



The Franchise Valuations Reporter



Have a Damages or Valuation Question?

Call us for a free, confidential consultation. Here are some of the questions we have been asked recently:

- What kinds of damages can I claim?
- How can the damages be proven?
- What's the difference between lost future profits and lost business value?

And we're always interested in your comments about the newsletter.

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Our Expertise

Within the franchise, distribution and dealership context, we are experts in:



- Damages, Valuations & Expert Testimony
- Finance, Accounting and Tax
- Cyber Security and E-discovery of Electronically Stored Information

We offer a free initial consultation. If any readers have questions, you are welcome to email or phone us and we will provide our best answer as quickly as possible.

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Valuations

Tax Inversions Put Focus on Intangible Values

Many companies are now considering (or acting) to shift profits away from the high U.S. corporate tax rates and into countries with lower tax rates, or in some instances to shift profits away from high state rates and into other jurisdictions with lower rates. Often these international deals involve tax inversions, where a company relocates its headquarters to a lower-tax nation, or Intangible Property Holding Companies for the incorporation of intangibles in low tax or no tax state jurisdictions. In the international arena companies often use transfer pricing to shift profits to a subsidiary or division located in a lower tax jurisdiction or in domestic transactions between related entities to shift income among state jurisdictions.

Intangible assets, such as brands, which provide a great deal of revenue, can be used as part of this strategy. Of course, the valuation of those assets that are transferred affects the reasonableness of inter-company charges. And confirmation of such valuations is important. It can be done in most instances by a formal valuation which often relies on third-party data sources such as ktMINE, Royalty Connection, RoyaltySource, RoyaltyStat LLC, *Licensing Economic Review*, *License Royalty Rates*, and *Markables* among others.

Useful Reading

For a recent article on the valuation of franchises, see Mark A. Daymon, "**What You Need to Know About Franchise Value**", in *Business Appraisal Practice*, Third/Fourth Quarter 2015; and for a review of the purpose and use of expert witnesses we recommend the article by doyen Phil Zeidman, "**Expert witnesses play larger role as legal world gains complexity**" in the January issue of *Franchise Times*.

Expert Testimony

Motion To Exclude Music Industry Experts Fails

In a recent copyright infringement suit involving the country hit "Backwoods" by Justin Moore, a federal district court in Nashville, Tennessee, denied the singer's motion *in limine* to exclude the testimony of three of the plaintiffs' expert witnesses[1]. The Court found each expert was qualified with respect to the customs and practices of the music industry, or on the calculation of Moore's profits and actual damages. In addition, the Court found that each of their opinions would assist the jury on the issue of damages.

The approved experts were 1) Dr. Michael Einhorn, an economist with a Ph.D. from Yale University, who is a former professor of economics and law at Rutgers University 2) Dr. Loren Mulraine, a law professor, entertainment attorney, singer, songwriter, producer, artist manager, and "the chief architect of the entertainment and music business certificate program at Belmont Law," and 3) Professor Melissa Wald, a professor in the Department

We Write the Book

Franchise Regulation and Damages, the only treatise that covers damages in franchise disputes and valuations of franchises, is updated 3 times a year.

For more details, to see a Table of Contents or to place an order, go to the Wolters Kluwer Law & Business web page [here](#).

DISCLAIMER

The information provided in this newsletter is for informational purposes only and should not be construed as legal or expert advice which can only be obtained from appropriate professionals. Franchise Valuations, Ltd. and Franchise Technology Risk Management provide such expert advice on the topics addressed herein.

Please visit our websites at www.FranchiseValuations.com and www.ftm.biz

of Recording Industry, College of Mass Communication, at Middle Tennessee State University, who is also a tenured Associate Professor who has worked in copyright administration for music publishers and record labels, and has designed royalty accounting systems.

[1] *Montana Connection, Inc. v. Moore*, December 4, 2015, No. 3:12-cv-0824, (Haynes, W.)

Changes to FRCP

Important Changes to the Federal Rules Take Effect

As most of our readers know, there are many new amendments to the Federal Rules of Civil Procedure ("FRCP") which took effect on December 1, 2015, following a four-year effort by the Civil Rules Advisory Committee in response to mounting concerns about the costs of litigation, particularly discovery and e-discovery. The aim of these amendments, like the admonition 'children behave', is to force litigants into a spirit of cooperation by, *inter alia*, introducing the concept of proportionality into the discovery rules and to better regulate e-discovery in particular. And the familiar language providing that documents and information are discoverable if they are "reasonably calculated to lead to the discovery of admissible evidence" has been deleted.

With respect to e-discovery, the Amended Rules emphasize the parties' ongoing duties about disclosure, discovery, or preservation of electronically stored information. And the comments to the Amended Rules make clear that the duty to preserve evidence can arise even before litigation is filed. However, even under the amendments, no sanctions may issue against a party for spoliation of electronically stored information unless all four of the following criteria are satisfied: (i) the ESI should have been preserved; (ii) it is lost; (iii) the party failed to take reasonable steps to preserve it; and (iv) it cannot be restored or replaced.

Nonetheless, if the spoliator "acted with the intent to deprive another party of the information's use in the litigation" -- then, regardless of prejudice, the court may presume the lost information was unfavorable to the spoliator or issue an adverse inference instruction, a default judgment, or dismissal. In such a case, prejudice need not be shown, and intent may be a jury issue.

Goodwill Impairment

European Goodwill Impairment Declines 41%

Goodwill impairments continued to decline for companies in the STOXX Europe 600 Index, according to the "2015 European Goodwill Impairment Study," from Duff & Phelps. Goodwill write-downs dropped by a substantial 41%, from €49.6 billion in 2013 to €29.4 billion in 2014. From an industry viewpoint, Telecommunication Services had the highest aggregate goodwill impairment at €8.9 billion. From a country viewpoint, the U.K. had the highest aggregate amount of goodwill impairments at €12.4 billion.

Goodwill impairment by U.S. firms up 18% in 2014

To the contrary, the dollar amount of goodwill impairment recorded by U.S. companies rose 18%, to \$26 billion, in 2014, according to a report from Duff & Phelps. The consulting firm reported that the number of goodwill

impairment events increased by 24%, to 341, for the same period, while the average impairment amount fell 5%, to \$75 million. The study also finds that the qualitative goodwill impairment test indicated record use, increasing to 54% from the 43% reported in 2014.

FASB Plans to Drop Step 2 of Goodwill Impairment Test

Perhaps as a result of the increased work and increased costs discussed above, the Financial Accounting Standards Board has tentatively decided it will make the goodwill impairment test simpler for public companies by dropping the second step in the two-step test. And rather than requiring private companies to carry goodwill at cost and test it annually for impairment, FASB will now allow private companies to amortize goodwill over 10 years. Impairment testing would only be required when triggering events occur suggesting its decline. However, since such amortization would impact earnings, many companies may choose to stay with impairment testing.

Miscellaneous Tax Items

Audits of Individual Tax Returns Drop for Fifth Straight Year

Audit rates for individual returns declined for the fifth straight year and fell to their lowest level in a decade, the IRS announced. They went from 1.58 million in fiscal year (FY) 2010 to 1.23 million in FY 2015, a reduction of 350,000 audits or 22 percent. Commissioner John Koskinen told the AICPA National Tax Conference in Washington, D.C. on November 3 that the IRS has lost 5,000 enforcement personnel since 2010, including revenue agents, revenue officers, and Criminal Investigation staff. Koskinen also noted that fewer employees doing compliance work means "leaving tax revenue on the table. In cutting the IRS budget, the government is forgoing billions just to achieve budget savings of a few hundred million dollars, since we estimate that every \$1 invested in the IRS produces \$4 in revenue."

IRS Announces Seven Steps To Make Identity Protection Part of Your Routine

The IRS has teamed up with state revenue departments and the tax industry to make sure people understand the dangers to their personal and financial data. Here are seven steps they propose to protect your tax and financial information:

1. Read your credit card and banking statements carefully and often - watch for even the smallest charge that appears suspicious. (Neither your credit card nor bank - or the IRS - will send you emails asking for sensitive personal and financial information such as asking you to update your account.)
2. Review and respond to all notices and correspondence from the Internal Revenue Service. Warning signs of tax-related identity theft can include IRS notices about tax returns you did not file, income you did not receive or employers you've never heard of or where you've never worked.
3. Review each of your three credit reports at least once a year. Visit annualcreditreport.com to get your free reports.
4. Review your annual Social Security income statement for excessive income reported. You can sign up for an electronic account at www.SSA.gov.
5. Read your health insurance statements; look for claims you never filed or care you never received.
6. Shred any documents with personal and financial information.

Never toss documents with your personally identifiable information, especially your social security number, in the trash.

7. If you receive any routine federal deposit such as Social Security Administration or Department of Veterans Affairs benefits, you probably receive those deposits electronically. You can use the same direct deposit process for your federal and state tax refund. IRS direct deposit is safe and secure and places your tax refund directly into the financial account of your choice.

Cyber-Security

[Newly discovered hack has U.S. fearing foreign infiltration](#)