



Ofcom Broadcasting Code Review 2009

The response of the British Board of Film Classification

Introduction

1. The British Board of Film Classification (BBFC) welcomes the decision to review the Broadcasting Code at this time, and notes that, in concluding that the rules do not need wholesale revision, Ofcom's preliminary findings mirror the findings of the BBFC's recent Classification Guideline Review Consultation¹: public attitudes to issues of harm, offence and protection of children have not, in general, shifted dramatically in the past four to five years.
2. In relation to the specific consultation questions posed by the consultation document, this response restricts itself to those on sexual material. It then goes on to deal with a small number of additional issues which may be raised by other stakeholders even though they do not relate directly to the changes proposed. These additional issues comprise: public concern about discriminatory language and behaviour; the use of 'representations of sexual intercourse' as a criterion (s1.17 of the current code); the references to films cut or rejected by the BBFC or classified by the BBFC at '15' or '18' (s1.20 – s1.23 of the current code); and the prohibition on BBFC 'R18' rated films or their equivalent (s1.25 of the current code).

Consultation questions

Question 1

3. Clarification would be an improvement, as the current wording contains no definition of 'adult-sex' material and contains an ambiguity about the acceptability of such material on services and at times not set out in s1.24 of the current code.

¹ 2009 Guidelines Research – Public Opinion and the BBFC Guidelines 2009 – Goldstone Perl Research / Slesenger Research / Bernice Hardie Market research
<http://www.bbfc.co.uk/downloads/index.php>

4. The definition proposed for 'adult-sex' material closely mirrors the BBFC's long standing definition of 'sex works' as well as the more recent statutory definition of 'pornography' contained in the Criminal Justice and Immigration Act 2008. This can only be helpful. The proposed new wording also makes it crystal clear where and when 'adult-sex' material may be broadcast.

Question 2

5. Given the rulings on this issue, a new rule clarifying the position regarding strong sexual material in programmes other than 'adult-sex' programmes is clearly appropriate, as is its proposed location directly after the rule on 'adult-sex' material.
6. The proposed Rule 1.19 to some extent mirrors the approach of the BBFC Guidelines² which allow, at '18', 'the more explicit images of sexual activity' provided they are 'justified by context', and which include a strong presumption that such images will not be considered contextually justified if they appear in a 'sex work' (or 'adult-sex' programme, to use Ofcom terminology). However, whereas the BBFC guidelines are clearly referring primarily to 'clear images of real sex', the proposed Rule 1.19 contains no definition of 'images....of a strong sexual nature'. It may be unclear whether this Rule allows films such as *Baise Moi*, *9 Songs*, *Disturbed* and *Taxi Zum Klo* to be shown. If a definition is not to be provided within the code then it may be helpful to touch on the issue directly in the supporting guidance.
7. The proposed wording for Rule 1.19 also includes a list of factors to take account of and these include, at the third bullet point, 'the purpose of the sex scene within the programme', noting that 'If the purpose is sexual arousal or stimulation of the viewer Rule 1.18 applies [ie it will be considered 'adult-sex' material and subject to the extra restrictions that apply to such content]'. While the purpose of this wording is clear – to prevent the gratuitous splicing of pornographic scenes into a work which, taken as a whole, is not an 'adult-sex' programme – we note that the effect may be to unintentionally capture a significantly broader range of material.

² BBFC Classification Guidelines 2009 <http://www.bbfc.co.uk/downloads/index.php>

Question 3

8. The BBFC has no view on whether the prohibition on the broadcast of 'R18' material or its equivalent should be maintained, but notes that, in its considerable experience, such content brings with it a whole raft of unique regulatory issues and difficulties. These are discussed more fully in paras 16 to 24.
9. Assuming that the status quo in relation to the prohibition of such content is maintained, separation of the rules relating to 'R18' content and its equivalent is sensible. The former is a question of fact – either the piece of content has been classified by the BBFC, or it has not – while the latter involves a judgement about whether a piece of content meets a particular set of criteria. It is logical to retain the former alongside the other rules relating to films classified by the BBFC, and to place the latter alongside the other rules relating to depictions of sexual activity.
10. While improving clarity, such a separation does not remove the difficulties inherent in setting a standard which is based on criteria set and operated by another regulator (ie, the BBFC), even though those criteria are clearly set out in published guidelines . The BBFC remains convinced that such difficulties can be overcome through good co-operation between Ofcom and the BBFC, and we note that such co-operation exists at present, with the BBFC offering practical assistance to the Ofcom content standards team on the division between '18' and 'R18' sex works. In order to avoid future confusion over 'R18' standards, we would strongly recommend that the BBFC is fully consulted over the new guidance that is proposed in this area.

Additional issues

Discriminatory language and behaviour

11. In para (1) of this response, we noted that, “in concluding that the rules do not need wholesale revision, Ofcom’s preliminary findings mirror the findings of the BBFC’s recent Classification Guideline Review Consultation³: public attitudes to

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issues of harm, offence and protection of children have not, in general, shifted dramatically in the past four to five years.” The exception to this general finding was in relation to language and behaviour which was racist, homophobic or otherwise discriminatory in nature.

12. The public consultation conducted by the BBFC, strongly suggested that public concern about such issues in films and DVDs was running more highly than at any time in the past. There was little public appetite for a simplistic approach, but considerable support for an approach which both raised the status of ‘discrimination’ as a classification issue and resulted in suitability judgements which were highly dependent on context, and, in particular, on whether the particular behaviour or language was presented in way in which it was explicitly or implicitly condemned. In particular, discriminatory language was seen as raising issues which were separate, distinct and of a higher order than those raised by expletives which were sexual or scatological in nature. For this reason, the BBFC Classification Guidelines published in June 2009 contain, at each classification category, context based criteria for discriminatory language which is quite separate from the criteria applied to ‘bad language’ more generally.

‘Representations of sexual intercourse’

13. In the current code, s1.17 requires that “representations of sexual intercourse must not occur before the watershed (in the case of television), or when children are particularly likely to be listening (in the case of radio), unless there is a serious educational purpose.” The experience of the BBFC suggests that public concern with regard to children seeing representations of a range of sexual activities not covered by the narrow definition ‘sexual intercourse’ is just as great. It may be worth giving consideration to replacing ‘sexual intercourse’ with a term that encompasses a rather broader range of sexual activity (including oral and anal sex).

Films cut or rejected by the BBFC or classified at ‘15’ or ‘18’

14. In the current code, s1.20 – s1.23 make reference to films cut or rejected by the BBFC, or passed by the BBFC at particular categories. We support the view that there is no reason to revise these sections of the code. In particular, we believe

that the prohibitions set out in s1.20 are essential if the statutory regulation of one medium is not to risk undermining the statutory regulation of another. We note that the arrangements by which the BBFC can provide broadcasters with confirmation that the material would not be rejected or subject to compulsory cuts according to the standards currently operating (known as 'Broadcast Advice Notices') have worked smoothly and efficiently.

15. We also support maintaining the rules placing restrictions on the broadcast of films classified by the BBFC at the '15 and '18' categories.

Prohibition on BBFC 'R18' rated films or their equivalent

16. As noted at para 8, the BBFC has no view on whether R18 or R18 equivalent material should be broadcast (s1.25 of the current code), but note that our own research shows that the public draw a sharp distinction between 'softcore' sex works (currently broadcast on encrypted channels) and 'hardcore' sex works (currently prohibited on any channel) and expect the latter to be clearly labelled as such, separated from other material in the marketplace, and supplied in a manner which severely restricts the possibility of children coming across them.⁴ In relation to the media regulated by the BBFC this is achieved by means of the 'R18' category which restricts exhibition of 'R18' films and supply of 'R18' DVDs to specially licensed establishments which are not accessible to children, and prohibits the supply of 'R18' DVDs by mail order.

17. We note, however, that the Ofcom statement 'R18 Material and its equivalent', issued at the time of publication of the current code, concluded that while 'R18' or 'R18'-equivalent material might impair the development of minors, it would not be likely to *seriously* impair their development. The current prohibition depends not on a judgement that any transmission of 'R18' or 'R18'-equivalent material would be incompatible with the relevant European Directive, but on a judgement that the access control systems available at that time were insufficiently robust. It seems likely to the BBFC that some may argue that the access control systems available in 2009 are sufficient to meet any reasonable test of robustness.

⁴ Knowing it when you see it: The difference between 'R18' and '18' video works – Dr Guy Cumberbatch & Sally Gauntlett (2005)

18. In the event that the review of the Broadcasting Code did lead to consideration of total or partial relaxation of the prohibition on 'R18' or 'R18'-equivalent material, the BBFC is well placed to offer advice and assistance on the unique and various difficulties posed to a regulator of such content. The BBFC is unrivalled in the UK in its experience in relation to the regulation of 'hardcore' sex works (ie works which feature, for the primary purpose of sexual arousal of the viewer, clear images of genitals during the performance of various sex acts, including oral, anal and vaginal penetration, masturbation and ejaculation) and has classified over 9,400 such works since the beginning of 2001.
19. The regulation of 'hardcore' sex material is a particularly difficult and specialised enterprise which is not well suited to a traditional broadcast regulation approach which places the onus on the supplier of the material to comply with a code and relies on consumer complaints to identify breaches, not least because the audience is unlikely to complain at the excesses. Much of the material deliberately skirts the boundaries of consent, legality, abuse, and harm with the result that the BBFC is forced to intervene with a regularity unmatched in other types of material: during 2008 over 27% of 'R18' features were subjected to compulsory cuts.
20. The modern trend in explicit 'hardcore' sex works is to depict sexual activity free from any pretence at narrative or relationships, and to show participants (especially women) being pushed to the very limits of their physical capabilities, often in a group sex scenario. Consensual adult activities are carried out in a manner which ranges in tone from gentle to mechanical to domineering to aggressive to abusive, and the task of establishing at which point to draw the line is not at all straightforward. Many 'hardcore' works also play around with notions of consent, youth, innocence, inappropriate relationships, pain and violence in ways which range from relatively innocuous to extremely disturbing. Over the course of years of experience of classifying thousands of 'hardcore' submissions, the BBFC has developed policies and procedures which allow for the consistent application of the tests of harm and legality. In doing so we take account of the vast and varied body of research evidence and also take expert advice from specialist psychologists and psychiatrists.
21. The legal issues relating to pornography are complex and include consideration of offences which may have been committed in the UK during filming (eg, public

indecent, voyeurism), issues relating to privacy (eg private home videos being distributed commercially), and material which may itself be illegal. The latter category includes both indecent images of children and material which might fall foul of the Obscene Publications Act. The question of what might be considered 'obscene' in UK law is particularly difficult. In effect, it is up to each jury to decide what constitutes obscenity and the standards not only change over time but also vary from jury to jury and from geographical area to geographical area. The BBFC seeks to avoid classifying obscene material by ensuring that it is up to date with the current application of the law.

22. The Home Office recognised the BBFC's expertise in this area as it considered introducing a new offence relating to possession of extreme pornographic material – now in force under the Criminal Justice and Immigration Act 2008. In light of the concerns expressed by the BBFC and others, the Act excludes video works classified by the BBFC from the scope of the offence. This exclusion was deemed necessary due to the difficulties of defining the unacceptable material in a manner which would allow for consistent interpretation by the various enforcement agencies and, indeed, by the courts. However carefully crafted the definition, the scope of the offence is inevitably dependent on a series of difficult judgements, and this is true of the range of criteria and legal restrictions that form the upper boundary of the 'R18' category. Such judgements can be made consistently by a single, independent, expert body, but are likely to result in wide disparities of interpretation if left to a variety of broadcaster compliance departments. With 'hardcore' sex works the consequence of an incorrect compliance department judgement is highly likely to be the transmission of material which is likely to seriously impair the development of children and /or be harmful to adults or to society and/or be illegal.

23. The BBFC makes no comment on the efficiency and effectiveness of broadcaster compliance departments, but notes that, in its considerable experience, many DVD distributors involved in the distribution of 'hardcore' sex works have shown evidence of consistently failing to understand the difference between what is acceptable and unacceptable. Although the criteria for the 'R18' category have remained almost completely unchanged over the period, the percentage of works submitted for classification at this category which require compulsory cuts on grounds of harm or legality has risen each year since 2001 and is running at a

rate of 28.2 % so far during 2009⁵. The trend towards increasingly extreme and problematic material appears to be inherent to the 'hardcore' sex work genre and sits uneasily with a regulatory model which relies on post-publication oversight because it so frequently strays into areas of harm and illegality in ways that are not clear to those who distribute it.

24. We would therefore strongly recommend that if the prohibition on such material is removed or relaxed, the new rule should require that all such content is subject to thorough pre-broadcast approval by independent experts in the field of regulation of hardcore pornography (and not just by the compliance department of the entity that is broadcasting it). One way of doing this would be to require that only 'hardcore' material classified by the BBFC could be broadcast (ie 'actual R18' rather than 'R18 equivalent'). If such a position was adopted, the BBFC has in place well established and cost effective procedures for confirming whether an individual piece of content does, or does not, have an R18 classification, and it would be open to both broadcasters and Ofcom to make use of that service for compliance purposes.

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⁵ For period 01/01/2009 to 31/07/09