
1. Making art from words: the picturisation adaptation right in copyright law

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1. INTRODUCTION

There is an enduring relationship between art and words. Art has been a companion of the printed word since at least the advent of publishing.¹ It began a marriage with fiction in some earnest from the 18th century, with illustrations decorating novels as frontispieces and sometimes depicting a limited number of the novel's key scenes. Gradually, illustrations began to pervade more of the novel, leading to the explosion of illustrated fiction in the 19th century.² The mid-20th century saw the resurgence of the comic book, which made its earliest appearance in the 1830s in Rodolphe Töpffer's works.³ This has led to the contemporary fascination with long-form textual-graphic narratives such as the graphic novel,⁴ and comic books. Graphic novels in particular are now enormously popular, highly acclaimed,⁵ and commercially successful,⁶ and demonstrate a growing interest in the merger between text and art in adult fiction.⁷ Other technologies, including photography, film and video games also 'picturise' fiction.

This chapter considers how copyright law does and should respond to visual art which is interpretive and derivative of literary text, particularly fiction. It focuses on the right to picturise literary text as a form of graphic storytelling (the 'picturisation right'). In most jurisdictions, this right is a subset of copyright's adaptation or derivative right, but

¹ John Harthan, *The History of the Illustrated Book: The Western Tradition* (Thames & Hudson 1997).

² Richard J Hill, *Picturing Scotland Through the Waverley Novels: Walter Scott and the Origins of the Victorian Illustrated Novel* (Ashgate Publishing 2010) 6. See also Stuart Sillars, *Visualisation in Popular Fiction 1860–1960* (Routledge 1995) 16.

³ Hillary Chute and Marianne DeKoven, 'Introduction: Graphic Narrative' (2006) 52(4) *MFS Modern Fiction Studies* 767, 769.

⁴ Jan Baetens, 'Graphic Novels' in Leonard Cassuto and Clare Eby (eds), *The Cambridge History of the American Novel* (CUP 2011).

⁵ Nick Drnaso's *Sabrina* is the first graphic novel to be nominated for the Man Booker prize in 2018, and Art Spiegelman's *Maus* won a special Pulitzer Prize in 1992. See Alex Marshall, 'Graphic Novel in Running for Man Booker Prize for First Time' *The New York Times* (New York, 23 July 2018) <www.nytimes.com/2018/07/23/books/booker-prize-graphic-novel-ondaatje.html> accessed 12 October 2018.

⁶ David Riley, 'Comics and Graphic Novels One of Highest Growth Categories in Publishing, Reports NPD' (*npd*, 6 October 2017) <www.npd.com/wps/portal/npd/us/news/press-releases/2017/comics-and-graphic-novels-one-of-highest-growth-categories-in-publishing-reports-npd/> accessed 12 October 2018.

⁷ Claire Fallon, 'Picture Books for Adults That You Should Read Immediately' (*The Huffington Post*, 10 November 2014) <www.huffingtonpost.com.au/entry/picture-books-adults_n_6115372> accessed 12 October 2018.

it may also engage the reproduction right. The chapter examines the evolution, rationale and scope of the picturisation right. The contentious aspect of the adaptation right, which, as mentioned, includes the picturisation right, is its ambit. The adaptation right includes the dramatisation,⁸ fictionalisation⁹ and translation¹⁰ rights, for example, all of which theoretically capture considerable textual change between the source work and the derivative work. The picturisation right ostensibly goes further, potentially extending to radical change between the textual constitution of the source work, and the pictorial form of the derivative work. Art Spiegelman, who crafted the iconic graphic work *Maus*, has suggested that the ‘picture/word divide’ is ‘as big a divide as the secular/religious divide’.¹¹ In traversing this chasm between word and image, the picturisation right is perhaps the closest copyright comes to monopolising the ideas that inhere in literary text. It is therefore important to consider the boundaries of the picturisation right, and its consonance with copyright’s idea-expression doctrine, which insulates ideas from the copyright domain.¹²

Questions surrounding the ambit and application of the picturisation right have practical contemporary significance and a number of factors suggest there will be more, not less, picturisation in future. In this digital age, the image is ubiquitous and ascendant. This probably explains the surge in interest in graphic narratives, and the consolidation of a lucrative market in them, particularly as today’s e-reading devices are able to tell stories simultaneously through text, pictures, and videos.¹³ The picturisation right also impacts numerous incredibly valuable graphic characters, which often have literary origins. James Bond, Tarzan, Harry Potter, Conan the Barbarian, and Sherlock Holmes are just some examples. If we include moving pictures in our concept of picturisation,¹⁴ then we must not forget that countless films and television shows owe their origin to literature. Famous examples from an almost limitless pool include *Game of Thrones*, *Gone with the Wind* and *To Kill a Mockingbird*. This trend is likely to continue, with some commentators noting a veritable adaptation boom as producers manage risk by utilising demonstratively successful published stories.¹⁵ Picturisation also deserves careful attention, because it impacts a number of competing interests. Since pictures potentially change the independent meaning of words, authors will likely have a keen interest in pictorial treatments of their

⁸ I.e., the right to make a dramatic adaptation of a novel.

⁹ I.e., the right to adapt a play into a novel.

¹⁰ I.e., the right to translate a literary work from one language into another.

¹¹ Cited in Chute and DeKoven (n 3) 772.

¹² For example, Article 9(2) of the Agreement on Trade-Related Aspects of Intellectual Property Rights 1994 (TRIPs), to which Australia is a signatory, provides that ‘[c]opyright protection extends to expressions and not to ideas, procedures, processes or mathematical concepts as such’. *Agreement on Trade-Related Aspects of Intellectual Property Rights (Annex 1C of the Marrakesh Agreement Establishing the World Trade Organization)* [1995] ATS 8, (entered into force on 1 January 1995).

¹³ Rachel Deahl, ‘Taking Storytelling Digital’ (*Publisher’s Weekly*, 31 August 2012) <www.publishersweekly.com/pw/by-topic/digital/content-and-e-books/article/53801-taking-storytelling-digital.html> accessed 2 November 2018.

¹⁴ Discussed further below.

¹⁵ Andrew Liptak, ‘Why Hollywood is Turning to Books for Its Biggest Productions’ (*The Verge*, 26 January 2017) <www.theverge.com/2017/1/26/14326356/hollywood-movie-book-adaptations-2017-expanse-game-of-thrones> accessed 2 November 2018.

literary text and the potential to economically exploit them. Downstream artists will wish to craft images from words that inspire them.

It is therefore important to identify the contours and boundaries of the picturisation right, as well as the context in which the right functions. A number of factors govern the competing interests surrounding the picturisation of literary text. These include the particular text of the picturisation right and its possible judicial interpretation as well as exceptions to infringement such as fair dealings – the focus of this chapter. Also relevant are understandings, misconceptions and assumptions regarding the picturisation right, licences and industry norms, and the levels of interest, disinterest and tolerance shown by copyright owners in infringing conduct. The latter considerations are beyond the scope of this chapter, but merit further empirical research.

2. LEGISLATIVE ORIGINS OF THE PICTURISATION RIGHT – AUSTRALIA

In copyright schemes, the picturisation right usually sits under the umbrella of the adaptation right. This has its history in Article 12 of the Berne Convention, which provides that '[a]uthors of literary, scientific or artistic works shall enjoy the exclusive right of authorizing adaptations, arrangements and other alterations of their works'.¹⁶ Article 14(1) provides those authors with the right to authorise cinematographic adaptations.¹⁷ The Berne Convention contains no specific mention of picturisation, other than this cinematographic adaptation right.

The Australian picturisation right first appeared in the Copyright Act 1968 (Cth) ('the Act') in the definition of 'adaptation', which includes, in relation to literary works, 'a version of the work in which a story or action is conveyed solely or principally by means of pictures'.¹⁸ There is no evidence as to why the picturisation right was included, and it has had no substantive discrete judicial attention. The Australian picturisation right was presumably inspired by the United Kingdom's (UK's) picturisation right, which first appeared in the Copyright Act 1956 (UK).¹⁹ The Copyright Bill 1956 had no picturisation right, but Lord Mancroft successfully moved an amendment to include one during the Bill's passage.²⁰

3. RATIONALE FOR THE PICTURISATION RIGHT

There is no evidence of what or who prompted Lord Mancroft to move the amendment, however he stated that the definition of adaptation as amended:

¹⁶ Berne Convention for the Protection of Artistic and Literary Works (Paris Act), opened for signature 24 July 1971, [1978] ATS 5 (entered into force on 15 December 1972).

¹⁷ *Ibid.*

¹⁸ Copyright Act 1968, s 10(1) (Cth) ('adaptation').

¹⁹ Copyright Act 1956 (UK), s 2(6)(a)(iv) defined 'adaptation' to include 'a version of the work in which the story or action is conveyed wholly or mainly by means of pictures in a form suitable for reproduction in a book, or in a newspaper, magazine or similar periodical'.

²⁰ HL Deb 14 February 1956, vol 195, col 893.

provides for another form of adaptation which, I understand, is becoming increasingly common . . . [the amendment] makes it an infringement to reproduce a story in the form of a strip-cartoon without the consent of the author of the story. This practice is becoming increasingly common in perfectly reputable journals, particularly children's papers illustrating history, the Bible and so on. I think this particular paragraph of the Amendment meets this trouble.²¹

The inclusion of the picturisation right may also have been explained by the burgeoning comic book genre in the 1950s. For example, Tarzan's most famous illustrator said in 1969:

What has become quite apparent for some time is the rise of a new reading public which takes 'pop' culture and 'pop' art quite seriously and is ready to accept new standards of higher aesthetic judgment as to what is called *art*. In my opinion, I think it is possible for the comic strip to reach the status of a new dimension, and I think it is possible to do this with the character and personality of TARZAN.²²

Following the repeal of the Copyright Act 1956 (UK), the picturisation right was retained in section 21(3) of the Copyright, Designs and Patents Act 1988 (UK). Lord Beaverbrook made the following observation about it when resisting a proposed amendment to delete the reference to 'pictures':

Clause 21(3) reiterates the definition of adaptation to be found in the 1956 Act . . . The intention of this provision is to cover the case where a story in the form of a literary work is turned into a cartoon strip for use in a book. To tell the same story in picture form is regarded as an adaptation of the literary work, and this requires the consent of the copyright owner.²³

As a subset of the adaptation right, the rationale for that right may help explain the particular theoretical and normative basis for the picturisation right. This analysis is complicated by the inability to homogenise the 'adaptation' right across copyright jurisdictions.²⁴ In Australia and the UK, for example, it is a narrowly defined series of particular transitions in form and content from the original work, while the United States (US) derivative right is defined more broadly, albeit accompanied by a sequence of illustrative examples.²⁵ It is notoriously difficult to explain copyright, let alone its individual rights, and there are robustly contested and competing theories. Similar controversies apply to

²¹ *Ibid.*

²² *Estate of Hogarth v Edgar Rice Burroughs Inc* (United States District Court, SD New York 15 March 2002) No. 00 CIV 9569 (DLC) [3].

²³ Copyright, Designs and Patents Bill HL, 3 December 1987, vol 490, col 1207 ('Copyright, Designs and Patents Bill').

²⁴ See the discussion in Daniel Gervais, 'The Derivative Right, or Why Copyright Law Protects Foxes Better than Hedgehogs' (2013) 15(4) *Vanderbilt Journal of Entertainment and Technology Law* 785, 822–31.

²⁵ Copyright Act 1976 (US), s 101 defines a derivative work as 'a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a "derivative work"'.

the adaptation or derivative right,²⁶ and there is no guarantee that those debates would be resolved in the same way across all of the subsets of the adaptation right. The economic or utilitarian theory tends to be frequently offered as an explanation of the adaptation right;²⁷ that is, protecting markets that are or could be exploited by the owner of copyright in the literary work, and thus encouraging the creation of the work. The statutory adaptation right seems largely to have followed the market,²⁸ and case law recognising copyright owners' rights in those markets.²⁹ However, it is not difficult to explain the picturisation right under the personality theory and even a moral rights framework, in which authors seek to protect the emotional bond they have with their creations. The labour theory might equally be persuasive, granting the labourer not only the rights in the source creation, but the halo of transformations that rely and build on the labourer's efforts.

Because Australia has conventionally been a passive recipient of UK copyright models, it is unsurprising that the rationale for the picturisation right remains unscrutinised under Australian copyright law. It seems clear that the picturisation right (and the adaptation right more generally) was considered necessary as a special, bespoke adaptation right because literary-to-image translations fall outside the acts that would otherwise be captured by the reproduction right. If they were captured by the reproduction right, the picturisation adaptation right would be tautological. The need for a customised picturisation right was implied by Lord Beaverbrook in his explanation that '[b]ecause the making of a pictorial form of a literary work *may not be copying* we make specific provision for a separate restricted act of adaptation'.³⁰ While some picturisations may arguably also be a reproduction of the original work, there would seem to be instances where this would not be the case. Indeed, it is suggested that the picturisation right occupies a unique niche that the reproduction right cannot extend to, and it is argued that a version of a novel solely or principally in pictures could not constitute any *reproduction* of the author's *written* expression.³¹

4. THE CONTOURS OF THE PICTURISATION RIGHT

i. Meaning of 'Version'

The Act contains no definition of 'version'. This term also appears in other adaptation rights contained in the Act, including dramatic 'versions' of literary works, and vice

²⁶ For an overview and critique of the various theories purportedly explaining the US derivative right, see Naomi Abe Voegtli, 'Rethinking Derivative Rights' (1997) 63 *Brooklyn Law Review* 1213, 1240–61. See also William M Landes and Richard A Posner, *The Economic Structure of Intellectual Property Law* (Harvard University Press 2003) 109.

²⁷ *Ibid.*

²⁸ As mentioned, Lord Mancroft moved to introduce the picturisation right in 1956 because picturisation was at the time 'becoming increasingly common'. HL Deb (n 20).

²⁹ See e.g. Pamela Samuelson, 'The Quest for a Sound Conception of Copyright's Derivative Work Right' (2013) 101 *Georgetown Law Journal* 1505 and Gervais (n 24) 794–5.

³⁰ Copyright, Designs and Patents Bill, emphasis added.

³¹ James Lahore, *Copyright and Designs* (3rd rev edn, Butterworths 1996) [34,050], emphases added.

versa.³² In *Dyason v Autodesk*, the Full Court of the Federal Court has interpreted ‘version’ in the adaptation right to bear its ‘ordinary and natural meaning as a special form or variant of something’.³³ The court pointed specifically to the picturisation right, ‘where the form of the work is itself greatly changed’,³⁴ as illustrating the ‘wide connotation to be attributed to the word’.³⁵ The court noted that the word ‘necessarily requires that there be change or variation. Though it goes too far to say that something is a version of another thing if the two are essentially different’.³⁶

Therefore the picturisation right would clearly not cover something like Thomas Phillips’s *A Humument: A Treated Victorian Novel*,³⁷ in which Phillips reorders the text of an 1892 novel in combination with his original drawings and collages. This quirky melange is not a ‘version’ of the original Victorian novel. It does not convey an *existing* story or action, but rather concocts a new ‘story’.

The concept of ‘version’ in the picturisation right is also complicated by the very nature of illustration and the process and effect of picturisation. Mitchell, for example, explains how we ‘read’ pictures similarly to ‘the way we read an ungraduated thermometer. Every mark, every modification, every curve or swelling of a line, every modification of texture or color is loaded with semantic potential’.³⁸ Pointon notes the complex process of interaction and communication between pictorial and verbal discourses in the illustrated book.³⁹ Similar issues arise in the transition from literary text to film picturisation. When Elena Ferrante was discussing the casting of the characters from her *Neapolitan* novels, she said:

... it is useless to say, ‘Lila has little or nothing to do with that body, that face, that gaze, that way of moving,’ etc. No real person will ever match the image that I or a reader have in our minds. This is because the written word, of course, defines but by nature leaves much to reader’s imagination. The visual image instead shrinks those margins. It is destined to always leave out something that the words inspire – something that always matters.⁴⁰

In this sense, the visual depiction is a ‘version’ of the work, but a necessarily compromised one. The work captured in the literary text is the ideal version, even if it is irreducible and indefinable because it is partly formed through the processes of individuals’ varied imaginations.⁴¹ The elusive nature of the literary character in particular means that it

³² Copyright Act 1968 (Cth), s 10 (‘adaptation’).

³³ *Dyason v Autodesk* (1989) 24 FCR 147, 155 (Lockhart 1).

³⁴ *Ibid.*

³⁵ *Ibid.*

³⁶ *Ibid.*

³⁷ Thomas Phillips, *A Humument: A Treated Victorian Novel* (Thames and Hudson 2017), available at <www.thamesandhudsonusa.com/books/a-humument-a-treated-victorian-novel-hard-cover-sixth>.

³⁸ W Mitchell, *Iconology: Image, Text, Ideology* (University of Chicago Press 2013) 67.

³⁹ Marcia Pointon, ‘On Reading Rowlandson’s the Vicar of Wakefield: Challenging and Subverting the Narrative’ (1986) 7(14) *Journal of Area Studies* 20, 20.

⁴⁰ Jason Horowitz, ‘Elena Ferrante on “My Brilliant Friend” Moving to the Screen’ *The New York Times* (New York, 26 May 2017) <www.nytimes.com/2017/05/26/books/elena-ferrante-on-my-brilliant-friend-moving-to-the-screen.html?_r=1> accessed 15 October 2018.

⁴¹ Jani McCutcheon, ‘Works of Fiction: The Misconception of the Literary Character as a Copyright Work’ *Journal of the Copyright Society of the USA* (forthcoming).

may be difficult to identify it as a 'work',⁴² which correspondingly makes it difficult to reconcile a pictorial 'version' of it. Ferrante also said that the process of casting:

was a radical change. The characters, the neighborhood are all created from words, and yet they move from literature to the screen. They leave the world of readers and enter into the much more vast world of spectators . . . It's a process that intrigues me. The substance of the books is reworked according to other rules and other priorities, and it changes nature.⁴³

These comments suggest that picturisation can be so much *more* than the literary source. This increases the risk that the picturisation may so radically augment the source that it drifts away from the semantic kernel of the literary text, perhaps to the point where it is no longer a 'version' of it. The boundary lines of a 'version' are clearly contestable. In *Dyason*, the court held that the definition of adaptation does not require 'that the impugned version of the work embodies or preserves the original intrinsic qualities of the copyright work'⁴⁴ and demonstrates 'that a work may be an adaptation of another work notwithstanding considerable differences between the two works'.⁴⁵ And yet there must come a point when those differences are so great that the downstream work cannot be considered a version of the source work. The concept of a 'version' as a variant of something suggests that at least some of the essential features of the source can be discerned in the variant, otherwise it may not be recognisable as an adaptation, but only as a discrete and unrelated independent work. Therefore, severe pictorial truncations of the literary text might not constitute a 'version'.⁴⁶ Likewise, an actionable picturisation may not result from humorous two-panel comics expressing the essence of classic literature, such as *Grapes of Wrath* distilling down to '(1) Farming sucks. Road trip! (2) Road trip sucks'.⁴⁷

ii. Meaning of 'Work'

The picturisation right is limited to a 'version' of the 'work' in which a story or action is conveyed solely or principally by means of pictures. This demands identification of the 'work', because only when we have defined the 'work' at issue can we determine whether a 'version' has been made of it. If we define a chapter or a character as a discrete work, this might raise unique issues that would not arise if we defined the novel itself as the work.

This concept of the work also explains the close relationship between the adaptation right and the copyright work as an immaterial idea. In its early history, copyright conferred a narrow right to protect only the original form of the verbatim text. The first ever copyright statute prohibited the printing, reprinting or importing of copyright 'books' without authorisation.⁴⁸ It did not expressly grant any right to create works based on the

⁴² Ibid.

⁴³ Horowitz (n 40).

⁴⁴ *Dyason v Autodesk* (n 33) 155.

⁴⁵ Ibid.

⁴⁶ Although a single recognisable scene from a literary work may constitute a substantial part of that work, and infringe. This issue is discussed further below.

⁴⁷ John Atkinson, 'Literary Classics Retold as Two-Panel Comics' (*Literary Hub*, 5 June 2018) <<https://lithub.com/literary-classics-retold-as-two-panel-comics/>> accessed 15 October 2018.

⁴⁸ The Statute of Anne, Copyright Act 1709 8 Anne c 21.

book, such as abridgements, translations and other adaptations such as picturisation. As Peter Jaszi and others have explained, gradually the reproduction right extended to non-literal reproductions. These were tolerated, and even commended, based on the logic that they represented the additive labour of new ‘authors’.⁴⁹ This development eventually led to, or was the prehistory of, a universal conception of the ‘work’ existing separately from the literal expression embodied in the material form of the book.⁵⁰ Such a conception is apparently essential to the evolution of the adaptation right. As Peter Jaszi explains:

copyright consists in the substance, and not in the form alone. That which constitutes the essence and value of a literary composition, which represents the results of the author’s labor and learning, may be capable of expression in more than one form of language different from that of the original. . . [Thus] translation is not in substance a new work. It is a reproduction in a new form of an existing one.⁵¹

This ‘penumbral concept of the “work”⁵² allowed ‘a general dominion over the imaginative territory of a particular literary or artistic production’.⁵³ In this respect, of all of the subsets of the adaptation right, the picturisation right is perhaps the poster child for capturing what Oren Bracha refers to as the ‘modern notion of the work as a shape-shifter’.⁵⁴

iii. Meaning of ‘Story or Action’

The statutory wording limits the adaptation to a version of the work in which a ‘story or action’ is conveyed solely or principally by means of pictures. This seems to fragment the work into component parts which *include* stories or actions, with the picturisation right only attaching to the story or action. Thus the picturisation is not truly a version of the entire work, it is only a version of those aspects of the work which depict a story or action. Does the requirement of a ‘story’ being picturised suggest that more than a small part of the work needs to be adapted? This depends on how we define both the terms ‘story’ and ‘action’, and whether they have separate meanings. We may think that a ‘story’ must refer to the entire narrative development of the literary text, but this denies the reality that there may be stories within stories. Similarly, an ‘action’ may be a discrete element of a larger story.

The requirement of a story or action also limits the scope of literary works captured by the picturisation right. Essentially, only literary works conveying a story or action are included. Do we take a post-modern construction of this? If we accept that everything

⁴⁹ Peter Jaszi, ‘Toward A Theory of Copyright: The Metamorphoses of “Authorship”’ (1991) *Duke Law Journal* 455, 472.

⁵⁰ *Ibid* 475: ‘Gradually, as the notion took hold that the “work” embraced more than the literal expression embodied in the corresponding manuscript, the shadow developed a pronounced penumbra, and the concept of the “work” came fully into its own’.

⁵¹ *Ibid* 478, quoting Eaton Drone, *A Treatise on the Law of Property in Intellectual Productions in Great Britain and the United States* (1879) 451–2.

⁵² *Ibid* 476.

⁵³ *Ibid* 478. See also Oren Bracha, ‘The Ideology of Authorship Revisited: Authors, Markets, and Liberal Values in Early American Copyright’ (2008) 118 *The Yale Law Journal* 186, 228, referring to the work as ‘an intellectual essence that could take a manifold of concrete forms’.

⁵⁴ Bracha, *ibid*.

is a narrative, or a story, depicting the ‘action’ of life, then most literary works would fall within the ambit of the picturisation right. Under copyright law, the literary works ostensibly captured by the picturisation right are expansive, and include software and the mundane user manual for a food blender. This raises interesting issues about the extent to which non-literary (in the aesthetic sense) works are covered by the right. For example, would Robert Sikoryak’s graphic novel depicting the 20,669-word iTunes terms and conditions infringe the right?⁵⁵ The iTunes terms and conditions would probably be a literary work, but most of us on a long flight would not turn to those terms and conditions to supply a good and distracting story or action. This did not stop Sikoryak being a little nervous as he crafted his graphic novel,⁵⁶ and the proclamation above the title that it is an ‘unauthorised adaptation’ is telling, unless it is simply a tongue in cheek marketing gimmick.

However, Sikoryak’s other graphic novel mashups may be caught by the picturisation right. In his 2009 *Masterpiece Comics*, cartoon characters Beavis and Butthead invade *Waiting for Godot*,⁵⁷ and Superman becomes Albert Camus’s *Stranger*.⁵⁸ Other examples of potentially ‘story-less’ versions include the conversion of a contract into a graphic form,⁵⁹ Sid Jacobson and Ernie Colón’s best-selling graphic novel adaptation of the 9/11 Commission Report,⁶⁰ and the graphic adaptation of the US Senate Intelligence Committee’s 2014 Torture Report.⁶¹ A particularly interesting example of the picturisation of ‘story-less’ words is conceptual art that is dependent on literary instructions, such as the work of Sol Le Witt. For example, the title to Sol LeWitt’s *Wall drawing #338* (1971) includes the instructions for its rendering:

Two part drawing. The wall is divided vertically into two parts. Each part is divided horizontally and vertically into four equal parts. 1st part: Lines in four directions, one direction in each quarter. 2nd part: Lines in four directions, superimposed progressively.⁶²

It is difficult to discern any ‘story or action’ in these words, even if they are the portal to the graphic manifestation of the art. Likewise, Olivia Locher’s photographic representations

⁵⁵ Sian Cain, ‘How the 20,699-Word iTunes T&Cs Became This Year’s Hottest Graphic Novel’ *The Guardian* (London, 9 March 2017) <www.theguardian.com/books/2017/mar/08/terms-and-conditions-itunes-t-and-c-graphic-novel-robert-sikoryak-interview> accessed 15 October 2018.

⁵⁶ Ibid. Sikoryak said ‘some of the language about not using the material you get from iTunes to infringe the intellectual property rights of a third party or Apple – that made me nervous as I was drawing. Have I done that? I think they’re talking about apps’.

⁵⁷ Jonathan Kuehlein, ‘Beavis and Butthead do Vladimir and Estragon’ *The Star* (Toronto, 18 October 2009) <www.thestar.com/entertainment/2009/10/18/beavis_and_butthead_do_vladimir_and_estrakon.html> accessed 15 October 2018.

⁵⁸ See the description at *Goodreads* <www.goodreads.com/book/show/6493536-masterpiece-comics> accessed 15 October 2018.

⁵⁹ Murray Procter and Ben Keenan, ‘The Comic Contract Movement – When a Picture Really Is Worth 1000 Words’ (*Mondaq*, 16 May 2018) <www.mondaq.com/australia/x/701424/Contract+of+Employment/When+a+picture+really+is+worth+1000+words+The+comic+contract+movement> accessed 15 October 2018.

⁶⁰ Sid Jacobson and Ernie Colón, ‘The 9/11 Report’ (*Slate*, 7 September 2006) <www.slate.com/articles/arts/culturebox/2006/08/the_911_report.html> accessed 15 October 2018.

⁶¹ Sid Jacobson, *The Torture Report: A Graphic Adaptation* (Public Affairs 2017).

⁶² See <www.artgallery.nsw.gov.au/collection/works/351.2011/>.

of some of America's 'absurd' laws are unlikely to represent any story or action embedded in the statutes that she pillories.⁶³

Another important issue arises. Does the right extend to the picturisation of a literary *character*, when it is only ostensibly limited to 'story and action'? Is the literary text compiling the character consonant with 'story' or 'action'? Is the character necessarily subsumed in story or action, or can it be distinguished from them? Character and plot are discrete topics in literary theory,⁶⁴ and yet, one US case has suggested that copyright may subsist independently in characters if they constitute the 'story being told'.⁶⁵ This anticipates that, at least in theory, characters may sometimes fuse with the story. We might ask, what is a 'story' or indeed 'action' without characters? Indeed, a number of dictionary definitions of 'story' embed characters in them.⁶⁶ It seems inevitable that a picturisation of a story or action would involve picturing characters.

iv. Meaning and Effect of Conveying Story or Action *Solely or Principally* by Means of Pictures

The picturisation right is limited to adaptations where the story is conveyed *solely or principally* by means of pictures. This means that the derivative work must be at least *principally* picturised. To state the obvious, the picturisation right is concerned with pictures, not words. Words can be protected under the reproduction right and have no need for a bespoke adaptation right. The picturisation right does raise some interesting questions, however. The right would clearly cover derivative works like comics or graphic novels, however, would it apply to the complementary addition of a number of illustrations to a novel, such as the 42 illustrations in the 200 pages of *Alice in Wonderland*?

The answer to this question is complicated by the fact that, while the copyright owner's right is the right to make a version of the work in its entirety, copyright prohibits *substantial* appropriations. Section 14(1)(b) of the Act clarifies that 'a reference to [an] . . . adaptation . . . of a work shall be read as including a reference to [an] . . . adaptation . . . of a *substantial* part of the work' (emphasis added). It may be difficult to conceive of a 'version' of *part* of a work, however section 14(1)(b) means that only a substantial part of the entire work need be picturised to constitute an infringement.⁶⁷ It is beyond the scope of this chapter to precis Anglo-Australian jurisprudence on the substantiality analysis in copyright infringement, however it is clear that substantiality is not dependent

⁶³ See Olivia Locher, *I Fought the Law* (Chronicle Books 2017) <www.chroniclebooks.com/titles/i-fought-the-law.html> which photographically depicts 'strange, outdated laws from each of the 50 U.S. states'.

⁶⁴ See e.g. the separate treatments in Peter Logan, Olakunle George and Susan Hegeman (eds), *The Encyclopedia of the Novel* (Wiley 2014).

⁶⁵ *Warner Bros Pictures v Columbia Broadcasting System* 216 F.2d 945 (1954).

⁶⁶ 'An account of imaginary or real people and events told for entertainment', 'story' (*Oxford Dictionaries Online*) <<https://en.oxforddictionaries.com/definition/story>>; 'A story is a description of imaginary people and events, which is written or told in order to entertain', 'story' (*Collins online dictionary*) <www.collinsdictionary.com/dictionary/english/story_1>.

⁶⁷ ' . . . the exclusive right to make an adaptation of a computer program which is a literary work includes the exclusive right to make versions of a substantial part of such a work'. *Dyason v Autodesk* (n 33) 168.

on quantitative appropriation.⁶⁸ Nevertheless, to infringe the picturisation right, the substantial part taken by the defendant must presumably convey ‘story’ or ‘action’. This is because the right is limited to making a version of the work in which the *story or action* is conveyed solely or principally by means of pictures.

This could raise an interesting question about whether the doctrine of substantiality in Australian copyright law fluctuates depending on the exclusive right at issue. Is a substantial part differently calibrated depending on the right that is infringed? Or is the true ‘home’ of substantiality the reproduction right? Does the nature of the adaptation right itself necessitate that a greater quantum is taken? This could be the case, because the adaptation right deals with ‘versions’ of works, which suggests a greater quantum of use in order to capture a ‘version’. It has been argued that ‘simply taking the attributes of a character, or a series of characters, in a literary work and making a pictorial story using those characters would not be an adaptation, as the definition requires the making of a version of the original work’.⁶⁹ Thus this objection is not because characters are distinct from story or action, but because they would fall short of constituting a ‘version’ of the work. And yet, as discussed above, section 14 clearly recognises that adaptations of substantial parts of a work may infringe. We must somehow reconcile the particular wording of the picturisation right with the clear wording of section 14(1)(b). Therefore, the graphic depiction of a character might be an adaptation of a substantial part of a work, provided a character is ‘story or action’. Thus the picture on a book cover may infringe the picturisation right if it conveys a qualitatively important aspect of the story or action in the literary source.

v. Meaning of ‘Pictures’

The picturisation right is also limited to conveying story or action wholly or principally by means of *pictures*. This demands some consideration of the meaning of ‘pictures’. ‘Picture’ was defined broadly in the US case *Parton v Prang* as ‘any graphic representation’,⁷⁰ but the word has received no judicial attention by Australian courts, and is likely to receive its ordinary meaning.

a. Films

Australian legal commentary recognises that the picturisation right may extend to forms such as multimedia and film,⁷¹ noting that the definition of ‘cinematograph film’ in section 10(1) of the Act refers to the ‘aggregate of . . . visual images embodied in an article or thing so as to be capable . . . of being shown as a moving *picture*’.⁷² Indeed, there is an obvious similarity between film and picturised fiction. Chute has described the proximity

⁶⁸ *IceTV Pty Ltd v Nine Network Australia Pty Ltd* (2009) 239 CLR 458, 473: ‘. . . in order to assess whether material copied is a substantial part of an original literary work, it is necessary to consider not only the extent of what is copied: the quality of what is copied is critical’.

⁶⁹ *Halsbury’s Laws of Australia*, Vol 23 (at 13 October 2013), 23 Intellectual Property, ‘Copyright’ [23.1.2770].

⁷⁰ *Parton v Prang* (1872) 18 F Cas 1273, 1275.

⁷¹ *Halsbury* (n 69); *ibid*.

⁷² S Ricketson and C Creswell, *The Law of Intellectual Property: Copyright, Designs and Confidential Information* (2nd edn, LBC Information Services 1999) [9.430], emphasis added.

between film and ‘graphic narratives’⁷³ resulting from each being a visual, sequential art form.⁷⁴

The waters are potentially muddied by section 21(1) of the Act, which deems films of literary works to be a reproduction, not an adaptation.⁷⁵ This may suggest that the picturisation right does not extend to literary-to-film *adaptations*, otherwise there would be redundant dual protection under both the reproduction and picturisation rights. This perhaps explains the UK picturisation right being limited to picturisations ‘in a book, or in a newspaper, magazine or similar periodical’.⁷⁶ However, the better argument is that section 21(1) is simply a deeming provision, to avoid quarrel about whether a film of the work is a ‘reproduction’. Both section 21(1) and the picturisation right acknowledge the substantial differences between literary text and pictures. With no obvious equivalency between the two media, statutory intervention is required to link them in both cases. For this reason, as other commentators accept, ‘it is quite possible that a film of . . . a work could be simultaneously both a reproduction and an adaptation’.⁷⁷ This may, for example, extend the picturisation right to interpretations such as ‘Literal Bohemian Rhapsody’, a spoken word film adaptation of Queen’s iconic song, the words of which are a literary work.⁷⁸ And yet, there are numerous instances when there would not be such an overlap, and only the picturisation right, or section 21(1), will operate. It will be recalled that the picturisation right is limited to circumstances where a ‘story or action’ is conveyed ‘solely or principally’ by pictures.

At first glance, it might be thought that films are comprised ‘solely or principally’ of pictures, but this ignores the wordiness of the *screenplay* which ordinarily accompanies the aggregate of visual images constituting the film. On the other hand, the ambit of section 21(1) is apparently much broader than the picturisation right, requiring only that a film ‘of the work’ be made, without requiring that it be a ‘version’ of the work, that it convey story or action, or that it be comprised ‘solely or principally’ of pictures. In both cases, if the film version is a substantial and transformative departure from the literary source, neither right may be infringed. In such circumstances, it would be difficult to argue that, under the picturisation right, the film is a ‘version’ of the work. Equally, under section 21(1) the film may not truly be ‘of the work’, but rather just capture its broad ideas. Ricketson and Creswell give the example of Visconti’s film *Death in Venice*, arguing that it bears little surface resemblance to Thomas Mann’s novella of the same name.⁷⁹

b. Photographs

The editors of *Halsbury’s Laws of Australia* suggest that the picturisation right extends to any form of visual display, including photographs or computer games.⁸⁰ In conventional

⁷³ Chute and DeKoven (n 3) 769–70.

⁷⁴ *Ibid.*

⁷⁵ Section 21(1) of the Act clarifies that ‘[a] reproduction of a literary, dramatic or musical work is deemed to have been made where a sound recording or cinematographic film of the work is made’.

⁷⁶ Copyright, Designs and Patents Act 1988 (UK), s 21(3).

⁷⁷ Ricketson and Creswell (n 72).

⁷⁸ To view the video, see <www.youtube.com/watch?v=PJO7bcRVPvI>.

⁷⁹ Ricketson and Creswell (n 72).

⁸⁰ *Halsbury* (n 69).

adaptations, words tend to follow photographs, rather than the other way around. For example, many of the characters in Ransom Riggs' *Miss Peregrine's Home for Peculiar Children* were inspired by existing photographs,⁸¹ and the contemporary phenomenon of 'flash fiction' is often built on a photographic prompt.⁸² However, given the abundance and accessibility of visual material in our image-saturated world, it is easy to picturise words using those existing stocks. Indeed, Ransom Riggs found himself having to do more of this in *Hollow City*, his sequel to *Miss Peregrine's Home for Peculiar Children*.⁸³ Nothing in the language of the picturisation right suggests that each image must be original to the adaptor.

c. Paintings

Clearly 'pictures' would also include painting and drawings. Fan art began as early as the 19th century,⁸⁴ and continues today.⁸⁵ However, fan art tends to be based on existing graphic representations of literary or graphic characters, rather than the literary works which may have complemented, or spawned, those graphic representations.⁸⁶ As such, they are less likely to engage the picturisation right.

5. DEFENCES

The primary objective of this chapter has been to analyse the meaning and potential ambit of the picturisation right, and when it might be infringed. The potential defences that might be raised in any infringement action should, however, be briefly mentioned. In the Australian context, these include the fair dealing defences, which require the putative infringer to establish that the picturisation was for one or more enumerated purposes. These could conceivably include research or study,⁸⁷ parody or satire,⁸⁸ criticism or review,⁸⁹ possibly reporting news⁹⁰ and even perhaps providing access to persons with a disability.⁹¹ The latter might include, for example, attempting to enhance the understanding of literary

⁸¹ Ginny Romney, 'Author Ransom Riggs Draws Inspiration from Old Photos For Peculiar Children Series, Sequel "Hollow City"' *Deseret News* (Salt Lake City, 21 February 2015) <www.deseretnews.com/article/865622417>.

⁸² See e.g. Sunday Photo Fiction at <<https://sundayphotofictioner.wordpress.com/>>.

⁸³ Romney (n 81).

⁸⁴ Examples include: Robert Braithwaite Martineau, *Kit's Writing Lesson* 1852 (Tate Gallery), which depicts a scene from Charles Dickens' *The Old Curiosity Shop*; William Powell Frith's portrait of Dolly Varden from Charles Dickens' *Barnaby Rudge* (Tate Gallery); Henry B Roberts, *Oliver Twist's Introduction to Fagin* (undated) (Walker Art Gallery, Liverpool); and John Quidor, *The Headless Horseman Pursuing Ichabod Crane* (1858, Smithsonian American Art Museum), depicting a scene from Washington Irving's short story *The Legend of Sleepy Hollow*.

⁸⁵ See the list of popular fan art websites at <www.bittbox.com/gallery/fan-art-websites>.

⁸⁶ See e.g. the Harry Potter fan art at <www.deviantart.com/fanart/popular-all-time/?q=harry+potter&offset=24>.

⁸⁷ Copyright Act 1968 (Cth), ss 40(1), 103C(1).

⁸⁸ Ibid ss 41A, 103AA.

⁸⁹ Ibid ss 41, 103A.

⁹⁰ Ibid ss 42, 103B.

⁹¹ Ibid s 113E.

text through picturisation for people with dyslexia or Alzheimers. It may even extend to 3-D picturisations which can be haptically perceived by the blind or visually impaired.

The dealing must also be fair. The research or study fair dealing defence lists five inclusive factors to be considered when determining whether a use is a fair dealing:

- (1) the purpose and character of the dealing or recording;
- (2) the nature of the work, adaptation, audiovisual item or performance;
- (3) the possibility of obtaining the work, adaptation, audiovisual item or an authorised recording of the performance within a reasonable time at an ordinary commercial price;
- (4) the effect of the dealing or recording upon the potential market for, or value of, the work, adaptation, audiovisual item or authorised recordings of the performance; and
- (5) in a case where part only of the work, adaptation, audiovisual item or performance is reproduced, copied or recorded, the amount and substantiality of the part copied, taken or recorded in relation to the whole work, adaptation, item or performance.⁹²

Australian case law provides limited assistance in understanding the fairness factors,⁹³ and has been criticised for obscuring, rather than clarifying, the law.⁹⁴ Unlike the US fair use defence,⁹⁵ Australian fair dealing jurisprudence has not expressly considered nor valorised the transformative nature of the defendant's conduct. This particular fair use criterion is problematic in the context of adaptations, which, by their nature, necessarily involve sometimes radical transformation between the source and the adaptation. Because the picturisation right rests on a foundation of fundamental formal transformation, this must signal a Parliamentary intention to reserve to the copyright owner a broad territory. However, the fair dealing regime permits defendants to graphically convert the plaintiff's words even within that territory, provided the picturisation achieves one of the privileged fair dealing purposes.

6. CONCLUSION

This chapter has scoped the contours of an under-examined adaptation right, the picturisation of literary works. In the absence of any judicial consideration of the right, the chapter has raised a number of questions considering the nature, rationale and ambit of the picturisation right, and attempted to answer them. The picturisation right was likely introduced into the copyright owner's suite of exclusive rights to cordon off text-to-image versions of literary works in response to growing market interest in them. A bespoke

⁹² Ibid ss 40(2), 103C(2).

⁹³ R Burrell, M Handler, E Hudson and K Weatherall, Submission 278 to the Australian Law Reform Commission inquiry, *Copyright in the Digital Economy* 2013.

⁹⁴ Michael Handler and David Rolph, "'A Real Pea Souper': The Panel Case and the Development of the Fair Dealing Defences to Copyright Infringement in Australia' (2003) 27(2) *Melbourne University Law Review* 381.

⁹⁵ Copyright Act 1976 (US), s 107.

picturisation right was considered necessary, since these transformations fell outside the acts that would be captured by the reproduction right. The picturisation right clearly has the potential to constrain artistic visions of literary works. Its true potency has not yet been tested judicially, but it will ultimately be determined by the interpretation of key phrases in the statutory right, particularly the meaning of ‘version’, ‘story or action’, and ‘picture’, in combination with the fair dealing defences. As a right which comes close to monopolising the ideas inhering in the literary text, these questions should be resolved taking a restricted view, consistent with the right’s original rationale, lest the copyright owner be granted, in effect, a right to imagine.