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Why Mickey Mouse is Not Subject to Congestion: A Letter on 'Eldred and Fair Use'

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Why Mickey Mouse is Not Subject to Congestion: A Letter on ‘Eldred and Fair Use’*

Michele Boldrin and David K. Levine

Summary

In “Eldred and Fair Use,” Posner comments that awarding a monopoly over Mickey Mouse avoids the congestion problem that occurs with open access highways. Is the public domain a commons like an open access highway? No, it is not.

KEYWORDS: Intellectual Property, Copyright, Patents, innovation

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In “Eldred and Fair Use,” Posner comments that awarding a monopoly over Mickey Mouse avoids the congestion problem that occurs with open access highways. Is the public domain a commons like an open access highway?

Only copies of ideas matter. If all the copies – in books and minds alike – were to vanish, the abstract existence of the idea would be of no use. When an idea is in the public domain, someone still *owns* each copy of the idea. The public domain is like the ideal of a competitive market with many owners/producers of essentially the same product competing with each other.

In their book, Posner and Landes say “If...anyone were free to incorporate the Mickey Mouse character...the value of the character might plummet.” It cannot be the social value of the Mickey Mouse character that plummets – this increases when more people have access. It is the market price of copies of the Mickey Mouse character that plummets. This is the ordinary consequence of increased consumption. No externality is involved: as more of a good is consumed, the more tired people become of it. To be an externality, it would have to be the case that my consumption of Mickey Mouse made you more tired of it – an improbability, to say the least.

Perhaps we should give Disney a monopoly because it “practices good husbandry of its characters”? If Disney had a monopoly on food, they would surely practice “good husbandry” of food, leaving us all on the edge of starvation. Since the losses to the rest of us would far outweigh the gain to Disney it is a relief to know that Mickey Mouse is not an essential ingredient of the American diet.

Further Reading:

Boldrin, Michele and David Levine, Retroactive Copyright Extension, available at <http://www.dklevine.com/general/intellectual/lp.htm>

Posner, Richard A. (2004) "Eldred and Fair Use", *The Economists' Voice*: Vol. 1: No. 1, Article 3, available at <http://www.bepress.com/ev/vol1/iss1/art3>