VALUE MANAGEMENT INC.

Investment Banking + Valuation Services

ISSUES + UPDATES

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AI-Generated George Carlin Triggers Right of Publicity Lawsuit

A "comedy AI" tool has created an "impersonation" of George Carlin that has triggered a lawsuit by his estate, claiming violations of the late comedian's right of publicity and copyright, reports Variety.

Harmless impression? Speaking at the beginning of the video, the AI tool, called Dudesy, says: "I listened to all of George Carlin's material and did my best to imitate his voice, cadence and attitude as well as the subject matter I think would have interested him today." Dudesy makes it clear that what you hear is an impersonation that was developed "the exact same way a human impressionist would," such as Andy Kaufman doing Elvis (or Rich Little doing everybody).

This lawsuit is among the first of what is likely to be many that will involve AI-generated images that are alleged to run afoul of copyrights or an individual's right of publicity.

The right of publicity is a form of intellectual property that covers not only a person's name and image, but also the signature, voice, and so on. It is an issue that often is overlooked because of a lack of awareness. The concept does not only apply to famous people—the average person has the right of publicity, and it has a value. Fundamental valuation techniques are used, but it requires the judgment and experience of someone who works with the right of publicity regularly.

What to Glean From the IRS Hiring Binge for BV Experts

The IRS employs many business valuation experts. In fact, it is looking for more—the agency needs to hire 31 BV professionals for open positions

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VMI Highlights:

Please join us in welcoming Rob Yohe, CPA, ABV, CFF, CFA, MBA to Value Management Inc.! Rob joins us with over 25 years of consulting experience providing accounting, financial, valuation and economic assistance to clients involved in an extensive variety of situations. A warm welcome to Rob!

Kaitlin Wilusz, ASA, CFA spoke at the ESOP Association's National Conference in Washington, D.C. this past May. Her session topic was "Understanding and Formulating Projections for ESOP Companies."

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across the U.S. Also, the job announcement lists the duties of the job, which provides an interesting perspective as to what it is focusing on in terms of valuation issues.

The job posting confirms certain matters are high on its target list, such as discounts and reasonable compensation (including benefits). Also, it's not surprising to see a focus on intangible assets and purchase price allocations, as these assets make up a growing proportion of company value.

The World's Most Valuable Brands, per Brand Finance Report

In the dynamic landscape of global commerce, some brands emerge as titans, rapidly ascending to prominence and reshaping industries. After achieving a 74% growth in brand value, Apple reclaimed its No. 1 ranking. Apple has achieved truly exceptional brand value growth this year, with its brand value increasing by $219 billion in a single year to $516.6 billion. This year's growth is approximately equal to the total value of Starbucks', Mercedes-Benz's, Tesla's, and Porsche's brands combined.

Brand Finance research finds very large increases in brand value amongst sectoral leaders such as Microsoft and NVIDIA. Microsoft's brand value rose by 78% to $340.4 billion, jumping two spots in the ranking to 2nd. NVIDIA, a key supplier of chips in the AI space, achieved a brand value rise of 163% to $44.5 billion, making it the fastest growing brand this year.

Google has retained third position, recording a 19% increase in brand value to $333.4 billion. The company has demonstrated good overall revenue growth, largely attributed to its narrative around AI, improved margins, and overall positive financial performance.

Amazon, the world's most valuable brand in 2023, has dropped to 4th position, with its brand value growing by 3% to $308.9 billion. A challenging consumer market over the past 12 months, influenced by high-interest rates, inflation, and a cost-of-living crisis have hurt Amazon's prospects.

Tesla dropped out of the top 10, falling to 18th place, due in part to its large exposure to the Chinese electric vehicle market and a reputation hit due to the company's close association with Elon Musk, a controversial leadership figure.

Deutsche Telekom is now the world's most valuable telecom brand, surpassing Verizon, and ranking ninth globally.

Brand value is estimated using a relief from royalty method, which is based on the notion that companies that own their brands are relieved from paying royalties to use them. The estimates are developed by reviewing comparable licensing agreements sourced from various databases. The report goes into detail about their brand valuation method.

Private Firms See Inflation as the Top Risk

Over three-quarters (78%) of private companies see inflation as the most concerning business threat, according to the "Private Company Performance Report" from CitrinCooperman. The firm polled 1,000 senior leaders of privately held companies spanning industry sectors across the U.S.

After inflation, the most concerning threats to private company leaders are supply-chain disruption, cyber threats, and cost of capital. A third of companies have experienced a cyber incident or breach in the past 24 months, the report says.

When analyzing how sensitive a company is to inflation, a "back to basics" approach can be used. For example, can the company pass inflation on to customers, and to what extent? Also, examine the impact to margins, investment efficiency, cost of equity, cost of debt, and the probability that inflation may cause the company to fail to a certain degree (go out of business entirely).

Tax Court Backs IRS on Contribution of Shares and Qualified Appraiser Rules

In a recent Tax Court case (In re Estate of Hoensheid, T.C. Memo 2023-34; 2023 Tax Ct. Memo LEXIS 33), the court backed the IRS when it issued a deficiency

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M&A Buyers Get Over 50% of Synergy Value, per recent MARKABLES Study

Synergies from M&A have been the focus of dealmakers, transaction advisory, value delivery, investors, and strategic management. There can be three major synergy categories:

- Revenue synergies result from incremental increases in revenues compared with standalone companies resulting from cross-selling, pricing, additional distribution, innovation, brand recognition and others.
- Cost synergies are commonly classified into how they occur (economies of scale, or increased volume; economies of scope or eliminating duplicate efforts; complementary resources or improving best practice; combined resources or increased buying power), and where they occur (manufacturing costs synergies; sourcing synergies; R&D synergies; and SG&A synergies).
- Balance sheet synergies are primarily one-off effects from capex and working capital reductions. They include, i.e., inventory reductions, financing terms, better capital allocation, elimination of duplicated capex and tax optimization.

Synergistic value results from the target company being worth more than its market cap (or estimated fair market value) because of what the acquirer can do with it. Of course, sellers know this and try to hike the price up to capture as much of that differential as possible.

In a paper published in 2013 Boston Consulting Group calculated that this split was 69% for the buyer and 31% of the value of the synergies for the sellers. According to a new study by MARKABLES, this split is now closer to 50-50. MARKABLES analysis of data from 605 public takeovers between 2010 and 2022 determined that the buyer gets between 56% and 58% of synergies and the sellers receive 42% to 44%.

The data suggests that the buyer's share has been decreasing over time. Some speculate that the reason may be that buyers became more prudent (or realistic) when estimating their synergy expectations. Voluntary synergy disclosures of public companies are made primarily to assure readers that an announced deal is going to be a good investment that creates value. If perceived positively, the disclosure will increase trust in the outcome of the transaction, and eventually result in a positive stock market reaction for acquirer's stock.

has been acquired by

served as financial advisor to seller
and served as deal team leader

The State of the Private Equity Market in 2023

It should come as no surprise that 2023 was a challenging year for the private equity industry. According to an article in the Spring 2024 issue of Middle Market Dealmaker, from a high of $2.2 trillion in 2021, deal activity dropped 35% to $1.4 trillion in 2022, and then plummeted another 40% to $850 billion in 2023 – marketing the lowest level since 2013.

This decline can be attributed to a combination of factors including rising interest rates, recession fears and the performance of individual companies, leading to fewer businesses coming to market.

Based on market feedback, initial buyer interest in the few companies that did go to market was notable, refecting the scarcity of deals. However, as processes progressed, three key factors were highlighted by many of the most active mid-market investment banks as leading to reduced interest:

- doubts about the sustainability of revenue and EBITDA growth,
- concerns over future performance amid economic headwinds, and
- the tightening of debt financing due to higher interest rates.

This divergence in valuation expectations caused many buyers to withdraw, while those remaining adjusted their valuations downward, reflecting these risks. Data from Sitton Place Strategies showed that only 30%-40% of deals launched in the first half of 2023 had closed by year-end.

Despite this, the deals that closed often did so at valuations that defied the broader trend of decline, a testament to the complexity of current market dynamics.

Deal Terms

Presented below is a summary of select results of the SRS Acquiom 2024 M&A Deal Terms Study which analyzed more than 2,100 private-target acquisitions that closed from 2018 through 2023 with aggregate value of $475 billion.

Deal Size – 2023 study shows same trends observed in 2022: lower valuations and a focus on the lower middle-market – 44% of deals were less than $50 million in the 2023 study, up from 40% in 2022.

Return On Investment (“ROI”) – 2.5x median ROI in 2023 study reflects decrease from 4x in 2022; median years to exit increased to 6.7 in 2023 from 6.5 in 2022.

Management Carveouts – provided in 6.1% of 2023 deals studied, up from 3.6% in 2022; this is a sign of buyer/seller valuation discord.

Earnouts – occurrence increased 50% in 2023, with earnouts in 33% of all non-life sciences deals studied (up from 21% in 2022); the contingent amount of the purchase price as a percent of closing payments grew to 32% in 2023, up from 30% in 2022. Earnouts were based on revenue or earnings/EBITDA in 87% of 2023 deals studied, up from 84% in 2022.

Escrows/Holdbacks – For 2021, 2022, and 2023, the median has been 10% of transaction value for deals without Representations and Warranties Insurance (“RWI”) identified.

Indemnification Caps – As a percentage of transaction value, the median cap for all deals studied, including those with RWI (which tends to lower the cap) was 10% in 2023 and 2022; where no RWI was identified, the median cap was 11.8% in 2023. It’s worth noting that in 2023 with escrows/holdbacks, the cap and escrow amount were the same in 63% of the deals.

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notice alleging anticipatory income and capital gains and denial of a charitable contribution deduction as it pertains to a contribution of shares of stock of a privately held company that were acquired for cash. One of the three owner brothers and the brother's wife gifted 1,380 shares of stock in the company, Commercial Steel Treating Corp. (CSTC), to Fidelity Charitable Gift Fund, a donor advisor entity. The intention was to have the shares gifted to Fidelity prior to the sale of the company to avoid the income (In the form of dividends) and capital gain from the shares that related to the sale transaction and to obtain a charitable contribution deduction for the fair market value of the stock contributed.

Due mostly to the actions of the donors and petitioners in this case, their plans went almost completely awry. On the transaction and accompanying activities regarding the contribution of the stock, the Tax Court sided with the IRS in determining that the income and gain was to be taxed to the petitioners under the theory of anticipatory income and gain. The main issue in this part of the decision related to the petitioners waiting too long to make the gift. In their effort to be certain that the sale transaction would go through, they waited too long. While petitioners made what might be considered a feeble effort to determine a date before the final terms and agreement to sell were made, those efforts fell short, and the Tax Court ruled the gift was made after the petitioners in effect received the income and gain. The gift was determined to be a valid gift but too late to avoid the income and gain.

The second major issue was whether or not the petitioners were allowed a charitable contribution deduction for the gift of the stock. Since the court had already ruled that a valid gift had been made, this issue turned on whether or not the gift was accompanied by a qualified appraisal of the CSTC stock that had been gifted.

The petitioner decided to use the "cheaper chicken" for the appraisal included in the filing for the gift. Instead of heeding the advice of his competent and experienced legal advisor, the petitioner decided to use an appraisal that was done by the financial advisor used by petitioner for purposes of effecting the transaction. That appraisal was offered to him at no additional charge than the advisor fee for the transaction. Consequently, the Tax Court determined there was a failure to procure a qualified appraisal and disallowed the charitable contribution deduction.

Patent Infringement Lawsuits Are on the Decline

Although the number of patents granted annually continues to rise, the number of patent infringement lawsuits filed in U.S. district courts has decreased significantly, according to a new study from Marcum. Findings include:

- In 2013, 6,497 cases were filed, but, by 2022, this number had dropped to 3,639;
- Median damages have recently trended downward, to $2.4 million from a peak of $9 million in 2005;
- Permanent injunctions granted have fallen sharply, from an annual rate of 80 to 36 over the last 15 years;
- As a venue preference, Western District of Texas has gained favor over the Eastern District of Texas (however, recent changes are also affecting the Western District's status); and
- After Halo Electronics, Inc. v. Pulse Electronics, Inc., from 2003 to 2022, 22% of cases saw enhanced damages due to willful infringement, averaging a 2.3x award multiplier.

Court Rules on Impact of Change in Corporate Domicile

***Palkon v. Maffei,* 2024 Del. Ch. LEXIS 48; 2024 WL 678204 (Feb. 20, 2024)**

This was a suit where the minority shareholders challenged the conversion of two Delaware corporations into Nevada corporations with the controlling shareholder delivering the deciding vote, the admitted purpose of which was reducing potential liabilities for directors and officers. This particular opinion dealt with a motion to dismiss the case. The Chancery Court in this case granted the defendants' motion to dismiss the plaintiff's request for injunctive relief but denied the motion to dismiss the primary complaint, which the defendants argued

did not state a claim. The Chancery Court noted that the outcome depended on the standard of review.

As depicted, the conversion was a self-interested transaction a controlling shareholder effectuated. The conversion conferred a nonratable benefit on the controlling shareholder, i.e., it lessened the liability exposure to directors and officers. This triggered the entire fairness standard of review. “There are no protective devices that could lower the standard of review. Entire fairness governs.” Thus, the plaintiffs have a stated claim on which relief can be granted. “The entire fairness standard has two dimensions: substantive fairness (fair price) and procedural fairness (fair dealing).”

After the conversion, the shareholders owned shares carrying a different bundle of rights under Nevada law, including a lesser set of litigation rights. The indication was that the conversion was not substantively fair. The conversion was impliedly procedurally unfair because there was no arm’s-length bargaining. The controlling shareholder delivered the vote. There was thus a claim to be stated, and the controlling shareholder, directors, and officers believed that they had greater protections under Nevada law. If a Delaware corporation converted into a Delaware LLC, a structure similar to the Nevada corporate law could be designed with a similar result. In that case, there would similarly be a claim to be stated.

However, this did not mean that the corporation cannot leave Delaware. “The plaintiffs can only state a claim on which relief can be granted because (1) the corporation has a stockholder controller, and (2) the board did not implement any protective provisions. The defendants also did not make any effort to compensate the stockholders for the reduction in their litigation rights. Change any of those variables and the outcome could be different.” Here, the defendants did not establish the protections upfront, and, therefore, they bore the burden of proving entire fairness. The defendants’ motion to dismiss was denied.

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