

# **EXHIBIT A**

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 CLERK U.S. DISTRICT COURT  
 CENTRAL DIST. OF CALIF.  
 LOS ANGELES

BY: \_\_\_\_\_

6 Attorneys for Plaintiffs,  
 7 LISA R. KIRBY, BARBARA J. KIRBY,  
 8 NEAL L. KIRBY, and SUSAN M. KIRBY

9 **UNITED STATES DISTRICT COURT**  
 10 **CENTRAL DISTRICT OF CALIFORNIA**

11 LISA R. KIRBY, as an individual  
 12 and as Trustee for THE  
 13 ROSALIND KIRBY TRUST, a  
 14 trust; BARBARA J. KIRBY, an  
 individual; NEAL L. KIRBY, an  
 15 individual; and SUSAN M.  
 KIRBY, an individual,

16 Plaintiffs,

17 vs.

19 MARVEL ENTERTAINMENT,  
 20 INC., a corporation; MARVEL  
 21 WORLDWIDE, INC., a  
 corporation; MARVEL  
 22 CHARACTERS, INC., a  
 corporation; MVL RIGHTS, LLC,  
 23 a corporation; THE WALT  
 24 DISNEY COMPANY, a  
 25 corporation; and DOES 1 through  
 26 10,

27 Defendants.

CASE NO. SACV10-00289-CJCCANL

**COMPLAINT FOR:**

- [1] DECLARATORY RELIEF RE: TERMINATION, 17 U.S.C. § 304(c);**
- [2] DECLARATORY RELIEF RE: PROFITS;**
- [3] CONVERSION; and**
- [4] VIOLATION OF LANHAM ACT, 15 U.S.C. § 1125.**

**DEMAND FOR JURY TRIAL**

1 Plaintiffs LISA R. KIRBY, BARBARA J. KIRBY, NEAL L. KIRBY, and  
2 SUSAN M. KIRBY, by and through their attorneys of record, hereby allege as  
3 follows:

4 **JURISDICTION AND VENUE**

5 1. This is a civil action seeking declaratory relief arising out of  
6 Plaintiffs' termination, pursuant to the United States Copyright Act of 1976, 17  
7 U.S.C. § 304(c), of prior grants of copyright in and to the original characters and  
8 works created and/or co-created by Jack Kirby (a.k.a. Jacob Kurtzberg) ("Kirby"),  
9 known as "The Fantastic Four," "Iron Man," "Ant-Man," "X-Men," "The  
10 Incredible Hulk," "The Avengers," "Thor," "Nick Fury," "Spider-Man," "Journey  
11 Into Mystery," "Rawhide Kid," "Strange Tales," "Tales of Suspense," "Amazing  
12 Adventures" and "Tales to Astonish."

13 2. This Court has subject matter jurisdiction over the claims set forth in  
14 this Complaint pursuant to the United States Copyright Act (hereinafter, the  
15 "Copyright Act"), 17 U.S.C. § 101 *et al.* pursuant to the Lanham Act, 15 U.S.C. §§  
16 1121 and 1125(a) and (c), and 28 U.S.C. §§ 1331 and 1338(a) and (b). This Court  
17 has supplemental jurisdiction over the related state claim herein under 18 U.S.C. §  
18 1367 in that these claims form part of the same case and controversy as the federal  
19 claims herein.

20 3. This Court has personal jurisdiction over the Defendants in that  
21 Defendants are regularly doing business in the State of California and in this  
22 district and maintain contacts within the State of California and this district.

23 4. Venue is proper in the United States District Court for the Central  
24 District of California pursuant to 28 U.S.C. §§ 1391(b) and (c) and 1400(a),  
25 because Defendants are conducting business in this district and are subject to  
26 personal jurisdiction in this district and because Defendants THE WALT DISNEY  
27 COMPANY, MARVEL CHARACTERS, INC., and MVL RIGHTS, LLC have  
28 their principal place of business in this district.

1 **PARTIES**

2 5. Plaintiff LISA R. KIRBY (hereinafter “Lisa Kirby”) is an individual  
3 and a citizen of and resides in the State of California, in the County of Ventura,  
4 and is and at all times has been a citizen of the United States. Lisa Kirby is the  
5 daughter of Jack Kirby. Lisa Kirby is the Trustee of the Rosalind Kirby Trust, a  
6 California trust.

7 6. Plaintiff BARBARA J. KIRBY (hereinafter “Barbara Kirby”) is an  
8 individual and a citizen of and resides in the State of New York, in the County of  
9 Putnam, and is and at all times has been a citizen of the United States. Barbara  
10 Kirby is the daughter of Jack Kirby.

11 7. Plaintiff NEAL L. KIRBY (hereinafter “Neal Kirby”) is an individual  
12 and a citizen of and resides in the State of California, in the County of Orange and  
13 is and at all times has been a citizen of the United States. Neal Kirby is the son of  
14 Jack Kirby.

15 8. Plaintiff SUSAN M. KIRBY (hereinafter “Susan Kirby”) is an  
16 individual and a citizen of and resides in the State of New York, in the County of  
17 Putnam, and is and at all times has been a citizen of the United States. Susan  
18 Kirby is the daughter of Jack Kirby.

19 9. Plaintiffs are informed and believe and based thereon allege that  
20 defendant THE WALT DISNEY COMPANY (hereinafter “Disney”) is a  
21 corporation organized and existing under the laws of the State of Delaware, which  
22 has its principal place of business in Los Angeles County, California.

23 10. Plaintiffs are informed and believe and based thereon allege that  
24 Defendant MARVEL ENTERTAINMENT, INC. (hereinafter, collectively with  
25 defendants MARVEL WORLDWIDE, INC., MARVEL CHARACTERS, INC.,  
26 and MVL RIGHTS, LLC, “Marvel”) is a corporation organized and existing under  
27 the laws of the State of Delaware; and that MARVEL ENTERTAINMENT, INC.  
28 regularly conducts significant business in the State of California and in the County

1 of Los Angeles. Plaintiffs are informed and believe and based thereon allege that  
2 Marvel was recently purchased by Disney, on December 31, 2009.

3 11. Plaintiffs are informed and believe and based thereon allege that  
4 defendant MARVEL WORLDWIDE, INC. is a Delaware corporation maintaining  
5 its principal place of business in New York, New York, and that MARVEL  
6 WORLDWIDE, INC. regularly conducts significant business in the State of  
7 California and in the County of Los Angeles.

8 12. Plaintiffs are informed and believe and based thereon allege that  
9 defendant MARVEL CHARACTERS, INC. is a corporation organized and  
10 existing under the laws of the State of Delaware, which has its principal place of  
11 business in Los Angeles County, California.

12 13. Plaintiffs are informed and believe and based thereon allege that  
13 defendant MVL RIGHTS, LLC is a corporation organized and existing under the  
14 laws of the State of Delaware, which has its principal place of business in Los  
15 Angeles County, California.

16 14. Plaintiffs are informed and believe and based thereon allege that  
17 Marvel is the relevant successor-in-interest to the following entities: Timely  
18 Comics; Atlas Comics; Atlas Magazines, Inc.; Magazine Management Company,  
19 Inc.; Canam Publishers Sales Corporation; Non-Pareil Publishing Corporation;  
20 Vista Publications, Inc.; Zenith Publishing Corporation; Bard Publishing  
21 Corporation; Warwick Publications, Inc.; Male Publishing Corp.; Miss America  
22 Publishing Corporation; Chipiden Publishing Corporation; Marvel Comics Group;  
23 and Marvel Entertainment Group, Inc. (“Marvel’s Predecessor(s)”).

24 15. Plaintiffs are informed and believe and based thereon allege that  
25 defendants MARVEL ENTERTAINMENT, INC., MARVEL WORLDWIDE,  
26 INC., MARVEL CHARACTERS, INC., MVL RIGHTS, LLC and THE WALT  
27 DISNEY COMPANY (“Defendants”) are the alter-egos of each other and there  
28 exists a unity of interest and ownership among such Defendants such that any

1 separateness has ceased to exist with respect to the works authored or co-authored  
2 by Kirby that are the subject hereof.

3 16. Plaintiffs are informed and believe and based thereon allege that the  
4 fictitiously named Defendants captioned hereinabove as Does 1 through 10,  
5 inclusive, and each of them, were in some manner responsible or legally liable for  
6 the actions, damages, events, transactions and circumstances alleged herein. The  
7 true names and capacities of such fictitiously named defendants, whether  
8 individual, corporate, associate, or otherwise are presently unknown to Plaintiffs,  
9 and Plaintiffs will amend this Complaint to assert the true names and capacities of  
10 such fictitiously named Defendants when the same have been ascertained. For  
11 convenience, each reference herein to a named Defendant shall also refer to the  
12 Doe Defendants and each of them.

13 17. Plaintiffs are informed and believe and based thereon allege that each  
14 of the Defendants was the agent, partner, servant, employee, or employer of each  
15 of the other Defendants herein, and that at all times herein mentioned, each of the  
16 Defendants was acting within the course and scope of such employment,  
17 partnership and/or agency and that each of the Defendants is jointly and severally  
18 responsible for the damages hereinafter alleged.

19  
20 **FACTS COMMON TO ALL CLAIMS FOR RELIEF**

21 18. Kirby is widely considered to be one of the most talented and prolific  
22 comic book artists/authors of all time. Beginning in 1936, and continuing almost  
23 uninterrupted until his death in 1994, Kirby conceived, drew and authored  
24 numerous comic books that were ultimately published by a wide variety of  
25 publishers, including Marvel.

26 19. Between 1958 and 1963, Jack Kirby authored or co-authored  
27 numerous original comic book stories featuring a variety of characters, including  
28 "The Fantastic Four," "X-Men," "Iron Man," "Spider-Man," "The Incredible

1 Hulk,” “Thor,” “The Avengers,” “Nick Fury” and “Ant-Man,” which were  
2 purchased by Marvel’s Predecessors and published in their following periodicals:  
3 *Amazing Adventures*, Vol. 1, Nos. 1-6; *Amazing Fantasy*, Vol. 1, No. 15; *The*  
4 *Amazing Spider-Man*, Vol. 1, Nos. 1-7; *The Avengers*, Vol. 1, Nos. 1-2; *The*  
5 *Fantastic Four*, Vol. 1, Nos. 1-21; *The Fantastic Four Annual*, No. 1; *Journey Into*  
6 *Mystery*, Vol. 1, Nos. 51-98; *The Incredible Hulk*, Vol. 1, Nos. 1-6; *The Rawhide*  
7 *Kid*, Vol. 1, Nos. 17-35; *Sgt. Fury and His Howling Commandoes*, Vol. 1, Nos. 1-  
8 4; *Strange Tales*, Vol. 1, Nos. 67-115; *Tales of Suspense*, Nos. 1, 3-48; *Tales to*  
9 *Astonish*, Vol. 1, Nos. 1, 3-50; and *The X-Men*, Vol. 1, Nos. 1-2 (hereinafter, the  
10 “Kirby Works”).

11 20. For much of this period, the comic book division of Marvel’s  
12 Predecessors was on the brink of bankruptcy due in large part to criticism in  
13 Fredric Wertham’s book, “Seduction of the Innocent,” the ensuing 1954 hearings  
14 of the Senate Subcommittee on Juvenile Delinquency, and the resulting censorship  
15 imposed on the comic book industry by the introduction of the “Comic Code  
16 Authority” in 1954. Shortly thereafter, the comic book market underwent a severe  
17 contraction.

18 21. In the period relevant to this action, Marvel’s Predecessors had a tiny  
19 office, very few employees, and fed the printing presses of related entities with  
20 comic book material purchased for publication from “freelancers” to which they  
21 had little or no obligation.

22 22. During this period, Kirby was not an employee of any of Marvel’s  
23 Predecessors and was not paid a fixed salary or wage by any of them. Marvel’s  
24 Predecessors were not financially obligated to Kirby, kept their options open, and  
25 thus never committed to any written agreement pursuant to which Kirby was to  
26 create his works. Like many others during this difficult economic time, Kirby  
27 worked solely on a freelance basis out of his own home, with his own instruments  
28 and materials and thereby bore the financial risk of creating his copyrighted

1 materials. At completion, such material was submitted to Marvel's Predecessors,  
2 and if they accepted it for publication, they purchased Kirby's material at a per-  
3 page rate.

4 23. The Kirby Works were not created as "works-made-for-hire" for  
5 Marvel's Predecessors.

6 24. A decade later, on or about May 30, 1972, at the request of Marvel's  
7 Predecessors, Kirby entered into an agreement with Magazine Management Co.,  
8 Inc. whereby he assigned his copyrights in the Kirby Works to Magazine  
9 Management Co., Inc. for additional compensation (hereinafter, the "1972 Grant").  
10 Marvel is the alleged successor-in-interest to Magazine Management Co., Inc.

11 25. On September 16, 2009, Plaintiffs served by first class mail, postage  
12 prepaid, notices of termination, pursuant to the Copyright Act, 17 U.S.C. § 304(c)  
13 (hereinafter, the "Termination Notices") on each of the Defendants and a number  
14 of their subsidiaries, licensees and affiliates, terminating the 1972 Grant and any  
15 prior implied grant to Marvel's Predecessors of the renewal copyright to the Kirby  
16 Works listed in the notices of termination, including any character, story element  
17 or indicia reasonably associated with the Kirby Works, all as set forth in the  
18 Notices of Termination.

19 26. Plaintiffs are informed and believe and based thereon allege that the  
20 copyrights to all the Kirby Works listed in the Termination Notices were renewed  
21 by Marvel or Marvel's Predecessors.

22 27. The Notices of Termination were drafted and served on Defendants,  
23 all in full compliance with the Copyright Act, 17 U.S.C. § 304(c), and the  
24 regulations promulgated thereunder by the Register of Copyrights, 37 C.F.R. §  
25 201.10.

26 28. The Notices of Termination will terminate on their respective  
27 effective dates (hereinafter, the "Termination Dates") all operative prior grants or  
28 purported grants of the renewal copyrights in and to the Works for their extended



1 renewal terms.

2 29. On the Termination Dates, Plaintiffs will recapture ownership of  
3 Kirby's original copyright interest in and to the Kirby Works for their respective  
4 extended copyright renewal terms (hereinafter, the "Recaptured Copyrights").

5  
6 **FIRST CLAIM FOR RELIEF**

7 (Declaratory Relief That the Notices of Termination Are Effective Pursuant to 17  
8 U.S.C. § 304(c) - Against All Defendants)

9 30. Plaintiffs re-allege and incorporate by reference paragraphs 1 through  
10 29 inclusive, as though fully set forth herein.

11 31. By reason of the foregoing facts, an actual and justiciable controversy  
12 has arisen and now exists between Plaintiffs and Defendants under Federal  
13 copyright law, 17 U.S.C. §§ 101 *et seq.*, concerning their respective rights and  
14 interests in and to the copyrights to various Kirby Works, for which Plaintiffs  
15 desire a declaration of rights.

16 32. Plaintiffs contend and Defendants deny that:

17 a. The Termination Notices are effective and will terminate on  
18 their respective Termination Dates the 1972 Grant and any other operative  
19 grants, assignments or transfers by Kirby of copyrights for the renewal terms  
20 in and to each and/or all of the Kirby Works (as defined in paragraph 19  
21 hereinabove) to any of Marvel's Predecessors, and will likewise terminate  
22 any assignments or licenses of such copyrights by Marvel or the Marvel  
23 Predecessors to third parties;

24 b. With respect to those Kirby Works solely authored by Kirby,  
25 Plaintiffs will own the Recaptured Copyrights for their renewal terms as of  
26 their respective Termination Dates;

27 c. With respect to those Kirby Works co-authored by Kirby  
28 (hereinafter "Co-Owned Kirby Works"), Plaintiffs will own Kirby's

1 undivided co-authorship share of the copyright to such works for their  
2 renewal terms as of their respective Termination Dates;

3 d. With respect to Co-Owned Kirby Works, Plaintiffs are entitled  
4 to a *pro rata* percentage of any and all proceeds, compensation, monies,  
5 profits, gains and advantages from the exploitation of, or attributable to, in  
6 whole or in part, such Co-Owned Kirby Works (hereinafter, sometimes  
7 referred to as “Profits”); and

8 e. With respect to Co-Owned Kirby Works, as of the respective  
9 Termination Dates, Defendants will jointly own the copyrights to such  
10 works for their renewal terms; both Plaintiffs and Defendants will have the  
11 non-exclusive right to exploit such jointly owned copyrights, subject to a  
12 duty to account to one another for a *pro rata* share of the Profits derived  
13 from such exploitation; and neither Plaintiffs nor Defendants will have the  
14 authority to confer exclusive licenses or grants to third parties with respect  
15 to such jointly owned copyrights, and/or any element thereof.

16 33. A declaration of the Court is necessary pursuant to the Declaratory  
17 Judgment Act, 28 U.S.C. §§ 2201 *et seq.*, so that the parties may know their  
18 respective rights and obligations with respect to the Termination Notices and the  
19 copyright interests thereby recaptured by Plaintiffs.

20 **SECOND CLAIM FOR RELIEF**

21 (Declaratory Relief Regarding the Principles to be Applied in an Accounting of  
22 Profits from the Exploitation of Jointly Owned Copyrights - Against All  
23 Defendants)

24 34. Plaintiffs re-allege and incorporate by reference paragraphs 1 through  
25 33 inclusive, as though fully set forth herein.

26 35. By reason of the foregoing facts, an actual and justiciable controversy  
27 has arisen and now exists between Plaintiffs and Defendants concerning how  
28 Profits from Co-Owned Kirby Works should be defined for purposes of

1 Defendants' and Plaintiffs' duty to account to one another for their respective  
2 exploitation of such works after their respective Termination Dates.

3 36. Plaintiffs contend and Defendants deny that:

4 a. Profits should include revenues from the exploitation of new  
5 derivative works based, in whole or in part, on Co-Owned Kirby Works and  
6 produced and/or completed on or after the respective Termination Dates, including  
7 but not limited to works produced and/or completed prior to such Termination  
8 Dates, but which are modified after such Termination Dates so as to comprise new  
9 derivative works under the Copyright Act (hereinafter collectively, "New  
10 Derivative Works");

11 b. Profits should include profits from New Derivative Works,  
12 notwithstanding that the underlying license agreement(s) for such New Derivative  
13 Works were entered into prior to the respective Termination Dates;

14 c. Profits should include Defendants' revenues from the  
15 exploitation on or after the respective Termination Dates of New Derivative Works  
16 in foreign territories, when such revenues result from the predicate exercise *in the*  
17 *United States* of any right under the copyright to a Co-Owned Kirby Work, by any  
18 Defendant, their licensees or assigns;

19 d. Profits should include Defendants' revenues from the  
20 exploitation of the copyright to a Co-Owned Kirby Work, or any elements thereof;  
21 notwithstanding that such copyright or copyrighted element is also subject to  
22 trademark protection or contains a registered trademark(s), if any, owned by any of  
23 the Defendants;

24 e. There should be no *apportionment* of Profits from the  
25 exploitation of a Co-Owned Kirby Work subject to an accounting, because such an  
26 accounting between joint copyright owners is governed by state law, which  
27 provides that each co-owner is entitled to a *pro rata* share of the Profits derived  
28 from co-owned property, irrespective of any "improvements" unilaterally made by

1 another co-owner;

2 f. Alternatively, if *apportionment* is ordered, it should apply only  
3 to Profits from the exploitation of a New Derivative Work *created by a Defendant*,  
4 but not to Profits from the mere *licensing* of a Co-Owned Kirby Work(s), because  
5 the compensation for such licensing inherently reflects market value  
6 *apportionment*;

7 g. Alternatively, if *apportionment* is ordered, there should be no  
8 *apportionment* for any item or element, the cost of which is already deducted in  
9 computing Defendants' Profits, because this would be "double counting";

10 h. Profits should include the Profits of the Marvel Defendants  
11 and/or their parent, Disney, and the Profits of any entity owned by either of them,  
12 and Defendants should be enjoined from reducing or diluting Plaintiffs' share of  
13 Profits by intra-corporate licensing between them or closely held or related entities;  
14 and

15 i. In determining Profits, deductible costs should include only  
16 reasonable costs directly attributable to the exploitation of New Derivative Works,  
17 of the type customarily deducted in arms' length agreements to exploit copyrights  
18 of comparable value, all in compliance with Generally Accepted Accounting  
19 Principles ("GAAP").

20 37. A declaration of the Court is necessary pursuant to the Declaratory  
21 Judgment Act, 28 U.S.C. §§ 2201 *et seq.*, so that the parties may know their  
22 respective rights and obligations with respect to Profits from the exploitation of the  
23 Recaptured Copyrights after the Termination Dates.

24 **THIRD CLAIM FOR RELIEF**

25 (Conversion – by Plaintiff Lisa R. Kirby, as Trustee for The Rosalind Kirby Trust  
26 ("Trustee") – Against all Defendants)

27 38. Plaintiff Trustee re-alleges and incorporates by reference paragraphs 1  
28 through 37 inclusive, as though fully set forth herein.

1           39.   Marvel’s Predecessors took possession of Kirby’s original artwork  
2 (the “Kirby Artwork”) for purposes of publishing the Kirby Works. The Kirby  
3 Artwork is of great historical and artistic value and significance.

4           40.   Kirby was the lawful owner of the Kirby Artwork. Kirby died on  
5 February 6, 1994, whereupon ownership of the Kirby Artwork passed to his  
6 spouse, Rosalind Kirby. Upon the death of Rosalind Kirby, ownership of the  
7 Kirby Artwork passed to The Rosalind Kirby Trust.

8           41.   In or around 1982, Jack Kirby demanded that Marvel return all of the  
9 Kirby Artwork in its possession or control.

10          42.   Plaintiff Trustee is informed and believes, and based thereon alleges  
11 that in or around 1984, the New York State Board of Equalization made inquiries  
12 as to sales tax due in connection with Marvel’s purchase of comic book artwork.

13          43.   Thereafter, commencing on or about October 16, 1986, Marvel  
14 purported to return to Kirby all of the Kirby Artwork in its possession or control.  
15 Marvel represented to Kirby that it had no other Kirby Artwork in its possession or  
16 control than that returned to Kirby, and Kirby and his successors, including  
17 Plaintiff Trustee, relied on Marvel’s representations.

18          44.   Plaintiff Trustee is informed and believes and based thereon alleges  
19 that Marvel retains in its possession certain Kirby Artwork that it did not return to  
20 Kirby, thereby exerting dominion over such Kirby Artwork and converting it to  
21 their own use. Plaintiff Trustee is informed and believes and based thereon alleges  
22 that Marvel concealed and continues to conceal that Marvel retained certain Kirby  
23 Artwork that it did not return to Kirby, and due to such ongoing concealment  
24 Plaintiff Trustee did not demand that Marvel return such Kirby Artwork.

25          45.   The Kirby Trust is unaware of the ultimate disposition of the Kirby  
26 Artwork converted by Marvel because such knowledge is within the exclusive  
27 possession of Marvel.

28          46.   As a proximate result of Marvel’s conversion, the Kirby Trust has

1 been deprived of its rightful possession of the Kirby Artwork, including the  
2 opportunity to use, enjoy, sell, license or otherwise dispose of such artwork, all to  
3 its damage in an amount to be determined at trial.

4 47. Defendants' acts alleged hereinabove were willful, wanton, malicious,  
5 and oppressive, and justify the awarding of exemplary and punitive damages.

6 **FOURTH CLAIM FOR RELIEF**

7 (Violation of the Lanham Act, 15 U.S.C. § 1125(a)(1)(B) –

8 Against all Defendants)

9 48. Plaintiffs re-allege and incorporate by reference paragraphs 1 through  
10 47, inclusive, as though fully set forth herein.

11 49. Plaintiffs are informed and believe and based thereon allege that on or  
12 around June 13, 2008, the major motion picture *The Incredible Hulk* was released,  
13 based on the Kirby Works. On or about May 1, 2009, the major motion picture *X-*  
14 *Men Origins: Wolverine* was released, based on the Kirby Works (collectively, *The*  
15 *Incredible Hulk* and *X-Men Origins: Wolverine* are referred to as the “Kirby  
16 Films”).

17 50. Plaintiffs are informed and believe and based thereon allege that the  
18 Kirby Films were released pursuant to a license from Marvel or Marvel's  
19 predecessors to third party licensees, and that such licenses did not require the  
20 licensees to properly accredit Kirby as the author or co-author of the underlying  
21 works on which the Kirby Films were based.

22 51. Marvel has manufactured, distributed and/or licensed innumerable  
23 products associated with the Kirby Films, such as merchandising (the “Kirby Film  
24 Merchandise”).

25 52. Plaintiffs are informed and believe and based thereon allege that in the  
26 Kirby Films and in the commercial advertising and promotion for the Kirby Films,  
27 Kirby was not properly identified by Marvel's licensees as the author or co-author  
28 of the underlying works on which the Kirby Films were based.

1           53. Plaintiffs are informed and believe and based thereon allege that in the  
2 commercial advertising and promotion for the Kirby Film Merchandise, Kirby was  
3 also not properly identified by Marvel as the author or co-author of the underlying  
4 works on which the Kirby Films and the Kirby Film Merchandise were based.

5           54. Plaintiffs are informed and believe and based thereon allege that  
6 Defendants thereby misrepresented in commercial advertising and promotion that  
7 Kirby is not the author or co-author of the Kirby Works underlying the Kirby  
8 Films and Kirby Film Merchandise. Such false claims, representations and  
9 wrongful omissions misrepresented in commercial advertising and promotion the  
10 nature, characteristics and qualities of the Kirby Films and Kirby Film  
11 Merchandise.

12           55. Plaintiffs are informed and believe and based thereon allege that such  
13 false or misleading descriptions, representations and omissions of fact regarding  
14 the Kirby Films and Kirby Film Merchandise in interstate commerce materially  
15 affected the purchasing decisions of consumers of such products.

16           56. Such use of false or misleading descriptions or representations of fact  
17 in interstate commerce is in opposition to the protection of the public interest.

18           57. Plaintiffs are informed and believe and based thereon allege that such  
19 false or misleading descriptions or representations were made by Marvel with a  
20 willful disregard for the public interest.

21           58. Plaintiffs are in commercial competition with Marvel with respect to  
22 the sale and licensing of works authored or co-authored by Kirby, and of derivative  
23 works based thereon.

24           59. Defendants' wrongful conduct has proximately caused and will  
25 continue to cause Plaintiffs substantial injury and damage including, without  
26 limitation, loss of customers, dilution of goodwill, injury to their business  
27 reputation, lost profits and diminution of the value of their interests in Kirby's  
28 works, derivative products and commercial activities and in Kirby's name and





1 of the Kirby Works to any of the Defendants and any of their predecessors-in-  
2 interest;

3           b. That, with respect to Kirby Works *solely authored* by Kirby,  
4 Plaintiffs will exclusively own the Recaptured Copyrights thereto for their renewal  
5 terms as of their respective Termination Dates, and any prior assignments or  
6 licenses to third parties of the renewal copyrights to such Kirby Works, in whole or  
7 in part, by Marvel or Marvel's Predecessors will be terminated as of the respective  
8 Termination Dates;

9           c. That, with respect to Kirby Works *co-authored* by Kirby,  
10 Plaintiffs will own a *pro rata* share of the copyrights thereto for their renewal  
11 terms as of their respective Termination Dates;

12           d. That, with respect to such Co-Owned Kirby Works, Plaintiffs  
13 are entitled to a *pro rata* percentage of any and all Profits attributable thereto, in  
14 whole or in part; and

15           e. That, with respect to such Co-Owned Kirby Works, both  
16 Plaintiffs and Defendants will each have the non-exclusive right to exploit the  
17 jointly owned copyrights thereto; that both Plaintiffs and Defendants will be  
18 subject to a duty to account to the other for a *pro rata* share of the Profits derived  
19 from such exploitation; and that neither Plaintiffs nor Defendants will have the  
20 authority to confer exclusive copyright licenses or grants to third parties with  
21 respect to such Co-Owned Kirby Works, or any element thereof.

22                                   ON THE SECOND CLAIM FOR RELIEF

23           66. With respect to Plaintiffs' and Defendants' duty to account to one  
24 another for their Profits from Co-Owned Kirby Works, for a declaration as  
25 follows:

26           a. That Profits should include Defendants' revenues from the  
27 exploitation of any and all New Derivative Works;

28           b. That Profits should include Defendants' revenues from any

1 New Derivative Works, notwithstanding that the underlying license agreement(s)  
2 for such New Derivative Works were entered into prior to the respective  
3 Termination Dates;

4 c. That Profits include Defendants' revenues from New Derivative  
5 Works in foreign territories, when such revenues result from the predicate exercise  
6 *in the United States* of any right under the copyright to a Co-Owned Kirby Work,  
7 by any Defendant, their licensees or assigns;

8 d. That Profits include Defendants' revenues from the exploitation  
9 of the Co-Owned Kirby Works or any elements thereof in New Derivative Works;  
10 notwithstanding that such copyrights or copyrighted elements are also subject to  
11 trademark protection or comprise registered trademarks owned by Defendants, if  
12 any;

13 e. That there should be no *apportionment* of Profits since  
14 Plaintiffs are entitled to a *pro rata* share of all such Profits as joint owners of the  
15 Co-Owned Kirby Works;

16 f. Alternatively, that apportionment, if any, will apply only to  
17 Profits from the exploitation of the Co-Owned Kirby Works in New Derivative  
18 Works created by a Defendant, but not to Profits from the mere *licensing* of the  
19 Co-Owned Kirby Works by any of the Defendants;

20 g. Alternatively, that there will be no apportionment for any item  
21 or element, the cost of which is already deducted in computing Defendants'  
22 Profits;

23 h. That Profits include the Profits of any and all Defendants, their  
24 subsidiaries and divisions; and

25 i. That in determining Profits, only reasonable costs directly  
26 attributable to the exploitation of the Co-Owned Kirby Works, of the type  
27 customarily deducted in arms' length agreements to exploit copyrights of  
28 comparable value to that of the Co-Owned Kirby Works, should be deducted from

1 gross revenues, all in compliance with GAAP.

2 ON THE THIRD CLAIM FOR RELIEF

3 67. For the value of the property converted;

4 68. For interest at the legal rate on the foregoing sum pursuant to Section  
5 3336 of the Civil Code;

6 69. For damages for the proximate and foreseeable loss resulting from  
7 Defendants' acts according to proof as shall be determined at trial;

8 70. For interest at the legal rate on the foregoing sum pursuant to Section  
9 3287(a) of the Civil Code;

10 71. For damages for time and money properly expended in pursuit of the  
11 converted property in the sum of an amount to be determined at trial;

12 72. For punitive and exemplary damages.

13 ON THE FOURTH CLAIM FOR RELIEF

14 73. For an order preliminarily and thereafter permanently enjoining  
15 Defendants from making such false or misleading descriptions, representations,  
16 and omissions of fact in connection with the Kirby Films, Kirby Film  
17 Merchandise, and Defendants' licensing and commercial activities, and from  
18 engaging in any further violations of the Lanham Act;

19 74. For up to three times the damages Plaintiffs sustained and will sustain  
20 and any income, gains, profits, and advantages obtained by Defendants as a result  
21 of their violation of the Lanham Act in an amount which cannot yet be fully  
22 ascertained, but which shall be assessed at the time of trial;

23 75. For such and other relief and remedies available under the Lanham  
24 Act, 15 U.S.C. §§ 1125 and 1117, which the Court may deem just and proper.

25 ON ALL CLAIMS FOR RELIEF

26 76. For Plaintiffs' costs of suit;


27 77. For interest at the highest lawful rate on all sums awarded Plaintiffs  
28 other than punitive damages;

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- 78. For reasonable attorneys' fees; and
- 79. For such other and further relief as the Court may deem just and proper.

DATED: March 9, 2010

TOBEROFF & ASSOCIATES, P.C.

By   
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Marc Toberoff

Attorneys for Plaintiffs LISA R. KIRBY,  
BARBARA J. KIRBY, NEAL L. KIRBY, and  
SUSAN M. KIRBY

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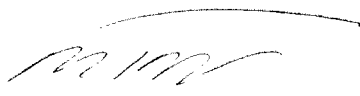
**JURY TRIAL DEMANDED**

Plaintiffs hereby request a trial by jury on each claim for relief alleged in the Complaint.

DATED: March 9, 2010

TOBEROFF & ASSOCIATES, P.C.

By



Marc Toberoff

Attorneys for Plaintiffs LISA R. KIRBY,  
BARBARA J. KIRBY, NEAL L. KIRBY, and  
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