

THE ADVENTURES OF ‘SUPERMAN’: A NARRATIVE WORTH MEDIATING

Jeffrey Zeman

I. INTRODUCTION

Summer, 2013. The world will believe, again, a man can fly. Most likely, anyway. Maybe. Fingers crossed.

The rights to Superman and his stories are the subject of a long-developing and heated dispute between publisher DC Comics (“DC”) and the estate of Jerry Siegel, co-creator of the iconic character.¹ While a much-talked-about reboot of the movie franchise enters preproduction, the latest round of lawsuits involves DC suing the Siegel family’s attorney.² The publisher claims attorney Marc Toberoff has wrongfully interfered with “contractual rights and other interests” by advising the families of Siegel and his co-creator, Joe Schuster, to reclaim the copyright previously assigned to DC, pursuant to the termination provisions of the Copyright Act of 1979.³ Toberoff has already failed in a motion to dismiss under California’s anti-SLAPP law,⁴ but continued animosity between these parties is in the interest of neither.

The history of the battle over Superman’s ownership has played out over the decades like a movie itself: when they were just teenagers, Jerry Siegel and Joe Shuster created the original story and artwork for an idea they called “Superman.” Jerry did the writing, Joe the artwork,⁵ and Jerry’s future wife, Joanne, modeled for Superman’s love interest, Lois Lane.⁶ In 1938, Siegel and Shuster assigned the rights to their creation to DC, in order to gain

¹ Siegel v. Warner Bros. Entm’t, Inc., 542 F. Supp. 2d 1098, 1104 (C.D. Cal. 2008).

² Michael Cieply & Brook Barnes, *Warner Brothers Sues ‘Superman’ Lawyer*, N.Y. TIMES, (May 14, 2010), available at <http://www.nytimes.com/2010/05/15/business/media/15warner.html>.

³ Matthew Belloni, *Superman Attorney Lawsuit: Smear Campaign or Savvy Strategy?*, THR, Esq. (Dec. 21, 2010), <http://www.hollywoodreporter.com/blogs/thr-esq/superman-attorney-law-suit-smear-campaign-63896>.

⁴ Eriq Gardner, *Warner Bros. Wins Battle in Round with Superman Lawyer*, THR, Esq. (Oct. 26, 2011), <http://www.hollywoodreporter.com/thr-esq/superman-lawsuit-warner-bros-253709>; Matthew Belloni, *Can the ‘Superman’ Lawyer SLAPP Away a Warner Bros. Lawsuit?*, THR, Esq. (Aug. 17, 2010), <http://www.hollywoodreporter.com/blogs/thr-esq/superman-lawyer-slapp-warner-bros-64178>.

⁵ *Warner Bros. Entm’t, Inc.*, 542 F. Supp. 2d 1098.

⁶ Bruce Weber, *Joanne Siegel, the Model for Lois Lane, Dies at 93*, N.Y. TIMES, (Feb. 15, 2011), available at <http://www.nytimes.com/2011/02/16/arts/16siegel.html>.

a wide audience with the help of the large publisher.⁷ But, consequently, they lost all future interest in the character and were left all but penniless while the character became a massive success for its owner.⁸ After enactment of the 1976 Copyright Act, the balance of power shifted back in the favor of the creators, who now had the power to terminate the assignment, and take back all the rights and interests they transferred before they had any idea what Superman would be worth.⁹ In the arc of this narrative, however, that power seems to have proven corrupting: leading the Siegel and Shuster estates to Toberoff, who both represents the families of the creators, and also owns and operates a Hollywood production company specializing in the brokerage of newly terminated copyright assignments.¹⁰ The final act of this story presents the Superman heirs with the opportunity to decide whether to renegotiate a new deal with DC Comics, or end the relationship and take their property elsewhere.¹¹

This note will illustrate that Congress has effectively created a balance of power between creators and distributors with the termination clause of the Copyright Act; a balance which permits the parties to reexamine their history together and possibly revise a new, more agreeable story for their future. To understand the position that the parties are in today, an examination of the story thus far is first in order; its telling will begin in Part II, with the quaint beginnings of Superman himself, including the development of the original character, art and story, and the subsequent assignment of interest in the character to DC Comics for a paltry sum of \$130.¹²

The discussion will then focus, in Part III, on the effect that the Copyright Act of 1976 and the “Termination Clause” therein has upon works similar to Superman, where a lone creator is at odds with a large publisher or distributor. The Copyright Act itself was enacted to facilitate the goal of promoting progress in the sci-

⁷ *Warner Bros. Entm't, Inc.*, 542 F. Supp. 2d at 1107.

⁸ Press Release, Jerry Siegel, Superman's Originator Puts 'Curse' On Superman Movie (Oct. 1975), available at <http://archives.tcj.com/275/siegel1975.pdf>.

⁹ *Warner Bros. Entm't, Inc.*, 542 F. Supp. 2d at 1113; Michael J. Bales, *Note and Recent Development: The Grapes of Wrathful Heirs: Terminations of Transfers of Copyright and "Agreements to the Contrary"*, 27 *CARDOZO ARTS & ENT. L.J.* 663 (2010).

¹⁰ Eriq Gardner, *The Man Hollywood Loves to Hate*, *IP LAW & BUSINESS*, 46 (Oct. 2008), available at <http://www.iplawandbusiness-digital.com/iplawandbusiness/sample/?u1=KLAWCA#pg46>; Matt Belloni, *Kirby Heirs Seeking Bigger Chunk of the Marvel Universe*, *THR, ESQ.* (Sept. 21, 2009), <http://www.hollywoodreporter.com/blogs/thr-esq/kirby-heirs-seeking-bigger-chunk-63343>.

¹¹ *Warner Bros. Entm't, Inc.*, 542 F. Supp. 2d at 1104.

¹² Siegel, *supra* note 8.

ences and arts, as set forth in Article I, Section 8 of the Constitution.¹³ With the 1976 Act, Congress set out to achieve that goal by protecting would-be creators from those that would exploit their creations, by guaranteeing that creators would have the opportunity to reclaim their works with the benefit of hindsight, should the work prove to be successful, and to renegotiate the terms of the assignment, should they choose.¹⁴

Next, in Part IV, an analysis of the application of the Termination power by the Siegel estate, and the resulting conflict of interest arising from the force with which the party has chosen to wield that power. After establishing their rights to the character and story elements of Superman that Siegel and Shuster created before the introduction of any "Work for Hire" agreement with DC Comics, the Siegel party has chosen not to settle for a new assignment contract with DC. This choice has led to the recent lawsuits, initiated by both sides, which created what seems to be an irreparable rift, with consequences for the future of the character and those who would benefit—creators, distributors and fans alike.

Finally, in Part V, this Note will attempt to illustrate that the position in which the Copyright Act puts parties subject to termination lends itself to the strengths of a form of alternative dispute resolution known as Narrative Mediation. Narrative mediation focuses on the parties' stories, wherein a mediator helps the parties reflect upon all that has come before, and breaks down the incongruities between each party's versions in order to construct a more cohesive narrative moving forward.¹⁵ Of late, Toberoff has seemed the villain: driving the creation of the final act of the seventy-plus year narrative that has developed between Superman's creators and publisher—pushing a scorched-earth policy upon the collaborative effort that resulted in the iconic character the world recognizes today.¹⁶ But perhaps a neutral third party can save the day: a mediator would be better suited to help the parties figure out, first, who deserves what in light of the parties' history together; second, how a continued relationship could benefit everyone; and third, how to make that relationship workable in the future. It is still not too late for the parties to take their story in another direction, to reconcile Superman's sordid past with the possibility of growth and

¹³ U.S. CONST. art. I, § 8, cl. 8.

¹⁴ Bales, *supra* note 9, at 666.

¹⁵ Christopher Harper, *Comment: Mediator as Peacemaker: The Case for Activist Transformative-Narrative Mediation*, 2006 J. DISP. RESOL. 595, 597 (2006).

¹⁶ Gardner, *supra* note 11, at 46.

progress in the future—the creation of a third and final act that can benefit creator, distributor and fans alike.

II. “TRUTH”: SUPERMAN’S CREATION AND SUBSEQUENT ALIENATION

It took several tries, but Jerry Siegel and Joe Shuster finally created a hit.¹⁷ They knew it—only no one else did.¹⁸ Siegel had imagined the super-powered hero in a flash of brilliance one sleepless summer night in 1934, while he and Shuster were high schoolers in Cleveland, Ohio.¹⁹ For several years the duo shopped around the art and story they had created together, but got zero bites from any publishers.²⁰ So when Detective Comics²¹ (“DC”) gave them the opportunity to have their character featured in the debut issue of *Action Comics* in March 1938, Siegel and Shuster put their best work together.²² “Detective’s only concern was that there would be panels sufficient for thirteen complete pages[.]” According to Shuster:²³

¹⁷ The Superman at issue here—the one we know today—was actually the third incarnation of the character Siegel and Shuster originally conceived. *Siegel v. Warner Bros. Entm’t, Inc.*, 542 F. Supp. 2d 1098, 1104 (C.D. Cal. 2008). The first was a bald super-villain who could read minds; the second was heroic, but a mere strongman, sans superpowers. *Id.* at 1102-04.

¹⁸ *Id.* at 1105.

¹⁹ *Id.* at 1104; Siegel, *supra* note 8.

²⁰ *Warner Bros. Entm’t, Inc.*, 542 F. Supp. 2d at 1104-05.

²¹ “The shorthand of a publication history that included partnerships, legal wrangling and acquisitions, DC began as National Allied Publications debuting with the tabloid-sized ‘New Fun: The Big Comic Magazine’ in 1935. The company’s second title, ‘New Comics’ #1 was published the same year, smaller and a size that became the standard for comics during the “Golden Age” of the ‘30s through the mid-50s. ‘New Comics’ became ‘Adventure Comics,’ which enjoyed a run through issue #503 in 1983 and the title was recently revived. A third title, “Detective Comics,” appeared in 1937 and featured detective tales until the introduction of The Batman in issue #27 in 1939.

“By then, Detective Comics Inc. had already merged with National, which had also added Action Comics, whose #1 issue had introduced Superman in 1938, and of course he and Batman earned their own titles as well. With the National Allied Publications merger, the company became National Comics and in 1944 took on All-American Publications. So now, with plenty of superheroes to its name, the comic book company became National Periodical Publications but used the logo ‘Superman-DC’ and became known as DC Comics as a nickname, eventually taking it on as an official name.”

Darryl Morden, *Secret Origin: The Story of DC Comics’ DVD Coming in November*, EXAMINER.COM LOS ANGELES (Aug. 20, 2010), <http://www.examiner.com/la-in-los-angeles/secret-origin-the-story-of-dc-comics-dvd-coming-november#ixzz1Bd77ug67>.

²² *Warner Bros. Entm’t, Inc.*, 542 F. Supp. 2d at 1106-07.

²³ *Id.*

Jerry told me that Detective preferred having eight panels per page but in our judgment this would hurt the property. I specifically refer to the very large panel appearing on what would be page 9 of the thirteen page release. We did not want to alter this because of its dramatic effect. Accordingly, on this page but six panels appeared.²⁴

Of those first thirteen comic book pages, published in *Action Comics No. 1*, the majority of panels were the product of Siegel and Shuster's own ambition, from back in 1934; those that weren't were created merely to meet DC's eight-panel-per-page requirement, using dialogue Siegel had already written.²⁵ The material carried around since then was comprised largely of newspaper-style strips, and established the predominant elements of Superman's story: a baby sent to Earth on a spaceship to escape a dying planet; superhuman powers derived from his home planet's heritage (including: "[s]uperhuman strength; the ability to leap 1/8th of a mile, hurdle a twenty-story building, and run faster than an express train; and nothing less than a bursting shell could penetrate his skin"²⁶); use of those powers to combat injustice; the big-city setting; the secret identity of Clark Kent, nebbishy newspaper reporter; the use of the newsroom to gather word of wrongdoing; Lois Lane and the conflict arising from her relationships with both Clark Kent and Superman.²⁷ The art for Lois Lane, in fact, was based on a model named Joanne Carter, eventually Joanne Siegel—Jerry Siegel's future wife; she was also just a teenager working her first modeling gig, in service of the creation of the very first Superman comic strips.²⁸

Detective Comics, eventually DC Comics, today a subsidiary of Time Warner, came upon the Superman strips while probing other publishers' rejected pitches for stories to include in *Action Comics, No. 1*.²⁹ As it happened, Siegel and Shuster were already working for DC at that time, hired to write and draw other characters they had created,³⁰ including "Slam Bradley" and "The Spy."³¹ When DC wanted Superman, they went to work cutting and past-

²⁴ *Id.*

²⁵ *Id.* at 1106.

²⁶ *Id.* at 1104.

²⁷ *Id.*; *Action Comics, No. 1*, 1-13.

²⁸ Bruce Weber, *Joanne Siegel, the Model for Lois Lane, Dies at 93*, N.Y. TIMES (Feb. 15, 2011), available at <http://www.nytimes.com/2011/02/16/arts/16siegel.html>.

²⁹ *Warner Bros. Entm't, Inc.*, 542 F. Supp. 2d at 1106.

³⁰ *Siegel v. Time Warner Inc.*, 496 F. Supp. 2d 1111, 1113-14 (C.D. Cal. 2007).

³¹ *Siegel v. National Periodical Publ'ns, Inc.*, 364 F. Supp. 1032, 1034 (S.D.N.Y. 1973).

ing their existing strips into comic book format. The abnormally large panel from page 9 would eventually be appropriated by Detective Comics as the template for the cover of *Action Comics, No. 1*, Superman's debut to the world.³² The iconic character would go on to garner fame and admiration the world over,³³ while Siegel and Shuster were paid only \$130—ten dollars a page for thirteen pages—plus the assignment to DC of “all [the] good will attached . . . and exclusive right[s]“ to Superman ”to have and hold forever.”³⁴ This was the beginning of the end.

It wasn't long before Superman's creators realized they had a runaway hit on their hands. The problem was that hit wasn't so much in their hands as it was in the hands of Detective Comics. In 1947, Siegel and Shuster brought their first lawsuit against DC, claiming the assignment of the rights to Superman was “void for lack of mutuality and consideration.”³⁵ The parties eventually settled—Siegel and Shuster were paid \$94,000.00 each in exchange for alienating their rights solely to DC and signing an order stipulating as such.³⁶ This was just the first of several attempts to reclaim their creation. Throughout the next several decades, Superman's creators would attempt to do battle with DC Comics, to little avail, as they were hardly more than a pest to the giant corporation.

³² *Action Comics*, *supra* note 27, Cover, 9. A first edition copy of the rare comic book sold in March, 2010 for \$1.5 million. CNN Wire Staff, *Rare Comic of Superman Debut Fetches \$1.5 million*, CNN (Mar. 30, 2010), available at <http://www.cnn.com/2010/SHOWBIZ/03/30/superman.comic/index.html>.

³³ “The Superman comic became an instant success, and Superman's popularity continues to endure to this day as his depiction has been transferred to varying media formats.” *Warner Bros. Entm't, Inc.*, 542 F. Supp. 2d at 1110. The value of the first publication of the Character, as noted above, is only one indication of the great success the character has achieved since his inception. The character and his accompanying stories have spawned countless comics, numerous television programs (including the currently-airing *Smallville*, wrapping up its tenth and final season) and five big-screen pictures (the most recent of which grossed \$391,120,000 in worldwide box-office alone), with a sixth in production. *Box Office History for Superman Movies*, THE NUMBERS, available at <http://www.the-numbers.com/movies/series/Superman.php> (last visited Jan. 25, 2012). This isn't to mention the myriad merchandizing deals bearing the Superman logo and the likeness of the character, ranging from t-shirts to lunchboxes, and action figures to steering-wheel covers.

³⁴ Gardner, *supra* note 10 at 49; Sean McGilvray, *Note: Judicial Kryptonite?: Superman and the Consideration of Moral Rights in American Copyright*, 32 HASTINGS COMM. & ENT. L.J. 319, 322 (2010); *Warner Bros. Entm't, Inc.*, 542 F. Supp. 2d at 1107. To be more specific, that \$130 payment was \$130 total, as in \$5 per page for Siegel and Shuster each. See also Siegel, *supra* note 8.

³⁵ *Warner Bros. Entm't, Inc.*, 542 F. Supp. 2d at 1112; See also Gardner, *supra* note 10, at 46, 49; McGilvray, *supra* note 34, at 323.

³⁶ McGilvray, *supra* note 34, at 323. \$94,000 in 1947 is equivalent to just shy of \$900,000 today.

At the time of Superman's creation, and subsequent consignment to Detective Comics, the Copyright Act of 1909 governed the rights of creators and assignees. Under the 1909 Act, "an author was entitled to a copyright in his work for twenty-eight years from the date of its publication. Upon the expiration of this initial twenty-eight year term, the author could renew the copyright for a second twenty-eight year period"³⁷ When the date of expiration of the original copyright term arrived in 1966, Siegel, Shuster and DC Comics returned to court in the Southern District of New York.³⁸ However Siegel and Shuster's efforts were again thwarted—the court held in their 1973 ruling that they had sold the renewal rights to the Superman character in the original assignment to Detective Comics in 1938.³⁹

In the years following Superman's consignment, DC Comics proved impervious to any threat to its control over the character (and all of the lucrative properties derived therefrom) that came through the courts. With the law on its side, the publisher had but one Kryptonite: negative sentiment from the press and the public. In 1975, DC and its parent company, Warner Bros., were in the middle of prepping the production of *Superman: The Movie*, to be released sometime in the next several years.⁴⁰ That same year, Siegel put out a press release entitled "SUPERMAN'S CREATOR PUTS 'CURSE' ON SUPERMAN MOVIE."⁴¹ In Siegel's own words, "I, Jerry Siegel, the co-originator of Superman, put a curse on the Superman movie. I hope it super-bombs."⁴² The re-

³⁷ *Warner Bros. Entm't, Inc.*, 542 F. Supp. 2d at 1107.

³⁸ *Id.* at 1113; McGilvray, *supra* note 34, at 323.

³⁹ *See Siegel v. National Periodical Publications, Inc.*, 364 F. Supp. 1032, 1038 (S.D.N.Y. 1973).

⁴⁰ McGilvray, *supra*, note 34; *Show Business: Here Comes Superman!!!*, TIME (Nov. 27, 1978), available at <http://www.time.com/time/magazine/article/0,9171,916487-1,00.html> ("In May 1974, at 5:30 in the afternoon, cocktail time at the Cannes Film Festival, an airplane flew over the strip of beach trailing a long banner announcing a new movie called Superman."). The movie would ultimately be released in 1978, starring Marlon Brando, Gene Hackman, and Christopher Reeve, in the title role. *Superman: The Movie* (Warner Bros 1978). Funny story in regard to the pains being taken to get this movie into production, as to Brando: the actor, who played Superman's father, Jor-El, wanted his character to be portrayed as a green suitcase; later, he suggested Kryptonians should look like floating bagels. *Show Business, supra* note 40. Richard Donner, the film's director, aptly interjected that, "all the kids, including Brando's own, who had read the comic books would know that Superman's father was not a bagel. Brando admitted the logic of that and decided to play Jor-El as Marlon Brando." *Id.*

⁴¹ *Warner Bros. Entm't, Inc.*, 542 F. Supp. 2d at 1113; Michael Catron, *Jerry Siegel's 1975 Press Release*, THE COMICS JOURNAL (Oct. 1975), available at <http://archives.tcj.com/275/siegel1975.pdf>.

⁴² Siegel, *supra* note 8.

lease described the mistreatment Siegel and his partner had received at the hands of Jack Liebowitz, a Board member at Warner Communications, the inequity in their earnings from the Superman assignment compared to those of DC and its directors, and the poor state of affairs in which the writing duo found themselves as a result. Bowing to the ever-growing negative publicity,⁴³ DC agreed to make voluntary concessions to the desires of Superman's creators in a new deal, in which Siegel and Shuster would concede to the ruling of the court in 1973, stipulating that they had sold the rights to Superman entirely to DC Comics, and that they had also sold any future interest in the character, including the renewal rights.⁴⁴ In return, DC would give Siegel and Shuster a modest annual compensation, medical benefits (the same as their employees) and credits on all subsequent comics, books, movies, etc. as "The Creators of Superman."

Perhaps this was a deal from which all parties benefited.⁴⁵ Nevertheless, the power was clearly still in the hands of DC Comics, who considered the arrangement a charitable donation,⁴⁶ emphasizing its "voluntary" nature: "Warner Communications, Inc. noted that its obligation to make such voluntary payments would cease if either Siegel or Shuster (or their representatives) sued 'asserting any right, title or interest in the 'Superman' . . . copyright.'"⁴⁷ The creators of the world's first superhero had finally gained some recognition, but it would take more than a "curse" to put them back in a position of power necessary to battle the publishing giant.

III. "JUSTICE": DC'S CONTROL OVER SUPERMAN INTERRUPTED BY THE TERMINATION CLAUSE OF THE COPYRIGHT ACT OF 1976

A brief history of DC Comics, as the adversary of Jerry Siegel and Joe Shuster in the proceedings examined here: when Siegel

⁴³ The New York Times had also printed an article chronicling the destitute states of affairs surrounding Siegel and Shuster. See Mary Breasted, *Superman's Creators, Nearly Destitute, Invoke His Spirit*, N.Y. TIMES, NOV. 22, 1975, at 62; Siegel, *supra* note 1, at 1112-13.

⁴⁴ See *Warner Bros. Entm't, Inc.*, 542 F. Supp. 2d at 1113.

⁴⁵ See Catron, *supra* note 41, at 2.

⁴⁶ "There is no legal obligation," Mr. Emmett [executive vice-president of Warner Communications, Inc.] said, "but I sure feel that there is a moral obligation on our part." *Warner Bros. Entm't, Inc.*, 542 F. Supp. 2d, at 1113.

⁴⁷ *Warner Bros. Entm't, Inc.*, 542 F. Supp. 2d, at 1113.

and Shuster first assigned the Superman rights for \$130, the publisher was called National Allied Publications.⁴⁸ Shortly thereafter,⁴⁹ the name was changed to Detective Comics,⁵⁰ and later simply DC Comics, as it is known today.⁵¹ DC Comics is currently a subsidiary of Time Warner, Inc.—the world's third largest entertainment conglomerate⁵² with 83 subsidiaries and affiliated companies (including many household names: Cable News Network, Inc. (CNN), Home Box Office, Inc. (HBO), Time, Inc. (publisher of such magazines as Time, Life, Sports Illustrated, Fortune, In-Style, People and Entertainment Weekly), Turner Broadcasting System, Inc. (TBS), Turner Network Television (TNT) and Warner Bros. Entertainment, Inc.) Compared to this colossal enterprise, Siegel and Shuster were nothing. A couple of high-school kids with a drawing of a guy in tights and a cape. From 1938 until the deal in 1975, while DC's enterprise was growing (National Comics merged with Warner Bros.-Seven Arts in 1969⁵³), Siegel and Shuster were only growing poorer. Though the inequality ensured that Siegel and Shuster's struggle against their publisher would be great, it also meant that it should have been small change out of the large corporation's pocket to reimburse the writers for their contribution to its enterprise.⁵⁴ DC refused to budge because it was afraid to set a dangerous precedent that would put power back into the hands of the creators, whose work they had been exploiting.⁵⁵ The Copyright Act of 1976, however, would ultimately set that precedent for it.

In their 1975 deal with DC Comics, Siegel and Shuster stipulated that their original transfer of the ownership rights for Superman occurred in 1938.⁵⁶ The courts had determined that, under the Copyright Act of 1909, all rights, including future interest, had been transferred at that time.⁵⁷ Therefore, any compensation that Siegel and Shuster continued to receive was at the will of DC

⁴⁸ See McGilvray, *supra* note 34, at 322.

⁴⁹ *Action Comics No. 1*, *supra* note 27, at Inside Cover.

⁵⁰ See McGilvray, *supra* note 34, at 322.

⁵¹ Time Warner Inc.'s Worldwide Subsidiaries and Affiliated Cos. List, TIME WARNER, available at http://www.timewarner.com/careers/international-privacypolicies/Time_Warner_Inc_Entity_List_v4_Final.pdf.

⁵² *Id.*; *Global 500*, FORTUNE MAG., available at http://money.cnn.com/magazines/fortune/global500/2010/full_list/ (last visited Nov. 7, 2010).

⁵³ PATRICK PARSONS, BLUE SKIES: A HISTORY OF CABLE TELEVISION 281 (2008).

⁵⁴ See Catron, *supra* note 41, at 2.

⁵⁵ *Id.*

⁵⁶ See *Warner Bros. Entm't, Inc.*, 542 F. Supp. 2d.

⁵⁷ See *Siegel v. Nat'l Periodical Publ'ns, Inc.*, 364 F. Supp. 1032, 1034 (S.D.N.Y. 1973).

Comics. Congress, however, recognized the inequity of such transactions—its intent was to confer the benefit of the renewal term for copyrighted material upon the creators—and, in 1976, it enacted a new copyright act.⁵⁸ The Copyright Act of 1976 included a termination provision—now codified as 17 U.S.C. § 304(c)—that allows creators or their heirs to reclaim their previously assigned copyrights after a statutorily provided time period has passed.⁵⁹ According to a House Legislative Report on the Copyright Act of 1976, “A provision of this sort is needed because of the unequal bargaining positions of authors, resulting in part from the impossibility of determining a work’s value until it has been exploited.”⁶⁰ Copyright law in the United States is established in Article I, Section 8 of the Constitution, and it necessitates proper incentives for creators of original works. Clause 8 of that section charges Congress with the duty, “To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”⁶¹ Accordingly, copyright law allows creators to exclusively reap the benefits of their creative work, where those who would merely copy could otherwise drive down its value.⁶² Theoretically, the protections incentivize creators to create in the first place, without fear that their hard work will be exploited by others, thereby contributing to progress in the arts and sciences.⁶³

Congress’s new inclusions effectively eliminated any kind of alienable renewal term for copyrighted works, and instead gave authors a chance to reap the proceeds of their creations with the benefit of hindsight.⁶⁴ That the right to renegotiate copyright assignments under the termination clause is inalienable, however, was not immediately apparent. In *Milne v. Stephen Schlesinger, Inc.*, the Ninth Circuit determined that “contracts signed on or after January 1, 1978 (the day the 1976 law went into effect) can preempt an exercising of termination.”⁶⁵ The plaintiff in that case was

⁵⁸ Bales, *supra* note 9, at 666.

⁵⁹ *See id.* at 664; “Termination of the grant may be effected at any time during a period of five years beginning at the end of fifty-six years from the date copyright was originally secured, or beginning on January 1, 1978, whichever is later.” 17 U.S.C. § 304(c)(3).

⁶⁰ Gardner, *supra* note 10, at 46.

⁶¹ U.S. CONST. art. I, § 8, cl. 8.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *See Bales, supra* note 14, at 664.

⁶⁵ Gardner, *supra* note 10, at 49; *See Milne v. Stephen Slesinger, Inc.*, 430 F.3d 1036, 1048 (9th Cir. 2005).

A.A. Milne—the creator of Winnie the Pooh,⁶⁶ who had named Pooh's friend Christopher Robin after his own son.⁶⁷ In 1930, Milne assigned Stephen Schlesinger the rights to his character, and Disney purchased Pooh from Schlesinger's widow in 1961.⁶⁸ After the Copyright Act of 1976 was enacted, Disney foresaw the threat of Milne's estate choosing to take advantage of its termination rights, and preemptively struck a new deal with both Schlesinger and Milne's heir, Christopher Milne, who used those impending rights to leverage more favorable terms for his father's estate.⁶⁹ Thereafter, Schlesinger's estate began filing suit against Disney for unpaid royalties under the 1961 licensing agreement—Disney, on the other hand, decided they wanted nothing more to do with the Schlesingers.⁷⁰

In 2002, when the Schlesinger license for Winnie the Pooh was approaching the date at which it would be eligible for termination, Disney tracked down Clare Milne, the granddaughter of Pooh's creator.⁷¹ Disney offered her even more favorable terms, should she choose to terminate the 1930 license and subsequently assign those rights to Walt Disney Productions.⁷² The Mouse House⁷³ was kind enough to even offer to fund the litigation necessary to do so, as well.⁷⁴ Despite the seemingly ingeniously diabolical use of the Copyright Act, the court held that Clare Milne could no longer exercise her right to terminate the Schlesinger license,⁷⁵ illustrating the benefit of the termination clause: creators and their heirs can use the threat of termination as leverage to broker a more favorable deal with assignees who have reaped substantial gains from the copyrighted property over the years and are threatened by the thought of losing their licenses. Although the Winnie the Pooh/Schlesinger license had not yet matured to its termination age, Christopher Milne had already exhausted the utility of the ter-

⁶⁶ See Gardner, *supra* note 10, at 49.

⁶⁷ Per Christopher Milne's autobiography, "[i]t seems to me, almost, that my father had got to where he was by climbing upon my infant shoulders, that he had filched from me my good name and had left me with nothing but the empty fame of being his son." CHRISTOPHER MILNE, *THE ENCHANTED PLACES* 179 (1976).

⁶⁸ See Gardner, *supra* note 10, at 49.

⁶⁹ See *Stephen Slesinger, Inc.*, 430 F.3d 1036 at 1040.

⁷⁰ See Gardner, *supra* note 10, at 49.

⁷¹ See *id.*; *Stephen Slesinger, Inc.*, 430 F.3d 1036 at 1041.

⁷² *Stephen Slesinger, Inc.*, 430 F.3d 1036 at 1041.

⁷³ i.e. Disney.

⁷⁴ See *Stephen Slesinger, Inc.*, 430 F.3d 1036 at n.5.

⁷⁵ *Id.* at 1048.

mination clause, by leveraging the 1983 deal with Disney and the Schlesinger estate.⁷⁶

If the power of the termination clause is to take two parties who have the benefit of seeing the true value of a property over the course of its life and transport them back to the time of consignment in order to create a more equitable contract, Christopher Robin had already taken that journey with Schlesinger, on behalf of the Milne family. In comic book vernacular, this phenomenon is often referred to as “retconning” a story.⁷⁷ “Retcon” is short for “Retroactive Continuity,” a literary device used by comic book authors to change the known history of their characters—most often superheroes.⁷⁸ Changing one element of a character’s past can alter the significance of all of that character’s future stories.⁷⁹ Comic book authors are especially fond of using this device when they want to resurrect a character that previously died at some point in the often decades-long archive of superhero stories under a publishing imprint.⁸⁰ Likewise, Congress has granted editorial power to creators over their own lives, by way of the termination clause of the Copyright Act. Christopher Robin Milne, standing from the retrospective viewpoint of the statutorily-created termination period, looked back at the way the story had gone—the success of Winnie the Pooh under the original assignment—and used his Congressionally-granted power to essentially edit that history. From there forward, the terms of the assignment would reflect what he learned with the benefit of hindsight: that Pooh had greater value than A.A. Milne had anticipated when he first signed away his interest in the anthropomorphic bear.

⁷⁶ *Id.* at 1045; Bales, *supra* note 14, at 674.

⁷⁷ TVTROPES.ORG, <http://tvtropes.org/pmwiki/pmwiki.php/Main/Retcon> (last visited Jan. 16, 2012). (“Retcon = ‘RETroactive CONTinuity. Reframing past events to serve a current plot need. When the inserted events work with what was previously stated, it’s a Revision; when they outright replace it, it’s a Rewrite. The ideal retcon clarifies a question alluded to without adding excessive new questions. In its most basic form, this is any plot point that was not intended from the beginning. The most preferred use is where it contradicts nothing, even though it was changed later on.”).

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ In 1988, DC Comics asked its readers to call in to a 1-900 number to vote on whether Batman’s sidekick, the second Robin, should die at the hands of the Joker. By a narrow margin, Robin was killed off by the readers. The character returned to comic book pages in 2005, and in 2006 it was explained that Robin had never died, because Superboy from an alternate universe had punched a rift in space-time—don’t ask. See JIM STARLIN, JIM APARO & MIKE DECARLO, *BATMAN: A DEATH IN THE FAMILY* (1988-89).

By including the termination clause in the Copyright Act of 1976, Congress voiced a desire in seeing a narrative in which creators' rights have not been written out of existence. As the court in the 2008 "Lassie case" (*Classic Media, Inc. v. Mewborn*), described the clause:

Congress enacted the inalienability of termination rights provision in § 304(c)(5) to resurrect the fundamental purpose underlying the two-tiered structure of the duration of copyrights it originally adopted: to award to the author, and not to the assignee of the right to exploit the copyright during its initial term, the monetary rewards of a work that may have been initially undervalued, but which later becomes a commercial success.⁸¹

The "two-tiered structure of the duration of copyrights it originally adopted" refers to the renewal period that courts had long deemed an alienable future interest, and had proven Siegel and Shuster's downfall in 1973. The *Classic* court here emphasized the distinction between the new copyright act and the old structure, understanding Congress' revision to mean that it wanted parties to reflect on the story thus far, and then renegotiate, moving forward. The court stressed the inalienability of termination by looking directly at the language of the clause, which says that an author can terminate prior assignments of copyright, "notwithstanding any agreement to the contrary."⁸² Distinguishing this case from *Milne*, the court emphasized the retroactive nature of the clause, by maintaining that Christopher Milne, at the time he struck his new deal in 1983, already had a right to serve notice of termination upon Schlesinger—the only reason that deal was upheld, in preference to the formal proceedings of termination, was because the Congressionally mandated statutory period had already vested.⁸³

There has been criticism of this reading—some believe that the threat of termination should be a bargaining chip for authors and creators at the outset of an assignment, to negotiate higher compensation for their original properties⁸⁴—but such criticism only serves to reinforce a reading of the statute that demands that parties "wait and see" before entirely ending negotiations. If authors were allowed to trade their termination rights, it would become regular practice, as was the case under the 1909 Act, nullifying Congress's changes to the provision. The nature of

⁸¹ *Classic Media, Inc. v. Mewborn*, 532 F.3d 978, 983 (9th Cir. 2008).

⁸² *Id.* at 982; 17 U.S.C. § 304(c)(5); Bales, *supra* note 14, at 674.

⁸³ Bales, *supra* note 14, at 674.

⁸⁴ Gardner, *supra* note 16, at 51.

Siegel and Shuster's bid to reclaim the rights to Superman, and the resulting determination in the Central District of California in March of 2008, emphasize the temporal reading of the statute, and the safeguard it establishes for authors:

The need for such a second bite at the apple flowed from the fact that the 1909 Act created a dual term in the copyright to a work, one realized upon the work's publication and the second occurring twenty-eight years later with the copyright's renewal. Justification for this splitting of terms was based, in part, on the understanding that an author's ability to realize the true value of his or hers work was often not apparent at its creation, but required the passage of time (and the marketing efforts by a publisher) to materialize.⁸⁵

The co-originators of the iconic superhero, realizing the value of their creation with the benefit of hindsight, were perfectly poised to have their whole sordid history retconned.

IV. "THE AMERICAN WAY?": THE SIEGEL FAMILY SUES DC TO REGAIN CONTROL OF SUPERMAN

The Siegel family finally had the power of the law on its side. It could use the threat of termination to gain much more than DC Comics had been willing to allow under the previous, 1909 Copyright Act.⁸⁶ Jerry Siegel died in January of 1996, and his wife, Joanne Siegel, became the beneficiary of the 1975 deal they had struck with DC.⁸⁷ In August of 2009, the United States District Court for the Central District of California would rule on the extent of the material recaptured by the Siegels' exercise of termination: "At the conclusion of this final installment regarding the publication history of and the rights to the iconic comic book superhero Superman, the Court finds that plaintiffs have successfully recaptured (and are co-owners of) the rights to the following works: (1) Action Comics No. 1 (subject to the limitations set forth in the Court's previous Order); (2) Action Comics No. 4; (3) Superman No. 1, pages three through six, and (4) the initial two weeks' worth of Superman daily newspaper strips. Ownership in

⁸⁵ See *Siegel v. Warner Bros. Entm't, Inc.*, 542 F. Supp. 2d 1098, 1113 (C.D. Cal. 2008).

⁸⁶ See *Siegel v. Warner Bros. Entm't, Inc.*, 658 F. Supp. 2d 1036 (C.D. Cal. 2009).

⁸⁷ See *Warner Bros. Entm't, Inc.*, 542 F. Supp. 2d at 1113.

the remainder of the Superman material at issue that was published from 1938 to 1943 remains solely with defendants.”⁸⁸

Joanne Siegel, and her daughter with Jerry, Laura Siegel Larson, served DC notice of termination under 17 U.S.C. § 304(c) on April 3, 1997.⁸⁹ The notices provided an effective date of April 16, 1999 for the termination of the 1938 assignment to DC.⁹⁰ As intended by Congress, the parties then should have settled on a new agreement, or else the Siegel family could take its stake in the property to a new distributor, should a better deal be found. Settlement discussions did ensue shortly after the termination notice was issued, and again after the date of termination passed, but the parties could not reach a deal.⁹¹ Over the next few years, drafts of a new agreement were traded between the parties, but the negotiations ended abruptly in September, 2002, when the Siegel heirs fired their lawyers and sent notice to DC that they were “‘stopp[ing] and end[ing] negotiations with DC Comics, Inc., its parent company AOL Time Warner and all of its representatives and associates concerning’ their rights to, among other things, Superman.”⁹² The Siegel family had unilaterally declared that it would exercise its termination rights, and take its stake in Superman elsewhere. But “‘elsewhere’” in this case is complicated.

In 2004 the Siegel estate teamed up with Hollywood attorney Marc Toberoff to file suit against DC.⁹³ The ten-day bench trial answered two questions for the Siegel Estate: (1) the validity and enforceability of the 1997 notice of termination; and (2) the parameters of the intellectual property recaptured by exercise of termination.⁹⁴ The determination would eventually lead to the March 2008 decision returning to the Siegel family the copyright to the material Jerry and Joe had created for *Action Comics, No. 1*.⁹⁵ On May 14, 2010, however, DC Comics would file a lawsuit against Toberoff in the Central District of California⁹⁶ on the theory that “‘the lawyer manipulated the families into repudiating their deals with Warners-owned DC Comics and entering deals with Toberoff that will give

⁸⁸ *Warner Bros. Entm't, Inc.*, 658 F. Supp. 2d at 1095.

⁸⁹ *Warner Bros. Entm't, Inc.*, 542 F. Supp. 2d at 1114.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.* at 1116.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Warner Bros. Entm't, Inc.*, 542 F. Supp. 2d at 1115; Gardner, *supra* note 10, at 51.

⁹⁶ Michael Cieply & Brook Barnes, *Warner Brothers Sues 'Superman' Lawyer*, N.Y. TIMES (May 14, 2010), available at <http://www.nytimes.com/2010/05/15/business/media/15warner.html>.

him almost half the revenue from the property.”⁹⁷ The suit is still pending in the Central District of California, but evidence exists to support a potential conflict of interest between Toberoff and his client, the Siegels.⁹⁸

Toberoff has a recent history of partnering with many of his clients; using their termination rights to create movie deals, such as *I Spy* with Sony.⁹⁹ In 2004, the lawyer started his own production company, along with Hollywood “super-agent” Ari Emmanuel of William Morris Endeavor. The company, Intellectual Properties Worldwide, has been dedicated to licensing intellectual property.¹⁰⁰ Toberoff has also been attempting to recapture the right of many of Jack Kirby’s comic book creations.¹⁰¹ As recently as July 2009, Toberoff has told the press that he has attracted the attention of large potential investors.¹⁰² Many are afraid that he will use Superman to leverage his own Hollywood Ambitions, come 2013,¹⁰³ when the Shuster Estate’s termination rights also kick in. Such a conflict of interest naturally leads to the suspicion that the lawyer for the Siegel family is not looking out for their best interests.

Should the Siegel heirs choose to walk away from DC’s distribution of their character, the result would seemingly be disadvantageous to everyone except Marc Toberoff. DC Comics has been producing Superman comics for over 70 years, and has introduced

⁹⁷ Belloni, *supra* note 3.

⁹⁸ “Toberoff has stated that, while a business partner Ari Emanuel had, in 2002, made a \$15 million offer to purchase the Siegel estate’s rights, that was a lawyer-to-lawyer offer made without response from the Siegels. And that when they dropped their legal representatives and broke off 2002 negotiations with DC, he was yet to meet them—that happened a month later when he agreed to represent them.”

However, one document which made its way to DC after being smuggled/stolen/leaked out of the Toberoff camp is labeled the “Superman-Marc Toberoff Timeline,” which appears to indicate that Toberoff wanted as much personal ownership of Superman as possible. This smoking gun is still to be addressed—though few doubt that it will be.” See Rich Johnston, *Will Toberoff Dismiss Warner’s Supersuit?*, BLEEDING COOL (Aug. 16, 2010), <http://www.bleedingcool.com/2010/08/16/will-toberoff-dismiss-warners-supersuit/>.

⁹⁹ Gardner, *supra* note 10, at 46.

¹⁰⁰ Eriq Gardner, *Will Marc Toberoff be the Last Superhero Standing?*, THR, Esq. (Sept. 22, 2009), <http://www.hollywoodreporter.com/blogs/thr-esq/marc-toberoff-last-superhero-standing-63346>.

¹⁰¹ Matt Belloni, *Kirby Heirs Seeking Bigger Chunk of the Marvel Universe*, THR, Esq. (Sept. 21, 2009), <http://www.hollywoodreporter.com/blogs/thr-esq/kirby-heirs-seeking-bigger-chunk-63343>. Kirby is the co-creator of Spider-Man and the Fantastic Four, amongst numerous other comic book properties.

¹⁰² “In July [of 2009], Toberoff revealed to [The Hollywood Reporter] that major financiers, including Goldman Sachs, had approached him about making some sort of major investment.” Gardner, *supra* note 10.

¹⁰³ Gardner, *supra* note 10, at 46.

an entire universe of characters and stories.¹⁰⁴ If Toberoff did indeed induce Joanne and Laura Siegel to cut off all communication with Warner Bros in favor of pursuing litigation and walking away from their history entirely, then it would seem he favors his own personal gain over the potential that a continued relationship offers. The Siegel family could still very well benefit from Warner Bros' distribution of its property. Warners has released three of the top ten grossing films of all time, based on international box office.¹⁰⁵ Furthermore, the distributor is known for producing high-grossing franchises and, in particular, adaptations of known properties—only two of Warners' top-ten grossing films are based on original material.¹⁰⁶ Additionally, the parties, in their conflict, ignore another facet of copyright law, apart from the creators, copiers, and those who would capitalize monetarily on Superman's legacy: the fans. Julie Cohen writes that a commonly misplaced interest in copyright is the public right to access the bounty of intellectual progress yielded by the efforts of copyright law.¹⁰⁷ The impending termination of DC's rights to Superman have forced the publisher (under the recent corporate header, "DC Entertainment") to rush a new Superman movie into production, and the reports thus far have been less than optimistic considering the talent involved, the truncated timetable for completion, and the certainty that even the best of creative talents can fold under artificial deadlines.¹⁰⁸ Accordingly, there has been fan outcry over the on-

¹⁰⁴ "The Superman character has evolved in subsequent works since his initial depiction in Action Comics, Vol. 1. These additional works have added decades of new material to further define, update, and develop the character (such as his origins, his relationships, and his powers and weaknesses) in an ongoing flow of new exploits and supporting characters, resulting in the creation of an entire fictional Superman "universe.'" Siegel v. Warner Bros. Entm't, Inc., 542 F. Supp. 2d 1098, 1110 (C.D. Cal. 2008).

¹⁰⁵ *All Time Box Office*, BOX OFFICE MOJO, <http://boxofficemojo.com/alltime/world/> (last visited Jan. 25, 2012).

¹⁰⁶ *Box Office by Studio: Warner Bros.*, BOX OFFICE MOJO, <http://boxofficemojo.com/studio/chart/?studio=WB-newline.htm> (last visited Jan. 16, 2012).

¹⁰⁷ See Julie E. Cohen, *The Place of the User in Copyright Law*, 74 *FORDHAM L. REV.* 347 (2005).

¹⁰⁸ Nikki Finke & Mike Fleming, *It's A Bird! It's A Plane! It's Chris Nolan! He'll Mentor Superman 3.0 And Prep 3rd Batman* (Feb. 9, 2010), <http://www.deadline.com/2010/02/its-a-bird-its-a-plane-its-chris-nolan-hell-mentor-superman-3-0-while-preparing-3rd-batman/>; *It's Official: Nolan Rebooting Superman* <http://movies.ign.com/articles/107/1076244p1.html> (Mar. 10, 2010); *Chris Nolan is meeting with a short list of possible Superman directors* (Sept. 23, 2010), <http://io9.com/5646542/chris-nolan-is-meeting-with-a-short-list-of-possible-superman-directors>; Mike Fleming, *Scoop: Zack Snyder Directing 'Superman'* (Oct. 4, 2010), <http://www.deadline.com/2010/10/zack-snyder-directing-superman/>.

"We're told by knowledgeable insiders the reason Warner Bros. picked Snyder for Man of Steel is that the script by David Goyer was rushed, is still a bit of a mess, and that Warner Bros. needs

screen fate of the beloved character.¹⁰⁹ Superman was born from the imagination and passion of his creators, driven only by their belief that the story of a hero, a savior to “the downtrodden and oppressed” could speak to all people.¹¹⁰ The standstill the parties have created by refusing to move forward amicably (or even begrudgingly) has put the creators—writers, artists, directors—who have inherited Superman in a creative vice; working, for now, under deadlines for the sake of shoehorning as much work as possible, and in the face of potentially forgoing the inclusion of well-known details and characters of the iconic stories. These are not conditions that promote progress in the arts.¹¹¹

V. “A NEVER-ENDING BATTLE”:¹¹²
NARRATIVE MEDIATION AS A MEANS TO RESOLVE
SUPERMAN’S UNCERTAIN FATE

If the foregoing tale were indeed a movie, the point at which the characters now find themselves would be the “Third Act Break”—the point at the end of the second act where the main characters have hit rock bottom.¹¹³ If the Story of *Siegel v. Warner Bros.* were a Superhero movie, Marc Toberoff would seemingly be

someone who won’t spend months or even years trying to get it just right (i.e., Aronofsky), because time is the one thing they don’t have: The studio must have a new Superman movie in production by 2011 or they’ll be subject to potential lawsuits by the heirs of the superhero’s creators.” Simon Abrams, *‘Superman’ Update: Story Details, Script Issues and Who the Studio Really Wanted as Director* (Oct. 6, 2010 11:46AM), <http://blog.moviefone.com/2010/10/06/superman-story-details-script-issues/>; “[R]eportedly, the main reason that Darren Aronofsky isn’t directing is because Warner Bros. was worried that he would spend so much time trying to fix the flawed script that the movie would miss its production deadline.” Meredith Woerner, *Is Zack Snyder’s Superman in Trouble?*, io9.com (Feb. 16, 2011), <http://io9.com/#!5761801/is-zack-snyders-superman-in-trouble>.

¹⁰⁹ In particular, fan input is often unsolicited, but perhaps valuable to the progress of art in our society (this is, of course, speculative): Cyriaque Lamar, *20 ways Zack Snyder’s Superman Can Avoid Becoming a Superdisaster* (Oct. 5, 2010, 4:45 PM), <http://io9.com/5656572/20-ways-zack-snyders-superman-can-avoid-becoming-a-superdisaster>; Hugh Hart, *Building a Better Superman: How Zack Snyder Can Forge a New Man of Steel* (Oct. 5, 2010, 6:23 PM), <http://www.wired.com/underwire/2010/10/superman-zack-snyder/>.

¹¹⁰ *Siegel v. Warner Bros. Entm’t, Inc.*, 542 F. Supp. 2d 1098, 1102-03 (C.D. Cal. 2008).

¹¹¹ As mandated by the Constitution. U.S. CONST. art. I, § 8, cl. 8.

¹¹² The iconic slogan, “Superman fights a never-ending battle for Truth, Justice and the American Way” originates in the character’s 1950s television program. Erik Lundegaard, *Truth, Justice and (Fill in the Blank)*, N.Y. TIMES (June 30, 2006), available at <http://www.nytimes.com/2006/06/30/opinion/30lundegaard.html>.

¹¹³ This is also referred to by screenwriting guru Syd Field as “Plot Point II.” See SYD FIELD, SCREENPLAY: THE FOUNDATIONS OF SCREENWRITING (2005).

the villain, whose corrupting power has caused a seemingly irreparable rift between the story's two main characters.¹¹⁴ But perhaps Toberoff is merely a scapegoat—a red herring, leading the characters away from resolution. A movie's resolution is found in the third act,¹¹⁵ and unfortunately for the superhero genre in general, of late, that resolution has often been found by bashing the bad guy's brains in.¹¹⁶ The stories that truly succeed don't rely on sheer physical force or *deus ex machina* to achieve resolution, but challenge the characters to find the strength inside themselves to grow as individuals.¹¹⁷ Resolution here will not be found by focusing on the actions of one man. In putting these parties in positions of equal power, Congress has given them a chance for resolution in the third act of their story. They are challenged to look back at the story as it developed up to now—what went right, and who may have been wronged—and then create a narrative in which they can better exist, going forward. Naturally, this means coming to a monetary settlement, and that is where mediation is useful. Mediation, as a general practice, can be defined as, “the intervention in a negotiation or a conflict of an acceptable third party who has limited or no authoritative decision-making power but who assists the in-

¹¹⁴ Think *SUPERMAN II* (Warner Bros. 1981), where General Zod holds the world hostage, threatening destruction unless Superman abandons his powers; Zod then goes on make the President kneel before him, effectively becoming Earth's ruler.

¹¹⁵ See FIELD, *supra* note 113.

¹¹⁶ See *IRON MAN* (Paramount Pictures 2008), in which a man who practically raised Iron Man tries to kill the protagonist, only to himself be pummeled by the hero, and then intentionally blown away by a fictitious reactor core; *THE INCREDIBLE HULK* (Sony Pictures 2008), in which the hero also pummels his antagonist, a fellow gigantic monster, to near-death; *SPIDER-MAN* (Columbia Pictures 2002), in which the antagonist, the Green Goblin, is impaled on his own mechanical, flying “Goblin Glider”; *SPIDER-MAN 3* (Columbia Pictures 2007), in which the two antagonists (1) explode, and (2) dissolve into nothingness.

¹¹⁷ *SPIDER-MAN 2* (Columbia Pictures 2004) actually had a reconciliatory ending, wherein Spiderman appealed to his antagonist's (Doctor Octopus) sense of personal responsibility. Relating his own loss (of his uncle, who died at least partially because of Spiderman's actions) to Doc Ock's (of his wife, who died because of an experiment he performed, gone horribly wrong), Spiderman was able to convince his antagonist to help him save New York by words and example. The bad guy still died, but he sacrificed himself to save the city. Thus ended an emotional arc for both characters: the antagonist reconciled his “evil” acts since the death of his wife with his moral self from before the accident because the protagonist was able to articulate his own inner strength of overcoming his own, personal hang-ups (he's dirt-poor, his best friend is trying to kill him, the love of his life is marrying someone else) for the betterment of others. The story for the film was written by Pulitzer Prize-winning author Michael Chabon.

Spider-Man 2 boasts a 95% “Fresh” rating on Rotten Tomatoes among top critics, and 81% audience approval, whereas *Spider-Man* holds only 83% and 65%, respectively, and *Spiderman 3* merely 41% and 54%. See ROTTEN TOMATOES, www.rottentomatoes.com (last visited Jan. 16, 2012).

volved parties in voluntarily reaching a mutually acceptable settlement of issues in dispute.¹¹⁸ Where two parties cannot come to new terms for the assignment of a copyright interest on their own, a neutral party can help them achieve what Congress intended.

Where litigation looks backward in time as a means to resolve disputes, mediation's retroactive aspect is merely utilized to construct a picture of the future, based on how the parties have reached the present;¹¹⁹ it helps conflicting parties create a cohesive narrative in order to walk away with a settlement that both can live with.¹²⁰ Narrative mediation adopts the view that "conflict is a breakdown in discourse, occurring when parties' views of reality and values are incongruent."¹²¹ Accordingly, "narrative mediators focus on the parties' 'stories' (both their narratives of the conflict as well as underlying interpretive frameworks which frame their understanding of the world), and then help the parties deconstruct the 'conflict-saturated' narrative and construct a more constructive alternative story which the parties use as a platform to build a more positive interaction."¹²² If this assumption is adopted, then resolution means first getting those parties to look at the story from the same perspective.¹²³ To really achieve an effective resolution to their story, the parties cannot allow a court to tell that story for them, as the court's story is one created out of conflict.¹²⁴ Litigation fosters attitudes of demonization, and an "us-them" mindset in order to convince a judge or jury that one party is somehow more deserving than the other, either morally or in the eyes of the law.¹²⁵ Mediators, on the other hand, do not ultimately decide who gets what,¹²⁶ so some of the adversarial pressure is removed.¹²⁷ In-

¹¹⁸ Robert Rubinson, *Article: Client Counseling, Mediation, and Alternative Narratives of Dispute Resolution*, 10 *CLINICAL L. REV.* 833, 849-850 (2004).

¹¹⁹ *Id.* at 833, 852.

¹²⁰ Scott J. Topolski, *Alternative Dispute Resolution: A True Alternative* (Aug. 2005), available at <http://www.bdbl.com/new/August2005Vol14Iss3.asp>.

¹²¹ Harper, *supra* note 15, at 597.

¹²² *Id.*

¹²³ Robert Rubinson, *Article: Client Counseling, Mediation, and Alternative Narratives of Dispute Resolution*, 10 *CLINICAL L. REV.* 833, 851 ("[A] critical component of mediation is that parties 'begin to acknowledge another view of the situation.'").

¹²⁴ Harper, *supra* note 15, at 597 ("[N]arrative mediators focus on the parties' 'stories' . . . and then help the parties deconstruct the 'conflict-saturated' narrative and construct a more constructive alternative story.").

¹²⁵ Ed Barna, *Finding Success Through Mediation*, *VERMONT BUS. MAG.* (July 2003), available at <http://www.vermontbiz.com/article/july/finding-success-through-mediation>.

¹²⁶ CHRISTOPHER W. MOORE, *THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT* 15 (2d ed. 1998); Robert Rubinson, *Article: Client Counseling, Mediation, and Alternative Narratives of Dispute Resolution*, 10 *CLINICAL L. REV.* 833, 849-850 (2004).

stead, mediators “push disputing parties to question their assumptions, reconsider their positions, and listen to each other’s perspectives, stories and arguments.”¹²⁸ Perhaps more importantly, in a case involving a property with perhaps limitless value into the future like Superman, mediators “urge parties to consider relevant law, weigh their own values, principles, and priorities, and develop an optimal outcome.”¹²⁹

One key to mediation is to first determine what the parties’ goals actually are, so that objectives outside the discussion do not get in the way.¹³⁰ This is perhaps speculative, but given the narrative so far, principles worth discussing exist beyond mere dollar signs. Time Warner, Inc., DC Comics’ parent company, is of course obligated to act in the best interests of its shareholders, so the decision to negotiate a deal to keep Superman is purely business—but the Siegel family may not see pure economics as the bottom line. Joanne and Laura Siegel purportedly called off talks with DC after they were insulted by an offer—Joanne said she had been “stabbed in the back.” As Jerry Siegel’s wife, she had been dealing with what she and her husband believed to be a great injustice for decades—she, herself, had been a part of the Superman story from the very beginning.¹³¹ She fought to correct this injustice until the day she died in February, 2011. For the family of Jerry Siegel, this was, and still is, likely a question of dignity.

Although the Siegel heirs have had direct contact with Time Warner’s chief officers in attempting to negotiate a deal, those executives have, in all likelihood, not been a part of the Superman story for nearly as long as she has. Managerial substitutions are common in the entertainment industry, and DC Comics is no exception; as recently as this past year, seeing slates of executives comes and go at the newly created “DC Entertainment” arm of the company, aimed at producing television and movies.¹³² As the

¹²⁷ Rubinson, *supra* note 118, at 851.

¹²⁸ Lela P. Love, *Symposium: The Top Ten Reasons Why Mediators Should Not Evaluate*, 24 FLA. ST. U.L. REV. 937, 939.

¹²⁹ *Id.*

¹³⁰ *Id.* (“Endeavors are more likely to succeed when the goal is clear and simple and not at war with other objectives.”).

¹³¹ Bruce Weber, *Joanne Siegel, the Model for Lois Lane, Dies at 93*, N.Y. TIMES (Feb. 15, 2011), available at <http://www.nytimes.com/2011/02/16/arts/16siegel.html>.

¹³² Nikki Finke, *TOLDJA! Warner Bros Creates DC Entertainment* (Sept. 9, 2009, 10:10 AM), <http://www.deadline.com/2009/09/toldja-warner-bros-creates-dc-entertainment/> (In which DC Entertainment is announced); Nikki Finke, *DC Entertainment Names Executive Team* (Feb. 18, 2010, 7:19 AM), <http://www.deadline.com/2010/02/dc-entertainment-names-executive-team/> (In which DC Entertainment’s executives are announced); Nellie Andreeva, *DC Entertainment*

leaders of one of the largest conglomerates in the world, they are likely not taking the time to put themselves in the shoes of the Siegel family before signing off on any concessions. Moreover, the limited part that the current executives played in the history of the Superman copyright also potentially restricted Joanne Siegel's ability to create a cohesive DC Comics story, with which to sympathize, on her own. "People can actually be said to think in terms of stories and their constituent parts (the themes, roles, and plots), which work together to create a system of meaning around particular people and events."¹³³ In adversarial litigation, the Siegel family would be hard pressed to see DC Comics or Time Warner as anything but the large conglomerate it is, with executives moving in and then moving on over the years.

Mediation is primarily a storytelling process, in which both parties actively participate.¹³⁴ Furthermore, "[i]n mediation, the conflicting parties' stories act like 'theories of responsibility,' which construct the logical, causal linkages between actors, their actions, and outcomes."¹³⁵ Mediation focused on allowing the representatives of the parties to participate in the storytelling would allow the current executives a chance to try to get Joanne and Laura Siegel into their shoes, as responsible businesspeople—this, in turn, would perhaps allow the Siegels to create the causal links necessary to a proper, cohesive narrative. The litigation process that resulted in the termination of the Siegels' Superman copyright was only focused on establishing whether the family was legally allowed to terminate, and to what extent they could reclaim works featuring the character.¹³⁶ The process only looked backward, but it hasn't yet looked forward; the extent to which it looked backward only lead to the present, but produced nothing to move the parties into the future. Superman's fate still hangs in the balance, and we all—creators, distributors, fans—have a lot to gain and a lot to lose.

Relocates Film, Television And Digital Operations To Burbank (Sept. 21, 2010, 10:24 AM), <http://www.deadline.com/2010/09/dc-entertainment-relocates-film-television-and-digital-operations-to-burbank/> (In which DC Entertainment is relocated from New York to Los Angeles); Nikki Finke, *More Shake-Ups Inside DC Entertainment* (Oct. 4, 2010, 2:06 AM), <http://www.deadline.com/2010/10/more-shake-ups-inside-dc-entertainment/> (In which three Senior Vice Presidents of DC Entertainment were fired).

¹³³ See Toran Hansen, *Other Contributions: The Narrative Approach to Mediation*, 4 PEPP. DISP. RESOL. L.J. 297.

¹³⁴ *Id.*

¹³⁵ *See id.*

¹³⁶ *Siegel v. Warner Bros. Entm't, Inc.*, 542 F. Supp. 2d 1098, 1116-17 (C.D. Cal. 2008); *Siegel v. Warner Bros. Entm't, Inc.*, 658 F. Supp. 2d 1036, 1095 (C.D. Cal. 2009).

VI. CONCLUSION

A sort of irony looms over the litigation of the Superman rights, as it has developed thus far. When The Man of Steel was brought to the big screen in 1978 he saved the world, and the love of his life, Lois Lane, by flying around the Earth fast enough to reverse its rotation, thereby also reversing time.¹³⁷ The parties at odds here have been given the same power—to turn back time and create a world that will be better for everyone in the future.

Jerry Siegel and Joe Shuster toiled over Superman—put their hearts and souls into their creation.¹³⁸ Nonetheless, Siegel and his family, after assigning over his interest to DC Comics, suffered greatly, despite the success of the Superman character.¹³⁹ DC Comics purchased a character from a couple of teenagers, without knowing whether or not it would ever be a success¹⁴⁰—perhaps they took a gamble, but it ultimately paid off in a big way.¹⁴¹ These are both valid stories, and part of the same history. From the vantage point of 1938, neither of the parties could have known whether they would meet with success or disaster.

At some point, Congress decided this was no way to promote progress in the arts, and decided to eliminate an element of that uncertainty.¹⁴² As established in the *Milne*¹⁴³ and *Classic*¹⁴⁴ cases, the Termination Clause of the 1976 Copyright Act was intended to give the parties the ability to travel back in time, to 1938, and reconsider whether they had struck a good deal, knowing what they know now.¹⁴⁵ Creators and distributors are given the chance to change their futures by reaching into the past.

Given this opportunity, however, the parties have instead opted to separately write their own versions of the past and steadfastly stick to them, despite the glut of lawsuits, animosity, and impending rift that their differences have caused. Thus, the fate of Superman is left uncertain indefinitely, and creative choices for the character's future give way to the expediency necessitated by artifi-

¹³⁷ Note: not how time travel would, even theoretically, work. *SUPERMAN: THE MOVIE* (Warner Bros. 1978).

¹³⁸ *Warner Bros. Entm't, Inc.*, 542 F. Supp. 2d at 1102.

¹³⁹ Siegel, *supra* note 8.

¹⁴⁰ *Warner Bros. Entm't, Inc.*, 542 F. Supp. 2d at 1104.

¹⁴¹ *Id.*

¹⁴² Gardner, *supra* note 10, at 46.

¹⁴³ *Milne v. Stephen Slesinger, Inc.*, 430 F.3d 1036, 1048 (9th Cir. Cal. 2005).

¹⁴⁴ *Classic Media, Inc. v. Mewborn*, 532 F.3d 978, 983 (9th Cir. Cal. 2008).

¹⁴⁵ *Warner Bros. Entm't, Inc.*, 542 F. Supp. 2d at 1113.

cial legal deadlines. The progress contemplated by the Framers of the Constitution is dictated now by dollar signs, rather than dreams.

In order to continue a future collaborating together, to keep all of the elements of the Superman story the world has come to know intact, the parties would have to engage in a meaningful discussion of where their two competing stories both meet and diverge.¹⁴⁶ The process of Narrative Mediation is directed at removing the “demonization”¹⁴⁷ from such a discussion, so that parties can see each other’s interests and values affected by the story as it has developed thus far.¹⁴⁸ In a twist of fate, it is now Superman that needs saving. With the tensions and stakes created by a greater than seventy-year-long history in mind, the Siegel estate and DC Comics would have the opportunity to write a new, happy ending for the Man of Steel.

¹⁴⁶ See Hansen, *supra*, note 135, at 297.

¹⁴⁷ See Barna, *supra* note 127.

¹⁴⁸ See Love, *supra* note 130, at 939.