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IP FRONTIERS

From planes to dolls: Copyright challenges in the toy industry

Copyrights on toys are easier to obtain than they are to assert or protect. To assert or protect your toy against a copycat (infringer), your toy cannot be useful and, you have to be able to identify the protectable elements within the toy.

Copyrights cannot be used to protect "useful articles." Before 1983 and the United State Court of Appeals for the Sixth Circuit's decision in *Gay Toys Inc. v. Buddy L. Corp.*, although toy manufacturers registered toys as sculptural works under the Copyright Statute, they sometimes found their copyrights invalidated by federal courts because these courts reasoned that toys are useful because children need toys for growing up, *Gay Toys Inc. v. Buddy L. Corp.*, 522 F.Supp. 622, 625 (D.C. Mich. 1981).

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For example, a district court found a toy plane was a "useful article," because a "toy airplane is useful and possesses utilitarian and functional characteristics in that it permits a child to dream and to let his or her imagination soar," *Id*. This particular reasoning was discredited by the Sixth Circuit, who stated that a painting of an airplane could also allow a child's imagination to soar and paintings are expressly protected by copyright, *Gay Toys Inc. v. Buddy L. Corp.*, 703 F.2d 970, 973 (6th Cir. 1983).

The Sixth Circuit ultimately held that toys do not have an intrinsic function other than the portrayal of the real item and are therefore, not useful and are protectable by copyright, *Id*. at 974.

The Sixth Circuit's *Gay Toys* case did not settle the usefulness issue for all toys. For example, toy stunt plane launchers were found "useful" by a district court because launchers launch toys into the air, which, this court reasoned, is a "use" beyond just portraying a real item, see *Lanard Toys Limited v. Novelty, Inc.*, 511 F.Supp.2d 1020, 1036 (C.D. Cal. 2007).

However, another court found doll clothing protectable (full size clothing is useful) because, unlike their larger, red-blooded, counterparts, dolls don't feel cold or worry about modesty, *Mattel, Inc. v. MGA Entertainment, Inc.*, 616 F.3d 904, 916 (9th Cir. 2010). Hence, when deciding whether to uphold the copyright of a toy, the court makes a judgment call regarding whether a toy is "useful."

Many toys, like dolls, are arguably not useful, but their copyright holders still face at least one more hurdle in asserting or defending the copyrights. This hurdle is showing that there are elements in a toy that are protectable and these copyrighted elements are infringed by someone selling a copycat toy.

Showing protectable elements was a problem for both Mattel and independent artist Bernard "Butch" Belair in the now infamous *Mattel, Inc. v. MGA Entertainment, Inc.* lawsuit and its related actions, otherwise known as the "Bratz case," which have now spanned almost a decade.

To summarize the complex Bratz case quickly, a contractor named Carter Bryant worked at Mattel in the "Barbie Collectibles" department at a time when he developed four sketches and a sculpt (a model) that arguably inspired the Bratz doll line. The Bratz dolls are characterized by exaggerated features, including oversized heads and small, long, slender bodies.

Bryant left Mattel, gave the sketches and the sculpt to Mattel competitor, MGA, and worked with MGA, who produced the highly successful Bratz dolls, see *Mattel*, 616 F.3d at 907-08. The Bratz dolls proceeded to outsell Mattel's Barbie dolls. Mattel sued Bryant, as well as MGA and initially, Mattel prevailed. However, the Ninth Circuit found that the case needed to be retried and it was, and MGA prevailed, *Id*. at 918.

Towards the conclusion of the *Mattel v. MGA* battle, Butch Belair, an independent artist, entered the fray. Butch is the creator and copyright holder of images used in Steve Madden shoe advertisements. The images included female figures, who had large heads and small bodies, as well as other visual similarities to the Bratz dolls.

Belair had learned from testimony during the *Mattel v. MGA* case that Bryant had copied a specific copyrighted image used in the Steve Madden advertisements, the "Angel / Devil Girl" and used it as inspiration when he created the initial sketches used to make the Bratz dolls. Thus, Belair sued MGA (and Mattel because ownership of the Bratz was not settled yet) for

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copyright infringement.

Both Mattel and MGA ran into the same problem in asserting copyright claims against MGA. They had trouble showing that the protectable elements of their copyrighted works were infringed by MGA in creating the Bratz dolls. In the case of Mattel, the Ninth Circuit ruled the district court made a "significant" error in finding for Mattel because the district court did not filter out the unprotectable elements in the sketches and the dolls when it compared them, see *Id*. at 916.

According to the court, these elements include the dolls' resemblance to humans, the urban or rural appearance, the thin body, *Id*. The Ninth Circuit stated, "Mattel can't claim a monopoly over fashion dolls with a bratty look or attitude, or dolls sporting trendy clothes-these are all unprotectable ideas," *Id*.

Belair's case did not even make it to a jury — it is currently on appeal to the Second Circuit after a summary judgment from the District Court Southern District of New York.

In the SDNY, Judge Scheindlin immediately excluded all the unprotectable elements discussed by the Ninth Circuit from her analysis and held that although it is undisputed that MGA was aware of the Steve Madden look and sought to capitalize on it, "Belair cannot monopolize the abstract concept of an absurdly large-headed, long limbed, attractive, fashionable woman. He has a copyright over the expressions of that idea as they are specifically articulated in the Angel/Devil image, but he may not prevent others from expressing the same idea in their different ways," *Belair v. MGA Entertainment, Inc.*, 831 F.Supp.2d 687, 698 (SDNY 2011).

In both decisions, the courts seemed to acknowledge that an idea contained in a valid copyright was utilized in the creation of something else, but yet, the original copyright holders were not protected against the individual who was inspired by the protected , original, work.

Copyright is certainly an inexpensive option when looking to protect a toy. But recent cases indicate that when asserting or defending that copyright, it is worthwhile to analyze exactly what you have protected in this registration and whether what is protected is what is being infringed before moving forward.

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