

## The Art of Appealing MPAA Film Ratings

By Alan R. Friedman

A variety of ingredients go into the success or failure of a motion picture. Without a screenplay that works, it is hard for a motion picture to do well. Similarly, the budget, the director, the actors and the subject matter are all factors that can contribute significantly to a movie's performance at the box office. So, too, do the size and effectiveness of a film's marketing and publicity campaign. One other factor of great importance is the rating that the Classification and Ratings Administration (CARA) of the Motion Picture Association of America (MPAA) assigns to a film.

It is no surprise that the more restrictive the rating, the narrower the audience eligible to see the film. A film rated "NC-17," meaning that no one under the age of 17 can attend it, or "R," so that anyone under the age of 17 must be accompanied by a parent or guardian, will be limited to a smaller pool of potential moviegoers than less restrictively rated movies. Even some adults who may be interested in a film's subject matter, actors or director nonetheless will not see a film if it is rated "R" because they anticipate that it will contain scenes or language that they would find offensive or more intense than they are comfortable seeing. Thus, an

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"arthouse" film intended for people over the age of 18 may suffer if it receives an R rating, even though the target audience is not foreclosed by its rating. This problem is magnified if a movie receives an NC-17 rating. Not only does the NC-17 rating signify the presence of more intense, potentially offensive content in the film, but also NC-17 rated movies are more difficult to market and exhibit than less restrictively rated movies. For example, television ads generally cannot be shown before 10:00 p.m., print advertising is harder to place and some exhibitors are reluctant to show NC-17 rated movies.

In recent months, there have been several rating-appeal decisions. This article addresses the steps available to filmmakers and distributors when a film they plan to release receives a rating they believe is overly restrictive. While an unwanted rating cannot always be avoided, there are steps that can be taken to try to change the rating.

### HOW THE RATINGS WORK

The rating assigned to a motion picture is not meant to be a critique of its quality, but rather is supposed to reflect what the MPAA's film raters believe a majority of American parents would think is appropriate for the film. *See, Classification and Rating Rules*, effective as revised Jan. 1, 2010, p. 16. Virtually all feature-length films that are intended to be theatrically released in the United States are rated by the MPAA. All movies distributed by the member companies of the MPAA — *i.e.*, the major film distributors Disney, Paramount, Sony Pictures, Twentieth Century Fox, Universal and Warner Bros. (and their subsidiaries) — must be rated under the MPAA rules. Further, while non-member companies are not required to have their films rated, "independent" film companies — *e.g.*, The Weinstein Company, Lionsgate and Summit Entertainment — regularly

submit their films for rating in order to avoid difficulties that arise in the marketing and distribution of unrated films.

The specific ratings that the MPAA may assign are G, PG, PG-13, R and NC-17. Although disagreements over the rating assigned to a movie can arise with any rating more restrictive than G, most disputes that result in formal rating challenges involve movies that receive an R or NC-17 rating. Accordingly, this article focuses on those ratings and the PG-13 rating that a distributor may believe should have been issued to an R rated movie.

Under the MPAA's Rating Rules:

- An NC-17 rated movie is one that the raters believe "most parents would consider patently too adult for their children 17 and under." Such a rating "can be based on violence, sex, aberrational behavior, drug abuse or any other element that most parents would consider too strong and therefore off limits for viewing by their children."
- R rated movies are movies that "contain some adult material" including "adult themes, adult activity, hard language, intense or persistent violence, sexually oriented nudity, drug abuse or other elements ...."
- A PG-13 rated movie "may go beyond the PG rating in theme, violence, nudity, sensuality, language, adult activities or other elements, but does not reach the restricted R category." For example, showing any drug use or more than brief nudity requires at least a PG-13 rating; movies that include "depictions of violence ... but generally not both realistic and extreme or persistent violence" may be rated PG-13; and with very limited exceptions, more than a single use of "one of the harsher sexually-derived words" requires an R rating.

When a film is completed, the producer or distributor may submit it to CARA to be rated. After viewing the completed film, one of CARA's "senior raters" will advise the producer/distributor of the rating assigned to the film and specific explanations for the rating. If the producer/distributor would prefer a less-restrictive rating, they may edit the film to address the rating reasons provided by CARA and resubmit the film with the hope that the rating will be lowered based on the changes. This process, together with an ongoing dialogue with CARA's raters, can be repeated over and over in an attempt to obtain a less restrictive rating.

Sometimes, however, the initial rating cannot easily be addressed by editing, or the edits required would cut elements of the film that the filmmaker/distributor view as essential. Other times, the filmmaker/distributor may decide, after having made edits but not succeeding in lowering the rating, that additional edits would require changing features of the film that they are unwilling to sacrifice. In those instances, there is one further avenue open to attempt to change the rating: Accept the undesirable rating, file an appeal, and demonstrate that a rating error was committed.

#### **THE APPEAL PROCESS**

The MPAA has adopted rules that provide a right to appeal rating decisions before an Appeals Board that includes, among others, representatives of the film-distribution member companies of the MPAA, representatives of theater-chain members of the National Association of Theater Owners (NATO), and representatives of up to four independent distributors or producers. *See, Classification and Rating Rules*, pp. 14-15. CARA estimates that approximately 12 rating appeals occur each year. This relatively small number may be explained by a number of factors, including the opportunity to edit and resubmit to obtain a lower rating, and the hurdles that the filmmaker/distributor must overcome to succeed with an appeal.

Among these hurdles is a requirement that the filmmaker/distributor convince *at least two-thirds of the Appeals Board* that the original rating decision was mistaken. While there is a quorum requirement of at least nine Appeals Board members for each appeal (of which three must be

members of NATO companies and three must be members of MPAA companies), CARA tries to impanel a 15-person Appeals Board for each appeal.

In my experience, however, it is rare to have a full 15-person Appeals Board, and far more common to have between 12 and 14 panelists. This is significant. Because the filmmaker/distributor must win at least two-thirds of the votes to prevail on an appeal, for panels that have 12, 13 or 14 members, the appellant can only lose four votes in order to succeed on the appeal. As a result, there is only a downside to having a 13th or 14th panelist, as they represent additional votes that *must be won*, since losing 5 votes of an appeal panel of 12, 13 or 14 panelists will, in each case, result in an unsuccessful appeal.

In addition to needing at least two-thirds of the vote, the standard to win a vote is high. The Rules provide that the Appeals Board members are to consider whether "the majority of American parents would believe that a less restrictive rating should have been assigned to the motion picture" and "may vote to overturn the rating of the motion picture only if they believe that the rating assigned by the Ratings Board was clearly erroneous ...." *See, Classification and Rating Rules*, p. 16.

Each rating appeal begins with the Appeals Board screening the movie. After that, the filmmaker/distributor, who can be represented by up to two people, and the Chairperson of CARA each have 15 minutes to argue their positions with respect to the appropriate rating for the film. This is followed by each having a 10-minute reply and, thereafter, the opportunity to answer any questions that the Appeals Board has concerning the arguments or the film.

#### **Filmmaker's Arguments**

There are two important elements of rating-appeal arguments that the filmmaker/distributor seeking a lower rating should address:

1. Why the content of the movie that resulted in the restrictive rating is creatively important and not gratuitous; and
2. Why application of the MPAA rating standards to such content requires that the rating be lowered to properly reflect what a majority of American parents would expect.

In my experience, the most convincing way to present these elements is to have an actor, director or other creative person involved in the production or distribution of the movie explain the creative importance of the scenes at issue, and then have an attorney apply the standards established in the Rules to the "facts."

Because the Appeal Boards panelists are all involved in some manner in the movie business, they are seasoned moviegoers who will want to know why the filmmaker believes that the scenes at issue are important to the film. Having this part of the argument come from a filmmaker, actor or an experienced producer adds to the force and credibility of the explanation offered. The filmmaker can explain how the scene was shot in a manner that makes awarding a less-restrictive rating appear more reasonable. For example, if the rating arose from a sex scene, the filmmaker can explain that he intentionally restricted the amount of nudity, made the scene shorter than it otherwise would have been, cut between the two actors to take away from the "reality" of the scene, etc. Similarly, if the rating had to do with the degree of violence, the filmmaker can explain, e.g., how he or she limited the number of stabbings, cut away so that the physical act of stabbing was not directly seen, made the blood that could be seen less gory, etc.

The Rules also permit references to scenes in other movies. This relatively new development, which took effect in April 2007, provides the appellant with the ability to use "precedent" to illustrate why the rating issued is not consistent with what a majority of parents would expect. For example, if the movie that is the subject of the appeal received a restrictive rating because of drug use, in preparing for the appeal, efforts should be made to identify other films that had an equal or greater amount of drug use, but nonetheless received a less-restrictive rating. The Rule permitting reference to other movies is narrow in scope and provides that an Appeals Board panelist who has not seen the referenced movie or who "lacks sufficient recollection of the entire motion picture to form a judgment on its rating" should disregard the comparison. *See, Classification and Rating Rules*, pp. 20-21. Because of this limitation, effort should be made to cite

relatively recent films that were either critically acclaimed or commercially successful to increase the likelihood that the Appeals Board members will be familiar with their content.

#### RECENT APPEALS

Among rating appeals in recent months, only one — for the film *Blue Valentine* — succeeded. In the case of *A Film Unfinished*, a documentary about the holocaust, the filmmakers appealed the R rating that was issued based on “disturbing images of holocaust atrocities including graphic nudity.” Despite referencing a prior holocaust documentary released in 1999 that received a PG-13 rating — because it contained “graphic images and descriptions of Holocaust atrocities” — and stressing the importance of the subject matter for children under the age of 17, the Appeals Board rejected the appeal.

Similarly unsuccessful was the argument that the R rating assigned to the film *The Tillman Story* should be lowered because of the importance of the subject matter to moviegoers under the age of 17. That movie, a documentary about the death of professional football player Pat Tillman, who chose to leave the NFL and enlist in the United States Army in 2002, received its rating due to “language.” Notably, six years earlier, the Iraq-based war documentary *Gunner Palace* received a PG-13 rating after a successful appeal of an R rating based on “language.”

Also, the appeal of the R rating issued to the movie *Trust* failed. The argument that the content of the film was important for children under the age of 17 was again unpersuasive. The film concerned the impact on a family of the young teenage daughter being preyed upon and raped by an online stalker. The Appeals Board upheld the R rating for “disturbing material involving the rape of a teen, language, sexual content and some violence.”

The decisions in the foregoing appeals demonstrate that arguments based on the “significance” of a movie to moviegoers restricted from seeing it, without more, are unlikely to prevail. Further, the decisions involving *A Film Unfinished* and *The Tillman Story* demonstrate that the ability to cite to relevant films that received lower ratings does not guarantee success.

**[Editor’s Note:** The MPAA also turned down an appeal of an R rating given for language in the film *The King’s Speech*. L.A. entertainment attorney Bert Fields told *The Am Law Daily* that “the MPAA has refused a hearing because they said [the appeal] was too late, which in my view is pretty lame.” The MPAA requires a rating appeal to be filed no less than 25 days before a film is distributed in the U.S.]

#### THE BLUE VALENTINE APPEAL

*Blue Valentine* initially received a NC-17 rating due to what the MPAA described as “a scene of explicit sexual content.” The movie is about a contemporary married couple in their mid- to late-twenties that shows them meeting, building a relationship, marrying and then, painfully, how their relationship splintered and failed. The scene in question, which was one of a number of scenes with sexual content, ran for approximately 30 seconds, and showed the woman receiving oral sex from the man.

The rating appeal provided an opportunity both to explain the importance of the scene and to highlight that it was shot in a manner intended to avoid an “NC-17” rating and conform to scenes with sexual content in movies receiving R ratings. First, the scene in question demonstrated a growth in trust and depth in the relationship. It was a spontaneous scene of intimacy between the couple that was shown as a flashback and juxtaposed with an awkward and, ultimately, unsuccessful attempt by the husband to reignite the romance in their relationship during its waning moments. Second, the scene did not depict any nudity and was not presented in a titillating or erotic manner. Third, because of how the scene was shot, it provided a favorable contrast to other movies that had received R ratings despite including arguably more risqué oral sex scenes.

Among the precedents cited were *Basic Instinct*, which had a similar scene, but with substantial nudity and multiple other scenes with sexual content and substantial nudity, and *A History of Violence* with Viggo Mortenson and Maria Bello that contained a similar scene of oral sex between husband and wife, but with more eroticism. The appeal also cited the popular films *Knocked Up* and *Superbad* (both

rated R) to contrast the scene of genuine intimacy in *Blue Valentine* between an adult couple in a committed relationship with the alcohol-infused, one-night-stand of unprotected sex in *Knocked Up*, and the pervasive focus on underage drinking and teenage sex in *Superbad*.

In addition to arguing that *Blue Valentine* in its entirety did not warrant an NC-17, that the scene in question was shot in a way that did not warrant an NC-17 and that precedential films with R ratings demonstrated that parents would not expect the content of *Blue Valentine* to receive an NC-17, the film distributor (The Weinstein Company) provided additional evidence. In preparation for the rating-appeal argument, the company held a research screening for parents who were asked what they thought it should be rated. These results provided substantial additional support for lowering the rating to R.

Rating appeals are difficult to win, with the MPAA estimating that approximately one-third succeed. But, as seen with the successful appeal of the rating for *Blue Valentine*, the rating-appeal process can provide filmmakers/distributors with an important safeguard when they believe that a rating error has been made. Because of the potentially large box-office impact that can result if a film is released with a more restrictive rating than appropriate, a successful rating appeal may provide a significant contribution to the film’s ultimate financial performance.