Comic Art, Creativity and the Law

Marc H. Greenberg

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While comic art is one of the oldest and most popular forms of art in the world,[1] the legal rights of the comic artist often balance precariously in the contemporary legal landscape. The relevant legal doctrines of copyright, contract and obscenity law oscillate between protecting and constraining the comic art form. *Comic Art, Creativity and the Law* suggests that this oscillation gives rise to a need for law reform to better support the comic artist. Through a comprehensive, engaging and accessible analysis, Greenberg pushes beyond the extensive body of general literature that addresses how the law affects the creative process, and specifically analyses the impact of the law on the comic artist; accordingly, the text is a unique authority and fills a gap in the literature.[2] Greenberg's analysis is conducted through an Anglo-American and European jurisdictional lens, and is applicable to Australian law particularly due to the parallel principles of American and Australian obscenity law.[3]

The book is divided into five substantive parts. Part I and II offer an introduction into how the law views the creative process. In Part III, Greenberg outlines the non-legal scaffolding of the comic art form through a historical overview and explanation of the collaborative nature of the art form, which enables the reader to appreciate how the law interacts with that scaffolding in the consecutive chapters. For instance, the historical reduction of comic strip sizing summarised in Part III is

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[1] The comic art form can be traced back as far as the Lascaux cave paintings, see Ann Miller and Bart Beaty, *The French Comics Theory Reader* (Leuven University Press, 2014) 104; Englishman William Hogarth's famous popular prints, *The Harlot's Progress* (1732) and *The Rake's Progress* (1733-34) arguably represent the first modern works of narrative sequence of images to communicate social and political commentary through satire.

[2] Negligible literature exists on comic art law. See the practical American work of Joe Sergi, *The Law for Comic Book Creators: Essential Concepts and Applications* (McFarland, 2015), and the Australasian scholarship of Augustine Brannigan, 'Crimes from Comics: Social and Political Determinants of Reform of the Victorian Obscenity Law 1938-1954' (1986) 19(1) *Australian & New Zealand Journal of Criminology* 23-42.

[3] There is no definition of 'obscenity' at Australian common law, although the generally accepted test is 'whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall': *R v Hicklin* (1868) LR 3 QB 360, 371 (Cockburn CJ) (discussed in *Crowe v Graham* (1968) 121 CLR 375, 392, 393 (Windeyer J)). Similarly, the basic guidelines for obscenity in the United States are outlined in *Miller v California* 413 U.S. 15 (1973) in which the main limb of the basic guidelines is (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest.

later highlighted in Part IV as being a leading cause of friction in the contemporary contractual relationship between comic artists and their respective publishers. Part IV discusses the fickle contractual relationship between comic art creators and publishers, and focuses substantially on the constrictive nature of copyright law on comic art. Part V may be considered the text's most prominent contribution, in which Greenberg examines the effect of censoring creativity through obscenity law, and argues that the constrictive doctrine has had a devastating impact on the freedom of comic artists to create new and controversial works.[4]

Copyright law is the principal legal doctrine that protects comic art. In Part IV, Greenberg swiftly demarcates the salient points between comic art and intellectual property: that comic art is characterised as a 'low art' form, and due to its collaborative nature and cultural bias, often fails to be recognised as a literary work for legal purposes.[5] Greenberg further approaches the intersection of copyright law jurisprudence with comic art through the concentrated twenty-seven page analysis of *Gaiman v. McFarlane*[6] and *In Re: Marvel Entertainment Group, Inc., et al*.[7] The cases are juxtaposed to argue that the law surrounding comic art is unclear and that reform is required. Brooker, who notes that this ambiguity is detrimental to creator's rights, supports his analysis.[8]

These cases first address the matter of a protectable character under copyright law, and second, the extent to which the 'work for hire' doctrine could be applied to characters created for, and used by, a comic book publisher. In *Wolfman*, the Court held that the creator did not own a single one of the 71 characters that he had crafted, as all were considered 'works for hire', even five characters that had been created prior to Wolfman's employment with Marvel. In *Gaiman*, the creator won on his claim of copyright ownership and the resulting right to royalties. Greenberg criticises the decision in *Wolfman*, and argues that the decisions in both cases cannot be reconciled. Greenburg criticises the

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[4] Marc H. Greenberg, *Comic Art, Creativity and the Law* (Edward Elgar Publishing Ltd, 2014) 188.

[5] The creation of comic art is often viewed as a 'low' form of art devoid of literary qualities as its creation is, in many instances, intended as a commercial art form, generally reproduced on newspaper, or published in inexpensive magazines. Additionally, prior to the 1970s, comic books were primarily aimed at young people, though this is no longer the case, see: Thierry Groensteen, 'Why Are Comics Still in Search of Cultural Legitimization?' in Jeet Heer and Kent Worcester (eds), *A Comics Studies Reader* (University Press of Mississippi, 2009) 4.

[6] 360 F. 3d 644 (7th Cir. 2004) ('*Gaiman*').

[7] Civil Action no. 97-638-RRM (November 6, 2000) ('*Wolfman*').

[8] M Keith Booker (ed), *Encyclopedia of Comic Books and Graphic Novels* (Greenwood Publishing Group, 2010).

subjective 'instance and expense' test, arguing that the convoluted judicial reasoning employed to side-step Wolfman's submission resulted in 'a significant element of uncertainty and unpredictability to a previously objective test'.[9] Greenberg highlights how the distinction between the cases did not turn on the application of copyright law, but rather on vague public policy. To abrogate this test, Greenberg submits, would result in a likely judicial emulation of *Gaiman*, with protection and compensation afforded to the creator.

Greenberg's criticism of the expansive application of the 'work for hire' doctrine is significant to the Australian copyright jurisdiction, in which artists are exposed to a similar employment exception. Accordingly, this analysis demonstrates the danger of an expansive legalistic interpretation of copyright exceptions that may ultimately deny fundamental rights.[10]

Part V is a topical resource in the wake of the *Charlie Hebdo* attack.[11] It goes beyond a historical examination of the repressive Comics Code Authority[12] to argue, through case analysis, that obscenity law is a negative and often unjust obstruction to freedom of expression that directly impinges on the rights of comic book creators,[13] distributors,[14] and readers.[15] Greenberg emphasises the need for reform to prevent creators and distributors facing the impossible choice between free speech and a custodial sentence,[16] and highlights the hypocrisy of decisions to ban the transportation of obscene works while allowing them in the privacy of the home.[17] Greenberg criticises the invoking of a 'protect the children' argument in response to expert testimony declaring that a comic

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[9] Greenberg, above n 4, 60.

[10] The U.S. 'work for hire' doctrine has similar characteristics to Australian law: *Copyright Act 1968* s 35(4) provides that the employer owns copyright in the literary or artistic work created in the course and within the scope of the employment.

[11] The divisive Parisian publication, *Charlie Hebdo*, which produces satirical content on provocative topics, was the victim of a massacre at its offices, where 12 people were slain, including 5 cartoonists; its content has since received sustained criticism. Aee Michael Canva, 'So Charlie Hebdo drew the drowned Syrian boy. Was it wrong?', *The Huffington Post* (online) 16 September 2015 <https://www.washingtonpost.com/news/comic-riffs/wp/2015/09/16/so-charlie-hebdo-drew-the-drowned-syrian-boy-was-it-wrong/>.

[12] See, eg, Amy Kiste Nyberg, *Seal of Approval: The History of the Comics Code* (University Press of Mississippi, 1998).

[13] *Florida v. Mike Diana* (Application for writ of certiorari in US Supreme Court, 27 June 1997).

[14] *Oklahoma v. Planet Comics* (Proceedings in Oklahoma Supreme Court 1997, defendants entered guilty plea).

[15] *U.S. v. Handley* 59 (Iowa District Court, 2008) 1.

[16] Ibid.

[17] Ibid.

is not obscene,[18] despite the facts having nothing to do with children being exposed to such alleged material. This judicial reasoning employed in the United States jurisdiction, that produced custodial and financial punishment for the comic book retailer, is reasoning not dissimilar to Australia's historically strict legislative approach to the banning of obscene comics to protect children's welfare.[19] Ultimately, Part V highlights a judicial misunderstanding of the comic art form, and submits that the severe legal consequences to creativity may ultimately cease the flow of comic book creation.

Comic Art, Creativity and the Law provides a unique insight into the intersection of law, policy and the comic art form, and is a valuable explorative resource for the specialist lawyer and creator alike. One of the notable strengths of the book is its comprehensive delivery: it meticulously provides the contextual information necessary to analyse the law from a practical perspective, and it is this perspective that enables Greenberg to highlight key areas for law reform.

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[18] *Jesus A. Castillo, JR., Appellant v The State of Texas, Appellee,* Decision of the Court of Appeals of Texas, Fifth District, 79 S.W.3d 817 (July 2, 2002).

[19] Mark Finnane, 'Censorship and the Child: Explaining the Comics Campaign' (2008) 23(92) *Australian Historical Studies* 222, see also: *Classification (Publications, Films and Computer Games) Enforcement Act 1995* ss 29, 33(1).

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