

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X  
 :  
 MARVEL WORLDWIDE, INC., :  
 MARVEL CHARACTERS, INC. and :  
 MVL RIGHTS, LLC, :  
 :  
 Plaintiffs, :  
 :  
 - against- :  
 :  
 LISA R. KIRBY, BARBARA J. KIRBY, :  
 NEAL L. KIRBY and SUSAN N. KIRBY, :  
 :  
 Defendants. :  
 -----X

Civil Action No. 10 Civ. 141 (CM) (KNF)

-----X  
 :  
 LISA R. KIRBY, BARBARA J. KIRBY, :  
 NEAL L. KIRBY and SUSAN N. KIRBY, :  
 :  
 Counterclaim-Plaintiffs, :  
 :  
 - against- :  
 :  
 MARVEL ENTERTAINMENT, INC., :  
 MARVEL WORLDWIDE, INC., :  
 MARVEL CHARACTERS, INC., MVL :  
 RIGHTS, LLC, THE WALT DISNEY :  
 COMPANY and DOES 1 through 10, :  
 :  
 Counterclaim-Defendants. :  
 -----X

**PLAINTIFFS' AND COUNTERCLAIM-DEFENDANTS' REPLY  
MEMORANDUM OF LAW IN FURTHER SUPPORT OF THEIR  
MOTION FOR SUMMARY JUDGMENT**

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## **PRELIMINARY STATEMENT**

Tracking the technique adopted in their own summary judgment motion, Defendants' opposition essentially postulates fictional "facts" and applies them to non-existent law. Under prevailing authority, all of the comic book works at issue (the "Works") were indisputably created at Marvel's instance and expense. Unable to contradict this showing, Defendants attempt to bury it under a blizzard of newly-offered irrelevant and inadmissible materials submitted in opposition to Marvel's motion. Defendants next contort the instance test into a form the law does not recognize, and restate their equally ungrounded vision of the expense test. They then ask the Court to rule in their favor based on how purely hypothetical facts nowhere supported by the record evidence might be applied against this invented law.

In the end, Defendants attempt to shroud in an analytic fog what well-established precedent both in this Circuit and elsewhere makes indisputably clear – that application of the instance and expense test to the Works is a fairly straightforward task. Under that case law the instance and expense test creates an integrated standard that is conclusively satisfied by – as is the case here – a demonstration that the hiring party induced the creation of, had supervisory control over, and paid for, the works in issue. Try as Defendants might to recast the nature of the governing inquiry, and divert the Court's attention from the only dispositive facts, there is no dispute as to Marvel's ownership of the Works under the law of this Circuit and or its entitlement to summary judgment in its favor.

## **ARGUMENT**

### **I. MARVEL IS ENTITLED TO SUMMARY JUDGMENT**

Defendants' smoke-blowing cannot obscure the straightforward nature of the two-pronged "instance and expense" test that determines whether a 1909 Act work was created for hire. The test is met "when the motivating factor in producing the work was the employer who

induced the creation,” *Playboy Enters., Inc. v. Dumas*, 53 F.3d 549, 554 (2d Cir. 1995), and that employer “ha[d] the right to direct and supervise the manner in which the work [was] carried out.” *Fifty-Six Hope Road Music Ltd. v. UMG Recordings, Inc.*, No. 08 CIV. 6143 (DLC), 2010 WL 3564258, at \*8 (S.D.N.Y. Sept. 10, 2010). The instance prong is the primary inquiry; expense is of only “minor importance.” *Murray v. Gelderman*, 566 F.2d 1307, 1310 (5th Cir. 1978). That Marvel engaged Kirby to contribute to the Works and paid him for those contributions “alone is enough to satisfy the instance and expense test.” *Nat’l Ctr. for Jewish Film, Inc. v. Goldman*, 943 F. Supp. 113, 118 (D. Mass. 1996).

**A. The Works Were Created At Marvel’s Instance Under Second Circuit Law.**

Defendants concede that the “hallmark” of the instance analysis is whether the hiring party “had the right . . . to direct and supervise the artist’s work.” Defendants’ Memorandum of Law In Opposition to Summary Judgment (“Opp.”) at 13. Where, as here, it is undisputed that Marvel “took the initiative in engaging” Kirby for specific assignments and “had the power to accept, reject, or modify [his] work,” that work was created at Marvel’s instance. *Estate of Hogarth v. Edgar Rice Burroughs, Inc.*, 00 CIV. 9569 (DLC), 2002 WL 398696, at \*18 (S.D.N.Y. Mar. 15, 2002), *aff’d*, 342 F.3d 149 (2d Cir. 2003).

Defendants do not dispute any of the facts that unequivocally show Marvel satisfies the instance analysis: Marvel “took the initiative in engaging” all contributors to its comic books by assigning them to work on specific projects, and maintained (and indeed exercised) the right to control and supervise all aspects of creation from conception to publication. *See* Marvel’s Local Rule 56.1 Statement (“56.1 Stmt.”) ¶¶ 15-16, 22-27, 30-35, 37, 40, 42-43, 54, 56, 58-59, 63. The irrelevant and inadmissible evidence Defendants adduce for the first time in opposition simply underscores Marvel’s right to accept, reject or modify the work. *E.g.*, Ayers Decl. ¶ 11; Colan Decl. ¶ 9; *see* February 18, 2011 Declaration of Randi W. Singer (“Singer Decl.”) Ex. 38.

Instead, Defendants attempt to sidestep this dispositive record by positing a dispute about whether Stan Lee is entitled to “sole credit” for the Works, *see* Opp. at 7. But the question of who did or should have received “credit” for the origination of the idea for any of the Works is entirely irrelevant to what is here at issue: who owned the copyright in the Works. This is so because copyright law concerns itself, not with the protection of abstract ideas, but solely with their tangible *expression*. *See* 17 U.S.C. § 102(b) (“[i]n no case does copyright protection for an original work of authorship extend to any idea”); *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003); *In re Marvel Entm’t Group, Inc.*, 254 B.R. 817, 832 (D. Del. 2000) (writer’s claim of independent creation did “not account for the transition from a story idea to a story ready for publication”). Without question, all contributors to Marvel’s comic books, Kirby included, brought ideas to the creative process. *See e.g.*, 56.1 Stmt. ¶¶ 40-42, 57. The legally dispositive point, however, is whether projects that resulted from such ideas were commissioned and ultimately controlled by Marvel. *See In re Marvel*, 254 B.R. at 830 (work was made for hire where Marvel expected writer to produce fresh stories, including new plots and characters but such ideas were at all times subject to Marvel’s editorial direction and control). Relatedly, the degree of Kirby’s creative freedom exercised in carrying out the assignments given him are of no legal moment. *E.g.*, *Murray*, 566 F.2d at 1311; *Fifty-Six Hope Road*, 2010 WL 3564258, at \*10; *Hogarth*, 2002 WL 398696, at \*19, \*22.

Defendants alternatively suggest that Marvel’s copyright ownership of the Works was somehow dependent on some sort of formal “contractual or legal right” governing, *inter alia*, Marvel’s entitlement to require revisions to Kirby’s contributions. Opp. at 13. For starters, Defendants have presented absolutely no admissible evidence that Kirby ever turned down an assignment or refused to make changes Marvel requested, thus reducing their supposed legal test

to the realm of the hypothetical. *See* 56.1 Stmt. ¶ 59. But more fundamentally, Defendants again pose a question that misapprehends the law and is without legal significance. Defendants miscite *Martha Graham School & Dance Foundation, Inc. v. Martha Graham Center of Contemporary Dance, Inc.*, 380 F.3d 624 (2d Cir. 2004), a case that nowhere supports their premise. Indeed, governing law is to the contrary. Marvel’s copyright ownership springs from the nature of its relationship with Kirby – *i.e.*, the undisputed facts that Kirby’s contributions to the Works were commissioned, supervised, and paid for by Marvel – and is not dependent on the existence of express contractual undertakings giving Marvel the right to editorial supervision that is inherent in the relationship. *See Marvel Characters, Inc. v. Simon*, 310 F.3d 280, 291 (2d Cir. 2002) (courts must “focus[] on the actual relationship between the parties, rather than the language of their agreements, in determining authorship”). In fact, Defendants have the law exactly backwards: it is their burden to come forward with evidence of an explicit contemporaneous agreement *to the contrary* if they are to overcome the law’s “almost irrebuttable presumption” that the Works were works for hire based on Marvel’s more than sufficient *prima facie* showing. *See, e.g., Hogarth*, 342 F.3d at 158; *In re Marvel*, 254 B.R. at 828. Defendants have completely failed to make this showing.

Defendants fare no better with their unsubstantiated attacks on the credibility of Lee, the only witness with direct personal knowledge of Kirby’s relationship with Marvel during the Time Period. *See* Opp. at 5-8. Defendants “cannot defeat summary judgment . . . merely by impugning [a witness’s] honesty.” *McCullough v. Wyandanch Union Free Sch. Dist.*, 187 F.3d 272, 280 (2d Cir. 1999); *see also Island Software & Computer Serv., Inc. v. Microsoft Corp.*, 413 F.3d 257, 261-62 (2d Cir. 2005) (“Broad, conclusory attacks on the credibility of a witness will not, by themselves, present questions of material fact.”). Moreover, the attempt to suggest that

Lee's testimony was somehow contrived based on his relationship with Marvel and Disney is another transparently meritless diversion. In point of indisputable fact, there is nothing contrived about Lee's testimony. For nearly fifty years, long predating any relationship with Disney (and this litigation), Lee has offered the same accounts. He has consistently and repeatedly explained how he, as Marvel's editor, had direct supervision over the creation of Marvel's comic books and bore principal responsibility for originating, on behalf of Marvel, most of Marvel's now-iconic stories and characters. *E.g.*, Singer Decl. Exs. 11, 18, 27, 32-33, 52; *see* Singer Decl. Ex. 1 at 14:2-20; Confidential Declaration of Marc Toberoff Ex. 4. Indeed, all of these statements were originally against Lee's own personal interest, as he himself wrote most of Marvel's comic books during the Time Period and could have attempted to assert the same rights Defendants assert here. *See* Singer Decl. Ex. 1 at 14:2-20; 56.1 Stmt. ¶ 27. Marvel's evidentiary proffer here is consistent with the entirety of those prior statements, and Defendants take no issue with the undisputed facts that Marvel had (and exercised) complete and direct authority to direct, supervise and control the creation of the Works, and that it bore the risk and paid for them.

In sum, nothing in Defendants' opposition papers raises a triable issue of material fact as to whether Kirby's contributions to the Works were created at Marvel's instance. They unquestionably were.

**B. The Works Were Created At Marvel's Expense Under Second Circuit Law.**

Defendants repeat – and rely for their sole authority on – the arguments made in their own summary judgment papers concerning why, allegedly, the Works were not prepared at Marvel's expense. The essence of their argument remains the fallacious proposition that this prong of the work-for-hire test can only be met if Marvel is able to demonstrate that it had a “legal obligation” to pay for every draft generated by Kirby, failing which the relationship assertedly involved no more than the “purchase of essentially speculative work.” Opp. at 12. No

such illogical requirement exists in the law. Again, Defendants ask the Court to rewrite the law and on the basis of a circumstance that did not exist, as there is no record evidence in the first instance that any of the Works had to be redrawn, let alone that Kirby ever was not paid for any of his contributions.

We will not repeat at length the governing test for meeting the expense prong and refer the Court to our prior briefing on this subject. *See* Memorandum of Law In Support of Motion for Summary Judgment (Docket No. 62) at 17-18; Memorandum of Law In Opposition to Defendants' Motion for Summary Judgment (Docket No. 81) at 13-15. It suffices to restate in summary that the Works were created at Marvel's expense because Marvel has shown that it paid Kirby a per-page rate for his completed contributions to the Works. *See, e.g., Playboy Enters.*, 53 F.3d at 552, 555. In effect, Defendants urge that this subordinate element of the work-for-hire test be redefined to accommodate their theory and in a manner that would have it operate without regard to the "instance" test to which it is moored. But the Defendants' position lacks any legal foundation. As has been noted, "[t]he simple fact that [the hiring party] paid [the hired party] a fixed [per-page] sum for each of the works published . . . is sufficient to meet the requirement that the works be made at [the hiring party's] expense." *Id.* at 555; *see also Twentieth Century Fox Film Corp. v. Entm't Distrib.*, 429 F.3d 869, 881 (9th Cir. 2005) (expense inquiry met when author was paid lump sum); *In re Marvel*, 254 B.R. at 830 (Marvel writer was paid flat fee per page of script).

The very most the record reveals as to the "risk" that Kirby assumed is his bearing the cost of using his own supplies, such as pencils. But this is not the form of "risk" that the work-for-hire doctrine concerns itself with. As the Second Circuit's *Playboy* decision and other authority makes clear, the relevant risk is the "risk of loss *on the project.*" *See Hogarth*, 2002

WL 398696, at \*20 (emphasis added); *see also Twentieth Century*, 429 F.3d at 881 (publisher satisfied expense prong when it “took on all the financial risk of *the book’s* success”) (emphasis added); *Murray*, 566 F.2d at 1310 (book created at hiring party’s expense where it “absorbed all costs of *publication*”) (emphasis added). Indeed, for that very reason, *Playboy* expressly rejected and put to rest Defendants’ cramped interpretation of the expense requirement, concluding that the facts that an artist worked with relatively little supervision and paid for his own supplies “have no bearing on whether the work was made at the hiring party’s expense,” and that it sufficed that the publisher had paid him a fixed per-page sum. 53 F.3d at 555. Here, it is undisputed that Marvel alone bore that risk in deciding whether to publish a comic book, in hiring, supervising and paying all the people involved in its development, in printing it and arranging for its distribution and sale, and in bearing the risk of financial loss if the publication did not succeed. 56.1 Stmt. ¶¶ 15-16, 19-21, 23-27, 30, 32-34, 39-40, 42-43, 45, 47-48, 54-56, 58-64, 66. That set of undisputed facts is determinative.

**C. Defendants Have Failed To Rebut The Work-For-Hire Presumption.**

To rebut the “almost irrebuttable presumption” that the Works were made for hire, Defendants must prove by a preponderance of the credible evidence that Marvel and Kirby had an express agreement during the Time Period that the Works were *not* made for hire. *Playboy Enters.*, 53 F.3d at 554-55. They have failed completely to do so; indeed, they expressly declare that “Kirby indisputably had no contract with Marvel during the [Time] Period.” Opp. at 14.

Defendants’ citation to agreements and check legends from after the Time Period and checks made out to people other than Kirby (and some by publishers other than Marvel) are wholly irrelevant to whether *Kirby’s* contributions to the Works *during the Time Period* were made for hire. Opp. at 16-20. Even were it otherwise, the case law is clear that “assignment” language is not dispositive of the work-for-hire issue, particularly where it is coupled with work-

for-hire language. See *Fifty-Six Hope Road*, 2010 WL 3564258, at \*11; see also *Twentieth Century*, 429 F.3d at 881; *Playboy Enters.*, 53 F.3d at 557; cf. *Archie Comic Publ'ns, Inc. v. DeCarlo*, 258 F. Supp. 2d 315, 331-32 (S.D.N.Y. 2003), *aff'd*, 88 F. App'x 468 (2d Cir. 2004).

Defendants' reliance on *Simon*, 310 F.3d 280, is similarly completely misplaced. That case involved a work alleged to have been independently created and then submitted to Marvel, and the subsequent "agreement to the contrary" was executed decades later. *Id.* at 289. In contrast, this case unambiguously involves Works created pursuant to assignments from Marvel. 56.1 Stmt. ¶¶ 54-55. Also in contrast to *Simon*, Marvel does not here rely on post-Time Period agreements to establish the Works were made for hire. Those agreements have relevance only to the extent that they – and other admissions by Kirby and his representatives that span more than thirty years – corroborate the status of the Works as of the time they were created. It is accordingly undisputed that:

- between 1966 and 1969, in connection with the character Captain America, Kirby signed an affidavit averring that he "felt that whatever [he] did for Timely belonged to Timely as was the practice in those days," and signed copyright registration applications stating that Marvel was a "[p]roprietor of a copyright in a work made for hire," *id.* ¶¶ 69-70;
- between 1972 and 1987, Kirby signed several agreements expressly acknowledging the work-for-hire status of his contributions to Marvel, including the Works, *id.* ¶¶ 71, 73-75;
- in 1986, Kirby wrote that he sought only "proper credit for [his] role in the creation of" certain of the Works, and this had "nothing to do with copyright ownership," *id.* ¶ 76; and
- in 1997, the legal representative of Kirby's estate stated that Kirby's wife Roz was "not challenging Marvel's rights in the various characters which Jack created [because] [a]ny issues regarding ownership have long since been put to rest," *id.* ¶ 77.

Defendants' contrary effort to rely on later-in-time agreements as the sole evidence of a supposedly contrary intent is foreclosed by the very case they cite.

## **II. INDEPENDENT CONTRACTORS WERE ENCOMPASSED WITHIN THE WORK-FOR-HIRE PROVISIONS OF THE 1909 ACT**

Unable to avoid summary judgment on the basis of existing law, Defendants once again urge the court to rewrite it, repeating the groundless arguments made in their own summary

judgment motion to the effect that independent contractors were not covered by the work-for-hire provisions of the 1909 Act. As Marvel explained fully in its opposition to that motion, Defendants urge a proposition that would require the Court to overturn decades of Second Circuit cases. *See Hogarth*, 342 F.3d at 159-63; *Playboy Enters.*, 53 F.3d at 554; *Siegel v. Nat'l Periodical Publ'ns, Inc.*, 508 F.2d 909, 914 (2d Cir. 1974); *Picture Music, Inc. v. Bourne, Inc.*, 457 F.2d 1213, 1216-17 (2d Cir. 1972); *Brattleboro Publ'g Co. v. Winmill Publ'g Corp.*, 369 F.2d 565, 567-68 (2d Cir. 1966); *see also Twentieth Century*, 429 F.3d at 877; *Forward v. Thorogood*, 985 F.2d 604, 606 (1st Cir. 1993); *Murray*, 566 F.2d at 1310. Indeed, the Second Circuit has expressly rejected Defendants' argument in this regard. *Hogarth*, 342 F.3d at 161 (finding courts in this Circuit are "obliged to follow *Picture Music*, especially after its holding was reconfirmed in *Playboy*"). Similarly, there is no merit to the contention that works created before the work-for-hire doctrine was expressly extended to independent contractors by *Brattleboro* in 1966 could not have been intended to be works for hire. *See Twentieth Century*, 429 F.3d at 877 (1948 book was work for hire); *Picture Music*, 457 F.2d at 1216-17 (1933 song was work for hire); *Archie Comic Publ'ns*, 258 F. Supp. 2d at 328 (1962 comic book was work for hire).

The sole new argument raised by Defendants is their assertion that independent contractors are outside the common law definition of "employee" and thus cannot create works for hire. *See Opp.* at 22-25. Defendants' reliance on *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989) ("CCNV") for this proposition fails to take account of the fact that that case analyzed the work-for-hire provision of the 1976 Act, not the 1909 Act. *See Hogarth*, 342 F.3d at 161-63; *see also Twentieth Century*, 429 F.3d at 878; *Easter Seal Soc'y for Crippled Children & Adults of La., Inc. v. Playboy Enters.*, 815 F.2d 323, 335 (5th Cir. 1987) (1976 Act's

work-for-hire provision represented a “radical break from ‘work for hire’ doctrine under the 1909 Act”). Indeed, the Second Circuit, when asked to address precisely the argument made here by Defendants, examined the cited text from *CCNV* and expressly rejected the contention. The court found the Supreme Court’s 1909 Act discussion, “if dictum at all, [was] dictum of a weak variety” that was “an insufficient basis to warrant . . . disregard of two clear holdings” of the Second Circuit in *Picture Music* and *Playboy*, making clear the lack of legal distinction under the 1909 Act between formal employer-employee relationships and those between independent contractor and hiring party for purposes of applying the instance and expense test. *See Hogarth*, 342 F.3d at 158-63. Defendants’ dissatisfaction with the state of the law in this Circuit forms no basis for this Court’s overturning it, nor do their unsupported assertions that a different result should obtain in the context of termination rights. *See Opp.* at 24-25.

### CONCLUSION

For the foregoing reasons, and the reasons set forth in Marvel’s opening brief, summary judgment should be entered in Marvel’s favor on the sole cause of action of its complaint and in favor of Marvel and Disney on Defendants’ counterclaim.

Dated: April 8, 2011

By: /s/ James W. Quinn

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