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## United States: The Sherlock Holmes Copyright Case

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### *Klinger v. Conan Doyle Estate, Ltd.*, 755 F.3d 496 (7th Cir. 2014)

The Seventh Circuit recently issued its decision in *Klinger v. Conan Doyle Estate, Ltd.*, holding that the copyright protection of a fictional character cannot be extended beyond the expiration of the copyright for a work in which the character first appeared just because the author altered the character in a subsequent work that still enjoyed copyright protection.

The case concerned the Sherlock Holmes stories authored by Arthur Conan Doyle. Doyle published fifty-six Sherlock Holmes stories and four Sherlock Holmes novels between 1887 and 1927. 755 F.3d at 497. Except for ten stories published between 1923 and 1927, all of the stories and novels are now in the public domain. *Id.* Thus, they can be copied and sold without a license from Doyle's estate. Several years ago, plaintiff-appellee Leslie Klinger, believing that he did not need a license, co-edited an anthology that contained works by various modern authors inspired by the Sherlock Holmes stories. *Id.* Most of these stories featured the characters Sherlock Holmes and Dr. Watson. *Id.* The Doyle estate was not pleased with Klinger's anthology and demanded a \$5,000 copyright license from Random House, the publisher of the book. *Id.* Random House agreed to pay and thereafter published Klinger's book. *Id.*

A few years later, Klinger decided to create a sequel to the anthology. He entered into negotiations with Pegasus Books to publish the sequel. *Id.* Before the sequel was completed, the Doyle estate learned of the project and demanded a licensing fee from Pegasus Books for the book to be legally published. *Id.* at 497-98. The Doyle estate advised Pegasus Books that, without a license, the estate would prevent distribution of Klinger's book, implicitly threatening to sue Pegasus for copyright infringement. *Id.* at 498. Pegasus Books was scared off from the project and told Klinger that he had to obtain a license from the estate before Pegasus Books would publish the sequel. *Id.*

Rather than pay for the license, Klinger sought a declaratory judgment in the United States District Court for the Northern District of Illinois that he was free to use the material in the Sherlock Holmes stories that already were in the public domain. *Id.* The district court granted Klinger's motion for summary judgment, and the estate appealed on two grounds: 1) the district court lacked subject matter jurisdiction, and 2) even if there was jurisdiction, the district court erred because the copyrights on the "complex" characters in the Sherlock Holmes stories, "whose complexity [was] not revealed until a later story," remained intact until the later stories entered the public domain. *Id.* The Seventh Circuit affirmed the district court in a decision written by Judge Richard Posner and joined by Judges Joel Flaum and Daniel Manion.

The jurisdictional question was whether there existed a case or controversy under 28 U.S.C. § 2201(a). *Id.* at 499. The Seventh Circuit concluded that such a controversy existed because the Doyle estate had made clear that if Klinger's book were published, it would prevent distribution of the book and potentially sue for copyright infringement, "twin threats" that "created an actual rather than potential controversy." *Id.*

In support of its jurisdiction argument, the estate had asserted that the case could not be heard until Klinger's book was finished because otherwise it was impossible to decide whether the book infringed the estate's copyrights. *Id.* at 499-500. The

court rejected this argument because the issue presented on appeal did not depend on the contents of the book. *Id.* at 500. Klinger had averred that his book would contain no copyrightable material that appeared only in the last ten books. *Id.* Thus, the question was purely one of law, namely, whether Klinger was free to copy the Sherlock Holmes characters as they were depicted in the earlier, public-domain stories. *Id.*

Turning to the merits, the court stated that when a story falls into the public domain, the elements of the story, such as the characters, follow, and there was no basis in statute or law "for extending a copyright beyond its expiration." *Id.* While it was true that the last ten stories still enjoyed copyright protection, those ten stories were derivative works and thus only the original elements added in those stories remained protected. *Id.* at 501. Those additions or alterations could not revive the expired copyrights in the original characters. *Id.* at 503.

The court addressed and rejected the estate's various arguments. First, the estate asserted that creativity would be discouraged if the court did not rule in its favor. *Id.* at 501. The estate maintained that it takes a long time to perfect a character and an author's incentive to improve the character in the future may be diminished if he loses the copyright and is forced to compete with copiers. *Id.* Judge Posner ruled that this argument had no relevance here because Arthur Conan Doyle died 84 years ago, so he would not be competing against the authors who were to contribute to Klinger's anthology. *Id.* Moreover, the estate's position might not even induce creativity. For example, it would reduce the incentive of subsequent authors to create derivative works, or it would encourage authors to write stories using their old characters in an effort to extend their existing copyrights. *Id.* Thus, this argument was rejected.

The estate also tried to distinguish between "flat" and "round" characters. *Id.* Round characters, according to the estate, evolve, and thus the characters of Holmes and Watson were not "fully rounded off" until the last story in 1927. *Id.* at 502. The court bluntly responded that it failed to see how this distinction could "justify extending the expired copyright on the flatter characters," especially since the last ten stories all were supposed to take place before 1914, the last year in which the other stories were set. *Id.*

The court was sympathetic to the estate's potential concern that a modern author might write a story disparaging the characters in the Sherlock Holmes stories, which could deter someone from reading Doyle's stories. *Id.* at 503. Judge Posner compared such a scenario to trademark dilution, but explained that no such comparable concept existed in copyright law. *Id.* In any event, the estate did not seem worried about potential disparagement and was more concerned with not receiving a licensing fee. *Id.*

The court concluded by noting that the estate's appeal was seeking copyright protection in the characters for a term of up to 135 years, a position "that bordered on the quixotic" and one that would be at odds with the "limited times" requirement in the Constitution's copyright clause. *Id.* The Doyle estate has indicated that it will appeal the Seventh Circuit's decision to the United States Supreme Court. Even if the Supreme Court grants *certiorari*, the estate faces an uphill battle in convincing the Supreme Court that the characters of the Sherlock Holmes stories should remain protected under copyright law.

*The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.*

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