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The Villainous Tale Behind the Term "Super Hero"

Capes, suits and spandex have billowed across comic pages for decades, worn by crusaders fighting for truth, justice, and the greater good. These iconic figures are known to all as superheroes. But are they truly ours, or does their name belong to someone else?

DC and Marvel claim to own the term "superhero" through a contentious trademark, yet evidence shows this word was firmly planted in the public lexicon long before. Now, a dedicated alliance of writers, artists, and true believers are challenging the corporate stranglehold on our shared language and lore.

This chronicle traces the rise of the "superhero" mark amid the golden age of comics, its unjustified claim in the 60s, and the ceaseless legal clashes since to free this ubiquitous term. The word yearns to slip its corporate shackles, but DC and Marvel's league of lawyers bars the exit.

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In hindsight the term “Super hero” may simply come off as a generic epithet used to describe any caped crusader or spandex clad crime fighter whether super powered, inhuman, demigod, or genius playboy billionaire philanthropist but reality is often disappointing. The term is actually trademarked and by none other than DC and Marvel.[1] Now, the purpose of a trade mark is to give its holder rights to protect the use of a mark which is capable of being represented graphically and distinguishing their goods or services from another. But how did this rather pedestrian term, one which seems far better suited to describing a genre of fiction than a singular brand, come to be locked down by the printed page's two titans of justice and injustice? What skullduggery and Herculean hubris allowed what can only be described as an act of generic idolatry?

[1] U.S. Reg. No. 0825835 (March 14, 1967)

The Secret Origins of "Super Hero"

The term "superhero" is now as commonplace in our modern parlance as "Velcro" or "cello-tape" but its history is shrouded in mystery and controversy. Though many lay claim to coining the ubiquitous moniker, the truth may never be known.

Some credit pioneers of the pulps like Street & Smith editor John Nanovic while others cite the visionary "Doc" Savage scribe Lester Dent. Comic historian Gerard Jones puts forth that pulp magazine editors developed it in the 1930s for characters with “superhuman prowess and distinct appearance.”[2]

But while its exact origins remain obscure, there is clear evidence “super hero” was in widespread generic use long before DC and Marvel's dubious trademark claim. The term appears throughout 1942's *Supersnipe Comics* published by Street & Smith.[3] Additionally, the phrase can be found in articles in *Timely Comics'* (later Marvel) *Captain America Comics* pre-dating the claimed date of first use.[4]

By the 1950s, “superhero” had become the vernacular used to describe the surging spandex-clad stars of comics from Batman to Captain Marvel.[5] But despite this ubiquitous generic application, behind the scenes, sinister forces were plotting to usurp the people's superhero and claim the word for themselves.

[2] Gerard Jones, *Men of Tomorrow: Geeks, Gangsters, and the Birth of the Comic Book* (Basic Books, 2004) p. 74.

[3] George Marcoux, *Supersnipe Comics* (Vol. 1) (Street & Smith Oct. 1942).

[4] Paul Gustavson, Ben Thompson, Carl Burgos, Al Anders, *Marvel Comics* (1939) #1 (Marvel Comics, August 1939).

[5] Laurence Maslon & Michael Kantor, *Superheroes: Capes, Cowls, and the Creation of Comic Book Culture* 67 (Crown Archetype 2013).



The Trademark Cabal

In 1966, an unholy alliance was formed between bitter rivals DC Comics and Marvel Comics in a nefarious plot to commandeer control of the popular superhero sobriquet through a joint trademark application.[6] The publishers laid claim to first use of the mark in 1960, despite the mountain of evidence that the term had already entered the public domain decades earlier.[7] Nevertheless, likely due to lack of opposition, the U.S. Patent and Trademark Office granted registration in 1967.[8] The conniving companies solidified their hold when the mark reached incontestable status in 1981. [9]

Empowered by their government granted monopoly, DC and Marvel ruthlessly enforced their ill-gotten trademark against creators great and small. The tiniest of presses who dared invoke the word "superhero" were bullied into capitulation. [10] The Big Two's legal lackeys would descend upon any upstart who encroached upon their hallowed mark.

Though DC and Marvel paid lip service to allowing descriptive usage, all too often polite requests to license the verboten vocabulary were met with the lawsuit gun rather than the negotiation table. Their Executive Vice Presidents of Bullying seemed to take fiendish delight in persecuting small fry while turning a blind eye to their own generic usage.

Truly it was a case of rules for thee but not for me, a despotic double standard on par with Gotham City's vilest villains. But like any good superhero story, there were challengers ready to oppose these malicious mark moguls and free the people's word.

[6] Supra note 1

[7] Supra note 3

[8] Supra note 1

[9] Trademark Electronic Search System, <http://tmsearch.uspto.gov> (last visited Mar. 6, 2023).

[10] Aislinn O'Connell, Generic Super Heroes: Can They Exist?, 10 The Comics Grid: J. Comics Scholarship 9 (2020).

Champions of the People

Unwilling to bend to the brigades of bullies, brave rebels sounded the call to challenge DC and Marvel's unjust claim on "superhero." But one by one, the corporate Goliaths used their near limitless legal funds and connections to quash these appeals for freedom.

In 2010, Mr Ray Felix sought to secure a trademark for his self-published creation, "A World Without Superheroes". DC and Marvel, swiftly and decisively swooped down, claiming exclusive domain over the phrase "super heroes", a sacred phrase etched into the very fabric of their comic book empires.[11]

[11] Felix, R. (2013, April 25). Comic-book creator takes on publishers Marvel and DC for right to use term 'superhero'. New York Daily News. (Accessed November 16, 2023) <https://www.nydailynews.com/2013/04/25/comic-book-creator-takes-on-publishers-marvel-and-dc-for-right-to-use-term-superhero/>.

Undeterred, Mr. Felix stood his ground and a legal battle for the very essence of creative expression ensued. Unfortunately, DC and Marvel, in a major power play secured a default judgment against Mr. Felix, effectively silencing his trademark claim.[12] Refusing to be vanquished, he appealed the decision, seeking justice for his creative endeavours.[13] Negotiations ensued, a chance for a peaceful resolution but alas, the talks crumbled, leaving only the harsh glare of the legal spotlight.

The next major challenge arose in 2016, when UK entrepreneur and law student Graham Jules applied to invalidate DC and Marvel's UK registration while battling the companies over his own trademark application for "Business Zero to Superhero." [14] Jules asserted "superhero" was now a common generic term, but the Intellectual Property Office disappointingly ruled only on the validity of the mark's original registration in 1979, upholding the trademark.

[12] United States Patent and Trademark Office. Trademark Trial and Appeal Board. (2012). Opposition No. 91204438. DC Comics and Marvel Characters, Inc. v. Reinaldo T. Felix.

[13] The Guardian. "Superheroes, space marines and lawyers get into trademark fight." The Guardian, 7 Feb. 2013. (Accessed 16 Nov. 2023.) www.theguardian.com/books/2013/feb/07/superheroes-space-marines-lawyers-copyright.

[14] Start Up Pop Up Ltd v DC Comics Inc. and Marvel Characters, Inc. [2016] O-267-16.

Though their trademark's validity was affirmed, Marvel and DC eventually relented in their opposition to Jules' pending trademark application for "Business Zero to Superhero." The trademark was successfully registered and remains active, enabling the harmonious coexistence of the two trademarks.

However, Marvel and DC's co-ownership of the "super heroes" trademark ensures their continued dominion over the term. They retain the authority to issue cease and desist letters or challenge trademark registrations for works that more closely align with their proprietary interests, specifically those within the superhero genre.

Like any epic superhero crossover, each confrontation with the marking monsters only strengthened their stranglehold but no dictatorship lasts forever.

The people yearn to take back their word and this saga's final chapter has yet to be written. There will be a champion who can finally triumph and break the corporate chokehold to return "superhero" to its rightful place in the public domain.

The Mark of Evil

Despite the righteousness of past petitioners, the legal system has thus far failed to deliver true justice in the battle against the "superhero" mark. But the tide may soon turn. The Lanham Act provides the kryptonite necessary to finally cancel this anticompetitive trademark and free the term once and for all.[15]

The Act states a mark becomes generic and subject to cancellation when the primary significance of the mark to the relevant public is as the common descriptive name for a type of product rather than an indicator of a single source.[16] This is known as "genericide" - the death of a trademark when it enters common parlance. For "superhero," that point of no return is clearly at hand.

A key case on genericide, *Elliott v. Google, Inc.*, lays out a comprehensive multifactor test for evaluating whether a term has become generic.[17] Application of these factors overwhelmingly supports cancelling Marvel and DC's illegitimate trademark:

A. Dictionary definitions treat "superhero" generically with no reference to any trademark rights.[18]

B. Competitors regularly use "superhero" in marketing their own comic products, demonstrating its generic nature.[19]

C. Consumers – both comic fans and the general public alike – refer to all costumed comic book characters with extraordinary powers as "superheroes" rather than indicating any specific connection to Marvel or DC.

D. The press and media use the term "superhero" generically when discussing the genre.[20]

E. There are no commonly used alternative terms for costumed comic book characters with special powers, which supports a finding of genericide. [21]

F. Even Marvel and DC predominately use "superhero" generically to refer to an archetype rather than as a brand.

G. Those challenging Marvel and DC's trademark enforcement have explicitly characterized the term as generic.

H. Consumer surveys, the most powerful evidence of genericness, would undoubtedly classify "superhero" as a generic descriptor rather than a brand name identifying Marvel and DC

On the basis of these profuse proofs, any reasonable adjudicator would be compelled to find in favor of cancelling the registration. The court need only muster the mettle to defy decades of lopsided precedent. The day draws near when Marvel and DC's despotic dominion over "superhero" will be overthrown, and the word will be free once more.

[15] Lanham Act, 15 U.S.C. §§ 1051-1141n (2023)

[16] 15 U.S.C. § 1064(3).

[17] *Elliott v. Google, Inc.*, 860 F.3d 1151, 1162 (9th Cir. 2017).

[18] Superhero. Merriam-Webster's Eleventh Collegiate Dictionary. Springfield, MA: Merriam-Webster, 2016.

[19] Image Comics. "Invincible." Image Comics, 2023. (Accessed November 16, 2023.) <https://imagecomics.com/comics/series/invincible>.

[20] Entertainment Weekly Staff. "'Superhero.'" Entertainment Weekly, 2023. Accessed November 16, 2023. <https://ew.com/genre/superhero/>.

[21] Cf. *Elliott*, 860 F.3d at 1162.

The Final Battle

And so the stage is set for a final reckoning between the corporate masters of the superhero mark and a people demanding their word be freed. An ultimate battle royale with law and justice hanging in the balance.

A hero now needs to rise from the legal trenches and file the cancellation action to end Marvel and DC's reign once and for all. The trademark trial of the century awaits. In the halls of justice, the thunderous opening statements will shake the pillars of the court. Searching cross-examinations will lay bare truths opaque and ineffable. And fiery closing arguments will ring out with Shakespearean eloquence, wrestling with profound questions of literature, language, and liberty.

The judgement will resound like a sonic boom, unleashing shockwaves across pop culture and the entertainment industry for years to come. Will the court uphold the corporate status quo, bowing down to DC and Marvel's domineering dollars? Or will it break the shackles of stare decisis and saavy legal sophistry to side with the people's claim? Never before has there been such a monumental decision in the name of super-heroism.

And in the end, if justice prevails and "superhero" is declared free, what then? A joyous victory to be sure, but the aftermath won't be without new battles to wage. Marvel and DC will continue throwing lawyers at the problem until Congress is forced to act. And once the gates open, what other generic marks will come tumbling down? Will Xerox and Kleenex be the next to fall from their precipices of privilege into the public domain?

The saga stretches on, but the liberation of "superhero" marks a major milestone with implications that will reverberate across copyright and trademark law for years to come. Soon the people may gain back their generic word, but ever looming is the spectre of IP law perverting the language anew. Eternal vigilance is the price of liberty. Our lexicon must be guarded now and forever from those who would monopolize and monetize the very words we speak.

The moral of this story is clear - we cannot rely on companies or governments to protect our shared language. The defence falls to us, the people, to safeguard our vocabulary and vernacular from corporate conquest. The battle continues, but as any superhero knows, where there is injustice, there are always those called by destiny to oppose it. Our superpower is our voice. And united, there is no evil or trademarked term we cannot overcome.