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Mickey & Me

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Unlike many of the symposium participants, I don't consider myself an intellectual property expert; I'm more of a consumer of intellectual property. I do have some credentials, however: I'm a Mickey Mouse fan from way back. I started reading Mickey Maus comic books in Vienna when I was about eleven. I would go down to a little corner store and buy a used comic book for two shillings. When I was done reading it, I would swap it for the next issue, for half a shilling, and rush home to read the next installment in Mickey's adventures. When I came to the United States, I was very surprised to learn that Mickey and the gang all spoke English. It took me many years to figure it all out.

My credentials also include a stint as an enforcer of intellectual property rights. My wife is a lawyer, and she used to represent Snoopy. It's really interesting being married to someone who enforces intellectual property rights: it becomes kind of an obsession. I found myself going into stores and surreptitiously sneaking up to little white dogs with black spots and checking under their tails, to see whether they were licensed by United Features Syndicate. I remember when we were in Las Vegas on a short vacation, and we passed by a novelty store where there was a T-shirt with a picture of Lucy on it. Lucy wasn't just sitting at her booth waiting to give advice, though; she was clutching her protruding belly and saying, "Damn you, Charlie Brown!" We bought the T-shirt, and lawsuits followed soon thereafter.

These days intellectual property is just one area of law I deal with, and every time I get into it, I have to re-think the principles involved. Some of our most deeply held values and beliefs tend to push us toward expanding intellectual property rights. Jessica Litman[1] mentioned a survey where 93% of the people agreed that you shouldn't be able to put Mickey Mouse on your product unless you're licensed. That's our natural reaction; it just seems right. It comes from, I think, our appreciation of the value of private property. We are a capitalist society, and we have a system of morality

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1. Jessica Litman, *Mickey Mouse Emeritus: Character Protection and the Public Domain*, 11 U. MIAMI ENT. & SPORTS L. REV. 429 (Spring 1994).

based on Judeo-Christian notions of right and wrong. We value the concept that people ought to have rights—exclusive rights—to the things they create. The basic notion is that if you go out and grow your own carrot, you get to eat it: it's your carrot. It's a notion that has a strong intuitive appeal. So every time I get involved in an intellectual property case, my sympathies tend to be with Snoopy and Mickey and Lucy. I have to ask myself each time: Why is intellectual property any different than real or personal property?

For one thing, intellectual property can be used by more than one person at a time. You can't use my house without interfering with my enjoyment of it, but you can use Mickey Mouse without taking him away from someone else. You may cause ill feelings, and you can diminish the return to the creator, but there is no reason why several people—an infinite number in fact—can't all create Mickey Mouse cartoons.

Another difference, as some of the symposium participants have stated, is that intellectual property can serve as a building block for the creative efforts of others. To take my house again, it's mine: unless I give you permission, you can't add a story to it. But once you put something out in the intellectual property domain--a song, a cartoon, and the like—other minds can easily build on it without interfering with your use. Indeed, there are very few clean slates out there; "[a]ll creators draw in part on the work of those who came before, referring to it, building on it, poking fun at it . . . ."[2]

Another difference between tangible property and intellectual property is that the value of intellectual property often depends on the interests and preferences of other people. The value of my house is determined in part by how it serves my purposes, and in part by market forces. The value of intellectual property depends on a lot of other things that are going on in society. Now, some of this value can be cultivated, and some of it can be mined, but some of it is really just a matter of happenstance: what the general public happens to find interesting or amusing at the moment. As Jessica Litman[3] and Leslie Kurtz[4] have pointed out, the converse is often true: intellectual property tends to build on elements that are out there already, and that don't necessarily belong to the crea-

2. White v. Samsung Elecs. Am., Inc., 989 F.2d 1512, 1515 (9th Cir. 1993) (Kozinski, J., dissenting from denial of rehearing en banc), *cert. denied*, 113 S. Ct. 2443 (1993).

3. *See supra* note 1.

4. Leslie Kurtz, *The Methuselah Factor: When Characters Outlive Their Copyrights*, 11 U. MIAMI ENT. & SPORTS L. REV. 437 (Spring 1994).

tor. It's often a continuing process, out of which something truly new emerges.

It is also much more difficult to contain intellectual property. Take, for example, the expression "Mickey Mouse." It's become a part of our language and has taken on its own unique meaning. This occurred through a process no one could predict or control. Our inability to contain intellectual property is something we have to take into account.

There are other things to consider when dealing with intellectual property as well. There are constitutional limitations in dealing with intellectual property. Restrictions on the use of intellectual property have to satisfy two requirements: They must promote the useful arts, and they must be for a limited duration.

We have a strong tradition of having things seep into the public domain. Shakespeare's works, perhaps more popular today than ever, belong in the public domain, as do those of Beethoven, Mozart, Dickens, and so on. Conceivably, we could have a system where every time we wanted to put on a Shakespearean play, we'd have to get permission from one of Bill's seventeenth generation heirs, or every time we wanted to play the *Ninth Symphony*, we'd have to look up Ludwig's descendants and try to get a license from them. But that kind of system would cut strongly against the grain of the way we view these things, and it would make our world a poorer place. The fact that we don't have to ask for permission enriches not only the public domain, but the creators themselves, or at least their legacies, because there are people out there who give their works new meaning, by giving them new twists, new interpretations, and new dimensions.

Jessica Litman mentions the fact that Steamboat Willie, the original incarnation of Mickey Mouse, is facing the ultimate fate of all copyrighted characters: entry into the public domain.[5] It's sort of a horrible thought, and it kind of shakes you up. Going back to 1961, when I was reading those cartoons in Vienna, I've always thought of Mickey as being safe under the protective arm of Walt Disney. The people at Disney have truly done a marvelous job of taking care of their character, promoting him, and keeping him fresh in the public mind. I think they deserve a lot of credit, and I think we've all been the beneficiaries. But once that protection disappears, what do we look for? Do we look to other areas of protec-

5. *Cf.* Jack Garner, *"Happily Ever After"—To 'Snow White' What a Doodle Is to a Rembrandt*, GANNETT NEWS SERV., May 25, 1993 (contrasting the original Snow White production by Walt Disney to the recent cartoon sequel as produced by another studio).

tion, like trademark law?

Trademarks raise some interesting questions, because at the core of trademark law is the issue of confusion. Confusion really is an interesting question when you deal with it in the context of a case. I had such a case, in *Plasticolor Molded Prods., Inc. v. Ford Motor Co.*,[6] dealing with Ford floormats. The twist was, they were made by Plasticolor. I made them change the labeling to something along the lines of, "This is not made by Ford. Now listen, this is really not made by Ford. Trust us, this is not made by Ford," in big letters, over and over. A consumer had to pick up the tab that said all this to even see 'Ford' underneath. The funny thing was, later consumer surveys showed that about 60% of those responding said they thought the mats were made by Ford. Go figure. This is just one example of how consumers are not always entirely rational.

We certainly do not want people buying counterfeit Mickey Mouse T-shirts thinking they were made by Disney and being deceived. But putting aside the question of confusion, what do we look for? In a recent article,[7] I lay out some of the policies we should think about when deciding how to protect trademarks. It seems to me there are basically four areas we should look at: moral considerations, utilitarian considerations, what I call the reverse utilitarian argument, and the communicative interest. Let me run through each of these briefly.

The moral consideration is simply this: What have you done that deserves protection? With a copyrighted character that has received the full benefit of its copyright, and then loses that protection upon expiration, it seems to me the moral claim is pretty weak. You have struck a deal with society, and the time you were given ran out. That should be the end of it.

Utilitarian considerations are a little more significant, because we know that if you give someone property rights in something, you avoid the tragedy of the commons.[8] Disney promotes its characters and protects them and that tends, according to economic theory, to enhance the value of the property, not only for Disney, but for the rest of us as well. But there are considerations that cut the other way. I once bought a pretty expensive Mickey Mouse

6. 713 F. Supp. 1329 (C.D. Cal. 1989). Unfortunately, the decision, along with my words of wisdom, was vacated, by me, no less. 767 F. Supp. 1036 (C.D. Cal. 1991).

7. Alex Kozinski, *Trademarks Unplugged*, 68 N.Y.U. L. Rev. 960 (1993).

8. *See generally* William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325 (1989).

watch. You get a good quality timepiece, and for those of us who can afford that kind of thing, I guess it's okay. But there is a segment of society that is completely excluded, because it cannot afford to buy a Mickey Mouse watch, T-shirt, and the like. So the utilitarian considerations, I think, usually end up being a wash.

The strongest argument is what I call the reverse utilitarian argument, an argument that is well illustrated by the *Air Pirates* case.[9] This copyright case addressed the question of whether a vulgar depiction of Mickey and Minnie Mouse was a parody covered by the fair use doctrine. I think what offended the court in *Air Pirates* was the fact that Mickey and Minnie were doing things they were not supposed to, things that were out of character for them. There's a lot to that. Think about Phillip Page's daughter, who was eating an ice cream bar with Mickey's face on it. The real reason she was able to enjoy it is because Mickey has such a wholesome image, a kind of pixie image, with the squeaky voice and all. It is the development of such a character, one that avoids negative associations, which not only allows Disney to make a profit, but also gives kids eating ice cream bars a real pleasure, a pleasure they might not otherwise have. I think that's a positive thing.

Now, removing intellectual property protections exposes these characters to a lot of anti-utilitarian pressures, and not simply those we saw in *Air Pirates*.[10] For example, if we open up the field and allow these characters to be portrayed by someone other than the company that created them, they will become different characters. They'll change personalities. Batman and Superman, for example, have changed: they're not the same Batman and Superman I was reading about in 1964. I'm kind of sorry, because I liked the old Batman; the new, snazzier one is not to my taste. But if you have a lot of people creating their own versions of characters, this is what can happen. You end up diminishing the value of the product, not just to the creator, but to the general public as well.

Finally, let me say just a word about the communicative aspect of intellectual property. Because it is a thing of the mind, intellectual property is inextricably intertwined with the way we communicate with each other. I don't want to get into the First Amendment—I've got lots of problems with the way the Supreme Court has approached much of First Amendment Law.[11] Instead, I

9. Walt Disney Prods. v. Air Pirates, 581 F.2d 751 (9th Cir. 1978).

10. *Id.*

11. *See* Alex Kozinski & Stuart Banner, *The Anti-History and Pre-History of Commercial Speech*, 71 TEX. L. REV. 747 (1993); Alex Kozinski & Stuart Banner, *Who's Afraid*

just want to talk about the policy interests at stake. When we limit the use of characters like Mickey Mouse and Snoopy, one of the things we do is wind up taking something that has become part of our culture and saying, in effect, these characters cannot be used as a means of communication. That really ends up diminishing our ability to speak with one another by choking off some of the vibrancy of our language.

As I said, I generally tend to be sympathetic to copyright owners and their enforcement concerns. When I stop and puzzle it out, though, I nonetheless share the skepticism expressed by some of the other symposium authors about extending the breadth of intellectual property protection too far.

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of Commercial Speech?, 76 VA. L. REV. 627 (1990).