

# EXHIBIT C

1 UNITED STATES DISTRICT COURT  
2 CENTRAL DISTRICT OF NEW YORK  
3  
4

5 MARVEL WORLDWIDE, INC., MARVEL )  
6 CHARACTERS, INC., and MVL RIGHTS, )  
7 LLC, )

8 )  
9 PLAINTIFFS, )

10 )  
11 VS. )

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

12 )  
13 LISA A. KIRBY, BARBARA J. KIRBY, )  
14 NEAL L. KIRBY and SUSAN N. KIRBY, )

15 )  
16 DEFENDANTS. )

17 \_\_\_\_\_ )

18  
19 VIDEOTAPED DEPOSITION OF MARK EVANIER

20 LOS ANGELES, CALIFORNIA

21 DECEMBER 6, 2010  
22  
23

24 REPORTED BY: CHRISTY A. CANNARIATO, CSR #7954, RPR, CRR

25 JOB NO.: 34168

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December 6, 2010

9:35 a.m.

Deposition of Mark Evanier, taken on behalf of  
Plaintiffs, held at the offices of Paul Hastings,  
515 S. Flower Street, 25th Floor, Los Angeles,  
California, before Christy A. Cannariato,  
CSR #7954, RPR, CRR.

A P P E A R A N C E S

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2  
3 REPRESENTING THE PLAINTIFFS:

4 WEIL, GOTSHAL & MANGES

5 BY: JAMES W. QUINN, ESQ.

6 BY: RANDI W. SINGER, ESQ.

7 767 FIFTH AVENUE

8 NEW YORK, NY 10153

9 -AND-

10 HAYNES AND BOONE

11 BY: DAVID FLEISCHER, ESQ.

12 1221 AVENUE OF THE AMERICAS, 26TH FLOOR

13 NEW YORK, NY 10020

14  
15 REPRESENTING THE DEFENDANTS:

16 TOBEROFF & ASSOCIATES

17 BY: MARC TOBEROFF, ESQ.

18 2049 CENTURY PARK EAST, SUITE 2720

19 LOS ANGELES, CA 90067

20  
21 ALSO PRESENT:

22 ELI BARD, DEPUTY GENERAL COUNSEL MARVEL ENTERTAINMENT

23 CHRIS JORDAN, VIDEOGRAPHER

24

25

1 briefly met Martin Goodman. But between '58 and '63, I  
2 think -- well, Stan Goldberg was partly on staff during  
3 that time.

4 Q. How about Larry Lieber?

5 A. Larry Lieber was freelance during that period,  
6 I believe. I don't believe he was on staff.

7 Q. But he was working from Marvel between '58 and  
8 '63?

9 A. He was in the freelance category, I believe.

10 MR. QUINN: I though I said either.

11 MR. TOBEROFF: You can continue with your  
12 answer because he asked for both freelance and at the  
13 office.

14 A. In freelance, people who worked for Marvel --  
15 excuse me.

16 People who did freelance work for Marvel  
17 during '58 and '63 would include Jack Kirby, Steve Ditko,  
18 Don Heck, Dick Ayers, Gene Colan, Vince Colletta, Russ  
19 Heath, Stan Goldberg, Al Hartley. Leaving some people  
20 out. These are people who I spoke to.

21 John Buscema did, I think, a few jobs for them  
22 during this period. Bill Everett did a few jobs for them  
23 during this period. Joe Sinott, Larry Lieber, Don Rico.  
24 I think George Roussos. I'm missing somebody. Paul  
25 Reinman, Artie Simek, Sam Rosen.

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 at the bottom of page 4, and then over to page 5. And  
2 you're talking about the period, I think, in the 30s to  
3 the 60s where you say that "the comic book industry was  
4 very much a fly-by-night industry." Do you see that?

5 A. Yes.

6 Q. And what did you mean by that?

7 A. Comic book publishers were -- well, the  
8 industry was born out of leftovers from the pulp magazine  
9 business, and the sheet music business, and a few other  
10 publications.

11 And publishers were not very stable. They  
12 came and went. They were small operations. They did not  
13 project an air of stability to their freelancers. A lot  
14 of people who worked for comic book companies weren't sure  
15 they were ever going to get paid. A lot of checks  
16 bounced.

17 There was always -- there was often a sense  
18 that the business was always a year from ending. During  
19 the 1950s, in particular, publishers came and went at an  
20 alarming rate. Over the years I heard many, many stories  
21 from artists and writers that they would go to an office  
22 to turn in work, and the company wouldn't be there  
23 anymore. Or they would get there and find out that the  
24 books that they were submitting for had been canceled.  
25 They started up titles and ended them at an alarming rate.

1           If you go through even the major publishers in  
2 that period, there are all these incidences of the  
3 company, you know, clinging to the window ledge by its  
4 fingernails, just barely holding on, threatening to close  
5 down, closing down sometimes and reopening a couple weeks  
6 later.

7           People being paid in cash. People being paid  
8 under the table, kickbacks.

9           It was not a mature business in the sense that  
10 the companies had stable foundations. There were  
11 companies that didn't even have physical offices.  
12 Somebody edited a line of comics out of their garage.

13          Q.       And how did you come -- I'm sorry. You can  
14 finish. I'm sorry.

15          A.       Well, just that the first generation of comic  
16 book publishers, until you had corporate takeovers in the  
17 late 60s, were small operations from -- generally owned by  
18 men who had stumbled into publishing. A large number of  
19 comic book publishers were cases where someone had started  
20 a company, gone bankrupt, and the printer had acquired the  
21 assets of the company and kept it going in order to keep  
22 their presses rolling.

23                So that never struck me as a mature way to  
24 have a publishing firm when you're putting out product  
25 just to keep the presses operative because you've got



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 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 unless it was approved either by Mr. Lee or by Mr. Goodman  
2 or both of them.

3 A. As with any publisher, yes, the publisher and  
4 editor have the final say whether they're going to publish  
5 something or not.

6 Q. And you testified previously that from time to  
7 time Mr. Lee, when he received materials from Mr. Kirby,  
8 would comment on them, and he would make changes in them;  
9 correct?

10 A. He would of course comment on them. As an  
11 editor, his job is to comment on them. To make changes in  
12 them? If he had purchased the pages from Mr. Kirby, he  
13 would make -- he could do whatever he wanted with them  
14 once he bought them.

15 Q. Didn't he, from time to time, we'd agree, he  
16 was being paid -- Kirby was being paid on a per page rate?

17 A. Yes.

18 Q. And did Mr. Lee from time to time ask Mr.  
19 Kirby to make changes or suggest changes in material that  
20 he submitted?

21 A. There were times when Stan would say, I need  
22 something else here. I can't take this story as it is.  
23 You've got to fix this before we can buy it. Yes.

24 Q. And Mr. Kirby would, in fact, make those  
25 changes and resubmit; correct?

1 get a distributor to give you an advance, and you can keep  
2 the costs of production of the item down, the risk in  
3 publishing comic books at times can be very minor. There  
4 is a risk certainly, but --

5 Q. So sometimes it's minor; sometimes it's major?

6 A. Yes. Yes.

7 Q. You stated in your report on page 5, I believe  
8 it's page 5, in the middle of the paragraph that, "Writers  
9 and artists were only paid if their work was accepted."

10 Do you see that?

11 A. Yes.

12 Q. What is the basis for that statement? Who  
13 told you that?

14 A. Everybody. That was just the way people  
15 understood it was done. That's the way when I got into  
16 the business it was done. And when I asked about that,  
17 they said that's how we do business.

18 Q. Would you dispute the testimony of Mr. Lee and  
19 Mr. Romita and Mr. Thomas who all testified that in this  
20 case that, in fact, writers and artists were paid for  
21 whatever page they produced, whether or not it was  
22 published?

23 MR. TOBEROFF: Objection. I'm not sure they  
24 all said that.

25 A. Well, if the work was accepted and paid for,

1 it might not be published. So the publication -- rarely,  
2 and I'm not saying this never happened, rarely did  
3 publishers keyed payment to the publication. What they  
4 keyed it to, what they based it on, was the acceptance of  
5 the work.

6 So if Romita, and Stan Lee, and the other  
7 gentleman Roy Thomas, said that artists -- that they  
8 always got paid for their work even if it wasn't  
9 published, well, they didn't always pay for the work.  
10 They rejected scripts. They rejected artwork. They made  
11 -- they told artists to redo things if they accepted it,  
12 but the fact they did not publish it did not cause them to  
13 ask the artist to give the money back.

14 Q. So when -- is it your view that if an artist  
15 is asked to redo a page or a panel or make a change that  
16 that's a rejection?

17 A. It's a rejection of the work as it stands  
18 unrevised.

19 Q. Is it fair to say that --

20 A. If they -- excuse me. I'm sorry. Go ahead.

21 Q. Is it fair to say -- is it your view that if,  
22 in fact, they redo the work and submit it, and they're  
23 paid for it, then that work would not have been rejected?  
24 I'm trying to understand what you mean by "rejected."

25 A. Well, I don't know if I introduced that word

1 into this discussion. But you submit work to -- let me  
2 give you an example.

3 I submitted scripts to DC Comics in 1968. The  
4 editors -- to Charlton. And the editors there said --  
5 sometimes sent them back and said we don't want this. It  
6 was rejected. I was not paid for it.

7 Once or twice the editor said: If you can  
8 come up with a better ending for this, I might buy it. So  
9 I did a -- rewrote the ending and submitted the work  
10 again.

11 Now, the first version that I submitted was  
12 rejected, rejected being the opposite of accepted here.  
13 The fact that some of the work didn't change doesn't  
14 change the fact that the first version in totality was  
15 rejected.

16 Q. So that's your understanding of "they were  
17 only paid if the work was accepted"?

18 A. Yes.

19 Q. But would you agree with me that the practice  
20 was if the work was accepted, the artist or writer was  
21 paid, whether or not it was published?

22 A. That I would agree with. Yes.

23 Q. Now, you mention that there were times that  
24 you brought things to DC Comics, I believe you said, and  
25 some of the work was not accepted. Was that work that

1 did as well, not just Marvel?

2 A. Yes.

3 Q. So they would be buying stories, artwork, et  
4 cetera, to possibly use in the future, or not, based on  
5 their own decision?

6 A. They would be buying material that they  
7 expected to use, and it was -- I don't think they bought  
8 anything without a very reasonable expectation that they  
9 would print it soon. But what frequently happened was  
10 that books would be canceled, and there would be stories  
11 and work left over.

12 There were a number of instances in the case  
13 of Marvel where a comic would be canceled, and there would  
14 be two or three issues which had not been printed yet.  
15 And Mr. Goodman would decide if they were not worth  
16 publishing, then the stories would go on the shelf. And  
17 then at some time later they might be taken off and  
18 published. He found a place to use them.

19 Q. Are you aware as you sit here today of any  
20 specific pages that Jack Kirby worked on back during this  
21 '58 to '63 period that were not accepted?

22 A. The five pages or six he did of the first  
23 Spider-Man story were not accepted.

24 Q. And was it your testimony that he was not paid  
25 for that?



1           A.       He told me he was not paid for it. He asked  
2 repeatedly for the pages to be returned, and they never  
3 were.

4           Q.       Other than Mr. Kirby telling you that, do you  
5 have any basis one way or the other as to whether or not  
6 he was, in fact, paid for it, those pages?

7           A.       I think Sol Brodsky told me Jack was not paid  
8 for them.

9           Q.       And if Stan Lee testified under oath that he  
10 was paid for them, you would just choose to believe Kirby?

11          A.       Well, I would tend to believe that Stan didn't  
12 know what frequently people were being paid for.

13          Q.       And what's the basis of that?

14          A.       Stan.

15          Q.       -- statement?

16          A.       Stan inoculated himself frequently from that  
17 end of the business.

18          Q.       How do you know?

19          A.       Sol Brodsky was the guy who usually would take  
20 care of making out the checks, or making out the check  
21 request forms, and such. But you're dealing here with  
22 something quite some time ago that people at the time  
23 didn't pay much attention to.

24          Q.       When you say "quite some time ago people  
25 didn't pay much attention to," what do you mean? What did

1 they not pay much attention to?

2 A. Stan would not have paid much attention to  
3 whether or not Jack was paid for the story at the time.

4 Q. And is that statement by you or that's an  
5 opinion? What is that based on?

6 A. My understanding of how Marvel was set up is  
7 that Stan would try to distance himself from the actual  
8 page rates and the checks. One of the things Sol Brodsky  
9 complained to me about good naturedly and jokingly how  
10 often he got stuck with being the bad guy for Stan and  
11 telling people they weren't going to get paid for things,  
12 or their rate was being cut, or their check was going to  
13 be late. But he handled that type of thing.

14 And Stan was -- Stan was not in the office  
15 very often, was not in the office every day. Other people  
16 would handle the bookkeeping. He was not -- Stan was not  
17 a bookkeeper. He was not a guy who spent a lot of time  
18 filling out the forms.

19 And frequently, when I asked Stan questions  
20 about the financial end of Marvel, he would just shrug and  
21 say, "That's not my job. I didn't do that."

22 Q. He was in the creative end?

23 A. He was in the editorial end, creative end,  
24 yeah. He was in charge of the stories and artworks areas,  
25 not in charge of the bookkeeping department.

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 for a long period of time, didn't they?

2 A. Amazing Fantasy was canceled after No. 15.

3 Q. Journey into Mystery?

4 A. Journey into Mystery changed into Thor. The  
5 comic -- that comic did last for a long time. That was a  
6 book that -- let me speak to a larger issue here.

7 During the 50s, they published dozens and  
8 dozens of what they called Weird Comics. They were ghost  
9 stories, horror stories.

10 Q. Right.

11 A. And they had a huge inventory of them. And  
12 they would change titles and cancel them. In those  
13 particular books, they could cancel one title and stick  
14 the material in another comic because there were no  
15 continuing characters. So the material done for Marvel  
16 Tales could be used in Uncanny Tales or could be used in  
17 Adventures of the Weird World or whatever.

18 Those comics as a bulk went on for a long  
19 time. Then they all got canceled because of the  
20 negativism in the country about horror comics. And they  
21 brought some of them back in a different format. They  
22 used the same name during the -- the content of Journey  
23 into Mystery changed. They just used that as a blanket  
24 title. Originally it was a horror comic. Later it was a  
25 science fiction comic. Later it was the comic starring

1 Thor.

2 Then they turned the title Journey into  
3 Mystery into the comic called Thor. The numbering of  
4 Journey into Mystery blend into the numbering of Thor.  
5 And then later still, they brought back another comic  
6 called Journey into Mystery, which reprinted old stories  
7 from before Thor was in the comics. So it was not a  
8 consistent ongoing title.

9 But they did have books that lasted awhile.  
10 They just did not have comics that ever looked like they  
11 would last for a while.

12 Q. You also say in your report that one of the  
13 many casualties, referring to one of the publishing  
14 companies that didn't make it in the 50s, was Mainline  
15 Publications, which was a relatively new company, I guess,  
16 that Simon and Kirby had put together in the mid 50s?

17 A. Yes.

18 Q. What did Mainline Publications actually  
19 publish?

20 A. They published four titles. And I will tell  
21 you the titles in a minute here. Police Trap, In Love,  
22 Fox Hole. And there was a war comic called Fox Hole,  
23 Police Trap, Bullseye, and In Love were the four titles.  
24 And they were about to launch two new ones at the time  
25 that --

1 A. Yes.

2 Q. And you are aware that Mr. Kirby, in signing  
3 that, received monies as part of that deal; correct?

4 A. I'm aware that he received part of the money  
5 he was promised.

6 Q. He received monies as a result of that?

7 A. I answered your question.

8 Q. Well, I'm going to say it really simply, Mr.  
9 Evanier.

10 A. All right.

11 Q. He received money in connection with the  
12 Captain America settlement, didn't he?

13 A. He received some money.

14 Q. Right. And you say on page 14 at the top of  
15 the page you conclude that.

16 (Reading:) It is extremely doubtful that  
17 either Marvel or freelance artists such as Jack  
18 Kirby, particularly between 1958 and 1963, had  
19 any understanding or intent that their freelance  
20 material created at home on their own steam, on  
21 their own dime, and later purchased on a per page  
22 basis after it was completed and approved for  
23 publication, was somehow work made for hire.

24 What is the basis of that statement as to what is  
25 Kirby's or other freelance artists' understanding or

1 intent was back in 1958 to 1963?

2 A. Well, in 1978, around 1978, when both DC and  
3 Marvel began to put the words "work for hire" into their  
4 contracts and releases and paperwork, there was an outcry  
5 in the comic book business about it because no one really  
6 knew -- had seen that term before.

7 I was on a panel at a convention called "What  
8 the Hell is Work for Hire?" Artists and writers did not  
9 -- had not been confronted with that language before, did  
10 not know what it meant. There was a lot of protest.  
11 There were people circulating petitions refusing to sign  
12 those documents.

13 DC Comics, at least, and maybe Marvel,  
14 modified their original agreements because there was so  
15 much protest from freelancers that they would not sign the  
16 contracts as they were initially worded.

17 So the words "work for hire" suddenly came  
18 into the comic book community, and people just were  
19 baffled by them. They didn't know what it meant.

20 And so I am concluding that when the work was  
21 done in '58 and '63, nobody thought the words "work for  
22 hire" would ever apply to their work because they didn't  
23 know those words.

24 Q. You do understand that the work for hire  
25 concept was in the 1909 Copyright Act? Been around