Unclassified Videos and Restraint of Trade

By Lee Finch

Background

Films have been subject to censorship since at least 1909 and, for films shown in public, classifications and related offences have existed since 1912. There was no equivalent for film recordings shown in private, which for most of the twentieth century did not pose a problem. The introduction of video recorders to the UK changed that. The early adopters of this new technology were smaller distributors providing pornographic, violent and other potentially obscene content. Whilst such works could, theoretically, be prosecuted under existing obscenity laws, doing so was not straight-forward and was only ever a reactive measure.

One, largely unsuccessful, attempt to address this issue was the publication by the Director of Public Prosecutions of a list of titles that he believed breached the laws on obscenity (the "video nasties" list). The effect of this list was arguably counter-productive: entry onto the list increased a film's notoriety and effectively amounted to free publicity. Further, there was no guarantee that the video nasty was actually obscene and a number of prosecutions were unsuccessful.

The Video Recordings Act 1984

The Video Recordings Act 1984 ("the Act") required all video works (save for a limited number of exempt works) to be submitted to the British Board of Film Classification ("BBFC") for classification. Under section 9 of the Act it was an offence to supply or offer for supply an unclassified video work. This offence was successfully prosecuted for over twenty years until it was noticed that a procedural error had been made during the passing of the Act.

In 2009, the Government announced that the offences under the Act should have been notified to the European Commission. The effect of the non-notification was that the Act was unenforceable against individuals. The Government consequently introduced the Video Recordings Act 2010 which repealed and immediately revived the Act. This did not, however, solve the problem of the convictions obtained between 1985 and 2009.

Following the announcement, there were a number of appeals against conviction. In *R v Budimir and another* [2011] QB 744, the Court of Appeal held that, in the absence of injustice, there was

no requirement imposed by national or EU law which required a final determination to be reopened: the convictions obtained whilst the Act was unenforceable survived.

Restraint of Trade

The prohibition against unclassified works applies even when the content has already been classified by another Member State. Consequently, the Act was open to attack as an unlawful restraint of trade.

In February 2009, the Court of Justice of the European Union ("CJEU") considered a German law which prohibited the sale to children of video recordings which had not been examined by the German authorities (Case C-244/06 *Dynamic Medien Vertriebs GmbH v Avides Media AG*). The CJEU held that Article 34 of the Treaty on the Functioning of the European Union ("TFEU") does not preclude such a rule unless the procedure for examination is inaccessible or cannot be completed within a reasonable time. The CJEU relied on the fact that the German law did not act as a blanket prohibition – unclassified works could still be sold to adults. What, then, of the comprehensive ban imposed by the Act?

In May 2011, Luton Borough Council Trading Standards brought prosecutions in relation to DVDs that had been offered for sale in breach of section 9 of the Act. It was common ground that the works had not been classified but were suitable for classification; some of the DVDs were cartoons intended for children. The Defendants argued that section 9 of the Act was an illegal restraint of trade under Article 34 TFEU and the Act was incompatible with Article 10 of the European Convention on Human Rights ("ECHR"). The trial judge rejected these arguments.

On 14 November 2014, the Court of Appeal rejected the Defendants' appeal (*R v Dryzner and another* [2014] EWCA Crim 2438) holding:

1. Article 34 TFEU was qualified by Article 36 TFEU: restrictions could be justified on the grounds of public morality;

2. The Act was clearly aimed at protecting children from viewing unsuitable material and protecting the public from exposure to extreme pornographic or violent images;

3. The fees payable upon submission for classification were not discriminatory;

4. On the evidence available in the case, there was nothing in the argument that it was disproportionate to require innocuous works to be classified;

5. Accordingly, the Act was wholly within Article 36 TFEU and did not constitute an illegal restraint of trade (relying on *Dynamic Medien*);

6. The appeal in respect of Article 10 ECHR raised the same issues and, for the same reasons, the Act fell within the qualification of Article 10(2).

Conclusion

The recent cases indicate that the sale or offer for sale of an unclassified video recording will usually be successfully prosecuted. Issues regarding restraint of trade, free speech, innocuous material and proportionality have been considered by the Court of Appeal and determined in favour of rigorous enforcement (it remains to be seen if the CJEU will be asked to definitively decide the legality of a blanket ban, such as that imposed by the Act). Nevertheless, the decision in *R v Dryzner* could be restricted by the limited facts available to the Court and we are unlikely to have seen the last of the EU and Human Rights arguments in this field.