is perhaps interesting that five of them have been heard or are pending this year. Several of the appeals have concerned the R18 certificate which allows video works to be supplied only in sex shops. On some occasions an R18 certificate has been refused, on others an R18 certificate has been granted where the applicant has asked for an 18 certificate and such certificate would allow the video to be supplied from shops not required to be licensed as sex shops. In order for a sex shop to be able to trade, it must first be licensed by the local authority for the area in which it wishes to trade and, if a shop supplies an R18 video, or offers to do so, without such a licence, its proprietor is committing a criminal offence by reason of s. 12 of the 1984 Act. Under the *Local Government (Miscellaneous Provisions)* Act 1982, s. 2, a local authority may resolve that sch. 3 of the Act shall apply to its area. This schedule is headed 'Control of Sex Establishments' and paragraph 6 deals with the licensing of sex shops.

There are now only some 80 sex shops in England and Wales, far fewer than when the 1984 Act was being debated in Parliament. The result is that there is now only a limited number of outlets for the sale of R18 material to those who require it and who are over 18 years of age. There can be no doubt that most people find this material at the very least distasteful and many would describe it in harsher terms, but others, particularly some who lead very insular lives, find it

stimulating and a means of sexual gratification. I shall not discuss whether such material may tend to deprave and corrupt, but there are those – not necessarily a negligible minority – who believe it is better that such material should be available under strict licensing conditions rather than in unregulated premises where profit is everything and where it is freely available to those under 18 years of age. Others go further and assert that it is preferable that such material be available, otherwise vulnerable members of society might be exposed to danger. I do not propose to venture into such difficult waters, especially as views are likely to be highly subjective rather than objective.

FACTS TO BE CONSIDERED

Under s. 2 of the 1984 Act, video works which are designed to inform, educate and instruct or are concerned with sport, religion or music or are video games are exempt and do not require a certificate. But such works are not exempt if, to any significant extent, they depict human sexual activity or restraint associated with such activity, mutilation or torture or other acts of gross violence towards humans or animals or they show human genital organs or human urinary or excretory functions.

It is axiomatic that most video works are exempt but the industry which produces them has set up a system of voluntary self-regulation devised by the European Leisure Software Publishers' Association, which makes its classification on the basis of suitability by age. The system is administered by the Video Standards Council, mainly in relation to video games, and is a self-classification scheme whereby the producer of the work assesses what is believed to be the correct classification. The Council looks at the classification and, if there is any doubt, the producer is contacted and the appropriate classification agreed.

Laudable that voluntary system may be – and the wording of s. 2 of the 1984 Act almost drives the industry to such a scheme – there is a danger that in a field where viewpoints tend to be subjective, the Board and others may well disagree with the classification. In *Carmageddon* (Appeal No. 11), the Council classified the work as suitable for 15 year olds but the Board refused a certificate. Ordinarily the Board would not have been consulted but the company producing the game very responsibly felt that 18 was the correct classification and submitted the work to the Board. Ultimately, the Committee granted an 18 certificate subject to a parental lock being fitted to the video work, being influenced to a certain extent by the fact that the game had to be played on a personal computer.

Section 4 (A) was inserted into the *Video Recordings Act* 1984 by the *Criminal Justice and Public Order Act* 1994. Sub-sections 1 and 2 read as follows:

(1) The designated authority shall, in making any determination as to the suitability of the video work, have special regard (among other relevant factors) to any harm that may be caused to potential viewers, or, through their behaviour, to society by the manner in which the work deals with

(a) criminal behaviour

(b) illegal drugs

(c) violent behaviour or incidents

(d) horrific behaviour or incidents or

(e) human sexual activity.

(2) For the purposes of this section:

"Potential viewer" means any person (including a child or young person) who is likely to view the video work in question if a classification certificate or a classification certificate of a particular description were issued.'

The words 'potential viewer' are not easy to construe. In introducing what was to become s. 4(A) in the House of Lords, the Government Minister, Earl Ferrers, said:

'A "potential viewer" includes anyone who is likely to see the work in question if it is classified or placed in a particular category and it specifically includes children and young persons who are under the age of 18 ... The criterion means that the British Board of Film Classification must consider who is in fact likely to see a particular video, regardless of the classification, so that if it knows that a particular video is likely to appeal to children and is likely to be seen by them, despite its classification being for an older group, then the Board must consider those children as potential viewers. That does not mean that the Board must ban the video altogether. The Board will still have discretion on how, or whether to classify it; but it must bear in mind the effect which it might have on children who may be potential viewers.'

In *Boy Meets Girl* (Appeal No. 10) the interpretation of s. 4(A) was considered by the Video Appeals Committee. The Committee accepted the interpretation put upon the words 'potential viewer' by the Board. The Board considers the audience to be addressed by the video and the audience which is going to see it should the Board grant a certificate. The Board has special regard to any harm that may be caused potential viewers, whatever age those viewers are likely to be, or harm which might be caused through the behaviour of viewers after seeing the video.

There can be little doubt that nowadays under-age viewing is commonplace and that many parents do not exercise the control that they should over their children's viewing. Video recorders are commonplace in the home and, from a very young age, children are able to operate them without difficulty. Thus unless video works are locked away or the viewing of children is closely supervised by their parents it is not improbable that a video classified with an 18 certificate could be seen by a child. These are all matters which the Video Appeals Committee must take into consideration when deciding whether or not a certificate should be granted.

This issue came up in the *Carmageddon* appeal where the Committee had to consider the effect of video games upon players, especially children. The Committee was most concerned that there appeared to be a dearth of research on the effect of video games upon children and has expressed the hope that some research will be carried out. Indeed, the Committee has to take into account that exposure to violence or pornography may desensitise those who frequently watch videos of this type, one result of which may be that the violence or pornography depicted may become more extreme. Of course the Committee must look at these video works in the light of current standards and current views on morals, recognising that what may be acceptable today would not have been acceptable to the drafters of the legislation several years before.

EUROPEAN CONVENTION ON HUMAN RIGHTS

Article 10 of the *European Convention on Human Rights and Fundamental Freedoms* 1950 states:

(1) Everyone has the right to freedom of expression. The right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

(2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interest of national security, territorial integrity or public safety, for the prevention of disorder or crime, or the protection of health or morals, or the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

The convention is about to be incorporated into English domestic law. In *Brind v Secretary of State for the Home Department* [1991] All ER at p. 734–5, Lord Ackner said:

'If the Secretary of State was obliged to have proper regard to the Convention, i.e. to conform with Article 10, this inevitably would result in incorporating the Convention into English domestic law by the back door'.

In *R v Morrisey & Staines*, *The Times* 1 May 1997, the Court of Appeal had to decide whether the coercive powers given by s. 177 of the *Financial Services Act* 1986 to investigate insider trading were in breach of the European Convention and therefore that answers given in response to questions were not admissible. The Lord Chief Justice stated:

'If the Court were to rule here that this evidence should be excluded, it would be obliged to exclude such evidence in all such cases. That would amount to repeal, or a substantial repeal, of an English statutory provision which remains in force in deference to a ruling which does not have a direct effect and which, as a matter of strict law, is irrelevant.'

Despite these two judgments, the British Board of Film Classification has taken into account the provisions of art. 10 of the convention which, of course, puts on the Board the burden to prove that a certificate should not be granted on the basis that the Board is protecting health or morals. In view of the attitude of the Board, the Video Appeals Committee has, of necessity, always had regard to art. 10 of the Convention. However the Committee also takes into account the judgment of the European Court of Human Rights in *Muller & Ors v Switzerland* (1988) 13 EHRR 212, which was a case concerned with the display of obscene paintings at a public exhibition. The court said:

'The applicant's conviction on the basis of Article 204 of the Swiss Criminal Code was intended to protect morals. Today, as at the time of the Handyside judgment, it is not possible to find in the legal and social orders of the Contracting States a uniform European conception of morals. The view taken of the requirements of morals varies from time to time and from place to place, especially in our era, characterised as it is by a far-reaching evolution of opinions on the subject. By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the 'necessity' of a 'restriction' or 'penalty' intended to meet them.'

For a number of years many distinguished jurists and others have encouraged the government of the day to introduce the European Convention into English domestic law and, as mentioned above, this is about to be done. As a result, and as a matter of law, the Board and the Committee will be obliged to consider art. 10 in coming to their respective conclusions, which will merely put on a statutory basis what has taken place over the years.

OBSCENITY

The Board and the Committee have to consider video works in the light of criminal law on obscenity as set out in the *Obscene Publications Act* 1959 (as amended).

It matters not that the certificate should be 18 or R18. If the article is in conflict with the criminal law, no certificate can be granted. But in order that there should be a criminal offence against s.2 of the *Obscene Publications Act* 1959 (OPA) and the amending act of 1964, it is necessary to show that the article published or to be published will tend to deprave and corrupt. Section 1(1) of the OPA sets out the test of obscenity as follows:

'For the purposes of this Act, an article shall be deemed to be obscene if its effect or (where the article comprises two or more distinct items) the effect of any one of its items is, if taken as a whole, such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it.'

Over the years, the definition has caused difficulty. What is the meaning of the words 'deprave and corrupt?' We know from *R v Anderson* [1971] 3 All ER 1152 that the words 'repulsive, filthy, loathsome or lewd' do not amount to obscenity and it is doubtful whether the interpretation in the famous *Penguin Books* case [1961] CRIM LR 173 is now good law. In that case Mr Justice Byrne said:

'To deprave means to make morally bad, to pervert, to debase or corrupt morally; corrupt means to render morally unsound or rotten, to destroy the moral purity or chastity of, to prevent or ruin a good quality, to debase, to defile.'

In *Knuller v Director of Public Prosecutions* [1973] AC 435, Lord Reid, said:

'(i) Corrupt is a strong word and the jury ought to be reminded of that, as they were in the present case. The Obscene Publications Act appears to use the word 'deprave' and 'corrupt' as synonymous, as I think they are. We may regret that we live in a permissive society but I doubt whether even the most staunch defender of a better age would maintain that all or even most of those who have at one time or in one way or another been led astray morally have thereby been depraved or corrupted. I think that the jury should be told in one way or another that although in the end the question whether the matter is corrupting is for them, they should keep in mind the current standards of ordinary decent people.' (p.456)

In order to prove a criminal offence, which must be proved beyond all reasonable doubt, the prosecution must show that even if there is a tendency to deprave and corrupt that tendency must be directed to those persons who are likely, having regard to all relevant circumstances, to look at the matter. In *R v Calder & Boyars* [1968] 3 ALL ER at p. 648, Lord Justice Salmon said:

'This Court is of the opinion that the jury should have been directed to consider whether the effect of the book was to tend to deprave

and corrupt a significant proportion of those persons likely to read it'.

The audience must be the likely audience, not the theoretically possible audience, and thus, in relation to sex shops, it must be in relation to persons who are over 18 years of age. In *Makin' Whoopee* (Appeal No. 14), the Board and the Video Appeals Committee had to decide whether the video work in question was obscene within the meaning of the Obscene Publications Acts. The Board decided that a certificate should not be granted but the Video Appeals Committee gave the work an R18 certificate. During the course of its judgment, the Committee said this:

'The Police and Customs & Excise have indicated that this is the type of material they would take to a Magistrates Court for forfeiture but the evidence, such as it is, presented to us indicates that at least one Court takes a different view in relation to magazines, and that the Crown Prosecution Service has advised against forfeiture proceedings in relation to magazines and videos of the same type. There is no doubt that Magistrates Courts reach inconsistent decisions on obscenity. It is unsurprising they should do so, given the widely subjective views held in respect of pornography. Our view is that we should consider the question of obscenity as a bench of Magistrates, properly instructed on the law, taking into account the evidence presented to us and having regard to the submissions made.

It needs to be said, however, that each video work has to be considered on its own content, on the likely audience and on its place of sale. Although works may be similar, no two works are the same and each case has to be considered on its own particular merits.

FORFEITURE

Section 3 of the OPA 1959 is concerned with forfeiture of obscene articles seized by the police from premises. It reads as follows:

'3(1) If a justice of the peace is satisfied by information on oath that there is reasonable ground for suspecting that, in any premises in the petty sessions area for which he acts, or on any stall or vehicle in that area, being premises or a stall or vehicle specified in the information, obscene articles are, or are from time to time, kept for publication for gain, the justice may issue a warrant under his hand empowering any constable to enter (if need be by force) and search the premises, or to search the stall or vehicle ... and to seize and remove any articles found therein or thereon which the constable has reason to believe to be obscene articles and to be kept for publication for gain.

3(3) [Subject to subsection 3(A) of this section] any articles seized under subsection (1) of this section shall be brought before a justice of the peace acting for the same petty sessions area as the justice who issued the warrant, and the justice before whom the articles are brought may thereupon issue a summons to the occupier of the premises or, as the case may be, the user of the stall or vehicle to appear on a day specified in the summons before a magistrates' court for that petty sessions area to show cause why the articles or any of them should not be forfeited; and if the court is satisfied, as respects any of the articles, that at the time when they were seized they were obscene articles kept for publication for gain, the court shall order those articles to be forfeited.'

In *Makin' Whoopee,* the Board stated that, notwithstanding the fact there is a single test, its understanding was that as a matter of practice that test was applied differently in respect of prosecutions under s. 2 and forfeiture proceedings under s. 3. It is undeniable that it is extremely difficult to obtain a conviction before a jury for a s. 2 offence; jurors are drawn at random from varying backgrounds and social viewpoints. As a result, it is understood that s. 2 prosecutions are not very frequent.

On the other hand extensive use is made of s. 3, searches of premises are commonplace and forfeiture proceedings are usually successful. One rather suspects that the Board's assertion that the test of obscenity is applied differently between the sections is correct. There can be no doubt that the framework of the 1959 Act, and particularly s.1, ensures that the test of obscenity is the same whether the proceedings are under s. 2 or s. 3. But it is often the case that the shopkeepers from whose premises the articles are seized do not have the money or, indeed, the inclination to challenge the seizure and magistrates are given little or no information as to those who are the likely audience and whether children are purchasers. Having said that, s. 3 search warrants are normally executed at shops which are not licensed sex shops and which are open to persons of every age. There is not the slightest doubt that the less responsible shopkeepers are lax in ensuring that material that is wholly unsuitable for children is not sold to them. It needs to be emphasised that *Makin' Whoopee* was given an R18 certificate, and it would be wrong to speculate what the opinion of the Video Appeals Committee would be were it to be asked to grant a certificate enabling the work to be sold in a shop not licensed as a sex shop.

Nevertheless, in every case, whether under s. 2 or s. 3, the question to be asked is whether the article, taken as a whole, would tend to deprave and corrupt those who are likely to see, read or view it and, however disagreeable the content may be, conviction or forfeiture cannot take place unless that test is met. The only difference is that s. 2 proceedings are criminal – requiring the prosecution to prove its case beyond reasonable doubt – whereas *Thomson v Chain Libraries Ltd* [1954] 2 All ER 616 says that the onus of showing why the articles should not be forfeited is upon the person summoned. It will be interesting to see whether this judgment will stand when art. 10 of the *European Convention on Human Rights* is in operation.

CONCLUSION

Whether the burst of activity in 1998 will continue no one knows, but it has been a challenging year for the Video Appeals Committee. The Committee has been surprised at the number of legal issues that it has had to consider, several of which have not been dealt with in this article. The task is a difficult one and its members of the Committee are acutely conscious that they are laying down guidelines and standards in a very sensitive field.

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