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Judicial Kryptonite?: Superman and the Consideration of Moral Rights in American Copyright

by

SEAN MCGILVRAY

I. Introduction: The Man of Tomorrow

He is one of the most iconic fictional characters of all time. Since his initial appearance in Action Comics, Vol. 1 in 1934, Superman has occupied a storied and dynamic place in the popular culture that goes beyond his roots as an expression of modern mythology. His ability to leap tall buildings in a single bound has amounted to nothing compared with his ability to leap between media platforms. From comic books to newspaper strips, radio plays to television series, and movies to licensed merchandise, the Superman character has proven to be a highly adaptable and highly profitable parcel of intellectual property. But over Superman's decades-long history, behind his...
four-color battles and alien invasions, the creators of Superman, Jerome Siegel and Joseph Shuster, have endured a never-ending battle of their own to assert their rights in the “Man of Steel” they created. Over the years, this battle especially affected Jerome Siegel. He lived a “lifetime of rage,” embodying the role of the alienated creator and suffering as the product of his imagination belonged to the publisher. The battle between the creators and the publisher played out in courtrooms and across negotiation tables for decades and has more colorful characters and dramatic moments than any comic book adventure.

The latest round of litigation over ownership rights to Superman is in progress and commentators predict a settlement on the horizon, though there are many aspects of the matter that still require adjudication. Interestingly, the proceedings thus far have produced at least one significant and potentially far-reaching outcome. In Siegel v. Warner Brothers Entertainment, Inc., Siegel’s heirs utilized the “termination of transfer” provision of the Copyright Act and obtained a summary judgment explicitly recognizing their copyright interest in the character of Superman, notwithstanding the fact that Siegel signed his interest away several times since the character debuted in the 1930s.

The Siegel decision implicitly addresses the moral right of an author to his work, which is traditionally not a factor in American copyright law, and offers an especially salient lens through which to view the justifications for these rights. This philosophical conception of copyright, with its focus on the relationship between a creator and his creation, has historically occupied an uncomfortable place in American jurisprudence. This discomfort is a result of the utilitarian statutory language, which focuses more on promoting artistic progress than on the ethical or philosophical connection between a creator and his creation. The Siegel decision demonstrates the benefits of valuing moral rights in determining intellectual property ownership rights, at least when dealing with characters sold before their value was realized. This

4. Id. at 185.
5. Id. at xiii.
10. Id. at 1107–14.
departure from previous copyright decisions is slight, but important, because it highlights the vigorous debate over the scope of copyright law. The right of authors and their heirs to terminate licenses and recapture the copyright interest is a powerful tool by which authors and their families can reassert ownership rights in their creations, despite the fact that they had previously assigned their rights to other parties. The result goes beyond the ability to simply renegotiate licenses and allows the full reclamation of previously relinquished intellectual property. As such, Siegel may herald at least a subtle shift in the copyright regime toward the legal recognition of moral rights.

This Note examines the Siegel decision as an example of how an author's moral rights to his or her creations can factor into American copyright law, with particular focus on the larger struggle between the competing interests of creators and purveyors of intangible media. In order to understand the decision in these terms, Part II provides a brief historical background of moral rights in American intellectual property law and contrasts the American tradition with the European approach. Part II then focuses in on the specifics of the Siegel decision and explores the origins of the never-ending battle between the Siegels and the publisher who owns the rights to Superman. Lastly, Part II outlines the competing interests in the Siegel litigation. Part III analyzes how the Siegel decision operates as a vindication of moral rights by delving into the controversies surrounding the termination of assignments by the heirs of authors. Part IV examines why this case is a victory for the conception of moral intellectual property rights, and why this approach is better than a purely economic conception. Part V concludes with a summary and some closing thoughts on the rhetorical value of Superman as a test case for resolving these issues.

II. Background: The Never-Ending Battle

A. Secret Origins: Siegel, Shuster, and DC Comics

In 1938, Jerome Siegel and Joseph Shuster were two socially awkward science fiction fans. Unaware that Siegel’s words and Shuster’s artwork would become the template for the world’s most famous superhero and launch the entire comic book industry, the pair collaborated on a series of illustrated short stories and comic strips. Superman’s first iteration was a bald menace to humanity, initially conceived as the villain of an early prose

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15. Peter Afrasiabi, Superman’s Latest Episode: The Rights of Authors and Their Families to Terminate a Copyright Grant and Recapture the Copyright, 50 ORANGE COUNTY LAWYER 34, 35 (2008).
16. JONES, supra note 3, at 35, 86.
piece. The partners eventually reworked the eponymous character into the
more heroic version known to today’s readers and packaged a few stories to
sell in the burgeoning comic book marketplace. Siegel and Shuster
attempted to sell Superman as an ongoing comic strip to daily newspapers,
but the pair had a difficult time making a syndicate deal in this format.
Eventually they found a buyer in National Allied Publications (“National”),
but National was only interested in publishing Superman in a reworked comic
book form different from the typical newspaper-style strip. Editor Vin
Sullivan commissioned the team to rework their substantially completed strips
into the new comic book format with cut-and-pasted strips and new material
to make longer stories. Siegel and Shuster were excited at the prospect of
getting their story out into the marketplace and thrilled at the $130 they
received in exchange for assigning all rights to the character to the publisher.
Siegel and Shuster were used to this kind of arrangement because it was the
same set of circumstances under which they had sold their previous
creations. Unfortunately, their satisfaction with this standard arrangement
was short-lived.

When Siegel and Shuster initially signed their rights over to National, they
did so under the U.S. Copyright Act of 1909 which granted the holder of a
copyright protection for that work for twenty-eight years from the date of its
publication. It is unclear what Siegel and Shuster intended to do at the end
of the initial twenty-eight-year term. When this term expired, Siegel and
Shuster could have renewed the copyright for a second twenty-eight year
period and renegotiated with National with a clearer idea of what the property was worth on the open market. They had great faith in the
enduring appeal of Superman, as demonstrated in their persistence in
shopping the character around unsuccessfully for years before their success
with National, which then became Detective Comics (“DC”). From the
start, Siegel deeply believed in the long-term possibility of the Superman

18. Id. at 82.
19. Id. at 115.
20. Id. at 124. See also DANIELS, supra note 17, at 37.
21. See DANIELS, supra note 17, at 25.
22. Id. at 23.
23. Id. at 30–31.
25. JONES, supra note 3, at 125.
27. See Afrasiabi, supra note 15, at 35.
29. See Jones, supra note 3, at 115.
30. DANIELS, supra note 17, at 30.
concept, referring to Superman in early sketches as "The Super Strip of Them All."\(^{31}\)

The contemporary publishing industry operated on a consignment basis, whereby companies like DC had no way of knowing, in a timely manner, the precise sales figures of their periodicals.\(^{32}\) The best they could hope for were rough averages that were received months after the initial books hit the stands.\(^{33}\) It did not take long for the sales of Superman to break records and swiftly begin to outsell the competition on the newsstands.\(^{34}\) It also did not take long for Siegel to start feeling that the publisher had taken advantage of him, and he began writing frequent letters requesting greater compensation in the form of higher pay rates for Shuster and him.\(^{35}\)

This dissatisfaction came to a head in 1947, when Siegel and Shuster brought an action in New York against DC\(^{36}\) to rescind their earlier assignment of all rights in the Superman character, claiming the agreement was "void for lack of mutuality and consideration."\(^{37}\) This litigation was the first volley in what would prove to be an extended series of legal skirmishes, setting the tone for the disappointment Siegel and Shuster would continue to encounter in their litigation efforts. The trial judge refused to void the assignment and held that DC was the exclusive owner of Superman and the entirety of rights in the character.\(^{38}\) The suit produced an eventual settlement that garnered the creators an additional $94,000 each, in exchange for signing a stipulation that DC was the sole owner of the character.\(^{39}\) While this amount was much higher than their initial payment, it was still a pittance compared to the overall revenue the character would continue to generate.

However, that was not the end of the matter. In 1966, the initial copyright term expired and the parties once more took to the courtroom in order to trade punches over the ownership of Superman.\(^{40}\) In the second action, the Second Circuit ruled that, when Siegel and Shuster originally assigned Superman's initial copyright term to DC, they also transferred their interest in the renewal term, "even though those renewal rights had yet to vest

\(^{31}\) JONES, supra note 3, at 115.

\(^{32}\) Id. at 141.

\(^{33}\) Id.

\(^{34}\) Id.

\(^{35}\) Id. at 185–86.

\(^{36}\) DC eventually became a part of the Time Warner media empire, although the comic books are still published under the DC banner and for the remainder of the Note will be referred to as DC. Siegel v. Warner Bros. Entm't, Inc., 542 F. Supp. 2d 1098, 1113 (C.D. Cal. 2008).

\(^{37}\) Id. at 1112.

\(^{38}\) Id.

\(^{39}\) Id.

when the grant (and later the stipulation) was made.”41 Siegel and Shuster were unable to recapture their rights to Superman.

In the 1970s, DC was faced with an image problem.42 Both Siegel and Shuster had experienced prolonged financial difficulty, a sorry state of affairs that stood in stark contrast to the success of the publisher.43 To bolster public opinion before the release of the Superman movie, DC entered into a further agreement with Siegel and Shuster in 1975.44 The terms of this agreement were more favorable to the creators, as long as they “re-acknowledged the Second Circuit’s decision that ‘all right, title and interest in’ Superman (including any and all renewals and extensions of . . . such rights) resided exclusively with DC Comics . . . .”45

The Copyright Act of 1976 changed the legal landscape concerning artists’ transfers of the copyrights in their creations by giving “artists and their heirs the ability to terminate any prior grants of the rights to their creations that were executed before January 1, 1978, regardless of the terms contained in such assignments . . . .”46 This grant gave writers like Siegel and artists like Shuster (and their heirs) the ability to reassert their rights in their creations,47 and provided Siegel a third chance to terminate the earlier assignment to DC. However, the process for determining when a license or transfer can be terminated under this scheme is complicated and relies on a number of arcane and rigidly formalistic formulae.48 The process of termination is convoluted and the requirements are potentially confusing, but if creators can clear the procedural hurdles, they can reassert ownership in their intellectual property and regain relinquished copyrights.49 This right of termination applies “regardless of the terms contained in such assignments.”50 It is this right that the Siegel family asserted in the present case and the bulk of the summary judgment opinion is dedicated to exploring the minutiae of their claim in order to assess its validity.51

41. Siegel, 542 F. Supp. 2d at 1112.
43. Id.
44. Siegel, 542 F. Supp. 2d at 1113.
45. Id.
46. Id.
48. Afrasiabi, supra note 15, at 34.
50. Siegel, 542 F. Supp. 2d at 1113.
51. Id. at 1101, 1116–39.
B. Fortress of Solitude: Moral Rights in American Copyright

American copyright law has historically stemmed from “consequentialist, economic, and incentive-based justifications, while continental European copyright law is informed to a greater degree by natural rights and concern to protect the personality interests of the author.”52 This difference betrays a fundamentally divergent view of the nature of media, whether art is seen as cultural production or merely creative goods.

While the moral rights approach is popular in most civil law jurisdictions, France is the spiritual center of this approach to copyright protection.53 The term “moral rights” comes from civil law and is a translation of the French *droit moral.*54 “[These] rights are of a spiritual, non-economic and personal nature,”55 springing from a “belief that an artist in the process of creation injects his spirit into the work and that the artist’s personality, as well as the integrity of the work, should therefore be protected and preserved.”56 These rights are directly tied to the role that the creator plays by mixing his labor with the raw creative essence of imagination and making something new. The artist can then sell his new creative product on the open market with other tradable commodities.57 Notwithstanding the commercial value of the work, the creation is nevertheless personal to the artist, and these moral rights exist independently of an artist’s copyright in his or her work.58

The notion of an author possessing some form of quasi-mystical right to his writings is alien to the American intellectual property regime. Unsurprisingly, American courts have almost universally ignored these rights when they consider copyright claims.59 The statutory basis for American copyright law comes directly from the United States Constitution.60 The Constitution is explicit in its goal: “to promote the Progress of Science and Useful Arts, by securing for limited Times to Authors... the exclusive Right to their... Writings...”61 In order to promote science and the useful arts,

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55. Id.
56. Id.
58. Carter, 71 F.3d at 81.
the provision grants authors a temporary monopoly over their creation. Often referred to as the “Copyright Clause,” this constitutional provision gives Congress the authority to enact a broad range of federal statutes designed to offer authors and artists incentive to create and protect their financial interests in their creations.62

The underlying motivation behind granting exclusive rights is a frequent subject of academic debate. Some scholars argue that it is possible to interpret the Constitutional Copyright Clause as not completely rejecting natural law.63 They assert that this interpretation is supported by both legislative history and policy-making interpretation.64 European intellectual property regimes tend to justify copyright, trademark, and patent law rights as protecting the creative laborer and the product of his toil.65 Such a conception is consonant with a Lockean focus on the individual aspects of creative endeavor.66 This “natural law mystique that traditionally has surrounded copyright... on the European continent” means Europe is in a better position to offer stringent protection to creators.67 By the same token, this “personality-based understanding of copyright law supports, and, in fact, requires, strong protection of those aspects of the work that reflect the author’s identity, whereas the [American] regulatory [system] is reluctant to acknowledge these rights.”68

III. Analysis: Truth and Justice

A. The Appeal of Moral Rights

A purely economic justification for copyright focuses on the efficiency of creating a marketplace for ideas to ascertain their cultural value. But the coldly calculating, mercenary nature of this approach doesn’t fully appreciate the cultural benefits of artistic endeavors.69 Intellectual property may be analogous to real property in many ways, but the act of creation is vastly

63. Id. at 500.
64. Id. at 506.
68. Birnhack, supra note 66, at 1294–95.
different and requires recognition of the personality of the author.\textsuperscript{70} Purely utilitarian protection does not make allowances for the personal risk of the artist in allowing the public into their consciousness and creating art by expressing their inner psyches, a process qualitatively different from more mundane types of production.\textsuperscript{71} Every society tends to revere its storytellers and artists. The moral rights approach carries a certain populist appeal, but what does it mean?

Moral rights in the context of copyrights can be a broad category. It is a catchall term that applies to a bundle of relationships and controls that stem from the labor involved in the creative work.\textsuperscript{72} The moral rights theory is based on a natural law conception of an author having a moral connection to his or her work over and beyond the economic incentive, which is inalienable from the author.\textsuperscript{73} The copyright statutes currently in force in France, Germany, and Italy all contain provisions that are expressly designed to protect the rights of disclosure, attribution, integrity, and withdrawal.\textsuperscript{74} While the American Copyright Act does not expressly authorize the protection of these rights, there are indirect methods for doing so, although attempts to address moral rights often do more harm than good.\textsuperscript{75} Trying to create a broader base for American copyright has actually resulted in decreased protection for the majority of authors.\textsuperscript{76} There remains an hospitable middle ground in which moral rights are recognized, while artists and the media companies that make their work widely available are still free to work together. This approach would allow copyright protection to continue to serve as a creative spur, with moral rights serving to augment this function.\textsuperscript{77}

B. Termination of Renewal

In 1976, Congress ended the confusion caused by the old copyright termination system by reviving an author's ownership interest in their creations at the end of the original statutory period regardless of "any agreement to the contrary."\textsuperscript{78} This work-around was intended to give authors

\footnotesize
\begin{itemize}
    \item \textsuperscript{73} \textit{Id.} at 359–62.
    \item \textsuperscript{74} \textit{Id.} at 359.
    \item \textsuperscript{75} \textit{Id.} at 412.
    \item \textsuperscript{76} \textit{Id.} at 399–400.
    \item \textsuperscript{77} Goldstein v. California, 412 U.S. 546, 555 (1973).
    \item \textsuperscript{78} 17 U.S.C. \textsection{} 304(c)(4)(A)(S).
\end{itemize}
greater bargaining power at the end of an initial assignment. This was largely because the consequences suffered from an "ill-advised and unprofitable grant[] that had been made before the author had a fair opportunity to appreciate the true value of his work product" could be harsh. Siegel and Shuster's compensation, even that received for the more generous grants of renewal rights, was never truly equitable when compared to the total revenue generated by the "Man of Steel." The most important time for addressing this disparity was at the time of renewal because this allowed all parties to approach the arrangement with a more realistic idea of the value inherent in the character.

This crucial opportunity was not available to Siegel and Shuster because the termination provision in the agreement, designed to prevent the consequences of poor contracting on their part, failed to accomplish its purpose. Although the termination provision was designed to tip the balance of power ever so slightly in the direction of creators, the shift was not automatic. Mindful of this failure, Judge Larson, of the Central District of California, who granted summary judgment to Siegel's heirs, thus awarding them Siegel's half of the copyright in Superman, gave unusual attention to the details of the story of the secret origin behind the creation of Superman. His opinion betrays an understandable fascination with the generative process. There are hints that he found the plight of Siegel and Shuster to be compelling on a personal level, demonstrated by his frequent references to the pair's process of giving "life and color" to the idea of the character.

Although Judge Larson seemed impressed with the romantic nature of the real life origin of Superman, he limited himself to an examination of two foundational issues that establish the scope of the termination provision: whether the termination notices were valid and, if valid, the reach of the rights that were recaptured.

At the time of the initial grant in 1938, the issue of whether Siegel and Shuster could assign the renewal term rights during the initial term was unresolved. In 1943, the Supreme Court held, in Fred Fisher Music Co. v. M. Witmark & Sons, that when an initial assignment was for all rights pertaining
to a work, it would include the renewal period and all renewal rights were lost for the author. Thus, in 1966, when the renewal rights to Superman should have been subject to renegotiation, the creators of Superman were not able to bargain for a more amenable arrangement that reflected the true market value of the property due to the prior assignment of all rights to DC. This underscores the disparate position of the bargaining parties in the creative marketplace. At the time of the initial publication, no one could have accurately predicted the popularity of the character. In some ways, Action Comics, Vol. 1 was published as a “pure accident,” and neither the creators of Superman nor any of the editorial staff had any real way of knowing the resonance the character would achieve and the hold it would take on the popular imagination.

Despite the cutthroat nature of the business, comic books are an art form and the works of writers and artists are “original works of authorship” fixed in a tangible medium of expression and are as worthy of copyright protection as any other media. Comic books do provide a unique form of expression because they occupy a hybrid place between “pictorial, graphic, and sculptural works” and “literary works.” Although comic book stories are pictorial, they are typically drawn from scripts that an author writes and exist as pure objects of collaboration. They operate much like musical compositions in that the script and art are “inseparable or interdependent parts.” The collaborative nature of the comic book creation process makes apportioning ownership interests problematic, even before publishers like DC enter the equation. The publisher takes all the financial risks by investing in a physical print run of the work, while the true value of the character may be independent of the particular comic in which he appears. The nascent comic book industry was heavily skewed toward the powerful publishers, leaving creators like Siegel and Shuster without any meaningful bargaining power. If the idea was for the creators to sign their rights away, as part of

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89. JONES, supra note 3, at 141.
90. DANIELS, supra note 17, at 35.
94. See DANIELS, supra note 17, at 15, 18.
96. Gaiman v. McFarlane, 360 F.3d 644, 658–59 (7th Cir. 2004).
98. See JONES, supra note 3, at 125.
standard operating procedure, and accept a page by page rate, renegotiating compensation when the value of the property was clearer, then the *Fred Fisher* case was disastrous for creators like Siegel and Shuster.99

The ambiguity in the 1976 Copyright Act requirements calls for a certain fastidiousness in examining the finer points of Siegel and Shuster’s creative timeline.100 Under the Act, the assignment of rights to works created and assigned prior to 1978 can be terminated any time within the five-year window beginning “exactly 56 years from the date copyright was originally secured.”101 For example, if a copyright was secured on April 18, 1938, the five-year termination window opened on April 18, 1994.102 But even if the heirs miss this initial window, a second five-year window opens 75 years after the date the initial copyright was secured, as long as the work was in its renewal term in 1998.103 An exception to this exists for works for hire, because they fall outside of the scope of the termination provisions.104 Not coincidentally, the vast majority of modern comic books are published on a work-for-hire basis and the current state of the industry is heavily skewed toward large corporate rights holders like DC and Marvel comics.105

Judge Larson’s decision zeroes in on the threshold issue of the effective date of the Siegel’s termination.106 The Siegel’s counsel created a date of termination that occurred before the publication of *Action Comics*, Vol. 1, but after DC had already published several advertisements for the upcoming book.107 Since the advertisements were printed in DC’s copyrighted books, it retained ownership in the elements of the character present in those advertisements.108 Judge Larson was somewhat glib in his assessment of the limits of the right to exploit those elements, stating specifically that “defendants may continue to exploit the image of a person with extraordinary strength who wears a black and white leotard and cape.”109 Even though he was careful to delineate the relatively useless extent of its implications, Judge Larson nevertheless refused to blur the line or stray from the formal

99. Chandra, supra note 47, at 256.
100. *Siegel*, 542 F. Supp. 2d at 1117.
102. Id.
103. Id.
104. Marvel Characters, Inc. v. Simon, 310 F.3d 280, 291 (2d Cir. 2002).
107. Id. at 1118.
108. Id. at 1126.
109. Id. 
requirements of termination. The Siegels were only able to terminate the assignment of the elements of the Superman character that surfaced in *Action Comics*, Vol. 1. They could not recapture ownership of subsequent developments of the series, like the name of Superman’s home planet of Krypton and the characters of Lex Luthor and Superman’s pal Jimmy Olsen. This created a bright line temporal distinction between elements of the character published by DC before and after the effectiveness window, and therefore outside the reach of the Siegel heirs. In addition to the advertising material, the publisher also retained an interest in several aspects of the character that were not present in his first appearance since they operate as derivative works. Characters and storytelling devices that would later become integral to the Superman milieu did not appear in the first issue. Notable absences include such villainous mainstays as Lex Luthor, Brainiac, and General Zod, as well as supporting characters like Jimmy Olsen and Perry White, not to mention Kryptonite or the Planet Krypton itself. Also, the original level of Superman’s abilities was far below what they would eventually become since he could not fly, was less than invulnerable, and the particulars of his origin remained largely unexplained. All these aspects of the character came later, a natural result of the extended serialized storytelling of comic books that have published continuously for eight decades. These later embellishments take the form of derivative works. The recapture of only some interests in the Superman character by Siegel’s heirs created a new issue of how those elements owned by the heirs and those owned by DC will interact. Another unresolved issue is to what extent the copyright interest recaptured by the Siegel heirs applies to the modern Superman character.

DC took the position that even if the termination notice was within the requisite timeframe, the copyrightable material contained in *Action Comics*, Vol. 1, are unaffected by the termination notice because those portions belong exclusively to them as “works for hire.” Since creative expressions that fall under a work-for-hire arrangement are exempt from the termination provisions of the 1976 Copyright Act, DC argued that “certain material found

110. *See id.*
111. *Id.* at 1145.
112. *See id.* at 1145, 1111.
113. *Id.* at 1121.
114. *Id.* at 1142–43.
116. *Id.*
117. *See DANIELS, supra* note 17, 18–19.
120. *Id.* at 1127.
in the comic book was created by Detective Comics’ in-house employees, or that the material was added to the underlying Superman material by Siegel and Shuster at the publisher’s direction.”121 DC’s contention was based on the fact that it requested that the comic strip be reformatted to a comic book. It argued that the change required additional materials that fundamentally transformed the work Siegel and Shuster created and, thus, that the changes were within the scope of the work-for-hire exception.122 Judge Larson eschewed the work-for-hire argument and agreed with the Second Circuit’s observation that “Superman and his miraculous powers were completely developed long before the employment relationship was instituted.”123 This analysis turned on the notion that Siegel and Shuster’s recalibration of the story, undertaken on DC’s orders, was not sufficiently transformative of the underlying creative material.124 Therefore, the changes did not overcome the assertion that portions undertaken as a work for hire were derivative works of the copyrightable material that the pair had already created.125 As such, Judge Larson clearly asserted that “the underlying work remain[s] the property of the creators.”126

Under this analysis, the Siegel heirs could successfully terminate the original grant of ownership of Superman, including all elements of the character that appeared in Action Comics, Vol. 1. The decision was not an unqualified success for the Siegels. Even if its exact parameters remain undefined, the decision grants the Siegel heirs a tangible right to some long-standing elements of the Superman mythos including “Superman’s name, his alter ego, his compatriots, his origins, his mission to serve as a champion of the oppressed, [and] his heroic abilities in general,” and, more particularly:

the entire storyline from Action Comics, Vol. 1, Superman’s distinctive blue leotard (complete with its inverted triangular crest across the chest with a red “S” on a yellow background), a red cape and boots, and his superhuman ability to leap tall buildings, repel bullets, and run faster than a locomotive.127

121. Id.
122. Id.
123. Id. (quoting Siegel v. National Periodical Publications, Inc., 508 F.2d 909, 914 (2d Cir. 1974)).
124. Id.
125. Id. at 1129.
126. 1-5 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT §5.03[B][1][b][c] at 7 n.92 (Matthew Bender & Co., Inc. 2009) (1978).
127. Siegel, 542 F. Supp. 2d at 1126.
While not expressly based on Siegel's moral right, the decision nevertheless provides an important step in that direction and supplies a useful dimension to the debate over moral rights' place in American copyright law.

While the Siegel decision is far from the death knell of the economic conception of ownership rights, it does represent a heretofore unprecedented willingness to factor natural moral rights concerns into the equation. A purely economic analysis of the case would have focused solely upon the contractual obligations created by the parties as they negotiated for ownership of the property.

Jerry Siegel provides a compelling example of the anger and bitterness that results when a creator is divorced from his creation. A quote from his obituary highlights his ever-increasing sense of alienation: "I can’t stand to look at a Superman comic book. It makes me physically ill. I love Superman, and yet to me he has become an alien thing." The pathos of an old man long denied access to his creation has become the constantly recurring theme of Jerry Siegel's story. One victory in the long struggle involved the recognition of Siegel's role in Superman's creation. This moral right of attribution is typically hard to establish with works for hire, making Siegel's recognition unusual. Siegel, as part of the 1974 deal with DC, won this right long after Shuster chose to stop litigating the matter. This was clearly of overwhelming importance to Siegel since he was willing to delay a deal that would have provided remuneration at a time when he was in serious financial trouble. Siegel insisted that every Superman product must clearly state "Superman Created by Jerry Siegel and Joe Shuster." This recognition of the inventors of the "Man of Steel" coincides neatly with the moral right of paternity, and Siegel's advocates knowingly referenced the European standard.

To be sure, Judge Larson's opinion considers the economic implications of the bargaining process and the limitations on the rights recaptured by the termination process. But the tone of the decision betrays his admiration for the writer and a tangible amount of sympathy for his plight, especially in the conclusory paragraph: "After seventy years, Jerome Siegel's heirs regain

129. See JONES, supra note 3, at 336.
131. JONES, supra note 3, at 321.
132. Id. at 316.
133. Id. at 320.
134. Id.
what he granted so long ago—the copyright in the Superman material that was published in *Action Comics*, Vol. 1."  \(^{136}\)

**IV. Proposal: The American Way?**

Judge Larson delivered an elegant solution to a long-standing problem. His order for summary judgment, granting the Siegel heirs an ownership interest in Superman, was an important step toward including moral rights of authors to their work into the calculus of intellectual property. He did so by slavishly parsing a complicated thicket of formal requirements, making this decision a victory for proponents of a more balanced regime.

Read side by side with the results of a factually similar case, the *Siegel* decision signifies a judicial soft spot for creators who traded away the rights to characters who would later prove to be valuable. Like Superman, the character of Captain America has pitted creator against publisher in a battle over ownership. \(^{137}\) With facts that closely resemble *Siegel*, the Second Circuit ruled that Captain America creator Joseph Simon successfully terminated a settlement agreement from 1969, in which he stated that he was operating in a work for hire capacity when he created the character for Marvel Comics. \(^{138}\) That case had several parallels with the Siegel litigation. Both authors had created enduring comic book characters and assigned the rights to the publishers. Simon, like Siegel, became dissatisfied with the state of affairs and took to the courts in the 1960s when the first twenty-eight-year copyright term approached its end. \(^{139}\) He claimed that he owned the copyright in the Captain America character. \(^{140}\) Marvel's argument, prefiguring DC's later claim, was that Simon conceived Captain America as work for hire and, therefore, held no claim to the copyright. \(^{141}\) The parties settled the matter on the conditions that Simon acknowledge that the works had been done for-hire and assign any existing rights to Marvel Comics. \(^{142}\) Simon then attempted to file a termination of transfer, premised on the claim that the settlement agreement was an "agreement to the contrary," which is expressly contemplated in the Copyright Act. \(^{143}\) Simon convinced the court that "any other construction of [the termination of transfer provision] would thwart the

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136. *Id.* at 1145.
137. Marvel Characters, Inc. v. Simon, 310 F.3d 280 (2d Cir. 2002).
138. *Id.* at 292.
140. *Id.*
141. *Id.*
142. *Id.*
143. *Id.*
clear legislative purpose and intent of the statute.144 Simon was then free to raise claims of authorship in the termination action.145

In a case between a creator and a giant corporate publisher, the popular sense of justice should influence the court to consider the importance of authorship in determining ownership interest. There is something morally compelling about authors fighting for the fruits of their labors.146 Both Simon and Siegel address the scope of the termination right granted by the 1976 Copyright Act, and both cases affirm the moral rights of comic book creators in their characters. The termination right does not apply to work-for-hire material, but the implications of such a construction are tantalizing. In a world where films licensed from comic books routinely top the movie charts, the copyright interest in four-color creations is increasing in value every summer, when blockbuster superhero films typically enter wide release. The Simon and Siegel cases, taken together, evince that the circuit courts are taking an increasingly expansive view of creators’ rights. This could have potentially far-reaching effects. Currently, the major comic book companies employ writers and artists largely on a work-for-hire basis, although there are less restrictive contracts that allow creators to retain ownership of their characters.147 The economics of the comic book publishing industry means that the largest publishers require creators to operate almost exclusively under work-for-hire contracts because the publishers take most of the financial risk in producing a book.148 However, the court in Simon was willing to discard even an explicit agreement to work for hire.149 In Siegel, the court applied an extremely narrow reading of the previous agreements between the parties, leaving room for the authors to later recapture their rights to work created before their working relationship with the publisher began.150 In the aggregate, this may signal an increase in judicial recognition of moral rights.

Critics of the Siegel decision may feel dissatisfaction with the degree to which it constrains the ability of publishers to efficiently exploit the property that they paid for as works for hire. Movie studios and other purveyors of

144. Marvel Characters, Inc. v. Simon, 310 F.3d 280, 290 (2d Cir. 2002).
145. Emerson, supra note 139, at 222.
146. This is evidenced by the fact that the drama surrounding Siegel and Shuster has been the subject of not only historical accounts, like MEN OF TOMORROW (JONES, supra note 3), but has proved fertile ground for fictional explanation. See MICHAEL CHABON, THE AMAZING ADVENTURES OF KAVALIER AND KLAY (2000); BRAD MELTZER, THE BOOK OF FATE (2006).
149. Marvel Characters, Inc. v. Simon, 310 F.3d 280, 292 (2d Cir. 2002).
media tend to protect their own interests, and may become hesitant to publish characters created by litigious creators. On a purely economic level, there may be an overall deleterious effect on the breadth of works being published, as publishers become hesitant about publishing new works because they fear that case law and the Copyright Act will undermine their ability to assert control over the property indefinitely, even if they contract for such control. Nevertheless, the high value of comic book characters will keep publishers from becoming too deterred.

The Siegel decision may have vindicated Jerry Siegel’s rights as a creator, but the exact nature of what his heirs secured for themselves remains unclear. Due to the unique nature of serial storytelling, the character has changed a great deal from his initial 1938 appearance in Action Comics, Vol. 1, to the contemporary manifestation. The degree to which the Siegels can exert influence over the modern character remains unclear. While they “own” half the character, it seems unlikely that they could exert any meaningful editorial control over him or access overseas profits (which would undoubtedly be phenomenal for an internationally known property like Superman). Even apportioning the profits from the spate of movies, comics, television shows, and other media since 1999 will prove to be a monumental and contentious undertaking.

Furthermore, this decision is only part of ongoing litigation and, therefore, the role it will ultimately play remains to be seen. Settlement is still a likely resolution and, if past transactions are any indication, there could be serious concessions by the Siegel heirs to their ownership rights. Nevertheless, Siegel’s heirs carved out a victory. Subsequent decisions in this case will deal with movie licenses and the fair market value of what Siegel sold, thus clarifying the value of what the heirs recaptured.

There are also a number of issues whose significance is not yet clear. There is a parallel proceeding with regard to the character of Superboy, the youthful incarnation of the character that proceeds apace. The role of the Shuster heirs is equally uncertain. The Superman trademark is another potential area of contention and will have a huge impact on the eventual outcome. The literary value of Superman is one thing, but the distinctive


visual elements of the character go a great distance towards creating the character's high value.\textsuperscript{157} Doctrinally distinct, the trademark issues will require an entirely different consideration.

\section*{V. Conclusion}

The battle over the rights to Superman has raged for the better part of a century. It has spanned generations. It is fitting that such an iconic character serves as the locus around which competing copyright protection interests have clashed because it provided a colorful framework for the serious debate over the issue. DC takes the role of a Lex Luthor-ian stand-in for the stereotypical corporate rights holder, who might desire world domination but is willing to settle for tighter intellectual property protection. Siegel embodies the qualities of tenacity and confidence in individual creative vision that inhere in romantic conceptions of authorship. The unfairness of the dealings between the two parties is as salient a demonstration of the unequal bargaining power between large corporations and individual authors as there could be. The litigation boils down to a level of iconic abstraction worthy of its own comic book.

The \textit{Siegel} decision granting summary judgment and awarding a significant portion of the copyright interest in the Superman character to the heirs of its creator is not a complete validation of moral rights, nor is it a purely utilitarian rejection of them. Rather, the decision demonstrates the courts' willingness to consider some elements of the moral rights conception, even as they grapple with the implications of the uneasy fit within the larger American copyright arena. This decision necessarily focused on a number of factually specific intricacies, but the case still provides a handy rubric for considering the appeal of moral rights and demonstrates the subtlety of their influence. In vindicating the Siegel heirs' right to terminate their renewal notice, despite clear and convincing language to the contrary, this case underscores the intuitive appeal of acknowledging the social appreciation for personal genius and the mystique of the creator.

\footnotetext{157. Trexler, \textit{supra} note 153.}
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