

News & Types: Commercial, Competition & Trade Update

Conan Doyle's Estate's "Quixotic" Efforts to Prevent Publication of Sherlock Holmes Book

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Practices: Commercial, Competition & Trade, Litigation

A recent case from the 7th Circuit Court of Appeals illustrates the time and expense required to respond to even a non-meritorious claim of infringement and to deal with threats that could end up being groundless. (*Leslie S. Klinger v. Conan Doyle Estate, Ltd.*, 7th Circuit Court of Appeals No. 14-1128, June 16, 2014)

Leslie Klinger is an author and editor specializing in the well-known Sherlock Holmes character created by Arthur Conan Doyle. (He is also an attorney based in California.) The Conan Doyle Estate purportedly enforces the copyrights remaining from the books and stories of Arthur Conan Doyle that created and developed the Sherlock Holmes character.

Arthur Conan Doyle published the first Sherlock Holmes story in 1887 and the last in 1927. The final ten stories were published between 1923 and 1927. Copyright protection is valid for 95 years. So, according to Judge Posner, the author of the 7th Circuit opinion, the only remaining copyright protection, as of the date of the opinion, are those stories published in 1923 and after. The copyright on the vast majority of Conan Doyle's work has expired.

In 2011, Klinger co-edited an anthology called *A Study in Sherlock: Stories Inspired by the Sherlock Holmes Canon*. The anthology included stories by modern writers inspired by and, in some cases depicting, the Sherlock Holmes character and his sidekick, Dr. Watson. At the time the Estate told Random House, the publisher, that it needed a license. Random House paid \$5,000 for a copyright license, although Klinger did not believe the anthology used any literary works for which the copyright was still in effect.

The anthology was apparently successful, so Klinger and his co-editor decided to create a sequel entitled *In the Company of Sherlock Holmes*. The Estate responded even more aggressively. Clearly a measly \$5,000 would not be sufficient this time. The Estate's notice to Pegasus, the publisher of the sequel, stated:

"If you proceed instead to bring out [*In the Company of Sherlock Holmes*] unlicensed, do not expect to see it offered for sale by Amazon, Barnes & Noble, and similar retailers. We work with those compan[ies] routinely to weed out unlicensed uses of Sherlock Holmes from their offerings, and will not hesitate to do so with your book as well."

Pegasus "yielded to the threat" and refused to publish *In the Company of Sherlock Holmes* until Klinger obtained a license.

Klinger did not obtain a license. Instead, he sued the Estate for a declaratory judgment that he was free to use Sherlock Holmes' related works for which the copyright had expired. The Estate's strategy was strange, to say the least.

At first, it seemed to have no strategy, as it defaulted by failing to appear and respond. Klinger then asked on a motion for summary judgment for the declaratory judgment that would permit publication of *In the Company of Sherlock Holmes*. The Estate finally responded with arguments opposing the motion. But the district court judge granted Klinger's motion for summary judgment. The Estate then appealed in the case in which it had originally defaulted.

Judge Posner clearly did not think much of the Estate's arguments. There were mainly two.

First, the Estate argued, there was no jurisdiction because there was no dispute. *In the Company of Sherlock Holmes* had not been published. But the Estate's notice was used against it to demolish this argument. The Estate made clear it would disrupt the distribution of the book through major book retailers, such as Amazon. The Estate also, at least implicitly, threatened to sue the publisher, Pegasus. So there was an actual dispute, not a potential dispute. Judge Posner even went so far as to add that Klinger could have sued the Estate for tortious interference with his business relations with the publisher.

The Estate went on to argue that, since the book had not been published, it could not be determined whether the book would use the small remaining portion of the Sherlock Holmes literature for which the copyright is valid (i.e., the post-1923 stories). But, noted Judge Posner, that was not this case. In this case, Klinger was simply seeking a declaratory judgment that he could use Sherlock Holmes' material for which the copyright had expired, a declaratory judgment to which he was entitled.

The second argument was more amorphous. Conan Doyle continued to develop the "complex" Holmes and Watson characters up to the final story in 1927. Therefore, the copyright on all of the works should continue until the Holmes and Watson characters were fully "complexified" (an actual word in the opinion placed in quotes presumably because it was used by the Estate). Judge Posner seemed to give this argument brusque treatment. Said Judge Posner,

"We cannot find any basis in statute or case law for extending a copyright beyond its expiration. When a story falls into the public domain, story elements – including characters covered by the expired copyright – become fair game for follow-on authors . . ." [citation omitted]

This might have been enough, but Judge Posner did not stop there. He went on for six pages, making the following points:

- The Estate argued that creativity would be discouraged if copyright protection was not extended beyond the 95 years for the older Sherlock Holmes' materials. But Arthur Conan Doyle died 84 years ago, so his creativity would not be affected. And the argument about discouraging creativity cuts two ways, as subsequent authors will be discouraged from creating derivative works. In addition, authors will write stories about existing characters to prolong copyright protection, rather than use their creative skills to create new characters.

- The Estate argued for heightened copyright protection for "round" fictional characters, as compared to "flat" characters (which the opinion noted gratuitously was "dramatized" by the Estate's attorney "repeatedly . . . describing large circles with his arms."). But Judge Posner used illustrations from Shakespeare and from the *Star Wars* movies to show that this does not justify extending copyright protection. Shakespeare developed Sir John Falstaff in multiple plays (sometimes inconsistently). *Star Wars* movies were not produced in the order in which they occurred in fiction, as Episodes IV, V, and VI were produced before Episodes I, II, and III. So the distinction between "round" and "flat" characters has nothing to do with copyright law.

Concluded Judge Posner, "[T]he [E]state's appeal borders on the quixotic." The Estate was seeking protection for up to 135 years (from 1887, when the first Sherlock Holmes story appeared, to 2022, 95 years after the last story appeared). It did not get this protection.

But even a "quixotic" case has costs. When *A Study in Sherlock: Stories Inspired by the Sherlock Holmes Canon*, the first Klinger book, was published, the Estate received \$5,000 to which, Judge Posner implies, it may not have been entitled. The Estate's aggressive (but inconsistent) tactics to prevent publication of the sequel were no doubt costly to Klinger, even though the arguments had no merit.

According to Klinger's website (<http://lesliesklinger.com/>), the sequel, *In the Company of Sherlock Holmes*, will be published by Pegasus in November, 2014. Fans are invited to buy the book through Amazon.