

On porn censorship and liberal ethics in the UK. Brief notes on the Audiovisual Media Services Regulations 2014

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Abstract

This article deals with the highly criticised Audiovisual Media Services Regulations 2014, which provides that now the *British Board of Film Classification (BBFC) regulations apply also to the videos-on-demand (and not only to DVDs)*.

L'articolo dà conto dell'Audiovisual Media Service Regulations 2014, con cui dallo scorso primo dicembre si sono ridotti grandemente i confini della liceità delle rappresentazioni audiovisive a carattere pornografico, là dove si è disposto che d'ora in poi si applicano ai video-on-demand le medesime restrizioni imposte dal British Board of Film Classification ai DVD.

Summary. 1. Introduction – 2. The British Board of Film Classification Guidelines and unacceptable material – 3. The Audiovisual Media Services Regulations 2014 – 4. Conclusion.

1. On 1st December 2014 the Audiovisual Media Services Regulations 2014 (AMSR 2014) has come into force [1]. Made by the Secretary of State in exercise of the powers conferred by section 2(2) of the European Communities Act 1972 [2], the AMSR 2014 has the effect to ban the online streaming of videos representing a wide range of sexual practices.

2. In particular, the following content is today unacceptable not only for the DVDs, but also for the videos-on-demand (VoD) [3]: i. Material which is in breach of the criminal law, including material judged to be obscene under the current interpretation of the Obscene Publications Act 1959 [4]; ii. Material (including dialogue) likely to encourage an interest in sexually abusive activity which may include adults role-playing as non-adults; iii. The portrayal of sexual activity which involves real or apparent lack of consent, any form of physical restraint which prevents participants from indicating a withdrawal of consent; iv. The infliction of pain or acts which may cause lasting physical harm, whether real or (in a sexual context) simulated (some allowance may be made for moderate, non-abusive, consensual activity); v. Penetration by any object associated with violence or likely to cause physical harm; vi. Sexual threats, humiliation or abuse which do not form part of a clearly consenting role-playing game (strong physical or verbal abuse, even if consensual, is unlikely to be acceptable) [5].

3. *Until December 2014, the censorship hit the cited practises to the limited extent that they would have been shown in videos sold in licensed sex shops, but the ASMR 2014 broaden the scope of the prohibition by providing that the British Board of Film Classification (BBFC) [6] R18 certificate regulations [7] apply now also to the VoDs [8]. Moreover, an on-demand programme service must not contain a video work that the BBFC has given a R18 certificate to, any material that would have received such a certificate or other material that might seriously impair the physical, mental or moral development of persons under the age of 18 “unless the material is made available in a manner which secures that such persons will not normally see or hear it” [9] (whether it will be technically feasible is not undoubted though).*

4. Whilst the aim of strengthening the children protection warrants everyone's applause (it provides “stricter rules than is required by the Directive” [10], as stated in the explanatory memorandum to the AMSR 2014), more doubts arise from the ban regarding adults-targeted VoDs. On closer view, hence, the problem goes back to the early stages. It is plausible that in a converging media world the same law should apply to the hard-copy DVDs and to the VoDs. Those who cry scandal today, they should have said something also to the ban applying to DVDs. Probably nothing has been said because of the low economic and social importance that the DVDs have nowadays: now that the censorship applies to the increasingly relevant world of the VoDs, it has come the time to

stand for a more liberal policy and to question the compatibility of the statutory law with the case law exemplified by *R v Michael Peacock* of 6 January 2012 [11], where it has been decided, among the other things, that showing extreme sexual acts between men, such as BDSM (whipping, staged kidnapping and rape play), fisting and urolagnia do not “deprave and corrupt” the viewer [12].

Note

[1] The act at hand was made on 4th November 2014 and laid before Parliament on 6th November 2014. It amends the Communications Act 2003 which provides for the regulatory framework for on-demand programme services. The Communication Act 2003 was previously amended by the Audiovisual Media Services Regulations 2009(6) and 2010(7), which implement Directive 2007/65 EC of the European Parliament and of the Council amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services.

[2] The “Act to make provision in connection with the enlargement of the European Communities to include the United Kingdom, together with (for certain purposes) the Channel Islands, the Isle of Man and Gibraltar” (official name of the European Communities Act 1972) provides for the incorporation of EU Law into the British system (for the Republic of Ireland s. the namesake European Communities Act 1972 (No. 27 of 1972)). The mentioned section provides a general power for further implementation of Community obligations by means of secondary legislation.

[3] VoD is used for “systems that allow one to watch a certain video content at any point in time via communication systems such as cable TV, satellite or the Internet [...] on the one hand services such as pay-per-view that allow viewers to watch a movie on a digital TV channel with the restriction that those movies are only offered at certain points in time; on the other hand VoD describes services such as True-VoD (TVoD) that allow a client to watch a video content immediately after its request” (M. Zink, *Scalable Video on Demand. Adaptive Internet-based Distribution*, Wiley, 2013, § 2.3.7).

[4] In light of the mentioned act, a work is obscene if, taken as a whole, it has a tendency to deprave and corrupt a significant proportion of those likely to see it.

[5] See *BBFC Guidelines. Age Ratings You Trust*, 24, available at http://www.bbfc.co.uk/sites/default/files/attachments/BBFC%20Classification%20Guidelines%202014_5.pdf (accessed 9th January 2015).

[6] The Commission is sometimes called *British Board of Film Censors*, even though the name has changed in 1985 (s., e.g., <http://www.independent.co.uk/news/uk/a-long-list-of-sex-acts-just-got-banned-in-uk-porn-9897174.html> , accessed 9th January 2015, regarding the protests against the news here discussed). It is an independent, non-governmental body which has classified cinema films since it was set up in 1912 and videos/DVDs since the Video Recordings Act was passed in 1984 (see <http://www.bbfc.co.uk/about-bbfc> , accessed 9th January 2015).

[7] The mentioned certificate was created in 1982 and consists of a film and video classification, whose diffusion is considered inappropriate by the BBFC, even though it does not necessarily go beyond the three Obscene Publications Acts of 1857, 1959 and 1964.

[8] This is made by amending section 368E(d) of the Communication Act 2003 (harmful material), whose subsection (2) is substituted by “an on-demand programme service must not contain any prohibited material”. Prohibited material is: *i.* A video work which the video works authority has determined for the purposes of the Video Recordings Act 1984 (which states that commercial video recordings offered for sale or for hire within the UK must carry a classification that has been agreed upon by) not to be suitable for a classification certificate to be issued in respect of it, or *ii.* material whose nature is such that it is reasonable to expect that, if the material were contained in a video work submitted to the video works authority for a classification certificate, the video works authority would determine for those purposes that the video work was not suitable for a classification certificate to be issued in respect of it.

[9] The third amendment it to section 368B(10) of the Communication Act 2003, so now Ofcom (Office of Communication, government-approved regulatory and competition authority for the broadcasting, telecommunications and postal industries) and the designated body, the Authority for Television On Demand (ATVOD), have the power to supply information to the BBFC for use by the BBFC in connection with the functions of Ofcom and ATVOD as the co-regulators for on-demand programme services.

[10] Explanatory Memorandum to the Audiovisual Media Services Regulations 2014, 2014 No. 2916, § 4.2. The directive at hand is dir. 2010/13/EU.

[11] L. Siry, *Extreme Pornography Regulation in the UK: Recent Developments*, 6 *Masaryk U. J.L. & Tech.* 283 (2012) moves from the mentioned case.

[12] It is true that formally the normative basis here is the Obscene Publication Act 1959, but, at the same time, the BBFC Guidelines refer to this last statute. Moreover, it is notable the ongoing *Weltanschauung* collision.

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