

YOU DON'T OWN ME

How *Mattel v. MGA Entertainment*
Exposed Barbie's Dark Side

ORLY LOBEL



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To Danielle, Elinor, Natalie, and all the
other leaders of tomorrow who are gutsy,
creative, and deliciously competitive.

And to On Amir, I love you.

*And another woman has usurped
The place that ought to have been mine*

—AKHMATOVA, NORTHERN ELEGIES

*There is no point in witnessing the destruction
of a man who is thoroughly virtuous or who is
thoroughly corrupt.*

—ARISTOTLE

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AUTHOR'S NOTE

A SUBSTANTIAL PART OF the book is anchored in the *Mattel v. MGA Entertainment* litigation papers, which span thousands of pages of testimony, briefs, evidence, and judicial decisions. I also spoke to dozens of sources while researching this book's stories. Some wished to remain anonymous, and some appear front and center, like Judge Alex Kozinski. Mark Lemley, whose productive energies are unrivaled, generously connected me with key people for interviews. I am grateful to the lawyers on both sides of the litigation who candidly shared their experiences, including Patricia Glaser, Annette Hurst, John Keker, Jennifer Keller, Michael Page, and Michael Zeller, and a number of jurors, whose personal accounts of the trial helped me better understand the atmosphere in the courtroom. I have also spoken with independent experts in the toy and entertainment industry. With respect to Mattel and MGA, I requested interviews with senior executives at both companies. At Mattel, I was able to speak to Tim Kilpin, who served as executive Vice-President of the Boys & Girls Global Brands, and then as Mattel's President and Chief Commercial Officer. Bob Eckert, Mattel's then CEO, declined to comment on his time at Mattel. At MGA, I interviewed its founder and CEO, Isaac Larian. Finally,

my numerous attempts to reach Carter Bryant, including through his relatives, were unsuccessful. Accordingly, all references to Bryant's background and personal life come from court records and interviews with other parties involved in the litigation. I thank all those who passionately shared their stories of hopes, dreams, losses, and victories with me.

INTRODUCTION

SHE WAS BLONDE AND beautiful—statuesque, with long slender legs, a tiny waist, and a chest so large that Finnish researchers claimed any similarly endowed woman would surely tip over. For years, Carter Bryant dutifully served her. He styled her hair, dressed her in skirts, dresses, and luxurious gowns, adorned her in jewelry, and even applied her makeup. She always looked fabulous. Day after day, week after week, she was unblemished, shiny, and new. And in a three-billion-dollar industry, she dominated over 90 percent market share for five decades. Perhaps that was what Carter despised: her perfection—the absence of a single flaw. She never changed. While people gained weight, their skin wrinkled and sagged, and their hair grayed, Barbie stood perfect and frozen against a changing world.

While she remained ageless and pristine, the world that she had been born into ceased to exist. Everything was raunchier and more perverse. Barbie remained maddeningly clean. A real artist, Carter saw beauty in the broken, the peculiar, the queer, perhaps even the grotesque. Like many creative people trapped in dead-end jobs, he experienced the angst of a servant whose golem had become the master. He dreamed of a new deity. He imagined a new icon that better reflected

the modern world, using the beauty of real people. Carter had not intended to assault Barbie's persona, her public image, or those invested in maintaining it. He hadn't even planned to confront his master. He could not have consciously dared to dream of the millions he would make from his rebellion, the millions in ensuing losses, and the decade-long legal battle that would not only change Barbie and the Mattel Corporation, but forever alter both the entire toy industry and the very laws governing creativity and competition. He certainly couldn't have foreseen the incredibly ferocious feud between his overpowering ex-employer and the flamboyant entrepreneur who gambled and risked it all to take a chance on him. Nor did he predict that lawyers would drag both his life partner, Richard Irmen, and his own mother, Jane, to testify on his behalf, asking them to reveal deep-seated intimate details of his life and passions. Most certainly, his dreams would not have included suffering depression and a stroke at the age of forty-one. Carter Bryant only wanted to build his own dream house, away from Barbie.

The story about when exactly Carter Bryant conceived of Bratz, the anti-Barbie doll, the first doll to present a true market challenge to Barbie since her 1959 debut, changes with the teller. The how and when of these dolls with oversized heads and diva-like attitudes is the *sine qua non* at the heart of the billion-dollar lawsuit waged by megadoll companies Mattel and MGA—the corporation that developed Bratz—for over a decade. According to Carter himself, inspiration hit one afternoon while he was officially on leave from Mattel and living with his parents in Kimberling City, a small town in western Missouri. He traces the precise moment of inspiration to a fateful drive home from the local mall, where he was temporarily working at an Old Navy, when a group of spirited high school girls walked past him. Here was a man who, after spending years in Southern California working on a supposedly teenage doll, suddenly realized Barbie looked nothing like these teenagers. These young schoolgirls shared almost no traits with Barbie, by then in her late forties, yet still sport-

ing a body even a supermodel would envy. At the turn of the century, Carter felt the edgy reality of American youth had little to do with the plastic Barbie, who, despite her unspoken X-rated German past, was so obviously frigid and oh-so-vanilla-white.

In contrast to Barbie's milquetoast façade, the teenage girls Carter spotted coming out of the gates of Kickapoo High School were sassy, hip, and vibrant. They showed midriff and defied type-casting. Unlike Barbie's straight blonde hair, their hairstyles were funky, short, spiked, and colorful. They did not wear pleated skirts and knee-high socks. They wore oversized clothes, baggy jeans—clothes that Carter's bosses at Mattel would have found too shabby, too lowly, and too, well, bratty, for their ice queen. After the serendipitous encounter with the group of teenage girls, he sketched his vision for a new generation of dolls—girl power for the twenty-first century. Little did he know that the sketches would seed both an empire and a billion-dollar lawsuit. And little did we know that the doll wars are, in the words of poet Rabindranath Tagore, where “the whole world meets in a single nest.”

It's not all fun and games at the world's most famous toymaker. Mattel appears in court regularly, and from its inception it has sued numerous artists, musicians, competitors, and even its own executives. Play is a sensitive thermostat, and behind the curtains of the cheery toy world we uncover the business strategies presaging cultural shifts and the realities of corporate machinations, backstabbing, and grudges. Indeed, Barbie's very inception can be traced back to international wars over originality and copying. At every turn, Mattel, the aging titan, vigorously attempts to control the image of its iconic best-selling doll, even when the prices paid are deceit, loss, and brutal failure. Although the ultimate battle between Barbie and Bratz began in California, the war is international, from Hong Kong to New York, from Germany to Mexico. The executives leading the charge are near polar opposites in personalities and temperament, yet toying with market shares proves each is susceptible to emotions

clashing against rational business decision making. As increasingly is the case among leading brands across all industries, the fights in the toy industry are now focused on controlling existing ideas rather than creating new ones. The battle hymn for market dominance demands that we ask: Does the current hyper-protection of intellectual property promote more innovation or perversely impede it?

Embarrassing internal memos reveal the state of panic at Mattel in the face of competition. The launch of Bratz is described in a document by Mattel executives as a "rival-led Barbie genocide," and the document announces: "This is war and sides must be taken: Barbie stands for good. All others stand for evil." But fighting for Barbie's life ain't cheap, and litigation has taken an enormous toll on both companies. Mattel's estimated legal expenses in its losing battle against Bratz alone has exceeded four hundred million dollars, while MGA, a newcomer to the toy industry, has spent nearly two hundred million dollars defending Bratz. Even more costly, however, is the effect of litigation on the spirit of the companies and their ability to sustain their economic dominance, and no less important, the effect on the personal lives of those partaking in the battle.

Sun-Tzu's timeless truth in *The Art of War* shines light on this story: sometimes you need to lose the battle to win the war. This is a story about how the quest for innovation can lead to ferociously unethical behavior, quashing creativity and innovation itself. It's a story about the risky transitions from ideation to commercialization and what happens when too many cooks claim the inspiration for one invention. It's a story about a savvy yet controversial libertarian judge who has made an incredible impact in taming our contemporary illusions about the law's overreach. It's a story about how passionate people who go against the tide—from attorneys to CEOs, from inventors to artists, from jurors to entrepreneurs—courageously shape our country's ideological, economic, cultural, and legal landscapes. This story is for all those who have ever experienced the creative spark, for all the leaders who are committed to their path and mission, for all

employees whose ideas were ever passed off as their boss's, for all entrepreneurs who faced a Goliath who fought dirty, for all parents who ever doubted the choices they make for their children, for all women who feel the unrealistic pressure of femininity, and for all of us grinding through grueling competition in pursuit of fulfillment and success.

. . .

From a young age, while other children were playing with toys for fun, I was learning about the toy world's grip on society. It began when I was nine. My mother asked me to star in some videos. She also asked that I bring some friends along for a strange kind of photo shoot. Fear not! These were not the type of movies that stage moms hope will turn viral and catapult their children into stardom—videos that make viewers cringe and decry the end of childhood. In fact, the videos were quite the opposite, comprising a central part of my mother's groundbreaking research seeking to understand play. My mother is a renowned psychology professor who has published pioneering studies on childhood development. She videotaped me, as a young girl, in research clips designed for experimental studies on the development of gender roles in toddlers, preteens, and teens. In the videos, my friends and I were filmed playing with "girl" toys—Barbie dolls, tiaras, and pretend makeup—and then, in another set of films, with "boy" toys—cars, balls, and Transformers. As part of the experiment, my mother screened these films for groups of children all around the world and asked for their reactions. Among the insights of her research was that, consistently, girls who play with typical boy toys enjoy a boosted social status. Boys, on the other hand, are penalized when they play with traditional girl toys. So, from an early age, I entered the research world and inadvertently became a critic of the toy industry. Rather than just playing with dolls, balls, and everything in between, I began considering how playing with toys shapes our identities, our relationships, our social status, and

our future. Despite, or perhaps because of, the numerous hats I have worn over the years—professor, author, researcher, lawyer, military intelligence commander, wife, and mother—I have never stopped studying these ideas. The way we play matters; just as the ways we create, compete, consume, and sell make us who we are.

The toy industry, despite its sweet, innocuous façade, is as ruthless as the most cutthroat businesses in Silicon Valley and on Wall Street. For over a decade, Mattel executives have been in crisis mode: sinking millions of dollars into undercover espionage, counterintelligence operations, and lawsuits. Barbie, their ice queen doll with a veiled German hooker past, was suddenly dethroned by a modern, voluptuous, multiethnic doll that entered the hearts and homes of children across America. What happens if Mattel can prove that the newcomer Bratz—Barbie's greatest competition since making her market premiere—was secretly born in the confines of Mattel's high-security facilities? As Mattel fights against the upstart MGA, maker of Bratz, its own toy empire unravels and its secret history—laced with backstabbing, financial scandals, sexual impropriety, racial tension, ego, and greed—is unearthed. The trials of the industry have fundamentally shaped our markets and society. They've shaped not only childhood play and consumption but also the laws and policies concerning copyright, patents, trade secrets, trademarks, employment contracts, antitrust, product safety, and the scope of fair competition. These trials challenge the right and freedom to leave jobs, compete with incumbent companies, control ideas, and innovate. Ultimately, these battles between toy titans reveal the true colors of contemporary global competition.

Our story begins with genius and creativity and becomes a cautionary tale about how economic wars can slowly morph into a personal vendetta. The twists and turns along the way are a microcosm of litigious America and how the personalities of judges, jurors, and witnesses can make or break court battles. At its core, this is a story about how once-innovative companies can become complacent,

opening space for new visionaries to upset the status quo. In my previous book, *Talent Wants to Be Free*, I argued that, whether you look at high-tech, pharma, entertainment, or financial industries, business strategies that imprison talent and attempt to appropriate every creative spark are counterproductive. Today, in the global talent wars, all companies must make decisions about the flow of ideas and knowledge within and outside the organization. Too often, corporate leaders make tactical moves that prove to be detrimental to their success in the long run. Alexander de Tocqueville, a Frenchman observing the nineteenth-century American landscape, famously said, "Scarcely any question arises in the United States which does not become, sooner or later, a subject of judicial debate." To channel Tocqueville in the twenty-first century, when the greatest battleground is on the front of innovation, scarcely an innovative challenge arises that does not sooner or later blossom into litigious action. Intellectual property is the bread and butter of the modern company, and California—home of celebrity and technology—is where the action happens. Be it Apple, Facebook, Twitter, Disney, or Mattel, corporate America's greatest assets are intangible, and the intellectual property wars are steaming hot. Behind the scenes, the fight over innovation raises fundamental questions about corporate leadership, market concentration, consumer behavior, and the psychology of creativity.

The toy wars are also a window into a world where gender, race, sexuality, class, nationality, and childhood all translate into profit in the global consumer market. By the time I reached middle school, I had already developed at least some sense of the toy industry's impact on society. Yet I knew little about the corporate forces that shape the toy market. Like most girls, my body image was inevitably affected by the unrealistic messages blasted by all-pervasive marketing, and I was drawn to fashion and boys from an early age. Truth be told, I was as blonde and slender as could be, but my environment offset the risk of turning into a "plastic" woman myself. From the very beginning, I was raised to resist the Barbie-pink messages of my

world. Fortunately, I was also encouraged to challenge the distorted realities of Barbie's world. I was taught to value brains over beauty, and I was lucky enough to have role models who encouraged my aspirations to excel in active military service, law school, and academia, all while becoming a mother of three. Ironically, of all her roles, from Malibu Barbie to CEO Barbie, parent—certainly the most meaningful role for many of us—is one that Barbie has never played.

"Barbie *c'est moi*," exclaimed Andy Warhol's muse, BillyBoy* (who, for no apparent reason other than to be close to a star, spells his name with an asterisk), inspiring the final portrait the pop artist painted before his death: a portrait of Barbie. Barbie has influenced much of western culture for better or worse. She has shaped the world of play for three generations. By Mattel's estimates, 90 percent of American girls aged three to ten own at least one Barbie. And if you collected all the Barbie dolls sold in the first three decades since her creation and placed them leg-to-leg, they would wrap around the Earth four times. But Barbie's reign was destined to end. The legal wars waged over these dolls have led to explosive court battles, federal investigations, public outcry, and overturned lives. After outselling every other doll ever made—with more than a billion dolls sold in over 150 countries—the twenty-first century signals an end to Barbie's reign.

In 2015, for the first time in decades, Mattel was no longer the world's number-one toy company. How did its amazing success eventually spiral into costly, irrational, losing battles in the face of new inventions, entrepreneurs, and innovation? How did its corporate executives fail so spectacularly to keep up with the realities of market competition, the tastes of consumers, and the realities of the global toy industry? How do business practices shift from visionary and ethical into multiple shades of gray?

As a lover of free speech, fair competition, and talent mobility, I welcome with open arms the disruptive shocks rocking consumer industries. *You Don't Own Me* is the result of years of investigation and research into hundreds of internal corporate memos, archives,

court records, and financial reports, as well as dozens of conversations with insiders, executives, designers, inventors, entrepreneurs, judges, jurors, and attorneys. The rise and fall of the world's most iconic plaything lays bare the power plays of those who control our contemporary markets. *You Don't Own Me* is a call to arms for all of us who consume and compete in these markets.

7

FANTASY, MEET PARODY

Life in plastic, it's fantastic

—AQUA

MATTEL HAS POURED POUNDS of liquid plastic in different colors into the same mold for decades. Barbie's secret to becoming a billion-dollar brand has been her versatility and ever expanding, consumerist lifestyle. Her silicon body is malleable to every aspiration, agitation, admiration, and frustration of the human mind. She embodies all professions, from nurse to astronaut, from gymnast to scientist, from babysitter to warrior, even if, most of the time, she just wants to dress up and party. For some of us, Barbie can mean blandness, but in a moment's notice she twists and turns until she mirrors our deepest anxieties and fears, pleasures and desires. Barbie is the ultimate American icon, pregnant with contrasting meaning (though never actually pregnant) and always ready to embody whatever paradigm or fantasy her user imagines. Barbie is both perfect and perfectly paradoxical: she is every woman, yet she is no woman. She is unchangeable yet endlessly mutable. She is sexual yet sexless. She is white but of all races and ethnicities.

So it should come as no surprise that Barbie has inspired art-

ists, photographers, writers, and musicians to express their own take on Barbie's many meanings, playfully straddling the dichotomies of goddess-bitch, clean-kinky, normal-twisted, and real-fantastic. But Mattel had developed a militant sense of protectionism over its top brand. Internally, the corporation constantly shot down edgier ideas by its employees for developing Barbie's persona, and sure enough, it hasn't welcomed artistic license from outside the corporation, by fans, artists, or competitors, with open arms. Rather than embracing the play on Barbie's multiple meanings, and the accompanying publicity, the corporation attempts to control its cultural queen's image and often chases these artists all the way to court. Again and again, Mattel has asked the courts to block any creative expression involving Barbie that is not descendant from Mattel itself.

A Bad Case of Culture Control

In 1997, a decade before the Barbie-Bratz feud erupted, the Danish pop band Aqua released their worldwide hit *Barbie Girl*. The song described Barbie's life in plastic as "fantastic," and was a top ten hit on the US *Billboard* Hot 100 of the year. The pop song has an addictive sweetness that definitely channels Barbie's shallow public persona. The female singer warbles in a high-pitched voice, while the male singer's pitch is low and manly. In the music video, a real-life Ken look-alike pulls off the real-life Barbie's arm. The lyrics speak for themselves:

*I'm a blond bimbo girl, in a fantasy world /
Dress me up, make it tight, I'm your dolly*

The song poked fun at the squeaky clean values Barbie represents as well as the kinky fantasies she ignites. At the same time, the chart-topper also reaffirmed Barbie's status as a worldwide cultural icon.

Mattel focused only on the song's negative connotations, and it sued Aqua and the music company that produced, marketed, and sold *Barbie Girl*. The toy giant asked the court for an injunction to block the song, arguing that the song confused consumers and tarnished Barbie's brand.¹

There is a corporate strategy that attorneys call "litigate to death." It involves huge businesses mobilizing small armies of lawyers to vigorously pursue baseless lawsuits. These legal teams hope to, and often do, drive their opponents—individual or small enterprises with very limited resources—to their brink until, finally, they settle and either stop competing, or just disappear. Litigate-to-death companies hope a global chilling effect accompanies isolated victories: if these industry giants successfully develop reputations as predators, willing to litigate to death, then no one will dare anger them in the first place.

Because no actual Barbie dolls or images were used in the song, Mattel could not sue for copyright infringement, which protects images and creative expression. Instead, Mattel alleged misuse of trademark for Aqua's unauthorized use of the word "Barbie," which Mattel owned. Trademark protects any word, name, symbol, or design used to identify and distinguish a seller's product. Mattel claimed that Aqua's misappropriation of the word might confuse the public into believing Mattel produced the song.

The central problem with Mattel's claim was that the song never misled people into believing that Mattel produced it. Normally, trademark litigation happens between two competitors: for example, when Mattel sued Jada Toys for its line called Hot Rigz, which sounded a bit too much like Mattel's Hot Wheels.² Mattel's legal team submitted two surveys that showed people believed Hot Rigz was either made or licensed by the same company producing Hot Wheels. The song *Barbie Girl*, on the other hand, was clearly a parody—poking fun at Barbie rather than trying to pass off the song as a Mattel product.

Legally, you can use a copyrighted work without the owner's permission if the use is for a "transformative" purpose, such as to comment upon, criticize, or parody the work. The idea behind the fair use defense is that ownership over expression must be balanced against our First Amendment right to free speech, which grants us the right to educate, criticize, and poke fun at other people's words and ideas. But the law in general, and intellectual property law in particular, is never that simple. For example, over the years, the courts have decided that *parody* is fair use but *satire* is not. What's the difference?

Here's how parody works: it takes an object, idea, or expression and uses it as the vehicle of a joke. Satire by contrast uses a humorous style or a character to make fun or expose the ironies of something else. For example, the Aqua song is a parody because it used the Barbie doll to comment directly about Barbie. Therefore, the court deemed it fair use. If, by contrast, Aqua used Barbie's image or name to comment on an unrelated matter, that would be satire. For example, if a video used Barbie to make fun of Ivanka Trump, the courts may find that use is satirical.

In the abstract, this line seems clear, but in reality, the line between parody and satire is blurry. For example, you may recall that during the 2008 presidential election, Sarah Palin was repeatedly referred to as *Caribou Barbie* in reference to her Alaskan roots and to poke fun at her conservative ultrafeminine manner. So would a skit of Palin as Caribou Barbie be fair use or an infringement of Mattel's trademark? In one seminal case, an author calling himself "Dr. Juice" wrote a book called *The Cat NOT in the Hat!*, subtitled *A Parody*.³ Despite the attempt at self-categorization, the court held the book was satire, not parody. The book heavily mimicked *The Cat in the Hat* by Dr. Seuss but used the original, signature Seussian style for a poetic rendition of the O. J. Simpson murder case:

One knife?/Two knife?/Red knife/Dead wife

Could Dr. Juice write these verses without infringing upon Dr. Seuss's intellectual property? The Ninth Circuit Court of Appeals found he could not. Unlike Aqua, whose Barbie song made fun of Barbie herself, Dr. Juice criticized the O. J. Simpson case, and not Dr. Seuss. The author's use of Seuss's iconic brand was, to use the reasoning of the court, "pure shtick." So copyright law and trademark law as they stand allow new expressions that make fun of original works, but it denies borrowing that original work to ridicule other unrelated issues.

Star Wars Fan Porn—Titillating Geeks Since 1977

Mattel has a kindred spirit in its zealous fight against parody: Disney. So it should have learned from Disney's losing battles, but it didn't. Imagine a pornographic, animated film called *Star Ballz*, completely based on the characters and storyline of *Star Wars*—would that stand up to fair use analysis? LucasFilm, now owned by Disney, is, like Mattel, notoriously protective of its intellectual property. In 1985, LucasFilm even sued the United States government, when President Reagan launched the military Strategic Defense Initiative (SDI), developing space-based laser missiles and battle stations, which he nicknamed *Star Wars*.⁴ The court was unmoved by LucasFilm's trademark infringement claim. The court explained that "when politicians, newspapers and the public generally use the phrase *Star Wars* for convenience, in parody or descriptively to further a communication of their views on SDI," LucasFilm cannot stop them.

Like Mattel, LucasFilm registers every possible trademark related to its intellectual property, slowly removing pieces of expression from the public domain. This is the primary concern with overly protecting intellectual property: that too much language, knowledge, and creative juices will be carved out and be deemed private property, making it impossible for the next artists, inventors, and competitors

to continue to create and innovate. In 2009, LucasFilm registered the term "droid." Notwithstanding that *droid* is just short for *android*, which is part of the English language, and the fact that the word *droid* first appeared back in 1952 in a short science fiction story titled "Robots of the World! Arise!" that had nothing to do with the *Star Wars* conglomerate, LucasFilm jealously guarded the phrase, threatening to sue Verizon Wireless after it dubbed its new Android phones "Droid." Verizon, perhaps because it too is a corporate giant which enjoys strong intellectual property protections, decided not to risk a lawsuit on grounds of principle. The two titans quickly settled the dispute, and Verizon agreed to pay for using the name. Of course, this sort of arrangement can be mutually beneficial for the two corporate giants, as both benefit from the exclusivity that intellectual property law grants over language. But the bigger picture is this: as more intangibles—words, images, algorithms, art, and science—are carved out of the public domain, it becomes much harder for newcomers, and anyone else not already strong and wealthy, to enter, create, innovate, and compete.

Now, if you've never seen *Star Ballz*, here's how one reviewer on Amazon described it: "crude, shoddily made, and full of groan-inducing sexual humor. I've seen worse, though." The porn-lite animated film naturally makes ample use of the obviously phallic nature of light sabers, and digs into the testosterone-driven environment of *Star Wars* by also turning stormtroopers into phalluses. Darth Vader, for no evident reason, has Mickey Mouse ears. Perhaps *Star Ballz*'s makers were poking fun at the Disney conglomerate at large, contrasting cuteness with evil. Perhaps, more fundamentally, they anticipated legal action taken by the Disney/LucasFilm empire, which alongside Mattel is one of the most infamous hoarders of intellectual property. After all, Mickey Mouse himself triggered Congress to pass the Copyright Extension Act.

LucasFilm indeed sued *Star Ballz* and, like Mattel, zealously overreached and lost. Like many Barbie parodies, the movie directly con-

versed with the artistic work it mimicked, making it a parody and squarely within the fair use defense. The court ruled in favor of *Star Ballz*, with San Francisco based judge Claudia Wilken writing, "The *Star Wars* films are so famous that it is extremely unlikely that consumers would believe that *Star Ballz* is associated with *Star Wars* or LucasFilm."⁵ An amusing remix of iconic cultural themes that avoid consumer confusion is what fair use is all about.

After LucasFilm lost it issued a statement: "We feel strongly that the law does not allow for parody to be a defense to a pornographic use of someone else's intellectual property, especially when that use is directed to children." The *Star Ballz* creators then sued LucasFilm for libel, claiming that the spokespeople for *Star Wars* defamed them in suggesting that the animated erotica was "pornography directed at children."⁶ More than anything, it was pornography directed at adult, tech nerds. As one devoted fan wrote excitedly about the court's decision to shield *Star Ballz* from the wrath of George Lucas: "To this day, *Star Wars* porn remains a safe, legally-protected way to titillate nerds and separate them from the money they earn at their systems engineer jobs."⁷ Without having any direct knowledge on the matter, I am told the art of spoofing famous sci-fi in porn is alive and well. Since *Star Ballz*, there have been at least half a dozen more adult movies made, including *Private Gold 81: Porn Wars—Episode 1* and the popular series *This Ain't Star Trek XXX*.

Fan porn notwithstanding, the distinction between parody and cashing in on a recognized brand remains deeply contested. Fair use is an amorphous defense. Like many other distinctions delineating the boundaries of intellectual property protection, the fair use defense draws notoriously unpredictable and vague lines. Therefore, when the courts decide on fair use, it is often understood as a heroic act which significantly shapes the future of cultural production. In protecting Aqua's *Barbie Girl* song from Mattel, Chief Judge Alex Kozinski of the Ninth Circuit Court of Appeals, who we will soon learn is America's champion of free culture, began his decision

with this memorable line: "If this were a sci-fi melodrama, it might be called Speechzilla meets Trademark Kong."⁸ Mattel is the King Kong of intellectual property, intent on devouring the small artists and inventors who challenge his dominance. Speechzilla is the story's savior—Judge Alex Kozinski.

As we shall soon see, Judge Kozinski has a raunchy sense of humor, and over lunch he gave me an example of a parody he liked. He and his wife, an attorney who, among many other things, has represented the *Peanuts* conglomerate as her client, were in Las Vegas. When they were out shopping, they saw a T-shirt of Lucy van Pelt pregnant, saying, "Damn you, Charlie Brown!" Kozinski doesn't believe that kind of poking fun hurts the brand. He also happens to think it's funny.

Adjudicating the Aqua case in his courtroom in Pasadena, California, Kozinski needed to elucidate Barbie's meaning and figure out what parodying her would mean. He described Barbie's cultural role this way:

Barbie has been labeled both the ideal American woman and a bimbo. She has survived attacks both psychic (from feminists critical of her fictitious figure) and physical (more than 500 professional makeovers). She remains a symbol of American girlhood, a public figure who graces the aisles of toy stores throughout the country and beyond. With Barbie, Mattel created not just a toy but a cultural icon. With fame often comes unwanted attention.

Before Judge Kozinski's Aqua decision, other judges had employed a stricter test of fair use. A parody was permitted only to use the minimum amount of protected material necessary to relay its message or idea. Kozinski diverged from precedent when he applied a more balanced approach. He explained that the song's repetition of the words *Barbie* and *Ken* were necessary for the purpose of parody. Even with the repetition, he said, no consumer is likely to think Mattel sponsored the song. (Funnily, Mattel's sponsoring of the song became

something of an urban legend when I was a kid.) He wrote, "Aqua is a Danish band that has, as yet, only dreamed of attaining Barbie-like status." Aqua had the right to sing its song.

Judge Kozinski was also unmoved by Mattel's claim that the song sullied its prom queen's clean image. Mattel's argument that the song was inappropriate for young girls and therefore tarnished Barbie's reputation is built upon the controversial theory of "dilution," which has gained some power in the past few decades. It expands trademark protection beyond the original scope of preventing consumer confusion, into the realm of protecting the strength and integrity of the brand. Dilution is another way to say that a company wants to control the way a brand is presented to the public. Since trademark law's original purpose was to protect consumers from fraud or deception, with producers trying to pass off their product as associated with a leading brand, it is hard to justify any legal protection when there is no likelihood of confusion. In protecting Barbie's image and soul, Mattel aggressively pushed for the more expansive protection against any risk of diluting or tarnishing the brand. Mattel had won such claims in the past. For example, it managed to shutter an independent magazine for Barbie collectors based on a dilution claim. In a victorious statement then, Mattel explained it would not allow third parties to present unflattering public images of Barbie: "What I do, first and foremost," vowed the CEO at the time, "is protect Barbie."⁹

Judge Kozinski agreed that Aqua's use of Barbie's name was potentially dilutive because the word *Barbie* now kindled thoughts of the popular song as well as the doll herself. However, he explained that when the use of a brand involves a social meaning, such as criticism and parody, the right to free speech outweighs a risk of dilution. The fact that the song lampoons Barbie's perfectly clean image was precisely what made it fair use. As Judge Kozinski closed his opinion, he had a final piece of advice: "The parties are advised to chill."¹⁰ Mattel did not take his advice.

When culture is freed, parodies upon parodies arise. To mark

Australia Day, a group of Aussies, swelling with national pride, uploaded on YouTube a parody of *Barbie Girl*, singing “Aussie Barbie, let’s go party. . . . Be my mate as the chops marinate. . . . Marination leads to my salvation.”¹¹ In 2015, another parody of the parody, parody squared if you will, featured a viral vlogger called #SelfieGirl. In the video, #SelfieGirl, obsessed with all things social media, sings, “I’m a selfie girl, in a selfie world, making my face known, alone with my cellphone.”¹² And in law school parodies, where the largest bar preparation company is called Barbri, we law professors repeatedly sit through spoofs of “I’m a Barbri girl in a Barbri world.” Fair use has that quality of cultural remixing: Aqua’s victory was not only for the band’s own creativity, but also a win for the continuous expansion of cultural production.

The original *Barbie Girl* song helped sell over eight million copies of Aqua’s album. In 2003, it even received the questionable distinction of being ranked by *Blender* magazine and VH1 as among the “most awesomely bad” songs ever created. That same year, Mattel bought the rights to the song from Aqua to use in its marketing campaign, changing the lyrics slightly but keeping most of it, including the line “*Life in plastic, it’s fantastic,*” intact. Mattel’s spokesperson explained, “The beauty of Barbie is that she can kiss and make up.”¹³ In the case of a single song, that may be true, but apparently not in the case of Thomas Forsythe’s art.

Barbie in a Blender and Other Fetishes

In 1997, the same year that Aqua launched *Barbie Girl*, Forsythe, a self-taught Utah artist, developed a series of seventy-eight photographs called *Food Chain Barbie*. His work depicted nude images of Barbie dolls juxtaposed against kitchen appliances and food.¹⁴ For example, *Malted Barbie* was a nude Barbie in a malt machine and *Barbie Enchiladas* showed four Barbies wrapped in tortillas and covered with salsa.

Five Moon Salutes showed five Barbies bent over to expose their perfect, and perfectly naked, behinds. Other titles included *Baked Barbie*, *Barbie a Trois*, *Barbie in a Blender*, and *Bargaritaville*. Initially, Forsythe's series received little attention and limited commercial success. The *Food Chain Barbie* series earned him less than four thousand dollars. But that didn't stop Mattel from filing a lawsuit. Mattel even subpoenaed a museum that displayed the collection, which resulted in sanctions against Mattel for overreaching and using intimidation tactics. The lawsuit over Forsythe's photography lasted five years. Forsythe was lucky: The American Civil Liberties Union (ACLU) decided to take up his case as an exemplary defense of free speech.

The Southern California chapter searched for an experienced copyright defense attorney to represent Forsythe pro bono. The problem was that going against Mattel, and its long-term law firm Quinn Emanuel, was not something that most attorneys are eager to do. "They are bullies represented by bullies," one prominent attorney told me. Another described Quinn this way: "For years it has engaged in scorched-earth representation of Mattel. A message that anytime anyone dares to challenge the corporation, the wrath of God will come down on them. It's as though they have a sign on the door: 'We're Mattel's permanent attack dogs.'" The ACLU of Southern California could not find a single law firm that would take on the case, and the branch had to turn to the ACLU Northern California chapter for help. In San Francisco, the ACLU secured one of the nation's most prominent intellectual property trial attorneys, Annette Hurst. She took on Forsythe's case pro bono and a decade later would become one of the key litigators on MGA's defense team when Mattel sued it for Bratz.

Forsythe described his artistic expression as "a pictorial antidote to the powerful cultural forces persuading us to buy the impossible beauty myth."¹⁵ Mattel saw only copyright and trademark infringement. As in the Aqua case, the trademark claim refers to the use of the word *Barbie* itself. Mattel further claimed that the image of

Barbie, her face, her body, her expression, and her look are all protected under copyright law. Mattel argued that even if an artist buys a Barbie doll and uses it in his art, he can be liable for copyright infringement. At trial, Forsythe explained he chose Barbie as the subject of his art because "Barbie is the most enduring of those products that feed on the insecurities of our beauty and perfection-obsessed consumer culture."¹⁶ Forsythe viewed his art as a social statement against this plasticization and crass consumerism. He wished to flip Barbie's message by displaying carefully positioned, nude, and sometimes frazzled looking Barbies in ridiculous, as well as dangerous, situations. As with most artists, he wanted to offer the public something new that builds upon, as well as rejects, the old. He wanted to create a different set of associations and context for the world's most famous doll.

Once again, Mattel's efforts to quash creative expression with a lawsuit were foiled when the court held that Forsythe's use of Mattel's copyrighted doll in the Food Chain Barbie photographs was fair use. Like the Aqua song, Forsythe was parodying the image of Barbie. The court understood the photographs as a critical commentary of Barbie's influence on gender roles and the position of women in society. As such, the public's interest in free expression must outweigh potential confusion about Mattel's sponsorship of the work: "It is not in the public's interest to allow Mattel complete control over the kinds of artistic works that use Barbie as a reference for criticism and comment." Calling the lawsuit "groundless," "objectively unreasonable," and "frivolous," the Los Angeles-based judge Ronald Lew ordered Mattel to pay Forsythe over two million dollars for the fees and costs he incurred during the long dispute. Ironically, the lawsuit gave Forsythe street credit and increased his commercial value: if a company as large as Mattel was interested in his work, then the show must be worth seeing. In five short years, Forsythe was transformed from anonymous artist into a creative photographer who survived Mattel's attack.

In 2005, Mattel started a lawsuit against a Canadian leather,

rubber-, and fetishwear store called Barbie's Shop in Calgary, Canada. Barbie's Shop advertised itself as selling custom clothes "for bad boys and girls." The irony, of course, is that Mattel was suing an adult store similar to those that sold the very first Bild Lilli. But beyond that, Mattel was asserting that no one other than it could use the doll queen's name, even if the owner of the shop, Barbara Anderson-Walley, went by the nickname Barbie. The middle-aged Canadian said wryly, "I was around before Barbie was—maybe I should sue them over the name." Nickname or not, Mattel's spokeswoman coldly stated: "We own the Barbie name, clothing and dolls. Even if your name happens to be Tommy, Ralph, or Barbie, in some areas that's already a trademark." Therefore, the small Canadian entrepreneurial venture was, according to Mattel, "a simple case of Internet piracy." When a New York court dismissed the case for lack of jurisdiction over a Canadian business, Anderson-Walley was elated. "As a little guy with no money, I thought I didn't have a hope," she confessed. The Calgary community at large was also delighted by the victory. Their cornerstone fetish market shop, which catered particularly to the LGBT community, survived an American conglomerate's intimidation tactics. "It's a welcome turn of events that a small local business is able to hold their own against a corporate giant," wrote the local LGBT magazine *GayCalgary*.

Next on Mattel's docket was Dungeon Barbie. In 2001, Mattel was shocked to see a side of Barbie that was even darker than Forsythe's *Barbie in a Blender*. British artist Susanne Pitt placed the head of Barbie onto big-breasted bodies clothed in rubber bondage costumes, and positioned her as mistress of an S&M dungeon.¹⁷ Pitt also introduced some anatomical corrections. She added nipples and a vagina to Barbie and a plastic penis to Ken. She then placed the dolls in sexual positions.¹⁸ She called her hero Lily the Diva Dominatrix, a protagonist in a tale of sexual slavery and torture. The submissive participant in the sexual exploit was another reconfigured Barbie. Mattel was not amused. It filed a suit for copyright infringement. Pitt

defended herself by drawing attention to Barbie being the reincarnation of Lilli, a European postwar sex doll. Pitt said she wanted to transport Barbie's hidden history into a "modern erotic context"—from Lilli to Barbie and back to Lily. What was the court to do with such a compelling artistic vision? Again, it turned to the concept of fair use.

Both in trademark and copyright law, fair use operates as an affirmative defense, meaning that defendants have to prove their position. The assumption is that any use is infringement and illegal, but the defendant—the artist, musician, or competitor being sued—can raise fair use as an exception. Then the alleged infringer has to convince the court that it was "fair" to borrow words or expressions owned by someone else. The analysis of fair use is one of those multifactored legal standards that weighs and balances the particular facts of the dispute at hand. This means that parties have an incredibly difficult time predicting what will be considered fair.

One factor is whether the new artistic work is "transformative," creating something new and original rather than merely supplanting the copyrighted piece and imitating it in mundane ways. In the case of the *Dungeon Doll*, the court reasoned that the anatomical changes and Pitt's costumes—"Lederhosen-style" Bavarian bondage dress with rubber helmets and PVC masks—were indeed transformative. *Dominatrix Barbie* was a substantial departure from Barbie's official persona as a child's plaything. The court conceded that Pitt's case would have been a losing one if, for example, she had simply dressed up Barbie dolls in cheerleader outfits. Like with Forsythe's and Aqua's artistic expressions, Pitt's work was understood by the court as a parody because Pitt was commenting on, and in turn subverting, what Mattel tried to maintain as Barbie's true nature.¹⁹

A related aspect in analyzing a fair use defense is whether the new work will compete with the older one. In Pitt's case, the judge cunningly noted that, to the best of her knowledge, there is no Mattel line of S&M Barbies (an underserved market, if you will). She saw no

danger of Dungeon Dolls supplanting the demand for Barbie dolls in the children's toy market.

Barbie bondage seems a natural step forward in the path of artistic commentary on Barbie. A woman chained was a pervasive metaphor in the late nineteenth-century suffrage movement and early twentieth-century feminism. Wonder Woman, another American icon, the greatest of female superheroes (dark haired but, like Barbie, busty with an impossibly tiny waist), is often depicted roped and chained and freeing herself from those bonds. Not coincidentally, Wonder Woman's creator William Marston was in his private life a bondage fetishist, a polyamorist, and a women's rights champion. The fair use of Barbie in bondage is a good reminder of why we protect parody against the bonds of copyright. Freeing culture is inextricably linked to freeing the mind and society from lingering inequities.

Although Mattel lost in a sequence of lawsuits against artists, even unsuccessful intellectual property litigation can chill free expression. All litigation is costly, and litigation against the world's largest toy maker magnifies these costs. Fortunately, Forsythe, Aqua, Anderson-Walley, and Pitt were able to sustain the costs and time in defending their art against Mattel. Some of them were lucky to have wealthy organizations, which supported their fight to keep culture free, sponsor their representation. Still, in the legal battlefield, even winners pay a great deal. American law doesn't ordinarily provide fee shifting—that is, it doesn't require the losing party to pay the winning party's litigation costs. There are some exceptions. The copyright and trademark statutes allow rewarding fees when the claims are abusive. This explains why Forsythe was granted two million dollars for defending himself against Mattel's lawsuit.

Mattel relies on the fact that court scare tactics can be effective even when a litigant's claims are rather weak. For example, a few years before the Pitt case, Mattel sued another artist, Paul Hansen, who lived in San Francisco. Hansen bought Barbie dolls and then

transformed them using accessories, such as pint-sized plastic babies, miniature rhinestone jewelry, and Lilliputian liquor bottles. Hansen's "Trailer Trash Barbie," with black roots peeking under her platinum blonde hair, was smoking a cigarette while carrying a baby on her hip. A speech bubble accompanied the doll's packaging, "My Daddy Swears I'm the Best Kisser in the County." Hansen named other dolls "Drag Queen Barbie," "Hooker Barbie," and "Big Dyke Barbie." The dolls gained some popularity as a counterculture cult item when Madonna bought a couple for her private collection. Mattel attacked. It sued Hansen, slapping him with \$1.2 billion in damages for copyright infringement, even though Hansen had made a rather meager profit selling his modified Barbie dolls.²⁰ A young attorney took on the case's defense pro bono. She stood at the defendant's table alone against five Mattel attorneys—"white men with no facial hair" as her colleague described the scene to me. When Mattel's attorneys began the hearing by detailing what the case was about, that second year associate cut them off and said, "Your Honor, we all know what this case is about." She looked straight at the team of Mattel's lawyers and said, "Your client has no sense of humor, that's what this case is about." The case was settled that day, with Mattel agreeing to forgo their claims of monetary damages in return for a promise that Hansen would not make any more of his cult Barbie dolls.

There are also special laws called anti-SLAPP (Strategic Lawsuits Against Public Participation), which provide rewards to defendants who are sued solely for the purpose of intimidation and silencing. The New York Supreme Court condemns SLAPPs, saying: "Short of a gun to the head, a greater threat to First Amendment expression can scarcely be imagined." In practice, fee-shifting and anti-SLAPP laws are still limited in their reach. They are certainly insufficient for offsetting the great personal and financial risks taken by individuals when a corporate giant attacks. For every artist or production company willing to take the fight to court, Mattel hopes to intimidate the multitude of ordinary artists and fans without the financial and

emotional means or support to endure a legal battle against them. In reality, many artists would rather settle than fight for justice.

Indeed, not all artists Mattel has sued have been able to stand their ground until the bitter end. This is especially true in infringement cases because proving fair use is wholly unpredictable. The cases that go all the way to trial are merely the tip of the iceberg. Mattel sends out dozens of cease-and-desist letters to those all over the world who dare play with Barbie's image. Some jurisdictions are more willing than others to support Mattel's crusade. For example, Mattel sued Argentinian filmmaker Albertina Carri, who created a short film called *Barbie También Puede Estar Triste* (*Barbie Gets Sad Too*) showing Ken as a sex-obsessed businessman and Barbie as a sad housewife who finds comfort in the arms of the maid Teresa. In 2002, Mexico City's Urban-Fest festival planned a screening, but Mattel convinced a Mexican court to issue an order banning the film from being shown because the sexual content would threaten Barbie's image. The parody shielding Barbie dolls in bondage failed to protect *Barbie Gets Sad Too* in the face of zealous Mattel lawyering in Mexico.

In their book *Reclaiming Fair Use*, intellectual property scholars Patricia Aufderheide and Peter Jaszi caution that if we, as a society, don't clarify the legal doctrine of fair use and make it less risky for artists to engage in routine acts of cultural expression, we stand to lose a great deal of creativity and innovation. They warn that fair use should not require heroic courage or be the privileged rare defense of established artists, First Amendment advocates, and resourceful competitors, all of whom can risk a lengthy trial to affirm their right to free speech. Rather, fair use must be something on which anyone can rely. Free speech should be a right that all of us, from elementary schoolchildren to amateur artists, can fearlessly exercise.²¹

The most valuable examples of fair use are those that remix cultural icons and turn their mainstream meanings on their head. Feminist writers often write of a desire to connect women and girls,

pointing to a disturbing gulf separating the women leading the fight for equality and the supposed beneficiaries: girls themselves. A disconnect between those who want to “liberate”—for lack of a less loaded term—and those who are captivated and confined by the chains of gender roles. Barbie, more than any other symbol, stands as the lead icon in this battle. The modern feminists speak of a Barbiphobia.²² But rather than fear Barbie as an evil symbol of feminine stereotypes, why not recognize her strength in shaping girls’ imaginations? Why not use the fact that she means so many different things, and yet at the same time means nothing—that she is a blank slate on which to shape, play, tear apart, and put back together? Barbie can lend herself to social commentary about sex, race, consumerism, corporations, and markets. In their 2000 *Manifesta*, feminist writers Jennifer Baumgardner and Amy Richards wrote that Barbie helped generations of girls-turned-women embrace their sexuality: “Barbie, who spends most of her time naked and shorn, will always be a way for young girls to imagine fucking in numerous positions.” Amen.

A recent example playing with Barbie’s sexual, or asexual, nature and her iconic wholesomeness is the art of photographer Sarah Haney, who shot a series of black-and-white photos of Barbie in sexual positions. Haney acknowledged the paradox of parodying a fantasy. Her photography recognizes that Barbie already embodied a range of contradictions: Barbie is the all-American Madonna whore.²³ Haney was drawn to the contrast illuminated when Barbie was placed in compromising positions, playing on her core clean, perfect image. Haney explains her take on Barbie this way: “she’s marketed as this wholesome, all-American Madonna to little girls, but if you look at her as an adult, particularly at her body and clothes, she’s a pretty clear embodiment of the whore.” Haney says that as a child, she was always bothered by Barbie’s perpetual smile. Haney recalls that growing up, she put Barbie through any number of tragedies but “no matter what befell her, she kept that fixed little smirk.” As an adult, Haney decided

to explore what Barbie might be hiding behind that smirk—behind the façade of perfection. Haney reasons, “After all, how great could life really be for a woman who clearly has an eating disorder, an addiction to plastic surgery, and nothing between her ears?”²⁴ By creating these photos of Barbie and Ken exploring their domestic selves, Haney portrays, in her own words, “the dark side of life in the Dream House: Barbie’s obsession with her body, Ken’s quest for sexual gratifications, all the dirty little secrets.”

There is no art without exchange; no meaning without interpretation. Why are artists so intent on deforming Barbie, tearing her apart, positioning her in sexually compromising positions, casting her in sadomasochistic roles, and subjecting her to acts of cruelty and torture? Ruth Handler claimed, “I designed Barbie with a blank face, so that the child could project her own dreams of the future onto Barbie.”²⁵ The blank slate that Barbie presents allows not only children, but fans, critics, and artists of all ages to put meaning on Barbie. Barbie parodies are not transformative in the sense they transform Barbie’s singular meaning into something entirely new; say from a naïve and asexual all-American girl to a Bavarian dominatrix. Barbie herself is already a parody. A group of adult men, sequestered behind closed boardroom doors, keep the fantasy of Barbie alive: our society’s dreams of plastic perfection. Those same men market her as a children’s toy. Thus, Barbie, in her very essence, embodies a double nature—puritanism molded into hypersexualization. As feminist writer Jeannie Thomas observed, “The bitch-goddess identity has been with Barbie since her inception.”

Barbie thus falls on both sides of the coin: she is sexual and asexual, wholesome and sullied, the misogynistic ideal of a feminist, the plastic pink of girls. If we, as a society, lock up iconic images and only give the artists the key when their work embodies an entirely fresh new break from the icon’s existing essence, we might side with Mattel that no one other than that company can play with Barbie’s meanings. That kind of mindset and accompanying laws would severely

limit cultural expression and hamper opportunities for social change and progress.

When we look closely at intellectual property, we discover that most often corporations—rather than creators—are the primary benefactors. The idyllic image of an artist collecting royalties to support his later work is now, largely, a myth. This modern phenomenon has led many scholars to question whether the original intent of the Constitution, which gave Congress the power to grant a monopoly ownership over ideas in order to motivate artists and inventors, is being subverted. Is intellectual property law as it stands today promoting progress in arts and sciences? Or is it hindering it by blocking too many new ventures and innovations? The legacy of building on culture, adapting, developing, and remixing it, is too often crushed by the contemporary expansion of intellectual property.

Mattel does not allow others to commit the same infractions on it as Mattel inflicted on Lilli's creators. As it established its dominance over the industry, Mattel sought to freeze the remake. Mattel certainly would not allow Carter Bryant to follow his own toy dreams if they endangered Barbie. The poet Tagore wrote "All humanity's greatest is mine." Having litigated against many artists and lost, Mattel might have learned the lesson that it cannot control culture and box up creativity. Back in the corporate boardroom, Mattel's leadership should have also realized that attempts to revive the aging queen of dolls by launching lawsuits, spying on competitors, and intimidating former employees were not the path to quelling Barbie's competition.