

# Intellectual Property Scholars Conference

Stanford University, August 9-10, 2012

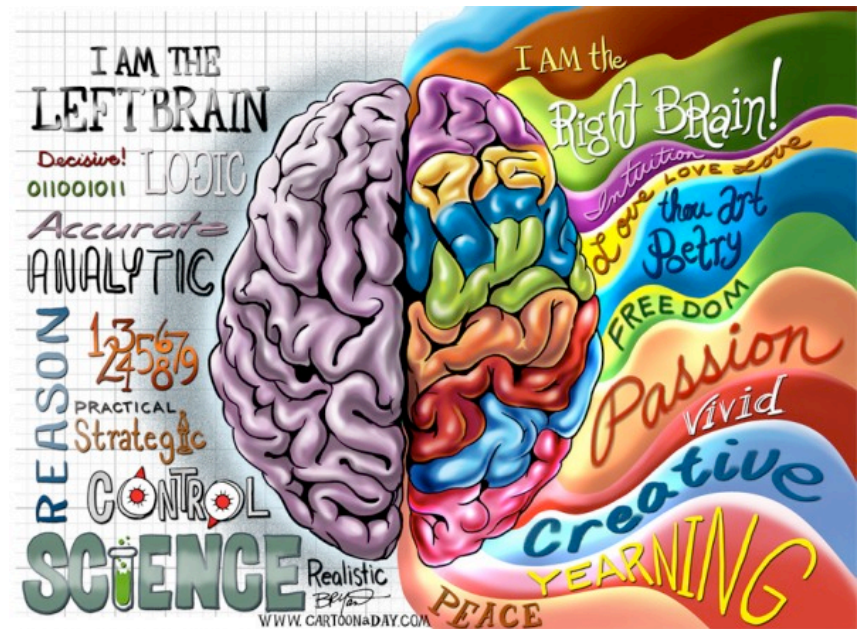
*Creativity Constrained: Comics and  
the Law*

Prof. Marc H. Greenberg

Golden Gate University School of Law

# Comic Art, Creativity and the Law

- Jonah Lehrer, in *Imagine: How Creativity Works*, explores how the creative process draws on both left and right brain functionality. He notes the importance of placing creativity in a cultural context. He also notes that creators often start using their left brain, and upon reaching an impasse or “block”, they move to right brain function, where unrelated concepts are brought to bear on the creative problem, which triggers a spike in gamma-wave rhythms right before an answer is found.
- Prof. Gregory Mandel argues that attitudes about that different treatment in the law as between co-inventors and co-authors is a result of inaccurate stereotypes about left-brain/right brain involvement in the creative process. See, Gregory Mandel, *Left-Brain versus Right Brain: Competing Conceptions of Creativity in IP Law*, 44 UC Davis Law Review 1:283 (2010),



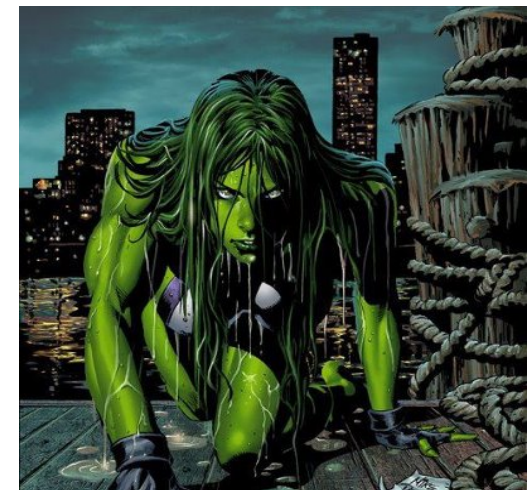
Left brain, Right brain Illustration ©  
CartoonADay.com (2012)

# Comic Art, Creativity and the Law

- Creativity-Focused Legal Issues Arising From Unique Comic Art Formats
  - Comic Art Formats
    - Monthly Floppies published by the leading companies, DC and Marvel, Dark Horse, Image, IDW
    - Graphic Novels published by the leading comics companies, and other mainstream publishers
    - Creator owned or focused comics (Aspen, Image)
    - Comic Strips licensed to syndicates and published in newspapers
    - Single illustration cartoons, with or without text
    - Political and/or editorial comics and cartoons
    - Underground Comix
    - Unlicensed Work & Fan Art



*Spawn*, © Todd McFarlane,  
Published by Image Comics



*She Hulk* © Marvel  
Comics

# Comic Art, Creativity and the Law

- Monthly Floppies
  - Defined – Floppies are the monthly, and sometimes weekly, comic books published year round – they average about 22 pages, and stories are sometimes told in a single issue, or other times follow a longer arc.
  - Legal Issues
    - Who owns the artwork, stories, characters?
    - Since works are often written, inked, lettered, and colored by different people, some of whom are employees and some independent contractors, what impact does this have on ownership and creative control?
    - How are derivative rights handled over the many years a character's story may be told?
    - Are artists employees of the writer, or are they co-creators?



Batman is owned and published by D.C. Comics



Marvel Comics publishes Iron Man



# Comic Art, Creativity and the Law

- Monthly Floppies
  - Legal Issues
    - The copyright termination cases involving the creators of Superman, and of much of the Marvel Universe of characters have revealed a series of legal issues for creators of long-running character-driven comic books:
      1. How is work for hire to be defined in the writer/artist relationship?
      2. Where a right to a character like Superman is terminated after 70 years of derivative works have taken the character in entirely new directions, how can new works be created by owners of the recaptured work, and still maintain character consistency?
    - Do the formalities of copyright termination frustrate their ability to encourage creators to create works?
    - How will the work for hire exemption as to termination rights affect the likelihood of greater or lesser creator control over works?



1<sup>st</sup> Appearance by Superman,  
Created by Jerry Siegel and Joe  
Schuster



First appearance by the Fantastic  
Four, created by Stan Lee and  
Jack Kirby

# Comic Art, Creativity and the Law

- Graphic Novels

- Defined – Graphic novels are longer form comic art works, which offer stories covering a wide range of genres, from longer superhero story arcs, to personal memoirs dealing with important social issues
- Legal Issues
  - Adaptations present issues re: the scope of derivative works.
  - Multi-volume story arcs present issues re: copyright protection over characters
  - Are there two copyrights created when the writer is also the artist? And if they are separate, who owns what in the absence of a contract?
  - Does work for hire apply if it is in a contract, but not supported by how the work was actually created?



Frank Miller's *The Dark Knight Returns* #2

I'D BEEN WAITING FOR SOME TIME ALONE WITH DAD. I MADE A VALIANT EFFORT TO BROACH THE TOPIC.



I HAD VIEWED THE COMMENT MORE AS AN ENTRY POINT, AND WASN'T REALLY PREPARED TO FOLLOW IT UP.



Alison Bechdel's *Fun Home*

# Comic Art, Creativity and the Law

- Creator owned or focused comics (Aspen, Image)
  - Defined – In some cases, creator-owned comics refers to creators who start their own publishing companies, such as Aspen; or they are companies like Image who contract with creators for work, and the creators keep the ©.
  - Legal Issues
    - Does the publishing company have any derivative rights to keep a series going if the creator leaves? If so, will the original creator get the equivalent of moral rights over the character, its mythology, and related characters?
    - Does the publishing company control ancillary rights like motion pictures, foreign licensing rights, merchandising?
    - What are the creative control rights of joint collaborators, particularly over long time periods?



Aspen's *Executive Assistant Iris* - Iris is a corporate executive assistant/ninja assassin, created by David Wohl

*Oliver*, by Gary Whitta and Darick Robertson, is a Steampunk-infused post-apocalyptic take on Dickens' *Oliver Twist* – to be published by Image in 2013



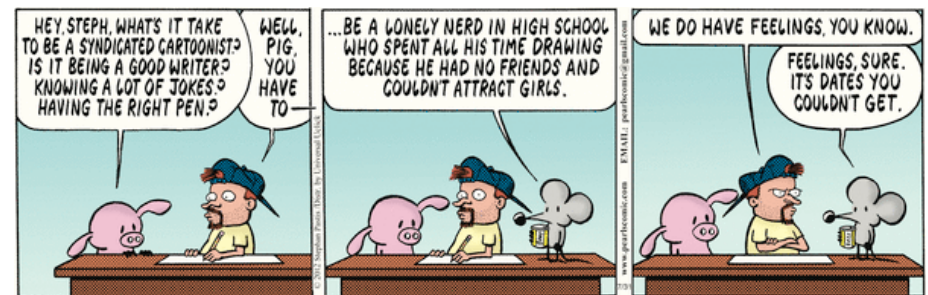


# Comic Art, Creativity and the Law

- Comic Strips licensed to syndicates and published in newspapers
  - Defined – comic strip creators generally both write and illustrate their strips, which are published via a licensing arrangement with large publishing syndicates – although some artists hire a team of workers to create the strip because of the pressure of a daily strip's production schedule
  - Legal Issues
    - Syndicates often dictate content restrictions in their agreements, and some strips move off the comics page as a result
    - To fit more strips on the comics page, syndicates shrink down the size of the strip, often compromising the integrity of the work – examples are found in Calvin and Hobbes, and Doonesbury, whose opening Sunday panels were often not published.
    - Merchandising issues



Dilbert © Scott Adams (2012), distributed by Universal Syndicate

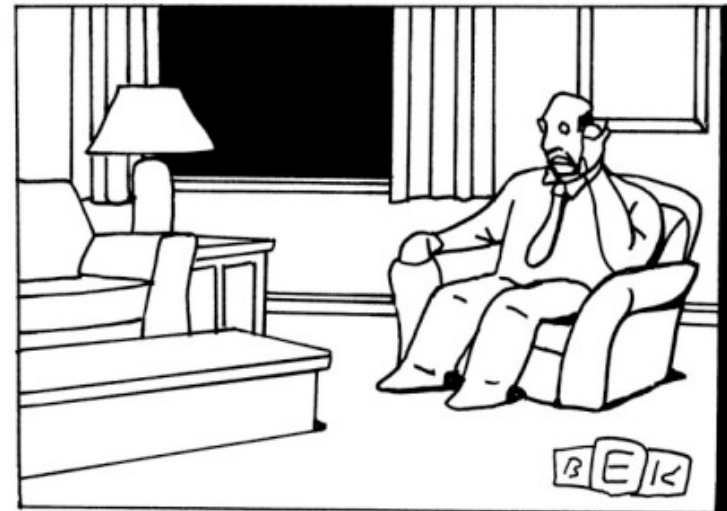


Pearls Before Swine © Stephan Pastis (2012), distributed by Universal Syndicate



# Comic Art, Creativity and the Law

- Single illustration cartoons, with or without text
  - Defined – these works of comic art are differentiated by the absence of sequential art – there is no narrative accomplished through multiple panels – they are stand alone works, usually published as an accompaniment to an unrelated literary work, often in magazines like the *New Yorker*.
  - Legal Issues
    - Ownership rights, including rights to the use of the works in digital versions of the magazines, in related merchandising, etc.
    - Content monitoring and controls exercised by the publishers
    - Size and other reproduction values dictated not by the creator, but by the publisher, as established by contract terms.



*"Just sitting here waiting for Facebook to go away."*

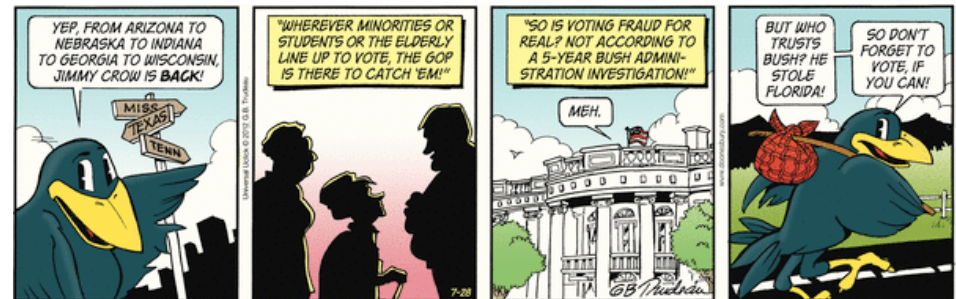
© Bruce Eric Kaplan – New Yorker Cartoon

# Comic Art, Creativity and the Law

- Political and/or editorial comics and cartoons
  - Defined – while the artistic format for these works can vary, their identifying element is the subject matter, primarily of a political nature
  - Legal Issues
    - Content restrictions imposed by social, moral and religious constraints can significantly affect the creative process
    - Contractual limitations re: space allowed for the work, color versus black and white reproductions, and work-for-hire issues all affect the creative process
    - External pressures exerted against the publishers (boycotts, cancelled subscriptions, etc.) can cause limits to be imposed as to subject matter.



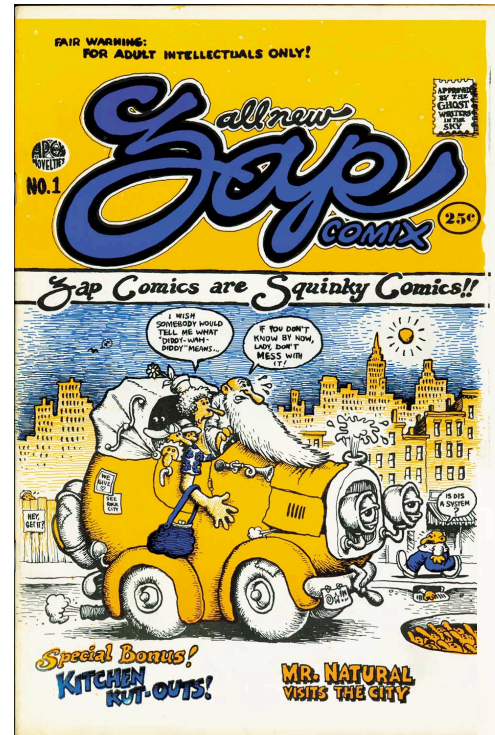
Pat Oliphant's *Captain Syria* July 30, 2012  
© Pat Oliphant (2012)



Garry Trudeau's *Doonesbury* "Jimmy Crow is Back" July 28, 2012  
© Garry Trudeau (2012)

# Comic Art, Creativity and the Law

- Underground Comix
  - Defined – creator-owned comics, usually one creator, distributed outside conventional channels, with topics ranging from sex, drugs and political protest
  - Legal Issues
    - Often prosecuted for obscenity
    - Lack of funding results in poor quality books, which negatively impacts sales
    - Limited to black and white printing, other than covers – and the rise of creator-owned publishers has marginalized this particular genre – the aging creators haven't been replaced by new ones.
    - Legal restrictions on content limit sales to adults only
    - Comic Book Legal Defense Fund originated as a means for creators to obtain legal assistance and defense



Zap Comix' No. 1, Cover written, illustrated and owned by Robert Crumb © (1968)

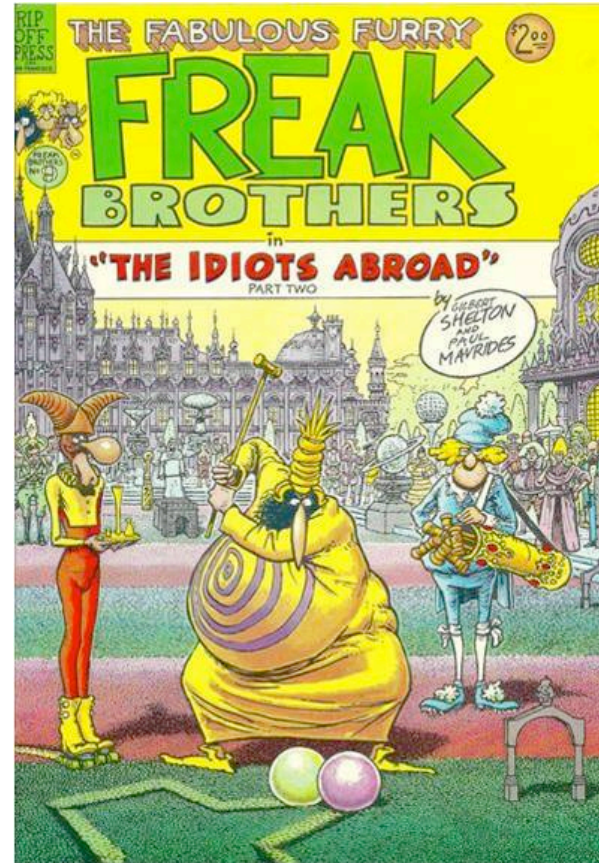
Trina Robbins' *One Flower Child's Search for Love*, © 1968, published in Zap Comix No. 1





# Comic Art, Creativity and the Law

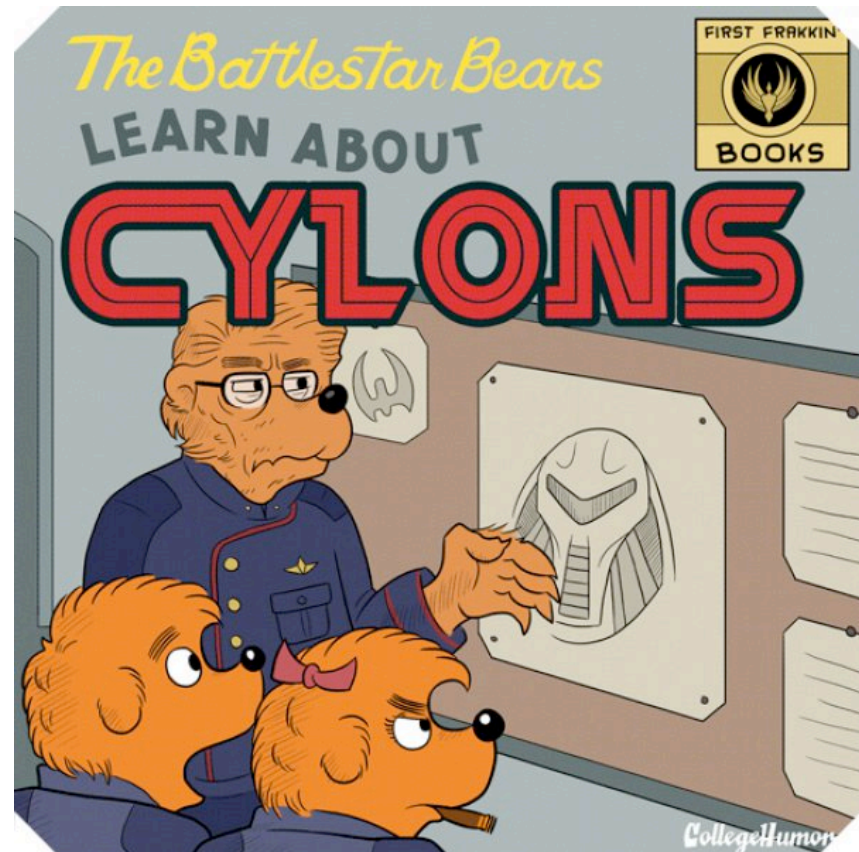
- Underground Comix
  - The Paul Mavrides Tax Case
    - The California Franchise Tax Board took the position that Mavrides' comics weren't literary works, and therefore weren't eligible for a sales tax exemption when they were sent to the publisher for final inking before publication.
    - After a four year battle, the FTB finally relented and changed the rules to allow comics to qualify for the exemption
    - The issue of whether comics are a blended art form of literature and artwork remains a legal battle – in one obscenity case, the creator was charged with separate counts for the text and the art



© 1971 by Gilbert Shelton and Paul Mavrides, *The Fabulous Furry Freak Brothers – The Idiots Abroad, Part Two*

# Comic Art, Creativity and the Law

- Unlicensed Work & Fan Art
  - Defined – The popularity of characters and story lines in comic art, and the ease of creation and distribution in the digital space has led to an explosion of fan created and otherwise unauthorized (by the original creator) works using the well-known characters and elements of their story lines.
  - Legal Issues
    - Derivative rights under copyright are the key issue – and come into play particularly when the fan art significantly changes the nature of the original expression, sometimes arising from a desire to deconstruct or critique the original work
    - Moral rights, attribution and integrity of the work also become problematic



From the College Humor site, posted by Rebecca Tushnet on her 43(B) log

# Comic Art, Creativity and the Law



*Wonder Woman* © DC Comics

## **The End**

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