

THE LEGAL DEPARTMENT

Loopholes & Legalese

HAVE YOU REVIEWED your employee agreements recently? This is a timely question given the epic battle between Mattel and MGA over Bratz dolls. One of the central disputes in that case concerns an employment agreement, and its genesis is instructive on how to avoid similar conflicts.

The case began in 2004 when Mattel sued Carter Bryant, a former Mattel designer, accusing him of violating his agreement with and duties owed to Mattel, and of infringing Mattel's copyright. Thereafter, the case swelled with Bryant and his new employer, MGA Entertainment, filing their own complaints against Mattel. Eventually Bryant settled with Mattel, but MGA did not.

One of Mattel's key arguments was that Bryant conceived of the name "Bratz" and created drawings of the "Bratz" dolls while employed at Mattel, and that the name and designs belonged to Mattel. Mattel's claims rested on a broad interpretation of an "Inventions Agreement" Bryant signed when he began working for Mattel, which states in relevant part (with emphasis added):

[I...agree] to communicate to [Mattel]...all inventions...conceived...at any time during my employment by [Mattel], [and] I hereby assign to [Mattel]...all my right, title and interest in such inventions, and...in any...copyrights...or copyright applications based thereon...[T]he term "inventions" includes, but is not limited to, all discoveries, improvements, processes, developments, designs, know-how...whether patentable or unpatentable...[This agreement] shall not apply to an invention that the employee developed on his or her own time... except for those inventions that...relate at the time of conception or reduction to practice of the invention to the employer's business...

MGA and Bryant, of course, argued for a more narrow interpretation of the agreement. In a series of rulings, the District Court agreed with Mattel and concluded that the Inventions Agreement conveyed to Mattel "any Bratz-related 'inventions' (including any designs, improvements, ideas, concepts and copyrightable subject matter), that Bryant created while employed with Mattel."

Though the decision is on appeal, and there are yet further proceedings ongoing at the district court level, the lesson is clear. Unless you enjoy spending a lot of time and money with your lawyers in court, take a small amount of time upfront with your lawyers to carefully review and craft any employment agreement. It may avoid a costly fight down the road.

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An Adult Appeal

Who said toys were just for kids?

By Richard Gottlieb

All of us in the toy industry are aware that there are adults, teens and seniors who purchase toys for their own use. We know they buy games, puzzles, dolls action figures and collectible cars for their own enjoyment. We are also aware that they love licenses like Transformers, Star Wars, GI Joe and Star Trek.

Yet, we as an industry for the most part act as if we were in the children's business. Walk into virtually any toy department or toy store and you will get the overwhelming sense that you are in a place exclusively for children. The product mixes, the signs, the fixtures, the ads and the licenses all make it very clear that we think toys are strictly for kids.

In fact, the very outlook of some in the toy industry is that if adults buy toys for themselves there is something wrong with them. Let me give you an example: A few years ago I was speaking with a clerk in a major toy chain who told me that he and the other staff members used to hide the new action figures when they arrived so that the adult collectors would not buy them all. They wanted to save them for the kids. As the clerk told me this, he acted as if there was some-

thing wrong with adults who purchased toys. I wondered at the time how many sales that store lost because some of the staff wanted to prevent adults from buying toys.

recession in 2008 but 13 percent is a surprisingly large amount for an industry that doesn't do much to market its products specifically to adults.

A working example

Imagine a toy store or department that is not designed for kids but for everyone. In addition to a large kid's section but there would sections for teens, adults and maybe even seniors. In teen and adult departments you would find strong presentations of licenses like Family Guy, The Simpsons, Star Wars, Star Trek and South Park. You would find action figures, miniature cars, games, puzzles and sophisticated construction sets. In short, you would find an adult's paradise.

Can't you just see a family hitting the toy department together with kids going to their sections while Mom and Dad go to theirs? Well, I actually did see it. It exists at the new Barnes & Noble flagship store on Lexington Avenue and 86th Street in Manhattan.

They have created a beautiful game and puzzle department on the main floor that is clearly meant for adults. This is telegraphed through content, through positioning and through signage.

It is purposely situated on a different floor than the children's toy department. The product mix consists of puzzles and games for the discerning adult shopper. The signage is appropriately sophisticated and suggests that this is clearly a place for adults.

The space allocated to the department is ample, running by my calculations to 140 running feet, with most shelving coming in at 8 feet in height. The game mix consists of European and American games that are categorized by anything from "Abstract Strategy" to "Adventure." The puzzle section is a strong mix of European and American manufacturers that run the full range of price points. In fact, a number of retails were over \$50, and from what I understand from talking to Barnes & Noble, they are selling. Clearly, the consumer is seeing products he or she would not see in most child-oriented toy stores and is buying them.

Barnes & Noble is positioned to be a breakout player in toys. It could be the first major chain to truly focus in on the allusive adult toy end user.

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| Age group | Annual \$ 2007 | Annual \$ 2008 |
|-----------|----------------|----------------|
| 12-17 | 5% | 5% |
| 18-34 | 5% | 4% |
| 35+ | 5% | 4% |
| Total | 15% | 13% |

Source: The NPD Group/Consumer Tracking Service

The numbers

Well, adults love to play and they love to play with toys. Yet, how big is the current adult/teen market? Those numbers are hard to come by. Perhaps it's because we never ask for them. Well, I did.

My first stop was to speak with someone in the action figure industry. I wanted to know what percentage of action figures were purchased by adults for their own use. He asked to remain anonymous but did tell me that, according to their figures, 33 percent of all action figures sold are purchased by adults for their own use. Does that surprise you? I have to admit, it surprised me.

My next stop was to ask NPD what kind of information they had on the adult/teen market. They graciously provided me with the following US sales data showing toy sales to end user adults and teens. The information is expressed in the percentage of total toy dollars spent. [See table above]

It looks like adult purchasers took a hit due to the

The fight between Mattel and MGA Entertainment over rights to the Bratz doll franchise has cost the companies involved a reported \$100 million in combined legal fees in the five years since litigation began. —Marc S. Cooperman