M E M O R A N D U M[*]

Re: Case Management: Mattel v. MGA Entertainment (Bratz litigation)

The Bratz matter is scheduled for trial in 9 months. The parties have been locked in a bitter and costly dispute over ownership of the Bratz line of dolls, breach of contract, copyright infringement, and related issues for six years. The first trial was handled by Judge Stephen Larson, who has since resigned from the bench. After the result of that first trial was overturned by the Ninth Circuit, the case was assigned to you. You have planned a case management conference for Thursday, May 18th at 10:30 am in Berkeley, California to develop a game plan for the upcoming trial.

Background Information

Mattel is the largest toy company in the world. It manufactures and distributes Fisher Price toys, Barbie dolls, Hot Wheels and Matchbox cars, Masters of the Universe, American Girl dolls, and a variety of board games. Its Barbie doll line, launched in 1959, has been the best selling doll product in the United States and worldwide for decades.

MGA Entertainment (short for Micro-Games America) was founded in 1979 by Isaac Larian, then a young entrepreneur who had emigrated from Iran and studied civil engineering. During much of its history, MGA focused on the importation of toy products, but failed to achieve sustained financial success apart from a few short-lived novelty products. That all changed in 2001 with the introduction of a multi-cultural/multi-ethnic line of fashion dolls under the trade name "Bratz." The four original dolls – Cloe, Yasmin, Jade, Sasha – featured large heads, large almond-shaped eyes, pouty glossy lips, and large feet.

Although the dolls were criticized by parents as being risque and over-sexualized, their sales took off in the Christmas 2001 holiday season. Mattel immediately noticed a significant dent in its Barbie sales, especially in the critical 8-12 year old "tween" market.

Mattel responded in 2003 by introducing its "Flavas" line of multi-ethnic, urban, hip hop style fashion dolls with "bling bling" jewelry and stick-on tattoos. Flavas were criticized in the press for being stereotypical, bad role models, and a misrepresentation of hip hop culture. They were also disparaged as rip-offs of MGA's Bratz line. Isaac Larian was quoted in the Wall Street Journal at the time saying that he was not worried by Mattel's introduction of Flavas: "The

[*] This case file is based on Mattel v. MGA Entertainment. The second trial ended in April 2011. Because the jury found that Carter Bryant developed the key drawings during a gap in his employment at Mattel, the copyright issues became moot. This training exercise puts you in the position of having to manage the copyright aspects of the case prior to trial. Some of the facts and documents of that litigation have been altered for pedagogical purposes of this judicial training exercise (and to avoid your having to review thousands of pages of material).

only thing that's missing is a cocaine vial. You think of Mattel, you think of Barbie and you think of sweetness. ... This is like 'gangster' Barbie, and I think it's going to backfire."

Flavas failed in the marketplace and Mattel discontinued marketing the product line. In an ironic twist, rumors had been circulating in the fashion doll industry that the inspiration and source for the Bratz line came from Carter Bryant, a former Mattel employee, and that he had developed the Bratz idea while employed in doll fashions at Mattel. Bryant worked for Mattel from September 1995 through April 1998. After an 8 month hiatus, Bryant returned to Mattel at the beginning of 1999. He departed in October 2000 for MGA. MGA's Bratz line emerged a short time later.

Mattel asserted in its complaint that Bryant came up with the idea and sketches for Bratz while working as its employee (and governed by its assignment agreement). Bryant worked in Mattel's Barbie Collectibles division during 1999 and 2000. Bryant admitted to assembling a Bratz prototype while at Mattel.

Mattel brought suit for breach of contract and copyright infringement against Bryant. It also sued MGA and Larian for copyright infringement, intentional interference with contract, and declaratory relief (including acquisition of the Bratz trademark). By early 2008, the Bratz line had achieved a large share of the fashion doll marketplace. Barbie revenues fell from a peak of $1.8 billion in 2002 to below $1.5 billion in 2007. MGA's Bratz revenues exceeded $2 billion in 2007.

Based on summary judgment motions presented in early 2008, Judge Larson interpreted Carter Bryant's employment agreement with Mattel to require assignment of ideas relating to dolls to Mattel if in fact Bryant conceived those ideas during his period of Mattel employment. The trial took place in summer 2008. Phase I focused on when Bryant conceived the Bratz doll line. Phase II focused on copyright infringement and the tort causes of action. Mattel prevailed on essentially all liability issues, but the jury awarded only $10 million for copyright damages. (Mattel had sought $2.4 billion.) Mattel also received a $90 million verdict on the tort claims. In December 2008, Judge Larson ordered a constructive trust for the Bratz trademark. By that order, Mattel essentially owned the Bratz line.

MGA sought expedited appeal. The Court of Appeals stayed the judgment – essentially allowing MGA to remain in operation, but with a dark cloud over its operations – pending appeal. Oral argument was heard in December 2009. In July 2010, the Ninth Circuit vacated the district court's decision and remanded for a new trial. The Ninth Circuit decision is included in this packet.

Assignment

The goal for the May 26th case management conference will be to think through a pre-trial order intended to structure resolution of the copyright liability aspects of the case. In particular, you will need to determine the following questions:

1. How should the jury be instructed regarding the copyright questions at issue?
    - Who decides what aspects of the Bryant sketches are protectable under copyright law – the judge or the jury? Think in particular about the following issues:
        - Originality I – The Bratz drawings are based to a substantial extent on the human form. To what extent should elements found in nature be excluded from protection? Who should decide whether or not such features are protectable?
        - Originality II – Carter Bryant testified that he was inspired by various other works and images in popular culture. To what extent should features from those works be excluded from the scope of protection? Does this testimony raise credibility issues? Who should decide whether or not a feature (or compilation of features) found in the prior art is protectable?
        - Useful Article – To what extent is the cut of doll clothing and other fashion accessories functional and hence unprotectable?
        - Fair Use/Freedom of Expression – Who decides whether any aspects of the Bratz dolls are fair use?
        - Compilation – To what extent should copyright protection for compilations of unprotectable elements be protected?
        - Sculpt versus Dressed Doll – Should the court consider the protectability of the sculpt separately from the dressed (and face painted) doll?
        - Jury Interrogatories versus General Verdict Form – Should the jury be asked to resolve only discrete factual issues (such as what is the scope and content of the prior art), leaving to the court the ultimate copyright infringement issue (assuming that Mattel owns the drawings in question, do the dolls infringe – i.e., is there substantial similarity of protected expression)?

2. Depending on your analysis of question 1, would it be constructive/appropriate to conduct a separate hearing prior to the trial to determine the scope of protection for the drawings?
    - If so, what would be the evidentiary standards used?

3. To what extent can experts address the copyright issues in the case?
    - Should legal experts be allowed to testify regarding copyright infringement analysis?

BRATZ CASE FILE
Background Materials

- First Amended Complaint
  - Exhibit A - Mattel Employee Confidential Information and Inventions Agreement (signed Jan. 4, 1999 by Carter Bryant)
  - Exhibit B - Mattel Conflict of Interest Questionnaire (signed Jan. 4, 199[9] by Carter Bryant)

- Deposition of Carter Bryant (February 22, 2007)
  - Exhibit CB1 - Meet the Bratz
  - Exhibit CB2 - Sculpt Drawing
  - Exhibit CB3 - Comparison Slides
  - Deposition Exhibit 27 (M0001604)

- Prior Art Materials (provided following Bryant deposition)

- Mattel, Inc. v. MGA Entertainment, Inc, 616 F.3d 904 (9th Cir. 2010)

- Nimmer on Copyright, selected sections

- California Law
  - California Labor & Professions Code § 2870 et seq.
  - California Civil Code § 3426 et seq. (Uniform Trade Secrets Act)
  - California Business & Professions Code § 16600 et seq.
  - California Business & Professions Code §17200

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MATTEL, INC., a Delaware corporation,

Plaintiff,

V.

MGA ENTERTAINMENT, INC., a California corporation; ISAAC LARIAN, an individual; CARTER BRYANT an individual

Defendants.

CASE NO. CV 04-9049 SGL (RNBx)
Consolidated With Case No. 04-9059 and Case No. 05-2727

MATTEL, INC.'S FIRST AMENDED COMPLAINT FOR:

1. COPYRIGHT INFRINGEMENT;
2. BREACH OF CONTRACT;
3. INTENTIONAL INTERFERENCE WITH CONTRACT;
4. CONVERION;
5. UNFAIR COMPETITION; AND
6. DECLARATORY RELIEF.

DEMAND FOR JURY TRIAL

Preliminary Statement

1. For years defendant MGA Entertainment, Inc. has engaged in a pattern of stealing and using Mattel, Inc.'s property and trade secrets. MGA's use of the stolen property and trade secrets caused and continues to cause significant harm to Mattel. MGA first stole "Bratz," a fashion doll, from Mattel, and then continued stealing Mattel's confidential and proprietary information to fuel MGA's growth.

2. Defendant Carter Bryant conceived, created and developed Bratz designs while he was employed by Mattel as a doll designer. He concealed his
Bratz work from Mattel and wrongfully sold Bratz to MGA that he was a Mattel employee. As MGA knows, Mattel owns the Bratz designs that Bryant made. As the rightful owner of those Bratz designs, Mattel has registered copyrights for them and seeks damages arising from MGA's repeated infringement of those copyrights.

Jurisdiction

3. This Court has federal question jurisdiction over this action pursuant to 28 U.S.C. § 1331, 17 U.S.C. § 101 *et seq.*, and 18 U.S.C. § 1964(c). This Court has supplemental jurisdiction over Mattel's state law claims pursuant to 28 U.S.C. § 1367.

Venue

4. Venue is proper in this District pursuant to 28 U.S.C. §§ 1391(b)-(d), 1391(f) and 1400(a) and 18 U.S.C. § 1965.

Parties

5. Mattel is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business in El Segundo, California.

6. Defendant MGA Entertainment, Inc. ("MGA") is a corporation organized and existing under the laws of the State of California, with its principal place of business in Van Nuys, California.

7. Defendant Carter Bryant ("Bryant") is an individual who formerly was employed by Mattel and has worked for and continues to work as a contactor for MGA. Mr. Bryant currently resides in the State of Missouri.

8. Mattel is informed and believes, and on that basis alleges, that defendant Larian is the President and CEO of MOA and an individual residing in the County of Los Angeles.

Factual Background

I. MATTEL

9. Mattel manufactures and markets toys, games, dolls and other consumer products. Harold Mattson and Eliot and Ruth Handler founded Mattel in 1945. The name of the company was created by incorporating the names of two of its founders, "MATT-son" and "EL-liot." Originating from the Handlers' garage in Southern California, the company greatly expanded its operations following World War II. During the next several decades, Mattel became famous for producing high-quality products at reasonable prices.

10. Critical to Mattel's success is its ability to design and develop new products. Mattel invests millions of dollars in product design and development and introduces hundreds of new products each year. Mattel maintains a 180,000 square-foot design center in El Segundo, California, that houses hundreds of designers, sculptors, painters and other artists, who work exclusively to create the products on which Mattel's business depends.

11. Mattel also has invested substantial amounts over many years to develop its business methods and practices, including, without limitation, its marketing and advertising research,

plans, methods and processes; its business research and forecasts; its costs, budgets, pricing, credit terms, deal terms and finances; its manufacturing, distribution, and sales methods and processes; and its inventory methods and processes. These represent a material part of the intellectual infrastructure of Mattel and are highly valuable.

II. MGA ENTERTAINMENT

12. Defendant MGA is also a toy manufacturer. MGA began as a consumer electronics business, but expanded into the toy business with licenses to sell handheld electronic games. By approximately late 1999 or early 2000, MGA developed a strategy to expand its business and compete directly with Mattel by launching a fashion doll line, so it stole a fashion doll that was owned by Mattel—"Bratz."

13. MGA intentionally stole not just specific Mattel property, such as Bratz designs, prototypes and related materials, but also a vast array of trade secrets and other confidential information that comprise Mattel's intellectual infrastructure. MGA's rapid growth was not organic, but rather was based upon its theft of Bratz. As a result, MGA lacked an appropriate intellectual infrastructure for a company of its size and it became increasingly difficult to manage. To deal with these problems, as detailed below, time and time again MGA simply stole Mattel's proprietary business methods, practices and information. This not only allowed MGA to avoid expending time, money and effort necessary to build a legitimate business, but also allowed MGA to unfairly compete against Mattel by taking Mattel's playbook.

III. MGA STEALS A NEW LINE OF FASHION DOLLS FROM MATTEL

14. Defendant Carter Bryant is a former Mattel employee. Bryant joined Mattel in September 1995, where he worked in Mattel's Design Center as a BARBIE product designer. In or about April 1998, Bryant resigned his position with Mattel and moved to Missouri to live with his parents. Late in 1998, Bryant applied to Mattel to be rehired. On January 4, 1999, he began working at Mattel in Mattel's Design Center, again as a product designer, for Mattel's BARBIE collectibles line.

15. Upon his return to Mattel in January 1999, Bryant executed an Employee Confidential Information and Inventions Agreement (the "Employment Agreement"), a true and correct copy of which is attached hereto as Exhibit A.

16. Pursuant to his Employment Agreement and as a condition of and in consideration for his employment, Bryant agreed, among other things, that he held a position of trust with Mattel, that the designs and inventions he created during his Mattel employment (with certain exceptions not relevant here) were owned by Mattel, and that he would be loyal to the company by agreeing not to assist or work for any competitor of Mattel while he was employed by Mattel.

17. On January 4, 1999, Bryant also executed Mattel's Conflict of Interest Questionnaire (the "Conflict Questionnaire"). Among other things, Bryant certified in the Conflict Questionnaire, that, other than as disclosed, be had not worked for any competitor of Mattel in the prior twelve months and had not engaged in any business venture or transaction involving a Mattel competitor that could be construed as a conflict of interest. A true and correct copy of the Conflict Questionnaire executed by Bryant is attached hereto as Exhibit B.

18. Pursuant to the Conflict Questionnaire, Bryant also agreed that he would immediately notify his supervisor of any change in his situation that would cause him to change any of the foregoing certifications. Despite this obligation, at no time did Bryant disclose to Mattel that he was engaging in any business venture or transaction with MGA or any other Mattel competitor.

19. More specifically, while Bryant was employed by Mattel, Bryant and other defendants misappropriated and misused Mattel property and Mattel resources for the benefit of Bryant and MGA. Such acts included, but are not limited to, the following:

a. using his exposure to Mattel development programs to create the concept, design and name of Bratz;
b. using Mattel resources, and while employed by Mattel, Bryant worked by himself and with other Mattel employees and contractors to design and develop Bratz, including without limitation by creating drawings and three-dimensional models of Bratz dolls, and fashion designs for the dolls' associated clothing and accessories; and
c. using Mattel resources, and while employed by Mattel, Bryant took steps to assist MGA to produce Bratz dolls.

20. During the time that he was employed by Mattel and thereafter, Bryant concealed these actions from Mattel, including by failing to notify his supervisor of the conflict of interest he created when he began working on MGA's behalf and when he began receiving payments from MGA. Bryant additionally enlisted other Mattel employees to perform work on Bratz during the time he was employed by Mattel and, by all indications, in at least some cases led them to believe that they were performing work on a project for Mattel.

21. Bryant also made affirmative misrepresentations to Mattel management and employees immediately before his departure from Mattel on October 20, 2000. For example, during Bryant's exit interview in October 2000, he told the Mattel Human Resources representative who conducted the interview that he was leaving Mattel to engage in non-competitive work. During his last few weeks at Mattel, Bryant told his co-workers and supervisors that he was going to leave Mattel for "non-competitive" pursuits. Bryant's representations to his supervisors and his co-workers were false. Bryant knew at the time that those representations were false and made those false statements to conceal from Mattel the fact that he was already working with MGA and that he had contracted with MGA to assign Bratz works to MGA and to provide design and development services to MGA, a Mattel competitor.

22. As a result of the efforts of Bryant and other Mattel employees working on Bratz (which were done without Mattel's knowledge), the Bratz dolls had been designed and were far along in development during the time that Bryant was employed by Mattel and prior to the time that Bryant left Mattel on October 20, 2000. Not only did Bryant create and develop designs for the dolls as well as other aspects of the products such as theft fashion accessories during the time he was employed by Mattel, but MGA showed finished Bratz prototypes and/or product to both focus groups and retailers in November 2000, less than three weeks after Bryant left Mattel. Bryant, Larian and others at MGA arranged these meetings and focus groups while Bryant was still employed by Mattel.

23. Bryant and MGA employees also repeatedly and continuously - communicated with employees of MGA Entertainment Limited on subjects such as design and manufacturing of Bratz.

24. Bratz also were shown to retailers at the Hong Kong Toy Fair in January 2001. By early 2001, only a few months after Bryant resigned from Mattel, MGA began having the Bratz fashion doll line and accessories manufactured and then, shortly thereafter, began selling them at retail.

25. Since 2001, MGA has distributed and sold Bratz and Bratz related products throughout the world. Mattel is informed and believes that MGA also licenses Bratz to third parties. Mattel is also informed and believes that MGA derives annual revenue from its sales and licenses of Bratz in excess of $500 million. Mattel is further informed and believes that MGA and Bryant claim current ownership of Bratz, and all copyrights and copyright registrations attendant thereto. MGA continues to market, sell and license Bratz and has expressed an intention to continue to do so.

26. Mattel is informed and believes that MGA and Larian encouraged, aided and financed Bryant to develop Bratz, knowing full well that Bryant was still employed by Mattel at the time and that by performing such work, including design-related work, for his own benefit and/or the benefit of MGA, Bryant would be, and was, in breach of his contractual, statutory and common law duties to Mattel. Mattel is also informed and believes that MGA proceeded to aid and encourage Bryant to develop Bratz with the goal of obtaining a valuable fashion doll line that would be commercially successful in the competitive, multi-billion dollar market for fashion dolls.

27. Pursuant to Bryant's contract with Mattel, among other things, Mattel is the true owner of Bratz designs and works, including those specifically that were conceived, created or reduced to practice during Bryant's Mattel employment as well as all designs and works that are or have been derived therefrom. Defendants' continued use, sale, distribution and licensing of Bratz thus infringes upon Mattel's rights, injures Mattel and unlawfully enriches the defendants.

CLAIMS FOR RELIEF
First Claim
Copyright Infringement
(Against MGA, Larian)

28. Mattel repeats and realleges each and every allegation set forth in paragraphs 1 through 27, above, as though fully set forth at length.

29. Mattel is the owner of copyrights in works that are fixed in tangible media of expression and that are the subject of valid, and subsisting, copyright registrations owned by Mattel. These include, without limitation, the works that are the subject of Registrations VA 1-378-648, VA 1-378-649, VA 1-378-650, VA 1-378-651, VA 1-378-652, VA 1-378-653, VA 1-378-654, VA 1-378-655, VA 1-378-656, VA 1-378-657, VA 1-378-658, VA 1-378-659, VA 1-378-660, VAu 715-270, VAu 715-271 and VAu 715-273.

30. Defendants have reproduced, created derivative works from and otherwise infringed upon the exclusive rights of Mattel in its protected works without Mattel's authorization. Defendants' acts violate Mattel's exclusive rights under the Copyright Act, including without limitation Mattel's exclusive rights to reproduce its copyrighted works and to create derivative works from its copyrighted works, as set forth in 17 U.S.C. §§ 106 and 501.

31. Defendants' infringement (and substantial contributions to the infringement) of Mattel's copyrighted works is and has been knowingly made without Mattel's consent and for commercial purposes and the direct financial benefit of defendants. Defendants, moreover, have deliberately failed to exercise their right and ability to supervise the infringing activities of others within their control to refrain from infringing Mattel's copyrighted works and have failed to do so in order to deliberately further their significant financial interest in the infringement of

Mattel's copyrighted works. Accordingly, defendants have engaged in direct, contributory and vicarious infringement of Mattel's copyrighted works.

32. By virtue of defendants' infringing acts, Mattel is entitled to recover Mattel's actual damages plus defendants' profits, Mattel's costs of suit and attorneys' fees, and all other relief permitted under the Copyright Act.

33. Defendants' actions described above have caused and will continue to cause irreparable damage to Mattel, for which Mattel has no remedy at law. Unless defendants are restrained by this Court from continuing their infringement of Mattel's copyrights, these injuries will continue to occur in the future. Mattel is accordingly entitled to injunctive relief restraining defendants from further infringement.

Second Claim
Breach of Contract
(Against Bryant)

34. Mattel repeats and realleges each and every allegation set forth in paragraphs 1 through 33, above, as though fully set forth at length.

35. Pursuant to his Employment Agreement, Bryant agreed that he would not, without Mattel's express written consent, engage in any employment or business other than for Mattel or assist in any manner any business competitive with the business or future business plans of Mattel during his employment with Mattel. Pursuant to his Mattel Employment Agreement, Bryant further assigned to Mattel all right, title and interest in "inventions," including without limitation "designs" and other works that he conceived, created or reduced to practice during his employment by Mattel. In addition, pursuant to the Conflict Questionnaire, Bryant certified that, other than as disclosed, he had not worked for any competitor of Mattel and had not engaged in any business venture or transaction involving a Mattel competitor that could be construed as a conflict of interest. Bryant further promised that he would notify his supervisor immediately of any change in his situation that would cause him to change any of the foregoing certifications or representations.

36. The Employment Agreement and the Conflict Questionnaire are valid, enforceable contracts, and Mattel has performed each and every term and condition of the Employment Agreement and Conflict Questionnaire required to be performed by Mattel.

37. Bryant materially breached the foregoing contracts with Mattel, in that, among other things, he secretly aided, assisted and worked for a Mattel competitor during his employment with Mattel without the express written consent of Mattel.

38. As a consequence of Bryant's breach, Mattel has suffered and will, in the future, continue to suffer damages in an amount to be proven at trial. Such damages include, without limitation, the amounts paid by the competitor to Bryant during his Mattel employment; the amount that Mattel paid Bryant during the time he wrongfully worked with MGA; the value of information and intellectual property owned by Mattel which Bryant provided to MGA; the value of the benefits that MGA obtained from Bryant during the time he was employed by Mattel; and the value of the benefits that MGA obtained from Bryant as a result of the work he performed for or with MGA during his Mattel employment.

39. Bryant's conduct has caused, and unless enjoined will continue to cause, irreparable injury to Mattel that cannot be adequately compensated by money damages and for which Mattel

has no adequate remedy at law. Bryan specifically acknowledged in his Employment Agreement that his breach of the Agreement "likely will cause irreparable harm" to Mattel and that Mattel "will be entitled to injunctive relief to enforce this Agreement, in addition to damages and other available remedies," Accordingly, Mattel is entitled to orders mandating Bryant's specific performance of his contracts with Mattel and restraining Bryant from further breach.

Third Claim
Intentional Interference with Contract
(Against MGA and Larian)

40. Mattel repeats and realleges each and every allegation set forth in paragraphs 1 through 39, above, as though fully set forth at length.

41. Valid agreements existed between Mattel and Bryant.

42. At all times herein mentioned, MGA and Larian knew that the Mattel Employees had a duty under their agreements not to work for or assist any competitor of Mattel, such as MGA. In addition, at all times mentioned herein, MGA and Larian knew that Bryant had assigned to Mattel, and was obligated to disclose to Mattel all inventions, including designs and other works, created, conceived or reduced to practice during his employment with Mattel.

43. Despite such knowledge, defendants MGA and Larian intentionally and without justification solicited, induced and encouraged Bryant to breach his contracts with Mattel.

44. As a direct and proximate result of defendants' efforts and inducements, Bryant did breach his contracts with Mattel.

45. As a result of said breaches, Mattel has suffered damages and will imminently suffer further damages, including the loss of its competitive position and lost profits, in an amount to be proven at trial.

45. Defendants performed the aforementioned conduct with malice; fraud and oppression, and in conscious disregard of Mattel's rights. Accordingly, Mattel is entitled to recover exemplary damages from defendants in an amount to be determined at trial.

Fourth Claim
Conversion
(Against All Defendants)

46. Mattel repeats and realleges each and every allegation set forth in paragraphs 1 through 45, above, as though fully set forth at length.

47. Defendants wrongfully converted Mattel property and resources by appropriating and using them for their own benefit and gain and for the benefit and gain of others, without the permission of Mattel.

48. Mattel was entitled to, among other things, the exclusive right and enjoyment in property and tangible materials owned by Mattel, including without limitation such proper and materials that were created by Bryant while he was a Mattel product designer. Such property was taken by Bryant from Mattel to further his own interests and, in at least some instances, provided by Bryant to Larian and MGA in furtherance of the interests of Bryant, Larian and MGA.

49. As a direct and proximate result of defendants' wrongful conversion of Mattel property, Mattel has incurred damages. Mattel, therefore, is entitled to recover compensatory damages in an amount to be determined at trial.

50. As a result of defendants' acts of conversion, Mattel is entitled to damages in an amount sufficient to indemnify Mattel for the loss suffered, which is not measured by the value of the property misappropriated, but includes the lost profits that Mattel suffered as a result of the conversion or, alternatively, the profits generated by the defendants that would not have been generated but for the conversion. Only such a measure of damages would fully and fairly compensate Mattel for the injury it suffered due to defendants' acts of conversion.

51. Defendants performed the aforementioned conduct with malice, fraud and oppression, and in conscious disregard of Mattel's rights. Accordingly, Mattel is entitled to recover exemplary damages from defendants in an amount to be determined at trial.

52. Furthermore, defendants' conduct has caused, and unless enjoined will continue to cause, irreparable injury to Mattel that cannot be adequately compensated by money damages and for which Mattel has no adequate remedy at law. Accordingly, Mattel is entitled to an order restraining defendants from further conversion of Mattel property and resources and/or restraining defendants from continuing to benefit from such conversion.

Fifth Claim
Unfair Competition
(Common Law and *Cal. Bus. & Prof Code* § 17200)
(Against All Defendants)

53. Mattel repeats and realleges each and every allegation set forth in paragraphs 1 through 52, above, as though fully set forth at length.

54. Section 17200 of the California Business and Professions Code prohibits unfair competition, including "any unlawful, unfair or fraudulent business act or practice…"

55. By engaging in the foregoing conduct, defendants have, individually and in combination, engaged in unlawful, unfair and/or fraudulent acts of unfair competition in violation of both the common law of the state of California and *Cal. Bus. & Prof. Code* § 17200 *et seq.* Such conduct included, without limitation, misappropriation of trade secrets. Such conduct also included, without limitation, MGA's and Larian's disparagement of Mattel's products and misrepresentations.

56. As a result of the aforementioned conduct, Mattel has suffered damages and will imminently suffer further damages, including but not limited to lost profits in an amount to be proven at trial. No adequate remedy at law exists for the wrongs and injuries Mattel has suffered and will continue to suffer, and Mattel is entitled to an injunction enjoining defendants' continued wrongful acts. Mattel is also entitled to recover compensatory and exemplary damages pursuant to the doctrine of common law unfair competition.

Sixth Claim
Declaratory Relief
(Against All Defendants)

57. Mattel repeats and realleges each and every allegation set forth in paragraphs 1 through 56, above, as though fully set forth at length.

58. As shown in the foregoing paragraphs above, an actual controversy exists between Mattel and defendants regarding defendants' lack of ownership interests in Bratz and Mattel's rights in the same.

59. Accordingly, Mattel seeks a declaration of the Court that defendants have no valid or protectable ownership rights or interests in Bratz, and that Mattel is the true owner of the same, and further seeks an accounting and imposition of a constructive trust over Bratz, including without limitation registrations and applications for registrations relating thereto made or filed by defendants and third parties, and over all revenues and other monies or benefits derived or obtained from MGAs and Bryant's purported ownership, use, sale, distribution and licensing of Bratz.

60. Mattel seeks a declaration of the Court that any and all agreements between Bryant, on the one hand, and MGA, on the other hand, in which Bryant purports to assign to MGA any right, title or interests in any work that he conceived, created or reduced to practice while a Mattel employee, including but not limited to the Bratz designs, is void and of no effect, including without limitation because Bryant had previously assigned said right, title or interest to Mattel and because Mattel was otherwise the owner of said right, title or interest.

Prayer for Relief

WHEREFORE, Mattel respectfully requests judgment:

1. For a declaration that defendants have no valid or protectable ownership interests or rights in Bratz designs and works conceived, created or reduced to practice by Bryant during the term of his Mattel employment and/or by any others then-employed by Mattel, as well as in all derivatives prepared therefrom, and that Mattel is the true owner of the foregoing;

2. For a declaration that any agreement between Bryant, on the one hand, and MGA or any person or entity, on the other hand, in which Bryant purported to assign any right, title or interests in any work that be conceived, created or reduced to practice while a Mattel employee, including but not limited to the Bratz designs, is void and of no effect;

3. For an Order enjoining and restraining defendants, their agents, servants and employees, and all persons in active concert or participation with them, from further wrongful conduct, including without limitation from imitating, copying, distributing, importing, displaying, preparing derivatives from and otherwise infringing Mattel's copyright-protected works;

4. For an Order, pursuant to 17 U.S.C. § 503(a) and other applicable law, impounding all of defendants' products and materials that infringe Mattel's copyrights, as well as all plates, molds, matrices and other articles by which copies of the works embodied in Mattel's copyrights may be reproduced or otherwise infringed;

5. For an Order mandating that defendants return to Mattel all tangible items, documents, designs, diagrams, sketches or any other memorialization of inventions created or reduced to practice during Bryant's employment with Mattel as well as all Mattel property converted by defendants;

6. For an Order mandating specific performance by Bryant to comply with and satisfy Bryant's contractual obligations to Mattel;

7. That Mattel be awarded, and defendants be ordered to disgorge all payments, revenues, profits, monies and royalties and any other benefits derived or obtained as a result of the conduct alleged herein, including without limitation of all revenues and profits attributable to defendants' infringement of Mattel's copyrights under 17 U.S.C. § 504;

8. For an accounting of all profits, monies and/or royalties from the exercise of ownership, use, distribution, sales and licensing of Bratz;

9. For the imposition of a constructive trust over Bratz, including without limitation registrations and applications for registrations relating thereto made or filed by defendants and third parties, and all profits, monies, royalties and any other benefits derived or obtained from defendant's exercise of ownership, use, sale, distribution and licensing of Bratz;

10. That Mattel recover its actual damages and lost profits;

11. That defendants be ordered to pay exemplary damages in a sum sufficient to punish and to make an example of them, and deter them and others from similar wrongdoing;

12. That defendants pay to Mattel the full cost of this action and Mattel's attorneys' and investigators' fees; and

13. That Mattel have such other and further relief as the Court may deem just and proper.

DATED: Nov. 19, 2006 QUINN EMANUEL URQUHART OLIVER & HEDGES, LLP

By_____
John B. Quinn
Attorneys for Plaintiff
Mattel, Inc.

DEMAND FOR JURY TRIAL

Plaintiff Mattel, Inc. respectfully requests a jury trial on all issues triable thereby.

DATED: Nov. 19, 2006 QUINN EMANUEL URQUHART OLIVER & HEDGES, LLP

By _____
John B. Quinn
Attorneys for Plaintiff
Mattel, Inc.

EMPLOYEE CONFIDENTIAL INFORMATION AND INVENTIONS AGREEMENT

I acknowledge that Mattel, Inc. (the "Company") operates in a competitive environment and that it enhances its opportunities to succeed by establishing certain policies, including those included in this Agreement. This Agreement is designed to make clear that: (i) I will maintain the confidentiality of the Company's trade secrets; (ii) I will use those trade secrets for the exclusive benefit of the Company; (iii) inventions that I create will be owned by the Company; (iv) my prior and continuing activities separate from the Company will not conflict with the Company's development of its proprietary rights; and (v) when and if my employment with the Company terminates I will not use my prior position with the Company to the detriment of the Company. In consideration of my employment with the Company and other good and valuable consideration, I agree that:

1. Provisions Related to Trade Secrets

(a) I acknowledge that the Company possesses and will continue to develop and acquire valuable Proprietary Information (as defined below), including information that I may develop or discover as a result of my employment with the Company. The value of that Proprietary Information depends on it remaining confidential. The Company depends on me to maintain that confidentiality, and I accept that position of trust.

(b) As used in the Agreement, "Proprietary Information" means any information (including formula, pattern, compilation, device, method, technique or process) that derives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use, and includes information on the Company, its customers, suppliers, joint ventures, licensors, licensees, distributors and other persons and entities with whom the Company does business.

(c) I will not disclose or use at any time either during or after my employment with the Company any Proprietary Information except for the exclusive benefit of the Company as required by my duties for the Company, or as the Company expressly may consent to in writing. I will cooperate with the Company and use my best efforts to prevent the unauthorized disclosure, use or reproduction of all Proprietary Information.

(d) Upon leaving employment with the Company for any reason, I immediately will deliver to the Company all tangible, written, graphical, machine readable and other materials (including all copies) in my possession or under my control containing or disclosing Proprietary Information.

2. Ownership of Inventions

(a) I agree to communicate to the Company as promptly and fully as practicable all inventions (as defined below) conceived or reduced to practice by me (alone or jointly by others) at any time during my employment by the Company. I hereby assign to the Company and/or its nominees all my right, title and interest in such inventions, and all my right, title and interest in any patents, copyrights, patent applications or copyright applications based thereon. I will assist the Company and/or its nominees (without charge but at no expense to me) at any time in every proper way to obtain for its and/or their own benefit, patents and copyrights for all such inventions anywhere in the world and to enforce its and/or their rights in legal proceedings.

(b) As used in this Agreement, the term "inventions" includes, but is not limited to, all discoveries, improvements, processes, developments, designs, know-how, data computer programs and formulae, whether patentable or unpatentable.

(c) Any provision in this agreement requiring me to assign my rights in any invention does not apply to an invention which qualifies under the provision of Section 2870 of the California Labor Code. That section provides that the requirement to assign "shall not apply to an invention that the employee developed entirely on his or her own time without using the employer's equipment, supplies, facilities or trade secret information except for those inventions that either (1) relate at the time of conception or reduction to practice of the invention to the employer's business, or actual or demonstrably anticipated research or development of the employer; or (2) result from any work performed by the employee for the employer." I understand that I bear the burden of proving that an invention qualifies under Section 2870.

(d) I hereby irrevocably designate and appoint the Company and each of its duly authorized officers and agents as my agent and attorney-in-fact to act for and in my behalf and stead to execute and file any document and to do all other lawfully permitted acts to further the prosecution, issuance and enforcement of patents, copyrights and other proprietary rights with the same force and effect as if executed and delivered by me.

3. Conflicts with Other Activities

(a) My employment with the Company requires my undivided attention and effort. Therefore, during my employment with the Company, I will fully comply with the Company's Conflict of Interest Policy, as it may be amended from time to time. I shall not, without the Company's express written consent, engage in any employment or business other than for the Company, or invest in or assist (in any manner) any business competitive with the business or future business plans of the Company.

4. Miscellaneous

(a) My obligations under this Agreement may not be modified or terminated, in whole or in part, except in writing signed by a Vice-President of the Company. Any waiver by the Company of a breach on any provision of this Agreement will not operate or be construed as a waiver of any subsequent breach.

(b) Each provision of this Agreement will be treated as a separate and independent clause, and the unenforceability of any one provision will in no way impair the enforceability of any other provision. If any provision is held to be unenforceable, such provision will be construed by the appropriate judicial body by limiting or reducing it to the minimum extent necessary to make it legally enforceable.

(c) My obligation under this Agreement will survive the termination of my employment, regardless of the manner of such termination. This Agreement will insure to the benefit of and be binding upon the successors and assigns of the the Company.

(d) I understand that the provisions of this Agreement are a material condition to my employment with the Company. I also understand that this Agreement is not an employment contract, and nothing in this Agreement creates any right to my continuous employment by the Company, or to my employment for any particular term.

(e) Any breach of this Agreement likely will cause irreparable harm to the Company for which money damages could not reasonably or adequately compensate the Company. Accordingly, I agree that the Company will be entitled to injunctive relief to enforce this Agreement, in addition to damages and other available remedies.

(f) This agreement will be governed by and interpreted in accordance with the laws of the State of California.

(g) This Agreement contains the complete agreement between the Company and me concerning the subject matter hereof and supersedes all other agreements and understandings. This Agreement may be executed in counterparts. This Agreement will be deemed effective as of the start of Employee's employment with the Company.

CAUTION: THIS AGREEMENT CREATES IMPORTANT OBLIGATIONS OF TRUST AND AFFECTS THE EMPLOYEE'S RIGHTS TO INVENTIONS THE EMPLOYEE MAY MAKE DURING HIS OR HER EMPLOYMENT.

Carter H. Bryant
Employee Signature

CARTER H. BRYANT
Employee Name (print)

01/04/99
Date

MATTEL, INC.
By: Teresa Newcomb
Signature

TERESA NEWCOMB
Name of Witness (print)

M 0001622

CONFLICT OF INTEREST QUESTIONNAIRE

BRYANT, CARTER H. | PROJECT DESIGNER |

Name (Last, first, M.I.) | Job Title | Department

Instructions: The purpose of this questionnaire is to confirm the propriety of relations between our key employees and our suppliers and competitors. Please read the definitions below and Mattel's policies concerning Conflicts of Interest. Then answer the questions by checking the correct answer. Base your answers on personal knowledge. There is no need to make inquiries or seek additional information since lack of knowledge of a situation indicates that there is no conflict of interest. Your answers to questions 1 through 8 should cover the past twelve months and the term "you" should include members of your immediate family.

Mattel Supplier is interpreted broadly for purposes of this questionnaire. A Mattel supplier is any person, partnership, trust, corporation, or other enterprise which during the past twelve months has done business or currently contemplates doing business with Mattel or any Mattel subsidiary.

Mattel Competitor is interpreted broadly for purposes of this questionnaire. A Mattel competitor is any person, partnership, trust, corporation, or other enterprise which has done business or contemplates doing business in any field that is in competition with Mattel or any Mattel subsidiary.

Interest means direct or indirect ownership of any stock, bond, option or right to purchase any security, share in profits, investment, partnership interest or other profit participation or equity interest whatsoever. Interest also means any agreement to perform services for or consult with or to deliver materials to or to receive compensation of any kind from any supplier or competitor. **You may disregard mutual investment trusts and publicly-owned corporations whose securities are traded publicly, in which you own not more than $25,000 in market value, but not to exceed 10% of an individual's net worth.**

Recipient of any commission, etc., means receipt of anything of value, in cash or in kind, over $60 on any one occasion or over $300 total during the past twelve months.

○ YES	● NO	1. Have you owned, directly or indirectly, any interest in a Mattel supplier?
○ YES	● NO	2. Have you owned, directly or indirectly, and interest in a Mattel competitor?
○ YES	● NO	3. Have you been the recipient of any commission, fee, loan, trip, gift, benefit or anything else of value that is derived in any way from a Mattel supplier?
● YES	○ NO	4. Have you been the recipient of any commission, fee, loan, trip, gift, benefit or anything else of value that is derived in any way from a Mattel competitor?
● YES	○ NO	5. Have you or any relative of yours by blood or marriage been a director, officer, consultant, agent, employee, or representative of or acted for any Mattel competitor in any capacity?
○ YES	● NO	6. Have you or any relative of yours by blood or marriage been a director, officer, consultant, agent, employee, or representative of or acted for any Mattel supplier in any capacity?
○ YES	● NO	7. Have you engaged in any activity including the acquisition or ownership of any interest, for personal profit, not expressly within the scope of the foregoing with respect to any supplier or competitor?
○ YES	● NO	8. Excepting normal everyday transactions (purchase of toys, etc.) have you engaged in any business venture or transaction involving a Mattel supplier or competitor or engaged in any activity which could be objectively construed as being a conflict of interest or allegiance?
○ YES	● NO	9. Are you aware of any activity of any employee which you believe could be construed as a potential conflict of interest with Mattel?

If your answer to any of the above questions is "yes," please explain in the space below:

4, 5, freelance design & artwork in 1998, from appx. 5/98 - 11/98. for the Ashton Drake galleries.

I certify that I have read Mattel's policies concerning Conflict of Interest and the answers to the above questions are true. I understand that failure to answer this questionnaire fully and truthfully constitutes grounds for immediate termination of my employment. I agree not to divulge any company information to unauthorized recipients. I also agree to notify my superior immediately of any changes in my situation that would cause me to answer any of the above questions differently. I further certify that, to the best of my knowledge, neither I nor any member of my immediate family is or has been engaged in any capacity which creates a Conflict of Interest.

Carter H. Bryant — 01/04/98

Signature — Date

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MATTEL , INC. PLAINTIFF	)	
v.	)	NO. CV05-02727
MGA ENTERTAINMENT, INC, ISAAC LARIAN, CARTER BRYANT, DEFENDANTS	)	

DEPOSITION OF CARTER BRYANT
FEBRUARY 22, 2007

APPEARANCES OF COUNSEL:
FOR THE WITNESS CARTER BRYANT:
MARIA CHRISTIANSON
ATTORNEY AT LAW
FOR THE PLAINTIFF MATTEL:
WILLIAM JOHNSON
ATTORNEY AT LAW
FOR THE DEFENDANTS MGA ENTERTAINMENT AND ISAAC LARIAN:
DAVID VAUGHN
ATTORNEY AT LAW

DEPONENT EXAMINED BY MR. JOHNSON

CARTER BRYANT, HAVING BEEN FIRST DULY SWORN BY THE CERTIFIED SHORTHAND REPORTER, WAS EXAMINED AND TESTIFIED AS FOLLOWS:

VIDEOGRAPHER: PLEASE STATE YOUR NAME FOR THE RECORD.

WITNESS: CARTER BRYANT

MR. JOHNSON: MR. BRYANT, ARE YOU FAMILIAR WITH THE SKETCHES CONTAINED IN EXHIBIT CB1?

WITNESS: YES.

MR. JOHNSON: CAN YOU DESCRIBE THEM FOR ME?

WITNESS: THOSE ARE THE CONCEPT SKETCHES THAT I DEVELOPED FOR THE BRATZ.

MR. JOHNSON: WHAT INSPIRED YOU TO CREATE THESE SKETCHES?

WITNESS: I HAVE A LONG HAD A DEEP INTEREST IN FASHION DESIGN. AFTER I MOVED BACK HOME TO MISSOURI IN APRIL 1998, I WAS TRYING TO FIND A NEW DIRECTION FOR MY CAREER. SOMETHING A BIT MORE INDEPENDENT AND CREATIVE. I WAS WORKING AT THE TIME AT AN OLD NAVY STORE. ONE AFTERNOON, I WAS DRIVING HOME FROM WORK AND I PASSED KICKAPOO HIGH. I SAW A BUNCH OF GIRLS STANDING TOGETHER. THEY WERE HIP AND SASSY. THEY HAD LITTLE TANK TOPS AND T-SHIRTS AND SWEATSHIRTS AND THINGS LIKE THAT . . . BAGGY PANTS. I THOUGHT WHY NOT PUT TOGETHER A PACK OF BRATTY, SASSY GIRLS WITH A PASSION FOR FASHION. I WENT HOME AND STARTED LEAFING THROUGH SOME FASHION MAGAZINES. I REMEMBER A PARTICULAR ISSUE OF SEVENTEEN MAGAZINE WITH DREW BARRYMORE ON THE COVER. IT WAS FILLED WITH IMAGES OF SASSY GIRLS. I REMEMBER BIG EYES, POUTY LIPS. LOTS OF ATTITUDE. THERE WAS AN IMAGE OF THE DIXIE CHICKS. AND AN AD FOR STEVE MADDEN SHOES – ACCENTUATING THE SHOES WITH BIG FEET. GIRLS LOVE SHOES, SO I EMPHASIZED BIG FEET IN MY DRAWING. I WAS ALSO AFFECTED BY THE GIRL ENSEMBLES IN THE POPULAR CULTURE – THE SPICE GIRLS, THE SEX AND THE CITY QUARTET, THE GIRLS ON FRIENDS.

MR. JOHNSON: ISN'T KICKAPOO A RURAL, MOSTLY WHITE HIGH SCHOOL?

WITNESS: I SUPPOSE SO.

MR. JOHNSON: SO IS THAT REALLY WHERE YOU GOT THE IDEA FOR FOUR MULTI-ETHNIC BRATZ DOLLS?

WITNESS: I WAS NOT REALLY FOCUSED ON THE MULTI-ETHNIC THEME AT THE TIME.

MR. JOHNSON: BUT THE DRAWINGS REFER TO MULTI-RACIAL, MULTI-ETHNIC, URBAN HIGH SCHOOL FASHIONS – BAGGY JEANS, BLOCKY SHOES, MIDRIFF-BARING SHIRTS – DO THEY NOT?

WITNESS: I SUPPOSE SO.

MR. JOHNSON: IF YOU CREATED THE DRAWINGS IN 1998, WHY DID YOU MARK THEM "© 2000."

WITNESS: THAT'S WHEN I STARTED TO CIRCULATE THEM?

MR. JOHNSON: WERE YOU WORKING AT MATTEL AT THE TIME THAT YOU SHOWED THEM TO OTHERS?

WITNESS: YES . . . . BUT I HAD CREATED THEM BEFORE I RETURNED TO MATTEL.

MR. JOHNSON: DID YOU DO ANY WORK ON THEM WHILE YOU WERE AT MATTEL?

WITNESS: THEY WERE BASICALLY DONE WHEN I RETURNED TO MATTEL. BUT I WAS STILL TINKERING WITH THEM. I MIGHT HAVE COLORED THE DRAWINGS AND WORKED ON SOME OF THE FASHIONS.

MR. JOHNSON: HOW DID YOU DEVELOP THESE DRAWINGS?

WITNESS: WELL, I WAS FORMALLY TRAINED IN FASHION ILLUSTRATION. SO I USED THOSE TECHNIQUES. I DEVELOPED A BASIC BODY SKETCH BASED ON FASHION DRAWING CONVENTIONS GOING BACK TO THE 1930S AND 1940S. CLASSIC LINES – ARM POSITIONS, HIP ANGLES. I THEN ADDED SOME ATTITUDE IN THE BODY LANGUAGE.

ONCE I HAD MY BODY SHAPE, I TURNED TO THE FACE AND HAIR. I EXAGGERATED THE FACIAL FEATURES – BIG EYES, LOTS OF EYE MAKE-UP, POUTY, GLOSSY LIPS. I REMEMBER CHANNELING JAPANESE ANIME, BETTY BOOP, THE ART OF MARGARET KEANE. I ALSO REMEMBER SOME OTHER CLASSIC DOLLS WITH BIG LUCID EYES - LIKE BLYTHE. I ALSO LOVED ANGELINA JOLIE – HER FACIAL FEATURES WERE ALMOST CARTOONISH. AND THEN SHE WAS THE BASIS FOR THE LARA CROFT VIDEO GAME CHARACTER. I WANTED THE BRATZ TO HAVE HER ASSERTIVENESS AND STYLE. NOT A RUNWAY MODEL STYLE. MORE LIKE THE BEAUTY AND FASHION THAT WAS ALL AROUND. I TRIED TO CAPTURE A GROUP OF HIP AND SASSY TEENAGERS.

MR. JOHNSON: DID YOU DRAW EACH OF THE BRATZ SEPARATELY?

WITNESS: I ONLY NEEDED TO MAKE ONE MASTER DRAWING. I THEN TRACED OVER IT USING A LIGHTBOX. THE LIGHTBOX SHINES LIGHT FROM UNDER THE MASTER DRAWING. IF YOU LOOK CAREFULLY, THE BODY SHAPE IS THE SAME FOR ALL OF THE SKETCHES. I BEGAN EACH DRAWING WITH THE BASIC BODY SHAPE AND THEN ADDED DIFFERENT FASHIONS, SKIN TONE, HAIR, AND EYE MAKE-UP.

MR. JOHNSON: HOW DID YOU DRAW THE ENSEMBLE IMAGE ON PAGE 1 OF EXHIBIT CB1?

WITNESS: THAT WAS MORE OF A FREE HAND DRAWING. I WANTED TO

SHOW THE GIRLS TOGETHER. I USED THE SAME BASIC FEEL – TILTED HIPS, OUTSTRETCHED ARMS, VIVID EXPRESSIONS.

MR. JOHNSON: LET'S TURN TO YOUR BACKGROUND AS A FASHION DESIGNER. WHEN DID YOU BECOME INTERESTED IN FASHION DESIGN?

WITNESS: WHEN I WAS GROWING UP, MY MOTHER USED TO SUBSCRIBE TO LOTS OF FASHION MAGAZINES. VOGUE. ELLE. THEY WERE ALWAYS AROUND THE HOUSE. I USED TO ENJOY LOOKING AT THEM. THAT GOT ME INTERESTED IN ILLUSTRATION. BY THE TIME I WAS IN HIGH SCHOOL, MY MOM AND I WOULD TALK ALL THE TIME ABOUT FASHION. AFTER COLLEGE, I ENROLLED IN AN INSTITUTE FOR ART AND DESIGN WITH THE HOPES OF BECOMING A FASHION DESIGNER.

MR. JOHNSON: HOW DID YOU COME TO WORK AT MATTEL?

WITNESS: WELL, IT'S NOT EASY TO GET A JOB IN THE FASHION INDUSTRY. I APPLIED ALL OVER THE PLACE. WHEN THE OPPORTUNITY TO WORK IN BARBIE COLLECTIBLES AT MATTEL AROSE IN 1995, I THOUGHT "WHAT THE HECK?" IT GAVE ME A START. IT WAS NOT QUITE THE FASHION INDUSTRY, BUT IT WOULD ALLOW ME TO USE MY ILLUSTRATION AND DESIGN SKILLS.

MR. JOHNSON: SO WHY DID YOU LEAVE IN 1998?

WITNESS: I WAS FEELING LIKE THE JOB WASN'T GOING ANYWHERE. I WAS BORED WORKING ON BARBIE FASHION. I WAS ALSO UNHAPPY LIVING IN SOUTHERN CALIFORNIA AND HAD A FALLING OUT WITH MY LOVER. I DECIDED TO GO BACK HOME AND SEE IF I COULD TRY OUT SOME OTHER THINGS.

MR. JOHNSON: WHY DID YOU RETURN TO MATTEL EIGHT MONTHS LATER?

WITNESS: I WAS HAVING TROUBLE GETTING SOMETHING ELSE STARTED. AND I MISSED MY FRIENDS IN LA. I WORKED SOME THINGS OUT IN MY PERSONAL LIFE.

MR. JOHNSON: I AM HANDING YOU A DOCUMENT MARKED EXHIBIT A FROM MATTEL'S FIRST AMENDED COMPLAINT. CAN YOU TELL ME WHAT IT IS?

WITNESS: UMMM. IT SAYS "EMPLOYEE CONFIDENTIAL INFORMATION AND INVENTIONS AGREEMENT."

MR. JOHNSON: DO YOU REMEMBER SIGNING THIS AGREEMENT?

WITNESS: I DON'T RECALL. BUT IT HAS MY SIGNATURE.

MR. JOHNSON: SO, ARE YOU SAYING THAT YOU SIGNED THIS AGREEMENT?

WITNESS: I SUPPOSE THAT I DID.

MR. JOHNSON: WHAT'S THE DATE ON THAT AGREEMENT?

WITNESS: JANUARY 4TH 1999.

MR. JOHNSON: DO YOU RECALL WHY YOU WOULD HAVE SIGNED THAT AGREEMENT ON JANUARY 4TH 1999?

WITNESS: THAT'S THE DATE THAT I RETURNED TO MATTEL.

MR. JOHNSON: PLEASE READ THE DOCUMENT. TELL ME WHAT YOU THINK THAT IT MEANS?

WITNESS: IT'S REALLY HARD TO READ. THE PRINT IS SO FINE. PLEASE GIVE ME A MINUTE.

MR. JOHNSON: PLEASE TAKE YOUR TIME.

WITNESS: I DON'T THINK I HAD A REAL CLEAR CONCEPT OF THIS CONTRACT DURING MY EMPLOYMENT. I DON'T THINK IT WAS EVER EXPLAINED TO ME FULLY. I THINK I THOUGHT THAT THE THOUGHTS THAT I HAD ON MY OWN TIME WERE MY THOUGHTS AND DIDN'T NECESSARILY BELONG TO ANYONE ELSE.

MR. JOHNSON: IF YOU HAD A DESIGN IDEA OUTSIDE OF WORK HOURS DURING THE TIME YOU WERE SUBJECT TO THIS AGREEMENT, BUT IT RELATED TO YOUR GENERAL FASHION DESIGN RESPONSIBILITIES AT MATTEL, DID YOU BELIEVE THAT MATTEL WOULD OWN THAT WORK PRODUCT?

MS. CHRISTIANSON: OBJECTION. HE'S NOT A LEGAL EXPERT.

MR. JOHNSON: I AM JUST ASKING FOR HIS UNDERSTANDING. MR. BRYANT, YOU CAN GO AHEAD AND ANSWER.

WITNESS: I THOUGHT THAT PROJECTS THAT I WAS WORKING ON SPECIFICALLY FOR MATTEL, IF I HAD THOUGHTS ABOUT THAT AFTER HOURS, THAT YEAH THAT WOULD BE A MATTEL THING. BUT IF I HAD ORIGINAL THINGS THAT I WAS THINKING ABOUT, THAT THOSE WEREN'T NECESSARILY MATTEL'S.

MR. JOHNSON: I AM HANDING YOU ANOTHER DOCUMENT THAT WAS

EXHIBIT B TO MATTEL'S AMENDED COMPLAINT. CAN YOU IDENTIFY THAT DOCUMENT FOR THE RECORD?

WITNESS: IT SAYS "MATTEL," AND IS TITLED "CONFLICT OF INTEREST QUESTIONNAIRE."

MR. JOHNSON: DID YOU SIGN IT?

WITNESS: YES.

MR. JOHNSON: WHAT IS THE DATE ON THE DOCUMENT?

WITNESS: IT SAYS JANUARY 4, 1998.

MR. JOHNSON: DOESN'T THE DOCUMENT REFER TO YOUR "FREELANCE DESIGN & ARTWORK IN 1998, FROM APPROXIMATELY 5/98 THROUGH 11/98"?

WITNESS: IT DOES.

MR. JOHNSON: SO DOES THAT MEAN YOU SIGNED IN ON JANUARY 4, 1999, THE SAME DATE AS THE "EMPLOYEE CONFIDENTIAL INFORMATION AND INVENTIONS AGREEMENT."

WITNESS: THAT SOUND SRIGHT. I SOMETIMES GET CONFUSED AT THE TURN OF THE YEAR.

MR.JOHNSON: MR. BRYANT, I AM HANDING YOU DEPOSITION EXHIBIT 27. PLEASE TELL ME THE TITLE OF THIS DOCUMENT?

WITNESS: IT SAYS THAT IT IS MATTEL'S PROPRIETARY INFORMATION CHECKOUT.

MR. JOHNSON: DO YOU RECALL SIGNING THIS DOCUMENT?

WITNESS: MY LAST DAYS AT MATTEL WERE A BLUR. I REMEMBER HAVING AN EXIT MEETING AND BEING ASKED TO SIGN THIS AGREEMENT.

MR. JOHNSON: SO YOU DO RECALL SIGNING IT?

WITNESS: YES.

MR. JOHNSON: AND DID IT REMIND YOU OF YOUR DUTIES REGARDING ASSIGNING INVENTIONS AND YOUR DUTIES TO PROTECT MATTEL'S PROPRIETARY INFORMATION?

WITNESS: I CAN'T SAY THAT I REALLY FOCUSED ON THIS PAPERWORK. I AM AN ARTIST, NOT A LAWYER. AND THERE IS ALL THIS LANGUAGE ABOUT "INVENTIONS." I DON'T THINK OF MYSELF AS AN INVENTOR. MATTEL HAS OTHER DIVISIONS, LIKE MECHANICAL TOYS, THAT INVOLVE ENGINEERING. BUT I WAS A FASHION ILLUSTRATOR AND A DESIGNER.

MR. JOHNSON: DOESN'T THIS AGREEMENT REFER TO COPYRIGHTS AS WELL AS INVENTIONS?

WITNESS: I REALLY DID NOT READ IT VERY CAREFULLY.

MR. JOHNSON: ARE YOU SAYING NOW OR WHEN YOU SIGNED?

WITNESS: BOTH.

MR. JOHNSON: WHAT WERE YOUR JOB RESPONSIBILITIES AT MATTEL?

WITNESS: I WORKED IN THE BARBIE COLLECTIBLES DIVISION. I DESIGNED FASHIONS FOR THE HIGHER END, THAT IS COLLECTIBLES, BARBIE LINE. IT WAS KIND OF LIKE FASHION DESIGN FOR RUNWAY MODELS, BUT I VERY SHORT MODELS WITH TINY FEET TO WORK WITH.

MR. JOHNSON: SO YOUR JOB RESPONSIBILITIES INCLUDED COMING UP WITH FASHIONS AND FASHION ACCESSORIES FOR DOLLS?

WITNESS: THAT SOUNDS RIGHT.

MR. JOHNSON: AND YOU WERE EXPECTED TO ILLUSTRATE THOSE FASHIONS AND WORK WITH OTHERS IN MANUFACTURING TO BRING THOSE FASHIONS TO THE MARKETPLACE.

WITNESS: YEAH.

MR. JOHNSON: LET'S TURN BACK TO EXHIBIT CB1. HOW DID YOU COME UP WITH THE NAMES FOR THE CHARACTERS?

WITNESS: I JUST WANTED SOME HIP NAMES THAT REFLECTED A MULTI-CULTURAL, MULTI-ETHNIC FEEL.

MR. JOHNSON: LET'S NOW TURN TO EXHIBIT CB2. MR. BRYANT, ARE YOU FAMILIAR WITH THAT DRAWING?

WITNESS: YES.

MR. JOHNSON: CAN YOU DESCRIBE IT FOR ME?

WITNESS: THAT IS THE TEMPLATE FOR THE BRATZ SKETCHES. THERE IS THE BRATZ ATTITUDE POSE ON THE LEFT AND A SYMMETRIC POSE ON THE RIGHT.

MR. JOHNSON: I UNDERSTAND THE POSE ON THE LEFT AS BEING THE TEMPLATE FOR THE SKETCHES. BUT WHY DID YOU DRAW THE SKETCH ON THE RIGHT?

WITNESS: THAT SKETCH WAS DEVELOPED SPECIFICALLY AS THE MODEL FOR A DOLL BODY.

MR. JOHNSON: DID YOU USE BARBIE AS A BASIS FOR THIS IMAGE?

WITNESS: I USED MY GENERAL KNOWLEDGE OF DOLL SHAPE, WHICH CERTAINLY REFLECTS THE BARBIE BODY DESIGN. BUT THE ELEMENTS ARE COMMON TO MANY DOLL BODIES.

MR. JOHNSON: WHEN DID YOU FIRST DRAW THIS DOLL BODY TEMPLATE?

WITNESS: I DON'T RECALL.

MR. JOHNSON: IS IT POSSIBLE THAT YOU DID THIS DRAWING IN 1999?

WITNESS: I DON'T RECALL.

MR. JOHNSON: DID YOU DO IT AT THE SAME TIME OR AFTER YOU DREW THE BODY PROTOTYPE FOR THE EXHIBIT CB1 IMAGES?

WITNESS: I DID IT AFTERWARDS.

MR. JOHNSON: DID YOU DO IT WHEN YOU WORKING FOR MATTEL?

WITNESS: I DON'T REMEMBER.

MR. JOHNSON: WHEN DID YOU FIRST COME IN CONTACT WITH ISAAC LARIAN, THE CEO OF MGA ENTERTAINMENT?

WITNESS: I DON'T RECALL.

MR. JOHNSON: WERE YOU WORKING AT MATTEL AT THE TIME?

WITNESS: I THINK SO.

MR. JOHNSON: WHO INTRODUCED YOU TO MR. LARIAN?

WITNESS: I BELIEVE IT WAS PAULA TREANTAFELLAS. PAULA AND I USED TO WORK TOGETHER AT MATTEL. SHE MOVED FROM MATTEL TO MGA SOME TIME IN 1999. I HAD SHOWN HER MY SKETCHES AND SHE SUGGESTED THAT I MAKE A PITCH TO ISAAC.

MR. JOHNSON: SO YOU WERE WORKING AT MATTEL AT THE TIME?

WITNESS: YES.

MR. JOHNSON: WHAT OCCURRED AT THE PITCH MEETING?

WITNESS: PAULA SHOWED ISAAC THE SKETCHES AND HE WAS INTRIGUED. HIS TEENAGE DAUGHTER YASMIN WAS AT THE OFFICE THAT DAY AND YOU COULD SEE THE SPARKLE IN HER EYES AS SHE WAS LEAFING THROUGH DRAWINGS. THAT SEEMED TO GET ISAAC INTERESTED.

MR. JOHNSON: SO WHAT HAPPENED NEXT?

WITNESS: EVERYTHING HAPPENED PRETTY QUICKLY. ISAAC INVITED ME TO WORK FOR MGA ON DEVELOPING THE BRATZ LINE. I IMMEDIATELY STARTED PLANNING TO QUIT MY JOB AT MATTEL. I GAVE NOTICE AND WAS WORKING IN THE EVENINGS ON DEVELOPING THE BRATZ. ISAAC WANTED US TO BE ABLE TO GET A PRODUCT INTO PRODUCTION IN TIME FOR THE SPRING TOY FAIRS SIX MONTHS AWAY. IT WAS A CRAZY PERIOD IN MY LIFE.

MR. JOHNSON: LET'S TURN TO EXHIBIT CB3. CAN YOU IDENTIFY PAGE 1?

WITNESS: THOSE ARE MY JADE SKETCHES ON THE LEFT. AND THAT IS THE FIRST GENERATION JADE DOLL ON THE RIGHT.

MR. JOHNSON: AND PAGE 2?

WITNESS: THAT'S MY ZOE SKETCH ON THE LEFT AND THE CLOE DOLL ON THE RIGHT. MGA DECIDED TO GO WITH A DIFFERENT NAME. BUT THAT IS THE DOLL THAT CORRESPONDS WITH THE ZOE DRAWING.

MR. JOHNSON: AND PAGE 3?

WITNESS: THAT'S THE LUPE DRAWING ON THE LEFT AND THE YASMIN DOLL ON THE RIGHT. ISAAC DECIDED TO RENAME LUPE FOR HIS DAUGHTER.

MR. JOHNSON: AND PAGE 4?

WITNESS: THAT'S MY HALLIDAE DRAWING ON THE LEFT AND THE SASHA DOLL ON THE RIGHT.

MR. JOHNSON: THE FASHIONS ON THE SASHA DOLL ARE VERY CLOSE TO THOSE ON THE DRAWING. IS THAT A COINCIDENCE?

WITNESS: SOME OF THE FIRST GENERATION DOLLS WERE BASED ON THE FASHIONS FROM THE ORIGINAL SKETCHES.

MR. JOHNSON: CAN YOU IDENTIFY THE IMAGES ON PAGE 5?

WITNESS: ON THE LEFT IS THE ENSEMBLE SKETCH. WE SOMETIMES CALL IT THE "HERO" SHOT. THE IMAGE ON THE RIGHT IS THE LOGO THAT WAS USED ON THE EARLY BRATZ PACKAGING.

MR. JOHNSON: WOULD YOU SAY THAT THEY ARE SUBSTANTIALLY SIMILAR?

MS. CHISTIANSON: OBJECTION. THAT QUESTION ASKS FOR A LEGAL OPINION. MR. BRYANT IS NOT A LAWYER OR A LEGAL EXPERT.

MR. JOHNSON: MR. BRYANT, YOU MAY ANSWER.

WITNESS: WELL, THE LOGO WAS BASED ON THE HERO SHOT, SO THERE IS BOUND TO BE SOME SIMILARITY.

MR. JOHNSON: LET'S TURN TO PAGE 6 OF EXHIBIT CB3. WHAT IS REPRESENTED HERE?

WITNESS: THE IMAGES ON THE LEFT ARE THE TEMPLATES THAT I DEVELOPED FOR THE BRATZ DRAWING AND SCULPT. THE IMAGE ON THE RIGHT IS THE MOLD OR SCULPT THAT WAS DEVELOPED FOR THE BRATZ DOLLS.

MR. JOHNSON: HOW MANY SCULPTS WERE USED IN MAKING THE DOLLS?

WITNESS: JUST ONE. ALL FOUR DOLLS ARE MOLDED FROM THE SAME SCULPT. THEY LOOK DIFFERENT BECAUSE OF THE SHADING OF THE SKIN TONE, FACE MAKE-UP, HAIR, AND FASHIONS. USING A SINGLE SCULPT REDUCES THE COSTS OF PRODUCTION.

MR. JOHNSON: WOULD YOU SAY THAT THE SCULPT IS SUBSTANTIALLY SIMILAR TO YOUR TWO-DIMENSIONAL DRAWINGS ON PAGE 6 OF CB3?

MS. CHISTIANSON: OBJECTION. THAT QUESTION CALLS FOR A LEGAL

OPINION.

MR. JOHNSON: MR. BRYANT, YOU MAY ANSWER.

WITNESS: I WAS NOT VERY MUCH INVOLVED IN THE DOLL SCULPT. THAT IS NOT MY AREA OF ART. I AM A FASHION DESIGNER. THE PERSON WHO MADE THE SCULPT HAD THE DRAWINGS. BUT SHE MADE THE MOLD USING HER OWN HANDS AND JUDGMENTS. AS I RECALL, PAULA THOUGHT THAT THE DRAWING LOOKED A BIT TOO OLD AND SULTRY. SO THE SCULPT SOFTENED THE IMAGE SO AS TO MAKE THE DOLL LOOK A BIT YOUNGER THAN THE DRAWINGS. YOU CAN SEE THAT THE SCULPT HAS MORE OF A BABY FACE THAN THE DRAWINGS.

MR. JOHNSON: THAT COMPLETES MY QUESTIONS. MS. CHRISTIANSON. MR. BRYANT REFERRED TO IMAGES THAT WERE THE INSPIRATION FOR HIS WORK – CONVENTIONAL FASHION ILLUSTRATION POSES, THE SPICE GIRLS, SEVENTEEN MAGAZINE, STEVE MADDEN ADVERTISEMENTS, ETC. I WOULD ASK AT THIS TIME THAT YOU PROVIDE US WITH THE IMAGES THAT HE WAS REFERRING TO.

MS. CHRISTIANSON: I WILL CONFER WITH MY CLIENT AND WE WILL SEE WHAT WE CAN DO.

MR. JOHNSON: THANK YOU. WE'LL GO OFF THE RECORD NOW.

Bratz!

Meet the Bratz! The Totally Transformable Teenage dolls! They're four best friends from high school who love to trade clothes, shoes and hairdos! They come to school with a new look every day!

By simply popping off the hairstyle and shoes, and exchanging them for one of their other hairstyles and pairs of shoes, or a friend's hairstyle and shoes, you can create a whole new look! Complete the look by changing their pants or skirts for one of their additional garments!

Each doll comes dressed in a trendy, hip outfit, with one or two additional pieces, such as an additional skirt or t- shirt (for mix and matching.) Each doll also comes with two great hairstyles, 2 great pairs of shoes, and a cool backpack.

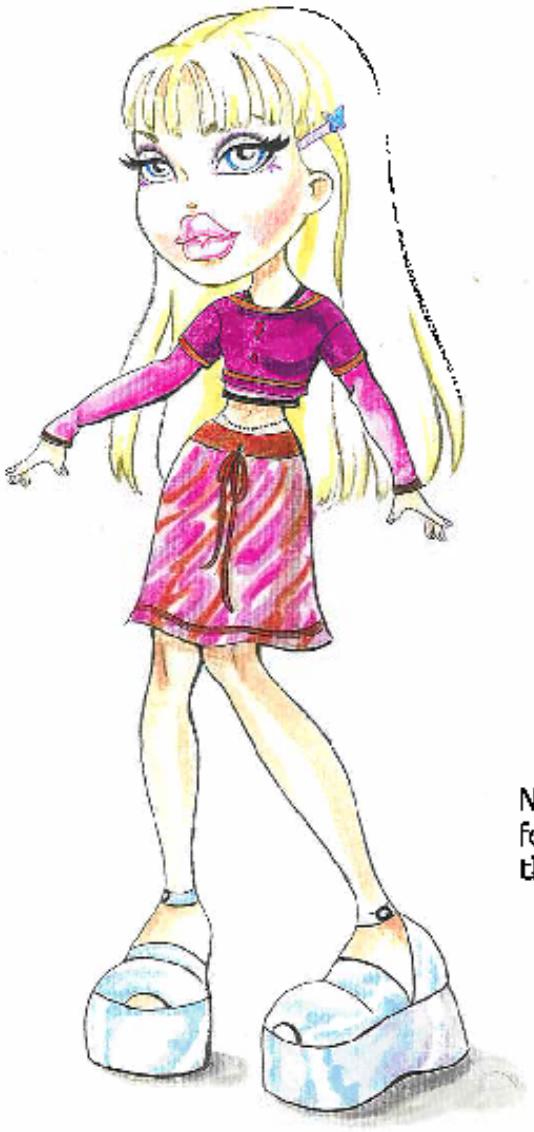
Exhibit CB1

Meet Zoe!

She's the queen of cool at school
with her short dark brown hair
and funky stompin' sneaks.
Hiphugger jeans, short tee shirt
and glittery vinyl backpack
complete her daytime look.

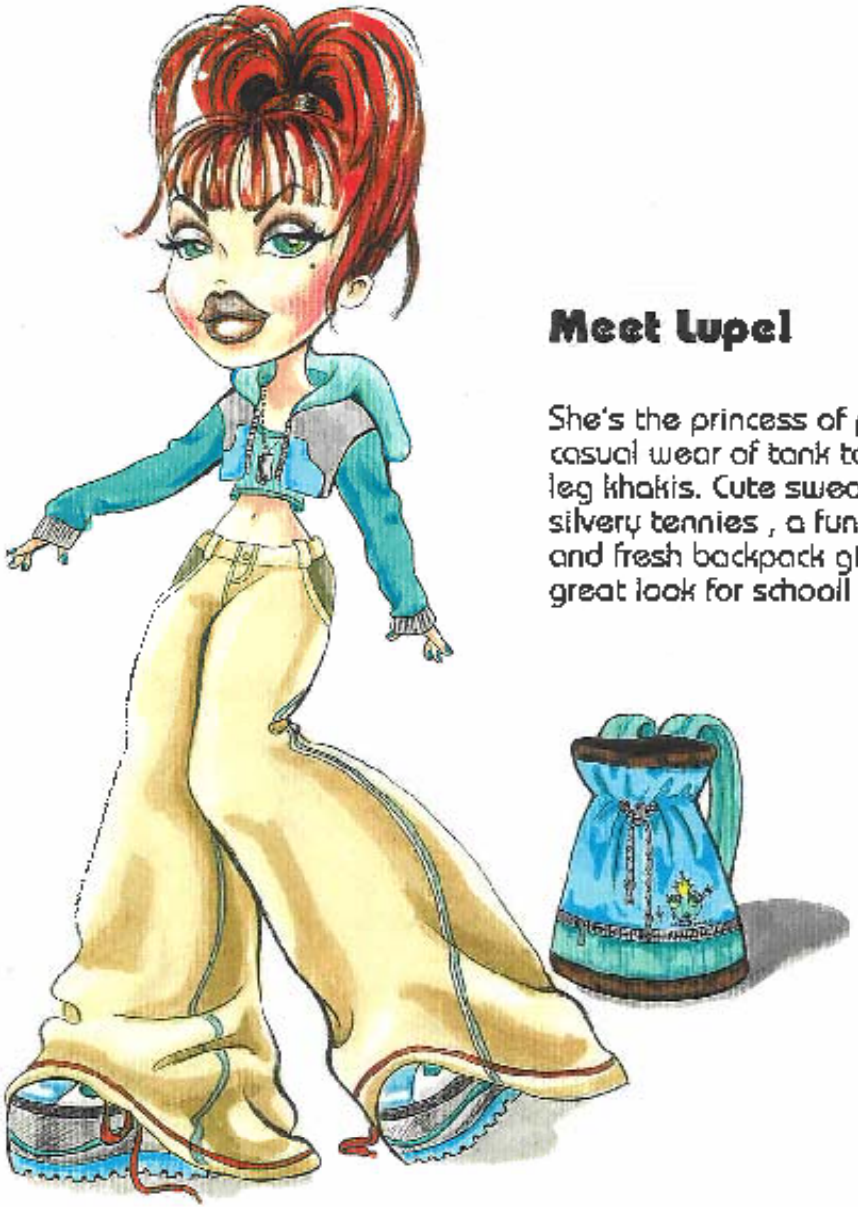
To give Zoe a whole new look for night, change her short dark brown hairstyle to her long blonde hairdo (included), change her pants to a skirt (also included) and change her sneakers to platform sandals (you get those too!)

Exhibit CB1



Now she has a whole new look for nighttime fun with the rest of the Bratz gang!

Exhibit CB1



Meet Lupe!

She's the princess of pretty in her casual wear of tank top and wide leg khakis. Cute sweatshirt, silvery tennies , a fun red updo and fresh backpack give her a great look for school!

For partytime, change her into a short skirt, braids and silver stompers!

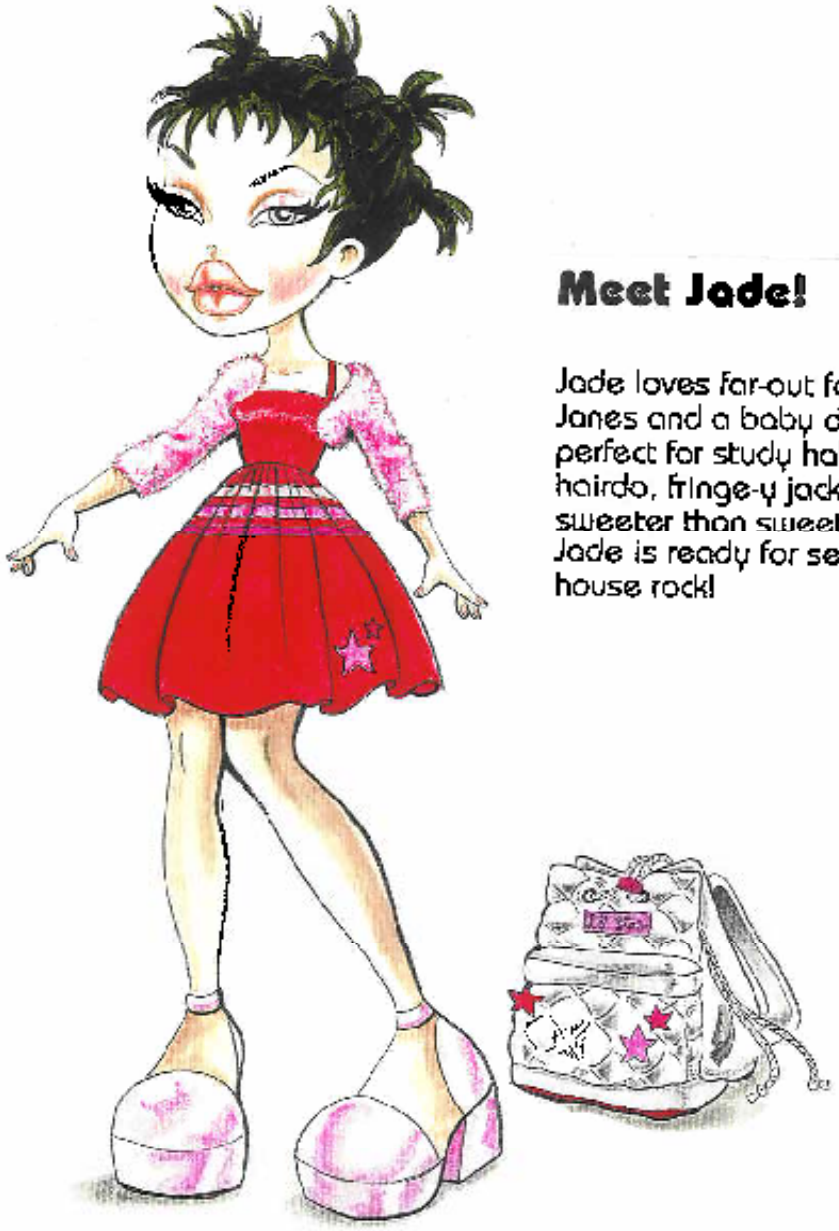
Exhibit CB1

Meet Hallidae!

She's got the beat! Ultra trendy street wear 'n' braids for hittin' the books. Jean skirt, boots and knit cap, not to mention a funky bookpack (check out the logos!) give Hallidae a look that is all that!

On date night, it's a sassy short dress, platforms, and a totally new 'do!

Exhibit CB1

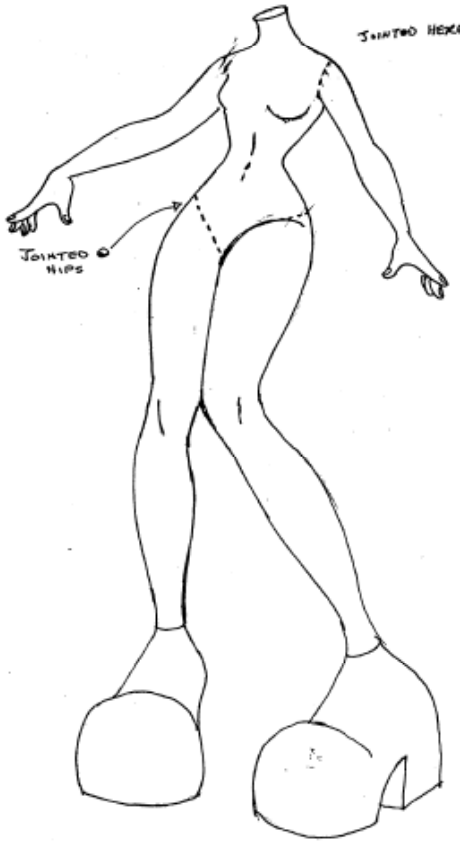


Meet Jade!

Jade loves far-out fashion! Mary Janes and a baby doll are just perfect for study hall! Twisty hairdo, fringe-y jacket and a sweeter than sweet backpack and Jade is ready for serious school house rock!

Exhibit CB1

For weekend nights hangin' with the Bratz, it's a sweet dragon logo tee, with ruffly skirt and those boots, she's as cool as can be!



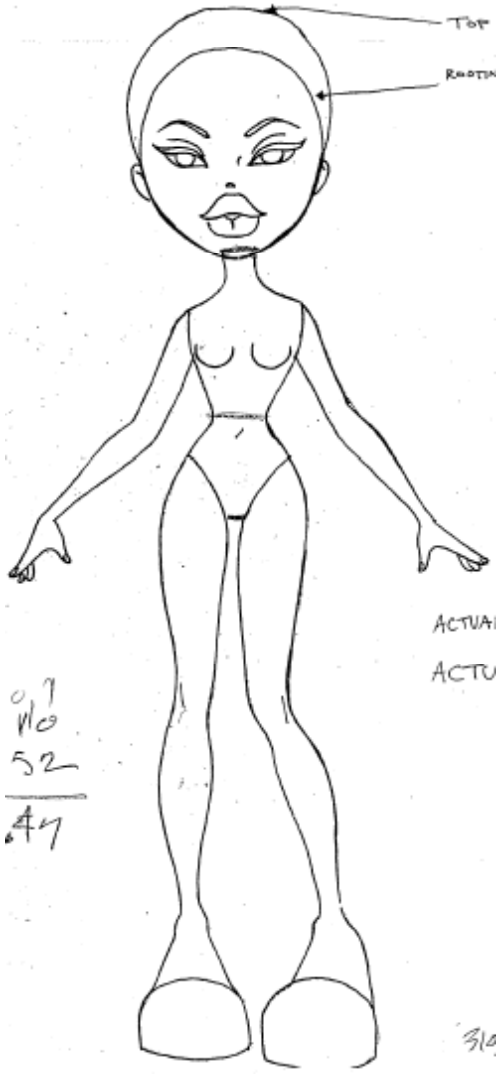


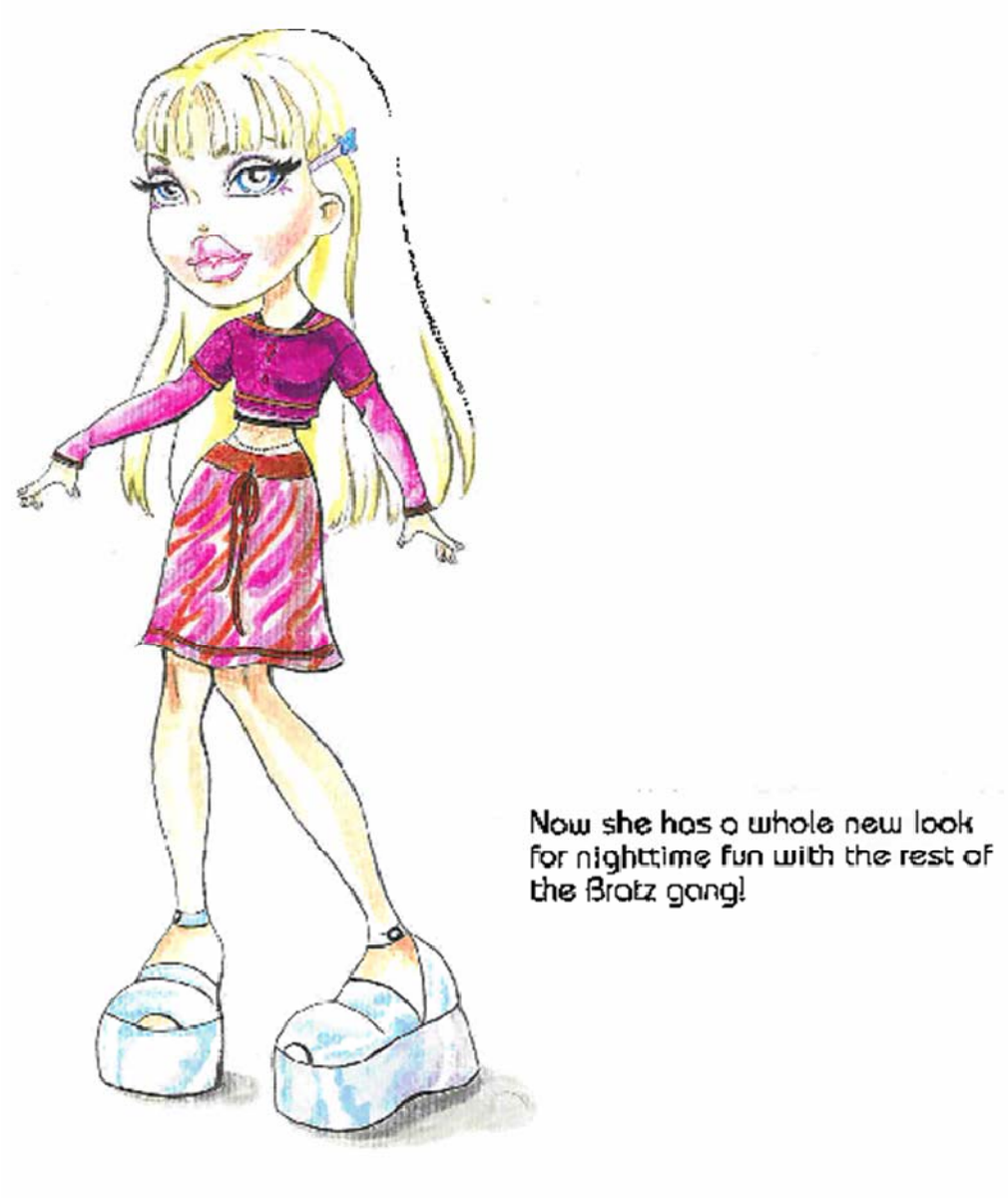
Exhibit CB2

Bryant “Jade” Drawings

MGA Jade Doll

Exhibit CB3

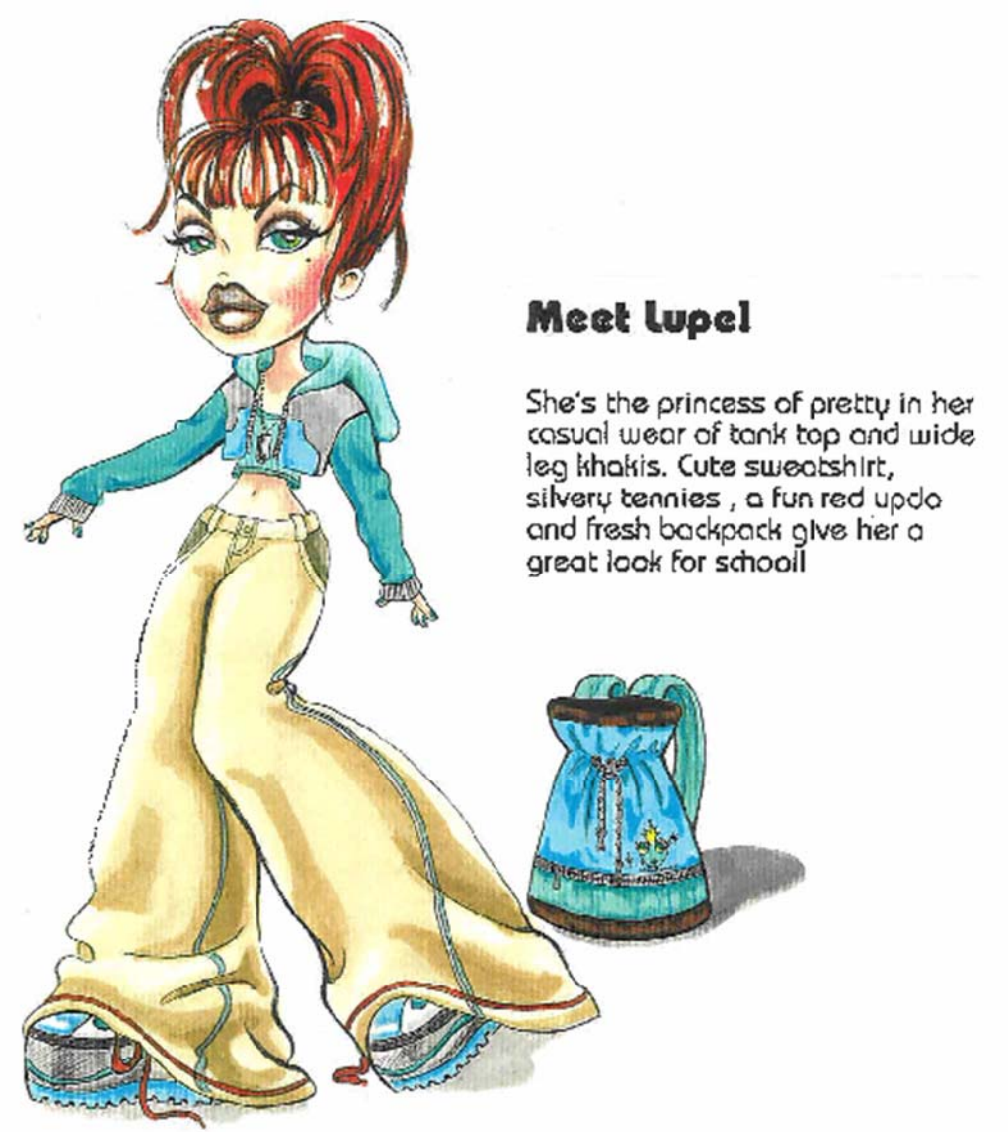
Bryant “Zoe” Drawing



MGA Cloe Doll

Exhibit CB3

Bryant “Lupe” Drawing



MGA Yasmin Doll

Exhibit CB3

Bryant “Hallidae” Drawing

Meet Hallidae!

She's got the beat! Ultra trendy street wear 'n' braids for hittin' the books. Jean skirt, boots and knit cap, not to mention a funky bookpack (check out the logos!) give Hallidae a look that is all that!

4

MGA Sasha Doll

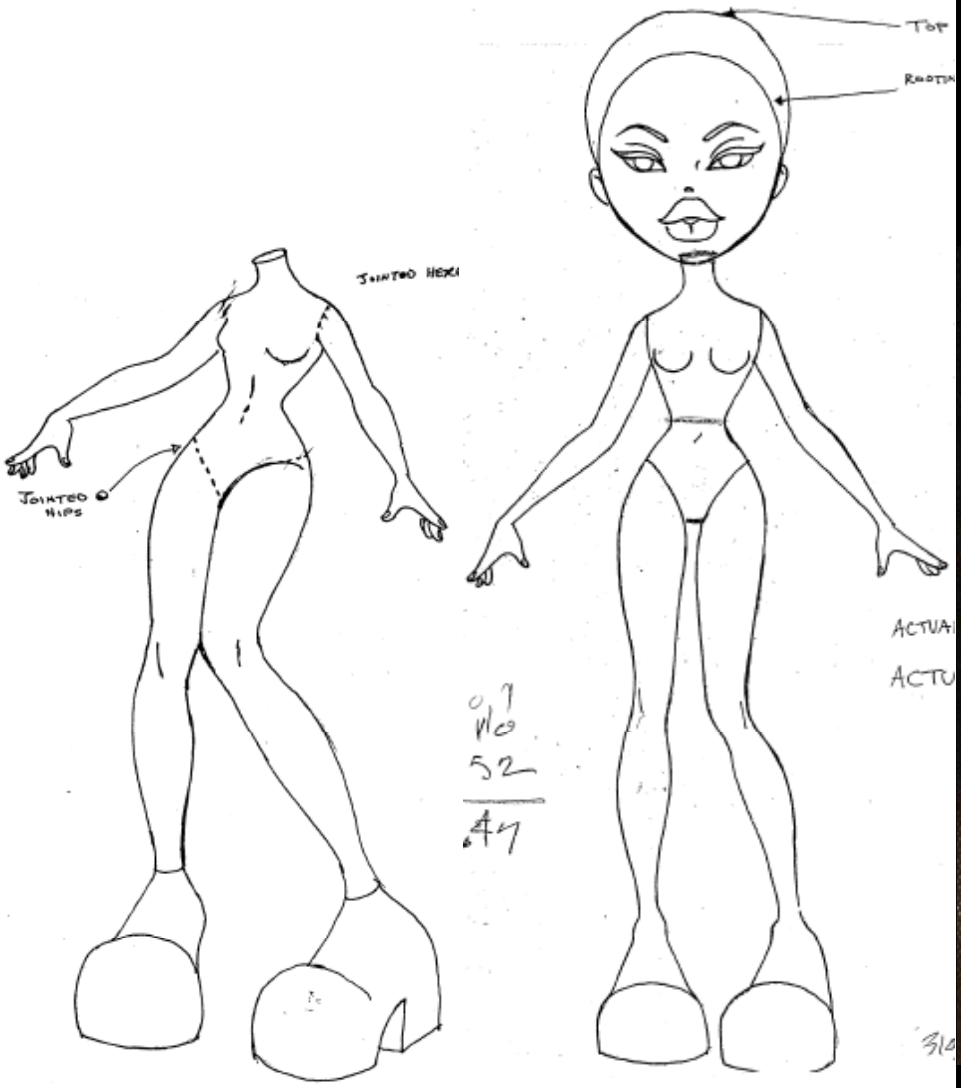
Exhibit CB3

Bratz Group Illustration

Bryant Drawing

Bratz Packaging

Exhibit CB3



Bryant Bratz Drawing

Bratz Sculpt

Exhibit CB3

Mattel

PROPRIETARY INFORMATION CHECKOUT MAT-4125-B

Each terminating employee should be aware that, in his Employee's Agreement, he has agreed to transfer all inventions made or conceived during the period of his employment to Mattel and to do all acts necessary to secure patent protection for such inventions for Mattel.

Each employee should also be aware that he has agreed to protect the proprietary information of Mattel. More particularly, he has agreed essentially as follows:

"In consideration of my employment by MATTEL, INC., or any of its subsidiaries or affiliated companies now or hereafter existing (hereinafter referred to individually and collectively as 'MATTEL'), I hereby covenant and agree that:

My interest in (a) any and all inventions, improvements and ideas (whether or not patentable) which I have made or conceived, or may make or conceive at any time during the period of my employment with the Company, either solely or jointly with others and in (b) any suggestions, designs, trademarks, copyright subject matter, literary or artistic works which I have made or conceived, or may make or conceive at any time during the period of my employment which relate or are applicable directly or indirectly to any phase of the Company's business shall be the exclusive property of the Company, its successors, assignees or nominees. (The items defined in (a) and (b) above will hereinafter be referred to collectively as 'Proprietary Subject Matter'.)

I shall make full and prompt disclosure in writing to an officer or official of the Company, or to anyone designated for that purpose by the Company, of all Proprietary Subject Matter made or conceived during the term of my employment. I agree, at the request of Mattel's Patent counsel, to provide additional information to more fully define the specific structure of the disclosed subject matter and to present support documents evidencing my conception and development of the subject matter.

Since the work for which I am employed upon which I shall be engaged will include Company knowledge and information of a private, confidential, or secret nature, I shall not, except as required in the conduct of the Company's business or as authorized in writing by the Company, during the course of my employment or thereafter, publish, disclose, or make use of, or authorize anyone else to publish, disclose or otherwise make use of any such knowledge or information, of a confidential nature to and the secret property of the Company or the design, construction, manufacture or sale of the Company's products or services. This obligation shall apply even to Company information created by me.

All documents, written information and other items including, but not limited to, notes, sketches, manuals, blueprints, notebooks, products, tools, fixtures, records and information relating to the business of the Company, made or obtained by me while employed by the Company shall be the exclusive property of the Company and shall be delivered by me to the Company on termination of my employment or at any time as requested by the Company".

Please acknowledge the above by signing and dating in the spaces provided below.

After Exit Int

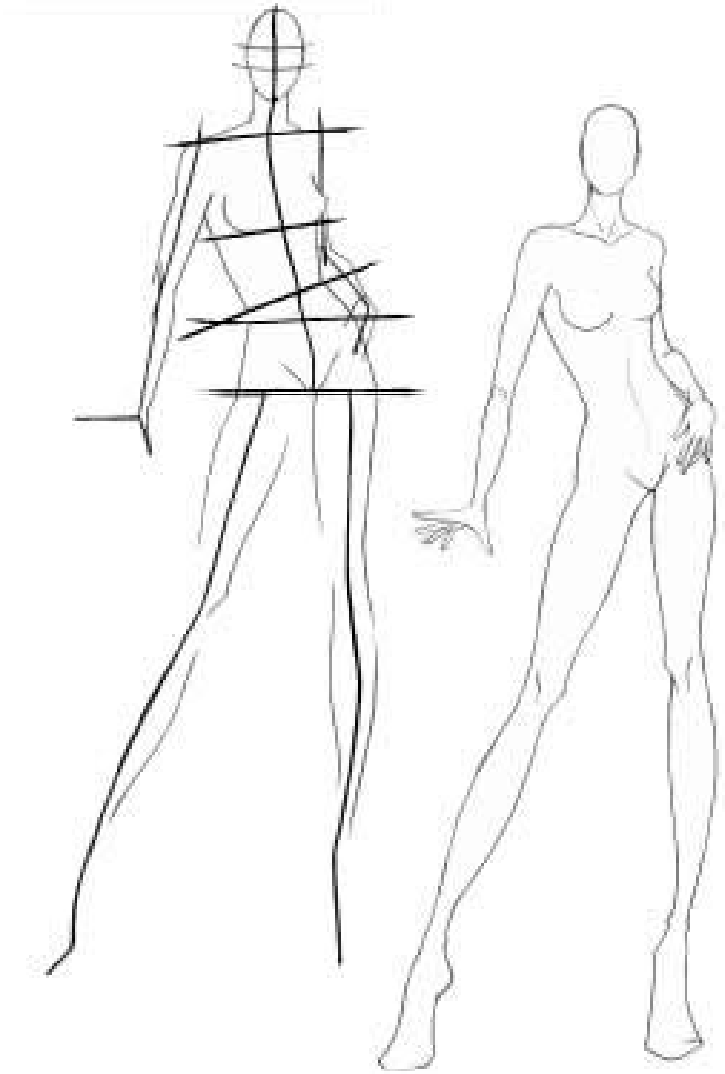
SIGNATURE [signature]	DATE 10/19/00
WITNESS [signature]	DATE 10/19/00

M 0001604

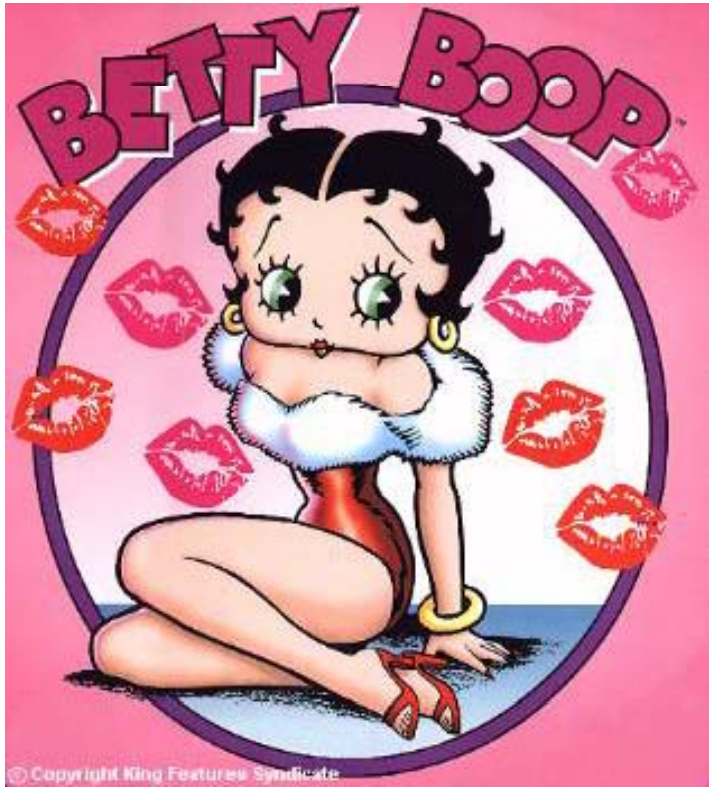
DEPOSITION EXHIBIT 27

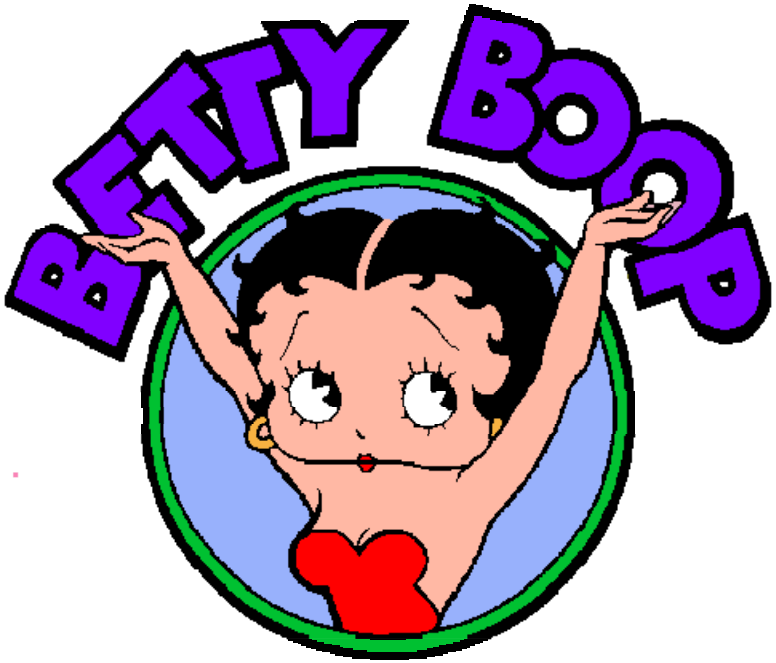
11-8-04 SH

Fashion Illustration



Prior Art





Prior Art

Japanese Anime

Prior Art

Fashion Dolls

Prior Art

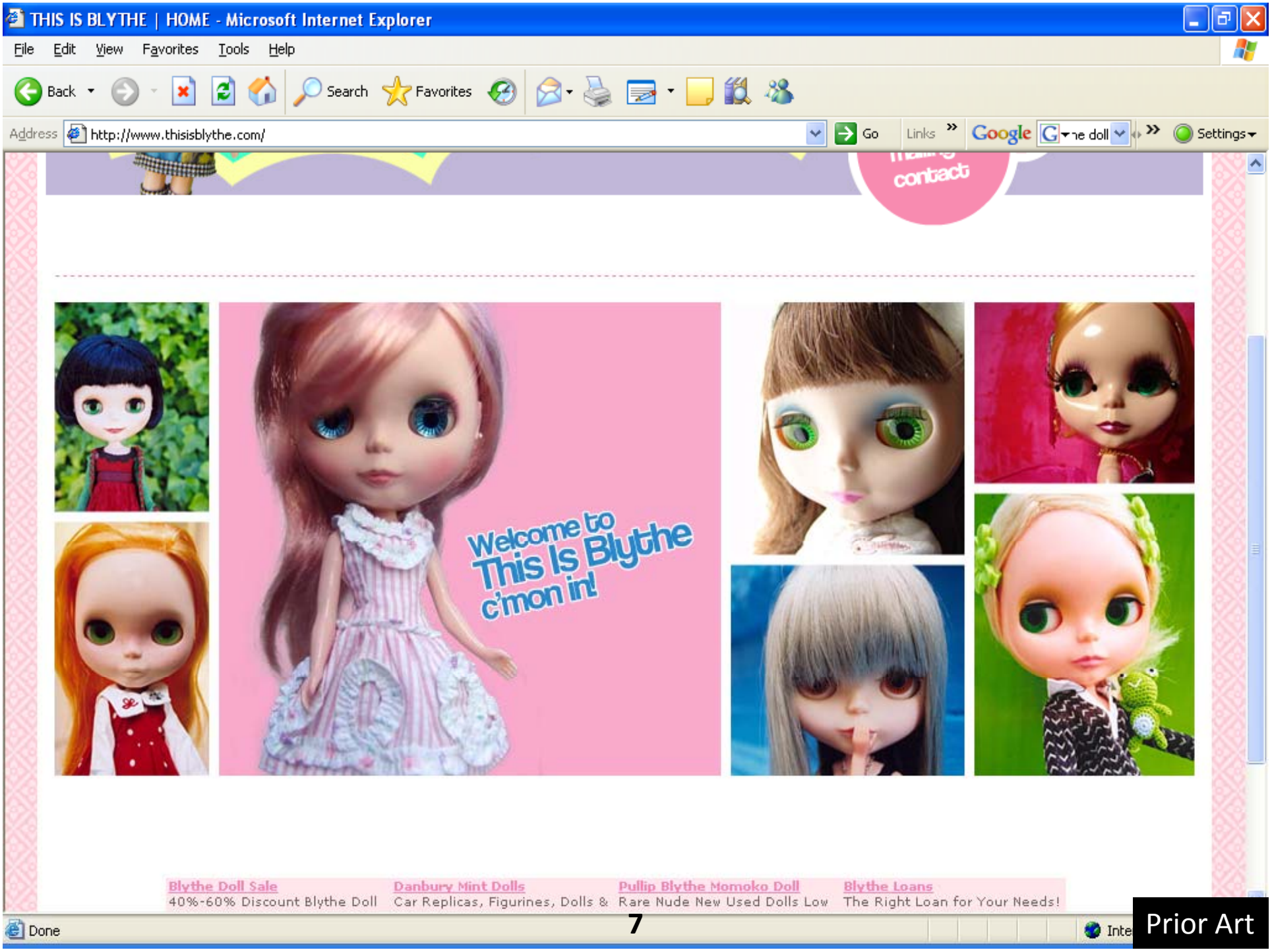
Prior Art


miss
BLYTHE
.com

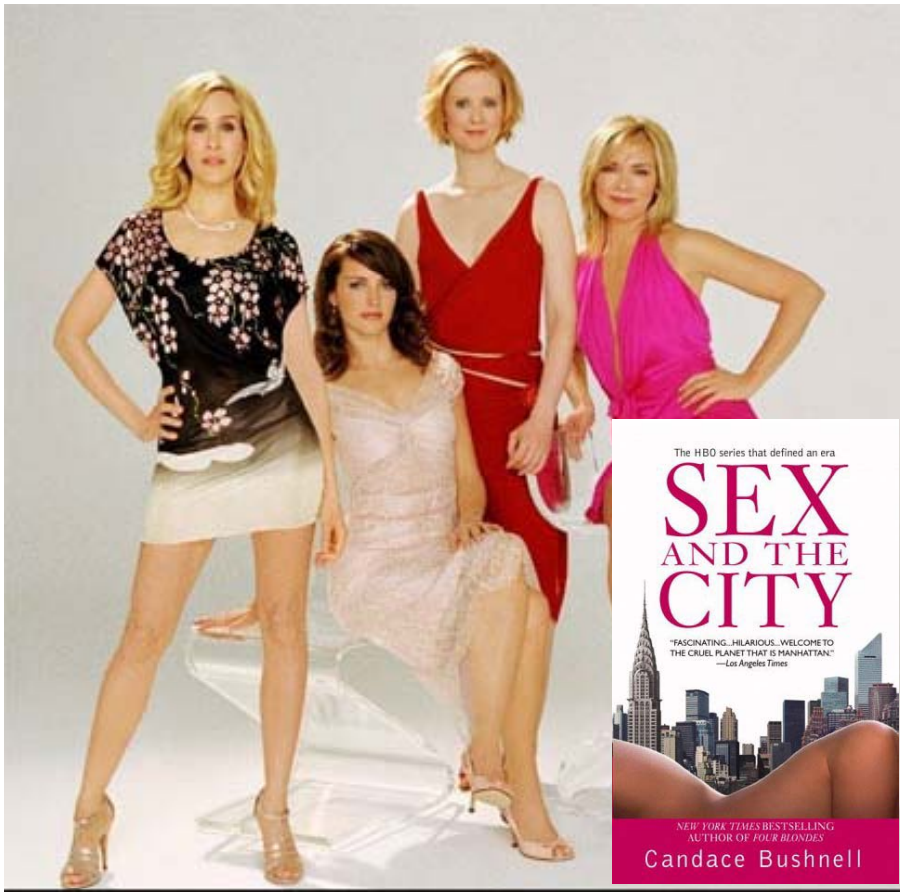

BLYTHE STYLE
PHOTOGRAPHS BY GINA GARAN
INTRODUCTION BY JUNKO WONG


Blythe
TAKARA

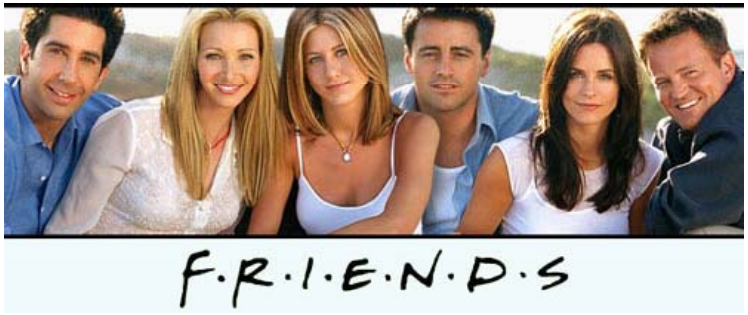
Prior Art


THIS IS BLYTHE | HOME - Microsoft Internet Explorer
File Edit View Favorites Tools Help
Back Search Favorites
Address http://www.thisisblythe.com/
Go Links Google Settings
contact
Welcome to
This Is Blythe
c'mon in!
Blythe Doll Sale
40%-60% Discount Blythe Doll
Danbury Mint Dolls
Car Replicas, Figurines, Dolls &
Pullip Blythe Momoko Doll
Rare Nude New Used Dolls Low
Blythe Loans
The Right Loan for Your Needs!
Done

Prior Art

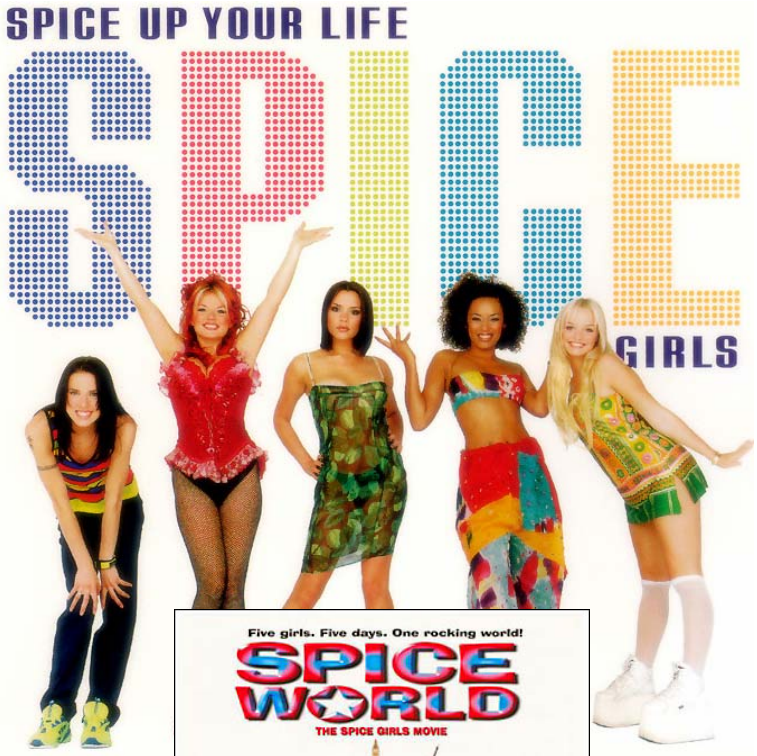


1998-2004

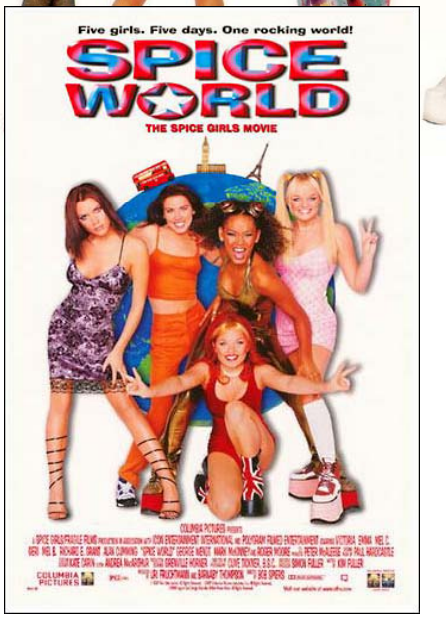


1994-2004

Prior Art



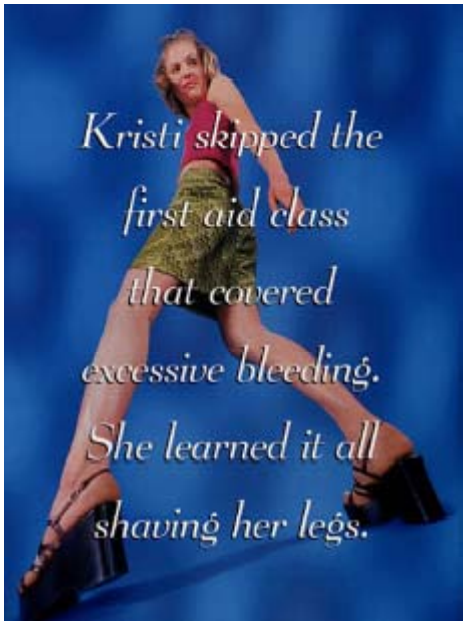
1997



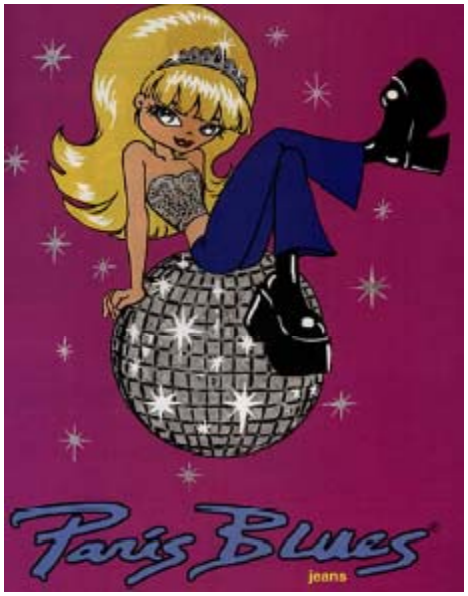
9

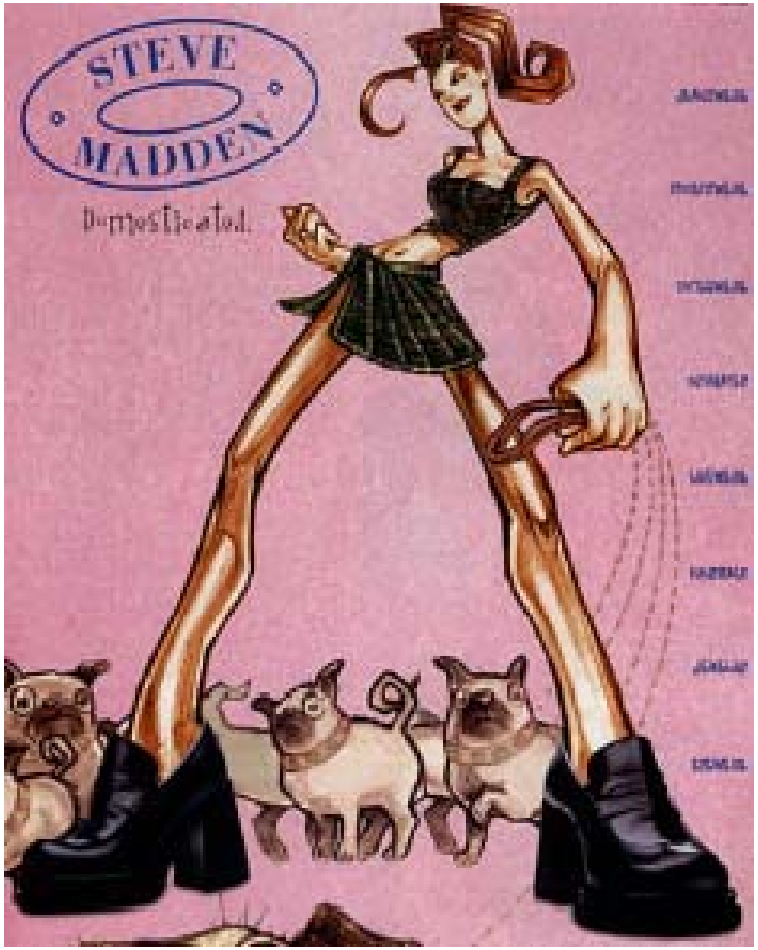
Prior Art

Prior Art

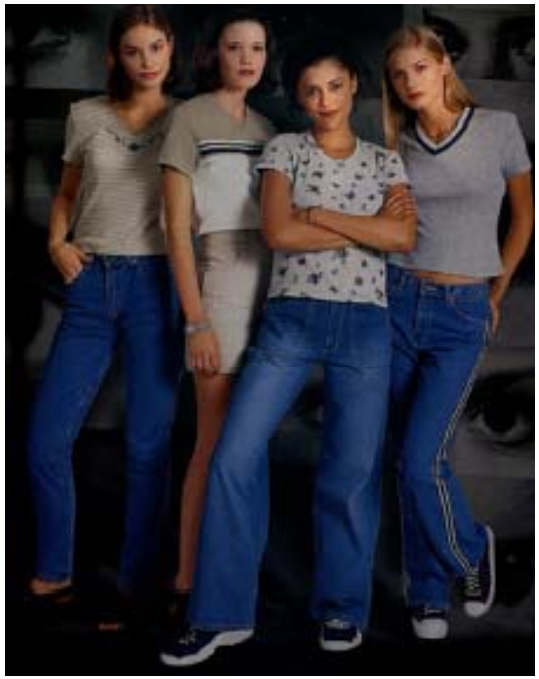

Kristi skipped the
first aid class
that covered
excessive bleeding.
She learned it all
shaving her legs.


love tests: is it just for now, or forever?
seventeen
August 1998
back to school
fashion issue


Paris Blues
jeans

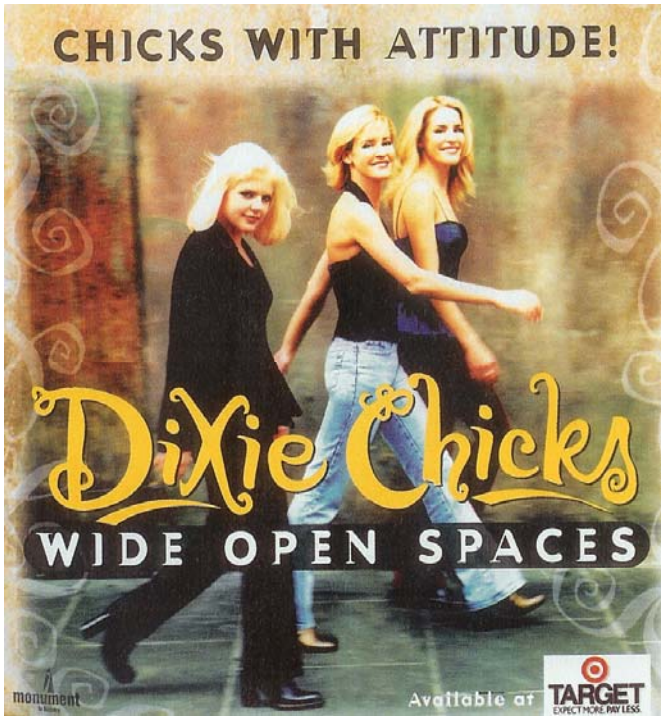

STEVE
MADDEN

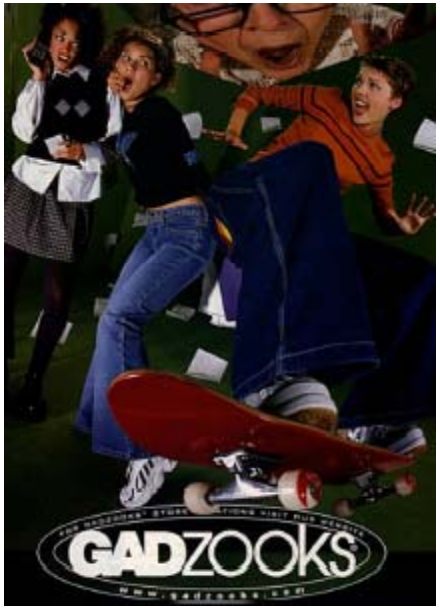
Prior Art




love tests: is it just for now, or forever?
seventeen
August 1998
back to school
fashion issue

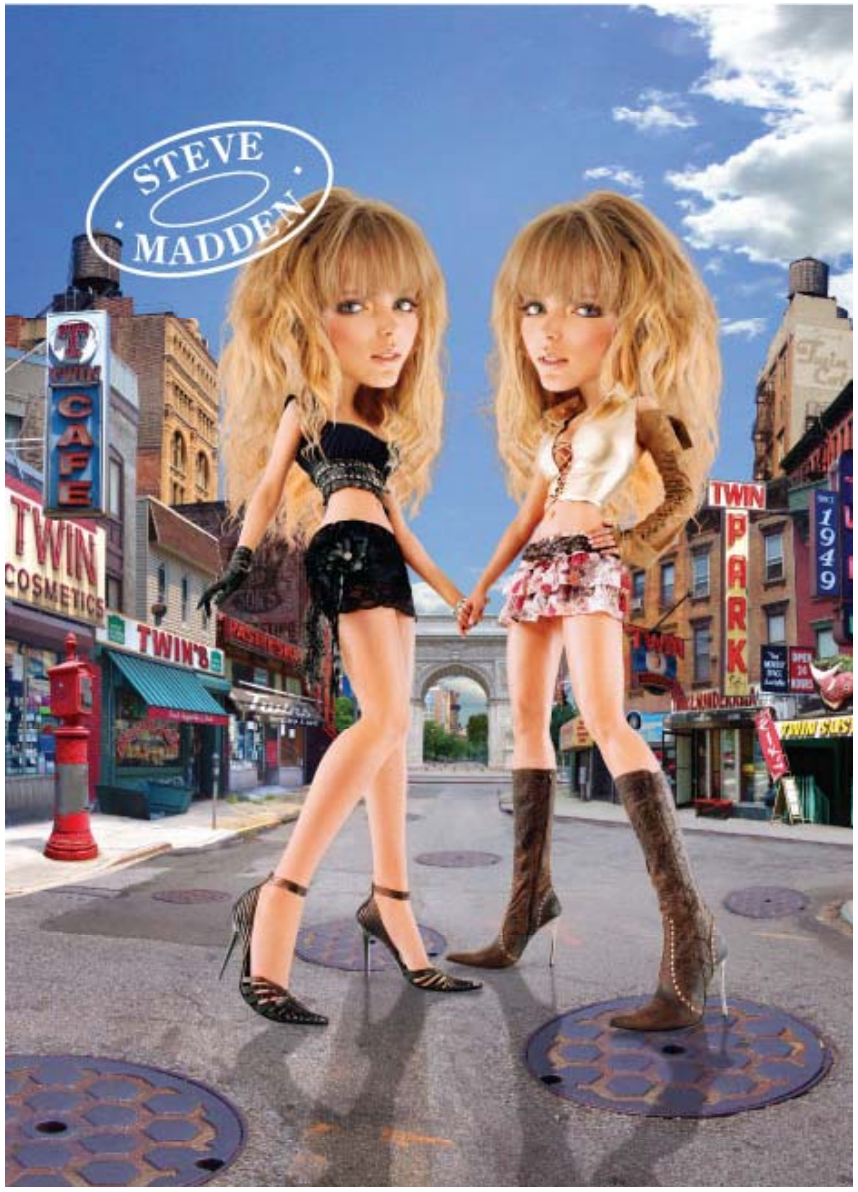

school fashion quiz
mostly C's
glamour girl
mostly E's
trendy girl
mostly B's
anti-fashion girl
mostly D's
earthy girl

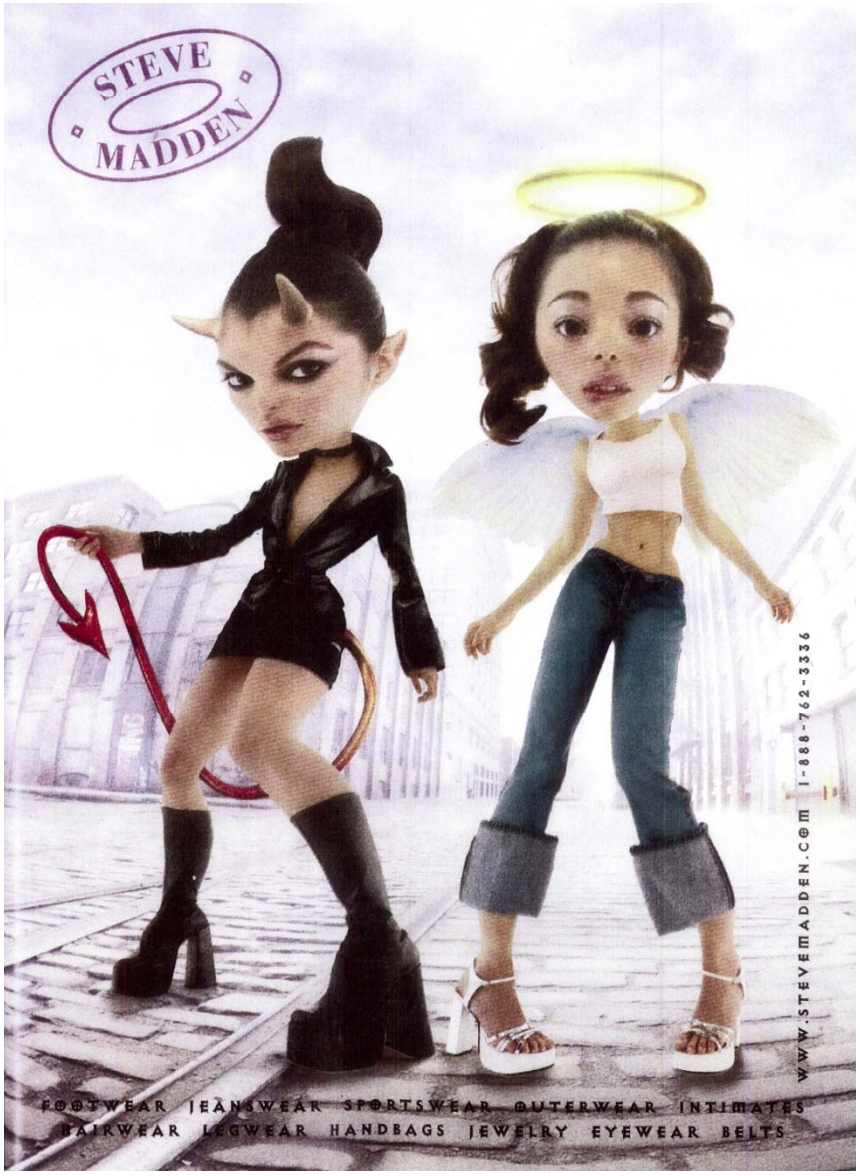

CHICKS WITH ATTITUDE!
Dixie Chicks
WIDE OPEN SPACES
monument
Available at
TARGET
EXPECT MORE. PAY LESS.


GADZOOKS


SKECHERS
FOOTWEAR

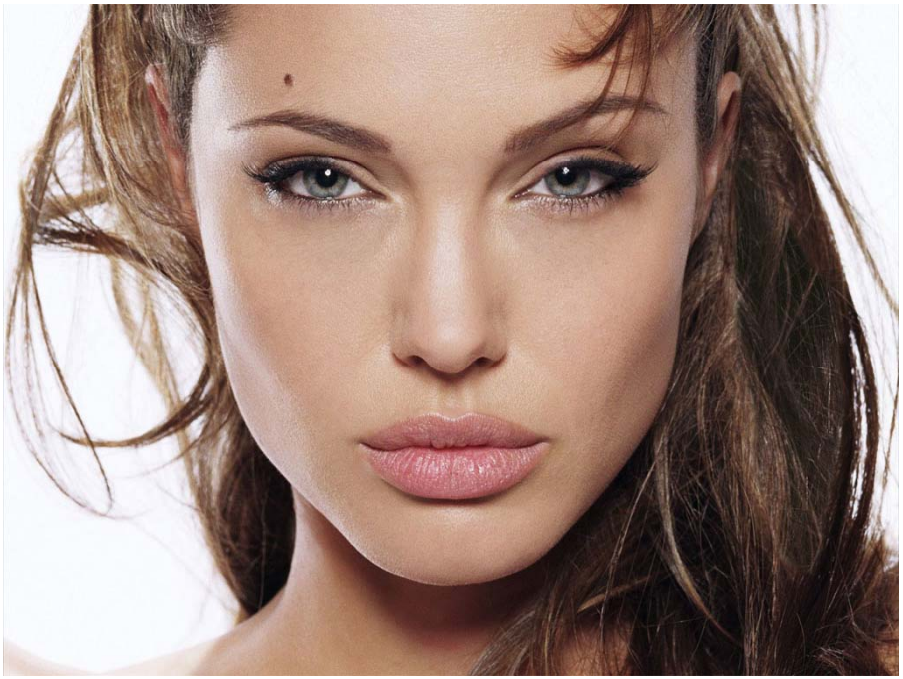
Prior Art


STEVE
MADDEN
CAFE
TWIN
COSMETICS
TWIN'S
TWIN
PARK
1949


STEVE
MADDEN
WWW.STEVEMADDEN.COM 1-888-762-3336
FOOTWEAR JEANSWEAR SPORTSWEAR OUTERWEAR INTIMATES
HAIRWEAR LEGWEAR HANDBAGS JEWELRY EYEWEAR BELTS

Prior Art

Angeline Jolie as Lara Croft



Prior Art

ment. *Borello,* 256 Cal.Rptr. 543, 769 P.2d at 403 ("The label placed by the parties on their relationship is not dispositive, and subterfuges are not countenanced.") Moreover, there is an issue of fact over whether the plaintiff Drivers were required to work regular schedules. Contrary to the district judge's suggestion, they were paid on a regular basis, although their salary was based on a percentage of each delivery. Nevertheless, the fact that their salary was determined in this way is equally consistent with an employee relationship, particularly where other indicia of employment are present. *Ali v. L.A. Focus Publ'n.,* 112 Cal.App.4th 1477, 1485, 5 Cal.Rptr.3d 791 (2003) (that reporter was paid by the article is indicative of an independent contractor relationship, but that fact alone is not dispositive if other indicia of employment are present); *Toyota Motor Sales U.S.A., Inc. v. Super. Ct.,* 220 Cal.App.3d 864, 877, 269 Cal.Rptr. 647 (1990) (the fact that worker was paid on a commission basis is consistent with employee status).

Similarly, setting aside evidence that the plaintiff Drivers did not, as a practical matter, determine their own routes, the ability to determine a driving route is "simply a freedom inherent in the nature of the work and not determinative of the employment relation." *Toyota,* 220 Cal. App.3d at 876, 269 Cal.Rptr. 647; *see also Home Interiors & Gifts, Inc. v. Veliz,* 695 S.W.2d 35, 40–41 (Tex.App.1985) (finding employee-employer relationship although drivers generally determined how to get to their destinations). These cases simply reflect the common-sense rule that, "[i]f an employment relationship exists, the fact that a certain amount of freedom is allowed or is inherent in the nature of the work involved does not change the character of the relationship, particularly where the employer has general supervision and control." *Air Couriers,* 150 Cal.App.4th at 934, 59 Cal.Rptr.3d 37 (quoting *Grant v. Woods,* 71 Cal.App.3d 647, 653, 139 Cal. Rptr. 533 (1977)).

Ultimately, under California's multi-faceted test of employment, there existed at the very least sufficient indicia of an employment relationship between the plaintiff Drivers and EGL such that a reasonable jury could find the existence of such a relationship. Indeed, although it plays no role in our decision to deny summary judgment, it is not without significance that, applying comparable factors to those that we apply here, the Internal Revenue Service (at EGL's request) and the Employment Development Department of California (at Narayan's request) have determined that Narayan was an employee for federal tax purposes (applying federal law) and California Unemployment or Disability Insurance (applying California law), respectively.

CONCLUSION

The judgment of the district court granting EGL's motion for summary judgment is REVERSED and REMANDED.

MATTEL, INC., a Delaware corporation, Defendant–counter–claimant–Appellee,

v.

MGA ENTERTAINMENT, INC.; MGA Entertainment (HK) Limited, a Hong Kong Special Administrative Region business entity; Isaac Larian, an individual, Counter–defendants–Appellants,

Carter Bryant, an individual, Plaintiff-counter-defendant,

Carlos Gustavo Machado Gomez, an individual; MGAE de Mexico, S.R.L. de C.V., a Mexico business entity, Counter-defendants,

Anne Wang, Third-party-defendant,

Omni 808 Investors LLC, Movant.

Carter Bryant, an individual, Plaintiff–counter–defendant–Appellee,

MGA Entertainment, Inc.; MGA Entertainment (HK) Limited, a Hong Kong Special Administrative Region business entity; Isaac Larian, an individual, Counter–defendants–Appellees,

v.

Mattel, Inc., a Delaware corporation, Defendant–counter–claimant–Appellant,

Carlos Gustavo Machado Gomez, an individual; MGAE de Mexico, S.R.L. de C.V., a Mexico business entity, Counter-defendants.

Nos. 09–55673, 09–55812.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted Dec. 9, 2009.

Filed July 22, 2010.

As Amended on Denial of Rehearing Oct. 21, 2010.

Background: Toy manufacturer brought action against former employee for breach of employment agreement after employee disclosed his idea for a line of fashion dolls to a competitor, and against competitor for copyright infringement. The United States District Court for the Central District of California, Stephen G. Larson, J., 2008 WL 5598275, awarded manufacturer $10 million in damages, imposed constructive trust transferring competitor's "Bratz" trademark portfolio to manufacturer, and enjoined future acts of copyright infringement. Competitor and former employee appealed.

Holdings: The Court of Appeals, Kozinski, Chief Judge, held that:

(1) employment agreement did not unambiguously require assignment of employee's idea for a new line of fashion dolls;

(2) awarding constructive trust was abuse of discretion;

(3) employment agreement was ambiguous as to whether it covered only works created within the scope of employment, or whether it covered works created on employee's own time; and

(4) fashion dolls with a bratty look or attitude, or dolls sporting trendy clothing were unprotectable ideas.

Vacated and remanded.

1. Trusts ⇦91

A constructive trust under California law is an equitable remedy that compels the transfer of wrongfully held property to its rightful owner. West's Ann.Cal.Civ. Code § 2223.

2. Trusts ⇦91

A plaintiff seeking imposition of a constructive trust under California law must show: (1) the existence of a res, property or some interest in property; (2) the right to that res; and (3) the wrongful acquisition or detention of the res by another party who is not entitled to it. West's Ann.Cal.Civ.Code § 2223.

3. Labor and Employment ⇦310

Under California law, employment agreement under which employee agreed to assign to employer, a toy manufacturer, any "inventions" he conceived or reduced to practice while working for employer, did not unambiguously require assignment of employee's idea for a new line of fashion dolls; contract specified that "inventions" included all discoveries, improvements, processes, developments, designs, know-how, data computer programs and formulae, but did not mention ideas.

4. Trusts ⚿101

Even if employment agreement required manufacturer's employee to assign his idea for a line of fashion dolls to manufacturer, constructive trust transferring competitor's "Bratz" trademark portfolio to manufacturer for dolls developed by competitor after employee started to work for it was abuse of discretion, where value added by competitor's hard work and creativity was much greater than the value of the original ideas employee brought with him, and resulted in creation of a $1 billion brand.

5. Trusts ⚿91

In general, the beneficiary of the constructive trust is entitled to enhancement in value of the trust property under California law; this is so not because the beneficiary has a substantive right to the enhancement but rather to prevent unjust enrichment of the wrongdoer-constructive trustee.

6. Trusts ⚿91

When the value of the property held in trust increases significantly because of a defendant's efforts, a constructive trust that passes on the profit of the defendant's labor to the plaintiff usually goes too far.

7. Labor and Employment ⚿310

Employment agreement assigning to employer inventions created "at any time during my employment" was ambiguous as to whether it covered only works created within the scope of employment, or whether it covered works created on employee's own time and outside of his duties with employer.

8. Copyrights and Intellectual Property ⚿89(2)

Genuine issues of material fact as to whether employment agreement assigned works to toy manufacturer that its employee created outside the scope of his employment and whether employee's sketches of a new line of fashion dolls and preliminary sculpt of a doll's body was outside the scope of his employment precluded summary judgment in manufacturer's copyright infringement action against competitor, which produced line of dolls based on employee's ideas.

9. Copyrights and Intellectual Property ⚿6, 12(1)

In determining scope of copyright protection afforded to preliminary sculpt of a doll's body, concept of depicting a young, fashion-forward female with exaggerated features, including an oversized head and feet, was unoriginal as well as an unprotectable idea.

10. Copyrights and Intellectual Property ⚿6

Sketches of a line of young, hip female fashion dolls with exaggerated features were entitled to broad copyright protection against substantially similar works, given wide range of expression available for such dolls.

11. Copyrights and Intellectual Property ⚿6, 64

Fashion dolls with a bratty look or attitude, or dolls sporting trendy clothing were unprotectable ideas, in determining whether preliminary sketches of a line of fashion dolls, in which toy manufacturer claimed copyright, were substantially similar to competitor's line of dolls; competitor's dolls could not be considered substantially similar to the preliminary sketches simply because the dolls and sketches depicted young, stylish girls with big heads and an attitude.

12. Copyrights and Intellectual Property ⚿53(1)

A finding of substantial similarity between two works in an action for copyright infringement cannot be based on similarities in unprotectable elements.

13. Copyrights and Intellectual Property ⚿53(1)

"Substantial similarity" for copyright infringement requires a similarity of expression, not ideas.

See publication Words and Phrases for other judicial constructions and definitions.

Trademarks ⚿1800

Bratz.

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Appeal from the United States District Court for the Central District of California, Stephen G. Larson, District Judge, Presiding. D.C. No. 2:04–cv–09049–SGL–RNB.

Before: ALEX KOZINSKI, Chief Judge, STEPHEN S. TROTT and KIM McLANE WARDLAW, Circuit Judges.

OPINION

KOZINSKI, Chief Judge:

Who owns Bratz?

I

Barbie was the unrivaled queen of the fashion-doll market throughout the latter half of the 20th Century. But 2001 saw the introduction of Bratz, "The Girls With a Passion for Fashion!" Unlike the relatively demure Barbie, the urban, multiethnic and trendy Bratz dolls have attitude. This spunk struck a chord, and Bratz became an overnight success. Mattel, which produces Barbie, didn't relish the competition. And it was particularly unhappy when it learned that the man behind Bratz was its own former employee, Carter Bryant.

Bryant worked in the "Barbie Collectibles" department, where he designed fashion and hair styles for high-end Barbie dolls intended more for accumulation than for play. In August 2000, while he was still employed by Mattel, Bryant pitched his idea for the Bratz line of dolls to two employees of MGA Entertainment, one of Mattel's competitors. Bryant was soon called back to see Isaac Larian, the CEO of MGA. Bryant brought some preliminary sketches, as well as a crude dummy constructed out of a doll head from a Mattel bin, a Barbie body and Ken (Barbie's ex) boots. The Zoe, Lupe, Hallidae and Jade dolls in Bryant's drawings eventually made it to market as Cloe, Yasmin, Sasha and Jade, the first generation of Bratz dolls.

Bryant signed a consulting agreement with MGA on October 4, 2000, though it was dated September 18. Bryant gave Mattel two weeks' notice on October 4 and continued working there until October 19. During this period, Bryant was also working with MGA to develop Bratz, even cre-

ating a preliminary Bratz sculpt.[1] A sculpt is a mannequin-like plastic doll body without skin coloring, face paint, hair or clothing.

MGA kept Bryant's involvement with the Bratz project secret, but Mattel eventually found out. This led to a flurry of lawsuits, which were consolidated in federal district court. Proceedings below were divided into two phases. Phase 1 dealt with claims relating to the ownership of Bratz; Phase 2 is pending and will deal with the remaining claims. This is an interlocutory appeal from the equitable orders entered at the conclusion of Phase 1.

During Phase 1, Mattel argued that Bryant violated his employment agreement by going to MGA with his Bratz idea instead of disclosing and assigning it to Mattel. Mattel claimed it was the rightful owner of Bryant's preliminary sketches and sculpt, which it argued MGA's subsequent Bratz dolls infringed. And it asserted that MGA wrongfully acquired the ideas for the names "Bratz" and "Jade," so the Bratz trademarks should be transferred from MGA to Mattel.

Mattel won virtually every point below. The jury found that Bryant thought of the "Bratz" and "Jade" names, and created the preliminary sketches and sculpt, while he was employed by Mattel. It found that MGA committed three state-law violations relating to Bryant's involvement with Bratz. And it issued a general verdict finding MGA liable for infringing Mattel's copyrights in Bryant's preliminary Bratz works. Mattel sought more than $1 billion in copyright damages but the jury awarded Mattel only $10 million, or about 1% of that amount, perhaps because it found only a small portion of the Bratz dolls infringing. *See* pp. 911–12 *infra.*

The district court entered equitable relief based on the jury's findings. As to the state-law violations, the district court imposed a constructive trust over all trademarks including the terms "Bratz" and "Jade," essentially transferring the Bratz trademark portfolio to Mattel.[2] The transfer prohibited MGA from marketing any Bratz-branded product, such as Bratz dolls (Bratz, Bratz Boyz, Lil' Bratz, Bratz Lil' Angelz, Bratz Petz, Bratz Babyz, Itsy Bitsy Bratz, etc.), doll accessories (Bratz World House, Bratz Cowgirlz Stable, Bratz Spring Break Pool, Bratz Babyz Ponyz Buggy Blitz, etc.), video games ("Bratz: Girlz Really Rock," "Bratz: Forever Diamondz," "Bratz: Rock Angelz," etc.) and *Bratz* the movie.

As to the copyright claim, the district court issued an injunction prohibiting MGA from producing or marketing virtually every Bratz female fashion doll, as well as any future dolls substantially similar to Mattel's copyrighted Bratz works. The injunction covered not just the original four dolls, but also subsequent generations (e.g., "Bratz Slumber Party Sasha" and "Bratz Girlfriendz Nite Out Cloe") and other doll characters (e.g., "Bratz Play Sportz Lilee" and "Bratz Twins Phoebe and Roxxi").

In effect, Barbie captured the Bratz. The Bratz appeal.

II

[1, 2] A constructive trust is an equitable remedy that compels the transfer of

1. The sculpt was actually crafted by a freelance sculptor with input from Bryant. The parties disputed below whether Bryant "created" it, and the jury found that Bryant did. This finding is not challenged on appeal.

2. Based on the finding that MGA wrongfully acquired the ideas for the names "Bratz" and "Jade," the district court also entered a UCL injunction and a declaratory judgment concerning MGA's right to the Bratz trademarks. For simplicity, we will refer only to the constructive trust to describe all equitable relief.

wrongfully held property to its rightful owner. *Communist Party of U.S. v. 522 Valencia, Inc.,* 35 Cal.App.4th 980, 41 Cal. Rptr.2d 618, 623 (1995); *see also* Cal. Civ. Code § 2223 ("One who wrongfully detains a thing is an involuntary trustee thereof, for the benefit of the owner."). A plaintiff seeking imposition of a constructive trust must show: (1) the existence of a *res* (property or some interest in property); (2) the right to that *res;* and (3) the wrongful acquisition or detention of the *res* by another party who is not entitled to it. *Communist Party,* 41 Cal.Rptr.2d at 623–24.

Prior to trial, the district court held that Bryant's employment agreement assigned his ideas to Mattel, and so instructed the jury. What was left for the jury to decide was *which* ideas Bryant came up with during his time with Mattel. It found that Bryant thought of the names "Bratz" and "Jade" while he was employed by Mattel, and that MGA committed several state-law violations by interfering with Bryant's agreement as well as aiding and abetting its breach. After trial, the district court imposed a constructive trust over all Bratz-related trademarks. We review that decision for abuse of discretion. *See GHK Assocs. v. Mayer Group, Inc.,* 224 Cal. App.3d 856, 274 Cal.Rptr. 168, 182 (1990).

A.

[3] A constructive trust would be appropriate only if Bryant assigned his ideas for "Bratz" and "Jade" to Mattel in the first place. Whether he did turns on the interpretation of Bryant's 1999 employment agreement, which provides: "I agree to communicate to the Company as promptly and fully as practicable all *inventions* (as defined below) conceived or reduced to practice by me (alone or jointly by others) at any time during my employment by the Company. I hereby assign to the Company ... all my right, title and interest in such *inventions,* and all my right, title and interest in any patents, copyrights, patent applications or copyright applications based thereon." (Emphasis added.) The contract specifies that "the term 'inventions' includes, but is not limited to, all discoveries, improvements, processes, developments, designs, know-how, data computer programs and formulae, whether patentable or unpatentable." The district court held that the agreement assigned Bryant's ideas to Mattel, even though ideas weren't included on that list or mentioned anywhere else in the contract.[3] We review the district court's construction of the agreement de novo. *See L.K. Comstock & Co. v. United Eng'rs & Constructors Inc.,* 880 F.2d 219, 221 (9th Cir.1989).

Mattel points out that the list of examples of what constitutes an invention is illustrative rather than exclusive. Ideas, however, are markedly different from most of the listed examples. *Cf. People ex rel. Lungren v. Superior Ct.,* 14 Cal.4th 294, 58 Cal.Rptr.2d 855, 926 P.2d 1042, 1057 (1996) (courts avoid constructions that would make "a particular item in a series ... markedly dissimilar to other items on the same list"). Designs, processes, computer programs and formulae are concrete, unlike ideas, which are ephemeral and often reflect bursts of inspiration that exist only in the mind. On the other hand, the agreement also lists less tangible inventions such as "know-how" and "discoveries." And Bryant may have conveyed rights in innovations that were not embodied in a tangible form by assigning inventions he "conceived" as well as those he reduced to practice.

We conclude that the agreement could be interpreted to cover ideas, but the text doesn't compel that reading. The district

3. Contrary to Mattel's argument, MGA adequately preserved its objections to this ruling.

court thus erred in holding that the agreement, by its terms, clearly covered ideas. Had the district court recognized the ambiguity, it might have evaluated whether it could be resolved by extrinsic evidence. *See Wolf v. Superior Court,* 114 Cal. App.4th 1343, 8 Cal.Rptr.3d 649, 655–56 (2004). At various stages of litigation, the parties introduced such evidence supporting their respective interpretations of "inventions." Contracts Mattel drafted for other employees, for example, expressly assigned their "ideas" as well as their "inventions." This tends to show that the term "inventions" alone doesn't include ideas. On the other hand, a Mattel executive claimed during her deposition that it was common knowledge in the design industry that terms like "invention" and "design" did include employee ideas. Because the district court concluded that the language of the contract was clear, it didn't consider the extrinsic evidence the parties presented. Even if it had, it may not have been able to resolve the meaning of "inventions." If the meaning turns in part on the credibility of conflicting extrinsic evidence, a properly instructed jury should have decided the issue. *See Morey v. Vannucci,* 64 Cal.App.4th 904, 75 Cal. Rptr.2d 573, 579 (1998). Because we must vacate the constructive trust in any event, for reasons explained below, this is a matter the district court can take up on remand.

B.

[4] The very broad constructive trust the district court imposed must be vacated regardless of whether Bryant's employment agreement assigned his ideas to Mattel. Even assuming that it did, and that MGA therefore misappropriated the names "Bratz" and "Jade," the value of the trademarks the company eventually acquired for the entire Bratz line was significantly greater because of MGA's own development efforts, marketing and investment. The district court nonetheless transferred MGA's entire Bratz trademark portfolio to Mattel on the ground that the "enhancement of value [of the property held in trust] is given to the beneficiary of the constructive trust." As a result, Mattel acquired the fruit of MGA's hard work, and not just the appreciation in value of the ideas Mattel claims it owns.

[5] In general, "[t]he beneficiary of the constructive trust is entitled to enhancement in value of the trust property." *Haskel Eng'g & Supply Co. v. Hartford Accident & Indem. Co.,* 78 Cal.App.3d 371, 144 Cal.Rptr. 189, 193 (1978). This is so "not because [the beneficiary] has a substantive right to [the enhancement] but rather to prevent unjust enrichment of the wrongdoer-constructive trustee." *Id.* Thus, a person who fraudulently acquired a house worth $100,000 in 2000 that appreciates to $200,000 by 2010 because of a strong real estate market can't complain when the rightful owner takes the benefit of the $100,000 increase. "[I]t is simple equity that a wrongdoer should disgorge his fraudulent enrichment." *Janigan v. Taylor,* 344 F.2d 781, 786 (1st Cir.1965).

This principle has the greatest force where the appreciation of the property is due to external factors rather than the efforts of the wrongful acquisitor. *Id.* at 787. "When the defendant profits from the wrong, it is necessary to identify the profits and to recapture them without capturing the fruits of the defendant's own labors or legitimate efforts." Dan B. Dobbs, *Dobbs Law of Remedies: Damages–Equity–Restitution* § 6.6(3) (2d ed. 1993). This is because "the aim of restitution has been to avoid taking the defendant's blood along with the pound of flesh." *Id.* § 6.6(3) n. 4. A constructive trust is therefore "not appropriate to every case because it can overdo the job." *Id.* § 4.3(2).

[6] When the value of the property held in trust increases significantly because of a defendant's efforts, a constructive trust that passes on the profit of the defendant's labor to the plaintiff usually goes too far. For example, "[i]f an artist acquired paints by fraud and used them in producing a valuable portrait we would not suggest that the defrauded party would be entitled to the portrait, or to the proceeds of its sale." *Janigan*, 344 F.2d at 787. Even assuming that MGA took some ideas wrongfully, it added tremendous value by turning the ideas into products and, eventually, a popular and highly profitable brand. The value added by MGA's hard work and creativity dwarfs the value of the original ideas Bryant brought with him, even recognizing the significance of those ideas. We infer that the jury made much the same judgment when it awarded Mattel only a small fraction of the more than $1 billion in interest-adjusted profit MGA made from the brand.

From the ideas for the names "Bratz" and "Jade," MGA created not only the first generation of Bratz dolls (Cloe, Yasmin, Sasha and Jade), but also many other Bratz characters (Ciara, Dana, Diona, Felicia, Fianna and so on), as well as subsequent generations of the original four dolls ("Bratz Flower Girlz Cloe," "Bratz on Ice Doll Yasmin," etc.). MGA also generated other doll lines, such as the Bratz Boyz, Bratz Petz and Bratz Babyz. And it made a variety of Bratz doll accessories, along with several Bratz video games and a movie. These efforts significantly raised the profile of the Bratz brand and increased the value of the Bratz trademarks.

It is not equitable to transfer this billion dollar brand—the value of which is overwhelmingly the result of MGA's legitimate efforts—because it may have started with two misappropriated names. The district court's imposition of a constructive trust forcing MGA to hand over its sweat equity was an abuse of discretion and must be vacated.

III

Mattel also claimed ownership of Bryant's preliminary Bratz drawings and sculpt under Bryant's employment agreement, and that MGA's subsequent Bratz dolls infringed its copyrights in those works. The drawings and sculpt clearly *were* "inventions" as that term is defined in Bryant's employment agreement with Mattel. However, MGA argued that the employment agreement didn't assign the items because Bryant created them outside the scope of his employment at Mattel, on his own time. At summary judgment, the district court held that the agreement assigned inventions even if they were not made during working hours, so long as they were created during the time period Bryant was employed by Mattel. So instructed, the jury found that Bryant made the drawings and sculpt while he was employed by Mattel, and the agreement therefore assigned them to Mattel.[4] The jury was not asked to find whether Bryant made the drawings and sculpt during Mattel work hours, and it's unclear whether the record contained any evidence on this point.

Once Mattel established ownership of Bryant's preliminary sketches and sculpt, it pursued a copyright claim against MGA. The district court instructed the jury that any "substantially similar" Bratz doll infringed Mattel's copyrights in the sketches and sculpt. During deliberations, the jury sent the judge a note asking if it could find infringement as to the first generation of

4. The jury also found that Bryant created the dummy doll, *see* pp. 907–08 *supra*, while he was at Mattel. The dummy was thrown away long before this litigation ensued, and was so crude that no copyright claim is based on it.

Bratz dolls and no others. The judge said it could. The jury returned a general verdict finding MGA liable for copyright infringement, but awarded Mattel only $10 million in damages, a tiny fraction of the more than $1 billion to which Mattel claimed it was entitled. The district court thought it unclear which Bratz dolls, or how many dolls, the jury thought infringing, so it made its own infringement findings in determining whether Mattel was entitled to equitable relief. The district court found the vast majority of Bratz dolls infringing and enjoined MGA from producing them or any other substantially similar dolls.

A.

[7] Bryant's 1999 employment agreement assigns to Mattel inventions created "at any time during my employment by the Company."[5] MGA argues that "at any time during my employment" covers only works created within the scope of Bryant's employment, not those created on his own time and outside of his duties at Mattel. Bryant wasn't tasked with creating new doll lines there; he designed fashions and hair styles for Barbie Collectibles. MGA thus argues that Bryant created the Bratz designs and came up with the names "Bratz" and "Jade" outside the scope of his employment, and that he therefore owns the work.[6]

The district court disagreed, holding at summary judgment that the agreement assigned to Mattel "any doll or doll fashions [Bryant] designed during the period of his employment with Mattel." It was therefore irrelevant "whether Bryant worked on [Bratz] on his own time [or] during his working hours at Mattel." We again review the district court's construction of the contract de novo. *See L.K. Comstock*, 880 F.2d at 221.

The phrase "at any time during my employment" is ambiguous. It could easily refer to the entire calendar period Bryant worked for Mattel, including nights and weekends. But it can also be read more narrowly to encompass only those inventions created during work hours ("during my employment"), possibly including lunch and coffee breaks ("at any time").[7] Extrinsic evidence doesn't resolve the ambiguity. For example, an employee testified that it was "common knowledge that a lot of people were moonlighting and doing other work," which wasn't a problem so long as it was done on "their own time," and at "their own house." She agreed when asked, "Was it your understanding that if you designed dolls when you were at home at night that you owned them?" However, another employee testified, "Everything I did for Mattel belonged to Mat-

5. The agreement excepts inventions that "qualif[y] under the provision of Section 2870 of the California Labor Code[, which] provides that the requirement to assign 'shall not apply to an invention that the employee developed entirely on his or her own time without using the employer's equipment, supplies, facilities or trade secret information except for those inventions that either (1) relate at the time of conception or reduction to practice of the invention to the employer's business ... or (2) result from any work performed by the employee for the employer.' "

6. It won't matter whether Bryant came up with the ideas in the course of employment if the district court or a properly instructed jury determines that the agreement didn't assign ideas in the first place. *See* Part II.A *supra*.

7. Mattel argues that because employers are already considered the authors of works made for hire under the Copyright Act, 17 U.S.C. § 201(b), the agreement must cover works made outside the scope of employment. Otherwise, employees would be assigning to Mattel works the company already owns. But the contract provides Mattel additional rights by covering more than just copyrightable works. The contract can also be enforced in state court, whereas Copyright Act claims must be heard in federal court.

tel. Actually, everything I did while I was working for Mattel belonged to Mattel."

[8] Because the agreement's language is ambiguous and some extrinsic evidence supports each party's reading, the district court erred by granting summary judgment to Mattel on this issue and holding that the agreement clearly assigned works made outside the scope of Bryant's employment. *See City of Hope Nat'l Med. Ctr. v. Genentech, Inc.*, 43 Cal.4th 375, 75 Cal.Rptr.3d 333, 181 P.3d 142, 156 (2008). The issue should have been submitted to the jury, which could then have been instructed to determine (1) whether Bryant's agreement assigned works created outside the scope of his employment at Mattel, and (2) whether Bryant's creation of the Bratz sketches and sculpt was outside the scope of his employment.

B.

The district court's error in construing the employment agreement is sufficient to vacate the copyright injunction. On remand, Mattel might well convince a properly instructed jury that the agreement assigns works created outside the scope of employment, or that Bryant's preliminary Bratz sketches and sculpt were created within the scope of his employment at Mattel. The district court would then once again have to decide whether to grant a copyright injunction. We therefore believe it prudent to address MGA's appeal of the district court's copyright rulings.

Mattel argued that MGA's Bratz dolls infringed its copyrights in the sketches and sculpt. To win its copyright claim, Mattel had to establish three things. First, Mattel had to prove that it owned copyrights in the sketches and sculpt (it did). Second, it had to show that MGA had access to the sketches and sculpt (obviously). Third, it had to establish that MGA's dolls infringe the sketches and sculpt (the kicker). *See Aliotti v. R. Dakin & Co.*, 831 F.2d 898, 900 (9th Cir.1987).

Assuming that Mattel owns Bryant's preliminary drawings and sculpt, its copyrights in the works would cover only its particular expression of the bratty-doll idea, not the idea itself. *See Herbert Rosenthal Jewelry Corp. v. Kalpakian*, 446 F.2d 738, 742 (9th Cir.1971). Otherwise, the first person to express any idea would have a monopoly over it. Degas can't prohibit other artists from painting ballerinas, and Charlaine Harris can't stop Stephenie Meyer from publishing *Twilight* just because Sookie came first. Similarly, MGA was free to look at Bryant's sketches and say, "Good idea! We want to create bratty dolls too."

Mattel, of course, argues that MGA went beyond this by copying Bryant's unique expression of bratty dolls, not just the idea. To distinguish between permissible lifting of ideas and impermissible copying of expression, we have developed a two-part "extrinsic/intrinsic" test. *See Apple Computer, Inc. v. Microsoft Corp.*, 35 F.3d 1435, 1442 (9th Cir.1994). At the initial "extrinsic" stage, we examine the similarities between the copyrighted and challenged works and then determine whether the similar elements are protectable or unprotectable. *See id.* at 1442–43. For example, ideas, scenes a faire (standard features) and unoriginal components aren't protectable. *Id.* at 1443–45. When the unprotectable elements are "filtered" out, what's left is an author's particular expression of an idea, which most definitely *is* protectable. *Id.*

Given that others may freely copy a work's ideas (and other unprotectable elements), we start by determining the breadth of the possible expression of those ideas. If there's a wide range of expression (for example, there are gazillions of ways to make an aliens-attack movie), then

copyright protection is "broad" and a work will infringe if it's "substantially similar" to the copyrighted work. *See id.* at 1439, 1446–47. If there's only a narrow range of expression (for example, there are only so many ways to paint a red bouncy ball on blank canvas), then copyright protection is "thin" and a work must be "virtually identical" to infringe. *See id.*; *Satava v. Lowry,* 323 F.3d 805, 812 (9th Cir.2003) (glass-in-glass jellyfish sculpture only entitled to thin protection against virtually identical copying due to the narrow range of expression).

The standard for infringement—substantially similar or virtually identical—determined at the "extrinsic" stage is applied at the "intrinsic" stage. *See Apple Computer,* 35 F.3d at 1443. There we ask, most often of juries, whether an ordinary reasonable observer would consider the copyrighted and challenged works substantially similar (or virtually identical). *See id.* at 1442. If the answer is yes, then the challenged work is infringing.

The district court conducted an extrinsic analysis and determined that the following elements of Bryant's sketches and sculpt were non-protectable:

1. The resemblance or similarity to human form and human physiology.
2. The mere presence of hair, heads, two eyes, eyebrows, lips, nose, chin, mouth, and other features that track human anatomy and physiology.
3. Human clothes, shoes, and accessories.
4. Age, race, ethnicity, and "urban" or "rural" appearances.
5. Common or standard anatomical features relative to others (doll nose and relatively thin, small bodies).
6. Scenes a faire, or common or standard treatments of the subject matter.

It found that the following elements were protectable:

1. Particularized, synergistic compilation and expression of the human form and anatomy that expresses a unique style and conveys a distinct look or attitude.
2. Particularized expression of the doll's head, lips, eyes, eyebrows, eye features, nose, chin, hair style and breasts, including the accentuation or exaggeration of certain anatomical features relative to others (doll lips, eyes, eyebrows, and eye features) and de-emphasis of certain anatomical features relative to others (doll nose and thin, small doll bodies).
3. Particularized, non-functional doll clothes, doll shoes, and doll accessories that express aggressive, contemporary, youthful style.

Based on this determination, the district court decided that "substantial similarity" is the appropriate test for infringement. And, in determining whether Mattel was entitled to equitable relief, it found that the two Bratz sculpts and the overwhelming majority of the Bratz female fashion dolls were substantially similar to Mattel's copyrighted works. The district court therefore entered an injunction prohibiting MGA from producing the infringing dolls or any future substantially similar dolls. We review de novo the district court's determination as to the scope of copyright protection. *See Ets–Hokin v. Skyy Spirits, Inc.,* 225 F.3d 1068, 1073 (9th Cir. 2000).

[9] 1. Doll Sculpt. The district court enjoined MGA from marketing or producing any doll that incorporates the "core Bratz fashion doll production sculpt" or the "Bratz Movie sculpt" because it held they were substantially similar to Bryant's preliminary sculpt.[8] By adopting the "substantially similar" standard, the district court afforded Bryant's sculpt broad copyright protection. *See* pp. 913–14 *supra.* MGA argues that the district court should have given Bryant's preliminary

8. The district court's analysis was brief, so we must infer this finding. It's possible that the district court also thought MGA's two sculpts were substantially similar to some of Bryant's sketches of doll bodies. Even if this were so,

sculpt only thin protection against virtually identical works.

In order to determine the scope of protection for the sculpt, we must first filter out any unprotectable elements. Producing small plastic dolls that resemble young females is a staple of the fashion doll market. To this basic concept, the Bratz dolls add exaggerated features, such as an oversized head and feet. But many fashion dolls have exaggerated features—take the oversized heads of the Blythe dolls and My Scene Barbies as examples. Moreover, women have often been depicted with exaggerated proportions similar to those of the Bratz dolls—from Betty Boop to characters in Japanese anime and Steve Madden ads. The concept of depicting a young, fashion-forward female with exaggerated features, including an oversized head and feet, is therefore unoriginal as well as an unprotectable idea. *Cf. Herbert Rosenthal*, 446 F.2d at 742 ("We think the production of jeweled bee pins is a larger private preserve than Congress intended to be set aside.... A jeweled bee pin is therefore an 'idea' that defendants were free to copy.").

Mattel argues that the sculpt was entitled to broad protection because there are many ways one can depict an exaggerated human figure. It's true that there's a broad range of expression for bodies with exaggerated features: One could make a fashion doll with a large nose instead of a small one, or a potbelly instead of a narrow waist. But fashion dolls that look like Patty and Selma Bouvier don't express the idea behind Bratz. Dolls depicting young, fashion-forward females have to have somewhat idealized proportions—which means slightly larger heads, eyes and lips; slightly smaller noses and waists; and slightly longer limbs than those that appear routinely in nature. But these features can be exaggerated only so much: Make the head too large or the waist too small and the doll becomes freakish, not idealized.

The expression of an attractive young, female fashion doll with exaggerated proportions is thus highly constrained. *Cf. Data East USA, Inc. v. Epyx, Inc.*, 862 F.2d 204, 209 (9th Cir.1988) ("Because of these constraints, karate is not susceptible of a wholly fanciful presentation."). Because of the narrow range of expression, the preliminary sculpt is entitled to only thin copyright protection against virtually identical copying.[9] *Cf. Ets–Hokin v. Skyy Spirits Inc.*, 323 F.3d 763, 766 (9th Cir. 2003) (photo of vodka bottle merits only thin protection because of limited range of expression); *Satava*, 323 F.3d at 812 (similar). The district court erred in affording broad protection against works substantially similar to the sculpt.

2. Bratz Sketches. The district court also enjoined MGA from marketing or producing nearly every Bratz female fashion doll—not just the first generation of dolls, but also subsequent dolls like "Bratz Nighty–Nite Yasmin" and "Bratz Campfire Felicia"—because it held they were substantially similar to Bryant's preliminary sketches.[10] MGA argues that the district court erred in failing to filter out the unprotectable elements of the dolls and

it wouldn't change our analysis because the sketches of doll bodies would be entitled to no more protection here than Bryant's sculpt.

9. Applying this test doesn't create a circuit split. Although other courts have invoked a "substantial similarity" test in cases involving dolls, they've used it to compare only the protectable features of the dolls, rather than the dolls overall. *See, e.g., Susan Wakeen Doll Co. v. Ashton Drake Galleries*, 272 F.3d 441, 451–52 (7th Cir.2001); *see also Aliotti*, 831 F.2d at 901–02. When there are few protectable features not required by the underlying idea, applying the substantial similarity test to them is effectively the same as determining whether the dolls or doll sculpts are virtually identical overall.

10. Infringement can occur even though the copyrighted work is done in a different medium than the challenged work. *Meshwerks, Inc. v. Toyota Motor Sales U.S.A., Inc.*, 528 F.3d 1258, 1267–68 (10th Cir.2008); *see Blanch v. Koons*, 467 F.3d 244, 252 (2d Cir. 2006).

by applying the substantial similarity standard.[11]

[10] Unlike the limited range of expression for the sculpt, there's a wide range of expression for complete young, hip female fashion dolls with exaggerated features. Designers may vary the face paint, hair color and style, and the clothing and accessories, on top of making minor variations to the sculpt. One doll might have brown eyes with bronze eyeshadow, wavy auburn hair, leather boots, a blue plaid mini matched with a black button-down, silver knot earrings and a barrel bag. Another might have green eyes with pink eyeshadow, brown hair in a messy bun, gold wedges, dark skinny jeans matched with a purple halter, a turquoise cuff and a clutch, along with a slightly different body and facial structure.[12] *See JCW Invs. v. Novelty, Inc.,* 482 F.3d 910, 917 (7th Cir.2007) ("Novelty could have created another plush doll of a middle-aged farting man that would seem nothing like Fred. He could, for example, have a blond mullet and wear flannel, have a nose that is drawn on rather than protruding substantially from the rest of the head, be standing rather than ensconced in an armchair, and be wearing shorts rather than blue pants."). The district court didn't err in affording the doll sketches broad copyright protection against substantially similar works.

[11] The district court did err, however, in failing to filter out all the unprotectable elements of Bryant's sketches. The only unprotectable elements the district court identified were: (1) the dolls' resemblance to humans; (2) the presence of hair, head, two eyes and other human features; (3) human clothes, shoes and accessories; (4) age, race, ethnicity and "urban" or "rural" appearances; (5) standard features relative to others (like a thin body); and (6) other standard treatments of the subject matter. And it reasoned that the doll's "[p]articularized, synergistic compilation and expression of the human form and anatomy that expresses a unique style and conveys a distinct look or attitude" is protectable, along with the doll fashions that expressed an "aggressive, contemporary, youthful style." But Mattel can't claim a monopoly over fashion dolls with a bratty look or attitude, or dolls sporting trendy clothing—these are all unprotectable ideas.

[12, 13] This error was significant. Although substantial similarity was the appropriate standard, a finding of substantial similarity between two works can't be based on similarities in unprotectable elements. *See Data East,* 862 F.2d at 209 (clear error for district court to determine substantial similarity existed based on unprotectable elements). When works of art share an idea, they'll often be "similar" in the layman's sense of the term. For ex-

11. Contrary to Mattel's argument, MGA's opening brief adequately preserved its objections to the district court's decision.

12. MGA argues that doll clothes aren't entitled to copyright protection. Copyright law doesn't protect ''useful articles'' that have an ''intrinsic utilitarian function'' apart from their expression or appearance. *See* 17 U.S.C. §§ 101, 102(a)(5). Human clothing is considered utilitarian and unprotectable. *See Poe v. Missing Persons,* 745 F.2d 1238, 1242 (9th Cir.1984). However, articles that are intended only to portray the appearance of clothing are protectable. *Id.* Dolls don't feel cold or worry about modesty. The fashions they wear have no utilitarian function. *Cf. Masquerade Novelty v. Unique Indus.,* 912 F.2d 663, 670–71 (3d Cir.1990) (animal nose masks have no utilitarian function apart from portraying appearance of animal nose); *Gay Toys, Inc. v. Buddy L Corp.,* 703 F.2d 970, 973 (6th Cir.1983) (toy airplane merely portrays appearance of actual airplane and has no utilitarian function). Even if we were to defer to the letter from the Copyright Office saying that doll clothing isn't protected, as MGA argues we should, the letter's interpretation is obviously wrong.

ample, the stuffed, cuddly dinosaurs at issue in *Aliotti*, 831 F.2d at 901, were similar in that they were all stuffed, cuddly dinosaurs—but that's not the sort of similarity we look for in copyright law. "Substantial similarity" for copyright infringement requires a similarity of expression, not ideas. *See id.* The key question always is: Are the works substantially similar beyond the fact that they depict the same idea?

MGA's Bratz dolls can't be considered substantially similar to Bryant's preliminary sketches simply because the dolls and sketches depict young, stylish girls with big heads and an attitude. Yet this appears to be how the district court reasoned:

> Especially important to the Court's [substantial similarity finding] is the consistency of the particularized expression of the dolls' heads, lips, eyes, eyebrows, eye features, noses, as well as the particularized expression of certain anatomical features relative to others . . . and de-emphasis of certain anatomical features (most notably the minimalized doll nose and thin, small doll bodies). Also important to the Court is the particularized, synergistic compilation and expression of the human form and anatomy that quite clearly expresses a unique style and conveys a distinct look or attitude. . . .

It might have been reasonable to hold that *some* of the Bratz dolls were substantially similar to Bryant's sketches, especially those in the first generation. But we fail to see how the district court could have found the vast majority of Bratz dolls, such as "Bratz Funk 'N' Glow Jade" or "Bratz Wild Wild West Fianna," substantially similar—even though their fashions and hair styles are nothing like anything Bryant drew—unless it was relying on similarities in ideas.

* * *

Bryant's employment agreement may not have assigned his ideas for the names "Bratz" and "Jade" to Mattel at all, and the district court erred by holding that it did so unambiguously. Even if Bryant did assign his ideas, the district court abused its discretion in transferring the entire Bratz trademark portfolio to Mattel. We therefore vacate the constructive trust, UCL injunction and declaratory judgment concerning Mattel's rights to the Bratz trademarks. The district court may impose a narrower constructive trust on remand only if there's a proper determination that Mattel owns Bryant's ideas.

The district court also erred in holding, at summary judgment, that the employment agreement assigned works created outside the scope of Bryant's employment. We therefore vacate the copyright injunction. On remand, Mattel will have to convince a jury that the agreement assigned Bryant's preliminary sketches and sculpt, either because the agreement assigns works made outside the scope of employment or because these works weren't made outside of Bryant's employment. And, in order to justify a copyright injunction, Mattel will have to show that the Bratz sculpts are virtually identical to Bryant's preliminary sculpt, or that the Bratz dolls are substantially similar to Bryant's sketches disregarding similarities in unprotectable ideas.

Nothing we say here precludes the entry of equitable relief based on appropriate findings.[13] Because several of the errors

13. We decline to address MGA's appeal of the mistrial order and Mattel's cross-appeal of the attorney-client privilege finding. These issues are likely moot, and their resolution is unnecessary to dispose of this interlocutory appeal. Our jurisdiction over them is also doubtful. *See Poulos v. Caesars World, Inc.*, 379 F.3d 654, 668–70 (9th Cir.2004). We also decline to address MGA's appeal of the district court's decisions concerning the three alleged state-law violations, which Mattel argues show that

we have identified appeared in the jury instructions, it's likely that a significant portion—if not all—of the jury verdict and damage award should be vacated, and the entire case will probably need to be retried. We express no opinion on this issue here, except to say that any further proceedings must be consistent with our decision.

America thrives on competition; Barbie, the all-American girl, will too.

EQUITABLE RELIEF VACATED. Each party shall bear its own costs.

Virgil E. DAY; Mel Hoomanawanui; Josiah L. Hoohuli; Patrick L. Kahawaiolaa; Samuel L. Kealoha, Jr., Plaintiffs–Appellants

v.

Haunani APOLIONA, individually and in her official capacity as Chairperson and Trustee of the Office of Hawaiian Affairs; Rowena Akana; Dante Carpenter; Donald Cataluna; Linda Keawe'ehu Dela Cruz; Colette Y. Pi'ipi'i Machado; Boyd P. Mossman; Oswald Stender; John D. Waihe'e, IV, Trustees of the Office of Hawaiian Affairs of the State of Hawaii sued in their official capacities for declaratory and prospective injunctive relief sued in individual capacities for damages; Clayton Hee; Charles Ota, Former Trustees of the Office of Hawaiian Affairs of the State of Hawaii, sued in their individual capacities for damages, Defendants–Appellees,

State of Hawaii, Defendant–Intervenor–Appellee.

No. 08–16704.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted Oct. 13, 2009.

Filed July 26, 2010.

Background: Native Hawaiians, as defined under Hawaiian Homes Commission Act (HHCA), filed § 1983 suit against trustees of Office of Hawaiian Affairs (OHA), seeking to enforce asserted right to ensure that public trust funds were devoted to betterment of conditions of Native Hawaiians, as required by Hawaii Admission Act. The United States District Court for the District of Hawaii, 451 F.Supp.2d 1133, Susan Oki Mollway, J., dismissed. Native Hawaiians appealed. The Court of Appeals, Berzon, Circuit Judge, 496 F.3d 1027, affirmed in part, reversed in part, and remanded. Motion to intervene by State of Hawaii was granted. On remand, the United States District Court for the District of Hawaii, Susan Oki Mollway, Chief Judge, 2008 WL 2511198, granted summary judgment in favor of trustees. Plaintiffs appealed.

Holdings: The Court of Appeals, Fisher, Circuit Judge, held that:

(1) the Hawaii Admission Act did not require OHA trustees to use its portion of proceeds only for betterment of the condition of native Hawaiians;

(2) use of public trust funds to lobby for bill for federal recognition of governing entity for any descendants of Hawaii's native indigenous people did not constitute a breach of the trust under the Act;

MGA wrongfully acquired the ideas for the names ''Bratz'' and ''Jade.'' We've found that the district court didn't properly analyze whether Mattel owns Bryant's ideas under his contract, so it's premature to try to determine whether MGA's acquisition of them was wrongful.

NIMMER ON COPYRIGHT - SELECTED SECTIONS
CHAPTER 2 The Subject Matter of Copyright

§ 2.08 Pictorial, Graphic, and Sculptural Works

Section 102(a)(5) of the Copyright Act specifies as copyrightable works of authorship "pictorial, graphic and sculptural works." These are defined to "include two-dimensional and three-dimensional works of fine, graphic, and applied art, photographs, prints and art reproductions, maps, globes, charts, diagrams, and models." The Committee reports further indicate that the definition of "'pictorial, graphic, and sculptural works' carries with it no implied criterion of artistic taste, aesthetic value, or intrinsic quality ... ." * * *

[H] Dress and Fabric Designs

[1] The Distinction between Dress Designs and Fabric Designs. In discussing the extent of copyright protection available for dresses and other items of clothing, a distinction must be made between two different concepts that, unfortunately for purposes of analysis, are often referred to by the same names. There is first the design imprinted on a fabric, such as a rose petal, which in a completed dress may appear repeatedly throughout the dress fabric, or may appear but once on a given dress. This is known both as a "design" and as a "pattern," but for our purposes will be referred to as a fabric design. Then there is the design that graphically sets forth the shape, style, cut, and dimensions for converting fabric into a finished dress or other clothing garment. This, too, is known as both a "design" and as a "pattern," but for our purposes will be referred to as a dress design.

[2] The Copyrightability of Fabric Designs. Although under an earlier view, fabric designs were not regarded as copyrightable, by reason of Mazer v. Stein,[1] it is now clear that such designs are copyrightable.[2] Such uncertainty as remains with respect to copyright for fabric designs is largely limited to the question of the necessity for, and proper placement of, copyright notice, in connection with fabric designs. 286

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[1] 347 U.S. 201 (1954) . See § 2.08[B][3] supra. The Mazer doctrine is incorporated in the current Copyright Act. H. Rep., p. 54.

[2] Peter Pan Fabrics, Inc. v. Brenda Fabrics, Inc., 169 F. Supp. 142 (S.D.N.Y. 1959) ; Peter Pan Fabrics, Inc. v. Acadia Co., 173 F. Supp. 292 (S.D.N.Y. 1959) , aff'd, 274 F.2d 487 (2d Cir. 1960) ; Peter Pan Fabrics, Inc. v. Candy Frocks, Inc., 187 F. Supp. 334 (S.D.N.Y. 1960) ; Spectravest, Inc. v. Mervyn's, Inc., 673 F. Supp. 1486 (N.D. Cal. 1987) . See Folio Impressions, Inc. v. Byer Cal., 937 F.2d 759 (2d Cir. 1991) (Treatise cited) (clearly erroneous to deny protection to rose design, albeit background may be unprotectible); Sherry Mfg. Co. v. Towel King of Fla., Inc., 753 F.2d 1565 (11th Cir. 1985) (towel design); Cameron Indus., Inc. v. Albert Nippon Co., 630 F. Supp. 1293 (S.D.N.Y. 1986) .

[3] The Copyrightability of Dress Designs. Statutory copyright protection is largely unavailing[3] for dress designs for several reasons. First, a clothing garment constitutes a "useful article" within the statutory definition, in that it is "an article having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information."[4] Copyright in the design of a useful article may be claimed "only if, and only to the extent that, such design incorporates pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article."[5] A fabric design is capable of such separate identification and independent existence, but a dress design typically is not.[6] On the other hand, Poe v. Missing Persons[7] holds that a possibly nonfunctional swimsuit intended for display at an art show might be copyrightable as a work of art. The Ninth Circuit remanded the case for trial whether the bathing suit at issue qualified as a useful item of clothing or as a work of art. Later, the Fifth Circuit aligned itself with "the Nimmer/Poe test."[8]

Another, and related impediment to statutory copyright for dress designs is found in a doctrine discussed more extensively in a subsequent section,[9] under which copyright for works of utility will protect only against copying for purposes of explanation, but will not prohibit copying for purposes of use. Thus, copyright in a dress design may protect against the duplication of such design on a paper to be used as an instructional sheet for an unauthorized designer, but it will not protect against the embodying of the design in competitive garments.[10]

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[3] See Galiano v. Harrah's Operating Co., 416 F.3d 411, 419 n.17 (5th Cir. 2005) ("*Nimmer On Copyright* does not conclude that clothing designs do not qualify for copyright protection per se, but it rather concludes that clothing designs rarely pass the 'separability' test").

[4] But arguably some clothing garments do not have an intrinsic utilitarian function, and are intended merely to portray the appearance of the article. Men's ties are a possible example. See *Nimmer on Freedom of Speech*, § 3.06[E][3].

[5] 17 U.S.C. § 101 (definition of pictorial, graphic, and sculptural works).

[6] See Morris v. Buffalo Chips Bootery, Inc., 160 F. Supp. 2d 718, 721 (S.D.N.Y. 2001).

[7] 745 F.2d 1238 (9th Cir. 1984).

[8] Galiano v. Harrah's Operating Co., 416 F.3d 411, 421 (5th Cir. 2005).

[9] See § 2.18 infra.

[10] Winfield Collection Ltd. v. Gemmy Indus. Corp., 311 F. Supp. 2d 611, 616 (E.D. Mich. 2004) (Treatise quoted) , aff'd mem. in part, rev'd as to fees, 147 Fed. Appx. 547 (6th Cir. 2005) ; Beaudin v. Ben & Jerry's Homemade, Inc., 896 F. Supp. 356, 359 (D. Vt. 1995) , aff'd, 95 F.3d 1, 2 (2d Cir. 1996) ; Russell v. Trimfit, Inc., 428 F. Supp. 91 (E.D. Pa. 1977) , aff'd mem., 568 F.2d 770 (3d Cir. 1978) (Treatise quoted); Jack Adelman, Inc. v. Sonners & Gordon,

Moving from traditional clothing, may a masquerade costume may qualify as applied art? Some decisions have so ruled.[11] Most pointedly, National Theme Prods., Inc. v. Jerry B. Beck, Inc.[12] ruled protectible highly distinctive costumes[13] that did not serve the purpose of clothing.[14] Other cases seem to reject that ruling--albeit in a clouded posture. Specifically, in Whimsicality, Inc. v. Rubie's Costumes Co., the district court initially rejected National Theme.[15] The Second Circuit affirmed on different grounds, noting that "we decline to follow the *National Theme* decision."[16] On remand, the district court undermined the principal basis for the appellate decision and seemed to determine the subject costumes to be protected by copyright.[17] Yet after those three rulings, the district judge actually issued two more unpublished modifications inclining in the opposite direction.[18] 292.10 More recently, a district court affirmed such copyright protection:

Inc., 112 F. Supp. 187 (S.D.N.Y. 1934) .

[11] See Celebration Int'l v. Chosun Int'l, Inc., 234 F. Supp. 2d 905, 912 (S.D. Ind. 2002) (Treatise quoted); Entertainment Research Group, Inc. v. Genesis Creative Group, Inc., 122 F.3d 1211, 1221 (9th Cir. 1997), cert. denied, 523 U.S. 1021 (1998) .

[12] 696 F. Supp. 1348 (S.D. Cal. 1988).

[13] "The inverted top hat portion [of the rabbi-in-a-hat costume] has a large brim approximately 31/2 feet in diameter that projects substantially away from the body of the wearer ... ." Id. at 1349 .

[14] "The Tigress costume was devised and is marketed by NTP as a novelty item intended as a wearable toy to be placed over a leotard or other adequate body covering solely for masquerade purposes. The costume cannot be worn without a separate body covering underneath as it is too narrow to cover a woman's chest and contains no sides or bottom." Id. at 1350 .

[15] 721 F. Supp. 1566, 1575 (E.D.N.Y. 1989).

[16] 891 F.2d 452, 455 & n.5 (2d Cir. 1989) (Treatise cited) . See Pollack, A Rose is a Rose is a Rose--But Is a Costume A Dress? An Alternative Solution in Whimsicality, Inc. v. Rubie' Costume Co., 41 J. Copyright Soc'y 1 (1993).

[17] 836 F. Supp. 112, 115 (E.D.N.Y. 1993) .

[18] Those modifications led to the following upshot, as quoted in subsequent litigation:

> Judge Dearie explained that Rubie's III returned the case to its posture at the time immediately prior to the Second Circuit's ruling and that, to the extent this was not explicit, Rubie's IV made this absolutely clear. Judge Dearie commented that ... "everyone including the plaintiff, knew that [the court never wavered on its decision that Whimsicality's copyrights were unenforceable]."

Whimsicality, Inc. v. Battat, 27 F. Supp. 2d 456 (S.D.N.Y. 1998) . That decision collaterally

> The clothing on a teddy bear obviously has no utilitarian function. It is not intended to cover embarrassing anatomical aspects or to protect the bear from exterior elements. Rather, it is intended and serves only to modify the appearance of the bear, to give the doll a different "look and feel" from others. Clothing on a bear replicates the form but not the function of clothing on a person. It does not constitute a "useful article" excluded from copyright protection.[19]

Although the Copyright Office examiner had ruled to the contrary, the court discounted those conclusions based on the plain language of the statute.[20] On reconsideration, the court specified that analysis must proceed case by case; although costumes for people might often be "useful articles," the costumes for dolls at issue in this case were not.[21]

Thereafter, the Second Circuit left open the possibility that costumes for people might indeed be copyrightable.[22] In so ruling, it "express[ed] skepticism regarding [defendant]'s claim that

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estopped the plaintiff from asserting copyright in its costumes. Id. at 463 . Independently, the judge commented that the costumes at issue, even with their "elaborate headpieces" and masks, are uncopyrightable as useful articles. Id. at 463 .

[19] Boyds Collection, Ltd. v. Bearington Collection, Inc., 360 F. Supp. 2d 655, 661 & n.11 (M.D. Pa. 2005) (footnote omitted) (Treatise cited).

[20] 360 F. Supp. 2d at 661-662 (Treatise cited) .

[21] 365 F. Supp. 2d 612, 615-617 & n.13 (M.D. Pa. 2005) (Treatise cited) . In that context, the court cited to Registrability of Costume Designs, 56 Fed. Reg. 56530 (Nov. 5, 1991) . In that study, the Office concluded,

> The examining practices with respect to masks will not treat masks as useful articles, but will instead determine registrability on the existence of minimum pictorial and/or sculptural authorship. Garment designs (excluding separately identifiable pictorial representations of designs imposed upon the garment) will not be registered even if they contain ornamental features, or are intended to be used as historical or period dress. Fanciful costumes will be treated as useful articles, and will be registered only upon a finding of separately identifiable pictorial and/or sculptural authorship.

Id. at 56531 .

[22] Chosun Intern., Inc. v. Chrisha Creations, Ltd., 413 F.3d 324 (2d Cir. 2005) . The district court had dismissed a complaint for infringement of animal-themed children's costumes, featuring sculpted hoods, claws at the end of sleeves, and the like. Id. at 325 . In so ruling, it criticized the regnant tests for physical and conceptual separability as being "too inconsistent to afford meaningful guidance." Id. at 327 . The Court of Appeals reversed.

> It is at least possible that elements of Chosun's plush sculpted animal costumes are separable from the overall design of the costume, and hence eligible for

Halloween costumes are, as such, copyright ineligible because they permit the wearer to masquerade."[23] Indeed, it went further, stating that defendant's

> broad understanding of masquerading as a "useful" function is at odds with the Copyright Act's very definition of "useful articles." After all, the Act states that a "useful article" is one "having an intrinsic utilitarian function that is *not merely to portray the appearance of the article or to convey information*." 17 U.S.C. § 101 (emphasis added). The function of a costume is, precisely, to portray the appearance of something (like a lion, ladybug, or orangutan), and in so doing, to cause the wearer to be associated with, or appear as, the item portrayed. It is difficult to see how such a "function" (separate and apart from the concomitant function as clothing) can make a costume, or a mask, "useful" under § 101.[24]

A week later, the Fifth Circuit denied copyright protection for "very creative" casino uniforms, including "elaborate masquerade-type costumes."[25] It adopted "the likelihood-of-marketability

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> protection under the Copyright Act. It might, for example, be the case that the sculpted "heads" of these designs are physically separable from the overall costume, in that they could be removed from the costume without adversely impacting the wearer's ability to cover his or her body. Similarly, it could be that the sculpted "heads" (and perhaps "hands") are *conceptually* separable. That is, Chosun may be able to show that they invoke in the viewer a concept separate from that of the costume's "clothing" function, and that their addition to the costume was not motivated by a desire to enhance the costume's functionality qua clothing.

Id. at 329-330 (emphasis original, footnote omitted).

[23] Id. at 329 n.3 ("Were this the case, masks would necessarily be deemed 'useful articles.' But that view has been expressly rejected by both the Copyright Office and by other circuits.")

[24] Id.

[25] Galiano v. Harrah's Operating Co., 416 F.3d 411, 413, 414 (5th Cir. 2005) .

> The caselaw on costume design is, to say the least, uneven. Generally speaking, however, it tends to reflect a direct relationship between a costume's copyrightabilility and its actual or potential market value as a stand-alone piece of artwork.

Id. at 420 (footnote omitted).

standard *for garment design only*,"[26] in the process labeling it "the Nimmer/Poe test."[27]

* * *

§ 2.18 Works of Utility: Limitations on Copyrightability by Reason of Utilitarian Function

[H] Protection for Toys and Games

[1] Copyrightability of Toys. Although it has sometimes been suggested that toys are not copyrightable,[28] this is not entirely true. In the first place, an accurate scale model, such as a model airplane or boat, will be copyrightable as a graphic or sculptural work * * *. Furthermore, a toy, such as a doll, is also a graphic or sculptural work * * *. Thus, one court granted copyright protection for a doll in the form of a chimpanzee named Zippy, after a real chimpanzee that had appeared on the *Howdy Doody* children's television program. On the issue of whether the doll qualified as a work of art, the court concluded:

> ... mere judges can hardly risk condemning Zippy for lack of artistry and thus prove themselves false prophets to the far-flung faithful Howdy Doody audience, which seemingly adores his bizarre features and funny face.[29]

If a toy qualifies as a pictorial, graphic or sculptural work, its copyrightability is not subject to the special requirements for "useful articles" applicable to works of applied art. This for the reason that a toy is not a "useful article" under the statutory definition because "toys do not even have an intrinsic function other than the portrayal of the real item."[30] However, apart from works that qualify as pictorial, graphic or sculptural works, it is true that toys as such are not

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[26] Id. at 421 (emphasis original). "This might most accurately be described as the *Poe* standard, even though the relevant language is found in *Nimmer on Copyright*." Id. at 421 n.25 .

[27] The fly in plaintiff's ointment was the lack of any "showing that its designs are marketable independently of their utilitarian function as casino uniforms." 416 F.3d at 422 .

[28] Jackson v. Quickslip Co., 110 F.2d 731 (2d Cir. 1940) .

[29] Rushton v. Vitale, 218 F.2d 434, 436 (2d Cir. 1955) ; Gay Toys, Inc. v. Buddy L Corp., 703 F.2d 970 (6th Cir. 1983) ; Fleischer v. Freundlich, 73 F.2d 276 (2d Cir. 1934) ; Ideal Toy Corp. v. Sayco Doll Corp., 302 F.2d 623 (2d Cir. 1962) . See Blazon, Inc. v. DeLuxe Game Corp., 268 F. Supp. 416 (S.D.N.Y. 1965) ; Fisher-Price Toys, Div. of Quaker Oats Co. v. My-Toy Co., 385 F. Supp. 218 (S.D.N.Y. 1974) . Cf. Ideal Toy Corp. v. Adanta Novelties Corp., 223 F. Supp. 866 (S.D.N.Y. 1963) .

[30] Gay Toys, Inc. v. Buddy L Corp., 703 F.2d 970 (6th Cir. 1983).

copyrightable.[31]

* * *

[2] Three Dimensional Copies of Copyrighted Illustrations of Toys. The further question arises whether the copyright of an illustration of a toy protects not only against reproduction of the illustration, but also against copying the illustration by reproducing the toy in three dimensional form. The issue is woven out of several strands, which must first be disentangled.

Consider first the case in which the toy itself would not be eligible for copyright as a pictorial, graphic or sculptural work (as explained above). In that case, the only copyrightable elements contained in the copyrighted illustration are the original elements of perspective, angle, and the like that the artist employed in depicting the toy in two-dimensional illustrated form. One who reproduces the toy in three-dimensional form, by hypothesis, does so by copying from the illustration only the noncopyright able elements--the structure and appearance of the toy itself--without copying the copyrightable elements, such as the lighting and particular perspective that go into depicting the toy in two-dimensional form. On that basis, there is no liability under this first assumption, for reasons sketched more generally above.

If, however, the toy that is the subject of a copyrighted illustration is itself eligible for copyright protection, then the problem of copying the illustration in three-dimensional form takes on an entirely different complexion. Under those circumstances, the protectible elements contained in the copyrighted illustration include not only the manner of depicting the toy in two-dimensional form, but also the form and appearance of the toy itself. These latter elements, if embodied in a three dimensional toy copied from the copyrighted illustration, render the toy an infringing copy. Thus, courts have correctly held three-dimensional dolls copied from the copyrighted cartoon

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[31] See, e.g., Seip v. Commonwealth Plastics, Inc., 85 F. Supp. 741 (D. Mass. 1949) . In some cases, the unauthorized manufacture of toys gives rise to a cause of action not for copyright infringement, but for unfair competition. Thus, in Warner Bros., Inc. v. Gay Toys, Inc., 658 F.2d 76 (2d Cir. 1981), defendants manufactured and sold a toy car that closely resembled a full-size 1969 Dodge Charger automobile that was featured in plaintiff's television series, The Dukes of Hazzard. Because defendants' toy included certain symbols associated with plaintiff's television show, such as a Confederate flag emblem and an orange color, plaintiff claimed violation of Section 43(a) of the Lanham Act. The court of appeals reversed the district court's denial of a preliminary injunction, finding that there was likelihood of confusion in that the public might believe that plaintiff sponsored or otherwise approved of the use of the similar symbols on defendant's toy car. On remand, see 553 F. Supp. 1018 (S.D.N.Y. 1983), later decision, 598 F. Supp. 424 (S.D.N.Y. 1984) .

illustrations of “Spark Plug, The Horse”[32] and “Betty Boop”[33] to constitute copyright infringements.

Finally, there are some related but distinguishable applications. For instance, the right to reproduce in two-dimensional form a three-dimensional “useful article” that is itself the subject of copyright is subject to special rules * * *. Another related but distinguishable question goes to the separate copyrightability, as a derivative work of a three-dimensional doll or toy embodying the features of a two-dimensional cartoon character. Even if the use of such cartoon character has been licensed, so that the doll or toy does not constitute an infringement of the cartoon copyright, it still will not be entitled to a derivative work copyright if all that have been added in the three-dimensional form are mechanical rather than artistic features.[34]

* * *

[32] King Features Syndicate v. Fleischer, 299 F. 533 (2d Cir. 1924) .

[33] Fleischer v. Freundlich, 73 F.2d 276 (2d Cir. 1934), cert. denied, 294 U.S. 717 (1935) . See Hene v. Samstag, 198 F. 359 (S.D.N.Y. 1912).

[34] Durham Indus., Inc. v. Tomy Corp., 630 F.2d 905 (2d Cir. 1980) (plastic, wind-up toys embodying features of Mickey Mouse, Donald Duck and Pluto denied derivative work copyright).

CALIFORNIA LABOR CODE § 2870-72

2870.

(a) Any provision in an employment agreement which provides that an employee shall assign, or offer to assign, any of his or her rights in an invention to his or her employer shall not apply to an invention that the employee developed entirely on his or her own time without using the employer's equipment, supplies, facilities, or trade secret information except for those inventions that either:

(1) Relate at the time of conception or reduction to practice of the invention to the employer's business, or actual or demonstrably anticipated research or development of the employer; or

(2) Result from any work performed by the employee for the employer.

(b) To the extent a provision in an employment agreement purports to require an employee to assign an invention otherwise excluded from being required to be assigned under subdivision (a), the provision is against the public policy of this state and is unenforceable.

2871. No employer shall require a provision made void and unenforceable by Section 2870 as a condition of employment or continued employment. Nothing in this article shall be construed to forbid or restrict the right of an employer to provide in contracts of employment for disclosure, provided that any such disclosures be received in confidence, of all of the employee's inventions made solely or jointly with others during the term of his or her employment, a review process by the employer to determine such issues as may arise, and for full title to certain patents and inventions to be in the United States, as required by contracts between the employer and the United States or any of its agencies.

2872. If an employment agreement entered into after January 1, 1980, contains a provision requiring the employee to assign or offer to assign any of his or her rights in any invention to his or her employer, the employer must also, at the time the agreement is made, provide a written notification to the employee that the agreement does not apply to an invention which qualifies fully under the provisions of Section 2870. In any suit or action arising thereunder, the burden of proof shall be on the employee claiming the benefits of its provisions.

CALIFORNIA CIVIL CODE § 3426 et seq.

3426. This title may be cited as the Uniform Trade Secrets Act.

3426.1. As used in this title, unless the context requires otherwise:

(a) "Improper means" includes theft, bribery, misrepresentation, breach or inducement of a breach of a duty to maintain secrecy, or espionage through electronic or other means. Reverse engineering or independent derivation alone shall not be considered improper means.

(b) "Misappropriation" means:

(1) Acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means; or

(2) Disclosure or use of a trade secret of another without express or implied consent by a person who:

(A) Used improper means to acquire knowledge of the trade secret; or

(B) At the time of disclosure or use, knew or had reason to know that his or her knowledge of the trade secret was:

(i) Derived from or through a person who had utilized improper means to acquire it;

(ii) Acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use; or

(iii) Derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use; or

(C) Before a material change of his or her position, knew or had reason to know that it was a trade secret and that knowledge of it had been acquired by accident or mistake.

(c) "Person" means a natural person, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government, governmental subdivision or agency, or any other legal or commercial entity.

(d) "Trade secret" means information, including a formula, pattern, compilation, program, device, method, technique, or process, that:

(1) Derives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use; and

(2) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

3426.2.

(a) Actual or threatened misappropriation may be enjoined. Upon application to the court, an injunction shall be terminated when the trade secret has ceased to exist, but the injunction may be continued for an additional period of time in order to eliminate commercial advantage that otherwise would be derived from the misappropriation.

(b) If the court determines that it would be unreasonable to prohibit future use, an injunction may condition future use upon payment of a reasonable royalty for no longer than the

period of time the use could have been prohibited.

(c) In appropriate circumstances, affirmative acts to protect a trade secret may be compelled by court order.

3426.3.

(a) A complainant may recover damages for the actual loss caused by misappropriation. A complainant also may recover for the unjust enrichment caused by misappropriation that is not taken into account in computing damages for actual loss.

(b) If neither damages nor unjust enrichment caused by misappropriation are provable, the court may order payment of a reasonable royalty for no longer than the period of time the use could have been prohibited.

(c) If willful and malicious misappropriation exists, the court may award exemplary damages in an amount not exceeding twice any award made under subdivision (a) or (b).

3426.4. If a claim of misappropriation is made in bad faith, a motion to terminate an injunction is made or resisted in bad faith, or willful and malicious misappropriation exists, the court may award reasonable attorney's fees and costs to the prevailing party. Recoverable costs hereunder shall include a reasonable sum to cover the services of expert witnesses, who are not regular employees of any party, actually incurred and reasonably necessary in either, or both, preparation for trial or arbitration, or during trial or arbitration, of the case by the prevailing party.

3426.5. In an action under this title, a court shall preserve the secrecy of an alleged trade secret by reasonable means, which may include granting protective orders in connection with discovery proceedings, holding in-camera hearings, sealing the records of the action, and ordering any person involved in the litigation not to disclose an alleged trade secret without prior court approval.

3426.6. An action for misappropriation must be brought within three years after the misappropriation is discovered or by the exercise of reasonable diligence should have been discovered. For the purposes of this section, a continuing misappropriation constitutes a single claim.

3426.7.

(a) Except as otherwise expressly provided, this title does not supersede any statute relating to misappropriation of a trade secret, or any statute otherwise regulating trade secrets.

(b) This title does not affect

(1) contractual remedies, whether or not based upon misappropriation of a trade secret,

(2) other civil remedies that are not based upon misappropriation of a trade secret, or

(3) criminal remedies, whether or not based upon misappropriation of a trade secret.

(c) This title does not affect the disclosure of a record by a state or local agency under the California Public Records Act (Chapter 3.5 (commencing with Section 6250) of Division 7 of Title 1 of the Government Code). Any determination as to whether the disclosure of

a record under the California Public Records Act constitutes a misappropriation of a trade secret and the rights and remedies with respect thereto shall be made pursuant to the law in effect before the operative date of this title.

3426.8. This title shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this title among states enacting it.

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CALIFORNIA BUSINESS AND PROFESSIONS CODE § 16600 et seq.

16600. Except as provided in this chapter, every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void.

16601. Any person who sells the goodwill of a business, or any owner of a business entity selling or otherwise disposing of all of his or her ownership interest in the business entity, or any owner of a business entity that sells (a) all or substantially all of its operating assets together with the goodwill of the business entity, (b) all or substantially all of the operating assets of a division or a subsidiary of the business entity together with the goodwill of that division or subsidiary, or (c) all of the ownership interest of any subsidiary, may agree with the buyer to refrain from carrying on a similar business within a specified geographic area in which the business so sold, or that of the business entity, division, or subsidiary has been carried on, so long as the buyer, or any person deriving title to the goodwill or ownership interest from the buyer, carries on a like business therein.

For the purposes of this section, "business entity" means any partnership (including a limited partnership or a limited liability partnership), limited liability company (including a series of a limited liability company formed under the laws of a jurisdiction that recognizes such a series), or corporation.

For the purposes of this section, "owner of a business entity" means any partner, in the case of a business entity that is a partnership (including a limited partnership or a limited liability partnership), or any member, in the case of a business entity that is a limited liability company (including a series of a limited liability company formed under the laws of a jurisdiction that recognizes such a series), or any owner of capital stock, in the case of a business entity that is a corporation.

For the purposes of this section, "ownership interest" means a partnership interest, in the case of a business entity that is a partnership (including a limited partnership a limited liability partnership), a membership interest, in the case of a business entity that is a limited liability company (including a series of a limited liability company formed under the laws of a jurisdiction that recognizes such a series), or a capital stockholder, in the case of a business entity that is a corporation.

For the purposes of this section, "subsidiary" means any business entity over which the selling business entity has voting control or from which the selling business entity has a right to receive a majority share of distributions upon dissolution or other liquidation of the business entity (or has both voting control and a right to receive these distributions.)

16602. (a) Any partner may, upon or in anticipation of any of the circumstances described in subdivision (b), agree that he or she will not carry on a similar business within a specified geographic area where the partnership business has been transacted, so long as any other member of the partnership, or any person deriving title to the business or its goodwill from any such other member of the partnership, carries on a like business therein.

(b) Subdivision (a) applies to either of the following circumstances:

(1) A dissolution of the partnership.

(2) Dissociation of the partner from the partnership.

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CALIFORNIA BUSINESS AND PROFESSIONS CODE § 17200 et seq.

17200. As used in this chapter, unfair competition shall mean and include any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by Chapter 1 (commencing with Section 17500) of Part 3 of Division 7 of the Business and Professions Code.

17201. As used in this chapter, the term "person" shall mean and include natural persons, corporations, firms, partnerships, joint stock companies, associations and other organizations of persons.

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17203. Injunctive Relief--Court Orders

Any person who engages, has engaged, or proposes to engage in unfair competition may be enjoined in any court of competent jurisdiction. The court may make such orders or judgments, including the appointment of a receiver, as may be necessary to prevent the use or employment by any person of any practice which constitutes unfair competition, as defined in this chapter, or as may be necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by means of such unfair competition. * * *

17204. Actions for Injunctions by Attorney General, District Attorney, County Counsel, and City Attorneys

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17205. Unless otherwise expressly provided, the remedies or penalties provided by this chapter are cumulative to each other and to the remedies or penalties available under all other laws of this state.

17206. Civil Penalty for Violation of Chapter

(a) Any person who engages, has engaged, or proposes to engage in unfair competition shall be liable for a civil penalty not to exceed two thousand five hundred dollars ($2,500) for each violation, which shall be assessed and recovered in a civil action brought in the name of the people of the State of California by the Attorney General, by any district attorney, by any county counsel authorized by agreement with the district attorney in actions involving violation of a county ordinance, by any city attorney of a city having a population in excess of 750,000, by any city attorney of any city and county, or, with the consent of the district attorney, by a city prosecutor in any city having a full-time city prosecutor, in any court of competent jurisdiction.

(b) The court shall impose a civil penalty for each violation of this chapter. In assessing the amount of the civil penalty, the court shall consider any one or more of the relevant circumstances presented by any of the parties to the case, including, but not limited to, the following: the nature and seriousness of the misconduct, the number of violations, the persistence of the misconduct, the length of time over which the misconduct occurred, the willfulness of the defendant's misconduct, and the defendant's assets, liabilities, and net

worth.
* * *

17208. Any action to enforce any cause of action pursuant to this chapter shall be commenced within four years after the cause of action accrued. No cause of action barred under existing law on the effective date of this section shall be revived by its enactment.