RECENT CASES

George Harrison's "subconscious plagiarism" of "He's So Fine" results in damage award of $587,000 to the song's copyright owner

George Harrison has been ordered to pay $587,000 in damages to ABKCO Music, Inc., the copyright owner of the song "He's So Fine." A Federal District Court in New York City had earlier concluded that Harrison subconsciously plagiarized the melody of "He's So Fine" in his hit song "My Sweet Lord" (420 F.Supp. 177). The infringement action against Harrison was brought originally by Bright Tunes Music. The company subsequently sold its copyright in "He's So Fine" and its rights in the litigation to ABKCO. ABKCO's owner, Allen B. Klein, had been Harrison's business manager from 1970

to 1973. It was during this period that the infringement first was asserted. Klein's conduct during settlement negotiations between Bright Tunes and Harrison has resulted in a reduction from a possible award of $1.6 million in damages to the $587,000 paid to Bright Tunes by ABKCO.

In calculating damages, the court noted that, mechanical royalties from "My Sweet Lord" totalled $260,103. In addition, ABKCO contended that it was entitled to a portion of the mechanical royalties received by Harrison for the less successful songs on the "All Things Must Pass" album and for "Isn't It a Pity," the other song on the "My Sweet Lord" single. The court acknowledged that Harrison received the same mechanical royalty for each of his songs "whether memorable or not." In order to compensate for the situation where mechanical royalties are primarily earned by the song which caused the purchase of the record, the court agreed to allocate 70%,

rather than 50%, of the mechanical royalties earned by the "My Sweet Lord" single to "My Sweet Lord." Fifty percent of the mechanical royalties earned by "All Things Must Pass" album were allocated to "My Sweet Lord." The court refused, however, to conduct such an allocation of royalties in connection with "The Best of George Harrison" album, since the album was issued several years after the initial release of "My Sweet Lord' and contained several other songs which were quite popular.

The gross earnings of "My Sweet Lord" from mechanical royalties as recalculated, totalled $646,601. This amount together with performance royalties, sheet music earnings and the earnings of Harrisonowned Apple Records. Inc. resulted in gross earnings of $2,152,028. Certain management fees, legal fees and promotion expenses claimed by Harrison were disallowed as deductions since there was no proof that the expenses could

be attributed to "My Sweet Lord." But commissions to ABKCO and to the Harry Fox Agency were approved, resulting in a balance of $2,133,316.

A certain portion of this amount was found to have resulted from factors other than the plagiarized music, such as the Harrison text, his stature in the field of music and "the selling power of his name." The court ruled that 3/4 of "My Sweet Lord" success was due to the plagiarized tune, the music having demonstrated its particular "catchiness" when "He's So Fine" became a first place record on the Billboard charts upon its release in 1973. The court concluded that $1,599,987 of "My Sweet Lord's" earnings were reasonably attributable to the music of "He's So Fine."

In examining the relationship between Klein and Harrison, the court pointed out that Klein, through ABKCO, had been Harrison's business manager, and had engaged counsel and consulted a musicologist on Harrison's

behalf when the infringement action commenced. Harrison terminated ABKCO's services in 1973. The court described how, in late 1975 and early 1976, ABKCO intruded into the pretrial settlement negotiations between Bright Tunes and Harrison. This interference occurred at a time when Klein was engaged in "bitter post-firing litigation' with Harrison. Klein's offer to purchase Bright Tunes for $587,000 may have caused Bright Tunes to forego further efforts toward a settlement, the court said. Klein also furnished Bright Tunes with certain of Harrison's financial schedules. The court declared that such actions breached ABKCO's duty to its former client.

Judge Owen therefore ruled that ABKCO was not entitled to profit from its purchase of Bright Tunes. (The copyright in "He's So Fine" apparently was the company's only asset). ABKCO's recovery was thus limited to what it paid for Bright Tunes. And ABKCO was

ordered to hold its interests in "He's So Fine" in trust for Harrison until Harrison paid the $587,000 award.

ABKCO Music, Inc. v. Harrisongs Music, 508 F.Supp. 798 (S.D.N.Y. 1981) [ELR 3:4:1]

Stage revue of Gershwin tunes is enjoined by Federal District Court in dispute over whether "grand rights" were infringed

Ira Gershwin, watching over his own rights and those of the estate of his deceased brother, George Gershwin, obtained an order stopping the production of "Lets Call the Whole Thing Gershwin," a musical revue presented in Los Angeles through early 1980.

The revue consisted of about 40 songs written largely by George and Ira Gershwin and performed by a cast of

8 actors and actresses in a variety of colorful costumes, with dance routines and musically-related dance-skits. The show used some scenery such as photographs of the Gershwins and a limited amount of dialogue describing the Gershwins, their music, and circumstances in which the works were created. It also included an identifiable character, Ira Gershwin, who appears in Act I as a man struggling to write lyrics for brother George's music.

The Whole Thing Company, according to the court's findings, had obtained licenses from the music publishers and had then proceeded on the assumption that a license from Mr. Gershwin was not required. After an ensuing disagreement concerning whether such a license was required, the producers and the Gershwin representatives settled on a license agreement on October 25, 1979. That license authorized the use of biographical information about Ira Gershwin, his brother George, and his family, the portrayal of Ira Gershwin and his brother

George, and the use of the name Gershwin in the title of the production. In return, the Whole Thing Company agreed to perform the revue only at the Westwood Playhouse in Los Angeles and only until January 31, 1980. The license also provided that the Whole Thing Company would not be required to pay any royalties to Mr. Gershwin.

After the show opened, Whole Thing spoke with people in New York who expressed an interest in taking the play to New York. Whole Thing then asked for permission to produce the play on Broadway, but it was denied. On January 31, 1980, Whole Thing continued to present the show and continued to negotiate with others to take it to New York, London, Japan, and elsewhere. The Gershwins soon began requesting that Whole Thing close the show and discontinue its negotiating efforts. On Whole Thing's failure to comply, Gershwin went to court.

In its decision issuing a preliminary injunction, the court held that Gershwin raised serious questions sufficient to require litigation and that the balance of hardships tipped sharply in his favor. Unfortunately, the court did not discuss even tentatively either of the parties' substantive arguments finding it unnecessary to discuss the probability of success on the merits.

Whole Thing argued that the music publishers of the Gershwin material had granted it the right it needed to stage its revue. Gershwin argued that the show infringed his "grand rights" in the songs presented. The court offered a broad definition of "grand rights" stating that grand rights are required if a song is used to tell a story or if a song is performed with dialogue, scenery, or costumes. The court found it unnecessary, however, to apply its grand rights definition at this stage of the proceedings.

Gershwin also argued that performance of the show after January 31, 1980 constituted unfair competition, infringement of his right of publicity, and a violation of the October 1979, Settlement Agreement. All these issues raised serious questions sufficient to require litigation, ruled the court.

In balancing the hardships, the court pointed out that though the producers may lose money by not being able to take the show to Broadway or elsewhere, Whole Thing was well aware that the Settlement Agreement provided that the show was only to be performed in Los Angeles and only until January 31, 1980. In contrast to Whole Thing's lack of hardships, Gershwin would suffer substantial hardships if the injunction were not granted, the court ruled, because future productions of Gershwin plays by companies licensed by him might not have been performed or might have been less successful as a

result of continued performances of "Lets Call the Whole Thing Gershwin."

The court thus issued a preliminary injunction preventing further negotiations or new agreements for future presentations of the show, but permitted the show to be performed in Los Angeles until April 27, 1980, the date Whole Thing's contract with the Westwood Playhouse expired. Whole Thing did not have any contracts with musicians, actors, actresses, or others that extended beyond that date.

Gershwin v. The Whole Thing Co., 208 U.S.P.Q. 557 (C.D.Cal. 1980) [ELR 3:4:2]

Copyright Royalty Tribunal's increase of compulsory license record royalty is upheld by Federal Court of Appeals

As previously reported (ELR 2:21:6 & 2:23:4), the Copyright Royalty Tribunal has increased the royalty rate payable under the compulsory license for making and distributing phonorecords containing new renditions of previously-released nondramatic musical works. The new rate became effective on July 1, 198 1, over the objections of the Record Industry Association of America and others who had appealed the Tribunal's rate increase.

The Federal Court of Appeals in Washington, D.C., heard oral argument in this appeal on June 18, 1981. On June 23, 1981, the court held "that the Tribunal acted within its authority in adjusting the mechanical royalty rate to 'either four cents, or three-quarters of one cent per minute of playing time or fraction thereof, whichever amount is larger,' and in assigning that increase an effective date of July 1, 1981."

The court further held, however, "that the Tribunal exceeded its authority in adopting a procedure for interim rate adjustments that requires the Tribunal to convene annual proceedings" and exercise its discretion in adjusting the rate. The court is allowing the Tribunal an opportunity "to adopt, if it so desires, an alternative scheme of interim rate adjustment that does not require annual exercise of discretion." The court's position apparently is consistent with that Of Commissioner Burg of the Copyright Royalty Tribunal, who opposed the proposed annual rate adjustments as being "unavoidably disruptive on general prevailing industry practices.

Recording Industry Association of America v. Copyright Royalty Tribunal, Case No. 80-2545 (D.C.Cir., June 23, 1981) [ELR 3:4:3]

National Football League's "cross-ownership" ban does not violate antitrust laws, Federal District Court decides

The National Football League has won a significant victory in an antitrust lawsuit filed against it by the North American Soccer League. At issue in the case was a proposed amendment to the NFL Constitution which prohibited the owners of majority interests in NFL teams, or any members of their families, from having an interest in another major league team in any sport. The proposed amendment also required NFL owners who already own interests in other teams to sell those interests or be subject to substantial fines and possible ejectment from the NFL.

As of the date the NASL filed its suit against the NFL, four NASL owners also owned majority interests in NFL teams - and thus would have been subject to the

cross-ownership ban. Among these were Lamar Hunt, owner of the NFL Kansas City Chiefs as well as the NASL Dallas Tornado, and Joe Robbie, owner of the NFL Miami Dolphins as well as the NASL Fort Lauderdale Strikers.

According to the NASL, the NFL's proposed crossownership ban constituted an unlawful conspiracy to deprive the NASL of a necessary competitive resource - sports entrepreneurial know-how and capital - by eliminating a fertile source of that resource, namely NFL team owners. Shortly after the case was filed, the NASL won a preliminary injunction barring the NFL from adopting the proposed ban pending trial. (ELR 1:2:5) Thereafter, the case was tried before the same judge who issued the preliminary injunction. And the NASL did succeed in convincing the judge that many of its important factual contentions were true. The court found, for example, that respected owners are important

to a professional sports league's stability and future. In fact, the court specifically found that "The presence of Hunt and the Robbie family as NASL owners has been of significant assistance to the league in attracting additional owners and capital, and in creating ... an aura of stability and 'credibility' for the NASL." Their departure from that league "would have a significantly adverse effect upon the NASL," said the court. The court also found that a significant reason the NFL wanted the ban was that it believed that cross-ownership strengthened the NASL in its efforts to compete with the NFL. In other words, the court agreed with the NASL that the purpose and effect of the ban were both anti-competitive.

Despite these factual findings, the court ruled in favor of the NFL because it also found that the NFL is a single economic entity - insofar as this case is concerned - and thus the proposed ban was not the result of a

"conspiracy" at all. It is this ruling that makes the case such a significant victory for the NFL. For years the NFL has argued that it is a single economic entity in the nature of a joint venture or partnership, and thus should not be liable under the antitrust laws for agreements made among its members. Although courts have acknowledged that professional sports are "truly a unique business enterprise," and that the relationships between teams in a league do "not fit the traditional competitive mold," no previous case ever exempted a league from the antitrust laws entirely on the "joint venture" theory. This case thus establishes a new precedent. In doing so, however, the court explained why this case differed from those that had been decided earlier.

The court held that in those areas where members of a league ordinarily would compete with one another, the Sherman Act applies, and the legality of any agreement between those teams restraining that competition is

judged by the rule of reason. "Thus the single economic entity defense fails in the player contract restriction cases, where all member teams compete with each other for players, and league restraint of that competition damages the players. Similarly, the defense fails where two member teams would compete in the same geographical area for sports fans' dollars, and league restraint of that competition damages a stadium operator."

On the other hand, said the court, if an agreement between members of a league does not restrain competition among themselves, a league "may properly be regarded as a single economic entity" and that agreement does not violate the antitrust laws. This is so, the court said, even if the agreement ".... disadvantages another competitor in the entertainment industry ... Economic conduct may damage competitors. Indeed, it may be specifically designed to do so. There is nothing illegal in that. Competitors compete." In this case, the court

found that the NFL competes with the NASL for team owners as a single entity. NFL owners do not compete among themselves for additional owners.

The court also rejected the NASL's contention that the NFL cross-ownership ban was a device to monopolize and restrain competition in the "sports capital and skill market." According to the NASL, the market consists only of present sports owners. While the court acknowledged that NFL owners were a particularly desirable part of the sports capital and skill market, it found that neither they nor all present team owners constitute the entire market. The court pointed out that every team owner was a non-owner prior to his first sports investment, and it specifically cited George Steinbrenner, owner of the New York Yankees, as an example of an owner who was part of the "sports capital market" before he bought the Yankees, even though he did not then own a professional sports team. The court thus ruled

that the NASL had not shown that the NFL cross-ownership ban would operate as a restraint on competition within the market consisting of potential sport team owners.

North American Soccer League v. National Football League, 505 F.Supp. 659 (S.D.N.Y. 1980) [ELR 3:4:3]

Local zoning ordinance barring all live entertainment was an overbroad restriction of protected expression, rules U.S. Supreme Court

The United States Supreme Court has held that a local ordinance prohibiting all live entertainment within the Borough of Mount Ephraim in New Jersey was overbroad and violated the First and Fourteenth Amendments. The conviction of a bookstore owner who

provided coin-operated booths where customers could view live nude dance performances was therefore reversed. The Court found that the Borough had failed to justify its "substantial restriction of protected activity." No evidence was presented that live entertainment would require additional parking, trash, police protection or medical facilities. And the ban was not a reasonable time, place and manner restriction due to its total exclusion of live entertainment, including nonobscene nude dancing.

In a concurring opinion, Justice Blackmun emphasized the importance of establishing a "reasoned and significant" basis for any zoning regulation which has an impact on rights of expression. And he cautioned local communities against justifying restrictions of protected expression on the ground that banned activities may be available in nearby communities.

Justice Powell's concurrence noted that a community might regulate or ban all commercial public entertainment in an ordinance more carefully drawn than Mount Ephraim's, particularly when substantially all commercial activities are banned in a residential area.

In dissent, Chief Justice Burger characterized the issue as "the right of a small community to ban an activity incompatible with a quiet, residential atmosphere," in order to preserve a "decent life." He concluded that the Mount Ephraim zoning ordinance imposed only a minimal intrusion on genuine rights of expression.

Schad v. Borough of Mount Ephraim, No. 79-1640, (U.S.Sup.Ct., June 1, 1981) [ELR 3:4:4]

Federal Court did not have jurisdiction to stay revocation of Aladdin Hotel's gaming license, appellate court rules

In March of 1979, the Nevada Gaming Control Board commenced proceedings to revoke the gaming license of the Aladdin Hotel Corporation after the corporation was convicted of federal felony offenses. The Commission agreed to stay the revocation pending negotiations between the Aladdin and a prospective buyer. When the proposed sale fell through, the Gaming Commission revoked the Aladdin's license.

The Aladdin successfully obtained a preliminary injunction in Federal District Court barring, for six months, the revocation of its gaming license and the closure of its casino. The Aladdin argued that under its agreement with the Gaming Commission, the hotel was entitled to a reasonable time to find a new buyer.

A Federal Court of Appeals has reversed the lower court order and has remanded the matter for dismissal on the ground that questions regarding the stay of the license revocation were a matter of state law and the District Court therefore lacked jurisdiction. The court noted that there was "no authority for the proposition that the holder of a license is entitled, as a matter Of due process, to a reasonable time to dispose of its assets prior to revocation."

Circuit Judge Poole, in dissent, would have found that the Aladdin had a federal claim to procedural due process safeguards to protect its property interest when dealing with the Gaming Commission. Judge Poole agreed with the majority, however, in finding that the District Court had exceeded the scope of the relief it was entitled to grant when the court allowed the Aladdin to continue operations rather than ordering the parties to comply with procedural safeguards in future hearings.

Aladdin Hotel Corporation v. Nevada Gaming Commission, Case No. 79-3497 (9th Cir., June 5, 1980) [ELR 3:4:4]

New Jersey's cable television act gives statewide board greater authority than municipalities over cable television franchises

Facing "yet another round in the bout" between cable television companies, the New Jersey Supreme Court has resolved the conflict between state and local power in the franchising of cable television. The case concerned the extent to which regional consideration, as perceived by the New Jersey Board of Public Utility, may prevail over local consideration, as perceived by the affected municipalities. The court presented a detailed discussion of New Jersey's cable television act,

broadly construing certain sections of the act and augmenting the statewide Board's power over cable television. In doing so, the court sustained the Board's decision allowing one cable, television company which operated in a number of local communities to extend its services into part of two adjoining communities, against the wishes of the two communities affected.

Clear Television Cable Corporation holds cable franchises for the townships of Dover and Berkeley, both consisting of mainland areas and beach areas. Clear was operating on the mainland area of both townships, but had not obtained certification for the beach areas - the areas of controversy in this case. The beach areas are located on the Island Beach Peninsula, which lies parallel to the mainland and is separated from it by Barnegat Bay. The Dover and Berkeley beach strips are thus separated by water from the mainland part of the municipalities. The beach strips themselves are not

contiguous; rather they are bordered by the beach municipalities of Lavalette, Seaside Heights and Seaside Park, which receive cable television service from National Video Systems.

National, after having been denied cable consents from Dover and Berkeley, petitioned the Board, charging its proposal to Dover and Berkeley had been arbitrarily denied. The Board ruled otherwise and National appealed to a New Jersey Appellate Court. Meanwhile, National intervened in Clear's beach application before the Board, requesting a full hearing so that the "regionalization" issue might be examined. The Board granted the request, and at these hearings National argued that its cable television operation on the beach strip in the areas of Lavalette, Seaside Heights and Seaside Park made it a more economical and feasible choice than Clear to provide service to the adjacent beach areas of Dover and Berkeley. Dover and Berkeley made it clear that they

did not want to divide their townships between two cable companies. Adopting the findings of the hearing examiner, the Board denied Clear's application and instead granted the beach certificates to National. Clear appealed. A New Jersey Appellate Court, hearing Clear's appeal together with National's appeal of the Board's earlier decision,. overturned the Board's award to National. The Appellate Court found that the Board acted beyond its authority granted under the cable television act.

The Supreme Court of New Jersey has reversed, reinstating the decision of the Board denying Clear's application and granting certification to National. The Court determined that the Appellate Court misapplied section 17 of the cable television act. That section authorizes the Board to require a company to provide service to an area greater than that covered by its municipal consent on regional grounds, but the section also limits its

application to a company that has received municipal consent under the act and is applying for Board certification.

The New Jersey Supreme Court recognized the logic of the Appellate Court, but determined that its reading of the section would effectively frustrate the legislative interest to empower the board to promote sensible regional policies. "Specific directives in the act requiring only the Board to consider regionalization issues indicates recognition by the Legislature that a municipality is not the most competent entity to consider factors affecting areas beyond its own borders," said the Court. The Appellate Court's strict literal interpretation of section 17 would give a veto to municipalities over the Board's power to effectuate regional decisions, concluded the court. The court upheld the award to National, deferring to the expertise of the Board and

finding sufficient evidence in the record to support the agency's determination.

Clear Television Cable Corp. v. Board of Public Utility Commissioners, 424 A.2d 1151 (N.J. 1981) [ELR 3:4:5]

Trial required in libel suit against Penthouse magazine filed by dolphin expert who alleges that article accused him of espionage

An article entitled "The Pentagon's Deadly Pets" that was published in the June 1977 issue of Penthouse magazine could be read as having charged a dolphin expert with espionage, a Federal Court of Appeals has held.

James W. Fitzgerald is a research scientist specializing in the activities of dolphins. The Penthouse article

described some of Fitzgerald's activities, including the use of his dolphins - which were described as "living, breathing submarines" - in connection with certain underwater operations of the Central Intelligence Agency. The article continued: "He even made overtures, possibly with CIA and Navy knowledge, to sell dolphin torpedoes or 'open-ocean weapons systems' to Mexico, Peru, Colombia, Chile, Argentina, and Brazil.... Fitzgerald wanted to make some fast bucks on the side by turning small countries into 'instant Naval powers.' The Pentagon couldn't possibly object for fear of exposing its whole operation."

A Federal District Court had granted a Penthouse motion for summary judgment, because it determined that, "fairly read," the article did not charge Fitzgerald with espionage. But a Federal Court of Appeals has disagreed, finding one possible interpretation of the article to be that Fitzgerald was attempting to sell defense

secrets to foreign countries, or in other words, was engaging in espionage.

To prove the truth of its article - truth being an absolute defense to a libel action - Penthouse offered the transcript of a "Sixty Minutes" television show on which Fitzgerald had appeared and brochures of Fitzgerald's Laboratories, Inc., in Spanish and English promoting the sale of dolphin technology. The Court of Appeals found that although this evidence establishes "that Fitzgerald had attempted to sell dolphin technology to other countries and that military application of the technology was one of its acknowledged uses ... [it] does not establish as truth that he had attempted to sell top secret military information to other countries." Since Fitzgerald "strongly denies he ever offered or attempted to sell such information to foreign countries," the issue is "obviously contested and deserves fuller development and ultimate resolution at trial," the court concluded.

Fitzgerald v. Penthouse International, Ltd., 639 F.2d 1076 (4th Cir. 1981) [ELR 3:4:6]

Advertising supplements are not qualified for exemption from Connecticut sales tax

The Supreme Court of Connecticut has ruled that advertising supplements inserted into newspapers are not exempt from the state's sales tax. The "preprints" were not newspapers, according to the court, since they were not published at "short, regular intervals, usually not exceeding a week," and they did not contain a variety of items which would appeal to "a wide spectrum of the general public." The preprints also were not an integral part of the newspaper. Although the Massachusetts Supreme Court in Sears, Roebuck & Co. v. State Tax

Commission, 370 Mass. 127, held that preprints were included within the definition of "newspaper" in that state Is sales tax exemption statute, the Connecticut court found that the newspaper publisher had "no enforceable interest at the time of the taxable event." The retailer and the printer were the only parties involved in the transfer of ownership of the preprint.

Another difference between supplemental advertising and the feature sections of a newspaper is that the preprint is prepared by an entity "totally independent" of the publisher. It is inserted into the newspaper to utilize the paper's distribution system, thereby gaining access to homes, rather than to attract regular readers. An advertising supplement does not contribute to the character of the newspaper; "it is not like a member of the family of sections making up the newspaper, but is more similar to the occasional house guest."

Also rejected by the court was the retailer's and printer's argument that preprints were exempt as materials which became an ingredient or component part of tangible personal property to be sold.

The court therefore concluded that "no portion of a newspaper's purchase price is given as consideration for any preprint it might contain." Thus, there being no sale of the preprint at the time the newspaper is purchased, the taxable event occurs when the printer sells the preprint to the retailer.

The opinion was issued in the form of advice to the Hartford Superior Court which was ruling on a tax assessment of approximately $76,000 levied against Eastern Color Printing Company and a refund claim for approximately $47,000 representing sales tax paid by Caldor, Inc. to Eastern Color.

Caldor, Inc. v. Heffernan (Conn.S.Ct., April 21, 1981) [ELR 3:4:6]

Briefly Noted:

Copyright.

Rod Stewart sued a jukebox owner for copyright infringement based on the public performance of his material on one of the owner's jukeboxes. The jukebox owner moved for summary judgment, asserting that because the establishment housing the jukebox charged for admission, the jukebox was not a "coin-operated phonorecord player" for the purposes of the Copyright Act and, therefore, no liability for infringement could be imposed on him for a public performance of Stewart's material on that jukebox. A Federal District Court in

Florida has denied the motion, however, holding that "defendants may still be liable for an unlicensed public performance of the plaintiffs' copyrighted works under the provisions of Section 501 as contributory infringers."

Rod Stewart v. Southern Music Distributing Co., Inc., 503 F.Supp. 258 (M.D.Fla. 1980) [ELR 3:4:6]

Contracts.

A cinematographer made an oral contract with a production company to introduce it to a film producer in need of production services in exchange for a percentage of the company's gross profits. After the company completed production work on the film, the cinematographer brought a contract action against the company, alleging that it had breached their oral agreement by

refusing to pay him his percentage upon the completion of the film. The company contended that a modification of their contract provided that he was to be paid only "as and when actually paid" by the producer of the film . A New York trial court granted the company's motion for summary judgment on Statute of Frauds grounds, and the cinematographer appealed. The Appellate Division of the New York Supreme Court has reversed, holding that "as it is arguable on this record that the parties orally agreed to a co-finder relationship, and as such an agreement is not within the purview of the Statute of Frauds, it follows that the plaintiff's complaint should not have been dismissed. . . ."

Holender v. Fred Cammann Productions, Inc., 434 N.Y.S.2d 226 (App.Div. 1980) [ELR 3:4:7]

Racing Regulation.

An Illinois trial court upheld an Illinois Racing Board decision to deny an application for a license to conduct a racing meet. The Board, created by the Illinois Horse Racing Act of 1975, had denied the application because certain deficiencies in the applicant's track and public facilities raised questions about his "financial integrity." The applicant appealed, contending that "the Illinois Horse Racing Act is unconstitutional because in giving consideration to 'financial integrity' as a standard for granting an application to race, it fails to define that term and leaves a finding as to financial integrity to the discretion of the board." An Illinois Appellate Court has affirmed the Board and trial court decisions, holding that "in view of the ramifications and possible financial involvements of various kinds of horse track organization, we think this general term is not inappropriate."

Gillilan v. Illinois Racing Board, 411 N.E.2d 1374 (Ill.App. 1980) [ELR 3:4:7]

Racing Regulations.

A horse owner appealed from a New York State Racing and Wagering Board determination that his horse is forever barred from racing in New York. The Board barred the horse because he was once raced as a "ringer" by a previous owner. A New York trial court overruled the Board, and the Appellate Division affirmed, holding that the Board's "determination to bar forever Saba's Jet from racing in New York was arbitrary and capricious and an abuse of discretion" in that the barring "regulation should not be construed to

require that the horse be barred from racing after it has come into the hands of an innocent purchaser."

Bokman v. New York State Racing and Wagering Board, 433 N.Y.S.2d 929 (App.Div. 1980) [ELR 3:4:7]

Sports.

A Federal Court of Appeals has upheld a Louisiana High School Athletic Association "Student transfer rule" that discourages New Orleans high schools from recruiting junior high school athletes. The rule deters recruitment by precluding students from competing in interscholastic sports for one year after a transfer to a high school outside his home district. The court held that the rule did not violate the Fourteenth Amendment guarantee of equal protection, because "the transfer rule is

rationally related to the state's valid and legitimate interest in deterring or eliminating the recruitment of promising young athletes by overzealous coaches, fans, and faculty members." Further, the students' due process rights had not been violated because "the privilege of participating in interscholastic activities must be deemed to fall ... outside the protection of due process."

Walsh v. Louisiana High School Athletic Association, 616 F.2d 152 (5th Cir. 1980) [ELR 3:4:7]

Product Liability.

The plaintiff brought an action against a bowling alley for personal injuries sustained when the plaintiff fell and cut her finger on a chipped portion of a bowling ball. A New Jersey trial court found the bowling alley strictly

liable for the plaintiff's injury. The Appellate Division has reversed, holding that the plaintiff's "use of the ball was incidental to the use of Defendant's premises and the supplying of such equipment should not result in imposition of liability on Defendant on any basis other than liability for injuries caused by conditions of the premises." Instrumental factors in the court's determination were that the plaintiff. personally selected her ball; did not rely on the bowling alley's expertise in making her selection; was no less able than the bowling alley to spot the ball's defect; was not separately charged for the ball; and could have brought her own ball.

Dixon v. Four Seasons Bowling Alley, Inc., 424 A.2d 428 (N.J.App. 1980) [ELR 3:4:7]

Obscenity.

An Illinois trial court issued a permanent injunction enjoining a theater owner from presenting explicit live sex shows because they were a public nuisance. The Appellate Court of Illinois has reversed', holding that an allegedly obscene human expression may not be enjoined as a public nuisance consistent with First Amendment freedom of speech. The court observed that "a prior restraint on live expression, in contrast to books or films, bears an even heavier presumption against its validity because the content of future expression is unknown." Contrasting the "lack of precision inherent in the concept of public nuisance" with the potency of the First Amendment, the court voided the injunction as an impermissible prior restraint.

City of Chicago v. Festival Theater Corp., 410 N.E.2d 341 (Ill.App. 1980) [ELR 3:4:7]

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