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## Comments

# Copyrights in Perpetuity: Peter Pan May Never Grow Up

Jennifer S. Green\*

### I. Introduction

2004 was known as “The Year of Peter Pan” throughout the United Kingdom.<sup>1</sup> The country celebrated the 100<sup>th</sup> anniversary of the stage play, *Peter Pan*, with picnics in Neverland, charity balls, treasure hunts, and appearances by *Peter Pan* characters in the London Marathon.<sup>2</sup> A movie about author James Matthew Barrie’s life leading up to the premiere of Peter Pan’s first appearance on the London stage was

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\* J.D. Candidate, The Dickinson School of Law of the Pennsylvania State University, 2006; B.A., University of Pittsburgh, 2003. This paper won the local level first place prize in the 2006 Nathan Burkan Memorial Comptition. This work is for my parents, Louise and Jan, who have given me their perpetual love and support. I would like to thank Meredith, Archie, Kurt, and my family for always encouraging me, even when they thought I was headed toward Neverland.

1. See Brief for Defendant, Memorandum of Points and Authorities in Support of Defendant’s Motion to Dismiss at 4, *Somma v. Great Ormond St. Hosp.*, No. C 02-5889 JSW (N.D. Cal. filed Apr. 9, 2004) (stating that the House of Lords adopted a “Proclamation of the Century of Peter Pan” in December 2003). *Id.*

2. Irene Segal Ayers, *Peter Pan: The Copyright that Would Not Grow Up*, PA L. WKLY., May 31, 2004, at S2.

recently released by Miramax.<sup>3</sup> *Peter Pan* continues to delight children and adults 100 years later, not only because of its story of children plotting to conquer a ship full of pirates while living without rules and responsibility (a life many adults would like to escape to at times), but also because the story is timeless.<sup>4</sup>

Barrie's early books inspired his play, which in turn inspired the first *Peter Pan* movie, a silent production in 1924.<sup>5</sup> Many more *Peter Pan* variations have been produced since, including cartoons and musicals. The movie *Hook*, for example, provides a platform for telling the story of the grown up Peter Pan,<sup>6</sup> and most recently, *Finding Neverland*, tells the story of how Barrie created *Peter Pan*.<sup>7</sup> These derivative works of the *Peter Pan* story have contributed to society's understanding of *Peter Pan*, J. M. Barrie, and the fantasy world to which both children and adults yearn to escape.

Emily Somma has contributed to children's literature by writing a contemporary novel using characters from the *Peter Pan* stories. Somma's book, *After the Rain, A New Adventure for Peter Pan*,<sup>8</sup> inspired both litigation and discussion focusing on copyright issues.

As a general rule, copyrights in both the United States and the United Kingdom do not reach a state of perpetuity,<sup>9</sup> but are perpetual copyrights foreseeable?<sup>10</sup> British Parliament has created an exception to this rule by granting a perpetual copyright for *Peter Pan*.<sup>11</sup> The *Peter Pan* endowment, and the conflicts it is creating, raise legal questions in the United States, not only concerning derivative works and copyright

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3. *Finding Neverland*, at <http://www.miramax.com/findingneverland/>. The site describes the movie as the story of a fictional telling of Barrie's process of the creation of Peter Pan, and spans the history of Barrie's initial inspiration to the play's London premiere.

4. No matter the year, children continue to imagine a world in which there are no rules about bedtime, bath time or getting up in time for school. The timelessness of the *Peter Pan* story is evidenced by the very books and movies discussed within this paper that continue to be released, including Emily Somma's *AFTER THE RAIN: A NEW ADVENTURE FOR PETER PAN*, and the Disney published, *PETER AND THE STARCATCHERS*.

5. Brief for Plaintiff, Amended Complaint for Declaratory Judgment at 3, *Somma v. Great Ormond St. Hosp.*, No. 02-5889 EMC (N.D. Cal. filed July, 2003).

6. *Hook* tells the story of a Peter Pan who did grow up and get married. Peter and his family visit Wendy as an old woman, who is being honored for her philanthropic work for "lost boys." Peter must regain part of his forgotten youth when Captain Hook kidnaps his children, and Peter must return to Neverland to rescue them.

7. Multiple other films have been produced telling the *Peter Pan* story.

8. Emily Somma, *AFTER THE RAIN, A NEW ADVENTURE FOR PETER PAN*, Daisy Books, 2002.

9. See Copyright Act at 17 U.S.C. §§ 101-803 (2003) and Copyright, Designs and Patents Act, 1988, c 48, sched. 6 (Eng.).

10. See S. Rep. No. 104-315, § X, n4 (1996). Senator Brown's minority views suggest that Congress will continue to increase copyright duration upon request.

11. Copyright, Designs and Patents Act, 1988, c 48, Pt. I, ch. I., s. 12 (Eng.).

duration, but also questions concerning the philosophical purpose of copyright law: “To Promote the Progress of Science and useful Arts. . . .”<sup>12</sup>

This Comment addresses the history and current state of copyright law and perpetual copyrights and argues that long-term copyrights are contrary to the purpose of copyright law. Section II provides background to the Emily Somma case by exploring the history of the Peter Pan copyright. Section III compares copyright law in the United States to copyright law in the United Kingdom, in both its historical context and current state. Section IV focuses on cases involving the *Peter Pan* copyright and questions the benefit of perpetual copyrights. Section V undertakes the question of whether long-term copyright protection contradicts the intention of copyright protection. This section focuses on how long-term copyrights affect the intended beneficiary of copyright law, the public. Section VI concludes with the proposition that expanding copyright terms will have the effect of perpetual copyrights, and these extended terms of protection are against the best interests of the intended beneficiaries of copyrights.

## II. History of the *Peter Pan* Copyright

In 1902, Barrie wrote *The Little White Bird*,<sup>13</sup> his first story about the little boy who refused to grow up.<sup>14</sup> More stories about Peter Pan followed, introducing friends of Peter Pan to the children who delve into Peter’s world.<sup>15</sup> Barrie then adapted Peter’s story into a play, entitled simply, *Peter Pan*.<sup>16</sup> The play was first performed in London in 1904.<sup>17</sup> It crossed the ocean quickly, and was performed in New York City in 1905.<sup>18</sup> Many subsequent books, movies, products, and even amusement park rides have since been based on the story of *Peter Pan*.<sup>19</sup>

Upon Barrie’s death in 1937, he willed the rights of *Peter Pan*, the play, to The Great Ormond Street Hospital (“GOSH”) in London.<sup>20</sup>

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12. U.S. CONST. art. I, § 8, cl. 8.

13. J.M. Barrie, *THE LITTLE WHITE BIRD*, also called, *ADVENTURES IN KENSINGTON GARDENS*, New York, C. Scribner’s Sons, 1902.

14. See Brief for Plaintiff at 3, *Somma* (No. 02-5889 EMC).

15. *Id.*

16. *Id.*

17. Ayers, *supra* note 2, at S2. Stating that 2004 is the 100<sup>th</sup> Anniversary of *Peter Pan*’s first performance at the Duke of York’s Theatre in London. *Id.*

18. See Brief for Defendant at 4, *Somma* (No. C 02-5889 JSW).

19. See generally Shannon P. Duffy, *Companies Sue Disney Stores Over Rights to ‘Tinkerbell’ Name*, *LEGAL INTELLIGENCER*, July 31, 2000, at 3 (discussing products using the name of the Barrie character, Tinkerbell); see Brief for Defendant at 4, *Somma* (No. C 02-5889 JSW).

20. See Brief for Plaintiff, *Somma* (No. 02-5889 EMC). Copyright, Designs and Patents Act, 1988, c 48, sched. 6 (Eng.) (defining “the work” as the play *Peter Pan*). *Id.*

GOSH, otherwise known as The Children's Hospital, continues to rely on income generated by licensing the rights of *Peter Pan* to provide world renowned pediatric care and to research pediatric illnesses.<sup>21</sup> In 1988, the British Parliament<sup>22</sup> enacted a provision granting the Great Ormond Street Hospital perpetuity for its long held copyright in J. M. Barrie's play, *Peter Pan*.<sup>23</sup> Parliament's act provided a continuous means of support for GOSH, the epitome of a sympathetic defendant. This seemingly benevolent act by Parliament provoked a positive response to a question that the United States Congress continues to respond to negatively: Should a copyright be perpetual?

Emily Somma would answer, no. Somma's book, *After the Rain*,<sup>24</sup> contains characters from the original *Peter Pan* stories.<sup>25</sup> Somma contends that these characters have passed into the public domain in the United States,<sup>26</sup> but GOSH fought the release of Somma's book. GOSH opposed Somma's January 2003 request in the District Court for the Northern District of California for a declaration that the *Peter Pan* characters fall within the public domain.<sup>27</sup>

### III. Current Copyright Law

Copyright law in both the United States and the United Kingdom has transformed since its inception,<sup>28</sup> and has been developed to benefit each country's needs.<sup>29</sup> Though each country has developed its copyright law through different time frames, the laws of both countries

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21. See Brief for Defendant at 3, *Somma* (No. C 02-5889 JSW).

22. Originally, the Statute of Anne, 1710, 8 Ann. ch. 19, provided copyright protection in England. Protection extended primarily to books, but included books "not yet composed or published, books already composed but not yet published, and books already composed and published." *Eldred v. Ashcroft*, 537 U.S. 186, 201 n.5 (2003). Parliament not only invested a copyright in the author of a book, but in the publisher as well. A proposed extension of the copyright term of the Statute of Anne was rejected by the English Parliament for fear that it would "perpetuate the monopoly position enjoyed by English booksellers. A state imposed legal monopoly ceased in 1695, but throughout the 18<sup>th</sup> Century Parliament was wary of taking any action that would benefit the booksellers' and publishers' advantage. The United States avoided this monopoly by granting copyrights only to authors. *Id.*

23. Copyright, Designs and Patents Act, 1988, c 48, sched. 6 (Eng.).

24. Somma, *supra* note 8.

25. See Brief for Plaintiff, *Somma* (No. 02-5889 EMC).

26. *Id.* After a work surpasses the limited years for copyright protection, it enters the public domain, and is then free for anyone to use. See BLACK'S LAW DICTIONARY (8th ed. 2004).

27. See Brief for Defendant, *Somma* (No. C 02-5889 JSW).

28. See Craig W. Dallon, *The Problem With Congress and Copyright Law: Forgetting the past and ignoring the Public Interest*, 44 SANTA CLARA L. REV. 365, 365-437 (2004) (discussing the history of copyright law in the U.S. and Britain, as well as the origin of copyright law in Roman and Jewish law). *Id.*

29. See *id.* at 366-67.

have ended up in similar places. Copyright laws in the United Kingdom and the United States share a centrality of purpose: the need to encourage the diffusion of knowledge and ideas to the public by providing protection to authors and artists who create expressions of knowledge and ideas.<sup>30</sup>

#### A. *Copyright Law in the United States*

Copyright law has a long history in the U.S. It originates in the Constitution, which states: “The Congress shall have Power . . . To Promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”<sup>31</sup> The first federal copyright act, passed in 1790, was modeled on Great Britain’s first copyright act, the Statute of Anne.<sup>32</sup> The 1790 copyright law was subsequently revised by the Copyright Act of 1909<sup>33</sup> when President Theodore Roosevelt decided the original law did not meet the needs of modern innovations.<sup>34</sup> The 1909 Act extended the period in which authors could hold copyrights from two fourteen year terms to two twenty-eight year terms.<sup>35</sup> The 1909 Act also changed the moment that copyright protection begins, from the time of registration to the time of publication, thereby resulting in greater protection for authors who delayed in registering their works.<sup>36</sup>

The Copyright Act of 1909, however, did not satisfy the requirements of the Berne Convention of 1886.<sup>37</sup> This treaty was the

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30. See KEVIN GARRET, ET AL., *COPINGER AND KONE JAMES ON COPYRIGHT* § 2-04 (Sweet and Maxwell 14th ed. 1998); see also *Mazer v. Stein*, 347 U.S. 201, 219 (1954).

31. U.S. CONST. art. I, § 8, cl. 8.

32. See Copyright Act of 1790, ch.15, 1 Stat. 124 (1790) (current Copyright Act at 17 U.S.C. §§ 101-803 (2003)); see also CRAIG JOYCE, ET AL., *COPYRIGHT LAW* 15-21 (6th ed., LexisNexis 2003). The Copyright Act of 1790 granted copyright protection to maps, charts, and books for an original fourteen-year term and a renewal fourteen-year term. *Id.*

33. Copyright Act of 1909, Pub. L. No. 60-349, ch. 320, 35 Stat. 1075, 1081, (current Copyright Act at 17 U.S.C. §§ 101-803 (2003)).

34. See JOYCE, *supra* note 32, at 21. The Copyright Act of 1909 established a longer period of protection and included “all writings of an author,” rather than the more specific, maps, charts, and books of the previous Copyright Act of 1790. See Dallon, *supra* note 28.

35. *Id.* The 1790 Act provided for a copyright holding period of two fourteen year terms.

36. *Id.* Copyright protection under the 1790 Act began at registration, not publication.

37. Berne Convention for the Protection of Literary and Artistic Works, signed on September 9, 1886, revised in Paris on July 24, 1971, 828 U.N.T.S. 22; The Berne Convention remains the primary treaty governing international copyrights. Every “major producer and/or consumer of copyright works” other than China, the former USSR, and the U.S. was a party to the treaty by the mid 1980s. The U.S. did not enter the Berne Convention until March 1, 1989. See JOYCE, *supra* note 32, at 21-37.

dominating authority of both international copyrights, and international intellectual property in general.<sup>38</sup> In 1955 Congress authorized a revision of the 1909 Act in an attempt to bring copyright law up to Berne Convention standards, and to address technological advancements<sup>39</sup> through legislation, rather than relying on antiquated common law.<sup>40</sup> The result of a twenty-one year revision process was the Copyright Act of 1976.<sup>41</sup> The 1976 Act did away with the requirement that in order to receive copyright protection a work must be published, and replaced it with the requirement that a work must be fixed in a “tangible form.”<sup>42</sup> Additionally, the 1976 Act required a work to be original to receive protection,<sup>43</sup> and increased the length of an author’s protection.<sup>44</sup> The 1976 Act extended the 1909 Act’s twenty-eight year term to a term of protection for the life of the author plus an additional fifty years.<sup>45</sup> In 1998, the Copyright Term Extension Act (“CTEA”) increased the author’s period of protection once again. The CTEA now provides protection for most<sup>46</sup> copyrights for the life of the author plus seventy years.<sup>47</sup>

The United States has grappled with the question of copyright terms since the passage of the 1790 Copyright Act.<sup>48</sup> When asked to consider

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38. *See id.* The United States’ lack of compliance with Berne Convention standards prohibited the United States from joining the Berne Convention for 80 years.

39. The revision required fixation in a tangible form rather than publication, and addressed newer creative works, such as motion pictures and audiovisual works, and sound recordings. *See* The Copyright Act of 1976, 17 U.S.C. § 102.

40. *See* JOYCE, *supra* note 32, at 22.

41. *See* JOYCE, *supra* note 32, at 22-23. Congress took its time to address reports and hold “extensive” hearings on what the new copyright law should contain. *Id.*

42. *See id.*; *See also* 17 U.S.C. § 101-102 (2003). The Copyright Act of 1976 provides that a work is “‘fixed’ in a tangible medium of expression” if it is “embod[ied] in a copy or phonorecord, by or under the authority of the author,” and “is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration. A work consisting of sounds, images, or both, that are being transmitted, is ‘fixed’ for purposes of this title if a fixation of the work is being made simultaneously with its transmission.” *Id.*

43. 17 U.S.C. § 102 (2003). Originality is not defined by the Copyright Act. Courts have defined original as the “product of plaintiff’s intellectual invention.” *Burrow-Giles Lithographic Co. v. Saroni*, 111 U.S. 53, 60 (1884).

44. *Id.*

45. *See* JOYCE, *supra* note 32, at 23.

46. 17 U.S.C. § 302(c). Anonymous works, pseudonymous works, and works made for hire receive protection for 95 years from the year of first publication, or 120 years from the year of creation, whichever comes first. *Id.*

47. *See* *Eldred v. Ashcroft*, 537 U.S. 186, 193 (2003).

48. *See Eldred*, 537 U.S. at 194. In 1790, the Copyright Act allowed 14 years of protection, renewable for another 14 years “if the author survived the first term.” *See* GARRET *supra* note 30. The length of protection was extended to 42 years in 1831, broken down into a 28-year initial term, renewable for another 14 years. The 1909 Act extended the copyright to 56 years, evenly divided between a 28-year initial term,

the question of perpetual copyrights, Congress and the courts have adamantly and consistently refused perpetuity, citing the Constitution.<sup>49</sup> The key phrase in the copyright clause is “by securing for limited [t]imes,” which plainly states in ordinary language that owners may hold copyrights only for a finite time.<sup>50</sup>

Despite the continuous temporal extensions of protection by Congress, the Supreme Court maintains in *Eldred v. Ashcroft*<sup>51</sup> that life of the author plus seventy years is a “limited time” for the purposes of the copyright clause.<sup>52</sup> The Court confirms that Congress’ ability to extend the term of a copyright exists in harmony with the restriction of a limited time.<sup>53</sup> The government’s ability to extend terms of protection, while still maintaining that those terms are limited, is exemplified by the extension of patent terms. James Madison, (who was the principal drafter of the Constitution’s language mandating a limited time) in his role as Secretary of State in the Jefferson administration issued an extension for patents, and as President, issued yet another extension for the protection of patents.<sup>54</sup>

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renewable for another 28 years. See Dallon, *supra* note 28. In 1976, Congress increased the term of years and modified the method of copyright. Instead of a copyright running from the date of publication as in the preceding Acts, copyright protection for identified works was to be calculated from the date of the work’s creation. Protection would last for 50 years after the author’s death, bringing United States protection in line with the Berne Convention for the Protection of Literary and Artistic Works. Works produced anonymously or under a pseudonym were protected for 75 years from date of publication or 100 years from the date of creation, whichever came first. See Berne Convention, *supra* note 37. In 1998 Congress enacted the Copyright Term Extension Act (“CTEA”) which increases protection to the time of the work’s creations plus 70 years after the death of the author. The case notes that for works with existing copyrights published prior to 1978, the CTEA extends protection to 95 years from publication. The Court notes that a significant reason for the term extension is to bring U.S. terms in line with European Union Terms. *Id.* at 195-196. Ironically, GOSH states that the original Peter Pan story remains under copyright in America through 2023, and it expires in Europe in 2007. See Nigel Reynolds, *Hospital to Fight Disney Over Peter Pan Rights*, TELEGRAPH (London), Oct. 9, 2004, available at <http://cyberlaw.stanford.edu/about/cases/Telegraph%20re%20Barry%20Prequel.pdf> (last visited Oct. 30, 2004).

49. See *id.*; see also, the Copyright Term Extension Act, 17 U.S.C. § 302(a) (1998).

50. See Alison Grossman, *Keep Your Hands Off Mickey! Dastar Decision Nearly Eclipses Public Domain Line*, 228 LEGAL INTELLIGENCER 115, June 16, 2003, at S2.

51. *Eldred*, 537 U.S. at 193. The Petitioners of *Eldred v. Ashcroft* did question Congress’ ability to extend the duration of a copyright, but questioned Congress’ action of extending the copyright duration for works in existence prior to the CTEA. *Id.*

52. *Eldred*, 537 U.S. at 199.

53. *Id.* at 204.

54. *Id.* The Court cites the Brief for Respondent at 15 to substantiate Congress’ ability to extend protection while remaining within the purpose of “limited times” set forth by the Constitution. The Court also points out that as President, Thomas Jefferson was the first “administrator of the patent system” and could have been the Founding Father with the narrowest view of copyright and patent law, yet he signed the 1808 and the 1809 “patent term extensions into law.” *Id.*



### B. *Copyright Law in the United Kingdom*

The United Kingdom's ("U.K.") body of law governing copyright is much the same as that of the U.S. The copyright laws of both countries share a common history and chronology, as the copyright law of the United States was based on Britain's.<sup>55</sup> British copyright law began with the invention of the printing press, because with the printing press came the phenomena of easy reproduction.<sup>56</sup> The ability to easily reproduce works frightened the monarchy, because it allowed for publication of literature that did not conform to the Crown's religious and political edicts.<sup>57</sup> To control the threat of widespread information, the monarchy issued a royal decree in 1534, barring any publication that was without royal license and approval.<sup>58</sup>

Several revisions of the 1534 law took place. For example, the monarch gave a publishing monopoly to the Stationers' Company, only to later leave the Company unprotected when the license to publish expired. The Statute of Anne later revised copyright law by granting protection to authors rather than publishers.<sup>59</sup> Similar to early United States registration requirements, the Statute of Anne required a work to be registered with the Stationers' Company to qualify for protection.<sup>60</sup> A revision in 1842 eliminated registration as a prerequisite to receive statutory protection, but maintained registration as a requirement to bring an action for copyright infringement.<sup>61</sup> Finally, the 1911 Act eliminated any requirement for registration in order to bring the U.K. into compliance with the standards of the Berne Convention.<sup>62</sup>

In contrast to modern U.S. copyright law, the U.K. currently bestows "moral rights" on the author of a work.<sup>63</sup> Moral rights protect an author, even if that author no longer owns the copyright to his or her work.<sup>64</sup> The U.K.'s copyright laws, however, do share a term of duration

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55. See *Eldred*, 537 U.S. at 186, 201 (2003); see also JOYCE, *supra* note 32, at 19.

56. *Id.*; see also JOYCE, *supra* note 32, at 15.

57. *Id.*

58. See JOYCE, *supra* note 32, at 15.

59. The Statute of Anne, 8 Anne, ch. 19 (1710); see also *supra* note 27, at 16.

60. See 8 Anne ch. 19 (1710); see also KEVIN GARRET, ET AL., *COPINGER AND SKONE ON COPYRIGHT* § 2-01 (Sweet and Maxwell 1998) (1870).

61. See GARRET, *supra* note 30, at § 2-01.

62. *Id.*

63. *Id.* 136 Cong. Rec. 3.672 (1990). "Moral rights is a French concept that . . . would give authors—freelance or staff—the inalienable right to approve any word change or references to their work."

64. See GARRET, *supra* note 30. Although moral rights are included in the Berne Convention, the United States has chosen not to legislate in this area. See JOYCE, *supra* note 32, at 608.

with the most recent U.S. copyright extension.<sup>65</sup> The latest British copyright legislation, the Copyright, Designs and Patents Act of 1988, provides for the same general copyright term as the CTEA: life of the author plus seventy years.<sup>66</sup>

Not surprisingly, the U.K., without a clear constitutional mandate like the U.S., has struggled with the concept of perpetual copyrights. Prior to 1911, works maintained a perpetual copyright at common law in the U.K., as long as they were unpublished or were copyrights of educational institutions.<sup>67</sup> Even though common law copyrights were abolished by the 1911 Act, the Act did codify perpetual copyrights for unpublished works.<sup>68</sup> After surviving several revisions, the 1988 Act finally eradicated the perpetual copyright, except for works published anonymously.<sup>69</sup> This most recent stance against perpetual copyrights clearly conflicts with the perpetual right to receive royalties granted to GOSH under the same 1988 Act.<sup>70</sup>

Although the U.S. Copyright Act of 1976 and the Copyright Term Extension Act ("CTEA") set forth simple and seemingly standardized formulas for determining the length of copyright protection, much debate has erupted over when GOSH's United States copyright in *Peter Pan* expires.<sup>71</sup>

#### IV. Cases Involving the *Peter Pan* Copyright

##### A. Emily Somma v. GOSH

Emily Somma wrote *After the Rain: A New Adventure for Peter Pan* ("*After the Rain*"),<sup>72</sup> based on the characters of Barrie's first stories.<sup>73</sup>

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65. Copyright, Designs and Patents Act, 1988, c 48, Pt. I, ch. I., s. 12 (Eng.) and Copyright Term Extension Act, codified in 17 U.S.C. § 302(a).

66. Copyright, Designs and Patents Act, 1988, c 48, Pt. I, ch. I., s. 12 (Eng.). See also, GARRET, *supra* note 30, at § 2-03. The U.K. and U.S. both have a standard copyright duration of life of the author plus seventy years. *Id.*

67. *Id.*

68. *See id.*

69. *See id.*

70. See GARRET, *supra* note 30, at § 6-50.1. The actual copyright of the play *Peter Pan* was extended to 2007 by the Act, but after that copyright expires, the hospital's trustees will continue to benefit by the royalties they will receive in perpetuity. *Id.*

71. See Brief for Defendant *supra* note 1; see Brief for Plaintiff *supra* note 5.

72. Somma, *supra* note 8.

73. J.M. Barrie's THE LITTLE WHITE BIRD was written in 1902. Subsequent works include: PETER PAN IN KENSINGTON GARDENS, 1906; WHEN WENDY GREW UP: AN AFTERTHOUGHT, 1908; and WENDY AND PETER (PETER PAN), 1911. These works are published online as part of a public domain database, available at <http://onlinebooks.library.upenn.edu/webbin/book/authorstart?B> (last visited Mar. 13, 2006).

Published in Canada in 2002, *After the Rain* is set in the Twenty-first Century and tells the story of a girl, Crystal, who sets off with two friends, Buddy and Sean, to rescue Peter Pan from Neverland.<sup>74</sup> GOSH sent Somma a letter in November of 2002 asserting that her novel was “unauthorized” and in conflict with the copyright it holds in *Peter Pan*.<sup>75</sup> GOSH ordered Somma to stop distribution of *After the Rain*.<sup>76</sup> Somma argued that all of Barrie’s early works entered the public domain prior to the CTEA, and therefore, the copyrights in those works were not extended.<sup>77</sup> Somma refused to surrender to GOSH, who endeavors to hold onto the gift of copyright Barrie bequeathed to support its continued treatment of underprivileged children.<sup>78</sup>

The Cyberlaw Clinic at Stanford Law School’s Center for Internet and Society (“the Center”) took Somma’s case as a pro bono project in 2002 because they recognized that Somma is an individual who is not likely to make a lot of money with her book.<sup>79</sup> Somma’s book represented, to the Center, the importance of an author’s freedom to use works that have entered the public domain.<sup>80</sup> The Center brought this case because it believes in the importance of protecting public domain rights and the creative freedom required to build it.<sup>81</sup>

Somma based her case on several ostensibly basic principles: one, GOSH holds a copyright only in *Peter Pan*, the play, and not in all of Barrie’s early works; two, Somma’s novel is based on characters in the public domain in the United States; and three, GOSH’s copyright in

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74. See Brief for Plaintiff, *Somma* (No. 02-5889 EMC).

75. See *id.* at 6.

76. See Ayers, *supra* note 2, at S2.

77. The first of these early works was published in 1911, and the copyright would have lasted for 50 years after Barrie’s death in 1937, therefore entering the public domain in 1987. See Brief for Plaintiff, *Somma* (No. 02-5889 EMC).

78. See Brief for Plaintiff, *Somma* (No. 02-5889 EMC).

79. Somma offered to pay royalties to the Great Ormond Street Hospital, but her offer was refused. See Ian Stewart, ‘*Peter Pan*’ falls into clutches of lawyers; Author challenges copyright ruling, SAN DIEGO UNION-TRIB., Jan. 1, 2003, at A6.

80. Stanford Law School Center for Internet and Society, *Emily Somma v. GOSH [Peter Pan case] Case Page*, FAQ’s, at [http://cyberlaw.stanford.edu/about/cases/emily\\_somma\\_v\\_gosh\\_peter\\_.shtml](http://cyberlaw.stanford.edu/about/cases/emily_somma_v_gosh_peter_.shtml) (last visited Mar. 13, 2006).

The Center has stated that “when a copyright expires, it is everyone’s right to build upon works in the public domain. There is, and should be, no exception to that right because the previous copyright holder was virtuous, just as there is no exception to a copyright just because the current copyright holder is not. In any case, Emily Somma voluntarily offered to donate part of the proceeds from her book to the children’s hospital. The Hospital’s Trustees refused. They demand that she stop distributing her book. This case is not about money, it is about creative freedom.”

*Id.*

81. *Id.*

perpetuity only applies to *Peter Pan*, the play,<sup>82</sup> so even if it did hold a copyright in any other of Barrie's works, they were not granted continued protection by Parliament's Proclamation.<sup>83</sup>

GOSH's first argument in response is based upon a lack of jurisdiction; GOSH has not yet argued the merits of the copyright in the *Somma* case.<sup>84</sup> However, GOSH has discussed the merits of this type of action in a recent public feud with Disney,<sup>85</sup> maintaining that it holds a U.S. copyright in *Peter Pan* through 2023.<sup>86</sup> Disney and GOSH have not yet litigated this issue, but are satisfied for the time being to make their case to the media.

### B. *Disney v. GOSH*

Disney initially avoided conflict with GOSH by disassociating itself with a *Peter Pan* movie that GOSH did not authorize.<sup>87</sup> Recently, perhaps inspired by *Somma*'s case, or shamed into action by the fact that one woman was willing to fight for the *Peter Pan* character, while the Disney conglomeration was not, Disney did some growing up of its own and faced GOSH's accusations.<sup>88</sup>

Disney published a new prequel to *Peter Pan*, entitled *Peter and the Starcatchers*,<sup>89</sup> based on Barrie's early stories of *Peter Pan*.<sup>90</sup> Disney has

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82. Copyright, Designs and Patents Act, 1988, c 48, sched. 6 (Eng.).

83. *Id.* Defines the work in question as "the play." *Contra* J.M.Barrie.co.uk, at [http://www.jmbarrie.co.uk/etc\\_index.html](http://www.jmbarrie.co.uk/etc_index.html) (last visited Mar. 13, 2006). According to Barrie expert Andrew Birkin, Barrie gave the hospital rights to the "whole *Peter Pan* concept," known as "The *Peter Pan* Gift," which included all the writings "in which *Peter Pan* puts in an appearance." The perpetual copyright would have a possible bearing on AFTER THE RAIN only if published in the U.K. *Id.*

84. See Stanford Law School Center for Internet and Society, *Emily Somma v. GOSH [Peter Pan case] Case Page, FAQ's*, at [http://cyberlaw.stanford.edu/about/cases/emily\\_somma\\_v\\_gosh\\_peter\\_.shtml](http://cyberlaw.stanford.edu/about/cases/emily_somma_v_gosh_peter_.shtml) (last visited Mar. 13, 2006).

85. See Brief for Plaintiff at 9-12, *Somma* (No. 02-5889 EMC). Disney previously maintained good relations with GOSH, purchasing the rights to *Peter Pan* to make its own movies and cartoons. See Ayers, *supra* note 2, at S2. Disney recently pulled out of a live action film version of *Peter Pan* because it was unable to reach an agreement with GOSH. See Reynolds, *supra* note 48.

86. See Reynolds, *supra* note 48; Holly M. Sanders, *Sick Kids Vs. Disney in 'Peter Pan' Dustup*, N.Y. POST (Online Edition), Oct. 12, 2004, available at <http://cyberlaw.stanford.edu/about/cases/NYPost%20re%20Barry%20Prequel.pdf>.

87. See Ayers, *supra* note 2, at S2. Ayers theorizes that Disney may not have wanted to challenge GOSH's copyright to protect its own interest in *Peter Pan*, and in deference to its own "aging copyrights." *Id.*

88. See Stewart, *supra* note 79.

89. See Reynolds, *supra* note 48. *Peter and the Starcatchers* is written by Dave Barry, Pulitzer prize-winning humor columnist, and Ridley Pearson, a crime writer. See *Peter Pan Fan* available at <http://www.peterpanfan.com/new/home.php#patc> (last visited March 13, 2006). Barry and Pearson are planning on writing a "continuation of the prequel," *Peter and the Shadowthieves*, despite GOSH's statement that Disney had no

utilized the same argument employed by Somma: the copyright in Barrie's early works expired prior to the CTEA and the books reside in the public domain.<sup>91</sup> GOSH, in response, has protested to the book's publisher in writing, but does not believe it could afford to bring suit in the United States.<sup>92</sup>

### C. *Are Copyrights in Perpetuity a Good Thing?*

The copyright in perpetuity bestowed upon GOSH by the British Parliament is the first of its kind.<sup>93</sup> The Berne Convention for the Protection of Literary and Artistic Works mandates that copyrights are protected for the life of the author plus fifty years, but it does not impose an upper limit.<sup>94</sup> While in this instance, Parliament was acting with the best intentions in granting GOSH a copyright in perpetuity, the precedent established is contrary to the essential purpose of copyrights.<sup>95</sup> Copyrights are intended to encourage creative works that benefit society by providing a means of support for the authors and artists creating those works.<sup>96</sup> Opponents of the CTEA argue that the public is entitled to an ample public domain, and if that domain is not continually re-stocked it will not be able to adequately serve the public.<sup>97</sup> The recent movies *Hook* and *Finding Neverland*, as well as the books GOSH is protesting, illustrate the ability of authors and artists to build upon previous works.<sup>98</sup> If one was able to control such copyrights in perpetuity, the creation of many new works, of benefit to society for purposes ranging from entertainment to education to self-enlightenment, would have to be aborted.

Congress conveys that the CTEA is a natural reaction to increased

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permission to publish *Starcatchers*. *Id.*

90. *Id.*

91. See Sanders, *supra* note 86.

92. See Reynolds, *supra* note 48. See Sanders, *supra* note 79. Sanders notes that Disney plans to donate proceeds from the U.K. premier of *Finding Neverland* to GOSH. *Id.*

93. See generally, Berne Convention for the Protection of Literary and Artistic Works, June 26, 2004, art. 7.

94. Berne Convention for the Protection of Literary and Artistic Works, June 26, 2004, art. 7. If the Berne Convention did impose an upper limit, the British Parliament, as a party to the Berne Convention, would have been forbidden from enacting a copyright in perpetuity.

95. JOYCE, *supra* note 32. The focus of copyright law in the United States is on benefiting the public first, and rewarding the author second. *Id.*

96. *E.g.*, Grossman, *supra* note 50, at S2.

97. *Id.* Grossman notes that the purpose of the public domain is to facilitate "innovation, creation, and development" by the public. *Id.*

98. These movies use the Peter Pan story but manipulate it to create something that is original in and of itself.

life-span and the later age at which adults choose to begin families.<sup>99</sup> Congress also puts forth the idea that an author or artist is entitled to the security that one's children, and their children's children, will be able to benefit from posthumous profits.<sup>100</sup> Additionally, Congress worried that the previous copyright term of fifty years failed to correspond with the longevity copyrighted works experience due to advancements in communications technology.<sup>101</sup>

### 1. Somma: The Case Against Copyright in Perpetuity

Emily Somma's case<sup>102</sup> against GOSH represents the essence of why artistic and literary works are given a term of protection and then enter the public domain.<sup>103</sup> Somma is one of an indeterminate number of people who use their creativity to build upon existing works to benefit society as a whole. Somma and Disney<sup>104</sup> have used their cases to make an argument that copyrights in perpetuity should not be encouraged because they will have detrimental effects for the public.<sup>105</sup> Somma and Disney do not need to make this argument, however, because the U.S. currently takes a stand against copyrights in perpetuity,<sup>106</sup> and both parties have other valid arguments to make on the merits of their cases. The lack of argument against copyrights in perpetuity in Somma's complaint, however, does not suggest that Somma and society do not directly benefit from the lack of such copyrights in the United States.

While copyrights in perpetuity are not an immediate threat,<sup>107</sup> opponents of the CTEA fear that continuous extensions by Congress of copyright terms are effectively creating perpetual copyrights.<sup>108</sup> Justice

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99. *Eldred*, 537 U.S. 186, 207 n.14 (2003). The Court cites statements of Senator Feinstein and Senator Hatch in the Congressional Record of 1995.

100. *Id.*

101. *Id.* Citing Senator Hatch's statement that copyright law has always "developed in response to significant changes in technology . . . [and] Congress . . . has fashioned the new rules that new technology made necessary." *Id.*

102. See Brief for Plaintiff, *Somma* (No. 02-5889 EMC).

103. *Eldred*, 537 U.S. at 247 (Breyer J. dissenting). Congress has stated that the purpose of copyright law "is not to reward the author, but rather to secure for the public the benefits derived from the author's labors. By giving authors an incentive to create, the public benefits in two ways: when the original expression is created and . . . when the limited term . . . expires and the creation is added to the public domain." *Id.*

104. Disney has always been a supporter of long term copyrights, see JOYCE, *supra* note 32, but has recently found a need to argue against long term copyrights when it was accused of infringing on GOSH's Peter Pan copyright. See Reynolds, *supra* note 48.

105. See Brief for Defendant *supra* note 1; see Brief for Plaintiff *supra* note 5.

106. *Eldred*, 537 U.S. at 197, 199; a copyright in perpetuity would clearly be in violation of the Constitution. *Id.*

107. The British Proclamation granting GOSH a copyright in perpetuity is the only known instance of indefinite protection.

108. *Eldred*, 537 U.S. at 208. Argument raised by Petitioners, disagreed with by the

Breyer, dissenting in *Eldred v. Ashcroft*, argues that while the CTEA does not literally create copyrights in perpetuity, the economic effect of the extension is a “virtually perpetual” copyright.<sup>109</sup> Breyer explains that a perpetual copyright is not what is desired by the Constitution because it has the effect of benefiting the estate of the artist or author, and prohibits the copyright from promoting the progress of society.<sup>110</sup>

Somma and Disney demonstrate that continually extended copyright terms hinder new creative works. Both Somma’s and Disney’s books put the *Peter Pan* characters in new situations with new characters to provide a fresh story to readers at a time when people are eager for more Peter Pan. These innovative works are not possible if copyrights are extended to prohibit authors from writing about relevant characters, a standard GOSH would like to uphold.<sup>111</sup>

## 2. Artists and Authors: The Case for Copyrights in Perpetuity

During debates on the CTEA, the Songwriters Guild suggested a perpetual term for copyright protection.<sup>112</sup> Songwriters testified that adequate compensation for both themselves, and their potential heirs, as provided by copyrights, is a significant incentive for them to create.<sup>113</sup> While it is easy for the courts to invoke limits on copyrights though the “limited times” language of the Constitution and the purpose of bestowing knowledge and information upon society, it is also easy to sympathize with the artists who desire long-term protection. An artist putting the necessary energy and emotion into creating a work that benefits the public is arguably entitled to the full financial reward of the work.

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Court. *Id.*

109. *Eldred*, 537 U.S. at 243 (Breyer J. dissenting).

110. *Id.* Breyer cites E. WALTERSCHEID, *THE NATURE OF THE INTELLECTUAL PROPERTY CLAUSE: A STUDY IN HISTORICAL PERSPECTIVE* 125-126 (2002) to clarify that when the Framers used the word, “science,” they intended the definition of “learning or knowledge.” *Id.*; see also Grossman, *supra* note 50. Grossman emphasizes that extensions limit the number of new creations by restricting the ability to draw upon the public domain. *Id.*

111. See Brief for Plaintiff, *Somma* (No. 02-5889 EMC).

112. See *Eldred*, 537 U.S. at 206 n.11. Discussing Register of Copyrights, Marybeth Peters’ reaction to the testimony of the Songwriters Guild.

113. *Id.* at 207 n.15. Statements were made by Bob Dylan, Don Henley, and Carlos Santana. Register of Copyrights, Marybeth Peters, expanded on the significance of adequate compensation by pointing out that compensation finances “production and distribution of new works” and does not merely function as a reward or compensation for existing creative works.

## V. Do Perpetual Copyrights Conflict with the Purpose of Copyrights?

Copyrights are granted to the authors and inventors mentioned in the Constitution's copyright clause to encourage those authors and inventors to produce works for the benefit of society at large.<sup>114</sup> The philosophical notions behind the copyright clause make sense; authors' and inventors' works benefit the public by providing entertainment and information in the form of literature, movies, news, works of art, and more. Through copyrights, the artists who create the work gain economic protection.<sup>115</sup> The artist profits from the work that the public has deemed beneficial, for if the public does not buy the work, there is no profit to be had. The copyright, by its intention, prohibits others from stealing, profiting from, and depriving the artist from profiting on what the artist has spent an indeterminable period of time creating. Additionally, and perhaps more importantly from the view of the Congress and the public, economic protection in the form of a copyright provides an author with the opportunity to work on the creation of new works that will, in turn, also benefit the public.<sup>116</sup>

The time of copyright protection is limited to provide further benefit to the public in the form of the public domain.<sup>117</sup> When a copyright term ends, the formerly protected work enters the public domain.<sup>118</sup> Once a work is in the public domain, the public is permitted to make use of that work by building on the expressions found within it to create new works that will also benefit society.<sup>119</sup> Building on a work in the public domain is exactly what Somma has done in *After the Rain*.<sup>120</sup> Somma used Barrie's early works, which, in her argument, have entered the public domain because their copyright has expired, in order to create a new story of Peter Pan that introduces children to another point of view on the

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114. U.S. CONST. art I, § 8, cl. 8.

115. H.R. Con. Res. 390, 105th Cong. (1998) (enacted). During House debates, representatives pointed out that well-known singers and songwriters who win awards are considered critically successful, but do not get rich from writing their songs. The representatives discussed artist Shaun Colvin, who at the time was pregnant, had won a Grammy, but was not wealthy and was concerned about her financial security. *Id.*

116. See *Princeton University Press v. Michigan Document Services, Inc.*, 99 F.3d 1381, 1410 (6th Cir. 1996); see also H.R. Con. Res. 390, 105th Cong. (1998) (enacted). The House wanted to ensure that the creative people of the U.S. are rewarded appropriately for their contribution to society. The Representatives also point out that artists build their body of work over a long period of time, and they need to be able to care for their families throughout that time.

117. The building of a public domain is the purpose of the "limited times" clause in the Constitution.

118. See *Eldred*, 537 U.S. at 223 (2003).

119. See *id.*

120. Daisy Books, *AFTER THE RAIN, A NEW ADVENTURE FOR PETER PAN*, Description, at <http://daisybooks.com/ATR.html> (last visited Mar. 10, 2006).



subject of growing up.<sup>121</sup>

When works enter the public domain, the public is free to use those works as they wish.<sup>122</sup> Often, by the time creative works enter the public domain, the public is so familiar with them that they feel as though the works are already part of a common heritage, rather than someone else's property right.

## VI. Perpetual Copyrights and the Public

The case for copyrights in perpetuity examines how artists, and then children and grandchildren of artists will benefit from perpetual copyrights, as they and their descendants will have more control over their works. The argument against copyrights in perpetuity observes that consumers and future artists will benefit because creative works will enter the public domain, allowing others to create more works. Both of these groups, however, are part of the public.<sup>123</sup> It is therefore necessary to maintain a system that will form a compromise between both groups. The CTEA purports to have done just that.<sup>124</sup> The CTEA is intended to provide benefits to both the artist in the form of trade<sup>125</sup> and economic benefits, and to society in the form of a public domain further enriched by the creative works that are the result of the increased benefits to artists.<sup>126</sup>

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121. *Id.*

122. *See* Copyright Office FAQs, Where is the Public Domain?, available at, [http://www.copyright.gov/help/faq/faq-definitions.html#public\\_domain](http://www.copyright.gov/help/faq/faq-definitions.html#public_domain) (last visited Mar. 10, 2006).

123. It is also interesting to note that some may move between the groups. Once a member of society creates a work, he or she may move into the artist group, and become more protective of his or her copyright, although the artist was able to create his or her work and obtain a copyright because of the ability to expand on ideas existing in the public domain.

124. *See* S. Rep. No. 104-315 § 3.I (1996). The Senate Report states the purpose of the Copyright Term Extension Act as creating a benefit to artists in the form of trade benefits and economic incentives, and a benefit to society in the form of a greater public domain. In § VIII and X, several Senators express the view that the CTEA is necessary to artists and authors due to the extension of copyright terms by the European Union, as well as pending legislation to extend copyright terms in other countries (Sweden, Portugal, Finland, and the Netherlands).

125. *See* S. Rep. No. 104-315 § X (1996). Senator Brown states that although the U.S. is creating an extension to align itself equally with the EU, most EU countries do not recognize corporate copyright ownership, while the U.S. does. Thus, EU countries generally provide less protection than the U.S. for corporate copyright ownership under the 1976 Act. The CTEA widens the difference between the EU and the U.S. of corporate copyright ownership protection. *Id.*

126. *See id.* Senator Brown finds that an additional 20 years on the duration of a copyright term will drain rather than enrich the public domain. He states that "researchers, academics, librarians, historians, and creators" relying on the public domain will simply have to wait longer in order to access creative materials. *Id.*

A. *Copyrights in Perpetuity Harm the Public*

The U.S. Senate Reports on the CTEA showcase how copyrights in perpetuity can harm emerging authors such as Somma, as well as artistic organizations such as Disney, while aiding copyright owners long after the artistic creator has passed away.<sup>127</sup>

The purpose of a copyright appears to be getting lost amidst the shuffle of copyright law. The intention of a long period of protection is to prevent a copyrighted work from being used without the copyright owner's consent, and to ensure that the copyright owner is paid for any use of the copyrighted work.<sup>128</sup> Copyright was established as an incentive for artists to provide creative works for the benefit of the public, the public being the primary concern.<sup>129</sup> In stating the purpose of the CTEA, the Senate cites the bill's benefit to the public as an afterthought; by providing so many benefits to authors, the public will inherently benefit because those authors will want to provide more and better creative works for the public.<sup>130</sup>

Copyright law seems to be tipping the balance between artists and the public. Artists receive longer periods of protection, but the public seems to receive only a longer waiting period before works enter the public domain.<sup>131</sup>

The public and the corporate world benefit greatly when creative ideas enter the public domain. Disney has made millions of dollars with its movies: *Snow White*, *Pinocchio*, *Beauty and the Beast*, *The Little Mermaid*, and *Fantasia*, and millions of people around the world have enjoyed watching Disney's movies. These movies are all the result of inspiration from creative works in the public domain.<sup>132</sup>

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127. See *id.* It is striking that as a member of Big Business, Disney can be a member of both the artist group and the emerging artist group. As a corporate entity, Disney has an interest in maintaining its copyrights for as long as it can. As a creative organization, Disney benefits by using works that have entered the public domain. *Id.*

128. See Kamal Puri, *The Term of Copyright Protection—Is it Too Long in the Wake of New Technologies*, EUR. INTELL. PROP. REV. 12(1), \*16 (1990) (discussing perpetual copyrights).

129. See S. Rep. No. 104-315, § X (1996).

130. See S. Rep. No. 104-315, § 3.I (1996).

131. See Puri, *supra* note 128, at \*18-19. Kamal Puri suggests that in the U.K., copyright terms for literary, dramatic, musical and artistic works should be reduced to 50 years, or until the death of the author, whichever is shorter. Puri also suggests that sound recordings, cinematograph films, radio and television broadcasts, and photographs should receive copyright protection for 25 years because these works specifically involve technical skills and because they usually do not remain popular for more than 25 years. While there are certainly many instances where this theory holds true, many technically involved creative works do remain popular for more than 25 years, a time period that would often be shorter than the career of the author. *Id.*

132. See S. Rep. No. 104-315, § X (1996). *Snow White*, *Pinocchio*, *Beauty and the*

Extended or perpetual copyrights may prohibit the public from obtaining or benefiting from creative works. For example, when a literary work enters the public domain, the publisher, and in turn, the consumer, no longer have to pay a royalty when the book is published, making that book much less expensive.<sup>133</sup> Additionally, songs that are greatly utilized by the public are still copyrighted and use could trigger a royalty payment if the copyright owner sued for infringement. The “Happy Birthday” song remains under copyright until 2010,<sup>134</sup> which explains why so many people are often subject to the embarrassment of embellished variations sung by waiters at birthday dinners.<sup>135</sup>

How is a balance between the artist and consumer groups to be reached? By necessity, the artists must receive a benefit. Otherwise, they have no incentive to create. Likewise, the public must receive a benefit, as much access to creative works as possible.<sup>136</sup> Is there any way to produce these results other than through the current system? Congress has yet to address that question.

### *B. Copyrights in Perpetuity Do Not Stimulate Creativity*

The Senate cites the “stimulation of new works” as one of the purposes of the CTEA.<sup>137</sup> While there is an obvious argument that increased copyright duration is appropriate due to the artist’s increased longevity,<sup>138</sup> a minority of Senators are adamantly opposed to the longevity argument.<sup>139</sup> It is certainly beneficial for artists to receive

*Beast*, and *The Little Mermaid* all came from stories in the public domain, while the music for *Fantasia* existed in the public domain. *Id.*

133. *See id.* For example, “In 1993, Willa Cather’s *My Antonia* went into the public domain. In 1994, seven new editions appeared costing from \$2 to \$24, thereby making the story available to many more people.” S. Rep. No. 104-315, § XI (1996). Senator Kohl points out that schools and libraries also suffer increased costs due to royalties, especially literature considered “classics.” Kohl cites that half of classical literature is purchased by schools and libraries, and increased copyright terms will increase the amount schools and libraries are paying for educational material. An extra 20 years of royalty payments is money that Kohl believes should go toward education, rather than to publishing companies. *Id.*

134. *See* S. Rep. No. 104-315, § X, n.4 (1996).

135. *See id.* Waiters singing in a restaurant is a public performance, and thus subject to copyright liability.

136. *See* S. Rep. No. 104-315, § X (1996). The goal of copyright is to stimulate artists to provide for the public.

137. *See* S. Rep. No. 104-315, § 3.I (1996).

138. *See Eldred*, 537 U.S. at 207 n.14 (2003). Referring to the notion that artists want their children to be able to profit from their creations, and that increased longevity increases the likelihood that artists (and others) are having children later in life. Children born later in life are more likely to live more of their life without their parents, which may increase to need to provide more for them. *Id.*

139. *See* S. Rep. No. 104-315, § X-XI (1996).

financial gain for the purpose of allowing them to continue to produce works; yet, it is questionable how an addition of twenty years onto the duration of copyright protection after the artist's death results in higher levels of creativity.<sup>140</sup> There may be some reassurance obtained by knowing that one's potential heirs will have copyright protection for an additional twenty years after one's death, but it is difficult to argue that the artist will receive any real benefit during his or her lifetime. Instead, the benefit often goes to corporations, who, in purchasing copyrights, can benefit by ensuring that copyright protection lasts longer, if not forever.<sup>141</sup>

If the Senate decided that life of the artist plus fifty years was not enough of an incentive to stimulate creative works, there is nothing to keep it from deciding that the life of the artist plus seventy years is not a sufficient incentive. This is the fear of the perpetual copyright. The history of the copyright suggests that duration periods will continue to increase, creating a perpetual copyright in theory if not reality.

Additionally, if the public domain is reduced by creating extensions or perpetual copyrights, there are, consequently, fewer raw materials to stimulate artists.<sup>142</sup> As the stimulation of artists was important enough to be included in the purpose of the CTEA,<sup>143</sup> the lack of materials available to stimulate artists should also be a vital concern. If a drought of creative material exists, then a downward cycle begins, and artists (and potential artists) would not be able to produce works to contribute to the public domain. This drought would, in turn, reduce available inspiration for other artists to produce their own works. The longer copyrights exist, the less original material will be available for future copyright protection.

Conversely, a long duration of copyright protection may be inherently tied to an artist's dream of success. Other than the creative drive and the need to express oneself, the one thing that may be responsible for keeping a starving artist from abandoning his or her art is the opportunity to make it big. Working intensely for an indefinite period of time may be the cross an artist bears to amass the fortune few actually obtain. The term of copyright protection that provides a continuous stream of income for one work, may, in actuality, be income that compensates for a dozen years of rejection by the public. A second cliché is that of the artist who may claim no recognition until after his death. Posthumously, an artist's family may finally receive the income and protection the artist failed to achieve in his lifetime. It is in this

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140. See S. Rep. No. 104-315, § X (1996).

141. See *id.*

142. See *id.*

143. See S. Rep. No. 104-315, § 3.I (1996).

unusual, but banal, circumstance that a long term copyright duration makes sense. The artist in many cases receives little to nothing for creativity during life, but upon success after death, his heirs should receive the reward, just as they shared the burden during the artist's life.

The aforementioned circumstances, however, are not the situations copyright law is designed to benefit. Copyright ultimately exists for the benefit of the public, and ensuring the rewards of posthumously successful artists does little to serve the public.

Another common circumstance of artistic survival is selling works to corporate conglomerates for immediate income, rather than waiting for income to trickle in for the duration of a copyright. In this instance, the beneficiary is without the sympathy of the artist's family. Instead of someone in need benefiting from an artist's hard work, a corporate bottom line is the actual beneficiary. An argument could be made that by obtaining the copyright, the corporation is able to more widely distribute the creative work, making the work available for more people at a cheaper price. In most cases, however, distribution would occur with or without corporate copyright ownership. A longer duration of corporate ownership may actually maintain high costs to the public by creating a monopoly of the work, rather than competition that could be created if the artist could license the work.

### C. *Somma and Disney: Showcasing the Harm of Perpetual Copyrights*

Parliament has granted only one copyright in perpetuity,<sup>144</sup> valid only in the U.K., yet, that grant has created confusion, tribulations, and controversy for both Somma and Disney.<sup>145</sup> GOSH claims that its *Peter Pan* copyright in the U.S. is valid due to its extension by the CTEA,<sup>146</sup> and Somma claims that she is merely expanding on the Peter Pan characters that entered the public domain,<sup>147</sup> an argument that Disney also articulates when questioned by GOSH on its latest Peter Pan publishing activities.<sup>148</sup> It is easy to speculate that because of the perpetual copyright Parliament granted GOSH, and because of the good works GOSH is conducting with the proceeds of its copyrights, GOSH

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144. See Copyright, Designs and Patents Act, *supra* note 11. The grant of a perpetual copyright was made to GOSH to maintain the charitable organization.

145. See Brief for Plaintiff, *supra* note 5; and see GARRET, *supra* note 30. The modification of the Peter Pan copyright has created further differences in copyright protection and confusion for Somma and Disney.

146. See Brief for Defendant, *supra* note 1.

147. See Brief for Plaintiff, *supra* note 5; and see Garret, *supra* note 30. Barrie's earlier works are freely published as part of the public domain.

148. See Reynolds, *supra* note 48. Disney is adamant that *Peter Pan* is in the public domain in the U.S. *Id.*

feels a sense of entitlement to *Peter Pan* works. Having spent approximately the last fifty-five years ruling *Peter Pan*'s commercialized Neverland, a world in which a charity's fantasy came true, GOSH is displaying Captain Hook's fear of the ticking clock: time is up for U.S. royalties.

Somma's *After the Rain* illustrates the danger of long term copyrights. Her book is a derivative work, by its nature building on Barrie's well-known characters. Utilizing characters that children are familiar with allows Somma to quickly draw in her readers, and to take them on a new journey through Neverland. One-hundred years later, Peter Pan is still a boy, and the reader explores the state of Peter's life and the consequences of choosing to stay a boy.<sup>149</sup> Without new works based on old creativity, stories that update, revitalize, and teach the lessons prompted by classical stories, will cease to exist. Society has benefited from updated stories that explore contemporary topics of divorce, death, war, and terror.<sup>150</sup> Limiting artists' ability to reconstruct classic works harms society, the intended beneficiary of copyright.<sup>151</sup>

Although no other examples of works affected by perpetual copyrights are available, (because perpetual copyrights essentially do not exist) it is easy to predict the damaging effect that they would have. Perpetual copyrights do not appear to be an impossibility when viewed in the light of global copyright action. Copyright term durations globally continue to increase in a manner similar to the increases made in the U.S.<sup>152</sup> Increased term durations have the affect of a perpetual copyright for those who are currently working with or around copyrights, while the

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149. See Daisy Books Publishing, *AFTER THE RAIN, A NEW ADVENTURE FOR PETER PAN*, story description, available at <http://www.daisybooks.com/> (last visited Jan. 17, 2005).

150. See, for example *Cinderella*, in its various forms: Della Cohen, *CINDERELLA: A READ ALOUD STORY-BOOK* (Mary Hogan ed., RH/Disney 1999); K.Y. Craft, *CINDERELLA*, (SeaStar Books 2000); *ROGERS AND HAMMERSTEIN'S CINDERELLA* (Walt Disney Video 2003); *EVER AFTER—A CINDERELLA STORY* (20th Century Fox 2003).

151. See *Mazer v. Stein*, 6347 U.S. 201, 219 (1954).

“[T]he philosophy behind the [Copyright] clause . . . is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors.”

*Id.*

152. See S. Rep. No. 104-315, § 3.III. The Berne Convention increased the standard term duration to life plus 50 years, and in 1993 the EU directed its member countries to increase copyright duration to life plus 70 years. One of the main purposes of the CTEA was to match the European Union's (“EU”) term, although the Berne Convention standard currently remains at life plus 50 years. Many EU countries have already complied with the EU Directive, while others are in the process of updating their codes. According to testimony of Marybeth Peters, Register of Copyrights, countries such as Poland Hungary, Turkey, the Czech Republic and Bulgaria, who would like to join the EU, are also likely to bring their own copyright laws into compliance with the EU. *Id.*

precedent of extensions make more extensions likely to take place.<sup>153</sup> The plausibility of continuous copyright extensions is what makes copyrights in perpetuity a rational fear. Eventually copyright duration terms are likely to reach perpetual or near-perpetual terms; therefore a line must be drawn. The Constitution clearly states that copyright protection is granted for a limited time.<sup>154</sup> This charge raises the question, how limited is life plus fifty years verses life plus seventy years? And if life plus seventy years is limited, then isn't life plus ninety, one hundred, two hundred years limited as well? After all, as long as there is a finite number, there is a limit.<sup>155</sup>

## VII. Conclusion

Copyrights in perpetuity are a foreseeable danger to copyright law. Perpetual copyrights rob future artists of creative inspiration, exceed the Constitution's limits for copyright, and deprive the public of a satisfactory public domain.<sup>156</sup> Long term copyrights globally have become the norm.<sup>157</sup> Thus far, Congress and the Supreme Court have deemed copyright terms as long as life plus seventy years to be a "limited time" sufficient to satisfy the requirements of the Constitution.<sup>158</sup> This is a twenty year increase over the term of life plus fifty years that was established by the Copyright Act of 1976.<sup>159</sup> If Congress can extend the copyright term by twenty years approximately twenty years after its last extension, there is nothing to stop it from extending it again in another twenty years, and so on.

Somma and Disney have dealt with the controversy of a copyright that is believed by the public to be in the public domain, and believed by the owner to remain under copyright protection. The literary works

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153. Cf. Puri, *supra* note 128, at \*13. It is interesting to note that other forms of intellectual property are granted terms of protection for much less time than copyrights. In this article, *The Term of Protection—Is it Too Long in the Wake of New Technologies*, Kamal Puri points out that in the UK, while copyrights receive protection for life plus, now 70 years (50 at the time of the article), designs and inventions receive protection for 15-20 years. This discrepancy also exists in the U.S. where patents receive protection for only 20 years. *Id.* U.S. Patent and Trademark Office, *What is a Patent?* available at <http://www.uspto.gov/web/offices/pac/doc/general/index.html#patent> (last visited January 16, 2005).

154. U.S. CONST. art. I, § 8, cl. 8.

155. BLACK'S LAW DICTIONARY 947 (8th ED. 2004). BLACK'S defines a limit as, "a restriction or restraint; a boundary or defining line; the extent of power, right or authority." *Id.*

156. See generally *Eldred*, 537 U.S. 186 (2003).

157. See *Eldred*, 537 U.S. at 207 n.14 (2003), see also *supra* note 118.

158. See generally *Eldred*, 537 U.S. 186 (2003). In *Eldred v. Ashcroft* the Supreme Court confirms the CTEA and finds that life plus seventy years is a limited time. *Id.*

159. *Id.*

Somma and Disney have produced demonstrate the benefit of utilizing works in the public domain.<sup>160</sup> Copyright exists for the advantage of the public.<sup>161</sup> It is important to remember the significant benefit the public receives when these creative works age and enter the public domain. Without a healthy, growing public domain, the public is at risk of producing fewer artists, by providing fewer works to stimulate future artists.

If countries around the world continue to increase copyright term durations to increase profits and trade, resulting in the need for the remaining countries to keep up by increasing their own copyright durations, the public will suffer. If the public suffers at the hand of copyright law, copyright law will contradict itself and the aspirations of the Constitution, art. I, § 8, cl. 8 will disappear.

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160. On March 22, 2005 Emily Somma and GOSH reached a settlement and released a press release announcing: "The parties wish to express their shared understanding that Ms. Somma's novel *AFTER THE RAIN: A NEW ADVENTURE FOR PETER PAN* constitutes a fair use which does not infringe on any of the U.S. intellectual property rights currently held by the [h]ospital. The [h]ospital believes that Ms. Somma has made an important contribution to the field of children's literature and recognizes her love of children."

161. See S. Rep. No. 104-315, *supra* note 152.



