

COPYRIGHT ROYALTY TRIBUNAL
CABLE ROYALTY DISTRIBUTION PROCEEDING

BRIEF ON BEHALF OF CLAIMANTS:

Archie Comic Publications, Inc.
DC Comics Inc,
Chicago Tribune New York News Syndicate, Inc.
William H. Cosby, Jr.
Harvey Cartoons
Henson Associates, Inc.
King Features Syndicate, Inc.
Larry Harmon Pictures Corp.
Marvel Comics Group, a Division of Cadence
Publishing Corporation
Muppets, Inc.
Radio Comics, Inc.
Warner Bros. Inc.

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PRELIMINARY STATEMENT

Claimants are the owners, respectively, of copyrights in pictorial, graphic and sculptural works some of which are BUGS BUNNY, ROAD RUNNER and PORKY PIG (owned by Warner Bros. Inc.), the MUPPET SHOW characters, including MISS PIGGY, KERMIT THE FROG, FOZZIE BEAR and others (owned by Henson Associates, Inc.), the SESAME STREET characters, including BIG BIRD, BERT, ERNIE, COOKIE MONSTER and others (owned by Muppets, Inc.), SUPERMAN, BATMAN and WONDER WOMAN (owned by DC Comics Inc.), SPIDERMAN and THE HULK (owned by Marvel Comics Group), CASPER THE FRIENDLY GHOST, WENDY THE FRIENDLY WITCH and BABY HUEY (owned by Harvey Cartoons), BOZO THE CLOWN (owned by Larry Harmon Pictures Corp.), FAT ALBERT (owned by William H. Cosby, Jr.); etc.

Claimants submit this Memorandum in support of their claims to copyright royalties pursuant to Section 111(d) (4) of the Copyright Act.

SUMMARY OF ARGUMENT

Section 111(d)(4) of the Copyright Act provides that the royalty fees deposited under Section 111 shall be distributed, in accordance with specified procedures (§111(d)(5)), to those "copyright owners" who claim that "their works were the subject of [essentially, distant non-network] secondary transmissions by cable systems" during the relevant time period. The statute mandates payment to "any such owner whose work was included" in the qualifying secondary transmissions. Section 111(d)(4)(A), (B) and (C).

The claimants here, all of whom are owners of copyrights in certain pictorial, graphic or sculptural works (hereinafter the "Characters"), are "copyright owners" of "works" each of which has been the "subject of" and was "included in a secondary transmission" of a non-network television program. Claimants' Characters, moreover, are unique and distinctive copyrighted works of a kind which are significantly different from material which is incorporated in television programming. Unlike other copyrighted works such as novels, plays and television scripts from which television programs are derived and which are incorporated in the programs, these Characters are not merged or worked

indistinguishably into the television program but are "included" therein and continue to retain their independent identities remaining visible and separately recognizable throughout.

Accordingly, these claimants are entitled as a matter of law to share in the Section 111 royalties.

The Copyright Act has intentionally omitted standards to be applied by the Tribunal "in determining the appropriate division among competing copyright owners" of the Section 111 royalty fees. "The Committee [on the Judiciary] concluded that it would not be appropriate to specify particular, limiting standards for distribution. Rather, the Committee believes that the Copyright Royalty [Tribunal] should consider all pertinent data and considerations presented by the claimants." H.R. Rep. No.94-1476, 94th Cong., 2d Sess.97 (1976) (hereinafter cited as "H.Rep.").

But while the standards for appropriate division of the Section 111 royalties among competing copyright owners are to be determined by the Copyright Royalty Tribunal, we submit that the Tribunal has no discretion to deny payment to any claimant who may be a "copyright owner" of a "work" which has been the "subject of" and "included" in a qualifying secondary transmission by a

cable system. Inasmuch as each of the claimants with respect to the copyrighted Characters has satisfied the statutory criteria, each is entitled as a matter of law to participate in the Section 111 royalty fund, the only question being "how much" - not "whether".

ARGUMENT

POINT I

CLAIMANTS ARE "COPYRIGHT OWNERS" OF "WORKS" UNDER SECTION 111.

Section 111 provides that the compulsory royalty fees deposited under that section shall be distributed to "copyright owners" whose "works" are the subject of, and are included in, certain secondary transmissions by cable systems.

Claimants here are "copyright owners" and the characters are "works" within the meaning of Section 111. The term "copyright owner" is defined in Section 101 of the Copyright Act; Section 102 of the Copyright Act sets forth the works of authorship in which copyright protection subsists and includes therein "pictorial, graphic or sculptural works". The characters here involved are depicted as such pictorial, graphic or sculptural works. Claimants are the owners of the copyrights in the Characters including, inter alia, the rights of reproduction (Section 106 (1)) and display (Section 106 (5)).

The copyrightability of pictorial, graphic or sculptural characters under the 1909 Act was not changed by the 1976 Act. Over the years, the courts have accorded

strong protection under the Copyright Law for such characters. See, for example, Detective Comics v. Bruns Publications, 111 F.2d 432 (2d Cir. 1940); Fleischer Studios v. Ralph A. Freundlich, Inc., 73 F.2d 276 (2d Cir. 1934); King Features Syndicate v. Fleischer, 299 F. 533 (2d Cir. 1924); Detective Comics v. Fox Publications, 46 F.Supp. 872 (S.D.N.Y. 1942); Hill v. Whalen & Martell, Inc., 220 F. 359 (S.D.N.Y. 1914); Geisel v. Poynter Products, Inc., 295 F.Supp. 331, 350 (S.D.N.Y. 1968).

POINT II

CLAIMANTS' CHARACTERS ARE UNIQUE
AND DISTINCTIVE COPYRIGHTED
PICTORIAL, GRAPHIC AND SCULPTURAL
WORKS AND ARE "THE SUBJECT OF
SECONDARY TRANSMISSIONS" AND ARE
"INCLUDED" IN SECONDARY TRANSMISSIONS
OF NON-NETWORK TELEVISION PROGRAMS.

Section 111(d)(4) provides for distribution of royalty payments to the copyright owners whose works were "included" in secondary transmissions of non-network television programs.

On the one hand, Congress did not limit the grant of copyright royalties to the owners of programs. Had Congress wished to do so, it would have provided for distribution to the copyright owners of programs included in secondary transmissions. The grant, however, is to the owner of a "work" included in a secondary transmission of a program. On the other hand, Congress did not intend to grant copyright royalties to the owners of all copyrighted works incorporated in television programs or on which television programs are based. It is significant that despite the long accepted and well known practice of incorporating and otherwise merging copyrighted works into television programs by, for example, the preparation of a television program as a derivative work from a novel, Congress, in Section 111 specified "included" as the operative relationship

between a copyrighted work and a television program which would give rise to copyright royalty liability.

Congress did not use "incorporate", "embody", "derived from" or "based on", verbs which, as Congress was aware, describe ways in which copyrighted works are transformed or assimilated into television programs. Congress chose, instead, to focus on a particular relationship between a copyrighted work and the television program, a relationship which is peculiarly applicable to pictorial, graphic and sculptural characters. That distinction is significant in supporting the claims with respect to the Characters here involved.

Fanciful characters that are created as pictorial, graphic and sculptural works are highly distinctive and valuable works, virtually sui generis among works traditionally accorded strong copyright protection. Unlike other copyrighted works such as novels, plays and television scripts from which television programs are prepared as derivative works (Section 106(2) of the Copyright Act), and which are incorporated in the programs or on which the programs are based, the Characters are not merged or worked indistinguishably into the television program but are "included" therein and continue to retain an independent

identity -- a life of their own.*

This Tribunal may take notice of the indisputable fact that these Characters have achieved, in this country and elsewhere, an extraordinarily high degree of recognition or identification, embodying traits, characteristics and qualities, as well as distinctive names and associations, which transcend the particular stories and settings in which they have been depicted. Indeed, this recognition persists long after those stories have been forgotten. It is the character, and its physical appearance (including its facial expressions and bodily movements), which together create a "persona" that has attained virtual celebrity status.

Significantly, these celebrated Characters, in sharp contrast to copyrightable elements of other works such as story lines, plots, themes, settings and the like, do not lose their identities or any of their distinctive characteristics when they are included in television programs. Their identities are not merged into the other program material and the Characters undergo no trans-

* This is the case irrespective of any licensing arrangements which may have been made by claimants with program producers or others.

formation;* nor are they subordinated to such other material, but rather the role of the Characters, individually and collectively, forms the central focus and appeal, not only of particular programs but also of the television series as a whole. Moreover, stopping the program and viewing a single frame or even running the film backwards would not alter the character's identifiability, it would remain and be seen as Bugs Bunny or Miss Piggy or Superman.

The fact that these Characters are "included" in secondary transmissions of non-network television programs brings these Characters directly within that category of works that is entitled to a distribution of royalty fees under Section 111(d)(4). Section 111(d)(4) is clear and unambiguous in not limiting the grant of copyright royalties to owners of programs and in specifically providing for the distribution of royalties to the owners of copyrighted works "included" (as opposed to incorporated) in the programs which are secondarily transmitted.

This conclusion is further supported by the fact that the principal appeal of the television programs to

*In this respect the Characters may be analogized to copyrighted music which, though included in a television program, nevertheless retains its separate identity. If the copyrighted music is entitled to be treated as a "work" "included" in a television program under Section 111, then Characters must also be deemed "works" so "included" under that section.

their audiences lies with the Characters and the unique qualities embodied in or represented by them, and not in the stories or anything else incorporated in the programs. These Characters have immense popular appeal and drawing power, and command intense loyalties and affections, thus helping to explain why the Characters -- and not the programs or stories in which they are "included" -- have become the warp and woof of an entire industry derived from their value in the promotion and sale of endless items of merchandise, such as toys, clothing, stationery, comic books, games, posters, novelty items, and other goods and services.

The Characters are, therefore, copyrighted works not only included in secondary transmissions of non-network television programs but are also the "subject" of the secondary transmissions.

POINT III

BECAUSE CLAIMANTS ARE "COPYRIGHT OWNERS"
OF "WORKS" WHICH HAVE BEEN THE "SUBJECT
OF" AND "INCLUDED" IN SECONDARY TRANS-
MISSIONS BY CABLE SYSTEMS, CLAIMANTS ARE
ENTITLED AS A MATTER OF LAW TO SHARE IN
THE SECTION 111 ROYALTY FUND

As demonstrated in the preceding portions of this brief, the claimants with respect to their copyrighted Characters are, within the meaning and purpose of Section 111 (d)(4), "copyright owners" of "works" which were the "subject of", and "included," in qualifying secondary transmissions made by cable systems during the relevant time period. Since each of the statutory criteria has been satisfied, the claimants are entitled as a matter of law to an appropriate share of the Section 111 royalty fees. The only question remaining, therefore, is "how much" the claimants are entitled to, not "whether" they are so entitled.

We submit that while the task of determining the appropriate division of the royalty fund among competing copyright owners has been committed to the Tribunal's jurisdiction, the Tribunal has no discretion to deny payment to any claimant, such as these owners of copyrighted Characters, who have met the statutory criteria of Section 111(d)(4).

CONCLUSION

Claimants have a right to receive an appropriate share of the cable television royalties under Section 111 of the Copyright Act.

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Respectfully submitted,

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