A Matter of Character

Intellectual property refers to creations, in many forms, that are granted certain protections. Generally, when the topic of intellectual property comes up thoughts go to written works, music, artistic work and inventions. All are creations, and all can even be considered art. Comics and graphic novels are often scorned as being a low form of entertainment, childish, pulp and scorned as art. However, the art, stories and characters are creations just as valid as those found in published novels, paintings in galleries, and other forms of creation that enjoy protection. Comics and graphic novels deserve the same protections granted to other forms of intellectual property.

It has often been found, in issues of intellectual property, that copyrights can at times be deemed to be co-owned. Creation can often be a joint effort and both parties should be granted proper and full protection. 17 U.S.C. § 101 allows that, "A "joint work" is a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole."[1] If one author or artist creates an image and the other creates dialogue, they have created a joint work; as such, both authors or artists must be appropriately credited. While not every collaboration can be considered co-authored, is it fairly clear when it is to be considered co-authored. "But where two or more people set out to create a character jointly in such mixed media as comic books and motion pictures and succeed in creating a copyrightable character, it would be paradoxical if though the result of their joint labors had more than enough originality and creativity to be copyrightable, no one could claim 659*659 copyright"[2]. In *Gaiman v. McFarlane, 360 F. 3d 644 - Court of Appeals, 7th Circuit*

[1] http://codes.lp.findlaw.com/uscode/17/1/101

[2] Gaiman v. McFarlane, 360 F. 3d 644 - Court of Appeals, 7th Circuit 2004

2004 The court found that the ideas for characters were contributed to the end character just as much as McFarland drawing of the character. Gaiman's ideas, story lines, and characters personality combines with McFarlane's art; created a character that would not have existed if they were separate creations. A comic character can easily become iconic, and can often consist of a joint effort. If a novel is the result of a long collaborative effort by two authors both authors can own the copyright for that novel and the characters contained within that novel. The same can be said of a painting, a song, or a research paper. There is no reason why this should not extend to such an effort on a comic and the characters and stories contained within. If both bring valuable contributions to a character that make that character distinct, and the contributions are relatively equal, they can safely be said to be co-created.

One benefit of the ownership of copyrighted material is the right to license the use of the material for a fee. The doctrine of Fair Use allows reproduction of copyrighted material, provided it is done under certain circumstances, such as for teaching purposes. Under 17 U.S.C. § 107, "fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright"[3]. This is done to benefit the public interest and help the flow of information. However, Fair Use may not apply if there is a commercial issue involved. Certain images, character, and words are strongly connect to an idea or character. But the issue now becomes how to determine if it is an issue of fair use or an issue of infringement? "This determination in turn depends upon a number of factual variables such as "(1) the strength of the plaintiff's mark, (2) the degree of similarity between the two marks, (3) the proximity of

---

[3] http://codes.lp.findlaw.com/uscode/17/1/107

the products or services, ... (4) the defendant['s] good faith in adopting its mark," *id.,* as well as the existence of actual confusion and the sophistication of the consumers of the products or services."[4] If the use of the mark acts to increase sales and revenue for the potentially infringing party it can be argued that the doctrine of Fair Use does not apply. If the marks are deliberately similar it may not be considered Fair Use as the plaintiff may be clearly attempting to use an established and recognized mark to further their own profits. A common argument to counter this claims that the exposure only helps the original mark and can in turn increase revenue and profits for them. In the case of *DC Comics Inc. v. Reel Fantasy, Inc., 696 F. 2d 24 - Court of Appeals, 2nd Circuit 1982* the court found that Fair Use did not apply and that a potential increase in sales did not create Fair Use, and there was a potential for harm. The court noted; "since one of the benefits of ownership of copyrighted material is the right to license its use for a fee, even a speculated increase in…sales as a consequence of… infringement would not call the fair use defense into play as a matter of law. The owner of the copyright is in the best position to balance the prospect of increased sales against revenue from a license." [5]. While Fair Use certainly does have its place, and is a valuable doctrine, that doctrine cannot apply when the use is intended to gain profit. It may be most common to consider this in terms of literature. Excerpts from novels are often used in a teaching setting, and this is a valid example of Fair Use. However, as in the case of *DC Comics Inc. v. Reel Fantasy, Inc.,* the use of a term such as "batcave" brings clear associations of the comic character Batman and attempts to profit of that similarity and association. Even if the intent was in "good faith" it abuses a valid copyright.

[4] DC Comics Inc. v. Reel Fantasy, Inc., 696 F. 2d 24 - Court of Appeals, 2nd Circuit 1982

[5] DC Comics Inc. v. Reel Fantasy, Inc., 696 F. 2d 24 - Court of Appeals, 2nd Circuit 1982

Another common issue is the idea that a copyright can expire, or even that the owner of the copyright can abandon their copyright. This brings the matter of how a copyright can be abandoned. There is no doubt that the owner of a copyright can dismiss their rights to the mark. However, this must be done so in a manner that is deliberate and makes it clear they are surrendering their work and it is then available to the public to copy. Merely failing to continue to publish does not constitute abandonment of the copyright. Furthermore, the attempt to publish does support an intention to continue ownership of a copyright. A comic that attempts to publish with any type of copyright notice attached shows a clear intent to continue the copyright. "the very fact that it continuously attempted to publish "strips" with some sort of copyright notice affixed, however imperfect that may have been, is conclusive evidence that it wished to claim a copyright upon them; and indeed it would have had no conceivable purpose in allowing its rights to lapse. It is of course true that the publication of a copyrightable "work" puts that "work" into the public domain except so far as it may be protected by copyright."[6] In *National Comics Publications v. Fawcett Publications, 191 F. 2d 594 - Court of Appeals, 2nd Circuit 1951* the question became whether or not copyright was abandoned. The court ruled that the copyright owners intent and attempts to publish were sufficient to indicate intent to maintain the copyright. Therefore, the characters they have created remain their property and are not public domain.

This leads to another issue, the renewal of copyright. There have been arguments that copyrights should be finite. They should be applicable for a set period, after which they expire. But a copyright often represents someone's livelihood. To deny them the right to benefit from their work is in error. Under the copyright act of 1909, a copyright was good for a length of 28 years,

[6] National Comics Publications v. Fawcett Publications, 191 F. 2d 594 - Court of Appeals, 2nd Circuit 1951

after which it could be renewed for another 28 year period. The Act explained; ""it should be the exclusive right of the author to take the renewal term, and the law should be framed as is the existing law, so that he could not be deprived of that right."[7] In 1976 Congress extended the duration of copyrights it also gave new protections to authors. Under 17 U.S.C. § 304(c) "Any copyright, the first term of which is subsisting on January 1, 1978, shall endure for 28 years from the date it was originally secured… the proprietor of such copyright shall be entitled to a renewal and extension of the copyright in such work for the further term of 67 years…" [8]

In *Marvel Characters, Inc. v. Simon, 310 F. 3d 280 - Court of Appeals, 2nd Circuit 2002* the creator of Captain America, sought to retain his rights to the character as the sole owner and creator. The court, after examining the evidence, found that Simon did have the rights to renew the copyright. "Simon argues that the district court was correct in finding that neither res judicata nor collateral estoppel barred him from asserting that he was the Works' author because the factual *issue* of authorship was never fully and fairly litigated in the Prior Actions and is quite different from his present *claim* to termination rights in the Works. Simon is correct"[7] They further found that Marvel has no right to bar the claim, due in part to their continued profits from the character.

As mentioned before, a character can become iconic. This is true of any character be it from a novel, a movie, or a comic. If someone were to describe a heroic character with the ability to fly, incredible strength, extreme speed, and invulnerability most people would think of the classic comic character Superman. In *Detective Comics v. Bruns Publications, 111 F. 2d 432 - Circuit Court of Appeals, 2nd Circuit 1940,* Bruns Publications, was found to have infringed by creating their character "Wonderman". Their character possessed strength and speed and were

[7] Marvel Characters, Inc. v. Simon, 310 F. 3d 280 - Court of Appeals, 2nd Circuit 2002
[8] http://www.law.cornell.edu/uscode/text/17/304

"champions of justice". Both wore their heroic costumes under their clothing and were invulnerable to bullets. Detective Comics claimed the "Wonderman" character clearly infringed upon the character of "Superman". Bruns claimed the powers of "Superman" could be traced to ancient heroes of mythology such as Hercules and they used nothing more than general types. However, the court found that far more than mere "types" were used "We think it plain that the defendants have used more than general types and ideas and have appropriated the pictorial and literary details embodied in the complainant's copyrights…We have repeatedly held that irrespective of the sources from which the author of a work may derive the material which he uses, a picture or writing which is his own production cannot be copied. The prior art is only relevant as bearing on the question whether an alleged infringer has copied the author or has taken his material directly from the prior art."[9] The court ruled that the artistic depiction of "Superman" was not simply a variation on the hero myth. Rather, he is a distinct character in his own right. Bruns clearly copied the character and attempted to create an identical character for their own means and profit. There have been numerous cases where a character was found to have infringed on a previously existing character. There is no reason that should extend to a comic character, especially perhaps the most well known comic character of them all.

In the end, a copyright is a copyright. No matter what the mark is affixed to, it must be afforded the rights due a proper copyright. All forms of intellectual property are protected under the copyright act.

[9] Detective Comics v. Bruns Publications, 111 F. 2d 432 - Circuit Court of Appeals, 2nd Circuit 1940