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Briefing Cases: Session on Copyright Law

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Briefing Cases

University of Baltimore School of Law

March 27, 2010
Session on Copyright Law
Prof. Lynn McLain

United States Court of Appeals,
Ninth Circuit.
WALT DISNEY PRODUCTIONS v. AIR PIRATES,
581 F.2d 751 (1978).

Appeal from the Northern District of California.

Before CHAMBERS, CUMMINGS, and ANDERSON, Circuit Judges.

CUMMINGS, Circuit Judge.

This case involves the admitted copying of plaintiff Walt Disney Productions' ("Disney") cartoon characters in defendants' adult "counter-culture" comic books. The present defendants are three individuals and two business entities operated by them. The complaint alleges that they infringed Disney copyrights, a Disney trademark and engaged in unfair competition, trade disparagement and interference with Disney's business. Disney sought injunctive relief, destruction of infringing materials, damages, costs and attorney's fees. The district court awarded Disney a temporary restraining order and subsequently granted its motion for a preliminary injunction, simultaneously issuing an opinion reported in 345 F.Supp. 108 (N.D.Cal.1972). As Judge Wollenberg noted in his opinion, the basic facts are undisputed. He found as follows (at 109-110):

Plaintiff holds valid copyrights on the various works noted in the first seven causes of action. The works protected by the copyrights comprise a series of cartoon drawings ranging from a single page to "book length." The cartoons depict the antics of characters created by plaintiff, with "balloons" over each of the characters' heads containing dialog. Cartoons are drawn to form a narrative.

According to plaintiff, defendants infringed Disney copyrights by copying the graphic depiction of over 17 characters.[FN5] Two of the characters are represented as insects, and the others as animals endowed with human qualities. Each character has a recognizable image.

FN5. At least 21 characters are now involved including such well known favorites as Mickey and Minnie Mouse, Donald Duck, the Big Bad Wolf, the Three Little Pigs, and Goofy.

The individual defendants have participated in preparing and publishing two magazines of cartoons entitled "Air Pirates Funnies." The characters in defendants' magazines bear a marked similarity to those of plaintiff. The names given to defendants' characters are the same names used in plaintiff's copyrighted work. However, the themes of defendants' publications differ markedly from those of Disney. While Disney sought only to foster "an image of innocent delightfulness," defendants supposedly sought to convey an allegorical message of significance. Put politely by one commentator, the "Air Pirates" was "an 'underground' comic book which had placed several well-known Disney cartoon characters in incongruous settings where they engaged in activities clearly antithetical to the accepted Mickey Mouse world of scrubbed faces, bright smiles and happy endings." It centered around "a rather bawdy depiction of the Disney characters as active members of a free thinking, promiscuous, drug ingesting counterculture."

* * *

Three years after granting the preliminary injunction, the district court granted summary judgment for plaintiff. . . . * * * In addition to granting Disney a permanent injunction, the court ordered defendants to deliver all infringing materials to Disney's counsel. Costs were awarded to Disney, and the amount of damages and reasonable attorney's fees to be paid to Disney was submitted to a magistrate for preliminary assessment. Only the question of defendants' liability is before us. We affirm as to copyright violation and reverse and remand as to the remainder.

I. Copyright Infringement

The issue that has attracted the most attention from the parties in this case is whether defendants' copies of the images of Disney's characters are infringements of Disney's copyright. In order to answer the subsidiary questions of whether Disney's characters are copyrightable and if so whether they were infringed, and whether defendants' infringement can be excused by the fair use defense or can be protected by the First Amendment, it is important to begin by noting what statute is controlling. * * * The new Copyright Act expressly provides that all causes of action that arose under the Copyright Act before January 1, 1978, "shall be governed by title 17 as it existed when the cause of action arose." Public Law # 94-553, 90 Stat. 2600 (Transitional and Supplementary Provisions § 112), reproduced in 17 U.S.C. § 501 note. Therefore to the extent the legal issues in this case are controlled by statute, the old Copyright Act governs.

A. Copyrightability

In some instances Disney's copyrights cover a book and others an entire strip of several cartoon panels. The fact that its characters are not the separate subject of a copyright does not preclude their protection, however, because Section 3 of the then Copyright Act provided that Disney's copyrights included protection for "all the copyrightable component parts of the work copyrighted" (note 7 *Supra*).

The essence of defendants' argument is that characters are never copyrightable and therefore cannot in any way constitute a copyrightable component part. That argument flies in the face of a series of cases dating back to 1914 that have held comic strip characters protectable under the old Copyright Act. See *Detective Comics, Inc. v. Bruns Publications Inc.*, 111 F.2d 432 (2d Cir. 1940); *Fleischer Studios v. Freundlich*, 73 F.2d 276 (2d Cir. 1934), certiorari

denied, 294 U.S. 717, 55 S.Ct. 516, 79 L.Ed. 1250; King Features Syndicate v. Fleischer, 299 F. 533 (2d Cir. 1924); Detective Comics, Inc. v. Fox Publications Inc., 46 F.Supp. 872 (S.D.N.Y.1942); Hill v. Whalen & Martell, Inc., 220 F. 359 (S.D.N.Y.1914); 1 Nimmer on Copyright § 30. It is true that this Court's opinion in Warner Brothers Pictures v. Columbia Broadcasting System, 216 F.2d 945 (9th Cir. 1954), certiorari denied, 348 U.S. 971, 75 S.Ct. 532, 99 L.Ed. 756, lends some support to the position that characters ordinarily are not copyrightable. There the mystery writer Dashiell Hammett and his publisher entered into a 1930 contract with Warner Brothers giving the movie production company copyright and various other rights to a "certain story * * * entitled Maltese Falcon" involving the fictional detective Sam Spade. In 1946, Hammett and other defendants used the Maltese Falcon characters in other writings, causing Warner Brothers to sue for copyright infringement and "unfair use and competition." After pointing out the sophisticated nature of the plaintiff, we construed the contracts between the parties and held:

"We are of the opinion that since the use of characters and character names are nowhere specifically mentioned in the agreements (including the assignment of copyright instrument), but that other items, including the title, 'The Maltese Falcon', and their use are specifically mentioned as being granted (to Warner Brothers), that the character rights with the names cannot be held to be within the grants, and that under the doctrine of Ejusdem generis, general language cannot be held to include them." (Footnote omitted.)

After so holding, Judge Stephens' opinion considered "whether it was ever intended by the copyright statute that characters with their names should be under its protection." In that context he concluded that such a restriction on Hammett's future use of a character was unreasonable, at least when the characters were merely vehicles for the story and did not "really constitute" the story being told. Judge Stephens' reasons for that conclusion provide an important indication of the applicability of that conclusion to comic book characters as opposed to literary characters. In reasoning that characters "are always limited and always fall into limited patterns," Judge Stephens recognized that it is difficult to delineate distinctively a literary character. Cf. Nichols v. Universal Pictures Corp., 45 F.2d 119 (2d Cir. 1930), certiorari denied, 282 U.S. 902, 51 S.Ct. 216, 75 L.Ed. 795. When the author can add a visual image, however, the difficulty is reduced. See generally 1 Nimmer on Copyright s 30. Put another way, while many literary characters may embody little more than an unprotected idea, a comic book character, which has physical as well as conceptual qualities, is more likely to contain some unique elements of expression. Because comic book characters therefore are distinguishable from literary characters, the Warner Brothers language does not preclude protection of Disney's characters.

B. Infringement and Fair Use

Defendants do not contend that their admitted copying was not substantial enough to constitute an infringement, and it is plain that copying a comic book character's graphic image constitutes copying to an extent sufficient to justify a finding of infringement. See 2 Nimmer on Copyright s 143.12; see generally Sid & Marty Krofft Television v. McDonald's Corp., 562 F.2d 1157 (9th Cir. 1977); Henry Holt & Co. Inc. v. Liggett & Myers Tobacco Co., 23 F.Supp. 302 (E.D.Pa.1938). Defendants instead claim that this infringement should be excused through the application of the fair use defense, since it purportedly is a parody of Disney's cartoons.

At least since this Court's controversial ruling in *Benny v. Loew's Inc.*, 239 F.2d 532 (9th Cir. 1956), affirmed by an equally divided Court, 356 U.S. 43, 78 S.Ct. 667, 2 L.Ed.2d 583, the standards for applying the fair use defense in parody cases, like the standards for applying fair use in other contexts, have been a source of considerable attention and dispute. As a general matter, while some commentators have urged that the fair use defense depends only on whether the infringing work fills the demand for the original (see, e.g., Note, Piracy or Parody: Never the Twain, 38 U.Colo.L.Rev. 550 (1966); see generally 2 Nimmer on Copyright s 145), this Court and others have also consistently focused on the substantiality of the taking. * * *

In inquiring into the substantiality of the taking, the district court read our *Benny* opinion to hold that any substantial copying by a defendant, combined with the fact that the portion copied constituted a substantial part of the defendant's work, automatically precluded the fair use defense. That such a strict reading of *Benny* was unjustified is indicated first by the fact that it would essentially make any fair use defense fruitless. If the substantiality of the taking necessary to satisfy the first half of that test is no different from the substantiality necessary to constitute an infringement, then the *Benny* test would be reduced to an absurdity, covering any infringement except those falling within the much-criticized and abandoned exception for cases in which the part copied was not a substantial part of the defendant's work.

The language in *Benny* concerning the substantiality of copying can be given a reading much more in keeping with the context of that case and the established principles at the time of that case if the opinion is understood as setting a threshold that eliminates from the fair use defense copying that is virtually complete or almost verbatim. Accord 2 Nimmer on Copyright s 145. It was an established principle at the time of *Benny* that such verbatim copying precluded resort to the fair use defense. See, e.g., *Leon v. Pacific Telephone & Telegraph Co.*, 91 F.2d 484 (9th Cir. 1937). Moreover, the *Benny* facts presented a particularly appropriate instance to apply that settled principle. As the *Benny* district court found, *Benny's* "Autolight" tracked the parodied "Gas Light" in almost every respect: the locale and period, the setting, characters, story points, incidents, climax and much of the dialogue all were found to be identical. 131 F.Supp. 165, 171. In this context, *Benny* should not be read as taking the drastic step of virtually turning the test for fair use into the test for infringement. See *Columbia Pictures Corp. v. National Broadcasting Co.*, 137 F.Supp. 348 (S.D.Cal.1955). To do otherwise would be to eliminate fair use as a defense except perhaps for those infringers who added an extra act at the end of their parody. Thus *Benny* should stand only as a threshold test that eliminates near-verbatim copying. In the absence of near-verbatim copying, other courts have analyzed the substantiality of copying by a parodist by asking whether the parodist has appropriated a greater amount of the original work than is necessary to "recall or conjure up" the object of his satire. *Berlin v. E. C. Publications, Inc.*, 329 F.2d 541 (2d Cir. 1964), certiorari denied, 379 U.S. 822, 85 S.Ct. 46, 13 L.Ed.2d 33.[FN13]

FN13. In so construing *Benny*, we necessarily disagree with its dictum that a parody is treated no differently than any other taking. See *Berlin v. E. C. Publications, Inc.*, 329 F.2d 541 (2d Cir. 1964), certiorari denied, 379 U.S. 822, 85 S.Ct. 46, 13 L.Ed.2d 33.

In order to facilitate application of either the *Benny* threshold test or the *Berlin* test, it is important to determine what are the relevant parts of each work that are compared in analyzing similarity. Plaintiff assumes in its brief that the graphic depiction, or pictorial illustration, is separately copyrightable as a component part, so that a verbatim copy of the depiction alone would satisfy the *Benny* test. Defendants proceed on the assumption that comparing their characters with plaintiff's involves a comparison not only of the physical image but also of the character's personality, pattern of speech, abilities, and other traits. Apparently this issue has not been addressed previously, and neither position is without merit. On the one hand, since an illustration in a book or catalogue can be copyrighted separately (see, e.g., *Lin-Brook Builders Hardware v. Gertler*, 352 F.2d 298 (9th Cir. 1965)), it might follow that an illustration in a comic strip is entitled to the same protection by virtue of Section 3 of the former Copyright Act. On the other hand, to a different extent than in other illustrations, a cartoon character's image is intertwined with its personality and other traits, so that the "total concept and feel" (*Roth Greeting Cards v. United Card Co.*, 429 F.2d 1106, 1110 (9th Cir. 1970)) of even the component part cannot be limited to the image itself.

We need not decide which of these views is correct, or whether this copying was so substantial to satisfy the *Benny* test, because it is our view that defendants took more than is allowed even under the *Berlin* test as applied to both the conceptual and physical aspects of the characters. In evaluating how much of a taking was necessary to recall or conjure up the original, it is first important to recognize that given the widespread public recognition of the major characters involved here, such as Mickey Mouse and Donald Duck, in comparison with other characters very little would have been necessary to place Mickey Mouse and his image in the minds of the readers. Second, when the medium involved is a comic book, a recognizable caricature is not difficult to draw, so that an alternative that involves less copying is more likely to be available than if a speech, for instance, is parodied. Also significant is the fact that the essence of this parody did not focus on how the characters looked, but rather parodied their personalities, their wholesomeness and their innocence.[FN15] Thus arguably defendants' copying could have been justified as necessary more easily if they had paralleled closely (with a few significant twists) Disney characters and their actions in a manner that conjured up the particular elements of the innocence of the characters that were to be satirized. While greater license may be necessary under those circumstances, here the copying of the graphic image appears to have no other purpose than to track Disney's work as a whole as closely as possible.

FN15. In making this distinction, we do not regard it as fatal, as some courts have done (see, e.g., *Walt Disney Productions v. Mature Pictures Corp.*, 389 F.Supp. 1397 (S.D.N.Y.1975)), that the "Air Pirates" were parodying life and society in addition to parodying the Disney characters. Such an effect is almost an inherent aspect of any parody. To the extent that the Disney characters are not also an object of the parody, however, the need to conjure them up would be reduced if not eliminated.

Defendants' assertion that they copied no more than necessary appears to be based on an affidavit, which stated that "the humorous effect of parody is best achieved when at first glance the material appears convincingly to be the original, and upon closer examination is discovered to be quite something else" (Br. 20-21). The short answer to this assertion, which would also justify substantially verbatim copying, is that when persons are parodying a copyrighted work,

the constraints of the existing precedent do not permit them to take as much of a component part as they need to make the “best parody.” Instead, their desire to make the “best parody” is balanced against the rights of the copyright owner in his original expressions. That balance has been struck at giving the parodist what is necessary to conjure up the original, and in the absence of a special need for accuracy, that standard was exceeded here. By copying the images in their entirety, defendants took more than was necessary to place firmly in the reader's mind the parodied work and those specific attributes that are to be satirized. See *Netterville, Parody, Mimicry and Humorous Commentary*, 35 *So. Cal. L. Rev.* 225, 238 (1962).

Because the amount of defendant's copying exceeded permissible levels, summary judgment was proper. * * *

C. First Amendment Considerations

Defendants also insist that the First Amendment should bar any liability for their parody because otherwise protected criticism would be discouraged. * * * Because the defendants here could have expressed their theme without copying Disney's protected expression, *Sid & Marty Krofft Television v. McDonald's Corp.*, 562 F.2d 1157 (9th Cir. 1977) requires that their First Amendment challenge be dismissed. See also *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 577 and n. 13, 97 S.Ct. 2849, 53 L.Ed.2d 965.

II. Trademark Infringement

Given the novelty and importance of the copyright issues in this case, plaintiff's eighth cause of action, which charged that defendants infringed its trademark “Silly Symphony” in their publications where they referred to “Silly Sympathies,” received little attention from the parties and the district court in the proceedings below. * * * Disney's comic books bear the title “Silly Symphony” and defendants used the title “Silly Sympathies” as the title of two of the cartoon stories in their books. In each instance, the respective parties arranged the title letters on a curving musical staff (Def.Br. 44). Besides reference to the comic books, apparently no other evidence suggesting a likelihood of confusion was offered.

On this record a grant of summary judgment for plaintiffs was improper. In discussing how district courts should attempt to determine likelihood of confusion, we previously have listed a wide range of factors that should be taken into account. While a comparison of the mark and the imitation is one such factor, that comparison should not be a simple, visual, side-by-side comparison but rather the mark and the imitation should be viewed “in light of what occurs in the marketplace,” (*James Burrough Ltd. v. Sign of Beefeater, Inc.*, 540 F.2d 266, 275 (7th Cir. 1976)), taking into account the “circumstances surrounding the purchase of the goods.” *Procter & Gamble Co. v. Conway*, 419 F.2d 1332, 1335, 57 CCPA 865 (1970). By making a simple abstract comparison, the district court apparently did not consider that defendants' imitation appeared only in the middle of their comic books and that defendants' comic books were sold in adult, counter-culture stores. When put in that context and when it is therefore recognized that the imitation would be seen by an adult in a counter-culture store who in all probability before seeing the imitation would already have been struck by the incompatibility of defendants' work with Disney's, as well as defendants' proper attribution of source in the front of each book, the

likelihood that the use of “Silly Sympathies” would be confusing is markedly diminished. See *Girl Scouts of the U.S. of A. v. Personality Posters Mfg. Co.*, 304 F.Supp. 1228 (S.D.N.Y.1969).

Notably, several of the other factors that we have directed district courts to consider also diminish the likelihood of confusion on the present state of the record. For example, there is no proof of actual confusion. Nor is there any indication of improper intent by defendants in their use of “Silly Sympathies.” In view of the district court's apparent reliance on an abstract comparison of the marks and the fact that the factual issues that might be explored would be helpful in determining likelihood of confusion, its order granting summary judgment on the eighth cause of action is reversed and remanded for trial.

* * *

Judgment affirmed as to copyright infringement and reversed and remanded as to trademark infringement, unfair competition and trade disparagement.

Suggested Elements for Briefing Appellate Cases for Full Understanding of Them

1. The parties, the deciding court, and the year of decision.
2. In a **civil** case, who sued whom for what? (Who was angry at whom, and why?) What remedy was sought? (What did the complaining party really want?) If it was a **criminal** trial, what was the defendant (a) charged with and (b) convicted of?
3. What is the defense's "theory of the case"? What is his/her story as to what happened?
4. What was/were the ruling(s) at trial from which the appeal was taken? (What is/are the question(s) before the appellate court?) Recount procedural steps of consequence (if more than one appellate level, at each appellate court) before arriving at this court.
5. What was the ultimate action taken by this court (e.g., affirmed, reversed, remanded (for what action?))?
6. What did each party argue as to each issue?
7. What was the appellate court's holding as to each issue on appeal? (Incorporate both the rule of law and the standard of review – if that standard was anything other than *de novo* review of a question of law – in your statement of the holding. If the standard of review was abuse of discretion, for example, the holding would be that it was (or was not) an abuse of discretion . . . ; this is far more correct than stating a holding as simply that the ruling "was affirmed or reversed.")
8. What was its reasoning as to each issue?
9. If there was a concurrence or a dissent, how would it have held? What was its reasoning?

After reading the case, think critically: does the court's reasoning make sense? Will its application provide the right results in future cases?

* * *

The format required by each professor may vary, but at a minimum they will all want you to know the facts, the holding, and the reasoning of the case.

Brief

1. *Walt Disney Productions v. Air Pirates* (9th Cir. 1978).
2. Defendants Air Pirates, et al., published “underground comics” copying the names and likenesses of 21 of Plaintiff-Disney’s cartoon characters (including Mickey and Minnie Mouse), but portraying them as promiscuous and drug-abusing. Disney sued Air Pirates in federal court for (1) federal copyright infringement, (2) trademark infringement, and (3), via pendent jurisdiction, unfair competition, trade disparagement and interference with Disney’s business under California law.

Disney sought an injunction, destruction of the Air Pirates comic books, damages, costs, and attorney’s fees.

3. Air Pirates admitted copying the Disney cartoon characters, but argued that the copying was permissible under the law, on three different theories:
 - (1) Cartoon characters are not copyrightable;
 - (2) Even if the characters are copyrightable, Air Pirates’ copying was a parody of the Disney works, and thus was permitted as “fair use”; and
 - (3) If the copying was not fair use, then it was nonetheless permissible under the First Amendment, which trumped the copyright law.
4. The United States District Court for the Northern District of California initially granted Disney a temporary restraining order, stopping further publication by Air Pirates. The court then granted Disney a preliminary injunction. Ultimately, it granted *summary judgment* for Disney on all three counts. The district court issued a permanent injunction against Air Pirates, ordered it to deliver all infringing materials to Disney’s lawyers, and to pay Disney’s court costs, damages, and reasonable attorney’s fees.

Air Pirates appealed to the United States Court of Appeals for the Ninth Circuit.

5. The Ninth Circuit affirmed in part and reversed in part:
 - (1) It affirmed the granting of summary judgment for the plaintiff as to copyright infringement.
 - (2) It reversed the granting of summary judgment for the plaintiff as to trademark infringement and remanded for trial on the issue whether consumers were likely to confuse Air Pirates’ works with Disney’s.
 - (3) It reversed the granting of summary judgment for the plaintiff on the state law claims: (a) as to unfair competition, due to failure to prove likelihood of confusion, and (b) failure to plead or prove sufficient facts for the other common

law theories alleged, and remanded for the district court to determine which state law theories were properly pleaded, and to proceed to trial on those theories.
[This part was edited from your copy of the case.]

6 – 8 Copyright Cause of Action

Issue 1: Copyrightability of Cartoon Characters

6. Defendants, relying on language in *Warner Bros v. CBS* (9th Cir. 1954) (the “Sam Spade” case), argued that characters cannot be copyrightable when they are merely “vehicles for the story” and do not constitute the story itself.
7. The *Air Pirates* court first pointed out that the holding in *Warner Bros.* was one of contract law, not copyright law, but then distinguished its dictum there as regarding “literary characters” and as recognizing merely that “it is difficult to delineate distinctively a literary character” so as to make that character copyrightable. The *Air Pirates* court distinguished cartoon characters from literary characters and cited a line of cases holding comic strip characters copyrightable under the 1909 Copyright Act.
8. *Held: Warner Bros.* does not preclude copyright protection of comic book characters, which have visual qualities. Disney’s characters here are copyrightable “component parts” of its comics, under § 3 of the Copyright Act of 1909.

Issue 2: Fair Use

6. Defendants admit that they copied the characters’ visual images from plaintiff, but argue that their copying is excused under the fair use defense because they were parodying plaintiff’s work.
7. The Ninth Circuit rejects the dictum in its own decision in *Benny v. Loew’s* (9th Cir. 1956) that parody, just like any other taking, is infringing if it copies substantially from the plaintiff. It reads *Benny* as holding only that “virtually complete” or “near verbatim” copying will not be fair use.

The *Air Pirates* court cites with approval *Berlin v. E.C. Publications* (2d Cir. 1964), which permits a parodist to copy the amount which is necessary to “conjure up” the original work which is the object of its parody (parodying the plaintiff’s work is what necessitates and thus excuses copying it to this extent, n.15).

8. *Held: Even under the Berlin test, defendants’ copying was not fair use. Taking the entire image was more than was necessary to have the readers recognize them: (1) the characters are widely known; (2) a caricature could be easily drawn; (3) and, since the object of the parody was the characters’ innocence and wholesomeness, those elements were the ones they could have played up.*

Issue 3: First Amendment

6. Defendants argue that the First Amendment prevents imposing any liability for parody; to impose liability will have a chilling effect on protected speech.
7. Defendants could have made their point without infringing copyright.
8. *Held:* Application of the copyright law does not interfere with First Amendment rights when defendants can express their ideas without infringing copyright.

6 – 8 Trademark Cause of Action

6. Plaintiff owns a trademark in the title of its comic books, “Silly Symphony,” arranged on a curving musical staff. Disney argues that defendants infringed that mark by using the title “Silly Sympathies,” arranged on a curving musical staff, for two of its cartoon stories in its “Air Pirates Funnies” books.
7. The district court compared the publications and found a likelihood of confusion. It failed to consider that defendants’ works are sold in “adult” stores and that the “Silly Sympathies” term occurs only in the middle of the book, after the consumer likely realizes the book is not a Disney product. There was no evidence of actual confusion, nor of any intent by defendants to confuse consumers as to the source of the goods.
8. *Held:* Error to enter summary judgment for plaintiff; reversed and remanded for trial.

Questions for Discussion

1. What should be the rule as to when the copying of copyrighted material for parodic purposes is “fair use” and thus not infringing? Should it differ from the usual rule in any way?
2. If parody should be a favored use in some way, how should parody be defined? Need it criticize the copyrighted work itself?
3. If the copying in *Air Pirates* (an excerpt is shown below) was excessive and thus infringing, how much of a change would have been enough to make the defendants’ use “fair use”?



The Air Pirates' version of Mickey and Minnie.

4. Is today's Web site's “Not Mickey” infringing?

