

# Never Neverland: Peter Pan and perpetual copyright

Dr Matthew Rimmer

In the case of *Emily Somma v Great Ormond Street Hospital for Sick Children*, there has been much debate over whether Peter Pan has passed into the public domain.

In 1902, JM Barrie first invented the puckish, fictional character of Peter Pan in his book *The little white bird*. In 1904, JM Barrie adapted his story into a stage play called *Peter Pan*, or *The boy who wouldn't grow up*. The play was a great success, and was adapted into a silent movie by Paramount pictures in 1923.

In 1929, JM Barrie assigned the copyright in the cycle of Peter Pan works to the Great Ormond Street Hospital for Sick Children — a children's hospital and medical charity. He confirmed the Hospital's ownership of this copyright in his last will and testament in 1937. In 1939, the Hospital licensed the animated film rights to Disney. In 1953, Disney released an animated film version of Peter Pan. It has released the film at regular intervals since that first production. In 1990, Steven Spielberg released an adaptation of the Peter Pan story called *Hook*. In 2002, Disney released the film *Return to Neverland*.

In 2002, the Canadian children's novelist J Emily Somma published the novel *After the rain: a new adventure for Peter Pan*. She sought to explore the themes of the classic story in a modern context:

*Of all of the famous children's stories coming from British authors in the late nineteenth and early twentieth century, Peter Pan is the one that jumps out as very clearly having been written for adults: On these magic shores children at play are forever beaching their coracles. We too have been there; we can still hear the sound of the surf, though we shall land no more.*

Somma's book concerns a 21st century girl, called Crystal McFarland, who rescues Peter Pan from perpetual childhood in Neverland. Her novel takes a much more positive attitude to the opportunities of adulthood than the original texts.

Somma published the novel *After the rain: a new adventure for Peter Pan* with Daisy Books in Canada, a jurisdiction in which the copyright in the Peter Pan works had expired. She sought permission from the Great Ormond Hospital to publish the novel in the United States and the

European Union. However, the Hospital refused her request to publish the book in the United Kingdom, the European Community, and the United States. The trustees asserted: 'The play by JM Barrie is in full copyright in the United States until 2023.' Furthermore, the trustees maintained: 'Unauthorised works, which contain the Peter Pan characters and elements from the original work, are not adaptable in the United States, without the permission of the Hospital, being protected by the laws of trademark and unfair competition.'

With the help of the Stanford Center for Law and the Internet, Emily Somma filed a pre-emptive lawsuit in the Federal Court of California against the Hospital to protect her derivative work, *After the rain*. She sought a declaration that copyright had expired in JM Barrie's books in the United States, and the characters of Peter Pan, Tinker Bell, Captain Hook, and Wendy were in the public domain.

The copyright in the works featuring Peter Pan has been revived in a number of jurisdictions. In the United Kingdom, the Parliament granted a perpetual copyright on the works of the Peter Pan cycle. Section 301 of the *Copyright, Designs and Patents Act 1988* (UK) provides:

*The provisions of Schedule 6 have effect for conferring on trustees for the benefit of the Hospital for Sick Children, Great Ormond Street, London, a right to a royalty in respect of the public performance, commercial publication, broadcasting or inclusion in a cable programme service of the play 'Peter Pan' by Sir James Matthew Barrie, or of any adaptation of that work, notwithstanding that copyright in the work expired on 31 December 1987.*

Furthermore, in other jurisdictions, the copyright in the works of Peter Pan was revived. In 1996, the European Union retrospectively extended the term of copyright protection for natural authors for life plus 70 years. Similarly, the United States Congress passed the *Sonny Bono Copyright Term Extension Act 1998* (US), and retrospectively extended the term of copyright protection to natural authors for life plus 70 years. The key question seems to be whether the Peter Pan works are eligible for this copyright term extension in

the United States.

Somma also sought a declaration that that her book *After the rain* did not infringe the work of JM Barrie. Her lawyers were confident that the book was protected by the defence of fair use under copyright law in the United States:

*We believe there would be a very strong argument that Emily would be free to publish her story even if the copyright had not expired. The precedent for this claim is, as the question suggests, the The wind done gone case. In that case, Alice Randall was permitted to write a story based on the novel Gone with the wind despite the fact that Gone with the wind was still under copyright. The Court held that a critical re-use of that story was fair use. So too could one argue that Emily's story is a fair use of the Barrie stories. It too builds upon the Peter Pan story in a way that questions the original author's point.*

Somma sought a declaration that her activities in publishing *After the rain* were protected by the First Amendment.

Furthermore, Somma sought a declaration that the Great Ormond Hospital could not claim any trademark in the character Peter Pan, whether under the *Lanham Act* or common law. She also sought a judicial determination that she was not infringing any rights in trademark or unfair competition held by the Great Ormond Hospital.

In response, the hospital argued that the Federal Court in California had no general or specific jurisdiction in this dispute between an English hospital and a Canadian author. While admitting that it had done business with California movie makers, the hospital denied doing business in California. The hospital also maintained that the matter was not ripe for a declaration of judicial rights.

In a curious twist, in 2004, the hospital also objected to a Peter Pan 'prequel' — entitled *Peter and the Starcatchers* — published by Hyperion, a Disney subsidiary. The book was written by Dave Barry and Ridley Pearson. The hospital argued that the unauthorised book infringed its copyright in Peter Pan. A spokesman for the Hospital said: 'JM Barrie gave the

copyright in Peter Pan to the hospital in 1929 and since then the royalties have been a significant but confidential source of income for the hospital. JM Barrie died in 1937 so copyright in the European Union runs until 2007 and until 2023 in the United States.' By contrast, Disney maintained: 'The copyright to the JM Barrie stories expired in the United States prior to 1998, the effective date of the US *Copyright Extension Act*, and thus were ineligible for any extension of their term.'

There have been echoes of such disputes over Peter Pan in Australia. In 1996, Australian author, Beth Spencer, published the novel, *How to conceive of a girl*. She used the fable of Peter Pan to explore social attitudes towards femininity, reproduction, birth and conception. Spencer was worried that particular copyright owners would refuse to give permission for the use of her work, because of the creative and critical nature of the subject matter. She commented:

*In a novella which is about a third of the book, I've used the occasional brief quote from Peter Pan as a structuring principle — little typographical stepping stones or punctuation points, if you like...*

*The quotes are something like less than 400 words out of 20 000; and I actually feel that Mr Barrie himself would approve, but he's dead and it would be some unknown person who administers the estate making the decision. What if they, just personally, didn't happen to like what I was doing.*

Fortunately for Spencer, the work of Peter Pan had fallen into the public domain in Australia. The Federal Government has since extended the term of copyright protection in 2004 to life of the author plus 70 years. However, the Australian Parliament decided that such an extension would not have a retrospective effect.

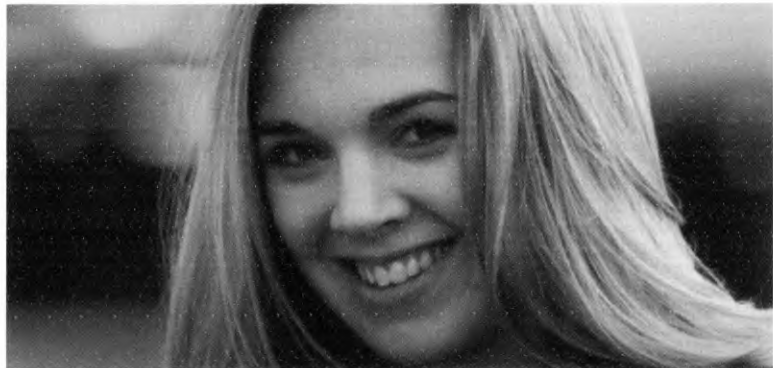
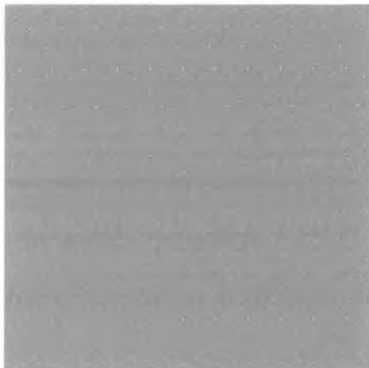
The case of Peter Pan provides a cautionary tale about the dangers of copyright term extension. There is a need to resist the special pleading of copyright owners. It is extraordinary that the United Kingdom Parliament should have awarded perpetual copyright protection to stock characters. It is troubling that the European Union, the United States, and Australia have dramatically extended the term of copyright protection. There is a need for greater conser-

vation of the public domain and the intellectual commons. As the lawyers for Emily Somma observe:

*JM Barrie almost certainly took the name 'Pan' from a magical figure in ancient Greek Mythology, and aspects of the Peter Pan character may have been based on Puck from Shakespeare's A Midsummer Night's Dream, Robin Hood, and other public domain fictional characters. Barrie's pirates borrowed many names and characteristics from real and literary pirates of his day. Emily should be as free to build on the past with her own creativity.*

It is inappropriate that Peter Pan should have perpetual copyright protection in light of the character's origins. There should be freedom for creative artists to use, adapt, and transform stories, plots and characters that are derived from the public domain.

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