

Appeal Nos. 11-55863, 11-56034

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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LAURA SIEGEL LARSON,  
*Plaintiff, Counterclaim-Defendant, Appellant, and Cross-Appellee,*

v.

WARNER BROS. ENTERTAINMENT INC. AND DC COMICS,  
*Defendants, Counterclaimants, Appellees, and Cross-Appellants.*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE CENTRAL DISTRICT OF CALIFORNIA  
THE HONORABLE OTIS D. WRIGHT II, JUDGE  
CASE No. CV-04-8400 ODW (RZX)

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**REPLY BRIEF OF CROSS-APPELLANTS AND APPELLEES  
WARNER BROS. ENTERTAINMENT INC. AND DC COMICS**

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## INTRODUCTION

This case should have ended long before it began. The parties all agreed on October 19, 2001, that they had a deal permanently resolving their dispute. Laura Siegel Larson said so, authorizing Kevin Marks to tell DC that her family accepted DC's offer. Marks said so, both when he told DC Larson accepted, and a year later when he told Larson "an agreement was reached last October with D.C." RER-13. DC said so, both in October 2001, and in the case below, affirming it was bound to the terms of Marks' October 19 letter. Even now, Larson tells the Court: "the parties thought they had arrived at terms" in October 2001. LOR-14.

And indeed they had arrived at terms. The October 19 agreement—set forth in DC's offer on October 16 and Marks' acceptance on October 19—covered every essential term of a copyright transfer and resolved every material issue that divided the parties. Under California law, that deal became binding the moment Marks expressed Larson's acceptance, notwithstanding the parties' contemplation that the deal would also be "papered" in a long-form. As Larson's agent, Marks signed a written acceptance on October 19, satisfying any signature requirements.

Under the deal, Larson would receive tens of millions of dollars in cash and future royalties, which DC has fully reserved and remains ready to pay. DC would receive peace with Larson and certainty in its Superman rights. The deal went bad

only when—and only because—Hollywood businessman Marc Toberoff entered the picture, seeking to reopen the dispute and obtain the Superman rights himself.

But Toberoff’s theory for escaping the 2001 deal is unavailing. Under Toberoff’s guidance, Larson asserts that, although all parties said they reached agreement on October 19, they were mistaken about essential terms. Her only evidence is an October 26 letter sent by DC’s negotiator, John Schulman—which Larson says differs materially from the October 19 letter. She is incorrect, and neither she nor Marks took this position at the time. Every essential term in Schulman’s letter is identical in substance to those in Marks’ letter. Any difference either involves a non-essential term or is one of semantics. If any material difference does exist, DC has long agreed: the October 19 letter controls.

DC also owns the large majority of Superman copyrights addressed in the 2001 agreement (save for parts of *Action Comics #1*), under the work-for-hire rules. Those rules and deals Larson’s father made with DC control here, assuming the Court reaches these issues. Each of the disputed Superman works was created by Siegel or other DC artists that DC employed, directed, and paid to create them.

DC’s deals with the Siegels should be honored, and “[a]t some point, litigation must come to an end. That point [is] now....” *The Facebook, Inc. v. Pac. Nw. Software, Inc.*, 640 F.3d 1034, 1042 (9th Cir. 2011). Judgment should be entered in DC’s favor, and the 2001 settlement agreement should be enforced.

## **I. THE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT TO LARSON ON THE SETTLEMENT QUESTION**

After two-and-a-half years of negotiation, Marks and Schulman agreed, during an October 16, 2001, call, on all terms essential to settle this dispute, including a copyright transfer. SER-105, 434. Larson accepted DC's terms on October 19—in a call Marks made that day and in a signed, six-page letter he sent. SER-107-08, 456-61. A contract was formed on October 19; its terms stated in Marks' letter. While Larson now recites a list of alleged differences among *later* communications, those differences do not speak to, and cannot alter, the terms of the October 19 deal. And none reflects a disagreement on a material term.

### **A. Larson And DC Formed An Agreement On October 19, 2001**

Between 1999 and 2001, Schulman and Marks spent many hours negotiating the parties' dispute. SER-434. By October 16, 2001, all crucial elements of the deal, including the scope of rights to be transferred and all monetary terms, were settled, save one. SER-105-08, 434-35. The remaining issue was Larson's right to claim an interest in Superman once certain early works entered the public domain; Marks and Schulman discussed that final point on October 16. SER-105-07, 434-35. DC made an offer on that final point and all other material terms. *Id.* On October 19, Marks telephoned Schulman to communicate Larson's acceptance and report "we are closed." SER-107-08. Marks sent a letter confirming Larson had "accepted D.C. Comics' offer," as detailed in a six-page term sheet. SER-456-61.

Marks' October 19 call and letter sealed the deal. The letter contained all material terms for a copyright transfer, specifically, "the subject matter [and] the price." *Levin v. Knight*, 780 F.2d 786, 787 (9th Cir. 1986); SER-456-61. The letter unequivocally accepted DC's offer. SER-456 ("The Siegel Family... has accepted D.C. Comics offer of October 16, 2001...."). The acceptance was signed by Larson's agent, "the party against whom enforcement is sought." *Levin*, 780 F.2d at 787. A binding agreement was formed. *Facebook*, 640 F.3d at 1037-38.

Larson does not argue *she* did not consent to be bound by the terms of Marks' October 19 letter. Rather, she suggests Marks misunderstood DC's offer, and thus his letter was a "counteroffer." LOR-14-17. But according to Marks' and Schulman's unrebutted testimony, Marks' letter was consistent with every material term of DC's October 16 offer. SER-110, 435. That testimony alone precludes the summary judgment order issued below, and justifies this Court entering judgment in DC's favor. Larson does not dispute this Court may enter judgment for DC. DCB-28. At a minimum, the issue must be remanded for trial. *Id.* at 34. For if a jury credited Marks' and Schulman's testimony that Marks' October 19 acceptance tracked DC's October 16 offer—as it easily could—then the Marks letter correctly states all essential terms agreed to by the parties, and a contract was formed.<sup>1</sup>

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<sup>1</sup> See *Facebook*, 640 F.3d at 1037; *Mattel, Inc. v. MGA Entm't, Inc.*, 616 F.3d 904, 910-13 (9th Cir. 2010); *Elite Show Servs., Inc. v. Staffpro, Inc.*, 119

The only evidence Larson offers to suggest that Marks' October 19 acceptance letter did not match the terms of DC's offer is Schulman's October 26 letter. SER-463-70. Larson argues the contract terms described in Schulman's letter vary so markedly from those described in Marks' letter that no jury could reasonably find that Marks accurately understood DC's offer when he unequivocally accepted it on Larson's behalf. LOR-13-24.

That supposed variance comes nowhere close to justifying summary judgment on the issue of contract formation in Larson's favor. First, the variance does not *eliminate* a factual dispute whether Marks understood DC's offer when he accepted it—at the very most, it *creates* a dispute. Second, the supposed variance is not a variance at all—there is no difference between two letters on any material term. *Infra* at 10-14. Third, even if Schulman's letter reflected a difference on a material term, that difference could not alter or supersede the *already-existing* October 19 agreement. If the law allowed a writing like Schulman's to undermine an earlier agreement, any party could repudiate a contract “by simply suggesting other and additional terms...” *Clarke v. Fiedler*, 44 Cal.App.2d 838, 847 (1941).

Through her agent, Larson provided a signed, written acceptance of DC's offer. No additional writing or signature was required. *Id.* at 846 (enforcing contract when there was no agreement signed by either party); *Ersa Grae Corp. v.*

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Cal.App.4th 263, 268 (2004); *Harris v. Rudin, Richman & Appel*, 74 Cal.App.4th 299, 308-09 (1999); *Duran v. Duran*, 150 Cal.App.3d 176, 181 (1983).

*Fluor Corp.*, 1 Cal.App.4th 613, 624 n.3 (1991); *Levin*, 780 F.2d at 787-88; CAL. CIV. CODE § 1624 (statute of frauds requires only that contract be “in writing and subscribed by the party to be charged *or by the party’s agent*”) (emphasis added); DCB-26-27.

Larson invokes the Copyright Act, and its rule that copyright assignments be “signed by the owner” of the copyright, or her “agent.” 17 U.S.C § 204(a). Larson concedes Marks was her agent, RER-9, and his letter clearly expresses her “acceptance” to “transfer all of [her] rights in ... ‘Superman,’” SER-456, 458. “If the copyright holder agrees to transfer ownership to another party, that party must get the copyright holder to sign a piece of paper saying so. It doesn’t have to be the Magna Charta; a one-line pro forma statement will do.” *Effects Assocs., Inc. v. Cohen*, 908 F.2d 555, 557 (9th Cir. 1990). Marks’ signed, six-page letter qualifies.

Finally, the parties’ actions show they agreed to be bound. They negotiated for two years, and resolved their last deal point on October 16. SER-456, 463-64. Larson suggests the October 16 deal was so hastily made that within days Marks and Schulman could not remember its terms; exchanged conflicting term sheets; and then let those conflicts fester. LOR-16-17. This account is unsupported. The parties stopped negotiating in October because they had a deal, and Marks *never* objected to Schulman’s letter or called it a counter-offer. DC undertook the separate task of preparing a long-form, SER-435, and began performing on the

2001 deal, reserving amounts due. These are all acts of parties who had a deal.<sup>2</sup>

**B. Contemplating A Long-Form Document Does Not Defeat A Deal**

Larson argues Marks' October 19 acceptance is not enforceable because it "was subject to documentation and would need to be reduced to a mutually-acceptable written contract." LOR-26. But (i) Marks' October 19 letter contains no such condition, and (ii) the rule in California could not be clearer:

The fact that an agreement contemplates subsequent documentation does not invalidate the agreement if the parties have agreed to its existing terms.

*Ersa*, 1 Cal.App.4th at 624 n.3; *accord Harris*, 74 Cal.App.4th at 307; *Stephan v. Maloof*, 274 Cal.App.2d 843, 848 (1969); *Facebook*, 640 F.3d at 1037; *Blix St. Records, Inc. v. Cassidy*, 191 Cal.App.4th 39, 48-49 (2010).

Larson's cases, LOR-27, show that California law requires an *express reservation* to make a contract unenforceable for lack of later documentation, *Rennick v. O.P.T.I.O.N. Care, Inc.*, 77 F.3d 309, 316 (9th Cir. 1996) (letter of intent not binding because it expressly stated it was "of no binding effect on any party hereto"); *Banner Entm't, Inc. v. Super. Ct.*, 62 Cal.App.4th 348, 359 (1998) (draft expressly disclaimed it constituted "legal and binding obligation" until

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<sup>2</sup> Toberoff calls the reserve "Hollywood accounting," LOR-7 n.2—and may need to say this to mislead Larson about the deal he induced her to abandon—but the *record fact* remains that a reserve was set; it totals more than \$20 million, SER-397-99; and the funds will be paid to Larson if this Court enforces the 2001 agreement. Larson gets all of this money, though Marks may have a claim to 5%; only Toberoff loses his improperly obtained 40% (or more) cut. DCB-16-19.

“signed by the parties”). Indeed, in *Duran*, 150 Cal.App.3d at 181, the party said she must “approve” the final written terms before being bound, but the court held that a jury must determine whether an enforceable agreement had been made.

Here no party ever made any such reservation, either in Marks’ letter or in the months that followed during efforts to finalize the long form. SER-114-15, 435, 456. Everyone continued to refer to the deal the parties had made—even Larson’s mother in her letter to Time Warner, in its response, and in Marks’ later communications with DC and Larson. SER-412-14, 416, 435-36; RER-13-14. If the question of contract formation was for the jury in *Duran*, where one party said her approval of formal documentation *was required*, DC is surely, at the very least, entitled to the same jury determination here, where no reservation was ever made.

Larson wrongly suggests Marks’ letter contained “clear reservations” that Larson did not consider the deal done until finally documented. LOR-28. The language she cites, SER-461, does not bear this out:

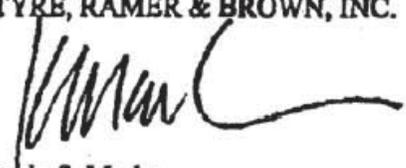
**John, if there is any aspect of the above that is somehow misstated, please let me know by Monday at 2:00, as I will be out of the office – and likely difficult to reach – for the following four weeks.**

**Many thanks for help and patience in reaching this monumental accord.**

Sincerely,

GANG, TYRE, RAMER & BROWN, INC.

By

  
Kevin S. Marks

Marks never reserves Larson's rights pending a final agreement. That is especially clear when read in conjunction with the first paragraph of Marks' letter, which contain an unambiguous "acceptance" by Larson on defined "terms":

Dear John:

**This is to confirm our telephone conversation of October 19, 2001. The Siegel Family (through Joanne Siegel and Laura Siegel Larson, the majority owners of the terminated copyright interests) has accepted D.C. Comics offer of October 16, 2001 in respect of the "Superman" and "Spectre" properties. The terms are as follows:**

SER-456.<sup>3</sup>

Finally, while Schulman's October 26 letter does not matter—since an agreement had already been reached—nothing in it constitutes a "clear reservation" either. Just the opposite: it expressly confirms "the deal we've agreed to." *Id.* SER-463. It notes that DC will undertake the task of putting together the contemplated long-form. And there is no reservation, clear or otherwise, of a right by DC to change the October 19 deal.<sup>4</sup>

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<sup>3</sup> Larson relies on *Valente-Kritzer Video v. Callan-Pinckney*, 881 F.2d 772, 775 (9th Cir. 1989), but there, the lawyer said his client had not seen or accepted the newly drafted contract. While his letter contained a "congratulations" for reaching a deal, the fact that his client had not reviewed it "undercuts the hint of finality that emanates" from his comment. *Id.* Here, Marks affirmed: Larson "accepted."

<sup>4</sup> DC's reservation to comment on the 50-plus-page long-form document its outside counsel first circulated in February 2002 is quite different, *cf.* LOR-29, and the reservation says nothing about re-opening the October 2001 deal, SER-463.

**C. Larson Has Not Raised Any Material Difference On Any Essential Term Between The Marks And Schulman Writings**

Larson does not dispute the only essential terms to a copyright transfer are “the subject matter, the price, and the party against whom enforcement is sought.” *Levin*, 780 F.2d at 787; LOR-29. But she spends pages of her brief citing places where, in her view, Marks’ October 19 and Schulman’s October 26 letters differ. Some of the purported differences result from Larson’s misapplication of the rules of contract interpretation. Others result from her failure to read the entire letters. The remainder are at most minor differences on non-essential terms. Even if any one met the high test for materiality (and none does), it would not matter. Sworn testimony from Schulman and Marks establishes that Marks precisely understood DC’s October 16 offer, and set forth and accepted its terms. SER-110, 112, 435. Inconsistent terms DC tried to add—if there are any—must be ignored. *Facebook*, 640 F.3d at 1037-38. And while Larson says Schulman tried to get a better deal for DC, DC’s position has been throughout: *if* there are any material differences in Schulman’s letter, Marks’ letter controls. RER-6; DCB-31; SER-435-37.

1. *Scope Of Rights*. Larson asserts that a material difference exists as to the scope of the properties—that Marks’ letter applies to Superman, Superboy, Spectre, and related properties, but Schulman’s supposedly expands the coverage to unnamed other properties. LOR-17. But in eight years of litigation, Larson has never identified a single property or work that she believes is covered by

Schulman's supposedly more expansive language, and DC has never asserted any rights over these mystery properties. That is because no such rights exist.

2. Monetary Terms. Larson asserts that Marks' letter does not allow DC to recover interest on the advances it provides, while the Schulman draft provides that interest "at 100% of prime" can be recovered after December 31 "of year of payment." LOR-18 (citing SER-458, 467). Larson is incorrect. Paragraph 8 of Marks' letter provides that "beginning January 1 of the following year," after DC pays an advance, "there shall be interest at the prime lending rate." SER-458. This provision, which Larson fails to mention, shows no difference exists at all.

Larson also suggests that "6% of DC's receipts from all Media licenses" is materially different from "6% of DC's 'gross revenues' derived from 'use of the property in any and all media,'" because "media licenses" is not defined in the Schulman letter, and thus might exclude direct sales or assignments. LOR-18-19. But the Schulman letter plainly uses the term "media license" in the broader sense to include such revenues. It lists revenue from sales of "merchandise actually produced by DC" as an example of revenue from "merchandising licenses." SER-467. Because his term "license" includes direct sales, it has the broader meaning that Larson says only Marks' letter included. *See People ex rel. Lockyer v. R.J. Reynolds Tobacco Co.*, 107 Cal.App.4th 516, 526 (2003).

Larson also points to semantic differences between the letters without assigning any weight to their materiality other than her own conclusory statements. For instance, she focuses on the fact that Marks' letter specifies three instances where the 6% media license fee would be reduced to 1.5%, whereas the Schulman draft cited these three instances as "examples." SER-457-58, 467-68, 495. In years of litigation, Larson has never pointed to a fourth property that was swept in.

Larson also suggests Schulman's letter allows DC to pay royalties below 1% in certain cases. LOR-20. Larson never raised this interpretation in her briefing or testimony below. Marks did not read the language that way, SER-536-37, nor did DC's later long-form draft, which clearly set the floor at 1%, SER-497. Even if Larson's new interpretation were correct, she cannot show it materially altered the agreement—particularly since it would permit *more* than 1% royalty in cases where Marks' letter capped the royalty at 1%. LOR-20.

Larson also says Schulman's letter departed Marks' letter by defining the term "extraordinary cases." SER 457, 467. It is hardly surprising that a vague term would be given a more precise definition, and the definition Schulman gave tracks the purpose articulated in the Marks draft, which stated that Six Flags would serve as an example because it "involves numerous characters." SER 457.

Along the same vein, Larson says Schulman's letter amended Marks' by defining "cameo" to mean stories where the subject "characters do not appear in

the title of the publication or feature.” SER-468. This definition accords with custom, DCB-33-34, and applied reciprocally—DC would not reduce Larson’s royalties if one of its other characters (*e.g.*, Batman) made a cameo in Superman. Noting an accepted definition for a vague term is hardly a material change.

3. “Other” Non-Essential Terms. Larson also complains of differences in language concerning warranties, indemnification, publicity, and credit, but none are essential terms to a copyright transfer. DCB-34; *Inamed Corp. v. Kuzmak*, 275 F.Supp.2d 1100, 1120-22 (C.D. Cal. 2002). Even if there were disagreement over such non-essential terms, a contract arose on October 19 when agreement on all *essential* terms was reached. *Facebook*, 640 F.3d at 1037-38.

In any event, Larson does not identify material differences as to these non-essential terms. As to the warranties, Larson would have been required to provide “100% ownership” to DC and be subject to a duty of good faith and fair dealing not to interfere with the contract, which is an implied provision of every contract in California. *See Digerati Holdings, LLC v. Young Money Entm’t, LLC*, 194 Cal.App.4th 873, 885 (2011). The trivial difference in language concerning warranties thus could hardly give rise to “significant potential liability.” LOR-22.

Similarly, the so-called “indemnification” provision merely implements the requirement that the “Siegel Family would transfer all of its rights ... resulting in 100% ownership to D.C.,” SER-458, and that the “Siegel Family” acted “through

Joanne Siegel and Laura Siegel Larson,” SER-456, in providing these rights. Far from being “significant obligations of the Siegels to indemnify,” LOR-23, the Siegel Family was asked to indemnify DC against suits by the Siegel Family.<sup>5</sup>

4. *The February 2002 Long-Form.* Larson also points to so-called “vast differences” between Marks’ letter and DC’s February 2002 long-form, LOR-24, but she identifies only a few provisions in that draft that even arguably conflict. As explained above and in DC’s principal brief, DCB-32-33, even if DC proposed materially different terms in the February 2002 draft long-form, those differences cannot erase the October 19 agreement. *Facebook*, 640 F.3d at 1038.<sup>6</sup>

#### **D. Marks’ August 2002 Memo Confirms A Deal Was Made**

A document this Court recently ordered Larson to produce confirms the parties made a binding agreement in October 2001. In an August 2002 memo,

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<sup>5</sup> Larson’s remaining items scarcely merit mention. She says Schulman required travel for Joanne Siegel and this was a material difference given her poor health. LOR-23. But Schulman’s letter made clear any travel was “subject to [her] health.” SER-464. Larson also cites a divergence as to credits in paid ads. LOR-23. But Schulman’s letter requires credit on all “works where credit to creators is customary,” SER-469, and Larson presents no evidence such credit was otherwise.

<sup>6</sup> Any differences are not material and are typical of clarifications in a long-form. Larson says the draft excluded services from the royalty sums. LOR-19. But because services were never addressed in the prior drafts, this is not a different term. The same is true of units, *e.g.*, returned or lost, for which there would be no revenue to pay royalties. LOR-21. Larson also says the draft excludes cash advances, LOR-19, but it does no such thing—it states a time when sums paid to DC would vest, SER-481. Unsurprisingly, Marks told Schulman the February long-form was “consistent” with the October deal. SER-125-28, 436, 440.

Marks reminds Larson *four times* that she made a “deal” or “agreement” with DC in October 2001, and said he might have to testify against her if she repudiated it. RER-13. Even though Marks drafted his memo long after receiving Schulman’s October 26 letter and after DC sent its February long-form, Marks never suggested that either altered the binding effect of the October 19 deal. Marks never said the parties viewed these two later documents as “counter-offers.” Nor did he suggest that these post-agreement documents revealed a “mistake” about the terms of the deal. Rather, Marks stressed again and again that “an agreement was reached” between DC and Larson, and breaching it would subject her to suit. RER-13-14.

As both sides understood at the time, Schulman’s October 26 letter and DC’s draft long-form were simply parts of hammering out the formal documentation for an agreement that had already been reached. SER-435; RER-13-14. Had Larson worked with DC to document the fine points of their agreement, this matter could have long ago been resolved. But instead, lured by Toberoff’s false promises, Larson reneged.

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The 2001 deal should be enforced, judgment should be entered in DC’s favor, and this case should end. At a minimum, the district court’s summary judgment order should be reversed, and the case remanded for a trial on DC’s settlement defense.

## II. DISPUTED FACTUAL ISSUES REMAIN AS TO DC'S STATUTE-OF-LIMITATIONS COUNTERCLAIM

DC's limitations defense turns on one disputed fact—whether settlement talks were terminated by a May 9, 2002, letter from Larson's mother to DC (making this action untimely), or a September 2002 letter from the Siegels to DC. DCB-37-39. While Larson argued below that settlement talks ended in September, she recently argued in the related *Pacific Pictures* case that the May 9 letter “ended” any chance of settling the matter. SER-827, 878-79. A jury should have a chance to hear this evidence and decide which letter ended settlement talks.

Larson contends the May 9 letter did not meet the requirements of the parties' tolling agreement, but that is a jury question. *Sanborn v. Fed. Crop Ins. Corp.*, 93 Cal.App.2d 59, 65 (1949). She also says that in *Pacific Pictures*, she described the May 9 letter as making negotiations “moribund,” which means “dying,” not dead. But she argued in *Pacific Pictures* the May 9 letter “ended” any prospect of resolving the matter, SER-825—which is possible only if the letter did, in fact, terminate negotiations.

Larson may have taken her new factual position to shield Toberoff from tort liability in *Pacific Pictures*—casting even more doubt on his relationship with her. *Cf. In re Pacific Pictures Corp.*, 2012 WL 1640627, at \*1 (9th Cir. May 10, 2012). But whatever her motive, if it is credible for Larson to argue in *Pacific Pictures*

that the May 9 letter ended any prospect of completing negotiations, then a jury in this case could find the same thing, and thus find that her lawsuit was untimely.

### **III. LARSON CANNOT DENY DC OWNS KEY SUPERMAN WORKS**

DC's cross-appeal challenges the district court's summary-judgment ruling that four Superman works were not made-for-hire: portions of *Action Comics #1* ("AC#1"); *Action Comics #4* ("AC#4"); *Superman #1* (pages 3-6) ("S#1"); and two weeks of "Pre-McClure Strips." Larson's opposition is unavailing.

#### **A. Elements Of AC#1 Were Made-For-Hire**

Key elements of AC#1, added in 1938, were made-for-hire. Compare ER-706, with SER-78; see also ER-654, 917, 957-59; SER-379-88, 442, 803. The court in *Siegel v. Nat'l Periodical Publ'ns*, 508 F.2d 909 (2d Cir. 1974), did not hold otherwise, and Larson's preclusion and merits arguments are without basis.

##### 1. National Is Not Preclusive

Larson argues *National* precludes DC from making its work-for-hire arguments about the 1938 additions to AC#1, but she is mistaken. The sole issue in *National* was whether Siegel and Shuster owned the renewal copyright in AC#1. *National* never considered the issue now before this Court: whether the 1938 additions in AC#1 were made-for-hire and thus are not subject to termination. Larson's suggestion (LOR-43) that *National* ruled on the work-for-hire status of the 1938 additions is inaccurate. It merely concluded that these "revisions" were

not “sufficient to create the presumption that *the strip* [*i.e.*, the AC#1 Superman strip *in toto*] was a work for hire.” 508 F.2d at 914 (emphasis added).

Larson concedes this case involves “evidence [and] argument not presented in [*National*],” but says issue-preclusion applies to any issue DC “could have” raised in *National*. LOR-44. Larson conflates issue-preclusion with claim-preclusion—it is only the latter doctrine that precludes litigating a claim that could have been raised. *Comm’r v. Sunnen*, 333 U.S. 591, 598 (1948); *Leather v. Eyck*, 180 F.3d 420, 426 (2d Cir. 1999). Larson offers seemingly contrary quotations from *Chicot County Drainage Dist. v. Baxter Cnty. Bank*, 308 U.S. 371, 378 (1940), and *Davis & Cox v. Summa Corp.*, 751 F.2d 1507, 1518 (9th Cir. 1985), but the quotes refer specifically to *res judicata* (or claim-preclusion).

Under settled *issue*-preclusion rules, a ruling in a prior case is preclusive only if the issue previously resolved is *identical* to the issue now raised, the issue was *actually litigated* before, and resolving it was *necessary*. *Sunnen*, 333 U.S. at 599-600; *Granite Rock Co. v. Teamsters*, 649 F.3d 1067, 1070 (9th Cir. 2011); DCB-70. Larson’s cases confirm this, *Norris v. Grosvenor Mktg. Ltd.*, 803 F.2d 1281, 1286 (2d Cir. 1986), and she fails all three elements of the test.

Here, new evidence and argument is presented concerning a new issue—the standalone work-for-hire status of the 1938 additions. And *National*’s comments about work-for-hire were “unnecessary” to its decision. *National* affirmed the

district court’s ruling that Siegel transferred his rights in *AC#1*, and, thus, it did not need to address the district court’s alternative ruling that *AC#1* was made-for-hire. Additional “determination[s] adverse to the winning party [*i.e.*, DC] do[] not have preclusive effect.” *Fireman’s Fund Ins. Co. v. Int’l Mkt. Place*, 773 F.2d 1068, 1069 (9th Cir. 1985). Larson disagrees, saying *National* could only reach the transfer-of-rights issue because it found *AC#1* was not a work-for-hire. LOR-44. *National* belies that reading: its comments on work-for-hire are *four sentences* at the end of the opinion, *after* affirming the district court’s transfer-of-rights ruling.

## 2. *The 1938 Additions Were Made-for-Hire*

Larson’s merits arguments are equally unpersuasive. The disputed *AC#1* elements were all added in 1938, after DC employed Siegel and Shuster as artists to create new and derivative works for DC. Because these elements were added at DC’s “instance and expense,” they are either works-for-hire in their own right, or DC is a joint owner of the works that contain them. DCB-42-43, 61-68.<sup>7</sup>

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<sup>7</sup> Larson concedes “authors of derivative works ... own the copyright to their added material.” LOR-55. DC thus at least owns the copyright in the 1938 elements. Larson denies DC can be a joint owner because there was no intent “that DC or its staff be considered ‘coauthors.’” LOR-53. But her own case—*Aalmuhammed v. Lee*, 202 F.3d 1227, 1234 (9th Cir. 1999)—confirms that a joint work is created where multiple authors make independent contributions intending that their contributions be integrated into a single work. Here, that was plainly the case. DC exercised control over the creation and merging of the new elements into *AC#1*. DCB-67-68. “[C]omic book[s] are typically the joint work of four artists—the writer, the penciler[,] the inker[,] ... and the colorist,” *Gaiman v. McFarlane*, 360 F.3d 644, 659 (7th Cir. 2004), and DC staff artists did the latter work. Larson

a. *New Content.* Pursuant to the 1937 Employment Agreement, DC instructed Siegel and Shuster to adapt their preexisting Superman story “into a full length ... strip” to be included in *AC#1*. ER-957; SER-379, 381. Siegel and Shuster “compli[ed],” ER-957, and “revised and expanded” their story to include new panels, text, and illustrations. ER-654, 957; SER-385-86. DC paid Siegel and Shuster for their contributions, ER-917, 958; SER-383, 804, and had the right to control and supervise them, ER-957; SER-379, 381, 383. These facts are undisputed, and easily satisfy the instance-and-expense test. DCB-67-68.

Larson quotes Shuster’s testimony that DC did not give them specific directions “as to what to do or what to include in Superman,” LOR-47, but the instance-and-expense test does not require particular directions—only that the work itself be ordered and paid for by the employer, DCB-54-55. It is the *right* to dictate substance that matters, *Twentieth Century Fox Film Corp. v. Entm’t Distrib.*, 429 F.3d 869, 879-80 (9th Cir. 2005), and DC owned and did exercise the rights one would expect an employer to exercise, ER-957, SER-379, 381, 383.

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touts that Siegel and Shuster’s names appear on the byline, LOR-53, but this is a custom not remotely dispositive of authorship. Indeed, the pair’s names appear on many works made-for-hire that Larson did not seek to terminate, and DC’s name appears on *AC#1*, the Promotional Announcements (which make no reference to Siegel or Shuster), and *all* Superman publications. Finally, the Announcements feature the cover art DC created and tout *AC#1*’s “*Color!*,” SER-370, making clear these DC-created elements were instrumental to *AC#1*’s “appeal,” *Aalmuhammed*, 202 F.3d at 1234.

Larson also argues the 1938 Assignment proves that the new material—created before the Assignment—was not work-for-hire. LOR-46. This is wrong for many reasons. Among them, the 1938 Assignment assigned to DC the parts of *AC#1* that Siegel and Shuster created *before* working for DC; it is the work the pair did on the new elements that was made-for-hire. *Fox*, 429 F.3d at 881, also rejects Larson’s claim about the assignment. Because the instance-and-expense test is satisfied for the 1938 additions, *supra* at 19-20, the presumption that DC owned all copyright in those works may be overcome only by evidence proving the parties *expressly agreed* Siegel would own the copyright, DCB-43. Larson has no such evidence, and *Fox* holds the mere existence of a later assignment does not qualify.<sup>8</sup>

*b. Colorization.* DC colorist Jack Adler—the only percipient witness—testified that Siegel and Shuster submitted the *AC#1* panels in black-and-white, and other DC artists selected colors to add. DCB-61. Larson does not defend the trial court’s erroneous ruling that colorization cannot be copyrighted. *Id.* at 61-62. But she does cite the court’s equally erroneous criticism of Adler. LOR-48-49. The court said Adler only “describe[d] procedures generally employed in the printing process,” rather than “what actually occurred with respect to” *AC#1*, SER-50, when, in fact, Adler addressed those specifics. He testified it was industry custom

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<sup>8</sup> Larson rewrites *Dolman v. Agee*, 157 F.3d 708, 712-13 (9th Cir. 1998), as holding, contrary to *Fox*, that an assignment alone rebuts the work-for-hire presumption. LOR-46. *Dolman*, 157 F.3d at 713, cited an assignment as but one of *numerous* factors that *together* sufficed. None of the other factors is present here.

for artists to submit “comic book work ... in black and white,” and that this “*was the case with Action Comics No. 1.*” SER-442 (emphasis added). He elaborated: “Siegel and Shuster provided the artwork in black and white. Color was applied as part of the regular printing process,” and he even identified, by name, the DC artist who “selected the color for Superman’s ‘S.’” *Id.* Larson speculates Siegel or Shuster submitted “color guides,” LOR-49, but no evidence supports this claim.

*c. Cover Art.* DC’s February 22, 1938, letter to Siegel makes clear—and Siegel’s memoir confirms—that DC’s artists “used one of those panel drawings of SUPERMAN” as a template to create “the cover” of *AC#1*. SER-388, 803. Larson says the cover was based on Shuster’s “large promotional panel-drawings,” LOR-50, but whatever drawing was used as a “template,” what matters is that the cover was created *by DC artists* and thus is owned by DC, DCB-62-67.

Larson asserts DC’s cover art is not independently copyrightable because it is “closely derived” from an interior panel and any differences are “de minimis.” LOR-51. But Larson concedes that the cover features Superman with “a visible S-crest on his chest” as well as “facial features and musculature,” LOR-51 n.8, while the interior panel does not.<sup>9</sup> Those differences satisfy the test in *Entm’t Research Grp., Inc. v. Genesis Creative Grp., Inc.*, 122 F.3d 1211, 1220, 1226 (9th Cir. 1997), that a derivative work is copyrightable if it contains “non-trivial” variations

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<sup>9</sup> DC did not use a “low-resolution copy” of the panel. LOR-51n.8. In fact, it enlarged the panel to make it more visible. *Compare* DCB-65-66, *with* SER-86.

from the original work. Larson says the different S-crest, facial features, and musculature appear in *other* panels in *AC#1*, LOR-51 n.8, but those elements first appeared in the Promotional Announcements that DC owns, DCB-80-81, 84. And, in any event, DC’s cover contains *seven other* non-trivial variations, DCB-64-65—all of which meet the *Genesis* test, and none of which Larson disputes.

**B. DC Owns The Pre-McClure Strips (“Strips”)**

1. *The Strips Were Made-for-Hire*

The Strips were created *after* Siegel and Shuster entered into the 1937 employment agreement with DC, and *after* the pair assigned all of their Superman rights to DC in 1938. ER-602-03, 615, 917; SER-582-89. DC does not “ignore” the “instance and expense” test because of these agreements. LOR-55. Just the opposite: the agreements are what *satisfy* the “instance” prong, because they mean the Strips were *necessarily* created at DC’s instance. DCB-71-72. Since DC was the sole owner of all rights in Superman properties, it had complete control over the creation of new Superman material. *Estate of Hogarth v. Edgar Rice Burroughs, Inc.*, 342 F.3d 149, 163 (2d Cir. 2003); *Picture Music, Inc. v. Bourne, Inc.*, 457 F.2d 1213, 1217 (2d Cir. 1972); DCB-47, 56-57. It is thus irrelevant that Siegel and Shuster exercised creative independence. LOR-55.<sup>10</sup>

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<sup>10</sup> While authors of authorized derivative works “own the copyright to their added material” (LOR-55), where—as here—the derivative work is made-for-hire, the statutory “author” is the hiring party. *Fox*, 429 F.3d at 881; DCB-9-10, 42-43.

Larson concedes “Siegel and Shuster were compensated” for their work, LOR-55, which is enough to satisfy the “expense” prong. *Playboy Enters., Inc. v. Dumas*, 53 F.3d 549, 555 (2d Cir. 1995). And she concedes they created the Strips *expecting* to be compensated for their work, *Murray v. Gelderman*, 566 F.2d 1307, 1311 n.7 (5th Cir. 1978), and that DC and McClure bore “the financial risk,” *Fox*, 429 F.3d at 881—again establishing “expense.” But she says the “expense” factor is not satisfied, because Siegel and Shuster were paid a royalty on net profits, rather than guaranteed compensation. LOR-55. Courts “roundly reject[]” that asserted distinction, as Toberoff well knows. *Marvel Worldwide, Inc. v. Kirby*, 777 F.Supp.2d 720, 741-42 (S.D.N.Y. 2011) (collecting cases).

2. *Larson’s Failure To Terminate The Strips Is Dispositive*

Larson does not deny that her termination notice omitted *all* information concerning the Strips required by federal law—title, author, copyright date, and registration number. Rather, she argues the omission was harmless, because her notice included a “catch-all” footnote indicating an intent to recapture “every ... omitted work.” LOR-57. That theory contradicts the plain terms of the rule, which treats as harmless *only* those mistakes that “do[] not materially affect the adequacy of the information” in the notice. 37 C.F.R. §201.10(e)(1)-(2). The *complete omission* of all required information obviously *does* materially affect the adequacy of the notice—even with a catch-all, the required information is nonexistent.

*Burroughs v. M-G-M, Inc.*, 491 F.Supp. 1320, 1326 (S.D.N.Y. 1980) (omission of five Tarzan works “‘materially affect(s)’ the adequacy of the Notice”).<sup>11</sup>

If a termination notice could simply refer to “all works, including omitted works,” there would be no point in requiring *any* information concerning particular works. The rules specifically define errors that are harmless, Larson’s error is not among them, and courts cannot engraft new exceptions, especially given the careful “compromise” the Copyright Act strikes between the rights of heirs and grantees like DC. DCB-15-16 (citing legislative history).<sup>12</sup>

### **C. Pages 3-6 Of *S#1* Are Works-For-Hire**

Larson maintains that pages 3-6 of *S#1* were created as part of the original Superman story in 1935—before Siegel and Shuster entered into a work-for-hire relationship with DC—and says there is “no evidence” to the contrary. LOR-53. Incredibly, Larson has no response (other than to ask the Court not to read it) to Siegel’s refutation of this theory in his memoir: “[Commentators] state Superman magazine No. 1 contains pages omitted from the Action Comics No. 1 origin story. The truth is that the additional pages were specifically created for use in Superman

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<sup>11</sup> Larson’s effort to distinguish *Burroughs* fails. It held the omission was “not harmless,” 491 F.Supp. at 1326, and the Second Circuit ruled the “incomplete notice left [the grantee] with license to use” the works. 683 F.2d 610, 622.

<sup>12</sup> Larson complains about DC’s “math,” LOR-59, but the numbers do not lie: of the 15 Superman works deemed subject to termination, the 12 Strips—80%—were completely omitted from her notices. DCB-76-77. That Larson wildly “over-noticed” other Superman works cannot turn a *nonexistent* notice of the Strips into an *adequate* one.

Magazine No. 1.” SER-805. Siegel’s admission and DC’s other evidence confirms these pages were made-for-hire on behalf of DC. DCB-78; SER-761.

**D. Artwork In AC#4 Is Work-For-Hire**

It is undisputed Siegel created *no* artwork to accompany the 1934 script that DC later incorporated into *AC#4*—a story illustrated by DC’s staff artists. DCB-79-80. Larson’s contention that DC cannot simultaneously own these illustrations as the author of a work-for-hire and as a joint author (LOR-54) misunderstands DC’s argument. DC’s primary submission is that the artwork is owned outright by DC as a work-for-hire, as the 99 panels of illustrations possess far more than the “*de minimis* quantum of creativity” necessary to be copyrightable. *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 363 (1991). The artwork is also a joint work between Siegel and DC, as both intended the script and illustrations to be combined into a comic strip. *Gaiman*, 360 F.3d at 659; *supra* n.7. Larson has no response, except to assert—without explanation—that the ownership of the *AC#4* artwork is “not before the Court.” LOR-54. It is. DC claimed ownership below, RER-3, and the district court considered but “decline[d] to address” it in its August 2009 order being appealed, ER-78-79. The issue is preserved. *O’Brien v. R.J. O’Brien & Assocs., Inc.*, 998 F.2d 1394, 1397 n.1 (7th Cir. 1993).

### **E. Copyrightable Elements In DC's Promotional Announcements**

Larson does not dispute the only issue before the district court on summary judgment concerning the Promotional Announcements was whether they fell outside the time-limit to terminate. The court held the Announcements were not subject to termination—and Larson does not challenge this ruling. LOR-71 n.14. The district court then made inaccurate statements concerning the visible elements in the Announcements based on its review of a poor, multiple-generation photocopy. SER-44-45. Because the “visibility” issue was not before the court, DC did not present briefing, evidence, or expert testimony addressing it. DCB-82.

Larson says DC nevertheless had “adequate notice” and a “fair opportunity” to be heard because the scope question was briefly raised during the summary judgment hearing. LOR-72. Not so. DC’s counsel specifically said at the hearing—without objection or contradiction—that “the scope of what’s in these ads ... is something for another day.” LSL-RER-80-81.

Larson offers no defense of the district court’s refusal to review an original version of the Announcements, as explicitly required by FED. R. EVID. 1002. *See* DCB-82-83 (collecting cases). And while she says the Announcements contain “no new copyrightable elements,” LOR-73, that is, at best, an issue for trial. In any event, a cursory review of an original Announcement shows it includes many, key copyrightable elements. DCB-84; Docket Nos. 30-1, 36-1.

## CONCLUSION

The Court should enter judgment in DC's favor on its settlement defense, or, at the least, reverse and remand on that defense and DC's limitations defense for trial. If the Court finds it has jurisdiction on the copyright issues presented, and it finds it needs to reach them, it should affirm and reverse in part, as DC has shown.

Respectfully submitted,

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Dated: June 19, 2012

**CERTIFICATE OF COMPLIANCE**

I certify that this brief complies with the type-volume limitation of FED. R. APP. P. 28.1(e)(2)(C) because it contains 6,796 words, excluding the portions exempted by FED. R. APP. P. 32(a)(7)(B)(iii). This brief's type size and type face comply with FED. R. APP. P. 32(a)(5) and (6).

Dated: June 19, 2012

O'MELVENY & MYERS LLP

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**CERTIFICATE OF SERVICE**

I hereby certify that on June 19, 2012, I caused to be electronically filed the Reply Brief Of Cross-Appellants And Appellees Warner Bros. Entertainment Inc. And DC Comics with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all interested parties in this case are registered CM/ECF users.

I declare under penalty of perjury under the laws of the United States that the above is true and correct. Executed on June 19, 2012, at Los Angeles, California.

/s/ Cassandra Seto  
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Cassandra Seto