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__Client Alert__: ***Who Wants To Be A Millionaire?***

By Ezra Doner*

In an integrated production, distribution and broadcast company like ABC/Disney, which division makes the profits?[1]

Contestants who appear on *Who Wants To Be A Millionaire* play to win a million dollars. Now Celador Productions, the show's creator, has successfully upheld a jury verdict in its favor of more than $319 million against the ABC Network.

__Background__

In 1999, Celador, a U.K. production company, licensed North American format rights in *Who Wants To Be A Millionaire* to the ABC television network and Buena Vista Television, both of which are owned by The Walt Disney Company. ABC's U.S.-produced *Millionaire* exploded out of the gate. One-time Disney Chairman Michael Eisner placed the value of *Millionaire* to ABC at "$1B, wild guess, maybe more."

Disney's accounting statements, however, reported Celador's 50% profit participation in the U.S. series as not a billion, nor a million, but . . . zero. In 2004, Celador proceeded to bring suit, and in 2010, a federal jury awarded Celador damages of $270 million, which, together with prejudgment interest, amounted to almost $320 million.

How did Disney determine Celador's profits to be zero, what happened to ABC's billion dollars in value, and what does this mean for revenue participants and television companies that produce, distribute and exhibit their own shows?

__Whose Revenues?__

In the jargon of filmed entertainment, people often ask about the "gross" of a movie, the "profits" of a TV show, the "sales" of a videogame. The follow up question they should be asking is, whose gross, whose profits and whose sales? The answer can be crucial.

[1] *Celador Int'l v. Walt Disney Co.*, 347 F.Supp.2nd 846 (C.D. Cal. 2004); affirmed, *Celador Int'l v. Am. Broad. Cos.*, 499 Fed.Appx. 721 (9th Cir. 2012).

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In the case of *Millionaire,* Disney designated little-known Valleycrest Productions Inc., an affiliate, to produce the episodes; then arranged for Valleycrest to license the episodes to ABC at cost; and then reported profits to Celador at the Valleycrest level – that is, the production company level. Under this structure, it was a legal certainty that in the initial broadcast cycle, there would be zero profit to Valleycrest and, hence, zero profit to Celador.

Of course, had Disney produced *Millionaire* for CBS, NBC or FOX, it is inconceivable that the deal would have been designed to yield zero profit from the first cycle. Either Valleycrest as producer, Buena Vista Television as distributor, or a Disney company acting for either or both, would have bargained for at least the possibility of profits.

Good Faith And Fair Dealing

Every contract carries with it an implied obligation of good faith and fair dealing. At trial, Disney argued it acted in good faith, but that's not how the judge and jury saw it. In this case, good faith and fair dealing meant that a contracting party, like Disney, which had the ability to manipulate financial outcomes, could not do so unfairly.

Renegotiation Anyone?

On successful television shows, it is not unusual for fees to production companies, show runners and on-screen talent to be periodically renegotiated, even if there isn't a contractual requirement to do so.

After *Millionaire's* breakout success, the Disney companies raised the per episode fee to Regis Philbin, the show's star host, and improved the commission to William Morris Agency, the show's packager, which had represented Celador in the *Millionaire* negotiations. But Disney did not revisit Celador's participation formula, which locked Celador at zero profits from the initial run.

Measure of Damages

At trial, Celador's experts testified regarding typical license fee increases for successful TV shows, and projected what Celador's 50% profit participation might have looked like if episode license fees had been increased to fair market value. Of the alternate projections presented by Celador's experts, the valuation to which the jury came closest operated as follows.[2]

For the first 107 episodes, the experts assumed that license fees would have stayed flat; that is, each of those episodes would have continued to yield zero profit to Celador. Starting at episode 108, however, the license fee would have risen to something like $2.4 million per episode, a big jump over ABC's actual license fee to its corporate cousin Valleycrest.

[2] Since the jury was not required to report details of how it assessed damages, this is an attempt to reconstruct the jury's calculation by reference to information in the court file.

Whose Profits Anyway?

Disney, as an integrated production, distribution and exhibition television company, had the practical ability to shift profits between its production, distribution and broadcast divisions. It could have favored Buena Vista Television, by increasing its distribution fee. Or it could have favored Valleycrest Productions by increasing its license fee (and, indirectly, Celador's profits). But the massive inflow of advertiser dollars, together with a more or less flat license fee, made ABC the big winner. And, in the participation reports, that made Celador the loser.

The Lesson

If you have the unilateral ability to structure a participant's outcomes, think carefully before you report a breakout success as a total loser. Because a jury may restructure that outcome for you.