

Before the Film and Publication Appeal Tribunal

In the matter between:

4/ 2014

Prima Interactive

Appellant

and

The Film and Publication Board

Respondent

Appeal in respect of the game: "Disney Infinity 2.0 – Marvel Super Heroes"

Professor Karthy Govender:

Introduction

On the 29th July 2014, a classification committee assigned the game *Disney Infinity 2.0* a restrictive age classification of 10-12PG (V). The effect of this classification is that children under the age of 10 are not permitted to play this game, while children between the ages of 10 and 12 are permitted to do so under parental supervision. Further, there is an advisory cautioning about the levels of violence in this game. The appellant, the distributor of the game, was aggrieved at the classification, which it considered to be unduly restrictive. As a consequence it appealed against the decision, and the appeal was heard on the 21st of August 2014¹. At the hearing, the appellant was represented by Ms K Galloway, and the respondent was represented by Mr S Kekana, head of the legal department of the FPB.

¹Professor KasturiMoodaliyar saw the segments of the game earlier in the week and participated in the deliberations telephonically.

After watching the various segments of the game, and after hearing arguments from the appellant and the representative of the FPB, the Appeal Tribunal decided unanimously to uphold the decision of the classification committee. We decided that the game *Disney Infinity 2* should be assigned a restrictive age classification of 10-12PG (V), and indicated that reasons for the decision would be handed down within fourteen working days. These are the reasons for our decision.

Summary of the arguments

In its grounds of appeal, the appellant contended that the target market of the game was children aged 7 and above, and so they requested an age classification of 7-9 PG. Ms Galloway contended that the objective of the game is to mimic the manner in which children interact with toys in their toy box at home. She submitted that there was no gore or blood portrayed, and that this was simply 'cartoon violence'. Her contention was that children aged 7 and above were familiar with the various superheroes, and would not find their activities menacing or disturbing. She indicated that other games, such as *Skylanders*, were considerably more violent; and, continuing with the comparative theme, she informed the hearing that the previous version of the game (*Disney Infinity 1.0*) had received a classification of 7-9 PG(V).

Mr Kekana questioned whether children aged 7 are able to distinguish between violence involving cartoon characters and violence in respect of others. He was of the view that they would be affected by the violence inflicted on the cartoon characters as much as they would be affected if the violence were being inflicted on humans. He argued that the segments of the game that we witnessed contained threat and menace, and that there were many scenes of destruction. He submitted that the participants engaged in the game through the superhero characters. This is referred to as 'third-person game play'. Thus a child, through the vehicle of his or her chosen superhero, engages in all the segments of the game. He also submitted that the game rewarded children for destroying opponents, and he suggested that this could cause harm to young children. He described the violence as 'competitive intensity', with the children using the superheroes to do the destruction and the killing. He concluded by submitting that the violence in the game could be described as mild or

moderate and that, according to the guidelines, games containing this level of violence should be classified as 10-12 PG (V).

Assessment of and application of the relevant legal principles

It was apparent that only three age classifications might be appropriate in this instance. The appellant argued that a restrictive age classification of 7-9PG(V) would be appropriate, while the FPB argued for a more restrictive classification of 10-12 PG (V). A restrictive age classification of 10 was also potentially appropriate.

At the commencement of the hearing, we were informed by Ms Galloway that the appellant had submitted the 'Marvel Hero' pack for classification, and since then an additional 'Toy Box' pack featuring a number of Disney characters had become available. We viewed both the 'Marvel Hero' pack and the 'Toy Box' pack at her request. The 'Toy Box' pack is materially different, and is much less menacing and threatening than the 'Marvel Hero' pack. Mr Danny Morobane, the head of classification at the FPB, informed the hearing that the onus is on the distributor to place all relevant information before the FPB when they submit a game for classification, and that they are aware of this obligation. After considering the matter, we decided that the Appeal Tribunal was obliged to consider only the content of the game that had been before the classification committee. The responsibility is on the distributor to place the relevant information before the classification committee, and in this case, they chose to submit the 'Marvel Hero' pack only. Given that games are developed incrementally with new content being added, we have to guard against repeated applications in respect of the same game.

The Appeal Tribunal hears appeals on the merits about decisions made by classification committees. It does not have the power to classify games at first instance. It is not also permissible for the Appeal Tribunal to assess a game that is materially different from that classified by the classifiers. In the circumstances, we had to restrict our discussions to the contents of the 'Marvel Hero' pack.

In this context, it may be useful to comment on section 18B of the Films and Publications Act (FPB Act)², which provides that a person may only re-apply for re-classification of a film,

² Films and Publications Act 65 of 1996 (as amended).

game, or publication after a period of two years from the date when it was first classified. It is apparent that this section applies to reclassifications of the same material. It was obviously intended to prevent distributors repeatedly applying in the hope of getting a more favourable classification on the same material.

Given that the contents of games change quite radically as the different stages are added to the game, it may be in accordance with the spirit of the FPB Act to entertain fresh applications before the expiry of two years from the date of the original classification. A responsible distributor may take the view that as a result of the stages that have been added after the initial classification, a more restrictive age classification than that which was originally assigned is warranted. We are of the view that if the game has changed materially, section 18B of the FPB Act does not prevent the distributor from approaching the FPB for a fresh classification before the expiry of the two year period. However, should the distributor seek to resubmit the game before the expiry of the two year period, it must:

- establish that the content of the game had changed materially,
- establish that the new content would justify a different classification; and
- provide adequate reasons as to why all the material was not made available to the original classification committee.

I turn now to consider what an appropriate classification would be for the game *Disney Infinity 2.0*. While we watched about 14 minutes of game time, we were informed that the 'Marvel Hero' pack has between 4 and 5 hours of play time. We can safely assume that the levels of intensity would increase as the game progressed. Many of the scenes depict heroes fighting unremittingly. A child who has assumed the role of one of the superheroes (third-person game play) would thus punch and fight for protracted periods. This is not typical of a game that is primarily designed for children. There are concerning levels of threat and menace with considerable destruction and violence. Accentuating the impact of the acts of destruction is the accompanying sound track. From the segments that we watched, we were not able to discern an overriding or redeeming message of good overcoming evil. There are also some underlying dark overtones that would cause distress and concern to young children.

We were particularly concerned with the dramatic opening scene, which lasted for approximately 4 minutes. There were indiscriminate shooting and fights with the menacing machine characters, culminating in some of these figures exploding. Accompanying this was the somewhat aggressive sound track that heightened the sense of anxiety and concern. We had serious concerns about the impact this first scene would have on 7- to 9-year-olds who are engaged in third-person game play. Furthermore, the Black Spiderman character appeared to convey an aura of menace and fear.

We were also concerned with the segment featuring Hulk clambering up a building and tearing down segments of it as he progressed to the top. The disintegration of the building as Hulk tore into it is accompanied by a loud and threatening sound track. Thus the impact of the aggressive visuals is enhanced by the forceful sound track.

The fourteen-minute segment we saw is teeming with impactful acts of destruction and fight sequences.

In mitigation there were some scenes that were complete fantasy, such as when Hulk jumps over buildings.

The guidelines³ require all decisions to consider the context, impact, and release format of material. When considering context, regard is to be had to the following:

- a) The expectations of the public in general and the target market of the material;
- b) The theme of the material;
- c) The manner in which the issue is presented;
- d) The literary, artistic, or educational merit of the game;
- e) The apparent intention of the game creator, as reflected in its effect.

The appellant indicated that its target market for the game was young children of age 7 and above. However, no information was placed before us about the theme, the literary, artistic or educational merit of the game, or the intention of the game creator. If there were redeeming literary, artistic or educational merit in the game, we would have anticipated the applicant drawing this to our attention. This was not done. All we had was a fourteen-

³Government Gazette number 35765 of 8 October 2012.

minute segment that depicted superheroes fighting and destroying, together with the brief representations made by the appellant.

As there was no evidence of redeeming literary, artistic or educational merit placed before us, we were obliged to proceed on the basis that there were no positive themes and no particular literary, artistic or educational merit to this game. We thus have a game lasting approximately 4 to 5 hours, with young children using superheroes to fight and destroy in a somewhat menacing and threatening environment without a redeeming theme or literary, artistic, or educational merit.

The guidelines⁴ state that the level of competitive intensity – to the extent that it is linked to in-game violence – must be regarded as a classifiable element. It goes on to state that higher levels of competitive intensity may result in higher aggression levels, and that this must be considered when determining an appropriate age restriction. This game is played in the third person, and appears to reward players for the level of destruction caused. This may result in higher aggression levels; and in the absence of contrary evidence or argument about redeeming literary, artistic or educational merit, a more restrictive, rather than less restrictive, age classification would appear to be appropriate.

The guidelines⁵ state, in respect of the classification 7-9PG, that competitive intensity may have a mild impact, and further that the material may contain mild impact violence in third-person game play. By way of contrast,⁶ the classification 10-12 PG is more appropriate in instances where the competitive intensity is of moderate impact, and where the game contains low, mild or moderate impact violence in the third-person game play. For the reasons stated above, we are of the view that the competitive intensity of this game is of moderate impact, and that it contains moderate impact violence. We are of the view that it would not be appropriate for children under 10 to play this game and that – given the heightened levels of threat and menace – children between the ages of 10 and 12 should do so with parental oversight.

⁴Section 21(2) of the Guidelines

⁵Section 28 of the Guidelines.

⁶Section 30 of the Guidelines.

In the circumstances the following order is made:

Order:

- 1. The appeal is dismissed.**
- 2. The decision of the classification committee assigning the game *Disney Infinity 2a* restrictive age classification of 10-12 PG (V) is affirmed.**
- 3. Children under the age of 10 are not permitted to play the game, and children between the ages of 10 and 12 must do so under adult supervision.**

Concurred by:

Adv. D Bensusan

Ms H Devraj

Ms P Marek

Prof. K Moodaliyar

Dated: 10th of September 2014.