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Lawsuit to unravel the mystery of Sherlock Holmes copyright

We all know who Sir Arthur Conan Doyle is, but who is Leslie S. Klinger, and why is he suing the mystery writer's estate? You might say Klinger leads a double life.

He is an estate planning and tax attorney at Kopple & Klinger LLP in Los Angeles. But he is better known as one of the world's leading experts on Sherlock Holmes. He is the author of many scholarly works on Holmes, including an award-winning three-volume annotated collection that has been called "the definitive exegesis of Holmes and his times."

Why is this Holmes scholar suing the estate of the beloved detective's creator? It seems so irregular, yet the answer is obvious. Klinger is trying to free his hero from the shackles of copyright law.

Even though Holmes first appeared in 1887 in "A Study in Scarlet," the writer's estate continues to assert copyright on the character. The Holmes "canon" consists of four novels and 56 stories. Most of those works were published before the all-important year of 1923. Under copyright duration rules, any work published in the U.S. before 1923 is in the public domain because its copyright has expired. Only 10 of the works (the "Ten Stories") were published in 1923 or later and are still protected by copyright.

Klinger is currently preparing a collection of original fictional stories that feature Sherlock and other characters that appear in the canon. As it had in the past, the estate contacted Klinger and demanded that he enter a copyright license agreement, even though Klinger contends that all the characters and story elements in the proposed book appear in the pre-1923 works.

Though Klinger had begrudgingly entered licenses with the estate in the past, this time he refused. In the response, the estate took a dastardly approach.

According to Klinger, the estate threatened "if you proceed instead to bring out (the new collection) unlicensed, do not expect to see it

offered for sale by Amazon, Barnes & Noble and similar retailers. We work with those companies routinely to weed out unlicensed uses of Sherlock Holmes from their offerings and will not hesitate to do so with your book as well."

This sounds like a tactic sprung from the mind of Professor Moriarty, who, according to Holmes, "had hereditary tendencies of the most diabolical kind."

Not intimidated, Klinger brought a declaratory judgment action in the federal court in Chicago, seeking to clarify that all the characters and story elements from the pre-1923 works are in the public domain. *Klinger v. Conan-Doyle Estate, Ltd.*, No. 13-cv-1226. Klinger has filed a motion for summary judgment and the estate has responded.

I was anxious to see what ingenious defense the estate would put forward to justify how it can demand copyright royalties for characters who were created 126 years ago. I was not disappointed. The estate has proffered a most intriguing explanation as to why they still control Holmes, Watson and company.

First, the estate admits that the first 50 stories "are indeed in the public domain" — a prudent move since it is undeniable under the Copyright Act provisions on duration. The heart of the estate's argument lies, as it logically must, in the fact (also indisputable) that the Ten Stories are still protected by copyright.

But to make this argument work, the estate would have to show some incontrovertible nexus between the late copyrights and the early characters, since the early works are admittedly in the public domain.

Put to the test, the estate made an argument that only an English major could devise. The argument is that Holmes and Watson were not "complete" in the first 50 works; they continued to be developed in the copyrighted Ten Stories. In those later works, Sir Arthur added new aspects to each character's background and even changed Holmes' outlook on the world, reflecting a gradual

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mellowing of his personality. Thus, we could not have known the real Holmes until the bitter end.

If the characters were only completed in the post-1922 stories, argues the estate, then those characters are still protected.

Klinger's position would create multiple personalities out of Holmes — a public domain version and the true version. This, the estate argues, is a travesty and can't be done: "Plaintiff suggests that Holmes and Watson can be dismantled into partial versions of themselves. But a complex literary figure can no more be unraveled without disintegration than a human personality."

Ingenious, perhaps, but ultimately unsatisfying from a copyright perspective. This is copyright we're talking about, not psychology.

The problem with the estate's argument is that it would result in adding years onto the copyright life of the Mr. Holmes. Holmes was protected by copyright from the moment he appeared in a publication with a copyright notice. The law does not say that the copyright duration clock begins ticking only when a character is complete.

How would we know whether or when a character is complete? Whose concept of "complete" controls? Is James Bond complete? How about Mickey Mouse? A copyright owner can continue

developing a character and making derivative works throughout the entire term of the copyright on the original character.

The notion that copyright duration is measured from the time a fictional character is complete seems unworkable. The result would be to keep a long-lived character in copyright far longer than the statute envisions.

The case of *Silverman v. CBS, Inc.* (2d Cir. 1989) provides a solution to the conundrums presented by this case. *Silverman* involved the characters of the old 1940s radio show "Amos 'n Andy," which went on to become a television show in the 1960s. The radio scripts had fallen into the public domain, but the television shows had not.

When confronted with the issue of whether the characters were still protected by copyright, the court ruled that the original characters as delineated in the radio shows remained in the public domain. The copyright dealing with the television episodes provided protection only for the increments of expression beyond what was contained in the early radio scripts.

That concept could readily be applied to the Holmes affair. Events and characters first appearing in the Ten Stories would remain inviolate. But anything or anyone appearing in the first 50 works belongs to the public.

There is a quid pro quo in copyright — certain exclusive rights are given to a copyright owner for a defined period of time, but once that period expires, the subject matter is free for the public to use as they wish. The estate's theory would provide it with extra years of copyright protection that were not part of the legislative bargain.

So perhaps Holmes does have a split personality for copyright purposes. But we can take solace in the fact that after 2022, when the last of the Ten Stories falls into the public domain, his malady will be cured and he will come together again as a whole person.

In the meantime, we will leave it to the experts to speculate about what Holmes himself would think of all this.