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University of New Hampshire School of Law
Two White Street
Concord, New Hampshire 03301 U.S.A.
Tel: (603)-228-1541
Fax: (603)-228-0386
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TABLE OF CONTENTS

VOLUME 55 — NUMBER 3

ARTICLES:

**THE FANTASTIC FAILURE: HOW CURRENT
COPYRIGHT LAW STACKS THE DECK AGAINST
THE ORIGINAL AUTHORS OF JUSTICE**

WAYNE M. COX.....361

**THE UNFETTERED EXPANSION OF
APPROPRIATION ART PROTECTION BY THE
FAIR USE DOCTRINE: SEARCHING FOR
TRANSFORMATIVENESS IN *CARIOU V. PRINCE*
AND BEYOND**

JACQUELINE MORLEY.....385

**GIVING DORMANT INTELLECTUAL
PROPERTIES AN EXTRA LIFE: HOW
BANKRUPTCY CAN REVIVE VIDEO GAME IP
THAT HAS FALLEN VICTIM TO ACQUISITION
BY EXPANSIONIST PUBLISHERS**

CHRISTOPHER RYAN.....417

The Fantastic Failure: How Current Copyright Law Stacks the Deck Against the Original Authors of Justice

Wayne M. Cox¹

I. Introduction

In 1837, Swiss cartoonist Rudolphe Töpffer found several publishers in Europe willing to publish and release his newest literary creation: a story with accompanying pictures.² On September 14, 1842, this story made its way across the Atlantic after John Neal, the publisher of New York newspaper *Brother Jonathan*, ran an English-language version of the story in his newest issue.³ Featuring the tales of Mr. Oldbuck failing to woo a woman known to the reader as his “ladye-love,” this tale represents the first recorded publication of a comic book in the United States.⁴ While several other publications resembling a comic book followed Mr. Oldbuck over the passing decades, the true comic book superstars first showed up in the late 1930s.⁵ The June 1938 issue of *Action Comics No. 1* revealed the Man of Steel, Superman, to the world.⁶ Just one year following Superman’s

¹ J.D. anticipated May 2015, Maurice A. Deane School of Law at Hofstra University; B.S. 2012, Villanova University School of Business. The author would like to thank his loving parents, Wayne T. Cox and Francine A. Cox, for their proofreading assistance and endless support, no matter the circumstances.

² Donald D. Markstein, *The Adventures of Mr. Obadiah Oldbuck*, TOONOPEDIA, <http://www.toonopedia.com/oldbuck.htm>.

³ *Id.*

⁴ *Id.* (explaining that, despite the fact that many hail Richard F. Outcault’s *The Yellow Kid* and/or Charles Henry Ross’ *Ally Sloper* as the original comic books published in the United States, *Mr. Obadiah Oldbuck* beat each to publication by 53 and 25 years, respectively); *see also* Donald D. Markstein, *Ally Sloper*, TOONOPEDIA, <http://www.toonopedia.com/sloper.htm>; Donald D. Markstein, *The Yellow Kid*, TOONOPEDIA, <http://www.toonopedia.com/yellow.htm>.

⁵ Shmuel Ross and Jennie Wood, *Comics Timeline: The History of the Funnies in America*, INFOPLEASE, <http://www.infoplease.com/spot/comicstimeline.html> (last visited Apr. 3, 2015). The late 1930s saw the debuts of heroes such as Batman, Superman, and The Flash, among others. *Id.*

⁶ *Siegel v. Warner Bros. Entm’t., Inc.*, 542 F. Supp. 2d 1098, 1102 (C.D. Cal. 2008) (exhibiting reprints of the original comic book covers); *see also* Jerome Siegel &

introduction to the American public, Batman made his heralded debut in *Detective Comics No. 27*.⁷

The appearance of characters such as Batman and Superman captivated millions of Americans, and a new massive entertainment industry was born. Without counting the hundreds of millions of dollars earned by comic book-based movies each year, the domestic sales of comic books and graphic novels reached an all-time high of nearly one billion dollars in 2013.⁸ Despite comics' worldwide domination of box offices over the past decade, and their record-setting sales of both books and merchandise, the majority of the characters at the heart of this success was created several decades ago by artists and writers who have long been denied copyright ownership of their creations.

In late September 2014, the Supreme Court was set to hear the case of *Marvel Characters, Inc. v. Kirby* before Marvel and the Kirby estate settled the case for an undisclosed fee just days before the Supreme Court was scheduled to decide whether to grant certiorari to the matter.⁹ At the heart of the case lay the creations of one Jack Kirby, a freelance artist who worked with Marvel mainly during the 1960s.¹⁰ During Kirby's time with Marvel, he was responsible for the co-creation of a majority of the Marvel comic book universe known today.¹¹ That very universe provided the base platform of characters

Joe Shuster, *Superman*, ACTION COMICS 1, at 1 (DC Comics June 1938) (first appearance of Superman), reprinted in SUPERMAN: THE ACTION COMICS ARCHIVES, VOLUME ONE (DC Comics 1998).

⁷ Bill Finger & Bob Kane, *The Case of the Chemical Syndicate*, DETECTIVE COMICS 27, at 2 (DC Comics May 1939) (first appearance of Batman).

⁸ Gus Lubin, *The Comic Book Industry Is On Fire, And It's About More Than Just The Movies*, BUSINESS INSIDER (Aug. 26, 2014, 11:57 AM), <http://www.businessinsider.com/the-comic-book-industry-is-on-fire-2014-8>.

⁹ Alex Pappademas, *Jack Kirby Estate Smashes Litigation, Settle for Undisclosed Sum of Money*, GRANTLAND (Sept. 29, 2014), <http://grantland.com/hollywood-prospectus/jack-kirby-estate-smashes-litigation-settles-for-undisclosed-sum-of-money/>.

¹⁰ *Id.*

¹¹ Kevin Melrose, *Marvel Titles Now Include Jack Kirby Creator Credit*, COMIC BOOK RESOURCES (Oct. 30, 2014, 6:55 AM), <http://robot6.comicbookresources.com/2014/10/marvel-titles-now-include-jack-kirby-credit/>.

upon which Marvel Studios, Sony Studios, and Fox Studios have capitalized over the past 15 years through a surge of superhero-centric films that have dominated Hollywood and global box offices.¹²

Although Kirby originally left Marvel in 1970 and never formally sued the corporation during his lifetime, he spent the final three decades of his life blasting the former CEO of Marvel, Stan Lee, and the company itself.¹³ Even after Kirby left Marvel, however, his influence ran so strong that both comic book lovers and lawyers alike continued to verbally support his claim to copyright ownership of the characters he created and gifted to the world while with Marvel.¹⁴

Kirby represents just one of many disenfranchised comic book artists stripped of authorship rights during the evolution of the comic book business into a multi-billion dollar industry.¹⁵ Yet the fact that the Supreme Court prepared to hear such a case marks an important turning point for the industry and the artists. Currently, significant ambiguity exists under federal copyright law concerning the rights of independent contractors in the work for hire context. Such ambiguity beckons the question whether current law unfairly favors employers in copyright ownership battles.¹⁶ The Supreme Court has been presented with several opportunities to lessen the amount of legislative ambiguity by granting certiorari to cases involving disenfranchised artists and writers, but has yet to do so.¹⁷

¹² Dominic Patten, *Marvel & Jack Kirby Heirs Settle Legal Battle Ahead of Supreme Court Showdown*, DEADLINE HOLLYWOOD (Sept. 26, 2014, 10:10 AM), <http://deadline.com/2014/09/jack-kirby-marvel-settlement-lawsuit-supreme-court-hearing-841711/>.

¹³ Alex Pappademas, *The Inquisition of Mr. Marvel: On the Surprisingly (surprisingly complicated) Legacy of Marvel Comics Legend Stan Lee*, GRANTLAND (May 11, 2012), <http://grantland.com/features/the-surprisingly-complicated-legacy-marvel-comics-legend-stan-lee/>.

¹⁴ *Id.*

¹⁵ See, e.g., Devin Leonard, *Marc Toberoff, Superman's Lawyer*, BLOOMBERG BUSINESS (June 13, 2013), <http://www.businessweek.com/articles/2013-06-13/marc-toberoff-supermans-lawyer>.

¹⁶ Supreme Court of the United States Blog (SCOTUSblog), *Kirby v. Marvel Characters, Inc.*, SCOTUSBLOG (Sept. 26, 2014), <http://www.scotusblog.com/case-files/cases/kirby-v-marvel-characters-incorporated/> [hereinafter SCOTUSblog].

¹⁷ Thomas Young, *Superman's Kryptonite: The Termination Right Loophole*, COPYRIGHT CULTURE: A LAW BLOG (Nov. 3, 2014),

This paper will discuss and analyze the rise of the comic book industry as a global force, the development of the work for hire doctrine with respect to comic book artists and authors, the emergence of the right of termination and its applicability, and how the inherent conflicts in the aforementioned frameworks serve to favor comic book publishing houses to the detriment of creators, robbing artists and creators of due credit and compensation.

II. The Work for Hire Doctrine, The Right of Termination, and The Copyright Act

The original Copyright Act of 1790 afforded copyright protection for an initial 14-year period with a corresponding option to renew the copyright for an additional term of 14 years.¹⁸ However, while granting some protection, the original Act did not indicate whether the transfer or assignment of the copyright of a fixed work would also include any of the “extensions, improvements, and all other incidentals” to the copyright.¹⁹ In other words, the first section of the Act was so limited that an assignment of a copyright at the time would not have functioned nearly as well compared to the transfer of a patent.²⁰ In both 1831 and 1870, Congress altered the original renewal rights granted to copyright owners to ultimately grant the exclusive right of copyright renewal to a living “author, inventor, or designer,” or “his widow or children, if he be dead.”²¹ These actions significantly changed the original terms of obtaining and renewing a copyright so that the right to copyright renewal would revert back to the author of

<https://copyrightculture.wordpress.com/tag/comic-books/> (discussing several of the termination right-based comic book cases the Supreme Court could have considered but declined to do so, such as *Peary v. DC Comics*, 2014 U.S. LEXIS 5678 (U.S. 2014) and the ongoing string of litigation between Superman’s creators and DC Comics).

¹⁸ Copyright Act of 1790, ch. 15, 1 Stat. 124 (repealed 1831).

¹⁹ *White-Smith Music Publ’g Co. v. Goff*, 187 F. 247, 250 (1st Cir. 1911).

²⁰ *Id.*

²¹ Patrick Murray, Comment, *Heroes-for-Hire: The Kryptonite to Termination Rights Under the Copyright Act of 1976*, 23 SETON HALL J. SPORTS & ENT. L. 411, 418 (2013).

the work or her family following expiration of the original 14-year term.²²

A. *Changes to the Copyright Act in an Attempt to
Protect Authors*

In 1909, Congress once again drastically altered copyright law. Under the Copyright Act of 1909, authors received initial copyright protection for 28 years, starting from the original date of publication with the option for a renewal period of a second 28-year term upon expiration of the original term.²³ Such a drastic increase—doubling the amount of years of protection available to authors—resulted from congressional reasoning that the inequality in the bargaining process between an author and publisher required some form of remedy.²⁴ Congress targeted the amendment to protect authors, such as scribes, that sold their copyrights for small sums of money to publishers that eventually profited handsomely from the works several years down the road.²⁵ The new renewal term further protected disenfranchised authors by creating an estate that was “clear of all rights, interests, or licenses granted under the original copyright.”²⁶ The intention here, again, was to protect authors and prevent poor bargaining decisions. In effect, the renewal term allowed authors to fairly renegotiate terms following the determination of a work’s value during the initial term through its exploitation.²⁷ However, no matter how well-intentioned

²² *White-Smith Music Publ’g Co.*, 187 F. 247 at 250.

²³ Act of March 4, 1909, ch. 320, 35 Stat. 1075 (1909) (repealed 1976) [hereinafter *Copyright Act of 1909*]; *see also* Murray, *supra* note 21.

²⁴ H.R. REP. NO. 60-2222, at 14 (1909) (quoting: “It not infrequently happens that the author sells his copyright outright to a publisher for a comparatively small sum. If the work proves to be a great success and lives beyond the term of twenty-eight years, . . . it should be the exclusive right of the author to take the renewal term, and the law should be framed . . . so that [the author] could not be deprived of that right”).

²⁵ *Id.*

²⁶ *G. Ricordi & Co. v. Paramount Pictures, Inc.*, 189 F.2d 469, 471 (2d Cir. 1951).

²⁷ *Stewart v. Abend*, 495 U.S. 207, 218–19 (1990).

these new additions to the Copyright Act of 1909 were, the “improved” system soon came under immense scrutiny.

While the Copyright Act of 1909 originally intended to provide copyright owners with the unalienable right to renew their respective copyright,²⁸ the Supreme Court severely confused the application of the law in the *Fred Fisher Music Co. v. M. Witmark & Sons* decision.²⁹ The main issue in this case centered upon whether an author legally possessed the ability to assign her interest in a renewable copyright of a fixed composition before even securing the copyright in the first place.³⁰ The Court held that 35 Stat. 1075 of the Copyright Act of 1909 did not prevent a future copyright holder from assigning her potential interest in a composition because “[t]he available evidence indicate[d] . . . that renewal interests of authors have been regarded as assignable both before and after the Copyright Act of 1909.”³¹ Following the decision in *Fisher*, Congress felt compelled to further amend U.S. copyright law “because of the unequal bargaining position of authors, resulting in part from the impossibility of determining a work’s value until [after] it has been exploited.”³² As a result, Congress made several essential changes to the Act, notably creating the right of termination of transfers and extending copyright protection periods. These changes were eventually codified in the Copyright Act of 1976.³³

On January 1, 1978, the Copyright Act of 1976 took effect and brought with it a number of changes. First of all, Congress changed the prior “two-term” protection system of 28 years to a single protection period lasting the life of the author plus another 50 years.³⁴ Under the terms of the Sonny Bono Copyright Term Extension Act, this period increased another 20 years, thus providing protection

²⁸ Copyright Act of 1909, §§ 23–24 (current version at 17 U.S.C. §§ 302–04 (1994)).

²⁹ 318 U.S. 643 (1943).

³⁰ *Id.* at 644.

³¹ *Id.* at 659.

³² H.R. REP. NO. 94-1476, at 124 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5740.

³³ 17 U.S.C. §§ 101–810; *see generally* H.R. REP. NO. 94-1476, *supra* note 32.

³⁴ *Id.* § 302(a).

during the author's lifetime plus another 70 years.³⁵ Concerning works created under corporate joint authorship, the Act provided 120 years of copyright protection after creation or for 95 years following publication, whichever ended earlier.³⁶

Because the newly adjusted copyright term only applied to works created after 1978 (the enactment date of the statute), works created previously were still subject to the renewal system provided by the 1909 Act.³⁷ Despite these bifurcated renewal provisions, the 1976 Act nonetheless allowed for an additional renewal term period of 19 years for works created before the 1978 deadline, resulting in a maximum protection term of 47 years.³⁸ For applicable works already renewed, the Sonny Bono Act tacked an additional 20 years on top of the original 47-year term.³⁹

B. *The Right of Termination of the 1976 Act*

The purpose of the right of termination focuses on allowing authors and their heirs to terminate previous allocations of copyrights, "safeguarding authors against unremunerative transfers" of copyrights.⁴⁰ This right of termination shows up in Sections 203 and 304 of the Copyright Act.⁴¹ Under Section 203, authors of works qualifying for copyright have the right to terminate:

the exclusive or nonexclusive grant of a transfer or license of copyright or of any right under a copyright, executed by the author on or after January 1, 1978.⁴²

³⁵ Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (1998) (codified as amended 17 U.S.C. §§ 108, 203, 301–04 (2000)) [hereinafter Sonny Bono Copyright Term Extension Act (when used to refer to the entire Act)].

³⁶ *Id.*

³⁷ 17 U.S.C. § 304 (2006).

³⁸ *Id.* § 304(a).

³⁹ Sonny Bono Copyright Term Extension Act, *supra* note 35.

⁴⁰ H.R. REP. NO. 94-1476, *supra* note 32.

⁴¹ *See* 17 U.S.C. §§ 203, 304 (2006).

⁴² *Id.* § 203(a) (2002).

Additionally, Section 203 also gives authors of copyrighted works the ability to reclaim works belonging to them, but only if they previously obtained copyright protection.⁴³ While this right of termination appeared “non-waivable” in nature, in an effort to neutralize the imbalance of power between authors and publishers, Congress stated that this right of termination could be transferred or forfeited via contract.⁴⁴ This amendment abrogated the Supreme Court’s holding in *Fisher* that a copyright owner could transfer ownership of her copyright to another before actually claiming the copyright.

While Sections 203 and 304 are mostly similar—aside from the “notwithstanding an agreement to the contrary” language—differences lie in the time period split between the two provisions.⁴⁵ For example, Section 203 focuses on the revisionary rights of authors who created works following the enactment of the 1976 Act (on or after January 1, 1978), while Section 304 reaches back and grants a retroactive termination right to authors before the cutoff date.⁴⁶ Under Section 203, an author may exercise her right of termination “at any time during a period of [5] years beginning at the end of [35] years from the date of execution of the grant.”⁴⁷ So long as the particular grant included the additional right of publication, then the 5-year period starts “at the end of [35] years from the date of publication . . . or at the end of [40] years from the date of execution of the grant, whichever term ends earlier.”⁴⁸ Under Section 304, an author and/or her heirs maintain the right of termination in a copyright for a period of 5 years, beginning 56 years after the original grant of the copyright.⁴⁹

The substantive changes made to the Copyright Act of 1976 trace back to the difficulties first encountered by both the courts and

⁴³ *Id.*

⁴⁴ *Id.* § 304(c).

⁴⁵ *See id.* §§ 203(a), 304(c).

⁴⁶ *Id.*

⁴⁷ 17 U.S.C. § 203(a)(3) (2002).

⁴⁸ *Id.*

⁴⁹ *Id.* § 304(c)(3).

the legislature following the *Fisher* decision. By extending existing copyright protection, allowing a longer term for future copyrights, and providing a protective safeguard of a termination right, Congress most certainly “intended to make the rewards for the creativity of authors more substantial.”⁵⁰ The termination right balances the unequal footing inherent in the bargaining process between authors and publishers, while also fulfilling the constitutional mandate of promoting “the Progress of Science and useful Arts, by securing for limited Times and Inventors the exclusive Right to their respective Writings and Discoveries.”⁵¹ While all of the changes made to the 1976 Act give authors more protection, creators classified under the “work for hire” standard continued to be shut out from using the termination right.⁵²

C. *Work for Hire Doctrine*

While a casual observer may not see much of a difference between the regular author-publisher relationship and the work for hire connection, both Congress and the courts have made sure to clearly divide the two groups of creators for more than a century.⁵³ While authors possess the right to assign their copyrights to other individuals or entities, authors and artists contracted under the work for hire umbrella may not legally claim any ownership or copyright to their work.⁵⁴ Congress created the right of termination for original creators of works that subsequently assign copyrights to their works, but consciously excluded creators of works made for hire from this right.⁵⁵ An employee or contractor creating a work made-for-hire forfeits the work’s copyright to his employer, who originally contracted with him, despite the fact that the creator of the work never assigned or

⁵⁰ See *Mills Music, Inc. v. Snyder*, 469 U.S. 153, 172 (1985).

⁵¹ U.S. CONST. art. I, § 8, cl. 8.

⁵² 17 U.S.C. §§ 203(a), 304(c) (2002).

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

contracted away the rights in the work in the first place.⁵⁶ The ramifications leave the original creator of a work for hire to watch his work eventually become exploited by the contracting entity, the scale of which is tremendous in the comic book industry.

Under Section 101 of the Copyright Act of 1976, the following types of creations constitute a work made for hire:

(1) a work prepared by an employee within the scope of his or her employment; or

(2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire.⁵⁷

Because the Copyright Act of 1909 governs copyrighted works created before January 1, 1978 (the date on which Congress officially enacted the Copyright Act of 1976), these older works receive a different statutory interpretation of the work for hire doctrine.⁵⁸ The 1909 Act defines “. . . the word ‘author’ [as including] an employer in the case of works made for hire.”⁵⁹ According to this definition, an employer that hires an individual to create a copyrightable work on his behalf retains authorship credit of the work, so long as no contrary contract exists between the parties.⁶⁰ Additionally, this presumption of

⁵⁶ 17 U.S.C. § 201; *Penguin Group Inc. v. Steinbeck*, 537 F.3d 193, 203 (2d Cir. 2008) (quoting: “Works for hire are exempt from Section 304(c) and (d)”); Terry Hart, *Marvel v. Kirby: Work for Hire and Copyright Termination*, COPYHYPE (Aug. 3, 2011), <http://www.copyhype.com/2011/08/marvel-v-kirby-work-for-hire-and-copyright-termination>.

⁵⁷ 17 U.S.C. § 101 (2005).

⁵⁸ *In re Marvel Entm’t Grp.*, 254 B.R. 817, 828 (D. Del. 2000).

⁵⁹ Copyright Act of 1909 § 62 (repealed Jan. 1, 1978).

⁶⁰ *Playboy Enters., Inc. v. Dumas*, 53 F.3d 549, 554 (2d Cir. 1995); *Siegel v. Nat’l Periodical Publ’ns, Inc.*, 508 F.2d 909, 914 (2d Cir. 1974).

ownership in favor of the employer generally extends to works created by independent contractors as well as to the work of employees.⁶¹ For works under the 1976 Act, copyright achieving protection initially vests in the author(s) of the work.⁶² In the case of a joint work, the Act deems both authors co-owners of the copyright in the particular work.⁶³

III. The Seventy Year Financial Purgatory of Superman’s Creators

A. The Struggle of Two Men in Recovering Superman

While Superman flew into homes establishing himself as a household name, his creators fought over his actual story for several years beforehand.⁶⁴ The joint creators of Superman, Jerome Siegel and Joe Shuster, first met in 1932 at Glenville High School in Cleveland.⁶⁵ They first co-published and worked together on a fanzine,⁶⁶ *Science Fiction: The Advance Guard of Future Civilization*.⁶⁷ Over time, Siegel and Shuster jointly created and slowly developed a character named Superman, although this original version of Superman resembled Lex Luthor more than it did the eventual Clark Kent.⁶⁸

⁶¹ *Brattleboro Publ’g Co. v. Winmill Publ’g Corp.*, 369 F.2d 565, 567–68 (2d Cir. 1966).

⁶² *Id.* § 201 (1978).

⁶³ *Id.*

⁶⁴ R.C. Harvey, *Who Discovered Superman*, *THE COMICS JOURNAL* (Jan. 6, 2014), <http://www.tcj.com/who-discovered-superman/>.

⁶⁵ *Id.*

⁶⁶ A “fanzine” is “a magazine that is written by and for people who are fans of a particular person, group, etc.” *Fanzine*, MERRIAM-WEBSTER ONLINE AMERICAN ENGLISH DICTIONARY, <http://www.merriam-webster.com/dictionary/fanzine> (last visited Apr. 3, 2015).

⁶⁷ Leonard, *supra* note 15, at 1.

⁶⁸ *Id.*

After deciding to ditch the concept of Superman as a bald evil villain using his powers to wage war around the globe, Siegel and Shuster continued going through iterations of iterations of Superman before Siegel developed the billion-dollar backstory: Superman would be a man blessed with supernatural athleticism forced to escape his own dying planet.⁶⁹ Before long, Siegel and Shuster managed to create the entire story of Superman, which would eventually catapult the character to worldwide fame.⁷⁰ Soon enough, the twosome began putting their stories into newspaper strips.⁷¹ After several weeks of failing to sell their Superman stories, Siegel and Shuster decided to cut and paste that very material into a comic book format instead of newspaper strips.⁷² The comic was eventually sold to Detective Comics⁷³ in 1938 for a grand total of \$130.⁷⁴ Soon enough, the creators looked on in horror as their creation achieved super-stardom and pervaded many different platforms, including radio, film, and merchandise without the duo seeing any further compensation for their creation.⁷⁵

In 1947, Siegel and Shuster unsuccessfully sued DC to retain ownership of their creation, only to be ostracized by the entire comic book industry for years following the suit.⁷⁶ In 1969, Siegel and Shuster went to court again to fight for their ownership rights, this time suing DC to reclaim their former copyright to the character and brand; they proved unsuccessful yet again.⁷⁷ In 1975, the partners decided to go public with their complaints and managed to obtain an

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ Leonard, *supra* note 15, at 1 (referencing the fact that Detective Comics was the precursor to DC Comics, now a wholly-owned division of Warner Brothers Entertainment).

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.* at 2.

⁷⁷ *Id.*

annual stipend of \$20,000 each from DC, which by that point had become a subdivision of Warner Brothers.⁷⁸ While Warner Bros. claims that the \$20,000 stipend eventually turned into \$100,000 for each artist annually,⁷⁹ Siegel nonetheless asked his family to reclaim his and his partner's rights and due compensation in Superman prior to his 1996 death.⁸⁰

B. *Superman's Creators' Legal Kryptonite*

Both Siegel's and Shuster's heirs were convinced that the 1976 Copyright Act would allow them to reclaim the Superman copyright even if the creation did not constitute a work for hire.⁸¹ After a few years of miscommunication between the two families and Warner Bros., Siegel's and Shuster's heirs hired famed intellectual property attorney Marc Toberoff to take on their cases.⁸² In 2008 Toberoff filed suit, arguing that Siegel's and Shuster's creative works belonged to their respective estates under Section 304(c) of the Copyright Act based upon the termination of the late creators' grant of rights to DC.⁸³ The District Court held that "[a]fter [70] years, [] Siegel's heirs regain what he granted so long ago—the copyright in the Superman material that was published in *Action Comics, Vol. 1.*"⁸⁴ However, the court later found that, while Siegel and Shuster were entitled to the copyright in the original Superman issue, their employment with DC from 1938 to 1943 rendered issues published during that time works made for hire and therefore, those works belonged to DC.⁸⁵

⁷⁸ *Id.*

⁷⁹ Leonard, *supra* note 15, at 2.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ Siegel, 542 F. Supp. 2d at 1145.

⁸⁵ See Siegel v. Warner Bros. Entm't Inc., 658 F. Supp. 2d 1036, 1095 (C.D. Cal. 2009).

Even though the courts' decisions granted fifty percent of the Superman rights to the Siegel family, the Warner Bros. loss (and corresponding switch of legal teams) revealed Toberoff's somewhat dubious motives in taking on the case in the first place.⁸⁶ While the Ninth Circuit later tossed out the charges of interference against Toberoff, an appellate court overturned⁸⁷ the previous verdict that had been in favor of the Siegels⁸⁸ and, in 2012, the District Court for the Central District of California found invalid the Shuster family's copyright reclamation attempt.⁸⁹ Both holdings were based upon the fact that Warner Bros. had reached prior deals with the late artists.⁹⁰ Afterwards, it seemed extremely unlikely that either of the estates had any surviving causes of action given the results of several settlements over the years that had contracted away the original rights of both creators.⁹¹ While this decision renders a poor precedent for other

⁸⁶ Trent Moore, *WB Wins, Heirs of Superman Creators Lose, Latest Legal Tussle*, BLASTR (Apr. 17, 2012, 5:26 PM) http://www.blastr.com/2012/04/wb_wins_heirs_of_superman.php. It turned out that Toberoff set up a joint venture with the Shuster family in 2001 to be called *Pacific Pictures*, which would have entitled Toberoff to half of their reclaimed rights to Superman. *Id.* Additional evidence soon surfaced concerning Toberoff's attempts to license the Siegels' Superman rights for \$15 million. *Id.*; see *Pac. Pictures Corp. v. U.S. Dist. Court*, No. 11-71844, 2012 U.S. App. LEXIS 7643 (9th Cir. Cal. Apr. 17, 2012).

⁸⁷ See *Larson v. Warner Bros. Entm't, Inc.*, No. 2:04-cv-08776, 2013 U.S. Dist. LEXIS 55950, at *18 (C.D. Cal. Apr. 18, 2013) (quoting: "[T]he 2001 settlement agreement between DC and the Siegels re-granted the Siegels' Superman, Superboy, and Superman Ad works to DC in return for substantial advances and royalties. Because the agreement leveraged the Siegels' all-encompassing 1997 termination notice to extract a highly remunerative new grant of the same rights, it was tantamount to following the statutory formalities and thus does not constitute an 'agreement to the contrary' under 17 U.S.C. § 304(c)(5)").

⁸⁸ Siegel, 542 F. Supp. 2d at 1145.

⁸⁹ In 2012, the court dismissed the Shuster family's claim for copyright ownership of Superman properties due to the existence of a 1992 agreement between Shuster's estate and DC. See *DC Comics v. Pac. Pictures Corp.*, No. 10-3633, 2012 U.S. Dist. LEXIS 149532, at *32 (C.D. Cal. Oct. 17, 2012). That agreement forfeited the Shuster estate's rights in exchange for the payment of Shuster's debts upon his death along with annual compensation to Shuster's siblings for life. *Id.*

⁹⁰ See *supra* notes 86, 88.

⁹¹ See *supra* notes 86, 88.

comic book creators looking to reclaim their copyrights under the right of termination provision, both Siegel and Shuster would have benefited greatly from obtaining legal advice while alive concerning their rights under various settlement terms.

IV. The Kirby Estate's Search for Justice in the Marvel Universe

A. A Long Lost Creator's Quest for Redemption

While Superman's creators fought DC and later Warner Bros., Jack Kirby waged quite a similar yet less litigious war against Marvel Comics. In 1961, the entity formerly known first as Timely Publications and then Atlas Comics transformed into Marvel Comics.⁹² Between 1961 and 1964, Marvel managed to create a number of the world's most popular comic characters even to this day, including the X-Men, The Fantastic Four, and nearly all of the main characters in the Avengers.⁹³ This fruitful and creative period lasted throughout the remainder of the 1960s as Marvel honed in on a process—now referred to as the “Marvel Method”—that churned out intellectual property, which is now worth billions of dollars in today's story-hungry entertainment marketplace.⁹⁴ While Kirby originally worked with Marvel as one of several freelance artists, his creative talents made him stand out.⁹⁵ Soon, Kirby formed a nearly perfect artist-writer combination with Stan Lee, in which Kirby illustrated the comics and Lee⁹⁶ wrote the accompanying storylines.⁹⁷ This “Marvel

⁹² Jim Beard, *Travel Back to Marvel's Forgotten Era, The Age of Atlas Comics*, MARVEL (Mar. 21, 2014), http://marvel.com/news/comics/22189/travel_back_to_marvels_forgotten_era_the_age_of_atlas_comics.

⁹³ Pappademas, *supra* note 13.

⁹⁴ *Id.*

⁹⁵ *See id.*

⁹⁶ *Id.* To this day, Stan Lee (*née* Stanley Martin Lieber) remains the most recognizable face of the comic book industry. *Id.* Lee worked at Detective Comics for some time, and interestingly enough, as a “playwright” for the U.S. Army during World War II, charged with illustrating pamphlets on how to avoid catching venereal disease overseas. *Id.* Lee became sick of the stale industry at the time and decided to write something he actually wanted to create. *Id.* The result of this breakthrough,

Method” comprised the gritty realness of Lee’s scripts with Kirby’s futuristic and imaginative art panes.⁹⁸

However, while Lee would go on to gain worldwide acclaim, Kirby encountered a much different fate. As Marvel’s editor-in-chief, general art director, and publisher, Lee enjoyed immense success as a result of the unparalleled comics creative run of the 1960s.⁹⁹ Kirby failed to reap the same financial benefits, largely due to his status as a freelance artist and an independent contractor for Marvel.¹⁰⁰ In 1970, Kirby left Marvel for the first time to join Marvel’s main rival, DC.¹⁰¹ Over the next few decades, Kirby would continue to jump back and forth between Marvel and other competitors, all the while publicly complaining that he was denied the great success, acclaim, and fortunes granted to Lee; though he never pursued litigation before he passed away in 1994.¹⁰² According to Kirby,

[i]t wasn’t possible for a man like Stan Lee to come up with new things — or old things, for that matter . . . Stan Lee wasn’t a guy that read or that told stories. Stan Lee was a guy that knew where the papers were or who was coming to visit that day.¹⁰³

The Fantastic Four, enjoyed acclaim and success, outsold the competition, and marked the start of the legend of Marvel Comics. *Id.* While Lee left the actual comics division in the 1980’s to jumpstart Marvel’s movie division (and would eventually become a general spokesman for the company), Lee will always be known as the face of Marvel and comics, generally, no matter the actual owner or management in charge, for better or worse. *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ Pappademas, *supra* note 13.

¹⁰⁰ *Id.*

¹⁰¹ Pappademas, *supra* note 9.

¹⁰² *Id.*

¹⁰³ Interview by Gary Groth with Jack Kirby, in L.A., Cal. (1989) (transcript available online, Gary Groth, *The Comics Journal Archive: Jack Kirby Interview*, THE COMICS JOURNAL 6 (May 23, 2011), <http://www.tcj.com/jack-kirby-interview>).

Without much to show for his extensive artistic contributions, not just in comics, but also on American culture for six decades and counting, Kirby's name became one of the most defended and hallowed by hardcore comic book fans.¹⁰⁴ For instance, fans have voiced disapproval of the perceived artistic decline and the subsequent commercial "sell-out" of Marvel following Kirby's departure from the company.¹⁰⁵

B. *Kirby's Avengers Strive for Compensation and Authorship Credit*

Despite the fact that Kirby failed to pursue legal action against Marvel during his lifetime, his heirs were not without options. Following Toberoff's great initial successes on behalf of the Siegel and Shuster estates, along with the purchase of Marvel by Disney for a cool \$4 billion in 2009, Kirby's heirs decided the time to seek further financial compensation had arrived.¹⁰⁶ Kirby's heirs hired Toberoff, who quickly sent several notices of copyright termination to Marvel, Disney, Fox, Sony, and several other film studios involved in productions of movies based on Kirby-created Marvel properties.¹⁰⁷ Soon thereafter, Marvel responded to said termination notices by suing the Kirby family and claiming that, according to previous contractual arrangements the corporation had made with Kirby, his creations were deemed works for hire and were not entitled to the right of termination.¹⁰⁸

Even though Kirby never legally possessed copyrights to the commissioned works for hire he created for Marvel as a freelance contractor (unlike Shuster and Siegel), a surprising amount of legal scholars rushed to support Kirby, arguing that the termination right provision should be extended to him and his heirs.¹⁰⁹ Chief among

¹⁰⁴ Pappademas, *supra* note 9.

¹⁰⁵ Pappademas, *supra* note 13.

¹⁰⁶ Pappademas, *supra* note 9.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ Eriq Gardner, *Jack Kirby's Heirs Get Huge Support in Quest to Bring Marvel Fight to Supreme Court*, HOLLYWOOD REPORTER (June 19, 2014, 8:46 AM),

these supporters was Bruce Lehman, former director of the U.S. Patent and Trademark Office and President Clinton’s chief advisor on intellectual property matters.¹¹⁰ Mr. Lehman filed an amicus brief with the Supreme Court in the case of *Kirby v. Marvel Characters, Inc.*,¹¹¹ on behalf of himself, former U.S. Register of Copyrights Ralph Oman, the Artists Rights Society, the International Intellectual Property Institute, and others.¹¹²

While the District Court previously dismissed Kirby’s case in 2013 based upon an alleged failure to properly rebut the work for hire presumption,¹¹³ Lehman argued that the decision ignored Kirby’s independence during his creation of Marvel properties, the legislative history on the meaning of the term “employer,” and the Supreme Court’s prior interpretation of a work made for hire.¹¹⁴ Specifically, in 1989, the Court held that a work failed to meet the requirements of a work made for hire if it was created by a skilled independent contractor working in his own studio, with his own materials, and he was charged with a specific task limited in time and scope.¹¹⁵ According to Lehman,

<http://www.hollywoodreporter.com/thr-esq/jack-kirbys-heirs-get-huge-712924>. See also Brief of Amici Curiae, Bruce Lehman, In Support of Petitioners <http://sblog.s3.amazonaws.com/wp-content/uploads/2014/07/Kirby-v.-Marvel-Lehman-Amicus-Brief-6.13.2014.pdf>; Brief of Amici Curiae, Mark Evanier, John Morrow, and PEN Center USA, In Support of Petitioners <http://sblog.s3.amazonaws.com/wp-content/uploads/2014/07/Kirby-v.-Marvel-Evanier-Amicus-Brief-6.13.2014.pdf>; Brief of Amici Curiae, Screen Actors Guild-American Federation of Television and Radio Artists, Directors Guild of America, Inc., and Writers Guild of America, West, Inc., In Support of Petitions <http://sblog.s3.amazonaws.com/wp-content/uploads/2014/07/Kirby-v.-Marvel-SAG-AFTRA-Amicus-Brief-6.13.2014.pdf>.

¹¹⁰ See Brief of Bruce Lehman et al. as Amici Curiae Supporting Petitioners, *Kirby v. Marvel Characters, Inc.*, 2014 U.S. LEXIS 4894 (2014) (No. 13-1178), available at <http://www.scotusblog.com/case-files/cases/kirby-v-marvel-characters-incorporated/>.

¹¹¹ 135 S. Ct. 42 (2014).

¹¹² Gardner, *supra* note 109.

¹¹³ *Marvel Characters, Inc. v. Kirby*, 726 F.3d 119, 143 (2d Cir. 2013).

¹¹⁴ Gardner, *supra* note 109.

¹¹⁵ *Cnty. For Creative Non-Violence v. Reid*, 490 U.S. 730, 753 (1989). See 17 U.S.C. § 101 (2010).

[t]he court of appeal’s analysis conflicts with Justice Marshall’s analysis of the work for hire doctrine under the 1909 Act. Jack Kirby’s works at issue fell into the category of “commissioned works” which Justice Marshall concluded were “conveyed” i.e., assigned. Furthermore, all of the evidence available to the lower courts supported that Kirby “conveyed the copyright” to Marvel, not that Marvel owned Kirby’s work at creation. That is precisely the circumstance 17 U.S.C. § 304 is intended to address by giving authors or their statutory heirs the opportunity to terminate such copyright transfers.¹¹⁶

Mr. Lehman was not the only one asking the Court to grant Kirby’s allegedly assignable rights to his heirs, which would allow for the possibility of termination. Another amicus brief, filed by Mark Evanier (a comic book historian and former adviser to Marvel, DC Comics, and Dark Horse Comics) and John Morrow of the PEN Center USA,¹¹⁷ supported Kirby’s argument for the right of termination under the Supreme Court’s interpretation of the work for hire doctrine.¹¹⁸ Evanier provided further background to Lehman’s legal argument; freelancers like Kirby worked in home studios, did not receive a salary but instead received compensation for each page created, their taxes were not withheld by the alleged “employer,” and the artists purchased their own working materials.¹¹⁹ These facts go to the heart of Lehman’s argument: Kirby’s creations did not constitute works for hire, but rather assignable properties authored by an independent contractor.

¹¹⁶ Lehman, *supra* note 109.

¹¹⁷ The PEN Center USA was founded in 1943 and represents more than eight hundred members including writers, poets, playwrights, essayists, novelists, television and screenwriters, critics, historians, editors, journalists, and translators in order to protect the rights of writers worldwide. See Pen Center USA, <http://www.penusa.org/about> (last visited Jan. 1, 2015).

¹¹⁸ Gardner, *supra* note 109.

¹¹⁹ *Id.*

The “instance and expense” test used by various courts to determine if a work qualifies as a work for hire was at the heart of this controversy. This test gained recognition in 1965 when the United States Court of Appeals for the Ninth Circuit stated:

when one person engages another, whether as employee or as an independent contractor, to produce a work of an artistic nature, that in the absence of an express contractual reservation of the copyright in the artist, the presumption arises that the mutual intent of the parties is that the title to the copyright shall be in the person whose instance and expense the work is done.¹²⁰

While not every single jurisdiction in the nation has adopted this framework to determine the existence of a work for hire, several consider this test as near-gospel, including the Second Circuit.¹²¹ In an effort to address the disconnect between differing jurisdictions, Justice Marshall held in *Reid* that the “instance and expense test” bore no application to works created under the breadth of the Copyright Act of 1976, and he instructed courts to look to common law agency rules when determining whether a work was created within the scope of employment.¹²² Such an analysis focuses upon the facts of the situation rather than a presumption.

In the most recent iteration of Kirby’s case against Marvel, many facts support Kirby’s argument that he was an independent

¹²⁰ *Lin-Brook Builders Hardware v. Gertler*, 352 F.2d 298, 300 (9th Cir. 1965).

¹²¹ See Wallace Collins, *New York vs. California Courts: Why They Handle Copyright Cases Differently*, ARTISTS HOUSE MUSIC, <http://www.artistshousemusic.org/videos/new+york+vs+california+courts+why+they+handle+copyright+cases+differently> (discussing why most copyright cases are handled in either the Second or Ninth Circuit courts, and the difference between the two aforementioned federal circuits: “In general, most of the bigger copyright cases. . . tend to be in New York, like the Second Circuit . . . and in the . . . Ninth Circuit . . . in California . . . I know that California law is much more artist-favorable, so a lot of the contracts with the major record labels, even if the labels are based in California, they make the forum New York, they want New York courts and New York law” since New York courts view contracts in a light much more favorable to companies and corporations).

¹²² *Reid*, 490 U.S. at 750–51.

contractor.¹²³ The Second Circuit Court of Appeals followed its precedent of applying the instance and expense test to the facts.¹²⁴ Following its decision that Marvel satisfied both prongs of the applicable framework, the court declared that the works at hand qualified as works made for hire under Section 304(c) of the Copyright Act.¹²⁵ The court pointed to a 1975 contract between Kirby and Marvel which labeled Kirby's work with Marvel as works made for hire.¹²⁶ The contract also included an assignment clause that granted Kirby's exclusive authorship rights to Marvel.¹²⁷ The plaintiffs argued that the agreement proved that Marvel acknowledged it indeed possessed no ownership to the copyrights of Kirby's created works, but the court disagreed and claimed that such a conflicting agreement failed to rebut the work for hire presumption.¹²⁸

V. Looking for a Crystal Ball: The Dangers that Lie Ahead

A. The Comic Industry's Attempts to Stave Off A Ticking Time Bomb

More than ever, comic books and their characters play an important role in such a continuously booming industry. Companies like Marvel, DC, Sony, and Fox all try to outdo each other, especially when a situation involves the release of movies based on comic book characters and their stories. With some of these film companies announcing superhero movie release dates that are years into the future, the race to find the next great comic to exploit via film and television continues to grow more and more intense. Due to the large stakes surrounding characters that were created decades ago, the

¹²³ Marvel Characters, Inc., 726 F.3d at 142.

¹²⁴ *Id.* at 141–43.

¹²⁵ *Id.* at 143.

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

question over who actually owns the exclusive distribution rights refuses to go away, and the studios operate in quiet terror.

Based on the question of how to apply the termination rights framework and whether or not there should be a presumption under the work for hire doctrine, the Supreme Court agreed to consider the Kirby estate's case in an attempt to clear up the inconsistencies experienced in the comics industry.¹²⁹ Faced with the mounting pressure of opponents in support of the disenfranchised artists and threats that an unfavorable decision by the Supreme Court would endanger comic, television, and film properties worth billions of dollars in future revenues, Marvel finally caved and announced a major settlement of an undisclosed amount with Kirby's estate; the announcement came just days before the Supreme Court was set to have a conference on the matter.¹³⁰

Simultaneous to the settlement talks with Kirby's estate, Marvel, DC, and other similar comic book companies continued offering settlements to disenfranchised artists to avoid a Supreme Court decision that would change the comic legal landscape, one way or another. In 2013, after providing inadequate compensation over the years, Marvel wrote a rather substantial check to Wolverine creator Len Wein following the success of the most recent installment of Wolverine films, *The Wolverine*.¹³¹ During the summer of 2014, *Guardians of the Galaxy* co-creator Bill Mantlo lay in a nursing home as the story he helped invent generated more than \$172 million in ticket sales within its first four days in movie theaters worldwide.¹³² It goes without saying that Mantlo received nary a penny for his contributions.¹³³

¹²⁹ SCOTUSblog, *supra* note 16.

¹³⁰ Pappademas, *supra* note 9.

¹³¹ Tim Molloy, *TCA: What Does It Pay to Create Wolverine? \$350, Initially*, THE WRAP (Aug. 7, 2013, 3:11 PM), <http://www.thewrap.com/tv/column-post/tca-what-does-it-pay-create-wolverine-350-initially-109241/>.

¹³² Dave Itzkoff, *Armed Animals Don't Invent Themselves: 'Guardians of the Galaxy' Character Creators Fight for Cash and Credit*, N.Y. TIMES, Aug. 6, 2014, available at http://www.nytimes.com/2014/08/07/movies/comic-character-creators-fight-for-cash-and-credit.html?_r=1.

¹³³ *See id.*

Meanwhile, co-creator of *The Punisher* series Gerry Conway claimed that although Marvel is yet to compensate him for the two *Punisher* films released since 2000, the company tried to repay him several times.¹³⁴ Conway further commented on the industry by saying:

the companies are at this point trying to find ways to compensate people . . . because of the nature of the way the business was at the time . . . we didn't think any of this was going to have any legs. We thought the business was going to collapse, to be honest with you.¹³⁵

While Wein seems more skeptical of Marvel, he claimed that when he was working for DC Comics, “anything [he] create[d] [he got] a piece of . . . Lucius Fox, for example, who was in the last trilogy of Batman movies played by Morgan Freeman, bought [his] new house.”¹³⁶

B. *The Difficulties Created by Decades of Outdated and Conflicting Interpretations*

While critics argue that the Kirby estate further took the wind out of the sails of similar disenfranchised comic book authors and artists by failing to take the case to the Supreme Court, one must take solace in the fact that justice was finally served in this particularly extraordinary case. While the Kirby estate succeeded in achieving what was likely a massive settlement payment from Disney and Marvel, Toberoff's other clients, the Siegel and Shuster estates, did not have the benefit of a Supreme Court interpretation of the law, and they continue to face closed doors at various district courts.

Comic book authors and artists who worked to create magnanimous universes of heroes continue to stand on the sidelines with their hands held outward. Instead of letting the highest court in the land decide, once and for all, exactly how the work for hire doctrine properly applies to independent contractor artists prior to the Copyright Act of 1976, ambiguity continues to run rampant. There

¹³⁴ Molloy, *supra* note 131.

¹³⁵ *Id.*

¹³⁶ *Id.*

remains a great deal of confusion concerning the applicability of work for hire rulings in the comic artist context. This lack of clarity prevents courts from fully granting actual authors the ability to exercise their termination rights via copyright ownership. Until another case reaches the Supreme Court, or Congress steps up and provides further enlightenment on the situation, huge comics conglomerates like Marvel and DC will continue to have the upper hand and take advantage of authors and artists whose creations are making them unbelievable sums of money.

VI. Conclusion

The fights between artists and corporate comic book conglomerates will continue to rage on until the rules governing the proper relationship between the parties receive further codification, either via statutory or judicial means. At this point in time, the current structure of the system provides corporations like Disney, Marvel, and DC with too much leverage in these legal battles. Unlike most artists and their estates, publishers and film studios have access to nearly unlimited financial means to settle copyright ownership disputes. Thanks to the extremely rare ability to provide immediate movie-going audiences and fan bases with each and every new comic story exported to the silver screen, Hollywood will return to the well until the very last drops of creative oil dry up. Unless this very specific situation of independent creators versus publishers finds a workable balance, either by judicial and/or congressional means, comic corporations will not cease in subjugating the authors, creators, and inventors who carry out copyright law's purpose of promoting "the Progress of Science and useful Arts."¹³⁷ As the immortal Uncle Ben once said to a teenaged Peter Parker before Parker transformed into Spider Man, "[w]ith great power, comes great responsibility."¹³⁸ Let us all hope that lawmakers and judges recognize the importance of this motto in protecting America's true innovators, no matter how small they may be.

¹³⁷ U.S. CONST. art. I, § 8, cl. 8.

¹³⁸ KillerZ, *With Great Power Comes Great Responsibility*, COMIC VINE (Sep. 12, 2014, 7:47 AM), <http://www.comicvine.com/with-great-power-comes-great-responsibility/4015-40616/>.

**The Unfettered Expansion of Appropriation Art Protection by the
Fair Use Doctrine: Searching for Transformativeness in *Cariou v.
Prince* and Beyond**

Jacqueline Morley¹

¹ J.D. Candidate May 2016, American University Washington College of Law; A.B. in History, Princeton University 2013. I would like to thank Julia Cosans and Joey Kavanagh, my editors at the American University Journal of Gender, Social Policy & the Law, for their assistance. I would also like to give special thanks to Professor Christine Farley for her wonderful encouragement and guidance throughout this entire experience and to my parents for their love and support.

TABLE OF CONTENTS

- I. Introduction** 388
- II. Background** 390
 - A. The Fair Use Doctrine: Benefits and Functionality . 390
 - B. Questioning the Validity of Appropriation: *Rogers v. Koons* and *Blanch v. Koons* 392
 - 1. *Rogers v. Koons*: Failing to Sculpt Transformativeness 393
 - 2. *Blanch v. Koons*: Incorporating Transformativeness into the Fair Use Doctrine 393
 - C. *Cariou v. Prince*: Affirmation of Appropriation Art 394
 - D. Testing the New Standard: *Kienitz v. Sconnie Nation LLC* and *Seltzer v. Green Day, Inc.* 396
- III. Analysis** 397
 - A. *Cariou v. Prince* Has Expanded the Application of the Fair Use Doctrine by Accepting *Canal Zone* as Transformative 397
 - 1. The Second Circuit’s Decision Blurred the Already Unclear Meaning of Transformativeness Within the Fair Use Doctrine..... 398
 - a. The *Rogers, Campbell* and *Blanch* Courts Developed a Seemingly Clear Standard for Examining Transformativeness under the Fair Use Doctrine..... 398

b.	By Following the <i>Rogers/Campbell/Blanch</i> Precedent, the District Court for the Southern District of New York Helped to Further Cultivate the Meaning of Transformativeness Under the Fair Use Doctrine.....	401
2.	By Reversing the <i>Cariou</i> Decision, the Appellate Court for the Second Circuit Blurred the Meaning of Transformativeness and Its Application Under the Fair Use Doctrine	406
a.	The Works that the Second Circuit Remanded Should Have Been Condemned as Not Transformative in Order to Create a Clear Standard	408
B.	<i>Seltzer</i> and <i>Kienitz</i> Represent a Continuation of the New Standard in Copyright Law	410
1.	The Effects of the <i>Cariou v. Prince</i> Appellate Decision Will Not Become Fully Clear Until More Cases Arise and More Appropriation Artists Strive to Incorporate Appropriated Artwork	413
IV.	Conclusion	415

I. Introduction

A tall Rastafarian stands shirtless in the woods, his dreadlocks hanging down his shoulders as he looks into the camera. Both his eyes and mouth have been blotted out by blue paint and his hands are obscured; in their place is a cutout guitar, which on closer inspection is revealed to be George Harrison's Rickenbacker.² The photograph is in black and white, creating a stark contrast with the periwinkle eye and mouth blotches.

This is Richard Prince's "Graduation," the centerpiece of his controversial collection *Canal Zone*, for which he was entrenched in a five-year legal dispute with photographer Patrick Cariou.³ Prince explains the composition in his own words: "I don't want to talk about where the Rastas came from. Like most images I work with[,] they weren't mine. I didn't know anything about the Rastas."⁴

The Rastas Prince mentions belong to Cariou; specifically, they are the subject of Cariou's 2000 photography book, *Yes Rasta*.⁵ Prince's *Canal Zone* was a thirty-piece installation that featured large acrylic and inkjet paintings, as well as the "Canal Zone" collage, which consisted of thirty-five photos of Rastafarians from Cariou's book, *Yes Rasta*.⁶ Although Cariou filed suit in December 2008, Prince's exhibit returned to the Gagosian Gallery in addition to a mix of blowups from *Yes Rasta* interspersed with photos of naked women.⁷

² Press Release, Gagosian Gallery, Richard Prince's Canal Zone (April 22, 2014) (on file with author) (describing the meaning of the pieces in Prince's own words), available at http://gagosian.vaesite.net/__data/c9017978fcb1cbdcc03a2fd42e281c.pdf [hereinafter Gagosian].

³ *Cariou v. Prince*, 714 F.3d 694, 704 (2d Cir. 2013), *cert. denied*, 134 S. Ct. 618 (2013) (hereinafter *Cariou II*).

⁴ Gagosian, *supra* note 2 (discussing Prince's use of *Yes Rasta* in his collection *Canal Zone*).

⁵ *Cariou II*, 714 F.3d at 699 (mentioning that Cariou lived in Jamaica with the Rastafarians for six years in order to capture the photographs).

⁶ *Id.* at 699–700 (describing the manner in which Prince dismantled a number of copies of *Yes Rasta* in order to complete his collection).

⁷ *Id.* at 700–01.

Although these photos included an acknowledgement in the 2014 press release associated with the showing, Prince declined to comment on the Rastafarian photos, claiming that he “doesn’t want to talk about where the Rastas came from.”⁸

Prince has made a career by producing appropriation art like *Canal Zone*, primarily through re-photography.⁹ However, Prince is not the first appropriation artist, as this type of artwork traces back to Andy Warhol and his 1962 reproductions of Marilyn Monroe in “Marilyn Diptych.”¹⁰ The majority of legal issues involving artwork fall within the parameters of copyright law, which protects all works of art upon a piece’s inception.¹¹ As a result, the author gains exclusive distribution, attribution, reproduction, and dissemination rights.¹² Despite the protection that copyright affords, it also allows for the proliferation of new works of art.¹³ Specifically, various exceptions exist to allow for the creative ability of artists; one such example is the fair use doctrine, which allows an artist to use a pre-existing work of art to create a new work of art.¹⁴

This Article will argue that the appellate decision in *Cariou v.*

⁸ Gagosian, *supra* note 2 (affirming that although Prince used Cariou’s photographs, he did not feel that he should be forced to answer to where he obtained them).

⁹ The Collection Online, *Untitled (Cowboy): Richard Prince*, THE METROPOLITAN MUSEUM OF ART, <http://www.metmuseum.org/collection/the-collection-online/search/283742?=&imgNo=0&tabName=gallery-label> (explaining that re-photography is the process of re-imaging another artist’s photograph).

¹⁰ SIMON WILSON, *TATE GALLERY: AN ILLUSTRATED COMPANION* 243 (Rev. Ed. 1991).

¹¹ 17 U.S.C. §§ 106–106A (2012); *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 552 (1985) (interpreting Section 106 that works of art vest instantaneously and are protected for the life of the author).

¹² 17 U.S.C. § 106.

¹³ See Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions*, 156 U. PA. L. REV. 549, 551–52 (Jan. 2008) (noting that the Copyright Act intends to protect copyrighted works while also allowing for another’s fair use of that work).

¹⁴ 17 U.S.C. § 107 (2012); Beebe, *supra* note 13, at 557.

Prince assisted appropriation artists in proving the validity of their artwork. Part II will discuss the interchange between appropriation art and the fair use doctrine. Part II will also examine cases preceding and succeeding *Cariou* and the effect of *Cariou* on subsequent appropriation art decisions. Part III argues that *Cariou*'s new standard has lessened the difficulty for appropriation artists to classify their works as transformative under the fair use doctrine. Part IV concludes that while this new standard is beneficial for the perpetuation of artwork and creativity in general, it may carry negative effects for artists that do not specialize in appropriation art.

II. Background

A. *The Fair Use Doctrine: Benefits and Functionality*

Derived from statutory language, the fair use doctrine provides appropriation artists with a protective tool that allows them to use pre-existing artwork in the creation of a new, original work.¹⁵ Since its inception, artists have invoked the doctrine to varying degrees of success.¹⁶ The fair use statutory language makes no mention of the fact that a work of art may be protected from copyright liability if it is transformative.¹⁷ Courts study four factors when considering the transformative aspects of a work of art: (1) the purpose and the nature of the use; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used; (4) and the effect the use has on the market value of the copyrighted work.¹⁸ The first prong of the four-

¹⁵ See 17 U.S.C. § 107 (2012).

¹⁶ Compare *Campbell v. Acuff-Rose Music*, 510 U.S. 569, 594 (1994) (granting fair use defense to a rap parody), with *Rogers v. Koons*, 960 F.2d 301, 303 (2d Cir. 1992) (denying fair use defense to a sculptor who created a sculpture based entirely on another artist's photograph).

¹⁷ 17 U.S.C. § 107 (2012) (stating that courts should consider the purpose and character of the use, including its commercial nature, but making no specific mention of transformativeness).

¹⁸ *Id.* (noting that use of a copyrighted work is protected by fair use if it comments, criticizes, or reports on copyrighted works).

factor test often becomes the “heart” of the fair use analysis.¹⁹ When analyzing the purpose and nature of the use, courts examine whether the new work transforms the original work by adding something new to the original creation, such as a new meaning, message, or expression of the original work.²⁰

Courts will consider the other factors if the work fails to sufficiently pass this first part of the test.²¹ A work of art that is not sufficiently transformative faces a much stricter analysis under the fourth factor—the effect on market value section of the test.²² As a result, courts may reject a work of art that adds little to an already existing work of art, especially if the success of the new work impedes the market success of the original artist.²³ Indeed, the fair use doctrine aims to provide protection for new works of art otherwise limited through copyright law, although, admittedly, courts will nevertheless find little reason to protect a work if the new work lacks a new, important element.²⁴

The second arm of the test scrutinizes the nature of the copyrighted work to determine whether it encompasses the type of work that should be afforded protection.²⁵ The courts place more emphasis on the third factor—amount and substantiality—as it allows the court to determine the extent to which the new work copied the

¹⁹ *Cariou v. Prince*, 784 F. Supp. 2d 337, 347–48 (S.D.N.Y. 2011) (hereinafter *Cariou I*) (noting that the more transformative the work, the less significant other factors may be that indeed weigh against a finding of fair use).

²⁰ *See Campbell*, 510 U.S. at 579 (defining transformativeness as something that lends a new meaning, message, or expression to the original work).

²¹ *See id.*

²² *Id.*

²³ *See American Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 922 (2d Cir. 1995).

²⁴ *See Campbell*, 510 U.S. at 579 (positing that the goal of copyright law is “to promote science and the arts” and that this aim is furthered by transformative works of art).

²⁵ *See id.* at 586 (noting that there are certain works that are “closer to the core” of what copyright law aims to protect).

original work; the court studies both the quantity and the quality or importance of the portion taken from the original creation.²⁶ Thus, a work that does not take voluminously from an original work can nonetheless infringe on the original work, particularly if it takes away “the heart of the [work].”²⁷

The fourth and final factor is connected to the “commerciality” portion of the nature and purpose of the new work.²⁸ Courts try to measure the economic value of the new work and any detrimental effect that it has on the original work of art.²⁹ Courts also try to take into account the effect that the new work of art could have on the sale of derivative works from the original as well.³⁰ As noted, courts follow the four-factor fair use test in examining whether a piece of artwork is protected under fair use. Two courts utilized this test to decide two important appropriation cases regarding the same artist, as discussed below.

B. *Questioning the Validity of Appropriation:* *Rogers v. Koons and Blanch v. Koons*

Jeff Koons is an appropriation artist that gained recognition in the 1980s for his use of pre-existing artwork, causing numerous artists to sue him over the years. Two of these cases, *Rogers v. Koons* and *Blanch v. Koons*, became integral in the development of the protection of appropriation art.³¹ Although both cases revolved around the issue of fair use, there were contrary conclusions.

²⁶ *See id.* at 587 (arguing that any key part of an original work, no matter the size, can diminish transformativeness).

²⁷ *Id.* (arguing that the main part of the copyrighted work is the portion from which it derives its meaning).

²⁸ *See id.* at 590 (defining commerciality as the examination of the economic effects that the appropriation had on the original work).

²⁹ *Id.* (indicating that the court must also take into account of the effect that derivatives could have on the market value of the original work).

³⁰ *Campbell*, 510 U.S. at 590.

³¹ *See generally* *Blanch*, 467 F.3d at 246–47; *Rogers*, 960 F.2d at 305.

1. Roger v. Koons: *Failing to Sculpt Transformativeness*

In 1980, Art Rogers, a photographer from California, took a commissioned photograph of a friend and his wife holding their eight German Shepherd puppies entitled “Puppies.”³² Koons purchased a postcard of the photograph in 1987 and built a sculpture, named “String of Puppies,” directly from the image.³³ The couple recognized the sculpture when it appeared on the cover of the *Los Angeles Times* and immediately notified Rogers; Rogers subsequently filed suit against Koons for copyright infringement.³⁴

The Court of Appeals for the Second Circuit examined “String of Puppies” under the fair use doctrine and could not discern the necessary connection to a specific commentary on the photograph itself.³⁵ The court found that Koons’s sole aim was to profit from the sculpture, and remanded the case for determination of an award amount and required Koons to turn over all copies of the sculpture.³⁶

2. Blanch v. Koons: *Incorporating Transformativeness into the Fair Use Doctrine*

The second case, *Blanch v. Koons*, involved photographs incorporated into a collage that Koons began in 2000. From the collage, Koons created *Easyfun-Ethereal*, a series of paintings, including one entitled “Niagara.”³⁷ “Niagara” specifically featured

³² Rogers, 960 F.2d at 304.

³³ *Id.* at 305.

³⁴ *Id.* (remarking that the newspaper even included Koons’s artwork and the article together with its exhibit at the Los Angeles Museum of Contemporary Art).

³⁵ *Id.* at 310.

³⁶ *Id.* at 312–13.

³⁷ *Blanch*, 467 F.3d at 247. Koons created collages comprised of magazine clippings and his own photographs. *Id.*

four pairs of women’s legs dangling over an assortment of pastries.³⁸ Koons took one of these pairs of legs from a photograph taken by Andrea Blanch in *Allure* magazine. Blanch ultimately noticed the painting on display at the Guggenheim in 2002.³⁹

The Court of Appeals for the Second Circuit found that Koons’s use of the sandaled feet constituted transformative art because the purpose of the use differed entirely from Blanch’s original intention.⁴⁰ “Niagara” represented a work of transformative art that added “something new, with a further purpose or different character” and “alter[ed] the first with new expression, meaning, or message.”⁴¹ The court relied on the incongruence between the artists’ different purposes in concluding that, in this situation, it was clear that Koons had created a transformative, new work of art.⁴² The court applied the other fair use factors as well, finding particularly significant the fact that Koons made more than \$125,000 from the original sale of just “Niagara.”⁴³ In comparison, Blanch made \$750 for her advertisement and had no plans for the future use of the photograph.⁴⁴ Using these facts, the court found it significant that Koons’s use of the photograph neither caused Blanch economic harm, nor decreased the value of her photograph in general.⁴⁵

C. *Cariou v. Prince: Affirmation of Appropriation Art*

After the Gagosian Gallery displayed Prince’s *Canal Zone*

³⁸ *Id.* at 247.

³⁹ *Id.* at 249.

⁴⁰ *Id.* at 253.

⁴¹ *Id.* (citing *Campbell*, 510 U.S. at 579).

⁴² *Id.* at 252–53 (concluding that Koons had used Blanch’s work for social commentary).

⁴³ *Blanch*, 467 F.3d at 248.

⁴⁴ *Id.* at 249.

⁴⁵ *Id.* at 258 (concluding that Blanch’s work was not devalued by Koons’s work).

beginning in 2008 and sold a companion catalogue to accompany the exhibit, Cariou filed suit for copyright infringement.⁴⁶ The District Court for the Southern District of New York found that Prince had infringed on Cariou's copyright because he failed to create an entirely transformative body of work separate from the photographs, even though Prince testified that his intention in creating *Canal Zone* had nothing to do with the original photographs.⁴⁷ Prince argued that because Cariou's photographs represented "mere compilations of facts concerning Rastafarians and the Jamaican landscape," they did not deserve copyright protection as a matter of law; the court disagreed.⁴⁸ Further, the court found that Prince and the Gagosian Gallery had acted in bad faith because he did not try to seek out the owner of the copyright, despite knowing the Rastafarians' origin.⁴⁹ The court also felt that the vast discrepancy in economic value of the two sets of artwork was significant.⁵⁰ As a result, the court weighed the commercial element strongly against Prince.⁵¹ In terms of damages, the court instituted a destructive injunction against Prince.⁵²

The Second Circuit reversed this decision by finding that of the thirty paintings in question, twenty-five were transformative.⁵³ The court chose to remand the case for further discussion on the final five paintings, though it registered no opinion as to whether it felt that

⁴⁶ Cariou II, 714 F.3d at 698.

⁴⁷ Cariou I, 784 F. Supp. 2d at 349 (noting that Prince mentioned that he was not trying to comment on the photographs or their genre).

⁴⁸ *Id.* at 346.

⁴⁹ *Id.* at 351 (remarking that the Gallery had a responsibility as well to ensure that Prince had requested permission).

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.* (indicating that eight of the paintings in the collection sold for \$10 million, per the fourth element of the test).

⁵³ Cariou II, 714 F.3d at 712.

those final few exemplified fair use.⁵⁴ Cariou and Prince settled out of court in early 2014.⁵⁵

D. *Testing the New Standard: Kienitz v. Sconnie Nation LLC and Seltzer v. Green Day, Inc.*

Since the conclusion of *Cariou v. Prince*, the District Court for the Western District of Wisconsin ruled in an appropriation case, *Kienitz v. Sconnie Nation LLC*, after controversy arose when the mayor of Madison, Wisconsin attempted to end an annual student protest event at the University of Wisconsin-Madison.⁵⁶ In response, Sconnie Nation, a local retail t-shirt company, created a screen-print shirt using Michael Kienitz’s photograph of the mayor with the phrase “Sorry For Partying,” and sold the shirts during the protest event.⁵⁷ The district court found that the fair use doctrine protected Sconnie Nation because the t-shirt was transformative and because it altered the photograph and featured the Mayor’s face in “lime green, against black, outlined in bright blue.”⁵⁸ Although Kienitz argued that the new version of the photograph was not a parody, the court held that the choice of colors and use of phrasing transformed the image on the shirt into a parody of the official portrait.⁵⁹

In *Seltzer v. Green Day Inc.*, Seltzer, an artist and illustrator, created a drawing named “Scream Icon” in 2003, which he developed into a poster that hung throughout Los Angeles as street art.⁶⁰ In 2008,

⁵⁴ *Id.*

⁵⁵ Brian Boucher, *Landmark Copyright Lawsuit Cariou v. Prince is Settled*, ART IN AMERICA (Mar. 18, 2014), <http://www.artinamericamagazine.com/news-features/news/landmark-copyright-lawsuit-cariou-v-prince-is-settled/>.

⁵⁶ *Kienitz v. Sconnie Nation*, 965 F. Supp. 2d 1042, 1047 (W.D. Wis. 2013) (remarking that the mayor used to attend the Mifflin Street Block Party himself).

⁵⁷ *Id.* at 1047–048. Sconnie sold the shirts from April to May both online and onsite. *Id.* at 1048.

⁵⁸ *Id.* at 1047.

⁵⁹ *Id.* at 1050–051.

⁶⁰ *Seltzer v. Green Day, Inc.*, 725 F.3d 1170, 1173–174 (9th Cir. 2013) (depicting the

Roger Staub took a photograph of a brick wall on Sunset Boulevard that included a poster displaying “Scream Icon” and later used this spot as the backdrop for rock band Green Day’s video, “East Jesus Nowhere.”⁶¹ The video moves in accelerated time, with the poster as the center point, and although Staub altered the poster by adding a red cross across the face, the poster is still clearly identifiable as “Scream Icon.”⁶²

The Ninth Circuit held that Staub created a new work because an “allegedly infringing work [is] transformative as long as a new expressive content or message is apparent.”⁶³ The court ruled that the use of the poster was not purposely commercial as the band did not use it to market their CDs or concerts, and had thus gained no real economic advantage in using the poster.⁶⁴ Although Seltzer did argue that Green Day’s use of the poster tarnished its meaning for him, the Ninth Circuit concluded that personal value was not a valid reason to prevent fair use of a work of art, especially when the work was supported by the other fair use factors.⁶⁵

III. Analysis

A. *Cariou v. Prince Has Expanded the Application of the Fair Use Doctrine by Accepting Canal Zone as Transformative*

The Second Circuit, by classifying twenty-five of Prince’s works as transformative, entirely altered the meaning of

drawing as an extreme close-up of a screaming face).

⁶¹ *Id.* at 1174.

⁶² *Id.*

⁶³ *Id.* at 1177 (holding that the video created a new message that incorporated the poster in a different context).

⁶⁴ *Id.* at 1178.

⁶⁵ *Id.* at 1179.

transformativeness within the context of the fair use doctrine’s four-factor test. If the court upheld the lower court’s decision, it would have taken a step closer to more properly defining the meaning of “transformative.” Additionally, affirming the lower court’s decision would have also outlined the proper application of the fair use doctrine.

1. *The Second Circuit’s Decision Blurred the Already Unclear Meaning of Transformativeness Within the Fair Use Doctrine*

The Second Circuit’s decision failed to adequately explain the manner in which a work of art should be analyzed in the context of transformativeness. The court only chose to rule on the transformativeness of twenty-five of the thirty paintings within the collection.⁶⁶ By remanding the last five paintings to a lower court, the appellate court lessened the meaning of its decision. Had the court given the reasoning behind the exclusion of the five paintings, subsequent courts would have a standard to compare their cases to.

- a. *The Rogers, Campbell and Blanch Courts Developed a Seemingly Clear Standard for Examining Transformativeness under the Fair Use Doctrine*

Transformativeness, as the court discusses it in the mentioned appropriation art cases, is an altogether vague and malleable standard.⁶⁷ In *Rogers*, which predates *Campbell*, the case that birthed transformativeness, the court touched on what would become the future foundation for the definition of transformativeness.⁶⁸

⁶⁶ Seltzer, 725 F.3d at 1179.

⁶⁷ Compare *Rogers*, 960 F.2d at 311 (holding that Koons failed to create a transformative work of art), with *Blanch*, 467 F.3d at 250 (struggling to find a concrete concept of transformativeness in the preceding case law).

⁶⁸ See *Rogers*, 960 F.2d at 310 (positing that Koons’s commentary on the banality of everyday life does not translate into a direct comment on Rogers’s photo specifically).

Specifically, the Second Circuit in *Rogers* placed emphasis on the good faith and commerciality, but said little about any transcendence of meaning.⁶⁹ The Second Circuit chose to focus closely on Koons's actions, and in particular, on his decision to tear the copyright mark off of Rogers's postcard.⁷⁰ The court adheres to this idea: if "the user stands to profit from the exploitation of the copyrighted material without paying the customary price," then there should be no fair use defense.⁷¹ Because there is no mention of transformativeness in the case, it remains unclear whether "String of Puppies" would have passed the standard created by *Campbell* in 1994.⁷² Koons clearly knew he directly copied Rogers's photograph; evidence existed that Koons instructed his workers to ensure that they exactly copied every aspect of the photo.⁷³ The final product was a Technicolor, 3D version of the original photo, with little deviation aside from whatever changes were required by the jump in medium.⁷⁴ Thus, though the court did not yet use the language of transformativeness, it nevertheless hit upon its meaning: Koons had failed to make something entirely new and different from the original work.⁷⁵

By the time the Second Circuit ruled in *Blanch* in 2006,

⁶⁹ *See id.* at 309–10 (discussing the defense of parody as fair use and how the defense can be negative for artists if it prevents the finding of "credit . . . where credit is due").

⁷⁰ *See id.* at 305.

⁷¹ *Id.* at 309 (quoting *Harper & Row*, 471 U.S. at 562).

⁷² *Compare* *Rogers*, 960 F.2d at 308–09 (concluding that "String of Puppies" was not allowable under the Fair Use Doctrine), *with* *Campbell*, 510 U.S. at 579 (holding that the song lyrics in question were transformative because they gave new meaning to Roy Orbison's song "Pretty Woman").

⁷³ *Rogers*, 960 F.2d at 305 (noting that Koons instructed his artisans to make the sculpture "just like the photo" and even gave specifications for which parts of the original artwork needed to be especially preserved).

⁷⁴ *Id.* at 305.

⁷⁵ *Id.* (demonstrating that Koons even gave instructions when the sculpture did not look enough like the original, such as "Girl's nose is too small. Please make larger as per photo").

numerous courts had applied *Campbell's* transformativeness test.⁷⁶ Applying its precedent, the Second Circuit in *Blanch* adhered strictly to the *Campbell* standard and noted that Koons's argument about the purpose of "Niagara" fit well into the transformativeness criteria.⁷⁷ By not tailoring his argument around the physical differences between the two works—"Silk Sandals" was a photograph, "Niagara," a painting—Koons made the correct decision because the court would have remained un-persuaded by this distinction.⁷⁸ An argument based on the physical difference between types of work would have yielded the same results as in *Rogers*: merely reconstructing a photograph as a sculpture or a painting does not constitute a substantial enough change.⁷⁹

However, by finding that "Niagara" did not infringe on Blanch's copyright, the Second Circuit drew a more definitive line for transformativeness.⁸⁰ "Niagara," which maintained the sandaled feet from Blanch's advertisement in an at least recognizable state, entirely changed the purpose that the feet served within the context of the work.⁸¹ The Second Circuit pointed to specific details, such as the changes in colors and the altering of the location, in finding that the work was transformative.⁸² In effect, Koons took "Silk Sandals,"

⁷⁶ *Blanch*, 467 F.3d at 252. See e.g., *Davis v. The Gap*, 246 F.3d 152, 174 (2d Cir. 2001) (adopting the *Campbell* test to determine the transformativeness of a photograph of the plaintiff wearing the defendant's sunglasses). See also *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605 (2d Cir. 2006); *Nunez v. Caribbean Int'l News Corp.*, 235 F.3d 18, 22–23 (1st Cir. 2000).

⁷⁷ *Blanch*, 467 F.3d at 252 (observing that Koons had "different objectives" when he designed "Niagara" than Blanch did when she initially made the advertisement).

⁷⁸ *Id.* (noting that the court has denied transformative use when "the defendant has done no more than find a new way to exploit the creative virtues of the original work").

⁷⁹ *Id.* (commenting that the court in the past has refused to find works of art transformative if they are merely in different mediums).

⁸⁰ *Id.* at 253 (admitting that because the Second Circuit had decided in favor of Koons, it had created a precedent that stipulated a meaning for transformativeness).

⁸¹ *Id.* at 253–54.

⁸² *Id.* at 259–61 (demonstrating that Koons changed the angle and context within which the pair of feet was located, while also altering the colors).

flipped it around, and added new colors, background and other feet to create something entirely new, with an entirely different meaning.⁸³

Although both cases involve the incorporation of pre-existing material into a new art work, the amount of the work appropriated in *Rogers* would at first glance appear to be more comprehensive; Koons painstakingly re-made the image presented in the original photograph when he created his statue.⁸⁴ However, the quantitative differences are not as jarring as might be believed.⁸⁵ Although Koons used the entirety of Rogers's photograph to construct "String of Puppies," he also arguably used the entirety of the main subject in the "Silk Sandals" advertisement.⁸⁶ It is clear that the new work incorporated all of the advertisement, just as Koons used all of "Puppies" to design "String of Puppies."⁸⁷ The court's discussion of the sandaled feet in "Niagara" implies that "transformativeness" is more closely related to meaning and context than to actual physical content and rearrangement.⁸⁸

b. *By Following the
Rogers/Campbell/Blanch
Precedent, the District Court for
the Southern District of New*

⁸³ See *Blanch*, 467 F.3d at 261 (depicting the feet as they sit next to three other pairs of feet above various dessert items).

⁸⁴ See *Rogers*, 960 F.2d at 305 (describing the process by which Rogers gave specific instructions to his workers on what he wanted the sculpture to look like).

⁸⁵ *Id.*

⁸⁶ Compare *Rogers*, 960 F.2d at 305 (noting that Koons used the entirety of the original photograph to create "String of Puppies"), with *Blanch*, 467 F.3d at 247 (observing that although the feet from "Silk Sandals" only made up part of "Niagara," Koons used the entirety of the advertisement).

⁸⁷ See *Blanch*, 467 F.3d at 260–61 (showing that the entire advertisement consists of just the feet wearing the sandals).

⁸⁸ See *id.* at 257–58 (concluding that because of the new meaning and purpose that Koons gave to Blanch's sandaled feet, he had clearly transformed the original work into a new piece of artwork).

*York Helped to Further Cultivate
the Meaning of
Transformativeness Under the
Fair Use Doctrine*

Cariou v. Prince represented an opportunity for the Second Circuit to further clarify what transformativeness should mean; it could have picked and chosen which paintings of Prince’s collection were transformative and which were not. While the appellate court proved to be more forgiving and selective, the trial court chose to condemn Prince’s entire collection.⁸⁹

The Southern District of New York discussed transformativeness in *Cariou* concisely. It went through the four steps of the fair use doctrine, but paid particular attention to the transformative test.⁹⁰ The court deliberated over the “purpose and character” portion of the test by dividing it into transformative use, bad faith, and commerciality.⁹¹ During its transformativeness evaluation, the court noted that the paintings were transformative “only to the extent that they comment[ed] on the [p]hotos.”⁹² The district court further explained that the paintings would be considered infringing works if they “recast[ed], transform[ed], or adapt[ed]” the photos.⁹³ In examining *Canal Zone*, the court found that the overall “transformativeness varies from work to work,” depending on the amount taken from the original photos.⁹⁴ Here the court tended towards the more physical aspect of the transformative test, as it found

⁸⁹ Compare *Cariou I*, 784 F. Supp. 2d at 250 (concluding that none of the paintings were protectable under the fair use doctrine), with *Cariou II*, 714 F.3d at 712 (demonstrating that the appellate court separated paintings that infringed on *Cariou*’s work from those that it felt should be protected under fair use).

⁹⁰ *Cariou I*, 784 F. Supp. 2d at 346–51.

⁹¹ *Id.*

⁹² *Id.* at 349.

⁹³ *Id.* See also *Castle Rock Entm’t v. Carol Publ’g Group*, 150 F.3d 132, 143 (2d Cir. 1998) (holding that the mere alteration of an original piece is not enough on its own to make a work transformative).

⁹⁴ *Cariou I*, 784 F. Supp. 2d at 349–50 (internal citation omitted).

that in the works where Prince used an entire photograph from *Yes Rasta* there was “vanishing little, if any, transformative element.”⁹⁵ Because the transformative element was not consistent throughout the paintings, the court found little support for a finding of fair use through the first factor.⁹⁶ The court additionally noted that the other sub-elements of the first factor weighed against Prince.⁹⁷ He had acted in bad faith when he failed to ask either Cariou or the publisher of *Yes Rasta* about licensing the photos.⁹⁸ The court also found that Prince’s use of Cariou’s photos was essentially commercial; Prince advertised for the collection extensively and made a substantial amount of money from the collection.⁹⁹

The court concluded that Prince failed the third prong of the test because he had used substantial portions of Cariou’s work.¹⁰⁰ The court also noted that Prince’s actions caused definite commercial harm to Cariou and pointed specifically to the fact that a gallery owner passed on showing Cariou’s collection because she believed Prince’s show to be a collaboration of the two artists.¹⁰¹ The second factor of

⁹⁵ *Id.* at 350 (comparing these non-transformative works with those that incorporated only a small portion of Cariou’s work).

⁹⁶ *Id.* (confirming that twenty-eight of the thirty paintings used portions of *Yes Rasta*).

⁹⁷ *Id.* at 351.

⁹⁸ *Id.* (noting that there were easy, accessible ways to contact Cariou either through the email listed on his website or through the copyright information provided in *Yes Rasta*).

⁹⁹ *Id.* at 350–51 (admitting that although there is cultural value to public art shows, these benefits are out-weighed by the extensive exploitation that occurred because of Prince’s use of the original photographs).

¹⁰⁰ *Cariou I*, 784 F. Supp. 2d at 352 (concluding that the portions of Cariou’s work that Prince had taken were the central figures of the portraits and were of “overwhelming quality and importance” to the original body of work).

¹⁰¹ *Id.* at 353 (arguing that an artist’s choice to not market his/her work does not make it impossible for the infringing artist to negatively affect the actual and potential markets of the original art work).

the test, the character of the copyrighted work, is generally not contested, and the court here found that Cariou’s photos were clearly copyrightable.¹⁰²

The Southern District of New York’s decision followed the *Rogers/Campbell/Blanch* path because the court concluded that Prince’s artwork was not transformative, even though some of the works used Cariou’s photos sparingly.¹⁰³ At the most basic level, Prince’s use of Cariou’s work was arguably even more blatant than either the use at issue in *Rogers* or *Blanch*.¹⁰⁴ Koons chose to incorporate both copyrighted works into his new, separate work; with “String of Puppies,” he used the postcard to create a new work in a new medium.¹⁰⁵ In *Blanch*, Koons took the advertisement, inserted it into his collage, and then created “Niagara” from this template.¹⁰⁶ In neither case did Koons use the physical copy of the original copyrighted work. Prince, on the other hand, did use a physical copy in his final piece, which seemingly made it more difficult to create something transformative.¹⁰⁷ Arguably, Koons removed some of the pressure of the transformativeness test by immediately switching mediums; Prince’s failure to do so makes the trial court’s decision understandable.¹⁰⁸ However, the standard forwarded by

¹⁰² *Id.* at 351–52 (holding that Cariou’s photographs were “highly original and creative artistic works”).

¹⁰³ *Id.* at 350.

¹⁰⁴ *Compare id.* at 349–50 (pointing to the fact that Prince used physical portions of Cariou’s work in *Canal Zone*), *with* *Rogers*, 960 F.2d at 305 (acknowledging that Koons created a new sculpture based on an original photograph) *and* *Blanch*, 467 F.3d at 247 (observing that Koons merely used *Blanch*’s advertisement as part of a larger work).

¹⁰⁵ *Rogers*, 960 F.2d at 305.

¹⁰⁶ *Blanch*, 467 F.3d at 247 (indicating that Koons inserted a physical copy of the cut-out feet from the advertisement into his reference by scanning the images and printing them out).

¹⁰⁷ *See* *Cariou II*, 714 F.3d at 701 (observing that each painting incorporated a different amount of appropriated material); *see also* *Blanch*, 467 F.3d at 250 (noting that Koons painted a likeness of the feet with different colors and textures in a row with other feet taken from other photos and advertisements).

¹⁰⁸ *See* *Cariou I*, 784 F. Supp. 2d at 352 (showing that the court paid close attention

Rogers/Campbell/Blanch indicates that physical appropriation—whether directly or through a medium proxy—is not the only important aspect; the meaning and context of the new artwork are important as well.¹⁰⁹

While Prince pointedly declined to ascribe any form of meaning to his work, the district court acknowledged that Prince was attempting to create a new work.¹¹⁰ The court pointed to the *Roger/Campbell/Blanch* standard by noting that Koons’ use of “Silk Sandals” was allowable because it functioned as the raw material for a new work of art that both relates a new meaning and comments on the culture surrounding advertisements.¹¹¹ Prince’s decision to use the *Yes Rasta* photos was not derived from a similar motive; Prince saw the Rastas and thought that would look good holding guitars.¹¹² Prince’s alteration of Cariou’s photographs does not place the subjects in a new context, nor does it add any definite meaning to them; it merely physically obscures another artist’s copyrighted work.¹¹³

It is in this situation that the other three factors come into play. Had Prince’s use of Cariou’s work not failed the other portions of the four-factor test, the district court might have chosen to allow the use. However, Prince’s use presented little transformative value and caused economic harm to Cariou.¹¹⁴ It could therefore not be protected under the fair use doctrine as defined by the *Rogers/Campbell/Blanch* standard.¹¹⁵

to Prince’s direct physical use of Cariou’s photographs).

¹⁰⁹ See *Blanch*, 467 F.3d at 252 (mentioning that transformativeness includes some form of new meaning within the creation of a new work of art).

¹¹⁰ *Cariou I*, 784 F. Supp. 2d at 349.

¹¹¹ *Id.* at 348 (citing *Blanch*, 467 F.3d at 252–53).

¹¹² *Id.* at 349.

¹¹³ *Id.* at 350 (holding that those paintings where Prince appropriate whole sections of Cariou’s work were the paintings that had the least transformative value).

¹¹⁴ See *id.* at 353–54.

¹¹⁵ See *id.* (noting that the goals of copyright are furthered by protecting Cariou’s

Despite the district court’s clear opinion that *Canal Zone* should not have been protected under the fair use doctrine, the destructive injunction brought a surprising, almost sinister aspect to the conclusion. Similar to the turnover order stipulated in *Rogers*, the destructive injunction took the logic of reimbursement many steps further: works that infringe other works should be destroyed at the plaintiff’s direction.¹¹⁶ Although a court may choose to implement a destructive order, the execution of one may have incited other courts to follow the district court’s lead. A wave of destructive injunctions, though possibly hindering the creative flow of the art world, would have perhaps incited a larger number of artists to exercise greater care when deciding to appropriate other artists’ works. However, none of this came to fruition when the appellate court vacated the order and reversed the trial court’s decision.¹¹⁷

2. *By Reversing the Cariou Decision, the Appellate Court for the Second Circuit Blurred the Meaning of Transformativeness and Its Application Under the Fair Use Doctrine*

The Second Circuit’s decision blurs the definition of transformativeness that developed through the decisions in both *Koons* cases and the standard that was generally followed by the district court in *Cariou*. In *Cariou*, the appellate court found that of the thirty paintings, twenty-five created an “entirely different aesthetic” from *Cariou*’s photographs.¹¹⁸ The court felt that Prince’s paintings were “crude and jarring works,” whereas *Cariou*’s photographs were “serene and deliberately composed portraits;” the court then went on to scrutinize the physical differences between the two sets of artwork.¹¹⁹

work from a use of minimal transformativeness like that of Prince).

¹¹⁶ See *Cariou I*, 784 F. Supp. 2d at 356; *but see Rogers*, 960 F.2d at 313 (ruling that the trial judge’s issuance of the turn-over order was within the boundaries of his authority).

¹¹⁷ *Cariou II*, 714 F.3d at 712.

¹¹⁸ *Id.* at 706.

¹¹⁹ *Id.*

The court pointed out that Prince’s “composition, presentation, scale, color palette, and media [were] fundamentally different and new” as was the “expressive nature” of *Canal Zone*.¹²⁰

This line of reasoning differs from the previous two cases, as the court in both *Blanch* and *Rogers* made it clear that in each case, the physical changes to the works in question were less important than the new meaning derived from the changes.¹²¹ The appellate court in *Cariou* backtracked on this standard and held that Prince’s artwork did not need to have any meaning, in relation to Cariou or otherwise.¹²² After examining the 30 works of art, the court concluded that five of the pieces could not be classified as transformative, but also failed to classify them as “not transformative.”¹²³

The Second Circuit tried to remedy this confusion by pointing out that a mere change of medium cannot be transformative.¹²⁴ However, the court’s finding of transformativeness, without the evidence of any new meaning or comment, implies that transformativeness must mean something else.¹²⁵ The court teases out this idea slightly by positing that Prince’s artwork gave “Cariou’s photographs a new expression and employ[ed] new aesthetics with creative and communicative results distinct from Cariou’s.”¹²⁶

¹²⁰ *Id.* (scrutinizing the differences in size and color of the two sets of artwork—i.e., that Cariou’s photographs are small and in black and white, whereas Prince’s paintings are much larger and incorporate color).

¹²¹ *See Blanch*, 467 F.3d at 257–58 (indicating that the new context of Koons’s work was much more important than the amount of Blanch’s work that was incorporated into “Niagara”); *Rogers*, 960 F.2d at 309–10.

¹²² *Cariou II*, 714 F.3d at 707 (mentioning that Prince chose to make no argument about what would make his work transformative and in what way he was commenting on *Yes Rasta*).

¹²³ *See id.* at 708, 710–11.

¹²⁴ *Id.* at 708 (giving the example that a book adapted for television or cinema is not considered transformative).

¹²⁵ *Id.* at 707. *See also* *Brownmark Films, LLC v. Comedy Partners*, 682 F.3d 687, 692 (7th Cir. 2012) (indicating that there is an intuitive aspect to transformativeness).

¹²⁶ *Cariou II*, 714 F.3d at 707–08 (concluding that when taken side-by-side, Prince’s

Transformativeness in this new standard seems to be based on something akin to an overall vibe, or aura, emanating from the new work, rather than anything more concrete.¹²⁷ Although this standard is vague, the court further confused the matter by failing to rule definitively on the remaining five pieces of artwork.¹²⁸ Despite listing a number of elements of “Graduation” that make it appear transformative, the court stopped short of passing judgment on the piece.¹²⁹ By failing to opine on the transformativeness of these final five paintings, the court made it difficult to discern a standard from the comparison of those works considered transformative and those not considered definitively transformative. This indecision leaves an undesirable gray area that can allow for much more appropriation art than was intended to be permitted under the fair use doctrine.¹³⁰

- a. *The Works that the Second Circuit Remanded Should Have Been Condemned as Not Transformative in Order to Create a Clear Standard*

When observing the paintings that were not considered clearly transformative, it is not immediately clear what made the court choose to exclude the five works.¹³¹ The Rastafarian from “Graduation” is

new paintings are clearly transformative).

¹²⁷ See, e.g., *id.* (implying that transformativeness is a quality that can be ascertained by looking at the work as a whole, rather than as a summation of its parts).

¹²⁸ See *id.* at 710–11 (stating that the court “cannot say for sure whether “Graduation” constitutes fair use” or whether or not it is transformative).

¹²⁹ *Id.* at 711 (observing that the blue tint, the lozenges over the Rastafarian’s face and mouth, and the pasted guitar all combine to make it seem that the work could be transformative).

¹³⁰ See *id.* at 712 (holding that the last five paintings should be remanded for further inspection, as it was unclear if they were transformative or not).

¹³¹ See *id.* at 701–03 (depicting “Graduation” and Cariou’s original photograph). See also Richard Prince, Canal Zone Catalogue (Graphic Thought Facility eds., 2008).

repeated in *Canal Zone (2008)* and *Meditation*.¹³² In each painting, the Rastafarian is altered with blue lozenges or a guitar, but it is always clear as to what the photograph may have looked like in its original form.¹³³ The other two excluded works feature a number of images: “Charlie Company” features four copies of the same Rastafarian on a donkey placed next to each other; “Canal Zone (2007)” includes roughly 35 of the photographs taken from *Yes Rasta* pasted next to each other.¹³⁴ Some of the images are not significantly altered from their original states, while others are colored over or drawn on.¹³⁵

Without knowing the Second Circuit’s reasoning behind its decision to exclude these paintings, it could be argued that the court would have felt that these were all works where Prince made only minimal alterations.¹³⁶ Although these paintings are different from the original photos, the Second Circuit acknowledged that they also had shared certain aesthetic similarities.¹³⁷ The Second Circuit seemed to have particular difficulty when discussing “Graduation;” it noted that although the altered Rastafarian did not fit well within the surroundings like he did within the original work, it was uncertain if there was enough of a difference to classify the work as transformative.¹³⁸ The court hedged on the point of defining

¹³² Cariou II, 714 F.3d at 711 (demonstrating that the same figure from *Yes Rasta* is present in the three works).

¹³³ *Id.* at 701–03, 711 (showing the Rastafarian altered with the lozenges and guitar in Prince’s “Graduation”).

¹³⁴ *Id.* at 699–700, 711 (explaining that both works feature a number of the photographs pasted together after they were torn out of Cariou’s *Yes Rasta*).

¹³⁵ *See id.* at 701–03, 711 (showing an example of the alterations Prince made to the figures from Cariou’s *Yes Rasta*, wherein the original photographs are recognizable beneath the alterations).

¹³⁶ *See, e.g., id.* at 711 (discussing the composition of each of the controversial five pieces).

¹³⁷ *Id.* (observing that although Prince altered the photographs, they still maintain a feeling of the original work).

¹³⁸ Cariou II, 714 F.3d at 711 (arguing that there was a level of comfort in the mood of the original photo that the dissonance found in the new painting misplaced).

transformativeness when it noted that the minimal alterations move the artwork “in a different direction.”¹³⁹ By noting this, the court pinpointed what could make a work transformative, but then failed to decide whether Prince had moved far enough in that new direction to determine if the five remaining works were transformative.¹⁴⁰ A definitive ruling on these final paintings by the appellate court would have helped subsequent courts better understand the standard for transformativeness. Such an analysis would have provided a useful tool for future courts in distinguishing between transformative and non-transformative works, especially as new appropriation cases have arisen in the aftermath of these decisions. The transformativeness of the five misfit paintings was never ruled upon; Prince and Cariou, rather than extend the legal process any further, reached a settlement in April 2014.¹⁴¹

B. *Seltzer and Kienitz Represent a Continuation of the New Standard in Copyright Law*

Seltzer and *Kienitz* are the two main appropriation cases decided in the wake of the *Cariou* ruling; both cases seem to follow the *Rogers/Campbell/Blanch* standard, thus rejecting the *Cariou* appellate court’s standard.¹⁴² The different mediums of these two new cases—a t-shirt and poster within a music video—provide a new take on the more traditional art forms of the earlier appropriation cases.¹⁴³

The Ninth Circuit in *Seltzer* commented on the difficulty of implementing the transformative standard in the beginning of its discussion of the fair use doctrine’s four-factor test.¹⁴⁴ The court noted

¹³⁹ *Id.* (commenting that Prince’s alteration changed the style of Cariou’s “classical portraiture”).

¹⁴⁰ *Id.* at 710–11 (quoting *Campbell*, 510 U.S. at 579) (admitting that it was unclear if the artworks represented a “new expression, meaning, or message”).

¹⁴¹ *Boucher*, *supra* note 55.

¹⁴² *See Kienitz*, 766 F.3d at 758–59 (holding that the most important fair use factor is usually the market effect); *Seltzer*, 725 F.3d at 1175–177 (finding that the context of the new work is integral to a finding of transformativeness).

¹⁴³ *See Kienitz*, 766 F.3d at 757 (showing that the medium was changed to a t-shirt); *Seltzer*, 725 F.3d at 1174 (showing that the medium was changed to a video).

¹⁴⁴ *Seltzer*, 725 F.3d at 1176 (noting that whether or not a work is transformative has

that the transformative test is often misused and has become representative of “all things to all people.”¹⁴⁵ The court looked back to the standard set forth in *Campbell* and found that Green Day’s use of “Scream Icon” was transformative.¹⁴⁶ The Ninth Circuit noted that because Green Day used the drawing merely as the raw material for a portion of a much larger and extensive video, there was a clear alteration of the purpose of the drawing.¹⁴⁷ The court also noted that the message of the video was entirely separate from anything that Seltzer chose to portray with the creation of “Scream Icon.”¹⁴⁸ The court admitted that the message of “Scream Icon” might be debatable, but that did not matter—it was clear that it had nothing to do with religion.¹⁴⁹ This analysis of transformativeness is similar to the analysis in the *Blanch* decision and the district court analysis in *Cariou*, in that the emphasis on the new context of the original work coincides with the idea that a transformative work is meant to have meaning beyond the original work.¹⁵⁰

In *Kienitz*, the District Court for the Western District of Wisconsin pointed specifically to the decision in *Cariou* when it looked to determine whether a t-shirt’s use of a portrait is

become a highly contentious topic).

¹⁴⁵ *Id.* (quoting 4 MELVILLE B. NIMMER & DAVID NIMMER ON COPYRIGHT § 13.05(A)(1)(b) (2011)) (noting that the source provides a listing of cases that have misused the transformative test).

¹⁴⁶ *Id.* at 1176–178 (concluding that Green Day’s use was only “incidentally commercial,” further favoring a finding of fair use).

¹⁴⁷ *Id.* at 1176–177 (finding that *Scream Icon* represents a “component” of the video rather than the entirety of the compilation).

¹⁴⁸ *Id.* (observing that the video has heavy religious symbolism including the desecration of a number of Jesus figures that appear at different points throughout the video).

¹⁴⁹ *Id.* at 1177 (noting that the spray-painted cross marking the face of *Scream Icon* and the context of the song give the clear impression that the song is about religion).

¹⁵⁰ Compare *Blanch*, 467 F.3d at 253, with *Cariou I*, 784 F. Supp. 2d at 348.

transformative.¹⁵¹ The court noted that by creating a new character and expression, a new image could become completely different from an original.¹⁵² The court pointed to the aspects of the two bodies of work in *Cariou* that were referenced in considering the transformativeness of Prince’s works—Prince’s paintings were “crude” and “provocative” whereas Cariou’s works were composed and serene.¹⁵³ It is clear that the district court tried to correctly incorporate the *Cariou* decision into its analysis; the aspects of the decision that it chose to emphasize demonstrate that it was focusing more on the transcendent meaning than the actual quantity of the appropriated material within the new work.¹⁵⁴

In following this line of reasoning, the court focused on the manner in which Scennie Nation altered and redesigned the photograph of the Mayor and the meaning that the new image evoked.¹⁵⁵ The court reasoned that the use of the image on the t-shirt was meant to be a political critique in the way of sophomoric humor and was entirely different from the serious importance that the original portrait intended to represent.¹⁵⁶ Although the Mayor and other concerned parties were offended by the message that the t-shirts represented, the court remarked that such a response is not enough to

¹⁵¹ 965 F. Supp. 2d at 1049 (referring to the *Cariou* decision while analyzing the transformativeness of the Scennie Nation t-shirt). *See also* *Cariou II*, 714 F.3d at 710 (arguing that artwork that incorporates appropriated art can still be transformative even if the amount is large).

¹⁵² Kienitz, 965 F. Supp. 2d at 1049–050 (citing *Cariou II*, 714 F.3d at 706–07) (observing that the altered copyrighted photographs of Rastafarians in *Cariou* were transformative because the paintings were entirely different in aesthetic and expression).

¹⁵³ *Id.* at 1050 (citing *Cariou II*, 714 F.3d at 706–07 and observing that these differences in meaning and tone made Prince’s works transformative).

¹⁵⁴ *Id.* at 1050–051 (focusing on the ways in which the photograph was altered to create the new image on the t-shirt).

¹⁵⁵ *Id.* at 1050 (arguing that the image on the t-shirt set an entirely different tone and had a different message than the portrait of the Mayor).

¹⁵⁶ *Id.* at 1050–051 (observing that the colors and wording of the t-shirt create an entirely different meaning from that of the solemn portrait).

bar a finding of fair use.¹⁵⁷ Kienitz noted that the use of the Mayor’s photograph in this case is one of the most easily protected forms of fair use; the shirt was very clearly a commentary on the Mayor and his waffling on the status of the campus gathering.¹⁵⁸ The court replied to Kienitz’s arguments by finding that the t-shirt in no way diverted sales from the original work.¹⁵⁹ By deciding that the t-shirt design was transformative, the court demonstrated that the context and meaning of the new work were more important than the physical quantity borrowed.¹⁶⁰

1. *The Effects of the Cariou v. Prince Appellate Decision Will Not Become Fully Clear Until More Cases Arise and More Appropriation Artists Strive to Incorporate Appropriated Artwork*

Even though the decisions in *Kienitz* and *Seltzer* are important for the development of appropriation art (and copyright law as a whole), these decisions cannot automatically be construed as concrete indicators of the path that copyright law will take.¹⁶¹ Even though both decisions reference *Cariou* as well as the *Rogers/Blanch/Campbell* standard, neither case involves the same medium of artwork as the

¹⁵⁷ *Id.* at 1050 (comparing with examples from *Campbell*, 510 U.S. at 579–80, noting that uses such as “When Sonny Sniffs Glue” and “I Love Sodom” were fair uses of “When Sunny Gets Blue” and “I Love New York,” respectively).

¹⁵⁸ *Kienitz*, 965 F. Supp. 2d at 1050–051.

¹⁵⁹ *Id.* at 1051 (positing that because the transformative nature of the t-shirt was so “robust,” the first part of the four-factor test favored *Sconnie Nation*).

¹⁶⁰ Compare *Kienitz*, 965 F. Supp. 2d at 1054 (holding that the different aspects of the t-shirt created an entirely new context and meaning for the photograph of the Mayor), with *Cariou II*, 714 F.3d at 710 (arguing that quantity of materials appropriated should be considered along with their “quality and importance”).

¹⁶¹ Compare *Cariou II*, 714 F.3d at 710 (holding that an artwork can borrow the entirety of another work and still maintain its transformativeness), with *Kienitz*, 965 F. Supp. 2d at 1053 (holding, similarly, that a work can include the entirety of another work and gain transformativeness because of new context).

artwork in those decisions.¹⁶² The ruling in *Kienitz*, though recently appealed, has been affirmed, with the court holding that Kienitz’s photo was improperly used and that similar, non-copyrighted photographs could have been used instead.¹⁶³

Because neither *Kienitz* nor *Seltzer* occurred in the Court of Appeals for the Second Circuit, like the other appropriation cases previously discussed, any future cases that occur in the Second Circuit are not bound to follow the rationales of *Kienitz* or *Seltzer*. However, as demonstrated by the different courts referencing other appropriation cases, a court will still look to other jurisdictions for guidance.¹⁶⁴ The *Kienitz* and *Seltzer* decisions demonstrated that there are ways to use pre-existing art legally if the artist alters the meaning and context of the artwork; yet, the true effects of the *Cariou* decision on the *Rogers/Blanch/Campbell* standard will not be discerned until more cases arise.¹⁶⁵

When new cases arise involving appropriation artists, such as Koons and Prince, the courts should attempt to delineate a clear standard against which other courts, regardless of jurisdiction, can measure their cases.¹⁶⁶ If the *Kienitz* and *Seltzer* decisions are any

¹⁶² See *Seltzer*, 725 F.3d at 1176–178 (referencing the decision made by the Second Circuit in *Cariou*, as well as *Blanch/Campbell*, but failing to mention the decision in *Rogers*); *Kienitz*, 965 F. Supp. 2d at 1049–051 (referencing the standards given by the preceding appropriation cases).

¹⁶³ *Kienitz v. Scornie Nation LLC*, 766 F.3d 756, 760 (7th Cir. 2014) (noting that the fair use doctrine was meant to “facilitate a class of uses that would not be possible if users always had to negotiate with copyright proprietors”).

¹⁶⁴ See, e.g., *id.* (citing cases from different circuits and showing that many different jurisdictions have been attempting to deal with the issue). See generally *N. Jersey Media Grp., Inc. v. Jeanine Pirro*, 2015 U.S. Dist. LEXIS 15912, at *95 (S.D.N.Y. Feb. 10, 2015). See also *Fox Broad. Co. v. Dish Network LLC*, 2015 U.S. Dist. LEXIS 23496 (C.D. Cal. Jan. 12, 2015).

¹⁶⁵ See *Kienitz*, 965 F. Supp. 2d at 1051 (holding that altering meaning and context of an original work of art can result in a transformative work of art); *Seltzer*, 725 F.3d at 1178 (finding similarly that altered works of art within a video do not detract from the video’s transformativeness).

¹⁶⁶ See *supra* Part III(B) (arguing that courts in varying jurisdictions have no clear standard to follow because different jurisdictions continue to rule differently on appropriation art).

indication of the manner in which other courts will react to the *Cariou* appellate decision, a standard will be developed that adheres to the theory that transformativeness derives from the creation of a work of art that applies new meaning and context to a pre-existing work.¹⁶⁷ The *Kienitz* and *Seltzer* decisions indeed have value despite involving forms of media not normally included within appropriation art cases; decisions involving various mediums and the crossovers among them will always prove useful for the development of a clearer standard within appropriation art.¹⁶⁸ The next time that the *Rogers/Blanch/Campbell* standard is invoked will determine whether the *Cariou* appellate decision has truly made it less difficult for appropriation artists to present their artwork as transformative under the fair use doctrine. However, this will not become clear until the next appropriation case arises and a court has the chance to weigh in on the transformative standard.

IV. Conclusion

The future of appropriation art within copyright law will be protected by the perpetuation of the fair use doctrine. As a whole, the fair use doctrine has become an effective tool by which courts can determine whether or not a specific work is a permissible infringement. However, the transformativeness portion of the first factor remains unclear. At times, the court defines transformativeness quantitatively, analyzing how much the new work and the old are similar, while in other instances the court looks further and ties transformativeness to a notion of the new meaning within a new context.

Because the appellate court hesitated when defining transformativeness concretely in *Cariou*, courts still have the chance to firmly decide what transformativeness actually means and how it

¹⁶⁷ See *supra* Part III(A)(1) (positing that the standard developed by *Rogers/Blanch/Campbell* defines transformativeness as the placing of a pre-existing work of art into a new context while affording it new meaning).

¹⁶⁸ See *Kienitz*, 965 F. Supp. 2d at 1047 (noting that the mediums involved were a t-shirt and a photograph); *Seltzer*, 725 F.3d at 1173–175 (observing that the mediums involved were a poster and a music video).

should be applied under the fair use doctrine. Subsequent cases following this decision have further cemented the idea that transformativeness is not only about the quantity taken from the original work, but also about transcending the original work and creating something new in both context and meaning.

As the court's decisions in *Kienitz* and *Seltzer* have shown, a work that places an appropriated work in a new context, resulting in a new meaning, is transformative, regardless of how much or how little of the original work is used. With this implied standard, the court can continue to uphold the fair use doctrine for appropriation art and perpetuate creativity within the art world, while still allowing for the protection of existing copyrighted works.

Giving Dormant Intellectual Properties An Extra Life: How Bankruptcy Can Revive Video Game IP That Has Fallen Victim To Acquisition By Expansionist Publishers

Christopher Ryan

There was a time at which it could have been said that the sun never set on the Roman Empire. At its height, the Empire mainly consisted of the entire area surrounding the Mediterranean Sea.¹ However, generations of constant expansion, numerous military campaigns, and an imperial system that proved unable to maintain internal order led to its inevitable collapse.² Now, Rome is revered as more of a cautionary tale—an example of what can happen when expansion leads to imbalance.

The same thing can be said for videogame companies since their proliferation in the late 1970s. Mainstream publishers pursue acquisition after acquisition, accumulating smaller development houses under their respective umbrellas.³ With the acquisition of each development house, a mainstream publisher obtains a development house's associated intellectual properties ("IP") and other assets.⁴ Unfortunately, budgetary expectations flowing from large publishers' business models mean that many IP must meet exceedingly high sales in order to offset increased budgets and mollify shareholders.⁵

¹ Lynn Harry Nelson, *Rome at its Height*, LECTURES IN MEDIEVAL HISTORY, http://www.vlib.us/medieval/lectures/roman_empire.html (last visited Oct. 10, 2014).

² *See id.*

³ *See* Don Reisinger, *Why Video Game Developer Acquisitions Scare Me*, CNET (Mar. 5, 2009), <http://www.cnet.com/news/why-video-game-developer-acquisitions-scare-me/>.

⁴ *See, e.g.*, Justin McElroy, *Microsoft's Checkered History of Gaming Acquisitions, from Bungie to Minecraft*, POLYGON (Sept. 15, 2014, 4:10 PM), <http://www.polygon.com/2014/9/15/6153109/microsoft-minecraft-acquisitions>.

⁵ *Id.* One of the best examples of this sort of interplay between publisher and acquired developer can be found in the story of Ensemble Studios, who were quoted as saying, "The reality is that every single game we shipped took twice as long as we said it was going to take, and cost twice as much to make. . . Microsoft is a public company[;] they answer to their shareholders, and we were simply too expensive." *Id.*

Further, publishers rarely respect the culture of the studios they purchase: they do not respect “tradition, because when they buy studios, they are usually buying a turnkey solution to a labor problem, rather than history or culture (even if the PR people say different[[]]).”⁶

Enterprise Applications consultant Joshua Greenbaum summed up the problem of tech companies being “too big to succeed,” stating:

These are companies that have been buying up customers, products, and market share with increasing frequency and avariciousness. In many cases they have made their owners wealthy and their shareholders happy, but all too often they have failed to deliver on the promises that were meant to justify a growth-at-all-costs strategy. What looks good on paper—bigger is better—is looking more and more to be as healthy for tech companies as an IV drip of anabolic steroids is for an athlete. Good for the seasonal batting average, but increasingly bad for the long term.⁷

This Article seeks to explain how the bankruptcy of large videogame publishers is a blessing in disguise for fans of troubled IP. Part I will discuss the culture of accumulation that represents the videogame industry’s publishing houses. It will also document examples of the timelines of IP from their inception to their current state, paying specific attention to their acquisition by chains of publishers and the resulting budgetary and developmental concerns. Part II will delve into some of the more recent bankruptcies of Atari, THQ, Midway, and 38 Studios and explain why their business models were untenable. Part II will compare and contrast the relative fortunes of IP after their sale at auction, or alternatively after their development teams have been part of a Chapter 11 corporate restructuring. Part III will explore some of the hurdles and missteps that can happen when a publisher files for bankruptcy. Finally, Part IV will examine the current state of the industry and give a prognosis for the modern

⁶ Colin Campbell, *20 Games Studios We Lost in 2012*, IGN (Dec. 11, 2012), <http://www.ign.com/articles/2012/12/11/20-studios-we-lost-in-2012>.

⁷ Joshua Greenbaum, *Too Big to Fail? How About Too Big to Succeed?*, EACONSULT (Nov. 7, 2013), <http://www.eaconsult.com/2013/11/07/too-big-to-fail-how-about-too-big-to-succeed/>.

publishing titans and predict whose bankruptcy is imminent and whose model will foster their continuing operation.

I. Manifest Destiny: The Expansion of the Mega Publisher

In a discussion of videogame publishing expansions, there is no better place to start than Electronic Arts (“EA”). Before 1991, EA pursued a novel premise—to be an independent publisher with no in-house development.⁸ Fast forward to founder Trip Hawkins’s exodus from leadership in 1991, when new CEO Larry Probst would implement a plan of aggressive acquisitions.⁹ Over the next couple of decades, EA would acquire 37 development companies across the world with a majority of them located in the United States.¹⁰ EA would continue this practice into the current generation, regardless of its level of effectiveness:

Tallying in spin-off studios, that’s an average of 1.2 acquisitions a year since 1991. . . Of the total, one-third [of the spin-off studios] have since been closed—all, again, within the past five years. All save Origin, Bullfrog, Maxis, and DICE have been renamed after their [sic] parent company, either in part or in whole.

The pattern to these acquisitions, if not universal, is infamous: find a company that made a really popular game, acquire the company and its properties; then set the team on churning out sequel after sequel to the game in question. Sometimes, likely not by design, the staff leaves or burns out, or one of the products sells poorly; the studio is closed or subsumed. . .

⁸ Eric-Jon Rossel Waugh, *A Short History of Electronic Arts*, BLOOMBERG BUSINESSWEEK (Aug. 24, 2006), <http://www.businessweek.com/stories/2006-08-24/a-short-history-of-electronic-arts>.

⁹ *Id.*

¹⁰ *See generally id.* *See also Electronic Arts*, CRUNCHBASE, <https://www.crunchbase.com/organization/electronicarts> (last visited Mar. 29, 2015).

EA seemed to have abandoned all of its founding principles and developed an attitude of rapid growth whatever the long-term cost, thereby setting a poor example for the rest of the industry. But it's not all bad news. The firm has set its sight on growth through creativity, and has been forced to come to terms with the costs of its own ambitions.¹¹

Though EA's policy of expansion may seem "monopolistic" (and in cases concerning the NFL,¹² for example, it decidedly is), courts have done little to restrain the expanding behemoth—placing the onus on the consumer to stop purchasing its products to stimulate change.¹³

It is perhaps most telling that former EA CEO John Riccitiello said, in an interview, "I don't think investors give a shit about our quality."¹⁴ Indeed, EA has kept afloat and remains profitable even as the industry has shifted towards more tablet- and mobile-based gaming.¹⁵ EA has also embraced microtransactions and free-to-play models, but its continued solvency is clearly a by-product of its strong goliath franchises like *Madden Football*, *FIFA Soccer*, *Battlefield*, and exclusive license rights to IPs like the *Harry Potter* universe and *James Bond 007*.¹⁶ More notably, the gaming community has vilified

¹¹ Waugh, *supra* note 8.

¹² Owen Good, *Madden's Exclusive NFL License Survives in \$27 Million "Monopoly" Lawsuit Settlement*, KOTAKU (July 20, 2012, 8:54 PM), <http://kotaku.com/5927919/maddens-exclusive-nfl-license-survives-in-27-million-monopoly-lawsuit-settlement>.

¹³ See generally Liron Offir, *Monopolistic Sleeper: How the Video Gaming Industry Awoke to Realize That Electronic Arts Was Already in Charge*, 8 DUQ. BUS. L. J. 91 (2006) (demanding public action and presenting aspirational court options that have yet to be realized).

¹⁴ Dean Takahashi, *John Riccitiello's Legacy: EA Survives, But Its Hit Points Are Dangerously Low*, VENTUREBEAT (Mar. 19, 2013, 1:00 PM), <http://venturebeat.com/2013/03/19/the-ups-and-downs-at-ea-under-fired-ceo-john-riccitiello-and-its-outlook-for-the-future/>.

¹⁵ John Gaudiosi, *Mobile Game Revenues Set to Overtake Console Games in 2015*, FORTUNE (Jan. 15, 2015, 10:56 AM), <http://fortune.com/2015/01/15/mobile-console-game-revenues-2015/>.

¹⁶ Takahashi, *supra* note 14.

EA for various reasons: its always-online digital rights management (“DRM”);¹⁷ consistent server issues with its steam alternative digital distribution system, Origin; sloppy, unoriginal annual re-hashings of tired franchises like *Need for Speed*; the aforementioned acquisition and gutting of popular development houses; and most flagrant to the commercial public, day-one disc-locked content (“DLC”).¹⁸ For the often-poor college student, using whatever negligible funds she has to purchase a video game and finding out that the publisher shipped an incomplete product for the price of \$60—with the rest of the content available for an extra \$20—is considered a huge insult. To exacerbate this less than rosy situation, the DLC is usually already on the disc purchased, and only needs the extra fee to be unlocked! In some cases, development teams prepare a completed product, only to have the publisher cut out a portion of it—take the *From Ashes* DLC for *Mass Effect 3*.¹⁹ EA’s CEO John Riccitiello “gloated over the 40 [percent] attachment rate to [*From Ashes*] . . . DLC that was later proven to be cut from the game and sold back to gamers as premium content”²⁰ EA’s COO, Peter Moore, elaborated on the sales strategy in an interview:

The other key thing is selling digital content on the day of launch When we sold *Mass Effect 3* back in March, we saw a 40 percent attach rate that first week to DLC at GameStop in the United States. Not only are you selling a \$60 game . . . you’re selling \$20 DLC, so the sale becomes \$80.²¹

¹⁷ See Paul Tassi, *EA Voted Worst Company in America, Again*, FORBES (Apr. 9, 2013, 12:06 PM), <http://www.forbes.com/sites/insertcoin/2013/04/09/ea-voted-worst-company-in-america-again/>.

¹⁸ William Usher, *Why People Hate EA? Ten Simple Reasons*, CINEMABLEND (June 18, 2012, 2:05 PM), <http://www.cinemablend.com/games/Why-People-Hate-EA-Ten-Simple-Reasons-43696.html>.

¹⁹ William Usher, *EA Proud of Day-One DLC: Selling \$20 DLC So the Sale Becomes \$80*, CINEMABLEND (May 10, 2012, 3:47 PM), <http://www.cinemablend.com/games/EA-Proud-Day-One-DLC-Selling-20-DLC-So-Sale-Becomes-80-42372.html>.

²⁰ *Id.*

²¹ *Id.*

EA has managed to garner so much ill will from the gaming community that it earned the ignominious title “Worst Company in America” in 2012 *and* 2013; only barely losing this calendar year to constant rival in infamy Comcast.²² In fact, EA is the only software developer to even make it to the “Worst Company” competition—the brackets almost always comprise cable and satellite service dealers, cellphone coverage plan companies, commercial airlines, and financial institutes.²³

Perhaps even more vexing than its double-dip payment model is its absorption and closure of fan-favorite studios. Westwood Studios is often considered the founder of the real-time strategy genre²⁴ of games.²⁵ Founded in 1985, Westwood Studios gained renown for creating games based on the *Dune* and *BattleTech* IP as well as its own IP, including the wildly successful real-time strategy game, *Command & Conquer*.²⁶ Westwood was profitable, and consumers loved its fun, well-produced games so much that EA

²² *Off the Hook: EA Drops Out of “Worst Company in America” Bracket in Round One*, FORBES (Mar. 24, 2014, 8:28 PM), <http://www.forbes.com/sites/danielnyegriffiths/2014/03/24/off-the-hook-ea-drops-out-of-worst-company-bracket-in-round-one/>.

²³ *See Here Are Your Contestants for the 2013 Worst Company in America Tournament!*, CONSUMERIST (Mar. 18, 2013), <http://consumerist.com/2013/03/18/here-are-your-contestants-for-the-2013-worst-company-in-america-tournament/>; Chris Morran, *Here It Is, Your Lineup for Worst Company in America 2012!*, CONSUMERIST (Mar. 12, 2012), <http://consumerist.com/2012/03/12/worst-company-2012-bracket-announcement/>.

²⁴ Real-time strategy games are defined as being “computer or console game[s] where you normally take control of armies of animated figures or characters, direct their development, and fight their battles. The reference to *Real Time* is mainly due to the fact that the game continues to run even if you are not actively giving commands” Jason Rybka, *RTS – Real Time Strategy*, ABOUT TECH, <http://vgstrategies.about.com/od/strategyglossary/g/rts.htm> (last visited Mar. 29, 2015).

²⁵ Luke Plunkett, *Let’s Pour One Out for Westwood Studios, Creators of the Real-Time Strategy Genre*, KOTAKU (July 13, 2011 12:00 AM), <http://kotaku.com/5820685/lets-pour-one-out-for-westwood-studios-creators-of-the-real-time-strategy-genre>.

²⁶ *Id.*

snatched it up in 1998.²⁷ Rather than utilize it as a somewhat of a turnkey moneymaker, EA began to micromanage Westwood, severely under-employing its talents:

Bought by Electronic Arts 1998, aside from *Command & Conquer* and *Dune* games[,] the studio's output soon drie[d] up, the Westwood name split across two studios which released things like failed MMO *Earth & Beyond* and under-appreciated action game *Nox*.

In 2002, shortly after the failure of *Command & Conquer Renegade*, Westwood was severely downsized by EA, and a year later the studio itself was closed, those remaining staff absorbed into EA's other studios.²⁸

Despite the shuttering of one of the gaming public's favorite studios,²⁹ its creation, *Command & Conquer*, would live on. *Command & Conquer: Generals* would survive Westwood's closure to be released on multiple platforms over the next few years.³⁰ The game was considered good, but also a departure from much of what had made the previous games famous:

Although *Command & Conquer: Generals* has many points that has made the franchise so popular over the years, it has been 'vanillafied' —it's been molded to play and appear like every other real-time strategy (RTS) game out there.³¹

²⁷ See generally *id.*

²⁸ *Id.*

²⁹ *Id.* "Of all the studios Electronic Arts has bought over the decades, few were as talented or important to the history of video games as Westwood Studios." *Id.*

³⁰ *Command & Conquer: Generals*, COMMAND & CONQUER WIKI, http://cnc.wikia.com/wiki/Command_%26_Conquer:_Generals (last visited Mar. 30, 2015).

³¹ Aaron "Omni" Simmer, *Command & Conquer: Generals*, THE ARMCHAIR EMPIRE (June 8, 2003), <http://www.armchairempire.com/Reviews/PC%20Games/command-conquer-generals.htm>.

This complaint is perhaps the essence of EA’s culture—it is so large that the only way it can functionally operate is not by allowing its teams the liberty to operate as they once had, but rather by forcing their assimilation into one sustainable business model.

When, for various reasons, *Command & Conquer: Generals* stopped enjoying the popularity of its predecessors, EA tried a new strategy—capitalize on the free-to-play model with the franchise on personal computers (“PCs”).³² This game would never see release, however.³³ In a press release that seemingly blamed customers for the halted release, EA announced to its fans that “[their] feedback from the alpha trial [was] clear” and that it would not make the game fans wanted to play. . . . [A]fter much difficult deliberation, [it had] decided to cease production . . . of the game.³⁴ Poor Victory Studios, the LA-based studio that EA had put in charge of the project, found its studio shuttered, with its employees either laid off or reabsorbed by EA.³⁵ This resulted in EA’s fourth cancelled *Command & Conquer* game before realization, which marked the likely death of the beloved franchise. Such is not to say that EA did not try to maintain the franchise; it had good intentions, not unlike equally ponderous, lummock Lenny with his puppy in Steinbeck’s *Of Mice and Men*.³⁶

The above tells a story that plays out time and again in the video games industry. The beloved *Star Wars* movie-turned-gaming franchise has encountered its ups and downs as well, even though *Star Wars 1313* impressed onlookers at the Electronics Entertainment

³² Michael McWhertor, *Command and Conquer Makes a Strategic Move Into The Free-to-Play Fight*, POLYGON (Feb. 25, 2013, 1:00 PM), <http://www.polygon.com/2013/2/25/4026740/command-and-conquer-preview-free-to-play>.

³³ Jason Schreier, *EA Cancels Command & Conquer*, KOTAKU (Oct. 29, 2013, 2:16 PM), <http://kotaku.com/ea-cancels-command-conquer-1454179860>.

³⁴ *Id.*

³⁵ Michael McWhertor, *EA Cancels Command & Conquer, Closes Development Studio*, POLYGON (Oct. 29, 2013, 2:07 PM), <http://www.polygon.com/2013/10/29/5043244/ea-cancels-free-to-play-command-and-conquer>.

³⁶ See generally JOHN STEINBECK, *OF MICE AND MEN* (1937).

Expo³⁷ in June 2012.³⁸ Produced by veteran studio LucasArts, the game featured franchise antihero Boba Fett as the strong, silent protagonist, and was highly anticipated by the gaming community.³⁹

Sadly, in late 2012, Disney purchased the rights to the *Star Wars* universe, closed LucasArts studios, and laid off over 150 employees.⁴⁰ A representative from LucasArts described its new strategy for managing its IP as a shift from an “internal development to a licensing model,” which would result in minimized risk to the company while “achieving a broader portfolio of quality *Star Wars* games.”⁴¹ While this might be an ultimately profitable move for Disney, it comes at a disappointing price for fans of the game.

Following a similar logic as that behind the death of *Command & Conquer*, Disney did not take a gamble on what might be an unprofitable game, killing it before it could potentially dampen investors’ appetites over the new acquisition.⁴² It is sadly not uncommon for a game based on already successful IP to be cancelled after its studio is absorbed into a new publisher. Thankfully, publishers themselves are not infallible, and have their fair share of trials and tribulations.

II. The Giants Fall

Broken bottles, rusted cans, candy wrappers, and the remains of defunct appliances form the landscape at the Alamogordo landfill not too far from El Paso, Texas. One thing separates this particular

³⁷ Otherwise known as “E3.” See ELECTRONICS ENTERTAINMENT EXPO, <http://www.e3expo.com> (last visited Mar. 26, 2015) (noting that “E3” refers to the annual video game conference and show in Los Angeles).

³⁸ Stephen Totilo, *The Strange Status of Star Wars: 1313, a Hot Game with an Uncertain Future*, KOTAKU (Feb. 28, 2013, 4:00 PM), <http://kotaku.com/5987674/the-strange-status-of-star-wars-1313-a-hot-game-with-an-uncertain-future>.

³⁹ See *id.*

⁴⁰ Sal Romano, *Disney Shuttters LucasArts, Star Wars 1313 Canceled [Update]*, GEMATSU (Apr. 3, 2013, 1:52 PM), <http://gematsu.com/2013/04/disney-shuttters-lucasarts-star-wars-1313-canceled>.

⁴¹ *Id.*

⁴² See *id.*

landfill from any other waste-processing center in the country—Alamogordo also acts as a metaphor for the hubris of large videogame companies and a stern warning to those who attempt to produce “shovelware”—products hastily rushed to market in an attempted cash-grab, often as a movie tie-in.⁴³ Under the countless tons of refuse, over 700,000 unsold copies of Atari’s fundamentally-flawed *E.T.: The Extraterrestrial* have remained entombed for the past 30 years, undisturbed until just recently when *Atari: Game Over*, a documentary about the struggling entertainment giant, was filmed.⁴⁴

Atari, Inc. would never fully recover from the hit to its reputation, and would eventually result in the creators of its innovative IP into multiple different companies in 1984.⁴⁵ With its losses approaching \$500 million⁴⁶ (due to the video game market crash of 1983), Atari, Inc. became Atari Games, Inc.⁴⁷ and Atari Consumer Electronics Division, both of which were later sold off and merged into JT Storage Company, then finally migrated into the Namco and then Infogrames portfolios (along with its associated IP).⁴⁸ Infogrames decided to “reinvent” the Atari brand in 2001, and prominently

⁴³ The term “shovel-ware” is hardly unique to the video games industry. PC Mag defines it as “the many ‘extra’ programs pre-installed on some PCs that offer little value (they are ‘shoveled’ in without regard to quality).” *Definition of: Shovelware*, PC MAG, <http://www.pcmag.com/encyclopedia/term/51294/shovelware> (last visited Mar. 26, 2015).

⁴⁴ See Timothy J. Seppala, *The True Story of the Worst Video Game in History*, ENGADGET (May 1, 2014, 1:45 PM), <http://www.engadget.com/2014/05/01/true-story-et-atari/>.

⁴⁵ Michael D. Current, *A History of WCI Games/Atari/Atari Games/Atari Holdings*, ATARI HISTORY TIMELINES BY MICHAEL CURRENT, <http://mcurrent.name/atarihstory/> (last updated Jan. 15, 2014).

⁴⁶ “Staggering from the failures of *Pac-Man*, *E.T.*, and the *5200*, Atari went on to lose more than \$536 million in 1983.” Alex Santoso, *The Rise and Fall of Atari*, NEATORAMA (May 5, 2008, 2:03 AM), <http://www.neatorama.com/2008/05/05/the-rise-and-fall-of-atari/>.

⁴⁷ *Id.*

⁴⁸ *Id.* See also Keza MacDonald, *Ign Presents: The History of Atari*, IGN (Mar. 20, 2014), <http://www.ign.com/articles/2014/03/20/ign-presents-the-history-of-atari?page=4>.

showcased the Atari logo on its box art for two new games.⁴⁹ By May 2003, Infogrames changed its name to Atari, seeking to capitalize on the more familiar name within the gaming community.⁵⁰ Bruno Bonnell, Chairman and CEO of IESA and Atari, stated:

In any language, Atari is synonymous with video games and it's recognized for transforming entertainment . . . Our industry is now outpacing the Hollywood box office and by choosing Atari as our signature, we are demonstrating our commitment to this growth and our determination to take entertainment to the next level for gamers worldwide.

Perhaps the greatest part of the Atari legacy is the recipe for creating games that capture an audience's imagination: creative ideas, the talent to bring them to life, and the passion to do so. . . elements have never been more abundant within our Company than they are right now. We have the strongest line up of properties we have ever had, deep ties with some of the world's most talented game developers, and an excitement about the future that's palpable.⁵¹

Bonnell's rosy outlook, however, would not match reality. Despite its refurbished moniker, Atari would not see another great commercial hit, either in terms of profitability or critical acclaim. For example, the studio tried to capitalize on some of its latent IPs, such as *Alone in the Dark*.⁵² The results were disastrous: a licensed movie

⁴⁹ Michael D. Current, *A History of HIAC XI/Atari Interactive*, ATARI HISTORY TIMELINES BY MICHAEL CURRENT, http://mcurrent.name/atarihstory/hiac_xi.html (last updated Dec. 26, 2014).

⁵⁰ *Infogrames Becomes Atari*, IGN (May 7, 2003), <http://www.ign.com/articles/2003/05/07/infogrames-becomes-atari>.

⁵¹ *Id.*

⁵² Before Atari's 2008 foray into the series, a new *Alone in the Dark* game had not been released for seven years. *Alone in the Dark Series*, Moby Games, <http://www.mobgames.com/game-group/alone-in-the-dark-series> (last visited Apr. 10, 2015).

which landed an abysmal MetaCritic score of nine out of 100; and a reboot of the franchise in 2008 that “enjoyed” ratings ranging from 47 out of 100 on the PlayStation 2, to 58 out of 100 on the Xbox 360.⁵³

The studio’s troubles were not fully unveiled until 2013, when Atari’s French parent, Atari S.A., admitted it had not “made a profit since 1999 despite asset sales and restructuring,” and forecasted “a ‘significant loss’ for 2012–2013.”⁵⁴ Atari owed between \$10 million and \$50 million to no less than 200 creditors (and as many as 999), while only reporting assets ranging between \$1 million and \$10 million, according to its Chapter 11 petition.⁵⁵

While Atari may have avoided bankruptcy in 1983 only to succumb to it three decades later, it was only a matter of time given its anti-developer policies, rush to capitalize off of licenses, failure to predict market reaction to games and consoles, and—most importantly—its inability to put out a quality product in over a dozen years.⁵⁶ If Atari were half as successful at creating and promoting games as it was at alienating customers and potential business partners, it may have had a chance. Instead, it sold its first gaming console for a whopping \$199 back in 1977.⁵⁷ It almost single-

⁵³ *Alone in the Dark Search Results*, METACRITIC, <http://www.metacritic.com/search/all/alone%20in%20the%20dark/results> (last visited Oct. 27, 2014).

⁵⁴ Douglas Wong & Andrew Harris, *Atari’s U.S. Operations File for Chapter 11 Bankruptcy*, BLOOMBERG (Jan 22, 2013 12:00 AM), <http://www.bloomberg.com/news/2013-01-21/atari-u-s-operations-file-for-chapter-11-bankruptcy.html>.

⁵⁵ *Id.*

⁵⁶ See generally Current, *supra* note 45; John Davidson, *It’s Time to Say Goodbye to Atari, Once and for All*, GAMESPOT (Jan 24, 2013), <http://www.gamespot.com/articles/its-time-to-say-goodbye-to-atari-once-and-for-all/1100-6402808/> (noting that the various practices of Atari’s corporate leadership have alienated developers, rival publishers, and of course the consumer); Mark Langshaw, *Atari Retrospective: The Rise and Fall of a Gaming Giant*, DIGITAL SPY (Jan. 27, 2013, 1:00 AM), <http://www.digitalspy.com/gaming/news/a453849/atari-retrospective-the-rise-and-fall-of-a-gaming-giant.html#~oTVrLIfDUERtYL>.

⁵⁷ Davidson, *supra* note 56. Adjusted for inflation, this amounts to just over \$800 by today’s standards. DOLLARTIMES, <http://www.dollartimes.com/inflation/inflation.php?amount=200&year=1970> (last visited Oct. 27, 2014).

handedly destroyed the fledgling videogame market with the aforementioned *E.T.* debacle.⁵⁸ It offended Nintendo by first passing on a mutually lucrative deal to market what would have been called the Atari Famicom system.⁵⁹ Later, by side-stepping Nintendo's proprietary lockout for third party games (resulting in a litany of lawsuits in the late 1980s),⁶⁰ Atari followed almost directly by suing Nintendo unsuccessfully for being a monopoly,⁶¹ developing half a dozen failed consoles,⁶² and driving away its own talented development teams.⁶³ In fact, Activision—the world's first ever third party game development studio, composed of former Atari developers—has far eclipsed the fame of its founders and has become one of the leading game publishing houses in the world.⁶⁴

THQ was another story altogether. Where Atari would often release compilations of previous games from its golden years time and again on as many systems as possible, THQ's attempted ingenuity may have led directly to its downfall.⁶⁵ Founded in 1989,⁶⁶ THQ's first

⁵⁸ Alex Morris, *How E.T. the Extra-Terrestrial Nearly Destroyed the Video Game Industry*, ALL BUSINESS EXPERTS (June 27, 2013), <http://experts.allbusiness.com/how-et-the-extra-terrestrial-nearly-destroyed-the-video-game-industry/5049/?singlepage=1#.VScKI2YkHBI>.

⁵⁹ *The Atari 7800 ProSystem*, ATARIMUSEUM, <http://www.atarimuseum.com/videogames/consoles/7800/7800menu/> (last visited Oct. 27, 2014).

⁶⁰ Davidson, *supra* note 56.

⁶¹ *Id.*

⁶² *Id.*

⁶³ Peter C. Beller, *Activision's Unlikely Hero*, FORBES (Jan. 15, 2009, 2:40 PM), <http://www.forbes.com/forbes/2009/0202/052.html>; see *Historical Timeline*, ACTIVISION BLIZZARD, <http://investor.activision.com/timeline.cfm> (last visited Oct. 27, 2014).

⁶⁴ See Geoffrey Tim, *Who's the Biggest Games Publisher?*, LAZYGAMER.NET (May 17, 2013, 9:00 AM), <http://www.lazygamer.net/general-news/whos-the-biggest-games-publisher/>.

⁶⁵ See *Why THQ Went Bust: Readers Feature*, METRO (Feb. 2, 2013, 1:00 AM) <http://metro.co.uk/2013/02/02/why-thq-went-bust-readers-feature-3377962/> [hereinafter *Why THQ Went Bust*].

several years as a game publisher reaped modest fortunes primarily in movie license tie-ins.⁶⁷ For the better part of a decade, THQ had exclusive license to make games based on Disney, Pixar, and WWE properties.⁶⁸ In spite of this success, THQ went from a billion-dollar company to a bust.⁶⁹ *Cracked* magazine summed up THQ's sudden insolvency in its characteristically irreverent manner: "THQ lost money so quickly and impossibly that Donald Trump thought he was CEO and declared bankruptcy again."⁷⁰

Though industry speculators pin THQ's demise on a number of factors—ranging from the increased cost of game development in breaching the next generation markets, to difficulty in adopting a viable online multiplayer strategy, to a flagging economy and a decline in discretionary spending—all can agree that the miserable failure of the uDraw concept directly contributed to THQ's ultimate unraveling.⁷¹ The uDraw, costing consumers on average \$70 per game per peripheral, is often referred to as THQ's "E.T. moment."⁷² One industry commentator posited that at a cost of "£30 [\$35] each to make plus additional software for it and development costs, that must be £50

⁶⁶ Luke Plunkett, *A History of THQ, 1989-2013*, KOTAKU (Jan. 23, 2013 10:00 PM), <http://kotaku.com/5978508/a-history-of-thq-1989-2013>.

⁶⁷ See *Why THQ Went Bust*, *supra* note 65.

⁶⁸ See Luke McKinney, *6 Reasons a Great Game Developer Just Went Bankrupt*, CRACKED (Jan 26, 2013), <http://www.cracked.com/blog/6-reasons-great-game-developer-just-went-bankrupt/>.

⁶⁹ See *id.*

⁷⁰ *Id.*

⁷¹ See *Why THQ Went Bust*, *supra* note 65. THQ's uDraw, a tablet interface peripheral, was a commercial success for the Nintendo Wii system, but a phenomenal failure for all other platforms. *Id.* Ubisoft's CEO Brian Farrell characterized his troubled company's disappointment: "We were looking at uDraw as a bridge to this core and digital future, and that bridge turned out to be a plank that we walked off of." Frank Cifaldi, *Just How Badly Did uDraw Hurt THQ, Anyway?*, GAMASUTRA (Feb. 2, 2012), http://www.gamasutra.com/view/news/129452/Just_how_badly_did_uDraw_hurt_THQ_anyway.php.

⁷² *Why THQ Went Bust*, *supra* note 65.

[\$58] million sunk into this one game alone!”⁷³ With 1.2 million unsold units, THQ encountered a staggering blow.⁷⁴

Sadly, it was the move away from its licensed content niche that may have ultimately unraveled the company. THQ was consistently profitable when relying on sales from movie tie-ins and yearly iterations of games in its wrestling franchises, but that model was becoming more unprofitable every year, as mobile- and tablet-based gaming started to capture the largest market share for casual gaming.⁷⁵ THQ did its best to adapt to a changing environment by acquiring new studios and IP as it evolved, but no one acquisition resulted in the runaway success it needed to stay afloat.⁷⁶ Though franchises like *Darksiders* and *Saints Row* would prove profitable, they were largely ignored by the gaming populace, who—during the economic slump lasting from 2008 to 2010—⁷⁷ spent what little disposable income they had on familiar IPs like *Call of Duty*, *Madden NFL*, and *Grand Theft Auto*.⁷⁸

In an attempt to further establish its new franchises, THQ began to sink unprecedented amounts of money into developing and marketing its games.⁷⁹ Nordic Games CEO Lars Wingefors, current

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ Christopher Dring, *The Collapse of THQ: The Full Story*, MCV (Jan. 31, 2013 1:34 PM), <http://www.mcvuk.com/news/read/the-collapse-of-thq-the-full-story/0110180>.

⁷⁶ See generally *Why THQ Went Bust*, *supra* note 65.

⁷⁷ Stephen Totilo, *NPD Clarifies: The Real List of Top 5 Best-Selling Games of 2008 Is...*, MTV MULTIPLAYER (Jan 20, 2009, 4:30 PM), <http://multiplayerblog.mtv.com/2009/01/20/the-real-top-5-selling-games-of-2008/>. The top five games for the fiscal year were *Wii Play*, *Madden NFL '09*, *Grand Theft Auto IV*, *Mario Kart*, and *Call of Duty: World at War*, all with over 4.5 million copies sold. *Id.*

⁷⁸ See generally Dring, *supra* note 75. See also Totilo, *supra* note 77.

⁷⁹ Luke Plunkett, *How THQ Went from Bad to Very Bad*, KOTAKU (Feb. 1, 2012, 10:00 PM), <http://kotaku.com/5881479/how-thq-went-from-bad-to-very-bad>. “[THQ] got it in its head a few years ago that it wanted/needed to compete with the big boys, the EAs and Activisions of the world, and figured the best way to do that would be to spend money. A lot of money. Blockbuster money, the kind of money it couldn't back up with blockbuster games.” *Id.*

owner of the *Darksiders* IP, characterized THQ's development budgets as "ridiculous," arguing:

THQ spent \$50 million making *Darksiders 2*. We can produce a product of the same quality but for a lower cost. \$50 million is ridiculous.⁸⁰

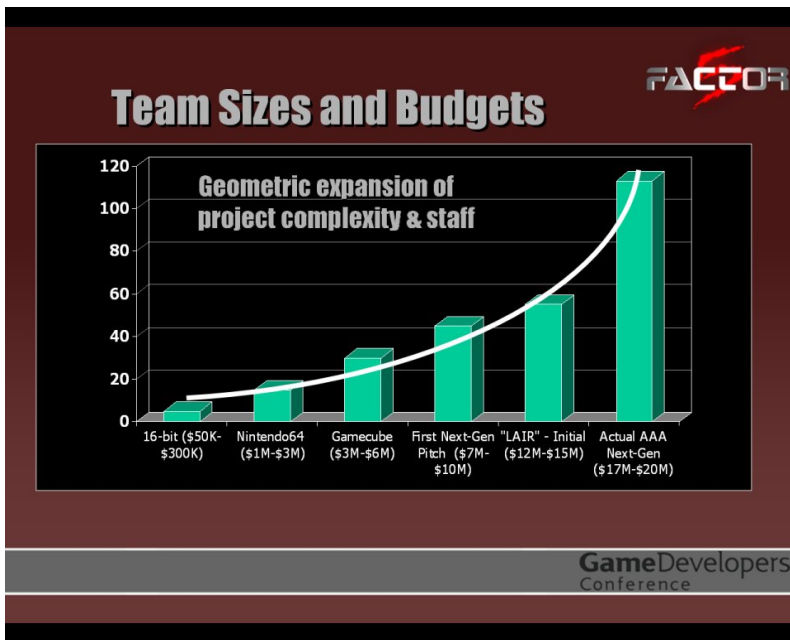
Though Wingefors's assertion is laudable if accurate, it ignores the trend of ever increasing development costs for blockbuster games. In an article titled "The Economics of Gaming," IGN noted,

the costs of developing games for the next-generation of consoles such as Microsoft's Xbox 360 and Sony's PlayStation 3 is estimated to be roughly \$10 million as compared to \$3–\$5 million for the Xbox, PlayStation 2 and GameCube. . . The exact licensing fee varies based on the manufacturer [e.g., Nintendo, Sony, Microsoft], as well as any deals they may give a publisher, but it can generally be anywhere from \$3 to \$10 per unit. . . Wholesalers typically pay around \$30 per game and with the costs of getting the goods to the wholesalers, any co-op advertising or marketing, and return of good contingencies being roughly \$14 per game, the publisher is going to typically get \$16 for every unit sold.⁸¹

It should be noted that this article was published in 2006, and the trend has only intensified since. At the Game Developers Conference of 2007, developer Factor 5 presented the reality of how exponentially complex and expensive development had become in the past decade:

⁸⁰ Emanuel Maiberg, *Darksiders 2's \$50 Million Budget Was "Ridiculous," Nordic Games CEO Says*, GAME SPOT (Sept. 21, 2014), <http://www.gamespot.com/articles/darksiders-2s-50-million-budget-was-ridiculous-nor/1100-6422461/>.

⁸¹ Ralph Edwards, *The Economics of Gaming*, IGN (May 5, 2006), <http://www.ign.com/articles/2006/05/06/the-economics-of-game-publishing>.



82

The trend has continued through the same exponential rise in costs, while profits for the mainstream AAA games⁸³ have not seen equivalent positive growth.⁸⁴ Factor 5 is by far the only company to bemoan the explosion in team size and budget for game complexity represented in this graph—save for the indie and mobile market, such projections are ubiquitous.⁸⁵ Part of THQ’s downfall was its inability

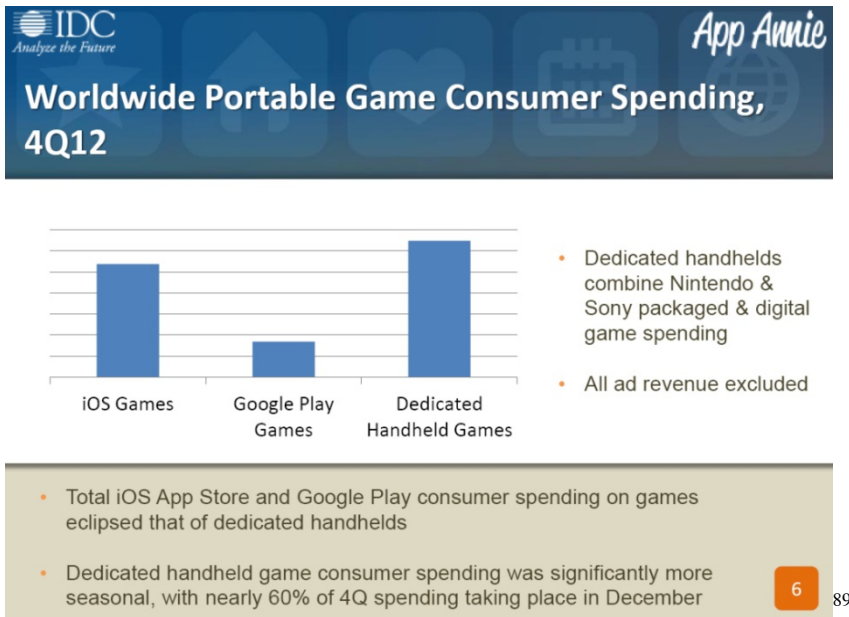
⁸² *Video Game Costs*, VGSALES, http://vg-sales.wikia.com/wiki/Video_game_costs (last visited Oct. 30, 2014).

⁸³ For purposes of this article, a “AAA Game” is distinct from an independently developed game, often boasting a budget in the seven or eight figure range— analogous to a Hollywood blockbuster film.

⁸⁴ See *The State of Games: State of AAA*, POLYGON (July 2, 2012, 5:03 PM), <http://www.polygon.com/2012/10/1/3439738/the-state-of-games-state-of-aaa>. “[N]o one is making money in AAA games. Costs are too high and the number of units that have to be sold in order to break even is in the mid-millions. Nobody is hitting those marks with any predictability, which means nobody is winning, or so they say.” *Id.*

⁸⁵ *Id.*

to compete in the modern arena of tablet-based and casual gaming.⁸⁶ Ten years ago, consoles and computer gaming made up the majority of the market, though this changed with the onslaught of portable and eventually mobile gaming.⁸⁷ Where portability was paramount, Nintendo and Sony reigned.⁸⁸ The market has vastly changed, however, as Google Play and iOS games now account for the lion's share of mobile gaming:



⁸⁶ Tracey Lien, *The Fall of THQ*, POLYGON, <http://www.polygon.com/covers/2014/12/9/7257209/the-fall-of-thq> (last visited Mar. 21, 2015). “While the market was moving to mobile, THQ was stuck in multi-year deals that meant it had to continue making licensed games for a shrinking console audience.” *Id.*

⁸⁷ *Video [sic] Game Set Sales Record in 2005*, CNN MONEY (Jan 14, 2006, 3:56 PM), <http://money.cnn.com/2006/01/13/technology/personaltech/gamesales/>. The iPhone had not yet come out, and handheld gaming made up only \$1.4 billion in 2006—almost 10 percent of the console market’s \$10.5 billion. *Id.*

⁸⁸ Donald Melanson, *A Brief History of Handheld Video Games*, ENGADGET (Mar. 3, 2006, 3:07 PM), <http://www.engadget.com/2006/03/03/a-brief-history-of-handheld-video-games/>. Before the PSP’s release in early 2005, Nintendo’s Gameboy line and Sega’s Gamegear were two of the most common handheld gaming devices. *Id.*

⁸⁹ Dan Crawley, *Dedicated Handheld Consoles Took a Beating from iOS and Android During Q4 2012*, VENTURE BEAT (Feb. 21, 2013, 3:06 PM),

As the publishers have either appropriated ever increasing amounts of money towards blockbuster AAA franchise games⁹⁰ or embraced mobile- and tablet-based gaming (including so-called “indie” games),⁹¹ THQ’s adherence to old practices made it miss out on extremely profitable strategies employed by smaller studios and publishers. Now, games like *Thomas Was Alone* and *Super Meat Boy* often go on to sell over a million copies, and often have teams of as few as one or two developers with budgets often in the low thousands!⁹²

Not all fault can be placed on THQ, however—it was innovating and providing generally excellent products, which sadly were not being purchased in quantities sufficient to sustain the publishing giant. The same cannot be said about Midway and its treatment of its seminal franchise, *Mortal Kombat*.

The year 1992 welcomed a new challenger to reigning arcade champion *Street Fighter 2*: Midway’s *Mortal Kombat*. *Mortal Kombat* bewitched teens with its over-the-top gore and mega-violence.⁹³ When

<http://venturebeat.com/2013/02/21/dedicated-handheld-consoles-took-a-beating-from-ios-and-android-during-q4-2012/>.

⁹⁰ See discussion of *Destiny*, *infra* Part IV.

⁹¹ Valerie Waldron, *The Rise of Mobile Games: Factors Contributing to Their Success*, UNIVERSITY OF MICHIGAN BLOGS - EATEN BY A GRUE: A BLOG ABOUT VIDEO GAMES AND LIBRARIES (Aug. 25, 2014), <http://www.lib.umich.edu/blogs/eaten-grue/rise-mobile-games-factors-contributing-their-success>.

⁹² See Sinan Kubba, *Thomas Was Alone Sells Over 700,000 Copies*, JOYSTIQ, <http://www.joystiq.com/2013/08/19/thomas-was-alones-sales-angle-over-700-000> (last visited Nov. 2, 2014); Edmund McMillen & Tommy Refenes, *Postmortem: Team Meat’s Super Meat Boy*, GAMASUTRA, http://www.gamasutra.com/view/feature/6348/postmortem_team_meats_super_meat_.php?print=1 (last visited Nov. 2, 2014); *The Making of: Thomas Was Alone*, EDGE-ONLINE (Aug. 14, 2013, 11:45 AM), <http://www.edge-online.com/features/the-making-of-thomas-was-alone/>. See also Laura Kate, *Thomas Was Alone Developer Interview—Exclusive*, WHAT CULTURE, <http://whatculture.com/gaming/thomas-was-alone-developer-interview-exclusive.php>. Mike Bithell, in fact, created *Thomas Was Alone* entirely by himself in his free time. *Id.*

⁹³ Ed Boon, *The History of Mortal Kombat*, IGN (May 5, 2011), <http://www.ign.com/articles/2011/05/05/the-history-of-mortal-kombat>.

it was released for consoles a year later, Midway also launched an “unprecedented ten million dollar advertising campaign” to ensure the game would be a commercial success.⁹⁴ A success it was—the newly spawned franchise released a sequel that shipped a record 2.5 million copies on its day of release.⁹⁵ The release was so successful that it surpassed box office results of that season’s Hollywood blockbuster movies, including *Forrest Gump* and *The Lion King*.⁹⁶ Unfortunately, not every game in the long-running series would be a critical or financial success; as of today, there have been over twenty games bearing the *Mortal Kombat* name, including multiple re-brandings, attempted diversions into the action-adventure genre, and even some crossovers with super heroes.⁹⁷ From 1997 to 2007, Midway would attempt to make the familiar format work in new scenarios—from the wonky *Mortal Kombat Mythologies: Sub-Zero*⁹⁸ to *Mortal Kombat: Shaolin Monks*—that were ultimately critically drubbed⁹⁹ because nothing captured the spirit and fun of the original trilogy.

Perhaps this was a reflection of Midway’s internal angst as it watched as its market share rapidly slipped. Midway found itself situated as the fourth best publisher of videogames in 2000, but by 2006, had plummeted to the 20th spot.¹⁰⁰ In an effort to boost its

⁹⁴ *Id.* at 2.

⁹⁵ NINA SCHUYLER, *THE BUSINESS OF MULTIMEDIA* 47 (Allworth Press 1995). In the context of video games, amount shipped merely means those sent to retail centers for later sale. See Horace Dediu, *Shipped and Sold: A Brief Introduction*, ASYMCO (May 28, 2012, 1:29 PM), <http://www.asymco.com/2012/05/28/shipped-and-sold-a-brief-introduction/>.

⁹⁶ *Mortal Kombat Sales*, N.Y. TIMES (Sept. 23, 1994), available at <http://www.nytimes.com/1994/09/23/business/mortal-kombat-sales.html>.

⁹⁷ See generally Boon, *supra* note 93.

⁹⁸ IGN rated *Mortal Kombat Mythologies: Sub-Zero* an abysmal 3.5 out of 10. *Mortal Kombat Mythologies: Sub-Zero Review*, IGN, <http://www.ign.com/games/mortal-kombat-mythologies-sub-zero/ps-2084> (last visited Jan. 25, 2015).

⁹⁹ Perhaps reflecting critical skepticism, GameSpot nominated this game for the title of “Most Surprisingly Good Game of 2005.” *Kommunity*, MORTAL KOMBAT ONLINE (Dec. 17, 2005, 8:22 PM), <http://www.mortalkombatonline.com/content/forum/showmessage.cds?id=63708> .

lagging market share, Midway began aggressively purchasing independent video game development studios as an effort to strengthen its portfolio and improve product development teams.¹⁰¹ Beginning in 2004, Midway acquired Surreal Development, Inevitable, Paradox Development, and Ratbag.¹⁰² The gamble would not pay off, however; fortunes continued to deteriorate, leading then-majority stockholder Sumner Redstone to sell off his 87 percent stake in the company in November 2008, which resulted in Midway's filing for protection under Chapter 11 the following February.¹⁰³

At the time it filed for Chapter 11 protection, Midway owed \$240 million to creditors, which amounted to "\$72.5 million more than the company's \$167.5 million in total assets as of September 2008."¹⁰⁴ Infuriating investors and development staff alike, Midway stalled in paying laid-off employees their severance while also setting aside bonuses for officers and executives to the tune of \$3,755,000, then ultimately selling off projects to other studios.¹⁰⁵ While not the first to be sold, the *Mortal Kombat* IP was sold to Warner Bros. Interactive Entertainment.¹⁰⁶

As of 2014, Midway is still subject to a liquidating trust that collects and distributes any proceeds or assets to its creditors while

¹⁰⁰ *Game Developers Top 20*, GAMASUTRA, http://www.gamasutra.com/view/feature/1744/game_developers_top_20_.php (last visited Oct. 20, 2014); Quang Hong, *Midway Fourth*, GAMASUTRA (Feb. 1, 2000), http://www.gamasutra.com/view/news/2666/Midway_Fourth.php.

¹⁰¹ *Midway Buys a Ratbag*, IGN (Aug. 4, 2005), <http://www.ign.com/articles/2005/08/04/midway-buys-a-ratbag>.

¹⁰² *Id.*

¹⁰³ Tor Thorsen, *Midway Bankrupt*, GAMESPOT (Feb. 12, 2009), <http://www.gamespot.com/articles/midway-bankrupt/1100-6204585/>.

¹⁰⁴ *Id.*

¹⁰⁵ Luke Plunkett, *Midway Looking to Offload Mortal Kombat, Screwing Former Employees*, KOTAKU (Mar. 2, 2009, 3:30 AM), <http://kotaku.com/5162447/midway-looking-to-offload-mortal-kombat-screwing-former-employees>.

¹⁰⁶ Kris Pigna, *Warner Bros. Emerges as Sole Bidder for Midway*, 1UP.COM (Jun. 27, 2009), <http://www.1up.com/news/warner-bros-emerges-sole-bidder>.

pursuing avoidance actions on its behalf.¹⁰⁷ The *Mortal Kombat* development team, re-branded as NetherRealm Studios by owner Warner Bros., has seen a phoenix-like rising from the ashes of mediocrity.¹⁰⁸ The first game produced after Midway sold the IP was simply titled *Mortal Kombat*.¹⁰⁹ Given the freedom to reestablish the *Mortal Kombat* brand, co-creator Ed Boon was able to engineer a hugely successful debut title for NetherRealm Studios.¹¹⁰ This is not to blame all of the franchise's woes on Midway Games, but rather to point out that almost the exact same development team was able to create a wildly successful game under different leadership. Once it was free from Midway's scramble for market dominance, the studio was able to avoid gimmicks and focus on what it does best: make a product that pleases die-hard fans of the series and sends parents into apoplexy. The *Mortal Kombat* brand shows no signs of slowing down, as 2015 will see the release of *Mortal Kombat X* across five separate platforms—and is expected to be wildly successful, even taking a progressive step toward allowing game purchasers to try the DLC characters before purchasing them.¹¹¹

¹⁰⁷ *Midway Games – CDDJ Bankruptcy Adversary Proceedings Report of Complaints, Dismissals, Defaults, Judgments*, BURBAGEWEDDELL, <http://www.burbageweddell.com/apscans/midway-games-cddj-apscans/> (last visited Nov. 1, 2014).

¹⁰⁸ See discussion, *infra* Part II.

¹⁰⁹ *Mortal Kombat*, GAMETRAILERS, <http://www.gametrailers.com/reviews/you2eq3/mortal-kombat-review> (last visited Apr. 19, 2011).

¹¹⁰ The 2011 re-branding of *Mortal Kombat* received overwhelmingly positive reviews, garnering an average of 85 out of 100 from review aggregate MetaCritic. *Mortal Kombat*, METACRITIC, <http://www.metacritic.com/game/xbox-360/mortal-kombat> (last visited Mar. 27, 2015). With a score of 86 on Xbox 360 and 84 on PlayStation 3, the game received predominantly positive reviews. *Id.* See also Mike McWhertor, *Mortal Kombat X*, POLYGON, <http://www.polygon.com/a/e3-2014/mortal-kombat-x> (last visited Oct. 20, 2014). It was also the best-selling *Mortal Kombat* game of all time. *Id.*

¹¹¹ William Usher, *Mortal Kombat X Lets You Try DLC Characters for Free*, CINEMA BLEND (Mar. 31, 2015), <http://www.cinemablend.com/games/Mortal-Kombat-X-Lets-You-Try-DLC-Characters-Free-71021.html>.

Unfortunately, not all IP fare as well as *Mortal Kombat* did after its 363 sale¹¹² to Warner Bros. Curt Schilling's *Kingdoms of Amalur* was unable to find a bidder after 38 Studios filed for Chapter 7 bankruptcy.¹¹³ Schilling, a former Boston Red Sox pitcher, and his 38 Studios are a story of disappointment, political intrigue, and the "chaos, arrogance, and mistakes that led to the destruction of [the studio] and the loss of \$75 million in taxpayer [dollars]."¹¹⁴

At the inception of 38 Studios, Curt Schilling intended to bankroll the company almost entirely out of his own pocket, hoping to keep as large a share of equity as possible in what he perceived to be a potential billion dollar company.¹¹⁵ After the initial investment of \$5 million, Schilling decided to seek outside funding, though his enviously regarded equity made his company an ironically hard pitch for potential investors.¹¹⁶ As investors continued to pass on his vision, Schilling's VP of business development suggested that the studio purchase Maryland's *Big Huge Games*.¹¹⁷ The sale was completed in May 2009, and added its associated IP and 70 new employees to the studio's repertoire.¹¹⁸

As the 2009 fiscal year came to a close, it became imperative that 38 Studios lock down additional funding.¹¹⁹ Schilling's luck

¹¹² A 363 sale is one governed by Chapter 363 of the Federal Bankruptcy Code, is characterized by an abnormally quick turnaround, and initiated by a 21 day notice to creditors. Jason Gold & Valerie Morrison, *How Bankruptcy Sales Really Work*, WILEY REIN (Aug. 2002), <http://www.wileyrein.com/publications.cfm?sp=articles&id=491>.

¹¹³ *Kingdoms of Amalur Wasn't Sold at 38 Studios Auction*, DESTRUCTOID (Dec. 16, 2013, 10:15 AM), <http://www.destructoid.com/kingdoms-of-amalur-wasn-t-sold-at-38-studios-auction-267553.phtml>.

¹¹⁴ Jason Schwartz, *End Game*, BOSTON MAGAZINE, available at <http://www.bostonmagazine.com/2012/07/38-studios-end-game/4/>.

¹¹⁵ *Id.* at 3.

¹¹⁶ *Id.* at 4.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

seemed to be changing when he met Donald Carcieri (Governor of Rhode Island at the time) at a private fundraiser for 38 Studios hosted at Schilling’s home.¹²⁰ While Massachusetts’s Governor Deval Patrick passed on offering Schilling any tax incentives, Carcieri was looking to improve his state’s technical market—to the tune of \$75 million in incentives—in exchange for the studio’s relocation and subsequent creation of 250 jobs over the next year.¹²¹

In spite of a series of mismanagements, arbitrary dealings with employees, and a free-spending mentality that had the company hemorrhaging money, 38 Studios released its first large title in 2012—*Kingdoms of Amalur: Reckoning* (“*Kingdoms*”).¹²² *Kingdoms* was commercially unviable for the amount spent, selling a mere 1.3 million copies—hardly enough to warrant a potential sequel.¹²³ The game would have to sell three million copies to break even.¹²⁴ Shortly thereafter, 38 Studios began to miss or make late payments to Rhode Island, in amount of millions of dollars.¹²⁵ In the end, Rhode Island lost its multi-million dollar investment, and the 379 employees of 38 Studios found themselves unemployed.¹²⁶

Though it could have been a solid franchise if it landed in the hands of a more competent developer or publisher, *Kingdoms of*

¹²⁰ Schwartz, *supra* note 114, at 5.

¹²¹ *Id.*

¹²² *Id.* at 5–6.

¹²³ *Id.* at 5. While \$1.3 million in sales may seem impressive, in terms of *Kingdoms of Amalur: Reckoning*, this was considered a failed venture. Andrew Yoon, *Kingdoms of Amalur Needed 3 Million Sales ‘to Break Even,’ RI Governor Says*, SHACK NEWS, <http://www.shacknews.com/article/73968/kingdoms-of-amalur-needed-3-million-sales-to-break-even> (last visited Mar. 26, 2015).

¹²⁴ Brian Crecente, *38 Studios Lays off Entire Staff*, POLYGON (May 24, 2012, 4:20 PM), <http://www.polygon.com/gaming/2012/5/24/3041662/38-studios-lays-off-entire-staff>.

¹²⁵ *Id.*

¹²⁶ *Id.*

Amalur found no buyer at 38 Studios liquidation auction.¹²⁷ In fact, 38 Studios' 363 sales would amount to less than \$1 million for Rhode Island; a far cry from the almost \$100 million the state invested.¹²⁸ Even with the high critical regard and tie-in with noted fantasy author R.A. Salvatore, the franchise appears doomed. Not all IPs are lucky enough to live out the Cinderella story that *Mortal Kombat* enjoyed. In fact, bankruptcy often goes vastly awry from what companies hope and predict.

III. No Easy Mode: When Bankruptcy Does Not Go as Planned

Without a background on the theory of bankruptcy, it becomes overly easy to sympathize with the plight of the troubled development teams when their publishers make too many financial blunders. With that in mind, the dichotomy of the “proper direction of bankruptcy”¹²⁹ needs to be explored before explaining why some publishers were able to emerge from bankruptcy more or less intact, while others found themselves thwarted at almost every step of the process.

Bankruptcy theory has historically been dominated by two main divisions: “the ‘free-market critics’ . . . [who argue] that the law of corporate reorganization frustrates the voluntary choices of commercial actors and therefore should be replaced with various proposals designed to maximize allocative efficiency,”¹³⁰ and “the ‘traditionalists’ [who] defend[] the basic structure of the current law, while also attacking free-market proposals as ill-conceived and impractical.”¹³¹ The free market approach advocates for “maximizing

¹²⁷ Robert Purchase, *No One Bought Kingdoms of Amalur*, EUROGAMER (Dec. 16, 2013), <http://www.eurogamer.net/articles/2013-12-16-no-one-bought-kingdoms-of-amalur>.

¹²⁸ Eddie Makuch, *38 Studios Auction Finds No Buyer for Amalur MMO, Kingdoms of Amalur: Reckoning Sequel*, GAMESPOT (Dec. 13, 2013), <http://www.gamespot.com/articles/38-studios-auction-finds-no-buyer-for-amalur-mmo-kingdoms-of-amalur-reckoning-sequel/1100-6416719/>.

¹²⁹ See Donald R. Horobkin, *The Role of Normative Theory in Bankruptcy Debates*, 82 IOWA L. REV. 75, 76 (1996).

¹³⁰ *Id.*

¹³¹ *Id.*

the value of the estate for the collective benefit of the creditors,”¹³² a staunchly capitalistic viewpoint that ignores the health of the bankrupt entity itself, along with the jobs of its employees. Traditionalists, on the other hand, are quick not to pigeonhole the actual theory behind bankruptcy, and instead suggest that traditionalism can be characterized by a “nagging distrust for any all-embracing, formal model of bankruptcy law and policy.”¹³³ Such a stance allows for multiple potential outcomes as various situations may demand.¹³⁴

As not all bankruptcy courts agree on the theory behind bankruptcy, it is no wonder that so many different outcomes can result from seemingly similar situations. Indeed,

courts have treated substantially identical factual settings differently—sometimes holding creditors liable for a breach of duty but other times absolving them for nearly identical actions under contractarian thinking¹³⁵

Further obfuscating the matter, courts often interpret jurisdictional matters arbitrarily, fudging the line between “core” and “non-core” bankruptcy matters as they deem appropriate.¹³⁶ Bankruptcy blogger Adam Lavine described the conflict as such:

Bankruptcy courts have jurisdiction over all “core” bankruptcy matters. A proceeding is core if “it invokes a substantive right provided by title 11 or if it is a proceeding that, by its nature, could arise only in the context of a bankruptcy case.” *In re Marcus Dev. Park, Inc.* 943 F.2d 261, 266 (3d Cir. 1991). In the context of

¹³² *Id.*

¹³³ *Id.* at 78.

¹³⁴ *Id.*

¹³⁵ Mark J. Roe & Federico Cenzi Venezze, *A Capital Market, Corporate Law Approach to Creditor Conduct*, 112 MICH. L. REV. 59, 61 (2013).

¹³⁶ Adam Lavine, *The Fight for Mortal Kombat Exits Bankruptcy as Part of Midway Games Sale*, BANKRUPTCY BLOG (May 4, 2011), <http://business-finance-restructuring.weil.com/363-sales/the-fight-for-mortal-kombat-exits-bankruptcy-as-part-of-midway-games-sale/>.

a 363 sale, proceedings requiring a bankruptcy court to interpret and give effect to its sale order have been deemed “core.”

Bankruptcy courts also have jurisdiction over “non-core” matters so long as the matters are sufficiently “related to” the bankruptcy case. To test for whether a case “relates to” the bankruptcy case, one asks “whether the outcome of a proceeding could conceivably have an effect on the estate being administered in bankruptcy.” *Pacor Inc. v. Higgins*, (*In re Pacor*), 743 F.2d 984, 994 (3d Cir. 1984).¹³⁷

As a careful reading of both *In re Marcus Dev. Park, Inc.* and *In re Pacor* suggests, terms like “could arise” and “could conceivably have an effect on” can allow bankruptcy judges to engage in quite a bit of subjective speculation. In addition, a bankruptcy court which had jurisdiction to hear matters that “could arise” or “could conceivably have an effect on” an issue being litigated could suddenly lose bankruptcy court jurisdiction due to a ruling or sale of a property in bankruptcy. Lavine’s bankruptcy blog explores one of the implications of a 363 sale on associated IP rights:

Midway Games Inc., the developers of the original Mortal Kombat videogame, filed for chapter 11 protection on February 12, 2009. Shortly thereafter, Threshold Entertainment Inc. filed an adversary complaint against the Debtor asserting, among other things, an exclusive license to produce derivate works based on Mortal Kombat . . . the Bankruptcy Court approved a 363 sale of substantially all of Midway’s assets to Warner Brothers Entertainment Inc. . . . Once the sale closed and Warner Brothers owned the Mortal Kombat assets, Threshold moved to substitute Warner Brothers as defendant in its adversary complaint against the Debtor. In a written opinion, however, the

¹³⁷ *Id.*

Bankruptcy Court dismissed the case for lack of subject matter jurisdiction.¹³⁸

When the sale was completed, the bankruptcy court contended that it no longer had subject matter jurisdiction, and that it was then a matter for a District Court.¹³⁹ Bankruptcy courts typically take this action because once the “property at issue no longer comprises part of the estate, it is hard to see how litigation relating to those assets ‘could conceivably have an effect on the estate.’”¹⁴⁰

Unlike Threshold’s proposed feature length film (which was never realized), a film based on Atari’s *Asteroids* IP is currently in the developmental stages.¹⁴¹ In the case of *Asteroids*, the rights were secured by Universal Studios prior to Atari’s bankruptcy, and should likely not be affected by the issues that plagued Threshold.¹⁴² Atari, however, managed to sell off the majority of its assets after it failed to obtain a satisfactory bidder on its entire portfolio.¹⁴³ Perhaps in view of the beginning of a return to Atari’s fortunes, the court approved Atari’s bankruptcy plan, which includes repayments of \$1.75 million; which is less than 20 percent of what it owes to its creditors over the next three years.¹⁴⁴

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ Ross Miller, *Producer Explains Asteroids Movie Plot*, SCREEN RANT (last updated Sept. 12, 2013, 1:52 PM), <http://screenrant.com/asteroids-movie-plot-ross-18283/>.

¹⁴² Michael Saba, *Universal Snags Movie Rights to Atari’s Asteroids*, PASTE (July 6, 2009, 11:53 AM), <http://www.pastemagazine.com/articles/2009/07/universal-snags-movie-rights-to-atari-asteroids.html>.

¹⁴³ See Alexander Sliwinski, *More Atari IP Auction Winners Announced, Stardock Plans Star Control Reboot*, ENGADGET (July 22, 2013, 2:00 PM) <http://www.engadget.com/2013/07/22/more-atari-ip-auction-winners-announced-stardock-plans-star-con/#continued>.

¹⁴⁴ Thomas Schulenberg, *Atari Earns Court Approval to Emerge from Bankruptcy*, JOYSTIQ (Nov. 2, 2014), <http://www.joystiq.com/2013/12/07/atari-earns-court-approval-to-emerge-from-bankruptcy/>.

Unlike Atari's relatively smooth bankruptcy approval, THQ fought an uphill battle. For starters, THQ sought to sell itself "whole," which meant including its development studios, IP, and games currently in development, to Clearlake Capital Group for \$60 million.¹⁴⁵ This move made three creditors and U.S. Trustee Roberta DeAngelis oppose such an action, as the timing of the sale was "too short a window to let interested parties participate in the sale process. . . . [t]he break-up fee and expense reimbursements . . . [were] excessive when measured against the cash portion of the purchase price . . . [t]he overbid procedures 'may [have] chill[ed] bidding,'" as well as a litany of other objections.¹⁴⁶ The creditors characterized THQ's proposed sale to Clearlake as "designed specifically to thwart any potential bidders from stepping forward to compete with Clearlake's bid."¹⁴⁷ The bankruptcy court agreed, swayed by the argument that THQ's sale to Clearlake would not maximize the value of its assets, and was designed to take advantage of the Christmas holiday when few bidders would be present.¹⁴⁸

Instead, THQ would have to take a route similar to that taken by Atari, which involved selling off IP and development studios at auction.

When it applied for bankruptcy protection [in] December [2012], THQ had hoped for an orderly purchase and restructuring, but [its worth when sold piecemeal] and . . . THQ's proposed complete sale did not make a strong enough case in the face of this, . . . [ultimately leading] to this auction.¹⁴⁹

¹⁴⁵ *Distressed Debt News: Objections in the THQI Bankruptcy*, DISTRESSED DEBT INVESTING (Jan. 2, 2013), <http://www.distressed-debt-investing.com/2013/01/distressed-debt-news-trustee-objection.html>.

¹⁴⁶ *Id.*

¹⁴⁷ Mike Rose, *THQ's Creditors Cry Foul over Clearlake Plans*, GAMASUTRA (Nov. 2, 2014), http://www.gamasutra.com/view/news/184327/THQs_creditors_cry_foul_over_Clearlake_plans.php#.UObE TIInjksL.

¹⁴⁸ *Id.*

¹⁴⁹ Daniel N. Griffiths, *The Break Up—Bankrupt THQ's Assets Sold at Auction*, FORBES (Jan. 24, 2013, 5:38 AM),

THQ ended up paying unsecured creditors between twenty and fifty two percent of what they were owed—allowing its creditors to fare better than those of Atari.¹⁵⁰ Fortunately for the development teams (and for fans of THQ IP), most of the studios were sold intact IP, and the developers could continue the projects on which they were working.¹⁵¹ While many IP were sold to equally large publishing houses, some, such as cult favorite *Darksiders*, found a new home with smaller publishers.¹⁵² As such, THQ seems to be the combined realization of free-market theorists’ favoring of creditors and traditionalists’ hope for an equitable solution for all parties.

IV. EA, Activision, and Ubisoft: Who Will Be the Next to Crash?

In 2009, EA executive Rich Hilleman indicated in a speech that his company “typically spends two or three times as much on marketing and advertising as it does on developing a game.” This formula is not necessarily applicable to every potential blockbuster game—an “AAA game”[] in gaming parlance—or to every company, but it is fair to say the break-even point for

<http://www.forbes.com/sites/danielnyegriffiths/2013/01/24/the-break-up-bankrupt-thq-assets-sold-at-auction/>.

¹⁵⁰ Michael Bathon, *THQ Gets Approval of Liquidating Plan Ending Bankruptcy*, BLOOMBERG (July 16, 2013, 4:14 PM), <http://www.bloomberg.com/news/2013-07-16/thq-gets-approval-of-liquidating-plan-ending-bankruptcy.html>; see *Atari’s Creditors Lift Veil on Efforts to Maintain Company as a Going Concern... Now We Know Why Atari Brand Hasn’t Been Sold*, ATARI USER, <http://atariuser.com/portal/atari-creditors-lift-veil-on-efforts-to-maintain-company-as-a-going-concern-now-we-know-why-atari-brand-hasnt-been-sold/> (last visited Mar. 30, 2015).

¹⁵¹ Jeffrey Grubb, *THQ Auction Results: Sega Buys Relic, Ubi Gets THQ Montreal, Koch Lands Volition, and More*, VENTURE BEAT (Jan 23, 2013, 11:48 AM), <http://venturebeat.com/2013/01/23/thq-auction/>.

¹⁵² *Id.* While gaming giant Ubisoft acquired South Park and Koch Media purchased Metro, some smaller bidders were successful—such as Crytek’s purchase of Homefront for \$500,000. *Id.*

the average AAA game is well above the development budget.¹⁵³

Over the course of the past generation,¹⁵⁴ a blockbuster game was expected to cost between \$20 and \$50 million.¹⁵⁵ Take-Two Games admitted that some of its recent best sellers cost in excess of \$60 million to produce.¹⁵⁶ Expected development costs for the newly released PlayStation 4 and Xbox One are higher than ever before.¹⁵⁷ With the selling price of games remaining roughly inflation-proof for the last 15 years, game developers and publishers need to make up the difference in quantity.¹⁵⁸ A 2008 study from the Electronic Entertainment Design and Research Institute suggested that just four percent of games that go into production will ever be profitable, and “only 20 percent of titles that make it to store shelves will achieve profitability.”¹⁵⁹ By 2012, that number was predicted to plummet

¹⁵³ Superannuation, *How Much Does It Cost to Make a Big Video Game?*, KOTAKU (Jan. 15, 2014 12:45 PM), <http://kotaku.com/how-much-does-it-cost-to-make-a-big-video-game-1501413649> (internal hyperlink omitted).

¹⁵⁴ As characterized by games for the PlayStation 3 and Xbox 360 platforms.

¹⁵⁵ Superannuation, *supra* note 153.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* See also William Usher, *Next-Gen Development Costs Will Rise, Says Bobby Kotick*, CINEMA BLEND, <http://www.cinemablend.com/games/Next-Gen-Development-Costs-Rise-Says-Bobby-Kotick-52391.html> (last visited Mar. 26, 2015).

¹⁵⁸ It should be noted that games for the Super Nintendo generation sold for around the same average price for which games currently sell, yet the former worked with much smaller budgets. See *The Real Cost of Gaming: Inflation, Time, and Purchasing Power*, IGN (Oct. 15, 2013), <http://www.ign.com/articles/2013/10/15/the-real-cost-of-gaming-inflation-time-and-purchasing-power>. Much of the difference in cost could be attributed to the expense of producing the cartridges themselves, often resulting in store prices higher than \$70. Kyle Orland & Jonathan Gitlin, *Why Retail Console Games Have Never Been Cheaper, Historically*, ARS TECHNICA (Jun. 30, 2013, 4:00 PM), <http://arstechnica.com/gaming/2013/06/why-retail-console-games-have-never-been-cheaper-historically/>.

¹⁵⁹ Don Reisinger, *Why Most Video Games Aren't Profitable*, CNET (Nov. 24, 2008, 12:04 PM), <http://www.cnet.com/news/why-most-video-games-arent-profitable/>.

further.¹⁶⁰ EA Games, in 2012, posted an average seven percent profitability; it would often spend \$40 million to make \$56 million.¹⁶¹ Ubisoft was also profitable, but only to the tune of 3 percent overall.¹⁶² The majority of the profits went to Activision, who made \$384 million in profits in the first fiscal quarter alone, but that number subtracts from \$1.2 billion in revenues.¹⁶³

To put this trend into perspective, it is important to look to the current situation. Activision, a studio that previously invested at or above the industry average in development and advertisement, is said to have invested an unheard of \$500 million in *a single game*.¹⁶⁴ With a staff of around 500 employees, four games planned out in the next decade, and the expectations of a billion dollar franchise, Activision's *Destiny* has broken just about every record in terms of investment and sales, shipping \$500 million in its first week of availability.¹⁶⁵ Many analysts now predict *Destiny* to sell 20 million copies¹⁶⁶—further proof that, for certain AAA IP, having a giant war chest still equates to

¹⁶⁰ Polygon Staff, *The State of Games: State of AAA*, POLYGON (July 2, 2012, 5:03 PM), <http://www.polygon.com/2012/10/1/3439738/the-state-of-games-state-of-aaa>.

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ Jenna Pitcher, *Report: Destiny Costs Activision \$500 Million to Develop and Promote*, POLYGON (May 6, 2014, 3:03 AM), <http://www.polygon.com/2014/5/6/5686268/Destiny-costs-activision-500-million-to-develop-promote>.

¹⁶⁵ Ben Kuchera, *Destiny Sales Total \$325M in First Five Days, Activision Says*, POLYGON (Sept. 17, 2014, 11:36 AM), <http://www.polygon.com/2014/9/17/6334261/destiny-sells-325-million>. See also Ronald Grover & Malathi Nayak, *Activision Plans \$500 Million Date with "Destiny"*, REUTERS (May 6, 2014, 12:50 PM), <http://www.reuters.com/article/2014/05/06/us-activision-destiny-idUSBREA4501F20140506>.

¹⁶⁶ Justin Olivetti, *Analyst Predicts That Destiny Will Sell Between 15M and 20M Units*, JOYSTIQ (July 25, 2014, 6:00 PM), <http://massively.joystiq.com/2014/07/25/analyst-predicts-that-destiny-will-sell-between-15m-and-20m-unit/>.

extreme profitability. With a combination of *Destiny* and the insanely profitable *Call of Duty* franchise, Activision could realistically ignore the entirety of its remaining IP and be not only solvent, but also extremely profitable.¹⁶⁷ As it remains, the presence of licensed franchises such as *Legend of Korra*, *Teenage Mutant Ninja Turtles*, *Transformers*, and *Cabela's Big Game Hunter* suggests that there is little to no chance that Activision will lose momentum, let alone file for bankruptcy.¹⁶⁸ As such, it is no wonder that Activision's stock is worth twice the value of its stock from three years ago.¹⁶⁹

While it is clear that Activision is not going anywhere, competitor Ubisoft has not been without its missteps. Commercial failures of the Sega Dreamcast, Atari Jaguar, PSP Go, Nokia N-Gage, Nintendo Virtual Boy, and numerous other consoles and peripherals have proven to be a stern warning to most publishers contemplating entering the console market.¹⁷⁰ Instead, publishers like Ubisoft have developed proprietary clients that afford them unique billing opportunities and ostensibly combat piracy.¹⁷¹ Unfortunately, Ubisoft's Uplay has been plagued with server errors, crashes, unresponsive plugins, and a commercially poor reception, particularly

¹⁶⁷ *Call of Duty: Modern Warfare 3* alone made \$775 million in only its first five days at retail. Angelo Dargenio, *10 Call of Duty Facts That Will Blow Your Mind!*, ARCADE SUSHI (Jun. 1, 2014, 1:30 PM), <http://arcadesushi.com/call-of-duty-facts-that-will-blow-your-mind/>.

¹⁶⁸ *Activision Games*, ACTIVISION, <http://www.activision.com/games> (last visited Nov. 3, 2014).

¹⁶⁹ *Activision Blizzard Year End Stock Prices*, ACTIVISION, <http://investor.activision.com/stocklookup.cfm> (last visited Mar. 29, 2015).

¹⁷⁰ Hayden Dingman, *Think Wii U Sales Are Bad? Recall These 13 Spectacular Game Console Failures*, TECHHIVE (Aug. 9, 2013, 3:30 AM), <http://www.techhive.com/article/2046066/think-wii-u-sales-are-bad-recall-these-13-spectacular-game-console-failures.html>.

¹⁷¹ See generally Logan Booker, *Ubisoft Focusing on "Good Services" and "Quality," Not DRM*, KOTAKU (Jun. 22, 2014, 1:30 PM), <http://www.kotaku.com.au/2014/06/ubisoft-focusing-on-good-services-and-quality-not-drm/>.

for those who choose to game on their PCs and must play through the client.¹⁷²

As DRM has been such a hot-button issue going into the PlayStation 4 and Xbox One generation, Ubisoft followed the trend—started by Sony and EA—by discarding Online Passes (a way to ensure the original buyer of the software would be the only one to profit from the full presentation of their games).¹⁷³ While this move may have fostered a bit of goodwill with the notably vociferous gaming community, the company subsequently suffered a few setbacks—the fact that hundreds of PC users were unable to access their newly purchased *Watch Dogs* game due to Uplay errors, combined with allegations that Ubisoft was misleading gamers with inaccurate visuals before the release, led to hundreds of negative community reviews for its expensive new IP.¹⁷⁴ Fortunately, gamers have been willing to forgive the French publishing house, and appear eager to purchase Ubisoft’s new offerings set to premiere later this year.¹⁷⁵ Due in part to its excellent titles, investment advisor MacroAxis lists Ubisoft’s probability of bankruptcy at a veritable industry low of 15.08 percent—“65.74 [percent] lower than that of the

¹⁷² As of November 3, 2014, a Google search of Ubisoft Uplay has an auto-fill of the following term additions, in a row: “Ubisoft Uplay down,” “support,” “crashing,” “not working,” “passport,” “servers down,” “site recovery,” and “store.” It is an indictment on Ubisoft that people find Ubisoft Uplay Store eight items down the list, following so many negative search terms. Search results for *Ubisoft Uplay*, Google, <https://www.google.com> (type “ubisoft uplay” into the search bar, then read the results that appear).

¹⁷³ William Usher, *Ubisoft Does Right by Gamers: Online Passes Are Gone*, CINEMA BLEND, <http://www.cinemablend.com/games/Ubisoft-Does-Right-By-Gamers-Online-Passes-Gone-60279.html> (last visited Nov. 1, 2013, 9:15 AM).

¹⁷⁴ Patricia Hernandez, *Watch Dogs, As Told by Steam Reviews*, KOTAKU (May 28, 2014, 1:30 PM), <http://kotaku.com/watch-dogs-as-told-by-steam-reviews-1582706191>. One of the more ironically entertaining customer reviews stated, “[t]he first mission is quite a difficult one where you have to repeatedly try to log in to the Uplay mainframe.” *Id.*

¹⁷⁵ Judging from IGN’s message boards, people seem to still remember the recent pitfalls, but are hopeful for near future. *What’s Your Opinion on Ubisoft This Year?*, IGN (Jan. 4, 2015), <http://www.ign.com/boards/threads/whats-your-opinion-on-ubisoft-this-year.454354106/>.

Technology sector, and 66.54 [percent] lower than that of Multimedia and Graphics Software industry.”¹⁷⁶

EA on the other hand, has proven to be an awkwardly lumbering giant,¹⁷⁷ unable to read the market and unwilling to take creative chances. Where it proves to be more daring, however, is in combatting piracy and securing profits through micro transactions and additional content, as well as hostile takeovers.¹⁷⁸ EA recently added PopCap Studios, responsible for tablet darling *Plants vs. Zombies*, for the tidy sum of \$650 million in cash, and offered to buy superstar studio Valve, valued in excess of \$1 billion.¹⁷⁹

EA, in an effort to make sure there were no unlicensed copies in the hands of pirates, originally insisted that its blockbuster *Sims 4* would be only playable online through its proprietary servers at Origin—a stance it walked back after a public relations nightmare.¹⁸⁰ Taking another step in the right direction, EA, like Ubisoft, also killed off its own despised Online Passes.¹⁸¹

EA’s biggest problem (i.e., its resistance to innovate creatively) has insulated it from many of the missteps of THQ, and even Activision, with its failed investment in *Tony Hawk: Ride*.¹⁸² Still, EA

¹⁷⁶ *Ubisoft Probability of Bankruptcy*, MACROAXIS, <http://www.macroaxis.com/invest/ratio/UBI.PA--Probability-Of-Bankruptcy> (last visited Nov. 4, 2014).

¹⁷⁷ As of April 2015, EA Games had a market cap of \$17.76 billion. *Electronic Arts*, GOOGLE FINANCE, <https://www.google.com/finance?client=ob&q=NASDAQ:EA> (last visited Apr. 2, 2015).

¹⁷⁸ *EA Wants to Buy Valve for \$1,000,000,000*, STEAMUNPOWERED, <http://steamunpowered.eu/ea-wants-to-buy-valve-for-1-000-000-000/> (last visited Nov. 3, 2014).

¹⁷⁹ *Id.*

¹⁸⁰ Paul Tassi, *EA Determined to Make Gamers Hate Origin Less*, FORBES (June 30, 2013, 10:10 AM), <http://www.forbes.com/sites/insertcoin/2013/06/30/ea-determined-to-make-gamers-hate-origin-less/>.

¹⁸¹ *Id.*

¹⁸² *Most Disappointing Game*, GAMETRAILERS, <http://www.gametrailers.com/videos/3prc3k/most-disappointing-game> (last visited Dec. 24, 2009). According to the trailer, *Tony Hawk: Ride* depended on a novel user

has to understand that sales for many of its big franchises have been flagging; watered-down sequels like *Dead Space 3* have proven too mainstream and safe to perform well critically and financially, and that its AAA blockbuster franchises are what is really keeping it afloat.¹⁸³ If EA wants to garner more consumer good will and continue what little anemic positive trend it may have recently started, it needs to focus less money on paranoid acquisitions and more funding on developing quality software. Sure, *Madden* will put money in its pockets every year; it just needs to focus on improving the experience. *Battlefield* will continue to be fruitful for EA if only it would just spend some of its money on acquiring other studios to fix its own servers.

As it stands, EA is at the same time the most and least likely publisher to go bankrupt next. It has a big war chest—but so did THQ. It has a solid IP portfolio, but it misuses it. It learns from some mistakes, while ignoring others. One thing is for sure—public sentiment is against it, with message boards all echoing the hope that EA is the next to go.¹⁸⁴ The horror stories go beyond server outages and poorly programmed games—customer service is also important. At the buggy and problem-plagued launch of *Sim City*, EA seemed almost retaliatory with its passive-aggressive responses to complaints.¹⁸⁵

One user was understandably frustrated with [the
launch day problems] and tried to ask a refunding [sic]

input system: a wheel-less skateboard. The game was voted “Most Disappointing Game” largely due to the difficulty in using the new hardware. *Id.*

¹⁸³ See, e.g., Sarah E. Needleman, *Electronic Arts Reports Profitable Holiday Season*, WALL ST. J. (Jan. 27, 2015, 9:07 PM). As usual, the brunt of EA’s profits this year came from its AAA games—*FIFA*, *Madden NFL*, and *Dragon Age*. *Id.*

¹⁸⁴ *Is EA Going Bankrupt?!*, IGN, <http://www.ign.com/boards/threads/is-ea-going-bankrupt.452870143/> (last visited Mar. 29, 2015). As of the writing of this article, four of the most recent six comments on the board include disparaging comments about EA’s potential demise, including “[d]on’t get my hopes up,” “[i]f only,” and “I only wish.” *Id.*

¹⁸⁵ John Gauder, *EA Refuses to Issue Refund for Sim City, Threatens Account Ban*, GAMECHUP (Mar. 7, 2013), <http://www.gamechup.com/ea-refuses-to-refund-user-for-simcity-threatens-account-ban/>.

citing the official EA press release which said ‘if you regrettably feel that we left [sic] you down, you can of course request a refund for your order.’ The customer service representative acknowledged the press release but then later added ‘it is also the [sic] our discretion to process a refund.’

Not only that he also mentioned that if the user tries to dispute it, his “account will be banned.”¹⁸⁶

EA has made strides to improve its image after such a rocky recent history, but its real problem goes much further than admittedly fickle public opinion.

If any of these three publishing powerhouses goes bankrupt in the next two years, it would be highly unexpected. Changes can happen quickly—as THQ has demonstrated. If EA is the next to go, it will be interesting to see where its portfolio of IP will migrate. Hopefully someone can turn around the once successful *Dead Space*. Maybe new life will be breathed into *Command & Conquer*. The only certainty is that bankruptcy will allow many long dormant IP a chance to thrive again with a new development team.

¹⁸⁶ *Id.*

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