

Committee Newsletter | Summer 2016

TABLE OF CONTENTS

Farewell from Your Committee Co-Chairs2
By Jeremy M. Evans and Ashley Hollan Couch

ARTICLES >>

Four Considerations When Planning to Produce a Film3
By Amelia Lo
Description: Are you planning to produce a film? Here are four things you should think about first.

M&A Led to Investors Successfully Bidding \$4 billion on the UFC: A Fan Speculates
Legal Future4
By Alvin Benjamin Carter III
Description: Mergers and acquisitions are at the heart of one of the biggest sports deals in history.

One Important Clause When Negotiating Endorsement Contracts: Right of First Refusal
.....5
By Hakeem Onafowokan
Description: The right of first refusal can be a powerful clause in endorsement agreements for athletes, entertainers or sponsors.

NEWS AND ANNOUNCEMENTS >>

American Bar Association Annual Meeting in San Francisco
August 4-9, 20167

Upcoming ABA YLD Events8

Farewell from Your Committee Co-Chairs

From Co-Chairs Jeremy M. Evans and Ashley Hollan Couch

Dear Entertainment and Sports Industry Committee Members:

As we come to the end of our appointments as your Co-Chairs, we want to thank you all for your engagement, interest and enthusiasm for our Entertainment and Sports Industry Committee. Over the past year, we have been delighted to meet many of you at YLD events at ABA conferences in Little Rock, San Diego and St. Louis, and hope to see everyone in the next few weeks in San Francisco at the ABA Annual Conference. We have also had the pleasure of communicating with many of you via email, and wish to thank all who have reached out to us to introduce yourselves and seek involvement. It is because of you that we have created such a dynamic Committee and increased our membership, leaving behind a strong legacy within the YLD and deeper connections to the ABA Entertainment and Sports Industry Forum. Over the past year, we have been honored to serve you. Some highlights of our tenure have included organizing panel discussions, social events and teleconferences, and publishing our seasonal newsletters and our upcoming 101 Practice Series article.

We are also excited to announce your new outstanding leadership team, which includes Co-Chairs Keith Black and Anant Tamirisa who held Vice-Chair roles this past year, as well as returning Vice-Chair Jerome Crawford and newly appointed Vice-Chairs Hakeem Onafowokan, Rachel Aminu, Colleen Ganin, Christopher Ivory, and Maacah Scott.

As we have been appointed to serve as the ABA YLD Vice-Chairs of Committees and Liaisons for 2016-2017, we are delighted to continue working with you and hope to meet those with whom we have not connected yet. Please do not hesitate to reach out to us if you are attending our upcoming YLD events.

Thank you for a wonderful year!

Best Regards,
Ashley & Jeremy

ARTICLES >>

Four Considerations When Planning to Produce a Film

By Amelia Lo

Producing a film is an exciting adventure, and in keeping with the “*no pain, no gain*” axiom, it also demands detailed planning, strong leadership, and extensive teamwork. In addition to the requisite agreements and contracts, budget controls, and business strategies, here are some additional considerations:

1. Corporate Formation

When producing a film, it is advisable to form a company, and when doing so, you have to decide whether you want to form a Sole Proprietorship, General or Limited Partnership, a Limited Liability Company, or a Corporation. Choosing the right type of company is of utmost importance as your business grows because the potential liabilities, tax implications, and compliance requirements of the various types of businesses differ significantly.

2. Intellectual Property Rights

As a producer, you (or your company) should ensure ownership of all intellectual property rights triggered from your production. This includes procuring proper licensure for the rights to record and sync music, for written content and performances, and other considerations. For example, if you hire a writer to help you write the work, you will need to ensure that he or she has assigned the copyright rights of his or her work to you or executed a similar licensing arrangement.

Furthermore, it is essential that a producer obtain talent releases and consent from all the actors and actresses before any shooting to ensure that permission to use their work is granted and obtained in writing. By doing this, it decreases the risks of future litigation and reputation damage, especially in the event that the final product attracts fame or generates considerable revenue. Particular care should also be taken if importing music or scripts from other countries, as the licensing requirements and intellectual property protections differ by territory. Ultimately, the use of any content without consent from the valid copyright owner (absent a valid legal defense) generally constitutes actionable infringement.

3. Using Workers from Outside Your State or Country

If you hire talent, contractors or employees from different territories, employment and immigration considerations may arise, including eligibility to work in the given location. The fundamental legal differences between independent contractors and employees must be considered when hiring staff or vendors. For instance, non-United States citizens have to obtain visas in order to work on a film. Producers should factor in the timelines and financial implications triggered by requisite visa approvals.

4. The Impact of Trade Unions

When hiring someone who belongs to a trade union, it is important to understand the implications of working with union members and to understand the parameters of the relevant union agreement(s) in place. Producers are required to conform to the terms in the applicable union contracts regarding treatment of talent and other employees, requisite wage standards, working condition requirements, and benefits as negotiated by the unions on behalf of their members.

Amelia Lo is Vice-Chair of the Hong Kong Federation of Women Lawyers Organising Committee and Corporate Restructuring Committee and organizing committee member of the Cross Strait Four Regions Young Lawyers Forum of the Law Society of Hong Kong.

M&A Led to Investors Successfully Bidding \$4 billion on the UFC: A Fan Speculates Legal Future

By Alvin Benjamin Carter III

As a law student, I often receive looks of shock when I reveal that I train mixed martial arts, or MMA, a sport I have followed since childhood. After 20 plus years of watching and six years of training, I am amazed to see the Ultimate Fighting Championship (UFC) sell for \$4 billion.¹ William Morris Endeavor-IMG, Silver Lake Partners, Kohlberg Kravis Roberts (KKR), and MSD Capital teamed up to make the purchase.² This is a smart move for the 23 year-old UFC, which produces approximately 2,000 hours of content each year with a market that includes 45% millennials.³

Fights are aired in 156 countries and often take place throughout the 50 States.⁴ This growth started 15 years ago when Frank and Lorenzo Fertitta and Dana White purchased the company for \$2 million at a time when mixed martial arts as a whole were little known in the United States.⁵ As the sport grew, the company grew.

The UFC started to acquire its competitors and made landmark deals with FOX and Reebok. Acquisitions have historically taken the UFC to the next level, so it is not surprising that acquisitions led to the success of the current sale. Silver Lake Investments orchestrated the merger of WME and IMG and then urged the conglomerate to grow through acquisitions. They also banded together with Silver Lake partner KKR. MSD Capital, who also works with Silver Lake, will own preferred shares of UFC.

¹ Ashlee Kieler, *UFC Sells Itself For Record-Breaking \$4 Billion*, Consumerist, July 11, 2016, <https://consumerist.com/2016/07/11/ufc-sells-itself-for-record-breaking-4-billion/>.

² *Id.*

³ Michael J. de la Merced, *UFC Sells Itself for \$4 Billion*, NY Times, July 11, 2016, http://www.nytimes.com/2016/07/11/business/dealbook/ufc-sells-itself-for-4-billion.html?_r=0.

⁴ *Id.*

⁵ *Id.*

The UFC's run up to this point has not gone off without a hitch. A class action law suit was filed by ex-fighters on December 18, 2015.⁶ After being removed to Nevada District Court, the saga continued in May 2016, with the Court granting the Plaintiff's motion challenging the privilege claim of UFC's parent company's, Zuff, Inc, regarding e-Discovery documents.⁷

After UFC 200, which featured some of the sports largest stars Anderson Silva and Brock Lesnar, and the completed sale of UFC, the anti-trust case is a nuisance plaguing the UFC and its new owners. Still, as the company continues its meteoric rise, it will be interesting to see if larger-scale legal troubles arise. The UFC has become drastically more sophisticated when compared to other mixed martial arts leagues, potentially putting an even larger target on its back. To quote the hip-hop legend Notorius B.I.G., "Mo' money, mo' problems."

Alvin Benjamin Carter III is a rising 2L at Northeastern University School of Law where he serves as the First Circuit Executive Lt. Governor for the ABA Law Student Division and co-chair and co-founder of numerous student organizations.

One Important Clause When Negotiating Endorsement Contracts: Right of First Refusal

By Hakeem Onafowokan

Here are some high dollar contracts for you: Kevin Durant's \$300 million contract with Nike in 2014,⁸ Nike's \$250 million apparel contract with the University of Texas Longhorns,⁹ and Oakley's sponsorship endorsement with professional golfer Rory McIlroy.¹⁰ What do all of these contracts have in common? Right of first refusal clauses.

Right of first refusal clauses are not exclusive to endorsement contracts. In fact, these clauses are often found in player contracts for the National Basketball Association,¹¹ National Hockey

⁶ *Cung Le v. Zuffa, LLC*, 108 F. Supp. 3d 768 (N.D. Cal. 2015).

⁷ *Cung Le v. Zuffa, LLC*, No. 2-15-cv-01045-RFB-PAL, 2016 WL 3035086, at *6 (D. Nev. May 26, 2016).

⁸ Darren Rovell & Marc Stein, *Nike Keeps Durant with Megadeal*, ESPN, Aug. 31, 2014, http://espn.go.com/nba/story/_/id/11443079/kevin-durant-oklahoma-city-thunder-stays-nike-shoe-company-matches-armour-offer.

⁹ Thomas Barrabi, *Texas Longhorns Apparel Contract: Nike, Under Armour Set for College Sports Clash*, International Business Times (2015), Sept. 30, 2015, <http://www.ibtimes.com/texas-longhorns-apparel-contract-nike-under-armour-set-college-sports-clash-2121334>.

¹⁰ Michael Lipkin, *Nike Escapes Oakley's Suit Over Pro Golfer Endorsement*, Law360, Dec. 18, 2013, <http://www.law360.com/articles/497150/nike-escapes-oakley-s-suit-over-pro-golfer-endorsement>.

¹¹ NBA Collective Bargaining Agreement, Dec. 2011, at 234, available at <https://www.scribd.com/doc/172760974/nba-nbpa-cba-2011> (last visited Jul 12, 2016).

League,¹² and Major League Soccer.¹³ Typically, the right of first refusal is found in restricted free agent clauses, where a player's current team has the right to match any offer from any other team offering the player a contract.

However, right of first refusal clauses are often issues of contention in endorsement contracts. Right of first refusal is a contractual right where one contracting party must give the other party the chance to match the offer that a third party has given to the party. When serving as an attorney for athletes, entertainers or sponsors, proper contractual language is essential to preserve certain rights. As a result, right of first refusal clauses can be a powerful tool in endorsement agreements.

Drafting a well written right of first refusal clause requires balancing your client's circumstances.¹⁴ For sponsors, a well-drafted right of first refusal clause allows the sponsor to keep their exclusive relationship with their client, while also protecting their initial investment.¹⁵ For athletes, a well-drafted right of first refusal clause allows the athlete to increase their market value as sponsors competitively bid for their services.¹⁶

On the other hand, a poorly-drafted right of first refusal clause may lead to issues. For instance, in 2012, Oakley sued Nike and professional golfer Rory McIlroy after the golfer signed an endorsement deal with Nike.¹⁷ Oakley claimed its contract with McIlroy gave it the right of first refusal to any endorsement deal.¹⁸ Although Oakley's lawsuit was later dismissed, the poorly worded right of first refusal clause resulted in all parties expending valuable time and resources litigating over contractual language.

More recently, Nike found itself attempting to enforce its right of first refusal clause when Olympic running prospect Boris Berian agreed to a sponsorship agreement with New Balance Athletics Inc.¹⁹ Berian's sponsorship agreement with Nike went through December 31, 2015, but it also gave Nike the right to match any offers obtained by Berian within a specified time.²⁰ Berian instead signed an endorsement with New Balance Athletics, although Nike thought it had legitimately exercised its right of first refusal.²¹ Although Nike later voluntarily withdrew its complaint – to

¹² Collective Bargaining Agreement between National Hockey League and National Hockey League Players Association, Feb. 15, 2013, at 35, *available at* <http://www.nhlpa.com/inside-nhlpa/collective-bargaining-agreement>.

¹³ Collective Bargaining Agreement between Major League Soccer and Major League Soccer Players Union, Feb. 1, 2015, at 79, *available at* <http://www.mlssplayers.org/images/Collective%20Bargaining%20Agreement%20-%20February%201,%202015.pdf>.

¹⁴ Jamie Heins & Brian Socolow, *Properly Drafted Right of First Refusal Helps Sponsors Keep Stars*, Sports Business Journal, Apr. 27, 2009, <http://www.sportsbusinessdaily.com/Journal/Issues/2009/04/20090427/from-the-field-of/properly-drafted-right-of-first-refusal-helps-sponsors-keep-stars.aspx>.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ Lipkin, *supra* note 10.

¹⁸ *Id.*

¹⁹ Pat Graham, *Sole Search: Berian Shines With Nike Lawsuit Behind Him*, Chicago Tribune, July 2, 2016, <http://www.chicagotribune.com/sports/sns-bc-oly--ath-track-trials-berian-20160702-story.html>.

²⁰ *Id.*

²¹ *Id.*

“eliminate this distraction for Boris” as he competed during Olympic Trials,²² a clearer right of first refusal clause may have prevented this situation.

In sum, whether contracting parties avoid litigating right of first refusal clauses for financial or business reasons, the best practice when drafting right of first refusal clauses is to ensure language specificity. Right of first refusal clauses should be clear about when a deal begins and ends, and should specifically state how the right should be exercised. Right of first refusal clauses often include language stating the existing sponsor has the right to match “material” terms of a third-party offer, but the “material” terms need to be defined clearly. Including as much detail as possible, while walking your client through various scenarios of how the provision will practically play out, allows all parties to save time and resources, and it helps to avoid future disputes.

Hakeem Onafowokan is an attorney at the League of Minnesota Cities, where he focuses on labor and employment law issues. He is a graduate of the University of Minnesota Law School.

NEWS AND ANNOUNCEMENTS >>



Location:

Marriott Marquis

780 Mission St San Francisco, CA 94103-3113

Date:

August 4-9, 2016

[Register and Book Housing!](#)

²² Sara Germano, *Nike Drops Lawsuit Against Olympic Hopeful Boris Berian*, The Wall Street Journal, June 23, 2016, <http://www.wsj.com/articles/nike-drops-lawsuit-against-olympic-hopeful-boris-berian-1466734919>.



YLD Events at ABA Annual Meeting

August 4 – 7, 2016
San Francisco, CA

[Register Now](#)

YLD Fall Conference

October 20 – 22, 2016
Detroit, MI

2017

YLD Events at the ABA Midyear Meeting

Feb. 2 – 5, 2017
Miami, FL

YLD Spring Conference

May 4 – 6, 2017
Montreal, Quebec
Canada

YLD Events at the ABA Annual Meeting

August 10 – 13, 2017
New York, NY