

*Love* type of fantasy which was discussed in the decision relating to the November 1981 issue of *Penthouse* classified as indecent in Decision 1033.

The dominant effect of *Penthouse*:

It is clear as might be expected, that *Penthouse* still has the presentation of sex as its dominant effect. The magazine uses letters, cartoons, feature columns, fiction and non-fiction and photographs to provide its readers with a veritable kaleidoscope of sexual content. Some of the material is helpful or harmless, more is aimed at the prurient and lascivious aspects of sex. The Tribunal has accepted that *Penthouse* contains some articles of literary and social merit. However, the fact that a magazine contains content of a positive nature does not give a publisher carte blanche so far as the remainder of the publication is concerned. As we stated in Decision No. 1033:

"... 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 wishes, with complete immunity, because of the existence of the other material in the issue."

The Tribunal reiterates its concern at the emergence of multiple model pictorial sections in *Penthouse*. We feel that when such sections are added to the remaining content, the publication progresses from merely being offensive to being injurious to the public good. We find most of the issues containing multiple model scenes depicting sex and violence, lesbianism and intimate heterosexual scenes to be indecent.

This classification covers the January, March, April, July, August, September, and October 1982 issues. The only exception to the classifications concerning multiple models are in relation to the February issue because the photographs, while explicit, did not depict such a high degree of intimacy as contained in the other 2 heterosexual portfolios. In permitting the February issue an age restriction classification we are stretching tolerance to the limit. The November issue we find unobjectionable because of the presentation we referred to earlier.

We are unable to find in the remaining provisions of section 11 any consideration which would help to save the issues listed above from a classification of "indecent". We do not traverse the various matters in detail, having set out the principles in Decision 1033.

We classify the February, May, June, November, and December publications as indecent in the hands of persons under the age of 18.

However, our function does not end here because Mr Heron urged us to make a section 15A order imposing an age restriction of 18 on *Penthouse* for the next 2 years even if we should find that the preponderance of issues were indecent. In those circumstances he said the Tribunal still had power to make the restriction order sought, but should direct that the magazines which were thought indecent should be re-submitted for classification so that they individually might be declared indecent. Although he had argued to the contrary in a previous case (see Decision No. 485), Mr Heron was prepared to accept that the rather roundabout course of action described above was envisaged by the provisions of section 15A because the Tribunal on 2 previous occasions (Decision Nos. 845 and 1038) had ruled that publications may be referred to the Tribunal for individual classification notwithstanding that a 2-year restriction classification is in force in respect of that publication.

Mr Heron submitted that we should accede to the approach he put forward because section 15A was enacted so as to facilitate the free flow of controversial magazines and to avoid the constant reference of serial publications to the Tribunal. While we agree with some aspects of Mr Heron's interpretation, we think it desirable to make some comment of our own on the purpose of section 15A.

We think the section is specifically aimed at periodical magazines such as *Penthouse*, which are published at regular intervals during the year.

In order to circumvent the necessity for such periodical or serial magazines being constantly seized and referred to the Tribunal the Legislature has permitted the Tribunal a discretion to make a 2-year forward classification of further issues of the publication in circumstances where it is able to form a clear opinion of the general nature of the publication. The Legislature has obviously thought that the Tribunal may be able to form an opinion on the perusal of no less than 3 issues of that publication, all published within a period of not more than 12 months.

We think it important to note in our view that the power to make a restriction order only exists in circumstances where the Tribunal has confidence that further issues of the publication will fall within the boundaries of the publications it uses to consider whether a section 15A order is merited. We think there is considerable strength in Mr Heron's submission that as a condition precedent to our ability to impose a section 15A order and an age restriction in the present case, we should find that the preponderance of the particular issues before us were not indecent. Conversely, we think

that where the Tribunal anticipates that a publication may deteriorate, or where it is unhappy with the standard of the issues referred to it, a section 15A order should not be made.

Mr Leloir for the Comptroller of Customs submitted that if the Department did not have a section 15A order which imposed a blanket guideline in respect of *Penthouse* issues, chaos could reign in respect of the seizure of *Penthouses* imported by private individuals coming into New Zealand. Not only would customs officers have difficulty knowing the classification which attached to individual issues of the magazine, the situation was even more complicated because sometimes overseas travellers were able to purchase copies of the magazine published in advance of those available in New Zealand.

As well, Mr Heron strongly submitted that an age restriction together with a section 15A order should be made in the public interest. He said such an order would remove uncertainty as to classification for the distributor, and would also protect people from prosecutions that might follow a *Penthouse* issue that is only declared indecent after it has been distributed.

We sympathise with both the Comptroller's and the distributor's position in this matter. However, the Tribunal must not lose sight of the fact that the difficulty which precludes us from making a section 15A order is caused by the standard of content the publisher chooses to place in its magazine. If the objectionable scenes were omitted from the issues we classified indecent, then there is little doubt the Tribunal would have made the order sought by Mr Heron. The Tribunal should not be pressured into making a section 15A order because the Customs Department and the distributor may be caused considerable inconvenience. Indeed Mr Heron disclaimed the suggestion that the commercial interests of the distributor should prevail over the public interest. We agree. While section 15A is a "convenience" section in that it helps to avoid the constant reference of a serial publication to the Tribunal, we feel that caution must be invoked in relation to its use lest the commercial "convenience" of a publisher gain more importance in the eyes of the Tribunal than the interests of the general community.

In any event we do not think the distributor's position to be totally uncertain. We were informed by Mr Heron that proof or advance copies of *Penthouse* are usually available some time before the main importation of that issue into New Zealand. Such advance issues could easily be referred to the Tribunal for classification, thereby allowing the distributor to import according to the Tribunal's classification in individual cases.

Alternatively, we think that we have given reasonably clear guidelines in Decisions 1033, 1038 and the present case to enable the importer to know with some certainty when any particular issue of *Penthouse* may run into the danger of being classified as unconditionally indecent. Although we hesitate to lay down hard and fast rules, the danger at present when the normal content of *Penthouse* is embellished by:

1. Scenarios involving more than 2 models, and in which sex and violence and intimacy and/or deviant aspects of sex are depicted among the models;
2. Multiple model scenes which depict lesbian acts;
3. Heterosexual scenarios in which there is a high degree of intimacy (e.g., fellatio or cunnilingus or intercourse) depicted in the couple's actions.

The formal orders will therefore be:

- (a) The January, March, April, July, August, September, and October issues are declared indecent;
- (b) The February, May, June, November, and December issues are declared indecent in the hands of persons under the age of 18;
- (c) The Tribunal refuses to make a section 15A order either in respect of a classification of indecent or a classification involving an age restriction on the U.S. edition of *Penthouse*.

District Court Judge W. M. WILLIS, Chairman.

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Decision No. 1054

Reference No. Ind. 7/83

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. Volume 14, No. 5 (January) 1983, No. 6 (February) 1983, No. 7