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14 UNITED STATES DISTRICT COURT
15 NORTHERN DISTRICT OF CALIFORNIA
16 SAN FRANCISCO DIVISION

17 JUNE EMILY SOMMA,)

18 Plaintiff,)

19 v.)

20 GREAT ORMOND STREET)
21 HOSPITAL,)

22 Defendant.)

Civil Case No. 02-5889 JSW

**SECOND AMENDED COMPLAINT
FOR DECLARATORY JUDGMENT**

DEMAND FOR JURY TRIAL

23 Plaintiff, by and through her attorneys, alleges as follows:

24 **THE PARTIES**

25 1. Plaintiff, J. Emily Somma, is the author of *After the Rain: A New Adventure for
26 Peter Pan*, published in Canada by Daisy Books and sold in the United States and elsewhere, and
27 a citizen of Canada residing in Hamilton, Ontario, Canada.

28 2. Defendant Great Ormond Street Hospital is a children's hospital and registered
29 charity in the business of providing medical services, having a primary place of business at 40-

PLAINTIFF'S SECOND AMENDED COMPLAINT
FOR DECLARATORY JUDGMENT

Case No. C-02-5889 JSW

1 41 Queen Square, London, England. A major source of Defendant’s outside funding comes
2 from the United States licensing of copyrights in J.M. Barrie’s play “Peter Pan.”

3
4 **JURISDICTION AND VENUE**

5 3. This Court has original jurisdiction over the subject matter of this lawsuit
6 pursuant to 28 U.S.C. §§ 1331 and 1338 because this case arises under the Copyright Act, 17
7 U.S.C. §§ 101 *et seq.*, the Lanham Act, 15 U.S.C. § 1125 and the Constitution of the United
8 States. This lawsuit is brought pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201.

9 4. Plaintiff is informed and believes and thereon alleges that Defendant Great
10 Ormond Street Hospital has systematically and continuously availed itself of the privilege of
11 doing business in California to exploit the copyrights currently asserted against Ms. Somma,
12 since 1937 and continuing to the present, as set out in paragraphs 32-57 of this Complaint, and
13 that Defendant therefore has sufficient contacts with this District both generally and specifically
14 in connection with the facts alleged in this Complaint that Defendant is subject to personal
15 jurisdiction in California.

16 5. Venue is proper in this district pursuant to 28 U.S.C. § 1391 because Defendant,
17 an alien, is subject to personal jurisdiction in this Court and because a substantial part of the
18 harm threatened to Plaintiff is occurring in this judicial district, where Plaintiff has sold her book
19 *After the Rain: A New Adventure for Peter Pan* and wishes to continue offering it for sale.

20
21 **GENERAL ALLEGATIONS**

22 6. The story of Peter Pan, by J.M. Barrie, is a world-famous story about a magical
23 boy who meets conventional London children, Wendy, John and Michael Darling. He teaches
24 them to fly and brings them to Neverland, a place where children never grow up, and they have
25 many adventures and escape from the evil Captain Hook and his band of pirates. Peter Pan’s
26 constant companion is a fairy named Tinker Bell.

1 7. The character of Peter Pan first appeared in a book titled *The Little White Bird*, by
2 J.M. Barrie, published in the United States in 1902. Barrie later wrote and published *Peter Pan*
3 *in Kensington Gardens; When Wendy Grew Up: An Afterthought* and *Peter Pan and Wendy*.

4 8. J.M. Barrie adapted his Peter Pan story into a stage play “Peter Pan” in 1904. The
5 play was a hit, and was adapted into a silent movie released in or around 1924 by Paramount
6 Pictures, a corporation with a principal place of business in Los Angeles, California.

7 9. In 1928, the United States Copyright Office issued a certificate of copyright
8 registration for the play “Peter Pan or The Boy Who Would Not Grow Up” in the name of James
9 Matthew Barrie.

10 10. By instrument dated August 14, 1929, Barrie assigned to The Hospital for Sick
11 Children, a predecessor of Defendant, his copyrights in the play “Peter Pan.”

12 11. In 1937, J. M. Barrie died and the Hospital became the owner of the copyrights to
13 J.M. Barrie’s play “Peter Pan.”

14 12. The books *The Little White Bird; Peter Pan in Kensington Gardens* and *Peter*
15 *Pan and Wendy*, and the characters described in these works, are in the public domain because
16 their copyrights have expired.

17 13. Plaintiff’s book, *After the Rain: A New Adventure for Peter Pan* (“*After the*
18 *Rain*”) is about a 21st century girl named Crystal McFarland who, with her friends Buddy and
19 Sean, rescues Peter Pan from endless childhood in Neverland, where he has lived for 97 years.

20 14. Plaintiff’s book, *After the Rain*, was inspired by the characters Peter Pan and
21 Tinker Bell and the fictional world Neverland in J.M. Barrie’s books, which are in the public
22 domain. *After the Rain*, as the title suggests, is a new story about Peter Pan and Tinker Bell and
23 various new characters created by Plaintiff, including new villains—the Keeper and his army—
24 and a new fairy named Oliver. The modern-day characters in *After the Rain* look forward to the
25 possibilities and opportunities that await them in adulthood. Some of the story takes place in
26 Neverland and some in the real world.

1 15. The editions of Plaintiff’s book *After the Rain* identify Plaintiff as the author,
2 prominently on the front cover, back cover, copyright and publication information, and in an
3 “About the Author” section at the end of the book.

4 16. The back cover of *After the Rain* states “J. Emily Somma’s *After the Rain* brings
5 the magic of J.M. Barrie’s loveable character Peter Pan into harmony with contemporary
6 children.” Otherwise, the book does not refer to J.M. Barrie.

7 17. *After the Rain* was published in August, 2002 by Daisy Books. At the time of the
8 book’s Canadian release, Plaintiff contacted an English publisher concerning publication and
9 distribution of her book in the United Kingdom. That publisher asked that Plaintiff clear her
10 intention to publish *After the Rain* with Defendant Great Ormond Street Hospital.

11 18. On or about September 3, 2002, Ms. Somma telephoned Kit Palmer of Defendant,
12 concerning her plans to publish and sell *After the Rain* in the United Kingdom.

13 19. On or about September 3, 2002, Ms. Somma sent four copies of *After the Rain* to
14 Ms. Palmer for review by Ms. Palmer and the Hospital trustees.

15 20. In September, 2002, Plaintiff and Ms. Palmer exchanged several e-mails
16 concerning the nature of *After the Rain* and of Defendant’s asserted rights in J.M. Barrie’s
17 works.

18 21. In an e-mail to Plaintiff dated September 6, 2002, Ms. Palmer stated “the hospital
19 retains all the rights in the individual characters, which nobody can use without our permission
20 in the copyrighted territories.” She further stated: “copyright...is, in this and other cases, a
21 question of what rights we have assigned, elsewhere over time, and whether they conflict with
22 rights already granted to others, and plans already in development. I am afraid I cannot be more
23 specific. For your information, Disney acquired the animation rights only from the hospital in
24 1939 and after the war released their first film of Peter Pan. –The rights for a sequel was
25 negotiated with Disney a couple of years ago. Columbia Tristar have the live action movie
26 rights.”

1 22. On September 18, 2002, Plaintiff sent an e-mail to Palmer in which she stated “I
2 am sorry if my reply to your e-mail was a bit blunt. I felt I had to make it very clear that the UK
3 copyright would not stop us promoting and marketing reprint and translation rights, CD rights,
4 and screen adaptation rights for *After the Rain* in countries where Peter Pan became public
5 domain 15 years ago.”

6 23. On September 25, Palmer wrote a letter to Plaintiff, a true copy of which is
7 attached to this Complaint as Exhibit A. She stated “As to your request for permission to publish
8 your book in UK, EU countries (now 15) and the U.S., I regret to inform you that the Hospitals
9 Trustees have decided not to authorize this. The play by J.M. Barrie is in full copyright in the
10 US until 2023. Unauthorized works, which contain the Peter Pan characters and elements from
11 the original Work, are not adaptable in the US without the permission of the Hospital, being
12 protected by the laws of trademark and unfair competition. If therefore, you are already
13 distributing/publishing the unauthorized publication “*After the Rain*” in the US we would ask
14 you to cease and from any acts in respect of the Work and its characters, including its adaptation,
15 production, sale, advertising and distribution.”

16 24. On October 2, 2002, Plaintiff again wrote by e-mail and facsimile to Ms. Palmer,
17 again noting that the books in which Peter Pan first appeared as an original character are in the
18 public domain. She noted that she did not require consent to sell *After the Rain* and stated her
19 intent to immediately “begin to offer it in all markets globally.”

20 25. On November 19, 2002, Defendant’s counsel, Alvin Deutsch Jr., of the New York
21 Law Firm of McLaughlin and Stern, LLP, sent a letter to Plaintiff concerning *After the Rain*, a
22 true copy of which is attached to this Complaint as Exhibit B.

23 26. In this November 19, 2002 letter, Defendant’s counsel stated, *inter alia*, “The
24 Trustees of the Hospital strongly object to any unauthorized publication of the work, its
25 characters, plots, sequences, or any derivatives thereof and are prepared to take appropriate
26 action to enforce its rights.”

1 27. The November 19, 2002 letter further stated that, “The Musical Play with a score
2 by Jules Styne, Betty Comden, Adolph Green, Mark Charlap and Carolyn Leigh is in its second
3 term of U.S. copyright. World-wide copyright will endure until 50 years after the demise of the
4 last of its authors.”

5 28. The November 19, 2002 letter further stated that “works which contain Peter Pan
6 characters and which may have entered the public domain are not adaptable in the U.S. without
7 the authority of the Hospital, being protected by the laws of trademark and unfair competition,
8 since: a) It is the James Barrie play which established, for all time, *Peter Pan* and the coterie of
9 characters associated with him; b) the public has come to identify *Peter Pan* as the Barrie Work.
10 Based on our preliminary research, no less than 13 dictionaries and 6 encyclopedias carry
11 essentially the following definition of Peter Pan: ‘hero of the play *Peter Pan* by Sir James M.
12 Barrie; c) The careful depiction of the character, traits and personality of Peter Pan around whom
13 the tale unfolds, invests that character with separate protection *qua* character.”

14 29. Defendant’s counsel referred to a previous suit for copyright infringement
15 brought by Defendant, *Hospital for Sick Children v. Melody Fare*, 516 F. Supp. 67 (E.D.Va.
16 1980) and further stated “The Hospital has, since the judgment in the Melody Fare case,
17 instituted litigation to protect its rights, all of which has been resolved in the Hospital’s favor.”

18 30. Defendant’s Counsel then stated, “This letter will serve as formal notice that any
19 acts in respect to the Work in the United States, including its adaptation, production, sale,
20 advertising and distribution without the permission of our client will not be countenanced. The
21 Hospital is prepared to protect its rights.”

22 31. As a result of Defendant’s and its counsel’s communications as alleged above,
23 and of her continuing to distribute *After the Rain* in the United States, Plaintiff has a reasonable
24 apprehension that Defendant will file suit against her in the United States.

25 32. In the July 29, 2004 Supplemental Joint Case Management Statement (Docket
26 #35), Defendant contradicted statements made in its previous letters to Plaintiff, stating in this
27 most recent court-filed document that “[t]his is an action for declaratory relief. Its premise is

1 that June Emily Somma faces a reasonable apprehension of being sued by [GOSH]. Every party
2 and lawyer involved in this matter knows that no such prospect exists.”

3 33. Defendant’s statements in the July 29, 2004 Supplemental Joint Case
4 Management Statement admits that its prior threats of legal action for copyright infringement
5 were unmeritorious.

6 **ALLEGATIONS CONCERNING PERSONAL JURISDICTION**

7 34. Defendant’s contacts with California for the purpose of exploiting the copyrights
8 and other rights now asserted against Plaintiff have been systematic and continuous since 1937
9 and continuing until the present.

10 35. Defendant’s counsel’s November 19, 2002 letter states, and Plaintiff thereon
11 alleges, that a major source of Defendant’s outside funding comes from the United States
12 licensing of rights to Peter Pan.

13 36. Defendant uses as its agent for licensing the play “Peter Pan” in the United States,
14 Samuel French, Inc. Samuel French, Inc. has an office in California located at 7623 Sunset
15 Boulevard, Hollywood, California, 90046.

16 37. Samuel French has licensed hundreds of separate productions of the play
17 throughout the United States, including productions in California. Samuel French has also
18 licensed hundreds of productions of the musical version of “Peter Pan” including productions in
19 California. Samuel French has also sold thousands of copies of the play, including sales in
20 California.

21 38. In 1935, before Barrie’s death, Walt Disney came upon the idea of making an
22 animated film based on Peter Pan. In 1938, Walt Disney’s company acquired the original print
23 of the 1924 silent movie “Peter Pan.” In or around 1939, Defendant licensed the film rights to
24 the stage play and the book to Disney’s company, which then had its principal place of business
25 in Hollywood, California.

26 39. Plaintiff is informed and believes and thereon alleges today Disney Enterprises,
27 Inc. (“Disney”) is a corporation having its principal place of business in Burbank, California.

1 40. On February 5, 1953, Disney released an animated film version of Peter Pan. It
2 was re-released in theaters in 1958, 1969, 1976, 1982 and 1989.

3 41. The National Broadcasting Company, Inc. (“NBC”) presented the play “Peter
4 Pan” starring Mary Martin, in 1955, 1956, 1960, 1963, 1966 and 1973. Plaintiff is informed and
5 believes and thereon alleges that NBC is a corporation with studio facilities in Burbank,
6 California.

7 42. In 1990, Disney released the 1953 animated film version, “Peter Pan” on video.
8 This version is still sold and rented on both video and DVD formats, generating royalties for
9 Defendant.

10 43. In or around 1990, Hollywood director Steven Spielberg directed “Hook” a live-
11 action film adaptation of the Peter Pan story, in which Peter Pan grows up and returns to
12 Neverland with his own children. “Hook” starred Robin Williams as Peter, Dustin Hoffman as
13 Captain Hook and Julia Roberts as Tinker Bell and included cameo appearances by Phil Collins,
14 David Crosby, Glenn Close, Jimmy Buffet and Lonnie Burr. Gwyneth Paltrow played the part of
15 Wendy.

16 44. In or around 1990, Columbia TriStar released “Hook.” Columbia Tristar is a
17 corporation having its principal place of business in California. TriStar subsequently released
18 Hook on video and DVD for sales and rentals. Plaintiff is informed and believes and thereon
19 alleges that Defendant licensed the right to adapt the play *Peter Pan* to Columbia TriStar and
20 received royalties in excess of £1,000,000, and continues to receive royalties, from screenings,
21 sales and rentals of “Hook” and related products.

22 45. Also in or around 1990, Fox Television (“Fox”) aired an animated cartoon
23 program series entitled “Peter Pan and the Pirates,” based on the Peter Pan stories. Actor Tim
24 Curry earned an Emmy award for his performance as the voice of Captain Hook in the series.
25 On information and belief, this series was licensed by Defendant, which collected royalties from
26 Fox for the series and related tie-in products.

1 46. Plaintiff is informed and believes and thereon alleges that Fox is a corporation
2 having its principal place of business in Los Angeles, California.

3 47. Within the past several years, Defendant negotiated with Disney to license a
4 sequel to the 1953 Disney animated Peter Pan film. In February, 2002, Disney released the
5 animated sequel, titled “Peter Pan: Return to Neverland.”

6 48. On March 6, 2002, Defendant issued a press release and photo call notice
7 announcing that a Peter Pan birthday cake would be unveiled to celebrate the Hospital’s 150th
8 anniversary year. The release notes that “the cake will also have a starring role at the premiere
9 of the new Disney Peter Pan movie, ‘Return to Neverland,’ on Sunday 17 March.”

10 49. Plaintiff is informed and believes and thereon alleges, GOSH has already received
11 over £100,000 in royalties from “Return to Neverland” as a result of its license agreement with
12 Disney.

13 50. On February 12, 2002, Disney released the 1953 movie Peter Pan on DVD. The
14 DVD includes extras such as commentaries by Walt Disney and the animators, the making of
15 Peter Pan, a “featurette” Peter Pan Story, a still gallery, Peter’s Playful Prank and a “Pirate
16 Treasure Hunt” game. On information and belief, Defendant licensed the Disney DVD of Peter
17 Pan and receives royalties from sales of the Disney DVD.

18 51. Plaintiff is informed and believes and thereon alleges that Miramax filmed
19 “Neverland,” a live-action film based on the play “The Man Who Was Peter Pan,” about Barrie’s
20 writing of Peter Pan, in Summer, 2002 in London, starring Johnny Depp as the author J.M.
21 Barrie and Kate Winslet as Barrie’s friend and neighbor, Sylvia Davies.

22 52. Plaintiff is informed and believes and thereon alleges that Defendant negotiated
23 with Miramax a license agreement under which it will receive royalties on the Box Office of
24 “Neverland.” Miramax is a subsidiary of Disney with business offices in Los Angeles,
25 California.

26 53. Plaintiff is informed and believes and thereon alleges that a live-action film
27 version of Peter Pan was filmed in 2002, directed by P.J. Hogan, starring Jason Isaacs as

1 Captain Hook (“the Hogan Peter Pan Film”). The Hogan Peter Pan Film was budgeted at £20
2 million, or over \$54 million. It is scheduled for release for Christmas, 2003.

3 54. Plaintiff is informed and believes and thereon alleges that the Hogan Peter Pan
4 Film is a joint venture of Universal Pictures, Columbia Pictures and Revolution Studios.

5 55. Universal Pictures is a corporation having its principal place of business in
6 Universal City, California.

7 56. Columbia Pictures Industries Inc. is a corporation having its principal place of
8 business in Culver City, California.

9 57. Plaintiff is informed and believes and thereon alleges that Revolution Studios is a
10 business of unknown form having its principal place of business in Santa Monica, California.

11 58. Plaintiff is informed and believes and thereon alleges that special visual effects
12 for the Hogan Peter Pan Film are being created and executed by Industrial Light and Magic, a
13 division of Lucas Digital, which has its principal place of business in San Rafael in California.

14 59. As alleged in Paragraph 21 of this Complaint, Kit Palmer of Defendant Great
15 Ormond Street Hospital expressly referred to Defendant’s agreements with Disney and Columbia
16 TriStar in her correspondence with Plaintiff, implying that these agreements are relevant to the
17 issue of whether Plaintiff has the right to publish, distribute and sell *After the Rain*.

18
19 **FIRST CAUSE OF ACTION**
20 ***Declaratory Judgment***
21 ***Copyright Act [17 U.S.C. §§ 101, et seq.]***

22 60. Plaintiff incorporates by reference the allegations in each of the preceding
23 paragraphs as if fully set forth in this paragraph.

24 61. An actual controversy exists as to whether Plaintiff’s marketing, distributing and
25 selling *After the Rain* infringes any copyright of Defendant.

26 62. As a matter of law, the characters of Peter Pan, Tinker Bell and others that
27 appeared in J.M. Barrie’s books *The Little White Bird*; *Peter Pan in Kensington Gardens*; and
28 *Peter Pan and Wendy* are in the public domain.

29 **PLAINTIFF’S SECOND AMENDED COMPLAINT
FOR DECLARATORY JUDGMENT**

Case No. C-02-5889 JSW

1 WHEREFORE, Plaintiff prays for relief as follows:

2 1) For a judicial determination and order declaring that, copyright having expired in J.M.
3 Barrie's books, the characters of Peter Pan, Tinker Bell, Captain Hook, Wendy, and others as
4 described in J.M. Barrie's books are in the public domain and may be used in all manner of
5 derivative works;

6 2) For a judicial determination and order declaring that under United States copyright
7 law, Plaintiff's book *After the Rain: A New Adventure for Peter Pan* does not infringe any
8 subsisting copyright on J.M. Barrie's play "Peter Pan or The Boy Who Would Not Grow Up;"
9 or adaptations thereof;

10 3) For a judicial determination and order declaring that Plaintiff's activities with respect
11 to *After the Rain* are protected by the First Amendment of the United States Constitution;

12 4) For a judicial determination and order declaring that Defendant does not have any
13 trademark rights, under the Lanham Act or at common law, in the character "Peter Pan" as
14 expressed in *The Little White Bird*; *Peter Pan in Kensington Gardens*; and *Peter Pan and*
15 *Wendy*.

16 5) For a judicial determination and order declaring that under United States trademark
17 and unfair competition law, Plaintiff's book *After the Rain: A New Adventure for Peter Pan*
18 does not infringe any enforceable rights of Defendant Great Ormond Street Hospital;

19 6) For a judicial determination and order declaring that under common law, Defendant
20 misused its copyright on J.M. Barrie's play "Peter Pan or The Boy Who Would Not Grow Up"
21 and a judgment barring Defendant from enforcing any copyright in the play unless and until its
22 misuse has ceased.

23 7) For an Order enjoining Defendant and its agents and attorneys from further asserting
24 copyright and trademark rights in the characters expressed in *The Little White Bird*; *Peter Pan*
25 *in Kensington Gardens*; and *Peter Pan and Wendy* including but not limited to Peter Pan, Tinker
26 Bell, Captain Hook and Wendy, and from purporting to enforce copyright in such characters
27 against authors and creators of other derivative works in the United States;

1 **DEMAND FOR JURY TRIAL**

2 Plaintiff demands a jury trial on all issues triable to a jury.

3
4 Dated: November 19, 2004

Respectfully submitted,

5 _____
6 /S/

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8 Jennifer Stisa Granick, Cal. Bar No. 168423
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