



ATO 'fame' tax determination TD 2023/4

Discussion paper

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1. Executive summary

ATO defines fame as *name, image, likeness, identity, reputation and signature (referred to as 'fame' for the purposes of this Determination)*.

Fame does not, of itself, result in income.

The ATO definition of fame does not reference income as a characteristic of fame.

By contrast, there is commercial evidence that portfolios of music rights are valuable and capable of sale to financial investors (e.g. Bowie Bond, Cirque du Soleil discussed in this paper).

There is significant evidence that fame may posthumously endure. Examples include the revenues generated by the Michael Jackson and Elvis Presley estates. This is clear evidence that fame is not, of itself, the source of profitable revenue.

The sale of copyright regularly occurs in the commercial world.

Transactions (sale and licensing) regularly occur with respect to brands.

Entertainment such as Cirque du Soleil relies on the employment of many hundreds of personnel and the deployment of significant capital (which is exposed to the risk of loss – such as that which arose as a result of the pandemic-induced bankruptcy of Cirque du Soleil).

There are well-established practices relating to the valuation of intangible assets including brands, designs and goodwill.

Performing artists typically generate performance and appearance fees. Where market demand and circumstances permit, the artist is often able to develop businesses (in combination with risk capital, personnel and complex commercial arrangements) which give rise to intangible assets which can also generate income.

The sole sources of income arising from fame which is likely to be inalienable from the individual artist(s) is performance and appearance fees. All other sources of income arise from the effective commercialisation of brand via the application of risk capital, personnel, outsourced service providers, licensing agreements and other commercial arrangements.

2. Background

In 2018 Federal Treasury issued a consultation paper on the issue of taxation of revenue from fame or image. The consultation paper provides the following background on the Federal government position at that time regarding 'fame and image' (page 4):

The licensing of fame or image is legally complex. Fame or image (or image rights) are not recognised under Australian intellectual property law. Instead, a series of protections from acts, such as defamation and consumer protection laws may give an individual certain rights to bring an action against other entities that make use of their fame or image without authorisation. These protections have been interpreted as creating a proprietary interest, the use of which can be licensed to another entity. These licences have been considered by some taxpayers and advisers as providing a basis in tax law to treat income received in respect of an individual's fame or image as being income of the licence holder rather than of the individual.

The consultation paper did not explore the origin of other sources of revenue (e.g. royalties, merchandise sale, streaming platform revenue etc).

In 2022 [TD2022/D3](#) was released. Key extracts from TD2022/D3 are set out below:

In Australian law, an individual with fame has no property in that fame^[3] and therefore cannot vest or transfer any property in their fame to another entity. Exploitation of an individual's fame can be done by way of agreement for a fee. Where a related entity is a party to such an agreement, it is incapable of authorising the use of the individual's fame by other entities as the agreement does not vest any property in the related entity. The fees paid for use of the individual's fame will be ordinary income of the individual and assessable to them under section 6-5.

The common law of Australia does not recognise as a proprietary right a' individual's ability to exploit their fame separately from an accompanying business.^[4] Consequently, there is no recognised proprietary right (common law or otherwise) in an individual's fame that is capable of transfer or assignment.^[5]

An individual with fame can exploit that fame by authorising others to use their fame for a fee. However, such an agreement would not vest any property in the individual's fame in the other entity. As a result, the related entity is not in a position to exploit the image of the individual with fame. The agreement between the related entity and the individual would merely authorise that which would otherwise be actionable.^[11] As a result, the other entity cannot derive income attributed to the use of the individual's fame. Accordingly, the income derived under the purported sub-licencing of those rights to a third party is the ordinary income of the individual.^[12] The related entity is receiving an amount that is being applied or dealt with on the individual's behalf.

The draft ruling does not explore the various sources of revenue that arise as a consequence of fame nor whether those revenues are attributable to the artist or businesses and legal rights that arise indirectly as a consequence of fame.

3. Observations regarding ATO TD 2023/4

The draft ATO TD does not consider the origin or value of 'fame' and defines fame in the following way: *their name, image, likeness, identity, reputation and signature (referred to as 'fame' for the purposes of this Determination).*

The dictionary definition of fame is: *the state of being known or recognized by many people because of your achievements, skills, etc.* ([Cambridge Dictionary](#)).

It is notable that the Cambridge definition of fame does not associate fame with wealth or income.

The definition of brand closely aligns with the ATO definition of fame. The dictionary definition of brand is *a type of product made by a particular company and sold under a particular name* ([Cambridge Dictionary](#)).

The [International Valuation Standards Council Perspectives Paper: Rethinking Brand Value](#) describes how brands create value, as follows (page 3):

How do brands create value?

Central to brand value creation is its enduring ability to generate incremental revenue as compared to unbranded and lesser branded substitute products via enhanced prominence, expectation of superior performance, and trust as perceived by stakeholders. Therefore, incremental revenue from a strong brand can be generated in two ways. Most typical is through the ability to charge a higher price or achieve a consumer preference as compared to a similar unbranded or lesser branded product (i.e., price or market share premium).

A key issue that is not addressed in the draft TD is, therefore, whether the definition of fame is fit for purpose. In particular, whether (for example) brand is incapable of ownership other than the individual artist and how brand value is nurtured to generate profitable returns.

In particular, the draft TD progresses on the unstated premise that all revenue and profit generated which is in some way associated with the individual artist originates from the artist and not from a variety of sources including capital which is deployed and risked in an attempt to generate profit.

The draft TD fails to recognise that fame and income are inherently distinct.

Fame cannot be directly measured with an objective yardstick. Measures of fame are (for example) views, days at the top of charts, crowd size, tickets sold etc. Many of these measures are also relative. For example, ticket sales of 100 for a pub gig might signify a degree of fame but also may seem inconsequential when compared with a stadium performance at which 40,000 attend.

In many respects then, fame (by the ATO definition) possesses characteristics that are both similar to brand and goodwill.

Goodwill is incapable of direct measurement. Goodwill arises as a consequence of an accumulation of assets which, acting together produce a profit which is in excess of the cost of capital in excess of a market rate of return required to reward the risk and opportunity cost of holding the accumulation of assets. In case law (see *Federal Commissioner of Taxation v Murry* (1998) 193 CLR 605 and *Commissioner of State Revenue v Placer Dome Inc* [2018] HCA 59), goodwill is characterised as the attractive force of custom. In economic, accounting and legal terms, goodwill arises after an appropriate return is earned on all other assets. In this respect, goodwill is a residual asset.

An important aspect of the *Murry* decision is that goodwill is property but is not capable of being dealt with separately to the business which gives rise to the goodwill.

Similarly, there are aspects of fame (by the ATO definition) which, in wider commercial terms, relate to the value of brand. In this regard, there are many examples of brand valuation, brand sales and brand licensing. There are specific

valuation methodologies which seek to value brands. These methodologies include the Relief from Royalty Method and Multi-Period Excess Earnings Method.

A further difficulty with the ATO draft TD is that it fails to recognise that fame often exists without an individual artist or group of artists capable of attribution of the fame. By way of example, Cirque de Soleil was sold by its founder in 2015 to a US PE group (TPG), Chinese investor Fosun and a Canadian pension fund. The sale price amounted to some USD1.5b as set out in the CDPO [media release](#).

Whilst the Cirque du Soleil profitability justified purchase price of USD1.5bn for the entire business, individual performers do not attract particularly high remuneration. According to [Glass Door](#), the average income of a Cirque du Soleil performer is around USD90k per annum.

According to an [ASIC search](#), the pre-kindergarten entertainers, The Wiggles, have operated via a company structure since 1993. Whilst substantially smaller than Cirque du Soleil and reportedly generating around \$30-40m per annum in total revenues, the company structure has facilitated the ongoing success of the Wiggles brand as founders have retired and new performers hired. This demonstrates the durability of brand and (by the ATO definition) fame of the Wiggles.

With a more concentrated pool of performers, it is logical that the 2021 hiring of several new Wiggles performers reportedly occurred on the basis of salaries of [\\$150k per annum](#).

4. Fame and celebrity as a source of income

Some of the world's most famous artists, musicians and performers source the largest share of their revenue from live touring performances. Others generate significant revenues from a share of royalties arising from copyright.

Musical artists and performers generate income from a variety of sources, including live performance. However, [Forbes ranks the late Michael Jackson](#) as the highest income earner of the decade 2010-2020 (Jackson died in 2009).

Living artists and the entities with respect to which they are related tend to generate income from a variety of sources, including:

1. Royalties and 'sync' revenue (use of songs or performances in movies, advertising etc)
2. Streaming and webcasting revenue (including Pandora, Spotify, Pandora etc)
3. Touring, shows, live performances
4. Product sponsorship and endorsement
5. Merchandise sales
6. Other licensing revenue (e.g. from tribute bands/performers)

In the music sphere, fame typically emerges from a combination of the success of recorded music and video along with successful live performances (including touring). However, fame and celebrity is increasingly dependent upon the successful curation of on-line/digital presence. The emergence of non-fungible tokens ["NFTs"] in the visual art sector provides an example of how virtual assets can become valuable in ways which result in a greater price for an asset than the physical form (if, indeed, the asset to which an NFT relates exists in physical form).

Fame can take many years to emerge notwithstanding the oft-quoted 'overnight' success label. Typically, fame (like brands) requires the application of risk capital, personnel and sophisticated commercial/legal arrangements to result in material levels of profitability.

There are also many examples of famous avatars which originated in the virtual world and later brought into the physical world via human actors. Examples include Superman, Pikachu, The Hulk and Shrek.

The digitalisation of entertainment has also seen an [emerging trend](#) by entertainers to create digital avatars which are then used to deliver performances via (e.g.) TikTok.

Examples also exist of famous artists who have rarely physically performed (e.g. [Brian Eno](#), [Sia](#)).

Sometimes fame will endure beyond the peak visibility of the artist and, in some cases, extend beyond the life of the artist. It is the existence of revenue arising from beyond the life of the artist which highlights that fame is capable of monetisation beyond the individual.

Increasingly, it is becoming apparent that fame is incapable of being determined to originate from a physical person or artist.

The challenge emerges to determine what the source of the fame is.

Fame does not, of itself, result in revenue.

5. Fame and celebrity as an asset

5.1 Art v artist

Music is a form of art and the popularity of particular music often endures long beyond the life of the writer, musicians or performers.

In recent years, a number of factors have emerged as drivers of music rights as valuable assets that are attractive to passive, financial investors outside the music industry.

These factors have included:

1. Digitisation of music enables copyright use to be monitored more easily than in the analogue era
2. The emergence of music streaming platforms
3. Recognition by individual music rights holders that management of those rights requires considerable oversight
4. Monetisation of those rights transfers the responsibility of ongoing management to the acquirer and is therefore a benefit to the owner of the rights
5. A 2019 [increase in the royalty rate](#) payable by streaming services from 10.5% to 15.1%

The singer, David Bowie, was one of the first artists to monetise music rights with the issue of "[Bowie Bonds](#)" in 1997. Bowie Bonds are said to be one of the first forms of securitised intellectual property in the arts/entertainment sector and attracted an investment grade credit rating.

Technological advances (beyond digitisation) means that the death of an artist no longer means the cessation (or material reduction) of revenue. Whilst the estates of Elvis Presley, Amy Winehouse, Michael Jackson, Billie Holliday and many others continue to enjoy ongoing royalty streams, the development of [holographic performance](#) means that a new revenue source for the estates of dead artists and music rights owners has the potential to emerge.

This raises the issue of the 'asset' from which the revenue is generated. Clearly, in the case of a dead artist/musician or performer, the source is not the artist/musician or performer.

The source of that revenue is a form of intellectual property.

This raises the question: if the dead artist can posthumously generate revenue, what is the source of the revenue while they are alive?

5.2 Private equity acquisitions of music rights

In recent years, the private equity investment management market has actively built portfolios of music copyright as a means of earning ongoing returns from the use of music libraries.

This phenomenon has seen increasing attraction to private equity firms with the emergence of streaming services such as Apple Music, Spotify and others.

It is suggested that global revenues of as much as \$2bn per annum are generated by the publishing rights owned by artists.

Round Hill Music was one of the first private equity firms to specialise in acquiring music catalogues as proposed in [this article from Vice](#). [Round Hill Music claims](#) to be one of the largest independent music rights owners in the world and has closed [three funds totalling over USD750](#) since its formation in 2010.

Music libraries can attract capitalisation rates of as little as 5% as suggested by the sale by Providence Equity of its Tempo music catalogue on a multiple of 20 times the ongoing income of its portfolio as discussed in [this Financial Times story](#).

Whilst music production companies such as Universal, Warner and BMG have traditionally invested heavily in acquiring the component of rights not owned by them as a result of music production contracts, private equity firms are increasingly attracted to the stable returns from music rights.

Investor, Primary Wave, founded in 2006, is said to have [attracted over USD1bn](#) in funding for catalogue acquisition as at December 2021. This funding is said to have been attracted from more traditional asset class investors such as Black Rock, KKR, Blackstone and Apollo.

6. Sources of revenue

The principal revenues arising from fame/celebrity were identified in the previous section.

Some of those revenues are sourced from and inalienable from the individual performer. However, many are the result of complex business operations and reliance upon copyrights, trade mark and the establishment of a brand.

Set out below is a description of each principal revenue item and the origin or source of that revenue:

Revenue	Source
Appearance fees (television etc)	Largely relate to the appearance of the artist/performer but not without legal
Touring/performance profits	The performer earns a fee for physically appearing and participating in rehearsals. Event/tour profit sharing arrangements are often negotiated with promoters. A complex business comprising legal advisers, promoters, venue booking agents, ticketing service providers, audio/visual technicians, equipment hire, security personnel, travel and accommodation agents, marketing support and administration are required to successfully mount a tour or an individual performance
Royalties	Derived from music sales and broadcasting audio/visual recordings which result in copyright
Streaming and webcasting revenues	Derived from licensing and legal agreements pertaining to copyright and the sharing arrangements which the artist/performer has negotiated with writers, musicians, record labels and streaming/webcasting platforms
Product sponsorship	Certain product sponsorship agreements involve the use of the artists trademarks
Product endorsement	To the extent that the endorsement is based on the appearance of the artist/performer, the revenue is likely to be derived from the artist/performer appearance
Merchandise sales	Merchandise sales typically arise via online presence (e.g. website, social media sites) and venue/touring outlets and therefore depend on trademarks, copyright, design features which are substantially independent from the artist/performer – as demonstrated in the recent Australian legal case involving the artist known as Katy Perry

7. Conclusions

Fame arises from a variety of attributes, not all of which attach to the artist, musician or performer.

Fame can endure beyond the life of the artist.

Capital markets have demonstrated with significant transactions over several decades that music rights are separate and separable from the artist and can have material value.

Performing revenue is often derived from complex business operations which generate profits for a number of parties involved in successfully mounting individual or touring performances – including promoters who take an equity risk on the success of an event.

These business operations require investment and, therefore, equity risk in a venture – only a part of which relies on the fame of the artist or performer.

Revenues such as streaming platform royalties, merchandising, social media advertising emerge independent of the artist or performer and are subject to trademark and copyright agreements which are separate and separable from the artist.

Some revenues require the physical presence of an artist (such as product endorsements and live performances) and are inalienable from the artist/performer.

Some of the most successful artists generate revenue for a business in return for a profit share (involving an equity risk) or a fee.

The origins of revenue from 'fame' are therefore complex and not capable of simply assigning the origin of all revenue to the artist or performer.

8. Authors

8.1 Dominic Churchill, executive director

Dominic is a corporate finance and investment banking professional with over 10 years' experience focussed on valuations and capital raising projects relating to alternative assets.

Prior to joining Peloton, Dominic was Associate Director – Head of Infrastructure at Chapman Capital Partners where he oversaw the firm's capital markets and advisory services to infrastructure clients.

From 2015 to 2019, Dominic was the Managing Director of Climate Capital, a renewable energy developer and investor focusing on projects which serviced ASX-listed, Government and large corporate clients.

In an advisory capacity, Dominic has been involved in a range of complex valuation engagements for tax and financial reporting compliance and decision making purposes for institutional, corporate and ASX-listed clients.

Dominic attended Swinburne University where he completed a Bachelor of Business (Finance).

8.2 Michael Churchill, head of valuations

Michael's career includes over 30 years' valuation and corporate advisory experience. He has held CEO and Partner roles since 1997.

His valuation and advisory roles have traversed infrastructure, resources, energy, telecommunications, technology and software, financial services, health and medical services. In 2014 he established the first joint venture with China's largest valuation firm outside of China to support Chinese investors deploying capital in Australia.

Michael has had extensive experience in small business tax matters (such as Division 152 Small Business Retirement Concessions) through to large corporate tax issues involving Div 6C (stapled structures), Div 855 (TARP), Div 149 (pre-CGT cost-base setting), transfer pricing, capital gains tax and other matters.

Michael has been an adviser to ATO and state revenue offices on tax and stamp duty valuation matters since 1999. He is responsible for the adoption by ATO of Market Valuation Guidelines across the ITAA and advised ATO on the implementation of the Tax Consolidation Regime and Mining Resource Rent Tax. He was also responsible for the valuation support to settlement of \$1bn of disputed R&D syndicate claims.

Michael is the only valuation professional to have been a member of the Tax Institute's National Dispute Resolution Committee. He is also former chair of the CPA Valuation group and a former councillor of Finsia.

Michael has provided expert testimony in the WA State Administrative Tribunal, Federal Court, Victorian Supreme Court, South Australian Supreme Court, a neutral evaluation hearing and Telecommunications Industry Ombudsman hearing in relation to shareholder disputes, managed investment schemes and a range of tax matters.

Over his career Michael has been responsible for over 1,000 valuation engagements including equity valuations of in excess of \$100bn in equity investments in unlisted infrastructure for major superannuation funds and fund managers.

He is co-author of *Business Valuations Digest* and author of a wide range of published material in relation to valuation, government business sales, regulatory cost of capital and tax valuation matters. He is a regular speaker on valuation issues.

Appendix 1 – Sources of information

1. [ATO TD 2022/D3](#)
2. [2018 Treasury consultation paper](#)
3. [Tax Institute submission](#) on TD2022/D3 (members only)
4. CPA submission on TD 2022/D3
5. [Taylor v Killer Queen, LLC \(No 5\) \[2023\] FCA 364 \(21 April 2023\)](#)
6. Hopgood Ganim TD 2022/D3 blog
7. [Active Accounting TD 2022/D3 blog](#)
8. [BlackBay Lawyers blog](#)
9. [Hall Chadwick blog](#)
10. [The Highest-Paid Dead Celebrities Of 2022—A Writer Earns Half-A-Billion From The Great Beyond \(forbes.com\)](#)
11. [Taxation Determination Draft Released | HopgoodGanim](#)
12. [Draft Taxation Determination TD 2022/D3: Use of an individual's fame \(taxinstitute.com.au\)](#)
13. [Internet searches \(links in the document\)](#)
14. [Cambridge Dictionary \(definition of fame\)](#)
15. [International Valuation Standards Council Perspectives Paper: Rethinking Brand Value](#)
16. Commissioner of State Revenue v Placer Dome Inc [2018] HCA 59
17. Federal Commissioner of Taxation v Murry (1998) 193 CLR 605