



Australian Government

Attorney-General's Department

Simplifying the classification of DVDs: discussion paper

June 2006

A proposal to reduce the regulatory burden related to the costs of classification of additional content on DVDs (and other media storage devices for films) without compromising the broader objectives of the national classification scheme

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The Attorney-General's Department invites comment on the issues raised in this discussion paper and on any other issue relevant to the topic.

Written submissions must reach the Department by 21 July 2006.

This paper is a discussion paper only; it does not reflect any concluded views about the issues canvassed.

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Invitation to comment

The Department invites comment on the proposal, the issues raised in this discussion paper, the accompanying draft Regulatory Impact Statement and on any other issue relevant to the topic of simplifying the classification of digital versatile discs (DVDs).

How to make a submission

Responses to the discussion paper may be made in electronic form or hard copy.

Unless marked confidential, responses may be made public and may be placed on the Department's website <www.ag.gov.au>.

If you wish your response to be treated as confidential, you should write "confidential" on the first page. The Department's preference is for responses to be public. Your identity may be suppressed if you request it. However, confidentiality should be reserved for material whose disclosure would be genuinely prejudicial to the party making the response.

All submissions, including confidential submissions, may be provided by the Department to the Office of Film and Literature Classification, the Classification Board and the Classification Review Board for the purpose of developing advice to Government.

Please send your written submission to:

Classification of DVDs Discussion Paper
Classification Branch
Attorney-General's Department
Robert Garran Offices
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BARTON ACT 2600
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All submissions must reach the Department by 21 July 2006.

This discussion paper in context

What is the scope of this paper?

This discussion paper is concerned with the classification of ‘additional content’ that accompanies already classified feature films for sale and hire on DVDs and other media storage devices for films (such as HD DVD, iPods, flash memory cards and ‘Blu Ray’).

‘Additional content’ includes value added content such as:

- additional scenes
- outtakes or bloopers
- ‘making of’ documentaries
- biographies of/interviews with directors/actors
- commentary by the director or others
- featurettes
- ‘easter eggs’ or hidden features.

For the purpose of this discussion paper, ‘additional content’ does not include:

- a feature film or episode of a television series
- subtitles, captions, dubbing or similar material
- interactive menus
- advertisements for films, computer games and publications ¹
- computer games.

This paper also deals with DVDs and other media storage devices that contain a film, additional content and a computer game.

Why is this paper being released?

The inclusion of additional content on DVDs and other media storage devices containing an already classified feature film means that the whole DVD or device must be submitted for classification. However, this only rarely results in a classification or consumer advice that is different to the already classified feature film it is sold with. This calls into question whether there is a net public benefit from the current approach to the classification of this additional content and whether any changes can be made to expedite processing and decrease costs without compromising standards.

¹ “Advertisement” is defined in the Classification Act and does not include “advertising, in an imported film or computer game that is in a form that cannot be modified, for a film or computer game that has not been published in Australia (the advertised film or game), whether or not the advertised film or game is later published in Australia. The Attorney-General has asked for a review of the provisions relating to advertising. Issues relating to advertisements will be considered in that review.

Separately to this paper, the Australian Attorney-General already proposes to introduce legislative amendments which would mean that the addition of subtitles, captions, dubbing or interactive menus to a DVD would not, of itself, require a fresh classification decision.

This paper seeks views on a proposal for simplifying the classification system for other additional content as listed above.

National classification scheme

The Commonwealth, States and Territories share responsibility for the regulation of films, including the classification of films stored on DVD and other storage devices, in Australia.

Complementary classification enforcement laws require films to be classified before they can be exhibited, sold, hired or advertised. There are limited exceptions to this requirement.

The Classification Act provides for the classification of films by the Classification Board in accordance with the National Classification Code and guidelines agreed by Censorship Ministers and considerations set out in section 11 of the Act.

Distributors of DVDs and other media storage devices apply to the Classification Board for classification. Applicants are required to apply in the approved form, including a contentious material statement that identifies any 'contentious material' in the DVD and the means by which access to that material may be gained. There are fees for classification which are prescribed in the Classification Regulations.

The Classification Act and State and Territory enforcement legislation require that if a film is modified after it has been classified, a fresh classification must be obtained before it can be exhibited, sold, hired or advertised. The inclusion of additional content on the storage device for the film causes that film to be 'modified' within the meaning of the Act and therefore the entire DVD or other storage device requires a fresh classification.

DVDs

DVDs are storage devices for digital content, including films. DVDs generally include an interactive menu to assist the user to access the film and any other content on the disc.

DVDs are a very popular source of entertainment in Australia with widespread appeal. In 2004:

- 40 million DVDs were sold by retailers (compared with 26 million in 2003)
- revenue from retail sales of DVDs was \$925m (up from \$10m in 1999)

- revenue from wholesale sales of DVDs was \$1,042m (up from \$798m in 2003)
- 62% of Australian households had a DVD player (up from 51% in 2003).²

The Australian Film Commission describes the DVD format as a cultural phenomenon that has:

- quickly overtaken video as the dominant way of watching movies at home
- turned many movie viewers into ‘buyers’ – effectively collectors – rather than ‘renters’, in a way that video never did
- prompted many Australians to install home cinemas, complete with surround-sound systems and large screens, to take advantage of the extra sound and picture quality of the format
- expanded into the impulse purchase and gift market alongside books and CDs as prices have dropped
- supplemented revenue for movie producers: it is now acknowledged that at least 50 per cent of the revenue that films make comes from the DVD and remaining video market
- revived many old movies for contemporary audiences
- tapped different audiences through the release of multiple versions of movies – from low-priced discs containing just the movie to higher-priced ones carrying extra features
- added a level of cinema appreciation and literacy for audiences via directors’ commentaries, deleted scenes, making-of documentaries and other special features.³

The Australian Film Commission also reports an industry view that consumer demand for DVDs continues to grow at a rapid rate, while competition amongst the major distributors has led to DVD prices falling. However, it also notes that industry players advise that the market is expected to plateau by 2007.⁴

Classification trends

The popularity of DVDs has had a direct impact on the operation of the Classification Board with demand for classification services for films for sale/hire increasing in both absolute terms (from 2536 in 1998/99 to 5992 in 2004/05) and as a proportion of all classified product (from 50% in 1998/99 to 60% in 2004/05).

With technological advances in the storage capacity of DVDs and other digital media (for example BluRay may have up to 10 times the storage capacity of a DVD), a wider range and greater volume of additional content is increasingly available. This has implications

² Australian Film Commission (2005) Australia’s Audiovisual Markets as updated at: http://www.afc.gov.au/gtp/pdfs/markets_video.pdf

³ Australian Film Commission (2005) Australia’s Audiovisual Markets as updated at: http://www.afc.gov.au/gtp/pdfs/markets_video.pdf

⁴ Australian Film Commission (2005) Australia’s Audiovisual Markets as updated at: http://www.afc.gov.au/gtp/pdfs/markets_video.pdf

for the time and costs of classification. In the last five years the total classifiable minutes on DVDs and other media storage devices has increased by more than 100%.

The OFLC conservatively estimates that about 16% of the DVDs currently submitted for classification contain already classified films together with “additional content”.

Classification of additional content on DVDs

Where a DVD contains a version of the feature film that has previously been classified, the Classification Board generally considers only the additional content on the storage device.

It is rare for a different classification or consumer advice to be assigned by the Classification Board following consideration of the additional content.

Cases where the classification or consumer advice has been changed as a result of the inclusion of additional content include *The Matrix* which was originally classified M with the consumer advice ‘Medium level violence.’ When subsequently released on DVD with additional content, some coarse language in the commentary caused the consumer advice to be changed to ‘Medium level violence, low level coarse language’. *Behind Enemy Lines* was originally classified M ‘Medium level violence, low level coarse language’. When it was released on DVD, violence in the deleted scenes included as additional content resulted in the new classification of MA 15+ ‘Medium level violence’.

Although rare, the incidence of additional content having a stronger impact than the feature is most likely to occur in the lower classifications (particularly G and PG) where the threshold for permissible content is lowest.

At the lower classifications, the classifiable element in additional content which is most likely to cause a higher classification or new consumer advice is coarse language. This can occur in for example, interviews, commentaries and ‘bloopers’. Coarse language and other classifiable elements can also occur in deleted scenes, alternative endings, featurettes and the like. In some cases, such content may have been deliberately deleted from the original feature to achieve a lower classification for public exhibition release.

In the restricted classifications MA 15+ and R 18+ there is less chance of the additional content being strong enough in impact to affect the feature’s classification or consumer advice. This is because the language (and other) classifiable elements have higher thresholds for permissible content. In these categories, the stronger material would usually only occur in deleted scenes, alternative endings, featurettes etc, and only extremely rarely in commentaries, interviews or ‘bloopers’.

The adult industry, which produces sexually explicit films or films mainly concerned with sex, overwhelmingly favours a single release of R18+ and X 18+ material, rather than the ‘feature plus additional content’ format, at present, although a few exceptions

have been identified. This means the Classification Board is currently rarely required to consider additional content on these types of DVDs.

What is the case for regulatory reform?

The Australian Government is concerned to ensure that regulation should not only be effective, but should also be the most efficient means for achieving relevant policy objectives. The benefits of any regulation to the community should outweigh the costs.⁵

The market for DVDs appears to grow stronger each year and, while the market is expected to plateau in 2007, an upward trend in applications for classification of DVDs shows no sign of abating.

As the storage capacity of DVDs and other digital devices grows, distributors seek to include increasing amounts of additional content on them. The classification of films involves direct costs to applicants (primarily DVD distributors). Under the Classification Regulations, fees increase in accordance with the duration of the DVD, so the inclusion of more material may lead to higher costs for distributors. There is a risk that distributors will choose to exclude additional content from DVDs and other storage devices in order to minimize classification fees – to the detriment of consumers.

There is a risk that each application for classification will take longer for the Classification Board to complete because of the amount of previously unclassified additional content it contains. The time taken to classify material is an issue for DVD distributors. The production and distribution of DVDs and related advertising cannot be completed until the product is classified because the classification marking and consumer advice must be included on such material.

In considering reform to reduce the regulatory burden of classification of additional content on DVDs and other storage devices, an important policy outcome is the preservation of the integrity and credibility of the national classification scheme. Research indicates that Australian consumers value the national classification scheme highly and that they use classifications to choose films, including DVDs, for themselves and those in their care.⁶ The community's high regard for the scheme should not be compromised by any changes to responsibility for classification decision making.

A precedent exists within the Classification Act for a model whereby industry assessors with appropriate training provide preliminary assessment reports to expedite the classification of computer games up to and including the 'M' classification. The classification decision is made by the Classification Board having regard to the assessment report and there are various checks and balances to preserve the integrity of the national classification scheme. This paper suggests applying a similar model to the additional content on DVDs as a strategy to diminish the regulatory burden on industry.

⁵ Office of Regulation Review (1998) A guide to regulation (second edition)

⁶ See: <http://www.ofrc.gov.au/special.html?n=204&p=145>

Options

What options for addressing the regulatory burden were considered?

Three options, including the preferred model, have been considered in this review. The options are:

Option 1: Maintain the status quo

The current statutory arrangements for classification of DVDs, including the requirement for a fresh classification if additional content is included, could be maintained unchanged.

The main advantage of this option is that it provides consumer and business certainty. It would not require changes to existing practices.

However, it does not address the potentially negative impact of the current regulatory approach on the use of the enhanced storage capacity of new devices and the potential for greater content to be provided to consumers in the future. The financial burden on industry and the workload associated with classifying would increase or, alternatively, the costs of inclusion of additional content will be unprofitable and consumers will be deprived of access to this material.

Option 2: Deem certain additional content to be classified

Under this option, storage devices containing classified films and additional content would automatically carry the classification and consumer advice assigned to the classified film without the whole product requiring a fresh classification.

The benefits of this option to industry are clear. As industry would no longer be required to submit such material for classification by the Board, it would benefit from savings in relation to associated application fees, processing times, administration costs and so on. Industry would also benefit from early certainty about the classification of a product, enabling it to commence its marketing sooner.

Despite these benefits, this option introduces an unacceptable cost to the public which would no longer be able to rely on the classification or consumer advice carried by a sale/hire film with additional content. In the rare instances where material stronger than that indicated by the classification and consumer advice is contained in the additional content, the consumer would not be aware of this until they viewed the product. This is contrary to the principle that people should be protected from exposure to unsolicited material that they find offensive. It therefore has the potential to undermine confidence in the classification scheme and consumer confidence in classification markings.

Current practice by industry is generally to include additional content that is of the same or less impact than the feature. Although industry is unlikely to knowingly alienate its market by including stronger or offensive material with a film of a lower classification, deeming additional content as classified at the same level as the feature film would not provide an incentive to ensure that classification levels are always considered.

There are likely to be significant information and public relations costs associated with managing potential confusion and concern arising out of the implementation of this option. The reputation of the national classification scheme could be seriously compromised.

This option is therefore not recommended.

Option 3: Preferred Option - Authorised Additional Content Assessor Scheme

This proposal is modeled on the existing authorised assessor scheme which has been operating successfully for computer games up to ‘M’ classification for over a decade.

Under this option, the Classification Act would be amended to introduce a scheme under which appropriately trained and authorised industry assessors recommend classifications and consumer advice to the Classification Board for the ‘additional content’ released with already classified feature films.

Where an application for classification of a film includes a feature film, additional content and a computer game, a report from the Additional Content Assessor would need to be accompanied by a separate report from an authorised computer games assessor.

Applicants would not be required to use this model and could continue to submit storage devices containing additional content for classification by the Board. However, all applicants would continue to be required to disclose contentious material.

Under the proposed scheme, the assessors’ reports would accompany the application for classification and inform the decisions of the Classification Board. The Board would retain ultimate responsibility for classification decisions and would view the material or require a demonstration of a computer game if it wished to do so.

The risks that the proposed model would lead to inappropriate classification decisions are limited because:

- all classification decisions would continue to be made by the Classification Board
- all unclassified feature films would continue to be assessed by the Classification Board and only ancillary material (ie additional content) would be preliminarily assessed by Additional Content Assessors
- a range of appropriate mechanisms would be implemented to quality assure the recommendations of Additional Content Assessors and deal with sub-standard assessments.

Appropriate checks and balances to ensure the consistency and quality of decisions based on the Additional Content Assessors' reports would be introduced. These include:

- mandatory initial and annual training for individual assessors
- powers to revoke the assessor status of a particular individual, including a possible three-year prohibition on reapplying for assessor status, following repeated reports which include misleading, incorrect or grossly inadequate information.
- a three-year prohibition on an applicant (ie a DVD distributor) using the scheme following repeated instances of it seeking a classification of additional material based on a report from an assessor which included misleading, incorrect or grossly inadequate information **and** which also led to the assessor's status being revoked
- powers to revoke a classification decision which was based on a report from an assessor which included incorrect, misleading or grossly inadequate information
- random and complaints-based auditing procedures.

As with computer games assessors, in order to receive and maintain authorisation, the Additional Content Assessor would need to undergo an initial three day training program and an annual one day refresher course. Based on cost-recovery principles these have been costed by the OFLC at \$1,380 and \$570 respectively.

Also, the Classification Regulations would be amended to provide for reduced fees for applications for classification of DVDs and other storage devices that are accompanied by an Additional Content Assessor's report. The following table compares the current and proposed fees:

Duration of Film	Current Fee \$ AUD	Proposed Fee where Authorised Industry Assessor Report is provided \$ AUD	Cost of Training \$ AUD
0–60 minutes	510	430*	Initial Training (3 Days) \$1,380
61–120 minutes	700		
121–180 minutes	840		
181–240 minutes	1 010		
241–300 minutes	1 180		
301–400 minutes	1 420		
401–500 minutes	1 660		
501–600 minutes	1 910		
601–700 minutes	2 120		
701–800 minutes	2 460		
More than 800 minutes	3 160		Annual Refresher Training (1 day) \$570

Table 1: Comparison of current and proposed fees under the proposed model

Table 2: Additional Content Assessor training costs

* The precise fee will be determined once feedback on the proposal has been received and the model settled. However, it is not expected to exceed \$500.

Issues for comment

1. Overall model

This paper seeks comments on the model proposed above.

In particular, comments are sought from distributors as to whether, if the Classification Act provided the option of an Additional Content Assessor scheme, it would be used in practice.

Comments are also sought from consumers and community groups as to whether the proposed model strikes the correct balance between protecting the integrity of the national classification scheme and reducing the regulatory burden on the distribution sector.

2. X 18+ films and the model

The proposed model is for Additional Content Assessors to make recommendations regarding the classification for additional content released commercially with already classified feature films from all classification categories, including the X 18+ classification.

The X 18+ classification is a special and legally restricted classification comprised solely of content of a sexually explicit nature. Most X 18+ films are modified versions of films produced in other countries where the content permissible in such films is less regulated or unregulated. If the proposal includes X 18+ material, the highest risk surrounds the inclusion of 'deleted scenes' as additional content. However, the adult industry generally favours a single release of X 18+ material rather than including additional content on a DVD with a feature film that has already been classified X18+.

Comments are sought on whether the proposed model should be available for and would be used by distributors of X18+ films.

3. The definition of 'feature film'

Additional Content Assessors would not assess feature films. For example, if a DVD or other media storage device contains a classified film and one or more unclassified feature films, whether or not it also includes other additional content, it could not be assessed by the Additional Content Assessor. The Classification Board would continue to classify all unclassified feature films.

It is also not proposed that assessors make recommendations about television series on DVD and other media storage devices. Each episode in the series is akin to a feature film and would continue to be dealt with only by the Classification Board.

While it is generally clear on a DVD which is the ‘feature film’ and which is the additional content, there are instances where the distinction between the two can become blurred. As a guiding principle however, while a feature could be released without additional content, the additional content would generally only ever be released together with the feature. In most cases the feature provides the context, background and reason for releasing the additional content. Another guide is that while the name of the feature will generally appear in the title of the DVD, the additional content will generally not.

In instances where it is not clear which is the feature and which is the additional content, the Classification Board would reserve the right to make this determination.

Comments are sought on whether it is necessary to define ‘feature film’ to achieve this policy objective and, if so, what might constitute an appropriate definition and why.

4. Quality assurance processes and safeguards – linking distribution companies and Additional Content Assessors

Several quality assurance processes and safeguards are identified in this paper.

One of the safeguards proposed is that an applicant could be prohibited from using the scheme for three years if they repeatedly provide reports from an assessor which include incorrect, misleading or grossly inadequate information and which also led to the assessor’s status being revoked. The policy objective is to encourage applicants (ie DVD distributors) to support high quality assessment processes.

Feedback is sought on the practical viability of this proposal, including any considerations that should be taken into account in prohibiting applicants (ie DVD distributors) from using the scheme, the proposed period of prohibition and an appropriate administrative review mechanism.

5. Quality assurance processes and safeguards – powers of revocation

It is proposed that failure by an Additional Content Assessor to undertake annual or additional refresher training would result in revocation of their authorised assessor status.

Serious or repeated misrepresentation of the impact or nature of the content or misleading the Board as to whether the feature film is identical to the already classified version could cause revocation of the assessor status.

Also, it is proposed that Additional Content Assessors be required to disclose not only ‘contentious material’, but all classifiable elements in the additional content of the same level or higher than the classified feature film.⁷ This would ensure that, for example, PG level content in additional content accompanying a G level feature is disclosed. A failure to disclose this content would result in revocation of the film’s classification if the Board would have given the film a different classification. Serious or repeated failure to disclose additional content could also cause revocation of assessor status.

This requirement contrasts with the computer games authorised assessor scheme which requires that assessors identify, assess and report on all classifiable elements at any level. This means that games assessors are required to report on, for example, PG level content in relation to a game that they recommend should be classified ‘M’. This requirement is not considered necessary for the Additional Content Assessor scheme because the focus of the assessment is to identify any elements that would give rise to a higher classification than the feature film. In addition, all content is relatively easily locatable by Classification Board members should they wish to view it (unlike computer games where it may be necessary to navigate through many levels of game-play).

So as not to require them to report the same content twice, applicants using Additional Content Assessors reports would not be required to provide a separate contentious material statement.

Feedback is sought on the proposed power to revoke the classification and the status of the Additional Content Assessor in instances where all classifiable elements in additional content at the same level and higher than the classified feature film have not been identified.

6. Assessment of DVDs containing computer games

The Classification Act does not enable dual classification of works that contain both computer games and films. A work is classified as either a film or a computer game.

An application for classification as a film results in a decision of G, PG, M, MA 15+, R 18+, X 18+ or RC. An application for classification as a computer game results in a decision of G, PG, M, MA15+ or RC. There are no R 18+ or X 18+ classifications for computer games.

Where it determines that a film containing a computer generated image is more appropriately dealt with as a computer game because of its interactivity and the nature of visual images, in light of the definition of ‘computer game’ in the Classification Act, the Classification Board will deal with the matter as an application for classification of a computer game. A similar power applies where a computer game submitted for

⁷ Section 21A of the Classification Act includes provision for the revocation of a film’s classification if “contentious material” has not been disclosed by the applicant. Contentious material is defined as being content that is M level and above.

classification is more appropriately dealt with as a film.⁸ These regulatory arrangements prevent the inclusion of film content that exceeds MA15+ in complex computer games and effectively support the policy of prohibiting R18+ and X18+ computer games.

Under the proposed assessor model, where an application for classification of a film contains a classified feature film, computer game and additional content, the application would need to be accompanied by a computer games authorised assessor's report, as well as the assessment of the additional content.

The Board would retain its discretion under section 15 of the Classification Act to treat the entire work as either a computer game or as a film for classification purposes (depending on the level of interactivity), and to require the submission of additional material and fees as appropriate.

Comments are sought on industry trends with respect to the inclusion of computer games and feature films on DVDs in the future.

7. Computer games assessors as authorised Additional Content Assessors for DVDs

The Classification Act provides for the Director of the Classification Board to authorise a person who has completed appropriate training for the purpose of making assessments of the classification of computer games.⁹ In practice, computer games authorised assessors are generally employees of the computer game distributor.

The training provided to the computer games assessors deals with the content permissible in the G, PG, M, MA15+ and RC classifications but not the R18+ and X18+ classifications (which are additional classifications applicable to films only). The training focuses on computer game content classification and procedures and does not deal with the classification of films.

Under the proposed model, computer games assessors would need to undertake additional training to be eligible for authorisation as an Additional Content Assessor.

Comments are sought from industry on the likely demand for persons to be authorised to undertake both computer games and additional content on DVD assessments. Views are also sought on the desirability and practicability of combined training programs for both categories of assessors.

⁸ Section 15 of the Classification Act confers on the Classification Board discretion to decline to deal with applications for classification of films or applications for classification of computer games under certain circumstances.

⁹ Section 17(5)

Abbreviations and terms in this paper

Classification Act – *Classification (Publications, Films and Computer Games) Act 1995* of the Commonwealth

Classification Board or Board – the Board established under the Classification Act to make classification decisions

Classification Regulations – *Classification (Publications, Films and Computer Games) Regulations 2005*

Complementary classification enforcement laws – the laws of the States and Territories concerned with the enforcement of classifications and other matters (see below)

Computer game – defined in the Classification Act

Consumer advice – advice regarding the content of a film assigned by the Board under the Classification Act

Contentious material – defined in the Classification Act. Material that would cause a film to be classified M or higher.

Contentious material statement – information regarding contentious material submitted as part of an application for classification

Department – Australian Attorney-General's Department

Film – defined in the Classification Act (and includes films stored on DVDs and other storage devices)

OFLC – Office of Film and Literature Classification

Relevant legislation

Australian

Classification (Publications, Films and Computer Games) Act 1995

Classification (Publications, Films and Computer Games) Regulations 2005

State and Territory

Classification (Publications, Films and Computer Games)(Enforcement) Act 1995 (ACT)

Classification (Publications, Films and Computer Games) Enforcement Act 1995 (NSW)

Classification (Publications, Films and Computer Games) (Enforcement) Act 1995 (Vic)

Classification of Films Act 1991 (Qld)

Classification of Computer Games and Images Act 1995 (Qld)

Classification (Publications, Films and Computer Games) Act 1995 (SA)

Censorship Act 1996 (WA)

Classification (Publications, Films and Computer Games) Enforcement Act 1995 (Tas)

Classification of Publications, Films and Computer Games Act 1995 (NT).