

No. 13-1523

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**In the Supreme Court of the United States**

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MARK WARREN PEARY, AS PERSONAL  
REPRESENTATIVE OF THE ESTATE OF JOSEPH SHUSTER,  
*Petitioner,*

v.

DC COMICS,  
*Respondent.*

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*On Petition for a Writ of Certiorari to the  
United States Court of Appeals for the Ninth Circuit*

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**BRIEF OF *AMICI CURIAE* BRUCE LEHMAN, FORMER  
ASST. SECRETARY OF COMMERCE AND DIRECTOR  
OF THE U.S. PATENT AND TRADEMARK OFFICE;  
RALPH OMAN, FORMER U.S. REGISTER OF COPYRIGHTS;  
THE ARTISTS RIGHTS SOCIETY, THE INTERNATIONAL  
INTELLECTUAL PROPERTY INSTITUTE, AND VARIOUS  
PROFESSIONAL ASSOCIATIONS, ILLUSTRATORS AND  
CARTOONISTS IN SUPPORT OF PETITIONER**

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**INTERESTS OF THE *AMICI CURIAE*<sup>1</sup>**

Bruce Lehman, as Assistant Secretary of Commerce and Director of the U.S. Patent and Trademark Office from 1993 through 1998, served as the chief advisor to the President for intellectual property matters, including copyright. He supervised and coordinated development of the Administration's position in support of the Copyright Term Extension Act of 1998 ("CTEA"), including the provisions permitting authors to recapture for the extended term copyrights they had transferred to others during the first 75 years of the term of copyright in works they created. From 1974 through 1983 he served as Counsel to the Committee on the Judiciary of the U.S. House of Representatives and was the principal legal counsel to the Committee on copyright matters. In that capacity, he advised the Committee in the 93rd Congress and the 94th Congress during the process of consideration and final passage of the 1976 Copyright Act. The Act extended the 56-year term of protection for works created under the 1909 Act for an additional 19 years, and gave the authors of those works the right to recapture for the extended term their ownership of copyrights previously transferred to others. These experiences afforded Mr. Lehman a thorough understanding of the intent and

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<sup>1</sup> No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution to fund the preparation or submission of this brief. No person other than the *amici* made such a monetary contribution. The parties have been given at least ten days' notice of *amici's* intention to file this brief and have given *amici* consent to file. Copies of the letters of consent will be filed with the Clerk of the Court.

objective of Congress in establishing the authors' termination rights at issue in the instant case.

Ralph Oman served as U.S. Register of Copyrights from 1985 to 1993. For the past 22 years, Mr. Oman has taught copyright law at George Washington University Law School, but it is his wealth of first-hand experience that has made him a true expert. He served as Chief Counsel of the Subcommittee on Patents, Trademarks, and Copyrights of the U.S. Senate Committee on the Judiciary and as Chief Minority Counsel of the Senate Subcommittee on Patents, Trademarks, and Copyright during the final two years of Senate consideration of the landmark 1976 Copyright Act. As the former Register of Copyrights, Mr. Oman recognizes that this case raises issues of national importance and implicates wide-ranging and recurring policy concerns of constitutional dimension. Mr. Oman cautions not to draw conclusions from the Copyright Office's failure to intervene at this point in the proceeding because during his tenure as Register of Copyrights it was the Office's policy not to weigh in at the cert stage, absent an express request from the Court or the Solicitor General that it do so. At this preliminary stage, the Court has yet to make such request.

The International Intellectual Property Institute (IIPI) is the foremost organization for providing education and guidance about intellectual property rights to leaders and innovators in developing countries. Since 1998, the nonprofit organization has educated government leaders about the economic value and impact of IP regulation, created opportunities for the economically disadvantaged to harness their



creativity and innovation, and helped traditional artisans – primarily women – protect and promote their cultural products. Current members on the board of advisors include Former Commissioner of Trademarks of the United States Patent and Trademark Office, Lynne Beresford; Former Commissioner of the Chinese Patent Office and Commissioner of State Intellectual Property Office, Dr. GAO Lulin; and former Vice President of the European Patent Office, Dr. Jacques Michel.

The Artists Rights Society (ARS) is the preeminent copyright, licensing, and monitoring organization for fine artists in the United States. Founded in 1987, ARS represents the intellectual property rights interests of over 60,000 visual artists and the estates of visual artists from around the world (painters, sculptors, architects, photographers and others). Among its American members are Jackson Pollock, Alexander Calder, Georgia O’Keeffe, Frank Lloyd Wright, Willem de Kooning, Mark Rothko, Robert Indiana, Sam Francis, Bruce Nauman, Frank Stella, Arshile Gorky, Richard Serra, Sol LeWitt, Lee Krasner, Barnett Newman, Milton Avery, Susan Rothenberg, and many others. Foreign members include Henri Matisse, Pablo Picasso, Rene Magritte, Marc Chagall, Marcel Duchamp, Joan Miró, Man Ray, Edvard Munch, Joseph Beuys, Pierre Bonnard, Fernand Léger, Alberto Giacometti, Georges Braque, Constantin Brancusi, Jean Dubuffet, Max Ernst, Le Corbusier, Vassily Kandinsky, and many others. A large percentage of the artists represented by ARS created works prior to enactment of the 1976 Copyright Act and have a strong interest in being able to assert the termination rights in such works granted to them under 17 U.S.C. § 304.

The American Society of Illustrators Partnership (ASIP) is a coalition of visual artist organizations, founded and funded entirely by working artists. ASIP was founded in 2007 , although many of its member organizations have distinguished histories dating back more than 50 years. The coalition encompasses a broad spectrum of creative artists, ranging from the nation's editorial cartoonists to medical illustrators, architectural and science illustrators, aviation artists, magazine, book and advertising illustrators. Combined, its members create much of the visual material in American contemporary culture. ASIP's board includes a Pulitzer Prize winner, a muralist for the Smithsonian's Air and Space Museum and two members of the Illustrators Hall of Fame; as well as artists who have received the top awards for achievement in their respective fields. The thousands of creators among ASIP's membership form the foundation of its interest in the continued effectiveness and fairness of copyright law, as well as its unique insight and unparalleled experience in how art is created, licensed and managed by the people who actually create it.

Joining as *amici* are an additional twelve professional organizations that represent illustrators and artists, as set forth in Appendix A at App. 1; plus fifty nationally celebrated illustrators, cartoonists and artistic professionals, including four editorial cartoonists who have been awarded the Pulitzer Prize, as set forth in Appendix B at App. 8.

All of the *amici* represent working artists that strive to participate in the proven value of their works, despite the greater market power wielded by

institutional and corporate purchasers. The artists' ability to make effective use of the termination rights at issue in this case must be preserved as Congress intended, if they are to retain meaningful benefits from their copyrights.

### **SUMMARY OF THE ARGUMENT**

In 1976, Congress extended the term of existing copyrights for an additional nineteen years and provided authors and designated heirs with the inalienable right to recapture for the extended term previously assigned copyrights. Counsel for the *amici*, Bruce Lehman and Ralph Oman, served as counsel to the Judiciary Committees of the House of Representatives and Senate, respectively, in crafting the legislative reports and official statements accompanying passage of that landmark legislation. As shown below, counsel have personal knowledge of Congress's intent that there be no exception to the inalienability of authors' termination rights. In 1998, Congress further extended the term of then existing copyrights for an additional twenty years; coupled this extension with a second termination right; additionally provided termination rights to the executor of an author's estate, and reiterated unambiguously that termination rights are inalienable.

It is under this specific statutory grant of authority that the petitioner in 2003 served a proper notice of termination regarding its co-authorship interest in Superman. But the decision of the Ninth Circuit eviscerated the petitioner's termination rights based on a contrived interpretation of state contract law and with little regard for the statute or Congress's intent.

The decision follows earlier decisions in the Ninth and Second Circuits, which erroneously substitute a state contract law analysis for the plain language of the pre-emptive Copyright Act. Given the concentration of copyright-based industries in these two circuits, their erroneous interpretation of 17 U.S.C. § 304(c)(5) gravely damages the copyright interests of the tens of thousands of authors, visual artists, illustrators, and cartoonists represented by the *amici*.

The federal legal issue presented has significant practical consequences as termination rights apply to all copyrighted works, except those “for hire,” at a time when the value of our copyright industries (*e.g.*, software, entertainment) is at an all-time high. The decisions cause real uncertainty as to the copyright ownership of innumerable works and invite a multiplicity of lawsuits, chilling a key federal right designed to foster the creativity of authors, and in turn, our culture and economy.

*Amici* urge this Court to grant the petitioner’s request for *certiorari* review and to reverse the decision below that strips the estate of Joseph Shuster—co-creator of one of the most iconic works of comic art and fiction in the twentieth century—of its statutory termination rights in spite of Congress’s clear mandate to the contrary, and negatively affects thousands of similarly situated authors and artists represented by the *amici*.

**ARGUMENT****I. THE DECISION THWARTS CONGRESS' EXPLICIT EFFORT TO ADDRESS AND PREVENT CONTRACTUAL RESTRICTIONS ON AN AUTHOR'S ABILITY TO RECAPTURE HIS/HER COPYRIGHTS**

As this Court has observed, “[t]he principal purpose of the amendments in [17 U.S.C. §] 304 was to provide added benefits to authors . . . . The termination right was expressly intended to relieve authors of the consequences of ill-advised and unremunerative grants that had been made before the author had a fair opportunity to appreciate the true value of his work product.” *Mills Music, Inc. v. Snyder et al.*, 469 U.S. 153, 172-73 (1985).

Section 304’s termination right was the most recent expression of more than a century of congressional intent. The 1909 Copyright Act provided an initial 28 year term with the right to renew for an additional 28 years. The renewal right specifically vested in authors and their families so that they “could not be deprived of this right.” H.R. Rep. No. 60-2222, at 14 (1909).

However, as in the instant case, Congress’s clear intent was undermined by judicial interpretation that the renewal copyright expectancy could be assigned anticipatorily and irrevocably to a publisher. *Fred Fisher Music Co., Inc. v. M. Witmark & Sons*, 318 U.S. 643 (1943). As a result authors and their heirs seldom had the chance to recapture earlier assigned copyrights because “publishers routinely required authors and their families to assign renewal rights in advance.” Peter S. Menell and David Nimmer, *Judicial*

*Resistance to Copyright Law's Inalienable Right to Terminate Transfers*, 33 Colum. J.L. & Arts 227, 227 (2009).

The 1909 Copyright Act was revised in 1976 after more than two decades of intensive study, largely conducted at Congress's direction, by the Copyright Office. The inability of authors and their heirs to take effective advantage of the renewal scheme was among the key issues examined by the Office, which submitted a comprehensive report to Congress in 1961 observing that "the reversionary feature of the present renewal system has largely failed to accomplish its primary purpose." Staff of H. Comm. on the Judiciary, 87<sup>TH</sup> Congr. Copyright Law Revision: Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law 53 (Comm. Print 1961). The report specified, therefore, that "the renewal interest be made unassignable in advance" in any revision legislation. *Id.* at 53-54.

*Amicus* Ralph Oman's predecessors as Registers of Copyright – starting with Arthur Fisher, continuing with Abraham Kaminstein, and culminating with the legendary Barbara Ringer – all strongly supported the major reform in U.S. copyright law that would give authors a sacrosanct right of termination. In his 1965 Supplementary Report to Congress, the Register of Copyrights, Abraham Kaminstein, explained the debate: "Throughout the drafting phase of the revision program, the most explosive and difficult issue has been the problem [of]... 'protection of authors against unenumerative transfers,' ... known generally as the 'reversion problem.'" Abraham Kaminstein, Supplementary Report of the Register of Copyrights on

the General Revision of the U.S. Copyright Law: 1965 Revision Bill, part 6 at 71 (1965) (“Kamenstein Report”).

Because the termination right was intended to be bullet-proof, the publishers fought it at each stage of the debate, but ultimately lost the battle. They could not convince Congress to weaken the termination right, and its inalienability provision, § 304(c)(5), survived largely as originally drafted.

Still, in enacting its reforms, Congress did not deprive assignees of any rights they bargained for and owned. When Congress decided in 1976 to abolish the dual term system entirely for post-1977 works, it modified that system with respect to pre-existing works by extending copyrights in their renewal term by nineteen years for a total term of seventy-five years. This enabled Congress to remedy the inequity identified by the Copyright Office by enacting termination provisions applicable to the extended renewal period without adverse consequences to terminated copyright assignees that had relied on the Court’s holding in *Fred Fisher*. Such assignees had no expectation of copyright exclusivity beyond fifty-six years; thus Congress gave the author and his or her statutory heirs the right to recapture the copyright for the nineteen year extension.

The 1976 Act provided that in the case of a deceased author, the termination right “is owned, and may be exercised by, his widow or her widower and his or her children or grandchildren.” Pub. L. No. 94-553, § 304(c)(2), 90 Stat. 2574. Consistent with the Copyright Office’s 1961 Report, this new termination right was specifically made inalienable in § 304(c)(5)

which stated that “[t]ermination ... may be effected *notwithstanding any agreement to the contrary*, including an agreement to make a will or to make any future grant.” 17 U.S.C. § 304(c)(5). 90 Stat. 2575 (Italics added).

The termination right was not an obscure provision that was snuck into the statute. It was the front-and-center subject of heated debate between opposing interests. Despite some changes to make the provision less onerous for publishers and movie studios (e.g., by requiring authors to give timely notice of intent to terminate assignments, instead of an automatic copyright reversion), the core of this authorial recapture right survived the legislative process. This would certainly not have been “the most explosive and difficult issue” in the reform legislation, if it could be so easily circumvented. Kamenstein Report, 1965 revision bill, part 6 at 71.

In 1998, Congress again extended the copyright term to harmonize U.S. law with evolving international law after the member states of the European Union collectively adopted a common copyright term spanning the life of the author plus seventy years. The Sonny Bono Copyright Term Extension Act (the “CTEA”) matched the common European standard by extending U.S. copyright term for an additional twenty years, including all copyrights then currently in force.

As to this extended term, the CTEA continued Congress’s policy of permitting authors and their statutorily defined heirs to recapture previously assigned copyrights. Furthermore, the CTEA expanded the class of those entitled to exercise the termination right to ensure widespread applicability of this



important remedial measure. For the first time, the CTEA granted the “author’s entire termination interest” to an “author’s executor, administrator, personal representative, or trustee” where there is no surviving spouse, child or grandchild. Pub. L. No. 105-298 § 103, 112 Stat. 2829.

The termination right was one of the five organizing principles of the 1976 Act: automatic copyright protection from the moment a work is fixed in a tangible medium of expression, broad coverage of subject matter, the unitary term (life of the author plus fifty years), the sweeping exclusive rights, and the inalienable termination right. On this sturdy armature, Congress built a regime of authors’ rights that gives them a chance to reap a fair reward from the fruits of their labor and creativity. Over two decades later, Congress, in the 1998 CTEA, not only reaffirmed its dedication to the termination rights scheme and the rights’ fundamental inalienability, it expanded its operation.

## **II. THE DECISION OF THE COURT OF APPEALS SHOULD BE REVERSED BECAUSE IT DEFIES THE COPYRIGHT ACT AND ENABLES EASY CIRCUMVENTION OF THE TERMINATION RIGHT**

### **A. The Decision Defies the Copyright Act**

Jerry Siegel and Joe Shuster’s “Superman” is one of the most iconic and lucrative characters in the world. It provided, even in 1976, a visible example of a work of authorship, sold for a pittance (\$130); and then generating millions for the publisher, while the authors are denied any ability to participate in the success of

their creation. In this light, the Ninth Circuit's decision is even more egregious. It not only blindly disregarded the express purpose of the termination right, but also defeated the provision specifically enacted to protect the termination interest of artists like Joe Shuster.

Joe Shuster co-authored Superman in 1934 and in 1938 assigned his copyrights to respondent's predecessor. It is undisputed that prior to the petitioner's service in 2003 of a notice of termination the respondent owned the copyrights in Shuster's work outright. The instant case concerns the right of the petitioner, as executor of the Shuster estate, to exercise its right to terminate Shuster's 1938 assignment pursuant to 17 U.S.C. § 304(d) and § 304(c)(2)(D). The statute gives such terminations priority over any pre-existing contractual agreements in plain language, unequivocally stating that "[t]ermination ... may be effected *notwithstanding any agreement to the contrary* [.]” (Italics supplied.). 17 U.S.C. § 304(c)(5).

The Court of Appeals disregarded the plain text and purpose of the statute by giving precedence to a mere pension agreement made in 1992 between DC Comics and Shuster's two siblings settling “all claims to any payments or other rights ...” which the siblings “may have ... now or hereafter ... in any and all work created by ... [their] brother, Joseph Shuster, or any works based thereon.” *DC Comics v. Pacific Pictures Corp.*, 2012 WL 4936588 (C.D. Cal. 2012).

Even if the termination right were not inalienable as plainly indicated in the statute, at the time of executing this agreement Shuster's siblings did not have the right to terminate earlier transfers of copyrights in their brother's works. In 1992, the right

to terminate prior copyright assignments of a dead author was limited to the author's surviving spouse, children, and grandchildren. 17 U.S.C. § 304(c)(2). Siblings were not and have never been included. *Id.* Since Shuster never married and had no children, no one held termination rights regarding his works in 1992.

In 1998 the CTEA extended the termination right for the first time to “the author’s executor, administrator, personal representative, or trustee” where there is no surviving spouse, children, or grandchildren, in which case such person “shall own the author’s entire termination interest.” 17 U.S.C. § 304(c)(2)(D). Therefore, it was and has never been within the power of Shuster’s siblings to contract away the termination interest directly or indirectly.

The Ninth Circuit’s interpretation of the statute defies it. Congress carefully considered the termination regime, but the decision completely ignored its explicit text and policy objectives by permitting unintended third parties to disenfranchise the intended beneficiaries of the statute.

### **B. The Decision Manipulates State Contract Law To Preempt a Federal Right**

The decision below follows a misinterpretation of the Copyright Act that is already entrenched in the Ninth Circuit in *Milne v. Stephen Slesinger, Inc.*, 430 F.3d 1036 (9th Cir. 2005) and the Second Circuit in *Penguin Group (USA), Inc. v. Steinbeck*, 537 F.3d 193 (2d Cir. 2008).

The Ninth Circuit’s refusal to give effect to petitioner’s termination rights in the instant case is

based entirely on the theory that such rights can be effectively contracted away irrespective of the explicit statutory prohibition in 17 U.S.C. § 304(c)(5) that “[t]ermination ... may be effected notwithstanding any agreement to the contrary[.]” In applying state contract law to eliminate the termination right the court of appeals all but disregarded the direct command of a federally pre-emptive statute enacted to carry out the purposes of Article I, Section 8, of the Constitution.

The Ninth Circuit’s disregard of the explicit inalienability of petitioner’s termination right follows its holding in an earlier termination rights case, *Milne, supra*. That case involved the attempt by Clare Milne to statutorily terminate the prior copyright transfers by her grandfather A.A. Milne of his *Winnie-The-Pooh* stories. Years earlier, a family trust that owned the copyrights by bequest had entered into a contract with the publisher revoking the author’s terminable pre-1978 copyright transfers and reassigning his copyrights in a non-terminable post-1977 grant—all for the express purpose of eliminating the termination rights of the author’s statutory heirs. *Milne*, 430 F.3d at 1040. In return for this agreement the Milne Trust received very significant compensation.

The court of appeals reasoned that even though this agreement eliminated the termination right it was not an “agreement to the contrary” prohibited by the statute, but a valid contractual “alternative” because the Trust had used the current termination right of Milne’s son, Christopher, as leverage to arrive at the bargain. *Id.* at 1045-1046. Undoubtedly, this holding was an attempt by the court to prevent the perceived injustice of allowing a member of the Milne family who

ostensibly benefitted from the Trust to later rely on the inalienability of the termination right. In reality, however, the parties could have simply adhered to the statute by serving a termination notice followed by a new license to the original licensee. 17 U.S.C. § 304(c)(6)(D). Regrettably, the tens of thousands of authors like *amici* now face the consequences of the Ninth Circuit's attempt to save one publisher from the consequences of an ill-advised deal, rather than enforce a statute intended to resolve much larger problems.

Unfortunately, the Second Circuit, the other jurisdiction primarily responsible for the jurisprudence governing the nation's copyright industries, followed the mistaken *Milne* decision in the *Steinbeck* case.

In 1994, John Steinbeck's second wife and widow, who owned her husband's copyrights by bequest, entered into an agreement which rescinded a 1938 copyright license by Steinbeck to a publisher and re-licensed the same copyrights to the publisher for an increased royalty and guaranteed advance above that in the 1938 contract. Neither of the author's surviving sons from his prior marriage were parties to this agreement. Under § 304(c), however, the sons held termination rights. Subsequently, one son and the surviving daughter of the other son (deceased) served the publisher with notice of termination. The district court correctly held that to the extent the widow's 1994 revocation and re-grant of rights operated to divest the author's son and granddaughter of their statutory termination rights, it was void as "an agreement to the contrary" under § 304(c)(5) of the Copyright Act. *Steinbeck v. McIntosh & Otis, Inc.*, 433 F. Supp. 2d 395, 402 (S.D.N.Y. 2006).

On appeal, the Second Circuit reversed on similar grounds to those relied on by the Ninth Circuit in *Milne*, holding that the 1994 Agreement expressly superseded the 1938 agreement and as such, there was no pre-1977 copyright grant to terminate. *Steinbeck*, 537 F.3d at 202. Following *Milne*, it held that the purpose of the statute was satisfied because Steinbeck's widow had used her putative termination right as bargaining power to renegotiate the original author-publisher agreement, at the expense of the statutory rights of the author's son and granddaughter. *Id.*

The instant case which relied on *Milne* and *Steinbeck* could not be more dissimilar, and thus demonstrates the grave problems which ensue when the lower courts substitute their own beliefs and policy rationalizations for the balanced judgments of Congress and fail to enforce the unmistakably plain language of a statute. The separation of powers bars courts from undermining legislative decisions as was done here. “[I]n our constitutional system the commitment to the separation of powers is too fundamental for [courts] to pre-empt congressional action by judicially decreeing what accords with ‘common sense and the public weal.’” *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 195 (1978). This deference applies with equal force to copyright law. *Eldred v. Ashcroft*, 537 U.S. 186, 212-13 (2003). In this case, it belies all belief that a modest pension agreement with relatives of the author, who held no rights in Superman, could be construed to block the explicitly inalienable and extremely valuable statutory termination right of the author's lawfully designated

executor, in whom Congress specifically vested that right.

This decision and those it relied upon thwart Congress's objective to safeguard the authorial termination right and invite all kinds of opportunistic conduct by grantees to circumvent it. These decisions undermine Congress's intent to relieve authors from unremunerative transfers so that they and their statutory heirs could finally participate in the proven value of their creations. They provide an easy road map for publishers, that can expend their superior resources to anticipatorily block termination without having to provide adequate benefits to authors and their families, easily defeating Congress's objectives and divesting the Act's intended beneficiaries. They encourage grantees to simply re-do pre-1978 copyright grants with self-interested copyright owners or successors (e.g., a middleman), who stand to lose from the exercise of statutory termination, or, as here, to make after-the-fact contract claims that this was their supposed intention.

This reverses Congress's intent, and provides a windfall to publishers and copyright successors, in the form of the extended renewal term, at the direct expense of the intended beneficiaries of the Copyright Act's termination right. Publishers would need only enter into or find some post-1977 document with general release language, as in this case, or some adjustment to a term(s) of a pre-1978 grant and claim that this non-terminable agreement "supersedes" or "novates" the pre-1978 grant. Authors and their families who dare to exercise the termination right will face ever-more protracted courtroom battles,

perpetuating the very author-publisher imbalance Congress expressly sought to remedy.

It is well known that the concentration of the media and publishing industries within the Ninth and Second Circuits gives them disproportional power in interpreting the Copyright Act. In the instant case two judges of a Ninth Circuit panel (Reinhardt, J., Sedwick, D.J.) enshrine a precedent that eviscerates a policy objective Congress has pursued for over a century.

### **III. THE QUESTIONS PRESENTED ARE OF NATIONAL IMPORTANCE BECAUSE AT STAKE ARE THE STATUTORY RIGHTS OF THOUSANDS OF AUTHORS AND ARTISTS**

*Amici* believe that without this Court's intervention these decisions mark the death of the termination right by allowing it to be easily circumvented. In fact, the decisions provide a roadmap and effectively gut any meaningful ability of the tens of thousands of artists and authors represented by *amici* to avail themselves of the statutory benefits Congress bestowed on them. They substitute Congress's clear articulation in the Copyright Act with interpretations of state contract law under which "any agreement to the contrary," apparently means "some agreements to the contrary" depending on the court's particular policy views.

Under *Milne* and *Steinbeck*, courts must not only apply state law to determine whether a pre-1978 copyright grant was impliedly superseded, but also determine whether the re-grantor possessed termination rights that could currently or soon be exercised, and whether such rights had in fact been used as bargaining leverage, and were exchanged for adequate



compensation. In this case, the Ninth Circuit disregarded even that. It hastily disposed of the Shuster estate's statutory termination rights by reading an "implied novation" of Shuster's original copyright grants, under purported New York law, into an irrelevant 1992 pension agreement between DC Comics and Shuster's siblings who lacked the legal authority to do so. Their half-page agreement neither mentioned Superman nor identified the original copyright grants it supposedly extinguished. The court of appeals accomplished all this inferentially, and on DC Comics's motion for summary judgment no less, in a perfunctory opinion which divested the Shuster estate of intellectual property worth hundreds of millions of dollars. In a word, the decision is outrageous.

Almost as troubling was the Ninth Circuit's apparent endorsement of this decision by swift denial of the Shuster estate's petition for rehearing en banc, even though the decision concerned important Ninth Circuit precedents and had been rendered over a dissent by Judge Thomas who unsurprisingly arrived at the opposite conclusion, while still focused on state law rather than the Copyright Act and the federal questions at issue.

None of these state-law inquiries into contractual machinations is a proper substitute for federal copyright law or a reliable method of determining a federal property right. If federal law can be avoided "by ad hoc accommodation" of the contract laws "of every State, then the scope of federal regulatory power would vary in accordance with the kaleidoscopic variations of local contract law." *N. Natural Gas Co. v. State Corp. Comm'n of Kan.*, 372 U.S. 84, 98 (1963).

The need for national uniformity in our copyright laws and certainty as to copyright ownership is particularly acute given the tremendous economic importance of our copyright-driven industries (e.g., computer software, movies, television, music, videogames, publishing).

Furthermore, federal copyright law is designed to enrich our culture and our economy by providing financial incentives for authors to create new works. *See Mazer v. Stein*, 347 U.S. 201, 219 (1954) (“The economic philosophy behind the [Copyright] clause ... is the conviction that encouragement of individual effort by personal gain is the best way to advance the public welfare through the talents of authors [] in ‘[] useful Arts.’”); *see also Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975). By allowing the remedial termination right to be easily circumvented, and injecting great confusion and uncertainty into the law, the decisions frustrate this fundamental objective.

Absent faithful interpretation of the Copyright Act, and a clear statement of the law from this Court, litigation in this area will increase significantly, given that the Act’s termination rights apply to hundreds of thousands of works, many of which have significant economic value. In light of the flexible contractual dodge endorsed by the Ninth and Second Circuits, which hold a near monopoly on copyright decisions, protracted litigation is almost certain to follow any notice of termination regarding a significant work, chilling the exercise of this important federal right. This not only harms the thousands of authors represented by the *amici* but is to the detriment of the millions who rely on a robust commercial environment

that maximizes the ability of artists and authors to paint, draw and write for the enrichment of all.

#### IV. CONCLUSION

The termination right is one of the five defining features of the Copyright Act and for copyrighted works created before January 1, 1978, it was designed to cover both the 19-year and 20-year extensions of the copyright renewal term under the 1976 Act, and the CTEA, respectively. *Amici* are astounded that both the Second Circuit and the Ninth Circuit—despite the unambiguous language of the statute, the explicit explanations provided by the House and Senate Reports, and the cumulative weight of its 20-year legislative history—could brush aside this potent statutory trail and divine enough wiggle room to summarily deny the timely exercise of an author’s termination right. There is no wiggle room in the statute. Under Section 304, an author, his statutory heirs and estate enjoy an un-waivable right to terminate prior copyright assignments.

The artists and authors represented by the *amici* are irreparably harmed by the erroneous precedents expanded by the decision below. The lower courts’ disregard for the statute leaves *amici* particularly vulnerable to the unequal bargaining power the termination regime was intended to ameliorate. This Court should exercise its authority to ensure uniform application of the Copyright Act’s explicitly inalienable termination right and to prevent its defiant erosion by the lower courts.

Respectfully submitted,

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## **APPENDIX**

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**APPENDIX A**

**This *amicus* brief is joined by the following organizations:**

**National Cartoonists Society (NCS)**

NCS is the world's largest and most prestigious organization of professional cartoonists. The NCS membership roster includes over 500 of the world's major cartoonists working in many branches of the profession, including newspaper comic strips and panels, comic books, editorial cartoons, animation, book illustration, and more. NCS' primary purposes are to elevate the ideals and standards of professional cartooning in its many forms; foster a social, cultural and intellectual interchange among professional cartoonists; and stimulate recognition and appreciation of the art of cartooning by the general public.

**Association of American Editorial Cartoonists (AAEC)**

AAEC is a professional association formed to promote the interests of staff, freelance and student editorial cartoonists in the United States. AAEC fosters communication and networking year-round and its annual convention allows member cartoonists to consider issues through panel discussions and guest speakers. AAEC also sponsors a "Cartoons for the Classroom" program designed to aid educators at all levels in teaching history, economics, social studies and current events.

## App. 2

### **Illustrators Partnership of America (IPA)**

IPA launched in 1998 to establish a national network of freelance illustrators that could join in promoting long-term professional and economic interests unique to their occupation. IPA's primary purposes are to advise illustrators on the protection and management of their intellectual property rights, including opportunities afforded by emerging technology and secondary markets; define and uphold professional standards among illustrators to protect against unfair business practices; and promote the awareness and exhibition of illustration as an art form. Since its grassroots inception, the IPA has preserved the integrity of the craft and effected positive change to help artists compete in a rapidly changing business and technological environment. In 2007, the IPA expanded their efforts by initiating the American Society of Illustrators Partnership.

### **American Society of Architectural Illustrators (ASAI)**

The American Society of Architectural Illustrators (ASAI) was founded in 1986 as a professional organization to represent the business and artistic interests of architectural illustrators throughout North America, and now includes over 450 practitioners worldwide among a total of eighteen countries. The Society's principal mandate was and remains the fostering a professional community and network, raising standards of architectural drawing, and educating the broader public about the important use of architectural illustration as a conceptual tool. The Society also assists in the advancement of the art and profession in a number of significant ways: as a referral



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agency for those seeking the services of a perspectivist, as a clearing-house for ideas and discussions about architectural illustration, and a sponsor of regional and local member activities. ASAI members have authored and contributed to numerous sourcebooks and reference publications during its history. By promoting the highest achievements in the illustration of our built environment, ASAI and its dedicated, passionate members continue to further the quality of the work, to benefit enthusiasts of architectural illustration and its end, architectu

#### **Association of Medical Illustrators (AMI)**

Since its establishment in 1945, AMI has codified the medical illustrating profession by accrediting graduate programs using a rigorous set of academic standards and guidelines; establishing a scholarly journal to disseminate knowledge and skills; and launching a board certification program. Medical illustrators are highly specialized visual artists that apply their interdisciplinary skills to further medical and scientific understanding for purposes of teaching, research, marketing, or demonstrative evidence in the courtroom. They have graduate level training or higher and possess dual skills in science and visual communication. Scientific and medical concepts are taught visually, and the diverse expertise of medical illustrators using a wide variety of media makes it possible to convey complex aspects of anatomy, biology and related scientific disciplines. As creators of original work that they may assign, the members of AMI have a direct interest in the realization of Congress' objectives regarding the termination right.

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### **Guild of Natural Science Illustrators (GNSI)**

The Guild of Natural Science Illustrators, Inc. is an international non-profit organization comprised of individuals in the field of natural science illustration. The Guild connects individuals in the field, assists those with the desire and ability to enter the profession and promotes better understanding of the profession to the general public and prospective clients. From its inception in 1968, the Guild has had the support of the National Museum of Natural History, Smithsonian Institution. Membership has burgeoned to nine hundred fifty-three members representing individuals living in all fifty states, the District of Columbia, Puerto Rico and twenty-three foreign countries. Much of the work created by natural science illustrators is published in books, journals, and magazines but is also utilized in other venues such as museum exhibitions and the internet.

### **American Society of Aviation Artists (ASAA)**

ASAA is a non-profit organization that allows members to share special aviation knowledge and traditional artistic processes necessary to the creation, improvement and public appreciation of aviation art. Since its incorporation in 1986, ASAA has pursued its mission of connecting aviation and aerospace artists in an effort to accurate and artistically creative representation of the machines, events, and people involved in the history of flight and the premiere technology of our time.. Aviation and aerospace art necessitate high standards of excellence and ASAA has fulfilled that need through its annual exhibitions and forums, regional meetings, scholarship programs, a

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quarterly journal, and of course, the member networking that a professional art society provides.

### **San Francisco Society of Illustrators (SFSI)**

Established in 1961, The San Francisco Society of Illustrators promotes illustration, encourages independence, fair practices and personal artistic excellence as its goals. For several decades, SFSI members have participated in the US Air Force Documentary Art Program and the National Parks Art Program, resulting in several works now permanently on display at the Department of the Interior in Washington DC.. SFSI members have also been involved with the National Aeronautics and Space Administration in documenting various NASA activities. Today many of the members are known nationally for their illustrations, which appear throughout the country in books, periodicals, postage stamps, advertisements, publications, television and film.

### **The Illustrators Club of Washington DC, Maryland and Virginia (IC)**

IC is a non-profit, all-volunteer trade association dedicated to promoting the art and business of illustration since 1986. IC's membership network includes professional illustrators, graphic designers, educators, students, vendors and related businesses. IC provides a broad palette of resources, programs and opportunities to educate and benefit members, art buyers and the general public. The club strives to protect the rights and interests of all members, while maintaining high standards and encouraging fair

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business practices throughout the graphic arts community.

### **Pittsburgh Society of Illustrators (PSI)**

Formed in 1996 as a social and business networking outlet for free-lance illustrators, PSI quickly morphed into a sophisticated trade organization with the aim of achieving closer social and professional contact among local illustrators; cultivating and strengthening the profile of the illustration art form in the Pittsburgh region by exhibiting and promoting members' work of the highest aesthetic caliber; acquainting Pittsburgh art patrons with members' work; hosting visiting illustrators, lecturers, and teachers; and fundraising and donating (including but not limited to scholarships) to worthy and needful college age art and design students pursuing the illustration craft.

### **Society of Illustrators Los Angeles (SILA)**

The Society of Illustrators of Los Angeles was founded in 1953 to promote the professional status of illustration as well as foster philanthropic and educational goals. From this small beginning it has grown to a very productive membership whose work is seen nationally by millions each year via all printed media, television, films, the Internet and gallery exhibitions. SILA has close to 200 members and is firmly established as the major professional art entity on the West coast, providing significant contribution to the vitality of the community as well as the nation.

### **The Society of Illustrators San Diego (SISD)**

The Society of Illustrators San Diego was formed in 1989 to promote awareness and abilities, to network

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among each other and with professionals in related fields, to create programs and activities for educational growth, and to provide social interaction for people who share similar experiences and interests. SISD provides a forum for guest speakers to show their work, talk about their experiences as a professional illustrator, and demonstrate their style and techniques. Additionally, SISD assists members with the business side of illustration, by offering pricing sessions, panel discussions on illustration buying and marketing; and lectures covering future illustration trends.

## APPENDIX B

**The following illustrators, cartoonists, and artistic professionals individually joined this *amicus* brief to show their support:**

### **Clay Bennett**

Five-time Recipient of the Pulitzer Prize for editorial cartooning, two-time recipient of the United Nations Political Cartoon Award, and recipient of the RFK Journalism Award, Sigma Delta Chi Award, the National Journalism Award, the National Cartoonist Society's Award for Editorial Cartoons, the John Fischetti Award, the Overseas Press Club Award, and the National Headliner Award, Mr. Bennett has earned almost every honor his profession has to offer. Mr. Bennett is a former president of the Association of American Editorial Cartoonists and his work is syndicated internationally.

### **Mike Peters**

Pulitzer Prize winning editorial cartoonist and Sigma Chi Hall of Fame inductee, Mr. Peters is also the creator of the comic strip *Mother Goose Grim*, which is syndicated in 500 newspapers with an estimated daily readership of 100 million. Mr. Peters is also the recipient of National Cartoonists Society Reuben award for Outstanding Cartoonist of the Year, the RFK Journalism Award, the Overseas Press Club Award, and numerous other distinctions.

### **Mark Fiore**

Pulitzer Prize-winning political cartoonist, recipient of the RFK Journalism Award, and Society of Professional Journalists' James Madison Freedom of Information Award, Mr. Fiore was referred to as "the undisputed

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guru of the form” by the Wall Street Journal. His work has been featured on the San Francisco Chronicle’s web site for over ten years as well as on websites for Newsweek, Slate, CBS News, Mother Jones and NPR. Fiore’s political animation has been featured on CNN, Frontline, and cable and broadcast outlets across the globe.

### **Nick Anderson**

Pulitzer Prize-winning editorial cartoonist currently at the Houston Chronicle and syndicated in over one hundred newspapers, Mr. Anderson is also the recipient of the Society of Professional Journalists’ Sigma Delta Chi Award, the National Press Foundation’s Berryman Award, and the Charles M. Schulz Award for best college cartoonist in the United States.

### **Liza Donnelly**

Award-winning and internationally celebrated cartoonist at The New Yorker Magazine for over 30 years, author of fifteen books, and a Cultural Envoy for the US State Department where she travels around the world speaking about freedom of speech, cartoons and women’s rights.

### **Hilary Price**

Creator of the nationally-syndicated comic strip *Rhymes with Orange* and three-time recipient of the Best Newspaper Panel Cartoon Award from the National Cartoonists Society.

### **Pat Brady**

Creator of nationally syndicated comic strip *Rose is Rose* and recipient of the National Cartoonists Society Reuben award for Outstanding Cartoonist of the Year.

**Brian Crane**

Cartoonist for nationally syndicated comic strip *Pickles* and recipient of the National Cartoonists Society Reuben award for Outstanding Cartoonist of the Year.

**Bill Griffith**

Creator of comic strip *Zippy*, currently syndicated in more than 100 newspapers.

**Sergio Aragones**

Cartoonist for Mad Magazine, creator of comic book *Groo the Wanderer*, and nine-time recipient of the Harvey Award for Humor.

**Mason Mastroianni**

Cartoonist for internationally syndicated comic strip *B.C.* and grandson of the comic's creator, Johnny Hart.

**Rob Rogers**, Pulitzer Prize finalist and editorial cartoonist for Pittsburgh Post-Gazette.

**Mark Parisi**, Cartoonist for nationally-syndicated comic strip *Off The Mark* and two-time recipient of the National Cartoonists Society Best Newspaper Comic Panel.

**Bill Morrison**, Comic Book Editor for *The Simpsons* and the Walt Disney Co..

**John Kovalski**, Artist for Mad Magazine.

**Michale Jantze**, Cartoonist for syndicated comic strip *The Norm*.

**Terri Libenson**, Cartoonist for syndicated comic strip, *The Pajama Diaries*.

**Daniel Beyer**, Cartoonist for syndicated comic strip, *Long Story Short*.



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**Jem Sullivan**, Cartoonist for Hallmark Greeting Card.

**Jan Elliot**, Cartoonist for comic strip *Stone Soup*.

**Oliver Simonsen**, Animator for the feature film *Cerebus the Aardvark*.

**J. David Spurlock**, Artist-writer-creator of *The Space Cowboy* and *The Edge*.

**Dave Blazek**, Creator of *Loose Parts* and *Biz*.

**Ed Siemienkowicz**, Creator of comic book *Chrome and Dust*.

**John Lotshaw**, Creator of web-comic *Accidental Centaurs*.

**David Lawrence**, Editor at Red Giant Comics.

**Arlen Schumer**, Author of *The Silver Age of Comic Books*.

**Steve Conley**, Author of *Bloop* and *Astounding Space Thrills*.

**Tim Mellish**, Artist of comic *Truth be Known*.

**John Patrick Auchter**, Creator of *Everyday People* and *Auchtoon*.

**Dan Thompson**, Artist for comic strip *Rip Haywire*.

**Donna A. Lewis**, Cartoonist for comic strip *Reply All*.

**Norm Feuti**, Cartoonist for comic strip *Retail*.

**Mary Peaco Todd**, Cartoonist and author.

**Steven Brower**, Author, comic historian, designer, and illustrator.

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**Derf Backderf**, Cartoonist, graphic novelist.

**Bob Englehart**, Editorial Cartoonist.

**Daryl Cagle**, Editorial Cartoonist.

**James E. Lyle**, Comic book artist and illustrator.

**Dan Collins**, Cartoonist.

**Mike Lynch**, Cartoonist.

**Michael Pohrer**, Cartoonist.

**Richard A. Braley**, Cartoonist.

**William Carr**, Cartoonist.

**Stacy Curtis**, Illustrator.

**Bucky Jones**, Illustrator.

**Janee Trasler**, Illustrator.

**Ed Steckly**, Illustrator.

**Mark Brewer**, Illustrator.