

IN THE MATTER of The Films, Videos, and
Publications Classification
Act 1993

AND

IN THE MATTER of an application under
Section 48 of the Act by
Simon Brady of the DVD
“Puni Puni Poemy”

**DECISION OF THE
FILM AND LITERATURE BOARD OF REVIEW
DECISION NUMBER ONE**

THE BOARD

1. Claudia Elliott, President
2. Greg Presland, Vice President
3. Mark Andersen
4. Brian McDonnell
5. Marion Orme
6. Lalita Rajasingham
7. Stephen Stehlin
8. Ani Waaka

Meeting at Auckland on 05 April 2005.

APPEARANCES

- i) Mr Simon Brady (hereinafter called “the Applicant”) and support person Ms Zeb Ahmed.

- ii) In attendance during submissions only Mr Owen Davie, Board Secretary.

THE CONTRIBUTORS

[1] Mr Simon Brady.

[2] The Office of Film and Literature Classification (hereinafter called “the Classification Office”).

BACKGROUND

[3] The Applicant has applied for a review of the decision of the Classification Office pursuant to Section 48 of the Films Videos and Publications Classification Act 1993 and Amendment Act 2005 (hereinafter called “the Act”) in respect to the DVD “*Puni Puni Poemy*”.

[4] “*Puni Puni Poemy*” was classified “*objectionable*” by the Classification Office and the decision was entered into the Register of Classification Decisions by the Classification Office on 20 December 2004.

[5] The application complies with Section 48 of the Act.

[6] Pursuant to Section 52 of the Act the Film and Literature Board of Review (hereinafter called “the Board) examined the publication without regard to the decision of the Classification Office.

THE DVD

[7] *Puni Puni Poemy* is a DVD of Japanese anime featuring two programmes; each approximately 30 mins in duration. The DVD also contains a number of extras including a segment involving the making of the English language soundtrack, and a number of previews of other anime DVDs. The total running time of the publication is 87 min 05 secs.

[8] The two programmes feature the adventures of Poemy Watanabe, a 10 year old schoolgirl and wanna-be voice actress, who becomes a superhero to fight invading aliens. In the process she teams up with the seven Aasu sisters who range in age from 3

to 28 years. The stories are highly exaggerated, cartoonish, and satirical, with constant references to the camera about the nature of the genre. The majority of these comments concern the requirement for the programme-makers to put in scenes and images designed to titillate and satisfy the fan-base.

[9] There are numerous sexual references and some depictions of sexual activity, although, through use of masking and pixilation, nothing is explicitly depicted.

SUBMISSIONS

A. Submission of the Applicant

[10] *“The essence of my submission is simple: the publication may be trashy and tasteless, but it is not harmful to society if restricted to an adult audience. While it depicts activities that fall within the statutory definition of “objectionable”, it does so in the context of outrageous parody. The manner of depiction therefore nullifies any potential for harm”.*

Background to the Publication

2.1 Genesis

[11] *“Puni Puni Poemy”* is a two-episode spin-off from the popular TV anime Excel Saga.

[12] The Excel Saga series is available in New Zealand with an “M” rating.

[13] The history of the publication establishes the *“interpretative tradition”* in which viewers are likely to approach the publication.

[14] The likely interpretation is relevant to the likely effects of the publication on the public and therefore has application to Section 3 of the Act.

2.2 Adaptation for Western Audiences

[15] Was released in Japan in 2001 and in the US in April 2004 and in Australia in October 2004.

[16] The Australian classification was “MA15” (sexual references) and in the UK “R18”.

Soundtracks

[17] Section 24 applies. There are three soundtracks:

- i) The English dub.
- ii) The original Japanese (with English sub-titles);
and
- iii) The English commentary track.

[18] All three soundtracks need to be given equal weight under Section 24.

[19] The Japanese soundtrack fulfils the requirements of Section 146(1).

Motivation for Review

[20] *“My greatest concern is the protection of parody as a vehicle for criticism and comment...I interpret “Puni Puni Poemy” as not just parodying a number of specific anime shows, but also as parodying various themes common to the genre”.*

[21] *“The theme most parodied is that of “fan service”, the unnaturally and gratuitously sexualised depiction of female characters for the supposed pleasure of the audience. “Puni Puni Poemy” exaggerates this tendency to a ridiculous extent, and just to make sure the viewer gets the point characters even address the audience directly on the subject”.*

[22] Refers to the Bill of Rights Act and the “Moonen” decision and states *“I submit that erring on the side of over-protection can actually increase the risk of public injury”.*

Application of Section 3(1)

[23] Meets the “gateway” issue of sex.

[24] *“I also take it as given that “Puni Puni Poemy” is inappropriate for young audiences”.*

Application of Section 3(2)

[25] “Moonen” applies but the issue is whether it “promotes” or “supports” the depiction of prohibited activities.

Promotion and Support

[26] “*The most obvious way publication may advance or encourage a prohibited activity is to present it as normal and desirable, or failing that present it as free from harmful consequences and not deserving of opprobrium*”.

[27] The fact that a publication does not broadly state “*this activity is wrong*” does not automatically imply silent promotion.

[28] Provided the publication is restricted to a suitably mature audience, appropriate judgments should be made without resorting to the lowest common denominator approach to classification.

[29] In respect to “*tendency to support*”, it could be argued that the activities prohibited by Section 3(2), if used in comedy, have the effect of desensitising the viewer and ultimately lowering society’s objection towards the activities.

[30] In the likelihood of “*injury to the public good*” scenario, the harm has to be sufficiently real to be discernable or actual. (Everard decision).

[31] “*Treating the prohibited activities in an off-hand light-hearted manner may be a relevant consideration under Section 3(3), but of itself such treatment does not meet the necessarily high threshold required by a deeming provision like Section 3(2)*”.

Interpretation Versus Objective Fact

[32] “*Both the Courts and s4 of the Act hold that it is a simple matter of fact whether a publication promotes and supports a given activity, and one that can be objectively determined by the classifying body...purported facts about these signs are actually contestable claims about their interpretation. The expertise of the classifying body lies at least partly in its ability to predict how a publication will be interpreted, which in turn allows conclusions to be drawn about its likely effect upon society*”.

[33] Parody is always open to multiple interpretations, creating a tension between surface appearance and implication, which is difficult to interpret.

[34] Anime fans will approach “*Puni Puni Poemy*” in the interpretative tradition of Excel Saga and others will have no difficulty understanding its farcical nature.

[35] The Court recognises a crossover between Section 3(2) and Section 3(4)(d), and Section 3(3) *News Media Limited v Film and*

Literature Board of Review [1997] 4 HR NZ 410 at 418 and “*Moonen I*”.

Scenes of Concern

[36] A number of scenes may be considered under Section 3(2)(a) including the implied rape of the Aasu sisters, to which Section 3(2)(b) also applies.

[37] Sexualised depictions of children occur in several places:

- The portrayal of Futaba’s crush on Poemy.
- Itsue disciplining some of her sisters including 15 year old Mitsuki.
- Poemy and the Aasu sisters bathing together.
- The off-the-cuff comments of a sexualised nature made by the characters.

[38] There is no tendency for “*promotion*” or “*support*” of these depictions. “*They fit within the general theme of exaggerated fan service, and are so outrageously incongruous that they cannot possibly be seen as normalising what is depicted*”.

[39] Examples of this are Futaba’s crush as a 10 year old cannot be taken seriously. It becomes even stranger when she picks up a hand-drill when trying to express her feelings for Poemy.

[40] “*Heavy layering of overt satire*” over the scenes in question ensures they will not be taken seriously.

The Rape Scene

[41] The rapes are implied rather than depicted and the viewer’s attention is distracted by a range of incongruous background images. The scene shows the six sisters as victims of a horrific act. The aliens are presented as repulsive. The audience sympathy would be with the sisters.

[42] The commentary by Poemy and K shows the scene is not there to titillate the viewer, and the character’s claim that it is, is ironic.

[43] The DVD does not “*promote*” or “*support*” the activities of Section 3(2)(a) or Section 3(2)(b).

Application of Section 3(3)

[44] A similar argument applies between Section 3(3) and Section 3(2). In respect to Section 3(3)(b) there is no disclosure of genitalia *“the animators are clearly out to tease the viewer by brushing as close to the limits of acceptability as possible”*.

[45] In respect to Section 3(3)(c) and 3(3)(e) the fan service parody is relevant. *“Its subject is largely the depiction of women in other anime and related media, so it is necessary to clearly distinguish between what may be termed first and second-order representation”*.

[46] *“The second-order representations of women are often objectifying and demeaning, but the characters are treated sympathetically when represented as being themselves. The effect is almost one of a visual staff commentary track, seamlessly interwoven with the actual show”*.

[47] *“The language is the kind of misogynistic language that has become common with the rise of rap music. Regardless, the effect of these scenes is to lampoon”*.

Application of Section 3(4)

[48] The dominant effect is one of sustained farcical inanity. No-one would take the publication seriously. It has twisted humour and frenetic delivery, and wildly exaggerated narrative. *“It is a blatant parody whose satirical nature will be obvious to any viewer, even those without prior knowledge of anime”*.

[49] The DVD is a competent production but is not great art. Nor does it have any particular cultural significance.

[50] The DVD will have limited audiences. Restricting its availability to adults ensure it will not be misconstrued by younger audiences.

CONCLUSION

[51] The publication *“should be classified as a restricted publication under Section 23(2)(c)(1) of the Act”*.

B. Submission of the Classification Office

[52] Section 52(2) applies.

[53] The written submission of Simon Brady “*is written from the perspective of an anime specialist and fan whose “greatest concern is the protection of parody as a vehicle for criticism and comment” (applicant’s submission p3)*”.

[54] The Office acknowledges the importance of protecting parody as a vehicle for social criticism and comment, but states parody is inherently open to different interpretations.

[55] The Board must consider “*the interpretation likely to be given to the DVD by the majority of New Zealanders attracted to animated cartoons, either for themselves or their children*”.

[56] The DVD contains sex and violence in terms of Section 3(1).

[57] The Australian Classification was “MA15+”

[58] “*The central issue is the extent to which the DVD tends to promote and support the exploitation of children or young persons or both for the sexual purposes in terms of Section 3(2)(a) or depicts sexual coercion in terms of Section 3(3)(a)(2)*”.

[59] Refers to *Moonen v Film and Literature Board of Review (“Moonen 1”)* in respect to the definition of “*promotes or supports*” in Section 3(2) and its correspondence with the Bill of Rights Act.

[60] The Applicant refers to “*Moonen*” and disagrees with the interpretation. The Board however is bound by the Court of Appeal decision.

[61] “*The Office submits that “Puni Puni Poemy” tends to promote and support the exploitation of children and young persons for sexual purposes by containing sequences that present sexual activity and sexual coercion involving characters who are presented as children and young persons*”.

[62] Some promotional advertising in respect to the DVD is similar to “*Lolikon porn*” “*which refers to a “Lolita complex” whereby one is attracted to children*”.

[63] The rape scene is a strong example of this kind of material.

[64] Refers to the scene where Futaba is chained and in leather bondage style outfit. Believes the alien leader refers to Futaba

being “*broken in*”. The scene continues with the alien referring to Poemy as having a “*skanky little body*”.

[65] The scenes which sexualise the child characters include the scene where Futaba is portrayed as having a crush on Poemy.

[66] The scene where two sisters are whipped and disciplined by Itsue is also sexualised.

[67] It continues where Poemy is admired and fondled by some of the Aasu sisters, including three year old Hitomi.

[68] “*Although there is a distinct tongue-in-cheek element to the publication that satirises the conventions of this particular style of anime, the scenes described are nevertheless included as part of the entertainment value of the DVD. By attributing adult sexual characteristics to characters depicted as children, and by presenting the scenes of sexual coercion described above in a light-hearted manner designed to entertain and titillate the viewer, the publication tends to encourage a viewpoint that children and young persons are legitimate objects of adult sexual desire and sexually coercive acts*”.

[69] Refers to particular comments made by the characters which reinforce the abuse of children.

[70] In respect to excisions, the material wanting excision is “*reasonably pervasive*” throughout the publication. On an ordinary rather than specialist interpretation of the contents of the DVD it can fairly be said to “*tend to promote or support the exploitation of children and young persons for sexual purposes including sexual coercion involving children*”.

[71] “*Puni Puni Poemy*” is therefore likely to injure the public good through its contribution to the normalisation of a viewpoint that children and young persons are legitimate objects of adult sexual desire and sexually coercive acts, by presenting this viewpoint in animated cartoon form, an otherwise legitimate or soft entertainment vehicle”.

THE APPLICABLE LEGISLATION

[72] In making its decision the Board is bound by the Act. The applicable sections in order are:

3. Meaning of “objectionable” - (1) For the purposes of this Act, a publication is objectionable if it 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.

(2) A publication shall be deemed to be objectionable for the purposes of this Act if the publication promotes or supports, or tends to promote or support,-

- (a) The exploitation of children or young persons, or both, for sexual purposes; or
- (b) The use of violence or coercion to compel any person to participate in, or submit to, sexual conduct; or
- (c) Sexual conduct with or upon the body of a dead person; or
- (d) The use of urine or excrement in association with degrading or dehumanising conduct or sexual conduct; or
- (e) Bestiality; or
- (f) Acts of torture or the infliction of extreme violence or extreme cruelty.

(3) In determining, for the purposes of this Act, whether or not any publication (other than a publication to which subsection (2) of this section applies) is objectionable or should be given a classification other than objectionable, particular weight shall be given to the extent and degree to which, and the manner in which, the publication-

- (a) Describes, depicts, or otherwise deals with-
 - (i) Acts of torture, the infliction of serious physical harm, or acts of significant cruelty:
 - (ii) Sexual violence or sexual coercion, or violence or coercion in association with sexual conduct:
 - (iii) Other sexual or physical conduct of a degrading or dehumanising or demeaning nature:
 - (iv) Sexual conduct with or by children, or young persons, or both:
 - (v) Physical conduct in which sexual satisfaction is derived from inflicting or suffering cruelty or pain:
- (b) Exploits the nudity of children, or young persons, or both:
- (c) Degrades or dehumanises or demeans any person:
- (d) Promotes or encourages criminal acts or acts of terrorism:
- (e) Represents (whether directly or by implication) that members of any particular class of the public are inherently inferior to other members of the public by reason of any characteristic of members of that class, being a characteristic that is a prohibited

ground of discrimination specified in section 21(1) of the Human Rights Act 1993.

(4) In determining, for the purposes of this Act, whether or not any publication (other than a publication to which subsection (2) of this section applies) is objectionable or should be given a classification other than objectionable, the following matters shall also be considered.

(a) The dominant effect of the publication as a whole:

(b) The impact of the medium in which the publication is presented:

(c) 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:

(d) The persons, classes of persons, or age groups of the persons likely to be made available:

(e) The purpose for which the publication is intended to be used:

(f) Any other relevant circumstances relating to the intended or likely use of the publication.

As amended by S4 of the Amendment Act 2005

4. Meaning of objectionable

(1) Section 3 of the principal Act is amended by inserting, after subsection (1), the following subsections:

“(1A) Without limiting subsection (1), a publication deals with a matter such as sex for the purposes of that subsection if –

“(a) the publication is or contains 1 or more visual images of 1 or more children or young persons who are nude or partially nude; and

“(b) those 1 or more visual images are, alone, or together with any other contents of the publication, reasonably capable of being regarded as sexual in nature.

“(1B) Subsection (1A) is for the avoidance of doubt.”

(2) Section 3(3) and (4) of the principal Act is amended by inserting, after the word “should” to both places where it occurs, the words “in accordance with section 23(2)”.

5. New sections 3A to 3D inserted

The principal Act is amended by inserting, after section 3, the following sections:

“3A Publication may be age-restricted if it contains highly offensive language likely to cause serious harm

“(1) A publication to which subsection (2) applies may be classified as a restricted publication under section 23(2)(c)(i).

“(2) This subsection applies to a publication that contains highly offensive language to such an extent or degree that the availability of the publication would be likely, if not restricted to persons who have attained a specified age, to cause serious harm to persons under that age.

“(3) In this section, **highly offensive language** means language that is highly offensive to the public in general.

“3B Publication may be age-restricted if likely to be injurious to public good for specified reasons

“(1) A publication to which subsection (2) applies may be classified as a restricted publication under section 23(2)(c)(i).

“(2) This subsection applies to a publication that contains material specified in subsection (3) to such an extent or degree that the availability of the publication would, if not restricted to persons who have attained a specified age, be likely to be injurious to the public good for any or all of the reasons specified in subsection (4).

“(3) The material referred to in subsection (2) is material that -

“(a) describes, depicts, expresses, or otherwise deals with -

“(i) harm to a person’s body whether it involves inflection of pain or not (for example, self-mutilation or similarly harmful body modification) or self-inflicted death; or

“(ii) conduct that, if imitated, would pose a real risk of serious harm to self or others or both; or

“(iii) physical conduct of a degrading or dehumanising or demeaning nature; or

“(b) is or includes 1 or more visual images -

“(i) of a person’s body; and

“(ii) that, alone, or together with any other contents of the publication, are of a degrading or dehumanising or demeaning nature.

“(4) The reasons referred to in subsection (2) are that the general levels of emotional and intellectual development and maturity of persons under the specified age mean that the availability of the publication to those persons would be likely to -

“(a) cause them to be greatly disturbed or shocked; or

“(b) increase significantly the risk of them killing, or causing serious harm to, themselves, others, or both; or

“(c) encourage them to treat or regard themselves, others, or both, as degraded or dehumanised or demeaned.

“3C Procedure for classification under sections 3A and 3B

In determining whether to classify a publication as a restricted publication in accordance with section 3A or section 3B, the Classification office must consider the matters specified in paragraphs (a) to (f) of section 3(4).

“3D How sections 3A and 3B relate to sections 3 and 23(2)(c)

Sections 3A and 3B are not limited by section 3, and do not limit the Classification office’s power under sections 3 and 23(2)(c) to classify a publication as a restricted publication.”

As amended by S7 of the Amendment Act 2005

7. Whether publication objectionable a matter of expert judgment

(1) the heading to section 4 of the principal Act is amended by omitting the words **“Whether publication objectionable”**, and substituting the words **“Classification of publications”**.

(2) Section 4(1) of the principal Act is amended by inserting, after the words “is objectionable”, the words “or should in accordance with section 23(2) be given a classification other than objectionable”.

4. Whether publication objectionable a matter of expert judgment - (1) The question whether or not a publication is objectionable is a matter for the expert judgment of the person or body authorised or required, by or pursuant to this Act, to determine it, and evidence as to, or proof of, any of the matters or particulars that the person or body is required to consider in determining that question is not essential to its determination.

(2) Without limiting subsection (1) of this section, where evidence as to, or proof of, any such matters or particulars is available to the body or person concerned, that body or person shall take that evidence or proof into consideration.

11. Rating and description applicable to copies – For the purposes of this Part of this Act, the rating and description (if any) assigned to any film under section 10 of this Act shall apply to every copy of that film that is identical in content with it, whether or not the copy is in a different gauge or a different technical form.

Cf. 1983, No. 130, s. 8 (5) – (8); 1987, No. 85, s. 13 (3)

23. Examination and classification – (1) As soon as practicable after a publication has been submitted or referred to the Classification Office under this Act, the Classification Office shall examine the publication to determine the classification of the publication.

(2) After examining a publication, and having taken into account the matters referred to in section 3 of this Act, the Classification Office shall classify the publication as-

- (a) Unrestricted; or
- (b) Objectionable; or
- (c) Objectionable except in any one or more of the following circumstances:
 - (i) If the availability of the publication is restricted to persons who have attained a specified age:
 - (ii) If the availability of the publication is restricted to specified persons or classes of persons:
 - (iii) If the publication is used for one or more specified purposes.

(3) Without limiting the power of the Classification Office to classify a publication as a restricted publication, a publication that would otherwise be classified as objectionable may be classified as a restricted publication in order that the publication may be made available to

particular persons or classes of persons for educational, professional, scientific, literary, artistic, or technical purposes.

Cf. 1963, No. 22, s. 10; 1983, No. 130, s. 15 (1), (2); 1987, No. 85, s. 23 (1)

24. Soundtrack to be considered – Where a film is intended to be viewed with an accompanying soundtrack (whether or not the soundtrack is an integral part of the film), an examination of the film under section 23 of this Act shall also take into account the content of the soundtrack and its relationship to the film.

Cf. 1983, No. 130, s. 13 (5); 1987, No. 85, s. 21 (4)

26. Classification applies to identical copies – For the purposes of this Act, the classification given to a publication under section 23 or section 55 or section 56 of this Act shall apply to every copy of that publication that is identical in content with it.

Cf. 1987, No. 85, s. 23 (2)

32. Excisions from and alterations to films –

Notwithstanding anything in section 23 of this Act, if, after examining a film under this Part of this Act (other than a film referred to it pursuant to section 29(1) or section 41(3) of this Act), the Classification Office is of the opinion that it would classify the film differently according to whether any specified part or parts of the film are excised from or left in the film, it shall, before making a final determination in respect of the classification of the film, follow the procedure prescribed by section 33 of this Act.

Cf. 1983, No. 130, s. 15 (3); 1987, No. 85, s. 24 (1)

The New Zealand Bill of Rights Act 1990

[73] The following sections of the New Zealand Bill of Rights Act 1990 (hereinafter called “the Bill of Rights”) apply:

4. Other enactments not affected – No court shall, in relation to any enactment (whether passed or made before or after the commencement of this Bill of Rights), -

(a) Hold any provision of the enactment to be impliedly repealed or revoked, or to be in any way invalid or ineffective; or

(b) Decline to apply any provision of the enactment –

by reason only that the provision is inconsistent with any provision of this Bill of Rights.

5. Justified limitations – Subject to section 4 of this Bill of Rights, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

6. Interpretation consistent with Bill of Rights to be preferred – Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning.

THE DECISION

[74] The Board by majority classifies “*Puni Puni Poemy*” as objectionable. Two minority decisions accompany this decision.

Section 3(1)

[75] In the Court of Appeal decision of *Living Word v Human Rights Action Group* (2000) 3 NZLR 570 (hereinafter called “the Living Word decision”) it was determined that the Board must consider whether the publication passed through one of the “gateways” and then consider if it was likely to be “*injurious to the public good*”.

[76] The Act does not define the phrase “*injurious to the public good*” so case law is relied upon to assist.

[77] The decisions of *Collector of Customs v Lawrence Publishing Co Limited* (1986) 1 NZLR 404 (hereinafter called “the Lawrence Publishing decision”) assists in defining “*injurious to the public good*”. At p 409 Woodhouse P states:

“The statutory concept requires demonstration that any relevant material has a capacity for some actual harm in order to justify the contemplated censorship”.

[78] In *The Society for the Promotion of Community Standards Inc v Everard* (1987) 7 NZLR 33 (hereinafter called “the Everard decision”) the issue of “*likelihood of injury to the public good*” is addressed as follows:

“That requires 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... In the end indecency and within that concept any necessary prerequisites of injury to the public good to a large extent are less matters of fact than of judgment. While not quite in the league of the search for love, beauty, and/or the meaning of life, the search of injury to the public good in the end involves a very considerable message of value judgment”.

[79] The Board considers pursuant to Section 3(1) of the Act that the publication passes through the “gateways” of sex, crime and violence in that it “*describes, depicts or expresses or otherwise deals with*” matters of sex, crime and violence in such a manner that the unrestricted availability of the publication is likely to be “*injurious to the public good*”.

[80] The “gateway” of sex involves the rape, the bath scene, when Itsue disciplines her sisters, and the attraction between Poemy and Futaba, both aged 10.

[81] There are numerous examples of sexualised material which include the scene in the hot-tub where the commentator states the characters are depicted nude, due to the animators own “*perversion*” and “*sexual desperation*”.

[82] There is also a sequence where Shii makes a number of references to her breasts and she fondles her breasts. Later one of the aliens pinches Shii’s nipples, and she moans in a sexualised manner. This character has no other part in the storyline, and is for exploitation and titillation only.

[83] Some of the aliens use their testicles as weapons.

[84] The board has considered the Amendment Act 2005 and in particular S4(1A) which states:

“...a publication deals with a matter such as sex for the purposes of that subsection if

(a) the publication is or contains 1 or more visual images of 1 or more children or young persons who are nude or partially nude; and

(b) *those 1 or more visual images are alone, or together with any other contents of the publication, reasonably capable of being regarded as sexual in nature.”*

[85] The Board in the majority finds that the publication does contain one or more visual images of children or young persons who are nude or partially nude, for example in the bath scene. The visual images in that scene, the scenes where Poemy and Futaba are sexually attracted to each other, and the other sexual scenes including the whipping and the rape, are reasonably capable of being regarded as sexual in nature.

[86] Examples of violence includes the rape, and the whipping and disciplining of two of the sisters by Itsue.

[87] There are numerous other depictions of characters being killed, beaten and tortured in the story, including when the alien queen is kicked in the head and when Poemy destroys a large robot spaceship.

[88] The impact of some of the violence is reduced by its farcical nature. The crucifixion for instance is not fatal because acupuncture is used and the dog, which is cut in three pieces, is done in virtual reality style.

[89] Crime is also a feature of the publication there being numerous assaults only some of which are farcical and rape, crucifixion and torture.

[90] The majority of the Board finds the unrestricted availability of “*Puni Puni Poemy*” to be “*objectionable*” in terms of Section 3(1) of the Act, in that the scenes involving sex, crime and violence are, in spite of the parody, sufficiently extensive and graphic that they are likely to be “*injurious to the public good*” if unrestricted.

Section 3(2)

[91] As the Board finds the threshold in Section 3(1) of the Act has been met, it must consider whether the activities in Section 3(2)(a) to (f) of the Act exist in the publication. The Board must then consider whether the publication “*promotes or supports, or tends to promote or support*” those activities. The phrases “*promotes or supports or tends to promote or support*” are not defined in the Act.

[92] The decision of *Moonen v Film and Literature Board of Review* (2000) 2NZ LR 9 (hereinafter called "*Moonen I*") assists in defining the words "*promotes or supports*". The decision states that "*description*" and "*depiction*" of a prohibited activity do not of themselves necessarily amount to promotion or support of that activity. There must be something about the way the prohibited activity is "*described, depicted or otherwise dealt with*" which can fairly be said to have the effect of "*promoting or supporting*" that activity.

S3(2)(a)

[93] The Board finds that the applicable sections in respect to this publication include Section 3(2)(a) "*The exploitation of children, or young persons, or both, for sexual purposes;*".

[94] In the bath scene, although there are no genitalia exposed, there is innuendo of sexual acts.

[95] In the rape scene, it is cartooned and there are a number of possible interpretations about what has actually happened, but a likely interpretation for many viewers will be that at least some, if not all, of the sisters were raped.

[96] The rape scene obviously also has application for Section 3(2)(b) "*The use of violence or coercion to compel any person to participate in, or submit to, sexual conduct*". The expressions on the victims faces, and the groaning will generally be seen as evidence that rape has occurred.

[97] The English commentary in "*Puni Puni Poemy*" acknowledges that there are sequences in the DVD which are of concern. The commentary includes statements such as "*They're just children*", "*That's just wrong*", "*That's weird*", "*I'm only 3*", "*I definitely wouldn't let my children see this*", and "*I wouldn't let my Presbyterian Church Minister uncle see this either*". Although the comments are said to increase the humour of the events, the Board accepts the Classification Office statement that "*Although the comments may be said in jest, they acknowledge, and reinforce, the fact that child characters are sexualised within the storyline*".

[98] The Applicant, who expresses concern for the protection of parody as a vehicle for criticism and comment, acknowledges that one interpretation of "*tendency to support*," is that the activities prohibited by Section 3(2) by mere inclusion in "*Puni Puni Poemy*"

has the effect of desensitising the viewer to their repugnant nature. He states “*While this approach may appeal to some social commentators, I submit that this is contrary to the intent of the Act. The law has moved on from the days of being concerned with the weakening of society’s moral fibre. Instead, it is concerned with “a likelihood [of injury to the public good] sufficiently real to be discernable or actual”. Treating the prohibited activities in an off-hand or light-hearted manner may be a relevant consideration under s3(3), but of itself such treatment does not meet the necessarily high threshold required by a deeming provision like s3(2)*”.

[99] The Board finds that the Applicant is a devotee of, and expert in Japanese anime, but prefers the Classification Office view of how the general population in New Zealand may view the publication. The Classification Office states “*Although there is a distinct tongue-in-cheek element to the publication that satirises the conventions of this particular style of anime, the scenes described are nevertheless included as part of the entertainment value of the DVD. By attributing adult sexual characteristics to characters depicted as children, and by presenting the scenes of sexual coercion described above in a light-hearted manner designed to entertain and titillate the viewers, the publication tends to encourage a viewpoint that children and young persons are legitimate objects of adult sexual desire and sexually coercive acts*”.

S3(2)(f)

[100] The Board considered s3(2)(f) of the Act as to whether “*Puni Puni Poemy*” uses acts of torture or the infliction of extreme violence or extreme cruelty.

[101] There are certainly numerous examples of extreme violence, extreme cruelty and torture in the publication. These include the crucifixion, even though not fatal, the whipping and numerous characters being killed, beaten and tortured. The robot Queen being kicked in the head, and when Poemy destroys the spaceship are examples of extreme violence and cruelty. The crucifixion can be interpreted as torture.

[102] The Board finds that the depictions of such extreme violence, cruelty and torture is to some extent promoted and supported or tended to be promoted or supported as, although farcical at time. “*Puni Puni Poemy*” shows few consequences for such actions, thereby reducing their impact in the minds of viewers.

[103] As the Board by majority finds S3 (2) of the Act applies which deems the publication objectionable, the Board does not need to consider S3 (3) of the Act.

EXCISIONS

[104] Pursuant to Sections 32 and 55(2) of the Act the Board has the power to make excisions to a publication if, after examining it, the Board is of an opinion that it would classify the publication differently according to whether excisions occurred.

[105] The Board did consider excisions in “*Puni Puni Poemy*” but believes the sexual criminal and violent content, is so intricately woven into the DVD that it would be impossible to remove it, and still maintain the credibility of the publication.

THE BILL OF RIGHTS

[106] In making its decision in respect to “*Puni Puni Poemy*” the Board has considered the *Living Word* decision which states:

“The balancing required by s3 must be infused by due consideration of the application of the Bill of Rights”

[107] The Board finds that the decision it has made is the least restrictive available to it, in accordance with the considerations it must have regard to under the various sections of the Act and the Bill of Rights.

[108] In *Moonen 1* the Court of Appeal suggested that it may be helpful to the Board in performing its functions to follow a 5-step process. In a later decision *Moonen v Film & Literature Board of Review* (2002) 2 NZLR 754, 760 (hereinafter referred to as “*Moonen 2*”) the Court of Appeal did, however, emphasize that the 5-step approach was not intended to be prescriptive and that other approaches are open. The Board notes that it does not find the application of the 5-step approach altogether easy, and notes that aspects of the approach would appear to require the Board to make judgements on the consistency with the Bill of Rights of the 1993 Act. The Board further notes that the Court of Appeal did say in *Moonen 1* that the approach was potentially difficult, and that the full Court of the High Court in *Moonen 2* echoed these sentiments saying that

“We have not exactly found the approach easy of practical application”.

[109] The Board would prefer a simpler approach which recognised that in interpreting and applying various concepts such as “*promotion and support*” and “*injurious to the public good*”, freedom of expression is required to be considered together with the reasonable limits on that freedom that the 1993 Act provides for. In the earlier part of this decision, the Board has emphasised that in classifying this publication it has been conscious of the importance of freedom of expression and has attempted to limit that freedom only to the extent that it is permitted by the 1993 Act, and in a manner that is proportionate to the harm that an un-excised version of the DVD and an unrestricted classification would cause. Nonetheless, it appears sensible for the Board to continue to utilise the 5-step approach for the present.

[110] In the *Moonen 1* decision the Court of Appeal held that a 5-step approach may assist in reconciling the relevant provisions of the Bill of Rights Act with those of the Classification Act.

[111] The first two steps are to identify the different possible interpretations of the word or words in the Act and if only one meaning is properly open to adopt it. The phrases in s 3 of “*promotion and support*” and “*injurious to the public good*” have been defined and the Board is bound to apply the definitions of the appropriate words in the sections in the Act, and in case law, and has done so.

[112] Step 3 of *Moonen 1* involves identifying the extent if any to which “*the meaning adopted limits*” the “*relevant right or freedom*”. It is acknowledged that the meaning identified in respect to important phrases defined in the Act, in case law and dictionary definition does limit rights and freedoms under the Bill of Rights Act, especially s 14. S 14 provides for the right to freedom of expression, including the right to seek, receive and impart information and opinions in any form. This freedom includes the right to produce and receive material of a sexual criminal or violent nature as seen in “*Puni Puni Poemy*”. As the Act under which this publication is reviewed is a Classification Act it is acknowledged that it limits the scope of the right of freedom of expression by defining publications objectionable pursuant to s 3 of the Act. The rights of free expression of video, DVD and film makers, producers, distributors and viewers are all restricted by the definition of words within the Act and the objectives of the Act. The extent to which these rights are restrictive is commensurate with the type of restriction placed on the film. All viewers are restricted in their right to view “*Puni Puni Poemy*”. All those involved in production, distribution, promotion and exhibition of

“*Puni Puni Poemy*” are restricted from having any person view the publication.

[113] The Board is then required to consider whether the extent of such limitation, if found, can be demonstrably justified in a free and democratic society. The objective of the Act is to provide a classification and censorship system in respect to publications, as set out in the long and short titles of the Act. The way in which the objective is achieved must be reasonable in proportion to the importance of the objective, and interfere as little as possible with the right or freedom affected. The Board has had to balance the value of freedom of expression against the need to protect persons from being exposed to the scenes of sex crime and violence in this publication.

[114] Pursuant to the 5th step in *Moonen 1* the Board considers the limitations it has placed on “*Puni Puni Poemy*” are justified on balance, taking into account the intention of the Act under which the Board is required to make its decision. It is the Board’s view that its decision can be demonstrably justified in a free and democratic society.

CONCLUSION

[115] The majority of the Board therefore deems the publication “*Puni Puni Poemy*” to be objectionable for the purposes of the Act in that it does “*promote or support or tend to promote or support*” the exploitation of children or young persons for sexual purposes. It also shows acts of torture or the infliction of extreme violence or extreme cruelty without showing consequences for the perpetrators. The Board finds that the amount of extreme violence and extreme cruelty does “*tend to promote or support*” the activities even if in anime form.

[116] Two minority decisions will accompany this decision.

Dated at Auckland this day of 2005

Claudia Elliott, President, Film and Literature Board of Review

Greg Presland, Vice President

Mark Andersen

Marion Orme

Stephen Stehlin

FIRST MINORITY DECISION

- [117] After careful consideration of the publication “*Puni Puni Poemy*,” we two are unconvinced that its availability to persons 18 years of age and older would be injurious to the public good. Our close consideration of this publication has led us to the view that it does not promote or support or tend to promote or support the exploitation for sexual purposes of children or young persons. We do not believe that the provisions of Section 3 (2) of the Act apply and therefore we are required to consider the provisions of Section 3 (3) of the Act.
- [118] The presentation of the characters in this Japanese anime DVD is complicated and far from straightforward. There is a complex mix of frenetic parody, self-reflexivity and irony in its story of the youthful heroine Puni Puni Poemy. We accept applicant Simon Brady’s contention that it is an “*ironic, multi-leveled parody of clichés in Japanese animation*” and that the content should not necessarily be taken at face value. Of course, the claims of parody cannot be used to exculpate a truly objectionable and injurious publication, but in our view “*Puni Puni Poemy*” does not fall into that category.
- [119] In terms of its most contentious specific scene, we do not believe the publication promotes or supports the rapes of Puni and the sisters. Rather we believe that this particular scene definitely does not show rape positively, instead it stresses the distress and pain of the victims who clearly do not enjoy the treatment to which they are subjected. Furthermore, in the scenes depicting (a) the girls together in the bath and (b) Puni and Futaba rolling around in a mildly sexual manner, we do not find this material to be clearly objectionable in terms of the provisions of the legislation.
- [120] In deciding on an appropriate classification, we took into particular account Sections 3(3)(a)(ii), and (iv) and Section 3(3)(b). After weighing up the extent and degree of material linked to these sub-sections of the Act, we suggest that an appropriate classification for “*Puni Puni Poemy*” would be: objectionable unless its availability is restricted to persons 18 years of age and older.

Brian McDonnell
Ani Waaka

SECOND MINORITY DECISION

[121] I do not believe that the provisions of section 3(2) apply. I am therefore required to consider section 3(3) of the Act.

[122] Anime is an increasingly popular genre in many parts of Asia, particularly Japan and "*Puni Puni Poemy*" is commendable of its genre contextualised in Japan. In making the decision, consideration is given to differing media.

[123] The medium is the message and here the medium (anime) is probably akin to an animated cartoon and as such given the fast 'montage effects' the message is subliminal.

[124] Persons above 13 today are exposed to multimedia and have life experience and a moral code (that fits their age group and culture) to view "*Puni Puni Poemy*" and place scenes in context., For example:

(a) two 10 year olds frolicking under the bedclothes is normal play amongst children in Asian Cultures and devoid of sexual connotations.

(b) the communal bathtub scene, again is common practice in Japan and seven 'sisters' in a tub is culturally accepted.

[125] In deciding on an appropriate classification I took into particular account section 3(3)(a)(ii) and (iv) and section 3(3)(b). After weighing up the extent and decree of material linked to the these subsections of the Act I suggest that an appropriate classification of "*Puny Puny Poemy*" would be objectionable unless its availability is restricted to persons aged 16 and over.

Lalita Rajasingham

Dated at Auckland this day of 2005.

Claudia Elliott
President, Film and Literature Board of Review