Texas Entertainment and Sports Law Journal

State Bar of Texas
Entertainment & Sports Law Section

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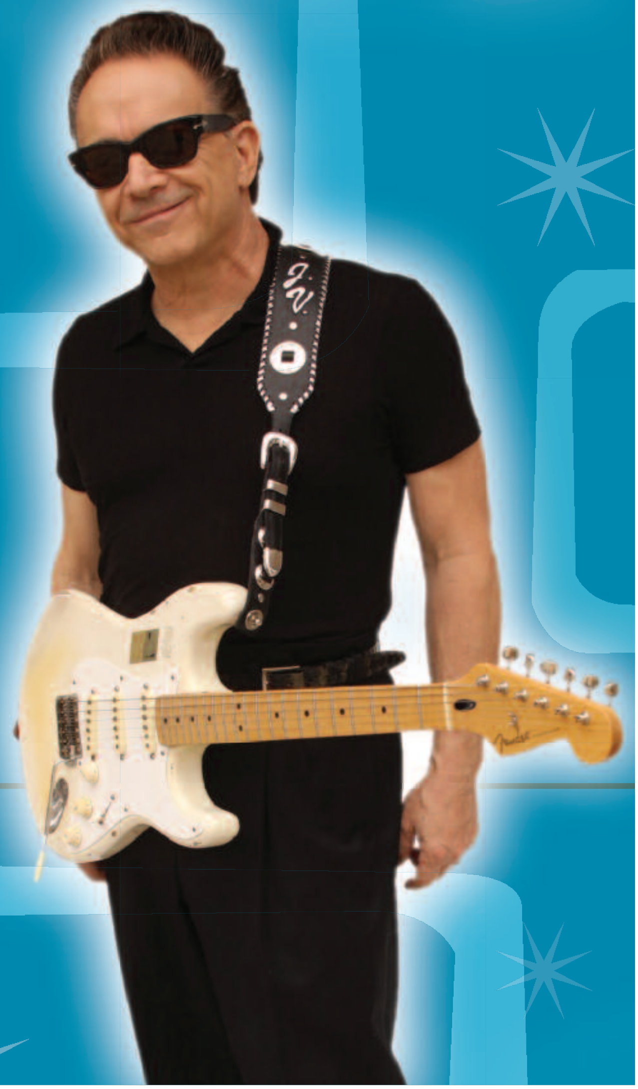

Jimmie Vaughan
2015 Texas State Musician

Jimmie Vaughan is far more than just one of the greatest and most respected guitarists in the world of popular music. As Guitar Player Magazine notes, "He is a virtual deity—a living legend." After all, Vaughan provides a vital link between contemporary music and its proud heritage, as well as being a longtime avatar of retro cool.

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TESLAW.ORG

The Texas Entertainment and Sports Law section of the State Bar of Texas is comprised of more than 950 Texas-licensed attorneys practicing in the areas of film, music, art, book publishing, and collegiate and professional sports. The TESLAW website at www.teslaw.org offers attorneys a chance to be listed with their focus area of practice in a publicly searchable database. The TESLAW Journal is a recognized publication providing scholarly and insightful articles on the law and practice of entertainment and sports law. Join today to be part of a collegial organization growing the practice of entertainment and sports law in Texas; for new bar members, the first year's dues are free.

CHAIR'S REPORT

Thank you for supporting TESLAW.

This is a Section that is open to everyone, whether or not you practice entertainment or sports law. So if you are a musician or listen to music, read or write books, observe or play a sport, produce or enjoy movies or television shows, act or support the theater, or make or watch cat videos on the Internet, we welcome you! A special thank you to Joel Timmer as he takes on the important role of Editor. Already he is lining up interesting and helpful articles and information.

In addition to our Journal, there are many benefits of TESLAW membership, including networking events, CLE, our E-Newsletter, an online database, cool T-shirts, and lots of fun and friendly colleagues who enjoy the same things you do. I am personally thankful to Victoria Helling and all the members who readily pitch in to help make our Section awesome.

TESLAW is becoming known for putting on entertaining Ethics programs (it's true!) during the State Bar's annual meetings. We like to blend celebrities and performers with lawyers and ethics experts to educate on a practical level. Kudos to member Dena Weaver who was a huge help in organizing June's well-attended presentations. The next big event on our calendar is the 25th annual Entertainment Law Institute in Austin on November 5th and 6th, with 14 hours of CLE credit. Director Mike Tolleson always arranges a fantastic program and your TESLAW membership gives you a discount on the cost. During SXSW in March, we will again be hosting our mixer for TESLAW members and clients, thanks to the hard work of Amy E. Mitchell (who does double-duty as our Webmaster).

Finally, I want to thank Craig Crafton, who built an impressive infrastructure that is making my transition to Chair an easy one. I know I can always call on Craig (and intend to do so throughout my term).

Please join us during the year! And feel free to reach out to me whenever you have questions or suggestions, or need a favor or introduction, or want a recommendation for a movie or funny cat video.

Sally Helppie
Chair 2015-2016

EDITOR'S REPORT

Joel Timmer, Editor

Having taken over as Editor of the Journal with the previous issue, new Associate Editor Stephen Aguilar and I were very happy to get our first issue under our belts. With that issue, we largely continued in the fine tradition of what had been done in the Journal previously. While we will continue to do that by publishing articles on topics of interest to our members, we are looking for ways to make the Journal even more useful to its readers.

One way we are seeking to do this is by providing information on organizations that support and benefit entertainment and sports law practitioners. These organizations might provide CLE or other educational opportunities, networking opportunities, or both. In this issue we are profiling the Sports and Entertainment Law Section of the Dallas Bar Association. We are looking for other organizations to profile in future issues. We do not want to limit this to bar sections, but would also like to provide information to readers about other trade or professional organizations that provide opportunities of interest to practitioners. If you know of or are involved with such an organization, please let us know. Better yet, write up an overview of the organization and its activities and submit it to us.

We are also considering adding additional features in the future. For example, we would like to publish a calendar of events of interest to practitioners, which would provide information on upcoming CLE events (but not be limited to only CLE events). We are looking for someone to oversee the calendar. If this is something you may be interested in, please let us know. Also, if you know of events to include in such a calendar, let us know that as well.

You might be starting to notice a theme in this letter, which is that we need you to help us make the Journal even more useful to TESLAW section members. We're always looking for articles to publish, so we encourage you to submit articles you've written or to let us know if you see articles by others published elsewhere that would be worth republishing here. We're also looking for assistance with putting the Journal together and getting it published, whether that involves overseeing a regular feature, proofreading articles, or something else. If you're interested in getting involved with the Journal…well you get the idea by now.

We also welcome your feedback…good, bad, or indifferent. Again, we want to make the Journal useful to you, so let us know whether we're achieving that goal and what we might do to achieve that goal more effectively. You can reach me at timmer.law.office@att.net.

I hope you enjoy this issue!

Joel Timmer
Editor

Overview of Panel Presentations from TESLAW at the State Bar of Texas Annual Meeting

By Stephen Aguilar

At this year's State Bar of Texas Annual Meeting held on June 18–19 at the Henry B. Gonzalez Convention Center in San Antonio, TESLAW hosted a lively and informative Ethics and Entertainment event that offered its attendees three hours of CLE credit. The event was comprised of three panel discussions, each focusing on a particular area of the entertainment and sports industry. The panels consisted of both attorney practitioners and industry professionals and were guided by moderators who often allowed their accomplished and entertaining panelists to delve into personal stories of their own real-world experiences in the entertainment and sports industries. Tying everything together was resident ethics specialist David A. Grenardo of St. Mary's School of Law, who enlightened each discussion with the various ethical ramifications implicated in certain situations.

Face the Music: Ethics and Music Law

Kicking off the program was an engaging discussion moderated by immediate past TESLAW chair Craig Crafton that featured Richard Kraft of Kraft-Engel Management (Beverly Hills, CA) and David Grenardo. Kraft-Engel Management is one of the world's leading agencies specializing in the representation of composers, songwriters and music supervisors for film, television, new media and theatre. Some of Mr. Kraft's representative clients have included composer Danny Elfman (*The Simpsons*, *Pee-Wee's Big Adventure*, *Beetlejuice*, and Tim Burton's *Batman*), and multiple Academy Award winner Alan Menken (*Pocahontas*, *Aladdin*, *Beauty and the Beast*, and *The Little Mermaid*). He has also been executive producer of over 150 soundtrack albums, and produced stage productions and live film music concert experiences.

Guided by Mr. Crafton and sourcing his rich background, Mr. Kraft entertained and informed the audience by recounting stories about representing composers in the music and film industry and some of the potential ethical concerns that may arise in that representation. One recollection addressed an issue Mr. Kraft faced in representing a composer who was guaranteed tracks on a soundtrack album, yet when the album was released, did not have any songs represented on the album. Faced with a situation that required zealous advocacy, Mr. Kraft successfully lobbied for the release of another soundtrack album that contained his client's work. Throughout the discussion, Mr. Grenardo pointed out certain ethical issues presented in the various scenarios, making reference to particular Texas Disciplinary Rules of Professional Conduct and their application. Often, these situations and a lawyer's relative obligations would be informed by such ethical considerations as an attorney's duty to remain truthful in statements to others, or a lawyer's duty to protect confidential information.

It's Only a Movie: Ethics and Film

The second panel combined both on-screen talent with legal experience. Joining Mr. Grenardo and moderator Sally Helppie, current TESLAW Section Chair, was actress Elaine Hendrix (Los Angeles, CA), currently starring in FX's *Sex&Drugs&Rock&Roll*, and attorney Thomas B. Collier, partner at entertainment law boutique firm Sloane, Offer, Weber and Dern, LLP (Beverly Hills, CA), which represents clients such as Morgan Freeman, Jessica Alba, and Mark Wahlberg. With over 100 film, stage, and screen credits to her name, including roles in such films as Disney's *The Parent Trap* and such hit shows as *Two and a Half Men* and *CSI*, Ms. Hendrix discussed how she has had to navigate certain ethical issues in her career, including the issues that arise when her work crosses paths with her passion for the humane treatment of animals. Speaking from his experience working in a firm that represents actors, directors, writers, producers, authors, and production companies in the fields of film, television, and new media, Mr. Collier discussed the various ethical concerns that sometimes confront him in his practice, including those dealing with child performers and the transfer of existing intellectual property to the screen. Again, Mr. Grenardo instructed the audience on the various ethical concerns involved in representing film and television stars, such as those involving competent and diligent representation and communications with those represented by counsel.

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Overview of Panel Presentations from TESLAW at the State Bar of Texas Annual Meeting

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The Sporting Life: Ethics and Sports

Rounding out the afternoon was a panel moderated by Alan Tompkins, who as Vice-President and General Counsel for Unity Hunt, Inc., manages legal matters for the Lamar Hunt family, who own the Kansas City Chiefs among other professional sports teams. Unity Hunt, Inc., also includes other affiliated entities, such as Hunt Sports Group, which operates FC Dallas of Major League Soccer. Involved in sports for over 45 years, panelist Barry Mendelson began his career as the radio announcer for the New York Giants and the New York Jets radio network, later working as Vice-President for the Boston Celtics, President of Ticketmaster Associates, and Executive Vice-President of Madison Square Garden Enterprises. He was also the personal manager for National Basketball Association legend Jerry West, and currently is President of Mendelson Entertainment Group LLC.

In a spirited conversation that touched on a range of sports from boxing to tennis, Mr. Mendelson delved into his deep personal experiences involving event promotion, team and athlete management, and broadcasting. He also spoke frankly about the future of sports broadcasting in a world of fragmented media. The panel also addressed the subject of illegal streaming of live sporting events and its ethical implications. Demonstrating admirable endurance throughout the afternoon, David Grenardo again enlightened the panel discussion with his insights into the various ethical dilemmas presented in the situations involving the representation of athletes and sports teams, including those related to conflicts of interest and scope of representation.

Submissions

All submissions to the TESLAW Journal are considered. Articles should be practical and scholarly to an audience of Texas lawyers practicing sports or entertainment law. As general guidelines, articles should be no more than twenty-five typewritten, double-spaced, 8 ½” x 11” pages, including any endnotes; however, longer articles will be considered. Endnotes must be concise, placed at the end of the article, and in Harvard “Blue Book” or Texas Law Review “Green Book” form. Please submit articles via e-mail in word or similar format to **timmer.law.office@att.net** or email this address to discuss potential topics.

Once an article is submitted, the Journal does not request any additional authorization from the author to publish the article. Due to the number of submissions and the number of potential publications in the marketplace, it is nearly impossible to monitor publication of submissions in other publications. It is up to the author to assure that we are notified should there be any restrictions on our use of the article. This policy has been implemented to assure that our Journal does not violate any other publication’s limitation on republication. The Journal does not restrict republication, and in fact encourages submission of an author’s article to other publications prior to or after our election to publish. Obviously, the Journal will make the appropriate attribution where an article is published with the permission of another publication, and request such attribution to the Journal, if we are the first to publish an article.

PROFILE

Dallas Bar Association Sports and Entertainment Law Section

By Joel Timmer

Founded in 1993, the Dallas Bar Association's Sports and Entertainment Law Section provides opportunities for sports and entertainment law practitioners to learn about current issues, earn CLE credit, and meet and network with other practitioners. The Section offers CLE luncheons on the fourth Wednesday of each month at the Belo Mansion in downtown Dallas.

Some of the recent topics and speakers for the CLE luncheons have included:

- Representing Actors for Film, Television and Broadway, by Tony-award winning actor Gregory Jbara
- Fighting to Make Movies: From "Rocky" to "The Karate Kid" and Beyond, a Hollywood Veteran Shares His Techniques for Bringing Sports Stories to the Screen, by Oscar-winning director John Avildsen with Sally Helppie
- Texas Music Office: New Directions, by the new Director of the Office, Brendon Anthony
- Reality TV: Representation, Pitfalls and Protection, by Carolyn Bailey, Production Coordinator with HGTV's "Fixer Upper," and Emily Horton

Other recent presentation topics have included legal issues faced by NFL-related entities and legal issues in operating a performance venue.

The Section has been able to attract a high-level of speakers despite the fact that speakers are not paid for their presentations. However, if speakers are required to travel from out of town (the Section does bring in speakers from around the country), the Section can cover their travel expenses. If you are interested in speaking at a CLE presentation, please contact section Chair Emily Horton at emily.lawyer@gmail.com or Vice Chair Victoria Helling at attorney.vhelling@gmail.com.

Members of the Dallas Bar Association may join the Section for only $25. The Section welcomes those who practice sports or entertainment law as well as those who simply have an interest in those areas. Non-DBA members may attend the luncheon presentations but must pay a fee to receive CLE credit.

Section members receive emails with details about upcoming CLE luncheons as well as other events and activities sponsored or supported by the Section. For example, each fall the Section typically presents a half-day Boot Camp for four hours of CLE credit on a substantive area within the sports or entertainment business. The topic for the 2015 Boot Camp is the use of literary properties, particularly books, for film and television production.

To join the Dallas Bar Association and/or the Sports and Entertainment Law Section, visit **www.dallasbar.org**, where you can also find a Calendar of Events with additional information on the monthly luncheon presentations.

PITCHING AND PLACEMENT AGREEMENTS

By Steven Winogradsky, Esq.

Steve Winogradsky is a partner in Winogradsky/Sobel, located in Studio City, CA, and the author of "Music Publishing: The Complete Guide" (Alfred Music 2013).

I. Introduction

With the decline of the recording industry and diminishing revenues from the sale of recorded music, many publishers, record companies and independent artists are looking for placements in television programs, motion pictures and commercials as a way of replacing some of the lost income.

"Television is the new radio" is the cry you hear, as placement in a television show not only generates income, it can stimulate record sales if licensed properly. Getting music into these programs is harder than it looks, and there are companies set up to provide services to music licensors specifically for this purpose.

"Pitching" or "placement" companies (the "Company" or "Companies") acquire certain limited rights from the owners of musical content in order to solicit the decision makers in film and TV. Often, those making the decisions are the music supervisors, who consult with the producers and directors to select the music for a particular project.

In exchange for these services, the Companies may be compensated with a combination of a commission on license fees and/or "back end" income or an ownership percentage in the copyrights of the songs placed. This article will discuss how these companies work, what the fee structures look like and discuss a sample agreement from the perspectives of both the Company and the artist.

II. Background

Rights of the copyright owners

It is essential to understand the legal aspects of the music industry to be able to analyze the potential income streams that might be generated by the songs in question. The Copyright Act of 1976 (USC §1700, et seq.) (the "Act") states as follows:

§106. Exclusive rights in copyrighted works
Subject to Sections 107 through 120, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

(1) to reproduce the copyrighted work in copies or phonorecords;
(2) to prepare derivative works based upon the copyrighted work;
(3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
(4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;
(5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and
(6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

Please note the difference between the copyright in a musical composition, usually controlled by a music publisher, and that of the sound recording embodying the underlying music composition, usually controlled by a record company. Sound

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Pitching and Placement Agreements

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recordings are defined in §101 of the Act as *"works that result from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture or other audiovisual work, regardless of the nature of the material objects, such as disks, tapes, or other phonorecords, in which they are embodied."*

Synchronization licensing

Licensing the use of a copyright in copies of audiovisual works is part of the right of reproduction granted exclusively to copyright owners in §106 of the Act. Although the word synchronization is not mentioned specifically, §106 gives the copyright owner the exclusive right to reproduce and authorize others to reproduce the copyrighted work in copies, such as television programs, motion pictures and home videos. Synchronization is the right to reproduce an audio representation of a copyrighted work with a visual image on film, tape or other visual media. The visual image is "married" or "synchronized" to the music, so that every time the same scene is shown the same music is heard. The words "sync license" usually refers to the composition, while the term "master license" refers to the recording, but the process for both as described below is the same.

Negotiating a sync license involves two main elements: permission and a determination of the license fee. As an exclusive right of the copyright owner, **permission** *must* be secured for the reproduction of the work in the program. There is no such thing as a compulsory license in sync licensing as there is in mechanical licensing. A publisher has absolute discretion to grant (or deny) permission, for any reason whatsoever, or for no reason at all.

Setting a **license fee** is also within the discretion of the publisher, as there is also no statutory rate as in mechanical licensing. Each production has its own licensing needs and each song has its own unique value to the publisher, so these negotiations are a one-to-one process between the publisher and the production company. All things being equal, a more popular song or a song by a major artist will command a higher fee than a less popular song or artist.

For the use of a composition in a single production, the primary components of the license terms consist of (1) media, (2) territory, and (3) length of the term of the license.

Media describes the method by which the production will be made available to the public. For example, there are various forms of television:

- "Free" or "broadcast" television, such as CBS, NBC, ABC and local stations that are available over-the-air without charge to the viewer;
- "Basic Cable television," such as CNN and MTV, which is available to cable customers as part of the "basic" package they receive upon signing up with the cable service;
- "Pay" or "Subscription" television, such as HBO or Showtime, where an additional fee is paid by the viewer for access to the pay networks' programming on an "all you can eat" basis;
- Satellite television, which incorporates many of the features of Basic Cable and Pay TV but is delivered via satellite rather than by cable;
- Pay-Per-View events ("PPV"), such as 1-time major sporting events or concerts, where the viewer pays a fee for that individual program;
- Video-On-Demand ("VOD"), where the viewer is able to watch a program at their convenience instead of waiting for the program to be run according to the networks' schedules; and
- Pay Video-On-Demand ("PVOD"), where the viewer pays a fee for the right to view the program at their convenience.

There is also theatrical exhibition (publicly performing for profit or non-profit in motion picture theaters, film festivals, and other places of public entertainment where motion pictures are customarily exhibited), non-theatrical exhibition (on common carriers such as commercial airlines, trains, ships and buses, as well as in educational, religious and penal institutions, health care facilities, libraries, museums, hospitals, military bases, oil rigs, marine and industrial installations, clubs, bars, restaurants, and similar "non-theatrical" venues where there is typically no direct charge imposed for viewing), "home video" (audio-visual

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How Does A Songwriter/Artist Benefit From Pitching-Placement Deals?

By Tamera H. Bennett

Tamera H. Bennett is a wife, mom, lawyer, mediator, blogger, podcaster, and legal writer. Tamera practices trademark, copyright and entertainment law at Bennett Law Office, P.C.

I. Introduction

While most songwriters and artists thrive on the creative process of crafting their next song or production, that creative process by itself often does not put money in the bank. The songs and master recordings need to be commercially exploited with the hope and goal of securing licensing fees.

From "legacy artists" who own their songs and master recording copyrights to independent singer-songwriters that have self-released their products, there is a depth of music no longer controlled by major record labels/publishers that needs to get into the hands of music supervisors and ad agency executives.

Songs and masters from "legacy artists" (typically recordings from the 1970s and earlier) may now be owned by heirs of that artist who are not involved in the music business. Current indie artists are typically so involved in their craft and with supporting themselves with touring that "pitching" songs to music supervisors is not really feasible.

Using a pitching or placement company ("Company") can often be the missing link in getting exposure and income from the song and master copyrights (collectively, the "Works").

The focus of this article is the review and negotiation of a "Placement Agreement" with a Company to pitch for film/TV deals. A Works owner enters into a Placement Agreement with the Company so that the Company will pitch the Works to music supervisors and secure placement of the Works in films and TV shows. In return for the placement, the Company will be compensated in either a percentage of the license fee, back-end revenue streams, or co-ownership in the song or master recording copyright.

It is worth noting that there are also companies that will "pitch" songs for audio-only uses. If you are looking to have Keith Urban make your song a hit, you would look for an independent "song plugger." There are a heavy concentration of song pluggers in Nashville and the other music industry hubs. While some song pluggers do focus on film/TV placements, pitching for film/TV is usually secondary to getting the song "cut" by a recording artist. Song plugging deals are a topic for another day.

II. Synchronization and Master Use Rights

Songs/musical works and master recordings (or sound recordings) are protected by US Copyright Law. 17 U.S.C § 102. The copyright that attaches to the song covers the words, music, and the arrangement. Sound recordings are defined as "works that result from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture or other audiovisual work."

As an example of the difference between owning the song copyright and the master copyright, recall that Dolly Parton is the songwriter of the hit "I Will Always Love You." Neither Dolly Parton nor the music publishing company that owns the song copyright for "I Will Always Love You" have any ownership in the sound recording copyright for the version of the song recorded by Whitney Houston for the movie *The Bodyguard*. Keep in mind that the producers of the movie *The Bodyguard* were required to secure a synchronization license to include the song in the film and a mechanical license to include the song on the soundtrack. See Steven Winogradsky's article "Pitching And Placement Agreements" elsewhere in this issue for a discussion on synchronization licenses.

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How Does A Songwriter/Artist Benefit From Pitching-Placement Deals?

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Pitching deals tend to be most successful if one-stop shopping is available for music supervisors. If one person or company owns the song copyright and the master recording copyright, the Company's job is easier in promoting the two rights in a bundle as the clearance process is simplified for the music supervisor.

That said, deals are done where only one or the other right is granted for pitching purposes. If a songwriter only owns his song copyright and his record label owns the master copyright, a deal could be structured for just pitching the songs, so long as the record label is on board to work with the Company in negotiating and finalizing licenses.

An option that might be more advantageous for an artist, songwriter, or their heirs that control their songs and masters is entering into a Placement Agreement for the masters only. In that case, once the music supervisor is in love with the master, then the music supervisor has to use the underlying song. In the event the music supervisor loves the song, but not the master, then a synchronization license would be negotiated for the underlying song. This does cut out the Company from a revenue stream, so the Company may have less of an incentive to pitch.

III. Driving Forces Behind the Works Owner's Decision

As part of the deal points discussed, the Works owner needs to determine what is driving the decision to enter into a Placement Agreement with a particular company. It is hard to believe that not every deal in the music business is totally about M-O-N-E-Y. (Following this article is an example of a pitching agreement.) The following factors, not ranked by importance, are typically considered by the Works owner prior to entering into a Placement Agreement:

A. Exclusive vs. Non-Exclusive

Will the Company have exclusive rights to pitch the Works? Keep in mind the exclusive right may be narrowed by the type of licenses the Company can issue, the term of the agreement and territory agreed to by the parties. In making this decision, the Works owner needs to consider: 1) the scope of the contacts and relationships the Company has in the Film/TV market; 2) if there will be any confusion or overlap in pitches if the right is non-exclusive; 3) whether there could be a specific carve-out for pre-existing relationships; 4) and whether to include a carve-out for live performance of the artist/songwriter to perform in film/TV shows when the artist/songwriter was solely responsible for securing the performance.

B. Term/Length of the Agreement

While it might be standard to see an agreement with a term of two or three years, the Works owner should determine if the Agreement needs to include a performance clause. If no placements or even substantial interest in the Works has occurred within 18 months of signing the deal, then perhaps the parties need to evaluate if this is a good fit. There is not a good reason to sign a placement deal for more than three years with a few one-year renewal periods.

C. Types of Licenses The Company Can Issue

The Works owner needs to determine in what areas the Company excels in placing songs/masters. If that area is audiovisual works, then the Works owner should limit the scope to synchronization rights and not include grand rights (think Broadway productions), merchandising, audio-only, games, toys, greeting cards, etc., in the scope of rights granted.

D. Money

It is imperative the Works owner chart multiple scenarios based on the proposed contract language to determine how much and when the Works owner is going to get paid. There are always alternatives to structuring the money. Keep in mind the "money" question is directly tied to the "ownership" question, the "administration question," and the "performance income participation" question. If the Company is solely being compensated as a percentage of front-end license fees, a range of 40% to 50% of the front-end fees is reasonable. If the Company is receiving compensation via administration rights, taking co-ownership, and/or performance income participation, then the Works owner needs to look at ways to balance the compensation to the Company so that the Company is not receiving more than 50% of the total compensation on a deal.

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EXCLUSIVE REPRESENTATION AGREEMENT

EXCLUSIVE REPRESENTATION AGREEMENT

This Agreement is made and entered into as of ___________, by and between _____________________________ (ASCAP) and/or _________________________ (BMI) and/or _______________________ (SESAC) ("Publisher"), located at ____, on the one part, and ____________________, demo/master owner, and ___________________ (BMI) (collectively, "Licensor"), _________________________, on the other part. Publisher and Licensor agree as follows:

1. Licensor seeks Publisher's services to exclusively ~~administer and~~ procure placements of some of Licensor's musical works, compositions and Master recordings, as are detailed on Schedule "A", and such other compositions and Master recordings as Licensor may designate in writing during the Term hereof (songs are referred to hereinafter as the "Composition" or "Compositions" and sound recordings/master recordings are hereinafter referred to as "Recordings").

Tamera 8/22/2011 10:20 AM
Comment [1]: Let's discuss how exclusive is exclusive. My client already has relationships and has been pitching songs/masters. If something develops from those pitches why should you guys get a cut?

Steven Winogradsky 8/26/2011 8:32 AM
Comment [2]: We are willing to have limited carve outs for existing relationships but wish to be informed of activity so that we don't also contact that party. Having multiple parties represent a catalog causes confusion as to who should be handling the licensing, which is why we don't want to represent catalogs on a non-exclusive basis. Many times, if a supervisor has a song from multiple sources, they will not use it rather than get in the middle of a dispute as to who gets paid for the license.

Steven Winogradsky 8/26/2011 7:21 AM
Comment [3]: The term "administer" in this instance refers to the placement activity only.

2. If and when a placement of one of Licensor's Compositions is procured directly by Publisher, subject to Licensor's approval, not to be unreasonably withheld, for either: (a) synchronization in a theatrical motion picture; (b) synchronization in a television program for broadcast to the public; (c) synchronization in a home video program for sale to the public; or (d) any audio-visual production (including, but not limited to, productions released on video cassette, video disc or DVD, soundtracks derived from said placements, commercials, promotional film or television trailers, Internet sites, computer programs and/or games, karaoke or any similar media) (collectively a-d are "Placements"), Licensor hereby irrevocably transfers, grants and assigns exclusively to Publisher, its successors and assignees the right to collect or receive revenues derived from all commercial activities above and resulting from such Placement of the Composition(s) throughout the world ("Territory"), including but not limited to, the following:

Tamera 8/22/2011 11:49 AM
Comment [4]: No audio-only deals; must be part of a sync deal.

Steven Winogradsky 8/26/2011 7:06 AM
Comment [5]: The word "soundtrack" indicates the project stems from an audiovisual use but will modify the langue to be more clear

Tamera 8/22/2011 11:44 AM
Comment [6]: What type of use do you anticipate on Internet sites, computer programs, etc?

Steven Winogradsky 8/26/2011 7:09 AM
Comment [7]: We have contacts with videogame producers as well as trailer houses that create spots for internet-only promotions of films, TV programs and videogames.

Tamera 8/22/2011 10:20 AM
Comment [8]: My client has a strong following in Australia and New Zealand and we have been working with a sub-publisher in that territory. We are going to need to carve out that territory.

Steven Winogradsky 8/26/2011 7:09 AM
Comment [9]: See my comment 2, above.

(A) Publisher shall receive and collect one hundred percent (100%) of all front-end license and option fees obtained in procuring Placements of Licensor's Compositions and/or Recordings, and Publisher shall remit to Licensor fifty percent (50%) of all said licensing fees and option fees pursuant to this paragraph within thirty (30) days of receipt by Publisher. Publisher shall be compensated with an amount equal to fifty (50%) of all said front-end Gross Placement fees and option fees generated per placed Compositions and or Recordings, as its commission ("Commission"), and

Tamera 8/22/2011 10:20 AM
Comment [10]: My client is only comfortable with front-end fees being collected. All back-end payments need to flow to my client and he will then cut you a check.

Steven Winogradsky 8/26/2011 8:27 AM
Comment [11]: Subject to comments below about co-ownership and administration, we feel that we are in a better position to monitor and collect all fees than most indie artists. This also insures that we get our share without the artist having to figure out how to account to us or, worse yet, having to chase them down for statements and our payments.

(B) fifty percent (50%) of Licensor's entire right, title and interest throughout the world and universe, including without limitation, the copyright (so-called Publisher's share), the right to secure copyright registration, and any and all copyright renewal rights, in and to the specific Composition ("Co-Published Composition").

Tamera 8/22/2011 10:20 AM
Comment [12]: Fantastic!

Tamera 8/22/2011 10:20 AM
Comment [13]: What? This is a pitching deal. My client was never told he had to give up half his ownership rights. DEAL BREAKER.

Steven Winogradsky 8/26/2011 7:24 AM
Comment [14]: Language reinserted. Acquiring an interest in the copyright allows us to continue to benefit financially from our efforts, all of which are done at no cost to the artist. The copyright transfer only applies to those songs we actually place, not all songs on Schedule "A".

(C) Licensor agrees that if and when Publisher procures an approved use of Licensor's Composition(s) for a specific television show, film production, or with a specific advertising agency, that Publisher shall then become Licensor's exclusive representative for music placements in that specific television show, film production, or with such advertising agency, according to the terms of this Agreement, during the Term hereof, and for the duration of that specific production or show.

Tamera 8/22/2011 10:20 AM
Comment [15]: Just need to confirm this is limited to a TV Show and not for the whole network.

Steven Winogradsky 8/26/2011 7:25 AM
Comment [16]: Correct.

(D) Upon expiration of the term, Publisher shall have the right to collect all license fees earned for the placement of the Compositions during the Term for a period six (6) months after expiration of the Term (the "Collection Period"). License fees received during the Collection Period shall be deemed to have been received by Publisher during the Term and shall be subject to all terms and conditions of this Agreement.

Tamera 8/22/2011 11:38 AM
Comment [17]: Again, my client needs to collect the back-end and then remit to you.

Steven Winogradsky 8/26/2011 7:25 AM
Comment [18]: See comment 12, above.

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(E) In addition, Publisher shall have the right to collect all license fees for any negotiations commenced during the Term, ~~even~~ if completed ~~within six (6) months~~ after expiration of the Term and all provisions of this paragraph 2 shall come into effect regarding division of fees ~~and assignment of copyright~~.

Steven Winogradsky 8/26/2011 7:27 AM
Comment [19]: Especially for feature films, it can take more than a year for the film to be completed and all payments made.

3. This Agreement shall come into effect as of __________________ and remain in effect for a period of __ years until _______________________ ("Term"). Upon expiration of the initial Term, this Agreement shall automatically renew for successive one-year periods, unless terminated by either party upon sixty (60) days written notice prior to the expiration of any Term. ~~If and when a placement of one of Licensor's Compositions and Masters is procured directly by Publisher (per paragraph 2, above), Publisher's right to administer said Composition (an "Admin Composition") shall remain in effect for a term of two years ("Admin Term"), commencing as of the date of the License for the placement.~~

Steven Winogradsky 8/26/2011 7:50 AM
Comment [20]: We usually ask for a term of 2 to 3 years, as it takes time for the music to circulate among our supervision clients and actually get into "rotation" and placed in a project.

4. ~~Licensor hereby assigns to Publisher the right to administer any Placed Composition (per paragraph 2, above), ("Admin Composition"), and exploit the Admin Compositions in any manner or media now known or unknown, to enter into and execute any and all licenses and agreements regarding the reproduction and other exploitations of the Admin Compositions, as well as the right to receive and collect and all gross sums (except for Writer's share of the "songwriter's share" of small performing rights payments hereunder, which if received by Publisher shall be promptly forwarded to Licensor without deductions or offset), together with accounting statements as received by Publisher derived from the use and exploitation of the Admin Compositions. Licensor, __________ (SS# : _______________) agrees to be the fiduciary recipient of one hundred percent (100%) of all net distributable royalties, fees, and income pursuant to this Agreement, for and on behalf of itself and its co-Licensors, co-writers, and co-publishers herein, and that Licensor shall be responsible to distribute and account for said fees and income according to its agreements with its co-Licensors~~

Tamera 8/22/2011 10:20 AM
Comment [21]: My client is not comfortable with an admin deal.

(A) Licensor shall compensate Publisher with an administration fee of ten (10%) percent of all of Licensor's "back-end" royalties received in the U.S., which were generated by and attributed to any placement (as described in paragraph 2 above) procured by Publisher pursuant to this Agreement. Publisher shall pay to Licensor 100% of any income received in the United States after deduction by Publisher of the ten percent (10%) Administration Fee, as set forth herein, such payments to be made quarterly, within forty-five (45) days following March 31, June 30, September 30, and December 31 of each year.

Steven Winogradsky 8/26/2011 7:59 AM
Comment [22]: We offer administration as an additional service to the artist, many of whom don't know how to register their songs with ASCAP or BMI, issue and review license agreements, have no foreign sub-publishers, etc. Not a deal breaker for us, just an accommodation to the artist to make sure they receive all moneys due to them from all sources.

Tamera 8/22/2011 11:46 AM
Comment [23]: My client is great with 10% on the back-end; but not if it is tied to an admin deal. If this is co-pub and admin deal, you are taking 50% of pub share and charging 10% on the other 50%?

Continued on page 20.

Crowdfunding: The Answer to the Sports Stadium Controversy

By Sean Brown*

I. Introduction

Across the country, states and municipalities spend millions, and sometimes billions, of dollars to create the latest, greatest sports stadium.[1] These stadiums sell as a key to redevelopment and as the only way to retain sports franchises.[2] Between 1990 and 2003, cities constructed over 50 new stadiums and taxpayers paid an estimated $9 billion of the $13.5 billion total cost of constructing these stadiums.[3] Between 2003 and 2011, owners in the four major professional sports leagues—the National Basketball Association (NBA), National Football League (NFL), Major League Baseball (MLB), and National Hockey League (NHL)—constructed over seventeen new stadiums.[4] These stadiums cost more than $9 billion, which is more than half of the total cost of the 50 stadiums built in the prior decade.[5]

All sports see these astronomical figures. Within the MLB, the New York Mets constructed a $688 million ballpark in 2009, the New York Yankees constructed a $1.5 billion ballpark in 2009, and the Miami Marlins constructed a $515 million ballpark in 2012.[6] Within the NFL, the Dallas Cowboys constructed a $1.15 billion stadium in 2009, and the New York Jets and New York Giants constructed a $1.6 billion stadium.[7] Additionally, the San Francisco 49ers opened a $1.3 billion dollar stadium in July 2014,[8] and the Minnesota Vikings are opening a $975 million dollar stadium in July 2016.[9] Within the NBA, the Brooklyn Nets constructed a $1 billion stadium[10] in 2012 and the Orlando Magic constructed a $480 million stadium in 2010.[11] Furthermore, the Milwaukee Bucks,[12] Sacramento Kings,[13] and Golden State Warriors[14] are all tirelessly trying to finalize plans for new stadiums.

These facts and figures make it apparent that somewhat of an "arms race" exists between cities and franchises to have the best professional sports stadium. Although an argument may surround the aggregate cost to build these stadiums, the real controversy lies with the source of the money used to finance the stadium.[15] The use of public money to finance the construction of sports stadiums has made their construction controversial.[16] When examining the financing of these stadiums, one generally sees that the city, county, or even the entire state funds a substantial portion of the total cost of the stadium.[17] Studies show that approximately 61% of the aggregate cost of these stadiums is raised from public funding for each stadium that is constructed or renovated in the four major sports.[18] This public funding derives primarily from taxes, and new or increased taxes always have their proponents and opponents.[19] Supporters of public funding argue that a new stadium produces a substantial economic windfall to cities, counties, or even states in which they are housed.[20] Meanwhile, the opposition's argument centers on the fact that the economic windfall is not actually realized.[21]

There appears to be no end to this apparent arms race.[22] Therefore, the controversy of using public money to finance the stadium will also likely not cease. Eliminating or minimizing the need for public money may be the only way to resolve this controversy. Crowdfunding may do just that. Crowdfunding is raising small amounts of money from a large number of people.[23] A crowdfunding campaign based on the reward model can eradicate or reduce the need for public financing by channeling the unique passion and love fans have for their professional sports teams, and could bring significant contributions for the construction of a new stadium or stadium renovation.[24]

This article will explore the ways in which stadiums are financed, examine the complexities of public financing, and look at how crowdfunding could be used in financing stadiums. Section II will look at how stadiums today are financed. It will also explore the intricacies of public financing, including how the money is collected. Furthermore, it will explore the arguments of opponents and proponents of new stadiums. Finally, Section III will propose that crowdfunding could be used by franchises and cities to raise money instead of other traditional public financing avenues. Additionally, it will discuss the strengths and weaknesses of using a crowdfunding campaign, employing the reward model to do so.

II. Ways to Finance a Professional Sports Stadium

In the past 20 years, the country has witnessed an immense transformation of the infrastructure in professional sports.[25] As of 2012, 125 of the 140 teams in the five largest professional sports leagues—the NFL, MLB, NBA, NHL, and MLS (Major League Soccer)—will play in stadiums constructed or refurbished since 1990.[26] Whether one considers inflation or not, costs have skyrocketed for these new and refurbished stadiums over the past half-century.[27] As these costs have risen, so has the

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Crowdfunding: The Answer to the Sports Stadium Controversy

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creativity in which the stadiums are financed.[28] As a result, both private and public money primarily finance stadiums.[29] Generally, loans from the league, an investment bank, or from the state account for the private financing.[30] Oftentimes, the revenues generated by the stadium then service that debt.[31] The following describes the most common ways in which these loans are serviced; however, note that when this money does not service debt deriving from the stadium, it generally goes to the owners.[32]

A. Private Financing

1) Owners

First, the owner(s) of the franchise that will play in the stadium can contribute their own money to finance a stadium.[33] Although owners are likely investing more of their dollars than in recent decades—anywhere between $30 and $100 million—this amount is a fraction of the total cost of a new stadium or arena, especially considering the rate at which the costs of an average stadium or arena is rising.[34] For example, Art Modell, owner of the Baltimore Ravens of the NFL, put up $34 million of his own money to help finance the Ravens' stadium.[35] Additionally, former Senator Herb Kohl gave the city of Milwaukee $100 million to help finance a new stadium for the Milwaukee Bucks of the NBA.[36] Although these numbers may seem large, they pale in comparison to the aggregate cost of the new or renovated stadiums and the net worth of many of these owners.[37]

2) Naming Rights

Second, the stadium can sell its naming rights—the right to name the stadium or arena—to aid in funding a new stadium.[38] Companies are willing to pay large amounts of money, yearly or in lump sum, to have a stadium named "[COMPANY STADIUM]" and have their name on the building for everyone to see.[39] Naming rights deals can be seen at a majority of professional sports stadiums.[40] For example, Heinz Field in Pittsburgh, Pennsylvania, home of the Pittsburgh Steelers of the NFL, is named after the H.J Heinz Company.[41] Citigroup paying $400 million over 20 years to name the New York Mets' stadium Citi Field provides a great example of the potential revenue naming rights agreements can generate.[42]

3) Professional Seat Licenses

Third, professional seat licenses (PSLs) purchased by fans can help finance the stadium as well.[43] PSLs allow fans to pay a fixed price to obtain the right to purchase season tickets in the new stadium.[44] These prices are usually high.[45] For example, PSLs

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Pitching and Placement Agreements

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products for personal use), Internet streaming and downloading (electronically delivered copies regardless of the means of data retention), as well as programming received via wireless mobile devices.

Territory is the geographic area in which the production will be distributed. It could be as small as a local television market or as broad as throughout the Universe. Common intervals between those extremes would be for the United States; U.S. and Canada; the World excluding U.S. and Canada; or specifically named territories.

Term would be the length of time the producers want to exploit the production. It could be as short as a few weeks or in perpetuity, depending on the distribution of the production. Again, common intervals could be one year, five years, ten years or any other time period requested by the producers.

Public performance licensing

Performing rights organizations ("PROs") are a major source of income for creators and copyright owners of musical compositions, whether for music created for television and motion pictures or popular songs performed in a variety of ways. The United States has three PROs serving writers and publishers, unlike most other countries in the world which only have one PRO. The function of the PROs is to collect royalties for the public performance of music and distribute these royalties to the creators and owners. Unofficial estimates are that the PROs in the United States alone collect about $2 billion, most of which is paid to their members.

The PROs make separate, but equal, distributions to the writers and publishers. These are the so-called "writer shares" and "publisher shares" and are the only source of music publishing income paid separately to writers, as all other income is collected by the publisher, who then divides it with the writer pursuant to their agreement.

For sound recordings, there are no public performance royalties for audiovisual works, so the license fee for the master license is the only source of revenue for owners of the masters.

III. What does a placement company do?

Once an agreement is signed with an artist, the Company attempts to get the music used by the various production companies it does business with. Those attempts may take the following forms:

1. Review the music and categorize it based upon genre, tempo, male or female vocal and assign key words to the song to be included in the metadata attached to the song. The "metadata" is information that is either included on a list or embedded digitally on the song file itself that includes all of the above information as well as the title, composer and publisher of the song. This allows the song to be included in a searchable database and supplies needed information for licensing and payment.

2. Develop a website where the music can reside to be searched by the Company's clients. Usually, this is an FTP site where music can be streamed for review purposes or where low quality files can be downloaded, subject to broadcast quality files being sent when a song is actually going to be used in the program.

3. Send the music directly to the music supervisor for a specific use in a specific project. This is where the Company's relationships really come into play, as the staff of the Company reviews programs to see what kind of music they might use that fits the genre of the program. Sometimes, the supervisors will call the company asking for a particular type of song to see if the company can offer something that matches the criteria.

4. Enter into agreements with studios and supervisors to supply hard drives of music for consideration. Sometimes, the companies work out the deal terms prior to sending of the music, so it is "pre-cleared," or the music is subject to negotiation on a case-by-case basis.

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Pitching and Placement Agreements

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IV. The Placement Agreement

For writers and/or artists signed to record companies or publishing deals, both of those companies usually have to be consulted for approvals and negotiation of fees. If there are multiple writers and therefore multiple publishers, the number of parties expands accordingly.

However, as we shall see, with many independent artists, both of these copyrights may be controlled by the same party. This is what is known as a "one-stop," which greatly simplifies the licensing process and is favored by the placement companies and music supervisors as it greatly speeds up any approval process called for in the agreement.

The key terms of the Placement Agreement (the "Agreement") are as follows:

1. **Exclusive vs. non-exclusive grant**: Many placement companies attempt to get the exclusive rights to pitch the music covered under the agreement. Having multiple parties pitch the same music is confusing to the music supervisors and can lead to disputes over which company actually secured the placement. In addition, the Company will want to continue to be thought of as the representative for that artist if the supervisor wants to license another of their songs.

2. **Term of the Agreement**: As it takes some time for the Company to distribute the music effectively and for the supervisors to listen and become aware of it, most companies request a term of 2–3 years, plus some post-term language for deals that have commenced but not reached completion. In many agreements, the term automatically renews for additional 1-year periods unless the artist gives notice no less than 60–90 days prior to the end of the then current term, including renewal terms.

3. **Music covered under the Agreement**: In this instance, both the musical compositions and master recording by the artist are included in the grant of rights. It is not necessary for the artist to grant rights for their entire catalog, so there is usually a schedule of titles that are covered under the agreement, with more titles added as the artists continue to create more music.

4. **Grant of rights**: The artist grants to the Company the rights to pitch the artist's music and to license the music on behalf of the artist with the potential audiovisual production companies who wish to use it. The Company gets a **limited power of attorney** in order to execute the agreements and **letter of direction** allowing them to collect and distribute the license fees according to the terms of the Agreement. Generally, the Agreement does not allow the Company to license the music for audio-only product, with the exception of a soundtrack album derived from a production into which the music is being licensed.

The artist retains all copyrights in their compositions and master recordings and has the full right to release, sell and distribute audio-only product, either physically or digitally, without the Company participating in the income stream. This may change, however, depending on the nature of compensation to the Company.

5. **Compensation**: In virtually all agreements of this type, the Company will collect the license fees and retain a portion (or all) of the fees as compensation for their efforts. It is not uncommon for the Company to retain up to 50% of the license fees as the reward for their efforts. In addition, some companies require that a percentage of the copyright in the musical composition be assigned to the Company to allow them to participate in the public performance royalty stream derived from the broadcasts of the production.

Keep in mind that this co-ownership **only** applies to the songs for which a placement has been secured, not a co-publishing deal for the artist's entire catalog or all songs listed on the schedule to the Agreement.

As the Company is now a co-copyright owner, the Company (or their publishing designee) is registered with the PRO as a co-publisher and is able to collect their percentage of the publisher's share of performance income directly from the PRO. This is important to the Company as it is not uncommon, for a program that is very popular and gets wide distribution, for the performance income to exceed the license fee and, since the placement was a direct effect of the Company's efforts, for the Company

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Pitching and Placement Agreements

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to believe it should be allowed to participate in the downstream income. The percentage assigned to the Company ranges from 25% to 75%, with a 50% share not being uncommon. Note that no ownership of the master recording is taken under this arrangement.

Often, the Company will also request the right to administer the publishing (for an additional percentage, as is standard for publishing administrators) in order to better control the flow of income and to make sure that the writers and co-publishers get paid properly. As many indie artists are unfamiliar with how to register their songs with the PROs or how to collect their income streams, this additional service can benefit both parties.

This business model may seem weighted heavily in favor of the Company, but it should be remembered that their efforts and any associated costs are at the Company's sole expense, without cost to the artist and with no guarantees that those efforts and costs will be repaid. The company is working "on spec," if you will, and absorbing all the risk associated with these costs. In exchange for that risk, their reward is the compensation listed above.

6. **Approvals and restrictions**: In some agreements, the Company is given free reign to license the music in any way it sees fit. However, in many agreements, there are restrictions about certain types of licenses requiring artist approvals. Usually, these contractual approvals are for X-rated or NC-17 rated films, political announcements or commercials. Sometimes, with artists who have more leverage, all licenses must be approved by the artist, but there is usually language allowing a certain period for the artist to approve or deny the proposed use and, if that response is not received, the request is deemed approved. The time allowed for clearance and approvals is very short, especially in television, so the approval period to the artist could be as short as 48 hours from receipt of notice from the Company.

7. **Warranties and Indemnifications**: The artist warrants that they have the right to convey to the Company the rights contained in the Agreement, including that there are no other third parties who might have an interest in the songs, that there are no samples contained in the songs and that they will indemnify the Company from any third party claims.

V. Benefits to the Artist

The most obvious benefit to the artist is income from the license fees and resulting public performance income. For independent artists, even a few thousand dollars is the difference between them surviving or folding. Consider that many indie artists make their living on the road and that $2,500 as their share of the license fee or performance income could keep them on the road for an additional couple of weeks, resulting in additional touring, merchandise and CD sales income.

In addition, the exposure of having a song on a television program drives all of the revenue sources listed immediately above. It is not uncommon for the Company to be able to negotiate for non-monetary benefits for the artist, such as the band name or website on a chyron or in a crawl at the bottom of the screen. In some cases, programs have their own websites that list the music contained in episodes of the program and it is possible to get a link on the program sites to the artist's website or iTunes page, thereby driving up sales.

Being able to say "as seen on Program X" also aids in the artist marketing themselves to club and concert promoters and bringing more fans to their appearances, also driving sales of CDs and merchandise on site.

VI. Potential Pitfalls for the Company

The whole idea behind the one-stop clearance is for the Company to have all the rights necessary to give a quotation and issue a license on behalf of the entire song. It is essential that the artist is able to convey 100% of the rights needed, which would include all co-writers, co-publishers and band members.

Too often, the artist "forgets" that someone they knew contributed to the song, or that one of the band members on the track is no longer a member. This can be a disaster for the Company, as their license agreement with the producers contains

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Pitching and Placement Agreements

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language that the Company warrants and represents that they have 100% of the rights and will indemnify the producers from any such third party claims. Although the Agreement between Company and artist has similar language, it is the Company who is more likely to have the resources to pay the indemnification costs, not the artist.

In addition, if the Company finds itself in this situation, it is likely that the production company will not accept more material from the Company and no further placements can be obtained from that producer.

VII. Conclusion

As with any successful negotiation, relationships like this can benefit both parties. The artist gets their music exposed to decision makers at the highest levels at no financial cost to the artist and both parties can earn income from the initial placement and a continuing revenue stream that could last for years.

How Does A Songwriter/Artist Benefit From Pitching-Placement Deals?

Continued from page 10.

E. Ownership

Is the Company asking to take a co-publishing interest either in the Works it is pitching or in the Works that are actually placed? This is often a deal-breaker for a Works owner that is strictly looking for a "pitching deal." The Works owner must determine if this type of arrangement is beneficial in the long-term. One option is to limit the number of Works included as part of the agreement until a track record can be determined.

F. Administration Rights

The Works owner needs to assess if they are signing an administration agreement with monetary incentives for placement of songs/masters or if they are solely signing a Placement Agreement. There is nothing wrong with an administration agreement that provides an incentive for pitching the songs. An issue arises if the Works owner thought it was signing a pitching agreement and suddenly it is negotiating an administration agreement.

G. Performance Income Participation

If the Company does not take an ownership interest in the underlying copyright in the song or master, often the Company will request a back-end profit participation in the publisher's share of performance income of the song for the placement that was made. So, if the song was included in a particular film, the Company would earn performance royalties from that film. This can become tricky. Do you rename the song and file it as a new work with your performance rights organization (ASCAP/BMI/SESAC) and list the Company as a co-publisher? How can the Works owner track that the performance rights organization is properly allocating just the money from that film to the title? What if there is money coming from other public performances of the song not associated with the film? Does the Work owner trust the income is being allocated correctly?

H. Approval Rights

Most Placement Agreements include some language allowing the Works owner the right to approve certain types of license, i.e., placements related to alcohol, or NC-17 or R-rated films. For many Works owners, the need to approve all licenses is paramount. In order for this arrangement to be successful, the Works owner needs to be available to grant approval on short-notice and must trust the Company is really negotiating the best terms available. If the Company is not pushing for the best terms, then it becomes difficult for the Works owner to approve licenses. If the Works owner is repeatedly not approving licenses, then

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How Does A Songwriter/Artist Benefit From Pitching-Placement Deals?

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the Company may become less inclined to pitch any of the songs/masters controlled by the Works owner. Issues with approval rights might be directly linked to the internal relationships factor discussed next.

I. Internal Relationships (Do we like each other?)

If the Works owner has a personal connection to the songs/masters that are going to be a part of the deal, then there has to be a personal connection between the Works owner and someone at the Company. Yes, this is a business transaction, but if synergy is lacking between the parties, then there may be an uphill battle regarding: 1) pitching the songs, and 2) approving licenses. This need for a personal tie may not be as strong for catalogs that are coming from a corporate setting, but for those catalogs in which you are working with heirs or directly with the songwriter, personal relationships can become a deal-breaker.

Depending on the bargaining power of the Works owner, some consideration should be given to including a "key man" provision in the Placement Agreement. If the decision was made to use a particular Company because of a key owner or key employee, then think about how the Works owner could terminate the Placement Agreement if the key person is no longer a part of the Company.

J. External Relationships (Can the Company deliver?)

The Works owner needs to conduct some due diligence and determine if the Company has the connections necessary to get their Works in front of the right people. There are never guarantees that past successes equal future results, but a solid track record has to be a part of the overall decision making process. Also, if the Company's major success is placing "electronica," do they have the connections for placing your "pop" songs written in the 1960s? This factor ties to the next point dealing with competing or complementary catalogs.

K. Competing or Complementary Catalogs

The Works owner has to determine the level of internal competition for getting the Works pitched. Does it make sense to sign with a Company that only deals with a specific genre of music? It might if you are in a niche market. If the Works owner has a select catalog of hits from a specific time period or genre, then perhaps signing with a Company representing similar songs/masters is a good idea. This links back to determining the scope of "external relationships." If music supervisors know that a particular placement company specializes in hits from 1960 to 1965, and that is what the Works owner has, then jump on board. Remember, the Company is limited in the number of Works it can submit to a music supervisor for a particular project. To maintain relationships with music supervisors, the Company has to be selective in what is submitted. The Works may not always be a fit for a particular film/TV show, but the Works owner needs to make sure the Works are being pitched for appropriate opportunities on a regular basis.

IV. Conclusion

Placement Agreements can be a win-win situation for the Works owner and the Company. Having a Placement Agreement can free an actively working artist/songwriter to spend more time on his craft or allow the heirs of an estate to see songs from 30, 40 or 50 years ago come to life in new media. When the right relationships are in place, the Works owner does have the bargaining power to negotiate terms that can be mutually beneficial to all parties.

EXCLUSIVE REPRESENTATION AGREEMENT

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5. In consideration of the above undertakings on the part of Publisher, the Licensor hereby agrees:

(A) Publisher shall have the right to deduct from any amounts payable to Licensor hereunder such portion thereof as may be required to be deducted under the applicable provision of any applicable statute, regulation, treaty or other law under any applicable union or guild agreement.

(B) Licensor, or its designee, shall collect Licensor's share of the "songwriter's share" of public performance royalties directly from the performing rights organization to which Licensor belongs and Publisher shall not be entitled to any portion of the "songwriter's share of public performance royalties."

(C) Only with the prior written approval of Licensor, Publisher may substitute a new title or titles for the Composition, make changes, arrangements, adaptations, translations, dramatizations, and transpositions of the Composition, in whole or in part, subject to Licensor's approval.

(D) Publisher shall not, without Licensor's consent, exploit grand performing rights, exploit or grant licenses for X-rated or NC-17 rated films.

6. During the Term, the Licensor hereby authorizes Publisher in the Territory the right to:

(A) use, perform, and reproduce (and grant to others the right to use, perform, and reproduce) the Recordings and Compositions indicated on Schedule "A" in connection with live and recorded audio-visual programs and productions, for purposes of exploitation pursuant to the terms of this Agreement. Licensor acknowledges that Publisher and its licensees are not signatories to any music labor unions or guilds (collectively "Guilds") and that Licensor's works were not recorded pursuant to any such Guilds;

(B) record (and grant the right to others to record) on film, videotape, computer disk and/or any other medium, whether known or hereafter devised, Licensor's Compositions in synchronization or timed-relation to audio-visual productions, and to issue synchronization licenses for the reproduction and/or synchronization or timed-relation of the Recordings on any visual, audio or audio-visual sound carrier now known or hereafter devised including but not limited to videocassette, DVD, CD-ROM, Internet and all other new media now known or hereafter developed;

(C) broadcast, telecast, syndicate, license, distribute, and otherwise exploit (and grant to others the right to broadcast, telecast, syndicate, license, distribute, and otherwise exploit) the Recordings ~~contained in Schedule "A"~~ in audio-visual works, and to manufacture, if necessary, on compact disc or other digital media, copies of the Recordings in sufficient numbers as may be required by Publisher solely for the promotion of continuing exploitation of the Recordings in the Territory as authorized hereunder. The costs of design, editing, mixing, production, manufacture and packaging of those discs and related artwork shall be borne solely by Publisher;

(D) issue performance licenses in the Licensed Territory as deemed necessary in the normal course of business;

(E) the right to use the name, photograph, likeness, and or biographical material as submitted or approved by the Licensor of any and all composers of the original recordings, for the purpose of the trade or otherwise in connection with the Recordings;

(F) all rights to license, assign, and enter into agreements to or with any person or entity with respect to all or any rights or part of the rights granted hereunder;

(G) all rights not expressly set forth herein as a licensed right are reserved by Licensor.

Tamera 8/22/2011 10:20 AM
Comment [24]: My client does not want to relinquish creative control in this area. We also need to consider proper tracking and payment with the PRO if we have a title change.

Tamera 8/22/2011 10:20 AM
Comment [25]: Let me check w/my client; we may need to add alcoholic beverages.

Steven Winogradsky 8/26/2011 8:25 AM
Comment [26]: Exclusions on subjects like this, certain products in commercials and political ads are almost always granted.

Tamera 8/22/2011 10:24 AM
Comment [27]: Good!

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EXCLUSIVE REPRESENTATION AGREEMENT

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7. Licensor hereby warrants and represents that _______________ has the right to enter into this Agreement and to grant to Publisher all of the rights granted herein, and that the exercise by Publisher of any and all of the rights granted to Publisher in this Agreement will not violate or infringe upon any common law or statutory rights of any person, firm or corporation, including, without limitation, contractual rights, copyrights and rights of privacy. All elements within the Composition and Master are either original with the Licensor, or are fully cleared by the Licensor. No Composition shall, in whole or in part, be an imitation or copy of, or infringe upon, any other material, or violate or infringe upon any common law or statutory rights of any person, firm or corporation, including, without limitation, musical samples, contractual rights, copyrights and rights of privacy. Licensor further represents and warrants that the rights granted herein are free and clear of any claims, demands, liens or encumbrances from any other party or musician or Guild, and that Licensor owns and controls all Master and Composition rights, together with co-writers, to the works and performances contained in Schedule "A", and that such use authorized herein will not give rise to any claims of infringement, invasion of privacy or publicity or claims for payment of re-use fees or residuals (any and all third party payments shall be Licensor's responsibility).

> Tamera 8/22/2011 10:28 AM
> **Comment [28]:** Two titles we previously discussed will be pulled from Schedule A as samples have not been cleared. If you guys want them, then we will give you the info so you can get them cleared.

8. Licensor hereby indemnifies, saves and holds Publisher, its assigns, licensees and its directors, officers, shareholders, agents and employees harmless from any and all liability, claims, demands, loss and damage (including reasonable counsel fees and court costs) arising out of or connected with or resulting from any breach of any of the warranties, representations or agreements made by Licensor in this agreement and resulting in a final, non-appealable adverse judgment to Licensor, or a settlement entered into with Licensor's prior written consent which consent shall not be unreasonably withheld.

> Tamera 8/22/2011 10:29 AM
> **Comment [29]:** We need to discuss mutual indemnity.

9. Licensor empowers and appoints ~~Publisher, or any of Publisher's officers~~ ___________________, a power of attorney limited solely to approved Placements of the Compositions and/or Masters ~~Licensor's true and lawful attorney (with full power of substitution and delegation) in Licensor's name, and in Licensor's place and stead, or in Publisher's name, to take such action, and~~ to make, sign, execute, acknowledge, deliver and record any and all instruments or documents which Publisher, from time to time, deems necessary to vest in Publisher and Licensor, their successors, assigns and licensees, any of the rights granted by Licensor hereunder, ~~and which pertain to the Compositions included in Schedule "A", including, without limitation, the securing of copyright in the Composition by Publisher in the names of those parties entitled to such copyright interest as set forth herein.~~ A copy of any documents, which Publisher signs on Licensor's behalf under its power of attorney, shall be promptly sent to Licensor.

10. This Agreement sets forth the entire understanding between the parties and cannot be changed, modified or canceled except by an instrument signed by both parties. This Agreement shall be governed by and construed under the laws of the state of California applicable to agreements wholly performed therein.

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EXCLUSIVE REPRESENTATION AGREEMENT

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11. If a dispute arises out of or relates to this Agreement, and if said dispute cannot be settled through negotiation, then the parties agree first to try in good faith to settle the dispute by mediation. The mediator shall be agreed to by all parties. In the event that a mediator cannot be agreed upon, then the Parties hereby agree to contact the Chair of the State Bar of California Alternative Dispute Resolution Section and request the names of three mediators. The parties shall then agree to submit any disputes to mediation using one of the three mediators identified. If the parties cannot agree to one of the three mediators, then any party may petition a court of law to order mediation within 30 days. If mediation has not been conducted and the matter not resolved within 45 days of a request by either party for mediation, the parties may then resolve the dispute by litigation.

~~In the event of legal proceedings between the parties, the parties agree to resolve such disputes through binding Arbitration in the County of Los Angeles.~~ The prevailing party in any action brought to enforce or interpret the terms of this Agreement shall be entitled to recover from the other its reasonable attorney's fees and court costs, in addition to any damages or other remedies awarded by the court.

Tamera 8/22/2011 10:43 AM
Comment [30]: Arbitration is long, drawn-out and expensive for both parties. Okay with a mediation provision.

Steven Winogradsky 8/26/2011 7:54 AM
Comment [31]: Approved

12. If any provision of this Agreement shall be held void, voidable, invalid, inoperative or otherwise unenforceable, no other provision of this Agreement shall be affected as a result thereof, and accordingly, the remaining provision of this Agreement shall remain in full force and effect as though such void, voidable, invalid, inoperative or unenforceable provision had not been contained herein, provided, however, that such provision was not clearly a material element of the consideration for this Agreement.

13. All notices, statements, payments or other written communications desired or required to either party under this Agreement shall be sent to Licensor at the addresses set forth below, or to such other addresses as the parties may designate to each other in the future. All notices shall be in writing and shall be sent by U.S. post or by personal delivery by means of a nationally recognized delivery service (e.g., FedEx or UPS).

14. Licensor acknowledges and agrees that Licensor has been represented by independent legal counsel or has had the opportunity to be represented by independent legal counsel of Licensor's own choice for purposes of advising Licensor in connection with the negotiation, preparation and execution of this Agreement.

Tamera 8/22/2011 10:53 AM
Comment [32]: Food for thought: Who does this clause protect?

Steven Winogradsky 8/26/2011 7:56 AM
Comment [33]: It protects both sides. Most artists are not capable of understanding a complex document like this, so their interests are protected by having a review by counsel. We are protected against any claims of forcing the artist to sign under duress without the opportunity to seek counsel.

IN WITNESS WHEREOF, the parties hereto have this day signed below to confirm the Agreement reached.

Dated as of: __________________________

____
Publisher

____
Licensor
Social Security #:
and on behalf of __________________

____
Publishing Designee (BMI), (Licensor)

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EXCLUSIVE REPRESENTATION AGREEMENT

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SCHEDULE "A"

For purposes of this Agreement, the term "Compositions" shall be deemed to mean Licensor's undivided copyright interest in and to the musical compositions owned or controlled in whole or in part by ______________ (BMI), and ______________ Publishing Designee (BMI), as set forth below:

List of Songs/Recordings

1.
2.
3.
4.
5.
6.

co-writes:

7.

8.

9.

10.

11.

________________________________ Writer, _____________ (BMI) __________________________________ Licensor, ______________ Publishing Designee (BMI)

Crowdfunding: The Answer to the Sports Stadium Controversy

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for the new AT&T Stadium, home of the Dallas Cowboys, cost as much as $150,000.[46] Thus, PSL sales could finance a large portion of a new stadium given their current market value.[47] For example, one Forbes writer believes that the San Francisco 49ers will raise approximately $500 million through PSL sales.[48]

4) Luxury Suites

Fourth, luxury suites in the new or renovated stadium can be used to service the debt issued to finance the stadium.[49] Luxury suites are highly priced as they often include "amenities such as parking passes, private elevators, a bathroom, a wet bar, a television, a refrigerator, an ice machine, food and beverage service, and additional outdoor seating."[50] Groups of people and organizations are willing to pay extra for these amenities. Luxury suites leases usually cost between $50,000 and $200,000 a year.[51] Thus, this source can provide millions of dollars annually. [52]

5) Commercial Licensing Agreements

Finally, commercial licensing agreements, primarily in the form of concessions and marketing opportunities, are a source of revenue to fund a new stadium.[53] Exploiting a concessions opportunity generally comes from three arrangements: collecting royalties based on sales, charging a fixed fee not based on sales, or a combination of the two.[54] The main difference between the first two options is the availability of up-front money.[55] Therefore, many concession agreements use the third option.[56] This allows the team or city to receive up-front fees via the fixed fee to help defray initial costs of the stadium, while also gaining the upside of royalties—the potential for greater revenue.[57]

The marketing opportunities that produce the most revenue derive from broadcasting and product licensing agreements.[58] National firms in product fields such as beer, gas, and automobiles usually sponsor local broadcasts.[59] Additionally, television networks such as ESPN/ABC, CBS, TNT, NBC, and FOX will pay large amounts of money for broadcasting rights.[60] This revenue source has been greatly increasing over the years, partly due to the fact that games are not only being broadcast on television, but also on mobile phones, tablets, and computers.[61] Additionally, product-licensing agreements, whether sold by a league or a team, are usually made with national manufacturers of consumer products like clothing, athletic gear, soda, and beer.[62]

In conclusion, teams have many private-money options to finance the stadiums in which they play. However, money from these sources is not commonly set aside for financing stadium construction.[63] Generally, private money goes to the owners by citing these funds as revenues in their general operations budget.[64] In contrast, public money is exclusively raised for costs related to stadium construction or renovation.[65]

B. Public Financing

Today, the most controversial aspect of stadium financing is the use of public financing.[66] Despite the presence of two impediments to public financing, professional sports stadiums often use public financing, usually in the form of a municipality issuing tax-exempt bonds.[67] Those two impediments are described below.

1) Impediments to public financing professional sports stadiums

First, almost every state restricts municipal lending to private entities.[68] However, these limitations only restrict the issuance of general obligation debt secured by the full faith and credit of the issuing government.[69] Nevertheless, municipalities evade the debt limitation by financing projects with higher interest rate bonds, as they are not secured by the full faith and credit of the issuing government.[70] Municipalities effectuate this strategy by creating one of the following fiscal models: a special district, special fund, or public authority.[71] A special district is an entity charged with the performance of a particular governmental task.[72] A special fund is a fund that can be used to service debt.[73] The special fund is commonly comprised of tax revenues, or direct payments made by those who receive the benefits or services provided.[74] A public authority is a private corporation borrowing funds by issuing bonds, and subsequently raising revenues sufficient to retire those bonds.[75]

Second, the Tax Reform Act of 1986 made significant changes affecting private-use bonds.[76] The reduction of the percentage of proceeds, from 25% to 10%, as the standard for the satisfaction of both the "use of proceeds" and "securities interest" test made the biggest impact.[77] Thus, a bond issue is a private-activity bond, and taxable, if more than 10% of the bond proceeds are used by a nongovernmental entity and more than 10% of the debt service is secured by property used directly or indirectly by a nongovernmental entity.[78] In the context of stadium financing, tax-exempt eligibility is conditioned upon permitting no more

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than 10% of stadium related revenues to finance the debt service on a tax-exempt bond issuance because a sports franchise will invariably use more than 10% of a stadium's services.[79] Although these changes were meant to end taxpayer financed stadiums, a loophole opened, as payments could be made with general municipal revenues.[80] This loophole has spawned the current debate regarding taxpayer financed stadiums, especially as the costs of stadiums continue to rise.

2) Most common taxes used to publicly finance sports stadiums

In sum, cities must issue debt with relatively high interest rates and must service 90% of the debt with general municipal revenues. These revenues are collected through creating and raising the following taxes: sales tax, tourist tax, user tax, sin tax, and lottery funds.[81] When a stadium is financed through an increase in sales tax, usually the sales tax of a geographic region where most potential spectators reside, increases or a new one is created.[82] The new tax usually applies to every taxable transaction within the region.[83] Arlington, Texas, provides a good example of using a sales tax to service tax-exempt bonds when it agreed to raise $135 million for The Ballpark at Arlington via a 0.5% increase in the local sales tax.[84] A municipality employs a tourist tax when it taxes hotel and motel rooms and rental cars with the idea that travelers using these services visit to attend an event at the stadium.[85] Resident voters like this tax because the burden of paying the stadium is shifted to nonresidents who are not even permitted to vote on the tax.[86] Thus, the tourist tax is "the most popular form of revenue generation used by sports stadium districts to repay their tax-exempt bonds."[87] Chicago employed a tourist tax when the city serviced public debt through a 2% City of Chicago hotel tax to help finance the home of the Chicago White Sox.[88]

Another popular method for municipalities to fund debt finance of sports stadiums is through a user tax.[89] A user tax imposes a tax on the people who use the sports stadium, which is generally executed through a "ticket or admissions tax or surcharge and a parking tax or fee."[90] For example, "the Allegheny Regional Asset District imposed a 5% surcharge on tickets to PNC Park, home of MLB's Pittsburgh Pirates, to help repay tax-exempt bonds used to finance the ballpark."[91] Similarly, Indianapolis, Indiana, increased its ticket surcharge by 1% to help repay tax-exempt bonds to finance Lucas Oil Stadium.[92] Furthermore, municipalities can execute a sin tax. A sin tax is executed when a municipality places excise taxes on alcohol and tobacco with the idea that no one must purchase these morally questionable products.[93] Because these products are morally questionable, taxing these products is politically popular. Cuyahoga County, Ohio, used sin taxes to finance the Gateway Project—the construction of Jacobs Field for the Cleveland Indians and Gund Arena for the Cleveland Cavaliers.[94] This tax added 4.5 cents to the cost of a pack of cigarettes, $3 per gallon of liquor, and 32 cents to the cost of a case of beer.[95] A lottery tax is utilized when a municipality uses lottery funds with the idea that it costs taxpayers nothing, as the lottery is a voluntary sweepstakes.[96] The Camden Yards, home of the Baltimore Orioles, used this type of financing.[97]

In addition to raising taxes, municipalities have also created tax-increment financing (TIF) districts to finance municipal bonds.[98] Generally, a municipality creates a TIF district to redevelop blighted areas.[99] The theory behind the district is that the redevelopment, in this case a professional sports stadium, will increase not only the value of what is being redeveloped but also the surrounding area.[100] Then, that increase in property taxes, from the increase in property value, finances the project because but for the new or renovated stadium, the surrounding property value would not have increased.[101] Recently, Detroit created a TIF district to finance the new sports complex centered around a new arena for the Detroit Red Wings.[102] Accordingly, as seen by the discussion above, municipalities go to great lengths to finance professional sports facilities.

3) Support for Public Financing

i. New or renovated stadiums create a substantial economic windfall

Proponents of public financing professional sports stadiums justify their stance for three primary reasons. First, proponents feel that professional sports stadiums bring a substantial economic windfall to the city through "mega-events" and sports teams playing at their respective stadiums.[103] The theory contemplates that large crowds of wealthy fans descend on a city's hotels, restaurants, and other businesses, thereby injecting large sums of money into the host cities.[104] In terms of single-day mega-events, the NFL claims that the Super Bowl has an economic impact of $400–$500 million, and the MLB claims that the MLB All-Star Game has an economic impact of $75 million and the World Series has up to a $250 million economic impact.[105] In 2011, Super Bowl XLV generated more than $600 million for North Texas.[106] Sports teams also boast about the money they contribute to their home cities.[107] The St. Louis Regional Chamber and Growth Association estimated that the St. Louis Cardinals baseball team infused $301 million in annual economic benefits to the region.[108] Also, in 2011, Conventions, Sports, Leisure International performed a study for the American Airlines Center in Dallas, Texas, and concluded that it generates roughly $600 million

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annually for the City of Dallas.[109] Accordingly, proponents believe that professional sports stadiums benefit the economy of a city or region greatly.

ii. New or renovated stadiums create jobs for its city's citizens

Second, proponents boast that stadiums create jobs for the area's citizens.[110] The most significant job creation from new or renovated stadiums likely does not come directly from the team and stadium, but from a boost in neighboring shops, hotels, restaurants, and transportation.[111] For example, Bank One Ballpark in Arizona created 400 jobs, the Jacksonville Jaguars stadium created 300 jobs, and the Baltimore Ravens stadium produced 1,394 jobs.[112] More recently, the Minnesota Vikings project that their new stadium will support 13,000 jobs.[113] Proponents argue that no readily available alternatives exist to produce these kinds of figures.

iii. New or renovated stadiums can revive a downtown

Another benefit is that a new stadium can be the catalyst for a city's revival.[114] Supporters of new stadiums contend that a stadium can turn a previously desolate zone of a city into a local hotspot.[115] For example, proponents look at Arizona's Bank One Ballpark as initiating a downtown revival, as downtown Phoenix is a place where people congregate on nights and weekends now.[116] The same is thought of Cleveland's Gateway Project, as that project spurned economic development in Cleveland, making its "Mistake on the Lake" nickname a distant memory.[117] Cleveland's Gateway Project used the construction of a baseball and basketball stadium to spur revitalization of downtown Cleveland that now includes a theater district, large corporate headquarters, two shopping malls, numerous restaurants and clubs, a museum district, and several apartment and condominium complexes.[118]

iv. New or renovated stadium provides indirect benefits to citizens

Finally, proponents also feel that cities and their citizens indirectly benefit from professional sports.[119] Professional sports are an important aspect of many people's lives.[120] The increasing number of cable channels dedicated to sports, the dedicated section to sports in most newspapers, the reaction of fans when their team wins or loses, and the fantasy sports industry show the importance of professional sports in many people's lives.[121] Furthermore, because professional sports teams are such an important part of many people's lives, professional sports teams create a sense of pride, not only for their local team, but also for the city itself.[122] Additionally, scholars have attempted to quantify this indirect benefit by measuring rents in cities with NFL franchises against other metropolitan areas without an NFL franchise.[123] They found that cities with NFL franchises command 8% higher rents than units in other metropolitan areas after correcting for housing characteristics.[124] Thus, "sports likely serve as a municipal amenity that can create social capital and improve the quality of life."[125]

4) Criticism for Public Financing

i. The tax base does not go to events at the stadium

On the other hand, opponents of using public money to finance professional sports stadiums feel that this system is flawed, as many individuals who pay the taxes do not attend the events and the purported benefits are inflated or never realized.[126] First, opponents argue that with a sales tax, the user is not paying, as there will be many people from that geographic region who do not enjoy the direct benefits of the stadium, especially as ticket prices to events continue to rise.[127] This argument is stronger when stadiums are constructed in downtown urban areas, as indigent and minority groups, who often constitute a large portion of the taxpayers in those areas, likely do not receive any benefit from the stadium because they cannot afford to attend the games.[128] Second, opponents argue that the tourist tax over-includes guests that visit the city for purposes other than an event at the stadium and under-includes stadium patrons and hoteliers who do business outside the city.[129] Also, opponents feel that a tourist tax makes the city vulnerable to losing visitors because of the noticeably higher prices for the taxed accommodations.[130] Third, opponents argue that the user tax is not as clear as the rationale—only those people who use the sports facility should have to pay for it—suggests.[131] This theory does not work due to the ten percent tests in the federal tax code related to tax-exempt bonds and sports stadiums, as most sports stadiums exceed the first ten percent test related to a stadium's use given the team playing in it.[132] Thus, a region cannot rely exclusively on user taxes to fund debt service for the stadium.[133] At the same time, proponents believe that the user tax actually gives the city a break, as the user tax model fails to account for the fact that the region benefits, to some extent, from being viewed as a "major league city" because it hosts a professional sports team.[134] Fourth, opponents argue

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that essentially no real correlation exists between those who pay sin taxes and those who consume benefits from a stadium, so opponents feel that these kinds of taxes are unwarranted.[135] Fifth, opponents feel that the lottery tax is regressive, as lower-income earners tend to spend more of their income on the lottery than do higher-income earners.[136] As mentioned already, lower-income earners are likely not deriving benefits from the stadium as they are unlikely able to afford a ticket considering the rising ticket prices.[137] Additionally, it will divert funds away from programs that the state lottery supports already.[138] Thus, opponents feel that a new or renovated sports facility does not warrant new or heightened taxes.

ii. No new money comes into the city

Additionally, opponents feel that purported economic windfall that professional stadiums provide cities is nonexistent, or at least drastically overstated because of three major flaws in the economic studies.[139] First, these studies fail to account for the substitution effect.[140] The substitution effect represents the idea that in the absence of professional sporting events, spectators would likely direct their spending elsewhere in the economy.[141] On the other hand, professional sports teams bring non-residents within the city limits to spend their entertainment dollars.[142] Second, critics point to crowding out.[143] Crowding out occurs when the crowds and congestion associated with a professional sports stadium tend to reduce other economic activity in the locale.[144] Therefore, opponents believe a professional sports stadium may affect the allocation of economic activity but not the total amount of activity that occurs.[145] Third, money spent in the local economies may not stay in the local economy.[146] For example, many athletes, who receive a large share of the revenues generated by the stadium, do not live in the area in which they play.[147] The same can be said for some of the owners, another major beneficiary of public-financed stadiums.[148] Therefore, opponents find it difficult to conclude that new money comes into the city where a professional sports team plays.

iii. New jobs come at a high price and are not full-time

Also, opponents feel that stadiums are not an effective method for job growth.[149] Construction companies, the most obvious beneficiaries of new stadium construction, only receive benefits to the extent they are not currently working.[150] Furthermore, public reports in Maryland showed that the then-proposed NFL stadium in Baltimore would create approximately 1,349 full-time jobs at a cost of $127,000 per job while the state's existing Sunny Day Fund for economic development had created 5,200 full-time jobs at a cost of $6,250 per job.[151] Furthermore, economic impact studies tend to overestimate the number of jobs that will be created.[152] For example, in Jacksonville, a report adjusted the number of jobs to be created to one-tenth of the original estimate.[153] Moreover, these jobs tend be low-wage, part-time, and seasonal. Renowned economist Andrew Zimbalist notes that teams only employ between 50 and 120 full-time employees; meanwhile, they employ several hundred low-skill, low-wage, part-time, and seasonal jobs.[154] For example, 7,500 of the projected 13,000 new jobs predicted by the Minnesota Vikings for their new stadium will be employed during the three-year construction period.[155] However, proponents counter that no better alternatives for job creation consistently exist, so creating jobs through sports stadiums is worth the subsidy.[156] Regardless, opponents feel that the cost per job and the types of jobs do not create the economic impact that other public investments do.[157]

iv. Revitalization comes from the people, not a stadium

Fourth, critics feel that a professional sports team does not revive a city.[158] Opponents maintain that professional sports follow wealth, not the other way around.[159] The real trophy for any city remains attracting large corporations, and large corporations tend to be lured by growing markets with surrounding regions filled with skilled and technical laborers.[160] Economists believe that sports facilities are likely just one quality of a desirable market to offer potential employees, while many other aspects, like airports, public transportation, safety, and cultural facilities exist that could also enhance the quality of life of employees.[161] Therefore, the ultimate question is whether building or renovating a stadium is the most effective way to spend the city's money.[162] Studies show that renovated or new stadiums are not an effective way to spend money, as they do not bring new people to the area and their profitability is low. On the other hand, proponents of public financing stadiums argue that the country or the world will not know what the city has to offer without professional sports teams.[163] Today, games are broadcast on radio, cable, satellite, and over the Internet, and reach more people than ever.[164] Thus, when a telecast shows the region or when the announcers talk about the city's beauty and the fantastic restaurants and bars, it equates to valuable advertising for the region.[165]

v. Cities are straddled with debt by vacant, publicly financed stadiums

Finally, some teams have abandoned their publicly financed stadiums, leaving the citizens of the city or county to pay off the debt.[166] For example, the old Giants Stadium carried $110 million in debt, or nearly $13 for every New Jersey resident, when

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the municipality demolished it to make way for MetLife Stadium.[167] Sadly, New Jerseyans are not alone in paying for stadiums that no longer exist. Residents of King County in Seattle, Washington, owed more than $80 million for the Kingdome.[168] Additionally, residents of Indianapolis, Philadelphia, Houston, Kansas City, Memphis, and Pittsburgh find themselves in the same predicament.[169] Opponents of public financing fear that if they vote to publicly finance a professional sports stadium, then they will also ultimately pay for a local vacant stadium.

III. Crowdfunding

A. Overview of Crowdfunding

Building a professional sports stadium requires a lot of money, and often times these projects have required public money.[170] Using public money is very controversial; therefore, professional sports teams could use crowdfunding to minimize or eliminate the need for public money. Crowdfunding involves raising small amounts of money from a large number of people.[171] To many, this fundraising option may seem odd because crowdfunding is often associated with startups looking to get off the ground or small businesses looking to expand.[172] However, anyone can use this fundraising avenue as long as they can get a following, and that is one asset that all professional sports team possess.

The crowdfunding industry is growing, and growing fast.[173] In 2012, 308 crowdfunding platforms across the world raised $2.7 billion, an 81% increase over the amount raised in 2011.[174] It is expected to grow to be a $93 billion industry by 2025.[175] These numbers demonstrate that crowdfunding is a real player in the capital markets, and likely is more than just a fad considering the growth of social media.[176] The growth and legitimacy of crowdfunding will likely prove to be critical, as any crowdfunding campaign employed by a sports team will likely need league approval, or due to its novelty, be subject to review by the league office for its compliance with the rules governing the league.[177]

Crowdfunding can be categorized into five models based on what the contributor receives: 1) donation, 2) reward, 3) pre-purchase, 4) lending, and 5) equity.[178] First, crowdfunding can be used in a donation model. The donation model entails contributors donating money to some company or cause, usually a non-profit.[179] In this model, the contributors receive nothing in return for their donation.[180] The advantage to this model is that the contributors expect nothing in return, making this model a cheap way to raise no-strings-attached money.[181] However, this model is generally limited to charities and non-profit institutions, rather than for-profit businesses.[182]

Second, crowdfunding can be used in a reward model.[183] When a company uses the reward model, the company gives the contributor some type of reward for their contribution, and usually the reward is better the more the contributor gives.[184] For example, if a contributor gave twenty dollars towards a campaign using the reward model, that contributor may receive a pen with the company name and logo on it.[185] Further, if the contributor gave fifty dollars, he or she would receive that same pen

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TESLAW Journal Articles Hypelinked

As part of our continuing effort to improve the TESLAW Journal, we have added hyperlinks to many citations. Each hyperlink will take the reader to the State Bar of Texas' free research service, Casemaker. If not previously registered for Casemaker, a reader will need to subscribe using their bar card number.

Using the "remember me" function ensures that sign-in will not be necessary each time a reader clicks a hyperlink. Unfortunately, Casemaker does not support all secondary sources and out of Texas citations — so not all citations are hyperlinked.

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and a company t-shirt.[186] The advantage to this model is that any organization can employ it. This model is very popular among the crowdfunding community: organizations have many resources to use for their campaign, and contributors unfamiliar with crowdfunding can easily find information regarding how it works. The disadvantage to employing this model for the organization is the expense. Organizations must pay anywhere from 4–9% to the website hosting the campaign and 3–5% for credit card or PayPal processing.[187] Also, they must pay for rewards they provide.

Third, a company can use the pre-purchase model. The pre-purchase model is used when a company needs money to produce a product and offers that product in exchange, usually at a discount, for a contribution.[188] For example, a headphone company may give out a pair of headphones for a fifty-dollar contribution; meanwhile, the headphones will sell for one hundred dollars in stores.[189] The advantages and disadvantages of the reward and pre-purchase models are primarily the same, as websites like Kickstarter and Indiegogo allow organizations to use both models on their platforms. However, one additional disadvantage exists. Organizations employing the pre-purchase model usually sell a tangible product versus a service or experience. Thus, the products of a service-based organization may not fit with the pre-purchase model.

Fourth, a company could use a lending model, which is offered in two forms: non-interest and interest.[190] Non-interest lending sites, most notably Kiva,[191] receive funds from individuals, lend that money to microfinance lenders, and those institutions lend to entrepreneurs around the world.[192] Here, the revenue made by the entrepreneur repays the principal to the individual using the website and the interest earned pays the operating costs of the lenders.[193] The interest lending sites work a little differently.[194] Lenders purchase notes issued by the website, and the site uses those funds to make loans to the underlying borrowers.[195] The site is only obligated to repay if the borrower repays; thus, in effect, the site acts as a pass-through conduit for borrower payments.[196] The advantage to the lending model is the ability to attract contributors, as only the principal is repaid to users of the non-interest sites, while interest is gained with the interest lending sites. On the other hand, the entire process is complicated, as a bank likely must get involved. Additionally, the organizations employing this model must repay the principal with interest.

Fifth, a company could use the equity model implemented under the new Jumpstart Our Business Startups (JOBS) Act.[197] Under this model, people would receive stock in the company for their contribution, making them investors sharing in the profits.[198] The JOBS Act sets up a system where companies can offer up to $1 million in stock, without registering those securities with the Securities Exchange Commission (SEC), through crowdfunding intermediaries, similar to sites already employing the other crowdfunding models, and investors can purchase the stock directly from the website.[199] The advantage to equity crowdfunding under the JOBS Act is that an organization can sell securities over the Internet to a larger audience. However, reporting requirements and other rules make organizations question whether the work and expense to comply are worth $1 million a year.

B. Using the Reward Model

Professional sports teams should use the reward model to raise money for a new stadium because of its ease in execution and fewer restrictions. The reward model should be used over the donation model so that the teams do not have to worry about the complexities of trying to set up a non-profit organization.[200] A non-profit organization is severely limited in how it is organized and operated.[201] The limitations derive from the requirement that non-profit organizations must have one of the following purposes: charitable, educational, religious, scientific, literary, fostering national or sports competition, preventing cruelty to children or animals, or testing for public safety.[202] Thus, the reward model allows teams to continue their for-profit operations and remain organized in the same way.

The reward model is a better alternative for sports teams than the pre-purchase model, as the pre-purchase model requires the team to give away tickets, a crucial aspect of their revenue.[203] The reward model allows the team to monetize items and experiences that normally do not generate revenue for them.[204] Thus, using the reward model instead of the pre-purchase model eliminates the interference a campaign can have on revenues. Additionally, the reward model is more favorable then the lending model because the reward model does not require the team to repay the principal of the loan or interest.[205] The team can simply give away inexpensive products and experiences, instead of cash, which is essential to all organizations, not just teams.[206]

Finally, the reward model may be more favorable than the equity model because of the SEC's many rules and regulations.[207] First and foremost, the JOBS Act limits the amount of money that can be raised in a year to $1 million.[208] This cap essentially makes it impossible for teams to use the equity model, as stadiums cost in the hundreds of millions dollars.[209] Additionally, the JOBS Act requires an issuer to provide a lot of information—prospectus-like documents and annual financial reports—to the SEC and investors that will likely cost the issuer thousands of dollars.[210] Lastly, the reward model does not require incumbent

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owners of the team to give up some power and rights to profits, as would be the case with the equity model.[211] In short, the reward model permits a professional sports team to avoid the SEC's review.[212]

C. How It Works

The reward model is most prevalently seen on Kickstarter and Indiegogo, websites that give people a platform for their fundraising campaigns online.[213] People often use these or similar websites because of their popularity and low fees;[214] however, a professional sports team likely will not need to use one of these because of the resources at their disposal and their popularity in the state in which the team plays.[215] As a result, a professional sports team can create their own website, similar to one that would be on Kickstarter and Indiegogo.[216] Experts believe to have a successful crowdfunding campaign an organization must have a superior funding page and a beautiful pitch video.[217] Therefore, teams should include videos with their most popular players asking fans for contributions, the design of the new stadium, text describing how the stadium will be beneficial to the community, and anything else that is compelling and creative.[218] That information should be displayed engagingly in text on their funding page.[219] Additionally, experts believe that a successful crowdfunding campaign begins before the official start date.[220] Thus, even before the site is created, the team must connect with its fans over the issue of their stadium. It must express its need for the stadium and its benefits.[221]

Furthermore, experts say that a successful crowdfunding campaign needs a compelling rewards strategy. Therefore, the team should provide a chart that shows what reward a contributor would receive in exchange for a certain amount of money contributed. The rewards should get better as the contributions get higher.[222] However, the contributions will not necessarily be equivalent to the value of the rewards,[223] as a team will be raising money in the cheapest way possible.[224] The team will likely focus on experiences that they can offer at a low cost that are not available to the average fan.[225] Experiences would likely include signed special edition t-shirts, signed memorabilia, exclusive access, and meeting players and coaches. These kinds of rewards would likely hurt their charitable contributions to the community because the items and experiences that would be offered as rewards in the crowdfunding campaign normally raise money for charity.[226] To remedy this situation, teams must focus on charitable efforts that require their time, instead of fundraising.[227] At the same time, teams should not offer items or experiences that generate revenue for them, like signage and tickets, to ensure their financial health. Offering attractive awards while ensuring the financial stability of the organization evidences a great rewards strategy.

After setting up a website where the campaign will be hosted, the team must decide how it will collect the money. Generally, organizations collect money in two ways: (1) flexible funding and (2) fixed funding.[228] Flexible funding allows an organization to draw on the money as it is contributed.[229] The advantage to flexible funding is that the organization can access the money as soon as it is received. Meanwhile, if the organization does not meet its goal and it keeps the money, contributors will likely question how the funds are used since the purported use of the funds required a certain amount of money and the organization did not reach its goal.[230] An organization employs fixed funding when it only collects the money once the goal set by the organization is met.[231] If the organization does not meet its goal, the contributors do not have to satisfy their pledged amount.[232] The advantage of fixed funding is that it gives its contributors peace-of-mind regarding how the funds will be used. The disadvantage lies with the organization, as it will receive none of the proceeds if it fails to reach its goal by even one dollar.[233]

Amidst these guidelines, no hard-and-fast rules exist regarding the collection and disbursement of these funds. Therefore, teams can choose a method that best fits their position, as every team and city is in a different situation. The method that would likely be the most advantageous would be somewhat of a blend of the two methods stated. The teams should set up a system where they can set a fundraising goal where they can draw on the money, but not until they finalize a plan for a new stadium or renovation, regardless of whether they reach their fundraising goal. Using this method will give the fans the security of knowing that their money is going towards the stadium or renovation and allows the team to draw on the money even if they do not meet the initial fundraising goal.

D. Case Study: Green Bay Packers

The Green Bay Packers of the NFL utilized a similar format for their recent renovations of Lambeau Field. The Packers are not owned like any other team in any other major league sport.[234] The Green Bay community owns the Packers.[235] This unique arrangement has allowed them to raise funds through selling stock.[236] However, a purchaser of Packers stock does not make a fan an investor in the typical sense.[237] A stockholder of Packers stock does not receive dividends, tickets, money upon sale of the

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team, or a charitable tax deduction.[238] Furthermore, stockholders can only transfer their stock through a gift to a family member.[239] Thus, substantively, Packers stockholders only "become a part of the Packers' tradition and legacy."[240]

In the recent past, the Packers have used stock sales to help finance renovations of Lambeau field.[241] In 2000, the Packers determined that Lambeau Field needed a $295 million renovation.[242] One method used to help finance this renovation was the sale of team stock.[243] The 1997 sale of team stock provided around $20 million for this renovation.[244] Furthermore, the Packers sold bricks and tiles to fans to be used around the stadium.[245] This approach raised $1 million.[246] Additionally, in 2011, the Packers raised approximately $67 million through a similar stock sale for a $143 million renovation to Lambeau Field.[247] The 2011 stock sale lasted 12 weeks and each share cost $250.[248] These fundraising efforts proved to be vital to the Packer's efforts to update Lambeau Field.

The fundraising mechanisms employed by the Packers are similar to a crowdfunding campaign using the reward model. Like reward-based crowdfunding, the Packers did not give their product (tickets) in exchange for contributions.[249] The Packers gave stock certificates, which have little value, if any, and honorary bricks and tiles.[250] Furthermore, like the Packers' 2011 stock sale that lasted 12 weeks, crowdfunding campaigns generally have a similar duration.[251] Lastly, like crowdfunding, the Packers' sale of stock is open to everyone.[252] However, two important differences exist. First, the minimum contribution, $250 per share, for the Packers' stock sale was high in comparison to most reward-based crowdfunding campaigns.[253] This difference amplifies an advantage of the reward-based crowdfunding model, as a team using the reward-based crowdfunding model can set their minimum contribution as low as they may want to invite their lower-income fan base to contribute.[254] Second, the Packer's cap the amount of shares that can be owned by one individual at 200,000.[255] No such limitation to an individual contributing exists for reward-based crowdfunding campaigns. Regardless of the differences, the Green Bay Packers sale of stock shows the potential for professional sports teams using reward-based crowdfunding to raise money for new stadium construction and renovation.

E. Probable Effect of Crowdfunding Stadiums

The most controversial aspect of financing a professional sports stadium is public financing. Adding crowdfunding as a way to raise funds could eliminate the need for public financing. If so, the controversy surrounding the providence of a municipality investing in a stadium would dissipate.[256] At the very least, crowdfunding can minimize the need for public financing. Despite the numerous articles, studies, and papers discussing how stadiums are poor investments for cities and its citizens, stadiums are continually being renovated and built, so some benefit, quantitative or qualitative, likely exists. Thus, drastically reducing the amount of public financing will likely have a similar effect to eliminating the need for it completely, as the debate results from the exorbitant amount of money that is contributed by cities. The reduced amount of money needed to fill the gap is likely to match the indirect benefit that is received by a city. Therefore, teams and municipalities should consider reward-based crowdfunding as a fundraising mechanism to realize these possible effects.

F. Obstacles with Using Crowdfunding

1) Amount of Money To Be Raised

Using crowdfunding as a fundraiser for professional sports team is not without its obstacles. First, the amount of money needed to replace or reduce public financing exceeds the average amount of money a crowdfunding campaign generates today.[257] The key to all crowdfunding campaigns is accumulating a following that loves your product. Many organizations using these campaigns are trying to build their brand and gain exposure. In this case, professional sports teams already have that following needed for a successful campaign, not to mention at a level much higher than even the most successful organizations using crowdfunding as a fundraiser. This type of following can be witnessed at the games that attract tens of thousands of fans to these stadiums,[258] at the team-inspired bars around the country,[259] and at viewing parties fans hold at their homes.[260] This type of following will likely lead to contributions as fans can spend up to $1,600 a year on sports.[261] Thus, teams can likely break records and raise more money than has ever been raised before using crowdfunding.

The force of an immense following is exemplified in the story of BuyaBeerCompany.com.[262] In November 2009, two marketing executives, Michael Migliozzi and Brian Flatow launched a crowdfunding campaign on their website buyabeercompany.com to buy Pabst Brewing Co.[263] Michael and Brian found 5 million people to pledge a total of over $200 million.[264] Although this campaign was never completed, as the SEC halted it because they were selling securities, the campaign shows the potential of crowdfunding campaigns that have a strong following. Thus, the key to the successful campaign was the cult-like following.[265] This cult-like

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following is similar for professional sports. Many fans use the term "we" when discussing their favorite team.[266] Robert Caldini, a professor of psychology at Arizona State, attributed this fact to fans identifying themselves with the team, as if they are "centrally involved in the outcome of the event."[267] Thus, the team the fan cheers is a representation of himself or herself.[268] For many, their professional sports teams represent a part of their childhood or their hometown.[269] Fans often boast about their team's greatness or the unique experience their favorite team's stadium provides.[270] Occasionally, people even cry when their favorite team loses.[271] This emotion and sense of identity that people associate with their favorite professional sports teams evidences the cult-like following similar to Pabst that can garner millions of dollars for the construction or renovation of a professional stadium.[272]

2) Timing

Another obstacle is the timing of the campaign. A project of this size requires dealing with many parties and takes multiple months, if not years.[273] For example, the team will need certain permits and approvals by the city and state.[274] In addition, as mentioned before, financing for professional stadiums generally does not come from one source, and the more parties involved, the longer the deal will take until it finalizes. Moreover, delays are likely with projects of this size due to the number of other companies involved—construction, utility, electrical, etc. Thus, determining the start and end date of the campaign will be extremely difficult, especially since the average campaign only lasts 90 days and finalizing a deal is likely to take much longer.[275]

3) Unknown Amount of Money Raised

Furthermore, associated with the timing challenge is not knowing exactly how much will be raised. Financing from crowdfunding is something that cannot be negotiated like most other financing options. The amount raised will not be known until the crowdfunding campaign has concluded. This is a problem because it will be hard to determine the amount of money needed from other sources, as the amount of financing from each source likely depends on one another. It will be extremely hard to start the campaign right away, as contributors will likely expect to know whether they must make good on their pledge. It would not be wise for a team to hold its most loyal fans hostage. Therefore, the team should start the campaign after receiving all it can from private sources. At this point, some of the delays associated with the initial stages would have passed. Also, a completion date would be more feasible to ascertain, giving the contributors peace of mind.

4) Poor Performing Team

Lastly, crowdfunding is likely to be a challenge for a poorly preforming team that is in need of a new stadium or renovation. As mentioned before, crowdfunding depends on a very loyal fan base. That type of fan decreases when a team is performing poorly or is without hope, making it difficult for the team to gather financial support on top of fans paying for tickets and buying memorabilia and apparel.[276] Today, many teams and cities are under increasing pressure from their respective leagues to keep their stadiums updated.[277] The pressure often comes in a subtle threat to move the franchise to a city that is willing to provide up-to-date facilities.[278] In order to combat this challenge, the respective team must put that pressure on its fans.[279] It must get them to buy into the rebuilding efforts and invite them to ride the proverbial bandwagon back to contention. Furthermore, the team must highlight the other attractions a stadium provides, such as concerts and other family events.[280] No formula avoids this obstacle besides winning and great marketing.

IV. Conclusion

Renovating or building a professional sports stadium can cost hundreds of millions of dollars, if not a billion dollars. The traditional way of financing these stadiums by partially or completely using public funds through tax-exempt bonds paid by the public is likely not going suffice anymore, given the controversy surrounding these transactions. Thus, teams and municipalities should consider crowdfunding to replace or drastically reduce the need for public funding. Crowdfunding permits individuals and organizations that want to keep a professional sports team in their respective cities to do so by providing an avenue where they donate their own money. Additionally, if a gap exists between the money raised and money needed, then those funds can be raised more easily through the city, as the amount left to be raised will likely correlate more closely with the perceived value of having a professional sports team.

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ENDNOTES

* Sean Brown is a graduate of Marquette University Law School and an associate at Norton Rose Fulbright US LLP. Thank you to Dean Matthew Parlow for your contributions. This article was first published in the Spring 2015 issue of the Willamette Sports Law Journal.

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