

COMMENT

SPIDER-MAN: WORK FROM HOME
AND RETAIN NO COPYRIGHT
UNDER THE INSTANCE
AND EXPENSE TEST

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From Spider-Man to Ms. Marvel, superheroes are beloved by many, but owned by the few. Marvel Entertainment retains the copyright to iconic characters such as these, despite the fact that Marvel's employees did not create them. These characters were created by freelance artists Jack Kirby, Steve Ditko, and Lawrence Lieber, among others. Yet, the Second Circuit ruled in Marvel Characters v. Kirby that these freelance artists have no claim of copyright over their own masterful works. The Second Circuit relied on the instance and expense test for copyright, as opposed to the Supreme Court's leading copyright decision, Community for Creative Non-Violence v. Reid. The former generally benefits publishing houses; the latter provides a thorough analysis into twelve factors surrounding the artist's relationship with the hiring party, the nature of the disputed work, the method of payment, etc.

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The artists are back in court to fight for the copyrights to these beloved characters. This Comment argues that Reid effectively overruled the instance and expense test, and that Lieber and Ditko's pending cases should be decided in accordance with the Supreme Court's twelve-factor analysis. In the alternative, the cases should be decided under the doctrine of conventional employment, which was the controlling test for works made for hire during the relevant time period.

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"[I]n this world, with great power there must also come—great responsibility."

—Stan Lee & Steve Ditko¹

INTRODUCTION

The Second World War has come to an end. The economy is up, but your spirits are down; you are an unemployed veteran with little more than colored pencils and cardstock paper to create a living from. Before being drafted, you had steady work with multiple animation, comic book, and newspaper comic strip companies. Now that you have returned from war, the comic book publisher you once worked for has relaunched all your creations without giving any due credit. This is Jack Kirby's story.²

In the mid-1950s, Kirby and his professional partner, Joe Simon, created Mainline Publications to broadcast their own artwork.³ The partnership ultimately ended, and Kirby made a temporary return to

1. Stan Lee & Steve Ditko, *Amazing Fantasy No. 15: "Spider-Man,"* 11 (1962).

2. *Jack Kirby*, BRITANNICA, <https://www.britannica.com/biography/Jack-Kirby> [<https://perma.cc/9F8S-E9B4>]; see also Brent Staples, *Jack Kirby, a Comic Book Genius, Is Finally Remembered*, N.Y. TIMES (Aug. 26, 2007) <https://www.nytimes.com/2007/08/26/opinion/26sun3.html> [<https://perma.cc/C2BY-8UAY>] (articulating that much of the success of publishing houses like Marvel and DC Comics rested on Kirby's artistic brilliance, particularly *Spider-Man*, *The Fantastic Four*, *The X-Men*, and *The Hulk*).

3. *Jack Kirby*, ATLAS TALES, <https://www.atlastales.com/cr/3> [<https://perma.cc/6ZJK-RHKF>]; BRITANNICA, *supra* note 2.

Atlas Comics, the predecessor of Marvel Comics.⁴ Kirby freelanced at both Atlas and DC Comics for some time but ultimately created the pinnacle pieces of his career in the Silver Age of Marvel, from 1958 to 1970.⁵

Kirby drew the cover for *Spider-Man's* first comic book appearance and created *The Avengers*, *The Fantastic Four*, *The Incredible Hulk*, and *The X-Men*, among many other sagas that are now worth millions of dollars and have graced cinemas across the world.⁶ All of it began in the humble abode of that World War II veteran, working with materials he bought in a space he paid for.⁷ Unbeknownst to Kirby, Timely/Atlas Comics would evolve into the multi-billion dollar company of Marvel Comics, which the Walt Disney Company would acquire in 2009.⁸ In 1970, Kirby left to work for rival company DC Comics, but his impact on Marvel remained.⁹ While his role in the

4. MARVEL: 75 YEARS, FROM PULP TO POP! (Marvel Studios, Bow + Arrow Entertainment, Nov. 4, 2014); *see also* BRITANNICA, *supra* note 2 (describing Kirby's return to Atlas after his deployment).

5. BRITANNICA, *supra* note 2; GINA MISIROGLU, THE SUPERHERO BOOK 27–36 (David A. Roach ed., 2004); MARTIN FLANAGAN, MIKE MCKENNY & ANDREW LIVINGSTONE, THE MARVEL STUDIOS PHENOMENON: INSIDE A TRANSMEDIA UNIVERSE 212 (2016); STEPHANIE WETZEL & CHARLIE WETZEL, THE MARVEL STUDIOS STORY 4–8 (2020) (noting Jack Kirby's nickname of "King Kirby" because of his impact on comics).

6. Lee & Ditko, *supra* note 1, at 13 (authoring the first appearance of Spider-Man); *see also* George Gustines, *Spider-Man's First Comic Brings \$3.6 Million, Likely a Record*, N.Y. TIMES (Sept. 9, 2021), <https://www.nytimes.com/2021/09/09/arts/spider-man-comic-auction-record.html> [<https://perma.cc/H3WW-B8GX>] (describing the evolution from the comic's original price of twelve cents to three-point-six million dollars); Scott Mendelson, *Marvel's Avengers, Ranked from Poorest to Richest in Worldwide Box Office*, FORBES (July 8, 2021, 1:10 PM), <https://www.forbes.com/sites/scottmendelson/2021/07/08/marvels-avengers-iron-man-black-widow-thor-hulk-ranked-from-poorest-to-richest-in-worldwide-box-office/?sh=55216b8c363a> [<https://perma.cc/TX2E-FAEV>] (approximating the worth of every major Marvel character).

7. *See* Marvel Characters, Inc. v. Kirby, 726 F.3d 119, 142 (2d Cir. 2013) (noting that Kirby expended the costs related to production of the pages).

8. Jim Beard, *The Atlas Era: Before Marvel Became Marvel*, MARVEL (Mar. 18, 2019), <https://www.marvel.com/articles/culture-lifestyle/the-atlas-era-before-marvel-became-marvel> [<https://perma.cc/FQ49-NWYF>]; 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> [<https://perma.cc/H8AV-4WRV>].

9. *See* BRITANNICA, *supra* note 2 (describing the tumultuous working relationship between Kirby and Marvel, Kirby's ultimate departure from transactions with the publishing house, and Kirby's legacy of influential works).

Marvel Universe has well-surpassed his lifetime, Kirby's estate does not currently possess any copyright to the same characters that he created.¹⁰ Marvel asserts that Kirby, and artists in similar situations, created the content as works for hire under the Copyright Act of 1909.¹¹ Because of the Marvel Method and the Second Circuit's use of the instance and expense test, Kirby and similarly situated artists have retained no benefit from the characters they conceived in their own sketchbooks.¹²

In 1989, the Supreme Court decided *Community for Creative Non-Violence v. Reid*,¹³ its leading decision pertaining to whether something is work for hire under copyright law.¹⁴ The Court held that Reid, the artist, was an "independent contractor, rather than" an employee of the organization he made the art for, and therefore the creation in dispute was *not* a work for hire.¹⁵ The Supreme Court outlined twelve factors that courts should consider when determining whether a creator was an employee or independent contractor, and thus whether the product in dispute should be considered a work made for hire.¹⁶

10. *Kirby*, 726 F.3d at 143.

11. Pub. L. No. 60-349, 35 Stat. 1075, 1075–88. Complaint at 2, *Marvel Worldwide, Inc. v. Kirby*, 777 F. Supp. 2d 720 (S.D.N.Y. 2011) [hereinafter *Kirby* Complaint]; Brief in Opposition at 1, *Kirby v. Marvel Characters, Inc.*, 573 U.S. 988 (2014) [hereinafter *Brief in Opposition*].

12. See Brian Cronin, *How Stan Lee Became Synonymous with the "Marvel Method"*, CBR (Nov. 14, 2018), <https://www.cbr.com/marvel-comics-stan-lee-marvel-method> [<https://perma.cc/ZZ8E-TRJK>] (describing the development of the Marvel Method); *Kirby*, 726 F.3d at 142; *infra* Section I.E.1. Compare *Brattleboro Publ'g Co. v. Winmill Publ'g Corp.*, 369 F.2d 565, 568–69 (2d Cir. 1966) (utilizing the instance and expense test to determine a work for hire copyright matter for the first time in the Second Circuit), with *Stenographic Report of the Proceedings of the Librarian's Conf.*, 2d Sess. 65 (Nov. 1–4, 1905) [hereinafter *Stenographic Report*] (affirmatively declaring that "the artist who is employed for the purpose of making a work of art so many hours a day [and] the independent artist should have different rights" when analyzing Congress' intended scope of work for hire under the Copyright Act of 1909).

13. 490 U.S. 730, 743 (1989).

14. Petition for Writ of Certiorari at 5, *Kirby*, 573 U.S. 988 (No. 13–1178) [hereinafter *Petition for Certiorari*]; accord 3 MELVILLE B. NIMMER, NIMMER ON COPYRIGHT § 9.03[D] & n.108 (2021) (noting that even the Second Circuit acknowledged a "pause" based on *Reid* (citing *Reid*, 490 U.S. at 743–44)).

15. *Reid*, 490 U.S. at 752–53.

16. *Id.* at 751–52; *infra* Section I.C.

Over twenty years later, the U.S. Court of Appeals for the Second Circuit decided *Marvel Characters, Inc. v. Kirby*.¹⁷ In 2011, Jack Kirby's estate sought to terminate the late artist's copyright assignments to Marvel Comics.¹⁸ The case began, as most media-renowned copyright lawsuits do, in the Southern District of New York.¹⁹ The district court granted summary judgment in favor of Marvel (the publisher) on its claim for declaratory relief.²⁰

The Second Circuit decided the appeal on the basis of its specially crafted instance and expense test, as opposed to the Supreme Court's *Reid* analysis.²¹ The circuit held that the copyrights vested in Marvel as works made for hire because Kirby's comics were created at Marvel's instance and expense.²² The Second Circuit held that Kirby's work was governed by the Copyright Act of 1909 rather than the Copyright Act of 1976 and thus treated the Supreme Court's rule in *Reid* as "mere dicta."²³

In September 2021, Marvel Characters initiated lawsuits against Lawrence D. Lieber and Patrick Ditko in the Southern District of New York.²⁴ Both Lieber's and Ditko's respective estates had served Marvel with termination notices of their copyright assignments; Marvel is

17. 726 F.3d 119 (2d. Cir. 2013).

18. Kirby Complaint, *supra* note 1111, at 4–5.

19. *Id.* at 1.

20. *Kirby*, 726 F.3d at 124.

21. *Id.* at 143.

22. *Id.* (utilizing the test introduced to the Second Circuit in *Brattleboro Publ'g Co. v. Winmill Publ'g Co.*, 369 F.2d 565, 568–69 (2d Cir. 1966)). *But see* *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 547 (1985) (stating that authorship vests at creation).

23. Petition for Certiorari, *supra* note 1414, at 5; *Kirby*, 726 F.3d at 139 n.8 (acknowledging the Second Circuit's "approach has been criticized" and citing the Nimmer treatise as well as *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 742 (1989)).

24. Complaint for Declaratory Relief at 1, *Marvel Characters v. Lieber*, No. 1:21-cv-07955 (S.D.N.Y. filed Sept. 24, 2021) [hereinafter *Lieber Complaint*]; Complaint for Declaratory Relief at 1, *Marvel Characters v. Ditko*, No.1:21-cv-07957 (S.D.N.Y. filed Sept. 24, 2021) [hereinafter *Ditko Complaint*]. Lawrence D. Lieber is a freelance artist and brother of Stan Lee. D.D. Degg, *Larry Lieber, Stan Lee's Brother, Sues Marvel*, DAILY CARTOONIST (Sept. 26, 2021), <https://www.dailycartoonist.com/index.php/2021/09/26/larry-lieber-stan-lees-brother-sues-marvel> [https://perma.cc/J9MB-F9CD]. Patrick Ditko is an artist, Steve Ditko's brother, and the administrator of his estate. *Ditko Complaint*, *supra* note 24, at 1–3.

seeking, in both suits, a declaration that the termination notices are invalid.²⁵

In both complaints, Marvel relies predominantly on the *Kirby* decision because the facts are extremely similar.²⁶ Since the Second Circuit utilizes the instance and expense test as opposed to applying the one dictated by the Supreme Court in *Reid*, Ditko's and Lieber's respective estates will likely face the same inequitable result Kirby's did in 2013.²⁷ This Comment argues that *Kirby* was wrongly decided, the instance and expense test is inconsistent with the Supreme Court's *Reid* test, and the pending cases should be decided based on the Supreme Court's *Reid* factors, as opposed to the instance and expense test.²⁸

This Comment analyzes three work for hire tests: conventional employment, instance and expense, and the twelve-factor *Reid* test.²⁹ Part I examines the prevailing work for hire precedent from 1909 to 1972 to describe the evolution of the tests.³⁰ Part I concludes by

25. Lieber Complaint, *supra* note 2424, at 5–6; Ditko Complaint, *supra* note 2424, at 5–6.

26. Lieber Complaint, *supra* note 2424, at 2; Ditko Complaint, *supra* note 2424, at 2.

27. *Kirby*, 726 F.3d at 144 (holding that Kirby's estate was without termination rights); *see also* Brief of Amici Curiae Bruce Lehman, Former Asst Secretary of Commerce and Director of the U.S. Patent and Trademark Office; Ralph Oman, Former U.S. Register of Copyrights; The Artists Rights Society, The Intellectual Property Institute, and Various Professional Associations, Illustrators and Cartoonists in Support of Petitioners at 21, *Kirby v. Marvel Characters, Inc.*, 573 U.S. 988 (2014) (No. 13–1178), 2014 WL 2754943, at *11 [hereinafter Lehman Amicus Brief] (foreshadowing the chilling effect on authors' rights that would occur if the Court did not weigh in on Kirby's claims); Brief of Screen Actors Guild-American Federation of Television and Radio Artists, Directors Guild of America, Inc., and Writers Guild of America, West, Inc. as Amici Curiae in Support of Petitioners at 25, *Kirby*, 573 U.S. 988 (No. 13–1178), 2014 WL 2811104, at *12 [hereinafter Screen Actors Guild Amicus Brief] (alluding to the inequities that would be forced upon "countless individuals" if the instance and expense test were to continue in use); *500 Greatest Songs of All Time*, ROLLING STONE (Dec. 11, 2003), <https://www.rollingstone.com/music/music-lists/500-greatest-songs-of-all-time-151127> [<https://perma.cc/FLX4-PY9R>] (demonstrating that nearly seventy-five percent of the "greatest" songs of all time in 2004 had been created before the Copyright Act of 1976, and therefore the artists would be subjected to the throes of the instance and expense test).

28. *Infra* Section II.A.2; *see* ROLLING STONE, *supra* note 27.

29. *Infra* Section I.E.1.

30. *Infra* Sections I.A–D.

discussing the Second Circuit's analysis in *Kirby*.³¹ Part II argues two independent theories that demonstrate why *Kirby* was incorrectly decided.³² Part II applies each theory and relevant work for hire test to *Kirby*'s facts and contrasts the theoretical outcomes with the Second Circuit's decision.³³ Part II then applies the facts of the pending cases to the three main work for hire tests.³⁴ Part II concludes with a policy discussion supporting the theories on equitable grounds.³⁵ The Comment concludes with a sense of urgency for these work for hire discrepancies to be resolved.³⁶

Kirby was wrongly decided because the Supreme Court defined "employment" in *Reid* through a factor test, and that definition applies to both Copyright Acts.³⁷ The Court also considered and effectively overruled the instance and expense test in *Reid*.³⁸ Nevertheless, even if *Reid* did not overturn the instance and expense test for both Copyright Acts, the leading test for employment during the years that the works in dispute were created should prevail when a court considers whether a work was made for hire.³⁹

I. BACKGROUND

Copyright protects "original works of authorship fixed in a tangible medium of expression."⁴⁰ Copyright protection exists at inception, meaning it begins from "the moment [the work] is created."⁴¹ Copyright, unlike patents, is a self-executing form of intellectual property; while the U.S. Copyright Office strongly recommends registration in order for creators to protect against copyright infringement, registration is not required by law.⁴²

If a creation qualifies as a work made for hire under either the Copyright Act of 1909 or the Copyright Act of 1976, then the hiring

31. *Infra* Sections I.A–D.

32. *Infra* Sections I.A–B.

33. *Infra* Sections I.A–B.

34. *Infra* Sections II.C.1–3.

35. *Infra* Section II.D.

36. *Infra* Conclusion.

37. *Infra* Sections II.A.1–3.

38. *Infra* Section II.A.2.

39. *Infra* Sections II.B.1–3.

40. *Copyright in General*, U.S. COPYRIGHT OFF., <https://www.copyright.gov/help/faq/faq-general.html> [<https://perma.cc/M2EV-M6XJ>].

41. *Id.*

42. *Id.*

party for which a work was created is the “author” at inception.⁴³ For example, if a writer works at a songwriting company and the writer drafts lyrics while employed there, then the copyright of those lyrics would probably belong to the songwriting company.⁴⁴ The writer would not be considered the “author” for purposes of copyright ownership unless there was some written agreement to the contrary.⁴⁵ Therefore, the songwriting company would be the “author,” and the lyrics would constitute a work made for hire.⁴⁶

Works made for hire can be quite nuanced, especially when considered under the Copyright Act of 1909, because the statute did not define the criteria for a work made for hire.⁴⁷ The task of refining those criteria fell to the courts and multiple tests emerged.⁴⁸ First, courts considered the doctrine of conventional employment, which prevailed until around 1966–1972.⁴⁹ Under the doctrine of conventional employment, if the creator was not a salaried employee, the work would probably not be considered made for hire.⁵⁰ Next, around 1972, the Second Circuit began using the instance and expense test, which held that if a work was created at the hiring party’s instance and expense, then the hiring party was the author and copyright owner, thus deeming the work as made for hire.⁵¹ Third, after the enactment of the Copyright Act of 1976, the Supreme Court decided *Reid*, which outlined twelve factors to be weighed during a work for hire analysis.⁵² Each test will be discussed in chronological order.⁵³

A. *Copyright Law and the Prevailing Work for Hire Test Before 1972*

The Copyright Act of 1909 “granted protection to works published with a valid copyright notice affixed on copies.”⁵⁴ The Act defined the

43. U.S. COPYRIGHT OFF., CIRCULAR 30: WORKS MADE FOR HIRE 1 (2021), <https://www.copyright.gov/circs/circ30.pdf> [<https://perma.cc/PK95-YXQM>].

44. *See id.* at 4.

45. *See id.*

46. *Id.*

47. Copyright Act of 1909, Pub. L. No. 60–349, 35 Stat. 1075.

48. *Infra* Sections I.A–B.

49. *Infra* Section I.A.

50. *Infra* Section I.A.

51. *Infra* Section I.B.

52. *Infra* Section I.C.

53. *Infra* Sections I.A–D.

54. *Timeline 1900–1950*, U.S. COPYRIGHT OFF., <https://www.copyright.gov/>

copyright term as twenty-eight years, with a renewal option for an additional twenty-eight years.⁵⁵ It was undisputed that “Congress intended the renewal copyright to benefit authors and their families.”⁵⁶

The Copyright Act of 1909 defined several terms, but it did not define “employer.”⁵⁷ The Act declared, however, that “the word ‘author’ shall include an employer in the case of works made for hire.”⁵⁸ The Supreme Court also held that a core principle of copyright law is that copyright “vest[s] in the author of an original work from the time of its creation.”⁵⁹ Therefore, the definition and implementation of “work for hire” and “employment” under the Copyright Act of 1909 fell to the courts for interpretation.⁶⁰

In 1903, the Supreme Court handed down its first-ever work for hire and employee-related copyright decision. In *Bleistein v. Donaldson Lithographing Co.*,⁶¹ the Court held that the hiring party, an advertising company, owned the copyright to the works in dispute because the artwork had been illustrated by conventional employees assigned to that specific task for the advertiser.⁶² Importantly, both the former U.S. Assistant Secretary of Commerce and Director of the Patent and Trademark Office, Bruce Lehman, and the former U.S. Register of Copyrights, Ralph Oman, affirmed that the Copyright Act of 1909 “codified then existing case law governing employed authors,” including *Bleistein*.⁶³

From 1909 to 1972, courts generally held that a work was made for hire if it was made in the context of conventional employment.⁶⁴ The common law of agency supported this notion.⁶⁵ This period aligns

timeline/timeline_1900-1950.html [https://perma.cc/KZK9-2QAK].

55. *Id.*

56. Petition for Certiorari, *supra* note 14, at 7.

57. Copyright Act of 1909, Pub. L. No. 60-349, 35 Stat. 1075; U.S. COPYRIGHT OFF., *supra* note 43, at 3.

58. § 62, 35 Stat. at 1088.

59. Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 547 (1985).

60. Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 744 (1989).

61. 188 U.S. 239 (1903).

62. *Id.* at 248, 252.

63. Lehman Amicus Brief, *supra* note 27,27 at 7.

64. The works in dispute for Kirby’s case were created between 1958–1963, and thus were included in this period. Petition for Certiorari, *supra* note 1414, at 3; *Reid*, 490 U.S. at 744; *infra* Section II.B.2.

65. NIMMER, *supra* note 14, § 9.03[D]; Petition for Certiorari, *supra* note 14, at 7.

with the working relationship between freelance artist Jack Kirby and Marvel Comics.⁶⁶ The Copyright Act of 1909 controlled during the period that Kirby created the works in dispute, but Supreme Court jurisprudence relating to both Copyright Acts is relevant when determining the meaning of works made for hire and employment because neither Copyright Act defined employment.⁶⁷

B. The Evolution of the Instance and Expense Test in the Second Circuit

The Second Circuit's relevant work made for hire precedent began in 1940, with its decision in *Yardley v. Houghton Mifflin Co.*⁶⁸ In that case, the court began rebutting the common law presumption of a conventional employee-employer relationship in potential work for hire cases with a sudden assumption that when "dealing with . . . commissioned work[s], the author impliedly agrees to assign the copyright, along with the work itself, to the hiring party."⁶⁹ While this case did not establish or utilize the instance and expense test, it blurred the line between employees and independent contractors.⁷⁰ *Yardley* was effectively overruled by *Reid*.⁷¹

*Brattleboro Publishing Co. v. Winmill Publishing Corp.*⁷² was the Second Circuit's first application of the infamous instance and expense test to independent contractors; the case involved a newspaper advertisement dispute.⁷³ The circuit articulated then existing

66. Formerly "Timely," and later known as Marvel Comics. BRITANNICA, *supra* note 2.

67. U.S. COPYRIGHT OFF., *supra* note 43, at 3.

68. 108 F.2d 28 (2d Cir. 1939).

69. *Compare id.* at 31 (holding that "[s]uch a presumption must rest on the supposed intention of the parties"), and *Lin-Brook Builders Hardware v. Gertler*, 352 F.2d 298, 300 (9th Cir. 1965) (creating, before any other court in the country, the principle of an instance and expense test and applying it to an independent contractor), with Brief of Amicus Curiae The California Society of Entertainment Lawyers in Support of Petitioners at 6, *Kirby v. Marvel Characters, Inc.*, 573 U.S. 988 (2014) (No. 13-1178), 2014 WL 2754942 [hereinafter Entertainment Lawyers Amicus Brief] (illustrating how the Second Circuit's decision in *Yardley* was contrary to the plain language of the Copyright Act of 1909).

70. *See Yardley*, 108 F.2d at 31.

71. *Infra* Sections II.A.1–2.

72. 369 F.2d 565 (2d Cir. 1966).

73. *Id.* at 567–68 (describing the work-for-hire doctrine in the conventional employee to employer relationship, applying the instance and expense test, and declaring that "[w]e see no sound reason why these same principles are not

principles of work for hire jurisprudence, which revolved around conventional employment, and decided the circuit would henceforth extend the application of works made for hire to freelancers and independent contractors.⁷⁴ The Second Circuit declared that “there is a presumption . . . that the copyright shall be in the person at whose instance and expense the work is done.”⁷⁵ *Brattleboro* was also effectively overruled by *Reid*.⁷⁶

The instance and expense test poses a short inquiry and tends to favor hiring parties over freelancers and employees.⁷⁷ When *Brattleboro* was decided in 1966, the circuit did not have many examples of what would meet the test’s low burden because the test had not been used by the circuit during the several decades since the Copyright Act of 1909 was passed.⁷⁸ The circuit stated that the test was to be utilized “most frequently in instances involving music publishers.”⁷⁹

Over the next decade, the circuit placed more and more independent contractors under the umbrella of employees by using the instance and expense test.⁸⁰ As it continued to utilize that test, the Second Circuit provided hiring parties with a low burden to satisfy to ensure that they would have ironclad copyrights over the work of independent contractors.⁸¹

applicable when the parties bear the relationship of employer and independent contractor”).

74. *Id.* at 568 (noting the court saw “no sound reason why these same principles [of conventional employment and work for hire] are not applicable when the parties bear the relationship of employer and independent contractor”).

75. *Id.* at 567.

76. *See* Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 751–52 (1989); *infra* Sections II.A.1–2.

77. *See, e.g.,* Lehman Amicus Brief, *supra* note 2727, at 21 (articulating that the instance and expense test creates a game of “gotcha’ designed to block freelance artists from exercising their rights”); Screen Actors Guild Amicus Brief, *supra* note 2727, at 25 (stating that the “liberally-applied, nearly insurmountable” instance and expense test “eviscerates the authorial rights that Congress preserved to creators”).

78. Lehman Amicus Brief, *supra* note 2727, at 21.

79. *Brattleboro*, 369 F.2d at 567; *see, e.g., also*, ROLLING STONE, *supra* note 2727 (illustrating the inordinate amount of valuable artistry governed by the principles of the Copyright Act of 1909).

80. Thomas M. Deahl II, *The Consistently Inconsistent “Instance and Expense” Test: An Injustice to Comic Books*, 14 J. MARSHALL REV. INTELL. PROP. L. 91, 101–04 (2014); Lehman Amicus Brief, *supra* note 2727, at 21.

81. Deahl II, *supra* note 80, at 102–06.

The Second Circuit decided *Picture Music, Inc. v. Bourne, Inc.*⁸² in 1972. The circuit utilized its newly furnished instance and expense test to treat an independent contractor as an employee for copyright purposes.⁸³ The circuit granted the copyright of an original musical score to Walt Disney Productions and Irving Berlin, Inc., thus stripping the composer of her one-half ownership interest.⁸⁴ This precedent-breaking decision, based admittedly on an implied assignment, paved the way for publishers to take credit from the original authors of a creative work by labeling independent contractors as employees.⁸⁵ *Picture Music* cited *Brattleboro* in its decision to treat an independent contractor as an employee.⁸⁶ The circuit declared that its instance and expense test would favor a hiring party whenever the court concluded that “the motivating factor in producing the work was the employer who induced the creation.”⁸⁷ The Second Circuit has effectively expanded the instance and expense test to apply outside the bounds of conventional

82. 457 F.2d 1213 (2d Cir. 1972).

83. Compare *id.* at 1216 (breaking precedent and applying the instance and expense test as opposed to relying on agency law surrounding traditional employment), *with* Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 748 (1989) (articulating the Court’s disagreement with the rationale used in *Picture Music*), and NIMMER, *supra* note 14, § 9.03[D] (dictating “the holding [and approach] of *Picture Music* becomes untenable” because of the Supreme Court’s interpretation of the Copyright Act of 1909).

84. See *Picture Music*, 457 F.2d at 1217 (“That [the composer/creator] acted in the capacity of an independent contractor does not preclude a finding that the song was done for hire.”).

85. See *id.* at 1215 (agreeing with the trial court’s reliance on the composer’s implied assignment and assumption of her intent to “convey all rights to the work in return for royalties and credits”); Petition for Certiorari, *supra* note 14, at 19–20; accord NIMMER, *supra* note 14, at 9–34 n.118 (emphasizing that “[t]his treatise has been a steady critic of [*Picture Music*’s] course”); Brief of Amici Curiae Mark Evanier, John Morrow and PEN Center USA in Support of Petitioners, Kirby v. Marvel Characters, Inc., 573 U.S. 988 (2014) (No. 13–1178), 2014 WL 2754941 [hereinafter PEN Center USA Amicus Brief] (arguing that the instance and expense test allows Marvel and similarly situated publishers to engage in a “revisionist history”).

86. Compare *Picture Music*, 457 F.2d at 1216 (utilizing *Brattleboro*’s disregard for the plain meaning of “employee” to misinterpret an implied assignment case), *with* NIMMER, *supra* note 14, § 9.03[D] (illustrating the country’s leading copyright treatise’s criticism of the Second Circuit’s choice to follow *Picture Music* and disregard the Supreme Court’s twelve-factor test).

87. *Picture Music*, 457 F.2d at 1216.

employment, all the way to independent contractors and freelance artists.⁸⁸

*C. The Copyright Act of 1976 and the Supreme Court's
Twelve-Factor Reid Test*

The Copyright Act of 1976 was passed after much deliberation over the somewhat contradictory and indiscriminate holdings of lower courts around the country.⁸⁹ The statute went into effect on January 1, 1978, and extended federal copyright protection to all works, regardless of publication status, and extended the length of a copyright term.⁹⁰

The statute has been amended several times since its inception, but as it stands, a copyright term lasts for seventy years after the author of the creation dies.⁹¹ The statute also contains a work for hire provision, one that is lengthier and more descriptive than its 1909 counterpart.⁹² Section 101 defines a work made for hire as:

(1) a work prepared by an employee within the scope of his or her employment; or (2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire.⁹³

For the purposes of this Comment, only § 101, relating to the scope of employment, is relevant to the discussion of Jack Kirby's work. Because Kirby's characters were created before the Copyright Act of 1976 was enacted, the Second Circuit held that the Copyright Act of 1909 controlled.⁹⁴ Recall, however, that the 1909 Act did not define the terms employer, employee, or work made for hire.⁹⁵ Despite

88. *Supra* notes 81–87 and accompanying text.

89. Jessica D. Litman, *Copyright Compromise and Legislative History*, 72 CORNELL L. REV. 857, 860–61 (1987).

90. Copyright Act of 1976, 17 U.S.C. §§ 102, 302 (1988).

91. *Id.* § 302(a) (articulating some of the terms of the Sonny Bono Copyright Term Extension Act).

92. *Compare id.* § 101, with Copyright Act of 1909, Pub. L. No. 60–349, 35 Stat. 1075, 1080 (excluding a “work-for-hire” provision).

93. 17 U.S.C. § 101.

94. *Marvel Characters, Inc. v. Kirby*, 726 F.3d 119, 137 (2d Cir. 2013).

95. *See supra* note 92 and accompanying text.

Congress's efforts to refine the boundaries of an employment relationship for copyright purposes, it still did not define the relationship in the statute.⁹⁶ The burden of defining the scope of employment fell to the Supreme Court.⁹⁷

The Court accepted this challenge and decided *Reid*, which remains its leading case for resolving work made for hire disputes.⁹⁸ The petitioners, "CCNV," were a non-profit organization based in Washington, D.C. with the goal of raising awareness about the plight of homeless people across the country.⁹⁹ CCNV contracted into an oral agreement with James Earl Reid, a sculptor from Baltimore, Maryland.¹⁰⁰ Mitch Snyder, acting as a representative of CCNV, called Reid, who agreed to sculpt three human figures for the "Christmastime Pageant of Peace."¹⁰¹ Reid initially "proposed that the work be cast in bronze, at a total cost of approximately \$100,000 and requiring six to eight months to complete."¹⁰² Snyder rejected that proposal because it was too expensive and would take too long.¹⁰³ These discussions took place in the fall of 1985, and CCNV needed the figures completed by December 12, 1985.¹⁰⁴ The project rested at a maximum budget of \$15,000, non-inclusive of Reid's services, "which he offered to donate."¹⁰⁵ Reid received an advance payment of \$3,000 and sent several sketches to CCNV, which "Snyder testified . . . [were] for his approval."¹⁰⁶ Reid spent much of November and early December 1985 working exclusively on the statue for CCNV and was visited several times by representatives of the organization.¹⁰⁷

96. See *supra* note 92 and accompanying text; STAFF OF S. COMM. ON THE JUDICIARY, 86TH CONG., COPYRIGHT LAW REVISION STUDIES 141 (Comm. Print. 1961) [hereinafter COPYRIGHT LAW REVISION STUDIES].

97. *Comty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 744 (1989); *Timeline: 1950–2000*, U.S. COPYRIGHT OFF., https://www.copyright.gov/timeline/timeline_1950-2000.html [<https://perma.cc/FCW3-RGB3>] (noting that in *Reid*, the "Supreme Court interpret[ed] the meaning of 'work made for hire' under copyright law," but declined to limit its rule to the Copyright Act of 1976).

98. *Reid*, 490 U.S. at 750–51.

99. *Id.* at 733.

100. *Id.* at 733–34.

101. *Id.* at 733.

102. *Id.*

103. See *id.*

104. *Id.* at 733.

105. *Id.* at 734.

106. *Id.*

107. *Id.*

Throughout this period, CCNV rejected some of Reid's ideas for the sculpture.¹⁰⁸ The parties neglected to discuss copyright ownership at any time during the statue's production process.¹⁰⁹

On December 24, 1985, Reid delivered the finished sculpture to Washington, D.C., where it was displayed near the Christmas pageant.¹¹⁰ CCNV paid Reid the remaining balance of the original \$15,000, and the statue was displayed for a month.¹¹¹ In January 1986, CCNV returned the statue to Reid's studio for repairs.¹¹² Snyder commenced plans for taking the statue on a nationwide tour, to which Reid objected, citing the inexpensive quality of the sculpture's materials.¹¹³ Reid presented options that would strengthen the statue for such a journey, including recasting the statue in bronze for \$35,000 or creating a "master mold" for \$5,000.¹¹⁴ Snyder refused "to spend more of CCNV's money on the project" and ordered Reid to return the sculpture in March 1986.¹¹⁵

Reid was frustrated with CCNV's rigidity and refused to return the sculpture.¹¹⁶ He then promptly filed a certification of copyright registration for "Third World America" and named himself as the author.¹¹⁷ Adding insult to injury, Reid declared that he was taking the statue on a nationwide tour of his own, albeit one more modest than the one Snyder had proposed.¹¹⁸ In retaliation, CCNV filed a competing certificate of copyright registration and initiated an action against Reid.¹¹⁹ CCNV sought the return of the sculpture it paid for and a determination of copyright ownership.¹²⁰

108. See, e.g., *id.* (explaining that CCNV rejected Reid's suggestion that the family depicted in the sculpture be holding their possessions in shopping bags and declared that the belongings must be depicted in a shopping cart).

109. *Id.*

110. *Id.* at 735. This was twelve days after the agreed upon date. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.* The title of the sculpture was "Third World America." *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

The district court granted a preliminary injunction and ordered Reid to return the sculpture to CCNV.¹²¹ After a two-day bench trial, the district court held that “Third World America” was a work made for hire under the Copyright Act of 1976.¹²² The court declared that Reid was an “employee” of CCNV within the meaning of § 101(1) of the 1976 Act, and therefore CCNV “was the exclusive owner of the copyright in the sculpture.”¹²³ The court reasoned that “CCNV was the motivating force in the statue’s production,” the idea was conceived by members of CCNV, and CCNV had “directed enough” of Reid’s “effort to assure that, in the end, he had produced what” CCNV wanted.¹²⁴ In the district court’s view, Reid was an employee through this collaborative project.¹²⁵ Both the Court of Appeals for the District of Columbia Circuit and the Supreme Court disagreed with the district court.¹²⁶

The court of appeals held that although CCNV conceived the original idea for the sculpture, Reid “contributed more than a minimal amount of creativity to ‘Third World America,’” and therefore, the work for hire doctrine was inapplicable to render the statue a work made for hire.¹²⁷ The court of appeals strongly disagreed with the district court’s reliance on CCNV’s role in producing the statue as the “motivating factor” sufficient to make CCNV the sole owner of the copyright.¹²⁸ Most distinctly, the court of appeals declared that “[i]f CCNV reproduces ‘Third World America’

121. *Id.*

122. *See id.* (interpreting the 1976 Act at the district court level, whereas the Supreme Court expanded this discussion into terms undefined by both Copyright Acts in its decision).

123. *See id.* (describing the district court’s erroneous conclusion that because CCNV conceived the original design, the work was made for hire for purposes of copyright).

124. *Id.* at 735–36.

125. *Id.* at 735.

126. *See id.* at 736, 753 (illustrating the Court of Appeals’ accuracy in deeming that Reid owned the copyright because the sculpture was not a work made for hire, and thus reversing and remanding the matter for the question of joint authorship).

127. *Cnty. for Creative Non-Violence v. Reid*, 846 F.2d 1485, 1495 (D.C. Cir. 1988), *aff’d*, 490 U.S. 730 (1989) (holding that joint authorship, rather than the work for hire doctrine, should be considered).

128. *See id.* at 1497 (noting the “prevailing confusion” surrounding the work for hire doctrine).

in any medium and profits thereby . . . an accounting would be due to Reid as a copyright owner.”¹²⁹

The Supreme Court’s landmark decision in *Reid* considered whether “Third World America” was prepared by an employee within the scope of his employment.¹³⁰ To address this issue, the Court started with an even more important one: for the purposes of copyright, how should the term “employee” be interpreted?¹³¹ The Court acknowledged that four interpretations of “employment” for purposes of copyright had shaped the country’s circuits, including the Second Circuit’s instance and expense test.¹³² The Court discussed each test in turn while addressing the case’s dispositive issue.¹³³

First, the Court turned to the language of the statute.¹³⁴ Because neither the Copyright Act of 1909 nor the Copyright Act of 1976 defined the terms “employee” or “scope of employment,” the Court concluded that Congress “intended terms such as ‘employee,’ ‘employer,’ and ‘scope of employment’ to be understood in light of agency law . . . [and that the Court should rely] on the general common law of agency, rather than on the law of any particular State [or circuit] to give meaning to these terms.”¹³⁵ The Justices reasoned that because of the nationwide implications of copyright law, their decision was particularly appropriate in the sense that it promoted a “national uniform copyright” policy, thus “pre-empting state statutory and common-law copyright regulation.”¹³⁶ The Court, therefore, emphasized the need for the work for hire doctrine to have clear and

129. *See id.* at 1498 (describing the Court of Appeals’ reasoning and decision to reverse the district court).

130. *Reid*, 490 U.S. at 738.

131. *Id.* at 739–40.

132. *Id.* at 738–39.

133. *Id.*

134. *See id.* at 739–40 (stating that “[t]he starting point for our interpretation of a statute is always its language”).

135. *See id.* (holding that “[w]here Congress uses terms that have accumulated settled meaning under . . . the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms” (citing *NLRB v. Amax Coal Co.*, 453 U.S. 322, 329 (1981)) (alterations in original)).

136. *Id.* at 740.

uniform boundaries centered around conventional employment, as opposed to the interpretation of any individual circuit.¹³⁷

Turning to the two tests propagated by the circuits and promoted by the petitioners, the Court rejected both.¹³⁸ The first test, referred to as “the right to control the product test,” was articulated by the Colorado Supreme Court and a federal district court.¹³⁹ The test’s dispositive inquiry was whether the hiring party retained the right to control the end product, regardless of whether the work was commissioned or specially ordered as part of a collective project.¹⁴⁰ The Court boldly rejected this test, finding that its requisite analysis clashed with the language of the statute and, by its nature, broadly encompassed too many categories of “specially ordered or commissioned” works.¹⁴¹ The Court succinctly and explicitly held that “[t]he hiring party’s right to control the product simply is not determinative.”¹⁴²

The second rejected test was the Second Circuit’s “actual control test,” later referred to as the instance and expense test.¹⁴³ The dispositive inquiry for this analysis was whether the work in dispute was actually created at the hiring party’s instance, as opposed to questioning the hiring party’s theoretical ability to control the work.¹⁴⁴ The Court vehemently rejected this test for a multitude of reasons.¹⁴⁵ Beginning with the test’s impact on independent contractors, the Court held that the actual control test automatically and erroneously labeled freelancers and independent contractors who were supervised in the creation of their particular works as employees under the statute.¹⁴⁶ The Supreme Court agreed with the Court of Appeals for the Fifth Circuit in its declaration that there was

137. *See id.* at 741 (agreeing “with the Court of Appeals that the term ‘employee’ should be understood in light of the general common law of agency”).

138. *Id.*

139. *Id.* at 738, 741.

140. *Id.* at 741.

141. *Id.*

142. *Id.* at 748.

143. *Id.* at 742; Deahl II, *supra* note 80, at 99; Appellants’ Opening Brief at 54–55, *Marvel Characters, Inc. v. Kirby*, 726 F.3d 119 (2d Cir. 2013) (No. 10-141) [hereinafter Appellants’ Opening Brief].

144. *Reid*, 490 U.S. at 742.

145. *Id.* (noting that the Second Circuit’s test was adopted by the Fourth and Seventh Circuits).

146. *Id.*

“‘simply no way’” to reconcile the Second Circuit’s test with the language and intent of copyright law.¹⁴⁷ The Supreme Court rejected CCNV’s contention that Congress intended to “incorporate a line of cases decided under the 1909 Act holding that an employment relationship exists sufficient to give the hiring party copyright ownership whenever that party has the right to control or supervise the artist’s work.”¹⁴⁸

The final and most integral part of the Court’s analysis centered around the solution to this question: how should courts interpret the meaning of employment during work for hire copyright disputes? The landmark rule holds as follows:

In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party’s right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are [1] the skill required; [2] the source of the instrumentalities and tools; [3] the location of the work; [4] the duration of the relationship between the parties; [5] whether the hiring party has the right to assign additional projects to the hired party; [6] the extent of the hired party’s discretion over when and how long to work; [7] the method of payment; [8] the hired party’s role in hiring and paying assistants; [9] whether the work is part of the regular business of the hiring party; [10] whether the hiring party is in business; [11] the provision of employee benefits; [12] and the tax treatment of the hired party No one of these factors is determinative.¹⁴⁹

The Supreme Court applied these twelve factors to Reid’s working relationship with CCNV and agreed with the court of appeals that “Reid was not an employee of CCNV but an independent contractor.”¹⁵⁰ Although CCNV paid for, directed, and controlled the details of the sculpture, the other factors weighed against a finding for a conventional employment relationship.¹⁵¹ The Court ultimately

147. *Id.*; see also NIMMER, *supra* note 14, § 9.03[D] (agreeing with the Court and declaring that the Second Circuit’s approach was contrary to the conventional meaning of employment that Congress intended to enact in the Copyright Act of 1909).

148. See *Reid*, 490 U.S. at 748–49 (emphasizing that “[p]etitioners’ reliance on legislative silence” was “particularly misplaced”).

149. *Id.* at 751–52.

150. *Id.* at 752.

151. *Id.*

declared that any compromises made regarding the sculpture did not transform Reid from an independent contractor into an employee for the purpose of copyright.¹⁵² Reid was an independently skilled artist who supplied his own tools, worked in his own studio, and set his own hours and working schedule.¹⁵³ If Reid wanted to retain help from assistants with the project, that was left to his direction as well.¹⁵⁴

The Court held that the petitioners relied on erroneous interpretations of employment and that CCNV was not the author of “Third World America.”¹⁵⁵ When reviewing work for hire under the Copyright Act of 1909, the Court stated that

[b]ecause the 1909 Act did not define “employer” or “works made for hire,” the task of shaping these terms fell to the courts. They concluded that the work for hire doctrine codified in § 62 [of the 1909 Act] referred only to works made by employees in the regular course of their employment.¹⁵⁶

Nowhere in the Court’s well-reasoned opinion did it hold that its definition of employment and the twelve-factor test were restricted only to works governed by the Copyright Act of 1976. Relatedly, in *Fogerty v. Fantasy, Inc.*,¹⁵⁷ the Court declared that “it is peculiarly important that the boundaries of copyright law be demarcated as clearly as possible,” thus illustrating the benefits of uniformity with regard to interpreting copyright across courts.¹⁵⁸

D. Copyright and Work for Hire Principles After Reid

Joshua Kaufman, the attorney representing Reid at the Supreme Court, recently stated in an interview that “the twelve factors outlined in *Reid* should permeate through the consciousness of the legal community when employment is being analyzed in the copyright context.”¹⁵⁹ Accordingly, one might posit that after the Supreme

152. *Id.* at 752–53.

153. *Id.*

154. *Id.* at 753.

155. *Id.* at 752–53 (affirming the court of appeal’s holding but remanding on the question of joint authorship and co-ownership of the copyright).

156. *Id.* at 744.

157. 510 U.S. 517 (1994).

158. *Id.* at 527.

159. Telephone Interview with Joshua Kaufman, Attorney for Reid in *Cnty. for Creative Non-Violence v. Reid* (Mar. 30, 2022) (stating that “the *Reid* factors are time tested measurements”).

Court established this clear standard to analyze “employment” for copyright purposes, subsequent cases throughout the circuits would follow the Court’s precedent and consistently apply the twelve non-dispositive factors. This hypothesis would be incorrect because the Second Circuit continues to treat the rationale used in *Reid* as “mere ‘dicta.’”¹⁶⁰

In *Playboy Enterprises, Inc. v. Dumas*,¹⁶¹ the Second Circuit deemed brief messages on the back of payment checks addressed to an artist’s widow sufficient to find a transfer of copyright to the magazine publisher.¹⁶² The illustrations in question were created under the authority of the Copyright Act of 1909.¹⁶³ The district court considered the *Reid* factors, for which it was later chastised by the Second Circuit Court of Appeals.¹⁶⁴ The court of appeals did not conduct an analysis of the *Reid* factors, but it acknowledged their presence to the extent of dismissing their merit with regard to the Copyright Act of 1909.¹⁶⁵

The court of appeals in *Playboy* ultimately declared that “the simple fact” that the publisher had paid the artist a “fixed sum” for the illustrations was sufficient to meet the expense prong of its instance and expense test.¹⁶⁶ Less than a decade later, the same court decided *Archie Comic Publications, Inc. v. DeCarlo*,¹⁶⁷ where a comic book publisher sought summary judgment and quiet title to the copyrights

160. Petition for Certiorari, *supra* note 14, at 5; see *Est. of Burne Hogarth v. Edgar Rice Burroughs, Inc.*, 342 F.3d 149, 163 (2d Cir. 2003) (holding that the historical review in *Reid* “is dictum of a weak variety”); see also *Marvel Characters, Inc. v. Kirby*, 726 F.3d 119, 139 n.8 (2d Cir. 2013) (acknowledging the criticism the instance and expense test received from preeminent practitioners and the Supreme Court, but utilizing the test regardless on the grounds the Court was interpreting the somewhat different 1976 Act).

161. 53 F.3d 549 (2d Cir. 1995).

162. *Id.* at 560.

163. *Id.* at 563.

164. See *id.* at 555 (stating that the district court used “the wrong test” while referring to the Supreme Court’s test).

165. See *id.* (emphasizing that the *Reid* test was unnecessary here because the facts required an analysis under the Copyright Act of 1909, not the Copyright Act of 1976); see also *Deahl II*, *supra* note 80, at 104 (comparing the *Reid* factors to the instance and expense test and finding the two approaches irreconcilable).

166. *Playboy*, 53 F.3d at 555. *Contra* NIMMER, *supra* note 14, § 9.03[D] (declaring that the Second Circuit erred in declining to follow the Supreme Court’s “unambiguous direction” of the twelve-factor *Reid* analysis).

167. 258 F. Supp. 2d 315 (S.D.N.Y. 2003), *aff’d*, 88 F. App’x. 468 (2d Cir. 2004).

of their illustrated characters.¹⁶⁸ The Southern District of New York treated a comic book artist who signed an “Independent Contractor’s Agreement” as an employee under the instance and expense test.¹⁶⁹ Straying even farther from Supreme Court precedent than before, the district court did not mention *Reid* even once in its *Archie Comics* opinion.

E. King Kirby Versus the Indestructible Copyrights of Marvel Comics

Several years later, the Second Circuit Court of Appeals decided *Marvel Characters, Inc. v. Kirby*.¹⁷⁰ While its application of the instance and expense test in *Kirby* seemed more contentious than that of the other post-*Reid* work for hire cases, the matter was settled before the Supreme Court decided whether to grant certiorari.¹⁷¹ The Walt Disney Company had purchased Marvel, and Jack Kirby’s estate sought to terminate the late artist’s implied assignment of copyright to the publishers.¹⁷² The case began in the United States District Court for the Southern District of New York.¹⁷³ The district court granted summary judgment to Marvel on its claim for declaratory relief.¹⁷⁴ The district court did not apply the twelve *Reid* factors because, according to the court, Kirby had relinquished his copyrights by signing his payment stubs, which had the following agreement on their backs:

I have no copyright rights and no claim to copyright, or to the renewal or extension of copyright, or any other rights (except only for my ownership of the original physical artwork being returned to me by Marvel) in any artwork, characters, publications or other material . . . created or prepared by me for or on behalf of, or

168. *Id.* at 316–17.

169. *Id.* at 324, 334.

170. 726 F.3d 119 (2d. Cir. 2013).

171. *Kirby v. Marvel Characters, Inc.*, 573 U.S. 988 (2014) (dismissing the petition for writ of certiorari pursuant to Supreme Court Rule 46.1).

172. 8*Marvel Worldwide, Inc. v. Kirby*, 777 F. Supp. 2d 720, 746 (S.D.N.Y. 2011), *rev’d in part, aff’d in part*, 726 F.3d 119.

173. Jamie Burton, *How Much Did Disney Buy Marvel for and When?*, NEWSWEEK (June 12, 2021, 10:00 AM), <https://www.newsweek.com/how-much-did-disney-buy-marvel-when-mcu-1599404> [<https://perma.cc/L9LL-MSSM>]; *Marvel Worldwide, Inc.*, 777 F. Supp. 2d at 724.

174. *Marvel Worldwide, Inc.*, 777 F. Supp. 2d at 725.

which was published by or under the authority of, Marvel Comics Group or any predecessor company.¹⁷⁵

To counteract this language, Kirby presented five freelancers who “specifically testified that Marvel’s checks in the 1950’s and 1960’s contained explicit language of purchase and assignment, *not* ‘work for hire.’”¹⁷⁶ Notwithstanding this testimony, the court held that the intent of the freelancers and the purchase language on the back of the checks failed to rebut the presumption that Kirby’s creations were works made for hire; the presumption which existed because of the instance and expense test.¹⁷⁷ The court did not consider that the language was identical to that of a standard assignment agreement and that Kirby’s estate sought to terminate that assignment.¹⁷⁸

The Second Circuit decided the appeal on the basis of employment under its instance and expense test.¹⁷⁹ The court concluded that because Kirby’s comics “were made at Marvel’s instance and expense,” the copyrights vested in Marvel as works made for hire.¹⁸⁰ The court of appeals did not conduct a *Reid* analysis.¹⁸¹ The court cited *Reid* once to acknowledge the Supreme Court’s rejection of the instance and expense test, but the circuit nevertheless relied on the instance and expense test in its holding.¹⁸² The circuit was able to do this by recognizing *Reid* as dicta whose principles only applied to works created under the Copyright Act of 1976.¹⁸³ Recall that Kirby’s works were created between 1958 and 1963.¹⁸⁴ The Second Circuit also passively mentioned the criticism of the instance and expense test propagated by Professor Melville Nimmer in his nationally-renowned copyright treatise.¹⁸⁵

175. *Id.* at 746 (alteration in original).

176. *See* Appellants’ Opening Brief, *supra* note 143, at 48 (illustrating that the intent of the freelancers was to sell the select pages that Marvel was interested in rather than to relinquish all of their rights indefinitely).

177. *Marvel Worldwide, Inc.*, 777 F. Supp. 2d at 750 (demonstrating that the district court utilized the instance and expense test as opposed to doing a *Reid* analysis).

178. Petition for Certiorari, *supra* note 14, at ii.

179. *Marvel Characters, Inc. v. Kirby*, 726 F.3d 119, 143 (2d. Cir. 2013).

180. *Id.*

181. *Id.* at 137, 143.

182. *Id.* at 138–39, 139 n.8.

183. *See id.* at 139 n.8 (treating *Reid* as dicta that applies only to the Copyright Act of 1976 and briefly acknowledging criticism of the instance and expense test).

184. *Id.* at 141.

185. *Id.* at 139 n.8.

Jack Kirby joined Marvel's predecessor comic book company before fighting in World War II.¹⁸⁶ When he returned, he resumed relations with the company and began working closely with Stan Lee.¹⁸⁷ The Second Circuit took these facts into consideration for both prongs in its instance and expense analysis.¹⁸⁸

1. The Second Circuit's instance and expense analysis in Kirby

The court first addressed whether "the works in question were made at Marvel's instance."¹⁸⁹ The criteria for satisfying this prong were identical to those of the actual control test (the previous name for the instance and expense test), which was explicitly rejected in *Reid*.¹⁹⁰ The court here defined "instance" as "the extent to which the hiring party provided the impetus for, participated in, or had the power to supervise the creation of the work."¹⁹¹ Although it was undisputed that Kirby was a freelance artist, that Kirby was not a formal employee of Marvel, and that Kirby illustrated for other companies during the same period, the court held that the instance prong was satisfied because Marvel asked Kirby to make pages and storylines for it.¹⁹²

It was also undisputed that Kirby did not have a fixed wage or salary, he worked out of his own home, paid for his own supplies, and did not receive any benefits from Marvel.¹⁹³ Despite the effect that Kirby's independence from Marvel could have had on any potential work for hire analysis, the Second Circuit held that Kirby failed to prove that the works had not been created at Marvel's instance.¹⁹⁴

186. See *supra* note 2 and accompanying text.

187. See *supra* note 5 and accompanying text; see also WETZEL & WETZEL, *supra* note 5, at 7 (describing the working relationship between Lee and Kirby); *Kirby*, 726 F.3d at 136, 141 (illustrating Kirby's work under the Marvel Method).

188. *Kirby*, 726 F.3d at 141–43.

189. *Id.* at 141.

190. Compare *id.* at 137–40 (describing the evolution of the instance and expense test, the actual control test, and the test's role in the Second Circuit), with *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 742 (1989) (explicitly rejecting the Second Circuit's work-for-hire test).

191. *Kirby*, 726 F.3d at 139.

192. See *id.* at 125–26, 141–42 (acknowledging that Kirby did not have a fixed salary, "did not receive benefits, and was not reimbursed for expenses or overhead in creating his drawings").

193. *Id.* at 125–26.

194. See *id.* at 140 n.9 (acknowledging also the Fifth Circuit's blatant criticism of the instance and expense test, where they deemed the test to be an "almost

While there were minor factual disputes as to who created some of the characters and plots at issue, Marvel conceded that “Kirby undoubtedly enjoyed more creative discretion than most artists did under the ‘Marvel Method.’”¹⁹⁵ Stan Lee, Marvel’s creative director during the relevant time period, testified that he “considered Kirby to be Marvel’s best artist.”¹⁹⁶ Lee even admitted that Jack Kirby’s creations were so popular that he “wanted to use Jack for everything, but [Lee] couldn’t because [Kirby] was just one guy.”¹⁹⁷

The Marvel Method was a unique tool utilized by Marvel and its predecessor companies to keep costs down while tapping into the best talent that New York City’s freelance artists had to offer.¹⁹⁸ During the “Silver” and “Golden” ages of Marvel Studios, Creative Director “Lee would come up with the idea for a character and a plot and give the overview to an artist, such as Jack Kirby. Kirby would . . . create how the character looked, . . . draw the panels,” add characters, and finalize a plot.¹⁹⁹

Turning to the expense prong, the Second Circuit, in *Playboy*, had established a low burden for whether a work was created at a hiring party’s expense.²⁰⁰ The court there held that “the ‘expense’ requirement [is] met where a hiring party simply pays an independent contractor a sum certain for his or her work.”²⁰¹ In *Kirby*, Marvel argued that it met this requirement solely by paying a flat rate for Kirby’s pages that it chose to publish.²⁰² Marvel asserted that it “paid Kirby a sum certain when it accepted his pages—irrespective of

irrebuttable presumption” that works by an independent contractor would be considered work for hire in the Second Circuit).

195. *Id.* at 141.

196. *See id.* at 126, 141 (referring to Kirby’s contribution to the first comic book illustration of *Spider-Man*, now worth millions).

197. *See id.* at 126–27 (stating that it was “beyond dispute . . . that Kirby made many of the creative contributions, often thinking up and drawing characters on his own, influencing plotting, or pitching fresh ideas”).

198. WETZEL & WETZEL, *supra* note 5, at 5–6; *see* Cronin, *supra* note 12 (detailing the working relationships behind the Marvel Method, in which artists like Kirby had a great deal of autonomy); Alex Grand, *From Golden Age to Marvel’s Silver Age*, COMIC BOOK HISTORIANS, <https://comicbookhistorians.com/from-golden-age-to-marvels-silver-age> [<https://perma.cc/Y7RZ-CDHD>] (describing the history of, and success behind, Marvel Studios).

199. WETZEL & WETZEL, *supra* note 5, at 5–6.

200. *See Playboy Enters., Inc. v. Dumas*, 53 F.3d 549, 555 (2d. Cir. 1995).

201. *Id.*

202. *Kirby*, 726 F.3d at 142.

whether the pages required edits or additions, were ultimately published, or were part of a comic book that was a commercial success—it took on the risk of financial loss.”²⁰³ Kirby argued that while Marvel paid a flat rate for the pages that it accepted, it did not pay for Kirby’s supplies when drawing the illustrations, nor did it provide him with office space to work.²⁰⁴ Kirby worked out of his home studio without any benefits or funding for his supplies.²⁰⁵ Marvel was free to reject and not pay for any number of Kirby’s pages, rendering Kirby able to sell those pages to other clients through his freelance work.²⁰⁶ Quite famously, Kirby created a hybrid comic of *Captain America* that Marvel ultimately rejected, which he then sold to Topps Publishing as *Captain Glory*.²⁰⁷

Kirby argued that while Marvel had the mere opportunity to purchase specific pages, he was the one who set out to create the art, and his authorship vested at the creation of the work, regardless of whether the work was sold.²⁰⁸ Kirby asserted that if authorship vests at creation, as the Supreme Court held in *Harper & Row, Publishers, Inc. v. Nation Enterprises*,²⁰⁹ how could Marvel have authored works that it rejected and were ultimately sold by Kirby to other publications?²¹⁰

Considering the relatively low burden required for a hiring party to satisfy the instance and expense test, the Second Circuit ultimately declared that Marvel had established a presumption that Kirby’s

203. *Id.* Compare Meredith Annan House, *Marvel v. Kirby: A Clash of Comic Book Titans in the Work Made for Hire Arena*, 30 BERKELEY TECH. L.J. 933, 947 (2015) (advocating for the continuation of the instance and expense test but acknowledging that “industry giants had major concerns about avoiding financial impracticability with respect to works made for hire”), with Jay Goldberg, *King Kirby and the Amazon’s Terminatin’ Copyrights: Who Will Prevail!?!?*, 2 AM. U. INTELL. PROP. BRIEF 10, 11 & n.8–12 (2010) (emphasizing that because Marvel was not committed to purchasing Kirby’s pages, the financial risks of creation fell on Kirby, who received nothing when a page went unsold).

204. *Kirby*, 726 F.3d at 142.

205. *Id.*

206. *Id.*; Lehman Amicus Brief, *supra* note 27, at 20.

207. PEN Center USA Amicus Brief, *supra* note 85, at 14.

208. *Kirby*, 726 F.3d at 142.

209. 471 U.S. 539 (1984).

210. *See id.* at 547 (affirming that the “rights—to publish, copy, and distribute the author’s work—vest in the author of an original work from the time of its creation”); Petition for Certiorari, *supra* note 14, at 5–6 (illustrating that it makes little logical sense for Marvel to be deemed the author of pages that ended up in the hands of other publishers).

creations were works made for hire.²¹¹ Kirby argued that “expense” required a “legal commitment to pay for the work’s creation,” and that Marvel could not satisfy this definition because it had no commitment to pay for anything Kirby made, nor was he reimbursed for rejected pages.²¹² Kirby also argued that “a publisher always bears the expense and financial risk of publication,” and that the cost of publication was insufficient to transform a published work into a work made for hire at inception.²¹³

Kirby’s estate sought a writ of certiorari from the Supreme Court.²¹⁴ Four amicus briefs were filed in support of Kirby, but not one was filed in support of Marvel.²¹⁵ Marvel filed a brief in opposition.²¹⁶ The parties settled before the Court’s Conference over whether to grant certiorari.²¹⁷ Based on the Court’s unanimous holding in *Reid* and the Second Circuit’s treatment of *Reid* as “weak” dicta, it is quite possible that the Court would have decided to hear the case.²¹⁸

211. *Compare Kirby*, 726 F.3d at 143–44 (remanding and instructing the district court to dismiss the action against Marvel because of the instance and expense test), *with Easter Seal Soc’y for Crippled Child. & Adults of La., Inc. v. Playboy Enters.*, 815 F.2d 323, 327 (5th Cir. 1987) (discussing the Second Circuit’s use of assignment language in *Yardley* to develop a line of cases that have created “an almost irrefutable presumption that any person who paid another to create a copyrightable work was the statutory ‘author’ under the ‘work for hire’ doctrine”).

212. *Kirby*, 726 F.3d at 126; Appellants’ Opening Brief, *supra* note 143, at 36.

213. Opening Brief for Appellants, *supra* note 143, at 36.

214. *Kirby v. Marvel Characters, Inc.*, 573 U.S. 988 (2014).

215. *See* Screen Actors Guild Amicus Brief, *supra* note 27, at 1 (written by the leading two labor unions and actors guilds with collective bargaining agreements with all major motion picture companies and record labels); Lehman Amicus Brief, *supra* note 27, at 1–2 (written by the Former Asst. Secretary of Commerce and Director of the U.S. Patent and Trademark Office as well as the former U.S. Register of Copyrights); Entertainment Lawyers Amicus Brief, *supra* note 69, at 1 (written by a non-profit organization seeking to “balance the influence of international conglomerates” in the arts); PEN Center USA Amicus Brief, *supra* note 85, at 1–3 (written by Mark Evanier, a prominent comic book historian, and PEN Center USA, an organization of over a thousand artists advocating for freedom of speech and creators’ rights).

216. Brief in Opposition, *supra* note 11, at 1.

217. *Kirby*, 573 U.S. 988; SUP. CT. R. 46.1 (dictating that “whenever all parties file with the Clerk an agreement in writing that a case” has been settled, the Clerk will dismiss the matter).

218. NIMMER, *supra* note 14, § 9.03[D]; *see also* *Kimble v. Marvel Ent. LLC*, 576 U.S. 446, 450 (2015) (deciding a case regarding the patent of a *Spider-Man* toy and demonstrating Justice Kagan’s interest in “doing whatever a spider can” to resolve Marvel’s intellectual property disputes).

*F. Revenge of the Comic Book Artists: Redemption for
Reid and Kirby in 2023*

In September 2021, Marvel initiated lawsuits against Lawrence D. Lieber and Patrick Ditko in the Southern District of New York.²¹⁹ Both Lieber's and Ditko's respective estates had served Marvel with termination notices of their copyright assignments; in both suits, Marvel seeks a declaration that the termination notices are invalid.²²⁰

In the complaints, Marvel relies predominantly on the *Kirby* decision because the facts are "virtually identical" in all three cases.²²¹ For example, all three creators were paid a per-page rate for the pages Marvel accepted but received no compensation for rejected pages.²²² All three creators also worked from home, were not provided with office space, and paid for their own art supplies.²²³ Because the Second Circuit utilizes the instance and expense test as opposed to applying either the Supreme Court's *Reid* factors or the controlling work for hire test from 1958–66, it is likely that Lieber and Ditko will face the same negative judicial result that Kirby did in 2013.²²⁴

Kirby was wrongly decided because the Supreme Court considered and effectively overruled the instance and expense test in *Reid*; the Court also defined the term "employer" in *Reid* through a twelve-

219. Lieber Complaint, *supra* note 24, at 1; Ditko Complaint, *supra* note 24, at 1; see also Sam Thielman, *Marvel Lawsuit Pits Superhero Artists Against the Corporations that Exploit Them*, NBC NEWS (Sept. 28, 2021, 2:19 PM), <https://www.nbcnews.com/think/opinion/marvel-lawsuit-pits-superhero-artists-against-corporations-exploit-them-ncna1280188> [<https://perma.cc/47D4-T9RG>] (chronicling the history of freelance artists' attempts to reclaim their works from publishing houses like Marvel).

220. Lieber Complaint, *supra* note 24, at 4, 6; Ditko Complaint, *supra* note 24, at 4, 6.

221. Lieber Complaint, *supra* note 24, at 1–2; Ditko Complaint, *supra* note 24, at 1–2.

222. Lieber Complaint, *supra* note 24, at 5–6; Ditko Complaint, *supra* note 24, at 5–6; see also Appellants' Opening Brief, *supra* note 143, at 7 (articulating that under the Marvel Method, no artist was paid for rejected pages).

223. *Marvel Characters, Inc. v. Kirby*, 726 F.3d 119, 125–26 (2d Cir. 2013); Petition for Certiorari, *supra* note 14, at 26.

224. *Kirby*, 726 F.3d at 127 (utilizing "the so-called 'instance and expense test'"); *infra* Section II.C.1.

factor test, and that definition must apply to both Copyright Acts.²²⁵ However, even if *Reid* did not overturn the instance and expense test for both Copyright Acts, the controlling work for hire test during the period in which the disputed works were created should be utilized when a court considers whether a work was made for hire.²²⁶

II. ANALYSIS

This Comment argues two important grounds on which *Kirby* was wrongly decided. The first theory is that *Reid* overruled the instance and expense test and that *Reid*'s test for employment applies to both the Copyright Act of 1909 and the Copyright Act of 1976.²²⁷ The second theory notes that even if *Reid* is not found to apply to the Copyright Act of 1909, the definition of "employment" under the 1909 Act should be determined by the work for hire test that was predominantly relied upon by the courts during the years in which the disputed work was created.²²⁸ Kirby created the relevant works from 1958–63.²²⁹ Lawrence Lieber's period of creation was 1962–64.²³⁰ Steve Ditko's works were authored from 1962–66.²³¹

A. *Theory I: Kirby Was Wrongly Decided Because Reid Must Control*

The Second Circuit's instance and expense test is inconsistent with the Supreme Court's precedent as outlined in *Reid* because it disposes of *Reid*'s twelve factors and instead makes two elements dispositive.²³² The pending Marvel cases should be decided using the

225. See, e.g., NIMMER, *supra* note 14, § 9.03[D] (stating that the Second Circuit should have followed the Court's "unambiguous direction" in how they interpret employment in work-for-hire cases); *infra* Sections II.A.1–2.

226. "Until the mid-1960's, federal courts applied the work-for-hire doctrine only to cases in which a traditional employer/employee relationship existed between the hiring party and the creator of the work." *Playboy Enters., Inc. v. Dumas*, 53 F.3d 549, 554 (2d Cir. 1995) (citing *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 749 (1989)); Reply Brief for Petitioners at 2, *Kirby v. Marvel*, 573 U.S. 988 (2014) (No. 13–1178), 2014 WL 3735727 [hereinafter Reply Brief for Petitioners].

227. *Infra* Sections II.A.1–3.

228. *Infra* Sections II.B.1–3.

229. Kirby Complaint, *supra* note 11, at 2.

230. Lieber Complaint, *supra* note 24, at 1.

231. Ditko Complaint, *supra* note 24, at 1.

232. See *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 751–52 (1989) (noting the twelve factors, none of which are dispositive); Petition for Certiorari,

Supreme Court's *Reid* factor test, as opposed to the Second Circuit's test.²³³ *Reid* should be read to apply to all copyrighted works, regardless of whether the works fall under the Copyright Act of 1909 or the Copyright Act of 1976.²³⁴

1. Reid effectively overruled the instance and expense test

The assertion that *Reid* effectively overruled the instance and expense test awakens a fair amount of criticism but relies on the Supreme Court's own language.²³⁵ The Court addressed "an important federal question" of the meaning of employee in work for hire matters when it decided *Reid*.²³⁶ The Court considered four different tests promulgated by the circuits, including one propagated by the Second Circuit.²³⁷

All nine Justices "rejected the Second Circuit's 'instance and expense' test" because of its irrebuttable reliance on the control of the hiring party.²³⁸ The Court reiterated that under the Second Circuit's test, "parties would not know until late in the process, if not until after the work is completed" whether the creation was a work made for hire at its inception.²³⁹ Therefore, the instance and expense test conflicts with the core copyright principle that authorship vests at creation.²⁴⁰ The instance and expense test even disturbs some of the Second Circuit's own precedent because it held in *Playboy* that "the mutual intent of the parties" should be considered when determining

supra note 14, at 18–20; Reply Brief for Petitioners, *supra* note 226, at 2 (noting the two dispositive elements in the Second Circuit are instance and expense).

233. *Infra* Sections II.C.1–3.

234. *Infra* Sections II.A–B.

235. *See Reid*, 490 U.S. at 742, 749 (considering the Second Circuit's test and rejecting it, because "there is no statutory support for an additional dichotomy between commissioned works that are actually controlled and supervised by the hiring party and those that are not").

236. Lehman Amicus Brief, *supra* note 27, at 11; *see also* NIMMER, *supra* note 14, § 9.03[D] (illustrating that the Court stepped in to resolve the dispute over the appropriate employment tests for work for hire).

237. *Reid*, 490 U.S. at 738–39; *supra* Section I.C.

238. *See* Lehman Amicus Brief, *supra* note 27, at 12 (citing *Reid*, 490 U.S. at 741) (illustrating that the actual control test and the instance and expense test are identical, and that the Court disposed of the actual control test).

239. *Reid*, 490 U.S. at 750.

240. Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 547 (1985) (declaring that authorship vests at creation).

whether a work was made for hire.²⁴¹ Therefore, the instance and expense test simultaneously requires that parties both wait until after the work is completed to know whether the work was made for hire, and that they configure a mutual intent as to copyright before the work is created.²⁴² This juxtaposition further buttresses the need for the Supreme Court's *Reid* test to prevail over the instance and expense test, as the circuits were evidently in need of a uniform federal test.²⁴³

Reid criticized the Second Circuit's "overbroad test as encompassing virtually all contributions to books or movies because such are 'usually prepared at the instance, direction, and risk of a publisher or producer.'"²⁴⁴ Both the "[Supreme] Court and the nation's leading copyright treatise have criticized the Second Circuit's approach" because of its breadth and consistently inequitable results.²⁴⁵ The instance and expense test "retroactively characteriz[es] independent work as employment 'for hire' [and] establishes a game of 'gotcha' designed to block freelance artists from exercising their rights under the Copyright Act."²⁴⁶

Because *Reid* was decided in 1989, critics assert that its language cannot apply to works created before 1978.²⁴⁷ However, if neither the Copyright Act of 1909 nor the Copyright Act of 1976 defined the term "employee," and the Supreme Court only had the opportunity

241. *Playboy Enters., Inc. v. Dumas*, 53 F.3d 549, 554 (2d Cir. 1995) (quoting *Lin-Brook Builders Hardware v. Gertler*, 352 F.2d 298, 300 (9th Cir. 1965)).

242. *Compare id.* at 554 (requiring the court to consider mutual intent of the parties before creation), *with* *Marvel Characters, Inc. v. Kirby*, 726 F.3d 119, 142 (2d Cir. 2013) (acknowledging that Marvel did not know whether it would accept a page until after Kirby created and presented it to them), *and* *Petition for Certiorari*, *supra* note 14, at 29 (illustrating that if Marvel intended to purchase some pages and reject others, the mutual intent of the parties could not have been for Marvel to be considered the author at creation).

243. *See infra* Part D.

244. *Petition for Certiorari*, *supra* note 14, at 17 (quoting *Reid*, 490 U.S. at 741).

245. *Entertainment Lawyers Amicus Brief*, *supra* note 69, at 7; *see* NIMMER, *supra* note 14, § 9.03[D]; *cf.* *Kirby*, 726 F.3d at 139 n.8 (acknowledging criticism levied against the instance and expense test by the Supreme Court and Nimmer).

246. *Lehman Amicus Brief*, *supra* note 27, at 21.

247. January 1, 1978, is the date that the Copyright Act of 1976 became effective. 17 U.S.C. §§ 101–1401 (1988); *see, e.g.*, *House*, *supra* note 203, at 939, 955 (agreeing with the Second Circuit's holding that *Reid* cannot apply to the "ambiguities" of the Copyright Act of 1909 because the task in *Reid* was "limited" to the Copyright Act of 1976).

to analyze the term after the 1976 Act was enacted, why should the definition be restricted? The Supreme Court never alluded or stated that its holding in *Reid* was limited to works created under the Copyright Act of 1976.²⁴⁸ The word “employee” appears in both statutes, yet critics of this argument would prefer that circuits use contradictory definitions for the same word.²⁴⁹ While that perspective would help multi-billion-dollar publishers such as Marvel maintain control over copyrights of characters that they did not illustrate, it is a view that is unsupported by law because the Supreme Court has consistently emphasized the importance of interpreting principles of copyright uniformly across the courts.²⁵⁰

The Supreme Court remains the ultimate authority on interpreting the laws of the United States, and it has interpreted the term “employee” for purposes of copyright to require a twelve-factor analysis.²⁵¹ The Second Circuit cannot treat the Supreme Court’s *Reid* holding as mere dicta in favor of the instance and expense test.²⁵² As the Supreme Court stated in *Reid*, there is “simply no way” to reconcile the Second Circuit’s work for hire test with the language and intent of copyright law.²⁵³

2. *The Second Circuit disregarded the Supreme Court’s Reid test*

Kirby was wrongly decided because the Second Circuit utilized its instance and expense test instead of *Reid*’s twelve-factor employment test.²⁵⁴ The circuit concluded that because Kirby’s comics were created at “Marvel’s instance and expense,” the copyrights vested in

248. *Reid*, 490 U.S. at 753.

249. Compare Brief in Opposition, *supra* note 11, at 1 (alleging that a “stark contrast” exists between “employment” under the different Copyright Acts), with NIMMER, *supra* note 14, § 9.03[D] (arguing that “[g]iven the Supreme Court’s unambiguous direction that the same standards govern ‘‘terms such as ‘‘employee,’’ ‘‘employer,’’ and ‘‘scope of employment,’’‘‘ it follows mathematically that the inquiry is the same in defining ‘employer’ under the 1909 Act . . . as defining ‘employee’ under the 1976 Act”).

250. See *Reid*, 490 U.S. at 741; Entertainment Lawyers Amicus Brief, *supra* note 69, at 2.

251. *Reid*, 490 U.S. at 750–52.

252. *Contra* Est. of Burne Hogarth v. Edgar Rice Burroughs, Inc., 342 F.3d 149, 163 (2d Cir. 2003) (stating that the historical review in *Reid*, “if dictum at all, is dictum of a weak variety”).

253. *Reid*, 490 U.S. at 742; NIMMER, *supra* note 14, § 9.03[D].

254. See *Marvel Characters v. Kirby*, 726 F.3d 119, 144 (2d Cir. 2013); *Reid*, 490 U.S. at 751–52.

Marvel as works made for hire.²⁵⁵ The circuit cited *Reid* only twice in the entire opinion, and it did not conduct a *Reid* twelve-factor analysis.²⁵⁶ The circuit cited *Reid* only to acknowledge the Supreme Court's rejection of the instance and expense test, but the circuit nevertheless relied on the instance and expense test.²⁵⁷ The circuit was able to do this by labeling *Reid* as dicta, whose principles only applied to works created under the Copyright Act of 1976.²⁵⁸ The Second Circuit also passively mentioned the criticism of the instance and expense test propagated by Professor Melville Nimmer in his nationally-renowned copyright treatise.²⁵⁹

When deciding *Reid*, the Supreme Court conducted a thorough analysis of the Copyright Act of 1909, the legislative history of its 1976 counterpart, and the interpretations of "employment" dictated by lower courts.²⁶⁰ Nowhere in the Court's analysis did the unanimous nine Justices limit their twelve-factor employment test to the Copyright Act of 1976. As several preeminent practitioners and the nation's leading copyright treatise have argued, *Reid*'s "holding . . . applies with equal force to 'employer' in the 1909 Act."²⁶¹ The Court stated that it granted certiorari in *Reid* to "resolve a conflict among the Courts of Appeals over the proper construction of the 'work made for hire provisions'"²⁶² The Court defined employment for purposes of copyright "by interpreting all of the relevant 'undefined statutory terms' . . . according to common law."²⁶³ The Court noted that, obviously, neither Copyright Act defined the scope

255. *Kirby*, 726 F.3d at 143.

256. *Id.* at 137, 139 n.8, 144.

257. *Id.* at 139 n.8 (citing *Reid* and Nimmer and stating that the Circuit's own "approach has been criticized").

258. *Id.* (treating *Reid* as dicta but acknowledging criticism of the instance and expense test).

259. *Id.* at 139 n.8, 144 (disregarding the Supreme Court's language in *Reid*; NIMMER, *supra* note 14, § 9.03[D] (criticizing the Second Circuit's instance and expense approach and noting that the support for the test has "entirely collapsed").

260. *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 743–49 (1989).

261. Reply Brief for Petitioners, *supra* note 226, at 3; *see also* NIMMER, *supra* note 14, § 9.03[D] (agreeing that the Supreme Court's test should apply to both acts because the Court's intervention in the realm of work-for-hire should not be ignored by the circuits).

262. *Reid*, 490 U.S. at 736.

263. Reply Brief for Petitioners, *supra* note 226, at 4; *see also Reid*, 490 U.S. at 743 (noting that "employee" was one of the undefined terms in the Copyright Act of 1909).

of employment within their respective texts.²⁶⁴ Therefore, the factors and guiding principles of *Reid* should apply to the application of “employment” under the 1909 Act in the same way they apply to the 1976 Act.²⁶⁵ The country’s leading copyright treatise emphasizes that “it follows mathematically that the inquiry is the same in defining ‘employer’ under the 1909 Act (the task in *Burne Hogarth v. Edgar Rice Burroughs*)²⁶⁶ as defining ‘employee’ under the 1976 Act (the task in *Reid*).”²⁶⁷

The circuit seemed to concede to the flaws of its test somewhat when it noted that the second prong of “[w]hether the [w]orks were created at Marvel’s expense presents a more difficult question.”²⁶⁸ Nevertheless, the court ultimately held that Kirby’s works were created at Marvel’s expense, relying admittedly on the sole existence of a “flat rate” paid for each page.²⁶⁹ The court stated that “we think that Marvel’s payment of a flat rate and its contribution of both creative and production value, in light of the parties’ relationship as a whole, is enough to satisfy” the burden of proving expense.²⁷⁰

This “burden,” which is met by almost all publishers in the ordinary course of business, was sufficient, in the Second Circuit’s view, to prove that the artwork Kirby created from his own supplies in his own apartment vested a claim of authorship in Marvel from the moment that Kirby’s ink was put to Kirby’s paper.²⁷¹ This makes little logical

264. *Reid*, 490 U.S. at 744–45.

265. NIMMER, *supra* note 14, § 9.03[D]; Reply Brief for Petitioners, *supra* note 226, at 3; Lehman Amicus Brief, *supra* note 27 at 7; *see also Reid*, 490 U.S. at 743 (declining to limit its decision to the Copyright Act of 1976, and illustrating the congressional intent of the Copyright Act of 1909); HOWARD B. ABRAMS & TYLER T. OCHOA, 1 THE LAW OF COPYRIGHT § 4.11 (2021) (arguing that “there seems [to be] no good reason why the use of the word ‘employer’ in the 1909 Act should not do the same [as it does in the 1976 Act]”).

266. 342 F.3d 149 (2d Cir. 2003).

267. *See id.* at 163; NIMMER, *supra* note 14, § 9.03[D] (noting also that Hogarth was an employee); ABRAMS & OCHOA, *supra* note 265, § 4.11.

268. *Marvel Characters v. Kirby*, 726 F.3d 119, 142–43 (2d Cir. 2013) (holding that to satisfy the instance prong, Marvel simply had to show that it induced Kirby to create some of his work between 1958 and 1963 and that it had a right to supervise some pages).

269. *See id.* at 143 (illustrating that Kirby would create pages, offer some to Marvel, and Marvel had the choice to purchase the ones it wanted to publish for a flat rate).

270. *See id.* (demonstrating that expense has a relatively low burden for the publisher to satisfy).

271. *Id.* at 143–44.

sense, which is likely why four amicus briefs were filed to support Kirby's petition for certiorari.²⁷² The Second Circuit's holding meant that even the pages that Marvel rejected and never paid Kirby for belonged to Marvel, since a fundamental principle of copyright is that authorship vests at creation.²⁷³ The circuit effectively held that even the comic strips in Kirby's wastebasket belonged to Marvel.²⁷⁴ If Marvel was the author for purposes of copyright, how was Kirby able to sell pages to other publishers?²⁷⁵ If Marvel was the original author for purposes of copyright, why did it require Kirby to assign copyright to it on the back of his pay stubs?²⁷⁶

3. *Into the multiverse: What if Kirby had been decided under the Reid test?*

Returning to the most important inquiry, what would have happened if the Second Circuit had applied the *Reid* factors to Kirby's facts? If the Second Circuit had applied the Supreme Court's *Reid* employment test, it is likely that it would have held that Kirby's creations were not works made for hire.

The first *Reid* factor considers the level of skill required to create the works in dispute.²⁷⁷ Creating illustrations of publishable quality requires skill that is not possessed by everyone; Kirby would argue that the skill required to create these comics, which were imaginative enough to be adapted into films and television shows, was especially high.²⁷⁸ Kirby would likely prevail on this inquiry, as it would be difficult for Marvel to argue that a high level of skill was not required to create its most profitable works.

272. *Supra* note 215.

273. *See* Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 546–47 (1985) (ruling that “[u]nder the Copyright Act, these rights—to publish, copy, and distribute the author’s work—vest in the author of an original work from the time of its creation”).

274. *Kirby*, 726 F.3d at 143; Petition for Certiorari, *supra* note 14, at 4–5.

275. *See, e.g.*, PEN Center USA Amicus Brief, *supra* note 85, at 14 (describing Kirby's successful submission of *Captain Glory* to Topps Publishing).

276. *Kirby*, 726 F.3d at 143.

277. *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 751 (1989).

278. Greg Theakston, *That Old Jack Magic*, JACK KIRBY MUSEUM: THE KIRBY EFFECT, <https://kirbymuseum.org/blogs/effect/jackmagic> [<https://perma.cc/3Y2E-EDHF>] (articulating the challenges faced by comic book artists prior to publication, such as consistency among drawings and navigating “line work”).

The second factor asks which party in the proceeding was the “source of the instrumentalities and tools.”²⁷⁹ It was undisputed that Kirby bought his own supplies and was not reimbursed for any materials.²⁸⁰ Kirby would almost certainly prevail on this factor.²⁸¹

The third factor considers the location of the work.²⁸² Freelancer Kirby worked in his own studio apartment, which Marvel had no role in securing or funding.²⁸³

The fourth factor pertains to the duration of the relationship between the parties.²⁸⁴ Kirby first began working with Marvel’s predecessor, Timely Comics, around 1939 or 1940, and that relationship ended “[a]t some point in the 1940s.”²⁸⁵ The works relevant to the suit were created by Kirby between 1958 and 1963, when Kirby reignited his working relationship with Marvel.²⁸⁶ Marvel would likely argue that Kirby’s return to Marvel demonstrates a close, continuous, and employment-like relationship.²⁸⁷ Whereas Kirby would argue that these divided periods demonstrate that he did not illustrate comics just for Marvel, and he would emphasize that he was a freelancer, regardless of the duration of time during which he worked with any specific publisher.²⁸⁸ Kirby likely has the stronger argument, but none of the factors are independently determinative.²⁸⁹

The fifth factor considers whether Marvel had the right to assign additional projects to Kirby.²⁹⁰ Marvel would most probably prevail on this factor because Stan Lee admitted that Kirby was his “best artist,” and that sometimes he needed to give certain comic strips to

279. *Reid*, 490 U.S. at 751.

280. *Kirby*, 726 F.3d at 142.

281. *Id.* at 125, 141–42 (conceding that freelancer “Kirby undoubtedly enjoyed more creative discretion than most artists did under the ‘Marvel Method’”).

282. *Reid*, 490 U.S. at 751.

283. *Kirby*, 726 F.3d at 126.

284. *Reid*, 490 U.S. at 751.

285. *Marvel Worldwide, Inc. v. Kirby*, 777 F. Supp. 2d 720, 731 (S.D.N.Y. 2011).

286. *Id.* at 724 (noting that the relevant works created between 1958–1963 were: *The Fantastic Four*, *The Incredible Hulk*, *The Mighty Thor*, *Spider-Man*, *Iron Man*, *The X-Men*, *The Avengers*, *Nick Fury*, and *The Rawhide Kid*).

287. *See Kirby*, 726 F.3d at 142.

288. *Id.*; Petition for Certiorari, *supra* note 14, at 24; Lehman Amicus Brief, *supra* note 27, at 21; PEN Center USA Amicus Brief, *supra* note 85, at 11.

289. *Reid*, 490 U.S. at 752.

290. *Id.* at 751.

someone else because Kirby “had so much to do.”²⁹¹ Kirby would assert that he sold pages to other publishers as well, but it was undisputed that Marvel assigned additional projects to Kirby.²⁹²

The sixth factor pertains to the extent of Kirby’s discretion over when and how long he would work.²⁹³ Once again, it was undisputed that Kirby was a freelancer, working within his own home and setting his own hours.²⁹⁴ Kirby would likely prevail on this factor.²⁹⁵

The seventh factor inquires into the method of payment between the parties.²⁹⁶ Kirby was paid a “sum certain” by Marvel, which meant a flat rate per page.²⁹⁷ The Second Circuit historically reasoned that the existence of a “sum certain” payment method “suggests a work-for-hire arrangement,” but acknowledged in its *Kirby* decision that “this distinction appears to be a rather inexact method of properly rewarding with ownership the party that bears the risk with respect to the work’s success.”²⁹⁸ Therefore, the existence of Marvel’s “sum certain” payments would probably not be dispositive to this factor.²⁹⁹ The Second Circuit has also held that “where the creator of a work receives royalties as payment, that method of payment generally weighs against finding a work for hire relationship.”³⁰⁰ It was undisputed that Kirby never received a single royalty for his work, nor was he paid by Marvel for the countless pages that he worked on and Lee rejected.³⁰¹ While this may be the most difficult inquiry to solve on these facts, Marvel would probably prevail on this factor in the Second Circuit.³⁰²

The eighth factor considers whether Marvel had any role in hiring or paying for assistants for Kirby.³⁰³ It is nearly unquestionable that Kirby would prevail on this factor because Marvel did not provide

291. *Kirby*, 726 F.3d at 126.

292. *Id.*

293. *Reid*, 490 U.S. at 751.

294. *Kirby*, 726 F.3d at 126.

295. *See id.*

296. *Reid*, 490 U.S. at 751.

297. *Kirby*, 726 F.3d at 140.

298. *Id.*

299. *See id.*

300. *Playboy Enters., Inc. v. Dumas*, 53 F.3d 549, 555 (2d Cir. 1995).

301. *Kirby*, 726 F.3d at 142.

302. Petition for Certiorari, *supra* note 14, at 4 (explaining that the seventh factor turns on whether a publisher paid a “sum certain” for the work).

303. *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 751–52 (1989).

Kirby with any assistants or compensation for any assistance he received.³⁰⁴

The ninth factor examines whether the creative work is part of the “regular business” of the hiring party.³⁰⁵ Marvel’s method for comic creation would likely tilt this factor in its favor, but Kirby would argue that the creative works were part of his own “regular business” since he sold pages to multiple publishers.³⁰⁶ This factor would likely be a close call, but the court would probably find in favor of Marvel.

The tenth factor asks the simple question of whether the hiring party is still in business.³⁰⁷ Despite its period of near-bankruptcy and evolution from “Timely” to “Atlas” to Marvel Comics, Marvel is a thriving conglomerate owned by the Walt Disney Company.³⁰⁸

The eleventh factor pertains to any provision of employee benefits.³⁰⁹ The presence of employee benefits would weigh in favor of finding that a work was made for hire.³¹⁰ It was undisputed that Kirby received no benefits, nor was he “reimbursed for expenses or overhead in creating his drawings.”³¹¹ Therefore, the eleventh factor would likely support Kirby’s argument.

The twelfth and final factor considers the tax treatment of the hired party.³¹² The Second Circuit never addressed tax treatment in its opinion,³¹³ however, Kirby and the authors of three amicus briefs asserted that “Marvel did not withhold payroll taxes or any other form of taxes from money paid to Kirby, nor did Kirby receive any

304. *Kirby*, 726 F.3d at 142–43.

305. *Reid*, 490 U.S. at 752.

306. *See, e.g.*, Marvel Studios, *supra* note 4 (illustrating the evolution of Marvel’s business); WETZEL & WETZEL, *supra* note 5, at 7 (describing the success of Marvel Studios from its near-closure and bankruptcy to its current multi-billion dollar market value); Cronin, *supra* note 12 (articulating how the Marvel Method was used to decrease Marvel’s operational costs); *Kirby*, 726 F.3d at 141–43 (stating that Kirby was undeniably a freelancer).

307. *Reid*, 490 U.S. at 752.

308. Michael Jung, *Why Marvel Changed Their Name from Timely Comics*, SCREENRANT (Oct. 22, 2019), <https://screenrant.com/why-marvel-change-name-timely-comics> [<https://perma.cc/2DKL-VQK9>]; *see* Burton, *supra* note 173 (stating that the Walt Disney Corporation paid approximately four billion dollars to purchase Marvel Studios).

309. *Reid*, 490 U.S. at 752.

310. *Id.*

311. *Kirby*, 726 F.3d at 125–26.

312. *Reid*, 490 U.S. at 752.

313. *See Kirby*, 726 F.3d 119–44.

health benefits, insurance, or any other traditional employee benefit, such as sick pay or vacation pay.”³¹⁴ This factor likely weighs in favor of finding that Kirby was not an employee for purposes of work for hire.

Therefore, out of the twelve factors outlined in *Reid*, seven weigh strongly in favor of finding that Kirby was not an employee for purposes of copyright, that Kirby was an independent contractor, and that Marvel was not the author of the creations at their inception.³¹⁵ Two factors, including the “duration of the relationship between the parties”³¹⁶ and “the method of payment,”³¹⁷ have strong arguments for either side. Even this preliminary investigation into the factors demonstrates that the Second Circuit should have examined *Reid*, as Kirby had robust arguments bolstered by the facts and core principles of copyright law.³¹⁸ It is impossible to definitively state how the Supreme Court would have ruled if the parties did not settle and certiorari had been granted, but a few factors are worth emphasizing.

Reid was a unanimous decision by the Supreme Court.³¹⁹ Every Justice saw the need to rectify the haphazard work for hire inquiries that differed from coast to coast and circuit to circuit.³²⁰ It is also possible that the Justices had a premonition that a colossal corporation such as Marvel would attempt to claim copyrights in this manner, as they alluded to such a concern, stating:

[the Community for Creative Non-Violence’s interpretation] leaves the door open for hiring parties, who have failed to get a full assignment of copyright rights from independent contractors . . . to

314. See PEN Center USA Amicus Brief, *supra* note 85, at 5 (explaining that “Marvel did not withhold payroll taxes or any other form of taxes from moneys paid to Kirby”); see also Appellants’ Opening Brief, *supra* note 143, at 22 (stating that “Marvel did not withhold any taxes from its payments”); Screen Actors Guild Amicus Brief, *supra* note 27, at 21 (explaining that Marvel “shoulder[ed] none of the employee benefits or taxes associated with an employment relationship”); Lehman Amicus Brief, *supra* note 27, at 20 (stating that Kirby was a “sole proprietor of his own business, [who] paid his own income and social security taxes . . . and paid all of his expenses”).

315. Factors demonstrating that Kirby would likely to prevail: one, two, three, six, eight, eleven, and twelve.

316. *Reid*, 490 U.S. at 751 (referring to the fourth factor).

317. *Id.* (referring to the seventh factor).

318. See *supra* notes 277–314 and accompanying text.

319. 490 U.S. 730, 753 (1989).

320. See *id.* at 738–44 (definitively declaring that the Second Circuit’s test was improper for a work-for-hire analysis).

unilaterally obtain work-made-for-hire rights years after the work has been completed as long as they directed or supervised the work, a standard that is hard not to meet when one is a hiring party.³²¹

The Supreme Court did not get a chance to weigh in on Kirby's case, but it may get an opportunity to do so in the coming years, depending on how the pending cases against Lieber and Ditko progress.³²² If the Second Circuit had conducted a twelve-factor *Reid* analysis, then Kirby most likely would have been successful in his 2013 suit.³²³

B. Theory II: Kirby Was Wrongly Decided Because the Controlling Test Between 1958 and 1963 Was Conventional Employment

Even if the Second Circuit disregarded *Reid*'s existence entirely, it still could have reached an equitable conclusion for Kirby if it had applied the work for hire test that controlled between 1958 and 1963.³²⁴ The prevailing work for hire test until approximately 1972 was the conventional employee-employer relationship; a plain reading of the Copyright Act of 1909 supports this assertion.³²⁵

1. Why courts must look to the controlling work for hire test of the time period

While the Copyright Act of 1909 did not define the particularities of an employee-employer relationship, the Supreme Court dictated that "where words are employed in a statute which had at the time a

321. *Id.* at 750 (quoting Marci A. Hamilton, *Commissioned Works as Works Made for Hire Under the 1976 Copyright Act: Misinterpretation and Injustice*, 135 U. PA. L. REV. 1281, 1304 (1987)).

322. Kirby v. Marvel Characters, Inc., 573 U.S. 988 (2014) (certiorari denied due to Supreme Court Rule 46.1); Eriq Gardner, *How the Supreme Court Could Shake up Disney's Spider-Man Plans*, HOLLYWOOD REP. (Dec. 20, 2021, 1:02 PM), <https://www.hollywoodreporter.com/business/business-news/how-the-supreme-court-could-shake-up-disneys-spider-man-plans-1235065460> [https://perma.cc/6YQB-X45W]; Blake Brittain, *Marvel Sues Comic Book Artists over Rights to Iron Man, Spider-Man, Others*, REUTERS (Sept. 24, 2021, 2:53 PM), <https://www.reuters.com/legal/transactional/marvel-sues-comic-book-artists-over-rights-iron-man-spider-man-others-2021-09-24> [https://perma.cc/3R3B-6JR8]; Thielman, *supra* note 219.

323. See *supra* Sections I.A.1–3.

324. The period in which Kirby created the works in dispute. Kirby Complaint, *supra* note 11, at 1.

325. Kaufman, *supra* note 159; *supra* Section I.A.; see also COPYRIGHT LAW REVISION STUDIES, *supra* note 96, at 29–31 (describing the study's determination that Congress was referring to the conventional employer-employee relationship).

well-known meaning at common law or in the law of this country they are presumed to have been used in that sense unless the context compels to the contrary.”³²⁶ This holding demonstrates that the plain and conventional meaning of a word must control as a “cardinal rule of statutory construction.”³²⁷

This argument, stating that the prevailing definition of “employee/work for hire” during a given time period should control for works created during that period, is rooted in both the Supreme Court’s and the Second Circuit’s precedent. In *Playboy*, the Second Circuit emphasized the importance of considering the knowledge and intent of the parties at the time in which they transacted.³²⁸ Intent includes the parties’ knowledge of the governing laws, their goals in the project, and copyright ownership.³²⁹ The court expressly declared that the “mutual intent” of the parties must be considered “[w]hen one person engages another, whether as an employee or as an independent contractor, to produce a work of an artistic nature” for a court to properly determine copyright ownership.³³⁰ The court’s accentuation of mutual intent demonstrates that each party’s beliefs about the legal issues surrounding the transaction should control when determining copyright ownership; otherwise, it could not constitute the mutual intent the court required.³³¹

The Supreme Court likewise held that a key principle of copyright law is that authorship and ownership vest at creation.³³² In *Harper & Row, Publishers*, which, like the Marvel cases, began in the Southern District of New York, the Court reversed the decision of the Second Circuit and expressly chastised the circuit for giving “insufficient deference” to the principles of the Copyright Acts, including the

326. *Standard Oil Co. v. United States*, 221 U.S. 1, 59 (1911).

327. *Molzof v. United States*, 502 U.S. 301, 307 (1992).

328. *Playboy Enters., Inc. v. Dumas*, 53 F.3d 549, 554 (2d Cir. 1995).

329. *Id.*

330. *Id.* (quoting Ninth Circuit precedent that treated independent contractors as employees in a blanket manner, without consideration of benefits, salaries, or other attributes of conventional employment); *see also* Entertainment Lawyers Amicus Brief, *supra* note 69, at 14 (asserting that “[w]ith district judges so tasked to resolve copyright claims *de novo* through the filter of incoherent law, creators simply cannot know what method of analysis will be employed or factors accorded the greatest (or any) weight in adjudicating their claims”).

331. *Playboy*, 53 F.3d at 554.

332. *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 547 (1984).

“exclusive right[s]” of “copyright owners.”³³³ The Court has repeatedly held that authorship vests at creation; this is important to emphasize because at the moment that Kirby created the disputed drawings, Marvel did not even know what the drawings looked like.³³⁴ Recall that Kirby had the option of selling some of the pages he created to Marvel, but Marvel was not Kirby’s sole customer, nor did Marvel purchase every page that Kirby presented to it.³³⁵

The Supreme Court has reiterated that under the Second Circuit’s test, “parties would not know until late in the process, if not until after the work is completed,” whether the creation was a work made for hire at its inception.³³⁶ Therefore, the Second Circuit’s instance and expense analysis conflicts with the Supreme Court’s core copyright principle that authorship and ownership vest at creation.³³⁷ This further affirms that a court must consider the prevailing test at the time of the disputed work’s creation or vesting of authorship to properly determine copyright ownership.

2. *The controlling work for hire test between 1958 and 1972*

In 1903, the Supreme Court decided the question of work for hire and employee authorship for the first time in *Bleistein v. Donaldson Lithographing Co.*³³⁸ The Justices held that illustrations created for a lithography company belonged to the hiring party because the illustrators were “persons employed and paid by the plaintiffs in their establishment to make those very things,” or in other words, conventional employees.³³⁹ Some notable copyright scholars, such as Bruce Lehman³⁴⁰ and Ralph Oman,³⁴¹ have asserted that the

333. *Id.* at 539, 546.

334. *See, e.g.,* *Marvel Characters, Inc. v. Kirby*, 726 F.3d 119, 126 (2d Cir. 2013) (explaining that Marvel could not know what Kirby’s drawings looked like until he offered them for purchase).

335. *Id.*

336. *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 750 (1989).

337. *Harper & Row, Publishers*, 471 U.S. at 547 (stating that authorship vests at creation).

338. 188 U.S. 239 (1903).

339. *Id.* at 248.

340. Former United States Assistant Secretary of Commerce, and Director of the U.S. Patent and Trademark Office. Bruce Lehman Biography, U.S. PATENT & TRADEMARK OFF., <https://www.uspto.gov/about-us/bruce-lehman> [<https://perma.cc/76HS-V9A2>].

Copyright Act of 1909 “codified then existing case law governing employed authors,” including *Bleistein*.³⁴² The illustrators in *Bleistein* “fit the traditional model of full time salaried or hourly workers performing their tasks using the equipment and workspaces of the employer and under the direct supervision of the employer.”³⁴³ Under this standard, Kirby’s illustrations would probably not be considered works made for hire because Kirby was neither a salaried employee nor were all of his creations intended for Marvel.³⁴⁴

Before the Copyright Act of 1909 was enacted, its drafters considered the attributions associated with conventional employment.³⁴⁵ “The drafters discussed that payment of a salary ‘entitle[d] an employer to all rights to obtain a copyright in any work performed during the hours for which such salary was paid.’”³⁴⁶ In an almost too-good-to-be-true situation (for Kirby), the drafters also declared that “the artist who is employed for the purpose of making a work of art so many hours a day [and] the independent artist should have different rights.”³⁴⁷ Recall that Kirby did not receive a salary, had no guarantee of payment until a page was explicitly accepted, and set his own working hours.³⁴⁸ It remained undisputed that Kirby was a freelancer, as opposed to a conventional employee of Marvel.³⁴⁹ Accordingly, by applying the expressed intent of the drafters of the Copyright Act of 1909, Marvel would likely not retain sole copyright in Kirby’s characters.

Congress likely did not define the term “employer” in the 1909 Act because its meaning was rudimentary and understood by the majority

341. Former United States Register of Copyrights. Ralph Oman Biography, U.S. COPYRIGHT OFF., <https://www.copyright.gov/about/register/oman/oman.html> [<https://perma.cc/R8LB-K7K9>].

342. Lehman Amicus Brief, *supra* note 27, at 7.

343. *See id.* at 7–8 (stating that “Congress codified this principle in the 1909 Act by defining ‘author’ to include the ‘employer in the case of works made for hire’”).

344. *Marvel Characters, Inc. v. Kirby*, 726 F.3d 119, 125 (2d. Cir. 2013); *see, e.g.*, PEN Center USA Amicus Brief, *supra* note 85, at 14 (citing some of Kirby’s contributions to Topps Publishing and noting that Marvel never objected to Kirby’s transactions with other publishers).

345. Stenographic Report, *supra* note 12, at 127.

346. Lehman Amicus Brief, *supra* note 27, at 7.

347. Stenographic Report, *supra* note 12, at 188.

348. *Kirby*, 726 F.3d at 125–26.

349. *Id.* at 125.

of courts.³⁵⁰ In 1910, Black’s Law Dictionary defined “employer” as “[o]ne who employs the services of others; one for whom employees work and who pays their wages or salaries.”³⁵¹ The same dictionary also defined the term “employee” as a term “ordinarily . . . used to signify a person in some official employment.”³⁵² In 1951, the fourth edition of the same dictionary defined “employer” in the same way that it had in 1910.³⁵³ Until at least 1972, which includes the relevant period of Kirby’s works, courts interpreting the Copyright Act of 1909 used these well-understood definitions of “employee” and agreed that independent contractors and freelancers were not generally considered employees.³⁵⁴ During this timeframe, the employer-employee relationship was considered reminiscent of the master-servant dynamic rooted in the French origins of the words.³⁵⁵

The 1909 Act’s legislative history also supported this “plain reading” of the statute.³⁵⁶ Even before Congress enacted the next Copyright Act in 1976, “it was commonly understood that work-for-hire encompassed only works by salaried employees.”³⁵⁷ This common understanding of work for hire would not encompass Kirby’s freelance creations.³⁵⁸ Studies prepared for the Subcommittee on Patents, Trademark, and Copyrights in 1961 found that a situation in which “the author created [the work] on his own volition and then sold to a proprietor” did not constitute a work made for hire.³⁵⁹

350. Petition for Certiorari, *supra* note 14, at 15.

351. See *Employer*, BLACK’S LAW DICTIONARY (2d ed. 1910).

352. *Employee*, BLACK’S LAW DICTIONARY (2d ed. 1910) (indicating also that the employer-employee relationship is rooted in the master-servant relationship of French history).

353. See *Employer*, BLACK’S LAW DICTIONARY (4th ed. 1951).

354. See, e.g., Petition for Certiorari, *supra* note 14, at 12–15 (articulating that until at least 1972, freelancers understood that they would neither be considered formal employees nor receive employee benefits or workspaces); *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 743 (1989) (describing work made for hire holdings under the Copyright Act of 1909).

355. *Employee*, *supra* note 352.

356. Petition for Certiorari, *supra* note 14, at 16.

357. Lehman Amicus Brief, *supra* note 27, at 8.

358. See *supra* note 354 and accompanying text.

359. Compare COPYRIGHT LAW REVISION STUDIES, *supra* note 96, at 141 (stating also that “[a] regular salary is usually indicative of employment for hire”), with *Marvel Characters v. Kirby*, 726 F.3d 119, 125–126 (2d Cir. 2013) (demonstrating that Kirby created illustrations with his own materials in his home and had the option to sell some of them to Marvel, but received no regular salary).

The leading definition or test for employment referred to the common law of agency and the conventional employer-employee relationship.³⁶⁰ Congress commissioned thirty-four studies to amend and address the ambiguities of copyright law before the 1976 Act was enacted.³⁶¹ A key study conducted by Borge Varmer demonstrated that “works-made-for-hire had been limited to those situations involving a traditional employment relationship.”³⁶² The study found:

[t]he statutory concept of employment for hire is based on the specific contractual relationship between employer and employee. The courts have not given a definition of that relationship which will cover all situations . . . but all the cases have involved salaried employees who received either a fixed salary or minimum salary plus commission . . . Hence, it may be concluded that section 26 [of the 1909 Act] refers only to works made by salaried employees in the regular course of their employment.³⁶³

If this standard was applied to Kirby’s facts, his creations between 1958 and 1963 would not be considered works made for hire because Kirby had neither a salary nor any guarantee that his pages would be accepted and purchased by Marvel.³⁶⁴

The Register of Copyrights submitted another report to Congress in 1961.³⁶⁵ Abraham Kaminstein, the sixth Register of Copyrights, affirmed that “[t]he courts . . . have not generally regarded commissioned works as ‘made for hire.’”³⁶⁶ Once again, it was undisputed that Kirby was a freelancer, and under this standard recommended by the Register of Copyrights, his illustrations would probably not constitute works made for hire.³⁶⁷

360. Petition for Certiorari, *supra* note 14, at 5.

361. See, e.g., *Mills Music, Inc. v. Snyder*, 469 U.S. 153, 159 (1985) (describing Congress’s authorization of thirty-four studies pertaining to copyright law, including work for hire).

362. Screen Actors Guild Amicus Brief, *supra* note 27, at 8–9.

363. STAFF OF S. COMM. ON PATENTS, TRADEMARKS, AND COPYRIGHTS, 86TH CONG., STUDY NO. 13: WORKS MADE FOR HIRE AND ON COMMISSION 127, 130 (Comm. Print. 1960) (Borge Varmer).

364. *Marvel Characters v. Kirby*, 726 F.3d 119, 125–26 (2d Cir. 2013).

365. See generally H. COMM. ON THE JUDICIARY, 87TH CONG., REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF COPYRIGHT LAW (Comm. Print 1961).

366. *Id.* at 86.

367. See *Kirby*, 726 F.3d at 137 (explaining works made for hire are not protected by termination rights).

These reports demonstrate that “through the early 1960s, when Jack Kirby created the works in question, the prevailing understanding, and indeed, the prevailing jurisprudence supported the” notion that works made for hire existed only in the sense of a conventional employer-employee relationship.³⁶⁸ This argument was bolstered by the Supreme Court’s declaration that while the term “employee” was not defined in either of the Copyright Acts, “Congress intended to describe the conventional master-servant relationship as understood by common-law agency doctrine” and well-understood dictionary definitions.³⁶⁹

3. Into the multiverse: What if Kirby had been decided under the controlling work for hire test from 1958 to 1963?

During the late 1950s and into the 1960s, freelancers like Kirby understood that their illustrations could be purchased by publishers like Marvel.³⁷⁰ These artists did not have formal employment agreements, and their understanding of the transaction was that some pages would be purchased, and then they would have to sign on the back of their publisher’s checks to get paid; if they did not sign, they would not be paid.³⁷¹ The language on the back of these checks indicated that there would be a purchase and assignment, not a transfer of copyright.³⁷² Accordingly, during his trial, Kirby presented five freelancers who “specifically testified that Marvel’s checks in the 1950’s and 1960’s contained explicit language of purchase and assignment, *not* ‘work for hire.’”³⁷³ “None of the relevant players

368. Screen Actors Guild Amicus Brief, *supra* note 27, at 11.

369. *Com. for Creative Non-Violence v. Reid*, 490 U.S. 730, 740 (1989) (asserting that Congress meant to define employment under work-for-hire as a formal employee-employer relationship).

370. Petition for Certiorari, *supra* note 14, at 11; Defendant’s Answer & Counterclaim at 16, *Marvel Characters, Inc. v. Lieber*, No. 21-cv-07955 (S.D.N.Y. filed Dec. 7, 2021) [hereinafter Lieber Answer]; Defendant’s Answer & Counterclaim at 16, *Marvel Characters, Inc. v. Ditko*, No.1:21-cv-07957 (S.D.N.Y. filed Dec. 7, 2021) [hereinafter Ditko Answer].

371. *Kirby*, 726 F.3d at 142–43.

372. Petition for Certiorari, *supra* note 14, at 11.

373. See Appellants’ Opening Brief, *supra* note 143, at 31, 47–48 (noting that on cross-examination, Stan Lee admitted that “Marvel’s checks contained ‘assignment,’ not ‘work for hire,’ language and that he really had no idea when the ‘work for hire’ legend first appeared on Marvel’s checks,” followed by Kirby utilizing the testimony of five other freelance artists who worked with Marvel during the same period to

involved in the comic book industry during this time period—not . . . Lee, or freelance artists such as Jack Kirby—would have considered this material to be ‘work made for hire,’ owned by Marvel” from the moment the artists’ pens hit the artists’ paper.³⁷⁴ Recall that Kirby presented many pages to Marvel that it rejected, and Kirby received no payment for anything that was not sold.³⁷⁵

Kirby created many works that were purchased and published by companies other than Marvel, as “[f]reelancers like Kirby were free to take unused concepts they created while working on a Marvel project, or ones that were rejected, and reuse them for other freelance work for other companies.”³⁷⁶ This emphasizes the most substantial hole in Marvel’s argument. If Kirby was an employee for purposes of work for hire, and the conventional meaning of employment does not control (meaning that Marvel was the author of the creations at their inception), then how were “Marvel’s” creations sold to and published by rival companies? Kirby did not work exclusively with Marvel, and he also found success in the projects that he saved for other companies.³⁷⁷ Kirby was not prohibited from working with Marvel’s competitors because he had no employment contract, benefits, or even guarantees from Marvel.³⁷⁸ For example, Kirby developed and sold a hybrid comic of *Captain America* to Topps Publishing entitled *Captain Glory*.³⁷⁹ Marvel could not have stopped Kirby from selling works to other companies, even if it wanted to, because it lacked any agreement or guaranteed working relationship with him.³⁸⁰

Critics argue that the instance and expense test should still control because it was the Second Circuit’s prevailing work for hire test at

explain that the language was interpreted as expressing a purchase of pages, but not work for hire copyright).

374. PEN Center USA Amicus Brief, *supra* note 85, at 14.

375. *Kirby*, 726 F.3d at 125–26.

376. PEN Center USA Amicus Brief, *supra* note 85, at 14.

377. BRITANNICA, *supra* note 2 (outlining Kirby’s comic book biography); Topps Comics, *Captain Glory*, COMIC BOOK REALM, <https://comicbookrealm.com/series/10659/0/captain-glory-one-shot> [<https://perma.cc/5SFU-V9PP>]; PEN Center USA Amicus Brief, *supra* note 85, at 14.

378. *Kirby*, 726 F.3d at 125–26; *see* PEN Center USA Amicus Brief, *supra* note 85, at 14 (dictating that “Marvel never objected [to these outside transactions], even though under Marvel’s new theory the company would have owned this Kirby creation as ‘work for hire.’”).

379. PEN Center USA Amicus Brief, *supra* note 85, at 14.

380. *Kirby*, 726 F.3d at 126.

one point, even if it was not in use during the years in which Kirby created the works in dispute.³⁸¹ The Supreme Court's language overruling the instance and expense test would once again refute this criticism.³⁸² The Supreme Court considered the Second Circuit's test and rejected it because the test acted as a catchall to treat all independent contractors as employees and gave far too much deference to the publishing party.³⁸³ Critics would be arguing for the utilization of a test that the Supreme Court rejected.

The reports to Congress, the contradictions within Marvel's argument, and the intent of the comic book artists while selling their pages all clearly establish that Kirby was not an employee of Marvel, and under the principles of conventional employment (the controlling test between 1958 and 1963) his creations should not be considered works made for hire.³⁸⁴ Even without relying on *Reid*, the controlling work for hire test from 1958 to 1963 should have been utilized by the Second Circuit because "parties reasonably relied in good faith on the state of law in their jurisdiction at the time that their agreements were drafted. Such reliance was contingent on the law of the time and should be honored. The agreements were indicative of the parties' expectations."³⁸⁵

In its suit against Kirby, Marvel sought "a judgment pursuant to 28 U.S.C. § 2201 declaring that the notices [served by Kirby's estate terminating the assignments were] invalid and of no legal force or effect."³⁸⁶ Marvel now seeks that relief, verbatim, from the estates of Lieber and Ditko.³⁸⁷ The complaints heavily rely on the Second Circuit's holding in *Kirby*.³⁸⁸ Therefore, if *Kirby* had been decided

381. See, e.g., Brief in Opposition, *supra* note 11, at 9.

382. See *supra* Sections II.A.1–2.

383. See *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 742–44 (1989).

384. See *supra* Sections II.B.1–2.

385. Kaufman, *supra* note 159 (explaining his arguments before the Supreme Court in *Reid* and stating that "court[s] should apply the work for hire law of the circuit at the time that the works in dispute were created").

386. Kirby Complaint, *supra* note 11, at 5.

387. Lieber Complaint, *supra* note 24, at 6 (referring to the termination notices that Lieber's estate served to Marvel in 2021, terminating copyright grants of Lieber's works created from 1962 to 1964); Ditko Complaint, *supra* note 24, at 6 (referring to the termination notices that Ditko's estate served to Marvel in 2021, terminating copyright grants of Ditko's works created from 1962 to 1966).

388. See Lieber Complaint, *supra* note 24, at 2; Ditko Complaint, *supra* note 24, at 2 (claiming that the issue should be ruled in the same manner as *Kirby*).

under the prevailing work for hire test between 1958 and 1963, Marvel would probably not have much of a case against Lieber and Ditko now.

C. *Kirby's Avengers: The Trials of Lieber and Ditko*

Marvel is attempting to use its success in *Kirby* to leverage similar wins against the estates of Lieber and Ditko.³⁸⁹ This Section predicts and compares the potential outcomes of these pending cases depending on which of the three work for hire tests discussed in this Comment is ultimately utilized by the court. At the time of this publication, the cases have not yet been decided by the District Court for the Southern District of New York.³⁹⁰

1. *The pending cases if decided under the Second Circuit's instance and expense test*

The instance and expense test would first consider whether “the works in question were made at Marvel’s instance.”³⁹¹ Lieber’s and Ditko’s circumstances are “virtually identical” to those of Kirby.³⁹² Both Lieber and Ditko were paid “a per-page rate for [their] contributions” but were not salaried and did not receive benefits from Marvel.³⁹³ Marvel reserved the right to reject Lieber and Ditko’s pages; in *Kirby*, the Second Circuit deemed this right sufficient to satisfy the instance prong.³⁹⁴ Therefore, it is likely that the Second Circuit would follow its own precedent and hold that Lieber and Ditko’s respective works were created at Marvel’s instance.

Regarding expense, the Second Circuit held in *Playboy* that expense is satisfied when “a hiring party simply pays an independent

389. See Lieber Complaint, *supra* note 24, at 2; Ditko Complaint, *supra* note 24, at 2.

390. See Bryan Sullivan, *Disney Fights for Rights to Popular Movie Characters*, FORBES (Oct. 1, 2021, 3:32 PM) <https://www.forbes.com/sites/legalentertainment/2021/10/01/disney-fights-for-rights-to-popular-marvel-characters/?sh=7f7582b852f0> [<https://perma.cc/7FNG-XPBG>].

391. *Marvel Characters, Inc. v. Kirby*, 726 F.3d 119, 139, 141 (2d Cir. 2013) (defining “instance” as “the extent to which the hiring party provided the impetus for, participated in, or had the power to supervise the creation of the work”).

392. Lieber Complaint, *supra* note 24, at 1-2; Ditko Complaint, *supra* note 24, at 1.

393. Lieber Answer, *supra* note 370, at 15-16; Ditko Answer, *supra* note 370, at 15.

394. See Lieber Answer, *supra* note 370, at 15; Ditko Answer, *supra* note 370, at 16; *Kirby*, 726 F.3d at 141-42.

contractor a sum certain for his or her work.”³⁹⁵ Lieber and Ditko were both paid a per-page rate for their contributions.³⁹⁶ In *Kirby*, the per-page rate satisfied the expense prong as a “sum certain.”³⁹⁷ The Second Circuit would probably abide by its finding in *Kirby* and hold that the expense requirement was met for both Lieber and Ditko.

The Second Circuit will most probably follow its decision in *Kirby*, utilize the instance and expense test, and ultimately hold that the works created by both Lieber and Ditko were works made for hire.³⁹⁸ This decision would be contrary to *Reid*, which both effectively overruled the instance and expense test and provided language defining the scope of employment through its twelve-factor test.³⁹⁹ This decision would also be contrary to the prevailing employment test of the time period in which Lieber and Ditko created the works, which was from 1962 to 1966; during those years, works were only considered made for hire in the presence of formal employment.⁴⁰⁰ If they are also unsuccessful at the Second Circuit Court of Appeals, then Lieber and Ditko will be faced with the same option that Kirby opted to exercise, which was to petition for certiorari.⁴⁰¹

2. *The pending cases if decided under Theory I (the Reid test)*

Reid overruled the instance and expense test and provided a twelve-factor test to define employment.⁴⁰² This Section analyzes the probable outcome of the pending Marvel cases if they are decided by the twelve-factor *Reid* test.

The first factor considers the skill required in creating the disputed works.⁴⁰³ Both Lieber and Ditko were freelance artists who illustrated characters that would, unbeknownst to the artists, go on to be worth billions of dollars and be the subjects of hundreds of films.⁴⁰⁴ For a publisher to find such immeasurable success in an artist’s drawings,

395. *Playboy Enters., Inc. v. Dumas*, 53 F.3d 549, 555 (2d Cir. 1995).

396. Lieber Answer, *supra* note 370, at 16; Ditko Answer, *supra* note 370, at 16.

397. *Kirby*, 726 F.3d at 142.

398. *See supra* notes 391–397 and accompanying text (predicting that the district court will abide by the Second Circuit Court of Appeals’ *Kirby* holding).

399. *See supra* Sections II.A.1–2.

400. *See supra* Sections II.B.1–2.

401. Petition for Certiorari, *supra* note 14, at 1.

402. *Supra* Sections II.A.1–2; *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 751–52 (1989).

403. *Reid*, 490 U.S. at 751.

404. *Barnes & Cieply*, *supra* note 8; *Brittain*, *supra* note 322.

the artist likely has to demonstrate superb creative skills.⁴⁰⁵ The Marvel Method also did not guarantee any commitment to the artists.⁴⁰⁶ It is likely that if a high level of skill was not required to create these works, then the artistic relationship would have been truncated.⁴⁰⁷ A court would probably find in favor of Lieber and Ditko on this factor.

The second factor considers the “source of the instrumentalities and tools.”⁴⁰⁸ Lieber and Ditko paid for their own supplies, and Marvel did not reimburse them for creation costs.⁴⁰⁹ A court would also likely hold in favor of the artists on this factor.⁴¹⁰

The third factor considers “the location of the work.”⁴¹¹ Both Lieber and Ditko worked from home, and it would be nearly impossible for Marvel to prove otherwise because “MCIPP⁴¹² had at best a tiny one or two-room office and very few or no employees”⁴¹³

The fourth factor pertains to “the duration of the relationship between the parties.”⁴¹⁴ Lieber began working for Marvel around 1958 and would argue that the duration of the relationship should not be significant because freelance artists were not prohibited from working with other publishers.⁴¹⁵ Ditko began working for Marvel around 1957 but would make the same arguments as Lieber.⁴¹⁶ Marvel would likely assert in both instances that a multi-year

405. See, e.g., Staples, *supra* note 2 (stating that Kirby, among other artists during Marvel’s Silver Age, had immense illustrative abilities).

406. See, e.g., Marvel Studios, *supra* note 4 (describing the skill and labor required to develop these characters); WETZEL & WETZEL, *supra* note 5, at 6–8 (defining the Marvel Method).

407. See WETZEL & WETZEL, *supra* note 5, at 6–8.

408. *Reid*, 490 U.S. at 751.

409. Lieber and Ditko assumed the financial risks of their creations with no guarantee that Marvel would purchase anything. See Lieber Answer, *supra* note 370, at 15; Ditko Answer, *supra* note 370, at 15.

410. Lieber Answer, *supra* note 370, at 15; Ditko Answer, *supra* note 370, at 15–16.

411. *Reid*, 490 U.S. at 751.

412. MCIPP refers to Marvel Comics and its publishing company predecessor as one entity. Lieber Answer, *supra* note 370, at 14.

413. Lieber Answer, *supra* note 370, at 13–14 (stating that the relevant time period for Lieber’s work is from 1962 to 1964); Ditko Answer, *supra* note 370, at 13–14 (stating that the relevant time period for Ditko’s work is 1962 to 1966).

414. *Reid*, 490 U.S. at 751.

415. Lieber Complaint, *supra* note 24, at 1.

416. Ditko Complaint, *supra* note 24, at 1.

relationship should sway this factor in its favor.⁴¹⁷ Ditko has a slightly weaker argument than Lieber since Ditko worked with Marvel longer.⁴¹⁸ Nevertheless, the absence of exclusivity renders it difficult to determine how a court would rule on this factor.

The fifth factor would consider whether Marvel had “the right to assign additional projects” to Lieber and Ditko.⁴¹⁹ A court would likely find in favor of Marvel on this factor because Marvel reserved the right to designate projects to Lieber and Ditko.⁴²⁰

The sixth factor would consider Marvel’s “discretion over when and how long” Lieber and Ditko were required to work.⁴²¹ Because both artists worked from home and set their own working hours, a court would likely rule in favor of Lieber and Ditko on this factor.⁴²²

The seventh factor would focus on how Marvel paid Lieber and Ditko.⁴²³ While it is undisputed that both artists were paid by check at a per-page rate for each page that Marvel accepted, Marvel would probably prevail on this factor.⁴²⁴ The circuit has historically reasoned that the presence of a “sum certain,” which would here be the per-page rate, sways in favor of a work for hire ruling.⁴²⁵

The eighth factor would consider whether Marvel had a role in hiring or paying for assistants for Lieber and Ditko.⁴²⁶ If an artist wanted an assistant, then it was the artist’s job to pay them, and Marvel did not reimburse any artist for an assistant’s salary.⁴²⁷ A court would also probably find in favor of Lieber and Ditko on this factor.

The ninth factor would examine whether the publishing of Lieber and Ditko’s respective works was considered part of Marvel’s “regular

417. Lieber Complaint, *supra* note 24, at 1; Ditko Complaint, *supra* note 24, at 1.

418. Ditko Complaint, *supra* note 24, at 1.

419. *Reid*, 490 U.S. at 751.

420. Lieber Complaint, *supra* note 24, at 2; Ditko Complaint, *supra* note 24, at 2.

421. *Reid*, 490 U.S. at 751.

422. Lieber Answer, *supra* note 370, at 15; Ditko Answer, *supra* note 370, at 15–16.

423. *Reid*, 490 U.S. at 751.

424. Lieber Complaint, *supra* note 24, at 2; Ditko Complaint, *supra* note 24, at 2; *see also* Appellants’ Opening Brief, *supra* note 143, at 47 (noting that “Marvel put a legal acknowledgement or ‘legend’ on the back of its checks, forcing freelancers to sign underneath to cash them”).

425. *Marvel Characters, Inc. v. Kirby*, 726 F.3d 119, 142–43 (2d Cir. 2013); *see* Lieber Answer, *supra* note 370, at 16; Ditko Answer, *supra* note 370, at 16.

426. *Reid*, 490 U.S. at 751–52.

427. *See* Appellants’ Opening Brief, *supra* note 143, at 8, 56 (illustrating, as an example, that Kirby had hired Mark Evanier, the author of one of the amicus briefs, as an assistant).

business.”⁴²⁸ Marvel would almost certainly prevail on this factor because it published the works of dozens of freelance writers and artists as part of its business model.⁴²⁹

The tenth factor would ask whether Marvel Comics is still operating. It most certainly is, and business is booming.⁴³⁰

The eleventh factor would consider whether Marvel provided Lieber and Ditko with benefits.⁴³¹ The artists would almost undoubtedly prevail on this factor because it was undisputed that neither Lieber nor Ditko received any form of benefits from Marvel.⁴³²

The twelfth and final factor is harder to predict, as it would consider Marvel’s tax treatment of Lieber and Ditko.⁴³³ While Marvel has not publicly disclosed its tax filing practices as they pertain to freelancers, it is fair to reason that, in the absence of a contract or salary, Marvel did not consider the artists as formal employees on its tax forms.⁴³⁴ Notably, “[i]n 1957, Marvel fired its ‘bullpen’ of employed artists and converted to a ‘freelance’ model to *avoid* . . . financial . . . risk.”⁴³⁵

Under the twelve-factor *Reid* analysis, seven factors strongly support the notion that Lieber and Ditko’s respective creations are not works made for hire.⁴³⁶ Conversely, three factors definitively support Marvel’s assertion that the works should be considered made for hire and that it should be deemed the author of such creations.⁴³⁷ While

428. *Reid*, 490 U.S. at 752.

429. See generally Cronin, *supra* note 12 (describing the Marvel Method during Stan Lee’s tenure); Marvel Studios, *supra* note 4 (illustrating the loose work environment and existence of several freelance artists at any one time).

430. *Reid*, 490 U.S. at 752; see Mendelson, *supra* note 6 (listing the net worth of some of Marvel’s published characters); Burton, *supra* note 173 (describing Disney’s 2009 purchase of Marvel Comics).

431. *Reid*, 490 U.S. at 752.

432. See Lieber Answer, *supra* note 370, at 15; Ditko Answer, *supra* note 370, at 15.

433. *Reid*, 490 U.S. at 752.

434. See Appellants’ Opening Brief, *supra* note 143, at 8 (asserting that Marvel did not withhold any taxes on its payments to Kirby).

435. Appellants’ Reply Brief at 12, *Marvel Characters, Inc. v. Kirby*, 726 F.3d 119 (2d Cir. 2013) (No. 10-141).

436. Factors one, two, three, six, eight, eleven, and twelve. See *Reid*, 490 U.S. at 751–52; see also *supra* notes 403–435 and accompanying text.

437. Factors five, nine, and ten. *Reid*, 490 U.S. at 751–52.

the outcomes of the fourth and seventh factors are difficult to predict, Marvel likely has a better chance of success with both.⁴³⁸

Therefore, under the twelve-factor employment test established by the Supreme Court in *Reid*, the disputed works of both Lieber and Ditko would probably not be considered works made for hire.⁴³⁹ If the district court implemented this factor test, it would likely either dismiss the complaints against Lieber and Ditko or address the possibility of joint ownership.⁴⁴⁰

3. *The pending cases if decided under Theory II (the controlling test from 1958 to 1966)*

Even without relying on *Reid*, the district court could decide the pending cases by utilizing the controlling work for hire test from 1962 to 1966.⁴⁴¹ The controlling work for hire standard during those years was the conventional employer-employee relationship.⁴⁴²

The drafters of the Copyright Act of 1909 stated that formally employed artists and freelance artists should have different rights.⁴⁴³ Until around 1972, courts interpreting the Copyright Act of 1909 expressly declined to treat independent contractors as employees and instead evaluated them under the conventional employer-employee relationship.⁴⁴⁴ Under this standard, neither the works of Lieber nor Ditko would be considered works made for hire because neither artist received a formal salary or employment benefits.⁴⁴⁵

Recall that in 1952, Black's Law Dictionary defined the traditional employer as "one for whom employees work and who pays their

438. See *supra* notes 414–418, 423–425 and accompanying text.

439. See *supra* notes 403–438 and accompanying text.

440. Cf. *Reid*, 490 U.S. at 753 (noting that while *Reid* was an independent contractor and the statue in dispute was not made for hire, the issue of CCNV's joint authorship was to be resolved on remand).

441. See *supra* Sections II.B.1–2.

442. See *Playboy Enters., Inc. v. Dumas*, 53 F.3d 549, 554 (2d Cir. 1995) ("Until the mid-1960's, federal courts applied the work-for-hire doctrine only to cases in which a traditional employer/employee relationship existed between the hiring party and the creator of the work.").

443. Stenographic Report, *supra* note 12, at 188.

444. See, e.g., *Reid*, 490 U.S. at 749 (expressing that courts generally deemed a creation to be a work made for hire only if it was made by a formal employee); Lehman Amicus Brief, *supra* note 27, at 8 (noting that "it was commonly understood that work-for-hire encompassed only works by salaried employees").

445. Lieber Answer, *supra* note 370, at 15; Ditko Answer, *supra* note 370, at 15; WETZEL & WETZEL, *supra* note 5, at 7.

wages and salaries.”⁴⁴⁶ Even under this broader definition, Marvel would not be considered Lieber and Ditko’s employer because of the absence of a salary.⁴⁴⁷ The freelance artists were not contractually obligated to Marvel, meaning that they were free to take work from other publishing houses, which they did.⁴⁴⁸

During Kirby’s trial, Marvel conceded that financial woes caused it to fire its formally employed artists.⁴⁴⁹ It remains undisputed that Lieber, Ditko, and the other freelancers were not considered employees of Marvel.⁴⁵⁰

If the district court were to utilize the same analysis that the courts used between 1962 to 1966, it would almost certainly determine that no conventional employment relationship existed between Marvel and Lieber or Ditko.⁴⁵¹ If the district court made such a ruling, then the disputed creations would not constitute works made for hire.⁴⁵²

*D. The Fantastic Four Policy Reasons Why Courts Should Avoid
the Instance and Expense Test*

Leading up to the enactment of the Copyright Act of 1976, national publishing companies reacted negatively to the prospect of the new termination provision for fear of losing their absolutist authority over their employees’ work.⁴⁵³ Congress noticed this imbalance of power, which is why it sought to resolve the inequity through the second Copyright Act’s enactment.⁴⁵⁴ Marvel’s spidey-senses likely alerted them to this pending termination provision

446. *Employee*, *supra* note 352.

447. Lieber Answer, *supra* note 370, at 15; Ditko Answer, *supra* note 370, at 15.

448. *See, e.g.*, Appellants’ Opening Brief, *supra* note 143, at 8 (explaining that even under the Marvel Method, freelancers like Kirby could, and did, sell to other publishers).

449. *See id.* at 6 (stating that Marvel’s predecessor, Timely, fired almost all its employees following a severe downturn in the industry).

450. *Marvel Characters, Inc. v. Kirby*, 726 F.3d 119, 125 (2d Cir. 2013); Lieber Answer, *supra* note 370, at 15; Ditko Answer, *supra* note 370, at 15.

451. *See supra* notes 443–450 and accompanying text.

452. *See supra* notes 443–450 and accompanying text.

453. Lehman Amicus Brief, *supra* note 27, at 17.

454. “[A]n author could easily be induced to sign a form contract stating that his work is ‘made for hire,’ and that ordinary book publication contracts, signed before the author has completed the work and calling for an advance against royalties, could be converted into ‘employment agreements’ as a matter of course.” U.S. GOVERNMENT PRINTING OFFICE, COPYRIGHT LAW REVISION: SUPPLEMENTARY REPORT OF THE REGISTER OF COPYRIGHTS [AND] 1965 REVISION BILL (1961).

because it explicitly changed the language on the back of all of its payment checks to freelance artists after the Copyright Act of 1976 was passed.⁴⁵⁵ Marvel's working relationship with Kirby, Lieber, and Ditko is reflective of the "predatory practices of publishers" that Congress sought to mitigate through its attempt to unify copyright law across the circuits.⁴⁵⁶

Second, if the termination rights that Congress intended for creators is stripped from them, the artists and their heirs will be forced to bear the risks and costs of litigation.⁴⁵⁷ Even though these valuable characters were conceived at the pen strokes of their artists, it is the artists who are being burdened with litigation to reach for the statutory rights outside of their grasp.⁴⁵⁸ Many famous works, well beyond those created by Kirby, Lieber, and Ditko, are reaching their "statutory renewal periods," therefore, this issue remains relevant.⁴⁵⁹ It is unjust and inequitable to make the artists sue for the rights that Congress intended to grant them.⁴⁶⁰

455. Petition for Certiorari, *supra* note 14, at 11–12, 12 n.2; *see also* Appellants' Opening Brief, *supra* note 143, at 31 (noting that on cross-examination, Stan Lee admitted that he "really had no idea when the 'work for hire' legend first appeared on Marvel's checks"); PEN Center USA Amicus Brief, *supra* note 85, at 20–21 (highlighting that Marvel had insecurities about its ownership of the work created by freelance artists, and that when it returned work to the artists, it added writing to characterize the works as "work[s] made for hire").

456. Lehman Amicus Brief, *supra* note 27, at 17; *see also* Greenberg v. Nat'l Geographic Soc'y, 533 F.3d 1244, 1259 (11th Cir. 2008) (stating that "[t]he 1976 Copyright Act was supposed to reverse two hundred years of publishers' exploitation of authors").

457. Screen Actors Guild Amicus Brief, *supra* note 27, at 4; *see also* Marvel Characters, Inc. v. Simon, 310 F.3d 280, 290 (2d Cir. 2002) (holding that "the legislative history of the termination provision reflects Congress's intent to protect authors from unequal bargaining positions").

458. *See* Screen Actors Guild Amicus Brief, *supra* note 27, at 25 (noting that "[w]here the scales of justice are tipped so heavily against the creator and the cost of litigation are [sic] so great, [the Second Circuit] all but eviscerates the authorial rights that Congress preserved to creators").

459. *Id.* at 4, 21 (stating that "[t]he inequity inherent in the . . . [Second Circuit's] test has the potential to detrimentally impact countless individuals beyond the parties to [Kirby's] case").

460. *See* PEN Center USA Amicus Brief, *supra* note 85, at 1 (asserting that the cases against Marvel under the 1909 Act "will have a broad and profound impact on nearly all artists, writers, and creators of comic books and other works, and their families"); Allissa Wickham, *High Court Urged to Review Marvel Copyright Row*, LAW360 (Apr. 2, 2014, 6:39 PM), <https://www.law360.com/articles/524397/high-court-urged-to>

Third, the Second Circuit's instance and expense test created an "almost irrebuttable presumption" that a work created by a freelance artist will vest a copyright in the purchaser.⁴⁶¹ This presumption is both contrary to the conventional definition of employer and unjust to the artist who bore the financial risks associated with creation.⁴⁶² Kirby, Lieber, and Ditko all produced their creations without the assistance of Marvel's money, but when it comes to reaping the benefits of those same characters, Marvel has made billions while the artists cannot even claim copyright royalties.⁴⁶³ "By retroactively deeming commissioned works as ones 'made for hire,' the Second Circuit has given the purchaser all of the copyright benefits . . . without any of the associated burdens or obligations."⁴⁶⁴

Fourth, notwithstanding the inordinate inequities propagated by the instance and expense test in its deference to publishers, the test is also incorrect because it "creates unnecessary uncertainty in copyright law."⁴⁶⁵ The Supreme Court affirmed the importance of uniformity across copyright interpretations in *Fogerty*, where it held that "the boundaries of copyright law [should] be demarcated as clearly as possible."⁴⁶⁶ The Second Circuit's jurisprudence has resulted in "substantial ambiguity," and a correction to the mistaken

review-marvel-copyright-row [https://perma.cc/ZL7B-2YBJ] (describing the consequences of Marvel's success on future work-for-hire cases).

461. Petition for Certiorari, *supra* note 14, at 4.

462. Lehman Amicus Brief, *supra* note 27, at 22; *see also* Screen Actors Guild Amicus Brief, *supra* note 27, at 4 (asserting that the Second Circuit's instance and expense test results "in a windfall to publishers at the expense of the creative community").

463. *See, e.g.*, Mendelson, *supra* note 6 (estimating the worth of each Marvel Comics character).

464. Screen Actors Guild Amicus Brief, *supra* note 27, at 20.

465. *See* Entertainment Lawyers Amicus Brief, *supra* note 69, at 3, 12 (remarking that the Second Circuit disregarded "the clear legal doctrines laid out by Congress and . . . [the Supreme Court] pertaining to the adjudication of copyright claims . . . [thus] destabilizing the copyright ecosystem in the process"); *see also* Carolyn Martin & Ethan Barr, *Copyright Termination, Work-for-Hire Doctrine Need Review*, LAW360 (Oct. 8, 2021, 4:38 PM), <https://www.law360.com/articles/1428464/copyright-termination-work-for-hire-doctrine-need-review> [https://perma.cc/CX2F-V9C5] (describing the need for the Court to intervene and rule equitably on work for hire under the 1909 Act).

466. *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 527 (1994).

uses of the instance and expense test would further the Court's goal of unifying the federal body of copyright case law.⁴⁶⁷

Critics argue that if Kirby, Lieber, and Ditko were not pleased with their arrangement with Marvel, they should have focused on their relationships with other publishers. Unfortunately, during the period of public outcry in which comics and similarly situated illustrations were frowned upon, Kirby and his comrades "had little choice" regarding what to do with their artwork.⁴⁶⁸ Many artists still combat these financial obstacles "each time they attempt to sell a work to a publisher with vastly greater market power" than the artist.⁴⁶⁹

Without either the Second Circuit's correction of its *Kirby* holding or the Supreme Court's review of the pending cases, the inequitable treatment of the artists behind some of the most famous and valuable characters of all time will continue in perpetuity.⁴⁷⁰ Policy considerations play a larger role at the Supreme Court, which would have to weigh in on the implications of when authorship is vested in an entity, coupled with concerns introduced by the authors of the four amicus briefs from *Kirby* if the pending cases reach the Court.⁴⁷¹

467. See Entertainment Lawyers Amicus Brief, *supra* note 69, at 13 (asserting that "[t]he decisions of the Second Circuit, at issue, have served only to obscure and complicate these [copyright] issues rather than to clarify them").

468. Lehman Amicus Brief, *supra* note 27, at 21.

469. *Id.*; see also Entertainment Lawyers Amicus Brief, *supra* note 69, at 1 (emphasizing that "individual creators in the entertainment industry are at a great disadvantage relative to corporate entities (such as studios and publishers) when attempting to protect or exploit their intellectual property"); Louis Menand, *The Horror: Congress Investigates the Comics*, NEW YORKER (Mar. 31, 2008), <https://www.newyorker.com/magazine/2008/03/31/the-horror> [<https://perma.cc/W2CR-QBAR>] (describing public outcry and the Senate Judiciary Committee's televised hearing regarding "comics' alleged corrupting influence on America's youth").

470. See *e.g.*, *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663, 667 (2014) (declaring that "courts are not at liberty to jettison Congress' judgment on" federal issues such as copyright); Entertainment Lawyers Amicus Brief, *supra* note 69, at 4 (arguing that "federal judges have used contradictory case law to upend numerous core tenants of copyright law, from statutory limitations on work for hire to the protection of an author's work against infringement").

471. See *e.g.*, Screen Actors Guild Amicus Brief, *supra* note 27, at 22 (stating that "[r]eview is [n]ecessary to [c]larify the [s]tate of the [l]aw to [a]void [u]nnecessary [l]itigation [d]ue to the messy and uncertain state of commissioned works under the 1909 Act").

CONCLUSION

Kirby was wrongly decided because the Supreme Court effectively overruled the instance and expense test and provided twelve factors that the Second Circuit should have instead utilized in its work for hire analysis.⁴⁷² Alternatively, without considering *Reid*, the leading test for employment at the time that the works were created should be used when a court considers whether a work was made for hire.⁴⁷³ When deciding *Kirby*, the Second Circuit declined to consider the controlling test at the time, which was conventional employment.⁴⁷⁴

The Supreme Court analyzed and discarded the Second Circuit's test in *Reid* because of the test's irrebuttable reliance on the hiring party's control.⁴⁷⁵ The Second Circuit's test also conflicts with the core copyright principle that authorship vests at creation.⁴⁷⁶ The guiding principles of *Reid* must apply equally to the interpretation of employment under the 1909 Act as they do to the 1976 Act.⁴⁷⁷ Even if *Reid* was not found to have overturned the instance and expense test, the controlling test for employment at the time the works in dispute were created should be used to determine whether a work was made for hire.⁴⁷⁸

The district court should either utilize the twelve-factor *Reid* test or a conventional employment analysis to decide the pending cases.⁴⁷⁹ If the district court follows the flawed instance and expense test, then it is highly probable that the court would rule in favor of Marvel and the artists would appeal.⁴⁸⁰

At the court of appeals, it is likely that the judges would reapply their *Kirby* holding because the facts are extremely similar for all

472. *Supra* Sections II.A.1–2.

473. *Supra* Sections II.B.1–2.

474. *See supra* Section I.E.

475. *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 741 (1989) (disagreeing with the Second Circuit's test because of its heavy reliance on whether the work was actually created at the hiring party's instance).

476. *Id.* at 737; *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 547 (1985).

477. “Ordinarily, ‘Congress’[s] silence is just that—silence.” *Reid*, 490 U.S. at 749 (quoting *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 686 (1987)) (rejecting CCNV's contention that Congress's silence should be interpreted as permitting the instance and expense test or the actual control test); *supra* Sections II.A.1–2.

478. *See supra* Sections II.B.1–2.

479. *Supra* Sections II.A.–C.

480. *See supra* Section II.C.1.

three cases.⁴⁸¹ Despite the Second Circuit’s acknowledgment of the criticism voiced by the Supreme Court and the country’s leading copyright treatises over the instance and expense test, it would likely affirm for Marvel.⁴⁸²

The estates of Lieber and Ditko would then be faced with the same options that Kirby’s estate contemplated in 2013: whether to risk the denial of certiorari or settle outside of court. Lieber and Ditko’s respective estates have hired the same attorney that represented Kirby’s estate in 2013, Marc Toberoff.⁴⁸³ It is too early to predict what the artists would do with another chance to claim the copyrights to their characters.

Only the Supreme Court can resolve the discrepancies and inequities perpetuated by the instance and expense test, beginning in 1972 with *Picture Music*.⁴⁸⁴ If Lieber and Ditko were to petition for certiorari, the Supreme Court might just be the (super)hero they need to resolve this injustice and return the characters to their creators.⁴⁸⁵ The Court would have to decide who owns these billion-dollar characters.⁴⁸⁶ It is a great responsibility, but as Marvel published over half a century ago, “in this world, with great power there must also come—great responsibility.”⁴⁸⁷

481. *Supra* Section II.C.1.

482. *Marvel Characters, Inc. v. Kirby*, 726 F.3d 119, 139 n.8 (2d Cir. 2013); *see Reid*, 490 U.S. at 742; NIMMER, *supra* note 14, § 9.03[D]; ABRAMS & OCHOA, *supra* note 265.

483. Brittain, *supra* note 322.

484. *Picture Music v. Bourne, Inc.*, 457 F.2d 1213, 1216 (2d Cir. 1972).

485. *See Kimble v. Marvel Ent., LLC*, 576 U.S. 446, 450 (2015) (demonstrating that the Supreme Court has commented on Marvel’s intellectual-property-related business practices previously and that sometimes one must do “whatever a spider can” to resolve a dispute).

486. Gustines, *supra* note 6; Mendelson, *supra* note 6.

487. Lee & Ditko, *supra* note 1, at 11.