

JUL 8 1980 RECD

Before the
COPYRIGHT ROYALTY TRIBUNAL
Washington, D.C. 20036

In the Matter of)
)
DISTRIBUTION OF CABLE)
TELEVISION ROYALTY FEES) CRT Docket No. 79-1

PROPOSED FINDINGS OF FACT
AND CONCLUSIONS OF LAW OF
THE CHARACTER CLAIMANTS

Pursuant to 37 C.F.R. §301.54, the character claimants respectfully submit their proposed findings of fact and conclusions of law:

I.

FINDINGS OF FACT

A. Identification of the Character Claimants

1. The character claimants are comprised of the following parties:

Archie Comic Publications, Inc.
DC Comics, Inc.
Harvey Cartoons
Henson Associates, Inc.
King Features Syndicate, Inc.
Larry Harmon Pictures Corp.
Marvel Comics Group, a Division
of Cadence Industries Corporation
Muppets, Inc.
Radio Comics, Inc.

B. Identification of the Copyrighted Characters
and Ownership of the Copyrights Therein

2. Each character claimant is the owner (currently, and throughout 1978, the relevant period) of copyright in certain pictorial, graphic and sculptural works, namely, well-known, distinctive and popular artistic visual character



creations ("characters").

See paragraph 2 of each of the following affidavits (hereinafter, collectively, "the character claimants' affidavits"):

(i) March 14, 1980 affidavit of Sol Harrison, President of DC Comics, Inc.

(ii) March 13, 1980 affidavit of Larry Harmon, President of Larry Harmon Pictures Corporation.

(iii) March 14, 1980 affidavit of John Goldwater, President of Archie Enterprises, Inc., parent of Archie Comic Publications, Inc. and Radio Comics, Inc.

(iv) March 14, 1980 affidavit of James Galton, President of Marvel Comics Group, A Division of Cadence Industries Corporation.

(v) March 14, 1980 affidavit of Joseph F. D'Angelo, President of King Features Syndicate, Inc.

(vi) March 19, 1980 affidavit of Alfred Harvey, President of Harvey Cartoons.

(vii) March 14, 1980 affidavit of Albert Gottesman, Vice President of Henson Associates, Inc.

(viii) March 14, 1980 affidavit of Albert Gottesman, Vice President of Muppets, Inc.

See also the transcript of the oral testimony of Dr. Vivian Horner, pp.54-55 (April 10, 1980).

3. Some of the principal copyrighted characters owned by each claimant are:

DC Comics, Inc.
Superman
Clark Kent
Lois Lane
Batman
Robin

Joker
Riddler
Aquaman
Penguin
The Catwoman

Henson Associates, Inc.

Kermit the Frog	Animal
Miss Piggy	Gonzo
Fozzie Bear	Statler
Rowlf	Waldorf
Scooter	Swedish Chef
Doctor Teeth and the Electric Mayhem	Sam the Eagle Robin

Muppets, Inc.

Big Bird
Bert
Ernie
Cookie Monster
Mr. Snuffle-Upagus
Grover
Oscar
The Count
Herry Monster

Marvel Comics Group, A Division of
Cadence Industries Corporation

Spider-Man
The Mighty Thor
Sub-Mariner
Iron Man
The Incredible Hulk
Captain America

Larry Harmon Pictures Corp.

Laurel and Hardy	Circus Boss
Bozo	Whacko Wolf
Butchy	Prof. Tweedyfoofer
Belinda	Big Shorty
Super Sniffer	Oodles Duck
Elvis	Punchy McFowl
Ervin	Creepy Gleep Short Biggy

Others (see para.2 of Larry Harmon affidavit)

Archie Enterprises, Inc. (Archie Comic
Publications, Inc. and Radio Comics, Inc.)

Archie
Jughead
Reggie
Betty
Veronica
Mr. Weatherbee
Miss Grundy
Josie

Melody
Valerie
Alan M.

King Features Syndicate, Inc.
Popeye
Olive Oil
Wimpie
Flash Gordon
Dale Arden
Ming
Zarkov

Harvey Cartoons
Wendy the good little witch
Casper the friendly ghost
Little Audrey
Herman
Katnip
Baby Huey
Buzzy
Spooky
Tommy Tortoise
Moe Hare
Nightmare
The Ghostly Trio

See paragraph 2 of each of the character claimants' affidavits.

4. Photographs or illustrations of the foregoing characters appear in the record. See the exhibits annexed to the character claimants' affidavits.

C. Inclusion of the Copyrighted Characters in Qualifying Secondary Transmissions

5. The copyrighted works, i.e., the copyrighted characters described above, were included in the following non-network or syndicated television programs or series broadcast during 1978:

DC Comics Inc.

- (a) "The Adventures of Superman," featuring Superman, Clark Kent and Lois Lane
- (b) "Batman," featuring Batman, Robin, Joker, Penguin, Riddler and The Catwoman
- (c) "Aquaman/Batman/Superman," featuring Aquaman, Batman and Superman

Henson Associates, Inc.

- (a) "The Muppet Show," featuring Kermit the Frog, Miss Piggy, et al.

Muppets, Inc.

- (a) "Sesame Street," featuring Big Bird, Bert, Ernie, Cookie Monster, et al.

Marvel Comics Group, a Division of
Cadence Industries Corporation

- (a) "Spider-Man," featuring Spider-Man
- (b) "Marvel Super Heroes," featuring The Mighty Thor, Sub-Mariner and Iron Man
- (c) "The Electric Company," featuring Spider-Man

Larry Harmon Pictures Corp.

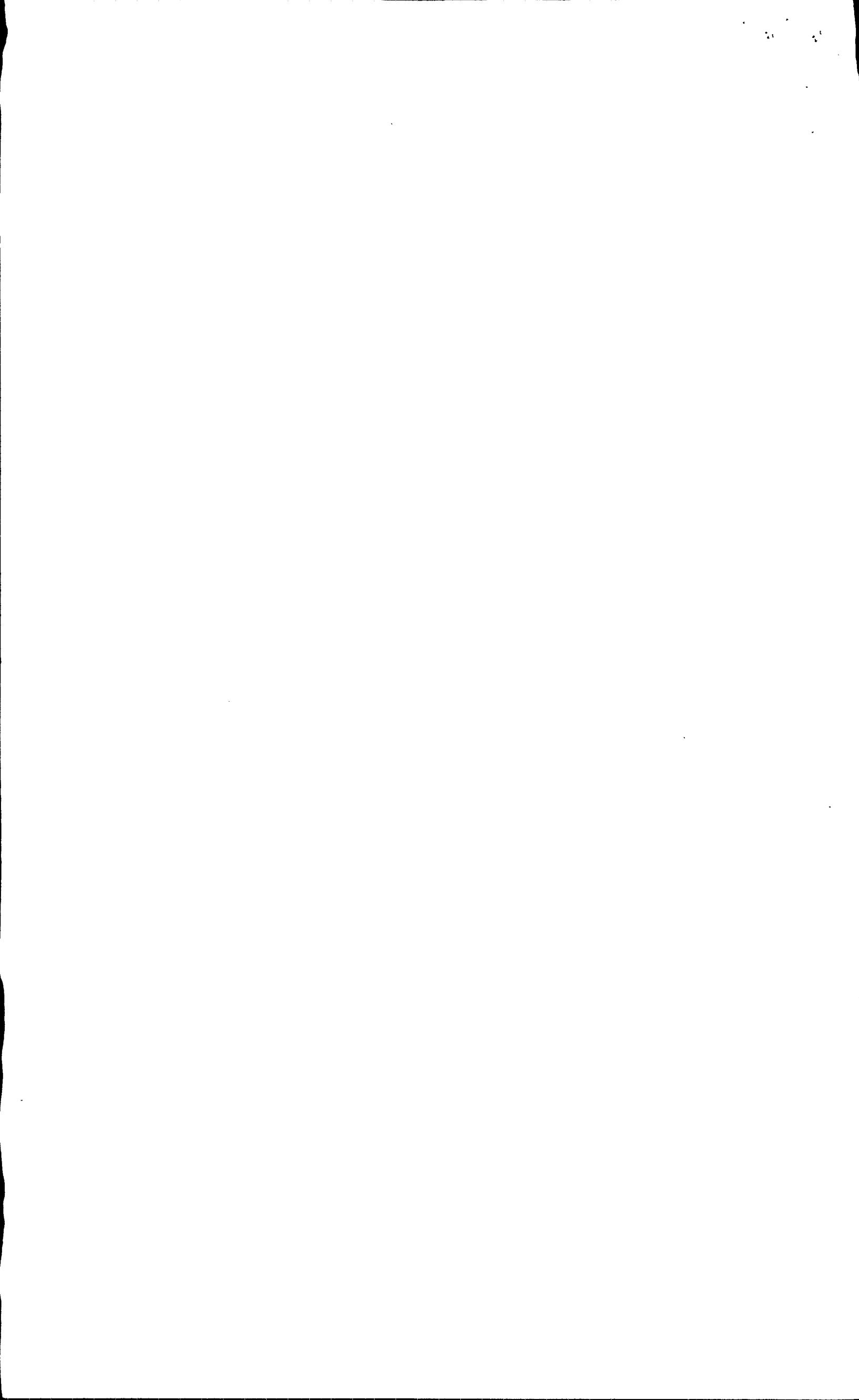
- (a) "The Laurel and Hardy Cartoon Show," featuring Laurel and Hardy
- (b) "Bozo's Big Top," featuring Bozo
- (c) "Bozo's Circus," featuring Bozo, Laurel and Hardy

Archie Enterprises, Inc. (Archie Comic
Publications, Inc. and Radio Comics, Inc.)

- (a) "The Archies," featuring Archie, Jughead, Reggie, Betty, Veronica, Mr. Weatherbee and Miss Grundy
- (b) "Josie and the Pussycats," featuring Josie, Melody, Valerie, and Alan M.
- (c) "Josie and the Pussycats in Outer Space," featuring Josie, Melody, Valerie and Alan M.

King Features Syndicate, Inc.

- (a) "Popeye," featuring Popeye, Olive Oil and Wimpie
- (b) "Flash Gordon," featuring Flash Gordon, Dale Arden and Ming



Harvey Cartoons

- (a) "Wendy the Good Little Witch,"
featuring Wendy
- (b) "Casper the Friendly Ghost,"
featuring Casper
- (c) "Little Audrey," featuring
Little Audrey
- (d) "Herman and Katnip," featuring
Herman and Katnip
- (e) "Baby Huey," featuring Baby Huey
- (f) "Buzzy the Funny Crow," featuring
Buzzy
- (g) "Spooky the Tuff Little Ghost,"
featuring Spooky
- (h) "Tommy Tortoise and Moe Hare,"
featuring Tommy Tortoise and Moe Hare
- (i) "Nightmare, the Galloping Ghost,"
featuring Nightmare
- (j) "The Ghostly Trio," featuring
the Ghostly Trio

See paragraph 3 of each of the character claimants' affidavits.

6. Each of the foregoing copyrighted works or characters was included in secondary transmissions made by cable systems of non-network television programs during 1978.

See paragraph 5 of each of the character claimants' affidavits, and the March 21, 1980 affidavit of Tami Kaiser (and the schedules annexed thereto concerning such cable carriage and related matters).

7. Certain additional information concerning the programs identified in paragraph 5 hereof (e.g., the markets and broadcast stations on which such programs were syndicated in 1978), to the extent included in the survey conducted by

The Arbitron Company during the four-week period November 1 through November 28, 1978 and reproduced as audience estimates in "Arbitron Television Syndicated Program Analysis -- November 1978," appears in the record. Further, "Sesame Street" was carried on 280 stations that are part of the Public Broadcasting System.

See paragraph 4 of each of the character claimants' affidavits (and the exhibits annexed thereto), and the March 21, 1980 affidavit of Tami Kaiser (and exhibits annexed thereto).

8. The foregoing copyrighted characters were included without transformation in appearance or identity in the television programs in which they were featured, and thus each character continued to retain its independent existence, its immediately recognizable identity and its distinctive appeal apart from and paramount to the particular stories, settings or other programming material in which the character was included.

See paragraph 6 of each of the character claimants' affidavits (and the visual representations of the characters annexed thereto), and the separate two-page March 14, 1980 affidavit of Albert Gottesman, Vice President of Henson Associates, Inc. and of Muppets, Inc.

D. The Value, Benefit, Popularity and Significance of the Copyrighted Characters -- Qualitative Factors

9. The copyrighted characters have substantial value, benefit, popularity, worth and significance in the context of video programming delivered by cable systems, especially for children, but also for adults:

(a) They are of direct benefit to cable systems by, for example, enhancing the ability of those systems to attract subscribers and increase revenues.

(b) The characters enjoy substantial popularity with cable subscribers and viewers.

(c) The value and benefit are based on the characters themselves, and not on the other programming material.

See Part "B" (pp.3-8) of the "Summary Statement of the Direct Case of the Character Claimants" dated March 21, 1980 (hereinafter, "Summary Statement"), and the transcripts of the sworn oral testimony of Dr. Vivian Horner and of Mr. Robert Bell at the evidentiary hearing of the character claimants before the Tribunal on April 10, 1980 (hereinafter, "the Horner testimony," "the Bell testimony").

10. The single most effective genre of children's television programming for producing the largest possible audience is that of animated programming, including cartoon characters and their individual characteristics and traits.

(a) Although the networks have been under extraordinary pressure over the last several years to reduce the number of cartoon programs shown in the Saturday morning slot (the so-called "Kid Vid Ghetto"), nevertheless, from 1973 to 1979 the decrease has been negligible, according to the recent report issued by the FCC's Task Force on Children's Programming. This is readily explained by the fact that if any network tried to show

some other form of programming in competition with cartoons, it would be "killed in the ratings," that is, it could not produce an audience large enough to justify the necessary advertising revenues.

(b) The experience of independent stations, and even network affiliates, who have chosen not to carry cartoons and, instead, have substituted their own locally originated programs, corroborates the substantial value, importance and popularity of the characters.

(c) Cartoons are "the most popular form of programming for children" (quoting Dr. Horner's testimony, p.14).

See Summary Statement, pp.3-5, and the Horner testimony, pp.9-14.

11. The "characters" are the primary attraction in these very popular cartoon series. "Plot" is a secondary consideration in animated cartoons; generally the plots are entirely predictable and viewers are really watching because they love the "characters," most often drawn from favorite comic books.

See Summary Statement, pp.5-6, and the Horner testimony, pp.13,14-17,20-21.

12. The situation is similar with respect to "live" impersonations of comic-book characters in the very popular television series derived from such sources. Plots, though they tend to be somewhat more inventive, are still largely of background and incidental interest and importance. Again, "characters" are the primary factor in

drawing and holding an audience.

See Summary Statement, pp.5-6, and the Horner testimony, pp.13, 14-17, 20-21.

13. With respect to the extraordinarily popular and unique Muppet characters, while not cartoon characters, they function in much the same way because of the attractiveness and distinctiveness of the Muppets -- they are lovely, wonderful, engaging and charming.

(a) "The Muppet Show" introduces a new dimension. It is not "children's programming," but is adult entertainment created for family viewing and, while it undoubtedly is expected that children will watch too, its primary audience is adults.

See Summary Statement, pp.5-6; the Horner testimony, pp.13, 14-17, 20-21; and the two-page March 14, 1980 affidavit of Albert Gottesman, Vice President of Henson Associates, Inc. and of Muppets, Inc. (demonstrating that it is the Muppet characters, not the other elements of the program (such as story line or theme), which create the enormous appeal of "The Muppet Show" and "Sesame Street," and that "The Muppet Show" was "sold" for television solely on the basis of the visual portrayal of its puppet characters).

14. Children, as well as adults, are drawn to and thus view the characters, not the other programming material, making the "characters" more important than the "story." This phenomenon is further illustrated by the fact that the identical character programming is frequently repeated and rerun within very short time periods, often in the very same week, without reduction in viewer interest.

See Summary Statement, pp.5-6, and the Horner testimony, pp.13, 14-17, 20-21.

15. The cartoon and other characters are of extraordinary financial benefit to the commercial broadcasters, and to the cable systems carrying broadcast material, and such material forms the backbone of children's programming.

(a) Cable systems, in selling their service to subscribers, ordinarily emphasize the children's programming (the key component of which is the "characters") which they carry, thus further corroborating the significant value and benefit of such material to cable systems.

(b) A typical example of cable system promotion, featuring the "characters," is in the record.

See Summary Statement, p.5 (and exhibit following page 12) and the Horner testimony, pp.13, 17-20.

E. The Value, Benefit, Popularity and Significance of the Copyrighted Characters -- Quantitative Factors

16. There is no readily available measure or gauge, in quantitative terms, of the popularity of the characters (as distinguished from the programs in which they are included). Nevertheless, their popularity is "very real and very substantial" even though it is not susceptible to exact measurement in quantitative terms. And that "popularity" translates into "value," in the context of video programming and distant signal cable carriage.

See the Horner testimony, pp.21, 24-26, 55.

17. Some quantitative signposts are available, however. Approximately 6.56% of all programming from syndicated

sources in 1978 consisted of animated or cartoon character programming. An additional .35% of all programming from syndicated sources in 1978 consisted of "The Muppet Show "; and "Sesame Street" and "The Electric Company" (both of which include substantial animated cartoon programming) ordinarily occupy about 17.8% of the total air time of the Public Broadcasting System. Thus, animated or cartoon characters and the Muppet characters represented at least approximately 7% of all syndicated programming during 1978.

See Summary Statement, pp.6-7; the Horner testimony, pp.21-26; the Federal Communications Commission October 1979 report titled "Television Programming for Children: A Report of The Children's Television Task Force" (including Volume 4, pp.18, 35-41, 94-95); and The Arbitron Company survey conducted during the four-week period November 1 through November 28, 1978 and reproduced as audience estimates in "Arbitron Television Syndicated Program Analysis -- November 1978" (pertinent portions of which are annexed to the character claimants' affidavits and the March 21, 1980 affidavit of Tami Kaiser).

F. The Value, Benefit, Popularity and Significance of the Copyrighted Characters -- Analogous Marketplace Factors (Character Licensing in the Merchandising of Goods and Services)

18. The individual images of the cartoon and Muppet characters owned by the character claimants have demonstrable and substantial value, as shown by their unique capacity to enhance the sales of a great variety of

goods and services, i.e., in the business commonly known as "character licensing" (see the Bell testimony, pp.142-143). Thus, there exists a market for the character likenesses so that the owners of the copyrighted characters license the rights to use the copyrighted characters (subject to strict and detailed quality controls, see the Bell testimony, pp.154-155, and the Horner testimony, pp.35-36) on or in connection with the products, services or promotional endeavors of the licensee.

See the Bell testimony, pp.137-166.

19. Character licenses fall into four general classifications:

(a) products sold through retail channels of distribution (e.g., dolls and even vitamins (three-dimensional replicas of the characters), as well as mugs, cups, glasses, clothing, games, toys and novelty items bearing two-dimensional depictions of the characters directly on the item);

(b) publications and other printed materials (e.g., puzzles, posters, etc.);

(c) sales promotion and premium ventures (e.g., "free" item bearing a character depiction is given away with a certain prescribed minimum sale of another product); and

(d) advertising or merchandising campaigns

where the character is used in the role of spokesman, endorser, or as a focal point for an ad campaign.

See the Bell testimony, pp.137-138, 141-142, 144-146, and Summary Statement, p.8.

20. The copyrighted characters which are the subject of this proceeding are "valuable properties for character licensing."

See the Bell testimony, pp.148-149.

21. The characters have a "life of their own" -- they transcend the very cartoon programs that spawn their lives and become "larger than life." It is the depiction of the character and its basic characteristics (e.g., personality) that is licensed and used in merchandising, and not any story line or plot or any of the other elements incorporated in any programming in which the characters are included.

See Summary Statement, p.8, and the Bell testimony, pp.141-142, 147-148, 155-156.

G. The Value, Benefit, Popularity and Significance of the Copyrighted Characters
-- Relevant Testimony of Other Claimants

22. Popularity -- i.e., what do cable subscribers want to view -- is a legitimate and important criterion in determining the amount or percentage of the cable royalty fees to which a claimant is entitled, and what is most popular generally is the most valuable. The popularity of certain works can be appraised without the need for "hard data" or the need to consult anything.

Oral testimony of Jack Valenti on behalf of MPAA (April 8, 1980).

23. One study concludes that 52% of the persons surveyed thought that one of the major services that cable television could provide was carriage of a channel devoted exclusively to children's programs, without advertising. Only three services offered by cable television were rated higher than children's programs (improved reception, first-run movies and concerts, and professional and collegiate sports events from other major cities). Thus, children's programming has substantial value and appeal, and cartoon and similar characters are an important aspect thereof.

Hart Survey attached as exhibit to written statement on direct case of The National Collegiate Athletic Association. See also Finding of Fact 10 above.

H. Analogies between Music and Characters

24. Music -- like characters -- is an element included in programs, but music is not itself a "program." Accordingly, the claim of the music interests is limited to the music itself and does not embrace other programming elements or the program as a whole in which music is carried.

Cross-examination of Dr. Richard Link (BMI) by Richard Dannay (March 31, 1980).

25. Music (i.e., the composition, lyrics, etc.) undergoes no transformation or loss of its identity when included in programs, and retains its basic character without merging into the other program material.

Cross-examination of Dr. Richard Link (BMI) by Richard Dannay (March 31, 1980).

26. Music is included in virtually all programs, but the music claims in this proceeding do not include any breakdown or allocation between "feature usage" of music (e.g., where it is the primary focus, as when a performer sings a song) and "background usage" (e.g., where music is incidental to the ongoing action, such as to heighten dramatic scenes). However, a substantial portion of music use is "background."

Cross-examination of Dr. Richard Link (BMI) and of Dr. Paul Fagan (ASCAP-SESAC) by Richard Dannay (March 31, 1980).

27. The music claims are not based in any way on popularity with cable subscribers or share of cable audiences, i.e., on what they want to watch or hear.

Cross-examination of Dr. Richard Link (BMI) and of Dr. Paul Fagan (ASCAP-SESAC) by Richard Dannay (March 31, 1980).

28. In contrast to music, the inclusion of characters in programs must be classified entirely as "feature usage" (because characters are the primary, if not sole, attraction in such programs), and there is affirmative evidence of the substantial popularity of the characters with cable systems and their subscribers.

The oral and written testimony of Dr. Vivian Horner and of Mr. Robert Bell, previously cited.

II.

CONCLUSIONS OF LAW

A. The Character Claimants' Legal Standing or Entitlement

1. The character claimants have legal standing to participate in this proceeding and are entitled as a matter of law to receive a distribution of an appropriate share of the cable royalty fees.

2. 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 "copyright owners" whose "works" are "included" in, and are the "subject of," certain secondary transmissions by cable systems. Payment is mandated to those claimants who satisfy the statutory criteria.

3. The character claimants have fulfilled each of the statutory criteria by establishing that they are "copyright owners" of "works" (namely, the copyrighted cartoon and Muppet characters) which during 1978 were "included" in and the "subject of" qualifying distant non-network secondary transmissions.

4. "Copyright Owners":

(a) The character claimants are "copyright owners" within the meaning of the Copyright Act, including Sections 101 and 111 thereof.

(b) Each of the character claimants is the owner of copyright in its characters, including, inter alia,

the right of reproduction under Section 106(1) and the right of display under Section 106(5) of the Copyright Act. See Findings of Fact 2-4 above.

(c) The character claimants have not transferred their ownership of the copyrights in their characters to program producers or anyone else.

See the Horner testimony, pp.54-55; the Bell testimony, pp.138-139; Findings of Fact 2-4 above.

5. "Works":

(a) The characters are "pictorial, graphic or sculptural" works within the meaning of Section 102 of the Copyright Act, and thus are works of authorship in which copyright protection subsists.

(b) The copyrightability of pictorial, graphic or sculptural characters under the 1909 Act was not changed by the 1976 Act. Courts have traditionally 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) (copyright in "Superman" character infringed by "Wonderman"); Fleischer Studios v. Ralph A. Freundlich, Inc., 73 F.2d 276 (2d Cir.1934), cert. denied, 294 U.S. 717 (1935) (dolls held to infringe the copyright in "Betty Boop" cartoon character); King Features Syndicate v. Fleischer, 299 F.533 (2d Cir.1924) (toy animals held to infringe the copyrights in cartoon character "Sparky" or "Spark Plug"); Detective Comics v. Fox Publications, 46 F.Supp. 872 (S.D.N.Y.1942) (infringement of copyrighted cartoon characters "Batman" and "Robin"); Hill v. Whalen & Martell, Inc., 220 F.359 (S.D.N.Y. 1914) (live dramatic



performance held to infringe the copyrights in cartoon characters "Mutt" and "Jeff"); Geisel v. Poynter Products, Inc., 295 F.Supp. 331, 350 (S.D.N.Y. 1968) (dolls could infringe copyrights in "Dr. Seuss" cartoons); Walt Disney Productions v. Air Pirates, 345 F.Supp. 108 (N.D. Cal.1972) and 581 F.2d 751 (9th Cir. 1978), cert. denied, 439 U.S. 1132 (1979) (copyright in "Mickey Mouse" and other Disney characters held infringed).

6. "Works" Distinguished from "Programs":

(a) Section 111(d)(4) does not limit the grant of cable royalties to the owners of "programs." The statutory grant is not to copyright owners of "programs" included in secondary transmissions. Rather, the grant is to the copyright owner of a "work" included in a secondary transmission of a program.

(b) The language of Section 111(d)(4)(A) is plain, express and unambiguous: the right to receive cable royalties is not limited to owners of "programs" or to works which are "programs"; rather, that right inures to the owner "whose work was included in a ... program"

(c) A contrary conclusion would require a change in the sequence of the words of Section 111(d)(4)(A) and the substitution of new words, thereby materially altering the meaning of that provision. It must be assumed that the legislative purpose is expressed by the ordinary meaning of the words used in the statute; and since the statute leaves no ambiguity, there is nothing to construe and no reason to go beyond the plain language of Section 111(d)(4)(A).

(d) If the statute were construed to require payment to owners of programs, rather than to owners of works included in programs, the logical and unavoidable conclusion would be that no payment could be made to the performing rights societies for the copyrighted music included in programs. Music, like characters, is a component of a program but is not itself a program; and thus the music interests are owners of works included in programs but are not owners of those programs. See Findings of Fact 24-28 above.

(e) Since music is entitled to be treated as a "work" "included" in the secondary transmission of a television program under Section 111, then the characters must also be considered "works" likewise "included" under that section. No justification can exist for granting the owners of copyrighted characters any different status or treatment than the owners of copyrighted music.

7. "Included":

(a) The statute does not require payment of cable royalties to the owners of all copyrighted works incorporated in television programs or on which such programs are based.

(b) Despite the long accepted and well known practice of incorporating and otherwise merging copyrighted works into television programs (by, e.g., the preparation of a television program as a derivative work from a novel), Section 111 specifies "included" as the operative relationship between a copyrighted work and a television program which

gives rise to cable royalty liability. The statute does not use such terms as "incorporate," "embody," "derived from," or "based upon" -- terms which describe ways in which copyrighted works are transformed or assimilated into television programs.

(c) Instead, the statute focuses on a particular relationship between a copyrighted work and the television program -- a relationship which is peculiarly applicable to pictorial, graphic and sculptural characters (as well as to music).

(d) Fanciful characters that are created as pictorial, graphic or 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 (like music) are not merged or worked indistinguishably into the television program but are "included" therein and continue to retain their independent identities -- each with a life of its own -- remaining visible and separately recognizable throughout.

(e) The characters have achieved, in the United States and indeed throughout the world, 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. In fact, 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) and personality, which together create a "persona" that has attained virtual celebrity status.

(f) These celebrated characters (like music, but 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 transformation. Nor are they subordinated to such other material, but rather the characters form the central focus and appeal, not only of particular programs but also of the television series as a whole.

(g) Even stopping the program and viewing a single frame or even running the film backwards would not alter a character's identifiability, and it would remain and be seen as, for example, Miss Piggy or Superman or Popeye.

(h) The principal appeal of the television programs to 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. The characters have immense popular appeal and drawing power, and command intense loyalties and affections, thus demonstrating

why the characters (and not the programs or stories in which they are "included") have become the foundation of an entire industry -- "character licensing" -- derived from their value in the promotion and sale of countless goods and services.

(i) Because the characters have been "included" in (and were the "subject of") secondary transmissions of distant non-network television programs during 1978, the characters fall directly within that category of "works" entitled to a distribution of cable royalty fees under Section 111(d)(4).

See Findings of Fact 5-14, 18-21 above.

8. There is no merit to the contention that the character claimants have no standing by virtue of alleged license agreements with television program producers or others permitting the use of the characters in particular films or series of films under defined circumstances.

(a) The licenses are not relevant or material to the question of the standing of the character claimants to receive royalties under Section 111.

(b) No one would contest the fact that the character claimants remain and continue to be the owners of the copyrights in their characters.

See the Horner testimony, pp.54-55; the Bell testimony, pp.138-139; Findings of Fact 2-4 above.

(c) Since secondary transmission rights are granted to cable systems by compulsory license, the character claimants, and other appropriate copyright owners, could neither withhold nor grant such secondary



transmission rights. Therefore, the character claimants could not have contracted away their rights, and the only question is who is entitled to share in the compulsory royalty payments collected for this use.

(d) Accordingly, irrespective of any licensing arrangements, the character claimants remain and are the "copyright owners" of "works" (i.e., the copyrighted characters) which were "included" in and the "subject of" qualifying secondary transmissions made by cable systems during the relevant time period. Since each of the statutory criteria has been satisfied, the character claimants are entitled as a matter of law to an appropriate share of the cable royalty fees, and the licenses can have no bearing on their status as "copyright owners" of their "works" under Section 111. This Tribunal has no discretion to deny payment to any claimant, such as an owner of copyrighted cartoon or similar characters, who has met the statutory criteria of Section 111(d)(4).

(e) Since the statute requires payment to copyright owners of "works," not "programs," it is necessarily contemplated that there may be several copyrights in television program material -- e.g., a copyright in the program qua program, as well as a copyright in the works (the characters) "included" in the program.

(f) Moreover, the character claimants necessarily own the right to display a copyrighted work publicly (expressly made applicable under Section 106(5) to pictorial, graphic or sculptural works). This display right was newly created under the 1976 Copyright Act, effective January 1, 1978, and therefore could not have been transferred under licenses made before 1978, when the right was not even in existence.

H.R.Rep. No.94-1476 at 63 (Comm. on the Judiciary, S.22, Sept.3, 1976, 94th Cong., 2d Sess.)

B. Classification of Character Claimants
Vis-a-Vis Other Claimants

9. The character owners have asserted claims only with respect to their works, i.e., their characters -- and not with respect to the programs (as a whole) in which those characters are included and featured, nor with respect to any other programming material, such as the stories, plots, themes, and settings.

10. The basis of the character owners' claims to cable royalties is therefore intrinsically different from the basis of the claims of the motion picture and syndicated program producers ("MPAA"). The character owners' claims are not linked to, derivative from, or otherwise connected or related to MPAA's claims; the claims of these parties are entirely independent of one another and must be treated in separate categories. MPAA concurs that its claims and those of the character claimants do not overlap (oral testimony of Robert Hadl, April 8, 1980).

11. Accordingly, the claims of the character owners and the claims of MPAA (or any other claimant) do not conflict, overlap, duplicate or otherwise detract from or diminish each other. The character claimants' share of cable fees shall be allocated from the common royalty fund and not from the share of MPAA or any other claimant.

C. The Harm Suffered from Distant
Signal Cable Carriage

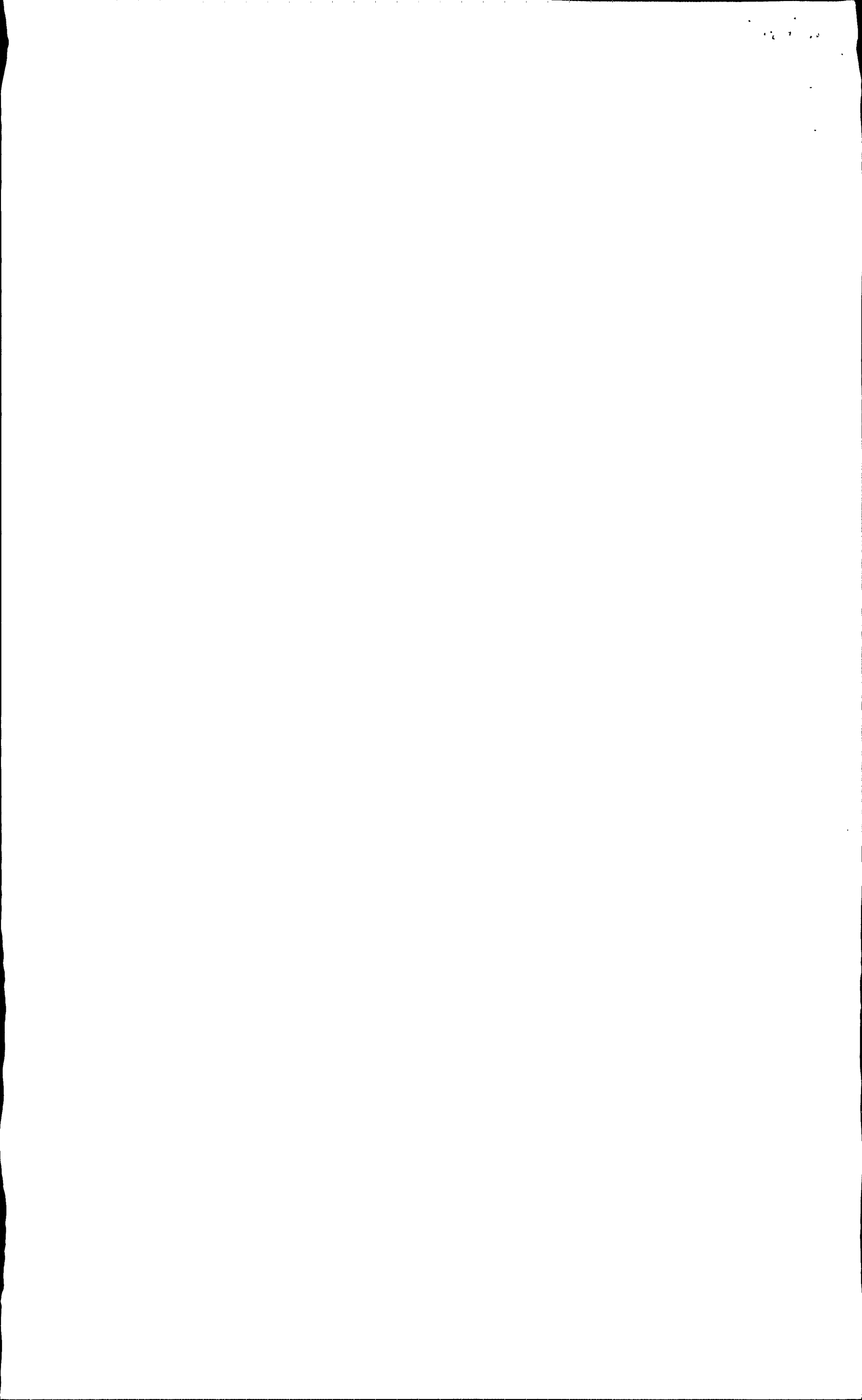
12. There has been a legislative determination that copyright owners are presumed to suffer damage or harm when their works have been included in secondary transmissions of distant non-network programming by cable systems, and this presumption is the foundation for liability or compulsory royalties under Section 111. H.R.Rep. No.94-1476, supra, at 90 (esp. third full paragraph).

13. There is no requirement, therefore, that any claimant prove specific or actual damage or harm, and proof that the claimant is the copyright owner of a work that was included in a secondary transmission made by a cable system of a non-network television program in whole or in part beyond the local service area of the primary transmitter will suffice to entitle the claimant to receive cable royalty fees.

14. The character claimants have satisfied the statutory criteria of Section 111(d)(4), and proof of actual damage is therefore unnecessary.

15. In any case, the character claimants have demonstrated that one form of actual damage is the loss of control over the use of their copyrighted works and the potential overexposure from repeated cable retransmissions which might lead to dilution in viewer interest and corresponding reduction in the value or appeal of the characters.

The Bell testimony, pp.157-161, 166.



16. The Copyright Law recognizes that in copyright cases it may be especially difficult or impossible to prove actual, measurable harm. Thus a copyright owner may recover statutory damages under Section 504(c) even in cases where there is no proof that the owner suffered actual damages or that the infringer made any profits. Similarly, where the copyright owner seeks the drastic relief of a preliminary injunction, the generally accepted rule is that where a prima facie case of infringement is established, there is no need to show detailed proof of irreparable harm, which is virtually presumed.

17. At least one claimant acknowledges the difficulty of presenting specific evidence of damage, there being no hard data demonstrating actual harm from cable carriage.

Oral testimony of Mr. Jack Valenti on behalf of MPAA (April 8, 1980).

D. The Percentage of the Cable Royalty Fees to which the Character Claimants Are Entitled

18. The characters, like music -- and in sharp contrast to the works of the other claimants in this proceeding -- are components of programs but are not themselves programs. Characters and music -- though both are included in television programs -- nevertheless retain their separate identities and distinctive characteristics; neither characters nor music merge into the other program material, and neither class of works undergoes any transformation.

See Findings of Fact 24-28 above.

19. The characters, however -- unlike music in the ordinary case -- are not subordinated to the other programming material; to the contrary, the characters form the central focus and appeal of the programs and television series in which the characters appear. Stated otherwise, the inclusion of characters in programs is a "feature usage," unlike music which is generally a "background usage."

See Findings of Fact 24-28 above.

20. Because the characters (like music) are copyrighted works which are distinct components of programs, but are not themselves "programs," the characters cannot be valued on the same basis as the interests of the other major claimants, such as MPAA, the sports groups and the broadcasters, for whose programs it may be possible and appropriate to consider such factors as total cable carriage time or share of total cable audience.

21. The Copyright Act, however, 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, supra, at 97.

22. While there is no litmus test to measure, in quantitative terms, the extraordinary and durable popularity.

of the characters, nevertheless that popularity is of substantial value and significance in the context of distant signal cable retransmissions, and popularity is a legitimate and important criterion in calculating a claimant's share of the cable royalty fees. See, e.g., Findings of Fact 16, 22 and 23.

23. Music was included in virtually all programs, whereas animated or cartoon characters and the Muppet characters represented at least approximately 7% of all syndicated programming during 1978. On the other hand, the characters appeared as a "feature usage," whereas music was for the most part merely "background usage."

24. Recognizing the validity of the claims of the character owners and their entitlement to receive a fair percentage of the cable royalty fees, but also the unavoidable difficulty of measuring their claims in precise quantitative terms, the Tribunal declares the following formula to be applicable in calculating the share due the character claimants, for the purpose of this particular proceeding covering the year 1978. Because of the similarities between music and characters as identifiable and separately recognizable elements of programs, the same percentage of the cable royalty fees allocated to music (15%) should be used in calculating the share due the character claimants, but with two adjustments: (i) to account for the differences in the number of programs in which music and characters appear, the character claimants' percentage share (15%) should apply only to 7% of the total

cable royalty fees; (ii) to account for the differences between the "feature" use of characters and the "background" use of music, the character claimants' share, as computed above, should be multiplied by a factor of three (3).

Thus the character claimants shall receive .0105 (.15 times .07) of the total cable royalty fund, multiplied by 3, resulting in an award to them of 3% of the total fund.

* * * * *

If any of the foregoing Findings of Fact shall be deemed to constitute a Conclusion of Law, it shall be considered as a Conclusion of Law, and conversely, if any of the foregoing Conclusions of Law shall be deemed to constitute a Finding of Fact, it shall be considered as a Finding of Fact.

Dated: New York, N.Y.
July 3, 1980

Respectfully submitted,

SCHWAB GOLDBERG PRICE & DANNAY

By Richard Dannay
Richard Dannay

1185 Avenue of the Americas
New York, New York 10036
(212) 575-8150

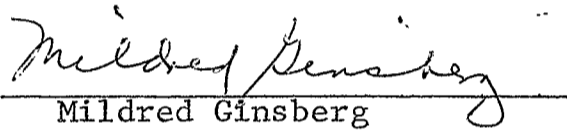
ATTORNEYS FOR CHARACTER CLAIMANTS:
Archie Comic Publications, Inc.
DC Comics, Inc.
Harvey Cartoons
Henson Associates, Inc.
King Features Syndicate, Inc.
Larry Harmon Pictures Corp.
Marvel Comics Group, a Division of
Cadence Industries Corporation
Muppets, Inc.
Radio Comics, Inc.

Of Counsel:
Richard Dannay
Morton David Goldberg



CERTIFICATE OF SERVICE

I, Mildred Ginsberg, a secretary in the law firm of Schwab Goldberg Price & Dannay, do hereby certify that I have, this 7th day of July, 1980, sent copies of the foregoing "Proposed Findings of Fact and Conclusions of Law of the Character Claimants" by first class United States mail, postage prepaid, to the parties on the attached list.


Mildred Ginsberg

Gene A. Bechtel, Esq.
Arent, Fox, Kintner, Plotkin & Kahn
1815 H Street, N.W.
Washington, D.C. 20006
Counsel for Public Broadcasting Service

Albert F. Ciancimino, Esq.
10 Columbus Circle
New York, N.Y. 10019
Counsel for SESAC, Inc.

Charles T. Duncan, Esq.
Peabody, Rivlin, Lambert & Meyers
1150 Connecticut Avenue, N.W.
Washington, D.C. 20036
Counsel for Broadcast Music, Inc.

James F. Fitzpatrick, Esq.
Arnold & Porter
1229 - 19th Street, N.W.
Washington, D.C. 20036
Counsel for Joint Sports Claimants

Gordon T. King, Esq.
Coudert Brothers
200 Park Avenue
New York, N.Y. 10017
Counsel for The National Association
of Broadcasters

I. Fred Koenigsberg, Esq.
One Lincoln Plaza
New York, N.Y. 10023
Counsel for ASCAP

Arthur Scheiner, Esq.
Wilner & Scheiner
2021 L Street, N.W.
Washington, D.C. 20036
Counsel for Motion Picture Association
of America

Judith Jurin Semo, Esq.
Squire, Sanders & Dempsey
21 DuPont Circle, N.W.
Washington, D.C. 20036
Counsel for NCAA

Jacqueline Weiss, Esq.
Public Broadcasting Service
475 L'Enfant Plaza West, S.W.
Washington, D.C. 20024

Jeffrey D. Southmayd, Esq.
Fisher, Wayland, Southmayd & Cooper
1100 Connecticut Avenue, N.W.
Washington, D.C. 20036
Counsel for The Christian Broadcasting
Network, Inc.

Ernest T. Sanchez, Esq.
National Public Radio
2025 M Street, N.W.
Washington, D.C. 20036
Counsel for National Public Radio

