

## CLOSING ADDRESS COMIC BOOK CONTRACTS CONFERENCE

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It is a high risk exercise to come in at the end of a conference and offer closing remarks without any real sense of the undoubtedly sophisticated and nuanced discussions that have preceded. Nevertheless I am delighted to be able to support this bold and, I think, socially useful initiative. That it is cutting edge was evidenced by my Google search of 'comic book contracts' which yielded results referring essentially only to this conference and to the work of Camilla Andersen and Robert de Rooy. My riding instructions from Camilla are that she wants me to say that comic book contracts are legally enforceable.

There are a number of issues raised by the use of graphics either alone or in combination with the written word to evidence contracts. At first blush the comic book contract might attract the kind of observation that Dr McCoy made to Captain Kirk in the old Star Trek series, adapted to present circumstances, 'It's a contract Jim, but not a contract as you and I know it.'

A first question is whether pictures can be used at all to convey meaning that can be given legal effect? Must they always be supplemented by oral explanation and/or written text? The answer to the latter question is probably 'yes'.

Britannica distinguishes pictures which do not represent language from writing that does. Pictures can convey meaning, but is it a meaning that has content which the law can interpret and apply? Pictorial road signs are used to give legally effective instructions such as 'Stop' and 'Don't Cross'. They are supported by regulatory text, but the regulation is generally not reproduced on the signs. Cautionary signs warn of bends in the road or of particular classes of animal that may be crossing. Their meaning is clear without text. The use of emojis to convey emotional responses to some prior text or an emotion accompanying a text is ubiquitous.

On a somewhat higher plane there are the cognitive speculations, few here are old enough to remember, of Marshal McLuhan who wrote in the 1960s. He wrote of the transition to linear thought generated by the advent of print technology and then the movement from linear to non-linear thought which he saw as generated by the transition to electronic media. The latter was

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characterised as using clouds of images from which the viewer would emerge with a general impression. The term 'pixelated consciousness', which came into usage much later, was a good term to describe that model of cognition.

Applying these thoughts to contract, it is necessary to consider its nature. For present purposes a contract may be given a brief non-technical description as – an agreement intended to be legally binding involving promises which confer or impose legally enforceable rights and obligations on the parties.

The question follows – how are legally binding agreements – contracts – formed? They may be:

- a) Oral – evidenced by speech, which may be coupled with a gesture, including perhaps the familiar handshake.
- b) In writing – the writing may be short, by hand, perhaps a bit elliptical and possibly even ungrammatical and possibly even close to meaningless. It may be long and complex and prepared by an expensive firm of lawyers and still sometimes, at critical points, close to meaningless. In the event when disputes emerge there is frequently argument about meaning.
- c) Partly oral and partly written.
- d) Evidenced by conduct, eg purchasing an item of goods in a shop – picking up the item, walking to the counter, perhaps, but not necessarily saying, 'I'll take that', and handing over money sufficient to meet the price shown on the price tag.

Contracts can be partly pictorial. A simple example – a man walks into a hairdresser, sits on the chair, produces a photograph of his head after a previous cut, points to the photograph and says 'Like that, please.' Here the picture gives content to the oral instructions. Graphical representations are routinely used in complex contracts. Construction contracts will often incorporate plans and drawings as part of the contract documents. There is currently considerable interest in the use of diagrams in complex business contracts between transnational parties to facilitate their mutual comprehension.

There is a question whether a picture or a set of pictures or drawings can by themselves evidence the terms of a contract. This may be tested with a thought experiment by asking the question – could one hand a set of pictures to a person and say 'look at these pictures and if you agree, sign here'? That is an unlikely scenario. To have legal effect, pictures would almost certainly have to be explained. The pictures coupled with the explanation would then evidence the terms of the contract. That is not unlike the concept of a contract which is partly oral and partly written or partly written and incorporating graphics. If an

essentially pictorial document is supplemented by simple text then the terms of the contract may be found in the oral explanation coupled with the pictures and the text. However, in the cases of persons of low literacy, it may be that the text, however simple, would have to be explained or indeed substituted by oral explanation. In some cases, after an established course of dealing, mere presentation of the pictures in that context might not require further explanation. The barber shop example comes to mind.

As a general proposition there is no reason in principle why pictures or drawings cannot be used to define or evidence an agreement – however it is difficult to see how they could do so on a free-standing basis absent text, context or oral explanation or a combination of all or any of those supplements.

What then is the nature of the interpretive exercise in relation to contracts dominated by pictures? Interpretation requires the identification of meaning. Because pictures are not language they may at worst, taken alone, be meaningless in terms of identifying rights and duties. At best they may offer a range of possible meanings. As already foreshadowed, the constructional choices they offer would at least be contextual requiring reference to surrounding circumstances known to the parties, including circumstances indicative of the purpose of the contract. Generally, however, at a practical level, there is likely to have been at least some kind of oral explanation to narrow down the range of meanings and which, taken with the pictures or drawings, will evidence the contractual terms.

Given the constraints I have outlined, there is unlikely to be any paradigm shift required in the essentials of the principles of contractual interpretation in their application to comic book contracts.

There is one issue to which I do direct attention. The very nature of a comic book contract suggests that there is little room for negotiation in its formation. Such contracts are likely to be in a standard form presented and explained on a take it or leave it basis. It would be difficult to imagine an unrepresented counterparty drawing pictures on the spot to suggest a variation in its terms. That raises the question, are such contracts empowering or contracts of adhesion? Just because a contract is presented in pictorial form doesn't guarantee that it is fair.

It is also necessary to recall that all contracts, however simple, may attract implied terms or be modified or supplemented by statutes including statutes of a regulatory character dealing with matters such as workplace relations and occupational health and safety.

There is no reason in principle why pictorial contracts explained orally or supplemented textually or contextually could not be enforceable in the same way as any other contract.