

Decency case

For the fourth time in four cases—three of them decided in Utah courts—legislation designed to prohibit cable television systems from carrying "indecent" programming has been declared unconstitutional, a violation of the First Amendment. In the case decided last week, U.S. Senior District Judge Aldon J. Anderson in Salt Lake City suggested another approach for those concerned about some of the offerings on cable television: Let parents "assume an important responsibility for maintaining a decent society."

At issue in the Utah case was a new state statute, one fashioned with an eye to avoiding the constitutional problems that had done in an earlier state law as well as an ordinance adopted by Roy City, Utah. It purports to regulate cable material according to "the time, place, manner and context in which the material is presented," and thus meet a standard under which the Supreme Court has upheld restrictions on speech.

But Anderson said the law does not meet the standard because, although the attorney general said he would not enforce the law between midnight and 7 a.m., he would be enforcing it "by reference to its content." The judge also said the law is "unconstitutionally overbroad and vague, and void on its face." He also said that the state act is preempted by the new federal cable TV policy law—but only because he found the state regulations unconstitutional.

Anderson's decision is of a piece with the two other opinions by U.S. district courts in Utah on efforts to regulate "indecent" cable television programming, as well as with one by the U.S. Court of Appeals for the 11th Circuit, in Atlanta in a case involving a Miami ordinance (BROADCASTING, April 1). Anderson said that the new Utah statute is more restrictive than the precedent established by the Supreme Court in *Miller v. California* permits—and that the rationale used by the FCC to prohibit broadcasters from airing "indecent" programming, as in the *Pacifica* case, cannot be applied to cable television.

George Shapiro, counsel for HBO, one of the plaintiffs in the case, said of the opinion: "It's a confirmation of what the other courts that considered the matter have said."

The Decency Act, enacted in 1983, would prohibit the depiction by cable television systems of "a human sexual or excretory organ or function," "a state of undress so as to expose the human male or female genitals, pubic area, or buttocks . . .," "an ultimate sexual act . . .," or "masturbation, which the average person applying contemporary community standards for cable television or pay-for-viewing television programming would find is presented in a patently offensive way for the time, place, manner and context in which the material is presented." The constitutionality of the act was promptly challenged in court by several cable systems, followed by HBO and a group of sub-

scribers.

A key deficiency of the Decency Act, in Anderson's view, is its failure to meet "all three prongs of the *Miller* test." (That test was devised in 1973 to define obscenity, but, Anderson noted, the state act goes beyond obscenity in the effort to attempt to regulate indecency.) He noted the act would permit banning material that does not "appeal to the prurient interest in sex or that, taken as a whole, contains serious literary, artistic, political or scientific value." Those are the first and third prongs of the *Miller* decision. To fall within the second prong, material must depict sexual conduct in a patently offensive way. But under the Utah statute, material would be indecent if it is patently offensive for the time, place, manner and context shown, regardless of whether the material depicts sexual conduct.

By failing to meet the *Miller* test, Anderson said, the Decency Act does not protect the values meant to be protected. It goes too far. It is, he said, "an unconstitutional regulation of cable television."

The state sought to invoke the Supreme Court's decision in the *Pacifica* case, in which the FCC was held to have the authority to impose sanctions on stations broadcasting "offensive" and "shocking" language at a time of day when children could be exposed to it. But Anderson—as have other judges in cases where that case was cited to support regulation of cable programming—said the decision is limited to the facts in the case. And, perhaps more important, he said "the fundamental differences between the broadcast medium and cable television require that *Pacifica* not be extended to cable television."

Anderson noted that the "scarcity" rationale which has been used to support government regulation of the content of broadcasting does not apply to cable television, a different medium. What's more, he agreed with the arguments made by the plaintiffs and the commission, which filed a friend-of-the-court brief, that cable television, unlike the FM station in the *Pacifica* case, "is not an uninvited intruder." A subscriber must initiate the service. Anderson also said the restrictions are so vague as to infringe upon protected speech. Because the meaning of the words of the restriction are unclear, Anderson said, cable operators are left without notice of what material can or cannot be shown. "Thus, operators may be deterred from distributing protected material because they are uncertain whether the showing of such material will subject them" to the penalties that are provided for in the act.

As for his personal suggestion, Anderson said: "Following Supreme Court precedent, today's ruling delineates an area in which private individuals, particularly parents, must assume an important responsibility for maintaining a decent society. The First Amendment," he added, quoting from an earlier case, puts "the decision as to what views shall be voiced largely into the hands of each of us . . ."

Cable sales aid: the VCR

Hoping to capitalize on the public's growing interest in home videocassette recorders, Jones Intercable announced last week plans to test market a VCR-cable package in four Jones systems beginning May 1.

During the two-month trial, Jones will offer consumers a General Electric VCR along with basic and two pay cable services for \$44.95 a month. Consumers will have to sign a two-year contract for the package, but, at the end of the two years, they will own the VCR.

If all goes well during the trial, said Glenn Jones, chief executive officer and president, the MSO will offer the package in its more than 50 other systems across the country. The systems serve 460,000 subscribers.

"We see a real synergy between VCR's and cable," said Jones. Cable can supply the programming to "fill up" the VCR, he said. Research has shown that VCR's are used primarily to time-shift—record and play back cablecast or broadcast programming at a more convenient time, he said.

The trial will be conducted in Jefferson county, Colo.; Oxnard, Calif., and Cedarburg-Grafton and Waupaca, both Wisconsin. The systems, which represent a cross section of Jones' cable systems, serve more than 50,000 subscribers, but pass nearly 150,000 homes, Jones said.

Jones hopes the marketing scheme will generate revenues by bringing aboard new basic and pay subscribers and by improving pay subscription retention through the two-year contracts.

The MSO, Jones said, will also make money off the sale of the VCR's. Around 15% of Jones Intercable's subscribers are expected to purchase VCR's in the coming year, Jones said. "So why shouldn't they buy them from us?"

The cable company will sell the GE Model 6010, which features two-event, 14-day programability and wireless remote control and, according to Jones Intercable, has a "normal retail price" of \$499. Jones would not reveal what the MSO is paying for the units, but a major Washington retailer said the wholesale price would be between \$250 and \$300. The retailer sells the earlier, similarly equipped GE Model 5010 for \$439.

In the largest of the test systems, Oxnard, consumers will be asked to pay a premium of around \$12 a month to purchase the VCR or nearly \$300 over the two-year contract period. At the moment, Oxnard subscribers are paying about \$33 a month to receive basic service along with HBO and Cinemax.

The three pay combinations that will be available with the VCR and the basic service in Oxnard and the other three markets: HBO and Cinemax; Showtime and The Movie Channel, and HBO or Showtime and the Disney Channel.

Jones said that the cable company would deem the trial a success and offer the VCR-cable package on a national basis if 2,000 or