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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 prime facie case of infringement.

You can, of course — in furtherance of progress in art — build upon, reinterpret and recombine 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 molt our way through fair use.

Purpose and Character of Use

The question here is how much does this new use transform the old and is it supplanting the old in the marketplace. 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 ve nion 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’g, Inc. v. News Ann. Pub’g, Inc., 809 F. Supp. 267, 280 (S.D.N.Y. 1992). Hence the elimination of the shopping mall ebot 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