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Article 3

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CRISES AND COMPULSORY LICENSES: CRAFTING A MORE EQUITABLE WORK-FOR-HIRE REGIME FOR COMIC BOOK CREATORS

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INTRODUCTION

People love superheroes.[1] Characters that once occupied a niche market for children and serious comic book collectors have recently enjoyed an explosion in mainstream popularity.[2] In both 2017 and 2018, seven of the top twenty grossing films in the United States were based on superheroes published by either Marvel Comics ("Marvel") or D.C. Comics ("D.C.").[3] While these superpowered adventurers have attained widespread popularity in films and on television, their native environment remains the monthly[4] comic book, in which their serialized exploits have run

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1 Webster's dictionary defines "superhero" as "a fictional hero having extraordinary or super human powers." *Superhero*, MERRIAM WEBSTER, https://www.merriam-webster.com/dictionary/superhero (last visited Dec. 12, 2019). While uses of the term may vary, for the scope of this discussion the phrase will refer primarily to the fictional costumed adventurers who adorn the pages of Marvel and D.C. Comics, as well as their accompanying extensions into other media, such as film and television.

2 *See* JON MORRIS, THE LEAGUE OF REGRETTABLE SUPERHEROES 8 (2015) ("Contemporary culture has embraced superheroes in a major way. Hardly a month goes by without an announcement about the release of a new blockbuster superhero movie. Superhero television shows are all over the airwaves…. Superheroes populate our video games, advertising, clothing, and…even home furnishings.").

3 *See 2018 Domestic Grosses*, BOX OFFICE MOJO, https://www.boxofficemojo.com/yearly/chart/?yr=2018&p=.htm (last visited Oct. 19, 2019); *2017 Domestic Grosses*, BOX OFFICE MOJO, https://www.boxofficemojo.com/yearly/chart/?yr=2017&p=.htm (last visited Oct. 19, 2019).

4 Comic book stories are generally published in monthly installments sold predominantly in comic book stores. Periodic collections of these monthly issues are published in bound editions and are often sold in general book stores. *See* Nathan Chandler, *How*

continuously for, in some cases, more than eighty years.[5]

Although the comic book medium includes a wide variety of storytelling genres, superheroes dominate the format.[6] In 2018, for example, 230 of the top 250 comics sold on the direct market were superhero titles.[7] The comic book industry is dominated by Marvel and D.C. Comics, which are owned, respectively, by Disney and WarnerMedia.[8] Between them, the two publishers accounted for approximately sixty-eight percent of the market share of comic books sold in 2018,[9] with most of their titles focusing on superheroes.

Notably, D.C. and Marvel Comics rely heavily on characters created many decades ago. Of the 200 highest-selling monthly comic books in 2018, 171 starred characters were created before the 1980s.[10] Of those, 59 were created in the 1930s or 1940s, and 102 were created in the 1960s.[11] Including characters created during or after the 1980s, but based on or derived from characters created before that period, the total rises to 191.[12] The 2018 top monthly sales charts include series starring only two D.C. or Marvel characters who were created after the 1970s and are not derivative of

Graphic Novels Work, HOW STUFF WORKS, https://entertainment.howstuffworks.com/arts/comic-books/graphic-novel.htm (last visited Jan. 9, 2020).

5 Superman stories have been published in *Action Comics* since the first issue of that series in 1938. *See* Dave Buesing, *Where to Start With D.C. Comics in 2020*, COMIC BOOK HERALD (Jan. 3, 2020), https://www.comicbookherald.com/where-to-start-with-dc-comics/.

6 *See* John Jackson Miller, *2018 Comic Book Sales to Comic Shops,* COMICHRON, https://www.comichron.com/monthlycomicssales/2018.html (last visited Oct. 20, 2019).

7 *See id.* Direct Market sales represent the number of comics sold in North America directly to comic book stores by Diamond Distributors which, until 2020, had exclusive distribution deals with all major comic book publishers. *See* Richard Pulfer, *Just What is the Direct Market in Comics and Where Did It Come From?* SCREENRANT (Apr. 13, 2020), https://screenrant.com/direct-market-comic-book-industry/; Nicole Drum, *What DC Comics Cutting Ties With Diamond Means for the Comics Direct Market*, COMICBOOK (June 16, 2020, 12:27 AM), https://comicbook.com/comics/news/dc-comics-diamond-distribution-split-direct-market-impact/.

8 Warner is in turn owned by AT&T, which purchased it in 2018. *See* Diane Bartz and David Shepardson, *AT&T closes $85 Billion Deal for Time Warner*, REUTERS (June 14, 2018, 5:28 PM), https://www.reuters.com/article/us-time-warner-m-a-at-t/att-closes-85-billion-deal-for-time-warner-idUSKBN1JA36U.

9 *See* Rich Johnston, *2018 Direct Market Sales Up On 2017 – By Over Half of One Percent,* BLEEDING COOL (Jan. 16, 2019), https://www.bleedingcool.com/2019/01/16/2018-direct-market-comics-sales-2017/.

10 *See* Miller, *supra* note 6. Ensemble books that feature a team of characters were counted for the purposes of this paper as of the date the team first appeared, even if it might contain characters created more recently.

11 *See id.*

12 *See id.* Such characters would include, for example, Venom, who was introduced in the 1990s as an offshoot of Spider-Man.

earlier characters—Deadpool and Domino.[13]

Storylines also frequently rely on older narratives. D.C., for example, has re-started its continuity[14] on multiple occasions, relying on crossover events—limited series featuring characters from across its publishing line—to create a new start from which characters' stories can be re-told from the beginning.[15] These crossovers, often containing the term "Crisis" in the title, tend to build off of each other, with each growing more complicated despite ultimately returning the company's best-known characters to a state from which their origins and best-known adventures can be re-told.[16]

Crossover "event" series, such as these *Crisis* books, have become increasingly prevalent in recent years.[17] "Crossovers reorganize a company's fictional universe, revise heroes' and villains' origin stories…and meditate on the cultural and personal relevance of the kinds of heroic stories that mainstream fantasy comics traffic in," Ken Parille writes for *The Comics Journal*.[18] "To both widen and close the loop of meta-circularity, current events typically evoke past ones."[19] Some fans have used the term "event fatigue" to voice their frustration of the cycle of heavily marketed stories that lack creativity.[20]

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13 Both were introduced in 1991. *See id*; *see also* Fabian Nicieza & Rob Liefeld, NEW MUTANTS, 98 (Marvel Comics 1991).

14 "Continuity" in comics refers to the interconnectedness of the stories in a particular publishing line over time, and the extent to which events reflected in one book are consistent with another, even if the latter were published years or even decades later. *See* GRANT MORRISON, SUPERGODS: WHAT MASKED VIGILANTES, MIRACULOUS MUTANTS, AND A SUN GOD FROM SMALLVILLE CAN TEACH US ABOUT BEING HUMAN 114 (2011). ("D.C.'s incoherent origins formed an archipelago of island concepts that were slowly bolted together to create a mega-continuity involving multiple parallel worlds …. Marvel improved on the formula by taking us on human journeys that could last as long as our own lives…where everything changed but always wound up in the same place.").

15 *See* Tom Bondurant, *A Brief History of Time: Unpacking DC's Reboots, Relaunches [and] Retcons*, CBR (June 7, 2016), https://www.cbr.com/a-brief-history-of-time-unpacking-dcs-reboots-relaunches-retcons/.

16 *See id.* In 1986, the series *Crisis on Infinite Earths* "rebooted" D.C.'s complicated continuity, with many of its characters, including Superman and Wonder Woman, starting over from scratch. Similar reboots have followed, including 2006's *Infinite Crisis* in which the events of the 1986 series were reexplored in a way that again altered D.C.'s continuity. *Flashpoint*, from 2011, yet again relaunched D.C.'s continuity, though threads of the previous continuities have since been reintroduced. *See id.*

17 *See* Ken Parille, *Everything Sells Everything*, THE COMICS JOURNAL (Oct. 19, 2017), http://www.tcj.com/everything-sells-everything/.

18 *Id.*

19 *Id.*

20 At the onset of Marvel's *Secret Empire* event, fan Paul Lister wrote, "readers just weren't ready or interested in being thrust into another event comic. With so many events

The lack of new characters and storylines in D.C. and Marvel comics can be attributed in part to the reluctance of creators to introduce new characters and ideas out of a fear that they will not share in the success of their contributions.[21] The employment contracts of most comic book creators are legally known as works-for-hire: creators[22] work for a publishing company with the understanding that the company will own the intellectual property in the resulting output.[23] In a work-for-hire agreement, the entity for whom the work is produced is considered the author, rather than the individual or individuals who actually created the work.[24]

While creators sometimes receive modest royalties for income derived from their works, such royalties are based on whatever contracts are established between the company and the creator, rather than on any legal requirement.[25] According to comic writer Mark Waid, the standard royalties received by comic creators are relatively small—"enough for a nice meal every few months."[26] Yet successful comic book properties can be worth millions. In 2017, for example, Mark Millar, a comic writer who eschewed Marvel and D.C. to develop his own work, sold the television and film rights to his creations to Netflix for $31 million.[27] Such a deal would be virtually unheard of for a writer who worked for Marvel or D.C.: because those companies are legally the authors of the

in the last decade, it was bound to feel repetitive—*Secret Invasion* just wasn't *that* long ago." Paul Lister, *Marvel Has an Event-Fatigue Problem*, MEDIUM (Oct 2, 2017), https://medium.com/panel-frame/marvel-has-an-event-fatigue-problem-12c42cb8ca52.

21 *See* Aaron Couch, *Marvel Legend Reveals What Stan Lee Initially 'Hated' About 'Age of Ultron' Breakout*, HOLLYWOOD REPORTER (May 1, 2015, 6:00 AM), https://www.hollywoodreporter.com/heat-vision/age-ultron-creator-roy-thomas-791320.

22 For the purposes of this discussion, the term "creator" will be used to refer collectively to the writers and artists who generally work in a two-person team to develop the bulk of any particular comic book.

23 *See* Mark Waid, *How DC Contracts Work*, THRILLBENT (June 21, 2013), http://thrillbent.com/blog/how-dc-contracts-work/.

24 *See* Lydia Pallas Loren, *Renegotiating the Copyright Deal in the Shadow of the "Inalienable" Right to Terminate*, 62 FLA. L. REV. 1330, 1339 (2010). The work-for-hire doctrine is distinct from a transfer of copyright ownership, in which the author creates the work on their own but later assigns the rights of it to another party. *See id.*

25 *See* Waid, *supra* note 23.

26 *Id.*

27 *See* NETFLIX, *Netflix Acquires Millarworld* (Aug. 7, 2017), https://media.netflix.com/en/press-releases/netflix-acquires-millarworld-1; Rich Johnston, *How Much Did Mark Millar Sell Millarworld to Netflix For?*, BLEEDING COOL (Oct. 11, 2019), https://www.bleedingcool.com/2019/10/11/how-much-did-mark-millar-sell-millarworld-to-netflix-for/ [hereinafter Johnston, *Millarworld*].

work prepared for them, any payments the companies make to creators for the use of their work in other media are optional and increasingly rare.[28] Yet the two companies still represent the bulk of the comic industry,[29] and most creators, unlike Millar, are unable to establish enough of a reputation outside Marvel or D.C. to similarly interest a media company in purchasing their oeuvre the way Netflix did with Millar's.[30]

The history of comic books is plagued by notable instances of creators being excluded from the market value of their work. This tradition dates back to the creation of Superman, a character who was so successful that his exploits essentially led to the development of the modern comic book industry.[31] Superman's creators, Jerry Siegel and Joe Shuster, sold the rights to the character to D.C. Comics in 1938 for a mere $130 before Superman ever appeared in print.[32] Nobody at the time could have known how popular Superman would become or that a media empire would be built around him that would survive more than eighty years later. More than thirty years after they sold Superman, long after the character had become a household name, Siegel and Shuster were "nearly destitute and worried about how they will support themselves in their old age."[33] In 1975, as a result of the bad publicity caused by the plight of Superman's creators, D.C. began paying the duo "modest annual payments."[34]

Despite those payments, the notorious story of Siegel and Shuster, along with other creators who did not share in the wealth derived from their works, disincentivized later comic book creators

28 *See* Waid, *supra* note 23.

29 *See* Miller, *supra* note 6.

30 *See* Kiel Phegley, *CREATORS ON CREATOR-OWNED: Kirkman, Millar [and] Niles*. CBR (July 5, 2012), https://www.cbr.com/creators-on-creator-owned-kirkman-millar-niles/. Millar concedes that had he not worked extensively for Marvel, there would have been no eventual audience for his creator-owned work. *See id.*

31 *See* MORRISON, *supra* note 14, at 12, 15.

32 *See* Siegel v. Warner Bros. Entertainment, 542 F.Supp.2d 1098, 1107 (C.D. Calif. 2008). Unlike most modern Superheroes, Superman was not created at the behest of D.C. but rather independently by Siegel and Shuster, who then transferred the ownership rights to D.C. *See id*. In the ensuing years, it has become standard industry practice for comic companies to instead establish all work they publish as works-for-hire when the work is commissioned. *See generally* Waid, *supra* note 23.

33 Mary Breasted, "Superman's Creators, Nearly Destitute, Invoke His Spirit," NEW YORK TIMES (Nov. 22, 1975), https://www.nytimes.com/1975/11/22/archives/supermans-creators-nearly-destitute-invoke-his-spirit.html.

34 *See Siegel*, 542 F.Supp.2d at 1138. D.C. noted that it had "no legal obligation" to make the payments, but did so out of "a moral obligation." *Id.*

from developing innovative new works. "I knew I wouldn't own any of it," Roy Thomas, a prolific writer for Marvel in the 1970s, said of his work.[35] "I accepted the work for hire, and as a result, I didn't want to create characters that much because I knew I would get resentful if they ever made movies and TV shows and merchandising out of it that I didn't get money and credit for."[36]

Yet one of the central purposes of copyright law—of allowing an individual to have a creative and financial monopoly on their own artistic expression—is to incentivize creativity and new ideas by rewarding those who develop them.[37] The kinds of private contracts used in the comic industry have led to exactly the opposite result.

Congress has acted on several occasions to remedy such disincentives: most notably, the Copyright Act of 1976 included a provision that allowed creators or their heirs to terminate a transfer of ownership after several decades, restoring ownership to the original creators.[38] However, the termination of transfer regime failed to achieve its goal in the comic book industry; in several high-profile instances, creators (or their heirs) attempting to assert their termination rights found themselves thwarted by courts for various reasons.[39]

Congress should act again to address the unique needs of the comic book industry and to foster a more equitable process of paying creators for their work. An industry-specific solution is required because comic books have proven to be *sui generis*; unlike most other works of art, Marvel and D.C. have been telling continuous, serialized stories that involve long and interlocking elements that have built on each other for decades.[40] Reverting the rights of such works back to creators would be untenable in the industry, as would strengthening the termination-of-transfer

35 *See* Couch, *supra* note 21.

36 *Id.*

37 *See* Harper & Row, Pubs., Inc. v. Nation Enters., 471 U.S. 539, 558 (1985) ("[T]he Framers intended copyright itself to be the engine of free expression. By establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas."). *See also* Loren, *supra* note 24, at 1349 ("Fundamentally, copyright protection in the United States is designed to provide an incentive for authors to create and disseminate new works of authorship to achieve progress in knowledge and learning.").

38 *See* 3 David Nimmer, *Nimmer on Copyright* § 11.01 (2020); 17 U.S.C. §§ 203, 304(c).

39 *See* discussion *infra* Part II-B.

40 *See* MORRISON, *supra* note 14, at 118.

protections; the inherently derivative nature of the works—the way each builds on the last—depends on the publishers having access to use characters as they wish.[41]

Yet the rationale behind termination-of-transfer—that the uncertainty of a creation's success puts authors in a poor bargaining position[42]—remains strong, particularly as regards comic book characters. The characters and concepts developed in comic books are particularly prone to becoming wildly successful in mass media, which is often accompanied by lucrative profits in ancillary merchandise.[43] Such success, however, is far from certain; for every popular hero of the past stands a litany of failures.[44] The negotiation of a fair deal is therefore difficult for creators and publishers alike. Writers and artists—particularly ones trying to break into the industry—are not in the position to demand a royalty for an unproven work. Publishers, for their part, face similar uncertainty in deciding whether it is worth paying a creator a premium before a work is published.

This Note proposes a new system of mandatory royalty payments to ensure just compensation for comic book creators who deliver works-for-hire. A procedure should be developed to ascertain the value of a property after a certain amount of time has passed, calculate which creators' work substantially contributed to that value and to what degree, and, finally, require a mandatory royalty to those creators.

Part I of this Note details the inequities that gave rise to the creator's rights movement in the comic book industry. Part II discusses the development and rationale of termination of transfer and its ultimate failure to serve comic book creators. Part III proposes extending a mandatory royalty to creators based on the calculated value of the properties they contribute.

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41 *See id.*

42 *See* H.R. Rep. No. 94-1476, at 124 (1976).

43 *See 'Avengers' Bulking Up $6 Billion Marvel Licensing Machine,* ADAGE (May 4, 2012, 1:49 PM), https://adage.com/article/media/avengers-bulking-6-billion-marvel-licensing-machine/234572.

44 *See* MORRIS, *supra* note 2, at 8 ("[N]ot every Spandex-clad do-gooder manages to make the big time. From the very origins of the genre…the family tree of costumed crimefighters includes hundreds of third-stringers and Z-listers: near-misses, almost-weres, mighta-beens, nice tries, weirdos, oddballs, freaks, and even the occasional innovative idea that was simply ahead of its time.").

I. THE HISTORY OF CREATOR ISSUES IN THE COMIC BOOK INDUSTRY

Most of the superheroes who appear in comic books today were created decades ago. The treatment of the writers and artists who created those characters has led to a ripple effect in which later generations have eschewed creating new works in order to avoid suffering similar inequities. The first part of this section will discuss the rise of the industry from the 1930s through the 1960s. The second will detail the injustices suffered by early creators and evince how their treatment has led to a dearth of new ideas in the industry.

A. The Outsized Contribution of the Golden and Silver Ages to the Superhero Genre

The superhero genre, as conceived in popular culture today, was largely born in June of 1938 when Superman debuted in *Action Comics # 1*, published by D.C. Comics.[45] The character birthed something of a revolution in popular culture: a do-gooding "champion of the oppressed," Superman brought justice at the height of the Great Depression to slumlords, overbearing mine owners, and war profiteers.[46] "In Superman, some of the loftiest aspirations of our species came hurtling down from imagination's bright heaven to collide with the lowest form of entertainment, and from their union something powerful and resonant was born, albeit in its underwear," comic creator Grant Morrison wrote in his book *Supergods*.[47]

Superman was also profitable. The character was "as recognizable as Micky Mouse, Charlie Chaplin, or Santa Claus. He was immediately intriguing, immediately marketable."[48] Within several years of his debut, Superman was so successful that he starred in three regularly published comic books, appeared on his own radio

45 *See* MORRISON, *supra* note 14, at 3-4.
46 *See id.* at 15.
47 *See id.*
48 *Id.*

program, and was featured on a wide variety of merchandise, including postage stamps, greeting cards, gum, and board games.[49] Superman starred in movie serials beginning in 1948 and a successful television series in the 1950s.[50]

Following the initial success of Superman, hundreds of other costumed adventurers began appearing in comic books, many of whom, including Batman, Wonder Woman, and Captain America, remain popular today.[51] This initial wave of superheroes fueled what is known as the "Golden Age" of comic books.[52] The popularity of superhero comics waned for various reasons in the 1950s,[53] but in the early 1960s, a plethora of new characters helped prompt a rebirth of the industry.[54] This era, known as the "Silver Age," was driven in large part by the co-creations of writer Stan Lee and artist Jack Kirby for Marvel comics.[55] These characters included the Fantastic Four, Thor, the Hulk, the X-Men, the Black Panther, the Silver Surfer, and others.[56] D.C. characters saw a resurgence during this period as well, driven by the success of the *Batman* television series in 1966.[57]

With a handful of notable exceptions, the superheroes from these eras remain the driving forces in the genre today.[58] Although new writers have added elements to each character, such as retroactively amended origins, supporting characters, and altered

49 *See id.* at 11.

50 *See* Nick Schager, *Superman: The Onscreen History*, ESQUIRE (June 14, 2013), https://www.esquire.com/entertainment/books/a23078/superman-movies-tv-history/. In 1978, the popularity of Superman reached new levels with an eponymously-titled major-budget film that would have a lasting influence on the presence of superheroes in the motion picture industry. *See* Richard Newby, *Why 'Superman' Is So Hard to Leave in the Past*, HOLLYWOOD REPORTER (Dec. 14, 2018 11:00 AM), https://www.hollywoodreporter.com/heat-vision/why-christopher-reeves-superman-is-hard-forget-1169350.

51 *See The Golden Age of Comics*, PBS: THE HISTORY DETECTIVES, https://www.pbs.org/opb/historydetectives/feature/the-golden-age-of-comics/ (last visited Jan. 31, 2021).

52 *See id.*

53 In large part because comics gained a negative reputation after psychiatrist Fredric Wertham and his book *Seduction of the Innocent* "blamed…comics and their creators for every social ill to afflict America's children." *See* MORRISON, *supra* note 14, at 54.

54 *See id.* at 90, 94-95.

55 *See id.* at 90.

56 *See id.*

57 *See id.* at 105.

58 *See* Miller, *supra* note 6.

superpowers, much of what is featured in their current exploits derives from the original works created more than a half-century ago.[59]

B. The Struggles of Comic Book Creators for the Rights to Their Work

In 1937, Jerry Siegel and Joe Shuster entered into an agreement with D.C. Comics providing that any work they did for the publisher "shall be and become the sole and exclusive property" of D.C.[60] This work included Superman, and D.C. paid the creators $130 for "exclusive rights" to the character "to have and hold forever" prior to the publication of his first appearance.[61] That two young creators would sell their work to a magazine for publication for a one-time fee was not unusual; the duo had already sold other characters to publishing companies that amounted to little success.[62] What nobody at the time could have predicted, however, was how popular, influential, enduring, and profitable Superman would eventually become. In the ensuing years, the sale of Superman by Siegel and Shuster would become what Morrison describes as a "dark and evil fairy tale" of "two innocent seventeen-year-old boys seduced by the forked tongues of cartoon fat-cat capitalists and top-hatted bloodsuckers. In this Hollywood tragedy, Jerry Siegel and Joe Shuster are depicted as doe-eyed ingenues in a world of razor-toothed predators."[63] Although the truth, as Morrison notes, was "less dramatic," the sale of Superman would

59 *See* Jason Serafino, *The 10 Best-Retellings of a Superhero's Origins*, COMPLEX (Sep. 5, 2012), https://www.complex.com/pop-culture/2012/09/the-10-best-re-tellings-of-a-superheros-origin/ ("[C]omic book publishers recently began retelling back-stories…. [C]ountless writers and artists have attempted to re-imagine these stories for new generations of fans, while also staying true to the originals."). Some writers have been lauded for finding creative ways to exploit obscure stories and characters from decades ago. *See Doctor Hurt*, RIKDAD'S COMIC THOUGHTS (Aug. 12, 2010), http://rikdad.blogspot.com/2010/08/doctor-hurt.html ("It would be fascinating to get the reaction of the creators from 1963 upon learning that a minor throwaway character from one story had become the primary villain in Batman stories from 2007 through 2010.").

60 Seigel v. Warner Bros. Entm't, Inc., 542 F. Supp. 2d 1098, 1106 (citations omitted).

61 *Id.* at 1107 (citations omitted).

62 *See id.* at 1106.

63 *See* MORRISON, *supra* note 14, at 12.

influence later creators to attempt to exercise greater care when approaching their work.[64]

One such creator was Jack Kirby, a driving force behind the early success of Marvel Comics. Kirby worked on a freelance basis for Marvel in that he "was not a formal employee of Marvel, and not paid a fixed wage or salary."[65] No clear understanding was reached as to whether Marvel or Kirby owned the rights to Kirby's works.[66] Decades later, each party would claim ownership: Marvel contended that, as a freelancer, Kirby had created works-for-hire which were wholly owned by Marvel.[67] Kirby's heirs would argue that Kirby had so much creative freedom while he worked for Marvel that he was essentially creating the work on his own and then selling it to Marvel.[68] The Second Circuit ultimately sided with Marvel.[69]

Regardless of who formally owned the characters, Kirby felt he was owed more for his contributions, waiting in frustration for "a piece of the earnings of that his creations were generating."[70] Kirby's prolific run of creating characters for Marvel came to an end in 1967, when he reportedly told friends, "I'm not going to give them another Silver Surfer."[71] Kirby feared meeting the same fate as Siegel, who, despite having created Superman, could barely find work and was financially struggling.[72] "[Kirby] didn't want to end up like the sixty-three-year-old proofreader working quietly at the corner desk at the Marvel offices, thrown a job because [Stan] Lee couldn't bear to see him so down on his luck, spat out by the industry he'd helped to build," comic historian Sean Howe writes in *Marvel Comics: The Untold Story*.[73] "Although Jerry Siegel didn't bring it up with people, a swirl of whispers followed as he made his way in and out of the office: '*That guy co-created Superman. D.C. Comics won't even let him in their offices anymore.*'"[74] Kirby

64 *Id.; see* SEAN HOWE, MARVEL COMICS: THE UNTOLD STORY 91 (2013) (describing how Jack Kirby sought to avoid the fate of Seigel).

65 *See* Marvel Characters, Inc. v. Kirby, 726 F.3d 119, 125 (2d Cir. 2013).

66 *See id*. at 125-126.

67 *See id.* at 137.

68 *See id*. at 126. *See also* discussion of the legal issues of the case *infra* at p. 23.

69 *See Marvel Characters, Inc.*, 726 F. 3d at 143.

70 HOWE, *supra* note 64, at 85.

71 *Id.* at 86.

72 *See id.* at 91.

73 *Id.*

74 *Id.* (emphasis in original).

ultimately quit Marvel for D.C., where he would go on to create several enduring characters, including "The New Gods."[75]

Kirby's partner on his early Marvel titles, Stan Lee, had also been frustrated with the lack of ownership in his works. According to Howe, Lee had cautioned younger writers to avoid the industry: "It is a business in which the creator…owns nothing of his creation. The publisher owns it…. I would tell any cartoonist who has an idea… [to] think twice before you give it to a publisher."[76] Lee, however, would later become a self-described "'quintessential, ultimate company man.'"[77] In the early 1970s, Marvel, fearing Lee might leave the company for D.C., as Kirby had, promoted Lee to the dual positions of president and publisher.[78] Lee would later receive a salary of $500,000 per year as the face of Marvel despite having less of a hands-on role in the company as the years wore on.[79]

While Lee initially voiced frustration with the way comic book creators were treated, he later defended Marvel and its contract structure.[80] Under a classical freedom of contract framework, it is the responsibility of the parties making contracts to ensure equity, rather than courts or legislatures; adherents to this view would assert that a creator who voluntarily sells the rights to a work to a publisher for any price, no matter how unfair, has no recourse other than to negotiate a better contract next time.[81] "I've created a number of characters for Marvel that have been successful, but when I created them, I knew they were the property of the company," Lee told an interviewer.[82] "For me to suddenly start

75 *See id.* at 163. Creative differences at D.C., combined with sluggish sales, eventually led Kirby back to another stint at Marvel, though, as with his first run with the company, it ended acrimoniously. *See id.* at 207. Toward the end of his career, Kirby worked in animation along with occasional comic book contributions. *See id* at 232, 239.

76 *Id.* at 113.

77 *Id.* at 245.

78 *See id.* at 121.

79 *See id.* at 398 (describing that in 1998, fearing Lee might attempt to assert ownership claims over some of his characters, Marvel signed a lucrative contract with him increasing his annual salary to $810,000 in addition to many other benefits, including a percentage of income derived from the use of his characters in film and television.).

80 *See id.* at 245.

81 *See* Baltimore & O.S.R. v. Voigt, 176 U.S. 498, 505-06 (1899) ("[M]en of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into freely and voluntarily, shall be held sacred, and shall be enforced by courts of justice . . . . [Y]ou are not lightly to interfere with this freedom of contract.") (quoting Printing Co. v. Sampason, L.R. 19 Eq. 465).

82 HOWE, *supra* note 64, at 245.

saying. . .'I wrote that, I'm going to sue,' to my way of thinking, that would be dishonest."[83]

Nevertheless, younger creators, witnessing the frustration and economic struggles of their forebears, grew alarmed and exercised caution when creating new work.[84] Roy Thomas, who created the superhero Vision and the villain Ultron in 1968,[85] along with the influential "Kree-Skrull War" storyline several years later,[86] eventually stopped developing new characters and instead attempted to find new spins on older characters and storylines.[87] "I started thinking about how someday they might make a movie or TV show out of one of these characters and how I'd hate the hell out of it if I didn't get money or credit for it," Howe quotes him as saying.[88] Thomas "[held] back on delivering new creations. He seemed almost gleeful in his reappropriations, his oeuvre fast becoming a metatextual commentary on ownership and copyright."[89]
Thomas's books *Invaders* and *All-Star Squadron*, for example, took place in the 1940s and re-explored the exploits of Golden Age heroes, often retelling stories from that era from a more modern perspective.[90]

Although many creators working on superhero comics in the 1980s hewed closely to Thomas's philosophy of working with previously-existing characters, a notable exception occurred in 1986 with D.C.'s publication of *Watchmen* by writer Alan Moore and artist Dave Gibbons. Moore originally intended the story, a deconstruction of superhero tropes, to focus on characters already owned by D.C., though the writer was subsequently convinced by D.C. editors to develop his own characters for the story.[91] Moore was

83 *See id.* Lee did, in fact, sue Marvel in 2002 for allegedly violating a provision of his 1998 contract that assured him a percentage of the profits of films or television using his characters. *See id.* at 417. The suit was settled out of court with Lee receiving a $10 million payment from Marvel in addition to his continued annual salary. *See id.* at 426.

84 *See* Couch, *supra* note 21.

85 *See id.*

86 *See* Matt Wood, *What the Kree-Skrull War Is and How It Will Affect the MCU*, CINEMABLEND (July 26, 2017 11:24 AM), https://www.cinemablend.com/news/1685080/what-the-kree-skrull-war-is-and-how-it-will-affect-the-mcu.

87 *See* HOWE, *supra* note 64, at 101.

88 *Id.* at 99.

89 *Id.* at 101.

90 *See* Paul O'Connor, *Retcon: Roy Thomas and Earth-2*, LONGBOX GRAVEYARD (Feb. 19, 2014), https://longboxgraveyard.com/2014/02/19/retcon-roy-thomas-and-earth-2/.

91 *See* Shaun Manning, *Alan Moore's Watchmen Feud With DC Comics, Explained*, CBR (Nov. 25, 2017), https://www.cbr.com/alan-moore-watchmen-feud-dc-comics-explained/;

wary of creating characters that would be owned by D.C. but ultimately agreed because he had demanded a special clause in his contract that provided that once the books were no longer in print, the ownership rights would revert to Moore.[92] "I was a very aware young man at that point," Moore told *Comicon* in 2006:

> I knew that Jack Kirby had been screwed. I knew that Marvel comics had screwed everybody and D.C. had screwed everybody since their inception. However, at the time when I was getting into the industry they were talking the language of progress…. Perhaps I was too ready to believe what I was told.[93]

The standard practice for most comic books at the time was for a title to go out of print after each issue had been released; since *Watchmen* was a twelve-issue limited series, Moore believed he would gain the rights to the characters after the publication of the final issue in 1987.[94] D.C., however, never took *Watchmen* out of print.[95] Instead, the company used the burgeoning graphic novel format—bound, collected reprints of individual comic books—to keep *Watchmen* in perpetual publication, and Moore never regained the rights to the characters.[96] Moore, a relatively sophisticated industry professional, negotiating with the intention of avoiding the pitfalls that befell earlier creators, had attempted and failed to use the power of contract to negotiate a deal that gave him the rights to his own work. "I said, 'Fair enough,'" Moore later told the *New York Times*. "You have managed to successfully swindle me, and so I will never work for you again."[97]

In 1992, seven of the top artists at Marvel departed the company to form Image, a new company founded in large part to protect the rights of creators.[98] All writers and artists at Image retain

Dave Itzkoff, *The Vendetta Behind 'V for Vendetta,'* N.Y. TIMES (Mar. 12, 2006), https://www.nytimes.com/2006/03/12/movies/the-vendetta-behind-v-for-vendetta.html.

92 *See* Itzkoff, *supra* note 91.

93 The Beat, *A FOR ALAN Pt. 2: the further adventures of Alan Moore*, COMICON (Mar. 16, 2006, 1:10 PM), http://web.archive.org/web/20060419040811/www.comicon.com/thebeat/2006/03/a_for_alan_pt_2_the_further_ad.html.

94 *See* Manning, *supra* note 91.

95 *See id.*

96 *See id.*

97 *See* Itzkoff, *supra* note 91.

98 *See* Patrick A. Reed, *ON THIS DAY IN 1992: THE START OF THE IMAGE COMICS*

ownership of their work.[99] Image has yielded a number of successful titles, including many that have since been adapted to other mediums; *Walking Dead*, for example, spawned several popular television shows.[100] Some creators who found initial success working for Marvel or D.C. have vastly preferred Image's business model.[101] "I try not to create new characters for Marvel or D.C.," writer Mark Millar said in 2012.[102] "I try to just do spins on their existing characters so they can't make a movie based on something I've created…. Legally, there's nothing to stop Marvel or D.C. adapting a book you've done with one of their characters scene-for-scene into a movie and then making toys of it and everything, and you wouldn't be paid one cent."[103] Millar wrote the *Civil War* storyline for Marvel that was turned into a successful film,[104] but later began working exclusively with Image. Because creators working with Image retain ownership of their work, a media company seeking to make a derivative work from an Image comic must negotiate with the creator, rather than Image.[105] Millar, for example, sold the television and film rights to all the work he had done for Image to Netflix in 2016, reportedly for $31 million.[106]

While Image has provided an alternative publishing model that

REVOLUTION, COMICS ALLIANCE (Feb. 1, 2016), https://comicsalliance.com/tribute-image-comics/.

99 *See id*. Some Image books included explicit references to creator freedom. An early issue of the series *Spawn*, drawn by Image co-founder Todd McFarlane, depicts a jail cell through which the arms of recognizable superheroes owned by Marvel and D.C.—Superman, Batman, the Hulk, Thor, and many others—reach for escape. "THEY ARE HEROES," the text reads. "CHAMPIONS. WATCHMEN. AVENGERS…. MEN OF STEEL…. THEY ARE TRAPPED…. THEY ARE SCREAMING." A line of hooded, bound prisoners stands across from the cell; they are described as "THEIR CREATORS. THE ONES WHO SOLD THEM." Todd McFarlane and Dave Sim, *Crossing Over*, SPAWN 10 (Image Comics 1993).

100 *See* Lesley Goldberg, *With 'The Walking Dead' Comics Now in the Books, What's Next for Robert Kirkman?*, Hollywood Reporter (July 3, 2019, 12:00 P.M.), https://www.hollywoodreporter.com/live-feed/walking-dead-comics-end-whats-next-robert-kirkman-1222389.

101 *See* Phegley, *supra* note 30.

102 *Id*.

103 *Id*.

104 *See* Megan Peters, *Creator Mark Millar Was Not Impressed With Captain America: Civil War*, COMICBOOK (Sept. 5, 2017, 10:33 PM), https://comicbook.com/marvel/2016/12/20/creator-mark-millar-was-not-impressed-with-captain-america-civil/.

105 Negotiations to sell the rights of a successful comic book to a film company differ from a deal to sell the rights to a story to a publishing company because in the former case the work has already proven lucrative on the market, and the negotiations can reflect the value of the property.

106 *See Netflix Acquires Millarworld,* NETFLIX (Aug. 7, 2017), https://media.netflix.com/en/press-releases/netflix-acquires-millarworld-1; Johnston, *Millarworld*, *supra* note 27.

has been enjoyed by authors like Millar and *Walking Dead* creator Robert Kirkman, Marvel and D.C. continue to dominate the comic industry, particularly in the superhero genre. In November 2019, for example, Marvel and D.C. together accounted for more than seventy percent of comics sold on the direct market.[107] Because of their dominance, Marvel and D.C. still represent the greatest chance of remunerative success for creators. The nature of the industry and its contract structures make it difficult, if not impossible, for creators to be fairly compensated for their work in a way that incentivizes future creators to develop innovative new works. As seen throughout this section, private market solutions of contract negotiations have failed creators. A legislative mandate is required to ensure that creators, no matter which company they work for, receive fair compensation.

II. TERMINATION OF TRANSFER AND COMIC BOOK CREATORS

The disparate bargaining position of creators in dealing with publishing companies was a major impetus in Congress's decision to include the termination-of-transfer provision in the Copyright Act of 1976.[108] In allowing authors or their heirs to terminate a transfer of copyright, Congress acknowledged the "unequal bargaining position of authors, resulting in part from the impossibility of determining a work's prior value until it has been exploited."[109] The language of the provision allows for the termination of transfers made through private contracts.[110]

And yet, for various reasons, the most high-profile attempts to exercise termination in the comic book field failed.

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107 *See* Rich Johnston, *Undiscovered Country #1 Outsells Batman #82 in November 2019 Diamond Comics Marketshare*, BLEEDING COOL (Dec. 6, 2019), https://www.bleedingcool.com/2019/12/06/undiscovered-country-1-outsells-batman-82-november-2019-diamond-comics-marketshare/.

108 *See* H.R. Rep. No. 94-1476, at 124 (1976).

109 *Id*.

110 17 U.S.C. § 203 (a)(5).

The following sections will, in turn, discuss the origins of the termination right and the attempts of comic creators to exercise it. The resulting failures and gaps in the doctrine signal the need for more legal reform and innovation.

A. The Passage of Termination of Transfer and Rationale Behind the Measure

The U.S. Constitution grants Congress the power to "promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."[111] The framers of the Constitution "intended copyright itself to be the engine of free expression. By establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas."[112]

The Copyright Act of 1909, the precursor to the current Act, gave authors control over their work for twenty-eight years with an option to renew those rights for another twenty-eight years.[113] When the initial term ended, the rights to a work would vest in its original author, even if that author had transferred or assigned the rights to someone else.[114] In including this renewal option, Congress intended to afford authors an opportunity to reclaim rights they had already sold to a publisher.[115] The House Committee report on the law noted that it "not infrequently happens that the author sells his copyright outright to a publisher for a comparatively small sum," and that, when it came time to renew a copyright, "it should be the exclusive right of the author to take the renewal form…so that he could not be deprived of that right."[116]

In *Fred Fisher Music Co. v. M. Witmark & Sons*,[117] however, the authors of the song "When Irish Eyes Are Smiling," which they had copyrighted in 1912 and sold to the Witmark publishing

111 U.S. CONST. art. I, § 8, cl. 8.
112 Harper & Row, Pubs., Inc. v. Nation Enters., 471 U.S. 539, 558 (1985).
113 *See* Nimmer, *supra* note 38, at § 11.07.
114 *See* Loren, *supra* note 24, at 1334.
115 *See* Nimmer, *supra* note 113 (quoting H.R. Rep. No. 60-2222, at 14-15 (1909)).
116 *Id*.
117 *See generally* Fred Fisher Music Co. v. M. Witmark & Sons, 318 U.S. 643 (1943).

company in 1917, sought to renew the copyright in their own name when the original term ended in 1939.[118] Witmark claimed that its acquisition of the rights had included not only the original period but the renewal term as well.[119] The Supreme Court held that the renewal provision of the 1909 law could not override an explicit transfer, where an author had granted a publishing company the exclusive rights to a work.[120] The Court ruled that when the rights to the song were transferred to Witmark, Witmark had ownership not only for that initial period but for the renewal period as well.[121]

Many believed that the Court in *Fred Fisher* "substantially thwarted" Congress's objective in passing the Copyright Act.[122] When debating a new copyright act to replace the 1909 law, Congress sought to rectify the *Fred Fisher* "deficiency."[123] In developing the new law, Congress "intended to provide added benefits to authors at a time when the work's true value can be appreciated"[124] in part because "authors are congenitally irresponsible" and "frequently they are so sorely pressed for funds that they are willing to sell their work for a mere pittance."[125]

The desire to protect authors eventually resulted in the inclusion of the termination of transfer provisions in the Copyright Act of 1976. The new copyright law dispensed with the previous regime's renewal system in favor of one term of copyright—life of the author plus fifty years (later extended to life of the author plus seventy years).[126] The reversionary right was replaced by termination of transfer: section 304(c) of the Copyright Act of 1976 allows authors of any work created before 1978 (or, if they are dead, their heirs) to terminate a grant they assigned to another party.[127] The new law provided a five-year window starting fifty-six years after the original copyright, meaning that termination must occur

118 *See id.* at 645-46.
119 *See id.*
120 *See id.* at 655, 657-58.
121 *See id.* at 655-56.
122 *See* Nimmer, *supra* note 38, at § 11.07 (citing Mills Music, Inc. v. Snyder, 469 U.S. 153, 185 (1985) (White, J., dissenting)).
123 *Id.* (quoting Discussion and Comments on the Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law 93 (Comm. Print 1963)).
124 Nimmer, *supra* note 38, at § 11.01.
125 *Id.* (quoting Fred Fisher Music Co. v. M. Witmark & Sons, 318 U.S. 643, 656 (1943)).
126 *See* Loren, *supra* note 24, at 1334.
127 *See* 17 U.S.C. § 304(c).

in one of those years.[128] Section 203 of the law extended similar protections to the authors of works created after 1978, beginning thirty-five years after the date of assignment of the copyright.[129]

Both sections 304 and 203 exempted works-for-hire from the termination provision as part of a compromise to secure the support of publishers.[130] The exemption reflects the view that works-for-hire are distinct from transfers; whereas in the latter case the author assigns ownership to another entity, works-for-hire are generally created when an entity commissions the author to create the work expressly for them.[131] In such cases, the entity for whom the work is prepared, rather than the person who actually creates the work, is deemed the "author," and therefore there is no transfer to terminate in such cases.[132]

The inclusion of termination in the 1976 Act was "an uneasy compromise" between "freedom of contract and constitutional protection for authorial works."[133] Authors favored the termination provision because publishers were more powerful and sophisticated than they themselves were; publishers believed that termination would be a detriment to their business model and disputed the notion that, when negotiating contracts, authors were unsophisticated or lacked bargaining power.[134] Congress ultimately included the provision on the grounds that the inferior bargaining position of authors grew not from a lack of sophistication but rather from the difficulty of determining what a work was worth before its publication.[135] Authors who negotiated away a work that was later determined to be of great value would therefore have another opportunity to reclaim that work. The termination provision was first included in a 1965 draft of what would become the

128 *See id.* The chance to terminate a transfer effectively ends 61 years after the original copyright.

129 *See* 17 U.S.C. § 203(a).

130 *See* Marci A. Hamilton, *Commissioned Works As Works Made For Hire Under the 1976 Copyright Act: Misinterpretation and Injustice*, U. PA. L. REV., 1281,1291-93 (1987).

131 *See* Loren, *supra* note 24, at 1339.

132 *See id.*

133 Kiley C. Wong, *Beyond the Gap: A Practical Understanding of Copyright's Termination of Transfers Provisions*, 27 BERKELEY TECHNOLOGY L.J. 613, 621 (2012).

134 *See id.* at 622. Publishers have far more creators to choose from than creators have publishers to choose from; publishers are therefore in a stronger position to turn down creators than vice versa. As such, it is difficult for a creator to include a provision in a contract for generous royalty payments in the event of a work's success.

135 *See id.* at 623.

1976 law; while the bill went through many changes in the nine years before it was finally passed, the rationale behind the termination provision was able to survive largely as originally drafted.[136] The provision explicitly allows for the termination of transfers made through private contracts, stating that termination "may be effected notwithstanding any agreement to the contrary."[137]

B. The Termination of Transfer Provision Fails the Siegel and Kirby Families

The legal history between Siegel and Shuster and D.C. Comics was contentious for decades. The creative team first sued the publisher in 1947, attempting to annul their sale of the Superman character for a lack of consideration.[138] That case ended with a settlement, in which D.C. paid Siegel and Shuster about $94,000.[139] In 1969, during the period when the character's original copyright would have been up for renewal under the 1909 Act, the creators attempted to reclaim the character.[140] The Second Circuit denied the claim, invoking *Fred Fisher*.[141]

Jerry Siegel died in 1996, but the 1976 Copyright Act's termination of transfer provision gave his heirs another chance to try to win Superman back from D.C. Comics.[142] In 1997, Joanne Siegel and Laura Siegel Larson, the widow and daughter of Jerry Siegel, respectively, filed claims to terminate the transfer of the rights in

136 *See* Mills Music, Inc. v. Snyder, 469 U.S. 153, 160-61 (1985).

137 17 U.S.C. § 203 (a)(5). This interpretation of the statute was challenged by Marvel after Joe Simon, the co-creator of Captain America, attempted to terminate his transfer of the character to the company. *See* Marvel Characters v. Simon, 310 F.3d 280, 282 (2d Cir. 2002). Marvel claimed that a prior negotiation with Simon voided his right to terminate the transfer. *See id*. at 285. The Court held it was "clear that an agreement made after a work's creation stipulating that the work was created as a work for hire constitutes an 'agreement to the contrary' which can be disavowed pursuant to the statute. Any other construction…would thwart the clear legislative purpose and intent of the statute." *Id*. at 290.

138 *See* Siegel v. Warner Bros. Entertainment Inc., 542 F.Supp.2d 1098, 1111-12 (C.D. Cal. 2008).

139 *See id.* at 1112.

140 *See id.*

141 *See id.* (citing Siegel v. National Periodical Publications, Inc., 508 F.2d. 909 (2d Cir. 1974)).

142 *See id. at* 1113.

the character to D.C.[143] The District Court for the Central District of California, in evaluating the claim, noted that the successful termination of a grant to copyright is generally "a feat accomplished 'against all odds.'"[144]

The court found that the Siegels were able to terminate the transfer of the rights to Superman.[145] Furthermore, the court noted that the termination of transfer concept was intended to give authors and their heirs "a chance to retain the extended renewal term in their work and then re-bargain for it when its value in the [marketplace] was known."[146] As such, the Siegels were awarded on summary judgment profits from the "domestic exploitation" of the Superman copyright, with the details of the resulting payments to be determined at trial.[147]

The Siegels' victory was short-lived. In 2013, the district court's decision was reversed by the Ninth Circuit, which held that, during settlement negotiations in the early 2000s, the Siegels had effectively accepted an offer from D.C. rendering "moot all of the other questions in this lawsuit."[148] The court made no mention of the 1976 Act's language stating that termination "may be effected notwithstanding any agreement to the contrary."[149]

Another notable attempt to exercise termination occurred in 2009 when Jack Kirby's descendants sought to reclaim over 262 works created by Kirby between 1958 and 1963.[150] The suit had major stakes for the comic book industry; because Kirby had made such a large number of lasting contributions to Marvel's publishing line (and, by extension, its film and television offshoots), the company's fictional universe and publishing empire would

143 *See Siegel*, 542 F.Supp.2d at 1114. The termination would have been effective as of April 1999—shortly before the expiration of the 61-year period from the original 1938 publication date. *See id*.

144 *See id.* at 1101-02 (citing 2 William F. Patry, Patry on Copyright § 7:52 (2007)).

145 *See id*. at 1126.

146 *Id.* at 1139.

147 *See id.* at 1142, 1145.

148 Larson v. Warner Bros. Ent., Inc., 504 Fed. Appx. 586, 588 (9th Cir. 2013).

149 17 U.S.C. § 203 (a)(5); *see also, supra* note 36 and accompanying text. The Second Circuit, by contrast, found in *Simon* that the "any agreement" language applied to a settlement agreement made after the initial transfer that purportedly declared Captain America to have been a work-for-hire. *See* Marvel Characters, Inc. v. Simon, 310 F.3d 280, 292 (2d Cir. 2002).

150 *See* Marvel Characters, Inc. v. Kirby, 726 F.3d 119, 124 (2d Cir. 2013).

effectively no longer exist if Marvel did not have access to Kirby's work.[151]

Marvel argued that the works the Kirby family sought to gain ownership over had been created as works-for-hire and were thus exempt from termination of transfer.[152] Kirby's family argued that Kirby had such wide latitude while working for the company that he had effectively created the work on his own and then sold it to Marvel.[153] They noted, for example, that Kirby had a non-exclusive deal with Marvel and could have sold the work to other publishers.[154] The court sided with Marvel, applying a test known as instance and expense.[155] Describing the relationship between Kirby and Marvel as "close and continuous," the court held that "Kirby's works during this period were hardly self-directed projects in which he hoped Marvel, as one of several potential publishers, might have an interest; rather, he created the relevant works pursuant to Marvel's assignment or with Marvel specifically in mind."[156] Furthermore, despite claims from the Kirby family that the artist had produced his work at his own expense, the court held that, because Marvel provided many of the finished aspects of Kirby's work—including inks, colors, and often plot and dialogue—the expense was undertaken by the company, not Kirby.[157] His works were for hire, and therefore exempt from the termination of transfer measure.

151 *See* Matthew Rossi, *How Jack Kirby Created the Entire Modern Media Landscape*, BLIZZARD WATCH (Apr. 4, 2019), https://blizzardwatch.com/2019/04/04/off-topic-jack-kirby-created-entire-modern-media-landscape/.

152 *See Kirby*, 726 F.3d at 137.

153 *See id.* at 125-26. Many copyright cases turn on ascertaining whether a work was done for-hire and in what capacity a putative employer, rather than an author, owns a work when there is no clear agreement to rely on. *See* Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 732 (1989).

154 *See Kirby*, 726 F.3d at 126.

155 *See id.* at 137. The instance and expense test states that "works by independent contractors may qualify as works-for-hire so long as they were created at the instance and expense of the commissioning party." Twentieth Century Fox Film Corp. v. Entm't Distrib., 429 F.3d 869, 877 (9th Cir. 2005).

156 *Kirby*, 726 F.3d at 141.

157 *See id.* at 142-43.

III. PROPOSAL TO REQUIRE COMPULSORY LICENSES FOR COMIC BOOK WORKS-FOR-HIRE

Siegel and Kirby epitomize the kinds of artists in whose interests Congress established the termination-of-transfer provisions. Both were creators whose dealings with their respective publishers came before it could have been known that the resulting work would become the base of publishing and media empires. Even more compellingly, the experiences of Siegel, Kirby, and other similarly situated creators have discouraged generations of comic book writers and artists from developing new creations. Indeed, the history of the comic book industry has seen repeated instances where creators, fearing they will see no profit or benefit from their work, "hold back."[158] This undermines one of the central tenets of copyright law—to incentivize the development of new works by providing creators with a reward for bringing those works forth and introducing them to the marketplace of ideas.[159]

A legislative recalibration is thus called for owing to the same underlying reasons that motivated Congress when it passed the 1976 law. While alterations to the existing termination scheme—for example, the elimination of the works-for-hire exception—are tempting, such a solution would ultimately be unworkable for the comic book industry. First, the superhero genre is largely dependent on derivative works.[160] Comic books are distinguishable from many other works of art in that, once introduced, characters are further developed over a long period of time by a host of creators.[161] Second, comic books are especially prone to uncertain market outcomes; characters can become universally recognized or relegated to complete obscurity.[162]

This Note's proposal assumes *arguendo* that all works currently owned by Marvel and D.C., whether explicitly commissioned or not, are works-for-hire.[163] Rather than implementing a scheme

158 *See* Couch, *supra* note 21; Phegley, *supra* note 30.

159 *See* Harper & Row, Pubs., Inc. v. Nation Enters., 471 U.S. 539, 558 (1985).

160 *See* MORRISON, *supra* note 14, at 118.

161 *See id.*

162 *See* MORRIS, *supra* note 2, at 8.

163 For a discussion of the instance and expense test and how a compulsory royalty might ensure more equitable compensation to authors of older works governed by the 1909 Copyright Act, *see* Meredith Annan House, *Copyright Law: Marvel v. Kirby: A Clash of*

that restores the ownership in works to their original creators, this proposal seeks to accomplish two things: (1) to better reward creators and to incentivize creative work by later comers and (2) to preserve the rich tradition of derivative creations based on older works.[164] This proposal affirms that the uncertainty of the value of a given work before it is published creates an inequity in bargaining power between creators and publishers and that private contracts alone are thus insufficient to recognize the goals of copyright. A legislative implement is necessary.[165]

A. Borrowing from the Music Industry's Compulsory Licenses

This proposal borrows from the compulsory license regime currently used in music reproduction. Section 115 of the 1976 Copyright Act allows a person to "obtain a compulsory license to make and distribute phonorecords of a nondramatic musical work."[166] That system was originally intended, as part of the 1909 Copyright Act, to prevent the development of a monopoly in the music industry by allowing multiple parties to copy a work.[167] By the time of the passage of the 1976 Act, the industry had grown accustomed to the license and feared that not retaining it would be too disruptive.[168] The 1976 law therefore included the license, with certain changes, including the prohibition of the exact duplication of an existing sound recording; instead, anyone seeking to distribute a recording of a work to the public could rerecord that work in

Comic Book Titans in the Work Made for Hire Arena, 30 BERKELEY TECH. L.J. 933, 961 (2015).

164 This proposal would echo some of the motivations behind a compulsory license regime promoted by the poet Ezra Pound, who "envisioned an international copyright law that would provide authors fair remuneration for their intellectual labor but would not stand in the way of wide, and, if necessary, statutorily compelled, dissemination of their works and translations at affordable prices." Robert Spoo, *Ezra Pound's Copyright Statute: Perpetual Rights and the Problem of Heirs*, 56 UCLA L. REV. 1775, 1807 (2009).

165 As with the rationale behind termination of transfer, this proposal recognizes the reality that the author holds "the primary responsibility for the work's commercial value and success" while recognizing that "publishers and other transferees can play a significant role in promoting and marketing the work, and sometimes even in shaping the creative work itself." Loren, *supra* note 24, at 1351.

166 17 U.S.C. § 115(a)(1)(A).

167 *See Statement to Congress by the U.S. Copyright Office: Hearing Before the Subcomm. on Courts, The Internet and Intellectual Property of the H. Comm. on the Judiciary,* 108th Cong. 2 (2004) (statement of Marybeth Peters, Register of Copyrights).

168 *See id.* at 3-4.

exchange for a compulsory fee.[169]

A licensing proposal for the comic book industry must differ in some significant respects. Significantly, rather than having private parties who seek to use a work pay the owner of that work, here, the corporate owner of the work would be in effect paying the original creator for the right to continue to use it—effectively a mandatory royalty payment. This royalty would be reassessed after the introduction of the work to the marketplace so as to more fairly acknowledge the value of the work after the passage of time. The payments would effectively be a mandatory royalty paid to the authors of a work out of the profits from that work, rather than a license to use the work.

The proposed payment structure for comic books, however, remains similar to the compulsory license in music in three important respects: first, it would be compulsory; companies would have to pay if they wanted to continue to use the work after a period of time. Second, as with the music license, this regime would be limited to a unique medium for purposes specific to that medium. Finally, it can be helpful to liken the publisher's right to use a creator's work to the ability of a music licensee to "cover" a song by taking an owner's work, evolving that work, and then distributing it.[170] It is critical to the proposal that these royalties would not be waivable. The purpose of the regime—to incentivize creativity by creating a more equitable share of works the value of which cannot yet be known—would be undermined if publishers were able to convince some creators to accept a one-time payment and forgo participation in future royalties.

The following subsections describe in greater detail how this proposed licensing structure could actually work, first with characters and character traits, and then with storylines. Going into these operational details illuminates the proposal's workability and adds yet another reason for Congress to move in this new direction.

169 *See id.* at 4-5.

170 Unlike the compulsory music license, which prevents a licensee from changing "the basic melody or fundamental character of the work," the companies here would have effectively free reign to do as they wish with the work. *See id.* at 4.

B. Assessing Royalty Payments for Characters and Character Traits

In order to enact this proposal, four steps would be necessary: First, a time period must be set during which to assess the value of the work created for a publisher. Second, the value of those works will have to be calculated. Third, creators' contributions must be separated and delineated. Finally, mandatory royalties would be paid based on these values on a regular basis according to a tiered percentage system.

Each of these steps will be illustrated through a case study of the comic book *New Mutants 98*, published in 1991.[171] The cover of the book boasts the introduction of three new characters: Deadpool, Domino, and Gideon.[172] The cover price of the issue is $1; as of 2021, a pristine copy was valued at $1,250.[173] The book's current value is due to its introduction of the Deadpool character; by 2019, Deadpool had starred in many ongoing comic books and limited series as well as spawning two successful feature films[174] and a host of other merchandise, including apparel and various games.[175] The Domino character has met with less success but has nevertheless starred in titular series on her own and reached audiences beyond comics as a secondary character in the second Deadpool film.[176] Gideon, meanwhile, was killed off in 1996 and,

171 *See* Nicieza & Rob Liefeld , *supra* note 13.

172 *See id.* Later stories revealed that the Domino character who appeared in *New Mutants 98* was an imposter, leading some fans to identify *X-Force 11* (1992) as the character's true first appearance. This distinction is irrelevant for the purposes of this discussion. *See* Brian Cronin, *What Issue Counts as Domino's First Appearance?*, CBR (June 4, 2017), https://www.cbr.com/what-issue-counts-as-dominos-first-appearance/.

173 *See 100 Hot Comics #59: New Mutants 98, 1st Deadpool*, SELL MY COMIC BOOKS, https://www.sellmycomicbooks.com/hot-comics-new-mutants-98.html (last visited Mar. 2, 2021).

174 *See The Definitive Deadpool Collecting Guide and Reading Order*, CRUSHING KRISIS, https://crushingkrisis.com/definitive-guide-to-collecting-x-men-as-graphic-novels/definitive-deadpool-collecting-guide-reading-order/ (last visited Jan. 3, 2020); *see also, Deadpool (2018) #1*, MARVEL, https://www.marvel.com/comics/issue/68142/deadpool_2018_1 (last visited Jan. 3, 2020); *Deadpool (2019) #1*, MARVEL, https://www.marvel.com/comics/issue/77807/deadpool_2019_1 (last visited Jan. 3, 2020).

175 *See* Carlos Cadorniga, *Get Pumped for 'Deadpool 2' with All Sorts of Merchandise Available Now,* MASHABLE (Mar. 29, 2018), https://mashable.com/2018/03/29/deadpool-2-nerdy-swag-list/.

176 *See* Chris Sims, *Domino Deserves a Spinoff Film, and There are Amazing Comic Stories to Mine*, THE VERGE (May 24, 2018, 1:09 PM), https://www.theverge.com/2018/5/24/17389658/domino-deadpool-2-comic-books-spinoff-movie.

despite several returns has been used sporadically at best.[177] These three characters and their varying levels of success provide a useful case study into how characters and elements could be assessed under the licensing proposal.

i. Determining a Period to Estimate the Value of a Work

In enacting the termination-of-transfer provision, Congress sought to allow creators to profit from their work "at a time when the work's true value can be appreciated."[178] In providing an alternate scheme to accomplish the same purpose, discerning this later time period is crucial. Publishers need a sufficient amount of time to freely use and develop characters. If that time period were too short, companies might be disincentivized from promoting the work or fully incorporating it within their publishing line out of fear of having to make royalty payments. If the time period were too long, creators would be insufficiently compensated for the market value of their work. Ideally, the time period would equal the amount of time it takes for the success of a character to be determined. Since such a precise determination would be impossible, an estimate will have to suffice. Deadpool, one of the most recent creative success stories, can provide a useful benchmark. The character had unequivocally become a sensation by the release date of the titular film in 2016—twenty-five years after his 1991 debut.[179] Most other successful characters had also been firmly established in their prominence by that twenty-five-year mark.[180] This time frame would allow publishers to fully integrate a character into their lines; it would allow time for not just the original creator, but others to guide and develop a character and add new

177 *See Gideon*, COMPLETE MARVEL READING ORDER, https://cmro.travis-starnes.com/character_details.php?character=3081 (last visited Dec. 30, 2020).

178 Nimmer, *supra* note 38, at § 11.01.

179 *See* Frank Pallotta, *'Deadpool' Franchise is a Box Office Rarity: An R-rated Hit,* CNN BUS. (May 18, 2018, 4:43 PM), https://money.cnn.com/2018/05/18/media/deadpool-2-box-office-rating/index.html.

180 Superman, for example, had already been the subject of multiple programs on television and radio 25 years after his debut, as had Batman. *See* Oliver Lyttelton, *Capes & Cowls: A History of Superheroes On TV*, INDIEWIRE (Mar. 17, 2016, 3:55 PM), https://www.indiewire.com/2016/03/capes-cowls-a-history-of-superheroes-on-tv-259596/. The characters created during the Silver Age, meanwhile, including the Hulk and Spider-Man, were similarly well-established 25 years after their debuts. *See id.*

and innovative developments.

Once the determination of an initial time period was made, characters should be periodically reassessed to determine their current value so that royalty payments can accurately reflect any rise and fall in their value during that period. This reassessment period should be shorter than the initial valuation in order to assess whether there have been any major swings in that time; for instance, a twelve-year evaluation—roughly half the initial term—could suffice. The character's value would thus be readjusted every twelve years after the initial twenty-five-year period.

ii. Determining the Value of a Property

An approximate value of a character could be calculated by taking into account annual comic sales and licensing revenue, including the use of a character in television, film, and video games. A panel of industry professionals, including representatives from publishing companies, former and current creators, critics, retailers, and other industry parties, would be helpful in fairly assessing the value of a character and ensuring fair accounting.

iii. Delineating the Contributions of Each Creator

Determining which creators should receive a royalty for their contributions to a character presents another daunting, but not insurmountable, task. Identifying the original creators of a character is generally simple enough; credit is typically given to the pairing of the writer and artist that created the character.

And yet, in a fictional universe as interwoven as those of Marvel and D.C., writers and artists make influential developments that resonate with readers for decades, in some cases to the extent that these other contributors have eventually been recognized as formal creators. In 2015, D.C. Comics began crediting Bill Finger, an early Batman writer, as co-creator of the character alongside Bob Kane, who had been credited as the character's sole creator for

more than seventy-five years.[181] In 2019, Batman writer Tom King suggested on Twitter that writers Dennis O'Neil and Steve Englehart, artists Neal Adams and Marshall Rogers, and writer/artist Frank Miller "should be credited as creators of Batman" because "their contributions to who 'Batman' is equal and maybe surpass Kane/Finger."[182] D.C. also retroactively credited writer Jamie Delano and artist John Ridgeway as creators of the character John Constantine for their contributions even though Constantine stories had already been published prior to Delano and Ridgeway's work.[183] Similarly, while the Deadpool character was originally created by the writer/artist team of Fabian Nicieza and Rob Liefeld, a significant part of the character's appeal is traceable directly to the contributions of writer Joe Kelly.[184]

The delineation would be analogous to the accounting used in copyright law when one co-author licenses the rights to a work that they own jointly with someone else.[185] In such cases, the "joint owner is under a duty to account to the other joint owners of the work for a rateable share of the profits."[186] Just as the contributions of each co-author are delineated during that accounting process, so too would they be separated and prorated here. The same panel discussed in the previous section could be used in this assessment.

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181 Kane reportedly negotiated a deal with D.C. Comics behind Finger's back that bestowed him with credit as the sole creator of Batman even though, according to most sources, Finger created most of the best-known traits of the character. *See* Charlie Jane Anders, *Who Really Created Batman? It Depends on What Batman Means to You*, WIRED (May 8, 2017, 7:00 AM), https://www.wired.com/2017/05/batman-and-bill-who-is-batman/; Marc Tyler Nobleman, *The Wikipedia entry for 'Bill Finger'…in 2006*, NOBLEMANIA BLOG (Aug. 23, 2018), https://www.noblemania.com/2018/08/the-wikipedia-entry-for-bill-fingerin.html.

182 Tom King (@TomKingTK), TWITTER (Nov. 30, 2019, 11:26 AM), https://twitter.com/TomKingTK/status/1200813406523199488?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E1200813406523199488&ref_url=https%3A%2F%2Fwww.cbr.com%2Fbatman-tom-king-creator-credits-oneil-adams-englehart-rogers-miller%2F.

183 *See* Brian Cronin, *Batman: Tom King Suggests Influential Contributors Get Co-Creator Credits*, CBR (Dec. 1, 2019), https://www.cbr.com/batman-tom-king-creator-credits-oneil-adams-englehart-rogers-miller/.

184 *See* Abraham Riesman, *The Deadpool Moment: The Inside Story of Marvel's Boom Brand*, VULTURE (Feb. 2016, 11:27 PM) https://www.vulture.com/2018/05/deadpool-secret-history.html. Several years after Deadpool was created, Kelly molded the character into an irreverent jokester who was often aware he was a fictional character, a trait that has remained with him in his various comic book and on-screen adaptions. *See id*.

185 *See* 1 David Nimmer, *Nimmer on Copyright* § 6.12 (2020).

186 *Id*.

iv. Payments to Creators

Once the value of a work is ascertained and the creators of the work have been delineated, the royalty should be paid. The precise amount of royalty payments would have to be small enough to deter publishers from shelving a work or using questionable accounting tactics to undervalue properties,[187] but large enough to allow creators to reap a reward. A proper percentage should be determined as a result of hearings and preliminary estimates on the value of particular properties. An estimated value of Deadpool, for example, would provide an idea of what a one percent or two percent annual payment of the character's worth would look like. The eventual annual payments to a creator of top-tier characters would serve a similar purpose to the annual salary paid to Stan Lee by Marvel throughout the latter portion of his tenure, which recognized his status as having co-created some of the company's best-known characters.[188]

The proposal imagines that the percentage payments that determine the amounts of the royalties will be determined by using a three-tier system. A character like Deadpool, the subject of hit movies and multiple comic series, would be in the top payment tier; Domino would appear in the middle tier. Gideon, meanwhile, would be in the bottom tier. This three-tier system would allow the creators responsible for the most popular characters to receive a greater share of those characters' success while incentivizing the creation and use of newer or lesser-known characters to increase their value. To further simplify the process, payments would not be made for each appearance or use of the work, but rather on an annual basis at the established percentage for the work. This would also hopefully disincentivize a publisher from limiting the use of a character in order to make fewer payments.

The use of characters falling within the lowest tier would trigger no royalty payments. Indeed, not every character created has a substantial value.[189] The use of characters like Gideon, who fall into the lowest tier, would be royalty-free; the no-fee tier would

187 *See* House, *supra* note 163, at 962.
188 *See* HOWE, *supra* note 7, at 398.
189 *See* MORRIS, *supra* note 2, at 8.

incentivize publishers to use the characters in that tier. It would also benefit a new writer or artist coming to the character because they could eventually receive a potential royalty if their creativity and contributions drove a character to new notoriety and higher tiers. Finally, this structure would benefit the original creators, who would not lose their initial credits and might eventually share in the reward that their work inspired.[190]

It would appear tempting to simply require creators and publishers to negotiate a contract for the use of a property—i.e. at the end of the twenty-five-year assessment period—with its value in the marketplace being more clear. Such a plan, however, would be extremely difficult to implement due to the sheer number of characters that would have to be accounted for—thousands of individualized negotiations would have to take place between creators and publishers. This plan, while still dealing with the same large number of characters, would have the advantage of concentrating all assessments within panels dedicated to doing so.

To be sure, there would be challenges to implementing such a system. First, companies would have to pay more than they currently do for characters. A small royalty to the creators of a work, however, should not be so burdensome as to disincentivize publishers from continuing their current business model. The weight of this proposal would fall largely on Marvel and D.C., which are owned, respectively, by Disney and AT&T.[191] Pre-determined payments to creators that accurately reflect the market value of those characters would be both just and affordable to those companies; indeed, because the payments would more accurately reflect the market value of the work, it would presumably be closer to the agreement that the creators and the publishers should have reached in the first place.

Another challenge would be in accounting for characters

190 *See id.* at 9 ("In comics, there's always a chance that a seemingly vanished character will come back from extinction. With superheroes becoming more popular with every passing day, you never know when a once-regrettable hero might return and become the next media sensation—or at least find devoted fans among a whole new generation of comics readers.").

191 Disney had a market capitalization as of late 2019 of $260 billion. *See The Walt Disney Company (DIS)*, YAHOO! FINANCE, https://finance.yahoo.com/quote/DIS/ (last visited Dec. 30, 2019). AT&T purchased WarnerMedia, the company that owns, D.C. Comics, for approximately $85 billion in 2018. *See* Bartz & Shepardson, *supra* note 8. AT&T, as of late 2019, had a market capitalization of $285 billion. *See AT&T Inc. (T)*, YAHOO! FINANCE, https://finance.yahoo.com/quote/T?p=T&.tsrc=fin-srch (last visited Dec. 30, 2019).

currently in use. The sheer number of such characters owned by Marvel and D.C. make such a task daunting. Nevertheless, excluding the creators of such characters from the proposal would effectively ignore the contributions of the very people it was intended to benefit. It would also discourage companies to take chances on new characters, knowing that those characters were the only ones they might have to eventually pay royalties on. In order to adhere to the spirit of the plan, currently existing characters should be included.

To make the accounting process easier, the plan could be phased in for current. Each year, publishers would have to assess and account for the works implemented for a particular part of their history. The first year after the plan went into effect, for example, would include assessments for characters ranging from 1938—the year the industry was effectively born with the creation of Superman—through 1948. Royalties for the creation of deceased creators would go to their heirs for the duration of the copyright.

C. Assessing Royalty Payments for Storylines

The creation of new storylines should also be subject to the compulsory royalty. Writers, for example, hesitate to develop innovative ideas for stories when they worry that those ideas will be exploited without any personal benefit to them.[192] Yet unlike characters, whose use can be clearly delineated—a derivative work either does or does not feature a character—comic book storylines are interrelated and built on top of each other.[193] Indeed, part of the allure of Marvel and D.C. comics is the way writers are able to manipulate and exploit eighty years of continuity to create stories that simultaneously play on classic stories while introducing new ones.

Companies should not have to fear paying a royalty for a minor use or mention of a particular story, or for a story that is used as an antecedent for a later tale. That could potentially curtail creative expression, rather than expand it, by having companies limit

192 *See* Phegley, *supra* note 30.
193 *See* MORRISON, *supra* note 14, at 114.

the use of prior stories in current ones. A comic work derivative of *Civil War*, for example, that retained its own story would therefore be treated as a separate work and not generate royalties for the creator of *Civil War*. Indeed, *Civil War II* retained its predecessor's general theme of having two factions of superheroes do battle over competing moral principles, but where the first story involved conflicts over privacy issues,[194] the second was largely distinctive and delved into philosophical differences over crime prevention.[195]

Only the use of a story in other media should trigger a royalty payment for the use of that work. Millar, for example, would receive a payment for a percentage of the profits of a film based on *Civil War* as if it were a character in the top tier proposed earlier.[196] Creators would not get a "double-dip" of royalties for contributing both the character and the story. That is, if a story heavily or exclusively featured a character they created, they would not receive a royalty for the use of that story.[197] The addition of storylines to this proposal is generally intended to benefit the scores of authors who did not create new characters but nevertheless created influential works with characters developed by other creators decades earlier.

194 *See* Alan Kistler, *Marvel's Civil War In Comics, Explained*, POLYGON (May 5, 2016, 3:00 PM), https://www.polygon.com/comics/2016/5/5/11597690/marvel-civil-war-comics.

195 *See* James Whitbrook, *Civil War II Is Finally Over, and We All Lost*, GIZMODO (Dec. 29, 2016, 11:03 AM), https://io9.gizmodo.com/civil-war-ii-is-finally-over-and-we-all-lost-1790590833.

196 The exclusive use of the top tier for stories would be due to the widespread exposure provided by film and television. *See supra* notes 85–91 and accompanying text.

197 For example, if a new film detailed the origin story of the character Darkseid, the Kirby estate would not receive a royalty for the story, because it would already be receiving a royalty for the use of Darkseid.

CONCLUSION

The U.S. Constitution included copyright protection for the purpose of allowing creators to profit from their work with the expectation that such rewards would incentivize future creators to develop new works and creative expression.[198] The kinds of contracts negotiated in the comic book industry have resulted in exactly the opposite effect. Creators are disincentivized from developing new ideas because of the perceived inequitable distribution to earlier creators of the rewards of their work.

Congress should address this situation for the same reasons it has intervened before; private contracts drafted in the absence of a regulatory regime fail creators who must negotiate before the value of their work can be ascertained. And yet the nature of the comic book industry is so unique that revising or changing termination-of-transfer so that creators can reclaim the full rights to their works could prove untenable.

A series of mandatory payments to creators after a period in which the value of the work has been determined would allow publishers to retain their ownership of a work and creators to benefit more equitably in the economic rewards generated from that work, effectively recognizing its value after it has had time to reverberate in the marketplace.

This proposal would have a dramatic effect on the comic book industry. Companies would have to make a significant number of payments where before they did not. Despite such difficulties, this proposal strives to create an equitable solution for an industry that is unlike any other, and where the dominant comic publishers can continue to benefit from the intellectual property they have acquired while paying creators a fairer price for the use of their works.

198 *See* Harper & Row, Pubs., Inc. v. Nation Enters., 471 U.S. 539, 606 (1985)*; see also* Loren, *supra* note 24, at 1349.