

## Germany

### **BROADCASTING**

#### **Pornography**

Administrative Court of Hamburg

March 1, 2001

ZUM-RD 2001/295

The plaintiff, a pay-tv broadcasting organisation which broadcasts encrypted programmes, broadcast several films several times, amongst them *Les Femmes Erotiques*, *Sexhibition I* and *Virtual Sex*. The defendant, the Media Authority of Hamburg, issued an order according to which the broadcaster had violated the Hamburg Media Law and the German State Treaty on Broadcasting which prohibited the broadcasting of pornographic subject-matter by reference to the prohibition contained in Article 184 of the German Criminal Act. The order threatened the broadcaster with the withdrawal of the broadcasting licence should it again broadcast a film which was pornographic in the sense of Article 184 of the German Criminal Act. The broadcaster appealed against this order to the Hamburg Administrative Court. It argued that since the broadcast was encrypted, there was no risk that the interests of children and young people could be offended and that the term pornography should be interpreted as limited to those acts which constituted a serious violation of the interests of youth, taking into account the changes in the view of pornography in society during recent years. According to this view, the films complained about could not be evaluated as pornographic.

#### **Definition of pornography limited to presentations damaging the interests of youths?**

According to the jurisprudence of the Federal Supreme Court (BGH St 32/40) it is not the task of the criminal law to enforce upon adult citizens a moral standard relating to sexuality. Views concerning the borderline between those presentations which should not be tolerated are dependent upon the time and subject to social changes. The Hamburg Court stressed that until now there is no scientific evidence on the potentially damaging effects of pornography. Accordingly, the legislator had decided to leave the consumption of sexual presentations for adults to decide for themselves, provided that it would not be a risk to other interests worthy of protection. The criminal laws which restrain pornography thus envisage that the protection of the undisturbed sexual development of children and young people and the interests of adults are best protected by not being confronted unintentionally with pornography. However, due to the lacking scientific assessment of the consequences of pornography including possible dangers for the development of children and young people, it was difficult to interpret the term pornography on the basis of the view that its purpose should be limited to the protection of children and young people. Accordingly, the term should be interpreted on the basis of the traditional concepts. Therefore a presentation is considered to be pornographic if, first, it shows sexual behaviour in the forefront in a rough and obtrusive manner by excluding any other human relations and if, secondly, its general tendency aims at or prevalingly aims at lecherous interests in sexual matters. With this regard essential elements of pornography are:

- the principle of exciting sexual lust;
- the de-humanisation of human sexuality.

However, also by reference to these traditional concepts it is not easy to delimit between those presentations which are pornographic and those which are not. A satisfactory definition of the term pornography hardly seems possible after all. The Court of Hamburg held that the generally applied abstract criteria concerning the definition of the term pornography have to be based on four elements. First, there must be an objective assessment of the overall tendencies of the presentation on the content level. This means that it has to be asked whether the observer is directed exclusively or mainly to the arousal of sexual excitement. Secondly, and concerning the exposition, it has to be verified whether the sexual processes are shown in a rough, obtrusive and attention-grabbing manner. Thirdly, it is required that the presentation exceeds the borders of sexual decency which are based on generally accepted moral concepts. Fourthly, the individual work has to be evaluated within its general context. A presentation is pornographic if all four tests have been satisfied.

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