

THE REGULATION OF IN-FLIGHT FILMS*

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1 Introduction

Since the screening of the first in-flight film, *The Lost World*, in 1925 on board a WWI converted bomber near London, in-flight entertainment (IFE), headed by film, has become an integral part of the airline industry. In fact, long haul international flights have become unimaginable (and increasingly unbearable) without in-flight movies. While TV programs, interactive games, internet access — and lately even gambling — have joined film as airlines continue to offer passengers more sophisticated IFE systems, movies on the main cabin and single-aisle screens remain a familiar sight on most commercial airlines internationally.

This otherwise pleasant experience recently turned sour for a parent travelling on an international flight with his two young children when the in-flight film contained scenes unsuitable for children of that age. The restrictive classification of the film in question, appropriately indicating that it was not suitable for children under a certain age, was of little assistance in the context of a captive audience in the main cabin on an intercontinental flight. This experience raises some questions regarding the regulation of IFE and, specifically, films. How does the regulation of IFE compare with that of “ordinary” cinema? What measures are in place to prevent this scenario and what regulation is desirable in this context?

This article examines the current regulatory framework within which films are exhibited on the one hand and the jurisdictional scheme within which airlines operate on the other, in order to establish the regulatory regime for in-flight films, specifically in South Africa. The analysis suggests that there is a regulatory hiatus between the established framework and current practice. The desirability of regulating in-flight films in the same way as regular cinemas is examined in this context.

2 The regulation of film exhibition

In South Africa, the exhibition of films is regulated under the Film and

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Publication Act.¹ The Act creates a Film and Publication Board,² which is empowered to classify certain films.³ In this way, age restrictions are awarded to specific films.⁴ It is an offence to exhibit in public or distribute any film that has not been classified by the Film and Publication Board.⁵ The Act does, however, provide for exemptions from these provisions.⁶ In terms of section 23, the executive committee of the Board may exempt “any particular film, any particular class of films, or any film intended for exhibition to a particular group of persons or under any particular circumstances” from section 26 under such conditions as the committee may determine. Exemptions are generally granted upon request in the case of film festivals, scientific seminars, do-it-yourself instructions, sport, wildlife and educational materials.⁷ The broadcasting industry is also exempted from the Act.⁸

The Film and Publication Board has developed guidelines for the classification of films under section 31 of the Act.⁹ In terms of these guidelines, eight categories of film classifications exist —

- A: suitable for all;
- PG: parental guidance is advised;
- 10M, 13M: the film contains scenes that are not deemed harmful to children, but may be inappropriate to some children within certain age groups, and children under 10 and 13 respectively must be accompanied by an adult;¹⁰
- 10, 13, 16 or 18: the film is not suitable for persons under the relevant age;
- The last four categories constitute legal restrictions on such films, that is, such films may not be exhibited to persons under that age.¹¹ The Act provides that any person who knowingly “exhibits in public” any film in conflict with the classification restrictions placed on such film by the Board, shall be guilty of an offence.¹²

The Act defines “in public” as including “any place to which admission is obtained for any consideration, direct or indirect”.¹³ Leaving aside for the moment all jurisdictional questions (which are addressed below),¹⁴ an

¹ 65 of 1996.

² S 3.

³ These are films that are submitted to the Board for classification in terms of the Act. See s 2(a), s 18.

⁴ S 18(4)(b).

⁵ S 26(1)(a).

⁶ Ss 22-24.

⁷ Film and Publication Board *Info for Distributors: Classification of a Film, Video, DVD or other Discs* http://www.fpb.gov.za/distr_info/index.html (19.10.04).

⁸ S 23(3).

⁹ GN 1671 in GG 25716 of 2003-11-14, <http://www.fpb.gov.za/classification/guideline.htm> (19.10.04).

¹⁰ These two classifications were recently introduced by the Film and Publication Board on a trial basis: see the Board’s classification notice on the film *Hellboy* <http://www.fpb.gov.za/index.html> (19.10.04).

¹¹ S 26(1)(f).

¹² S 26(1)(f).

¹³ S 1.

¹⁴ See par 3 *infra*.

aeroplane seems to fall within this definition. It follows that it would be an offence to exhibit a film on board a flight that has not been classified by the Board or contrary to the conditions imposed by such classification. These conditions are not limited to age restrictions, but may also include requirements regarding consumer advice that must be given prior to such exhibition.

The South African regime of film regulation corresponds closely to international practice in this regard, especially in the Commonwealth. In Australia for example, all films must be classified by a Classification Board, functioning as part of the Office of Film and Literature Classification, before such films may be released to the public.¹⁵ Some States have their own classification authority identical to the national board, such as the South Australian Classification Council, which classifies films for that particular State.¹⁶ All classifications are enforced by the individual States and Territories, which also take part in the formulation of national guidelines for classification and oversight of the work of the Board.¹⁷ Each State has enacted legislation that prohibits the exhibition in a public place of any film that has not been classified or is in contravention of classification restrictions or conditions.¹⁸ What is noteworthy in the current context is that all eight State statutes expressly include aircraft in their definition of “public place”. However, all exclude aircraft in international flight, that is, “a flight that passes through the air space over the territory of more than one country and includes any part of the flight that may occur within Australia”, from this definition of “public place”.¹⁹ In terms of this scheme, film regulation is expressly applied to domestic flight in Australia, while it is excluded from international flight equally expressly.

3 Aviation jurisdiction

The absence of any similarly clear indication in South African film legislation of the regulation and scope of in-flight film obliges one to fall back on general principles of aviation law and in particular its treatment of jurisdictional questions. Aviation law is fairly standardised by means

¹⁵ Classification (Publications, Films and Computer Games) Act 7 of 1995.

¹⁶ South Australia Classification (Publications, Films and Computer Games) Act 88 of 1995.

¹⁷ Legislation complementary to the Commonwealth Classification (Publications, Films and Computer Games) Act 7 of 1995 has been enacted in the various Australian States and Territories to provide for the enforcement of the classification scheme in each State or Territory. See eg the Australian Capital Territory Classification (Publications, Films and Computer Games) (Enforcement) Act 47 of 1995. A list of these statutes can be found at <http://www.oflc.gov.au/content.html?n=128&p=75> (19.10.04).

¹⁸ Eg ss 6-9 of the Australian Capital Territory Classification (Publications, Films and Computer Games) (Enforcement) Act 47 of 1995.

¹⁹ New South Wales Classification (Publications, Films and Computer Games) Enforcement Act of 1995, s 4.

of a number of international conventions.²⁰ South Africa is a signatory to many of these and most have been implemented in this country through national legislation.²¹ The most pertinent are the Aviation Act²² and the Civil Aviation Offences Act.²³

The Chicago Convention provides that aircraft shall have the nationality of the State in which it is registered.²⁴ In South Africa, the Aviation Act²⁵ and its regulations govern the registration of aircraft. This registration, and hence the nationality of aircraft, has important implications from a jurisdictional point of view.

3 1 Extraterritorial jurisdiction

As a general principle of international law, the sovereignty of States allows and at the same time restricts States to exercise their jurisdiction within their own territory to the exclusion of other States.²⁶ Amongst other factors, however, international travel and crime make any strict adherence to this general principle unrealistic, with the result that some States do exercise their governmental functions outside their own territories.²⁷ In *The Lotus Case (France v Turkey)*,²⁸ the Permanent Court of International Justice came to the conclusion that there is no general prohibition in international law against States exercising jurisdiction in their own territory over acts committed abroad or extending the application of their laws extraterritorially.²⁹

²⁰ These conventions cover a large range of legal aspects comprising aviation law and include the following: Convention for the Unification of Certain Rules Relating to International Carriage by Air, 1929 (Warsaw Convention); Convention on International Civil Aviation, 1944 (Chicago Convention); International Air Services Transit Agreement, 1944; Convention on the International Recognition of Rights in Aircraft, 1948 (Geneva Convention); Convention on Offences and Certain Other Acts Committed on Board Aircraft, 1963 (Tokyo Convention); Convention for the Suppression of Unlawful Seizure of Aircraft, 1970 (The Hague Convention); Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, 1971 (Montreal Convention); Convention for the Unification of Certain Rules Relating to International Carriage by Air Performed by a Person Other than the Contracting Carrier, 1974 (Guadalajara Convention); Convention on International Interests in Mobile Equipment, 2001 (Cape Town Convention).

²¹ The Carriage by Air Act 17 of 1946 incorporates the Warsaw Convention; the Aviation Act 74 of 1962 consolidates the adoption of the Chicago Convention and the International Air Services Transit Agreement; the Civil Aviation Offences Act 10 of 1972 incorporates the Tokyo Convention, the Hague Convention and the Montreal Convention; the Convention on the International Recognition of Rights in Aircraft Act 59 of 1993 incorporates the Convention on the International Recognition of Rights in Aircraft.

²² 74 of 1962.

²³ 10 of 1972.

²⁴ Art 17.

²⁵ 74 of 1962.

²⁶ Dugard *International Law — A South African Perspective* 2 ed (2000) 133; Brownlie *Principles of Public International Law* 5 ed (1998) 289 303; Shaw *International Law* 4 ed (1997) 452.

²⁷ Dugard *International Law* 133.

²⁸ 1927 PCIJ Reports, Series A no 10. Discussed in Dugard *International Law* 134, Brownlie *Public International Law* 304-306 and Shaw *International Law* 460-461.

²⁹ Dugard *International Law* 134. International law in other words generally allows the extension of a State's procedural as well as substantive jurisdiction beyond its territory, subject only to a number of specific restrictions. For a discussion of such restrictions, see Dugard *International Law* 134-142 and Brownlie *Public International Law* 313-314.

These principles are particularly relevant in the context of criminal law.³⁰ There exists a presumption of statutory interpretation in South Africa against the extraterritorial operation of criminal law.³¹ However, there is no bar against parliament expressly providing for the extraterritorial operation of a particular statute.³²

In aviation law, a useful distinction may be drawn between acts that can be described as “international crimes”,³³ and acts that are merely “domestic crimes”.³⁴ As far as international aviation crimes are concerned, few problems arise regarding jurisdiction. The hijacking of aircraft and, more generally, any act that may jeopardise the safety of an aircraft, are outlawed by a number of international treaties.³⁵ These conventions expressly provide for the extraterritorial jurisdiction of States having some interest in the prosecution of the offenders in a given instance.³⁶ In such cases, the State of registration of the aircraft, any State where the aircraft lands with the offender on board or a State where the lessee of the particular aircraft³⁷ has its principle place of business, may all have jurisdiction over the offence, irrespective of where the aircraft was at the time when the offence was committed.³⁸ It is, however, in relation to domestic crimes that difficult questions regarding extraterritorial jurisdiction arise. As noted above,³⁹ the enforcement of South African film regulation is achieved by means of criminal sanction. We must consequently focus on the extraterritorial jurisdiction regarding domestic crimes to assess the application of South African film regulation to in-flight screening.

3 2 Aviation Act

In terms of the Aviation Act,⁴⁰ any offence committed on board a South African registered aircraft, irrespective of where such aircraft is located at the time of the act, is deemed to have taken place in South Africa.⁴¹ For purposes of *determining* jurisdiction, the act is further deemed to have taken place where the accused is. There is some debate as

³⁰ Dugard *International Law* 134-136.

³¹ Dugard *International Law* 136; Du Plessis *Re-interpretation of Statutes* (2002) 194.

³² Dugard *International Law* 136. See eg s 2(1) of the Prevention of Organized Crime Act 121 of 1998; s 11 of the Protection of Information Act 84 of 1982; s 3 of the Simulated Armaments Transactions Prohibition Act 2 of 1976 and s 327 of the Merchant Shipping Act 57 of 1951.

³³ These are acts that contravene either customary international law or international treaties. See Dugard & Van den Wyngaert *International Criminal Law and Procedure* (1996) xi-xiii xvii-xviii.

³⁴ These are acts that contravene municipal criminal law, excluding international crimes, as defined above, even where such international crimes are also criminalised by municipal law, ie would also qualify as a contravention of municipal criminal law.

³⁵ The Tokyo, The Hague and Montreal Conventions.

³⁶ See Dugard *International Law* 146-148.

³⁷ Where that aircraft is leased to the lessee without crew.

³⁸ The Hague Convention art 4. *Cf* also the Civil Aviation Offences Act 10 of 1972, ss 3 and 4.

³⁹ See par 2 *supra*.

⁴⁰ 74 of 1962.

⁴¹ S 18.

to whether this section is merely procedural in nature or whether it subjects all acts on board aircraft to substantive South African criminal law.⁴²

In England, section 62(1) of the Civil Aviation Act,⁴³ which is very similar to section 18 of the Aviation Act,⁴⁴ has been interpreted as aimed only at providing a venue where an offence has been committed on board British registered aircraft and not at applying substantive English criminal law to such aircraft.⁴⁵ The leading case in point is that of *R v Martin*,⁴⁶ in which the accused were indicted with the unlawful possession of opium in contravention of the Dangerous Drugs Act⁴⁷ on board a British registered aircraft in flight between Bahrain and Singapore. In a motion to quash the indictment, the accused argued that the court lacked jurisdiction, because the alleged offence was committed completely outside England. The prosecution relied on section 62(1) of the Civil Aviation Act⁴⁸ and argued that upon a proper interpretation of the section, the whole of English criminal law applies to British registered aircraft.⁴⁹ The defence, on the other hand, contended that the section only supplied the venue for the prosecution of acts committed on board British registered aircraft, which would otherwise be an offence if committed on board an aircraft, that is, independent of the Civil Aviation Act.⁵⁰ The court opted for the second interpretation, thereby restricting section 62(1) of the Civil Aviation Act⁵¹ to procedural consequence. The court concluded that “before the section operates at all there must be [an] inquiry [into] whether any offence has been committed; if an offence has been committed, then s 62(1) of the Civil Aviation Act, 1949, determines the place where it should be tried.”⁵² It follows that in order to ascertain whether a specific act performed on board an aircraft constitutes an offence, the definition of the alleged offence must be scrutinised. In the case of a statutory offence, the relevant statute must be analysed to ascertain whether the offence is restricted to a certain place.⁵³ In the instant case the court concluded that in terms of the Dangerous Drugs Act,⁵⁴ it was only an offence to be in possession of opium *in Great Britain* and subsequently the motion was granted. However, the court drew a

⁴² The question is whether the term “jurisdiction” as employed in s 18 refers to a substantive concept or merely to a procedural/adjudicatory concept of jurisdiction.

⁴³ 1949.

⁴⁴ 74 of 1962.

⁴⁵ English law serves as an important comparative source in this context since it has strongly influenced both South African aviation law and South African international law and jurisdiction. *LAWSA I Aviation and Air Transport* par 498; Dugard *International Law* 135.

⁴⁶ [1956] 2 All ER 86.

⁴⁷ 1951.

⁴⁸ 1949.

⁴⁹ *R v Martin supra* 88.

⁵⁰ 1949; *R v Martin supra* 88.

⁵¹ 1949.

⁵² *R v Martin supra* 91.

⁵³ *R v Martin supra* 92.

⁵⁴ 1959.

distinction between “offences against the moral law”, which will be an offence wherever it is committed (including in international flight) and “offences which are merely breaches of regulations that are made for the better order or government of a particular place or area or country” and which will only be an offence if committed in that place, area or country.⁵⁵ An example of the former would be murder, while the unlawful possession of a prohibited substance is an example of the latter.⁵⁶ This approach was confirmed in *R v Naylor*,⁵⁷ although in somewhat more restrictive terms. There the court concluded that section 62(1) of the Civil Aviation Act⁵⁸ “does cover any acts or omissions which would constitute offences if committed in this country unless they are contrary to some purely domestic legislation.”⁵⁹ In that case larceny was found to fall within the first category.

The interpretation of section 62(1) of the Civil Aviation Act⁶⁰ in the *Martin* and *Naylor* cases as being a “venue-selecting section” cannot be faulted on textual grounds and is certainly a logical reading of that section.⁶¹ However, it is difficult to see how the distinction between “offences against the moral law” and “breaches of regulation” or offences in terms of “purely domestic” legislation can be sustained.⁶²

It is not altogether clear into which category a contravention of such regulation would fall in the context of film regulation. At first sight it would appear that such an offence would constitute a breach of a regulation of a purely domestic nature as contemplated in the *Martin* and *Naylor* cases. However, film regulation, especially the classification of films with age restrictions, is squarely based on morality. Not only are the judgments in making a classification based on moral grounds, but the purpose of such classification in protecting children from unsuitable material is also clearly based on morality.

Even if one were to accept the English law approach to the interpretation of these aviation jurisdictional sections, it would seem that such an approach provides no clear answer as to whether film regulation under the Film and Publication Act⁶³ applies extra-territorially to airlines via section 18 of the South African Aviation Act.⁶⁴ On a strict textual approach, as evidenced in the *Martin* and *Naylor* cases, I would venture to suggest that section 18 of the Aviation Act⁶⁵ does not

⁵⁵ *R v Martin supra* 92.

⁵⁶ *R v Martin supra* 92.

⁵⁷ [1961] 2 All ER 932.

⁵⁸ 1949.

⁵⁹ *R v Naylor supra* 933.

⁶⁰ 1949.

⁶¹ Williams “Venue and the Ambit of Criminal Law” 1965 *LQR* 276 417.

⁶² See the comments of Viscount Simonds in *Cox v Army Council* [1962] 1 All ER 880 883; Williams 1965 *LQR* 419; Notes 1956 *LQR* 319.

⁶³ 65 of 1996.

⁶⁴ 74 of 1962.

⁶⁵ 74 of 1962.

apply film regulation to South African aircraft during international flight.

3 3 Civil Aviation Offences Act

The Civil Aviation Offences Act⁶⁶ seems to resolve the dispute regarding extra-territorial jurisdiction of substantive criminal law in the context of aviation, at least as far as South African law is concerned. In terms of section 3(1), any act taking place on board a South African registered aircraft in flight, which would have constituted an offence if that act had taken place in South Africa, would be an offence, irrespective of where the aircraft is in flight at the time of the offence. It would seem that, contrary to section 18 of the Aviation Act,⁶⁷ this section is not procedural in nature. It is not restricted to providing a venue for offences committed on board aircraft, but deems all acts committed on board South African registered aircraft as having taken place in South Africa for purposes of determining whether an offence has been committed or not. This provision therefore governs the step preceding the application of section 18 of the Aviation Act,⁶⁸ as contemplated in the *Martin* case with reference to the similar provision in the English law Civil Aviation Act.⁶⁹ It is important to note that section 3(1) of the Civil Aviation Offences Act⁷⁰ applies only to South African registered aircraft.

The following steps must, therefore, be followed to prosecute any offences committed on board South African registered aircraft in South African courts:

- The particular in-flight action must be deemed to have taken place in South Africa.
- South African criminal law must subsequently be applied to the conduct to determine whether it is indeed an offence.
- If the conduct is indeed considered to be an offence, the court that has jurisdiction over the place where the offender happens to be will have jurisdiction to convict the offender.

4 In-flight exhibitions

Based on the above analysis, it seems that South African film regulation should apply to the in-flight exhibition of films on board South African registered aircraft. This is primarily the result of the creation of an offence as an enforcement mechanism in the Film and

⁶⁶ 10 of 1972.

⁶⁷ 74 of 1962.

⁶⁸ 74 of 1962.

⁶⁹ 1949.

⁷⁰ 10 of 1972.

Publication Act.⁷¹ As indicated above, it is an offence in South Africa to exhibit in public a film that has not been classified by the Film and Publication Board.⁷² It is also an offence to exhibit any film in public in contravention of any classification restrictions imposed by the Film and Publication Board.⁷³ Since the definition of “in public” in the Act includes aircraft,⁷⁴ it follows that exhibiting such films in-flight on board a South African registered aircraft will also be an offence.

Despite this conclusion, the South African Film and Publication Board, working in conjunction with law enforcement agencies, does not in practice regulate the in-flight screening of films on board South African registered aircraft.⁷⁵ Films exhibited on board such flights are generally procured abroad and do not pass through local regulatory review. This state of affairs seems to be in line with international practice.⁷⁶ It would seem that the in-flight exhibition of films, at least on international flights, is not regulated by any authority,⁷⁷ despite the extensive regulatory regime regarding film exhibitions found in most countries worldwide. Where classifications are adhered to, it is on a voluntary basis (presumably as part of the particular airline’s customer service practice and identity).⁷⁸ In the Australian film regulation statutes discussed above, domestic flights are expressly included in the regulatory net, while international flights are expressly excluded.⁷⁹ The South African legal position⁸⁰ that applies film regulation to all in-flight exhibitions is also largely due to the breadth (perhaps over-breadth) of the interacting legislation referred to above rather than any stated objective or policy to regulate such exhibitions. However, all of this is of little or no assistance to the passenger-parent mentioned in the introduction to this article, which raises questions regarding the desirability of regulating the (international) in-flight exhibition of films.

⁷¹ 65 of 1996.

⁷² Film and Publication Act 65 of 1996, s 26(1)(a).

⁷³ Film and Publication Act 65 of 1996, s 26(1)(f).

⁷⁴ Film and Publication Act 65 of 1996, s 1. See n and accompanying text *supra*.

⁷⁵ In other words, such films are not classified by the Board and enforcement of the Film and Publication Act in the airline context is also not pursued by the enforcement authorities, ie the South African Police Service and Directors of Public Prosecutions.

⁷⁶ Correspondence with nine of the world’s largest airlines, a number of international regulatory bodies in the field of aviation generally and IFE particularly, as well as a number of national regulatory bodies equivalent to the South African Film and Publication Board, confirms this position.

⁷⁷ This includes classification authorities such as the Film and Publication Board, and enforcement authorities such as the South African Police Service and Directors of Public Prosecutions.

⁷⁸ Correspondence with the airline Virgin Atlantic and the British Board of Film Classification, eg, confirms that films exhibited on board that airline’s flights, including international flights, follow the British Board of Film Classification’s ratings voluntarily and not because it is legally compelled to do so.

⁷⁹ See n 15-19 and accompanying text *supra*.

⁸⁰ As opposed to South African practice.

5 Policy considerations

5.1 Protection of Children and Freedom of Speech

It is widely accepted that one of the principal reasons for film regulation is the protection of children. Section 2 of the Film and Publication Act⁸¹ states the object of the act *inter alia* as the protection of children. This attitude is echoed in the Australian classification scheme,⁸² where the national classification code provides that classification decisions should be based on the principle that “minors should be protected from material likely to harm or disturb them”.⁸³ It is towards this goal that film classification generally takes the form of age restrictions, either restricting the exhibition of the relevant film to persons above a stated age or providing consumer information regarding the suitability of the film for young viewers.

Restrictive film classification, that is, where exhibition to certain viewers is prohibited, raises obvious concerns regarding freedom of expression. The right to freedom of expression is constitutionally protected in South Africa.⁸⁴ Apart from the instances expressly excluded from the right in section 16(2) of the Constitution,⁸⁵ all other restrictions on free expression have to be balanced against the right in order to be constitutionally mandated limitations in terms of section 36 of the Constitution.⁸⁶ In terms of the general limitations clause,⁸⁷ limitations on constitutional rights must be kept to a minimum.⁸⁸ In this context one would expect film classifiers to limit restrictive classifications to those instances where the purpose of such classification is clearly and irrefutably served and to favour an approach of providing consumer information, without placing a restriction on the film, in the majority of cases.⁸⁹ This approach seems to strike an appropriate balance between freedom of expression and the core purpose of film classification, namely the protection of children.⁹⁰

In the context of a captive audience, such as passengers in the main cabin on board a long-distance flight, the consumer protection-free choice route, outlined above, seems less effective. It is of little assistance to a parent travelling with minor children to be told that the film about to

⁸¹ 65 of 1996.

⁸² See n 15-19 and accompanying text *supra*.

⁸³ Schedule to the Classification (Publications, Films and Computer Games) Act 7 of 1995. For more examples of this widely accepted goal, see the British Board of Film Classification *Classification Guidelines* (2002) www.bbfc.co.uk (19.10.04); the Indian Cinematograph Act 37 of 1952 and The Motion Picture Law of the Republic of China, 2001 art 26(4).

⁸⁴ In s 16 of the Constitution of the Republic of South Africa Act 108 of 1996 (the Constitution).

⁸⁵ These are: (a) propaganda for war; (b) incitement of imminent violence; and (c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.

⁸⁶ Cheadle, Davis & Haysom *South African Constitutional Law: The Bill of Rights* (2002) 238.

⁸⁷ S 36 of the Constitution.

⁸⁸ S 36(1)(e) of the Constitution.

⁸⁹ See *Memorandum on the Objects of the Films and Publications Bill, 1995* (Bill 104D-95).

⁹⁰ Which is also constitutionally entrenched in s 28.

be exhibited on the main cabin screen contains material unsuitable for young viewers. It is not even a general requirement that children be accompanied by their parents on board flights.⁹¹ The young passengers are restricted to their seats facing the screen and it seems unrealistic that these passengers can somehow be prevented from viewing the film. In reality no choice exists. From a regulatory point of view, restrictive classification seems to be the only effective way of protecting children in this scenario.

This conclusion seems to be supported by those national regulatory regimes that expressly include aircraft in the film regulation net. Examples are the Australian scheme discussed above,⁹² as well as the Indian Cinematograph Act.⁹³ The question regarding the absence of such regulation on international flights, however, remains.

The protection of children is internationally recognised as an important goal of national film regulation.⁹⁴ The international community has also indicated its commitment to the protection of children through a number of international conventions, foremost amongst which is the United Nations Convention on the Rights of the Child⁹⁵ to which all but two UN members are legally bound, including South Africa.⁹⁶ In South Africa in particular the rights of children are expressly entrenched in the Constitution.⁹⁷ These considerations strongly support the regulation of film exhibition on board international flights in the interest of children.

5.2 Jurisdictional difficulties

One consideration that may act as a hurdle to international in-flight film regulation is jurisdictional difficulties. Due to the sovereignty of States, the regulatory regime of a particular country does not apply in another country.⁹⁸ This principle creates a dilemma in international aviation in that aeroplanes often cross several jurisdictions during a single international flight.⁹⁹ If the principle is strictly applied, aircraft are subject to the regulations of each successive State they enter and are not subject to any regulation when they fly over the high seas. This is clearly

⁹¹ See eg South African Airways' special conditions regarding unaccompanied children, incorporated into its general conditions of carriage by art 19 of those conditions, in terms of which children of any age may travel unaccompanied by their parents except with regard to children below the age of five where adult escorts are required, which can be provided by the airline. See <http://www.flysaa.com> (19.10.04).

⁹² See n 15-19 and accompanying text *supra*.

⁹³ Act 37 of 1952, s 2(e), which includes in the definition of "place" "any description of transport, whether by sea, land or air".

⁹⁴ See n 81-83 and accompanying text *supra*.

⁹⁵ Adopted by the General Assembly, resolution 44/25 of 20 November 1989.

⁹⁶ Davel (ed) *Introduction to Child Law in South Africa* (2000) 202.

⁹⁷ S 28.

⁹⁸ Brownlie *Public International Law* 291-294; Shaw *International Law* 370.

⁹⁹ Brownlie *Public International Law* 323.

an untenable situation. The resultant legal uncertainty alone renders the approach unfeasible.

One alternative approach is to apply no regulation. In such a case the argument could be that due to an aeroplane's transitory nature it is not bound by national regulation. This is equally undesirable. With reference to this approach, the court said in *R v Martin*:¹⁰⁰

"It is most unsatisfactory if there is to be complete lawlessness on British aircraft . . ."

A murder committed on board such an aircraft would go unpunished.¹⁰¹ The court therefore opted for a compromise approach, which states that such regulation as forms part of the "moral law" applies to aircraft at all times, but "regulations that are made for the better order or government of a particular place or a particular country" do not apply to aircraft travelling outside that particular country.¹⁰² This approach cannot be supported on the ground that the distinction between these two types of regulations cannot be sustained, as indicated above.¹⁰³

In my view, the Chicago¹⁰⁴ and Tokyo Conventions¹⁰⁵ provide the necessary legal mechanisms to apply domestic regulation to an aircraft irrespective of its location at any particular point in time, thereby solving the jurisdictional difficulties. These two Conventions create a system of aircraft registration, which results in imposing nationality on aircraft, so that it can subsequently be subjected to national legislation.¹⁰⁶ In terms of this approach, the implementation of national regulation by means of creating offences for non-compliance, as is the case in South African film regulation, results in such regulation applying to aircraft registered in a particular jurisdiction. It is the existence of an offence that causes the application of the regulation.

Strong policy arguments have, however, been advanced against this approach. In *R v Martin*¹⁰⁷ the court accepted the argument that it is anomalous that domestic regulation could apply to a foreign traveller on board British aircraft thousands of miles from Great Britain "about which he cannot have any possible knowledge at all". An example of this anomaly would be a medical doctor, registered as such in England, travelling on board a South African registered aircraft between New York and Paris and carrying medicine for which, in terms of South African regulation, he or she must have a licence to be in lawful possession of it. Not being a South African registered medical practitioner and obviously not being in possession of the required

¹⁰⁰ *Supra* 91.

¹⁰¹ *R v Martin supra* 91-92.

¹⁰² *R v Martin supra* 92.

¹⁰³ See n 61-65 and accompanying text *supra*.

¹⁰⁴ Convention on International Civil Aviation, 1944.

¹⁰⁵ Convention on Offences and Certain Other Acts Committed on Board Aircraft, 1963. See text accompanying n 20-n 70 *supra*.

¹⁰⁶ Brownlie *Public International Law* 430-431; Shaw *International Law* 370-373.

¹⁰⁷ *Supra* 91.

licence, the doctor would be committing an offence under South African law. He or she could subsequently be prosecuted in South Africa in terms of the above stated jurisdictional approach.¹⁰⁸

In the context of film regulation, these policy considerations are less persuasive. The would-be offenders in this context are not innocent, ignorant travellers, completely unconnected to the specific jurisdiction save for the deemed nationality of the aircraft in which they happen to travel. In terms of South African film regulation, the offenders would be those who exhibit the film without the necessary regulatory approval. That would be the airline itself. This outcome is far removed from the example of the English doctor above and the anomaly it represents. It seems to me that the necessary distinction to avoid the anomaly, at least regarding domestic regulation, is between innocent, ignorant travellers on the one hand and those operating or involved in the operation of the aircraft on the other hand. In the case of the last category, no strong policy considerations seem to exist against the full application of domestic regulation to acts committed on board international flights. This includes film regulation.

5.3 Self-regulation

The final policy consideration is whether legal regulation is the best route in addressing the current concern. Self-regulation has been widely accepted as effective in the context of the film industry. In both Japan and the United States, for example, the national classification scheme is administered by independent industry-driven institutions. In Japan it is the Motion Picture Code of Ethics Committee¹⁰⁹ and in the United States the Motion Picture Association of America.¹¹⁰ In the context of in-flight films it is, however, to be doubted whether self-regulation will be effective. The absence to date of any such self-regulation suggests it may not. One reason for this state of affairs is that there are no strong market forces creating incentives for the airline industry to impose such self-regulation. I would suggest that in-flight entertainment play only a small role in passengers' choice of airlines and flights. One would think that factors such as brand confidence, flight times and routes, price, frequent flyer programs and the quality of the in-flight service play more determinative roles in airline selection.¹¹¹ While the nature of the

¹⁰⁸ See *R v Naylor* *supra* 933; Williams 1965 *LQR* 419; *LAWSA I Aviation & Air Transport* par 560.

¹⁰⁹ *Eirin Iji Inka*. For a history, see Alexander "Obscenity, Pornography and the Law in Japan: Reconsidering Oshima's *In the Realm of the Senses*" 2002 *Asian-Pacific Law & Public Policy Journal* 148.

¹¹⁰ MPAA. See Septimus "The MPAA Ratings System: A Regime of Private Censorship and Cultural Manipulation" 1996 *Columbia-VLA Journal of Law and the Arts* 69.

¹¹¹ See Abeyratne "Sustainability of Air Carriers and Assurance of Services" 2003 *Journal of Air Law and Commerce* 3 6.

in-flight entertainment offered may be amongst these factors,¹¹² the particular movie to be exhibited on the main cabin view screen on board a particular flight is surely not a high priority.

5 4 Technological Development

The suggestion that the title of an in-flight movie does not feature among the determining factors in choice of airline, does not mean that airline industries do not take measures to ensure good quality IFE. Today most aeroplanes are fitted with channel based entertainment systems, which individualise in-flight entertainment with an interactive LCD display built into every seat so that each passenger has a choice regarding what he or she wants to see. These systems invariably include the option of blocking certain material for certain passengers. A film containing unsuitable material for children can therefore be blocked from being viewed by all young passengers. In this way, the captive audience is in the process of being dismantled through technological development. Despite this technological advancement, however, main cabin view screens remain in standard use in most aeroplanes. Moreover, although the problem of young children being exposed to unsuitable material is alleviated to some extent, the consumer information function of film classification in the context of in-flight entertainment is amplified. The need for some form of regulation therefore remains.

6 Conclusion

It is astounding to find an unregulated activity at the heart of two areas of such rigorous legal regulation as film and publication on the one hand and aviation on the other. The unregulated status of in-flight film exhibition results in consumers being exposed with little or no remedy, as the parent-passenger in the introduction to this article recently discovered.

The analysis of the South African regulatory regime regarding both film and aviation and the interaction between the two, has indicated that the means exist to regulate the activity and that it should be legally regulated. As a matter of practice, however, in-flight films are not regulated in South Africa. This is also generally the case on international flights, despite similar aviation and film regulation worldwide. Although there are strong policy considerations against extra-territorial extension of domestic regulation, they are not persuasive in the context of in-flight film regulation. The main goal of film regulation, namely the protection of children, is, however, of such paramount importance internationally and locally that it outweighs most jurisdictional concerns regarding such regulation.

¹¹² Eg, whether such offering includes internet access, gambling, interactive games and individual monitors.

The absence of strong market forces that could move the airline industry to adopt self-regulatory measures regarding in-flight films leaves legal regulation as the only avenue for addressing this concern. As indicated above, the legal measures to effect this regulation are already in place, both locally and internationally. One hopes that the relevant regulatory authorities, in particular the South African Film and Publication Board, in conjunction with law enforcement agencies such as the South African Police Service and Directors of Public Prosecutions, will extend their regulatory grasp to include in-flight exhibition of films in line with its statutory mandate.

OPSOMMING

In Suid-Afrika, soos in menige ander jurisdiksies, word die publieke vertoon van films deur 'n stelsel van klassifikasie in terme van die Wet op Films en Publikasies 65 van 1996 geregleer. Hierdie stelsel behels dat 'n film eers deur die Film- en Publikasieraad (FPR) geklassifiseer moet word alvorens dit aan die publiek vertoon word en dan slegs in terme van enige beperkings wat die FPR daarop geplaas het. Nie-nakoming van enige van hierdie vereistes is 'n misdryf. Een van die hoofmerke van hierdie regulering is die beskerming van kinders teen ongewenste materiaal.

Die vertoon van films op vliegtuie is 'n integrale deel van enige lang (veral internasionale) vlug. Aangesien (jong) kinders heel dikwels passasiers op sulke vlugte is, ontstaan die vraag of bovermelde stelsel van film regulasie ook ten opsigte van filmvertonings aan boord vliegtuie geld.

In hierdie artikel word ondersoek ingestel na die betrokke statutêre raamwerke waarbinne films en lugvervoer onderskeidelik geregleer word. Daar word spesifiek op die interaksie tussen die onderskeie regulasies gefokus en tot die gevolgtrekking gekom dat daar 'n gaping in regulering tussen hierdie twee velde in die praktyk bestaan. Ten slotte word daar na 'n aantal beleidsoorwegings ten gunste van die regulering van films aan boord vliegtuie gekyk en moontlike wyses waarop sodanige regulering kan geskied word voorgestel.