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October 4, 1979

ATTORNEY GENERAL OPINION NO. 79- 220

Mr. Norman G. Manley
Deputy County Attorney
Office of the Butler County Attorney
Butler County Judicial Building
El Dorado, Kansas 67042

Re: Crimes Against the Public Morals -- Promoting Obscenity --
Programming on Cable Television Stations

Synopsis: If cable television systems choose to offer obscene materials for broadcast to subscribers regardless of procedures to prevent viewing by minors, a violation of K.S.A. 1978 Supp. 21-4301 has occurred.

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Dear Mr. Manley:

You inquire whether a cable television service may televise "X-Rated" or "hardcore" movies over an available channel for a fee. Your letter also indicates those subscribers exercising their option to receive such programs would be provided with a lock box so that subscribers could remove a key and prevent minors from viewing the programs.

By way of background it is our understanding that an "X rating" is a classification as to the subject matter of a given film imposed by the seven member Rating Board maintained by the Motion Picture Association of America as follows:

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" X: 'No one under 17 admitted.' This is patently an adult film and no children are allowed to attend. It should be noted, however, that X does not necessarily mean obscene or pornographic in terms of sex or violence. Serious films by lauded and skilled filmmakers may be rated X. The Rating Board does not attempt to mark films as obscene or pornographic; that is for the courts to decide legally. The reason for not admitting children to X-rated films can relate to the accumulation of brutal or sexually connected language, or of explicit sex or excessive and sadistic violence." (Emphasis supplied.)

Additionally, it is our understanding that the term "hardcore" is a slang expression generally dealing with the sexual explicitness of a given film.

Our research indicates the State of Kansas does not specifically regulate the above, the former being a rating established by private enterprise, the latter an illusive concept. Rather the State of Kansas exercises its police power in banning the promotion of "obscenity" as defined in K.S.A. 1978 Supp. 21-4301(2) (a) as follows:

"Any material or performance is 'obscene' if the average person applying contemporary community standards would find that such material or performance, taken as a whole, appeals to the prurient interest; that the material or performance has patently offensive representations or descriptions of ultimate sexual acts, normal or perverted; and that the material or performance, taken as a whole, lacks serious literary, educational, artistic, political or scientific value."

If materials carried by cable systems meet the above definition, such programming is subject to the same prohibitions as are other mediums of communication.

K.S.A. 1978 Supp. 21-4301 provides in pertinent part:

"(1) Promoting obscenity is knowingly or recklessly:

"(a) Manufacturing, issuing, selling, giving, providing, lending, mailing, delivering, transmitting, publishing, distributing, circulating, disseminating, presenting, exhibiting or advertising any obscene material; or

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"(b) Possessing any obscene material with intent to issue, sell, give, provide, lend, mail, deliver, transfer, transmit, publish, distribute, circulate, disseminate, present, exhibit or advertise such material; or

"(c) Offering or agreeing to manufacture, issue, sell, give, provide, lend, mail, deliver, transmit, publish, distribute, circulate, disseminate, present, exhibit or advertise any obscene material;" (Emphasis supplied.)

Federal regulations define cable television systems as:

"Cable television system. A non-broadcast facility consisting of a set of transmission paths and associated signal generation, reception, and control equipment, under common ownership and control, that distributes or is designed to distribute to subscribers the signals of one or more television broadcast stations, but such term shall not include (1) any such facility that serves fewer than 50 subscribers, or (2) any such facility that serves or will serve only subscribers in one or more multiple unit dwellings under common ownership, control, or management." 47 C.F.R. §76.5(a). (Emphasis supplied.)

The use of transmission paths necessarily infers "transmitting" as provided in K.S.A. 1978 Supp. 21-4301(1)(a). In addition, 47 C.F.R. §76.5(a) indicates that cable television systems "distribute" which is also prohibited by K.S.A. 1978 Supp. 21-4301(1)(a). Mere transmission is an activity contemplated by statute. Thus, a system which provides a lock-box to each subscriber will not prevent the cable service from transmitting or distributing. The act of transmission occurs regardless of who receives it or the method of its reception.

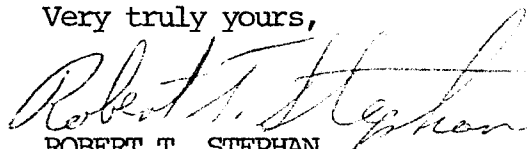
K.S.A. 1978 Supp. 21-4301(1)(c) also prescribes "offering or agreeing to . . . sell" Because cable television service and programs are offered for a fee, such transmission constitutes a sale.

Thus, in light of the above, two questions must be answered. First, is the material being disseminated obscene as defined by relevant State law and second, is it proposed to be made available in a manner contemplated by K.S.A. 1978 Supp. 21-4301(1). We have answered the latter in the affirmative while the answer to the former rests with the judicial process and must be determined on a case by case basis.

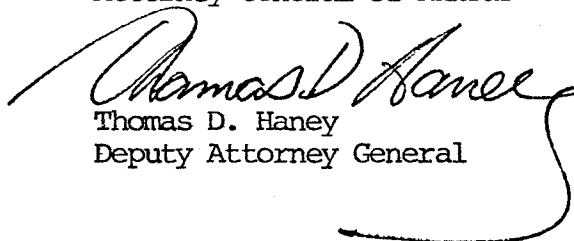
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Thus, in our opinion, the manner in which the described cable television system chooses to disseminate its programming constitutes means which are specifically subject to the provisions of K.S.A. 1978 Supp. 21-4301(1). Additionally, it is our opinion that, if the content of such programming is obscene by appropriate state standards, such amounts to promoting obscenity as prescribed by law.

Very truly yours,



ROBERT T. STEPHAN
Attorney General of Kansas



Thomas D. Haney
Deputy Attorney General

RTS:TDH:may