Disney's rights to young Mickey Mouse may be wrong

Film credits from the 1920s reveal imprecision in copyright claims that some experts say could invalidate Disney's long-held copyright.

By Joseph Menn, Los Angeles Times Staff Writer

He is the world's most famous personality, better known in this country than anyone living or dead, real or fictional. Market researchers say his 97% recognition rate in the U.S. edges out even Santa Claus.

He is the one -- and, for now, only -- Mickey Mouse.

As Mickey turns 80 this fall, the most beloved rodent in show business is widely regarded as a national treasure. But he is owned lock, stock and trademark ears by the corporate heirs of his genius creator, Walt Disney.

Brand experts reckon his value to today's Walt Disney Co. empire at more than $3 billion. Acts of Congress have extended Mickey's copyright so long that they provoked a Supreme Court challenge, making Mickey the ultimate symbol of intellectual property.

All signs pointed to a Hollywood ending with Disney and Mickey Mouse living happily ever after -- at least until a grumpy former employee looked closely at fine print long forgotten in company archives.

Film credits from the 1920s revealed imprecision in copyright claims that some experts say could invalidate Disney's long-held copyright, though a Disney lawyer dismissed that idea as "frivolous."

Although studio executives are not yet hurling themselves from the parapets of Sleeping Beauty's castle, the unexpected discovery raises an intriguing question: Is it possible that Mickey Mouse now belongs to the world -- and that his likeness is usable by anybody for anything?

For the record, any knock-offs would have to make clear that they did not come from Disney, or else risk violating the separate laws that protect trademarks. And the potentially free Mickey is not the most current or familiar version of the famous mouse.

Copyright questions apply to an older incarnation, a rendition of Mickey still recognizable but slightly different. Original Mickey, the star of the first synchronized sound cartoon, "Steamboat Willie," and other early classics, had longer arms, smaller ears and a more pointy nose.

The notion that any Mickey Mouse might be free of copyright restrictions is about as welcome in the Magic Kingdom as a hag with a poisoned apple. Yet elsewhere, especially in academia, the idea has attracted surprising support.

"That 'Steamboat Willie' is in the public domain is easy. That's a foregone
Disney's rights to young Mickey Mouse may be wrong — Los Angeles Times

Brown was one of the few who knew that odds of a mistake were high. "Everybody is really on the original copyright?" a former archivist knew that the company didn't exist then. He wondered: Whose name wrote that Mickey Mouse had been created by Walt Disney Co. in 1928. The story has been chewed over by law students as class projects and debated by professors. It produced one little-noticed law review article: a 23-page essay in a 2003 University of Virginia legal journal that argued "there are no grounds in copyright law for protecting" the Mickey of those early films.

Roger Schechter, a George Washington University expert on copyright, called the article's argument "a plausible, solid, careful case." By contrast, a Disney lawyer once threatened the author with legal action for "slander of title" under California law. No suit was filed.

In the waning days of his case, Brown returned to the arguments of Disney lawyers who wrote that Mickey Mouse had been created by Walt Disney Co. in 1928. The former archivist knew that the company didn't exist then. He wondered: Whose name is really on the original copyright?

No one expects Disney, which declined interview requests, to surrender Mickey without an all-out legal brawl. And the cost of what has been an academic exercise would soar if moved into a federal courtroom.

"Law and equity might line up on the side of forfeiture," said Michael J. Madison, associate dean of the University of Pittsburgh School of Law. But "Disney has enough ammunition on its side to dissuade all but the most well-financed competitor, or any but the most committed public-interest advocates, from challenging Mickey."

The story begins once upon a time, when a longtime Disney devotee dared awake the dragon in the Disney company's powerful legal department.

Gregory S. Brown, 51, a former Disney researcher who has lived in the same one-bedroom apartment in Hollywood for two decades, seems an unlikely giant-killer. Thin, pale and bespectacled, he looks the part of an obsessive archivist. He has worked little since a heart attack in 1998, getting by mostly on disability payments.

As a child, Brown was intrigued by a book on the hard slogging by Walt Disney and his brother Roy to establish themselves in the early days of film and animation. That launched a lifelong fascination with the business side of the Disney empire.

While in high school, Brown visited Disney offices to research a term paper and ended up getting hired as an assistant to Disney archivist David R. Smith in 1974. Brown helped catalog correspondence between the Disney brothers and had access to other internal records.

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Brown moved on from Disney to UCLA, the American Film Institute and a brief and unremarkable producing career, and then he teamed with a friend in a 1980s takeover bid for Harvey Productions -- home of Casper the Friendly Ghost.

Conducting a "due diligence" assessment of Harvey's assets -- making sure that no legal or financial problems could haunt the purchase -- Brown found a stinker.

After release of the movie "Ghostbusters," Harvey had sued Columbia Pictures in 1984, complaining that the cartoon ghost in the logo of Bill Murray's crew looked an awful lot like Casper's sidekick, Fatso. Columbia Pictures convinced a judge that a lapsed copyright had dumped Fatso into the public domain, ending the case.

Brown also discovered that Harvey had failed to renew other copyrights covering the company's ghosts. Casper was public property too.

Now armed with knowledge about the frequency and implications of copyright confusion, Brown launched a business venture exploiting some of that murkiness. He would market recreated animation cels from a 1933 Mickey Mouse short called "The Mad Doctor." Brown had discovered that the Disneys failed to renew copyright claims on that film.

But the Disney company sued so quickly that Brown never sold a cel. Although "The Mad Doctor" was indeed out of copyright, that long-ago oversight had not freed Mickey, whose ostensible copyright protection predated the short.

Brown lost. Worse, he was clobbered with a $500,000 judgment.

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Brown was one of the few who knew that odds of a mistake were high. "Everybody screwed up copyright in the '20s, '30s and '40s," said Schechter, the author of several books on copyright law. "Under the 1909 act, courts were really insistent on conclusion," said copyright scholar Peter Jaszi of American University's Washington College of Law after studying the issue at The Times' request.

The issue has been chewed over by law students as class projects and debated by professors. It produced one little-noticed law review article: a 23-page essay in a 2003 University of Virginia legal journal that argued "there are no grounds in copyright law for protecting" the Mickey of those early films.

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Brown went searching for flawed formalities -- and found one. It was on the title card at the beginning of a "Steamboat Willie" cartoon that had just been rereleased on a 1993 LaserDisc honoring Mickey's 65th birthday. It said in full:

"Disney Cartoons
Present
A Mickey Mouse
Sound Cartoon
Steamboat Willie
A Walt Disney Comic
By Ub Iwerks
Recorded by Cinephone Powers System
Copyright MCMXXIX."

For Brown, it was as if the glass slipper fit him perfectly. The key was location of the word "copyright" in relation to the name "Walt Disney." There were two other names listed in between -- Cinephone and Disney's top studio artist, Ub Iwerks. Arguably, any one of the three could have claimed ownership, thereby nullifying anyone's claim under arcane rules of the Copyright Act of 1909.

Welcome to the wonderful world of copyright law.

Brown leapt on the ambiguity, asking the court to reconsider its ruling against him on grounds that Mickey Mouse was out of copyright. But he was too late. Without ruling on the merits of Brown's arguments, the judge tossed it aside as untimely.

It was not the end. Debate over Mickey's copyright status simply changed settings.

Arizona State University professor Dennis Karjala, a Brown acquaintance, suggested that one of his law school students look into the claim as a class project. Lauren Vanpelt took up the challenge and produced a paper agreeing with Brown. She posted her project on the Internet in 1999.

Across the continent, a Georgetown University law student stumbled on Vanpelt's paper more than a year later. "I just came across it," recalled Douglas Hedenkamp. "I was intrigued."

Hedenkamp examined copyright registration forms at the Library of Congress. He went to UCLA's archives and watched old shorts, noting the same title cards. He agreed: They revealed an excess of ambiguity.

Today, title-card claims are no longer required. But when courts rule on historical copyright issues, they follow the laws in place at the time -- in this case, says Hedenkamp, the 1909 law requiring that the word copyright or its symbol be "accompanied by the name of the copyright proprietor" -- a rule scholars said means in the immediate proximity.

The authoritative legal treatise "Nimmer on Copyright" says that a copyright is void if multiple names create uncertainty, and courts have agreed. In 1961, a federal judge in Massachusetts cited the "accompanied by" rule in throwing out a copyright claim by newspaper cartoonist Art Moger. Moger's name was included in the title above his panels, but the name of another artist ran inside the boxes.

"The fact that [Moger's] name is prominently displayed . . . does not, by any means, rule out the possibility" that the other artist is the copyright holder, the judge wrote.

Hedenkamp finally wrote to Disney's in-house lawyers, an attempt to satisfy his curiosity. Had he missed something? Or was there really a problem with Mickey's copyright?

Disney legal advisors were not amused. General Counsel Louis Meisinger wrote back that it would be "inconceivable that any modern court would find any confusion about the identity of the proprietor of Mickey Mouse cartoons."

He even threatened Hedenkamp with legal action if the young scholar openly advanced such claims.

"With respect to your plans to otherwise promote these as being in the public domain," Meisinger added, "please be advised that slander of title remains actionable
under California law for both compensatory and punitive damages."

Nonetheless, Hedenkamp let the genie out of the bottle, spelling out his arguments in the Virginia Sports and Entertainment Law Journal, a publication of the University of Virginia's law school. It attracted little attention off-campus.

Although losing Mickey would be the greatest rights setback for the world's biggest family entertainment company, it wouldn't be the first.

One of Walt Disney's earliest creations was Oswald the Lucky Rabbit. After the cartoon proved popular, a New York distributor used an advantage in its contract to take control of Oswald, then hired away many of Disney's artists. Mickey was the product of a desperate comeback attempt by Walt and his brother.

After that painful experience, the Disneys "held on to everything they did with a ferociously strong grip," former company Vice Chairman Roy E. Disney said recently.

Disney's carefully controlled licensing pioneered a sweeping business strategy that today uses television to promote movies that sell toys and bring people out to theme parks.

Though Disney sees itself as the hero of a corporate Cinderella story, the company's aggression in copyright cases has verged on the cartoonish.

There was the time that it threatened to sue three Florida day-care centers for painting Disney figures on their walls. And this year, Disney did sue a home-based business for $1 million after a couple put on children's parties with ersatz Eeyore and Tigger costumes.

Ironically, the company has mounted international efforts to claim some characters for the public domain -- such as Bambi and Peter Pan -- even as it defends Mickey Mouse. Many of Disney's most famous figures were the creations of others, including Cinderella, Pinocchio, Pooh and Snow White, though it has vigorously protected its depictions of them.

In such battles, Disney has been known to employ arguments every bit as arcane as anything raised against it by Brown.

Take the saga of Bambi, by Austrian Felix Salten. The story of the fawn was first published in Germany in 1923 without a formal copyright notice, which wasn't required there. Three years later, Salten republished it with a notice.

In the 1930s, Salten's rights were assigned to Disney, which made the famous 1942 movie. When Salten's heirs renewed the copyright in 1954, they correctly listed 1926 as the year of Bambi's first copyright.

But in a 1994 dispute over royalties with a small publisher that had acquired the Salten family's rights, Disney lawyers said the 1954 copyright was void because it was filed three years too late -- based on the fact that the story was first published in 1923. A federal judge sided with Disney, ruling Bambi was in the public domain.

Though that finding was reversed on appeal, the legal ordeal bankrupted the publisher.

Today, Brown still lives off disability payments. His appeal was dismissed when he missed a filing deadline. Disney then seized $20,000 from his accounts, which Brown says was all he had.

The former Disney devotee has soured on the company. But he continues to be charmed by the genius behind Mickey Mouse.

"If Walt Disney had lived another 20 years, the world today would be a much better place," Brown said. "I don't know anyone else I could say that about, except maybe Bobby Kennedy."

Hedenkamp, after writing his law review article, never heard from Disney again. Now 32, he works at an Irvine firm handling commercial law.

He describes himself as a "huge fan" of Disney. He also says that because Disney has taken advantage of so many characters created by others, it is only fair that artists get to borrow from Disney.

"Other people should get to put their spin on those old characters," Hedenkamp said.

Roy Disney said he had never heard the theory about problems with the title cards. Nor was he surprised.

During those early years, he said, "Nobody knew what they were doing."
Meisinger, the former general counsel, is now a Los Angeles County judge. Asked about the Hedenkamp article in an interview in his chambers, Meisinger gave an instant nod of recognition but ignored an invitation to take up the argument again.

"Everything has to fall into the public domain sometime," he said, then headed back to court.

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Times researcher Scott Wilson contributed to this report.