

December 8, 1966

OPINION NO. 499  
Answered by Letter-Denman

Honorable Don Burrell  
Prosecuting Attorney  
Greene County  
Springfield, Missouri



Dear Mr. Burrell:

This is in answer to your questions regarding certain procedural elements in prosecutions relating to obscene movies. As you know, this office rarely handles criminal prosecutions at the trial level, and we cannot give specific answers to all of your questions, but we are glad to give you what help we can.

The first question you ask is if there are any Missouri statutes in effect which apply to the showing of obscene movies. Section 563.280, RSMo Supp. 1965, which makes it a criminal offense to circulate obscene matter including any obscene, lewd, licentious, indecent or lascivious picture, photograph, print or other publication of indecent immoral, or scandalous character is, by its terms, applicable to the showing of obscene movies.

The standard of obscenity is that adopted by the United States Supreme Court. The basic standard as now applied was phrased by the Court in Roth v. United States and Alberts v. California, 354 U. S. 476, 77 S.Ct. 1304 (1957) as follows:

"\* \* \* whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."

Honorable Don Burrell

This standard was interpreted in three recent cases handed down by the Court, *Edward Mishken v. State of New York*, U.S. \_\_\_\_\_, 86 S.Ct. 958, 16 L.Ed.2d 56; *Ralph Ginzburg et al. v. U.S.*, U.S. \_\_\_\_\_, 86 S.Ct. 942, 16 L.Ed.2d 31; and *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General of the Commonwealth of Massachusetts*, U.S. \_\_\_\_\_, 86 S.Ct. 975, 16 L.Ed.2d 1. In these cases, particularly in the *Mishken* and *Ginzburg* cases, the Court introduced the idea that at least in a criminal prosecution, as opposed to an in rem injunction suit, the manner in which the solicitation was made and the material sold, could be considered to determine whether the material was in fact obscene. Under this concept of variable obscenity, allowing children to see movies would be an element which might properly be considered to determine whether prosecution would lie.

As to your question of who you may proceed against, the statutes provide that any person who shall knowingly publish the obscene material is guilty of the offense. Keeping in mind the various elements that must be proved by the state, particularly knowledge, either actual or inferred, any person who contributes to the showing or publishing of the matter in such a manner as to constitute publication may be prosecuted. In *State v. Vollmar*, 389 S.W.2d 20, the latest Missouri case on obscene literature, the store manager who sold the books was prosecuted.

You also have asked whether you may proceed on the basis of an injunction prior to publication or file a regular criminal complaint after the film has been shown. Section 563.285, RSMo Supp. 1965, provides for the enjoining of the publication of obscene material pursuant to the procedure set forth therein. This remedy would be applicable to obscene movies.

However, I am sure you realize that because of the free speech doctrine, it generally is much more difficult to priorly restrain the publication of obscene material than to institute a criminal prosecution after publication.

We regret that we cannot supply you with sample complaints or forms for injunctions which you request as we have no such forms available to us.

We do refer you to the following cases involving alleged obscene movies which have been before the United States Supreme Court after its decision in the *Roth-Alberts* case which may be of help to you: *Kingsley Int'l Pictures Corp. v. Regents of*

Honorable Don Burrell

the University of New York, 360 U.S. 684, and Times Film Corporation v. City of Chicago, 355 U.S. 35. Also we recommend the article Censorship of Obscenity, The Development of Constitutional Standards, 45 Minnesota Law Review 5 (1960-61), a comprehensive discussion of the problem of obscenity.

Very truly yours,

NORMAN H. ANDERSON  
Attorney General

JHD:cw