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Silencing the Crowd: Regulating Free Speech in Professional Sports Facilities

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SILENCING THE CROWD: REGULATING FREE SPEECH IN PROFESSIONAL SPORTS FACILITIES

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I. INTRODUCTION

On August 26, 2008, Bradford Campeau-Laurion was simply heading to the restroom when everything changed.[1] Taking in a Yankees game with his friend, Campeau-Laurion figured the seventh-inning stretch was a good time to head to the restroom.[2] The only problem was that the seventh-inning at Yankee Stadium was reserved for the song "God Bless America."[3] Based on a policy instituted in October 2001, the Yankees restricted fan movement at certain exits during the airing of the song by using New York Police Department (NYPD) officers, ushers, stadium security, and chains to keep fans in their seats.[4] This policy was created to encourage patriotism.[5]

When Campeau-Laurion, who does not participate in religious activities and objects to being required to participate in them, refused to return to his seat, he was forcibly ejected by two uniformed NYPD officers.[6] On April 15, 2009, Campeau-Laurion sued the Commissioner of the NYPD, the City of New York, the two uniformed police officers, and the New York Yankees alleging a violation of his First, Fourth, and Fourteenth Amendment rights, as

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1. Complaint of Campeau-Laurion v. Kelly, Case No. 09CV3790, at 1 (S.D.N.Y April 15, 2009) [hereinafter *Campeau-Laurion* Complaint].

2. *Id.*

3. *Id.*

4. *Id.* at 2.

5. *Id.*

6. *Id.* at 5-6. There were some reports that Campeau-Laurion was ejected because he was drunk and disorderly; a claim Campeau-Laurion denies. Samantha Gross, *NY Baseball Fan Settles 'God Bless America' Suit*, ABCNEWS.COM, July 7, 2009, http://abcnews.go.com/Sports/wireStory?id=8022571.

well as violation of public accommodation statutes and common law.[7]

Because the "God Bless America" suit was eventually settled,[8] it remains unclear as to what extent professional clubs may legally regulate, or even restrict, such forms of expression. In many cases the expression is from the patrons, such as an overzealous fan with an offensive sign, or an alcohol-induced heckler in a profanity-ridden diatribe. Yet, the expression is sometimes through the club, such as the Yankees' "God Bless America" policy or a faith night featuring the club's star player professing his or her faith immediately preceding or following a game.[9] In both situations, free speech rights are implicated and deserve attention.

A key legal issue arises when fans are so offended by the expression that they hold the club liable, such as the case with the Yankees' "God Bless America" policy, leaving clubs' general counsel scrambling to decide what content they were legally allowed to permit as well as what they are legally allowed to restrict in the future. As such, the aim of this article is to discuss and analyze how general counsels' free speech concerns at a facility[10] are impacted by a professional sports club's[11] leasing arrangement with the local government and independent business decisions to regulate fan conduct. The analysis will demonstrate that a club's general counsel may play a significant role in affecting both the current and future application of free speech analysis in terms of the club's decisions regarding the facility.

The first portion of this article provides a brief distinction between professional and non-professional sports, and why this distinction is significant in terms of free speech analysis. Second, this article discusses the public forum and state action requirements that shape free speech claims in professional sports facilities. Third, this article discusses current free speech

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7. *Campeau-Laurion* Complaint, *supra* note 1, at 1.

8. *See* Judgment Pursuant to Rule 68, ¶ 1, Campeau-Laurion v. Kelly, Case No. 09CV3790 (S.D.N.Y. 2009).

9. For example, minor league baseball clubs around the country, as well as a handful of Major League Baseball clubs, have held "Faith Nights" that often include players speaking about their faith. Reid Cherner, *If You Billed It Around Faith, They Will Certainly Come*, July 7, 2008, USATODAY.COM, http://www.usatoday.com/sports/baseball/minors/2005-07-21-faith-night_x.htm.

10. For the purpose of this article, "facility" or "facilities" refers to all professional sporting venues, including baseball and football stadiums and hockey and basketball arenas. Unless otherwise noted, "facility" or "facilities" does not include public venues such as high school football fields and township baseball fields.

11. For the purpose of this article, "professional sports clubs" refers generally to the four major professional club sports leagues in the United States: Major League Baseball (MLB), National Football League (NFL), National Hockey League (NHL), and National Basketball Association (NBA). Team Names, http://www.teamnames.us/ (last visited Feb. 1, 2010). However, the principles are intended to extend to all professional sports leagues that involve privately owned clubs and publicly owned sports facilities.

issues that have arisen in professional sports facilities.[12] Finally, this article makes certain recommendations to help guide general counsel in balancing a professional sports club's legal obligations to permit certain types of free expression with its business goals to maintain a profitable and family-friendly environment.

It is worth noting that this author recognizes that deviations from free speech laws and regulations at facilities often go unnoticed and unchallenged. Moreover, civil liberty advocates are unlikely to defend a belligerent fan's right to badger an opposing club's fan. Even so, free speech concerns should not be swept under the cost/benefit analysis carpet as a mere academic exercise. As demonstrated by the Yankees' "God Bless America" policy, one overly restrictive policy could easily escalate into a lawsuit and the inevitable bad press.

II. THE UNIQUENESS OF PROFESSIONAL SPORTS

Although there has been a considerable amount of scholarly writing on the subjects of free speech rights and sports fans,[13] free speech rights and college sports facilities,[14] and free speech rights and professional athletes,[15] few have approached the topic in terms of free speech rights and professional sports facilities. The combination of privately owned professional sports clubs and publicly funded facilities creates a unique professional sports private-public hybrid that remains legally complex and largely unsettled amongst courts. Whereas purely public entities are subject to constitutional restrictions, purely private entities are most often not.[16] Therefore, the combination requires further analysis.

Unlike many of the non-professional clubs, such as the schools playing in the National Collegiate Athletic Association (NCAA), all but one of

12. This Article will only address facilities' liability for free speech issues that arise during game-related events. For example, if a facility were to host a religious event during an off day, the analysis would differ significantly and it is possible that the facility would be considered a public entity for that event. Such an event recently occurred when Pope Benedict XVI held mass at both Nationals Stadium and Yankee Stadium. *Papal Masses at National and Yankee Stadiums to Reflect Diversity of U.S. Population, Celebrate Several Bi-Centennials*, USCCB.ORG, http://www.usccb.org/archives/2008/08-047.shtml (last visited Mar. 27, 2009).

13. *See generally* Howard M. Wasserman, *Fans, Free Expression, and the Wide World of Sports*, 67 U. PITT. L. REV. 525 (2006).

14. *See generally* Clay Calvert & Robert D. Richards, *Fans and the First Amendment: Cheering and Jeering in College Sports*, 4 VA. SPORTS & ENT. L.J. 1 (2004).

15. *See* Christopher J. McKinney, Comment, *Professional Sports Leagues and the First Amendment: A Closed Marketplace*, 13 MARQ. SPORTS L. REV. 223, 232-33 (2003).

16. Gilmore v. Montgomery, 417 U.S. 556, 565 (1974); *see also* Sue Davis, *The Supreme Court: Finding State Action . . . Sometimes*, 26 HOW. L.J. 1395, 1395 (1983).

America's major professional clubs are privately owned and operated.[17] Further, most professional sports clubs' facilities are publicly owned and financed.[18] By contrast, many NCAA clubs stem from public schools in which the club's budget and the facility are publicly funded. As a result, those clubs' facilities are susceptible to constitutional limitations and the free speech analysis is fairly straight-forward. Even so, it is notable that the public-private distinction does not reach the league itself, since the NCAA, the United States Olympic Committee, and professional sports leagues are all private entities.[19] As such, this article's discussion involves the individual clubs and, more importantly, the facilities where they play their home games.

Cities have entered into the business of subsidizing professional sports facilities, especially with professional baseball and football, since the middle

17. The Green Bay Packers are the only non-private club of the four major sports leagues, operating as a publicly-owned, non-profit corporation since 1923. *Community/Shareholders*, PACKERS.COM, http://www.packers.com/community/shareholders (last visited Mar. 27, 2009). Although it does not affect this analysis, it is notable that a handful of professional clubs are owned by publicly-traded companies. For example, Cablevision, CVC on the NYSE, owns the New York Rangers, New York Knicks and the WNBA club, the New York Liberty. *Corporate Information – Sports & Entertainment*, CABLEVISION.COM, http://www.cablevision.com/sportsent/msg_properties.jsp (last visited Mar. 27, 2008).

18. The percentage of professional sports clubs that play in publicly owned and operated facilities varies considerably from sports to sport: MLB (76.7%), NHL (46.7%), NBA (46.67%), and NFL (87.5%). *Ballparks*, BALLPARKS.COM, http://ballparks.com (last visited Mar. 27, 2008). Further, many of the privately owned and operated facilities have also received some form of government funding or other financial support (e.g. tax breaks, donated land, etc.), which at a certain point could be significant enough to fall under the "publicly owned" analysis. For MLB, two of the seven private facilities fall under this quasi-publicly funded category: Busch Stadium (St. Louis Cardinals; long-term loan from county) and Sun Life Stadium (Florida Marlins; 10% publicly financed). *Id.* For the NHL, nine of the sixteen private facilities fall under this category: HSBC Arena (Buffalo Sabres; 43.3% publicly financed), Pengrowth Saddledome (Calgary Flames; 100% publicly financed), Pepsi Center (Colorado Avalanche; tax rebates and exemptions), Scotiabank Place (Ottawa Senators; government loan and federal grant), St. Pete Times Forum (Tampa Bay Lightening; government bonds), Staples Center (Los Angeles Kings; 15.6% publicly financed), TD Garden (Boston Bruins; city bonds and land), United Center (Chicago Blackhawks; infrastructure costs), Verizon Center (Washington Capitals; infrastructure costs), and Wachovia Center (Philadelphia Flyers; infrastructure costs). *Id.* For the NBA, nine of the fifteen private facilities fall under this category: AT&T Center (San Antonio Spurs; city sales tax), EnergySolutions Arena (Utah Jazz; city land grant), Pepsi Center (Denver Nuggets; tax rebates and exemption), Quicken Loans Arena (Cleveland Cavaliers; tax exempt bonds issued by county), Rose Garden Arena (Portland Trail Blazers; 13.2% publicly financed), Staples Center (Los Angeles Clippers and Los Angeles Lakers; 15.6% publicly funded), TD Garden (Boston Celtics; city bonds and land), United Center (Chicago Bulls; infrastructure costs), Verizon Center (Washington Wizards; infrastructure costs), and Wachovia Center (Philadelphia 76ers; infrastructure costs). *Id.* For the NFL, three of the four private facilities fall under this category: Bank of America Stadium (Carolina Panthers; land money provided by city and building relocation money provided by county), Sun Life Stadium (Miami Dolphins; 10% publicly financed), and FedEx Field (Washington Redskins; 28.1% publicly financed). *Id.*

19. McKinney, *supra* note 15, at 232-33.

of the twentieth century.[20] Further, the aggregate amount of government subsidy money has increased considerably,[21] and despite economist warnings against doing so,[22] clubs continue to receive such public funding.[23] In fact, clubs have threatened to leave cities as a means to elicit additional funding.[24] As such, the public-private hybrid will remain prevalent in the professional sports landscape and merits particular scholarly attention.

In order to sort through the legal boundaries in this public-private hybrid, courts must find two key requirements: a state actor and a public forum. As will be discussed, this untangling has proven to be difficult based on the various tests employed, which often leads to inconsistent results.

III. THE PROBLEM: APPLYING INCONSISTENT STATE ACTOR AND PUBLIC FORUM TESTS

First Amendment protected speech is a staple of American democracy that courts have not taken lightly.[25] Read literally, the First Amendment is succinct and clear: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom

20. Steven A. Riess, *Historical Perspectives on Sports and Public Policy*, *in* THE ECONOMICS AND POLITICS OF SPORTS FACILITIES 13, 14 (Wilbur C. Rich ed., 2000).

21. While the aggregate amount has increased, clubs have contributed more often; therefore, the percentage of government subsidy of the entire cost of the facility has decreased.

22. *See* Allen R. Sanderson, *In Defense of New Sports Stadiums, Ballparks and Arena*, 10 MARQ. SPORTS L.J. 173, 173 (2000) (noting economic studies that conclude "stadiums do not serve as catalysts for economic development, nor do they constitute good public investments"); but *see generally* Symposium, *Stadium Finance, Naming Rights & Team Relocation*, 12 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 291 (2002). All panelists generally agreed that public stadium financing is a net positive.

23. For example, the Minnesota Twins are currently receiving government money for their new facility, Target Field, to open in 2010. *Official Site of the Minnesota Twins: Ballpark*, MLB.COM, http://minnesota.twins.mlb.com/min/ballpark/index.jsp (last visited Mar. 27, 2009).

24. This threat is real, as evidenced by the Los Angeles Dodgers (leaving Brooklyn), *Brooklyn Dodgers*, BASEBALL-REFERENCE.COM, http://www.baseball-reference.com/bullpen/Brooklyn_Dodgers (last visited Feb. 1, 2010) and Indianapolis Colts (leaving Baltimore), *Colts Leave Baltimore*, TheBALTIMORESUN.COM, http://www.baltimoresun.com/sports/baltimore-colts/bal-coltsmove-pg0329,0,3231118.photogallery (last visited Feb. 1, 2010), and Baltimore Ravens (leaving Cleveland). *Cleveland Browns Move to Baltimore Revisited*, CLEVELANDLEADER.COM, http://www.clevelandleader.com/node/3129 (last visited Feb. 1, 2010). This ploy was successfully parlayed into a new ballpark for the Florida Marlins. *Florida Marlins New Ballpark*, MLB.COM, http://florida.marlins.mlb.com/flaballpark/new_ballpark.jsp (last visited Apr. 24, 2009).

25. It is important to note that there is a distinction between the First Amendment and free speech. The First Amendment refers to constitutionally protected speech applicable against the government, whereas free speech refers to the societal understanding and tradition of protecting an individual's right to express oneself and participate in public discussion. Wasserman, *supra* note 13, at 553.

of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."[26] Along with the Fourteenth Amendment's application of the same constitutional limitations at the state level,[27] individuals seemingly receive significant constitutional protection against entities restricting their free speech. However, the First Amendment and Fourteenth Amendment do not protect United States citizens from constitutional violations by private entities.[28] In order to invoke protection, the private entity's actions, in most cases, must qualify as public under the "state actor" requirement.[29] Although outside the scope of this article, general counsel should note that a state constitution may provide certain free speech protection against private actors, essentially eliminating the state actor requirement.[30]

In addition to the state actor requirement, the metes and bounds of free speech analysis require a determination of the venue at issue; here, the venue is the professional sports facility. Specifically, courts look to determine whether the facility, or a particular section of it, is a public forum. The public forum requirement determines the rights that a private actor has in using government property for one's private expression.[31] Not surprisingly, the analysis of both the state actor and public forum prongs is an imprecise science that tends to be very fact specific and has not been consistently determined by the courts.

A. State Actor Requirement

In professional sports, First Amendment protection during a club's home

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26. U.S. CONST. amend. I.

27. *See* U.S. CONST. amend. XIV.

28. *See* Gilmore v. Montgomery, 417 U.S. 556, 565 (1974); *see also* Committee For A Better Twin Rivers v. Twin Rivers Homeowners' Ass'n, 423 A.2d 615, 628 (N.J. 2007). "Only a handful of states recognize a constitutional right to engage in free speech, assembly, or electoral activity on privately owned property held open to the public, such as a shopping mall or a college campus." Davis, *supra* note 16, at 1395.

29. *Gilmore*, 417 U.S. at 565.

30. For example, article 1, ¶ 6 and ¶ 18 of the New Jersey State Constitution provide protection "against unreasonably restrictive or oppressive conduct on the part of private entities that have otherwise assumed a constitutional obligation not to abridge the individual exercise of such freedoms because of the public use of their property." State v. Schmid, 423 A.2d 615, 628 (N.J. 1980); *See* N.J. CONST. art. 1, ¶¶ 6, 18.

31. *See e.g.* Capitol Square Review and Advisory Bd. v. Pinette, 515 U.S. 753, 761 (1995). "The right to use government property for one's private expression depends upon whether the property has by law or tradition been given the status of a public forum, or rather has been reserved for specific official uses." *Id.* (*citing* Cornelius v. NAACP Legal Defense & Ed. Fund, Inc., 473 U.S. 788, 802-03 (1985)).

games depends on the nature of the entity controlling the facility. Most professional clubs are private entities that play their games in a facility built largely or entirely with public funds, owned by the local government, and leased long-term, exclusively, and on favorable terms to the club. [32] However, the facility is likely only subject to First Amendment restrictions if the club is held to be a state actor. Although courts initially held a very restrictive view in applying the state actor requirement,[33] Supreme Court rulings in the mid-twentieth century have extended the state actor requirement dramatically[34] and have made finding a professional sports facility as a state actor probable.

Currently, courts predominantly use three different tests to identify state action: symbiotic relationship, entwinement, and public function.[35] Most jurisdictions have not indicated that they have adopted a particular test.[36] Rather, courts often consider each test in order to find state action under at least one test.[37] Even the Supreme Court has noted that the application of the state action doctrine is "one of the more slippery and troublesome areas of civil rights litigation."[38]

This Article will analyze each of the three tests. As is shown below, it appears courts are most willing to find state action where a private professional club plays its home games in government-owned facilities if the court utilizes the symbiotic relationship test. If a court finds that a club operates as a state actor, the identification is limited to the club's functions in operating the facility and does not extend to its internal decisions not directly tied to the facility.[39]

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32. Wasserman, *supra* note 13, at 541; *see generally Ballparks*, BALLPARKS.COM, http://ballparks.com (last visited Mar. 27, 2009); *see also* McKinney, *supra* note 15, at 232-33.

33. *See* The Civil Rights Cases, 109 U.S. 3, 17 (stating that "civil rights . . . cannot be impaired by the wrongful acts of individuals, unsupported by state authority in the shape of laws, customs, or judicial or executive proceedings").

34. *See generally, e.g.*, Marsh v. Alabama 326 U.S. 501 (1946); Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961).

35. Wasserman, *supra* note 13, at 542-53; *but see* Gallagher v. Neil Young Freedom Concert, 49 F.3d 1442, 1446-57 (10th Cir. 1995) (finding four tests for state action: nexus, symbiotic relationship, joint action, and public function).

36. *See* Philips v. Pitt County Mem'l Hosp., 572 F.3d 176, 182 (4th Cir. 2009) (acknowledging that there is no specific formula for state action).

37. *See e.g.*, Thompson v. Davidson Transit Org., 563 F.Supp.2d 820, 825-26 (M.D. Tenn. 2008); Carmack v. Mass. Bay Transp. Auth., 465 F.Supp.2d 18, 26-31 (D. Mass. 2006).

38. Graseck v. Mauceri, 582 F.2d 203, 204 (2d Cir.1978), *cert. denied*, 439 U.S. 1129 (1979).

39. Wasserman, *supra* note 13 at 552. For example, the state actor finding does not impact the club's player transactions and employee personnel decisions.

1. Symbiotic Relationship Test.

In *Burton v. Wilmington Parking Authority*, the Supreme Court greatly expanded the state action test involving public-private hybrid participation by requiring a "symbiotic relationship."[40] The Court held that a private restaurant leasing its property from a publicly owned garage was a state actor because of the "benefits mutually conferred" between the government and restaurant.[41] The restaurant was found to benefit from the government's upkeep of the area, convenient parking for patrons, prestige of the government-owned building, and economic benefits that the government received from the restaurant's success.[42] The Court noted that state action was found because the state "has so far insinuated itself into a position of interdependence [with the private party] that it must be recognized as a joint participant in the challenged activity . . . ." [43] This symbiotic relationship must be more than a passing business relationship. Later courts have recognized that "extensive state regulation, the receipt of substantial state funds, and the performance of important public functions do not necessarily establish the kind of symbiotic relationship between the [state] and a private [party] that is required for state action."[44]

At the professional sports level, a district court in New York incorporated *Burton's* symbiotic relationship test in *Ludtke v. Kuhn*, determining that Yankee Stadium functioned as a state actor in a claim against the Yankees' decision to ban females from its clubhouse.[45] The *Ludtke* court held that the combination of a publicly funded stadium, the city's upkeep of the stadium, and the correlation of the city's profit from its lease and the Yankees gate attendance created such a symbiotic relationship.[46]

The impact of economic profit and the finding of a symbiotic relationship is not surprising given the tremendous amount of money a city puts into building a facility with the understanding that it will eventually obtain a return on its investment. For example, the Texas Rangers Baseball Club benefits

40. *Burton*, 365 U.S. at 726. Although the "symbiotic relationship" test is accredited to *Burton*, the phrase "symbiotic relationship" was never actually used in the opinion. Rather, the phrase was coined in *Moose Lodge No. 107 v. Irvis*, when the Court referred to "the symbiotic relationship between lessor and lessee that was present in *Burton* . . . ." Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 175 (1972).

41. *Burton* at 724-25.

42. *Id.*

43. *Id.* at 725.

44. Gallagher v. Neil Young Freedom Concert, 49 F.3d 1442, 1451 (10th Cir. 1995).

45. Ludtke v. Kuhn, 461 F. Supp. 86, 93 (S.D.N.Y. 1978).

46. *See id.* at 93-94.

from the Arlington Sports Facilities Development Authority's commission of a $135 million subsidy (of a $191 million total cost) for its stadium, Rangers Ballpark in Arlington.[47] This subsidy makes economic sense by allowing the club to allocate its assets to its other needs and dramatically reducing the long-term debt the club would otherwise accumulate if it financed a new stadium. In addition, because the subsidy is combined with a favorable lease that entitles nearly exclusive control of stadium operations to the Rangers, the club also receives the benefit of the autonomy it needs to run a successful business.

In exchange for this financial support, the city benefits because of the impact on city development, the "civic-pride" benefits of maintaining a major league club, and the additional revenue received by the city. Regarding the Rangers, the Dallas/Fort Worth metropolitan area receives nearly $203 million yearly, of which the City of Arlington is estimated to receive roughly $121 million (60%) due to Rangers Ballpark's economic impact.[48] Further, Rangers Ballpark impacts nearly 5,100 full and part time jobs in the region, including 2,000 in the Arlington area alone.[49] This result follows suit with the Authority's stated purpose "to promote economic development within the City of Arlington."[50] The city also receives revenue based on tickets sold (with a maximum of $2 million); thus, there is a correlation between the club's success and the city's benefits.[51] Finally, Rangers Ballpark is an integral feature of Arlington's ongoing urban renewal plan to become the "Entertainment District" of the Dallas/Fort Worth Metropolitan area.[52]

Thus, the mutually interwoven benefits conferred between the City of Arlington and the Rangers probably would meet the *Burton* symbiotic relationship test. This is significant because such a financial arrangement is fairly common among professional sports clubs, which strongly indicates that

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47. *Sports Facility Reports*, LAW.MARQUETTE.EDU, http://law.marquette.edu/cgi-bin/site.pl?2130&pageID= 3461 (last visited Apr. 24, 2009).

48. *Analysis of Potential Economic and Fiscal Impact for the Ballpark in Arlington*, ARLINGTON.TX.US, Oct. 2000, *available at* http://www.ci.arlington.tx.us/finance/pdf/asfda/impacts.pdf.

49. *Id.*

50. *Id.*

51. *Id.*

52. In addition to the Rangers Ballpark, the area also features countless restaurants and Six Flags Over Texas. *See Dallas Cowboys New Stadium*, DALLASCOWBOYS.COM, http://stadium.dallascowboys.com (last visited Mar. 27, 2009). The area also includes the Dallas Cowboys new stadium (also publicly funded) and potentially a high-tech entertainment plaza, currently called "Glorypark" (partially publicly funded). *Id.* The two centerpieces of the area will clearly be the baseball and football facilities. *Id*; *So Far, Development Isn't Cropping Up Near Cowboys' New Stadium*, DALLASNEWS.COM, Mar. 2, 2009, http://www.dallasnews.com/sharedcontent/dws/spt/football/cowboys/stories/022109 dnmetstadiumdevelop.40c84e1.html.

professional sports clubs are acting as state actors if a court utilizes this test.

2. Entwinement.

In *Brentwood Academy v. Tennessee Secondary School Athletic Ass'n*, the Supreme Court recently enunciated a new, independent state action test that looks at whether a private entity is so "entwined" with government that otherwise private conduct takes on a public character.[53] The *Brentwood* Court addressed whether the Tennessee Secondary School Athletic Association (TSSAA), a voluntary association "incorporated to regulate interscholastic athletic competition among public and private secondary schools," engaged in state action when it enforced one of its rules against a member school.[54] Finding a "pervasive entwinement of state school officials in the structure of the association," the Court held that the association's regulatory activity at issue should be treated as state action.[55] Specifically, the Court noted that the association drew eighty-four percent (84%) of its membership from public schools, acted through public school representatives, drew its officers from the public schools, was largely funded by public school dues and income received through athletics, and had historically regulated athletics in lieu of the State Board of Education's exercise of its statutory authority.[56] As a result, the Court permitted Brentwood Academy's section 1983 claim against the association in order to prevent the association's enforcement of a rule prohibiting the use of undue influence in the recruitment of student-athletes.[57]

Although there do not appear to be any cases involving the entwinement test and facilities, a court would likely look at the title of the facility's ownership, who controls the facility operations, who maintains the authority to establish free speech or other Constitutional rules in the facility, and whether the government provides police and other security officials to enforce the club-created rules in the facility.[58] For example, if the government retains ownership and management of the facility, the facility lease forbids the club from creating any free speech restrictions, and/or the government provides

53. Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 302 (2001). The "entwine" aspect of this test derives in part from *Evans v. Newton*. *See generally* Evans v. Newston, 382 U.S. 296 (1966). However, as the *Brentwood* dissent notes, the majority's utilization of "entwinement" as a distinct test is created in the *Brentwood* decision itself. *Evans*, 382 U.S. at 312-15 (Thomas, J., dissenting).

54. *Evans*, 382 U.S. at 290.

55. *Id.* at 291.

56. *Id.* at 290-91.

57. *Id.* at 305.

58. Wasserman, *supra* note 13, at 549.

traffic police and in-facility security, the club would likely qualify as a state actor under the entwinement test. However, because most clubs tend to maintain exclusive title of their facility, have nearly complete autonomy over the facility's operations, free speech regulation, and in-facility security during games, it appears as though few, if any, facilities would be considered state actors under this test.

3. Public Function.

The public function test requires a court to ask whether "the private entity exercise[s] powers which are traditionally exclusively reserved to the state . . . ."[59] In effect, the test determines whether a private entity is a state actor if it performs a government function, such as holding a state election[60] or owning and operating a town.[61] However, this test has been applied very narrowly due in part to the Supreme Court's extremely restrictive "traditionally exclusively" standard.

As such, it is unlikely an entire facility would qualify because providing sports facilities is not a function traditionally exclusively provided by the government.[62] However, it is conceivable that a particular extension of a facility could qualify under the public function test. For example, a sidewalk parallel to the facility, owned and maintained by the club, may qualify as a public function unless there are some distinguishing factors on that sidewalk. In *United Church of Christ v. Gateway Economic Development Corp.*, the Sixth Circuit held that a sidewalk outside the Cleveland Indians' stadium, Progressive Field (formerly Jacobs Field), looked and felt like a typical sidewalk, thus it operated as a public function.[63] Therefore, the public-private partnership that owns the Indians, Gateway Economic Development, functioned as a state actor when it prohibited protests on the sidewalk.[64] Even

59. Wolotsky v. Huhn, 960 F.2d 1331, 1135 (6th Cir. 1992).

60. *See generally* Flagg Bros., Inc. v. Brooks, 436 U.S. 149 (1978).

61. *See generally* Marsh v. Alabama, 326 U.S. 501 (1946).

62. Until the ballpark boom in the 1960s and 1970s, many professional facilities were publicly funded. JAY WEINER, STADIUM GAMES: FIFTY YEARS OF BIG LEAGUE GREED AND BUSH LEAGUE BOONDOGGLES 61 (2000). However, "many professional facilities" is not enough to qualify for the public function because it must be "traditionally exclusively" publicly funded. Notable facilities that were built before or during that era and were not publicly funded include Fenway Park (built in 1912 for the Boston Red Sox) and Chavez Ravine (built in 1962 for the Los Angeles Dodgers and California Angels). *Ballparks*, BALLPARKS.COM, http://ballparks.com (last visited Mar. 27, 2009). Therefore, professional sports facilities as a whole likely do not qualify under the "traditionally exclusively" standard.

63. United Church of Christ v. Gateway Econ. Dev. Corp., 383 F. 3d 449, 452-55 (6th Cir. 2004).

64. *Id.* at 452.

so, the state actor determination only extended to the sidewalk.[65] Thus, like the entwinement test, a court adopting the public function test is unlikely to find state action for an entire facility.

B. Public Forum Requirement

Once state action has been found by a court, or alternatively, the state constitution provides an exception, free speech analysis proceeds to the public forum requirement, which sets the boundaries for how a club may limit activity protected by the First Amendment in and around its facility.[66] Unlike the state actor requirement, the public forum prong has proven to be less applicable to professional sports facilities and is more likely to provide considerable autonomy for a club's operations of its facility. Therefore, forum analysis is critical in assessing a club's liability and often will be outcome-determinative.

Although most facilities are publicly owned, mere government ownership or control is not sufficient to create a public forum.[67] Rather, the Supreme Court has identified three types of fora for the purpose of evaluating the constitutionality of regulating speech on public property:[68] 1) the traditional public forum;[69] 2) the designated public forum;[70] and 3) the nonpublic forum.[71] In a traditional or designated public forum, free speech may be restricted only by reasonable time, place, or manner regulations that serve a significant governmental interest and permit ample alternative channels for communication.[72] By contrast, in a nonpublic forum, there is limited

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65. *Id.* at 454.

66. Int'l Soc'y for Krishna Consciousness, Inc. v. N.J. Sports and Exposition Auth., 691 F.2d 155, 159 (3rd Cir. 1982).

67. *See* Greer v. Spock, 424 U.S. 828, 837 (1976). For example, a jailhouse might limit protesting in areas of a jail used exclusively for jail uses. U.S. v. U.S. Dist. Court, 407 U.S. 297, 321 (1972).

68. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45-46 (1983).

69. For example, streets, parks, and public sidewalks. Kreimer v. Bureau of Police of Morristown, 958 F.2d 1242, 1255 (3d Cir. 1992).

70. For example, a town hall meeting where public officials have limited the meeting's discussion content to a specified subject matter. Eichenlaub v. Twp. of Indiana, 385 F.3d 274, 281 (3d Cir. 2004). It is notable that some courts have broken down designated forums into two sub-categories: non-limited and limited. "Non-limited" designated forum does not limit who can speak or what can be discussed; "limited" designated forum may restrict access to certain groups of speakers and limits discussions to only certain topics. Every Nation Campus Ministries at San Diego State Univ. v. Achtenburg, 597 F.Supp. 2d 1075, 1092 (S.D. Cal. 2009).

71. For example, the perimeter walkways of an interstate highway's rest areas. Jacobsen v. Bonine, 123 F.3d 1272, 1273-74 (9th Cir. 1997).

72. Consol. Edison Co. v. Pub. Serv. Comm'n, 447 U.S. 530, 535 (1980).

protection against free speech restrictions, requiring only that the regulations are "reasonable and content- neutral . . . ."[73]

When determining whether a government-owned facility is a public forum, courts look primarily at the purpose of the facility's construction, the commercial nature of the stadium's operation, any written policies regarding the stadium's purpose, and how consistently any regulations limiting expressive activities are enforced.[74] Courts must also consider whether an expressive activity is consistent with the primary function of a forum. However, courts focus not only on the location that the would-be speaker seeks access but also on the context of the property as a whole. Thus, certain locations in a facility may elicit different public forum status.[75] This inquiry focuses on the specific space to which the would-be speaker seeks access, but should also take into account the context of the property as a whole.[76]

The most logical application of public forum analysis for professional facilities occurs within the grandstands. There, cheering and other forms of expression are not only expected, but are in many ways encouraged during a game with open bleacher seating, noise inducing messages on a videoboard, and natural moments for boisterous cheering (i.e. the home club hits a homerun or scores a touchdown).[77] Moreover, the public is indiscriminately invited to participate with pre-determined ticket prices, and there is no inquiry into a fan's identity, loyalty, or intent.[78] Thus, a stadium is a uniquely appropriate place for speech, and professional sports stadiums appear to fit nicely into the traditional public forum bucket.

The public forum itself is likely limited only to the grandstand within the government-owned facility.[79] Unless the other parts of the facility are public fora for separate reasons, the balance of the facility, including the playing

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73. U.S. Postal Serv. v. Council of Greenburgh Civic Ass'ns, 453 U.S. 114, 131 (1981).

74. *See generally* Gerhardt A. Gosnell II, *Banner Policies at Government-Owned Athletic Stadiums: The First Amendment Pitfalls,* 55 OHIO L.J. 1143 (1994); *see also* Int'l Soc'y for Krishna Consciousness, Inc. v. N.J. Sports and Exposition Auth., 691 F.2d 155, 160 (3rd Cir. 1982). "The primary factor in determining whether property owned or controlled by the government is a public forum is how the locale is used." *Id.*

75. Cornelius v. NAACP Legal Defense & Educ. Fund, 473 U.S. 788, 804 (1985).

76. DiLoreto v. Downey Unified Sch. Dist. Bd. of Educ., 196 F.3d 958, 968 (9th Cir.1999), *cert. denied*, 529 U.S. 1067 (2000).

77. Of course, the level of encouraged cheering speech varies considerably based on the sport. For example, while continuous fan noise is acceptable during a baseball game, it is not appropriate to talk during much of a tennis match or golf tournament.

78. Wasserman, *supra* note 13, at 532.

79. *Id.* at 535. *See* Air Line Pilots Ass'n v. Dept. of Aviation, 45 F.3d 1144, 1151 (7th Cir. 1995) (limiting the public forum in an airport only to the display cases within the airport and not to the airport as a whole, which was found to be a nonpublic forum).

field, scoreboard, and public-address (PA) system, would remain a nonpublic forum. In fact, the club could utilize the nonpublic forum to exercise its own form of expression by supporting the home club[80] or even heckling the away club[81] via the facility's PA system and videoboard projections.

The application of the public forum analysis has been implemented somewhat inconsistently by the courts. At least one court, *Stewart v. D.C. Armory Board Decision*, has recognized that the public forum analysis in the sports facility context is fact specific, and that the same stadium "may not have the same public forum status in all places at all times."[82] In *Stewart*, the court held that the facility at issue, RFK stadium in Washington D.C.,[83] may be a public forum based on its operation and designation.[84] In denying the facility authority's motion to dismiss, the court found that there were sufficient facts to possibly show a public forum by designation because the stadium officials had failed to remove non-event related signs in the past (i.e. happy birthday wishes); thus, the stadium may have to permit the plaintiffs to display banners that read biblical passages.[85]

The *Stewart* court looked at three factors in applying the public forum doctrine: (1) the stated intent of the government in funding the facility, (2) the compatibility of the facility with the contested expressive activity, and (3) whether the facility utilized a consistent policy and practice in regulating such activity.[86] In addressing the first factor, the court stressed that a court may not place total reliance on the statute authorizing the government agency that controls the facility, but rather it must focus on the actual conduct the agency has demonstrated.[87] For the latter two factors, the court stressed that it must look beyond the stated policy itself and examine how that policy is actually enforced.[88] Therefore, substance takes precedence over form in applying the

80. For example, the Texas Rangers play the theme song to the movie *The Natural* whenever a Ranger hits a home run at Rangers Ballpark in Arlington, Texas.

81. For example, a baseball stadium often plays the theme song to *Jeopardy* when the away club has a long conference at the mound.

82. Stewart v. D.C. Armory Bd. Decision, 863 F.2d 1013, 1018 n.8 (D.C. Cir. 1988).

83. RFK stadium was 100% publicly financed. *Sports Facility Reports*, LAW.MARQUETTE.EDU, http://law.marquette.edu/cgi-bin/site.pl?2130&pageID=3461 (last visited Apr. 24, 2009).

84. *Stewart*, 863 F.2d at 1016.

85. *Id.* at 1020.

86. *Id.* at 1019-20.

87. *Id.* at 1019. For example, many authorizing statutes state that it will create a facility for the purpose of holding athletic events. *See* Int'l Soc'y for Krishna Consciousness, Inc. v. N.J. Sports & Exposition Auth., 532 F. Supp. 1088, 1092 (D.C.N.J. 1981). The authorizing statute states: "An Act to provide stadiums and other buildings and facilities in the Hackensack meadowlands for athletic contests, horse racing and other spectator sporting events . . . ." *Id.*

88. *Id.* at 1020.

Stewart factors, and the case should be used as a caution to general counsel that mere lip service to a particular free speech regulation is ineffective if the policy is not regularly and fairly enforced.

Unlike the court in *Stewart*, the courts in *Krishna Consciousness, Inc. v. New Jersey Sports and Exposition Authority*[89] and *Hubbard Broadcasting Inc. v. Metropolitan Sports Facilities Commission*[90] held that the facilities at issue did not create a public forum. In *Krishna Consciousness*, the Third Circuit held that the Meadowlands Sports Complex (the Meadowlands)[91] in New Jersey is not "'designed, built, intended[,] or used as a public forum.'"[92] Like many other professional stadiums, the Meadowlands is owned by a government-created entity, the New Jersey Sports and Exposition Authority (Authority).[93] The court stated that the Meadowlands functioned as a "commercial venture by the state," reasoning that it was intended to provide economic benefits to the state and generate enough income to break-even, but the stadium was never intended to be a public forum.[94] As such, the court permitted the Authority to regulate certain forms of solicitation because they were counterproductive to the Authority's objectives.[95]

Similarly, in *Hubbard Broadcasting*, the Eight Circuit held that the government-owned Metrodome is not a public forum because its commission, the Metropolitan Sports Facilities Commission, was created to provide sports facilities, and the Metrodome was intended to be a sports complex.[96] The *Hubbard* court then expanded on *Krishna Consciousness* by stating that a court must look into the specific entity or component of a government stadium at issue in order to determine whether there is a limited public forum status.[97] For example, the court looked at the particular advertising space within the Metrodome, rather than the stadium as a whole, to determine that the advertising space was not a public forum.[98] Thus, the court left open the

89. *See generally* Int'l Soc'y for Krishna Consciousness, Inc. v. N.J. Sports and Exposition Auth., 691 F.2d 155 (3rd Cir. 1982).

90. *See generally* Hubbard Broad. Inc. v. Metro. Sports Facilities Comm'n, 797 F.2d 552 (8th Cir. 1986).

91. The Meadowlands is primarily a professional football facility that hosts two NFL clubs, the New York Giants and the New York Jets.

92. *Krishna Consciousness*, 691 F.2d at 158 (*citing* Int'l Soc'y for Krishna Consciousness v. N.J. Sports and Exposition Auth., 532 F. Supp. 1088, 1100 (D.N.J. 1981)).

93. *Id.*

94. *Id.* at 161.

95. *Id.*

96. Hubbard Broad, Inc. v. Metro. Sports Facilities Comm'n, 797 F.2d 552, 555 (8th Cir. 1986).

97. *Id.*

98. *Id.* at 556.

possibility that a portion of a stadium may be considered a public forum, while the balance of it is nonpublic.

In sum, general counsel may not rely solely on the authority's incorporating statute[99] or the mere fact that it is a professional stadium.[100] The public forum status may shift over time, particularly involving certain locations in the facility.[101] However, general counsel must keep in mind that even if the facility meets a court's standard for a public forum, individuals may not have the full First Amendment protection they anticipate if the stadium does not qualify as a state actor or an exception under a state constitution. While a court is likely to find state action status under at least the symbiotic relationship test, the free speech hill becomes significantly steeper when the court attacks the public forum prong. Even so, limited public forum status (e.g., just the grandstand) or nonpublic forum status are certainly attainable and warrant attention.

IV. FREE SPEECH ISSUES IN PROFESSIONAL SPORTS FACILITIES

A comprehensive list of fan and club activities that have elicited free speech issues is seemingly impossible to accurately gather and is beyond the scope of this article. However, this section will discuss four ongoing issues that are prevalent enough in current professional sports events to merit specific analysis: offensive cheering speech, expressive written speech (e.g., signs and t-shirts), faith nights, and political speech.

A. Offensive "Cheering Speech"

Fan expression or "cheering speech"[102] has always been a major component of sports, but how far is too far? While few disagree that it is okay for a club to encourage its fans to cheer for the hometown club, is it okay for a club to restrict its fans from booing the away club? How about a policy restricting its fans from booing its own club?[103] What if the fans use a sexual

99. *See* Stewart v. D.C. Armory Bd. Decision, 863 F.2d 1013, 1019 (D.C. Cir. 1988).

100. *Id.* at 1018.

101. *See Hubbard Broad*, 797 F.2d at 556.

102. "Cheering speech" was coined by Professor Howard Wasserman. Wasserman, *supra* note 13, at 527.

103. There were rumors that Chicago Cubs officials told security to crack down on fans who were booing Cubs outfielder Alfonso Soriano. Club officials denied such a policy, stating that although it has a policy against fans using profanity and racial slurs—both of which this author notes are probably protected free speech rights—there is no club policy against booing players from either club. *Cubs Chairman Says No Special Instructions for Bleachers*, ESPN.COM, May 28, 2008, http://sports.espn.go.com/mlb/news/stor y?id=3416364.

innuendo[104] or a profanity[105]? What if, instead of profanity, the fans chant "Mets Suck?"

Assuming that the grandstand is subject to constitutional protection as a state actor, fans should be protected for both cheers and jeers that contain profanity[106] or sexual innuendo.[107] Likewise, even if the facility is found to be a nonpublic forum, a club cannot create "viewpoint-based" restrictions that distinguish between positive and negative comments.[108] Rather, the club must limit its restrictions to the more broad "content-based" discrimination that essentially chooses between permitting certain types of comments or establishing a wholesale ban, regardless of the perspective.[109]

Finally, general counsel may be faced with a cheering speech complaint under the "captive audience" doctrine, which argues that because fans are captives in the stadium they are unable to avert their eyes in order to avoid objectionable speech.[110] This argument is unlikely to succeed as the "captive audience" doctrine has only been utilized in a few specific circumstances, such as homes,[111] the workplace,[112] public schools,[113] government offices,[114] and

104. For example, in response to a verbal altercation at a salad bar between Texas Tech Chancellor and men's basketball coach, Bobby Knight, students at the University of Kansas chanted "salad tosser" at Coach Knight during a 2004 basketball game between the schools. The phrase was a double entendre referring both to the incident and a particular sexual act. Wasserman, *supra* note 13, at 573-.

105. Consider the prevalent chants of and t-shirt reading "Fuck Duke" at a Maryland basketball game in January 2004, leading NCAA and college officials to attempt to create policies discouraging such behavior. Howard Wasserman, *Free Speech on College Campuses*, FIRSTAMENDMENTCENTER.COM, http://www.firstamendmentcenter.org/speech/pubcollege/topic.aspx?topic=fan_profanity (last visited Mar. 27, 2009). Likewise, as an indication of its general disdain for cross-town rival Boston College, one of Boston University's most popular student cheers ends with, "Fuck 'em up, fuck 'em up, BC sucks." In fact, this cheer is used regardless of whether BU is playing BC.

106. *See* Cohen v. California, 403 U.S. 15, 21 (1971) (protecting a jacket that read, "Fuck the Draft" because people can avert their eyes from the profanity).

107. *See* Hustler Magazine v. Falwell, 485 U.S. 46, 57 (1988) (protecting a parody of a liquor ad series depicting nationally known minister, Jerry Falwell, through sexual double entendres).

108. Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 829-30 (1995).

109. For example, a government agency could determine whether it would permit specialty plates regarding abortion rights (content-based discrimination) but not whether it would only permit pro-life or pro-choice plates and ban the other (viewpoint-based discrimination). Choose Life Ill., Inc. v. White, 547 F.3d 853, 865 (7th Cir. 2008).

110. *See Cohen*, 403 U.S. at 21.

111. *See generally* Rowan v. U.S. Post Office Dept., 397 U.S. 728 (1970).

112. *See generally* E.E.O.C. v. Preferred Mgmt. Corp., 216 F.Supp. 2d 763 (S.D. Ind. 2002).

113. *See generally* Stone v. Graham, 449 U.S. 39 (1980).

114. *See generally* Milwaukee Deputy Sheriffs Ass'n v. Clarke, 513 F.Supp. 2d 1014 (E.D. Wis. 2007).

public transportation.[115] Moreover, the doctrine has never been applied to listeners in public places of recreation or sporting events, places in which boisterous expression is both permitted and encouraged.[116]

B. "Written Speech": Expressive Signs, T-shirts and other Written Paraphernalia

Unlike cheering speech, expressive signs, t-shirts and other written paraphernalia (what this author calls "written speech") can be displayed on a television and viewed by millions of people and, more importantly for this article, be removed by facility employees. The content is generally premeditated and, in certain cases, has more impact. Although it espouses many of the same legal principles as cheering speech, written speech has lead to a few published court decisions and high profile sporting news reports, which merit specific attention.

For example, two recent cases involved security officers removing fans' signs bearing the biblical reference, "John 3:16."[117] In both cases, the court held that the fan's speech was protected.[118] Likewise, free speech issues have arisen from the content of fans' t-shirts. For years, clubs have had to deal with fans' shirts stating "_____ Sucks." In 2002, the Seattle Mariners attempted to confront this issue head-on by requiring any fans sporting "Yankees Suck" t-shirts to either turn them inside-out, remove them, or leave the facility.[119] After fan backlash, the Mariners briefly rescinded the policy only to introduce during the 2007 season a new policy that required Safeco Field[120] employees to issue "red card" warnings to fans who violated one of the eight enunciated rules, including a ban on profanity and obscene clothing, two constitutionally

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115. *See generally* Pub. Utilities Comm'n v. Pollak, 343 U.S. 451 (1952).

116. Wasserman, *supra* note 13, at 570. This author found one case that casually classified sports fans (at a high school game) as a "captive audience" when they witnessed a fight occur in the stands. Fuller v. Decatur Pub. Sch. Bd. of Educ. Sch. Dist. 61, 78 F.Supp. 2d 812, 814 (C.D. Ill. 2000), *aff'd*, 251 F.3d 662 (7th Cir. 2001). This classification was pure dicta.

117. "For God so loved the world that he gave his one and only Son, that whoever believes in him shall not perish but have eternal life." *John* 3:16. *See generally* Aubrey v. City of Cincinnati, 815 F. Supp. 1100, 1103 (S.D. Ohio 1993); Stewart v. D.C. Armory Bd. Decision, 863 F.2d 1013, 1014 (D.C. Cir. 1988).

118. *Aubrey*, 815 F. Supp. at 1106 (holding that the Cincinnati Red's banner system was vague and overbroad); *Stewart*, 863 F. 2d at 1021 (remanding to the lower court to evaluate the banner policy in light of the court's finding of a public forum).

119. *M's Ban Controversial Anti-Yankees T-shirts from Safeco Field*, KOMONEWS.COM, Apr. 29, 2002, http://www.komonews.com/news/archive/4059581.html.

120. Safeco Field was seventy-two percent publicly funded. *Sports Facility Reports*, LAW.MARQUETTE.EDU, http://law.marquette.edu/cgi-bin/site.pl?2130&pageID=3461 (last visited Apr. 24, 2009).

protected forms of expression.[121] This guideline for what is and is not permissible speech at the facility is the closest this author has seen a facility attempt to create (purposefully or otherwise) a "designated public forum."

In utilizing current technology, fans have recently taken "written speech" to the next level. For example, in 2006 the St. Louis Cardinals permitted fans to "text" messages to the video scoreboard at their stadium.[122] During a school trip, one high school student texted a message accusing a classmate of having a sexually transmitted disease.[123] The falsely accused student sued the Cardinals for defamation, claiming that the Cardinals "owed a duty of reasonable care to all fans in attendance," including herself, and that the Cardinals breached that duty by posting the message "to anyone who could read."[124] Although the case was eventually settled, general counsel should note that at least one club has now been forced to pay out for offensive fan speech displayed on its own equipment.

As the *Stewart* court noted, an important step in determining whether a facility can ban particular written speech depends largely on whether the facility is a public forum.[125] Because a public forum is traditionally devoted to the free exchange of ideas and maintains a considerably higher standard of review than a nonpublic forum, a facility will likely have to demonstrate that it is a nonpublic forum in order to institute a restrictive written speech policy.[126] This is in large part because facilities tend to allow a great variety of signs, t-

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121. Huan Hsu, *Ballpark Bleachers Are No Longer a Heckler's Paradise, Especially at Safeco*, SEATTLEWEEKLY.COM, June 5, 2007, http://www.seattleweekly.com/2007-06-06/news/ballpark-bleachers-are-no-longer-a-heckler-s-paradise-especially-at-safeco.php?page=full. The complete list of banned expression is:

> [1] Foul/abusive language or obscene gestures[; 2] Intoxication or other signs of impairment related to alcohol consumption[; 3] Displays of affection not appropriate in a public, family setting; [4] Obscene or indecent clothing[; 5] Any disruption of a game or event, including throwing of objects or trespassing on the playing field or other restricted areas[; 6] Sitting in a location other than the guest's ticketed seat[; 7] Fighting, taunting or making threatening remarks or gestures[; and 8] Smoking or the use of tobacco products, in any form.

Id. The reverse side of the red card reads: "'If you receive this card, we believe that your behavior has crossed this line . . . . Continued abusive behavior will require us to eject you from the ballpark without refund—something we don't want to do.'" *Id.*

122. *Woman Sues Cardinals Over Posting Negligent Message on Scoreboard*, CBSSPORTS.COM, Nov. 8, 2007, http://www.cbssports.com/mlb/story/10460570. On March 17, 2009, the case, A B A Minor v. St. Louis Cardinals (case no. 0722-CC08889), was formally dismissed. *See* CASE.NET, https://www.courts.mo.gov/casenet/base/welcome.do (last visited Apr. 24, 2009).

123. *Id.*

124. *Id.*

125. Stewart v. D.C. Armory Bd. Decision, 863 F.2d 1013, 1016-17 (D.C. Cir. 1988).

126. *See id.* at 1016.

shirts, and other written speech; in order to selectively eradicate particular messages without implicating First Amendment protections, the facility would likely need to argue its merits under the nonpublic forum's reasonableness standard. Further, courts will look at past practices of a facility. If that facility has previously and consistently permitted the distribution and display of other expressive materials, such as political literature and large banners, the intentional restriction of particular offensive or controversial written speech is less likely permissible if found to occur in a public forum.[127]

Finally, general counsel may be at the whim of unofficial league policies, particularly with the written speech issue. For example, during the Barry Bonds all-time home run hoopla, Major League Baseball asked clubs to carefully screen anti-Bonds signs.[128] As this speech is almost certainly protected, a league's concern over public image may one day place a club on the hook for an expensive lawsuit.

C. Faith Nights

During the summer of 2008, the Texas Rangers hosted two Christian rock bands as part of its annual Faith Concert Series.[129] Similarly, on July 20, 2008, the Atlanta Braves hosted GospelFest.[130] The Braves' GospelFest has traditionally included post-game speeches by club players, including former Braves pitcher John Smoltz.[131] While such religious based activities (Faith Nights) are fairly new to the major league level,[132] they have become quite

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127. *Id.* at 1018-19.

128. Mark Fainaru-Wada, Lance Williams, & Chronicle Staff Writers, *Silencing Angry Fans - Those Creating Signs About Barry Bonds, Home Runs and Steroids Are Finding Their Message Can Be Tough to Get Across Fans*, SFGATE.COM, July 1, 2007, http://www.sfgate.com/cgi-bin/article.cgi?file=/c/a/2007/07/01/MNGMVQP7KF1.DTL.

129. *See generally Get Involved With the Rangers,* TEXAS.RANGERS.MLB.COM, http://texas.rangers.mlb.com/tex/community/get_involved.jsp#faith (last visited Feb. 1, 2010). In previous years the Faith Concert Series has been called other names, such as "Faith Night" and "Concert Night." However, they have always featured Christian-theme music.

130. Official Website of the Atlanta Braves, MLB.COM, http://atlantabraves.com (last visited Apr. 27, 2009).

131. *Braves Bench Focus on the Family*, SOUTHERN VOICE, Aug. 4, 2006, http://www.sovo.com/2006/8-4/news/localnews/braves.cfm. During the speech, Smoltz acknowledged that he is both applauded and booed for his religious advocacy. In 2004, Smoltz had created controversy when he criticized gay marriage, stating, "What's next? Marrying an animal?" *Id.* On a related note, starting in 2001 the Braves had held "gay days" as part of an unsuccessful bid to land the 2006 Gay Games in Atlanta. By 2003, the Braves discontinued the event. *Id.*

132. Other clubs, like the Cincinnati Reds, Houston Astros, and Colorado Rockies have also introduced Faith Nights. *See Faith Day,* MLB.COM, http://www.mlb.com/cin/ticketing/faith_day.jsp (last visited Feb. 1, 2010); *Faith and Family Night: Saturday August 22,* HOUSTION.ASTROS.MLB.COM, http://houston.astros.mlb.com/hou/ticketing/faithandfamily.jsp (last visited Feb. 1, 2010);

prevalent throughout the minor leagues.[133] In fact, it is standard practice for many minor league clubs to ship in religious groups to their games.[134] In one instance, a club distributed religious themed bobbleheads, including Noah, Moses, and John the Baptist.[135] This burgeoning event has even developed into a cottage industry of organizations dedicated to coordinating Faith Nights.[136]

Along with the risk of offending non-Christians, the introduction of faith-based game day events could very well be the impetus to persuade a court to find a public forum. As such, the long-term risks of government regulation may outweigh the short-term financial reward of such an event. Specifically, an open-door policy of permitting Christian organizations to perform, speak, or both, before the fans may create an unwanted limited public forum for religion-based speech.[137] As a result, it may, open the floodgates for various religious groups to argue that they are also entitled to equal access before the club's fan base. Given the protection a public forum receives against viewpoint discrimination, religious-based organizations could present a strong legal claim, not to mention considerable public relations leverage, as a club's denial could appear anti-Semitic.

Even so, because a song or speaker has a religious flavor, it does render the speech impermissible. For example, courts have considered religious-based speech (e.g. invocations) in terms of graduation ceremonies at public university sports facilities and held that such religious-based speech is a common formality at public events that represents commonly held views.[138] In such cases, spectators were free to sit down or leave the grandstand altogether. Of course, the analysis might be different if were a student not permitted to graduate or even just removed from the graduation ceremony if that person did not observe the invocation.

Bob Nightengale, *Baseball's Rockies Seek Revival on Two Levels*, USATODAY.COM, June 1, 2006, http://www.usatoday.com/sports/baseball/nl/rockies/2006-05-30-rockies-cover_x.htm.

133. Reid Chemer, *If You Billed It Around Faith, They Will Certainly Come*, USATODAY.COM, July 21, 2006, http://www.usatoday.com/sports/baseball/minors/2005-07-21-faith-night_x.htm .

134. *See id.*

135. *Id.*

136. For example, Third Coast Sports Foundation considers itself "a non-profit ministry focused on reaching today's generation for Christ through sports and music." Third Coast Sports, Inc., http://www.thirdcoastsports.com/default.asp (last visited Apr. 27, 2009).

137. *See* Stewart v. D.C. Armory Bd. Decision, 863 F.2d 1013, 1019-20 (D.C. Cir. 1988).

138. *See e.g.*, Tanford v. Brand, 104 F.3d 982, 985-86 (7th Cir. 1997) (stating that invocation was not coercive, but rather "simply a tolerable acknowledgment of beliefs widely held among the people of this country."); Chaudhuri v. Tennessee, 130 F.3d 232, 236 (6th Cir.1997) (stating that invocations have secular purpose in that they "solemnize[] public occasions, express[] confidence in the future, and encourage[] the recognition of what is worthy of appreciation in society.").

While there does not appear to have been any challenges regarding Faith Nights (so far), the Yankees' "God Bless America" case could open a Pandora's Box for all sorts of religious-based claims. This is especially true when, like the playing of "God Bless America" during the seventh-inning stretch, a religious event or song is aired during the sporting event. Whereas a fan may choose to bypass a pre- or post-game religious event by arriving late or leaving early, an in-game religious event forces the spectator to either witness the event or leave the grandstand or possibly even the facility.

D. Political Speech

Political content in sports facilities is nothing new. Dating back to the 1918 World Series and in response to World War I, baseball games have begun with a rendition of the "Star Spangled Banner."[139] Countless politicians have thrown out the first pitch for a baseball game.[140] Elected officials frequently discuss sports to garner favor with the everyday American.[141] In fact, through integration,[142] Title IX,[143] antitrust cases and legislation,[144] and athletes serving in the military,[145] sports have been a sparkplug for debate about race, gender, judicial fairness, and patriotism.[146]

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139. Wasserman, *supra* note 13, at 559. The post-9/11 introduction of "God Bless America" to baseball games also could be considered overlap with the political speech arena. *Id.* at 560.

140. For example, President Barrack Obama signed on to throw out the first pitch for the 2009 All-Star Game, becoming the fourth president to do so for an All-Star game, joining Kennedy, Nixon, and Ford. Prerana Swami, *Obama to Throw First Pitch at All-Star Game*, CBSNEWS.COM, June 24, 2009, http://www.cbsnews.com/blogs/2009/06/24/politics/politicalhotsheet/entry5109670.shtml. This seemingly benign event can also backfire. Ranked as of one the top ten worst first pitches thrown, Cincinnati Mayor Mark Mallory missed the catcher by over ten feet and nearly pegged an unsuspecting umpire. *Top 10 Worst First Pitches: Cincinnati Mayor Mark Mallory*, TIME.COM, http://www.time.com/time/specials/packages/article/0,28804,1889502_1889506_1889494,00.html (last visited May 14, 2009). The event led to considerable embarrassment for the mayor.

141. *See e.g. Obama's Final Four Picks Revealed*, CNN.COM, Mar. 18, 2009, http://politicalticker.blogs.cnn.com/2009/03/18/obamas-bracket-revealed/.

142. Most notably, Jackie Robinson breaking the color barrier in baseball in 1947. *Jackie Robinson: Breaking the Color Barrier*, WASHINGTONPOST.COM, http://www.washingtonpost.com/wp-srv/photo/gallery/070413/GAL-07Apr13-71015/index.html (last visited Feb. 1, 2010).

143. Title IX promotes gender equality in intercollegiate sports. *See* 20 U.S.C. § 1681-1688 (1995).

144. *See* Fed. Baseball Club of Balt., Inc. v. Nat'l League of Prof'l Baseball Clubs, 259 U.S. 200, 209 (1922); Flood v. Kuhn, 407 U.S. 258, 259 (1972); Curt Flood Act of 1998, 15 U.S.C. § 26b (2009).

145. For example, Arizona Cardinal Pat Tillman left the club in order to serve as a U.S. Army Ranger. *See generally* Pat Tillman Foundation, http://www.pattillmanfoundation.org/ (last visited May 14, 2009).

146. *See e.g.* ELLIOT J. GORN & WARREN GOLDSTEIN, A BRIEF HISTORY OF AMERICAN SPORTS 183-251 (1993) (discussing the interrelationship of sports and twentieth century America).

Yet, with the increased media attention and public access to professional sports, general counsel must be more wary than ever about the impact of political speech that occurs within its facility.

Recently, sports facilities have also become a breeding ground for counter-political speech. For example, fans may refrain from singing or may even boo the "Star Spangled Banner" or "God Bless America."[147] In July 2004, baseball player Carlos Delgado created a national stir when he refused to stand for "God Bless America" in an act of defiance against the United States' participation in the war in Iraq.[148] Although it did not break a league or club policy, the act elicited widespread booing.[149] The same song has drawn a divisive reaction with the Yankees' seventh-inning stretch policy.

Clubs have also allowed politicians to use the club's facilities to aid their campaign. For example, in 2007, longtime Rudy Giuliani supporter and then-Texas Rangers-owner, Tom Hicks, allowed then-presidential candidate Giuliani to use Rangers Ballpark for a fundraiser and political rally.[150]

Similarly, Major League Baseball has publicly embraced its impact on civil rights, notably through Jackie Robinson. In 1997, the league celebrated its fiftieth year since integration by ceremoniously retiring Robinson's uniform number, number forty-two.[151] In 2007, Major League Baseball celebrated the sixtieth anniversary of integration by permitting over one hundred and fifty players, including five clubs, to wear the retired number for a game.[152] Also in 2007, Major League Baseball introduced the "Civil Rights Game," a pre-season weekend event that highlights baseball's impact on the Civil Rights Movement.[153]

As with other forms of free speech expression, the limits on regulating

147. For example, at a recent Floyd Mayweather Jr. versus Ricky Hatton boxing match in Las Vegas, Nevada, a contingency of Hatton's British fans booed loudly during the singing of the Star Spangled Banner. Chuck Johnson, *Mayweather Plays it Rough in Victory Over Hatton*, USA TODAY, Dec. 10, 2007, at 12C *available at* http://www.usatoday.com/sports/boxing/2007-12-08-mayweather-hatton_N.htm. There is no indication that the fans were escorted out of the facility or asked to refrain from booing.

148. Steven Wine, *Delgado Cleanly Fields Questions Regarding War Protest*, COMMON DREAMS.ORG., Jan. 28, 2005, http://www.commondreams.org/headlines05/0128-09.htm.

149. *Id.*

150. T.R. Sullivan, *Giuliani Takes Swings With Rangers*, MLB.COM, Sept. 8, 2007, http://mlb.mlb.com/news/article.jsp?ymd=20070908&content_id=2197070&vkey=news_mlb&fext=.jsp&c_id=mlb.

151. Bob Nitengale, *Numbers Too Large For Jackie Robinson Tribute?*, USATODAY.COM, Apr. 13, 2007, http://www.usatoday.com/sports/baseball/2007-04-11-robinson-number-42_N.htm.

152. *Id.*

153. *Civil Rights Game 2007*, MLB.COM, http://mlb.mlb.com/mlb/events/civil_rights_game/y2007/ (last visited May 14, 2009).

political speech must be evaluated in the context of the action to create such expression. For example, during a game at Dodgers Stadium in 1976, two fans ran onto the playing field and attempted to burn an American flag.[154] After being tackled by Chicago Cubs centerfielder, Rick Monday, the two were arrested, not because of the content of their attempted political speech, which is undoubtedly protected as free speech,[155] but rather because the act was not permitted in that location.[156] By setting the flag on fire, the fans interfered with the game; thus, the act was no longer within the scope of the public forum doctrine's protection.[157]

As clubs continue to push the brink of free speech limitations through various forms of in-game events and "cheering speech," general counsel must be extra careful to monitor any such free speech regulations and ensure that the facility maintains fair and consistent policies. Although clubs may have some control over how the protests may occur (e.g., to protect public safety),[158] racist, misogynistic, and other forms of hateful speech may very well constitute protected speech in the sports facility forum.[159] The following section proposes certain methods in which general counsel may effectively perform such monitoring.

V. PROPOSAL: BALANCING FREE SPEECH REQUIREMENTS WITH BUSINESS OBJECTIVES

Courts have yet to affirmatively hold that clubs are state actors merely because they play in government-subsidized facilities. However, with clubs continuing to push the envelope for what is constitutionally permissible, general counsel are left in a precarious position. As such, this Article concludes by proposing certain business practices that general counsel should consider in determining a club's free speech regulatory policy.

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154. Joe Resniak, *Rick Monday Saved the Flag 30 Years Ago*, Apr. 22, 2006, WASHINGTONPOST.COM, http://www.washingtonpost.com/wp-dyn/content/article/2006/04/22/AR2006042201389.html.

155. Texas v. Johnson, 491 U.S. 397, 399 (1989) (stating that flag burning is protected by the First Amendment).

156. Wasserman, *supra* note 13, at 536.

157. *Id.*

158. *See* Int'l Soc'y for Krishna Consciousness, Inc. v. N.J. Sports and Exposition Auth., 691 F.2d 155, 162 (3rd Cir. 1982).

159. *See* Wasserman, *supra* note 13, at 562-63 (considering the speech protection a group such as the KKK would be entitled to if it were to protest at a Jackie Robinson event).

A. Understand the Governing Authority's Authorizing Statute and Lease

The authorizing statute guides how a governmental agency is required to fund and manage the club's facility.[160] In many cases, it will simply require the agency to fund a certain amount of money and hand over the reins of the facility's operation to the club. While this arrangement is facially ideal, it may also evoke the "symbiotic relationship" test for state action, as the club is given nearly complete autonomy to operate the facility despite the subsidy of state funds. This is especially true when the payment is contingent on ticket, parking, and other sales. Instead, a club may prefer to leave certain executive, but otherwise benign, control to the government, such as control over the facility's streets and sidewalks. Of course, too much commingling of responsibilities could have the reverse affect and create an "entwinement" capable of evoking the same state action that the club intended to avoid. In theory, clubs could simply accept less "free" money in order to limit the risks of a state action finding.[161]

If possible, general counsel should participate in the process by which the authorizing statute is constructed. Ideally, the approved statute would be limited in scope so that the stated purpose of the authority that owns the stadium is solely to promote the sporting events within the facility.[162] General counsel should also attempt to negotiate a favorable lease that includes a provision in which the governmental agency agrees not to designate the facility a public forum. Regardless, general counsel should keep in mind that the language of the statute gives way to the actual conduct of the governmental agency when determining if the operation of the facility takes the form of a public forum.[163] That is, even the most perfectly worded authorizing statute is

160. The D.C. Armory Board built RFK Stadium. D.C. CODE § 2-321 (2009). The New Jersey Sports and Exposition Authority built the Meadowlands. N.J.STAT ANN. § 5:10-1 (2009). The Metropolitan Sports Facilities Commission built the Metrodome. MINN. STAT. § 473.552 (2009).

161. Again, this author notes that there are certain business practices that could and should exceed (potentially academic) concerns over constitutional challenges.

162. For example, the Meadowlands Authority's authorizing statute limits the Authority to supporting sporting events and horse races. Int'l Soc'y for Krishna Consciousness, Inc. v. N.J. Sports & Exposition Auth., 532 F. Supp. 1088, 1092 (D.N.J. 1981). "An Act to provide stadiums and other buildings and facilities in the Hackensack meadowlands for athletic contests, horse racing and other spectator sporting events . . . ."). By contrast, the Rangers Ballpark's Authority's authorizing statute is less favorable, broadly authorizing the Authority to promote the local economy. ARLINGTON SPORTS FACILITIES DEVELOPMENT AUTHORITY, INC. – ORGANIZATION AND PURPOSE, *available at* www.arlingtontx.gov/finance/pdf/asfda/finplan1.pdf (last visited Mar. 31, 2010). "The purpose of the Authority is to promote economic development within the City of Arlington (the 'City') in order to reduce unemployment and underemployment, and to promote and encourage employment and the public welfare of, for, and on behalf of the City by developing, implementing, providing and financing projects authorized under the Act."

163. Stewart v. D.C. Armory Bd. Decision, 863 F.2d 1013, 1019 (D.C. Cir. 1988).

collateral to a court's analysis if the terms of the statute are not properly executed.

In a perfect world for state action analysis, the authorizing statute would create a favorable loan on a deep discount that is not contingent to the success of the club and is fixed on a rate the club can outperform. Of course, business realities kick in and such a fixed loan could be financially devastating in an economic downturn and likely unappealing to the government lender. There is certainly financial security in having a variable payment arrangement that hinges on the club's success (e.g., attendance). Thus, until a court determines that an authorizing statute can significantly affect state action analysis and a state action determination creates more than an academic legal quandary, there is little sense in foregoing a sweetheart loan arrangement.

B. Proactively Participate in the Marketing Departments' Promotional Schedule

Although marketing departments create and adjust their promotional schedule throughout the entire season, the majority of the decisions occur in the months preceding the first day tickets go on sale for the season. Once the schedule is produced, hard copies are distributed by the thousands, and it is difficult to make changes. Thus, general counsel should be sure to review it before publication in the event that free speech issues arise.

Although general counsel may not have the authority to change the event itself, a simple re-titling may be an effective way to overt controversy. For example, a "Faith Night" can be renamed "Concert Night." Although a selling point may be the religious aspect itself, if the concert features a well-known religious based band, the front office may strike a compromise and change the promotional title but add the band name, such as "Concert Night with MercyMe".[164] This way, the band's religious following will still arrive, while the club remains facially neutral. Similarly, general counsel should suggest that the concert occur outside the facility, such as in the parking lot or neighboring streets. Thus, the facility minimizes the risk of inadvertently becoming a public forum for religious debate.

C. Fight Negative Free Speech with Positive Free Speech

Whereas clubs like the Seattle Mariners opted to create an absolute ban on

164. MercyMe is a platinum recording Christian rock band that has performed at numerous sporting events. MercyMe Home Page, MERCYME.ORG, http://www.mercyme.org/main/ (last visited Aug. 26, 2009).

negative expression,[165] a better policy is to counter the unwanted negative expression with positive expression. For example, facilities can be proactive in guiding the crowd to express themselves positively and in a family-friendly manner through the PA announcements and videoboard. Instead of simply reading "Make some noise!," a videoboard can read, "Let's go (home club)!" Further, clubs can giveaway fan-friendly t-shirts on nights that the club is playing arch-rivals that may elicit shirts of the "Jeter Sucks" or "Broncos Suck" nature. More directly, the clubs could create an "exchange" night, where fans can replace their offensive t-shirts with fan-friendly ones.

D. Create Family Sections

In 1982, the Mariners became the first club in Major League Baseball to designate family sections, which prohibited the purchase or consumption of alcohol.[166] Clearly alcohol can affect how fans behave by inhibiting their discretion in using profanity and expressing their opinions about the opposing players and fans. Many facilities, both professional and amateur, have followed suit in an effort to curb such behavior and promote family-fun while retaining the cash cow sales of alcohol and avoiding First Amendment concerns in the balance of the facility. Such family sections might exclude profanity (both oral and written) and alcohol. However, in creating such sections, it is important that the family section is not pervasive throughout the stadium, or else it may act to regulate expression in a manner that is not content-neutral.[167]

VI. CONCLUSION

Professional sports clubs face unique free speech challenges when dealing with ordinary game-day activities when their games are played in facilities partially or wholly funded by the government. By accepting a publicly funding facility under favorable leasing terms, clubs trade off the autonomy reaped by private organizations in their daily business operations, leaving general counsel responsible for sorting through the club's liability for its actions that infringe on protected free speech. To appreciate the scope of liability, general counsel must first navigate through an uncertain web of case law to determine whether the club's facility satisfies the state actor, public forum requirements, or both. While recent court decisions seem to indicate

165. Hsu, *supra* note 121.

166. *Id.*

167. *See* Timothy Zick, *Speech and Spatial Tactics*, 84 TEX. L. REV. 581, 605-06 (2006) (warning against buffer zones that act to discourage protected public dissent).

that public funding is enough to satisfy the state actor requirement[168] and elicit First Amendment protections for the fans, the public forum test is still too fact specific to generalize.

Looking back at the New York Yankees lawsuit over its "God Bless America" policy and whether the Yankees could have regulated such free speech, this complex legal web becomes evident. First, in analyzing the state actor requirement, the answer appears clear on its face: "old" Yankee Stadium (1923-2008) was owned entirely by the city of New York. More importantly, the *Ludtke* court has already ruled that "old" Yankee Stadium satisfied the symbiotic relationship test for state action.[169]

Assuming a court would again find sufficient grounds for state action, that court would then proceed to a public forum analysis. While there is no evidence of a traditional public forum, a court might use the *Stewart* analysis to determine that the Yankees created a public forum by designation if it only limited bathroom access during "God Bless America" or other political or religious-themed game day events. To create any restrictions against leaving one's seat, the Yankees would need to demonstrate that they enacted reasonable time, place or manner regulations that serve a significant governmental interest and permit ample alternative channels for communication.[170] If the "God Bless America" policy created a nonpublic forum, then the restriction need only be "reasonable and content-neutral."[171]

Here, it does not appear to matter what type of public forum a court would categorize Yankee Stadium's "God Bless America" policy. Rather, any policy that only limits fan mobility during a political or religious-themed game day event would likely qualify the facility as a public forum under both standards. As an alternative, the Yankees could have avoided this predicament by keeping the hand-held barriers as an incentive for fans to stay put but permitted anyone to leave without asking any questions. Instead, the Yankees put themselves in a foreseeable position, and as a result, the club was faced with some harsh criticism; the city of New York had to pay over $20,000 in

168. *E.g.* Int'l Soc'y for Krishna Consciousness, Inc. v. N.J. Sports and Exposition Auth., 691 F.2d 155, 159 (3rd Cir. 1982). "We accept at the outset that the Authority, being an instrumentality of the State of New Jersey, furnishes the necessary state action . . . ."); Ludtke v. Kuhn, 461 F. Supp. 86, 93-94 (S.D.N.Y. 1978) (holding that New York City's involvement with Yankee Stadium meets the state actor requirement under the entwinement test); *see also* Stewart v. D.C. Armory Bd. Decision, 863 F.2d 1013, 1016 (D.C. Cir. 1988) (holding that because RFK stadium is government-owned property, the claimant may present first amendment claims).

169. *Ludtke*, 461 F. Supp. at 93.

170. Consol. Edison Co. v. Pub. Serv. Comm'n, 447 U.S. 530, 535 (1980).

171. U.S. Postal Serv. v. Council of Greenburgh Civic Ass'ns, 453 U.S. 114, 131 n.7 (1981).

settlement money and attorneys' fees.[172] As part of its settlement with Campeau-Laurion, the Yankees have stipulated that they have no policy or practice at the "new" Yankee Stadium restricting fan movement during the airing of "God Bless America," and if they do reinstate the policy, Campeau-Laurion would be free to sue the Yankees under that policy.[173]

The lesson learned is that general counsel must weigh the pressures from the front office to conduct certain profitable, but controversial events with the responsibility to monitor the threat of legal actions, public relations hits, and league disapproval. As such, clubs should provide justifiable reasons for any restrictions that they place on free speech and maintain their policies in a fair and consistent manner. Clubs should also keep an eye on how other professional clubs have decided to regulate and manage free speech issues. Finally, given the tenuous string of case law on this issue, clubs should stay posted on any legal developments regarding free speech in professional sports facilities. After all, one significant court decision that affirmatively resolves these unclear issues could dramatically affect how professional sports clubs conduct their business.

172. The City agreed to pay Campeau-Laurion $10,001 and his attorneys' fees and costs in the amount of $12,000. *See* Judgment Pursuant to Rule 68, ¶ 1, Campeau-Laurion v. Kelly, 09CV3790 (S.D.N.Y. 2009).

173. Stipulation and Order, ¶¶ 1, 4, Campeau-Laurion v. Kelly, 09CV3790 (S.D.N.Y. 2009).