

(2) Notwithstanding the provisions of subsection (1) of this section, whether the publication of any book or the distribution of any sound recording would be in the interests of art, literature, science, or learning and would be for the public good, the Tribunal shall not classify it as indecent."

The Tribunal bears in mind the comments of Jeffries, J., in *Waverley Publishing Company Limited v. Comptroller of Customs 1980*, 1 NZLR 631, where he said at page 646:

"Because of the universality of comprehension of the graphic form, with its concomitantly more direct and powerful emotional appeal, this medium has proved more vexing for those who must control indecency than the written word. Verbal indecency became a social issue with the rise in literacy following universal education. Perhaps that particular medium is now perceived as less potentially harmful than representational photography, and cinematic films. Confirmation of this observation is to be found in the Report of the Committee on Obscenity and Film Censorship which had Professor Bernard Williams as its chairman. It reported in November 1979; Cmnd. 7772. Recommendation 6 of its general proposals is:

"The printed word should be neither restricted nor prohibited since its nature makes it neither immediately offensive nor capable of involving the harms we identify, and because of its importance in conveying ideas."

I recognise that representational photography, for those entrusted with the perplexing task of deciding between the acceptable and non acceptable is one of the nicest problems of the line drawing which must be faced.

I think that every item which comes before the Tribunal for decision must be measured against the definition of indecency, and the considerations contained in section 11 of the Act which are not exhaustive. However, I think that a book or sound recording is likely to be indecent and injurious to the public good if:

1. It is predominantly concerned with the prurient and lewd aspects of sex; and
2. The exact subject matter is described, depicted or expressed in a patently offensive manner so as to concentrate attention and reaction on the prurient and lewd aspects of sex; and
3. The work looked at in its entirety had negligible literary or artistic merit, and is otherwise not redeemed by its medical, legal, political, social or scientific character or importance.
4. The likelihood of corruption far outweighs possible benefit.
5. The sincerity of purpose which produced the item is gravely in question."

In the Tribunal's view these publications must be classified as indecent and injurious to the public good for the reasons mentioned by Jeffries, J.

W. M. WILLIS, District Judge, Chairman.

Decision No. 1033
Reference No. Ind 3/82

Before the Indecent Publications Tribunal

IN the matter of the Indecent Publications Act 1963, and in the matter of an application by the Comptroller of Customs for a decision in respect of the following publications:

Penthouse U.S. Vol. 13, Nos. 1, 2, 3, published by Penthouse International Ltd., New York:

Judge W. M. Willis (Chairman), Mesdames H. B. Dick, L. P. Nikera, Messrs J. V. B. McLinden, I. W. Malcolm.

Hearing: 1 April 1982.

Decision: 8 October 1982.

Appearances: Mr Leloir for Comptroller of Customs, Mr Heron for Importer, Gordon and Gotch (N.Z.) Ltd.

DECISION

IN decision No. 936, the Indecent Publications Tribunal declared *Penthouse* (U.S.) published by Penthouse International Ltd. to be indecent in the hands of persons under 18 years of age and made a restriction order under section 15A of the Indecent Publications Act.

That order expired on 21 December 1981 and in submitting the 3 present publications to the Tribunal, Mr Leloir stated that the Customs Department's purpose was to obtain from the Tribunal a further 2-year restriction order, thus avoiding the necessity of frequent applications for individual classification of *Penthouse* issues in the future.

The basis of the Customs Department's application was that the standard of these 2 issues of *Penthouse* was comparable with the standard of the 3 issues of *Penthouse* classified by the Tribunal in decision No. 936.

The broad format of *Penthouse* is similar to the 1979 issues. The magazine still contains articles and essays of social and literary merit, and this written content has not significantly deteriorated either in quantity or text since the publication was last before the Tribunal. We must qualify the remarks we have just made by stating that it would have been difficult for certain sections of the magazine (i.e. *Forum* and *Call Me Madam*) to deteriorate further.

A change has been noticed in the pictorial sections of the magazine. Generally *Penthouse* contains 3 such sections in any given issue. There is a *Pet of the Month* section, which is invariably found in the middle of the publication to permit a centrefold shot to be provided, and there are usually 2 other pictorial sections.

In the three 1979 issues examined in decision No. 936 none of the total of ten pictorial sections featured more than 1 model. The photographs were frank and the Tribunal noted:

"It is apparent that there has been some change in the last 2 years in the photographic material, and there is now a greater emphasis on the vaginal area than before".

In 1981 the situation is different. There are roughly the same number of pictorial features as the 1979 issues and not only do those sections feature explicit genital detail, but also each magazine contains a pictorial section with 2 or more models.

It seems obvious to us that *Penthouse* is taking another major step forward in the kind of photographs it is presenting to its readers. This change has no doubt been brought about by *Penthouse's* desire to stay at the forefront of its competitors.

In these circumstances we cannot accept Mr Leloir's submission that the 1979 issues are comparable with those under consideration. We find it necessary to assess *Penthouse's* position anew.

The dominant effect, and literary and social merit of *Penthouse*.

There can be little doubt that *Penthouse* is concerned primarily with the presentation of material on sex. In dealing with its main subject the magazine ranges from a sensible discussion of pertinent issues (e.g. the articles on male sexuality, Shere Hite, in the November 1981 issue) to objectionable extremity (e.g. *Forum*, *Call Me Madam*, and *Sweet Chastity*, in the same issue). Similar variation is evident in the photographic material. While some pictures are gross others are unexceptionable. In passing we note that our view of the 1981 issues almost exactly parallels the Tribunal's view of the same magazine in 1974 when in decision No. 830 the Tribunal stated:

"The amount of material not concerned with sex varies among the scenes but at nowhere threatens to contest the dominance, in context and illustration, of the varied sexual fare. In its nature and in the tone of its treatment, some of the sexual material is more objectionable than the features of earlier issues on which the Tribunal commented."

Our view of the present issues is that the bulk of each magazine is tolerable in today's environment. Had the standard of the 1981 issues been the same as the 1979 issues (considered in decision No. 936) we would have had little hesitation in accepting the Comptroller's submission and maintaining the status quo.

However, we are quite concerned by the emergence of the multiple model pictorial sections in each of the 1981 *Penthouse* issues. In favour of the publisher and distributor we should say we have reservations about prohibiting the circulation of *Penthouse* magazine because of a single portfolio of photographs in any particular issue. While the dominant effect of *Penthouse* is obviously to cover sexual matters, we feel that the photographic side of the magazine contributes only partially to the overall dominant effect.

We also accept in a situation where the particularly offensive material is relatively brief in relation to the remaining content of the magazine or book, that we must be careful to ensure that there is good cause for declaring the whole publication to be indecent.

On the other hand, we think we can justifiably declare a publication unconditionally indecent if, in bringing about part of its dominant effect, it carries a section too far. If this were not so *Penthouse* or any similar magazine could present a section or portfolio of gross photographs of any kind it wished, with complete immunity, because of the existence of the other material in the issue.

Bearing the above principles in mind we turn to examine the publications before us. As we have previously indicated, the marked deterioration we note is in the presence of the multiple model scenes and so we give these our particular