

**THE FINE ART OF FILM: VISUAL ART APPEARING
IN MOVIES, TV AND MULTIMEDIA WORKS**

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A rash of highly-publicized lawsuits and a recent Second Circuit opinion have sent a clear message to attorneys advising clients in the film, T.V. and multimedia industries that using copyrighted visual art (paintings, photographs, sculptures, posters, toys, etc.) as props or set decorations in movies or other audiovisual works without permission may constitute copyright infringement, be beyond the limits of “fair use” and trigger costly federal copyright litigation. Producers of television, video, motion picture and multimedia works (collectively “Audiovisual Works”) as well as film and T.V. distributors, video game developers, art directors, production designers and their attorneys and insurers should take note of the following practical suggestions, licensing guidelines and analysis of published and unpublished court opinions interpreting an array of state and federal statutes protecting works of visual art.

Copyright Law

The U.S. Copyright Act¹ gives owners of copyrighted artworks a number of

exclusive rights violated by the unauthorized use of the art in Audiovisual Works. Depending on the circumstances, these may include the right to reproduce, to distribute, to display publicly and the right to make derivative works based on the art.² Although the Visual Artists Rights Act of 1990 gives moral rights protection to authors of specified works of “visual art”, the Act expressly excludes from its scope, false attributions, alterations, mutilations and other moral rights violations of visual art in motion pictures, computer programs and other Audiovisual Works.³ Similar moral rights laws exist in many European countries but do not uniformly exempt Audiovisual Works. For this reason, laws of relevant foreign jurisdictions should be reviewed before an Audiovisual Work is distributed internationally, particularly in the home country of the artist whose work is being used without permission.⁴

Fair Use

Invariably, counsel for the producer or distributor of the allegedly infringing Audiovisual Work will invoke the doctrine of “fair use”⁵ in defense of claims for using artwork without permission. For several reasons however, there is considerable uncertainty inherent in relying on a fair use defense. In essence, fair use is an equitable doctrine, inviting subjective rulings of trial judges often swayed by personal prejudices, irrelevant facts and visceral reactions. Further uncertainty arises from the crazy-quilt of inconsistent and irreconcilable trial and appellate decisions from District and Circuit

courts across the country departing from common law case precedent and according undue weight to the four non-exclusive, Copyright Act section 107 statutory factors enacted in 1978⁶. A more enlightened analysis and application of the law of fair use appears in Justice Souter's U.S. Supreme court majority opinion in *Campbell v. Acuff-Rose Music, Inc.*,⁶ ⁷in Judge Pierre Leval's decision in *American Geophysical Union v. Texaco, Inc.*⁸ and Judge Leval's 1997 Nimmer lecture and earlier article, "*Toward a Fair Use Standard*".⁹

Alternate Grounds For Liability

Additional statutory and common law liability for using or imitating artworks, particularly famous works or works of famous artists, include Lanham Act section 43(a)¹⁰ liability for "passing off" an imitation work as the work of the artist. Further, trade dress protection for the distinctive, original and non-functional style of an artist has been recognized in more than one case.¹¹ Visualizing ersatz Norman Rockwell, Leroy Neiman or Roy Lichtenstein-style artworks is not difficult. But for the average moviegoer, distinguishing the knock-offs from the originals may be virtually impossible.

Liability for fraudulent sale of counterfeit artworks is beyond the scope of this article, as is a filmmaker "conspiring" to create counterfeit works and forgeries, documented in Orsen Well's film, "*F is For Fake*." Defamation is another possible ground for suit where inferior artwork is passed off as the plaintiff's work or erroneously

attributed to the wrong artist.¹² A claim under New York state's Artist's Authorship Rights Act¹³ was brought in a recent case involving the unlicensed use of a poster in a television program.¹⁴

Also beyond the scope of this article is liability for trademark infringement and dilution arising from trademarks, product packaging and logo artwork appearing on screen, and the related practice of "product placement" - where trademark owners voluntarily supply producers with free products to be used as props or set dressing in the hope that the trademark owner will benefit from the implied endorsement of a hugely popular, world famous movie star.

Cases

Television and Video.

In the recent Second Circuit decision in *Ringgold v. Black Entertainment Television, Inc.*,¹⁵ arguably the nation's most influential appellate panel on copyright matters handed down some bright-line rules in a case involving a poster of a photograph of a mixed media textile work entitled "Church Picnic Story Quilt" used in an episode of a nationally broadcast television situation comedy.

The Court's opinion is a holy grail for producers and artists. First, it makes explicit that set decorations do not enjoy blanket immunity from copyright infringement liability

merely because a work is in the background of a shot.

The Court assessed the substantiality of the copying of the visual art by using an “observability” test, well suited to the audio-visual medium of television. In no particular order of importance the Court considered factors including: the number of times the work appeared; the duration of each shot in which the work appeared; the amount of the work visible in each shot; the total on-screen time the work was displayed; the relative location and prominence of the work within the shot(s); and the lighting, focus and camera angles showing the work.

The court noted that in total, the poster appeared on screen for 26.75 seconds and in combination with the foregoing factors, found the Plaintiff’s work was “plainly observable.”

In further support of its decision, the Circuit Court cited regulations promulgated by the Librarian of Congress requiring public broadcasting companies to pay royalties to owners of copyrights to certain works of visual art used in television programs, either as a “featured” or “background” use.¹⁶ The court found it significant, if not determinative that the Librarian prescribed royalty payments even for “background uses” where the work appeared in less than “full screen” or “substantially full screen” or “full screen for 3 seconds or less.” Despite the literal reading of the regulation, it is doubtful that the Librarian intended that every use be royalty-bearing, regardless of how *de minimus* it may have been.¹⁷ But the court seized on the 26 aggregate seconds that the work appeared in less than full screen display and ruled the use to be more than *de minimus* and infringing.

In finding the fair use defense to be inapplicable the court used both the common law test of whether or not the use was “transformative,” as well as the statutory fair use factors enumerated in section 107. The Court found that the use was decorative and therefore not “transformative” and not even “remotely similar to any of the section 107 illustrative fair use categories of criticism, comment, news reporting, teaching or research.

Acknowledging the value of graphic and fine art as set decorations not only in television, but also in motion pictures and live theatrical productions, the Court admonished producers against using art as set decoration without paying fair compensation:

“[J]ust as members of the public expect to pay to obtain a painting or a poster to decorate their homes, producers of plays, films, and television programs should generally expect to pay a license fee when they conclude that a particular work of copyrighted art is an appropriate component of the decoration of a set.”¹⁸

The opposite result was reached in an unpublished District Court opinion in *Frank Schaffer Publications, Inc. vs. The Lyons Partnership*.¹⁹ In the so-called “Barney” case, California Central District Court Judge Manuel Real denied a plaintiff’s motion for preliminary injunction in a copyright infringement action brought by the publisher/copyright owner of educational charts and wall decorations used as set dressing in up to 30 “Barney and Sons” children’s television programs. The injunction was denied

despite the fact that the programs containing the unlicensed wall charts were broadcast for over a year, twice a day, six times a week and then distributed on videotapes.

In a lengthy opinion published only in the *Entertainment Law Reporter*,²⁰ Judge Real catalogued a number of factual considerations in reaching a decision that the taking was *de minimus* and a non-infringing “fair use” under 17 U.S.C. § 107, relying almost exclusively on the four statutory fair use factors in section 107.

In finding the use was “incidental” and “fair”, the court examined the extent of the unauthorized use and noted the plaintiff’s works were: usually in the background; often not in focus; a “tiny fraction” of their original size; often partially or wholly obscured by one or more actors; only discernable in their entirety “for a few seconds”, which the court characterized as “fleeting”; used only once in a “featured” manner, i.e., where the actors interacted with the plaintiff’s work; and not used in their entirety. The court addressed the third statutory factor of “amount and substantially of the portion used” by mathematically quantifying that only “25%”, “8/30ths”, “5/32nds” of the work was actually used in Defendant’s programs.²¹

In addressing the issue of whether copying occurred, Judge Real used the “ordinary observer” test set forth in *Transgo, Inc. v. Ajac Transmission Pts. Corp.*,²² (whether the work is recognized by an ordinary observer as having been taken from the copyrighted source,²³ and *Warner Bros. v. American Broadcasting Cos.*,²⁴ holding the literal copying of a small and unusually insignificant portion of the plaintiff’s work is not copyright infringement.

But it appears that the fourth statutory fair use factor, the character and nature of the defendant's work, tipped the scales against Plaintiff. Because "Barney" is a PBS program viewed almost exclusively by young children, notwithstanding the obvious commercial elements of the programs and videos, Judge Real concluded that the unauthorized use was for "educational" purposes, pointing out that Plaintiff's works contained in large part factual material, (geometric shapes, etc.) and citing a law review Note quoted in dicta in a 5th Circuit case that "courts have tended to be most receptive to unauthorized [fair] use of educational, scientific and historical works."²⁵

Motion Pictures.

Several recent motion pictures attracted both trademark and copyright infringement claims over visual art. In 1997 Warner Brothers was sued by a sculptor and the Protestant Episcopal Cathedral Foundation of the District of Columbia on copyright, Lanham Act, anti-dilution and federal moral rights grounds over a religious sculpture, *Ex Nihilo*, appearing in the Satanic-themed film "*The Devil's Advocate*."²⁶ In the film, a bas-relief sculpture similar to the Plaintiff's sculpture initially appears as an imposing, dominant feature in the background of one of several sets. In a climactic scene the nude human figures in the sculpture are animated and "morphed" using CGI (computer generated images). Figures intended by the artist to depict "the whole community of man struggling to be born and formed as a group out of the torrential void of creation," begin

writhing lasciviously and according to the complaint: “engaging in sexual acts.” By the magic of Hollywood, the Plaintiff’s biblical sculpture is transformed into what the Plaintiffs allege to be “an embodiment of all things demonic.”

The “demonic” sculpture is also featured on Warner Brothers’ “*Devils Advocate*” website, and in a section entitled “Hell’s Decor” users were reportedly invited to download a copy of the sculpture onto their computers for use as background “wallpaper,” encouraging the copying of the allegedly infringing work by conceivably millions of website visitors.

Because the art was featured both in its static and animated forms in full-frame closeups in scenes totaling a minute or more, if what was used is indeed a substantially similar copy of the Plaintiffs’ sculpture and not Warner Brothers’ original creation merely based on the idea of the Plaintiffs’ work, *de minimus* and fair use defenses may not prevail. And even if the movie version of the work was not substantially similar enough to constitute copyright infringement it may meet a lower standard of similarity, under trademark law’s “likelihood of confusion” test. The complaint alleges that because *Ex Nihilo* had been featured as the artist’s “signature” work, it functioned as the artist’s trademark. Thus, it is alleged that Warner Brothers’ “inferior, distorted” copy constitutes trademark and trade dress infringement and trademark dilution under section 43(a) of the Lanham Act.²⁷ The artist’s final claim arising out of the unauthorized morphing of his piece was brought under the Visual Artists Rights Act²⁸ which provides for damages and attorneys’ fees for intentional distortions, modifications or mutilations of a work which

are prejudicial to the artist's honor and reputation.²⁹

The *Devil's Advocate* case was settled with Warner Brothers agreeing to pay an undisclosed sum to the artist and agreeing further to remove the offending scenes from the videocassette versions of the film. Another case by a different sculptor also against Warner Brothers, *Leicester v. Warner Brothers*, the so-called "Batman" case,³⁰ had the opposite result.

In 1994 Warner Brothers used part of an office building in downtown Los Angeles and four towers which formed part of the street wall side of the building in the motion picture *Batman Forever*. Although Warner Brothers obtained permission from the owners of the building, sculptor Andrew Leicester did not give permission to film his copyrighted, monumental, multi-part sculpture which included the four towers. The federal District court in Los Angeles ruled in favor of Warner Brothers and the artist appealed.

On November 29, 2000 in an opinion written by Judge Pamela A. Rymer (concurring opinion by Judge A. Wallace Tashima, dissent by Judge Raymond C. Fisher), the Ninth Circuit Court of Appeals affirmed the trial court's holding that portions of the artist's sculpture including the four towers bearing purely decorative, sculptural features were part of an "architectural work," and thus 17 U.S.C. §120(a), (the "public place/pictorial representation" exception to copyright protection,) permitted Warner

Brothers to photograph and use the sculpture without the artist's permission. Judge Fisher's thoughtful dissent pointed out that the section 120(a) "public place/pictorial representation" exception to copyright protection would not apply if the sculptural towers comprising part of the subject sculpture were "conceptually separable" from the adjacent office building.

In *Sandoval v. New Line Cinema Corp.*,³¹ the motion picture "Seven" was the subject of a copyright infringement suit which was successfully defended by New Line Cinema over the unauthorized use of ten photographs appearing as background set decorations. Several portraits by a photographer appeared in the background of ten separate camera shots lasting less than 30 seconds in total in the film. The Court granted defendant's summary judgment motion and dismissed the Plaintiff's claim, finding the photographs to be "virtually undetectable" in the picture. The dismissal was affirmed by the Second Circuit Court of Appeals.

Two important New York District Court decisions, *Woods v. Universal City Studios*,³² and *Amsinck v. Columbia Pictures Industries*,³³ reached opposite results. In *Woods*, the artist Lebbeus Woods obtained one of the two reported preliminary injunctions against a motion picture in the past 30 years for infringing his copyrighted drawing "*Neomechanical Tower (Upper) Chamber*" in Universal's motion picture, "*12 Monkeys*". Wood's drawing depicted a high ceiling, a chair mounted on a vertical rail attached to a wall and a sphere suspended in front of the chair with cables looping

beneath the chair and the sphere. In the opening scenes of Universal's film, the main character (played by Bruce Willis) is brought into a room and seated in a chair attached to a vertical rail on a wall with a sphere. Terry Gilliam, the director of *12 Monkeys* admitted he had seen a copy of Wood's (*Upper*) *Chamber* drawing and had discussed it with the film's production designer.

In rejecting Universal's claim of *de minimus* infringement constituting fair use, the court pointed out the infringing footage lasted for five of the film's 130 minutes and described the "striking detail" of Universal's 3-dimensional copy of plaintiff's 2-dimensional drawing.³⁴ That the lead character was actually seated in the chair in four different scenes, including at the start of the film may also have weighed against a finding of fair use.

In *Amsinck*, however, the plaintiff's case was dismissed on Columbia Pictures' summary judgment motion. Plaintiff's artwork consisted of pastel colored teddy bears which the artist had licensed for use in connection with various household articles and toys, including a "Baby Bears Musical Mobile" which was used in Columbia's film "*Immediate Family*". The mobile appeared in "several" scenes lasting for periods ranging from 2 seconds to 21 seconds with a total exposure of 1 minute, 36 seconds. The Baby Bears were clearly visible in close-up shots but barely visible in the distant background in other shots.

Two basic findings underpinned the court's ruling. The most surprising was the court's conclusion that because the use of the mobile in a motion picture was so "different

in nature from the actual copyrighted [work]” and its appearance was “fleeting” and “impermanent,” the use did not constitute a “copy” of the plaintiff’s work,³⁵ citing *Mura v. Columbia Broadcasting Systems, Inc.*,³⁶ which held that the broadcasting of hand puppets on a television show was not a “copy” for copyright infringement purposes.

The court also boldly declared that the single most important factor in a fair use analysis was the effect on the potential market of the infringed work. Finding little or no danger that the infringing movie would take the place of the artwork in the marketplace, the court gave little weight to accepted precedent that the reproduction of an entire work is generally not considered fair use, *American Geophysical Union v. Texaco, Inc.*,³⁷ cited the equitable maxim of “*de minimus non curat lex*”, and dismissed plaintiff’s case.

Multimedia Works

In the area of electronic, CD Rom and other computer works, the case of *Jefferson Airplane v. Berkeley Systems, Inc.*,³⁸ reminds would-be plaintiffs and their counsel of the importance of strict compliance with copyright registration formalities. In *Jefferson Airplane, supra.*, the defendant used the “flying toasters” art from a Jefferson Airplane album cover to create an animated computer “screen saver.” Unfortunately, the plaintiff based its claim on a copyright registration covering only the album sound recording and not the album cover art. Because the registration did not include or even mention the album cover art, the plaintiff failed to satisfy the statutory registration prerequisite to

bringing a copyright infringement claim,³⁹ and the complaint was dismissed.

Television Commercials

One of the most interesting cases involving the unauthorized use of a copyrighted doll in a television commercial was filed in the Central District federal court in California. The suit was brought by the Mattel Company, guardians of the multibillion dollar *Barbie* doll franchise, against Nissan Motors over the featured appearance of a Barbie-scale doll in an animated television commercial.⁴⁰ The primary characters of the 60-second spot are two dolls, named Roxanne and Nick, apparently on a date in a toy Nissan sports car.

As in the *Jefferson Airplane* case, *supra.*, basic copyright registration formalities play a key role in the defense strategy. Defense documents question the validity of Mattel's Barbie copyright on the basis that one or more early Barbie copyright registrations failed to disclose that Barbie was a virtual replica of a 1950s German adult toy doll named "Lillie".

Notwithstanding that Mattel later acquired the copyright to Lillie from the German manufacturer in 1964, because Barbie was originally created without the permission of Lillie's copyright owners, Nissan argues, Mattel's Barbie copyright registration is invalid for at least two reasons. First, because the original registration did not disclose the derivative nature of the Barbie prototype; and second, because Mattel's Barbie design

contained insufficient original expression beyond the Lillie doll to qualify for copyright protection.

Both the Nissan Barbie case and the *Barney* case *supra.*, illustrate the irony of how overzealous enforcement of copyrights can backfire on Plaintiffs or yield pyrrhic victories.

Practical Guidelines

The foregoing statutes and decisions provide no bright line test for determining whether a particular use will be substantial enough to obtain a preliminary injunction or final judgment. Counsel for producers of Audiovisual Works should not only advise their clients to avoid liability in the obvious situations, but should also be sensitive to less obvious potential infringements for using copyrighted carpet designs, wall paper or textiles (i.e., bedsheets, bath towels, etc.). Although the rules may not be susceptible of precise definition, empirical data from interviews with studio lawyers and over 20 years of practical experience suggest caution in the following circumstances: An actor, particularly a speaking or lead actor, handles or uses the art; the art appears in its entirety, in full screen, or in a close-up shot for more than a few seconds; the art is used in recurring episodes of a network television program; the art is particularly large, such as murals or a monumental sculpture; the art is owned by a competitor or notoriously litigious plaintiff, is often bootlegged or counterfeited or is the subject of prior litigation.

Examples include motion picture key art, posters or toys depicting characters such as Disney's Mickey Mouse, Donald Duck, etc., Warner Bros.' Looney Toons, Paramount's Star Trek sets, props or cast, Mattel's Barbie doll, or even the Eveready battery bunny.⁴¹

Licensing Practices

To avoid the risks, expense and hassle of infringement claims, counsel for producers of Audiovisual Works should advise their clients to obtain a license before using illustrations, drawings, paintings, sculptures or other two- or three-dimensional works of graphic or visual art.

Licenses permitting the use of art are usually obtained either from the artist or the artist's representative or gallery. In this author's experience, reuse fees or royalties are not usually paid for reruns of television programs or when theatrical motion pictures are released on video or broadcast on television.

Licenses are usually granted in exchange for either a flat fee or a rental payment, with more paid for a "major" use (i.e., more than a few seconds, full frame or close-up) than for a "minor" use. License fees are not usually paid for merely "incidental" uses (i.e., less than two seconds or less than 20 percent of the work shown on screen). Flat fees for using art in a full-length feature motion picture, nationally broadcast video or television program range from approximately \$1,000 to \$5,000 for a major use and between \$200 and \$2,500 for a minor use with higher fees available in special

circumstances. Rental fees range from 10 to 25 percent of the retail price of the art for each week (or part of a week) the art is used by the production entity.

Retroactive licenses in the above ranges are paid when art is used without permission, plus a reasonable additional sum (20 to 50 percent of the license fee) if the services of an attorney are required.⁴²

Using artwork in a film or T.V. set to decorate, illustrate or express a dramatic vision can be as vital to a successful production as the script, costumes, music or special effects. One of the only cases in the past 30 years where a preliminary injunction halted the distribution of a film resulted from failing to obtain an artist's permission to use a drawing as the basis for a set design.⁴³ With so much at stake production counsel should strictly limit their reliance on the fair use defense and should urge their movie clients to accept licensing and clearance of artwork and set decorations as a standard industry practice.

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ENDNOTES

1. 17 U.S.C. §101 et seq.
2. 17 U.S.C. §106
3. 17 U.S.C. § 106A, 101
4. See, Loi du 11 Mars 1975 Sur La Propriété Littéraire et Artistique, (France).
5. 17 U.S.C. § 107
6.
 - 1) The purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
 - 2) The nature of the copyrighted work;
 - 3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
 - 4) the effect of the use upon the potential market for or value of the copyrighted work.
7. 510 U.S; 569 (1994)
8. 37 F.3d 881, superceded 60 F.3d 913 (2d Cir. 1994)
9. Pierre N. Leval, Nimmer lecture: Fair Use Rescued, 44 U.C.L.A. L.Rev. 1449, (1997); Toward a Fair Use Standard 103 Harv.L.Rev. 1105 (1990).
10. 15 U.S.C. §1125(a)(1)
11. See Romm Art Creations, Ltd. v. Simcha International, 786 F.Supp. 1126, (E.D.N.Y. 1992); Hartford House Ltd. v. Hallmark Cards, Inc., 647 F.Supp. 1533, 1543 (D. Cob. 1986), *aff'd* 846 F.2d 1268 (10th Cir. 1988), *cert. denied*, 488 U.S. 908 (1988)
12. See Lind, *The Visual Artist and the Law of Defamation*, U.C.L.A. Ent. L. Rev. Vol.2, Issue 1 (Winter 1995)
13. N.Y. Arts & Cult. Affairs Law §14.03 (McKinney Supp. 1995)
14. See *Ringgold v. Black Entertainment Television, Inc.*, 126 F.3d 70 (2d Cir. 1997), discussed *infra*. After erroneously granting summary judgment for defendants on copyright infringement claims, the District Court declined to exercise its supplemental jurisdiction over the state moral rights claim and dismissed the action. The Second Circuit reversed and remanded the case instructing the District Court to give “renewed consideration” to Plaintiff’s state claims under the New York Artist’s Authorship Rights Act. *Id.* at 81.
15. *Ibid.*

16. 37 C.F.R. §253.8(b)(1)(i)(A), (B)
17. Read literally, virtually any use, regardless of how fleeting, fits into the regulation's definition of "background use." See *Frank Schaffer Pub. Inc. v. The Lyons Partnership*, fn. 19, *infra*.
18. *Ringgold, supra.* at 80
19. CV 933614R (August 25, 1993)
20. (March 1994) ELR 15:10:19
21. But see *contra.*, *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 566 (1985).
22. 768 F.2d 1001, 1018, (9th Cir. 1985), quoting *Bradbury v. Columbia Broadcasting Sys.*, 287 F.2d 478, 485 (9th Cir. 1961), *cert. dismissed* 368 U.S. 801, *cert. denied* 474 U.S. 1059, (1986).
23. *Ibid.*
24. 720 F.2d 231, 242 (2d Cir. 1983)
25. *Frank Schaffer Publications, Inc., supra.* citing *Triangle Publications v. Knight-Ridder Newspapers*, 626 F.2d 1171, 1176 (5th Cir. 1980).
26. *Fredrick Hart and The Protestant Episcopal Cathedral Foundation of the District of Columbia v. Warner Brothers, Inc. and Time Warner, Inc.*, Civ. No. 97-1 956-A (E.D. VA. 1997).
27. 15 U.S.C. §§1125(a)(1)(A),(B); 15 U.S.C. §1125(c)
28. 17 U.S.C. §106A(a)(3)
29. As discussed *supra*, the Visual Artists Rights Act expressly excludes from its scope of protection, prejudicial alterations occurring in motion pictures. 17 U.S.C. §106A(c)(3); 17 U.S.C. §101(A),(B), definition of "work of visual art."
30. *Leicester v. Warner Brothers* 232 F 3d 1212 (9th Cir.2000).
31. *Sandoval v. New Line Cinema Corp.*, 973 F. Supp. 409 (1997); *affirmed*, 147 F. 3d 215 (2d Cir.1998)
32. 920 F.Supp. 62 (S.D.N.Y. 1996)
33. 862 F.Supp. 1044 (S.D.N.Y. 1994)
34. 920 F.Supp. at 65

35. 862 F.Supp. at 1048
36. 245 F.Supp. 587, 590 (S.D.N.Y. 1965). Note however that *Mura* was decided before the 1976 Copyright Act provided copyright owners with a display right, see 17 U.S.C. §106(5).
37. 37 F.3d 881, superseded 60 F.3d 913 (2d Cir. 1994).
38. 886 F.Supp. 713 (N.D.CA. 1994)
39. 17 U.S.C. §411
40. *Mattel v. Nissan* CV97-6955 (C.D. CA. 1997). See also, *Mattel v. MCA*, CA97-06791 (C.D. CA. 1997); *Mattel v. Miller*, CV97-2173 (C.D. CA. 1997).
41. *Eveready Battery Co. v. Adolf Coors Co.*, (N.D. Ill. 1991) 765 F.Supp. 440; *Dr. Pepper Co. v. Sambo Restaurants, Inc.*, 517 F.Supp. 1202 (N.D. Tex. 1981); *Mattel v. Nissan*, *supra*.
42. See, Graphic Artists Guild, *Handbook of Pricing and Ethical Guidelines*, (10th Ed.2001) pg. 249
43. See Note 31 *supra*.