STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition of **MEREDITH CORPORATION** for Redetermination of a Deficiency or for Refund of Corporation Franchise Tax under Article 9-A of the Tax Law for the Fiscal Years Ended June 30, 1998, June 30, 1999 and June 30, 2000.	: : : : : :	DETERMINATION DTA NO. 822396

Petitioner, Meredith Corporation, filed a petition for redetermination of a deficiency or for refund of corporation franchise tax under Article 9-A of the Tax Law for the fiscal years ended June 30, 1998, June 30, 1999 and June 30, 2000.

A hearing was held before Timothy Alston, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on March 23, 2009, with all briefs submitted by July 29, 2009, which date began the six-month period for the issuance of this determination. Petitioner appeared by Jonathan M. Wagner, Esq., and Maria Jones, Esq. The Division of Taxation appeared by Daniel Smirlock, Esq. (Clifford M. Peterson, Esq., of counsel).

ISSUE

Whether amounts paid by petitioner's televison stations pursuant to certain license agreements to broadcast television programs are properly considered rentals of tangible personal property for purposes of petitioner's property factor calculations under Tax Law § 210(3)(a)(1).

FINDINGS OF FACT

1. Petitioner, Meredith Corporation, is an Iowa corporation headquartered in Des Moines, Iowa. During the period at issue petitioner was primarily engaged in two lines of business: publishing and television broadcasting. Petitioner's television broadcasting business is of relevance to the present matter.

2. Petitioner operated 12 television stations during the period at issue, none of which was located in or broadcasted into New York. Petitioner's stations were subject to regulation by the Federal Communications Commission.

3. In November 2001, the Division of Taxation (Division) commenced an audit of petitioner's corporation franchise tax returns for the tax years at issue. Petitioner filed combined returns with its subsidiaries for the years under audit and reported its liability under the entire net income base. The audit focused on combination issues, which were ultimately resolved.

4. In or about July 2004, during the course of the audit, petitioner raised the issue of whether amounts paid by its television stations for programming pursuant to license agreements with various third parties should be considered payments for the rental of tangible personal property and therefore included in its property factor calculations for purposes of determining its business allocation percentage under Tax Law § 210(3)(a)(1).

5. In response, the Division's auditors advised petitioner's representatives of its position that amounts paid under licensing agreements for programming where such programming was delivered by satellite transmission was not a rental of tangible personal property and therefore was not properly included in property factor calculations under Tax Law § 210(3)(a)(1). Where programming was delivered by videocassette, however, it was the Division's position during the

audit that amounts paid for such programming were properly included in property factor calculations.

6. The Division's auditors reached the foregoing conclusions following a review of a July 2, 1991 letter issued by the Division's Office of Counsel (***see*** Finding of Fact 37) and a review of several license agreements provided by petitioner. The Division's auditors were not knowledgeable regarding satellite technology and did no research on this topic before reaching their conclusions.

7. On May 5, 2006, petitioner timely filed forms CT-8, Claim for Credit or Refund of Corporation Tax Paid, (i) for the tax year ended June 30, 1998, requesting a refund of tax paid under Article 9-A in the amount of $288,735.00, (ii) for the tax year ended June 30, 1999 requesting a refund of tax paid under Article 9-A in the amount of $290,936.00, and (iii) for the tax year ended June 30, 2000 requesting a refund of tax paid under Article 9-A in the amount of $196,509.00.

8. Petitioner's refund claims were premised on changes to its property factor calculations. Specifically, for each of the years, petitioner considered amounts paid to third parties for licensed programming as rentals of tangible personal property and thus included such payments in its property factor calculations. As all of petitioner's television stations were located outside of New York, the inclusion of such payments in petitioner's property factor calculations had the effect of decreasing petitioner's property factor (by increasing the property factor's denominator) and thus decreasing petitioner's business allocation percentage.

9. The Division did not grant petitioner's refund claims, nor did it issue any notice of disallowance in respect of the claims.

10. Petitioner filed a Request for Conciliation Conference dated August 8, 2006 and a Conciliation Order denying petitioner's request was issued on April 11, 2008. On July 7, 2008, petitioner filed a timely petition seeking refund of tax paid under Article 9-A for the years at issue and in the amounts claimed on its forms CT-8.

11. The parties stipulated that if the subject licensing costs were determined to be properly included in the property factor calculations, then the amount of petitioner's actual claims in each year would be i) $288,735.00 for the tax year ended June 30, 1998, ii) $290,936.00 for the tax year ended June 30, 1999, and iii) $196,509.00 for the tax year ended June 30, 2000.

12. Petitioner's franchise tax returns filed with its forms CT-8 claimed refunds due of: i) $255,630.00 for the tax year ended June 30, 1998, ii) $257,114.00 for the tax year ended June 30, 1999, and iii) $171,957.00 for the tax year ended June 30, 2000.

13. Petitioner's television stations acquired programs in three ways: 1) Programs supplied by broadcast networks with which the stations were affiliated. 2) Programs produced by the stations themselves, such as local news broadcasts. 3) Programs licensed from third parties such as syndicators. Petitioner's payments to such third parties for programs is the subject of the instant dispute.

14. Petitioner licensed programs from third parties pursuant to written license agreements. Examples of such programs include shows such as Dr. Phil, Judge Judy, Rikki Lake, Regis and Kelly, Mad About You, and Home Improvement, as well as feature films originally shown in theaters.

15. Petitioner submitted several representative samples of its television stations' license agreements.

16. Pursuant to these agreements petitioner licensed the right to broadcast a particular program or programs. The consideration paid by the station to the third party under the license agreements was expressly for the right to broadcast the program.

17. The license agreements also provided for the delivery of the program or programs to the station. During the period at issue virtually all programs were delivered by satellite transmission and the agreements expressly noted and provided for this method of delivery. The agreements generally required the station to bear the cost of the reception of the satellite transmission.

18. The agreements also provided for the delivery of a hard copy of the program by shipment. This method of delivery was generally employed as a backup arrangement in the event of a failure of the satellite delivery.

19. The license agreements limited the station's rights to broadcast programs to that station's existing over-the-air transmission facilities, sometimes referred to as free broadcast televison rights. The agreements also limited such rights to the station's broadcast market. Within that broadcast market, the agreements generally provided the station with an exclusive right to broadcast the particular program.

20. The agreements typically placed broadcast obligations and restrictions on the station. That is, the agreements typically required that the station broadcast the program within a particular period of time upon receipt. Some agreements restricted the number of times a station could broadcast the material. Many license agreements required that the show be broadcast within a particular window of time during the day.

21. The license agreements typically allocated the advertising time within the program between the station-licensee and the third party-licensor.

22. Following their broadcast of the program or programs pursuant to the license agreement, petitioner's television stations had no other interest in or right to use the programs. The agreements generally required the station to either return any copies of the programs to the third party-licensor or to destroy or erase any such copies.

23. As discerned from the evidence in the record, when programming material is originally produced, it is captured as audio and visual images in the camera, then recorded and stored in some form of recording medium. At this point the recorded material is in the possession of the third party-licensor. To provide the material to the television station-licensee, the recorded material is converted to the proper format and transmitted by electromagnetic signals. The signals are transmitted by the third party to a satellite, which, in turn, transmits the signals to petitioner's television station. Upon receipt by the televison station, the material is stored in some form of recording medium. When the station broadcasts the material, it plays it on equipment that transmits the program over-the-air via radio wave transmission to the station's viewers.

24. The signals transmitted by the third parties to the stations contain the electronics that hold all of the audio and video images that comprise the program. With the proper equipment those signals can be converted into images and sounds.

25. Through the 1970s, broadcast programming that stations licensed or rented from third parties such as syndicators was delivered to those stations by a delivery service and played on equipment that transmitted the programming to viewers by high-powered transmitters. The typical form of delivery for syndicated programming was by videotape.

26. In the late 1970s stations began receiving programming, including licensed programming, by satellite transmission.

27. The first satellite system was put in place in the mid-1970s by the Public Broadcast System. During the 1980s, the commercial broadcast networks began a transition to satellite-based delivery systems. Syndicators also transitioned to satellite delivery systems at around the same time, and by the late 1980s and early 1990s the syndicators were predominantly satellite-based.

28. The transition by the commercial broadcast networks to satellite delivery systems was discussed extensively in the trade and popular press. The transition was particularly well known in New York, given New York's position as headquarters for the networks.

29. Today, virtually all television stations obtain their programming by satellite delivery. As noted previously, video tapes are occasionally used if the satellite system goes down or there are other problems. Upon receiving programming delivered by satellite, stations store the programs on computer servers, disks or videotape before transmitting the program to the public.

30. There is no difference in the economic activity of a station whether it receives the programming by videotape or by satellite. Fundamentally, the business of a television station is to acquire programming that will attract a large audience or a specialized audience and to sell advertising time based on the audience. It makes no difference to that business activity whether the programming is delivered by satellite or by tape.

31. Like other broadcasters, petitioner's stations began to transition to satellite delivery systems in the early 1980s. This transition did not change, in any way, the substance of petitioner's stations' business as described above.

32. There is no distinction in petitioner's use of the programming whether it is delivered by satellite or by videotape and there is no material difference in the terms of the licensing

agreements whether the programming is delivered by satellite or by videotape. Furthermore, the size of the viewing audience is unaffected by the method of delivery of the programming.

33. Satellite delivery benefits both broadcasters and their audiences. Satellite delivery is a more secure and more efficient means of delivery and its use eliminates disadvantages suffered by some rural broadcasters.

34. Satellite signals are electronic signals which contain the video images and the audio of the programming. With the proper equipment anyone, even an unauthorized viewer, can see the video images and hear the audio. Moreover, if one were to steal the server on which the signals are stored, one would deprive the owner of that programming, much the same way that the theft of a videotape would deprive the owner of that tape of the programming recorded thereon.

35. At hearing petitioner presented the testimony of Joseph Snelson, vice president and director of engineering for the Meredith Broadcasting Group. Mr. Snelson testified that satellite signals are tangible and “very real” in the sense that “they contain the electronics that holds the essence . . . the program, the audio and video signals, the substance of what the program is.” He further testified that “with the proper equipment, even by somebody unauthorized, if they knew how to do it, they can intercept those signals.” He further testified that “you can touch” satellite signals in the sense that “with the right equipment” viewers “can see and hear what was recorded.”

36. Petitioner also presented the testimony of Dr. Joseph Kraemer. Dr. Kraemer was accepted as an expert in the field of satellite communications. Dr. Kraemer testified that programs delivered by a satellite to a television station for broadcast over that station were tangible personal property. Dr. Kraemer asserted that “the critical issue” was that “the station . . . received a good, an item, a product that is used or useful to generate revenue.” He opined that

satellite transmission was "something physical" because "you can control it, you can see it, you can accelerate it, you can listen to it."

37. The July 2, 1991 letter issued by the Division's Office of Counsel (***see*** Finding of Fact 6) responded to a taxpayer request for confirmation that for purposes of allocating the amount of rent paid for the leasing of films in the property factor of the business allocation percentage, the New York portion of such rent is determined by applying the New York state viewing audience ratio to such total rents. The opinion letter, provided in relevant part,

> Before we can answer this question, we must decide whether such amounts paid for the films in fact constitute tangible personal property. It appears from the information you provided us that [the taxpayer] enters into a licensing agreement which grants it the right to broadcast a film . . . . In order to facilitate that agreement, [the taxpayer] obtains a copy of the film. The copy is used for broadcasting purposes. The copy of the film is tangible personal property. The transfer of the copy, combined with the licensing agreement to broadcast that copy, constitutes a lease of tangible personal property (***Columbia Pictures, Inc. v. Tax Commr.***, 176 Conn. 604, 410 A2d 457 [1979]). The transfer of the copy may not be separated from the licensing agreement. "The license to exhibit without the transfer of possession would be valueless. Together they are one transaction . . . ." (***United Artists Corp. v. Taylor***, 273 NY 334 [1937]).

38. The July 2, 1991 letter ultimately concluded that, in accordance with Technical Services Bureau Memorandum TSB-M-83(20)(C), dated July 20, 1983, the value of the rent paid for the films for purposes of the property factor is determined by multiplying the value of the rented property (determined in accordance with Tax Law § 210[3][a][1]) by the New York State viewing audience ratio, i.e., the New York state viewing audience divided by the total viewing audience.

39. The July 2, 1991 opinion letter was the Division's policy for corporations that had similar facts through the tax year ended December 31, 2007.

40. The July 20, 1983 Technical Services Bureau Memorandum cited above, titled Valuation of Films Produced by Broadcasters for Television Exhibition in Computing the Property Factor of the Business Allocation Percentage, announced the following policy effective for taxable years beginning on or after January 1, 1982 with respect to corporations engaged in the business of broadcasting television programs and producing films for television exhibition:

> The average fair market value of a "film," produced by a corporation engaged in the business of broadcasting television programs, attributable to New york state shall be determined by multiplying the applicable average fair market value of the "film" by the New york state viewing audience ratio.

The memorandum defined "film" as the "physical embodiment of a play, story . . . or other work created for public entertainment" and indicated that the term included "a tape."

41. The Division's Taxpayer Guidance Division announced the following policy in a TSB-M dated June 4, 2008 titled Computation of the MTA Surcharge for Corporations Engaged in the Business of Broadcasting (TSB-M-08[6]C):

> It is the Tax Department's position that when a broadcaster obtains a license to use a program or film for a certain number of times and/or over a limited period of time and the broadcaster receives the program or film in hard copy, the broadcaster has received the intangible right or license to use the program or film. Accordingly, the value of the program or film may not be included in the property factor . . . since it is not considered to be tangible personal property. This new position applies to taxable years beginning on or after January 1, 2008.
>
> Note: Programs or films obtained by a broadcaster in electronic form (for example, over a satellite or over the Internet) have always been considered an intangible right or license to use and are not includable in . . . the . . . allocation percentage.

42. Petitioner submitted proposed findings of fact numbered 1 through 31. The following proposed findings of fact are accepted and have been incorporated, in substance, into the Findings of Fact herein: 1-21, 24, 25, 27. Proposed finding of fact 23 is unsupported by the record and is therefore rejected. Proposed findings of fact 26 and 30 are irrelevant to this

determination and are therefore rejected. Proposed findings of fact 22, 28, 29 and 31 are legal opinions or conclusions and are therefore rejected.

43. The Division submitted proposed findings of fact numbered 1 through 44. The following of the Division's proposed findings are accepted and have been incorporated, in substance, into the Findings of Fact herein: 1, 2, 4, 12, 17, 18, 20, 22-28, 30, 32, 33, 35, 37, 38, 44. The following proposed findings of fact are unsupported by the record and are therefore rejected: 19, 31. The following proposed findings of fact are irrelevant to this determination and are therefore rejected: 3, 5, 6-11, 13-16, 21, 29, 34, 36, 39-43.

SUMMARY OF THE PARTIES' POSITIONS

44. Petitioner contends that the satellite signals are tangible personal property and that, accordingly, payments made pursuant to the license agreements were rentals of tangible personal property under the relevant statute. Petitioner asserts that its position is consistent with the legislative history and purpose of the corporation franchise tax. That is, petitioner asserts that the satellite programming is not representative of something (e.g., stocks or bonds) and therefore incorporeal, but the thing itself, the means by which petitioner generates profits. Petitioner also asserts that its position is consistent with the statute's goal of measuring economic activity within the state.

45. Petitioner further contends that ***Matter of Disney Enterprises*** (Tax Appeals Tribunal, October 13, 2005, ***confirmed*** 40 AD3d 49, 830 NYS2d 614 [3rd Dept 2007], ***affd on other grounds*** 10 NY3d 392, 859 NYS2d 87 [2008]), upon which the Division relies, is distinguishable from the present matter.

46. Petitioner also asserts that the Division's position on audit, which drew a distinction based on method of delivery, was not supported by the Division's pre-2008 written guidance on

this issue, i.e., TSB-M-83(20)S and the opinion letter dated July 2, 1991. Petitioner asserts that such guidance drew no such distinction.

47. Petitioner also raises an equal protection argument, asserting that the Division's position on audit, which drew a distinction based on the method of delivery of programs to stations, improperly treats similarly situated taxpayers differently, considering that the substance of the economic activity, both for the station and the viewing public, is the same whether the programs are delivered by satellite or hard copy.

48. Petitioner also asserts that the Division's position on audit, which accorded more favorable tax treatment to delivery by hard copy, discouraged economic efficiency and technological progress.

49. The Division contends that ***Matter of Disney Enterprises*** is dispositive of the present matter. The Division also contends that its treatment of petitioner's property factor does not offend the constitution and that petitioner's equal protection argument is misplaced. The Division further asserts that petitioner erred in its reliance on the TSB-M-83(20)C because that memorandum was factually distinguishable from the present matter. The Division also asserts that petitioner did not pay for or receive tangible personal property. Finally, the Division contends that the testimony of petitioner's expert did not support its argument.

CONCLUSIONS OF LAW

A. Article 9-A of the Tax Law imposes a franchise tax on all domestic and foreign corporations doing business, employing capital, owning or leasing property, or maintaining an office in New York State (Tax Law § 209[1]).

B. New York corporate taxpayers report their tax liability based on their computation of the highest of four income bases, one of which is entire net income (Tax Law 210[1][a-d]).

Petitioner reported its liability during the years at issue under the entire net income base. Entire net income is allocated to New York pursuant to the taxpayer's business allocation percentage. The business allocation percentage consists of property, receipts and wage factors. As noted, petitioner's calculation of its property factor is at issue in the present matter.

C. The property factor of the business allocation percentage equals:

> the percentage which the average value of the taxpayer's real and tangible personal property, whether owned or rented to it, within the state during the period covered by its report bears to the average value of all of the taxpayer's real and tangible personal property, whether owned or rented to it, wherever situated during such period (Tax Law § 210[3][a][1]).

For purposes of this calculation, the value of rented property is "the product of (i) eight and (ii) the gross rents payable for the rental of such property during the taxable year" (Tax Law § 210[3][a][1]).

D. Tax Law § 208[11] defines "tangible personal property" for purposes of Article 9-A as follows:

> [C]orporeal personal property, such as machinery, tools, implements, goods, wares and merchandise, and does not mean money, deposits in banks, shares of stock, bonds, notes, credits or evidences of an interest in property and evidences of debt.

This definition has remained unchanged since the enactment of New York's corporation franchise tax statute in 1917.

E. In ***Matter of Disney Enterprises*** the Tax Appeals Tribunal held, and the Appellate Division confirmed, that the fair market value of film negatives was not properly included in property factor calculations where a large portion of such fair market value represented the value of the right to reproduce the films for sale in the consumer market.[1]

The petitioner in ***Disney*** owned certain film negatives, which it had previously included in its property factor calculations at their cost value. ***Disney*** sought to include the negatives in its property factor at their fair market value pursuant to Tax Law § 210[3](a)(1).[2] As determined by the Administrative Law Judge and affirmed by the Tribunal, "a large portion" of the fair market value of the negatives was the value to reproduce the films for sale in the consumer market. The Tribunal further affirmed the ALJ's conclusion that this "copyright" represented an intangible asset not properly included in the property factor. In reaching this conclusion, the Tribunal noted that "the value of an intangible asset cannot be included in the property factor" in calculating a taxpayer's BAP.

F. The Tribunal's holding in ***Disney*** is controlling in the instant matter and compels a finding against petitioner. Pursuant to the license agreements, petitioner's television stations acquired the exclusive rights to broadcast a particular program or programs within a given market, and the consideration paid by the stations under the license agreements was expressly for the right to broadcast the program (***see*** Findings of Fact 16 and 19). The programming material was delivered to the stations for the sole purpose of enabling the stations to broadcast the material, i.e., to exercise their broadcast rights. The stations had no interest in or right to use the

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[1] In its brief petitioner misstates the holding in ***Disney***, asserting that "***Disney*** concluded that the *copyright value* of film negatives (not the royalties) could not be included in the property factor" (emphasis added). As noted, ***Disney*** held that the *fair market value* of the negatives could not be included in the property factor because a large portion of such fair market value included the copyright value of the negatives.

[2] Petitioner also misstates Disney's position, stating that Disney argued that the fair market value of the negatives should be increased to take into account income that could be generated from their use. Disney did not seek to increase the fair market value of the negatives; rather, it sought to value the negatives at their fair market value rather than their cost.

programming beyond the terms of the license agreements (***see*** Finding of Fact 22). As noted by the Division in its brief (and not disputed by petitioner) the right to broadcast a program is among the rights owned by the holder of a copyright (***see*** 17 USC § 106[4]). Further, the owner of a copyright may transfer any part of his rights (***see*** 17 USC § 201[d]). Accordingly, similar to the copyright at issue in ***Disney***, i.e., the right to reproduce films for sale, the right to broadcast programs is a copyright, an intangible asset. Pursuant to ***Disney***, therefore, the consideration paid for this intangible asset does not constitute the rental of tangible personal property and may not be included in petitioner's property factor calculations under Tax Law § 210[3](a)(1).

G. Petitioner seeks to distinguish ***Disney*** by noting that, as stated in the Tribunal's decision, "[Disney] did not take an exception to the conclusion of law wherein the Administrative Law Judge determined that intangible assets are excluded when determining the property factor."

While Disney did not appeal this general proposition, as noted in the Tribunal's decision, it did argue that "whenever an item of tangible personal property is to be valued for purposes of the property factor, the value of any related intangible rights cannot be removed." The Tribunal specifically rejected this argument and by its conclusion effectively did remove the value of the related intangible rights (copyrights) from the value of tangible personal property (film negatives). A similar situation is present in the instant matter. Under the license agreements petitioner received the right to broadcast the program along with the program itself. The right to broadcast is unquestionably an intangible asset and the program (whether or not it is deemed tangible personal property under Tax Law § 208[11]) unquestionably had, as petitioner notes, "a concrete existence outside of and independent of any 'right.'" This is analogous to Disney's ownership of negatives along with the right reproduce the negatives for sale. As the entirety of the license fees paid by petitioner were for the right to broadcast, under the rationale of ***Disney*** such payments were for an intangible asset and cannot be included in the property factor.

H. The foregoing analysis, premised on ***Disney***, appears to differ from the Court of Appeals' analysis of the transactions at issue in ***United Artists v. Taylor*** (272 NY 334 [1937]), cited in the Opinion of Counsel letter dated July 2, 1991 (***see*** Finding of Fact 37). ***Taylor*** involved the transfer of films by a motion picture distributor to a motion picture exhibitor along with the license to use or exhibit the films for a specified time. As noted in the opinion letter, the Court of Appeals found that "[t]he license to exhibit without the transfer of possession would be valueless. Together they are one transaction . . . ." Accordingly, the Court of Appeals held that the transaction was a sale of tangible personal property subject to New York City's sales tax.

While there can be little doubt that ***Disney*** undermined the rationale of, and thus effectively "overruled" the July 2, 1991 opinion letter, as petitioner correctly notes, the Tribunal "could not possibly overrule the Court of Appeals decision in ***Taylor***, nor is there even the suggestion in ***Disney*** that the Tribunal meant to undo that 72-year old precedent." Nor, it should be noted, could the Appellate Division overrule the Court of Appeals when it confirmed the Tribunal's ***Disney*** decision. ***Disney***, a franchise tax matter, in no way overrules ***Taylor***, a sales tax case. As the two case involve different statutes and different types of taxes, they are distinguishable.

I. Petitioner also sought to distinguish ***Disney*** from the instant matter on the facts by noting, correctly, that "there was no issue in ***Disney*** concerning the broadcast of licensed programming to the public." More significantly, however, in both cases the question presented involved whether intangible assets (copyrights in both cases) should be separated from related assets for purposes of the property factor.

J. Petitioner also notes in its brief that "***Disney*** had nothing to do with measuring the proportion of a New York viewing audience, the yardstick of economic activity for broadcasters under the Franchise Tax." Neither, however, does the instant matter, as the question presented is whether the license fees should be included in petitioner's property factor calculations.

K. Petitioner further sought to distinguish ***Disney*** by noting that the amount to be included in the property factor, that is, the value of the assets rented is not at issue in the present matter, while in ***Disney*** the Division took issue with the fair market value as established by an expert at the hearing. This is an insignificant difference; for although the valuation of the assets was contested by the Division in ***Disney***, the Tribunal's decision did not address this issue. As noted previously, the record in ***Disney*** showed that "a large portion" of the fair market value of the negatives was attributable to the intangible assets. This fact was enough for the Tribunal to conclude that the fair market value of the negatives was not properly included in the property factor. Consequently, the Tribunal's decision did not need to address the issue of whether the expert properly established a fair market value for the negatives. In the present matter, there is no question as to the amount of consideration paid under the license agreements, all of which was for the intangible right to broadcast.

L. Pursuant to the foregoing conclusions, method of delivery is not a factor in determining whether programming received by television stations is properly included in the property factor. As noted, under ***Disney*** "the value of an intangible asset cannot be included in the property factor." The Tribunal reached this conclusion notwithstanding that the intangible asset at issue (copyright) was related to tangible personal property (film negatives). Accordingly, the question of whether programming received by satellite is tangible personal property under Tax Law §

208[11] is rendered moot. This determination thus reaches no conclusion as to whether programming received by satellite is tangible personal property under the statute.

M. Petitioner's other arguments (***see*** paragraphs 46-48) respond to the position taken by the Division on audit, that is, that the method of delivery of programming determines whether the amounts paid for such programming may be included in the property factor. As the Division no longer takes this position, and considering the previous discussion herein, such arguments are no longer tenable.

N. The petition of Meredith Corporation is denied.

DATED:Troy, New York
January 14, 2010

/s/ Timothy Alston
ADMINISTRATIVE LAW JUDGE