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CASES OF INTEREST

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IP/Entertainment Law Weekly Case Update For Motion Picture Studios And Television Networks

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Belair v. MGA Entertainment, USDC S.D. New York, November 16, 2011

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- District court grants summary judgment in favor of defendant, manufacturer of Bratz dolls, finding that no jury could reasonably find that elements of defendant's dolls were substantially similar to the protectable elements of plaintiff photographer's copyrighted image.

Plaintiff photographer Bernard Belair brought suit against defendant MGA Entertainment, Inc., alleging that MGA's Bratz line of dolls unlawfully infringed on a copyrighted image that he created for a Steve Madden shoe advertisement. The court granted MGA's motion for summary judgment, finding that no reasonable trier of fact could find that any of the Bratz dolls are substantially similar to the figures depicted in Belair's copyrighted image.

In the late 1990s, Belair created a series of images to be used in advertisements for Steve Madden shoes. Belair obtained copyrights for a number of those images, including copyright registration for an image entitled "Angel/Devil Girl," depicting two female figures standing side-by-side on an empty cobblestone street in an urban landscape. Although the women resemble humans, they have extremely long limbs, large heads, and tiny torsos. One of them – "Devil" – has horns and a tail and the other – "Angel" – has wings and a halo. The image incorporates numerous photographs of the same female model with features that have been manipulated and altered. Sometime around August 1998, Carter Bryant, who worked for toy maker Mattel at the time, conceived of the Bratz dolls. He envisioned a group of four young friends who were cool and popular, wore trendy clothing, and had an attitude of "we can do anything, we've got a lot of power, we believe in ourselves." By September, 2000 Bryant had moved from Mattel to MGA and had taken his idea for the Bratz dolls with him. At MGA, he gave preliminary drawings to Margaret Leahy, a sculptor, who created the first prototype – or "sculpt" – for the dolls. He also gave her a copy of the Angel/Devil image, which had appeared in the August 1999 edition of *Seventeen* magazine, for additional



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inspiration. Leahy hung the image on her wall by her workspace and used it to help her create the initial Bratz sculpt. The first line of Bratz dolls — Cloe, Sasha, Yasmin, and Jade — arrived in stores in 2001, and over the following decade, the Bratz brand proved extremely popular, selling over 380 million Bratz products worldwide and generating over \$2 billion dollars in U.S. revenue.

To prove copyright infringement, plaintiff must establish that (1) the defendant has actually copied the plaintiff's copyrighted work *and* (2) the copying is illegal because a substantial similarity exists between the defendant's work and the protectible elements of plaintiff's work. Since defendant MGA did not dispute that it actually copied the Angel/Devil image, the court identified the dispositive issue as whether a reasonable juror find a substantial similarity between the Bratz dolls and the protectible elements of plaintiff's image.

At the outset, the court discussed copyright in the context of an image, noting that copyright protection only extends to the particular, original expression of an idea – not the idea itself – and that under the doctrine of “scènes à faire,” elements of an image that flow naturally and necessarily from the choice of a given concept are not “original” and are not protectable. A photograph may be original in its rendition of a subject, and rendition doesn't concern what is depicted, but rather how it is depicted. Originality in rendition may include the photographer's selection of elements that have an aesthetic effect on the final work, including lighting, shade, lens, angle depth of field, composition, and other choices, such as manipulation of color balance, saturation, or contrast. Originality may also come from the photographer's creation or arrangement of the subject, rather than photographing a ready-made scene or object. If the photographer arranges or otherwise creates the object that he then captures with his camera captures, he may have the right to prevent others from producing works that depict that subject.

The court also noted that elements of plaintiff's image were not protectable, including that the common theme of a young, attractive, fashionable woman and the elements that flow naturally and necessarily from that choice of subject. Under the Ninth Circuit decision in *Mattel v. MGA Entertainment*, those elements included “idealized physical proportions” – “slightly larger heads, eyes and lips; slightly smaller noses and waists; and slightly longer limbs than those that appear routinely in nature.” These exaggerated and idealized proportions are common both in children's toys and in the fashion industry, and plaintiff could not assert a protectable claim to them. He also was not entitled to copyright protection for elements of his image that represented concepts of women's fashionable clothing – high-heeled shoes and boots, and heavy use of makeup



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– since these flowed naturally from defendant’s choice to a fashion doll. In order to survive defendant’s motion for summary judgment, plaintiff must show that a reasonable juror could find that defendant’s expressions of these concepts in its Bratz dolls were substantially similar to his particular and original expression of them in his Angel/Devil image.

Despite a number of identifiable differences between the physique of the Bratz sculpt and that of Angel and Devil, the court did find significant similarities between the Bratz sculpt and the Devil/Angel image. The court concluded, however, that “[t]he fact that the Bratz sculpt is similar to the Belair image is not dispositive because the physical differences between Belair’s women and the model sculpt pale in comparison to the differences between Belair’s women and the painted, clothed, and made-up Bratz dolls that are packaged and sold as finished products. No reasonable juror could find that those final products are substantially similar to Belair’s image.”

Acknowledging that if defendant were selling the sculpt as a final product, a triable issue of fact might exist, the court found that plaintiff’s complaint alleged that the Bratz line of dolls, toys, games, and videos – and not the sculpt – infringed on his copyrighted image. The sculpt was only one component of some of the Bratz dolls and was not incorporated at all into many of the Bratz toys, games, and videos.

The court noted that, in the context of toys – and particularly toys that replicate human or quasi-human forms – differences in physical features, clothing and accoutrements matter to the determination of substantial similarity. None of the Bratz dolls was dressed in substantially similar manner to plaintiff’s Angel and Devil, or had hair and eyes that were similar. And while the Bratz dolls and the figures in Angel/Devil image did share similarly large heads, long limbs, and thin waists – no surprise since they were initially modeled after the Belair figures – in their transformation from a photograph to tangible figures, the Bratz dolls had been molded, painted, and dressed so that they no longer looked like the Devil and the Angel.

The court concluded: “It is undisputed that MGA was aware of the Steve Madden look and sought to capitalize on it. But that is not enough to justify a finding of infringement. ‘Stirring one’s memory of a copyrighted character is not the same as appearing to be substantially similar to that character, and only the latter is infringement.’ Although the Bratz dolls may indeed bring to mind the image that Belair created, Belair cannot monopolize the abstract concept of an absurdly large-headed, long limbed, attractive, fashionable woman. He has a copyright over the expressions of that idea as they are specifically articulated in the Angel/Devil image, but he may not prevent others from



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expressing the same idea in their different ways.”

Because it found that there was no copyright infringement as a matter of law, the court declined to consider defendant’s argument that plaintiff’s claims for alleged copyright violations before October 20, 2006, are barred by either the three statute of limitations or laches.

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