Against the Grain

Volume 16 | Issue 2 Article 48

2004

2004 Charleston Conference -- 24th Annual Issues in Book and Serial Acquisition

Editor

DOI: http://dx.doi.org/10.7771/2380-176X.4326

Cases of Note — Copyright
from page 65

Mattel struck back via a subpoena asking for **SFMOMA's** licensing policies and all actions **SFMOMA** had taken to prohibit use of the art in its collection by other parties. **SFMOMA** could see where that was heading and objected. The district court quashed the subpoena and awarded fees to **SFMOMA** and sanctioned **Mattel**.

Somehow this strikes me as a bit harsh, perhaps in light of the burdensome and oppressive interrogatories I used to lay on hapless defendants during my erstwhile legal eagle career.

***Mattel** wanted to impeach the expert witness by showing that his employer regularly sent out cease and desist letters to pirates reproducing their art.*

*The district court, however, saw it as an attempt to rile **SFMOMA** which was not a party to the suit and get them to pressure their art expert to not testify.*

Meanwhile, **Tom** had videotaped himself "executing" his Barbie collection. Somehow, **Mattel** got wind of this and obtained a copy pursuant to discovery. The use of this tape was deemed irrelevant by the district court.

Copyright

The Copyright Act, 17 U.S.C. ß 106 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 moil 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., LP 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 Publ'g, Inc. v. News Am. Publ'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