

TOBEROFF & ASSOCIATES, P.C.  
2049 Century Park East, Suite 3630  
Los Angeles, CA 90067  
Tel: 310-246-3333  
Fax: 310-246-3101  
MToberoff@ipwla.com

Attorneys for Defendants Lisa R. Kirby, Barbara J. Kirby, Neal L. Kirby and Susan M. Kirby

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

---

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

Plaintiffs,

-against-

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

Defendants.

Civil Action No. 10-141 (CM) (KF)

**DEFENDANTS' STATEMENT OF  
MATERIAL FACTS PURSUANT TO  
LOCAL RULE 56.1 IN SUPPORT OF  
DEFENDANTS' MOTION FOR  
SUMMARY JUDGMENT**

[Hon. Colleen McMahon]

[ECF Case]

---

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

Counterclaimants,

-against-

MARVEL ENTERTAINMENT, INC.,  
MARVEL WORLDWIDE, INC.,  
MARVEL CHARACTERS, INC., MVL  
RIGHTS, LLC, THE WALT DISNEY  
COMPANY and DOES 1 through 10,

Counterclaim-Defendants.

---

Pursuant to Local Civil Rule 56.1(a) of the Local Rules of the United States District Court for the Southern District of New York, defendants Lisa R. Kirby, Barbara J. Kirby, Neal L. Kirby and Susan M. Kirby ( “Kirbys”) submit the following Statement of Undisputed Facts in support of their Motion for Summary Judgment:

1. On September 16, 2009, the Kirbys served Notices of Termination (“Termination”) pursuant to 17 U.S.C. § 304(c) to recapture their father Jack Kirby’s copyrights in his works by statutorily terminating all prior grants of copyright therein, including a 1972 agreement between Jack Kirby and plaintiffs’ predecessor Magazine Management Co., Inc. Declaration of Marc Toberoff (“Tob. Dec.”), ¶ 4; Ex. A; Ex. M.

2. On January 8, 2010, plaintiffs Marvel Worldwide, Inc., Marvel Characters, Inc. and MVL Rights LLC (including predecessors, “Marvel”) sued the Kirbys, seeking a declaratory judgment that the Termination is invalid on the purported ground that the subject works, published from 1958-1963, were all “works made for hire.” *See* Complaint at 2 (Docket No. 1).

3. In 1954 Fredric Wertham’s book *Seduction of the Innocent* accused comic books of “poisoning the minds” of America’s youth. Declaration of John Morrow (“Mor. Dec.”), Ex. A at 4; Declaration of Marc Evanier (“Ev. Dec.”), Ex. A at 7; Ex. F at 200:4-201:20.

4. The resulting public backlash led to Senate hearings on the corrupting influence of comics, and nearly bankrupted the struggling comic book “industry.” *Ev. Dec.*, Ex. A at 7; *Mor. Dec.*, Ex. A at 5; *Tob. Dec.*, Ex. F at 200:4-201:20.

5. In or about 1957, Marvel fired most of its staff artists and writers that it had employed. *Ev. Dec.*, Ex. A at 8; *Mor. Dec.*, Ex. A at 5, 8-9; *Tob. Dec.*, Ex. F. at 123:18-125:9; 200:4-201:20; Ex. U at 80.

6. In or around 1956, Kirby began submitting freelance material to Marvel. *Ev. Dec.*, Ex. A at 9; *Mor. Dec.*, Ex. A at 7.

7. Between 1958-1963, Marvel purchased material from freelance artists.

Ev. Dec. Ex. A at 9, 11-14; Mor. Dec. Ex. A at 5-6; Tob. Dec., Ex. C at 23:4-24:4; Ex. E at 71:17-72:7; 72:22-73:8; 100:21-101:9; Ex. F at 194:11-21; 200:4-201:13; Ex. J at 396:1-4; Ex. K at 232:5-10.

8. Between 1958-1963, Kirby produced and sold artwork to Marvel on a freelance basis only, and was not employed by Marvel. Ev. Dec., Ex. A at 9, 11-12; Morrow Dec., Ex A at 7-10; Tob. Dec., Ex. C at 23:4-24:4; Ex. E at 71:17-72:7; 72:22-73:8; Ex. F at 194:11-21; Ex. J at 256:25-257:25; 396:1-14; Ex. L at ¶¶ 1-4, 10, 11, 13.

9. Marvel did not have a written agreement with Kirby between 1958-1963. Mor. Dec. Ex. A at 9; Ev. Dec. Ex. A 11; Tob Dec., Ex. C at 23:4-24:4; Ex. E at 71:17-72:7; 72:22-73:8; 73:11-74:5; 76:25-77:6; Ex. F at 194:11-21; 199:8-200:3; 204:6-19; 204:24-205:15; Ex. J at 256:25-257:25; Ex. L ¶¶ 1, 3; Ex. M.

10. The first written agreement between Marvel and Kirby was fully executed on June 5, 1972. Tob Dec., Ex. L ¶¶1, 3; Ex. M.

11. Between 1958-1963, Kirby worked out of the basement of his own home, set his own hours, paid his own overhead and insurance and paid all expenses associated with his creations, including for his own paper, pens, pencils and other materials, and such expenses were not reimbursed by Marvel. Ev. Dec. Ex. A at 11-12; Mor. Dec. Ex. A at 8; Tob. Ex. E at 76:4-24; Ex. F at 194:11-21; 199:8-200:3; 210:3-8; Dec., Ex. G at 90:12-91:15; 92:24-93:11; Ex. H at 9:15-10:9; Ex. CC at K860-61.

12. Between 1958-1963, Marvel did not withhold payroll taxes or any other taxes from its payments for the artwork it bought from Kirby. Ev. Dec., Ex. A at 12; Mor. Dec., Ex A at 8; Tob. Dec., Ex. E at 79:5-14; Ex. F at 15:24-16:24; Ex. L, at ¶ 13.

13. Between 1958-1963, Kirby did not receive any health benefits or insurance from Marvel, nor any other employment benefits such as vacation or sick pay. Ev. Dec., Ex. A at 12; Mor. Dec. Ex. A at 8; Tob. Dec., Ex. E at 79:18-25; Ex. F at 204:6-19; 204:24-205:15; Ex. L at ¶¶ 10-11.

14. Between 1958-1963, if artwork page(s) submitted by Kirby were rejected

by Marvel, Kirby was not compensated for the pages and his time and expense in creating the pages. Ev. Dec., Ex. A at 1-4, 12; Mor. Dec., Ex A at 3, 8-10; Ex. B; Tob Dec., Ex. B at 50:20-51:25; 61:24-62:9; Ex. C at 140:19-141:3; Ex. D at 89:13-92:5; 138:11-139:4; 178:5-13; 180:4-182:12; Ex. E at 71:17-72:7; 73:11-74:5; 76:25-77:6; 77:20-79:4; 103:7-105:17; Ex. F at 123:18-125:9; Ex. G at 57:19-58:21; 62:19-63:6; 234:12-235:5; 235::6-236:1; Ex. H at 37:6-19; Ex. I at 17:17-25; Ex. N, Ex. O at 71-74; Ex. P, Ex. Q; Ex. R; Ex. S.

15. Between 1958-1963, Kirby was not paid for submitted artwork Marvel requested him to redraw. Ev. Dec., Ex A at 12; Mor. Dec., Ex. A at 8-9; Tob Dec., Ex. B at 61:24-62:9; Ex C at 136:7-138:15; Ex. E at 76:25-77:6; 77:20-79:4; Ex. G at 57:18-58:21; 62:19-63:6; 234:12-236:1; Ex. H at 37:6-19; Ex. V at 396; Ex. Z.

16. Marvel was not legally obligated to purchase any of the artwork submitted by Kirby between 1958-1963. Ev. Dec., ¶¶ 17, 19-20; Ex A at 11-12; Ex. B; Ex. C; Mor. Dec., Ex. A at 8-10; Tob Dec., Ex. B at 56:2-57:19; 58:10-23; Ex. C at 23:4-24:4; 105:15-17; Ex. D at 178:5-13; Ex. E at 71:17-72:7; 72:22-73:8; 73:11-74:5; 76:25-79:4; Ex. F at 194: 11-21; 204:6-19; 204:24-205:15; 205:19-207:11; Ex. J at 256:25-257:25; Ex. V at 396, 407, 428; Ex. L at ¶¶ 1-4, 10, 11, 13.

17. Between 1958-1963, Kirby was free to, and in fact did, pitch and sell work to other publishers while he was selling work to Marvel, as did other freelance artists that worked with Marvel. Ev. Dec. ¶ 18; Mor. Dec., Ex. A at 9-10; Tob. Dec., Ex. D at 177:11-15; Ex. W at 5, 6, 18, 19, 21, 25, 55, 80-81, 84-85; Ex. X at 18462-18466; Ex. Y.

18. Marvel has no copies of any checks, dated between 1958 -1963, with legends on the back that were issued by Marvel to Kirby, or to any other freelancer, for submitted work. Tob Dec., Ex. L ¶¶ 2, 4.

19. The earliest checks to a freelancer with a legend on the back, produced by Marvel in this action, are from 1974, and the legend on such checks states, in part, that the artist is being paid “for my assignment to [Marvel] of any copyright,

trademark and any other rights in or related to the material, and including my assignment of any rights to renewal copyright,” and nowhere mentions the phrase “work for hire” or “work made for hire.” Tob. Dec., Ex. E at 100:21-101:9; Ex. J at 396:1-14; Ex. K at 232:5-10; Ex. L at ¶¶ 2, 4; Ex. AA at 14603; Ex. T.

20. The first check produced by Marvel with a legend, mentioning “work for hire” or “work made for hire,” is from 1986, after the explicit new “work for hire” provisions in section 101 of the Copyright Act of 1976 became effective on January 1, 1978. Tob Dec. Ex. BB.

21. Between 2006-2008, Marvel entered into a number of separate agreements with the Kirbys to purchase at a per-page rate unpublished artwork by Jack Kirby for a *Fantastic Four* story that Marvel had originally rejected, and various additional pages of rejected unpublished artwork by Kirby for *Thor*, *Fantastic Four* and *X-Men*. Mor. Dec., Ex. A at 3-4; Ex. B; Tob. Dec., Ex. D at 91:13-92:5; 138:11-139:4; Ex. P, Ex. Q; Ex. R; Ex. S.

Dated: February 25, 2011

Respectfully submitted,  
TOBEROFF & ASSOCIATES, P.C.

/s/ Marc Toberoff

Marc Toberoff (MT 4862)

Attorneys for defendants  
Lisa R. Kirby, Barbara J. Kirby, Neal L.  
Kirby and Susan M. Kirby

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that the foregoing was served electronically by the Court's ECF system and by first class mail on those parties not registered for ECF pursuant to the rules of this court.

Dated: February 25, 2011

TOBEROFF & ASSOCIATES, P.C.

/s/ Marc Toberoff

---

Marc Toberoff (MT 4862)

Attorneys for defendants

Lisa R. Kirby, Barbara J. Kirby, Neal L.  
Kirby and Susan M. Kirby