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Censorship for art's sake.

CENSORSHIP FOR ART'S SAKE

LLM RESEARCH PAPER

LAWS 520 MEDIA LAW

LAW FACULTY
VICTORIA UNIVERSITY OF WELLINGTON

2003

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ABSTRACT

This paper analyses the censorship of art under the New Zealand censorship regime. In particular it looks at how a publication's status as art or artistic merit can be related to the Films, Videos, and Publications Classification Act's overarching inquiry into likelihood of injury to the public good. How the New Zealand Bill of Rights Act 1990 and in particular the right to freedom of expression informs this relationship is also discussed.

The author finds that an artistic publication may be saved from censorship on either or both of two grounds: if its status as 'art' diminishes its potential to harm; or alternatively, if, despite the harmful nature of the publication, its artistic merit justifies its redemption, on a 'net harm' analysis. This paper looks at how New Zealand's censoring authorities are describing the impact a publication's artistic status has on its propensity to harm, as well as how they are striking the balance between artistic merit and harm. In particular it raises accountability and practical issues with respect to New Zealand's censors' common failure to articulate how this balance is being struck.

This paper locates this discussion within the context of censoring post-modern art to illustrate the potential significance of this balancing act, and the importance, therefore, of clearly articulating how it is being struck. It canvasses the problems post-modern art poses for the censor and seeks to resolve how censorship can accommodate post-modern art while also protecting the public.

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This new movement has brought censorship of art sharply into the limelight. How does a censor determine whether or not a publication is art, or has artistic merit? Does a publication's obvious status as art impact on how its content and messages are received? How is the social value of art to be balanced against its propensity to harm? What redemptive power does it hold? A publication's artistic merit have?

This dilemma is not as hopeless as Amy Adler would have us believe. Despite her argument that the battle between censorship and art necessitates a winner, there is room for compromise, for reconciling to some extent the interest in preserving contemporary art and the concern to protect the public. Finding that middle ground, however, requires careful negotiation.

¹ Amy Adler, "Post-Modern Art and the Dilemma of Censorship Law" (1990) *April Yale L.J.* 1239, 1278.

² See Amy Adler, "The Ninth Annual Edward G. Dwyer Memorial Lecture: The Art of Censorship" (2000) *W. Va. L. Rev.* 283, 213.

I. INTRODUCTION

In the end, we as a society are left with a choice: either we protect art as a whole or we protect ourselves from obscenity. But we choose one at the sacrifice of the other. It is impossible to do both.¹ Amy Adler

Balancing the rights of artists to express themselves and the social value of art against the need to protect the public from harm is a precarious exercise. The difficulty with censoring art is that often the very things that make art invigorating, enlightening and exciting are also those that make it a threat to society's standards of decency and morality. Thus, what provokes censorship of art is unfortunately often also what ought to invoke protection for it.²

Contemporary or post-modern art has sought to embody this dilemma, making censorship no longer a question of extent and degree, but a dangerous game of chance. It has the unique propensity to possess equal shares of both perceived social menace and irrelevance and perceived social value. It pushes all boundaries, deliberately testing the nerves and tolerance of its public and censor, while making its audience guess at and question its categorisation as art.

This new movement has dragged censorship of art sharply into the limelight. How does a censor determine whether or not a publication is art, or has artistic merit? Does a publication's obvious status as art impact on how its content and messages are received? How is the social value of art to be balanced against its propensity to harm? What redeeming power does, or should a publication's artistic merit have?

This dilemma is not as hopeless as Amy Adler would have us believe. Despite her argument that the battle between censorship and art necessitates a winner, there is room for compromise, for reconciling to some extent the interest in preserving contemporary art and the concern to protect the public. Finding that middle ground, however, requires careful negotiation.

¹ Amy Adler "Post-Modern Art and the Death of Obscenity Law" (1990) April Yale LJ 1359, 1378.

² See Amy Adler "Thirty-Ninth Annual Edward G. Donley Memorial Lectures: The Art of Censorship" (2000) W Va L Rev 205, 213.

It is clear that New Zealand's censoring authorities are not striking this balance with erudition. While they appear apt at identifying the artistic merit in contemporary art, it is difficult to ascertain what, if any, bearing artistic merit is having on their final determinations. Precision and clarity in this respect is important in terms of the need for transparency within our censorship system, but is also critical, from a practical perspective, in the context of censoring post-modern art.

This paper begins its analysis with a general discussion of the relationship between censorship and art. Part III sets out the statutory framework for censorship in New Zealand. This part identifies the relevant sections of the New Zealand Films, Videos and Publications Act 1993 ("the Classification Act") and briefly explains their scope and operation. Part IV acknowledges the reality that censorship is essentially a holistic and subjective exercise rather than one that is tightly legislatively bound, but discusses also the need for transparency. Part V articulates how the New Zealand Bill of Rights Act 1990 ("the Bill of Rights") and in particular the right to freedom of expression informs the censorship process, and, more specifically, impacts on the censorship of art.

Part VI establishes the Classification Act's overarching inquiry into a publication's propensity to injure the public good. Parts VII, VIII and IX discuss how art can be assessed against this standard of injuriousness. This paper proposes that an artistic publication can be redeemed in two primary ways under the Classification Act. Firstly, its obvious status as 'art' can make it less harmful by putting its viewer 'on guard' and encouraging him or her to look critically at its content. Secondly, a publication may be saved by virtue of its artistic merit, value or importance. Its artistic merit, however, must be balanced against its potential to harm in order to determine the publication's 'overall injuriousness' or 'net harm'. Within Parts VII, VIII and IX the approach of New Zealand's censors to assessing a publication's artistic status or merit, and the impact these attributes have on the question of injuriousness, is critiqued. In particular accountability and practical concerns are raised over the constant failure of New Zealand's censors to clearly articulate how the balance between artistic merit and harm is being struck.

Part X seeks to illustrate the salience of this balancing act in the context of post-modern or contemporary art. This part will explain why post-modern art poses so many problems for the censor. Lastly, this paper considers how New Zealand's censors might best reconcile the need to protect the public and this particularly controversial, but socially relevant, brand of art.

II. ART AND CENSORSHIP

A. Why Protect Art?

Definitions of art and the reasons for preserving it have changed markedly over time and still remain diverse. Traditional or representational art is to be valued because it is aesthetically pleasing, impressive and skilful. Successful artists are perceived as particularly insightful, having an 'eye for beauty' or an ability to capture and express the subtler aspects of our surroundings and feelings. Art also has tremendous power to compel, energise and move its consumers. As artist, Keith Haring, asserts, art has an ageless relevance to human life and a unique propensity to communicate: "drawing is still basically the same as it has been since prehistoric times. It brings together man and the world".³

Furthermore, art makes a significant contribution to political, academic and cultural discourses, or the "marketplace of ideas";⁴ the core rationale for freedom of expression. The "marketplace of ideas" theory reflects an "underlying faith in the ability of people to seek and determine the truth for themselves".⁵ This autonomy, however, relies on the availability of a wealth of opinions, perspectives and beliefs as well as material, such as political art, that invites and encourages critical thinking. Artists are valuable contributors to the "marketplace of ideas", increasingly endeavouring to unsettle and question the status quo in their art. Post-modern art in particular contributes to the "marketplace of ideas" in seeking to challenge its viewers, often representing 'fringe' or sidelined groups and highlighting and subverting socially and culturally constructed realities.

³ Elisabeth Sussman (ed) *Keith Haring* (Whitney Museum of American Art, New York, 1998) 3.

⁴ *Abrams v United States* (1919) 250 US 616, 630 Oliver Wendell J.

⁵ R. Smolla *Free Speech in an Open Society* (Vintage Books, New York, 1992) 6-8.

B. Censorship and Art: Healthy Rivals?

In order to be challenging and 'avant-garde' artists often push boundaries, in particular standards of morality and decency, provoking censorship. This conflict between art and censorship is often regarded as regrettable. As Amy Alder laments, the bickering will never cease because, "as soon as we put up one boundary, an artist will violate it, because that's what artists do".⁶ What this elucidation of the clash between censorship and art reveals is that censorship is not entirely at odds with the flourishing of artistic discourse. Censorship, in fact, often stimulates it. So as to be surprising, provocative or to push boundaries, artists need boundaries, in particular standards of goodness and decorum, to push. As Senior Lecturer in Art History at Victoria University, Jenny Harper affirms, contemporary art responds, on some level positively, to censorship deliberately setting out to pose problems for it.⁷

Some might argue that censorship ensures that society's perceptions, fears and principles are not challenged because it prevents contentious artwork being made available to the public. This argument fails, however, to take account of the discussion, controversy and debate that often ensues from censorship. In fact, an artwork that calls censorship to battle will almost invariably have more of an impact on society than one that escapes scrutiny. The content, meaning and effects of, for example, Robert Mapplethorpe's photography, Keith Haring's painting and recent films, *Baise Moi* and *Irreversible*, have been publicly and more fully debated because of the censorship issues these publications provoke. It is, in fact, during the censorship process that a lot of the issues these artworks intend to raise are fleshed out and addressed. Censorship has art critics, the media and the public asking art's salient questions: "is this art?" or "just sick?", "since when was pornography classed as art?" and "is [sexually explicit art] exorcising our sexual demons, comedy or just rude?". Censorship, therefore, is by no means a silent operator. It can work to engage rather than stifle the discussion and debate that much art aims to invoke.

⁶ Amy Adler "Post-Modern Art and the Death of Obscenity Law" (1990) April Yale LJ 1359, 1378.

⁷ 'Pavement' (February/March 1999) Issue 33 Decision (28 July 1999) Office of Film and Literature Classification 9900178, 4.

Censorship is, therefore, also a valuable contributor to the “marketplace of ideas” and an important voice in artistic discourses. Its pitch and volume, however, must be carefully judged. As Karen Finley warns, censorship can have a silencing effect on artists, hindering the development of art and weakening an important medium for social, cultural and political comment. Any inroads censorship makes into artistic freedom, therefore, must be carefully navigated. It is a particularly delicate and complex balancing act: the censor must take account of the layman’s understanding of, and approach to, art while also understanding and paying dividends to the agendas and aims of artists and curators.

III. STATUTORY FRAMEWORK

The Classification Act provides a legal framework, governing most media, to allow for the censorship of “objectionable”⁸ publications.

A. Meaning of “*Objectionable*”

To be brought within the reach of the Classification Act, the publication must pass through one of the “subject matter gateways” listed in section 3(1).⁹ The list, therefore, is inclusive. To be considered by the censor the publication must describe, depict, express or otherwise deal with, “sex, horror, crime, cruelty or violence”.¹⁰

Once it is established that the publication deals with the requisite subject matter, the test for objectionability is whether making it available is “likely to be injurious to the public good.”¹¹ The Classification Act sets out two categories of publications.

B. Section 3(2)

Section 3(2) of the Classification Act deems objectionable publications that promote or support or tend to promote or support various activities, such as the

⁸ Films, Videos and Publications Classification Act 1993, s3(1).

⁹ *Living Word v Human Rights Action Group* [2000] 3 NZLR 570, paras 25 & 29 per Richardson P.

¹⁰ Films, Videos and Publications Classification Act 1993, s3(1).

¹¹ Films, Videos and Publications Classification Act 1993, s 3(1).

exploitation of children for sexual purposes, necrophilia or extreme cruelty. Merely depicting these acts will not suffice; the publication must have the effect of advocating or encouraging the prohibited activity.¹² Clearly it is Parliament's view that any publications that do promote or support this conduct are likely to injure the public good for the purposes of 3(1). Because this is a deeming provision, publications that fall under this category are banned regardless of any redeeming features they may possess.

C. Sections 3(3) and 3(4)

Alternatively, if a publication does not promote or support one of the activities listed in section 3(2), it may still be banned or regulated based on consideration of a number of relevant criteria set out in sections 3(3) and 3(4). Its injuriousness under these sections is a matter of extent and degree. Subsection (3) provides that particular weight should be given to the extent to which the film depicts: torture, maiming or cruelty; sexual violence or coercion; degrading sexual or physical conduct; sex with children; or sadomasochism.¹³ Particular weight is also to be given to the extent to which the film: exploits child nudity; degrades any person; promotes criminal or terrorist acts; or represents discriminatory hate speech.¹⁴

Subsection (4) requires the censor to give consideration to several other features of the publication. These include the film's dominant effect; its merit, value or importance with respect to particular fields of study; the impact of its presentation medium; the persons to whom it is intended or likely to be made available and the film's purpose.¹⁵ Of particular relevance to my thesis is section 3(4)(c) that obliges the censor to consider:

"the character of the publication including any merit, value, or importance that the publication has in relation to literary, artistic, social, cultural, educational, scientific and other matters".¹⁶

¹² Films, Videos and Publications Classification Act 1993, s 3(2)(a) to (f).

¹³ Films, Videos and Publications Classification Act 1993, s 3(3)(a)(i) to (v).

¹⁴ Films, Videos and Publications Classification Act 1993, s 3(3)(b) to (e).

¹⁵ Films, Videos and Publications Classification Act 1993, s 3(4)(a) to (e).

D. Section 4

Section 4 of the Classification Act states that whether or not a publication is objectionable is "a matter for the expert judgment" of the censor and relieves him or her from giving evidence as to, or proof of, his determination. It does, however, require that the censor take into consideration any evidence as to, or proof of, matters and particulars that may be relevant to the question of injuriousness and that are made available to him or her.

E. The Censorship Process

New Zealand's primary censoring authorities are the Office of Film and Literature Classification ("the Office") and the Film and Literature Board of Review ("the Board"). Publications of concern or believed to be in need of regulation are submitted first to the Office. The Office can, in accordance with the Classification Act, ban or restrict the availability of a publication or assign it an unrestricted classification. Anyone who disagrees with the classification can apply to have the classification reviewed by the Board under section 47 of the Classification Act. The Board reviews the publication rather than the original decision and makes an entirely new decision based on its own response to the publication.

IV. CENSORSHIP REALITIES

A. A 'Melting Pot' Exercise

Before embarking on any analysis of censorship, it is necessary to acknowledge first, that it is a value-laden, intuitive and holistic, rather than a tightly legislatively bound, process. According to the Court in *The Society for the Promotion of Community Standards Inc v Everard* ("Everard") the reality of censorship is that:¹⁶

while not quite in the league of the search for love, beauty or the meaning of life, the search of injury to the public good in the end involves a very considerable message of value judgment.

¹⁶ (1987) 7 NZLR 33, 37 (CA).

Although section 3 of the Classification Act does indicate what type of considerations, effects and subject matter are relevant to the censorship exercise, whether, in fact, a publication has a particular effect, influence or is injurious is ultimately a matter for the personal opinion, or as section 4 of the Act affirms, the "expert judgment" of the censor. The Classification Act then merely sets out a framework within which the censor is to exercise this discretion. The scope therefore, for clear precedent with respect to, for example, what will constitute, and how much weight will be given to a publication's artistic merit or how its status as art will affect its injuriousness, is somewhat limited. Not only will it be difficult for our censors to describe such a 'melting pot' process, publications will differ in terms of the challenges they pose, while our censors' interpretations of and responses to these publications will be equally as variable.

B. The Importance of Transparency

The fact that censorship is a predominantly subjective process, however, does not shelter it entirely from scrutiny. As one of the greatest limitations of freedom of expression, censorship must exhibit some level of transparency. Section 4, as affirmed by the Court in *Vixen Digital Limited v The Film and Literature Board of Review* ("*Vixen Digital*"), simply establishes that our censoring authorities have an inquisitorial and discretionary role:¹⁷ it does not permit the censor to be entirely vague about, or fail to articulate, how or why he or she has reached a particular decision. Sections 38(2)(a) and 55(1)(c) of the Classification Act require the Office and the Board respectively to give written notice of, and reasons for, its decision. According to the Court in *Vixen Digital*, where the legislature has specified that reasons must be given, those reasons must be sufficient to enable any body with the power of review to understand the process of thought whereby the conclusion was reached. A bare declaration that all relevant matters have been considered is not enough; what is

¹⁷ (11 April 2002) High Court, Wellington AP 101/00,13 Durie J. Vixen Digital Limited complained that the Board failed to give sufficient reasons for its decision which gave rise to practical issues of business efficacy. It affected the commerciality of the appellants import business in that it had no guidelines by which to decide whether to import publications or not. There could be no confidence in importing any particular line of videos and importers would be compelled to submit individual videos for assessment at considerable extra cost.

required is that applicable criteria are “identified and dealt with in a clear and open manner”.¹⁸

V. THE NEW ZEALAND BILL OF RIGHTS ACT 1990

A. The Relevant Sections

Any censorship regime obviously impinges on the right to freedom of expression and thus necessitates consideration of the Bill of Rights. Section 14 of the Bill of Rights provides that 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.

With respect to the relationship between the Classification Act and the Bill of Rights, other relevant provisions of the Bill of Rights are sections 4, 5 and 6. Section 4 confirms that the Bill of Rights is not supreme law. Section 5 allows limitations to the rights and freedoms contained in the Bill of Rights, however only “such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.” Section 6 considers the interpretation of other enactments, prescribing that where they can be given a meaning consistent with the Bill of Rights that meaning shall be preferred.

B. Taking a ‘Bill of Rights Consistent’ Approach

As the Court of Appeal made clear in *Moonen v Board of Film and Literature Review* (“*Moonen 1*”) censorship decisions must be made having regard to this right to freedom of expression.¹⁹ It is not sufficient to conclude that although the restrictive provisions of the Classification Act are inconsistent with section 14, by dint of section 4 of the Bill of Rights, the Classification Act simply prevails. Instead by virtue of sections 5 and 6, a “section 14 consistent” approach must be taken to interpreting the

¹⁸ *Vixen Digital Limited v The Film and Literature Board of Review*, above, 14.

¹⁹ [2000] 2 NZLR 9, 19 (CA) Tipping J.

Classification Act. In other words the Classification Act must be given “such available meaning as impinges as little as possible on freedom of expression”.²⁰

1. *Will it make a difference?*

What this means is that phrases such as “likely to be injurious to the public good” and “promotes and supports” must be interpreted so as to advance the aims of section 14 as far as is feasible. However, whether this direction can in reality have much of an, or at least a discernible, impact on censorship is debatable.²¹ Given that the concept of objectionability is so subjective, essentially all the Bill of Rights can require is that the censor adapt his personal ideas about what amounts to injuring the public good so to bring them, as far as possible, in line with section 14. The extent to which they can or should be adapted, will still be determined according to the censor’s own intuitions and beliefs. Furthermore, we depend on the censors for their description of what has been censored. While the Bill of Rights might necessitate low or minimal limitations on freedom of expression with respect to interpreting the Classification Act, it cannot touch or inform the censor’s intuitive responses to and interpretations of the publications. For example, the censor might read down the meaning of injuriousness so as to impinge as little as possible on the right to freedom of expression, however the aims of section 14 might be substantially compromised if he has a particularly prudish and exasperated interpretation of the publication.

Nevertheless, there is no question that the right to freedom of expression is highly relevant to the censorship exercise. Perhaps all we can do is trust those charged with interpreting and applying the Classification Act to be alert to and bear in mind the right and its importance when making decisions that impinge on it. In particular, where a publication’s propensity to harm the public good is ambiguous or debatable, the censor must err on the side of freedom of expression.

²⁰ *Moonen v Board of Film and Literature Review*, above, 19.

²¹ Paul Rishwoth *The New Zealand Bill of Rights* (Oxford University Press, Auckland, 2003) 329.

C. *Is Art Afforded Extra Protection as a Valuable Expression?*

With respect to censorship of art, consideration of the Bill of Rights raises some interesting issues. As previously established, art is generally perceived to be of particular value to society. However, while earlier elucidations of freedom of expression were concerned with the protection of 'valuable' expressions geared toward the spread of political truth and refinement of the individual, later theories have emphasised the importance of a "marketplace of ideas" that entertains 'good' and 'bad' speech. Rather than censoring opinions perceived to be bad, misguided or damaging so as to allow only the valuable and profound to influence and educate the public, it is better that the public choose for themselves what is 'good' speech.²² The ultimate good is better achieved "through the free trade in ideas" or by proving itself in the "competition of the market".²³

This theory is reflected in our articulation of the right, which contains a non-exhaustive list of broadly described activities that constitute freedom of expression. There is nothing in section 14 that advocates valuing some expressions over others. Instead, following the Court of Appeal's decision in *Moonen I*, the right is as wide as "human thought and imagination"²⁴. Section 14 must extend to protect statements of opinion of which we disapprove, which are by moral standards, deviant or salacious and most certainly, those that simply have no positive social purpose.

Given that discriminating between expressions on the basis of their worth seems to run against the spirit of section 14, it might be argued that a Bill of Rights consistent approach to censorship must not afford extra protection to art. Put another way, because section 14 does not entertain notions of artistic, scholarly or high culture snobbery, the Bill of Rights cannot offer any special protection for art, over and above, what the Classification Act already allows.

²² See J. Milton *Areopagitica, A Speech for the Liberty of Uncensored Printing to the Parliament of England* (Clarendon Press, Oxford, 1644, reprinted 1875) 51-2: "[T]hrough all the windes of doctrin were let losse to play upon the earth, so Truth be in the field, we do injuriously by licencing and prohibiting to misdoubt her strength. Let her and Falshood grapple; who ever knew Truth put to the wors in a free and open encounter?"

²³ *Abrams v United States* (1919) 250 US 616, 630 Oliver Wendell J.

²⁴ [2000] 2 NZLR 9, 19 (CA) Tipping J 9,16.

However, to argue that there is no inherent hierarchy of expression in section 14 is to take the statements of the Court of Appeal in *Moonen 1* too far. What the Court establishes is that the content of a statement cannot deprive it of the protection accorded by freedom of expression, no matter how undesirable or offensive it might be. However, in saying that no expression can be cast outside of the dominion of section 14, the Court does not implicitly reject the notion that some expressions will be closer to the core values of freedom of expression, such as enlightenment, education and political truth, and so will be afforded more protection than others. Generally the closer the expression is to what are considered the core values of freedom of expression, the more difficult it will be to justify, in accordance with section 5, the establishment of limits upon it. Thus it should be more difficult to censor art, which is considered to be instructive, socially beneficial or more conducive to the maintenance of a free and democratic society, than expressions considered to be, for example, degrading to particular members of society, such as pornography or hate speech.

D. Section 3(4)(c)

Regardless of which view is taken, however, 3(4)(c) of the Classification Act, which allows for a publication to be redeemed by virtue of its artistic merit, must be attributed particular emphasis in accordance with section 14.

Considered in isolation, section 3(4)(c) does not appear to invoke the Bill of Rights. This is because section 3(4)(c) by itself does not conflict with the right to freedom of expression. Instead it works with right, in serving to redeem and make available publications that might otherwise be banned or restricted by the rest of section 3(1). To illustrate visually the relationship between section 3(4)(c), the Classification Act and section 14 of the Bill of Rights one might envisage a battle between censorship and freedom of expression. If section 3(1) is a battalion of men advancing toward the front line of section 14 in order to attack it or impinge on it, one of section 3(1)'s soldiers, section 3(4)(c) is running in the opposite direction. He moves in the same direction as, with or at least will not clash with, the right of free speech. Given, therefore, that section 3(4)(c) does not call freedom of speech to battle, but in fact it supports it, there seems no need to give it any greater Bill of Rights

flavour. Certainly finding the interpretation of section 3(4)(c) that affords the least possible infringement on section 14 is an anomalous exercise, because it does not infringe it at all.

However, if section 3(4)(c) is considered in the context of, or as contributing to, the section 3(1) inquiry, which does overtly conflict with the right to freedom of expression, it is easier to see how section 14 might or should impact on its scope and operation. The definition of "objectionable" in section 3(1) sets the threshold at which concern for the public good will trump the right to freedom of expression. Thus, if "likelihood of injury to the public good" is interpreted so as to impinge as little as possible on section 14, section 3(4)(c) must be given an interpretation that allows it to have as great an impact or influence on the question of injuriousness as possible. By virtue of the friction between section 3(1) and freedom of expression, it becomes necessary to strengthen the power of section 3(4)(c) or at least to interpret it and define its power with section 14 concerns in mind. It does not matter, therefore, whether section 14 will protect certain expressions over others. Section 14 gives credence to section 3(4)(c) anyway, simply by virtue of the fact that section 3(4)(c) has redeeming or saving power in the context of legislation that seeks to limit freedom of expression. From a purely practical perspective, section 14 would support a reading of section 3(4)(c) that enhances its potential, simply because this would, presumably, result in more publications being made available than if it were read down.

VI. *ART: INJURIOUS TO THE PUBLIC GOOD?*

A. *Section 3(1): Censorship's Overarching Inquiry*

Section 3(1) of the Classification Act sets out the basis for regulating or banning publications. A publication's classification must reflect the extent to which, or in what circumstances, it is "objectionable". A publication is "objectionable" for the purposes of this section where it:²⁵

²⁵ Films, Videos and Publications Classification Act 1993, s 3(1).

“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”.

Putting aside the requisite or ‘gateway’ subject matter, a publication’s objectionability is measured solely according to whether its availability is likely to injure the public good.

Indeed there is nothing in section 3 to suggest an alternative benchmark for classification might be employed. Subsections (2), (3) and (4) are explicitly directed at ascertaining a publication’s objectionability. Subsection (2) explicitly states that a publication “shall be deemed to be objectionable” if it promotes or supports its listed activities, and subsections (3) and (4) focus consideration of various aspects of a publication on the question of “whether a publication is objectionable or should be given a classification other than objectionable”.

That everything considered by dint of section 3 must relate to a publication’s likelihood of injuring the public good is further supported by section 4 of the Classification Act. Although this section deals primarily with the matter of proving or supporting with evidence the censor’s decisions under section 3, the censor’s obligations regarding proof are explicitly and solely related to determinations made in answering “the question of whether a publication is objectionable”.²⁶ If there was some other question to be answered by the censor or if its “expert judgment”²⁷ was to be exercised beyond ascertaining a publication’s potential to injure the public good, presumably section 4 would make mention of it.

Clearly the issue of whether making available a publication will injure the public good is not entirely at the discretion of the censor, given that section 3(2) requires the him or her to find a publication objectionable, and, thus, injurious if it promotes or supports various social evils. However, with respect to section 3(3), if objectionability is the sole basis for classification, anything that does not, in the

²⁶ Films, Videos and Publications Classification Act 1993, s 4.

²⁷ Films, Videos and Publications Classification Act 1993, s 4.

editor's mind, affect a publication's potential to injure the public good, must be irrelevant to its classification.²⁸

B. Assessing Art Against the Section 3(1) Inquiry

How then is art to be assessed against this standard of injury to the public good? How does the fact of a publication being artistic or having artistic merit relate to this inquiry?

The Classification Act allows art to be redeemed with respect to its potential injuriousness on two bases. Firstly the fact of a publication being or revealing itself as art can affect its propensity to actually harm the public, for example, to disturb or propound damaging messages. Secondly a publication's merit, value or importance, its *worth* as art, by dint of section 3(4)(c) can make it beneficial to the public, and so from a net harm perspective, less injurious to the public good.

VII. LESS HARMFUL, AND SO LESS INJURIOUS?

A publication's status as art can impact on how its content might be interpreted by, and affect or influence its viewers. Quite independent, therefore, of its artistic worth or merit, a publication can be less injurious or redeemed simply by virtue of the fact that its obvious artistic agenda 'takes the sting out' of its offensive, disturbing or questionable content.

²⁸ It might be argued that the words "other than objectionable" allow the censor to determine a publication's classification on a basis other than objectionability. However, this discretion, if indeed it can be read into section 3, has not been exercised by any of New Zealand's classification authorities. It is apparent from their application of section 3 that the words "other than objectionable" simply make clear that subsections (3) and (4) do not have the deeming effect of subsection (2). Publications that are classified according to subsection (2) are either classified as objectionable or unrestricted. The words "other than objectionable" in subsections (3) and (4), however, allow the censor to take account of the extent to which and in what circumstances a publication is objectionable and give it an alternative classification, but, one that still reflects its propensity to harm. The words refer to conditional classifications set out in section 23(2) such as "objectionable except if the publication is used for a specific purpose" or "objectionable except if the availability is restricted to persons of a specific age".

A. *Why Less Harmful?*

1. *The 'subtleties' of art*

That art has its own internal redeeming property with respect to actual injuriousness or harm is reflected in academic Donna Bank's view that art "cannot be subjected to the same patent offensiveness as in other areas" because "its subtleties are too expansive."²⁹ What Banks appears to be saying is that art is a particularly layered, complex and elusive form of expression. It aims to distort, move, illustrate and create ambiguities and tensions, and to challenge assumptions. Bank's argument, therefore, is that art's content, or what is simply depicted by an artist, cannot be considered and censored on face value or independent of these aims. There is a further point to artistic expression that offsets the 'prima facie' offensiveness of its subject and makes it less injurious.

Banks uses the work of Robert Mapplethorpe to illustrate her point.³⁰ She refers to two photographs depicting a naked boy seated on a couch and a girl seated on a bench with her dress pulled up. The subject matter is clearly inflammatory, raising questions of child pornography and abuse. However, although the images of the two children have negative connotations, the photographs are clearly artistic. The subjects of the photograph are lit in such a way that they appear, not as children, but classicised figure studies of cherubs and putti. The photograph does make reference to, or at least hint at, child pornography but it does so in the context of a greater artistic statement. Its reference to child pornography is part of a characteristic tension in Mapplethorpe's work, between aestheticism or beauty and the obscene. According to Bank this 'subtlety' or artistic merit in Mapplethorpe's work "neutralises it from moral attack"³¹ or makes it less objectionable, although she does not explain why.

It is less objectionable because the sum of Mapplethorpe's work is not the depiction of naked children. The analogy to classical art is surprising in light of its subject and indicates that there is commentary and meaning above what it depicts.

²⁹ Donna R Banks "Conservatism in the 1980s: Art and Obscenity in Cincinnati, the Beauty and the Conflict" (1991) *How LJ* 1439, 1450.

³⁰ Banks, above, 1441.

³¹ Banks, above, 1441.

Once the point of the work is realised - that it is designed to make his viewer feel revolted by and drawn to it simultaneously - it becomes apparent that Mapplethorpe is aware of the offensiveness of child pornography. He *uses* it to unsettle the aestheticism of his photography. Mapplethorpe, therefore, can be distinguished from a child pornographer because he employs, but most importantly acknowledges, the offensiveness of child pornography in his work. This level of consciousness or control on the part of the creator appeases, and is reassuring to, viewers of art.

2. Art 'awareness'

Perhaps what also makes Bank's claim that the 'subtleties' of art make it less harmful, tenable, is the fact that society is well versed in the role of art and the artist in society. Consumers of art are *aware* that artistic expression is a discourse endowed with subtlety, complexity and depth. An artwork's specific meaning or 'subtlety' may not always be picked up or understood by its viewer, however, what is important is that he knows he should be looking for it. This awareness is manifested in people's behaviour when confronted with art. Most people will stand in front of an artwork for a long time contemplating, mulling over and discussing the effect it has on them, its possible meaning and what the artist has attempted to achieve. Certainly, that art inspires such depth of thought makes it of particular value to society. However the salient point for the purposes of this discussion is that the critical approach or level of responsiveness that art encourages, also makes it less injurious or harmful.

Even if a person fails to appreciate or understand the "subtleties" of a work of art, he is familiar with its agenda; he knows, because of a publication's status as art that there is something more to or special about what is depicted. A standard pornographic film made purely for titillation purposes, for example, that does not assert itself as 'art', does not put its viewer on guard in this sense or give any indication that he is to look critically at it. Instead, the film may be perceived to reflect reality. Where, for example, particularly degrading, coercive and dehumanising acts are depicted, the absence of any sign that this is not normal sexual activity, that instead, for example, it is art or a commentary on that activity, clearly makes its content more damaging or influential.

3. *Less threatening*

Not only does an image that is asserted as 'art' invite and encourage its viewer to look critically at it, it is somehow less threatening, worthless or sinister than its non-artistic or critically unacclaimed equivalent. The belief that appreciating art is an enlightening, therapeutic and positive experience means that its content is more optimistically received. Consumers are more inclined to tolerate, open themselves and even enjoy artistic content that is disturbing, obscene or controversial because it is perceived to be part of a powerful message, realisation or experience. When a viewer is aware that a particularly shocking photograph or film is 'art' he or she perhaps feels safer, satisfied, even excited when the work has the desired effect. Michael Haneke's film *The Piano Teacher* described by some as "Euro art-shock sadomasochistic porn"³² gains a five star rating in a Guardian review for bringing its critic, Peter Bradshaw, to his "hands and knees".³³ Bradshaw marvels at Haneke's ability to generate "scenes of nerve-jangling disquiet and intimately unpleasant trauma"³⁴ leaving his viewer feeling as though he or she has "taken some sort of shot between the eyes".³⁵ An average pornographic or 'smut' film that has sadomasochistic content might also put its viewer "in a place [he] doesn't want to be, and keep [him] there".³⁶ However, he or she will be unlikely to relay these feelings with enthusiasm or credit the film's impact to its maker, hailing it, as Bradshaw does, as an "inspired nightmare".³⁷

B. Relating the Special Properties of Art to Section 3 Matters and Considerations

These aspects of art can obviously feed into and inform several section 3 inquiries. The above comments can clearly be related to whether or not a publication promotes or supports,³⁸ or how a publication deals with, a particular activity,³⁹

³² Peter Bradshaw "The Piano Teacher" (9 November 2001) *The Guardian* 18.

³³ Bradshaw, above, 18.

³⁴ Bradshaw, above, 18.

³⁵ Bradshaw, above, 18.

³⁶ Bradshaw, above, 18.

³⁷ Bradshaw, above, 18.

³⁸ Films, Videos and Publications Classification Act 1993, s 3(2).

³⁹ Films, Videos and Publications Classification Act 1993, s 3(3).

consideration of its dominant effect,⁴⁰ character⁴¹ and likely audience.⁴² These matters are all relevant to a publication's propensity to harm. It is artificial, however, to look at each of these matters separately with respect to classifying art, given that consideration of art's unique properties and complexity runs similarly through all of these inquiries.

C. *How Are New Zealand's Censors Taking Account of Art's Special Properties?*

The Office and the Board are clearly alert to art's special agenda. They often only intimate, however, rather than state explicitly, that there is something different about art, that at first instance, it is less injurious because its viewers are aware of its creators' purpose and more inclined to approach it critically and pick up, or at least appreciate, that it has 'subtleties'.

1. *Understated*

In its consideration of the film, *The Piano Teacher*, for example, the Office touches upon the significance of its director having control of, or carefully working his offensive subject matter. The Office viewed the film as "a thoughtful and complex psychological drama", that "explores" rather than merely depicts the unstable mental state and sexual proclivities of its main character and that deals with violence, sex and cruelty "in a highly structured matter".⁴³ According to the Office, the impact of its sexually explicit scenes lies in their "studied performance" rather than in their "graphic display".⁴⁴ Implicit in the words "studied", "thoughtful", "complex" "structured" and "explore" is the perception that the film's director has a particular command of his subject. These observations do relate in part to the film's value as a serious commentary on sadomasochistic practices, however, they indicate also a sense of assurance or trust in the film's director that the Office does not fully articulate. Yet the fact that the director has thought about, worked in to the film and deliberately

⁴⁰ Films, Videos and Publications Classification Act 1993, s 3(4)(a).

⁴¹ Films, Videos and Publications Classification Act 1993, s 3(4)(c).

⁴² Films, Videos and Publications Classification Act 1993, s 3(4)(d).

⁴³ *The Piano Teacher' Decision* (28 September 2001) Office of Film and Literature Classification, 200672, 3.

⁴⁴ *The Piano Teacher' Decision*, above, 3.

channelled the offensive aspects of his subject certainly appears to be influencing the Office's decision.

2. *Misdirected*

In deliberating the objectionability of artist, Keith Haring's work, the Office and the Board again appear keenly aware of the impact a publication's status as art has on its propensity to harm, but do not focus this discussion so as to communicate this point strongly.

One of Keith Haring's paintings contains representations of intercourse, possibly anal and sadomasochistic sexual activity, invoking consideration of sections 3(2)(b) and 3(2)(f) of the Classification Act. These provisions deem objectionable publications that promote or support the use of violence or coercion to compel any person to participate in, or submit to, sexual conduct (3(2)(b)) or that promote or support acts of torture or the infliction of extreme violence or cruelty (3(2)(f)).

The painting is composed of six separate images. One image presents one human figure thrusting a weapon through the body of another that is tied at the ankles with outstretched arms. The first figure has an erect penis with one hand placed above this. Another image depicts a man crouching on a bench with ankles apparently bound. A second figure stands between the feet of the first holding a leash attached to the first figure and with an erect penis poised at its buttocks.⁴⁵

In its discussion of sections 3(2)(b) and 3(2)(f) both the Office and the Board emphasise the symbolic or semiotic quality of Haring's paintings that make it less realistic and therefore, less compelling.⁴⁶ ⁴⁷The Office acknowledges that the artwork alludes to sadomasochistic practices, however, the fantastic, cartoon-like and simplistic nature of Haring's figures causes it to "lack reality", weakening the impression that its subjects are in fact suffering pain or being forced or coerced into

⁴⁵ *Keith Haring Decision* (4 August 1999) Office of Film and Literature Classification 9900890, 6.

⁴⁶ *Keith Haring Decision*, above, 10.

⁴⁷ *Keith Haring Decision* (1 July 1999) Film and Literature Board of Review 4/99, 5.

participating.⁴⁸ Perhaps this last observation does not respond directly to the issue of promoting or supporting the depicted activities, however, the Office is acknowledging the ‘distancing’ quality or effect of artistic modes of expression. It is the “simple child-like simplicity of Haring’s drawing” that removes the images from the realm of literal depictions, making it impossible to mistake the world depicted with the real world.⁴⁹

However, while this is certainly true, the artistic or symbolic quality of Keith Haring’s work does more than simply make its content seem less real. Furthermore, the Office’s point, that Haring’s unrealistic style ensures that its viewer does not think what he is looking at is real, seems a somewhat elementary one in the context of harm. What Haring’s style does, (and what the Office and the Board fail to make meal of), is clearly indicate to its viewer that it is art. Its unequivocal status as art signals a multi-dimensional, complex and non-literal meaning. This realisation, as opposed to simply an awareness that what is before him is not real, is of much greater significance in terms of the risk of the viewer misreading and being negatively influenced by Haring’s work. This is what the Board and the Office would be better to spell out or emphasise.

3. *Overstated*

Unfortunately where the Office has attempted to make the argument that art reveals a particular purpose that automatically makes it less harmful, it has been somewhat overzealous. Indeed, if the Office’s reasoning behind its classification of Mapplethorpe’s *Jim and Tom, Sausalito 1977* were followed it would be difficult to deem any artistic expression objectionable.

The photograph shows two men in front of an outside wall beside a metal ladder, with parts of their bodies lit by strong sunlight and the rest in dark shadow. One of the men is standing, bent at the knees, in front of the other. He is urinating in

⁴⁸ *Keith Haring Decision* (4 August 1999) Office of Film and Literature Classification 9900890, 10.

⁴⁹ *Keith Haring Decision* (4 August 1999) Office of Film and Literature Classification 9900890, 3.

the other's mouth. The other man is kneeling passively before him with his head forward and mouth open, catching the urine in his mouth.⁵⁰

The photograph clearly triggers consideration of section 3(2)(d) of the Classification Act which deems objectionable a publication that promotes or supports or tends to promote or support the use of urine in association with sexual conduct. The Office is clearly reluctant to find the publication objectionable and endeavours, although tenuously, to relate the fact of the publication being art to the question of whether the publication promotes or supports the activity it depicts.

The Office begins its analysis by mentioning "the traditional role of the artist, the status of art in our society and the context in which the artwork would be viewed as art". It makes the assertion that because the publication will be viewed as art, "it will not have the *effect* of acting an encouragement" of the activity it depicts.⁵¹ The Office appears to be drawing on the idea that the public recognise the suggestiveness, non-literal or experimental aspect of art and so are less likely to be swayed or influenced by it, which is, as previously contended, a compelling argument.

However, the Office overstates the significance of the publication's status as art to the question of injuriousness. In answer to the section 3(2)(d) inquiry the Office asserts that it is "the art of Mapplethorpe that is being supported"⁵² as opposed to the use of urine in association with degrading and dehumanising sexual conduct. Not only does this statement seem to suggest that any publication that is art, regardless of its meaning or effect, will escape the section 3(2) deeming provision, this unfortunate assertion might have pornographers insisting that their work simply promotes or supports pornography and not the degrading and humiliating acts it may depict.

D. Hidden Teeth

Despite art's refined agenda, its 'subtleties' and cleverness, it is not always harmless. Perhaps the reason why the Office postulated such a clumsy and vague

⁵⁰ *Robert Mapplethorpe Decision* (30 November 1995) Office of Film and Literature Classification 9501765, 3.

⁵¹ *Robert Mapplethorpe Decision*, above, 5.

⁵² *Robert Mapplethorpe Decision*, above, 9.

interpretation of Mapplethorpe's work is that a closer analysis would have revealed the photograph does in fact promote or support the use of urine in sexual conduct.

The photograph is one of a several dedicated to criticising the oppression of gay men by a society that views their sexual practices as degenerate or immoral. Mapplethorpe's own homosexuality and his activist agenda are well known and emphasised in brochures and explanatory notes accompanying his work. Furthermore, the overt classicisation of the photograph: his heightened use of traditional light and composition and his virtuoso technique may be read as a seditious demand that we see and re-evaluate the 'debased' practice and people he portrays. Therefore, even on a non-literal and critical reading, the work advocates the use of urine in sexual conduct and must, therefore, be objectionable for the purposes of section 3(2)(d). Thus, there can be no absolute exemption for art because, even in light of its artistic, complex or multi-dimensional schema, on occasion it may still say or endorse something that the Classification Act deems objectionable.

Where the Office and the Board have demonstrated an awareness that a publication's artistic status will not always dilute or obscure its damaging aspects is in their classification of David Hamilton's *Holiday Snapshots*. The soft cover book contained more than 300 photographs of naked or partially clad pre-pubescent and pubescent females with obvious sexual overtones. One photograph which is typical in its display and suggestiveness of the others in the book, depicts the rear of a naked girl, apparently asleep, lying amidst scattered towels and cushions; its caption reads "Loved it!".⁵³

A senior lecturer in photography, consulted by the Office, affirmed that the photographs were artistic emphasising Hamilton's deliberate abstractions of body parts, his soft focus, the beautiful quality of light and the natural poses adopted by the girls.⁵⁴ The Board acknowledged Hamilton's reputation as a skilled photographer, that the book was glossy and well-bound and the "quality"⁵⁵ of some of the images. However, the publication was deemed objectionable by both the Board and the Office

⁵³ *'Holiday Snapshots' Decision*, (4 December 2001) Film and Literature Board of Review 2/2001, 2.

⁵⁴ *'Holiday Snapshots' Decision* (10 March 2000) Office of Film and Literature Classification 9901504, 6.

⁵⁵ *'Holiday Snapshots' Decision*, (4 December 2001) Film and Literature Board of Review 2/2001, 11.

because it tended to promote or support the exploitation of children and young persons for sexual purposes. The fact of the photography being clearly artistic did not cloak or deflect Hamilton's unequivocal intention to titillate and elicit a sexual response from his reader.⁵⁶

Although there are exceptions, generally, however, a publication that is easily recognised as 'art' by virtue of its medium, presentation or context, will be less harmful, and so for the purposes of section 3(1), less injurious, than its artistically void equivalent. The Office and the Board have to some extent exhibited an awareness of this fact, although have often failed to accurately capture exactly what it is about art, in terms of what it conveys and the type of response it evokes, that makes it less harmful.

VIII. MORE WORTH, AND SO LESS INJURIOUS?

An artistic publication might also be redeemed by virtue of its artistic merit, value or importance (which will subsequently be referred to as "artistic merit") in accordance with section 3(4)(c).

A. Section 3(4)(c)

Section 3(4)(c) of the Classification Act obliges the censor to consider:

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

1. *The character of the publication*

The character of the publication or its status as, for example, a work of art, documentary or anatomy text book can be related to the above inquiry into the publication's propensity to harm. As previously discussed, a publication that is obviously artistic may, for example, make its viewer aware that its depiction of

⁵⁶ The inconsistency between the Office's decision in HS and Mapplethorpe can perhaps be explained by the reluctance of the Office to find objectionability under section 3(2)(d). It may be that they perceived this section as harping back to obscenity law and traditional views of proper sexual activity.

sadomasochistic activity has a symbolic purpose, and is not, therefore, to be taken literally. Alternatively its representational or unrealistic nature might have the effect of anaesthetising or distancing its viewer making its content less influential. An anatomy text book that depicts naked children is unlikely to be viewed as harmful because its scientific emphasis desexualises its content and is unlikely to titillate and inspire paedophiles. Similarly a documentary that includes scenes of rape and sexual violation might not be considered harmful because of its pervasive didactic tone that forces its viewers to contextualise and critically consider its potentially injurious content.

2. *Merit, value or importance*

A publication's merit, value or importance with respect to literary, artistic, social, cultural, educational discourses can not be so easily related to the Classification Act's overarching inquiry. Unlike the character of a publication, which can be easily associated with the question of injuriousness, it is difficult to see how a publication's *worth*, implicit in the words "importance", "merit" or "value", can have any effect on its propensity to harm.

What these words suggest is that, independent of its injurious aspects, a publication may be redeemed or at least avoid a restrictive classification on the ground that it makes a significant contribution to, for example, an artistic, cultural or scientific field. Paragraph (c), therefore, appears to provide, in part, an alternative basis for classification that protrudes from the overarching inquiry into injury. Instead of prohibiting or restricting the availability of publications only to the extent that they have negative effects on society, paragraph (c) offers positive protection for certain publications.

3. *Relating merit, value and importance to the question of injuriousness*

Consideration of a publication's positive attributes, such as its value or importance, does not fit comfortably with the wording of section 3(1). In particular, the word "injurious" appears to focus censorship on a publication's negative aspects:

to injure the public good is to do something harmful or destructive to it. This reading is supported by *Everard* where it is stated that:⁵⁷

The requirements for discernible injury and capacity for some actual harm do not impose a procedure or evidential necessity for actual evidence to that effect. They are matters which an expert body can establish from its own judgment if necessary....when one considers the likelihood of injury to the public good, one looks for a likelihood sufficiently real to be discernible or actual. Mere paranoid possibilities do not suffice..

Although *Everard* was concerned with a different statutory framework, The Indecent Publications Act 1963, the above passage continues to be cited by the Board and New Zealand Courts as a useful elucidation of “likely to injure the public good”.⁵⁸ Of particular relevance to this discussion is the requirement that the likelihood of injury be “sufficiently real to be discernible or actual”. To identify a real or actual risk of injury, the Court suggests that the injury must be a particular outcome or effect, for example, that members of the public will be persuaded, aroused or inspired by and will act on a publication’s negative message or be psychologically harmed by a particularly shocking publication. It is difficult to see how a publication’s artistic merit, value or importance, as opposed to merely the fact that it is art, can inform this type of inquiry. How does the censor classify two publications that are equally likely to exploit the nudity of children, arouse its viewers and inspire child abuse where one of them has considerable artistic merit? Under *Everard* the risk of the particular injury is equally “real” or “discernible” for both.

Can, therefore, or should a publication’s impressive and artistic qualities only be taken into account where they work to dilute its injurious and damaging aspects or does section 3(1) allow the censor to consider artistic merit quite independently of its capacity to harm?

If section 3(4)(c) were to be taken into account only to the extent that it impacted on a publication’s propensity to instigate a particular type of harm, it would

⁵⁷ (1987) 7 NZLR 33, 37 (CA).

⁵⁸ See for example ‘*Lies*’ Decision (4 July 2002) Film and Literature Board of Review 4/2002, 15; ‘*8 Mile*’ Decision, (3 March 2003) Film and Literature Board of Review 2/2003, 12; ‘*Baise Moi*’ Decision Number 5, (3 September 2002) Film and Literature Board of Review 6/2002, 30.

be in part redundant. As previously mentioned, the character of the publication, the fact of its being art, may make it less harmful. However, here it is the *effect* of the publication being artistic that is related to the question of injury, and not the fact that the work has artistic merit, value or importance. The publication's character, therefore, is material, however how important or valuable the publication is in this respect, is not.

4. *The 'net harm' concept of injuriousness*

If section 3(4)(c) is to have any bearing on a publication's classification, section 3(1) must allow for a 'net harm' approach to evaluating a publication's injuriousness. The censor, therefore, is not limited to considering section 3(4)(c) in light of whether a publication will have a particular harmful effect. Instead, a publication's harmful parts, for example, its depiction of sexual violence in an explicit, horrific and shocking way are weighed against its beneficial features such as its artistic merit. *Overall* the publication is less injurious to the public good than its non-artistic equivalent, because the publication's positive aspects "cancel out" some, or all, of its negative parts. The fact that the publication's artistic merit may have no counteracting effect on its damaging aspects is not critical to this balancing act.

IX. SECTION 3(4)(c) IN ACTION

Once the relevance of a publication's merit to the question of injuriousness is explained, the application of section 3(4)(c) does not appear particularly problematic. However, determining, in the first instance, whether a publication has artistic merit is by no means straightforward given the subjectivity of notions of merit and value, and in particular art. Furthermore, although the net-harm approach is theoretically sound, in practice it is extremely difficult to strike a balance between a publication's artistic merit and its propensity to do actual harm. They are such qualitatively different concepts that run on separate tracks; although for the purposes of section 3(1) we might say that a publication's artistic merit makes it overall less injurious, it does not, in fact, have any practical or 'real' impact on the publication's harmful aspects.

A. *Artistic Merit?*

1. *The language of section 3(4)(c)*

The Classification Act does not elaborate on the meaning of “artistic” or “merit, value or importance”. It is common sense that the publication must have something to do with art or contribute in some way to artistic discourse. The words “merit, value or importance” suggest that its contribution must be at least a significant, meaningful or useful and denote notions of quality or superiority.

2. *The Bill of Rights*

Section 14 of the Bill of Rights advocates a wider interpretation. Again, whether section 3(4)(c) runs against the non-exclusive spirit of freedom of expression or whether in endeavouring to protect ‘core value’ expressions, it finds agreement in section 14, is immaterial. The fact that section 3(4)(c) has redeeming power in the context of a section which seeks to limit the availability of publications and impinge on freedom of expression, necessitates a broad reading of the words “artistic” and “merit, value and importance”.

Firstly, a publication need not necessarily be particularly fine art to have “value or importance” in relation to artistic matters. While it is difficult to avoid giving “artistic merit” a meaning other than artistic worth, in the sense that a publication must be ‘good’ or ‘high’ art, the words “value” or “importance” can be interpreted to include artistic publications that are not so impressive. Section 3(4)(c) might recognise publications that, for example, are valuable or important in the sense that they add to the marketplace of artistic ideas, as opposed to only those that are high quality contributions.

This is not to say, however, that all publications that qualify as having artistic merit, value or importance are to be redeemed equally under section 3(4)(c). Artistic merit is still a question of extent and degree. Under the net harm approach the artistic importance and value must still outweigh the harmfulness if it is to escape censorship. Thus a publication that only tenuously has artistic merit or that does not appear to

contribute much to the 'marketplace' of artistic ideas, will struggle to be redeemed if its potential to harm is great.

Section 14 has more significance from a practical perspective in affording a publication the 'benefit of the doubt' where there is some argument as to its artistic merit. Opinion may well differ on whether a publication is in the first instance, artistic, and whether it has artistic merit, leaving the censor in an apparently difficult position. However if section 3(4)(c) is applied in light of the Bill of Rights, the censor must remain receptive to the possibility of artistic merit, even if controversial. Where evidence conflicts, the interpretation that impinges as little as possible on freedom of expression must be adopted. Accordingly, if a credible expert asserts that a publication has artistic merit, then the censor should classify the publication on the basis that it has, despite contradictory evidence from other experts. The Bill of Rights requires that the burden of establishing artistic merit is not onerous, and where there are conflicting opinions, as is inevitable in such a subjective context, the censor must accept that artistic merit does not have to be universally perceived. A publication may still have significant artistic value if it is only recognised by some viewers.

3. *The overlap between artistic, social, cultural and educational merit*

It is necessary to note that, although basic statutory principles would require that the term "artistic merit" mean something different from literary, cultural, scientific or educational merit, in reality there is significant overlap between these terms. To focus solely on the way in which a publication is artistic in the sense that it is aesthetic or skilful, is to fail to recognise that this is in fact an outmoded conception of art. Much contemporary or post-modern art, for example, is characterised by, for example, its political and societal focus and, in fact, even a rejection of aestheticism and traditional notions of art.

What gives Mapplethorpe's work artistic merit, for example, or what makes it of such great interest to art curators and historians is not just its traditionally 'artistic aspects' - for example, its classicised composition and use of light. Art critics are equally interested in the social commentary in his work, his endeavour to highlight,

question and subvert culturally constructed prejudices and assumptions.⁵⁹ Thus, what makes his work a valuable contribution to artistic discourse makes it also of significant social, cultural and even possibly educational importance. Our censors are clearly aware of this reality and often either group and list various categories of merit, or apply section 3(4)(c) generally.

Given that this paper focuses on art, the majority of publications discussed are those that are most commonly regarded as artistic as opposed to those that strictly have "artistic merit". They are publications such as Mapplethorpe's work that make their most valuable contribution to artistic discourse, predominantly artwork and film. Accordingly, to capture the various merits of art (and in the interests of economising words), the term "artistic merit" is used throughout this paper to denote the value a publication has as art, including its social or cultural importance.

4. How are New Zealand's censors identifying artistic merit?

In terms of identifying artistic merit, the Board and the Office have generally deferred their own judgment to expert opinion or relied on critical acclaim the publication has received overseas as evidence of it having artistic merit. For example, in its consideration of a 'centre-fold' style photograph published in *Pavement* magazine of an Asian prostitute lifting her dress to expose her genitals, the Office defers to the judgment of Senior Lecturer in Art History at Victoria University, Jenny Harper, to explain its post-modern meaning and vouch for its artistic status.⁶⁰ Of *Irreversible*, the Office notes that its two main actors are among the most popular in contemporary French cinema and that director Gaspar Noe's films have consistently received critical attention.⁶¹ Similarly the Board makes mention of *8 Mile*'s highly respected director⁶² and the fact that *Bully* won an award at the Stockholm Film Festival and that *Baise Moi* was listed in the top ten films for the year 2000 in Time

⁵⁹ See Donna R Banks "Conservatism in the 1980s: Art and Obscenity in Cincinnati, the Beauty and the Conflict (1991) How LJ 1439, 1450.

⁶⁰ 'Pavement' (February/March 1999) Issue 33 Decision (28 July 1999) Office of Film and Literature Classification 9900178, 4.

⁶¹ 'Irreversible' Decision (not dated) Office of Film and Literature Classification 300049, 18.

⁶² '8 Mile' Decision, (3 March 2003) Film and Literature Board of Review 2/2003, 16.

magazine.⁶³ Clearly the implication is that because the merit in these works has been widely recognised or notable to “art” experts or critics, they must be clever, insightful or of particular relevance to artistic discourse.

In light of the fact that artistic merit is a highly subjective concept, the Board and the Office cannot be criticised for relying on expert or outside opinion. Furthermore, in assuming that a publication has artistic merit or significance if a credible expert contends it has, both authorities are advancing the interests of freedom of expression. It appears that if an arts critic, curator or historian has located some artistic value or merit in a publication, their opinion will go unchallenged by the Office and Board. They do not engage in debate over the relative merits of the expert’s opinion or whether a publication should have received a particular award. Nor have they attempted to ascertain whether a publication has been more heavily criticised than commended and assess its artistic merit on that basis. For example, the Office would not have had to look far to find evidence or argument that the post-modern film *Baise Moi*, a film that deliberately mimicks “violent hardcore porn”⁶⁴, is void of artistic merit. The film received considerable condemnation from credible critics for being “arty rubbish”,⁶⁵ “too pleased with the debased romanticism of its slapdash self”⁶⁶ and dressed up “smut”. Despite the dispute over the artistic merit of *Baise Moi* however, the Office did not seek to contradict the expert opinion of Dr Harriet Margolis, Senior Lecturer in Film Studies at Victoria University⁶⁷ who affirmed that the film had artistic value as commentary on the history of film.

Both authorities have also been careful to acknowledge a publication’s artistic merit, even where it might go ‘over the heads’ of or seem irrelevant to, the average person or artistic ‘layman’. With respect to *Irreversible* the Office identified its merit as being of “particular interest to students of film by virtue of its innovative techniques and structure.”⁶⁸ Similarly the Board acknowledged *Baise Moi*’s

⁶³ ‘*Baise Moi*’ Decision Number 5, (3 September 2002) Film and Literature Board of Review 6/2002, 36.

⁶⁴ Margaret Agnew “Wham, bam, kill me, mademoiselle” (14 December 2002) *The Christchurch Press* Christchurch 4.

⁶⁵ Joe McGovern, MATINEE MAGAZINE <http://www.rottentomatoes.com/m/BaiseMoi_1108213>

⁶⁶ J Hoberman VILLAGE VOICE <http://www.rottentomatoes.com/m/BaiseMoi_1108213>

⁶⁷ ‘*Baise Moi*’ Decision (20 August 2001) Office of Film and Literature Classification 102668, 14.

⁶⁸ ‘*Irreversible*’ Decision (not dated) Office of Film and Literature Classification 300049, 18.

importance as “a post modern movie with some value from a feminist perspective and “for some tertiary studies in the evolution of films depicting women and crime”.⁶⁹ This is, therefore, also commendable in light of section 14 which would support giving emphasis to a publication’s artistic merit, even where it is only relevant to specific sectors of society.

B. Balancing Artistic Merit Against Propensity to do Actual Harm

Section 3(4)(c) does not simply require the censor to identify a publication’s artistic merit: it must also be balanced against a publication’s propensity to do actual harm, in order to come to some conclusion as to the publication’s overall injuriousness.

1. Section 3(2)

Obviously where a publication promotes or supports or tends to promote or support one of the activities specified in section 3(2), its merit, value or importance will not be entertained at all. This is because section 3(2) is a ‘watertight’ provision in the sense that if a publication fulfils its criteria, it is deemed objectionable irrespective of how it might fare under the other section 3 criteria.

2. Section 3(3) and 3(4)

Where a publication falls outside the section 3(2) category, its merit, value or importance is allowed to have some redeeming effect. Section 3(4) requires that the censor “give consideration to” the matters it sets out, including artistic merit. This direction on its own does not assist in determining to what extent artistic merit should impact on a publication’s classification. In fact, it might be argued that subsection (4) is deliberately vaguely drafted in this sense so as to preserve the censors’ discretion to balance the factors in 3(4) against those in 3(3) however he sees fit. Nonetheless the instruction to give “*particular weight*” to the extent and degree to which, and the manner in which, the publication deals with the various activities listed in section

⁶⁹ ‘*Baise Moi*’ Decision Number 5, (3 September 2002) Film and Literature Board of Review 6/2002, 36.

3(3), suggests that determinations made under this section are to have greater sway than those in section 3(4).

3. *The Bill of Rights*

Once again, given that section 3(4)(c) has potential to lessen the censorship regime's impingement on freedom of expression, its power must be amplified as much as possible. In terms of balancing a publication's merit, value and importance against its harmful aspects, it is difficult to ignore the clear instruction to put particular weight on section 3(3) which, by dint of section 4 of the Bill of Rights, must necessitate giving greater emphasis to section 3(3) matters than those listed in section 3(4). This does not mean necessarily that artistic merit, where it is particularly compelling, cannot outweigh a publication's propensity to do actual harm. A 'section 14 consistent' approach to balancing a publication's artistic merit against its harmful aspects, would demand that artistic merit be given as much weight as possible. In particular, where the appropriate balance between harm and artistic merit is difficult to discern, the censor should err on the side of giving accent to its artistic merit.

C. *How Are New Zealand's Censor's Striking The Balance?*

Whether New Zealand's censoring authorities are performing this balancing act with section 14 in mind is uncertain. Both the Board and the Office consistently fail to balance, or at least articulate the balance, between a publication's artistic merit and its propensity to harm. Upon reading the majority of the Board and Office's decisions, one can only assume that a 'net harm' approach is being taken in order to account for artistic merit under section 3(1). Neither authority makes clear, however, what bearing a publication's artistic merit has on its classification. Instead, artistic merit seems invariably to have been just 'thrown in the mix'.

1. *Clearly beneficial, and so less injurious*

Generally both the Board and the Office communicate or at least imply why a publication's artistic merit makes it of some benefit to society, and so, from a net harm perspective, less injurious to the public good. In its consideration of artist

William Brower's *Painting Depicting A Beauty Contest Winner Arriving Home to Find Her Husband Abusing Their Child* and *Painting Depicting A Family* for example, the Office concludes that the paintings' artistic merit is in their propensity to "encourage people to examine society and the status quo and provide "thought-provoking ideas for students of art and art history".⁷⁰ Similarly, the controversial film *Irreversible* which received considerable media and public attention for its depiction of a harrowing and realistic rape scene that lasted 9 minutes, was held to contribute to a wider discourse on gender relations and violence.⁷¹ It is implicit from these statements why these works should be protected: because they make valuable contributions to various ongoing debates and artistic discourses.

2. *Where the balance has been struck*

Very occasionally the Board and the Office do successfully elucidate the balance between a publication's value and its potential to harm. Having found that Mapplethorpe's photographs deal with gay and sado-masochistic sexual subculture in a manner which is confronting and difficult, the Office, for example, concludes that given the persuasive evidence as to the publications' merit and status as "serious works of art", "the "wider public interest is better served by the publications being made available than not".⁷² Similarly in the Board's final consideration of the Moonen publications, photographs depicting nude pre-pubescent and pubescent boys in a sexualised way, it explicitly states that it has balanced the artistic merit in the photographs against the likelihood of injury to the public good. The Board concludes that despite Moonen's obvious artistic ability, his "technical proficiency" as an artist did not lessen the publication's injuriousness.⁷³

D. *The Board's General Failing*

Almost invariably, however, both the Office and the Board fail to clarify to what extent a publication's positive artistic attributes compensate for the harmful

⁷⁰ *William Brower Decision* (6 July 2000) Office of Film and Literature Classification 8.

⁷¹ *'Irreversible' Decision* (not dated) Office of Film and Literature Classification 300049, 18.

⁷² *Robert Mapplethorpe Decision* (30 November 1995) Office of Film and Literature Classification 9501765, 9.

⁷³ *'Moonen' Decision* (16 September 2002) Film and Literature Board of Review 5/2003 22.

aspects of works. How, for example, does the valuable societal probing in Brewer's work mitigate the fact that "taken as images alone [the paintings] present sexual conduct with a child to high extent and degree".⁷⁴ How is the fact that *Irreversible* has something valuable to say balanced against the possibility of some members of society failing to contextualise the film's rape scene and being aroused, titillated or inspired by it? We know these works have artistic merit, but its relevance is typically left vague.

The same criticism can be made of the Board's classification of *8 Mile* and *Bully*. The films were classified by the Board as objectionable unless shown only to persons aged 18 years, but the extent to which the films' artistic merit alleviates the danger it poses to young persons who might be influenced by the pervasive use of drugs, crime and sexual activity in the films, is not clear. In fact it does not seem to weigh in against this concern at all. Perhaps artistic merit becomes immaterial where a publication presents a particular risk to young people. If so, why is this not said?

Furthermore, even where the Board and the Office discuss a publication's artistic merit at length or where it seems a pivotal consideration, the Board has shied away from addressing its significance in a meaningful way. In its review of the catalogue accompanying an exhibition of internationally renowned artist Keith Haring's work, the Board has this to say about the publication's artistic merit:⁷⁵

the label 'artistic merit'(s.3(4)(c)) [is not] sufficient on its own to remove a publication from the ambit of the Act; but while not a determinant characteristic is still one to be considered. In this case, the whole framework of the artist's life and work, as set out and depicted in the book, was a relevant consideration.

This statement, which represents the sum of the Board's consideration of the weight of section 3(4)(c), tells us what is already apparent from the wording of the section: that artistic merit will be considered but will not permit a publication to escape scrutiny under the Classification Act altogether. With respect to the nature and relevance of the artistic merit in Haring's work the Board could not be more vague

⁷⁴ *William Brower Decision* (6 July 2000) Office of Film and Literature Classification 5.

⁷⁵ *Keith Haring Decision* (1 July 1999) Film and Literature Board of Review 4/99, 6.

and uninformative. How important or “relevant” is “the whole framework of the artist’s life and work”?

5. *Is it all obvious?*

It might be argued that although the authorities’ final conclusions are generally brief and uninformative, by looking back at their determinations under various section 3 matters, it is clear which have had the greatest influence and why they have reached their decisions. Normally the Board and Classification Office deal with the various subsections individually and come to conclusions under each (at least this is how the written decisions are set out). It is assumed, therefore, that the final determination will manifest the sum of what has been decided earlier. This may be so where a publication does not have any merit, value or importance. Where section 3(4)(c) is removed from the mix, the censor’s determinations under other section 3 matters will generally all relate to the publication’s propensity to do actual harm and the censor’s classification presumably will mirror this.

Take for example, the Board consideration and classification of the film *Lies*.⁷⁶ This challenging and sexually explicit South Korean feature film about a relationship between a 38 year-old man and a woman twenty years younger, was classified objectionable unless restricted to persons 18 years of age and older. If assumed, for the moment, that the film has no artistic merit or no redeeming positive attributes for the purpose of section 3(4)(c), it is clear how the Board’s determinations under various section 3(3) factors has informed the classification.

According to the Board the numerous masochistic scenes in the film raised concern over sections 3(3)(a)(ii) and 3(3)(a)(v) issues, namely the manner in which the film dealt with sexual violence and sexual satisfaction derived from inflicting cruelty or pain. The fact that the sadomasochistic acts were consensual and that there was some level of equality depicted, in that both the man and the woman inflicted the beatings, were held to be mitigating observations.⁷⁷ The film’s dominant effect for the

⁷⁶ *Lies’ Decision* (4 July 2002) Film and Literature Board of Review 4/2002.

⁷⁷ *Lies’ Decision*, above, 17.

purposes of section 3(4)(a) was to communicate the obsessive, introspective and dysfunctional nature of the protagonists' relationship.

It is fairly obvious how this film might be harmful: the fear is that the pervasive emphasis on sex and violence in the film might serve to inspire members of the public to coerce others into participating in sadomasochism. The film's potential to injure in this respect is reduced by the fact that it does not actually depict anyone being coerced into sadomasochistic activity and does not portray the protagonists' relationship as particularly satisfying or desirable. The R18 classification quite clearly reflects the level of maturity the Board believes is required to pick up on, understand and take account of the aspects of the film that make it less harmful. Thus, although the Board has not spelt out its reasoning in any sort of conclusion or final comment, it is relatively easy to gauge what factors mentioned earlier in the decision have had the greatest bearing on the classification.

However, where the censor has identified some artistic merit in the publication but has failed to indicate what impact it has had, his or her process of thought becomes very unclear. The R18 classification no longer reflects simply the extent to which the film is likely to do actual harm. Instead, it signifies its "overall injuriousness" or a compromise between harmfulness and merit. Where this balance has been struck, however, cannot be discerned from the R18 classification. "Lies", for example, according to the Board, does have artistic merit: it is clearly an 'art house' film and its director has an international reputation for being "cutting-edge", avant-garde and experimental and is hailed for "tearing down sacred cows in repressive Korean society".⁷⁸

One can only guess, however, how this affects the publication's overall injuriousness or net harm. Perhaps the film might have been classified on the basis of potential harm alone as R21 or even banned, but its artistic merit, its importance as a "cutting edge" and avant-garde film, shifted its classification to R18 so as increase its availability. Alternatively its artistic merit may not have had any bearing on the classification at all and the R18 classification may reflect simply the likelihood of

⁷⁸ 'Lies' Decision, above, 20

actual harm. To what extent the R18 classification is a sign of the film's potential to do actual harm or of its potential benefit to society, is not apparent.

a. Missing transparency

Not only, therefore, are New Zealand's censoring authorities not dealing with section 3(4)(c) in a "clear and open manner",⁷⁹ but by failing to articulate the balance between artistic merit and harm, they throw their whole process of reasoning into question, making it difficult to follow. Despite the fact that censorship is a holistic and intuitive process, it is not enough merely to suggest that a publication's artistic merit has had some influence, given that it has such a qualitatively different effect on a publication's classification than the rest of section 3 considerations. Artistic merit redeems a publication, irrespective of its potential to actually do harm: to what extent it does this, therefore, must be made clear.

b. Careless balancing

The fact that New Zealand's censoring authorities are failing to address the significance of artistic merit is not just of concern because of the need for transparency or accountability in censorship. From a practical perspective, this failure to specify how artistic merit is impacting on their decisions is worrying because it suggests New Zealand's censors are not giving much thought to the balance or are making a "slapdash" or blunt net assessment of injuriousness.

With respect to censoring most art, perhaps this is relatively unimportant. The relevance or power of section 3(4)(c) is often largely inconsequential because a publication that clearly reveals itself as art, such as Haring's paintings, Mapplethorpe's photographs or an 'art-house' film like Haneke's *The Piano Teacher*, will already be significantly redeemed by the fact of it being clearly artistic. The internal redeeming property of art, discussed earlier, might have substantially saved the publication and so its artistic merit or section 3(4)(c) may not have any or at least a noteworthy effect on the publication's classification. It might be argued, then, that

⁷⁹*Vixen Digital Limited v The Film and Literature Board of Review* (11 April 2002) High Court, Wellington AP 101/00, 13 Durie J.

the complacency with which New Zealand's censors are striking the balance between artistic merit and propensity to harm is fairly immaterial.

X. *BALANCING ARTISTIC MERIT AND HARM IN THE CONTEXT OF POST-MODERN ART*

Contemporary art, however, has brought the power of section 3(4)(c) rudely into focus making the assessment of net harm or 'overall injuriousness' a crucial and precarious exercise- or at least one that cannot be approached with complacency. The defining characteristics of post-modern art, its controversial themes and elusive status as 'art', bring censorship's objectives, protecting the public from real harm and preserving valuable expressions sharply into conflict.

A. *The Quintessential Post-Modern Work of 'Art'*

The work of performance artist, Karen Finely, described as "obscenity in its purest form",⁸⁰ provides a fitting example of this 'new' art. Finley smears food into her genitals, defecates on stage and graphically describes bizarre sex acts with priests, relatives and the handicapped. Firstly, her work clearly flouts the traditional definition of art as something that is aesthetically pleasing, positive and uplifting. Furthermore, its message is socially and politically charged and highly relevant. Her performance seeks to highlight and challenge the exploitation and humiliation of women in pornography and prostitution. She does the same performance in clubs and in galleries. By taking 'smut' and female degradation out 'of the gutter', where it can be avoided and ignored, and by transporting it into the realm of 'high art', Finely brings it sharply into focus, forcing her viewers to experience and confront it.

Finely's work is the quintessential contemporary or post-modern artistic statement: it deals with a 'taboo' subject, it is provocative and it does not look like art. Its art or worth, therefore, is in its elusiveness, obscenity and challenging subject matter: all of which make her performance more worrying with respect to injuring the public good. Depending on one's perspective, her work might be considered to be

⁸⁰ Amy Adler "Post-Modern Art and the Death of Obscenity Law" (1990) April Yale LJ 1359, 1369.

pornographic, and thus a worthless and lowly expression, or artistic and socially relevant or valuable.⁸¹ This new art deliberately sets out to pose a problem for the censor, inviting him or her to bite at its professed artistic merit, but threatening him with unbridled obscenity and offensiveness if its subtleties and merit are not picked up by its audience.

Consider that Finley's performance is videotaped, (to bring her work within the scope of the Classification Act),⁸² and that she distributes one copy to a sex-shop video parlour and the other to an art house cinema to make her point. How, then, would our censors approach the dilemma Finley's work poses?

B. Artistic Merit?

Post-modern art does not always reveal any 'inherent', traditionally artistic or obvious worth, and is often criticised for being 'bad taste', self-indulgent or worthless. This, however, is the point of much contemporary art: it defies the demand that good art be pure, self-critical, original and sincere and attacks rebelled against modernist distinctions between good art and bad and between high art and popular culture. Artist Robert Rauschenberg's response to a commission to do a portrait for a group gallery show, a telegram that read "This is a portrait....if I say so", personifies this post modern preoccupation.⁸³ Raushenurg's work might be denounced for its meaninglessness, its lack of serious content and somewhat decadent irrelevance. However, this resistance to understanding why this 'degenerate' work should be called art is exactly the point - it is what gives rise to the 'art' in Raushenurg's work, which is the testing of expectations, the boundaries of art and the limits of artistic snobbery.

In terms of recognising the artistic merit in Finley's work, the Board and the Office are unlikely to stumble on the fact that it does not look like 'art'. While some members of the public will claim to see post-modern art 'for what it is', as a "sand-

⁸¹ See Paul Rishwoth *The New Zealand Bill of Rights* (Oxford University Press, Auckland, 2003) 313.

⁸² It would otherwise fall outside the definition of a "publication" for the purposes of section 2 of the Classification Act.

⁸³ Adler, above, 1376.

box for the rich”⁸⁴ or a frivolous, pointlessly offensive and meaningless discourse, and will criticise the art industry and its consumers for unwittingly entertaining and promoting it, both the Office and the Board appear impartial to this criticism. Rather than adopting the “I know it when I see it” approach to identifying art, which might have resulted in finding much contemporary art void of artistic merit, as mentioned earlier both the Board and the Office often defer to expert opinion and have thus found artistic merit in post-modern publications such as *Baise Moi* and the *Pavement* photograph. They are clearly alert to the fact “what is and isn’t [art] seems irrelevant within the post-modern framework”.⁸⁵

1. Why asking the experts is appropriate

Once again, the censors’ reliance on the opinions of those immersed in or familiar with the art industry cannot be criticised in light of the fact that the salient consideration must be the contribution the publication makes or its importance to artistic discourse. This emphasis on contribution resolves at least some of the difficulty, in the context of post-modernism, of distinguishing, for example, pornography and such ‘lesser’ expressions, from art. A pornographer, for example, might argue that his film is no less artistic than *Baise Moi*. Rather than attempting to explain the subtle differences between the films (which might only serve to make the distinction appear strained), he or she is better focus on contribution and look to expert opinion. If film experts and critics are not interested in defending the pornographer’s work then it does not make any significant contribution to artistic discourse and should not, therefore, be protected.

While it seems somewhat dangerous to rely on the opinions of experts, given that it is predominantly artistic ‘laymen’ who will be exposed to publications, it is important to note that is not a relevant concern in the context of section 3(4)(c). Section 3(4)(c) involves determining simply whether a publication has artistic merit or not. Once a publication’s artistic merit is ascertained for the purposes of section 3(4)(c) it is then balanced against its potential to harm, and this is where the fact that

⁸⁴ Amy Adler “The Thirty-Ninth Annual Edward G. Donley Memorial Lectures: The Art of Censorship” (2000) Winter W Va L Rev 205, 216.

⁸⁵ ‘*Pavement*’ Decision (February/March 1999) Issue 33 Decision (28 July 1999) Office of Film and Literature Classification 9900178, 4.

its artistic merit or intricacies might be 'over the heads' of some of its viewers can be addressed.

C. *Striking the Balance*

Identifying the artistic merit in post-modern art is only the first and small hurdle in its censorship. Of much greater consequence, and more difficult, is striking the balance between contemporary art's social and artistic value and its propensity to harm.

1. *Why the balance is critical*

Post-modern art is unlikely to be redeemed by virtue of its status of art, because its status as art is often not disclosed. While the screening of Finely's video in the art house cinema, for example, might invite a critical approach to her work that makes it less harmful, those who unwittingly stumble upon it in the sex shop are unlikely to appreciate that it is 'art'.

Similar concerns arise in respect of the *Pavement* publication. The photograph depicts a Japanese prostitute, dressed in a school uniform, naked from the waist down, with her legs spread and grinning out at the viewer. The photographer deliberately draws on the centrefold tradition in order to challenge it and highlight the exploitation of his subject. The differences between this photograph and, for example a *Penthouse* centrefold, however, are subtle. If contemplated long enough, there is something unsettling about the photograph: the Japanese woman grins brashly out at the viewer "available for sex",⁸⁶ but her surroundings are decidedly unsexy and evoke some level of pity. She lies on a mattress in a small cubicle, there are stains dripping down the wall and the only other items in the cubicle are a box of tissues, container of lubricant and waste disposal bin. The suggestion is that she is just one object among many in the cubicle used over and over for sex. However, if one was to come across the publication on an internet website, would he or she identify the photograph as art or playing into post modern discourse? Probably not.

⁸⁶ 'Pavement' (February/March 1999) Issue 33 Decision (28 July 1999) Office of Film and Literature Classification 9900178, 4.

The film *Baise Moi* raises similar issues. Harriett Margolis insists that the film invokes the discourse of self-conscious postmodernism with its inherent elements of parody, satire and irony.⁸⁷ The film, she says, deliberately draws on the conventions of pornography in order to subvert and critique the genre. The problem is, however, that in employing the visual style, narrative conventions and even actors associated with porn films *Baise Moi* looks in many respects exactly like a regular pornographic film. To the unwary or untrained eye it is just a lot of “humping and killing”⁸⁸ that is presented in an overtly sexualised and blunt manner.

Thus, the power of section 3(4)(c) becomes particularly troubling or at least significant. These publications have, according to the ‘experts’, artistic merit, but the fact of them being art, let alone, having artistic merit, may not be apparent to their consumers. Allowing its artistic merit to pull it out of the depths of objectionability is a risky business. If the publication’s consumer misses the artistic “foothold”, he has a long way to fall. If *Baise Moi*’s post-modern agenda is lost on its viewer, for example, it may tend to fetishise “the very actions it aims to decry”.⁸⁹ In the context of a film that explicitly depicts two women being raped, this is a perilous risk to run. The concern to protect art meets, head on the need to protect the public, and the balance between these objectives, therefore, must be delicately struck.

C *Contextualising Post-Modern Art: Highlighting its Status*

1. *Labelling post-modern art as ‘art’*

One possible way around this dilemma is to ensure that these potentially damaging publications are contextualised as art: to locate them firmly and clearly within artistic discourse. Doing so will reduce the likelihood of viewers misunderstanding the publication’s purpose and will at least alert them to the fact that what is represented or depicted is to be approached with some depth of thought and consideration.

⁸⁷ *Baise Moi* Decision (20 August 2001) Office of Film and Literature Classification 102668, 14.

⁸⁸ Jon Popick, PLANET SICK-BOY <<http://www.rottentomatoes.com/m/BaiseMoi-1108213>>

⁸⁹ Sean Axmaker, SEATTLE POST-INTELLIGENCER <<http://www.rottentomatoes.com/m/BaiseMoi-1108213>>

By restricting the screening of *Baise-Moi* to film festivals, the Board might have clarified its ambiguous status or at least ensured that its viewers were more likely to pick up, or at least, look for its subtleties or post-modern meaning. Instead, the Board overturned the Office's decision to limit the film's screening to film festivals, giving *Baise Moi* a general R18 classification that did not specify in what context it was to be shown. That the film's purpose was, by some, being misconstrued in the 'mainstream' theatres is apparent from film critic Margaret Agnew's description of her experience seeing the film:⁹⁰

I am the sole woman in a hushed theatre at Hoyts. Around me there are about a dozen men, some of quite advanced years, all sitting silently and singly, with cavernous gaps between them. There's not a dirty mac in sight but I still feel like I've accidentally stumbled into an exclusive men's club.

The implication is that this audience were unlikely to appreciate the film as a "gritty urban depiction of disenfranchised women", but rather as titillating "hard-core porn".

Context is what saved the *Pavement* publication. The Office agreed with the editor of *Pavement* that it in light of its reputation as a "popular culture magazine and not a porn mag"⁹¹ and as having an interest in art, the majority of its readers will appreciate that the photograph is a "spoof" of pornographic tradition.⁹² In its consideration of Keith Haring, the Office makes a similar observation. The Office acknowledges the "status and importance within the art world" but goes on to say of the gallery context in which his work will be shown and its audience:

There is also a wealth of information and educational material accompanying the exhibition which helps to explain the context, and to a certain extent the meaning of the artworks. However, if the requisite cognitive ability to understand the information is missing then the information itself is of little value.

⁹⁰ Margaret Agnew "Wham, bam, kill me, mademoiselle" (14 December 2002) *The Christchurch Press* Christchurch 4.

⁹¹ 'Pavement' *Decision (February/March 1999) Issue 33 Decision* (28 July 1999) Office of Film and Literature Classification 9900178, 2.

⁹² 'Pavement' *Decision*, above, 4.

What this statement successfully elucidates is a connection between context, harm and artistic value. The value or importance of Haring's work depends to a large extent upon its context indicating, and its consumers having the ability to understand, that it has such value or importance. As a guideline, therefore, perhaps the point at which a publication ceases to communicate its artistic value or relevance, the redeeming power of section 3(4)(c) should also cease to have any effect. Not only does such a rule address the issue of harm or misinterpretation, but it recognises also that certain publications rely on a particular context for their meaning, and, therefore, their artistic merit or importance.

2. *Paternalism refuted*

This approach may attract considerable criticism for being elitist or paternalistic. However, whether it is anymore selective and discriminatory than, for example, simply assessing whether a publication is injurious in terms of the manner in it deals with sexual violence or its dominant effect, is debatable. If a film strongly depicts but only subtly denounces sexual violence, it will be classified according to the level of sophistication or maturity required to pick up on its messages. The effect of this is usually to give it a rating that prohibits members of the public below a certain age viewing the publication.

Perhaps there is a greater basis for allegations of snobbery and paternalism where a classification discriminates between adult members of the public. Some might argue that this is the effect of requiring that a particular publication be withdrawn from the 'mainstream' and shown in an art house cinema, in the context of a film festival or in a gallery or museum. Firstly, however, banning a publication from the 'mainstream', does not necessarily exclude a mainstream audience. Galleries, museums and film festivals are open to everybody (unless age restrictions are imposed) and are not, therefore, discriminatory. Although galleries and film festivals often attract an intellectual or critically tuned audience this is simply a reality rather than a rule. They do not prohibit anybody of age from seeing or viewing the publications they house. Furthermore the purpose of restricting particularly challenging post-modern art to galleries and art-house cinemas is to clearly indicate its artistic agenda, rather than to discriminate between members of the public.

3. *The art industry: a 'safe' forum for pushing political, social and cultural boundaries*

Furthermore, there is significant social benefit in exploiting the branding power of, and channelling controversial publications through, institutions such as galleries, museums and art-house cinemas. Art's curators, academics and critics create a world in which challenging, contentious and obscene images and ideas can be consumed, considered or work-shopped relatively 'safely'. It is a 'safe' forum for exploration because it alerts consumers to non-literal and more complex interpretations of otherwise damaging and offensive publications. Furthermore 'high culture' signifiers reassure audiences of art that they are not lowly voyeurs, immoral and sexually deviant, and thus, open them up to considering commentary on 'taboo', 'dark' and repressed subjects such as sexuality, disease and mental illness. In being relatively enclosed, internally controlled and "safe", the art industry is a valuable round-table for social experimentation and an important "marketplace" for ideas.

4. *Where post-modern art resists contextualisation*

The problem with contextualising all contemporary art, however, is that often by banning it to the galleries and film festivals, the censor will strip the work of some or all of its meaning. For example, Karen Finley's art or statement is in the distribution of her video to art house cinemas *and* to sex shops. She deliberately plays with context. To allow her video to screen in a film festival but not to be shown in the sex shop video parlour would be to destroy part of her point or art: to have people respond to her differently in different contexts: to be truly degraded in one and highlight her degradation in the other.

Similarly, publications such as *Baise Moi* and the *Pavement* photograph rely in part, for their impact, on catching their viewers unawares. In order to subvert or unravel the pornographic genre they draw on, these publications must convincingly inhabit it. They seek to trick or lure their viewer into believing that what is being shown is pornography so that, rather than slating the genre from outside of it, they are able to unravel and critique it from within or make it 'comment on itself'. *Baise Moi*,

for example, deliberately employs pornographic conventions such as explicit up close camera shots and background music characteristic of 'porn films'. It masquerades as 'porn' and relies on its viewer relating to it as such so that he or she experiences the tension between, for example, titillation and rape. In doing so, the film successfully makes pornography 'own' its exploitation of women. Having its post-modern or artistic purpose rudely and prematurely announced prevents the film from 'sneaking up on' its viewer, and, thus, undermines much of this film's message and effect.

D. Salvation by Artistic Merit Alone?

Where confining a publication to an artistic context will sufficiently compromise its meaning and relevance, the censor must, therefore, confront the conflict between protecting the public and protecting this new art. If exhibiting outside the art-house context is critical to Finely's artistic statement, and her art is sufficiently compelling and relevant to those within the art industry, then its artistic merit and value might outweigh its potential to harm its unwitting viewers. A 'Bill of Rights consistent approach' to this dilemma would advocate erring on the side of making Finely's publication available.

1. Too limited redeeming value?

The difficulty with such an approach is that artistic merit, that is apparent only to experts familiar with post-modern discourse or who are 'in on the joke', so to speak, consequentially has limited social value for the wider public. Certainly, there is obvious societal benefit in a publication that makes a revolutionary statement, advancing the evolution of art. Whether 'specialised' social merit is enough, however, to outweigh the harm posed to the majority of its viewers who will be oblivious to its merit or even the fact that it is art, however, is debatable.

E. The Right Approach to Censoring Post-Modern Art

Thus, where post-modern art cannot be redeemed in the first instance by virtue of its artistic status, the censor's first port of call must be the gallery or film festival. If the work can be contextualised so as to alert the viewer to its artistic agenda, without

substantially compromising its artistic meaning, effect or value as a post-modern work of art, then this is the appropriate compromise.

If the work resists or refuses contextualisation, then the censor must balance the film's artistic merit against its propensity to harm. This is admittedly a thorny exercise that is fraught with risk considering post-modern art's often elusive status as 'art' and challenging subject matter. Nevertheless, if a work of art begs this balance it must be struck. It requires simply pitching the interests of a small sector of society to whom the work is highly relevant, and the welfare of the public at large. The balance may well come down on censorship's side although, as mentioned earlier the publication's censorship, the formal recognition that it has pushed one of society's boundaries too far, may well be part of its revolution.

XI. CONCLUSION

The intersection between art and censorship has not been clearly staked out by New Zealand's censors. Although it is established that a publication's status as art as well as its artistic merit can be related to the Classification's Act primary inquiry into injuriousness, New Zealand's censors are not elucidating with any level of conviction or certainty, exactly how this is being done. Their comments with respect to a publication's status as art are often nebulous, understated or fail to capture precisely what it is about 'art' that makes it less harmful. Rather than focusing solely on how, for example, a particular painting or film *itself* alerts its viewers to an artistic agenda, New Zealand's censors might rely more heavily on the public's understanding of, and familiarity with, artistic discourse in general as a redeeming feature of 'art'.

Of more concern, however, is both the Board and the Office's consistent failure to identify how a publication's artistic merit impacts on its publication. Seldom has there been any recognition from either censoring authority that artistic merit actually works to balance against a publication's harmfulness or that it necessitates a 'net harm' assessment of the publication. This vagueness with respect to artistic merit not only obscures the censors' process of reasoning, but reflects also a worrying level of apathy with respect to striking this critical balance between a publication's social or artistic worth and its potential to harm.

Where New Zealand's censors especially cannot afford to look dozily on this exercise, however, is in the context of post-modern art. This new art deliberately slides between the censorship criteria. Its artistic and social merit often derives from what makes it particularly offensive or harmful. Furthermore, its merit is often deliberately made difficult to discern. Post-modern art, then, brings to a cross-road the concern to protect the public and the desire to preserve art; and demands that the censor determine who has the right of way.

This paper advocates that the censor seek first to compromise these conflicting interests by contextualising post-modern art where possible so as to alert its viewer to its status as art and reduce its propensity to harm. However, where the publication's elusiveness is crucial to its meaning and, thus, significance or importance, the censor must attempt to balance its artistic merit against its propensity to harm.

Admittedly this is a thorny task given the qualitatively different tangibles he must balance and the risks inherent in redeeming a potentially offensive publication solely by virtue of its artistic merit - that will go 'over the heads' of most of its consumers. However, why the striking of this balance is so difficult or precarious, is exactly why the censor must confront it and clearly elucidate how it is being struck.

The censor of art makes resonant determinations; her or she may restrict the freedom of artistic expression, or alternatively sanction a publication likely to cause a degree of societal harm. How the line is drawn between these competing concerns is, therefore, of utmost public interest. Accordingly, it is incumbent upon the censor to elucidate clearly the emphasis accorded to art in his or her decisions. A more attuned approach to, and appreciation of, the post-modern and artistic agenda in censorship will serve to clarify and better the relationship between censorship and the art industry; fostering not Adler's bitter conflict, but instead, censorship for art's sake.

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