

Proud Sponsor of Your Favorite Team, Player and Actor...What Every In- House Attorney Needs to Know About Sponsorship Agreements

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Why do companies seek sponsorships?

- Seeking Partnerships, NOT transactions, with partners that can help a company drive profitable market share growth
- To sell more product, generate revenue
- Partnerships lead to:
 - Driving Retail – Leverage the sports team to create opportunities for the product to sell (e.g., special events – selling opportunities)
 - Build brands – differentiate and integrate retail activation with key consumers
 - Engage your system – give the distributors/sales reps great selling tools with great stories (e.g., NASCAR, NFL, NHL, MLB teams, Soccer, College)

Sports Team's Perspective – Why sponsorships?

- Source of Revenue
- Build Partnerships - with Strong Brands
 - Fans can identify with strong brands
 - Expectations of fans
 - Wide variety of partnerships (consumer goods, professional services)
 - Unique experience
 - Provides a team the opportunity to share fan experiences with those outside the traditional fan base, through joint marketing initiatives

Building a Sponsorship Agreement

- From a Sponsor's POV:
 - Know the goals and marketing strategy of your senior management
 - Scope of participating brands
 - Types of assets available for sale (Intellectual Property, merchandise, tickets, signage, advertising, consumer experiences)
 - New Market Initiative
 - Exclusivity
 - Ensure that the sports team/property has the rights to market and sell to you
 - Reps/Warranties
 - Indemnification
- From a Sports Team's POV:
 - Understand the scope of your inventory of assets
 - Driving Revenue
 - Strong Brands, Family-Friendly Brands
 - Types of Sponsorship Fee structures (flat fee versus other types)

Cornerstones of a Sponsorship Agreement

- Grant of Rights
- Scope of Category Exclusivity (if any)
- Use of Marks
- Indemnification
- Term and Termination
- Exclusive Negotiating Period and Options to Extend
- Force Majeure/Work Stoppage
- Representations and Warranties
- Delivery of Elements
- Ambush Marketing
- Remedies
- Celebrity/Spokesperson Endorsements

Grant of Rights

- The right to use licensed property (IP) to promote brands
- Sponsors seek to reserve the right to change participating brands
- Sponsorship elements – advertising, marketing, promotional, affiliation, activation, pass-through
- League subservience – NFL/NFLP, MLB/MLBP
 - Example: MLB requires team contracts to have a broad supremacy clause subjecting them to MLB’s governing documents, restrictions limit a sponsor’s advertising rights to a team’s home television territory or designated market area
 - MLB Advanced Media (“BAM”)- Internet-related rights are subject to specific terms and conditions of BAM agreements and authority, such rights can be terminated at any time at the direction of MLB

Grant of Rights (cont'd)

- Examples of rights granted:
 - Naming Rights
 - Use of Trademarks/Advertising
 - Media exposure (internal-programs, guidebooks, newsletters, external)
 - Presence Rights (e.g., in-game promotions, signs, banners, booths, product display/demonstrations, game and parking ticket backs)
 - Internet website linking, banner advertising
 - Tickets, suites, hospitality
 - Consumer experiences (on-field, pre-game meet and greets, team and player appearances)
 - Merchandise (signed and unsigned uniforms, equipment, photos)
- Examples of rights not granted:
 - Post-season rights
 - Player endorsements

Exclusivity

- Define the Sponsor Category
 - Sponsor's POV: define category broadly, to lock up direct and potential competitive categories
 - Sport's Team's POV: define category concisely, to preserve existing and future marketing opportunities
 - Categories are susceptible to multiple carve-ups:
 - Automotive- Energy (oil, gas, mini-marts), cars (sales, leasing, rental, parts)
 - Beverage- Alcoholic (domestic, import and craft beers, wine, spirits), soft drinks (carbonated and non-carbonated), juice, milk, energy drinks, bottled water
 - Financial Services- traditional banking (savings, checking, on-line), credit cards, affinity credit cards, broker/dealers, mutual funds
 - Telecommunications and Internet- local and long-distance phone service, wireless, toll-free, ISP and web-hosting, wireless internet, calling card, video teleconferencing

Exclusivity (cont'd)

- Designations
 - “An official sponsor of...” versus “The official sponsor of...”
- Exclusive or Non-Exclusive
 - Exclusivity carries a premium price to be charged by the team and expectations on behalf of the sponsor regarding protection
 - Define exclusivity rights based on product categories and not specified competitors, to avoid unintended expansion of the category
 - Limit category to type of business that sponsor is primarily engaged in (e.g., domestic airline travel vs. air cargo companies and private jet services)

Use of Marks – Approval Process

- Sports Team's:
 - Control exploitation and monitor quality AND activities with pre-approval rights
 - Use of style guide
 - No use with other third-party marks
- Sponsor's:
 - Minimize approval rights. Approval rights cause delays (micromanagement), interference with business activities, lost business opportunities, etc.
- Compromise
 - Pre-approval for selected matters (e.g., content modifications prior to public display, licensed products prior to production/public display)
 - Short time periods
 - Deemed approval or Deemed denied

Use of Marks – Approval Process

- Consistent approval process for property
- Quality standard for selected matters (e.g., “first class manner consistent with professional sports property industry standards, and shall not reflect negatively on any Team Party”)
- Samples/audit rights/requests and requirement for timely delivery

Sublicensing

- Pass-through rights to retail channel partners, franchisees
- Prohibition?
- If Permitted:
 - Liability for sublicensee actions
 - Separate agreements by sublicense in favor of licensor/3rd party beneficiary
 - No assignment of agreement without consent
 - Geographic limitations- are there limitations on the territory in which a team can grant rights? For example, certain professional sports leagues limit the ability of their teams to grant local sponsorship rights (may be tied to the team's television territory)

Indemnification

- Typical coverage by Sponsor
 - Promotional, marketing, advertising activities
 - Defects or deficiencies in products or services
 - Actual or alleged unauthorized use of IP
 - Breach of 3rd party agreements to effectuate terms of the main agreement
 - Breach of representations/warranties
- Typical coverage by Sports Team
 - Breach of reps/warranties
 - Negotiation, delivery and/or grant of rights
 - Claim or action relating to loss, injury, death, arising from negligence/willful misconduct, acts, omissions
- Insurance

Term and Termination

- Different deals may demand different termination language:
 - Terminate without cause
 - Continue the deal and modify
 - Ability to cure a “breach”
 - Terminate at end of season, keep exploitation rights
- Breach/Nonpayment
 - Notice and cure? Capable of cure?
- Special rights of termination:
 - Morals clause/Change in Circumstances/Adverse Publicity
 - Standard – Reasonable or Sponsor’s sole opinion
 - Failure to obtain approvals
 - Failure to protect confidential information/data/content
 - Consider unique/specific concerns- may be beneficial to not have mutual ability to terminate without cause, due to sunk costs
 - Option to renew

Term and Termination

- Bankruptcy/insolvency (KEY with technology related companies)
- Effects of termination:
 - (Immediate) cessation of use of licensed properties
 - Sell off of licensed properties (hard goods vs. electronic goods)
 - Right to exhaust promotional materials (distributed or not?)
 - Eliminate/Recall advertising signage, tickets
 - Acceleration of payments/refund of payments

Exclusive Negotiation Period-Be Specific

- Which party triggers it, method, duration, finality
- Right of First Refusal
 - Often combined
 - Who has leverage?
 - Deal chilling
 - Option fees (refundable/non-refundable)
 - Tight windows
- Other Provisions
 - Reservation of Rights (All rights not expressly granted are reserved to Sports Team/Licensor)
 - Confidentiality
 - Most-Favored-Nations

Force Majeure

- Reciprocal
- Acts of God (floods, fire, weather, terrorism or catastrophe) that could not have been prevented by reasonable precautions
- Should Force Majeure definition include economic hardship? Work Stoppage?
- Work Stoppage
 - Strike, Lock-out, Work Stoppage
 - Replacement Players?
 - Number of Games missed (Pro-rated reduction in Sponsorship Fee, “Make-Good” Credits)

Force Majeure

- Continue performing agreement, but suspend payment obligation?
- Equitable adjustment of Sponsorship Fee?
- Terminate agreement? If so, how long after Labor Dispute begins?
- Extension of Term for Period of Work Stoppage

Representations and Warranties

- A Party's ownership of all right, title and interest to licensed properties
- No infringement/no third party rights or authorizations/no violation of third party agreements or arrangements
 - Licensee: As extensive protection as can be obtained – no issues with third parties
 - Licensor: Carve out any gap areas (e.g., music)

Delivery of Elements

- Delivery of Elements versus Elements Negotiated
- Sponsor should ensure that it is getting the value of the deal
- Tickets, Signage, Performances, Advertising
- Include a “reconciliation of assets” provision in the deal

Ambush Marketing

- Definition: Marketing and promotional activities by non-sponsors that either directly or indirectly state or imply an affiliation with or endorsement from a team or organization, without payment or authorization
 - Creation of any advertising that incorporates a theme or would lead a reasonable person to believe the non-sponsor is in some way associated with or has the endorsement of the team or organization
 - Example: 1996 Olympics in Atlanta – Nike’s “Just Do it America” posters..Official Product Sponsor was Reebok
 - Enforcement Challenges-unpredictable nature of ambush marketing, not practical to require a team to pursue litigation against ambush marketers
 - Best Practices
 - Sponsors- negotiate for “commercially reasonable efforts” at team’s expense
 - Sports Teams- negotiate for reasonable efforts, commitment to cooperate, and avoid allowing ambush marketing to become a breach of the agreement

Remedies

- Cumulative remedies?
- Exclusivity of indemnity?
- Property: Set up immediate injunctive relief (KEY with technology/media)
 - Irreparable harm and insufficiency of legal remedy
 - No requirement to prove actual damages or post bond (or only minimum)
- Self-help; mitigate damages

Celebrity/Spokesperson Endorsements

- Key issues to consider:
 - Media Use/Associated Releases
 - Name, signature, image likeness, etc
 - All consumer and promotional print, publicity and advertising materials, digital content, point-of-sale and sweepstakes materials
 - Scope of Services
 - Television/radio commercials, personal appearances
 - Best Practice- When scope is undefined, include a representative sample or schedule as an Exhibit attached to the agreement
 - Publicity
 - Best Practice- ensure contract sets forth scope of publicity (interviews, autograph sessions, corporate appearances)
 - Morals Clause
 - Depictions of players with team's marks

Celebrity/Spokesperson Endorsements

- Social Media Efforts
 - Best Practice – negotiate for pre-approval rights for Tweets and Facebook postings related to your company's product
 - Compensation
 - Exclusivity
 - Opportunities Presented
 - Best Practice – negotiate for pre-approval rights for offers to celebrity to pose/be filmed or photographed for material intended for print, online or broadcast publication/distribution
- Appearance (Hair, tanning, body art, jewelry)
 - Allowed to wear clothing of competitor during contract term?
- Unique Services (specific performance, basis for injunctive relief)

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