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12 J. EMILY SOMMA

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

16 JUNE EMILY SOMMA, )

17 Plaintiff, )

18 v. )

19 GREAT ORMOND STREET )  
20 HOSPITAL, )

21 Defendant. )

Civil Case No. 02-5889 EMC

**AMENDED COMPLAINT FOR  
DECLARATORY JUDGMENT**

**DEMAND FOR JURY TRIAL**

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

23 **THE PARTIES**

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29 AMENDED COMPLAINT FOR DECLARATORY JUDGMENT





1           10. By instrument dated August 14, 1929, Barrie assigned to The Hospital for Sick  
2 Children, a predecessor of Defendant, his copyrights in the play “Peter Pan.”  
3

4           11. In 1937, J. M. Barrie died and the Hospital became the owner of the copyrights to  
5 J.M. Barrie’s play “Peter Pan.”  
6

7           12. The books *The Little White Bird*; *Peter Pan in Kensington Gardens* and *Peter Pan*  
8 *and Wendy*, and the characters described in these works, are in the public domain because their  
9 copyrights have expired.  
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11           13. Plaintiff’s book, *After the Rain: A New Adventure for Peter Pan* (“*After the Rain*”)  
12 is about a 21st century girl named Crystal McFarland who, with her friends Buddy and Sean,  
13 rescues Peter Pan from endless childhood in Neverland, where he has lived for 97 years.  
14

15           14. Plaintiff’s book, *After the Rain*, was inspired by the characters Peter Pan and Tinker  
16 Bell and the fictional world Neverland in J.M. Barrie’s books, which are in the public domain.  
17 *After the Rain*, as the title suggests, is a new story about Peter Pan and Tinker Bell and various  
18 new characters created by Plaintiff, including new villains –the Keeper and his army- and a new  
19 fairy named Oliver. The modern-day characters in *After the Rain* look forward to the possibilities  
20 and opportunities that await them in adulthood. Some of the story takes place in Neverland and  
21 some in the real world.  
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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 "About  
3 the Author" section at the end of the book.  
4

5           16. The back cover of *After the Rain* states "J. Emily Somma's *After the Rain* brings the  
6 magic of J.M. Barrie's loveable character Peter Pan into harmony with contemporary children."  
7 Otherwise, the book does not refer to J.M. Barrie.  
8

9           17. *After the Rain* was published in August, 2002 by Daisy Books. At the time of the  
10 book's Canadian release, Plaintiff contacted an English publisher concerning publication and  
11 distribution of her book in the United Kingdom. That publisher asked that Plaintiff clear her  
12 intention to publish *After the Rain* with Defendant Great Ormond Street Hospital.  
13

14           18. On or about September 3, 2002, Ms. Somma telephoned Kit Palmer of Defendant,  
15 concerning her plans to publish and sell *After the Rain* in the United Kingdom.  
16

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

20           20. In September, 2002, Plaintiff and Ms. Palmer exchanged several e-mails concerning the  
21 nature of *After the Rain* and of Defendant's asserted rights in J.M. Barrie's works.  
22

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

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

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15 23. On September 25, Palmer wrote a letter to Plaintiff, a true copy of which is attached to  
16 this Complaint as Exhibit A. She stated “As to your request for permission to publish your book in  
17 UK, EU countries (now 15) and the U.S., I regret to inform you that the Hospitals Trustees have  
18 decided not to authorize this. The play by J.M. Barrie is in full copyright in the US until 2023.  
19 Unauthorized works, which contain the Peter Pan characters and elements from the original Work,  
20 are not adaptable in the US without the permission of the Hospital, being protected by the laws of  
21 trademark and unfair competition. If therefore, you are already distributing/publishing the  
22 unauthorized publication “After the Rain” in the US we would ask you to cease and from any acts in  
23 respect of the Work and its characters, including its adaptation, production, sale, advertising and  
24 distribution.”  
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1           24. On October 2, 2002, Plaintiff again wrote by e-mail and facsimile to Ms. Palmer, again  
2 noting that the books in which Peter Pan first appeared as an original character are in the public  
3 domain. She noted that she did not require consent to sell *After the Rain* and stated her intent to  
4 immediately “begin to offer it in all markets globally.”  
5

6           25. On November 19, 2002, Defendant’s counsel, Alvin Deutsch Jr., of the New York  
7 Law Firm of McLaughlin and Stern, LLP, sent a letter to Plaintiff concerning *After the Rain*, a true  
8 copy of which is attached to this Complaint as Exhibit B.  
9

10           26. In this November 19, 2002 letter, Defendant’s counsel stated, *inter alia*, “The Trustees  
11 of the Hospital strongly object to any unauthorized publication of the work, its characters, plots,  
12 sequences, or any derivatives thereof and are prepared to take appropriate action to enforce its  
13 rights.”  
14

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

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

7  
8 29. Defendant’s counsel referred to a previous suit for copyright infringement brought by  
9 Defendant, *Hospital for Sick Children v. Melody Fare*, 516 F. Supp. 67 (E.D.Va. 1980) and  
10 further stated “The Hospital has, since the judgment in the Melody Fare case, instituted litigation to  
11 protect its rights, all of which has been resolved in the Hospital’s favor.”  
12

13 30. Defendant’s Counsel then stated, “This letter will serve as formal notice that any acts in  
14 respect to the Work in the United States, including its adaptation, production, sale, advertising and  
15 distribution without the permission of our client will not be countenanced. The Hospital is prepared  
16 to protect its rights.”  
17

18 31. As a result of Defendant’s and its counsel’s communications as alleged above, and of  
19 her continuing to distribute *After the Rain* in the United States, Plaintiff has a reasonable  
20 apprehension that Defendant will file suit against her in the United States.  
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24 **ALLEGATIONS CONCERNING PERSONAL JURISDICTION**  
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1           32. Defendant's contacts with California for the purpose of exploiting the copyrights and  
2 other rights now asserted against Plaintiff have been systematic and continuous since 1937 and  
3 continuing until the present.  
4

5           33. Defendant's counsel's November 19, 2002 letter states, and Plaintiff thereon alleges,  
6 that a major source of Defendant's outside funding comes from the United States licensing of rights  
7 to Peter Pan.  
8

9           34. Defendant uses as its agent for licensing the play "Peter Pan" in the United States,  
10 Samuel French, Inc. Samuel French, Inc. has an office in California located at 7623 Sunset  
11 Boulevard, Hollywood, California, 90046.  
12

13           35. Samuel French has licensed hundreds of separate productions of the play throughout the  
14 United States, including productions in California. Samuel French has also licensed hundreds of  
15 productions of the musical version of "Peter Pan" including productions in California. Samuel  
16 French has also sold thousands of copies of the play, including sales in California.  
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19           36. In 1935, before Barrie's death, Walt Disney came upon the idea of making an animated  
20 film based on Peter Pan. In 1938, Walt Disney's company acquired the original print of the 1924  
21 silent movie "Peter Pan." In or around 1939, Defendant licensed the film rights to the stage play  
22 and the book to Disney's company, which then had its principal place of business in Hollywood,  
23 California.  
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1           37. Plaintiff is informed and believes and thereon alleges today Disney Enterprises, Inc.  
2 (“Disney”) is a corporation having its principal place of business in Burbank, California.  
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4           38. On February 5, 1953, Disney released an animated film version of Peter Pan. It was re-  
5 released in theaters in 1958, 1969, 1976, 1982 and 1989.  
6

7           39. The National Broadcasting Company, Inc. (“NBC”) presented the play “Peter Pan”  
8 starring Mary Martin, in 1955, 1956, 1960, 1963, 1966 and 1973. Plaintiff is informed and  
9 believes and thereon alleges that NBC is a corporation with studio facilities in Burbank, California.  
10

11           40. In 1990, Disney released the 1953 animated film version, “Peter Pan” on video. This  
12 version is still sold and rented on both video and DVD formats, generating royalties for Defendant.  
13

14           41. In or around 1990, Hollywood director Steven Spielberg directed “Hook” a live-action  
15 film adaptation of the Peter Pan story, in which Peter Pan grows up and returns to Neverland with  
16 his own children. “Hook” starred Robin Williams as Peter, Dustin Hoffman as Captain Hook and  
17 Julia Roberts as Tinker Bell and included cameo appearances by Phil Collins, David Crosby, Glenn  
18 Close, Jimmy Buffet and Lonnie Burr. Gwyneth Paltrow played the part of Wendy.  
19

20           42. In or around 1990, Columbia TriStar released “Hook.” Columbia Tristar is a  
21 corporation having its principal place of business in California. TriStar subsequently released Hook  
22 on video and DVD for sales and rentals. Plaintiff is informed and believes and thereon alleges that  
23 Defendant licensed the right to adapt the play *Peter Pan* to Columbia TriStar and received royalties  
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1 in excess of £1,000,000, and continues to receive royalties, from screenings, sales and rentals of  
2 “Hook” and related products.  
3

4 43. Also in or around 1990, Fox Television (“Fox”) aired an animated cartoon program  
5 series entitled “Peter Pan and the Pirates,” based on the Peter Pan stories. Actor Tim Curry earned  
6 an Emmy award for his performance as the voice of Captain Hook in the series. On information  
7 and belief, this series was licensed by Defendant, which collected royalties from Fox for the series  
8 and related tie-in products.  
9

10 44. Plaintiff is informed and believes and thereon alleges that Fox is a corporation having its  
11 principal place of business in Los Angeles, California.  
12

13 45. Within the past several years, Defendant negotiated with Disney to license a sequel to  
14 the 1953 Disney animated Peter Pan film. In February, 2002, Disney released the animated  
15 sequel, titled “Peter Pan: Return to Neverland.”  
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17 46. On March 6, 2002, Defendant issued a press release and photo call notice announcing  
18 that a Peter Pan birthday cake would be unveiled to celebrate the Hospital’s 150th anniversary  
19 year. The release notes that “the cake will also have a starring role at the premiere of the new  
20 Disney Peter Pan movie, ‘Return to Neverland,’ on Sunday 17 March.”  
21

22 47. Plaintiff is informed and believes and thereon alleges, GOSH has already received over  
23 £100,000 in royalties from “Return to Neverland” as a result of its license agreement with Disney.  
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1           48. On February 12, 2002, Disney released the 1953 movie Peter Pan on DVD. The  
2 DVD includes extras such as commentaries by Walt Disney and the animators, the making of Peter  
3 Pan, a “featurette” Peter Pan Story, a still gallery, Peter’s Playful Prank and a “Pirate Treasure  
4 Hunt” game. On information and belief, Defendant licensed the Disney DVD of Peter Pan and  
5 receives royalties from sales of the Disney DVD.  
6

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8           49. Plaintiff is informed and believes and thereon alleges that Miramax filmed “Neverland,”  
9 a live-action film based on the play “The Man Who Was Peter Pan,” about Barrie’s writing of Peter  
10 Pan, in Summer, 2002 in London, starring Johnny Depp as the author J.M. Barrie and Kate Winslet  
11 as Barrie’s friend and neighbor, Sylvia Davies.  
12

13           50. Plaintiff is informed and believes and thereon alleges that Defendant negotiated with  
14 Miramax a license agreement under which it will receive royalties on the Box Office of “Neverland.”  
15 Miramax is a subsidiary of Disney with business offices in Los Angeles, California.  
16

17           51. Plaintiff is informed and believes and thereon alleges that a live-action film version of  
18 Peter Pan was filmed in 2002, directed by P.J. Hogan, starring Jason Isaacs as Captain Hook (“the  
19 Hogan Peter Pan Film”). The Hogan Peter Pan Film was budgeted at £20 million, or over \$54  
20 million. It is scheduled for release for Christmas, 2003.  
21

22           52. Plaintiff is informed and believes and thereon alleges that the Hogan Peter Pan Film is a  
23 joint venture of Universal Pictures, Columbia Pictures and Revolution Studios.  
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1           60. As a matter of law, the characters of Peter Pan, Tinker Bell and others that appeared in  
2 J.M. Barrie's books *The Little White Bird*; *Peter Pan in Kensington Gardens*; and *Peter Pan*  
3 *and Wendy* are in the public domain.  
4

5           61. The public, including Plaintiff, has the right in the United States to copy the expression  
6 embodied in these public domain books and to create and sell derivative works based upon the  
7 public domain characters, regardless of whether there are subsisting copyrights on other derivative  
8 works based on the same characters.  
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10           62. Plaintiff is entitled to a declaratory judgment that *After the Rain* does not infringe any  
11 copyright of Defendant.  
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15                                   **SECOND CAUSE OF ACTION**  
16                                   *Declaratory Judgment*  
17                                   ***U.S. Constitution, First Amendment-Works in The Public Domain***

18           63. Plaintiff incorporates by reference the allegations in paragraphs 1-57 as if fully set forth  
19 in this paragraph.

20           64. An actual controversy exists as to whether Plaintiff has the right to publish, market  
21 distribute and sell *After the Rain* in the United States without permission of Defendant.  
22

23           65. As a matter of law J.M. Barrie's books *The Little White Bird*; *Peter Pan in*  
24 *Kensington Gardens*; and *Peter Pan and Wendy* are in the public domain.  
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1 **FOURTH CAUSE OF ACTION**  
2 ***Declaratory Judgment***  
3 ***Lanham Act [15 U.S.C. § 1125]***

4 73. Plaintiff incorporates by reference the allegations in paragraphs 1-57 as if fully set forth  
5 in this paragraph.

6 74. An actual controversy exists as to whether Plaintiff has the right to publish, market,  
7 distribute and sell *After the Rain* in the United States.

8 75. Defendant Great Ormond Street Hospital has no legal claim under the Lanham Act to  
9 prohibit the use of characters from J.M. Barrie's Peter Pan works, and the names of those  
10 characters, in derivative works, such as *After the Rain*.

11 76. As a result of: (a) almost 100 years of Barrie and Defendant licensing the Peter Pan  
12 works to different publishers and entertainment businesses; and/or (b) the use of the names and  
13 graphic representations of characters as trademarks for a wide variety of good and services, by  
14 entities other than defendant; and/or (c) as a result of these characters passing into the public  
15 domain and thus now appearing in copies of Barrie's books and derivative works created,  
16 published or sold by numerous different entities, consumers do not perceive the names or characters  
17 in J.M. Barrie's works as identifying a single source for literary or theatrical works or performances  
18 that include these names or characters.  
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1 published or sold by numerous different entities, consumers do not perceive the names or characters  
2 in J.M. Barrie's works as identifying a single source for literary or theatrical works or performances  
3 that include these names or characters.  
4

5 83. There is no likelihood that potential purchasers of *After the Rain* will be confused as to  
6 the source or sponsorship of *After the Rain* and mistakenly believe it to originate from, or be  
7 sponsored by, Defendant Great Ormond Street Hospital.  
8

9 84. Plaintiff is entitled to a declaratory judgment that her activities with respect to *After the*  
10 *Rain* in the United States do not constitute unfair competition or violate any rights of Defendant  
11 under common law.  
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13  
14 WHEREFORE, Plaintiff prays for relief as follows:  
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- 16 1) For a judicial determination and order declaring that, copyright having expired in J.M  
17 Barrie's books, the characters of Peter Pan, Tinker Bell, Captain Hook, Wendy, and others  
18 as described in J.M. Barrie's books are in the public domain and may be used in all manner  
19 of derivative works;  
20  
21 2) For a judicial determination and order declaring that under United States copyright law,  
22 Plaintiff's book *After the Rain: A New Adventure for Peter Pan* does not infringe any  
23 subsisting copyright on J.M. Barrie's play "Peter Pan or The Boy Who Would Not Grow  
24 Up;" or adaptations thereof;  
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- 1 3) For a judicial determination and order declaring that Plaintiff’s activities with respect to  
2 *After the Rain* are protected by the First Amendment of the United States Constitution;  
3
- 4 4) For a judicial determination and order declaring that Defendant does not have any  
5 trademark rights, under the Lanham Act or at common law, in the character “Peter Pan” as  
6 expressed in *The Little White Bird*; *Peter Pan in Kensington Gardens*; and *Peter Pan*  
7 *and Wendy*.  
8
- 9 5) For a judicial determination and order declaring that under United States trademark and  
10 unfair competition law, Plaintiff’s book *After the Rain: A New Adventure for Peter Pan*  
11 does not infringe any enforceable rights of Defendant Great Ormond Street Hospital;  
12
- 13 6) For an Order enjoining Defendant and its agents and attorneys from further asserting  
14 copyright and trademark rights in the characters expressed in *The Little White Bird*; *Peter*  
15 *Pan in Kensington Gardens*; and *Peter Pan and Wendy* including but not limited to  
16 Peter Pan, Tinker Bell, Captain Hook and Wendy, and from purporting to enforce  
17 copyright in such characters against authors and creators of other derivative works in the  
18 United States;  
19
- 20 7) For the recovery of Plaintiff’s full costs and reasonable attorneys fees; and  
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- 22 8) For such additional and further relief, in law and equity, as the Court may deem just and  
23 proper.  
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1 Dated: January 10, 2003

Respectfully submitted,

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4 Elizabeth H. Rader, Cal. No. 184963  
5 Jennifer Stisa Granick, Cal. Bar No. 168423  
6 Lawrence Lessig

7 Center for Internet & Society  
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10 559 Nathan Abbott Way  
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12 Attorneys for Plaintiff J. Emily Somma  
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1 **DEMAND FOR JURY TRIAL**

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

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5 Dated: January 10, 2003

Respectfully submitted,

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8 Elizabeth H. Rader, Cal. No. 184963  
9 Jennifer Stisa Granick, Cal. Bar No. 168423  
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29 Attorneys for Plaintiff J. Emily Somma