SCHOOLS: Board of Curators of the University of Missouri authorized to maintain and operate a TV station in connection with educational function of the university.

RADIO AND TELEVISION:

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Mr. Lester L. Cox
Member, Board of Curators
University of Missouri
Columbia, Missouri

Dear Sir:

Your letter at hand requesting an opinion of this department for the Board of Curators of the University of Missouri, which, in part, reads:

> "At its regular meeting held Friday, April 11th, Hotel Muehlebach, Kansas City, Missouri, the Board of Curators unanimously approved courses in television and radio broadcasting, both oral and visual, which would include all of the arts and sciences pertaining to oral and visual broadcasting. These courses will be in use beginning September of this year. It is, therefore, requested that you give us an opinion based upon the fact that we will have television and radio broadcasting courses and that it is our desire to establish a television broadcasting station at the University of Missouri for the basic purposes of teaching and training students in these respective arts.
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> "While a portion of the programs may be sold for commercial purposes, the basic purpose will be for teaching. We believe that by having commercial programs in connection with the regular studies by our students, they will get practical and

> first-hand knowledge of commercial radio and television in which field they will be trained. It is also understood that there will be no basis of profit from the operation of television as any amount that is received for commercial purposes will be reinvested in the training of such students in the various broadcasting arts or in acquiring additional equipment for their training.
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> "If your good offices will furnish us an opinion based upon these facts, stating that the Board of Curators has incorporated as a part of its curriculum actual courses in television science, that because of such action the Curators would be authorized to operate a television station in order to provide complete and actual training facilities in connection with these courses. Your help will certainly be appreciated as the freeze on television is lifted, and we would like to have a letter from your office along this line to attach to our application to the FCC."

In advising you on the question presented it becomes necessary to consider certain constitutional and statutory provisions relating to the government and operation of the university.

Regarding the government of the University of Missouri, Section 9(a) of Article IX of the Missouri Constitution provides:

> "The government of the State University shall be vested in a board of curators consisting of nine members appointed by the governor, by and with the advice and consent of the senate."

In this connection Section 172.010, RSMo 1949, provides:

> "A university is hereby instituted in this state, the government whereof shall be vested in a board of curators."

Section 172.020, RSMo 1949, in part, provides:

> "The university is hereby incorporated and created a body politic, and shall be known by the name of 'The Curators of the University of Missouri,' and by that name shall have perpetual succession, power to sue and be sued, complain and defend in all courts; to make and use a common seal, and to alter the same at pleasure; to take, purchase and to sell, convey and otherwise dispose of lands and chattels; to act as trustee in all cases in which there be a gift of property or property left by will to the university or for its benefit or for the benefit of students of the university; to condemn and appropriate real estate or other property, or any interest therein, for any public purpose within the scope of its organization, in the same manner and with like effect as is provided in chapter 523, RSMo 1949, relating to the appropriation and valuation of lands taken for telegraph, telephone, gravel and plank or railroad purposes; * * *"

Under the provisions of the last-quoted section the university is established as a corporate entity, and as such has such powers as are expressly conferred upon it, such as to sue and be sued; to take, purchase, sell and otherwise dispose of lands and chattels; to condemn and appropriate real estate and other property.

The Supreme Court of Missouri has also declared that the Board of Curators, acting in behalf of the university, has broad power conferred on it by implication. Thus in State ex rel. Curators of University of Missouri v. McReynolds, 354 Mo. 1199, 193 S.W. (2d) 611, the court, in determining that the board had implied power to issue revenue bonds to finance the erecting of dormitories, said at S.W. l.c. 613:

> "Although the Legislature has specifically authorized cities to issue revenue bonds, the fact it has not given the curators such express power does not prevent the implication of such power. The broad powers historically exercised by the curators without specific legislative authority

> or appropriations present a different situation from an ordinary municipal corporation depending entirely upon taxation for its support and with powers rigidly limited by statute or charter."

Section 172.100, RSMo 1949, vests the curators with the powers to make bylaws or ordinances, rules and regulations as may be expedient for the accomplishment of the trust reposed in them, which would be the government of the State University. Thus the section reads:

> "The curators shall have power to make such bylaws or ordinances, rules and regulations as they may judge most expedient for the accomplishment of the trust reposed in them, and for the government of their officers and employees, and to secure their accountability, and to delegate so much of their authority as they may deem necessary to such officers and employees or to committees appointed by the board."

In the case of Pyeatte v. Board of Regents of University of Oklahoma, 102 F. Supp. 407, the court was considering similar constitutional and statutory provisions contained in the Oklahoma statutes in determining the powers of the Board of Regents of the University of Oklahoma. At l.c. 413 the court said:

> "Title 70 O.S.A. Sec. 1218 provides as follows: 'The said board of regents shall make rules, regulations and by-laws for the good government and management of the university and of each department thereof; prescribe rules and regulations for the admission of students * * *.'
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> "Over and above the express power conferred upon the Board of Regents by the statutory provision, the Oklahoma Constitution also provides for government of the University by the Board of Regents. Article 13, Sec. 8, Oklahoma Constitution. The term 'government' is very broad and necessarily includes the power to pass all rules and regulations which the Board of Regents considers to be for the benefit of the health, welfare, morals and education of the students, so long as such

> rules are not expressly or impliedly prohibited. Rheam v. Board of Regents of University of Oklahoma, 161 Okl. 268, 18 P. 2d 535."

The Constitution of Missouri, like that of Oklahoma, vests the government of the State University in a particular board. The Legislature, by statutory enactment, has expressly conferred broad regulatory power on said board in order that it may accomplish the trust reposed in it in governing the university.

Therefore, it would appear that the Board of Curators of the University of Missouri would have the power to pass rules and regulations and to take such other measures as it would consider to be for the benefit of the health, welfare, morals and education of the students receiving educational advantages from that institution, so long as such rules and regulations were not expressly and impliedly prohibited.

By legislative enactment there has been established in connection with the State University, and as distinct departments thereof, a College of Agriculture and a School of Mines and Metallurgy. It is so provided by Section 172.430, RSMo 1949.

However, there are several other departments of the State University which have not been provided for by an act of the Legislature, but which nevertheless have been created in carrying out the educational program of the school. Some of these are the departments of journalism, law, medicine, etc.

Moreover, the Legislature has recognized the existence of departments of the university other than that of agriculture and mines and metallurgy. Thus Section 172.450, RSMo 1949, provides:

> "The college of agriculture and the school of mines and metallurgy herein provided for shall have each a separate and distinct faculty, whose officers and professors may be the same, in whole or in part, as the officers and professors in other colleges and departments of the university."

Presumably the establishment of these other educational departments was done under the direction of the Board of Curators exercising power conferred upon it by earlier constitutional and statutory provisions similar to those above cited and quoted.

Furthermore, in expanding the educational facilities of the university the Board of Curators has recently approved the institution of courses in television and radio broadcasting, as you have outlined it in your request. The authority for instituting said courses stems from that expressly and impliedly conferred by the constitutional and statutory provisions above cited.

The question which you have presented is whether or not, in connection with said courses, the Board of Curators is authorized to establish and operate a television broadcasting station at the university for the basic purpose of supplying students complete educational training in these respective arts. It is further understood that, if such a station is established, it would in some degree be used for commercial purposes in the manner indicated and the income or money received from its commercial use would be reinvested in the training of students and in acquiring additional equipment.

If such authority exists for the Board of Curators of the University of Missouri to establish a television broadcasting station and operate it as outlined, it must stem from implied powers for nowhere in our laws is such authority expressly conferred.

Apparently the appellate courts throughout the country have rarely had occasion to consider the right of colleges and universities to engage in or to conduct commercial or semi-commercial activities in connection with their educational curriculums for there is a dearth of authority on the question.

In the case of Long v. Board of Trustees, 24 Ohio App. 261, 157 N.E. 395, a taxpayer's injunction suit was instituted against the Board of Trustees of Ohio State University to restrain them from establishing and maintaining a book store. For some years a private corporation had maintained a book store on the campus to sell books and supplies to students and professors. The Board of Trustees desired to operate a state book store and sell books and supplies to the students on practically a cost basis. They purchased the stock inventory of the private corporation, assumed a certain amount of indebtedness of the corporation and made additional purchases of merchandise amounting to several thousand dollars. In deciding the case favorably to the Board of Trustees, and dismissing the plaintiff's petition, the court, at N.E. l.c. 396, 397, said:

> "The constitutional question is a challenge to the right of the state, or an agency of the state, to engage in a commercial enterprise, where such enterprise is incidental

to or closely connected with a legitimate function of the state. This is a far-reaching proposition. Originally the governmental functions of the state were simple, and confined strictly to state functions; but as the state has advanced the government becomes more complex. In comparatively recent years the state has enlarged the scope of its enterprises so as to include many that have heretofore been considered as purely private enterprises. These are mostly, if not entirely, cases or instances where a commercial or private enterprise is carried on as accessory to some legitimate function of the state. This is especially true with respect to the universities of the state.

"The Ohio State University is by statute made a body corporate, and very broad general powers have been conferred upon it in respect to the adoption of by-laws, rules and regulations for the government of the University, and no express limitation is found as to the general scope of the powers and duties of the trustees as to the business to be carried on by the University.

"It would follow, necessarily, that all the enterprises undertaken by the University should be reasonably incidental to the main purpose, to wit, the maintenance of a University. The Ohio State University has for many years to a limited extent engaged in the furnishing of supplies to University students upon a cost basis. We see no reason why this is not a legitimate enterprise of the University, subject to such limitations as may be imposed by statute.

* * * * *

"The State University, by its board of trustees, has been given general authority by statute to maintain a University and to provide for the control and government thereof, and that authority would include an enterprise reasonably incidental to the main purpose of

> the University. There are no such limitations with respect to the board of trustees of the Ohio State University as to interfere with or prevent the incidental enterprise under consideration. * * *"

In the case of Davie v. Board of Regents of the University of California, 66 Cal. App. 693, 227 P. 243, a suit for damages was instituted against the University of California by a student charging personal injuries received, resulting from the alleged negligence of a physician who performed an operation on the plaintiff in the infirmary maintained by the university. Under the rules and regulations of the university, students enrolling, and thereafter semiannually, were required to pay a three dollar infirmary fee which entitled them to consultation and ordinary medical service. However, for surgical operations the cost thereof had to be borne by the patient. It was alleged that from said fees from all students the university realized considerable profits, and that maintaining the hospital by the Board of Regents of the university was something separate and apart from any educational function and was in fact a proprietary or private function of the university. The Appellate Court of California, in upholding the sustaining of a demurrer to the plaintiff's petition, said at P. 244, 246:

> "The main contention of appellant and the one chiefly relied upon for a reversal is that the complaint shows that defendant has undertaken to do something separate and apart from any educational functions, and in consequence thereof has become liable for the alleged tortious act. In support thereof it is argued that the defendant corporation, the Regents of the University of California, has a dual character - governmental and also proprietary and private - and when acting in the latter capacity its liabilities arising out of either contract or tort are the same as those of natural persons or private corporations, and he invokes the application in his favor of the rule established by the decisions of this state, that a municipal corporation is liable for torts of its agents committed in the performance of activities or functions purely private and proprietary in their nature.

> "Respondent, on the other hand, contends that the pleading shows on its face that the infirmary is maintained as a part of the University of California, operated only in connection with the educational functions thereof, and this being so, it is not liable for the torts of its agents committed in connection therewith. * * *
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> "We do not deem an extensive review of the authorities from the other states essential, and it would answer no useful purpose. Suffice it to say that they generally hold that the maintenance of a hospital by a municipality is a governmental function, and that in the conduct thereof the municipality is not liable for the tortious acts of its employees.
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> "Reading the complaint in the present action from its four corners, it conclusively appears therefrom that the infirmary in question is conducted by the defendant corporation for the exclusive use of the students, and that it is so conducted by it for the sole purpose of safeguarding and protecting the health of the student body. This being so, it is in no sense an organization for profit, and the imposition of the small fee does not convert this governmental function into a proprietary one. * * *
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> "This being so, the promotion and welfare of the students in this respect must be held to be the exercise of a duty involving governmental functions in the highest degree."

In Fanning v. University of Minnesota, 183 Minn. 222, 236 N.W. 217, a taxpayer's injunction suit was instituted to enjoin the erection of a dormitory. Part of the cost of building the dormitory was to be realized from earnings of the university press which did work not connected with the university. In ruling that this was proper the Supreme Court of Minnesota said, S.W. l.c. 220:

> "The university has a so-called university press intended primarily for its own publications and incidental university uses. It prints for the departments and charges them. This is a matter of accounting. It does work not connected with university purposes at not less than current rates. These earnings it puts in the dormitory fund. The earnings are incidental to the use of the plant for university purposes. The board has not established a printing plant in competition with private plants and does not contemplate doing so. It is only this, that earnings accrue for work conveniently done by its press, but wholly incidental to its main use for proper university purposes, and it chooses to use them in building a dormitory. There is no legal objection." (Emphasis ours.)

However, in State ex rel. v. Southern Junior College, 166 Tenn. 535, 64 S.W. (2d) 9, the Supreme Court of Tennessee upheld an injunction ordered by the lower court to enjoin the school from engaging in the commercial printing business. But we believe this case can be distinguished from the Fanning case. The junior college was a private institution operating under a charter and the powers conferred therein. The school, among other courses, offered one in printing, and maintained a printing shop. Two experienced printers were employed as foremen, and the students taking the printing course did the other work in the shop. The evidence also showed that 62½% of the work done was commercial printing, in direct competition with other private printers. It also appeared from the evidence that the total profit of the print shop for the year 1932 was applied to the general purposes of the school rather than to maintain and operate the print shop. Furthermore, the charter under which the college operated contained an expressed provision that it shall not possess the power to buy or sell products or engage in any kind of trading operation. In ruling on the case the court, at S.W. l.c. 10, said:

> "The chancellor expressed the opinion that there was obviously no express power conferred upon the defendant by its charter to operate a commercial printing shop, and that no such authority could be implied from the powers granted, since the carrying on of the business of commercial printing had no reasonable relation to the conduct

> of the school. The chancellor further thought that the charter denial of power on the part of the corporation 'to buy or sell products or engage in any kind of trading operation' was an express prohibition against the conduct of a commercial printing shop by it.
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> "These conclusions seem to us to be unavoidable. Instead of being an incident, the commercial feature absorbed the greater part of the activities of this printing shop. Without doubt the defendant school was entitled to own a printer's outfit and to use that outfit in giving practical instructions to the students in this art. The institution, however, had no authority to employ this equipment commercially in the printing trade, and the chancellor properly so held.
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> "We are satisfied that the defendant school here is not entitled to operate its printing shop as formerly until it obtains additional authority from the Legislature."

In the case of Batcheller v. Commonwealth ex rel. Rector and Visitors of University of Virginia, 176 Va. 109, 10 S.E. (2d) 529, the court was considering the authority of the Rector and Visitors of the University of Virginia to obtain a permit for the establishment, maintenance and operation of an airport. The school offered specific courses in the science of aeronautics, and the operation of the airport, if permitted, was to be done in connection with these courses. In holding that the university could operate the airport the Supreme Court of Virginia took judicial notice of the fact that similar institutions, as well as the university itself, were operating incidental and necessary enterprises. In ruling on the question the court, at S.E. 534, 535, said:

> "The pilots and operators who will own the aircraft which will be used for student flight instruction and the business transactions of these parties with the Authority will be commercial. This, however, is purely incidental to the main purpose of

the University in this connection, namely, the training of students in the science of aeronautics. * * *

* * * * *

"The University by Sec. 806 of the Code of 1919 is a corporation. It has all of the powers possessed by other corporations under the provisions of Chapter 147 of the Code. It has not only the powers expressly conferred upon it, but it also has the implied power to do whatever is reasonably necessary to effectuate the powers expressly granted. 13 Am. Jur., Corporations, Sec. 740.

"The University has for many years engaged in many necessary and incidental enterprises which might be termed commercial. Judge Fletcher, speaking for the commission, says:

"'The University in making application for the permit in question was not asking for the right to engage in commercial aviation, but only for the right to operate and conduct an airport for the landing and departure of civil aircraft engaged in commercial aviation, upon which there could be given instruction in student flying so necessary and essential to its course in aeronautics. The planes (not owned by the University) operating on such field will be engaged in commercial aviation, but that fact would not involve the University in commercial aviation - the most that can be said in reference to the granting of the permit is that the University will be authorized by the permit to own and operate an airport upon which aircraft engaged in commercial aviation may land or take off, but this would not involve it in a purely commercial or industrial enterprise, but, as has been shown, in an enterprise necessary to and incidental to the full and complete instruction in the course in aeronautics which it has established.

> "'The objection to the granting of the proposed airport on the ground that it involves the University of Virginia in a commercial activity, would seem not to be well founded in view of other incidental enterprises conducted by the University of Virginia and by institutions of the state similar to the University, the authority to conduct such enterprises having been generally accepted. There would seem to be but little distinction between the acquisition and operation of an airport of the nature of that applied for and of other activities conducted by the University of Virginia, of which, in so far as such facts do not definitely appear of record, the Commission takes judicial notice, as being matters of common knowledge, of public record, of government, etc., and which would seem under the authorities to be permissible. * * *'
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> "The University operates a large hospital, a farm, a dining hall, and many other necessary but incidental enterprises. The same is true of other State educational institutions.
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> "Upon the whole we are of opinion to affirm the order of the commission."

In Villyard v. Regents of University System of Georgia, 204 Ga. 517, 50 S.E. (2d) 313, suit was instituted to enjoin the defendants from operating a laundry and dry-cleaning business and furnishing services at reduced prices. Said business was being operated at one of the state colleges, and the customers were both students and the public, consisting mostly of general employees, faculty members, executive officers, and their respective families. In ruling on the question, and upholding the right to conduct said business, the Supreme Court of Georgia said, S.E. l.c. 315, 316:

> "The duties and powers of the Regents of the University System of Georgia are set forth in the Code, Secs. 32-101 et seq. They are untrammelled except by such restraints of law as are directly expressed, or necessarily implied. 'Under the powers granted, it becomes necessary * * * to look for limitations, rather than for authority to do specific acts. * * * Limited only by

their proper discretion and by the Constitution and law of this state, they may "exercise any power usually granted to such corporation." State v. Regents of the University System of Ga., 179 Ga. 210, 227, 175 S.E. 567, 576.

"Whether or not the operation of a laundry and dry-cleaning service by a State college at reduced prices for the benefit of students, faculty members, and persons connected with the institution, constitutes unfair competition, is a question of first impression in Georgia.

"In Davison-Nicholson Co. v. Pound, 147 Ga. 447(4b), 94 S.E. 560, this court, in dealing with the powers and duties granted by the legislature to the board of trustees of a State educational institution, held that 'the right to protect a public educational institution and its student body is equal to or superior to the right of one, as a merchant, desiring to deal with such institution, or its students'.

"In other jurisdictions, enterprises held to be reasonably related to the education, welfare, and health of student bodies, and therefore not to constitute unfair competition, include the following: cafeterias which were operated primarily for the student body, but which also served the faculty, and occasionally parents and visitors. Goodman v. School District, 10 Cir., 32 F. 2d 586, 63 A.L.R. 92 and annotation on page 100; Ralph v. Orleans Parish School Board, 158 La. 659(2), 104 So. 490; Hempel v. School District, 186 Wash. 684, 59 P. 2d 729; Bozeman v. Morrow, Tex. Civ. App., 34 S. W. 2d 654; rental of school property for opera, public dance, or community purpose, in competition with private business (Beard v. Board of Education of North Summit School Dist., 81 Utah 51, 16 P. 900; Young v. Board of Trustees of Broadwater County High School, 90 Mont. 576(8), 4 P. 2d 725; Merryman v. School District No. 16, 43 Wyo. 376, 5 P. 2d 267, 86 A.L.R. 1181); operating a store for the purpose of selling books and other student supplies to university students and professors upon a cost basis (Long v. Board of Trustees

> of Ohio State University, 24 Ohio App. 261(1), 157 N.E. 395); operating a university press for work done outside of that done for university, the earnings being incidental to its use for university purposes (Fanning v. University of Minnesota, 183 Minn. 222(5), 236 N.W. 217); maintenance of a recreation center. Dodge v. Jefferson County Board of Education, 298 Ky. 1(2), 181 S.W. (2d) 406; operation of a university infirmary Davie v. Board of Regents of University of California, 66 Cal. App. 693, 227 P. 243; manufacture and distribution of hog-cholera serum to farmers and swine-growers at cost (Fisher v. Board of Regents of the University of Nebraska, 108 Neb. 666, 673, 189 N.W. 161.
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> "Applying the above legal principles to the facts of the present case, if the operation of the laundry and dry-cleaning service, at a price less than the commercial rate for the benefit of those connected with the school, is lawful, it matters not that such enterprise is competitive with the plaintiffs' business. 'When free public schools were first established, they competed with and ultimately drove from the field numerous private schools, but those who conducted the private schools could not complain of unfair competition since the state had the right to establish the free school system. Universities and colleges established by the states are in direct competition with privately controlled colleges, but the competition is not unfair nor unlawful because the state has the power to establish its universities and colleges, and to support them by taxation.' Beard v. Board of Education of North Summit School Dist., 81 Utah 51, 56, 16 P. 2d 900, 902, supra."

In the Batcheller case the court pointed out that the university had for many years been engaged in incidental enterprises which might be termed "commercial." The same is also true regarding the University of Missouri.

To name some of the incidental commercial activities conducted at the university, there is maintained and operated a

university book store, a cafeteria, a dairy and dairy salesroom where all dairy products are sold, sales of poultry and eggs are made, in connection with horticulture there are orchards maintained and fruit therefrom is sold, in connection with field crops seeds of various kinds are sold, in connection with the instruction in forestry trees and shrubs are sold, in animal husbandry stock is sold, and, also, a university hospital and infirmary are maintained.

We have been informed by Federal Communication authorities that other state educational institutions maintain and operate radio broadcasting stations, and in one instance a television station is operated together with a broadcasting station. Some of these schools are: University of Oregon, Michigan State, University of Minnesota, University of Wisconsin, University of Florida, University of Illinois, University of North Dakota and University of South Dakota, and Iowa State at Ames, Iowa, has both a broadcasting and television station.

While the traditional idea regarding the function of the university is that of furnishing education to the students on the campus attending the school, there is also carried on an extensive adult education and extension service program for the purpose of bringing education to the people of Missouri throughout the state.

This program is a part of the educational facilities of the university carried out under its direction and control. Courses in many phases of education are conducted in different localities throughout the state. Catalogues are prepared by the university giving information regarding the adult education and extension service program.

The Legislature makes sizeable appropriations for the university to conduct this program. According to figures recently furnished by the university, an appropriation for adult education and extension service in the amount of $131,750 was made for the 1951-53 biennium.

Other than the adult education and extension service program, many extramural educational activities are conducted by the university, particularly in the field of agriculture.

In recent years the value of visual aid in education has been recognized, and today it is used extensively.

Mr. Lester E. Cox

Television might be considered in its infancy, but already it has been used for educational purposes, at least in the field of medicine. Unquestionably its extended use as a teaching technique in many phases of education is forthcoming.

At the time of the adoption and passage of the constitutional and statutory provisions relating to the University of Missouri it was undoubtedly intended that the university would grow and extend its educational advantages commensurate with the times. As said by the court in the Fanning case, supra, N.W. l.c. 219:

> " * * * The statute and Constitution intended a university which would grow and develop and undertake activities in the way of research and in other respects not then visualized in the dreams of its founders. * * *"

You have stated, however, if a television station is operated by the university it will be used to some extent for commercial purposes. By this we understand that some commercial time will be sold to advertisers. It is conceivable that the marketing of television advertising in itself would be a phase of the education in that field from which students taking the courses in television and broadcasting would benefit.

As long as the maintenance and operation of a television station would be for the principal purpose of education, any commercial activities incident to its educational purpose and use would not render its operation illegal. Such we believe is in accord with the authorities heretofore cited.

CONCLUSION

In the premises, it is the opinion of this department that the Board of Curators of the University of Missouri would be authorized to maintain and operate a television station in connection with the university in carrying out its educational purpose.

Respectfully submitted,

RICHARD F. THOMPSON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

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