

## Attorney's Fees in Copyright Infringement Cases

One of the benefits of registering your copyright in a work with the US Copyright Office is the opportunity to seek recovery of your attorney's fees if you subsequently pursue an infringement action and are the "prevailing party."

Without registration prior to the alleged infringement having taken place, the weapon of being able to collect attorney's fees from the defendant will be unavailable to you. However, before you choose to sue another party for copyright infringement, given the language of the statute, be advised that should you be unsuccessful in your claim, you could find yourself paying the legal fees of your adversary.

That is exactly what happened to Mattel, the creator of Barbie dolls, in its eight-year unsuccessful copyright infringement battle with MGA Entertainment, creator of the Bratz dolls. The Ninth Circuit upheld the trial court's award requiring Mattel to pay MGA more than \$137 million for its attorney's fees. Ouch!

Section 505 of the Copyright Act ("the Act") gives the trial judge the discretion to "award a reasonable attorney's fee to the prevailing party. . . ." In deciding whether to award attorney's fees, a trial judge determines who prevailed and whether the award will further the purposes of the Act. Merely because the plaintiff asserts claims that might be considered "objectively reasonable," such will not thwart a prevailing defendant from successfully arguing for its attorney's fees.

Urging meritorious copyright defenses can be one way to advance the purpose of the Act, which is "to stimulate artistic creativity for the general public good." In the battle of the dolls, the trial court decided that because MGA vigorously defended against Mattel's claims, competition in the market place was allowed to advance.

### **What to take away from Mattel's expensive lesson?**

Before pursuing a claim of copyright infringement, perform a careful analysis of what defenses the infringer is likely to assert and whether you can overcome them. Also, be certain that you have exhausted all other avenues to resolve your dispute - including mediation or other alternative means of dispute resolution. Remember, once you enter into litigation, it can be difficult to extricate yourself from the consequences of that choice.