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To Be Continued: How Comic Book Copyright Inequity Inspired Industry Innovation and Instilled Instrumentalities for Independence

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Note

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Before Superman first made the world believe a man can fly or Captain America greeted Hitler with a punch to the face, comic book publishers sought to exercise command over all the characters and stories that writers and artists put to paper. Until recently, this one-sided industry culture regarding ownership—reinforced by decades of court rulings in publishers' favor—left creators with few avenues by which to retain control of their art. The legal norms that enforced creators' subservient position in the comic book copyright ecosystem drove these authors to seek out and construct alternative systems from which they could realize the benefits of ownership.

This Note first shows that creators' resistance to copyright inequity has been the chief factor driving innovations in the comic book industry over the past eighty years. Where creators were once almost entirely dependent on major publishers for work, the alternative systems developed in response to this inequity have enabled writers and artists to negotiate with publishers on equal footing and often from a position of power. The Note then weighs the benefits and drawbacks of modern routes available for publishing creator-owned comics, with a focus on the frontier of Substack newsletters' noncopyright system, which for the first time offers some creators the "industry-changing" opportunity to receive up-front payment while also retaining ownership of their works.

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RICHARD P. METZROTH [*]

INTRODUCTION

On the first page of the first issue of *Action Comics*, writer Jerry Siegel and artist Joe Shuster introduced their new protagonist as: "Superman! Champion of the oppressed, the physical marvel who had sworn to devote his existence to helping those in need!"[1] To ensure their hero's escapades continued in print, the young creators reluctantly assigned copyright in Superman to their publisher,[2] and later efforts to assert their ownership failed in court.[3] In the decades that followed, as their "champion" went on to make billions for the company that published his adventures, "the oppressed" would include Siegel and Shuster themselves.[4]

Eighty-three years later, the writers of DC Comics' *Batman* and Marvel Comics' *X-Men* quit their high-profile assignments and published their own comics through Substack, an online newsletter platform that both paid the creators in advance and allowed them to retain copyrights in their works.[5]

What changed in the interim? How did comic book creators go from powerless to superpowered in controlling ownership of their works? The shift did not happen overnight. Since the inception of the medium, comic book publishers have sought to exercise total command over all of the

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[*] J.D. Candidate, University of Connecticut School of Law, May 2023. Thank you to Professor Steven Wilf, who provided this Note with the wisdom of Solomon, even from an ocean away; to the staff of the *Connecticut Law Review* for loaning its strength of Hercules during the editing process; and to Julie, whose patience rivals the stamina of Atlas. This Note is dedicated to my grandmother, Almut Metzroth, who has always encouraged my writing with the power of Zeus, and who displayed the courage of Atlas in publishing her origin story; and to Tom, who is growing up with the speed of Mercury.

[1] Jerome Siegel & Joe Shuster, *Superman*, *in* ACTION COMICS, June 1938, at 1, *reprinted in* ACTION COMICS: 80 YEARS OF SUPERMAN: THE DELUXE EDITION 15 (Paul Levitz ed., 2018).

[2] *See* John Kobler, *Up, Up and Awa-a-y!: The Rise of Superman, Inc.*, SATURDAY EVENING POST, June 21, 1941, at 14, 73.

[3] Siegel v. Time Warner Inc., 496 F. Supp. 2d 1111, 1115–16, 1118–20 (C.D. Cal. 2007); *see infra* Section I.A.

[4] *See* Mary Breasted, *Superman's Creators, Nearly Destitute, Invoke His Spirit*, N.Y. TIMES (Nov. 22, 1975), https://www.nytimes.com/1975/11/22/archives/supermans-creators-nearly-destitute-invoke-his-spirit.html; *infra* Section I.D.

[5] George Gene Gustines, *Comic Book Writers and Artists Follow Other Creators to Substack*, N.Y. TIMES (Aug. 9, 2021), https://www.nytimes.com/2021/08/09/business/media/substack-comic-books.html; *see infra* Section III.A.

characters and stories that creators put to paper.[6] Writers and artists once routinely signed away all claims to copyright in their creations in exchange for a paycheck.[7] When creators like Siegel and Shuster began to fight back, the legal battles over their rights to the intellectual property in their works rivaled any of the superhero melees they once illustrated.[8] But throughout the twentieth century, publishers like DC and Marvel—backed by an invulnerable bargaining position and court rulings that shaped copyright law—largely prevailed in shielding their rights of ownership.[9] The prominent cases are familiar to comic book fans and legal scholars alike.[10] But in the same way that comics' serialized tales continue in the next issue, the creators' stories did not end with a final judgment.

This Note focuses on that "next issue" and shows that creators' resistance to copyright inequity was the chief factor driving innovations in the comic book industry over the past eighty years. The legal norms that enforced creators' subservient position in the comic book copyright ecosystem drove these authors to seek out and construct alternative systems. As a result of these innovations, where creators were once almost entirely dependent on major publishers for work, these new outlets have eliminated the obligation to accept "medieval" contract terms.[11] Many creators can now choose to negotiate deals to create works for hire for DC and Marvel or focus exclusively on the properties they create and own.[12] Creators' ability to insist on retaining ownership of their original works has increased to the point where, after decades of disputes, copyright is no longer the chief animating conflict between today's comic book creators and publishers, high-profile cases involving past works notwithstanding.[13]

To illustrate how this shift has occurred, this Note examines creator innovations chronologically. Part I explores the traditional copyright-assignment culture of the early comic book industry and the doomed attempts by the creators of Superman and Captain America to regain control of their iconic characters. Part II addresses how creators transformed the industry by resisting the publisher-dominated copyright regime, and it

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[6] PAUL LOPES, DEMANDING RESPECT: THE EVOLUTION OF THE AMERICAN COMIC BOOK 2 (2009).

[7] The waiver was often printed on the paycheck itself. *Id.* at 15*; see infra* text accompanying notes 119–20.

[8] *See infra* Part I; 3 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT §§ 11.07[D][4][a], 11.10[C][1] (Matthew Bender rev. ed. 2022) [hereinafter NIMMER ON COPYRIGHT] (analyzing the impacts on copyright law resulting from disputes over ownership of Captain America and Superman).

[9] 3 NIMMER ON COPYRIGHT, *supra* note 8, §§ 11.07[D][4][a], 11.10[C][1].

[10] *See, e.g.*, *id.*; Matthew Rizzuto, *Jack the King Kirby: Comic Creator*, COMIC BOOK HISTORIANS (Dec. 24, 2018), https://comicbookhistorians.com/long-live-jack-the-king-kirby-creator-of-greatness-by-matthew-rizzuto/ (providing an overview of the legal actions taken by artist Jack Kirby and his family, as well as other comic creators, to obtain ownership of their works).

[11] Greg Baisden, *New Contracts at DC*, COMICS J., Oct. 1988, at 11, 11; *see infra* Sections II.B–C.

[12] *See* LOPES, *supra* note 6, at 180; *infra* Section III.E.

[13] *See infra* note 274.

explores how the 1976 Copyright Act provided a legal foothold for creators to retain and reclaim ownership. Part III weighs the benefits and drawbacks of modern avenues available for publishing creator-owned comics, with a focus on the frontier of Substack's noncopyright system.

Until recently, the traditional publisher-dominated culture of the comic book industry, together with consistent court rulings in favor of publishers, left creators with few avenues by which to retain control of their art. As the constitutional purpose of copyright is to "promote the progress of . . . useful arts,"[14] it is ironic that promotion of the American comic book has come not from the prevailing parties of court rulings that purport to further this constitutional ideal, but from the innovations created by the losers in response to legal obstacles.

I. THE WAY OF THE WORLD

No matter the aims of the Constitution, not everyone in the 1930s would have agreed that comic books even qualified as "useful art" worth promoting.[15] At the dawn of the industry, neither publishers nor creators were much interested in refining their wares as art, as profits motivated both sides to prioritize quantity and speed.[16] "[Q]uestions about the potential of this art form in terms of narrative and visual breadth, or as a vehicle for the personal expression of artists, were more or less nonexistent."[17] The artists, who were primarily from working-class and ethnic immigrant backgrounds, routinely turned over all ownership rights to their work to publishers in exchange for modest page rates and the opportunity to make a living in a booming field.[18] Even unsophisticated publishers, of which there were many,[19] could offer low rates and one-sided terms,[20] knowing that the artists

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[14] U.S. CONST., art. I, § 8, cl. 8.

[15] *See* LOPES, *supra* note 6, at xiii–xv, 1, 9 (2009) (describing the early evolution of comic books as driven by a "singular *industrial* logic" as they were "produced in an assembly-line fashion for a mass market," even though artists soon "enthusiastically embraced this new medium of expression and developed a true craft and tradition of comic art"); Alan Moore, *Buster Brown at the Barricades*, OCCUPY COMICS, no. 2, 2013, at 28, 29 (noting that artistry was absent in early comic book publishers' motivations).

[16] LOPES, *supra* note 6, at 2.

[17] *Id.*

[18] *Id.* at 2, 14; Gary Groth, *Infantino*, COMICS J., Nov. 1996, at 52, 60.

[19] LOPES, *supra* note 6, at 9–10. "[F]rom 1939 to 1941, twenty-five new publishers entered the field." *Id.* at 11.

[20] In addition to waiving ownership rights, these terms included sweatshop-like working conditions, long hours, and no published credit. *Id.* at 12–15. As nearly all early comic book publishers retained ownership of the works, these employment agreements were "adhesion contracts," which Friedrich Kessler warned would enable "powerful industrial and commercial overlords . . . to impose a new feudal order of their own making upon a vast host of vassals." Friedrich Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629, 632, 640 (1943).

would accept or be replaced by any number of others.[21] "But that was the way of the world in those days, and everybody just accepted it," artist Carmine Infantino, then a teenager who drew comics after school, recalled a half-century later.[22] The dominant position that publishers held over creators, and the accompanying focus on profits over artistic merit, would shape the industry for decades.[23]

A. *Siegel and Shuster: From Superman to Funnyman*

Jerry Siegel had no interest in selling Superman for pennies on the dollar. For five years in the mid-1930s, the young writer, together with his artist partner, Joe Shuster, pitched their concept for a new kind of adventure character to "practically every [newspaper] syndicate and comic-magazine editor in the country,"[24] but they never received a substantial offer.[25] Finally, when Detective Comics, which had earlier published Siegel and Shuster's "more conventional" adventure comics, made a concrete offer for Superman, its authors were ready to accept.[26]

But with the offer came a release form assigning to Detective Comics the "exclusive rights to the use of the characters and story, continuity and title of strip . . . to have and hold forever and to be your exclusive property."[27] The accompanying offer read: "It is customary for all our contributors to

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[21] *Id.* at 14 (quoting artist Will Eisner as saying: "We were always told we are replaceable. Everybody knew and understood that if you didn't like the rates, the payment, you would go and they would replace you."); BOB KANE, BATMAN AND ME 23 (1989) ("Jerry Iger was an extremely crafty businessman who knew how to play upon young cartoonists' ambitions. Like others, I was eager to get into print and grateful for being hired, so I accepted the low pay."); Joe Latino et al., *Vin Sullivan—Present at the Creation*, ALTER EGO, Aug. 2003, at 3, 10 (comparing the availability of new artists to "the Hollywood scene where three or four people . . . become stars and six or seven hundred are trying to become stars").

[22] Groth, *supra* note 18, at 59–60. Infantino described the comic production "shops" as "big factory rooms, huge rooms, with guys at desks lined up, one in back of the others, just rows of them drawing away . . . ." *Id.* at 60. Infantino would go on to become a defining artist on comics like *Batman* and *The Flash* in the 1960s, and later became the publisher and president of DC Comics. Margalit Fox, *Carmine Infantino, Reviver of Batman and Flash, Dies at 87*, N.Y. TIMES (Apr. 5, 2013), https://www.nytimes.com/2013/04/06/arts/carmine-infantino-who-revamped-batman-and-the-flash-dies-at-87.html.

[23] LOPES, *supra* note 6, at 1–2.

[24] Kobler, *supra* note 2, at 73; *see* Latino et al., *supra* note 21, at 12 ("Siegel and Shuster had been to every newspaper syndicate office in New York City, I think."); LES DANIELS, SUPERMAN: THE COMPLETE HISTORY 26 (2d ed. 2004).

[25] DANIELS, *supra* note 24, at 30. In 1935, Siegel had turned down a vague offer from National Allied Publishing's Major Malcolm Wheeler-Nicholson, knowing from experience that the fledgling comic book publisher was not financially stable—it was "certainly no place for Superman." *Id.* at 23, 25; NICKY WHEELER-NICHOLSON, DC COMICS BEFORE SUPERMAN 111, 117 (2018). The same publishing operation, under a new name and new management after Wheeler-Nicholson's business partners forced him into bankruptcy, would finally publish Superman three years later. *Id.* at 245; DANIELS, *supra* note 24, at 30–31.

[26] DANIELS, *supra* note 24, at 25, 30–31.

[27] Siegel v. Nat'l Periodical Publ'ns, Inc., 508 F.2d 909, 911 (2d Cir. 1974).

release all rights to us. This is the businesslike way of doing things."[28] According to a 1941 retelling, the creators "mulled this over gloomily" before Siegel said, "Well, at least this way we'll see him in print."[29] Siegel, tired of years of rejections, "just wanted to give his brainchild a chance."[30] In agreeing to this deal, they "would be relinquishing their equity in all possible future profits from syndication, radio, movies, and so on."[31] Those licensing fees went to the publisher.[32] Siegel and Shuster signed in return for their usual rate of $10 per page—$130 for a thirteen-page story.[33] By 1941, Superman was making $1.5 million a year for the company that would come to be known as DC Comics.[34]

Seeking to annul their contracts, Siegel and Shuster sued DC in New York state court in 1947.[35] The court found that the creators had transferred all of their Superman rights to the publisher in 1938.[36] With appeals pending, the parties settled in 1948, and the creators gave up their claims in exchange for $94,000.[37] Unsurprisingly, this marked the end of the partners' time creating Superman's continuing adventures for DC.[38]

After their experience with DC, Siegel and Shuster made sure to retain their ownership of their next project. While still working on Superman, they created a new, inherently different superhero: Funnyman, a "strange hybrid" of the superhero genre and humor comics.[39] Siegel and Shuster's original editor on Superman, Vin Sullivan, had founded a small publishing house and was willing to oblige the partners' ownership demands if it meant a chance to publish the next Superman.[40] Although it was a commercial failure,[41] Funnyman is a pioneering book in the history of comics—the prototype of the creator-owned comic book. Sullivan's willingness to let Siegel and Shuster retain ownership rights while he stood to profit only from

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[28] Kobler, *supra* note 2, at 73.

[29] *Id*.

[30] DANIELS, *supra* note 24, at 41.

[31] Kobler, *supra* note 2, at 73.

[32] DANIELS, *supra* note 24, at 41.

[33] JOE SERGI, THE LAW FOR COMIC BOOK CREATORS 195–96 (2015).

[34] Kobler, *supra* note 2, at 76. LOPES, *supra* note 6, at 15. Detective Comics became National Periodical Publications in 1946, though the logo on its comics' cover made it more commonly known as "DC Comics"—a name it formally adopted in 1977. Tom Bondurant, *A Brief History of Time: Unpacking DC's Reboots, Relaunches & Retcons*, CBR (June 7, 2016), https://www.cbr.com/a-brief-history-of-time-unpacking-dcs-reboots-relaunches-retcons/; DANIELS, *supra* note 24, at 41.

[35] Siegel v. Time Warner Inc., 496 F. Supp. 2d 1111, 1115 (C.D. Cal. 2007) (discussing the 1947 state court action).

[36] *Id*. at 1116.

[37] *Id*. at 1118.

[38] SERGI, *supra* note 33, at 202; LOPES, *supra* note 6, at 15.

[39] Thomas Andrae, *Funnyman, Jewish Masculinity, and the Decline of the Superhero*, *in* SIEGEL AND SHUSTER'S FUNNYMAN 49, 51 (Thomas Andrae & Mel Gordon eds., 2010).

[40] *Id*. at 53.

[41] Siegel and Shuster produced six issues of the "Funnyman" comic book and a short-lived syndicated comic strip before the character "faded into oblivion." *Id*. at 51, 75, 77, 79.

publication was antithetical to the industry of the era, but it is the same basic agreement under which most creator-owned comics are published today.[42] Funnyman represents the first crack in the foundation of a comic book industry built upon publisher domination of ownership rights.

Perhaps more than any other creator in the 1930s, Jerry Siegel resisted forfeiting his rights to his intellectual property. But given the culture of the industry in regard to copyright at the time, he and Shuster never had a chance. Siegel and Shuster's only choice was between signing away their rights for a modest paycheck in the short-term, or risk going broke in hopes of profiting handsomely in the long run as part-owners in the property they created. The same dilemma is familiar to comic creators to this day.

B. *Simon and Kirby: From Captain America to Fighting American*

Other creators viewed Siegel and Shuster's initial contract as a cautionary tale,[43] but among their contemporaries only a few had both the foresight and leverage to negotiate any rights of ownership.[44] In 1940, Will Eisner negotiated an "unprecedented solution" with a syndicate whereby the copyrights to his comic book newspaper inserts would be registered in the publisher's name but would revert to him if their employment agreement dissolved.[45] This deal effectively gave Eisner ownership of his most famous creation, The Spirit.[46] In 1946, Batman creator Bob Kane reportedly used the impending Siegel and Shuster lawsuit as leverage to secretly renegotiate his own contract with DC for legal ownership, including rights of reversion,

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[42] *See infra* Section III.A.

[43] *See* SEAN HOWE, MARVEL COMICS: THE UNTOLD STORY 91 (2012) ("[Kirby] didn't want to end up like [Siegel,] 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. . . . Kirby refused to meet such a fate."); *id.* at 99 (describing writer Roy Thomas's reluctance to create new characters that Marvel would own).

[44] *See* JOE SIMON, JOE SIMON: MY LIFE IN COMICS 217 (2011) (quoting comics historian Mark Evanier as saying, "You know it's the story around comic books that only two guys in the business can read contracts. . . . That's Will Eisner and Joe Simon.") (internal quotation marks omitted); *id.* at 245–46 ("I was wiser than a lot of the other guys in copyrighting material and owning properties.").

[45] BOB ANDELMAN, WILL EISNER: A SPIRITED LIFE 53–54 (2005). Andelman credits Eisner's cognizance of the importance of copyrights to his experience running an artists' studio. *Id.* As part of his exit from the studio, Eisner had to sell his rights to Sheena the Jungle Girl, whose adventures are still being published today. *Id.* at 52; *Series: Sheena Queen Jungle*, PREVIEWS WORLD, https://www.previewsworld.com/Catalog/Series/146044-SHEENA-QUEEN-JUNGLE (last visited July 5, 2022).

[46] Andelman, *supra* note 45, at 54–57 (describing Eisner's creation of The Spirit under this arrangement); Jim Amash, *"I Always Felt Storytelling Was as Important as the Artwork,"* ALTER EGO, May 2005, at 7, 10 (quoting Eisner as saying, "I actually owned the features all the time . . . because if anything happened to me, it would signify the end of our agreement and the property would go to my estate.").

a percentage of subsidiary rights, and to be credited as Batman's creator.[47] In 1953, Joe Kubert lucked out when his publisher quit the comics business and kindly obliged his request to transfer rights in his works back to him.[48] For the most part, though, "such deals were unthinkable for most in the comic book industry."[49]

In 1940, Joe Simon and Jack Kirby sold their new creation, Captain America, to Timely Comics, the publisher that would become Marvel.[50] The prospect of publishing a patriotic hero with World War II on the horizon intrigued the publisher enough to give the creators twenty-five percent of the profits from the comic book sales.[51] "The deal alone instantly made Simon and Kirby big guns in the industry,"[52] particularly as the first issue of *Captain America Comics*—with a crackerjack cover featuring the hero punching Hitler in the face—sold through nearly a million copies.[53] However, Timely deducted "all the fees and salaries for the whole company" out of Simon and Kirby's royalties, leaving "almost nothing" left.[54] So the creators jumped ship to DC, where their success on Captain America provided the leverage to negotiate a $250-per-week salary on top of a twenty-five-dollar page rate—but no ownership rights.[55] Upon leaving

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[47] GERARD JONES, MEN OF TOMORROW: GEEKS, GANGSTERS, AND THE BIRTH OF THE COMIC BOOK 246–47, 305 (2004). According to Jones, Kane told DC he had been a minor when he first sold his Batman rights to DC—a rather transparent lie that DC nevertheless could not disprove. *Id.* at 246. Like many stories about Kane, the full truth is likely impossible to discern. Kane "had a tremendous ego" and a "predisposition to aggrandize his work on Batman," according to his biographer, Thomas Andrae. Marc Tyler Nobleman, *Interview with Co-author of Bob Kane's Autobiography*, NOBLEMANIA (Mar. 30, 2014), https://www.noblemania.com/2014/03/interview-with-co-author-of-bob-kanes.html; *see* Marc Tyler Nobleman, *Bob Kane's Niece*, NOBLEMANIA (Jan. 8, 2013), https://www.noblemania.com/2013/01/bob-kanes-niece.html ("Kane was a perpetual liar according to most everyone I talked to who knew him . . . ."). Whatever deal Kane made paid dividends in the 1960s, when just as the "Batman" television show became a hit, Kane sold his rights back to DC's new owners for a "million-dollar fee." JONES, *supra*, at 305–06.

[48] Tom Spurgeon, *Joe Kubert, 1926–2012*, COMICS REPORTER (Aug. 13, 2012), https://www.comicsreporter.com/index.php/joe_kubert_1926_2012/ (describing St. John Publications returning the copyright to the prehistoric protagonist Tor).

[49] Corey Blake, *Joe Kubert and the Early Days of Creator-Owned Comic Books*, CBR (Aug. 17, 2012), https://www.cbr.com/joe-kubert-and-the-early-days-of-creator-owned-comic-books/.

[50] Marvel Characters v. Simon, 310 F.3d 280, 282 (2d Cir. 2002). Publisher Martin Goodman used "at least eighty different company names over the years, usually several simultaneously" in an effort to manipulate tax laws or perhaps to evade creditors or censors. JONES, *supra* note 47, at 198; SIMON, *supra* note 44, at 97–98. For clarity, this Note will largely refer to all incarnations of his company as Marvel—a name it formally adopted in the 1960s.

[51] *Marvel Characters*, 310 F.3d at 282; SIMON, *supra* note 44, at 92 (noting that Simon took fifteen percent and Kirby ten percent).

[52] JONES, *supra* note 47, at 200.

[53] SIMON, *supra* note 44, at cover, 87, 111.

[54] *Id.* at 111–12. This practice, now referred to as "Hollywood accounting," is still commonly used in entertainment industries. *Id.* at 112; *see* 3 NIMMER ON COPYRIGHT, *supra* note 8, § 9.02 (noting that "the nature of the royalty formula (e.g., whether based on gross receipts, or 'net profits' defined in such manner as to leave virtually nothing after deduction of 'costs') and the numerical amount of the percentage may well vary depending upon the author's bargaining position") (footnote omitted).

[55] SIMON, *supra* note 44, at 112–13.

Timely, Simon orally assigned whatever rights he may have had in Captain America back to the publisher.[56]

After serving in World War II, the partners had, as Simon put it, "become pretty disillusioned by the habits of people who would take everything away from you, put the copyrights in their own names, and not deliver on the royalties or fudge them up."[57] Without any passive income from the intellectual properties they'd created for DC and Marvel, Simon and Kirby depended on new freelance assignments.[58] The in-demand partners "moved from publisher to publisher, cutting increasingly lucrative deals . . . ."[59] Innovation followed. As the popularity of superheroes began to wane after the war, Simon and Kirby invented an entire genre: romance comics, designed specifically for an audience of "More Adult" female readers.[60] Under a deal at Crestwood Publications that gave them fifty percent of the net profits,[61] *Young Romance* was an "unqualified success" and "launched countless imitators."[62] And when Marvel briefly resumed publishing Captain America in 1953, Simon and Kirby countered by creating and publishing *Fighting American*.[63] As Simon later recalled his thinking at the time: "[T]here's no reason we can't do our own character again. They can't corner the market on patriotism, after all. Why don't we show them how it's done?"[64] This time, Simon and Kirby kept the rights.[65]

As the examples of Superman and Captain America show, early comic book creators had few options but to assign their copyright interests in their works to their publishers. These publishers partly fulfilled the constitutional aims of copyright law by "enriching the general public through access to creative works."[66] In today's comic book ecosystem, leaving rights of ownership solely with publishers has the potential to incentivize creators to innovate as they "design around" existing works.[67] But in the 1940s, publishers primarily looked to profit not from new ideas but from churning out material quickly and cheaply—most notably by replicating and

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[56] *Marvel Characters*, 310 F.3d at 282.

[57] SIMON, *supra* note 44, at 147.

[58] *See Id.* at 160 ("We needed income. I had to line up some new freelance work. After all, we had families to support and mortgages to pay off.").

[59] Robert Greenberger, *Comics Finds True Love*, MILLENNIUM EDITION: YOUNG ROMANCE COMICS, April 2000, at inside front cover.

[60] *Id.* at inside front cover, inside back cover; SIMON, *supra* note 44, at 163–64.

[61] SIMON, *supra* note 44, at 164–65.

[62] Greenberger, *supra* note 59, at inside back cover.

[63] SIMON, *supra* note 44, at 188. Forty years later, Fighting American's similarities to Captain America would spark a legal battle with Marvel. *See infra* note 203.

[64] SIMON, *supra* note 44, at 188.

[65] Declaration of Joseph Simon in Opposition to Plaintiffs' Motion for Preliminary Injunction at 3, Marvel Characters, Inc. v. Awesome Ent. L.L.C., No. 97 Civ. 5848 (S.D.N.Y. Aug. 12, 1997), 1997 WL 34639827.

[66] Fogerty v. Fantasy, Inc., 510 U.S. 517, 527 (1994).

[67] Dallas F. Kratzer III, Comment, *Up, Up and Away: How Siegel and Shuster's Superman Was Contracted Away and DC Comics Won the Day*, 115 W. VA. L. REV. 1143, 1170–71 (2013).

repurposing thinly veiled imitations of Superman.[68] "[L]iterally hundreds of superheroes appeared, trying to capture the attention of young readers."[69] The comic book as a fledgling art form was at risk of stagnation.

C. *Seduction of the Innocent*

From the 1930s through the 1950s, exclusion from propriety interests in their works disincentivized the average comic book creator from improving the quality of his works. Over the next thirty years, the problem would only deepen as jurisprudence tightened publishers' grips on copyrights, despite legislation designed to give creators more opportunities to share in the proceeds of their work-for-hire creations. The story of Siegel and Shuster would repeat itself: creators would sign away their copyrights, lose or settle a legal battle aimed at regaining those rights, and then find themselves persona non grata with major publishers.[70]

Simon and Kirby parted ways after a Senate subcommittee on juvenile delinquency in 1954 entertained the theories of psychiatrist Fredric Wertham tying comic book reading to criminal conduct.[71] The nationally televised

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[68] *See* LOPES, *supra* note 6, at 20–21. DC vigorously pursued legal action against competitors. SERGI, *supra* note 33, at 41–46. In *Detective Comics, Inc. v. Bruns Publications, Inc.*, 111 F.2d 432, 434 (2d. Cir. 1940), the Second Circuit found that superheroes in general were an unprotectible idea, rather than infringing DC's copyrights in Superman. This allowed other publishers to create their own superpowered imitations. *See* Jamie Lund, *Copyright Genericide*, 42 CREIGHTON L. REV. 131, 140–42 (2009). Still, in *National Comics Publications, Inc. v. Fawcett Publications, Inc.*, 191 F.2d 594 (2d Cir. 1951), DC won a ruling that some of Fawcett's Captain Marvel stories copied Superman stories closely enough to constitute infringement. Fawcett settled and agreed to stop producing comics featuring Captain Marvel. Joseph Kary, *Superman vs. the Big Red Cheese*, COMIC BOOK MARKETPLACE, Jan. 1998, at 18, 20–21; SERGI, *supra* note 33, at 73.

[69] LOPES, *supra* note 6, at 20–21.

[70] *See, e.g.*, Michael Dean, *Post Mortem: Marv Wolfman Talks About His Day in Court*, COMICS J., Nov. 2001, at 4, 8 (describing writer and former Editor-in-Chief Marv Wolfman's blacklisting at Marvel after his failed suit, *In re Marvel Entertainment Group*, 254 B.R. 817 (D. Del. 2000), to assert ownership over seventy-one characters he had created for the publisher); Robert Stanley Martin, *All Quacked Up: Steve Gerber, Marvel Comics, and Howard the Duck*, HOODED UTILITARIAN (May 28, 2014, 6:33 AM), *available at* https://web.archive.org/web/20140529143308/http://www.hoodedutilitarian.com/2014/05/all-quacked-up-steve-gerber-marvel-comics-and-howard-the-duck (describing writer Steve Gerber's claims that Marvel fired him because he was contemplating legal action over the copyright to his creation of Howard the Duck, though Marvel maintained the firing was over lateness); Jim Shooter, *Writer/Editors – Part 3*, JIMSHOOTER.COM (Aug. 16, 2011), http://jimshooter.com/2011/08/writereditors-part-3.html (noting that both Gerber's lateness and his threats to sue led to his firing). Siegel himself struggled to find consistent comic work after his suit, largely getting assignments out of pity. *See* JONES, *supra* note 47, at 283–84; HOWE, *supra* note 43, at 45, 91 (describing Siegel's attempt to write for Marvel at a time when he feared losing work because of an impending copyright lawsuit); *see also* Steve Bissette, Introduction to *What Are Creators' Rights?*, COMICS J., Sept. 1990, at 66, 68 ("Obviously, there is no such thing as 'job security' when the company owns your work under terms that legally deny that you are even the creator (or 'Author') of the work.").

[71] RONIN RO, TALES TO ASTONISH: JACK KIRBY, STAN LEE, AND THE AMERICAN COMIC BOOK REVOLUTION 56–57 (2004); *see* S. REP. NO. 84-62, at 12–16 (1955) (summarizing the hearings of April 21–22 and June 4, 1954); SIMON, *supra* note 44, at 182–86 (describing Joe Simon's experience watching the televised proceedings).

hearings capped a grassroots crusade in protest of comics' content that crippled the industry.[72] Dozens of publishers, from well-established companies to new outfits like Simon and Kirby's own startup, Mainline Comics, went out of business as total monthly sales dropped from 80 million to 40 million.[73] With severely limited options, existing creators struggled to find work, took pay cuts, or, like Simon, moved to other industries.[74]

The 1960s brought early creators who had signed away their ownership rights an opportunity to get them back. Under the Copyright Act of 1909, copyright holders could control works for an initial period of twenty-eight years, at which point the original author had the right to renew in his own name for an additional twenty-eight years, regardless of any assignment of the copyright in a work made in the meantime.[75] Given the sagas of Superman and Captain America, this renewal right held obvious attraction for the characters' creators. Congress intended authors to exercise this right in cases where they sold their rights "to a publisher for a comparatively small sum" only for "the work [to] prove[] to be a great success."[76] But the Supreme Court undermined this goal in 1943 when it held in *Fred Fisher Music Co. v. M. Witmark & Sons* that creators could assign this renewal right.[77] For the creators of Superman and Captain America, this decision would become a sticking point.

Joe Simon moved proactively, suing Marvel in New York state court in 1966—two years before the end of the initial twenty-eight-year copyright term for Captain America; a federal suit followed a year later.[78] Simon claimed that, as the original co-author of the Captain America character and the first ten issues of *Captain America Comics*, he had the right of renewal under the 1909 Copyright Act.[79] Marvel argued that even had Simon not assigned away *all* his rights—including the right of renewal—in 1940, he also initially created the works as an "employee for hire," and therefore the publisher owned the copyright and the right of renewal.[80] This was a rather challenging claim for Marvel to make, as Simon was not an employee when

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[72] *See generally* LOPES, *supra* note 6, at 41–56; SERGI, *supra* note 33, at 4 (noting Wertham "is uniformly blamed for the downfall of comics in the fifties").

[73] LOPES, *supra* note 6, at 56; MARK EVANIER, KIRBY: KING OF COMICS 87 (2008). Marvel only survived by making a deal with the distributor owned by DC. JONES, *supra* note 47, at 262, 279.

[74] LOPES, *supra* note 6, at 57; RO, *supra* note 71, at 57.

[75] 3 NIMMER ON COPYRIGHT, *supra* note 8, § 11.07[B].

[76] H.R. REP. NO. 60-2222, at 14–15 (1909).

[77] Fred Fisher Music Co. v. M. Witmark & Sons, 318 U.S. 643, 657 (1943).

[78] SERGI, *supra* note 33, at 57–58. Both cases are described in *Marvel Characters v. Simon*, 310 F.3d 280, 283–84 (2d Cir. 2002), a later case brought under the 1976 Copyright Act. Carl Burgos, who created the original Human Torch character for Marvel in 1939, also "pursu[ed] legal action" and "registered some copyright claims in 1967 that went nowhere," then "left comics behind for good." HOWE, *supra* note 43, at 13–14, 75–76.

[79] *Marvel Characters*, 310 F.3d at 283.

[80] *Id.*

he and Kirby independently created Captain America[81] and only accepted an editorial position when the publisher wanted to capitalize on the superhero's success as a "springboard for other projects."[82] Marvel, though, had an ace in the hole: Jack Kirby, Simon's former partner of over twenty years.

Unlike Simon, Kirby in 1966 was working exclusively for Marvel. His creative vision was shaping nearly the entire line of the company's superhero comics as it brought the genre into a new era—and sold in record numbers.[83] Because the fallout from the Senate hearings had so reduced the number of publishers, Kirby was also completely dependent on Marvel for work—compensated only by a standard rate for pages that saw print—and under constant pressure to provide for his family.[84] So Marvel offered Kirby a deal: say Captain America was work for hire, and the company would pay him the same amount of any future settlement with Simon.[85] That, or he would be fired immediately.[86] Kirby backed Marvel, writing in an affidavit: "I felt that whatever I did for [Marvel Comics] belonged to [Marvel Comics] as was the practice in those days. When I left [Marvel Comics], all of my work was left with them."[87] Simon, then, had to overcome both this damning statement from the Captain's co-creator as well as the *Fisher Music* decision that allowed publishers to claim that creators could assign their renewal right inclusive of all other rights of ownership. The odds got worse when in 1968 the same U.S. district court hearing Simon's case ruled against the children's

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[81] *Id.* at 282. ("According to Simon, he created Captain America as an independent, freelance project before shopping it around to various publishers."); *see* SIMON, *supra* note 44, at 85–89, 92 (describing Simon's recollection of Captain America's creation); JONES, *supra* note 47, at 200 (describing Marvel's willingness to buy the rights to publish Captain America).

[82] SIMON, *supra* note 44, at 93.

[83] EVANIER, *supra* note 73, at 111, 122, 128, 133. The question of Kirby's working relationship with Marvel editor Stan Lee, and the amount each contributed to the development of the company's famous characters, is almost certainly the most debated issue in the history of American comic books. *See generally id.* at 112, 114, 122, 124, 127–28, 131, 133; HOWE, *supra* note 43, at 262–63 (describing Lee and Kirby's own disagreements over their roles in creating Marvel characters in the 1960s); *see also* Marvel Worldwide, Inc. v. Kirby, 777 F. Supp. 2d 720, 724–25 (S.D.N.Y. 2011) (noting that Kirby "played a key role in the creation of a number of iconic characters," while also making clear "this case is not about whether Jack Kirby or Stan Lee is the real 'creator' of Marvel characters"). In 1999, Mark Evanier testified that Kirby had created or co-created "somewhere between 50 and 70 percent" of the Marvel universe of characters. Michael Dean et al., *Creators' Rights on Trial: Marv vs. Marvel, Part 2*, COMICS J., Nov. 2001, at 68, 77.

[84] EVANIER, *supra* note 73, at 133, 136–38; SIMON, *supra* note 44, at 227 ("All of Kirby's work in the '60s was for Marvel, and he was always terrified that he would stop getting assignments. It was a big deal for him. He had to bring the money home for Roz, put food on the table for the kids."). Kirby had "four kids and a steady stream of financial crises." EVANIER, *supra* note 73, at 147.

[85] SERGI, *supra* note 33, at 58; HOWE, *supra* note 43, at 77.

[86] Dean et al., *supra* note 83, at 76.

[87] SERGI, *supra* note 33, at 58; *see* Tom Brevoort, *Lee & Kirby: The 1966 Testimony of Jack Kirby*, TOM BREVOORT EXPERIENCE (Sept. 11, 2021), https://tombrevoort.com/2021/09/11/lee-kirby-the-1966-testimony-of-jack-kirby (reprinting the full affidavit). Forty-five years later, this testimony served as evidence against copyright claims brought by Kirby's family regarding other Marvel characters. Marvel Worldwide, Inc. v. Kirby, 777 F. Supp. 2d 720, 746 (S.D.N.Y. 2011); *see infra* text accompanying notes 225–32.

author known as Dr. Seuss in a similar suit, holding that plain contract language assigning "all rights" meant "a totality of rights."[88]

As a result, in November 1969, Simon and Marvel settled.[89] Simon received a cash payment—"some money, but not a hell of a lot"[90]—in exchange for assigning any remaining rights he may have had to Marvel.[91] But he also agreed to say that, despite the truth of the character's origins, he had created Captain America as an employee for Marvel.[92] Later, Simon would say that he only settled because he could no longer afford to litigate the issue.[93] Once again, the publisher's dominant position in the copyright ecosystem had left a creator with no choice but to give up his rights of ownership, and in this case, pit him against his longtime partner and accede to a lie about his character's origin. Simon later called the settlement "a tough thing to swallow."[94]

D. *Heroes of the People*

Also in 1969, Siegel and Shuster once again challenged DC's ownership of Superman, this time by claiming they held the renewal rights.[95] But much like Siegel's earlier suit, this argument failed to take flight. In 1973, the district court granted summary judgment to DC.[96] As Simon had feared a few years earlier, the court relied on the Dr. Seuss decision, finding that the creators' 1948 settlement assigning "all" their rights to DC included the right to renewal that would not arise until decades later.[97] The Second Circuit upheld the decision that "general words of assignment can include renewal

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[88] Geisel v. Poynter Prods., Inc., 295 F. Supp. 331, 341–42 (S.D.N.Y. 1968).

[89] Marvel Characters, Inc. v. Simon, 310 F.3d 280, 283–84 (2d Cir. 2002).

[90] SIMON, *supra* note 44, at 228. Kirby reportedly expected $7,500 as his match to Simon's settlement. HOWE, *supra* note 43, at 105.

[91] Marvel Characters, Inc. v. Simon, No. 00 CIV. 1393(RCC), 2002 WL 313865, at *9 (S.D.N.Y. Feb. 27, 2002) (quoting the settlement agreement: "Simon shall and hereby does assign . . . any and all right, title and interest he may have or control or which he has had or controlled in and to the following (without warranty that he has had or controlled any such right, title or interest)").

[92] *Id.* at *8 (quoting the settlement agreement: "Simon acknowledges and agrees that all his work on the Materials, and all his work which created or related to the Rights, was done as an employee for hire of [Marvel].")

[93] *Id.* at *2.

[94] SIMON, *supra* note 44, at 228.

[95] Siegel v. Nat'l Periodical Publ'ns, 364 F. Supp. 1032, 1033 (S.D.N.Y. 1973); Siegel v. Time Warner Inc., 496 F. Supp. 2d 1111, 1119 (C.D. Cal. 2007) (noting Siegel and Shuster filed in 1969).

[96] *Siegel*, 364 F. Supp. at 1038.

[97] *Id.* at 1035, 1038. The district court also found that the character had been a work for hire—despite its independent creation five years before the sale to DC—because Siegel and Shuster had made revisions at the instance of DC in 1938. *Id.* at 1036. On appeal, the Second Circuit overturned the work-made-for-hire finding, noting that "Superman and his miraculous powers were completely developed long before the employment relationship was instituted," and any revisions were insufficient to create a presumption of work-made-for-hire. Siegel v. Nat'l Periodical Publ'ns, Inc., 508 F.2d 909, 914 (2d Cir. 1974). Fifty years later, the "instance and expense" test would be the key dispute in the legal battle waged by Jack Kirby's family to regain ownership of the creators he created for Marvel. Marvel Characters, Inc. v. Kirby, 726 F.3d 119, 140–43 (2d Cir. 2013); *see infra* text accompanying notes 225–32.

rights,"[98] but it used a different rationale. The Supreme Court had noted in *Fisher Music* that "an assignment by the author of his 'copyright' in general terms did not include conveyance of his renewal interest."[99] The original Superman contract, though, had given DC the "exclusive right to the use of the characters . . . *to have and hold forever*" and prevented the creators from selling Superman stories to others "*at any time hereafter*."[100] These indefinite time elements were enough to overcome the presumption against transferring renewal rights.[101] The court concluded that Siegel's 1947 case[102] precluded further challenges to DC's ownership.[103]

Within a year, beaten down by legal fees, disrespect, and age, the creators of Superman were "nearly destitute."[104] Siegel suffered a heart attack; Shuster was legally blind.[105] Unlike the aftermath of their earlier court defeat, Siegel and Shuster had no more innovations left in them—at least none they could print in a comic. But they still had the power to change the industry one last time. Although an appeal to the Supreme Court was pending, Siegel took his case to the court of public opinion. Explaining his version of events, he wrote a press release asking "my fellow Americans to please help us by refusing to buy comic books, refusing to patronize the new Superman movie, or watch Superman on TV until this great injustice against Joe and me is remedied by the callous men who pocket the profits from OUR creation."[106] He had the support of fellow creators both young and old, as well as the fans, who saw him and Shuster as heroes.[107] The story made national news, and bad press mounted. Jack Liebowitz, the former DC president who had played a direct role in the creators signing away their rights in 1938, pointed to freedom of contract and contended the publisher was legally within its rights, but he then added to DC's public image troubles by suggesting that "[i]f Siegel and Shuster had 'just stayed put,' . . . instead

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[98] *Siegel*, 508 F.2d at 913 (citing Venus Music Corporation v. Mills Music, 261 F.2d 577 (1958)).

[99] Fred Fisher Music Co. v. M. Witmark & Sons, 318 U.S. 643, 653 (1943).

[100] *Siegel*, 508 F.2d at 913–14 (emphases added by the court).

[101] *Id.*; *see* Corcovado Music Corp. v. Hollis Music, Inc, 981 F.2d 679, 684–85 (2d Cir. 1993) (distinguishing *Siegel* from other cases where authors assigned copyrights in general terms without such time elements).

[102] *See supra* text accompanying notes 35–37.

[103] *Siegel*, 508 F.2d at 914.

[104] Breasted, *supra* note 4; *see* JONES, *supra* note 47, at 289–91 (describing *Superman* editor Mort Weisinger's demeaning attitude toward Siegel's writing); HOWE, *supra* note 43, at 45 (describing an incident in which Weisinger told Siegel he would use his script for toilet paper).

[105] JONES, *supra* note 47, at 316; David Vidal, *Superman's Creators Get Lifetime Pay*, N.Y. TIMES (Dec. 24, 1975), https://www.nytimes.com/1975/12/24/archives/supermans-creators-get-lifetime-pay.html.

[106] SERGI, *supra* note 33, at 203. The release began with prose that seemed like it belonged in a comic book: "I, Jerry Siegel, the co-originator of Superman, put a curse on the Superman movie! I hope it super-bombs. I hope loyal Superman fans stay away from it in droves. I hope the whole world, becoming aware of the stench that surrounds Superman, will avoid the movie like a plague." *Id.*

[107] JONES, *supra* note 47, at 317–20.

of initiating lawsuits, they would have profited well over the years."[108] Nine days later, DC caved. While a share of ownership was out of the question following the Second Circuit's decision, the creators received a pension, medical insurance, and a measure of respect: all Superman books (and the upcoming movie) would henceforth say the character was created by Jerry Siegel and Joe Shuster.[109]

By taking his case to the media, Siegel had replicated the one previous occasion upon which publishers had changed their ways: the public pressure from outraged parents and Senators in response to Fredric Wertham's juvenile delinquency claims in the 1950s.[110] But in 1975, the impetus for change came from creators, not the audience. The Siegel and Shuster agreement showed for the first time that creators could grab a foothold in the imbalanced power dynamic that for so long had allowed publishers to dictate the terms.[111] Other creators would soon take notice.[112]

The legal obstacles remained. The disparity of bargaining power between comic book creators and publishers was the type of working relationship Congress had in mind when it included renewal rights in the 1909 Copyright Act.[113] But the Supreme Court precedent in *Fisher Music* "largely frustrated" any value the renewal mechanism could have provided those in an inferior bargaining position[114]—all the more so when indiscriminate terms like "forever" and "hereafter" were all publishers needed to include to eliminate an author's right of renewal. Siegel and Shuster's case became a prime example of the futility of bringing a lawsuit based on renewal rights, even when the original assignment of rights made no *specific* mention of them.[115] Clearly, renewal rights would never be a solution if creators were ever going to get "a second bite at the apple"[116] to regain ownership rights, as Congress had intended. Luckily for creators, copyright law in 1975 was ripe for change.

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[108] Thomas Collins, *A Ray of Hope for Superman's Creators*, NEWSDAY, Dec. 10, 1975, at 3A, *available at* https://www.newspapers.com/clip/83637025/siegel-shuster-newsday/ (last visited July 1, 2022).

[109] Vidal, *supra* note 105; JONES, *supra* note 47, at 320–22.

[110] *See supra* text accompanying notes 71–72.

[111] JEAN-PAUL GABILLIET, OF COMICS AND MEN: A CULTURAL HISTORY OF AMERICAN COMIC BOOKS 84 (2010) (describing DC's 1975 Siegel and Shuster agreement as proof that "the economic logic of comic books, unchanged over the course of forty years, according to which writers and artists were work-for-hire employees that did not enjoy any rights to the products of their work, began to fissure").

[112] *See infra* Sections II.A–B.

[113] *See* 3 NIMMER ON COPYRIGHT, *supra* note 8, § 9.02 (describing as a rationale for renewal rights: "[A]n author (at least one without a reputation for past successes) must necessarily find himself in a poor bargaining position when he initially negotiates the sale of his copyright. For this reason, a 'second chance' may well be warranted for authors at a time when the economic worth of his work has been proven.").

[114] Siegel v. Warner Bros. Ent., 542 F. Supp. 2d 1098, 1139–40 (C.D. Cal. 2008).

[115] 3 NIMMER ON COPYRIGHT, *supra* note 8, § 9.06[A][1].

[116] *Siegel*, 542 F. Supp. 2d at 1139.

II. FLIPPING THE SCRIPT

If DC and Marvel in the mid-1970s[117] were concerned that creators' public prominence could lead to more equitable negotiations,[118] they could take comfort in knowing creators had few alternatives but to accede to publishers' terms. Marvel ensured freelance creators could not get paid without signing away their rights. The company stamped the following language directly on their paychecks: "By endorsement of this check: I, the payee, acknowledge full payment of my employment by [Marvel], 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."[119] DC used a similar scheme, then switched to an "art protection service," whereby the publisher would possess the original pages of artwork until the artist personally came to claim them by signing a waiver saying they had been completed as works for hire.[120]

The legal battles over Superman and Captain America had made creators aware of the importance of ownership. Kirby had been stockpiling ideas for years, rather than including them in his work-for-hire comics, where he could have no hope of retaining rights.[121] Marvel writer and editor Roy Thomas followed Kirby's lead. Tasked with adding a new superhero to The Avengers, Thomas recycled and revamped existing characters rather than create a new one—specifically because he was wary of facing the same ownership difficulties as Simon and Siegel.[122] "I started thinking about how someday they might make a movie or TV show out of one of these

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[117] Although other mainstream comic book publishers—such as Archie, Gold Key, and Harvey—also produced comics in this period, they had a significantly smaller output and, with a few exceptions such as Warren, targeted exclusively juvenile readers. *See, e.g.*, *The Newsstand: April 1976*, MIKE'S AMAZING WORLD OF COMICS, http://www.mikesamazingworld.com/mikes/features/newsstand.php?month=4&year=1976 (last visited July 5, 2022) (displaying all the comics on sale from mainstream publishers in a given month); GABILLIET, *supra* note 111, at 72 (2010) ("[T]he gap between the titles bought by children and teenagers (then led by DC and Marvel) and family-oriented comic books (read by the whole family and often purchased by parents) of the Archie, Dell, or Gold Key kind widened."). For these reasons, this Note focuses primarily on the business practices of DC and Marvel.

[118] See JONES, *supra* note 47, at 320–21 ("To [DC's] attorneys, however, credit threatened to open the door to legal challenges. If someone other than the corporation could claim to have created an intellectual property, authorship and ownership could be called into question. And if Siegel and Shuster were given credit as creators, who would be making the same demand next? What other properties would be disputed?").

[119] Marvel Worldwide, Inc. v. Kirby, 777 F. Supp. 2d 720, 747 (S.D.N.Y. 2011); *see* Gary Friedrich Enters., LLC v. Marvel Enters., Inc., 837 F. Supp. 2d 337, 341 (S.D.N.Y. 2011) (describing different checks for Marvel's employees and freelancers). Archie Comics also used a similar policy, which became the central issue in *Archie Comic Publications, Inc. v. DeCarlo*, 258 F. Supp. 2d 315, 329–31 (S.D.N.Y. 2003), when an artist could not produce copies of the checks.

[120] KEITH DALLAS & JOHN WELLS, COMIC BOOK IMPLOSION: AN ORAL HISTORY OF DC COMICS CIRCA 1978, at 59 (2018).

[121] EVANIER, *supra* note 73, at 147, 150.

[122] HOWE, *supra* note 43, at 99.

characters and how I'd hate the hell out of it if I didn't get money or credit out of it," Thomas said.[123]

A. *With Our Powers Combined…*

Initially, the companies had no intention of changing the core element of their business model: that the publishers would own all the characters and stories that appeared in their comics. Marvel demonstrated this entrenched mindset in the early 1970s when Stan Lee asked Will Eisner if he would be interested in succeeding Lee as Marvel's top editor.[124] Eisner, whose business savvy with the newspaper syndicates in the 1940s made him one of the few creators to enjoy the copyright in his creations,[125] told Lee his plans if he took the job. "[O]ne of the first things I would do is abandon the work-for-hire system that you have here. . . . [A]llow the writers and artists to keep copyrights. The book publishing business does that and does it quite profitably. Then return their original art to them."[126] Marvel balked, and Eisner walked.[127] Lee later said he would have been open to discussing the idea, but not his corporate bosses: "At that time, that wasn't the way it was done in comics."[128] A few years later, new Marvel Editor-in-Chief Archie Goodwin attempted to staunch an exodus of creators to DC by suggesting profit sharing, health insurance, and returning artwork.[129] The publisher's stance was unchanged: "Why are we talking about giving benefits and royalties to these people? . . . These aren't employees on the books—they're people we hire for *piecework*."[130]

Congress had such a publisher in mind when it overhauled the nation's copyright law in 1976.[131] Among the changes was the elimination of the

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[123] *Id.*

[124] ANDELMAN, *supra* note 45, at 203–04. The meeting likely occurred between 1972 and 1974. *Id.* at 206.

[125] *See supra* text accompanying notes 45–46.

[126] ANDELMAN, *supra* note 45, at 204.

[127] *Id.* at 204–05. ("'Oh, we can't do that,' Lee's boss said. 'That's impossible to do here.'") Around the same time, DC President Carmine Infantino asked Eisner and Joe Simon "to take over a whole division of comic books and produce them," but the two creators decided they could not make it profitable for themselves. SIMON, *supra* note 44, at 219.

[128] ANDELMAN, *supra* note 45, at 205.

[129] HOWE, *supra* note 43, at 191. DC's policy at this time was slightly more understanding, giving creators a percentage of merchandise featuring their work, though "copyright adjustments [remained] beyond [DC's] current capacity to invoke." DALLAS & WELLS, *supra* note 120, at 60.

[130] HOWE, *supra* note 43, at 191. As Eisner had suggested, benefits offered to comic book freelancers were worse than those offered to those working in other industries. *See* LOPES, *supra* note 6, at 101 ("Describe these conditions to any other professional and the response is one of horror. In every respect, we're years behind them and losing ground.").

[131] *See* Lydia Pallas Loren, *Renegotiating the Copyright Deal in the Shadow of the "Inalienable" Right to Terminate*, 62 FLA. L. REV. 1329, 1344–46 (2010) (explaining that "[t]he image of authors as poor businessmen" guided Congress' adoption of termination rights and "continues to affect courts' understanding" of the concept); Marvel Characters, Inc. v. Simon, 310 F.3d 280, 292 (2d Cir. 2002)

renewal procedures—which the cases of Joe Simon, Jerry Siegel, and Joe Shuster had demonstrated were illusory[132]—in favor of an *inalienable* termination right on the part of the original author.[133] As Congress explained: "A provision of this sort is needed because of the unequal bargaining position of authors, resulting in part from the impossibility of determining a work's value until it has been exploited."[134] Critical for comic creators working for DC and Marvel, however, this right would not apply to their made-for-hire works.[135]

The new termination provision would force comic book publishers to make some immediate changes in their relationship with freelance creators. Unlike the 1909 Copyright Act that preceded it, the 1976 Act formally defined the term "work made for hire."[136] For works created outside of a formal employer-employee relationship to qualify, the Act requires a written agreement that specifically identified the relationship as work for hire.[137] Marvel had to eliminate its policy whereby creators assigned their rights to the publisher simply by signing their paycheck without any mention of the work's creation.[138] Instead, Marvel asked all creators to sign a page-long agreement that noted that "all work, writing, art work material or services . . . was and is expressly agreed to be considered a work made for hire."[139]

Creators were not pleased. A day after editors asked them to sign the agreement, the Marvel office building "was papered with copies of the

("Congress's goal in providing authors with this termination right was to enable them to reclaim long lost copyright grants.").

[132] *See supra* Sections I.C–D.

[133] *See* Stewart v. Abend, 495 U.S. 207, 230 (1990) (calling the termination of transfer right "inalienable"). Transfers of rights in works created after the new law went into effect on January 1, 1978, could be terminated after thirty-five years, while pre-1978 works could have their grants terminated after fifty-six years. 17 U.S.C. §§ 203(a), 304(c).

[134] H.R. REP. NO. 94-1476, at 124 (1976).

[135] 17 U.S.C. § 304(c).

[136] 17 U.S.C. § 101; 1 NIMMER ON COPYRIGHT, *supra* note 8, § 5.03[B][1][a][i].

[137] 17 U.S.C. § 101.

[138] SERGI, *supra* note 33, at 158–59; *see* Jim Shooter, *The Secret Origin of Jim Shooter, Editor in Chief – Part 3*, JIMSHOOTER.COM (June 29, 2011), http://jimshooter.com/2011/06/secret-origin-of-jim-shooter-editor-in_29.html/ (describing the surprise Marvel's new editor-in-chief felt when learning of the change).

[139] Gary Friedrich Enters., LLC v. Marvel Characters, Inc., 716 F.3d 302, 309–10 (2d Cir. 2013). The agreement's validity was the central issue in this case, in which writer Gary Friedrich sued to claim the renewal rights to the Ghost Rider character he created for publication in Marvel Comics in 1972. *Id.* at 307–08. The court would find that the agreement was "ambiguous on its face," "ungrammatical," and "awkwardly phrased" with an "opaque cluster of clauses." *Id.* at 314. After taking a three-day seminar on copyright law, Marvel's new Editor-in-Chief, Jim Shooter, had rewritten the agreement he received from Marvel's outside counsel to make it less "terrifying" and fit on one page. Shooter, *supra* note 138; Jim Shooter, *The Secret Origin of Jim Shooter, Editor in Chief – Part 4*, JIMSHOOTER.COM (June 30, 2011), http://jimshooter.com/2011/06/secret-origin-of-jim-shooter-editor-in_29.html/. As late as 2003, Marvel was still using a slightly modified version of Shooter's one-page agreement as part of a longer work-made-for-hire contract. *Compare* 716 F.3d at 309–10 (quoting from the agreement) *with* Marvel Entertainment, Inc. Epic Writer's Work-Made-For-Hire Agreement 7–8, *available at* http://web.archive.org/web/20030608175409/http://marvel.com/epic/downloads/EPICWritersWMFH.PDF.

document," including "[t]he elevator lobby . . . the elevators . . . the walls of the sixth floor lobby . . . [and] the doors."[140] The agreement had been co-opted; the words "Don't sign this contract!! You will be signing your life away!!" were scrawled across the top. The bottom of the document announced a "comics contract meeting."[141]

Influential artist Neal Adams, who had aided Siegel and Shuster's public relations campaign three years earlier,[142] hosted "nearly 50 professionals"—including the top editors at DC and Marvel—to form the "Comic Creators Guild."[143] A consensus was hard to come by: Adams' initial recommended page rates were "laughed at by knowledgeable professionals and ultimately thrown out."[144] Demands largely centered on royalties and benefits, rather than the copyrights at the heart of the changes in the law.[145] Although the guild fizzled,[146] it may have had some impact in Marvel and DC revising their contracts. Under these deals, rather than agreeing that all work they would ever do for the publisher would be made-for-hire, as Marvel's previous document mandated, creators would acknowledge the status of a work with each job they submitted—a practice that continues today.[147] The discussions also showed that some creators were no longer concerned with the consequences of airing their grievances in front of their employers. And these grievances would only continue to simmer.

B. *The Battle for Independents*

The companies' policies frustrated the constitutional aims of copyright to advance the useful arts by incentivizing low-quality work while also disincentivizing both existing and new creators from meeting their artistic potential. As Steve Bissette, who experienced burnout after drawing "Swamp Thing" for DC, noted in 1990: "Work-for-hire on company-owned characters cannot help but be a process of artistic erosion, for countless writers and artists."[148] Creators working solely for a page rate knew that if publishers really needed pages before a comic's deadline, they would accept just about anything. Artists lowered their standards.[149] They also knew they

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[140] Shooter, *supra* note 138.

[141] Gary Groth, *The Comics Guild, A Professional Guild to Protect the Rights of Visual Creators: A Report*, COMICS J., Oct. 1978, at 15, 16.

[142] Vidal, *supra* note 105; Collins, *supra* note 108.

[143] Groth, *supra* note 141, at 15–16.

[144] *Id.* at 16.

[145] GABILLIET, *supra* note 111, at 188.

[146] *Id.* at 187–89 (noting that the guild marked the "[t]he last attempt to create a collective organization of mainstream comic book creators").

[147] *Id.* at 189.

[148] Bissette, *supra* note 70, at 68, 71.

[149] *See* Alex Grand & Jim Thompson, *Jim Shooter Biographical Interview*, COMIC BOOK HISTORIANS (Sept. 30, 2021), https://comicbookhistorians.com/jim-shooter-biographical-interview-by-alex-grand-jim-thompson/ (quoting Shooter: "When there was all just page rate, [artist] Bill [Mantlo]

weren't at risk of being replaced. "There weren't a lot of new guys lining up for the dying industry, just the most driven and most in love with the art form, hungry for assignments and happily taking direction."[150] Existing creators held back their best ideas,[151] lost their creativity,[152] or looked to leave the industry.[153] Even Kirby left comics in 1978 to work in animation.[154] As a result of this dearth of talent, the quality of the comics suffered.[155]

In response to the unfavorable terms they were receiving at the mainstream publishers, some creators attempted to negotiate for a portion of ownership rights to limited success.[156] The other option was to take their talents elsewhere, but the number of independent publishers remained limited.[157] Although underground "comix" artists had long resisted creators'

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was the guy who would stay up all night and finish something, and he'd turned it in. And he actually liked that. Because if there were words on paper, nobody's going to turn him down, right? Because they needed it. And he exploited that and he was doing some pretty crummy hack work.").

[150] HOWE, *supra* note 43, at 212–13.

[151] *See id.* at 247–48. ("Marvel was not exactly the House of New Ideas. Roy Thomas had been saying it all along: why give creations away?").

[152] Bissette, *supra* note 70, at 68 (accusing the longtime writer of Marvel's *X-Men* of "maintaining his tenure, royalties, and 'job security' at the loss of the very skills that put him in that position," and of "consciously working and reworking the same idea 'relentlessly for a decade.'").

[153] HOWE, *supra* note 43, at 213; LOPES, *supra* note 6, at 101 (quoting Mark Evanier: "When I got into comics around 1970 and I started hanging out with people who did comics or who'd done them all their lives, I found that the only thing most of them wanted from the field was out. Some of them hated the field.").

[154] EVANIER, *supra* note 73, at 189, 191, 197.

[155] Grand & Thompson, *supra* note 149 (quoting Shooter on the state of Marvel in 1978: "Everything's late. There's corruption and there's theft going on. There's all kinds of terrible stuff and the books sucked."); DALLAS & WELLS, *supra* note 120, at 75 (quoting creator Michael T. Gilbert: "By 1978 I was mostly done [reading] DC and Marvel. I was much more into underground comix and alternative titles . . . . From my perspective DC had really gone downhill . . . [with comics] largely produced (in my opinion!) by second-rate talent, and printed on cheap plastic plates."); *see* HOWE, *supra* note 43, at 213 (describing veteran creators as feeling the need to "to make a go of it within the strictures of the system, waiving royalties and reining in their more esoteric flights of fancy").

[156] Writer Tony Isabella developed DC's first Black superhero to star in his own book, Black Lightning, not as a traditional work made for hire but as a partnership in which he would receive twenty percent of profits from the character's use in other media. DALLAS & WELLS, *supra* note 120, at 37. However, when DC looked to add Black Lightning to the "Super Friends" cartoon, it insisted Isabella's cut come out of the share of the animation studio, Hanna-Barbera. Rather than pay Isabella, the studio instead created its own thinly veiled imitation—Black Vulcan. Isabella quit writing the "Black Lightning" comic after this incident. *Id.* at 62. Writer Steve Gerber's 1977 Marvel contract included benefits and editorial decisions related to the character he created, Howard the Duck. But if "Marvel chose to terminate his employment, the privileges with Howard would be terminated along with it." Marvel fired Gerber within the year. Martin, *supra* note 70.

[157] Ken Jones, *This Business of Comics: An Interview with Mark Evanier*, COMICS J., Nov. 1986, 60, 66 ("This was the way it was in comics until very recently. If you had the greatest idea for a comic book—the new Spider-Man—there was no American comic book publisher to whom you could take the damn thing and share in its success. No one. They wouldn't guarantee you creative control of it, they wouldn't guarantee you a continuing credit on it, they wouldn't guarantee not to fire you and bring in someone else.").

traditional subordinate role,[158] the prurient content and minimal distribution of their works limited their audience,[159] making them an unlikely model for advancing comics as a "useful art."[160] The advent of comic book specialty shops, though, gave independent publishers a much more viable distribution method to produce comics with content closer to the mainstream.[161] These "alternative" comics "combin[ed] the presentation of an underground magazine with content that was closer to that of the large publishers . . . ."[162] The new, smaller publishers could focus exclusively on older audiences and stand out by producing quality books.[163] They also attracted prominent creators who were either out of work[164] or disgruntled with their deals at DC or Marvel by offering them more equitable contracts.[165] The success these publishers enjoyed in competing with DC and Marvel prompted Marvel to imitate with its own "Epic" line of comics, which broke new ground for the company both by targeting adult readers and—in a unique exception to its

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[158] LOPES, *supra* note 6, at 62. Despite astronomical page rates, many underground artists, led by R. Crumb, refused to work on Marvel's *Comix Book* in 1974, as it meant giving up ownership of the material. Eventually, Marvel renounced its copyright claims on the work it did receive—then promptly canceled the series. Stan Lee reportedly "was afraid of a revolt" by Marvel's regular creators over the concessions made to the underground "hippies." GABILLIET, *supra* note 111, at 120.

[159] RICHARD ARNDT, STAR*REACH COMPANION 72 (2013) ("Underground comix were great, but they weren't for the average comic reader. They were for potheads and freaks and whatever . . . ."). Indeed, early "comix" output was sexually explicit and chiefly sold in head shops. GABILLIET, *supra* note 111, at 64–66; LOPES, *supra* note 6, at 82 ("While every imaginable, and unimaginable, sex act and theme appeared in a majority of comix stories, Robert Crumb and other artists brought it to the forefront in comix titles focusing exclusively on pornography.").

[160] One of these comix, "Air Pirate Funnies," was the subject of a landmark case in the Ninth Circuit that reaffirmed corporations' dominance over creators in the comic book copyright ecosystem by holding that the Disney parody used more copyrighted material than necessary and therefore could not qualify as fair use. Walt Disney Prods. v. Air Pirates, 581 F.2d 751, 757–58 (9th Cir. 1978).

[161] LOPES, *supra* note 6, at 100–01.

[162] GABILLIET, *supra* note 111, at 83.

[163] LOPES, *supra* note 6, at 101. The limited operations of these publishers also enabled them to "survive on what [Marvel] would consider minuscule sales; 5,000, 10,000 copies" per issue. Dean et al., *supra* note 83, at 95.

[164] In 1978, DC canceled forty percent of its comics and laid off six staffers and dozens of freelancers—moves which led both the editors and creators who had been working on those books to search for regular work elsewhere. *See generally* DALLAS & WELLS, *supra* note 120, at 5, 68–69, 73–74 (describing the causes and aftermath of the 1978 DC layoffs, which came to be known as the "DC Implosion"). Jim Shooter said the DC Implosion led many creators to forgo their concerns and sign Marvel's work-made-for-hire agreement. Grand & Thompson, *supra* note 149. ("The next morning, I have a line out the door, into the lobby and people standing in the elevator or downstairs in the lobby, waiting to get up, to come sign that piece of paper. And so, everybody kind of signed it then.").

[165] Dean et al., *supra* note 83, at 95–96; LOPES, *supra* note 6, at 101 ("New independent publishers would have another effect on the comic book field: better treatment of comic book artists."); HOWE, *supra* note 43, at 232 ("Eclipse Comics, which offered royalties and copyright contention . . . had become the de facto home of Marvel expatriates . . . ."). Not all of these independent publishers lived up to their promises. *See, e.g.*, Bissette, *supra* note 70, at 71 ("In one case, Steve Perry and I completed a job with the understanding that we owned the copyright, only to have that copyright taken away with a single phone call—*after* the job had been completed and accepted.").

regular policy—by allowing creators to retain ownership of the work published within.[166]

Tired of losing talent and market share to these upstart publishers, DC and Marvel both introduced new contracts in the early 1980s that offered creators handsome royalties on successful comics.[167] By the end of the decade, both publishers had announced plans to allow creators, at long last, to retain ownership of new properties that Marvel and DC published.[168] DC Executive Vice President Paul Levitz even acknowledged that the standard contract terms of ten years earlier had been "medieval."[169] Before long, DC and Marvel regained their market share, while many of the new publishers, stripped of the competitive advantage, struggled to stay in business.[170]

Still, these independent publishers had a lasting effect on comic books' growing reputation as a respectable art form by "promot[ing] the status of writers and illustrators as artists, in the eyes of both publishers and buyers."[171] Alternative publishers provided a platform for comics with mature themes that would not fit the superhero-centric publishing plan of DC and Marvel.[172] They also gave comic creators a taste of the benefits that retaining ownership could provide, as in the case of licensing juggernaut "Teenage Mutant Ninja Turtles"—which started as a self-published parody comic of Marvel and DC

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[166] GABILLIET, *supra* note 111, at 88; HOWE, *supra* note 43, at 248; Baisden, *supra* note 11, at 11–12. Marvel and DC also steadily improved the "graphic and print quality" of their publications to match the expectations of adult readers. LOPES, *supra* note 6, at 100.

[167] DC shared four percent of profits to be split between the writer and artist after a comic's first 100,000 sales; most of DC and Marvel's books hit this threshold at the time. "Marvel scrambled to match the terms," but insisted on calling the payments "incentives" rather than "royalties"—the publisher's attorneys apparently believing "royalties" referred to works the payee owned. HOWE, *supra* note 43, at 246.

[168] Baisden, *supra* note 11, at 11–12; *Marvel Plans to Augment Creators' Benefits*, COMICS J., Mar. 1980, at 13. Whether the publishers lived up to the spirit of these deals is another matter. A famous example of a publisher's failure to do so is DC's publication of writer Alan Moore's "Watchmen" and "V for Vendetta." The publishing contract specified that ownership would return to Moore once the book went out of print. Nearly 40 years later, DC has always kept the books in print. Moore believed DC "knowingly stole[] from me." 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; *see* Sam Thielman, *Marvel and DC Face Backlash over Pay: "They Sent a Thank You Note and $5,000 – The Movie Made $1bn,"* GUARDIAN (Aug. 9, 2021, 10:32 AM), https://www.theguardian.com/books/2021/aug/09/marvel-and-dc-face-backlash-over-pay-they-sent-a-thank-you-note-and-5000-the-movie-made-1bn.

[169] Baisden, *supra* note 11.

[170] ARNDT, *supra* note 159, at 95, 98; John Jackson Miller, *1991 Comic Book Sales to Comics Shops*, COMICHRON, https://www.comichron.com/monthlycomicssales/1991.html (last visited July 5, 2022) (showing Marvel and DC combined to account for nearly three-quarters of the "share of overall dollars" on all comics published in 1991).

[171] GABILLIET, *supra* note 111, at 88.

[172] *See What Are Creators' Rights?*, *supra* note 70, at 76 (noting that the Brothers Hernandez, a trio of independent creators, "would not have brought *Love and Rockets* to Marvel," and "Marvel wouldn't have taken it.").

properties, only to surpass them for a time in popularity.[173] As the industry entered the 1990s, the best-selling comics by far remained those superhero comics in which the creators had no share of the intellectual property.[174] The new artists of those comics started to wonder why that was.

C. *The Image Revolution*

Frank Miller had made a name for himself through his work both writing and drawing *Daredevil* on a work-made-for-hire basis for Marvel Comics.[175] When he looked to publish his original comic *Ronin* in 1982, he decided to put his name to good use. Despite his success at Marvel, he took *Ronin* to DC, which offered to let him retain ownership of his characters.[176] "[B]y taking my name to another publisher, that was a critical statement—saying that I could bring my audience with me," he said.[177] Ten years later, seven Marvel artists would test Miller's example on a larger scale—and turn the industry on its head.

Prioritizing style over substance, Marvel's new vanguard of creators were artists for the MTV generation. All in their twenties, they produced detailed work that "embrace[d] the visual language of postnarrative music videos" by focusing on drawing Marvel's heroes in energetic "contortions [that] no longer exactly obeyed anatomical rules."[178] To make their pages as visually impactful as possible, they broke with the advice of older creators and created exciting new characters to match.[179] The new characters and dynamic visuals brought renewed interest from readers.[180] The royalties on these comics made artists like Todd McFarlane, Rob Liefeld, and Jim Lee

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[173] *See* Sean T. Collins, *How "Teenage Mutant Ninja Turtles" Went From In-Joke to Blockbuster*, ROLLING STONE (Aug. 14, 2014, 1:34 PM), https://www.rollingstone.com/movies/movie-news/how-teenage-mutant-ninja-turtles-went-from-in-joke-to-blockbuster-230484/ (describing how the independent comic that spawned a successful toy line and television cartoon began as a parody of popular comics: DC's *The New Teen Titans* ("Teenage") and Marvel's *Uncanny X-Men* ("Mutant"), *Daredevil* ("Ninja"), and the anthropomorphic *Howard the Duck* ("Turtles")).

[174] DC and Marvel published ninety-six of the top 100–selling comics in August 1991. *Teenage Mutant Ninja Turtles* was the only creator-owned comic to make the list. John Jackson Miller, *August 1991 Comic Book Sales to Comics Shops*, COMICHRON, https://www.comichron.com/monthlycomicssales/1991/1991-08Diamond.html (last visited July 5, 2022).

[175] HOWE, *supra* note 43, at 234–35.

[176] *Id.* at 246–47.

[177] *Id.* at 247.

[178] *Id.* at 318–19; The Image Revolution (Respect Films 2014), at 08:38. ("I don't think those guys cared about getting the page done, it was about 'what do I need to do to make this page look unbelievable and powerful,' because they were big fans themselves and they were all working on their dream job.").

[179] HOWE, *supra* note 43, at 318, 330; The Image Revolution, *supra* note 178, at 06:14.

[180] Todd McFarlane's depiction of the new villain Venom catapulted *The Amazing Spider-Man* into its best sales in twenty years. HOWE, *supra* note 43, at 318. "At the time there were four Spider-Man books, but only Todd McFarlane's was selling in the millions." The Image Revolution, *supra* note 178, at 04:46. McFarlane's *Spider-Man* sold a record-breaking 2.4 million copies in 1990. The following year, the first issue of *X-Force*, featuring a host of new characters created by artist Rob Liefeld, sold over 4 million copies. The debut of *X-Men*, with art by Jim Lee, sold 7.5 million. M. Clark Humphrey, *Bye Bye Marvel; Here Comes Image*, COMICS J., Feb. 1992, 11, 11–12.

"some of the highest-paid comic book creators of all time."[181] To comic retailers, "any book they touched was just gold."[182] In 1991, forty-four of the top fifty selling comics were drawn by just seven Marvel artists.[183] But their art was all made for hire. Marvel owned the copyrights, and thus reaped most of the rewards.[184]

Like Miller before them, McFarlane and Liefeld both believed the fans would follow the artists, not only the characters.[185] McFarlane, disillusioned with the disparity and editorial interference, was the first to quit working for Marvel.[186] Inspired by the difficulties faced by Jack Kirby and creators' failed attempts to unionize in the 1970s, McFarlane knew creators needed to present a united front to make any substantive change.[187] He and Liefeld convinced Lee and the four other top-selling Marvel artists to join them in quitting their lucrative assignments and publishing their own books.[188] Despite their financial success, the opportunity to control their own intellectual property—and the accompanying licensing revenue—was a key factor.[189]

The bold move paid immediate dividends. McFarlane and Liefeld were right—the readers followed the creators. The seven artists founded Image Comics, where each partner would be autonomous and own the intellectual property to his own books.[190] In an era where the best-selling independent comic would top out at 120,000 copies, the first Image comic, Liefeld's *Youngblood*, approached 500,000 sales.[191] McFarlane's first issue of *Spawn* sold 1.7 million copies—a record for a creator-owned comic book.[192] With just nine Image comics boosting sales, the partners' publisher became the first independent to surpass DC's market share.[193]

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[181] Humphrey, *supra* note 180, at 12.

[182] The Image Revolution, *supra* note 178, at 09:11.

[183] *Id.* at 21:53. "The culture at Marvel was changing. . . . The bottom line was the sales were following Todd, Rob, and Jim and the other guys." *Id.* at 16:06.

[184] Humphrey, *supra* note 180, at 12. In two years, Marvel's sales grew by thirty percent, while net income more than quadrupled. HOWE, *supra* note 43, at 332. After going public with an initial public offering of $16.50 in July 1991, Marvel's stock reached $65 a share in February 1992. M. Clark Humphrey, *Marvel Stock Price Takes a Fall*, COMICS J., Feb. 1992, 23.

[185] The Image Revolution, *supra* note 178, at 18:22; HOWE, *supra* note 43, at 331.

[186] HOWE, *supra* note 43, at 331.

[187] *See id.* at 331, 336; The Image Revolution, *supra* note 178, at 18:31, 22:19.

[188] The Image Revolution, *supra* note 178, at 18:31–24:30. Image Comics first published its book through a partnership with Malibu Comics but was publishing its own books within a year. Valerie Potter, *Image Leaves Malibu, Becomes Own Publisher*, COMICS J., Jan. 1993, at 22.

[189] The Image Revolution, *supra* note 178, at 13:12, 26:59.

[190] *Id.* at 25:59.

[191] *Id.* at 32:14.

[192] John Jackson Miller, *May 1992 Comic Book Sales to Comics Shops*, COMICHRON, https://www.comichron.com/monthlycomicssales/1992/1992-05Diamond.html (last visited July 5, 2022).

[193] Valerie Potter, *Malibu Moves Ahead of DC in Comics Market*, COMICS J., Aug. 1992, at 7, 7. DC responded by killing Superman, a move Liefeld viewed as a direct reaction to Image's market share. The Image Revolution, *supra* note 178, at 33:49. The 1992 issue featuring Superman's death racked up 5 million advance orders and accounted for $30 million in sales on its first day of release in 1992. John

In one fell swoop, Marvel lost all the artists on its four ongoing X-Men comics, among other top sellers.[194] Marvel President Terry Stewart, though, didn't believe the publisher had anything to worry about, saying: "The importance of the creative people is still secondary to the . . . characters."[195] The public disagreed. In the days after the creators' exodus became news, the market value of Marvel's stock dropped over $137 million.[196] Rather than rethink its stance on copyright or increase its royalties,[197] Marvel stuck to its big guns—the X-Men and Spider-Man[198]—confident that the fan favorites would attract readers regardless of the talent behind them.[199] But "commercial concerns were starting to overwhelm the contents of the comics."[200] Marvel's stock continued to plummet.[201] Eventually, Marvel would turn hat in hand to Rob Liefeld and Jim Lee, offering them $3 million contracts, as well as a share of the profits, to reboot *The Avengers*, *Captain America*, *Fantastic Four*, and *Iron Man*.[202] The new series were only a few months old when Marvel filed for bankruptcy at the end of 1996.[203]

Jackson Miller, *1992 Comic Book Sales to Comics Shops*, COMICHRON, https://www.comichron.com/monthlycomicssales/1992.html (last visited July 5, 2022); JONES, *supra* note 47, at 335. The marketing stunt worked, for a time returning DC to the position of top-selling publisher for the first time since 1987. HOWE, *supra* note 43, at 349–50.

[194] The Image Revolution, *supra* note 178, at 21:40. Jim Lee drew *X-Men*, Rob Liefeld drew *X-Force*, Whilce Portacio drew *Uncanny X-Men*, and Marc Silvestri drew *Wolverine*. Erik Larsen succeeded McFarlane, first on *The Amazing Spider-Man*, then *Spider-Man*. Jim Valentino drew Marvel's best-selling non-X-Men, non-Spider-Man title, *Guardians of the Galaxy*. *Id.*

[195] Thomas S. Mulligan, *Holy Plot Twist: Marvel Comics' Parent Sees Artists Defect to Rival Malibu, Stock Dive*, L.A. TIMES (Feb. 19, 1992), https://www.latimes.com/archives/la-xpm-1992-02-19-fi-2444-story.html.

[196] *Id.* The precipitous drop was the result of a negative article in *Barron's* that highlighted the artist's exodus while also pointing to the company's debt and limited growth potential. *Id.* Retailers quoted in the article said Marvel was "becoming 'old hat' and lacks innovation and creativity." Douglas A. Kass, *Pow! Smash! Ker-plash!—High-Flying Marvel Comics May Be Headed for a Fall*, BARRON'S, Feb. 17, 1992, at 14.

[197] *See* HOWE, *supra* note 43, at 351 ("'Quite frankly,' [writer and artist Jim] Starlin said, 'Marvel is not paying rates or royalties that are competitive with what Malibu and Dark Horse are offering.'").

[198] *Id.* at 352 ("If it didn't have webs on it or a big 'X' on it, [Marvel editors] were afraid to do it.").

[199] *Id.* at 342.

[200] *Id.*

[201] *Id.* at 356 (noting that Marvel's stock fell sixty percent by late 1993).

[202] The Image Revolution, *supra* note 178, at 55:26; HOWE, *supra* note 43, at 371, 373. Marvel gave these comics the collective title *Heroes Reborn*. *Id.* at 373.

[203] HOWE, *supra* note 43, at 387; *In re* Marvel Ent. Grp., 222 B.R. 243, 245 (D. Del. 1998). Marvel would survive under the leadership of Toy Biz, a licensing company that Marvel had helped form in 1993. *Id.* Just eleven years later, Disney bought Marvel for $4 billion. Brooks Barnes & Michael Cieply, *Disney Swoops into Action, Buying Marvel for $4 Billion*, N.Y. TIMES (Aug. 31, 2009), https://www.nytimes.com/2009/09/01/business/media/01disney.html.

In a bit of historical symmetry, Liefeld licensed Joe Simon and Jack Kirby's Fighting American, which the older creators had created forty years earlier in response to Marvel publishing comics featuring Captain America in their absence (see *supra* text accompanying notes 63–65), and then published the art he had already completed for *Captain America* as *Fighting American* through his own company. Luke Y. Thompson, *Youngblood at Heart*, OC WEEKLY (Oct. 11, 2007), https://www.ocweekly.com/

By banding together, the Image founders succeeded where the 1978 union attempt had failed. "People had done independents, obviously, for years before Image existed, but they never really made the impact that we always knew a group of guys could make together," Image co-founder Marc Silvestri said. "No one had really done that before."[204] But unlike the independent comics of the 1980s, the contents of the books did not so much tread new ground as they dressed up superheroes in new costumes.[205] And while the Image founders shared their wealth by paying top dollar to hire staff and writers to pitch in on their books, these deals were usually made without any sort of contract.[206] While a rising tide lifted all boats, only the Image founders themselves enjoyed the benefits of copyright that creators had sought for decades.[207] The real value of early Image Comics came not in their artistic merit or business practices, but in showing that the value of the intellectual properties that Marvel and DC guarded so closely depended greatly on talented creators to periodically reinvigorate them for new generations. The founders' path to independent success—redirecting the fanbase they grew through work-made-for-hire contracts to their creator-owned comics—would become the template for many ambitious creators today.[208]

D. *Termination Rights*

While the new guard was reinventing the business of comics, the comic book trailblazers were reaching the end of their road. Joe Shuster died in 1992, Jack Kirby in 1994, and Jerry Siegel in 1996.[209] But their decades-long fight over the rights to the characters they created did not end with their deaths.

The 1976 Copyright Act had given authors the ability to terminate a transfer or license of the copyright in a work fifty-six years after its creation.[210] It also specified that this termination right would, after an author's death, pass to any surviving spouse, children, and grandchildren,

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news-youngblood-at-heart-6364374/. Without any acknowledgement of the Fighting American's previous publication history, Marvel sued for copyright infringement and unfair competition as well as trade dress and trademark claims. Complaint, Marvel Characters, Inc. v. Awesome Ent., L.L.C, No. 97 Civ. 5848 (S.D.N.Y. July 29, 1997), 1997 WL 34639840. The case settled and Liefeld published the art with minor changes. Thompson, *supra*.

[204] The Image Revolution, *supra* note 178, at 22:19.

[205] *See* Humphrey, *supra* note 180. At the company's founding, McFarlane described Spawn as "just a cool superhero guy with a big cape." *Id.*

[206] The Image Revolution, *supra* note 178, at 37:29, 52:11. This practice would later lead to a lengthy court battle when writer Neil Gaiman sued McFarlane over the copyrights to the characters he helped create for an issue of *Spawn*. Gaiman v. McFarlane, 360 F.3d 644, 648–49 (7th Cir. 2004).

[207] This would change as Image opened its doors to others' creator-owned work when Jim Valentino became publisher in 1999. *See infra* Section III.A.

[208] *See infra* text accompanying note 250.

[209] JONES, *supra* note 47, at 333, 336.

[210] *See supra* text accompanying notes 131–35.

or in the absence of any, the executor of his estate.[211] Siegel's family moved to terminate its half of the Superman copyright assignment to DC in 1997.[212] Simon, at eighty-six years old,[213] similarly moved to reclaim his half of Marvel's assignment on the original Captain America comics in 1999.[214] "Part of the court's decision would affect writers and artists everywhere," Simon wrote in his autobiography. "Since I have always tried to protect my rights and Jack's, and pave the way for other comic book guys, this was especially satisfying."[215]

For the Siegel family and Simon, at least, the termination rights provided the leverage they had needed for so long. The Siegels agreed in 2001 to transfer all ownership rights to Superman in exchange for significant royalties on all Superman comics and media and at least $8 million.[216] Apparently unsatisfied, the Siegels subsequently attempted to rescind the 2001 agreement, resulting in a lengthy legal saga, but the agreement was ultimately held to be binding in 2013.[217]

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[211] 17 U.S.C. § 304(c)(2). This Note uses the term "families" as a shorthand reference for these entities, rather than heirs, as the Copyright Act determines ownership of the termination rights, not a will or intestate succession. *See* Loren, *supra* note 131, at 1331–32 n.5.

[212] Siegel v. Warner Bros. Ent., 542 F. Supp. 2d 1098, 1114 (C.D. Cal. 2008). The Siegel family also sought to terminate DC's copyright in another superhero, the Spectre, which Siegel had co-created in 1939. SERGI, *supra* note 33, at 248 n.4. Siegel could have moved to terminate the Superman copyright as early as 1984, though he likely did not want to jeopardize his pension. His family served DC with a termination notice just two weeks before the window to do so closed. *See id.* at 205; 17 U.S.C. § 304(c)(4)(a) ("[T]he notice shall be served not . . . more than ten years before [the effective termination] date."). Shuster died unmarried and childless. In 1992, his sister, the executrix of his estate, vowed not to pursue claims against DC in exchange for increased pension payments. Shuster's nephew later became executor of the estate and pursued a termination claim, but DC won on summary judgment on the basis of the 1992 agreement. DC Comics v. Pac. Pictures Corp., No. CV 10-3633 ODW (RZx), 2012 WL 4936588, at *2–3, *9 (C.D. Cal. Oct. 17, 2012), *aff'd*, 545 F. App'x 678 (9th Cir. 2013); *see* Declaration of Keith Adams in Support of Motion for Partial Summary Judgment as to Fourth, Fifth & Sixth Claims for Relief at 1, DC Comics v. Pac. Pictures Corp., No. CV 10-3633 ODW (RZx) (C.D. Cal. Feb 5. 2013), ECF No. 578 [hereinafter Superman Settlements], *available at* https://www.scribd.com/document/131819692/The-Final-Siegel-Shuster-Settlements (last visited Feb. 28, 2022) (the 1992 agreement).

[213] HOWE, *supra* note 43, at 402.

[214] Marvel Characters, Inc. v. Simon, 310 F.3d 280, 284–85 (2d Cir. 2002). Jack Kirby's family opted not to join Simon's suit because of the costs. SIMON, *supra* note 44, at 241.

[215] SIMON, *supra* note 44, at 242; *see* Robert Wilonsky, *Custody Battle*, DALLAS OBSERVER (Apr. 19, 2001, 4:00 AM), https://www.dallasobserver.com/arts/custody-battle-6392445 ("Christ, I'm doing this for my children and other creative people who should have their rights. . . . I'm too old to be doing this for myself, but I'm not going to quit by any means.").

[216] The Siegel family will receive a one-percent royalty on the sales of Superman comics and a six-percent royalty of gross revenues on Superman's appearances in other media until at least 2033; *see* Larson v. Warner Bros. Ent., No. 2:04-cv-08400-ODW(RZx), 2013 WL 1694448, at *5 (C.D. Cal. Apr. 18, 2013); SERGI, *supra* note 33, at 208 (noting that Superman will enter the public domain in 2033); Superman Settlements, *supra* note 212, at 2–7 (the 2001 agreement). The royalties last while Superman's first publication in Action Comics in 1938 remains under copyright, and a few years beyond for planned movies, television shows, and the like. *Id.*

[217] During this period, the Siegels won a number of court battles, including a finding that they had in 1999 successfully terminated the copyright to the first issue of Action Comics. *Siegel*, 542 F. Supp. 2d at 1114, 1145 (C.D. Cal. 2008). It was on appeal of this judgment that the Ninth Circuit held the 2001

Simon initially lost in the district court, which focused on his false stipulation in his 1969 settlement that Captain America had been a work made for hire.[218] But the Second Circuit reversed on appeal, finding that allowing a settlement to retroactively classify a work as made-for-hire "would likely . . . provide a blueprint by which publishers could effectively eliminate an author's termination right."[219] Such a finding, the court said, "would likely repeat the result wrought by the *Fred Fisher* decision," which had effectively nullified renewal rights and led Congress to create the termination right.[220]

Before the case could be heard on remand, Simon settled for an undisclosed amount in exchange for transferring all of his rights to the publisher.[221] As a result of both settlements, all Superman and Captain America comics now credit their respective creators.[222]

Had Simon not settled, the district court on remand would have determined whether Captain America had been a work made for hire, as Marvel contested.[223] Since Simon (with Kirby) had "unquestionably created Captain America prior to his employment" with Marvel,[224] it appears likely that the court would have found that the work-made-for-hire exception to termination rights did not apply. If so, the case could have created a precedent in creators' favor that Kirby's family may have cited when it sought to terminate Marvel's rights to the works he created in the 1960s.[225]

It remains unknown whether such a precedent would have been persuasive to the court in Kirby's case, or whether the court still could have distinguished the environment in which Kirby co-created Captain America

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agreement created a binding settlement. Larson v. Warner Bros. Ent., 504 F. App'x 586, 587–88 (9th Cir. 2013). After remand, the Ninth Circuit rejected the Siegel family's final appeal in 2016. Larson v. Warner Bros Ent., 640 F. App'x 630, 633 (9th Cir. 2016).

[218] Marvel Characters, Inc. v. Simon, No. 00 CIV. 1393(RCC), 2002 WL 313865, at *8–9 (S.D.N.Y. Feb. 27, 2002). For discussion of the 1969 settlement, see *supra* Section I.C.

[219] *Marvel Characters*, 310 F.3d at 290–91. As a preliminary matter, the court also found that the renewal rights at issue in 1969 and the termination rights at issue in 2002 were separate rights, and so settling one right did not preclude a claim on the other. *Id.* at 288.

[220] *Id.* at 291 (discussing Fred Fisher Music Co. v. M. Witmark & Sons, 318 U.S. 643 (1943)). For a discussion of *Fred Fisher*'s effect on Simon's 1960s litigation, see *supra* Section I.C.

[221] SIMON, *supra* note 44, at 242–43; *Marvel Enterprises Settles Legal Dispute with Joe Simon Concerning Captain America*, Press Release, CBR (Oct. 9, 2003), https://www.cbr.com/marvel-enterprises-settles-legal-dispute-with-joe-simon-concerning-captain-america/. Simon died in 2011 at age ninety-eight. Bruce Weber, *Joe Simon, a Creator of Captain America, Is Dead at 98*, N.Y. TIMES (Dec. 15, 2011), https://www.nytimes.com/2011/12/16/books/joe-simon-a-creator-of-captain-america-is-dead-at-98.html.

[222] Superman Settlements, *supra* note 212, at 5; SIMON, *supra* note 44, at 243.

[223] SERGI, *supra* note 33, at 65.

[224] Meredith Annan House, Note, *Marvel v. Kirby: A Clash of Comic Book Titans in the Work Made for Hire Arena*, 30 BERKELEY TECH. L.J. 933, 959 (2015).

[225] Marvel Worldwide, Inc. v. Kirby, 777 F. Supp. 2d 720, 724–25 (S.D.N.Y. 2011) *aff'd in part, vacated in part sub nom.* Marvel Characters, Inc. v. Kirby, 726 F.3d 119 (2d Cir. 2013). For discussion of Kirby's creation of these characters, *see supra* note 83.

from that in which he created superheroes for Marvel in the 1960s.[226] But as it stood, the district court found "no genuine issues of material fact, and that the Kirby Works were indeed works for hire . . . ."[227] After the Second Circuit affirmed,[228] the Kirbys filed a petition to the Supreme Court,[229] which distributed it for conference.[230] Before the Supreme Court could hear the case, the parties settled in 2014.[231] As in the aftermath of Siegel and Simon's termination rights cases, Kirby's name immediately started appearing as a co-creator in the credits of comics featuring his characters.[232]

Whereas DC and Marvel had previously been able to reliably depend on courts to back their positions in ownership disputes with creators,[233] these settlements demonstrated a reversal of publishers' dominant legal position as it pertains to copyright. DC and Marvel were willing to pay substantial settlements rather than risk the possibility that a court would decide that creators can terminate their assignment of ownership of intellectual properties that have grossed billions at the box office.[234] That risk is not going away. In 2021, five other prominent creators who worked for Marvel in the 1960s and '70s (or their successors in interest) notified Marvel that they too were terminating copyrights in their works.[235] Marvel sued in response, and in its complaint pointed to the Second Circuit's decision in

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[226] For a possible distinction, see Videotaped Deposition of Stan Lee at 54–57, *Marvel Worldwide*, 777 F. Supp. 2d 720 (No. 1:10cv141), *available at* https://www.scribd.com/document/371812855/Kirby-Marvel-appellate-document-record-Volume-10-Stan-Lee-Deposition (last visited Mar. 2, 2002) (noting that Captain America was the only character Marvel published that Kirby had created before he was working with Marvel).

[227] *Marvel Worldwide*, 777 F. Supp. 2d at 725.

[228] *Marvel Characters*, 726 F.3d at 124, 143.

[229] Petition for Writ of Certiorari, Kirby v. Marvel Characters, Inc., 573 U.S. 988 (No. 13-1178), 2014 WL 1275190.

[230] Docket, *Kirby*, 573 U.S. 988 (No. 13-1178), https://www.supremecourt.gov/docketfiles/13-1178.htm.

[231] Brooks Barnes, *Marvel Settles with Family of Comics Artist Jack Kirby*, N.Y. TIMES (Sept. 26, 2014), https://www.nytimes.com/2014/09/27/business/media/marvel-settles-with-family-of-comic-book-artist-jack-kirby.html. Although terms of the settlement remain undisclosed, one report described the settlement as "[m]id eight figures." Rich Johnston, *The Settlement Received by Jack Kirby's Estate from Marvel and Disney for Not Going to the Supreme Court*, BLEEDING COOL (Oct. 13, 2014), https://bleedingcool.com/comics/the-settlement-received-by-jack-kirbys-estate-from-marvel-and-disney-for-not-going-to-the-supreme-court/.

[232] Kevin Melrose, *Marvel Titles Now Include Jack Kirby Creator Credit*, CBR (Oct. 30, 2014), https://www.cbr.com/marvel-titles-now-include-jack-kirby-creator-credit/.

[233] *See supra* Part I.

[234] *See Brands (US & Canada)*, BOX OFFICE MOJO, https://www.boxofficemojo.com/brand/ (last visited July 5, 2022) (showing Marvel as the top grossing "brand" of films based on their properties at over $16 billion, with DC fourth at over $6 billion).

[235] *See* Brief of Larry Lieber and the Estates of Artists Steve Ditko, Don Heck, Gene Colan, and Don Rico as Amici Curiae in Support of Petitioners at 1, Markham Concepts, Inc. v. Hasbro, Inc., 142 S. Ct. 1414 (2022) (No. 21-711), 2021 WL 6012535 ("Lieber co-created Iron Man, Thor, and Ant-Man; Steve Ditko created Spider-Man and Doctor Strange; Don Heck co-created Hawkeye, Iron Man and Black Widow; Gene Colan co-created Falcon, Captain Marvel, Guardians of the Galaxy and Blade; and Don Rico co-created Black Widow.") (italics removed).

Kirby's case as support for its stance that the characters were works made for hire.[236] Whether the creators prevail or settle, Simon may have achieved his goal of paving the way for other creators to fight for ownership of their characters and stories.[237]

III. TRUTH, JUSTICE, AND THE SUBSTACK WAY

Although the outcome of cases involving older works may have a symbolic effect on the general relationship between creators and publishers, they do not serve as direct precedent for modern comics. The underlying issue in the Siegel, Simon, and Kirby cases, as well as the pending cases involving their contemporaries, was whether the pre-1978 comics they created qualified as works made for hire under the 1909 Copyright Act, and thus would be ineligible for termination.[238] However, similar cases involving works created since January 1, 1978, apply the 1976 Copyright Act to determine whether a work is eligible for termination. By requiring a written agreement for a commissioned work to be classified as a work made for hire, the 1976 Copyright Act clarifies whether the creator or publisher is the "author" for the purposes of copyright. With most contracts, the parties will know with certainty whether their art will be a work made for hire when the work is commissioned, rather than when the status is challenged in court. This clarity, and the accompanying understanding of the limitations of working for DC and Marvel, has ushered the comic book industry into a new era. This is the age of the creator-owned comic.

A. *The Kirkman Manifesto*

Artist Jim Valentino took over as publisher of Image Comics in 1999, after two of his fellow founding members left the company.[239] Under Valentino's leadership, Image opened its doors to works by other creators,

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[236] *E.g.*, Complaint for Declaratory Relief at 1–2, Marvel Characters, Inc. v. Lieber, No. 21-cv-07955 (S.D.N.Y. Sept. 24, 2021).

[237] The Supreme Court recently passed on an opportunity to clarify what qualified as a work made for hire under the Copyright Act of 1909 when it declined to hear *Markham Concepts, Inc. v. Hasbro, Inc.*, 1 F.4th 74, 77 (1st Cir. 2021) (holding that the prototype of a board game was made for hire because it was created at the instance and expense of a toy developer, and thus precluded the termination claim of the game designer's family), *cert. denied*, 142 S. Ct. 1414 (2022).

[238] Even though the defendants in these cases are pursuing termination under the 1976 Copyright Act, to determine whether a work created before 1978 was a work made for hire—and therefore ineligible for termination—courts still apply the doctrine of the 1909 Copyright Act. *See, e.g.*, Roth v. Pritikin, 710 F.2d 934, 937–39 (2d Cir. 1983) (holding that the work-made-for-hire provisions of the 1976 Copyright Act do not apply retroactively).

[239] The Image Revolution, *supra* note 178, at 1:06:00. Rob Liefeld had started his own company, Maximum Press, and resigned from Image on acrimonious terms. *Id.* at 59:40. Jim Lee sold his studio, Wildstorm Productions, in 1998 to DC, where he would eventually take on the role of publisher and chief creative officer. *Jim Lee*, DC COMICS, https://www.dccomics.com/talent/jim-lee (last visited July 5, 2022).

and in so doing, diversified its offerings beyond superheroes.[240] This approach, which Image still uses today, differs sharply from DC and Marvel's focus on works made for hire. Image is "only interested in publishing original content for which [creators] would retain all rights."[241] The company profits not through hiring freelancers to create new adventures of publisher-owned characters, but instead by taking a flat fee off the sales of the books it publishes and leaving the rest for the creators to split among themselves.[242] This alternative approach to copyright has attracted top creators.[243]

In 2008, after four years of writing superhero comics for Marvel under an exclusive contract,[244] Robert Kirkman was finding comparative success with his independent titles. Together, the three series published by Image Comics that he created and wrote were selling over 50,000 copies a month, [245] with *The Walking Dead* making forays into the top 100 of the comic sales charts.[246] With these healthy independent sales, Kirkman stopped working for Marvel—a move that impressed Image founder Todd McFarlane. "He quit the competition, cold turkey," McFarlane said. "I thought we had an obligation to go, 'Wow, time to add a partner.'"[247] Image invited Kirkman to become the company's first new partner since its founding in 1992.[248]

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[240] The Image Revolution, *supra* note 178, at 1:06:09 ("For [Valentino], the sensibility was to broaden the scope as much as humanly possible and not rely on any specific genre or anything like that but just good books by good creators.")

[241] *Submissions*, IMAGE COMICS, https://imagecomics.com/submissions (last visited Mar. 4, 2022). Somewhat ironically, given his zeal for creator ownership, Robert Kirkman's own publishing company, Skybound Entertainment, takes an ownership stake of the comics it publishes while offering creators "advances, international distribution, plus marketing, story and design guidance." Susan Karlin, *Robert Kirkman's Skybound Launches New Comic Creators*, FAST COMPANY (Jan. 6, 2012), https://www.fastcompany.com/1679353/robert-kirkmans-skybound-launches-new-comic-creators. Despite these diverging policies, Skybound "operate[s] in concert" with Image. *FAQ*, IMAGE COMICS, https://imagecomics.com/faq (last visited July 17, 2022).

[242] *Submissions*, *supra* note 241. Smaller independent publishers may take a percentage or split of either ownership or media rights. *See* Stephanie Cooke, *A Guide to Comic Book Publishers - Updated*, CREATOR RESOURCE (Sept. 1, 2021), https://www.creatorresource.com/a-guide-to-comic-book-publishers/ (outlining various publishers' requirements).

[243] *See, e.g.*, Rich Johnston, *Jonathan Hickman and Bryan K Vaughan* [sic] *Talk to Ryan King*, BLEEDING COOL (Feb. 25, 2012), https://bleedingcool.com/comics/jonathan-hickman-and-bryan-k-vaughn-talk-to-ryan-king/ (quoting *Saga* writer Brian K. Vaughan as saying "Image's creator owned contract is the most fair of anyone in comics").

[244] Kirkman's Marvel contract excepted the creator-owned titles he wrote for Image Comics. George Gene Gustines, *Writer of the Undead Is Reborn as a Partner at Image Comics*, N.Y. TIMES (July 22, 2008), https://www.nytimes.com/2008/07/22/books/22kirk.html.

[245] The television adaptation of *The Walking Dead* was still two years away when the comic book sold 27,685 copies in July 2008, while *Invincible* sold 15,059, and *The Astounding Wolf-Man* sold 8,951. By comparison, only the top five–selling comics that month sold over 100,000 copies. John Jackson Miller, *July 2008 Comic Book Sales to Comics Shops*, COMICHRON, https://www.comichron.com/monthlycomicssales/2008/2008-07.html (last visited July 5, 2022).

[246] *Id.*

[247] The Image Revolution, *supra* note 178, at 1:13:14.

[248] Gustines, *supra* note 244; *Robert Kirkman Made an Image Partner*, ICV2 (July 22, 2008, 11:00 PM), https://icv2.com/articles/comics/view/12962/robert-kirkman-made-image-partner.

With the industry's attention firmly captured, Kirkman urged other creators to follow his path and stop accepting work-made-for-hire contracts.[249] In a video that came to be known as "The Kirkman Manifesto,"[250] he outlined his vision for creators:

> The way that the comic industry should work is that you start out in low-selling creator-owned stuff that you do on your own or low-selling books that you eventually graduate up to Marvel from doing, or DC. And you work your way up through them, and when you hit a certain level where you can sell a book on your own, you leave. And that's the way it should be. Everyone would be happier doing their own work.[251]

Kirkman criticized creators he viewed as complacent in solely producing work-made-for-hire superhero stories,[252] and warned that depending solely on Marvel and DC to continually assign them work was unsustainable.[253]

Instead, Kirkman suggested, established writers and artists should trade on their names and reputations and bring loyal readers with them to their original concepts, which would be both within their control and potentially much more lucrative, both through the sales of comics[254] and licensing for television and movies.[255] McFarlane, one of the comic industry's prime examples of independent success, later characterized Kirkman's pitch to creators bluntly: "Stop writing for fucking Marvel and DC, and you will succeed."[256]

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[249] Word Balloon, *The Robert Kirkman Manifesto*, SOUNDCLOUD (Aug. 14, 2008), https://soundcloud.com/wordballoonpodcast/word-balloon-the-robert-kirkman-manifesto-august-14th-2008 [hereinafter *Kirkman Manifesto*]. Only the audio of Kirkman's statement remains available online. The original video was published in a now-antiquated format and is no longer accessible, though a short textual summary remains at the original webpage that hosted it. Robert Kirkman, *Video Editorial: Robert Kirkman*, CBR (Aug. 13, 2008), https://www.cbr.com/video-editorial-robert-kirkman/; *see* The Image Revolution, *supra* note 178, at 1:12:47 (showing a short clip of the video).

[250] *Kirkman Manifesto*, *supra* note 249; *Year in Review: The Kirkman Manifesto*, CBR (Dec. 29, 2008), https://www.cbr.com/year-in-review-the-kirkman-manifesto/; Brian Cronin, *Mark Waid Chat Transcript*, CBR (Dec. 12, 2008), https://www.cbr.com/mark-waid-chat-transcript/.

[251] *Kirkman Manifesto*, *supra* note 249, at 4:57.

[252] *Id.* at 2:03 ("Right now, the comic book industry is backwards. No one watches a movie and decides that they want to do movies and aspires to only every do *Pulp Fiction 2*. And no one reads a novel and decides they want to do novels, and only ever aspires to do *Moby Dick 2*.").

[253] *Id.* at 3:33 ("At the end of the day, when you're hot, you're hot, and when you're not hot, they don't want you, and your career is over. And that's bad for creators.").

[254] *Id.* at 4:02 (noting that creator-owned books are often more profitable to creators, even if they sell fewer copies than their comics for DC and Marvel, because "they're not paying for a corporation").

[255] *Id.* at 6:55.

[256] The Image Revolution, *supra* note 178, at 1:13:07. While the other original Image founders have all returned on occasion to create comics for DC or Marvel, McFarlane refused for thirty years until he announced plans to write a Batman-Spawn crossover issue that DC will publish in December 2022. *Id.* at 1:19:01; Spencer Perry, *Comic-Con 2022: New Batman/Spawn Crossover Announced*, COMICBOOK.COM (July 22, 2022, 06:37 PM), https://comicbook.com/dc/news/comic-con-2022-batman-

The initial reaction to Kirkman's pitch, both from his fellow creators and outside analysis, largely suspected that his creator-owned success was an outlier, and that his plan was unscalable for most creators whose original comics would not sell nearly as well.[257] Within a few years, however, the Kirkman Manifesto appeared to be at least partially prophetic, as more top creators found success after moving on from DC and Marvel.[258] Artist Paolo Rivera echoed Kirkman's concerns when he ended a ten-year exclusive contract with Marvel in 2012:

> Marvel owns the copyrights to my *entire* professional portfolio. And why shouldn't they? I was, of course, compensated fairly for it, and for that I'm grateful—but the sum total of that work is not enough to support me in the distant future. My page rate is essentially the same as when I started at 21, so I've decided to invest in myself. What I create in the next decade needs to pay dividends when my vision gets blurry and my hands start to shake . . . .[259]

Similarly, Brian K. Vaughan described his own move from writing for Marvel and DC to creator-owned comics at Image as leaving "mom and dad" and "going away to college."[260] Kirkman became the ultimate proof of his own concept when *The Walking Dead* became a pop-culture phenomenon, with a hit television show and a "horde of video games, costumes, toys, books and theme park attractions."[261] The 100th issue of the comic book sold 366,000 copies, more than double the amount of any other comic in July

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spawn-crossover-announced/. This follows a 2021 partnership with DC to produce action figures and statues of the company's superheroes. *McFarlane Toys Partners with Warner Bros. Consumer Products to Create New DC Direct Collectibles with Exclusive Global Distribution*, MCFARLANE TOYS (July 27, 2021), https://mcfarlane.com/news/mcfarlane-toys-dc-direct-announcement/.

[257] Comic writer Brian Michael Bendis, who had enjoyed success both through his work for Marvel and his independent titles, called Kirkman's statement "dopey" for overstating creators' chances of success in leaving Marvel and DC. Word Balloon, *The Bendis Rebuttal to the Kirkman Manifesto*, SOUNDCLOUD, at 3:29 (Aug. 2008), https://soundcloud.com/wordballoonpodcast/the-bendis-rebuttal-to-the-kirkman-manifesto-aug-2008. Similarly, Mark Waid, who wrote extensively for both DC and Marvel and was at this time editor-in-chief of publisher Boom! Studios, called Kirkman's statement "adorable" in its naivety. Cronin, *supra* note 250; *see* Todd Allen, *The Kirkman/Bendis Debates: Let's Do the Math*, PUBLISHERS WEEKLY (Nov. 24, 2008), https://www.publishersweekly.com/pw/by-topic/new-titles/adult-announcements/article/3110-the-kirkman-bendis-debates-let-s-do-the-math.html (concluding that creator-owned comics potentially could be a more profitable career path over time, but they were not at that time a lucrative source of income for most creators).

[258] *See* Valerie Gallaher, *As Paolo Rivera Leaves "Daredevil," How Will Mainstream Comics Hold on to Their Talent?*, MTV NEWS (June 19, 2012), http://www.mtv.com/news/2625461/paolo-rivera-leaves-daredevil/ (describing multiple creators' departures from DC and Marvel); Johnston, *supra* note 243 (discussing the career paths of writers Jonathan Hickman and Brian K. Vaughan).

[259] Paolo Rivera, *End of an Era*, SELF-ABSORBING MAN (June 18, 2012), https://paolorivera.blogspot.com/2012/06/end-of-era.html.

[260] Johnston, *supra* note 243.

[261] Derrik J. Lang, *"The Walking Dead" Takes a Bite Out of Pop Culture*, ASSOCIATED PRESS (Oct. 11, 2012, 1:30 PM).

2012.[262] Kirkman's success showed that creator-owned comics could fulfill the constitutional aims of copyright not only by incentivizing authors to create new works but also through their mass distribution.

As Kirkman noted in his manifesto, producing creator-owned comics exclusively is not for everyone.[263] Some creators may want to use the opportunity to develop relationships with other creators,[264] forming partnerships that could then go on to produce comics they co-own.[265] Others may simply enjoy the opportunity to play in the "sandbox" featuring much-beloved characters.[266] Still other creators may be risk-averse and continue working for DC and Marvel while the paychecks remain steady, as Kirby did.[267] As pointed out by the initial critics of the Kirkman Manifesto, if creator-owned comics do not sell, the creators do not make any money, and can even lose money if they hire freelance colorists and letterers who do not share in the comic's ownership.[268] If this were the norm for creator-owned comics (and Image's significant market share would suggest otherwise),[269] the constitutional aims of copyright would be better served by leaving copyrights in control of profitable publishers, who would be

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[262] John Jackson Miller, *July 2012 Comic Book Sales to Comics Shops*, COMICHRON, https://www.comichron.com/monthlycomicssales/2012/2012-07.html (last visited July 5, 2022).

[263] *Kirkman Manifesto*, *supra* note 249, at 10:50.

[264] *Creator vs. Corporate Ownership*, COMICS J., Sept. 1990, at 101, 102 ("We stayed on [DC's *Swamp Thing*] because we loved the characters and there was a genuine creative chemistry going on . . . .").

[265] For example, writer Ed Brubaker and Steve Phillips partnered to produce *Gotham Noir* and *Sleeper* for DC, then teamed up again for *Criminal* and *Fatale*, among other creator-owned comics published by Image. David Harper, *This Noir Life: A Retrospective of the Brubaker/Phillips Partnership*, SKTCHD (Mar. 28, 2016), https://sktchd.com/longform/this-noir-life-a-retrospective-of-the-brubakerphillips-partnership/. Writer Brian K. Vaughan and artist Marcos Martín first worked together on Marvel's *Doctor Strange: The Oath*, then later co-created *The Private Eye*. Jesse Schedeen, *BKV and Marcos Martin Debut The Private Eye*, IGN (Mar. 19, 2013, 10:45 AM), https://www.ign.com/articles/2013/03/19/bkv-and-marcos-martin-tease-new-project.

[266] *See* Matt Lune, *Ram V on Playing in the DC Sandbox for One-Shot "Catwoman" #9*, MULTIVERSITY COMICS (Mar. 12, 2019), http://www.multiversitycomics.com/interviews/ram-v-interview-catwoman/.

[267] *See Creator vs. Corporate Ownership*, *supra* note 264, at 104.

[268] Allen, *supra* note 257.

[269] The market share of Image Comics, which exclusively publishes comics that are creator-owned (either in full or in part), averaged 12.5% over the four quarters of 2021, while DC and Marvel, which publish almost entirely work-made-for-hire comics, averaged 59.2% combined. *See* Milton Griepp, *Comic Store Publisher Market Shares – Q1 2021*, ICV2 (Apr. 22, 2021, 3:44 AM), https://icv2.com/articles/markets/view/48161/comic-store-publisher-market-shares-q1-2021; Milton Griepp, *Comic Store Publisher Market Shares – Q2 2021*, ICV2 (July 23, 2021, 3:06 AM), https://icv2.com/articles/markets/view/48888/comic-store-publisher-market-shares-q2-2021; Brigid Alverson, *Comic Store Publisher Market Shares – Q3 2021*, ICV2 (Oct. 18, 2021, 4:39 PM), https://icv2.com/articles/markets/view/49542/comic-store-publisher-market-shares-q3-2021; Milton Griepp, *Comic Store Publisher Market Shares – Q4 2021*, ICV2 (Feb. 10, 2022, 3:19 PM), https://icv2.com/articles/markets/view/50226/comic-store-publisher-market-shares-q4-2021 (tracking actual sales at a sample of over 100 comic shops). In the 1980s, Marvel's market share alone "was thought to have topped 70%." John Jackson Miller, *Comics Publisher Market Shares by Year*, COMICHRON, https://www.comichron.com/vitalstatistics/marketsharesyearly.html (last visited July 5, 2022).

incentivized to produce comics and could ensure mass distribution.[270] But this would reproduce the same problems that arose in the 1970s, when creators without an ownership stake did not produce their best work.[271]

A balance of these interests must be struck to fulfill the constitutional aims of copyright. To create a more equitable industry, some have argued for legislation that would mandate nonwaivable royalties.[272] But such a change is unnecessary. As discussed earlier, Marvel and DC have incentivized creators by regularly offering royalties since the 1980s, a practice that only increased as publishers competed against each other for creators' works.[273] But more so, the growth of creator-owned comics has incentivized innovative storytelling while decreasing the traditional dominance of work-made-for-hire schemes in the comic book copyright ecosystem. Furthermore, the advance clarity that the 1976 Copyright Act provides on a work's status means creators know what they are getting into when they choose to work for DC and Marvel—they have fewer causes to challenge whether their art was made for hire. Indeed, litigation over copyright in modern works has largely been limited to allegations of fraud, disputes between co-creators, and the rare situations in which no written contract exists.[274] More commonly, disputes between

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[270] For an argument to this end, see Patrick Murray, Note, *Heroes-for-Hire: The Kryptonite to Termination Rights Under the Copyright Act of 1976*, 23 SETON HALL J. SPORTS & ENT. L. 411, 414, 435–36 (2013).

[271] *See supra* notes 121–23, 149 and accompanying text. Some modern creators still refrain from creating new characters for Marvel or DC, as Jack Kirby and Roy Thomas once did. Ron Enclerico, Note, *Crises and Compulsory Licenses: Crafting a More Equitable Work-for-Hire Regime for Comic Book Creators*, 34 J.C.R. & ECON. DEV. 249, 263 (2021). But others have taken the opposite approach. Like the future Image founders did while working for Marvel, *see supra* note 180, they create hosts of new made-for-hire characters for which they may later receive royalties before focusing on creator-owned work. *See, e.g.*, Colleen Glennon, *Batman Writer Confirms Even More New Characters Coming to DC in 2021*, SCREEN RANT (Dec. 20, 2020), https://screenrant.com/batman-tynion-confirms-new-dc-characters-2021.

[272] House, *supra* note 224, at 961 (arguing for mandatory royalties once profits on the property hit a certain threshold); Enclerico, *supra* note 271, at 272–73 (proposing a compulsory licensing scheme akin to the music industry).

[273] *See supra* Section II.B.

[274] *See, e.g.*, Gaiman v. McFarlane, 360 F.3d 644, 648–49 (7th Cir. 2004) (a dispute over copyrights for characters created for a *Spawn* comic without a written contract); Complaint for Declaratory Relief at 5–6, Moore v. Kirkman, No. CV12-6811 (C.D. Cal. Aug. 7, 2012), 2012 WL 3191433 (alleging fraudulent inducement to assign copyright in *The Walking Dead*); Complaint and Demand for Jury Trial at 9–13, Crabtree v. Kirkman, No. 22-cv-00180 (C.D. Cal. Jan. 9, 2022) *available at* https://www.scribd.com/document/552107905/Crabtree-v-Kirkman (last visited July 1, 2022) (alleging fraud and breach of oral contract between co-creators of *Invincible*); Class Action Complaint at 42–45, Rogers v. Action Lab Ent., No. 22-cv-00159 (M.D. Penn. Jan. 31, 2022), *available at* https://www.classaction.org/media/rogers-v-action-lab-entertainment-et-al.pdf (last visited July 1, 2022) (claiming breach of contract and fraud by a publisher that creators allege, *inter alia*, refused to pay royalties or release publishing rights); *see also* Karen Berger et al., *Panel 2: Comic Book Jurisprudence with Q&A*, 35 CARDOZO ARTS & ENT. L.J. 575, 592 (2017) (discussing how co-creators are often friends and see no need to have a "pre-nuptial agreement" defining ownership).

publishers and creators now concern royalties, credit, and other contract terms, rather than ownership.[275]

This shift in litigation partly reflects the ever-evolving perception of who should be considered an "author," particularly in collaborative settings like comic books.[276] But it also reflects the shift in the dominant position that publishers once held in their relationship with creators. In today's comic book industry, the crucial question is not whether ownership in the hands of creators or publishers better fulfills the constitutional aims of copyright,[277] rather, it is a question of agency. While the Siegel-Shuster and Simon-Kirby partnerships were fighting for control over Superman and Captain America,[278] they were also fighting to give creators a legitimate voice in negotiations with publishers. Should creators sign a work-made-for-hire contract with guaranteed short-term gains, or should they pursue publishing methods in which they retain ownership for a chance at larger dividends in the long term? After decades of struggle, creators are finally empowered to make that choice for themselves.

But what if creators did not have to choose? What if a comic book publisher was both willing to adopt the risk by paying creators ahead of publication and also allow them to retain all copyrights? Such an arrangement was unthinkable until 2021, when Substack entered the comic book industry and did just that.

B. *Introducing Substack: Is it Friend or Foe?*

Founded in 2017, Substack provides writers with tools to distribute and monetize email newsletters. Its mission at launch, as one report put it, was to provide "[i]nstant, one-man success" for writers who could curate a newsletter and "convince thousands of people to pay [them] for it."[279] Substack sells its service by noting that "[w]riters retain total independence,

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[275] *See* Thielman, *supra* note 168 (discussing a number of recent contract disputes between publishers and creators in the wake of Marvel and DC mining their comics for movies and television).

[276] *See* Peter Jaszi, *Toward a Theory of Copyright: The Metamorphoses of "Authorship,"* 1991 DUKE L.J. 455, 463, 470 (arguing that the Romantic conception of "authorship"—"individual control over [a] created environment"—can be alternatively "suppress[ed] or revis[ed]"); Martha Woodmansee, *On the Author Effect: Recovering Collectivity*, 10 CARDOZO ARTS & ENT. L.J. 279, 290 (1992) ("In a variety of ways, electronic communication seems to be assaulting the distinction between *mine* and *thine* that the modern authorship construct was designed to enforce.").

[277] *See* Jaszi, *supra* note 276, at 500–01 (concluding that "authorship," while important in shaping copyright doctrine, "does not matter much" in deciding "the tension between access and ownership").

[278] *See supra* Part I.

[279] Peter Kafka, *Meet the Startup That Wants to Help You Build a Subscription Newsletter Business Overnight*, VOX (Oct. 16, 2017, 11:00 AM), https://www.vox.com/2017/10/16/16480782/substack-subscription-newsletter-sinocism-bill-bishop-ben-thompson-stratechery. Substack recommends charging five to ten dollars per month for "personal interest" newsletters, or "substantially higher" for "professional interest" newsletters. *Great Writing is Valuable*, SUBSTACK, https://substack.com/going-paid (last visited Aug. 19, 2022) (data shown by clicking the question mark in the "Estimate what you could make on Substack" box).

with complete ownership of their mailing lists, intellectual property, and content."[280] For those successful in building and maintaining an audience, producing newsletters can be a lucrative business. In April 2019, Substack reported that its twelve "top-earning writers [annually made] an average of more than $160,000 each."[281]

To lure writers to its platform, Substack has invested millions in venture capital funding[282] through a grant program it calls "Substack Pro."[283] In a writer's first year in the program, Substack pays a substantial amount up front in exchange for eighty-five percent of subscription revenue.[284] After the first year, the guaranteed money ends, while the writer keeps ninety percent of subscription revenue.[285]

In 2021, as Substack faced increased competition in the online newsletter field,[286] it looked to expand its user base by recruiting creators from a new field: comic books.[287] To this end, in June 2021 it hired Nick Spencer, fresh off a three-year run writing *The Amazing Spider-Man* for

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[280] Hamish McKenzie, *Why We Pay Writers*, ON SUBSTACK (Mar. 12, 2021), https://on.substack.com/p/why-we-pay-writers. The only nonexclusive copyright license authors give to Substack is limited to displaying, distributing, formatting, and marketing the works. *Terms of Use*, SUBSTACK (Aug. 17, 2021), https://substack.com/tos; *Publisher Agreement*, SUBSTACK (Nov. 24, 2021), https://substack.com/pa.

[281] Alex Kantrowitz, *Paid Email Newsletters Are Proving Themselves As a Meaningful Revenue Generator for Writers*, BUZZFEED NEWS (Apr. 29, 2019), https://www.buzzfeed.com/alexkantrowitz/writers-have-been-trying-to-support-online-themselves-for.

[282] In 2019, venture capital firm Andreessen Horowitz announced a $15.3 million Series A investment in Substack. Anthony Ha, *Newsletter Platform Substack Raises $15.3M Round Led by a16z*, TECHCRUNCH (July 16, 2019, 10:00 AM), https://techcrunch.com/2019/07/16/substack-series-a/. In 2021, the firm led a fresh round of funding worth $65 million, which "would value the company at around $650 million." Kia Kokalitcheva & Dan Primack, *Scoop: Substack Is Raising $65 Million amid Newsletter Boom*, AXIOS (Mar. 29, 2021), https://www.axios.com/2021/03/30/substack-andreessen-horowitz-newsletter.

[283] McKenzie, *supra* note 280.

[284] Steven Perlberg, *The New York Times Is Readying a Big Newsletter Push as Substack Tries to Poach Its Top Writers with Advances Worth Hundreds of Thousands*, INSIDER (Apr. 23, 2021, 1:02 PM), https://www.businessinsider.com/new-york-times-responds-to-the-substack-boom-2021-4.

[285] McKenzie, *supra* note 280. Substack's ten-percent cut after the initial year is the same as its standard newsletter program, which is otherwise free to use. *Great Writing is Valuable*, *supra* note 279.

[286] Established tech firms like Facebook and Twitter have launched newsletter services. Sara Fischer, *Scoop: Facebook Explores Paid Deals for New Publishing Platform*, AXIOS (Mar. 16, 2021), https://www.axios.com/2021/03/16/facebook-paying-writers-journalists-pages; Mathew Ingram, *Twitter Gets into the Newsletter Business—Should Substack Be Worried?*, COLUM. JOURNALISM REV.: THE MEDIA TODAY (Jan. 28, 2021), https://www.cjr.org/the_media_today/twitter-gets-into-the-newsletter-business-should-substack-be-worried.php. Traditional media outlets such as the New York Times have also invested in newsletters, partly in response to Substack recruiting their writers. Perlberg, *supra* note 284. New startups like Ghost, "a nonprofit publishing platform that bills itself as 'the independent Substack alternative,'" have also entered the field. Kate Knibbs, *Why Are Writers Fleeing Substack for Ghost?*, WIRED (June 7, 2021, 7:00 AM), https://www.wired.com/story/ghost-substack-platforms-publishers/.

[287] Steven Perlberg, *Substack Just Made a Major New Hire as It Goes After Comic-Book Writers and Expands Its Fiction Efforts*, INSIDER (June 9, 2021, 9:46 AM), https://www.businessinsider.com/substack-is-getting-into-comic-books-and-fiction-2021-6.

Marvel Comics,[288] to "cut deals with comics writers that allow them to hire artists and a small production team."[289] Two months later, Substack convinced James Tynion IV, the writer of DC Comics' *Batman*, to pass up a three-year exclusive contract renewal to instead "create a new slate of original comic book properties directly on [Substack]."[290] The same day, Jonathan Hickman, the lead writer and "showrunner" of Marvel's *X-Men* line of comics, also announced that he would be releasing new comics through Substack.[291] Hickman announced his *X-Men* departure a week later.[292] Tynion and Hickman were just the beginning, as more comic creators also announced they had received grants to produce Substack newsletters,[293] including "big-name creators" like Brian K. Vaughan, who had already found success publishing his creator-owned comics through Image and other print publishers.[294]

Substack attracts creators by removing many of the financial barriers to producing comic books. As writer Kelly Thompson put it, "comics are really[,] really hard. It's hard to make them, it's harder to make them good, and it's hardest to make them good and also financially viable. But Substack has taken some of those hurdles out of the way . . . ."[295] Through the creator-owned comic model,[296] creators may have to wait a full year after starting work on a comic to realize a profit.[297] Substack Pro, in contrast, has reportedly offered creators as much as $600,000 up front.[298] In addition,

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[288] *Nick Spencer*, LEAGUE OF COMIC GEEKS, https://leagueofcomicgeeks.com/people/766/nick-spencer/comics/137131 (last visited July 5, 2022).

[289] Perlberg, *supra* note 287.

[290] James Tynion IV, *A Whole New Era*, THE EMPIRE OF THE TINY ONION (Aug. 9, 2021), https://jamestynioniv.substack.com/p/a-whole-new-era.

[291] Jonathan Hickman, *Three Worlds. Three Moons.*, 3 WORLDS / 3 MOONS (Aug. 9, 2021), https://3w3m.substack.com/p/three-worlds-three-moons; Tim Adams, *Jonathan Hickman Is Leaving X-Men with Inferno's Conclusion*, CBR (Aug. 17, 2021), https://www.cbr.com/jonathan-hickman-leaves-x-men-inferno-conclusion/.

[292] Unlike Tynion, Hickman said he would write for Marvel again in the future. Adams, *supra* note 291.

[293] Gustines, *supra* note 5. Other creators turned down Substack Pro offers. *See, e.g.*, Ed Brubaker, *From the Desk of Ed Brubaker*, NOTES FROM THE BASEMENT, https://mailchi.mp/basementgang/tc06a2c0ve (last visited July 5, 2022).

[294] Christian Holub, *Inside New Substack Comic Projects from Tom King, Brian K. Vaughan, Grant Morrison, and More*, ENT. WEEKLY (Jan. 31, 2022, 9:00 AM), https://ew.com/books/inside-new-substack-comic-projects-from-tom-king-brian-k-vaughan-and-more/.

[295] Kelly Thompson, *Everybody Wants to Rule the World*, 1979 SEMI-FINALIST (Sept. 28, 2021), https://1979semifinalist.substack.com/p/everybody-wants-to-rule-the-world.

[296] *See supra* Section III.A.

[297] Kelly Sue DeConnick, *It's Complicated.*, MILKFED DISPATCHES (Sept. 3, 2021), https://milkfeddispatches.substack.com/p/its-complicated.

[298] Rich Johnston, *Kelly Sue DeConnick & Matt Fraction Undecided on Substack Offer*, BLEEDING COOL (Sept. 6, 2021), https://bleedingcool.com/comics/kelly-sue-deconnick-matt-fraction-undecided-on-substack-offer/; Heidi MacDonald, *10 Days That Shook the World V2.0*, BEAT (Aug. 20, 2021, 10:00 AM), https://www.comicsbeat.com/10-days-that-shook-the-world-v2-0/. While crowdfunding platforms like Kickstarter also allow creators to be paid up front, these differ from Substack Pro in two important

unlike creator-owned comics published through traditional publishers, creators publishing through Substack retain their ability to license reprints and collections of their comics in print to the publisher of their choice.[299]

Substack also presents the opportunity to build on the innovations that brought comics to this point. While some comics published via Substack stick to standard page sizes for eventual print publication, others adjust their content to better fit vertical scrolling native to web browsers or mobile devices.[300] Hickman said he welcomed the chance to surprise readers and "to tell stories of varying lengths . . . based on what the story demands instead of how many 20 page issues (chapters) eventually make up a [collected edition]."[301] Writer Grant Morrison said they saw the newsletter format "as a way to deliver a different take on narrative, where the basic throughline of a spooky twist ending story could form the backbone of a more elaborate and personal story structure."[302]

In announcing his Substack deal, Tynion described the same career path to success in creator-owned comics that Kirkman espoused thirteen years earlier.[303] But he said the financial security Substack offered would allow him to better capitalize on his audience and try out new ideas.[304] By offering payment in advance, while also allowing creators to retain copyrights in their work, Substack Pro offers "the best of both worlds," according to writer Kelly Sue DeConnick.[305] "It's a hell of a thing for artists to get paid *and* keep their rights," DeConnick wrote. "That's an industry-changing year right there."[306]

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ways. First, with crowdfunding, creators must pitch their specific planned works to buyers and raise funds themselves, whereas Substack Pro selects creators to receive grants based on their reputation and potential to create unspecified future works. Second, creators are responsible for fulfilling crowdfunded comics, often including finding methods to deliver their physical works to buyers, which can often be an exhausting process. *See* Christopher Sebela (@xtop), TWITTER (FEB. 25, 2022, 7:57 PM), https://twitter.com/xtop/status/1497375197443198979 ("paid the printer for all these comics. no takebacks. though i was kind of locked in when the kickstarter money showed up, this was the biggest hurdle of all. except for shipping it all out. why did i do this again?"). Conversely, once Substack creators' comics are completed, delivery to subscribers consists of merely formatting an email.

[299] *See* Tynion IV, *supra* note 290.

[300] *Compare* Saladin Ahmed, *TerrorWar Chapter 1*, COPPER BOTTLE (Dec. 21, 2021), https://www.copperbottle.net/p/terrorwar1 (using standard comic book-sized pages), *with* Molly Knox Ostertag, *Darkest Night Chapter One*, IN THE TELLING (Dec. 13, 2021), https://ostertag.substack.com/p/darkest-night-chapter-one (using overlapping panels designed for scrolling on digital devices).

[301] Hickman, *supra* note 291.

[302] Holub, *supra* note 294.

[303] *See supra* text accompanying note 251; Tynion IV, *supra* note 290.

[304] Tynion IV, *supra* note 290 ("This deal gives me the security to build the sort of books that I think could thrive in the comics market given the chance, but require growing in a different sort of way than monthly periodicals. Because, let me tell you… I have IDEAS.").

[305] DeConnick, *supra* note 297. DeConnick wrote that Substack Pro had offered her and her husband, writer Matt Fraction, a Substack Pro deal, but they had not yet accepted nor turned it down. *Id.*

[306] *Id.*

C. *Potential Problems with Substack: A Return to Arts Patronage?*

At first glance, Substack's model would appear to be the long-sought solution to give comic book creators both the financial freedom and incentive to create. But a publisher or platform that has almost no stake in the copyright of its content presents a new set of challenges. First, creators must agree to conform their work to meet Substack's terms and conditions. Second, in forgoing any copyright interests of the work creators publish through its platform, Substack has little incentive to help its creators enforce these rights. Third, by investing only in marquee names, Substack hinders equitable and efficient dissemination of works on its platform. In these ways, Substack Pro resembles the historic model of arts patronage that copyright laws replaced,[307] yet it fails to improve upon the copyright system. Rather than providing a revolutionary business model for the future, Substack could be sending creators back to the dark ages.

1. *Terms and Conditions*

Artists have had patrons since before the Roman Empire.[308] Without a developed concept of intellectual property, a writer was "first and foremost a craftsman" with no recognition of ownership in the product of his labor.[309] Creators relied on patronage for funding, and in exchange the high-society patron could show off his creative tastes.[310] But patronage often came with a "complicated and contradictory mixture of deep gratitude and powerful resentment" between patron and creator.[311] From the artist's perspective, resentment arose when patrons took credit, demanded works flatter their tastes, refused to pay, or were ignorant of their commissions' artistic worth.[312]

As the concept of copyright developed in the eighteenth century, it greatly complicated the patronage relationship by tying literary works' ownership to its authorship rather than its patronage.[313] Literary patrons, despite lacking ownership of the works they helped to fund, still often demanded reciprocity in the works' content, which fostered resentment among their authors.[314] Wariness over retaining independence from patrons'

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[307] *See* Jaszi, *supra* note 276, at 487–88 (noting that the Copyright Act of 1909's treatment of employed authors was potentially a "controversial innovation" in the wake of the historic recognition of patronage).

[308] MARJORIE GARBER, PATRONIZING THE ARTS 1 (2008).

[309] Martha Woodmansee, *The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the "Author,"* 17 EIGHTEENTH-CENTURY STUDIES 425, 426, 430, 433 (1984); *cf.* LOPES, *supra* note 6, at xiv–xv (describing early comic book artists as "mostly craftsmen producing a mass product").

[310] GARBER, *supra* note 308, at 1.

[311] *Id.* at 2.

[312] *Id.* at 5–11.

[313] *Id.* at 4.

[314] The patron of Langston Hughes, Charlotte van de Veer Quick Mason, "advised him on the content and tone of his first novel, *Not Without Laughter* (1930), and he was ultimately dissatisfied with some of the changes she suggested." *Id.* at 12–13.

interference was a major concern for authors as the United States weighed a federal arts subsidy program in 1965.[315] As actor Charlton Heston told Congress: "[T]he artist's point of view . . . has always been reduced to its simplest terms, 'Give me the money, but do not tell me what to do.'"[316]

Substack has attempted to avoid this conflict by promising to leave content decisions to its authors. "We see [Substack Pro] deals as business decisions, not editorial ones," co-founder Hamish McKenzie wrote in 2021. "We don't commission or edit stories. We don't hire writers, or manage them. The writers, not Substack, are the owners. No-one writes *for* Substack—they write for their own publications."[317] But despite its claims, Substack still retains some editorial control through its "Content Guidelines," which restricts authors from publishing material that, *inter alia*, infringes copyright, makes harassment or threats, promotes hate speech or "harmful or illegal activities," chiefly markets products or services, or is sexually explicit.[318] Most of these aims are admirable—though many authors have criticized Substack for ignoring the harassing speech and misinformation that its users post through the platform[319]—but the

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[315] Enrique R. Carrasco, Note, *The National Endowment for the Arts: A Search for an Equitable Grant Making Process*, 74 GEO. L.J. 1521, 1528 (1986).

[316] *National Arts and Humanities Foundations: Joint Hearings Before the Spec. Subcomm. on Arts & Humans. of the S. Comm. on Lab. & Pub. Welfare and the Spec. Subcomm. on Lab. of the H. Comm. on Educ. & Lab., Part 1*, 89th Cong. 57–58 (1965) (statement of Charlton Heston).

[317] McKenzie, *supra* note 280.

[318] *Id.*; *Content Guidelines*, SUBSTACK (Nov. 24, 2021), https://substack.com/content.

[319] *See, e.g.*, Elizabeth Dwoskin, *Conspiracy Theorists, Banned on Major Social Networks, Connect with Audiences on Newsletters and Podcasts*, WASH. POST, https://www.washingtonpost.com/technology/2022/01/27/substack-misinformation-anti-vaccine/ (Jan. 27, 2022, 12:03 PM) (describing Substack as "increasingly a hub for controversial and often misleading perspectives about the coronavirus," largely as a result of its "hands-off approach" to content moderation); Helen Lewis, *On Substack, You Can Never Go Too Far*, ATLANTIC (May 10, 2021), https://www.theatlantic.com/ideas/archive/2021/05/substack-soap-opera-change-media-business/618827/ (noting that Substack "cannot support shoe-leather reporting, deep investigations, and FOIA requests—those fundamental checks on democracy that rarely drive clicks by the million"). In announcing he was ending his Substack newsletter, feminist author Jude Doyle wrote that the platform had "morphed into a haven for online transphobia," and accused Substack of taking a "laissez-faire approach to bigoted speech." Jude Ellison S. Doyle, *Substack Is Not a Neutral Platform*, GEN (Mar. 17, 2021), https://gen.medium.com/substack-is-not-a-neutral-platform-8fc5bdf8e5f2. *Contra* Ben Smith, *Why We're Freaking Out About Substack*, N.Y. TIMES: THE MEDIA EQUATION, https://www.nytimes.com/2021/04/11/business/media/substack-newsletter-competition.html (Oct. 5, 2021) (quoting journalist Jesse Singal likening a boycott of Substack over the views of some of its authors to "'boycotting a paper company' over a writer who has books printed on their paper"). Substack's founders believe that the company has "relatively less responsibility to get involved" in content moderation because readers must choose to read the newsletters, as opposed to algorithm-based social media feeds. Clio Chang, *The Substackerati*, COLUM. J. REV. (2020), https://www.cjr.org/special_report/substackerati.php; *see also* Chris Best et al., *Substack's View of Content Moderation*, ON SUBSTACK (Dec. 22, 2020), https://on.substack.com/p/substacks-view-of-content-moderation. In response to backlash to their moderation policies, the founders maintained that "putting up with the presence of writers with whom we strongly disagree . . . is a necessary precondition for building trust in the information ecosystem as a whole." Hamish McKenzie et al., *Society Has a Trust Problem. More Censorship Will Only Make It Worse.*, ON SUBSTACK (Jan. 26, 2022),

restrictions still represent the same category of patron interference that authors have resisted for over a century. In comic book terms, they also reflect the Comics Code, content standards enacted in the wake of the moral outrage toward comics of the 1950s that coddled mainstream comics' subject matter for the next fifty years.[320] Substack's authors must accept these terms as the price of doing business.

Ultimately, Substack's conditions are minimal, and creators likely expect that most traditional comic book publishers would require similar general standards of the material they publish.[321] In borderline cases, though, a traditional publisher would exercise editorial judgment by considering the context of an allegedly harmful or explicit passage within a work and communicating the boundaries of acceptable use to the creator. Substack's reliance on blanket terms and conditions would prohibit such contextualization and subject authors to a guessing game as to what content will fall within the platform's undefined mores.

2. *Disincentive to Combat Infringement*

In outlining the extent of its restrictions, Substack has essentially erected a barrier between itself and its content and promised not to climb over it. Although the barrier purportedly exists to protect editorial independence, implicit in this model is that the barrier shields the company while leaving the author isolated and legally exposed. The "Content Guidelines" make this explicit to authors: "You and you alone are responsible for the content you publish on Substack, and liable for any harm caused by the content you publish."[322] But what about harm to the authors? If a third party infringes an author's copyright in her Substack work, the barrier absolves Substack of any obligation to enforce the copyright on behalf of the author.

Substack addressed this shortcoming in 2020 with the advent of its "Substack Defender" program, which provides legal assistance to authors whose works "may attract unreasonable legal pressure, such as abuses of copyright laws, assaults on first amendment rights, and spurious defamation claims."[323] But Substack's involvement is optional: "Substack will make the ultimate choice on who is accepted into the program and

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https://on.substack.com/p/society-has-a-trust-problem-more. Substack may insist on being seen as a hands-off "platform" rather than a "publisher" in order to avoid liability for its author's works under 47 U.S.C. § 230. Amanda Kadish, *The Limits of Section 230*, BROOK. L. NOTES, Spring 2021, at 44, 44.

[320] *See* SERGI, *supra* note 33, at 222–24 (noting that the Comics Code was "de facto censorship" that forced publishers who aimed comics at older audiences out of business); LOPES, *supra* note 6, at 31 (noting that the Code "solidified the perception of the comic book as a subliterate, children's medium").

[321] *See, e.g.*, *FAQ*, *supra* note 241 ("While Image as a company spearheads the promotion and distribution of the titles it publishes, it does so with non-creative interference to protect the company and maintain responsibility for our public image.").

[322] *Content Guidelines*, *supra* note 318.

[323] *Legal Support for Substack Writers*, ON SUBSTACK (July 15, 2020), https://on.substack.com/p/legal-support-for-substack-writers.

which cases to support."[324] Rather than defending all of its authors as needed, Substack hopes that partaking in selective litigation may deter future claims.[325]

A system in which publishers have no responsibility to confront piracy presents the same problem authors faced in eighteenth-century Germany, at a time when authors were first struggling to claim ownership of their works.[326] Publishers' powerlessness to halt rampant appropriation of works necessitated the concept of separating a book's expression from its form, which in turn led to the enactment of Germany's first copyright laws.[327] By absolving itself of enforcement, Substack is *choosing* to implement a system that resembles that of a pre-copyright era. This backward step harms both creators and Substack. Unchecked infringement would undermine much of the progress creators have made to be legally recognized as the authors of their works. And if creators' costs related to infringement negate much of the benefits they derive from Substack,[328] they will be disincentivized to continue publishing through the platform.

3. *Disparity Among Authors*

Without an interest in copyright, and like traditional arts patronage, Substack's interest only goes as far as its financial investment in author's works. By choosing to incentivize high-profile authors with Substack Pro deals while leaving the average writer to build an audience without financial support,[329] Substack is naturally promoting a select group of established authors over others. This selective promotion runs counter to the constitutional aim of copyright law to "promote the progress of . . . useful arts."[330] In an article on "peaceful revolutions" in copyright, Nicolas Suzor identified fairness and efficiency as key criteria consistent with this constitutional goal for use in weighing whether a new production system could outperform a conventional copyright system.[331] By giving Substack

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[324] *Id.*

[325] Chris Best, Comment to *id.* ("I hope that by defending *very* vigorously in a few cases, we can contribute to a climate where writers feel they can fully exercise the crucial right to a free press.").

[326] *See* Woodmansee, *supra* note 309, at 437–40 (describing the inability of even "conscientious publishers" of the time to halt piracy in the absence of copyright law).

[327] *Id.* at 445.

[328] These costs stem from creators' attempts to confront infringement themselves as well as the opportunity cost of selling their works through traditional publishers who offer greater protection against unauthorized duplication of their works.

[329] Substack offers advice on its website on growing an audience and connects authors to share tips among themselves. *The Essential Knowledge Writers Need to Succeed on Substack*, SUBSTACK, https://substack.com/grow (last visited Aug. 18, 2022); *Being Independent Shouldn't Mean Being Alone*, SUBSTACK, https://substack.com/go (last visited Aug. 18, 2022).

[330] U.S. CONST., art. I. § 8, cl. 8.

[331] Nicolas Suzor, *Free-Riding, Cooperation, and "Peaceful Revolutions" in Copyright*, 28 HARV. J.L. & TECH. 137, 179–80 (2014). According to Suzor, "'peaceful revolutions' restructure copyright markets into cooperative systems based on 'negotiation, consent, and self-interest.' In doing so, they

Pro authors better deals and resources than its standard authors, Substack's approach is inherently inefficient and unfair.

The traditional copyright model inefficiently limits distribution of works because it must balance access by the public with incentives to produce.[332] Substack Pro's distribution of its works is even less efficient than the traditional model. If standard Substack authors cannot rely on the platform to protect their copyrights from infringement and piracy, they will be disincentivized to produce works through the platform. By contrast, a traditional publisher who enforces all of its works' copyrights—even simply as a licensee, rather than an owner—incentivizes creators to produce because they know public access to their work will be limited to those who are willing to pay.

Under John Rawls' theory of distributive justice, "any inequalities [of social goods] must improve everyone's situation, and especially the situation of the worst-off."[333] Contrary to this theory, Substack Pro invests company resources—including copyright enforcement—in those writers with existing audiences.[334] This only widens the gap between the haves and the have-nots because the success of a Substack Pro author has no effect on the average Substack author. Subscribers to a popular newsletter are not likely to seek out other newsletters simply because they are distributed by the same platform.[335] The inequity inherent in the Substack Pro model thus prevents it from outperforming the traditional copyright model, making it inferior at promoting the progress of the useful arts.

D. *A Better Tomorrow*

Under any copyright model, publishers have no legal obligation to promote the progress of the arts. They need only conform to legislation Congress has enacted as a means toward fulling this constitutional end. As the history of the comic book copyright ecosystem shows, however, publishers whose policies on copyright do not incentivize creators to produce their best works often find themselves at a competitive

represent an alternative system of coordinating creative production that is both more efficient and more suited to developing a 'just and attractive' culture than the current copyright system." *Id.* at 141. Substack Pro fits this description by restructuring the comic book market into a cooperative system.

[332] *Id.* at 180–81.

[333] Leif Wenar, *John Rawls*, STAN. ENCYC. OF PHIL., https://plato.stanford.edu/entries/rawls/ (Apr. 12, 2021).

[334] *See* Chang, *supra* note 319 ("[T]he most successful people on Substack are those who have already been well-served by existing media power structures. Most are white and male; several are conservative."); MacDonald, *supra* note 298 (suggesting that the most lucrative Substack Pro grants only accelerated the departure of prominent artists from Marvel and DC).

[335] Readers will form brand loyalty to a publisher only if they believe the stamp of that publisher (such as Image Comics, *see supra* Section II.C) conveys a level of quality to its works, rather than mere distribution. *See* Carol M. Kopp, *All About Brand Loyalty: What It Is, and How to Build It*, INVESTOPEDIA, https://www.investopedia.com/terms/b/brand-loyalty.asp (June 8, 2022) ("The first and most important condition for brand loyalty is quality.").

disadvantage.[336] Absent any legislation mandating equitable treatment of authors, the market will naturally push publishers toward a constitutionally efficient copyright model. Although their comics model is still in its infancy, newsletter platforms like Substack could take steps to better incentivize creators to publish their best work through them by taking steps to alter and expand enforcement of author's copyrights.

Substack should first eliminate the discretionary nature of its Substack Defender legal defense program. Knowing Substack's financial clout stands behind the copyright to their work—even without an ownership stake—will give more creators confidence to distribute their works through the platform. While promising legal defense to all creators is likely financially unrealistic at this stage of Substack's growth, even with the deep pockets of its venture capitalist investors,[337] Substack could alternatively guarantee legal services proportionate to the revenue an author earns through the platform. It should avoid giving Substack Pro writers preferential access to the Defender program, as doing so would exacerbate the challenges that Substack Pro already presents to distributive justice.

Substack could also expand the Defender program to *offensively* protect the works it publishes from infringement. Despite rampant piracy,[338] comic book publishers have been reluctant to confront the problem.[339] And newsletters are especially prone to infringement, where unauthorized duplication is as simple as forwarding an email.[340] By pursuing legal action against infringers, then, Substack could counteract this vulnerability while also showing good-faith enforcement of their user's copyrights where no legal obligation exists,[341] and at the same time get a leg up on traditional

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[336] *See supra* notes 148–55 and accompanying text.

[337] A downturn in the venture capital market cooled Substack funding discussions in 2022 and raised questions about the company's outlook. Benjamin Mullin, *Substack Drops Fund-Raising Efforts as Market Sours*, N.Y. TIMES (May 26, 2022), https://www.nytimes.com/2022/05/26/business/media/substack-venture-capital.html ("Substack has told investors that it had revenue of about $9 million in 2021, . . . meaning that the discussions valued the company at a hefty premium relative to its financial results."); *see Substack Now Has One Million Paid Subscribers and Zero Profits*, MOTLEY FOOL (Nov. 15, 2021, 11:00 PM), https://www.fool.com/investing/2021/11/15/substack-now-has-one-million-paid-subscribers-and/ (noting that despite Substack's growth, it "still needs to figure out how to turn a profit").

[338] *See Rise of Comic Book Piracy "A Real Problem,"* BBC (Nov. 29, 2019), https://www.bbc.com/news/entertainment-arts-50564713 (quoting one creator as estimating "30 million views of pirated comic books per month, a number which 'far overshadows actual customers'").

[339] Joshua L. Simmons, Note, *Catwoman or the Kingpin: Potential Reasons Comic Book Publishers Do Not Enforce Their Copyrights Against Comic Book Infringers*, 33 COLUM. J.L. & ARTS 267, 285 (2010).

[340] *See, e.g.*, Joanna Lobo (@thatdoggonelady), TWITTER (July 3, 2020, 4:50 AM), https://twitter.com/thatdoggonelady/status/1278974493893857285 ("For God's sake, can people stop forwarding my paid newsletter to friends? . . . Accessing it for free is unfair to my paying subscribers and to me.").

[341] As an online platform, Substack complies with the safe-harbor provisions of the Digital Millennium Copyright Act, 17 U.S.C. § 512(c)(3)(A), by providing a resource for authors or users to report copyright infringement. *Submit a Request*, SUBSTACK: HELP CENTER, https://support.substack.com/hc/en-us/requests/new?ticket_form_id=360001921412 (last visited July 28, 2022).

comic publishers. Even if completely stopping piracy is next to impossible, such a move would not only make up for part of the disincentive that Substack currently has to protect its authors' copyrights but also distinguish it from its competition.

In 2022, a startup called Zestworld launched a newsletter platform specifically designed for comic creators.[342] As it launches, Zestworld has instituted two policies that, although likely temporary,[343] address many of the shortcomings of Substack. First, it only publishes works by authors it invites, and second, it offers authors not only advances and total ownership of their works but also equity in the platform itself.[344] These policies, if maintained, could both avoid potential interference inherent in the patronage model and provide a more efficient and equitable service than that offered by Substack.

To appeal to the widest possible user base, Substack's terms and conditions need to apply to a variety of subjects and viewpoints, and its "hands-off approach" to enforcement[345] must consider the company's—and its financiers'—focus on growth.[346] In contrast, a platform that solely published works of invitees would not need its authors to agree to blanket terms and conditions but could negotiate the general type of content to be produced before extending an invitation. Furthermore, a platform that invests advances in all of its creators would be less incentivized to give some creators preferential treatment over others, mitigating concerns of growing inequality between the haves and have-nots in the creative community. This relationship between publisher and creator would be more akin to Image Comics' modern publishing system than patronage.

Giving creators equity in the platform itself goes a step further. When the creators also have a financial stake in the success of each other's works, the system becomes more like a guild than a publisher-creator relationship. In a guild-like system where all qualified creators share in the platform's profits beyond their own contributions, creators would be incentivized and have the creative freedom to produce their best work, defend each other's

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[342] Natalie Jarvey & Travis Clark, *Comics Publishing Platform Zestworld Launches with Over $9 Million in Funding, Giving Creators Ownership of Their IP and Tools to Monetize It in Other Mediums*, INSIDER (Mar. 21, 2022, 12:00 PM), https://www.businessinsider.com/comics-creator-platform-zestworld-launches-IP-ownership-equity-2022-3.

[343] In response to the author's query, a Zestworld representative indicated that the company plans to open its platform to all comic creators once the product is more developed, and that the platform "do[es] not foresee offering advances in perpetuity as the platform matures and we can offer other types of value to our creators." E-mail from Zestworld Support to author (Mar. 28, 2022, 05:35 PM) (on file with author) [hereinafter Zestworld Support].

[344] *Id.*; Jarvey & Clark, *supra* note 342.

[345] Best et al., *supra* note 319.

[346] Chang, *supra* note 319 ("When I asked if Substack's investors were looking for large returns, [co-founder Chris] Best replied, 'We have expectations for growth for ourselves that are at least as high as our investors.'"); *see* Kokalitcheva & Primack, *supra* note 282 (describing Substack's funding). Zestworld is also backed by venture capitalist funding, but at a smaller scale—slightly more than $9 million, compared to more than $80 million thus far for Substack. Jarvey & Clark, *supra* note 343.

intellectual property, and maintain a level of parity among each other. Such a system could achieve many of the same goals that creators' failed unionization attempts had in the 1980s or that the early Image Comics partners enjoyed in the 1990s[347]—better pay, creative independence, and ownership of their works' copyright.

Because the industries of both newsletter services and comic publishers are so crowded, creators have options in how they distribute their works. Substack is gambling that when its first-year grants expire, creators will have built a sufficiently large subscriber base that they will want to continue publishing on the platform.[348] Even if the financial returns fall short, innovations like guaranteeing legal protection of copyrights could secure creators' continued use of the platform. Competitors like Zestworld can carve out market share by being particularly attuned to the needs of comic creators or by offering unique services.[349] Creators will ultimately decide which innovations prove to be the most effective in attracting and retaining their talents. Newsletter platforms can either adopt some of these changes now to better align themselves with the interest of creators, or risk emulating Marvel in the 1990s—looking on as creators move on to greener pastures, while the readership follows.

CONCLUSION

When the comic book industry began, publishers prioritized profits over artistry, and for the next half-century, the vast majority of their comics targeted the tried-and-true audience of children. By 1977, DC Comics Publisher Jenette Kahn[350] recognized that publishers could reach new audiences and maximize profits by investing in comics as an art form:

> The only way to truly create something new is for an artist and writer . . . to come up with something . . . they truly believe is terrific; that they want so much to do, would kill to do. Because then that will come through somehow in the comic book. It will be a good comic book that way and it will find people who want to read it.[351]

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[347] *See supra* Part II.

[348] *See* McKenzie, *supra* note 280. *But see* Mullin, *supra* note 337 ("[S]ome writers who were initially won over by Substack's pitch eventually decided to leave the platform, preferring to court their audience directly without paying the company its cut."). In the face of technological competition, McKenzie believes Substack can distinguish itself on "the human stuff." Smith, *supra* note 319 ("We have to prove to the writers we're delivering enough value to them to keep them happy and help them succeed.").

[349] Zestworld says it offers "a variety of tools specifically designed for the needs of the comic creator that Substack does not have, including tiered pricing and the ability to offer different publication types (comic issues vs. process updates). In the future, we will have even more unique offerings such as digital collectibles." Zestworld Support, *supra* note 343.

[350] Kahn served as DC publisher from 1976–2002. Paul Levitz, *Jenette Kahn Interview*, PAUL LEVITZ (Mar. 15, 2016), http://paullevitz.com/jenette-kahn-interview.

[351] DALLAS & WELLS, *supra* note 120, at 36.

In other words, happy creators make good, original comics[352]—and those are the comics that sell. Happy creators thus fulfill the constitutional aims of copyright by advancing comics as a useful art. Kahn's statement foreshadowed the more equitable treatment that DC and Marvel would offer creators in the years that followed.[353] During this time, the publishers began to realize that the only way to incentivize creators to do work they "would kill to do" was to give them more equitable terms, including a stake in ownership.

This recognition only came about after decades in which creators struggled for an equitable share of their rights. Despite losing control of Superman and Captain America, the legal plights and resulting innovations of Siegel and Shuster and Simon and Kirby underlined the importance of copyright for those creators who followed them. As the next generations of creators increasingly asserted ownership demands in negotiations with their publishers, the industry evolved with creator ownership as a central concern. Eventually, creators not only achieved the original goal of equitable negotiations with publishers but surpassed it. Today, top writers and artists often have a superior negotiating position and enjoy autonomy in choosing between competing publishers. For these creators, negotiations need not even begin without full retention of ownership, and thus copyright is no longer the chief animating force in their relationship with publishers. If the trend continues, more creators will be able to dictate similar terms to their publishers.

After nearly a century of creators finding new ways to publish works without forfeiting ownership, the entrance of Substack into the comic book field demonstrates that the onus is now on publishers to innovate to attract creators. What challenges to this new iteration of the comic book copyright ecosystem await, and how will creators and publishers innovate in response? Like any serialized comic book, the answers are still to be written. To be continued . . .

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[352] As Mark Evanier characterized Jack Kirby's later years at DC: "There's a limit . . . to how good anyone can be when they hate the people for whom they're working." Jones, *supra* note 157, at 78.

[353] *See supra* Section II.B.