

# Barbie™

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*Intellectual property laws are the means by which corporations allow access to their products. Mattel Inc.'s Barbie doll is highly dependent on the intellectual property system, and this Article provides the first serious account of the development of Barbie as an object of intellectual property. It demonstrates the significance of Barbie as an intellectual property object, and it traces how intellectual property laws emerged as such a powerful technology of control in the period from Barbie's birth in 1959 to the present. The Article also shows that the great unrecognized feature of the intellectual property system is its ability to manipulate desire.*

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## I. INTRODUCTION

Most discussions of intellectual property law miss the point. Authors tend to pick apart some small aspect of a law, explaining why their proposed reform will provide better policy outcomes, or they examine a court decision and explain why the judges there have gotten it wrong. Although many of these articles are useful contributions, they miss the larger story of how the intellectual property *system* works in practice, and particularly how the system has changed over the years, and how it has come to be so important in our modern day society. These accounts also fail to explain how companies have responded to the intellectual property system, and how they have engineered changes in the system over time. Although there are notable counter-examples, in general we have few accounts of the larger story of the development of

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intellectual property and the interactions between intellectual property laws and the companies that are dependent on them. This is a remarkable gap, because the intellectual property system is the central means of corporate control of property, and is responsible for literally trillions of dollars' worth of value in these days of the information economy, digital commerce, and modern branding practice.<sup>1</sup> Part of the reason for this lacuna is that it is hard to get a handle on such a big topic. The development of the intellectual property system over the last sixty years is hard to explain; it has grown so far, so fast, and is so important to our modern society. How can one pin it all down?

One way of understanding the magisterial sweep of the intellectual property system is to focus on a single object. And there is no better object of study than Barbie. Conceived in 1959 by Mattel Inc.'s Ruth Handler, Barbie embodies all of our changing understandings about intellectual property law in the postwar period; and more than this, Mattel has driven numerous changes to the intellectual property system in order to better protect Barbie.<sup>2</sup>

Too much has been written about the wasp-waisted doll, and it is hard to imagine that there could be a fruitful area of study left within the Barbie canon. As far back as 1994, the author of a Barbie text noted that "rarely does a pop culture conference pass without some mention of the postmodern female fetish figure."<sup>3</sup> Barbie is a tiresome and hoary cultural subject, as well-worn as a pebble washed in the endless stream of academic discourse. Surely there cannot be anything interesting left to say about her? Yet, weirdly, no one has ever sought to map the relationship between Barbie and intellectual property. This observation is surprising—remarkable, really—because intellectual property laws are central to the cultural artifact that is Barbie.

The reason for this is not immediately apparent, because intellectual property laws are only supposed to provide a limited monopoly to creators to encourage them to create socially useful things like the great American novel, a distinctive logo, a better mousetrap. Copyright, patent and trademark laws are, by and large, supposed to create incentives to encourage creative business activity and a means to guard consumers

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1. Cf. Xuan-Thao Nguyen, *Collateralizing Intellectual Property*, 42 GA. L. REV. 1, 10 (2007) (examining the way that intellectual property assets are used for commercial interests).

2. Sarah Kershaw, *Ruth Handler, Whose Barbie Gave Dolls Curves, Dies at 85*, N.Y. TIMES (Apr. 29, 2002), <http://www.nytimes.com/2002/04/29/arts/ruth-handler-whose-barbie-gave-dolls-curves-dies-at-85.html>.

3. M.G. LORD, FOREVER BARBIE: THE UNAUTHORIZED BIOGRAPHY OF A REAL DOLL 14 (1994).

from duplicity.<sup>4</sup> However, the creation of the concept of Barbie shows that the signal feature of the intellectual property system of the late twentieth and early twenty-first centuries is that it is not really a system of incentives, but rather a technology of control. It is a mechanism for the creation and manipulation of desire. This is strange, for there is nothing in any intellectual property law that talks explicitly about creation of image, about the molding of wants and needs in society, or about the maintenance of yearning and aspiration through commercial consumption. Yet this has become one of the most significant features of intellectual property, and modern marketers understand the intellectual property system as a kind of cultural *cordon sanitaire*. It controls access with an imaginary legal rope, one patrolled by lawyers, which effectively separates the aspirational dream from the purchased object.

This brings us back to Barbie. Intellectual property laws are the means by which Mattel controls public perceptions of Barbie, one of the central objects of material culture in the twentieth century, and the laws set the conditions under which Mattel allows access to Barbie. Without them, Barbie simply could not exist in the form that we understand her. At the same time, Mattel's use of the intellectual property system to patrol and control access to Barbie has influenced the development of that system over the latter part of the twentieth century and early part of this century. Thus, a review of the intellectual property history of Barbie will tell us how and why these sets of laws have emerged as such a powerful technology of control in the period from Barbie's birth in 1959 to the present.

So there *is* something interesting left to tell about Barbie; indeed this story is central to the creation of Barbie and our modern intellectual property system. This Article tells that story. In the Parts that follow we examine the relationship between Mattel and Barbie, and we look at the way that, over time, companies have come to understand how to use the intellectual property system to engage in the social construction of meaning. We trace out how Mattel's intellectual property strategy was founded on power, control, and sex.

But all of this is for later. First, we need to understand Barbie's birth.

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4. See Mark A. Lemley, *The Economics of Improvement in Intellectual Property Law*, 75 TEX. L. REV. 989, 993-1000 (1997).

## II. WORD MADE FLESH-TONED: CONCEIVED IN SIN

And the Word was made Flesh, and dwelt among us.

—*John* 1:14 (King James)<sup>5</sup>

John the Baptist opens his Gospel with a revision of the Genesis story in a way that is familiar, but which remains both beautiful and arcane: “In the beginning was the Word, and the Word was with God, and the Word was God.”<sup>6</sup>

The “Word” is God’s message to humanity—although the earlier Greek term, *logos*, can be translated as “word,” “message,” “mind,” “reason,” or “knowledge,” amongst many other alternatives.<sup>7</sup> When, later in his Gospel, John seeks to tell us how Jesus came to be, he returns to this term and gives us the remarkable quotation that opens this section.<sup>8</sup> He tells us that “the Word was made Flesh,” and the Word as Flesh came down to earth to be with us.<sup>9</sup>

The language is electric and the religious significance is profound; but, beyond this, that simple sentence is a remarkable description of the creative moment. A creator conceives of an intangible idea, the Word, and through force of will imagines it into being, bringing it into our world in physical form. John the Baptist understood what all venture capitalists will tell you: the idea alone is not enough, it must be turned into something. It must be made flesh.

Although all forms of creativity follow this pattern, toys and dolls are particularly literal embodiments of this description of creativity. The physical form of the doll is conjured from the idea, and this form must be a compelling version of the idea, and must succinctly define it. Or, as one commentator put it:

A toy is an abstraction distilled into concrete form[,] . . . a magical translation of idea into object. The more faithful the translation, the stronger the toy. The ability of a toy to reduce . . . is what makes it

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5. *John* 1:14 (King James).

6. *Id.*

7. Adam Gopnik, *Word Magic*, NEW YORKER (May 26, 2014), <http://www.newyorker.com/magazine/2014/05/26/word-magic> (“[*L*og $\acute{o}$ s, translated in the King James Version of the Gospel of John simply as ‘the word,’ turns out to be the most all-purpose of items. Twenty-three alternate meanings for it are listed [in the *DICTIONARY OF UNTRANSLATABLES: A PHILOSOPHICAL LEXICON 1287* (Emily Apter, Jacques Lezra & Michael Wood eds., 2014)] alone—it is, the editors say, a model of ‘polysemy,’ packing multiple meanings into a single sign, and managing to suggest both words themselves and the wider shores of wisdom that words articulate.”).

8. *John* 1:14 (King James).

9. *Id.*

powerful: a hypothetical concept has become a tangible symbol you can hold in your hand.<sup>10</sup>

Mattel's Barbie doll is a striking, and strikingly literal example of this. Barbie is the Word, made Flesh-toned.<sup>11</sup>

Born fifty-six years ago, Barbie sprang forth from the imagination of Ruth Handler, one of the founders of Mattel.<sup>12</sup> In the standard account of Barbie, she is said to be the first adult-appearing doll aimed at young girls, although adult fashion dolls had existed in the courts of Europe for hundreds of years before then,<sup>13</sup> and until the 1820s all dolls that were children's playthings had adult form.<sup>14</sup> And of course, the official narrative holds that Barbara Millicent Roberts is a Midwestern gal, a teenage fashion model from Willows, Wisconsin.<sup>15</sup> But the creation story of Barbie is more inflected than this, and less wholesome. Barbie was patterned on another doll, "Lilli," which Ruth Handler chanced upon while on a European tour with her family.<sup>16</sup> Spied in a toy store window in Lucerne, Switzerland,<sup>17</sup> the doll that would become Barbie was anything but a sweet gal from Wisconsin: Lilli was a working girl. In some versions of this story, commentators note the sinful nature of Lilli,

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10. WOODROW PHOENIX, *PLASTIC CULTURE: HOW JAPANESE TOYS CONQUERED THE WORLD* 7, 9 (2006).

11. *Cf. John* 1:14 (King James).

12. Although Jack Ryan, one of the Mattel executives at the time, was credited with being the father of Barbie in his obituary, *see* JERRY OPPENHEIMER, *TOY MONSTER: THE BIG, BAD WORLD OF MATTEL* 101 (2009), it is generally accepted that Handler conceived of the idea of Barbie from watching her daughter Barbara play with paper dolls. *See* WARMAN'S *BARBIE DOLL FIELD GUIDE: VALUES AND IDENTIFICATION* 11 (Paul Kennedy ed., 2009), which she connected to the Bild-Lilli doll as discussed *infra* note 50.

13. *Cf.* PHILIP MANSEL, *DRESSED TO RULE: ROYAL AND COURT COSTUME FROM LOUIS XIV TO ELIZABETH II* 8-9 (2005) ("Until the late eighteenth century . . . dolls wearing the latest style extended French fashions[;] . . . a Paris fashion doll was going to London once a month; a doll 'dressed in the court dress' was sent from Paris to Queen Caroline of Ansbach, on her husband's accession in 1727.").

14. LORD, *supra* note 3, at 16.

15. BARBIE, <http://www.barbiemedia.com> (last visited Oct. 17, 2015). Although in years to come Barbie would be many other occupations, including presidential candidate, soldier, debutante, executive, etc. You name it. WARMAN'S *BARBIE DOLL FIELD GUIDE: VALUES AND IDENTIFICATION*, *supra* note 12.

16. RUTH HANDLER WITH JACQUELINE SHANNON, *DREAM DOLL: THE RUTH HANDLER STORY* (1994); Steven C. Dubin, *Who's That Girl? The World of Barbie Deconstructed*, in *THE BARBIE CHRONICLES: A LIVING DOLL TURNS FORTY* 19, 19-20 (Yona Zeldis McDonough ed., 1999); LORD, *supra* note 3, at 29.

17. There is some question about which European city Handler discovered Lilli; the consensus seems to be Lucerne, Switzerland. *See* HANDLER WITH SHANNON, *supra* note 16, at 1-3; LORD, *supra* note 3, at 29. *But see* Carol Ockman, *Barbie Meets Bouguereau: Constructing an Ideal Body for the Late Twentieth Century*, in *THE BARBIE CHRONICLES*, *supra* note 16, at 75, 78 (claiming Handler saw the doll on a trip to Germany).

tut-tutting at how she became Barbie.<sup>18</sup> It turns out though that the sin at Barbie's birth did not come from another doll; as we will see, it came from her creator.

In this Part we examine how the intellectual property system turned the image and concept of Barbie into the physical form of the doll. In later Parts we look at how the process operated in the opposite direction: how Mattel co-opted the intellectual property system to protect the cultural concept of "Barbie." Word and Flesh, Flesh and Word. So connected it is almost impossible to separate the two.

Lilli was a strange model for a children's doll: she was the embodiment of a lewd cartoon character created by Reinhard Beuthien for a tabloid German newspaper, *Bild-Zeitung*.<sup>19</sup> The character Lilli was an under-employed secretary who hooked on the side, or at least spent a great deal of time "socializing" with rich sugar daddies to supplement her income<sup>20</sup>—a stereotype familiar in postwar Europe and one which, slightly deracinated and more homogenized, found acceptable expression around the same time in Audrey Hepburn's characterization of Holly Golightly from *Breakfast at Tiffany's*,<sup>21</sup> and as a more moralistic cautionary tale in Elizabeth Taylor's portrayal of Gloria Wandrous in *Butterfield 8*.<sup>22</sup>

The Lilli dolls, designed by O & M Hausser, were released in 1955 and featured Lilli in various outfits, many of them racy.<sup>23</sup> The dolls were not intended for children, and apparently were bought by men as gag gifts for bachelor parties, as dashboard adornments, or as suggestive gifts for their girlfriends and mistresses.<sup>24</sup>

Just what did German men do with the [Lilli] doll? "I saw it once in a guy's car where he had it up on the dashboard," said Cy Schneider, the former Carson/Roberts copywriter who wrote Barbie's first TV

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18. See LORD, *supra* note 3, at 25-29.

19. As a result, her other common name is "Bild-Lilli." See, e.g., Ockman, *supra* note 17, at 78.

20. SARAH HERMAN, A MILLION LITTLE BRICKS: THE UNOFFICIAL ILLUSTRATED HISTORY OF THE LEGO PHENOMENON, 13-18 (2012).

21. BREAKFAST AT TIFFANY'S (Paramount Pictures 1961).

22. BUTTERFIELD 8 (Warner Brothers Entertainment 1960). The acceptable and casual prostitution of Lilli, and by implication Barbie, is discussed in Tracy Quan, *The Littlest Harlot*, SALON (Nov. 26, 1997, 12:46 PM), <http://www.salon.com/1997/11/26/26harlot/>.

23. See LORD, *supra* note 3, at 25, 27.

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

commercials. “I saw a couple of guys joking about it in a bar. They were lifting up her skirts and pulling down her pants and stuff.”<sup>25</sup>

For all of Lilli’s suggestiveness and for all the feminist concern voiced about Barbie’s effect on female body image over the years,<sup>26</sup> the original sin lay with Barbie’s creators. Mattel took the Lilli doll and reproduced her as the Barbie doll, with only the slightest cosmetic alteration. Her hairline was adjusted to have a less pronounced widow’s peak, and her eyebrows became less severely arched.<sup>27</sup> Although Mattel initially tried to create its own head for Barbie, in the end the results were disappointing and so the engineers cast Barbie’s head directly from Lilli’s.<sup>28</sup> Apart from these minor changes, the dolls were identical, even down to the sideways-glancing eyes on both dolls. “In the end, Lilli and her new sister were barely distinguishable except to the new doll’s creator,”<sup>29</sup> so much so that the first Barbie outfits were simply dresses made for Lilli, bought directly from the European supplier who made Lilli’s dresses.<sup>30</sup> Years later, Mattel co-founder Elliot Handler, Ruth Handler’s husband, was asked whether the Mattel doll was a knockoff of Lilli:

Well, you might call it that, yes. Ruth wanted to adopt the same body as the Lilli doll with some modifications. Changes were made, improvements were made. Ruth wanted her own look [for the doll].<sup>31</sup>

On one level, Mattel’s sin is both quotidian and unimportant. Many successful products are ripped off from unsuspecting competitors, and this was particularly prevalent in toy and doll manufacturing during the middle of the twentieth century. LEGO, another toy conceived in the mid-fifties, was a stud-for-plastic-stud copy of an English construction toy called Kiddicraft Interlocking Building Cubes, a fact generally elided

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25. LORD, *supra* note 3, at 27-28. Perhaps this explains why Robin Gerber described Lilli, somewhat idiosyncratically, as a “sex toy”—an observation which is, perhaps, literally true in some strange meaning of the expression, albeit a meaning that departs from modern understanding of the term. See GERBER, *supra* note 24, at 9.

26. See, e.g., Wendy Singer Jones, *Barbie’s Body Project*, in THE BARBIE CHRONICLES, *supra* note 16, at 91, 91; Dubin, *supra* note 16, at 24-26; Ockman, *supra* note 17, at 75.

27. LORD, *supra* note 3, at 32.

28. *Id.*

29. GERBER, *supra* note 24, at 13. Handler claimed that Mattel went through a careful sculpting process. See HANDLER WITH SHANNON, *supra* note 16, at 8-9 (“[W]hen we began sculpting Barbie’s face, I insisted that it not be too pretty or contain too much personality. I was concerned that if she had too much personality, a little girl might have trouble projecting her *own* personality on the doll.”).

30. GERBER, *supra* note 24, at 14. Subsequently Barbie’s dresses were designed by Charlotte Johnson, see LORD, *supra* note 3, at 33, who it is sometimes suggested was the uncredited genius behind Barbie’s success. See HANDLER WITH SHANNON, *supra* note 16, at 8.

31. OPPENHEIMER, *supra* note 12, at 35.

in the standard histories of the iconic Danish product.<sup>32</sup> Almost inevitably, Mattel's sin was washed clean by later payments to the owners of various Lilli-related intellectual property,<sup>33</sup> although not without some canny legal maneuvering.<sup>34</sup> By the early sixties, Mattel had settled one infringement suit<sup>35</sup> and purchased its way out of remaining suits by acquiring the rights to Lilli, a little like medieval parishioners who bought their way out of sin through papal indulgences.<sup>36</sup> The Lilli dolls were quietly forgotten, and a new creation myth of the Barbie doll was officially approved and promulgated.<sup>37</sup>

Yet the sin lingers and continues to infect Barbie. Lilli's role in Barbie's birth echoes down through the decades, and Mattel's approach to Barbie exhibits a strange kind of compulsion about intellectual property. In the early days of Mattel, Ruth Handler did not unveil her toys at the New York Toy Fair because she did not want the ideas stolen, and she is said to have self-consciously created only those toy designs that were easy for Mattel to copyright.<sup>38</sup> Shortly after Barbie's birth, Jack Ryan, the

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32. SARAH HERMAN, *A MILLION LITTLE BRICKS: THE UNOFFICIAL ILLUSTRATED HISTORY OF THE LEGO PHENOMENON* 16 (2012) ("In a 1988 Privy Council ruling (*InterLEGO A.G. v. Tyco Industries, Inc.*), Lord Oliver of Aylmerton explained how for all practical purposes the original building bricks created by the LEGO Group, known as the Automatic Binding Bricks, were precise copies of Hilary Page's design. The Kiddicraft brick had no patent protecting it in Denmark and Godtfred [Kirk Christiansen, the Lego brick designer] had admitted in court that he and his father took the samples of Kiddicraft's bricks and used them as a model.").

33. LEGO did the same thing with the Kiddicraft system, purchasing the "rights" from Page after the event in order to bolster its claims of intellectual property infringement by a later competitor. *See id.*

34. *See* OPPENHEIMER, *supra* note 12, at 30-31 ("Mattel, playing fast and loose, never bothered to secure licensing permission from Greiner & Hausser GmbH, the manufacturer of Bild-Lilli, to remake her into Barbie. This would lead to court battles in the United States and Germany, beginning in the early 1960s and going into the twenty-first century."); *see* LORD, *supra* note 3, at 57-59 (discussing Louis Marx case, wherein the basis of the action was U.S. Patent No. 2,925,684 (issued Feb. 23, 1960, to R. Hausser et al for a doll leg joint)).

35. LORD, *supra* note 3, at 308 n.57 (citing *Louis Marx and Co., Inc. v. Mattel, Inc.*, No. 341-61-WB (S.D. Cal. Mar. 24, 1961)).

36. GERBER, *supra* note 24, at 137-38 ("Barbie's connection to Bild-Lilli was being officially denied because of a dispute with Greiner & Hausser (G & H), the successor to O & M Hausser, the German company that created Lilli."). In 1960, G & H filed a patent for the Lilli hip joint, then licensed it to Marx Toys, a big competitor of Mattel, who then sued for infringement as noted in the previous footnote. *See* LORD, *supra* note 3, at 308 n.57. The suit was dismissed and subsequently Mattel bought German copyrights and licensed the patents for around \$25,000, including the ongoing licensing rights once the license to Marx toys expired. *See* OPPENHEIMER, *supra* note 12, at 34.

37. *Bild Lilli Doll History 1952-1964*, DOLL REFERENCE, [http://www.dollreference.com/bild\\_lilli\\_doll.html](http://www.dollreference.com/bild_lilli_doll.html) (last visited Oct. 17, 2015) ("Mattel acquired the rights to Lilli in 1964, thus her production ceased."); *Bild Lilli and the Queens from Outer Space*, FONDATION TANAGRA, <http://www.fondationtanagra.com/en/article/bild-lilli-and-the-queens-of-outer-space> (last visited Oct. 17, 2015) ("After *Lilli* doll's physical shape was 'acquired' by Mattel (so they claim!).").

38. GERBER, *supra* note 24, at 4.



larger-than-life head of Mattel's research and development department, was granted a patent on an invention for doll construction that allowed Barbie to stand upright,<sup>39</sup> and various other patents would be issued to him over the years for an articulated waist joint for the doll, for her tinny voicebox, and other innovations.<sup>40</sup> These and other forms of intellectual property would be the basis for Mattel's control strategy for the doll over the years.<sup>41</sup>

It is not like Mattel was alone in this approach: other toy companies around the time of Barbie's birth were also trying hard to find ways of using intellectual property to gain competitive advantage.<sup>42</sup> G.I. Joe was released in 1964 by Hasbro and featured a distinctive scar down his right cheek.<sup>43</sup> Don Levine, Hasbro's then creative director of product development, explained that he included the wound because "[t]here was no other way to trademark the human body."<sup>44</sup> He was half right: trademark law does not actually extend to protection of these features, but other types of intellectual property and consumer protection laws could be pressed into service. In the end, the important thing for companies like Hasbro and Mattel is to be able to beat their chests and make threatening noises to any competitors who strike a mold directly from the doll. In an amusing footnote to the story, Hasbro was initially appalled that the G.I. Joe figure had a manufacturing defect—a thumbnail incised on the wrong side of its thumb—but the company grew to appreciate the defect since it could also be used as more evidence of intellectual property infringement.<sup>45</sup>

Like Hasbro, Mattel has always been concerned about protecting the Barbie doll's form through the intellectual property system. But Mattel's view of the relationship between Barbie and intellectual property

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39. Doll Construction, U.S. Patent No. 3,009,284 (issued Nov. 21, 1961) [hereinafter '284 Patent].

40. OPPENHEIMER, *supra* note 12, at 13-14.

41. *See id.* at 35.

42. Mattel however seems to have been particularly adept at this type of "translation," *see* PHOENIX, *supra* note 10: its "HotWheels" line of toy cars was clearly derived from the established British Matchbox line of cars (albeit far superior in many respects). *See* OPPENHEIMER, *supra* note 12, at 35, 66-67.

43. G.I. Joe was, of course, Barbie's real boyfriend, the Adam to her Eve. Barbie's putative boyfriend, Ken, released in 1961 was almost universally assumed to be gay, over the protestations of Mattel and much to the company's chagrin. The company was keen to demonstrate all of the roles that the Barbie doll could embody—teen model, astronaut, NASCAR driver, soldier—but always denied that these roles included being a beard to a closeted 11½ inch doll.

44. VINCENT SANTELMO, THE OFFICIAL 30TH ANNIVERSARY SALUTE TO G.I. JOE 1964-1994, at 17 (1994).

45. *Id.*

seems to be something more than a simple desire for protection in the Hobbesian world of toy manufacture. It is more like a strange repulsion-attraction dynamic that was born in the circumstances of her birth; the kind of compulsion that seems almost too simplistic in its Freudian overtones. But, simple or not, this explains a great deal about how Mattel understood Barbie and sought to protect her image. As we'll see in the next two Parts, Mattel consistently misjudged the limits of their control over Barbie-as-concept. Their overreach is hard to understand except by reference to the sin of Barbie's birth.

### III. FLESH AND CONTROL

*Oh, that this too, too solid flesh would melt,  
Thaw and resolve itself into a dew.*

—William Shakespeare, *Hamlet* Act I, Scene 2<sup>46</sup>

The physical reality of the doll soon became the least important aspect of Barbie. Barbie as a doll is uninteresting, but the abstract idea of “*Barbie-ness*” is truly significant. Executives within Mattel quickly came to realize that they had to care more about the concept of Barbie, than they did about the doll.

It is at this point that Barbie became intellectual property, where her Flesh melted into a dew, losing all physicality and turning back into the Word. The doll was no longer central, the important feature was the image and concept of Barbie. This movement could only happen through the intercession of the intellectual property system, because these laws are legal mechanisms of control. Mattel did not understand this at first, but it learned quickly, and it started to understand what it would take to use law to create the concept of Barbie.

The *image* of Barbie came from the conjoined efforts of Mattel's marketing and legal departments. Marketing created and refined the core meaning of “Barbie,” and Mattel's legal department worked diligently to ensure that this essence of Barbie was always protected.<sup>47</sup> Mattel created the concept of Barbie as more than the doll, and placed it into the world's consciousness through innumerable advertisements, outfits, and occupations over the doll's fifty-six years. Varying sources claim that a Barbie doll is sold every two to three seconds<sup>48</sup> and that if all the dolls sold were placed end to end, they would encircle the earth some

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46. WILLIAM SHAKESPEARE, *HAMLET* act 1, sc. 2.

47. *See, e.g.*, '284 Patent, *supra* note 39.

48. BARBIE, *supra* note 15; Anna Quindlen, *Barbie at 35*, in *THE BARBIE CHRONICLES: A LIVING DOLL TURNS FORTY* 117, 119 (Yona Zeldis McDonough ed., 1999).

extraordinary number of times.<sup>49</sup> There is an aerobics instructor Barbie and a power executive Barbie, as well as “ethnic” Barbies of numerous shades. She has posed as the Statue of Liberty, has been a presidential candidate, and has served in NASA and in the 101st Airborne.<sup>50</sup> She has been the subject of cross-marketing efforts with brands as august as Saks Fifth Avenue and as downmarket as Walmart.<sup>51</sup> She has been clothed by Oscar de la Renta, Christian Louboutin, Donatella Versace, and Vera Wang.<sup>52</sup> She has starred in her own television series.<sup>53</sup> And so on.

Through relentless marketing, Mattel coded the very idea of Barbie into our social consciousness. But this could not have happened without the involvement of lawyers. Mattel was extremely thorough in building a huge portfolio of trademarks, and in policing them from outsiders. It has registered marks for numerous variants of the word “Barbie” and for any number of Barbie add-ons—“Barbie Dreamhouse,” “Malibu Barbie” (of course), “Barbie Life,” “Barbie in Princess Power,” and so on.<sup>54</sup> It has asserted rights over the distinctive Barbie pink color so that other toy companies cannot use it, and has regularly claimed the image and form of the doll herself as a mark.<sup>55</sup> Barbie’s distinctive silhouette with her high forehead and perky ponytail is protected, of course, and as the Internet emerged as a commercial force, Mattel quickly secured numerous domain names referencing the word “Barbie.” The company maintains its main website for Barbie dolls and related paraphernalia at

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49. Ockman, *supra* note 17, at 85.

50. WARMAN’S BARBIE DOLL FIELD GUIDE: VALUES AND IDENTIFICATION, *supra* note 12, at 13.

51. *See id.* at 462-67; Shirley R. Steinberg, *The Book of Barbie: After Half a Century, the Bitch Continues To Have Everything*, in KINDERCULTURE: THE CORPORATE CONSTRUCTION OF CHILDHOOD 249, 249-54 (Shirley R. Steinberg ed., 3d ed. 2011).

52. *See* WARMAN’S BARBIE DOLL FIELD GUIDE: VALUES AND IDENTIFICATION, *supra* note 12, at 461.

53. *See generally* Steinberg, *supra* note 51, at 249-54; Ingrid Sydenstricker, *Barbie: Eleven Inches of Might*, VESTIMENTUM (Mar. 7, 2013), <http://vestimentumblog.wordpress.com/2013/03/07/barbie/>; WARMAN’S BARBIE DOLL FIELD GUIDE: VALUES AND IDENTIFICATION, *supra* note 12, at 13.

54. BARBIE DREAMHOUSE, Registration No. 86226011; MALIBU BARBIE, Registration No. 2897987, 0689055, 0728811, 2110856, 2181437, 2495195, 2503187 and others; BARBIE LIFE, Registration No. 86134189; BARBIE IN PRINCESS POWER, Registration No. 86110970.

55. U.S. Trademark Application Serial No. 78386111 (Mar. 17, 2004); U.S. Trademark Application Serial No. 78056239 (Apr. 2, 2001); U.S. Trademark Serial No. 77442813 (Apr. 8, 2008).

www.barbie.com, but also holds domain name registrations for barbie.net, barbie doll.info, barbie doll.net, and barbie world.com.<sup>56</sup>

More than merely relying on the formal registrations, the company understood very early that the associations and references evoked by Barbie could, helpfully, be licensed and sold to others. It pioneered cross-branding and licensing of the image of Barbie for all manner of uses.<sup>57</sup> According to Cy Schneider, the advertising executive at Carson/Roberts who handled Mattel's advertising during the fifties and sixties, Mattel struck licensing deals at this time with more than 100 companies to use the Barbie brand on their products.<sup>58</sup> This is almost certainly more than any other company of the period, and Mattel was particularly innovative in its approach to marketing during the middle of the last century. Even before it released Barbie in 1959, Mattel pioneered the use of television to spur demand for its toy guns and other toys.<sup>59</sup> It never let up in its embrace of licensing, of course. Fifteen years ago, Rogers noted that the licensing of Barbie-branded paraphernalia included Barbie CD-ROMs, as well as "Barbie stickers, greeting cards, calendars, watches, backpacks, coloring books and story books for children, wrapping paper, jumbo trading cards, lunch boxes, and clothing (including girls' underwear)."<sup>60</sup> The list of Barbie paraphernalia is, of course, much longer these days, and Mattel's grasp on Barbie-related trademarks is even more implacable.<sup>61</sup>

However, the intellectual property mechanisms of control that Mattel used to amass such power over the brand of Barbie created an unexpected point of weakness. In time, Barbie's influence reached around the world, but as her reach grew, Mattel's grip on her became more fragile. As more people came to know of Barbie, they began to co-opt the doll and her meaning as their own in ways, which appalled Mattel and resonates to this day.

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56. *Mattel, Inc. v. Above.com Domain Privacy*, Case No. D2011-2264 (WIPO Feb. 23, 2012) [Féral-Schuhl, Arb.], <http://www.wipo.int/amc/en/domains/search/text.jsp?case=D2011-2264>.

57. MARY F. ROGERS, *BARBIE CULTURE* 94-95 (1999).

58. *Id.* at 91.

59. In 1955, Mattel took a huge gamble and became the sole sponsor of a new television program called the "Mickey Mouse Club." OPPENHEIMER, *supra* note 12, at 21-22. It cost \$500,000, a huge amount at that time, in a period when their main competition boasted spending around \$300 a year on advertising. LORD, *supra* note 3, at 21-22. With the success of the Mickey Mouse Club, Mattel went from strength to strength and changed advertising and marketing forever. *See* OPPENHEIMER, *supra* note 12, at 25; LORD, *supra* note 3, at 21.

60. ROGERS, *supra* note 57, at 91.

61. *See, e.g.*, BARBIE, Registration No. 3518164 for "magnetically encoded debit and credit cards."

The timing of Barbie's commercial success intersected with second wave feminism that grew in force from the 1960s, and, as is now familiar, the doll became a metaphor and symbol for everything that was oppressing women.<sup>62</sup> The cultural meaning of Barbie was extraordinarily loaded and became a magnet for criticism. By now, the examples are well-known: Barbie is "too tall and too thin . . . [with] outsize breasts and non-existent hips";<sup>63</sup> she is a bad role model for girls and she causes eating disorders and body dysmorphic disorders;<sup>64</sup> she discourages girls from taking an interest in math;<sup>65</sup> she teaches girls a certain type of "emphasized femininity" that valorizes niceness and focuses on female achievement as one that resides only in the aesthetic or sexual realms;<sup>66</sup> her anodyne whiteness and straightness stigmatizes race and gender minorities, which forms part of the apparatus of their oppression.<sup>67</sup>

Attacks on Barbie came in numerous forms. Intellectuals and feminists spoke out against her, and the efforts of the company to respond to and address these criticisms went largely unrecognized.<sup>68</sup> It mattered little that, in 1971, Mattel changed the doll's gaze from a demurely submissive downturned glance to a straight-forward and straight-ahead look.<sup>69</sup> Whatever her new look, it could not remove the negative connotations of the concept of Barbie. Some of the attacks on the concept came in unexpectedly sly and amusing forms: the Barbie Liberation Organization switched voiceboxes in a number of Teen Talk Barbies and Talking Duke G.I. Joes during the 1993 Christmas shopping

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62. *Barbie: The Female's Icon*, HISTORY ENGINE, <http://historyengine.richmond.edu/episodes/view/9966> (last visited Oct. 17, 2015).

63. Ockman, *supra* note 17, at 75. Lord notes that Barbie's proportions were dictated not by misogyny, but by the practicalities of making clothes appear proportional at the smaller sizes demanded by Barbie's height, LORD, *supra* note 3, at 12-13 ("The inner seam on the waistband of a skirt involves four layers of cloth—and four thicknesses of human-scale fabric on a one-sixth-human-scale doll would cause the doll's waist to appear dramatically larger than her hips.").

64. Kelly D. Brownell & Melissa A. Napolitano, *Distorting Reality for Children: Body Size Proportions of Barbie and Ken Dolls*, 18 INT'L J. EATING DISORDERS 295-98 (1995).

65. See generally Jones, *supra* note 26; Ockman, *supra* note 17; Quindlen, *supra* note 49, at 117.

66. ROGERS, *supra* note 57, at 14-15, 19-21 (noting features of Barbie's emphasized femininity and providing examples of women who underwent plastic surgery in an effort to be more like Barbie).

67. *Id.* at 47-60.

68. See, e.g., Jacqueline Urla & Alan Swedlund, *The Anthropometry of Barbie: Unsettling Ideals of the Feminine Body in Popular Culture*, in *DEVIANT BODIES: CRITICAL PERSPECTIVES ON DIFFERENCE IN SCIENCE AND POPULAR CULTURE* 277, 277-314 (Jennifer Terry & Jacqueline Urla eds. 1995).

69. LORD, *supra* note 3, at 12; see also Sydenstricker, *supra* note 52.

season, and put them back on shelves for unsuspecting shoppers.<sup>70</sup> It is unknown how many young girls and boys were permanently scarred by Barbie's unexpectedly-deep voice saying "Eat lead, Cobra," or by G.I. Joe's surprisingly high-register interest in the prospect of an unusual mission: "Let's go shopping!"<sup>71</sup>

Barbie was not just a lightning rod for criticism; she was also a potent object for artistic reinterpretation in various forms. As a result, artists of many types have used Barbie to present all manner of messages. Todd Haynes famously used Barbie in *Superstar*, his portrayal of Karen Carpenter's life,<sup>72</sup> shaving down the limbs and face of the doll to show Carpenter's struggle with, and eventual death from, anorexia nervosa.<sup>73</sup> Barbie has been reimagined in versions of Marcel Duchamp's *Nude Descending a Staircase*, in pastiches of Edward Hopper's dystopian cityscapes, as Edouard Manet's *Olympia*, as the *Venus de Milo*, and as Botticelli's *Birth of Venus*.<sup>74</sup> Maggie Robbins' *Fetish Barbie* showed Barbie with hundreds of nails driven into her, looking for all the world like a West Central African *Nkondi* nail fetish statue.<sup>75</sup>

Other unsanctioned uses are commercial or at least not so self-consciously "artistic." For years there was an East Village, Manhattan, shop that sold versions of the doll clothed in S&M gear, Barbie-as-Christ crucified, or Barbie displayed as a hunting trophy.<sup>76</sup> These days one can find all manner of Pinterest pages of Barbie, dressed as Wonder Woman, or Audrey Hepburn, or as a stripper, or in latex, or handcuffed with zipties.<sup>77</sup>

The attacks on and uses of the concept of Barbie presented Mattel with a problem of control. Saying nothing about these uses might be

70. David Firestone, *While Barbie Talks Tough, G.I. Joe Goes Shopping*, N.Y. TIMES (Dec. 31, 1993), <http://www.nytimes.com/1993/12/31/us/while-barbie-talks-tough-g-i-joe-goes-shopping.html>.

71. *See id.*

72. Dubin, *supra* note 16 at 37; Caryn James, *FILM VIEW: Politics Nurtures 'Poison,'* N.Y. TIMES (Apr. 14, 1991), <http://www.nytimes.com/1991/04/14/movies/film-view-politics-nurtures-poison.html>.

73. *See generally* SUPERSTAR: THE KAREN CARPENTER STORY (Iced Tea Productions 1988).

74. Dubin, *supra* note 16, at 37.

75. LYNN SPIGEL, WELCOME TO THE DREAMHOUSE: POPULAR MEDIA AND POSTWAR SUBURBS 339 (2001). For the image, refer to LORD, *supra* note 3, at 274. For a discussion of Nkondi figures, see generally *Nkondi*, WIKIPEDIA, <http://en.wikipedia.org/wiki/Nkondi> (last modified Apr. 10, 2015, 6:03 PM).

76. Dubin, *supra* note 16, at 36.

77. Katie Burdett, *Barbie*, PINTEREST, <http://www.pinterest.com/katiemayburdett/barbie/> (last visited Oct. 17, 2015); Jennifer Gillespie, *Altered Barbie*, PINTEREST, <http://www.pinterest.com/texasdiva74/alterd-barbie/> (last visited Oct. 17, 2015); Marilyn Sorenson, *Barbie Dolls*, PINTEREST, <http://www.pinterest.com/marilyncsor/barbie-dolls/> (last visited Oct. 17, 2015).

seen as a kind of implicit sanction, and the company could not ignore every appropriation. But where should it draw the line? Mattel had to accept that, even outside academic and feminist criticism where the company could do little, Barbie's ubiquitous strength and worldwide recognition would mean that she would be re-imagined in all sorts of ways. This tension was particularly fraught for the company when dealing with artistic works, and thus began Mattel's fifty-year engagement with the policing of Barbie artworks—an engagement that has arced wildly between embrace and reprimand, a dysfunctional relationship which shows varying degrees of tolerance on the part of the company.

For example, Andy Warhol wrote in his diary that his portrait of Barbie was enthusiastically embraced by the Mattel brass, even though Warhol did not like the painting: "The Mattel president said he couldn't wait to see it and I just cringed."<sup>78</sup> Some exhibitions of Barbie-related art have been staged with the permission of Mattel, or with its implicit sanction.<sup>79</sup> For Barbie's 35th birthday, Mattel created Barbie Festival, complete with an exhibition of various artworks featuring Barbie: a version of Seurat's seminal *Un dimanche après-midi à l'Île de la Grande Jatte* with pasted-on Barbies, and a reproduction of Monet's *Nymphéas* made indescribably better by the addition of Barbies floating on the lily pads.<sup>80</sup> Other shows have been quietly accepted, and Mattel did not seek to stop exhibitions like the 1994 German exhibition *Künstler und Designer gestalten für und um Barbie* or the *Salon de Barbie* show in the same year at New York's avant garde gallery, the Kitchen,<sup>81</sup> even though the latter exhibition contained images connecting Barbie with sex and violence.

Other artists have not been so lucky. The best-known examples of artistic use of Barbie are familiar because the artists met with Mattel's vigorous attempts at suppression of their message. Three in particular stand out: the web-based case of "Distorted Barbie,"<sup>82</sup> the postcards of

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78. LORD, *supra* note 3, at 261. Oddly, the Barbie painting seems to have been commissioned by Mattel CEO Jill Barad, a "she" not a "he": "Barad told how she had met [Andy Warhol] at a publicity party for She-Ra, and, after he revealed a fascination with Barbie, [she] commissioned a portrait of the doll." *Id.* at 125.

79. See, e.g., SPIGEL, *supra* note 74, at 339 (giving examples of exhibitions of Barbie related art sanctioned or allowed by Mattel).

80. *Id.*

81. *Id.*

82. See generally *Case Study: Barbie*, lecture from *Intellectual Property in Cyberspace*, BERKMAN CTR. INTERNET & SOC'Y HARV. U., <http://cyber.law.harvard.edu/property00/respect/csbarbie.html> (last visited Oct. 17, 2015); *Mattel, Inc. v. Walking Mountain Prods.*, 353 F.3d 792 (9th Cir. 2003); *Mattel, Inc. v. MCA Records, Inc.*, 296 F.3d 894 (9th Cir. 2002).

“Food Chain Barbie”<sup>83</sup> and the litigation over the pop song “Barbie Girl” by the Danish band Aqua.<sup>84</sup>

The earliest high profile dispute involved Mark Napier, a digital artist who, in the first days of the commercial web, appropriated graphic images from the Internet and distorted them in various ways to convey various messages.<sup>85</sup> He described his work as “woven . . . images of the body, religious icons, pop culture and the computer interface itself.”<sup>86</sup> One of Napier’s subjects was (inevitably) Barbie and he attracted the ire of Mattel when he published some of his Barbie images on his website, called “Distorted Barbie,” and in an e-zine called *Enterzone*.<sup>87</sup> The dispute became a minor *cause célèbre* of the period because Mattel did not merely approach Napier to take the site down, but sent a threatening cease-and-desist letter to Napier’s ISP, claiming copyright infringement, and the ISP complied with Mattel’s demand to shut down the site.<sup>88</sup> The ruckus occurred in October 1997, when Internet intermediary liability was still uncertain.<sup>89</sup> As a result, it spurred a great deal of commentary and criticism, and even featured an early example of grassroots net hacktivism.<sup>90</sup> Beyond this, however, the matter never went to court and the outcome was not particularly problematic.<sup>91</sup> Napier merely changed certain aspects of the Barbie images and references by distorting the images of Barbie to the point of unrecognizability, and by changing the name of the site to “The Distorted \$arbie.”<sup>92</sup> His site was promptly reinstated under a new ISP, and is available to this day.<sup>93</sup> This is not to

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83. *Internet Trademark Case Summaries: Mattel, Inc. v. Walking Mountain Prods.*, FINNEGAN, LLP, <http://www.finnegan.com/MattelIncWalkingMountainProds> (last visited Oct. 22, 2015).

84. *See Mattel*, 296 F.3d 894.

85. *Case Study: Barbie*, *supra* note 82.

86. *Id.*

87. Rosemary J. Coombe & Andrew Herman, *Culture Wars on the Net: Intellectual Property and Corporate Propriety in Digital Environments*, 100 S. ATL. Q. 919, 932 (2001).

88. Steve Silberman, *Mattel’s Latest: Cease-and-Desist Barbie*, WIRED (Oct. 28, 1997), <http://archive.wired.com/culture/lifestyle/news/1997/10/8037>.

89. *Id.* (“Mattel’s technique of targeting Napier’s ISP raises thorny questions . . . about the role of ISPs in defending their users’ content against lawsuits.”).

90. *See Case Study: Barbie*, *supra* note 82 (“Christian Crumlish, the editor of Enterzone, followed the progress of the Napier controversy. For a time, he published a nearly day-to-day account of the issue at a site called ‘The Daily Barbie.’ It connected readers to a site which invited people to join the rebellion by creating a ‘meme’ of Distorted Barbie—that is, mirroring the site faster than legal teams can ask that it be torn down.”); *see also* Coombe & Herman, *supra* note 87, at 932.

91. *Case Study: Barbie*, *supra* note 82 (“Interport, not wanting to become embroiled in a law suit, asked Napier to comply [with Mattel’s legal demands.] [H]e complied.”).

92. *The Distorted \$arbie*, NAPIER, <http://users.rcn.com/napiier.interport/barbie/> (last visited Oct. 17, 2015).

93. *Id.*



suggest that Mattel's actions were appropriate, but the dispute can justifiably be read as an interesting historical artifact and little more. It occurred during the early days of the Internet, when there was a Cambrian explosion of artistic appropriation and re-use of a kind that conservative and technology-challenged lawyers at companies like Mattel were ill-suited to understand.

A few years later, artist Tom Forsythe created a series of seventy-eight photos entitled "Food Chain Barbie," portraying Barbie dolls in danger of being attacked by various vintage household appliances.<sup>94</sup> The dolls were usually shown naked, and the scenarios were sometimes sexualized.<sup>95</sup> Thus, the picture entitled "Malted Barbie" featured a nude doll on a Hamilton Beach malt machine, "Fondue a la Barbie" depicted Barbie heads in a fondue pot, "Barbie Enchiladas" depicted four Barbie dolls wrapped in tortillas, and covered with salsa in a casserole dish in an oven.<sup>96</sup> Forsythe only managed to sell a small number of the photos as promotional postcards, mostly in his hometown of Kanab, UT, and he grossed the princely sum of \$3,659 from the project.<sup>97</sup> Yet Mattel sued Forsythe, claiming all manner of ills—trademark infringements of various sorts, copyright infringement, and infringement in their rights in the Barbie trade dress<sup>98</sup>—and it pushed the case through the district court and eventually to the court of appeals. It lost ignominiously, with all of its claims dismissed at each level of the proceeding.<sup>99</sup> Most revealing of all, the company was ordered to pay the defendant's court costs and attorney's fees, to the tune of more than \$1.8 million.<sup>100</sup> This happens so rarely in U.S. intellectual property cases that it is virtually unheard of; but the court concluded that Mattel's actions in bringing the case were "groundless and unreasonable" and these exceptional circumstances warranted the huge award for the defendant.<sup>101</sup>

The final significant art-related dispute was over the song "Barbie Girl" by Aqua, a late-nineties Danish pop band.<sup>102</sup> The band reinterpreted

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94. *Mattel, Inc. v. Walking Mountain Prods.*, 353 F.3d 792, 796 (9th Cir. 2003). Although Forsythe called his series "Food Chain Barbie" the dispute is often called the "Barbie in a Blender" case. *Barbie-in-a-Blender Artist Wins \$1.8 Million Award*, OUT-LAW.COM (July 2, 2004), <http://www.out-law.com/page-4681>.

95. *Mattel, Inc.*, 353 F.3d at 796.

96. *See id.*

97. *See id.* at 797.

98. *Id.* at 796.

99. *Id.* at 816; *Mattel, Inc. v. Walking Mountain Prods.*, No. CV99-8543 RSWL (R2K), 2004 WL 1454100 (C.D. Cal. June 21, 2004).

100. *Mattel, Inc.*, 2004 WL 1454100, at \*4.

101. *Id.* at \*3.

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

Barbie's image through lyrics and a music video in ways that Mattel objected to. Of particular concern were references that Barbie was a "party girl," the suggestion that she wanted Ken to undress her, and a lyric suggesting that she was "a blond bimbo girl, in a fantasy world."<sup>103</sup> Mattel sued the band and the publishers of the song on the basis of confusion and dilution in trademark law, and under provisions of an international treaty protecting industrial property.<sup>104</sup> Mattel lost at first instance on a summary judgment motion by the defendants, and on appeal in the United States Court of Appeals for the Ninth Circuit on all counts.<sup>105</sup>

The case is known best for its discussion of what amounts to commercial speech in trademark dilution cases, and also for when a trademark is used in a parodic sense rather than as a satire in trademark confusion cases.<sup>106</sup> As the court noted, the song used the Barbie trademarks and trade dress in order to comment on the concept of Barbie: a canonical example of allowing artists to use a mark in order to comment both on the physical doll and the concept of Barbie-ness. The case is nowadays routinely used to demonstrate the interaction between trademark and freedom of speech.<sup>107</sup> An amusing coda to the story is that, as dishonorable a loss as the case was for Mattel, it did not stop the company from licensing the "Barbie Girl" song only a few years later, for use in an advertising campaign.<sup>108</sup>

These three art cases do not seem to make much sense. They each represent high-profile losses, of various sorts, for Mattel, and on their face the company should never have brought suit. It is hard to intuit what was going on behind the scenes at Mattel that led to these cases; however, it is revealing that they all occurred from 1996 to 2004.<sup>109</sup> This period coincided with the early efflorescence of the commercial Internet, which

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103. *Id.* at 901.

104. *Id.* at 899.

105. *Id.* at 899, 908; *Mattel, Inc. v. MCA Records, Inc.*, 28 F. Supp. 2d 1120 (C.D. Cal. 2998).

106. *See, e.g.*, William McGeeveran, *Rethinking Trademark Fair Use*, 94 IOWA L. REV. 49, 54 (2008) (categorizing the "Barbie Girl" song as commercial speech and parody).

107. *See, e.g.*, Tamar Buchakjian, *Mattel, Inc. v. MCA Records, Inc.: Let's Party in Barbie's World—Expanding the First Amendment Right to Musical Parody of Cultural Icons*, 36 LOY. L.A. L. REV. 1321 (2003), <http://digitalcommons.lmu.edu/llr/vol36/iss3/7> (describing the Ninth Circuit decision and discussing its approach to the balance between speech interests and trademark).

108. Mike Masnick, *Mattel Now Using Song in Commercial . . . Which It Once Sued over Copyright Infringement*, TECHDIRT (Oct. 23, 2009, 11:38 AM), <https://www.techdirt.com/articles/20091019/1632286599.shtml>.

109. *See Case Study: Barbie*, *supra* note 82 (stating that Napier created Distorted Barbie site in 1996, and Mattel sent a cease and desist letter shortly thereafter).

presented all intellectual property owners with a new and unprecedented challenge not seen since the advent of the photocopier in the seventies and the video recorder in the eighties. With so many new and problematic uses of Barbie emerging during this time, it is not very surprising that Mattel would adopt a bunker mentality, hunkering down and lashing out at most every unauthorized use. Even those cases which did not involve the Internet—the “Barbie Girl” case and “Food Chain Barbie”—must still have been framed for Mattel through the flood of uncontrolled and seemingly uncontrollable web-based uses flourishing at that time.

As such, Mattel’s response to artistic appropriation should not be seen through the lens of the well-known cases; these disputes are probably an artifact of the time that they were brought. After that brief period of panic, we saw a gradual shifting of Mattel’s litigation strategy: away from heavy-handed enforcement against authorized use and towards a more focused approach on what really mattered to the company. We will look at this strategy in the next Part, but it is worth noting how Mattel approached artistic re-use of Barbie after the “Food Chain Barbie” and “Barbie Girl” cases. Nowadays it is simple to find examples of artistic appropriation of Barbie that once would have been unthinkable. The photographer David Laundy has, for some time, been producing images of Barbie in various sexualized poses; his most recent book, *Bad Barbie*,<sup>110</sup> is nothing but picture after picture of Barbie and Ken engaging in various acts of sexual congress.<sup>111</sup> It is impossible to imagine this work existing without the signal loss that Mattel suffered in “Food Chain Barbie.” That case also featured explicitly in the calculations of others who adopt Barbie in their art: “Altered Barbie” is a community of artists committed to producing artwork with Barbie dolls, that was formed in San Francisco in 2002. The group hosts an annual exhibition, now in its thirteenth year,<sup>112</sup> which has not been shut down by Mattel. The organization’s website recounts Tom Forsythe’s legal victory in some detail, and extracts the newspaper accounts of the case seemingly as a prophylaxis against Mattel suing its artists.<sup>113</sup> No mention is made,

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110. DAVID LEVINTHAL, *BAD BARBIE* (2009); see also DAVID LEVINTHAL, *BARBIE MILLICENT ROBERTS* (1998).

111. See LEVINTHAL, *BAD BARBIE*, *supra* note 110.

112. See ALTERED BARBIE, <http://alteredbarbie.com> (last visited Oct. 18, 2015).

113. Kayla Garelick, *Legal History*, ALTERED BARBIE, <http://alteredbarbie.com/about-us/legal-history> (last visited Oct. 18, 2015) (“Here are some news articles etc. on the web that comment on this issue. I have more that [I] will post as I update the page. The most important thing is to make it clear to Mattel that we know we are protected because Mattel can still approach artists and scare them and the artist’s webhosts!”).

however, of the “Distorted Barbie” case—which is surprising given the artistic similarities between “Altered Barbie” and “Distorted Barbie.” Perhaps it is just because Mark Napier’s success is less well-known.

If there is a lesson in the art cases it is that Mattel struggled with issues of control. Having learned how to use intellectual property to construct the meaning of Barbie, it failed to understand its limits. The company failed to recognize the fragility at the heart of Barbie, and did not understand that the laws could not remedy this. It pushed too far and was slapped back. Arguably, it was a simple strategic overreach by the company.

But that does not explain it all. There was something else going on with the company’s view of Barbie, something we have not yet looked at. Although it is easy to say that Mattel’s intellectual property strategy was about control—all intellectual property management is about that—there are other features that define and explain Mattel’s understanding of Barbie. It should come as no real surprise that these two features are sex and power.

#### IV. SEX AND POWER

*Everything in the world is about sex except sex. Sex is about power.*  
—Oscar Wilde (attrib.)<sup>114</sup>

It is impossible to understand Barbie without considering Mattel’s litigation strategy. We discussed this in the previous Part, but only within the context of artistic re-use, and only involving a few high profile cases. In order to understand the concept of Barbie, we need to think carefully about why Mattel approached litigation as it did. At first blush, it seems like Mattel did not know what it was doing in bringing suit, but this is a misreading. Mattel has had a very precise strategy, and it has applied the power of the intellectual property system in very targeted ways.

Perhaps more than any other corporation, Mattel understood very early how to use intellectual property to craft an image and to guard it from all sides. In the hands of Ruth Handler and those who came after her, intellectual property became the core technology to create and defend the concept of Barbie. Without Mattel’s effective marshaling of intellectual property’s systems of power—seen in trademark registrations for the Barbie name or the color pink, the infringement suits to shut down unauthorized artists like Tom Forsythe or Aqua, and patents over the physical characteristics of Barbie—we could not identify the unique properties that define the evanescent meaning of Barbie. Without

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114. BETH STEELING, CONSTRUCTING AND DECONSTRUCTING WOMAN’S POWER (2002).

Mattel's mastery of intellectual property there would be so many competing ideas, and so many unauthorized uses of Barbie's image. Barbie would be blurry and dim, the indistinct aura of an image seen through a heat haze. Although many people dislike Barbie or are conflicted about whether they admire what Barbie stands for, *everyone* recognizes her as a uniquely-clear cultural object.<sup>115</sup> Her outline is as sharp and distinct as the sound of a struck bell.

This could only have happened through strong enforcement of rights, and it has been the job of Mattel's legal department to apply the force of the company's intellectual property rights to ensure the signal purity of the message told about Barbie. Indeed, it is not just the lawyers who think this way, it goes all the way to the top: Jill Barad, Mattel's high profile CEO in the late nineties said, "What I do in my job, first and foremost," Barad said, "is protect Barbie."<sup>116</sup> However, as we saw illustrated in the previous Part, Mattel's innovative use of the intellectual property system created Barbie's unexpected fragility, and the company has wrestled with the consequences ever since.

The culture of protection led to Mattel consistently overreaching in its protection of Barbie; so much so that the standard cultural studies conception of Mattel is as an intellectual property bully. Accounts from cultural studies focus on examples of Mattel's overreach to suggest either that intellectual property systems are broken or that the company should ameliorate its hardball tactics, or both. Critics like Rochelle Dreyfuss note how the term "Barbie" has expressive meaning beyond its purely connotative function that Mattel should not be able to control.<sup>117</sup> When Joan Kennedy, Ted Kennedy's wife, complained that when she was with Ted she was not taken seriously—"when I'm with Ted I'm a Barbie doll"<sup>118</sup>—we understood exactly what she meant, and her analogy is appealing because it is evocative, interesting, accurate, and not even slightly confusing to Mattel. Dreyfuss, concerned about speech freedoms, expresses dissatisfaction at laws that allow and even encourage Mattel to clamp down on these kinds of associations and expressive

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115. See, e.g., Rosemary J. Coombe & Andrew Herman, *Defending Toy Dolls and Maneuvering Toy Soldiers: Trademarks, Consumer Politics, and Corporate Accountability on the World Wide Web*, MIT COMMUNIS FORUM, <http://web.mit.edu/comm-forum/papers/coombeherman/coombeherman.html> (last visited Oct. 18, 2015) ("Barbie says a lot about the world. I can't think of any other icon that is more widely accepted as an image of femininity.").

116. Coombe & Herman, *supra* note 115.

117. Cf. Rochelle Cooper Dreyfuss, *Expressive Genericity: Trademarks as Language in the Pepsi Generation*, 65 NOTRE DAME L. REV. 397, 400 (1990).

118. *Id.* at 397.

uses.<sup>119</sup> Jason Mazzone similarly criticized Mattel for using trademark to regulate protected speech, suggesting that the company wrongly pursues non-commercial users of Barbie iconography and takes “false positions” in relation to the interaction between trademark law and speech.<sup>120</sup>

Other critics go further. Coombe and Herman focus on the company’s efforts to control Barbie’s image on the web, suggesting that “Mattel . . . is known as one of the most vociferous and energetic of corporate censors in cyberspace.”<sup>121</sup> They argue that Mattel’s strong-arm tactics, in shutting down collectors’ sites, fan sites and sites featuring unauthorized Barbie imagery, are inconsistent with the way that fans understand cultural products like Barbie.<sup>122</sup> Commentators have examined how the Internet has given rise to fan cultures that adopt cultural objects that previously were wholly controlled by corporations and which create crises of control among those companies as they lose power over their objects.<sup>123</sup> Censorship and bullying via intellectual property tends to follow. Noted feminist and author of *No Logo*, Naomi Klein, was particularly appalled by the company’s boast that it has a hundred trademark investigations going on at any one time. She thought that this was “almost comically aggressive.”<sup>124</sup>

These criticisms are of course absolutely true, and in one sense, Mattel *is* an intellectual property bully. We have seen a number of examples in the previous Part, but there are numerous additional examples of Mattel seeking to exert power to stop uses of Barbie. Mattel has been particularly vigilant in dealing with domain names, for example threatening the registrant of thebarbies.com into submission despite it

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119. *Cf. id.* at 400. Dreyfuss suggests that there are examples of cases that are expressive but have source signal connotations, e.g., a Barbie t-shirt, that complicates the analysis, and where the surplus value generated may require a complicated accounting. *See id.* at 402. However this does not change her fundamental analysis. *See id.* at 402-03.

120. JASON MAZZONE, COPYFRAUD AND OTHER ABUSES OF INTELLECTUAL PROPERTY LAW 155-56 (2011).

121. Coombe & Herman, *supra* note 115, at 4.

122. *Id.* at 3 (“As Henry Jenkins and John Fiske have shown, fans actively produce cultural meanings and create popular culture through creative appropriations and recontextualizations of mass cultural commodities.”).

123. *See, e.g.*, Henry Jenkins, ‘*Cultural Acupuncture*’: *Fan Activism and the Harry Potter Alliance*, 10 TRANSFORMATIVE WORKS & CULTURES (2012); JOHN FISKE, UNDERSTANDING POPULAR CULTURE (2010); Rebecca Tushnet, *Legal Fictions: Copyright, Fan Fiction, and a New Common Law*, 17 LOY. L.A. ENT. L.J. 651, 655-60 (1997) (describing, generally, fan fiction and fan uses as tributes or critique); Anupam Chander & Madhavi Sunder, *Everyone’s a Superhero: A Cultural Theory of “Mary Sue” Fan Fiction as Fair Use*, 95 CAL. L. REV. 597, 601-12 (2007) (describing and defending various unsanctioned uses by fans).

124. NAOMI KLEIN, NO LOGO: TAKING AIM AT BRAND BULLIES 181 (2000).

being a small group of women who liked to play videogames.<sup>125</sup> Further, the company has sought numerous transfers of domain names after the introduction of ICANN's Uniform Domain Name Dispute Resolution Policy, winning back *barbie dollmaker.com*, *fashionbarbie dolls.com*, *fashionbarbie girls.com*,<sup>126</sup> and losing others, including *ukbarbie.com*,<sup>127</sup> *escortbarbie.com*,<sup>128</sup> and *callgirlbarbie.com*.<sup>129</sup>

Sometimes Mattel has acted like an exemplar of bullying; such as when it brought suit against Barbara and Dan Miller, the publishers of a guide for Barbie collectors, seeking control over the content of their guide.<sup>130</sup> Apparently Mattel was ticked off by negative comments made in the guide regarding overpricing and business decisions the company made involving Barbie. One Mattel lawyer was quoted saying to the couple's attorney at the time, "We want the Millers' house."<sup>131</sup> It is hard to see this as anything other than pointless intimidation by a company seeking to exert power through the intellectual property system. Mattel also claimed a trademark violation and sued the publisher of *Adios Barbie*, an academic collection of essays examining women's body image. Under pressure of suit, the book's title was changed to *Body Outlaws*, a much less expressive and interesting title to be sure.<sup>132</sup> Ohio-based Barbie collector and dealer, Paul David, commented in a catalog that "if there were an ugly contest, Elizabethan Queen Barbie would definitely win."<sup>133</sup> After protracted litigation, he settled and agreed that in subsequent descriptions he would portray Barbie as "wholesome, friendly,

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125. *What Is THEBARBIES.COM?*, <http://www.barbieslapp.com/others/tribes.htm> (last visited Oct. 18, 2015).

126. *Mattel, Inc. v. PrivacyProtect.org/Stuparu Darius*, No. D2012-1281 (WIPO Aug. 13, 2012) [Tan, Arb.]; *see also* *Mattel, Inc., Mattel España S.A., v. Glaciar State S.L.*, No. DES2009-0040 (WIPO Nov. 18, 2009) [Arb.] (*barbiestore.es* transferred to Mattel); *Mattel, Inc. v. Above.com Domain Privacy*, No. D2011-2264 (WIPO Feb. 23, 2012) [Féral-Schuhl, Arb.] (*barbie dressup games.net* transferred to Mattel); *Mattel, Inc. v. Andrew Cuthbert*, No. 1214706 (N.A.F. Aug. 26, 2008) [Féral-Schuhl, Arb.] (*barbie-girl.biz* transferred to Mattel); *Mattel, Inc. v. Maria Morariu*, No. D2011-2229 (W.I.P.O. Feb. 8, 2012) [Barbero, Arb.] (*barbie doll games.net* and *jocuri-barbie.com* transferred to Mattel).

127. *Mattel, Inc. v. Angela Knox*, No. FA0403000245916 (N.A.F. Apr. 21, 2004) [Gold, Arb.].

128. *Mattel, Inc. v. Barbie of Cleveland a/k/a Barbie Beeler*, No. FA0403000248741 (N.A.F. May 12, 2004) [Arb.].

129. *Mattel, Inc. v. Richard Robert*, No. FA0405000271644 (N.A.F. Jun. 30, 2004) [Arb.].

130. ROGERS, *supra* note 57, at 92.

131. Doug Clark, *Litigation Barbie, Made by Mattel*, SPOKESMAN-REV. (Oct. 5, 1997), <http://www.spokesman.com/stories/1997/oct/5/litigation-barbie-made-by-mattel/>.

132. *Body Outlaws: The Book*, ADIOS BARBIE, <http://www.adiosbarbie.com/body-outlaws> (last visited Oct. 18, 2015).

133. Lisa Bannon, *Barrister Barbie: Mattel Plays Rough*, SOUTH COAST TODAY, <http://www.southcoasttoday.com/apps/pbcs.dll/article?AID=/19980109/LIFE/301099948> (last updated Jan. 11, 2011, 1:50 AM).

accessible and kind, caring and protecting, cheerful, fun loving, talented and independent.”<sup>134</sup> These are just some of the standover tactics that Mattel has used against small operators who fail to pay appropriate respect to Barbie.<sup>135</sup>

But it is a mistake to think that Mattel’s litigation strategy is just about power, or just about harassment. Indeed most of the bullying stories come from the late nineties, a period when Mattel was noticeably anxious about Barbie, as illustrated in the previous Part. More recently, Mattel’s litigation strategy has involved the brute calculus of competitive advantage. For nearly a decade Mattel fought a lawsuit against MGA, the maker of the lucrative line of “Bratz” dolls, claiming a number of largely spurious causes of actions—trade secret infringement, industrial espionage, contractual breach, breach of fiduciary duty, breach of duty of loyalty, unjust enrichment and so on—on the basis that Carter Bryant, the designer of the Bratz line, had been a designer for Mattel immediately prior to taking his designs to MGA.<sup>136</sup> MGA and Bryant fought back, claiming unfair competition, copyright infringement, and various other sorts of claims, that are, essentially, intellectual property litigation boilerplate.<sup>137</sup> MGA engaged in all the usual posturing expected in disputes of this kind: the counterclaim, for example, noted at one point that Barbie did not “play nice” with others and needed to be “taught to share.”<sup>138</sup>

The suit was only about Barbie in the sense that the Bratz Pack was tremendously successful—its global sales were estimated at \$2 billion and at one point the line outsold sales of Barbie dolls<sup>139</sup>—and so the MGA dolls undercut Mattel’s profit margins in the Barbie range. Given

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134. *Id.*; ERIC CLARK, *THE REAL TOY STORY: INSIDE THE RUTHLESS BATTLE FOR AMERICA’S YOUNGEST CONSUMERS* (2007).

135. Other examples include shutting down the annual children’s charities fundraiser for the Great Lakes Chapter of the Barbie Collectors’ Club because it was not a Mattel-authorized event and the protracted litigation against Paul Hansen’s development of a line of Exorcist Barbies, Tonya Harding Barbies, and Drag Queen Barbies, *see* Bannon, *supra* note 133, and seeking to shut down clothing webstore barbiesshop.com, *see* OPPENHEIMER, *supra* note 12, at 247-50.

136. Margaret Talbot, *Little Hotties*, *NEW YORKER*, Dec. 4, 2006, at 74, 76; *see also* OPPENHEIMER, *supra* note 12, at 282. Bryant had been a hair, makeup, and fashion designer from 1995-2000 before taking the designs that became Bratz to MGA in October 2000. *See id.* at 250-51.

137. Margaret Talbot, *Bratz v. Barbie: Who’s the Bad Girl?*, *NEW YORKER* (Apr. 22, 2011), <http://www.newyorker.com/news/news-desk/bratz-v-barbie-whos-the-bad-girl>.

138. OPPENHEIMER, *supra* note 12, at 252-53.

139. *Id.* at 252-58. “From the first day Bratz hit the store shelves in the United States and overseas, sales of the Pack immediately skyrocketed—girls loved them—soaring to the 200 million mark by 2007, with global sales estimated at over \$2 billion.” *See id.* at 252. “Bratz had surpassed Barbie, becoming the top fashion doll, at least for one quarter.” *See id.* at 258.



MGA's market power and the amount it spent on the case, the suit certainly was by no means bullying, but it did demonstrate Mattel's use of litigation as a competitive strategy, as well as how long and hard it was prepared to fight to protect its market. The case was likened to an intellectual property dispute in *Jarndyce v. Jarndyce*.<sup>140</sup> Filed in 2004, the Mattel matter dragged on for years, consuming hundreds of millions of dollars in legal costs on each side.<sup>141</sup> Internal memos suggested that Mattel saw the battle in particularly Hobbesian terms.<sup>142</sup> This was war and sides needed to be taken. Barbie stood for good. All others stood for evil.<sup>143</sup>

Years of litigation were nasty and brutish, with more settlements, judgments, and reversed judgments than anyone could realistically follow. The case also involved genuinely ridiculous game-playing by the attorneys involved,<sup>144</sup> along with questions over the impartiality of the jury.<sup>145</sup> In the end, the case concluded with no damages awarded to either side. Mattel, however, was ordered to pay \$137 million in costs and fees.<sup>146</sup>

Mattel is thus the prototype for the modern-day corporation, dependent on intellectual property for its livelihood. But such a corporation is no longer unusual, neither in the use of intellectual property nor its occasional overreach. Each large corporation that seeks

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140. CHARLES DICKENS, BLEAK HOUSE 20 (1854) ("Jarndyce and Jarndyce drones on. This scarecrow of a suit has, in course of time, become so complicated that no man alive knows what it means. The parties to it understand it least, but it has been observed that no two Chancery lawyers can talk about it for five minutes without coming to a total disagreement as to all the premises. Innumerable children have been born into the cause; innumerable young people have married into it; innumerable old people have died out of it. A long procession of Chancellors has come in and gone out; the legion of bills in the suit have been transformed into mere bills of mortality; there are not three Jarndyces left upon the earth perhaps since old Tom Jarndyce in despair blew his brains out at a coffee-house in Chancery Lane; but Jarndyce and Jarndyce still drags its dreary length before the court, perennially hopeless.").

141. Talbot, *supra* note 137.

142. *Id.*

143. *Id.*

144. When Mattel's legal team from Quinn Emmanuel Urquhart Oliver & Hedges sought to book a hotel for the trial in 2008, it found that the opposing counsel from Skadden, Arps, Slate, Meagher & Flom had booked the hotel and had made the hotel agree not to put up the Quinn Emmanuel team. See OPPENHEIMER, *supra* note 12, at 254. The lead counsel for Mattel brought the legality of the hotel's agreement with Skadden before the judge in the case for determination. See *id.* The judge declined to rule. See *id.*

145. *Id.* at 261 ("Near the end of the deliberations, Juror No.8 was reported by another member of the panel as having made an ethnic slur against the [owner of MGA].").

146. Tim Cushing, *It's Finally Over: 8 Years Of Mattel vs. Bratz and No One's Getting Paid but the Lawyers*, TECHDIRT (Jan. 29, 2013, 3:27 AM), <https://www.techdirt.com/articles/20121019/17344420768/its-finally-over-8-years-mattel-vs-bratz-no-ones-getting-paid-lawyers.shtml>; see also *Mattel, Inc. v. MGA Entm't, Inc.*, 705 F.3d 1108, 1111-12 (9th Cir. 2013).

to gain a competitive advantage from intellectual property will overreact from time to time, and companies often send out cease-and-desist letters with the same levels of anguished fervor and regularity as letters from a demented stalker. It is in the nature of modern companies to seek to shut down their competitors and to police the uses that outsiders make of their iconic properties. Mattel is not unusual in this sense and, for all the claims of the commentariat, it is not even that interesting an example. The headline “Big Corporation Seeks To Control Public Image and Unauthorized Use of its Flagship Product Using Intellectual Property” is, these days, the definition of a dog-bites-man story.

Except this is not the whole story. It is not just that Mattel uses litigation for commercial benefit. Mattel’s litigation strategy demonstrates how the company sees Barbie and sex. Its two ignominious losses in the “Barbie Girl” and “Food Chain Barbie” cases each involve an overreaction over the depiction of Barbie in sexual settings. Mattel’s lawyers must have counseled the company that these were bad cases to bring, but the company pushed ahead regardless. Other high profile overreaches also involved sex. When Barbie Benson, the former Miss Nude Canada, created a racy website with the name “Barbie” on it, Mattel predictably objected.<sup>147</sup> When Karen Caviale sought to create *Barbie Bazaar*, a collectors magazine, she had to promise never to show Barbie “in any lewd or lascivious manner,” otherwise she would be refused permission from the company to use the mark.<sup>148</sup> On many occasions the company has indicated it is particularly concerned with sex: “I think of Barbie as a universally accepted vehicle that kids project their imaginations into—we have an obligation to keep it pure,” explained Mattel’s then-chief operating officer, Bruce Stein.<sup>149</sup>

It is wrong to say, as one law blogger noted, that “Mattel has made it very clear that if you even think about using the name Barbie, then you will be hauled into court.”<sup>150</sup> Mattel is not just an intellectual property bully, and its strategy is not just about commercial gain. Mattel has a particular litigation strategy to protect Barbie’s purity: to ensure the depiction of Barbie in sexually-demure forms. But, of course, Mattel has created an impossible dilemma for itself, because Barbie has to be both sexy and chaste.

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147. Coombe & Herman, *supra* note 87, at 903.

148. ROGERS, *supra* note 57, at 92 (citing Karen Caviale, *A Letter from the Editor*, 9 *BARBIE BAZAAR* 26 (1997)).

149. Bannon, *supra* note 133.

150. *Nobody Plays with Barbie*, AM. CONST. SOC’Y WM. & MARY L. SCH. (Nov. 14, 2008), <http://acs.blogs.wm.edu/2008/11/14/nobody-plays-with-barbie/>.

Mattel's litigation strategy is therefore much more than the simple assertion of control for its own sake. It is directed to two ends: towards commercial control of Barbie and control over the sexualized flesh of her body. At times these ends are in opposition—seen most clearly in the example of suing Aqua for a slightly racy depiction of Barbie in a song, and then immediately licensing the song for use in an advertisement. At other times, as in the Bratz litigation, the company's strategy was only about using the power to wrest commercial control of the doll market. Finally, other times Mattel's concern over the sexual depiction of Barbie made them lose all sight of commercial reality, and bring suits like "Food Chain Barbie," which ended up costing the company untold millions.

Mattel's split personality is interesting for a number of reasons. First, there is the obvious connection between Mattel's use of intellectual property to regulate the sexual depiction of Barbie, and the "sinful" character of Lilli. There is, no doubt, some interesting Freudian association between the sin of Lilli's appropriation by Mattel, and the way that the company has sought to use intellectual property to make Barbie perfectly chaste.

More significantly for intellectual property law, Barbie is a particularly vivid example of how companies in the late twentieth century connected intellectual property and desire. Intellectual property laws became the means to regulate consumer desire for the material object. Mattel came to understand how it could use intellectual property to control access to Barbie and to maintain desire for the concept that Barbie came to represent. Mattel's use of intellectual property as a mechanism of desired regulation is obvious because of the self-evident connection between sex and Barbie. But other owners routinely use intellectual property for the same ends: one need only take a walk in a high-end mall to see exactly the same intellectual property lessons encoded in the displays for Louis Vuitton bags, Chanel shoes, and NFL sweatshirts.

## V. THE VENUS OF HAWTHORNE

But if Barbie's substance is the very essence of the mid-twentieth century, her form is nearly as old as humanity, and it is her form that gives her mythic resonance. Barbie is a space-age fertility symbol: a narrow-hipped mother goddess for the epoch of cesarean sections. She is both relentlessly of her time and timeless. To such overripe totems as the Venus of

Willendorf, the Venus of Lespugue, and the Venus of Dolni, we must add the Venus of Hawthorne, California.<sup>151</sup>

What does Barbie tell us about intellectual property, and vice versa? In sum, the story of Barbie shows us the deep links between intellectual property laws, desire, sex, and commercial gain. Barbie is Word made Flesh. She is a fertility goddess who can never be reproduced without permission from corporate headquarters; she is the Venus of Hawthorne, California, the original home of Mattel. She is sexy but cannot be used in a way that connotes sex. Yet sex suffuses every part of Barbie as cultural object, every part of Barbie as intellectual property, every part of Barbie as Word. This is obvious in her form and in the nature of the actions that we have seen Mattel engage in, as well as in the sin of Barbie's birth. But it is also present in the very intellectual property system itself. Mattel turned intellectual property into an engine of desire, and a mechanism of consumer chastity. In the hands of Mattel, the intellectual property system became a technology for the maintenance of desire through control over the purity of Barbie's image. As such, the intellectual property that is Barbie is only available to the select. If this means that desire can only be fulfilled and pleasure can only be had upon payment of a fee, well, Barbie's real mother, Lilli, was familiar with that type of transaction.

Beyond this signal lesson about intellectual property and desire, we learn a great deal from studying how Mattel used and adapted intellectual property to create Barbie, the doll and the concept. We can see how commercial imperatives dictated a large part of Mattel's litigation strategy over Barbie, but not always. Finally, we can see the strength of the trademark system applied as a means of control over the idea of a Midwestern girl from Wisconsin, a "teenage fashion model" who reshaped the world.

The intellectual property history of Barbie is a story of power and control and money and desire. It tells us how intellectual property works in reality. It is the story of a doll from 1959, who is much more than a doll now. It is the story of the Word, made Flesh-toned.

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151. LORD, *supra* note 3, at 74-75.