

In The
Supreme Court of the United States

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

Petitioners,

v.

MARVEL CHARACTERS, INCORPORATED,
MARVEL WORLDWIDE, INCORPORATED,
MVL RIGHTS, LLC, WALT DISNEY COMPANY,
MARVEL ENTERTAINMENT, INCORPORATED,

Respondents.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit**

**BRIEF OF AMICI CURIAE
MARK EVANIER, JOHN MORROW
AND PEN CENTER USA
IN SUPPORT OF PETITIONERS**

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INTERESTS OF AMICI CURIAE¹

Amici curiae Mark Evanier, John Morrow and PEN Center USA support Petitioner’s position in this case as the determination of the important issue presented – whether “work for hire” is applicable to an independent content creator under the 1909 Copyright Act – will have a broad and profound impact on nearly all artists, writers, and creators of comic books and other works, and their families. Amici submit this Brief in an effort to aid the Court by providing historical context and perspective on the work of Jack Kirby and the custom and practice in the comic book industry during the 1958-1963 period relevant to this case.

Mark Evanier has been involved in the comic book industry for over forty years as a writer, columnist and historian. Mr. Evanier has extensive knowledge of the work of Jack Kirby and the comic book industry in the time period relevant to this case. One of Mr. Evanier’s earliest jobs in the comic book industry was as an apprentice for Jack Kirby. Mr. Evanier has since written five books on the history of comic books, including *Kirby: King of Comics* (2008),

¹ Pursuant to Supreme Court Rule 37.6, counsel for amici certify that no counsel for a party authored this brief in whole or part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus made such a monetary contribution. The parties have been given at least ten days’ notice of amici’s intention to file this brief. Letters of consent are being filed with the Clerk of this Court.

the definitive biography of Jack Kirby and winner of both the prestigious Eisner and Harvey Awards, and *Mad Art* (2002), a history of *Mad* Magazine. As a comic book historian, Mr. Evanier has written about and acted as an advisor to most of the major comic book publishers, including Marvel, DC Comics, and Dark Horse Comics. Mr. Evanier serves as a moderator or panelist at numerous comic book industry events, including the Comic-Con International in San Diego, where he routinely interviews the comic book “greats.” For his efforts in recording and preserving the history of the comic book art form, Mr. Evanier received the esteemed Bob Clampett Humanitarian Award in 2001.

John Morrow’s experience in the comic book industry spans twenty years as a writer, archivist and publisher, and also has a great deal of knowledge of the work of Jack Kirby and the comic book industry in the relevant time frame. Mr. Morrow’s company, TwoMorrows, is widely recognized as a premier publisher of books and magazines regarding the history of comic books, including the Eisner Award-winning *Comic Book Artist*, covering the history of comic book creators, *Alter Ego*, focusing on the Golden and Silver Age of comics (1940s to 1960s), and *The Kirby Collector* and *The Collected Jack Kirby Collector*, regarding the work of Jack Kirby. Mr. Morrow has extensively researched Jack Kirby, amassing a wealth of archival material, and conducted dozens of interviews of leaders in the comic book business from the 1950s and 1960s. Mr. Morrow has also written

several introductions for Marvel's reprinting of classic comic book series by Jack Kirby, including *The Fantastic Four*, *The Mighty Thor*, *Nick Fury*, and *Captain America*.

PEN Center USA (PEN USA) is an organization of over 700 novelists, poets, essayists, translators, playwrights, screenwriters, teleplay writers, journalists, and editors. As part of International PEN, PEN USA is chartered to defend free and open communication within all nations and internationally. Each spring, the PEN World Voices Festival of International Literature showcases work of writers from around the world in a cross-cultural celebration of the written word. Chaired by Salman Rushdie, the Festival has featured such luminaries as Nadine Gordimer, Toni Morrison, Orhan Pamuk, Umberto Eco, Ian McEwan, and Mario Vargas Llosa. PEN USA encourages literacy and writing via diverse programs that defend freedom of speech, confer literary scholarships and awards, and enrich the writing community by encouraging participation from underrepresented groups. PEN USA is dedicated to supporting creators of literary culture, and it is in pursuit of this goal that PEN USA joins this brief as an *amicus*.



SUMMARY OF ARGUMENT

From its beginnings in the 1930s through the 1960s, the comic book business was very much a fly-by-night industry. Jack Kirby's career is emblematic

of its haphazard, un-businesslike nature during this period. Kirby (born Jacob Kurtzberg in 1917) began his career in the depths of the Great Depression, hauling his art portfolio to various publishers, newspaper syndicates, and animation companies in and around New York City. Kirby created or co-created many enormously popular characters and comics, including *Captain America*, *The Fantastic Four*, *The Mighty Thor*, *The Incredible Hulk*, *The Avengers*, *X-Men*, *Spider-Man*, *Sgt. Fury and His Howling Commandos*, and *Ant-Man*. However, due to the perilous financial condition of the comic book business in the late 1950s, artists such as Kirby were required to work from their homes as freelancers. Their material was purchased for publication at what is called the “page rate,” basically a standard rate for a page of printed material accepted for publication.

Kirby worked on his own as a freelancer, supervised himself, and did not create under the direction of Stan Lee or anyone else at Marvel. Kirby worked from his home, first in Long Island and later, in the late 1960s, in Southern California. Kirby set his own hours and working conditions, and paid his overhead and all expenses associated with his creations. He purchased his own art supplies, including paper, pencils, ink, pens, brushes, and other materials used to create a comic book story. As such, Kirby, not Marvel, took on the financial risk of creating Kirby’s works.

Beginning in the late 1950s, and during the period in question (1958-1963), Marvel sought to

drastically reduce its overhead and financial commitments. Artists like Kirby were not paid a salary by Marvel. Marvel purchased Kirby's artwork and story by the page on a piecework basis – again, at the “page rate” for each page accepted by Marvel for publication. If a page or story was rejected by Marvel, Kirby was not compensated for his work and personally withstood the financial loss.

Kirby sold his work product to Marvel, not his time or services. The page rate Kirby received was fixed and did not depend on the amount of time spent writing or illustrating the pages. If Marvel rejected pages and/or the concepts depicted, Kirby could and would take them to other publishers.

Marvel did not withhold payroll taxes or any other form of taxes from moneys paid to Kirby, nor did Kirby receive any health benefits, insurance, or any other traditional employment benefit, such as sick pay or vacation pay. As a direct result of the arrangement between Marvel and Jack Kirby, it is an understatement to say that Marvel prospered greatly from Jack's original creations.

It is extremely doubtful that freelancers like Jack Kirby, particularly between 1958 and 1963, had any understanding or intent that freelance material created at home on their own steam and their own dime, purchased after completion by the page if and only if such page was accepted for publication, was somehow Marvel's “work made for hire,” authored

and owned by the publisher from the moment the freelancer's pencil hit paper.



ARGUMENT

I. Jack Kirby's Business Relationship with Marvel Reflects a Highly Independent Freelance Creative Artist Selling Work in a Volatile Industry

A. The Comic Book Business Was Unpredictable; Publishers Cut Costs, Providing No Security for Freelancers

In 1939, Martin Goodman, a publisher of men's magazines, founded Marvel's predecessor, Timely Comics, to publish comics. The "comic book industry" grew out of the Great Depression and was hardly an industry at all, at the time serving primarily as a conduit to republish newspaper comic strips. When publishers such as Goodman could not acquire enough newspaper products to reprint, they acquired new product for publication from eager young artists at cut-rate prices. Comic books were considered the lowliest form of publishing in both cultural and business terms.

Goodman's relative, Stanley Lieber (a.k.a. "Stan Lee"), started in 1939 as an office boy at Timely Comics. In 1941, Goodman had Lee, then 18 years old, run his fledgling comic book business. They published comic books in all sorts of genres, from

Westerns and crime to romance, imitating whatever trend was popular at the moment.

In the mid-1940s, Timely moved to large offices on the 14th floor of the Empire State Building. Here, Timely maintained an in-house “bullpen” of staff artists creating comic book stories on salary. In late 1949, Goodman discovered a closet full of unused artwork, and as a result of this huge surplus of art, along with changes in New York employment tax laws, decided firing the entire bullpen of artists and using up the surplus art would be financially beneficial. Goodman only retained production assistants and editors as employees. Artists formerly employed in the Timely “bullpen,” such as Syd Shores, Mike Sekowsky, Joe Maneely, Dan DeCarlo, and Carl Burgos, suddenly found themselves freelance artists, working from home studios, creating characters and stories at their own expense.

Between 1935 and 1940, Jack Kirby worked in New York at the Max Fleischer animation studio, the Lincoln Features Syndicate, Universal Phoenix Syndicate, and Fox Comics, Inc. When he was employed as a staff artist, Kirby attempted to supplement his income during off-hours by selling freelance comic book work to other companies. While at Fox Comics, Kirby formed his famous partnership with Joe Simon, and together they created and sold comics material to several different publishers.

From 1940-41, Simon and Kirby worked as editors for Goodman at Timely, where they taught

young Stan Lee the editorial ropes. They soon left, however, accepting what they believed to be a better deal creating material for publication by DC Comics, while continuing to sell to other publishers. The entry of the United States into the Second World War, and Simon's and Kirby's military service, all but ended the team's collaboration with DC. After the war, Simon and Kirby moved on to create super-hero, adventure, crime and romance comics which they sold to various publishers, including Hillman Publications, Crestwood, Headline Publications, and Harvey Publications.

Goodman, meanwhile, was publishing every kind of comic book he could print, including westerns, romance, crime, war comics, horror stories, books featuring "funny animal" characters, and super-heroes. Some comic book titles lasted a few years. Others were cancelled after a few issues.

In 1954, Fredric Wertham's book *Seduction of the Innocent* accused comic books of poisoning the minds of America's youth. This led to Senate hearings, and the resulting public backlash brought the comic book business to the brink of ruin. Goodman did not cease publishing comic books but wound up losing his distribution channels. This resulted in another surplus of completed material, so to stay in business, Goodman had Lee inform all the artists (now freelancers) that, once again, he would not buy any work from them.

Kirby had work at the time, though not a significant amount. He (with some initial input by Simon) had created a successful new comic published by DC called *Challengers of the Unknown*, a superhero team many consider to be the predecessor of *The Fantastic Four* team. Kirby was also drawing and sometimes writing short mystery and ghost comics for publication by DC. With another writer, Dave Wood, Kirby created a syndicated newspaper strip called *Sky Masters*. Kirby had a business dispute with a DC editor, Jack Schiff, over *Sky Masters*, and soon discovered he was no longer welcome at DC. This created a financial crisis in the Kirby household, especially after *Sky Masters* folded.

In 1958, Timely, which by then was also going by the name Marvel Comics (and briefly Atlas Comics), published a very small number of titles and started to purchase freelance artwork from artists once the available surplus art was exhausted. Kirby was one of the first artists Stan Lee contacted. Though Goodman's company bought material for low page rates, Kirby produced as much as he could. Marvel/Atlas had virtually no staff other than Stan Lee, who acted as both the editor and art director, and production was limited to a handful of titles per month.

B. The “Marvel Method”: Using Freelance Artists to Plot and Draw Comic Book Stories to Reduce Costs

During this time period, Stan Lee and the freelance artists developed what became known as the

“Marvel Method,” both to relieve Lee of his heavy workload and to take advantage of the artists’ skills as storytellers. Normally at a company like DC Comics, a detailed, panel-to-panel script would be handed to an artist to literally “fill in.” The writer of the script would have little (usually no) contact with the artist. The writer employed by this type of company would create the entire plot and indicate in his script what happened in each panel and what the artist was to draw.

This was not the case at Marvel. Lee would simply talk to the artists about potential story ideas. Sometimes Lee would come up with the basic idea, sometimes the artist would come up with the idea, and sometimes the idea would be a collaborative effort. The artist was then expected to plot a detailed story as well as illustrate the story in panels.

Following these very informal meetings, the artist would return to his own studio, usually at home, and draw out the entire comic in pencil, deciding what the action should be in each panel and working out the actual storyline. These were decisions that had traditionally been made by the writer of the comic, not the artist.

As Stan Lee himself noted on many occasions, “plotting” with Kirby could often be accomplished in a matter of minutes, and in later years might be done via a brief phone call with Kirby telling Lee what he intended to provide for the next issue. With Kirby, Lee would frequently offer a just a bare-bones

concept, or the name of a character, and sometimes not even that. Kirby would plot and illustrate a story. As Kirby worked, he would not only draw out the story and invent new characters where needed, he would write extensive margin notes, including suggested captions and dialogue, so that when Lee dialogued the balloons, he would know what story points Kirby felt should be made in each panel. Lee would then dialogue the balloons based on Kirby's illustrated story, notes, suggestions and perhaps a brief conversation.

Even on comic book titles produced primarily by other artists, Kirby made important contributions, such as creating the cover illustration for Spider-Man's debut in *Amazing Fantasy* No. 15.

Kirby worked from his home in Long Island late into the night, not at Marvel's New York City offices. He went to Marvel's offices two or three times a month to simply drop off material. He was extremely independent; did not work from any written material supplied by Marvel, nor did he create material under any real direction or supervision by Marvel. In creating material, Kirby paid all his own expenses and was not reimbursed by Marvel. He periodically bought his own paper, pencils, pens, brushes, ink and other materials. Marvel did not pay Kirby any sort of salary, nor did Kirby receive any traditional employment benefits. The transaction was a straightforward purchase of finished material.

C. Freelancers Understood That Their Work Was Purchased and Assigned Not Owned at Inception as “Work for Hire”

Given the chaotic and depressed nature of the comic book industry during the late 1950s, Atlas/Marvel and others also rarely, if ever, wrote contracts with freelancers. Kirby did not have a written contract regarding the freelance artwork he sold to Marvel from 1958 through 1970, and certainly not in the 1958-1963 period at issue in this case.

Instead, Marvel at some point began placing legends with legal language on the back of checks provided to freelancers, such as Kirby, where the freelancer had to sign the back of the check in order to be paid. The language on the back of Marvel's freelance checks as late as 1974 and 1975 still included language of purchase and assignment, not language that the work is owned at the outset as “work made for hire,” e.g. “By endorsement of this check. I, the payee, acknowledge full payment for my employment by Magazine Management Company, Inc. and for my assignment to it of any copyright, trademark and any other rights in or related to the material and including my assignment of any rights to renewal copyright.” App.105.

The legends on the back of Marvel's checks to freelancers used the foregoing language of assignment or something similar until 1978, when the 1976 Copyright Act went into effect. Faced with the new copyright law's recitation of “work for hire,” Marvel

changed the legends on the back of its freelance checks to a “work for hire” acknowledgement. The 1987 checks produced by Marvel contain the following language: “By acceptance and endorsement of this check, payee acknowledges, a) full payment for payee’s employment by Marvel Entertainment Group, Inc., b) that all payee’s work has been within the scope of that employment, and c) that all payee’s works are and shall be considered as works made for hire, the property of Marvel Entertainment Group, Inc.” App.106. Again, artists were required to sign the back of the check in order to be paid.

Marvel had been purchased by Perfect Film and Chemical Corporation in 1968 (renamed Cadence Industries in 1973). Because of Marvel’s highly informal, if not haphazard, practices during the late 1950s and early 1960s, Cadence was concerned with first determining and then shoring up Marvel’s assets, including Marvel’s warehouse(s) full of original artwork. In the 1970s Cadence/Marvel started demanding that artists such as Jack Kirby sign agreements such as the 1972 Agreement assigning to Marvel all previous Kirby work published by Marvel. Ex. 17 at 1.A.(1). Similarly Cadence/Marvel sought to comply with the new Copyright Act’s explicit work-for-hire provisions by having freelancers sign “work-for-hire” releases for prior work long after such work had been created. Cadence was seeking to “clean up,” if not completely rewrite, Marvel’s past to protect what had become recognized as valuable intellectual property.

None of the relevant players involved in the comic book industry during this time period – not Goodman, Lee, or freelance artists such as Jack Kirby – would have considered this material to be “work made for hire,” owned by Marvel from the moment the work was created on the freelancer’s drawing table. In those instances where Marvel rejected the pages, freelancers like Kirby were not paid anything for their efforts or services. If Kirby redrew rejected material, he was not paid for the original page; he was paid for only the redrawn page, provided Marvel chose to buy the work. Freelancers like Kirby were free to take unused concepts they created while working on a Marvel project, or ones that were rejected, and reuse them for other freelance work for other companies. In fact, Kirby amassed a sizeable collection of pages while working on Marvel projects at home in the 1960s, keeping them for possible future use. Kirby developed a new version of *Captain America* that Marvel rejected, and Kirby later used this artwork to create *Captain Glory*, published by Topps. Marvel never objected, even though under Marvel’s new theory the company would have owned this Kirby creation as “work for hire.” Additionally, in 1969, an independent company licensed the rights from Marvel to produce merchandise featuring Marvel’s characters, and under the name “Marvelmania International,” paid Kirby separately for the use of several of his rejected pages from Marvel projects, plus some personal artwork, and published the material in the *Jack Kirby Portfolio* sold by Marvel to comic book fans. One of those rejected drawings was

reworked later and used as the cover of Kirby's self-published *GODS* portfolio.

II. Kirby's Independently Designed Seminal Creations

Jack Kirby was unquestionably the dynamic creative force behind what are considered to this day to be Marvel's most iconic superheroes. His work was instrumental in Marvel's resurgence in the early 1960s. These successes include *The Fantastic Four*, *Captain America*, *the X-Men*, *The Incredible Hulk*, *The Mighty Thor* *the Avengers*, *Ant-Man*, *Sgt. Fury and His Howling Commandos*, and many others. These works all contain the markings of his fertile creative mind and fascination with science, science fiction, astronomy, mythology and religion. Kirby created the iconic "look" of these characters, which have largely remained unchanged to this day, and would often work on his own to *both* plot and draw the original storylines of these comics. In addition to the main characters, Kirby created many of the supporting characters (*e.g.*, new villains like *Galactus* and *Dr. Doom*) appearing in such comics. Kirby even played a part in the creation of the Spider-Man character, with artist Steve Ditko "taking over" the comic from Kirby.

A. The Fantastic Four

Martin Goodman and Marvel had a reputation for imitating successful comics at other companies.

Goodman wanted Lee to publish a superhero team book to compete with DC Comics' *Justice League of America*. Lee and Kirby met and bounced ideas off each other. Lee describes the process himself in interviews and in published accounts such as his introductions in books such as *Origins of Marvel Comics* (1974) and *Son of Origins of Marvel Comics* (1975). In all these accounts, new comics were always created in joint "bull" sessions with the artist, usually Kirby.

Kirby thereafter drew the first issue of *The Fantastic Four*, and Lee dialogued the story. Many view *The Fantastic Four* as a descendent of Kirby's *Challengers of the Unknown* due to parallels between the works, particularly in a story that first appeared in *Challengers of the Unknown* #2 (Aug./Sept. 1958), several years before the debut of the *Fantastic Four* in November 1961. In the *Challengers of the Unknown* #2 story, following a failed space flight similar to the failed space flight in the later *Fantastic Four* #1, one of the *Challengers* acquires powers similar to those of the *Fantastic Four*: the ability to control and shoot flames, superhuman strength, and the power to turn invisible. The members of the *Challengers* also had personality traits similar to the *Fantastic Four*. Pilot "Ace" Morgan, like the *Fantastic Four*'s Reed Richards, was the decisive leader of his group. "Rocky" Ryan, like Benjamin Grimm, aka "The Thing," was the group's strongman. Daredevil "Red" Ryan was the resident firebrand, much like Johnny Storm. "Prof" Haley was, like Sue Storm, the bland

and nondescript member of the group. The *Challengers* team, like the *Fantastic Four*, confronted science fiction enemies in a wide variety of fantastic settings.

At Kirby's peak in the early and mid-1960s, the *Fantastic Four* comic book introduced dozens of new and imaginative characters, such as Dr. Doom, Alicia Masters, The Watcher, The Inhumans, The Black Panther, Galactus, The Silver Surfer, The Frightful Four, The Skrulls and many more. Many of these characters spun off into their own series; others reappeared time and again, not only in *Fantastic Four* but in other Marvel comics. Tellingly, after Kirby became disenchanted with Marvel and contemplated working with DC, the *Fantastic Four* ceased offering notable new characters.

B. The Mighty Thor

Jack Kirby was known to be very keen on mythology, particularly Norse mythology. In 1942, Kirby created a Thor-like character in a story he created with Joe Simon – “Villain from Valhalla,” published in May 1942 in DC Comics' *Adventure Comics* #75. Kirby thereafter included Thor in DC's *Tales of the Unexpected* #16, published in August 1957, where Thor sported a horned helmet and wielded a magic hammer.

In contrast, at no time before or after the appearance in 1962 of Marvel's *Thor* in *Journey into Mystery* #83 (August 1962) did Stan Lee, or his brother Larry Lieber, the credited “writer,” express any

interest in Norse mythology, or in using mythological gods as comic book characters. Kirby's lifelong interest in mythology continued after the creation of Thor when, working for DC Comics again in the 1970s, he created his own pantheon of mythological deities in his *New Gods* comic book and his "Fourth World" saga.

In a 1998 interview, Stan Lee was asked about the mythology-based "Tales of Asgard" *Thor* stories. Lee replied, ". . . most of those were dreamed up by Jack because he did a lot of research on Norse gods . . . more than I did." There is no doubt that *The Mighty Thor* was a Jack Kirby creation.

C. Spider-Man

Jack Kirby was also known to have been involved in the original creation of *Spider-Man*, based upon a character called *The Fly* that Simon and Kirby had created in the late 1950s, which was in turn based on an earlier character called *The Silver Spider*. Kirby originally drew the first five pages of the initial *Spider-Man* story, which like *The Fly* was about a young orphan who with the aid of a magic ring transformed himself into a superhero. Lee rejected Kirby's story, and then asked Steve Ditko to draw the first *Spider-Man* story instead of Kirby. Interestingly, Lee did not use Ditko's cover; Jack Kirby produced the cover of the first Spider-Man story published in *Amazing Fantasy* #15 (August 1962). While Kirby

was paid for this cover, he was not paid for the five Spider-Man pages that Marvel rejected.

D. Sgt. Fury and His Howling Commandos

In an interview conducted for the magazine, *Jack Kirby Collector* #25 (August 1999), artist John Severin, who had worked with Timely and Lee, recalled a meeting with Jack Kirby in the late 1950s. Severin related the following, which perfectly describes the concept of Sgt. Fury:

Jack wanted to know if I'd be interested in syndication [of a newspaper comic strip]. He said we could be partners on a script idea he had. The story would be set in Europe during WWII; the hero would be a tough, cigar-smoking Sergeant with a squad of oddball G.I.s – sort of an adult Boy Commandos. Like so many other grand decisions I have made in comics, I peered through the cigar smoke and told him I really wasn't interested in newspaper strips. We finished cigars and coffee and Jack left, heading towards Marvel and Stan Lee.

Prior to the debut of *The Fantastic Four*, Marvel published what are considered within the comics industry to be derivative comics of little note or originality (with the exception of *Captain America*, created by Simon and Kirby and published in 1941). *The Fantastic Four*, *The Incredible Hulk*, *The Mighty Thor*, *X-Men*, *Ant-Man*, *Sgt. Fury and His Howling Commandos* and *The Avengers* were all created or

co-created by Kirby or jointly created by Kirby and Lee. Prior to 1958, Marvel is not considered, to those familiar with the history of comic books, to have produced any significant original creations, while during this time period, Kirby developed a continuous string of creative and financial successes including *Captain America*, *Boy Commandos*, *Sandman*, *the Newsboy Legion*, and the *Fly*. Kirby and Joe Simon also pioneered the genre of Romance comics, which in the late 1940s and 1950s were selling in the millions, sparking imitators throughout the comics field. Those knowledgeable in the comic book industry recognize that Marvel's editor, Lee can boast no notable original comics creations once Kirby stopped selling to Marvel in 1970, while Kirby went on to create numerous new concepts and characters which are major titles at DC Comics today, such as the *New Gods*, *Darkseid*, *Mister Miracle*, *Kamandi*, *OMAC*, *the Demon*, and many others.

III. The 1980s “Return of Original Artwork” Fiasco

Marvel trailed other comic book publishers, particularly its chief rival DC Comics, in returning original artwork to freelance artists such as Jack Kirby. The reasons are several, but boil down to primarily two: fear that they would owe New York sales tax and insecurities about ownership. Marvel's new corporate parent, Perfect Film, which became Cadence, had concerns about Marvel's highly informal business practices in the 1950s and 1960s and

how these practices affected their ownership in what had become very valuable properties. Coinciding with the new work-for-hire provisions under the 1976 Copyright Act, Perfect Film/Cadence “rewrote” Marvel’s past in an apparent effort to protect its interests.

As such artwork began to fetch considerable sums in the 1970s, artists began demanding the return of their artwork. DC Comics capitulated, publicly stating that the company had no legal claim to the artwork. Initially, Marvel refused to return artwork, but changed course in the mid-1970s and began returning then-current artwork. By the late 1970s Marvel began returning older artwork from the 1960s, provided the recipients signed releases prepared by Marvel re-characterizing their artwork as “work made for hire.” Marvel thus embarked on a campaign to retroactively force purchases and assignments of rights to older freelance material into its new “work for hire” mold.

As Jack Kirby was behind most of Marvel’s most famous characters, he suffered the brunt of these efforts for years. Like many other freelancers, Kirby had requested the return of his artwork to provide his family with some form of security. Whereas other artists had to sign a single-page release to get their artwork back, Marvel provided Kirby with a much more onerous four-page document. The Kirby release was apparently a result of Marvel’s heightened concerns with respect to Kirby’s numerous, and now famous, creations. Due to a public outcry in support of Kirby, Marvel backed down somewhat, but Kirby

was still required to sign Marvel's "work for hire" release before Marvel returned any of Kirby's artwork to him in 1987.

* * * *

Marvel is in many ways "the house that Jack built." With little or no financial security, the prolific Kirby created a wealth of material featuring novel storylines and characters, while Marvel alone has reaped the benefits of Jack Kirby's most valuable creations. Kirby worked from the basement of his own home and set his own hours. He did not receive any of the benefits, security or guarantees of employment in producing what are considered to be seminal characters and stories. He continually faced the risk that Marvel, at its sole discretion, could reject his work without payment for his investment of time and money. The only contemporaneous agreement Marvel had with Kirby consisted of a legend Marvel placed on the back of its checks with express copyright assignment language, a tactic that forced him to sign his name in order to get paid – at the page rate – for his creations. A 1972 agreement was their first formal agreement, again expressly assigning to Marvel copyrights to Kirby's works, published by Marvel ten years earlier.

Decades after the success of the key Kirby characters, Marvel, under its new corporate parents, Perfect Film/Cadence, attempted to "clean up" Marvel's claims to what had become comic book franchises, effectively by re-writing history. *Amici* believe

that Marvel is engaging in the same revisionist history today as the Kirby family members seek to avail themselves of their termination rights pursuant to the Copyright Act.



CONCLUSION

For the foregoing reasons, as well as for the reasons stated in the petition, the petition for writ of certiorari should be granted.

Respectfully submitted,
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June 13, 2014