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Writing About Comics and Copyright

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WRITING ABOUT COMICS AND COPYRIGHT

Ronan Deazley and Jason Mathis

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For Moira and Ruby

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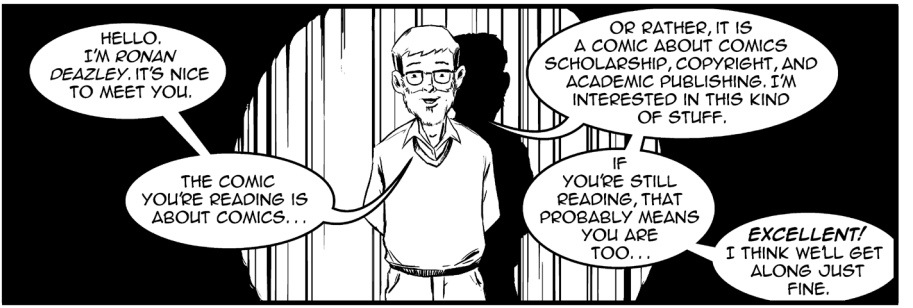
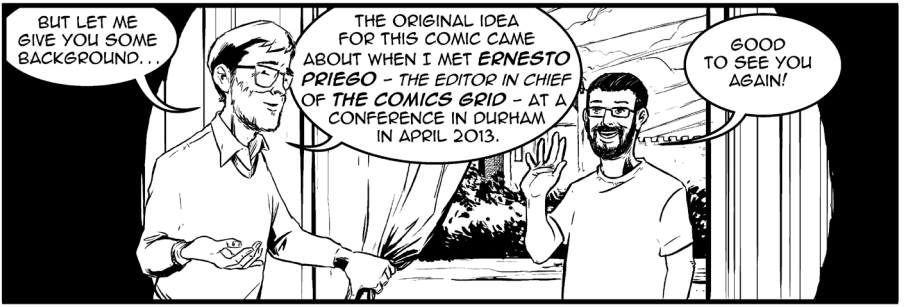
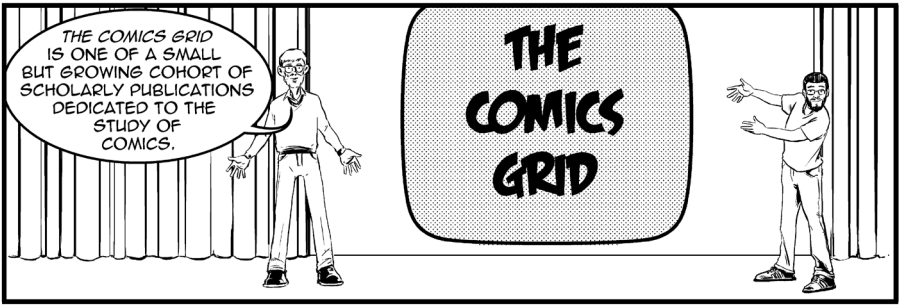
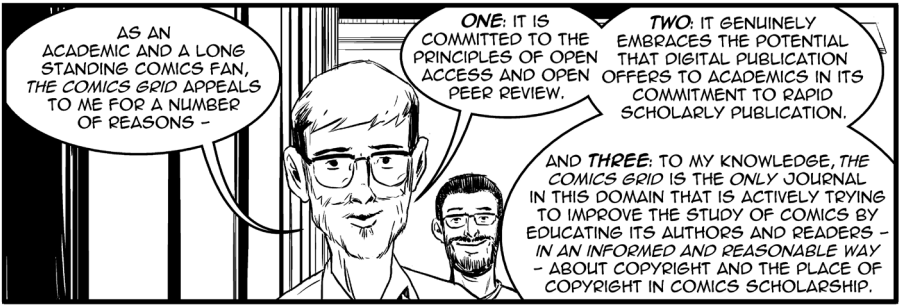
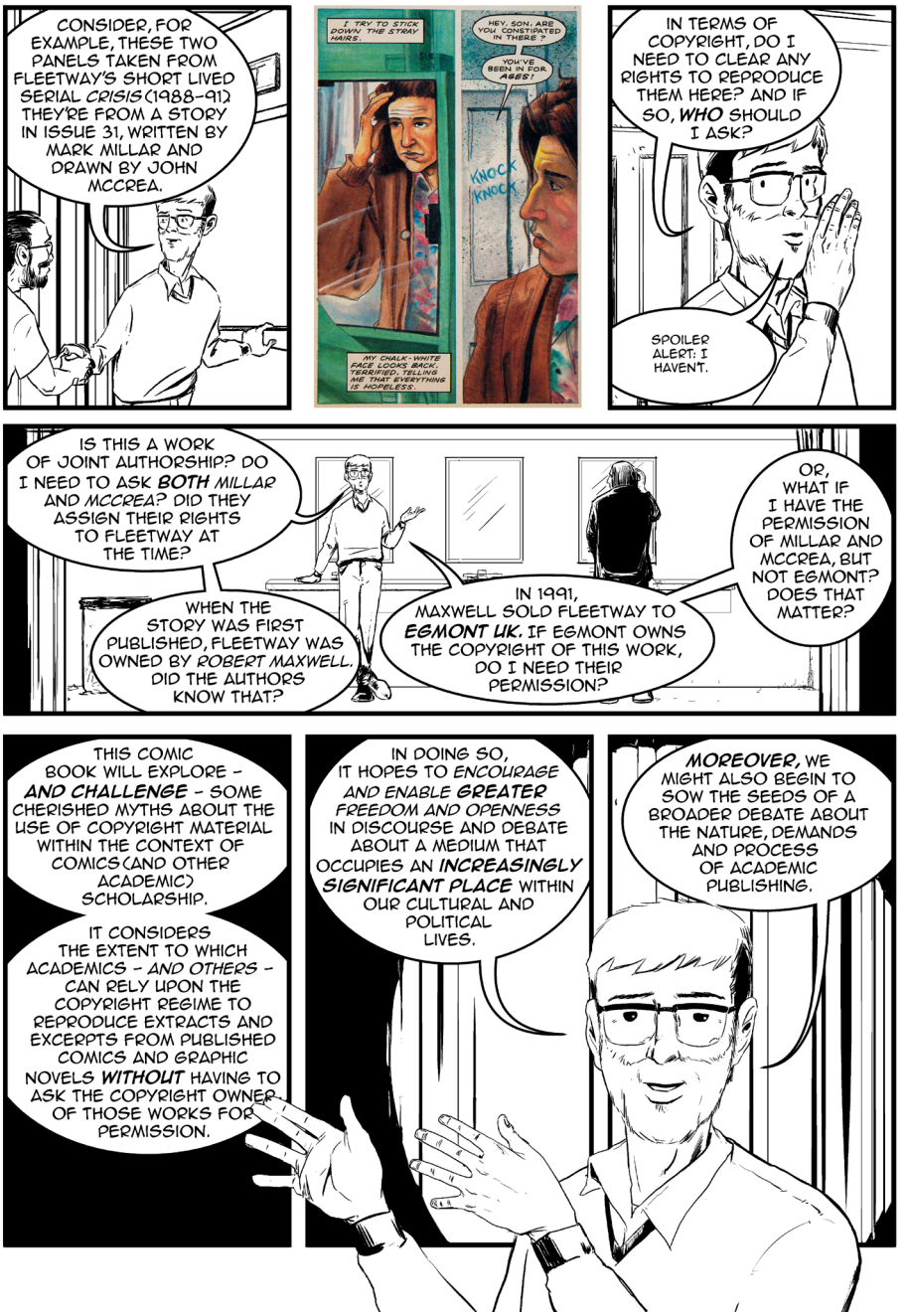

HELLO. I'M *RONAN DEAZLEY*. IT'S NICE TO MEET YOU.
THE COMIC YOU'RE READING IS ABOUT COMICS...
OR RATHER, IT IS A COMIC ABOUT COMICS SCHOLARSHIP, COPYRIGHT, AND ACADEMIC PUBLISHING. I'M INTERESTED IN THIS KIND OF STUFF.
IF YOU'RE STILL READING, THAT PROBABLY MEANS YOU ARE TOO...
EXCELLENT! I THINK WE'LL GET ALONG JUST FINE.


BUT LET ME GIVE YOU SOME BACKGROUND...
THE ORIGINAL IDEA FOR THIS COMIC CAME ABOUT WHEN I MET ***ERNESTO PRIEGO*** – *THE EDITOR IN CHIEF OF* ***THE COMICS GRID*** – AT A CONFERENCE IN DURHAM IN APRIL 2013.
GOOD TO SEE YOU AGAIN!


THE COMICS GRID IS ONE OF A SMALL BUT GROWING COHORT OF SCHOLARLY PUBLICATIONS DEDICATED TO THE STUDY OF COMICS.
THE COMICS GRID


AS AN ACADEMIC AND A LONG STANDING COMICS FAN, *THE COMICS GRID* APPEALS TO ME FOR A NUMBER OF REASONS –
ONE: IT IS COMMITTED TO THE PRINCIPLES OF OPEN ACCESS AND OPEN PEER REVIEW.
TWO: IT GENUINELY EMBRACES THE POTENTIAL THAT DIGITAL PUBLICATION OFFERS TO ACADEMICS IN ITS COMMITMENT TO RAPID SCHOLARLY PUBLICATION.
AND ***THREE***: TO MY KNOWLEDGE, *THE COMICS GRID* IS THE *ONLY* JOURNAL IN THIS DOMAIN THAT IS ACTIVELY TRYING TO IMPROVE THE STUDY OF COMICS BY EDUCATING ITS AUTHORS AND READERS – *IN AN INFORMED AND REASONABLE WAY* – ABOUT COPYRIGHT AND THE PLACE OF COPYRIGHT IN COMICS SCHOLARSHIP.


CONSIDER, FOR EXAMPLE, THESE TWO PANELS TAKEN FROM FLEETWAY'S SHORT LIVED SERIAL *CRISIS* (1988-91) THEY'RE FROM A STORY IN ISSUE 31, WRITTEN BY MARK MILLAR AND DRAWN BY JOHN MCCREA.
I TRY TO STICK DOWN THE STRAY HAIRS.
MY CHALK-WHITE FACE LOOKS BACK, TERRIFIED, TELLING ME THAT EVERYTHING IS HOPELESS.
HEY, SON. ARE YOU CONSTIPATED IN THERE?
YOU'VE BEEN IN FOR AGES!
KNOCK KNOCK
IN TERMS OF COPYRIGHT, DO I NEED TO CLEAR ANY RIGHTS TO REPRODUCE THEM HERE? AND IF SO, ***WHO*** SHOULD I ASK?
SPOILER ALERT: I HAVEN'T.
IS THIS A WORK OF JOINT AUTHORSHIP? DO I NEED TO ASK ***BOTH*** MILLAR AND MCCREA? DID THEY ASSIGN THEIR RIGHTS TO FLEETWAY AT THE TIME?
WHEN THE STORY WAS FIRST PUBLISHED, FLEETWAY WAS OWNED BY ROBERT MAXWELL. DID THE AUTHORS KNOW THAT?
IN 1991, MAXWELL SOLD FLEETWAY TO ***EGMONT UK.*** IF EGMONT OWNS THE COPYRIGHT OF THIS WORK, DO I NEED THEIR PERMISSION?
OR, WHAT IF I HAVE THE PERMISSION OF MILLAR AND MCCREA, BUT NOT EGMONT? DOES THAT MATTER?
THIS COMIC BOOK WILL EXPLORE - ***AND CHALLENGE*** - SOME CHERISHED MYTHS ABOUT THE USE OF COPYRIGHT MATERIAL WITHIN THE CONTEXT OF COMICS (AND OTHER ACADEMIC) SCHOLARSHIP.
IT CONSIDERS THE EXTENT TO WHICH ACADEMICS - *AND OTHERS* - CAN RELY UPON THE COPYRIGHT REGIME TO REPRODUCE EXTRACTS AND EXCERPTS FROM PUBLISHED COMICS AND GRAPHIC NOVELS ***WITHOUT*** HAVING TO ASK THE COPYRIGHT OWNER OF THOSE WORKS FOR PERMISSION.
IN DOING SO, IT HOPES TO *ENCOURAGE AND ENABLE* ***GREATER*** *FREEDOM AND OPENNESS* IN DISCOURSE AND DEBATE ABOUT A MEDIUM THAT OCCUPIES AN ***INCREASINGLY SIGNIFICANT PLACE*** WITHIN OUR CULTURAL AND POLITICAL LIVES.
MOREOVER, WE MIGHT ALSO BEGIN TO SOW THE SEEDS OF A BROADER DEBATE ABOUT THE NATURE, DEMANDS AND PROCESS OF ACADEMIC PUBLISHING.

COMICS SCHOLARSHIP AND CLEARING RIGHTS

Academics who research and write about the visual world often complain about the way in which copyright law can hinder their scholarly endeavours, and with good reason. Writing about visual work without reproducing that work is an impoverished exercise, for both writer and reader. But, reproducing visual material can trigger concerns on the part of the conscientious author or – more often – demands on the part of the publisher about the need to secure copyright permission. In this respect, comics scholarship is no different from any other field of visual or cultural studies. Clearing rights for publication can be frustrating and time-consuming, and academic publishers often manage the business of copyright clearance by making their authors responsible for securing permissions. *European Comic Art* provides a good example. When an article is accepted for publication, authors are 'required to submit copyright agreements and all necessary permission letters for reprinting or modifying copyrighted materials, both textual and graphic', and are 'responsible for obtaining all permissions and clearing any associated fees.'

Not all publishers, however, adhere to such a black and white position. The *Journal of Graphic Novels and Comics* is published by Taylor & Francis. In the 'Authors Services' section of their website, the publisher acknowledges that reproducing short extracts of text and other types of material 'for the purposes of criticism may be possible without formal permission'. To better understand *when* permission is needed, the publisher directs its authors to the Publishers Association's *Permissions Guidelines*.

To better understand *what rights* need to be cleared, authors are directed to the publisher's own FAQs about using third-party material in an academic article. Thirteen of the publisher's FAQs expressly relate to the reproduction of visual material, and of those only two concede the possibility of reproducing work without permission (they relate to, respectively, the use of 'screenshots or grabs of film or video' and the use of 'very old paintings').

What is not clear from the FAQs document is whether the publisher is purporting to accurately represent the law in this area. If so – as we shall see – the FAQs document is clearly deficient. If, however, Taylor & Francis is simply using the FAQs document to

set out the parameters of its own editorial policy on the reproduction of copyright-protected third-party material, then so be it: the publisher is perfectly entitled to adopt such editorial guidelines as it sees fit. I would suggest, though, that in cleaving to an editorial policy that fails to take full advantage of the scope which the copyright regime allows for the lawful reproduction of copyright-protected material without need for permission, the publisher is missing an opportunity to enable and encourage its contributors to augment and enrich comics scholarship as a discipline.

It is in this respect that *The Comics Grid* is more ambitious and forward-thinking: it actively promotes the lawful use of copyright-protected content for the purposes of academic scholarship. The journal's copyright policy sets out that third-party images are reproduced on the basis of 'educational fair use', with readers and contributors directed to Columbia University Libraries' *Fair Use Checklist* for further information. This is a checklist that has been developed to help academics and other scholars make a reasonable and balanced determination about whether their use of copyright-protected work is permissible under s.107 of the US *Copyright Act* 1976: the fair use provision.

Obviously, *The Comics Grid* locates its copyright advice within the context of US copyright law. But, as a Glasgow-based academic, with an interest in both the history and the current state of the UK copyright regime, my particular focus within this comic concerns the extent to which academics – or indeed anyone interested in writing about comics – can rely upon UK copyright law to reproduce extracts and excerpts from published comics and graphic novels *without* having to ask the copyright owner for permission. To address that issue we must consider three key questions. What constitutes 'a work' protected by copyright within the context of comics publishing? What does it mean to speak of 'insubstantial copying' from a copyright-protected comic? And what can be copied lawfully from a comic for the purpose of criticism and review?

WHAT IS 'A WORK'?

The *Copyright Designs and Patents Act* 1988 (the CDPA) provides a detailed and exhaustive list of eight types of work that qualify for copyright protection within the UK. So, before one can properly appreciate what latitude there exists within the copyright regime for the reproduction of copyright-protected work without permission, one must understand what constitutes 'a work'. This is axiomatic: one can only sensibly and reasonably interrogate notions of *substantial copying* and *fair dealing* – about which more below – in relation to an identified 'work'.

To be sure, for most copyright-protected content what constitutes 'a work' will not present many conceptual challenges. The work is: the novel, the poem, the playtext, the score, the painting, the photograph, and so on. Like the proverbial elephant, we tend to know the work when we see it. With comics, however, things are not always so straightforward.

One characteristic of comics is that individual storylines are often presented to the reader, played out across a number of issues: similar to the serialisation of literary works – often published with accompanying illustrations – by Victorian novelists such as Dickens or Collins. If Dickens's work was still in copyright today would we regard, say, *Great Expectations* as 'a work', even though it was first published in serial form? Almost certainly yes; few would seek to argue otherwise. Should we read (certain) comics in a similar vein: that is, works first published in serial form?

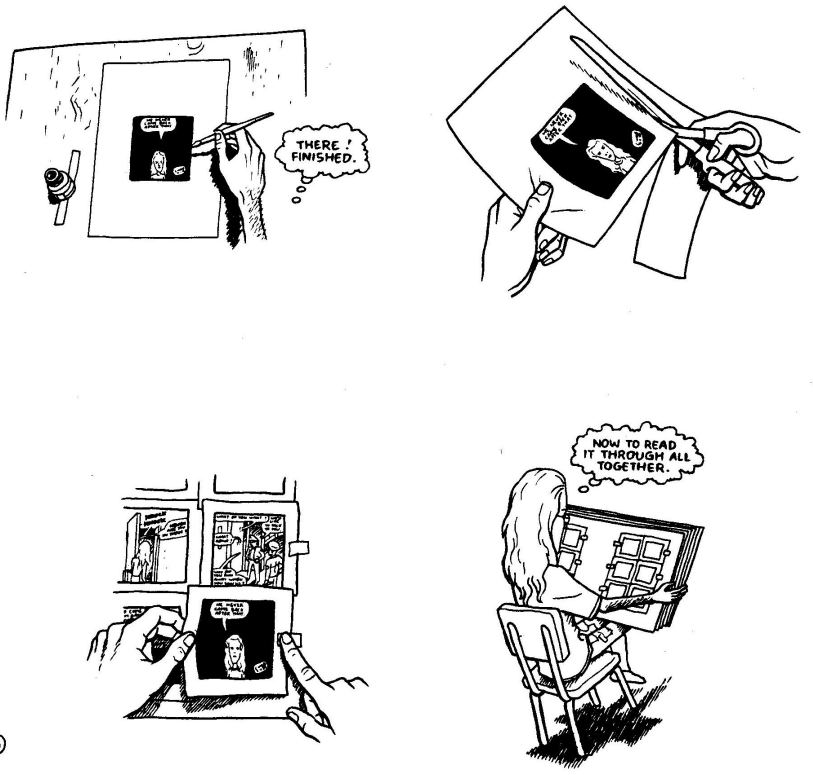
Consider Dave Sim's *Cerebus the Aardvark*. Published over a period of nearly 30 years (1977-2004), this groundbreaking comic is best understood as a series of ten 'novels' collected into 16 'books'. The third of these 'novels', *Church & State*, was first published across 59 issues between 1983-88 (Issues 52-111) before being collected and published as a novel in two volumes (*Church & State Volume I* and *Church & State Volume II* in 1987 and 1988 respectively). So: for copyright purposes, what is the 'work'?

Or what about Chester Brown's adaptation of the *Gospel of Mat-*

thew? Brown began his adaptation in *Yummy Fur* Issue 15 (March 1989). It continued in the remaining issues of *Yummy Fur* (Issues 16-32), and then in Brown's next project: *Underwater* (11 issues, 1994-97). The most recent instalment ('Chapter 20, verses 1-29') appeared in *Underwater* Issue 11 in October 1997 and, at the time of writing, Brown has yet to complete his work on the remaining eight chapters. But again: what, here, is the 'work'?, and does our understanding of 'the work' shift depending on what we know about the author's own creative process?

Brown, in this respect, provides an intriguing case study. In *Yum-*

my Fur Issue 20 he offers his readers an insight into the way he constructs his comics (at least, circa 1990).

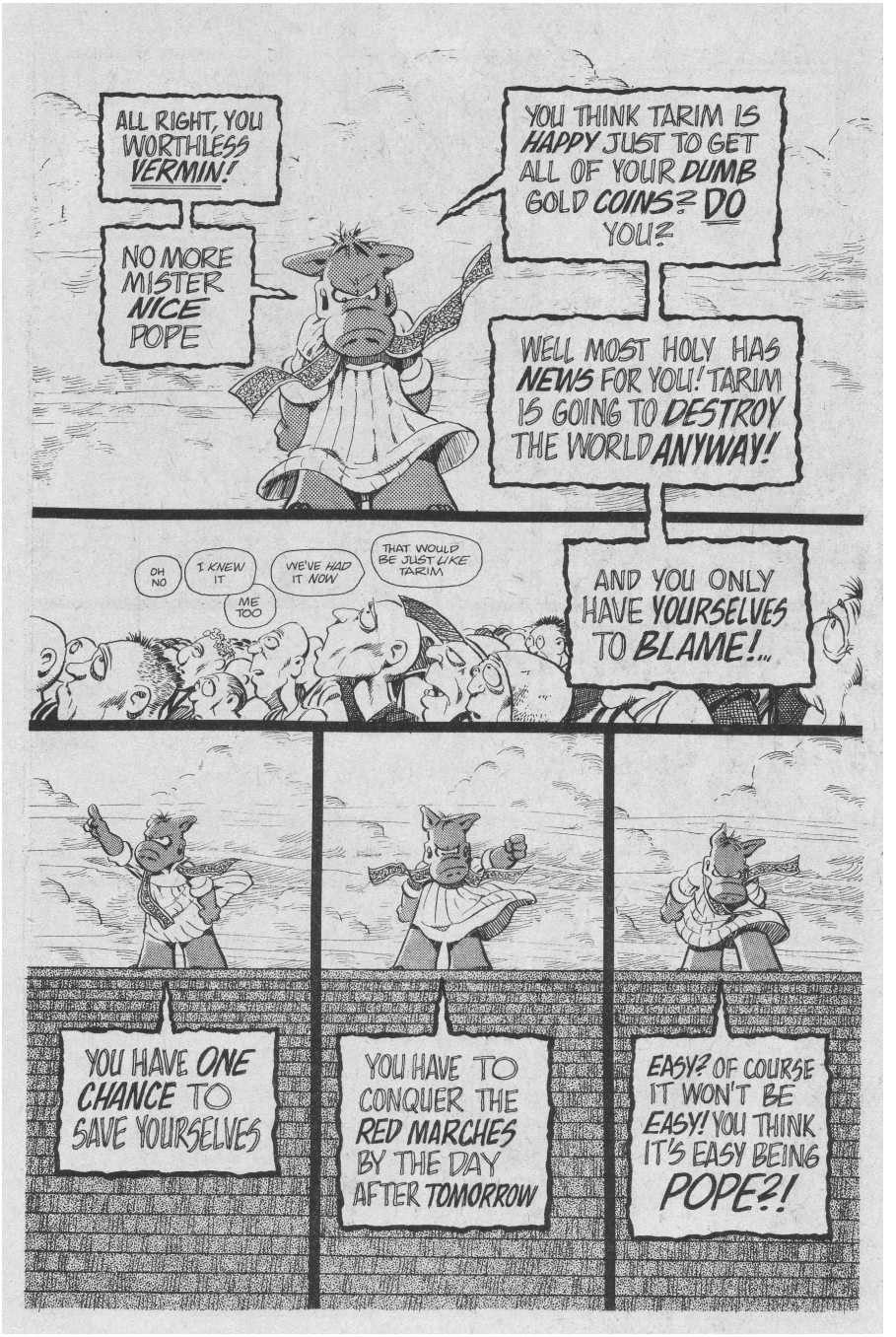


Brown typically works with page layouts of between five and seven panels (which panels are rarely uniform in size or shape). But, whereas most comic artists sketch or draft a page of comic art as a single page, Brown draws each panel individually, on a separate sheet of paper (often 'cheap typewriting paper'), and then assembles each 'page' of the comic by arranging these individual panels on a larger sheet. Given this, should we regard each of Brown's panels as a 'work'?

One final example: Chris Ware's wonderful *Building Stories* (2012), an exquisite artefact, beautifully rendered by the artist, and luxuriously produced by the publisher. Its unconventional format challenges preconceptions that anyone – whether a long-standing comics fan or not – might have about the form and format of the comic. It consists of 14 different types of printed work (individual books, newspapers and broadsheets, flip books, a poster, accordion-style fold-outs, and so on) which present the reader with a complex, multi-layered story centred around an unnamed female protagonist, but one that eschews narrative linearity. Produced over a period of ten years, these 'works' are collectively presented to the reader in an illustrated box: a format inspired by Marcel Duchamp's *Box in a Valise* (1935-41).

So: what is 'the work' that is the subject of copyright protection? The box and its contents? Should we understand each of the 14 vignettes as separate works in themselves, rather than parts of a richer, more ambitious and intriguing narrative project? Is the box itself 'a work'?

My point here is not to make things more difficult for those writing about comics who are grappling with copyright clearance issues, or to further obfuscate an already problematic legal landscape; quite the reverse. But one cannot escape the fact that the very nature of comics problematise what are otherwise often simple, conceptual distinctions in other fields of literary and artistic publishing. And as we shall see, these definitions matter; for example, the courts routinely identify the *amount of the work that has been copied* as a significant factor in determining whether the use of the work constitutes 'fair dealing'.


ALL RIGHT, YOU WORTHLESS VERMIN!
NO MORE MISTER NICE POPE
YOU THINK TARIM IS HAPPY JUST TO GET ALL OF YOUR DUMB GOLD COINS? DO YOU?
WELL MOST HOLY HAS NEWS FOR YOU! TARIM IS GOING TO DESTROY THE WORLD ANYWAY!
OH NO
I KNEW IT
ME TOO
WE'VE HAD IT NOW
THAT WOULD BE JUST LIKE TARIM
AND YOU ONLY HAVE YOURSELVES TO BLAME!...
YOU HAVE ONE CHANCE TO SAVE YOURSELVES
YOU HAVE TO CONQUER THE RED MARCHES BY THE DAY AFTER TOMORROW
EASY? OF COURSE IT WON'T BE EASY! YOU THINK IT'S EASY BEING POPE?!

To return to *Cerebus*: reproducing one page from *Church & State* – a work that runs to 1220 pages in its entirety – is a very different prospect to the reproduction of a single page from one of the 59 individual issues that progress the *Church & State* storyline. Quantitatively speaking, it is the difference between reproducing 5% of an individual comic and reproducing 0.08% of the *Church & State* novel.

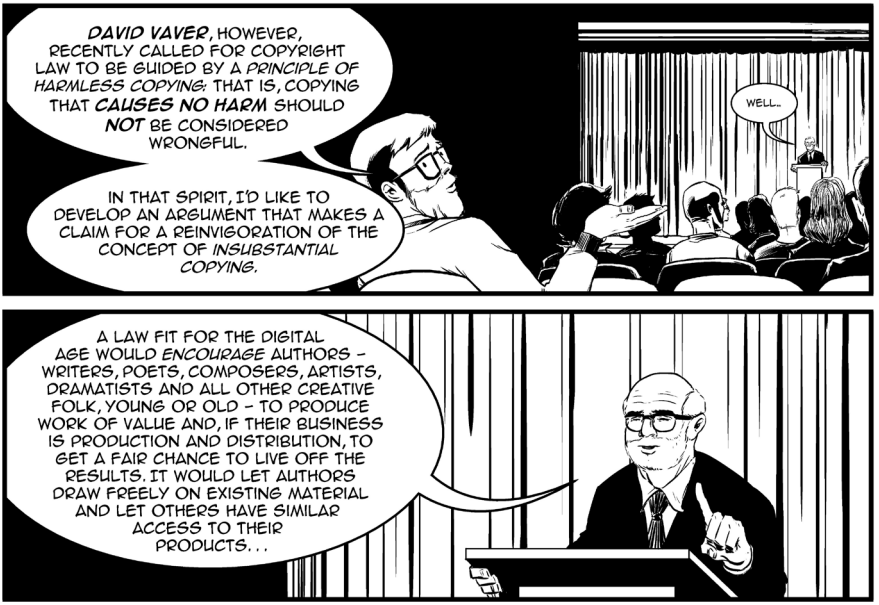
But we will return to the concept of 'fair dealing' in due course. For now, it is enough to reiterate that identifying what constitutes 'a work' when dealing with comics can be conceptually problematic, which in turn blurs the boundaries of permissible and impermissible use for both copyright owner and user.

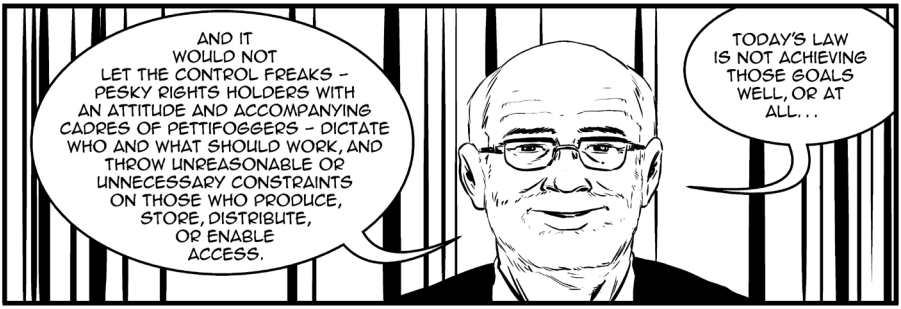
Let us presume, however, that one can confidently identify the 'work' with which one is dealing; that being the case, there are two obvious strategies that an academic or researcher might rely upon when reproducing material from that work without the need for permission from the copyright owner. They concern: (i) insubstantial copying; and, (ii) fair dealing for the purpose of criticism and review.

INSUBSTANTIAL COPYING

Section 16 of the CDPA sets out the various 'acts restricted by copyright': that is, the different types of protected activity that require permission from the copyright owner. The legislation provides, however, that the protection granted only extends 'to the work as a whole or any substantial part of it'. Put another way: it is lawful to make use of another's copyright work, as long as you are copying less than a substantial part of the work. But where does one draw the line between substantial and insubstantial copying?

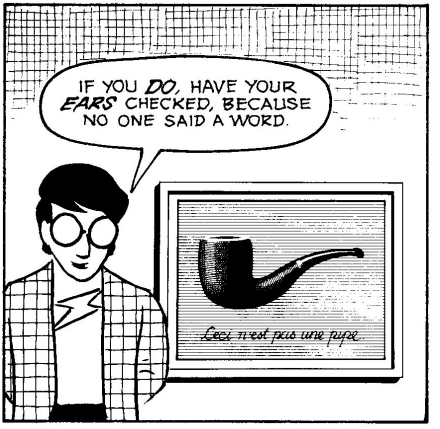
It is said that substantiality depends more upon the *quality* rather than the *quantity* of what has been taken. In many respects this militates against the likelihood of successfully relying upon an argument of insubstantial copying when reproducing material – even a single panel – from a comic without permission. Without wishing to indulge in cliché, if there is any truth in the claim that a picture paints a thousand words, the argument that reproducing even a single panel from a comic might be regarded as *qualitatively significant copying* is likely to enjoy some traction.





To understand what lawful insubstantial copying might mean in relation to a comic, one must understand *the comic as sequential art.* Will Eisner first wrote about the comic as sequential art in 1985. In 1993, Scott McCloud developed the concept further in his seminal *Understanding Comics*. Of particular interest is what McCloud has to say about 'closure' (the experience of 'observing the parts but perceiving the whole'), a foundational concept in the psychology of narrative. McCloud argues that comics rely upon 'closure' as an agent of 'change, time and motion': a phenomenon that occurs in *the space between* comic panels, often referred to as 'the gutter'. He writes as follows: 'Comics panels fracture both time and space, offering a jagged, staccato rhythm of unconnected moments. But closure allows us to connect these moments and mentally construct a continuous, unified reality'. And whereas closure in the context of film and television is 'continuous, largely involuntary and virtually imperceptible', with comics closure depends upon the active participation of the reader.

Consider the single panel from *Understanding Comics* reproduced on the next page. If you are reading this comic online, then, with this panel, you are looking at a digital copy of a digital copy of a printed copy of an image that incorporates a drawing of an iconic twentieth century painting. By itself, the image is simply an image, bearing as much significance (or not) as the reader cares to invest in it. But when presented as part of a sequence, as McCloud puts it, 'the image is transformed into something more: the art of comics'. It is the *sequential nature* of the comic form that is imperative here, and, I would suggest, when applying well-established principles of copyright law to the comic as 'a work', we should be



sensitive to the unique vocabulary and grammar of comics as an art form. That is, if the phenomenon of closure is as integral to the very nature of the comic as McCloud suggests, then – without a sequence, without the gutter – the reproduction of a single panel from a comic should not typically be regarded as an instance of substantial copying: at least not from a *qualitative* perspective.

There is, of course, something counterintuitive about this analysis: one presumes someone writing about a comic chooses to reproduce a particular panel from the comic *precisely because it is significant*. And, on its face, this logic appears to be at odds with my argument that a single panel from a comic should not be understood to be qualitatively substantial or significant. And yet, adhering to that argument does not mean that the panel cannot or should not be regarded as significant within the context of a scholarly article (or indeed, a review or a blog). In this respect, it is essential that we hold in mind – and clearly differentiate between – the two different contexts within which the image is reproduced: the comic as a copyright-protected 'work', and the scholarly article. There is no contradiction in the idea that the same image might be *qualitatively insignificant* in the former context, while simultaneously being *intellectually or illustratively significant* in the latter.

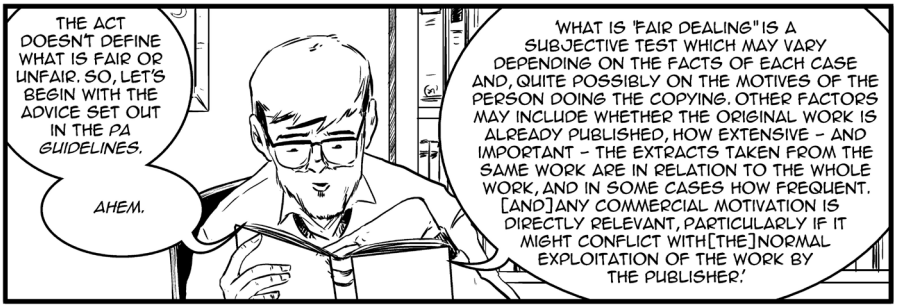
Also, I make no claim here about whether a single panel from a comic may or may not be a *quantitatively* significant part of the comic within which it appears. That will always depend upon the individual circumstances under consideration. Quantitatively, for example, it is easy to see how reproducing a single panel from a three or four panel daily newspaper comic strip would amount to substantial copying. But consider again the panel from *Understanding Comics*: it is one of six panels on a page in a comic book of 215 pages. It represents approximately 0.1% of the work that is *Understanding Comics*. Does that amount to substantial copying – from a quantitative perspective – for the purposes of the CDPA?

CRITICISM AND REVIEW

Section 30(1) of the CDPA permits copying for the purpose of criticism and review, so long as the copying constitutes 'fair dealing'. The actual wording of the legislation is as follows:

> Fair dealing with a work for the purpose of criticism or review, of that or another work or of a performance of a work, does not infringe any copyright in the work provided that it is accompanied by a sufficient acknowledgement and provided that the work has been made available to the public.

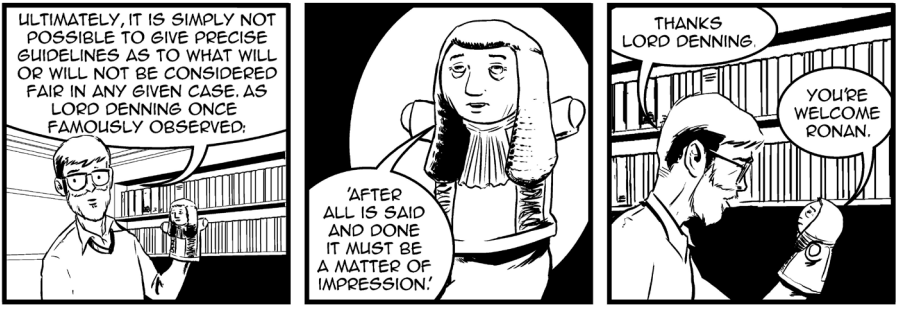
So, there are two obvious questions to ask: what constitutes 'fair dealing'?, and what qualifies as 'criticism and review'?



On the first point, I'd like to offer an important correction: fair dealing is *not* determined *subjectively* (that is, from the perspective of the person alleging copyright infringement). Time and again, the courts have stressed that the concept of fair dealing is to be tested *objectively*. Lord Justice Aldous put it very succinctly in *Hyde Park* (2000): 'the Court must judge the fairness [of the use] by the *objective standard* of whether a fair minded and honest person would have dealt with the copyright work in the same manner [as the defendant]'.

Otherwise, the PA's advice is, in many respects, a reasonable summary of current copyright doctrine on the concept of fair dealing. Recent court decisions have indicated a number of factors worth bearing in mind, many of which are alluded to in the PA *Guidelines*. For example, in *Ashdown* v. *Telegraph Group* (2001) Lord Phil-

lips identified three considerations of particular importance: (i) whether the work competes commercially with the original work; (ii) whether the original work was published or not; and, (iii) the amount and importance of the material that has been copied from the original work. In *Fraser-Woodward* (2005), Mr Justice Mann also stressed that the *motives* of the user are important, as is *the actual purpose* of the new work that is being produced ('Is it a genuine piece of criticism or review, or is it something else, such as an attempt to dress up the infringement of another's copyright in the guise of criticism'). Importantly, Mann J decided that, depending on the circumstances, reproducing an original work *in its entirety* could be regarded as fair.



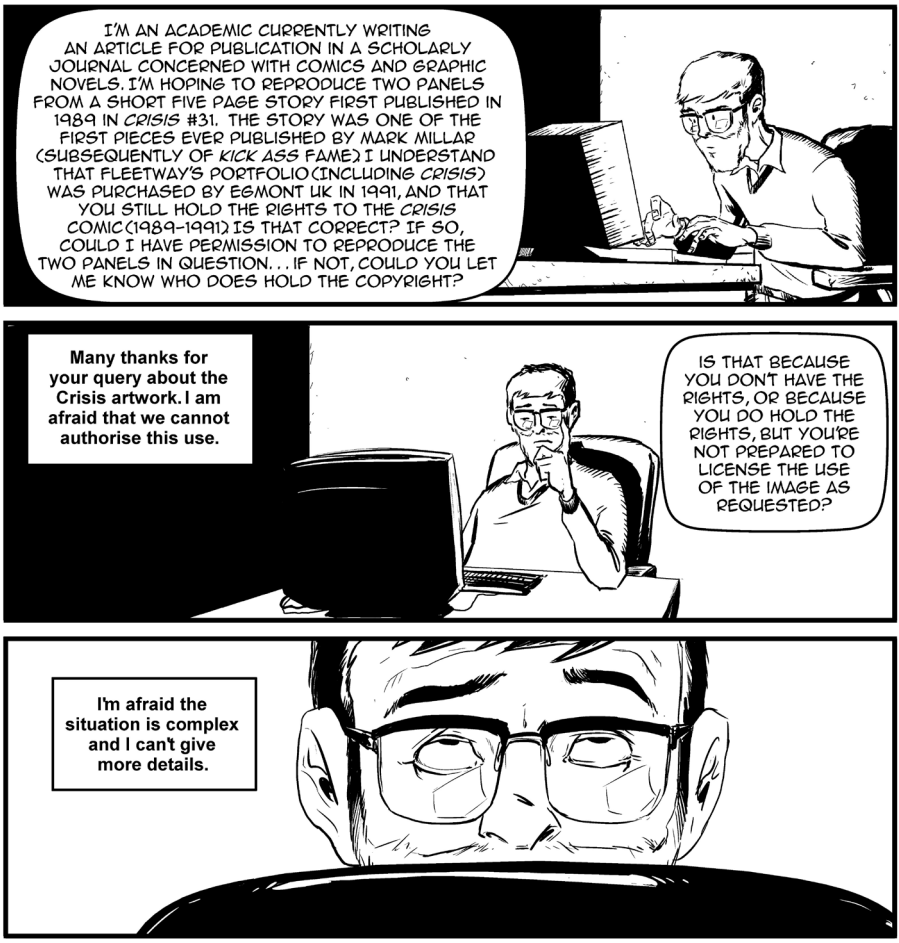
But what constitutes 'criticism and review'? Again, let's consider the PA *Guidelines*: they set out that copying is permissible provided there is 'a significant element of actual criticism and review *of the work being copied* (i.e. substantial comment, as opposed to mere reproduction), although this is sometimes interpreted liberally' (emphasis added). Unfortunately, this advice is likely to mislead. The suggestion that the criticism in question needs to be directed at the work being copied is out of step with both the literal wording of the CDPA and with existing copyright jurisprudence. The legislation is unambiguous that criticism can be concerned with 'the work', 'another work', or 'a performance of a work'. Moreover, the courts have established that the scope of the exception is not confined to a critique or review of the style or merit of a work or performance *per se*, but can extend to the ideas, doctrine,

or philosophy underpinning the work, as well as to its social or moral implications. The comments of Lord Justice Robert Walker, in *Pro Sieben Media AG* v. *Carlton UK Television Ltd* (1999), provide a useful touchstone: that '"criticism or review" [is an expression] of wide and indefinite scope'; that '[a]ny attempt to plot [its] precise boundaries is doomed to failure'; and that it is an expression 'which should be interpreted liberally'. Without doubt, s.30(1) offers the academic working in the field of comics scholarship – as well as academic publishers – much greater scope for reproducing copyright-protected work than the PA *Guidelines* appear to concede.

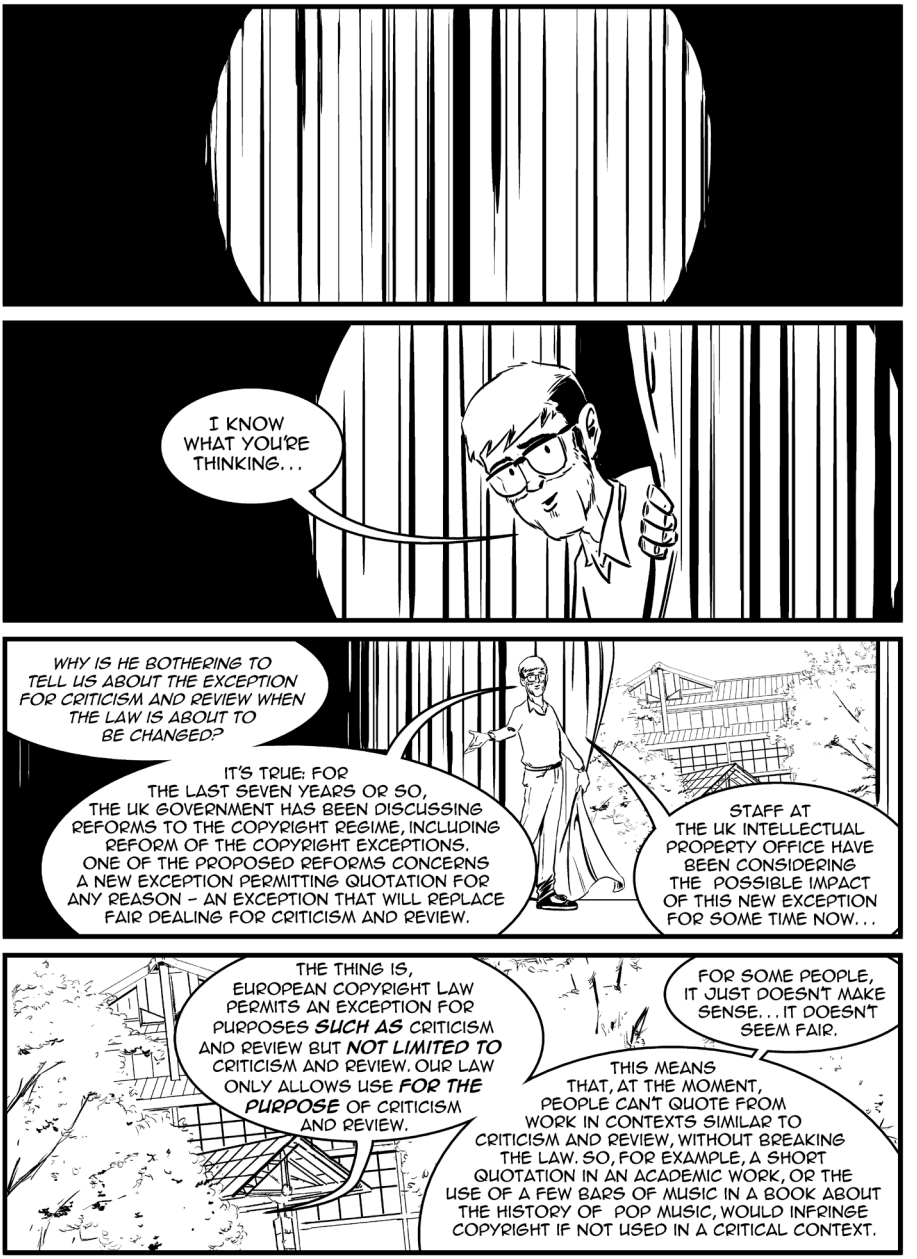
Consider, for example, the various images from other people's comics that I have included within this comic. Upon what basis do I reproduce them here? I could offer justifications that rely upon both strategies discussed so far: insubstantial copying, and fair dealing for criticism and review. Without doubt, the latter provides me with my most robust defence, but I have offered no criticism or review of the works from which the images were taken. So what is 'the work' that I am critiquing or reviewing? I have a number of 'works' in mind, including (but not limited to): *The Comics Grid*; Taylor & Francis's FAQs document concerning the use of third-party material in academic articles; the Publishers Association's *Permissions Guidelines*; and the *Copyright Designs and Patents Act* itself. Without hesitation, I would defend my reproduction of the copyright material reproduced within this comic as lawful (and without having cleared rights).

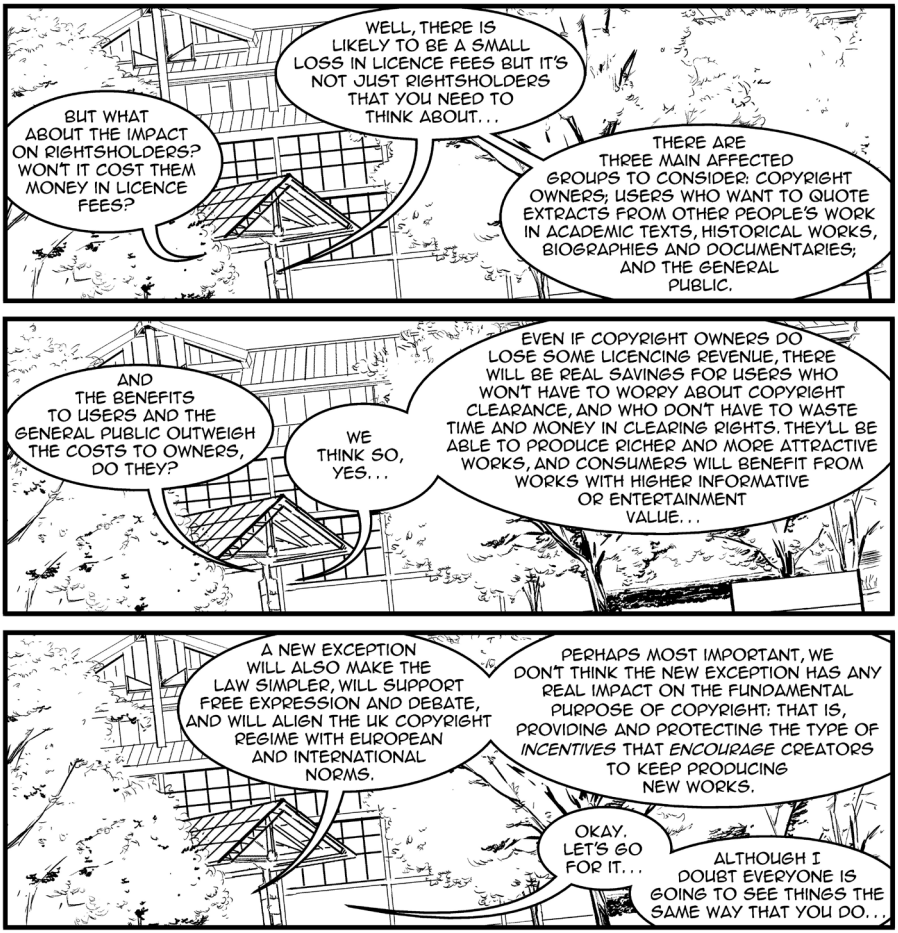
Only in relation to one illustration did I seek permission from (what I took to be) the copyright owner: the two panels from *Crisis* Issue 31 (reproduced on page 2 of this comic). Now, it is important to be clear that I did not seek permission because I considered it necessary. There is nothing about this illustration – when compared with the rest of the copyright-protected material that I have reproduced in this comic – that marks it out as warranting special attention or consideration (at least not from a rights-clearance perspective). Rather, my motivation was far more self-regarding

and mundane. Dear Reader, a grand reveal: the young man in those panels is none other than myself, aged seventeen. (Ah vanity, thy name is Deazley.) That said, my experience, in trying to clear rights in that particular image, is one that will no doubt be familiar to many academics who write about visual culture. I wrote to the permissions department of Egmont UK on 6 May 2013 as follows:



CURRENT PROPOSALS FOR REFORM





The decision to introduce the new exception for quotation is to be welcomed. The government-funded UK Research Councils make clear that research should be relevant to society and wider societal concerns; it should engage the public and empower people; it should have impact. It is right that the copyright regime should enable, not inhibit, those aspirations. The government should take full advantage of the latitude afforded under European copyright law to ensure the new quotation exception facilitates research endeavour – *including the dissemination of that research* – to the fullest possible extent, albeit without unduly compromising the economic interests of copyright owners.

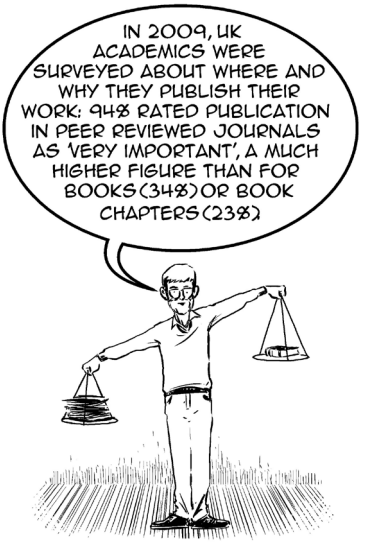
Indeed, in this context, the IPO strikes the right note in emphasising that the quotation of works should be permitted 'only to the extent necessary, and *without competing with sales of the original work*'. And again: '[a]s this exception will be limited to "fair dealing" and extracts will be limited to the extent necessary to serve their purpose, works using extracts *will not substitute for, or compete with, originals*'. This focus on the likely commercial competition between the two works in question underscores the extent to which quotation – within the context of academic scholarship and publishing – should generally be unburdened from the various costs (whether financial or administrative) associated with copyright clearance. Would anyone sensibly claim that the copyright-protected material that I have reproduced in this comic commercially competes with, or acts as a substitute for, any of the underlying works?

To be sure, a less nimble and less enlightened copyright regime – one that was less minded to enable freedom of expression – might require that users seek permission for all such quotations, and thus secure a potential revenue stream for copyright owners. But copyright has never been concerned solely with securing any and every potential revenue stream for copyright owners; nor should it. The type of use and quotation that we have been discussing in this comic is not such use as should require permission or payment. Or, to put it in copyright legalese: these types of use fall outwith what might reasonably be regarded as the normal exploitation of copyright protected work; neither do they unreasonably prejudice the legitimate interests of the authors concerned.

CONCLUSION

Will these proposed reforms make a difference? Will the new quotation exception make it easier for academics writing about comics – or indeed any academic working in the humanities – to reproduce copyright-protected work within their published research without needing to clear rights? Probably not: at least not in any significant way. Where they might make a difference is in relation to researchers who disseminate their work through websites and blogs, as well as other types of grey literature. Rarely is the content of this type of material subject to editorial or other third-party intervention, and as such researchers themselves can choose to benefit from an exception that enables greater use of copyright-protected content without the need for formal permission.

But the mainstay of academic publication lies in books, book chapters, and journal articles, with journal publication firmly established as the predominant form across all disciplines. Moreover, that dominance appears to be increasing. For as long as these types of output dominate the research landscape, academic publishers will remain the principal gatekeepers to the dissemination of scholarly research. And for as long as they do, any meaningful opportunity for researchers to benefit from the scope of these new exceptions is likely to be marginal, if not entirely bargained away as part of the publication process.



We have seen how the Publishers Association interprets the existing exceptions far more narrowly than it needs to in the advice it gives its members on copyright permissions. We also know that, in any event, academic publishers typically manage the business of copyright clearance by making their contributing authors respon-

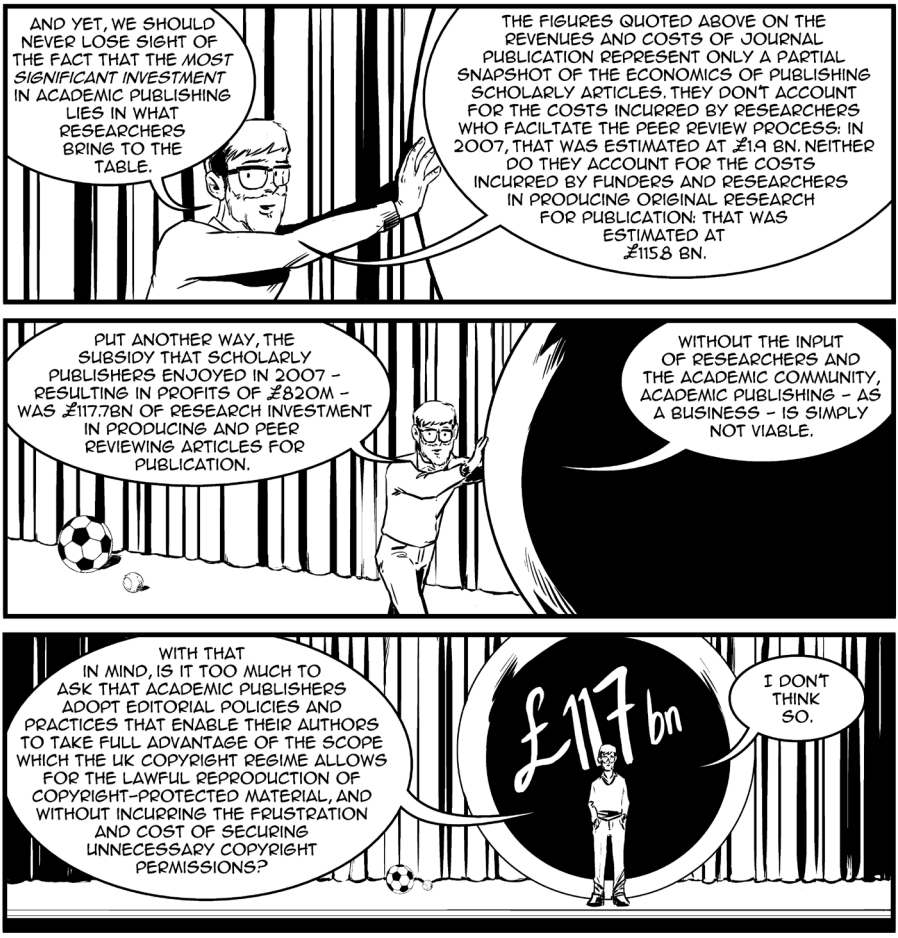
sible for securing permissions, and even when the use of the material is covered by an exception. The imperatives underpinning those behaviours – maximising profit and minimising the risk (or fear) of copyright litigation – are entirely cogent, and they are unlikely to diminish in the mind of the publisher anytime soon. In short, it will make no difference to an academic that the copyright regime enables quotation from a work for purposes *such as* criticism and review, if the publisher does not choose to take advantage of that exception. Rights will still have to be cleared; and fees might still have to be paid.

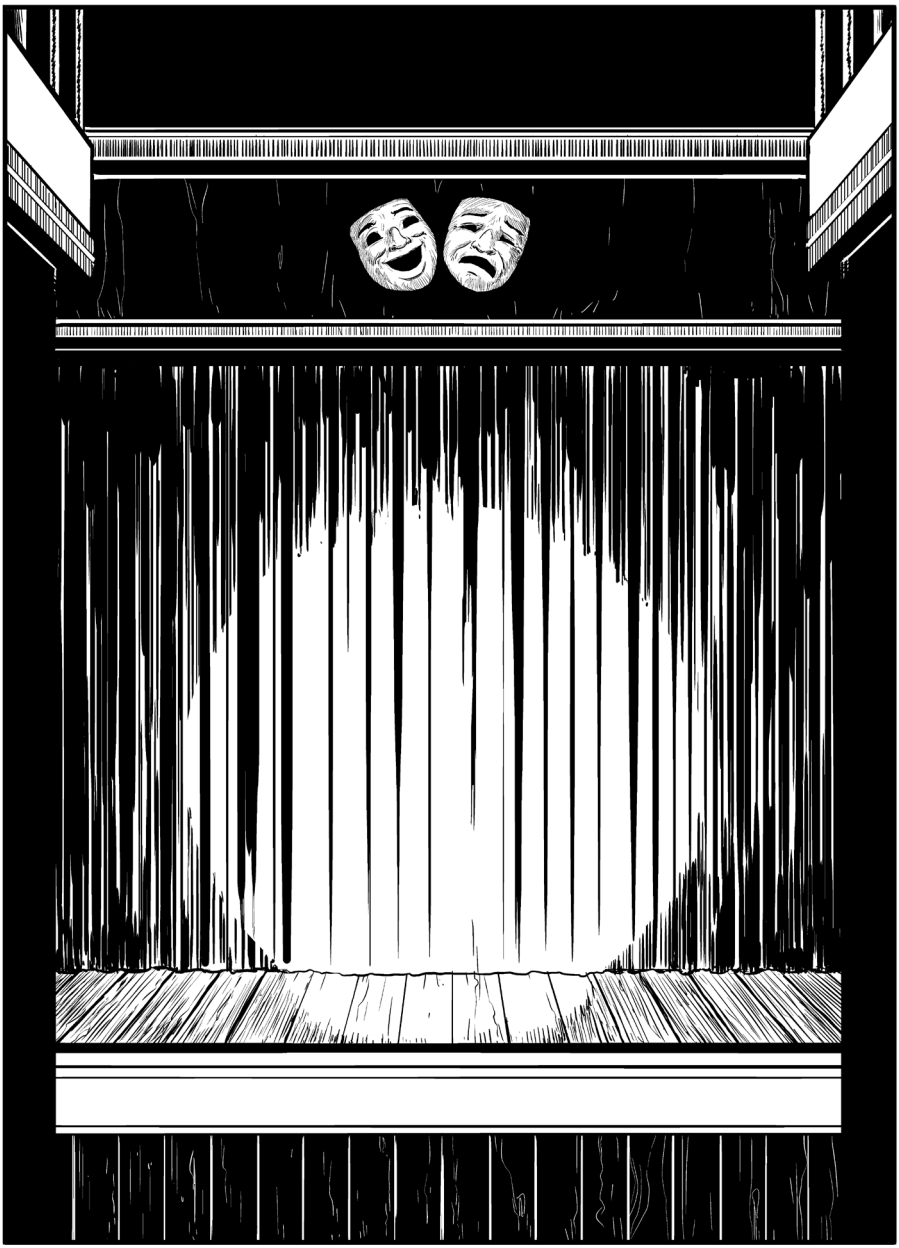
And why shouldn't academic publishers seek to maximise profits, and minimise their risks? The simple reality is that academic publishing is a global success story, and one that should be celebrated and supported. In 2007, the estimated annual revenue generated by (English-language) scientific and scholarly journal publication was just under $8bn (or just over £4bn), the bulk of which revenue (68-75%) was generated through academic library subscriptions.

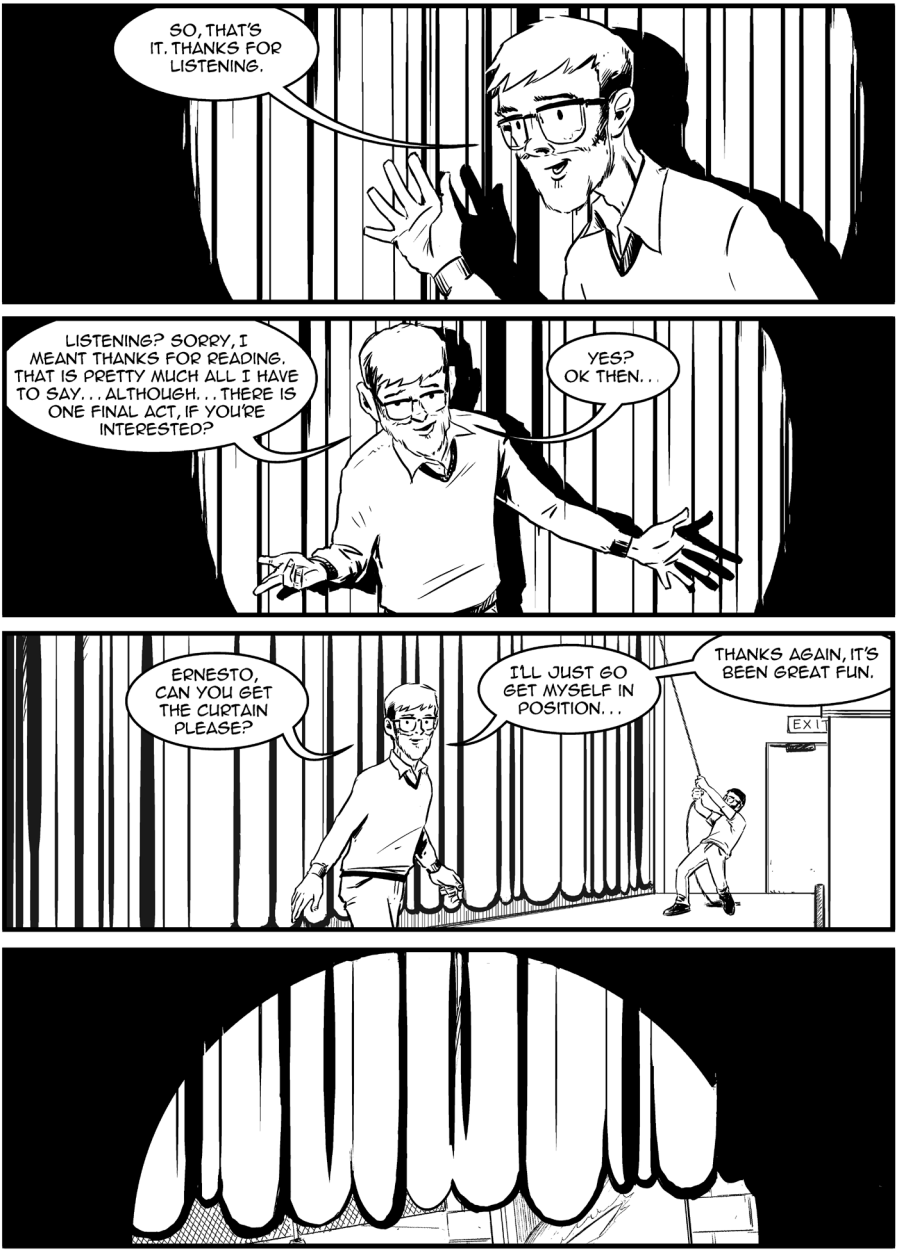
Moreover, this is an industry that has sustained year on year growth throughout the current economic crisis. By 2011, for example, the annual revenue generated by journal publishing had risen to $9.4bn.

To be sure, the nature of research communication is changing, but academic publishers will continue to perform an integral role in the future of scholarly endeavour and enterprise for many years to come. Indeed, it is important that they do so. They certify and review research, copy-edit, type-set and proof it for publication;

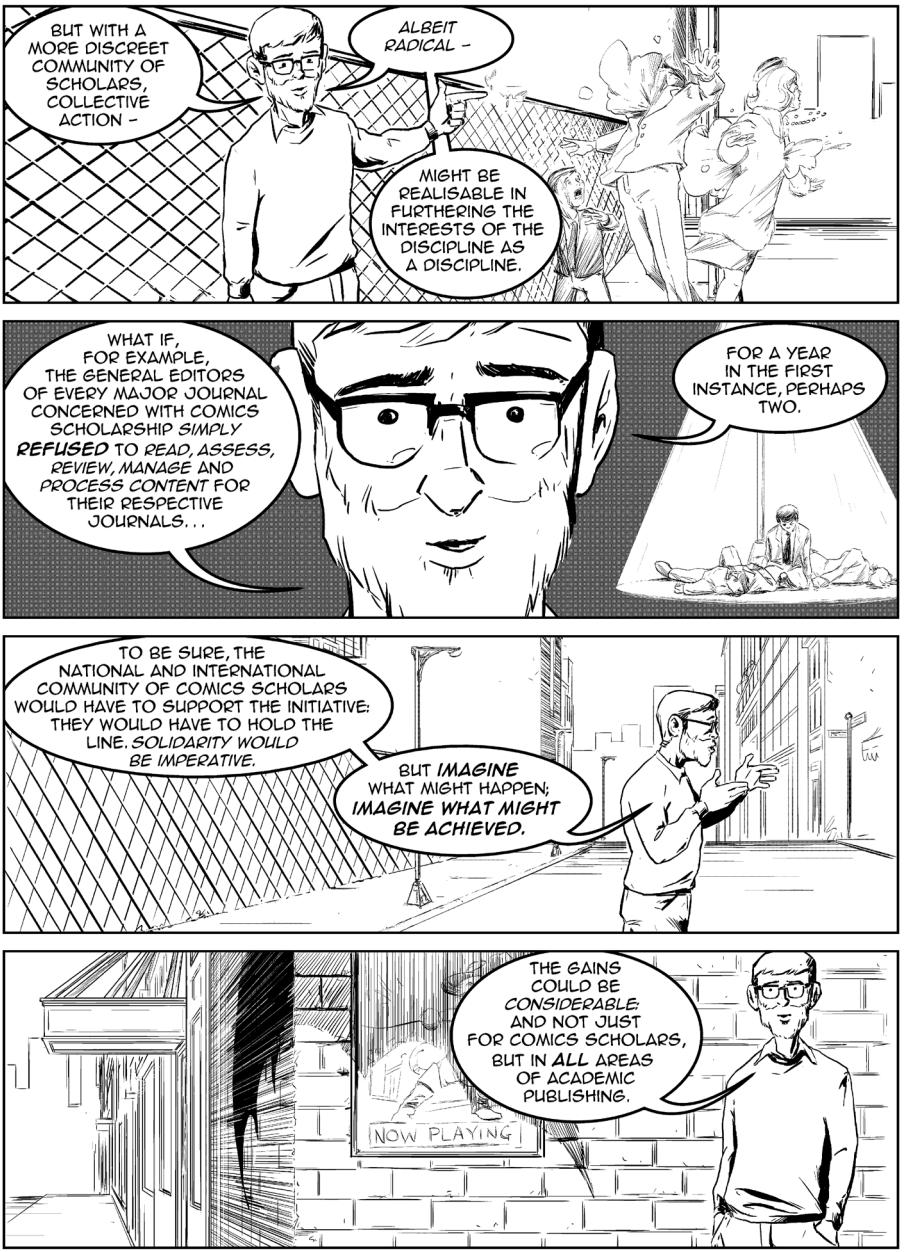
they advertise, market and distribute the journals in which the research is published, develop new tools and platforms for engaging with that research, and archive and preserve it for the longer term. They add value in making our work easier to discover and navigate through citation linking and the allocation of persistent identifiers (digital object identifiers, or DOIs), coding for web dissemination, and other semantic publishing techniques. *How much* value academic publishers actually add is a question for debate, but certainly they do add value.






SO, THAT'S IT. THANKS FOR LISTENING.
LISTENING? SORRY, I MEANT THANKS FOR READING. THAT IS PRETTY MUCH ALL I HAVE TO SAY. . . ALTHOUGH. . . THERE IS ONE FINAL ACT, IF YOU'RE INTERESTED?
YES? OK THEN. . .
ERNESTO, CAN YOU GET THE CURTAIN PLEASE?
I'LL JUST GO GET MYSELF IN POSITION. . .
THANKS AGAIN, IT'S BEEN GREAT FUN.
EXIT


DEAR READER: THIS IS THE POINT IN THE COMIC IN WHICH I MAKE THE SHIFT FROM *'CRITIQUE'* TO *'MANIFESTO'*.
THOSE OF A MORE *CAUTIOUS DISPOSITION* MIGHT WISH TO STOP READING NOW.
NOW THAT 1 DECEMBER 2013 HAS PASSED, WE LIVE IN A WORLD IN WHICH UK ACADEMIA'S PREOCCUPATION WITH THE ***REF*** HAS DIMINISHED, AT LEAST TEMPORARILY.
WHAT IF, IN THAT PERIOD OF CALM, A COMMUNITY OF SCHOLARS CAME TOGETHER TO CONSIDER HOW THE DEMANDS OF COPYRIGHT CLEARANCE CAN FETTER ACADEMIC SCHOLARSHIP –
DEMANDS IMPOSED UPON AUTHORS BY ACADEMIC PUBLISHERS, OFTEN WITHOUT ANY REAL NEED.
AND WHAT IF THEY DECIDE TO ACT? HOW MIGHT THEY EXERCISE LEVERAGE WITH THEIR PUBLISHERS?
THERE IS ONE BEGUILINGLY SIMPLE BUT POWERFUL OPTION: ***WITHDRAW CONTENT AND EXPERTISE.***
NOTHING IS MORE LIKELY TO FOCUS THE MINDS OF ACADEMIC PUBLISHERS THAN THE PROSPECT OF MAINTAINING JOURNALS *WITHOUT* ANY JOURNAL ARTICLES.
BUT WHO COULD DO SUCH A THING?
I DOUBT THAT LEGAL ACADEMICS COULD BE MOBILISED IN THIS WAY: THERE ARE TOO MANY JOURNALS, AND THE DISCIPLINE IS TOO LARGE AND DIVERSE TO HOPE FOR CONCERTED, DISINTERESTED UNANIMITY OF THOUGHT AND ACTION.


BUT WITH A MORE DISCREET COMMUNITY OF SCHOLARS, COLLECTIVE ACTION –
ALBEIT RADICAL –
MIGHT BE REALISABLE IN FURTHERING THE INTERESTS OF THE DISCIPLINE AS A DISCIPLINE.
WHAT IF, FOR EXAMPLE, THE GENERAL EDITORS OF EVERY MAJOR JOURNAL CONCERNED WITH COMICS SCHOLARSHIP *SIMPLY* ***REFUSED*** TO *READ, ASSESS, REVIEW, MANAGE AND PROCESS CONTENT* FOR THEIR RESPECTIVE JOURNALS. . .
FOR A YEAR IN THE FIRST INSTANCE, PERHAPS TWO.
TO BE SURE, THE NATIONAL AND INTERNATIONAL COMMUNITY OF COMICS SCHOLARS WOULD HAVE TO SUPPORT THE INITIATIVE: THEY WOULD HAVE TO HOLD THE LINE. *SOLIDARITY WOULD BE IMPERATIVE.*
BUT *IMAGINE* WHAT MIGHT HAPPEN; ***IMAGINE WHAT MIGHT BE ACHIEVED.***
NOW PLAYING
THE GAINS COULD BE *CONSIDERABLE:* AND NOT JUST FOR COMICS SCHOLARS, BUT IN ***ALL*** AREAS OF ACADEMIC PUBLISHING.

NOTES

This comic has been produced with the support of CREATe: the *RCUK Centre for Copyright and New Business Models in the Creative Economy* (www.create.ac.uk). An extended version of this essay (in a more traditional academic format) will be made available through the Publications section of the CREATe website (www.create.ac.uk/publications).

In the notes and comments that follow, all references to material and quotations from online sources are accurate as of 30 September 2013.

PAGE 1

If you don't already know it, you'll find *The Comics Grid* here: www.comicsgrid.com.

As well as being the Editor in Chief of *The Comics Grid*, Ernesto Priego is a Lecturer in Library Science at City University, London, and a researcher affiliated to the University College of London Centre for Digital Humanities. His research interests and expertise include: comics scholarship, digital humanities, library science, open access publishing, online and mobile journalism, social media, and scholarly communications.

PAGE 2

The two panels reproduced on this page are from "Her Parents" by Mark Millar and John McCrea, *Crisis* # 31 (Nov. 1989) Fleetway Publications: [15-19 (17/5-6)].

PAGE 3

The report referred to on this page was produced on behalf of the British Academy: *Copyright and research in the humanities and social sciences: A British Academy Review* (September 2006). You can find the full report here: http://www.britac.ac.uk/policy/copyright-research.cfm.

The 'Information for Contributors' to the journal of *European Comic Art* is available here: http://journals.berghahnbooks.com/eca/index.php?pg=notes.

PAGE 4

The 'Authors Services' section of the Taylor & Francis website can be found here: http://journalauthors.tandf.co.uk/permissions/usingThirdPartyMaterial.asp.

Taylor & Francis's FAQs about using third-party material in a journal article are available here: http://journalauthors.tandf.co.uk/permissions/usingThirdPartyMaterialFAQs.asp.

The Publishers Association's *Permission Guidelines* are available here: http://www.publishers.org.uk/images/stories/AboutPA/PA_Permissions_Guidelines.pdf.

PAGE 5

For details of *The Comics Grid's* submissions policy, as well as the journal's copyright information, see: http://www.comicsgrid.com/about/submissions.

PAGE 6

You can find the *Copyright Designs and Patents Act* 1988 (as amended) set out in full here: http://www.legislation.

gov.uk/ukpga/1988/48/contents.

PAGE 7

The panel reproduced on this page is from: Chester Brown, "Matthew, 5:11-7:27", *Yummy Fur* # 21 (June 1990) Vortex Comics Inc.: 18/6.

PAGE 8

Chester Brown, *Yummy Fur* # 20 (April 1990) Vortex Comics Inc.: 5/1-4.

The reference to 'cheap typewriting paper' is taken from: Joe Matt, *Peepshow* (Princeton, Wisconsin: Kitchen Sink Press, 1991), 67/19.

PAGE 9

The panel on this page is from: Chris Ware, "Browsing", *Building Stories* (London: Jonathan Cape, 2012), 1/3.

PAGE 10

Dave Sim, *Church & State Volume I* (Windsor, Ontario: Aardvark-Vanaheim, 1987), 421.

PAGE 11

Although I suggest that there are 'two obvious strategies' that might be relied upon when reproducing copyright-protected material without the need for permission, there is, in fact, a third strategy worth considering: fair dealing with a work for the purpose of non-commercial research (in accordance with section 29(1) of the CDPA). I develop the argument in relation to this third strategy in the extended version of this essay that will be made available through the Publications section of the CREATe website (www.create.ac.uk/publications).

PAGES 12 & 13

The economic rights conferred upon a copyright owner under section 16 of the CPDA include the right to: copy the work; issue copies of the work to the public; rent or lend the work to the public; perform, show or play the work in public; communicate the work to the public; and make an adaptation of the work. For further details, see sections 17-21 of the CDPA.

Section 16(3)(a) of the CDPA makes clear that any reference to the doing of an act restricted by copyright in a work concerns doing that act 'in relation to the work as a whole *or any substantial part of it*' (emphasis added).

The man at the lectern is David Vaver, and the quote is from his article: 'Harmless Copying' (2012) *Intellectual Property Journal* 19-28. David Vaver is Emeritus Professor of Intellectual Property & Information Technology Law in the University of Oxford, and the former Director of the Oxford Intellectual Property Research Centre. Currently, he is Professor of Intellectual Property Law at Osgoode Hall Law School, and the Editor in Chief of the *Intellectual Property Journal* which he founded in 1984.

PAGE 13

For Will Eisner's discussion of the comic as sequential art, see: *Comics and Sequential Art: Principles and Practices from the Legendary Cartoonist* (New York and London: WW Norton & Co., 2008 (first published in 1985)). Scott McCloud developed Eisner's analysis further in: *Understanding Comics: The Invisible*

Art (Northampton MA: Kitchen Sink Press, 1993). (The McCloud quotes are from pages 5 and 66-68.)

PAGE 14

McCloud, *Understanding Comics*: 25/6.

PAGE 16

The full citation for the *Hyde Park* case is: *Hyde Park Residence* v. *David Yelland* (2000) WL 462. (The quote from Lord Justice Aldous is at paragraph 38.)

PAGES 16 & 17

The full citation for the *Ashdown* case is: *Ashdown* v. *Telegraph Group* [2001] EWCA Civ 1142. (Lord Phillips's discussion of 'fair dealing' can be found at paragraphs 66-77.)

PAGE 17

The full citation for the *Fraser-Woodward* case is: *Fraser-Woodward* v. *BBC* [2005] EMLR 22. (Justice Mann's comments on fair dealing are at paragraphs 55-70.)

For Lord Denning's quote, see: *Hubbard* v. *Vosper* [1972] 2 QB 84 (page 94).

PAGE 18

The full citation for the *Pro Sieben* case is: *Pro Sieben Media AG* v. *Carlton UK Television Ltd* [1999] FSR 610. (The quotes from Lord Justice Robert Walker are at page 620.)

PAGES 18 & 19

For those interested in how I came to feature in *Crisis* #31, the story is simple enough. Between the ages of 16 and 22 I worked in Northern Ireland's first comic shop – *Dark Horizons* – which, at the time, was part-owned by John McCrea. When John was commissioned to illustrate "Her Parents" he asked if he could draw me into the story (the central character, apparently, reminded him of me). Photographs were taken; the rest in history. (And yes, those are my actual clothes.)

PAGE 19

These three panels are based upon an exchange of emails over a two week period (6-21 May 2013) between myself and the Brand Manager in the Permissions Department of Egmont UK.

PAGES 20 & 21

The 'dialogue' between the two employees of the Intellectual Property Office is a fictionalised account of various arguments in favour of introducing a new quotation exception set out in the IPO's Impact Assessment IA No: BIS0310 ('Exception for use of quotations or extracts of copyright works'), which can be found here: http://www.ipo.gov.uk/consult-ia-bis0310.pdf. Although the dialogue is fictional, the arguments presented are all based on the actual text of the IPO's Impact Assessment document.

PAGE 21

For details of Research Council UK's current policy on open access to publicly funded research, see here: http://www.rcuk.ac.uk/research/Pages/outputs.aspx.

PAGE 22

Again, these quotes are taken from the IPO's Impact Assessment IA No:

BIS0310.

The 'copyright legalese' referred to at the bottom of the page relates to the so-called 'three-step test' which can be found in Article 9(2) of the Berne Convention. The Berne Convention (which originally dates to 1886) is an international agreement that requires signatories to the Convention to recognise and confer copyright protection on the literary and artistic works of authors from other signatory countries. In this way, the Convention enables the operation of the international copyright regime. Article 9(2) of the Convention provides that '[i]t shall be a matter for legislation in the countries of [the Berne Union] to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author'.

PAGE 23

The 2009 survey referred to here was conducted on behalf of the Research Information Network: *Communicating Knowledge: How and why UK researchers publish and disseminate their findings* (September 2009). You can find this report here: http://www.jisc.ac.uk/publications/research/2009/communicatingknowledgereport. (The figures quoted are from page 16 of the report.)

PAGE 24

The estimate of the revenue generated by academic journal publishing in 2007 is from M. Ware and M. Mabe, *The stm report: an overview of scientific and scholarly journal publishing* (The Netherlands, IASTM Publishers, 2009) (page 16). The more recent estimate of revenue generated in 2011, is from the third edition of Ware and Wabe's report (published in 2012)(again, page 16).

The estimates of the investment and profits made by academic publishers in publication and distribution activities in 2007 are from a 2008 report by the Research Information Network: *Activities, costs and funding flows in the scholarly communications system in the UK*. You can find the report here: http://www.rin.ac.uk/our-work/communicating-and-disseminating-research/activities-costs-and-funding-flows-scholarly-commu. (The figures quoted can be found on pages 32 and 33 of the report.)

PAGE 25

The figures on this page concerning the cost of producing and peer-reviewing research are also taken from the 2008 Research Information Network Report (see above). (The figures quoted are from pages 30 and 32 of the report.)

PAGE 28

The REF – or the Research Excellence Framework – is the official mechanism for assessing the quality of research in UK higher education institutions. The REF produces assessment outcomes for submissions made by participating institutions that: provide useful benchmarking information for the higher education sector; establish reputational yardsticks; assist funding bodies in decisions about the future

allocation of research funding; ensure some measure of accountability for the substantial public investment in research. Whether the REF process itself is an efficient and effective means of making these determinations remains open to question. You can find out more about REF 2014 here: http://www.ref.ac.uk/

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