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Green
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Entertainment

Featuring people, news and business issues for the entertainment and media industry.

In This Issue

ALAN LADD, JR., et al., v WARNER BROS. ENTERTAINMENT, INC.

A Study in Packaging Motion Pictures for Television Exhibition

Motion picture distributors, or studios, often license motion pictures and television products to domestic and international television exhibitors in batches or packages. These packages contain anywhere from two titles to hundreds of titles, and can include first run theatrical motion pictures, library motion pictures, movies-of-the-week and television series.

The value negotiated for these packages as well as the values assigned to the individual titles within the packages have long been an area of contention between profit participants and studio distributors.

JOYCE HESSELBERTH

Studios generally maintain that the license fee for each title contained in a package is separately negotiated in order to achieve the maximum overall package value. When a single price is negotiated for the entire package, the studio will reallocate the total license fee to each title using an internal methodology that should result in the fair market value being assigned to each licensed product.

Participants have held a different position. They contend that although studios enter into television licensing arrangements that benefit their overall business interests, these transactions do not always fairly represent the value of the individual motion pictures and television products. Questioning the assigned value for individual titles within these television packages and the subsequent allocation of licensing fees is an issue that is commonly raised as part of a participations audit. The resolution of these disagreements can be included, but are generally not identified, in the overall audit settlement.

In ALAN LADD, JR., et al., v WARNER BROS. ENTERTAINMENT, INC., the plaintiff chose to litigate instead of settling this issue. While the lawsuit contained many allegations of wrongdoing, the issue of television packaging and allocation of licensing fees was particularly interesting.

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Retransmission Royalties

MARK STEPHEN

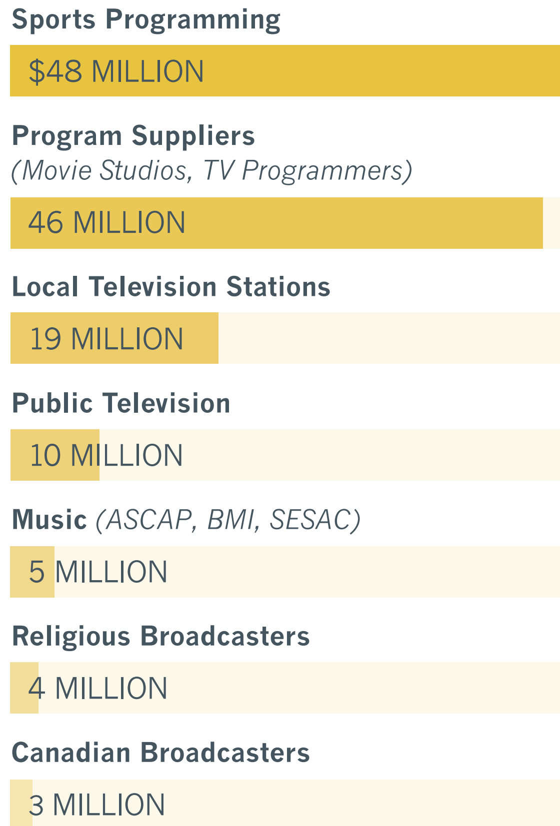
Retransmission royalties are one of the best-kept secrets in the television and entertainment industry. Over $300 million in retransmission royalties are collected annually in the United States. So what are retransmission royalties and who is entitled to distributions?

Retransmission royalties compensate copyright holders for simultaneous retransmissions of "distant signals" of their programming. Near cities, viewers can access broadcast television stations. Broadcast networks pay license fees to distributors for programming which is aired by these stations. However, many areas of the country are too remote to have access to open air signals. In these areas, "distant signals" are often retransmitted by cable and satellite providers.

While the copyright holders of the programs are entitled to compensation for the rebroadcasting of their programming, collecting from the more than 3000 cable and satellite platforms would be a cumbersome task. In order to simplify the process, Congress inserted Sections 111 and 119 into the US Copyright Act, requiring retransmitters to pay a statutory fee for the rebroadcast of free television signals.

Cable and satellite operators report their carriage of retransmitted signals to the Copyright Royalty Board (CRB) and pay royalty fees. The CRB distributes the royalties through the Motion Picture Association of America, which distributes funds to copyright holders.

In order to get their piece of the pie, copyright holders must file a claim with the CRB. All copyright holders share from the same royalty pot. This is why



retransmission royalties are a guarded secret – the greater the number of claimants, the smaller the distribution to each one. Royalties are divided into the major categories of copyrightable content including movies, sports, music, local television, and public television, and then distributed to copyright claimants within each category.

An Inside View of Royalty and Merchandise Audits

On April 2, 2013, Ilan Haimoff, Principal at Green Hasson Janks, and Jeff Korchek, VP of Legal and Business Affairs of Mattel, Inc., presented insights into royalty and merchandise audits to students at the Pepperdine University School of Law. Korchek provided a case study from Mattel, revealing insights from the perspective of an executive inside a large corporation. Haimoff provided a different viewpoint, discussing negotiation and execution of merchandising agreements. Haimoff stressed the importance of utilizing accounting experts when negotiating and drafting contracts in order to prevent ambiguity and enforcement disagreements. Haimoff also discussed the process utilized in conducting royalty audits and some common issues uncovered during the process. Drawing on his extensive experience in the entertainment industry, he provided a glimpse into some of the most prevalent royalty issues encountered in the motion picture and television industry. Together, Korchek and Haimoff provided the class with different perspectives that provided a well-rounded look at an important topic. The presentation culminated in a lively discussion as Korchek and Haimoff interacted with the class.

Green Hasson Janks at the CalCPA Entertainment Industry Conference

The 2013 CalCPA Entertainment Industry Conference was held on June 12, 2013 at the Beverly Hilton. The Entertainment Industry Conference is an annual gathering of leaders and experts who provide tax, financial planning, business management, legal, consulting, and other advisory services to professionals in all segments of the Hollywood entertainment sector.

The conference featured various panels on critical entertainment topics including the growth of new media, China's entertainment industry, and various international tax matters. The conference also included updates on domestic taxes, estate planning, and music publishing. The lunch keynote speaker was Hawk Koch, president of the Academy of Motion Picture Arts & Sciences and board member of the Motion Picture & Television Fund.

Green Hasson Janks provided sponsorship for the event, with several professionals attending and three members of our firm participating in separate panel discussions. Tax Partner Polina Chapiro was a member of a panel on international tax, discussing topics such as tax planning related to residency, foreign tax credits, and other mitigating strategies. Tax Principal Akash Sehgal was a member of a panel on domestic tax issues, which covered various local and business tax license matters. Ilan Haimoff, principal and the leader of the entertainment practice, moderated a panel on new media, including a discussion on negotiation of new media deals, coordination of new and old media careers for talent, and the avoidance of contractual pitfalls. The event provided a great opportunity for industry leaders to share expertise and explore new ways to better serve their clients.

Meeting Minions and Others at the Licensing Expo

On June 18-20, members from our Royalty & Contract Audit practice, Ilan Haimoff, David Robinson, Victoria Farrell, and our managing partner, Leon Janks, attended the annual Licensing Expo in Las Vegas. What an event! With licensors and licensing industry leaders from around the globe, the show provided an excellent forum for face-to-face meetings and a first-hand look at the latest in merchandising and entertainment. Several exhibitors presented impressive landscapes for their brands, which included big names such as Smurfs, Rovio (Angry Birds), Boy Scouts of America, Peanuts, John Wayne Enterprises, Jim Henson Company, Sega, Electrolux, Coca-Cola, CBS, Saban Brands (Power Rangers) and more! We look forward to continuing our conversations with those we met at the show.

In the News...

SECOND IN A SERIES

Producer Share Participations

The Reporting of New Media

by Anita Wu

To the generations of multi-taskers and people constantly on the go, Netflix's brand promise of delivering content to its users "anytime, anywhere"[1] has an undeniable appeal. Hulu Plus entered the marketplace with an offer to provide its subscribers with "More wherever. More whenever. Than ever."[2] Several other content service providers followed suit. And consumers have responded in droves. So how does a producer share participant even begin to assess whether he or she is reaping the equitable, financial benefits from the explosion of new media distribution? The first step is to know what to look out for.

In the world of profit participations, "new media" distribution generally refers to on-demand access to content for display on a digital device such as a television, computer, smartphone or tablet. In certain instances, the content is transmitted through intermediary equipment such as a gaming console or set-top box. The sweeping use of the word "new" is a misnomer as some of the related technologies have been around since the late 1990s, and their application in the entertainment space followed soon afterward:

PRODUCED BY MAGAZINE

ANITA WU IN THE MARCH 2013 EDITION OF PRODUCED BY MAGAZINE

Anita writes an article about Producer Share Participations: The Reporting of New Media in the March–April 2013 edition of Produced By magazine. Read more *here*.

DAVID ROBINSON IN THE MAY 2013 EDITION OF PRODUCED BY MAGAZINE

David writes about vertical integration and the effects of related party deals on profit participants in the May–June 2013 edition of *Produced By* magazine. Read more *here*.

DAVID ROBINSON MODERATES PANEL AT PRODUCED BY CONFERENCE

From The Hollywood Reporter: "Lawyers and finance experts pulled back the curtain for a look at how profit participations are born and where they sometimes end up." Read the article *here.*

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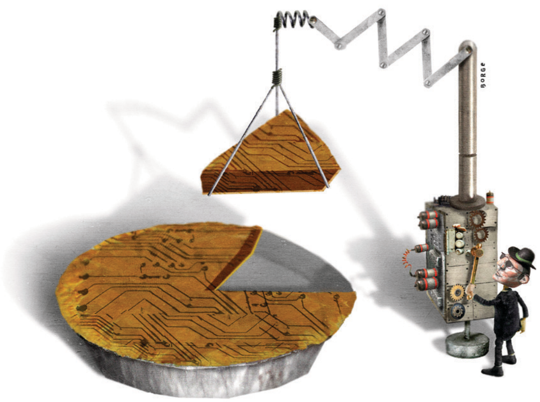
Ladd alleged that the Warner Bros. undervalued 12 of its motion pictures when it included them in 218 different domestic and international television packages. Ladd's expert, David Simon, with 32 years of experience in the motion picture industry, testified that Warner Bros. employed a practice known as "straight-lining" when determining the value of the pictures included in these packages. Straight-lining assigns the same value to every title in a package regardless of its fair market value.

Simon provided testimony and documentation showing that despite Warner Bros.' practice of assigning a letter grade to each title in a package based on criteria such as box office receipts, genre, star talent and awards, each title was allocated the same value.



RICHARD BORGE

In defense of its practice of straight-lining, Warner Bros. argued that this practice is both common and undisputed in the entertainment industry. Ladd offered testimony refuting this statement.

Simon also testified that Warner Bros. was allocating excessive license fees to titles that the studio wholly owned. This practice would allow Warner Bros. to divert license fees away from titles on which it had to pay third-party profit participations.

Ladd also alleged that by employing the straight-lining valuation method and by over-allocating license fees to its wholly-owned titles, Warner Bros. was in breach of the contract because it did not comply with the implied covenant of good faith and fair dealing that is contained in every contract executed in California. A studio executive testified that the studio was required to "fairly and accurately allocate license fees to each of the films based on their comparative value as part of a package." Warner Bros.' response to this allegation was that the fee allocations were determined by the licensee, not Warner Bros.

The jury rendered its decision in favor of Ladd, stating that even if Warner Bros.' positions were correct regarding the prevalence of the straight-lining valuation method and the insistence of the television licensees on the values assigned to individual titles contained in a package, Warner Bros. was still required to fairly allocate and report the license fees it received.

The Second Appellate District of California upheld the decision and awarded the Plaintiff $3,190,635, its share of the amount by which the defendant undervalued the 12 Ladd motion pictures.

If you are an individual, company stakeholder or the beneficiary of a trust or estate with profit participation rights to movies or television shows, you could be at risk for underpayment. A detailed periodic review of your distributions, such as a profit participation audit, is a great way to ensure equitable treatment.

But when should you consider a profit participation audit? Ilan Haimoff and Peter Klass have created a road map to help you assess your risk as a profit participant. Download it at greenhassonjanks.com/publications

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