

Marc Toberoff (MT 4862)
TOBEROFF & ASSOCIATES, P.C.
2049 Century Park East, Suite 2720
Los Angeles, CA 90067
Tel: 310-246-3333

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

Defendants.

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

[Hon. Colleen McMahon]

[ECF Case]

**CONFIDENTIAL DECLARATION OF GENE COLAN IN SUPPORT OF
DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND DEFENDANTS'
OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

I, Gene Colan, hereby declare as follows:

1. I am familiar with the facts set forth below and make this declaration in support of defendants' motion for summary judgment and defendants' opposition to plaintiffs' motion for summary judgment. The facts set forth herein are known to me of my own personal firsthand knowledge and, if called as a witness, I could and would testify competently thereto under oath.

2. I have been a comic book artist for the past six decades. I have drawn all sorts of comic books – superhero, Westerns, horror and romance books. I am perhaps most well known for drawing the artwork for almost all of the *Daredevil* comic books from issue no. 20 in September 1966 through issue no. 100 in June 1973; for the entire 70-issue run of *The Tomb of Dracula* from April 1972 through August 1979, and for many issues of the *Howard the Duck* title, from issue no. 4 in July 1976 to issue no. 31 in May 1979.

3. In 2008, the Cartoon Art Museum in San Francisco honored me with the Sparky Award, named in honor of Peanuts creator Charles “Sparky” Schulz. In conjunction with the award, the museum presented the exhibit “*Colan: Visions of a Man without Fear*” from November 15, 2008 to March 15, 2009. The Comic Art Professional Society presented me with its *Sergio Award* in October of 2009. I also was inducted into the Will Eisner Comic Book Hall of Fame in 2005. I was also nominated in 1975 by the Academy of Comic Book Arts for the Shazam Award as Best Penciller (Dramatic Category); *The Tomb of Dracula* was also nominated that year for the Shazam Award for Best Continuing Feature. I also was nominated in 1979 and 1980 for the Eagle Award, given by comic book fans in the United Kingdom, for Favorite Comicbook Artist (US).

4. I know that Marvel preferred to purchase artwork from freelancers rather than to hire staff artists. I was hired in 1946 as a staff artist by Timely Comics which later became Atlas Comics and then Marvel Comics. While on staff, I drew *The Human*

Torch (July 1948), *Complete Mystery* comic book (August 1948), the gangster comic books *All True Crime Cases* (April 1948) and *Lawbreakers Always Lose* (Spring 1948), and other titles on an anonymous basis. But in the late 1940s, I and virtually all the other Timely staff artists were let go. After that, I sold artwork on a freelance basis to Timely, to National Comics, which later became DC Comics, and to other companies too.

5. To Timely/Marvel I sold artwork published in *Adventures into Terror* (August 1951 to March 1954), *Battle* (August 1952 to August 1958), *Battle Action* (August 1952 to August 1957), *Battleground* (May 1956 to September 1957), *Gunsmoke Western* (October 1956 to August 1957, September 1962 and May 1963), *Journey into Mystery* (March 1955, November 1956, June 1962 and July 1962), *Marines in Battle* (December 1955 to February 1956 and April 1957 to September 1958), *Strange Tales* (July 1952 to October 1952, May 1953 to March 1954, December 1956 to July 1957, February 1962 to November 1962), the *Sub-Mariner* feature in *Tales to Astonish* (February 1962 and August 1965 to November 1966), the *Iron Man* feature in *Tales of Suspense* (March 1963 and January 1966 to March 1968), and *Doctor Strange* (September 1968 to November 1969 and February 1975 to June 1977).

6. To National/DC I sold freelance artwork for many titles, including *Hopalong Cassidy* (February 1954 to April 1957), *All-American Men of War* (February 1953 to February 1954, March 1957 and November 1965 to February 1966), *Falling in Love* (February 1965 to November 1966), *Girls' Romances* (June 1964 to March 1967), *Our Army at War* (December 1952 to February 1954), and *Secret Hearts* (December 1963 to October 1967). I also sold artwork to such publishers as St. John Publishers, Charlton Comics and Dell Comics in the 1950's and 1960's.

7. After I had a falling out with Marvel editor Jim Shooter, I sold stories to DC Comics for *Batman* (October 1981 to September 1982), *Detective Comics* (January 1982 to October 1986), and *Wonder Woman* (February 1982 to July 1983).

8. I paid my own way as a freelancer. I did not work in Marvel's or DC's

offices, but out of my own space. I paid my own overhead, and I bought the art supplies with which I created my freelance artwork, and neither Marvel nor DC reimbursed me for any of these costs.

9. I did not have a written contract with Marvel until 1975. Before that in the 1950's and 1960's Marvel just paid me on a per-page basis for the artwork it accepted and purchased. On the occasions when Marvel requested that I change or redraw any pages, I did so in order that Marvel would accept the artwork, and without any additional compensation for my time. Marvel only paid for the final freelance work it accepted and purchased for publication and did not pay for rejected material or material it wanted you to revise.

10. In March 22, 1975 I entered into an employment agreement for the first time with Marvel, a true copy of which is attached as Exhibit "A." The employment agreement had a three year term, and would automatically be renewed afterwards year to year unless terminated by either party. In contrast to my prior open-ended relationship in which neither I nor Marvel were obligated to one another, in this employment agreement I was obligated to provide 396 pages of penciled artwork at approximately 33 pages per month, and I agreed not to provide any comic book or magazine material to anyone other than Marvel. Marvel was obligated to pay for this minimum supply of artwork on a bi-weekly basis at an agreed starting page rate of \$53, and for any pages which exceeded this minimum at the same rate. I was also eligible for and received health benefits under this agreement, unlike before.

11. Significantly, this agreement states that "WRITER/ARTIST will make all changes and rewrite/refrain all Material as reasonably required by the Publisher of Marvel without charge (that is, rewrites/redrawing and changes shall not constitute pages for purposes of computing re fee payable hereunder)." This carried forward Marvel's customary practice regarding redraws.

12. I didn't think that the artwork I created as a freelancer in the 1950's and

1960's could be called "work for hire." Nobody at Marvel ever told me that they considered my artwork to be "work for hire" in the 1950's or 1960's. At that time I understood that Marvel would own the artwork I submitted once they accepted it because I was selling it to Marvel. I remember that my Marvel checks in the 1960s had writing on the back, but this did not state that my artwork was "work for hire." It stated that I was granting or transferring all my rights in my artwork to Marvel.

13. Even as late as my 1975 agreement with Marvel, the agreement makes no mention of Marvel owning artwork as "work for hire." On the contrary, it states, like the language on the back of Marvel's checks, that the parties understanding is that "WRITER/ARTIST grants to Marvel the sole and exclusive right to" the artwork.

14. I remember that it was not until the late 1970's that the words "work for hire" and "work made for hire" were inserted in the statement on the back of Marvel's checks. I think Marvel began calling everything "work for hire" starting in the late 1970's. For instance in 1978, Marvel editor Jim Shooter insisted that everyone suddenly sign a form "agreement" issued by Marvel which said that all artwork and materials created in the past or in the future are to be considered a "work made for hire." I was required to sign the form if I wanted to continue to work with Marvel. Attached as Exhibit "B" is a true copy of the "work for hire" form I signed on May 30, 1978.

15. I also recall that Marvel suddenly began returning original freelance artwork in the late 1970's, early 1980's because, as I understood it, they were very concerned that they would otherwise owe a tremendous amount of New York sales tax on all the freelance artwork they had purchased over the years.

16. Because I had very little to show for my enormous creative contribution to Marvel since 1946, and no financial security whatsoever, not even a small pension, on April 28, 2008, I wrote a letter to Marvel's editor Joe Quesada requesting a substantial retirement package. My health was waning and I was in desperate need of financial aid. A true copy of this letter is attached as Exhibit "C." Marvel agreed to pay me only 5% of

the retirement sum I requested, and insisted that I must sign a lengthy additional agreement drafted by Marvel's attorneys, before it would contribute anything to my retirement needs. Even though I had not contested Marvel's ownership of all rights in my material, assigned to it so long ago, and even though I had signed Marvel's mandatory retroactive "work for hire" form in 1978 (Exhibit B); Marvel still found it necessary to repeat in this agreement that everything I had created since 1946, that Marvel published, was "work for hire." A copy of this agreement dated May 31, 2008 is attached hereto as Exhibit "D."

I declare under penalty of perjury that to the best of my knowledge the foregoing is true and correct.

Dated: March 12, 2011



Gene Colan