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## Comic Book Original Pages: Are They Literature or a Commodity?

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# COMIC BOOK ORIGINAL PAGES: ARE THEY LITERATURE OR A COMMODITY?

## I. INTRODUCTION

In 1983, Kevin Eastman and Peter Laird, two aspiring illustrators, were sitting in their Massachusetts apartment when Eastman came up with some sketches of turtles with nunchakus.<sup>1</sup> After looking at Eastman's drawings, Laird said, "We'll call them Teenage Mutant Ninja Turtles."<sup>2</sup> With that statement, the concept for the "Teenage Mutant Ninja Turtles" comic book was born.<sup>3</sup> Eastman and Laird began self-publishing<sup>4</sup> their creation in 1984.<sup>5</sup> Since then, the pizza-eating terrapins have gone on to generate a billion dollars in film, television and licensing revenues.<sup>6</sup>

Success stories such as Eastman and Laird's are rare, but even that slim chance may be denied comic book artists if a tax is imposed on original comic book pages by the California State Board of Equalization (BOE). According to section 1543 of the California Code of Regulations, authors of "original manuscripts" are not required to charge sales tax when

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1. Ken Ross, *Ninja Turtles Storm Comic Book World*, UPI, Nov. 10, 1986, available in LEXIS, News Library, UPI File. Nunchakus is a martial arts weapon that "consists of two hardwood sticks joined at their ends by a short length of rawhide, cord, or chain." WEBSTER'S NEW COLLEGIATE DICTIONARY 812 (9th ed. 1988).

2. Ross, *supra* note 1. The Teenage Mutant Ninja Turtles are a team of cartoon martial-arts turtles named after the Renaissance artists Leonardo, Raphael, Michaelangelo and Donatello. *Id.*

3. The Teenage Mutant Ninja Turtles were created as a "parody of every other comic book hero that existed at the time." Alex Beam, *T.G.I.W.: Turtle Mecca*, BOSTON GLOBE, Dec. 21, 1988, at 43. Many similarities can be found between the Teenage Mutant Ninja Turtles comic books and author/illustrator Frank Miller's version of *Daredevil* (published by Marvel Comics in the early 1980s), which featured a band of ninja called the Hand. See Frank Miller, *DAREDEVIL*, Sept. 1981-Jan. 1983.

4. "Eastman and Laird scraped together \$500 of their own [money], borrowed \$700 from Laird's uncle, printed 3,000 copies [of Teenage Mutant Ninja Turtles #1] and found a distributor willing to take a chance." Ken Ross, *supra* note 1.

5. ROBERT M. OVERSTREET, *THE OFFICIAL OVERSTREET COMIC BOOK PRICE GUIDE 1988-1989*, 366 (18th ed. 1988).

6. Marcy Magiera, *Torrid Turtle race; Ralston, Penney's join rush to Ninjas' sequel*, ADVERTISING AGE, Mar. 25, 1991, at 49.

selling the rights to their work.<sup>7</sup> In March of 1993 the BOE determined<sup>8</sup> that comic book creator Paul Mavrides, co-author<sup>9</sup> and illustrator of the *Fabulous Furry Freak Brothers*,<sup>10</sup> owed \$1,467.70 in retroactive taxes<sup>11</sup> and that comic book original pages do not have the status of an author's manuscript.<sup>12</sup> Instead, the BOE decided that comic book original pages are camera-ready artwork that combine text and imagery.<sup>13</sup> As a result of the BOE's determination regarding Mavrides, certain comic book authors<sup>14</sup> who work or live in California will be expected to collect sales tax on all royalties paid to them for original comic book pages.<sup>15</sup> Thus, successful

7. CAL. CODE REGS. tit. 18, § 1543(b)(1)(A) (1992).

8. A determination is the "decision of a court or administrative agency. It implies an ending or finality of a controversy or suit." BLACK'S LAW DICTIONARY 450 (6th ed. 1990). In addition, the BOE is:

a constitutional body authorized by the Legislature to administer and enforce the sales and use tax law . . . . Although the Board must necessarily pass on matters of both law and fact, its administrative determination of matters of law are subject to judicial review, but the courts will give great weight to the Board's interpretation.

Coast Elevator Co. v. State Bd. of Equalization, 44 Cal. App. 3d 576, 587 (1975).

9. Mavrides' co-author is Gilbert Shelton, who created the comic book cult classic in the late 1960s. THE WORLD ENCYCLOPEDIA OF COMICS 612 (Maurice Horn ed. 1976).

10. *Mavrides Makes a Stand for Cartoonists' Rights*, THE COMICS JOURNAL, Oct. 1992, at 28. The *Fabulous Furry Freak Brothers* (published by Rip Off Press in San Francisco), have been described as "three refugees from the '60s [who] amuse themselves by mooching one another's hash brownies and playing tricks on a dunderhead named Norbert the Nark." Andrew Leonard, *The Taxman Cometh: California Cracks Down on Comics*, S.F. BAY GUARDIAN, June 2, 1993, at 25, 26.

11. Letter from Sanford Present, Kaye, Scholer, Fierman, Hays & Handler, attorney for Paul Mavrides, to the BOE (July 29, 1993) (on file with author).

12. Letter from William E. Hitchcock, Supervising Tax Auditor, BOE, to Paul Mavrides (Mar. 22, 1993) (on file with author).

13. *Id.*

14. According to the BOE, the sales tax would apply regardless of whether the comic book author or the publishing company owned the copyright to the material being published. Letter from G. D. Seames, Senior Tax Representative, BOE, to Paul Mavrides (Dec. 14, 1992) (on file with author). In the case where the publisher owns the copyright to the published material, "the royalties received represent . . . the selling price of the text and artwork to [the publisher] for its use in comic books." *Id.* When a comic book author retains the rights to the published material, a lease with the publisher is created, and "receipts from the lease are subject to tax." *Id.*

15. *Mavrides Makes a Stand for Cartoonists' Rights*, THE COMICS JOURNAL, Oct. 1992, at 28. Exempted from sales tax are comic book authors whose periodical work is "issued at average intervals not exceeding three months . . . ." CAL. REV. & TAX. CODE § 6362 (West 1987). Mavrides' work, like many other comic book authors, is either non-periodic in nature (only a single issue is published) or does not meet the interval requirement. Telephone interview with Paul Mavrides (Mar. 13, 1994). See also *Welcome to the Wizard Price Guide*, WIZARD, Apr. 1994, at 130, 134-99.

comic book authors—and ultimately the comic book publishers—may face retroactive<sup>16</sup> tax bills of tens of thousands of dollars.<sup>17</sup>

The Mavrides determination marks the first time that California (or any other state) has asserted that sales tax applies to the delivery of comic book original pages to the publisher.<sup>18</sup> As a result of the BOE's determination, portions of California's substantial comic book publishing industry are at risk. Although not as well known as Batman,<sup>19</sup> Superman<sup>20</sup> and Spider-Man,<sup>21</sup> characters such as Prime,<sup>22</sup> Lady Arcane<sup>23</sup> and the Savage Dragon<sup>24</sup> make their homes in California's comic book publishing houses, which include Harvey Comics, Heroic Publishing, Image Comics, Malibu Comics and Rip Off Press.<sup>25</sup>

While the immediate effect of the tax is retroactive liability,<sup>26</sup> another concern is the effect the application of the tax will have on future publishing opportunities. Most comic book publishers survive on a marginal basis;<sup>27</sup> the new tax liability may force publishers either to curtail their publishing schedules or to shut down completely.<sup>28</sup>

16. Mavrides claims the BOE plans "to audit each of his California publishers' royalty payment records as far back as California statutes of limitations allow in order to gain lists of all resident California comic artists doing business with these same companies." *Id.*

17. In 1992, the first issue of *Youngblood* by comic book author Rob Liefeld sold 930,000 copies. Even if Liefeld received just ten percent of the cover price in royalties, he would have received more than \$232,000 for that single issue. See Elizabeth Gleick, *Bang! Wap! Holy Moola! Youngblood's Whiz Kid Creator Leaps Comic-Book Protocol in a Single Bound*, PEOPLE, June 15, 1992, at 89.

18. *State Flip-Flops, Tells Mavrides to Pay Up*, THE COMICS JOURNAL, May 1993, at 9.

19. Published by DC Comics. OVERSTREET, *supra* note 5, at 33.

20. Published by DC Comics. *Id.* at 355.

21. Published by Marvel Comics. *Id.* at 15.

22. Published by Malibu Comics. *Welcome to the Wizard Price Guide*, WIZARD, Apr. 1994, at 130, 177.

23. Published by Heroic Publishing. *Comic Publishers*, COMICS BUYER'S GUIDE, Aug. 27, 1993, at 26, 40.

24. Published by Image Comics. *Id.*

25. Addresses on file with the author.

26. *Mavrides Makes a Stand for Cartoonists' Rights*, THE COMICS JOURNAL, Oct. 1992 at 28.

27. The majority of comic book publishers in California, and across the country, are small press operations, and print just enough books to stay in business. See Andrew Leonard, *The Taxman Cometh: California Cracks Down on Comics*, S.F. BAY GUARDIAN, June 2, 1993, at 25, 27. Their low profit margins provide a tenuous existence at best, which is evidenced by the number of comic book publishers that leave the industry each year. In 1987, for example, Aaargh!, Amazing, Elite, Imperial, Lodestone, Showcase, Solson, Timeline, and Wonder were among the publishers who left the business. OVERSTREET, *supra* note 5, at A-24.

28. See discussion *infra* part IV.C.1.

The major point of contention between the comic book industry<sup>29</sup> and the BOE is whether comic book pages should be classified as an author's manuscripts. While commercial artwork is subject to sales tax under the California Code of Regulations, an original manuscript is not.<sup>30</sup> A secondary issue is the effect that the BOE's ruling in the Mavrides determination will have on comic book publishers' ability to publish books in the future and its potential application to other literary genres such as illustrated children's books.<sup>31</sup>

This Note begins with a discussion of the relationship between a comic book author and his or her publisher, and the result of this relationship—the comic book original page.<sup>32</sup> This Note will then review the Mavrides determination which gave rise to the controversy.<sup>33</sup> The Note will then focus on the language of title 18, section 1543 of the California Code of Regulations and on the California case law relating to the Statute.<sup>34</sup> Next, this Note will explore this legal framework's applicability to the Mavrides determination and to comic book original pages in general.<sup>35</sup> This Note will also look at the impact that the determination will have on California's comic book industry and on other similarly situated genres.<sup>36</sup> Finally, this Note will argue that the language of the statute and policy considerations mandate that comic book original pages be given the status of an "original manuscript."<sup>37</sup>

## II. CREATING AN ORIGINAL COMIC BOOK PAGE

Unlike Eastman and Laird of Teenage Mutant Ninja Turtles fame, most comic book authors, like Mavrides, are published by existing comic book companies. The relationship between a comic book author and a

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29. In addition to Mavrides' counsel, the Comic Book Legal Defense Fund (which has industry-wide support) is also advocating that comic book original pages should be given "original manuscript" sales tax exemption. Flyer distributed by the Comic Book Legal Defense Fund (on file with author). The Comic Book Legal Defense Fund, which provides legal representation to persons in the comic book industry, is guided by the principle "that comics should be accorded the same Constitutional rights as literature, film, or any other form of expression." *Id.*

30. CAL. CODE REGS. tit. 18, § 1543(b)(1)(A) (1992).

31. See *infra* note 122 and accompanying text.

32. See discussion *infra* part II.

33. See discussion *infra* part III.

34. See discussion *infra* parts IV, V.

35. See discussion *infra* parts VI.A-B.

36. See discussion *infra* part VI.C.

37. See discussion *infra* part VII.

comic book publisher begins with an agreement whereby the publisher will pay the author a certain sum of money to create an original manuscript (the original comic book pages).<sup>38</sup>

The comic book author begins by presenting a plot to the editor at the publishing house.<sup>39</sup> After a series of revisions, the penciler<sup>40</sup> takes the plot and begins laying out the illustrations on a drawing board based on the plot.<sup>41</sup> Next, the author pencils in the text (narration and dialogue), which is often not contained in the plot.<sup>42</sup> After the author completes the text, the page is given to an inker,<sup>43</sup> who goes over the pencils with ink.<sup>44</sup> The author then gives the boards, complete with inked illustrations and text, to the editor for more revisions until the boards are finally ready for publication.<sup>45</sup> These completed boards are the comic book original pages.<sup>46</sup>

The comic book original pages are then shipped to the printer in one of two formats: (a) they can be shipped along with a color guide<sup>47</sup> to the printer where they are shot by a camera and converted into sheets of film called color separations,<sup>48</sup> or (b) they can be scanned onto a computer disk and sent in digitized form to the printer for conversion into color separations.<sup>49</sup> The color separations are then used to create the comic book printing plates.<sup>50</sup>

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38. Telephone Interview with Mark Todd, President of Rip Off Press, Inc. (Feb. 7, 1994).

39. LES DANIELS, *MARVEL: FIVE FABULOUS DECADES OF THE WORLD'S GREATEST COMICS* 226 (1991).

40. The penciler can either be the author or an illustrator who works in collaboration with the author. See STAN SAKAI, *AMAZING HEROES* 39 (1991).

41. DANIELS, *supra* note 39, at 227.

42. *Id.* at 228.

43. As with a penciler, the inker may be the author or another person working in collaboration with the author. See STAN SAKAI, *AMAZING HEROES*, 36 (1991).

44. DANIELS, *supra* note 39, at 228.

45. *Id.* at 229.

46. JOHN HEGENBERGER, *COLLECTOR'S GUIDE TO COMIC BOOKS* 209 (1990).

47. The coloring for comic book pages is not done directly on the original artwork. Rather, a colorist paints on a reduced photocopy of the original artwork. After painting the page, the colorist "assigns a code number to each colored area as a guide for the color separator who prepares the film from which the printer will make printing plates." *Id.*

48. All color comic books are printed from color separations, which consist of four separate sheets of film. See WILL EISNER, *COMICS AND SEQUENTIAL ART* 151-152 (1985). The four colors of film, black, yellow, red and blue, combine to create the different colors in comic books. *Id.*

49. Nancy J. McCarthy, *The return of the world's most famous ghost to Harvey Comics is no apparition*, *PERSONAL PUBLISHING*, Dec. 1990 (reprint) (on file with author).

50. DANIELS, *supra* note 39, at 230.

After the comic book original pages are completed and delivered to the publisher, the comic book author receives royalty payments for his comic book original pages in one of two ways,<sup>51</sup> he either receives: (a) a flat fee for the finished comic book original pages, or (b) a percentage of sales of the published comic book.<sup>52</sup>

### III. THE MAVRIDES DECISION: A HISTORICAL SUMMARY

Paul Mavrides has worked in the comic book industry as a creator since 1977.<sup>53</sup> Along with his work on the *Fabulous Furry Freak Brothers* comic book for Rip Off Press, Mavrides has also worked for Last Gasp Comics, Eclipse Comics, Kitchen Sink Press, Fantagraphics Books and Tundra Publishing.<sup>54</sup>

In April of 1991, the BOE "made an error while checking Mavrides' 1990 sales tax returns. Due to an erroneous entry in their [sic] computerized records, a '1' [was] replaced with a '9,' [and] the Board concluded that Mavrides had made \$80,000 more than his returns had declared in the royalty earnings category."<sup>55</sup> The BOE then requested that Mavrides send complete information regarding his royalty income.<sup>56</sup> Mavrides responded to the BOE inquiry, describing his original comic books pages as "sequential panel-story telling [sic] . . . involving . . . labor as both [an] artist and writer."<sup>57</sup>

During the process of correcting its numerical mistake, the BOE determined that royalty payments made to Mavrides for work on comic book original pages fell under its definition of a direct sale to the publisher.<sup>58</sup> Furthermore, the BOE determined that Mavrides was legally bound

51. Telephone Interview with Mark Todd, President of Rip Off Press, Inc. (Feb. 7, 1994). In addition, a few established comic book authors receive advances for their comic book original pages. *Id.*

52. *Id.*

53. *Mavrides Makes a Stand for Cartoonists' Rights*, THE COMICS JOURNAL, Oct. 1992, at 28.

54. *Id.*

55. *Id.*

56. Letter from O.A. McCarty, Supervisor, BOE, to Paul Mavrides (Apr. 29, 1991) (on file with author).

57. Letter from Paul Mavrides to the BOE, (Oct. 17, 1991) (on file with author).

58. *Mavrides Makes a Stand for Cartoonists' Rights*, THE COMICS JOURNAL, Oct. 1992, at 28.

to bill and collect sales tax based on royalties paid to him by publishers, which were registered California businesses.<sup>59</sup>

Citing title 18, section 1543 of the California Code of Regulations, Tax Board Supervisor O.A. McCarty informed Mavrides that, "[s]ince the finished artwork is a substantial and intrical [sic] part of the finished product, and since a separation can not [sic] be made between the artwork and the manuscript . . . tax would apply to . . . the royalties received."<sup>60</sup>

After a meeting with Mavrides in March of 1993, the BOE reaffirmed its position that original comic book pages do not comprise an original manuscript and informed Mavrides that:

The materials that you send to the publishers are considered to be camera ready artwork. You provide the publisher with a full page black and white outline that contains the page layout frame by frame, illustration outlines, and placement of the text that accompanies the illustrations. This item is photographed to develop an acetate overlay of the desired size for printing the final page. . . .

Any gross receipts from these items furnished to publishers would be subject to tax under Regulation 1543(b)-(3)(A).<sup>61</sup>

The BOE's determination regarding Mavrides is important because its interpretation of the regulations is given substantial weight by the courts.<sup>62</sup> The BOE could then go after the rest of California's comic book creators, who would also be liable for retroactive sales tax based on royalties received for original comic book pages.<sup>63</sup> In addition, Califor-

59. *Id.*

60. Letter from O.A. McCarty, Supervisor, BOE, to Paul Mavrides (Dec. 27, 1991) (on file with author).

61. Letter from William E. Hitchcock, Supervising Tax Auditor, BOE, to Paul Mavrides (Mar. 22, 1993) (on file with author).

62. "If there appears to be some reasonable basis for the [BOE's] classification a court will not substitute its judgment for that of the [BOE]." *Coast Elevator Co. v. State Bd. of Equalization*, 44 Cal. App. 3d 576, 586 (1975) (citing *L.A.J., Inc. v. State Bd. of Equalization*, 38 Cal. App. 3d 549, 554 (1974)).

63. Mavrides claims the BOE planned:

to audit each of his California publishers' royalty payment records as far back as California statutes of limitations allowed in order to gain lists of all resident California comics artists doing business with these same companies. Once it had these lists, the Board intended to track down and make all California resident comic artists and creators register with the Equalization Board as small businesses. These artists would then have to back-file with the State and back-bill *their* publishers accordingly. From there it would have continued to spread to other publishers through the chain of involved creators.



nia's comic book creators could be required to pay and collect sales tax on all future comic book pages sold to their publishers.<sup>64</sup>

#### IV. CALIFORNIA TAX STATUTES

The California Revenue and Tax Code imposes a sales tax on "the privilege of selling tangible personal property at retail."<sup>65</sup> Under the California Code of Regulations,<sup>66</sup> "[w]hen a transaction is regarded as a sale of tangible personal property, tax applies to the gross receipts from the furnishing thereof, without any deduction on account of the work, labor, skill, thought, time spent, or other expense of producing the property."<sup>67</sup> In applying the California Code of Regulations, the question then becomes what constitutes a sale of tangible personal property?

*Mavrides Makes a Stand for Cartoonists' Rights*, THE COMICS JOURNAL, Oct. 1992, at 28-29.

64. Although the disputed tax is for the 1990 tax year, the BOE asked for a "breakdown of any receipts that represent text only, with no artwork, for the period January 1, 1990 to December 31, 1992." Letter from William E. Hitchcock, Supervising Tax Auditor, BOE, to Paul Mavrides (Mar. 22, 1993) (on file with author). The statement implies that Mavrides is liable not only for the sales tax on comic book original pages sold in the 1990 tax year, but also for sales tax on pages sold in future tax years.

65. CAL. REV. & TAX. CODE § 6051 (West 1987).

66. Section 1500 of the California Code of Regulations is:

issued by the State Board of Equalization pursuant to section 7051 of the Revenue and Taxation Code, to implement, interpret or make specific provisions of the California Sales and Use Tax Law and to aid in the administration and enforcement of that law, which is contained in Part 1 of Division 2 of the Revenue and Taxation Code.

CAL. CODE REGS. tit. 18, § 1500 (1992).

67. CAL. CODE REGS. tit. 18, § 1501 (1992).

### A. *Sale of Tangible Personal Property*

In commercial transactions, tangible personal property changes hands in two ways. The transaction involves either the sale of tangible personal property, which is subject to taxation, or the transfer of tangible personal property that is merely incidental to the performance of a service, which is exempt from taxation.<sup>68</sup> In determining whether a particular transaction should be subject to sales tax, title 18, section 1501 of the California Code of Regulations looks to the true object of the contract: “[I]s the real object sought by the buyer the service per se or the property produced by the service. If the true object of the contract is the service per se, the transaction is not subject to tax even though some tangible personal property is transferred.”<sup>69</sup>

The development of film furnished by a customer is an example of a contract where the true object sought by the buyer is the service.<sup>70</sup> An example of a service contract that also includes the transfer of tangible personal property, but is not subject to taxation, exists in title 18, section 1543 of the California Regulations.<sup>71</sup> According to this section, the transfer of an “original manuscript” is not subject to sales tax.<sup>72</sup>

### B. *Summary of Title 18, Section 1543: Original Manuscripts*

#### 1. Application of the Statute to Textual Material

California Code of Regulations section 1543 states that an author is “any person who creates an original manuscript for the purpose of publication.”<sup>73</sup> This section further states that “[t]he transfer to a publisher of an original manuscript . . . by the author . . . for the purpose of publication is not subject to taxation. The transfer of any paper . . . or other tangible personal property transferred as a means of expressing an idea is not taxable.”<sup>74</sup> Thus, when a literary author hands the finished manuscript over to his publisher, the transaction is not taxable. What is

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68. *See id.*

69. CAL. CODE REGS. tit. 18, § 1501 (1992)

70. CAL. CODE REGS. tit. 18, § 1528(b)(3)(A) (1992).

71. CAL. CODE REGS. tit. 18, § 1543(b)(1)(A) (1992).

72. *Id.*

73. *Id.* at (a)(1).

74. *Id.* at (b)(1)(A).

and is not an author's manuscript becomes more complicated, however, when illustrations become part of the manuscript.

## 2. Application of the Statute to Illustrated Material

In regard to illustrations standing alone, sales tax does not apply to preliminary art, which includes "roughs, visualizations, layouts and comprehensives, title to which does not pass to the client."<sup>75</sup> On the other hand, finished art—all art used for "actual reproduction by photo-mechanical or other processes; or for display purposes including charts, graphs, and illustrative materials not reproduced"<sup>76</sup>—is subject to sales tax.<sup>77</sup> Tax would apply to the sale of a painting, for example, "even though the work of art may express an original idea . . . the purchaser desires the tangible object itself."<sup>78</sup> By the same token, if comic book original pages were purchased solely for their artistic value, which they often are,<sup>79</sup> they would also be subject to sales tax.<sup>80</sup>

The application of sales tax becomes cloudy, however, in situations where text and illustrations are combined. On the one hand, "[t]ransfers of photographs or illustrations illustrating text written by the photographer or illustrator are not taxable when they are merely incidental to the editorial matter."<sup>81</sup> On the other hand, and as the BOE reasoned in the Mavrides determination,<sup>82</sup> tax does apply to the "gross receipts from the retail sale of camera-ready art or camera-ready copy. The measure of tax includes charges for the performance of all production functions, whether the charges are separately stated or not."<sup>83</sup> In the simplest situations, a

75. CAL. CODE REGS. tit. 18, § 1540(b)(4)(A) (1992). "Roughs," "visualizations," "layouts," and "comprehensives" are prepared solely for the purpose of "demonstrating an idea or message for acceptance by the client before a contract is entered into or before approval is given for preparation of finished art to be furnished by the agency, commercial artist or designer to its client." *Id.*

76. CAL. CODE REGS. tit. 18, § 1540 (b)(4)(B) (1992).

77. CAL. CODE REGS. tit. 18, § 1543(b)(5) (1992).

78. *Simplicity Pattern Co. v. State Bd. of Equalization*, 27 Cal. 3d 900, 908-09 (1980).

79. The buying and selling of comic book original art, like animation celluloids, has become a burgeoning market in recent years, and certain individual pages command prices upwards of \$500. GRAPHIC COLLECTIBLES CATALOG (Dec. 1992) (on file with author).

80. CAL. CODE REGS. tit. 18, § 1543(b)(5) (1992).

81. CAL. CODE REGS. tit. 18, § 1543(b)(1)(B) (1992).

82. Letter from William E. Hitchcock, Supervising Tax Auditor, BOE, to Paul Mavrides (Mar. 22, 1993) (on file with author).

83. CAL. CODE REGS. tit. 18, § 1543(b)(3)(A) (1992).

manuscript with just a few spot illustrations would not be taxable, while a graphic poster with just a few lines of text would be.

But what if the manuscript is for an art book that contains just a few captions of text? Or what if the manuscript is a comic book original page which integrates text and illustration? The line between incidental artwork and camera-ready art or copy has not been clearly delineated. Unfortunately, California case law provides little support for either position.<sup>84</sup>

## V. CALIFORNIA CASE LAW

No California case has dealt specifically with the issue of whether comic book original pages should be considered an author's manuscript or camera-ready artwork. Two cases, however, have dealt extensively with the issue of whether the author's manuscript exemption should be applied in the context of film negatives and master recordings and in the context of drawings, designs, engineering specifications and computer software.<sup>85</sup>

### A. *Simplicity Pattern Co. v. State Board of Equalization*

In *Simplicity Pattern Co. v. State Board of Equalization*,<sup>86</sup> the plaintiff contended that its film negatives and master recordings were not tangible property because the purchaser's primary interest was not in the physical objects, the negatives and recordings, but rather "in the right to exploit the intellectual products they embodied."<sup>87</sup> The court, however, rejected the plaintiff's argument and held that:

The regulation's manuscript example is distinguishable from the sale here because a manuscript is used solely for its intellectual content. In contrast, the parties here stipulated plaintiff's subsidiary "was engaged in the business of producing audiovisual education aids . . . consisting of film strips and records . . . produced, filmed and recorded by conventional

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84. See *infra* notes 85-95 and accompanying text.

85. See discussion *infra* parts V.A-B.

86. 27 Cal. 3d 900 (1980).

87. *Id.* at 906.

means," and that "copies were made for sale . . . from the 'negative' or 'master' production versions."<sup>88</sup>

The court also added that even if the object under consideration is only partially tangible, "physical objects valued in part for their intellectual content may be taxed as tangible personal property on their total worth."<sup>89</sup> Therefore, if it is determined that comic book original pages do not comprise an original manuscript, their total worth is subject to taxation as tangible personal property in those situations where the art and text are inseparable.<sup>90</sup>

### B. Navistar International Transportation Corp. v. State Board of Equalization

In *Navistar International Transportation Corp. v. State Board of Equalization*,<sup>91</sup> the court considered whether drawings, designs, engineering specifications and computer software, which contained trade secrets for use in manufacturing turbine engines, were tangible personal property and subject to sales tax.<sup>92</sup> Again, the court distinguished the property under consideration from an author's manuscript: "Unlike the author, Solar cannot be deemed a mere consumer of the paper on which the drawings, designs and engineering specifications were recorded. On the contrary these documents, once created, had intrinsic value. They were not only physically useful but crucial to the process of manufacturing turbine engines."<sup>93</sup>

The court held that there was no difference between plaintiff's drawings and the master tapes and film negatives used to produce

88. *Id.* at 909. Based on facts similar to *Simplicity's*, the California Court of Appeal in *A&M Records, Inc. v. State Bd. of Equalization* followed *Simplicity's* reasoning in holding that master tapes plaintiff record company received from a producer were subject to sales tax as tangible personal property. 204 Cal. App. 3d 358, 376 (1988).

89. *Simplicity*, 27 Cal. 3d 900, 906 (1980).

90. After the transaction in *Simplicity* took place, the California tax code was amended so that "[a]mounts paid for the furnishing of the tangible elements' shall not include any amounts paid for the copyrightable, artistic or intangible elements of such master tapes or master records, whether designated as royalties or otherwise." CAL. REV. & TAX. CODE § 6362.5 (West 1987). The scope of this section, however, has not been extended beyond master tapes and master records. The general rule remains that partially tangible objects may be taxed on their total worth. *Simplicity*, 27 Cal. 3d 900, 907 (1980).

91. 13 Cal. App. 4th 1459 (1993).

92. *Id.* at 1464.

93. *Id.* at 1468.

audiovisual material in *Simplicity*.<sup>94</sup> In both cases:

The items were not supplied incident to a service, [were] not the pure expression of an idea or an incorporeal right and are useful in the manufacturing process. The fact that the items were unquestionably valued primarily for their intellectual content does not preclude their being taxed as tangible property based on their entire worth.<sup>95</sup>

## VI. ANALYSIS

### A. Case Law

Applying the *Simplicity* and *Navistar* analysis, original comic book pages would be considered tangible personal property. Like the master tapes and negatives in *Simplicity* and the drawings and designs in *Navistar*, comic book original pages are valued in part as physical objects since they are used to create color separations. However, comic book original pages are distinguishable from items such as master tapes and drawings in that they are literary works,<sup>96</sup> and thus, should be given the status of an author's manuscript.

### B. Statutory Law

#### 1. Original Manuscript

Although an author's manuscript is an example of a transfer of tangible personal property incidental to the performance of a service,<sup>97</sup> section 1543(b)(1)(A) explicitly states that "[t]he transfer of any paper . . . or other tangible personal property transferred as a means of expressing an idea is not taxable."<sup>98</sup> Therefore, even if comic book original pages were deemed tangible personal property, they would not be precluded from

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94. *Id.*

95. *Id.* (citing *Simplicity*, 27 Cal. 3d 906, 909 (1980)).

96. See *infra* notes 132 & 136 and accompanying text. Comic book original pages status as literary works is further evidenced by the fact that art Spiegelman's (who has abandoned the use of capital letters in his name) *Maus II*, published in 1991, a comic book graphic novel, spent time on the *New York Times*'s Best Seller list. *Best Sellers*, THE COURIER-JOURNAL, May 16, 1992, Forum, at 13A.

97. CAL. CODE REGS. tit. 18, § 1501 (1992).

98. CAL. CODE REGS. tit. 18, § 1543(b)(1)(A) (1992).

section 1543(b)(1)(A) if they were deemed equivalent to an author's manuscript.

The text contained in comic book original pages is often quite different from the text contained in the original plot and revised plots that the comic book creator provides to the publisher.<sup>99</sup> In fact, the plot often contains no text at all.<sup>100</sup> In many instances, the text is not provided until it is finally written in on the comic book original page.<sup>101</sup> Thus, notwithstanding the fact that it might simultaneously be considered an illustration or camera-ready artwork, a comic book original page is an original manuscript in the true sense of the phrase, as it is often the first complete written version of the story.

## 2. Text Combined with Illustration

By using the word "idea" as opposed to the word "text," section 1543(b)(1)(A) of the Code implies that its applicability is not limited exclusively to textual material. Although illustrations on their own are clearly taxable,<sup>102</sup> "illustrations illustrating text written by the . . . illustrator are not taxable when they are merely incidental to the editorial matter."<sup>103</sup>

Comic book original pages, however, do not contain a set ratio of illustrations to text. Instead, a comic book original page is distinguishable from an illustration generally in that it "presents a montage of both word and image, and the reader is thus required to exercise both visual and verbal interpretive skills."<sup>104</sup> Another factor that makes comic book original pages unique is that the line separating text from art in comic book original pages is often blurred. Words on a comic book original page are often treated graphically, "provid[ing] the mood, a narrative bridge, and the implication of sound."<sup>105</sup> In terms of comic book original pages that

99. DANIELS, *supra* note 39, at 227 and text accompanying note 41.

100. *See id.* at 228.

101. *Id.*

102. California Code of Regulations section 1501 provides: "Tax . . . also appl[ies] to the sale of artistic expressions in the form of paintings and sculptures even though the work of art may express an original idea since the purchaser desires the tangible object itself; that is, since the true object of the contract is the work of art in its physical form." CAL. CODE REGS. tit. 18, § 1501 (1992).

103. CAL. CODE REGS. tit. 18, § 1543(b)(1)(B) (1992).

104. WILL EISNER, COMICS & SEQUENTIAL ART 8 (1985).

105. *Id.* at 10.

contain no text, “[i]t is possible to tell a story through imagery alone without the help of words.”<sup>106</sup>

Thus, whether a comic book author chooses to employ text, illustration, or a combination of both, the entire comic book original page is transformed into a unique story-telling device that “employ[s] a series of repetitive images and recognizable symbols. When these are used again and again to convey similar ideas, they become a language—a literary form, if you will.”<sup>107</sup>

### 3. Camera-Ready Artwork

Even though comic book original pages are an original manuscript and the meaning of “incidental” remains unclear, the BOE nonetheless contends that they are camera-ready art<sup>108</sup> as expressly stated in California Code of Regulations section 1543(b)(3)(A).<sup>109</sup> At this point, the definition of camera-ready is crucial. Instead of providing the original pages as camera-ready boards, an author could just as easily provide the same information to the publisher digitally via computer disk, which is not camera-ready.<sup>110</sup> If a manuscript transferred via computer disk is not considered camera-ready, then it would make no sense if the determination of whether a manuscript is subject to sales tax is dependent upon the *manner* in which it is transferred to the publisher.

### C. Policy Issues

#### 1. Effect on California’s Comic Book Industry

Even assuming that original comic book pages are tangible objects and are either camera-ready or illustrations, valid policy considerations dictate that the BOE give comic book original pages the literary status of an original manuscript. The BOE is vested with the discretion as to how

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106. *Id.* at 16.

107. *Id.* at 8.

108. Letter from William E. Hitchcock, Supervising Tax Auditor, BOE, to Paul Mavrides (Mar. 22, 1993) (on file with author).

109. CAL. CODE REGS. tit. 18, § 1543(b)(3)(A) (1992).

110. “Camera-ready” is defined as “[r]eproduction . . . copy, both text and illustrative material, that is ready to be photographed and made into lithographer’s film.” CAL. CODE REGS. tit. 18, § 1543(a)(4)(G) (1992).



a particular tax code should be applied.<sup>111</sup> Among the questions the BOE should consider before applying a tax is whether "the tax [has] an unduly deterrent effect on the general economy. . . ."<sup>112</sup>

Imposing a sales tax on comic book original pages would place California in a severely disadvantaged position when competing for a piece of the \$675 million a year generated nationally by the comic book industry.<sup>113</sup> Since a tax levied on comic book original pages is the same whether ten books are published or ten million books are published, comic book giants such as New York-based Marvel Comics and DC Comics, which generate millions of dollars annually,<sup>114</sup> will not be significantly affected by the Mavrides determination. Instead, the burden would fall on the independent publishers<sup>115</sup> of comic books, who would be disproportionately impacted because of their small print runs.

California-based publisher Rip Off Press, Inc., for example, pays comic book authors an average of \$100,000 a year in royalties.<sup>116</sup> An additional sales tax of \$8000 a year might not seem like much, but it nonetheless looms large when compared to Rip Off Press's annual net profit of zero.<sup>117</sup> Thus, independent comic book publishers such as Rip Off Press may be forced to curtail comic book publication activities or be pushed out of the business altogether.<sup>118</sup> This would have the effect of decreasing tax revenue generated from corporate and employment taxes, and tax revenue generated from comic book sales.

Other comic book publishers would be discouraged from entering the California market and might choose to set up shop in another state. In addition, California comic book creators might be forced to seek non-California publishers for their work.

111. See CAL. REV. & TAX. CODE § 7051 (West 1993).

112. See W. Sumner Holbrook, Jr. & Francis H. O'Neill, *California Property Tax Trends: 1850-1950*, 24 S. CAL. L. REV. 252, 254 (1950-51).

113. Kenneth Howe, *New Breed of Comics Means Big Business*, S.F. CHRON., June 29, 1993, at C1.

114. Of the \$675 million in sales generated annually by the comic book industry, Marvel Comics and DC Comics account for approximately 44% and 24%, respectively. *Id.*

115. In the comic book trade, publishers other than Marvel Comics and DC Comics are generally called independent publishers. See *Introduction* to THE NEW COMICS xi (Gary Groth & Robert Fiore eds., 1988).

116. Telephone Interview with Mark Todd, President of Rip Off Press, Inc. (Feb. 7, 1994).

117. *Id.*

118. *Id.*

The loss of California publishers would also impact a comic book author's ability to publish his or her own work.<sup>119</sup> Until the 1970s, "comic books were simply another arena for the ruthless exploitation of labor. Comic-book artists and writers worked for flat fees, had no rights to the characters they created, and were paid peanuts."<sup>120</sup> Independent comic book publishers like Rip Off Press and Last Gasp Comics are credited with starting the practice of granting rights to comic book authors,<sup>121</sup> a practice which is gradually gaining acceptance in California.<sup>122</sup>

In addition to publisher and author concerns, section 1543(b)(1)(A) should also be treated as an exemption since exemptions are "granted as an aid or encouragement to individuals, corporations, or businesses, to do something . . . for the good of the community at large."<sup>123</sup> By pushing the independent publishers out of the comic book market, the BOE will eliminate the type of work that the California tax code has given special protection.<sup>124</sup> Comic books from independent publishers were traditionally distinguished by a "defiance of convention, a defiance which, embracing a variety of social issues as well as warm bodies, has distinctly political overtones."<sup>125</sup>

## 2. Broader Application of the Tax

A sales tax on comic book original pages would not necessarily be limited to comic book authors. Instead it could also be applied to other literary genres, such as illustrated children's storybooks. In cases where illustrated children's books are produced from original pages, they would

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119. See Andrew Leonard, *The Taxman Cometh: California Cracks Down on Comics*, S.F. BAY GUARDIAN, June 2, 1993, at 25.

120. *Id.* "Even today, the two publishers who account for more than 50 percent of all comic-book sales—Marvel and DC—still employ most of their artists, writers, inkers, and letterers on a work-for-hire basis, meaning these employees receive no royalties." *Id.*

121. *Id.* at 25, 27.

122. See *Malibu Graphics Publishing Group Announces Unique Creator-Ownership Arrangement with Former Marvel Comics Artistic Team*, PR Newswire, Feb. 19, 1992, available in LEXIS, News Library, Wires File.

123. W. Sumner Holbrook, Jr. & Francis H. O'Neill, *California Property Tax Trends: 1850-1950*, 24 S. CAL. L. REV. 252, 272 (1950-51).

124. CAL. REV. & TAX CODE § 6362 (West 1987). This section exempts from sales tax "the gross receipts from the sale of . . . tangible personal property which becomes an ingredient or component part of any newspaper or periodical regularly issued at average intervals not exceeding three months and any such newspaper or periodical." *Id.*

125. LES DANIELS, *COMIX: A HISTORY OF COMIC BOOKS IN AMERICA* 165 (1971).

be analytically identical to comic book original pages. In cases where illustrated children's books are produced from a combination of text and artwork, if "separation can not [sic] be made between the artwork and the manuscript,"<sup>126</sup> the entire work is subject to tax. At the very least, the artwork is subject to tax, even if it is an integral part of the storytelling. Thus, as in the California comic book industry, publishers and authors of illustrated children's books may be forced to set up shop in other jurisdictions.

## VII. CONCLUSION

Although Mavrides is a relatively small actor in the comic book industry, the BOE may very well view his determination as a test case.<sup>127</sup> According to Mavrides,<sup>128</sup> the BOE plans to "audit each of his California publishers' royalty payment records as far back as California statutes of limitations allow in order to gain lists of all resident California comics artists doing business with these same companies."<sup>129</sup> The BOE could then track down all California resident comic book authors and force them to register with the BOE as small businesses.<sup>130</sup> "These artists would then have to back-file with the State and back-bill *their* publishers accordingly. From there it would . . . [continue] to spread to other publishers through the chain of involved creators."<sup>131</sup>

There is no question that a sales tax imposed on comic book original pages would have a profoundly negative effect on California's independent comic book publishers and the comic book authors that employ their services. Thus, it is imperative that the BOE deem comic book original pages the equivalent of an author's manuscript.

126. Letter from O. A. McCarty, Supervisor, BOE, to Paul Mavrides (Dec. 27, 1991) (on file with author).

127. "Comic-book conspiracy theorists suggest that the state picked Mavrides as their choice to set a precedent because they figured some guy who wasn't a star in the mainstream, who was barely surviving to begin with, wouldn't put up much of a fight." Andrew Leonard, *The Taxman Cometh: California Cracks Down on Comics*, S.F. BAY GUARDIAN, June 6, 1993, at 25, 27.

128. See *supra* note 63.

129. *Mavrides Makes a Stand for Cartoonists' Rights*, THE COMICS JOURNAL, Oct. 1992 at 28. In regard to the statute of limitations, the BOE may bring an action "[a]t any time within three years after any tax or any amount of tax required to be collected becomes due and payable." CAL. REV. & TAX. CODE § 6711 (West 1987).

130. *Mavrides Makes a Stand for Cartoonists' Rights*, THE COMICS JOURNAL, Oct. 1992, at 28.

131. *Id.* at 28-29.

Ironically, amidst the controversy surrounding the status of comic book original pages, comic book author art spiegelman (who has abandoned the use of capital letters in his name) received the highest literary award, the Pulitzer Prize,<sup>132</sup> in 1992 for his comic books<sup>133</sup> *Maus*<sup>134</sup> and *Maus II*.<sup>135</sup> As one of the more vocal members of the comic book community, spiegelman responded quickly to the BOE's ruling in the Mavrides determination saying, "[i]f the implications of California's tax board—that comics are not literature but simply a commodity—are allowed to stand, I guess I'll have to send back my National Book Critics' Circle nominations . . . as well as my Pulitzer."<sup>136</sup> And if the BOE gets its way, comic book creators like spiegelman might not have to worry about returning awards since there may not be any more works like *Maus* and *Maus II* on which to bestow awards.

Alex Chun\*

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132. spiegelman received a special Pulitzer award for his "body of work" in *Maus*, published in 1986, and *Maus II*, released in 1991. William M. Reilly, *Holocaust Memoir, Comic Book Style, Wins Special Pulitzer*, UPI, Apr. 7, 1992, available in LEXIS, News Library, UPI File.

133. *Maus* was published as a graphic novel, which simply stated, means a comic book published as a quality paperback book or as a hardcover book. LES DANIELS, *MARVEL: FIVE FABULOUS DECADES OF THE WORLD'S GREATEST COMICS 192* (1991); spiegelman used the comic book format to tell the story of his father's Holocaust experience by depicting Jews as mice and Nazis as cats. See *infra* notes 134 & 135.

134. ART SPIEGELMAN, *MAUS: A SURVIVOR'S TALE* (1986).

135. ART SPIEGELMAN, *MAUS: A SURVIVOR'S TALE: AND HERE MY TROUBLES BEGAN* (1991).

136. Flyer distributed by the Comic Book Legal Defense Fund (Aug. 1993) (on file with author). *Maus* has sold over 100,000 copies and was nominated for a National Book Critics Award in 1986. Estelle Lander, *Comics: Serious Business*, *NEWSDAY*, Mar. 13, 1989, City Business, at 8.

\* The author would like to dedicate this note to his fellow comic book geeks (both past and present), but most of all, to his family and to his cherished wife, Anh.

