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Cases of Note -- Copyright

Bruce Strauch

The Citadel, strauchb@citadel.edu

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Q & A — Copyright Column

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ANSWER: This question seems to indicate that the copy of the article was obtained from a document delivery service and that royalties were paid. But royalties were paid only for one copy. If multiple collaborators share a printed copy of an article by passing it around, there is no problem because the article is not reproduced. If a pdf file is sent to multiple users, the law treats it as if multiple copies were made. A copy in computer RAM is a copy that counts. Thus, a copy is basically sent to each collaborator and royalties should be paid for each of those copies.

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Cases of Note — Copyright

by Bruce Strauch (the Citadel) <strauchb@citadel.edu>

Barbie Bashing Finds a Safe Harbor in Fair Use


**Mattel** is of course Mattel, owner of Barbie dolls.

**Tom Forsythe.** AKA “Walking Mountain Productions,” resides in Kanab, Utah where he produces politically charged photos. And for an earnest type such as he, how can you resist using a naked Barbie attacked by vintage household appliances.

And what an array of possibilities: “Fondue à la Barbie” with Barbie heads floating in a fondue pot; “Malted Barbie” with her perched buck naked on a vintage Hamilton Beach malt machine; and “Barbie Enchiladas” with four (count them—four—no less) Barbies wrapped in salsa soaked tortillas toasting in an oven.

Filled with divine fire, he produced 78 photos in this genre with the series title “Food Chain Barbie.” He held back 36 unpublished. As a true devotee of his craft, he considered them substandard.

And what would those have been? “Microwave Barbie”? “Parboiled Barbie”?

Needless to say, **Mattel** took umbrage at this sullying of America’s favorite blonde. Alleging copyright, trademark and trade dress infringement, it tried to enjoin publication. Based on fair use, **Tom** won summary judgment at the district court level. Hence the **Mattel** appeal to the Ninth Circuit.

**Tom** vowed he was attempting to “critique the objectification of women associated with Barbie and lambast the conventional beauty myth and the societal acceptance of women as objects because this is what Barbie embodies.” And, of course, the use of Barbie was essential as “the most enduring of those products that feed on the insecurities of our beauty and perfection-obsessed consumer culture.”

**Where.** Yes, there are folks consumed with such issues. Many can be found in the English departments of our groves of academe.

As you can imagine, there’s not a huge market for **Tom’s** work. He showed at two art festivals in Utah and maintained a Website. He printed up 2,000 postcards but sent out only 500, many of which he handed out in Kanab, his hometown. A feminist scholar used the cards in her lectures. A Kanab bookstore bought 500 for resale.

Total gross income: $3,659.

**Intrigued, I went and located Kanab on a map. It’s way down at the bottom of the state, east of St. George, and due north of the Arizona town of Fredonia. Hmmm.**

**Discovery.**

**Tom** served on **Mattel** an expert witness report from a curator at the **San Francisco Museum of Modern Art (SFMOMA)** as to how **Tom** was right smack in the tradition of twentieth century artists.

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Copyright

The Copyright Act, 17 U.S.C. 8106 grants the owner exclusive rights. Mattel, of course, owns the copyright to Barbie and Tom's use is a prima facie case of infringement.

You can, of course — in furtherance of progress in art — build upon, reinterpret and reconceive earlier Barbie works in the — dare I say — food chain. See Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 575-77 (1994). Fair use is designed to permit comment and criticism so as to not stifle that marvelous creativity the law is designed to foster. So let's mow our way through fair use.

Purpose and Character of Use

The question here is how much does the new use transform the old and is it supplanting the old in the market place. Campbell, 510 U.S. at 579, 584. Parody can meet the transformative standard as long as it takes no more than is necessary to "conjure up" the older work. Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc., 109 F.3d 1394, 1400 (9th Cir.).

Mattel presented a shopping mall survey showing that few passing mall rats understood the images to be parody. The Ninth Circuit said parody vel non was a question of law and not a majority public opinion question and all courts were in agreement on this. See Campbell, 510 U.S. at 582-83; Leibovitz v. Paramount Pictures Corp., 137 F.3d 109, 114-15 (2d Cir. 1998); Dr. Seuss, 109 F.3d at 1400-01.

So What Is Parody?

A rhetorical device. A "form of social and literary criticism" with "socially significant value as free speech under the First Amendment." Dr. Seuss, 109 F.3d at 1400. And of course many parodies will flop. So it doesn't have to be funny or effective. See, e.g., Yankee Pub'l'g, Inc. v. News Ann Pub'l'g, Inc., 809 F. Supp. 267, 280 (S.D.N.Y. 1992). Hence the elimination of the shopping mall slob vote.

A parody is a "literary or artistic work that imitates the characteristic style of an author or a work for comic effect or ridicule." Campbell, 510 U.S. at 580 (quoting AMERICAN HERITAGE DICTIONARY 1317 (3d. 1992)). The parody "may loosely target an original" if it "reasonably could be perceived as commenting on the original or criticizing it to some degree." Id. At 580-81, 583. Bad taste is not an issue. Id. At 582-83 (quoting Bleistein v. Donaldson continued on page 67).
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Lithographing Co., 188 U.S. 239, 251 (1903).

Mattel argued that context be ignored, but
“in parody, as in news reporting, context is ev-
everything.” 510 U.S. at 588.

Mattel marketed Barbie as the “ideal Amer-
ican woman” and a “symbol of American girl-
hood.” Mattel v. MCA Records, Inc., 296 F.3d 894, 898 (9th Cir. 2002). The little plastic va-
va-voom just reeks of excitement, wealth, beauty
and glamour.

Tom flips this image by making her obvi-
ous to domestic dangers and putting her in las-
civious sexual poses. And thus made his thun-
dering critique of the harm Barbie does to gender
roles in our society. Parody is found in this “join-
der of reference and ridicule.” Campbell, 510
U.S. at 583.

Market Effect

What if everyone made ditzy Perils-of-
Pauline Barbies? Or “widespread and unre-
stricted” porno Barbies? Id. At 590. The less
the adverse effect on the copyright owner, the
better for the perpetrator’s claim of fair use san-
dry. Dr. Seuss, 109 F.3d at 1403.

Well, of course, parents won’t rush out and
buy Barbie with her head in an oven in place
of our culturally esteemed Miss B and stud-muf-
fin Ken. Not to mention “Kira,” “Skipper,” and
“Teresa” none of whom have yet to be plunged
into a blender anyhow. And how could Barbie
in a fondue pot possibly substitute for “Splash
Cycle” Barbie riding on her three-wheeled
amphib or the greatly coveted “Barbie Dream
House,” a battery-powered Victorian doll mas-
nion?

Mattel carried the impairment of
Barbie’s value. But this factor does not con-
consider the possibility that the criticism could be
so devastating that folks would begin to shun
Barbie and its market value would drastically
plunge.

In an interesting parallel case, muse-inspired
Susan Pott dressed Barbies in sadomasochis-
tic outfits and sold them as “Dungeon Dolls.”
The S.D.N.Y. court held these femmes little
creatures to be both sufficiently transformative
and the market harm improbable. The only
market invaded was the “adult” doll market, and
Mattel was certainly not going into that field.
Mattel, Inc. v. Pott, 229 F. Supp. 2d 315, 321-22
(S.D.N.Y. 2002).

Now Disney on the other hand…

And our Ninth Circuit held this wonderfully
flowering of artistry and social criticism in
“Malted Barbie” just too great for mere words
to describe.

Well, What About Trademark Then?

The Lanham Act’s limited protection is mere-
ly to “avoid confusion in the marketplace.”
We can’t have that avid Barbie collector being
duped into thinking “Malted Barbie” is a genu-
ine Mattel product.

But Barbie’s role in our dare we call it “cul-
ture” is an integral part of our vocabulary, a sig-
ifier beyond its identifying purpose on the
Mattel doll.

Rogers v. Grimaldi, 875 F.2d 994, 999 (2d
Cir. 1989) gives us one of those annoying bal-
cancing tests between public interest in avoiding
consumer confusion and public interest in free
expression. Under the Rogers test, artistic works
do not infringe unless the title has “no artistic
relevance to the underlying work whatsoever…”

What would that be? Garbage pile Barbie
with no doll in the tableau? Just a bucket of
debris?

… or, if it has some artistic relevance, un-
til the title explicitly misleads as to the source or
the content of the world.” Id.

The Ninth Circuit found Tom’s use of the Barbie
mark relevant to the work, and that the photo
pictures did not explicitly mislead a consumer into
thinking Mattel had produced these grotesque-
ries.

Okay, Let’s Try Trade Dress.

trade dress. This involves “the total image of a
product and may include features such as size,
shape, color or color combination, texture,
graphics, or even particular sales techniques.”
Two Peas, Inc. v. Taco Cabana, Inc., 505 U.S.

Well, he, of course, did use a Barbie doll
with that unattainable figure. But just as in
trademark, Barbie holds an icon status that just
cries out for parody and social commentary, and
there is no likelihood the public will think
“Barbie Enchiladas” a Mattel product.

Biz of Acq — Changes In Workflow
Caused By Changes In Technology

by Carla Beasley (Assistant Director for Materials Services, Forsyth County
Public Library, 585 Dahlonega Road, Cumming, GA 30040; Phone: 678-513-
9375; Fax: 678-513-8474) <beasleyc@mail.forsyth.public.lib.ga.us>

Column Editor: Audrey Fenner (Head, Acquisition Department, Walter
Clinton Jackson Library, University of North Carolina at Greensboro, P.O. Box
26170, Greensboro, NC 27402; Phone: 336-256-1193; Fax: 336-334-4731) 
<fafenner@uncg.edu>

Column Editor’s Note: Migrating to a
new integrated library system makes it nec-
essary to reorganize technical services work
processes. Carla Beasley describes a workflow study in a public library Materials
Department following a system migration. Results of the study made it clear that revis-
ing the workflow and reallocating staff hours
would increase the department’s efficiency and reduce duplication of effort. — AF

The workflow in our Materials Department
was moving like an inchworm — bunching up
in one area, suddenly flattening out in another.
And like the inchworm, the pace was slowing
to a crawl.

The staff had known for some time that the
job was no longer getting
the job done. In a department responsible for
all collection functions, including acquisitions,
cataloging, processing, collection development/
selection, and interlibrary loan for the system,
materials had to move quickly and efficiently.

In the seven years that Forsyth County
Public Library has been an independent sys-
tem, change has become a way of life. Rapid
population growth has brought heavy circula-
tion and increased demand on our library re-
sources. Growth also necessitated upgrading
and expanding technology. In one six month
period, our department saw major technology
changes.

1. We became full cataloging members
in OCLC in late 2001. This greatly
expedited acquiring records for new
items.

2. We migrated from Classic Dynix to
Dynix Horizon in January 2002. This
resulted in numerous acquisi-
tions changes in the way selections,
orders and invoices were recorded
and processed.

At the time of the Horizon migration, the
Materials Department consisted of the follow-
ing staff:

Acquisitions: a supervisor and two ac-
quisions assistants
Collection Development: two full-time librarians
Cataloging: one full-time cataloging librarian, one full-time copy cataloger
Processing: one full-time materials processor
Interlibrary Loan: one 20-hour special-
ist, one 18-hour aide to handle ship-
ning and receiving.

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