RECENT CASES

Record retailer's claim that major record distributors violated Sherman Act by conspiring with chain stores is rejected; but discriminatory pricing claim under Robinson-Patman Act is remanded for determination as to whether records warehoused in California remained in the flow of interstate commerce

Charles and Jane Zoslaw may have thought they were marching to the beat of a different drum in 1965 when they opened the Marin Music Centre, a Mill Valley retail record store. But in the early 1970s, there was a dramatic increase in the number of record retailers who chose to join the band. Ultimately, in 1977, the Zoslaws' store went out of business, but not without leaving a legacy - a lawsuit filed in 1975 against several record distributors, including Warner/Elektra/Atlantic Corporation, MCA Distributing Corporation and Polygram Distribution, Inc., and against Tower Records, a record and tape retailer.

The Zoslaw's action alleged that the distributors had violated section 2(a) of the Robinson-Patman Act by selling records and tapes to retail chain stores, such as Tower, at lower prices than those offered to single stores. The Zoslaws also alleged that other sections of the Act were violated by distributor discrimination in favor of the retail chains in granting promotional allowances and other special services.

Under section 2(a) of the Robinson-Patman Act, the Zoslaws were required to demonstrate that the distributors were (1) engaged in interstate commerce; (2) that the alleged price discrimination occurred in the course of such commerce, and (3) that the purchases involved were "in interstate commerce."

A Federal District Court found that the Zoslaws had totally failed to prove the factual allegations of their complaint (533 F.Supp. 540). In particular, they had not shown that sales by the distributors to retail chains were in interstate commerce. The District Court noted that each distributor maintains a regional warehouse in California which supplies the records and tapes ordered by stores in the San Francisco Bay area. Depending on the distributor involved, each of the warehouses receives a varying percentage of records and tapes which are manufactured out of state. For example, WEA's California warehouse receives approximately 10% of its records and tapes which are from out of state, while Polygram's warehouse receives approximately 15% of its goods from out of state. Affidavits indicated that the California warehouses are stocked for general inventory purposes depending upon a record's anticipated performance. That is, records are not ordered for particular customers. Therefore, subsequent sales to San Francisco retailers were not in the flow of interstate commerce, the District Court concluded in granting summary judgment to the distributors on the Robinson-Patman claim. The Sherman Act claims of the Zoslaws also were rejected as totally without support.

A Federal Court of Appeals has ruled that summary judgment on the Robinson-Patman issues was granted prematurely by the District Court. The Court of Appeals stated that the warehouse storage of records and tapes manufactured outside of California was not of itself sufficient to remove the goods from the stream of interstate commerce. If WEA and Polygram, which are subsidiaries of record manufacturing companies, acted independently in their marketing decisions concerning the distribution of the out of state items warehoused in California, this may have served to break the flow of interstate commerce between the parent record corporations and the local record retailers. It is this one issue of fact which remains to be resolved by the District Court on remand.

The District Court also had concluded that "drop shipments" to Bay Area retail record stores were so scattered and insignificant that they were insufficient to support a Robinson-Patman Act claim. Drop shipments occur when an out of state manufacturing plant sends a shipment of records or tapes directly to the local retailer. The Court of Appeals upheld the District Court's disposition of this issue, noting that drop sales are not a part of the normal marketing pattern of the distributors and occur only when there are gaps in the standard distribution system.

The District Court's denial of the Zoslaw's claims under the Sherman Act also was upheld. The Sherman Act allegations were "an attempt to breathe a new life into their Robinson-Patman claims by recasting them in the form of a conspiracy . . ." The first conspiracy allegedly was comprised of the record distributors and chain retailers in order to favor the chains at the expense of small record retailers. In the absence of any direct evidence of a conspiracy, the Zoslaws would have had to show "consciously parallel" business behavior on the part of the record companies, which behavior was against each conspirator's self interest, that is, that marketing decisions were not based on good faith business judgments. But there were significant variations rather than substantial similarities in the pricing structure and promotional policies of the distributors. And the distinctive promotional offers and discounts of the companies seemed designed to encourage rather than restrict competition. The distributors' account classification systems, including, in some cases, additional discounts to chain store retailers, also were based on justifiable competitive grounds. Thus, WEA did give Tower a subdistributor price in 1975 even though Tower did not meet WEA's technical definition of a subdistributor. But WEA did so because of claims by various large retailers that they were receiving lower prices from WEA's competitors and thus its failure to reduce prices would adversely affect the retailers' merchandising of WEA's records. Thus, WEA's decision did not indicate a conspiracy to favor large record chains.

Further, the distributors had no reason to join a conspiracy which would increase the bargaining power of the major chain stores against the distributors themselves.

The Zoslaw's contention that the participation of distributors at meetings of the National Association of Record Manufacturers evidenced a "cartel" also was rejected. Attendance at industry meetings, absent any indication of agreement to an illegal arrangement, is not sufficient to prove a conspiracy.

Also rejected was a claim of vertical conspiracy in violation of section 1 of the Sherman Act which essentially restated the allegations of the RobinsonPatman claim. There was no evidence of any vertical agreement between a distributor and a favored retailer to exclude competitors, stated the court. Even assuming evidence of an exclusionary effect, vertical arrangements are not a per se violation of section 1 and thus are illegal only if they are found to be unreasonable.

The Zoslaw's claim that Tower attempted to monopolize the retail market in record and tape sales in the San Francisco Bay area in violation of section 2 of the Sherman Act also was unsuccessful. No direct evidence was presented of specific intent to monopolize; the Zoslaws merely claimed that Tower engaged in predatory pricing by setting its prices for records and tapes below the Zoslaw's cost of doing business. But Tower did not price below its own "average variable cost of production." The court also noted that Tower was operating only two retail stores in the six San Francisco Bay area counties which were the relevant geographic market and that Tower accounted for no more than 10% of the total retail record and tape sales in that area. The District Court had pointed out that during the time the Zoslaws were in business, the Marin County record market underwent considerable growth and that many other stores were selling records at lower prices than the Zoslaws. The absence of significant market power and the existence of numerous other retail outlets supported a finding that there was no issue of material fact regarding the attempted monopolization claim.

Zoslaw v. MCA Distributing Corporation, Case No. 80-4330 (9th Cir., Dec. 1, 1982) [ELR 4:17:1]

School district's widespread, unrestricted distribution of unauthorized tapes of copyrighted films recorded from off-the-air broadcasts was not fair use

An educational cooperative in upstate New York has been found liable for copyright infringement due to its large-scale off-the-air videotape reproduction of 19 copyrighted films. The Board of Educational Services in Erie County is a non-profit organization which provides educational services to over 100 affiliated schools. Among the services provided by the Board are a videotape library and duplication program and a film print library. During a recent two year period, there were over 16,000 "usages" of the Board's videotape service. In 1978, Encyclopedia Britannica Educational Corporation, Learning Corporation of America and Time-Life Films, the copyright holders of the 19 films videotaped by the Board, obtained a preliminary injunction prohibiting the

Board from videotaping the companies' programs off the public airwaves. Encyclopedia Britannica v. Crooks, 447 F.Supp. 243 (W.D.N.Y. 1978). After a two-week trial and a 30-page opinion, a Federal District Court has granted the request of the copyright holders for a permanent injunction on the grounds that the Board's "highly organized and systematic program for reproducing videotapes on a massive scale" did not constitute a fair use of the material.

In their action, the copyright holders claimed three separate kinds of copyright infringement by the Board in violation of sections l(a) and (d) of the Copyright Act of 1909: (1) the making of five original master videotapes and videotape copies derived from all the master tapes; (2) the vending of the copied works by the Board; and (3) the public performance of these works in the classroom.

The Board contended that it was making a fair use of the copyrighted material and that repeated showings of off-the-air videotaped programs permitted it to engage in "time-shifting" to allow a more flexible television viewing schedule for the convenience of teachers and students.

The court found that the fair use defense was not available to the Board. The Board's videotaping practices were found to interfere with the marketability of the copyrighted works by fulfilling the demand for the original work. The copyright holders may have maintained their profitability despite the Board's activities, but their profits might have been greater but for the unauthorized copying. Furthermore, Learning Corporation of America chose to take a loss of $400,000 in revenue from educational television broadcast sales when it decided, in January of 1978, to no longer offer its films for broadcast by educational television networks. This decision was based upon declining film sales which LCA believed was caused by off-the-air videotaping by educational institutions. Allowing unlimited videotape copying or abandoning the educa tional television market are not reasonable alternatives for copyright holders of educational films, stated the court.

The nature of the use is also a factor in a fair use claim. The purpose of the Board's use concededly was educational and non-commercial. But again, the massive scope of the copying and the "highly sophis cated methods" used by the Board in producing and distributing copies of the films exceeded any reasonable amount of copying for purposes of criticism, comment or review. Further, 16 of the 19 works were owned by the Board in film format. Thus, teachers were not totally dependent on the videotape service for access to the works. The court also noted that educational film companies have entered into various types of licensing agreements with other schools. For example, under one such agreement, Encyclopedia Britannica allows a school to make unlimited videotape copies of any EB film already owned by the institution. The fee for the license is based upon the number of playback machines authorized to show the copies. The agreement requires that the videotape copies produced under the license be erased or destroyed at the expiration of the agreement. The Erie County Board's videotape service kept no records of the use of the videotape copies after they were delivered to the schools, and no restrictions or requirements were imposed on the use of the copies.

The court also found that the Board's distribution of the videotapes did not serve the public interest in the manner upheld as fair use in the case of Williams & Wilkins Co. v. United States, 487 F.2d 1345 (1973). Williams v. Wilkins involved the photocopying of articles from medical journals which were otherwise difficult to obtain. In this case, however, none of the 19 films was out of print and all were available from the copyright holders in either film or videotape format.

Lastly, the copying was not only substantial but ,.verbatim," and some of the copies were kept and used for 10 years which amounted to " a virtual substitution for the purchase or license of the plaintiff's works. The court distinguished Universal v. Sony (ELR 1:11:1, 3:13:1), which is now pending before the U.S. Supreme Court, by noting that Sony involves private home videotaping. Sony and this case are "no more alike than an apple to an oyster," said the court.

The Board raised the additional argument that by licensing the films for broadcast by a publicly financed educational television station, the producers expected that the broadcasts would be received free of charge and that the application of copyright statutes to bar off-the-air recording, therefore, would be unconstitutional. This conclusion was "as far-fetched as it is erroneous," declared the court. The programs were broadcast with a copyright notice, and the choice of media or the source of funding did not abrogate the rights of the copyright holders.

On the issue of damages, the court noted the request of the copyright holders for an award of statutory damages of $250 per infringement pursuant to section 101(b) of the old Copyright Act. As calculated by the copyright holders, such damages amounted to $93,000. The Board argued that actual damages should be awarded and that such damages amounted to $265, the price of one additional film print which might have been purchased by the Board's film service but for the videotape copying. This was inadequate, observed the court. However, prior to entering an award, the court directed the parties to present additional information on such questions as the Board's awareness of the infringing activities, the amount of time that elapsed between separate acts of infringement, and the "heterogeneity test" (whether a single integrated transaction results in one infringement). Attorney's fees were denied.

The permanent injunction which was entered by the court included, in addition to a prohibition against the copying of the 19 works directly involved in the action, a restriction against the copying by the Board of any of the 126 other works also owned by the film companies. Some limited or temporary use of the films might be considered fair use under section 107 of the 1976 Copyright Act. If the Board proposes guidelines concerning the scope of such use, the court suggested that it would consider amending the injunction accordingly. The court also suggested that the parties consider entering into an agreement regarding the use of the existing works in the Board's library before the court ordered the erasure of the infringing copies.

Encyclopedia Britannica Educational Corporation v. C.N. Crooks, 542 F.Supp. 1156 (W.D.N.Y. 1982) [ELR 4:17:3]

Los Angeles Raiders must defend Oakland's eminent domain action at trial, and will have to return to Oakland for 1983 season if case not concluded by then

The Los Angeles Raiders have been eliminated from Super Bowl contention - but nevertheless have made NFL history this season. Indeed, they have made professional sports history, because the Raiders are the first team ever to move from one city to another without league consent as a result of a court order.

The Raiders, formerly of Oakland, California, moved to Los Angeles at the start of the 1982 football season as a result of its victory in an antitrust lawsuit initiated by the Los Angeles Coliseum Commission which the Raiders quickly joined. (For reports of earlier rulings in that case, see ELR 1:9:6, 2:3:3, 2:17:5.) The antitrust case is now pending before a Federal Court of Appeals.

Early in 1980, shortly after the Raiders announced their intention to move to Los Angeles, the City of Oakland filed an action of its own in California Superior Court designed to thwart the Raiders' departure. Oakland's game plan revolved around California's condemnation law which gives cities the right to "acquire by eminent domain any property necessary to carry out any of its powers or functions."

Though Oakland's suit was an entirely novel use of California's eminent domain statute, the Superior Court did grant the city a preliminary injunction barring the Raiders from moving to Los Angeles until the case was concluded. Within weeks thereafter, the Raiders made a motion for summary judgment, contending that Oakland's suit had not been filed for the purpose authorized by statute. Rather, the Raiders argued that Oakland's suit had been filed in order to gain an unfair advantage over the Raiders in lease renewal negotiations and that the city's acquisition of the team was not necessary to carry out any of the city's powers or functions. The Superior Court agreed. While it recognized that the functions of a city are not fixed or static, it nevertheless held that the operation of a professional sports team did not fall within any previous definition of "municipal function." Accordingly, the Superior Court dismissed Oakland's suit and dissolved the preliminary injunction which to that point had prevented the Raiders from moving to Los Angeles.

Oakland appealed, and last summer, the California Supreme Court reversed. In a decision released on June 21, 1982, the court appeared to rule that Oakland's proposed acquisition of the Raiders easily could be for the purpose of carrying out its municipal functions. The court noted one of its earlier decisions in which it had ruled that the acquisition by Los Angeles of a baseball field was "obviously for proper public purposes." It also noted decisions of other courts that have held that construction and maintenance of sports stadia also are proper public purposes. Given these precedents, the California Supreme Court said, "If acquiring, erecting, owning and/or operating a sports stadium is a permissible municipal function, we discern no valid legal reason why owning and operating a sports franchise which fields a team to play in the stadium is not equally permissible."

This language gave great aid and comfort to Oakland, but was not long to remain part of the Supreme Court's official opinion. Rather, on August 5, 1982, the Supreme Court modified its decision. Among several changes it made, the court deleted this language. In its place, the court said instead, "Is the obvious difference between managing and owning the facility in which the game is played, and managing and owning the team which plays in the facility, legally substantial? To date, (the Raiders) have not presented a valid legal basis for concluding that it is, but we do not foreclose the trial court's reaching a different conclusion on a fuller record."

As revised, the court's decision concluded that the acquisition and operation of a sports franchise "may be an appropriate municipal function," and if so, Oakland would have the statutory power to acquire the Raiders by eminent domain. This conclusion was not at all hampered by the fact that for the most part, the Raiders consist of intangible contract and franchise rights, rather than tangible property. According to the Supreme Court, California's eminent domain statute - as it was amended in 1975 - was intended to authorize condemnation of any type of property, personal as well as real, and intangible as well as tangible.

The case has been remanded to the Superior Court in Monterey County, and a trial has been scheduled to begin on March 16, 1983. In the meantime, there has been further pretrial jockeying for strategic position. Immediately after the Supreme Court remanded the case for trial - and just days before the start of the 1982 season - Oakland sought an order reinstating the preliminary injunction it had enjoyed prior to the dismissal of its case. The Superior Court denied Oakland's request, without conducting an evidentiary hearing, thus enabling the Raiders to move to Los Angeles. Undaunted, Oakland then petitioned the California Court of Appeal for a writ of mandate requiring the Superior Court to reinstate the preliminary injunction. The appellate court held that as a general rule, Oakland would have been entitled to a reinstatement of the injunction when the Supreme Court reversed the dismissal of, and thus reinstated, the city's case. Here however, circumstances had changed since the prior injunction was dissolved. Specifically, Oakland had won its antitrust suit against the NFL and had in fact arranged to play its 1982 home games in the Los Angeles Coliseum. For this reason, the appellate court ordered the Superior Court to hold a hearing to determine whether the injunction should be reinstated.

On December 10, 1982, Superior Court Judge Robert O'Farrell issued a preliminary injunction ordering the Raiders to return to Oakland for the 1983 season unless the Raiders win the eminent domain suit before then.

City of Oakland v. Oakland Raiders, 32 Cal.3d 60 (1982); City of Oakland v. Superior Court, Case No. A018955 (Cal.App., October 15,1982) [ELR 4:17:4]

National Labor Relations Board decision not to issue unfair labor practice complaint in connection with workers' challenge to motion picture industry roster system is not subject to review by Federal Court

When 11 craft workers in the motion picture industry sought to challenge the validity of an industry experience roster and seniority system, the Regional Director of the National Labor Relations Board investigated the charges and refused to issue an unfair labor practice complaint. This decision will stand since a Federal Court of Appeals recently has determined that it lacks subject matter jurisdiction to order the issuance of a complaint.

The experience roster is maintained by the Association of Motion Picture and Television Producers, Inc., an employers' association, and by the International Alliance of Theatrical Stage Employees as signatories to a

Standard Basic Agreement. Under the Agreement, each employer in the unit must give preference in employment to persons who have worked for members of the multi-employer bargaining unit, but only if the work was performed or the worker was hired in Los Angeles County. Under a supplemental agreement with Local 659, IATSE, employment preference must be given in accordance with the employee's experience roster placement. A person is not placed on the roster until he or she has worked 30 days for one unit employer or 90 of 365 days for several unit employers. All unit employees are required to become and remain members of the union.

The craftworkers alleged that the industry experience roster denied initial employment because of union considerations and that the roster system was enforced in an arbitrary and discriminatory manner in violation of section 8 of the National Labor Relations Act.

The Regional Director refused to issue a complaint because he found insufficient evidence of a de facto closed shop, and also because he determined that the roster system itself did not violate section 8.

This decision was appealed to the General Counsel of the NLRB. The appeal was denied, in part because of the Counsel's interpretation of a statutory sixmonth statute of limitations period which served to bar charges arising from roster placements made after a 1976 open roster period.

The workers then requested the Federal District Court to order the General Counsel to issue a complaint in the matter. The court, however, dismissed the action for lack of subject matter jurisdiction, holding that the General Counsel's decision not to issue an unfair labor practice complaint generally is not reviewable. And a Federal Court of Appeals upheld this decision' noting that there had been no showing that the General Counsel acted outside his statutory authority, that the workers' constitutional rights were violated, or that the General Counsel acted "wholly without basis in law."

Baker v. International Alliance of Theatrical Stage Employees, Case No. CA 81-5217 (9th Cir., Nov. 9, 1982) [ELR 4:17:5]

Rubik's Cube imitator is enjoined from infringing puzzle's protected packaging and trade dress

The Rubik's Cube has become as much a challenge to the courts as to puzzle devotees. Ideal Toy Corporation, the exclusive distributor of the cube, was granted an injunction against several manufacturers of imitation puzzles in Ideal Toy Corp. v. Chinese Arts & Crafts, Inc., 530 F.Supp. 375 (1981) (ELR 4:1:3). Ideal also obtained a preliminary injunction against Plawner Toy Manufacturing Corporation, the distributor of an identical cube called the '.Wonderful Puzzler," and this injunction has been upheld, although modified, by a Federal Court of Appeals.

Ideal argued that Plawner had imitated the packaging and appearance of Rubik's Cube to confuse the public in violation of section 43(a) of the Lanham Act. Plawner countered that Rubik's Cube is not a patented item, and it contended that Ideal was using trademark law and state law of unfair competition as a means of obtaining a "perpetual patent," contrary to Sears, Roebuck & Co. v. Stiffel Co., 376 U.S. 225 (1964) and Compco Corp. v. Day-Brite Lighting, Inc., 376 U.S. 234 (1964).

The Court of Appeals rejected Plawner's argument, saying that Sears-Comco did not disturb a state's power to protect against the infringement of a nonfunctional element that has acquired a secondary meaning. States may do so, said the court, in order to prevent consumers from being misled as to the source of a product.

The District Court had found that the colors and patches used on Rubik's Cube did serve an identifying purpose and thus were non-functional. Ideal also had demonstrated that the packaging and trade dress of Rubik's Cube have secondary meaning. Among the factors supporting a finding of secondary meaning were: the extensive copying of Rubik's Cube, including an admission of copying by Plawner; Ideal's two million dollar advertising budget; the use of the trade dress and package design for approximately one year, during which time the five million units were sold; and consumer confusion, as evidenced by the fact that many unauthorized imitations of the cube were mistakenly returned to Ideal for repair.

The Court of Appeals concluded that the motion for a preliminary injunction was properly granted. However, the wording of the injunction was modified to focus on the protectible physical appearance of Rubik's Cube.

Ideal Toy Corporation v. Plawner Toy Mfg. Corp., 685 F.2d 78 (3d Cir. 1982) [ELR 4:17:5]

Landmark status for building housing Copacabana nightclub is upheld; tax exempt status of dramatists' organization's headquarters is affirmed

Is the New York County Court showing signs of an "edifice complex?" Two cases recently decided by the court involve the status of local buildings.

In Matter of Omabuild N. V. State Supreme Court Justice Ernst H. Rosenberger upheld a Board of Estimate determination that the 12-story building at 14 East 60th Street, whose ground floor is occupied by the

Copacabana night club, was property included in the Upper East Side Historic District. The owner of the property contended that the building, constructed in 1902, lacked aesthetic character, architectural distinction and historical importance. The owner noted that restricting development of the property would cost the City more than one million dollars in a tax revenue and substantial job opportunities. But the court concluded that the City Planning Commission and the Board of Estimate did not err in designating the building a landmark.

In The New Dramatists, Inc. v. Tax Commission of the City of New York, State Supreme Court Justice Arthur E. Blyn restored the realty tax exemption to the premises at 424 West 44th Street - the headquarters of the New Dramatists, Inc. The theatrical organization was founded in 1949 in order to provide educational opportunities for dramatists. Its first directors included Russell Crouse, Oscar Hammerstein II and Richard Rodgers.

Among the activities conducted by the group are script critiques, approximately 75 script readings per year, discussions and lectures, production observerships and a scriptshare program through which scripts are distributed to colleges and regional theaters which may then decide to stage a reading or performance of a play.

The organization had obtained a real property tax exemption in 1970 under section 420-a of the New York Real Property Tax Law. But the group's 1980 application for a continuation of the exemption was denied on the grounds that the New Dramatists did not conduct an educational institution because there were no formal classrooms on the premises or regular attendance by members. Justice Blyn disagreed with this conclusion, noting that the group did aid "the expansion of knowledge by teaching, instruction or schooling." He therefore declared the subject property exempt from real estate taxes.

Matter of Omabuild N.V., New York Law Journal, Nov. 16, 1982 (p. 11, col. 3); The New Dramatists, Inc. v. Tax Commission of City of New York, New York Law Journal, Dec. 1, 1982 (p. 6, col. 2) [ELR 4:17:6]

Federal Court of Appeals reverses $938,000 judgment awarded to art dealer who purchased Matisse painting with allegedly defective title; issue of whether painting was illegally exported from Italy will be heard at new trial

Disputes concerning internationally renowned works of art seem to inspire a sense of intrigue akin to a Robert Ludlum epic. In the case of the "Frua DeAngeli Matisse," the facts revealed that Anna Vichey, a United States citizen, became the owner of the Henri Matisse painting, "Portrait sur Fond Jaune," in 1969 upon the death of her father Carlo Frua DeAngeli. Carlo Frua DeAngeli had an extensive private collection of paintings in Milan, Italy. The Matisse arrived in New York in 1970, and subsequently was sold, in 1973, to Marie Louise Jeanneret, an art dealer in Geneva, for approximately $230,000. Jeanneret attempted to sell the work for approximately twice the amount she had paid Anna and Luben Vichey, but was unsuccessful.

In 1974, Jeanneret learned that an Italian official in charge of the export of paintings was "looking for" the Mastisse piece, because the painting may have been exported illegally. Jeanneret claimed that she could no longer sell or show the painting and therefore proposed that the sale be annulled. The Vicheys rejected this proposal, and in 1977, Jeanneret brought an action claiming breach of express and implied warranties of title, false and fraudulent misrepresentation and breach of contract.

She sought damages of not only the $230,000 she had paid for the painting, but the higher value it might have commanded absent the alleged defect in title.

After a jury trial, a verdict of $1,688,000 was returned for Jeanneret based on her causes of action for breach of implied warranty of title and breach of contract. Jeanneret agreed to accept a reduction in this award suggested by Federal District Court Judge Cannella to the amount of $938,000 - this being the $750,000 estimated current value of the painting if free of title defects, plus $184,000 interest expense and $4,000 in lost profits claimed by Jeanneret.

A Federal Court of Appeals has reversed the lower court's judgment and has ordered a new trial. The appellate court pointed out that the parties had assumed that liability was governed by the law of New York where the negotiations for the sale of the painting occurred. Under second 2-312(1)(a) of the Uniform Commercial

Code as adopted in New York, the Vicheys had conveyed good title to Jeanneret. When the painting was exported from Italy, the heirs of Carlo Frua DeAngeli were merely exporting to themselves. The purported rights of the Italian government were neither a "security interest" nor a lien or encumbrance, stated the court. It also was unlikely that even if the painting was illegally exported, the Italian authorities would confiscate the work outside their country or that Jeanneret would be liable for any fines. Italian law regarding the exportation of works of art is far from clear. There appears to be a distinction between items more than 50 years old and those works that have been created more recently. The Matisse work was painted sometime in the early 1920s, and thus may not have been 50 years old at the time of export. However, even if the painting were subject to the more restrictive provisions of Italian law on the export of older paintings, the liability to pay the Italian government the value of the exported item and any fine would rest on the exporter, not on a purchaser.

Judge Henry J. Friendly observed that it also was unlikely that any other government would aid Italy in securing the return of the painting in light of the "tenuous nature of the claim that a not especially notable painting by a French twentieth century master who ... left a thousand paintings constituted an important part of Italy's artistic patrimony." Although the actual violation of Italian law might create an encumbrance sufficient to support Jeanneret's claim, the court refused to find, absent further evidence, that the alleged violation was sufficient ground for awarding damages to the art dealer.

Among the factors necessitating a new trial, stated Judge Friendly, were the lack of New York case law on the issue of defective title in works of art, the erroneous instruction by Judge Cannella concerning the financial liability of the owner of an illegally exported painting, and the failure of the trial court to "focus" the jury's attention adequately on the age of the painting when it was exported from Italy. At the new trial, the court emphasized, Jeanneret will be required to produce more definitive evidence as to the date of the painting's creation.

Jeanneret v. Vichey, Case No. 82-7203 (2d Cir., Nov. 12, 1982) [ELR 4:17:6]

Briefly Noted:

Invasion of Privacy.

An injunction obtained by Brooke Shields which barred certain uses of nude photographs taken when Shields was 10 years old, has been broadened in scope by a New York appellate court. The injunction, issued by Justice Edward T. Greenfield, prohibited the appearance of the photographs in pornographic publications (ELR 3:21:4). The appellate court has modified the injunction to prohibit any use of the photographs for advertising or trade. The appellate decision was based on the ground that Shields, as a minor, had the right to disaffirm the consent granted to the photographer by her mother. Justice Greenfield apparently had issued the narrower injunction in response to a previous, erroneous ruling by another justice that under sections 50 and 51 of New York's Civil Rights Act, Shields could not totally disaffirm a contract consented to by her parent.

Shields v. Gross, New York Law Journal (June 18, 1982) [ELR 4:17:7]

Arbitration.

In an arbitration proceeding to determine the status of New York newscaster John Johnson's 1980 exclusive agency contract with the William Morris Agency, an American Arbitration Association panel has declared the contract terminated. However, Johnson was ordered to pay the agency approximately $4,000 - the amount claimed by William Morris as outstanding commissions on the newscaster's salary. Two of the three arbitrators granted the agency the additional sum of $9,800 from Johnson. Moreover, "notwithstanding the termination" of those agreements, a majority of the arbitrators also ordered Johnson to pay the Morris Agency all additional commissions to become due "in accordance with the terms of those Agreements as if they had not been terminated."

In the Matter of the Abritration between William Morris Agency, Inc. and John Johnson and John Johnson Productions, Inc., American Arbitration Association Case No. 13-140-0487-82 (Oct. 6, 1982) [ELR 4:17:7]

First Amendment.

The constitutionality of a controversial Washington statute regulating pornography and moral nuisances has been upheld by a Federal District Court. The commencement of prosecutions under the Act had been enjoined pending review by the court (ELR 4:1:7). But Judge Robert J. McNichols has determined that the statute does meet the standards set forth in Miller v. California, 413 U.S. 15 (1973). Judge McNichol cautioned that any civil prosecutions conducted under the Act will require some element of scienter and that the right to trial by jury may not be insringed in civil prosecutions. But the high criminal penalties provided - up to $50,000 per violation - were found to have a rational connection with the government's objective of regulating Pornography. The legislature was entitled to impose sanctions which amounted to "more than merely a cost of doing business."

Spokane Arcades, Inc. v. Eikenberry, 544 F.Supp. 1034 (E.D. Wash. 1982) [ELR 4:17:8]

High School Sports.

Separating seasons of play for male and female high school athletic teams is a permissible method of allocating limited facilities, according to the Supreme Court of Minnesota. Charlotte Striebel, a female high school student, challenged the constitutionality of the Minnesota statute authorizing separate seasons of play according to sex. The court found the seasonal separation policy "an administrative decision uniquely within the competence of educators," and a "reasonable means of maximizing participation by both sexes in the high school athletic program." The court noted that "while we could not condone a solution which benefitted boys at the expense of the more recent girls' programs, neither season is so substantially better than the other as to deny equal protection of the laws."

Striebel v. Minn. State High School League, 321 N.W.2d 400 (Minn. 1982) [ELR 4:17:8]