

*EW 3/58*

**United States Circuit Court of Appeals  
For the Second Circuit.**

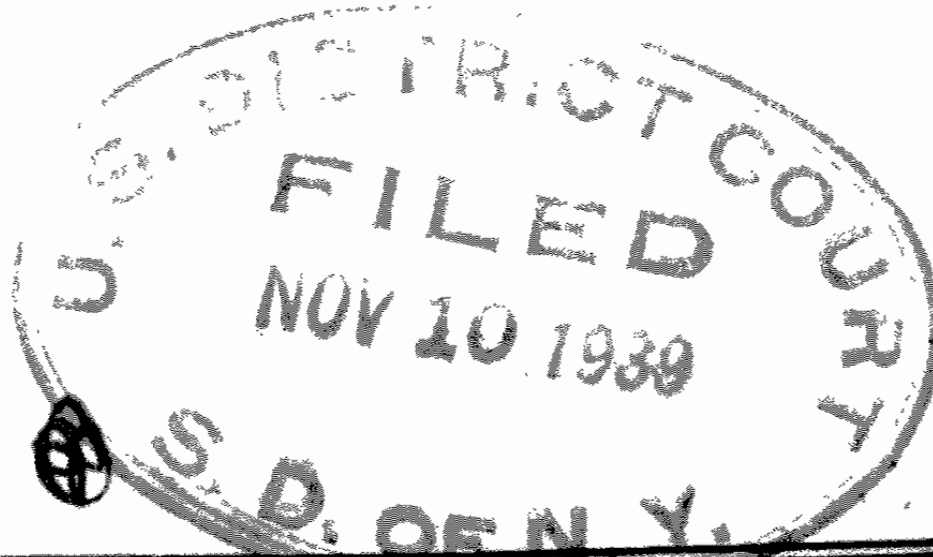
DETECTIVE COMICS, INC.,  
*Plaintiff-Appellee,*

AGAINST

BRUNS PUBLICATIONS, INC., KABLE NEWS  
COMPANY, and INTERBOROUGH NEWS CO.,  
*Defendants-Appellants.*

**TRANSCRIPT OF RECORD**

ON APPEAL FROM THE UNITED STATES DISTRICT  
COURT FOR THE SOUTHERN DISTRICT  
OF NEW YORK.



## **I N D E X .**

---

	PAGE
Statement Under Rule XIII .....	1
Subpoena .....	2
Bill of Complaint .....	3
Amended Answer of Defendant Bruns Publications, Inc., to Plaintiff's Bill of Complaint .....	13
Answer of Defendant Kable News Company to Plaintiff's Bill of Complaint .....	17
Answer of Defendant Interborough News Co. to Plaintiff's Bill of Complaint .....	20
Testimony .....	23
Opinion .....	155
Findings of Fact and Conclusions of Law .....	162
Decree Appealed From .....	176
Stipulation Attached to Decree .....	182
Petition for Appeal .....	183
Order Allowing Appeal .....	184
Assignment of Errors .....	185
Citation on Appeal .....	188
Statement as to Contents of Record .....	189
Stipulation as to Record .....	191
Clerk's Certificate .....	192

## TESTIMONY.

## WITNESSES FOR PLAINTIFF.

	PAGE
Jacob S. Liebowitz:	24
Direct .....	49
Cross .....	
Jerome Siegel:	53
Direct .....	54
Cross .....	64
Re-direct .....	66, 69
Re-cross .....	68
Re-re-direct .....	
Warren A. Angel:	71
Direct .....	73
Cross .....	76
Re-direct .....	76
Re-cross .....	
Max C. Gaines:	127
Direct .....	138
Cross .....	
Sheldon Mayer:	140
Direct .....	141
Cross .....	
Harry Donenfeld:	143
Direct .....	145
Cross .....	151
Re-direct .....	

## WITNESSES FOR DEFENDANTS.

	PAGE
William Eisner:	
Direct .....	79
Cross .....	92
Re-direct .....	104
Re-cross .....	105
Samuel M. Iger:	
Direct .....	107
Cross .....	109
Victor S. Fox:	
Direct .....	115
Cross .....	118
Re-direct .....	124
Re-cross .....	126
(Recalled):	
Direct .....	153
Cross .....	154

## EXHIBITS.

## PLAINTIFF'S EXHIBITS.\*

- 1 to 11.—Eleven cards received from United States Copyright Office (received in evidence at p. 27, fols. 79-80) .....
- 12 to 22.—First eleven issues of Action Comics (received in evidence at p. 27, fols. 80-81) .....
- 23.—Copy of magazine called Wonder Comics (received in evidence at p. 28, fols. 83-84) .....
- 24.—Agreement (received in evidence at p. 33, fols. 98-99) .....

\*The exhibits received in evidence are omitted by stipulation (see p. 189 herein).

- 25.—Check, dated March 1, 1938 (received in evidence at p. 33, fols. 98-99) .....
- 26.—Agreement (received in evidence at p. 35, fols. 103-104) .....
- 27.—“Superman” strip (received in evidence at p. 37, fols. 109-110) .....
- 28.—Agreement (received in evidence at p. 37, fols. 110-111) .....
- 29.—Sales record (received in evidence at p. 47, fols. 139-140) .....
- 30.—Letter, dated June 20, 1934 (received in evidence at p. 66, fols. 197-198) .....
- 31.—Letter, dated October 4, 1934 (received in evidence at p. 66, fols. 197-198) .....
- 32.—Circular (received in evidence at p. 72, fols. 214-215) .....
- 33.—Poster (received in evidence at p. 72, fols. 215-216) .....
- 34.—Affidavit (received in evidence at p. 102, fols. 305-306) .....
- 35.—Letter (received in evidence at p. 106, fols. 318-319) .....
- 36 to 47.—“Superman” strips (received in evidence at p. 138, fols. 412-413) .....
- 48.—Memorandum (received in evidence at p. 139, fols. 417-418) .....
- 49.—Check, dated January 3, 1938 (received in evidence at p. 151, fols. 453-454) .....

\*The exhibits received in evidence are omitted by stipulation (see p. 189 herein).

- 50.—Check, dated January 5, 1938 (received in evidence at p. 152, fols. 454-455) .....
- 51.—Check, dated December 23, 1937 (received in evidence at p. 152, fols. 455-456) .....
- 52.—Check, dated January 10, 1938 (received in evidence at p. 152, fols. 455-456) .....
- 53.—Check, dated January 28, 1938 (received in evidence at p. 153, fols. 457-458) .....

#### DEFENDANTS' EXHIBITS.

- A.—Drawing (received in evidence at p. 144, fols. 431-432) .....
- B.—Drawing (received in evidence at p. 144, fols. 431-432) .....

\*The exhibits received in evidence are omitted by stipulation (see p. 189 herein).



# United States District Court

FOR THE SOUTHERN DISTRICT OF NEW YORK.

1

---

DETECTIVE COMICS, INC.,

Plaintiff,

AGAINST

BRUNS PUBLICATIONS, INC., KABLE NEWS COMPANY,  
and INTERBOROUGH NEWS CO.,

Defendants.

---

## Statement Under Rule XIII.

2

The proper style of the Court and the title of this cause is shown above.

The suit was commenced on March 16, 1939, by service of subpoenas on the defendants, together with copies of the bill of complaint. An amended answer was filed by the defendant Bruns Publications, Inc., on April 6, 1939. Answers were filed by the defendants Kable News Company and Interborough News Co. on April 25, 1939.

The original parties were Detective Comics, Inc., plaintiffs, and Bruns Publications, Inc., Kable News Company, and Interborough News Co., defendants. The parties on this appeal are the original parties.

3

The defendants were not arrested and no bail taken or property attached in this action.

The trial was had on April 6 and April 7, 1939, before Honorable John M. Woolsey.

No question in this case has been referred to a Commissioner or Master or Referee.

The decree appealed from herein was entered on June 16, 1939. There was no interlocutory decrees. An order allowing an appeal was signed by Honorable Edward A. Conger, United States District Judge for the Southern District of New York, on June 20, 1939, and entered on the same date.

**Subpoena.**

THE PRESIDENT OF THE UNITED STATES OF AMERICA.

TO BRUNS PUBLICATIONS, INC., KABLE NEWS COMPANY,  
AND INTERBOROUGH NEWS CO., GREETING:

YOU ARE HEREBY COMMANDED to appear before the Judges of the District Court of the United States of America for the Southern District of New York, in the Second Circuit, to answer a bill of complaint exhibited against you in said Court, in a suit in Equity by

DETECTIVE COMICS, INC.

and to further do and receive what the said Court shall have considered in this behalf. And this you are not to omit under the penalty on you and each of you of Two Hundred and Fifty Dollars (\$250).

WITNESS Honorable John C. Knox, Judge of the District Court of the United States for the Southern District of New York, at the City of New York, on the 16th day of March, in the year One Thousand Nine Hundred and Thirty-nine and of the Independence of the United States the One Hundred and sixty-third.

CHARLES WEISER,  
Clerk.

WEIL, GOTSHAL & MANGES,  
Solicitors.

The defendants are required to file their answer or other defense in the above cause in the Clerk's Office on or before the twentieth day after service hereof excluding the day of said service; otherwise the bill aforesaid may be taken *pro confesso*.

(Seal)

CHARLES WEISER,  
Clerk.

**Bill of Complaint.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

Index No. ....— Civil: 3/58.

DETECTIVE COMICS, INC.,

Plaintiff, 8

AGAINST

BRUNS PUBLICATIONS, INC., KABLE NEWS COMPANY,  
and INTERBOROUGH NEWS CO.,  
Defendants.

DETECTIVE COMICS, INC., plaintiff above named, files this bill of complaint and alleges and charges as follows:

1. Plaintiff, Detective Comics, Inc., at all times hereinafter mentioned was and still is a corporation organized and existing under and by virtue of the Laws of the State of New York, having its principal office and place of business at No. 480 Lexington Avenue, in the Borough of Manhattan, City, County and State of New York within the Southern District of New York, and was and still is engaged in the business of publishing magazines for sale to the general public throughout the United States of America and elsewhere.

2. Upon information and belief, defendant, Bruns Publications, Inc., at all times hereinafter mentioned was and still is a corporation organized and existing under and

*Bill of Complaint.*

10

by virtue of the Laws of the State of New York, having its principal office and place of business at No. 480 Lexington Avenue, in the Borough of Manhattan, City, County and State of New York within the Southern District of New York, and was and still is engaged in the business of publishing magazines for sale to the general public in the United States of America and elsewhere.

11 3. Upon information and belief, defendant, Kable News Company, at all times hereinafter mentioned was and still is a corporation organized and existing under and by virtue of the Laws of the State of Illinois and has and now does regularly engage in business in the State of New York and maintains a principal office and place of business at No. 420 Lexington Avenue, in the Borough of Manhattan, City, County and State of New York within the Southern District of New York, and was and still is engaged in the business of distributing magazines throughout the United States of America and elsewhere.

12 4. Upon information and belief, defendant, Interborough News Co., at all times hereinafter mentioned was and still is a corporation organized and existing under and by virtue of the Laws of the State of New York, having its principal office and place of business at No. 525 West 52nd Street, in the Borough of Manhattan, City, County and State of New York within the Southern District of New York, and was and still is engaged in the business of distributing magazines in the City and State of New York.

5. This is a suit brought for infringement of copyrights granted under the statutes of the United States upon a periodical and this Court has jurisdiction of the

*Bill of Complaint.*

13

cause of action herein as the same is a suit in equity arising under the Copyright Laws of the United States.

6. Said defendants are inhabitants of and may be found within the Southern District of New York.

7. Plaintiff was organized for the purpose, among other things, of carrying on and since its organization has carried on and is now carrying on, the business of writing, producing, publishing and selling periodicals; that for these purposes it has caused to be written by its agents a series of periodicals entitled "Action Comics"; that plaintiff, being an employer for whom said periodicals were made for hire, is the author and proprietor thereof. 14

8. Plaintiff, being a corporation organized and existing under and by virtue of the Laws of the State of New York, is and was at the time of securing and registering claim to copyrights in said periodicals, as hereinafter set forth, a citizen of the United States.

9. Said periodicals caused to be written by plaintiff, the author thereof, by its agents as aforesaid, contain a large amount of matter wholly original with said author thereof and constitute copyrightable subject matter under the Laws of the United States. 15

10. Plaintiff did on or about the 18th day of April, 1938, secure copyright for the June, 1938, issue of said periodical "Action Comics" by publishing the same and offering the same to the general public with the following notice of copyright, "Entire contents copyright 1938 by Detective Comics, Inc." inscribed upon the title page; plaintiff did on or about the 25th day of May, 1938, secure copyright for the July, 1938, issue of said periodical



*Bill of Complaint.*

16

"Action Comics" by publishing the same and offering the same to the general public with the following notice of copyright, "Entire contents copyright 1938 by Detective Comics, Inc." inscribed upon the title page; plaintiff did on or about the 25th day of June, 1938, secure copyright for the August, 1938, issue of said periodical "Action Comics" by publishing the same and offering the same to the general public with the following notice of copyright, "Entire contents copyright 1938 by Detective Comics, Inc." inscribed upon the title page; plaintiff did on or about the 25th day of July, 1938, secure copyright for the September, 1938, issue of said periodical "Action Comics" by publishing the same and offering the same to the general public with the following notice of copyright, "Entire contents copyright 1938 by Detective Comics, Inc." inscribed upon the title page; plaintiff did on or about the 25th day of August, 1938, secure copyright for the October, 1938, issue of said periodical "Action Comics" by publishing the same and offering the same to the general public with the following notice of copyright, "Entire contents copyright 1938 by Detective Comics, Inc." inscribed upon the title page; plaintiff did on or about the 26th day of September, 1938, secure copyright for the November, 1938, issue of said periodical "Action Comics" by publishing the same and offering the same to the general public with the following notice of copyright, "Entire contents copyright 1938 by Detective Comics, Inc." inscribed upon the title page; plaintiff did on or about the 25th day of October, 1938, secure copyright for the December, 1938, issue of said periodical "Action Comics" by publishing the same and offering the same to the general public with the following notice of copyright, "Entire contents copyright 1938 by Detective Comics, Inc." inscribed upon the title page; plaintiff

17

18

*Bill of Complaint.*

19

did on or about the 25th day of November, 1938, secure copyright for the January, 1939, issue of said periodical "Action Comics" by publishing the same and offering the same to the general public with the following notice of copyright, "Entire contents copyright 1938 by Detective Comics, Inc." inscribed upon the title page; plaintiff did on or about the 27th day of December, 1938, secure copyright for the February, 1939, issue of said periodical "Action Comics" by publishing the same and offering the same to the general public with the following notice of copyright, "Entire contents copyright 1939 by Detective Comics, Inc." inscribed upon the title page; plaintiff did on or about the 25th day of January, 1939, secure copyright for the March, 1939 issue of said periodical "Action Comics" by publishing the same and offering the same to the general public with the following notice of copyright, "Entire contents copyright 1939 by Detective Comics, Inc." inscribed upon the title page; plaintiff did on or about the 25th day of February, 1939, secure copyright for the April, 1939, issue of said periodical "Action Comics" by publishing the same and offering the same to the general public with the following notice of copyright, "Entire contents copyright 1939 by Detective Comics, Inc." inscribed upon the title page.

20

21

11. After publication of each of said periodicals with said notices of copyright as aforesaid, plaintiff duly registered its claim to copyright in each of said issues of said periodical "Action Comics" by filing, in respect of each such issue thereof, with the Register of Copyrights application therefor, specifying that each issue of said periodical belongs to subdivision (b) of Section 5 of the Act of March 4, 1909 and heretofore (in respect of each of said issues of said periodical) duly deposited in the mail, addressed to the Register of Copyrights, Washing-



*Bill of Complaint.*

ton, D. C., two complete copies of the best edition of each issue thereof then published as aforesaid, which were printed from type set within the limits of the United States from type set therein, and were bound within the limits of the United States, and paying, in respect of each such issue of said periodical, to the Register of Copyrights the fees required by law.

23 12. There was duly issued to plaintiff under seal of the Copyright Office and signed by the Register of Copyrights, a certificate of registration in respect of each such issue of said periodical, except as hereinafter stated, as follows:

(a) As to the June, 1938 issue of said periodical:  
June 14, 1938—Class B, No. 379787.

(b) As to the July, 1938 issue of said periodical:  
June 14, 1938—Class B, No. 379788.

(c) As to the August, 1938 issue of said periodical:  
July 30, 1938—Class B, No. 385466.

24 (d) As to the September, 1938 issue of said periodical:  
September 17, 1938—Class B, No. 387907.

(e) As to the October, 1938 issue of said periodical:  
October 27, 1938—Class B, No. 394784.

(f) As to the November, 1938 issue of said periodical:  
October 27, 1938—Class B, No. 394886.

*Bill of Complaint.*

(g) As to the December, 1938 issue of said periodical:

December 22, 1938—Class B, No. 399214.

(h) As to the January, 1939 issue of said periodical:

February 7, 1939—Class B, No. 405349,

as by said certificates, or duly authenticated copies thereof here ready in Court to be produced and profert of which is hereby made, will more fully and at large appear. 26

In respect of the February, 1939, March, 1939 and April, 1939 issues of said periodical, the issuance to plaintiff of such certificates of registration is imminent, all requirements of law having been duly complied with by plaintiff for the issuance thereof in due course.

13. Thereby there was secured to plaintiff, its successors and assigns, as provided by law for the first term of twenty-eight years from the foregoing dates of publication, the exclusive rights and privileges in and to the copyrights of each of said issues of said periodical "Action Comics" throughout the United States and territories thereof, including the sole liberty and exclusive right to print, re-print, publish, copy and vend said copyrighted periodicals. 27

14. Since the respective dates of publication of each of said issues of said periodical as hereinbefore set forth, said periodicals have been published by plaintiff and all copies of said periodicals made by plaintiff or under its authority or license have been printed and bound as set forth in paragraph "11" above and that all such copies

*Bill of Complaint.*

28

bore the notices of copyright as set forth in paragraph "10" above.

15. Plaintiff since the time of securing copyrights and registering claims thereto as aforesaid, and prior to the infringement herein complained of, has been and now is the sole proprietor of the entire right, title and interest in and to the said copyrights of each issue of said periodical "Action Comics" and of all rights and privileges granted and secured thereby and is entitled to sue for infringement thereof.

16. Copies of each of said copyright issues of said periodicals each entitled "Action Comics" and of the infringing periodical entitled "Wonder Comics", issue of May, 1939, are deposited with the Clerk of this Court upon the filing of this bill and plaintiff begs leave to produce the same upon the hearing or trial of this action or upon any motion made in the course thereof.

17. After the securing of copyrights as aforesaid and before the commencement of this action, and without the consent and against the will of plaintiff and in infringement of said copyrights and in violation of the rights of plaintiff, defendant Bruns Publications, Inc., published or caused to be published and is about to place upon the market for sale to the general public throughout the United States and elsewhere, a periodical entitled "Wonder Comics", May, 1939 issue, portions of which were copies from plaintiff's aforementioned copyrighted periodicals. Upon information and belief, Kable News Company, and Interborough News Co. have been retained by defendant, Bruns Publications, Inc., to distribute said infringing periodical to dealers thereof for sale to the

*Bill of Complaint.*

31

general public throughout the United States and elsewhere and said defendants, Kable News Company, and Interborough News Co., are presently in possession of large numbers of copies of said infringing periodicals and are about to distribute or are in the process of distributing said infringing periodical to dealers thereof for sale to the general public throughout the United States and elsewhere. All said acts of all said defendants are in violation of plaintiff's rights hereinabove set forth.

18. Plaintiff has just learned of such infringement and of the proposed distribution of said infringing periodical. Said infringing periodical has never before been published or distributed or sold to the general public anywhere in the United States or elsewhere and unless such publication, distribution and sale be forthwith enjoined and restrained, plaintiff will suffer irreparable injury and substantial damages.

19. Plaintiff by reason of the foregoing premises cannot have adequate relief except in a court of equity and in this Court.

WHEREFORE, plaintiff prays

(a) for a decree adjudging plaintiff's aforesaid copyrights to be good and valid and owned by plaintiff and to have been infringed by defendants;

(b) that the defendants, their officers, agents and employees and all persons acting under their direction, and each of them, may be perpetually enjoined and restrained from in any wise infringing plaintiff's said copyrights;

(c) that a preliminary injunction may be granted to plaintiff against defendants to the same purport,

33

*Bill of Complaint.*

34

tenor and effect as hereinbefore prayed for in regard to said perpetual injunction;

(d) that defendants be decreed to pay plaintiff such damages as may be sustained by plaintiff in consequence of defendants' unlawful acts and to account and pay over to plaintiff all gains, profits and advantages derived or realized by defendants from their infringement of plaintiff's said copyrights;

35

(e) that defendants be required to deliver up on oath to be impounded during the pendency of this action all copies in their possession or under their control, infringing plaintiff's said copyrights and to deliver up on oath for destruction all such infringing copies and all plates, molds, matrices and other means for making such infringing copies;

(f) that defendants pay the costs of this action and that reasonable attorneys' fees be allowed to plaintiff;

36

(g) that plaintiff have such other, further and different relief in the premises as the Court may deem just and proper.

WEIL, GOTSHAL & MANGES,  
Solicitors for Plaintiff,  
Office & P. O. Address,  
No. 60 East 42nd Street,  
Borough of Manhattan,  
City of New York.

HORACE S. MANGES,  
Solicitor.

(Verified on March 16th, 1939, by Jacob S. Liebowitz,  
Secretary and Treasurer of Plaintiff.)

**Amended Answer of Defendant Bruns Publications, Inc., to Plaintiff's Bill of Complaint.**

37

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

Docket No. ....—Civil: 3/58.

—o—  
DETECTIVE COMICS, INC.,

Plaintiff,

38

AGAINST

BRUNS PUBLICATIONS, INC., KABLE NEWS COMPANY,  
and INTERBOROUGH NEWS Co.,  
Defendants.

—o—

The defendant Bruns Publications, Inc., for its amended answer to plaintiff's bill of complaint herein, shows:

FIRST: Admits the allegations contained in paragraphs of said bill of complaint marked or numbered "1", "2", "3", "4", "5", "6", "7", "8" and "16".

39

SECOND: Denies the allegations contained in paragraphs of said bill of complaint marked or numbered "17" and "19".

THIRD: Denies so much of paragraph of said bill of complaint numbered "18" as alleges, or contains the conclusory averment, that said defendant's periodical infringes plaintiff's periodical.

40 *Amended Answer of Defendant Bruns Publications, Inc.,  
to Plaintiff's Bill of Complaint.*

FOURTH: Denies knowledge or information sufficient to form a belief as to paragraphs of said bill of complaint marked or numbered "9", "10", "11", "12", "13", "14" and "15".

FOR A FIRST, SEPARATE AND DISTINCT DEFENSE THIS  
DEFENDANT ALLEGES:

41 FIFTH: That those portions of plaintiff's magazine "Action Comics" concerning which infringement is alleged, are not susceptible of monopolization under the copyright laws, by virtue of the fact that the ideas expressed therein as well as the form of such expression were not original with the author thereof.

FOR A SECOND, SEPARATE AND DISTINCT DEFENSE THIS  
DEFENDANT ALLEGES:

42 SIXTH: That the comic strip "The Wonder Man" contained in this defendant's publication is an entirely independent concept, created by this defendant's artist, who worked independently of plaintiff's comic strip and plaintiff's character "Super Man", and that this defendant's said comic strip, or any part thereof, or said character, "The Wonder Man" were not copied from plaintiff's comic strip or character "Super Man", and that defendant's said comic strip and character "The Wonder Man" do not, therefore, constitute an infringement of plaintiff's copyright.

FOR A THIRD, SEPARATE AND DISTINCT DEFENSE THIS  
DEFENDANT ALLEGES:

SEVENTH: This defendant denies that, in preparing, compiling and printing its comic strip entitled "The Won-

*Amended Answer of Defendant Bruns Publications, Inc.,* 43  
*to Plaintiff's Bill of Complaint.*

der Man", or in creating the central character thereof, known as "The Wonder Man", it unfairly used or pirated the result of plaintiff's labors, and this defendant alleges that its aforesaid acts were not a substitute for, or in lieu of a resort to, original resources or independent creation.

FOR A FOURTH, SEPARATE AND DISTINCT DEFENSE THIS  
DEFENDANT ALLEGES:

EIGHTH: Denies having seen plaintiff's magazine prior to the conception, origination and publication by this defendant of said defendant's magazine. 44

FOR A FIFTH, SEPARATE AND DISTINCT DEFENSE THIS  
DEFENDANT ALLEGES:

NINTH: That by reason of plaintiff's piratical use of ideas and concepts contained in various publications by others than the plaintiff, and the consequent infringement by plaintiff of the copyrights of others, plaintiff is guilty of inequitable conduct and should not be heard to complain herein against this defendant.

FOR A SIXTH, SEPARATE AND DISTINCT DEFENSE THIS  
DEFENDANT ALLEGES: 45

TENTH: That upon receipt by this defendant of notice from plaintiff of alleged infringement of copyright or of the alleged appearance of similarity between plaintiff's and this defendant's respective publications, this defendant caused changes to be effected in its publication so as to remove or discontinue such similarity between its and plaintiff's publications, although this defendant believed, and still believes, that it had a legal right to print and publish the matter which plaintiff alleges to have constituted an infringement of plaintiff's copyright herein.



46 *Amended Answer of Defendant Bruns Publications, Inc.,  
to Plaintiff's Bill of Complaint.*

FOR A SEVENTH, SEPARATE AND DISTINCT DEFENSE THIS  
DEFENDANT ALLEGES:

ELEVENTH: That the acts on the part of this defendant of which plaintiff complains herein do not consist of such a copying of any material or substantial part of plaintiff's publication or copyrighted matter as to constitute an infringement of plaintiff's copyright.

47 WHEREFORE said defendant Bruns Publications, Inc., prays that a decree be entered herein dismissing plaintiff's bill of complaint, together with the costs of this action and reasonable counsel fee.

KOENIG, BACHNER & KOENIG,  
Solicitors for Defendant,  
Bruns Publications, Inc.,  
Office & P. O. Address,  
No. 70 Pine Street,  
Borough of Manhattan,  
City of New York.

48 RAPHAEL P. KOENIG,  
Solicitor.

(Verified on April 4, 1939 by Victor S. Fox, President  
of Defendant.)

49 **Answer of Defendant Kable News Company to  
Plaintiff's Bill of Complaint.**

UNITED STATES DISTRICT COURT,  
SOUTHERN DISTRICT OF NEW YORK.

—o—  
DETECTIVE COMICS, INC.,

Plaintiff,

AGAINST

BRUNS PUBLICATIONS, INC., KABLE NEWS COMPANY,  
and INTERBOROUGH NEWS CO.,

Defendants.

—o—  
Defendant, Kable News Company, by its attorney,  
Samuel A. Fried, answering the complaint herein, respectfully shows to this Court as follows:

FIRST: Denies any knowledge or information sufficient to form a belief as to the allegations contained in paragraphs marked 7, 9, 10, 11, 12, 13, 14, 15 of the complaint, 51  
herein.

SECOND: Denies any knowledge or information sufficient to form a belief as to the allegations contained in paragraph marked 17 of the complaint herein, except that this defendant admits that he distributed the May, 1939 issue of "Wonder Comics", prior to service of the complaint herein upon this defendant.

THIRD: Denies upon information and belief each and every allegation contained in paragraph 18 of the com-

52

*Answer of Defendant Kable News Company to  
Plaintiff's Bill of Complaint.*

plaint herein, except that it admits that the May, 1939 issue of "Wonder Comics" is the first issue thereof distributed by this defendant.

FOR A FIRST, SEPARATE AND DISTINCT DEFENSE,  
DEFENDANT ALLEGES:

53

FOURTH: Upon information and belief that those portions of complainant's magazine "Action Comics" concerning which infringement is claimed are not susceptible of monopolization under the copyright laws, in that the ideas expressed as well as the form of expression thereof used in complainant's said magazine was not original with the author thereof.

FOR A SEPARATE, SECOND AND DISTINCT DEFENSE,  
DEFENDANT ALLEGES:

54

FIFTH: That it admits that it has distributed for sale the May, 1939 issue of "Wonder Comics", published by the defendant Bruns Publications, Inc., but also denies, upon information and belief, that its distribution thereof was with knowledge of any rights of the plaintiff or with knowledge of any copyright therein vested in or claimed by the plaintiff.

FOR A THIRD, SEPARATE AND DISTINCT DEFENSE,  
DEFENDANT ALLEGES:

SIXTH: Upon information and belief that the defendant Bruns Publications, Inc.'s comic strips of its "Wonder-Man", are an entirely independent concept created by said defendant's artist working independently of the plaintiff's comic strips "Super-Man", and that the "Wonder-Man" comic strips were not copied from those of

55

*Answer of Defendant Kable News Company to  
Plaintiff's Bill of Complaint.*

"Super-Man", and is therefore not an infringement thereof.

FOR A FOURTH, SEPARATE AND DISTINCT DEFENSE,  
DEFENDANT ALLEGES:

SEVENTH: Upon information and belief defendant denies that in preparing, compiling or printing its comic strip "Wonder-Man", the defendant Bruns Publications, Inc., as a substitute for, or in lieu of a resort to original resources, or independent creation, unfairly used or 56  
pirated the results of the plaintiff's labor.

WHEREFORE, this defendant prays for a decree dismissing the plaintiff's complaint herein and requiring the plaintiff to pay the costs of this action and that reasonable attorney's fee be allowed to this defendant.

Yours, etc.,

SAMUEL A. FRIED,  
Attorney for Defendant,  
Kable News Company,  
Office & P. O. Address, 57  
291 Broadway,  
Borough of Manhattan,  
City of New York.

To:

WEIL, GOTSHAL & MANGES,  
Attorneys for Plaintiff,  
60 East 42nd Street,  
New York City.

58 **Answer of Defendant Interborough News Co.  
to Plaintiff's Bill of Complaint.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

---

DETECTIVE COMICS, INC.,

Plaintiff,

AGAINST

59 BRUNS PUBLICATIONS, INC., KABLE NEWS COMPANY,  
and INTERBOROUGH NEWS Co.,  
Defendants.

---

Defendant, Interborough News Co., by its attorney,  
Samuel A. Fried, answering the complaint herein, respect-  
fully shows to this Court as follows:

60 FIRST: Denies any knowledge or information sufficient  
to form a belief as to the allegations contained in para-  
graphs marked 7, 9, 10, 11, 12, 13, 14, 15 of the complaint  
herein.

SECOND: Denies any knowledge or information suffi-  
cient to form a belief as to the allegations contained in  
paragraph marked 17 of the complaint herein, except  
that this defendant admits that he distributed the May,  
1939 issue of "Wonder Comics", prior to service of the  
complaint herein upon this defendant.

THIRD: Denies upon information and belief each and  
every allegation contained in paragraph 18 of the com-

*Answer of Defendant Interborough News Co. to  
Plaintiff's Bill of Complaint.*

plaint herein, except that it admits that the May, 1939  
issue of "Wonder Comics" is the first issue thereof dis-  
tributed by this defendant.

FOR A FIRST, SEPARATE AND DISTINCT DEFENSE, DEFENDANT  
ALLEGES:

FOURTH: Upon information and belief that those  
portions of complainant's magazine "Action Comics"  
concerning which infringement is claimed are not sus-  
ceptible of monopolization under the copyright laws, in 62  
that the ideas expressed as well as the form of expression  
thereof used in complainant's said magazine was not  
original with the author thereof.

FOR A SECOND, SEPARATE AND DISTINCT DEFENSE, DEFENDANT  
ALLEGES:

FIFTH: That it admits that it has distributed for sale  
the May, 1939 issue of "Wonder Comics", published by  
the defendant Bruns Publications, Inc., but also denies,  
upon information and belief, that its distribution thereof  
was with knowledge of any rights of the plaintiff or with  
knowledge of any copyright therein vested in or claimed 63  
by the plaintiff.

FOR A THIRD, SEPARATE AND DISTINCT DEFENSE, DEFENDANT  
ALLEGES:

SIXTH: Upon information and belief that the defend-  
ant Bruns Publications, Inc.'s comic strips of its "Wonder-  
Man", are an entirely independent concept created by said  
defendant's artist working independently of the plaintiff's  
comic strips "Super-Man", and that the "Wonder-Man",  
comic strips were not copied from those of "Super-Man",  
and is therefore not an infringement thereof.

64 *Answer of Defendant Interborough News Co. to  
Plaintiff's Bill of Complaint.*

FOR A FOURTH, SEPARATE AND DISTINCT DEFENSE, DEFENDANT  
ALLEGES:

SEVENTH: Upon information and belief defendant denies that in preparing, compiling or printing its comic strip "Wonder-Man", the defendant Bruns Publications, Inc., as a substitute for, or in lieu of a resort to original resources, or independent creation, unfairly used or pirated the results of the plaintiff's labor.

65 WHEREFORE, this defendant prays for a decree dismissing the plaintiff's complaint herein and requiring the plaintiff to pay the costs of this action and that reasonable attorney's fee be allowed to this defendant.

Yours, etc.,

SAMUEL A. FRIED,  
Attorney for Defendant,  
Interborough News Co.,  
Office & P. O. Address,  
291 Broadway,  
Borough of Manhattan,  
City of New York.

66

To:

WEIL, GOTSHAL & MANGES,  
Attorneys for Plaintiff,  
60 East 42nd Street,  
New York City.

**Stenographer's Minutes.**

67

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

Civ. 3-58.

DETECTIVE COMICS, INC.,

Plaintiff,

AGAINST

68

BRUNS PUBLICATIONS, INC., KABLE NEWS COMPANY, and  
INTERBOROUGH NEWS COMPANY,  
Defendants.

Before:—HON. JOHN M. WOOLSEY,

*District Judge.*

New York, April 6, 1939;  
11:00 A. M.

69

APPEARANCES:

WEIL, GOTSHAL & MANGES, Esqs., Attorneys for Plaintiff;  
Horace S. Manges, Esq., of Counsel.

SAMUEL A. FRIED, Esq., Attorney for Defendants Kable  
News Company and Interborough News Company.

KOENIG, BACHNER & KOENIG, Esqs., Attorneys for Defendant Bruns; Raphael P. Koenig, Esq., and Asher Blum, Esq., of Counsel.



70

*Jacob S. Liebowitz—for Plaintiff—Direct.*

The Court: I have read your briefs and I received an amended answer for the defendant Bruns. There is no objection to that being filed?

Mr. Manges: No, your Honor.

The Court: I understand in a general way what this is about. Now, you better make your record. There is no use having an elaborate opening or anything like that. Make your record by showing your contracts and show what you have got in the way of rights and then we will deal with that question.

71

JACOB S. LIEBOWITZ, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

*Direct Examination by Mr. Manges:*

Mr. Manges: Your Honor, upon consent may I have it noted upon the record that the correct name of Kable News Co., Inc., should read Kable News Company, with no "Inc."

The Court: How can that be?

Mr. Manges: It is an Illinois corporation.

Mr. Fried: That is correct, your Honor.

The Court: We really don't pay any attention, under the new rules, to any of these things at all unless they are pleaded and proved. The plaintiff is Detective Comics, Inc., a corporation of New York State?

Mr. Manges: Yes, your Honor.

The Court: And Bruns Publications?

Mr. Manges: Is also a New York corporation.

72

73

*Jacob S. Liebowitz—for Plaintiff—Direct.*

The Court: Kable News Company—just a proper name written out in full—is an Illinois corporation?

Mr. Manges: Yes, doing business in New York. That is conceded.

The Court: And the Interborough News Company?

Mr. Manges: Is a New York corporation.

The Court: Does that have an "Inc." on it?

Mr. Manges: No. That is an old name and that was before the statute. Isn't that correct, Mr. Fried?

74

Mr. Fried: I assume so.

Mr. Manges: I call your Honor's attention to the fact that the first six paragraphs of the complaint are admitted by all the defendants.

The Court: I noticed that.

Q. Mr. Liebowitz, you are secretary and treasurer of the plaintiff corporation? A. Yes.

Q. And how long have you been acting in that capacity? A. Since the date of organization.

The Court: When is that?

The Witness: December 30th, 1936.

75

Q. And the company is in what business? A. Publishing magazines, four comic magazines.

Q. And what are those magazines? A. Action Comics, Detective Comics, Adventure Comics and More Fun Comics.

And when did your company commence publishing Action Comics? A. The first issue was a June issue.

Q. What year? A. 1938.

Q. Has it been published monthly thereafter up to date? A. Yes.

76

*Jacob S. Liebowitz—for Plaintiff—Direct.*

Q. And was that first issue published on or about April 18th, 1938? A. That is right.

The Court: The June issue was published in April?

The Witness: Yes, sir; put on sale about April 18th.

The Court: Why was it called the June issue?

The Witness: Magazine dates as a rule are always post dated.

77

Mr. Manges: I think that is customary in the trade.

The Court: I know to a certain extent. You might get April Harpers' Magazine perhaps on the 25th of March, we will say, just as a guess—I don't know what the exact date would be—but it wouldn't be two or three months before.

The Witness: I can explain that first issue. We put that out April 18th and we left it on sale for about six weeks. The next on-sale date was about May 25th and thereafter it was published periodically about that time so there was only a month's difference after that time.

78

The Court: That was a trial balloon, the first one? The Witness: Yes.

Q. In other words, the July issue came out May 25th, is that right? A. Yes.

Q. Is not that a common practice in the field of pulp magazines, Mr. Liebowitz? A. It is.

Q. I show you these 11 cards and ask you if they are the 11 cards received by you from the Copyright Office of the United States (handing witness)? A. Yes, they are.

Q. And do they all refer to the magazine Action Comics? A. Yes.

79

*Jacob S. Liebowitz—for Plaintiff—Direct.*

Mr. Manges: I offer them in evidence.  
(Marked Plaintiff's Exhibits 1 to 11 in evidence.)

Q. I show you these 11 magazines taken from the files of this court and ask you if they represent the first 11 issues respectively of the magazine Action Comics published by the plaintiff?

The Court: That goes from July to when?

Mr. Manges: From the July, 1938, issue to and including the April, 1939, issue.

80

A. That is right.

The Court: Should not that be 10?

The Witness: Eleven. It is including the April issue.

Mr. Manges: If we included May we would have 12, a complete year.

The Court: Your first issue was the June issue?

Mr. Manges: Yes.

(Marked Plaintiff's Exhibits 12 to 22, inclusive, in evidence.)

81

Q. Mr. Liebowitz, were all copies of the June issue identical and all copies of the July issue identical, and so forth? A. Yes.

The Court: All copies published of each issue were the same?

Mr. Manges: Yes.

The Court: The same in pictures; the same in letter press, and everything?

Q. That is correct, Mr. Liebowitz? A. Yes.

82 *Jacob S. Liebowitz—for Plaintiff—Direct.*

Q. Were all copies of all the issues printed from type set within the United States? A. Yes.

Q. Where were all the copies bound? A. In New York City.

Q. And was the \$2.00 copyright fee paid by the plaintiff in each of the eleven instances? A. Yes.

Mr. Manges: Will counsel stipulate that this is the magazine of the defendant Bruns Publications?

Mr. Fried: Yes.

83 The Court: Do all of you agree to that?

Mr. Koenig: Yes, sir.

Mr. Manges: I offer this magazine in evidence called Wonder Comics, being the copy produced from the file of this court.

(Marked Plaintiff's Exhibit 23 in evidence.)

Mr. Manges: May the record show that that was the copy to which I referred when counsel for the defendants conceded that that is the magazine Wonder Comics published by the defendant Bruns Publications?

The Court: When was that published?

Mr. Manges: This is marked May, 1939.

84 The Court: Is there any stipulation that that is the first one they published?

Mr. Manges: That is conceded.

Mr. Koenig: Yes, your Honor, that is conceded.

Mr. Manges: It is the May issue published in March.

Q. Mr. Liebowitz, the plaintiff is still the sole proprietor of these eleven copyrights that have been offered in evidence? A. Yes.

*Jacob S. Liebowitz—for Plaintiff—Direct.*

85

Q. Now, with respect to the strip "Superman," is that contained in each of the eleven issues? A. It is.

Q. And it is always the first strip? A. Yes.

Q. And it is always 13 pages? A. Not always. In one instance I think it was cut down to 9 pages.

The Court: It is the leading strip in your magazine each time; that is, the real protagonist is the "Superman" against the "Wonderman" here, is that it?

Mr. Manges: That is it exactly.

86

The Court: That is as I gather it from your briefs.

Q. Is the copy of "Superman" written for the plaintiff each month by Mr. Siegel? A. Yes.

The Court: Who is Mr. Siegel?

Mr. Manges: He is the author.

The Court: What is his first name?

The Witness: Jerome Siegel.

The Court: He is an employee of your company?

The Witness: He is.

87

Q. You have a contract with Mr. Siegel for this copy, have you not? A. We have a contract, yes.

Q. Now will you tell us how the "Superman" feature came to you? A. Well, when we contemplated a proposed publication of a new magazine we were looking around for some features. One of the features submitted was this "Superman" strip.

The Court: Who submitted that?

The Witness: It was submitted through the McClure Newspaper Syndicate.

*Jacob S. Liebowitz—for Plaintiff—Direct.*

The Court: By this Mr. Siegel?

The Witness: It was originally submitted by Mr. Siegel to the McClure Newspaper Syndicate and they couldn't use it at the time. We, being on good terms with them, and they knew that we were looking for some features for a new magazine, they submitted that strip to us for consideration. We decided to publish it.

Q. And when was that? A. About January, of 1938.

89 Q. And thereafter did you enter into a contract with Mr. Siegel and Mr. Shuster? A. Yes.

Q. And Mr. Shuster is the man that does the drawings from Mr. Siegel's copy? A. That is right.

The Court: Make that clear.

Mr. Manges: One man writes it and the other man draws. Two men do the work.

The Court: This was in January, 1938?

The Witness: Yes.

The Court: You mean that the letter press describing this extraordinary creature is written by one man—what is his name?

90 Mr. Manges: Mr. Siegel conceives all the story part; Mr. Shuster does the art work, the cartoons.

The Court: What is his first name?

Mr. Manges: Joe.

Q. Did Detective Comics, Inc., buy the rights to "Superman" from Messrs. Shuster and Siegel on or about the 1st of March, 1938? A. Yes.

The Court: You bought the rights to "Superman"? What do you mean by that? You made a contract with them that they should do this for

*Jacob S. Liebowitz—for Plaintiff—Direct.*

you? Did they copyright it beforehand or was it a common law copyright that they assigned to you? What happened?

Mr. Manges: I will offer documents.

The Court: I don't mean to be impatient.

Q. I show you this paper and ask if that was entered into between Detective Comics and Messrs. Siegel and Shuster on or about March 1st, 1938 (handing witness paper)? A. That is right.

The Court: By this document, signed by both of them, they gave you exclusive rights to this creation of theirs called "Superman". Both the author and the cartoonist signed it. That is the beginning. That, in effect, is an assignment of a common law copyright by both of these people. It is hard to conceive of just what you would call it because these comic strips become almost entities and, I suppose, one would call that an assignment.

Mr. Manges: Yes, sir; of all their proprietary rights in and to the comic strip.

The Court: Of course, the comic strip does not 93 exist until it is written.

Mr. Manges: The character, the central character.

The Court: That is the curious point about it. It is like "The Toonerville Trolley" and many of the other things that become kind of informally incorporated. At any rate, that was the basis on which a contract, or what not—whatever it is—you don't need to call it some juridical name—was made.

Mr. Manges: I offer this in evidence.



94

*Jacob S. Liebowitz—for Plaintiff—Direct.*

Mr. Koenig: This is objected to by the defendant Bruns on the ground there is no indication to what it refers.

The Court: "Superman."

Mr. Koenig: It says "a strip entitled 'Supermen'" but it does not refer to any particular strip or the contents thereof.

95

The Court: I will let that in because that is one they start with and, as I say, these things like "Superman" and "Little Orphan Annie" and all these other things are—these people couldn't assign the comic strip if it had not been written. It is really a contract that they will do some stuff which they will exhibit.

Had they shown you what "Superman" was before the contract was entered into?

The Witness: Yes, certainly.

The Court: So you knew in a general way what ideas they had?

The Witness: At the time this release was given the 13 pages for the first issue had already been drawn.

96

The Court: So that "Superman" had achieved 13 pages by March 1st when that was given?

The Witness: That is right.

Mr. Koenig: May I inquire as to when the pencil date was put in?

The Witness: At the time it was signed. That is my handwriting.

Mr. Fried: If your Honor please, I object to it on the further ground—I assume you are offering it in evidence, Mr. Manges?

Mr. Manges: I did offer it.

*Jacob S. Liebowitz—for Plaintiff—Direct.*

97

Mr. Fried: On the ground it is contrary to the pleadings of the complaint. Complainant pleads, I believe, in one of the paragraphs that the author of this strip was in the employ. It does not read that he acquired the rights or whatever copyrights he may have as an independent contractor.

The Court: Under these new rules it doesn't make the slightest bit of difference if there is a variance like that. I will let it in and if necessary you can conform the pleadings to the proof. Under the new rules we just don't pay any attention to those things. (Marked Plaintiff's Exhibit 24 in evidence.) 98

Q. Mr. Liebowitz, you say by March 1st, 1938, the first strip of 13 pages had been drawn? A. That is right.

Q. Had it also been submitted to your company by them? A. That is right, and paid for.

Q. And have you with you the check referred to in the last exhibit, since the question of date has been raised? A. (Producing paper and handing to counsel.)

Mr. Manges: I offer in evidence a check dated March 1st, 1938, of Detective Comics, Inc., to Messrs. Siegel and Shuster for \$412, including the first item of \$130. 99

(Marked Plaintiff's Exhibit 25.)

Q. Continuously subsequent to March 1st, 1938, have Messrs. Siegel and Shuster submitted the script for the strip "Superman" for the magazine Action Comics? A. Yes.

The Court: They have worked for you ever since?  
The Witness: Yes.

100

*Jacob S. Liebowitz—for Plaintiff—Direct.*

Q. And by September 22nd, 1938, did you put into writing the terms of employment under which they were to work? A. That is right.

Q. And that was with respect to "Superman" for Action Comics? A. Yes.

Mr. Manges: I offer this in evidence.

The Court: Ask him whether that is the paper. You must not lead him quite so much.

101 Mr. Manges: I want to shorten this. I don't think there is any dispute about this.

Q. I show you that paper and ask you if that is the agreement you have been referring to (handing witness)?  
A. It is.

Mr. Manges: I offer it in evidence.

Mr. Koenig: I object to it on the ground of immateriality. It has nothing to do with the issue.

The Court: What is the date of this thing?

102 Mr. Manges: It is dated September 22nd, 1938. Mr. Fried objected about not showing employment and now when I want to show employment the other defendant objects.

The Court: I try these cases very broadly and I usually go by the rule that you can always take something off that you have on but you can't put something on that you haven't got and every now and then when you come to decide a case you find that there is something that you wish were there, so it is better to have too much than too little in these equity cases. It doesn't make the slightest difference as there is no jury present.

In a case of what I call conception of these comic strips I should think it was rather important to

*Jacob S. Liebowitz—for Plaintiff—Direct.*

103

tie up these authors of it as much as possible with the person who is claiming a copyright to it, so I shall let this in.

Mr. Fried: No objection.

(Marked Plaintiff's Exhibit 26 in evidence.)

Q. Has the plaintiff licensed the McClure Newspaper Syndicate to use the comic strip "Superman" in daily papers throughout the United States? A. It has.

Q. Is that of 75 West Street, New York City? A. That is right.

Q. When was that license issued? A. September, 1938.

Q. And is it still in existence? A. It is.

Q. I show you this strip and ask you if that is a strip containing the first 6 "Superman" strips which were submitted to McClure Newspaper Syndicate pursuant to that license (handing witness)?

104

The Court: What is precisely your point?

Mr. Manges: I am just trying to show the value. This is a specimen.

Mr. Koenig: If your Honor please, at this point may I interpose the objection to that that I don't see how that is relevant to the issues forming a part of this case?

105

The Court: I will find out. Mr. Manges, what exactly is the point of this? You claim if you should be successful in this case and you get an injunction that would bear on the profits?

Mr. Manges: Of course, that would follow.

The Court: The statute says "In lieu." Of course on statutory damages the value of the thing would not play any role at all but I thought, if it was a proper thing to allow it on some minimum or maximum or something like that, if you claim

*Jacob S. Liebowitz—for Plaintiff—Direct.*

actual damages you would have to be heard through a Master. I just wanted to get what your idea was. Why do you want these pictures? What does that mean?

Mr. Manges: I wanted to get into the record the fact that there is a very serious license question that we are trying to protect and must protect. If these people plagiarize of course we can not keep up the license which is of immense value.

The Court: That is as to the value of your license?

Mr. Manges: Exactly. In answer to Mr. Koenig's objection that he doesn't know what "Superman" we are talking about I would like a specimen in here to show that this is the "Superman".

The Court: But this is so long afterwards. We all know the "Superman" we are talking about merely by referring to that first March 1st letter which was telling of your "Superman", just calling it "Superman". You did have 13 pages or something like that, which had already been set up and it was the subject matter that you were discussing. It was the subject matter of that license or exclusive agreement or what not. If you want to go on and show that you have given a license to a newspaper syndicate, that is all right, but why go on to these pictures?

Mr. Manges: I just want to identify that as being the same subject matter, as one sample.

The Court: You only licensed "Superman"?

Mr. Manges: Only "Superman". Ever since the license began there has been a weekly strip given to McClure.

The Court: I will let you do that.

*Jacob S. Liebowitz—for Plaintiff—Direct.*

Mr. Manges: I offer the strip.

The Court: That is just an illustrative exhibit of the sort of thing you give them weekly?

Mr. Manges: Yes, your Honor.

The Court: You are not going to put them all in for the whole year, are you?

Mr. Manges: Oh, no.

(Marked Plaintiff's Exhibit 27 in evidence.)

Q. Have you the McClure agreement with you? A. Producing paper and handing to counsel.)

Mr. Manges: I offer in evidence the document produced by the witness.

Mr. Koenig: May I urge an objection on the ground of materiality, your Honor?

The Court: It may be premature until there is a ruling about this. I suppose if there is any recovery it may come in before the Special Master so I will have it marked.

(Marked Plaintiff's Exhibit 28 in evidence.)

Q. Mr. Liebowitz, did your company run a contest to determine the most popular of the features of the magazine? A. Yes, sir.

Q. And did "Superman" win that contest?

Mr. Koenig: I object to that, your Honor.

The Court: I don't care. I will let him do that. We are in a zone of the grotesque. Don't be so serious about the thing. We will find out about it and get the whole business and if that is their best lead they are entitled to show that.

Mr. Koenig: Maybe I can't impel myself into the grotesque, your Honor, from lack of experience in

*Jacob S. Liebowitz—for Plaintiff—Direct.*

this type of imaginative litigation but I conform to your Honor's ruling.

The Court: You won't suffer by so doing. What is this last question: If they had a contest? How did you have the contest; by radio or what?

Mr. Manges: I am going to ask him.

Q. Will you tell us the facts with respect to this popularity contest conducted by your magazine? A. In the September, 1938 issue we offered 25 \$1.00 prizes for the best letter on the magazine and also they were to enumerate the first five features in accordance with their liking.

Q. That is the notice that appeared on the inside cover of the September, 1938 issue at the time? A. That is right.

Q. Proceed. A. We received a number of replies.

Q. Have you the figures with you? A. Yes; they are in that envelope there.

The Court: He can refresh his recollection.

Q. (Handing witness papers.) A. Out of a total number of 542 replies tabulated on "Superman" 404 preferred "Superman" as the first feature; 59 shows it as the second; 22 as the third; 21 as the fourth; 17 as the fifth; 19 replies show no indication at all, making a total of 542.

The Court: 404 put it first?

The Witness: Yes.

The Court: It has an appeal to at least 404 persons.

The Witness: That is out of the total replies of 542 replies tabulated.

Q. To your knowledge, has the magazine become known as "Superman" to any part of your reading public?

*Jacob S. Liebowitz—for Plaintiff—Direct.*

The Court: As to what?

Mr. Manges: Has the Action Comics magazine become known as "Superman" to any part of the reading public.

Q. Do people inquire for it as "Superman"?

The Court: That may well be but that would come in better on an unfair competition question than it would on a copyright question.

Mr. Manges: It is again showing the value where it is the leading part of the whole magazine, where the public gets to know the whole magazine by that.

The Court: How does he know?

Mr. Manges: I am asking if he does know.

The Court: Do you know?

Mr. Manges: I said "to your knowledge".

The Court: "To your knowledge" is vague.

Have you ever heard anybody ask for your magazine under the name of "Superman"? You yourself, I mean? I don't mean what somebody has told you.

The Witness: No.

The Court: He has never heard it himself.

Mr. Manges: I will bring it out through the distributor.

Q. Do you know Mr. Victor Fox, the President of Bruns Publications? A. Yes.

Q. And how long have you known him? A. Since December, 1936.

Q. In what building are the plaintiff's offices? A. 480 Lexington Avenue.

Q. And where are the offices of the defendant Bruns Publications? A. 480 Lexington Avenue.



*Jacob S. Liebowitz—for Plaintiff—Direct.*

Q. And the offices of each of those corporations have been in 480 Lexington Avenue since the inception of the respective corporations? A. That is right.

The Court: They are not in the same office or anything like that?

Mr. Manges: No; they are in the same building.

The Court: Have they got separate offices?

The Witness: Separate offices.

The Court: How separate?

The Witness: They are on different floors.

Mr. Manges: Completely so.

The Witness: One is on the ninth floor and one is on the seventh.

The Court: Which are you on?

The Witness: The ninth.

Q. Is Mr. Donenfeld the president of your company?

A. He is.

Q. And did Mr. Donenfeld at one time have a 50 per cent. interest in the Bruns Publications? A. Yes.

Q. Was Mr. Fox at the office of the plaintiff at any occasion during the year ending March 20th, 1939? A.

120 Yes.

Q. How frequently? A. I should say at least once a week; sometimes oftener.

Q. Did you ever see him at the office of the Independent News Company? A. I did.

The Court: What is that?

Mr. Manges: That is a distributor.

Q. What is the Independent News Company A.  
A distributing Company.

*Jacob S. Liebowitz—for Plaintiff—Direct.*

Q. And are they located in 480 Lexington Avenue also?

A. Yes.

Q. And are you also connected with that firm? A. I am.

Q. And did the Independent News Company act as distributor for another magazine of Bruns Publications?

A. Yes.

Q. And in connection with that other magazine was Mr. Fox frequently at the office of Independent News Company? A. I saw him there often.

Q. And did you see him there often during the last year? A. Yes.

Q. How often did you see him at the office of Independent News Company during the last year? A. I don't know; I would say daily.

The Court: Is this on the question of access?

Mr. Manges: Yes, sir.

The Court: The defendants have got to admit access. That does not mean that you haven't a cause of action but you must admit this was published. The difference between a copyright and a patent, the main difference, we will say, is that the first person who invents something gets a right for a period of time but a man who writes a book or something of that kind, he only gets a right to prevent the copying of the book and it is of the essence of copyright that there be copying and there cannot be copying unless there be access. In other words, suppose you lived in England and I lived here and we wrote two stories that were almost identical. There would not be any breach of copyright on my part if I didn't know your story, didn't know anything about it, and it couldn't be estab-

*Jacob S. Liebowitz—for Plaintiff—Direct.*

lished I ever saw it. You would have to have access before you get anywhere. This had been on the newsstands and sold. If you deny access there wouldn't be anything in it.

Mr. Koenig: I was going to point out the fact that this magazine was published during this period of time that was under discussion.

The Court: Do you admit that you people saw this magazine?

Mr. Koenig: I don't doubt that they did, your Honor.

The Court: Can't you admit it and be done with it? That is the reason I always advocate in cases of this kind that the real test is to make a motion to dismiss on the pleadings with the things annexed to it and by that process you admit access and say "We don't care whether we had access or not but what we did was not an infringement of copyright" and I have induced a great many people to follow that course. Some people think it is a dangerous course. I don't think it is. However, don't let us waste time on the question of access on a magazine.

Mr. Koenig: We concede that the magazine was published and we knew of its existence.

The Court: That you had seen it?

Mr. Koenig: Yes.

The Court: Then you have to say access is admitted. Why don't you say it?

Mr. Koenig: Yes.

The Court: All right, access is admitted. Then drop all this.

Mr. Manges: Mr. Fried, do you admit access?

Mr. Fried: I have nothing to do with the publication at all but it seems to me that this book

*Jacob S. Liebowitz—for Plaintiff—Direct.*

was published and distributed for eleven months and was distributed widely to the public and of course there was general access to everybody.

The Court: I should think there wasn't any question about it.

Mr. Manges: What I am bringing out is the question of wilful piracy; that this man was seen examining the sales figures on the sales slips.

The Court: Go on.

Mr. Manges: That is what I was doing.

The Court: There is no question about access. 128

Q. You say you saw Mr. Fox frequently, practically daily at the office of Independent News Company within the last year? A. Yes.

Q. Were the sales figures of his magazine Action Comics on the same slips coming in from the dealers as another magazine of Mr. Fox's? A. No, they were not on the same card.

The Court: Another magazine of Mr. Fox's? The sales figures of your magazine were shown in cards sent in by the Independent News Company? 129

Mr. Manges: I will withdraw that.

Q. Did you ever see Mr. Fox looking at the sales figures in connection with your magazine Action Comics? A. Yes.

The Court: How does it happen? He cannot see the sales figures without looking at something.

Mr. Manges: I want to find out under what circumstances he saw that happen and how did it happen.

The Witness: Well, it is usual for a distributing company to send out a pick-up card to a dealer.

*Jacob S. Liebowitz—for Plaintiff—Direct.*

The Court: A what?

The Witness: They call that a pick-up card. They send a card to a dealer and the dealer indicates on it what the sales of the magazine are at any particular time by making an actual checkup on the news-stands.

The Court: There is something that I haven't been told yet.

*By the Court:*

131 Q. Is Independent News Company your means of distribution? A. Yes.

Q. Through whom you distribute? A. Yes.

Q. The distributors of the other magazines are these gentlemen who are defendants in the case? A. No, they distribute another magazine. They are publishers of another magazine.

Q. Who? A. Bruns Publications.

Q. I know, but haven't you got some distributors here? Doesn't one of these counsel represent a distributing company, the Kable News Company and then there is the Interborough? A. Yes.

Mr. Fried: That is correct. We distribute, at the present time, this book that is in question before your Honor.

The Court: That is called an infringement?

Mr. Fried: Yes, sir.

The Court: That is all I am asking you.

Mr. Fried: But it seems that the defendant publisher did distribute his magazine or one or two of his other magazines through the same Independent News Company which was the distributor of the plaintiff.

*Jacob S. Liebowitz—for Plaintiff—Direct.*

Q. You had a common distributor at one time? A. Yes.

Mr. Fried: That is the situation.

*By Mr. Manges:*

Q. And in that way did Mr. Fox see the checkup cards?

The Court: How do you know? Did you see him looking at it?

The Witness: Yes, sir.

*By the Court:*

Q. Were they things that anybody could look at in the Independent News Company? A. No. Mr. Fox was anxious to know how his magazine was selling and I was anxious to know how Action Comics was selling and our other comic magazines were selling too, and in the morning before——

Q. What day? A. Well, almost every day; the cards would come in daily. Before they were actually assorted according to state or city I would be looking at the cards and he would be looking at the cards.

Q. Were you an officer of the Independent? A. Yes.

Q. What officer? A. Secretary.

Q. And was he an officer? A. The defendant?

Q. No; was Mr. Fox an officer? A. Of the Bruns Publications?

Q. Of the Independent News Company? A. No.

Q. What this really amounts to is you say you and he would come down almost every day to the Independent News Company and see what the returns were from your respective papers and you would look at yours and he would look at his or you would look at his and he would

*Jacob S. Liebowitz—for Plaintiff—Direct.*

look at yours? A. I had a right to look at his. I was an officer of the distributor.

Q. You were an officer of the distributor? A. Yes.

Q. And you didn't object to his looking at yours? You didn't prevent him from looking at yours? A. I couldn't. The returns were there and weren't assorted, they were all in one batch and were being sorted out.

Q. Hadn't you ever said anything to him to stop him or something of that kind? A. No. I had no reason to believe—we were on very friendly terms.

137 Q. In other words, they had admitted access from the point of view of copyright and the fact is they had access to your returns, is that it? A. Yes.

*By Mr. Manges:*

Q. And from those cards could Mr. Fox tell that the magazine Action Comics was selling very well?

Mr. Fried: Objected to.

The Court: What was your circulation? Let us get down to the facts. Have you records of your circulation?

138 The Witness: Yes, sir.

Q. (Handing witness papers.) A. Will you give us the figures, please? A. Shall I read first for the first issue?

Q. Yes.

The Court: Where did you get this from?

The Witness: My actual sales records.

The Court: Your sales records in your office?

The Witness: Yes.

The Court: All right. Why don't you mark that as an exhibit and save time if it is altogether. How big an edition did you publish?

*Jacob S. Liebowitz—for Plaintiff—Direct.*

The Witness: 500,000.

The Court: Every month?

Mr. Manges: That is the present number.

The Witness: Yes, the present number.

The Court: Is it more than in previous months?

The Witness: Yes, it has always increased since the first issue.

Mr. Manges: I offer in evidence the sheet produced by the witness.

(Marked Plaintiff's Exhibit 29 in evidence.)

140 Q. Mr. Liebowitz, on Plaintiff's Exhibit 29 you have a column at the top marked "Draw" and then another column marked "Sales". Will you tell us what you meant by the word "Draw"? A. "Draw" are the number of copies distributed to wholesalers all over the country. "Sales" are the net sales after returns have been deducted.

Q. I notice that with respect to the last two issues marked thereon, being March and April, 1939, "Est" is written after the figure. What does that mean? A. It means estimated sales.

The Court: You haven't got final returns on those? 141

The Witness: No, sir.

Q. Are they estimated from the pick-up cards? A. The pick-up cards, yes, sir.

Q. And with respect to the March issue are the figures now practically final within a couple of thousand dollars? A. Within a thousand copies.

Q. Have you had a request from a law firm in Milwaukee requesting the granting of the right to use "Superman" on garments?



142

*Jacob S. Liebowitz—for Plaintiff—Direct.*

Mr. Fried: That is objected to.

The Court: I don't think it is material.

Mr. Manges: I withdraw it.

Q. The "Superman" figure has been used on your covers for the months, as I understand it, of December, February, March and April, is that correct?

The Court: You mean a figure representing this?

Mr. Manges: "Superman".

143

The Witness: It was also used on the first issue.

Mr. Fried: If your Honor please, I object to it.

That is all before your Honor now in the evidence.

The Court: It is on the exhibit.

Mr. Manges: I will withdraw it.

Q. Did you have a conversation with Mr. Fox during the month of February, 1939, with respect to a comic magazine? A. Yes.

Q. Will you tell his Honor what was said by Mr. Fox and what was said by you, to the best of your recollection?

144 A. Well, he was up to see me at one time at the office, I think it was around five o'clock. A part of the conversation was to the effect to inform me he was going to publish a comic magazine and that the issue was being prepared in about two weeks. I said it was quite a surprise to me because I thought we would have known before and I didn't think it was possible to get an issue out in two weeks' time.

The Court: What did the Bruns Publications publish before?

The Witness: The World Astrology Magazine.

The Court: An astrology magazine?

The Witness: Yes.

*Jacob S. Liebowitz—for Plaintiff—Cross.*

145

A. (Continued) At that time we discussed costs. He told me he was getting his plates done for \$950. I didn't believe it. He said, "Well, if you want to I will let you meet the man. He is coming in tomorrow and I will introduce you to him". Talking over the general characteristics of the magazine that he proposed he said his magazine was going to contain the best features of comic magazines on the stands; it would have detective, adventure, action, fun. I had no idea at the time, of course, that he was contemplating any—

Mr. Fried: I object, your Honor.

146

The Court: Strike that out.

Mr. Manges: That is all.

The Court: Now we will have a recess for about five minutes.

(Short recess.)

*Cross-Examination by Mr. Koenig:*

Q. With reference to these postal cards, Mr. Liebowitz, are they ordinary penny postal cards sent through the United States mails? A. Yes.

147

The Court: Which?

Mr. Koenig: These postal cards referred to, your Honor, are ordinary penny postal cards sent through the United States mails.

The Court: You mean for the contest?

Mr. Koenig: No, with reference to the checkup on the figures; the returns which he said Mr. Fox examined.

The Court: That Mr. Fox and he saw?

Mr. Koenig: Yes.

*Jacob S. Liebowitz—for Plaintiff—Cross.*

Q. These postal cards, do they contain the name of the magazine? A. That is right.

Q. And they had no reference to any particular feature in the magazine? A. No.

Q. Was it your practice to have more than one magazine on a postal card at any time? A. Sometimes; yes.

Q. And how many magazines would you have on a postal card? A. I should think it varied; sometimes we would have two, most often it was just one.

149 Q. Was there any time in which any of the magazines published by the Bruns Publishing Company was on a postal card containing Action Comics? A. I believe so.

Q. And how many of these postal cards would you send out at one time? A. To all the dealers.

Q. How many dealers? A. I should say about 600 or 700.

Q. And what period of time were they sent out or what interval of time? A. It all depends what information we want. Sometimes we want a 15-day checkup after the magazine was on the stand 15 days and at another time we would ask for complete returns on any particular issue that we wanted.

150 Q. Would you send them out more than once a month? A. Not often. We would sometimes send out a 15-day checkup and also follow it up with a card asking for complete returns.

Q. So that you would get of a morning sometimes many more than 600 or 700 postal cards? A. No, we never got that many at one time.

Q. Do you make your mailings separate as to each magazine? A. Well, they would be checked by dealers at different intervals and come from different parts of the country. They would not come at the same time.

*Jacob S. Liebowitz—for Plaintiff—Cross.*

Q. Would the occasion ever arise when you would send out a postal card on Action Comics and another one on another magazine that the reference on both would be received at or about the same time?

The Court: On the same card?

Mr. Koenig: On different cards.

A. On different cards; that is right.

Q. So it is possible that there may have been well over a thousand cards received at one specific time? A. No, it is not possible in only one day. We never did get that many. 152

Q. How many did you get in a day? A. We would receive sometimes 100 or 150 or 200. I never counted them.

Q. Let me understand this: in order to get the returns on a magazine like Action Comics you would necessarily have to examine several hundred cards over a period of time? A. Yes, surely.

Q. And did you see Mr. Fox do this? A. Not the complete compilation, no. I might say that the World Astrology Magazine was a magazine that sold around 33 per cent. of the total copies distributed and Action Comics enjoyed sales of 80 or 85 per cent. There would be occasions when World Astrology dealers would have a very good sale on World Astrology and then the position might be quite the reverse. That happened when I would be looking at World Astrology. 153

Q. Isn't it a fact you examined your cards separately and Mr. Fox examined his cards separately? A. We might on occasion but very often we would both come down on a morning and we would both be very anxious to see

154

*Jacob S. Liebowitz—for Plaintiff—Cross.*

what the results were and we would be looking them over at the same time on the desk.

Mr. Koenig: That is all.

*Cross-Examination by Mr. Fried:*

Q. Just one question. You stated that your sales for Action Comics was 80 or 85 per cent., did you not? A. Not on an average; no, sir.

155

Q. Well, for instance on the June issue you had a draw of 202,000 odd and you sold 130,000, is that right? A. That is right.

Q. And on the next issue you had a draw of 211,000 and you sold 136,000? A. Yes.

Mr. Fried: That is all.

Mr. Koenig: When did Mr. Fox cease to use your distributing concern?

The Witness: I think he gave the Independent News Company notice on February 11th, 1939.

156

*Jerome Siegel—for Plaintiff—Direct.*

157

JEROME SIEGEL, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

*Direct Examination by Mr. Manges:*

Mr. Manges: I only bring on this witness because they plead as a separate defense lack of originality. I think it is a burden.

The Court: All right.

Mr. Manges: Since they plead that I think it is a burden on our part to go forward with something, however little. 158

The Court: It is your burden to establish originality. I don't care what you do, just so we get it done.

Q. Is the script for "Superman" as published in Action Comics magazine written by you, Mr. Siegel? A. Yes.

Q. And are you the Mr. Siegel that has been referred to in these written exhibits that have been offered this morning? A. Yes, sir.

Q. You have been here since the beginning of the trial in this room? A. Yes, sir. 159

Q. And you have heard the testimony? A. Yes, I have.

Q. Where do you reside? A. In Cleveland, Ohio.

Q. And you have come here for this trial? A. Yes.

Q. Mr. Siegel, when did you conceive the idea of "Superman", approximately? A. Six years ago.

Q. And you have been the only one that has written the script for "Superman" appearing in Action Comics magazine, have you not? A. Yes, I have.

Q. And after you conceived of it, you tell us what you did about it, after you put it in script? A. The



*Jerome Siegel—for Plaintiff—Cross.*

system with which we work now is different. The system with which we work is different than it was when we first started.

The Court: Tell us how you did it first and tell us how you do it now.

The Witness: Originally I would write out the script and recite it to an artist and point out the way that I thought the scenes should be depicted and then he would proceed to finish off according to my points. Now we have a great deal of work and we find it necessary to have artists assist us so I write up the script and mail it to the city where the apprentice lives and this apprentice makes rough sketches of the drawings and Shuster finishes the drawings.

Q. And Mr. Shuster is the Mr. Shuster that has been referred to in the prior testimony, is he? A. Yes.

Q. And he is the main artist? A. Yes, he is.

Q. In writing up your script do you copy anybody else's work? A. No.

Q. Is it original with you? A. Yes, it is.

Mr. Manges: That is all.

*Cross-Examination by Mr. Blum:*

Q. Did you ever hear of a comic strip called "The Phantom"? A. Yes, I have heard of it recently.

Q. When was the first time you heard of "The Phantom"? A. It may have been about a year ago or a year and a half.

Q. Where did you see the comic strip entitled "The Phantom"? A. The first time I saw it I believe it was—

*Jerome Siegel—for Plaintiff—Cross.*

The Court: It doesn't make the slightest difference. This isn't a patent case. I don't care what he knows, the question is whether what he did he thought of himself. He said he didn't copy it. Now the question is whether the other people copied his thing.

Mr. Blum: What I am addressing myself to is what he may have seen and what he may have copied.

The Court: When did you see it?

The Witness: Either about a year or a year and a half ago.

Q. And that was prior to the first publication of the "Superman", wasn't it? A. Yes, it was.

Q. And where did you see the publication of "The Phantom"? A. It was reprinted in one of the Big Little Books sold in the 5 and 10 cent stores.

Q. How was that character, "The Phantom" dressed; in what costume? A. Well, when I first saw the book I was startled to see how similar it was to the "Superman" features.

The Court: He said he conceived the idea of the "Superman" six years ago and now he says he saw this "Phantom". Before the "Superman" was published, you mean?

The Witness: Yes.

Q. I believe you stated to the Court that you were startled at the similarity between "The Phantom" and the "Superman". Now tell the Court what points of similarity startled you? A. Well, the character appeared to be dressed in a close-fitting costume.

Q. What other points of similarity? A. Well, that is about as far as it went.



*Jerome Siegel—for Plaintiff—Cross.*

Q. Did you see in that little book or in those cartoons scenes depicting this character, "The Phantom", taking off his outer garments and appearing a skin tight black costume with a mask? A. No, I did not.

Q. What newspapers did you read in your home town before the "Superman" was published? A. The Cleveland News, The Plain Dealer and Press.

Q. Now I show you a photostat of a sheet of paper which bears the date of November 6, 1937, New York Journal and American, and call your attention to the strip  
167 entitled "The Phantom" and ask you whether this is the figure that you saw in that book prior to the publication of the "Superman"? A. This is the figure that I saw in the book.

Mr. Blum: I ask that this be marked for identification.

The Court: Where is the book?

Mr. Blum: I don't know what book. I will try and see if this is the book he saw.

Q. Is this the book which you saw? A. I don't believe that was the release.  
168

The Court: Look at it.

Q. (Handing book to witness.) A. It may have been another book issued by the same company.

Q. Just look at this book which I show you and tell us how closely the pictures in this book represent the pictures in this book which you saw before the "Superman" was published? A. Well, I did not read the book, I merely picked it up and flipped the pages and noted that the character was similar to the way I had depicted "Superman".

*Jerome Siegel—for Plaintiff—Cross.*

Q. Up to that time the "Superman" had not been published, isn't that so? A. It had not.

Q. Now flip the pages of this book and look at the cover and tell the Court how closely the pictures in the book you have in your hand—

The Court: He can't tell the Court any such thing. The Court could look at it himself.

Mr. Blum: Your Honor, we haven't the book which he says he saw in Cleveland or elsewhere. I haven't got it.

The Court: It doesn't do any good then. He  
170 has already said the principal thing was the taking off of the outer garments which left a close fitting garment inside.

Q. Was that picture of "The Phantom" you saw in that book one which represented a character with a mask?  
A. Yes, sir.

The Court: That case we had, and that I got reversed in, that I first decided in your favor involved just the same sort of question we have here, namely, a trespass by this man is not a defense  
171 for a trespass by that man.

Mr. Blum: I am not pleading trespass by this man.

The Court: That is what you are leading up to.

Mr. Blum: No. The man says he conceived of it some six years ago. Upon that I don't know what corroboration is going to be offered.

The Court: I don't either. Certainly people like Eugene O'Neill always keep notes and can trace their characters back. Those things are an exception to the self-serving declaration rule and they are always allowed in patent cases.

Mr. Blum: I am not charging any trespass because it so happens we are the attorneys for the

172

*Jerome Siegel—for Plaintiff—Cross.*

King Features Syndicate which published "The Phantom" and we have never made any claim of infringement against the plaintiff or against the defendant. It is not a matter of trespass at all.

The Court: What are you claiming?

Mr. Blum: I am trying to find out what originality or what spark of originality this character the "Superman" possesses, that is all.

The Court: Go on.

Mr. Blum: Just one question so I won't weary the Court.

173

Q. Since you haven't the book which you say that you saw prior to the publication of the "Superman" how about this picture on the cover of the book I show you, is that about the same as the picture you saw about a year and a half ago? A. Yes, except that I think the other was whole length.

Mr. Blum: I offer this.

The Court: You can't do that. I am very, very broad about these trials, but that is going much afield. You produced that book, which is all right.

174

Mr. Blum: May I just have it marked for identification?

The Court: You can have anything marked for identification. What about this other photostat you had, has that been marked?

Mr. Blum: No, your Honor, that has not been marked. I would like to mark that now, if I may. This is a page of the New York Evening Journal.

(Marked Defendant's Exhibit A for Identification.)

*Jerome Siegel—for Plaintiff—Cross.*

175

The Court: The only part you are interested in is just this thing marked "Phantom"?

Mr. Blum: Yes, sir.

The Court: Did you ever see that?

The Witness: The daily stuff?

Q. Did you ever see that paper? A. This paper; no. When I came to New York the first time a few years ago that was shown to me up at Mr. Nicholson's office.

The Court: Whose office?

The Witness: Major Nicholson.

176

A. (Continued) However, there is one other thing I would like to mention—I mean in connection with my having seen this book.

Q. Go ahead. A. When I saw this book I went over to the artist's office and I wondered whether our "Superman" had been seen lying around the King Features Syndicate.

The Court: You went over to an office? Whose office?

The Witness: Joseph Shuster. We had submitted our script and strip first to Central Press and the Central Press Syndicate, which is owned by King Features—

177

The Court: When had you first gotten your script up, you and Shuster together? Do you remember the date?

The Witness: I couldn't tell you the exact date. If I look back through my letters I might find correspondence. However, there are different ways I could find that out.

*Jerome Siegel—for Plaintiff—Cross.*

The Court: How can you find it out? You live in Cleveland, don't you?

The Witness: That won't be necessary, but I wish to say that "Superman" was submitted to the King Features Syndicate quite a while before I saw this book and possibly before they distributed it.

Q. Who submitted it? A. Central Press Syndicate, which is owned by King Features Syndicate.

179 Q. How do you know it is owned by King Features Syndicate? It may be, but I don't know it.

Mr. Manges: Mr. Blum isn't on the stand.

Q. How do you know Central Press Syndicate is owned by King Features Syndicate? A. Well, I heard it and I also saw something from Central Press Syndicate bearing a King Features Syndicate stamp.

Q. You mean at the present time? A. Yes.

Mr. Blum: I move to strike out that part about the King Features Syndicate.

180 The Court: I don't know that I will strike it out.

Mr. Blum: Just so we will know what we are talking about I would like to have it marked for identification.

The Court: What?

Mr. Blum: The book and the photostat.

The Court: You can mark anything for identification but I don't care about the book.

*By the Court:*

Q. What I want to find out from you is this: This photostat is of the New York Journal. Putatively, at

*Jerome Siegel—for Plaintiff—Cross.*

least, it says Saturday, November 6, 1937. That was after you claim to have conceived the idea of "Superman"? A. Yes, sir.

Q. And it was before "Superman" was published? A. Yes.

Q. Is that right? A. Yes.

Q. When did you first come to New York? A. I believe three years ago.

Q. That would be 1936. That would be before this was published. This is November 6, 1937. A. Perhaps it was two years. I don't know the exact date but it was just a little while before these magazines were completely taken over by Detective Comics. 182

Q. That is all right, but what I am trying to find out is the relation in time of this comic strip called "The Phantom" to your conception of the "Superman" and your actual publication of the "Superman". You say this particular publication was between those dates, that is, November 6, 1937, which was the date which was between the time when you first conceived "Superman" and the time when "Superman" was published by this plaintiff, is that right? A. Yes.

Q. What was your business before, during this time when you say you conceived this "Superman"? Were you just a newspaper reader or were you a draftsman? A. In an amateurish way I was putting out magazines, editing through the mails. 183

Q. You don't do any drawing yourself? A. No, I do not.

Q. You just write the letter press releases? A. Yes.

Mr. Blum: I will say, your Honor, that I can show very easily that the publication of this began in February, 1936. I have a copy of the certificate



*Jerome Siegel—for Plaintiff—Cross.*

from the register where we registered the title in the Patent Office of some of the original sheets.

The Court: The Patent Office?

Mr. Blum: You register the title in the Patent Office as a trade-mark, and that certificate was granted in July, 1936, I think. We will take it up later.

The Court: I don't know what that has got to do with it. I want to get through with this. All I want to do is to look at these magazines.

*By Mr. Blum:*

Q. Do you have with you the very first drawing that was made of the "Superman"? A. I do not. That strip was redrawn a number of times.

Q. When was that strip drawn for the first time, in what year?

The Court: He didn't draw it, he wrote the letter press. When did you get together, you and the artist and complete the strip?

Mr. Blum: That is what I meant to ask.

Q. When did you and your artist get together for the first time to make a complete strip? A. In 1933.

Q. Have you got the duplicate of that strip, the original strip? A. It might possibly be in the release that was printed in the magazine because we had drawn several variations of the strip and we cut it up and pasted them in magazine form.

The Court: Unless we have the date of it it would not do us any good anyhow.

Mr. Blum: That is all.

*Jerome Siegel—for Plaintiff—Cross.*

*Cross-Examination by Mr. Fried:*

Q. Will you please turn to page 8 in Detective's Action book, November, 1938 issue, and look at that and then will you turn—

The Court: Where are they numbered?

Mr. Fried: None of them are numbered, you have got to count them. Your Honor can identify them by looking at the motion papers for an injunction.

Q. (Continuing) How many frames or boxes constitute the story of "Superman" in that particular issue?

A. 99. There are 100 pictures to the release but 99 panels.

Q. 99 panels, is that right? A. Yes.

Q. And how many pages does it cover? A. 13.

Q. Would you say that the other 8 or 9 issues also are of 13 pages each? A. With the exception of an issue that was 9 pages.

Q. And each of these 13-page issues of "Superman" contain about 99 or 100 frames? A. That was the average.

Q. It is alleged by the complainant here that this picture on page 8, which I will mark with an "X"—

The Court: You mean that picture of a moon and a man striding along?

Mr. Fried: That is right.

Q. (Continuing)—was infringed by a picture on page 4 of Wonder Comics, the defendant magazine, which we will mark X-1. Now, this magazine, Wonder Comics, consists of 14 pages of script of "Wonderman", does it not, and it too has at least 100 frames, is that right? A. Well, it may possibly have more. I didn't count them.



190

*Jerome Siegel—for Plaintiff—Re-direct.*

Q. But at least 100?

The Court: He didn't count them. Anybody can count them if they take time. We are not interested in how many frames there are.

Q. In the June issue of Action Comics will you turn to page 1, and we will mark this picture Y. Will you also turn to page 1 in Wonder Comics?

191

The Court: I don't see why, when you have a witness on the stand, you have to do these things. After all, it is how it strikes me, not how it strikes him.

Mr. Fried: I am trying to direct your Honor's attention to the specific charges of infringement.

The Court: I know, but you can do that in your argument. We are just wasting time now. We don't need a witness on the stand to do that. When you have a lot of these things to look at I just look at them and make up my mind. Ask him anything about dates or anything like that, if you want.

192

Mr. Fried: There are no other questions, your Honor.

*Re-direct Examination by Mr. Manges:*

Q. I show you this letter dated June 20, 1934, and ask if this is a letter that you sent to Mr. Frank Armer (handing witness)? A. Yes, it is.

Q. Will you read that and see if that refreshes your recollection as to the dates with respect to "Superman"?

The Court: Does it refresh your recollection?  
The Witness: Yes, it does.

*Jerome Siegel—for Plaintiff—Re-direct.*

193

Q. Do you know when you submitted the first script of "Superman"? A. You mean to any publication?  
Q. Yes.

Mr. Manges: I will withdraw the question.

Q. I show you this letter dated October 4, 1934, and ask you if it is a letter written by you to Mr. Frank Armer?

The Court: Who is Mr. Frank Armer?

Mr. Manges: He is an editor.

194

The Court: Ask him.

A. He was the editor of Super Magazines, Incorporated. This is my letter.

Mr. Manges: I offer this letter.

The Court: You have got a witness on the stand, a live man, still articulate enough to say the dates when he first submitted it.

Q. Will you please read the letter of October 4th, 1934, and see if that refreshes your recollection as to the script of "Superman"? A. This was the feature "Superman" which was submitted to publications at this time.

195

The Court: What time?

The Witness: Previous to October, 1934.

The Court: I will let you mark these things on the theory of an inventor's notes.

Mr. Manges: They are the originals which I obtained from the addressees.

The Court: They are signed by you?

The Witness: Yes.

Mr. Fried: If your Honor please, I object to the introduction of those letters in evidence upon the

*Jerome Siegel—for Plaintiff—Re-cross.*

ground that they are incompetent, irrelevant and immaterial; on the further ground they are not binding on the defendant Kable News Company and the defendant Interborough News Company.

The Court: You haven't been in this kind of a case much because if you had you would know, for instance, that if Eugene O'Neill keeps a little notebook, things like that are always allowed in when he has a case for copyright infringement, and so about notes of inventors. There is no question about that and I think these are juridicially competent for that reason.

Mr. Manges: I offer the letter of June 20th, 1934, as Plaintiff's Exhibit No. 30.

(Marked Plaintiff's Exhibit 30 in evidence.)

Mr. Manges: I offer the letter of October 4th, 1934, as Plaintiff's Exhibit 31.

(Marked Plaintiff's Exhibit 31 in evidence.)

Mr. Manges: That is all.

The Court: We will adjourn until a quarter of three.

(Recess until 2:45 P. M.)

(AFTER RECESS.)

2:45 P. M.

JEROME SIEGEL, resumed the stand.

*Re-cross Examination by Mr. Blum:*

Q. Show me the earliest dated drawing that you can produce of the "Superman" drawings? A. Well, that letter dated 1934.

The Court: He didn't make the drawings.

*Jerome Siegel—for Plaintiff—Re-cross.*

Q. I am referring to a drawing that was made for you by Mr. Shuster or by anybody else of the "Superman". Have you any early dated drawing here? A. Well, I don't have any reproduction.

Q. You haven't got it? A. No.

*By the Court:*

Q. Have you got any drawing? What is the earliest drawing that you have got? Have you got any here? A. Well, it was reprinted in the magazine.

Q. Is that the earliest representation you have got of it? A. Well, no, it was not. It was first drawn on ordinary paper.

Q. Of course it was. What have you got now? Supposing somebody was doubting your word about it what have you got to show, what can you produce and say "Here is something that indicates when I first did this"?

The Court: That is what you mean, don't you? Mr. Blum: Yes, sir.

A. The only drawings I can show are those that are in the magazine.

The Court: That begins in March, 1938, doesn't it?

Mr. Manges: April.

The Court: The April number of 1938?

Mr. Manges: It is the June issue but published in April.

Q. That is the earliest thing you have got to show? A. Yes.

*Jerome Siegel—for Plaintiff—Re-re-direct.*

*By Mr. Blum:*

Q. Please look at this picture on the cover of this book I hand you (handing witness). Is that identical with the picture that you saw sometime in 1937 or 1936?

A. I don't recall seeing this picture.

Q. Now I show you this picture on the other cover. Is that the picture which you saw in 1937 or in 1936?

A. It might have been. I don't remember exactly how that appeared.

The Court: You can't get anywhere with that.

Mr. Blum: I think so. I am through with this witness.

*Re-re-direct Examination by Mr. Manges:*

Q. Mr. Siegel, in your letter of June 20th, 1934, Plaintiff's Exhibit 30, you state: "You may be interested to know that a strip of mine entitled 'Superman' may be syndicated in the daily newspapers in a half a year or so." Now, on the date that you wrote that letter were there scripts of "Superman" in existence? A. Yes.

Q. In strips?

The Court: In drawings?

Mr. Manges: Yes.

Q. Were there strips of it, of drawings? A. Yes, there were.

Q. And prior to the date of the writing of this letter on June 20th, 1934, had you sent "Superman" strips to any newspaper or magazine? A. Yes, I had sent it to the newspaper syndicates or to a publisher's syndicate.

The Court: Are you giving the real name?  
The Witness: Yes.

*Jerome Siegel—for Plaintiff—Re-cross.*

The Court: Publishers Syndicate?

The Witness: Yes.

The Court: Where is that?

The Witness: That is in Chicago.

A. (Continued) And to Mr. La Farve of the La Farve Newspaper Syndicate.

*Re-cross Examination by Mr. Blum:*

Q. What happened to those drawings that you say were made in 1934 and sent to these various people? A. 206  
Well, they were pasted up into a magazine page form.

Q. Where are they now? A. Well, they are in the magazine.

Q. I am asking about the original drawings that you say were made in 1934, where are they?

Mr. Manges: He answered that they are in the magazine.

The Court: He says the only place now is in the magazine.

*By the Court:*

Q. What did you say? A. Yes, those drawings were cut up and pasted into magazine form, into page form for magazines.

Q. And then what happened to them? A. And they were sent in and are now published in Action Comics.

Q. But after they were pasted in magazine form were they photographed or photostated or what happened to them? How did they reproduce them? A. They were simply cut up into magazine page form and mailed in to the magazine in the beginning of 1938. That is what happened to them.

*Jerome Siegel—for Plaintiff—Re-cross.*

Q. You mean the ones that you say you had back in 1934? A. Yes.

Q. And then that was turned into this Action Comics and by them printed but you made up a dummy or something like that with these pictures in it. From that they reproduced the pictures, is that the idea? A. The very same pictures.

Q. The very same pictures, yes, but don't you see you made one picture, you and your collaborator Shuster, and then what he is asking you is where is that earliest picture that you made and you say that you had made some, you and Mr. Shuster, is that right? A. Yes.

Q. You made some before June 20th, 1934? A. Yes.

Q. Was Mr. Shuster working then with you? A. Yes.

Q. You made some then and those same ones you had made at that time were subsequently, not having been taken by these other newspaper syndicates to whom you offered them, were subsequently taken by Action Comics, is that the story? A. Yes.

Q. Then Mr. Blum wants to ask you what has become of those and you say what? A. I suppose they are in the office of the magazine, in the files.

Q. In the files? A. I think so.

Q. Would they be dated? A. Well, they have no date upon them.

Mr. Blum: That is all.

Mr. Manges: That is all.

*Warren A. Angel—for Plaintiff—Direct.*

WARREN A. ANGEL, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

*Direct Examination by Mr. Manges:*

Q. Mr. Angel, are you connected with the defendant Kable News Company? A. I am.

Q. In what capacity? A. Vice-president and General Manager.

Q. The Kable News Company distributed the May, 1939 issue of Wonder Comics, did it not? A. We did.

Q. And when did it distribute it? A. In the middle of March, 1939. This last month.

Q. Will you give us the date? A. I think it was completed on March 22nd,—final copies were shipped.

Q. And when did it begin? A. About the 15th, 16th.

Q. And how many copies of that issue of Wonder Comics were distributed by Kable News Company?

Mr. Blum: I object to that. I think he is trying to anticipate what may or may not be an accounting. It is not important, the extent of the defendant's business.

The Court: I will let him do it.

A. Approximately 230,000.

Q. I show you this paper and ask you if this is a circular distributed by Kable News Company with respect to Wonder Comics (handing witness)? A. It is, sir.

Q. And when was that circular distributed? A. I don't know the exact date but it is in the latter part of March I know.

The Court: After this was drawn up?



*Warren A. Angel—for Plaintiff—Direct.*

The Witness: About the same time we sent out the book is about the same time we sent out the copy.

Mr. Manges: I offer this in evidence.

(Marked Plaintiff's Exhibit 32 in evidence.)

215 Q. I call your attention to the fact that Plaintiff's Exhibit 32 states: "May issue shipping at once." Does that refresh your recollection as to which went first, the distribution of the magazine or the distribution of the circular? A. I don't know. I can't answer that accurately but it was probably sent out at the same time the books were being shipped.

Q. I show you this poster and ask if that was a poster used by the Kable News Company (handing witness)? A. Yes, it was.

Q. In connection with Wonder Comics? A. That is right.

Q. Was this poster distributed throughout the country? A. It was.

Mr. Manges: I offer it in evidence.

(Marked Plaintiff's Exhibit 33 in evidence.)

Q. Mr. Angel, you know Mr. Fox, the president of the defendant Bruns Publications, do you not? A. I do, sir.

Q. Did you ever have any conversation with Mr. Fox as to the similarity of Wonder Comics with Action Comics? A. No, sir, I did not.

Q. You and he never discussed the question of similarity of these two magazines? A. Are you talking of contents?

Q. Any kind of similarity? A. No, sir.

Q. Did you ever discuss the question of such similarity with any other person? A. No, sir.

*Warren A. Angel—for Plaintiff—Cross.*

Q. You say similarity in contents. Did you discuss any other kind of similarity? A. Yes, sir.

Q. What kind? A. Being a comic magazine I discussed that part of it.

The Court: What do you mean by that?

The Witness: He handled about five comic magazines of this type, like Detective Comics, Western Comics, and I asked him what type of comic it was and he said a general comic.

218 Q. But there was no conversation concerning Action Comics? A. No, sir, there was not.

Q. Was there any conversation concerning the character "Wonderman"? A. No, sir, there was not.

Q. Or "Superman"? A. No, sir.

Mr. Manges: That is all.

*Cross-Examination by Mr. Fried:*

Q. Mr. Angel, you are the vice-president of the Kable News Company, are you not? A. Yes, sir.

219 Q. And your office is located here in New York City? A. Right.

Q. Kable News Company is a national distributor of magazines? A. Yes, sir.

Q. About how many magazines does Kable News Company distribute? A. Title or numbers?

Q. Titles? A. About 175 or 180.

Q. And about how many copies of magazines do you distribute monthly? A. Between 7,000,000 and 8,000,000.

Q. A month? A. A month.

*Warren A. Angel—for Plaintiff—Cross.*

Mr. Manges: I respectfully object to this as not proper cross-examination; nothing that I brought out.

The Court: I don't know what you are getting at. It does not seem to have anything to do with this. If you want to show it is a successful concern, I suppose it is.

Mr. Fried: Your Honor, I want to get in the testimony of Mr. Angel which I would give in direct because I would like not to have Mr. Angel come back tomorrow.

The Court: I am quite willing to do that but I am only asking what it has got to do with this; what is the importance of it. Supposing you called him on direct examination. What was the point of it?

Mr. Fried: These are just general questions. I am just leading into something.

Q. You entered into a contract, did you not, Mr. Angel, with the Bruns Publications for the distribution of Wonder Comics? A. Yes, sir.

222 Q. How many issue of Wonder Comics have you distributed? A. One.

Q. And that is the May, 1939, issue of Wonder Comics? A. Yes, sir.

Q. Just how do you distribute this magazine? What is the operation of distributing this magazine, Mr. Angel? A. The mechanical operation?

Q. Yes. A. We furnish the publisher or his bindery or his printer labels and instructions to ship directly from his plant.

Q. To whom? A. To our wholesalers located throughout the country.

*Warren A. Angel—for Plaintiff—Cross.*

Q. Were the labels containing and names and addresses of your wholesalers forwarded to any bindery in this case? A. Yes.

Q. To whom? A. Trade Bindery.

Q. And where are they located? A. I don't know the exact address. I think it is 31st Street.

Q. In New York City? A. In New York City.

Q. And the magazines are then sent out by the Trade Bindery Company, are they? A. Yes, sir.

Q. Before Kable News Company even saw the magazine, is that right?

The Court: What is the difference?

A. I saw copies partly, half way through the distribution. Somewhere in there I saw copies.

The Court: It doesn't make any difference anyhow.

Mr. Fried: This is really on the question of knowledge and intent here, your Honor.

The Court: They did distribute it.

Mr. Fried: Yes, they did. There is no question about that.

The Court: I don't care what their intent was. They run the risks of trespassing if they are wrong.

Q. Did Kable News Company have any knowledge of the contents of Wonder Comics magazine? A. No, sir.

Q. Did it have anything to do with the manufacture of the "Wonderman"? A. No, sir.

The Court: That doesn't make any difference if they distributed it, not the slightest. Is that all?

Mr. Fried: That is all.

226

*Warren A. Angel—for Plaintiff—Re-direct.*  
*Warren A. Angel—for Plaintiff—Re-cross.*  
*Discussion.*

*Re-direct Examination by Mr. Manges:*

Q. You have no sales figures as yet for the May issue, have you? A. Not as yet. We have none. The book is still on sale.

*Re-cross Examination by Mr. Fried:*

Q. When does this book come off sale, Mr. Angel?

227 A. It should come off sale along about the latter part of April.

Q. Then you won't know what the actual sales of this magazine are until 70 days thereafter, is that correct?

A. That is correct.

Q. That is 70 days after the off-sale date? A. That is correct.

Mr. Fried: That is all.

Mr. Manges: I understand counsel will concede that Mr. J. Stolz is a director of Interborough News Company, is that correct?

228

Mr. Fried: He is a vice-president.

Mr. Manges: I understand it will be conceded that on or about July 27, 1938, Mr. Stolz sent a certain letter to all branch managers, inspectors and route men, with which Interborough News Company had relations, a letter in the form that I have here in my hand.

The Court: What date?

Mr. Manges: July 27th, 1938. Is that correct?

Mr. Koenig: I merely tell Mr. Manges on his statement that Mr. Stolz sent out this letter I

*Discussion.*

229

would not require him to prove the actual sending out of it by producing him.

The Court: Is it signed?

Mr. Manges: No; it is a mimeographed letter.

The Court: Where is Mr. Stolz?

Mr. Manges: I was going to subpoena him. I asked if I would have to and they said no, they would concede the letter was sent out and, acting on that, I didn't subpoena him. If there is any question about it I would like to subpoena him.

The Court: Did you see the letter before?

230

Mr. Manges: I showed it to him before.

Mr. Koenig: I said I would not require Mr. Stolz to be produced to say he sent out the letter.

The Court: That speaks for itself. If he did send out the letter or circular, whatever it is, then let it be admitted.

Mr. Koenig: Mr. Fried represents the Interborough News Company.

Mr. Fried: If your Honor please, I represent the Interborough News Company in this case but I know nothing about this letter and I certainly am not in the position to concede that the letter was written. I know nothing about it. As a matter of fact, this letter was written in 1938.

231

Mr. Manges: Then I ask that Mr. Stolz be produced.

The Court: Where is he?

Mr. Manges: He is up in his office.

The Court: Where is his office?

Mr. Fried: The last I knew of Mr. Stolz is he went out to Detroit to attend the funeral of the president of the Interborough News Company, one of the defendants in this case. Whether he has come back or not I do not know.

Mr. Manges: Mr. Stolz, I am informed, is in his office right now.

The Court: Call him up and tell him to come down here. Have one of your men call him up and tell him to come down here. Why didn't you speak to the person that represented Interborough News Company?

Mr. Manges: I did, your Honor, I spoke to both of these gentlemen this morning. I spoke to both of these men.

The Court: This is not the Municipal Court.

Mr. Fried: Mr. Manges, in order that the record be clear, you will have to concede I made no comment about that letter. You showed me the letter and then it was taken out of my hands and I made no comment about that letter.

The Court: In order to prove it he would have to have Mr. Stolz; you knew that, didn't you? You knew he would have to prove it by Mr. Stolz, didn't you?

Mr. Fried: Perhaps. I didn't even know that. I had no notice of this letter at all.

The Court: Well, we will get it in eventually by somebody. There must be other people in their office. You subpoena the whole bunch of them and bring them down here tomorrow.

Mr. Manges: Otherwise the plaintiff will rest, your Honor.

The Court: I will let you deal with that letter after the defendants' case is in.

Has the defendant got anybody to call?

Mr. Blum: Do you rest, Mr. Manges?

Mr. Manges: We rest except for that letter.

Mr. Blum: That can always go in at any time.

WILLIAM EISNER, called as a witness on behalf of the defendants, being first duly sworn, testified as follows:

*Direct Examination by Mr. Blum:*

Q. State your age, residence and occupation? A. I am twenty-two years old. I am an artist. I live at 2564 Creston Avenue, Bronx, New York.

Q. Are you engaged in business for yourself? A. I am.

Q. What is the nature of that business? A. We supply comic material for newspapers and magazines.

Q. Who is the other person who is associated with you in that business? A. Mr. Iger.

Q. Did you supply or did Mr. Iger and you supply to the defendant in this case Bruns Publications the pictures and the drawings for the matter complained of? A. Yes, we did.

Q. What was your relation with the Bruns Company at that time? Were you employed by them or were you independent contractors? A. We were independent contractors.

Q. In addition to supplying material in the form of drawings and script to the Bruns Company, the defendant in this case, have you also supplied such material to other concerns? A. We have.

The Court: What has this got to do with it? It doesn't make the slightest impression on me. These people published the thing.

Q. This is the material you supplied—

The Court: What difference does it make. It is there and I look at it. I am not going to listen to



*William Eisner—for Defendants—Direct.*

it. It is just perfectly absurd. Why you want to go into it I cannot understand.

Mr. Blum: I want to go into the question now whether he copied and where he derived the material that he supplied to the defendant.

The Court: It doesn't make any difference. If the result of the thing is something that is copied and they knew this magazine, this other magazine, and here they have got this thing, what difference does it make whether the man who drew these things—you mean you want to show he didn't know the other magazine?

Mr. Blum: I want to show this: that before he had ever heard of plaintiff's magazine he had submitted to the defendant his own drawings and script of the character in issue; that he was told to come back; that at the end of a year or so he finally induced the defendant Bruns Company to publish his material and that before that time, before he had ever heard of the plaintiff's magazine or character, this man, from his knowledge of comic strips and his reading of strips like "The Phantom" and others, had found these common sources and derived the idea of a man dressed in tight fitting costume and performing all these feats.

In these copyright cases I think the defendant is entitled to prove first lack of actual copy, that the material was originated before the plaintiff's material appeared on the market and that there was a common source which was availed of by this man. Those are the standard defenses which I have listed in my little trial memorandum and you are always allowed to prove that. If it were a question, for example, of a low comedy Irishman

*William Eisner—for Defendants—Direct.*

and a low comedy Jew, like in that *Abie's Irish Rose* case, in that case the defendant was allowed to prove that these comic characters were known for many, many years and the defendant derived its knowledge not from the plaintiff but from some sources common to all, and that is what I am trying to prove here. It is a standard proof and I think proof of that kind has been offered in other cases.

The Court: I understand if I wanted to cut out everything else except that question of access and just take those things and look at it that is all I would have to do in this case. 242

Mr. Blum: Suppose, for example, your Honor, you would believe this man made a drawing in January, 1938, and submitted it to the defendant Bruns Publishing Company before the plaintiff's magazine had ever been published?

The Court: It doesn't make the slightest difference if the Bruns Company—before the plaintiff's magazine had ever been published?

Mr. Blum: Yes.

The Court: Then these people went on after the magazine had been published, they went and picked up this thing and found it had gone well and went on and took it on and they knew it was, according to their contention, a copy. 243

Mr. Blum: But even in the case of a copy you must prove something more than access; you must prove an actual plagiarism or copying.

The Court: You can do it by looking at it. That is the way you do it. I am very used to these cases. All I have to do is look at the two things and determine it. This man could talk blue in the face

*William Eisner—for Defendants—Direct.*

and say one thing was not copied from another but it doesn't make any difference if you had that thing and this thing was published and they knew it when it was published.

Mr. Blum: May I remind your Honor of the *Dardanella* case where Jerome Kern was accused of having copied his song from another. He took the stand and denied the copying. He said that the fundamental musical motif was one in Beethoven's Symphony published a hundred years prior to that and then Judge Learned Hand made up his mind as to whether when Mr. Kern wrote it he was thinking of the plaintiff's song or whether he was thinking of Beethoven's Symphony.

The Court: How can he make up his mind on a thing like that?

Mr. Blum: He made up his mind adversely to the defendant because he said on the entire case he believed Mr. Kern was thinking of Beethoven's musical motif and not of the plaintiff's theme.

The Court: I am not going to waste much time on this. Just exactly what is it you want to prove?

Mr. Blum: I want to prove this: that before the plaintiff's magazine was published this man and his associate had produced the drawings and part of the script which is complained of in issue without the slightest knowledge of any work that might have been done by plaintiff's writer and by plaintiff's artist at that time; that the material was then submitted to the Bruns Company prior to the time of publication of the plaintiff's magazine; that this man derived his knowledge of this figure, this man in skin tights, from "The Phantom" which had been a well known comic strip running in the daily papers for about three years prior to that.

*William Eisner—for Defendants—Direct.*

The Court: I don't know whether a man in tights can be copyrighted. The question is whether a whole thing, which you see here, whether one is a copy of the other.

Mr. Blum: To that extent, if this man states that in January, 1938, for example, he had conceived of his figure, made up drawings and submitted that to the defendant Bruns Company, the inquiry naturally starts with, first, whether he is to be believed. Now, if the plaintiff's figure were a very unusual grotesque figure, let us say, like "Betty Boop" or "Mickey Mouse" or "Barney Google," to take some of the adjudicated cases, and this man says he was the prior originator, we have one issue of credibility. On the other hand, whereas in "The Phantom" you do have a prominent representation of a man dressed in skin tights and wearing a mask and performing all kinds of feats of incredible agility, you do have common to the world what this man says was the source from which he got his idea and to that extent, as I understand the complaint—we have no bill of particulars but going back to the moving papers for preliminary injunction where the plaintiff stated its case, what they did there was this: Out of the several hundred pictures of plaintiff's various issues and the one issue of defendant's magazine they took little panels or frames, about five or six of the defendant's, and said that there the script and the picture is a deceptive simulation of panels with pictures and script in plaintiff's magazine. That was the allegation of copying.

For example, they claim that because this man had described his figure as "The Champion of the

*William Eisner—for Defendants—Direct.*

Oppressed" that was a coincidence to stating that to warrant the assumption of mere coincidence because they described their man——

The Court: I don't want to hear the whole case argued.

Mr. Blum: My questions will be very brief.

The Court: How long will this take?

Mr. Blum: I should say it wouldn't take more than five minutes for this man and five minutes for another man.

The Court: All right, I will hear you, but I don't think there is very much in it so long as he published it after, but go on.

Q. I show you a sheet of drawings and call your attention to the full length figure, which I will designate with a capital X, and ask you when you made the first drawing of that figure? A. The first drawing of that figure was made early last year.

Q. What part of 1938? Give us the month as best you can. A. Approximately January.

The Court: Is that thing I see before me a drawing in pen and ink on paper?

The Witness: That is a drawing in pen and ink on paper.

The Court: You mean it is an original drawing?

The Witness: That is the original.

Q. Now, how about the other items which appear on this sheet of paper, when were they drawn or written, in what and in what year? A. The rest of the page was drawn in early January of this year.

Q. That is 1939? A. 1939.

*William Eisner—for Defendants—Direct.*

Mr. Manges: What part of the picture?

The Court: I will put a circle in red around it. All the rest of it outside of this red pencil line was in January of 1939?

The Witness: Yes.

Mr. Blum: I offer in evidence the drawing identified by the X in red pencil as Defendant's Exhibit B.

Mr. Manges: I object to it upon the ground it is immaterial, incompetent and irrelevant, and not binding in any way upon the plaintiff. If they sat down and copied our material it is a plagiarism regardless of the date when a part of the drawing may have been commenced.

The Court: I think probably you are right, it would be a plagiarism, but it is irrelevant and immaterial. I don't really see anything in that thing myself. Mark it for identification and if I am wrong then you can have it if you go up.

Mr. Blum: This is made by this man, according to his testimony, before the plaintiff's publication ever appeared upon the market.

The Court: Yes, but that did not appear on the market. The plaintiff's publication did appear on the market before the defendant's publication subsequently came out.

Mr. Blum: Will your Honor permit me to offer that in evidence for what it is worth?

The Court: No, I will let you mark it for identification and I will exclude it.

Mr. Blum: Before I make my offer I would like to ask a few questions.

Q. At the time that you made the drawing marked with a capital X had you in any way known or heard of the plaintiff's character "Superman"? A. No, sir.



*William Eisner—for Defendants—Direct.*

Q. Was this drawing marked X your original drawing?

A. Yes, sir.

Q. And in making that drawing did you copy it from any other drawing? A. No, sir.

Mr. Blum: I now offer in evidence this drawing as Defendant's Exhibit B.

Mr. Manges: I renew my objection.

The Court: I will exclude it.

Mr. Blum: I ask that it be marked for identification.

(Marked Defendant's Exhibit B for Identification.)

Q. I show you Defendant's Exhibit A for Identification and ask you to look at the portion of Defendant's Exhibit A which is entitled "The Phantom." For how many years have you known of a comic strip, "The Phantom," being published in this country?

Mr. Manges: Objected to as incompetent, irrelevant and immaterial.

The Court: What difference does that make? I don't understand this whole thing. I think you are entirely on the wrong track about it. I may be wrong—I don't say I am right—but I am just telling you what my impression is.

Mr. Blum: Your Honor, I tried to brief this in my trial brief and it seemed to me that under the authorities—first of all we go back to the old case—

The Court: I don't want to hear the case argued now.

Mr. Blum: But, your Honor, I state, as I understand the law and the reason why I am offering this testimony is if there is any similarity between the figures of the respective parties but there was

*William Eisner—for Defendants—Direct.*

a prior source open to the world and known to all and this man who made the drawings for the defendant derived whatever similarity exists from something in the public domain, that upon that there can be no finding of infringement. That is my theory and for that reason I would like to ask one or two questions.

The Court: All right, go on and get your evidence in. You can mark that for identification and if I want to take it then I will take it but you go on and ask your questions and get through.

Q. For how many years have you known of the comic strip entitled "The Phantom" which appears upon Defendant's Exhibit A?

Mr. Manges: That is objected to as incompetent, irrelevant and immaterial.

The Court: I will let him answer that.

A. I think five years.

Q. You are sure that it was at least as far back as 1937? A. Positive.

Q. And did you know of this comic strip "The Phantom" before you had ever heard of the plaintiff's character or of its script? A. Yes, sir.

Q. Does that Defendant's Exhibit A for Identification illustrate the manner in which "The Phantom" has been portrayed to the public? A. It does.

Mr. Blum: I offer Defendant's Exhibit A for Identification in evidence.

The Court: I think probably the best thing to do is to reserve my views on that for the moment and also on the other exhibit. I will reserve my rul-



*William Eisner—for Defendants—Direct.*

ing on the other drawing this chap subsequently made which you just had marked for identification and also on this one and we will see how it develops. Perhaps during the argument I will decide on that. I think it is a very interesting question. It is something that I am quite satisfied in my mind about. We will take this up on the argument.

263 Q. Did you personally prepare all the drawings and all the script for the defendant's publications? A. I did—not all of the drawings.

Q. Who is the man who made some of the drawings if you didn't make them all? A. Well, we have boys working in the office.

Q. Were all the drawings made under your supervision? A. They were.

Q. Were any of the drawings of the defendant's publications copied from any of the drawings in Action Comics, which is the plaintiff's publication? A. No.

Q. Was any of the script of the defendant's publication copied from any of the script or words of the plaintiff's publication? A. No, sir.

264 Q. Referring to Defendant's Exhibit B for Identification and these words "Thus was Fred Carson the Wonderman endowed with supernatural strength" and so on. When for the first time did you designate your figure as the "Wonderman"? A. When I first presented the sketch that is marked with the X to Mr. Fox.

The Court: And when was that?

The Witness: That was in January of last year, 1938.

Q. What month of 1938? A. January of 1938.

*William Eisner—for Defendants—Direct.*

Q. And at the time you thought of the phrase or words "The Wonderman" had you at that time ever heard or had you ever known of "The Superman", which is the plaintiff's character? A. No, sir.

Q. Tell the Court how you came to think of the idea of a man dressed in tight fitting costume and performing numerous wonderful feats, as represented in Defendant's Exhibit B for Identification?

Mr. Manges: That is objected to as not within the scope of the issues.

The Court: How did he think of it?

Mr. Blum: Suppose I reframe the question.

Q. When you drew Defendant's Exhibit B for Identification and you got the idea of representing this figure performing a number of feats showing strength and agility had you previous to that time read or known of characters in literature dressed like the man in Defendant's Exhibit B for Identification and performing numerous feats of strength and agility?

Mr. Manges: That is objected to.

The Court: I don't think that is in these cases. 267 It doesn't make the slightest difference what was formerly in literature. If you are writing history it doesn't make any difference about those things. It doesn't seem to me that it does. He said he had this thing independently and did not copy it. We will have to see whether subsequent proceedings resulted in a breach of the plaintiff's copyright by reason of the publication of this thing, whether it is near enough like it to be a breach of copyright, but I don't see what other people did. It is not a question of antecedent things that were affected

*William Eisner—for Defendants—Direct.*

at all, it is just a question of whether A was copied from B. Every time you publish something it throws something into the public domain. Anybody can copy that to a certain extent—he can copy it too much and he has to be very, very particular if he starts to do any copying and if access is proved it dilutes his claim that he didn't copy it, so to speak. You are attempting to counter on that with dilution of the claim made by the plaintiff of copying by claiming that this man did the thing antecedent to the time the plaintiff's "Superman" was published, but I don't see that.

Mr. Blum: We don't have to go into Achilles with impervious skill.

The Court: You did in this brief.

Mr. Blum: We don't have to go into that. I don't want to argue the case, I want to get through, but may I suggest this: In the "Betty Boop" case which your Honor decided let us assume there had been proof that the "Betty Boop" figurine had been sold for a hundred years, with the exception of some very slight immaterial variation in contour?

The Court: I don't believe a hundred years ago they had a conception of "Betty Boop".

Mr. Blum: You see the defendant's figurine and the plaintiff's figure, the two of them look very much alike, but the defendant's figurine very much resembles something, let us say, which was commonly sold ten years previously and the defendant says "Before I designed my doll I knew that this thing had been made and you could buy it in any store for ten years."

*William Eisner—for Defendants—Direct.*

The Court: You are arguing the case. I don't want to hear any argument of the case. What question do you want to ask? I will pass on that now.

Mr. Blum: The question I want to ask is this:

Q. What sources known to you did you use in designing the figure which is marked with a capital X in Defendant's Exhibit B for Identification, sources known to you and published to the world?

Mr. Manges: Objected to as not within the scope of the issues. 272

The Court: I will take it subject to objection but I don't believe it has got anything to do with it. Go on.

A. The mythical characters—

Q. Let us confine ourselves to comic strips, books and things.

The Court: Confine yourself to "The Phantom", or whatever it is.

A. I was influenced by "The Phantom" who defended poor people and wore a skin-tight costume. 273

Q. In the daily sequences of the "The Phantom" as that appeared in the newspapers, is this character represented or was it represented as performing feats of great strength and agility? A. I didn't hear all of that.

Q. In these prior publications of "The Phantom" prior to the beginning of 1938 was that character "The Phantom" shown in these cartoons as performing feats of great strength and agility?

Mr. Manges: I object to that as not the best evidence and not within the scope of the issues.

*William Eisner—for Defendants—Cross.*

The Court: He said he thought of "The Phantom" and we have a picture of "The Phantom" in there, haven't we?

Mr. Blum: Yes.

The Court: I will sustain that objection. I don't need any more of this.

Mr. Blum: Very good. I am through with this witness.

*Cross-Examination by Mr. Manges:*

Q. Mr. Eisner, when is the first time that you ever saw copies of the magazine Action Comics? A. I don't recall it definitely.

Q. You don't recall? A. No. I have seen it from time to time.

Q. From what time to what time? A. Well, I have seen it on the newsstands.

Q. How long ago? A. Several months ago.

Q. How many months ago? A. I don't recall.

Q. One month ago or eleven months ago? A. Between that time; about eight months ago.

276 Q. Don't you follow the comic magazines as they come out? A. I am aware as they come out.

Q. Isn't that your line of trade? A. That is true.

Q. If you were selling a Chevrolet car would you watch the Plymouth? A. Well, naturally.

Q. If you saw a new magazine come out in April, 1938, Action Comics, would you look at it then or not? A. I didn't know the exact date when it did come out.

The Court: He said he doesn't remember when he first saw it. He couldn't possibly see it before it came out and it came out in April, 1938.

*William Eisner—for Defendants—Cross.*

Mr. Manges: Yes, sir, and I am trying to find out whether he saw that first issue at the time it came out in April, 1938.

The Witness: No, I did not.

Q. Did you see it in May, 1938? A. I don't recall the exact month I saw an issue of it but I saw it later on after that date.

Q. Did you read the contents of the magazine? A. No.

Q. You never read "Superman"? A. No.

Q. Never to this day have you read the script of "Superman", is that right? A. No. I saw it recently.

Q. You said you didn't know?

The Court: He said he didn't read it then when he first saw it.

Q. When for the first time did you ever read the comic strip "Superman"? A. About several days after our comic book came out.

The Court: Why did you read it then?

The Witness: Because I was informed by Mr. Fox that some sort of action was being taken.

Q. Referring to this lawsuit? A. Referring to a lawsuit.

Q. And until you heard of this lawsuit you, the creator of "Wonderman", never read the strip "Superman", is that right? A. That is true.

Q. And when you did read "Superman" did you see the clause "Champion of the Oppressed" repeated several times? A. I think I have seen that.

Q. You think you have seen it? A. I am not sure. It was mentioned several times. I don't know.

*William Eisner—for Defendants—Cross.*

Q. Do you know whether you ever used that phrase?

The Court: I was going to say that those are just ordinary English words. You mean just because it is repeated about this man therefore it is one of your main claims for infringement?

Mr. Manges: "Superman" is continually portrayed as "Champion of the Oppressed." They use that phrase throughout. They use "Wonderman, Champion of the Oppressed"—the same identical phrase.

Q. Did you ever see the words "Foe of evil and injustice" in "Superman"? A. I don't recall the exact words of the feature.

The Court: Of course, I can look at all these things and compare the two and see whether one of them is too close to the other.

Mr. Manges: This is only on credibility, your Honor.

The Court: All right; go on.

Mr. Manges: I would like to go down the list on some of these things and see what position he is going to take with reference to them. Some of them may refresh his memory.

The Court: I will let it in. Cross-examination is a very wide field. Go on.

Q. The "Superman" and "Wonderman" are dual characters, are they not? A. What do you mean, dual, two characters, two different characters?

Q. Aren't they in the character of an ordinary person and then they both, when they take off their ordinary garments, they assume the character of a person with

*William Eisner—for Defendants—Cross.*

superhuman attributes; isn't that so with respect to both of them? A. Well, as for the "Wonderman"—

Q. Yes or no? A. I don't know. I don't know whether the "Superman" refers from one to the other or from the other to one.

Q. You did read the November, 1938 issue of Action Comics, did you not? A. I don't remember what that issue looked like. I don't remember the exact date. If I see a copy—

Q. I refresh your recollection that at page 8 it states: "Outside the night club, he sheds his garments and glasses and stands revealed in the Superman uniform." Do you remember having read that? A. I have seen that.

The Court: Is that a picture with the moon back of it?

Mr. Manges: There is a moon back of one; yes, your Honor.

Q. And do you remember in your issue at page 4: "Alone on the deserted field a transformation takes place. Fred Carson removes his outer garments and becomes the Wonderman, mightiest human on earth"; do you remember that in yours? A. Yes, sir.

Q. Is it not true then that both "Superman" and "Wonderman" have a dual personality?

The Court: An ordinary man who wears glasses and a man who takes his clothes off and becomes incredible, that is what he means.

A. Well, he does. He wears civilian clothes as a disguise. He is essentially the "Wonderman." He only wears those clothes to disguise the fact that he is a "Wonderman".



Q. Is not that fact also true with respect to "Superman"? A. From what I read in that issue, yes.

Q. That is not at all true with respect to "The Phantom", is it? A. It is true. He wears civilian clothes to disguise his person.

Q. Isn't "The Phantom" just one personality? A. No.

Q. In the strip "The Phantom" there is no occasion where an ordinary man becomes superhuman through a change of costume, is there? A. Well, he doesn't become superhuman because he changes his costume at all.

287 Q. And there is not the dual personality that there is in the case of "Superman" and "Wonderman", is there? A. The fact that "Wonderman" changes his costume does not make him superhuman.

Q. But he is never superhuman until he takes off his ordinary garments, isn't that right? A. It depends on the story.

Q. Is that right? A. It depends entirely on the story. I can not state a rule.

Q. Do you recall a drawing that you did of "Wonderman" running toward a full moon and using the phrase "Off into the night"? A. I do.

288 Q. Do you remember seeing a copy of "Superman" also running into a full moon and using the phrase "Off into the night" in the caption? A. A lot of words including that.

Mr. Blum: Would you mind reading the entire thing in each magazine?

The Court: I don't care about what he remembers or doesn't remember about this thing. What is the good of going through all those parallel copyings?

Mr. Manges: I thought he might remember that some of these things were before him when he did his drawing.

The Court: He said that they were not already.

Q. This idea of "Wonderman's" hand crushing a gun, when did that occur to you? A. As I was creating the feature.

Q. Was that back in 1938? A. No.

Q. When? A. That was when I recently completed the feature in January.

Q. January, 1939? A. Yes.

Q. And when did you create the cover of Wonder Comics? A. That was created prior to the drawing; I think in December.

Q. That was created in December of what year? A. 290 Of this last year, 1938.

The Court: Do I understand, aside from this drawing of this man with his hands raised and a W on his chest in Defendant's Exhibit B for Identification, do I understand that aside from that all the other part of this was drawn in January, 1939, or subsequent thereto?

The Witness: That is right.

The Court: Everything else on this exhibit?

The Witness: That is right.

Q. You say you created the cover of Wonder Comics 291 in 1938, do you not? A. Yes.

Q. You swore to an affidavit in this action in opposition to a motion for a preliminary injunction, did you not? A. I did.

Q. You swore to that on the 20th of March, 1939? A. I did.

Q. Do you remember swearing to this effect at that time: " \* \* \* that he (meaning you) created the cover with respect to Wonder Comics in January, 1939"? A. Now you mentioned it, I must have.

Q. Which is correct? A. Well, it was over a period of time. The reason I mentioned that is because I presented a sketch of the cover and then the final drawing was made. There were two stages: one is the pencil sketch of what the cover would be like and then the second is the inked drawing that goes in.

Q. With respect to Defendant's Exhibit B for Identification I call your attention to the fact that the top of it is roughened. Was there anything taken off of that? A. Yes, there was the title of the story, the "Wonderman".

293 That was taken off the drawing.

Q. Why was that taken off before it was presented here? A. Because we saved the title to place the title on future drawings in order to save the job of redrawing the title.

*By the Court:*

Q. You mean that is cut off? A. No, it was not cut off just before I brought it here.

Q. You cut the drawing when you make the title? A. It is page 1.

294 Q. As shown on page 1 in volume 1 of Wonder Comics in order not to have to draw and redraw the same heading? A. Exactly.

Q. You just cut off that part of it? A. That saves considerable time, yes, sir.

Q. And this first page here of this "Wonderman" is practically that same drawing there, isn't it? A. Except for the fact that it had color.

Q. This has color and that hasn't got the title on the top which it did have in the first place? A. That is right.

Q. Then you took it off to use on the next number, is that it? A. That is right. On subsequent numbers we used it.

*By Mr. Manges:*

Q. Have you the rest of that paper preserved? A. We can present it if you wish. We can get it. We have it.

Q. Has it any date on it? A. No, it has no date. That is the exact replica of it.

The Court: This is the exact replica. You can see the curve there where the "Wonderman" comes in.

Q. You say the insert X is the only part of Defendant's Exhibit B for Identification which was completed before January, 1939, is that right? A. That is right. 296

Q. And the insert X is superimposed in the case of this exhibit on something else. Can you tell us what is underneath Exhibit X? A. There is another drawing underneath of that character. I will explain that piece of paper that is pasted on the board, which is a piece of bond on which we make sketches. We use a soft bond and that drawing we wanted more suitable after I had completed it, completed the page, so I merely pasted over it and let that go as that.

Q. For what use did you draw the insert X back in 1938? A. That was to show to Mr. Fox the idea of the character. 297

Q. Of what character? A. "Wonderman."

Q. Did you first use the expression "Wonderman" on any drawing after conferring with Mr. Fox? A. I don't understand. You mean after January, 1938?

Q. No. At any time did Mr. Fox suggest to you calling the figure "Wonderman"? A. No, it was my thought.

Q. And was that thought expressed by you after Mr. Fox had given you an order to do any art work? A. That

298 *William Eisner—for Defendants—Cross.*

was expressed by me when I first presented the sketch in January, 1938.

*By the Court:*

Q. Have you got a nom de plume which you use? A. I do it under several nom de plumes.

Q. Which ones? A. Will Erwin and Renze and Edwin P. Willis. We put nom de plumes on these drawings because I do so many of them I can't possibly—

299 Q. You don't remember your own name? A. It doesn't sound like my own name.

Q. You have got what looks like Crown Willis on this. A. It is Erwin. It is very, very small.

Q. What you meant was Erwin Willis? A. Yes.

Q. And that is one of your nom de plumes? A. Yes.

Q. Why do you use a nom de plume? The only way to get a reputation is to come out straight on your own. I don't see why you use a nom de plume. A. Because I do so many if I signed my right name to each piece—I use a different style on some features than I use in others and in some places I draw what is called a straight illustration and in some I do goop comics.

300 Q. You mean a straight illustrator does not want to be associated with goop comics, is that the idea? A. No; it is better business because the publishers who buy the stuff feel that it is not good when one man is doing the entire book, all the features.

*By Mr. Manges:*

Q. Mr. Eisner, is Defendant's Exhibit B for Identification a print of your ink drawing? A. That is not a print, that is the original ink drawing.

The Court: That is the original ink drawing which is colored and reproduced in color.

*William Eisner—for Defendants—Cross.*

301

Q. And is the insert X also the original ink drawing? A. That was the original ink drawing.

Q. And where was this insert X taken from, another large sheet? A. That was taken from a large bond sheet that was part of it.

Q. Have you got the rest of that? A. No, sir.

Q. What did you do with it? A. Destroyed it.

Q. When did you destroy it? A. We destroyed that sometime last summer, in 1938.

The Court: What did it contain?

The Witness: It contained a preliminary sketch for a magazine that we first presented to Mr. Fox in January, 1938 called Kid Comics.

The Court: And then you decided on a different thing that you were going to do and just took that one thing out, that figure?

The Witness: That is right.

Q. Did you ever show the insert X to anybody else except Mr. Fox after you drew it? A. Not that I can think of.

Q. And when did you show it to Mr. Fox? A. The first time we showed it to Mr. Fox was in January, 1938. 303

Q. In your affidavit submitted in opposition to the preliminary injunction you went very thoroughly into the whole question of originality, did you not? A. Apparently, yes.

Q. What? A. Yes.

Q. And you claimed therein in page 1, did you not, that "Superman" is not, as claimed by Mr. Liebowitz, an original character? A. That is true.

Q. And then you mention in your affidavit the creation by you of the first cover of "Wonderman" in January, 1939, do you not? A. Yes, sir.



*William Eisner—for Defendants—Cross.*

Q. Now, can you point out to me any place in that affidavit where you mentioned anything about having created any "Wonderman" in January, 1938, or any part of the year 1938?

The Court: Show the affidavit.

Mr. Manges: I am going to show it to him (handing to witness).

A. I find no mention of that.

The Court: When was the affidavit executed?

Mr. Manges: March 20th, 1939. I offer the original of that affidavit in evidence.

The Court: Have you got it here?

Mr. Manges: It is with the filed papers.

(Deemed marked Plaintiff's Exhibit 34 in evidence.)

Q. Mr. Eisner, how long after you read "Superman" did you begin to use a W in a circle on the breast of "Wonderman"? A. I used the W in a circle on the breast of "Wonderman" before I saw that "Superman".

306 It was part of the original idea.

Q. In other words, Mr. Siegel has copied all of this from you, is that it? A. I haven't claimed that.

Q. Don't you think it is a rather unusual coincidence?

Mr. Fried: I object to that as calling for the operation of the witness's mind.

The Court: That is a good kind of objection, nevertheless he is not claiming any infringement by him. It is perfectly possible for two people to develop things independently.

*William Eisner—for Defendants—Cross.*

Mr. Manges: Yes, but this is such a copy of these things it would be almost incredible.

The Court: That is to be argued, of course.

Q. Do you claim that "Superman" is a Latin type? Do you contend that?

The Court: What difference does it make if he contends it or not. I don't understand the point.

Mr. Manges: This question has come up. It is on credibility.

The Court: Would he be incredible if he said it is not?

Mr. Manges: He has made an affidavit as to several things here.

The Court: Does his affidavit say he is of a Latin type?

Mr. Manges: His affidavit says he is of a certain type. I will show him his affidavit and ask him.

The Court: What difference does it make?

Mr. Manges: On the question of credibility only. This man's credibility is a very sharp issue here.

The Court: Assume all this put in here amounts to anything at all, his affidavit is a perpetual, standing, definite challenge to things that he has said, isn't it? I don't see why you want to ask him whether he is a Latin type or not.

Q. Mr. Eisner, did you have anything to do with the wording of this poster for Wonder Comics? A. No.

Q. Do you know who did get this out, Plaintiff's Exhibit 33? A. I imagine—

The Court: You don't know?

The Witness: I don't know.

Mr. Manges: That is all.



310

*William Eisner—for Defendants—Re-direct.*

*Re-direct Examination by Mr. Blum:*

Q. When your affidavit verified on March 20th, 1939, was prepared, who asked you the questions about the things that you said in this affidavit?

The Court: It doesn't make the slightest difference.

Mr. Manges: That is objected to.

311

The Court: The fact that he may have omitted something is something you can argue about, but it doesn't make any difference who asked him about it.

Mr. Blum: I agree.

Q. When this affidavit of March 20th, 1939, was prepared did anybody, the attorney who prepared this, or anybody else, ask you about when you first submitted the drawings of "Wonderman" to Mr. Fox?

Mr. Manges: That is objected to. The affidavit speaks for itself.

The Court: That is a question for argument.

312

Mr. Blum: I just want to bring out a point. I was the first one that brought this out and Mr. Koenig, with all due respect—

Mr. Manges: I object to that. I think it is grossly improper.

The Court: No, I don't think it is grossly improper, but I don't think you need it. It is not in there and it is not stated and I don't think it makes any difference whether a person asked him about it or not.

Q. When you submitted this material to Mr. Fox in 1938, was there only drawing of the "Wonderman" or

*William Eisner—for Defendants—Re-cross.  
Samuel M. Iger—for Defendants—Direct.*

313

were there a series of drawings? A. There were several pencil drafts.

Q. And what was this Kid Comics that you have mentioned; what nature of publication was that? A. It was supposed to be a comic magazine larger than the ordinary type of magazine. It was supposed to be of tabloid size, soft paper cover, to be sold for five cents.

Mr. Blum: That is all.

*Re-cross Examination by Mr. Manges:*

314

Q. You say there were several "Wonderman" drawings in January, 1938? A. There were several pencil drafts, pencil drawings.

Q. Have you got them with you? A. No.

Q. What did you do with the other ones? A. We destroyed those.

Q. When did you destroy those? A. About the summer.

Q. What is that? A. During the summer sometime of 1938.

Mr. Manges: That is all.

315

SAMUEL M. IGER, called as a witness on behalf of the defendants, being first duly sworn, testified as follows:

The Court: Have you gotten any message from Mr. Stolz yet?

Mr. Fried: My associate called up the office of Mr. Stolz and found that he had arrived early this morning from Detroit and that he was not in the office now. Let me take a look at that letter again

316

*Samuel M. Iger—for Defendants—Direct.*

about which so much fuss has been made and maybe we can arrange with Mr. Koenig to consent to it.

Mr. Blum: Why not let it go in subject to correction?

The Court: Why don't you let it go in subject to correction, if you find there is something to be corrected about it or it is not a circular and was not sent out.

317

Mr. Koenig: My position is consistent. I told Mr. Manges if he told me Mr. Stolz sent it out I would not require his presence and that I would object to it.

Mr. Manges: That is right.

Mr. Koenig: That is the agreement I made with you and I don't need his presence so far as I am concerned.

Mr. Fried: I would consent to conceding that if Mr. Stolz were here he would testify he sent this letter, if that is the concession you want.

Mr. Manges: That is satisfactory. To the people stated at the top?

318

The Court: Of course if he sent the letter and if it is addressed to somebody—is it?

Mr. Manges: Yes sir. I offer it in evidence.

The Court: Mr. Stolz is supposed to be what?

Mr. Manges: He is the vice-president of the Interborough News Company.

Mr. Koenig: I have an objection to the contents of the letter.

The Court: It is contents from Interborough.

Mr. Koenig: Yes, but I object on behalf of Bruns.

The Court: I will let it go in.

(Marked Plaintiff's Exhibit 35.)

*Samuel M. Iger—for Defendants—Direct.*

319

*Direct Examination by Mr. Blum:*

Q. What is your age, residence and occupation? A. 56 East 57th Street; cartoonist; thirty-five.

Q. Please tell the Court what you know about the drawings marked with a red X on Defendant's Exhibit B for Identification? A. That is the original drawing that was presented to Mr. Fox.

Q. When? A. In January, or thereabouts, of 1938. It was on this little piece of paper. As a matter of fact it was done that way because it was just a rough idea of our character.

320

The Court: By "our character" are you associated—

The Witness: "Wonderman".

The Court: Are you associated with this other chap who has just been on the stand?

The Witness: That is correct, sir.

The Court: Mr. Eisner?

The Witness: Eisner.

Q. What is your connection with Mr. Eisner? A. I am a partner with him.

Q. For how many years have you been a cartoonist? A. Ten years.

Q. At the time this drawing referred to by the red X was made was it designated by any word or words? Was it called by any name? A. Yes.

Q. What was the name? A. "The Wonderman."

Q. Do you know who made the drawing referred to by the X? A. My associate, Mr. Eisner.

Q. Were you there when the drawing was made? A. I was.

321

*Samuel M. Iger—for Defendants—Direct.*

The Court: When was it made?

The Witness: That was made prior to January, 1938, possibly a week prior.

Q. Are you sure when this drawing marked with a red X was made that this was prior to the time that Action Comics, plaintiff's magazine, was published? A. Definitely.

323 Q. For how many years have you known of the comic strip "The Phantom" which is shown in Defendant's Exhibit A for Identification, being exclusively circulated in this country? A. I remember seeing that I would say about 1934, in the New York Journal.

Q. Has that been a very popular and well known—  
A. I take that back. I would say about 1935.

Q. Has that been a very popular and well known feature? A. I suppose it has. It runs in all the Hearst publications.

Q. But you have seen it continuously in New York City? A. I have.

324 Q. And had the character "The Phantom" always been shown as dressed in the mask and with the tight fitting costume as shown in Defendant's Exhibit A for Identification? A. That is right. Naturally we were slightly influenced by that character.

Q. Has it also been shown at various times as throwing off its outer clothing to perform its feats of strength and agility?

Mr. Manges: I object to that as not the best evidence.

The Court: What would be the best evidence?

Mr. Manges: If he has, your Honor, any strips the strips themselves are the best evidence.

*Samuel M. Iger—for Defendants—Cross.*

Mr. Blum: I have a number of others if Mr. Manges insists.

The Court: I don't want to go into this now.

Mr. Blum: That is probably the last question I will ask this man.

The Court: I hope so. I am not interested. I don't see anything in this at all. I am the person that has got to decide this thing. There is no jury here and if I have got enough to think about it I don't see why you should go further. What difference does it make?

326 Mr. Blum: Just one question and I think I am through with this witness. Should he answer it or does your Honor think he should not answer it?

The Court: Read the question.

(Question repeated.)

The Court: Are you claiming you are going back to what is a common source?

Mr. Blum: That is correct.

The Court: You don't want to put in a lot of strips of "The Phantom". He is putting on a coat to go out here.

Mr. Blum: If Mr. Manges wants—

327 The Court: I don't want it. I don't want to bother about it.

Mr. Blum: If your Honor will permit him to answer this question I will be through with this witness.

The Court: I don't see anything in that at all.

Mr. Blum: Direct examination closed.

*Cross-Examination by Mr. Manges:*

Q. Mr. Iger, when for the first time did you see Mr. Eisner's affidavit in this action? A. I think I saw it—I don't remember the exact time.

*Samuel M. Iger—for Defendants—Cross.*

The Court: Was it before today?

The Witness: Yes, it was.

The Court: Did you make an affidavit yourself?

The Witness: No, I didn't.

Q. It is dated the 20th of March, as you will see (handing witness). Was that about the time that you saw it? A. I suppose so.

Q. Did you see it before he signed it? A. I believe I did.

329 Q. Did you call his attention to the fact that he had not mentioned anything in that affidavit about 1938? A. No. It didn't occur to me because we had the original—we knew he had the original of the "Wonderman." That is the definite reason why I didn't think of that. I would certainly have insisted on him putting that in there if I had known it was that important.

The Court: You didn't see this affidavit until sometime after he executed it, did you?

The Witness: That is correct.

Mr. Manges: He testified differently. May I have that read?

330 The Court: When did you see that affidavit first?

The Witness: I saw the affidavit after Mr. Eisner had signed it. He showed it to me.

Mr. Manges: May we have that part of his testimony read, your Honor?

The Court: If you say he said he saw it before it was signed—

The Witness: No, that was after.

(The following questions and answers were read):

"Q. It is dated the 20th of March, as you will see. Was that about the time that you saw it? A. I suppose so.

*Samuel M. Iger—for Defendants—Cross.*

"Q. Did you see it before he signed it? A. I believe I did."

The Witness: I saw it after he signed it.

*By the Court:*

Q. What is your final testimony? A. The final is I saw it after he had signed it.

Q. After he had signed it? A. Yes.

Q. And when did you see it? A. I should say after he had signed it he had a copy of it and he brought it to the office and he showed it to me. 332

Q. He didn't sign it in your office? A. Not that I know of.

Q. Have you got an office together? A. Yes, we have.

Q. What is it, a studio? A. It is two offices, sort of a studio, you might call it.

Q. And did somebody come up to you and to him about the affidavit and talk to you both? A. No, I suppose they talked to Mr. Eisner.

Q. No; I mean did somebody come into your office when you were both there and talk to you about the affidavit that Mr. Eisner was going to make, discuss what he was going to say? A. Well, he told me he was going to sign some affidavit. After it was done he brought it to the office and showed it to me. I was not there directly. 333

Q. And you were not there when it was being made? A. No, sir.

*By Mr. Manges:*

Q. Did you have anything to do with the pasting of this insert X upon Defendant's Exhibit B for Identification? A. You mean actually pasting on or did I have someone do it?



*Samuel M. Iger—for Defendants—Cross.*

Q. Either one? A. Well, I suggested using the original because it was the truest thing to the one that we had submitted to Mr. Fox in 1938. As the nearest thing to it I figured if we showed that he would be able to get a true picture to it for from the first series on. That was my suggestion; Mr. Eisner had not mentioned it.

Q. And when was the initial W put on? A. At that time.

*By the Court:*

335 Q. What time? A. In 1938, January.

Q. And when that first reached Mr. Fox's hands it was just a little piece of paper? A. It was that character.

Q. Just a little piece of paper? A. A little piece of bond paper with a drawing on it.

Q. Not a great big piece? A. No, it was not.

336 Q. And the little piece of paper was subsequently trimmed down a bit and put on to this sheet, on to this pen and ink drawing, is that right? A. May I explain further, your Honor, how we do that? We had this original drawing of the "Wonderman." He had drawn on a sheet of paper—he started to draw the character. I am denying that. I told him why not use the original we had presented to Mr. Fox so we would have an actual shot of the "Wonderman" as he is so he could really follow a true picture of it.

Q. What do you mean? What time was it that you were doing this? A. In January possibly of this year.

Q. 1939? A. 1939.

Q. We will say for the sake of some sort of continuity, that in January, 1939, you were engaged in making up this pen drawing? A. The completion with a pen.

Q. The completion of this pen drawing for this Wonder Comics Magazine? A. Yes.

*Samuel M. Iger—for Defendants—Cross.*

Q. And whilst you were doing that you and your partner, Mr. Eisner, had a talk and you called his attention to the fact that he originally had drawn a figure under the figure which is pasted on there? A. That is correct.

Q. And you suggested to him that it would be better to put on the picture now pasted on there? A. That is right.

Q. For the reason that that picture was the original, is that it? A. That is right.

Q. And that is the story? A. That is the story.

*By Mr. Manges:*

Q. When did you first read the script "Superman" in Action Comics? A. After the question of whether we had copied the character in Action Comics called—what do you call him? I don't recall. As a matter of fact I very seldom read—I don't read all the comic books. We do read the comic books that we supply.

Q. And you never saw the "Superman" strip until this lawsuit was begun, is that it? A. That is correct.

339 Q. It is a fact, is it not, that the insert X on Defendant's Exhibit B for Identification was never used by either you or Mr. Eisner until January, 1939? A. That is correct.

The Court: Was never used, yes, but it was drawn before?

The Witness: It was drawn, yes, that is correct.

Q. And when you used it it was after Mr. Eisner states he knew about "Superman" having been created, isn't that right? A. I don't contend that.

Q. Didn't Mr. Eisner testify—

The Court: Never mind whether you heard it or not.

*Samuel M. Iger—for Defendants—Cross.*

Mr. Manges: If your Honor wants that——

The Court: I don't know whether it is necessary or not.

*By the Court:*

Q. It was your partner who did the drawing? A. William E. Eisner.

Q. A drawing of "Wonderman" was placed where that present "Wonderman" is pasted? A. Yes, sir.

Q. On what sort of paper do you call that, bond? A. Bond.

Q. Is that what the original is on? A. That is what the original is on.

*By Mr. Manges:*

Q. Have you any papers or records of any kind in your possession to show that insert X was not drawn at the same time as the entire balance of Defendant's Exhibit B for Identification? A. We did have some pencil roughs of a complete story that we later supplied.

Q. Have you or have you not? A. At the present time, no.

Q. When for the first time did you talk about the character "Superman" with Mr. Eisner? A. I wouldn't know the exact date. It was prior to the time I even met Mr. Fox. We talked about a superhuman type of a thing, a modern Samson idea.

Q. When I referred to "Superman" I was talking about the "Superman" of Action Comics. A. Well, I don't know much about the "Superman" other than what I read recently.

Q. When was the first time that you discussed Action Comics' "Superman" with Mr. Eisner? A. When did I first discuss "Superman"? After it was brought to our

*Victor S. Fox—for Defendants—Direct.*

attention that you claimed a similarity between our character and yours.

Q. Can you explain by what process the lines of the legs are carried down so accurately from the insert to the paper upon which the insert is superimposed? A. By what process?

Q. Yes? A. You mean whether a pen was used or a brush?

The Court: The pasting?

The Witness: No, he means the continuity. That was done by a brush.

Q. And when was that done? A. After the thing was pasted on it was not completed, it was a little bit of a "rough" pasted over it to finish the original character. We had to paste it over to finish the panel. It is obvious.

Mr. Manges: That is all.

Mr. Blum: That is all.

VICTOR S. Fox, called as a witness on behalf of the defendants, being first duly sworn, testified as follows:

*Direct Examination by Mr. Blum:*

Q. Mr. Fox, you are the President of the defendant Bruns Publications, Inc.? A. I am.

Q. For how many years have you been in the publishing business? A. About three.

Q. I show you a picture marked with a red X in Defendant's Exhibit B for Identification and ask you to tell the Court when you saw this picture for the first time

and who showed it to you (handing witness)? A. In January of 1938.

Q. Who showed it to you? A. Mr. Eisner, of Eisner & Iger, came to my office and solicited me on putting out a comic magazine. He showed me this among some seven or eight features in a magazine called Kid Comics, or the dummy of a magazine.

Q. At the time he showed you this picture was there any name upon this figure or character? A. Yes.

Q. What was the name? A. There was "Wonderman" or "The Wonderman".

Q. Did you take up this matter of this Kid Comics magazine with Mr. Donenfeld of Independent News Co., Inc.? A. I did.

Q. And what did you suggest to Mr. Donenfeld? A. I suggested to him that I would manufacture a so-called tabloid sized comic magazine which would be twice the size of those ordinarily sold by other publishers of 28 or 32 pages, I don't recall which, and I submitted this dummy to him and I said "I want you to put this out for five cents, as a five-cent seller. There is no other one in the market for five cents. I would like you to distribute it for us." He said, "Let me have the dummy. I will talk it over with my associate and we will let you know."

Q. What connection has this Mr. Donenfeld with Detective Comics, Inc., the plaintiff in this case? A. I understand he is president of that company.

*By the Court:*

Q. He is also the president of the Independent? A. He told me he is half owner but I am not certain whether he is.

Q. He told you? A. He told me he is half owner.

Q. Is he an officer? Do you deal with the Independent or not? A. Everything I wanted from Independent he arranged for me. He said he is Independent News Company, he and Sampliner are the Independent News Company and he has his man sign checks, his man Liebowitz who testified here, sign checks for Independent, which is jointly with Sampliner.

Q. What reply, if any, did you get from Mr. Donenfeld about distributing this magazine Kid Comics? A. About two weeks after I submitted the dummy to him he told me that he couldn't distribute this magazine because it would be in competition with his line of comic magazines.

The Court: What date was this?

The Witness: In January of 1938. I would say the latter part of January, 1938.

Q. And was this done before the publication of Action Comics, which is the plaintiff's magazine? A. Yes.

Q. Now I show you a copy of your affidavit verified in this instance in this cause on March 20th, 1939, page 3, and ask you whether you then stated to the Court the things about which you testified to today? A. Well, I signed this affidavit.

The Court: You are cross-examining him.

Mr. Manges: I object to that question.

The Court: I will sustain it.

Mr. Blum: I agree it should be sustained. May I note this: They made a great point because the other two affidavits did not refer to it. Now here is one man whose affidavit did refer to it.

The Court: All right, why don't you ask him. He is on the stand. I don't mean ask him whether

*Victor S. Fox—for Defendants—Cross.*

it is in his affidavit, but ask him what the fact was. What is it you want to ask him about?

Mr. Blum: That is all and I think I am through with this witness.

Q. When you got this dummy back from Donenfeld what did you do with it then? A. It stayed in my office for several weeks and then either Mr. Eisner or Mr. Iger called me up and said they wanted to know what disposition I was going to make of putting out the magazine. I told them I was not prepared to do it at that time and they asked me if they could have their dummy back and I sent it over to their office.

Mr. Blum: Direct examination closed.

*Cross-Examination by Mr. Manges:*

Q. The dummy that you say you submitted to Mr. Donenfeld, did that include Defendant's Exhibit B for Identification? A. Yes. You mean by that this one figure?

Q. Yes. A. Yes.

Q. The insert X was in it? A. The insert X with several boxes, about three boxes, three panels on the page were sketched out; the "Wonderman" with various poses, and the rest was marked "same" and "same" and "same".

Q. How did you happen to submit that insert X? A. What is it?

Q. The insert X?

The Court: How did he happen to submit it?

Mr. Manges: How did he happen to submit the insert X?

The Court: Who?

*Victor S. Fox—for Defendants—Cross.*

Mr. Manges: Mr. Fox.

The Court: Mr. Fox submitted it to Mr. Donenfeld.

A. It was part of this entire dummy. The dummy is a rough sketch, and so forth, of a contemplated publication.

Q. And what was it called? A. The outside of the publication was "Kid Comics." You mean what was this page called? I have already testified to that: "The Wonderman" or "Wonderman."

Q. Don't you know which? A. I don't recall whether it was one word "Wonderman" or "The Wonderman."

Q. Have you got any part of that left? A. I testified that I returned it to Iger & Eisner in the form of this put-together dummy. This is part of it right here and we have it now.

Q. That is insert X? A. Yes, sir. This is part of it. This was returned when he came back to me again to discuss this new book.

The Court: Who is Donenfeld, the president of the plaintiff?

Mr. Manges: Of the plaintiff.

The Witness: And also part owner of the distributing company.

The Court: What do you call that distributing company?

The Witness: Independent News Company, Inc.

Q. When for the first time did Bruns Publications, Inc., commence distributing through the defendant Kable News Company? A. March 15th.

Q. Do you contend that the defendant Bruns Publications is committed under contracts for the purchase of



*Victor S. Fox—for Defendants—Cross.*

paper and for the printing of the magazine Wonder Comics? A. I do.

Mr. Blum: I object to that. I don't see how that is competent.

The Court: What has that got to do with it?

Mr. Manges: There are certain things in the affidavit on that that I want to ask him about.

The Court: That might come up on the question of damages or something like that.

359 Mr. Manges: I am only addressing myself on the question of credibility.

The Court: He says "yes."

Mr. Manges: But he has got a fantastic figure here and I want to show that.

The Court: That hasn't anything to do with credibility, if people always claim a great deal more than they have any idea of getting.

Mr. Manges: That is not the point, your Honor. If you will just allow me a few questions I think I can bring it home.

The Court: All right.

360 Q. To what extent is the Bruns Publications committed for these purchases, in dollars and cents? A. Well, I can not give you audited figures, but approximately \$75,000.

The Court: For pulp paper and so forth?

The Witness: Yes, your Honor. We make contracts over a period of time and we make contracts with the printed. We made a contract, a two-year contract with the printer.

The Court: Is that purely for this one magazine?

The Witness: Yes, your Honor.

Mr. Manges: That is what he claims.

*Victor S. Fox—for Defendants—Cross.*

Q. Can you tell us how the defendant Bruns Publications can possibly be committed for the sum of \$75,000? A. The cost of publishing the magazine of the type of Wonder Comics based on a print order, let us say, of approximately 300,000 is about \$67,000, your Honor, and over a period of a year—

Q. Just a minute. Your distributor has stated that it is 230,000. Is that correct? A. Yes, but I anticipate my market and I figure on 300,000, Mr. Manges.

Mr. Blum: Your Honor, if we wish to hear it, we are in equity, but certainly we are going very far afield. 362

The Court: I will tend to that.

Mr. Blum: Very well.

The Court: I don't see how that justifies any contract. Is there anything in the affidavit that is counter to what he has testified to now?

Mr. Manges: Well, the real cost of an issue is something like \$7,000 an issue and for two issues it would be \$14,000 and this man says \$67,000.

The Court: He might have made a year's contract. I don't know. 363

Q. You say you have a contract for how long with your distributor?

The Court: I don't want to hear any more of this. This is just silly.

Mr. Manges: Your Honor, I think we can show it is cancellable on thirty days' notice or something like that, so there is no commitment at all.

The Court: What difference does it make whether there is a commitment or not?

*Victor S. Fox—for Defendants—Cross.*

Mr. Manges: Only because of his affidavit that there is one.

The Court: If he has a contract there may be an "out" in it, as bankers call it, or he can get rid of it for some other reason, then you can show the fact that he has got a contract. Don't let us be foolish. There is no sense in this.

Q. When did you first read the "Superman" strip in Action Comics? A. Oh, I have seen it from time to time; several times, I guess, ever since it has been published.

Mr. Manges: That is all.

Mr. Blum: That is all.

The Court: Does the defendant rest?

Mr. Blum: We rest.

Mr. Manges: I have two witnesses in rebuttal that will be very short, each about five minutes.

The Court: What are they about?

Mr. Manges: Just denying things that have come up during the defense. It may be less than five minutes.

The Court: There is no use taking it up now. We will do it tomorrow morning. You will have to argue this thing right away as soon as you get through and if I am satisfied about it maybe I will decide it right away. I can't tell; it depends on how it strikes me. You better be ready with everything.

Mr. Manges: Yes.

The Court: We will adjourn until 11:00 o'clock tomorrow morning.

(Adjourned to Friday, April 7, 1939, at 11:00 o'clock A. M.)

*Victor S. Fox—for Defendants—Cross.*

New York, April 7, 1939;  
11:00 A. M.

(TRIAL RESUMED.)

Mr. Manges: Your Honor, may I recall Mr. Fox for cross-examination on just one matter?

The Court: Yes.

VICTOR S. FOX, resumed.

*Cross-Examination by Mr. Manges (Con't):*

Q. Mr. Fox, you made an affidavit in this action, did you not, in opposition to the motion for a preliminary injunction? A. I did.

Q. Is this paper which I show you your affidavit in this action (handing witness)? A. It is.

Q. When was it sworn to? A. May 20th.

The Court: May 20th?

The Witness: It is a misspelled word. It should be March.

Q. March 20th, 1939? A. Yes.

Q. In that affidavit did you tell the story of having submitted a dummy of Kid Comics to Mr. Donenfeld? A. Yes.

Q. Is there any mention in that affidavit that the character "Wonderman" was contained in that dummy? A. No, there is none.

Mr. Manges: That is all.

*Victor S. Fox—for Defendants—Re-direct.*

*Re-direct Examination by Mr. Blum:*

Q. Now, I call your attention to the last paragraph on page 3 of your affidavit in which you stated as follows—

The Court: Don't read it to him; show it to him to refresh his recollection and ask him about it.

Q. I show you the last paragraph on page 3 of this affidavit.

Mr. Manges: May we have that read in? It is just a few lines.

The Court: If you want to have it read in I don't care.

Mr. Blum: Suppose I read it.

"I find that a number of the ideas which were embodied in the dummy of 'Kid Comics' which I left with Donenfeld are being used in a number of Donenfeld's comic magazines; to-wit, Action Comics, More Fun Magazine, Detective Comics, and Adventure Comics."

372 Q. Now please state to the Court the ideas referred to in this paragraph of your affidavit which you allege were being used in the publications there referred to?  
A. There were a number of ideas in that paragraph that included, of course, the "Wonderman".

Mr. Manges: I move to strike out "of course."

The Witness: Well, there were so many similarities that I didn't think of specifying at the time I made the affidavit.

The Court: So many similarities between what?

*Victor S. Fox—for Defendants—Re-direct.*

The Witness: Between Kid Comics, the rough dummy of Kid Comics submitted to me in January, 1938, and the publications that I named in the affidavit, owned by Mr. Donenfeld.

The Court: Yes, but they weren't out then.

The Witness: Some of them were, your Honor. Some of his publications were. I make reference to several publications.

The Court: This was not out.

The Witness: Action was not out, no, your Honor.

The Court: And the "Superman" strip was not out.

The Witness: Your Honor, I was explaining the reason for the way the paragraph read.

Mr. Blum: May I say this, your Honor: Of course I may be wrong because I was pitch-forked into this case only recently but this affidavit was verified in March, 1939, and I think their Action Comics came out in April, 1938, and the Action Comics, if I remember correctly, has their feature of the "Superman".

The Court: Yes, but he is talking about when it was submitted to him, isn't he?

Mr. Blum: No.

Mr. Manges: That is right.

The Witness: I was referring to the—

Mr. Blum: Just a minute, please, I am replying to the Court. He verifies this affidavit in March, 1939, and he says "I find that a number of the ideas which were embodied in the dummy of Kid Comics which I left with Donenfeld are being used in a number of Donenfeld's comic magazines; to-wit, Action Comics," and then he referred to two other magazines.

376

*Victor S. Fox—for Defendants—Re-cross.*

The Court: In other words, your position is switching around and claiming that in effect Mr. Donenfeld's organization was plagiarizing something that they saw—I don't know the names of the people who were on the stand yesterday—that were drawn and submitted to you; that is what you are claiming?

Mr. Blum: That is correct.

377 Q. I am asking you at the time that you swore to this affidavit on March 20th, 1939, had Action Comics already been published by the plaintiff in this case? A. Yes, it had.

The Court: We all know that. Why waste time on a silly thing like that.

Mr. Blum: That is all.

The Court: So your point is, as a matter of fact, that the "Superman" was copied from the other. You are going to argue that, I suppose, it was really copied from the other, is that it?

378 Mr. Blum: That is it; also that the defendant had knowledge of their character before they had any knowledge of the plaintiff's character.

*Re-cross Examination by Mr. Manges:*

Q. Mr. Fox, at the time that you executed the affidavit of March 20th, 1939, you had read the moving affidavits in the injunction application in this action, had you not? A. Yes.

Q. And yet you did not think it worth while to mention "Wonderman" as to one of these matters that you claimed Mr. Donenfeld's magazines were copying from you, did you? A. Well—

*Max C. Gaines—for Plaintiff—Direct.*

379

Q. Yes or no.

The Court: Including it anyhow.

A. Including it, your Honor. I am not a lawyer. I just drew it in my own language.

Mr. Manges: That is all.

Mr. Blum: That is all.

380

MAX C. GAINES, called as a witness on behalf of the plaintiff, in rebuttal, being first duly sworn, testified as follows:

*Direct Examination by Mr. Manges:*

Q. Mr. Gaines, for a period of five years between 1934 and February, 1939, were you connected with the McClure Newspaper Syndicate? A. I was.

Q. And did you during that period have charge of their comic newspaper and book department? A. I had charge, complete charge of the editorial supervision of all the material in comic books and complete charge of the color printing department. 381

Mr. Manges: Will you stand up, Mr. Iger?  
(Mr. Iger stands in the court room.)

Q. Mr. Gaines, do you know Mr. Iger? A. Yes.

Q. How long have you known him? A. I had business contacts with Mr. Iger for a period of three years or so.

Q. When was the last time you saw Mr. Iger, Mr. Gaines? A. In the latter part of April, 1938.



*Max C. Gaines—for Plaintiff—Direct.*

Q. Now, will you tell us and his Honor what conversation you had with Mr. Iger at that time? A. In the latter part of April, 1938, Mr. Iger called me on the phone and told me he would like to discuss a very important proposition. I invited him to come down to see me. He came down either the same day or the following day and said that he was interested at that time in coming out with another comic magazine. He had a lot of material available and could get other material and he wanted help from me to finance him in a comic publication. I told Mr. Iger at the time that I thought the market was so overcrowded with comic magazines—

Mr. Blum: I object to what he told the witness.

The Court: I will let him go on with the whole conversation and we will get the picture of what happened. Go on.

A. (Continued)—I told Mr. Iger I thought the field was so overcrowded and glutted with magazines that a new magazine would not have a chance. However, he insisted that he had some very fine material. So I said, "All right, Mr. Iger, send down what you have got and I will look it up and I will give you an answer in a couple of days." I understand he came down several days later while I was out of the office.

The Court: When did you see him again?

The Witness: I haven't seen him until I met him yesterday in the court room.

The Court: Did he leave anything for you to look at?

The Witness: He did not leave any material at the time. However, he did ask me, "What magazines are you getting out now, Mr. Gaines?" I

*Max C. Gaines—for Plaintiff—Direct.*

said, "I am now getting out five magazines, three for the Dell Publishing Company; the Popular Comics, the Funnies, and another comic magazine and I am printing the insides of two for the Detective Comics organization; Detective Comics and Action Comics." He said, "Could I have a copy of those magazines?" I turned to my assistant, who was sitting in the same office, and I said, "Sheldon, give Mr. Iger one issue of the five magazines we are producing" and Mr. Mayer, my assistant, went to the various files containing these five magazines, picked out one copy of each, and handed them to Mr. Iger. Mr. Iger then said good bye and left.

Q. And one of these copies was an issue of Action Comics, you say? A. At that time we had already produced the first issue of Action Comics.

Q. That was the June, 1938 issue? A. That was the June, 1938 issue, and that was handed to Mr. Iger with the other four books.

*By the Court:*

Q. Did Mr. Iger refer to this thing called Kid Comics? A. No, he did not. He did not refer to any one dummy of any kind at all. He said he had sufficient material and he was anxious to get in the comic field, in the publication field and could I work with him and help finance the proposition.

Q. You said you didn't think there was any field for it? A. I said at that time I was handling enough books and I didn't want to become involved in any more. I pointed out the fact I was already doing business with two and I didn't want to set up in competition with two of my best customers.

*Max C. Gaines—for Plaintiff—Direct.*

Q. Two what, comics? A. No, I was publishing three books for the Dell Publishing Company and two books for the Detective Comics, five in all. Three of them I was absolutely editing and producing the entire publications.

Q. On Detective Comics you were not? A. On Detective Comics and Action Comics I was only printing the insides, that is, the four color newsprint inside.

Q. And you said you didn't want to go in competition with your own customers? A. With my own good customers.

389 Q. Then you have never seen him since? A. I didn't see him until yesterday in court.

*By Mr. Manges:*

Q. Did you hear Mr. Iger say that he never saw Action Comics before this lawsuit was started? A. I did.

Q. That testimony is not correct then, is it?

Mr. Fried: I object to that.

The Court: I can decide that. I heard the witness testify.

390 Q. I show you these four sheets and ask you if you have ever seen any of them before (handing witness)?

Mr. Manges: I ask that these four sheets be marked for identification.

(Marked Plaintiff's Exhibits 36 to 39, inclusive, for Identification.)

The Court: You say you had not seen those or you had?

The Witness: I didn't answer the question yet.

Q. Have you ever seen Plaintiff's Exhibits 36 to 39 inclusive for Identification or any parts thereof be-

*Max C. Gaines—for Plaintiff—Direct.*

fore? A. I have seen these on five or six various occasions.

The Court: Seen what?

The Witness: I have seen these various original drawings on five or six various occasions.

Q. Who is the first person that submitted them to you? A. After I had—

Q. Who was the first person? A. The Dell Publishing Company.

Q. When and under what circumstances? A. Early in January, 1936, I had made a visit to the Dell Publishing Company, for whom I had just finished producing and printing the first issue of a comic book known as Popular Comics. These four drawings in slightly different form—by "different form" I mean when they were submitted—were turned over to me by the Dell people in the form of daily strips, six daily strips. 392

Q. Of the same drawings? A. But the same drawings which were rearranged into this page form for use in Action Comics. Together with these drawings and some additional drawings on "Superman" a letter addressed to the Dell Publishing Company by Mr. Shuster and Mr. Siegel of Cleveland was turned over to me at the same time together with a 16-page dummy of a comic tabloid magazine. The substance of the letter was to the effect— 393

Mr. Blum: I object to that. If the letter is here let us have it.

The Court: Have you got the letter here?

The Witness: I haven't got the letter here.

The Court: From who?

The Witness: To the Dell Publishing.

The Court: From who?

The Witness: From Shuster.

A. (Continued)—when this material was turned over to me together with the letter by the Dell Publishing it was turned over for the purpose of ascertaining at that time whether we could make use of this material in the Popular Comics Magazine and I was requested by the office of the Dell Publishing Company, who turned the material over to me, to get in touch with these people and advise them whether or not we could use their material. A day or two later I wrote to Mr. Siegel in Cleveland advising him that the material had been turned over to me, that I would keep it for a while and give it consideration and then let him know whether or not we could make use of it in Popular Comics. I had three or four letters from Mr. Siegel in a period of two or three months following that. I finally decided at that time I didn't have use for it and I returned these drawings, which were completely inked in in daily strip form to Mr. Siegel, advising him that I would bear them in mind and if at any time I could make use of any of his material, including these drawings, I would let him know.

The next time I saw these original drawings, also in daily strip form, was a little over a year ago. In fact it was last December, December, 1937, while I was still with the McClure Syndicate, I had an idea of getting out a certain weekly tabloid containing a certain type of comic strip form for newspaper syndication and I wrote to Mr. Siegel and asked him if he still had available the material which he had sent me several years ago and which I had returned and to please forward it immediately as I might have some use for it. He sent on these drawings again with some other material which he wanted me to make use of. I kept them for a period of about three or four weeks until I found out definitely that the idea that I was working on was not feasible at the time for news-

paper syndication. During that three or four week period the Detective Comics people, for whom I had then been printing one magazine, Detective Comics, told me they want to come out with another book called Action Comics, they have already had the title registered; did I have any material available which they could use in a book of that nature? I said, "Yes, I have got some here from Siegel which I think is very good and which should be a natural," to use a colloquialism, "for that type of book, depicting action according to the title," and so forth. So, I submitted to Mr. Liebowitz about January of 1938— Mr. Donenfeld was not available at the time—these strips, these daily strips, six of which, involving one full week daily continuity, were completely inked in and three or four weeks or two or three weeks in pencil, part of which were inked in and part of which were left in pencil.

I had further discussions during that period or shortly afterward with Mr. Liebowitz and Mr. Sullivan, the editor of the comic magazines for the Detective Comics group, and impressed upon him the fact that this would be a good idea and by all means to use it in Action Comics. They agreed that it was a good thing, with the result that I wrote Mr. Siegel that inasmuch as the newspaper idea I was working on at the time when I wrote him to submit the stuff was not feasible I had taken the liberty of turning over to Mr. Liebowitz and Mr. Sullivan this material for use in Action Comics and that if he had any objections to let me know immediately. Evidently he had no objections because we put it in Action Comics, No. 1.

Q. The first issue? A. The first issue of Action Comics primarily as it was submitted to me in daily strip form. These drawings that I have before me are part of the 13 pages which constitute the entire "Superman" feature in the first issue of Action Comics, with the exception of three or four panels on page 1.

*Max C. Gaines—for Plaintiff—Direct.*

*By Mr. Manges:*

Q. And are these some of the other pages (handing witness)?

The Court: You better mark them for identification too.

(Marked Plaintiff's Exhibits 40 to 47 inclusive, for Identification.)

401 A. I might mention, while we are waiting for those exhibits to be marked, that I was so impressed with this strip when I first got it over three and a quarter years ago that I made an effort at that time to have it used for newspaper syndication but my organization, McClure Syndicate, at the time did not feel they were ready to go into any additional promotion for a daily feature. Subsequently, however, after the feature got started in Action Comics it did go into newspaper syndication and started syndicating to newspapers in January of this year and is now appearing in about twelve different papers throughout the country.

402 *By the Court:*

Q. You are not connected with either party in this case?

A. I print Action Comics and Detective Comics for the Detective Comics organization.

Q. But I mean you are not employed by any of them?

A. Yes.

Q. You have business relations? A. I have business relations but I am not employed by them.

Q. You are no longer employed by the McClure Syndicate? A. No, I am a New York sales representative for the Greater Buffalo Press, Buffalo, New York. We print

*Max C. Gaines—for Plaintiff—Direct.*

comic sections for newspapers and magazines. In addition to that I get out two comic magazines of my own.

*By Mr. Manges:*

Q. I show you Plaintiff's Exhibits 40 to 47 inclusive for Identification and ask if they are others of the drawings that you have just referred to?

The Court: What do you mean "drawings just referred to"?

Mr. Manges: He said there were 13 sheets altogether and I showed him four. 404

Q. Are these eight a part of the original thirteen that you have mentioned? A. I didn't mention any thirteen sheets, I mentioned the fact that I had received from Siegel originally three and a half years ago or so, and then again about over a year ago, one week's finished drawings of the "Superman" strip which I identify as being these same drawings with the possible additions of two or three panels here and I said at the same time he submitted to me in rough form partly finished but practically all in pencil three or two weekly continuities in daily strip form. 405

The Court: And those are all part of those submitted to you, as you describe?

The Witness: They look like the same drawings submitted to me as described before by myself in finished and penciled form with the exception of the last panel which was added on to finish up a page.

The Court: At the bottom of the page?

The Witness: At the bottom of the pages and these too (indicating).



406

*Max C. Gaines—for Plaintiff—Direct.*

Mr. Manges: The witness is now referring to Exhibit 40 for Identification.

The Court: The last panel on the bottom of the page in Exhibit 40 for Identification.

The Witness: In Exhibit 36 for Identification this has been changed and these have been changed (indicating). This is part of the original drawings.

Q. When you say "this" what do you mean? A. That upper right hand corner.

407

The Court: That little baby tossing around a large chair, is that it?

The Witness: Yes, sir. You see, in order to get this material which we needed for the first issue of Action Comics, instead of having Mr. Siegel redraw an entire 13-page continuity we told them to take the daily strips, cut them up, paste them together in this form so we could reduce them to give us the proper size for the magazine. I can make the distinction here between the first week continuity which was submitted to me originally and the drawings here that were submitted to me originally partly in ink but mostly in pencil because on the first week's continuity Mr. Siegel has drawn them on a certain type of drawing paper which, when chemically treated, brings out certain Benda dot effects.

408

The Court: What is Benda?

The Witness: Benda is a process of making a tone over white and after the drawing is made on that chemically treated paper and the drawing is finished then the chemical is applied to the paper which brings out these half tone dots.

409

*Max C. Gaines—for Plaintiff—Direct.*

Q. Is that why some of the panels have a yellower tone? A. Well, that may be due to age perhaps as well as the chemical effect on the paper.

The Court: The chemical effect of age on pulp is very extraordinary.

The Witness: It also is on this when exposed to the light. Pulp paper will become absolutely yellow with age.

Q. All of these exhibits for identification that are now before you, these twelve, are all drawings of "Superman" that appeared in the first issue of Action Comics, are they not? A. Yes, sir. I might say that these pieces that were cut out were cut out by the McClure Newspaper Syndicate in preparing the promotion for the Newspaper Syndication to the newspapers. We wanted certain drawings showing certain "Superman" effects so we cut them out of these drawings and used them in our promotion work.

410

The Court: When you got the work and started promoting them that was when you got them back from Action Comics?

411

The Witness: That is right.

Q. That was in 1939? A. That was in the end of 1938.

Mr. Manges: Now, I offer these 12 exhibits for identification in evidence.

The Witness: There is evidently one page missing there before there were 13 pages in the first issue of Action Comics.

Q. But you had seen all 13? A. Yes.

*Max C. Gaines—for Plaintiff—Cross.*

The Court: They may be admitted.  
(Plaintiff's Exhibit 36 to 47 inclusive for Identification now received in evidence.)

Mr. Manges: That is all.

*Cross-Examination by Mr. Blum:*

Q. Are you the part owner and managing editor of All American Comics? A. Yes.

Q. Is any company owned by Mr. Donenfeld the remaining owner of all American Comics? A. No.

413 Q. Who is the remaining owner of All American Comics? A. Mr. Liebowitz.

Q. Is that the Mr. Liebowitz who is associated with the plaintiff in this case, the man you mentioned? A. That is correct.

Q. How about Movie Comics; is Mr. Liebowitz also interested in that? A. He is personally.

Q. Is he personally interested in All American Comics? A. He is.

414 Q. You have referred in your testimony to a great deal of correspondence between yourself, Mr. Siegel, the Dell Publishing Company, and so on. Have you any of that correspondence here? A. None of it available.

Q. When did you look for it? A. I threw away most of that correspondence two years ago. I clean my files out once a year and throw away what I don't think I need any further.

Q. Do you have at the present time a scrap of paper or a record of any kind as to the date when you first saw the Siegel drawings? A. I believe so.

Q. Where is it? A. (Witness produces a paper.)

Q. Let me see it, please. A. (Witness hands to counsel.)

*Max C. Gaines—for Plaintiff—Cross.*

The Court: As long as he has taken it and looked at it, under Judge Lacombe's ancient ruling you can put it in evidence because—whether it is relevant or not I don't know—it becomes competent at once.

Q. This memorandum is dated June 8th, 1938, is that correct? A. Correct.

The Court: Is that your signature, Mr. Gaines, in pencil?

The Witness: Yes.

Q. Who was the Mr. Waldo to whom this communication of June 8th, 1938, is addressed? A. Mr. Waldo is the head of the McClure Newspaper Syndicate, Mr. Richard T. Waldo. That is an interoffice communication between myself and the head of the company.

Mr. Blum: That is all.

Mr. Manges: I offer the memorandum in evidence.

Mr. Blum: I object to it.

The Court: You can object to it but that is all you can do. I will allow it in because that is the rule in this court; if a person demands something he takes it with the burden.

Mr. Blum: I agree with that partially but does that mean every self-serving declaration in there is admissible?

Mr. Manges: I don't offer it to prove it as to its contents.

The Court: He offers it as to the date and also as to the time when he put these things in. Before you asked for it and you got it and now it is in. (Marked Plaintiff's Exhibit 48 in evidence.)

*Sheldon Mayer—for Plaintiff—Direct.*

SHELDON MAYER, called as a witness on behalf of the plaintiff, in rebuttal, being first duly sworn, testified as follows:

*Direct Examination by Mr. Manges:*

Q. Mr. Mayer, were you the assistant of Mr. Gaines?

A. was.

Q. And during what period? A. From January of 1936 till the present day.

419 Q. I show you these exhibits, being Plaintiff's Exhibits 36 to 47, inclusive, and ask you if you have ever seen them before (handing witness)? A. I have.

Q. Will you tell his Honor when for the first time you saw them and under what circumstances? A. Mr. Gaines showed these to me in daily strip form when they were sent to him by the Dell Publishing Company.

The Court: What time?

The Witness: In January of 1936.

Q. And was that just after the first issue of Popular Comics had come out? A. That is right.

420 Q. And Popular Comics had come out about December 20th, 1935? A. That is right.

Q. Were you present, as Mr. Gaines states, when he had a conversation with Mr. Iger in April of 1938? A. Yes, sir, I was.

Q. Is it true, as he testified, that he asked you to give Mr. Iger—

The Court: That is not the way to ask a question. He can tell the story.

Q. Will you tell us what happened? A. Mr. Iger came into the office and after a discussion with Mr. Gaines Mr.

*Sheldon Mayer—for Plaintiff—Cross.*

Gaines asked me to get one copy each of all the magazines that we were connected with. Among them was Action Comics.

Q. And what did you do? A. I picked one out of each and, as I said, I gave them to Mr. Iger.

Q. At that time? A. At that time.

Q. And are you certain that Action Comics was one of the five? A. Absolutely.

Q. That was the first issue of Action Comics? A. That is right.

Mr. Manges: That is all.

*Cross-Examination by Mr. Blum:*

Q. What day in the month of April, 1938, did Mr. Iger come to your office? A. Well, I can't say the date exactly but I do know that it was toward the end of April. I can positively prove that. He came back about a week later after he saw Mr. Gaines with the drawings that he had promised to show Mr. Gaines, his own stuff, and Mr. Gaines wasn't there and after some little conversation Mr. Iger and I went out to lunch and we were going to have oysters but it was too late in the season, so that I know it was just at the end of April.

Q. Mr. Iger at that time did show you some drawings? A. He did.

Q. Do you remember the drawings Mr. Iger showed you sometime in April? A. I do.

Q. What were they? A. They were a series of—well, several series. As a matter of fact, they were photostatic copies of drawings and if I am not mistaken most of them were used in the Jumbo Comics.

Q. What characters were there in these drawings that Mr. Iger showed you? A. Oh, there was an aviation strip

and there was a spy strip. I don't recall the names of the characters because they didn't impress me very much at the time.

Q. During the course of years, say from 1936 up to the present time, how many comic strips have been submitted to you: 50, 100, how many? A. I couldn't say exactly. Possibly 50 or 100.

Q. You pretend you can remember at the present time every one of these strips that were submitted to you and the date upon which they were submitted?

Mr. Manges: I object to that, as to what the witness can do.

The Court: It makes no difference whether he can or not, if he can remember this particular one.

Q. Have you stated your best recollection as to what Mr. Iger showed you? A. Yes.

Q. Prior to the time you saw these drawings, Exhibits 36 to 47, inclusive, had you ever seen cartoons published showing a man in the conventional strong man's costume, like a wrestler or a circus acrobat?

Mr. Manges: I object to that as incompetent, irrelevant and immaterial.

The Court: It is cross-examination and I will let him go on.

A. Of course.

Q. I beg your pardon? A. Yes.

Q. That has been a common feature for many years, hasn't it? A. I wouldn't say that exactly, no.

Q. Was it shown in "The Phantom" before you saw these drawings, Exhibits 36 to 47 inclusive?

Mr. Manges: There is no proof that "The Phantom" was connected with ours or anything like it. It is not a superman.

The Court: In the case of *Sheldon v. Metro-Goldwyn-Mayer*, probably the most important copyright case that has been up for a long time, and on which I was reversed, I am sorry to say, such a copyright of course is valid and the public domain is important only on the issue of infringement, that is, so far as it may break the force of the inference to be drawn by the work—the defendant has access to other material which would have served him just as well. That is all it amounts to. They just try to create what I mentioned as an intellectual alibi, and was criticized.

Mr. Blum: That is all.

Mr. Manges: That is all.

HARRY DONENFELD, called as a witness on behalf of the plaintiff, in rebuttal, being first duly sworn, testified as follows:

*Direct Examination by Mr. Manges:*

Q. Mr. Donenfeld, you are the president of the plaintiff corporation? A. I am, sir.

Q. Did Mr. Victor Fox ever submit to you a dummy for a magazine Kid Comics? A. No, sir.

Q. Did Mr. Fox ever submit to you any dummy with the "Wonderman" character on it? A. No, sir.

Q. Did he ever submit to you a dummy with the drawing contained on it which now appears as panel X on



430

*Harry Donenfeld—for Plaintiff—Direct.*

Defendant's Exhibit B for Identification? A. No, I have never seen that at any time.

Mr. Blum: May I interrupt for a moment. I had the idea that Exhibit B had been allowed to go in subject to further ruling, in other words, Exhibits A and B, as I understood your Honor's ruling yesterday, were in subject to ruling at the final argument.

The Court: What has that got to do with it? Can't he show it to the witness?

431

Mr. Blum: No; but he said Exhibit B for Identification and I just want to clear up that point.

Mr. Manges: It is marked that way.

The Court: Reserving it doesn't make the slightest difference.

Mr. Blum: I just wanted to make sure my recollection was correct.

The Court: I think I will let them both in and then we can strike out the identification.

(Defendant's Exhibit A and B for Identification received in evidence.)

432

Q. Mr. Fox stated that this submission of a dummy to you took place in the month of January, 1938. Will you tell us where you were during that month? A. Around the latter part of December I took a cruise on the Holland-American Line and it landed me in Havana New Years. I spent New Years eve in Havana and a few days subsequent to that and then about the first week in January I went to Miami and spent the entire month in Miami up to about the 2nd or 3rd of February. I was away from New York from the latter part of December until the early part of February.

*Harry Donenfeld—for Plaintiff—Cross.*

433

The Court: Mr. Fox didn't fly down by airplane and submit this to you or anything like that?

The Witness: No, sir.

Q. Did you meet Mr. Fox in any part of your cruise or trip? A. No.

Q. Did you see Mr. Fox from the time you left New York until the time you returned? A. No, sir.

Q. I show you this paper and ask you if it is a check which you cashed on the "Statendam" on the 23rd of December, 1937? A. Yes.

Q. Does that refresh your recollection? A. Yes, sir. I purchased some stuff in Cuba.

434

The Court: What is this?

Mr. Manges: This is to refresh his recollection, to corroborate what he is saying.

The Court: You have a man on the stand.

Mr. Manges: This is definite proof as to the dates.

The Court: It doesn't show that it was cashed on the "Statendam."

Mr. Manges: Yes, sir, it does. The purser's stamp of the "Statendam." I will withdraw it.

The Court: You assume, first, except in the case of a hostile witness, you are going to call somebody who is telling the truth and then after he has done it you don't have to bolster it with pillows.

Mr. Manges: On the question of dates I wanted it to appear with certainty. However, I won't press the point. That is all.

435

*Cross-Examination by Mr. Blum:*

Q. Did you see Mr. Fox in the early part of February shortly after you return from Miami? A. Yes, I might have.

*Harry Donenfeld—for Plaintiff—Cross.*

Q. I didn't hear you. You might have? A. Yes, I might have then.

Q. Was it in the early part of February that Mr. Fox showed you Kid Comics? A. He never showed me Kid Comics.

Q. After you returned from your cruise how long did you stay in New York before going to Miami? A. I didn't come back to New York. I took the cruise and when the boat got to Havana I got off the boat and I stayed in Havana for about a week and from there flew to Miami. I didn't come back to New York at all.

Q. Have you ever been convicted of any crime? A. Yes, sir.

Q. How many times? A. I wasn't convicted; I pleaded guilty in General Sessions for publishing magazines and paid a fine.

The Court: What was it supposed to be, an improper magazine?

The Witness: It was supposed to have been magazines which I have discontinued about 1934.

The Court: Was it improper?

The Witness: Yes.

The Court: Lewd or something like that?

The Witness: Snappy magazines, snappy stories. In fact that was the title of it, "Snappy Stories."

Q. Was that the only conviction? A. Yes.

Q. Was that the only time you pleaded guilty? A. That was when I pleaded guilty, in General Sessions. It was in Special and then it was transferred to General and I pleaded guilty.

Q. Haven't you pleaded guilty in the Federal Court recently for sending obscene matter through the mails?

*Harry Donenfeld—for Plaintiff—Cross.*

A. No, sir, I was never involved in any Federal Court action.

Q. I would like to have you search your memory because I want the correct answer, if you remember it. Haven't you pleaded guilty in the Federal Court recently?

A. Do you think I am going to perjure myself?

Q. I don't know. A. I have made a definite statement that I was never indicted, never had any business with any Federal authorities or any Federal courts; never been indicted and never pleaded. Is that clear?

Q. That is clear. A. O. K., sir.

The Court: Why do you use "O.K."?

The Witness: I am sorry, Judge, but I made the statement.

Mr. Blum: That is all.

The Court: Do you realize that that isn't so? You asked him if he pleaded guilty in the Federal Court and he said he didn't plead guilty in the Federal Court. Are you certain he didn't?

Mr. Blum: Yes. What happened is I didn't hear very well and Mr. Manges said "you are incorrect" and I thought he meant "he is incorrect"—just a case where my hearing should be a little better.

The Court: All right, then I think you should apologize to the witness for talking to him in that way when he said definitely he had not been indicted in this court. If he was I could send for the Clerk's records and it is very easy for me to find out whether it is true or not.

Mr. Blum: I would not have asked that question except that my hearing is getting worse. I am very sorry I asked that question.

The Court: He says he is sorry he asked that question, and that's that.

*Harry Donenfeld—for Plaintiff—Cross.*

*Cross-Examination by Mr. Fried:*

Q. Mr. Donenfeld, how many magazines do you publish at the present time? A. Four comics and World's Fair Comics and Superman Comics—that makes the six comics—and I have got Fact Detective and Fact Magazine—that is eight.

Mr. Manges: We are talking about the plaintiff corporation, are we not?

Mr. Fried: I am asking him how many magazines are published by any of his companies.

The Court: You didn't ask him that.

Mr. Fried: All right; then I will reframe my question.

The Court: I will let him ask it.

Mr. Fried: He has already begun to answer my question.

The Court: But don't you know it doesn't make any sense if a person answers a question that was not intended to be asked and does not answer it right. What do you intend to ask?

Mr. Fried: If your Honor please, I have practiced law in these courts for more than twenty-five years and I believe I have some ideas of the conduct of a case.

The Court: Now I am trying this case, remember that. The trouble is lawyers think they try the cases and I don't believe in that, the judge tries the case. Now, what I want to know is what do you want to ask this witness? Just ask him the question.

Mr. Fried: All right, your Honor, I will address the witness.

*Harry Donenfeld—for Plaintiff—Cross.*

Q. Mr. Witness, how many magazines are published by yourself or any companies in which you are interested? I don't want you to enumerate them; tell me the number. A. I will; ten.

Q. And how many companies publish these ten magazines? A. Three.

Q. What relationship is there between these three companies and Mr. Liebowitz, if any?

Mr. Manges: I think this should be limited to the plaintiff corporation. I don't see where we are going to get with other corporations that have nothing to do with this action. 446

The Court: You can not tell what the ramifications are. Maybe he is going to make an argument about Liebowitz testifying or something like that; I don't know. I will let him answer.

Mr. Manges: I think he should be limited to matters I brought out through the witness.

The Court: I think he could be limited to that but I don't believe in it.

Q. I have asked my question. What is the answer? A. Ten. 447

Q. I beg your pardon? A. Ten magazines.

The Court: That is not the question. Repeat the last question.

Q. (Read.) A. Mr. Liebowitz is employed by me as general manager of all my businesses.

Q. Who owns the stock? Who is the actual owner of the stock in All American that is in the name of Liebowitz? A. I have nothing to do with the All American.

Q. Will you please answer my question?

*Harry Donenfeld—for Plaintiff—Cross.*

Mr. Manges: I object to that.

The Court: Do you know a thing like that?

The Witness: I have nothing to do with the All American.

The Court: Do you know?

The Witness: Mr. Liebowitz is part owner of it, I know, and Mr. Liebowitz is part owner of Movie Comics and All American.

Q. Didn't Mr. Liebowitz endorse in blank the shares  
449 of stock he owns in All American Company?

Mr. Manges: I object to that.

The Court: I think you have gone far enough. Start on something else.

Mr. Fried: I will take an exception to your Honor's ruling.

Q. This cruise that you started off on, Mr. Donenfeld, in December, 1937, was it? A. That is right.

Q. How many days cruise was it? A. A seventeen day cruise.

Q. What stops did it make? A. All through the South;  
450 Curacao, Caracas, the West Indies, and the last stop on the way back was Havana. The ship got to Havana the 31st of December.

Q. Did the cruise continue back to New York? A. It did.

Q. You tell us now that you didn't come back to New York, is that right? A. Surely.

Q. With that cruise? A. That is right, I did not come back to New York.

Q. You tell us there was not an intermission between the time you concluded your cruise and the time you went to Miami? A. I have a check here that I issued—

*Harry Donenfeld—for Plaintiff—Re-direct.*

Q. I am not asking you about a check.

The Court: Just answer that.

A. Repeat the question.

Q. (Read.) A. I stopped in Havana in between.

Q. And you didn't come back to New York before you went to Miami? A. That is right, I did not come back to New York.

Q. And you didn't speak to Fox in New York in January? A. Definitely not. On the 3rd of January I paid  
452 the bill at the National Hotel in Havana.

Mr. Fried: I move that that answer be stricken out as not responsive.

The Court: I will let it stay there. I believe in having things sound like sense. I will let it stay in that way.

Q. What was the day that you finally returned to New York? A. The early part of February.

Q. Do you know the exact day? A. The 3rd or 4th of February.

Mr. Fried: That is all.

*Re-direct Examination by Mr. Manges:*

Q. And is this the check dated January 3rd, 1938, to the National Hotel in Havana? A. Yes, sir.

Q. Your check? A. That is my check and that was for my bill.

Mr. Manges: I offer it in evidence.  
(Marked Plaintiff's Exhibit 49 in evidence.)



454

*Harry Donenfeld—for Plaintiff—Re-direct.*

Q. I show you this check dated January 5th, 1938, to the order of the Dempsey-Vanderbilt and ask you if that is your check? A. Yes, it is my check.

Q. And when and where did you issue it? A. I issued it in Miami and I cashed it at the Dempsey-Vanderbilt Hotel, for \$50.

Q. January 5th, 1938? A. January 5th, 1938.

Mr. Manges: I offer it in evidence.  
(Marked Plaintiff's Exhibit 50 in evidence.)

455

Q. I show you this check of December 23rd, marked "SS Statendam, Purser's Office," and ask you if that is a check cashed by you on the SS Statendam on December 23rd, 1937? A. Right, sir.

Mr. Manges: I offer this in evidence.  
(Marked Plaintiff's Exhibit 51 in evidence.)

Q. I show you this check dated January 10th, 1938, to the order of Dempsey-Vanderbilt and ask you if it is a check cashed by you in Miami, Florida, on that day? A. Yes, that was a bill I paid for \$167 to the Dempsey-Vanderbilt Hotel.

456

Q. The check was issued on that day? A. That is right.

Mr. Manges: I offer it in evidence.  
(Marked Plaintiff's Exhibit 52 in evidence.)

Q. I am going to skip some and come to January 28 and ask you if this is a check you issued on January 28, 1938, in Miami, Florida (handing witness)? A. Yes. This Mr. Braelew has got an agency down there known as the Dade County News Agency and I cashed the check—

*Victor S. Fox—Recalled—for Defendants—Direct.*

457

I think you will find the stamp—at the Dade County News Agency.

Mr. Manges: I offer it in evidence.  
(Marked Plaintiff's Exhibit 53 in evidence.)  
Mr. Manges: That is all. Plaintiff rests.

VICTOR S. FOX, recalled, in sur-rebuttal, further testified as follows:

458

*Direct Examination by Mr. Blum:*

Q. Mr. Fox, did you hear the testimony just given by Mr. Donenfeld? A. I did.

Q. State to the Court whether to your knowledge Mr. Donenfeld was in New York before he went to Miami in January of 1938?

The Court: You mean was he ever in New York or was in New York after he went on his cruise, between the time when he went on his cruise and the time he was in Miami?

Mr. Blum: That is right. That is the question.

459

A. I recall distinctly that he was in New York. We had a conversation where he had a lot of trouble with some of his magazines and he was trying to get himself straightened out. He had to break his cruise short.

Mr. Manges: I object to this.

The Court: He says he had a conversation. Where was the conversation?

The Witness: The offices of the Independent News Company were on the same floor with my

460 *Victor S. Fox—Recalled—for Defendants—Cross.*

offices, our company's offices, and we were talking outside of the door of their offices, I recall distinctly, because he was in a hurry to get away.

Mr. Manges: Can we have the date fixed?

The Witness: I would say I cannot give you the precise date, but it would be between January 10th and 20th, 1938.

Mr. Blum: That is all.

*Cross-Examination by Mr. Manges:*

461 Q. Have you any proof at all besides your word that you saw Mr. Donenfeld in New York between January 10th and January 20th, that those dates are correct, in 1938? A. I was unprepared for the question but if I have the time—I keep memorandums of all my conversations with Donenfeld because I found that they were not always according to Hoyle.

Mr. Manges: I move to strike out the answer.  
The Court: Strike it out.

462 A. (Continued) And I have in my files undoubtedly a memorandum of the conversation between me——

Mr. Manges: That is all.

The Court: Is there anything else?

Mr. Blum: That is all so far as I am concerned.

The Court: I will hear from you in justification of this publication, "Wonderman".

(Counsel sum up to the Court.)

**Opinion.**

463

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

Docket #....—Civil 3-58.

(Opinion #12,125, Filed April 13, 1939.)

—o—  
DETECTIVE COMICS, INC.,

Plaintiff,

464

AGAINST

BRUNS PUBLICATIONS, INC., KABLE NEWS Co.,  
and INTERBOROUGH NEWS COMPANY,

Defendants.

—o—  
ON FINAL HEARING IN A CAUSE OF COPYRIGHT INVOLVING  
TWO COMIC STRIPS, THE PLAINTIFF'S COMIC STRIP  
CALLED "THE SUPERMAN", AND THE DEFENDANTS'  
COMIC STRIP CALLED, "THE WONDERMAN".

465

(Statement of names of counsel who appeared in the case.)

WOOLSEY, J.

The plaintiff may have judgment as hereinafter prescribed.

**I.**

The basis of my subject matter jurisdiction in this cause is the Copyright Law. Title 17, U. S. Code.

*Opinion.*

The defendant Bruns Publications, Inc., is the publisher of the alleged infringing magazine, and the other two defendants are distributors thereof.

## II.

The copyrights indicated in the complaint:

(a) As to the June, 1938, issue of said periodical: June 14, 1938—Class B, No. 379787.

467

(b) As to the July, 1938, issue of said periodical: June 14, 1938—Class B, No. 379788.

(c) As to the August, 1938, issue of said periodical: July 30, 1938—Class B, No. 385466.

(d) As to the September, 1938, issue of said periodical: September 17, 1938—Class B, No. 387907.

(e) As to the October, 1938, issue of said periodical: October 27, 1938—Class B, No. 394784.

(f) As to the November, 1938, issue of said periodical: October 27, 1938—Class B, No. 394886.

468

(g) As to the December, 1938, issue of said periodical: December 22, 1938—Class B, No. 399214.

(h) As to the January, 1939, issue of said periodical: February 7, 1939—Class B, No. 405349,

are for what is considered in the Copyright Law to be an original work, and which is, therefore, copyrightable.

In respect of the February, 1939, March, 1939 and April, 1939 issues of said periodical, the issuance to plaintiff of such certificates of registration is imminent, all requirements of law having been duly complied with by plaintiff for the issuance thereof in due course.

*Opinion.*

## III.

The next question which arises in all copyright cases, is whether there has been any access, *i. e.*, any chance to copy the plaintiff's work.

I think that access—if it is not accepted as common ground—certainly has been established because the plaintiff's magazine was on all the newsstands for *circa* a year before the defendant's magazine was published.

## IV.

470

I have gone through all the plaintiff's magazines and the defendant's magazine, and I find that in the one copy of the defendant's magazine which has come out—the May, 1939 number of the magazine called "Wonder Comics"—there has been unfair use by the defendant of the plaintiff's copyrighted pictures, and unfair paraphrase of the plaintiff's text accompanying its pictures.

Consequently, in my opinion, infringement has been shown both textually and pictorially.

Short of "Chinese copies" of the plaintiff's "Superman" strip, the defendant could hardly have gone further than it has done. *E. g.*, the pictures shown in the moving papers on the preliminary injunction which came before one of the Judges in motion part and which may be referred to in the findings of fact to be hereinafter provided for, and the parallel column comparison of the text as shown at pages 9 and 10 of the plaintiff's trial brief.

471

## V.

It seems to me that in dealing with a comic cartoon of the kind embodied in both the defendant's and the plaintiff's magazines, it has to be remembered that every such cartoon embodies a conception of humor or surprise or in-

credibility—whatsoever the cartoonist may be aiming at—and what the owner of the copyright is entitled to is the protection of that embodiment of his concept. E. g., *King Features Syndicate v. Fleischer*, 299 Fed. 533 (C. C. A. 2), which is often called, as it was on this trial, the “Spark Plug” case, and *Fleischer Studios, Inc. v. Ralph A. Freundlich, Inc.*, 73 F. (2) 276 (C. C. A. 2), which is often called, as it was on this trial, the “Betty Boop” case.

Inasmuch as I have found unfair use by the defendants, that means infringement of the plaintiff’s copyrights and  
473 entitles the plaintiff under the Copyright Act to a judgment for an injunction with costs and to damages and profits.

## VI.

Now we come to the question of mechanics, for my decision must be embodied in some juridical act in order to have it of any value.

Counsel for the plaintiff must forthwith prepare and submit to me, through the Clerk’s office, findings of fact following the complaint with such additions as counsel for the plaintiff may be advised, as, for example, the  
474 pictures shown in the papers on the motion for the preliminary injunction, and the comparison of the texts shown on pages 9 and 10 of plaintiff’s trial brief, and conclusions of law in accordance with this opinion, which is just the barest outline of my views herein.

Counsel for the plaintiff must give five days’ notice of such findings of fact and conclusions of law to counsel for the defendants.

Counsel for the defendants may, if he be so advised, on the return day of such notice, submit to me a criticism of the findings of fact which plaintiff’s counsel may have proposed.

Only the findings of fact and conclusions of law which I sign will be filed as part of the record herein. We do not have cross-findings in this Court.

I suggest this procedure because I think that counsel for the defendants will probably find that a great many of the proposed findings of fact by the plaintiff are not subject to any objection. There will probably be only a few really controversial matters.

Any memoranda on the subject of findings of fact made by defendants’ counsel must be served on plaintiff’s counsel and admission of service secured before submission to me. 476

Now, in order that I may be facilitated in correcting the findings of fact, I want them sent to me typed in triple spacing so that I can correct them by writing in between the lines if I wish to.

The necessity for this form of procedure has been approved by the United States Supreme Court in a case which was decided under Equity Rule 70½, *Interstate Circuit, Inc. v. U. S.*, 304 U. S. 55, 56 and 57. Before that case, I had always made out findings of fact in my opinion, and had then said at the end thereof that the opinion should stand as the findings of fact and conclusions of law in the cause. The Supreme Court, under the case just cited, literally enforced Rule 70½ and ended that practice. 477

## VII.

With regard to the remedy, after the findings of fact and conclusions of law are signed by me, the plaintiff will have to submit, through the Clerk’s office, a final decree



carrying costs and counsel fees, to be fixed as hereinafter prescribed, which will provide—

1. For a permanent injunction forbidding the further publication by the defendant Bruns Publications, Inc., of its cartoon character 'Wonderman', in such form as will make that cartoon character trespass in any respect on the plaintiff's cartoon character 'Superman'.

I have already indicated herein some of the respects in which I think it has already trespassed, and, for the future, the two cartoons must be kept apart.

The form of the injunction to be submitted should, I think, substantially follow the lines of the injunctions granted in the 'Spark Plug' and 'Betty Boop' cases referred to above. The records on appeal in those cases are available to be looked at in the Association of the Bar or in the Clerk's office of the Circuit Court of Appeals in this building.

2. For a recovery by the plaintiff from the defendants of the plaintiff's damages and profits which I have fixed under Section 25(b) of the Copyright Act at Fifteen hundred dollars (\$1,500).

The defendants, Kable News Company and the Interborough News Company, will only be secondarily liable for such damages and profits in case the Bruns Publications, Inc., cannot answer therefor. In such event, they will be jointly and severally liable therefor as joint and several infringers of the plaintiff's copyright.

### VIII.

In the final decree the plaintiff will have also costs as against the defendants, including all taxable allowances

and disbursements, and also reasonable counsel fees, as provided under Section 40 of the Copyright Act. Costs are mandatory against the unsuccessful party under that Act, but counsel fees shall be recoverable in the first instance from the Bruns Publications, Inc., and only on failure to secure payment from it may the plaintiff have recourse to the Kable News Company and the Interborough News Company who will then, as in the case of the damages and profits hereinabove provided for, be jointly and severally liable therefor.

### IX.

Counsel fees will be fixed by me before any final decree is entered. In order to enable me to fix these fees in accordance with the canons of legal charges laid down by Judge Choate of this Court, and quoted by me in *In re Osofsky*, 50 F. (2d) 925, I will require the plaintiff's counsel to serve, with two days' notice, on the attorneys for the defendants and submit to me a verified petition dealing fully with their services and disbursements herein.

### X.

Only after these fees are fixed in accordance with the canons of charges above referred to, and the costs are taxed, may a final decree be noticed for settlement, in order that the costs, including counsel fees allowed, may be included in the final decree.

The final decree will be submitted to me through the Clerk's office on the usual notice.

WOOLSEY,  
U. S. D. J.

484

**Findings of Fact and Conclusions of Law.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

Civil 3-58.

---

 DETECTIVE COMICS, INC.,

Plaintiff,

485

AGAINST

BRUNS PUBLICATIONS, INC., KABLE NEWS COMPANY,  
and INTERBOROUGH NEWS CO.,

Defendants.

---

 FINDINGS OF FACT.

486 1. Plaintiff, Detective Comics, Inc., at all times hereinafter mentioned was and still is a corporation organized and existing under and by virtue of the Laws of the State of New York, having its principal office and place of business at No. 480 Lexington Avenue, in the Borough of Manhattan, City, County and State of New York within the Southern District of New York, and was and still is engaged in the business of publishing magazines for sale to the general public throughout the United States of America and elsewhere.

2. Defendant, Bruns Publications, Inc., at all times hereinafter mentioned was and still is a corporation organized and existing under and by virtue of the Laws of the State of New York, having its principal office and

*Findings of Fact and Conclusions of Law.*

487

place of business at No. 480 Lexington Avenue, in the Borough of Manhattan, City, County and State of New York within the Southern District of New York, and was and still is engaged in the business of publishing magazines for sale to the general public in the United States of America and elsewhere.

3. Defendant, Kable News Company, at all times hereinafter mentioned was and still is a corporation organized and existing under and by virtue of the Laws of the State of Illinois and has regularly engaged and still regularly engages in business in the State of New York and maintains one of its principal offices and place of business at No. 420 Lexington Avenue, in the Borough of Manhattan, City, County and State of New York within the Southern District of New York, and was and still is engaged in the business of distributing magazines throughout the United States of America and elsewhere. 488

4. Defendant, Interborough News Co., at all times hereinafter mentioned was and still is a corporation organized and existing under and by virtue of the Laws of the State of New York, having its principal office and place of business at No. 525 West 52nd Street, in the Borough of Manhattan, City, County and State of New York within the Southern District of New York, and was and still is engaged in the business of distributing magazines in the City and State of New York. 489

5. Defendants, Bruns Publications, Inc., Kable News Company and Interborough News Co., are inhabitants of and may be found within the Southern District of New York.

6. Plaintiff was organized for the purpose, among other things, of carrying on and since its organization has carired on and is now carrying on, the business of writing, producing, publishing and selling periodicals; that for these purposes it has caused to be written by its agents a series of periodicals entitled "Action Comics"; that plaintiff, being an employer for whom said periodicals were made for hire, is the author and proprietor thereof.

491 7. Plaintiff, being a corporation organized and existing under and by virtue of the Laws of the State of New York, is and was at the time of securing and registering claim to copyrights in said periodicals, as hereinafter set forth, a citizen of the United States.

8. Said periodicals caused to be written by plaintiff, the author thereof, by its agents as aforesaid, contain a large amount of matter wholly original with said author thereof.

492 9. Plaintiff did on or about the 18th day of April, 1938, secure copyright for the June, 1938 issue of said periodical "Action Comics" by publishing the same and offering the same to the general public with the following notice of copyright, "Entire contents copyright 1938 by Detective Comics, Inc.," inscribed upon the title page; plaintiff did on or about the 25th day of May, 1938, secure copyright for the July, 1938 issue of said periodical "Action Comics" by publishing the same and offering the same to the general public with the following notice of copyright, "Entire contents copyright 1938 by Detective Comics, Inc.," inscribed upon the title page; plaintiff did on or about the 25th day of June, 1938, secure copyright for the August, 1938, issue of said periodical

"Action Comics" by publishing the same and offering the same to the general public with the following notice of copyright, "Entire contents copyright 1938 by Detective Comics, Inc.," inscribed upon the title page; plaintiff did on or about the 25th day of July, 1938, secure copyright for the September, 1938, issue of said periodical "Action Comics" by publishing the same and offering the same to the general public with the following notice of copyright, "Entire contents copyright 1938 by Detective Comics, Inc.," inscribed upon the title page; plaintiff did on or about the 25th day of August, 1938, secure copyright 494 for the October, 1938, issue of said periodical "Action Comics" by publishing the same and offering the same to the general public with the following notice of copyright, "Entire contents copyright 1938 by Detective Comics, Inc.," inscribed upon the title page; plaintiff did on or about the 26th day of September, 1938, secure copyright for the November, 1938, issue of said periodical "Action Comics" by publishing the same and offering the same to the general public with the following notice of copyright, "Entire contents copyright 1938 by Detective Comics, Inc.," inscribed upon the title page; plaintiff did on or about the 25th day of October, 1938, secure copy- 495 right for the December, 1938, issue of said periodical "Action Comics" by publishing the same and offering the same to the general public with the following notice of copyright, "Entire contents copyright 1938 by Detective Comics, Inc.," inscribed upon the title page; plaintiff did on or about the 25th day of November, 1938, secure copyright for the January, 1939, issue of said periodical "Action Comics" by publishing the same and offering the same to the general public with the following notice of copyright, "Entire contents copyright 1938 by Detective Comics, Inc.," inscribed upon the title page; plaintiff did

*Findings of Fact and Conclusions of Law.*

on or about the 27th day of December, 1938, secure copyright for the February, 1939, issue of said periodical "Action Comics" by publishing the same and offering the same to the general public with the following notice of copyright, "Entire contents copyright 1939 by Detective Comics, Inc.," inscribed upon the title page; plaintiff did on or about the 25th day of January, 1939, secure copyright for the March, 1939, issue of said periodical "Action Comics" by publishing the same and offering the same to the general public with the following notice of copyright, "Entire contents copyright 1939 by Detective Comics, Inc.," inscribed upon the title page; plaintiff did on or about the 25th day of February, 1939, secure copyright for the April, 1939, issue of said periodical "Action Comics" by publishing the same and offering the same to the general public with the following notice of copyright, "Entire contents copyright 1939 by Detective Comics, Inc.," inscribed upon the title page.

10. After publication of each of said periodicals with said notices of copyright as aforesaid, plaintiff duly registered its claim to copyright in each of said issues of said periodical "Action Comics" by filing, in respect of each such issue thereof, with the Register of Copyrights application therefor, specifying that each issue of said periodical belongs to subdivision (b) of Section 5 of the Act of March 4, 1909 and (in respect of each of said issues of said periodical) duly deposited in the mail, addressed to the Register of Copyrights, Washington, D. C., two complete copies of the best edition of each issue thereof then published as aforesaid, which were printed from type set within the limits of the United States from type set therein, and were bound within the limits of the United States, and paying, in respect of each such issue

*Findings of Fact and Conclusions of Law.*

of said periodical, to the Register of Copyrights the fees required by law.

11. There was duly issued to plaintiff under seal of the Copyright Office and signed by the Register of Copyrights, a certificate of registration in respect of each such issue of said periodical, as follows:

- (a) As to the June, 1938 issue of said periodical:  
June 14, 1938—Class B, No. 379787.
- (b) As to the July, 1938 issue of said periodical:  
June 14, 1938—Class B, No. 379788.
- (c) As to the August, 1938 issue of said periodical:  
July 30, 1938—Class B, No. 385466.
- (d) As to the September, 1938 issue of said periodical:  
September 17, 1938—Class B, No. 387907.
- (e) As to the October, 1938, issue of said periodical:  
October 27, 1938—Class B, No. 394784.
- (f) As to the November, 1938 issue of said periodical:  
October 27, 1938—Class B, No. 394886.
- (g) As to the December, 1938 issue of said periodical:  
December 22, 1938—Class B, No. 399214.
- (h) As to the January, 1939 issue of said periodical:  
February 7, 1939—Class B, No. 405349.
- (i) As to the February, 1939 issue of said periodical:  
March 29, 1939—Class B, No. 411088.



*Findings of Fact and Conclusions of Law.*

502

- (j) As to the March, 1939 issue of said periodical:  
March 4, 1939—Class B, No. 409037.
- (k) As to the April, 1939 issue of said periodical:  
March 17, 1939—Class B, No. 409444,

which said certificates are in evidence herein as Plaintiff's Exhibits 1 to 11, inclusive.

503 12. Since the respective dates of publication of each of said issues of said periodical as hereinbefore set forth, said periodicals have been published by plaintiff and all copies of said periodicals made by plaintiff or under its authority or license have been printed and bound as set forth in Finding No. 10 hereof and that all such copies bore the notices of copyright as set forth in Finding No. 9 hereof.

504 13. Plaintiff since the time of securing copyrights and registering claims thereto as aforesaid has been and now is the sole proprietor of the entire right, title and interest in and to the said copyrights of each issue of said periodical "Action Comics" and of all rights and privileges granted and secured thereby.

14. Copies of each of said copyright issues of plaintiff's said periodical entitled "Action Comics" are in evidence herein as Plaintiff's Exhibits 12 to 22, inclusive.

15. "Action Comics" is a monthly periodical, 64 pages long, containing comic cartoons, telling complete stories or stories in serialized form. The retail sales price of said magazine is 10¢ per copy. The sales of said magazine to the general public have risen from month to month since the initial publication and distribution thereof.

*Findings of Fact and Conclusions of Law.*

505

Estimated present sales thereof to the general public are at the rate of 350,000 copies per issue out of 472,000 distributed copies of each issue thereof.

16. The first and principal comic strip feature in each issue of "Action Comics" is entitled "Superman", a wholly original fantastic description of a human being known as "Superman" and possessed of superhuman attributes. Said feature is 13 pages long in each issue of "Action Comics" in evidence herein except for the October, 1938 issue thereof (Plaintiff's Exhibit 16) in which it is 9 pages long. Said comic strip is the most popular and most important comic strip feature in said magazine. In recognition of such popularity and importance the feature "Superman" is prominently displayed by way of feature announcement on the covers of the issues of "Action Comics" for December, 1938 and February, March and April, 1939. In the June, 1938, December, 1938 and March, 1939 issues of "Action Comics", "Superman" is the central theme of the cover display. 506

17. Defendant, Bruns Publications, Inc., has an office in the same building as plaintiff. Within the year prior to the commencement of this action, its president, Victor S. Fox, who directs its affairs and controls its policies frequently called at plaintiff's office and had full knowledge of the existence of "Action Comics" and its principal feature "Superman" and knew that the same were copyrighted by plaintiff. Said defendant, Bruns Publications, Inc., and defendants, Kable News Company and Interborough News Co., had access to plaintiff's magazine "Action Comics" and to the principal feature thereof entitled "Superman" for some time prior to the publication and distribution of the infringing periodical entitled "Wonder Comics" hereinafter referred to. 507

*Findings of Fact and Conclusions of Law.*

18. On or about March 15, 1939 defendant, Bruns Publications, Inc., published or caused to be published and placed on the market for sale to the general public through the United States and elsewhere, a periodical entitled "Wonder Comics", May, 1939 issue thereof, being the first issue of said magazine. A copy of said issue of said periodical entitled "Wonder Comics", issue of May, 1939 is in evidence herein as Plaintiff's Exhibit 23. The same consists of comic cartoons, telling complete stories or stories in serialized form.

19. Said May, 1939 issue of said periodical entitled "Wonder Comics" contains 64 pages (the same number of pages as "Action Comics"), has the same page size as "Action Comics" and the retail sales price thereof is 10¢ per copy, the same retail sales price per copy as "Action Comics".

20. The first and principal feature of said May, 1939 issue of said periodical entitled "Wonder Comics" is a 14 page comic strip entitled "Wonder Man", describing the exploits of a human being possessed of superhuman attributes. Said comic strip entitled "Wonder Man" is directly copied after plaintiff's comic strip entitled "Superman". Said comic strip character called "Wonder Man" is, except for a different device on the chest, directly copied after plaintiff's comic strip character "Superman".

21. Defendant, Bruns Publications, Inc., has copied plaintiff's copyright and has paraphrased plaintiff's textual material accompanying the pictures in plaintiff's comic strip entitled "Superman". Specific instances and examples of such copying are as follows:

*Findings of Fact and Conclusions of Law.*

(a) "Superman" is a normal human being possessed of superhuman powers of strength and speed.

"Wonder Man" is likewise a normal human being possessed of superhuman powers of strength and speed.

(b) "Superman" conceals his strength beneath ordinary clothing and stands revealed in his true character only after removing his regular garments and appearing in a skin tight acrobatic uniform emblazoned with the letter "S" on his chest. The color of the uniform is blue with trunks of extra color (Plaintiff's Exhibit 17, November, 1938 issue of "Action Comics", p. 8). 512

"Wonder Man" likewise conceals his strength beneath ordinary clothing and stands revealed in his true character only after removing his regular garments and appearing in a skin tight acrobatic uniform. Such uniform is emblazoned with the letter "W" on his chest. The color of the uniform is red with trunks of extra color (Plaintiff's Exhibit 23, p. 4).

(c) "Superman" is stated to be "champion of the oppressed" (Plaintiff's Exhibit 12, June, 1938 issue of "Action Comics", p. 1).

"Wonder Man" is likewise stated to be "champion of the oppressed" (Plaintiff's Exhibit 23, p. 1). 513

(d) "Superman" is portrayed running toward a full moon "off into the night" (Plaintiff's Exhibit 21, March, 1939 issue of "Action Comics", p. 12).

"Wonder Man" is likewise portrayed running toward a full moon "off into the night" (Plaintiff's Exhibit 23, p. 13).

(e) The hand of "Superman" is shown crushing a gun with the legend appearing over the picture "then

*Findings of Fact and Conclusions of Law.*

crushes it to a pulp" (Plaintiff's Exhibit 18, December, 1938 issue of "Action Comics", p. 5).

The hand of "Wonder Man" is also shown crushing a gun; the legend appearing above the picture being "instead a hand seizes the gun and crushes it in its grasp" (Plaintiff's Exhibit 23, p. 9).

(f) "Superman" is portrayed as having succeeded in beating a bullet to its target and preventing its harming the intended target by interposing his impenetrable figure (Plaintiff's Exhibit 19, January, 1939 issue of "Action Comics", p. 9).

"Wonder Man" is shown stopping and throwing back shells (Plaintiff's Exhibit 23, p. 8).

(g) "Superman" is impervious to bullets; he is pictured as being shot at by three men each holding a gun, but remaining unharmed (Plaintiff's Exhibit 13, July, 1938 issue of "Action Comics", p. 2).

"Wonder Man" is likewise impervious to bullets. He is likewise shown being shot at by three men each holding a gun, one of them stating: "It's no use—bullets can't penetrate his skin" (Plaintiff's Exhibit 23, p. 13).

(h) "Superman" is shown leaping over a twenty story building (Plaintiff's Exhibit 12, June, 1938 issue of "Action Comics", p. 1).

"Wonder Man" is pictured leaping from building to building (Plaintiff's Exhibit 23, p. 9). This picture of "Wonder Man" is similar in action and portrayal to the cover of Plaintiff's Exhibit 18, being the December, 1938 issue of "Action Comics" and to the picture appearing in the middle of page twelve of Plaintiff's Exhibit 12, being the June, 1938 issue of "Action Comics".

*Findings of Fact and Conclusions of Law.*

(i) "Superman" is described as being engaged in his "one-man battle against evil and injustice" (Plaintiff's Exhibit 18, December, 1938 issue of "Action Comics", p. 1). It is also stated that "he battles the forces of evil and injustice" (Plaintiff's Exhibit 21, March, 1939 issue, p. 1).

"Wonder Man" is described as "relentless foe of all that is evil and unjust" (Plaintiff's Exhibit 23, p. 1).

(j) "Superman" is pictured as ripping open a steel door (Plaintiff's Exhibit 12, June, 1938 issue of "Action Comics", p. 3).

"Wonder Man" is pictured as ripping through a steel door (Plaintiff's Exhibit 23, p. 10).

(k) "Superman" is stated to be "the strongest man on earth" (Plaintiff's Exhibit 17, November, 1938 issue of "Action Comics", p. 1).

"Wonder Man" is stated to be "the strongest human on earth" (Plaintiff's Exhibit 23, p. 1).

22. Jerome Siegel, writer, and Joe Shuster, artist, collaborated in the creation of the comic strip character "Superman" and created the same in 1933. The material appearing in the "Superman" comic strip in the first issue of "Action Comics" (June, 1938 issue, Plaintiff's Exhibit 12) was prepared by them in 1934.

23. Said Jerome Siegel and Joe Shuster on or about March 1, 1938, for a valuable consideration paid to them by plaintiff, assigned and transferred to plaintiff all of their rights and copyrights in and to said comic strip character "Superman" and in and to the material which thereafter appeared as the "Superman" comic strip in the first issue of "Action Comics" (June, 1938 issue thereof,



520

*Findings of Fact and Conclusions of Law.*

Plaintiff's Exhibit 12). Since March 1, 1938 Jerome Siegel and Joe Shuster have created all the material appearing in each of the "Superman" comic strips in all issues of plaintiff's magazine "Action Comics" pursuant to employment for that purpose by plaintiff and said Jerome Siegel and Joe Shuster have received from plaintiff compensation therefor.

24. Defendants, Kable News Company and Interborough News Co., were retained by defendant, Bruns Publications, Inc., to distribute said magazine "Wonder Comics" to dealers in periodicals throughout the United States and elsewhere and said defendants, Kable News Company and Interborough News Co., have distributed 230,000 copies or thereabouts of said magazine "Wonder Comics" to dealers thereof for sale to the general public throughout the United States and elsewhere.

## CONCLUSIONS OF LAW.

1. This court has jurisdiction of the cause of action herein as the same is a suit in equity arising under the Copyright Laws of the United States.

2. This court has jurisdiction over the persons of the defendants and each of them.

3. There was duly secured to plaintiff, its successors and assigns, as provided by law for the first term of twenty-eight years from the respective dates of publication above referred to in Finding No. 9, the exclusive rights and privileges in and to the copyrights of each of the issues of the periodical "Action Comics" therein referred to, throughout the United States and territories

*Findings of Fact and Conclusions of Law.*

523

thereof, including the sole liberty and exclusive right to print, reprint, publish, copy and vend said copyrighted periodicals.

4. Plaintiff's aforesaid copyrights are good and valid and owned by plaintiff.

5. Plaintiff's aforesaid copyrights have been infringed by defendants by virtue of the publication and distribution of the May, 1939 issue of the periodical entitled "Wonder Comics".

524

Dated, May 11th, 1939.

WOOLSEY,  
United States District Judge.

525