

Creativity Stolen

By EBONY KOGER*

Introduction

THE COMIC INDUSTRY has made a comeback once again, making it impossible to miss this era's comic boom.¹ The presence of the comic industry is evident whether you are a comic nerd or a comic hater.² The noticeable difference between previous comic comebacks and today's is a huge, multibillion dollar movie media presence.³ Marvel, for example, can be seen everywhere: on billboards, toys, candy, television, and movies.⁴ Marvel's media presence, through Disney and Netflix, has essentially monopolized the rights to one of the largest comic icons in the world, Stan Lee.⁵ Appearing in over twenty-eight Marvel films, Marvel creator Stan Lee has become a household name.⁶ Stan Lee is recognized as a comic legend⁷ and revered throughout the comic world. His creative career began in 1939, and by sheer comic volume alone, has had an impact in making the comic industry what it is today.⁸ His fifteen-year long Disney lawsuit⁹ is a testament to just how lucrative and relevant the comic industry has become.

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1. See Mike Musgrove, *Heroic History of Marvel Comics*, WASH. POST (Oct. 5, 2012), https://www.washingtonpost.com/entertainment/books/heroic-history-of-marvel-comics/2012/10/05/d8100a32-f692-11e1-8253-3f495ae70650_story.html?utm_term=.559ebd6c8a80 [http://perma.cc/7EEN-ZJRQ].

2. See *id.*

3. Tim DeForest, *Marvel Comics: American Company*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/topic/Marvel-Comics> (last visited Feb. 19, 2018) [http://perma.cc/F449-UH9Y].

4. *Id.*

5. See *id.*; see Musgrove, *supra* note 1 (mentioning the \$4 billion Marvel sale to Disney in 2009).

6. See Sidney Fussell, *Stan Lee Has Made 28 Cameos in Marvel Movies and Shows – Here They Are*, BUS. INSIDER (Feb. 16, 2016, 3:31 PM), <http://www.businessinsider.com/every-stan-lee-cameo-2016-2> [https://perma.cc/3QDX-V9WP].

7. *Id.*

8. See *id.*

Stan Lee built a comic empire¹⁰ that has found its way into the hearts of millions. From DC to Marvel, there is an endearing and relatable character for everyone. The cast of characters ranges from a plethora of loveable aliens, to a genetically altered sarcastic raccoon in *Guardians of the Galaxy*,¹¹ to the newest strong female lead, who inspires women everywhere¹² in *Wonder Woman*,¹³ to the first film adaptation of *X-Men*,¹⁴ which never seems to run out of astonishing mutant characters. This list includes Detective Comics (more fondly known as DC Comics) which features greats like *Superman*¹⁵ and *Batman*,¹⁶ which are bringing new character iterations into the current movie media storm. Comic interpretation seems to have found a way to reach every demographic while continuing to thrive and change, appealing to more individuals, and making this the comic era of the century.

Despite the crazed fandom associated with comics and the current movie media frenzy, few comic consumers stop to think about the comic process. Many may believe it begins with one artist in a dark room, one spotlight, and his or her imagination. Often, artists are confined to their general assignments or themes, but many of these characters are birthed and created in one mind.¹⁷ Unlike Stan Lee, most artists are never given recognition or payment comparable to what their product profits.¹⁸

Comic creators are central to the comic process. Once their designs are uploaded, animations can be regenerated and put to life digitally, but there is no comic without the artist's rendering. Creating comic magic takes time to develop, hone, and imagine. Artists nor-

9. *Stan Lee Media, Inc. v. Walt Disney Co.*, 774 F.3d 1292, 1294 (10th Cir. 2014) (ending a fifteen-year long legal dispute between Stan Lee and Disney where Stan Lee fought to regain the Marvel rights he sold at too good of a price).

10. *Id.*

11. *GUARDIANS OF THE GALAXY* (Marvel Studios 2014).

12. Paul Chi, *Why the Wonder Woman Effect Is Seriously Inspiring Female Filmmakers*, VANITY FAIR (June 30, 2017, 9:55 AM), <https://www.vanityfair.com/hollywood/2017/06/wonder-woman-patty-jenkins-sam-taylor-johnson-gypsy> [<https://perma.cc/6696-RWHN>] (showing a more specific example of the "Wonder Woman Effect").

13. *WONDER WOMAN* (Warner Bros. 2017).

14. *X-MEN* (20th Century Fox 2000).

15. *MAN OF STEEL* (Warner Bros. 2013) (showing current interpretation of Superman).

16. *BATMAN V. SUPERMAN: DAWN OF JUSTICE* (Warner Bros. 2016) (showing current interpretation of Batman).

17. MARC H. GREENBERG, *COMIC ART, CREATIVITY AND THE LAW* 10–11 (Shubha Ghosh & Robin Paul Malloy eds., 2014).

18. *Id.* at 50–55 (story of Marvin Wolfman and his losing battle against Marvel).

mally do not create a lifelong character in a day. It can take weeks or years to create the perfect character.¹⁹ Sometimes characters never make it off the drawing board.²⁰ Other times, characters are tweaked or repurposed later.²¹ Either way, the comic creation takes extraordinary amounts of hard work and imagination that are put into each character from start to finish.

For example, the birth of the legendary Superman was not overnight. In the 1930s, writer Jerome Siegel and artist Joseph Shuster began creating this iconic character.²² The dynamic comic duo worked hard creating Superman, encountering many bumps along the way.²³ Superman did not begin as the “faster than a speeding bullet,” red-laser-eyed, caped crusader that is known and loved today.²⁴ Superman’s first powers included telepathy and mind control.²⁵ In fact, the original Superman’s secret identity was Bill Dunn, a homeless man, turned super by a scientist.²⁶

This is a good example of the artistic process at work because a single character can take years to develop.²⁷ Artists spend days, hours, or years with characters.²⁸ They mold, shape, and even step into the character to examine them from inside-out in order to create the perfect superhero or villain,²⁹ a feat many take for granted. Putting monetary and ownership value on creative commitment is where the behind-the-scenes comic battle begins.³⁰ This comment sheds light on an often-unnoticed legal issue that surrounds the comic world, the lack of worth given to comic creation and ownership rights of comic creators. Section I addresses the background of comic art and history. Section II gives an overview of over 100 years of comic copyright law and examines a few key cases. Section III explores potential solutions to the power imbalance. Lastly, section IV examines the comic indus-

19. See generally *Creating the Superhero*, THECOMICSBOOKS.COM, <http://www.thecomicsbooks.com/old/Hist1.html> (last visited Feb. 19, 2018) [<https://perma.cc/XZ8H-ZNZP>] (showing how comic characters developed throughout the years).

20. See GREENBERG, *supra* note 17, at 43–45.

21. See *id.*

22. *Siegel v. Warner Bros. Entm’t Inc.*, 658 F. Supp. 2d 1036, 1042 (C.D. Cal. 2009).

23. See Dallas F. Kratzer III, Note, *Up, Up & Away: How Siegel & Shuster’s Superman was Contracted Away & DC Comics Won the Day*, 115 W. VA. L. REV. 1143, 1145–47 (2013).

24. *Id.*

25. *Id.* at 1146.

26. *Id.*

27. See *id.* at 1146–47.

28. See *id.*

29. See *id.*

30. GREENBERG, *supra* note 17, at 37.

try shift, which could potentially be the beginning of the end of true comic creativity.

I. Background

Caricatures and drawings were among the first forms of communication used by humans.³¹ Early comic art expression came through hieroglyphics that told a story through a series of pictures or scenes.³² Images create feelings and words in the human mind to convey or stimulate further growth or communication.³³

Current communication is woven intricately with personal computers, tablets, and smart phones. As an electronic generation, people are inundated constantly with pictures, drawings, and depictions.³⁴ Creating digital art is increasingly common.³⁵ Smart phone applications, supporting personal artistry through photographs and colorful drawing enhancements, have become a visual art virtual explosion. Even the most basic smiley face emoji, colon plus right-parentheses, tells a story. This artistic sentiment and communicative tool is extremely powerful and so embedded in today's culture that the visual artistry goes unnoticed, but it is all comic art communication.³⁶

Graphic novels or magazines are the most popular forms of comic art,³⁷ however, comic art is more expansive.³⁸ Cartoons and comics have been a part of American culture since its inception.³⁹ In the past, and even currently, comics have been looked upon with disdain and contempt.⁴⁰ Comics and cartoon art have been the subject of censorship and suppression for hundreds of years.⁴¹ Comics "have been viewed as a threat to society, amid claims that they incite juvenile delinquency, and are scandalous, indecent and obscene."⁴²

While cartoons and art have been around since human inception, the more commonly recognized comic art, the glossy, grid, floppy,

31. *Id.* at 21.

32. *Id.*

33. *See id.*

34. Neil Cohn, *Will Emoji Become a New Language?*, BBC (Oct. 13, 2015), <http://www.bbc.com/future/story/20151012-will-emoji-become-a-new-language> [https://perma.cc/8UU7-KV5C].

35. *See generally id.*

36. GREENBERG, *supra* note 17, at 21.

37. *Id.* at 25.

38. *See id.* at 3, 25.

39. *See id.* at 3.

40. *See id.*

41. *Id.*

42. *Id.*

magazine fold, became an “indelible feature of American popular publishing” by the 1900s.⁴³ However, by the “counter-culture movement of the 1960s,” comics were forced into an underground *comix* movement, in an effort to battle content restrictions imposed by the “Comic Code Authority.”⁴⁴ These underground comics were very basic; they featured hand-rendered stories “written, penciled and inked and lettered by a single artist.”⁴⁵ However, this anti-comic sentiment did not last long. The end of the 1970s brought great change to the comic revolution with the Comic Code Authority loosening its hold and spring boarding the comic industry into a new era.⁴⁶

Prior to the underground comix years, DC and Marvel were the two major companies employing comic book creators.⁴⁷ This meant that the artists’ drawings and story lines were compensated with monthly salaries, but under copyright law, their entire produced work fell under the umbrella of “works for hire” and thus considered the intellectual property of the company.⁴⁸ Feeling discontent at the unfair situation, and inspired by master creator and pioneer, Will Eisner, many artists began to leave the major companies in hopes of starting their own publishing companies.⁴⁹ By the 1980s, larger comics, known as “graphic novels” began to gain popularity, including works like *The Dark Knight Returns*.⁵⁰ This piece is a 1986 psychological thriller written by Frank Miller, “which took a critical look at Batman and vigilante justice;”⁵¹ later, *Batman v. Superman: Dawn of Justice* (2016)⁵² loosely adapted parts of the novel into film.

43. *Id.* at 22–23.

44. *Id.* at 28. The comics industry created The Comic Code Authority in response to a 1954 Senate Committee on the Judiciary subcommittee hearing charged with investigating the causes of juvenile delinquency in which Dr. Frederic Wertham gave a scathing review of comics and their effect on juvenile delinquency. *Id.* at 28, 111–22. In essence, the comics industry self-censored in response. *Id.* at 111–22.

45. *Id.* at 28.

46. *Id.* at 29.

47. *Id.*

48. *Id.*

49. *Id.* at 29; see generally *A Short Biography*, WILLEISNER.COM, <http://www.willeisner.com/biography/index.html> (last visited Feb. 25, 2018) [<https://perma.cc/AUH5-S6SW>] (portraying Will Eisner as the “father of graphic novel” most known for his comic, *The Spirit*).

50. GREENBERG, *supra* note 17, at 31.

51. *Id.*

52. See David Betancourt, *Frank Miller on His ‘Dark Knight Returns’ 30 Years Later: ‘I was Rooting for Batman All the Way,’* WASH. POST (Feb. 22, 2016), https://www.washingtonpost.com/news/comic-riffs/wp/2016/02/22/frank-miller-on-his-dark-knight-returns-30-years-later-i-was-rooting-for-batman-all-the-way/?utm_term=.d0a7fb510eca [<https://perma.cc/G7NC-AHFS>] (providing examples of similarities between the graphic novel and the film:

II. 100 Years of Law

Prior to the comic shift in the 1970s, comic books were only pennies a piece.⁵³ Generally, “[c]omics were sold in drug stores, supermarkets, convenience stores and some general interest book stores.”⁵⁴ Comics were a dime-a-dozen and artists seemed content to simply be published.⁵⁵ That previous reality is a far cry from the multi-billion-dollar movie industry that exists today. With companies like Disney, Netflix, and Warner Brothers paying big money for ownership rights or distribution power,⁵⁶ the individual creative brain power behind the comic becomes much more relevant. Traditionally, artists retain the original art renderings pages (the original comic illustrations), which is a practice that has become much more lucrative with the comic genre popularity growth.⁵⁷ The robust market of original comic art is an added incentive for artists to enter the comic field.⁵⁸ The sale prices for comics can range from as little as \$20 to as much as \$657,250—the amount paid for *Amazing Spider-Man* #328, by creator Todd McFarlane, sold in July of 2012.⁵⁹

Before the comic industry became lucrative, there was little need for government regulation, so the first Copyright Act of 1909 was remiss in loosely defining or failing to articulate the parameters surrounding the comic industry, making only a small reference to “works made for hire.”⁶⁰ It took another seventy years before the Copyright Act of 1976 attempted to define the Work-for-Hire doctrine.⁶¹ When applied, this definition effectively severed employee rights by removing the author’s ownership interest and giving the employer the title of “author” in work-for-hire cases.⁶² If a person creates the work, it is done so “within the course and scope of their role as an employee.”⁶³ Essentially, if a person uses tools provided by the employer, the law

older batman coming out of retirement and the “famed fight” between Superman and Batman).

53. GREENBERG, *supra* note 17, at 39.

54. *Id.*

55. *See id.* at 39–40.

56. *See, e.g.*, WUNDER WOMAN (Warner Bros. 2017); *Daredevil* (ABC Studios 2015–16). *See generally* Stan Lee Media, Inc. v. Walt Disney Co., 774 F.3d 1292 (2014) (describing how companies are paying for rights and powers for comic rights).

57. GREENBERG, *supra* note 17, at 39–40.

58. *See id.* at 40.

59. *Id.*

60. *Id.* at 56.

61. *Id.* at 63–64.

62. *Id.* at 56.

63. *Id.*

presumes the work was created for the employer and is thereby the employer's sole property.⁶⁴

A. Ownership Rights

There are three different levels of ownership: (1) retention of all rights by the creator; (2) exclusive license given by the creators to publish; and (3) a "transfer of all rights to the work to the publisher."⁶⁵ It is under the last level of ownership that employee rights are given to the employer and work-for-hire takes place.⁶⁶

1. Retention of Rights

Retention of rights refers to when the creator retains all ownership rights.⁶⁷ This could be considered the highest possible level of ownership.⁶⁸ Finding artists with retention of rights at this level is rare. The likely reason is because corporations with deep pockets are able to swallow up the dying art form due to the inability of most artists to live without a paycheck while they hope their characters will one day make it big.

The closest to full retention of rights an artist is likely to receive is if they become popular or relevant enough to retain some creative pull with larger syndicates. One such instance is the case of Bill Watterson, creator of 1985's *Calvin and Hobbes*.⁶⁹ Watterson fought to retain any ownership rights during years of negotiations.⁷⁰ The small, one-to-five frame comic *Calvin and Hobbes* was an instant success and picked up by over 250 newspapers in its first year.⁷¹ However, in order to publish his work, Watterson had to sign over his rights to an intermediary corporation, often referred to as a syndicate.⁷² It is common in the comic industry for the "syndicates . . . to demand rights they neither need nor deserve when contracting with unknown cartoonists."⁷³ Watterson had virtually no say about the merchandising offers that came flooding in because the syndicate would not sell the strip to

64. *Id.*

65. *Id.* at 37–38.

66. *Id.*

67. *Id.* at 37.

68. *Id.*

69. *Id.* at 45–46.

70. *Id.*

71. *Id.* at 45.

72. *Id.*

73. *Id.* at 46.

newspapers and other outlets unless Watterson “gave the syndicate the right to merchandise the strip in other media.”⁷⁴

Fortunately, Watterson’s success through *Calvin and Hobbes* gave him a measure of bargaining power that many artists are unable to attain.⁷⁵ Even though Watterson technically sold all exploitation and licensing rights, he continued to protest any merchandising sales of the animated stars for five years, and because of his great popularity, the syndicate felt pressured to oblige to his protests resulting in the loss of millions of dollars in profits.⁷⁶ By the fifth year, the dispute between the parties turned uglier and Watterson began losing the battle.⁷⁷ Backed into a corner by increasing pressure to merchandise, Watterson felt his only out was to quit.⁷⁸ Luckily, Watterson’s gamble paid off when the syndicate chose to renegotiate the contract instead of replacing him completely with alternate artists and authors, something the syndicate was contractually within its right to do.⁷⁹

2. Exclusive License

Exclusive license gives complete rights to the future of a comic. Business and Commercial Litigation section 101.41 describes exclusive license as follows:

[i]f the rights granted by the licensor is such that no one else can have these rights, the person to whom the rights are granted is called an EXCLUSIVE LICENSEE. An exclusive licensee has the right to exclude others, including the licensor, from exercising the rights granted in the license agreement.⁸⁰

Applying the law to creators, exclusive licenses strip the creator of all rights and decision making regarding the future of his or her creation, as discussed in the Watterson example. This ownership scheme, in which the artist is subject to unfair bargaining power, leaves the artist with no legal recourse upon contract formation.⁸¹

A syndicate may also grant a series of licenses for different types of uses—for toys, films, or other merchandise.⁸² Alternate licensing

74. *Id.*

75. *Id.* at 47.

76. *See id.* at 45–48.

77. *Id.* at 46.

78. *Id.*

79. *Id.*

80. 10 THOMAS J. SARTORY, BUSINESS AND COMMERCIAL LITIGATION IN FEDERAL COURTS § 101:41 (4th ed. 2017) (emphasis added).

81. GREENBERG, *supra* note 17, at 46.

82. *See generally* Nicole J.S. Sudhindra, *Marvel’s Superhero Licensing*, WIPO (June 2012), http://www.wipo.int/wipo_magazine/en/2012/03/article_0005.html [<https://perma.cc/>

contracts can give the licensor the ability to control the way in which the characters are used, how much of the characters likeness is allowed, or even the amount of time the use is allowed.⁸³ Marvel did what few others could do by creating a “licensing strategy [that] enabled it to distribute its characters beyond comic books to multiple media formats, including films, television, and video games.”⁸⁴ Marvel licensed every product fathomable until finally opening its own Marvel Studios in 1966, which inevitably helped Marvel retain “full control over its creative assets and a greater stake in the box office returns.”⁸⁵ Marvel is one of the few comic ventures to have large production opportunities; most comic companies are unable to reach multimedia-platform status.⁸⁶ Many larger intermediate companies or syndicates seek to find and publish comic works under an exclusive license in order to gain full control and maximize their potential for profit.⁸⁷

3. Transfer of All Rights to Publisher

Normally, work-for-hire or full employment capacity is the area in which the creator (either artist or author) holds no rights of control over the product.⁸⁸ This is where many artists and creators find consistent contractual employment opportunities.⁸⁹ When artists agree to these contracts, they know that all their future works are not, and will never be, their personal or intellectual property.⁹⁰ Often, companies will assign, generate, or request characters or products to fit within the great design of their current projects.⁹¹ While these contract agreements fare well for larger companies, artists can easily find themselves stifled in creativity and without full understanding of where their intellectual property rights end and where the company’s begin.⁹² Marvin Wolfman is an example of this complex dynamic.

NDA9-CENP] (providing an example of the different licenses Marvel granted to different companies).

83. *Id.*

84. *Id.*

85. *Id.*

86. *See* DeForest, *supra* note 3.

87. *See* GREENBERG, *supra* note 17, at 43–47.

88. *Id.* at 37–38.

89. *See id.* at 37, 50.

90. *See id.* at 37–38.

91. *Id.* at 38.

92. *Id.*

Marvin Wolfman has been a writer for over five decades.⁹³ During this time he wrote for both Marvel and DC Comics as an independent contractor and was also a “creator and publisher of a series of fanzines (short fan magazines).”⁹⁴ As a publisher, Wolfman did not retain ownership rights for the work created by his authors, and was in the rare position, while working as an independent contractor, to retain copyright ownership rights to all new characters created or storylines written by him (except when working for DC Comics).⁹⁵ Wolfman’s freelance work eventually landed him a contract with Marvel, working as editor in chief.⁹⁶ Through his employment agreement he “transferred copyright to Marvel for all work he delivered to them.”⁹⁷ The employment contract expressly provided “that ‘[t]he ideas and character or characters used therein shall constitute Marvel’s exclusive property for all times.’”⁹⁸ Marvel felt this exclusivity policy extended to all works created during the time Wolfman was a freelancer for Marvel; accordingly, Marvel asserted rights to those characters and ideas.⁹⁹ Wolfman disputed any consent to this policy, arguing the release of ownership and copyright applied only “to artwork, and not the ideas or characters contained in that art.”¹⁰⁰ Wolfman created more than seventy-one original characters appearing in Marvel Comics.¹⁰¹ One of his original characters is “Blade,” which was adapted to a film and grossed over \$150 million worldwide.¹⁰²

This case sparked a discussion on the parameters of ownership creation both under the work-for-hire context and copyright.¹⁰³ Wolfman claimed that ownership of personally created characters had not been discussed during employment negotiations and since “book publishers did not have a common practice,” Wolfman made the “reasonable assumption” that he would retain “his rights vis-a-vis the characters he created.”¹⁰⁴ Wolfman also contended that “he created five characters [before] his relationship with Marvel.”¹⁰⁵ The Delaware

93. *Id.* at 51.

94. *Id.*

95. *Id.*

96. *Id.* at 52.

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.* at 53.

102. *Id.*

103. *In re Marvel Entm’t Grp., Inc.*, 254 B.R. 817, 828–29 (D. Del. 2000).

104. *Id.* at 823.

105. *Id.* at 824.

District Court did not agree, finding Wolfman could not prove his characters were not created at the request of his employers.¹⁰⁶

B. Work-for-Hire

The Copyright Act of 1909 section 26 lacks clarity when first referencing work-for-hire.¹⁰⁷ Section 26 states,

[i]n the interpretation and construction of this title “the date of publication” shall in the case of a work of which copies are reproduced for sale or distribution be held to be the earliest date when copies of the first authorized edition were placed on sale, sold, or publicly distributed by the proprietor of the copyright or under his authority, and the word “author” shall include an employer in the case of works made for hire.¹⁰⁸

In re Marvel, quoting *Playboy*, restates section 26 to say, “[u]nder this definition, an ‘employer’ who hires another to create a copyrightable work is the ‘author’ of the work for purposes of the statute, absent an agreement to the contrary.”¹⁰⁹ Work-for-hire plainly defines that a buyer becomes the author under this agreement.¹¹⁰ Furthermore, there is a presumption of employer (buyer) ownership in the context of both employees and independent contractors.¹¹¹ For the court to presume the copyrighted material rightfully belongs to the employer, the burden is placed on the employer to show “‘credible evidence’ that an employee worked at the ‘instance and expense’ of the employer.”¹¹² The Fifth Circuit interpreted the instance and expense test somewhat more loosely by observing that “[a]ctual exercise of [direction and supervision] is not controlling, and copyright is vested in the employer who has no intention of overseeing the detailed activity of any employee hired for the very purpose of producing the material.”¹¹³ If the “motivating factor” to produce the work was initiated by the employer, then the work is produced at the “instance and expense” of the employer.¹¹⁴ This is a very low threshold to meet because “motivating factor” is loosely defined as inducement by the employer.¹¹⁵ These rules favor the employer over employees try-

106. *Id.* at 834.

107. GREENBERG, *supra* note 17, at 56.

108. *Id.* (emphasis omitted).

109. *In re Marvel Entm't Grp., Inc.*, 254 B.R. at 828 (citing *Playboy Enters., Inc. v. Dumas*, 53 F.3d 549, 554 (2d Cir. 1995)).

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.* at 829.

114. *Id.* at 828–29.

115. *Id.* at 829.

ing to circumvent contractual obligations to reclaim rights to work made while under contract.¹¹⁶ However, the employee can rebut this presumption by showing the parties entered into an alternate agreement “by which the employee or independent contractor retained the copyright in his work.”¹¹⁷ However, as discussed above, creators are very unlikely to have bargaining power to enter into contracts that allow them to retain copyright of their work.

The *In re Marvel* court made clear the parameters of “instance and expense.”¹¹⁸ Marvel argued that since the characters created were at its request, used to further plot lines and keep stories interesting, Wolfman was only fulfilling his end of their contractual bargain to create characters.¹¹⁹ Wolfman argued that since he worked without supervision, with his own materials, in a managerial position, he should retain the rights to the characters he developed, especially without an express agreement stating otherwise.¹²⁰ Wolfman argued that working at someone’s “instance and expense” means that there is direct supervision over one’s work.¹²¹ This interpretation might mean that an employee needs to work in a traditional office environment, not offsite, with close oversight, solely filling up pages that are independently and expressly contracted. The court did not find this argument compelling.¹²² The court held, “[r]egardless of whether an artist is an employee or an independent contractor, where an employer pays an artist a sum certain for his or her work, the artist has produced at the employer’s expense.”¹²³ The court reasoned that even though Wolfman was not directly supervised, Marvel still “reserved the right to supervise Wolfman’s work” at any time, so actual exercise of supervisory rights does not determine when “instance” occurred.¹²⁴

C. Copyright Limits

The second issue the *In re Marvel* court addressed pertained to similarities, and possible overlap, for certain characters that Wolfman created.¹²⁵ Wolfman claimed his characters were fully developed prior

116. *See id.*

117. *Id.*

118. *See id.* at 828–29.

119. *Id.* at 829.

120. *Id.* at 829–30.

121. *Id.*

122. *Id.* at 830.

123. *Id.*

124. *Id.*

125. *See generally id.* at 831.

to working for Marvel, but the court ultimately held that these characters were not fully developed, and were thus made at Marvel's instance and expense.¹²⁶ To fully examine the copyright holding, an examination of the seminal cases of Superman's Siegel and Shuster must be discussed.¹²⁷

In 1938, Jerome Siegel (writer) and Joe Shuster (artist) sold Superman to DC Comics for \$130.¹²⁸ Despite the contract's plain copyright ownership language, Siegel and Shuster sought to void the 1947 contract agreements.¹²⁹ Their efforts were unsuccessful because they had transferred all of their rights, leaving DC Comics as the sole, exclusive owner of Superman.¹³⁰ Unsatisfied with this outcome, the duo attempted to reestablish ownership rights in the 1960s and 1970s without success.¹³¹ However, after the second round of litigation, in 1975, DC Comics renegotiated with Siegel and Shuster acknowledging that "all right title and interest in' Superman . . . resided exclusively with DC Comics and its corporate affiliates[,]” but DC would provide “modest annual payments for the remainder of [Siegel's and Shuster's] lives” as the creators of Superman.¹³² It should also be noted the initial creation for Superman was not work-for-hire because it was not performed at the instance and expense of the employer.¹³³ Superman was created four years before the contractual agreements began and the employers were not the motivating factor in the production of the works.¹³⁴

Courts up until now have remained firm in holding that, when one signs over one's exclusive rights to use and own characters, and the contract is otherwise valid, there is no renegotiation of this right after the fact; it is final.¹³⁵ But over thirty years after this disagreement appeared settled, new opportunities for litigation emerged with the Copyright Act of 1976.¹³⁶ The updated Copyright Act provided au-

126. *Id.* at 831–34.

127. *See* Siegel v. Nat'l Periodical Publ'ns, Inc., 508 F.2d 909 (2d. Cir. 1974); *see also* Siegel v. Warner Bros. Entm't Inc., 542 F. Supp. 2d 1098 (C.D. Cal. 2008); *see also* Siegel v. Warner Bros. Entm't Inc., 658 F. Supp. 2d 1036 (C.D. Cal. 2009); *see also* Larson v. Warner Bros. Entm't Inc., 504 Fed. Appx. 586 (9th Cir. 2003).

128. Kratzer III, *supra* note 23, at 1149.

129. *Id.*

130. *Id.*

131. *Id.* at 1149–50.

132. *Id.* at 1150.

133. Siegel v. Nat'l Periodical Publ'ns, Inc., 508 F.2d 909, 914 (1974).

134. *Id.*

135. *Id.* at 913–14.

136. Kratzer III, *supra* note 23, at 1149, 1151.

thors (both artists and creators) with the “right of termination of transfer, the ability to terminate prior grants or licenses of a copyright that occurred before 1978.”¹³⁷ The original 1909 Copyright Act “sought to provide authors and their families with an unalienable . . . copyright renewal,” but the Supreme Court seemed to believe the right to contract included the ability to assign renewal rights as well.¹³⁸ Renewal rights essentially allow non-work-for-hire contracts the option to recover some previously relinquished rights after a certain amount of time.¹³⁹ This is contrary to the general concept of contracts. Most contractual agreements are continuous by nature unless they have a specific end date or a reason to be renegotiated; “[a] party cannot avoid a contractual obligation merely by complaining that the deal, in retrospect, was unfair or a bad bargain.”¹⁴⁰

However, the Supreme Court’s desire to adhere to a standard contractual agreement, thus supporting corporate bargaining power, played a part in the congressional decision to revise the 1909 Copyright Act. In effect, it was designed to recognize the unequal bargaining power of the artists and authors, who, by nature, would be unable to determine the value of their work until after it had been exploited.¹⁴¹ There was also some negative press surrounding the Superman affair which might have contributed to the Copyright Act’s revision, including a 1975 New York Times article which “ran a story about how the two creators of Superman were living in near destitute conditions.”¹⁴²

The Copyright Act of 1976 did two important things.¹⁴³ “First, [it] expanded by nineteen years the duration of the renewal period for works, like the initial release of Superman in *Action Comics*, Vol. 1, that were already in their renewal term at the time of the Act’s passage.”¹⁴⁴ Most importantly, Congress gave the ability to “terminate” any prior grants that met certain requirements, thus freeing artists from any previous terms.¹⁴⁵ These “right of termination transfers” would essentially protect the authors from pre-distinguishing all of their works as

137. *Id.* at 1150.

138. *Id.* at 1151.

139. *Id.*

140. *Farrar v. Direct Commerce, Inc.*, 215 Cal. Rptr. 3d 785, 795 (1st Dist. 2017).

141. *Kratzer III*, *supra* note 23, at 1151.

142. *Siegel v. Warner Bros. Entm’t Inc.*, 542 F. Supp. 2d 1098, 1112–13 (C.D. Cal. 2008) (*Siegel I*).

143. *Id.* at 1113.

144. *Id.*

145. *Id.*

unremunerative—having little to no value or profit.¹⁴⁶ This was in order to protect creators because the idea that all artists' work will never be worth more than a base work-for-hire wage, while their ideas and concepts would be making huge profits, seemed too much for Congress to overlook.¹⁴⁷ Currently, creators have the power to terminate “the exclusive or nonexclusive grant of a transfer or license of copyright or of any right under a copyright, executed by the author on or after January 1, 1978.”¹⁴⁸ With this new ability to reclaim previously licensed works, after seventy years the Siegel and Shuster families sought to regain copyright in Superman material.¹⁴⁹

Shortly after the next right-of-termination claim expiration, the Siegel heirs (widow, Joanne Siegel and daughter, Laura Siegel-Larson) sought to once again retain their ownership rights in the 2008 opinion written by Judge Stephen G. Larson, which left quite an impact in the comic legal world.¹⁵⁰ After four years of back-and-forth written negotiations, Warner Bros. and the Siegel heirs were unable to come to any settlement agreements.¹⁵¹ In absence of party agreement, Judge Larson ruled that the settlement negotiations did not result in an enforceable contract, thereby granting the Siegel heirs access to proceed with litigation.¹⁵² A year later, Judge Larson took on the “task of disentangling [the relationships and contractual agreements surrounding Superman], and giving legal meaning to them,” ultimately finding that the Siegel heirs recaptured some rights to *Actions Comics* No. 1.¹⁵³

A few years later Warner Bros. appealed Judge Larson's decision.¹⁵⁴ The Ninth Circuit partially overruled the decision stating that Judge Larson erred concerning whether the parties reached a settlement agreement in the 2001 negotiations.¹⁵⁵ This decision was based on the Ninth Circuit's interpretation of the October 19, 2001 acceptance letter from the Siegel heirs stating their acceptance and relating the terms of the conditions.¹⁵⁶ Counsel for Warner Bros. used this

146. Kratzer III, *supra* note 23, at 1151.

147. *See id.*

148. 17 U.S.C. § 203(a) (2018).

149. Kratzer III, *supra* note 23, at 1152–53.

150. *Siegel I*, 542 F. Supp. 2d at 1114.

151. *Id.* at 1115–16.

152. *Id.* at 1139.

153. *Siegel v. Warner Bros. Entm't Inc.*, 658 F. Supp. 2d 1036, 1042, 1095 (C.D. Cal. 2009).

154. *Larson v. Warner Bros. Entm't Inc.*, 504 Fed. Appx. 586, 587 (9th Cir. 2013).

155. *Id.*

156. *Id.*

purported acceptance letter to draft a fifty-six page draft agreement in February 2002, and the court should have used the May 5, 2002 response letter from the Siegels rejecting all of the new additions in the fifty-six page draft agreement when ruling, but it did not.¹⁵⁷ Nor did the court use the response letter sent three months later in which,

Joanne Siegel wrote a letter to Time Warner's Chief Operating Officer Richard Parsons, recounting that she and her daughter had "made painful concessions and reluctantly accepted John Shulman's last [settlement] proposal [in October 2001]," but upon [receiving and] reading the proposed draft agreement learned that they had been "stabbed in the back," as it "contained new, outrageous demands that were not in the [October 19, 2001] proposal," such as conditions placed on rights for financial compensation.¹⁵⁸ Warner Bros. quickly responded claiming that all of "the major points covered in the draft agreement" . . . accurately represented the agreement previously reached.¹⁵⁹

This decision to overturn Judge Larson's ruling appears to be an underhanded attempt to side-step the Copyright Act of 1976. Judge Larson took care to fully consider the validity and enforceability of termination notices.¹⁶⁰ The window for eligible termination renewal is relatively small.¹⁶¹ The 1976 Copyright Act effective date must fall within a five-year window between fifty-six years from the date the copyright was originally secured, but not more than sixty-one years.¹⁶² While there are other requirements as well, such as advanced notice in writing, the purpose of this time-window was so only renewal agreements created by the 1976 extensions would be affected.¹⁶³

Given the short window for qualification, it appears as though few cases would be affected by the 1976 Copyright Act so as to benefit from it. Yet the Ninth Circuit chose to honor the acceptance of a five-page written, *outlined* version mail correspondence during negotiations, instead of honoring a verbal rejection of a fifty-six-page augmented draft agreement.¹⁶⁴ Is the judicial goal to preserve the rigidity of contracting at all costs even when it is unfair to do so? Is there a greater purpose for essentially overruling the 1976 Act's allowances of termination of renewal rights? While these answers are unclear, what

157. *Siegel I*, 542 F. Supp. 2d at 1136–37.

158. *Id.* at 1115.

159. *Id.* at 1115–16.

160. *See id.* at 1116–17.

161. *See id.* at 1117.

162. *Id.*

163. *Id.*

164. *See generally id.*; *see generally* Larson v. Warner Bros. Entm't Inc., 504 Fed. Appx. 586, 587 (9th Cir. 2013).

remains clear is that comic industry creators are still left with very few creative protections.

III. Possible Solutions for Artists to Regain Rights

A. Fight Back with Unconscionability

The only viable chance for an artist to retain intellectual property ownership is during the original contracting event. In contract law, unfair bargaining power is cause to challenge the validity of a binding contract.¹⁶⁵ The law of unconscionable contract, California Civil Code section 1670.5, states that if a contract is “unconscionable at the time it was made[,] the court may refuse to enforce the contract . . . or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.”¹⁶⁶ Unconscionable contracts are those that are “so one-sided as to ‘shock the conscience.’”¹⁶⁷ “Under California law, ‘unconscionability has both a “procedural” and a “substantive” element,’ the former focusing on ‘oppression’ or ‘surprise’ due to unequal bargaining power, the latter on ‘overly harsh’ or ‘one-sided’ results.”¹⁶⁸ The California Supreme Court has observed that “unconscionability requires a substantial degree of unfairness *beyond ‘a simple old-fashioned bad bargain.’*”¹⁶⁹

In most situations there is a lone artist who is signing away his or her thoughts and creativity permanently to secure a job doing the work he or she loves. What happens if the artists or authors do not sign the contract? There is no job security, and little to no representation or publishing help for the creators. They are trapped with the option of signing or losing their dream profession because it will not support them financially. Corporations and syndicates clearly have the most (if not all) publishing power. There are options to lessen the contractual standard for exclusivity at the moment of contracting, but the creators are still left without leverage at the bargaining table. Practically applied, there is only a small chance, in extreme situations [researching a winning case has proved unfruitful], in which a creator could potentially prove an unconscionable contract and restore ownership rights after contracting out of his or her creative rights. Unconscionability must meet a very high threshold because it must be

165. CAL. CIV. CODE § 1670.5 (West 2018).

166. § 1670.5(a).

167. Mohamed v. Uber Techs., Inc., 848 F.3d 1201, 1210 (9th Cir. 2016).

168. *Id.*

169. *Id.*

deemed both procedurally and substantively unconscionable.¹⁷⁰ Procedural unconscionability concerns both the manner and circumstances of the involved parties; focusing on level of oppression, absence of choice, surprise, and unequal bargaining power, resulting in no real choice at all.¹⁷¹

B. Independent Contracting

Independent contracting is a common contractual work agreement, but it can easily turn into another form of work-for-hire agreement.¹⁷² Independent contractors often retain copyright of their authorship works whereas, in work-for-hire agreements, the employee is creating work within the scope of employment, giving the employer sole ownership.¹⁷³ Generally, independent contracting favors and protects the employee instead of the employer; however, there is little incentive for companies to voluntarily give more rights to the contractors. Instead a trend is emerging that encourages companies to consider independent contractor agreements with stronger ownership clauses or even suggesting work-for-hire contracts instead.¹⁷⁴

How to assign creative ownership is also challenging outside of the comic industry. In an article advising contracting software engineers, companies (employers) are cautioned against independent contracting.¹⁷⁵ Instead, Toher and Helms suggest work-for-hire contracts with the understanding that they attach insurance and employment benefits, but that small payout is preferable to losing ownership rights.¹⁷⁶ However, to avoid the complex test to determine worker status, technology contracting uses clear intellectual property language

170. See *Chavarria v. Ralphs Grocery Co.*, 733 F.3d 916, 922 (9th Cir. 2013).

171. *Id.*

172. Gordon Firemark, *Producer Beware: "Work Made For Hire" Agreement Creates a "Statutory Employee" Relationship*, L. OFFICES GORDON P. FIREMARK (July 1, 2013), <https://firemark.com/2013/07/01/producer-beware-work-made-for-hire-agreement-creates-a-statutory-employee-relationship/> [https://perma.cc/TF9C-RWK5]; Arina Shulga, *Independent Contractors or Employees: California's "Work For Hire" Contracts*, LEXISNEXIS LEGAL NEWSROOM: LAB. & EMP. L. (Mar. 23, 2011, 3:35 PM), <https://www.lexisnexis.com/legalnewsroom/labor-employment/b/labor-employment-top-blogs/archive/2011/03/23/independent-contractors-or-employees-california-s-work-for-hire-contracts.aspx> [https://perma.cc/9WNC-BRVJ].

173. See J. Patrick Toher & Shawn C. Helms, *The "Work For Hire" Doctrine Almost Never Works in Software Development Contracts*, CORP. COUNSEL BUS. J. (June 1, 2008, 1:00 PM), <http://www.metrocorpcounsel.com/articles/9954/work-hire-doctrine-almost-never-works-software-development-contracts> [https://perma.cc/89F3-L6LJ].

174. *Id.*

175. *Id.*

176. *Id.*

to establish ownership and licensing at the outset.¹⁷⁷ The article essentially illustrates the trend away from independent contracting when dealing with potential copyright issues, and can be analogized to the current comic industry standard of corporate ownership control.

C. Natural Direction of Industry

Currently, the comic industry is shifting towards a collaborative norm.¹⁷⁸ Teams of artists, authors, illustrators, colorists, and editors, work together to produce large volumes of work.¹⁷⁹ Not just one or two creators create characters and storylines; instead, huge creative teams share in the load. This new industry direction protects publishers and syndicates from ownership issues, because under this scheme, there is no question that all work-product is work-for-hire.¹⁸⁰ However, this direction also means the industry is shifting away from providing authors and creators with true compensation for their efforts, and it shows the industry trying to retain all rights by its structure from design, distribution, and publication structure.¹⁸¹ Instead, the trend continues to minimize comic art and artist compensation under the lens of cultural bias and “low” form of art.¹⁸²

IV. Who is Taking Advantage of Whom?

After over 100 years, the artists and creators of comic stories are still left in unfavorable positions.¹⁸³ Artists and creators have few rights if they ever hope to see their imaginations truly come to life. Yet, as their relevance in the media world expands, their rights continue to shrink. The film industry is a booming market. All production companies are fighting to stay relevant and popular, and comics are great source material. They have built in characters, storylines, sets, and huge fan bases.¹⁸⁴ Not to mention films are a lucrative and thriving business—the 2012 *Avengers* grossed one billion dollars alone.¹⁸⁵ Now, advanced computer graphics allow film makers a chance to reproduce artist renderings, construct amazing live action scenes, and

177. *Id.*

178. GREENBERG, *supra* note 17, at 16.

179. *Id.*

180. *See id.*

181. *Id.*

182. *Id.* at 13.

183. *Id.* at 188.

184. *Id.* at 41.

185. *Id.*

create cinematic magic with ease.¹⁸⁶ The digital process is easier than drawing and painting each scene, or frame, by hand which takes a massive amount of skill, patience, and physical labor.¹⁸⁷ The digital process leaves the minds and talents behind these epic stories nameless and unrewarded.

The sanctity of contracting should be honored, but at what cost? Currently, artists have less than desirable options if they want to see their product published.¹⁸⁸ This includes signing away potential rights before their creations have a chance to thrive. This is a time where so many storylines are being repackaged and regenerated into print and films, yet, as a society, we choose not to honor comic creativity, a wholesome past time, often well regarded. Corporate profit sharing margins or gross bottom lines do not seem to be the problem, as corporate comic profits soar.¹⁸⁹ Instead, it is corporate inability to “share” profits fairly with creators that has the comic industry stuck at a crossroads.

Stan Lee is a popular comic icon, who makes a terrible example of artist exploitation. During fifteen years of litigation against Disney, Lee legitimately contracted out licenses and ownership rights to several Marvel characters, then had seller’s remorse after Disney revitalized some characters beyond the scope of Marvel Studio’s abilities and efforts.¹⁹⁰ It is easy to see the disadvantage in which artists and creators are placed. The need for jobs is crucial, as most artists may not have the luxury to create freely until their creations pay out. Comic creators depend on intermediaries and larger corporations to support them,¹⁹¹ but at what cost? There must be a better way than giving up exclusive rights to their intellectual property or giving away their rights before characters have even become profitable. Work-for-hire comes with the understanding that all work created at the instance and expense of an employer is thereby the property of the employer.¹⁹² This law is stifling to the comic industry. The very nature of “instance and expense” undermines the creative process by not al-

186. *Id.* at 42.

187. Palle Schmidt, *Digital vs. Drawing on Paper*, COMICS FOR BEGINNERS (Apr. 8, 2014), <https://comicsforbeginners.com/digital-vs-drawing-paper/> [https://perma.cc/R76N-HJER].

188. *See generally* GREENBERG, *supra* note 17, at 37–46 (showing the levels of ownership in practice).

189. *See* DeForest, *supra* note 3.

190. *See generally* Stan Lee Media, Inc. v. Walt Disney Co., 774 F.3d 1292 (10th Cir. 2014).

191. GREENBERG, *supra* note 17, at 43.

192. *In re* Marvel Entm’t Grp., Inc., 254 B.R. 817, 828 (D. Del. 2000).

lowing it to fully grow and develop. Artists are essentially at risk of producing a comic conveyor belt. While there are hundreds, if not thousands, of characters already in existence, the human mind has endless capabilities to create even more fantastic characters and universes. Giving the human mind space to work at its own creative pace can allow for a new generation of comic works. Surely when Superman was created people did not imagine he would be so beloved, which begs the question, what other potentially iconic characters are being suppressed by the threat of comic thievery? Further, where is the incentive to create and let creativity reign free if artist's creations will inevitably be sold to the highest bidder? There is very little incentive when an artist's creations are out of their hands almost as quickly as they enter their mind. The artist's highest attainable dream cannot be to create, knowing their creation will never belong to them and will ultimately be controlled by someone else.

Examining the case above, do artists retain the ability to go home and create off the clock? Or does the Wolfman opinion of "instance and expense"¹⁹³ also extend to their personal time? The *In re Marvel Entertainment Group* court found that if an employer "reserved the right" to supervise the creator's work, or if an employer requests an employee to "create story ideas," the instance and expense test will easily be satisfied.¹⁹⁴ Under the instance and expense test, if artists work from home and are employed under a work-for-hire employment contract, then there is actually no time that an employer could say created works were not at the employer's instance and expense. This law makes working from home a figurative creative prison. The instance and expense test also can perpetuate legal repercussions down the road after an employment contract has ended. Can former employment contracts be used to say any future creations were really created while under contract and thereby the employer still retains exclusive ownership? Would that mean all employment contracts are as permanently binding as signing away all future ownership rights?

The current salary of a comic creator is not available on the Bureau of Labor Statistics, but according to various sources, the median pay for comic book authors is anywhere from \$36,500 to \$53,080 depending on the category.¹⁹⁵ New artists may even be paid considerably

193. *Id.*

194. *Id.* at 830.

195. . Megan Leonhardt, *How Much You Can Earn in the Comic Book Industry—From Artist to CEO*, MONEY (Nov. 2, 2017), <http://time.com/money/5004439/how-much-you-can-earn-in-the-comic-book-industry-from-artist-to-ceo/> (last visited Feb. 12, 2018) [<https://>

less, as low as \$2000 for a 100-page book, totaling a mere \$2.50 per hour.¹⁹⁶ An artist is stuck with two options: sign or walk away from their dream. Since corporations are the ones with the publishing power, they have the option to lessen the contractual standard for exclusivity—yet, this option is not usually in the contract. Rather, work-for-hire contracts are a way to minimize any possible chance at retaining intellectual property.

As mentioned above, Stan Lee, Siegel, and Shuster are not the best examples of starving, bullied artists, who lack representation and bargaining power. Even though Siegel and Shuster created Superman together, they gladly relinquished rights when the duo began to struggle within their working relationship and grew tired of their creation.¹⁹⁷ The decision to sell their right to *Superman* came after unsuccessfully shopping publishers for a number of years.¹⁹⁸ Before the duo sold, they likely felt they were in a place of hopelessness. They had put years into a character that they could not push to the next level on their own. But like Stan Lee, they too had seller's remorse. While they may have felt hopeless, they still chose to contract and give away all of their rights, and "sole exclusive property," to the Man of Steel, Superman.¹⁹⁹ On the other hand, Watterson, the creator of *Calvin and Hobbes*, retained some rights, as discussed previously, fought for more rights than he retained, and prevailed at the end because the intermediary did not want to lose its artist.²⁰⁰

His contract success may be attributed to *Calvin and Hobbes* being a more specialized, political piece that is harder to replicate with the same flavor. Or maybe success came because the intermediary, or syndicate, wanted to give respect and homage to the originality behind the creation. After all, a happy artist is likely to be a productive artist, but it is hard to say. What is clear is that the Wattersons of the world are uncommon, especially because there is a growing trend in collaborative computer-generated animation. There may be a shift to group productivity that would make it impossible for a single artist to lay claim to character rights. This trend gives companies the incentive to employ more work-for-hire artists, in the hope of creating nameless

perma.cc/3XC8-WNYE]; *A Short History Of Comic Books*, ART CAREER PROJECT, <https://www.theartcareerproject.com/careers/comic-book-art/> (last visited Feb. 12, 2018) [<https://perma.cc/WG8Y-P93L>].

196. Leonhardt, *supra* note 195.

197. Siegel v. Warner Bros. Entm't Inc., 658 F. Supp. 2d 1036, 1042 (C.D. Cal. 2009).

198. Siegel v. Warner Bros. Entm't Inc., 542 F. Supp. 2d 1098, 1105 (C.D. Cal. 2008).

199. *Id.* at 1106.

200. GREENBERG, *supra* note 17, at 45–49.

groups, to produce large scale productions, which are exclusively owned by a single entity.

Conclusion

We are in an era of global intellectual property growth. The intellectual property legal field is booming as new movies are being produced, but behind the scenes, artists are struggling to create and retain rights to their own intellectual property. Everything from rock gardens to nail polish designs are up for copyright protections. Yet, after a century of litigation, comic creators are left with few contracting or ownership rights. They are still voiceless and nameless. Maybe that voice will one day soon be irrelevant. Maybe it already is.

