

THE LEGAL DEPARTMENT

A Picture Problem

SO, YOU HAVE A LICENSE FOR a popular children's character, including the exclusive right to develop and sell toys incorporating that character. You, therefore, own and control all the copyrights relating to the toys you make and sell, right? Not necessarily. A federal appeals court recently concluded that you probably do not have all the rights you think, unless you have a proper contract in place.

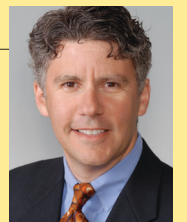
As most PLAYTHINGS readers know, the owner of Thomas & Friends licensed the right to toys of its characters to Learning Curve International. In turn, Learning Curve hired a photographer to take photos of its Thomas toys for promotional materials. After several years, Learning Curve stopped using the photographer's services, but continued to use the photos he took of the company's toys in advertising, packaging and on the Internet. Not surprisingly, the photographer sued Learning Curve for copyright infringement.

Learning Curve defended the charge by arguing that the photos were "derivative works" of its toys and that they were not original enough to warrant copyright protection. (Generally speaking, a "derivative work" is a work based upon a preexisting work.) The appellate court disagreed. It concluded that even though the photographs were derivative works of Learning Curve's toys, the photographer had contributed sufficient additional originality in the artistic and technical choices that went into the creative process of depicting the toys in the photos.

Learning Curve also argued that the photographer did not have authority to register the copyrights to the photographs of its toys. Again the appellate court disagreed. Normally, because Learning Curve owned the underlying work (the toys), it would own the right to create derivative works from the toys. Here, however, by hiring the photographer to take photos of its toys, copyright law says Learning Curve gave up the copyrights in those photos...probably. Why couldn't the court rule definitively for the photographer? Because the record was not clear whether Learning Curve and the photographer had agreed to alter the general rule in their contract.

The court noted that one way to avoid the situation in which Learning Curve found itself was to make clear by contract that the parties agree who owns the copyrights in any derivative works based on its toys. And that's the lesson for this month: Negotiating a good contract in advance will preserve your copyrights in your toys and the derivative works from your toys.

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Millennials Rising

'Building Our Future' folks on 'Generation Next'

By Richard Gottlieb

[This is the third in a series of articles that analyzes the results of the Building Our Future Toy Conference organized by Richard Gottlieb's USA Toy Experts in conjunction with PLAYTHINGS in October 2009. The purpose of the conference was to explore the future of the toy industry and of play. It brought together 21 thought leaders from a variety of disciplines both inside and outside the toy industry to discuss a series of topics. The conversations were sometimes vigorous, sometimes funny and always interesting. The resulting articles serve to synthesize the participant's thoughts so that we can get a clearer picture of the opportunities and risks ahead. In this month's article, we take a look at the topics of consumers and the state of retail.]

The new consumer

The toy industry is faced with a rising generation of parents who have been raised with the Internet, cell phones, texting and social networking. They are called "Millennials," "Generation Y," "Generation Net" and even "Echo Boomers." Whatever you call them, they are very different from the Baby Boom and Generation Xers who came before them.

"My take away from all of this: If you don't have any Millennials in your organization, go out and hire some. They get it."

They are described as less consumerist, more communitarian and team oriented than their parents or grandparents. They are frugal and not into "things." What they do like are products that are functional and that are freighted with values with which they agree (think scooters and bikes). They are confident and feel empowered by the choices they make.

Millennials are into social networking, texting and in general are very comfortable with having a world of information and an infinite number of products available to them at their fingertips. What kinds of consumers will they be? That was the question that our attendees were asked to consider.

Attendees seemed both concerned and wary of this generation that didn't particularly like to consume. Never-the-less they dug in and came up with some interesting predictions on what the future looks like for the toy industry vis- a-vis this rising generation:

- Millennials are not into frivolous products so "novelty toys" are going to be at risk.
- They are, however, very much into function so toys that do sell will need to demonstrate value, values and longevity.
- This generation trusts their peers so bloggers, social networks and friends will have a bigger impact on the choices that these shoppers make. As a result, look for a continuing downward trend in traditional forms of advertising.

- Millennials act on the values that Boomers and Gen Xers only espoused, so look for green products and packaging to become far more important.

This next generation is also going to have a big impact on retailing, which not coincidentally, was the next topic our conference members considered.

Retail in the 21st century

We asked our participants to consider this question: The specialty and non-specialty retail markets have suffered from store erosion over the last few years. There is no toy industry without retailers (at least for now) so what is the future of retailing? Here is what our participants had to say:

- **Specialty retail is going to get stronger.** Participants had a growing respect for a new generation of specialty toy store owners that are seen as "hard-nosed" and do not engage in "emotional buying." They are technologically savvy and are therefore willing to ignore the established rules of the game (think sales reps) in order to embrace new ways of buying and selling (think the Internet). The recession hit these specialty retailers hard but those who survived are strong and growing. They are expanding the size of their stores and adding doors. They will be a force.

- **Paradigms may shift as toymakers become confident enough to test existing retail relationships** by engaging in direct commerce with consumers. Particular reference was made to Spin Master's TV-advertised 800 numbers and Hasbro issuing a catalog.

- **Brick-and-mortar retail is going to become far more experiential** as merchants realize that they must offer services that simply cannot be found on the Internet. The result: a more hands-on experience for consumers who will get to "test drive" more toys in-store before buying them; and a resulting evolution of toy stores into social centers where people go to play, not just to shop.

I want to again thank all of our participants for their insights and predictions. I am going to continue my trip into the future of play by holding a Building Our Future Conference in Europe this month in conjunction with the Spielwarenmesse International Toy Fair Nuremberg. I'll tell you all about it in a future article. Until then, keep your eyes on the future.

Richard Gottlieb is president of Richard Gottlieb & Associates, a provider of business development services to the toy industry. His 'Out of the Toy Box' blog can be read daily on Playthings.com. He can be reached at richard@usatoyexpert.com.



Millennials are the most ethnically/racially diverse generation in US history. 59.8 percent (a record low) are white; 18.5 percent are Hispanic; 14.2 percent are black; 4.3 percent are Asian; 3.2 percent are mixed race or other. —Pew Research Center