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Barbie in Bondage: What Orly Lobel's Book "You Don't Own Me: How Mattel v. MGA Entertainment Exposed Barbie's Dark Side" Tells Us About the Commoditization of the Female Body

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Cover Page Footnote

Professor of Law and Director of the Franklin Pierce Center for Intellectual Property at the University of New Hampshire School of Law. The author would like to thank UNH Law Dean Megan Carpenter for her leadership and support for legal scholarship, Marcy Pearson for editing assistance, and Orly Lobel for writing her wonderful book. This Essay is dedicated to Casey Bartow-McKenney.

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Ann Bartow*

INTRODUCTION	436
I. BARBIE AS BOTH CULTURAL ICON AND CULTURAL MIRROR	437
II. VIRGIN OR SLUT? THE PERVASIVE DOUBLE BIND	445
A. <i>Barbie in the Bathwater</i>	451
B. <i>Oh Barbie</i>	453
C. <i>Barbie in a Blender and Barbie in a Dungeon</i>	457
1. Blender Barbie.....	457
2. Barbie as Dungeon Doll	461
D. <i>Barbies Aren’t Bratz</i>	462
III. CHEERLEADER “BARBIES”	464
CONCLUSION.....	472

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INTRODUCTION

You Don't Own Me is a terrific title for Orly Lobel's recently published book.¹ It very succinctly makes the point that Barbie cannot be owned, at least not the way that Mattel, Inc. wishes. Barbie was derived from another doll which had origins outside of Mattel.² Mattel's innovation was to take an intentionally eroticized doll intended as a sex toy for male adults, tone down the sexuality somewhat, and then market it primarily to female children, with a host of compatible outfits and accessories.³ It was a brilliant idea, but not one that cannot be fully locked up with copyrights or trademarks.⁴ When MGA Entertainment began taking market share away from Mattel by offering Bratz dolls that provided enhanced sex appeal combined with more racial diversity, Mattel unsuccessfully tried to litigate Barbie back into dominance.⁵ Mattel learned that it simply did not own the Barbie concept as broadly, or as comprehensively, as it wished it could.

Lobel's story of Mattel's intellectual property based litigation campaign to "protect" Barbie from artists, musicians, and Bratz dolls demonstrates the sexism that infuses the toy industry, and depicts an inconsistent societal uneasiness about sexualized toys intended for children. This review essay reflects upon two of the central claims of *You Don't Own Me*: first, that when companies put their energy and resources into intellectual property litigation rather than innovation, it is a strategy that is likely to fail; and second, that Barbie is a "lead icon" in the disconnect between women pushing for gender equality and those who prefer traditional gender roles for women.

¹ ORLY LOBEL, *YOU DON'T OWN ME: HOW MATTEL V. MGA ENTERTAINMENT EXPOSED BARBIE'S DARK SIDE* (2018).

² See source cited *infra* note 148.

³ See ROBIN GERBER, *BARBIE AND RUTH: THE STORY OF THE WORLD'S MOST FAMOUS DOLL AND THE WOMAN WHO CREATED HER* 9–10 (2009).

⁴ See generally I.S., *Who Owns an Idea?*, *ECONOMIST* (May 28, 2018), <https://www.economist.com/prospero/2018/05/28/who-owns-an-idea> [<https://perma.cc/CFH5-Q2M9>].

⁵ *The \$1 Billion-Plus Battle Over Bratz: Bribery, Monopoly-Building and Barbie*, *THE FASHION LAW* (Mar. 11, 2019), <http://www.thefashionlaw.com/home/the-1-billion-plus-battle-over-bratz-bribery-monopoly-building-and-barbie> [<https://perma.cc/28NZ-8966>].

Part I explains the outsize presence that Barbie has in the toy market and in society generally. Part II discusses the “double binds” that plague both Barbie’s fans and her detractors, and the sexually charged discourse that follows Barbie into the courtroom and throughout society. It also explains the often ignored nexus between intellectual property law, privacy norms, and widespread but largely unarticulated assumptions about sexuality. Part III describes a recent Supreme Court copyright law case involving cheerleader uniforms which reflects the same judicial discomfort about women’s bodies that pervades litigation involving Barbie. Finally, the conclusion praises Orly Lobel for writing such a wonderfully rich and informative book, and the valuable insights it offers into intellectual property law, gender equality, and innovation policy.

I. BARBIE AS BOTH CULTURAL ICON AND CULTURAL MIRROR

For a not quite twelve-inch doll, “Barbie” has had a surprisingly profound and lasting impact on American culture. Barbie was a pioneer in the field of fashion dolls, giving girls a chance to play something besides a maternal role when they interacted with Barbie dolls and their accessories. Barbie was marketed as a “teenage fashion model.”⁶ In matters of style, Barbie is both a trend follower and a trendsetter. The clothing and accessories made in her size are mostly miniature versions of garments that are already popular, but she is also dressed by famous designers.⁷

According to one academic: “‘Reading’ the Barbie doll as a historical text sheds light on the continuities and changes in teen culture, gender roles, sexuality, and consumer culture.”⁸ In the late

⁶ Claire Winters, *Ruth Handler and Her Barbie Refashioned Mattel and the Toy Industry*, INVESTOR’S BUS. DAILY (Sept. 23, 2016), <https://www.investors.com/news/management/leaders-and-success/ruth-handler-and-her-barbie-refashioned-mattel-and-the-toy-industry/> [<https://perma.cc/T6T4-K3M4>].

⁷ Julia Neel, *The Designer’s Doll*, VOGUE (Jan. 9, 2009), <https://www.vogue.co.uk/gallery/barbies-designer-looks> [<https://perma.cc/KNS2-BFQF>].

⁸ Miriam Forman-Brunell, *What Barbie Dolls Have to Say about Postwar American Culture*, SMITHSONIAN CENTER FOR EDUCATION AND MUSEUM STUDIES,

1950s and early 1960s Barbie “represented a ‘teen culture’ that rapidly proliferated in the postwar years due to rising prosperity, spreading suburbs, and expanding leisure time.”⁹ As teen culture has changed, so too has Barbie. Her facial appearance and hair styles have been altered.¹⁰ Her clothing and accessories change over time to reflect whatever is trendy and popular. As of 2016, Barbie comes in four different body types: curvy, petite, and tall, as well as in her original form.¹¹ Her companion, Ken, is also now available in multiple permutations: three different body types, seven skin tones, eight hair colors, and nine hairstyles.¹²

When Jill Barad took charge of the Barbie line at Mattel in 1997, she “reasoned that Barbie sales were flagging because of criticism that the doll was sexist.”¹³ To address this, she began marketing Barbie as a professional role model with the tagline “We Girls Can Do Anything.”¹⁴ Not simply a fashion doll of leisure, Barbie has held many occupations:

Barbie’s early professions were limited to those considered appropriate for a woman in the early 1960s—fashion model, student teacher, nurse, ballerina, flight attendant—but even so, Barbie

www.smithsonianeducation.org/idealabs/ap/essays/barbie.htm [https://perma.cc/JSV9-YQ79] (last visited Nov. 20, 2018).

⁹ *Id.*

¹⁰ FASHION DOLL GUIDE, <http://blog.fashion-doll-guide.com/images/Barbie-Doll-History-3.jpg> [https://perma.cc/UB6A-3J9U] (last visited Nov. 20, 2018); see also Brittany Talarico, *Barbie’s Evolution from 1959 to 2016*, PEOPLE (Jan. 28, 2016), <https://people.com/style/barbies-evolution-from-1959-to-2016/> [https://perma.cc/5UU8-GUT3].

¹¹ Eliana Dockterman, *What I Learned Watching Moms and Kids Meet Curvy Barbie*, TIME (Jan. 28, 2016), <http://time.com/4192898/barbies-new-body-inside-a-mattel-focus-group/> [https://perma.cc/XYV3-BT2B]; see also *Expanded Fashionistas Line Offers New Body Types for Ken and Added Barbie Styles*, MATTEL NEWSROOM (June 20, 2017), <https://news.mattel.com/news/barbieR-brand-reveals-most-diverse-kenR-lineup-to-date> [https://perma.cc/LV3Q-AHUS].

¹² R. Eric Thomas, *All the Ken Dolls You Will Meet in Your Lifetime*, ELLE (June 20, 2017), <https://www.elle.com/culture/news/g30010/all-the-kens-you-will-meet-in-your-lifetime/> [https://perma.cc/9YFH-GAZ5]; see also Parija Kavilanz, *Barbie’s Boyfriend Ken Gets Diverse Makeover*, CNNMONEY (June 20, 2017, 2:20 PM), <http://money.cnn.com/2017/06/20/news/mattel-ken-dolls-diverse/index.html> [https://perma.cc/2M99-5NVC].

¹³ GERBER, *supra* note 3, at 247.

¹⁴ *Id.*

represented choice and independence. Since then she has had, by Mattel's count, more than 100 professions, representing many lines of work. Whether a fashion designer, paleontologist, NASCAR driver, pilot, military officer (decked out in a Pentagon-approved uniform), veterinarian, Olympian, or U.S. presidential candidate, Barbie has always been a career girl, and through the years she has reflected the changing nature of career options for women.¹⁵

Still, her appearance is her calling card. At a 2014 birthday party for her, then-Mattel CEO Bryan G. Stockton reminded the audience: "Barbie has still got it all goin' on. Over the decades, she's been a firefighter's hose assistant, back-up astronaut, nurse, secretary, faithful girlfriend . . . and she's done it all lookin' pretty damn fine I must say."¹⁶ He further stated: "And keeping with the times, we're [sic] just launched Entrepreneur Barbie to help little girls imagine themselves starting their own little scrapbooking or doggie-walking home business." Entrepreneur Barbie was described as "on LinkedIn" and "Already Way More Connected Than You"¹⁷ by a pro-Barbie commentator who observed: "Barbie has worked every second of every day since she was invented in 1959, and she's broken more glass ceilings than Sheryl Sandberg."¹⁸ Mattel probably liked this press, but was likely less enthusiastic when "The Tonight Show with Jay Leno" displayed a fictional "Barbie Crystal Meth Lab" which mocked how Barbie

¹⁵ Laura Cloer, *Barbie Turns 50*, VISION (2009), <http://www.vision.org/visionmedia/society-and-culture/barbie-dolls-barbie-turns-50/13166.aspx> [<https://perma.cc/8LYZ-YNYZ>].

¹⁶ Sue Dunum, *Barbie Turns 55—Still Has a 16 Inch Waist*, LAPINE (June 20, 2014), <https://thelapine.ca/barbie-turns-55-still-has-a-16-inch-waist/> [<https://perma.cc/7U4X-TU9M>].

¹⁷ Roo Ciambriello, *Entrepreneur Barbie is on LinkedIn, and She's Already Way More Connected than You*, ADWEEK (July 3, 2014), <https://www.adweek.com/creativity/entrepreneur-barbie-linkedin-and-shes-already-way-more-connected-you-158737/> [<https://perma.cc/2PNU-SVBH>].

¹⁸ Charlotte Alter, *In Defense of Barbie: Why She Might Be the Most Feminist Doll Around*, TIME (Feb. 5, 2014), <http://time.com/4597/in-defense-of-barbie-why-she-might-be-a-feminist-doll-after-all/> [<https://perma.cc/5BQE-9B2R>].

usually has a career that is “in keeping with the times or in this case, in keeping with society’s current problems.”¹⁹

How many Barbie dolls, how many Barbie outfits, and the number and fanciness of Barbie peripherals a girl owns can be indicators of family wealth. While a basic Barbie in a casual dress might be acquired for around ten dollars,²⁰ Barbie enrobed in a fancy outfit such as an Oscar de la Renta gown costs well over one hundred dollars on sale.²¹ A top of the line Barbie Dream House costs closer to three hundred dollars.²² There have always been many Barbie outfits and accessories for sale, and in the 1960s, “Barbie’s extensive wardrobe exemplified the ethos of an expanding consumer culture where spending replaced saving.”²³

Blond haired, blue eyed, and voluptuously breasted, with flawless skin, Barbie sometimes dates Ken, a handsome boy doll who completely lacks genitals, sporting only a “modest bump” where they should be.²⁴ One commentator observed that, though Barbie has been condemned as sleazy and provocative, “Barbie and her boyfriend Ken, who joined her in 1961, remain curiously sexless.”²⁵ This never stopped my friends and me from laying him on top of Barbie when she relaxed supine on her pink camping cot, or in the bed of her RV. Barbie is beautiful in ways that boys like,

¹⁹ Sara Lennon, *Challenges to Barbie*, Ms. LENNON’S SOCIETY AND CULTURE WIKI (July 31, 2013), <http://societyculturechs.pbworks.com/w/page/67921102/Challenges%20to%20Barbie> [<https://perma.cc/8SY9-2KAR>].

²⁰ *Dolls*, BARBIE, <https://barbie.mattel.com/shop/en-us/ba/all-barbie-dolls#facet:9811497110100989711498105101383549555259,112114105991019511711510040123423257465757125325746575741&productBeginIndex:0&orderBy:&pageView:grid&minPrice:&maxPrice:&pageSize:&contentPageSize:&> [<https://perma.cc/4KVV-VRUB>] (last visited Dec. 21, 2018).

²¹ *Oscar de la Renta Barbie® Doll*, BARBIE, <https://barbie.mattel.com/shop/en-us/ba/barbie-sale/oscar-de-la-renta-barbie-doll-dgw60> [<https://perma.cc/2784-UNGH>] (last visited Nov. 20, 2018).

²² *Barbie® Dreamhouse® & Pop Up Camper Gift Set*, BARBIE, <https://barbie.mattel.com/shop/en-us/ba/barbie-sale/barbie-dreamhouse-pop-up-camper-gift-set-t03411b> [<https://perma.cc/5AWC-T2QV>] (last visited Nov. 20, 2018).

²³ Forman-Brunell, *supra* note 6.

²⁴ See JEANNIE B. THOMAS, *NAKED BARBIES, WARRIOR JOES, AND OTHER FORMS OF VISIBLE GENDER* 116–18 (2003).

²⁵ *Barbie, Life in Plastic: No Amount of Human Willpower Can Defy the Might of the Pink Princess*, *ECONOMIST* (Dec. 19, 2002), <https://www.economist.com/node/1487595> [<https://perma.cc/4SZT-XSDG>] [hereinafter *Life in Plastic*].

and she dresses for male attention. She is a somewhat sanitized version of “her ancestor, Lilli, a coquettish-looking German doll that male bachelors brought to bars and dangled from their rear-view mirrors.”²⁶

Turning away from playing with Barbie dolls is a putting away of childish things,²⁷ and an assertion of advancing maturity and impending adulthood for some children. Others become Barbie collectors for life, and are known as “Adult Barbie Enthusiasts.”²⁸ Some of the Adult Barbie Enthusiasts keep their Barbies pristine to maximize their long-term value. Others prefer more provocative fare, purchasing “bondage Barbie” dolls and accessories from websites like Etsy, which recently featured Barbie sized bondage gear including collars, cuffs, harnesses, floggers, and even strap on dildos.²⁹

Original body Barbie currently has a height of 5 feet 9 inches at 1/6 scale and corollary 36-inch chest, 16-inch waist and 33-inch hips.³⁰ A real woman with these proportions would not be able to menstruate or even hold up her head,³¹ and “she would have the

²⁶ Forman-Brunell, *supra* note 8.

²⁷ See 1 Corinthians 13:11.

²⁸ Kristl Tyler, *Player Profile: Adult Barbie Enthusiasts*, HOW TO PLAY WITH BARBIES (Mar. 11, 2011), <https://playbarbies.wordpress.com/2011/03/11/adult-barbie-enthusiasts-an-introduction/> [<https://perma.cc/4XS4-QGVW>]; see also Helen Lawson, ‘I’m Barbie Man’: Collector Spends \$80,000 and Fills Four-Bedrooms on 2,000 Barbies (and He Has 1,000 Kens), DAILY MAIL (Mar. 7, 2013), <http://www.dailymail.co.uk/news/article-2289592/Im-Barbie-Man-Collector-spends-80-000-fill-s-bedrooms-3-000-Barbies-says-wants-twice-many.html> [<https://perma.cc/G38A-RMML>].

²⁹ See *Bondage Barbie Search Results*, ETSY.COM, <https://www.etsy.com/search?q=bondage%20barbie> [<https://perma.cc/54Z2-5ZXA>] (last visited Nov. 30, 2018).

³⁰ K-Man, *Barbie’s Impossible Measurements?*, BARBIE BLUES (Apr. 13, 2009), <http://barbieblues.blogspot.com/2009/04/barbies-impossible-measurements.html> [<https://perma.cc/52MB-KLTU>]; Nina Golgowski, *Bones so Frail It Would Be Impossible to Walk and Room for Only Half a Liver: Shocking Research Reveals What Life Would Be Like If a REAL Woman Had Barbie’s Body*, DAILY MAIL, <http://www.dailymail.co.uk/news/article-2308658/How-Barbies-body-size-look-real-life-Walking-fours-missing-half-liver-inches-intestine.html> [<https://perma.cc/W4CB-KG2V>]; see also Dunum, *supra* note 16.

³¹ Zali Yager, *Is Barbie Bad for Body Image?*, CONVERSATION (Dec. 22, 2014), <https://theconversation.com/is-barbie-bad-for-body-image-33725> [<https://perma.cc/6AMK-5DJL>].

BMI of a severe anorexic, and would have difficulty standing up on those tiny feet.”³² In addition:

Her 16-inch waist would also be four inches thinner than her head, leaving room for only half a liver and a few inches of intestine. Like her fragile 3.5-inch wrists, her 6-inch ankles would prevent her from heavy lifting. Then, as far as holding up her entire body—despite so much of it missing—it’d be an entirely impossible feat requiring her to walk on all fours.³³

Blaming Barbie for establishing unrealistic body standards for women is a standard fledgling feminist rhetorical move that high school and college students make when they begin recognizing the patriarchal nature of society.³⁴ Decades ago, Barbie was a specific consciousness raising tool for feminists.

Barbie remained at the forefront of cultural criticism diffused by the ongoing second wave of feminism. At this point in the movement, women were considering the many ways that patriarchy is embedded in everyday life. Feminists both in and out of the academy began to evaluate gender inequality and to contest the representative images of women that pervaded society through the media. Barbie soon served as one image of contention. At the Miss America Pageant of 1968, Robin Morgan led a powerful and publicized protest in which feminists threw bras and other

³² Alter, *supra* note 18.

³³ Golgowski, *supra* note 30.

³⁴ See Emily Shire, *Don't Make Barbie's Body Crisis Ours*, DAILY BEAST (Jan. 28, 2016), <https://www.thedailybeast.com/dont-make-barbies-body-crisis-ours> [<https://perma.cc/5SCF-PVC7>]; see also *Life in Plastic*, *supra* note 25 (“More than this, Barbie has joined the gallery of rogues—alongside supermodels, women’s magazines and the advertising industry—held responsible for teenagers’ weight anxiety, and women’s body complexes. The doll, says Mary Rogers, a professor of sociology at the University of West Florida and author of a book on Barbie, ‘belongs to that chorus of voices extolling not only slimness but also beauty and youthfulness as requisites of feminine success.’ Naomi Wolf, author of ‘The Beauty Myth,’ argues that Barbie shares the blame for the fact that girls are raised with a clear expectation of what a sexually successful woman should look like. The ‘official breast,’ Ms. Wolf once said, was ‘Barbie’s breast’—and shame on any girl who failed to possess or acquire one.”).

“feminine” objects with placards referring to attacks on the Barbie doll: “I am . . . Not a Toy, a Pet, or a Mascot.”³⁵

In 1970 the National Organization of Women (“NOW”) placed its formal assault on Mattel when its New York Chapter issued a press release condemning ten companies for sexist advertising. They targeted Mattel’s ad depicting boys playing with educational toys and girls with dolls.

In February 1972, feminists from NOW created another public scene when they distributed leaflets at the New York Toy Fair and claimed Barbie encouraged girls “to see themselves solely as mannequins, sex objects or housekeepers.”³⁶

Interestingly, in 1972 Barbie was represented as Miss America. In 1975, Growing Up Skipper was introduced in which Skipper, Barbie’s younger sister, could literally grow breasts with the movement of her arms; feminists responded that this particular figure showed a male interpretation of a female coming of age with superficial changes in presentation of breasts and sophistication.³⁷

In 2014, two years before making Barbie available in curvy, petite, and tall varieties, Mattel tried to fight back against criticisms of her unrealistic proportions, and launched a campaign called #Unapologetic to push back at Barbie’s critics.³⁸ “In essence, Barbie is always asked to apologize for what she looks like,” a Mattel spokesperson said, “[a]nd the message there is to be unapologetic.”³⁹ Mattel thus tried to make it seem as though an attack on Barbie was an attack on all women pursuing peaceful body acceptance. However, while “Mattel’s intent was for Barbie to be unapologetic about shattering body and gender stereotypes,” one feminist noted with dismay that “Barbie is unapologetic about

³⁵ SEE M.G. LORD, *FOREVER BARBIE: THE UNAUTHORIZED BIOGRAPHY OF A REAL DOLL* 60 (2004).

³⁶ See *id.* at 90.

³⁷ Hannah Tulinski, *Barbie as Cultural Compass: Embodiment, Representation, and Resistance Surrounding the World’s Most Iconized Doll* (May 2017) (B.A. thesis, College of the Holy Cross) (on file with Sociology & Anthropology Department, College of the Holy Cross), at 19, http://crossworks.holycross.edu/soc_student_scholarship/1 [<https://perma.cc/7YY5-GAEY>].

³⁸ Alter, *supra* note 18.

³⁹ *Id.*

being objectified, having an unattainable body and being materialistic.”⁴⁰ This reflects the feminist dilemma of Barbie: Barbie is closely identified with girls and women, so pointed criticism of Barbie feels (and often is) sexist and offensively disparaging of all women. This can make one want to defend Barbie and her fans. But female empowerment is not a commodity that can be bought or sold. Barbie is not a toy that effectively advances gender equality when she is viewed as representative of real girls or women.

Barbie is one of the many gendered toys in the “pink aisle” of the toy department that is focused on fashion and beauty. This has an impact on boys as well as girls. One observer noted:

[W]hile building blocks or sports can easily become a group project, playing with costumes or building a hospital for dolls are coded “pink,” associated with femininity and therefore shame for boys early on, cutting many of them off from their authentic inclinations to be imaginative or caring or domestic, and helping plant the seeds of toxic masculinity.⁴¹

The differences between Barbie and G.I. Joe are stunning. Dubbed “America’s Movable Fighting Man” by manufacturer Hasbro, G.I. Joe originally came with “twenty-one movable parts with which to throw grenades, wield flamethrowers, or storm the barricades of Mattel’s success.”⁴² He also has an extensive wardrobe and range of accessories available for purchase.⁴³ Like Barbie and Ken, he lacks defined genitals.⁴⁴ But he was never intended to be a sex symbol. And if he evolved from an adult sex toy, nobody talks about it.

⁴⁰ Beth Snyder Bulik, *Mattel Pushes Barbie as Model of Empowerment for Young Girls*, ADAGE (Sept. 2, 2014), <http://adage.com/article/news/mattel-pushes-barbie-model-empowerment-young-girls/294755/> [<https://perma.cc/7J4V-6DYP>].

⁴¹ Sarah Seltzer, *Saying Goodbye to the Gendered Toy Aisle*, FLAVORWIRE (May 8, 2015), <http://flavorwire.com/517812/saying-goodbye-to-the-gendered-toy-aisle> [<https://perma.cc/2YBU-UGZ4>].

⁴² GERBER, *supra* note 3, at 119.

⁴³ *Id.*

⁴⁴ *Id.* at 120.

When Barbie appeared in the Swimsuit Issue of Sports Illustrated,⁴⁵ she was not hurting real women by appearing in provocative magazine photos. But she was not being a strong female role model either, because she was flaunting her looks rather than using her brains, strength, and talent. Mattel clearly used the Sports Illustrated opportunity to intentionally remind its customer base about Barbie's significant sex appeal. Less intentionally, perhaps, Mattel also reminded observers about "the contradictions and challenges of feminism: how do we encourage girls without encouraging them to grow up too quickly? And how do we let girls know that they can do and be interested in anything without tearing down traditionally feminine spheres, be they fashion or mothering, in the process?"⁴⁶

II. VIRGIN OR SLUT? THE PERVASIVE DOUBLE BIND

In *You Don't Own Me*, Orly Lobel provides a fascinating account of how the world's most successful doll company dedicated too many resources toward suing its competitors, and not nearly enough toward fomenting creativity and innovation in its product lines.⁴⁷ She also catalogs the impact that gender stereotypes have had on Barbie's launch, her evolution over time, her successes, and her currently declining market share. Though she does not use the term explicitly, Lobel paints a detailed picture of both a doll and the company behind it that are as trapped and limited by double binds as the real women navigating the same terrain.

As part of her story arc, Orly Lobel does a wonderful job describing the discomfort the public, the courts, and the people running Mattel have dealing consistently with Barbie's sexuality.

⁴⁵ Danielle Wiener-Bronner, *Entrepreneur Barbie Will Inspire Young Girls to Be Vaguely Ambitious*, ATLANTIC (June 18, 2014), <https://www.theatlantic.com/business/archive/2014/06/entrepreneur-barbie-mattel/373008/> [https://perma.cc/6JA9-J3UC].

⁴⁶ Alyssa Rosenberg, *Why This Feminist is Looking Forward to a 'Barbie' Movie*, WASH. POST (July 11, 2017), https://www.washingtonpost.com/news/act-four/wp/2017/07/11/why-this-feminist-is-looking-forward-to-a-barbie-movie/?utm_term=.ebe53b341745 [https://perma.cc/CK6Y-SQG4].

⁴⁷ LOBEL, *supra* note 1.

Ruth Handler, a co-founder of Mattel often credited as the “inventor” of Barbie, got the idea from a German doll called Bild Lilli,⁴⁸ which in turn was adapted from a cartoon character with a “baby doll face” but “long blonde hair and a voluptuous grown woman’s body.”⁴⁹ In three dimensions, Lilli was marketed as an adult sex toy to grown men.⁵⁰ The fact that Barbie is derived from a sex toy is often mentioned in court filings and in the media as a way to derogate or diminish her.⁵¹ Barbie’s origins are typically referenced as “the dirty little secret Barbie creators hoped everyone would forget” or something similar.⁵² Yet, it is clear Mattel knew exactly what it was doing when Barbie was launched. One Barbie historian states that Mattel marketers expressly decided that, “instead of attempting to mitigate Barbie’s mature qualities, Mattel should emphasize them. Since Barbie was well-dressed and attractive, mothers ought to consider her a tool for teaching their daughters about the importance of appearance and femininity.”⁵³ Mattel portrays Barbie as virginal when that is helpful to the brand, but has always retained the sexually provocative aspects of Barbie that distinguished her and made her popular in the first place.

Ruth Handler saw the doll’s potential as a toy for children who wanted to role play something other than being mommies. Though “MILF” is a well-known pornography trope that has, like most porn tropes, become part of the mainstream lexicon,⁵⁴ it is not a

⁴⁸ *The “Wholesome” Barbie Doll is Based on a German Call Girl*, PLAID ZEBRA (Feb. 25, 2016), <https://theplaidzebra.com/the-wholesome-barbie-doll-is-based-on-a-german-call-girl/> [<https://perma.cc/Z6PS-3DUX>].

⁴⁹ LOBEL, *supra* note 1, at 60–61.

⁵⁰ Jennifer Latson, *The Barbie Doll’s Not-for-Kids Origins*, TIME (Mar. 9, 2015), <http://time.com/3731483/barbie-history/> [<https://perma.cc/9J5R-FYXG>].

⁵¹ See, e.g., MessyNessy, *Meet Lilli, the High-end German Call Girl Who Became America’s Iconic Barbie Doll*, CABINET OF CHIC CURIOSITIES (Jan. 29, 2016), <http://www.messynessychic.com/2016/01/29/meet-lilli-the-high-end-german-call-girl-who-became-americas-iconic-barbie-doll/> [<https://perma.cc/QF5D-TF44>]; Elizabeth Sherman, *How a Sexy German Cartoon Gave Birth to the Barbie Doll*, ALL THAT’S INTERESTING (Aug. 31, 2016), <http://allthatsinteresting.com/bild-lilli> [<https://perma.cc/7WCT-3RL5>].

⁵² Sherman, *supra* note 51.

⁵³ Cristen Conger, *Who Invented the Barbie Doll and Why?*, HOWSTUFFWORKS (Jan. 28, 2009), <https://entertainment.howstuffworks.com/barbie-history.htm> [<https://perma.cc/NXE5-QZ24>].

⁵⁴ *MILF*, DICTIONARY.COM UNABRIDGED (2019).

term that can be accurately used to describe Barbie. In fact, Barbie is not and has never been a mother:

Barbie has conspicuously missed out on one career path: motherhood. Though often seen in beautiful wedding gowns (modeled “for her designer friends,” says Mattel), she has remained single. The children in her life have been limited to siblings and cousins, and her caregiving roles have ranged from babysitter to teacher to doctor. Although Handler did not argue that a woman’s choices should preclude motherhood, “Mom” is not a title Barbie the role model can claim. In the entire Barbie line, best friend Midge is the only doll who has been marketed with the essential profession of “married, with children.”⁵⁵

Midge’s 2002 pregnancy was controversial, even though she wore a wedding ring and her husband was also available for purchase.⁵⁶ Part of the problem apparently was the perceptual link between pregnancy and sex, which is generally a prerequisite to pregnancy. Some people feared that fecund Midge would promote teen pregnancy.⁵⁷ It is unclear whether Barbie is childless to keep her sexy or to keep her virginal.

The doll now known as Barbie moved a few places along the double bind continuum from slut to virgin as a precursor to being launched in the United States. As Lobel describes it, in addition to changing her name to Barbie, “Americanizing” Lilli meant shrinking her lips but widening her eyes, keeping her large breast size but removing her nipples and erasing her vagina.⁵⁸ This rendered her sexy in clothes, but sexless outside them. Almost three decades ago, law professor and feminist legal theorist Margaret Jane Radin articulated what she described as the “double binds” that informally but quite powerfully regulate the social

⁵⁵ Cloer, *supra* note 15.

⁵⁶ Sue Chan, *Barbie’s Pregnant Friend Yanked*, CBS NEWS (Dec. 24, 2002), <https://www.cbsnews.com/news/barbies-pregnant-friend-yanked/> [<https://perma.cc/9NXH-SB8S>].

⁵⁷ *Id.*

⁵⁸ LOBEL, *supra* note 1, at 65.

construction of women.⁵⁹ For example, women are expected to be friendly and obedient in the workplace if they want to succeed there, but these same qualities, whether innate or cultivated, make these “good colleagues” seem ill suited for leadership positions by employers looking for hard edges and ruthless decision making. Women who do not make children their top priority are censored by a society that will also deem women who are actively engaged with children too occupied and distracted to take on demanding positions in politics, or the workplace.

When women dress for success, the double bind ensures that whatever outfit they choose, it is always wrong. Women who dress to hide their bodies are deemed frumpy, unattractive, and unprofessional. Yet women who wear bright colors and body conscious clothing are castigated for using their sex appeal to get ahead, suspected of intentionally distracting the men they are competing with, or plotting to seduce the boss.

As Lobel engagingly recounts, Barbie too is restricted by the double bind. Her appeal to girls is partly aspirational; Barbie gives girls a way to be vicariously voluptuous and beautiful in a particular kind of big eyed, tiny waisted, large breasted, mane of blonde-hair tossing kind way. Barbie is attractive and popular, and she looks like a fashion model in her lovely clothes. Girls can fantasize about being an idealized size and shape, driving a pink convertible, and living in a colorful and well-appointed Dream House.⁶⁰

With the assistance of hair bleach and breast implants, “Barbie” is the look adopted by many Playboy centerfolds and successful pornography performers. Despite her Lilli origins, Mattel executives have never overtly deployed allusions to the commercial sex industries. They want Barbie, when viewed by parents, to be wholesome enough to be an appropriate plaything for children. At the same time, they know that the sexual frisson around her is part of her appeal to the children themselves:

⁵⁹ Margaret Jane Radin, *The Pragmatist and the Feminist*, 63 S. CAL. L. REV. 1699 (1990).

⁶⁰ *Barbie® Dreamhouse®*, BARBIE, <https://barbie.mattel.com/shop/en-us/ba/dollhouses/barbie-dreamhouse-dhc10> [<https://perma.cc/DN4T-XET6>] (last visited Nov. 20, 2018).

By the time Barbie turned 50, in 2009, Mattel had sold more than 1 billion copies of the doll, partly by “cultivating its wholesome image,” according to TIME. But Handler acknowledged that Barbie was undeniably sexier than most American dolls of her day. She didn’t see anything wrong with that, according to her 2002 obituary in the New York Times.

“Every little girl needed a doll through which to project herself into her dream of her future,” she said in a 1977 interview, as quoted in the obituary.

“If she was going to do role playing of what she would be like when she was 16 or 17, it was a little stupid to play with a doll that had a flat chest. So I gave it beautiful breasts.”⁶¹

Barbie’s appearance creates “double binds” that plague both Barbie’s fans and her detractors. Her sex appeal is what initially set her apart from other dolls and made her wildly popular. But Mattel feared that “too much” sexiness would make Barbie unappealing, alarming even, to parents. Ironically, Mattel ultimately lost a significant portion of its Barbie market share to Bratz, a line of dolls even more overtly sexualized than Barbie. This leads to the litigation that features prominently in *You Don’t Own Me, Mattel v. MGA Entertainment*.⁶²

Back in 1991, “mindful of the African-American market, Mattel in 1991 introduced its new black Shani, Asha, and Nichelle dolls with different skin tones but with the same traditional Barbie figures.”⁶³ Mattel has had an odd and complicated history with Barbie and race, as illustrated by this anecdote:

In 1997 Mattel joined forces with Nabisco to launch a cross-promotion of Barbie with Oreo cookies. Oreo Fun Barbie was marketed as someone with whom little girls could play after class and share

⁶¹ Latson, *supra* note 50.

⁶² *Mattel, Inc. v. MGA Entm’t, Inc.*, 616 F.3d 904, 910 (9th Cir. 2010).

⁶³ Julie Wosk, *The New Diversity in Barbie Dolls: Radical Change or More of the Same?*, HUFFINGTON POST (Feb. 8, 2016), https://www.huffingtonpost.com/julie-wosk/the-new-diversity-in-barb_b_9181740.html [<https://perma.cc/NQS3-PKXF>].

“America’s favorite cookie.” As had become the custom, Mattel manufactured both a white and a black version. Critics argued that, in the African American community Oreo is a derogatory term meaning that the person is “black on the outside and white on the inside,” like the chocolate sandwich cookie itself. The doll was unsuccessful and Mattel recalled the unsold stock, making it sought after by collectors.⁶⁴

More recently, there were minor controversies about a hairstyle worn by a Black Barbie,⁶⁵ and the appearances of Black Barbies generally.⁶⁶ Mattel likes to broadcast its “progressiveness” on race, but mainly seems to make decisions based on what sorts of dolls are likely to sell. Marketability is of course an entirely reasonable consideration for a for profit toy company, but Mattel cannot seem to resist crediting itself with using the power of Barbie for positive social engineering.⁶⁷

Being called “Barbie” when that is not your actual name is not a compliment. The appellation “Barbie” is hurled at women as an insult, to connote phoniness, empty-headedness, shallowness, and plasticity.⁶⁸ In Canada, women politicians working on strengthening laws to protect the environment are dismissed as “climate Barbies.”⁶⁹ Supposedly progressive people denounced then Alaska Governor Sarah Palin as “Caribou Barbie” when she

⁶⁴ Lennon, *supra* note 19.

⁶⁵ Nadra Nittel, *Mattel’s New Black Barbie’s Hair Isn’t Offensive—It’s Just a Few Years Too Late*, RACKED (May 7, 2018), <https://www.racked.com/2018/5/7/17321362/barbie-black-hair-mattel-backlash> [<https://perma.cc/VSV2-57BW>].

⁶⁶ Latoya Peterson, *New Black Barbies, Same Old Controversy*, JEZEBEL (Oct. 22, 2009), <https://jezebel.com/5387821/new-black-barbies-same-old-controversy> [<https://perma.cc/HA3N-98JP>]; Emily Peck, *Barbie’s Surprising Comeback Has Everything to Do with Race*, HUFFINGTON POST (Mar. 3, 2017), https://www.huffingtonpost.com/entry/barbie-diversity_us_58b5debde4b060480e0c7aa2 [<https://perma.cc/W6DS-PPDA>].

⁶⁷ See Wosk, *supra* note 63.

⁶⁸ See, e.g., Lennon, *supra* note 19.

⁶⁹ Nancy Peckford, *Peckford: McKenna (And Others) Are Right to Take on the Trolls*, OTTAWA CITIZEN (Sept. 21, 2017), <https://ottawacitizen.com/opinion/columnists/peckford-mckenna-and-others-are-right-to-take-on-the-trolls> [<https://perma.cc/UXA5-7NQX>].

ran for Vice President of the United States.⁷⁰ One observer noted, that “conservatives use her name as a slur; Erick Erickson of RedState called Texas state senator Wendy Davis ‘Abortion Barbie’ after her 11-hour filibuster of an antiabortion bill.”⁷¹ Texas attorney general Greg Abbott then “thanked a supporter who called Davis ‘Retard Barbie’ over Twitter.”⁷² Mattel’s tepid response was to state, “[a]s a pop-culture icon, Barbie is often referenced as part of larger conversations occurring in culture.”⁷³

A. *Barbie in the Bathwater*

One of Lobel’s many interesting insights involves the uneasiness with which the legal system deals with sexualized toys. Some jurists have ignored Barbie’s sex appeal, while others somewhat creepily embrace it. Judges can make perplexing choices when contemplating or ignoring women’s bodies generally. Sometimes judges will interject women’s bodies into cases that otherwise do not logically require them. In an article provocatively entitled “Is Privacy a Woman?” author Jeanie Suk discussed *Kyllo v. United States*,⁷⁴ a Fourth Amendment case in which the Supreme Court considered the government’s use of a thermal-imaging device to detect the amount of heat emanating from a home. Although the facts of the case involved heat lamps that were used to grow marijuana indoors, Suk pointed out the unexpectedly gendered and sexualized perceptions driving the Court’s analysis, writing:

Justice Scalia speculated [that], the heat-sensing device might well disclose intimate information—such as “at what hour each night *the lady of the house takes her daily sauna and bath.*” This far-fetched figure of the imagination is apparently intended to evoke private acts that people care to hide from public view. This particular detail is

⁷⁰ Elizabeth Dias, *The Toy Barbie Responds to the Wendy Davis Barbie Wars*, TIME (Aug. 20, 2013), <http://swampland.time.com/2013/08/20/the-toy-barbie-responds-to-the-wendy-davis-barbie-wars/> [<https://perma.cc/6DFG-FUX9>].

⁷¹ Alter, *supra* note 18.

⁷² Dias, *supra* note 70.

⁷³ *Id.*

⁷⁴ 533 U.S. 27 (2001).

striking in its anachronism. Most people today shower rather than bathe. Moreover, Justice Scalia does not imagine merely any detail of the home, but a woman, specifically a “lady.” And speaking of “the lady of the house” implies her counterpart, the master of the house. This anachronistic language thus calls to mind more than the privacy interests of a lady bathing. It also evokes the privacy interest of the man entitled to see the lady of the house naked and his interest in shielding her body from prying eyes. Privacy is figured as a woman, an object of the male gaze.

The lady in the bath thus pits old against new, anachronism against futuristic technology. She is a figure for values of old-fashioned privacy under threat. Privacy is a woman—not just a woman, but a lady—imagined as domesticity in a well-ordered traditional marital home. Justice Scalia invites us to “see” a thermal image of this lady. We become invited voyeurs. Her sybaritic form is revealed to show the need to keep her hidden from view.⁷⁵

In Justice Scalia’s mind, constructs of privacy and search and seizure became about female nudity, despite the lack of naked or bathing bodies extant in the actual legal dispute. An analogous phenomenon happens whenever Barbie is involved. She is just a plastic doll, but she makes people think about female sexuality.

One Barbie variation, “Barbie Video Girl,” led an FBI field office to warn that, because it had an embedded camera, it could be used to create child pornography.⁷⁶ The Barbie Video Girl doll, which went on sale in 2010, could record up to 30 minutes of footage through a digital camera on its front.⁷⁷ The images could be viewed on the doll itself, or could be uploaded to a computer via USB cable. Though there does not appear to have been a single instance in which the Barbie Video Girl actually was used to make

⁷⁵ Jeannie Suk, *Is Privacy a Woman?*, 97 *GEO. L.J.* 485, 488–89 (2009).

⁷⁶ *FBI Memo Raises Barbie Child Pornography Fears*, BBC NEWS (Dec. 6, 2010), <http://www.bbc.com/news/world-us-canada-11930727> [<https://perma.cc/7EZS-C863>].

⁷⁷ *Id.*

or distribute child pornography, the FBI got a fair amount of press for “raising awareness” of the possibility.⁷⁸ In response, Mattel did not point out that most girls have access to cell phones, which also have cameras and are connected directly to the Internet, making it far more convenient for filming and distributing illicit pornography. Instead Mattel rather cravenly issued a statement which said, “Mattel products are designed with children and their best interests in mind. Many of Mattel’s employees are parents themselves and we understand the importance of child safety—it is our number one priority.”⁷⁹ Despite its popularity, Mattel discontinued Barbie Video Girl in 2012.⁸⁰ No toy company wants its products connected in any way with child pornography. Mattel probably feared that the imaginative leap between an intentionally sexy doll with a camera in its abdomen and films of children being raped was too narrow, especially after the FBI had made and publicized this connection.

B. *Oh Barbie*

In *Mattel v. MCA Records*, a Ninth Circuit panel contemplated whether a commercially released song called “Barbie Girl” by the Danish band Aqua trampled illegally upon Mattel’s intellectual property.⁸¹ In the song, one bandmember sings in a high-pitched voice in the persona of Barbie, while another bandmember, calling himself Ken, sing lyrics such as:

I’m a Barbie girl, in my Barbie world
Life in plastic, it’s fantastic
You can brush my hair, undress me everywhere

⁷⁸ *FBI Issues Warning Over Barbie ‘Video Girl’ Which Could be Used by Paedophiles to Make Child Pornography*, DAILY MAIL (Dec. 8, 2010), <http://www.dailymail.co.uk/news/article-1335649/FBIs-Barbie-child-memo-Camera-used-paedophiles-make-pornography.html> [<https://perma.cc/6K2N-J7ZY>] [hereinafter *FBI Issues Warning*]; Karen Araiza, *FBI Issues Alert on Barbie Doll with Video Camera*, NBC 10 PHILADELPHIA (Dec. 8, 2010), <https://www.nbcphiladelphia.com/news/local/FBI-Issues-Alert-on-Barbie-Doll-With-Video-Camera-111548184.html> [<https://perma.cc/J4KG-ZMNP>].

⁷⁹ *FBI Issues Warning*, supra note 78.

⁸⁰ *Barbie® Video Girl™ Doll (AA)*, MATTEL AND FISHER-PRICE CUSTOMER SERVICE, <https://service.mattel.com/us/TechnicalProductDetail.aspx?prodno=R4807&siteid=27&catid=508> [<https://perma.cc/2U59-EHJ8>] (last visited Nov. 21, 2018).

⁸¹ *Mattel, Inc. v. MCA Records, Inc. (Mattel I)*, 296 F.3d 894 (9th Cir. 2002).

Imagination, life is your creation
 Come on Barbie, let's go party!
 I'm a blonde bimbo girl, in a fantasy world
 Dress me up, make it tight, I'm your dolly
 You're my doll, rock and roll, feel the glamour in
 pink
 Kiss me here, touch me there, hanky-panky
 You can touch, you can play
 If you say "I'm always yours" . . . ⁸²

Mattel sued Aqua, alleging trademark infringement and trademark dilution, but lost on the free speech grounds of parody and nominative fair use both at the district court level and in the Ninth Circuit Court of Appeals.⁸³ As a general matter, the fair use doctrine of trademark law (and the fair use doctrine of copyright law as well) is an important bulwark of free speech, and this holding was correct and justified by the facts. It has also been persuasively asserted, however, that unauthorized uses of intellectual property connected to sexualized goods and services that are linked to female bodies are more likely to found "fair" in a legal dispute than those that are gender neutral or those that code male.⁸⁴ Rebecca Tushnet has written that "[c]urrent fair use opinions treat sexualizing a text as automatically constituting relevant commentary on the original, unlike other forms of reworking."⁸⁵ Andrew Gilden has made a similar argument, asserting that sexualized content and depictions of women's bodies are more likely than other works to be seen as "raw materials" that

⁸² *Id.* at 909.

⁸³ *Id.*; *Mattel, Inc. v. MCA Records, Inc. (Mattel II)*, 28 F. Supp. 2d 1120 (C.D. Cal. 1998).

⁸⁴ Rebecca Tushnet, *My Fair Ladies: Sex, Gender, and Fair Use in Copyright*, 15 AM. U. J. GENDER, SOC. POL'Y & L. 273 (2007) [hereinafter *My Fair Ladies*]; see also Rebecca Tushnet, *Patry on My Fair Ladies*, REBECCA TUSHNET'S 43(B)LOG: FALSE ADVERTISING AND MORE (Mar. 14, 2007), <https://tushnet.blogspot.com/2007/03/patry-on-my-fair-ladies.html?m=0> [<https://perma.cc/6AF4-U8SY>]; cf. Brian Soucek, *Aesthetic Judgment in Law*, 69 ALA. L. REV. 381 (2017). See generally Kara W. Swanson, *Intellectual Property and Gender: Reflections on Accomplishments and Methodology*, 24 AM. U. J. GENDER, SOCIAL POL'Y & L. 175 (2015).

⁸⁵ *Tushnet, supra* note 84, at 277.

others can make transformative use of in ways that are considered fair uses under copyright law.⁸⁶

So it is no surprise that the district court's "fair use" based ruling was affirmed in a Ninth Circuit opinion authored by then Judge Alex Kozinski, a jurist seemingly fond of sexually charged disputes. The first line of his opinion is: "If this were a sci-fi melodrama, it might be called Speech-Zilla meets Trademark Kong."⁸⁷ It is probably for this reason that Chapter 9 of *You Don't Own Me* is entitled "Taming Barbie: Starring Judge Alex Kozinski as Speechzilla." Kozinski then somewhat hyperbolically explains:

Barbie was born in Germany in the 1950s as an adult collector's item. Over the years, Mattel transformed her from a doll that resembled a "German street walker," as she originally appeared, into a glamorous, long-legged blonde. Barbie has been labeled both the ideal American woman and a bimbo. She has survived attacks both psychic (from feminists critical of her fictitious figure) and physical (more than 500 professional makeovers). She remains a symbol of American girlhood, a public figure who graces the aisles of toy stores throughout the country and beyond. With Barbie, Mattel created not just a toy but a cultural icon.⁸⁸

None of this information was necessary to the resolution of the case. Toys do not have to be cultural icons to be susceptible to parodies that are protected by the First Amendment. The "German street walker" detail is completely gratuitous, but injecting sex into his work is something of a Kozinski hallmark. Lobel explains that when she told him that her feminist mother taught her "that Barbie sends girls the wrong message about body image," Kozinski retorted: "[t]he only thing wrong that I saw when I held Barbie is when I lift her skirt there is nothing underneath."⁸⁹

⁸⁶ See Andrew Gilden, *Raw Materials and the Creative Process*, 104 GEO. L.J. 355 (2016).

⁸⁷ *Mattel I*, 296 F.3d at 898.

⁸⁸ *Id.*

⁸⁹ LOBEL, *supra* note 1, at 182.

Lobel also recounted an episode in 2008 in which Kozinski recused himself from an obscenity trial after it was disclosed that he kept online media files that included what some described as “bestiality porn.”⁹⁰ The files included a photo of naked women on all fours painted to look like cows, a video of a man fighting off a donkey with an enormous erect penis that repeatedly attempts to mount and penetrate him, a graphic depiction of a woman shaving her pubic hair, images of masturbation, public sex, and a folder that contained a series of photos of women’s crotches as seen through snug fitting clothing or underwear. Aggressively defended by his wife at the time as simply a fan of “raunchy humor,”⁹¹ Kozinski himself tried to pin part of the blame for the more repulsive files upon one of his sons.⁹²

When this story broke, I was contacted by a reporter who asked me if I was willing to watch some of the files and opine as to whether or not they constituted pornography. At the time I was a tenured member of the faculty at the University of South Carolina School of Law, but in an abundance of caution I obtained written permission from my Dean and Associate Dean to view those files on my law school computer before I opened any. I knew I did not want them on my personal laptop! However, after viewing several files and photos from the Kozinski website in which it seemed possible to me that the people engaged in the sex acts were under the age of eighteen, thereby constituting child pornography, I deleted them immediately and told the reporter I could not fulfill the request. To be very clear, I did not see evidence of any

⁹⁰ *Id.* at 179–80.

⁹¹ *Wife of Porn Case Judge Stands by Her Man*, CBS NEWS (June 17, 2008, 3:38 PM), <https://www.cbsnews.com/news/wife-of-porn-case-judge-stands-by-her-man/> [<https://perma.cc/VY5D-5TRJ>].

⁹² *Kozinski’s Porn Stash Revealed (Updated with Link to Picture) (Update: Kozinski’s Son Uploaded Material?) (Update Trial Suspended)*, PATERICO’S PONTIFICATIONS: HARANGUES THAT JUST MAKE SENSE (June 11, 2008, 5:37 PM), <http://patterico.com/2008/06/11/kozinskis-porn-stash-revealed/> [<https://perma.cc/6Z4C-5GAG>]; *see also* David Lat, *The Kozinski Controversy: Had Enough Yet?*, ABOVE THE LAW (June 17, 2008, 11:30 PM), <https://abovethelaw.com/2008/06/the-kozinski-controversy-had-enough-yet/> [<https://perma.cc/KL95-9EYY>]; Scott Glover, *9th Circuit’s Chief Judge Posted Sexually Explicit Matter on His Website*, L.A. TIMES (June 11, 2008, 12:00 AM), <http://www.latimes.com/local/la-me-kozinski12-2008jun12-story.html> [<https://perma.cc/D3XE-59SC>].

prepubescent children in the images I reviewed, but it did seem eminently possible that some of the people depicted were teenagers under the age of eighteen.

The sad but all too predictable coda to these anecdotes occurred too late to appear in *You Don't Own Me*. In December of 2017, Alex Kozinski was accused of sexual harassment by a number of his former clerks,⁹³ and retired in disgrace from his judicial appointment.⁹⁴ One of the accusations made against him was that he required some of his clerks to view pornography in his chambers unrelated to any case before the Ninth Circuit, asking at least one whether it aroused her sexually.⁹⁵

C. *Barbie in a Blender and Barbie in a Dungeon*

As Rebecca Tushnet and Andre Gilden have each explained, some types of transformative works are almost immunized against copyright infringement findings.⁹⁶ Because she is a sexualized female doll, unauthorized communicative uses of Barbie are likely to be found to be fair use, especially if the uses have a sexual aspect. Below are two examples, both explained by Lobel in more detail (along with other cases) in *You Don't Own Me*.

1. Blender Barbie

Every July 27 is National Barbie in a Blender Day,⁹⁷ “a holiday created by a student group called Freeculture.org that promotes the public interest in intellectual property and telecommunications

⁹³ Matt Zapotosky, *Prominent Appeals Court Judge Alex Kozinski Accused of Sexual Misconduct*, WASH. POST (Dec. 8, 2017), https://www.washingtonpost.com/world/national-security/prominent-appeals-court-judge-alex-kozinski-accused-of-sexual-misconduct/2017/12/08/1763e2b8-d913-11e7-a841-2066faf731ef_story.html?utm_term=.210bf2c59af2 [https://perma.cc/8KUC-CC36].

⁹⁴ Dahlia Lithwick, *What Has the Judiciary Learned Since Kozinski?*, SLATE (Jan. 29, 2018, 1:41 PM), <https://slate.com/news-and-politics/2018/01/after-kozinski-court-employees-cant-get-clarity-on-how-to-report-judicial-abuse.html> [https://perma.cc/58UZ-ZJYC].

⁹⁵ Zapotosky, *supra* note 93.

⁹⁶ See *supra* notes 84, 86.

⁹⁷ *National Barbie-in-a-Blender Day*, CHECKIDAY.COM, <https://www.checkiday.com/a8cc6665d4c154a80447a730b520025d/national-barbie-in-a-blender-day> [https://perma.cc/T3L3-M8DX] (last visited Nov. 21, 2018).

policy.”⁹⁸ This is a consequence of the Forsythe case.⁹⁹ In 1999, artist Tom Forsythe created a series of photographs titled “Food Chain Barbie.” He asserted that the project was intended to criticize the objectification of women and the impossible beauty standards the Barbie represents.¹⁰⁰ Forsythe’s photographs showed the doll in various poses, some of which were highly sexualized:

Forsythe showed nude and buxom Barbies wrapped in a tortilla, smothered with enchilada sauce, stuffed inside a blender and roasting inside a toaster. In another picture, several Barbie heads are impaled on fondue forks inside a boiling pot. But the photo that particularly irked the El Segundo toy maker was one showing Barbie with a food mixer blade between her legs. Mattel’s legal papers called the photographs “crudely sexual and violently misogynistic” and accused the little-known Utah artist of infringing on the company’s intellectual property rights.¹⁰¹

So Forsythe was ostensibly using his art to accuse Mattel of misogyny, while Mattel made the same accusation against Forsythe, and also filed a lawsuit against him alleging copyright and trademark infringement.¹⁰² Mattel asserted it owned “the image of Barbie, her face, her body, and her look” through copyright protection.¹⁰³ The district court concluded that

⁹⁸ Will Collette, *Friday, July 27—National Barbie in a Blender Day: Almost as Exciting as International Talk Like a Pirate Day (September 19)*, PROGRESSIVE CHARLESTOWN (July 26, 2012), <http://www.progressive-charlestown.com/2012/07/friday-july-27-national-barbie-in.html> [<https://perma.cc/Y656-F2BX>]; see also *National-Barbie-in-a-Blender Day: Celebrating Free Speech and Fair Use*, PRETTY.USEFUL.STUFF (July 27, 2010), <http://prettyusefulstuff.blogspot.com/2010/07/national-barbie-in-blender-day.html> [<https://perma.cc/5LG6-H38X>].

⁹⁹ *Mattel Inc. v. Walking Mountain Prods.*, 353 F.3d 792 (9th Cir. 2003).

¹⁰⁰ Catherine Elsworth, *Artist Wins Battle Over Nude Barbie*, TELEGRAPH (June 29, 2004, 12:01 AM), <https://www.telegraph.co.uk/news/worldnews/northamerica/usa/1465744/Artist-wins-battle-over-nude-Barbie.html> [<https://perma.cc/95VL-LLU9>].

¹⁰¹ David Rosenzweig, *Artist’s Use of Barbie Dolls is Protected, Judge Rules*, L.A. TIMES (Aug. 14, 2001), <http://articles.latimes.com/2001/aug/14/local/me-33884> [<https://perma.cc/ET7V-C2KM>].

¹⁰² *Walking Mountain Prods.*, 353 F.3d at 795–816.

¹⁰³ LOBEL, *supra* note 1, at 135–36.

Forsythe's depictions of Barbie were fair use because "(1) his use was parody meant to criticize Barbie, (2) he only copied what was necessary for his purpose, and (3) his photographs could not affect the market demand for Mattel's products or those of its licensees."¹⁰⁴

The Ninth Circuit Court of Appeals affirmed in an opinion that contained several notable judicial contentions:

Mattel, through impressive marketing, has established Barbie as "the ideal American woman" and a "symbol of American girlhood" for many. *Mattel, Inc. v. MCA Records, Inc.* ("MCA"), 296 F.3d 894, 898 (9th Cir. 2002), cert. denied, 537 U.S. 1171, 123 S. Ct. 993, 154 L. Ed. 2d 912 (2003). As abundantly evidenced in the record, Mattel's advertisements show these plastic dolls dressed in various outfits, leading glamorous lifestyles and engaged in exciting activities. To sell its product, Mattel uses associations of beauty, wealth, and glamour.

Forsythe turns this image on its head, so to speak, by displaying carefully positioned, nude, and sometimes frazzled looking Barbies in often ridiculous and apparently dangerous situations. His lighting, background, props, and camera angles all serve to create a context for Mattel's copyrighted work that transform Barbie's meaning. Forsythe presents the viewer with a different set of associations and a different context for this plastic figure. In some of Forsythe's photos, Barbie is about to be destroyed or harmed by domestic life in the form of kitchen appliances, yet continues displaying her well known smile, disturbingly oblivious to her predicament. As portrayed in some of Forsythe's photographs, the appliances are substantial and overwhelming while Barbie looks defenseless. In other photographs, Forsythe conveys a sexualized perspective of Barbie by showing the nude doll in sexually suggestive contexts. It is not difficult to see the commentary that Forsythe intended or the harm

¹⁰⁴ *Walking Mountain Prods.*, 353 F.3d at 800.

that he perceived in Barbie's influence on gender roles and the position of women in society.

However one may feel about his message—whether he is wrong or right, whether his methods are powerful or banal—his photographs parody Barbie and everything Mattel's doll has come to signify. Undoubtedly, one could make similar statements through other means about society, gender roles, sexuality, and perhaps even social class. But Barbie, and all the associations she has acquired through Mattel's impressive marketing success, conveys these messages in a particular way that is ripe for social comment.¹⁰⁵

Rather than a sex kitten, the judge found Barbie's persona to be “the ideal American woman” and a “symbol of American girlhood.” It is this image that the judge concluded Forsythe “turns on its head” by parodically portraying her as “disturbingly oblivious,” “defenseless” and “sexualized.” The court concluded that Forsythe had a sufficiently transformative intent, and had produced a sufficiently transformative message, for his photographs of Barbie to constitute fair use. “This ruling shows that might is not always right,” said Forsythe in an interview after the verdict issued, stating, “The judge's decision is a powerful victory for all feminists who criticize Barbie's stereotype of women and the unquestioning acceptance that allows Mattel to sell these hyper-sexualized hunks of plastic into millions of American homes.”¹⁰⁶

Amy Adler has criticized the “transformative use” branch of fair use analysis in copyright law, arguing that it relies on rote statements of intended meanings by artists, which can have censorious impact on the visual arts because artists need to articulate the “correct” meanings of their work if they want to successfully assert fair use defenses.¹⁰⁷ Certainly Adler's critique rings true with respect to Barbie cases, with the Forsythe opinion providing a prime example.

¹⁰⁵ *Id.* at 802 (emphasis added).

¹⁰⁶ Ace in the Hole, *Play with Your Toys!*, DAILY REVOLUTION <http://dailyrevolution.org/allgood/010817.html#today> [https://perma.cc/VX5W-MHCZ] (last visited Nov. 21, 2018).

¹⁰⁷ Amy Adler, *Fair Use and the Future of Art*, 91 N.Y.U. L. REV. 559 (2016).

2. Barbie as Dungeon Doll

Another Barbie case with a less clearly valuable social commentary involved an artist who put Barbie in bondage in a dungeon. Susanne Pitt was sued by Mattel¹⁰⁸ for selling what she called a Dungeon Doll, a repainted and recostumed Barbie doll with a SuperStar Barbie head; the Dungeon Doll was sold through the post and “an internet website, which featured images of the recostumed and painted SuperStar Barbie doll in a sexually explicit story and offered various sexual paraphernalia for sale.”¹⁰⁹ Pitt “added nipples and a plastic vagina to Barbie and a plastic penis to Ken.”¹¹⁰ The court noted:

The images of Plaintiff’s recostumed copyrighted work that appeared on Defendant’s website were presented in a photographic storyboard. “Lily the Diva Dominatrix,” a recostumed and apparently physically altered Barbie doll, was the protagonist in a tale of sexual slavery and torture, the victim of which was another reconfigured Barbie. Defendant also sold numerous “adult” products that were described on the website. See *id.* [sic] Defendant’s “touch-ups” of the dolls plus the setting she creates for them transform, to put it mildly, the original doll to an extent beyond merely “supplanting” it. A different analysis would apply if Defendant had, for example, dressed Barbie dolls in a different style of cheerleader outfit than those marketed by Mattel. To the Court’s knowledge, there is no Mattel line of “S & M” Barbie.¹¹¹

As with Forsythe’s photographs of Barbies in blenders, Pitt’s work was held to communicate something acceptable about Barbie in a copyright sense. A district court judge wrote: “Defendant asserts that she is at least in part attempting to comment on what she perceives as the sexual nature of Barbie through her use of

¹⁰⁸ Mattel, Inc. v. Pitt, 229 F. Supp. 2d 315 (S.D.N.Y. 2002).

¹⁰⁹ *Id.* at 318.

¹¹⁰ LOBEL, *supra* note 1, at 137.

¹¹¹ *Pitt*, 229 F. Supp. 2d at 322 (emphasis added).

customized Barbie figurines in sadomasochistic costume and/or storylines.”¹¹² Because Pitt had a specific message she could articulate, she was entitled to a fair use defense that the court suggests might not have been available had she simply “dressed Barbie dolls in a different style of cheerleader outfit than those marketed by Mattel.”¹¹³ Barbie is officially a Dallas Cowboys cheerleader.¹¹⁴ There are also specific “Cheerleader Barbies” for a number of colleges and universities.¹¹⁵ Making Barbie a dominatrix without authorization by Mattel was fine with the court, but non-permissively making her a New England Patriots cheerleader might not have been. As Amy Adler has explained, some messages will productively trigger the transformative use analysis, but others will not, which puts pressure on visual artists to ascribe “correct” messages to their works.¹¹⁶

D. Barbies Aren't Bratz

Alex Kozinski stated in his *Mattel v. MCA Records* opinion that “Barbie has been labeled both the ideal American woman and a bimbo.”¹¹⁷ He at least recognized the Barbie double bind. Her successors, including Bratz and Monster High dolls, are less likely to pose this dichotomy. One observer asserted, “Barbie is being pushed out in favor of younger, sluttier dolls with bigger heads. First it was Bratz with their outrageously puffed up lips, heavy

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Dallas Cowboys Cheerleaders Barbie® Doll*, BARBIE, <https://barbie.mattel.com/shop/SearchDisplay?categoryId=&storeId=10151&catalogId=10104&langId=-1&sType=SimpleSearch&resultCatEntryType=2&showResultsPage=true&searchSource=Q&pageView=&beginIndex=0&pageSize=36&searchTerm=dallas+cowboys#facet:&productBeginIndex:0&orderBy:&pageView:grid&minPrice:&maxPrice:&pageSize:&contentPageSize:&> [https://perma.cc/Q8BL-MKAN] (last visited Nov. 21, 2018).

¹¹⁵ *Special Edition Cheerleader Barbie Dolls (1973-Now)*, EBAY https://www.ebay.com/b/Special-Edition-Cheerleader-Barbie-Dolls-1973-Now/160834/bn_569_47948 [https://perma.cc/4LW9-9HJ5] (last visited Nov. 21, 2018); see also Michael Smith, *Mattel's University Barbie Goes Back to School, Sporting SEC Team Colors*, SPORTSBUSINESS J. (July 2, 2012), <https://www.sportsbusinessdaily.com/Journal/Issues/2012/07/02/Colleges/Barbie.aspx> [https://perma.cc/PL6C-29U3].

¹¹⁶ Adler, *supra* note 107.

¹¹⁷ *Mattel I*, 296 F.3d 894, 898 (9th Cir. 2002).

makeup and feather boas, now it's Monster High dolls, who dress like prostitutes and have the dimensions of lollipops."¹¹⁸

Though busty blonde women may still be dismissed as "Barbies," the more contemporary, racially and ethnically inclusive way to insult physically attractive women is by referencing the Bratz dolls. For example, Kim Kardashian West was recently referred to as Kanye West's "forever-bronzed, real-life Bratz doll wife."¹¹⁹

Mattel executives clearly understand that it is the amped up sex appeal of Bratz dolls that have made them such effective Barbie competitors. But after losing the Bratz litigation, rather than making Barbie sexier, Mattel eventually chose to make Barbie more diverse, manufacturing Barbie with curvy and petite body types in addition to "original" and adding new skin tones and hair textures.¹²⁰ Since the introduction of the more diverse Barbie lines, Mattel's sales have increased,¹²¹ demonstrating the accuracy of

¹¹⁸ Alter, *supra* note 18.

¹¹⁹ Angela Helm, *Kim Kardashian West Jumps Into Ye's Latest Dustup and Twitter Tells Her to Have a Stadium of Seats*, GRAPEVINE (May 27, 2018, 12:20 PM), https://thegrapevine.theroot.com/kim-kardashian-west-takes-a-break-from-cultural-appropriation-1826356212?utm_medium=socialflow&utm_source=theroot_twitter&utm_campaign=theroot_twitter_impression=tru [<https://perma.cc/8M29-QTU4>].

¹²⁰ Eliana Dockterman, *Barbie's Got a New Body*, TIME, <http://time.com/barbie-new-body-cover-story/> [<https://perma.cc/CFH8-T4AS>] (last visited Nov. 21, 2018).

¹²¹ See Christina Cauterucci, *Little Girls' Reactions to the New "Curvy" Barbie Prove Why We Need "Curvy" Barbie*, SLATE (Jan. 28, 2016, 1:33 PM), http://www.slate.com/blogs/xx_factor/2016/01/28/little_girls_reactions_to_curvy_barbie_prove_why_we_need_curvy_barbie.html [<https://perma.cc/5ZAW-ZHFB>]; Tanya Sweeney, *Happy Birthday Barbie—She's More of a Feminist Icon Than You Think*, IRISH TIMES (Mar. 9, 2017), <https://www.irishtimes.com/life-and-style/people/happy-birthday-barbie-she-s-more-of-a-feminist-icon-than-you-think-1.3003972> [<https://perma.cc/5XGE-U3NT>]; Eli Blumenthal, *Barbie's Greater Diversity Pays Off for Mattel*, USA TODAY (Oct. 20, 2016, 11:55 AM), <https://www.usatoday.com/story/money/2016/10/20/american-girl-barbie-show-life-mattel/92454658/> [<https://perma.cc/LNN3-J8EH>]; Gayathree Ganesan, *Barbie Sales Are Up Following Introduction of Diverse Dolls*, HUFFINGTON POST (Oct. 21, 2016, 10:46 AM), https://www.huffingtonpost.com/entry/barbie-sales-are-up-following-introduction-of-diverse-dolls_us_580a1c16e4b000d0b1560dd5 [<https://perma.cc/LL5E-MF3J>]; Anne D'Innocenzio, *New Toys Reflecting Increasing Diversity*, ASSOCIATED PRESS (Oct. 21, 2016), <https://www.pressherald.com/2016/10/21/new-toys-reflecting-increasing-diversity/> [<https://perma.cc/BS2F-AEZ2>].

Lobel's thesis about the superiority of innovation over litigation for boosting revenues.

Yet Barbie, and Mattel, are still caught in a double bind. Not enough changes caused the Barbie brand to stagnate and lose significant market share to Bratz. But too many changes could dilute the "Barbie essence" that has made her a long term, widely recognized cultural icon. If the more diverse line of Barbies does not succeed in the marketplace long term, it will not be too surprising if Barbie gets a Bratz style makeover.

III. CHEERLEADER "BARBIES"

Rather than randomly interjecting sexualized women into a case, sometimes judges prefer to minimize or ignore the female bodies that are inherently, if invisibly, part of a dispute. Just as the court in the Forsythe case preferred to ignore Barbie's racy aspects and characterize her as "the ideal American woman,"¹²² judges may pretend not to notice the breasts directly in front of them.

In *Star Athletica v. Varsity Brands*¹²³ the Supreme Court willfully ignored the women's bodies that were central to the case. The dispute involved the copyrightability of chevrons, zig zags, and stripes, simple symmetrical flourishes decorating cheerleading uniforms. It is the first time the Supreme Court heard a case concerning copyrights and apparel design. In a heavily criticized outcome, the Justices voted six to two in favor of an interpretation of certain provisions of the Copyright Act which held the very simple ornamentation to be copyrightable, and therefore infringed by a competitor. Varsity Brands asserted copyright protection for five styles of cheerleading wear it claimed were being infringed by *Star Athletica*¹²⁴:

¹²² *Mattel Inc. v. Walking Mountain Prods.*, 353 F.3d 792 (9th Cir. 2003).

¹²³ *Star Athletica, LLC v. Varsity Brands, Inc.*, 137 S. Ct. 1002 (2017).

¹²⁴ Daniel Fisher, *Fashion Industry Wins as Supreme Court Says Cheerleader Uniform Design May Be Copyrighted*, FORBES (Mar. 22, 2017, 6:16 PM), <https://www.forbes.com/sites/danielfisher/2017/03/22/fashion-industry-wins-as-supreme-court-says-cheerleader-uniform-design-may-be-copyrighted/#4d6e08aae28e> [<https://perma.cc/7798-CRP2>].



Design 299A

Design 299B

Design 074

Design 078

Design 0815

Those five designs dominate Varsity Brands' cheerleading costume portfolio.¹²⁵ The company alters the colors it produces them in, using color selections chosen by the entities who purchase them; ordinarily they seem to be ordered in “school colors” and embellished with school names and logos.¹²⁶ While the company designs and sells cheerleading uniforms for boys and men, it was only those intended for women and girls that were the subject of this dispute. This is not surprising because the uniforms intended for boys and men are significantly less body conscious. Those uniforms are comprised of tee shirts and shorts or long pants in school colors, bearing team names and school logos. Nothing about them seems intended to accentuate the wearer's waist, chest, hips or ass¹²⁷:



¹²⁵ See generally Varsity Spirit, *2018 Fashion Show*, YOUTUBE (Jan. 25, 2018), <https://www.youtube.com/watch?v=eycSba8BhjA> [<https://perma.cc/WG5U-29DT>].

¹²⁶ Varsity Spirit Fashion (@varsityfashions), INSTAGRAM, <https://www.instagram.com/varsityfashions/> [<https://perma.cc/9KUB-JVZU>] (last visited Nov. 21, 2018); Varsity Spirit, *2018 Varsity Spirit Fashion Digital Calendar*, YOUTUBE (Jan. 26, 2018), https://www.youtube.com/watch?v=bSXkK85u8_E [<https://perma.cc/U22X-WYKX>].

¹²⁷ *Men's Uniforms*, CHEERLEADING.COM, <https://www.cheerleading.com/uniforms/men-s-uniforms> [<https://perma.cc/UR56-W9ZS>] (last visited Nov. 21, 2018).

Copyright law is designed to protect aesthetic features of a “design of a useful article” only when these aesthetic attributes are distinct from the article’s useful or functional elements.¹²⁸ No copyright protection is available for the useful, or functional attributes of a “pictorial, graphic or sculptural work,” which is the category of copyrightable work that a cheerleading costume fits into best.¹²⁹ An interesting question, though, is whether the uniforms are pictorial works or sculptures. It doesn’t matter at the doctrinal level since copyright protections in both categories are equally limited by the useful article doctrine. However, it may have been important when the works were being analyzed. To those who conceptualized the disputed design features as pictorial works, they are atop garments that lay flat, in two dimensions, vertically from a clothes hanger or spread out on a desk or table. To those who visualize the uniforms as they are meant to be used, covering the three-dimensional bodies of cheerleaders, they are more like sculptural works, and the usefulness of the chevrons, zig zags, color blocks, and stripes is more evident.

The district court ruled against Varsity Brands’ copyright claims because it found that the chevrons, zig zags, and stripes were fully integrated into the product’s mission of identifying the wearer as a cheerleader, rendering the design elements useful, utilitarian, and functional, and “unseparable.”¹³⁰ A majority of the Court of Appeals for the Sixth Circuit panel disagreed with this

¹²⁸ 17 U.S.C. § 101 (2012).

¹²⁹ *Id.* Section 106 of the Copyright Act provides a non-exhaustive list of the types of creative works that are eligible for copyright protection. The “useful articles doctrine” appears in Section 101 of the Copyright Act as follows:

“Pictorial, graphic, and sculptural works” include two-dimensional and three-dimensional works of fine, graphic, and applied art, photographs, prints and art reproductions, maps, globes, charts, diagrams, models, and technical drawings, including architectural plans. Such works shall include works of artistic craftsmanship insofar as their form but not their mechanical or utilitarian aspects are concerned; the design of a useful article, as defined in this section, shall be considered a pictorial, graphic, or sculptural work 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.

¹³⁰ *Varsity Brands, Inc. v. Star Athletica LLC*, No. 10-2508, 2014 WL 819422, at *8–9, (W.D. Tenn. Mar. 1, 2014), *vacated and remanded*, 799 F.3d 468 (6th Cir. 2015), *aff’d sub nom.* *Star Athletica, LLC v. Varsity Brands, Inc.*, 137 S. Ct. 1002 (2017).

analysis, concluding that a blank cheerleading costume would still be a cheerleading costume, and when one pictured graphic designs lifted off Varsity Brands' cheerleading uniforms they could be applied to the surface of another garment or "hung on the wall and framed as art."¹³¹ A spirited dissent disagreed, observing that without the surface designs at issue the costumes were just dresses, tops, or shirts; they were needed to communicate that the wearer was a cheerleader.¹³²

The Supreme Court majority held:

[A] feature incorporated into the design of a useful article is eligible for copyright protection only if the feature (1) can be perceived as a two- or three-dimensional work of art separate from the useful article and (2) would qualify as a protectable pictorial, graphic, or sculptural work—either on its own or fixed in some other tangible medium of expression—if it were imagined separately from the useful article into which it is incorporated.¹³³

The Court distilled this test from Sections 101 and 113 of the Copyright Act, legislative history, and somewhat precedential case law.

Applying the test to the facts of the case, Justice Clarence Thomas wrote:

First, one can identify the decorations as features having pictorial, graphic, or sculptural qualities. Second, if the arrangement of colors, shapes, stripes, an chevrons on the surface of the cheerleading uniform were separated from the uniform and applied in another medium—for example, on a painter's canvas—they would qualify as "two-dimensional . . . works of art . . .," § 101. And imaginatively removing the decorations from

¹³¹ *Star Athletica LLC*, 799 F.3d at 491–92.

¹³² *Id.* at 495–96.

¹³³ *Star Athletica LLC v. Varsity Brands, Inc.*, 137 S. Ct. 1002, 1007 (2017).

the uniforms and applying them in another medium would not replicate the uniform itself.¹³⁴

Justice Thomas asserted that “[t]he focus of the separability inquiry is on the extracted features and not on any aspects of the useful article that remain after the imaginary extraction.”¹³⁵ While on the surface it is clear that he was talking about picturing the design flourishes independent of the clothing, it is hard not to read the work “extraction” and picture the uniforms being “extracted” or removed from human cheerleaders.

Ultimately the majority treated the chevrons, zig zags and stripes as if they were “iron on decals” that one might apply to a tee shirt or other garment with heat and pressure. It is easy to assume that decorative iron on decals are original enough to be copyrightable, because very little creativity is required to cross the threshold into copyrightability. One can picture the decals before they are affixed to anything, separate from the clothing items they will be affixed to. One can also imagine the decals decorating walls or doors. Because the Justices in the majority could mentally picture chevrons, zig zags and stripes floating independently from the cloth of the cheerleading costumes that they embellished, and because these Justices felt the chevrons and stripes were adequately creative to warrant copyright protection, they concluded that the separability test was “satisfied here.”

In explaining the scope of the copyrights held by Varsity Brands, Justice Thomas wrote:

Just as two-dimensional fine art corresponds to the shape of the canvas on which it is painted, two-dimensional applied art correlates to the contours of the article on which it is applied [T]he only feature of the cheerleading uniform eligible for a copyright in this case is the two-dimensional work of art fixed in the tangible medium of the uniform fabric [R]espondents have no right to prohibit any person from manufacturing a cheerleading uniform of identical shape, cut, and dimensions to

¹³⁴ *Id.* at 1012.

¹³⁵ *Id.* at 1013.

the ones on which the decorations in this case appear. They may prohibit only the reproduction of the surface designs in any tangible medium of expression.¹³⁶

The Justices in the majority were unwilling to fully contemplate the ways on which the “items of designs” functioned when women wore the cheerleading costumes, instead using the sterile framing of “three dimensional.” Had the dissenters been more forceful in their language and imagery, perhaps some of their colleagues could have been persuaded. “The clothes on the hanger do nothing. The clothes on the woman do everything. And that is, I think, what fashion is about,” said Justice Stephen Breyer during oral argument.¹³⁷ If he had been a little more specific about why “clothes on the women do everything” he might have been more persuasive, at least to the women Justices, who all voted with the majority.

Cheerleading uniforms identify the wearers as cheerleaders and broadcast school or team affiliations, usually with trademarked logos and colors. The other function of cheerleading costumes is to attractively display the bodies of the cheerleaders wearing them. Once that fundamental truth is recognized, the errors riddling the majority’s analysis become obvious. The design features can make the cheerleaders’ shapes look different, more Barbie-like with narrower waist. The chevrons are placed on the uniforms to accentuate the breasts of the cheerleaders. The stripes near the hem of the cheerleaders’ shirts are to draw attention to the cheerleaders’ legs. Varsity Brands assured the Copyright Office that it was not seeking copyright protection for the shape, contour, cut, style, or fit of its cheerleading costumes,¹³⁸ but ultimately that is what the company asked the courts for, and that is what it obtained.

Justice Thomas characterized the dissent’s argument as an assertion that “the decorations are ineligible for copyright protection because, when imaginatively extracted, they form a

¹³⁶ *Id.* at 1012–13.

¹³⁷ Transcript of Oral Argument at 47, *Star Athletica LLC v. Varsity Brands, Inc.*, 137 S. Ct. 1002 (2017) (No. 15-866).

¹³⁸ *Id.* at 17–18.

picture of a cheerleading uniform.”¹³⁹ He said that Star Athletica “claims that the decorations cannot be copyrighted because, even when extracted from the useful article, they retain the outline of a cheerleading uniform.”¹⁴⁰ He concluded that neither is a bar to copyright because “two dimensional applied art correlates to the contours of the article on which it is applied.” He refused to acknowledge the functional role that the chevrons and stripes played when cheerleaders don the costumes and the “contours of the articles on which [the art] is applied” are the actual outlines of their bodies.¹⁴¹

Yet, anyone involved in fashion understands the visual power of clothing design. As two textile consultants explained:

Optical illusions are best created by different types of lines. The amazing thing is that a bulgy part of the body can be hidden with silhouettes and heaviness can be shown on some parts by adding designer lines in the form of pleats, tucks, seams and necklines. Physiologically, lines make the eyes twist and control our brain in such a way that our eyes follow and fix on the design. When lines come together (converge), the eyes follow them to the point at which they meet and become a focal point making that part of your body look smaller. Conversely, when lines move away (diverge) from each other, the eyes follow them to the end, which become a focal point, and make you look wider. So the idea is to have lines come together or move away from each other to that point on your body that you either want to look smaller or wide.¹⁴²

In addition, there is scientific research that suggests the optical illusions created by design elements such as strips and chevrons

¹³⁹ *Star Athletica LLC*, 137 S. Ct. at 1006.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² Vaishally Verma & Perna Kapila, *Lines: As Optical Illusion on Dress: Lines Aligned to Look Fine*, TEXTILE LEARNER, <http://textilelearner.blogspot.com/2016/06/lines-as-optical-illusion-on-dress.html> [<https://perma.cc/DH86-QUKH>] (last visited Nov. 21, 2018).

affects not only a person's appearance, but also how she feels about her body.¹⁴³ To anyone willing to look at the impact they have in visually presenting the bodies wearing them, the functionality of the disputed design elements is very clear.

Barbie is never mentioned in the Varsity Brands opinion, but her influence is present. Varsity Brands wants to "own" the design elements that make all female cheerleaders look more Barbie-esque when they wear them. Unlike Barbie, these cheerleaders may have nipples, defined genitals and excess body fat, but Varsity Brands uniforms bring them into visual conformity.

Like Ruth Handler in her work for Mattel, Varsity Brands has a history of copying the good ideas of others. Star Athletica presented evidence that:

To build its empire, Varsity copied cheerleader-uniform designs from its competitors. Each year Varsity would select certain competitors' designs and add them to its product line. And if a customer requested a competitor's style that was not already included in Varsity's product line, Varsity trained its sales staff to submit a request to Varsity to create a custom copy of the competitor's uniform.¹⁴⁴

Ronald Mann has accurately criticized the holding as being anticompetitive, noting that cheerleaders' uniforms "would be considerably less useful as a cheerleader's uniform without the chevrons, stripes, and zigzags" because teams do not dress their cheerleaders in plain white tunics, writing, "[t]he majority opinion of Justice Clarence Thomas . . . has nothing to say about concerns of competition policy. Rather, as you might expect from a Thomas opinion, the text addresses the topic wholly as a matter of statutory interpretation. Working in that vein, it reads the statute as giving

¹⁴³ See, e.g., Jessica Ridgway et al., *An Exploratory Study of the Impact of Optical Illusion Garments on Women's Self-Perceptions*, 2015 INT'L TEXTILE & APPAREL ASS'N (ITAA) (2015) ANN. CONF. PROC., https://lib.dr.iastate.edu/cgi/viewcontent.cgi?article=1310&context=itaa_proceedings [<https://perma.cc/XW9W-XWFW>].

¹⁴⁴ Brief for Petitioner at 12, *Star Athletica LLC v. Varsity Brands, Inc.*, 137 S. Ct. 1002 (2017) (No. 15-866).

remarkably broad protection to industrial designs.”¹⁴⁵ In fact, if you look over some Cheerleader Barbie costumes, you will see piping and chevrons and color blocking and wonder how Mattel has avoided being sued for copyright infringement by Varsity Brands.

As with Mattel and Barbie before Bratz, Varsity Brands powerfully dominates the market for cheerleading uniforms. Copyright protection will be a very useful tool too weld against competitors such as Star Athletica, potentially for years to come. The current popularity of chevrons and zig zags makes effective competition difficult. Only when competitors develop new and adequately divergent styles of cheerleader costumes and convince those who clothe cheerleaders to purchase them will Varsity Brands’ competitive advantage decline. If a parallel Barbie versus Bratz type competition arises, it is likely to be a competitor that offers more unabashedly sexual cheerleader uniforms than Varsity Brands does that prevails.

CONCLUSION

In *You Don’t Own Me*, Orly Lobel provides an engaging account of Barbie’s evolution in American culture, the courts, and the marketplace. She also does so much more, weaving in fascinating stories of gender, feminism, sexuality, and the creative process. She gives readers the opportunity to think about major intellectual property constructs through a “Barbie lens,” which proves to be surprisingly valuable.

After reading *You Don’t Own Me* and many other varied accounts of Barbie over the decades, one reaches the conclusion that Barbie really does represent American womanhood, just not in the way that Mattel intends. Barbie helps socialize children to understand that women need to be pretty to be appealing, but that too much sexiness leads to accusations of whoredom. Barbie makes it clear that owning shiny material possessions is important,

¹⁴⁵ Ronald Mann, *Opinion Analysis: Court Uses Cheerleader Uniform Case to Validate Broad Copyright in Industrial Designs*, SCOTUSBLOG (Mar. 22, 2017, 9:31 PM), <http://www.scotusblog.com/2017/03/opinion-analysis-court-uses-cheerleader-uniform-case-validate-broad-copyright-industrial-designs/> [<https://perma.cc/TH5Q-ASAM>].

but if you want to be a Barbie collector, you better not remove these possessions from their original packaging. Barbie teaches us that women can pursue almost any occupation, but they need flattering clothes and just the right accessories if they hope to succeed. Barbie is made for children, but has eschewed motherhood, because it does not mix with dream houses, pink convertibles, or form fitting fashions. If Barbie was a living being, she would be the double bind personified.

APPENDIX

FIGURE 1¹⁴⁶:



¹⁴⁶ See, e.g., *Mattel University of Florida - University Barbie African-American Cheerleader Doll*, AMAZON.COM <https://www.amazon.com/University-Florida-Barbie-African-American-Cheerleader/dp/B0031KNVVG> [<https://perma.cc/8QM8-HFND>] (last visited Mar 18, 2009).

FIGURE 2¹⁴⁷:

¹⁴⁷ *University of Kentucky Barbie Doll*, MATTEL, <https://barbie.mattel.com/shop/en-us/ba/university-of-kentucky-barbie-doll-x9201> [<https://perma.cc/B5TH-EK9N>] (last visited Jan. 30, 2019).

FIGURE 3¹⁴⁸:



¹⁴⁸ *Meet Lilli, the High-end German Call Girl Who Became America's Iconic Barbie Doll*, MESSY NESSY (Jan. 29, 2016), <http://www.messynessychic.com/2016/01/29/meet-lilli-the-high-end-german-call-girl-who-became-americas-iconic-barbie-doll/> [<http://perma.cc/QF5D-TF44>].