Experts No Silver Bullet in Copyright Case - Hearsay Blocks Way

by Maggie Tamburro

The U.S. Court of Appeals for the 2nd Circuit has issued what may be the final chapter in a lingering copyright dispute involving heirs of famed comic book artist Jack Kirby and works he allegedly produced half a century ago, some of which have perhaps contributed to pop culture's most recognizable – and lucrative – comic heroes.

Siding with a federal district court out of the S.D. of New York, the 2nd Circuit found that expert testimony was unable to save the day for certain of Kirby's heirs, in an opinion which has foiled their attempts to wrestle control of property rights in the works at issue away from the publisher, entertainment enterprise Marvel. The works involved some 262 comic illustrations Kirby allegedly produced for Marvel in the late 50's and early 60's.

Kirby, whose prolific drawings and body of work spanned over five decades, has been described by some as"genre-defining" and is often credited with collaborating on the creation of such enduring superheroes as Spider-Man and The Incredible Hulk. Many attribute Kirby with innovating a unique style of comic book drawing which captured eye-popping movement at a time before big-screen special effects had the ability to make today's superheroes larger-than-life.

The Battle Begins…

The copyright battle erupted after Kirby's heirs in the case informed Marvel in 2009 that they intended to exercise statutory termination of rights with respect to the disputed works in accordance with certain timing provisions pursuant to applicable copyright law, 17 U.S.C. § 304.

In 2010, Marvel filed the present action, seeking a declaration from the court that Kirby's heirs in the suit have no termination rights under the applicable statute, because – according to Marvel – the works at issue were "made for hire," and thus the purported notices of termination were ineffective. Kirby's heirs counterclaimed, seeking a declaration that their termination notices were valid.

After legal wrangling that resulted in the dismissal of two heirs named in the action for lack of personal jurisdiction, Marvel requested that the district court exclude expert testimony offered on the issue of the nature of the relationship between Kirby and Marvel at the time the disputed works were produced.

The district court granted the publisher's motions to exclude the experts' testimony and also granted a motion made by Marvel for summary judgment – in essence delivering a big win for Marvel. Kirby's heirs appealed.

Can Experts Save the Day?

Key to the legal outcome in this case was the nature of Kirby's relationship with the publisher Marvel during the period of time from 1958 to 1963 – the five year timeframe in which the works at issue were allegedly produced by Kirby and published by Marvel.

In seeking to provide evidence as to that relationship, the heirs sought to introduce expert testimony and reports which would give a "historical perspective" on events surrounding a work relationship which existed some fifty years ago.

The court first addressed an interesting expert question – could testimony from a historian be admissible as expert testimony pursuant to Federal Rule of Evidence 702? The court answered with a resounding yes, stating, "We have no doubt that a historian's 'specialized knowledge' could potentially aid a trier of fact in some cases."

The appellate court explained, "A historian could, for example, help to identify, gauge the reliability of, and interpret evidence that would otherwise elude, mislead, or remain opaque to a layperson." The court concluded further that such an expert "might helpfully synthesize dense or voluminous historical texts. … Or such a witness might offer background knowledge or context that illuminates or places in perspective past events."

Hearsay Blocks The Way…

Recognizing that a historian could serve as an expert witness was only part of the battle, however. Unfortunately for Kirby's heirs, the court found the historical expert testimony here failed to pass muster under Federal Rule of Evidence 702 – in that it was largely grounded in hearsay.

Affirming the lower court, the 2nd Circuit concluded the experts' reports were "by and large undergirded by hearsay statements, made by freelance artists in both formal and informal settings, concerning Marvel's general practices towards its artists during the relevant time period." Thus, the court concluded that the testimony was merely speculative as to the intent of the parties, and also improperly attempted to offer an opinion on the credibility of other witness versions.

With respect to hearsay and expert testimony, the court made an important point, stating, “Although the Rules permit experts some leeway with respect to hearsay evidence,” referencing here Federal Rule of Evidence 703 ”a party cannot call an expert simply as a conduit for introducing hearsay under the guise that the expert used the hearsay as the basis of his testimony (quoting a 2007 case from the S.D.N.Y.)”

Instead, concluded the court, “[t]he appropriate way to adduce factual details of specific past events is, where possible, through persons who witnessed those events. And the jobs of judging these witnesses’ credibility and drawing inferences from their testimony belong to the factfinder.”

No Silver Bullet…

The 2nd Circuit’s decision affirming the lower court’s exclusion of the experts has effectively closed the chapter on this copyright tug-of-war, at least for now. For Kirby’s heirs, however, the ending likely wasn’t the one they sought – their experts failed to be the silver bullet needed to shine light on the fifty-year-old relationship involving Jack Kirby and Marvel when he rendered the famous works at issue.

But the case can serve as a reminder that Federal Rule of Evidence 702 contemplates admissibility of many types of expert testimony – not just scientific – including, in the right case and circumstances, historians who have specialized knowledge and meet reliability requirements. As the Committee Notes on the 2000 Amendment to Federal Rule of Evidence 702 state, “The trial court’s gatekeeping function applies to testimony by any expert (referencing *Kumho*).”

However, a non-scientific expert will still be subject to reliability requirements. The Committee Notes continue, “While the relevant factors for determining reliability will vary from expertise to expertise, the amendment rejects the premise that an expert’s testimony should be treated more permissively simply because it is outside the realm of science.”

What would the heirs have needed to show in this case in order for their experts’ testimony and reports to be admissible as to historical perspective? Could they have tried admitting the testimony another way – for example perhaps under a hearsay objection – rather than as expert testimony?

The 2nd Circuit’s opinion is *Marvel Characters, Inc. v. Kirby*, Case No. 11-3333-CV (2nd Cir. Aug. 8, 2013).

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