RECENT CASES

ASCAP and BMI blanket licenses for local TV stations violate antitrust laws, Federal District Court rules

The blanket license policies of ASCAP and BMI have been subjected to intense antitrust scrutiny time and again, most recently in the CBS case (ELR 1:1:1 and 1:24:1) and in BMI v. Moor-Law (ELR 3:18:1). In CBS, the courts approved the use of blanket licenses by ASCAP and BMI in connection with their dealings with television networks. And in Moor-Law, the courts approved blanket licensing of nightclubs, restaurants and similar establishments where music is performed live. Moreover, in FEL Publications v. Catholic Bishop, a Federal Court of Appeals has overturned a District

Court ruling that a religious music publisher's blanket license violated the antitrust laws. (See following story.) Thus, in a wide variety of contexts, the blanket license has passed antitrust muster on several occasions.

In one context, however, it has not - at least so far. Judge Gagliardi of the Federal District Court in New York City has just ruled that the blanket licenses used by ASCAP and BMI in their dealings with local television stations are not legal. According to Judge Gagliardi, the blanket licenses that ASCAP and BMI have granted to local stations for some 40 years restrain trade in violation of the Sherman Act for three reasons: blanket licenses prevent price competition between music composers; they require local stations to pay for licenses to compositions they do not want in order to obtain licenses for compositions they do want; and local stations cannot reduce their music costs by reducing the amount of music they broadcast. (Blanket license fees are based on stations' revenues, not on the amount or popularity of the music they broadcast.)

Judge Gagliardi acknowledged that blanket licenses have "recognized virtues" and "efficiencies" which make them pro-competitive and even essential for certain kinds of users. Nightclubs and restaurants that cannot predict their music needs were specifically mentioned. Local television stations - which were defined as all television stations except the 15 that are owned by the networks - do not benefit from these "efficiencies," however, according to Judge Gagliardi. He expressed the view that local stations are almost always able to predict their music needs, because most of the music they broadcast is prerecorded on syndicated programming acquired by stations from program distributors.

In the absence of blanket licenses, Judge Gagliardi concluded that television producers would acquire music performance rights from composers at the very same time producers acquire synchronization rights. In that fashion, producers could "pass along" performing rights to the stations that broadcast their programs. Indeed, the availability of "source licensing" of this sort was precisely the reason the Court of Appeals concluded in the CBS case that blanket licensing of the networks was not a restraint of trade at all.

Judge Gagliardi distinguished the CBS case from this one on the grounds that the networks have the bargaining power necessary to obtain source licenses from producers. Local television stations do not have such power, he ruled, and thus will not be able to obtain source licenses unless blanket licenses are first eliminated. The validity of this distinction is certain to be a major issue in the appeal that ASCAP and BMI immediately announced they would file.

Buffalo Broadcasting Company v. American Society of Composers, Authors and Publishers, Case No. 78 Civ. 5670 (SDNY, August 19, 1982) [ELR 4:9:1]

Religious music publisher's blanket license for copies made by Catholic parishes does not violate antitrust laws

The Catholic Bishop of Chicago has been locked for several years in a copyright infringement suit with F.E.L. Publications, the publisher of the songs that are included in most of the hymnals used in that city's parishes. The Roman Catholic Church has never developed a national hymnal, and thus most parishes use custom-made ones. Until 1972, FEL licensed parishes to copy its songs in exchange for a royalty of 2 cents per song per copy. However, widespread infringement problems lead FEL to adopt an "Annual Copying License" in that year. This license was made available at an annual fee of $100, and it authorized parishes to make unlimited copies of any of FEL'S 1400 songs. In addition, FEL offers One Time Usage Licenses (which permit copies of FEL songs to be made for use on a single occasion for a fee of 2 cents per copy per song). And FEL sells sheet music, song books, and congregation cards.

Differences between FEL and the Catholic parishes of Chicago resulted in a copyright infringement suit being filed by FEL in 1976. Some time thereafter, FEL and the Catholic Bishop both moved for summary judgment. A Federal District Court granted the Bishop's motion, ruling that FEL's Annual Copying License was a tying agreement that violated the S herman Act and was an unauthorized attempt to license not-for-profit performances. (ELR 3:1:3)

The Court of Appeals has reversed, however. The appellate court ruled that the Annual Copying License is not a tying contract at all, but instead is a blanket license of the sort involved in the CBS case (ELR 1:1:1 and 1:24:1). The court ruled that FEL's annual license has many pro-competitive redeeming features which preclude declaring it illegal per se, as the District Court had done. It is a "reasonable and flexible tool," said the Appeals Court, for dealing with problems in the liturgical market. The court noted that a copyright is worthless unless its owner has the means of enforcing its rights. And the annual license takes into account the number of churches, the volume of compositions, the impracticability of negotiating individual licenses and the "ephemeral nature of publication by a church." It also affords efficiencies, because individual transactions would be expensive and would require individual monitoring.

Furthermore, the court held that under the rule of reason, the annual license is not illegal, because it has no anti-competitive effects. This is so, said the court, because FEL affords parishes alternative opportunities to acquire rights to individual songs. These alternatives are realistically available, the court held, even though the annual license is the only one that enables parishes to create their own custom hymnals. Neither the Copyright Act nor the Sherman Act guarantee parishes the right to do so.

The court also ruled that the annual license was not an attempt by FEL to license non-profit performances. The annual license authorizes copying. Since the license is not an outright sale, FEL was within its rights in limiting the copying license to a period of one year, after which the license has to be renewed or the copies destroyed.

The Catholic Bishop has filed a petition for certiorari with the United States Supreme Court.

F.E.L. Publications v. Catholic Bishop of Chicago, CCH Copyright Law Reports, para. 25,376 (7th Cir. 1982) [ELR 4:9:2]

Trial court ruling invalidating Pennsylvania's blind-bidding statute is reversed on appeal

A Federal Court of Appeals in Pennsylvania has tarnished the Grail by reversing a trial court ruling which found that the state's Feature Motion Picture Fair Business Practices Law was unconstitutional (ELR 3:9:1).

The Act forbids all blind-bidding, limits advances and certain guarantees, and restricts the duration of exclusive first runs. The trial court ruled that the Act violated the First and Fourteenth Amendments because the Act created, on its face, delays in licensing films for exhibition, and might inhibit the production of films by changing the financial structure of the industry. After screening this argument, the Court of Appeals noted that the Act does not directly affect speech or content, but rather is "an economic statute designed to regulate motion pictures as commodities."

A similar statutory scheme has been upheld in Ohio in the case of Allied Artists Pictures Corp. v. Rhodes, 496 F.Supp. 408 (S.D. Ohio 1980) (ELR 2:7:l, affirmed in relevant part, ELR 4:4:3). The Ohio Act was found to be content-neutral trade practice legislation which served a legitimate governmental interest.

In the Pennsylvania case, the trial court granted summary judgment and thus precluded an evaluation of the impact of the Act on First Amendment values and of the state's asserted concerns. The Court of Appeals reversed for this reason.

The Court of Appeals also reversed the trial court's ruling that the Act conflicted on its face with the Copyright Act and therefore was unconstitutional under the Supremacy Clause. The Ohio court had reviewed extensive argument on this question and had concluded that the regulation of film licensing did not interfere with the exercise of federally-created rights by the owners of copyrighted films. Whether the restrictions contained in the Pennsylvania Act interfere with the objectives of the Copyright Act must be carefully reviewed by the trial court on remand, stated the Court of Appeals.

Associated Film Distribution Corporation v. Thornburgh, Case Nos. 81-2706, 81-2707 and 81-2708 (3d. Cir., July 20, 1982) [ELR 4:9:2]

Stravinsky's archives are to be sold to UCLA even though the University of Texas offered to pay $500,000 more than UCLA

In view of the dissonance between the two trustees of a trust established under the will of Igor Stravinsky, a New York Surrogate has determined that Stravinsky's archives and manuscripts will be sold to UCLA.

The historic materials, called a "national treasure" by Surrogate Millard E. Midonick, are owned by a corporation in which 50% of the stock is held by Stravinsky's widow and 50% by the trust. UCLA and the University of Texas both offered to purchase the stock of the corporation. UCLA offered $1.5 million payable over a 45-month period; this was at least $500,000 less than the University of Texas' offer of about $2 million payable immediately in cash.

After a hearing, Surrogate Midonick noted that each university would provide similar and suitable "housing, guardianship, restoration, curatorial and cataloging services" for the archives. However, Professor Edward Hugo Roesner, a musicologist designated as an independent expert by the court, was of the opinion that UCLA's distinguished and extraordinarily strong music department would be more in tune with the surrogate's stated objective of obtaining "optimum enhancement" of the reputation of Stravinsky in order to produce larger royalties on the assets owned by all of the individual beneficiaries as well as the trust. For example, UCLA proposed to publish a complete edition of Stravinsky's works. This project would be enormously helpful to stimulate scholarship, according to Roesner, and was the strongest aspect of either university's proposal. Roesner also emphasized that "...you cannot get Away from (the fact) that Stravinsky did live there (Los

Angeles) regardless of what his frosty relationships with the university ... may or may not have been, and given the general association of the man with the area, this would seem ... to be an appropriate and fitting place for them to go......

Surrogate Midonick therefore authorized and directed the trustees to sell the archives and manuscripts to UCLA.

Estate of Igor Stravinsky, Surrogate's Court, New York Law Journal (May 17, 1982) [ELR 4:9:3]

Society of Authors' Representatives agrees to Consent Judgment barring it from requiring members to adhere to suggested fees and ending restriction on member advertising

The Society of Authors' Representatives has agreed to write an end to a chapter of its past during which the Society allegedly engaged in a conspiracy to violate section 1 of the Sherman Act.

A civil complaint filed by the Department of Justice on July 8, 1982 charged that beginning in about 1976, the SAR combined with certain unnamed coconspirators, including members and officers of the SAR, to fix the commissions and other fees members of the SAR charge for their services, to prohibit advertising by members of the SAR, and to prohibit members of the SAR from soliciting each others' clients. The complaint further alleged that as a result of this combination and conspiracy, "competition among literary agencies has been restrained and authors seeking and using the services of literary agencies have been deprived of the benefits of free and open competition."

The SAR is an association of approximately 54 literary agencies which represent writers of books, magazine articles, plays, films and television productions. The agencies negotiate the sale of rights to an author's work and collect money due to the author. In 1966, the SAR adopted a Code of Ethics which recommended that member agencies charge specified rates for certain services, normally 10%. A Society pamphlet stated that certain rates were "standard" or "customary" and identified "maximum" rates. Member agencies have discussed their rates with each other, and the SAR does have a Committee on Ethics and Practices to enforce the requirements in the Rules, the Code of Ethics and a 1976 Canon of Ethics. Hownot enforced the allegedly objectionable regulations for years. Nevertheless, the Consent Judgment, which will be effective for 10 years from the date of its entry by a Federal District Court in New York City, will prevent the SAR from fixing or "recommending adherence to any rates." The Society still may require that its members charge no fees for reading and evaluating manuscripts, and may prohibit its members from engaging in false or misleading advertising and from tortiously interfering with contracts between members and clients. In agreeing to the entry of the Consent Judgment, the SAR did not acknowledge that it had engaged in any illegal conduct.

A Competitive Impact Statement was filed with the proposed Consent Judgment Comments may be submitted to the Department of Justice by September 8, 1982. Those comments will be considered by the Government and the court, and the proposed Consent Judgment will be entered sometime thereafter.

United States of America v. Society of Authors' Representatives, Case No. 82 Civ. 4445 (S.D.N.Y. 1982) [ELR 4:9:3]

Court reduces damages awarded to "Yazoo" Smith in antitrust suit against Washington Redskins

James McCoy "Yazoo" Smith won himself a place in NFL history with an antitrust lawsuit he filed against the Washington Redskins in 1970. For a time, it appeared as though he had won himself a rather substantial sum of money as well. But a Federal District Court in Washington, D.C., has reduced a treble damage judgment previously entered in Smith's favor from $276,600 to a mere $12,000. The legal principle Smith fought for remains, however. And for that, it is fair to say his fellow players owe him a debt of gratitude.

The story of this new landmark case begins in 1968 when Smith graduated from the University of Oregon as an All-American and was drafted by the Redskins in the first round. After several months of negotiations, during which Smith was represented by an agent, Smith signed a one-year NFL Standard Player Contract with the Redskins calling for a total of $50,000 consisting of a $23,000 "signing bonus," an additional $5,000 if he made the team, and a salary of $22,000. Smith did make the team and performed well until he suffered a serious neck injury in the final game of the 1968 season, an injury that ended his professional football career.

Two years later, Smith filed an antitrust suit against the Redskins in which he alleged that the NFL player draft, as it existed in 1968, constituted an illegal "group boycott" Smith contended that had it not been for the draft, he would have negotiated a longer, more lucrative contract which would have contained "injury protection" provisions, that is, provisions guaranteeing him payment for the full term of the longer contract even in the event of a disabling injury. The case went to trial in 1976 and

Smith won. A Federal District Court in Washington, D.C., held that the NFL draft, as it existed in 1968, did constitute an illegal group boycott. The court ruled that the boycott was illegal per se under the antitrust laws, but that even if the "pe se rule" were inapplicable, the draft was an unreasonable restraint of trade because it was "significantly more restrictive than necessary," and thus was illegal under the "rule of reason" as well. The District Court also agreed with Smith that but for the draft he would have negotiated a three-year "fully guaranteed" contract worth $92,200 more than Smith had actually been paid by the Redskins, which amount the court trebled to $276,600 as provided by the Sherman Act Smith v. Pro-Football, Inc., 420 F.Supp. 738 (D.D.C. 1976)

Smith's victory was a significant factor in enabling the NFL Players Association to negotiate a then-new collective bargaining agreement which substantially modified

NFL draft procedures. Thus the draft now used by the NFL is not the same as the one Smith successfully challenged.

The Redskins appealed Smith's victory with some, though not complete, success. The ruling of the Court of Appeals was what some would call a "split decision." On the legal issue of whether the old NFL draft violated the antitrust laws, the appellate court agreed that it did. Thus, Smith's basic win was preserved, but on grounds less sweeping than those used by the District Court. The Court of Appeals ruled that the draft was not illegal "per se" and should not have been tested by that strict standard. Instead, the Court of Appeals held that the draft should have been tested by the "rule of reason," though it agreed that even under that more lenient standard, the old NFL draft was illegal.

On the damage issue, the Redskins enjoyed a more complete victory. The appellate court held that there simply was no evidence that absent the draft, Smith would have been able to negotiate a contract containing a guarantee of three years' full salary, regardless of injury. Accordingly, the Court of Appeals sent the case back to the District Court for recomputation of damages. Smith v. Pro-Football Inc., 593 F.2d 1173 (D.C. Cir. 1979) (ELR 1:7:4)

The District Court has now made that recomputation. This time, the court determined that had there been no draft, Smith would have been able to negotiate a contract calling for a total of $54,000 for one year, instead of the $50,000 he in fact earned. The court trebled the $4,000 difference and has awarded Smith the resulting $12,000. In so ruling, the court rejected a Redskin contention that it was entitled to credit for $19,800 it paid to Smith as workers' compensation. The court decided that such a credit would have given the Redskins an unjust "double benefit" for that payment, because it would have reduced the Redskins' workers' compensation liability and its antitrust liability at the same time.

The court also rejected certain contentions made by Smith in the hopes of preserving his six-figure judgment Smith had argued that in the absence of the draft, he would have negotiated a three-year deal with the Redskins, and that if so, the Redskins would have had him sign a series of three separate NFL Standard Player Contract forms. According to Smith, the Redskins use of multiple contract forms would have "inadvertently" guaranteed him payment for the entire three years, regardless of his injury. In support of this contention, Smith relied on Chuy v. Philadelphia Eagles, 595 F.2d 1265 (3d Cir. 1979) (ELR 1:11:4), in which a jury did construe a series of contracts to provide just such a guarantee. In this case, however, the court ruled that even if the Redskins had had Smith sign a series of contracts, provisions used by the Redskins, which were not used by the Eagles in the Chuy case, made it plain that the Redskins would have been obligated to pay Smith only for the balance of the particular season in which his injury actually occurred. The court also rejected the contention that the salaries paid to "glamour rookies" during the 1965-1966 bidding war between the NFL and the AFL indicated the amount Smith would have received had there been no draft. And it rejected Smith's argument that the court's conclusion that he would have been paid only $54,000 failed to take into consideration certain facts which Smith felt indicated he really would have been paid more. The court even rejected Smith's request for pre-judgment interest.

Thus, insofar as Smith personally is concerned, the case that began with such a bang has ended with little more than a whimper.

Smith v. Pro-Football, Inc., 528 F.Supp. 1266 (D.D.C. 1981) [ELR 4:9:4]

IATSE roster system was not used to discriminate against the hiring of women, rules Federal District Court

Entertainment industry unions, such as Local 659 of the International Alliance of Theatrical Stage Employees, commonly group their members according to an experience roster. When producers who are signatories to a collective bargaining agreement with Local 659 hire a union member, they must hire from the roster and must give preference in hiring to those individuals in the "highest" group, that is, those members with the greatest seniority.

Laurel D. Moore, who is a still photographer, applied for roster placement twice. Her application was not accepted on the grounds that she did not meet the placement requirement that she have worked for a single signatory employer for a total of 30 days within a one year period or for two or more signatory employers for a total of 90 days within a one year period.

Moore claimed that her failure to obtain employment in the film industry was the result of employment practices in violation of Title VII, in particular, that Local 659 had discriminated against women in the application of the roster and that the roster operated "to freeze the status quo of prior discrimination."

Summary judgment has been granted to Local 659 by Judge Malcolm M. Lucas of the Federal District Court in Los Angeles. It was found that Moore had presented no evidence that the 30/90 day work requirement was applied discriminatorily. During the past several years, two of the four still photographers placed on Local 659's roster were women.

Local 659 also contended that its roster was a bona fide seniority system and therefore "protected" from charges, under section 703(h) of Title VII, that it is an unlawful employment practice. The Supreme Court has noted that the distinguishing features of a seniority system include the improvement of employment rights and benefits based on some measure of time served in employment. The employment preferences enjoyed by members of Local 659's "Group 1" are based on the length of time a member has been in Groups 1 and 2. Moore did not show that the roster was established or has been maintained for a discriminatory purpose. A long-time Local member testified that the roster was instituted in 1949 as a means to control employment qualifications.

Judge Lucas concluded that the issue of whether the roster is a bona fide seniority system was not shown to be a disputed issue of fact. He therefore granted the Local's motion for summary judgment.

Moore v. International Alliance of Theatrical Stage Employees Local 659, Case No. CV-81-4017 (C.D. Ca., July 20, 1982) [ELR 4:9:5]

Ban on editorializing by broadcasters that receive funds from the Corporation for Public Broadcasting violates the First Amendment, Federal District Court rules

The Pacifica Foundation has prevailed in its action challenging the constitutionality of a federal ban on editorializing by noncommercial educational television and radio stations that receive funds from the Corporation for Public Broadcasting (CPB). Pacifica, which owns and operates six radio stations, and the League of Women Voters asserted that section 399 of the Public Broadcasting Act of 1967 violates both the First Amendment and the Equal Protection Clause of the Fifth Amendment. Judge Malcolm M. Lucas agreed that the ban on editorializing "limits the means by which certain noncommercial licensees may participate in the debate of issues of public interest and importance...." Judge Lucas acknowledged that First Amendment protection for the broadcast media, as distinguished from other means of communication, has been reduced in certain circumstances, such as the broadcasting of patently offensive material. But with respect to a ban on editorials, the application of a less stringent First Amendment standard is not justified, Judge Lucas ruled.

The government contended that section 399 served a compelling governmental interest in preventing funded noncommercial broadcasters from becoming propaganda organs for the government and in preventing government funding from interfering with the balanced presentation of opinion by such stations. However, the fear of governmental manipulation was speculative and unwarranted, in the court's view, for several reasons. First, noncommercial stations receive funding from a variety of sources. In 1977, CPB financing constituted a "modest" 25% of the support received by noncommercial broadcasters. No broadcaster receives more than approximately 33% of its funds through CPB grants, and most stations receive substantially less than 25% of their revenue from CPB. Further, the CPB was established as an independent, non-profit, private corporation in order to insulate noncommercial programming activity from political control. The CPB does not operate any stations and does not produce programmings its funding decisions are based on "objective, nondiscretionary" criteria. An additional safeguard against government interference is provided by the fairness doctrine. The doctrine bars any broadcast licensee from presenting unbalanced programming. These factors serve to lessen the possibility that noncommercial broadcasters will be transformed into government propaganda organs.

Summary judgment therefore was granted to Pacifica on the basis that the restrictions of section 399 are inconsistent with the guarantees of the First Amendment and are null and void. The court, in the absence of sufficient evidence, did not rule on Pacifica's claim that the statute's failure to prohibit editorials by stations receiving federal funds from sources other than CPB, and thereby potentially subject to government supervision of programming, was a violation of Equal Protection guarantees.

During the lengthy' procedural development of the action, Pacifica dropped its original challenge to the constitutionality of a portion of section 399 which prohibits all public broadcasting stations from supporting or opposing political candidates.

League of Women Voters of California v. Federal Communications Commission, Case No. CV-79-1562 (C.D.Cal., Aug. 6, 1982) [ELR 4:9:5]

Distribution of a magazine to even just one newsstand or other retail outlet, if "substantial," is sufficient to constitute "the first general distribution of the publication to the public" for statute of limitations purposes in libel and privacy cases

The April 1980 issue of Los Angeles Magazine contained an article entitled "Anatomy of a Highrise Murder." The article was about the death of a Santa Monica teenager in December of 1978. One of the subjects of the piece, Bernard Sabbath Strick, and his parents sued the article's publisher and authors for libel. Their initial complaint was filed in California Superior Court on March 27,1981. An amended complaint was filed on November 24, 1981, in which they added claims for deceit and breach of contract.

On November 17, 1981, the defendants filed a motion for summary judgment on the ground that the plaintiffs' libel claims were barred by the one-year statute of limitations period found in section 340(3) of the California Code of Civil Procedure. Under section 340(3), libel actions must be commenced within one year of the "publication" of the allegedly defamatory language. The defendants argued that the "publication" of the April

1980 issue of Los Angeles Magazine occurred on March 21, 1980, the date some 95,000 copies of that issue were delivered to the post for mailing to subscribers. That delivery was one year and six days prior to the date the plaintiffs filed suit.

Although the date of mailing a periodical to subscribers had been recognized as the publication date in other jurisdictions, the court denied the defendants' summary judgment motion and stated that evidence of newsstand sales rather than mailings is required to establish "publication" in California for purposes of the statute of limitations. Since the defendants had not addressed the issue of newsstand sales and had not presented any evidence on that point, the court's ruling was made without prejudice.

The defendants filed a second motion for summary judgment on May 7, 1982. With this second motion they provided declarations of managerial employees of local newspaper and magazine delivery services. Their testimony established that thousands of copies of the April 1980 issue of Los Angeles Magazine were delivered to newsstands and other retail outlets on March 26, 1980, Defendants also provided the declaration of the owner of one of the larger newsstands in Los Angeles and his testimony established not only that his newsstand received 186 copies of that issue on the morning of March 26, 1980, but also that those copies were placed on the shelves and available to the public by 9:30 that morning.

In opposition to this second motion, the plaintiffs presented evidence by declaration testimony which established that some newsstands or other retail outlets did not receive copies of the April 1980 issue of Los Angeles Magazine until after March 27,1980. The plaintiffs argued that "publication" did not occur until all of the newsstands and retail outlets had received copies of the issue in question and had made them available to the public.

The court granted the defendants' second motion for summary judgment, finding that "publication" had occurred on March 26,1980, which was one year and one day prior to the plaintiffs' filing suit. The court felt that the defendants' evidence establishing that some copies of the magazine had been distributed to some newsstands on March 26, 1980 was a sufficient showing of publication to commence the limitations period. Judge Bruce Geernaert, who also heard the first motion, indicated that defendants need not show that all copies of a magazine were distributed to all newsstands or other outlets by a certain date. He found that "publication" occurs when distribution of some of the magazines to some retail outlets is "substantial." Although he did not define "substantial," he indicated that it is dependent on the facts of the particular situation, and he stated that distribution of some copies to only one newsstand could be "substantial" if that is the major newsstand in a given locality.

The court stated that such a flexible standard is needed because it is impossible to make a reasonable determination of the exact amount of distribution sufficient to activate the limitations period in any given situation.

The court seemed to rely on the rule established in Belli v. Roberts Brothers Furs, 240 Cal.App.2d 284 (1966), that it is the first distribution of a periodical to the public which is critical in commencing the statute of limitations.

Strick v. Los Angeles Magazine Co., Inc., LASC Case No. C 361 283 (August 25, 1982) [ELR 4:9:6]

Georgia statute regulating the distribution of obscene materials is declared unconstitutional

A Federal District Court in Georgia has declared unconstitutional a Georgia statute regulating the sale or display of materials containing descriptions or depictions of "illicit sex or sexual immorality or which are lewd, lascivious or indecent." The Act was found overbroad in that many best-selling novels, classic plays and art history texts might be categorized as prohibited materials.

The Act also was flawed by its vagueness. Vague statutes may result in the arbitrary enforcement of laws that fail to give officials notice of what conduct is prohibited. There was testimony that it was difficult to determine which materials, under the Act, would be deemed "lewd, lascivious, or indecent," or would "provoke or arouse lust or passion."

Further, even when the state seeks to protect minors from sexually explicit pornography, certain standards must be applied in order to assure that the dissemination of material protected by the First Amendment will not be suppressed. Georgia's Act did not contain guidelines such as those set forth in Miller v. California, 413 U.S. 15 (1973).

The Act also infringed impermissibly on the protected rights of adults, stated the court The "public display" provision in the statute would prevent perusal by, and limit sales to, adults of non-obscene, protected materials.

As in the California case of American Booksellers Association, Inc. v. Superior Court of Los Angeles (ELR 4:4:7), which involved similar restrictive municipal ordinances, the court restrained further enforcement of the Act.

American Booksellers Association, Inc. v. McAuliffe, 533 F.Supp. 50 (N.D.Ga. 1981) [ELR 4:9:7]

Briefly Noted:

Privacy.

During a broadcast of WNBC's "Live at Five" television news program, reporter Chauncy Howell reviewed new spring hairstyles. The report-was illustrated by photographs taken at the Pierre Michel salon. One of the women appearing in the photographs brought an action against NBC and the salon in which she sought $600,000 in damages for the allegedly unauthorized use of her likeness to advertise and promote the salon in violation of New York Civil Rights Law sections 50 and 51.

NBC's motion for summary dismissal of the complaint has been granted. A New York appellate court determined that the photographs were related to fashion news, "a matter of legitimate public interest to the viewers of 'Live at Five.'"

Gough v. National Broadcasting Corp., (N.Y. App., New York Law Journal, Sept. 1, 1982) [ELR 4:9:7]

Broadcast Regulation.

The Federal Communications Commission properly exercised its authority and discretion when it granted short-term license renewals for two radio stations accused of employment discrimination and of neglecting their public affairs commitments, the Federal Court of Appeals in Washington, D.C., has held. Renewal of the stations' licenses had been contested by local organizations. In response to issues raised by these organizations, the FCC held a hearing which led an administrative law judge to conclude that the stations' employment practices during the terms of their licenses "could not have been much poorer." After the FCC ordered a hearing, however, the stations' affirmative action efforts "notably intensified." The judge also found that although the stations' public affairs responsibilities had not been entirely fulfilled, they had made good faith efforts to do so. Based on these findings, the judge recommended a one-year renewal, and the FCC adopted that recommendation. The groups appealed, arguing primarily that the FCC had erred in considering the stations' post-term employment records. The Court of Appeals held that post-term employment statistics may not be considered when a station has been guilty of intentional discrimination during its license term. Here, however, intentional discrimination had not been proved. Under such circumstances, the court ruled that post-term employment statistics may be considered and used as a basis for prospective administrative sanctions such as short-term renewals. The court also ruled that the FCC has the "widest possible latitude" in selecting sanctions for stations' failure to fulfill their public affairs responsibilities.

Metro-Act of Rochester v. Federal Communications Commission, 670 F.2d 202 (D.C. Cir. 1981) [ELR 4:9:7]

DEPARTMENTS

In the Law Reviews:

The first issue of Volume 4 of Comm/Ent has just been published by Hastings College of Law, 200 McAllister Street, San Francisco, California 94102. It contains the following articles.

The First Amendment and the Cable Television Operator: An Unprotective Shield Against Public Access Requirements by Michael J. Meyerson, 4 Comm/Ent 1 (1981)

The Equal Time and Fairness Doctrines: Outdated or Crucial to American Politics in the 1980's by Howard Downs and Karen Karpen, 4 Comm/Ent 67 (1981)

Abuse of the Equal Opportunities Doctrine by Presidential Incumbents by Martine Safran, 4 Comm/Ent 91 (1981)

Child Pornography, the First Amendment, and the Media: The Constitutionality of Super-Obscenity Laws by James W. Moore, 4 Comm/Ent 115 (1981)

Pirates Walk the Plank: The Unauthorized Interception of Pay Television Transmissions by John H. Works, Jr., 4 Comm/Ent 141 (1981)

The most recent issue of Communications and The Law, published by Heckler Publishing, 520 Riverside Avenue, Westport, CT 06880, contains excerpts from the New York Fair Trial Free Press Conference held in May 1981, as well as the following articles which are excerpts from remarks delivered at the International Communications Workshop in Washington, D.C., in November 1981, and a forum entitled "Problems Unique to the Entertainment Personality" sponsored by the Association of the Bar of the City of New York.

On Government Control of the Media by Corydon B. Dunham, 4/3 Communications and the Law 19 (1982)

Problems Unique to the Entertainment Personality by Elizabeth Elster Granville, 4/3 Communications and the Law 23 (1982)

Copyright Considerations by William M. Borchard, 4/3 Communications and the Law 25 (1982)
Income Tax Planning for Entertainers by Bruce D. Haims, 4/3 Communications and the Law 33 (1982)

Estate Planning for Entertainers by David W. Schaff, 4/3 Communications and the Law 45 (1982)
[ELR 4:9:8]