

EXHIBIT 2

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF NEW YORK

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MARVEL WORLDWIDE, INC., MARVEL)
CHARACTERS, INC., and MVL RIGHTS,)
LLC,)
)
PLAINTIFFS,)

VS.) NO. 10 CV 141 (CM)(KNF)

LISA A. KIRBY, BARBARA J. KIRBY,)
NEAL L. KIRBY and SUSAN N. KIRBY,)
)
DEFENDANTS.)

VIDEOTAPED DEPOSITION OF MARK EVANIER
LOS ANGELES, CALIFORNIA
DECEMBER 6, 2010

REPORTED BY: CHRISTY A. CANNARIATO, CSR #7954, RPR, CRR
JOB NO.: 34168

1 and Mr. Williamson?

2 A. Maybe an hour.

3 Q. And in preparation for your deposition today,
4 did you review any documents apart from your report
5 itself?

6 A. I reviewed the subpoena of I don't know if --
7 I don't know if it counts for appearance today, but I
8 reviewed the subpoena of materials to be produced.

9 Q. Any other documents?

10 A. No.

11 Q. Did you, in preparation for your deposition
12 today, review any deposition transcripts in this case?

13 A. No.

14 Q. Now, I know we touched on this briefly in your
15 initial deposition, but could you tell us again how you
16 came to be retained as an expert in this matter?

17 MR. TOBEROFF: Asked and answered.

18 A. Mr. Toberoff asked me to be an expert witness
19 in this matter.

20 Q. And when approximately did that occur?

21 A. I don't remember.

22 Q. Was it -- give me your best estimate. Was it
23 a year ago?

24 A. I don't remember.

25 Q. Do you recall whether it was before or after

1 and comic book characters published by Marvel between '58
2 and '63 as well as his relationship with Marvel during
3 this key period?

4 A. Yes, I was.

5 Q. Okay. That's the opinion I'm referring to.
6 Got it?

7 A. No, no. Let me -- the opinion is not on that
8 page you're citing. The opinion is throughout the report.
9 Are you asking me to how do I -- how did I arrive at the
10 opinion stated throughout the document that are summarized
11 on this page?

12 Q. Yes.

13 A. All right. Okay.

14 Q. Yeah. Not a trick question.

15 A. No. I'm just trying to answer -- I was trying
16 to figure out why you were calling my attention to that
17 one sentence.

18 Q. Because it summarized your opinion.

19 MR. TOBEROFF: Objection. Mischaracterizes
20 the report. It doesn't summarize his opinion.

21 A. The opinions in this report were formulated by
22 my calling upon years and years of studying Marvel Comics,
23 reading Marvel Comics, interviewing and talking to people
24 who made Marvel Comics, visiting the Marvel offices,
25 discussing Marvel history with other people who have done

1 similar investigations and interviews, reading articles
2 about Marvel. It's -- the opinions are based on 40 years
3 of -- more than 40 years of following Marvel Comics,
4 probably 50 years.

5 Q. And specifically you referred to reviewing
6 or -- let me go back.

7 Could you tell me with some level of
8 specificity the people interviews -- take it back. Strike
9 the question.

10 In connection with preparing the report
11 itself, did you conduct any interviews in order to prepare
12 the report?

13 A. Did I conduct any interviews specifically for
14 towards this report?

15 Q. Yes.

16 A. No, I did not.

17 Q. And specifically with regard to the
18 preparation of the report, did you review any documents or
19 reference works in connection with preparing the report?

20 A. I got some dates out of my own book on Jack,
21 and I think I looked some up on the Internet to just
22 verify my recollection of dates and spellings.

23 Q. So other than checking on some dates and
24 spellings from your book on Jack Kirby and other
25 information available on the Internet, you didn't review

1 any other documents that are reference materials; correct?

2 A. Let me think. Well, I clipped some of my
3 qualification from a bio of myself which was easier to
4 just paraphrase or transcribe some of that. I think I cut
5 and pasted some of my own credits out of another bio of
6 myself I had on my computer.

7 MR. TOBEROFF: Take your time in answering the
8 question.

9 THE WITNESS: Okay.

10 A. I -- well, I had taken when Mr. Toberoff told
11 me of the assignment here, what he needed from me. I took
12 notes on my computer as he was telling me on the phone,
13 and then that was the file I used.

14 In other words, I had jotted that down, then I
15 basically I expanded my notes on top of that. I opened
16 the file that had -- he had written. He had said -- he
17 told me a couple little facts about the case, and I had
18 took that, and then I took that -- it's not a separate
19 document, it's -- I took that, opened that file on my
20 computer, and then I wrote the expert report in that file
21 using, you know, material that was above and below to --

22 Q. What was the material?

23 A. Well, like he told me about the dates of the
24 some checks that were supplied that were in evidence, and
25 he told me we have these checks from these periods. And

1 so I had the dates of those checks in that file so I could
2 reference them here.

3 Q. Have you ever seen a check from the period
4 between 1958 and 1963?

5 A. From '58 and '63? No.

6 Q. That would be the part, the period, that you
7 say in your report is the key period; correct?

8 A. That is my understanding of the case is that
9 the main focus is on that period.

10 Q. What were the other facts -- and I use that in
11 quotes -- but what was the other information that Mr.
12 Toberoff supplied to you in connection with the
13 preparation of your report?

14 A. He didn't supply much of anything. I took --
15 while he was telling me what he needed, I made some notes
16 to myself of things that I wanted to cover that I thought
17 I should cover that occurred to me while I was talking to
18 him. I wrote "original art" and a couple other key words.

19 He didn't supply -- let me think if I can --
20 what else he supplied me, if there's anything else.

21 Well, I wrote -- as reference, I looked at the
22 expert report that I had filed in the Superman matter just
23 for the form to cover the format of an expert report, and
24 the headings such as the compensation in prior cases and
25 publications.

1 Q. I'm not focused on, you know, the form. I'm
2 asking whether in addition to what you've already
3 testified about can you think of any other documents or
4 reference materials that you utilized in the preparation
5 of your report?

6 A. I don't believe so. No.

7 Q. And you mentioned something about some visits
8 to Marvel offices. Did you visit the Marvel offices in
9 connection with your preparation of your report?

10 A. No.

11 Q. When did you make visits to the Marvel
12 offices?

13 A. Oh, the first time was around the July 4th
14 weekend of 1970. And then I probably visited the office
15 every two or three years after that.

16 Q. And in the course of those visits, did you
17 interview people in connection with what they did at
18 Marvel?

19 A. Yes, I did.

20 Q. Who?

21 A. That's a very long list. I talked to -- by
22 interview, are you meaning informal conversations or
23 formal conversations?

24 Q. Either way. Did you speak to Mr. Lee, for
25 example?

1 A. Many times. Yes.

2 Q. Mr. Romita?

3 A. Yes.

4 Q. And Roy Thomas?

5 A. Yes.

6 Q. Any others?

7 A. Probably 50 to 100 others.

8 Q. When was the last time you visited the Marvel
9 offices?

10 A. About five years ago.

11 Q. In connection with any of your visits, did you
12 make any notes or obtain any documents relating to your
13 visits?

14 A. I made some notes occasionally after to remind
15 myself -- not notes at the time. I made some notes
16 afterwards to jot down things that I was wanting to
17 remember.

18 By visits to Marvel offices, are you including
19 things like going out to lunch with people? I probably
20 talked to these people more at lunch across the street or
21 down the street than actually at the office.

22 Q. This is over a long period of time; is that
23 right?

24 A. Since 1970.

25 Q. Now, I think you mentioned having discussions

1 Colan, John Buscema, Saul Buscema, Marie Severin. Did I
2 say Roy Thomas? Gary Friedrich, Alan Brodsky, Sol
3 Brodsky, Janice Cohen, John Verpooten, Tony Mortellaro,
4 Herb Trimpee, Chick Stone, Joe Sinott, Frank Giacoia, Mike
5 Esposito, Barry Smith.

6 These are just people who did work for Marvel
7 or did freelance work for Marvel. I have talked to people
8 at other companies about Marvel history.

9 Getting back to people at Marvel, Len Wein,
10 Marv Wolfman, Steve Englehart, Steve Gerber, Gerry Conway,
11 Dan Adkins, Vince Colletta, Syd Shores.

12 I apologize. You're going to have to look up
13 a lot of these on the Internet to find the spellings.

14 George Tuska, Johnny Craig, Archie Goodwin.
15 Did I say Jim Shooter? Tom DeFalco, Mark Gruenwald, Carol
16 Kalish, Peter David.

17 Q. That's fine.

18 A. I've got about another 300 if you want to take
19 the time.

20 Q. No, we can move on.

21 But I'm correct that in connection with the
22 actual preparation of your report, you didn't actually
23 discuss -- have the interviews with those people; correct?

24 A. No. And quite a few of those people are
25 deceased.

1 I think Marie Severin did some freelance work
2 for them during this period, maybe a little later than
3 '63.

4 There's probably another name or two --

5 Q. Okay. That's fine.

6 A. -- I can't think of at the moment.

7 Q. That's fine.

8 Now, when you were first retained by Mr.
9 Toberoff, what did he say to you about specifically about
10 the opinions that he wanted you to render?

11 MR. TOBEROFF: Lacks foundation. Assumes
12 facts.

13 A. Well, I think the issue of me doing an expert
14 report was first mentioned by The New York Times before
15 Mr. Toberoff approached me. I declined to be interviewed
16 by The Times, and in an article they said Evanier would
17 not -- some form of Evanier didn't speak to us because
18 he'll probably be a witness in this case or an expert.
19 And I believe Mr. Toberoff said something like, Well, I
20 guess The New York Times was ahead of us.

21 Then he asked me to prepare an expert report,
22 and he said that he wanted me to cover -- he wanted me to
23 address the relationship -- the working relationship that
24 Jack had with Marvel, how he worked for them, what his
25 relationship to the company was.

1 Q. Well, did you go to any reference work or
2 textbook or publication of any kind to check to see
3 whether or not the conclusions you reached were, in fact,
4 reliable?

5 A. I don't know of any reference book or source
6 like you're describing that would do that. I derived a
7 lot of my knowledge about Marvel from books, as I
8 mentioned. There is very little written and published
9 about a lot of this material. A lot of what has been
10 published about it was written by me.

11 So if the question is, did I check my opinions
12 against published works by others, I don't think there are
13 any published works by others that would cover this
14 material.

15 Q. Okay. And my question -- and that's close,
16 but my question is: Is there any way that you can think
17 of to test the reliability of the opinions that you
18 reached or what you say is your understanding of what
19 occurred back in '58 through '63? Any way to test that?

20 A. Let me think for a minute.

21 I don't know of any way to test this kind of
22 thing.

23 Q. Take a look at your report. And I want to
24 point you to certain things that you wrote.

25 Let's look at page 5, for example. Starting

1 people there, printers there to pay.

2 And the companies were frequently pleading
3 poverty, lowering rates. It was a very -- it was a
4 business that very few people bet would be there in the
5 future.

6 It's amazing that it's still there. Even when
7 I got into comic books into the early 70s, there were
8 people, prominent people, in the industry predicting the
9 industry had less than five years to live and predicting
10 demise. And then you still had -- would have frequent
11 cases where you came in one day and they'd canceled half
12 the line or laid off half the staff. And there were
13 problems meeting payroll sometimes, problems paying
14 people.

15 So when I say "fly-by-night," that's kind of a
16 way of saying the industry was not very well grounded
17 in --

18 Q. How did you come to find out all these facts?

19 MR. TOBEROFF: Asked and answered.

20 A. All right. Well, since about 1966 or -67,
21 I've been talking to people who did comics. I was
22 fascinated by comic books. And I have interviewed just
23 about everybody I could meet who ever worked in comic
24 books, including, you know, people who ran xerox machines
25 or photostat cameras.

1 And whatever was written about comics, which
2 for a long time was not much, I bought, I read. I read
3 all the comic books. I still have one of the largest
4 collections around.

5 And I have been going to comic book
6 conventions since 1970. There's this annual convention in
7 San Diego that's now -- they've had 41 of them. I've been
8 to all 41 of them. And at most of them I've conducted
9 panels and seminars and interviewed people extensively.

10 Because there has not been as much written
11 about comics as there probably should be, the history has
12 been mostly oral. And I've been fortunate to have
13 interviewed a lot of people who worked in comic books in
14 the early days, frequently the only interview they ever
15 gave.

16 The convention has been very nice. If I tell
17 them they've located an oldtimer who worked in comic books
18 in the 40s who hasn't been around the industry for a
19 while, he's never been to a convention, they'll send him a
20 first class ticket and fly him to San Diego to be there.
21 And I'm usually the person who interviews that person. I
22 can give you examples of that, if you want.

23 But at the convention, most of the panels that
24 are about comic book history are conducted by me. And so
25 it's been kind of since the late 60s it's been kind of an

1 interest of mine. And even before I thought I might work
2 in the comic book field, I was fascinated by it.

3 And just, you know, when I was in high school,
4 I found out that one of the kids in my chemistry class had
5 a father who had worked in comics. And I asked him, Could
6 I meet your father? And he didn't understand why I wanted
7 to, and his father didn't understand. But I went over one
8 day and spent the afternoon talking to his father about
9 working for publishers in the 1950s. His father had not
10 drawn a comic book since, well, in at least 10 years. I
11 just wanted to know what the business was like, how he was
12 treated, how he did what he did, how the work was
13 produced.

14 I don't know if I'm answering your question.

15 Q. Yeah. That's fine. Okay.

16 You mentioned at the top of page 5 in that
17 connection that: Comic book publishers did not see any
18 value in the product, in their product, beyond monthly
19 sales figures.

20 What's the basis for that statement?

21 A. Early on, this is something that was told to
22 me by the artists and the editors and people I talked to.
23 Jack Kirby talked to me greatly about that. Jack was in
24 comics almost from the beginning. And he was by no means
25 the only one who told me this, but he used to say that

1 these guys had no imagination; that the publishers all
2 they thought about was this month's sales and that they
3 didn't realize that they were -- that they had the
4 underpinnings of a media conglomerate. Didn't use the
5 term at that time, obviously.

6 But these characters that they were doing
7 could be exploited in other fields. You know, he would
8 point to, in fact, Walt Disney was not interested in just
9 making Mickey Mouse cartoons. Walt Disney was interested
10 in expanding Mickey Mouse into all different fields and
11 doing toys and games and comic books and comic strips and
12 eventually a theme park. Whereas someone like Martin
13 Goodman at Marvel, who he cited frequently, was he thought
14 was a man of limited vision, limited imagination.

15 And he told stories about how he would go to
16 Martin Goodman and tell him what Marvel could be, how it
17 could expand. This is even before it was called Marvel.
18 And he got back very little response. It was just -- he
19 did not -- he always thought that Martin Goodman grossly
20 undervalued Marvel when he sold it in the late 60s.

21 Q. Now, your testimony is or your opinion is that
22 publishers didn't see any value in the product beyond
23 monthly sales figures, but you previously testified, I
24 believe, and written that during this period of time the
25 publishers also would not negotiate with artists with

1 A. No.

2 Q. You never heard that before?

3 A. I never heard that he fired them because they
4 were working for other publications. No.

5 Q. What --

6 A. No, I did not.

7 Q. Did you ever hear that they were working for
8 other publications?

9 A. Yes.

10 Q. At the same time they were working for Marvel?

11 A. Yes.

12 Q. Go back to page 5 for a moment. The top
13 paragraph. First full paragraph. You write, "There was
14 no expectation that it would ever be reprinted and little
15 that the characters would be merchandised or exploited in
16 other media."

17 What was the basis for that conclusion?

18 A. The way it was described to me by people who
19 were working there in the comics at the time.

20 Q. In fact, a number of publishers did reprint
21 their books, did they not, back in this period of time?

22 A. What period are we talking about?

23 Q. We're talking about up through the 50s and
24 60s.

25 A. There was very little reprinting done of

1 There was a lot of romance material for Crestwood. There
2 was a book called Young Romance. There was a book called
3 Strange Worlds of your Dreams. There was also a book
4 called Young Love. There was a book called Young Brides.

5 Do you want more than that?

6 Q. No, that's fine.

7 With regard to going back to this issue of
8 reprints and merchandising and so forth. Am I correct
9 that, in fact, there were merchandise that was sold with
10 regard to Captain America back in the 40s and 50s?

11 A. In the 40s, very little.

12 Q. There was some?

13 A. There was a Captain America fan club that they
14 advertised in the comics and sold. You could get -- you
15 could join the Captain America Sentinels of Liberty, and
16 you could get a pin and a badge and a certificate for a
17 dime.

18 Q. What about Superman? There was -- Superman
19 was merchandised back in the 40s and 50s, wasn't it?

20 A. Superman was merchandised. Yes.

21 Q. Now, in connection with the opinions in your
22 report, is one of the bases for reaching those opinions or
23 reaching the understandings that you had -- the personal
24 interactions you had with Mr. Kirby?

25 A. Yes.

1 Q. And with the Kirby family, Mrs. Kirby?

2 A. Yes.

3 Q. Now, did it -- you've testified previously
4 that, I think in the prior deposition but also in other
5 places, that Kirby often had some poor memory about things
6 that had occurred in the past as to things that were
7 created or not created.

8 MR. TOBEROFF: Misstates prior testimony.

9 A. I don't think you're characterizing my
10 testimony correctly.

11 Q. Okay. What was it that -- what was your
12 understanding of -- strike that.

13 It's a fact, is it not, that from time to time
14 Jack Kirby would make statements with regard to the
15 creation of characters that turned out to be incorrect;
16 isn't that right?

17 A. No. Once in a while there was -- there were a
18 couple occasional incidents, and he corrected himself when
19 he realized his mistake.

20 Q. Okay. The record will speak for itself.

21 Did it ever occur to you, based on your
22 interactions with Kirby and Roz, that his version of what
23 had occurred back in 1958 through 1963 may have been
24 incorrect?

25 A. It occurred to me that it might have been, and

1 versions Mr. Kirby has given. Let me say that again. Mr.
2 Kirby's version was always consistent. Mr. Lee's version
3 has changed from time to time, and Mr. Kirby's version is
4 in conflict with some of the accounts Mr. Lee has given.

5 Q. And you chose to find Mr. Kirby's version more
6 credible than Mr. Lee's; is that correct?

7 A. I chose to find -- I chose to believe the
8 version which I heard from both of them which coincided
9 and to discount any versions which only served one
10 person's purposes.

11 MR. QUINN: Let me have that answer back,
12 please.

13 (The record was read.)

14 Q. So you chose to disbelieve certain parts of
15 Mr. Lee's version or testimony in favor of Mr. Kirby's
16 version; correct?

17 MR. TOBEROFF: Misstates --

18 A. No. No.

19 MR. TOBEROFF: Misstates the record. He said
20 he had never read Lee's testimony.

21 A. First of all, I'm not talking about testimony.
22 I'm talking about versions that -- I'm talking about
23 sitting across from Stan at lunch and hearing him tell me
24 things and talking to him informally and talking to him
25 one on one. I have also read interviews of him.

1 Mr. Lee's versions occasionally differ from
2 one another. You can't believe all of them because
3 occasionally they're mutually exclusive.

4 When Mr. Lee's version and Mr. Kirby's version
5 matched up, and they matched the printed comics, and they
6 kind of coincide with what people around them told me,
7 then that is the version that I take to be the most
8 credible.

9 Q. And when they don't match up, you chose Mr.
10 Kirby over Mr. Lee; isn't that true?

11 MR. TOBEROFF: Misstates testimony.

12 A. That's -- yeah, that's misstating testimony
13 like the man says.

14 Q. I'm not asking for the testimony.

15 A. No. No. What I'm saying is that in cases
16 where I have heard multiple versions, or things which
17 sometimes which just don't match the printed comics that I
18 can hold in my hand, I choose to -- I make a value
19 judgment for myself, as anybody doing journalism would do,
20 and I believe the version that seems to be the most
21 consistent throughout more people's versions.

22 Q. Now, in reaching the opinions that you reached
23 in connection -- in connection with your report, is it
24 your testimony that you did not read the sworn testimony
25 of Stan Lee in this case?

1 A. I glanced at it. I did not read it in full.

2 Q. And is it also your testimony that you did not
3 read the sworn testimony of John Romita in this case?

4 A. I did not see Romita's testimony.

5 Q. And is it your testimony that you did not read
6 the sworn testimony of Roy Thomas in this case?

7 A. I did not read Mr. Thomas's testimony.

8 Q. And so you mentioned as a journalist that you
9 would want to get the fullest information possible to
10 reach certain conclusions. Wouldn't it have been useful
11 for you to have read the actual sworn testimony of people
12 who were at Marvel at part of or all of the period from
13 1958 through 1963?

14 MR. TOBEROFF: Objection. You're referring to
15 depositions that occurred after this report.

16 A. That's what I was going to say. Are you
17 asking me did I read the testimony -- are you asking me
18 did I read their testimony before I prepared my report?

19 Q. Yes.

20 A. The testimony didn't exist when I prepared my
21 report.

22 Q. Mr. Lee testified --

23 MR. TOBEROFF: Some did; some didn't.

24 Q. -- in May of 2010. Your testimony -- your
25 report is dated in November of 2010. So by my

1 recollection, that's -- it did exist for about six months.

2 A. I had not -- I was not aware of it.

3 Q. So I have it right. Mr. Toberoff did not make
4 you aware of Mr. Lee's testimony before you issued your
5 report. Is that your testimony?

6 A. I did not have a copy of Mr. Lee's testimony
7 before I issued my report.

8 Q. Did you ask for a copy of it before you issued
9 your report?

10 A. No, I did not.

11 Q. Were you aware there was such a deposition?

12 A. I was not necessarily aware that it had taken
13 place yet.

14 Q. So Mr. Toberoff did not inform you that Mr.
15 Lee had been deposed in this lawsuit under oath prior to
16 your issuing the report; is that correct? Do I have that
17 right?

18 A. Let me think. I don't remember that. I don't
19 remember.

20 Q. It's fair to say, is it not, that essentially
21 the methodology you used in coming to the opinions that
22 you did in your report is that you took versions from
23 Kirby, versions from Lee, and you decided which ones you
24 thought were the most credible; isn't that right?

25 A. No.

1 MR. TOBEROFF: Misstates testimony.

2 A. No. No, that's not what I said at all. I
3 said, first of all, I said I looked at the printed comics.
4 I looked at whatever materials existed. I talked to other
5 people who were around at the time who had histories of
6 working with Stan Lee and with Jack. I talked extensively
7 with Sol Brodsky, who was Stan's right-hand man during
8 this period. I talked to other -- I talked to Steve
9 Ditko, who was working for Marvel during this period.

10 MR. TOBEROFF: You can keep answering.

11 A. Yeah. All right. I'm sorry. Then I lost my
12 train of thought here.

13 It is not merely a matter of me weighing
14 Stan's accounts against Jack's.

15 Q. In reaching the conclusions that you reached
16 in your report, which was submitted to us in early
17 November, I'm correct that you did not read the testimony
18 of Stan Lee, John Romita, and Roy Thomas who testified in
19 this case; correct?

20 A. That is correct.

21 Q. Even though all of those depositions took
22 place before you issued your report?

23 A. I don't know that that's true.

24 Q. I will so represent to you that it's true.

25 A. I did not read those depositions.

1 A. Jack's original pages of Spider-Man were not
2 used. Then Steve Ditko did it. However, Jack maintained
3 that he created Spider-Man.

4 Q. And so this would be a circumstance, for
5 example, where -- maybe I've got this wrong.

6 But put aside what he maintained. What did
7 you conclude as to the creation of Spider-Man? Did you
8 find Mr. Kirby's version more credible than Mr. Lee's,
9 which is in clear conflict?

10 A. I don't find them completely in conflict. I
11 find certain areas that overlap. And in this particular
12 -- this is -- you're kind of asking me for what could be a
13 very long answer here, if you want to go through the whole
14 thing.

15 Q. I don't know. That's a good question.

16 A. Because I've spent hours discussing this with
17 people. My version that I reported on, written about, of
18 the creation of Spider-Man allows for certain he said/he
19 said variations. There are, however, certain parallels in
20 the stories and the accounts that I find indisputable.

21 Q. So you're taking an amalgam of different facts
22 and versions and choosing to try to make them consistent
23 in such a way that you reach a conclusion?

24 A. Well, when I report on this, I try to separate
25 what is conjecture from what is, I believe, indisputable.

1 And I leave it -- well, when I have written about this, I
2 generally leave it to the reader to make certain decisions
3 about the process.

4 I think that there are things you can say
5 about it that are obvious. I think there are things you
6 can say that are simply common sense, because I don't
7 think that either Stan's or Jack's accounts exactly match
8 the physical evidence of the printed comic that resulted.

9 But I think it is possible to come to a
10 scenario of how Spider-Man came to be that allows for the
11 fact that at various stages there's the Stan Lee version,
12 and the Jack Kirby version, and they could in some cases
13 both be true based on interpretation of certain words,
14 certain verbs.

15 It's something when I have written about it
16 I'm very careful to try and not take -- not to say either
17 Stan's version was completely correct or Jack's version
18 was completely correct, because I don't think either one
19 of those tells the entire story. But they are not -- it
20 is wrong to say that they are in complete conflict.

21 Q. Some areas we can agree on. I think we did
22 agree on one, which was that Stan, in fact, didn't use the
23 original drawings by Jack with regard to Spider-Man;
24 correct?

25 A. That is correct.

1 A. All right. Where did I say that word?

2 Q. We'll come back to it.

3 A. Depending on the context, that might be the
4 correct word.

5 MR. TOBEROFF: Misstates his testimony.

6 Q. I think you testified previously in the prior
7 deposition, but I want to ask you a follow up in this
8 context.

9 You have written extensively about Jack Kirby
10 and his contributions to the comic book industry; correct?

11 A. Yes, I have.

12 Q. And you also have given lectures and spoken
13 extensively on that subject?

14 A. I have.

15 Q. And could you estimate for me or for us how
16 much you've been paid or how many royalties you've
17 received in connection with the books you've published on
18 Jack Kirby, the articles that you've written on Jack
19 Kirby, the presentations you've made on Jack Kirby going
20 back over the last 20 or 30 years?

21 A. Well, lectures I think I have never been paid
22 for a lecture about Jack. I have been paid for lectures
23 where Jack was mentioned, but he was not the primary
24 subject of the lecture.

25 Articles? I have written the Forwards for --

1 I'm going to give you an estimate. This is not a finite
2 number. I have written the Forwards for approximately 20
3 to 25 reprint collections of Jack's work. And I usually
4 get somewhere between \$250 or \$500 for each one, which is
5 a standard fee for Introductions of these kind of things.

6 Q. Mm-hmm.

7 A. I have written one book about Jack. I really
8 don't remember how much I've been paid on that, but I
9 believe we're furnishing that material to you, if I can
10 dig out the records of what I've been paid on that.

11 What else is there?

12 Q. Do you have an estimate as to how much that
13 would be?

14 A. Well, for the Forwards maybe --

15 MR. TOBEROFF: I think he's referring to the
16 book.

17 A. The book? I don't have --

18 Q. I was referring to the book.

19 A. I don't have an estimate for it. They're way
20 behind in paying me, so I don't know.

21 Q. You refer yourself in the report at one point
22 as a comic book historian. Is there anybody else in the
23 industry that you consider to be a comic book historian?

24 A. Yes. You know, to varying degrees there are
25 lots of people who write about comic books. Roy Thomas

1 MR. TOBEROFF: Compound.

2 A. Well, Mr. Kirby believed -- said that he took
3 some of the ideas that became the Marvel heroes in. He
4 brought them in, did sketches first, took them in and
5 showed them to Stan.

6 So to the extent that that answers your
7 question, that answers your question.

8 Q. Well, I'm asking for your understanding as to,
9 first of all, what did Mr. Kirby tell you about that,
10 which characters, when did he do that, and whether or not
11 this was one of the versions you chose to believe.

12 A. Okay. Mr. Kirby told me that he brought in
13 sketches for new characters, including rough sketches of
14 The Fantastic Four that he did on his own. Brought them
15 in.

16 His version of the creation of Fantastic Four
17 was that when Mr. Goodman asked for a superhero book to
18 parallel DC Comics' Justice League of America, Stan's
19 initial idea was to revive the characters from the 1940s
20 The Human Torch, The Submariner, Captain America, and
21 certain others.

22 And Mr. Kirby then went out and said, no, we
23 need new characters. And he came up with some sketches.
24 And he took them in, and The Fantastic Four was born out
25 of those discussions.

1 Brodsky, who was the right-hand man who was present for a
2 lot of this, he more or less endorsed the Kirby version to
3 me.

4 Q. Sol Brodsky is dead; right?

5 A. Yes, he is. But I haven't published this.
6 This is an area where when I write about this, I say that,
7 and I think I say in my book, in effect, Jack and Stan got
8 together and came up with the characters. I don't remove
9 from that period, which as you keep reminding me I was not
10 present for --

11 Q. I haven't reminded you the whole day.

12 A. I think you did someplace in there, but
13 anyway.

14 You know, there's a limit to how much we can
15 know about what two men did behind closed doors years ago.
16 There's also a limit to how much each of them could even
17 remember about that at the time.

18 And I was sometimes when I have written about
19 this I also from my own experience talk about the fact
20 that collaborators can honestly disagree five minutes
21 after a meeting of whose idea was which because one person
22 threw out an idea and another person expanded on it and
23 such.

24 So I have not uncovered anything which would
25 convince me that Jack didn't bring in some sketches. And

1 I don't know how much those sketches resembled the
2 finished product. But Jack said he brought in ideas. I
3 know that Jack was a fountain of ideas; that he had a
4 lifetime history of batting out ideas for new characters
5 and sketches. And every single human being who ever
6 worked with Jack will tell you that, including Stan Lee.

7 So I choose to believe that because of Jack's
8 modus operandi, and the way he always worked, that he
9 brought in something, and Stan brought in something, and
10 collectively The Fantastic Four emerged from those
11 discussions. And I specifically avoid trying to say that
12 I know exactly what happened behind those closed doors,
13 because it was apparent to me that there was some level of
14 collaboration there.

15 I find in my own experience, and in my own
16 observation, and talking to the people who knew Jack well,
17 Jack was a creating character machine. He was also
18 creating characters. He created characters when he was
19 asked to. He created characters when he wasn't asked to.
20 He was a very fertile person. And Stan has said that many
21 times.

22 Q. Do you know -- I'm sorry. Please finish.

23 A. So I hope I'm answering your question. But
24 the mere fact that somebody says, you know, that a
25 publisher says I would really like to do a western, and

1 I would want to know if, you know, The New
2 York Times gave him the typewriter he was working on.

3 Q. Anything else?

4 A. I think those right there are --

5 Q. Well, let's assume they're going to pay him
6 for the article whether or not they publish it.

7 MR. TOBEROFF: Again I object. He's not a
8 lawyer, asking for a legal conclusion as to whether
9 something is work for hire under the 1909 Copyright Act
10 that even lawyers have trouble answering. It's outside
11 the scope of his expert opinion.

12 A. I think this question is too vague to answer
13 even as it is.

14 MR. QUINN: This is probably a good place to
15 break for lunch.

16 THE VIDEOGRAPHER: Off the record. The time
17 is 1:10 p.m.

18 (Recess.)

19 THE VIDEOGRAPHER: Back on the record. The
20 time is 2:20 p.m.

21 Q. BY MR. QUINN: Good afternoon, Mr. Evanier.

22 A. Good afternoon, sir.

23 Q. You had mentioned previously in connection
24 with one of the answers you had given regarding
25 conclusions you had reached relating to Jack Kirby's

1 relationship with Marvel back in the '58 to '63 period
2 that you'd had discussions with, among other people, Sol
3 Brodsky. Remember that?

4 A. Yes.

5 Q. Could you tell me when you had those
6 discussions?

7 A. 1975 and 1976. Met mr. Brodsky before that.
8 We had an extended conversation in '75 and another one in
9 '76.

10 Q. And do you recall -- how long ago, by the
11 way, did Mr. Brodsky pass away?

12 A. Oh, early 80s. '83, '84, I think.

13 Q. You mentioned you had a conversation with him
14 in '75 and '76. What do you recall him telling you at
15 that time about the Kirby/Lee relationship in the '58 to
16 '63 period?

17 A. Well, mostly I told Sol the way I understand
18 the situation, and he agreed or amplified or corrected me.
19 I was mostly using him as, you know, Jack told me this,
20 Stan told me this, what do you think?

21 Q. Do you recall the specifics of the
22 conversation you had with Mr. Brodsky about what you were
23 saying your understanding was and what his responses were
24 as to what Jack told you or what Stan told you?

25 A. He endorsed pretty much most of what Jack told

1 me but with some corrections and different memories. Do
2 you have a specific topic?

3 Q. Well --

4 A. We talked for hours.

5 Q. What is it that Jack told you that you say Mr.
6 Brodsky endorsed?

7 A. Well, I asked him in the early days was it
8 true that Jack would come up with the plots for things,
9 and Jack would go home often with know -- with very little
10 input from Stan. Or that sometimes it would be done over
11 the phone, and Stan would say, "I don't have time to talk
12 about the next issue with you, so just do something," and
13 Jack would go ahead and draw an issue.

14 I remember one thing he told me was that --
15 and this is not a quote; this is a paraphrase by me --
16 that repeatedly there was a situation where Jack would
17 come into the office, and he and Stan would talk about the
18 next issue of Fantastic Four, the issue of Fantastic Four
19 that Jack was going to go home and start working on.

20 And on the way out, Jack -- and Stan would say
21 to Jack: Oh, then after that we're going to do a Thor
22 story, you know, next month. Got any ideas for that?

23 And Jack would say -- this is me making
24 something up here -- Jack would say something like: Oh,
25 yeah, I got an idea for a story with Loki in it. And then

1 Jack would go home and draw the Thor story that wasn't
2 needed next instead of The Fantastic Four story that was.
3 He would get confused as to which story he was supposed to
4 do in what order.

5 So he would do this whole issue of Thor and
6 bring it in, and Stan would say: Well, where's the issue
7 of Fantastic Four we were doing?

8 And he'd say: Oh, I thought we were doing
9 Thor first. He would get confused as to which book he was
10 to do in which order.

11 Q. Is that because there were deadlines that he
12 had to meet?

13 A. They were pretty much ahead of deadlines.
14 It's just that one book may be way farther ahead than
15 another. Stan would pick out which -- let's do a Thor
16 next. Based on sometimes the deadlines had less to do
17 when the material was needed for publication than when the
18 artist would be inking the story would be needing work.
19 In other words, if the inker of Fantastic Four was not
20 busy, they might do a Fantastic Four issue next so they
21 could feed work to that inker.

22 Most of the stories they did were way ahead of
23 publication deadline because Jack and Stan were both very
24 prolific, both very fast and producing an awful lot of
25 work. Jack occasionally would do an issue, you know, in a

1 Q. You state in the paragraph that starts
2 "Goodman meanwhile" about a few lines down. "But until
3 the debut of Fantastic Four in 1961, few comics seemed to
4 be permanent fixtures."

5 What's the basis for that statement?

6 A. Looking at the history of publishing at
7 Marvel, they tended to cancel books very fast. The ones
8 that -- the ones that kept going for quite some time were
9 flukes.

10 And, you know, I have talked to an awful lot
11 of people about Martin Goodman, and there is a unanimity
12 of opinion about him from people who worked in that time
13 period. And Stan Lee has said this on many occasions, and
14 Sol Brodsky said it, and Jack said it. It's a consistent
15 portrait of a man who was always trigger happy, ready to
16 cancel a comic when he got one bad sales report. Sales
17 were down, he would cancel a book.

18 Sol Brodsky told me that frequently, very
19 often, in fact, what would happen would be that they would
20 get the sales figures in on, let's say, you know, Issue 22
21 of a comic. And Martin would go, oh-oh, it's down. Let's
22 cancel it. Then someone would tell him, well, we've got
23 Issues 22, 23. We've got the next three issues sitting on
24 the shelf. And he would decide, well, it would be cheaper
25 to publish them than to write that material off. So

1 they'd publish those issues. And by the time they could
2 cancel the book and not have inventory left over, they
3 would get some encouraging sales figures, so he would
4 uncanceled the book.

5 And so very few comics at Marvel were ever
6 done with the expectation, well, this comic will be done a
7 year from now or two years from now, which was different
8 from quite a few of the other publishers. Most of the
9 major publishers had a few titles that were solidly
10 ensconced. And DC Comics was never worried they would
11 have to cancel Superman soon. Dell Comics was never
12 worried they would have to cancel Donald Duck soon.

13 But Martin ran his company with the idea that,
14 well, we may have to cancel all war comics and replace
15 them with Westerns, or replace all our love comics and
16 replace them with comic books about funny rabbits or
17 something.

18 Q. You're familiar with Marvel's horror titles?

19 A. The ones in the 50s?

20 Q. Yes.

21 A. Yes, I am.

22 Q. Amazing Fantasy and Journey into Mystery?

23 A. Amazing Fantasy was in the late 50s, early
24 60s. Yes.

25 Q. Those, that group of titles, in fact, did last

1 most of these stories.

2 A. I am not familiar with that deposition. I
3 have seen him claim that on some occasions.

4 Q. Okay. On page 10 of your expert report at the
5 top of the page you say.

6 (Reading:) As Stan Lee himself noted on many
7 occasions, "plotting" with Kirby could often be
8 accomplished in a matter of minutes and in later
9 years might be done via brief phone call with
10 Jack telling Stan what the next issue would be
11 about.

12 Now, what is the basis for that statement?

13 A. I listened in on one of Jack and Stan's
14 plotting -- on Jack's end of a phone call the first day I
15 ever met Jack.

16 Q. And how did that go? What do you recall about
17 listening in to a plotting phone call between Jack and
18 Stan Lee?

19 A. Three friends of mine and I visited Jack.
20 This was in July of 1969. I think it was the second week
21 of the month.

22 Q. I think you testified about that previously.

23 A. While we were there, I was talking to Jack in
24 this little den he had in his house in Irvine. Roz came
25 in and said, "Stan Lee is on the phone."

1 And Jack said, "Tell him I will call him
2 back."

3 And Roz said, "It's 5:30 in New York,"
4 whatever the time was. "He's got to leave for the day.
5 He needs to talk to you."

6 And Jack said -- apologized to us, and he took
7 the call in front of us. And Jack just told -- just had
8 on his drawing board at the time he had Fantastic Four No.
9 98, which he had just completed and was about to send in.

10 And he already had -- he knew what he was
11 doing on -- he was going to draw an issue of Thor next.
12 And he knew what he was going to do for that. And Stan
13 was calling to find out when The Fantastic Four issue
14 would be in and to discuss what Jack would do for the next
15 issue because Stan needed to write some advertising copy
16 that would say what the issue was about.

17 And Jack told him what he had in mind for the
18 story. And Stan said, Great. And I did not hear Stan's
19 end of the conversation.

20 Q. I was going to ask you that. It wasn't on a
21 speaker phone, was it?

22 A. No, no, but --

23 Q. Didn't have speaker phones back then.

24 A. But the whole conversation was probably less
25 than four minutes, so it was a brief phone call. And I

1 heard Jack tell Stan what the next issue would be about,
2 which is what I wrote here.

3 Q. And that's the basis for the statement?

4 A. That's exactly the basis of the statement.

5 And on top of that --

6 Q. So other than the one --

7 A. No, no. Let me finish my sentence, please.

8 On top of that, Stan said things like that all
9 the time. Stan told me on many occasions that, especially
10 on the later issues, Jack was controlling the story lines.
11 I think there's a quote elsewhere in my book here where I
12 quote Stan as saying, "Sometimes Jack will tell me what
13 the next issue is about." That's from an interview that
14 Stan gave in Castle of Frankenstein magazine about this
15 time.

16 So that's the basis for that. I mean, this is
17 a very consistent portrait here, and I see no evidence to
18 the contrary anywhere.

19 Q. You are aware, are you not, that at least with
20 regard to some of the characters there were actual scripts
21 and outlines that were prepared?

22 MR. TOBEROFF: Vague.

23 A. I don't know what you mean by that.

24 Q. Well, we've seen before the outline for
25 Fantastic Four we looked at it in the last deposition.

1 A. Yes.

2 Q. And you are aware, aren't you, that, for
3 example, Mr. Lieber, Larry Lieber, has said on many
4 occasions that he wrote full scripts for the comics that
5 he was doing. You're aware of that?

6 A. Yes, he has said that.

7 Q. And that, in fact, includes a number of the
8 comics that Jack was doing the artwork for; correct?

9 A. Yes.

10 Q. By the way, do you have any basis for
11 disagreeing with Mr. Lieber's statements that he would
12 write the scripts before the panels would be drawn?

13 MR. TOBEROFF: Vague as to what we're talking
14 about exactly.

15 Q. With regard to those comics that Mr. Lieber
16 wrote the scripts for, do you have any basis for
17 disagreeing that he wrote those scripts before the panels
18 were drawn?

19 A. My understanding is that Larry Lieber wrote
20 scripts before the panels were drawn, but that that
21 statement as you phrased it does not give a full portrait
22 of the process.

23 Q. Other than the phone call that you described
24 in 1969, do you have any other personal direct knowledge
25 of how the comic books that Lee and Kirby worked on

1 together were plotted?

2 A. Talking to people who worked with them,
3 talking to Sol Brodsky, talking to other people who worked
4 with Stan and Jack concurrently.

5 Q. Who were the other people?

6 A. Talking to Stan for that matter, Stan himself.
7 Stan and Jack both told me stories that matched up about
8 those meetings. You know, if Stan says, oh, yeah,
9 sometimes I just called Jack and said do another issue of
10 Dr. Doom, and Jack tells me the same thing, I assume
11 that's pretty good verification.

12 Q. On page 10 also you wrote that, "As Kirby
13 worked, he would not only draw out the story and invent
14 new characters where necessary" -- by the way, part of his
15 assignment was as to invent new characters, where
16 necessary, wasn't it?

17 MR. TOBEROFF: Vague.

18 Q. Wasn't that part of the shtick?

19 MR. TOBEROFF: Vague. No Yiddish, please.

20 A. I understand Yiddish a little bit.

21 As you phrased it, that's difficult to answer.
22 Give me a minute here.

23 Jack was paid and credited as the artist. It
24 has never been in the industry an assumption that the
25 artist would make up characters when he drew the comic.

1 like that in the room helping flesh out whatever ideas you
2 had, change them, and bring in his input.

3 I'm not saying Stan is lying. I'm saying he's
4 choosing his words carefully, remembering a version. I
5 disagree with Stan about some aspects of Marvel history.
6 We've had friendly arguments about certain issues and
7 certain comics and how things came about and how they were
8 published. And sometimes I get him to agree with me. I
9 show him evidence.

10 Q. Well, one thing we've established, during this
11 period from '58 to '63, Stan was there, and you weren't.

12 A. Yes.

13 Q. You say in your expert report at page 15
14 carrying over to 16 that "It is also worth noting that
15 Stan Lee did not create any important characters either
16 before Jack Kirby first worked with Lee or after Jack
17 Kirby stopped working with Lee in 1970."

18 Do you see that bottom of 15 over to 16 in
19 your report?

20 A. Hold on here. Yes, I see that.

21 Q. After he stopped working for Lee in 1970, what
22 successful characters did Kirby create?

23 A. Well, he created a series for DC called The
24 New Gods. Featured a villain called Dark Side, one of the
25 most important villains in Allied DC Comics. Did a book

1 old picture of me.

2 MR. TOBEROFF: Very cherubic.

3 What number are we up to?

4 Q. 14. Can you just identify this document for
5 us, please.

6 A. This is a scan or xerox of my column that
7 appeared in Jack Kirby Collector No. Thirty-Eight

8 Q. And just a couple of questions on this. You
9 were being asked, I guess, a series of This is Jack FAQs.

10 A. Yes.

11 Q. Frequently Asked Questions. And one of them
12 is: Jack Kirby designed Spider-Man's costume.

13 And your answer: False. Steve Ditko designed
14 the distinctive costume we all know and love. Jack did
15 claim to have presented the idea to Stan of doing a hero
16 named Spiderman, no hyphen, who walked on walls and other
17 Spiderman themed powers, a claim which Stan formally
18 denies.

19 A. I think I said vociferously denies.

20 Q. Oh, I'm sorry. You're right. Vociferously
21 denies.

22 Tell me which version do you believe with
23 regard to Jack's supposedly bringing the idea of Superman
24 -- Spider-Man to Stan Lee? Do you believe Jack's version
25 or Stan's vociferous denial?

1 A. As I stated earlier, I believe -- well, I
2 believe that Jack did bring in the idea of doing Spiderman
3 to Marvel.

4 Q. So you believe Jack's version?

5 A. I believe that part of Jack's version.

6 Q. That's the part I'm asking you about.

7 A. Okay. I believe that Jack did come in and
8 present that to Marvel.

9 Q. Okay. And that's based on your discussions
10 with Jack?

11 A. Based on my discussions with Jack, based on
12 the fact that he had this piece of artwork that said
13 Spiderman done by Joe Simon earlier.

14 Q. That's the one that you don't have any idea
15 where it is today; right?

16 A. I don't know where it is today, no, but
17 it's --

18 Q. Did you ever see the piece of work?

19 A. I held it in my hands.

20 Q. You did. And what happened to it? Do you
21 have any idea?

22 A. Jack kept it for many years, and at one point
23 when he was talking to Joe Simon, Joe said, "Hey, I'd like
24 that back." And he sent it back to Joe Simon. I think I
25 answered this question earlier. And the last I saw of it