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The Fine Line Between Copyright Infringement Or Artistic Creativity

Exactly what constitutes an infringement copyright? How much of an image can be reproduced and in what fashion before it's considered a breach of copyright? Lawyer Sharon Givoni looks at some recent cases which illustrate some of the grey areas of the law.



The Food Chain Barbie series were shot with a 50mm macro lens on a Canon 35mm SLR with Kodak Ektachrome 64T tungsten-balanced transparency film. They were lit with Lowell tungsten lights which, according to Forsythe, allowed for 'real time' preview. Mattel Inc, the owner of the Barbie® brand unsuccessfully sued the photography for copyright infringement. Reproduced with permission of the photographer.



Sometimes, as a photographer, you may use a popular image as the subject of your work in a humorous sense. For example, to make a particular statement about culture and society. Likewise, you might find that an artist uses one of your images in a context which you find unsavoury. While the intention behind such uses may be perfectly well meaning, they can give rise to copyright problems.

To demonstrate the point, consider the following scenarios:

- A photographer uses images of Mattel Inc's Barbie® doll in a series of creative photographs to make a statement about societal misconceptions associated with Barbie®.
- An artist creates a unique mural using cut up photographs taken by a well-known photographer.
- An artist constructs sculptural works based on a photograph seen on a greeting card.
- An artist creates a photograph which looks similar to a well-known photograph of a movie star, but superimposes another actor's face.

These scenarios are actually all based on real life examples and, while the artists in these examples may have had perfectly good intentions, some found themselves being the subject of legal actions.

This article examines some of the legal issues that might arise if you use another image or product as a subject for your photographs or someone uses your own photograph for the purpose of social commentary or humorous critique.

Defending Barbie®

Let's start with the Barbie® case. Despite only being a plastic doll, Barbie® has always enjoyed being in the media spotlight. While Mattel benefited from all the media attention that Barbie® and Ken's recent split received, the same could hardly be said in relation to the recent nude photo scandal in the USA involving photographer Tom Forsythe and his Food Chain Barbie series of photographs.

The series consisted of 78 photographs, in which Forsythe depicted Barbie® in various absurd and often

sexualised positions. The photographs were sold as postcards and prints over the Internet and generally depict one or more nude Barbie® dolls juxtaposed with vintage kitchen appliances.

For example, 'Malted Barbie' features a nude Barbie® placed on a vintage Hamilton Beach malt machine. 'Fondue a la Barbie' depicts Barbie® heads in a fondue pot. 'Barbie Echiladas' depicts four Barbie® dolls wrapped in tortillas and covered with salsa in a casserole dish in a lit oven. These are hardly the polished, fresh-faced images that Mattel would like to portray.

Forsythe's market success with these images was limited. He claims that he made less than US\$180 selling the Barbie postcards. Nevertheless, this didn't stop Mattel from suing him for copyright infringement and a host of other "legal sins" such as trademark infringement and misleading conduct.

The Copyright Issue

The judge took the view that, given that Mattel owns copyright to Barbie's® unadorned head and parts of the figure, because Forsythe photographed the Barbie® figure and reproduced those photographs, Mattel established a prima facie case of copyright infringement.

Having made this observation, the judge recognised that USA copyright law recognises certain defences to copyright infringement if the use of the copyright amounts to a 'fair use'. One such 'fair use' could be reproducing a copyright work to criticise or comment on another work. The Australian approach to fair use is somewhat more limited, but exceptions still apply (see below).

In the self-acclaimed "artsurdist" claimed that his photographs were an attempt to critique the objectification of women associated with Barbie®. He chose to parody Barbie® in his photographs in order to "lambast the conventional beauty myth and the societal acceptance of women as objects". These are concepts which Tom Forsythe believed were embodied by Barbie®.

To achieve his desired effect, he used the crisp, slick, eye-popping techniques of advertising photography.

What The Court Said

In the initial decision, the court took the view that there was little likelihood that people would think that Mattel was behind the images and so concluded that Forsythe's reproduction of the Barbie doll in photos was a 'fair use'. This use was, therefore, within the general 'fair use' defence to copyright infringement that applies in the USA. The court was influenced by the fact that the photographs could not affect the market demand for Mattel's products.

However, Mattel appealed. In the appeal decision, the judge considered the connotations of Tom Forsythe's photographs observing that, "Forsythe has turned Barbie's glamorous image on its head [by] displaying carefully positioned, nude, and sometimes frazzled looking Barbies in often ridiculous and apparently dangerous situations". In some of Forsythe's photos, the judge noted, "Barbie is about to be destroyed or harmed by some domestic life in the form of kitchen appliances yet continues displaying her well known smile, disturbingly oblivious to her predicament". The lighting, background, props and camera angles, the judge concluded, "...all serve to create a context for Mattel's copyrighted work that transform Barbie's meaning".

The judge decided that, "the benefits to the public in allowing such use — allowing artistic freedom and expression and criticism of a cultural icon — are great".

The fact that Forsythe's pictures had no real impact on Mattel's market for "derivative uses" tipped the scale in the artist's favour and Mattel lost the appeal case.

It is not entirely clear whether the decision would have been decided differently in Australia as our copyright laws do not have a general 'fair use' exception. There is a defence for copyright infringement where the work has been copied for the purpose of genuine criticism or review and the trend seems to be that the criticism would need to be of the subject itself. In this case, Barbie®, as opposed to society as a whole.

The Susan Pitt Case

Leaving the Food Chain Barbie series aside, Mattel often goes to court to protect its Barbie® brand including, in another separate but not dissimilar US case, suing a female artist called Susan Pitt who designed and sold a line of figures called “Dungeon Dolls”. These were physically altered Barbie dolls, clothed in sadomasochistic attire. The artist also maintained an Internet Website which featured images of the re-costumed and painted Superstar Barbie® doll.

When Mattel claimed that Pitt had infringed copyright in its “Superstar” Barbie, Pitt defended herself claiming her work as “legitimate freedom of artistic impression”.

The court took the view that although Pitt had used the entire copyrighted work — the unadorned doll’s head — she had substantially changed the decoration on the head and body of the doll. The court took the view that although the resulting images evoked the image of Barbie, the change was sufficient enough so as not to amount to copyright infringement.

In both the Forsythe and Pitt cases the US courts found themselves making a distinction between freedom of artistic expression and criticism of a cultural icon and copyright infringement. Often, the line between them can be fine.

The Annie Leibovitz Case

Dolls aside, sometimes well known photographs can, in themselves, be the subject of humorous critique.

For example, back in 1996, Annie Leibovitz sued Paramount Pictures because of an advertisement for the film *Naked Gun 33 1/3: The Final Insult*. The

advertisement displayed a picture of a pregnant naked model with a backdrop similar to that used in Leibovitz’s controversial photograph of a nude and very pregnant Demi Moore on the cover of the 1991 August issue of *Vanity Fair* magazine.

Rather than reproduce the actual image of Demi Moore, Paramount commissioned its own photographer to take a photograph of a very pregnant model, posing in a similar way to Demi Moore and superimposed the face of the film’s star, actor, Leslie Nielson.

Leibovitz sued Paramount Pictures for infringing copyright in her photograph.

In this instance, the court took the view that although the Nielson advertisement closely mimicked the lighting, backdrop and body configuration of the original photo, the photographer took no more than was necessary to conjure the Demi Moore photograph in the eyes of the viewer. Therefore this amounted to a ‘fair use’ and no copyright infringement had occurred.

Ultimately, in Australia the test for copyright infringement is whether there has been a substantial reproduction of the photograph and this will generally be a question of fact and degree. The other important rule to also bear in mind is that, as a general rule, copyright does not protect ideas, only the expression of those ideas.

Using the *Vanity Fair* case as an example, taking a photograph of pregnant women in a similar posture to the Demi Moore would not in itself amount to copyright infringement. However, problems might arise if you copy specific elements of the photograph — the lighting, colours, composition, the look of the model and so on. If what has been copied amounts to a substantial reproduction in both qualitative and quantities sense, then on the face of it, there would be a copyright infringement.

Moral Rights

The other issue that the Demi Moore case raises is that of moral rights.

Moral rights were introduced into Australian copyright law on 21 December 2002 and potentially have an enormous impact on professional photographers.

Moral rights are important because they are separate to copyright in the sense that they are personal rights and remain with the photographer even if that photographer sells the copyright in the image to someone else.

Essentially, there are two moral rights. The first is the right of ‘attribution’, i.e. the right to be acknowledged as the author of the work (and the right against false attribution). The second is the right of ‘integrity’, i.e. the right not to have your work treated in a derogatory manner. For example, mutilation or distortion of the work that is prejudicial to the author’s honour or reputation.

Although there have been no cases on moral rights in Australia to date, the types of acts that could amount to a breach of a photographer’s rights might include:

- Colourising a black and white photograph taken by a photographer who is well known for his or her black and white photography.
- Reproducing a photograph in a book without attributing the photographer; or
- Digitally manipulating a well-known photograph, such as the *Vanity Fair* picture of Demi Moore, without obtaining the artist’s permission.

Copying In A Different Medium

Up to this point, we have been exploring some of the more conventional issues that arise when material is taken and used in a photograph.

However, what if someone were to take the subject of your photograph and make a sculpture of it? Would this be legal? The answer depends on a number of factors such as whether the sculpture substantially reproduces the original photograph.

A case on point actually happened in the USA some years ago when photographer Art Rogers successfully sued the artist Jeff Koons who used his photograph titled *String of Puppies* as a model for four sculptures, three of which sold for US\$367,000. Rogers had licensed his photograph to a greeting card company and claimed that the artist had substantially copied his photograph without permission.

Each case will turn on its particular facts, but some factors which the courts are likely to take into account include:

- Whether the use has a commercial purpose or whether it has some other purpose. For example, using a work in a humorous sense for the genuine purpose of critiquing it.
- How much of the copyright material is taken.
- Whether what was taken caused harm to the commercial interests of the copyright owner.
- The motives behind the use of the work.
- Whether the artist who copied the work made a commercial gain from the subject of the reproduction — for example, in the greeting card case.

The Australian Position

There have been very few cases in Australia concerning issues surrounding photography, parody and the ‘fair use’ defence. While the US cases do provide some guidance on the issues, they do not provide a clear indication of what the approach of the Australian courts would be — particularly as Australian copyright laws are different.

In any event, as these cases demonstrate, in an area such as photography, where the overall visual impression in each work is of central importance, each will turn on its facts. While the courts have sometimes applied the rough practical test that ‘what is worth copying is worth protecting’, defences to copyright infringement may nevertheless apply.

This is an area where there are no hard and fast rules. If your photograph has been used out of context or in a manner that breaches your moral rights you may have legal remedies. On the flipside, if you use someone else’s product, image, photograph or artwork as a subject for one of your own photographs, even if you have the best intentions, you might want to consider seeking legal advice. Sometimes only small modifications to a photograph can significantly reduce the risk of infringing someone else’s rights, whether they be copyright, trade mark rights or otherwise. P

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[This article is of a general nature only and should not be relied upon as a substitute for professional legal advice.]

Images from Tom Forsythe’s Food Chain Barbie series can be viewed at www.tomforsythe.com

Official images of Barbie®, reproduced courtesy of Mattel Inc. The company often goes to court to protect its Barbie® brand.

