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A View From Across the Pond: Duran Duran’s Termination Rights Under The U.S. Copyright Act Come Undone By British High Court Ruling^[1]

BY KENNETH D. FREUNDLICH AND MICHAEL J. KAISER

INTRODUCTION

In 2014, the British rock band Duran Duran served upon their music publisher, Gloucester Place Music Limited (“GPML”), Notices to Terminate Duran Duran’s 1980’s grants of U.S. copyrights in thirty-seven valuable songs to GPML’s predecessor. The relevant music publishing agreements contained a broad grant of rights, an English choice of law clause as well as a clause mandating that disputes be heard in English Courts. As with most agreements of this type, the grant of rights clauses did not address the exercise of U.S. termination rights—rights that are generally deemed inalienable—under the U.S. Copyright Act^[2], 17 U.S.C. § 203.

GPML fought back by filing an action against Duran Duran in the England and Wales High Court of Justice (Chancery Division), in an action titled, *Gloucester Place Music Limited v. Le Bon, et al.*, [2016] EWHC 3091 (Ch) (“*Gloucester Place*”). In *Gloucester Place*, GPML, recognizing that it could not otherwise prevent Duran Duran from purporting to exercise their termination rights under U.S. law, nevertheless sought a judgment that the exercise of such termination rights was a breach of the Duran Duran music publishing agreements by derogating from the agreements’ otherwise broad grant of copyrights for the full terms thereof.

Gloucester Place has brought to the forefront, indeed to the courtroom, a nagging question as to what might happen if a foreign author tried to terminate

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Flying Down to Rio - The 2016 Summer Olympic Games

BY JOHN T. WENDT

Flying into Rio de Janeiro for the 2016 Summer Olympic Games one can see the beautiful, shimmering beaches of Guanabara Bay and the mountains rising from out of the water. But, the view from above hid many of the problems below. Contaminated venues, the Zika virus, and crime dominated the headlines. In August, 2016 just before the Games began visitors were greeted by local striking police holding banners in English and Portuguese saying, “Welcome to Hell...Police and firefighters don’t get paid...Whoever comes to Rio de Janeiro will not be safe.”

Brazil’s once vibrant economy is in a prolonged recession with double-digit inflation. Its debt had been downgraded to junk status and billions of dollars were stolen from state oil giant Petrobras. Brazil’s first female President President Dilma Rousseff was impeached

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Presenting the Case to Build and Maintain a Successful Sports Franchise: *A Great Venue, Lease, Market, and Personnel*

BY JEREMY M. EVANS

In our last article with the *Entertainment & Sports Lawyer*, “Stadium Financing: American Taxpayers should throw the Red Flag,”^[1] we discussed stadiums and taxpayer dollars. In that article, we underscored the emotional, logical, and factual circumstances surrounding stadium financing. We asked why American taxpayers continue to fund, through their tax dollars, sporting stadiums. In this article, we will discuss how franchises become and stay successful despite or because of new stadiums. Moreover, we will highlight the four essentials of how sports franchises become and stay successful.

VOIR DIRE

By successful we mean a sports franchise that wins in all facets of the game. Specifically, a sports franchise that is successful is one that wins during the regular season, wins championships after the regular season, puts fans in the seats, has positive and growing financials, has great product on the field, meaningful community relations, terrific management, leadership, and does all of the above consistently. In sports terminology, we might call these types of franchises “dynasties.” If a sports franchise does not win and win it all, what else is point of playing professionally?

With that in mind, the four essentials for building and maintaining successful franchises are as follows: (1) a great **venue**, (2) a complimentary and fair **lease**, (3) a large and/or committed media and fan **market**, and (4) lastly, team and ownership **personnel** that are reliable, honest, and results-driven. These are not of this author’s creation, but rather are the creation of Brian Schoenborn,^[2] a Minnesota businessman-first attorney, a colleague with much experience in stadium building, sports team ownership, in both the business and legal wings of the practice of law. He shared with the author recently that when building and maintaining professional franchises, that the first three are very important aspects to franchise success. He added the fourth, as a related point.

We argue here that all four essentials are important in building and maintaining a successful sports franchise, using examples of past and current sports franchises.

OPENING STATEMENT

Think of one successful sports franchise with a bad venue. Can you? Unlikely, the teams that struggle with bad venues often struggle to win games. While we do not want to pick on any specific franchises, for discussion’s sake, the Oakland Raiders and Athletics, Tampa Bay Rays, San Diego Chargers, and others have had some regular season and post-season success, but no championships recently and in some cases, never. In reality, the above teams had success in spite of their home venues that many argue and claim are in decrepit shape. In some sense, the four essentials to sports franchise success as a whole have propelled the franchises into success. In this way, the four essentials play together and are not mutually exclusive.

Some have argued that we are in the midst of the golden age of sporting venues.^[3] While that may be true, especially as Los Angeles Rams owner Stan Kroenke is building what will be the most expensive sports complex in the world in Inglewood, California,^[4] others would disagree. The San Diego Padres, Cincinnati Reds, Baltimore Orioles, and many other sports franchises in professional leagues would argue that their new or relatively new venues have not brought success. To demonstrate, we will look at some specific sports franchises to demonstrate the importance of venue, lease, market, and personnel, their relation to each other, wins, and success.

WITNESSES: Direct, Cross-Examination, and Redirect

1. O.co Coliseum, Oakland, California^[5] *(Oakland Athletics and Raiders)*

The Oakland Coliseum houses both the Athletics of Major League Baseball (MLB) and the Raiders of the National Football League (NFL). Raiders fans are known to be some of the most passionate fans in the world. Athletics fans are similarly known to be among the most loyal fans. The Athletics franchise dates back to 1901 in Philadelphia, where the franchise won many World Series Championships and even spent some time in Kansas City before making its way to the Bay Area. More recently, the Athletics were reintroduced to fame with their style of play and player acquisitions seen through *Moneyball*^[6], the book by Michael Lewis, and subsequent movie^[7]

starring Brad Pitt playing Athletics front office executive Billy Beane.^[8]

Among fans and publications alike, Oakland's home field is rated as one of the worst in all of professional sports.^[9/10] Per Korey Beckett via *TheSportster.com* in "Top 15 Worst Sports Stadiums in America."^[11]

"Since there are currently no stadiums being built for the Raiders or Athletics, they are stuck with this big eyesore for a while. For baseball, the foul territory is way too big and the sightlines are terrible because most of the seats are tarped off. As for football, it's hilarious to still see a team with a baseball field on their playing surface. The stadium is also old and outdated, and it has even had sewage problems because the field is 23 feet below sea level. Why hasn't either team been able to move yet?"

Despite the stadium ranking and having played in that stadium since 1966, both the Athletics and Raiders have managed seven championships between them since 1972 (Athletics: 1989, 1974, 1973, 1972; Raiders: 1984, 1981, 1977). However, the Oakland Coliseum is the only remaining stadium in the United States to house both professional baseball and football teams and it seems to have taken a toll on both franchises' success since the glory days of the 80's. As a matter fact, the Raiders' most recent 1984 Super Bowl championship is from when the team moved to Los Angeles (1982–1994).

The Athletics and Raiders did have some success in the early 2000's and the Athletics won the American League West Division in 2012 and 2013 with a wild card berth in 2014. However, the success of these two franchises is because of their personnel, market, and lease. In other words, these teams won games despite their bad venue. Let us dive a bit deeper into that.

The Raiders in the early 2000's did not win a Super Bowl, but they had talent on the field, good head coaches, and a strong market. Head coach Jon Gruden took his team to the playoffs two straight years and then left the team to win the 2003 Super Bowl Championship with the Tampa Bay Buccaneers against none other than the Oakland Raiders. Former Raiders owner Al Davis cared deeply about the Raiders franchise and would do anything to win. In terms of market, the fans also filled the seats every home and road game driving up franchise value and revenue.

The Athletics of the early 2000's were similarly successful because they had talent on the field starting with three ace starting pitchers in Barry Zito, Mark Mulder, and Tim Hudson, along with the home run hitting Jason Giambi and other stars. From 2012-2014, the front office

personnel led by Billy Beane made shrewd acquisitions in the draft and trade markets, anchored by soon to be American League Most Valuable Player and third baseman Josh Donaldson.^[12] The same Billy Beane, despite his sometimes controversial decision-making, is widely recognized as one of the best and most intelligent front office executives in all of sports. Ownership has been steady, but not willing to spend top dollar for talent, and this is where Beane has been so invaluable to the franchise because he has to find talent for less money. Beane does not have luxury to overspend so his decisions are based on analytics, projections, and baseball knowledge.

Financial resources are the last essential for successful franchises and in this case, that is a reference to the lease agreement for the Athletics^[13] and the Raiders.^[14] The problem with both teams' leases is not the price per year, it is actually favorable to the teams, but the absence of longevity in a short-term lease harms the Raiders franchise as they continue to search for a new home and possible a new city in Las Vegas, Nevada.^[15] Similarly, the Athletics may have a longer-term lease than the Raiders on a lease deal signed in 2014, but they also continue to search for a new home and new city. San Jose anyone?^[16] The lack of a long-term lease and therefore a long-term home leads to a lack of faith in the teams' commitment to the community and its fans.

Overall, we have two franchises that have a venue in dire shape, are at the bottom of the league in terms of payroll,^[17/18] and have talent that has had its ups and downs with the Raiders looking like the better team compared to the Athletics in terms of wins in 2016. However, it is of note that the salary cap in the NFL limits teams in terms of spending versus the luxury tax in the MLB that only penalizes teams for going over the designated dollar threshold. Therefore, team finances (e.g., payroll) are not really an issue in terms of parity in the NFL where teams are equally balanced financially. For example, the disparity between the highest and lowest NFL team payroll is roughly \$20 million. In the MLB, it is \$166 million.

Nonetheless, despite the bad venue and lack of longevity in the lease, the Oakland-San Francisco media market is ranked sixth^[19] in the United States, but both franchises rank near the bottom of their respective leagues in terms of team payroll and franchise value. Oakland is fighting an uphill battle. Across the Bay, is a completely different story for the San Francisco Giants^[20] (MLB) and soon-to-be moved from Oakland Golden State Warriors^[21] (National Basketball Association (NBA)) who have or will soon have new venues, favorable leases, a great market, and already have terrific personnel on and off the hardwood court and baseball diamond. Further south, the San Francisco 49ers (NFL) have a brand new venue, a favorable lease, a less than great market since moving forty plus miles south of their main base of fans and a

major city,^[22] but what many have also said are terrible personnel in the front office and on the gridiron and the results are evident.^[23/24]

The saving grace for the Raiders and Athletics has been their on-field and front office personnel and the fans and their media market. The franchises are winning games despite their venue and lease. The fans are passionate and continue to drive the team forward. To push them over the top again, it may take new venues and favorable leases. In other words, some stability and comfort in the direction and home of the franchise. As President Abraham Lincoln once said, “*A house divided against itself cannot stand.*” A franchise pushing to move, with its fans pushing to stay, cannot win a championship.

2. Tropicana Field, St. Petersburg, Florida^[25] (Tampa Bay Rays)

The Tampa Bay Rays should not be a successful franchise. Their lack of a quality home^[26/27] and the longevity of a long-term home^[28/29/30] in the eleventh-ranked media market^[31] should provide for consecutive one-hundred loss seasons. However, since the Rays entered MLB as an expansion team in 1998,^[32] they have had some terrific regular season and post-season success. Their success, however, is in spite of their venue and lease issues, and is paced by the sheer will to win and shrewd front office decisions that have resulted in great on-the-field production.



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In 2008, the Rays won 97 games and lost in the World Series. In 2010, 2011, 2012, and 2013, the Rays won at least 90 games and made the playoffs three times losing each time in the American League East Division Series. The last three seasons have been down years, but unsurprising since the franchise lost some important personnel in 2014. Their head coach Joe Maddon^[33] left for the 2016 World Series Champion Chicago Cubs and their Executive Vice President of Operations Andrew Friedman^[34] went to the Los Angeles Dodgers.^[35]

The Rays home field is considered by many to be one of the worst professional stadiums around and their home attendance proves it. Christina Kahrl via *ESPN.com* writes in “Why moving the A’s and Rays would be good for baseball:”^[36]

“The hard facts are that the Rays haven't drawn 2 million fans since their inaugural season in 1998 and have finished last or next to last in attendance in 13 of their 18 years in existence. The A's [Oakland Athletics] can at least say that they drew 2 million fans in 2014, as well as in every year between 2001-2005. When they reliably contend, they get there. So Tampa Bay/St. Petersburg hasn't done much with its opportunity, and the A's have been No. 2 with a bullet behind the Giants in the Bay Area for years now.”

The Rays have had some on-the-field success with great draft picks in David Price, Evan Longoria, Carl Crawford, and trades for the likes of Ben Zobrist and many more. Essentially, their front office and on-the-field talent have performed despite a bad venue, suspect lease, and smaller market in terms of fans. As Kahrl argues in the article mentioned above, the Rays would be wise to sign a television deal for surplus cash to purchase better players, a better home, and a better fan experience. The television deal will not be a Dodger-sized one at \$8 billion,^[37] but it would be close to what the Cincinnati Reds, San Diego Padres, and St. Louis Cardinals received (\$1 billion over 15-20 years).^[38] The Rays would at least get \$650 million over 15 years, the same value of the franchise, which unfortunately ranks thirtieth out of all thirty MLB teams.^[39]

Even with the Rays securing an opt-out of their lease agreement in 2016^[40] with the city of St. Petersburg (neighboring to Tampa Bay in case you were wondering), the Rays are also having a tough time finding a new home like the Athletics and the Raiders. In the Rays situation, however, it is less clear based on the lack of fan attendance whether fans are opposed to moving. Some have argued, including this author that the Rays may be better off moving to Montreal by staying in the American League East and creating a Montreal-Toronto Blue Jays rivalry in Canada.^[41]

Then again, the Colorado Rockies with a new venue at Coors Field have not played as well as the Rays in an arguably weaker National League West Division, but have far outpaced the Rays in attendance since their respective entrances into MLB (Rockies entered the league in 1993 as an expansion team).^[42] Maybe a new venue and favorable lease will do the trick. They are needed. Per Korey Beckett via *TheSportster.com* in “Top 15 Worst Sports Stadiums in America.”^[43]

“We now reach the top of the list to find the worst stadium in sports, Tropicana Field. “The Trop” was opened in 1990 and was basically empty for years besides tennis and concerts because they didn’t have a tenant. Finally, the Rays moved into Tropicana Field and it was immediately clear that the stadium was a God awful design for baseball. The whole place feels like a big warehouse with terrible sightlines and the constant fear of a baseball hitting a catwalk and plunking one of the 800 fans in attendance right on the noggin. The turf is ugly and terrible, and is truly the worst place to watch a game. New stadiums are starting to get proposed, so hopefully this stadium is only in use for a few more years.”

Overall, the Rays lack three of the four essentials to a successful sports franchise in having a bad venue, suspect lease, and less than a committed market. They have had some on-the-field success, but no sustained success and that success can be credited to the players, coaches, and front office personnel (the fourth prong of a successful sports franchise) pursuing excellence despite the circumstances. Much of this success is attributed to former front office boss Andrew Friedman,^[44] now gone and since replaced.^[45] Until the Rays can get a new or renovated venue with a favorable lease, a television contract to strengthen their market and team value, and then utilize that increased value to purchase top talent and other team personnel, they will continue to struggle and be hard-pressed to win the World Series and become a healthy and sustainable sports franchise. Nevertheless, leave it to the Rays to break the mold by utilizing market-theory to bring together top-notch talent on the cheap and surprise everyone.

2. Qualcomm Stadium, San Diego, California^[46] (*San Diego Chargers*)

Sad as it is, we end this article with our third and final example in a beloved city and America’s finest city, the author’s current home city, San Diego, California. The San Diego Chargers have some unfortunate issues

with nearly all four essentials to a successful sports franchise. Their venue is rated as one of the worst in the United States. Despite being the eighth largest city in America by population,^[47] San Diego is the twenty-eighth ranked media market.^[48] The lease with the City of San Diego is beneficial as the Chargers basically do not pay rent,^[49] but it is not a good deal for the city and that matters when it comes to creating and maintaining good will with public officials, the media, and the fans.^[50/51] Lastly, the personnel on the field have yielded some success, but the franchise has never won a Super Bowl while in the NFL. However, the Chargers did win the American Football League Championship in 1963, prior to the merger with the NFL, against the Boston Patriots.

With regard to the Chargers home field, Qualcomm Stadium, per Korey Beckett via *TheSportster.com* in “Top 15 Worst Sports Stadiums in America.”^[52]

“San Diego is one of the best cities in the United States with some of the best weather, but they have a huge garbage pile known as Qualcomm Stadium that plays host to the Chargers. At nearly 50 years old, the Chargers rightfully want to move but fans (again, rightfully) don’t want to pay for one and the team is threatening a move to Los Angeles. Qualcomm is falling apart, the video boards are God awful, and the only thing that looks good inside of the stadium is when the Chargers are wearing their powder blue uniforms. One fan said that calling it a dump is an insult to dumps.”

The situation got worse with two competing measures on the ballot in November 2016, such that the Chargers are now expected to exercise their option to move to Los Angeles and join the Rams in their new stadium in Inglewood.

The smaller media market exasperates the problem for the franchise because the fan base is passionate, but smaller. By example, the Chargers are ranked thirty-first out of thirty-two teams in the NFL for 2016 in attendance.^[53] It is also a frustrated fan base as it dealt with whether the team will stay in San Diego or leave for Los Angeles. Being the twenty-first ranked NFL team in terms of franchise value^[54] means that combined with low attendance it struggles to keep finances strong.

Where the team lacks the private financing to build a new stadium based on its franchise value and market, it means that it would need to lean on the political class and the citizenry for good will to gain stadium incentives, which it was unsuccessful in doing. Fortunately for the Chargers, they have a beneficial lease that allows them to opt-out every year in February and they pay little to no rent based on rent credits and a litigation settlement.

Despite the bad venue, small market, and politically-charged lease agreement, the Chargers have had significant regular season success. That success is because of personnel on-the-field and the sidelines. The Chargers have made the playoffs while playing in the AFL in 1960, 1961, 1963, 1964, and 1965. The Chargers have made the playoffs since playing in the NFL in 1979, 1980, 1981, 1982, 1992, 1994, 1995, 2004, 2006, 2007, 2008, 2009, and 2013. The Chargers have made the playoffs at least once in every decade since 1960. If anything, the Chargers may be the most successful regular season and playoff-making sports franchise of the teams analyzed here, despite playing under worse or at least similar circumstances.

As discussed previously, the NFL's salary cap puts parity first for the League so teams are equally-balanced financially at least in terms of payroll. The talent on the payroll has been seen through on-the-field personnel like Quarterbacks Dan Fouts, Drew Brees, Phillip Rivers, running back LaDainian Tomlinson, and the late-linebacker Junior Seau being key cogs in the sports franchise's success. The Chargers also have a handful of head coaches who had career winning records above the .500 mark.^[55] Authors more knowledgeable may even delve into some front office personnel that have made a difference.

CLOSING ARGUMENT

Admittedly, there are always exceptions to the rules. The four essentials (venue, lease, market, and personnel) are a guide to successful sports franchises. The sports franchises that demonstrate all four essentials, say the New England Patriots, Chicago Cubs, Chicago Blackhawks, Los Angeles Kings, Boston Red Sox, New York Yankees,

Cleveland Cavaliers, and the Golden State Warriors, among others, are also teams that have won one or more national championships in the last decade. Some teams recently broke curses, others just cannot seem to get over the hump of winning a championship.

New stadiums are not the answer to all sports franchise problems. There are teams that have new venues, but no new championships. There are teams that have new venues, but terrible personnel. The same could be said for market-size and favorable leases and how that plays with personnel and venue. The four essentials play together and the more they play together well, the more likely it is that the franchise will win and win consistently.

It is certain that although venue, lease, and market are important in a sports franchise's success, it is personnel that matters most. Looking through the lens of the Oakland Athletics and Raiders, Tampa Bay Rays, and San Diego Chargers, we can see superior talent on the field, on the sidelines, and in the front office matters, often pushes, and threads the needle of success. Human intuition, invention, and integrity are really what drives a franchise to be good or bad.

The 2015 Kansas City Royals were World Series Champions with one of the lowest payrolls, an old, but renovated and likeable stadium, a dedicated fan base, and a smaller market. In the end, it is the talent that wins, but having a secure home base with fans that care and fill the seats helps tremendously. That being said, we raise the question that was asked at the beginning of this article, when was the last time a sports franchise with a terrible home venue won a championship? The answer is never.

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