



STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612

ROBERT T. STEPHAN
ATTORNEY GENERAL

January 13, 1987

MAIN PHONE: (913) 296-2215
CONSUMER PROTECTION: 296-3751

ATTORNEY GENERAL OPINION NO. 87- 6

Mr. Timothy Chambers
Reno County Attorney
206 West First Street
Hutchinson, Kansas 67501

Re: Crimes and Punishment -- Code; Crimes Against the
Public Morals -- Sale of Magazines Containing
Advertisements for Obscene Materials or Devices.

Synopsis: A clerk selling an adult magazine can be held
liable for promoting obscenity if the inclusion
of an advertisement for obscene materials or
devices makes the whole magazine obscene. Cited
Herein: K.S.A. 1986 Supp. 21-4301.

* * *

Dear Mr. Chambers:

As County Attorney for Reno County, you request our
opinion concerning the advertisement of obscene materials
or devices. Specifically you ask whether a clerk in a
retail store can be held criminally liable for selling a
magazine which contains an advertisement for obscene
materials or devices.

K.S.A. 1986 Supp. 21-4301 reads in 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 device;

. . . .

"(3) (a) Any material or performance is 'obscene' if the average person applying contemporary community standards would find that:

"(i) the material or performance, taken as a whole appeals to the prurient interest;

"(ii) the material or performance has patently offensive representations or descriptions of (A) ultimate sexual acts, normal or perverted actual or simulated, including sexual intercourse or sodomy, or (B) masturbation, excretory functions, sadomasochistic abuse or lewd exhibition of the genitals; and

(iii) the material or performance, taken as a whole, lacks serious literary, educational, artistic, political or scientific value.

"(b) 'Material' means any tangible thing which is capable of being used or adapted to arouse interest, whether through the medium of reading, observation, sound or other manner.

"(c) 'Obscene device' means a device, including a dildo or artificial vagina, designed or marketed as useful primarily for the stimulation of human genital organs." (Emphasis added.)

In the situation with which we have been presented, the clerk is selling materials, not devices. Further, the clerk is not himself advertising material or devices, he is merely selling magazines which contain another's advertisements. Thus, the question we are left with is whether the material being sold by the clerk is "obscene" as defined by K.S.A. 1986 Supp. 21-4301(3) (a).

It appears that a clerk who sells such a magazine would not meet the criteria for promoting obscenity unless the inclusion of the advertisement in a magazine makes the entire publication obscene.

The Kansas obscenity statute is a correct statement of the most definitive Supreme Court case, Miller v. California, 413 U.S. 15, 37 L.Ed.2d 419, 93 S.Ct. 2607, reh. den. 414 U.S. 881, 38 L.Ed.2d 128, 94 S.Ct. 26 (1973). The law on obscenity is that material is obscene if an average person applying contemporary community standards would find the work, taken as a whole, appeals to the prurient interest in sex, portrays sexual conduct in a patently

offensive way and does not have serious literary, artistic, political or scientific value.

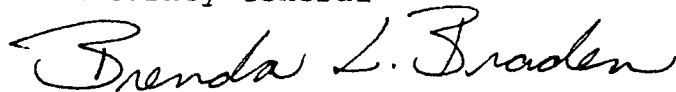
A clerk does not sell or advertise obscene materials or devices within the meaning of the statute by selling a magazine which includes an advertisement for such items. Under the statute and the Miller standard the work must be taken as a whole. Therefore, for a clerk to be held liable for promoting obscenity because of an advertisement for obscene materials or devices in a magazine, the advertisement must make the whole publication obscene.

In conclusion, a clerk can be held liable for promoting obscenity if the material sold is obscene. Depending on community standards, an advertisement may make the entire publication obscene, and thus, the statute would be applicable.

Very truly yours,



Robert T. Stephan
Attorney General



Brenda L. Braden
Deputy Attorney General

RTS:BLB:may