

NOTICE OF DECISION UNDER SECTION 38(1)

TO: Commissioner of Police

Title of publication: Wicked Camper EHJ635

Other known title: Not stated

OFLC ref: 1600220.000

Medium: Vehicle

Maker: The Wicked Cult Limited

Country of origin: New Zealand

Language: English

Classification: Unrestricted.

Excisions: None

Descriptive Note: None

Display conditions: None

REASONS FOR THE DECISION

The Office of Film and Literature Classification (Classification Office) examined the publication and recorded the contents in an examination transcript. A written consideration of the legal criteria was undertaken. This document provides the reasons for the decision.

The Nature of the Publication:

The material for consideration consists of images and text that appear on the front, the back and on both sides of a campervan designated as *Wicked Camper EHJ635*. The campervan is offered for hire by a business known as Wicked Campers, owned by The Wicked Cult Limited.

While the medium - a campervan - has not until recently been examined by the Classification Office it clearly fits the definition of “publication” under s2(c) of the Films, Videos, and Publications Classification Act 1993 (FVPC Act) “a paper or other thing that has printed or impressed upon it, or otherwise shown on it, one or more (or a combination of 1 or more)

images, representations, signs, statements or words ...” The breadth of the definition indicates Parliament’s intention that the scope of the FVPC Act not be limited to films, DVDs, books and magazines. While a campervan’s status as a publication may not be immediately apparent, it meets the s2(c) definition, as do other unusual mediums previously classified under the FVPC Act. For instance:

- Apparel: OFLC 800513 – *Vestal Masturbation (Cradle Of Filth T-Shirt)*
- Drink Can – OFLC 1101242 - *Miss Svenson's Classroom Detention*
- Playing Cards: OFLC 9501108 - *Hershe Highway*
- Billboard: OFLC 702680 - *Erotica Lifestyles Expo Billboard*
- Card/Jigsaw Puzzle: OFLC 9601115 – *Colt Puzzle Cards*
- Calendar: OFLC 301472 - *Massive FHM Wall Calendar 2003*
- Street Sign: OFLC 9600069 - *"The New Venus Shop" Sign on Karangahape Rd*
- Packing Box: OFLC 9902226 - *'Just' 17 Love Doll*
- Sticker: OFLC 1400015 – *Panty Dropper*

Submission procedure:

The campervan is one of a number submitted for classification. The Classification Office received copies of the material for classification in the form of photographs of the front, back and sides of each campervan. They were submitted for classification on behalf of the Commissioner of Police under s13(1)(ab) of the FVPC Act. *Wicked Camper EHJ635* was received on 23 March 2016 and added to the group of vehicles already submitted by the NZ Police.

On 01 April 2016 the Classification Office advised the owner of the campervan of the right to make written submissions regarding classification. The Secretary for Internal Affairs, who has an automatic right to make written submissions, was also informed of the application for classification. When the owner advised that they did not have access to the campervan under consideration, the Classification Office provided them with copies of the submitted images on 07 April 2016. The closing date for submissions was 21 April 2016.

Under s23(1) of the FVPC Act the Classification Office is required to examine and classify the publication.

Under s23(2) of the FVPC Act the Classification Office must determine whether the publication is to be classified as unrestricted, objectionable, or objectionable except in particular circumstances.

Section 23(3) permits the Classification Office to restrict a publication that would otherwise be classified as objectionable so that it can be made available to particular persons or classes of persons for educational, professional, scientific, literary, artistic, or technical purposes.

Synopsis of written submission(s):

Lengthy written submissions were received from both the New Zealand Police and Ford Sumner Lawyers, the legal representatives for the owner. These submissions have been thoroughly considered and are discussed below.

Synopsis of Submission from New Zealand Police

The written submission from the New Zealand Police, dated 21 April 2016, relates to *Wicked Camper EHJ635* and to two others (*Wicked Camper JKC408* and *Wicked Camper JLT886*) that have been dealt with in a separate decision.

The Police submit that *Wicked Camper EHJ635* should be classified as objectionable.

Wicked Camper EHJ635 includes depictions of popular cartoon characters *the Smurfs*, one holding a large “joint” or cannabis cigarette and the other standing in front of a large amount of smoke.

Police submit that “the wording of the vehicle relating to “smurf” is consistent with the cartoon television show where the characters will often substitute a noun, verb or adjective with the word “smurf”. The rear of the vehicle reads “To smurf or not to smurf that is the question” and when considered in the context of the entire publication the Police submit that slogan is most likely to mean “to smoke or not to smoke, that is the question”. The left side ...reads “I don’t give a smurf” and the Police submit that the most likely meaning of the phrases is “I don’t give a fuck (or shit)”.

The main concern with the publication, however, is the depiction [of] characters from a popular children’s television show and film engaging in [sic] criminal offending by possessing and consuming Class C controlled drugs as classified by the Misuse of Drugs Act 1975.

Wicked Camper EHJ635 depicts images of the Smurfs and, as such, will naturally attract the attention of children and young people.

The Police go on to make further submissions relating to the three publications listed above, including *Wicked Camper EHJ635*.

The Police submit that, regardless of the intentions of The Wicked Cult Limited or Wicked Campers, it is the effect of the three publications that needs to be considered for classification, not the intention of the publications. In these three cases, each publication depicts the criminal activity of illicit drug use in cartoon characters that are popular and easily recognisable by children and young persons. The images are; large, brightly coloured, and contain (generally) happy facial expressions. The images appear to be comedic, the characters are depicted as happy, and in no way is there any indication that the characters using the illicit drugs should not be doing so. The Police respectfully submit that all of these factors lead to the conclusion that the images and wording of each of these three publication have the effect of promoting or supporting the criminal activity [sic] of consuming and/or possessing illegal drugs. It is this promotion and encouragement of illicit drug use that is injurious to the public good, particularly when publications will naturally attract the attention of children and young persons.

The Police conclude that, in their view, *Wicked Camper EHJ635* should be classified as objectionable. Failing that outcome, it “should at least be age restricted to protect children and young persons.”

Synopsis of Submission from Ford Sumner Lawyers

The points most relevant to the consideration of the campervan which is the subject of this decision are the use of humour and the references to drugs. With regard to publications that deal with drug use, in paragraph 52.3 the submission refers to other decisions of the Classification Office that “display and promote frequent drug use” where the publications were given an unrestricted classification.

The use of humour is dealt with in paragraphs 53 to 57 of the submission. It is stated that “humour through social commentary and satire is the commanding influence, objective intent and prevailing characteristic” of each van. The content is intended to attract attention through

the use of “light hearted quotes, provocative sayings and colourful artistic imagery...” The imagery and text are said to be a satirical commentary using references to popular culture and that this humour and satirical intent is:

...clearly demonstrated within the context of the text and images, both individually and collectively, which is also an effective method of marketing, as it attracts and reflects Wicked’s young customer base through its extensive use of popular culture touchstones.

At paragraphs 58 to 63 the submission considers the right to freedom of expression contained in the New Zealand Bill of Rights Act 1990 (NZBORA) and whether any limitation on the availability of the campervans would be a reasonable restriction on that right. The submission states “...painting a vehicle with artistic imagery and provocative phrases is no different from an individual displaying artwork in a gallery...” and that “there is no content on Wicked’s vehicles which would be injurious to the public good in any way or form and no objectionable activity is “*promoted or supported*” by the content”. A restriction would be an unreasonable limitation on the right to freedom of expression.

The campervan under consideration in this decision is dealt with at paragraphs 80 to 86 of the submission:

(Paragraphs 80-81) On one long side of the vehicle a Smurf type cartoon character is detailed with the words “Drowsy” and holding a cigarette ... the artist’s meaning behind this is parody; the Smurf character is tired and this is another homage to pop culture.

Phrases playing on the word “Smurf” are placed on the other long side and rear of this campervan. On the rear of the campervan is a play on the Shakespearean phrase “To be, or not to be” where the word “be” has been replaced by the word “Smurf”. Regarding the image of a Smurf and the phrase “I don’t give a Smurf” on the other long side of the campervan, the submission considers that “This phrase is a further popular culture reference with another play on words, playing on the original phrase “I don’t give a damn”.”

The submission concludes that there is “no objectionable aspect to the content displayed”, nor is there anything on the campervan that would be offensive to any groups in society: “The sayings are not in any way offensive, a cigarette is a commonly accepted image and the Smurfs are a well-known children’s cartoon”.

Description of the publication:

The images and text in question appear on both sides and on the back of *Wicked Camper EHJ635*. The front has the word “Wicked” on the bonnet in large red letters. Text on the back windows of the campervan gives contact details.

The left side has a large image of a Smurf, a character from a popular children’s television cartoon. The figure is blue, with a white cap and pants. In front of its body, both hands hold up what appears to be a hand-rolled cigarette, very large in relation to the size of the Smurf figure. A small amount of smoke can be seen issuing from the upper end of the cigarette. The figure grins. The word “drowsy” in large, blue, graffiti-style capitals, occupies the space below the campervan’s windows.

The right side focuses on a similar Smurf character with its eyes half shut and a finger scratching its chin. A white speech bubble in the shape of clouds along the side of the campervan has the words “I don’t give a smurf..” in blue graffiti-style text.

Beneath the back window are words in white capitals on a black background that read, "To smurf or not to smurf, that is the question."

New Zealand Bill of Rights Act 1990:

Section 14 of the New Zealand Bill of Rights Act 1990 (NZBORA) states 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". Under s5 of the NZBORA, this freedom is subject "only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". Section 6 of the NZBORA states that "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 role of the Classification Office is to determine whether the likelihood of injury to the public good (if any) arising from the availability of a publication outweighs the right to freedom of expression and therefore constitutes a reasonable limitation of this right.

The meaning of "objectionable":

Section 3(1) of the FVPC Act sets out the meaning of the word "objectionable". The section states that 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.

The Court of Appeal's interpretation of the words "matters such as sex, horror, crime, cruelty or violence" in s3(1), as set out in *Living Word Distributors v Human Rights Action Group (Wellington)*, must also be taken into account in the classification of any publication:

[27] The words "matters such as" in context are both expanding and limiting. They expand the qualifying content beyond a bare focus on one of the five categories specified. But the expression "such as" is narrower than "includes", which was the term used in defining "indecent" in the repealed Indecent Publications Act 1963. Given the similarity of the content description in the successive statutes, "such as" was a deliberate departure from the unrestricting "includes".

[28] The words used in s3 limit the qualifying publications to those that can fairly be described as dealing with matters of the kinds listed. In that regard, too, the collocation of words "sex, horror, crime, cruelty or violence", as the matters dealt with, tends to point to activity rather than to the expression of opinion or attitude.

[29] That, in our view, is the scope of the subject matter gateway.¹

The content of the publication must bring it within the "subject matter gateway". In classifying the publication therefore, the main question is whether or not it deals with any s3(1) matters in such a manner that the availability of the publication is likely to be injurious to the public good.

¹ *Living Word Distributors v Human Rights Action Group (Wellington)* [2000] 3 NZLR 570 at paras 27-29.

Matters such as crime

The images and text on the campervan can be interpreted as relating to drug use. The Police have indicated that they consider *Wicked Camper EHJ635* to be showing one Smurf holding a cannabis cigarette and another standing in front of a large cloud of smoke. They also take issue with the wording below the back window of the campervan, considering that it is likely to mean “to smoke or not to smoke, that is the question.” The submission from the owner’s legal representative makes light of the most questionable figure: the Smurf is said to be holding a cigarette, a “commonly accepted image.” The submission dismisses this as parody in homage to pop culture. However, the Classification Office does not accept this interpretation: it seems clear that viewers are meant to think that the hand-rolled cigarette held by the Smurf is a joint.

Cannabis is specified as a Class C controlled drug on the schedule to the Misuse of Drugs Act 1975.

The question of whether the campervan promotes or encourages criminal acts is considered under s3(3)(d).

Certain publications are "deemed to be objectionable":

Under s3(2) of the FVPC Act, a publication is deemed to be objectionable if it promotes or supports, or tends to promote or support, certain activities listed in that subsection.

The Classification Office has considered all of the matters in s3(2), but none are relevant to this publication.

Matters to be given particular weight:

Section 3(3) of the FVPC Act deals with the matters which the Classification Office must give particular weight to in determining whether or not any publication (other than a publication to which subsection (2) of this section applies) is objectionable or should in accordance with section 23(2) be given a classification other than objectionable.

The Classification Office has considered all the matters in s3(3). The matter relevant to the publication is:

s3(3)(d) The extent and degree to which, and the manner in which, the publication promotes or encourages criminal acts or acts of terrorism.

Wicked Camper EHJ635 does not promote or encourage criminal acts. The left side of the campervan shows a Smurf holding a large, hand-rolled cigarette that viewers are intended to think is a joint. If this were obvious, the campervan would raise concerns similar to those already addressed in the Classification Office’s decision that campervans *Wicked Camper JLT886*, *Wicked Camper GCT799* and *Wicked Camper JKC408* clearly promote and support the use of illegal drugs.² However, there are several factors which limit the likelihood that young viewers would immediately place such a construction on the image.

² (OFLC Refs: 1600221.000, 1600222.000 and 1600223, previously classified as objectionable)

The representation of a Smurf holding a cigarette is not particularly humorous or celebratory as is the case for images on *Wicked Camper JLT886*, *Wicked Camper GCT799* and *Wicked Camper JKC408*. The cigarette is a very large and quite odd object, and the Smurf is holding it in a manner that does not immediately suggest that he is smoking it. The words on the sides of the campervan are hard to read and children and young teenagers are likely to struggle to give meaning to any of the text on the campervan. Young viewers are likely to be attracted to the Smurf figures but they are unlikely to find the overall visual effect of this campervan appealing. The crude artwork and messy appearance of the campervan are as likely to repel the gaze as attract it. There is nothing particularly funny or “cool” about what is represented on the campervan.

On *Wicked Camper JLT886*, *Wicked Camper GCT799* and *Wicked Camper JKC408* (previously classified as objectionable) the text and images tend to reinforce each other to produce an overall drug use theme. The same cannot be said of *Wicked Camper EHJ635*. It is not at all obvious that the cloud that forms a speech bubble on the right side of the campervan is smoke, nor is there a strong connection between the text on the campervan and any perception of drug use. A phrase such as “To smurf or not to smurf, that is the question” will be meaningless to most people (unless they are familiar with its Shakespearean origin). The Office is aware that the word “smurf” has migrated from the popular cartoon programme into various countercultural contexts and has gained new meanings related to drugs. “Smurf” has been used as a slang term for the drug Ecstasy and the word “Smurfing” is a term that refers to repeated purchase of small quantities of pseudoephedrine for manufacture into methamphetamine. The image and text on the left side of the campervan could also refer to one of the potential effects of cannabis – inducing drowsiness. Computer gaming also has its “Smurfs” (experienced gamers posing as “newbies” in online gaming) but this use is rather more innocent. Most viewers, and certainly most young viewers, will be unaware of these associations.

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

Section 3A provides that a publication may be classified as a restricted publication under section 23(2)(c)(i) if it

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.

"Highly offensive language" is defined in s3A(3) to mean language that is highly offensive to the public in general.

The campervan does not exhibit any highly offensive language.

Publication may be age-restricted if likely to be injurious to public good for specified reasons:

Section 3B provides that a publication may be classified as a restricted publication under section 23(2)(c)(i) if it

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).

The Classification Office has considered all the matters in s3B(3), but none are relevant to this publication.

Additional matters to be considered:

s3(4)(a) The dominant effect of the publication as a whole.

The dominant focus of the material on the campervan is on the Smurf figures and the repetitive use of the word “Smurf”. If humour is intended, it is quite obscure. Messages about drug use are similarly unclear.

s3(4)(b) The impact of the medium in which the publication is presented.

The imagery on the campervan is a form of commercial promotion for Wicked Campers and, as such, is designed to be large and to have impact. By its very nature the medium has the potential to be inadvertently viewed in motion on the road, as well as in car-parks and a variety of off-road situations, including tourist spots, camping grounds and public places where children are likely to view the images. Unlike other portable media (such as DVDs or t-shirts), which allow considerable agency and control over the manner and circumstances of viewing, including access, any problematic parts of the campervan cannot easily be covered, for instance with clothing, or displayed only in restricted areas or to select persons.

s3(4)(c) The character of the publication, including any merit, value or importance it has in relation to literary, artistic, social, cultural, educational, scientific or other matters.

The images and text on the campervan subverts well-known children’s cartoon characters for a commercial purpose. The images and text have the characteristics of graffiti art, but there is no real attempt at producing material with merit in this respect. They are a commercial appropriation of a graffiti “look” that would alienate many actual graffiti artists, and they are not executed with any real skill or attempt at expression in art terms.

The campervan has no particular merit, value or importance in any of the above terms.

s3(4)(d) The persons, classes of persons, or age groups of the persons to whom the publication is intended or is likely to be made available.

The campervan is specifically intended to be displayed to a wide public audience. The humour is aimed at young adults but is presented to all ages indiscriminately. It is noted that the campervans are not hired to people under the age of 18 years. However, the age of the user(s) has no relevance to the campervan’s accessibility to others.

s3(4)(e) The purpose for which the publication is intended to be used.

Images and text on the campervan is a form of commercial promotion designed to create public awareness of Wicked Campers and their brand.

s3(4)(f) Any other relevant circumstances relating to the intended or likely use of the publication.

No other relevant circumstances are apparent.

Conclusion:

Wicked Camper EHJ635 is classified as unrestricted.

In the framework set by the NZBORA, classification decisions must be reasonable and demonstrably justifiable. In this instance, the material considered does not meet the criteria of s3(3)(d). While the Classification Office is concerned about any potential use of favourite children's characters to promote or encourage criminal acts, in this case the link to drug use is tenuous. Only one image plausibly raises the question of promotion or encouragement for the use of an illegal drug. It does not do so in a manner likely to make enough of an impression on young viewers to justify restricting the campervan from them, an outcome that would in effect be banning its use as a campervan. Unlike the text and images on the previously classified *Wicked Camper JLT886*, *Wicked Camper GCT799* and *Wicked Camper JKC408*, where there was a clearly promotional aspect, there are no strongly credible references to cannabis or to any other illegal drug on *Wicked Camper EHJ635*. To impose a ban or restriction on this campervan would be neither reasonable nor justified.

Date: 16 May 2016

For the Classification Office (signed):

Note:

You may apply to have this publication reviewed under s47 of the FVPC Act if you are dissatisfied with the Classification Office's decision.

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