RE: BRITISH VIDEOGRAM
ASSOCIATION

O P I N I O N

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Ref: KCC/JMW/BUA

THE BRITISH VIDEOGRAM ASSOCIATION
RE: OBSCENE PUBLICATIONS ACT

INSTRUCTIONS TO COUNSEL TO ADVISE

Counsel will receive herewith a copy of a Government backed private member's Bill introduce by Mr Gerald Howarth, M.P. together with an explanatory note issued by the Home Office. The Bill is due for its second reading on 3rd April, 1987.

Instructing solicitors have been asked to obtain counsel's opinion regarding the effect which this Bill if passed would have upon Videos which are exempt from or certified under the Video Recordings Act 1984. The clients would particularly like to have Counsel's opinion on the merits and de-merits of the proposed new test of obscenity.

There is some urgency regarding Counsel's opinion as the clients have been asked by the Home Office to let them have their views in early March. Counsel is therefore requested to submit a written opinion as soon as possible. Should Counsel wish to discuss this matter with instructing solicitors he should not hesitate in telephoning Mr. Cousins.

OPINION

I am asked to advise the British Videogram Association on the Obscene Publications Bill, which is due to receive its second reading on Friday, 3rd April. I am particularly asked to comment on the proposed new test of obscenity.

The purpose of the Bill is to enlarge dramatically the test of obscenity, and to apply this broadened crime for the first time to radio, television and cable broadcasts, as well as to forms of publication (books, papers, films, videos etc) which are subject to the present obscenity law. The Bill achieves its purpose of extending the scope of that law by adding to it an entirely new concept of obscenity, namely whatever "a reasonable person would regard as grossly offensive" in dealing with any matters at all relating to violence or sex or drug-taking. The present law punishes publications which harm likely readers (by "tending to deprave and corrupt" them). The new law retains this test, but also requires magistrates and jurors to convict if, notwithstanding the harmless effect of the material, it would nonetheless shock and disgust a reasonable person.

The Video Recordings Act 1984 makes provision for the classification of works which depict to any significant extent "human sexual activity, gross violence or genital organs." (Section 2). The Howarth Bill punishes the publication of videos which grossly offend by reason of the manner in which they portray acts of violence, sexual activity, genital organs and the taking of controlled drugs. It follows that classified videos will be subject to prosecution for obscenity if reasonable persons are shocked and disgusted by the very matters which have required them to be classified in the first place. The only exception might be films

which have no sex or violence but contain incidents which involve drug-taking: these may avoid classification but remain vulnerable under the new test.

It seems to me that the video publishing and distribution industry has much to fear from the passage of this Bill. At present, the BBFC adopts a reasonably sophisticated approach to censorship questions, keeping video films within the law both by directing cuts in scenes which may cause harm to viewers within the particular age group, (thus satisfying the present 'deprave and corrupt' test) and additionally having regard, as required by Section 4 of the Act, to the liklihood of classified videos being viewed in the home. The Bill would add yet a third test, and the "gross offensiveness" yardstick would need to be introduced at every level of the classification system. "Would a reasonable person be offended at the thought of young children viewing this scene when watching a home video?" will be the overriding question, irrespective of the context or merit or dominant effect of the work. It will be little comfort for video distributors to know that the BBFC might also be prosecuted, since its classification certificate issued pursuant to an Act of Parliament is clearly an incitement to and an abetting of the publication of a classified video. This fact alone will make the BBFC much more cautious in its classification decisions, as it will be constantly vulnerable to prosecution. Distributors who submit videos for classification at present need have little fear of a prosecution under the "deprave and corrupt" test, given the BBFC's ability to notice and excise potentially harmful scenes. They would stand a much greater risk of prosecution over classified videos from which the BBFC has not removed material which might shock a person as reasonable, as, say, Mrs Mary Whitehouse.

The BVA could press strongly for the exemption of classified videos from the new test, or it could oppose the Bill in toto. I fear the first approach, however fair and just given that videos are submitted to a classification system, would be doomed to political failure, on the same principle as the Government adopted in 1984 in refusing a similar request to exempt classified videos from the existing obscenity law. My general views on the new test are as follows:

The "Gross Offensiveness" Test

Under the present test of obscenity, it is harm - in the sense of a potential to deprave and corrupt the mind or morals of likely viewers - that is the criterion for guilt. This is simple enough for a jury to understand when properly explained. The test of "gross offensiveness" is conceptually very different. It focuses on what might be termed "gut reaction" - the instant response of shock or disgust to particular visual images. The respondent is described as "a reasonable person", but this is merely a code for the tribunal deciding the issue: since magistrates and jurors invariably regard themselves as "reasonable", they will test the material according to their subjective and immediate response. "Offensive" merely means that to which offence is taken, whether on grounds of morals or politics or aesthetics; "gross" will probably be interpreted by the courts as "obvious" rather than "extreme". Thus a reaction of shock and disgust, as distinct from mild disapprobation, would plainly satisfy the new criterion. In this sense, it casts a very wide net indeed.

British criminal law has generally distinguished between actions which harm and actions which err in taste. The latter are contained by less serious "nuisance" offences pivoting upon the test of "indecency". This is defined as anything which offends the modesty of the average person, and it is certain that definitions from indecency cases will be

applied by the Courts to the new test of "gross offensiveness", which will be equated with old laws against "outraging public decency." More recently, the "indecency" concept has been used to punish displays offensive to the unsuspecting public (e.g. by advertising or unsolicited mailing). The use of such a broad test is justified to protect citizens from gratuitous offence which they do not seek out: the mischief of the Bill is that it applies the concept to material which citizens choose to view, and judges it according to the artificial reactions of those who might never choose to expose themselves to it.

Some idea of the nature of the material which might be seized under the "gross offensiveness" rubric is provided by Customs seizures under the prohibition against the importation of indecency. These have included a vast array of homosexual literature (in the "Gays the Word" case, the haul included novels by Gore Vidal, Jean Genet and Oscar Wilde, the text of "Torch Song Trilogy" and books about Aids), books depicting the art of Rowlandson, Gilmay and Aubrey Beardsley, and sex education kits prepared by the Unitarian Church. As recently as 1977, the exhibitors of the record cover "Never Mind the Bollocks, here's the Sex Pistols" were prosecuted on the grounds that "bollocks" was an offensively indecent word. It is worth recalling that in 1973 three Court of Appeal judges held that David Bailey's television film about Andy Warhol was grossly offensive, and in 1984 one High Court judge applied the same epithets to "Scum". In both cases the IBA disagreed, and these proceedings serve as a warning that there will be no consistency in the approach of different courts and different juries and different policemen. Is a video of the film "Scum", classified as 18, likely to offend the new test? The answer depends on the entirely subjective reaction of some future jury.

In short, the test of "gross offensiveness" is far too vague and subjective to be a fair or proper criterion of guilt for an offence which carries up to 3 years in prison and which is aimed at regulating artistic freedom. It is a fundamental principle of criminal law that it should be sufficiently certain to enable citizens to regulate their conduct so as to avoid committing crimes. The "gross offensiveness" test would entirely fail to provide that necessary measure of certainty, and prosecutions would smack of retroactive law enforcement. No real limitation is supplied by the Bill in making the test relate to

"i) acts of violence or cruelty (of any kind)

ii) incidents of a horrific nature

iii) sexual activity (of any kind) or acts of force or restraint which are associated with such activity,

iv) genital organs or urinary or excretory functions or

v) the taking of controlled drugs"

These phrases are so general that any video which deals with human love relationships or which has scenes of violence would be included. Videos dealing with current events would be candidates as well, together with many feature films already released on video

"Offensive" quality videos

There is a profound objection to a criminal sanction expressed in a way which would prima facie apply to many videos or recognised dramatic or cinematic merit. It is accepted that part of the function of film and documentary and satire is to jolt reasonable people, to make them re-examine complacent assumptions. A good deal of creative imagery

makes use of sexual or violent themes as part of this process, frequently with a deeply moral purpose. By taking "gross offensiveness" as the yardstick of guilt, the Bill enables prosecutions to be brought against video films of recognised social or artistic merit, leaving the publishers to exculpate themselves by proving (the burden shifts to the defence) that the merit outweighs the offensiveness. The possibility of a prosecution is itself a deterrent to creating and publishing "offensive" art: few film makers and even fewer distributors welcome the prospect of a fortnight in an Old Bailey dock, however likely they are to be acquitted by a sympathetic jury at the end of the day. The objection to the Bill, therefore, is not so much that it will send publishers of meritorious works to prison - juries can generally, although not always, be relied upon to make sensible decisions. The objection is to the chilling effect that the new test will have in authorising police and prosecution action, an effect which will be particularly marked upon institutions within the film and video industry. It will create a climate of caution and fear, a climate in which potentially offensive (because new or radical) works will not be commissioned or made or transferred to video because of possible risks. This is not a climate in which innovative and exciting work can be encouraged or made available to the public.

The objection - and it is both a political and a cultural objection - to entrusting Government-employed lawyers with the administration of a vague and discretionary censorship law was authoritatively expressed by Lord Reid, the greatest post-war jurist, in his warning against re-activating an old offence of "conspiracy to outrage public decency" - a concept to which the Bill gives a statutory lease of life. In Knuller v DPP, he said:

"If there were in any book, new or old, a few pages or even a few sentences which any jury could find to be outrageously indecent, those

who took part in its publication and sale would risk conviction. Notoriously many old works, commonly regarded as classics of the highest merit, contain passages which many jurymen might regard as outrageously indecent. It has been generally supposed that the days of bowdlerizing the classics were long past, but the introduction of this new crime might make publishers of such works think twice. It may be said that no prosecution would ever be brought except in a very bad case. But I have expressed on previous occasions my opinion that a bad law is not defensible on the ground that it will be judiciously administered".

It is not, of course, merely a question of bowdlerizing the classics. The Bill catches many programmes of satirical or social importance. "Spitting Image" makes use of gross images offensive to many (the Rupert Murdoch puppet contravenes Section 1(1)(a)(iv) of the Bill whenever it breaks wind, as this "portrays, deals with or relates to....excretory functions"). Documentaries about famines in Africa and "War on Want" advertisements may contravene Section 1(1)(a)(ii) by portraying "incidents of a horrific nature". Section 1(1)(a)(i) catches "acts of violence or cruelty <u>of any kind</u>", ranging from news coverage of crime or revolution to plays and documentaries about nuclear war. The reference to "sexual activity <u>of any kind</u>" ranges in scope from gross kissing to offensive warnings against Aids and venereal disease, while the inclusion of "the taking of controlled drugs" seems aimed at films like "Christianne F" which graphically depict the degradation of drug-addiction in order to serve as a warning against it. All that is required to justify searches, seizures and prosecutions is for a police officer, with the approval of a DPP lawyer, to take the view that films or books or videos in the above categories contain a scene - of however short duration - which a reasonable person might (not would) regard as grossly offensive. This gives reason to suspect

that a serious crime has been committed, and justifies prosecuterial action.

The 'Reasonable Person' Test

The Bill judges "gross offensiveness" by reference to the sensibilities of "a reasonable person". The immediate problem, of course, is that reasonable people have very different thresholds of offence. Since taking of offence is a subjective reaction, this standard merely adds to the uncertainty outlined above. Most crimes require a "guilty mind" - a subjective appreciation in the mind of the defendant of the wrongfulness of his or her conduct. This Bill does not require the prosecution to prove "mens rea", ie a knowledge by defendants that their publications will shock: it imputes guilt whenever a tribunal retrospectively decides that the publication would shock a hypothetical person, were that person ever to be exposed to it. Publishers cannot know, in advance, what sort of "reasonable person" will be constructed by the tribunals ultimately judging their work, and in consequence cannot foretell by what standard they will be judged.

The other objection to "a reasonable person" as a standard is that the Bill fails to give any assistance as to quantity. There are, presumably, some millions of "reasonable people" in Britain: is it enough that one is offended, or a significant proportion, or a majority, or all? Clearly a number of people took offence at scenes in "The Singing Detective", while a majority of viewers appreciated them in the context of the drama. The director's guilt or innocence would depend on what direction the judge gave as to the proportion of reasonable persons whom the prosecution had to prove were shocked.

The Return of the "Purple Passage"

The most important and most overdue reform achieved by the 1959 Obscene Publications Act was in requiring works of art and literature to be judged "as a whole". This ended a century of forensic philistinism in which books by Zola, Maupassant, D H Lawrence, Joyce, Radclyffe-Hall and others were deemed obscene because of "purple passages" (in some cases, mere sentences) lifted out of context. This was grossly unfair to the work in question, and much of the freedom enjohed by literature since 1951 is a result of the "dominant effect" principle enshrined in Section 1(1) of the 1959 Act. The new Bill ignores Section 1(1) and applies the test only to "articles" described by Section 1(2) ("any description of article containing or embodying matter to be read or looked at or both, any sound record, and any film or other record of a picture or pictures"). The "taken as a whole" qualification will therefore not apply to "articles" alleged to be grossly offensive. It follows that if any passage or sequence or even frame in a video is apt to cause shock and dismay, a prosecution may be brought.

In 1959, the Select Committee on the Obscene Publications Act had stressed the importance of considering the 'dominant effect' of the whole work:

"The contrary view, under which a work could be judged obscene by reference to isolated passages without considering the total effect, would, if taken to its logical conclusion, deprive the reading public of the works of Shakespeare, Chaucer, Fielding and Smollett, except in expurgated editions. We therefore recommend that regard should be paid in any legislation to the effect of a work as a whole."

The danger of allowing any incursion on the "taken as a whole" principle, especially in relation to videos, should be obvious. It would not even be necessary for the prosecution to screen for the jury the entire tape: they could simply show the offending scene and invite a conviction, without any reference to theme or context or message. It is not without interest that Mrs Whitehouse has adopted a similar tactic in screening extracts of television programmes to convince MPs that the Bill should be passed.

The Message is Irrelevant

The abandonment of the "taken as a whole" qualification and the absence of any requirement on the part of the prosecution to prove an intention to offend means that there is no scope, in applying the new test, for any consideration of the works' purpose, theme or message. "Gross offensiveness" is judged "by reason of the manner in which it portrays, deals with or relates to...acts of vidence, incidents of a horrific nature, sexual activity (of any kind)." The entire focus of the new test is upon physical acts or incidents, whether described in words or simulated on film. This is the same artificial and pettifogging approach which was adopted by the more obviously visible "laundry list" of the 1986 Churchill Bill. The objection is the same: by making it a crime for the media to cause offence, it becomes more difficult to expose certain forms of behaviour precisely because they are offensive. Sanitisation, by lessening anger and outrage, provides legitimacy or at least indifference. Anger and outrage are entirely valid emotions to arouse in a cause, as part of a political or social argument for a change in perceptions. Reaction of shock and outrage have been part of the purgative function of drama from its earliest days. Where

the scenes which arouse these emotional responses are plucked out of context and dissected in a Courtroom, the result is grossly unfair to the publisher.

The Likely Audience

Another reform of fundamental importance to the fair operation of the obscenity laws, established by Parliament in the 1959 Act, was the requirement that directed the Court's attention to the article's effect on its likely audience. No article is obscene per se: its potential for harm must be judged accordingly to the character of the persons who are likely to see or to read it. This is an obviously fair and reasonable approach: it means, for example that explicit material may be shown to particular interest groups who would not be affected by it - doctors, researchers, lawyers, policemen and so on. Films can receive more latitude when shown to buffs at film festivals than when placed on general release. The question is whether the publisher of written or visual material is to be condemnded as criminal for causing harm to a reasonably foreseeable group of consumers.

The new Bill abandons this audience-centred approach in favour of a test which pivots upon the causing of dismay to what might be termed "the reasonable busybody". What is criminal is not shock and disgust caused to consumers (who may in no way be disturbed by exposure to the material) but shock and disgust caused to others at the very idea that people are consuming - even enjoying - the material. Section 1(3) and (4) of the Bill deem an offence to be committed where a reasonable person regards either a particular act of publication or "any further publication that could reasonably be expected to follow from that publication" as grossly offensive. This makes plain that what the Bill

seeks to do is not to protect people from gratuitous exposure to outrageous material, but to protect people from becoming angry at the thought that material which might outrage them, if they ever saw it,was being enjoyed by others.

It seems to me that this raises a fundamental philosophical problem for this legislation. It is not really aimed at protecting anyone from direct assault by depictions of physical acts: it is aimed at protecting hypothetical individuals from the thought that others may be voluntarily exposing themselves to ugly words and pictures. The Magistrate, for example, must ask himself not whether he is offended by the article in question, but whether he is offended at the thought that such an article (even if it does not personally offend him) might be seen by others. This offence need not be taken at the thought that exposure might harm or outrage the audience: it might merely be based on some personal view of the magistrate or juror that "videos sold in newsagents ought not to show things like that". Or "That's not a fit subject for public discussion". In this way, radio and television and films and videos and books will be constructed by notions of "seemliness" invoked by the DPP and applied by the Courts.

Extended Liability

Publishers are liable, not merely for shocking the Court by virtue of a particular publication, but ~~by~~ for shocking it at the prospect of further publications for which they are not directly or morally responsible. Whenever republication (e.g. by third party copying) is reasonably forseeable, conviction may follow even though the original publication is inoffensive. It is now reasonably forseeable that video tapes hired to adults may be watched by children and played back with

technical devices such as freeze-frame on hand. I imagine that the prosecution argument to convict a distributor for hiring a video cassette of "Scum" or "Jubilee" would be that reasonable persons would be grossly offended at the thought of potentially violent youth watching the video, and playing it back frame-by-frame to study the methods of violence employed by the characters. The result of such prosecutions will be to impose a suffocating caution on the BBFC in classifying videos: not only must it exclude material that magistrates may find to be "grossly offensive", it must also exclude material which might be extracted by video techniques and become offensive when put to uses over which they have no control.

Unfair Prosecutions

Section 2 of the Bill I find grossly offensive, in three respects:

a) It permits the prosecution to have two bites at the cherry of conviction, by putting its case in two alternative ways. It can allege that the article tends to deprave and corrupt, and if that allegation is rejected it can nonetheless invite the Court to convict on the basis that publication in any event is grossly offensive. Since these tests involve entirely different questions, the prosecution is given an unfair advantage.

b) That unfairness is re-inforced by the provisions which permit evidence introduced in support of one ground to be used to obtain a conviction on the other. What this does, quite blatantly, is to allow a defendant to be convicted on the basis of irrelevant and inadmissable evidence. Such a situation is both deplorable and unparallelled in English criminal law.

It will work in thoroughly unsatisfactory ways. On the one hand, evidence may be called under the existing law in relation to a video about drugs, to show that the drug in question induces corrupt behaviour. The jury may decide that the video does not in fact promote drug-taking, and so old test (1) is not made out. Yet it may go on to use this evidence to convict the video distributor on new test (2), on the basis of emotions of shock and disgust generated by hearing the otherwise inadmissable evidence. Alternatively, the jury may hear pursuant to test (2) all sorts of wild allegations made by complainants who have been offended by the film, suggesting that it corrupts in insidious ways. The jury may find that the video itself was not grossly offensive (test 2) but use the otherwise inadmissable hearsay allegations to bring back a conviction under test (1). What is so unfair about this procedure is that the orthodox rules of evidence will apply strictly to the defence, which will be unable to call evidence to rebut the prejudicial hearsay allegations.

c) Clearly it is a more serious crime to corrupt than to offend. Yet the Bill makes no provision for a "special verdict" in which the jury indicates which test it finds proven. So video dealers are in danger of being sent to prison for corruption, after trials where in fact the jury found them guilty merely of causing offence.

Conclusion

The DPP's guidelines in relation to prosecuting "video nasties" do not, as I recall, adopt the test of "gross offensiveness". It is interesting to compare their fair and ~~[illegible]~~ unperturbed approach to censorship with the blunt language of the Howarth Bill. It is language which will result, in my view, in the effective abolition of the 18R category and in a good deal of confusion and uncertainty as the BBFC struggles to divine what

a "reasonable person" would find to be shocking and disgusting.

For video distributors and shop traders, the enactment of the Bill would mark a return to the bad old days before 1984, when prosecutions were brought in an entirely arbitrary and inconsistent manner against dealers who were presumed personally to have vetted every cassette in their stock. It is important to recognise that in relation to videos (the position is otherwise with respect to film and television) the DPP's consent is not required for police seizures or prosecutions. It follows that traders will be prosecuted in Manchester for videos which can be sold without any problems in London. The end result of the new Bill, of course, will be a massive increase in police time (and public money) expended on watching videos for "offensive" scenes and raiding video stores for evidence of the new crime of offending reasonable people.

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