

20 November 2006

Classification Review Board
22 – 33 Mary Street
Surry Hills
Sydney NSW 2010

Submission: New South Wales Council for Civil Liberties

Re: Viva Erotica – Application for Review of Classification from Adultshop.com Limited

Introduction

The New South Wales Council for Civil Liberties (NSWCCL) makes this submission in circumstances where we have not been provided with any of the material listed below under the heading “procedure”.

We note that Board has required that we make a submission in these circumstances.

We therefore make the obvious point that these submissions are inherently preliminary. We request an opportunity to make further submissions following receipt of additional material.

Significant issues raised by this application

The NSWCCL believes that this review application provides an opportunity for the Board to address three important matters, as follows:

- (a) the procedures to be adopted by the Board in classification reviews;
- (b) the apparent attitude of the Board to give reduced weight to submissions from persons or bodies that have not viewed the film which is the subject of review;
- (c) the standards of morality, decency and propriety generally accepted by reasonable adults, and the means by which the Board forms views as to such standards.

This submission briefly addresses these matters.

Procedure

The process of the Board should allow parties before the Board to realistically participate in the proceedings before the Board.

The Board's procedure should involve providing each party with the following:

- (a) a copy of the application to the Board;
- (b) a copy of the film, publication or computer game the subject of review;
- (c) a copy of the report of the Classification Board;
- (d) a copy of all evidence and written submissions received by the Board, and an opportunity to respond to such evidence and submissions;
- (e) a copy of all legal advice received by the Board in relation to the film, publication or computer game under review, and an opportunity to respond to such legal advice; and
- (f) an indication of the particular matters which the Board is likely to rely upon in making its determination, and an opportunity to make submissions in relation to those particular matters.

Further, NSWCCCL submits that the Board should reform the way in which it records its decisions, in the following ways:

- (a) the Board should not treat statutory material, including the Code and the Guidelines as material taken "into account" (refer to paragraph 4 of most decisions, which purport to list the evidentiary and other material taken into account). The Board should be seen to apply the relevant statutory material, the Code and the Guidelines in accordance with their terms;
- (b) the Board should distinguish between evidentiary material and material in the nature of submission. In this way, matters of fact and matters involving judgment can be clearly identified and analytically addressed;
- (c) the Board should summarise the evidentiary material and submissions in its reasons for decision, particularly where the Board has not agreed with a particular piece of evidence or submission. Unless the Board does so, a reader of the decision is unable to perceive the competing views as to classification.

NSWCCL believes that such procedures will enhance the integrity of decisions of the Board and make them less vulnerable to public criticism and legal review.

The NSWCCCL asks that the above procedures be followed in this matter.

Reduced Weight

NSWCCL notes the statement in the letter from Board dated 1 November 2006 inviting a submission from NSWCCCL:

"In the past, the Review Board has given less weight to submissions made by organisations where representatives of that organisation have not viewed the film or product under review."

NSWCCL submits that such statement demonstrates an erroneous approach to classification decision-making.

Obviously, the present submission is being made without any representative of NSWCCL having viewed the film. The matters raised in this submission do not in any way depend upon a viewing of the film. There is no justification for giving reduced weight to the matters raised in this submission merely because a representative of NSWCCL has not viewed the film, or chooses subsequently not to view the film.

Further, NSWCCL makes this submission as an organisation, and not as an individual. NSWCCL does not seek to make submissions based on an individual's subjective opinion as to the appropriate classification of the film. It is inherently impossible for an organisation such as NSWCCL to view a film. That does not make NSWCCL's views about classification of a particular film any less worthy of consideration.

The overriding principle underlying NSWCCL's submission is that the system of classification established under the relevant legislation is one that is principle based, and that accordingly, subjective opinions of individuals in relation to works under review are of limited relevance.

In making this submission, NSWCCL recognises that the Board's function involves reflecting community values in classification decisions. Classification decisions can and do involve exercising judgment within the scope provided for under the legislation. The Board's structure reflects that such judgment is not to be made by judges, politicians or public servants, but by persons who are able to responsibly reflect the views of the community.

This attribute of the Board promotes community acceptance of classification decisions. To the extent that decisions of the Board are seen to be subjective reactions to a particular work, community acceptance of classification decisions will be undermined.

Standards of morality, decency and propriety generally accepted by reasonable adults

NSWCCL understands that the applicant for review wishes to rely on survey evidence as to the views of Australian adults in relation to the depiction of actual sex in films classified R18+.

NSWCCL submits that the Board should take appropriate survey evidence into account in making its decision.

NSWCCL submits that to the extent that the Board relies on standards of morality, decency and propriety generally accepted by reasonable adults in coming to its decision on this matter, it should proceed on the basis that they should seek to reflect such standards as are found objectively through evidence such as survey evidence, and should not rely on their personal, subjective, opinions.

NSWCCL notes that the Board discussed community standards in its decision concerning the classification of the film *9 Songs* in January 2005. The decision is of particular interest because there was a separate majority and minority view on this aspect. NSWCCL notes that neither the majority nor minority expressed their views as to community standards by reference to any objective criteria. This aspect of the decision is unsatisfying.

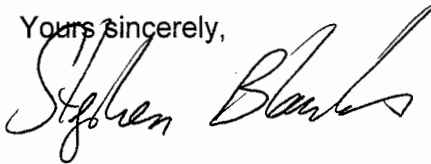
Ultimately, if a significant majority of adults believe that the depictions of actual sex in the film *Viva Erotica* do not offend their standards of morality, decency and propriety then the Board should classify the film as R18+. Appropriate consumer advice can be provided with the film to ensure that potential consumers of the film are not misled.

Conclusion

The Board is required to take into account the matters set out in section 11 of the *Classification (Films, Literature and Computer Games) Act 1995*. NSWCCCL submits it should do so in a way that ultimately promotes community confidence in its processes. This involves adopting an open and transparent procedure, having regard to evidentiary material where it is available, and properly explaining its decision.

As noted above, NSWCCCL may wish to make further submissions after reviewing the material referred to above.

Yours sincerely,

A handwritten signature in black ink that reads "Stephen Blanks". The signature is written in a cursive, flowing style.

Stephen Blanks
Secretary, NSW Council for Civil Liberties