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# Will the Real Miss America Please Stand Up? Copyright Considerations in Recent Comics News

BY [MARICELA GONZALEZ](#) / ON NOVEMBER 3, 2016

Diversity in comics is always important but currently it is a hot topic in the comic book industry and broader pop culture fandom discourse.<sup>[1]</sup> In the vein of a modern legacy of reintroducing characters of color in their own titles,<sup>[2]</sup> Marvel, which is along with DC one of two major comic book publishers and entertainment media companies,<sup>[3]</sup> announced the latest solo comic featuring a character of color.<sup>[4]</sup> Marvel announced that dimension-hopping Latina superhero, Miss America Chavez, created by Joe Casey and Nick Dragotta, will star in her own comic in 2017.<sup>[5]</sup> America continued to gain popularity following Kieron Gillen and Jaime McKelvie's reimagining of the character in their 2011 *Young Avengers* run.<sup>[6]</sup> A Latina comic book lead should be a major moment for Marvel save for one wrinkle—Casey and Dragotta announced this summer their new, creator-owned series featuring a butt-kicking, cosmic superhero called America Vasquez.<sup>[7]</sup> Sound familiar?

This buzzy bit of comics news raises intriguing legal questions. Are Casey and Dragotta infringing on the copyright to a character they originally created?<sup>[8]</sup> What does copyright infringement of comic book characters look like? Will Marvel actually sue Casey and Dragotta for breach of contract and copyright infringement?

## Who Owns Comic Book Characters?

While the specifics of most comic book industry contracts are unknown, the expectations are rather uniform—virtually every contract the major publishers, that is, Marvel and DC, have with writers and artists ensures that works (characters, stories, art) are considered works made for hire.<sup>[9]</sup> A work made for hire is a “a work prepared by an employee within the scope of his or her employment” or “a work specially ordered or commissioned for use as a contribution to a collective work” under specific circumstances, including an expressly written agreement.<sup>[10]</sup>

All copyrights associated with America Chavez almost certainly belong to Marvel. If Casey and Dragotta created America Chavez as part of work made for hire, then Marvel is considered the author and initial owner of the work, including the copyright to America Chavez.<sup>[11]</sup> Since the character debuted in 2011, the work made for hire agreement follows the Copyright Act of 1976, which defines what constitutes a work made for hire unlike the Copyright Act of 1909.<sup>[12]</sup>

## What Constitutes Copyright Infringement of a Comic Book Character?

The earliest foundational copyright infringement case relating to comic book publishers was soon after *Man of Steel*<sup>[13]</sup> first debuted in print.<sup>[14]</sup> In April 1940, the Second Circuit held that Bruns Publications, Inc. infringed on Detective Comics, Inc.'s (DC's predecessor) copyrights

since Bruns' Wonderman comic book character was substantially similar to Detective Comics' Superman.<sup>[15]</sup> Bruns argued Superman's unique features stemmed from "heroes of literature and mythology" and thus Superman with his superhuman strength and pursuit of justice over evildoers is not subject to copyright protection.<sup>[16]</sup> The Second Circuit rejected this argument, stating that Bruns used more than general types and ideas and . . . appropriated the pictorial and literary details embodied in . . . [Detective Comics'] copyright."<sup>[17]</sup> *Detective Comics v. Bruns* ensured that comic book characters albeit based on archetypes found throughout literature mythology are capable of copyright protection.<sup>[18]</sup>

At the end of the Golden Age of Comics,<sup>[19]</sup> the Second Circuit upheld the test it established, *Detective Comics v. Bruns*, in Judge Learned Hand's opinion in *National Comics v. Fawcett*. National Comics Publications, Inc., another predecessor of DC, claimed that Fawcett Publications, Inc. infringed on its copyright in Superman with their superhero Captain Marvel.<sup>[20]</sup> At the heart of the conflict was competition, for throughout the 1940s, Captain Marvel comics outsold Superman comics.<sup>[21]</sup> Judge Hand reversed the district court's holding that National Comics abandoned its copyright to Superman and affirmed the ruling that Fawcett infringed on National Comics' copyright in its red-suited, cape-wearing brawny superhero Captain Marvel.<sup>[22]</sup> Judge Hand rejected the district court's reasoning that National Comics' copyright was only for early depictions of Superman, stating that the copyright of a later expression of Superman is valid as a . . . "variant of some already published work."<sup>[23]</sup> Therefore, *National Comics v. Fawcett* affirmed that copyright protection in comic book characters extends to derivative works.<sup>[24]</sup> Fawcett ultimately settled with National Comics, though the company that flourished in the 1940s with its Captain Marvel comics never recovered.<sup>[25]</sup> Today, Captain Marvel also known as Shazam is a fully integrated character in DC Comics' superhero lexicon.<sup>[26]</sup>

## **Will Marvel Sue?**

While Marvel could make a solid argument that Joe Casey and Nick Dragotta have infringed on Marvel's copyright to America Chavez, the entertainment juggernaut will most likely not take any legal action. The reputational risks and public relations concerns in alienating women, LGBTQ, and fans of color not to mention the high cost of litigation, weigh against Marvel's incentives to sue Casey and Dragotta for copyright infringement. Marvel would want to avoid extended litigation, especially if there is any ambiguity in Casey and Dragotta's contracts. In 2008, Marvel attempted to quash Ghost Rider creator Gary Friedrich's claim that he owned copyright to the flaming skull-headed anti-hero, as well as countersue Friedrich for copyright infringement in Friedrich's sale of Ghost Rider merchandise.<sup>[27]</sup> However, the Second Circuit overturned the appellate court's grant of summary judgment in favor of Marvel, citing material ambiguity in Friedrich's contract with Marvel.<sup>[28]</sup> This resulted in Marvel and Friedrich settling out of court.<sup>[29]</sup> Plus, given Marvel's concerted efforts to portray diversity in its comics, the publisher's legal actions to prevent another Latina-led comic could negatively affect its investment in attracting broader audiences. This battle of the Latina superheroes will probably

not be fought in the courthouse or conference room but in comic book shops worldwide next year.<sup>[30]</sup>

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<sup>[1]</sup> Amanda Marcotte, *Good riddance to geek culture's "good old days": At NY Comic Con, optimism about diversity abounds*, Salon, (Oct. 10, 2016) <http://www.salon.com/2016/10/10/good-riddance-to-geek-cultures-good-old-days-at-ny-comic-con-optimism-about-diversity-abounds/>.

<sup>[2]</sup> Frank Pallotta, *A Marvel insider explains why its iconic superheroes are getting more diverse*, CNN Money, (Jul. 7, 2016) <http://money.cnn.com/2016/07/07/media/marvel-diversity-iron-man/>.

<sup>[3]</sup> See *About Marvel: Corporate Information*, Marvel.com, <http://marvel.com/corporate/about> (last visited Sept. 28, 2016) (describing itself as "one of the world's most prominent character-based entertainment companies" . . . rather than a comic book or media company); See also *DCEntertainment.com*, <http://www.dcentertainment.com> (last visited Sept. 28, 2016) ("DC Entertainment works in concert with many key Warner Bros. divisions to unleash its stories and characters across all media,").

<sup>[4]</sup> James Whitbrook, *Marvel Is Finally Giving America Chavez Her Own Comic Series*, io9, (Oct. 7, 2016) <http://io9.gizmodo.com/marvel-is-finally-giving-america-chavez-her-own-comic-s-1787544855>.

<sup>[5]</sup> *Id.*

<sup>[6]</sup> Rollin Bishop, *Will Marvel Sue Over America Vasquez, Image's America Chavez?*, Inverse, (Jul. 18, 2016) <https://www.inverse.com/article/18453-image-all-america-comix-basically-america-chavez-america-vasquez>.

<sup>[7]</sup> Graeme McMillan, *Image Comics Plans New 'All-America' Hero for 2017 Series (Exclusive)*, The Hollywood Reporter, (Jul. 18, 2016) <http://www.hollywoodreporter.com/heat-vision/image-comics-plans-new-all-911716>.

<sup>[8]</sup> *Id.*

<sup>[9]</sup> Mark Waid, *How DC Contracts Work*, Thrillbent, (June 21, 2013) <http://thrillbent.com/blog/how-dc-contracts-work>.

<sup>[10]</sup> Copyright Act of 1976, 17 U.S.C. § 101 (2012).

<sup>[11]</sup> Borge Varmer, Nimmer on Copyright VI 12-CLRS13 (2015).

<sup>[12]</sup> For more in-depth discussion on work for hire agreements under the Copyright Act of 1909, see 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/>.

<sup>[13]</sup> Man of Steel is a common moniker for the superhero Superman.

<sup>[14]</sup> *Action Comics #1* Grand Comics Database <http://www.comics.org/issue/293> (last visited Sept. 26, 2016). Database The first issue of Action Comics, owned by Detective Comics (now DC), was released on April 18, 1938. *Action Comics #1* features a man dressed in a blue suit and red cape called Superman, capable of superhuman feats.

<sup>[15]</sup> *Detective Comics v. Bruns Pubs.*, 111 F.2d 432, 433 (2d Cir. 1940).

<sup>[16]</sup> *Id.*

<sup>[17]</sup> *Id.* at 433–434. (“So far as the pictorial representations and verbal descriptions of ‘Superman’ are not a mere delineation of a benevolent Hercules, but embody an arrangement of incidents and literary expressions original with the author, they are proper subjects of copyright and susceptible of infringement.”).

<sup>[18]</sup> *Id.*

<sup>[19]</sup> The Golden Age of Comics began in 1938 with *Action Comics #1* featuring Superman and lasted through 1950. Other “ages” of American comics include the Silver Age from 1956 to 1970, the Bronze Age from 1970 to 1985, and the Modern Age from 1985 to the present. *Comics Timeline*, Heroes and Villains: Silver Age Comics <https://silveragecomics.omeka.net/timeline> (last visited Sept. 26, 2016).

<sup>[20]</sup> *Nat’l Comics Pubs. v. Fawcett Pubs.*, 191 F.2d 594 (2d Cir. 1951).

<sup>[21]</sup> See *The Golden Age of Comics*, PBS <http://www.pbs.org/opb/historydetectives/feature/the-golden-age-of-comics/> (last visited Sept. 26, 2016).

<sup>[22]</sup> See *Nat'l Comics Pubs.*, 191 F.2d at 603 (1951); See also Britton Payne, *Comparison of Covers from Superman v. Captain Marvel*, Super-Grokster <http://www.brittonpayne.com/Marvel/SupermanWonderman.htm> (last visited Sept. 26, 2016) (providing a side-by-side comparison of comic books covers featuring Superman and Captain Marvel that look and feel strikingly similar).

<sup>[23]</sup> *Nat'l Comics Pubs.*, 191 F.2d at 600 (1951).

<sup>[24]</sup> *Id.*

<sup>[25]</sup> See Marc Buxton, *The Rich History of Captain Mar... er, Shazam!*, Comic Book Resources, (Aug. 29, 2014) <http://www.cbr.com/the-rich-history-of-captain-mar-er-shazam>.

<sup>[26]</sup> *Id.*

<sup>[27]</sup> *Gary Friedrich Enters., LLC v. Marvel Characters, Inc.*, 716 F.3d 302 (2013).

<sup>[28]</sup> *Id.*

<sup>[29]</sup> Eriq Gardner, *Marvel Settles Lawsuit With 'Ghost Rider' Creator*, The Hollywood Reporter, (Sept. 9, 2013) <http://www.hollywoodreporter.com/thr-esq/marvel-settles-lawsuit-ghost-rider-624609>.

<sup>[30]</sup> See Emily Gaudette, *Marvel's 'America' to Follow a Foul-Mouthed, Queer Young Avenger*, Inverse, (Oct. 7, 2016) <https://www.inverse.com/article/21930-marvel-america-chavez-solo-series-lgbt-heroes-lesbian-superhero>.