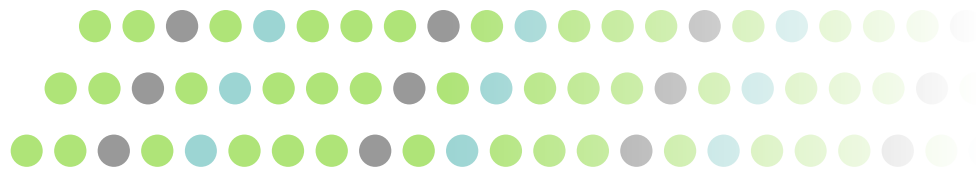




The Value of Fiscal Sponsorship in FLOSS Communities

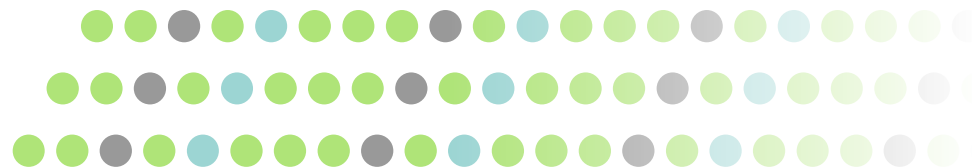
Tony Sebro

Software Freedom
Conservancy



A Little Background

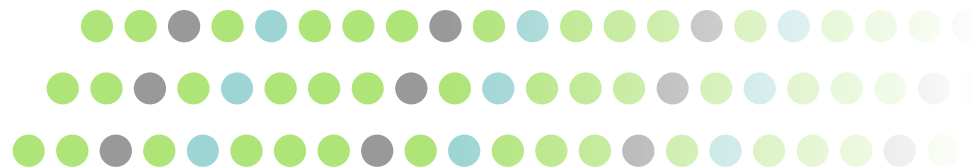
- 13+ years experience in tech law, business development and strategy (5 with IBM; 6 in private practice)
 - litigation
 - licensing
 - monetization
- Joined Conservancy in 2011
- IAAL, but TINLA and IANYL



Needs of unincorporated projects

Unincorporated projects face some/all of the following concerns:

- Lack of a means to raise, manage, and spend funds
 - Individuals can volunteer code, corporations can donate employee time – but what about donations of \$ and assets?
- Lack of administrative support and expertise
- Lack of a central place to hold assets
- Potential risk/exposure to individual developers
- *Insulation from corporate influence?*



A (c)(3) Corporate Home...

...can be a viable solution:

- Lack of a means to raise, manage, and spend funds?
 - Receive charitable donations
 - Enter into contracts (with developers, with venues)
 - Earn funds
 - Invest funds
 - Spend funds



Photo by 401(k) 2013. (CC By-SA 2.0)

A (c)(3) Corporate Home...

...can be a viable solution:

- Lack of administrative support?
 - Administrative infrastructure
 - bookkeeping
 - Technical infrastructure
 - e.g., hosting
 - Technical governance?



Photo by U.S. Army. (CC By 2.0)

A (c)(3) Corporate Home...

...can be a viable solution:

- Lack of a central place to hold assets?
 - Asset stewardship
 - Copyrights
 - Trademarks
 - Domain names
 - Contracts
 - e.g., CLAs
 - Physical assets



Photo by Michael Styne. (CC By-SA 2.0)

A Non-profit Corporate Home...

...can be a viable solution:

- Potential risk/exposure to individual developers?
 - Volunteer Protection Act: limits the liability of volunteers acting on behalf of a public charity
 - Corporate home can also manage risk associated with contracts, conferences, etc.



Photo by Michael Styne. (CC By-SA 2.0)

A (c)(3) Corporate Home...

...can be a viable solution:

- Insulation from corporate influence?
 - A public charity must act in the interest of the community
 - Donors can't dictate how their donations are to be used
- NOTE: Insulation from **imbalanced** corporate influence?
 - A trade association can act in the interests of the sector and balance the competing interests of its members



Can a FOSS (c)(3) be insulated?

- Insulation from corporate influence?
 - Jim: “The best firms invest in **external research and development**”
 - (c)(3) purpose: “charitable, educational, scientific, literary,” etc.
 - **How do we reconcile?**



Benefit from aligned interests

Alvin Ailey's mission: establishing an extended cultural community which provides dance performances, training and community programs for all people.

Toyota's mission:
obviously, something else

- Business case to justify support



Photo by Knight Foundation. (CC By-SA 2.0)

Possible (c)(3) Solutions

Start Your Own
Foundation



Join a
Comprehensive
Fiscal Sponsor



A

Connect with a
Grantor/Grantee
Fiscal Sponsor



C



If You Build It...

Your Own Foundation



The Process:

- Select a corporate & governance structure (officers, board, etc.)
- Incorporate at the state level
- 501(c)(3) status?
- Questions to ask:
 - What level of services do we need?
 - What services can be handled in-house vs. via third party assistance?
 - Do we have enough funding to cover the overhead?



If You Build It...

Your Own Foundation



Pros

- Single-brand focus
- Complete autonomy

Cons

- High overhead
- Who's going to do the work? (bandwidth and expertise)
- **501(c)(3) status?**



Comprehensive Fiscal Sponsor

Comprehensive Fiscal Sponsor



- Project signs a fiscal sponsorship agreement and becomes fully-integrated into the sponsor
- Sponsor supervises project to ensure that activities comply with IRS rules.
- Sponsor manages liability
- Sponsor can provide a full-range of services, e.g.,
 - Bookkeeping, asset management
 - Connection to legal services (either in-house counsel or external)
 - communications w/ project decision-makers covered by attorney-client privilege
 - Some sponsors provide a technical governance structure (YMMV)



Comprehensive Fiscal Sponsor

Comprehensive Fiscal Sponsor



Pros

- Shared overhead burden
- Additional administrative/legal services
- Administrative bandwidth and expertise
- Built-in (c)(3) status

Cons

- Pooled resources = pooled risk*
- Loss of autonomy
- Branding confusion?



*Did you say “Pooled Risk”?

Comprehensive
Fiscal Sponsor



Open Questions:

- How do the sponsor's (or any one member project's) “liabilities” affect the restricted funds of fellow member projects?

Possible Solution: Charitable Trust Doctrine?

- *“New York's long-standing policy honoring donors' restrictions on the use of the property they donate has greater weight than the claims of creditors.”*

– Matter of Friends for Long Island's Heritage, 80 AD3d 223, 235 (2nd Dept 2010)



Grantor-Grantee Sponsor

Connect with a
Grantor/Grantee
Fiscal Sponsor



C

- Project executes an ongoing grant agreement with Sponsor
- Project is autonomous legal entity
- Sponsor can receive and manage funds on behalf of project, and deliver funds in the form of a grant
- Sponsor ensures that project fulfills the grant
- Developers manage their own personal liability
- Services: usually lighter weight service plan than in the comprehensive fiscal sponsorship model
 - Sponsor can provide a full-range of services for a fee, **or** can enter into contracts with third-party service providers on behalf of project



Grantor-Grantee Sponsor

Connect with a
Grantor/Grantee
Fiscal Sponsor



C

Pros

- Shared overhead burden
- Complete autonomy
- Administrative bandwidth and expertise
- Built-in (c)(3) status

Cons

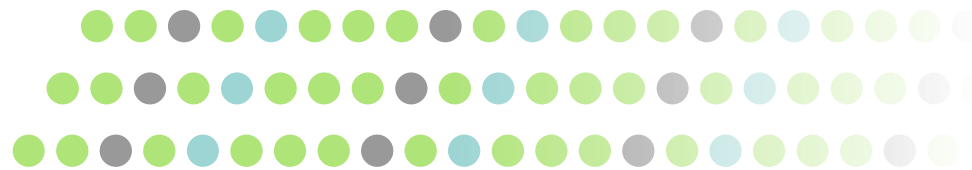
- Developers can't claim protection under VPA
- Projects that are unincorporated entities may **still** need to bear tax burden
- If not careful, the IRS will treat donations as a “conduit” directly to unincorporated project



From a developer's perspective

Benefits of (c)(3) fiscal sponsorship

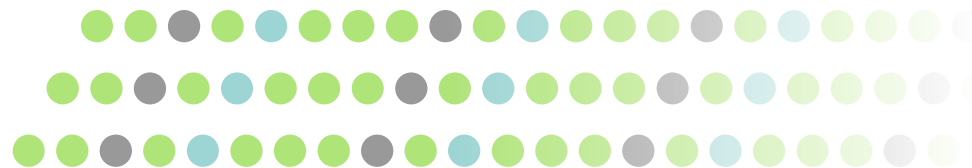
- Short cut to (c)(3) corporate status
- Economies of scale = lower admin costs
- Administrivia: outsourced and centralized
- Institutional expertise



From a company's perspective

(c)(3) fiscal sponsor vs. unincorporated entity:

- Better governance, better structure, built-in mentorship = greater stability
- Usual benefits of (c)(3)s:
 - Can donate \$ in addition to developer time
 - Assurance of neutral territory (also shielded from competitors' direct influence)
 - Can still “vote” with allocation of employee time
 - Employees' extracurriculars won't create extra liabilities issues



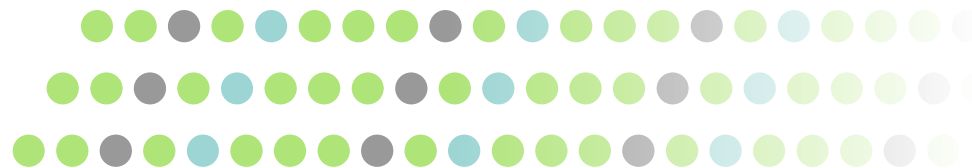
From a company's perspective

(c)(3) vs. (c)(6) -or- corporate in-house FOSS project

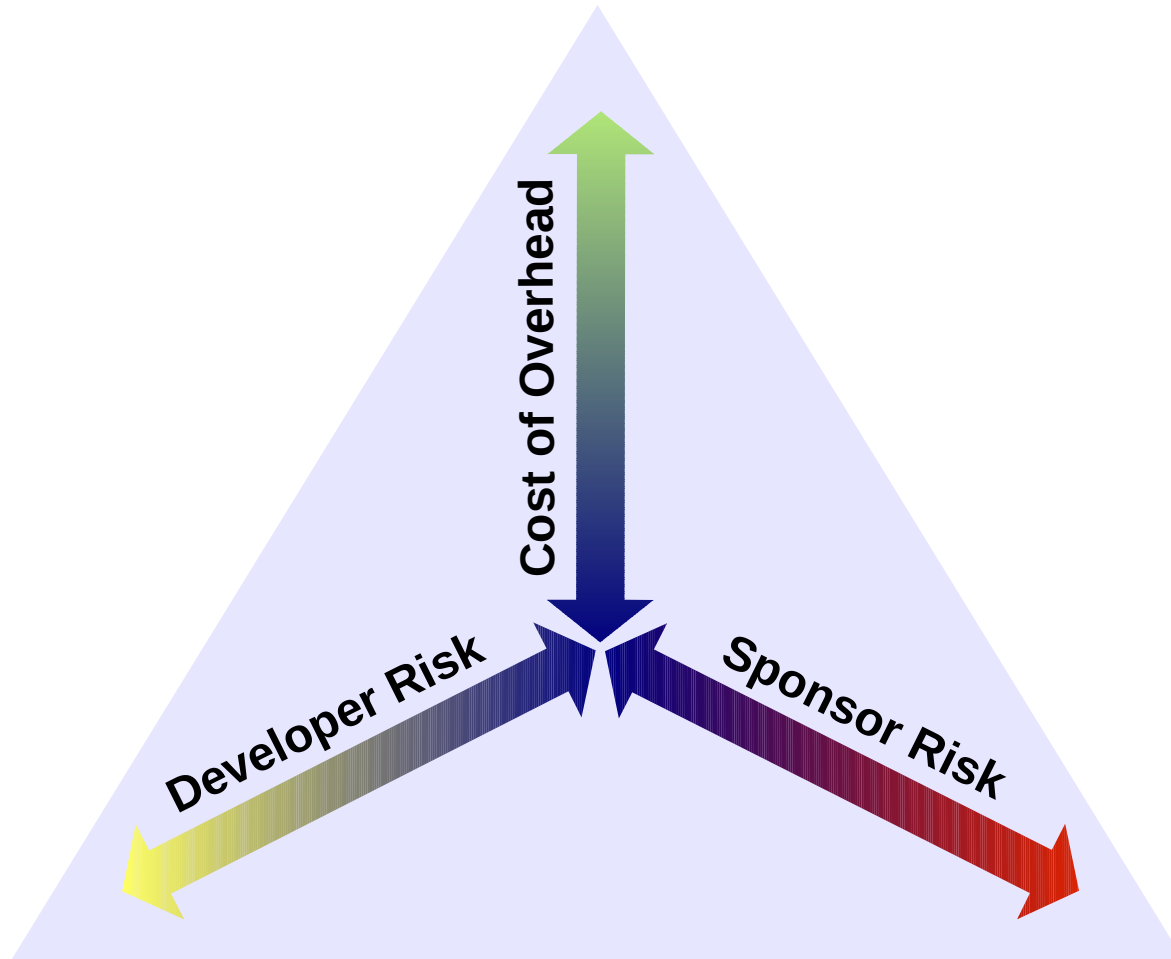
- Community-centric culture attracts and retains developers
- Doing the Right Thing fosters “nights and weekends” motivation
- Fiscal sponsorship provides same benefits + greater stability and fewer “distractions”

vs.

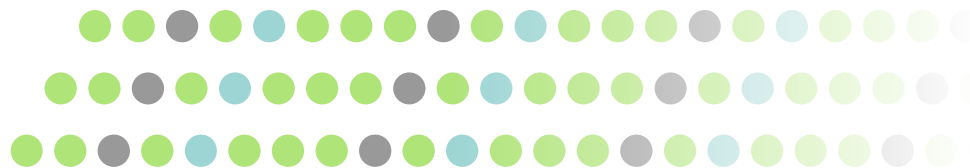
- Control



Structural Trade-Offs

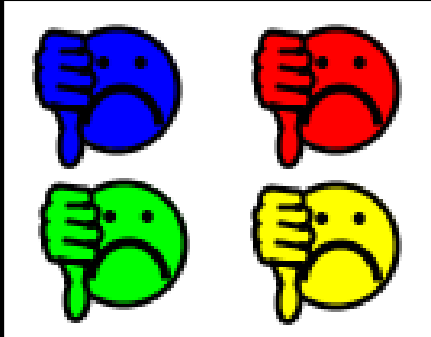


software freedom
conservancy

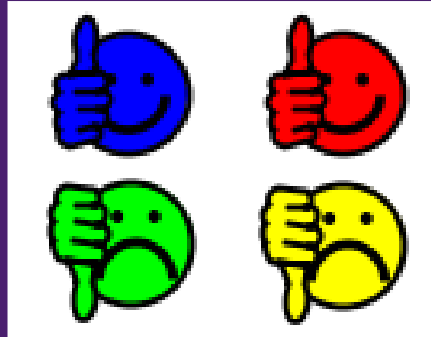


Crude Cost/Benefits Diagram #1

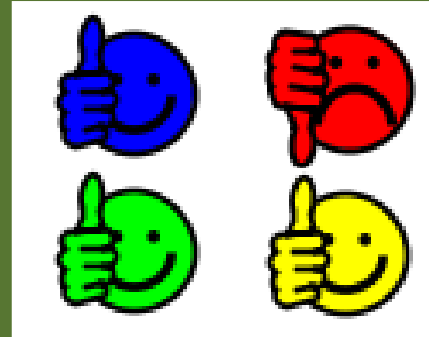
Unincorporated Entity



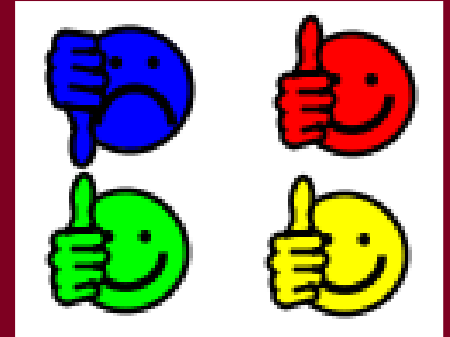
Your Own Foundation



Comp Fiscal Sponsor



Grantor/Grantee



Developer Risk

Cost of Overhead

Sponsor Risk

Bandwidth & Expertise



New Trends in Fiscal Sponsorship

Fiscal Sponsor with an LLC Subsidiary



Photo by Melissa Gutierrez. (CC By-SA 2.0)

- Sponsor creates a single-member LLC subsidiary. Project signs fiscal sponsorship agreement with LLC
- LLC is a separate entity under corporate law, **but not under tax law**
 - Single-member LLC subs are ignored by tax law
 - LLC can benefit from Sponsor's (c)(3) status
 - Sponsor is shielded from LLC's liabilities
 - Developers are still shielded by VPA
- Sponsor manages funds for and provides services to LLC
- Sponsor supervises LLC to ensure that LLC complies with IRS rules



New Trends in Fiscal Sponsorship

Fiscal Sponsor with an LLC Subsidiary



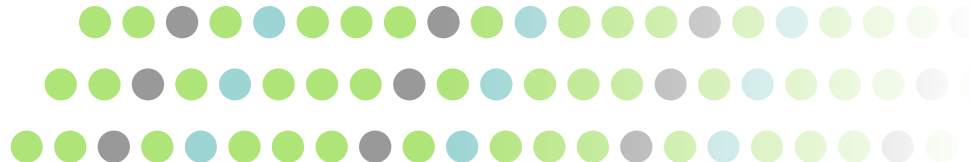
Photo by Melissa Gutierrez. (CC By-SA 2.0)

Pros

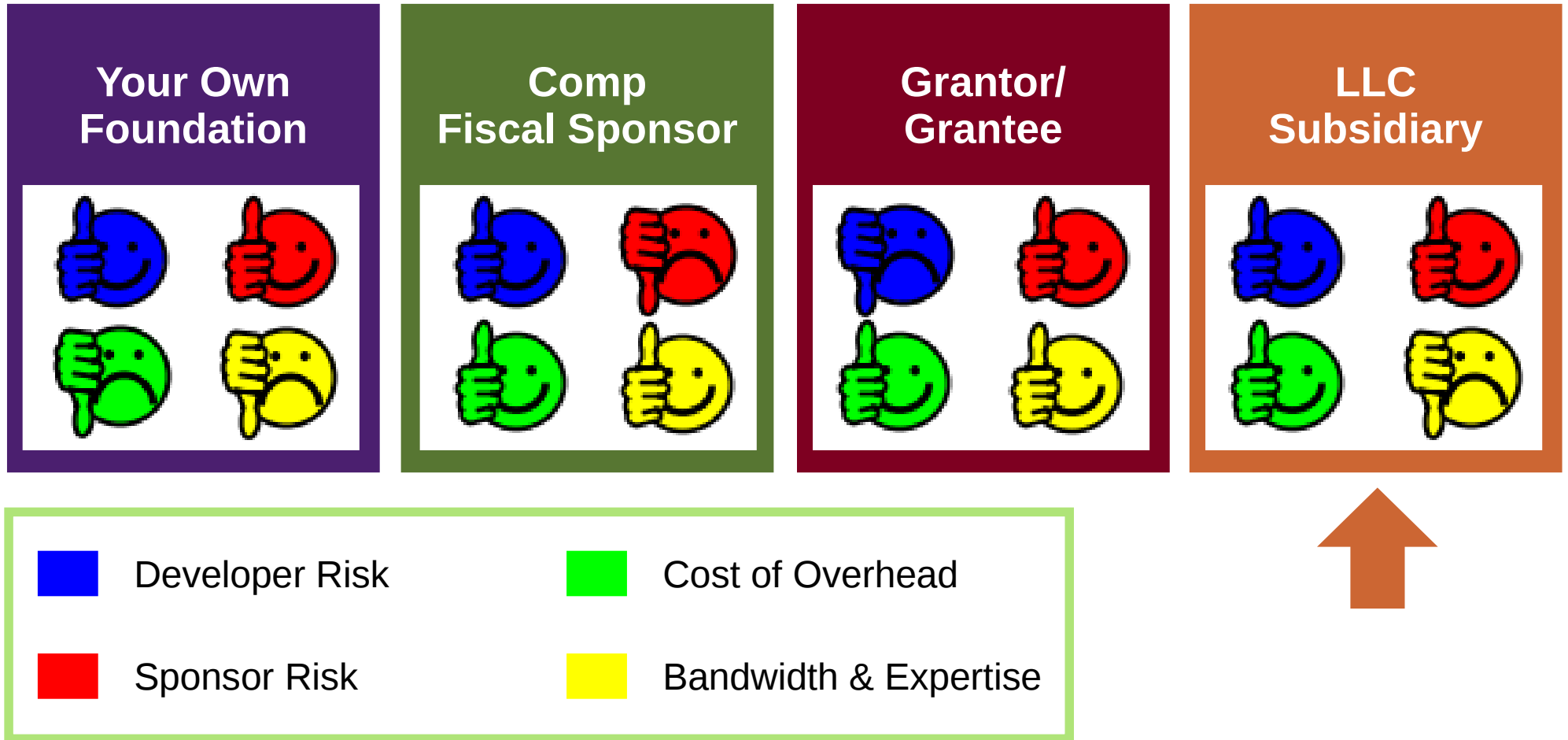
- Same benefits as a Comprehensive Fiscal Sponsor
- Additional liability protection for the sponsor (and, by extension, for “sister” projects)

Cons

- New; not as established
- Additional layer of complexity
- Piercing the corporate veil?



Crude Cost/Benefits Diagram #2



New Trends in Fiscal Sponsorship

Playpen, Apartment, or Nursing Home?



Photo by calmovie. (CC By-SA 2.0)



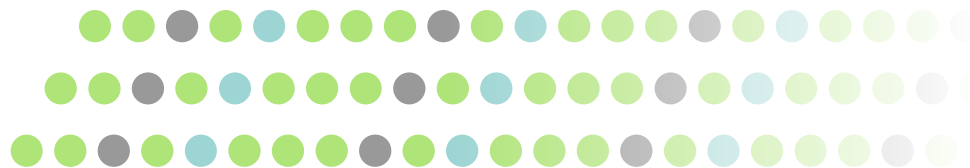
Photo by d.neuman. (CC By-SA 2.0)



Photo by Stephen Craven. (CC By-SA 2.0)

Future Questions

- Are these models truly scalable for FLOSS?
- Can the LLC Subsidiary model work?
- Sponsor proliferation: Good or Bad Thing?





Thanks for your time!

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