

## *Comics, Courts and Controversy: A Case Study of the Comic Book Legal Defense Fund*

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For several years I have been working on a series of articles focused on an array of legal issues, involving First Amendment rights, tax law, copyright transfers, and the work for hire doctrine, all arising from the literary format known as comic books and/or graphic novels. This work has evolved and changed as my research has continued. This first article, a case study of the Comic Book Legal Defense Fund, a New York non-profit organization, focuses on a series of cases the organization has been involved with, whose efforts illustrate how the use of tax regulations can chill First Amendment rights, and how criminal penalties found in obscenity law, and particularly the Protect Act, also serves to chill the expression of free speech, and unduly restrict authors from pursuing First Amendment defenses in these cases.

The literary form we call “comics” or “comic books”, encompasses a much larger range of works than traditional superhero adventures. The use of sequential graphics and concurrent dialogue or narration to tell a story is a form of expression and entertainment that has been in use for thousands of years. Current examples of this storytelling format can be found in what are referred to as “graphic novels” as well as the more commonly known comic book or magazine. These novels often have adult themes and illustration, and are sold exclusively to adult audiences.

Like any works intended for adult audiences, these graphic novels often draw the attention of law enforcement agencies seeking to prevent dissemination to minors. Sometimes those enforcement efforts conflict with the First Amendment free speech rights of the creators or distributors of these literary works. It is at that point that the Comic Book Legal Defense Fund (CBLDF), a relatively unknown group of lawyers and their supporters, enter the scene and provide critically needed legal support for those artists and shop owners.

The first case examines, in detail, the legal issues confronted by the CBLDF in their participation in the case of *Mavrides v. Board of Equalization*, in which Paul Mavrides, one of the creators of the 60's era characters, *The Fabulous Furry Freak Brothers*, challenged a ruling of the Board of Equalization (BOE) regarding at what point in the process of creating drawings for a comic book, a sale of the work is deemed to have occurred, for sales tax purposes. The BOE took the position that a comic book was a work of art and therefore not a literary work. Literary works are exempt from state tax in California until the final work is published and sold at retail. Works of art, on the other hand, are taxed upon sale, regardless of whether they are "finished" works. Comic books are sequential graphic and literary works, a combined work, since they tell a story in words and art. The same is true for other literary works, such as children's books, encyclopedias, and any works with a combination of graphics and text. CBLDF and Mavrides battled the BOE interpretation of the tax law, clarifying that all such works

are literary works. In so doing, they prevented a chilling effect on publishing, which would have resulted in many works never being published had they been subject to substantial tax levies upon submission to a publisher. As one scholar noted, "the power to tax, is the power to destroy".

The second case profiled in the article is the case of *People v. Lee*, in which the State of Georgia prosecuted a multi-count distribution of obscenity to a minor, involving a graphic novel, entitled *The Salon*. A free copy of a sampler of graphic novel excerpts, which included a panel from *The Salon* in which a reader, looking closely, could see a drawing of the artist Picasso, and his penis, was mistakenly given to a young boy. The subsequent prosecution by the state threatened the store owner with a 21 year jail sentence. It took a year, and over \$100,000 in defense legal fees, before an aggressive prosecutor was forced to dismiss the case.

The third case examined is *People v. Handley*, an Iowa Federal Court prosecution of Christopher Handley for violation of the PROTECT Act, (118 USC §1446(a)), in which the defendant, an adult, who purchased Japanese manga comics directly from Japan, was prosecuted for receiving and possessing material with explicit adult content. Pre-trial motions arguing that the terms of the PROTECT Act were inconsistent with the obscenity definition established by the Supreme Court in *Miller v. California*, 413 U.S. 15 (1973), were unsuccessful. Equally unsuccessful was an effort to bar prosecution based on the Supreme Court's holding, in *Stanley v. Georgia*, 394 U.S. 557 (1969). that the receipt and subsequent possession of adult material in one's own home is protected free speech activity. Faced with the prospect of a long prison sentence if convicted, Handley was unwilling to take the risk that a First Amendment defense might fail, and so he accepted a plea which did result in a jail sentence of several years.

These last two cases are then examined as examples of how the threat of criminal penalties in cases involving graphic art depicting sexual themes has the effect of chilling the rights of defendants to assert First Amendment defenses. A detailed analysis of the literature involving the deterrent effect of criminal penalties in these cases yields the conclusion that this effect cannot be shown, whereas the chilling impact criminal penalties has on free speech rights is demonstrated, at least anecdotally. This leads to the argument that the law in this area is ripe for revision, and that eliminating, or at least lessening, criminal penalties in favor of protecting First Amendment rights is a well supported change that needs to be made.