

**Before the Film and Publication Appeal Tribunal.**

In the matter between:

**9/2012**

**Electronic Arts South Africa.**

**Appellant**

and

**The Film and Publication Board.**

**Respondent**

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**Award**

In re: Appeal against the classification of the interactive computer game: –

***Army of Two: The Devil's Cartel.***

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**Professor K Govender**  
(Chairperson)

**Context and brief description of the Game.**

- 1) The electronic game, "Army of Two: The Devil's Cartel" is the third in the series of games. It is described as a first person shooter game that emphasizes co-operative action between two players. The story-line, to the extent that we could gather, is about a mayor of a Mexican City seeking to destroy a Mexican drug cartel while the objective of the cartel is to bring down the mayor. The two protagonists, Alpha and Bravo, are literally battle scarred veterans who use a range of military grade weapons in the war waged against the cartel. It was accepted by the parties that this is a game about shooting and killing.
- 2) A two person classification committee on the 12<sup>th</sup> of September 2012 viewed the gameplay footage supplied by the appellant and determined that a restrictive age classification of '16' would be appropriate. The appellant appealed against the classification on the basis that a '16' age classification would not be appropriate in this case because of what was described as 'very strong impact violence.' The appellant contended for a classification of '18' because of the strong language used, images of nudity and on account of the intensity of the violence. The previous versions of this game were assigned restrictive age classifications of '18'. Regrettably the appellant provided very little detail in its grounds for appeal.

### Submissions at the hearing.

- 3) On the 16<sup>th</sup> of October 2012, the Appeal Tribunal viewed the gameplay footage at the offices of the appellant and heard arguments in this matter. The appellant was represented by Mr Ralph Spinks, its product marketing manager and the respondent was represented by Mr Brandon Steele, one of the classifiers in the matter.
- 4) The Tribunal viewed two separate versions of the gameplay footage and the versions were, in our opinion, materially different. Mr Spinks indicated that the footage that we viewed was a work in progress and that much of it had still to be 'polished' and that the terrain which appears underdeveloped would be re-worked and made much more realistic. He argued that the explicit language, violence and nudity would justify the higher restriction of '18'. In the footage we witnessed, we saw no evidence of nudity and nor did we hear explicit language and these factors therefore are not afforded weight in our deliberations. Mr Spinks estimated the game, when completed, will comprise approximately 25 different levels and it appears to be scheduled for release in March 2013. It appears that this application for classification is brought to South Africa more than six months in advance to facilitate the marketing and advertising of the game.
- 5) We are uncertain whether the version of the gameplay that we witnessed was the same as that examined by the classifiers. Mr Steel was clear that the gameplay witnessed at the appeal hearing was not the same as that viewed by the classifiers. He went on to state that in the gameplay footage examined by the classifiers there was no depiction of dismemberment. By way of contrast, there was a scene of dismemberment and a fairly explicit scene of an enemy character being shot which was not depicted earlier. These comments were supported by his report dated 12<sup>th</sup> of September 2012 in which he stated explicitly that there were no scenes of dismemberment or mutilation. Mr Steele then went on to state that had the classifiers examined the version that was presented to the Appeal Tribunal, they would have assigned the game an '18' classification.
- 6) Mr Spinks denied that the classifiers examined a different version. We had no way of ascertaining for certain whether we saw the same version presented to the Classification Committee. It is absolutely imperative that the version that is placed before the Appeal Tribunal is the same as that examined or assessed by the classifiers. If that is not the case, then the Appeal Tribunal ceases to be an appellate body and will then operate as a decision maker at first instance. The Film and Publication Act makes it clear that the Appeal Tribunal is meant to operate solely as an appellate tribunal and a film, game or publication has to be assessed by a classification committee prior to the Appeal Tribunal having jurisdiction to deal with the matter.<sup>1</sup> The Board needs

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<sup>1</sup>Section 20(1) Film and Publication Act 65 of 1996 (as amended) (the FPB Act).

to put steps in place to ensure the film, publication or footage of the game that is viewed by the classifiers is the same as that viewed by the Appeal Tribunal. Under normal circumstances, if we were uncertain as to whether a different version was before the Appeal Tribunal, we would have resolved to refer the matter back to the classifiers to examine and assign a classification to the game. However we decided to render a final decision in this matter because the appellant was requesting a more restrictive classification and Mr Steele was present and indicated that an '18' classification would be the most appropriate to assign to the game. Thus referring the game back to the classifiers would have been an exercise in futility.

### **Conclusions and Findings.**

- 7) It may be more prudent, in these circumstances, when the game is still in the developmental stage and the final version is likely to have a higher intensity of the violence, to err on the side of caution and assign a more restrictive age classification.
- 8) This is a violent game in which the participants are encouraged to kill as many people and destroy as much as they can. The participants are given extra 'overkill points' if they kill excessively and are supplied with additional ammunition as a reward. We need to point out that viewing the gameplay in isolation makes it very difficult to assess the theme or narrative or to assess the development of the characters in any meaningful way. Commercial considerations appear to be the primary motivation for this appeal. It appears that the higher classification would be more attractive to the market that the game is aimed at. If it is classified as '16' it may be less attractive to those wanting to play a game of this mature.
- 9) The violence was constant and unrelenting in the gameplay that we witnessed. There were scenes of people dying in pools of blood, decapitation, bodies exploding and realistic killing with blood being splattered. It is clear that when the various scenes are 'polished' the intensity and explicitness of the violence is likely to be accentuated. This is an interactive game and the players engage in and participate fully in the various scenes. It was apparent to us, that the only classifications feasible were either a restrictive age classification of '16' or '18'.
- 10) Every game has to be classified on its individual merits and in accordance with the FPB Act and the guidelines issued in terms of the Act. The guidelines, in respect of the classifiable element of violent in respect of the '16' age classification, state the following:

The game may include sequences of violence but not in graphic detail. Mutilation and dismemberment may occur in animated contexts.

From what we witnessed, this is a violent game and there is not much more than the scenes of violence. The scenes are graphic and the mutilation and dismemberment are conveyed in graphic detail

- 11) On the basis of what we witnessed, we are of the view that a classification of '18' would be more appropriate and agree with both the applicant and the respondent in this regard. We are fortified in our view that a more restrictive age classification is appropriate because of the uncertainty of the final product. Given the appellant's keenness to direct its marketing at people who find this sort of game compelling, it is much more likely that the intensity of the violence will be more extreme in the scenes yet to be developed. In the circumstances we are of the view that an appropriate classification would be '18' V.

**Recommendation on processes to be adopted for the classification of games:**

- 12) However, we need once again, to mention our concerns about the manner in which games are being classified. Both the Classification Committee and the Appeal Tribunal were shown versions of the gameplay footage. It is clear that these applications are being brought much in advance of the launch date so to maximize the marketing and advertising of the game. This is a perfectly legitimate commercial objective, but it needs to be balanced against the imperative that the various Classification Committees and the Appeals Tribunal act in accordance with the legal prescripts of the FPB Act. In terms of section 18(3) of the FPB Act, the classification committee is obliged, in the prescribed manner, to examine the film or game referred to it and then classify the film or game. Viewing the gameplay footage selected by the appellant, determining a classification and then simply attaching this classification to the game will not meet the legal obligation on the classification committee to 'examine the film or game.' As we stated in our previous award<sup>2</sup> much more needs to be done in order to meet the legal obligation of examining the game before a classification is assigned.

- 13) In terms of section 18(3) of the FPB Act, the Classification Committee may:

- a) Classify a game as 'refused classification' if it falls within section 18(3)(a) of the FPB Act;
- b) Classify the game as XX if it falls within section 18(3)(b) of the Act;
- c) Classify the game as X18 if it falls within section 18(3)(c) of the Act;
- d) Impose an age classification or other conditions, after having regard to the Guidelines, if the game falls within section 18(3)(d).

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<sup>2</sup>. We indicated our concerns about the process that is used to classify games in our awards in respect of the appeals regarding the games 'The Secret World' 3/2012 and 'Skylanders Giants' 7/2012.

In our award in the Spear appeal<sup>3</sup> we stated :

These categories deal with socially repugnant activities such as child pornography; the advocacy of hatred based on identifiable group characteristics that constitute incitement to cause harm; explicit sexual conduct that violates or shows disrespect for human dignity; bestiality, incest, rape, or the explicit infliction of sexual or domestic violence. It also covers publications containing explicit sexual conduct, which are required to be regulated. These are activities to which MrBudlender correctly referred to as 'presumptively harmful'. This would mean that once the publication contains, for instance, images of the explicit infliction of domestic violence, such a publication will be presumed to be harmful without the necessity of any further proof to establish that.

- 14) It is quite apparent that the legislature either wanted to proscribe some of these activities and expression totally or to severely restrict them because of the social harm that they can cause. It is vital that we respect the legislature's will in this regard. By classifying a game months before it is completed on the basis of gameplay footage submitted by the distributors mean that we could unwittingly be permitting activities and expression into the public domain which the legislature in terms of section 18 of the FPB Act clearly intended either to proscribe or to restrict severely. We could be classifying perfectly innocuous game-play footage only to find later that much more egregious scenes have been added to the game itself. Once a classification is assigned to the game-play footage, there is no further legal obligation on the distributors to re-submit the completed game to the Board. This could lead to abuses with presumptively harmful activities not being restricted or prohibited as they should be in terms of the FPB Act.
- 15) It was this concern that caused us in our award in the appeal in respect of the game 'The Secret World' to request the head of the legal department of the Board to ascertain the best practices used by other countries in the classification of games. In order to assist the Board and the distributors, we made<sup>4</sup> a number of suggestions as to the nature of the information that should be placed before the Classification Committee to enable it to make a proper decision in terms of the FPB Act. It is apparent from the documents in the matter currently before us that these recommendations were not implemented as the appellant did not provide the information requested. With some modifications we restate the minimum information required to enable the classification committee to make a proper and lawful decision in terms of the FPB Act. We recommend that the following information be

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<sup>3</sup>In the appeal against the classification titled "The Spear" 8/2012 (Film and Publication Appeal Tribunal).

<sup>4</sup>Suggestion were made in the award in respect of the appeal in respect of the game ' The Secret World' 3/2012.

provided by all distributors when applying for the classification of a game prior to the game being distributed:

- A) The distributors must in a written report accurately and fully describe the game and they are required to make full disclosure as to whether there are any scenes or segments that may be harmful or disturbing to children or whether such scenes may be included as the various stages of the game are developed. They must be notified that if there are any significant omissions or inaccuracies in their report and if these are subsequently drawn to the attention of the Board, then a different classification may be assigned to the game.
- B) The distributor must indicate that the game does not and will not:
  - contain child pornography, propaganda for war or is an incitement to imminent violence;
  - advocate hatred based on an identifiable group characteristic that constitutes incitement to cause harm;
  - depict explicit sexual conduct which violates or shows disrespect for the right to human dignity of any person;
  - depict bestiality, incest, rape, conduct or an act which is degrading of human beings;
  - depict conduct which constitutes incitement of or encourages harmful behavior;
  - depict the explicit infliction of sexual or domestic violence;
  - depict explicit presentation of extreme violence;
  - contain explicit sexual conduct.
- C) The classification assigned to the game in other jurisdictions must be placed before the Classification Committee by the distributor at the time the application is made. It is important to stress that the classification, in other jurisdictions, assigned to the game itself and not the classification that is assigned to the gameplay footage or trailer be placed before the Classification Committee.
- D) The distributors must, if it is possible, remove the bars preventing players graduating to more advanced levels and they must ensure that a person familiar with the game demonstrates at least one hour of gametime to the classification committee. A reasonable explanation must be provided in writing if the distributors cannot comply with either of these requests.
- E) The Classification Committee may require the demonstrator to display segments or scenes from different levels of the game, if they deem this to be necessary and if the nature of the game permits this. We suggest that at least three levels be demonstrated, preferably at the beginning, in the middle and at the end of the game, if this is possible.

If this is not possible then a reasonable explanation must be provided in writing by the distributor.

16) In examining the game, regard must be had to all these and any other relevant factors. We have not heard argument on the feasibility of the suggestions made, but in our opinion, they should not impose an undue burden on either the board or the distributors. Mr Spinks indicated that the applicant in this case would not have difficulty in demonstrating different levels of the game to a classification committee. This is the main requirement that we are seeking to introduce. These are suggestions and are not meant to be prescriptive conditions. However it must be emphasized, that it is not legally permissible to examine the trailer or gameplay footage and then classify the game without in anyway engaging with the game itself. We are of the view that the supply of the information listed above will enable classifiers to properly classify games in instances where the distributors wish to classify a game before the release date. We strongly recommend that the head of the Legal Department and the Head of Classification of the Board meet the distributors of electronic games and explain the proposals being suggested, elicit and consider their views and then indicate how games are to be classified until the formal promulgation of further guidelines. This is a matter that needs to be addressed urgently. Until guidelines are provided by Council and the Board, the suggestions and recommendations made should be followed.

Dated at Durban on the 20<sup>th</sup> of October 2012.

Concurred by

**Adv. D. Bensusan**

**Ms H. Devraj**

**Prof. K. Moodaliyar**

**Ms D. Terblanche**