

## Introduction

Children play, learn and grow immersed in a commercialised world where distinctive toys and character merchandise cater for special occasions, idle moments, training for adulthood or just for the sake of making the mundane more enjoyable. Unsurprisingly, many intellectual property cases today centre around the intangible rights claimed over toy helmets, juvenile T-shirts, or ride-on kids' suitcases, as there is a profitable industry based on children's entertainment and their special attachment to the commodities associated with that entertainment.

This book explores how the business of play and the development of modern intellectual property evolved together, and alongside concerns about children's consumption becoming a legitimate source of revenue and profit. Or, in other words, how that industry and children's special attachment to it gradually emerged. In so doing, it considers the paradox in the relationship between the growth of intellectual property and the presumed innocence of childhood that initially underpinned controversies about the construction of the child as a consumer. As is apparent throughout the book, our main argument is neither moralistic nor regulatory. Rather, our concern is to explore how, since the late nineteenth and through to the twentieth century, attempts to come to terms with this paradox were embedded in many issues and contexts. In tracing those entangled relationships, we think it is possible to see how modern authorship, entrepreneurship and even the child as a consumer, all came into simultaneous existence through a process of the mutual conferring of reality. In other words, intellectual property is not only a product of statutes. It includes a layer of activities and cultural presumptions that capture attention and generate goodwill around a particular set of creations.

From the obvious paternalistic connotations of authorship to the wireless technique of 'unclinging', one of the ways in which these dynamics took off was with the emergence of the industrial author. By connecting ideas of childhood as a state of imagination and innocence to business practices, some creators began to entertain the possibility of becoming entrepreneurs in light of the many possible kinds of

commodities that could arise from their creations. The book traces the commercial practices of Lewis Carroll and queries the legendary status of Beatrix Potter as the founder of British character merchandising. The late Victorian and Edwardian business practices of these authors are differentiated from the more extensive transatlantic licensing of the film cartoon character ‘Felix the Cat’ and the world’s most famous rodent, ‘Mickey Mouse’. Carroll and Potter were mostly able to effectively assert legal rights in a way that maintained an intimate relationship between the author and the eventual children’s gift products. However, in the 1920s and 1930s, the craze for character merchandise unleashed by film led to a far more undisciplined consumption. For the most part, the formal designation of legal rights – copyright, design, passing-off and trademark law – failed to protect the exclusive interests imagined by the enterprise originators. Nevertheless, a cultural distinction between authorised and unauthorised merchandise began to take hold, enabling manufacturers, retailers and consumers to choose the closeness of their affiliation with a brand family. This leads to the question of whether the modernisation of intellectual property law came about more through shifting entrepreneurial practices and associated development of new forms of expertise than as a direct consequence of legislative reform or judicial innovation.

Our history complicates conventional understandings about how creativity became industrialised and challenges conventional wisdom about the legal evolution of intellectual property rights to prevent free-riding and support investment in product development. We show how licensing practices became normalised after the 1930s. By the 1960s, the scope of licences entered into had become a yardstick to measure the extent of an enterprise’s property claim. Through detailed cultural, legal and business case studies, the book traces how effective international commercial licensing infrastructures were built, which included exposure to preferred protocols of consumption, with a premium attached to authorised products that created a profitable environment to exploit and grow the global trade in character merchandise. The book identifies a tension between a latent concern for protecting the innocence of the child and increasingly sophisticated strategies aimed at recruiting consumers into the commercialisation of play. We try to avoid the negative connotation that is often attached to profiting from child-related ventures, focusing instead on how intellectual property practices tended to blur the distinction between the institutions of the family and the market, as well as between gift and commodity.

For readers interested in the institution of law, this book adds to and interacts with the standard histories of intellectual property law. Firstly, it highlights the importance of studying the twentieth century to understand modern intellectual property law. As the law evolved alongside the maturing of international consumer markets, it was the most significant period of development in modern intellectual property law. In that sense, this work offers a critical point of departure from existing historiographies that have emphasised and fetishised the eighteenth and nineteenth centuries when explaining the ‘origins’ of intellectual property. Much contemporary

scholarship on intellectual property history ends the discussion with early twentieth-century codifying events (e.g. the 1911 Imperial Copyright Act), even though modern international cultural trade was barely established at that time. By looking at the emergence of commercial expansion and the development of cross-industry dynamics, the book is a clear departure from those that look for the mythical origins of intellectual property law in earlier centuries.

Secondly, one of the aims of this book is to shed some light on the way different branches of intellectual property law (copyright, design, trade mark and patent) coalesce creatively to foster merchandising opportunities and develop business strategies. We look at the permeable boundaries between different intellectual property rights and how all rights could be engaged to protect different aspects associated with trade in the authorised product. It is the intersection of rights that facilitates opportunities for brand extension, rather than the discrete limits to protection, that is of particular interest here.

Thirdly, the book draws attention to the relevance of corporate structures and history as key resources to aid understanding of how intellectual property law was imagined and managed in practice. Rather than prioritising the ‘law on the books’, this work highlights how legal relations were constructed and enforced in businesses, showing the emergence of ‘workarounds’ and other innovations to overcome formal impediments to corporate ambition.

Lastly, the book shows the emergence of the child as a particular kind of consumer, crossing the boundary between play and education, and how intellectual property law was fundamental to that. One of the notable features of the child-related entertainment industry was its capacity to invest in audience and consumer participation. The children were not constructed as ‘passive’ consumers but were expected to engage deeply in imaginary play and role-play centred around their toys and playthings. Franchise holders also supported platforms for membership, participation and club enrolment. Where educational value became a marketing tool, the business of play helped reconstitute the identity of the child through socialisation. Thus, the way in which you instructed a child incorporated recruitment into broader agendas of social and cultural inclusion that signalled that imitation and copying were appropriate when associated with authorised consumption.

This history provides an important context to help better our understanding of late twentieth-century debates about piracy, copyright infringement and ‘user rights’. We argue that the success of some corporations in regulating piracy relied on their capacity to understand, anticipate and domesticate channels of child and consumer participation. Engaging with the terms of play has always been part of intellectual property history, but for most of the twentieth century it was primarily viewed opportunistically, rather than as a threat to enterprise.

This work pays special attention to the logic of derivatives (tie-ins, merchandising, syndication and licensing schemes) as the main setting from where intellectual property practices emerge. We suggest that in conventional intellectual property

literature, licensing is constructed as a mere contractual arrangement. Based on archival research, we develop a different view, arguing that intellectual property licensing entails a relationship based on trust and investment in a fantasy, creating extended relationships that transcend traditional delineations of producer, distributor or consumer. We also investigate how this trust relationship posed particular difficulties for public broadcasters whose charters posit a different kind of engagement with their audiences.

Combined, the themes of the book expose the capacity of the law to imagine and bring into being new markets, new kinds of business association and new kinds of cultural activity. Thus, it provides an alternative framing to the conventional view of the law as based on ‘protection’ of intangible property rights. The analysis is attentive to insights from literary studies, mass communications, sociology, cultural studies and social anthropology. However, we are not seeking to bridge the disciplines of humanities/social sciences and law.

For readers interested in publishing history and commodity culture, we historicise and problematise the construction of authorship and its relevance to intellectual property relations in the late nineteenth century and into the twentieth century. The literary text is not approached as a bounded cultural object, a vessel that transmits an authorial expression that can be further analysed or deconstructed to reveal a deeper hidden subtext, perhaps also revealing insights into the subjectivity of the author. Instead, we consider the text in the context of its circulation in the market. However, we also depart from histories of print capitalism that treat the book as an object of trade, its central characteristics exposed in narratives about the exploits of entrepreneurs, their commercial intentions and successes in expanding readerships. Instead, in our view, literary texts are conceived of as communication devices that carry multiple kinds of significations that produce intellectual property law’s subjects and objects, transgressing public and private spheres, and reconstituting the institutions of the market and the family.

We are aware that there is criminological and psychoanalytical literature that critically engages with the idea of the child, family, innocence and predatory behaviour. The motivations of those who profess to be lovers of children or are intensely engaged in the world of the child are judged with reference to ideas of propriety and concern for criminal behaviour. This book is not concerned with those debates or concerned with drawing the line between appropriate and inappropriate standards of conduct. Rather, chapters are attentive to the child as an audience, with reference to the specifics of mass communications technologies. We are especially interested in film distribution and radio and television broadcasting as technologies that mediate relations between the family and the market. The focus is not merely on the construction of audiences *for* radio, television and film programmes, as defined by distribution contracts and broadcast licensing agreements. We are also interested in the multiple ways in which audiences are assembled and interacted with. Our contention is that the notion of audience is

hypermobile, with possibilities of its constitution extended through new consumption practices inflected with judgements about the types of gift or commodity that are suitable for a child.

In discussing the idea of ‘the child’, we draw upon sociological literature, in particular histories about the construction of childhood in the twentieth century, the family and the gift. This literature largely engages in discussion of innocence, exploitation and commodification through a critical reading of the circulation of media products and their marketing. This can lead to a reification of commodity relations, which assumes that there is an object of contractual exchange regulated by law. This positioning is often adopted in commodification critiques without reading the business and legal records associated with commercial activity. The inaccessibility of business and legal records and the difficulty associated with interpreting them has contributed to this problem.

Our primary sources – the business and legal artefacts that document specific pathways of commodity relations – provide the original foundation to our analysis. This material includes business correspondence, confidential memorandums, corporate minutes, trade association records and journals, as well as conventional legal artefacts such as intellectual property registrations and litigation. We draw upon all these sources to explore how legal and business practices and discourses were deeply implicated in the emergence of constructs that, as a society of consumers, we have come to take for granted. The subject positions interrogated include that of the child, consumer, creator, author, entrepreneur, manager, agent, audience and fan. We posit that these were not merely private subjectivities that interacted with consumerism and branding through audience participation, product purchases or self-identification as a fan. Rather, our contention is that, in the age of global mass communications, the family became a market and, at one and the same time, the market became a family. Intellectual property law was central to this dynamic, not through the creation of intangible property rights or their deeper penetration into culture, but because law produced and regulated the connections between subjects, objects and institutions. Where the family was the site of consumption, the circulation of a commodity or gift depended upon reference to notions of trust, exploitation, protection, competition, affiliation and individualisation. The institutions of the family and the market became inseparable from their configuration and reconfiguration as actors navigated commercial paths, opportunities and aspirations.

Each chapter explores different sites where aspects of these dynamics can be traced. The focus is not always directly linked to the production of a particular toy or franchise. As is explained in the chapter previews below, which actors are considered as key protagonists, and the specific assemblages that emanate from quandaries around commercial opportunities and limits to trade, varies. While there are recurrent themes, we are not seeking to expose a ‘new origin’ of intellectual property or trace the sequential development of the infrastructure that supports character merchandising across the twentieth century. Our selection highlights different

tensions around particular practices and discourses that, with the passage of time, were managed, in particular, through professionalisation and recourse to ideological ideas of the function of intellectual property rights.

This book is not only relevant to critical thinkers interested in the business of play and the child as a special kind of consumer. The methodology and themes explored have broader relevance for understanding the intersection of media, culture and law, and the reproduction of commodity relations in the age of mass communications. Many of the dynamics explored are also relevant to contemporary debates about social media, self-branding and the death of privacy discussed in relation to the lack of regulatory oversight over the design of platform technologies and techniques of surveillance capitalism. While the communications technologies may have changed, and we do not explore these more recent developments, there are continuities with processes of commodification that evolved across the twentieth century. In understanding this earlier age, we are better able to appreciate the shape of the world today and our place within it.

#### PREVIEW OF BOOK CHAPTERS

Chapter 1 explores one of the most enduring popular works for children, Lewis Carroll's *Alice's Adventures in Wonderland* (1865). Charles Dodgson (1832–1898) wrote it at a time when the very conception of childhood as a distinctive and cherished stage of human development was being explored and, through the popularity of Dodgson's penmanship, being promulgated. Dodgson's interest in children is also apparent from his (now controversial) photographs of children and from his obsessively detailed exchanges with his publisher, Frederick Macmillan, over the presentation of *Alice* and other works for children. Dodgson sought to curate the way young readers entered into and experienced the fantasy realm. He wanted to be recognised as the author Lewis Carroll, father of the *Alice* universe, and used copyright to assert his paternity of the creative representations of *Alice*. He appeared to draw the line at ventures he judged could dilute the fantasy, such as mass-manufactured goods produced outside of Victorian artistic creative industries. Dodgson wrote at a time when authors could and did control the terms of engagement with their fantasy through the exercise of copyright. Managers, agents and lawyers would supersede this authorial power and authority in the following century.

Through tracing the character merchandising of Beatrix Potter (1866–1943), Chapter 2 explores why Potter should be considered as both a creative and an industrial author. She directly engaged with the idea of childhood where the parent was a consumer, an idea that affected the direction of her creativity. We also consider the extent to which she relied upon intellectual property laws to support her merchandising interests. Potter's forethought in registering copyright and design rights is much commented on by her biographers. However, at that time, intellectual property law struggled with the very idea of an 'industrial author'. And, although

Potter engaged and popularised an expanded idea of authorship and intellectual property, she never used her rights defensively to protect the exclusivity of the ‘Peter Rabbit’ range of merchandise from imitations and piracies. Rather, particularly incensed by the loss of her copyright over *The Tale of Peter Rabbit* in the United States and frustrated by her dealings with British doll-makers, she was drawn into debates about British manufacturing, the politics of international trade and the reform of tariff law. Potter’s legacy was to encourage the practice of authorising iterations of popular character designs across an ever-increasing range of goods circulating as appropriate gifts for children and decorative embellishment for the home.

Chapter 3 unpacks the pivotal idea of instruction in making up a particular type of subjectivity: the ‘Meccano Boy’. This construction toy schooled the child in scientific education, social participation, civic roles, life within a profession and in building the material infrastructure of modernity. Playing with Meccano encouraged translation of an intangible idea represented in two dimensions into material forms through the production of three-dimensional compositions of machinery or models. We compare the legal interpretation of this form of play with its broader cultural significance. Branding strategies attached to the toys and the paraphernalia collected and exchanged by community members, sensitivity towards group identity and a distinctive approach to piracy were all tied together in the attempt to create a base of socially connected consumers, orchestrated to extract commercial value from educational play. Meccano did not involve free play or simply making educational models. A toy for making toys, Meccano was marketed as training for adulthood. Through the establishment of Meccano guilds and the relevance of the *Meccano Magazine*, children, their fathers and a wider brotherhood were interpellated as active developers of Meccano. It was a brand and activity Meccano designed for international appeal and where the child was happily engaged in play that supported a later life that contributed to international industrialisation.

Chapter 4 explores the powerful creation of Felix the Cat and Mickey Mouse, simple anthropomorphic characters represented on film and embraced by fans, which formed the foundation of extended business activities and tie-ins in the 1920s and 1930s. The term ‘animated properties’ acknowledges that these popular fictional representations were attributed subjecthood and, as such, came alive outside the celluloid frame. This overlaid the idea of the family with entrepreneurial dimensions. Felix and Mickey were regularly visited in the cinema, pre-packaged as family-friendly viewing. Doll effigies and other merchandise literally took the characters into the heart of the home to be present in the daily lives of the entire family unit. We are interested in the tensions that arose between authors, film distributors, entrepreneurs and merchandising agents who sought to step into the role of the parent entitled to control interactions and the staging of further public appearances of Felix and Mickey.

The chapter goes on to discuss the ambivalent role of intellectual property registration in stabilising the character merchandising trade in this era, exploring what was particularly distinctive about the Disney Corporation's industrial system of production and distribution. As Disney was unable to rely upon legal enforcement of imagined rights, the successful strategy was an organisational one with cultural ambitions, engaging franchise managers and licensees in educating children and the trade about the protocols of consumption attached to play. It involved building a portfolio of characters based upon traditional fare for children, while standardising the visual identity of Disney products. The new international infrastructures of exploitation entirely displaced lingering concerns for protecting the innocence of children from the marketplace. The Disney brand came to signify child-friendly cultural content of all kinds, with trust in the name secured by the deployment of a new legal creation, the phenomenon of 'world rights' exploited by a new managerial class, Disney Enterprises' agents.

In 1929, J. M. Barrie (1860–1937) made a bequest to the Great Ormond Street Hospital for Sick Children of his most popular creation, 'Peter Pan'. Chapter 5 explores the dynamic of gift-giving specifically for the benefit of vulnerable children and how this translated into licensing practices. A *Peter Pan* movie, to be directed by George Cukor with Audrey Hepburn as the main protagonist, was never made because of the bitter relationship that developed between the licensor, the Great Ormond Street Hospital, and its licensee, the Disney Corporation, which resulted in litigation in the 1960s. By looking at the misfortune of a film that was never made, the chapter shows how licensing intangible properties involved not only a question of contract and property but also a more complicated question of trust, sociality and the etiquette of managing commercial opportunities. The chapter engages the reader in a deeper consideration of the impact of the Disney Corporation, not just in creating a highly effective managerial infrastructure to exploit and construct the child as a consumer but also in developing intellectual property strategies to gain a privileged position with consumers, who were now conceived of as being included within the Disney family.

A key phenomenon of the twentieth century is the rise of merchandising agents as a distinct and independent profession in the United Kingdom. While previous chapters have discussed merchandising practices, the development of these activities was always attached to specific corporations such as Meccano Ltd, Pat Sullivan Studios and Disney Corporation. Chapter 6 traces the rise of merchandising agencies and focuses on the most influential independent British agency of the period, Walter Tuckwell & Associates. A former Disney employee, New Zealander Walter Tuckwell (1913–1980) fostered a network connecting and linking commercial and legal opportunities offered by television programmes and the emerging demand for child-related products. The chapter discusses the specific relationship between content creation and marketing that arises with the earliest days of television. This

entails a discussion of Tuckwell's role at the British Broadcasting Corporation (BBC) and, in particular, how objections to the development of merchandising inside the corporation were managed. We then show how the arrival of commercial television changed agendas, leading to stabilisation in contractual practices between broadcasters, licensing agencies and sectors such as the toy, publishing and food industries, all of which were eager to capitalise on the new communication medium. By the late 1960s, children's participation in commodification was fully promoted and fortified in intellectual property practice and was an integral part of television culture, regardless of the character of the broadcast licence.

The tangled beginnings of the establishment of merchandising at the BBC is further developed in Chapter 7. The most troubling question for the corporation was how, in line with the organisation's traditional public values and duties as expressed in its charter and broadcasting licence, it should respond to the exploitation of radio identities such as 'Uncle Mac', a persona linked to the radio star and BBC employee Derek McCulloch, that were, without authority, also being commercialised on everyday consumer goods by outsiders to the corporation. Internal dynamics at the BBC were further impacted by the development of commercial television and the unexpected success of television programmes such as *Doctor Who*. Expectations shifted. Rather than being criticised for commercialisation, the public corporation's failure to pursue profit is what became contentious. One outcome was the development of a new management unit separate from programming, the BBC Exploitation Department, later renamed as BBC Television Enterprises, which served as merchandising agent for third-party productions such as *The Magic Roundabout* and *The Wombles*. Both instances resulted in litigation.

The book's conclusion returns to the commercialisation of *Alice in Wonderland* to draw together thoughts about how attitudes towards childhood have changed and how controversies about this continue to be negotiated outside of public view. It reconnects with discussion of Dodgson's nineteenth-century conception of 'the child' and its boundary with adulthood, as set out in Chapter 1, by considering the controversy surrounding Jonathan Miller's 1966 *Alice* film, screened by the BBC at Christmas. It was not specifically targeted for a child audience. Thus, a representation that was highly unlikely to have concerned Dodgson at all was considered controversial enough to be discussed in the British Parliament. Commissioned by the BBC's drama department, the art film offered a surreal Victorian dreamscape of childhood, as much for an erudite adult audience as for a child audience. This representation of the 'children's classic' provoked public responses of hostility and incomprehension, attracting protests about a liberality that ought to be banned.

This controversy allows us to reference changed understandings of childhood, particularly in light of Disney's rendition of *Alice* and the development of the BBC's institutional role in the 1960s, where there is ready acceptance of the children's

department remit, with the imagery of the child overlaid with expectations of marketing and age-appropriate merchandise. Many issues that vexed the BBC in this period are rooted in the paradox that underpins the whole book: the tension between exploitation and innocence; family and market; public and private; and the normalisation of the logic of commercialisation tied to intellectual property.