

# The Application of the Sales Comparison Affiliate Transaction Provision to New, In-House Streaming Transactions Involving Historical Television Programs, and Their Impact on Profit Participants

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## ABSTRACT

In this Article, the Authors discuss how the rise of in-house streaming services will impact profit participation. Specifically, this Article discusses: (1) the vertical integration of the television industry, including the recent advent of in-house streaming services exhibiting content produced by their related-party studios; (2) the context in which the Sales Comparison ATP became a standard provision in profit participant agreements and how this history aids in its interpretation; (3) the meaning and purpose of each sentence and term in the Sales Comparison ATP; and (4) a roadmap for how profit participants may be able to leverage the Sales Comparison ATP to preserve their rights as entertainment conglomerates increasingly use their own streaming platforms to exhibit the valuable library television programs that they own.

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## INTRODUCTION

Over the past two years, the major entertainment conglomerates have launched (or are planning to launch) their own streaming services to exhibit their owned television programs, including Disney (with Disney+), Warner-Media (with HBO Max), NBCUniversal (with Peacock), and ViacomCBS (with Paramount+). The streaming services will exhibit new programming developed for initial (and sometimes exclusive worldwide) exhibition on the streaming service, and programs initially exhibited elsewhere, such as prior exhibitions on a broadcast network or foreign exhibition on foreign networks.<sup>1</sup>

This is a marked departure from the status quo. In the past, these conglomerates generally licensed their owned television programs to unrelated, third-party streaming video-on-demand (VOD) companies like Netflix and Amazon Prime, after their initial exhibitions elsewhere, as another distribution of the program.<sup>2</sup> At least for successful programs, these unrelated, third-party streaming licenses have significantly increased the compensation received by talent (often the creators and showrunners of television programs), who participate in the profits of these programs (“profit participants” in industry parlance). Indeed, for the most part, these streaming licenses have added a substantial additional revenue stream to their profit participation statements.

Profit participants in these historical television programs have legitimate concerns about how the entertainment conglomerates will structure their new in-house streaming deals and the impact these deals will have on their profit participation in these library programs.<sup>3</sup> These concerns are based on the fact

1. See discussion *infra* Subpart II.A.
2. These third-party licenses have, in many cases, given new life to television programs that are no longer on the air (such as *The Office*, *Criminal Minds*, and *Grey's Anatomy*) or provided what has been called the “Netflix Bump,” by increasing viewership on all platforms for shows that are/were still in production (such as *Breaking Bad* and *Schitt's Creek*). See Laura Bradley, ‘Schitt’s Creek’ *Emmys* Domination Highlights the Power of the Netflix Bump, DAILY BEAST (Sept. 20, 2020, 9:50 PM), <https://www.thedailybeast.com/schitts-creeks-emmys-domination-highlights-the-power-of-the-netflix-bump?ref=scroll> [<https://perma.cc/2NE9-CHP3>].
3. This Article uses the terms “related-party transaction” or “affiliate transactions” to indicate transactions or agreements between two entities within a larger entertainment conglomerate (for example, agreements between HBO Max, the streaming platform,

that studios have different incentives when licensing to third parties as opposed to licensing to affiliated companies for streaming content or otherwise.

Generally, when a studio licenses a television program to an unrelated streamer like Netflix, it has an economic incentive to maximize the revenue from the license, which benefits both the studio and its profit participants.<sup>4</sup> These incentives change if the program is licensed to a related-party streamer. The entertainment conglomerate's economic interest is to keep the profits from the program (namely, subscription fees or ad revenue) at the streamer-exhibitor level because it, unlike the studio, does not share its profits with the participants. Thus, the conglomerate is incentivized to have the related-party streamer pay lower license fees to its related-party studio than a third-party streamer would in order to keep more money within the conglomerate. Moreover, the conglomerate (not the market) is calling the shots, so the related-party streamer does not have to worry that its lower-than-market-rate license fees will impact its ability to license and keep valuable library content.

Regarding the impact on the profit participants, many of the contracts between talent and studios governing these historical programs (at least those drafted from the early 2000s until recently) will contain a particular type of "Dealings with Affiliates" or "Affiliate Transaction Provision" that was popular for much of the last twenty years. The key fourth sentence of this type of affiliate transaction provision requires that all affiliate transactions shall be on comparable monetary terms to similar transactions for comparable programs that their affiliates entered into with unrelated third parties. We refer to this type of affiliate provision as a "Sales Comparison ATP" because it embodies a sales comparison approach the studio must use to model each related-party transaction covered by the provision. To the extent that there is a Sales Comparison ATP in a profit participation agreement, it will govern the terms of these new related-party streaming transactions and whether the transactions can be successfully challenged. This is the case whether or not the agreement contains an imputed license fee (ILF), as long as the streaming transaction is not covered in whole, or in part, by the ILF.<sup>5</sup>

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and Warner Bros. Television (WBTV), the studio, within the larger WarnerMedia conglomerate).

4. Although this general trend holds, there are potential issues as far as how studios allocate and negotiate license fees in output deals, where the license fees paid by the distributor (Netflix, for example) are not always tied to key metrics of success for the relevant program. Instead, studios have an economic incentive and, hence, may try to negotiate higher license fees for less successful shows that they know will never go into profits, and lower license fees for the more successful shows that will go into profits, so as to keep more money in-house and conversely share less with the profit participants.
5. An ILF is an agreement between the participant and the studio to impute a certain value to the profit participation statement for certain specified related-party transactions (such as the network broadcast license of a television program).

The profit participants for several highly popular series, including *Friends*, *Law & Order*, and *The Office*, have recently negotiated or otherwise blessed the terms of new related-party streaming deals for these programs following the expiration of their deals with unrelated streamers.<sup>6</sup> We believe that these participants have received this kind of special treatment because: (1) there is a Sales Comparison ATP in the talent's profit participation agreements that governs these new related-party transactions; (2) there are no similar transactions with unrelated third parties for comparable programs entered into by the newly created in-house streamers upon which to base or model the new related-party streaming transactions,<sup>7</sup> and therefore, the threshold/liability test in the fourth sentence of the Sales Comparison ATP cannot be met; and (3) there are recent unrelated-party transactions not involving the in-house streamer for the same or comparable programs (which, as discussed below, is relevant to the damages standard of the Sale Comparison ATP). Therefore, the entertainment conglomerates really had no choice but to pay fair market value (or at least something close to it) to these participants.

Consider this example: if Netflix recently paid \$500 million for the streaming rights to a particular historical program (and other comparable programs), the conglomerate would be hard pressed to pay less than \$500 million in the next transaction for that same program if the entertainment conglomerate decided to keep the program in-house and not go to market. What will happen in five years if and when there are few, if any, similar streaming transactions for comparable programs between unrelated parties?

This Article addresses: (1) the context in which the Sales Comparison ATP became a standard provision in profit participant agreements and how this history aids in its interpretation; (2) the meaning and purpose of each sentence and term in the Sales Comparison ATP; and (3) a roadmap for how participants may be able to leverage the Sales Comparison ATP to preserve their rights as entertainment conglomerates increasingly use their own streaming platforms to exhibit the valuable library television programs that they own.

There are no binding appellate opinions interpreting a Sales Comparison ATP, which is the primary focus of this Article. Two recent nonbinding legal opinions, however, have discussed the meaning of certain aspects of the provision and are instructive on their application in the streaming context: (1) a 2019 arbitration award that became public in connection with a motion to vacate a portion of the award (the petition concerned punitive damages and was unrelated to the issues discussed in this Article); and (2) a trial court's 2020 interim opinion in a first-phase contract interpretation trial.

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6. Several case studies are discussed *infra* Subpart III.C.

7. The typical Sales Comparison ATP looks at similar transactions entered into by the related-party licensee and not the related-party studio.

In a recent arbitration between various Fox entities and the profit participants of the television program *Bones*, the profit participants challenged three self-dealing transactions between Fox Studios and its various affiliates: (1) Fox Network's license of the rights to broadcast *Bones* for seasons five through eight after the initial broadcast network license term had expired; (2) Hulu's license of the rights to exhibit *Bones* on its streaming platform (at a time when the Fox conglomerate owned a 30 percent interest in Hulu, thus making it a related-party transaction); and (3) certain Fox foreign affiliates' licenses of the rights to broadcast *Bones* abroad.<sup>8</sup> As discussed more fully below, the arbitrator found that the obligations in the Sales Comparison ATP in the participants' contracts with Fox Studios applied to each of these affiliate transactions—including the transaction with Hulu for streaming rights to exhibit *Bones*—and that the Fox Studio had breached the provision with respect to each of these challenged transactions.<sup>9</sup> As discussed below, we generally agree with the arbitrator's rulings in this case.

In a contract interpretation bench trial that did not get into issues of liability or damages involving the creator and certain of the other profit participants of the television program *The Walking Dead* (TWD), the participants challenged American Movie Classic Company's (AMC) treatment of various related-party transactions (among other issues).<sup>10</sup> The trial judge made two rulings as to the meaning of the Sales Comparison ATP that bear on the issues discussed in this Article. First, the trial judge ruled that the Sales Comparison ATP provision did not apply to transactions between affiliates where the studio and the participants had agreed that an ILF would apply to that transaction. While we respectfully disagree with the trial judge that the TWD plaintiffs ever agreed to an ILF, we agree with the general proposition that where the parties do, indeed, agree on the express terms of an ILF for a particular affiliate transaction, the ILF, and not the Sales Comparison ATP, governs what should be put on the profit statements for that related-party transaction. Second, the trial court ruled that if the studio breaches the Sales Comparison ATP with respect to a particular affiliate transaction, the participant's damages are limited to what the affiliate licensee would have paid for the rights being licensed, even if an unrelated third party would have paid more. This bears on the in-house streaming issue as follows: if the in-house streamer has a policy of never paying more than a certain amount to license a program, damages for breaching the Sales Comparison ATP will be limited to that amount, as opposed to the fair

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8. Amended Final Award at 15, 34, 37, *Twentieth Century Fox Film Corp. v. Wark Ent. Inc.*, No. 1220052735 (JAMS Arbitration Feb. 4, 2019), <https://deadline.com/wp-content/uploads/2019/02/final-amended-award-redactions.pdf> [<https://perma.cc/556G-2GZ2>].

9. *See id.* at 45–52.

10. The authors were trial counsel for the plaintiffs in the contract interpretation trial, *Kirkman v. AMC Film Holdings LLC*, No. BC672124, 2020 WL 4364279 (Cal. Super. Ct., July 22, 2020).

market value of the streaming license fee. As discussed below in Subpart II.B, we respectfully disagree with this aspect of the trial judge's interim ruling.

## I. VERTICAL INTEGRATION IN THE TELEVISION INDUSTRY AND WHY THE SALES COMPARISON ATP WAS DEVELOPED

In 1970, the Federal Communications Commission instituted the Financial Interest and Syndication Rules (the Fin-Syn Rules) that were designed to prevent the then big three broadcast television networks (NBC, CBS, and ABC) from monopolizing the television landscape. The Fin-Syn Rules did so by preventing the networks from owning (or having a financial interest in) any of the programming that they distributed or aired during prime time.<sup>11</sup> In general, the Fin-Syn Rules restricted the harms to profit participants flowing from vertical integration and the rise of self-dealing, as described below.

The Fin-Syn Rules ended in 1995, following Fox's entry into the television broadcast business and a hard fought battle between the networks, studios, and the federal government over antitrust issues.<sup>12</sup> Thereafter, vertically integrated entertainment conglomerates grew out of mergers of the studios and networks (broadcast and cable), and they have come to dominate the television industry.<sup>13</sup>

A vertically integrated conglomerate might own, among other things: (1) a domestic network that is the initial exhibitor of a television program; (2) other domestic networks for subsequent runs of the program (that is, syndication); (3) foreign networks for exhibition of the program abroad; (4) streaming platforms that exhibit the program; (5) production companies that produce the television program; and (6) distribution companies that distribute rights in the television program to related and unrelated networks and streaming platforms, domestically and abroad for broadcast, basic cable, premium pay, and streaming exhibitions.

For streaming platforms (which are a particular focus of this Article), there are a number of different models: (1) subscription streaming video on demand (SVOD), which makes money through subscriptions and not ad revenue (such as Netflix and Amazon Prime); (2) ad-supported video on demand (AVOD), which makes money through ad revenue (such as Peacock); and (3) hybrid models that provide for both subscription and ad-supported VOD (Hulu, for example).

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11. Amend. of Part 73 of the Comm'n's Rules & Reguls. with Respect to Competition & Resp. in Network Television Broad., 23 F.C.C.2d 382, 384–85 (1970).
  12. See Rev. of the Syndication & Fin. Int. Rules, Sections 73.659–73.663 of the Comm'n's Rules, 10 FCC Rcd. 12165 (1995); Evaluation of the Syndication & Fin. Int. Rules, 8 FCC Rcd. 3282 (1993); *Cap. Cities/ABC, Inc. v. FCC*, 29 F.3d 309 (7th Cir. 1994).
  13. See Stanton L. Stein & Marcia J. Harris, *Vertically Challenged: Repeal of the Fin-Syn Rules and Vertical Integration Led to a Barrage of Lawsuits by Profit Participants in Television Projects*, L.A. Law., May 2003, at 30, 31.

The production and distribution functions of an entertainment conglomerate are invariably performed by studio entities, and the studio generally owns the programs it produces. The studio entities then license rights in the programs they own to networks and other platforms that will exhibit the program. Since the sunset of the Fin-Syn Rules, these licenses have increasingly been between affiliated entities, at least domestically (and, historically, except for streaming), although recently, vertically integrated entertainment companies have built up or developed in the first instance their in-house streaming capacity to merit a general transition from third-party streaming to in-house streaming.<sup>14</sup>

Creators of television programs, showrunners, executive producers and directors (often referred to as “artists” or “talent”) are also major players in the television industry. For example, a studio may employ a writer to create the idea for a television program and write the pilot. In exchange, the studio may agree to pay the writer fixed compensation and a percentage of the profits (or contingent compensation, as studios now prefer to call it) of the program, as measured by the profits (after costs like production, distribution costs, and distribution fees are deducted) received by the studio. The contract between the studio and the talent profit participant invariably makes clear that the participant does not share in the profits of the studio’s affiliated entities that are the licensees of rights to the program. In other words, the talent profit participant does not generally share in the money received by the networks from advertising revenues and subscription fees from the streaming platforms. That is because the studio and network, even if related, are separate legal entities.

Before the sunset of the Fin-Syn Rules and the widespread vertical integration of the television industry, the economic interests of the studio and profit participants were generally aligned—at least when it came to the studio’s licensing of a program to unrelated networks, as was required under the Fin-Syn Rules. The studio and profit participants each had the economic incentive to obtain the highest possible license fee from the network. These license fees would be paid to the studio, and any profits would be shared with the participants.

Vertical integration, however, created the opposite economic incentive. A vertically integrated entertainment conglomerate, which produces, distributes, and exhibits a television program on its own networks and streaming platforms, makes more money if the license fees paid to the studio (or imputed to the participant, if there is an ILF and the studio does not actually receive payment of a license fee for the specific related-party transaction at issue) are below fair market value, that is, below what would result from an arm’s length negotiation between unrelated entities. While the studio makes less because the lower

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14. See Marc Simon, Note, *Vertical Integration and Self-Dealing in the Television Industry: Should Profit Participants Be Owed a Fiduciary Duty?*, 19 CARDOZO ARTS & ENT. L.J. 433, 440 (2001).

license fees reduce its revenues, the affiliated networks and streaming platform(s) keep more money (from ad revenue and subscription revenue) because they pay lower license fees. This income shifting would be a wash if there were no profit participants and the only players were the related-party studio and networks/streaming platform(s). But income shifting matters a great deal when the profit participants' interests are also considered. Simply put, if the revenues associated with a program are kept at the network/streaming platform level, then the studio makes less profit, and it pays less to its participants. Thus, the vertically integrated conglomerate makes more profit in total if it pays below-market value license fees because it shares less overall with the participants.

As a result, since the end of the Fin-Syn Rules, vertically integrated entertainment companies have increasingly tried to own the television programs that they exhibit and distribute so that they can make money on the program on the exhibitor side (such as from ad revenue and, more recently, subscription revenue from in-season streaming) and on the studio side (where they license the program in downstream domestic and foreign distribution channels and platforms, including out-of-season streaming on SVOD platforms), and structure related-party transactions to keep more money at the exhibitor level.<sup>15</sup>

In the first ten years after the sunset of the Fin-Syn Rules, one affiliate transaction model that was used by the entertainment conglomerates was for the studio to provide in its profit participation agreements that the studio would negotiate at arm's length with its affiliated entities and enter into license fee agreements with them at fair market value. For example, the operative agreements between several of the profit participants and NBC Studios (NBCS) for the *Will & Grace* television series, which were entered into in 1996 and 1999, provided that “[w]ith respect to agreements between NBCS, on the one part, and affiliated entities of NBCS or NBC, on the other part, such will be at fair market value.”<sup>16</sup> Such agreements were to be “negotiated in good faith at arm's length with the intent that all compensation paid to [NBCS] for the Program shall be at fair market value.”<sup>17</sup> Provisions like these required a subjective, fact intensive determination of whether the related parties actually negotiated with each other at arm's length and whether the resulting license fee was at fair market value (what an unrelated third party would pay to license the program under normal market conditions).<sup>18</sup> Such provisions gave the participants the

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15. See Stein & Harris, *supra* note 13, at 30.

16. First Amended Complaint at 16, *Kohan v. NBC Studios*, No. BC307563 (Cal. Super. Ct. Apr. 27, 2007) (emphasis omitted), 2004 WL 2963757. Mr. Nessim, one of the authors, was trial counsel for the participants in this case.

17. *Id.* at 19 (alteration in original) (emphasis omitted).

18. This Article cites to both California and New York cases wherever possible, as most entertainment profit participation contracts are governed by either California or New York substantive law, whether by a choice-of-law contractual provision or conflict of law principles.

contractual right to hold the studio accountable for obtaining fair market value license fees—something that is subjective at least to some extent and seldom black and white—from its affiliated network. They also required the studio to negotiate with its affiliate network at arm’s length, an impossibility in some cases for the affiliated entities to do since they have a common ownership and may often share employees, among other things. Further, if the studio failed to comply with these obligations, the participants could sue for damages of the fair market value of the license fees at issue.<sup>19</sup>

Many participants brought profit participation lawsuits under provisions like the NBCS fair market value/arm’s length standard. The suits were expensive and time consuming for the entertainment conglomerates because the questions of whether the related-party transaction at issue was at fair market value or negotiated at arm’s length were fact-based questions that were not clear-cut, were not appropriate for determination on summary judgment, and required a trial with a battle of the experts.<sup>20</sup>

As a result of this litigation, beginning about twenty years ago, the vertically integrated entertainment conglomerates tried to limit their obligations to profit participants with respect to related-party transactions. They did so with the Actual License Fee Model and the Imputed License Fee Model (or ILF Model), both our terms to describe the two prevalent models, discussed below. Both models generally involved the use of a Sales Comparison ATP for related-party transactions other than the broadcast network license fee transaction (including, later, related-party streaming transactions) and were in common use over the past twenty years, at least before the recent shift towards further consolidation and streaming-only deals.

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Fair market value “is the price that a willing buyer and a willing seller would agree to in an arm’s-length transaction.” Am. Soc’y of Composers, Authors & Publishers v. Showtime/The Movie Channel, Inc., 912 F.2d 563, 569 (2d Cir. 1990); *see also Value*, BLACK’S LAW DICTIONARY (11th ed. 2019) (defining fair market value as “[t]he price that a seller is willing to accept and a buyer is willing to pay on the open market and in an arm’s-length transaction; the point at which supply and demand intersect”); CAL. CIV. PROC. CODE § 1263.320(a) (West 2021) (“The fair market value of the property taken is the highest price on the date of valuation that would be agreed to by a seller, being willing to sell but under no particular or urgent necessity for so doing, nor obliged to sell, and a buyer, being ready, willing, and able to buy but under no particular necessity for so doing, each dealing with the other with full knowledge of all the uses and purposes for which the property is reasonably adaptable and available.”); Whittier Health Servs., Inc. v. Pospesel, 20 N.Y.S.3d 240, 242 (App. Div. 2015) (holding that a sale of property was at arm’s length because seller and buyer were unrelated and the offer reflected the condition of the property and the level of interest).

19. *See* CIV. PROC. § 1263.320(a).

20. *Cf.* Stein & Harris, *supra* note 13, at 32–33 (detailing a wave of lawsuits against studios and networks, all of which were settled before trial).

### A. *The Actual License Fee Model*

One model used is what we call the “actual license fee” model. In this model, studios provide in their profit participation agreements with talent that they may negotiate directly with their affiliates and enter into license agreements with them, including for the initial exhibition of the program. This model invariably includes a Sales Comparison ATP to govern all related-party transactions, including for the initial exhibition of the program. Again, the Sales Comparison ATP generally provides that each related-party transaction must be on comparable monetary terms to the terms on which the affiliate licensee enters into similar transactions for comparable programs. The actual license fee model with a Sales Comparison ATP was used by Fox, Warner Bros., and other studios during all or part of the first two decades of this century.

### B. *The Imputed License Fee Model*

The second model commonly used by studios to address related-party transactions during the first two decades of this century is what we call the ILF model. This model, at least until recently, was largely limited to the initial network broadcast of a program—the ILF did not apply to downstream, off-network distribution, including streaming, or in domestic or foreign syndication. For the initial broadcast of the program, the studio and the participant would agree on an express amount that would be put on—or imputed to—the participation statements as a stand-in for a negotiated license fee between the related network and studio (rather than use an actual license in the model described above). This ILF model was used by NBCUniversal, Disney, CBS, and other studios that were part of vertically integrated entertainment conglomerates during all or most of the first two decades of this century. Even under the ILF model, however, profit participation agreements invariably included a Sales Comparison ATP to govern related-party transactions that were not covered by the ILF. This includes transactions for streaming, other domestic syndication and other foreign distribution. Therefore, for related-party transactions other than the initial exhibition of the program on a broadcast or cable network (and any other transactions covered by the ILF), the Actual License Fee Model and the ILF model were generally the same: the Sales Comparison ATP applied to both.

### C. *New Models in the Streaming Era*

Recently, new entrants into the vertically integrated entertainment space—Netflix and Amazon Prime, as key examples—have further disrupted and revolutionized the two historical models described in the prior Part.<sup>21</sup>

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21. See Ken Ziffren, *How Talent Deals Are Evolving as Studios Become Streamers*, HOLLYWOOD REP. (Feb. 6, 2020, 6:30 AM), <https://www.hollywoodreporter.com/news/ken-ziffren-how-talent-deals-are-evolving-as-studios-become-streamers-guest-column-1274871> [<https://perma.cc/Z6NV-RLCQ>].

These entities have, in substance, expanded the ILF model to cover all uses of a program, which in the streaming era may only (or at least largely) be the related-party streaming use. Any scripted programs these new entertainment companies develop and finance, generally, will be exhibited on their own streaming platforms in perpetuity, often exclusively. There will be no more traditional tiered distribution in the linear world (that is, first the initial network exhibition, then foreign distribution, and then off-network domestic syndication). Instead, these conglomerates employ a direct-to-consumer model reliant upon subscription revenue.

Under this expanded ILF model, Netflix and Amazon Prime have been willing to pay talent more upfront, as opposed to the traditional model which rewards talent for successful television programs over time through their profit participation.<sup>22</sup> In some cases, Netflix and Amazon Prime have actually committed to eight-figure guarantees per year the program is exhibited.<sup>23</sup> In other words, the Netflixes and Amazon Primes of the world have bought out their talent for a fixed amount, instead of providing their talent with a percentage of profit participation dependent upon the program's success and unaffiliated downstream distribution. Given their subscription models, it has made good business sense for these nontraditional entertainment conglomerates to invest hundreds of millions of dollars in content creation, to keep their subscribers, and gain new ones. As a result, however, certain industry experts believe there has been a "race to the bottom for profit margins."<sup>24</sup> Each streaming platform's creation of its own content will only increase in the future as there will be less product to license from unrelated studios as more conglomerates keep their programs in-house.

While not the primary focus of this Article, we note for context that as more traditional entertainment conglomerates are increasingly developing their own streaming platforms to exhibit content, their new talent agreements

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22. Historically, the formula for profit participants to maximize profits was for a television program to stay on the air long enough to have a hundred episodes or more—enough to sell reruns to other non-network television networks in syndication. The bulk of the profits for studios and participants have come from these syndication deals, not the initial license fees to produce and exhibit the show. For example, the creators of *Seinfeld*, *Friends*, and *The Simpsons* have made "hundreds of millions of dollars this way," as participants who were entitled to a cut of the series' profits. Joe Flint, *The War for Talent in the Age of Netflix*, WALL ST. J. (Sept. 21, 2019, 12:00 AM), <https://www.wsj.com/articles/the-war-for-talent-in-the-age-of-netflix-11569038435> [<https://perma.cc/XH2P-EDL7>]. Netflix and Amazon Prime have disrupted this model by wooing high profile producers to make content exclusively for their services, including Netflix's deals with *Grey's Anatomy* creator Shonda Rhimes and *Glee* producer Ryan Murphy. It has been reported that Netflix paid nine-figure upfront fees to Ms. Rhimes and Mr. Murphy, but no profit participation, because Netflix doesn't sell reruns of its shows to other platforms or have other downstream distribution. *Id.*

23. Ziffren, *supra* note 21.

24. *Id.*

are moving closer to the Netflix/Amazon Prime SVOD models described above, as follows:

### 1. Disney

As of November 2019, Disney began using what it calls a “Series Bonus Exhibit” (SBE) in its new talent deals for subscription offerings on Disney+ and Hulu.<sup>25</sup>

The SBE rewards profit participants with bonus payments for longevity (starting with the second season); current program rankings (with separate computations for linear or digital programming); awards like Emmys or Golden Globes); library performance (after production ends); and with separate accountings for merchandising/licensing (unless the content is based on preexisting Disney programming), traditional VOD rentals and electronic sell-through, music and publishing.<sup>26</sup>

As part of this model, Disney can exhibit a show that it has produced on whatever platform it chooses, without having to renegotiate with the producers who created it.<sup>27</sup> An example is a recent \$100–\$150 million deal with Dan Fogelman, creator of the hit drama *This Is Us*. It has been reported that this deal provides for upfront payments only, with no sharing in subsequent profit.<sup>28</sup> Many talent-side transactional entertainment attorneys who have spent their careers negotiating profit participation agreements believe that the SBE model provides for payouts that are substantially less than could be earned on successful series with a traditional profit definition.<sup>29</sup>

### 2. WarnerMedia

New digital deals for HBO Max provide a participant with an ILF from HBO Max, which is “tiered and dependent” on how the program was previously distributed on WarnerMedia’s network platforms.<sup>30</sup> There are different rules for programs developed exclusively for the affiliated subscription service. Unlike Disney, these deals are not buyouts, but more like traditional profit participation agreements. Talent-side transactional entertainment lawyers anticipate that this structure will be more favorable to participants than the Disney formula.<sup>31</sup>

That being said, it has been reported that Warner signed Greg Berlanti to a \$300 million deal last year that is structured more like the upfront Netflix model as opposed to the traditional profit participation model.<sup>32</sup> The large

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25. *Id.*

26. *Id.*

27. *See id.*

28. Flint, *supra* note 22.

29. Ziffren, *supra* note 21.

30. *Id.*

31. *Id.*

32. Flint, *supra* note 22.

upfront payment essentially buys him out as a profit participant—or financial stakeholder—in the shows he has made with the studio. “He will also receive bonuses based on how long a show runs.”<sup>33</sup> This is consistent with Warner’s strategy of treating fairly only those participants currently running successful programs or under continuing overall deals with the studio.<sup>34</sup>

### 3. NBCUniversal

Peacock is NBCU’s new streaming outlet. Thus far, it appears to use a version of the ILF model. Representative contracts from NBCU suggest that the planned ILF provides for only 85 percent of the net approved budget for scripted dramas for the first four seasons of exhibition on Peacock.<sup>35</sup> This undoubtedly will lead to deficits, at least in the first four seasons of exhibition. “All other rights are reserved for the . . . [relevant] NBCU studio for exploitation of the program under the MAGR definition it now employs. NBCU may still be charging a distribution fee under its MAGR, which puts it out of sync with its competitors.”<sup>36</sup>

What remains to be determined—and which is the focus of this Article—is over time, how entertainment conglomerates will address new related-party streaming deals for historical library television programs, where the profit participation agreements were negotiated years before in-house streaming was anticipated and have a Sales Comparison ATP. Although we have the recent eight-figure deals for *Friends*, *The Office*, and *The Big Bang Theory* where the entertainment conglomerates that owned the programs caused their studios to license them to their respective in-house streaming platforms, these deals are likely outliers. In addition to the participants likely having the Sales Comparison ATPs in their profit participation agreements, these deals were close in time to similar transactions for the same or comparable programs with unrelated third parties, which likely will not be the norm going forward. In such instances, the Sales Comparison ATPs in the participation agreements will be the linchpin for participants to prevent self-dealing and ensure that these new related-party deals are at, or near, fair market value. We discuss this issue in greater detail below at Subpart III.C.

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33. *Id.*

34. Cf. Lesley Goldberg, *Greg Berlanti Inks \$400M Overall Deal Extension at Warner Bros. TV*, HOLLYWOOD REP. (June 7, 2018, 11:15 AM), <https://www.hollywoodreporter.com/live-feed/greg-berlanti-inks-400m-deal-extension-at-warner-bros-tv-1118103> [<https://perma.cc/BY3F-LU4B>] (discussing Berlanti’s deal and his numerous concurrently running programs).

35. See Ziffren, *supra* note 21.

36. *Id.*

## II. THE MEANING AND APPLICATION OF THE SALES COMPARISON ATP

As discussed in Part I, most participant contracts from the past twenty years, under either model, include a Sales Comparison ATP that governs at least certain transactions between affiliates, generally including streaming. For example, contracts during this time period between the main Warner Bros. television studio, WBTV, and profit participants invariably included a provision like this:

Dealings with Affiliates: [(1)] Artist acknowledges that WBTV is a subsidiary of Warner Bros. Entertainment Inc., which is a subsidiary of AOL Time Warner, Inc., a diversified, multi-faceted, international company, whose affiliates include, or may in the future include, among others, exhibitors, networks, stations and programming services, syndication and distribution companies, video device distributors, record companies, publishers (literary and electronic), internet service providers and/or other internet companies, and wholesale and retail outlets (individually or collectively, “Affiliated Company or Companies”). [(2)] Artist further acknowledges that WBTV may, in the unilateral exercise of its sound business judgment and taking into account business interests of WBTV and its Affiliated Companies, make use of Affiliated Companies in connection with its distribution and exploitation of the Series episodes (including the Pilot), as, when and where WBTV deems it appropriate to do so. [(3)] Artist expressly waives any right to object to such distribution and exploitation of any Series episode (including the Pilot), or aspects thereof, or assert any claim that WBTV should have offered the applicable distribution or exploitation rights to unaffiliated third parties (in lieu of, or in addition to, offering the same to Affiliated Companies). [(4)] In consideration thereof, WBTV agrees that WBTV’s transactions with Affiliated Companies will be negotiated in good faith (i.e., any such amounts shall be generally consistent with the amounts that the Affiliate Company pays in similar transactions with unrelated third party distributors for comparable programs, that is, programs of similar length, type and ratings performance). (5) Artist agrees that its sole remedy against WBTV for any alleged failure by WBTV to comply with the terms of this paragraph shall be money damages, . . . and Artist hereby waives any right to seek or obtain preliminary or permanent equitable relief in connection with any such alleged failure. (6) In no event shall Company or any Affiliated Company be liable under any circumstances for consequential, incidental, special, exemplary, or punitive damages.<sup>37</sup>

We have included the numbers in parentheses to facilitate the below discussion of the purpose and meaning of each sentence of the Sales Comparison ATP.

Other studios have used similar Sales Comparison ATPs, with minor variations in the specific language, but with the same goal in mind—to provide a largely objective standard for related-party transactions. For another example,

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37. Trial Exhibit 296 at 27, *Kirkman v. AMC Film Holdings LLC*, No. BC672124 (Cal. Super. Ct. July 22, 2020) (emphasis omitted). This exhibit is on file with the authors.

the provision in AMC's profit participation agreement with Robert Kirkman, the creator of TWD, states:

Dealings with Affiliates: [(1)] Owner acknowledges that AMC is part of a diversified, multi-faceted, international company, whose affiliates include, or may in the future include, among others, production companies, exhibitors, television "platforms", networks, stations and programming services, video device distributors, record companies, publishers (literary and electronic) and wholesale and retail outlets (individually and collectively "Affiliated Companies). [(2)] Owner further acknowledges that AMC has informed Owner that AMC may elect to make use of Affiliated Companies in connection with its production, distribution and exploitation of the Pilot and Series, as, when and where AMC deems it appropriate to do so. [(3)] Owner expressly waives any right to object to such production, distribution and exploitation of the Pilot and Series, or aspects thereof, or assert any claim that AMC should have offered the applicable production/distribution/exploitation rights to unaffiliated third parties (in lieu of, or in addition to, offering the same to Affiliated Companies). [(4)] In consideration thereof, AMC agrees that AMC's transactions with Affiliated Companies will be on monetary terms comparable with the terms on which AMC enters into similar transactions with unrelated third party distributors for comparable programs after arms length negotiation. [(5)] Owner expressly agrees that its sole right and remedy against AMC for any alleged failure by AMC to comply with the terms of this paragraph shall be a claim for damages at law; and Owner hereby waives any right to seek or obtain preliminary or permanent equitable relief in connection with any such failure.<sup>38</sup>

A third example is the Sales Comparison ATP used by Fox Studios, which was included in agreements for the profit participants in *Bones*:

Dealings With Affiliates: [(1)] Each of Company and Artist acknowledges that Fox is part of a diversified, multi-faceted, international company, whose affiliates include, or may in the future include, among others, exhibitors, television "platforms", networks, stations and programming services, video device distributors, record companies, internet companies, so called "E.Commerce companies", publishers (literary and electronic) and wholesale and retail outlets (individually or collectively, "Affiliated Company or Companies"). [(2)] Each of Company and Artist further acknowledges that Fox has informed Company and Artist that Fox intends to make use of Affiliated Companies in connection with its distribution and exploitation of the Series episodes (including the Pilot), as, when and where Fox deems it appropriate to do so. [(3)] Each of Company and Artist expressly waive any right to object to such distribution and exploitation of any Series episode (including the Pilot) (or aspects thereof) or assert any claim that Fox should have offered the applicable distribution/exploitation rights to unaffiliated third parties (in lieu of, or in addition to, offering the same

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38. Trial Exhibit 1, at 10–11, *Kirkman*, No. BC672124 (emphasis omitted). This exhibit is on file with the authors.

to Affiliated Companies). [(4)] In consideration thereof, Fox agrees that Fox's transactions with Affiliated Companies will be on monetary terms comparable to the terms on which the Affiliated Company enters into similar transactions with unrelated third-party distributors for comparable programs. [(5)] Each of Company and Artist agrees that Company's and Artist's sole remedy against Fox for any alleged failure by Fox to comply with the terms of this Paragraph shall be actual damages, and Company and Artist hereby waive any right to seek or obtain preliminary or permanent equitable relief or punitive relief in connection with any such alleged failure.<sup>39</sup>

As shown by these three examples, the Sales Comparison ATP language is relatively standard across studios. There are some individual variations, however. For instance, the fourth sentence of the Kirkman ATP includes a requirement that the unrelated-party transactions used to model the related-party transactions must be negotiated at "arms length," a negotiated term that is not expressly included in the other ATPs (though it is implied by the requirement that the related-party transaction be based on unrelated third party deals).<sup>40</sup> Similarly, the WBTW Sales Comparison ATP states that related-party transactions shall be negotiated in "good faith," suggesting a subjective standard.<sup>41</sup> However, the fourth sentence goes on to define good faith in an objective manner: "i.e., any such amounts shall be generally consistent with the amounts that the Affiliate Company pays in similar transactions with unrelated third party distributors for comparable programs, that is, programs of similar length, type and ratings performance."<sup>42</sup> The use of "i.e." as opposed to "e.g." is key. The phrase "i.e." means "that is," and "introduces a rewording or a clarification of a statement that has just been made or of a word that has just been used."<sup>43</sup> By contrast, the phrase "e.g." means "for example" and "introduces one or more examples that illustrate something stated."<sup>44</sup>

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39. Declaration of Molly M. Lens at 12–13, *Wark Ent. Inc. v. Twentieth Century Fox Film Corp.*, No. BC602287 (Cal. Super. Ct. May 2, 2019) (emphasis omitted). This document is on file with the authors.
  40. Trial Exhibit 1, *supra* note 38, at 11. The mandate that each related-party transaction be modeled on transactions between unrelated parties is a strong indicator of fair market value since unrelated parties negotiate at arm's length and obtain fair market value. See, e.g., *Guilford Wineries & Distilleries v. Fresno County*, 124 Cal. Rptr. 96, 98–99 (Ct. App. 1975) (holding that sale of a business was arm's length transaction because "[t]here was no relationship whatsoever between the two corporate entities and the sale was consummated only after extensive negotiations between the officers of the companies").
  41. Trial Exhibit 296, *supra* note 37, at 28.
  42. *Id.*
  43. e.g., MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/e.g.> [<https://perma.cc/XZ82-93X2>].
  44. *Id.*

Notwithstanding these slight differences, the Sales Comparison ATPs are remarkably similar among the studios and are intended to give the entertainment conglomerate some protection against claims of self-dealing while, at the same time, providing participants with some protection from self-dealing.

The Sales Comparison ATP protects the entertainment conglomerate by creating a largely objective standard for related-party transactions. The studio must compare and model, in real time, its related-party transactions, basing them upon similar transactions that its affiliates (or the studio itself, depending on the language of a particular ATP) engaged in with unrelated third parties for comparable programs. The entertainment conglomerate should have the information in-house on its own transactions that are necessary to ensure compliance. If the studio does the modeling correctly—meaning a particular related-party transaction is on comparable monetary terms to similar transactions with unrelated third parties for comparable programs—the studio cannot be sued for failing to offer the rights in question to an unrelated third party or for failing to obtain fair market value for the rights. The participant conditionally waived these rights in the third sentence of the provision.<sup>45</sup> In other words, the studio avoids the subjective fair market value and arm's length test that was in the *Will & Grace* contract and other contracts of its era, as described above in Part I.

The Sales Comparison ATP protects talent as well. The talent's waivers of the rights set out in the third sentence of the Sales Comparison ATP, namely the right to object to (1) the studio's engaging in such related-party transactions and (2) the studio offering the applicable rights to unaffiliated third parties to see if they would pay more, are contingent upon the studio complying with the requirements of the fourth sentence. If the studio does comply with the requirements in the fourth sentence, the resulting related-party contract terms should be at or close to fair market value, as they are modeled on similar transactions with unrelated third parties for comparable programs. If the studio does not comply with the requirements of the fourth sentence, both waivers in the third sentence are vitiated and the participant can bring a claim based on one or both of them.

While the term fair market value is not used in the Sales Comparison ATP—and the provision is intended to avoid a subjective determination of the fair market value of the relevant related-party transaction and how it was negotiated—the language in the third and fourth sentences indicate that if

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45. If the affiliate's similar transactions with unrelated third parties are below fair market value—because the affiliated network is a successful bottom feeder and only pays below fair market value in transactions with third parties because of its practices or economics—but the other requirements of the fourth “In consideration” sentence are met, the participant has no claim for breach. Presumably, however, the affiliated network could not consistently pay below fair market value and hope to license quality programs from unrelated third parties.

the requirements of the fourth sentence are met, fair market value (or something very close to it) will be the result: The related-party transaction must be compared to, and modeled on, similar transactions negotiated at arm's length between unrelated parties, which are presumed to be fair market value.

The Sales Comparison ATP can therefore be viewed as a modified fair market value test, which, like the Actual License Fee and ILF model terms, is our term. It is a modified fair market value test in that if the studio complies with it as to a particular related-party transaction, the result should be at, or close to, fair market value, even though the studio is not required to determine the fair market value at the time of the transaction or negotiate with its affiliate in any particular way (as compared to the requirements in the *Will & Grace* type ATP).

The guilds have also adopted a version of the Sales Comparison ATP. The Directors Guild of America (DGA), the Writers Guild of America (WGA), and the Screen Actors Guild-American Federation of Television and Radio Artists (SAG-AFTRA), on the one hand (together, the Guilds), and the major studios and independent production companies, on the other hand, entered into collective bargaining agreements in 2008, which continue to the present date. These collective bargaining agreements contain the following standard for how gross receipts from related-party transactions are accounted for guild purposes (because the Guilds receive a percentage of the gross receipts from such transactions).

When the 'Employer's gross' derived from such exploitation is received from a related or affiliated entity that acts as the Distributor or exhibitor of the program, then the 'Employer's gross' received by the Employer from the licensing of such rights shall be measured by [(1)] the Distributor/exhibitor's payments to unrelated and unaffiliated entities in arms' length transactions for comparable programs or series, [(2)] or, if none, then the amounts received by the Employer from unrelated and unaffiliated Distributors/exhibitors in arms' length transactions for comparable programs or series, [(3)] or, if none, a comparable Distributor/exhibitor's payments to comparable unrelated and unaffiliated entities in arms' length transactions for comparable programs or series.<sup>46</sup>

The Guilds' standard is quite similar to the Sales Comparison ATPs discussed above. It provides that for related-party transactions, the Employer's gross (which is generally the studio's revenue), is determined not by the amount agreed to between the related-party studio and exhibitor (because related-party transactions are not presumed to be at fair market value), but instead based on a comparison and modeling of unrelated-party transactions in the following order: (1) by the distributor's/exhibitor's (often a network)

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46. Complaint at 26, *Kirkman v. AMC Film Holdings LLC*, No. BC672124 (Cal. Super. Ct. July 22, 2020), 2017 WL 3485074.

own transactions with unrelated parties for comparable programs/similar transactions; (2) if there are no such transactions, then by the studio's transactions with unrelated distributor/exhibitor entities; and (3) if there are no such transactions, then by the general marketplace of comparable programs/similar transactions between unrelated parties not involving entities of that conglomerate since there are none.

The first prong of the Guilds' ATP parallels the most common version of the fourth threshold sentence of the Sales Comparison ATP (although there is some variation in them as to whether the affiliate licensee's or studio's transactions with unrelated third parties are the basis for modeling). The third prong of the Guilds' ATP departs from the fourth sentence of the Comparison Sales ATP in that if the conglomerate does not have similar transactions for comparable programs with unrelated third parties at either the affiliate or studio level, the Guilds may use the entire marketplace of similar transactions entered into by unrelated entities for comparable programs to determine their share of the transaction. As discussed below in Subpart III.A, which addresses damages under the Sales Comparison ATP, the Guild's standard—which all of the major studios agreed to—indicates the intent of the studios that if there are no similar unrelated-party transactions for a comparable program by its affiliate, then under the Sales Comparison ATP, damages must be calculated based on the general market of unrelated-party transactions, namely fair market value.

#### A. *The Sales Comparison ATP Broken Down Sentence by Sentence*

We next break down and analyze the meaning of the Sales Comparison ATP, sentence by sentence, as each sentence impacts the parties' rights and obligations.

##### 1. The First Sentence

The first sentence is an acknowledgment by the participant of the breadth and nature of the conglomerate, the scope of its businesses, and its vertical integration. The term "Affiliated Companies" is very broad, and it includes not only current affiliates but ones that may be created in the future, such as in-house streaming services.

##### 2. The Second Sentence

The second sentence acknowledges that the contracting entity, which is usually a studio entity, may make use of Affiliated Companies in connection with the distribution and exploitation of the program. While the second sentence does not use the term "transaction," it implies (when reading the Sales Comparison ATP as a whole) that if the contracting entity chooses to make use of an affiliate in connection with the distribution or exploitation of the program, then there will be a transaction between the affiliated companies. Otherwise, the Sales Comparison ATP requirements could be avoided by simply making use of affiliated companies without entering into transactions

with them. In our view, the first promise of the Sales Comparison ATP is that each use of an Affiliated Company requires a transaction.

The *Bones* arbitration award addressed this issue in the context of the Fox conglomerate's related-party streaming platform, Hulu, and the arbitrator's findings were consistent with our reading of the first promise. Specifically, Judge Lichtman stated:

Respondents argue that [the Fox Studio] is, and at all relevant times was, the copyright owner of *Bones*. Inexplicably, though, [the Fox Studio] permitted parent company [the Fox Network], which had no streaming rights, to exploit those rights anyway—and to give nearly all of the revenue from that exploitation to FBC so that this revenue would not be shared with Respondents.

....

Mr. Pearson confirmed his testimony that in 2010 there was an understanding with respect to *Bones* that the Network would get full-season stacking rights for Hulu Plus going forward for the 2010/2011 season. However, this testimony was impeached by other testimony showing that the Studio, after 2010, continued to assert that there was no digital rights agreement and that it was reserving its right.

....

Based on the evidence presented, the Arbitrator finds no agreement between the Studio and the Network giving the Network current in-season streaming rights.<sup>47</sup>

With this finding, Judge Lichtman indicated that when the Fox Studio granted to the Fox Network certain streaming rights in *Bones* (which the Fox Network later licensed to Hulu), this grant of rights was a transaction, and there had to be an agreement with monetary terms between the Fox Studio and Fox Network as consideration for the license of these digital rights.

### 3. The Third Sentence

The third sentence provides that the participant conditionally waives: (1) any objection to the studio engaging in such related-party transactions as contemplated in the second sentence, and (2) any claim that the studio should have also offered the applicable rights to unaffiliated third parties.

The key here is that the participants' waivers in the third sentence are conditioned on the studio's satisfaction of the requirements in the fourth sentence of the Sales Comparison ATP. If the studio fails to comply with these obligations, the two waivers in the third sentence are vitiated. If the waivers are vitiated, the participant can: (1) object to the contracting company engaging in such related-party transactions, and (2) can claim that the contracting company should have also offered the applicable distribution/exploitation rights to unaffiliated third parties. One can argue whether, in the absence of the third

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47. Amended Final Award, *supra* note 8, at 37, 39, 41 (citation omitted).

sentence, the participant has the right to make either objection.<sup>48</sup> However, the Sales Comparison ATP, when read as a whole,<sup>49</sup> appears to recognize or create such a contractual right if the requirements of the fourth sentence are not satisfied.

#### 4. The Fourth Sentence

The fourth sentence begins: “In consideration thereof,” which means that in exchange for the participant making the two waivers set out in the third sentence, the studio agrees that each related-party transaction will meet each of the requirements of the fourth sentence. This, in our view, is the studio’s second promise in the Sales Comparison ATP.

The fourth sentence embodies a classic sales comparison test, one of the primary methods for determining fair market value.<sup>50</sup> The case law establishes

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48. There is no fiduciary relationship as a matter of law in the ordinary profit participation relationship. *See, e.g.,* *Wolf v. Superior Court*, 130 Cal. Rptr. 2d 860, 865–66 (Ct. App. 2003). But the authors believe there is a good argument that in the absence of a standard for related-party transactions in a profit participation contract with a studio (for example, if there is no ATP of any form), there is an implied obligation that all related-party transactions be at fair market value, the historical standard. *See* Complaint, *supra* note 46, at 26.

49. *See supra* Parts II.A.4, II.A.5.

50. Although the case law regarding the comparison sales test generally arises in the context of damages (where, as we discuss in the next Part, adjustments are appropriate), the general principles underlying the comparison sales test are helpful here. The first question in applying the comparison sales test is the prima facie similarity of the things being compared. *See In re City of New York*, No. 14010/00, 2007 WL 509797, at \*22 (N.Y. Sup. Ct. Feb. 15, 2007) (“[S]ince the comparable sales are not sufficiently similar to the subject property to permit meaningful comparison . . . the court concludes that it is unable to rely upon the appraisals offered by either party . . .”); *see also* *Gen. Elec. Co. v. Town of Salina*, 504 N.E.2d 686, 687 (N.Y. 1986) (“[M]arket value may be determined with evidence of *recent* sales of comparable properties.” (emphasis added) (citations omitted)); 51 N.Y. JUR. 2D *Eminent Domain* § 214, Westlaw (database updated Feb. 2021) (“Sales of comparable properties reflect market conditions in a given area in a given time.”). At the very least, comparable means “similarity in many respects.” *Fairfield Gardens, Inc. v. United States*, 306 F.2d 167, 173 (9th Cir. 1962).

A dissimilar sale cannot be manipulated until it becomes comparable. *See, e.g., In re City of New York*, No. 30021/97, 2008 WL 183720, at \*24–25 (N.Y. Sup. Ct. Jan. 15, 2008) (throwing out comparables that were not similar before adjustments). Of course, comparables will not be identical, and in the damages context (discussed in the next Part) courts allow adjustments to account for slight differences in otherwise similar sales in the damages stage. *Cf. County of Glenn v. Foley*, 151 Cal. Rptr. 3d 8, 13 (Ct. App. 2012) (noting that adjustments are natural and necessary, since parcels will not be precisely equivalent); *Emeryville Redevelopment Agency v. Harcros Pigments, Inc.*, 125 Cal. Rptr. 2d 12, 19 (Ct. App. 2002) (describing comparable sales approach as identifying properties “deemed to resemble the condemned property in relevant respects” and then deriving a market value after “typically adjusting the price to reflect such matters as material differences between the properties”); *Friedberg v. Comm’r*, 102 T.C.M. (CCH) 356 (2011) (noting that a “textbook” example of the comparable sales method included

that a sales comparison approach, which uses transactions between unrelated parties to determine the value of the subject transaction, is synonymous with a fair market value standard.<sup>51</sup> Similarly, California Evidence Code section 816 (Comparable Sales), which governs expert opinion testimony on the market value of property, provides:

When relevant to the determination of the value of property, a witness may take into account as a basis for his opinion the price and other terms and circumstances of any sale or contract to sell and purchase *comparable* property if the sale or contract was *freely made in good faith within a reasonable time before or after the date of valuation*. In order to be considered comparable, the sale or contract *must have been made sufficiently near in time to the date of valuation*, and the property sold must be located sufficiently near the property being valued, and *must be sufficiently alike in respect to character, size, situation, usability, and improvements*, to make it clear that the property sold and the property being valued are comparable in value and that the price realized for the property sold may fairly be considered as shedding light on the value of the property being valued.<sup>52</sup>

The Evidence Code sets forth a damages standard for the retrospective litigation setting. The threshold sentence, however, requires a real time comparison, so in the Sales Comparison ATP context, the similar transactions must have occurred prior to the related-party transaction at issue, and not after. The requirement in the Evidence Code that “comparable sales” must be “within a

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“a series of adjustments to the sale price” of each comparable), *supplemented on reconsideration*, 106 T.C.M. (CCH) 360 (2013).

For example, properties sold within the geographic area of properties taken in eminent domain proceedings are usually not directly comparable to the subject land, and therefore, differences between the property taken and the alleged comparables must be adjusted. *E.g.*, *Martin v. State*, 304 N.Y.S.2d 467, 469 (App. Div. 1969) (“Differences between the subject property and alleged comparables are the proper subject of adjustment by expert witnesses, and the degree of comparability becomes a question of fact.”). *See generally* 51 N.Y. JUR. 2D *Eminent Domain* § 216, West (database updated Feb. 2021) (“The failure to make adjustments renders the testimony of experts as to land value deficient, of little probative value, subject to being discredited, or insufficient to establish value.” (footnotes omitted)).

51. *See, e.g.*, *Pac. Mut. Life Ins. Co. v. County of Orange*, 232 Cal. Rptr. 233, 235 (Ct. App. 1985) (“[There are] three basic methods for determining fair market value. They are: (1) the market data method, or comparable sale method; (2) the income capitalization method; and (3) the cost replacement, or reproduction cost method.”); *Cane Tenn., Inc. v. United States*, 71 Fed. Cl. 432, 438 (2005) (“Among the accepted methods of determining market value before and after a taking is a comparable sales approach.”); *Allied Corp v. Town of Camillus*, 604 N.E.2d 1348, 1351 (N.Y. 1992) (“[C]ourts have traditionally valued property by one of three methods: comparable sales, capitalization of income or reproduction cost less depreciation.” (citations omitted)); *Caldor, Inc. v. Bd. of Assessors*, 642 N.Y.S.2d 69, 70 (App. Div. 1996) (“It is well settled that evidence of comparable sales is the preferred measure of a property’s value for the purposes of assessment valuation.” (citations omitted)).
52. CAL. EVID. CODE § 816 (West 2021) (emphasis added).

reasonable time” or “near in time” to the transaction being valued,<sup>53</sup> supports our conclusion that the Sales Comparison ATP includes a requirement that the proposed comparable transactions must be close in time to the subject transaction. We regard this as part of the similar transaction requirement. In addition, the Evidence Code’s requirements that the comparable transaction must be “freely made in good faith” and “sufficiently alike in . . . character, size, [and] situation”<sup>54</sup> mirror the language in the Sales Comparison ATP that the comparable programs must be of similar length, type, and ratings performance.

The fourth sentence in the Sales Comparison ATP has five separate requirements: (1) the subject related-party transaction must contain monetary terms (such as a license fee); (2) those monetary terms must be comparable with the monetary terms the Affiliated Company pays; (3) in similar transactions that existed at the time of the related-party transaction at issue; (4) with unrelated parties; (5) for comparable programs.<sup>55</sup> The fourth sentence, therefore, denotes bilateral obligations—the studio makes its promises in the fourth sentence in consideration for the waivers provided by the participant in the third sentence.

A third promise in the Sales Comparison ATP, which is a combination of an express and implied promise, is that the studio will have (or obtain) access to its affiliates’ similar transactions with unrelated parties for comparable programs, and it will model each related-party transaction on them in real time.<sup>56</sup> Indeed, how else can the parties, including the studio, receive the benefit of the objective test in the fourth sentence, which the studios designed to avoid the uncertainty of a subjective fair market determination, and the ensuing litigation it caused? In sum, while the fourth sentence does not require the studio to subjectively determine the fair market value of each related-party transaction before it enters the transaction, it does require this objective modeling.

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53. *Id.*

54. *Id.*

55. Kirkman’s Comparison Sales ATP with AMC had a sixth “after arm’s length negotiation” requirement. Trial Exhibit 1, *supra* note 38, at 11. For most Comparison Sales ATPs, this requirement is implied in the requirement that the monetary terms must be similar to the monetary terms of similar transactions with unrelated third parties, which are presumed to be arm’s length negotiations.

56. Note the use of the plural “similar transactions.” One outlier comparable program/transaction does not meet this requirement; there must be at least two comparable programs and transactions. The use of the plural recognizes that multiple comparables make for a more accurate valuation than a single one and should be used when available. This point is supported by standard practice of the comparable sales method. *E.g.*, *In re Addition to Lincoln Square Urb. Renewal Project*, 199 N.Y.S.2d 225, 232 (Sup. Ct. 1960) (“[A] single sale is not enough to establish value.”). *But see* *Manorhaven Boulevard v. Town of North Hempstead*, 342 N.Y.S.2d 962, 967 (App. Term. 1973) (observing that “reliance upon one sale as a means of determining value is recognized in this State as valid,” but pointing out that comparability must mean, “at the very least, similarity in many respects” (quoting *Fairfield Gardens*, 306 F.2d at 173)).

Judge Lichtman agreed with this interpretation in the *Bones* dispute. He emphasized that it was the Fox Studio's obligation to consider similar transactions that meet the requirements of the fourth sentence for each related-party transaction at the time the related-party transaction takes place. Judge Lichtman focused on the portion of the fourth sentence which states that the related-party transactions "*will be* on monetary terms comparable," clarifying that the Fox Studio may consider only third party transactions with the relevant Fox affiliate that existed before the challenged related-party transaction.<sup>57</sup> Thus, Judge Lichtman found that the Fox Studio could not satisfy the requirements of the fourth sentence by identifying third-party transactions its affiliates entered into after the challenged related-party transaction took place, as follows:

According to Fox's present assertion, the standard of [the threshold sentence] will only be employed if a particular transaction is challenged. Under this scenario, then, there is no metric by which the Studio and Participants have to measure the fairness of the transaction, no certainty that what the Network indeed agreed to was fair, and no way for the Studio to belatedly bring the transaction into compliance. In fact, under Fox's construction, a transaction that complies with [the threshold sentence] at the time of licensing could subsequently become non-compliant if [the Fox studio's] affiliates thereafter enter into benchmark agreements on more favorable monetary terms. Fox cannot seriously contend that any party, let alone the Studio and Participants, actually agreed to unknown, subsequently occurring "similar transactions" standard to be the controlling standard. This interpretation is illogical and untenable.<sup>58</sup>

When read together, the third and fourth sentences of the Sales Comparison ATP provide that if the studio can establish that it met each of the requirements of the fourth sentence for a particular related-party transaction, the participant cannot bring a claim that the rights in question should have also been offered to unrelated parties or that the applicable license was under fair market value. However, if the studio cannot make this showing, the consideration for the participant's two waivers in the third sentence is vitiated, and the participant may object on one or both bases. Again, this reading is consistent with the *Bones* Award, where Judge Lichtman relied on statements of the Fox executives who drafted the Fox Studio's Sales Comparison ATP:

Then, Mr. Newman<sup>59</sup> revealed that he was involved in the group that conceived of [the Sales Comparison ATP]:

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57. Amended Final Award, *supra* note 8, at 17.

58. *Id.* at 18.

59. This refers to Gary Newman, who was then Chairman of Twentieth Century Fox Television, the studio.

Q. Now, from being involved in the group that conceived this paragraph, do you have an understanding of what the goals were in terms of this particular language?

A. Yes.

Q. What are the goals?

A. You know, as we were trying to come up with a standard of dealing that, that would be as objective as we could make it, we decided to utilize the comparable terms that the affiliated company, so in our case it would have been the Fox network, had entered into with third parties.

In direct contrast to Ms. Walden's understanding of the Studio's obligation to participants, Mr. Newman stated that the goal of [the ATP] was to make an objective standard. He explained why:

[W]e felt that was a better standard than the more subjective ones, like fair market value or other such things. We wanted something that you could actually go find data and be able to draw your conclusions from, from that data.

Not only do each of the co-presidents of the Studio initially vary widely in their understanding of the obligations the Studio had toward its talent, Ms. Walden actually attempted to provide a completely different interpretation, enabling Fox to defend itself on the basis of fair market value. This concept nowhere appears in the contract.

Ironically, when Mr. Newman was recalled to the stand on behalf of Fox, he then tried to adopt Ms. Walden's concept of fair market value and move away from the very language of the provision itself and one he helped develop. By attempting to morph the language of the operative contract to one of fair market value, both the Network and the Studio are in sync with one another in their defense of the breach claims. However, this attempt to adopt the same understanding only serves to highlight the breach and their impeachment.

Even after stating that the standard was an objective one requiring data, Mr. Newman did not recall whether he himself ever did any research or asked anybody to do research to aid in the Studio's negotiations with the Network. Instead, Mr. Newman claims he went to agents to get marketplace information regarding Season 5. Essentially, this "marketplace information" was gathered from a single lunch conversation about CBS's renegotiation on Ghost Whisperer with ABC Studios. Not only did this testimony lack any specificity, but more importantly, to reiterate, "*market information*" is not the standard under [the ATP].

Fox's own witnesses—from the Studio and the Network—establish that Fox did not even attempt to comply with [the ATP]. In fact, there is no evidence that even one Fox employee asked for, received, or reviewed a "similar transaction[]" with unrelated third party distributors for comparable programs."

The testimony of both Mr. Newman and Ms. Walden regarding “marketplace information” is not only troubling but extremely disconcerting. The more these individuals testified the more incredulous their testimony appeared. Specifically, their testimony was not only “*NOT*” at odds with the Network but actually served the interests of the Network, meaning if they could successfully morph the standard of third party comparables to some marketplace value it would then serve to argue that no breach occurred since the value of *Bones* was fairly calculated and achieved.

This is not a case of insufficient, questionable, or unreliable information. Rather, this is a case of a complete absence of information, and the plain words of [the ATP] require that Fox look at “similar transactions with unrelated third-party distributors for comparable programs.” This was not done, and Fox cannot deny this fact.<sup>60</sup>

The requirements of the fourth sentence must be satisfied as to each related-party transaction for the program at issue. For example, in the *Bones* case, there were three distinct related-party transactions challenged by the participants, and Judge Lichtman found that the Fox Studio must satisfy the fourth sentence for each of them: (1) several renewal/extended term broadcast network license fee agreements between the Fox Studio and the Fox Network for seasons 5–8; (2) the license transaction between the Fox Network and Hulu for streaming rights; and (3) foreign license transactions between the Fox Studio and various affiliated foreign Fox Networks.<sup>61</sup>

Another key issue with respect to the fourth threshold sentence is what the requirements in it mean—such as “similar” or “comparable”—and how close the monetary terms, transactions, or programs must be in order to meet these requirements. An ancillary question is whether adjustments are allowed at this threshold/liability stage. For example, it is common when valuing a house by the sales comparison method to make adjustments for a different number of bedrooms, a different lot size, and the like between the subject

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60. Amended Final Award, *supra* note 8, at 15–16 (citations omitted).

61. *Id.* at 15, 34, 37. When considering each of the international related-party transactions that were challenged in the *Bones* case, Judge Lichtman found breaches with respect to the United Kingdom, Spain, and Italy. *See id.* at 34. As to the United Kingdom related-party transaction with the Sky Network (a Fox affiliate), the Fox Studio representative conceded that the studio did not model its related-party transaction with Sky on third-party agreements between Sky and unrelated studios. *Id.* at 35. The Fox Studio representative testified that the studio determined the license fees it sought from Sky based on the Fox Studio’s historical practices in the territories, not Sky’s licensing practices with unrelated third parties, as required by the Fox Studio’s Comparison Sales ATP. *Id.* Fox argued that the participants failed to satisfy their burden under the Comparison Sales ATP because they presented no evidence of unrelated third-party deals with Sky. *Id.* In response, Judge Lichtman found that Fox would turn the Comparison Sales ATP “on its head” with this argument, as the Fox Studio is the party that promised to comply with the fourth sentence in exchange for the participants’ waivers in the third sentence. *See id.*

house and the houses it is being compared to, in order to determine the value of the subject house. Can a similar adjustment be made at the threshold/liability phase where the purpose is not to determine a specific value, but to see if the transaction in question can be further challenged, that is, whether the waivers in the third sentence will be enforced. We believe that the “similar” and “comparable” requirements in the fourth sentence require more than just the ability to compare the monetary terms, transactions, or programs at the threshold/liability stage with adjustments. Rather, the monetary terms, transactions and programs of the challenged transaction and those it is compared to must be close without adjustments. The fact that the fourth sentence does not state “similar or comparable with adjustments” supports our belief that no adjustments are allowed at the threshold/liability phase. This is different from the damages phase, as set forth in the fifth sentence discussed below, in the event of a breach of the provision, where adjustments are allowed. Our view is consistent with the language in the WBTV Sales Comparison ATP, which defines comparable programs as “programs of *similar* length, type and ratings performance.”<sup>62</sup>

Similarly, with respect to comparable monetary terms, it is difficult to talk about this requirement unless it is coupled with the similar transactions requirement. Read together, these two requirements refer to: (1) the monetary term—the dollar amount of the license fees; and (2) the transaction terms—the bundle of rights being licensed, including the type of rights being licensed (network broadcast rights vs. streaming rights vs. cable syndication rights vs. foreign distribution rights), the cycles of each (an initial broadcast network license agreement is not a similar transaction to an extended term broadcast network license agreement), the number of exhibitions allowed under the license (allowing ten exhibitions for \$1 million is not a similar transaction to allowing one hundred exhibitions for the same \$1 million), the territory, and the length of term of the license.<sup>63</sup> In the streaming context, a similar transaction must be for similar streaming rights, such as territory and term. For example, if an unrelated third-party streaming deal is for five years and for the United States only, but the related-party deal is in perpetuity and for worldwide streaming, they are not similar transactions.

There are still questions about how close a transaction, program, and monetary terms must be to be similar or comparable. For example, if the related-party streaming transaction at issue has a license fee of \$2 million an episode, and the proposed similar transactions have license fees of \$2.5 million and \$2.7 million an episode, is that close enough to satisfy the studio’s obligations under

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62. Trial Exhibit 296, *supra* note 37, at 28 (emphasis added).

63. To further illustrate, a transaction for the initial network license of a television program is not a similar transaction to an extended term network license of a television. And a network license fee transaction for the sixth season of a successful series is not a similar transaction to an eighth season network license fee transaction.

the comparable monetary terms requirement? Similarly, with respect to comparable programs in the context of a first extended-term broadcast license fee negotiation for a particular program (for its fifth and sixth seasons), are other one-hour dramas in their fourth season (when the extended-term deal is negotiated) close enough to each other if one has a top ten rating and the other has middling rankings? These types of questions are still being litigated.

Studios have sometimes argued that if a particular related-party transaction is simply capable of being compared to proposed similar transactions (and the other component parts of the threshold sentence), even if they are very different, the requirement is satisfied.<sup>64</sup> For example, if the challenged transaction between the studio and its affiliate had a license fee of \$1 million an episode and the affiliate paid \$2 million for similar rights from unrelated studios, studios have argued that the challenged related-party transaction meets the requirements of the fourth sentence because it is capable of being compared to the third party license fee transactions, even if the monetary terms are not close to each other. Similarly, one can compare a streaming transaction involving a one-year term in the United States only to another streaming transaction involving a five-year term and a worldwide distribution even though the material transaction terms are quite different. The dictionary definitions for comparable and similar give some justification for this position.<sup>65</sup>

This studio argument raises similar questions to the issue of whether adjustments are allowed at the threshold/liability phase or whether the two things being compared must be sufficiently close without adjustments, as discussed above. We again submit that “capable of being compared” as the definition of what is comparable or similar is incorrect. At this threshold/liability stage, the intent of the parties—and the only interpretation that makes sense given the purpose of the Sales Comparison ATP—is that the items being compared (whether they are monetary terms, similar transactions, or comparable programs) must be sufficiently similar or close without adjustments. Again, how similar and close is a contract interpretation question and—based on the language of the typical Sales Comparison ATP—subject to debate. How can one say at the threshold/liability stage that a transaction with a monetary term of \$1 million has a comparable monetary term to another transaction for \$3 million even if they can be compared with adjustments. This would pervert

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64. See, e.g., *Sander/Moses Prods., Inc. v. NBC Studios, Inc.*, 48 Cal. Rptr. 3d 525, 530–31 (App. Ct. 2006) (quoting disputed jury instructions to the effect that “[t]he term comparable means capable of or suitable for comparison or similar. To determine what is comparable, you should consider only the factors that the evidence has shown were appropriate and consistent with the contract’s purpose for determining license fees.”).

65. See *Comparable*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/comparable> [<https://perma.cc/L6FV-75AP>] (“[C]apable of or suitable for comparison; similar, like.”); *Similar*, BLACK’S LAW DICTIONARY (2d ed. 1910) (defining “similar” as “sameness in all essential particulars”).

the modified fair market value purpose of the fourth sentence. Unless the challenged related-party transaction and the proposed similar transactions are sufficiently close or similar in each of the requirements of the fourth sentence, without any adjustments, the obligations in the fourth sentence would be meaningless. (Whether a monetary term of \$1.2 million is sufficiently close to a monetary term of \$1 million, however, can be debated.) Again, the fourth sentence does not state comparable or similar with adjustments. Studios could have drafted the sentence this way, but they did not. In sum, both the language and the purposes of the fourth threshold sentence dictate that comparable and similar must mean close and not just capable of being compared with adjustments.

If the studio does not satisfy its obligations in the fourth sentence with respect to a particular related-party transaction, the studio can still enter into the transaction.<sup>66</sup> As the fifth sentence makes clear, the participant has no right to enjoin the transaction. In reality, the participant may not even know about the related-party transaction when it takes place, let alone its terms and how it compares to unrelated-party transactions. But if the studio does not meet its obligations in the fourth sentence at the time of the transaction, it will do so at its own peril—such a breach opens the studio up to a damages claim pursuant to the fifth sentence, which is discussed in the next Part.

### 5. The Fifth Sentence

The fifth sentence of the Sales Comparison ATP addresses what happens when the studio breaches its earlier promises in the ATP. The participant may sue for damages but not for injunctive relief. This may sound simple, but there are profound questions about the measure of damages and how damages may be proved.

Under both New York and California law, the basic principle of contract damages is to put the injured party in as good a position as he or she would have been if the contract had been fully performed.<sup>67</sup> The legal term for this is expectation damages. Therefore, the first question is whether the participant's expectation damages pursuant to the fifth sentence are limited to what the affiliated company would have paid if it licensed the program from an unrelated third party (that is, focusing on the peculiarities of the specific affiliated licensee)? Or, is the participant entitled to the fair market value of

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66. Indeed, the fifth sentence expressly provides that the participant cannot enjoin the transaction, and the participant would often not have the information in real time to do so, even if he or she was permitted to do so under the Sales Comparison ATP.

67. *E.g.*, *Brushston-Moira Cent. Sch. Dist. v. Fred H. Thomas Assocs.*, 692 N.E.2d 551, 553 (N.Y. 1998); *Goodstein Constr. Corp. v. City of New York*, 604 N.E.2d 1356, 1360 (N.Y. 1992); *Postal Instant Press, Inc. v. Sealy*, 51 Cal. Rptr. 2d 365, 368 (Ct. App. 1996) (“Under general contract principles, when one party breaches a contract the other party ordinarily is entitled to damages sufficient to make that party ‘whole,’ that is, enough to place the non-breaching party in the same position as if the breach had not occurred.”).

what a particular third party or hypothetical buyer would have paid to a hypothetical seller to license the program, which were the rights the participant waived in the third sentence, in return for the studio complying with its now breached obligations under the fourth sentence? The recent TWD interim ruling addresses this issue.

B. *The Authors Respectfully Disagree With the TWD Interim Ruling Finding That Damages Are Limited to What the Affiliate Would Have Paid*

The trial court's recent interim ruling in the TWD case found that "[t]he plain language of the ATP forecloses application of a [FMV] standard" since the fourth sentence of the ATP only requires consideration of similar transactions that AMC "enters into with unrelated third part[ies] . . . for comparable programs after arms length negotiation," not the entire market."<sup>68</sup> The court adopted AMC's argument that damages are limited to what the studios' affiliates would pay in their transactions with unrelated third party studios.<sup>69</sup> According to this argument, if the studio conglomerate has a policy or practice of never paying fair market value or has a cap of a certain amount that it would pay to license a television program (no matter how successful the television show is), then damages are limited to the amount the studio conglomerate would pay.<sup>70</sup>

We respectfully disagree with this interim ruling, and only the future knows whether the TWD plaintiffs will prevail on their eventual appeal (assuming no earlier settlement) of this finding. Among other reasons, we think the trial court erred because it relied only on the fourth sentence of the Sales Comparison ATP to come to its conclusion, and did not address the impact of the third and fifth sentences of the Sales Comparison ATP.

As discussed above, the third sentence of the Sales Comparison ATP provides that the participant conditionally waives: (1) any objection to the company engaging in related-party transactions, and (2) any claim that the company should have also offered the applicable rights to unaffiliated third parties.<sup>71</sup> These waivers are made in consideration of, and therefore conditioned upon, the studio not breaching its obligations in the fourth sentence. As discussed above, when these obligations are breached, the participant's waivers are vitiated. Thus, we submit that the expectation damages are not what would result had the studio complied with its obligations in the fourth sentence. Instead, we submit that expectation damages are what the participant

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68. Kirkman v. AMC Film Holdings LLC, No. BC672124, 2020 WL 4364279, at \*24 (Cal. Super. Ct. July 22, 2020).

69. *Id.* at \*25–26.

70. *Id.* at \*25.

71. Again, with respect to the Kirkman ATP, this includes "production, distribution and exploitation." Trial Exhibit 1, *supra* note 38, at 10.

expected had it not agreed to the waivers in the third sentence: the license fee a particular (desperate) third party would have paid, if there is such proof, or the value the studio would have received on the open market with a hypothetical buyer and seller in the classic fair market value test.

This reading is reinforced by the plain language of the fifth sentence. It provides that if the studio fails “to comply with the terms of this paragraph,” namely the Sales Comparison ATP in its entirety, the participant can sue for monetary damages. The fifth sentence does not limit monetary damages to what the affiliate licensee would have paid in similar transactions with unrelated third parties for comparable programs, as the fourth sentence does for purposes of its comparison and modeling threshold test. Rather, the fifth sentence only comes into play if the threshold test in the fourth sentence is breached. Again, this suggests that the measure of damages, namely the expectation of the parties in the event of a breach of the fourth sentence, is linked to the two vitiated waivers in the third sentence and not to what should have happened but did not because of the studio’s breach of its obligations in the fourth sentence.<sup>72</sup>

The Guilds’ Sales Comparison ATP also supports this reading of the fifth sentence. If there are no similar transactions for comparable programs between: (1) the studio’s licensee affiliate and unrelated entities; or (2) the studio licensor and unrelated entities, then the value of the related-party transaction is determined by “comparable Distributor/exhibitor’s payments to comparable unrelated and unaffiliated entities in arms’ length transactions for comparable programs or series,” namely the general market and not what a peculiar affiliated licensee would have paid an unrelated third party.<sup>73</sup> All of these arguments were presented to the trial judge in the TWD contract interpretation trial, but the trial court’s statement of decision did not address these arguments and, instead, chose to adopt the arguments presented in AMC’s proposed statement of decision.

### 1. Proving Damages Under the Fifth Sentence

We submit that under the fifth sentence (when read in connection with the third and fourth sentences), expectation damages are the greater of: (1) what a particular third party would pay for the rights in question; or (2) fair market value pursuant to the classic test, and that fair market value can be proven by any method recognized by law for valuing an income producing property.<sup>74</sup> We believe that the participant is entitled to the greater of the two

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72. This is also consistent with the fourth sentence of the Sales Comparison ATP, which requires that each related-party transaction be modeled on transactions between unrelated parties—which is a strong indicator of fair market value since unrelated parties negotiate at arm’s length and obtain fair market value.

73. Complaint at 26, *supra* note 46.

74. While the Sales Comparison ATP does not use the actual term “fair market value” and

because these are the two rights that are conditionally waived in the third sentence of the Sales Comparison ATP. For example, if one unrelated third party network was desperate to obtain the rights to a certain program and the participant can prove that the network would have paid \$5 million an episode for the broadcast network license, but the fair market value for a hypothetical buyer is only \$4 million, the participant is entitled to damages of the greater of the two measures.

The two primary methods for measuring damages are the comparable sales method and the income method.<sup>75</sup>

*a. The Comparable Sales Method*

As to the comparable sales method, the “major premise of the sales comparison approach is that an opinion of the market value of a property can be supported by studying the market’s reaction to comparable and competitive properties.”<sup>76</sup> The “foundational criteria” for the comparable sales method for determining fair market value is that the comparables be “sufficiently alike” in “character, size, situation, usability, and improvements.”<sup>77</sup>

Under the comparable sales approach, the appraiser or damages expert finds data for sales of similar properties that are “‘voluntary,’ ‘near in time,’ ‘in the vicinity,’ and ‘involve land with similar characteristics.’”<sup>78</sup> The appraiser/expert then “uses the prices from the comparison sales, which establish the market value of the similar properties, to determine the market value of the subject property, by adjusting the price upward or downward to account for

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the threshold/liability sentence of the provision is a comparison/modeling test that does not require the determination of fair market value, the overall purpose of the provision is to ensure that all related-party transactions will be at or close to fair market value. The studios wanted a simpler, more objective way of getting to nearly the same place, which did not require a subjective determination of a fair market value number at the time of structuring the related-party transaction. Prior to the studios’ adoption of the Sales Comparison language, studios had problems defending their related-party transactions against claims of self-dealing, because where there was a standard at all, it was a subjective fair market value/arm’s length negotiation standard, or no standard at all (in which case we contend there was an implied fair market value standard, *see supra* Part II).

75. The third approach, reproduction cost, does not apply to television programs.

76. *W.O.R.C. Realty Corp. v. Bd. of Assessors*, 951 N.Y.S.2d 36, 48 (App. Div. 2012) (quoting *APPRAISAL INST., THE APPRAISAL OF REAL ESTATE* 297 (13th ed. 2008)).

77. *County of Glenn v. Foley*, 151 Cal. Rptr. 3d 8, 11 (Ct. App. 2012).

78. *Hous. Unlimited, Inc. Metal Processing v. Mel Acres Ranch*, 443 S.W.3d 820, 829–30 (Tex. 2014) (quoting *City of Harlingen v. Estate of Sharboneau*, 48 S.W.3d 177, 182 (Tex. 2001)); *see also, e.g., FMC Corp. v. Unmack*, 678 N.Y.S.2d 426, 427 (App. Div. 1998) (holding that under comparable sales approach, market value is determined by reference to recent sales of comparable properties); *Mazur Bros. Realty v. State*, No. 112659, 2010 WL 8913275, at \*6 (N.Y. Ct. Cl. Oct. 25, 2010) (under a comparable sales approach, rejecting sales that were too remote in time).

differences between the properties.”<sup>79</sup> Comparability is required in all dimensions, such as in the context of a license fee transaction for a television program: comparable monetary terms, similar transactions, closeness in time, and comparable programs.<sup>80</sup> It is not enough to have three out of four requirements met, particularly where no adjustments are made for differences.

That being said, dissimilar things can be compared to prove damages, if they are comparable and adjustments are made.<sup>81</sup> For example, if the subject property has two bedrooms and a five thousand square foot lot and a proposed comparable has five bedrooms on a twenty thousand square foot lot, a monetary adjustment is made when determining fair market value based on the value of the extra bedrooms and land.

This does not contradict our position that adjustments are inappropriate when determining whether the studio breached its obligations under the fourth sentence with respect to any particular related-party transaction. Adjustments make no sense in the context of the threshold sentence and allowing them would defeat the sentence’s modified fair market purpose. The fourth sentence requires an objective comparison and modeling of the monetary terms of the subject related-party transaction based on the monetary terms of similar transactions for comparable programs. But the fourth sentence does not require the studio to identify a fair market value number for the related-party transaction. Thus, under the fourth sentence, the price for a five bedroom house on a twenty thousand square foot lot cannot be modeled on the price of a two bedroom house on a five thousand square lot if the goal (which it is, in part) is to give participants protection against self-dealing.

By contrast, if the studio has already breached its obligation under the fourth sentence and the participant brings a damages claim, then under the fifth sentence, the damages can be determined by a sales comparison approach using adjustments. In the context of valuing a license transaction, if a particular related-party transaction allowed twenty runs in 2012, and the two proposed similar transactions allowed ten runs and took place in 2002, there could be an adjustment by the appraiser/expert based on both variables (number of runs

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79. *Hous. Unlimited*, 443 S.W.3d at 829–30.

80. *Cf. Syufy Enters. v. Am. Multicinema, Inc.*, 793 F.2d 990, 1003 (9th Cir. 1986) (“Comparability is a question of fact. . . . It was for the jury to consider . . . the validity of comparison and to adjust its damage award accordingly.”); *Kenny v. Lesser*, 722 N.Y.S.2d 302, 306 (App. Div. 2001) (observing that the jury serves a “discretionary, fact-finding function” in determining comparability); *In re City of New York*, No. 4000/07, 2008 WL 4866345, at \*9 (N.Y. Sup. Ct. Nov. 10, 2008) (“Hence, differences between comparable sales and the property to be valued are the proper subject of adjustment by expert witnesses and create a question of fact as to the degree of comparability.” (citation omitted)).

81. *See, e.g., Menorah Congregation & Religious Ctr. v. Feldman (In re Menorah Congregation & Religious Ctr.)*, 554 B.R. 675, 696 (Bankr. S.D.N.Y. 2016); N.H. Dep’t of Transp. v. Franchi, 48 A.3d 849, 852–53 (N.H. 2012).

and time period) at the damages stage. These adjustments are customarily shown on a grid that lists common characteristics of each of the comparable sales and the subject property and identifies the various adjustments of the comparable sales' characteristics to the subjects.

The recent *Bones* arbitration provides a good illustration of the comparison sales approach. Judge Lichtman awarded damages for the related-party network license fee transactions based on a comparison of the *Bones* license fee to the license fee paid by Fox to license *House* (a comparable one-hour drama licensed by Fox from an unrelated third party).<sup>82</sup>

Respondents' industry expert, Laurie Younger, compared the license agreements for Seasons 5–8 of *Bones* to the agreements for the same seasons of *House*. Her analysis ties the . . . license fee to the production budget for each of Seasons 5–8 of *Bones* and assumes that all breakage actually paid by FBC would still have been paid under a . . . license fee, which provides for payment . . . approved by the network.

Fox argues that Participants fail to calibrate for differences between *House* and *Bones*. The Arbitrator disagrees. As Ms. Younger explains, the monetary terms of FBC's extended-term license for *House* seasons 5–7 account for differences in performance by setting license fees . . . and by providing formulas . . .<sup>83</sup>

As to season eight, Judge Lichtman noted that the license fee Fox paid for *Bones* (elsewhere the Award indicates it was \$2 million per episode)<sup>84</sup> was not comparable to the \$5 million per episode paid for *House*, and while Fox could reasonably pay less for *Bones* than *House* in season 8 (since its ratings were lower), there was no justification for the dramatically lower *Bones* license fees given the narrowing performance gap between the two programs.<sup>85</sup>

To determine the damages associated with Fox Studio's breaches of the Sales Comparison ATP with respect to the foreign distribution of *Bones*, Judge Lichtman compared the foreign license fees paid for *Bones* with the license fees paid by Fox affiliates to third parties to license comparable programs in

82. In that case, there was no dispute over whether *House* was an appropriate comparable program. Judge Lichtman found that:

Both parties agree that *House* is a “comparable” program to *Bones*. Indeed, both parties' experts agree that *House* is the only “comparable program” that existed at the times *Bones* was licensed for Seasons 5–8. FBC paid [redacted] for Seasons 5–6 of *House*, and had never paid anything less in connection with any one-hour scripted series licensed from any third-party distributor prior to the Seasons 5–6 license. As such, there was no basis under [the Sales Comparison ATP] for [the Fox Studio] to have accepted lesser monetary terms from [the Fox Network] for the same seasons of *Bones*.

Amended Final Award, *supra* note 8, at 45 (emphasis added).

83. *Id.* at 46–47 (emphasis added) (citations omitted).

84. *Id.* at 12.

85. *See id.* at 46.

the applicable territory.<sup>86</sup> For the United Kingdom market, the participants' expert took a conservative approach and used the program *Journeyman* (a less successful show that the Fox Studio licensed to Sky), as a proxy for what Sky should have paid to license *Bones*, starting in season one. Judge Lichtman also noted that Sky licensed *House* from NBCU and *Lost* from Buena Vista for more than it licensed *Bones*.<sup>87</sup>

For Italy, Judge Lichtman found that the Fox Italian affiliate's licenses with a third party for the television program *NCIS* were "the most similar transactions" to the *Bones* licenses.<sup>88</sup> For Spain, FIC Spain obtained the valuable first window for *Bones* for seasons 9–11 (the first window had previously been licensed to an unrelated third party). Therefore, the participants' expert identified FIC Spain's license agreements with CBS for *Blue Bloods* and *Hawaii Five-O*, for which FIC Spain obtained the first licensing window, as the most similar transactions for comparable programs with unrelated third parties.<sup>89</sup> Because the Fox Studio had not modeled its related-party transactions with its Italian and Spanish affiliates on these unrelated third party transactions for *NCIS*, *Blue Bloods*, and *Hawaii Five-O*, Judge Lichtman found that Fox had breached the Sales Comparison ATP and awarded damages based on the differences between what the Fox affiliates paid for these international distribution deals and the amounts paid to Fox Studios for the foreign exhibition rights for *Bones*.<sup>90</sup>

Although the *Bones* decision supports the use of the comparison sales approach, including using unrelated-party transactions where one party was the affiliate licensee, we submit that damages under the fifth sentence of the ATP can be proven in any legally recognized way.<sup>91</sup> Among other things, damages are awarded only if the two waivers in the third sentence are vitiated by the studio failing to comply with the modified fair market value standard in the fourth sentence. There is no limitation in the fifth sentence with respect to how the participant may prove damages.

Had the entertainment conglomerates wanted to limit the monetary damages provided in the fifth sentence to what its affiliate licensee would have paid to an unrelated studio in a similar transaction for a comparable program, they could have used the same language from the fourth sentence and added it to the fifth sentence. Indeed, in some more recent Sales Comparison ATPs

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86. *See id.* at 34–36.

87. *Id.* at 48.

88. *Id.* at 49.

89. *Id.* at 49–50.

90. *Id.* at 50.

91. Nowhere in the *Bones Award* does Judge Lichtman interpret the ATP, or the damages sentence in particular, as requiring the use of in consideration sentence comparables. Rather, Judge Lichtman determined damages on this basis since that is how the parties presented the damages' side of the case to him.

that we have seen, some studios have included additional language in the fifth sentence that purports to limit the remedy provided to the amount that would meet the standard of the fourth sentence.<sup>92</sup> For these Sales Comparison ATPs, the studios will have a stronger argument that the proof of damages is limited to the studio affiliates' own deals, rather than the broader marketplace of deals that can be used to determine fair market value.

*b. The Income Method*

A second method of proving the fair market value of an income producing property is the income approach. This approach estimates damages based on future cash flows of the program at issue, not from comparable sales.<sup>93</sup> “The income approach to valuation is based on the premise that income producing property derives its value from the net income it is able to produce.”<sup>94</sup> Specifically, the damages are based on a projection of the net income the licensee expects to earn from the transaction or property at issue. This approach is commonly applied in litigation involving real estate disputes. In such instances, “the appraiser estimates the fair market rental income of the property, makes deductions for vacancy and loss of rentals to arrive at [an] effective gross income, then deducts expenses to arrive at net income, which is then capitalized.”<sup>95</sup> The same approach applies if the property being appraised is a television program in the context of a particular challenged related-party transaction. The appraiser or other expert estimates the total expected income to the licensee from the specific related-party transaction for the network broadcast license of a program. This would include the ad revenue and MVPD revenue associated with exhibitions of the program, but could also include things like lead-in and lead-out value, and the increased value to the brand caused by exhibitions of the program. Then, the appraiser or other expert would deduct expenses to get to net income, which would be capitalized over the relevant period of time. In the streaming context, the income method may be harder to measure. This is because the value of a program to a licensee streamer is based on the

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92. See, e.g., Trial Exhibit 9 at 15, *Kirkman v. AMC Film Holdings LLC*, No. BC672124 (Cal. Super. Ct. July 22, 2020) (limiting damages to “the establishment of monetary terms which meet the foregoing standard,” as set out in the fourth “In consideration” sentence). This exhibit is on file with the authors.

93. See *Trimarco v. Data Treasury Corp.*, No. 30324–2003, 2013 WL 7231013, at \*29 (N.Y. Sup. Ct. Oct. 30, 2013).

94. *Senpikie Mall Co. v. Assessor*, 525 N.Y.S.2d 104, 106 (App. Div. 1988); see also *Bontrager v. Siskiyou Cnty. Assessment Appeals Bd.*, 118 Cal. Rptr. 2d 182, 185 (Ct. App. 2002) (noting that the income approach “convert[s] the expected income into the value of the property”); *EHP Glendale v. County of Los Angeles*, 122 Cal. Rptr. 3d 378, 387 (Ct. App. 2011) (“The income method is based on the assumption that in an open market a willing buyer would pay a willing seller an amount approximately equal to the present value of the income to be derived from the property.”).

95. *VGR Assocs. v. Assessor, Bd. of Assessment Rev. of New Windsor*, 857 N.Y.S.2d 666, 679 (App. Div. 2008) (citation omitted).

program's ability to keep and attract subscribers, a metric that it is more difficult to measure.

## 2. Measuring Fair Market Value in a Retrospective Appraisal on an Ex Ante vs. Ex Post Basis

A retrospective appraisal is when you are appraising today something that happened (or should have happened) in the past. It is what is done in litigation, which by definition, is after the fact. For instance, a participant may sue a studio over a particular related-party transaction that happened in 2010, but it may not be until 2021 when experts will value what should have been paid in 2010 for the relevant license. This is in contrast to a real time or current appraisal, which would occur in real time at the time of breach, for example, in 2010 when the challenged related-party transaction took place.

There are two types of retrospective appraisals. An ex ante appraisal is a retrospective appraisal based solely on the knowledge that was available to the parties at the time the transaction took place.<sup>96</sup> Under the ex ante approach, experts will opine on the value of the challenged related-party transaction using information available at the time the transaction took place.

An ex post appraisal is a retrospective appraisal that uses the income that was actually produced by the transaction/asset in question—even if it was not knowable when the challenged related-party transaction took place—as a proxy for what would have been predicted when the underlying transaction took place. Courts allow this approach when doing so would result in a more accurate calculation of damages, calling it the “book of wisdom” approach.<sup>97</sup> The economic theory underlying an ex post appraisal is that there is often insufficient objective evidence in the future that proves what people actually knew at the time of the challenged related-party transaction. Courts, however,

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96. See, e.g., *Lucente v. Int'l Bus. Machs. Corp.*, 310 F.3d 243, 262 (2d Cir. 2002) (“New York’s rule for ‘[m]easuring contract damages by the value of the item at the time of the breach is eminently sensible and actually takes expected lost future profits into account.” (quoting *Sharma v. Skaarup Ship Mgmt. Corp.*, 916 F.2d 820, 826 (2d Cir. 1990))); *Schonfeld v. Hilliard*, 218 F.3d 164, 176 (2d Cir. 2000) (“When the defendant’s conduct results in the loss of an income-producing asset with an ascertainable market value, the most accurate and immediate measure of damages is the market value of the asset at the time of breach—not the lost profits that the asset could have produced in the future.”); *Sharma*, 916 F.2d at 825 (“[T]he market value at the time of the breach is the measure of damages.”).

97. *Sinclair Refin. Co. v. Jenkins Petrol. Process Co.*, 289 U.S. 689, 698 (1933) (noting that information might become “available to correct uncertain prophecy” after a breach of contract); see also *Fishman v. Estate of Wirtz*, 807 F.2d 520, 552 (7th Cir. 1986) (“[W]e know of no case that suggests that a value based on expectation of gain is more relevant and reliable than one derived from actual gain.”); *In re Bd. of Rapid Transit R.R. Comm’rs of N.Y.*, 90 N.E. 456, 465 (N.Y. 1909) (“Certainty is better than conjecture, and the injuries actually inflicted a better guide than the opinions of experts as to the market values just before and after . . .”).

generally favor an *ex ante* perspective when it is not clear that *ex post* information would result in a more accurate assessment of damages.<sup>98</sup>

In select situations, New York courts have recognized a third, hybrid approach to damage calculations that incorporates information from before and after the time of breach.<sup>99</sup>

### III. FURTHER ANALYZING THE REQUIREMENTS OF THE THRESHOLD SENTENCE IN THE CONTEXT OF RELATED-PARTY STREAMING

As more entertainment conglomerates move towards exhibiting their library content on their own in-house streaming platforms—once their contracts with Netflix, Amazon Prime, Hulu, and other third-party streaming services expire—profit participants should keep a close eye on these new related-party transactions to make sure studios comply with their obligations under any Sales Comparison ATP in the relevant profit participation agreements. As discussed in Subpart II.A above, we predict this area will be ripe for litigation over the next decade. In this final Part of the Article, we set out a few guidelines to keep in mind, particularly where there is a Sales Comparison ATP in the governing participation agreement, to ensure participants are protected as the industry further moves toward in-house streaming.

#### A. *There Must Be a Transaction Between Affiliates With Monetary Terms*

As we explain above in Part II, the first requirement of the Sales Comparison ATP is that there must be a transaction with monetary terms each time the studio makes use of an affiliated company for the distribution or exploitation of a program. Regarding digital streaming rights, there must be a transaction between the studio entity that owns the rights to the program and the related-party streamer for the digital rights in order to exhibit the program at issue. Additionally, the transaction must be on monetary terms. In other words, the

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98. *See, e.g.*, *Odetics, Inc. v. Storage Tech. Corp.*, 185 F.3d 1259, 1277 (Fed. Cir. 1999) (affirming that license agreements made four and five years after an initial patent infringement were “irrelevant for the hypothetical negotiation” landscape given changes in technology and the economy).

99. *See, e.g.*, *Credit Suisse First Bos. v. Utrecht-Am. Fin. Co.*, 923 N.Y.S.2d 482, 483 (App. Div. 2011) (“In accordance with the objective that a party seeking recovery for breach of contract is entitled ‘to be made whole’ as of the time of the breach, the jury should be able to make its valuation determination on all relevant elements of the case, whether dated pre-breach, on the date of breach, or ‘some short time period thereafter.’” (citations omitted) (first quoting *Simon v. Electrospace Corp.*, 269 N.E.2d 21, 26 (N.Y. 1971); and then quoting *Boyce v. Soundview Tech. Grp., Inc.*, 464 F.3d 376, 389 (2d Cir. 2006))); *see also* Elizabeth A. Evans & Roman L. Weil, *Ex Ante Versus Ex Post Damages Calculations*, in *LITIGATION SERVICES HANDBOOK: THE ROLE OF THE FINANCIAL EXPERT* § 5, § 5.8 (Roman L. Weil et al. eds., 6th ed. 2017) (“No single approach will be appropriate for all situations; the decision to apply any particular approach will depend on case specifics. For any method described in this chapter, one can concoct a situation in which the result of applying that method would not satisfy a common perception of fairness.”).

studio must receive compensation for granting the in-house streamer the rights to stream the program.

In cases where the participant already agreed to an ILF for certain related-party transactions—namely, the transaction between the studio and the domestic broadcast network—we anticipate that some studios may take the position that the ILF covers in-house streaming as well, and thus the Sales Comparison ATP does not apply. Whether this is correct or not depends on the language of any ILF in the participant’s contract.

Some ILFs cover only the domestic network exhibition of a program. For example, the ILF used by NBC Studios in or about 2006 states expressly that it only applies when “the Program is a primetime series that is produced solely by [NBCS] (as opposed to being co-produced by [NBCS] and another studio) pursuant to a license agreement from the NBC television network . . . [for] runs licensed to the NBC television network.”<sup>100</sup> Thus, the ILF can be interpreted to cover exhibitions on the NBC television network only. However, the term “NBC television network” is not defined in the agreement, and questions could arise if, for instance, Peacock was just a division of the NBC television network. We do not know that to be the case, but if it were, the argument could be made that the ILF covers streaming exhibitions on Peacock as well.

Other ILFs are drafted more expansively and may cover some or all related-party streaming. For example, the ILF in AMC’s Proposed MAGR Definition for TWD, which the trial court found to be binding on the plaintiffs, provides: “As the license fee payable for the right to broadcast the Program by means of Non-Standard Television in the Territory in perpetuity over any programming services of AMC or an AMC Affiliate, AMC shall be deemed to have received an amount (the ‘Imputed License Fee’) . . . .”<sup>101</sup> The AMC MAGR Definition defines Non-Standard Television extremely broadly, including:

[A]ny and all forms of electronic or electromagnetic or other non-tangible exhibition or transmission of audiovisual programming, whether now existing or developed in the future, for display on a television receiver or other form of display device whether now existing or developed in the future, other than exhibitions by means of Standard Television, Consumer Video Devices and Non-Theatrical Distribution.<sup>102</sup>

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100. Trial Exhibit 236 at 42, *Kirkman v. AMC Film Holdings LLC*, No. BC672124 (Cal. Super. Ct. July 22, 2020). This exhibit is on file with the authors.

101. Trial Exhibit 9, *supra* note 92, at 6 (emphasis omitted). One of the issues in the TWD initial-phase contract interpretation trial was whether AMC’s MAGR Definition applied to the plaintiffs’ contracts, even though the definition did not exist when the plaintiffs entered into their contracts with AMC and the plaintiffs never agreed to its terms. The trial court found that AMC’s MAGR Definition did apply. *Kirkman v. AMC Film Holdings LLC*, No. BC672124, 2020 WL 4364279 at \*4–8 (Cal. Super. Ct. July 22, 2020). The authors respectfully disagree with this decision, and it remains to be seen what the outcome of any appeal will be.

102. Trial Exhibit 9, *supra* note 92, at 3. The AMC MAGR Definition also defines “AMC

The definition expressly includes (i) video on demand platforms whereby a subscriber has unlimited access to specific programming for a regularly charged fee (SVOD); and (ii) free to the consumer advertiser supported video on demand platforms (AVOD).<sup>103</sup> Thus, under AMC's MAGR Definition, it appears that the ILF covers all domestic streaming (SVOD and AVOD) on any programming service of any AMC Affiliate, in perpetuity.

*B. The Subject Related-Party Transaction Must Be Compared to and Modeled on Similar Transactions for Comparable Programs*

The requirements in the fourth sentence of the Sales Comparison ATP, if followed in real time, require the studio to compare and model its in-house streaming deals on similar streaming transactions (at least two) between the affiliated streaming service and unrelated third party studios for comparable programs. This poses a number of questions in the streaming context, beyond the definitional questions discussed above with respect to what a similar transaction is, what a comparable program is, and what comparable monetary terms are.

First, for some new in-house streaming services, such as Disney+ and Peacock, the affiliated streaming service may not have any historical transactions with unrelated third parties where they licensed content to stream.<sup>104</sup> Thus, under the typical form of Sales Comparison ATP, there will be no similar transactions with unrelated third parties upon which to model the related-party streaming transactions. For profit participants who have such an ATP in their agreement, there is an argument that the related-party streaming deals for exhibitions on these two platforms (and other new platforms that license content from affiliated companies only) will constitute a per se breach of the fourth sentence. The studios will not be able to do the real-time comparison and modeling required under the fourth sentence because no models exist. If

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Affiliate" quite broadly, to include "any parent, division, subsidiary or affiliate of AMC, including, without limitation, any corporation, person or entity which directly or indirectly through one or more intermediaries controls, or is controlled by, or is under common control with AMC." *Id.* at 2.

103. *See id.* at 3. Non-Standard Television shall include (i) "over-the-air pay" or on a subscription basis (SVOD); and (ii) "single and multi-channel multi-point distribution service and satellite transmission directly to TVROs," all on a license (AVOD). *Id.*

104. We understand that Peacock may be licensing some content from third parties. For instance, in a contract with ViacomCBS, Peacock has licensed certain rights to exhibit full seasons of *Ray Donovan* (distributed by CBS Television Distribution) and *Yellowstone* (distributed by ViacomCBS Domestic Media Networks). Joan E. Solsman, *Peacock TV: Everything to Know About the Part-Free, Part-Paywalled Streaming App*, CNET (Mar. 9, 2021, 6:54 AM), <https://www.cnet.com/news/peacock-tv-free-premium-streaming-app> [<https://perma.cc/2JMX-N6E5>]. The details of these deals have not been made public. However, the fact that such deals exist means that, in the near term at least, there may be transactions between Peacock and unrelated third parties upon which to model the related-party transactions.

we are right about that, the waivers in the third sentence are vitiated, and the participant can bring a claim for damages. Again, we anticipate there will be an uptick in litigation in the streaming arena for those participant contracts with historical Sales Comparison ATPs.

These damages analyses will present challenges to both sides, under both the comparable sales approach and the income method. Under the comparable sales approach, the question of what a comparable/similar license is will be hotly debated. Is a Netflix license sufficiently similar to a Disney+ license to use it as a comparison? Does it come down to the number of subscribers on a service, the term of the contract, or the territory covered? For Peacock, which is an AVOD platform, does the comparison license have to be for another AVOD platform like Hulu? Or can the participant look to Netflix and Amazon Prime for comparables? The answers to these questions will undoubtedly depend on the terms of the deals in question (although there will inevitably be ambiguities), expert testimony, and facts about the value of different streaming platforms, such as the number of subscribers and subscription fees for SVOD or the amount of ad revenue and user views for AVOD.

With respect to the income method, as we mentioned above, it will be challenging to measure the gross income from the streaming of one program, much less how to arrive at net income or how it should be capitalized over time. It may require discovery into the streamers' own algorithms to measure the value of particular programs in attracting and keeping subscribers, although the streamers will likely argue that this information is a protected trade secret and not the proper subject of discovery. It may also require the development of new ratings metrics that measure how often programs are streamed.<sup>105</sup> It may be easier to apply this method for AVOD platforms, where experts can identify the value of advertising attributable to views of a particular program. But in both cases, it will likely require a more sophisticated valuation expert than the typical former industry business affairs executive.

Second, and relatedly, for an in-house streaming platform where its affiliated studio has contracted with unrelated third parties in the past—such as HBO Max and WBTV—there will likely be some similar WBTV transactions for comparable programs with unrelated third parties upon which to base the new related-party streaming transactions. Whether use of WBTV's transactions—and not HBO Max's similar transactions—can be looked at for purposes of determining compliance with the fourth threshold sentence depends on whether that sentence limits the modeling on the related-party streamer's (and not the studio's) own historical similar transactions. But even

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105. We understand that Nielsen Ratings has developed a new ratings system for streaming programs, starting in August of 2020. *See, e.g.*, Rick Porter, *Nielsen's Top Streaming Chart: The Major Takeaways So Far*, HOLLYWOOD REP. (Dec. 16, 2020, 6:35 AM), <https://www.hollywoodreporter.com/live-feed/niensens-top-streaming-chart-the-major-takeaways-so-far> [<https://perma.cc/F8S4-PNGK>].

if there is a per se breach of the fourth sentence in this instance because HBO Max has no qualifying similar transactions with unrelated third parties for comparable programs (and only WBTB does), there should be no damages provided that the new related-party transaction is modeled on what WBTB did in such prior transactions.

And third, as there are fewer and fewer unrelated third-party streaming deals overall, with each platform largely licensing content from its own libraries and creating its own original programming, it will become even more difficult to determine the fair market value of these in-house licenses if and when participants sue for breaches of the ATP. Again, it remains to be seen how participants will address these damages issues, but one thing is certain: it will come down to a battle of the experts.

### C. Case Studies

There are already a number of case studies that provide some insight into how entertainment conglomerates are dealing with the in-house licensing of streaming rights for their most valuable content.

For example, Peacock has acquired the streaming rights for three of Dick Wolf's *Law & Order* shows and three from his *Chicago* franchise.<sup>106</sup> It has been reported that the deal is worth \$300–\$400 million, is nonexclusive, and covers only domestic rights.<sup>107</sup> “While the nine-figure deal is noteworthy . . . [it is] less than the \$500 million Peacock paid for *The Office* [distributed by NBCUniversal Television Distribution] after a bidding war with Netflix.”<sup>108</sup> That is perhaps because the Wolf deal is nonexclusive, with Hulu and Amazon sharing those same domestic rights to *Law & Order: SVU*.<sup>109</sup>

NBCU is not the only entertainment conglomerate paying nine-figures to secure the streaming rights to its studio's valuable library content. HBO Max is reported to have paid a multibillion dollar sum to license the domestic streaming rights to *The Big Bang Theory* (distributed by Warner Bros. Television Distribution).<sup>110</sup> HBO Max is also reported to have paid \$425 million over five years to license the digital rights to *Friends* (also distributed by Warner Bros. Television Distribution).<sup>111</sup> These license fees will be attributed to the

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106. Lesley Goldberg, *Dick Wolf Sets Rich Six-Show Streaming Deal at Peacock*, HOLLYWOOD REP. (Jan. 16, 2020, 1:00 PM), <https://www.hollywoodreporter.com/live-feed/dick-wolf-sets-rich-six-show-streaming-deal-at-peacock-1270337> [<https://perma.cc/6EVJ-MEF9>].

107. *Id.*

108. *Id.*

109. *Id.*

110. Lesley Goldberg, ‘Big Bang Theory’ Sets Staggering Multi-Billion Dollar HBO Max Streaming Deal, HOLLYWOOD REP. (Sept. 17, 2019, 5:00 AM), <https://www.hollywoodreporter.com/live-feed/big-bang-theory-sets-staggering-multi-billion-dollar-hbo-max-streaming-deal-1240250> [<https://perma.cc/5PT6-AMYJ>].

111. *Id.*

profits for the WBTV studio, and thus, will be shared with the profit participants of these highly successful shows.

To date, in certain deals, the profit participants have been brought into the license fee negotiations. For example, entertainment attorney Cliff Gilbert-Lurie of Ziffren Brittenham, who represents Dick Wolf, and whose firm represents *The Office* showrunner Greg Daniels, has been quoted saying: “Whether or not our clients have strict approval rights, the studios have included us in some major deals to try to guarantee that the license fees are appropriate.”<sup>112</sup>

These enormous payouts, however, may not last. Entertainment industry executives have been quoted as saying: “These deals are so high-profile, it would be insane of [the studios] to try to cheat creators out of money because that would be asking for a lawsuit.”<sup>113</sup> Studios may not have the same incentives for lesser known, lower profile library content. Profit participants should keep a careful eye on how their studio partners deal with their in-house streamers as their library content becomes available. In addition, while participants can now often leverage the precedents of what Netflix and Amazon Prime (and other unrelated streamers) paid to unrelated studios to license digital content, over time, there will be fewer unrelated-party transactions, and this will be harder to determine.

## CONCLUSION

There is no question that as the entertainment industry continues to consolidate and digital viewing replaces traditional linear programming, there will be further impacts on profit participants—both those who participate in the profits of library content like *Friends* and *The Office* and those who participate in new deals for content developed exclusively for in-house streaming as the first run platform. The trend appears to be moving towards an expanded ILF approach that provides large upfront payouts but less back-end participation. However, many library shows will continue to be subject to the Sales Comparison ATPs and the new related-party streaming transactions will have to be evaluated under that standard.

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112. Bryn Sandberg, *After ‘Friends’ and ‘The Office’ Megadeals, Stars Want Their Slice of Streaming Money*, HOLLYWOOD REP. (July 18, 2019, 6:45 AM), <https://www.hollywoodreporter.com/live-feed/friends-office-megadeals-stars-see-streaming-money-1225151> [<https://perma.cc/XA3S-ME26>].

113. *Id.*

