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 headed and objected. The district court quashed the subpoena and awarded fees to SFMOMA and sanctioned Mattel.

Somewhere, 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. 8 106 grants the owner exclusive rights. Mattel, of course, owns the copyright to Barbie and Tom’s use is a prime facie case of infringement. You can, of course — in furtherance of progress in art — build upon, reinterpret and recontextualize 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 not to stifle that marvellous creativity the law is designed to foster. So let’s mull 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. Of course many parodies will flop. So it doesn’t have to be funny or effective. See, e.g., Yankee Pub’g, Inc. v. News Ann. Pub’g, Inc., 899 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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