

EXHIBIT B

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JOHN MORROW

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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MARVEL WORLDWIDE, INC.,
MARVEL CHARACTERS, INC.,
and MLV RIGHTS, LLC,

Plaintiffs,

v.

Case No. 10-141-CMKF

LISA R. KIRBY, BARBARA J.
KIRBY, NEAL L. KIRBY and
SUSAN N. KIRBY,

Defendants.

-----x

Video Deposition of JOHN MORROW
(Taken by Plaintiffs)
Raleigh, North Carolina
January 10, 2011

Reported by: Marisa Munoz-Vourakis -
RMR, CRR and Notary Public

TSG JOB NO. 35702

JOHN MORROW

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2 the case for the magazine.

3 So I called him and asked him if he would
4 be interested in doing an interview. He said, you
5 know, possibly somewhere down the line, you know, we
6 could do something like that. That was our first
7 contact.

8 And then I guess I assume he called me --
9 you might remember better than I do -- but like about a
10 year ago, and asked if I would do the report.

11 Q. And what did you understand the subject
12 matter of the report or the content of the report was
13 going to be?

14 A. Oh, well, see, there were a few things that
15 were going to be covered. A lot of the history of
16 Marvel Comics going back to like the 1940s. Jack
17 Kirby's history working for the company, and gosh, sort
18 of, you know, that it should contain, you know, my
19 personal observations from my years of doing, you know,
20 comic scholarship work, about, you know, industry
21 practices and things like that.

22 Q. Was any engagement letter signed between
23 Mr. Toberoff's office and yourself?

24 A. What is an engagement letter?

25 Q. A letter setting out the terms and

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Q. And that continues today?

A. It does. I think we actually told them we would be dropping it to just about 800 an issue now because of the economy and all sales have kind of declined.

Q. Do you have any understanding with Mr. Toberoff with regard to any arrangement to publish anything about this case in consideration of your providing a report?

A. No. No. I hope after it's all said and done that I can interview various parties involved, if they're allowed to talk about it. But, no, we don't have an arrangement or anything like that.

Q. Have you ever had any business dealings with Mr. Toberoff prior to being contacted in connection with this case?

A. No, other than my initial request to get an interview from him, which never resulted in anything.

Q. How old are you?

A. About 48.

Q. And would you summarize your educational background, beginning with high school?

A. Sure. Twelve years of high school diploma, four-year college degree with a bachelor in fine arts.

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2 programs. A wide range of things. A lot of commercial
3 real estate work, things like that.

4 Q. Do you have any legal training?

5 A. No. No.

6 Q. Do you have any training in the art or
7 science of determining whether people are telling the
8 truth or lying?

9 A. No, no professional training. I guess just
10 intuition, such as it is.

11 Q. What, if anything, did you do to prepare
12 for today's deposition?

13 A. I pulled out a few issues of our
14 publications and a few other publications, just to
15 reread some things.

16 What else? I read back my report, met with
17 Mr. Toberoff yesterday for an hour or two, and having
18 never done this before, he kind of talked me through
19 what the, you know, the whole experience was going to
20 be like, and he told me not to get nervous and kind of
21 went over my report page by page and just talked about
22 specifics of what I put in there.

23 Other than that, pretty much nothing.

24 Q. Where did the meeting between yourself and
25 Mr. Toberoff take place?

JOHN MORROW

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2 A. Oh, over at the, what is it, the Sheraton
3 Hotel, where he's staying.

4 Q. And was anyone other than the two of you
5 present at that meeting?

6 A. No.

7 Q. And during the course of that meeting, did
8 you look at any documents other than your expert
9 report?

10 A. No.

11 Q. Have you ever seen any other expert report
12 issued in connection with this case?

13 A. No.

14 Q. Have you ever been told what the contents
15 of any other expert report issued in this case are?

16 A. No.

17 Q. Have you reviewed any deposition testimony
18 given in this case?

19 A. No.

20 Q. So you've never reviewed the deposition
21 testimony of Mark Evanier, for example?

22 A. No. I work with Roy Thomas, and Roy in a
23 phone conversation mentioned to me that he had been
24 deposed, and it took like, he said it took like three
25 days or something like that, but we didn't actually

JOHN MORROW

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2 talk about specifics of what he said or anything that
3 went on.

4 Q. And I'm correct based on your answer, I
5 assume that you have not seen any testimony of Stan Lee
6 or any of the Kirbys?

7 A. No.

8 Q. Or John Romita?

9 A. No.

10 Q. Were you told of any testimony given by
11 Larry Lieber in the case?

12 A. No.

13 Q. On this one, I've -- check your
14 acquaintanceship, if any, with some people, first of
15 whom is Martin Goodman. Did you ever meet Martin
16 Goodman?

17 A. Oh, no, that was well before my time.

18 Q. Did you ever meet Saul Brodsky?

19 A. No.

20 Q. Did you ever meet Stan Lee?

21 A. I met him on a few occasions. I'm not sure
22 that he would recall them.

23 The first time would have been 1978, just
24 standing in line at a comic convention to get his
25 autograph.

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2 Lisa or Neal told you was pertinent to the opinions
3 that you've set forth in your expert report?

4 A. Well, I can't really recall specifics right
5 now. Of course, I've done a lot of interviews over the
6 years and read probably ten times as many as I've
7 actually conducted, and they all kind of, you know, go
8 in there and help form the opinions on things.

9 So I'm sure if I had the interviews in
10 front of me, I could read through them and say oh,
11 yeah, that probably helped form my opinions on my
12 report as well, so.

13 Q. Did you refer to any Neal or Lisa Kirby
14 interviews?

15 A. I didn't specifically refer to those
16 interviews, no, not when I was doing the report.

17 Q. Have you ever interviewed Susan Kirby?

18 A. No, I've not.

19 Q. Or Barbara Kirby?

20 A. No, have not.

21 Q. Did you ever attend a meeting at Marvel
22 attended by Jack Kirby?

23 A. No, I've never been in the Marvel offices.

24 Q. Have you ever been told about any story or
25 plotting conferences at Marvel?

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later on.

A. Okay.

Q. According to your report, I think you became involved in the comic book industry in 1989?

A. No, 1994.

Q. Did you have any connection to the comic book industry prior to 1994?

A. Well, my only connection was that I was a comics fan, a comics collector, devoured fan magazines and the Comics Journal, publications like that, really enjoyed learning about comics history and reading about it, that dates back all the way to probably 1969, 1970 when I got my first comic book.

So, but no, I didn't have any professional connection to comics at all before 1994.

Q. And would it be fair to say that you have been a lifelong fan of Jack Kirby?

A. Lifelong?

Q. Well, at least once you started reading comics?

A. Well, no, not since I started. I actually hated his work when I started reading comics. I was about age 14 where I first developed an appreciation of his work. Before that, I couldn't stand his art style.

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2 Q. And I know we covered this a little bit
3 generally, but I'd like to cover it more specifically,
4 what you were asked to cover specifically in your
5 report?

6 A. Well, the history of Timely and Marvel and
7 kind of the history work practices at the time. Jack
8 Kirby's history with the company dating all the way
9 back to what his first work for them with Joe Simon in,
10 what was it, 1939, 1940.

11 His -- Jack Kirby's career, how he left
12 Marvel, went to work for DC in the '40s, his work in
13 the '50s, how he ended up back at Marvel in the late
14 '50s and then the working relationship between he and
15 Stan Lee, as I understood it, in the '60s.

16 But, you know, a lot of the history of the
17 company and, you know, what I knew about Jack Kirby's
18 personal work habits, you know, where he worked, how he
19 worked, I guess that's pretty much --

20 Q. Now, what you know about Jack Kirby and his
21 work habits was not derived from personal observation
22 of Jack Kirby working, is that correct?

23 A. Correct. Well, I've seen his studio in
24 California, but that was after he had been deceased,
25 and that's not where he was working when he was doing

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2 the work in general.

3 Q. And so your knowledge of Jack Kirby's
4 working habits and how he worked during the period from
5 '58 to '63, which is the period relevant to this case,
6 is based on what you've read about Mr. Kirby?

7 MR. TOBEROFF: Misstates testimony.

8 A. A lot of it is based on what I've read
9 throughout the years. A lot of it is, I believe, I'm
10 sure I talked to Roz Kirby about that, about what it
11 was like living in New York and working in New York.

12 I know I've read -- Mark Evanier has
13 written several times about visiting Jack's studio and
14 what that was like.

15 I believe in the Neal Kirby interview, we
16 talked about that they called their dad's work space
17 the dungeon, I believe, because it was in the basement
18 of their New York home.

19 I do recall he painted a very graphic
20 picture of what it was like down there. I got a very
21 good sense of what it looked like. It was this room
22 with this one little basement window for light, which
23 is why they called it the dungeon.

24 But also I read a lot over the years about
25 how Kirby worked when he was working with Joe Simon as

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2 well. How they had shared their across-the-street
3 attic studios right after the war. They got, you know,
4 veteran housing and built houses and worked across the
5 street from each other, to the point Joe Simon even
6 told me they lived in different cities, because the
7 state was the dividing line, or different counties, I
8 guess, between the two houses. Just picked up a lot
9 over the years from various things I've read and
10 talking to different people.

11 Q. Did you ever talk to Joe Simon about Jack
12 Kirby and his work?

13 A. Yes, we have. I actually interviewed Joe
14 Simon for the Jack Kirby Collector.

15 Q. And did Mr. Simon describe the nature of
16 the working relationship between Jack Kirby and Marvel
17 during the 1958 to '63 period?

18 A. I don't believe so, because I don't believe
19 Simon and Kirby were particularly close at that point.
20 Their company had dissolved shortly before that, which
21 was the big reason Kirby ended up back in Marvel, and
22 that seems to be kind of a dead area in the
23 relationship. There's not been much written or said
24 about it.

25 Q. Did Neal Kirby ever tell you that he had

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2 does kind of show that Kirby was doing things
3 differently from everybody else.

4 Q. Have you ever heard that Fantastic Four
5 number one was the first issue that employed the more
6 Marvel method?

7 A. I've not heard that that was the first
8 issue, no.

9 Q. Am I correct though, you cannot testify
10 with any degree of certainty as to whether or not
11 Mr. Kirby was working from scripts at any time between
12 '58 and '63?

13 MR. TOBEROFF: Asked and answered.

14 It's okay, you can answer it.

15 A. I can't say definitively, but there's
16 anecdotal evidence that he was working Marvel method
17 during that period.

18 Q. Exclusively?

19 A. Exclusively? I had never heard him say
20 that he was working from Larry Lieber's scripts, but
21 Mr. Lieber says he was providing scripts, so I guess
22 it's possible Mr. Lieber provided scripts and Mr. Kirby
23 just went on and did what he wanted anyway.

24 Q. Apart from that being possible, do you have
25 any direct knowledge to suggest that it didn't happen

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2 A. Oh, I probably spent seven, eight hours,
3 something like that, probably total.

4 Q. And do you recall approximately when you
5 began to actually write the report?

6 A. I don't recall the date. I think it was
7 about -- Mr. Toberoff told me we needed to have
8 something done in a couple of weeks, and so I didn't do
9 like, you know, eight hours altogether. There were a
10 couple of revisions on it, so, but, I mean, I think I
11 started about two weeks before we submitted it,
12 something like that.

13 Q. And did you input a draft on your own
14 computer?

15 A. No, the initial draft actually came from
16 Mr. Toberoff's office. We spoke over the phone. The
17 problem is I've not done one of these before, so I had
18 no idea like the format. I've never even seen one
19 before. So I asked for their assistance with that. We
20 kind of just sort of did an informal interview over the
21 phone. They'd ask me questions about things, and I
22 would give them my sense, and then they send over --
23 they typed up kind of an initial draft of it and sent
24 it over to me with the understanding that, you know,
25 this is just our run through on it, make any changes

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2 you want.

3 Once I had the basic, you know, format
4 there in a Word document, it was very easy to go in and
5 alter things, and I changed a considerable amount of
6 what they sent over.

7 Q. Do you recall over how long a period of
8 time it was between your receipt of that initial draft,
9 to the completion of the final report?

10 A. No, I remember I was very busy at the time,
11 and I think -- I'm going by memory here, but it seems
12 like it was about a two-week process. It may have been
13 a little more, a little less than that. But once I got
14 the draft, I think it was -- I spent about two days or
15 three days before I sent it back to them as my like
16 final version.

17 At that point, they looked it over, found a
18 couple of typos, things like that. Somebody from his
19 office called me up and said I think we got, you know,
20 couple of typos. You might want to consider fixing.
21 They told me I would go in, and they were, I'd change
22 them and send them back, you know, the final, final
23 draft.

24 Q. And how long prior to the delivery of that
25 initial draft that was prepared by Mr. Toberoff's

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2 was covered by Mark Evanier's report?

3 A. No, they didn't. I have absolutely -- I've
4 not seen Mark's report. I have had no knowledge of it
5 whatsoever. I did know that he and I were listed as
6 the two expert witnesses or expert reports or whatever,
7 but that's the extent of my knowledge of it.

8 Q. Did you use any reference materials in
9 preparing your report?

10 A. I did. I mean, I pulled out some books and
11 looked things up to try and get dates correct and
12 things like that.

13 Q. Do you recall what books you pulled out and
14 used?

15 A. I think several issues of Alter Ego
16 Magazine, issues of the Jack Kirby Collector,
17 particularly issue 41. We actually published a couple
18 of Mr. Kirby's contracts with Marvel and so I referred
19 back to those.

20 I know there was an article in Alter Ego
21 number 49 that Tom Lammers wrote about the history of
22 Timely and Atlas Comics and their whole problems with
23 their distributor.

24 Books, I believe I pulled out, Stan Lee's
25 Excelsior, his biography, and I referred to some of the

JOHN MORROW

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2 materials that we've gotten from Stan Lee's archives
3 for a book we're doing on Stan.

4 Q. The we being TwoMorrows?

5 A. Yes.

6 Q. Your company?

7 A. Yes, Roy Thomas and Danny Fingeroth, who
8 did Write Now Magazine for us. They are coauthoring
9 that book.

10 Q. But you will be publishing?

11 A. Right, yes.

12 Q. You are not writing the book?

13 A. No, I'm not writing.

14 Q. And do you recall what materials from those
15 archives you looked at?

16 A. There were some interviews, transcripts of
17 radio interviews that Stan did in the '60s, some
18 newspaper clippings. One in particular I remember,
19 Stan was talking about the different way he works with
20 different artists, and he talked about he has a story
21 conference with Gene Colan over the phone. He would
22 put the phone up to his reel-to-reel tape recorder and
23 just let Stan talk. And then Gene would have the
24 recording of that to refer to after the fact.

25 So they didn't actually have a lot of give

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2 and take. When they worked, it was just Stan talking.
3 Whereas, he said, with Jack Kirby, it was an entirely
4 different thing. It might be by phone, it might be in
5 person, it might just be let's use Dr. Doom in the next
6 issue Jack, okay, and that might be the whole story
7 conference.

8 So let's see what else was in that batch?

9 I sent -- you should have a list of all the
10 research materials and stuff we have. I think there's
11 a pretty good list of material we got together for that
12 Stan Lee book.

13 Q. Right. But I'm trying to focus on what
14 materials you referred to in connection with the
15 preparation of the expert report from that list. I
16 assume you didn't look at all of it?

17 A. No. I looked at main issues of the Jack
18 Kirby Collector, if I got my facts straight, Alter Ego,
19 and then that Stan Lee interview. That was probably
20 most of it.

21 Q. Did you listen to the radio interview in
22 connection with the preparation of your report?

23 A. I don't actually have a copy of the audio
24 of that. All I've got is the written transcripts.
25 Mr. Fingerroth has copies of the audio.

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2 BY MR. FLEISCHER:

3 Q. I've placed before you what we've marked
4 for identification as Exhibit 4. It bears production
5 numbers JM131 through 144?

6 (The document referred to was marked
7 Plaintiff's Morrow Exhibit Number 4 for
8 identification.)

9 Q. Is the first page of the exhibit the e-mail
10 forwarding to you the first written draft of the report
11 that you are aware of and the other pages of the
12 exhibit, the attachment to that e-mail?

13 A. This looks like it, yes.

14 Q. Did you provide the substance of everything
15 set forth in this draft, which is part of Exhibit 4?

16 A. Everything?

17 Q. Yes.

18 A. No, did not. After our initial
19 discussions, they prepared this and sent this to me. I
20 was quite impressed actually with how well they did
21 with it. Then at that point, I took this and modified
22 it.

23 Q. Is there anything in this draft that you
24 did not provide to them in verbal terms prior to
25 receiving the draft?

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2 A. Well, we -- let's see, obviously the bio,
3 that was sent by e-mail. The introduction, let's see,
4 the introduction was just their summation of what they
5 told me this would be about. The qualifications are
6 based on the bio that I sent in.

7 The historical background, A, historical
8 background, most of that was provided by them. We had
9 some brief discussions on that.

10 Let's see, Jack Kirby and Marvel -- again,
11 most of that was provided by them. We had some brief
12 discussion on that, but most of that is from them.

13 Q. You are talking about the material on page
14 135?

15 A. Well, yeah, page four.

16 Q. Page four of the draft?

17 A. Yeah, the Jack Kirby Marvel background.

18 Q. Okay. And on page five, there's another
19 numbered section headed Kirby's working relationship
20 with Marvel. How much of that did you provide and how
21 much was there?

22 A. Well, we had a pretty good conversation
23 about this. You know, I'm not sure how much of it they
24 took verbatim from me, but, again, this is the draft
25 they sent me. So it was based on our conversation. I

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2 feel a lot more of this is what we talked about on the
3 phone, because most of the early historical stuff is
4 just a matter of record. This seems to have more of my
5 opinions in it at this stage.

6 So that section two would be, I'd say,
7 largely from our phone conversations, and section
8 three, right, they asked about if I knew anything on
9 the Hulk, and I didn't really have too much information
10 on that. So not much came forth on that.

11 Q. Is the material -- let's just take it
12 paragraph by paragraph, if you don't mind.

13 A. Okay.

14 Q. Under the heading Jack Kirby's creations
15 and co-creations, how much of that paragraph was
16 provided -- was based on information you provided and
17 how much was provided in their initial draft to you?

18 A. Well, the first sentence sounds like it was
19 probably taken verbatim from something I said; as is
20 the second. Actually, it all sounds like it could have
21 been taken verbatim from me.

22 The second one under Fantastic Four, if
23 that's not all taken verbatim from me, it's
24 definitely -- that goes (sic) exactly my thoughts. So
25 it may well have all been taken from me.

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2 The incredible Hulk, they were just asking
3 for that.

4 Thor should have been basically from me.

5 Spider-man should be from me.

6 Sgt. Fury, I added quite a bit on that
7 after they sent this.

8 Number four --

9 Q. I think we can skip over four, because
10 that's part of the -- when they sent you the report,
11 did they indicate to you what they expected to be added
12 under the conclusion heading?

13 A. No, they just, as it says there, just to
14 recap everything.

15 Q. What did you understand your function to be
16 in completing the conclusion section here or recap?

17 A. Just to recap the main points, you know, as
18 far as just recap the main points of the history and
19 Kirby's working relationship, you know, what I
20 understood of work-for-hire. That's pretty much it, or
21 what I understood work-for-hire, how I felt it related
22 to this.

23 Q. And after receiving Exhibit 4, what did you
24 do with respect to the report then by way of completing
25 it?

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2 e-mail, just to make sure he knew it had been sent to
3 his assistant.

4 Q. Did Mr. Toberoff respond to this e-mail?

5 A. I don't believe so. Again, it's possible
6 there was an e-mail saying thanks, I got it or
7 whatever. But I don't believe I got a response back
8 from him.

9 Q. Do you recall any discussion about any
10 substantive changes to the report, other than the
11 correction of typos?

12 A. I don't recall right now, no.

13 Q. Let me direct your attention to page four
14 of the draft, that's part of Exhibit 5, which is your
15 signed version, and specifically the first sentence,
16 full sentence at the top of page four that begins:
17 Marvel required me to sign a work-for-hire agreement
18 for the various work I produced for them, and in the
19 course of this project, Marvel finally paid Jack
20 Kirby's estate \$325 for the use of that unused Kirby
21 story Kirby drew in 1970. Actually, it doesn't just
22 begin, that's the whole sentence.

23 Did you have any discussion with someone
24 from Mr. Toberoff's office about that sentence?

25 A. You know, I took that out of the final one,

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2 because I thought it kind of wasn't pertinent, and then
3 you guys would think I'm some kind of expert on
4 work-for-hire, which I'm not. So that's why I took
5 that out.

6 Q. Did something prompt you to take it out?

7 A. No, just rereading back over it.

8 Q. So in a subsequent draft, this sentence was
9 modified or deleted?

10 A. I believe so. I don't have the -- I
11 thought this was the final version, but I guess it's
12 not.

13 Q. The last phrase of that sentence that I
14 just read, where it says Marvel finally paid Jack
15 Kirby's estate \$325, what did you mean by finally
16 there?

17 A. Because he had not been paid for it when it
18 was originally drawn.

19 Q. And you know that how?

20 A. Because rejected work, all the historical
21 data shows rejected and redrawn work or rejected work
22 wasn't paid for, and that redrawn work wasn't like, you
23 know, paid again for.

24 Q. And what historical data are you referring
25 to to support that statement?

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2 Marvel paid for them, Jack wouldn't have had the
3 opportunity to throw them in the garbage. Marvel would
4 have done something with them.

5 Q. Am I correct that you don't have any
6 firsthand knowledge about whether or not Jack was paid
7 for the pages you're referring to in this sentence?

8 A. Well, by firsthand knowledge, was I there,
9 for instance? No, of course not. I was much too young
10 to be there. You know, I'm not privy to Marvel's
11 books, so, no, I can't say definitively that it was on
12 the books that he was paid.

13 I know when we did -- Marvel wanted to do a
14 book called Fantastic Four Lost, which was -- I
15 assembled an unused Fantastic Four story from various
16 collector's collections. They had scattered pieces of
17 this story that Marvel -- Jack had drawn in, I guess,
18 1969 but Marvel never published.

19 Marvel read my article in the Kirby
20 Collector and said oh, we should get that together and
21 finish it and publish it.

22 So when they contacted me about doing all
23 of that, I told them that, you know, unless there's
24 some reason to believe that they paid for that
25 originally that, you know, no, they're not going to get

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2 copyright to terminate because Marvel was -- its work
3 product Marvel was the author. Kirby is not the
4 author. Stan Lee is not the author. So, and that
5 seemed to be key to the case.

6 Q. Did you ever have discussion about the
7 issues in the case with anyone from Mr. Toberoff's
8 office?

9 A. I think I talked to Mr. Toberoff about the
10 intricacies of work-for-hire. I think he kind of sort
11 of explained those to me. I don't remember when that
12 discussion was. It was over the course of between our
13 first correspondence and this, but I couldn't tell you
14 exactly when.

15 Q. And prior to that discussion, did you ever
16 have an independent understanding of the legalities
17 associated with work-for-hire under the copyright laws?

18 A. In my layman's understanding, yeah. I
19 remember in the late '70s, it suddenly became a big
20 issue. I remember, you know, who Neal Adams is. There
21 was an issue about are the companies going to return
22 our original art to us or not. And our issue at the
23 time is well, if they don't return it, then they own
24 it, so they have to pay sales tax on it, and Neal Adams
25 was trumpeting that as a major reason why the companies

JOHN MORROW

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2 contracts to kind of protect yourself in cases like
3 that.

4 So, yeah, I had at least a rudimentary
5 knowledge of what work-for-hire was about. I don't
6 think I know every detail by any means, but I got the
7 basics.

8 Q. What is your understanding of what
9 work-for-hire is, as you sit here today?

10 A. Well, in terms of just in general, or in
11 terms of this case?

12 Q. I mean, well, in general.

13 A. In general. Well, for it to be
14 work-for-hire, my understanding is that, like the
15 people you're dealing with, they have to have an
16 obligation to pay you, first of all, for the work
17 you're doing. It's not like -- I'm like -- I mean,
18 there has to be like a guarantee of payment for the
19 work you are going to do for them. It has to be kind
20 of agreed in advance. I know in a lot of instances,
21 there actually has to be a written document before work
22 begins saying this is work-for-hire agreement, both
23 parties understand that.

24 You know, for instance, I know
25 work-for-hire is a whole lot more clear and easy to

JOHN MORROW

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1
2 were asked to provide are set forth in the second
3 paragraph of the introduction, preceded by the letters
4 A, B and C?

5 A. Yes.

6 Q. Were those the specific opinions that you
7 had in mind when you were talking with Mr. Williamson
8 and making the revisions to the draft report?

9 A. Yes.

10 Q. And with respect to your opinions
11 concerning Marvel's history before, during and after
12 the 1958 through 1963 time period, apart from what
13 you've described as reading interviews and materials
14 over the years and perhaps conducting some interviews,
15 is there any other basis that you had for offering
16 opinions concerning that history?

17 A. Well, what you mention encompasses a lot.
18 Just the sheer number of pages we published on comics
19 history since we started in 1994 is pretty extensive.

20 So I don't want to discount the value of
21 that, in my opinion for him. And just the number of
22 books I've read in that time period as well.

23 And before, I mean, the four-page list of
24 research materials I sent you is not all of the books
25 I've ever read on comics history. There's any number

JOHN MORROW

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2 that I, you know, also sold or traded or donated or
3 whatever.

4 So, I mean, this has, you know, comics
5 history has been kind of in my life since I was
6 12-years old, so, I mean, I think that's sufficient to
7 form opinions, frankly.

8 Q. And with respect to your opinions
9 concerning the B element described here, which is the
10 business relationship between Jack Kirby and other
11 freelancers with Marvel during this period, is there
12 anything, other than what you just described and
13 described earlier, that you used as a basis for forming
14 opinions with regard to that relationship?

15 A. All my research materials, you know,
16 conversations I've had, convention panels I've
17 attended, where these creators were actually speaking
18 firsthand about it, but, yeah, I mean, I think we've
19 outlined where my research comes from.

20 Q. And with respect to the last of the three
21 described opinions, which is Jack Kirby's creation or
22 co-creation of many of Marvel's most famous characters
23 during the period, did you do anything other than,
24 again, what you've described previously?

25 A. I think that's pretty much the same. A lot

JOHN MORROW

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1 of firsthand accounts by creators, a lot of interviews.

2 Q. Any firsthand accounts by creators
3 concerning people who were at story conferences between
4 Jack and Stan Lee?
5

6 A. Certainly. I think, wow, let's see, I
7 believe Flo Steinberg is mentioned, of course, she
8 wasn't actually in the conference, she was outside, as
9 the secretary, but could overhear things.

10 I believe Marie Severin has commented on
11 story conferences.

12 John Romita, of course, I think I
13 elaborated earlier the example where Stan was driving
14 him home, that's a good example.

15 Who else? Of course Mark Evanier hearing
16 the phone, one side of the phone conference from
17 Mr. Kirby's studio. I'm sure there's more. Those were
18 the ones that immediately come to mind.

19 Q. What information did you get from Flo
20 Steinberg about this subject?

21 A. Oh, I just recall, I can't give you a
22 specific right off the top of my head, but I remember
23 her speak or read of her speaking about -- you know,
24 Stan Lee was infamous for very enthusiastic story
25 conferences in his office. He would stand on the desk

JOHN MORROW

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2 break.

3 THE VIDEOGRAPHER: The time is
4 11:55 a.m. This is the end of tape number
5 three. We are off record.

6 (Recess.)

7 THE VIDEOGRAPHER: The time is
8 12:02 p.m. This is the beginning of tape
9 number four. We're back on the record.

10 BY MR. FLEISCHER:

11 Q. Am I correct in looking at your report that
12 the report contains both statements of fact and
13 statements of opinion?

14 A. To my knowledge, yes.

15 Q. And is there a way that I can distinguish
16 or the reader can distinguish what you are stating as a
17 matter of fact, from what you are stating as a matter
18 of opinion?

19 A. I'm not sure how to answer that. I'm
20 stating the facts, as I understand them. And I -- I
21 mean, it's, I understand my job with this report is to
22 give my opinions. But my opinions are based on the
23 facts, as I understand them.

24 So I don't know that the two are so
25 intertwined. I'm not quite sure how you would like a

JOHN MORROW

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2 formula for saying okay, this is fact, this is opinion.
3 I don't really understand.

4 Q. In some places in your report, you say it
5 is my opinion that, or words to that effect, I assume?

6 A. Oh, right, if I say I believe that, that
7 would obviously be an opinion.

8 Q. I can assume -- let me just finish the
9 question.

10 A. Oh, I'm sorry.

11 Q. Am I safe in assuming that when you say it
12 is my opinion that, or words to that effect, that that
13 is an opinion, not a fact?

14 A. Yes, my opinion based on the facts that I
15 understand.

16 Q. And if you don't preface a conclusionary
17 statement with it is my opinion that, or words to that
18 effect, is there any way to know whether you are
19 stating something you believe is a matter of opinion or
20 is a matter of fact?

21 A. Well, I guess we'd have to take it line by
22 line, and you could say is that a fact or is that an
23 opinion? And if it's a fact, I can tell you what it's
24 based on. That we could do. But in terms of just
25 something so the casual reader can go oh, that's a fact

JOHN MORROW

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2 or that's an opinion, I don't know that there's some
3 kind of system in place for someone to do that.

4 Q. So the reader, other than with respect to
5 statements prefaced by it is my opinion that, or
6 similar words, would have to ask you -- follow up and
7 ask you whether it's a statement of fact or opinion?

8 A. As with any document, certainly, yes.

9 Q. And am I correct that the statements that
10 appear in the report that purport to relate facts are
11 facts that you have derived from research as opposed to
12 personal observation, something you saw, something you
13 heard directly or something like that?

14 MR. TOBEROFF: Asked and answered.

15 A. Yes. I mean, my report is based on
16 research and the opinions I've formed based on the
17 research.

18 Q. Is there any method by which the reader of
19 your report could test reliability of the conclusions
20 in your report?

21 A. I guess they could read the same research
22 materials I've read, and if they've read our -- the
23 publications we've put out over the last 17 years, I
24 think they could do a pretty decent job of going
25 through and seeing where I got my information and

JOHN MORROW

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1
2 giving it validity, yes.

3 Q. So the only way you could test validity is
4 by reviewing, theoretically, everything you've
5 reviewed, and in your view, the reader of that material
6 would always come to the same conclusion that you came
7 to?

8 A. Well, I can't say always, because I can't
9 speak for other people and how their thought processes
10 work. I was asked to do an expert report based on my
11 knowledge that I gained over the years, so that's what
12 I did.

13 Q. Just in terms of methodology, if I wanted
14 to test reliability of a statement in your report, the
15 only way I could do that is by immersing myself in all
16 of the material you reviewed over the years and making
17 judgment?

18 MR. TOBEROFF: Misstates testimony.

19 A. You asked a way that you could validate
20 what I put in my report. That is one way. There are
21 probably other ways. Probably other people who have
22 read other research materials and read other interviews
23 could probably evaluate what I said as well. There may
24 be other ways. I don't really know how to answer that
25 question.

JOHN MORROW

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2 Q. What I'm getting to is this, if you had
3 written a scientific paper, where you set forth, take a
4 wild example, the proof of Fermat's last theorem.

5 A. Whatever that is.

6 Q. Which is A to the end, plus B to the end
7 equals C to the end, has no whole number solution
8 greater than two, and you published that paper, the
9 scientific mathematical community would be in a
10 position to test that by looking at your calculations.
11 And I'm trying to get to is there any way the reader of
12 your report could apply some methodology to testing the
13 reliability of your conclusions?

14 A. A methodology to test reliability? By, I
15 assume, by reading the rest of the testimony in this
16 case, other people's depositions, that could, you know,
17 support or reject some of the things I say in my
18 opinions. But, again, I'm not -- I don't really know
19 how to answer that question.

20 Q. Let me direct your attention to page three
21 of your report, not the final report, that's the one --
22 Exhibit 9, and specifically to the sentence appears to
23 be the third sentence in the second full paragraph,
24 which I'll read for the record, "Prior to my 1996
25 article, the unused Fantastic Four story was unknown to

JOHN MORROW

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2 for DC at the same time and summarily told them to
3 leave, and they went to work for DC comics. Then they
4 went to war.

5 Then Simon and Kirby worked for Harvey
6 Comics, Enterprise Comics and a lot of other companies
7 but not for Marvel.

8 Q. What was the relationship between Timely
9 and Kirby and Simon at the time Captain America was
10 being published?

11 A. I believe I put that in here. I don't know
12 where that is. Kirby was working for, I believe, Fox
13 Features at the time when he met Joe Simon. Simon took
14 an editor's job at Timely and worked on agreement with
15 Martin Goodman for Timely publishing Captain America,
16 and Simon and Kirby, I believe, would get 20 percent of
17 the profits, Simon would get 15 percent and Kirby would
18 get ten percent. Simon got the extra percentage
19 because he brokered the deal with Goodman. They
20 produced ten issues of Captain America there at Timely
21 before difficulties arose and they parted ways.

22 Q. Did Timely pay Jack Kirby for work he did
23 on Captain America, or did Joe Simon pay Jack Kirby, or
24 did someone else pay Jack Kirby?

25 A. I wasn't there and can't say for certainty.

JOHN MORROW

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2 was just accumulating.

3 Q. Was that an assumption on your part or
4 based on specific information?

5 A. It's based on reading research in that time
6 period.

7 Q. Yet you use the phrase a closet full of
8 unused artwork. Doesn't that refer to just pencils?

9 A. Not in this case. I believe in this case,
10 it would refer to stories that were not published.

11 Q. To be more accurate, your report should
12 have said a closet full of finished stories?

13 A. Certainly, yes, that's fine.

14 Q. And you indicate in your report that
15 Mr. Goodman gave Stan Lee the job of firing the
16 employees, the staff of the company at that time?

17 A. Yes.

18 Q. What is the basis for that?

19 A. Mr. Lee's own biography, various historical
20 articles written, interviews in Alter Ego. I remember
21 Alan Bellman particularly talking about that, that they
22 had like a little PA system, and you would be called
23 into the office and you would go oh, he's getting laid
24 off, he's getting laid off, and one day he heard his
25 name over the PA system and realized it was his turn.

JOHN MORROW

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2 A. Well, you could say that it's possible any
3 number of their early successes were on spec. If Joe
4 Simon brought in Captain America and said let's make a
5 deal with this, does that follow your definition of on
6 spec.?

7 Q. Is it your understanding that Joe Simon
8 brought Captain America to Martin Goodman or that he
9 was working at the request of Martin Goodman on a
10 superhero character?

11 A. My understanding is that Joe Simon brought
12 it to Martin Goodman.

13 Q. How did you get that understanding?

14 A. From Joe Simon's biography and from Jack
15 Kirby confirming that in interviews.

16 Q. So let's put Captain America aside.
17 Any other instance in which you can think
18 of, any work published by Marvel up to 1963 was created
19 on spec.?

20 A. I'd have to do further research. Bill
21 Everett created the Submariner. I'm not, off the top
22 of my head, sure of the instances of how that ended up
23 at Timely. That was around the same time period as
24 Captain America.

25 The Human Torch, Carl Burgos is another

JOHN MORROW

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1
2 drew some sample pages, brought them in and Stan said
3 no. He rejected probably because it was too close to
4 Archie Comics' Fly, and that's when Stan had Steve
5 Ditko come in.

6 Q. Are you saying that Jack brought the pages
7 without being given an assignment by Stan with respect
8 to Spider-Man?

9 A. No, I think Jack brought in the concept,
10 the idea to Stan as one that they had kind of kicked
11 around at Mainline for doing, and Stan said sure, let's
12 give it a try, and I don't know what level of input
13 Stan gave Jack at that point.

14 Q. Do you have an opinion with regard to
15 whether or not Jack Kirby was the sole creator of Sgt.
16 Fury and the Howling Commandos?

17 A. Well, I put in my report -- a quote that
18 really caught my attention when we interviewed John
19 Severin for the Jack Kirby Collector. On page 12 and
20 13 of my report, he talked about met over coffee with
21 Jack Kirby, and Jack at that point was trying to get
22 syndicated newspaper strips purchased to syndicates and
23 he had this idea that he pitched to John Severin to get
24 John to draw it, because John was very good at drawing
25 war comics, and -- well, the quote is in the report.

JOHN MORROW

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2 You can read it. But that one was very interesting to
3 me. That's not an interview I actually conducted. Jim
4 Amash conducted that actually.

5 Q. So returning to my question, do you have an
6 opinion as to whether or not Jack Kirby was the sole
7 creator of Sgt. Fury and the Howling Commandos?

8 A. Well, you have to define sole creator. Do
9 I think Jack Kirby initiated the concept? Yes. That
10 right there makes me think that Jack Kirby initiated
11 the concept.

12 Did Stan Lee have input into the concept?
13 I would think as editor, certainly. It could have been
14 as simple as this is hypothetical. It could have been
15 as simple as Stan saying Jack, we need a war book, and
16 Jack said oh, I got this great idea I was kicking
17 around, and then he presented it, and maybe Stan added
18 some stuff, something like that.

19 It could have been that Jack walked in and
20 said Stan, here's an idea. If you want to use it, we
21 can do it. I, of course, wasn't there, so I don't
22 know. But this leads me to believe that Jack initiated
23 the concept outside of Marvel and through whatever
24 process it was brought in. I'm sure Stan had some
25 input into it. The question is how much?

JOHN MORROW

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2 Q. Do you have any information to the effect
3 that Stan -- that Jack Kirby began drawing Sgt. Fury
4 and the Howling Commandos before getting an assignment
5 from Stan to do so?

6 A. No, not that he began drawing it, no.

7 Q. Had Stan Lee ever done war comics for
8 Marvel before Nick Fury?

9 A. Yes, he had.

10 Q. Was there something unique about Sgt. Fury
11 and this Howling Commandos and the war of comic genre?

12 A. Yes, there was.

13 Q. What was unique about it?

14 A. Sgt. Fury was, for me, the first war comic
15 I actually could read. I never enjoyed war comics.
16 There was something about the feel and the tone of it
17 and the level of action in it that I really enjoyed.
18 At that point, I had never discovered Kirby's earlier
19 war comics. But when I first saw Sgt. Fury, it was
20 like, okay, this is almost like superhero comics, which
21 I like, but done as a war comic. It had a lot of the
22 same trademarks that the superhero comics had.

23 Q. It was unique in the sense that you liked
24 it?

25 A. It was unique in the sense that it was

JOHN MORROW

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2 lessen that Stan didn't add to it, but it's -- Jack --

3 Q. When you say it's a Jack Kirby creation --

4 MR. TOBEROFF: He was still talking,

5 he said but Jack.

6 BY MR. FLEISCHER:

7 Q. I thought you had finished your answer.

8 A. Well, just that it just screams that was a
9 Jack Kirby creation.

10 Q. Screams that to you?

11 A. To me, yes.

12 Q. That is your opinion?

13 A. That is my opinion, yes.

14 Q. Now, do you know whether Jack Kirby put
15 pencil to paper before discussing the Thor character or
16 the concept of a Thor book with Stan Lee?

17 A. No, do not.

18 Q. So when you say it's your conclusion that
19 it's the sole creation of Jack Kirby, you are saying it
20 was his idea?

21 A. That is my opinion, yes. The idea to take
22 Thor and use him as an ongoing superhero and cloak him
23 into Norse mythology would have been Jack's idea.

24 Q. But he wouldn't have drawn anything until
25 getting the go ahead of from Stan and having a story

JOHN MORROW

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2 conference of some kind with Stan, is that correct?

3 MR. TOBEROFF: Assumes facts, lacks
4 foundation.

5 A. Again, I wasn't there in 1961 and '62 when
6 these books were being produced. I can give you my
7 opinion, if that's what you'd like.

8 My opinion is that Jack came to Stan Lee
9 and said hey, I got this idea for a superhero based on
10 Thor. And Stan would say something along the lines of
11 okay, we've got a dead magazine and a mystery with
12 nothing going on. Our superheroes are starting to take
13 off. Let's do it. At that point, they would kick
14 around details of it. That's my opinion.

15 Q. Do you have an opinion with regard to who
16 is the creator of Ant Man?

17 A. He is such a lesser known character, I
18 don't think I actually included anything about Ant Man
19 in there. I have not heard or read much historical
20 data on Ant Man. What I do know about Ant Man is
21 that --

22 Q. Just try to restrict yourself to my
23 questions.

24 A. I'll say no, I have no opinion.

25 Q. I don't mean to cut you off, but we are

JOHN MORROW

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2 Q. I think you indicated earlier, I just want
3 to make sure I'm clear for the record, is it your
4 understanding that Marvel had the right to make changes
5 in the work submitted by Kirby?

6 A. Well, that's generally the job of an editor
7 in any publishing house. The editor accepts the work
8 and they edit it.

9 Q. So the answer would be --

10 A. Would be yes. Yes.

11 Q. Do you know whether Jack Kirby ever
12 received any vacation pay from Marvel?

13 A. No, none that I'm aware of.

14 Q. Well, are you aware that he didn't receive
15 vacation pay?

16 A. My understanding is that he did not, and
17 that's why he produced so many pages at such a faster
18 rate than most of the other artists, so that he could
19 keep up with his family finances and be able to take a
20 little time off once in a while.

21 Q. Am I correct that you cannot testify from
22 firsthand knowledge that throughout Mr. Kirby's career
23 with Marvel, he never received any form of vacation
24 pay?

25 A. From firsthand knowledge, no, I cannot.

JOHN MORROW

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2 So a lot of these were unpublished pages
3 that appeared in there.

4 So he had possession of those, Marvel
5 didn't, which leads me to believe he was not paid for
6 them or Marvel would have kept possession of them.

7 Q. So there is some relevance about who
8 retains the pages?

9 A. I think so, but, again, there's, you know,
10 a certain amount of fluidity to the working
11 relationship there, particularly in the early days of
12 Marvel, when everybody is trying to please everybody
13 else.

14 Q. Would I be correct again in saying that you
15 have no firsthand knowledge as to whether or not Jack
16 Kirby was paid for these pages?

17 A. No, I do not.

18 Q. The next one, the last one I'll ask you
19 about is the X-Men. Do you have any information about
20 this?

21 A. The X-Men one is interesting, because it
22 was actually inked by Chick Stone. So that leads me to
23 believe that that one may have been paid for, because
24 it got to the inking stage. It was actually inked and
25 lettered and had a logo put on it, and apparently at

JOHN MORROW

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2 with the company for a while, who to this day is not
3 regarded as a particularly compelling artist.

4 Well, I correct that, Steve Ditko also
5 would be a very influential creator there, except that
6 his influence was largely on one or two strips.

7 Whereas Jack Kirby's influence was across the board.
8 But certainly Ditko, you can't discount his work on
9 Spider-Man, and to some extent, on Doctor Strange.

10 Q. What about John Romita?

11 A. Well, Romita didn't come in until Ditko
12 left Spider-Man, so we're talking what year was that?
13 Probably around '64, somewhere in there. He became
14 influential, but not at first.

15 At first, actually, the fans tended to
16 really dislike him, because he wasn't Ditko. It took
17 him a while to get the feel for the Marvel style, which
18 is why Stan had Jack do layouts for him.

19 Q. In your report on page 11, under the
20 heading of Fantastic Four, you describe some history,
21 as you understand it with regard to the publication by
22 Marvel of Fantastic Four number one, correct?

23 A. Correct.

24 Q. There's nothing here that talks about the
25 actual circumstances, as you understand them, of the

JOHN MORROW

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2 creation of Fantastic Four, is there? That is to say,
3 the interaction between Stan Lee and Jack Kirby?

4 A. Well, that in Origins of Marvel Comics, Lee
5 admits that he discussed Fantastic Four with Jack Kirby
6 before writing anything. I think that goes to that.

7 Q. Do you have any other information with
8 regard to the circumstances of the interaction between
9 Stan Lee and Jack Kirby, other than what was in Stan's
10 Marvel comic book?

11 A. Again, I'm sure there is more. This is off
12 the top of my head. I don't have anything now. You
13 know, if I put more time and think about it,
14 particularly into researching old interviews, I could
15 probably find something.

16 Q. Can you tell me what --

17 MR. TOBEROFF: What is this?

18 MR. FLEISCHER: Let me identify it for
19 the record.

20 BY MR. FLEISCHER:

21 Q. I've placed before you as Exhibit 14 a
22 two-page document. It has production numbers Marvel
23 14587 and 88.

24 (The document referred to was marked
25 Plaintiff's Morrow Exhibit Number 14 for

JOHN MORROW

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2 referred to a minute ago, comparing Kirby's Spider-Man
3 with Ditko's Spider-Man?

4 A. Yes.

5 Q. And do you agree that Kirby's Spider-Man
6 looks like the Simon Kirby Captain America character?

7 A. There are similarities certainly, but there
8 are similarities among most superhero costumes. It's
9 kind of that's just the way superheroes are drawn. I
10 think the finished Spider-Man is obviously very
11 different from either of the other two.

12 Q. And in this document, there is a depiction
13 of The Fly, particularly on the second page on a couple
14 of covers, do you see those?

15 A. Yes.

16 Q. And would you agree that the look of The
17 Fly is substantially different than the look of
18 Spider-Man?

19 A. Yes, I would.

20 Q. I'd like to direct your attention again to
21 your report in Exhibit 9, the final version, and the
22 first sentence of your conclusion says, and I'm going
23 to quote it: "To recap, I believe that Kirby's work
24 for Marvel from 1958 to 1963 was not 'work for hire'".

25 I had understood you earlier to have

JOHN MORROW

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2 eliminated a conclusion with regard to work-for-hire
3 because you didn't feel you were competent to opine
4 with respect to work-for-hire. Is there a reason --

5 A. Not in a legal. Not in a legal.

6 MR. TOBEROFF: Let him finish the
7 question and give me room to object.

8 BY MR. FLEISCHER:

9 Q. Is there a reason that you feel competent
10 to make the statement in the first sentence here?

11 MR. TOBEROFF: Objection, misstates
12 his prior testimony. You can answer.

13 A. Yes, from what my understanding, my
14 layman's understanding of work-for-hire, I feel
15 confident to make that statement.

16 Q. Is that an expert opinion?

17 A. Yes, that's my expert opinion.

18 Q. A minute ago you said it was a layman's
19 opinion.

20 A. My expert layman's opinion. Not my expert
21 legal opinion, but my expert layman's opinion. I, of
22 course, am not an attorney.

23 Q. Do you know whether there were any changes
24 in the concept of work-for-hire that occurred in the
25 mid-'70s applicable to works created after 1978?

JOHN MORROW

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2 A. I've got a basic understanding of how the
3 copyright law changed, yes.

4 Q. And what's your understanding of how the
5 concept of work-for-hire under the copyright law
6 changed as a result of statutes that became effective
7 on January 1 of 1978?

8 MR. TOBEROFF: Objection, lacks
9 foundation, misstates the law. Go ahead.

10 A. Well, my understanding of the copyright law
11 change, I guess it was written in 1976 and enacted in
12 1978, defined work-for-hire is you have to have a
13 preexisting agreement between the person commissioning
14 the work, the person doing the work, usually in
15 writing.

16 That you had to -- it's not work-for-hire
17 if you are doing it at your own expense. That there's
18 not some financial guarantee of payment, it's not
19 work-for-hire.

20 You have to believe that -- both parties
21 have to believe that from the second of inception of
22 that work, that the employer owns that work, which I
23 don't believe was the case with this. And I'm sorry,
24 I'm blanking out on the others. But that's -- that in
25 a lot of cases freelance work is not work-for-hire, but

JOHN MORROW

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2 there are cases where it is.

3 Q. I think the question was, what changed as a
4 result of the '78 -- the statute that became effective
5 on January 1, '78? I'm a little confused about your
6 answer.

7 Were you describing the elements of
8 work-for-hire in your answer, as you understood them
9 that changed in 1978, or were you talking more
10 generally?

11 A. I was talking more generally in terms of
12 why I made this statement, so.

13 Q. Well, do you know what changes occurred as
14 a result of the Copyright Act of 1976 that became
15 effective in 1978?

16 A. Right. I believe that you had to have an
17 actual signed contract for it to be considered a
18 work-for-hire. I'm sorry, I'm blanking out on that
19 one, so.

20 Q. Do you know what the elements of a
21 work-for-hire were under the preceding statute, which
22 was the Copyright Act of 1909 as amended?

23 A. No, I do not.

24 Q. Do you know which statute would have
25 applied to work created between 1958 and 1963?

JOHN MORROW

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2 A. I would assume the one that was enacted
3 prior to the 1976 change.

4 Q. Do you know one way or the other?

5 A. Well, it makes sense, but, well, yes, it
6 would have to be the one that was before the 1976
7 change.

8 MR. TOBEROFF: Just word of caution
9 with regard to the word assume. Since you
10 are not supposed to speculate when you say
11 assume, I don't believe you are speculating,
12 but I would be careful with that word.

13 THE WITNESS: Okay.

14 BY MR. FLEISCHER:

15 Q. Is it your understanding that the concept
16 of work-for-hire is a legal concept?

17 A. Yes.

18 Q. And you, I think agree, you are not
19 qualified to offer a legal opinion, is that correct?

20 A. A legal opinion, correct.

21 Q. And in your conclusion on page 14 at the
22 bottom, you continue: Nor do I believe that Marvel
23 itself in this period viewed or understood such
24 freelance work to be made-for-hire, since there is no
25 evidence of Marvel having documentation to support it.

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2 work-for-hire. I don't think they had ever even heard
3 the term. If they had heard it, I don't think they
4 would have known what it meant.

5 Q. Did you ever see a copyright application
6 signed by Jack Kirby for Marvel for work published by
7 Marvel?

8 A. I don't believe so. Why would Kirby have
9 filed a copyright application if Marvel was filing the
10 copyright applications?

11 Q. Do you know if the copyright applications,
12 for example, for Captain America were filed by someone
13 in the legal department of Marvel or just some
14 editorial employee or other employee of Marvel at the
15 time?

16 A. Are you talking in 1939?

17 Q. 1940 or whenever Captain America was
18 started.

19 A. I have no idea. I've never seen those
20 papers.

21 Q. Do you think it would have been prudent for
22 you to review some copyright applications before
23 rendering the opinion you've offered here in your
24 report?

25 A. In retrospect, yeah, certainly. I didn't

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2 have access to those. But if I had, I certainly would
3 have reviewed them.

4 Q. Couldn't you have gotten copies of
5 copyright registrations from the copyright office?

6 A. I guess I could have gone through and
7 gotten copyright applications on every character Marvel
8 ever produced for this report, but that didn't seem to
9 be really in the scope of it.

10 Q. And in fact, you didn't attempt to obtain
11 any copyright applications?

12 A. No, I did not.

13 Q. For any character or publication, right?

14 A. No, I did not.

15 Q. In your understanding of the concept of
16 work-for-hire, can a work made-for-hire be a work
17 created by a freelancer?

18 A. Yes, there are instances where a freelancer
19 can work under work-for-hire, yes.

20 Q. Mr. Morrow, I placed before you what we've
21 marked for identification as Exhibit 17. It bears
22 production numbers JM225 through 227.

23 (The document referred to was marked
24 Plaintiff's Morrow Exhibit Number 17 for
25 identification.)

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2 After you had described something to that
3 effect, you were then asked, which I believe you were
4 intending to describe the 1909 Act, you were asked, do
5 you know the test of the 1909 Act? And I believe your
6 answer was no?

7 A. Yeah. What I just described would have
8 been the test under the 1909 Act.

9 So the 1976 Act added some requirements,
10 like getting a contract signed before work begins, like
11 if somebody wants to do a -- somebody is hired to do a
12 screenplay ahead of time, we'll pay you \$10,000 for
13 this, we'll pay you 5,000 when you sign and 5,000 when
14 you deliver it. Even though he is a freelancer under
15 the 1978 version, that would be work-for-hire.

16 So that's a good instance of where a
17 freelancer could be work-for-hire under the '78 law.

18 So, yeah, I got confused with the
19 questioning on do I know the difference between the '78
20 and 1909? I think I have a decent understanding of the
21 difference.

22 MR. TOBEROFF: Okay.

23 FURTHER EXAMINATION BY COUNSEL FOR PLAINTIFFS
24 BY MR. FLEISCHER:

25 Q. Just some follow-up questions.

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2 Did Mr. Toberoff help you in -- at a break
3 in triggering the testimony that you just gave?

4 A. During the break, he pointed out to me that
5 you got that wrong, and I knew I did, because he had
6 helped me understand the differences in copyright law
7 way back before I did my report over the phone, because
8 I had a lot of questions about what was work-for-hire
9 and what was not.

10 Q. So is your understanding of the content of
11 the copyright law and in particular the elements of
12 work-for-hire under that law, derived from your
13 discussions with Mr. Toberoff?

14 A. Well, partially, yeah, but also, I mean, we
15 had had freelance illustrators and designers that
16 worked for our ad agency sign work-for-hire contracts
17 for us, long before I was ever doing the Jack Kirby
18 Collector.

19 Before that I had a grasp of work-for-hire.
20 You know, Mr. Toberoff helped me understand really the
21 distinction with the new law versus the old.

22 Q. And did you ever read the work-for-hire
23 provisions of the new law and whatever provisions of
24 the old law --

25 A. Yeah, I actually went on line to the