

SILKE VOGELSANG

**CENSORSHIP AND THE PROTECTION OF MINORS
- AN ANALYSIS ON THE BASIS OF NEW
ZEALAND'S AND GERMANY'S LEGAL POSITIONS -**

**LLM RESEARCH PAPER
FREEDOM OF EXPRESSION AND FREEDOM OF
INFORMATION (LAWS 520)**

**LAW FACULTY
VICTORIA UNIVERSITY OF WELLINGTON**

2005

V 879

VOGELSANG, S.

Censorship

and the

protection of minors.

W

1

Victoria

UNIVERSITY OF WELLINGTON

Te Whare Wānanga
o te Ūpoko o te Ika a Māui



LIBRARY

CONTENTS PAGE

I	INTRODUCTION.....	5
II	WHAT ARE THE POTENTIAL HARMS TO MINORS?.....	6
III	THE LEGAL POSITION IN NEW ZEALAND.....	9
A	Censorship Law in New Zealand.....	9
1	<i>History and development of censorship law in New Zealand.....</i>	9
2	<i>Current developments in New Zealand Censorship Law.....</i>	10
B	Countervailing Values.....	11
C	Office of Film and Literature Classification.....	12
1	Organisation and functions of the classification office.....	12
2	Procedure of the OFLC.....	12
D	Censorship Decisions.....	14
1	<i>Legal Basis.....</i>	14
(a)	Interpretation of section of the 3(2) FVPCA.....	14
(b)	Interpretation of section 3(1) of the FVPCA.....	15
(c)	Factors within section 3(3) and (4) of the FVPCA	18
2	<i>Consideration of Factors.....</i>	19
(a)	Section 3(3)(a) of the FVPCA.....	19
(b)	Section 3(3)(d) of the FVPCA.....	21
(c)	Section 3(4) of the FVPCA).....	22
3	<i>Objectionable publications according to section 3(2) of the FVPCA.....</i>	24
4	<i>Section 3A and 3 B of the FVPCA.....</i>	24
IV	LEGAL POSITION IN GERMANY.....	25
A	Countervailing Values.....	25
B	Different Statutes Dealing with Media-related Protection of Minors.....	27
C	Different Authorities Dealing with Media-related Protection of Minors....	27
1	<i>The film industry body for voluntary self-control (FSK).....</i>	27
(a)	Development of the FSK.....	28
(b)	Structure and organisation of the FSK.....	29
(c)	Procedure of the FSK.....	29
(d)	Decisions by the FSK.....	32
(i)	Possibility of identification.....	32
(ii)	Exaggeration.....	33

(iv)	Voyeuristic approach.....	33
(v)	Comprehensibility of the plot.....	34
(vii)	Target group.....	35
(viii)	Signification of scenes depicting sex or violence.....	35
(ix)	How is violence depicted?	35
2	<i>The entertainment-software body for voluntary self-control (USK)</i>	37
3	<i>Federal Department for Media Harmful to Young Persons</i>	38
(a)	Structure and Organisation of the BPjM.....	39
(b)	Procedure of the BPjM.....	39
(c)	Implications of indexing.....	41
(d)	Indexing practice.....	42
(e)	Harmful material that is likely to be included in the list.....	43
(i)	Depiction of violence.....	44
(ii)	Glorification of National Socialist ideology, racial hatred, glorification of war, playing down of war.....	45
(iii)	Media producing disorientation in sexual ethics, pornography.....	46
(iv)	Severely harmful material according to section 15(2) of the Protection of Young Persons Act.....	47
(f)	Provisos.....	48
(i)	Indexing solely for political, social, religious or ideological content.....	48
(ii)	Indexing supporting arts, science, research or teaching.....	49
(g)	Patterns of the BPjM with regard to computer games.....	53
V	<i>ANALYSIS OF MEDIA-RELATED PROTECTION OF MINORS UNDER THE TWO LEGAL SYSTEMS</i>	53
A	<i>Direct Comparison of Ratings in New Zealand and Germany</i>	53
1	<i>General factors</i>	53
2	<i>Comparison of film ratings</i>	55
3	<i>Comparison of video and computer games ratings</i>	56
4	<i>General Differences</i>	58
B	<i>Limits to an Effective Protection of Minors</i>	60
1	<i>Circumventing of restrictions</i>	60
2	<i>Reconciliation of freedom of expression with protection of minors</i>	63
VI	<i>CONCLUSION</i>	66

<u>APPENDIX 1:</u>	<i>RELEVANT SECTIONS OF THE NEW ZEALAND BILL OF RIGHTS ACT 1990</i>	74
<u>APPENDIX 2:</u>	<i>RELEVANT SECTIONS OF THE FILMS, VIDEOS, AND PUBLICATIONS CLASSIFICATION ACT 1993 (AS AMENDED BY THE FILMS, VIDEOS, AND PUBLICATIONS CLASSIFICATION AMENDMENT ACT 2005)</i>	74
<u>APPENDIX 3:</u>	<i>RELEVANT SECTIONS OF THE GERMAN BASIC LAW</i>	78
<u>APPENDIX 4:</u>	<i>RELEVANT SECTIONS OF THE ACT TO PROTECT YOUNG PERSONS</i>	78
<u>APPENDIX 5:</u>	<i>RELEVANT SECTIONS OF THE GERMAN CRIMINAL CODE</i>	92
<u>APPENDIX 6:</u>	<i>RATINGS OF VIDEO AND COMPUTER GAMES IN NEW ZEALAND AND GERMANY FROM JANUARY 2004- SEPTEMBER 2005</i>	98
<u>APPENDIX 7:</u>	<i>RATINGS OF FILMS IN NEW ZEALAND AND GERMANY FROM JANUARY 2004- SEPTEMBER 2005</i>	100

ABSTRACT

"I think it's a clear statement that adults do have rights to view and see what they want, up to the point where it impinges on the rights of others. But I think that the legislation clearly states that we have a duty to protect children."¹

New Zealand as well as Germany provide for legislations² protecting children and young persons from media items that are harmful to their development and education. This essay explores the legal positions of New Zealand and Germany with regard to media-related protection of minors. While introducing the different institutions, entrusted with protection of minors in both countries, this paper also compares their measures to protect young persons and examines patterns in censorship decisions. Additionally, the paper looks at justifications for censorship measures with regard to minors that restrain freedom of expression and freedom of information. Although the right to freedom of expression and information is very fundamental to a democracy, it must be balanced with protection of minors, which is also a legally protected right. Thus, this paper advocates that limitations to freedom of expression and information are sometimes necessary to prevent minors from being harmed in their development and education. Finally the paper argues that neither the German nor the New Zealand censorship system provides for an absolutely effective protection and that parents and legal guardians are asked to take responsibly.

The text of this paper (excluding abstract, table of contents, footnotes, bibliography and appendices) comprises approximately 15,982 words.

Censorship Law- Protection of Minors

¹ Kathryn Paterson, former Chief Censor of the Office of Film and Literature Classification, (Dominion, 8 April 1994: 2).

² Such as the Protection of Young Persons Act and the Films, Videos, and Publications Classification Act.

I INTRODUCTION

Media consumption is very attractive, especially to young people, and electronic media are very diverse. Not only are the traditional media such as television and films very popular with children, also new technologies such as video and computer games attract minors' attention. Some of this media, however, can have a negative and injurious effect on the intellectual and emotional development of minors. It is, in particular, the new technologies like computer and video games that are most problematic as far as censorship is concerned.³ This is due to the fact that these types of media are dynamic and interactive and therefore exert a quite different influence on children and young people than a medium such as television, where the recipient is more passive.⁴

When certain media items are likely to harm children and young persons, protection of minors comes into play. Media-related protection for minors tries to protect minors from those influences of the "adult world" that are at odds with their developmental stage.

Both in New Zealand and Germany institutions judge media according to their potential harm in order to regulate public dissemination. These regulations restrain freedom of expression including freedom of information laid down in section 14 of the New Zealand Bill of Rights Act 1990 (hereinafter BORA) and in section 5(1) of the German Basic Law (hereinafter BL).

It can hardly be seriously asserted that children and young persons do not need media-related protection at all.⁵ What we are mainly concerned with here is the question of how to draw a line between necessary protection of minors and effective guarantee of freedom of expression. Both of these objectives are very crucial and should not be undermined by each other.

³ Chris Watson and Roy Shuker *In the Public Good? Censorship in New Zealand* (The Dunmore Press, Palmerston North, 1998) 8.

⁴ Chris Watson and Roy Shuker, above n 3, 8.

⁵ Chris Watson and Roy Shuker, above n 3, 12.

First of all, this research paper examines the potential harms to minors that are associated with objectionable publications and states why minors need to be protected from them. Next, the paper introduces the legal systems of classification in Germany and New Zealand as well as the different authorities dealing with media-related protection of minors. By comparing the two legal systems the question is asked whether there are some patterns in the classification decisions of both countries and whether these differentiate. Before drawing a conclusion, the research paper focuses on the limits of an effective protection of minors and argues that freedom of expression and protection of minors can be reconciled, even though the correlation between objectionable material and harm to minors is not always certain.

This paper will focus on cinematic movies, video and computer games, books and CDs. Youth-endangering material that is disseminated via means of broadcast, that is radio and television, or via advertisements and Internet, are beyond the scope of this research paper and are only mentioned in passing.

II WHAT ARE THE POTENTIAL HARMS TO MINORS?

First of all, it seems worthwhile exploring what children and young persons need to be protected from, which includes the question why minors should be protected at all. In general, minors need to be protected because they are “different from adults – in the sense of being more vulnerable, less critical and more impressionable”.⁶ Children and young people are not as stable and emotionally mature as adults generally are. In many respects, minors lack experience and they often do not have the ability to assess situations properly. Thus, there is a “general interest in protecting children from things that they lack the experience and frame of reference to understand and deal with – until they have acquired sufficient knowledge and maturity to stand on their own two feet”.⁷ So, the reason for protecting minors is

⁶ Marita Ulvskog, Minister for Culture in Sweden “Children and Young People in the New Media Landscape” (Expert Seminar, Modern Museum, Stockholm, 12 February 2001) available at: >http://www.eu2001.se/eu2001/news/news_read.asp?iInformationID=11803< (last accessed: 30 September 2005)

⁷ Marita Ulvskog, see above n 6.

that there is material that can harm their well-being and impair them in their development.⁸

Harm to the development of minors can appear in various ways. It is often asserted,⁹ that young people, who are confronted with violent and brutalising material, could be inclined to show propensity to violence themselves. It is easy enough to make broad generalisations about the evils of violence in the media, but in reality the issue is an extremely complex one. The correlation between violent behaviour and harmful media items is not undisputed.¹⁰ The same is true for the correlation between media items, containing matters relating to sex, and abnormal behaviour of minors. Social science and psychological studies generally conclude that violence in the media is not the definite cause for violent behaviour of minors.¹¹ The question of whether the restriction of media items is justified, even though the causality of their harm is not certain, will be dealt with later.¹²

After having discussed the reasons for protecting minors, it seems worthwhile to examine the different materials that are regarded as harmful to young persons. The categories of what constitutes harmful or objectionable material to minors are nearly the same in New Zealand and Germany. They comprise, for instance, contents relating to sex, violence, crime, horror or cruelty.¹³

As far as the classification of harmful material is concerned, the German and New Zealand systems differ, in that Germany seems especially aware of preventing young persons from coming into contact with material that glorifies the war and especially National Socialists' ideological ideas. This is, of course, due to our

⁸ Federal Ministry for Family, Senior Citizens, Women and Youth *Medien und Gewalt, Befunde der Forschung seit 1998* (Report about Media and Violence, Juli 2004) available at ><http://www.bmfsfj.de>< (last accessed 30 September 2005)

⁹ Frank Neubacher "Ein kriminologischer Beitrag zur Relevanz der Medien für fremdenfeindliche bzw. Rechtsextremistische Gewaltkriminalität", (1999) BPJS aktuell, 30, 34.

¹⁰ Chris Watson and Roy Shuker, above n 3, 18.

¹¹ Federal Ministry for Family, Senior Citizens, Women and Youth *Medien und Gewalt, Befunde der Forschung seit 1998* (Report about Media and Violence, Juli 2004) available at ><http://www.bmfsfj.de>< (last accessed 30 September 2005).

¹² See page 63.

¹³ See section 3(1) of the Films, Videos, and Publications Amendment Act.

responsibility with regard to the Second World War. Sadly, parties like the Nationaldemokratische Partei Deutschlands (National-Democratic Party of Germany) or the Deutsche Volkunion (German People's Union) promoting radical right-wing ideas have numerous followers, particularly young people. Calls for racial hatred, xenophobia and the promotion of National Socialists' ideas are immensely dangerous for the development of children and young persons.¹⁴ Consequently, there is need for action for the censorship authorities in Germany.

Neither the German nor the New Zealand¹⁵ system provides for censorship powers with regard to media contents denigrating groups solely on the basis of gender or sexual orientation. Additionally, New Zealand censors are not empowered to censor racist material. Denigration on grounds of racism are, however, factors that the classification officers have to consider¹⁶ if the publication deals with one of the matters¹⁷ set out in section 3(1) of the Films, Videos, and Publications Act.

III THE LEGAL POSITION IN NEW ZEALAND

A Censorship Law in New Zealand

1 History and development of censorship law in New Zealand

The first signs of censorship in New Zealand go back to 1858, when customs regulations prohibited the importation of "indecent" and "obscene" material.¹⁸ In 1866, the so-called Vagrant Act¹⁹ was passed which made it a criminal offence to

¹⁴ Christine Bergmann, Secretary of the Federal Department for Family, Senior Citizens, Women and Youth "From anti-Semitism to xenophobia – Right-wing extremist media in Germany" (Annual Meeting of the Federal Department for Media Harmful to Young Persons, Marburg, 10 November 1999) 3.

¹⁵ See *Living Word Distributors Ltd v Human Rights Action Group* [2000] 3 NZLR 570 (CA).

¹⁶ Section 3(3) of the Films, Videos, and Publications Act.

¹⁷ These matters comprise sex, horror, crime, cruelty, and violence.

¹⁸ Paul Christoffel, *Censored – A Short History of Censorship in New Zealand* (Department of Internal Affairs, Wellington, 1989) 3.

¹⁹ The Vagrant Act contained no definition of what constitutes "obscene" or "indecent" material and left this determination to the public.

“wilfully expose to view” in public “any obscene book, print, picture, drawing or representation”.²⁰

Censorship became of real importance to New Zealand towards the late nineteenth century and the early twentieth century resulting in numerous laws extending the powers of censorship.²¹ The reasons for this change comprise, for instance, the fact that pornographic and erotic material was available to a greater extent. Also, there were various conflicting social forces, such as conservative and liberal movements, which influenced the country at that time.²² All these different influences led to the fact that numerous indecent publications came to the courts.²³

Another factor influencing censorship was that movies became more and more popular as the number of movie theatres grew enormously.²⁴ Many people feared that films would have a negative impact on young people who were particularly attracted to them.²⁵ The fear was mainly that movies would cause an increase in the crime rate, antisocial behaviour and sexual impropriety as well as a decline in moral values.²⁶ In the 1930s, cheap magazines, and comic books from the United States and, twenty years later, innumerable and often dubious literature came to New Zealand.²⁷ In 1954, there was a great fear that these kinds of literature would be morally harmful and negatively affecting the juvenile delinquency rate. Thus, the legislature quickly passed acts aimed at counteracting this development.²⁸ In 1963 the Indecent Publications Act was passed. Technological innovations such as television and video created new needs for action with regard to censorship regulations. Television and video have been criticised for distorting the imagination of minors and increasing

²⁰ Paul Christoffel, see above n 18, 3.

²¹ Paul Christoffel, see above n 18, 1.

²² Paul Christoffel, see above n 18, 1 and 4.

²³ The first “indecent” publication a New Zealand court had to deal with was in 1890, when five booksellers were arrested for selling novels by the controversial French author Émile Zola. The booksellers were finally convicted, although one of the novels they had sold was not even translated into English.

²⁴ Chris Watson and Roy Shuker, above n 3, 28.

²⁵ Chris Watson and Roy Shuker, above n 3, 28; Paul Christoffel, see above n 18, 1.

²⁶ Chris Watson and Roy Shuker, see above n x, 27.

²⁷ Paul Christoffel, see above n 18, 1

²⁸ Paul Christoffel, see above n 18, 2.

violence.²⁹ Thus, in 1983 the Films Act was passed and four years later the Video Recordings Act in order to react to the greater availability of violent and sexual material associated with videos.³⁰ These three statutes³¹ established specialist authorities,³² which were empowered to restrict or prohibit objectionable publications.³³ The jurisdiction of these authorities extended over films and video recordings, as well as books, magazines and sound recordings.³⁴ All other material rested under the residual competence of the courts.³⁵

2 *Current developments in New Zealand Censorship Law*

On 1 October 1994 the above-explained classification system was replaced, because it was regarded as being too complex, dissatisfactory and inefficient.³⁶ The new classification system is enforced and administered from one body only, namely the Office of Film and Literature Classification (hereinafter the OFLC) and has the Films, Videos, and Publications Classification Act 1993 (hereinafter FVPCA) as its legal basis.

In the case of films and videos, New Zealand has a three-tier system for rating and classifying. Every film must be rated or classified, and labelled before it can be released to the public.³⁷ The Film and Video Labelling Body is mainly responsible for rating unrestricted films and for cross-rating films already rated in Australia or the UK. If the film has been classified as "restricted" in Australia or the UK, or if the film is likely to be classified as restricted or objectionable by the OFLC, the Labelling Body will submit the film to the OFLC.³⁸ The OFLC is, in turn, responsible for

²⁹ Chris Watson and Roy Shuker, above n 3, 14.

³⁰ Paul Christoffel, see above n 18, 2.

³¹ The Indecent Publications Act 1963, the Films Act 1983, and the Video Recordings Act 1987.

³² These specialist bodies include the Video Recordings Authority, the Film Censor, and the Indecent Publications Tribunal.

³³ John Burrows and Ursula Cheer *Media Law in New Zealand* (5 ed, Oxford University Press, Melbourne, 2005) 451.

³⁴ John Burrows and Ursula Cheer, above n 33, 451.

³⁵ John Burrows and Ursula Cheer, above n 33, 451.

³⁶ Paul Christoffel, above n 18, 1; John Burrows and Ursula Cheer, above n 33, 451, 452.

³⁷ Section 8 of the Films, Videos, and Publications Classification Act sets out certain examples according to which a film is exempt from requiring a label.

³⁸ Section 12(1A) of the Films, Videos, and Publications Classification Act.

classifying all films that are submitted to it. The Film and Literature Board of Review constitutes the review body and is an independent authority administered by the Department of Internal Affairs.

The Film, Videos, and Publications Classification Amendment Act 2005 introduced some changes to this new classification system with regard to protection of minors.³⁹

B Countervailing Values

As mentioned above, there are situations in which minors need to be protected from certain kinds of media items, to support them in their personality development. In order to achieve this, censorship measures are sometimes necessary. Censorship occurs “whenever particular words, images, sounds, and ideas are suppressed or muted”.⁴⁰ Censorship, thus, limits other rights such as freedom of expression and freedom of information. Section 14 of the New Zealand Bill of Rights Act 1990 ensures that “everybody has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form.”⁴¹ All authorities dealing with censorship measures such as the OFLC need to consider these rights. Freedom of expression and freedom of information can be limited as long as the limit is “reasonable”,⁴² prescribed by law⁴³ and “demonstrably justified in a free and democratic society.”⁴⁴ Thus, authorities dealing with censorship have to balance freedom of expression with “Parliament’s intention that the availability of publications likely to be injurious to the public good should be restricted or prohibited”.⁴⁵ In the case of protection of minors, a balance needs to be found between effectively guaranteeing freedom of expression and preventing minors from accessing material that is injurious to them.

³⁹ See page 24.

⁴⁰ Chris Watson and Roy Shuker, above n 3, 12.

⁴¹ Section 14 of the New Zealand Bill of Rights Act 1990.

⁴² Section 5 of the New Zealand Bill of Rights Act 1990.

⁴³ Section 5 of the New Zealand Bill of Rights Act 1990.

⁴⁴ Section 5 of the New Zealand Bill of Rights Act 1990.

⁴⁵ Annual Report 2004, (Report of the Office of Film and Literature Classification for the year ended 30 June 2004) 35.

C Office of Film and Literature Classification

1 Organisation and functions of the classification office

The OFLC has operated since 1994 and its main task⁴⁶ is to classify publications that are likely to require restriction or which may be objectionable. The OFLC includes the Chief Censor of Film and Literature, the Deputy Chief Censor of Film and Literature, a team of classification officers⁴⁷, and an Information Unit providing research services and dealing with complaints and inquiries. The officers have a diverse background: some have had legal training, some come from previous censoring authorities, and others have a nursing or counselling background.⁴⁸

Publications⁴⁹ subject to classification by the OFLC include any film, video recording, DVD, CD ROM, computer image, book, magazine, newspaper, photograph or sound recording. Thus, the OFLC is responsible for a wide range of publications. However, websites hosted outside New Zealand are not included in the Office's field of responsibility, and media such as broadcasting, telecommunications and satellite transmissions are covered by other legislation.

2 Procedure of the OFLC

Possible sources from which a publication can be submitted to the OFLC include the Film and Video Labelling Body, the Chief Executive of Customs⁵⁰, and

⁴⁶ The Office has also the power of imposing display conditions on restricted publications and functions as an expert in front of New Zealand's courts; see section 77 of the Films, Videos and Publications Classifications Act 1993 for all the functions of the Office.

⁴⁷ The appointment of the classification officers is legally limited to three years with one possible term of reappointment.

⁴⁸ John Burrows and Ursula Cheer, above n 33, 453.

⁴⁹ According to section 2 of the Films, Videos, and Publications Classification Act a publication is defined as (a) any film, book, sound recording, picture, newspaper, photograph, photographic negative, photographic plate, or photographic slide; (b) any print or writing; (c) a paper or other thing – that has printed or impressed upon it, or otherwise shown upon it, 1 or more (or a combination of 1 or more) images, representations, signs, statements, or words; (d) a thing (including, but not limited to, a disc, or an electronic or computer file) on which is recorded or stored information that, by the use of a computer or other electronic device, is capable of being reproduced or shown as 1 or more images, representations, signs, statements, or words).

⁵⁰ Section 13(1)(a) of the Films, Videos, and Publications Classification Act 1993.

the Secretary of Internal Affairs.⁵¹ Also, any person can submit a publication to the OFLC, if this person receives the Chief Censor's leave to do so.⁵² If the Chief Censor refuses this leave, he must give reasons for this decision.⁵³ The Chief Censor may also direct the Chief Executive of Customs or the Secretary of Internal Affairs to submit a publication to the OFLC.⁵⁴ This indicates that the Chief Censor has considerable discretion in deciding which publications are classified. This discretion is justified as the Chief Censor is regarded as an expert authorised by the FVPCA.⁵⁵

The OFLC can classify a publication as: unrestricted; objectionable; or objectionable unless restricted to persons of a specific age⁵⁶, to specified persons or classes of persons⁵⁷, or to use for one or more specified purposes.⁵⁸

A classification constitutes a legal statement about the persons to whom a publication may be made available. Classifications have legal force and persons not complying with the conditions or restrictions associated with a classification can be prosecuted.

The classification officers can also impose display conditions on a publication⁵⁹ after having considered the likelihood of offence being caused to reasonable members of the public.⁶⁰

With the Chief Censor's leave, all publications may be submitted for reconsideration three years⁶¹ after they have first been classified.⁶² This second

⁵¹ Section 13(1)(b) of the Films, Videos, and Publications Classification Act 1993.

⁵² Section 13(1)(c) and (2) of the Films, Videos, and Publications Classification Act 1993.

⁵³ Section 15(5) of the Films, Videos, and Publications Classification Act 1993.

⁵⁴ Section 13 (3) of the Films, Videos and Publications Classification Act 1993.

⁵⁵ Section 4(1) of the of the Films, Videos and Publications Classification Act 1993.

⁵⁶ Examples for a restricted classification are labels such as R 16 or R 18, which restrict the access to the publication to people over a certain age such as sixteen or eighteen years.

⁵⁷ An example for "specified persons" or "specified purposes" is the condition to only show the publication at a film festival or to people who are enrolled in a tertiary media or film studies course.

⁵⁸ Section 23(2) of the Films, Videos and Publications Classification Act 1993.

⁵⁹ Section 77(1)(c) of the Films, Videos and Publications Classification Act 1993.

⁶⁰ Section 27(2)(c) of the Films, Videos and Publications Classification Act 1993

⁶¹ Under certain conditions even an earlier reconsideration is possible, section 40 Films, Videos, and Publications Act 1993.

⁶² Section 42 of the Films, Videos and Publications Classification Act 1993.

control takes into account that society changes and a publication can be regarded differently after a certain amount of time. Classification decisions can be reviewed at the Film and Literature Board of Review⁶³ (hereinafter FLBR) and the review decision may be appealed to the High Court on a point of law⁶⁴ and later to the Court of Appeal.

D Censorship Decisions

1 Legal Basis

The legal basis for censoring publications in New Zealand is the Films, Videos, and Publications Classification Act 1993 as amended by the Films, Videos, and Publications Classification Amendment Act 2005 (hereinafter FVPCA). This Act contains a detailed definition of when a publication is objectionable.⁶⁵ When determining whether a publication is objectionable, a two-step process has to be undertaken.⁶⁶ First, it has to be asked whether the publication is objectionable under section 3(2) FVPCA. If the publication does not fulfil the requirements of section 3(2) FVPCA, it has to be examined as to whether it is objectionable within section 3(1), (3) and (4) FVPCA.

(a) Interpretation of section of the 3(2) of the FVPCA

Section 3(2) of the FVPCA reads:

A publication shall be deemed to be objectionable for the purposes of this Act if the publication promotes or supports, or tends to promote or support,—

- (a) the exploitation of children, or young persons, or both, for sexual purposes; or
- (b) the use of violence or coercion to compel any person to participate in, or submit to, sexual conduct; or
- (c) sexual conduct with or upon the body of a dead person; or
- (d) the use of urine or excrement in association with degrading or dehumanising conduct or sexual conduct; or

⁶³ Section 91 of the Films, Videos and Publications Classification Act 1993.

⁶⁴ Section 58 of the Films, Videos, and Publications Classification Act 1993.

⁶⁵ See section 3 of the Films, Videos, and Publications Classification Act 1993.

⁶⁶ *News Media Ltd. v Film and Literature Board of Review* [1997] 3 HRNZ 410.

- (e) bestiality; or
- (f) acts of torture or the infliction of extreme violence or extreme cruelty.

In *Moonen v Film and Literature Board of Review*⁶⁷ the Court of Appeal has interpreted section 3(2) of the FVPCA. In that decision the Court of Appeal concluded that the High Court (and the Board of Review) did not correctly apply the words “promotes or supports, or tends to promote or support” within section 3(2) of the FVPCA and had erred in law in their approach to the role of the Bill of Rights.⁶⁸ The starting point of this appeal was a decision by the OFLC and later by the FLBR, according to which some publications⁶⁹ of Mr. Moonen’s were classified as objectionable, because they were regarded as tending to promote the exploitation of young boys for sexual purposes.⁷⁰ Following an appeal by Mr. Moonen the High Court held that the FVPCA 1993 “prevailed over the Bill of Rights Act and that the interpretation provisions of section 6 did not arise”.⁷¹ The Court of Appeal said that the words “promotes or supports” must be given “such available meaning as impinges as little as possible on the freedom of expression” in order to be consistent with the Bill of Rights.⁷²

Section 5 of the BORA states that rights and freedoms ensured by the BORA are „subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”⁷³ Moreover, when interpreting the words of an enactment and when there is more than one possibility of interpretation, preference should be given to that interpretation which is consistent with the rights and freedoms ensured under the BORA.⁷⁴

⁶⁷ *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9.

⁶⁸ *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9.

⁶⁹ Among the publications were a book called “The Seventh Acolyte Reader” which contained stories describing sexual activities between men and young boys under the age of 16 and numerous photographs of naked children.

⁷⁰ Section 3(2)(a) of the Films, Videos, and Publications Classification Act.

⁷¹ *Moonen v Board of Literature Review* [1999] NZAR 324 (HC).

⁷² *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9.

⁷³ Section 5 of the New Zealand Bill of Rights Act 1990.

⁷⁴ Section 6 of the New Zealand Bill of Rights Act 1990.

As far as the words “promotes or supports or tends to promote or support”⁷⁵ are concerned the Court of Appeal found:⁷⁶

“Description and depiction of a prohibited activity do not of themselves necessarily amount to promotion of or support for that activity. There must be something about the way the prohibited activity is described, depicted or otherwise dealt with, which can fairly be said to have the effect of promoting or supporting that activity.”

In the decision about the computer game “Manhunt”⁷⁷ the OFLC considered the *Moonen*-approach⁷⁸ and stated that the game depicted acts of torture and the infliction of extreme violence as stated in section 3(2)(f) of the FVPCA, but that the mere depiction was not enough to assume that the game promoted, supported or tended to support or promote these acts.⁷⁹

(b) *Interpretation of section 3(1) of the FVPCA*

Section 3(1) of the FVPCA reads:

(1) For the purposes of this Act, a publication is objectionable if it describes, depicts, expresses, or otherwise deals with matters such as sex, horror, crime, cruelty, or violence in such a manner that the availability of the publication is likely to be injurious to the public good.

In *Living Word Distributors v Human Rights Action Group*⁸⁰ the Court of Appeal interpreted section 3(1) of the FVPCA and determined the extent of censorship powers. The publications in question in that case were two videos⁸¹ produced by religious organisations in the United States in 1989. In one of the videos entitled “Gay Rights/Special Rights: Inside the Homosexual Agenda” it is asserted

⁷⁵ Section 3(2) of the Films, Videos, and Publications Classification Act.

⁷⁶ *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9, para 29.

⁷⁷ OFLC *Manhunt* Decision No. 302023 (11 December 2003).

⁷⁸ The approach was also considered with the same result in OFLC *Driv3r* Decision No. 31804 (31 August 2004).

⁷⁹ OFLC *Manhunt* Decision No. 302023 (11 December 2003) 5.

⁸⁰ *Living Word Distributors Ltd v Human Rights Action Group Inc* (Wellington) [2000] 3 NZLR 570.

⁸¹ Gay Rights/Special Rights: Inside the Homosexual Agenda and AIDS: What you haven't been told.

that the pursuit of homosexuals or transgender people of equal rights is not justified. The other video named "AIDS: What you haven't been told" mainly claims that homosexual people are one of the causes of the spreading of HIV and AIDS. Both of the videos are provocative and tendentious⁸² and "reveal an abhorrence of what is called the 'homosexual lifestyle'."⁸³

The OFLC classified the videos as objectionable unless their availability is restricted to persons below eighteen years of age.⁸⁴ The Human Rights Action Group, which submitted the videos to the OFLC, appealed against that decision to the Board of Review seeking a complete ban on the videos. The Board of Review complied with the applicant's request and classified the videos as 'objectionable', because they tended to represent that a class of persons were inherently inferior by reason of a characteristic within section 3(3)(e) of the FVPCA, "which was a prohibited ground of discrimination under s 21(1) of the Human Rights Act 1993"⁸⁵.⁸⁶ The distributors appealed to the High Court, which upheld the Review Board's decision to ban the videos. The distributors finally appealed to the Court of Appeal.

The Court of Appeal said that the High Court as well as the Board of Review erred in law.⁸⁷ It held that a publication must deal with either sex, horror, crime, or violence in a matter likely to be injurious to the public good, in order to be objectionable. The subject matter of the FVCPA is therefore limited to the above-mentioned matters. Moreover, it was held that the category "sex" only refers to

⁸² *Living Word Distributors Ltd v Human Rights Action Group Inc* (Wellington) [2000] 3 NZLR 570, 572.

⁸³ *Living Word Distributors Ltd v Human Rights Action Group Inc* (Wellington) [2000] 3 NZLR 570, 588.

⁸⁴ *Living Word Distributors Ltd v Human Rights Action Group Inc* (Wellington) [2000] 3 NZLR 570, 572.

⁸⁵ Section 21(1) of the Human Rights Act 1993 prohibits the discrimination of people on the grounds of, amongst others, sex, which includes pregnancy and childbirth; and sexual orientation, which means a heterosexual, homosexual, lesbian or bisexual orientation; and disability, which means the presence in the body of organisms capable of causing illness.

⁸⁶ Board of Review decision, 4 HRNZ 422, *Living Word Distributors Ltd v Human Rights Action Group Inc* (Wellington) [2000] 3 NZLR 570, 570.

⁸⁷ *Living Word Distributors Ltd v Human Rights Action Group Inc* (Wellington) [2000] 3 NZLR, 586.

activities and not to attitudes or sexual orientation.⁸⁸ Accordingly, publications dealing with people's sexual orientation do not fall in the category "sex".

An example of a publication that seems to pass through the gateway of all the matters enumerated in section 3(1) of the FVPCA is the computer game "Manhunt"⁸⁹ which contains sexual activities, "features many images, effects and characters readily associated with mainstream horror,"⁹⁰ and presents the main characters as criminals. A player wanting to win this game must brutally kill people and learn over an extended period of time to acquiesce in, tolerate, or even enjoy, the violence he or she inflicts.⁹¹ Thus, the game was, in particular, regarded as containing matters such as cruelty and violence and it was, therefore, banned.⁹²

(c) *Factors within section 3(3) and (4) of the FVPCA*

When deciding whether a publication is objectionable within section 3(1) of the FVPCA, the classification officers have to take certain factors into account that are laid down in section 3(3) and (4) FVPCA.⁹³ Some of these factors relate to the protection of children. Section 3(3) FVPCA requires the classification officer to give particular weight:

[T]o the extent and degree to which, and the manner in which the publication –

- (a) Describes, depicts, or otherwise deals with -
 - (i) acts of torture, the infliction of serious physical harm, or acts of significant cruelty;
 - (ii) sexual violence or sexual coercion, or violence or coercion in association with sexual conduct;
 - (iii) other sexual or physical conduct of a degrading or dehumanising or demeaning nature;
 - (iv) sexual conduct with or by children, or young persons, or both:

⁸⁸ *Living Word Distributors Ltd v Human Rights Action Group Inc* (Wellington) [2000] 3 NZLR 570.

⁸⁹ OFLC *Manhunt* Decision No. 302023 (11 December 2003).

⁹⁰ OFLC *Manhunt* Decision No. 302023 (11 December 2003) 3.

⁹¹ OFLC *Manhunt* Decision No. 302023 (11 December 2003) 6.

⁹² OFLC *Manhunt* Decision No. 302023 (11 December 2003) 4.

⁹³ See Appendix No.2.

- (v) Physical conduct in which sexual satisfaction is derived from inflicting or suffering cruelty or pain;
- (b) exploits the nudity of children, or young persons, or both;
- (c) degrades or dehumanises or demeans any person;
- (d) promotes or encourages criminal acts or acts of terrorism
- (e) represents (whether directly or by implication) that members of any particular class of the public are inherently inferior to other members of the public by reason of any characteristic of members of that class, being a characteristic that is a prohibited ground of discrimination specified in section 21(1) of the Human Rights Act 1993.

Moreover, section 3(4) FVPCA lays down further matters that need to be considered in the classification decision. These matters are:⁹⁴

- (a) the dominant effect of the publication as a whole;
- (b) the impact of the medium in which the publication is presented
- (c) the character of the publication, including any merit, value, or importance that the publication has in relation to literacy, artistic, social, cultural, educational, scientific, or other matters;
- (d) the persons, classes of persons, or age groups of the persons to whom the publication is intended or is likely to be made available;
- (e) the purpose for which the publication is intended to be used;
- (f) any other relevant circumstances relating to the intended or likely use of the publication.

2 *Consideration of Factors*

(a) Section 3(3)(a) of the FVPCA

The extent and degree to which and the manner in which publications depict or describe acts of torture, the infliction of serious physical harm, or acts of significant cruelty within section 3(3)(a)(i) of the FVPCA is an important factor in numerous classification decisions.⁹⁵ So, when classifying publications it is often decisive how violence is depicted.

⁹⁴ Section 3(4) of the Films, Video, and Publications Classification Act.

⁹⁵ OFLC *Man on Fire* Decision No. 400690 (25 May 2004); OFLC *Head in the Clouds* Decision No. 401689 (21 October 2004); OFLC *House of Sand and Fog* Decision No. 400259 (10 March 2004); OFLC *Mortal Kombat Deadly Alliance* Decision No. 300085 (5 February 2003); OFLC *Kingdom of Heaven* Decision No. 500671 (2 May 2005) OFLC *Gore Ultimate Soldier* Decision No. 201214 (22 August 2002); OFLC *Fahrenheit* Decision No. 501380 (3 August 2005); OFLC *Exorcist: The*

For instance, in the decision about the film "House of Wax",⁹⁶ the OFLC found the film contained numerous depictions of acts of horrific cruelty and violence. They stressed the fact that the violence elements were often over-the-top and presented excessively.⁹⁷ Thus, they found the depictions of violence distressed and injured children and impressionable young persons below the age of 16 years, whereas older children were regarded as more likely being familiar with the "genre conventions".⁹⁸

Likewise, the criterion for classifying "The Passion of the Christ" was section 3(3)(a)(i) of the FVPCA, as the OFLC regarded it to be dominated by the presentation of extensive and intense violence, cruelty and torture.⁹⁹ Also, when deciding the classification of the computer game "Manhunt",¹⁰⁰ the classification officers concluded that violence was the focus of the game, because the player is "required to kill or execute a variety of opponents in order to proceed through the game."¹⁰¹ The classification officers banned the computer game because violence and cruelty are presented to a high degree and in a graphic and brutal manner.¹⁰²

In the decision about the film "King Arthur" the extent of the depiction of sexual violence in terms of section 3(3)(a)(ii) of the FVPCA was considered.¹⁰³ The

Beginning Decision No. 401760 (1 November 2004); OFLC *Blade II* Decision No. 201708 (7 November 2002); OFLC *Breed* Decision No. 400631 (14 May 2004); OFLC *Call of Duty* No. 301866 (5 November 2003); OFLC *Chaser* Decision No. 401836 (23 November 2004); OFLC *Cold Mountain* Decision No. 302169 (14 January 2004); OFLC *Dawn of the Dead* Decision No. 400718 (28 May 2004); OFLC *Dead to Rights* Decision No. 300075 (24 January 2003); OFLC *Def Jam: Fight for New York* (23 September 2004); OFLC *Doom 3* Decision No. 400887 (24 June 2004); OFLC *Far Cry* Decision No. 400357 (24 March 2004); OFLC *Elephant* Decision No. 400030 (30 January 2004); OFLC *Backyard Wrestling 2: There Goes the Neighbourhood* Decision No. 401747 (24 November 2004); and OFLC *Driv3r* Decision No. 401148 (31 August 2004).

⁹⁶ OFLC *House of Wax* Decision No. 500951 (16 June 2005).

⁹⁷ OFLC *House of Wax* Decision No. 500951 (16 June 2005) 2.

⁹⁸ OFLC *House of Wax* Decision No. 500951 (16 June 2005) 2.

⁹⁹ OFLC *The Passion of the Christ* Decision No. 400212 (20 February 2004).

¹⁰⁰ OFLC *Manhunt* Decision No. 302023 (11 December 2003).

¹⁰¹ OFLC *Manhunt* Decision No. 302023 (11 December 2003) 6.

¹⁰² OFLC *Manhunt* Decision No. 302023 (11 December 2003) 6.

¹⁰³ OFLC *King Arthur* Decision No. 401069 (8 July 2004).

OFLC stated that the film contained one scene of sexual violence that, however, did not constitute the major theme of the film.¹⁰⁴

Likewise, in the review decision about the film "Saving Private Ryan"¹⁰⁵ section 3(3)(a)(i) of the FVPCA played a dominant role. The Board found the film contained many scenes, such as the beginning scene of the invasion of Omaha Beach, that fall under that section. However, the Board also considered the matters in section 3(4) of the FVPCA and classified the film as R15 due its educational merit.¹⁰⁶

(b) Section 3(3)(d) of the FVPCA

The extent and degree to which a publication promotes or encourages criminal acts within section 3(3)(d) of the FVPCA has been considered in the rating of various publications¹⁰⁷ such as the game "Driv3r".¹⁰⁸ The player of that game performs various missions, some of a criminal nature. The OFLC has seen the game to encourage and normalise crime because it presented criminal activities as amusing and entertaining.¹⁰⁹

The same factor was considered in the decision about the computer game "Grand Theft Auto 2".¹¹⁰ The game's extent of criminal activity is high, as the player can only win by performing various crimes. The OFLC, however, stated that the criminal activities were depicted unrealistic and real life acts were not encouraged.¹¹¹ Nevertheless, the OFLC also found that serious crimes, which constitute the sole component of the game, were normalised¹¹² and thus rated the game as R 18.

(c) Section 3(4) of the FVPCA

¹⁰⁴ OFLC *King Arthur* Decision No. 401069 (8 July 2004).

¹⁰⁵ FLBR *Saving Private Ryan* Decision 4/98 (10 December 1998).

¹⁰⁶ FLBR *Saving Private Ryan* Decision 4/98 (10 December 1998) 3.

¹⁰⁷ OFLC *Mafia* Decision No. 201414 (19 September 2002).

¹⁰⁸ OFLC *Driv3r* Decision No. 401148 (31 August 2004) 6.

¹⁰⁹ OFLC *Driv3r* Decision No. 401148 (31 August 2004) 7.

¹¹⁰ OFLC *Grand Theft Auto II* Decision No. 9902128 (2 February 2000) 2.

¹¹¹ OFLC *Grand Theft Auto II* Decision No. 9902128 (2 February 2000) 2.

¹¹² OFLC *Grand Theft Auto II* Decision No. 9902128 (2 February 2000) 2.

The dominant effect of the publication as whole within section 3(4)(a) of the FCVPA seems to play a role in various decisions of the OFLC.¹¹³ For instance, when rating the film "21 Grams"¹¹⁴ it was argued that its dominant effect "is of an engaging and complex, but somewhat bleak, drama exploring a number of themes and featuring a non-linear plot."¹¹⁵ The OFLC argued that this complexity of the film indicated an adult orientation and made it unsuitable for younger viewers.

In the decision about the film "Cold Mountain" the dominant effect was seen as an intense drama with many scenes containing sexual activities.¹¹⁶ According to the OFLC the sexual activities are "frankly conveyed and introduce children and young persons to concepts that they are not at a developmental stage to deal with."¹¹⁷

The "dominant effect" was also a decisive factor in the review decision of the film "Closer".¹¹⁸ Closer is an adult drama dealing with themes like love, sex, truth and deceit. The main characters often refer to sexual activities and body parts in a very explicit, and vulgar manner. The Classification Office classified the film as restricted to audiences below eighteen years of age, because the "language of four dysfunctional people who antagonise one another with sexual jealousy, mind-games and manipulation"¹¹⁹ would harm minors. The Distributor of the film, Sony Pictures, applying for a review, argued that the Classification Office's decision was inconsistent with the ratings the film received in other countries, "particularly those that can reasonably be compared with New Zealand." Throughout the world, the film has received classifications from restricted to persons below eighteen years of age to no age-restriction at all. Australia, for instance, rated 'Closer' 'MA' meaning those under fifteen years of age must be accompanied. In the UK, Norway and in Finland the film has been released for audiences as of fifteen years of age, whereas in

¹¹³ See for instance OFLC *Call of Duty* No. 301866 (5 November 2003); OFLC *Chaser* Decision No. 401836 (23 November 2004); OFLC *21 Grams* Decision No. 400019 (20 January 2004); OFLC *Cold Mountain* Decision No. 302169 (14 January 2004); OFLC *Doom 3* Decision No. 400887 (24 June 2004)

¹¹⁴ OFLC *21 Grams* Decision No. 400019 (20 January 2004) 3.

¹¹⁵ OFLC *21 Grams* Decision No. 400019 (20 January 2004).

¹¹⁶ OFLC *Cold Mountain* Decision No. 302169 (14 January 2004) 3.

¹¹⁷ OFLC *Cold Mountain* Decision No. 302169 (14 January 2004) 3.

¹¹⁸ Decision by the FLBR *Closer* (11 February 2005).

¹¹⁹ Decision by the FLBR *Closer* (11 February 2005).

Germany and the Netherlands people from the age of twelve were allowed to see the film. The Italian censors have even decided that the film did not require an age-restriction at all.

Moreover, the applicant argued that an R 18 rating would convey a wrong picture of the nature of the film to the potential viewers and would prevent people from seeing it.¹²⁰

The Board of Review found that due to the vulgar language and the few violent scenes, the film passed through the gateway of 'sex' and 'violence' within section 3(1) FVCPA.¹²¹ Furthermore, it said that in order to protect minors without undermining freedom of expression, a restriction to persons below sixteen years of age is sufficient to prevent an injury to the public good. Having taken the dominant effect of the film within section 3(4) FVCPA into account, the Board concluded that sex or sexualised language did not have such a dominant effect. Furthermore, the Board considered the persons, or age groups of persons to whom the film was intended to be shown. The Board said that the film was aimed at an adult-audience, as it deals with serious themes, has long conversations and lacks action scenes. However, the Board also acknowledged that the legal age for consent to sexual activity is sixteen years. It therefore found the film already suitable for 16-year old people.¹²²

3 *Objectionable publications according to section 3(2) of the FVPCA*

Due to the Court of Appeal's holding in *Moonen v Film and Literature Board of Review*¹²³ classification officers interpret section 3(2) of the FVPCA very narrowly

¹²⁰ Decision by the FLBR *Closer* (11 February 2005).

¹²¹ Decision by the FLBR *Closer* (11 February 2005).

¹²² Decision by the FLBR *Closer* (11 February 2005).

¹²³ *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9.

and therefore often state that the requirements of section 3(2) of the FVPCA are not fulfilled.¹²⁴

In *Society for the Promotion of Community Standards Inc. v Film and Literature Board of Review*¹²⁵ the Society for the Promotion of Community Standards appealed to the High Court against the decision of the Board of Review concerning the film 'Visitor Q'. 'Visitor Q' is a satire on Japanese society and is described to feature drug use, murder, violence, necrophilia, incest and lactation.¹²⁶ The Review Board found the film objectionable within section 3(1) of the FVPCA except if the availability of the publication was limited for the purpose of study in a tertiary media or film studies course or as part of a film festival, and in all cases to persons who have attained the age of eighteen years. The Board concluded that the film did not fulfil the requirement of section 3(2) of the FVPCA. While dismissing the appeal, the High Court clarified that a publication should not be seen as tending to promote or support a specified activity "unless there was a real or material or substantial risk, as assessed by the expert classifying body, that it would do so".

4 Section 3A and 3B of the FVPCA

Due to the Films, Videos, and Publications Classification Amendment Act 2005 publications can now be age-restricted if they contain highly offensive language likely to cause serious harm.¹²⁷ Likewise, publications may be age-restricted if they are likely to be injurious to public good for specific reasons.¹²⁸ These specific reasons exist when publications deal with harm to a person's body or self-inflicted death;¹²⁹

¹²⁴ OFLC *Mortal Kombat Deadly Alliance* Decision No. 300085 (5 February 2003); OFLC *Kingdom of Heaven* Decision No. 500671 (2 May 2005) OFLC *Gore Ultimate Soldier* Decision No. 201214 (22 August 2002); OFLC *Fahrenheit* Decision No. 501380 (3 August 2005); OFLC *Exorcist: The Beginning* Decision No. 401760 (1 November 2004); OFLC *Blade II* Decision No. 201708 (7 November 2002).

¹²⁵ *Society for the Promotion of Community Standards Inc. v Film and Literature Board of Review* [2005] BCL 658, Court of Appeal.

¹²⁶ Decision of the Board of Review, 3/2002, No 8, 1 November 2002; Cinema festival under fire over sex film" (17 March 2005) New Zealand Herald.

¹²⁷ See section 3A of the Films, Videos, and Publications Act.

¹²⁸ See section 3B of the Films, Videos, and Publications Act.

¹²⁹ Section 3B(a)(i) of the Films, Videos, and Publications Act.

conduct that, if imitated, would pose a real risk of serious harm to self or others;¹³⁰ physical conduct of a degrading or dehumanising or demeaning nature.¹³¹ Section 3B(4) of the FVPCA states the reasons for these restrictions, which are:

that the general levels of emotional and intellectual development and maturity of persons under the specified age mean that the availability of the publication to those persons would be likely to

- (a) cause them to be greatly disturbed or shocked; or
- (b) increase significantly the risk of them killing, or causing serious harm, to themselves, others or both; or
- (c) encourage them to treat or regard themselves, others, or both, as degraded or dehumanised or demeaned.

IV LEGAL POSITION IN GERMANY

A *Countervailing Values*

Article 2 of the German Basic Law guarantees everybody the right to free development of his or her personality. As far as minors are concerned this provision also means, that they have to be protected from those media items that can negatively impact on their social-ethical development.¹³² This is not only the task of the parents or legal guardians but also of the State, because Germany is a social federal state.¹³³ Media-related protection of minors can, however, restrain certain rights such as freedom of expression, information, press, broadcasting, and films. In Germany, these rights are guaranteed under section 5(1) BL which reads:¹³⁴

Every person shall have the right freely to express and disseminate his opinions in speech, writing, and pictures and to inform himself without hindrance from generally accessible sources. Freedom of the press and freedom of reporting by means of broadcasts and films shall be guaranteed.

¹³⁰ Section 3B(a)(ii) of the Films, Videos, and Publications Act.

¹³¹ Section 3B(a)(iii) of the Films, Videos, and Publications Act.

¹³² Ingeborg Becker-Textor *Mediale Gewalt – Eine reale Bedrohung für Kinder?* (AJZ Druck & Verlag, Bielefeld 2000) 208.

¹³³ Article 20(1) of the Basic Law reads: The Federal Republic of Germany is a democratic and social federal state.

¹³⁴ See Appendix 3.

The rights guaranteed in section 5(1) BL are also known as “freedom of communication”¹³⁵ and are deemed pivotal and indispensable for a liberal democracy.

The above-mentioned rights can be limited by the “provisions for the protection of young persons”¹³⁶. However, the statutory provisions to protect young persons need to be balanced against the basic rights ensured in section 5(1) BL.¹³⁷ Only if protection of young persons prevails according to this balancing act, can adult’s freedom of communication be restrained.¹³⁸

Section 5(1)(3) BL states that “there shall be no censorship”.¹³⁹ This means that any law providing for censorship violates section 5(1)(3) BL and is, thus, unconstitutional. The prohibition of censorship, however, only refers to pre-censorship. Censorship constitutes “every restraining measure before the creation or dissemination of an intellectual work, especially the submission of the work to state authorities for approval of its content”.¹⁴⁰ The reason for the prohibition of pre-censorship is to avert the typical dangers associated with a preventive control, namely the fear of paralysing intellectual freedom.¹⁴¹

B Different Statutes Dealing with Media-related Protection of Minors

In recent years, the media-related protection of young persons has been extended and improved in Germany. Statutes dealing with media protection of young persons are, for instance, the Criminal Code (Strafgesetzbuch), the Inter-State Agreement on the Protection of Youth in the Media (Jugendmedienstaatsvertrag)¹⁴²

¹³⁵ Nigel Foster and Satish Sule *German Legal System and Laws* (3ed, Oxford University Press, 2002) 224.

¹³⁶ Section 5(2) BL.

¹³⁷ Rudolf Doleze *Bonner Kommentar zum Grundgesetz* (Heidelberg, Loseblattsammlung, Stand: 2005), 123.

¹³⁸ Ingo von Münch *Grundgesetz Kommentar Band 1* (Beck Verlag, Isensee-Kirchhof, 1974) 224.

¹³⁹ Section 5(3) of the German Basic Law.

¹⁴⁰ Federal Constitutional Court, BVerfGE 33, 52, 72.

¹⁴¹ Petra Meier, assistant chairwoman of the BPjM “Jugendschutz und Indizierungspraxis – Die Aufgaben der Bundesprüfstelle” (2005, Speech at the University of Hamburg, Hamburg, 9 March 2005).

¹⁴² The Inter-State Agreement came into force on 1 April 2003 and its task is the uniform protection of minors in all the federal states with regard to contents in electronic information- and communication media, which harm the development of minors.

and the Act to Protect Young Persons (Jugendschutzgesetz). Germany is deemed to have the most extensive, but at the same time most confusing, regulations protecting minors in the world.¹⁴³

C Different Authorities Dealing with Media-related Protection of Minors

There are numerous different bodies dealing with protection of minors with regard to different types of media in Germany. The bodies relevant for the purposes of this research paper are, first, the Film Industry Body for Voluntary Self-control (Freiwillige Selbstkontrolle der Filmwirtschaft) that deals solely with the classification of films. Secondly, there is the Entertainment Software Body for Voluntary Self-Control (Unterhaltungssoftware Selbstkontrolle), which is responsible for the classification of computer games. Finally, there is the Federal Department for Media Harmful to Young Persons (Bundesprüfstelle für jugendgefährdende Medien), whose task is to ban objectionable media items.

1 The film industry body for voluntary self-control (FSK)

The film industry body for voluntary self-control (hereinafter FSK) is assigned to the "Spitzenorganisation der Filmwirtschaft"¹⁴⁴ (hereinafter SPIO), which is a merger of the associations of the film producers, film distributors, and cinema owners.¹⁴⁵ The SPIO, however, does not have any influence with regard to the work and the decisions of the FSK.¹⁴⁶

The FSK carries out voluntary controls for films, videocassettes, and other picture carriers such as DVDs,¹⁴⁷ which are provided for public showing or dissemination in Germany.¹⁴⁸ According to its principles, the FSK decides the rating

¹⁴³ Joachim von Gottberg "Wie funktioniert der Jugendschutz in Deutschland?" (1997) 2 tv diskurs, 12.

¹⁴⁴ Top organisations of the German film industry.

¹⁴⁵ Section 1(1) of the FSK principles.

¹⁴⁶ Linda Janssen "Die freiwillige Selbstkontrolle der Filmwirtschaft", 1.

¹⁴⁷ Television including pay television is dealt with by other organisations such as the Commission for Protection of Minors (KJM) and the body for voluntary self-control for television (FSF).

¹⁴⁸ Section 1(1) of the FSK principles.

for specific age groups. The Protection of Young Persons Act,¹⁴⁹ as well as the FSK principles¹⁵⁰ form the legal basis for the activities of the FSK. The FSK principles mainly comprise regulations concerning the proceedings, structure and organisation of the FSK as well as rating criteria. The objective of the principles is to effectively enforce freedom of expression, information, and arts, while balancing other basic rights such as the minors' freedom from bodily, mental and psychological harm.¹⁵¹

(a) Development of the FSK

The FSK was founded by the film industry after the Second World War in 1949. The aim of the film industry's associations was to render official intervention and state regulation unnecessary.¹⁵² Furthermore, the reasoning behind the formation of the FSK was that censorship should not be done by the occupying powers anymore, but rather by the film industry itself, namely by people who were not involved with the Nazi regime, and were, thus, acceptable to the occupying powers. The core reason for checking films at that time was the fear that National Socialists' ideas could be disseminated via feature films. However, the protection of young persons soon came to the foreground as an issue for the control body.

The FSK is an institution organised under private law and, due to its financing by the applicants' fees, economically autonomous.¹⁵³ The rating decisions by the FSK are accepted by the federal states of Germany as their own decisions.¹⁵⁴

(b) Structure and organisation of the FSK

There are over 190 people working voluntarily for the FSK. The examiners are appointed¹⁵⁵ for three years and have different social backgrounds and

¹⁴⁹ See Appendix No 5.

¹⁵⁰ FSK principles are available in German only at >http://www.spio.de/media_content/422.pdf< (last accessed 30 September 2005).

¹⁵¹ Section 2(1) of the FSK principles.

¹⁵² For the development of the FSK see: ><http://www.spio.de/index.asp?SeitID=16>< (last accessed: 30 September 2005)

¹⁵³ See section 2(4) of the FSK principles.

¹⁵⁴ See section 12(1) and section 14(6) of the Protection of Young Persons Act.

¹⁵⁵ The members are partly appointed by film and video industry and by public authorities.

professions.¹⁵⁶ Many of them have experience with working with children and young persons. The pluralistic formation of the working commissions is supposed to achieve a preferably wide spectrum of assessment for the decisions to be made.¹⁵⁷ The examiners are independent and not bound to any instructions.¹⁵⁸

There are three parallel 'working commissions', each consisting of seven examiners: the chairperson (a full representative of the film- and video-industry), three members of the film- and video-industry, two members appointed by the government as well as one expert on the protection of minors.¹⁵⁹

(c) Procedure of the FSK

The FSK acts upon a request.¹⁶⁰ If a film is supposed to be publicly shown or disseminated to persons below the age of eighteen years, it is statutorily mandatory¹⁶¹ that the film is provided with a release code. These release codes are only given by the FSK. Though there is no statutory duty to submit media to the FSK, the trade associations of the SPIO have obliged their members to only publicly offer those products checked by the FSK.¹⁶² Furthermore, media that have not been checked by the FSK can only be made available to adults. This is the reason why it makes no sense for a company to operate outside the system. Although no company is legally obliged to submit their products to the FSK, these products could only be sold to persons who are at least eighteen years of age. So, companies have to weigh up if they would rather submit their products to the FSK or do without the consumers below the age of eighteen years. Also, if the companies are members of the SPIO and

¹⁵⁶ Among them are journalists, teachers, psychologists, media scientists, students, social workers, housewives, and judges.

¹⁵⁷ Section 2(2) of the FSK principles.

¹⁵⁸ Section 7(1) of the FSK principles.

¹⁵⁹ Section 5(2) No 1 of the FSK principles.

¹⁶⁰ Section 9(1) of the FSK principles.

¹⁶¹ Section 12(1) of the Protection of Young Persons Act.

¹⁶² Section 1(2) No 1 and 2 of the FSK-principles.

do not comply with the obligation (imposed by the SPIO) to submit films to the FSK, there are sanctions within the organisation.¹⁶³

If an applicant requests a release code for a specific age group for a film, the examiners of the FSK have three possibilities to act: they can comply with the request without limitation, they can impose conditions such as cuts or changes to the film, or they can dismiss the request.¹⁶⁴ The applicant has the choice to carry out the conditions and, for instance, cut scenes out of the film, or to accept a stricter release code.

The examinations consist of hearing, discussion and resolution and are not open to the public.¹⁶⁵ The discussions in the commissions are confidential as well as the voting results.¹⁶⁶ The commissions decide by the majority of votes.¹⁶⁷ In the case of a tied vote, the application is regarded as dismissed. An abstention is not admissible.¹⁶⁸

Films that might potentially impair the development and education of children and adolescents shall not be released¹⁶⁹ for that age group.¹⁷⁰ This impairment refers to an assumed potential effect of the film.¹⁷¹ The FSK principles set out certain guidelines that have to be adhered to by the examiners:¹⁷²

1. All impairments that arise from a film have to be considered. In doing so the whole effect of the film has to be taken into account.
2. Likely to impair the development and education of children and adolescents are, in particular, films that overstrain nerves; cause excessive strain; excessively excite fantasy; inhibit or harm the character, moral (including

¹⁶³ Section 1(3) of the FSK-principles.

¹⁶⁴ Section 12(1) of the FSK principles.

¹⁶⁵ Section 9(3) of the FSK principles.

¹⁶⁶ Section 7(1) of the FSK principles.

¹⁶⁷ Section 7(7) of the FSK principles.

¹⁶⁸ Section 7(7) of the FSK principles.

¹⁶⁹ Release codes include: released for general audience, without age restriction; released for audiences as of six years of age; released for audiences as of twelve years of age; released for audiences as of 16 years of age; and restricted to audiences below 18 years of age.

¹⁷⁰ Section 14(1) of the Protection of Young Persons Act and section 18(1) of the FSK principles.

¹⁷¹ See Labelling of films by the FSK ><http://www.spio-fsk.de>< (last accessed 30 September 2005).

¹⁷² Section 18(2) of the FSK principles.

religious) or mental education and lead to detrimental expectancies towards life.

3. A film can only be released for a specific age group, if it cannot impair the development or education of any person of that age group. When doing so, it does not only have to be geared to average minors, but also to those inclined to endangering. Only extreme cases are to be exempt.

Severely youth-endangering films such as films that glorify the war are not rated.¹⁷³ The film is then treated as being rated as R 18. The BPjM, however, can index this film.

So, when the FSK examines a film, it undertakes a three-steps test. First, the examiners have to find out whether the publication is included in the List of Publications Harmful to Young Persons. Secondly, the examiners determine whether the publication is severely harmful to young persons.¹⁷⁴ If these questions are answered in the negative, the third and final question is whether the film potentially impairs the development and education of children and adolescents of a certain age group.

The applicant as well as the overruled minority can apply to the main commission for a review of the decision.¹⁷⁵ In that case the decision cannot be altered to the appellant's detriment.¹⁷⁶ Finally, there is the possibility of an appeal to the appeal commission.¹⁷⁷ The federal states as well as the central associations of the film- and video-industry are entitled to appeal. The decisions of the appeal commission are final. The ratings of the FSK are valid, until a review is requested. This is only possible if the underlying circumstances have changed significantly or a considerably altered version of the film is submitted.¹⁷⁸

¹⁷³ Section 14(3) of the Protection of Young Persons Act.

¹⁷⁴ Section 14(3) of the Protection of Young Persons Act.

¹⁷⁵ Section 5(1) and 13 of the FSK principles.

¹⁷⁶ Section 14(3) of the FSK principles.

¹⁷⁷ Section 5(1) of the FSK principles.

¹⁷⁸ Section 16(1) of the FSK principles.

(d) Decisions by the FSK

The main task of the FSK is to examine, whether a film potentially impairs the development and education of children and adolescents of a certain age group. When doing so, the classification officers have to consider the effect of the whole film.¹⁷⁹ Moreover, the examination of a film must not be carried out on the basis of taste, or personal view.¹⁸⁰ Although, the FSK looks at each film individually, the decisions sometimes seem to have certain patterns:

(i) Possibility of identification

One consideration that is often made by the classification officers is whether minors watching a particular film would be likely to identify with the characters and their behaviour. In a second step, it is asked whether the plot is likely to cause an imitation of the action.

The film "Closer"¹⁸¹, for instance, was given an R 12 classification on the ground that the film was not likely to encourage young persons to identify with the characters, as there were "no fascinating elements in the film for persons as of twelve years of age".¹⁸² Likewise, when rating the film "Monster" it was argued that the main protagonist, a female serial killer, was not stylised into a heroine and there were no possibilities of identifying with her, although she was also depicted as a victim.¹⁸³

The classification officers of the film "Resident Evil: Apocalypse" could not agree on whether the lack of a story and the stringing together of violent scenes would prevent minors from identifying with the protagonists or whether exactly the opposite was true and minors would be disorientated.¹⁸⁴

¹⁷⁹ Section 2(3) of the FSK-principles.

¹⁸⁰ Section 2(3) of the FSK-principles.

¹⁸¹ FSK rating of the film "Closer" Decision No. 100 924/K (13 December 2004).

¹⁸² FSK rating of the film "Closer" Decision No. 100 924/K (13 December 2004) 2.

¹⁸³ FSK rating of the film "Monster" Decision No. 97 507/K (26 March 2004) 2.

¹⁸⁴ FSK rating of the film "Resident Evil: Apocalypse" Decision No 99 247/K (23 August 2004) 2.

(ii) Exaggeration

Another factor that the classification officers often appear to take into account is whether a particular scene is depicted exaggeratedly. To put it in other words, if children or young persons seem to be able to perfectly distinguish between reality and fiction, they are less likely to be harmed by such a media item. For instance, in the decision about the film "Soul Plane",¹⁸⁵ the FSK argued that although the film contained vulgar language and lewdness remarks, the whole context of the film was "crazy and exaggerated" and, thus, seemed artificial.¹⁸⁶ So, the FSK felt that the film could be released for persons above twelve years of age.

Another example is the film "Gothika" which was rated as R 16, despite the depictions of violence and the dark atmosphere, because it was argued that 16 year olds would be capable of interpreting the incidents as a fictive story.¹⁸⁷

(iv) Voyeuristic approach

In many decisions of the FSK¹⁸⁸, the classification officers analyse whether a particular subject is depicted in a voyeuristic manner. In the decision about the film "Kinsey"¹⁸⁹ which is about a sexologist living at the end of the 19th century, the FSK argued that the many explicit sex scenes are not depicted in a voyeuristic manner. The film's subject, namely sexology, was rather cautiously introduced.

(v) Comprehensibility of the plot

Many decisions refer to whether the film's plot is easily comprehensible for minors. When rating the film "King Arthur" as R 12, it was geared at the comprehensibility of the incidents, which were, thus, easily to assimilate.¹⁹⁰ Likewise,

¹⁸⁵ FSK rating of the film "Soul Plane" Decision No. 100 056/K (19 October 2004).

¹⁸⁶ FSK rating of the film "Soul Plane" Decision No. 100 056/K (19 October 2004) 1.

¹⁸⁷ FSK rating of the film "Gothika" Decision No. 96 828/K (3 February 2004) 2.

¹⁸⁸ FSK rating of the film "Kinsey" Decision No. 101 015/K (21 December 2004); FSK rating of the film "House of Sand and Fog" Decision No. 101 444/K (7 February 2005).

¹⁸⁹ FSK rating of the film "Kinsey" Decision No. 101 015/K (21 December 2004).

¹⁹⁰ FSK rating of the film "King Arthur" Decision No. 98 729/K (13 July 2004) 2.

the reason for not releasing the film "9 Songs" for audiences below 16 years of age, was that the plot would not be comprehensible to this age group.¹⁹¹

When rating the film "21 grams" the question, whether the film's plot was comprehensible for minors as of twelve years of age or could emotionally ask too much of them, was disputed.¹⁹² While some of the classification officers found the film to be unsuitable for viewers as of twelve years of age, the majority of them argued that the complexity of the film was exactly the reason why minors would not be so emotionally involved in the incidents.¹⁹³

A similar criterion like "comprehensibility of the plot" seems to be whether a situation is communicable to minors. Thus, the reason, why the film "House of Sand and Fog"¹⁹⁴ was already released for persons above twelve years of age, was that the situations depicted were not communicable to younger viewers.

(vii) Target group

Another factor often taken into account is the film's target group. The film "My Summer of Love"¹⁹⁵ was regarded as not being aimed at minors and therefore as not appealing to them. The same is true for the decision about the film "Closer",¹⁹⁶ in which the examiners argued that the vulgar language of the film seemed rather dissociated and adult-orientated. In both decisions, the fact that the film was aimed at an adult audience was a reason for releasing it to audiences above twelve years of age, as children between 12-18 years would not be interested in the questionable scenes.

¹⁹¹ FSK rating of the film "9 Songs" Decision No 101 086/K (30 December 2004) 2.

¹⁹² FSK rating of the film "21 Grams" Decision No 96 389/K (12 December 2003) 2.

¹⁹³ FSK rating of the film "21 Grams" Decision No 96 389/K (12 December 2003) 2.

¹⁹⁴ FSK rating of the film "House of Sand and Fog" Decision No. 101 444/K (7 February 2005).

¹⁹⁵ FSK rating of the film "My Summer of Love" Decision No. 102 777/K (20 June 2005).

¹⁹⁶ FSK rating for the film "Closer" Decision No. 100 924/K (13 December 2004).

(viii) Signification of scenes depicting sex or violence

In some decisions the significance and background of depicting scenes containing sexual acts or violence is emphasised. For example, the examiners of the film "My Summer of Love" found the scenes depicting sexuality and drug consumption necessary for the film's dramaturgy and authenticity.¹⁹⁷ In the film "Thirteen", the fact, that the drug consumption of two teenage girls was shown in a deterrent rather than a glamorising way, justified an R 12 classification.¹⁹⁸ The deterrence effect was also stressed when deciding the rating of the film "Saving Private Ryan". Despite the very violent and cruel scenes especially at the beginning of the film, the examiners found that it did not have a brutalising effect and that the message of the film directed against the inhumanity of every war became very clear, because the cruelty of war is shown in a frightening manner.

(ix) How is violence depicted?

Finally, many decisions are based on the criteria how violence is depicted. The examiners ask, for instance, whether or not violence is depicted as an end in itself. When rating the film "King Arthur" this was answered in the negative and contributed to the film's R 12 classification.¹⁹⁹ The same applies for the film "Exorcist – The Beginning", which did not receive a stricter rating than R 16, because the existing depictions of violence were not shown as an end in itself but in order to intensify the suspense.²⁰⁰

The decisive factor when rating the film "Resident Evil: Apocalypse" was the manner in which the violent scenes were illustrated.²⁰¹ It was concluded that the requested classification of R 16 could not be given, as "the determined factor for the film's effect was not the story itself, but the presentation of action, violence, and

¹⁹⁷ FSK rating of the film "My Summer of Love" Decision No. 102 777/K (20 June 2005) 2.

¹⁹⁸ FSK rating of the film "Thirteen" Decision No. 95 034/K (25 August 2003) 2.

¹⁹⁹ FSK rating of the film "King Arthur" Decision No. 98 729/K (13 July 2004) 2.

²⁰⁰ FSK rating of the film "Exorcist – the Beginning" Decision No. 99 530/K (14 September 2004) 2.

²⁰¹ FSK rating of the film "Resident Evil: Apocalypse" Decision No. 99 247/K (23 August 2004) 1.

killing.”²⁰² In the review decision of “Resident Evil: Apocalypse” it was stressed that numerous killings were not shown in a typical manner for the genre “action- and zombie-film”, but rather in a cynical, malicious and serious way.²⁰³ Likewise, in the review decision of “Resident Evil: Apocalypse – cut version” it was emphasised that the acts of violence evoked feelings such as malicious joy and delight in destruction which could lead minors to become dull and disorientated.²⁰⁴

Also, the main criteria for rating the film “Sin City” as R 18 was that violence was depicted as an end in itself and “the imaginativeness of injuring, mutilating and killing of people”²⁰⁵ seemed to be unlimited in that film.

Though the classification officers of the film “Irreversible” found that violence was not shown as an end itself, they agreed that the film was nevertheless likely to have a disorientating effect on minors, because it gave the impression that the people involved sought satisfaction in acts of violence.²⁰⁶

In the decision about the film “House of 1000 corpses”, it was discussed whether the violence-, torture- and killing-scenes were embed in the genre “horror film” or whether they had the effect of straining minors. The classification officers agreed that during the last 25 minutes of the film the stylistic devices of the conventional horror genre were no longer applied²⁰⁷ and the depictions of violence and killings gained a new dimension in terms of graphicness.²⁰⁸ This new dimension of violence was the reason for not releasing the film to minors.²⁰⁹ The same aspect was decisive when rating the film “Kill Bill”: The film was seen as a complete cold-

²⁰² FSK rating of the film “Resident Evil: Apocalypse” Decision No. 99 247/K (23 August 2004) 2.

²⁰³ FSK rating of the film “Resident Evil: Apocalypse” Decision No. 99 247/K (1 September 2004) 2; FSK rating of the film “Resident Evil: Apocalypse – cut version” Decision No. 99 247/K (8 September 2004) 2.

²⁰⁴ FSK rating of the film “Resident Evil: Apocalypse - cut version” Decision No. 99 247-a/K (9 September 2004) 2.

²⁰⁵ FSK rating of the film “Sin City” Decision No. 102 463/K (17 May 2005) 2.

²⁰⁶ FSK rating of the film “Irreversible” Decision No. 94 976/K (18 August 2003) 2.

²⁰⁷ The same was argued in the Decision of the film “Dawn of the Dead” Decision No. 97 342/K (15 March 2004) and in the Review Decision of “Dawn of the Dead” Decision No. 97 342/K (24 March 2004).

²⁰⁸ FSK rating of the film “House of 1000 Corpses” Decision No. 96 421/K (16 December 2003) 2.

²⁰⁹ FSK rating of the film “House of 1000 Corpses” Decision No. 96 421/K (16 December 2003) 2.

blooded and unemotional revenge- and killing-orgy in which the scenes of violence were depicted down to the last detail and set a new benchmark in terms of graphicness.²¹⁰

In the classification of the film "The Passion of Christ" the examiners found important that the story about the passion of the Christ was depicted authentically, as it closely orientated to the literal traditions of the four gospels.²¹¹ However, it was concluded that minors under the age of sixteen could not cope with this film, as the Christ's suffering, especially the whipping and crucifixion, is depicted very graphically and intensively and reach an extent resulting in horror about the cruelties.²¹²

2 *The entertainment-software body for voluntary self-control (USK)*

The entertainment-software body for voluntary self-control (USK) was established in 1994 and is concerned with assigning age ratings to computer- and videogames.²¹³ Since the implementation of the Act to Protect Young Persons 2003 age ratings are obligatory and have to be visibly printed on the computer- or video game as well as on the data carrier itself. Likewise with films, it is an offence for anyone to allow a child access to a game for which he or she is underage. The structure and working procedure of the USK can be compared to the one of the FSK. The USK uses the same release codes²¹⁴ as the FSK.

The classification officers²¹⁵ are independent and are not allowed to work in the hard- or software industry. They are often pedagogues, journalists or social scientists, who have experience in the work with children and young persons.

²¹⁰ FSK rating of the film "Kill Bill" Decision No. 95 526/K (9 October 2003) 2-3.

²¹¹ FSK rating of the film "The Passion of Christ" Decision No. 97 225/K (4 March 2004), 2.

²¹² FSK rating of the film "The Passion of Christ" Decision No. 97 225/K (4 March 2004), 2.

²¹³ See section 1(1) of the USK principles.

²¹⁴ Section 14(2) of the Protection of Young Persons Act: Unrestricted, released for audiences 6,12,16, restricted to persons over the age of 18.

²¹⁵ The classification officers are appointed by different public and private authorities enumerated in section 2(3) of the USK principles.

Producers of games can submit their products for a classification after having paid a certain fee. The classification officers of the USK deny the classification, if, for instance, the software constitutes a criminal offence or glorifies the war.²¹⁶ In these cases it is very likely that the BPjM will index the item.

The decisions of the USK are expert's reports that belong to the suppliers of the video and computer games. The contents of the decision can only be passed on to third persons, if the supplier consents.²¹⁷ However, the decisions generally include a restricted notice for passing their contents to third persons.²¹⁸

3 *Federal Department for Media Harmful to Young Persons*

The Federal Department for Media Harmful to Young Persons (hereinafter BPjM) came into existence on 14 May 1954 and is an official administrative authority of the German government. The Protection of Young Persons Act is the BPjM's legal basis. The function of the BPjM is to protect children and adolescents from any media that might contain harmful or dangerous contents. The BPjM monitors media items such as films, videos, DVDs, computer games, audio records, CDs, print media and Internet sites.²¹⁹ If these media types have a *severely* damaging impact on the development and education of children and adolescents and prevent them becoming responsible citizens, the BPjM can index them by including them in the List of Publications Harmful to Young Persons.²²⁰

²¹⁶ Section 12(5) of the USK principles.

²¹⁷ Section 6(3) of the USK examination rules, available at ><http://www.usk.de>< (last accessed 30 September 2005).

²¹⁸ Section 6(3) of the USK examination rules, available at ><http://www.usk.de>< (last accessed 30 September 2005).

²¹⁹ The BPjM can only index video and computer games if they have not been rated by the USK. Likewise, films and videos can only be put on the index if they have not been rated by the FSK.

²²⁰ Section 18(1) of the Protection of Young Persons Act.

(a) Structure and Organisation of the BPjM

The BPjM is a board of twelve representatives of different social organisations and is composed of the chairperson, eight assessors representing various groups, and three assessors from federal states.²²¹ The state governments nominate the federal state assessors. The other members represent various facets of society such as creative and performing arts, literature, book trade and publishing, school teaching, or churches.²²² They are recommended by the associations they belong to and then appointed by the Federal Ministry for Family, Senior Citizens, Women and Youth.²²³

If it is obvious that a media item is harmful to the moral development and education of minors, the Protection of Young Persons Act²²⁴ provides for a simplified procedure in which a decision on indexing can be taken by a committee of three.²²⁵

(b) Procedure of the BPjM

The BPjM can generally only take action if other administrative institutions such as the German Youth Welfare Departments file a complaint against an object.²²⁶ If an official request has been filed, the BPjM has a duty to act.²²⁷ If the board decides with a majority of two thirds of the members²²⁸ that the material is dangerous for young persons, it enters its name into the List of Publications Harmful to Young Persons. In the case of a simplified proceeding the decision has to be made unanimously by the three members.²²⁹

Section 15(2) of the Act to Protect Young Persons provides for certain media contents that are regarded as severely endangering even without being included in the

²²¹ Section 19(1) and (5) of the Protection of Young Persons Act.

²²² Section 19(2) of the Protection of Young Persons Act.

²²³ Section 19(2) of the Protection of Young Persons Act.

²²⁴ Section 23(1) of the Protection of Young Persons Act.

²²⁵ This committee then only consists of the chairperson of the BPjM and two members, one of them being a representative of the above-mentioned associations.

²²⁶ Section 21(1) and (2) of the Protection of Young Persons Act.

²²⁷ Section 21(1) of the Protection of Young Persons Act.

²²⁸ Section 19(6) of the Protection of Young Persons Act.

²²⁹ Section 23(1) of the Protection of Young Persons Act.

List of Media Harmful to Young Persons. Categories of these kind of publications include media carrying content glorifying war; media presenting minors in unnatural, sexually provocative physical postures; or media presenting in a disgraceful manner people who are dying or are exposed to severe physical or psychic suffering, although there is no public interest in such mode of reporting.²³⁰

The Federal Constitutional Court has held that it needs to be "obvious that these publications are likely to severely morally harm children and adolescents".²³¹ The criteria "obviousness" means that the severe youth endangering results from an "overall picture of the publication or particular striking details".²³²

Although the above-mentioned publications do not need to be indexed and the restrictions are valid irrespectively,²³³ the BPjM includes them in the List of Media Harmful to Young Persons due to reasons of clarification.

The distributor, publisher or owner of an indexed media item can appeal to an administrative court²³⁴ or he or she can remove the incriminating content and request a further examination.²³⁵ Given that the item is no longer harmful to minors, it has to be deleted from the list.

(c) Implications of indexing

If media items have been indexed, they are subject to numerous restrictions. First, an indexed item cannot be offered, given, or made accessible to children and young persons.²³⁶ Secondly, an indexed item cannot be displayed, put up or shown at a place that is accessible by children and young persons.²³⁷ Thirdly, the item cannot be offered or given to another in retail trade outside of the business premises or sold

²³⁰ See section 15(2) of the Protection of Young Persons Act for all categories.

²³¹ Federal Constitutional Court, BVerfGE 77, 346, 358.

²³² Federal Constitutional Court, BVerfGE 77, 346, 358.

²³³ Section 15(2) of the Protection of Young Persons Act.

²³⁴ Section 25(1) of the Protection of Young Persons Act.

²³⁵ The BPjM identifies the incriminating parts that lead to the indexing decision. Thus, the applicant knows which parts he or she needs to remove in order to have the publication in removed from the list.

²³⁶ Section 15(1) of the Protection of Young Persons Act.

²³⁷ Section 15(1) of the Protection of Young Persons Act.

via mail order.²³⁸ Fourthly, the list of indexed media items cannot be published for the purpose of business advertisement.²³⁹ Fifthly, in the case of business advertisement it is not allowed to refer to a pending indexation procedure.²⁴⁰ Sixthly, an indexed media item cannot be advertised.²⁴¹

It is an offence not to comply with these restrictions, which is punished by imprisonment or a fine.²⁴² Also, is a further punishable offence if media items carrying content defined in § 86, § 130, § 130a, § 131, § 184, § 184a, or § 184b of the German Criminal Code²⁴³ are involved. For instance, section 131 of the Criminal Code prohibits the dissemination of media that “describe cruel or otherwise inhuman acts of violence against human beings in a manner which expresses a glorification or rendering harmless of such acts of violence”. The objective of this provision is to stop especially the trade with depictions of extreme violence that are not only harming minors but are also injurious to the public good.²⁴⁴ Furthermore, section 184 of the Criminal Code prohibits the dissemination of pornographic material to persons under the age of eighteen years. Pornography²⁴⁵ cannot be sold via trade order or at kiosks, and cannot be shown in public theatres or broadcasted. Pornographic material relating to children, animals, and depictions of violence are subject to an absolute prohibition on production and dissemination.²⁴⁶ The possession of child pornography is criminal, likewise the handing of such material to minors. Apart from child pornography, parents do not commit an offence, if they possess or hand to minors material, that falls under section 131 or 184 Criminal Code.²⁴⁷

²³⁸ Section 15(1) of the Protection of Young Persons Act.

²³⁹ Section 15(1) of the Protection of Young Persons Act.

²⁴⁰ Section 15(1) of the Protection of Young Persons Act.

²⁴¹ Section 15(1) of the Protection of Young Persons Act.

²⁴² Section 27 of the Protection of Young Persons Act.

²⁴³ See Appendix No. 5 for the provisions of the Criminal Code.

²⁴⁴ Joachim von Gottberg “Wie funktioniert der Jugendschutz in Deutschland?” (1997) 2 tv diskurs, 12.

²⁴⁵ Pornography is defined as a presentation of sexuality that is not connected to any kind of psychologically motivated human relationship and which glorifies sexual satisfaction as the only reason for human existence, often accompanied by explicitly depicted genitals; Federal Constitutional Court, BVerfGE 83, 130.

²⁴⁶ Section 184(3) of the Criminal Code.

²⁴⁷ Joachim von Gottberg, see above n 244, 13.

Indexing does not result in a general ban, but is simply intended to prevent minors from coming into contact with potentially harmful media. All media items shall be deleted from the index, once the requirements for putting them on the list no longer exist.²⁴⁸ Otherwise the media items have to be deleted from the index after 25 years.²⁴⁹

(d) Indexing practice

Since taking up examination activity the BPjM has indexed on various grounds. It has been observed, that in the course of the years the complaints have shifted to publications containing violent material.²⁵⁰ Ever since its establishment the BPjM has indexed books that glorify the National Socialist regime, in order to prevent a right-wing extremist influence. Since 1991, the complaints are increasingly directed to an indexation of right-wing extremist and pornographic material.²⁵¹ Furthermore, the BPjM has to deal with numerous complaints about brutal video films and computer games glorifying war.²⁵²

(e) Harmful material that is likely to be included in the list

According to section 18(1) of the Protection of Young Persons Act all media items, which "might have a severely damaging impact on the development and education of children and adolescents to responsible personalities in society" can be included in the List of Publications Harmful to Young Persons. Thus, the Protection of Young Persons Act leaves a wide scope for subjective evaluation. The Act enumerates some examples of contents with a severely damaging impact such as "media and other publications with immoral and brutalising content or those

²⁴⁸ Section 18(7) of the Protection of Young Persons Act.

²⁴⁹ Section 18(7) of the Protection of Young Persons Act.

²⁵⁰ History about the BPjM, available at: ><http://www.bundespruefstelle.de/bpjm/Die-Bundespruefstelle/geschichte.html>< (last accessed: 30 September 2005).

²⁵¹ History about the BPjM, available at: ><http://www.bundespruefstelle.de/bpjm/Die-Bundespruefstelle/geschichte.html>< (last accessed: 30 September 2005).

²⁵² History about the BPjM, available at: ><http://www.bundespruefstelle.de/bpjm/Die-Bundespruefstelle/geschichte.html>< (last accessed: 30 September 2005).

instigating violence, crime and racism".²⁵³ The BPjM, however, can amend this catalogue by their decisions.²⁵⁴

(i) Depiction of violence

The BPjM is mostly concerned with representations of violence. In this area, it has indexed mainly videos and computer games. The BPjM has held media presentations of violence to have a coarsening and brutalizing effect in cases where violence is depicted in the grand style and in epic breadth; where violence is propagated as the prime means of conflict resolution; or where scenes of death and carnage are depicted in detail as ends in themselves.²⁵⁵ Further examples of media items causing a brutalizing effect is when the use of violence in the name of the law or in the services of an alleged good cause is portrayed as a simple matter of course and quite normal, although violence in truth negates law and order.

Media with immoral and brutalising content or that instigating violence or crime are generally considered harmful and dangerous.²⁵⁶ For instance, in 1986 the BPjM indexed the record "Der nette Mann" by the band "Böhse Onkelz", because of glorification of its brutalising content.²⁵⁷ One of the songs of the indexed record is the song "Der nette Mann"²⁵⁸ which contained lyrics like:

I fancy little children
dismembered and sliced
warm flesh, no matter from whom,
I want to have sex with everybody

²⁵³ Section 18(1) of the Protection of Young Persons Act.

²⁵⁴ Joachim von Gottberg, see above n 244, 14.

²⁵⁵ Bundesprüfstelle für jugendgefährdende Medien, Information about Protection of Minors, available at: ><http://www.bundespruefstelle.de/bmfsfj/generator/bpjm/Jugendmedienschutz/wegweiser-jugendmedienschutz>< (last accessed 30 September 2005).

²⁵⁶ Section 18(1) of the Protection of Young Persons Act.

²⁵⁷ BPjM, Examination No 371/86, Decision No 2638(V) (25 August 1986).

²⁵⁸ The original lyrics as published in BPjM, Examination No 371/86, Decision No 2638(V) (25 August 1986) are: Kleine Kinder hab ich gern zerstückelt und in Scheiben, warmes Fleisch, egal von wem, Ich will's mit allen treiben ob Tiere oder Menschen... blutbeschiert und mit großer Lust wühl ich in deinen Gebeinen. Komm mein Kleines, du sollst heut mein Opfer sein. Ich freu mich schon auf dein entsetztes Gesicht und die Angst in deinem Teint.

whether animal or human...

smearred with blood and with great lust

I am groping in your mortal remains

(...)

Come on, little girl, you will be my victim today

I am already looking forward to your horror-stricken face

and the fear in your complexion

The BPjM found this song not only depicted cruelties, but also preached a cold and callous attitude towards little children.²⁵⁹ Furthermore, the song glorifies child abuse and preaches murder of children. The BPjM said that the song is likely to appeal to the baser human instincts and to invoke or intensify an unfeeling disposition with regard to the fate and suffering.²⁶⁰ Moreover, the perpetrating of severe crimes is glamorised and perverse slaughter of humans is depicted as ideal and worthy of imitating.²⁶¹ The BPjM indexed the song, because it feared that especially young people could be provoked to violent acts as a result of listening to it.²⁶²

(ii) Glorification of National Socialist ideology, racial hatred, glorification of war, playing down of war

The Protection of Young Persons Act does not expressly mention the propagation and glorification of National Socialist ideology as a reason for indexing a publication. However, as mentioned before, the BPjM can amend the catalogue of indexing reasons. Also, the Federal Administrative Court has held that "every publication that is hostile towards the German Constitution is disorientating to minors."²⁶³ Furthermore, the Federal Court of Justice has ruled that material is harmful to minors if it denies the killing of millions of people, in particular the systematic liquidation of Jews in the 'Third Reich'; or if an attempt is being made to rehabilitate and enhance²⁶⁴ the status of the National Socialist regime via false or

²⁵⁹ BPjM, Examination No 371/86, Decision No 2638(V) (25 August 1986) 6.

²⁶⁰ BPjM, Examination No 371/86, Decision No 2638(V) (25 August 1986) 6.

²⁶¹ BPjM, Examination No 371/86, Decision No 2638(V) (25 August 1986) 6.

²⁶² BPjM, Examination No 371/86, Decision No 2638(V) (25 August 1986) 6.

²⁶³ Federal Administrative Court [1987] NJW 1987, 1431, 1431.

²⁶⁴ Often Adolf Hitler and his accomplices are represented as models or tragic heroes.

incomplete information.²⁶⁵ Media are likewise harmful to minors if they support the radical doctrine of National Socialism, its “programme of popular education, and its preparation and waging for war”.²⁶⁶

The BPjM has held that war of a kind likely to endanger the young is glorified, when it is portrayed as attractive or as a possibility of acquiring recognition or fame.²⁶⁷ A playing down of war can be equivalent to a glorification of war and therefore equally harmful to the young where death, destruction, and the deprivation and misery of war are trivialised.

Furthermore, the BPjM can index material on the grounds that it is racist. According to the BPjM a media item incites to racial hatred, if persons are portrayed or discriminated against as inferior or contemptible because they belong to another race, nation, or religion. Particularly, in recent years, the BPjM has been engaged in indexing proceedings involving brutal videos and computer games that glorify war or are racist.²⁶⁸

The BPjM has, for example, indexed several games such as “Wolfenstein 3D”²⁶⁹ or “Return to Castle Wolfenstein”,²⁷⁰ because these games made use of swastikas. According to section 86a(1) of the Criminal Code it is prohibited to domestically distribute or publicly use symbols of unconstitutional organisation such as the former National Socialist organisation. Also, the BPjM held that the use of symbols like swastikas is youth endangering, because the impression is given that the organisations represented by the symbols still exist.²⁷¹ Moreover, these symbols propagate the organisations and their ideological ideas.²⁷²

²⁶⁵ Federal Court of Justice, BGHSt 13,22, 37 and BGHSt 14, 293.

²⁶⁶ Administrative Appeal Court Muenster (Oberverwaltungsgericht) (29 November 1966) Az. II A 436/64, upheld by the Federal Administrative Court 28, 61.

²⁶⁷ Decision of the BPjM No. 714 (6 May 1960).

²⁶⁸ History about the BPjM, available at ><http://www.bundespruefstelle.de>< (last accessed: 30 September 2005)

²⁶⁹ Decision of the BPjM, Decision No. I 7/03, Examination No. 2429/03 (6 November 2003).

²⁷⁰ Decision of the BPjM, Decision No. 6189 (V), Examination No. 8/02 (22 February 2002).

²⁷¹ Decision of the BPjM, Decision No. 6189 (V), Examination No. 8/02 (22 February 2002) 3.

²⁷² Decision of the BPjM, Decision No. 6189 (V), Examination No. 8/02 (22 February 2002) 4.

(iii) Media producing disorientation in sexual ethics, pornography

A media item is pornographic where, diminishing all other human dimensions, it foregrounds sexual acts in a coarsely insistent fashion and displays an objective general tendency aimed exclusively or mainly at stimulation of the sexual drive.²⁷³

(iv) Severely harmful material according to section 15(2) of the Protection of Young Persons Act

Section 15(2) of the Protection of Young Persons Act states that there are certain categories of harmful data media that are automatically subject to the restrictions, irrespective of being included in the List. Those categories include:²⁷⁴

1. Media carrying content defined in s 86, s 130, s 130a, s 131, s 184, s 184a or s 184 b German Criminal Code²⁷⁵
2. Media carrying content glorifying war;
3. Media presenting in a disgraceful manner people who are dying or are exposed to severe physical or psychological suffering or violating human dignity by presenting actual facts and developments, although there is no justifiable public interest in such mode of reporting;
4. Media presenting Children and Adolescents in unnatural, sexually provocative physical postures;
5. Media, which might have a severely damaging impact on the development and education of Children and Adolescents to responsible personalities in society.

According to section 130(3) of the Criminal Code it is a punishable offence to deny the Holocaust.²⁷⁶ Material denying the Holocaust is regarded as severely harmful in terms of section 15(2) No. 1 of the Protection of Young Persons Act and is automatically included in the list. People who deny the Holocaust, however, often

²⁷³ Federal Constitutional Court, BVerfGE 83, 130.

²⁷⁴ Section 15(2) of the Protection of Young Persons Act.

²⁷⁵ See Appendix 5 for the provisions of the Criminal Code.

²⁷⁶ Section 130(3) of the Criminal Code reads: Whoever publicly or in a meeting approves of, denies or renders harmless an act committed under the rule of National Socialism (...) in a manner capable of disturbing the public peace shall be punished with imprisonment for not more than five years or a fine.

argue²⁷⁷ that the punishment and restrictions associated with denying the Holocaust restrain them in their freedom of expression. The Federal Constitutional Court held, however, that the denial of the holocaust is not protected by freedom of expression.²⁷⁸ The statement that there has not been a persecution of Jews in the Third Reich is an assertion of fact, which is proved to be untrue according to innumerable eyewitness reports and documents, the verdicts of courts in numerous criminal proceedings, and the findings of history.²⁷⁹ The FCC held that protection of minors cannot automatically restrain right-wing extremist expressions, but both legally protected rights need to be balanced. However, when weighing up freedom of expression with protection of the young, it is significant whether the assertion of facts is true or not. The Federal Constitutional Court has said that an opinion that is based on a provably false assertion of facts is less worthy of protection than one that is based on a true assertion. Thus, the FCC did not see a violation of section 5(1) BL.

This judgment seems to be reasonable and valid at least as far as Germany is concerned. The liberal-democratic civil rights are based on the knowledge that all humans have the same dignity. The denial of the Holocaust constitutes an attack on the survivors and the descendants of the persecuted, whose sufferings and losses are denied. Due to the responsibility with regard to the Second World War, Germany needs to ensure that these attacks do not happen. Thus, it is indispensable, at least for Germany, to set limits and make the denial of the Holocaust an offence. State actions are especially necessary in order to protect children and young persons, who can be easily influenced by right-wing extremist propaganda.²⁸⁰ Protection of minors outweighs the protection of an assertion that is proven false.

(f) Provisos

²⁷⁷ David Irving "The Wages of Apostasy: Life Under Fire" (Presented at the Eleventh Institute of Historical Review (IHR) Conference, October 1992) available at: <http://www.nizkor.org/ftp.cgi/people/i/irving.david/press/jhr.v13n1> (last accessed: 2 October 2005).

²⁷⁸ Federal Constitutional Court, BVerfGE 90, 241 (13 April 1994).

²⁷⁹ Federal Constitutional Court, BVerfGE 90, 241 (13 April 1994).

²⁸⁰ Bettina Brockhorst "Zwischen Meinungsfreiheit und Gefahr für die Jugend" (1999) BPJS-aktuell, 67.

There are two provisos that the board has to take into account, when deciding whether to index a media item.

(i) Indexing solely for political, social, religious or ideological content

The first proviso is that a media item cannot be put on the list solely for political, social, religious or ideological content.²⁸¹ However, anticonstitutional publications are not protected by this proviso, as they run counter to the constitution. These publications can be indexed, even if the endangerment of the youth is exclusively based on the publications' political expressions. This mainly concerns Neo-nazi propaganda.

(ii) Indexing supporting arts, science, research or teaching

The second proviso is that media cannot be indexed for content supporting arts, science, research or teaching.²⁸²

The Federal Constitutional Court made the most current statement about the relationship between arts and protection of young persons²⁸³ in the so-called 'Mutzenbacher decision'²⁸⁴ in 1990. That decision dealt with the novel "Josefine Mutzenbacher - The Life Story of a Viennese Prostitute, as Told by Herself"²⁸⁵ which is about a fictional Viennese prostitute, who offered diverse sexual acts to men from the upper- and under-class of Vienna when she was a little child. The very detailed depiction of the protagonist's experiences gave the book the character of child pornography. The BPjM argued that the novel obviously seriously endangered

²⁸¹ Section 18(3) No 1 of the Protection of Young Persons Act.

²⁸² Section 18(3) No 2 of the Protection of Young Persons Act.

²⁸³ The Federal Constitutional Court mainly considers cases involving basic rights and its main function is that of guardian the German Constitution. The court upholds and protects basic rights and can hear directly complaints by individuals that they rights may have been infringed contrary to the human rights provisions of the constitution.

²⁸⁴ Federal Constitutional Court, BVerfGE, 83, 130.

²⁸⁵ The novel, whose author is unknown, was first published in 1906, but was disseminated to a wider extent in the 1970s in Germany.

minors, because it “focused in a coarse, importunate manner on the heroine's sexual exploits”.²⁸⁶ Furthermore, the novel judged “child prostitution and promiscuity positively and even glorify them and make them seem harmless”.²⁸⁷ Thus, the BPjM indexed the novel in 1982. The Federal Constitutional Court, however, overruled the indexing decision, because freedom of arts²⁸⁸ was not taken into account. First of all, the FCC ruled that a pornographic novel can constitute art within the meaning of section 5(3) BL.²⁸⁹ Secondly, the Court held that if a publication capable of being viewed as an artwork is placed on a restricted list such as “the index”, a balancing against freedom of arts is required, even if the publication is obviously capable of greatly morally endangering children or youths.²⁹⁰ Neither the legal interest of freedom of arts nor the one of protection of minors has, from the outset, primacy over the other. As the Federal Constitutional Court had overruled the indexing decision, the BPjM had to decide the case again in order to take freedom of arts into account. The BPjM did so, but nevertheless indexed the book again.

Another example of when the BPjM had to balance freedom of arts and protection of minors was when six photos were submitted to the board that were published in the magazine VOGUE in 1999 under the headline “Fairytale games – fairy or little diva: two girls and their beauty dreams”.²⁹¹ One of these photos showed a five-year-old girl with lots of makeup, curly hair and a low-cut shirt. The BPjM said that due to the posture of the girl and the use of lighting effects and make up a “Lolita-effect” is created and it is suggested to the observer that the girl is equipped with the same erotic potential and the same sexual desire as an adult woman.²⁹² Another photo showed a seven-year old girl, who was naked. The upper half of the girl's face was cut, so that only the red made up mouth and a naked child body can be seen. The child's vagina cannot be seen, as a cat covers it. An additional photo showed the same girl wearing only panties and having one hand on her breasts. Next

²⁸⁶ Federal Constitutional Court, BVerfGE, 83, 130.

²⁸⁷ Federal Constitutional Court, BVerfGE, 83, 130.

²⁸⁸ Section 5(3) BL reads: “Art and scholarship, research, and teaching shall be free”.

²⁸⁹ Federal Constitutional Court, BVerfGE, 83, 130.

²⁹⁰ Federal Constitutional Court, BVerfGE 83, 130.

²⁹¹ Decision by the BPjM, Decision No. VA 5/99 (2 December 1999).

²⁹² Decision by the BPjM, Decision No. VA 5/99 (2 December 1999).

to the photo the quotation "Little boys are little boys. A girl is already born as a woman" was published.

The examiners of the BPjM found that the photos were likely to disorientate minors in a social-ethical way and unanimously decided to index them. Moreover, the examiners said that the depicted children would be lowered to the level of "objects of illustration" resulting in a flagrant violation of human dignity. This disparagement of the children and the violation of human dignity would be perceptible for minors.²⁹³ The depictions would contribute to a formation of opinion according to which it is 'normal' or 'socially adequate' that children take on the role of "objects of illustration" available as other people like it.²⁹⁴ Though the examiners admitted that the photos contained artistic features freedom of arts had to come second to the protection of minors in that case.²⁹⁵ The danger that minors would regard themselves as "objects of illustration", accept their role and perhaps become victims of sexual encroachments, weighs more heavily than the value of the artwork published in the VOGUE.

(g) Patterns of the BPjM with regard to computer games

There are certain patterns the BPjM follows when deciding whether a certain item should be indexed or not. For instance, computer games are not put on the index, in which the killing of people is depicted in a defamiliarised manner²⁹⁶ and in a way that does not suggest parallels to reality. To turn this argument on its head, it means that if killing scenes are depicted very realistically, a computer game can be indexed. That is why the computer game "Wolfenstein 3 D" has been indexed, because the BPjM found the essential content of the game to be "the unscrupulous and realistically shown killing of human individuals."²⁹⁷ Additionally, the acts of killing

²⁹³ Decision by the BPjM, Decision No. VA 5/99 (2 December 1999).

²⁹⁴ Decision by the BPjM, Decision No. VA 5/99 (2 December 1999).

²⁹⁵ Decision by the BPjM, Decision No. VA 5/99 (2 December 1999).

²⁹⁶ This is the reason why there are often special versions created for the German market, in which, for instance, green blood comes out of a wound instead of red one, implying that aliens are being killed and not humans.

²⁹⁷ Decision of the BPjM, Decision No. I 7/03, Examination No. 2429/03 (6 November 2003) 1.

and their aftermath would be visualised realistically and emphasised by background sounds such as screams of pain and shots.²⁹⁸

Moreover, games are not indexed, if, although they contain some horror and splatter elements, the violent parts do not dominate. To turn the argument on its head, it means that if violence constitutes the dominant factor of a computer game it can be indexed. For example, the computer game "Return to Castle Wolfenstein" was indexed for its brutalising content.²⁹⁹ In that decision the BPjM stated that they generally consider computer games as brutalising, in which the player is asked to destroy human life and the individual killing scenes are presented down to the smallest detail.³⁰⁰ The computer game "Manhunt" has been indexed for that reason.³⁰¹ The examination officers of that game stated that the killing acts were "depicted so brutalising, real and fully detailed, that even people with a lot of experience in protecting minors get to know a new dimension of violence."³⁰²

Another example of a brutalising computer game is "Postal 2 – Share the Pain" which is an "Ego-Shooter" game meaning that the players experience the events through a subjective camera. The player's arsenal of this game consists of weapons³⁰³ that exist in real life. The game has been indexed, because it depicts violence in brutalising and violent form.³⁰⁴ If the opponents are successfully shot, streams of blood appear and if the opponent's head is shot, it can burst open.³⁰⁵ The examiners found it very alarming that the acts of violence are committed in surroundings that are familiar from the everyday life such as the city, or a

²⁹⁸ Decision of the BPjM, Decision No. I 7/03, Examination No. 2429/03 (6 November 2003) 1.

²⁹⁹ Decision of the BPjM, Decision No. 6189 (V), Examination No. 8/02 (22 February 2002).

³⁰⁰ Decision of the BPjM, Decision No. 6189 (V), Examination No. 8/02 (22 February 2002) 4.

³⁰¹ Decision of the BPjM, Decision No. 6600 (V), Examination No. 29/04 (11 March 2004).

³⁰² Decision of the BPjM, Decision No. 6600 (V), Examination No. 29/04 (11 March 2004) 3.

³⁰³ These weapons comprise, for instance, batons, pistols, shotguns, machine guns, grenades, as well as untypical weapons such as Molotov cocktails or the heads of cows, which are contaminated with anthrax.

³⁰⁴ Decision of the BPjM, Decision No. 6902 (V), Examination No. 681/04 (22 March 2005) 4.

³⁰⁵ Decision of the BPjM, Decision No. 6902 (V), Examination No. 681/04 (22 March 2005) 4.

cemetery.³⁰⁶ Thus, a player of “Postal 2 – Share the Pain has the possibility to digitally play an amok run or to get the incentive of a real amok run.”³⁰⁷

Additionally, the BPjM indexes all publications glorifying arbitrary law.³⁰⁸ In the decision about the computer game “Manhunt” the examiners argued that the main characters did not only take the law into their own hands, but also did not show that there were any boundaries for their cruelties.³⁰⁹ Thus, the BPjM found “Manhunt” not only glorified arbitrary law, but also the complete dissociation from basic rules of social life of man.³¹⁰

V ANALYSIS OF MEDIA-RELATED PROTECTION OF MINORS UNDER THE TWO LEGAL SYSTEMS

A Comparison of Ratings in New Zealand and Germany

1 General factors

The FVPCA provides for uncountable factors that New Zealand censorship authorities consider in their classification decision.³¹¹ For instance, they consider the extent and degree to which publications deal with acts of torture, the infliction of serious harm, or sexual or physical conduct of a degrading nature.³¹² Furthermore, classification officers take into account the extent and degree to which publications exploits the nudity of minors³¹³, degrades or dehumanises or demeans any person,³¹⁴ or promotes or encourages criminal acts or acts of terrorism.³¹⁵ Additionally, publications can be age-restricted in New Zealand if they contain highly offensive

³⁰⁶ Decision of the BPjM, Decision No. 6902 (V), Examination No. 681/04 (22 March 2005) 4.

³⁰⁷ Decision of the BPjM, Decision No. 6902 (V), Examination No. 681/04 (22 March 2005) 4.

³⁰⁸ Decision of the BPjM, Decision No. 6600 (V), Examination No. 29/04 (11 March 2004) 5.

³⁰⁹ Decision of the BPjM, Decision No. 6600 (V), Examination No. 29/04 (11 March 2004) 5.

³¹⁰ Decision of the BPjM, Decision No. 6600 (V), Examination No. 29/04 (11 March 2004) 5.

³¹¹ See section 3 of the Films, Videos, and Publications Classification Act.

³¹² Section 3(3)(a) of the FVPCA.

³¹³ Section 3(3)(b) of the FVPCA.

³¹⁴ Section 3(3)(c) of the FVPCA.

³¹⁵ Section 3(3)(d) of the FVPCA.

language likely to cause serious harm³¹⁶ or if they are injurious to the public good for specific reasons³¹⁷ such as if the availability of the publication would be likely to cause persons under the specified age to be greatly disturbed or shocked.³¹⁸

As opposed to that, the German classification officers do not have explicit guidelines in a legislative form. Their general criterion is whether publications potentially impair³¹⁹ or have a severely damaging impact³²⁰ on the development and education of minors. However, the classification officers have created guidelines themselves by their previous decisions. The FSK seems to consider factors such as whether it is possible for minors to identify with characters, whether the film is exaggerated, whether the plot is comprehensive, who the target group is, the significance of scenes depicting sex or violence, and how violence is depicted. All these factors are quite similar to the ones enumerated in section 3(3) and (4) of the FVPCA. The same is true for the standards applied by the BPjM. They consider the extent and manner of how violence or sexual-related material is depicted. One difference between the two systems seems to be that German censors consider factors such as the glorification of National Socialist ideology, racial hatred, glorification of war and playing down of war. This is due to the Germans' responsibility with regard to the Second World War.

Drawing a conclusion there are no major differences in the general standards applied by the censors in Germany and New Zealand. However, it seems worthwhile to directly compare the ratings of films and computer games in New Zealand and Germany in order to examine whether there is a pattern in rating them and to see whether one of the countries classifies stricter in practice.

2 *Comparison of film ratings*

³¹⁶ Section 3A of the FVPCA.

³¹⁷ Section 3B of the FVPCA.

³¹⁸ Section 3B(a) of the FVPCA.

³¹⁹ Section 14(1) of the Protection of Young Persons Act.

³²⁰ Section 18(1) of the Protection of Young Persons Act.

When comparing the 52 films that have been rated in New Zealand as well as in Germany between January 2004 and September 2005³²¹, it seems that the New Zealand system classifies stricter than the German one. Although, almost 39% of the films (20 films) received exactly the same rating in New Zealand and Germany, New Zealand gave in almost 39% of the films (20 films) a stricter rating. In 11 of the 20 films, in which New Zealand gave a stricter rating, the age groups to which the films were released differed in four years.³²²

As opposed to that, Germany classified 10 of the films (19%) stricter than New Zealand. In half of the cases the German classification officers gave an R 18 rating, whereas the films were released as R 16, respectively R 13 in one case in New Zealand.

Two films³²³ were rated R 12 in Germany and M³²⁴ in New Zealand. Although these films did not receive a restriction in New Zealand, they did not receive a strict one in Germany.

To draw a conclusion, the New Zealand system has rated the 52 films stricter than Germany and often to a considerable extent. When, for instance, the complexity and difficulty of a film was an issue New Zealand's decisions often resulted in stricter ratings, as the film was regarded as being aimed at older viewers.³²⁵ As opposed to that, the German classification officers often took the complexity as a sign that younger viewers could watch a film, as they would not be emotionally involved.³²⁶

Beyond this, the different decisions did not reveal whether one country classifies a certain type of film (for instance a film containing a lot of violence) stricter than the other country.

³²¹ See Appendix X for a list of the films and their ratings in New Zealand and Germany.

³²² New Zealand gave these films an R 16 classification, whereas gave an R 12 classification.

³²³ These films are "King Arthur" and "Open Water".

³²⁴ Classified as "M" in New Zealand, meaning that the film is not restricted, but recommended as suitable for mature audiences of sixteen years of age and over.

³²⁵ See for example Decision of the OFLC *21 Grams* Decision No. 4000019 (20 January 2004) 3; Decision of the FLBR *Closer* (11 February 2005).

³²⁶ Decision of the FSK *Closer* Decision No. 100 924/K (13 December 2004).

3 Comparison of video and computer games ratings

When comparing the 40 computer games that have been rated in New Zealand as well as in Germany between January 2004 and September 2005³²⁷, it has to be noted that 47% of them (19 films) received the same rating in both countries. Germany rated 8 games (20%) stricter than New Zealand, whereas the New Zealand censors rated 11 games (28%) stricter than the German ones. One of the residual two games was rated R 12 in Germany and was labelled M in New Zealand. The other one was rated R 18 in New Zealand and banned in Germany.³²⁸ All the computer games that were rated stricter in New Zealand, received an R 18 rating in New Zealand and an R 16 rating in Germany. In the cases when German censors rated stricter (indexation, R 18), the New Zealand classification officers gave ratings from R 13 to R 18.

This comparison between the classification decisions does not really reveal that one country rates stricter to a great extent. Both countries rated the computer games very strictly, though. In many decisions relating to computer games the classification officers refer to the realistic weapons and acts of violence depicted in the game. So, both countries rate computer games stricter, which depict an extreme extent of violence.³²⁹ Ego-Shooter games like *Soldier to Fortune*,³³⁰ in which players experience the events through a subjective camera³³¹ are rated very strictly. Both countries find the fact that these games are very realistically depicted and for the transfer of violent acts in a game into reality very alarming,³³² because games, in which violent acts blend the transfer from virtual to real world, are dangerous.

³²⁷ See Appendix 6 for a list of the games and their ratings in New Zealand and Germany.

³²⁸ This game is "The Punisher".

³²⁹ See for example OFLC *Backyard Wrestling 2: There goes the Neighbourhood* Decision No. 401747 (24 November 2004) 3.

³³⁰ "Soldier to Fortune" was created in cooperation with the far right-wing magazine of the same name from the USA. It received an R 18 classification in Germany as well as in New Zealand.

³³¹ Gerald Jörns *Jugendschutz versus (Alltags-) Pädagogik* (25 June 1999), ><http://www.usk.de>< (last accessed:)

³³² Decision by the OFLC *Soldier of Fortune* Decision No 546 (21 June 2005).

So, one pattern of both classification systems is the question of whether violence is depicted realistically.

4 General Differences

The Court of Appeal held that a publication must deal with either sex, horror, crime, or violence in a matter likely to be injurious to the public good, in order to be objectionable.³³³ Applying this strict approach to the interpretation of section 3(1) FVCPA, censors do not have the power to censor material denigrating groups on the sole basis of their sexual orientation.³³⁴ This is also true for material denigrating people on the basis of their race or gender.

This leads to the question whether censors should have the power to censor derogatory, highly offensive, or hateful opinions about particular groups – material that amounts to “hate speech”. Some people fear that hate speech laws would curtail freedom of expression and do not see the necessity of introducing such laws, as the current laws restricted freedom of expression enough.³³⁵ The Government Administration Committee, considered the implementation of hate speech laws.³³⁶ The Parliamentary Select Committee has heard submissions with regard to the necessity of new laws preventing hate speech.³³⁷ The Government did not, however, include these laws in the Films, Videos, and Publications Classification Amendment Act 2005, on the grounds that censorship law would not be the appropriate place to deal with hate speech.³³⁸ It was argued that if matters of opinion or belief became another ‘gateway’ within section 3(1) FVCPA, there would be the risk of a potential

³³³ *Living Word Distributors Ltd v Human Rights Action Group* [2000] 3 NZLR 570, 586.

³³⁴ *Living Word Distributors Ltd v Human Rights Action Group* [2000] 3 NZLR 570.

³³⁵ Newstalk ZB, Herald Staff “Opposition Voiced to Hate Speech Laws”(17 March 2005) New Zealand Herald.

³³⁶ Films, Videos, and Publications Classification Amendment Bill, Report of the Ministry of Justice, Part 2, 15.

³³⁷ See Films, Videos, and Publications Classification Amendment Bill, Report of the Ministry of Justice.

³³⁸ Films, Videos, and Publications Classification Amendment Bill, Report of the Ministry of Justice, Part 2, 15.

abuse.³³⁹ Unpleasant political or religious opinions or ideas could be suppressed, which is, of course, very dangerous for a democracy. A test which only focuses on the inquiry whether a hate speech publication is “injurious to the public good”, would not effectively protect freedom of expression. Another problem with hate speech is that it is not easy to define what hate speech comprises.

The Government suggested that hate speech laws should be better dealt with in the sphere of the Crimes Act and the Human Rights Act.

Under section 61(1)(a) of the Human Rights Act 1993 it is unlawful to publish or distribute written matter which is threatening, abusive or insulting or to do this via means of broadcasting. Furthermore, according to section 131(1) of the Human Rights Act 1993 any person commits an offence, who, “with intent to excite hostility or ill-will against, or bring into contempt or ridicule, any group of persons in New Zealand on the ground of the colour, race, or ethnic or national origins of that group of persons.”³⁴⁰ These sections have, however, never been used with regard to films. This is maybe due to the fact that these sections have a high threshold.³⁴¹ The Human Rights Commission argued “there were some difficulties in trying to address the consequences of hate speech/vilification through the Human Rights Act 1993 and that there were advantages in dealing with the issue under the ambit of censorship law.”³⁴²

Hate speech does not only harm the persons against whom the speech is aimed at. Racist, denigrating or discriminating material can be very injurious to the education and development of minors. Such material can easily influence children or young people, especially if they are not protected against these damaging influences through disposition or education. Though, according to section 3(3)(e) of the FVPCA classification officers need to consider if members of any particular class of the public are represented “inherently inferior to other members of the public by reason of any

³³⁹ Films, Videos, and Publications Classification Amendment Bill, Report of the Ministry of Justice, Part 2, 15.

³⁴⁰ Section 131(1) Human Rights Act 1993.

³⁴¹ Submission of the Human Rights Act Commission on the Films, Videos and Publications Classification Amendment Bill, 7.

³⁴² Films, Videos, and Publications Classification Amendment Bill, Report of the Ministry of Justice, Part 2, 13.

characteristic of members of that class being a characteristic that is prohibited ground of discrimination specified in section 21 (1) of the Human Rights Act. However, there is no protection for unnamed individuals who are member of a group represented as inherently inferior. Thus, legislation prohibiting or restraining hate speech is warranted and there "is a role for the FVPCA in protecting harm to vulnerable individuals and groups from vilification."³⁴³ Furthermore, the advantage of implementing censorship powers concerning hate speech material is that the material does not necessarily have to be banned, but an age-restriction, as a less severe means, is possible. Of course, hate speech laws should not undermine freedom of expression. Thus, an appropriate threshold test needs to be introduced, determining when material denigrates groups on the basis of their sexual orientation, their race or gender.

B Limits to an Effective Protection of Minors

1 Circumventing of restrictions

It is worth noting that neither the German nor the New Zealand system provides for an absolute effective protection of minors. This is due to the fact that minors often find ways to access restricted material.³⁴⁴ First of all, minors often use the Internet, which is very hard to monitor, in order to gain access to restricted or banned material in form of a pirate copy.³⁴⁵ Secondly, it is often the case that older children or adults give objectionable material to minors. What is more, minors often receive media items restricted to their age groups from their parents or legal guardians. In such cases, protection of minors comes up against limiting factors, because "detecting and prosecuting such offences is very difficult".³⁴⁶ Also, in Germany parents or legal guardians are not punished if they make restricted or

³⁴³ Submission of the Human Rights Act Commission on the Films, Videos and Publications Classification Amendment Bill, 6.

³⁴⁴ See for example the Underage Gaming Research (Office of Film and Literature Classification and the Department for Internal Affairs, September 2005).

³⁴⁵ Gerald Jörns, above n 332.

³⁴⁶ Chris Watson and Roy Shuker, see above n 3, 15.

indexed material accessible to their children. This is due to their constitutionally protected right of custody.³⁴⁷

A survey about gaming behaviour³⁴⁸ in New Zealand initiated by the OFLC and the Department of Internal Affairs has found out that age-restrictions on computer games have little effect. In that survey 331 students between 15 and 18 years of age³⁴⁹ were given a questionnaire containing 24 games rated R 18 as well as 2 games³⁵⁰ that were banned. The students were asked whether or not they had played any of these games. The survey³⁵¹ found out that a 62% of the respondents said that they had played at least one of the enumerated games.³⁵² The most popular and most often played game seemed to be the Grand Theft Auto series,³⁵³ as each of the four series' games has been played by around 35% of the 15-17 year olds.³⁵⁴ The banned computer game "Manhunt" has been played by 7% of the minors, whereas the banned game "Postal 2" has only been played by 3 % of them.³⁵⁵

Furthermore, 43% of the respondents said that they bought the restricted or banned computer games themselves and 75 % of them stated that they rented them.³⁵⁶

³⁴⁷ However, if they misuse this right severely, the right can be restrained. For example, if legal guardians make child pornography accessible, the youth welfare departments can intervene and implement protection of minors by a proceeding at the guardianship court.

³⁴⁸ Underage Gaming Research (Office of Film and Literature Classification and the Department for Internal Affairs, September 2005).

³⁴⁹ The OFLC only analysed the responses from those below the age of 18, as the focus of the research was on underage gaming.

³⁵⁰ The games that were banned are "Manhunt" and "Postal 2".

³⁵¹ According to the OFLC the results of this survey can only be treated as indicative, as there are many factors that might have influenced them. For the factors likely to have influenced the results see: Underage Gaming Research (Office of Film and Literature Classification and the Department for Internal Affairs, September 2005) 4.

³⁵² Underage Gaming Research (Office of Film and Literature Classification and the Department for Internal Affairs, September 2005) 5.

³⁵³ The Grand Theft Auto series includes Grand Theft Vice City, Grand Theft San Andreas, Grand Theft Auto II and Grand Theft Auto III.

³⁵⁴ Underage Gaming Research (Office of Film and Literature Classification and the Department for Internal Affairs, September 2005) 5.

³⁵⁵ Underage Gaming Research (Office of Film and Literature Classification and the Department for Internal Affairs, September 2005) 5.

³⁵⁶ Underage Gaming Research (Office of Film and Literature Classification and the Department for Internal Affairs, September 2005) 15.

What is more, 35 % of the respondents stated that their parents usually bought the computer games for them, and 12 % said that their siblings did so.³⁵⁷

The overall conclusion of this survey is that many minors are able to play computer games that are restricted to their age group or banned. Surveys with similar results have been undertaken in Germany as well.³⁵⁸ It is illegal to sell, supply or exhibit computer games as well as all other publications that are restricted to a certain age group or banned to an underage person.³⁵⁹ However, the problem is not only that storekeepers do not properly check the age of their customers, but also that parents buy or rent restricted computer games for their children. It is understandable that many minors are not really prevented from using restricted media items by an age-restriction,³⁶⁰ as testing one's boundaries is part of growing-up and to some minors a prohibited publication becomes even more interesting. For instance, some people regard the indexation of a publication by the BPjM as a trademark.³⁶¹ But it seems very problematic that parents do not comply with the restrictions. Three-quarters of the respondents, who had played the restricted or banned computer games, stated that their parents were aware of the games they played.³⁶² Thus, there are only two conclusions to draw: Either parents do not really care whether their children use media items that are restricted to them, or they do not really understand that these kinds of media items can have a negative effect on their children. Parents have the same legal obligation as storekeepers to make sure that minors do not get access to restricted or banned media items. Additionally, parents should feel morally obliged to make sure that their children only use media items that are released to them. The law places responsibility on them in that respect. However, if parents do not take this

³⁵⁷ Underage Gaming Research (Office of Film and Literature Classification and the Department for Internal Affairs, September 2005) 5.

³⁵⁸ Gerald Jörns, above n 332.

³⁵⁹ Section 123 of the Films, Videos, and Publications Classification Act.

³⁶⁰ 76% of the respondents stated that an age restriction did not matter to them, while 20% of those who had played an objectionable computer game said the restriction made the game even more interesting. See Underage Gaming Research (Office of Film and Literature Classification and the Department for Internal Affairs, September 2005) 5.

³⁶¹ Gerald Jörns, above n 332.

³⁶² Underage Gaming Research (Office of Film and Literature Classification and the Department for Internal Affairs, September 2005) 5.

responsibly, there is little, censorship measures can do to make them. This problem clearly does not admit of an easy solution, but the fact that minors cannot absolutely effectively be prevented from gaining access to objectionable material, does not mean that the whole system fails. Instead, one should strengthen the control measures, which the law provides for the compliance with the restrictions. For instance, one important step is to inform parents and legal guardians better about the potential harms that are associated with restricted publications. As the market of games is hard to overlook for parents they need orientation.³⁶³ And maybe there should be higher fines for shopkeepers who sell restricted items to minors in order to give them a stronger incentive to comply with the restrictions.

2 *Reconciliation of freedom of expression with protection of minors*

New Zealand as well as Germany provide for legislation protecting children and young persons. In addition to that, freedom of expression is regarded as a very crucial human right in both countries. To illustrate the restraints on freedom of expression, one has only to mention the far-reaching implications that are associated with an indexation by the BPjM. The indexing procedure by the BPjM, for instance, makes adults' access to restricted media very difficult and due to the advertising prohibition such media items often disappear from the market, because they cannot be sold economically.³⁶⁴ Also, due to the far-reaching implications of an indexation distributors often create a special version of a film or computer game for the German market. The problem here is, however, in particular, that the BPjM cannot examine a media item prior to its release on the German market, as this would violate against the prohibition of pre-censorship.³⁶⁵ As a consequence, publishers or distributors rather remove parts of the content than being subject to the restrictions.³⁶⁶ This is even often the case for removals that would not be necessary. This situation can be described as a 'chilling effect' of freedom of expression.

³⁶³ Gerald Jörns, above n 332.

³⁶⁴ Gerald Jörns, above n 332.

³⁶⁵ Gerald Jörns, above n 332.

³⁶⁶ Gerald Jörns, above n 332.

This brings us to the difficult question how we can reconcile protection of minors with freedom of expression. The New Zealand and German censorship systems protect minors in order to prevent them from being impaired in their development and education. It is interesting to consider this impairment and examine when objectionable publications harm minors. New Zealand and German censorship authorities, for example, sometimes restrict sexual-orientated publications in order to prevent an impairment in their sexual-ethical development. Some people, however, argue that sexually explicit publications do not have a negative impact on minors.³⁶⁷

As with sexual-orientated material, the effects on minors of publications containing violent are disputed.³⁶⁸ The effects of media violence on the recipient constitute a field of research that is intensively dealt with by scientists.³⁶⁹ With regard to video and computer games there are several theories with regard to their effect on minors. According to one theory computer games enhance the willingness to act aggressively and the propensity to violence.³⁷⁰ Another theory argues that depictions of violence create fear and thus inhibit people from being aggressive and violent.³⁷¹ According to a further theory watching of violent scenes has a blunting effect and results in a habituation effect. Finally, it is argued that playing computer games has an inhibitory effect, because people would relieve stresses.³⁷² None of these four theories has been proven or rebutted.³⁷³ Though the approaches are different, all researchers agree, that there is no mono-causal explanation for the effect of violence depicted in computer games.³⁷⁴ In addition to that, there are also social science and psychological studies trying to find out the correlation between violence in the media in general and violent behaviour of minors, which also

³⁶⁷ Edward Donnerstein "Is It Sex or Is It Violence" in Edward Donnerstein (ed) *The Questions of Pornography – Research Findings and Policy Implications* (Free Press, New York, 1987) e, 1987, 130.

³⁶⁸ Federal Department for Family, Senior Citizens, Women and the Young "Media and Violence", Befunde der Forschung seit 1998, 2; Chris Watson and Roy Shuker, above n 3, 18.

³⁶⁹ Federal Department for Family, Senior Citizens, Women and the Young "Media and Violence", Befunde der Forschung seit 1998, 2.

³⁷⁰ Frank Neubacher "Ein kriminologischer Beitrag zur Relevanz der Medien fuer fremdenfeindliche bzw. Rechtsextremistische Gewaltkriminalitaet", 34.

³⁷¹ Gerald Jörns, above n 332.

³⁷² Gerald Jörns, above n 332.

³⁷³ Hartmut Gieselmann *Die Gewalt in der Maschine – Ueberlegungen zu den Wirkungen von aggressiven Computer-Spielen* >usk.de<

³⁷⁴ Gerald Jörns, above n 332.

generally conclude that violence in the media is not the definite cause for violent minors.³⁷⁵

Consequently, the question arises, whether the restriction of media items is justified, even though the causality of their harm is not certain?

The conclusion, which emerges from all the studies, is that violence depicted in media items is not the definite cause for violent or abnormal behaviour in media. The same is true for publications containing sexual-orientated material. All this goes to show that there are a number of factors such as the influences of families and schools that can contribute to abnormal behaviour of minors. The fact that there is no proven research about the correlation seems to imply that it is impossible to prove that. This is due to the fact that every person is influenced by uncountable factors, and one cannot certainly say which one of them caused certain harm.³⁷⁶ Thus it appears to be impossible to prove the existence of an effect of endangerment in a concrete case. Conversely, one cannot say that the lack of proof shows that certain media items do not harm minors. Moreover, if there is a real risk that objectionable material can impair the development and education of minors, it has to be taken seriously, as the development of children and young persons is a very crucial legally protected right. In order to not undermine freedom of expression, one has to cautiously examine the link between harmful material depicted in the media and abnormal behaviour of minors. Thus, it is indispensable that censors assess a potential effect of a publication, even though they are not absolutely certain about its harm.³⁷⁷ This is why the question of whether a publication is objectionable is a matter of expert judgements³⁷⁸ by authorities such as the OFLC, the FSK or the BPjM. Also, these authorities are subject to legislation, which determines and limits their censorship powers. Furthermore, one has to bear in mind that not only mentally stable children and youth

³⁷⁵ Federal Department for Family, Senior Citizens, Women and the Young "Media and Violence", Befunde der Forschung seit 1998, 2; Chris Watson and Roy Shuker, above n 3, 18.

³⁷⁶ See generally, Chris Watson and Roy Shuker, above n 3, 18.

³⁷⁷ The need of assessing potential effects rather than proven effects has been discussed in several decisions by the BPjM. See, for instance, Decision of the BPjM *Return to Castle Wolfenstein* Decision No. 6189 (V), Examination No. 8/02 (22 February 2002).

³⁷⁸ Section 4(1) of the Films, Videos, and Publications Classification Act.

need to be protected, but also those who are prone to an endangerment, because they are not largely protected against damaging influences through disposition or education.

VI CONCLUSION

This paper has rendered a broad overview of the media-related protection of young persons in New Zealand and Germany. Moreover, the paper tried to show that although freedom of expression and freedom of information constitute very crucial rights, the intellectual and emotional development of minors is equally important and regulations are necessary. This is even true when the correlation between objectionable material and harm to minors is not certain or proved.

By comparing the two different legal systems, the paper has shown that both countries have similar standards they apply when age restricting or banning objectionable material. The only difference is that Germany can censor on the grounds that material is racist, glorifying or downplaying the war or promoting National Socialist' ideas. Furthermore, a comparison between the ratings of New Zealand and Germany has revealed that New Zealand censors rated stricter as far as films are concerned. With regard to computer games there was no major difference in the strictness of ratings.

Furthermore the paper has shown that neither system can absolutely prevent minors from accessing objectionable or restricted publications. If parents or legal guardians do not take the responsibly and ensure that their children do not use restricted or banned media items, there is little censorship measures can do.

BIBLIOGRAPHY

I GERMAN SOURCES

A TABLE OF LEGISLATION

Basic Law for the Federal Republic of Germany (Grundgesetz).

Protection of Young Persons Act (Jugendschutzgesetz).

Criminal Code (Strafgesetzbuch).

B TABLE OF CASES

BVerfGE 83, 130 (Judgment by the Federal Constitutional Court)

BVerfGE 33, 52 (Judgment by the Federal Constitutional Court)

BVerfGE 30, 354 (Judgment by the Federal Constitutional Court)

BVerfGE 77, 346 (Judgment by the Federal Constitutional Court)

BVerfGE 90, 241 (Judgment by the Federal Constitutional Court)

C DECISIONS BY THE FEDERAL DEPARTMENT FOR MEDIA HARMFUL TO YOUNG PERSONS

Decision by the BPjM *Return to Castle Wolfenstein* Decision No. 6189 (V) (22 February 2002)

Decision by the BPjM *Manhunt* Decision No. 6600 (V) (11 March 2002)

Decision by the BPjM *Wolfenstein 3 D* Decision No. I 7/03 (6 November 2003)

Decision by the BPjM *Postal 2 – Share the Pain* Decision No. 6902 (V) (22 March 2005)

Decision by the BPjM *The Punisher* Decision No. 6956 (V) (11 May 2005)

D DECISIONS BY THE FILM BODY FOR VOLUNTARY SELF-CONTROL

- Decision No. 99 530/K (14 September 2004) Exorcist the Beginning
- Decision No. 99 247/K (23 August 2004) Resident Evil: Apocalypse
- Decision No. 99 247/K (1 September 2004) Resident Evil: Apocalypse
- Decision No. 99 247/K (8 September 2004) Resident Evil: Apocalypse (cut version)
- Decision No. 99 247-a/K (9 September 2004) Resident Evil: Apocalypse (cut version)
- Decision No. 98 729/K (13 July 2004) King Arthur
- Decision No. 97 507/K (26 March 2004) Monster
- Decision No. 97 342/K (15 March 2004) Dawn of the Dead
- Decision No. 97 342/ K (24 March 2004) Dawn of the Dead
- Decision No. 97 225/K (4 March 2004) The Passion of Christ
- Decision No. 96 828/K (3 February 2004) Gothika
- Decision No. 96 421/K (16 December 2003) House of the 1000 Corpses
- Decision No. 96 389/K (12 December 2003) 21 Grams
- Decision No. 95 526/K (9 October 2003) Kill Bill
- Decision No. 95 034/K (25 August 2003) Thirteen
- Decision No. 94 976/K (18 August 2003) Irreversible
- Decision No. 102 777/K (26 June 2005) My Summer of Love
- Decision No. 102 463/K (17 May 2005) Sin City
- Decision No. 101 444/K (7 February 2005) House of Sand and Fog
- Decision No. 101 015/K (21 December 2004) Kinsey
- Decision No. 101 086 (30 December 2004) 9 Songs
- Decision No. 100 056/K (19 October 2004) Soul Plane
- Decision No. 100 924/K (13 December 2004) Closer

E OTHER PRIMARY SOURCES

Bergmann, Christine, Secretary of the Federal Department for Family, Senior Citizens, Women and Youth "From anti-Semitism to xenophobia – Right-wing extremist media in Germany" (Annual Meeting of the Federal Department for Media Harmful to Young Persons, Marburg, 10 November 1999)

Federal Ministry for Family, Senior Citizens, Women and Youth *Medien und Gewalt, Befunde der Forschung seit 1998* (Report about Media and Violence, July 2004) available at ><http://www.bmfsfj.de>< (last accessed 30 September 2005).

Meier, Petra assistant chairwoman of the BPjM "Jugendschutz und Indizierungspraxis – Die Aufgaben der Bundesprüfstelle" (2005, Speech at the University of Hamburg, Hamburg, 9 March 2005).

Ulvskog, Marita Minister for Culture in Sweden "Children and Young People in the New Media Landscape" (Expert Seminar, Modern Museum, Stockholm, 12 February 2001) available at:
>http://www.eu2001.se/eu2001/news/news_read.asp?iInformationID=11803< (last accessed: 30 September 2005)

F SECONDARY MATERIAL

Becker-Textor, Ingeborg *Mediale Gewalt – Eine reale Bedrohung für Kinder?* (AJZ Druck& Verlag, Bielefeld 2000) 208.

Brockhorst, Bettina "Zwischen Meinungsfreiheit und Gefahr für die Jugend" (1999) BPjS-aktuell, 67.

Doleze, Rudolf *Bonner Kommentar zum Grundgesetz* (Heidelberg, Loseblattsammlung, Stand: 2005)

Foster, Nigel and Satish Sule *German Legal System and Laws* (3ed, Oxford University Press, 2002)

Kommers, Donald *The Constitutional Jurisprudence of the Federal Republic of Germany* (Duke University Press, Durham and London, 1989)

Münch von, Ingo *Grundgesetz Kommentar Band 1* (Beck Verlag, Isensee-Kirchhof, 1974)

Neubacher Frank "Ein kriminologischer Beitrag zur Relevanz der Medien für fremdenfeindliche bzw. Rechtsextremistische Gewaltkriminalität", (1999) BPJS aktuell, 30.

Von Gottberg Joachim, "Wie funktioniert der Jugendschutz in Deutschland?" (1997) 2 tv diskurs.

Zarusky, Juergen "Leugnung des Holocaust – Die antisemitische Strategie nach Auschwitz" (1999) BPJS Aktuell – Von Antisemitismus bis Xenophobie – Rechtsextreme Medien in Deutschland.

G OTHER

Hartmut Gieselmann *Die Gewalt in der Maschine – Ueberlegungen zu den Wirkungen von aggressiven Computer-Spielen* >usk.de< (last accessed 30 September 2005)

Jörns, Gerald *Jugendschutz versus (Alltags-) Pädagogik* (25 June 1999), >http://www.usk.de< (last accessed: 30 September 2005)

The principles of the Body for Voluntary Self-Control, available at: >http://www.spio.de/media_content/422.pdf< (last accessed: 30 September 2005)

The principles of the Software for Voluntary Self-Control, available at: >http://www.usk.de< (last accessed 30 September 2005)

The examination rules of the Software for Voluntary Self-Control, available at: >http://www.usk.de< (last accessed 30 September 2005)

History about the BPjM, available at: >http://www.bundespruefstelle.de/bpjm/Die-Bundespruefstelle/geschichte.html< (last accessed: 30 September 2005).

II NEW ZEALAND SOURCES

A LEGISLATION

Films, Videos and Publications Classification Act 1993.

Films, Videos and Publications Classification Amendment Act 2005.

Human Rights Act 1993.

New Zealand Bill of Rights Act 1990.

Video Recordings Act 1987.

Films Act 1983.

Indecent Publications Act 1963.

B TABLE OF CASES

Living Word Distributors Ltd v Human Rights Action Group Inc (Wellington) [2000] 3 NZLR 570.

Moonen v Film and Literature Board of Review [2000] 2 NZLR 9.

Moonen v Board of Literature Review [1999] NZAR 324 (HC).

News Media Ltd. v Film and Literature Board of Review [1997] 3 HRNZ 410.

C DECISIONS OF THE OFLC

Decision of the OFLC *Soldier of Fortune* Decision No. 546 (21 June 2000).

Decision by the OFLC *Man On Fire* Decision No. 400690 (25 May 2004).

Decision by the OFLC *Mafia* Decision No. 201414 (19 September 2002).

Decision by the OFLC *Kingdom of Heaven* Decision No. 500671 (2 May 2005).

Decision by the OFLC *Mortal Kombat Deadly Alliance* Decision No. 300085 (5 February 2003).

Decision by the OFLC *House Of Sand And Fog* Decision No. 400259 (10 March 2004).

Decision by the OFLC *Head In The Clouds* Decision No. 401489 (21 October 2004).

Decision by the OFLC *GTA 2* Decision No. 9902128 (2 February 2000).

Decision by the OFLC *Gore Ultimate Soldier* Decision No. 201215 (22 August 2002).

Decision by the OFLC *King Arthur* Decision No. 401069 (8 July 2004).

Decision by the OFLC *Fahrenheit* Decision No. 501380 (3 August 2005).

Decision by the OFLC *Exorcist The Beginning* Decision No. 401760 (1 November 2004).

Decision by the OFLC *Backyard Wrestling 2: There Goes the Neighborhood* Decision No. 401747 (24 November 2004).

Decision by the OFLC *Elephant* Decision No. 400030 (30 January 2004).

Decision by the OFLC *Far Cry* Decision No. 400357 (24 March 2004).

Decision by the OFLC *Doom 3* Decision No. 400887 (24 June 2004).

Decision by the OFLC *Def Jam: Fight For NY* Decision No. 401531 (23 September 2004).

Decision by the OFLC *Dead To Rights* Decision No. 300075 (24 January 2003).

Decision by the OFLC *Dawn Of The Dead* Decision No. 400718 (28 May 2004).

Decision by the OFLC *Driv3r* Decision No. 401148 (31 August 2004).

Decision by the OFLC *Cold Mountain* Decision No. 302169 (14 January 2004).

Decision by the OFLC *Chaser* Decision No. 401836 (23 November 2004).

Decision by the OFLC *Call of Duty* Decision No. 301866 (5 November 2003).

Decision by the OFLC *Breed* Decision No. 400631 (14 May 2004).

Decision by the OFLC *Blade II* Decision No. 201709 (7 November 2002).

Decision by the OFLC *21 Grams* Decision No. 400019 (20 January 2004).

Decision by the OFLC *The Passion of The Christ* Decision No. 400212 (20 February 2004).

Decision by the OFLC *House of Wax* Decision No. 500951 (16 June 2005).

Decision by the OFLC *Manhunt* Decision No. 302023 (11 December 2003).

D DECISIONS OF THE FILM AND LITERATURE BOARD OF REVIEW

Decision by the FLBR *Saving Private Ryan* Decision 4/98 (10 December 1998).

Decision by the FLBR *Closer* (11 February 2005).

E OTHER PRIMARY SOURCES

Films, Videos, and Publications Classification Amendment Bill, Report of the Ministry of Justice.

Submission of the Human Rights Act Commission on the Films, Videos and Publications Classification Amendment Bill.

F SECONDARY MATERIAL

Burrows, John and Ursula Cheer *Media Law in New Zealand* (5 ed, Oxford University Press, Melbourne, 2005)

Christoffel, Paul *Censored, A Short History of Censorship in New Zealand* (Department of Internal Affairs, Wellington, 1989)

Donnerstein, Edward "Is It Sex or Is It Violence" in Edward Donnerstein (ed) *The Questions of Pornography – Research Findings and Policy Implications* (Free Press, New York, 1987) e, 1987, 130.

Watson, Chris and Roy Shuker *In the Public Good? Censorship in New Zealand* (The Dunmore Press, Palmerston North, 1998) 8.

G OTHER

Annual Report 2004, (Report of the Office of Film and Literature Classification for the year ended 30 June 2004)

Irving, David "The Wages of Apostasy: Life Under Fire" (Presented at the Eleventh Institute of Historical Review (IHR) Conference, October 1992) available at: ><http://www.nizkor.org/ftp.cgi/people/i/irving.david/press/jhr.v13n1>< (last accessed: 2 October 2005).

Newstalk ZB, Herald Staff "Opposition Voiced to Hate Speech Laws"(17 March 2005) New Zealand Herald.

Office of Film and Literature Classification, Information Sheet *The Powers Functions and Operation of the Office of Film and Literature Classification*, available at: <http://www.censorship.govt.nz> (last accessed: 30 September 2005)

Underage Gaming Research (Office of Film and Literature Classification and the Department for Internal Affairs, September 2005).

APPENDIX 2: RELEVANT SECTIONS OF THE FILMS, VIDEOS, AND PUBLICATIONS CLASSIFICATION ACT 1993 (AS AMENDED BY THE FILMS, VIDEOS, AND PUBLICATIONS CLASSIFICATION AMENDMENT ACT 2005)

3. Meaning of "objectionable":

(1) For the purposes of this Act, a publication is objectionable if it describes, depicts, expresses, or otherwise deals with matters such as sex, horror, crime, cruelty, or violence in such a manner that the availability of the publication is likely to be injurious to the public good.

[(1A) Without limiting subsection (1), a publication deals with a matter such as sex for the purposes of that subsection if—

- (a) the publication is or contains 1 or more visual images of 1 or more children or young persons who are nude or partially nude; and
- (b) those 1 or more visual images are, alone, or together with any other contents of the publication, reasonably capable of being regarded as sexual in nature.

[(1B) Subsection (1A) is for the avoidance of doubt.]

(2) A publication shall be deemed to be objectionable for the purposes of this Act if the publication promotes or supports, or tends to promote or support,—

- (a) the exploitation of children, or young persons, or both, for sexual purposes; or

APPENDIX 1: RELEVANT SECTIONS OF THE NEW ZEALAND BILL OF RIGHTS ACT 1990

5. Justified limitations - Subject to section 4 of this Bill of Rights, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

6. Interpretation consistent with Bill of Rights to be preferred - Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning.

14. Freedom of Expression - Everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form.

APPENDIX 2: RELEVANT SECTIONS OF THE FILMS, VIDEOS, AND PUBLICATIONS CLASSIFICATION ACT 1993 (AS AMENDED BY THE FILMS, VIDEOS, AND PUBLICATIONS CLASSIFICATION AMENDMENT ACT 2005)

3. Meaning of "objectionable":

(1) For the purposes of this Act, a publication is objectionable if it describes, depicts, expresses, or otherwise deals with matters such as sex, horror, crime, cruelty, or violence in such a manner that the availability of the publication is likely to be injurious to the public good.

[(1A) Without limiting subsection (1), a publication deals with a matter such as sex for the purposes of that subsection if—

- (a) the publication is or contains 1 or more visual images of 1 or more children or young persons who are nude or partially nude; and
- (b) those 1 or more visual images are, alone, or together with any other contents of the publication, reasonably capable of being regarded as sexual in nature.

(1B) Subsection (1A) is for the avoidance of doubt.]

(2) A publication shall be deemed to be objectionable for the purposes of this Act if the publication promotes or supports, or tends to promote or support,—

- (a) the exploitation of children, or young persons, or both, for sexual purposes; or

- (b) the use of violence or coercion to compel any person to participate in, or submit to, sexual conduct; or
- (c) sexual conduct with or upon the body of a dead person; or
- (d) the use of urine or excrement in association with degrading or dehumanising conduct or sexual conduct; or
- (e) bestiality; or
- (f) acts of torture or the infliction of extreme violence or extreme cruelty.

(3) In determining, for the purposes of this Act, whether or not any publication (other than a publication to which subsection (2) of this section applies) is objectionable or should [in accordance with section 23(2)] be given a classification other than objectionable, particular weight shall be given to the extent and degree to which, and the manner in which, the publication—

- (a) Describes, depicts, or otherwise deals with—
 - (i) acts of torture, the infliction of serious physical harm, or acts of significant cruelty:
 - (ii) sexual violence or sexual coercion, or violence or coercion in association with sexual conduct:
 - (iii) other sexual or physical conduct of a degrading or dehumanising or demeaning nature:
 - (iv) sexual conduct with or by children, or young persons, or both:
 - (v) Physical conduct in which sexual satisfaction is derived from inflicting or suffering cruelty or pain:
- (b) exploits the nudity of children, or young persons, or both:
- (c) degrades or dehumanises or demeans any person:
- (d) promotes or encourages criminal acts or acts of terrorism:
- (e) represents (whether directly or by implication) that members of any particular class of the public are inherently inferior to other members of the public by reason of any characteristic of members of that class, being a characteristic that is a prohibited ground of discrimination specified in section 21(1) of the Human Rights Act 1993.

(4) In determining, for the purposes of this Act, whether or not any publication (other than a publication to which subsection (2) of this section applies) is objectionable or should [in accordance with section 23(2)] be given a classification other than objectionable, the following matters shall also be considered:

- (a) the dominant effect of the publication as a whole:
- (b) the impact of the medium in which the publication is presented:
- (c) the character of the publication, including any merit, value, or importance that the publication has in relation to literary, artistic, social, cultural, educational, scientific, or other matters:
- (d) the persons, classes of persons, or age groups of the persons to whom the publication is intended or is likely to be made available:
- (e) the purpose for which the publication is intended to be used:

(f) any other relevant circumstances relating to the intended or likely use of the publication.

3A. Publication may be age-restricted if it contains highly offensive language likely to cause serious harm:

- (1) A publication to which subsection (2) applies may be classified as a restricted publication under section 23(2)(c)(i).
- (2) This subsection applies to a publication that contains highly offensive language to such an extent or degree that the availability of the publication would be likely, if not restricted to persons who have attained a specified age, to cause serious harm to persons under that age.
- (3) In this section, highly offensive language means language that is highly offensive to the public in general.

3B. Publication may be age-restricted if likely to be injurious to public good for specified reasons

- (1) A publication to which subsection (2) applies may be classified as a restricted publication under section 23(2)(c)(i).
- (2) This subsection applies to a publication that contains material specified in subsection (3) to such an extent or degree that the availability of the publication would, if not restricted to persons who have attained a specified age, be likely to be injurious to the public good for any or all of the reasons specified in subsection (4).
- (3) The material referred to in subsection (2) is material that—
 - (a) describes, depicts, expresses, or otherwise deals with—
 - (i) harm to a person's body whether it involves infliction of pain or not (for example, self-mutilation or similarly harmful body modification) or self-inflicted death; or
 - (ii) conduct that, if imitated, would pose a real risk of serious harm to self or others or both; or
 - (iii) physical conduct of a degrading or dehumanising or demeaning nature; or
 - (b) is or includes 1 or more visual images—
 - (i) of a person's body; and
 - (ii) that, alone, or together with any other contents of the publication, are of a degrading or dehumanising or demeaning nature.
- (4) The reasons referred to in subsection (2) are that the general levels of emotional and intellectual development and maturity of persons under the specified age mean that the availability of the publication to those persons would be likely to—
 - (a) cause them to be greatly disturbed or shocked; or
 - (b) increase significantly the risk of them killing, or causing serious harm to, themselves, others, or both; or
 - (c) encourage them to treat or regard themselves, others, or both, as degraded or dehumanised or demeaned.

4. Classification of publications a matter of expert judgment

(1) The question whether or not a publication is objectionable [or should in accordance with section 23(2) be given a classification other than objectionable] is a matter for the expert judgment of the person or body authorised or required, by or pursuant to this Act, to determine it, and evidence as to, or proof of, any of the matters or particulars that the person or body is required to consider in determining that question is not essential to its determination.

(2) Without limiting subsection (1) of this section, where evidence as to, or proof of, any such matters or particulars is available to the body or person concerned, that body or person shall take that evidence or proof into consideration.

23. Examination and classification

(1) As soon as practicable after a publication has been submitted or referred to the Classification Office under this Act, the Classification Office shall examine the publication to determine the classification of the publication.

(2) After examining a publication, and having taken into account the matters referred to in [section 3 to 3D], the Classification Office shall classify the publication as—

(a) unrestricted; or

(b) objectionable; or

(c) objectionable except in any one or more of the following circumstances:

(i) if the availability of the publication is restricted to persons who have attained a specified age [not exceeding 18 years];

(ii) if the availability of the publication is restricted to specified persons or classes of persons;

(iii) if the publication is used for one or more specified purposes.

(3) Without limiting the power of the Classification Office to classify a publication as a restricted publication, a publication that would otherwise be classified as objectionable may be classified as a restricted publication in order that the publication may be made available to particular persons or classes of persons for educational, professional, scientific, literary, artistic, or technical purposes.

APPENDIX 3: RELEVANT SECTIONS OF THE GERMAN BASIC LAW

2. Personal freedoms - (1) Every person shall have the right to free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral law. (2) Every person shall have the right to life and physical integrity. Freedom of the person shall be inviolable. These rights may be interfered with only pursuant to a law.

5. Freedom of expression - (1) Every person shall have the right freely to express and disseminate his opinions in speech, writing, and pictures and to inform himself without hindrance from generally accessible sources. Freedom of the press and freedom of reporting by means of broadcasts and films shall be guaranteed. There shall be no censorship. (2) These rights shall find their limits in the provisions of general laws, in provisions for the protection of young persons, and in the right to personal honour. (3) Art and scholarship, research, and teaching shall be free. The freedom of teaching shall not release any person from allegiance to the constitution.

20. Basic institutional principles - (1) The Federal Republic of Germany is a democratic and social federal state.

APPENDIX 4: RELEVANT SECTIONS OF THE ACT TO PROTECT YOUNG PERSONS

§ 1 Definitions

(1) The following definitions shall apply by letter and spirit of this Act:

1. *Children* are persons below the age of 14 years.
2. *Adolescents* are persons as of 14 but below the age of 18 years.
3. A *Custodial Person* is an individual who is personally or together with another individual responsible for care and custody of other persons according to the legal provisions of the (German) Civil Code [BGB].
4. *Person with Parental Power* describes the status of any person above the age of 18 who is permanently or for a defined period of time or in the context of school or vocational training or under a youth welfare scheme in charge of educational duties for a child or adolescent on the basis of an agreement with the *Custodial Person*.

(2) *Data media* in terms of this Act are physical media which carry text, pictures or sound suitable for transfer or direct perception or built into projectors or game

machines. Physical dissemination, letting, offering or access of data media shall be deemed equivalent to electronic dissemination, letting, offering or access unless related to broadcasting in terms of § 2, German Interstate Broadcasting Convention.

(3) *Telemedia* in terms of this Act are media which are transmitted or rendered accessible through electronic information and communication services according to the Tele-Services Act [TDG] or in compliance with the German Interstate Media Act. The terms of "transmission" and "accessible" in Phrase 1 shall apply to operators' own or other operators' programmes.

(4) *Mail order business* in terms of this Act shall apply to any commercial transaction relating to ordering and sending of goods by conventional mail or online without personal contact between supplier and buyer or without any technical or other measures to prevent shipment to children and adolescents.

(5) The provisions of §§ 2 through 14 of this Act shall not apply to married adolescents.

§ 11 Movie performances

(1) Presence of *Children* and *Adolescents* at public movie performances shall not be permissible unless the films shown have been cleared for them by the supreme state authority or an organisation of voluntary self-control in a procedure according to § 14, Sub-Clause 6 or if they are labelled "Information Programme" or "Educational Programme".

(2) Presence of *Children* as of six years of age at public movie performances may be permissible, in deviation from Sub-Clause 1, if the films shown have been cleared/labelled for *Children* and or *Adolescents* as of twelve years, provided that parental guidance is ensured (*Custodial Person*).

(3) Presence at public movie performances shall be solely permitted with parental guidance (*Custodial Person, Person with Parental Power*), notwithstanding the conditions specified in Sub-Clause 1. This restriction shall apply to the following situations:

1. *Children* below the age of six years;
2. *Children* as of six years at performances finished later than 8 p.m.;
3. *Adolescents* below the age of 16 years at performances finished after 10 p.m.;
4. *Adolescents* as of 16 years at performances lasting beyond midnight.

(4) Sub-Clauses 1 through 3 shall apply to public movie performances independent of techniques of recording and reproduction. They shall also apply to advertising commercials and supporting programmes. They shall not apply to non-commercial films, as long as those films are not used for commercial purposes.

(5) Commercials and advertising programmes for tobacco products and alcoholic drinks must not be shown before 6 p.m., notwithstanding the conditions specified in Sub-Clauses 1 through 4.

§ 12 Data media with films or games

(1) Recorded video cassettes and other data media suitable for distribution and reproduction on a monitor or playing on a monitor, using data media with films or games, shall not be accessible in the public for *Children* and *Adolescents* unless they have been cleared and labelled for the respective age group by the supreme state authority or an organisation of voluntary self-control in a procedure according to § 14, Sub-Clause 6, or unless they are labelled "Information Programme" or "Educational Programme".

(2) Labelling codes according to Sub-Clause 1 should be clearly visible on the surface of data media and on its cover. The following steps may be taken, in this context, by the supreme state authority:

1. Instructions on content, size, form, colour and fixation of codes.
2. Exceptional permissions regarding fixation of codes to media surfaces or cover. Telemedia operators who are involved in distribution of film and game programmes have to make sure that labels on their products are clear and unambiguous.

(3) Data media which are unlabelled or are labelled "Not released for young people" by the supreme state authority or an organisation of voluntary selfcontrol, in compliance with § 14, Sub-Clause 2; and in a procedure according to § 14, Sub-Clause 6, or § 14, Sub-Clause 7, shall be subject to the following restrictions:

1. They must not be offered or rendered available to *Children* or *Adolescents*.
2. They must not be offered or rendered available in retail stores, stands or other points of sale outside business rooms usually not visited by customers or in mail order schemes.

(4) The following rules shall apply to machines selling recorded data media:

1. They must not be installed in public places accessible for *Children* and *Adolescents*.
2. They must not be installed outside business spaces.
3. They must not be installed in unguarded entrance areas, lobbies or corridors.

Rules 1-3 shall not apply to exclusive sale of data media adequately labelled according to § 14, Sub-Clause 2, Nos. 1-4, and to selling machines furnished with mechanical devices to prevent distribution among *Children* and *Adolescents* of age groups for whom the programmes concerned have not been cleared according to § 14, Sub-Clause 2, Nos. 1-4.

(5) Data media with extracts of film and games programmes, in deviation from Sub-Clauses 1 and 3, may be distributed in conjunction with periodicals if they are clearly labelled by the distributor to the effect that an organisation of voluntary self-control has confirmed that the extracts concerned do not include material with a potentially undesirable impact on young people. Such label together with a clearly visible code shall be attached to both the periodical and the data media prior to distribution. § 12, Sub-Clause 2, Phrases 1 and 2 shall apply as the case may be. Release according to Phrase 1 may be ruled out for a distributor by the supreme state authority.

§ 13 Equipment for monitor games

(1) Playing at electronic games monitors without prizes, installed in public areas, may be permitted to *Children* and *Adolescents* not accompanied by a *Custodial Person* or *Person with Parental Power* if the play programmes have been released for the age group concerned according to § 14, Sub-Clause 6, by the supreme state authority or an organisation of voluntary self-control and have been appropriately labelled or labelled "Information" or "Educational" by the operator of the games facility.

(2) Electronic games monitors may be installed

1. in public areas accessible for *Children* and *Adolescents*,
2. outside business spaces,
3. in unguarded entrance halls, lobbies or corridors,

if their programmes have been released for *Children* as of six years of age and have been appropriately labelled or labelled "Information" or "Educational" according to § 14, Sub-Clause 7.

(3) § 12, Sub-Clause 2, Phrases 1 and 2, shall apply to the mode of labelling of said equipment.

§ 14 Labelling of films as well as of film and play programmes

(1) Films as well as film and play programmes which might potentially impair the development and education of *Children* and *Adolescents* to responsible personalities in society shall not be released for that age group.

(2) The following release codes may be issued for films as well as film and play programmes by the supreme state authority or an organisation of voluntary self-control in a procedure on the basis of Sub-Clause 6:

1. Released for general audiences, without age restriction
2. Released for audiences as of six years of age
3. Released for audiences as of twelve years of age
4. Released for audiences as of 16 years of age
5. Restricted to audiences below 18 years of age.

(3) Data media shall not be labelled at all if their content has been rated according to § 15, Sub-Clause 2, Nos. 1-5, by the supreme state authority or by an organisation of voluntary self-control or if they have been included in the List according to § 18. The supreme state authority shall be obliged to notify the applicable criminal prosecution authority of any fact indicative of an offence under § 15, Sub-Clause 1.

(4) A programme for data media or monitor games which is fully or substantially identical with data media recorded in the List according to § 18 shall not be labelled. The same shall apply to programmes meeting the prerequisites for inclusion in the List. In cases of doubt, the Federal Review Board for Publications Harmful to Young People shall be asked for a ruling in response to a procedure initiated according to Sub-Clause 6 by the supreme state authority or an organisation of voluntary self-control.

(5) Labelling of film programmes for data media and monitor games shall as well apply to public performances and the films selected for such events. Compulsory labelling of films for public film performances may just as well apply to film programmes of identical quality as may be shown by means of data media and

other film performance facilities. Sub-Clause 4 shall apply accordingly.

(6) Supreme state authorities may agree on a common procedure for release and labelling of films as well as of film and play programmes based on findings recorded from reviews that had been undertaken by organisations of voluntary self-control set up and supported by industrial associations. Such an agreement may provide that release and labelling by one organisation of voluntary selfcontrol is equivalent to release and labelling by the supreme authorities of all German states unless a deviating decision has been taken by one supreme state authority for the region under its administrative responsibility.

(7) Films or film and play programmes for information, instruction or teaching purposes must not be labelled "Information" or "Educational" unless they are clearly harmless to *Children* and *Adolescents*. Sub-Clauses 1-5 shall not apply. The supreme state authority may rule out an operator's general right of labelling or of labelling certain film or play programmes or may lift a label already applied to a product by an operator.

(8) For decision-making on labelling, due consideration should be given to potentially harmful titles, supplements or other text, pictures or sounds in data media or performance facilities in addition to the actual film or play programmes.

§ 15 Date media harmful to young people

(1) The following restrictions shall apply to data media which by public announcement have been included in the list of publications harmful to young people:

1. They must not be made available or accessible to *Children* and *Adolescents*.
2. They must not be displayed or performed and made otherwise available in a place accessible to *Children* or *Adolescents*.
3. They must not be offered or let to persons other than customers in retail trade outside business spaces or in stands or other points of sale usually not visited by customers or in mail order business or public or lending libraries.
4. They must not be offered or let to persons other than customers through commercial lending or comparable permission to use, except for stores not accessible to and optically barred from *Children* and *Adolescents*.
5. They must not be launched through mail order channels.
6. They must not be offered, announced or advertised in a public place accessible to and not optically barred from *Children* and *Adolescents* by dissemination of data media or telemedia apart from routine business transactions within the trade sector concerned.
7. They must not be produced, bought, supplied, stored or launched for full or partial (extracts) use, according to Nos. 1-6, or for enabling use by third persons.

(2) The following categories of harmful data media shall be subject to the restrictions of Sub-Clause 1 even without being included in the List or in a special announcement:

1. Media carrying content defined in § 86, § 130, § 130a, § 131, § 184, § 184a or § 184b, German Criminal Code;
2. Media carrying content glorifying war;

3. Media presenting in a disgraceful manner people who are dying or are exposed to severe physical or psychic suffering or violating human dignity by presenting actual facts and developments, although there is no justifiable public interest in such mode of reporting;

4. Media presenting *Children* and *Adolescents* in unnatural, sexually provocative physical postures;

5. Media which might have a severely damaging impact on the development and education of *Children* and *Adolescents* to responsible personalities in society.

(3) Subject to the restrictions of Sub-Clause 1, even without being included in the List or specially announced, are also data media which are qualitatively comparable to or identical with other data media which by special announcement already are included in the List.

(4) The List of harmful media must not be printed or published for advertising purposes.

(5) No advertisement of whatever kind must disclose that a procedure for getting data media or comparable telemedia included in the list had been or still is pending.

(6) If trading is permissible at all, producers shall inform, prior to delivery, wholesale or retail partners of any restriction according to Sub-Clause 1, Nos. 1-6.

§ 16 Special rules on telemedia

Rules on telemedia included in the List of harmful media according to § 18 shall be issued under state law.

§ 17 Name and scope of activity

(1) This agency formally named "Federal Review Board for Publications Harmful to Young People" [Review Board] shall be established by Federal Government.

(2) Decisions on inclusion into or deletion from the List of harmful media shall be taken by the Review Board.

§ 18 List of Media Harmful to Young Persons

(1) Data media and telemedia which might have a severely damaging impact on the development and education of *Children* and *Adolescents* to responsible personalities in society shall be registered by the Review Board and included in a List of Publications Harmful to Young Persons [List]. Included are media and other publications with immoral and brutalising content or those instigating violence, crime and racism.

(2) The List shall be made up of the following four parts:

1. Part A [Public List of Data Media] shall include all media not to be listed in Parts B, C or D.

2. Part B [Public List of Totally Banned Media] shall include media not to be listed in Part D but rated absolutely harmful by the Review Board in terms of § 86, § 130, § 130a, § 131, § 184a or § 184b, German Criminal Code.

3. Part C [Non-Public List of Media] shall include media not included in Part A

for exemption from public listing, according to § 24, Sub-Clause 3, Phrase 2, as well as all telemedia not to be listed in Part D.

4. Part D [Non-Public List of Totally Banned Media] shall include media not included in Part B for exemption from public listing, according to § 24, Sub-Clause 3, Phrase 2, as well as telemedia rated harmful by the Review Board in terms of § 86, § 130, § 130a, § 131, § 184a or § 184b, German Criminal Code.

(3) Exclusion criteria:

1. Media must not be included solely for political, social, religious or ideological content;
2. Media must not be included for content supporting arts, science, research or teaching;
3. Media must not be included for content in the interest of society unless presented in an unacceptable manner.

(4) Media may be exempt from listing in cases of minor relevance.

(5) Media shall be included in pursuit of a court ruling according to which the content meets the conditions of § 86, § 130, § 130a, § 131, § 184, § 184a or § 184b, German Criminal Code.

(6) Telemedia shall be included in the list in response to an application filed by the Central State Agency for Media Protection of Young Persons unless such application cannot be supported by plausible reasoning or is unjustified under the practice of the Review Board.

(7) Media shall be deleted from the list when the conditions for listing have ceased to exist. Any listing shall expire after 25 years.

(8) Sub-Clause 1 shall not apply to films nor to film and play programmes labelled according to § 14, Sub-Clause 2, Nos. 1-5. Sub-Clause 1 shall not apply either to telemedia on which a decision had been taken by the Central State Agency to the effect that the conditions for listing according to Sub-Clause 1 did not exist. Sub-Clause 1 shall not apply to telemedia which had been rated by an official body of self-control unless the Central State Agency has ruled that conditions do exist for listing according to Sub-Clause 1.

§ 19 Composition of the Review Board

(1) Serving on the Federal Review Board for Publications Harmful to Young Persons are one chairperson appointed by the Federal Ministry for Family, Senior Citizens, Women and Youth, one official appointed by each of the State governments as well as additional officials appointed by the above Federal Ministry. At least one deputy shall be appointed to the chairperson and to each of the officials. State governments may confer to a supreme state authority their right of appointment according to Sub-Clause 1.

(2) Officials appointed by the above Federal Ministry shall represent the following facets of society:

1. Creative and performing arts
2. Literature
3. Book trade and publishing
4. Suppliers of data media and telemedia

5. Non-government bodies of youth welfare
6. Bodies of public youth welfare
7. School teaching
8. Christian churches as well as Jewish and other religious communities holding the status of a public-law corporation.

Book traders, publishers and suppliers of data media and telemedia thus work together with institutions involved in comparable activities for evaluation and distribution of media notwithstanding their modes of recording and reproduction.

(3) Chairperson and officials shall be appointed for an office term of three years. Those failing to comply with their duty of full cooperation with the Review Board may be recalled by the appointing authority before the end of their full office term.

(4) The members of the Review Board shall not be bound to instructions.

(5) Twelve members of the Review Board shall constitute a quorum which shall include the chairperson, three State-appointed officials and one official each of the groups listed in Sub-Clause 2 (1-8). In case of absence of appointed members, a quorum may be constituted by at least nine members which, in turn, should include at least two members representing the groups 1-4, Sub-Clause 2.

(6) Any decision on listing shall be taken by a two-third majority of members present at the given meeting. In case of absence of appointed members, such decision shall require not less than seven votes (Sub-Clause 5, Phrase 2).

§ 20 Institutions with right of nomination/appointment

(1) The right of nomination and appointment according to § 19, Sub-Clause 2, shall be used by one official or deputy each representing the following organisations:

1. For creative and performing arts:

Deutscher Kulturrat,
Bund Deutscher Kunstszene e.V.,
Künstlergilde e.V.,
Bund Deutscher Grafik-Designer.

2. For literature:

Verband Deutscher Schriftsteller,
Freier Deutscher Autorenverband,
Deutscher Autorenverband e.V.,
PEN-Zentrum.

3. For book trade and publishers:

Börsenverein des Deutschen Buchhandels e.V.,
Verband Deutscher Bahnhofsbuchhändler,
Bundesverband Deutscher Buch-, Zeitungs- und Zeitschriftengrossisten e.V.,
Bundesverband Deutscher Zeitungsverleger e.V.,
Verband Deutscher Zeitschriftenverleger e.V.,
Börsenverein des Deutschen Buchhandels e.V. – Publishers Committee
Arbeitsgemeinschaft der Zeitschriftenverlage (AGZV) im Börsenverein des Deutschen Buchhandels.

4. For suppliers of data media and telemedia:

Bundesverband Video,

Verband der Unterhaltungssoftware Deutschland e.V.,
 Spitzenorganisation der Filmwirtschaft e.V.,
 Bundesverband Informationswirtschaft, Telekommunikation und neue
 Medien e.V.,
 Deutscher Multimedia Verband e.V.,
 Electronic Commerce Organisation e.V.,
 Verband der Deutschen Automatenindustrie e.V.,
 IVD Interessengemeinschaft der Videothekare Deutschlands e.V.

5. For non-government bodies of youth welfare:

Bundesarbeitsgemeinschaft der Freien Wohlfahrtspflege,
 Deutscher Bundesjugendring,
 Deutsche Sportjugend,
 Bundesarbeitsgemeinschaft Kinder- und Jugendschutz (BAJ) e.V.

6. Bodies of public youth welfare:

Deutscher Landkreistag,
 Deutscher Städtetag,
 Deutscher Städte- und Gemeindebund.

7. For school teaching:

Gewerkschaft Erziehung und Wissenschaft im Deutschen
 Gewerkschaftsbund,
 Deutscher Lehrerverband,
 Verband Bildung und Erziehung,
 Verein Katholischer Deutscher Lehrerinnen.

8. For public-law corporations according to § 19, Sub-Clause 2, No. 8:

Plenipotentiary of the Council of Evangelical Churches of Germany,
 Commissioner of German Bishops – Catholic Office in Berlin,
 Central Council of Jews in Germany.

Any organisation using its right of nomination and appointment shall appoint two persons, an official and a deputy. One official and deputy shall be selected by the Federal Ministry of Family, Senior Citizens, Women and Youth if more than one nominations are submitted by an organisation named in Sub-Clause 1.

(2) Officials and deputies may as well be nominated by organisations not explicitly named, as long as the latter are representative of any of the groups listed in § 19, Sub-Clause 2. The above Federal Ministry shall use the Federal Gazette once a year, in January, to invite nominations which then should be submitted within six weeks from the date of invitation. It shall select and appoint one additional official or deputy per group from among the nominations received within the above period of six weeks. No consideration shall be given to nominations submitted by organisations without association status or from organisations of whom sustainable activity cannot be expected. Decision shall be taken by drawing lots if no agreement can be achieved on one of several nominees. Sub-Clause 1, Phrase 3, shall apply accordingly. Provided due consideration of the workload on the Review Board or an insufficient number of nominations submitted by organisations for any of the listed groups, officials and deputies may be appointed by the above Federal Ministry, with Phrase 5 applying accordingly.

§ 21 Procedure

- (1) The Review Board, as a rule, shall take action in response to formal request.
- (2) Formal requests may be submitted by the Federal Ministry of Family, Senior Citizens, Women and Youth, the Central State Agency for Media Protection of Young Persons and youth welfare offices at state and local levels. Formal requests may as well be made by persons listed in Sub-Clause 7 for deletion from the List of Harmful Publications or for an official statement to the effect that media are not fully or partially identical with media already listed.
- (3) A procedure may be suspended by the Chairperson if inclusion into or deletion from the List is out of question.
- (4) The Review Board shall as well take formal action in response to a formal request submitted by an authority not explicitly mentioned in Sub-Clause 2 or by an established non-government body of youth welfare, provided that the Chairperson considers such proceedings in the best interest of protection of young persons.
- (5) The Review Board for Publications Harmful to Young Persons shall take formal action by order of the Chairperson under the following conditions:
 1. In case of doubt as to whether the content of a medium is partially or fully identical with the content of a medium already listed.
 2. In case of findings to the effect that the conditions for listing according to § 18, Sub-Clause 7, Phrase 1, do no longer exist.
 3. If inclusion into the List according to § 18, Sub-Clause 7, Phrase 2, is no longer valid and conditions for listing continue to exist.
- (6) Prior to decision-making on listing of a telemedium, the Review Board shall provide the Central State Agency with an opportunity for being heard without delay. Such testimony shall be duly considered by the Review Board before a decision is taken. The Review Board may take a final decision unless testimony has been filed by the Central State Agency within five working days from invitation.
- (7) The author or holder of beneficial interest in telemedia shall be provided with an opportunity of being heard on the case under review.
- (8) Rulings shall be passed on to the following persons/institutions:
 1. Author and holder of beneficial interest in the data media concerned;
 2. Author and supplier of telemedia;
 3. Applicant authority;
 4. Federal Ministry of Family, Senior Citizens, Women and Youth, supreme state authorities of youth welfare and Central State Agency for Media Protection of Young Persons.All distribution-related and advertising restrictions resulting from the given ruling shall be communicated in detail. The reasons should be stated in the same notification or should be separately communicated within one week.
- (9) The Review Board and the Central State Agency shall maintain close cooperation and exchange of information.
- (10) The Review Board shall have the right, as of January 1, 2004, to levy fees on proceedings opened on request of persons listed in Sub-Clause 7 for the

purpose of one of the following rulings:

1. The content of a given medium is not fully or partially identical with the content of a medium already listed.
2. A given medium is to be deleted from the List.

The Federal Ministry of Family, Senior Citizens, Women and Youth hereby is authorised to issue a ministerial order to specify chargeable offences and fees, with such order being subject to consent of the Federal Council. The Administrative Expenses Act shall apply.

§ 22 Listing of periodically published data media and telemedia

(1) Periodically published data media may be included for periods of three to twelve months into the List of Publications Harmful to Young Persons if more than two of their issues were listed within that twelve-month period. This shall not apply to dailies and political magazines.

(2) Telemedia may be included for periods of three to twelve months into the List of Publications Harmful to Young Persons if more than two of their issues were listed within that twelve-month period. Sub-Clause 1, Phrase 2, shall apply accordingly.

§ 23 Simplified procedure

(1) The Review Board may resort to a simplified procedure to pass a unanimous resolution to the effect that a medium may potentially jeopardise the moral development of *Children* or *Adolescents* and their education to become a responsible personality in society, such simplified procedure being related to a reduced number of decision-makers, i.e. the Chairperson plus two members, one of them being a representative of one of the groups according to § 19, Sub-Clause 2, Nos. 1-4. The fully staffed Review Board shall take a final decision if a unanimous resolution cannot be achieved (§ 19, Sub-Clause 5).

(2) Inclusion into the List according to § 22 cannot be done by means of the above simplified procedure.

(3) Respondents may file an objection to a simplified procedure (§ 21, Sub-Clause 7) within one month from service by submitting an application for a ruling by the fully staffed Review Board.

(4) The Review Board may rule in a simplified procedure deletion of a medium from the List under the condition of § 21, Sub-Clause 5, No. 2, on completion of ten years from the date of inclusion.

(5) In a situation in which large-scale distribution, dissemination or other means of accessibility of data media or telemedia is an imminent threat although definitive listing is obviously forthcoming, such listing may be ruled in a simplified procedure. Sub-Clause 2 shall apply accordingly.

(6) Such simplified and temporary ruling shall be deleted from the List contemporaneously with the definitive ruling by the Review Board, yet not later than after one month. Said one-month deadline (Phrase 1) may be extended by another month. Sub-Clause 1 shall apply accordingly. Extension, just as the original deadline, shall be published in the Federal Gazette.

§ 24 Keeping of the List of Media Harmful to Young Persons

- (1) The List of Media Harmful to Young Persons [List] shall be kept by the Chairperson of the Review Board.
- (2) Decisions on listing or delisting shall be taken without delay. Amendments to the List shall be made as soon as an earlier ruling by the Review Board is rescinded or otherwise invalidated.
- (3) Any listing or delisting of a data medium shall be published in the Federal Gazette with reference to the underlying ruling. Publication should not be done for data media disseminated merely by telemedia or if such publication would have a harmful impact on the practice of protection of young persons.
- (4) Inclusion in Parts B or D of the List shall be reported by the Chairperson to the local criminal prosecution authority. A medium shall be included in Parts A or C in case of a legal ruling to the effect that its content has no relevance in terms of the Criminal Code. The Chairperson shall obtain another ruling of the Review Board to consider potential deletion from the List.
- (5) For a telemedium listed in response to an offence committed abroad, the Chairperson shall report such listing to the applicable self-control bodies of telemedia for inclusion in user-autonomous filter programmes. Such report must be exclusively used for inclusion in user-autonomous filter programmes.

§ 25 Legal process

- (1) Recourse to administrative tribunals shall be taken for any action or appeal against a ruling by the Review Board on listing of a medium or rejection of an application for delisting.
- (2) Recourse to administrative tribunals may as well be taken by an applicant authority for any action or appeal against a ruling by the Review Board on listing of a medium or suspension of proceedings.
- (3) Such action shall be filed against the Federal Government, represented by the Review Board.
- (4) An appeal shall not have suspensive effect. Filing of an appeal shall not depend on an investigation in a pre-trial process. A ruling in a simplified procedure, however, shall depend on a prior ruling by the Review Board staffed according to § 19, Sub-Clause 5.

§ 26 Power of executive order

The Federal Government is authorised to issue executive orders with consent of the Federal Council to settle details regarding location of and procedures used by the Review Board as well as keeping of the List.

§ 27 Penal rules

- (1) The following offences shall be liable to imprisonment up to one year or a fine:
 1. Presentation or letting in any form of data media in violation of § 15, Sub-Clause 1, Nos. 1-5 or 6, also in conjunction with Sub-Clause 2;
 2. Production, procurement, supply, storage or import of data media in violation of § 15, Sub-Clause 1, No. 7, also in conjunction with Sub-Clause 2;

3. Copying or publication of the List of Media Harmful to Young Persons in violation of § 15, Sub-Clause 4;
 4. Providing of a relevant clue in any business advertising activity in violation of § 15, Sub-Clause 5;
 5. Infringement of an enforceable ruling issued according to § 21, Sub-Clause 8, Phrase 1, No. 1.
- (2) Event operators or other businessmen staging events shall be liable to punishment for the following offences:
1. Premeditated offence in violation of § 28, Sub-Clause 1, Nos. 1-18 or 19, carelessly causing severe danger to the physical, spiritual or moral development of at least one *Child* or *Adolescent*;
 2. Premeditated activities in pursuit of profit or persistent repetition of activities listed in § 28, Sub-Clause 1, Nos. 4-18 or 19.
- (3) Imprisonment up to six months or fine up to 180 daily rates shall be imposed upon negligent offenders of the following rules:
1. Sub-Clause 1, No. 1;
 2. Sub-Clause 1, Nos. 3, 4 or 5.
- (4) Sub-Clause 1, Nos. 1 and 2 and Sub-Clause 3, No. 1 shall not be applied to a *Custodial Person* for offering or letting a medium to a *Child* or *Adolescent* or making such medium accessible to them in any other way. This, however, shall not apply to cases of gross negligence of educational duty.

§ 28 Civil penalty rules

- (1) The following premeditated or negligent offences, as committed by operators or event organisers, shall be liable to (non-criminal) civil penalties:
1. Failure of adequate announcement and clearly perceptible presentation of legal provisions applicable to the premises concerned in violation of § 3, Sub-Clause 1;
 2. Use of a label in contravention of § 3, Sub-Clause 2, Phrase 1;
 3. Failure of adequate and/or timely information in contravention of § 3, Sub-Clause 2, Phrase 2;
 4. Presentation of an information or announcement of a film or a film and games programme or advertising of them in contravention of § 3, Sub-Clause 2, Phrase 3;
 5. Toleration of a *Child's* or *Adolescent's* presence in a restaurant in contravention of § 4, Sub-Clause 1 or 3;
 6. Toleration of a *Child's* or *Adolescent's* presence at a public dance in contravention of § 5, Sub-Clause 1;
 7. Toleration of a *Child's* or *Adolescent's* presence in a public gambling hall or a comparable room in contravention of § 6, Sub-Clause 1;
 8. Toleration of a *Child's* or *Adolescent's* participation in a prize-winning game in contravention of § 6, Sub-Clause 2;
 9. Contravention of an enforceable ruling according to § 7, Phrase 1;
 10. Permission or promotion of consumption of an alcoholic drink by a *Child* or *Adolescent* in contravention of § 9, Sub-Clause 1;
 11. Providing alcoholic drinks in a vending-machine in contravention of § 9, Sub-

- Clause 3, Phrase 1;
 11a, in deviation from § 9, Sub-Clause 4, launching sugared alcohol-containing beverages;
12. Providing tobacco products to a *Child* or *Adolescent* below 16 years of age or toleration of smoking by said persons in contravention of § 10, Sub-Clause 1;
 13. Providing tobacco products in a vending-machine in contravention of § 10, Sub-Clause 2, Phrase 1;
 14. Toleration of a *Child's* or *Adolescent's* presence at a public film performance or advertising credits or supporting programme in contravention of § 11, Sub-Clause 1 or 3, and in conjunction with Sub-Clause 4, Phrase 2;
 - 14a Presentation of an advertising film or commercial programme in contravention of § 11, Sub-Clause 5;
 15. Rendering a data medium accessible to a *Child* or *Adolescent* in contravention of § 12, Sub-Clause 1;
 16. Offering or letting a data medium in contravention of § 12, Sub-Clause 3, No. 2;
 17. Installation of a vending-machine or games monitor in contravention of § 12, Sub-Clause 2, or § 13, Sub-Clause 2;
 18. Distribution of data media in contravention of § 12, Sub-Clause 5, Phrase 1;
 19. Toleration of a *Child* or *Adolescent* playing at games monitors in contravention of § 13, Sub-Clause 1;
 20. Failure of adequate and/or timely announcement of compulsory information or notice in contravention of § 15, Sub-Clause 6.
- (2) The following premeditated or negligent activities conducted by suppliers shall be considered regulatory offences:
1. Failure of adequate and/or timely presentation/display of compulsory information or notice in contravention of § 12, Sub-Clause 2, Phrase 1, No. 1, also in conjunction with Sub-Clause 5, Phrase 3, or § 13, Sub-Clause 3;
 2. Contravention of an enforceable ruling according to § 12, Sub-Clause 2, Phrase 2, also in conjunction with Sub-Clause 5, Phrase 3, also in conjunction with Sub-Clause 5, Phrase 3, or § 13, Sub-Clause 3, or § 14, Sub-Clause 7, Phrase 3;
 3. Failure of adequate and/or timely presentation of information or notice in contravention of § 12, Sub-Clause 5, Phrase 2;
 4. Unjustified labelling of a film or film or games programme "Information" or "Educational" in contravention of § 14, Sub-Clause 7, Phrase 1.
- (3) Other regulatory offences:
1. Failure of adequate and/or timely presentation of information or notice in contravention of § 12, Sub-Clause 2, Phrase 3;
 2. Use of a notice in contravention of § 24, Sub-Clause 5, Phrase 2.
- (4) A regulatory offence is committed by a person above 18 years of age who encourages a *Child* or *Adolescent* to assume behaviours that ought to be prevented by a ban according to Sub-Clause 1, Nos. 5-8, 10, 12, 14-16 or 19 or § 17, Sub-Clause 1, No. 1 or 2, or § 12, Sub-Clause 3, No. 1 or according to an enforceable ruling as specified in § 7, Phrase 1. The ban according to § 12, Sub-

Clause 3, No. 1, shall not apply to a *Custodial Person* or a person acting with consent of a *Custodial Person*.

(5) A regulatory offence may be punishable by a fine up to € 50,000.

APPENDIX 5: SECTION 130 OF THE GERMAN CRIMINAL CODE

Section 86 - Dissemination of Means of Propaganda of Unconstitutional Organizations

(1) Whoever domestically disseminates or produces, stocks, imports or exports or makes publicly accessible through data storage media for dissemination domestically or abroad, means of propaganda:

1. of a party which has been declared to be unconstitutional by the Federal Constitutional Court or a party or organization, as to which it has been determined, no longer subject to appeal, that it is a substitute organization of such a party;

2. of an organization, which has been banned, no longer subject to appeal, because it is directed against the constitutional order or against the idea of international understanding, or as to which it has been determined, no longer subject to appeal, that it is a substitute organization of such a banned organization;

3. of a government, organization or institution outside of the territorial area of application of this law which is active in pursuing the objectives of one of the parties or organizations indicated in numbers 1 and 2; or

4. means of propaganda, the contents of which are intended to further the aims of a former National Socialist organization,

shall be punished with imprisonment for not more than three years or a fine.

(2) Means of propaganda within the meaning of subsection (1) shall only be those writings (Section 11 subsection (3)) the content of which is directed against the free, democratic constitutional order or the idea of international understanding.

(3) Subsection (1) shall not be applicable if the means of propaganda or the act serves to further civil enlightenment, to avert unconstitutional aims, to promote art or science, research or teaching, reporting about current historical events or similar purposes.

(4) If guilt is slight, the court may refrain from imposition of punishment pursuant to this provision.

Section 130 - Instructions for Citizens

Section 130 - Agitation of the People

(1) Whoever, in a manner that is capable of disturbing the public peace:

1. incites hatred against segments of the population or calls for violent or arbitrary measures against them; or
2. assaults the human dignity of others by insulting, maliciously maligning, or defaming segments of the population,

shall be punished with imprisonment from three months to five years.

(2) Whoever:

1. with respect to writings (Section 11 subsection (3)), which incite hatred against segments of the population or a national, racial or religious group, or one characterized by its folk customs, which call for violent or arbitrary measures against them, or which assault the human dignity of others by insulting, maliciously maligning or defaming segments of the population or a previously indicated group:

a) disseminates them;

b) publicly displays, posts, presents, or otherwise makes them accessible;

c) offers, gives or makes accessible to a person under eighteen years; or

(d) produces, obtains, supplies, stocks, offers, announces, commends, undertakes to import or export them, in order to use them or copies obtained from them within the meaning of numbers a through c or facilitate such use by another; or

2. disseminates a presentation of the content indicated in number 1 by radio,

shall be punished with imprisonment for not more than three years or a fine.

(3) Whoever publicly or in a meeting approves of, denies or renders harmless an act committed under the rule of National Socialism of the type indicated in Section 220a subsection (1), in a manner capable of disturbing the public peace shall be punished with imprisonment for not more than five years or a fine.

(4) Subsection (2) shall also apply to writings (Section 11 subsection (3)) with content such as is indicated in subsection (3).

(5) In cases under subsection (2), also in conjunction with subsection (4), and in cases of subsection (3), Section 86 subsection (3), shall apply correspondingly.

Section 130a - Instructions for Crimes

(1) Whoever disseminates, publicly displays, posts, presents, or otherwise makes accessible a writing (Section 11 subsection (3)) which is capable of serving as instructions for an unlawful act named in Section 126 subsection (1), and is intended by its content to encourage or awaken the readiness of others to commit such an act, shall be punished with imprisonment for not more than three years or a fine.

(2) Whoever:

1. disseminates, publicly displays, posts, presents, or otherwise makes accessible a writing (Section 11 subsection (3)) which is capable of serving as instructions for an unlawful act named in Section 126 subsection (1); or

2. gives instructions for an unlawful act named in Section 126 subsection (1), publicly or in a meeting, in order to encourage or awaken the readiness of others to commit such an act,

shall be similarly punished.

(3) Section 86 subsection (3), shall apply correspondingly.

Section 131 - Representation of Violence

(1) Whoever, in relation to writings (Section 11 subsection (3)), which describe cruel or otherwise inhuman acts of violence against human beings in a manner which expresses a glorification or rendering harmless of such acts of violence or which represents the cruel or inhuman aspects of the event in a manner which injures human dignity:

1. disseminates them;

2. publicly displays, posts, presents, or otherwise makes them accessible;

3. offers, gives or makes them accessible to a person under eighteen years; or

4. produces, obtains, supplies, stocks, offers, announces, commends, undertakes to import or export them, in order to use them or copies obtained from them within the meaning of numbers 1 through 3 or facilitate such use by another,

shall be punished with imprisonment for not more than one year or a fine.

(2) Whoever disseminates a presentation of the content indicated in subsection (1) by radio, shall be similarly punished.

(3) Subsections (1) and (2) shall not apply if the act serves as reporting about current or historical events.

(4) Subsection (1), number 3 shall not be applicable if the person authorized to care for the person acts.

Section 184 - Dissemination of Pornographic Writings

(1) Whoever, in relation to pornographic writings (Section 11 subsection (3)):

1. offers, gives or makes them accessible to a person under eighteen years of age;
2. displays, posts, presents or otherwise makes them accessible at a place accessible to persons under eighteen years of age, or into which they can see;
3. offers or gives them to another in retail trade outside of the business premises, in kiosks or other sales areas which the customer usually does not enter, through a mail-order business or in commercial lending libraries or reading circles; 3a. offers or gives them to another by means of commercial rental or comparable commercial furnishing for use, except for shops which are not accessible to persons under eighteen years of age and into which they cannot see;
4. undertakes to import them by means of a mail-order business;
5. publicly offers, announces, or commends them at a place accessible to persons under eighteen years of age or into which they can see, or through dissemination of writings outside of business transactions through normal trade outlets;
6. allows another to obtain them without having been requested to do by him;
7. shows them at a public film showing for compensation requested completely or predominantly for this showing;
8. produces, obtains, supplies, stocks, or undertakes to import them in order to use them or copies made from them within the meaning of numbers 1 through 7 or to make such use possible by another; or
9. undertakes to export them in order to disseminate them or copies made from them abroad in violation of the applicable penal provisions there or to make them publicly accessible or to make such use possible,

shall be punished with imprisonment for not more than one year or a fine.

(2) Whoever disseminates a pornographic presentation by radio shall be similarly punished.

(3) Whoever, in relation to pornographic writings (Section 11 subsection (3)), which have as their object acts of violence, the sexual abuse of children or sexual acts of human beings with animals:

1. disseminates them;
2. publicly displays, posts, presents or otherwise makes them accessible; or
3. produces, obtains, supplies, stocks, offers, announces, commends, or undertakes to import or export them, in order to use them or copies made from them within the meaning of numbers 1 or 2 or makes such use possible by another,

shall be punished, if the pornographic writings have as their object the sexual abuse of children, with imprisonment from three months to five years, and otherwise with imprisonment for not more than three years or a fine.

(4) If the pornographic writings (Section 11 subsection (3)) in cases under subsection (3) have as their object the sexual abuse of children and reproduce an actual or true-to-life event, then the punishment shall be imprisonment from six months to ten years if the perpetrator acted professionally or as a member of a gang which has combined for the continued commission of such acts.

(5) Whoever undertakes to gain possession of pornographic writings (Section 11 subsection (3)) for himself or a third person, which have as their object the sexual abuse of children, shall, if the writings reproduce an actual or true-to-life event, be punished with imprisonment for not more than one year or a fine. Whoever possesses the writings indicated in sentence 1 shall be similarly punished.

(6) Subsection (1), number 1 shall not be applicable if the person responsible for the care of the person acts. Subsection (1), number 3a, shall not apply if the act takes place in business transactions with commercial borrowers. Subsection (5) shall not apply to acts, which serve exclusively to fulfill legal, official or professional duties.

(7) In cases under subsection (4), Section 73d shall be applicable. Objects, to which a crime under subsection (5) relates, shall be confiscated. Section 74a shall be applicable.

Section 184a - Engaging in Prohibited Prostitution

Whoever persistently contravenes a prohibition enacted by ordinance against engaging in prostitution at particular places at any time or during particular times of

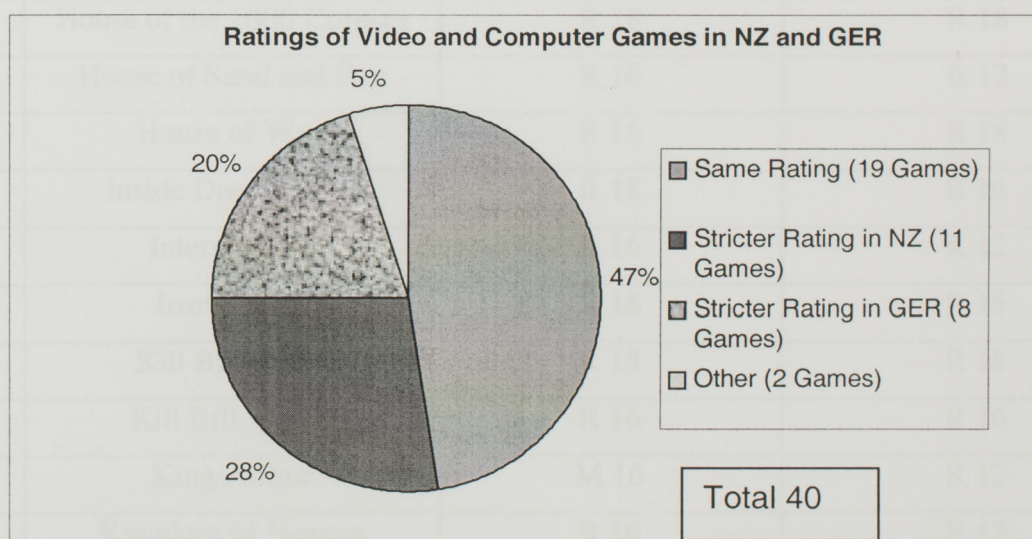
the day, shall be punished with imprisonment for not more than six months or a fine of not more than one hundred eighty daily rates.

1.)	Section 184b - Youth-Endangering Prostitution	R 16
2.)		R 16
3.)	Whoever engages in prostitution:	Indicated by the DP/MI
4.)	1. in the vicinity of a school or other locality which is intended to be visited by persons under eighteen years of age; or	
5.)		R 16
6.)	2. in a house in which persons under eighteen years of age live,	
	in a way which morally endangers these persons, shall be punished with imprisonment for not more than one year or a fine.	
7.)		R 15
8.)	Chronicles of Narnia: Escape from Bait-Par-They	R 15
9.)	CSI Miami	M 16 R 12
10.)	Def Jam: Fight for NY	R 15
11.)	DOOM 3	R 15
12.)	Driver	R 15
13.)	Fahrenheit	R 15
14.)	For City	R 15
15.)	Gate Ultimate Soldier	R 15
16.)	Grand Theft Auto 2	R 15
17.)	Grand Theft Auto III	R 15
18.)	Grand Theft Auto: London Special Edition	R 15
19.)	Grand Theft Auto San Andreas	R 15
20.)	Grand Theft Auto Vice City	R 15
21.)	Mafia	R 15
22.)	Manhunt	Objectionable (banned) Indicated by the DP/MI
23.)	Marine Sharpshooter	R 15
24.)	Medal of Honor	R 15

APPENDIX 6: RATINGS OF VIDEO AND COMPUTER GAMES IN NEW ZEALAND AND GERMANY FROM JANUARY 2004- SEPTEMBER 2005

	Computer Game	Rating NZ	Rating Germany
1.)	Backyard Wrestling	R 18	R 16
2.)	Blade II	R 18	R 16
3.)	BloodRayne	R 18	Indexed by the BPjM
4.)	Boiling Point	R 18	R 16
5.)	Breed	M 16	R 16
6.)	Call of Duty (United Offensive)	R 16	R 18
7.)	Chaser	R 16	R 16
8.)	Chronicles of Riddick: Escape from Butcher Bay	R 18	R 18
9.)	CSI Miami	M 16	R 12
10.)	Def Jam: Fight for NY	R 18	R 18
11.)	DOOM 3	R 16	R 18
12.)	Driv3r	R 18	R 16
13.)	Fahrenheit	R 16	R 16
14.)	Far Cry	R 16	R 18
15.)	Gore Ultimate Soldier	R 18	R 18
16.)	Grand Theft Auto 2	R 18	R 16
17.)	Grand Theft Auto III	R 18	R 18
18.)	Grand Theft Auto London Special Edition	R 18	R 16
19.)	Grand Theft Auto San Andreas	R 18	R 16
20.)	Grand Theft Auto Vice City	R 18	R 16
21.)	Mafia	R 18	R 16
22.)	Manhunt	Objectionable (banned)	Indexed by the BPjM
23.)	Marine Sharpshooter	R 16	R 16
24.)	Medal of Honour	R 13	R 18

25.)	Mortal Kombat: Deadly Alliance	R 18	R 18
26.)	Mortal Kombat: Deception	R 18	R 18
27.)	Painkiller	R 18	R 18
28.)	Postal 2: Share the Pain	Objectionable (banned)	Indexed by the BPjM
29.)	Roadkill	R 18	R 18
30.)	Soldier of Fortune	R 18	R 18
31.)	Soldier of Fortune II	R 18	R 18
32.)	State of Emergency	R 18	R 18
33.)	Still Life	R 16	R 16
34.)	SWAT 4	R 16	R 16
35.)	The Getaway	R 18	R 16
36.)	The Getaway: Black Monday	R 18	R 16
37.)	The Punisher	R 18	Indexed by the BPjM
38.)	Unreal Tournament 2004	R 16	R 16
39.)	Wolfenstein 3D	R 13	Indexed by the BPjM
40.)	Return to Castle Wolfenstein	R 16	Indexed by the BPjM



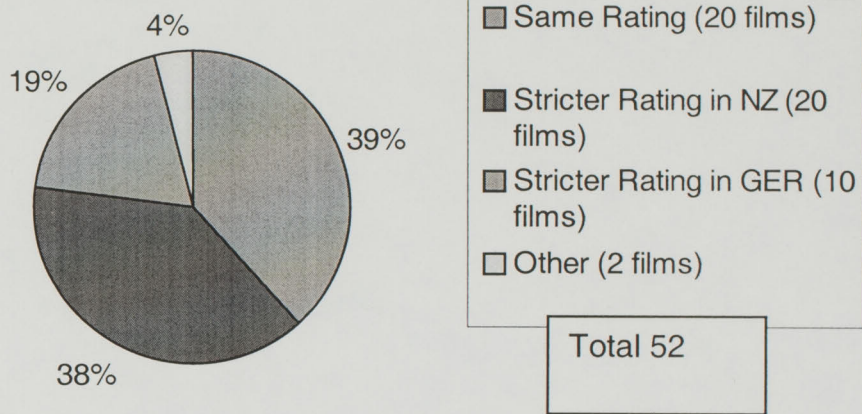
***APPENDIX 7: RATINGS OF FILMS IN NEW ZEALAND AND GERMANY
FROM JANUARY 2004- SEPTEMBER 2005***

	TITLE	RATING IN NZ	RATING IN GERMANY
1.)	21 Grams	R 16	R 12
2.)	9 Songs	R 16	R 16
3.)	Alexander	R 13	R 12
4.)	Could Mountain	R 16	R 12
5.)	Confidences Trop Intimes (Intimate Strangers)	M 16	R 6
6.)	Darkness	R 13	R 16
7.)	Dawn of the Dead	R 16	R 18
8.)	Elephant	R 16	R 12
9.)	Exorcist: The Beginning (Exorcist IV)	R 16	R 16
10.)	Gothika	R 16	R 16
11.)	Head in the Clouds	R 16	R 12
12.)	Hostage	R 16	R 16
13.)	House of the 1000 Corpses	R 18	R 18
14.)	House of Sand and Fog	R 16	R 12
15.)	House of Wax	R 16	R 18
16.)	Inside Deep Throat	R 18	R 16
17.)	Intermission	R 16	R 12
18.)	Irreversible	R 18	R 18
19.)	Kill Bill Vol. I	R 18	R 18
20.)	Kill Bill Vol. II	R 16	R 16
21.)	King Arthur	M 16	R 12
22.)	Kingdom of Heaven	R 16	R 12
23.)	Kinsey (Let's talk about Sex)	R 16	R 12
24.)	Land of the Dead	R 16	R 18

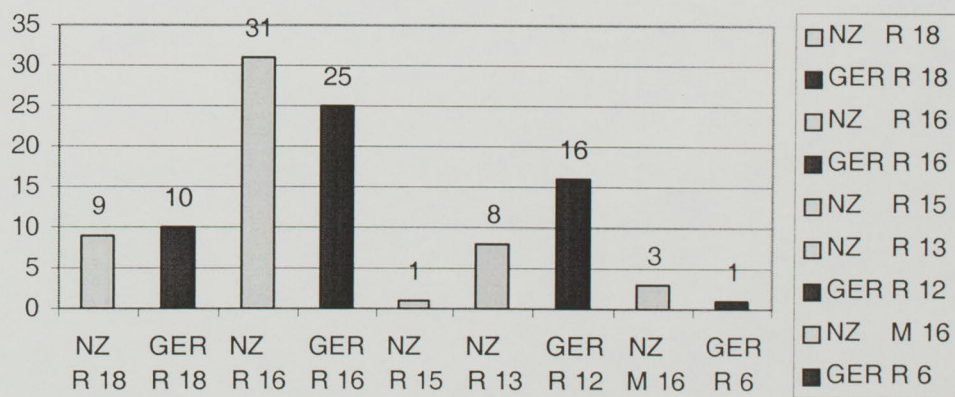
25.)	Man on Fire	R 16	R 18
26.)	Monster	R 18	R 16
27.)	My Summer of Love	R 16	R 12
28.)	Nathalie	R 16	R 16
29.)	Night Watch	R 16	R 16
30.)	Open Water	M 16	R 12
31.)	Precious Moments (Fremragende Timer)	R 16	R 16
32.)	Resident Evil: Apocalypse (Resident Evil II)	R 13	R 18
33.)	Seed of Chucky	R 16	R 16
34.)	Shaun of the Dead	R 13	R 16
35.)	Sin City (Frank Miller's Sin City)	R 18	R 18
36.)	Soul Plane	R 16	R 12
37.)	Taking Lives	R 16	R 16
38.)	Team America World Police	R 16	R 16
39.)	The Amityville Horror	R 16	R 16
40.)	The Butterfly Effect	R 16	R 16
41.)	The Chronicles of Riddick	R 13	R 12
42.)	The Cooler	R 16	R 16
43.)	The Dreamers	R 18	R 16
44.)	The Girl Next Door	R 16	R 12
45.)	The Grudge	R 16	R 16
46.)	The Last Samurai	R 13	R 16
47.)	The Manchurian Candidate	R 13	R 12
48.)	The Passion of the Christ	R 15	R 16
49.)	The Punisher	R 18	R 18
50.)	The Skeleton Key	R 13	R 16
51.)	Thirteen	R 16	R 12

52.)	Wonderland	R 18	R 16
------	------------	------	------

Film ratings in New Zealand and Germany between January 2004 and September 2005



Use of Rating Labels in New Zealand and Germany:



AS741
VUW
A66
V879
2005

