Cases of Note -- Copyright

Bruce Strauch
The Citadel, strauchb@citadel.edu

Follow this and additional works at: http://docs.lib.purdue.edu/atg

Part of the Library and Information Science Commons

Recommended Citation
Strauch, Bruce (2004) "Cases of Note -- Copyright," Against the Grain: Vol. 16: Iss. 2, Article 33.
DOI: https://doi.org/10.7771/2380-176X.4311

This document has been made available through Purdue e-Pubs, a service of the Purdue University Libraries. Please contact epubs@purdue.edu for additional information.
Q & A — Copyright Column

from page 64

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.

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 Forsyth is 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 a la Barbie” with Barbie heads floating in a fondue pot; “Malted Barbie” with her perchacked buck naked on a vintage Hamilton Beach milk 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 He held back 386 unpublished.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 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.
2004 Charleston Conference — 24th Annual Issues in Book and Serial Acquisition

Call For Papers, Ideas, Conference Themes, Panels, Debates, Diatribes, Speakers, Preconferences, etc. ...

Wednesday, November 3, 2004 — Preconferences
Thursday-Saturday, November 4-6, 2004 — Main Conference
Francis Marion Hotel, 387 King Street, Charleston, SC 29403

If you are interested in leading a discussion, acting as a moderator, coordinating the lively lunches or simulation rooms, or would like to make sure we discuss a particular topic, please let us know. The Charleston Conference prides itself on creativity, innovation, flexibility, and informality. If there is something you are interested in doing, please try it out on us. We’ll probably love it ...

The Conference Directors for the 2004 Charleston Conference include — Rosann Bazirjian, Chair (Penn State University) <rvb9@psuilas.psu.edu>, David Goodman, Chair <goodmanny@aol.com>, Deana Astle (East Carolina University) <astle@ecu.edu>, Barbara Dean (Arlington County Public Library), Stuart Grinell (Ambassador Books and Media) <bookman@iquest.net>, Ramune Kubilius (Northwestern Health Sciences Library) < r-kubilius@nwu.edu>, Heather Miller (SUNY-Albany) <hmler@uamail.albany.edu>, Jack Montgomery (Western Kentucky University) < jack.montgomery@wkcu.edu>, Vicky Speck (ABC-Clio) <vspeck@abc-clio.com>, Katina Strauch (College of Charleston) <kstrauch@ comcast.net> or www.katina.info/conference. Send ideas by June 30, 2004, to any of the Conference Directors listed above.

Or to: Katina Strauch
MSC 98, The Citadel, Charleston, SC 29409
843-723-3536 (phone & fax)
<kstrauch@comcast.net>
http://www.katina.info/conference

Rachel K. Schenk Memorial Scholarship

This year the second Rachel K. Schenk Memorial Scholarship of $1,200 will be awarded to the person who has demonstrated a true love of books. There are three requirements:

1) The applicant must write an essay of 600 words on "my love of books."
2) The applicant must be a librarian with a library degree.
3) The applicant must be a first-time attendee to the Charleston Conference for 2004.

Please note: The Rachel K. Schenk Memorial Scholarship will be given for the next four years and will be an award of $1,200 per year. So if you don't get it one year, there is always the next year.

Deadline for application is August 20, 2004. For more information, visit http://www.katina.info/conference/scholarship.html or contact <kstrauch@comcast.net>.
Cases of Note — Copyright
from page 66

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-
can 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-
cious physical poses. And thus made his thun-
dering critique of the harm Barbie does to gender
gles 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 parodist's claim of fair use sanctu-
ary. 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-muff-
in 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 amph-
ibol or the greatly coveted "Barbie Dream
House," a battery-powered Victorian doll man-

Mattel carped about the impairment of
Barbie's value. But this factor does not con-
dier 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, mused-charm
Suzanne Pliot dressed Barbies in sadomasochis-
tic outfits and sold them as "Dungeon Dolls." The
S.D.N.Y. court held these cunning little crea-
tures 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. Pliot, 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 genu-
ine Mattel product.
But Barbie's role in our daze we call it "cul-
ture" 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 bal-
ancing 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 pall Barbie
with no doll in the table? 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 Circuit 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 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
craves 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 Dahnneea Road, Cumming, GA 30040; Phone: 678-513-
9335; 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) <sfenner@uncg.edu>

Column Editor's Note: Migrating to a
new integrated library system makes it neces-
sary 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.
A recent online system migration from Clas-
sic Dynix to Horizon had changed daily rou-
tines. 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 develop-
ment, 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
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 24-hour special-
list, one 18-hour aide to handle shi-
pping and receiving.

continued on page 68

<http://www.against-the-grain.com> 67

Against the Grain / April 2004