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# Copyright Termination, Work-For-Hire Doctrine Need Review

By **Carolyn Martin and Ethan Barr** (October 8, 2021, 4:38 PM EDT)

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On Sept. 24, the comic book publisher Marvel Characters Inc. initiated five lawsuits in California and New York federal courts, attempting to invalidate copyright termination notices sent by a former writer and the estates of several former artists.[1]

Given the historic exploitation of artists' rights by corporate behemoths, this has firmly placed copyright termination rights and the work-for-hire doctrine in the spotlight.

Both U.S. Supreme Court jurisprudence and federal copyright law concerning these issues fail to properly address an economy increasingly dominated by independent contractors, and this lack of guidance has exacerbated the rift between content creators and corporations.

It is crucial that the U.S. Copyright Office review and clarify this outdated legal framework. With the 35-year termination window approaching for a massive number of works created since the Copyright Act of 1976, and the proliferation of the gig economy, such a review is long overdue. Moreover, the issues raised in these disputes may be ripe for judicial review by the Supreme Court, though history suggests corporations are more willing to settle.

The copyrights in the Marvel cases included some of the most recognizable characters from the "Avengers" series, such as Iron Man, Black Widow, Thor and even Spider-Man. In each complaint, Marvel alleges that all artists were paid a per-page rate for their work and that Marvel had the right to exercise creative control, therefore rendering the artists' contributions works made for hire.

This is familiar territory for Marvel — it filed a similar suit in 2010 that it ultimately settled for what has been estimated to be tens of millions of dollars just before the Supreme Court was scheduled to hear the case.[2] Notably, all the involved works were created before the Supreme Court enumerated certain factors for determining works made for hire in Community for Creative Non-Violence v. Reid.[3]

Under the Copyright Act, authors of copyrighted works may terminate prior transfers of their copyrights to third parties, regardless of any conflicting contract terms, after 35 years have passed.[4] Congress created this right to level the playing field, acknowledging the limited bargaining power authors hold when originally agreeing to these transfers, especially when dealing with large corporations.

One noteworthy exception to statutory termination — works made for hire — is markedly fact-specific; determinations often turn largely on contractual language.

While the Supreme Court's decision in CCNV was illuminating in 1989, its flaws have been exposed over time. Many contracts assigning copyright ownership before 1989 were negotiated without the guideposts of the work-for-hire doctrine. Fast-forward, and, in today's booming gig economy, independent contractor agreements have become the norm, and the current legal landscape does not reflect this marketplace shift.

Moreover, the federal statute governing specially commissioned works by independent contractors fails to address more contemporary works. In essence, the law has failed to evolve with the industries, subject matter and people that it governs.

In 2014, the Supreme Court declined to hear a case regarding ownership rights in Superman in the Peary v. DC Comics case,[5] but it remains to be seen whether this recent bevy of litigation by Marvel and others will influence the court's approach going forward.

While these cases could likely settle, some clarification regarding copyright termination rights and the work-for-hire doctrine would ultimately be fairer for content creators approaching the termination window, and it would provide guidance for those entering new relationships.

While the termination right is a powerful tool, certain types of works — specifically works made for hire and derivative works — are excluded from statutory termination. The work-for-hire exception only applies if the work satisfies the statutory definition, be it a work created by an employee within the scope of employment or specially commissioned work from an independent contractor.

When faced with this issue, courts generally look beyond contract terms. As a result, termination is not futile simply because contractual language labels creations as works made for hire.

With no clear standard for distinguishing whether a hired party is an employee or independent contractor, the Supreme Court in CCNV provided various factors to aid courts in this determination, including but not limited to the duration of the relationship between the parties, location of work, method of payment, provision of employee benefits, tax treatment of employees and the extent of the hired party's discretion over work hours.[6]

Nevertheless, many contracts scrutinized under these factors were negotiated prior to the CCNV decision. Given historical imbalances in bargaining power between independent artists and corporations, it appears patently unfair to analyze the assignment of rights under a legal framework that was unavailable to artists such as the creators of characters in the Marvel Universe.

Furthermore, many works are created in collaborative environments, particularly in the case of juggernaut companies like Marvel, so copyright ownership disputes may involve multiple authors. Unlike the Copyright Act of 1976, the Copyright Act of 1909 did not expressly address works made for hire, and the dearth of litigation surrounding works created under the 1909 Act does not provide helpful precedent.

With the somewhat recent passage of Title II of the Music Modernization Act, copyright termination issues also implicate the rights of musicians who created works under the 1909 Copyright Act, or before February 1972, otherwise known as legacy artists.[7]

Although legacy artists have been given the opportunity to recoup royalties for the exploitation of their works that were assigned to record labels, there are limitations. First, the law applies only to sound recordings, so copyrights in musical works may still be exploited. And, importantly, separate contracts may still be analyzed under the work- for-hire doctrine and subject to the issues associated with negotiating power disparities.

Perhaps most importantly, independent contractor agreements are more prevalent than ever in a labor market increasingly comprised of short-term employment, i.e., the gig economy. In 2018, Gallup reported that approximately 36% of workers participated in the gig economy in some capacity.[8]

Data shows that this percentage of freelance workers is expected to increase to about half the U.S. population within the next decade.[9] Coupled with the impact of the pandemic on the economy, that may be a conservative estimate.

Several of the enumerated factors in CCNV only apply to a finite group of artists, particularly in the context of increased freelance and remote work. Factors such as the location of the work and length of the relationship no longer appear to reflect these shifting industrial patterns in a work-for-hire analysis.

The statutory definition of specially commissioned works is also short-sighted. To qualify as a "work specially ordered or commissioned for use," there are two stringent statutory requirements. First, the parties must expressly agree in a signed writing that the work will be a work made for hire.

Second, the work must come within one of nine statutorily defined categories of works: a contribution to a collective work, a motion picture or other audiovisual work, a translation, a supplementary work, a compilation, an instructional text, a test, test answer materials or an atlas.[10] It is worth noting that this is intended to be an exhaustive list, but it does not appear to contemplate certain works created in today's environment.

While the statutory definition of specially commissioned works includes atlases, which now go largely unused, programming code or certain works in the realm of digital design are conspicuously absent. The law is unclear on whether these types of works would be considered works made for hire. Authors of copyrightable works in fields like web development and graphic design have little guidance as it pertains to their ownership.

And of course, even with possible revisions to the law, some authors may still struggle to retain copyright ownership due to exploitation by the corporations that hire them.

Derivative works are also excluded from the scope of the termination right. If authorized by the original agreement and created prior to termination, derivative works are not affected by statutory termination. This can also lead to harsh realities for authors. Due to power imbalances, they may be unable to negotiate around the exception, permitting hiring parties to exploit and receive income from derivative works under the terms of terminated grants.

Nevertheless, the entity exploiting rights retained in connection with derivative works may find the author has negotiated his secured termination rights to a direct competitor. This could spark interesting disputes between power players who each hold rights to a common character or theme. Even the possibility of such a result could restore leverage to the original creator.

Given the success of the Marvel Cinematic Universe, there is almost certain to be a seemingly endless number of movies involving characters for whom the copyrights have been assigned.

In fact, several movies are already in production, and some are on their way to theaters this year and next. None will be affected by the termination provision because they are considered derivative works. Some artists may still continue to receive payments from comic book sales, but such sales make up a small fraction of the revenue generated by the Marvel media franchise as a whole.

The copyright termination right applies to all works, even those created before the Copyright Act of 1976. As 35 years have passed since 1976, we are sure to see an increasing number of copyright termination cases.

However, the benefit of the copyright termination right often extends to the heirs of deceased individuals. For example, four of the five recent Marvel lawsuits have been brought by the estates and relatives of writers and artists. More importantly, copyrights are most economically beneficial earlier in their lifespans.

Citing a congressional report in his dissent in the 2003 Eldred v. Ashcroft decision, Justice Stephen Breyer noted that "only about 2% of copyrights between 55 and 75 years old retain commercial value."[11] Given that many artists are not retaining the benefit of the copyright termination right when they need it most in their careers, it is worth revisiting whether 35 years is far too long before the right vests.

While the Marvel litigation has a high profile, the treatment of these cases under the current legal framework could exacerbate existing inequities, fail to address an evolving economy and extend benefits of the copyright termination right beyond the lives of its intended beneficiaries.

On Sept. 30, the U.S. Court of Appeals for the Second Circuit ruled that the writer of what eventually became the film "Friday the 13th" could terminate assignment and reclaim copyright of his screenplay as an independent contractor.[12]

Although the decision signals an acknowledgment of the changing economy, this is merely one case among what is sure to be many. Even if the Marvel cases eventually reach the Supreme Court, this almost begs the U.S. Copyright Office to review and possibly modify the fact-dependent work-for-hire test.

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[1] https://www.law360.com/articles/1425024/marvel-battles-to-keep-avengers-characters-copyrights.

[2] Marvel Characters, Inc. v. Kirby , 726 F.3d 119 (2d Cir. 2013).

[3] 490 U.S. 730 (1989).

[4] 17 USC §§ 203, 304(c)–(d).

[5] Peary v. DC Comics , 574 U.S. 923 (2014).

[6] CCNV, 490 U.S. 730 at 751–52.

[7] https://www.lutzker.com/music-modernization-act-a-guide-for-copyright-owners/.

[8] https://www.gallup.com/workplace/240929/workplace-leaders-learn-real-gig-economy.aspx.

[9] https://www.statista.com/statistics/921593/gig-economy-number-of-freelancers-us/.

[10] 17 USC § 101.

[11] 537 U.S. 186, 248 (2003) (Breyer, J., dissenting).

[12] https://www.law360.com/articles/1283055.

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