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Cases of Note -- Copyright

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Q & A — Copyright Column
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ANSWER: This question seems to indicate that the copy of

Cases of Note — Copyright

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

Barbie Bashing Finds a Safe Harbor in Fair Use

Mattel, Inc. v. Walking Mountain Productions, United States Court of Appeals for the Ninth Circuit, 2003 U.S. App. LEXIS 26294 (2003).

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 He held back 386 unpublished. As a true devotee of his craft, he considered them substandard.

And what about those have been? "Microwave Barbie?" "Parbroiled Barbie?"

Needless to say, **Mattel** took umbrage at this sully 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."

Whew. 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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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. § 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*

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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 everything.” 510 U.S. at 588.

Mattel marketed Barbie as “the ideal American woman” and a “symbol of American girlhood.” *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 oblivious to domestic dangers and putting her in lascivious sexual poses. And thus made his thundering critique of the harm Barbie does to gender roles in our society. Parody is found in this “joinder of reference and ridicule.” *Campbell*, 510 U.S. at 583.

Market Effect

What if everyone made ditzzy Perils-of-Pauline Barbies? Or “widespread and unrestricted” porno Barbies? *Id.* At 590. The less the adverse effect on the copyright owner, the better for the parodist’s claim of fair use sanctuary. *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-muffin 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 mansion?

Mattel carped about the impairment of Barbie’s value. But this factor does not 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 **Susanne Pitt** dressed Barbies in sadomasochistic outfits and sold them as “Dungeon Dolls.” The S.D.N.Y. court held these cunning 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. Pitt*, 229 F. Supp. 2d 315, 321-22 (S.D.N.Y. 2002).

Now Disney on the other hand ...

And our Ninth Circuit held this wonderful 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 merely to “avoid confusion in the marketplace.” We can’t have that avid Barbie collector being duped into thinking “Malted Barbie” is a genuine **Mattel** product.

But Barbie’s role in our dare we call it “culture” is an integral part of our vocabulary, a sig-

nifier 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 balancing 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 pail Barbie with no doll in the tableau? Just a bucket of debris?

... or, if it has some artistic relevance, unless the title explicitly misleads as to the source or the content of the world.” *Id.*

The Ninth Cir. found **Tom’s** use of the Barbie mark relevant to the work, and that the photo titles did not explicitly mislead a consumer into thinking **Mattel** had produced these grotesqueries.

Okay, Let’s Try Trade Dress.

The Lanham Act, 15 U.S.C. § 1125 covers 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 Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 765 n.1 (1992).

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>

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Column Editor’s Note: *Migrating to a new integrated library system makes it necessary 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 revising 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.

A recent online system migration from **Classic Dynix** to **Horizon** had changed daily routines. Workflow patterns that each staff mem-

ber had known so well were 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 system, change has become a way of life. Rapid population growth has brought heavy circulation and increased demand on our library resources. 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 acquisitions 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 following staff:

Acquisitions: a supervisor and two acquisitions 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 specialist, one 18-hour aide to handle shipping and receiving.

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