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## Sherlock Holmes & the Case of the Contested Copyright

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*Sherlock Holmes & the Case of the Contested Copyright*

JESSICA L. MALEKOS SMITH\*

ABSTRACT

*For generations, Sir Arthur Conan Doyle’s novels and short stories on the adventures of Sherlock Holmes have captivated the minds of readers and fueled a lucrative intellectual property market. The historical trajectory of international copyright protections to this literary canon, however, is an equally intriguing, if not mysterious, page-turner. This Note explores the procedural history of *Klinger v. Conan Doyle Estate, Ltd.*, and examines how the literary characters of Sherlock Holmes and Dr. John H. Watson can simultaneously exist in the public domain, while certain story elements still remain under copyright protection in the United States until 2022.*

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## INTRODUCTION

“There is nothing more stimulating than a case where everything goes against you.” Sherlock Holmes, *The Hound of the Baskervilles*.<sup>1</sup>

From 1887 to 1927, Sir Arthur Conan Doyle published approximately fifty-six Sherlock Holmes adventure short stories and four companion novels.<sup>2</sup> Hereafter, these literary works shall be referred to as THE COMPLETE 60 SHERLOCK CANON. The copyrights to THE COMPLETE 60 SHERLOCK CANON officially expired in Canada in 1980 and in the United Kingdom (“U.K.”) in 2000.<sup>3</sup> In fact, the United States (“U.S.”), is the only remaining country where certain individual works in Conan Doyle’s Sherlock Holmes literary canon still remain under statutory copyright protection.<sup>4</sup>

Within THE COMPLETE 60 SHERLOCK CANON, only ten short stories still enjoy federal statutory copyright protection in the U.S.<sup>5</sup> These select works shall be referred to as THE PROTECTED 10 STORIES.<sup>6</sup> The Conan Doyle Estate Company (“the Estate Company”) is presently the intellectual property owner, or copyright holder, of THE COMPLETE 60 SHERLOCK CANON.<sup>7</sup> Intellectual property, as defined by Harvard Law

1. ARTHUR CONAN DOYLE, *THE HOUND OF THE BASKERVILLES* loc. 79 (1902) (ebook).

2. See *Klinger v. Conan Doyle Estate, Ltd.*, 755 F.3d 496, 497 (7th Cir. 2014) (Chief Judge Richard Posner explaining “Arthur Conan Doyle published his first Sherlock Holmes story in 1887 and his last in 1927. There were 56 stories in all, plus 4 novels. The final 10 stories were published between 1923 and 1927”).

3. See Chris Redmond, *Notes on the Ownership of the Sherlock Holmes Stories*, SHERLOCKIAN.NET COPYRIGHT, <http://www.sherlockian.net/acd/copyright.html> (last visited Apr. 18, 2016).

4. See Betsy Rosenblatt, *What Does the Free Sherlock Ruling Mean for Fans?*, BAKERSTREETBABES.COM, Dec. 31, 2013, <http://bakerstreetbabes.com/what-does-the-free-sherlock-ruling-mean-for-fans/> (“The entire Holmes Canon was already in the public domain everywhere but the United States. So people who have been making Holmesian fanworks outside the U.S. have been in the copyright clear for quite some time.”) (last visited Apr. 18, 2016).

5. See Jack Bouboushian, *Who Owns Sherlock Holmes?*, COURTHOUSE NEWS SERVICES, Feb. 19, 2013, <http://www.courthousenews.com/2013/02/19/54960.htm> (explaining that without proper licensing in the U.S., one cannot “use any characters or other story elements that first appeared in one of the ten (10) stories that remain under copyright in the United States.”) (last visited Apr. 18, 2016).

6. See Rosenblatt, *supra* note 4.

7. *Who Are Conan Doyle Estate Ltd.?*, CONAN DOYLE ESTATE, <http://www.conandoyleestate.com/index.php/who-are-conan-doyle-estate-ltd/> (last visited Apr. 18, 2016).

Professor William Fisher, is “a loose cluster of legal doctrines that regulate the uses of different sorts of ideas and insignia.”<sup>8</sup>

Within THE COMPLETE 60 SHERLOCK CANON, only four novels and forty-six short stories were published in the U.S. prior to January 1, 1923.<sup>9</sup> Because THE PROTECTED 10 STORIES were published after 1923, they are still protected under the U.S. Copyright Term Extension Act of 1998.<sup>10</sup> In *Klinger v. Conan Doyle Estate, Ltd.*, the U.S. District Court for the Northern District of Illinois explained that “[w]orks first published through the end of 1922 remain unprotected today . . . . The U.S. copyright in any work published or copyrighted prior to January 1, 1923, has expired by operation of law, and the work has permanently fallen into the public domain in the United States.”<sup>11</sup> Thus, the works that are available in the U.S. public domain shall be referred to as THE PUBLIC USE 50 STORIES.

Although the copyrights to THE PUBLIC USE 50 STORIES have expired, thereby releasing the material into the public mainstream, do the characters of Sherlock Holmes and Dr. John H. Watson simultaneously exist in the public domain by operation of law?<sup>12</sup> If so, how does the U.S. legal system reconcile this issue with the concurrent existence of Conan Doyle’s PROTECTED 10 STORIES? Is this an equitable interpretation of the law if THE PROTECTED 10 STORIES materially contribute to the character development of Sherlock Holmes and Dr. Watson? Further, does a bifurcation of these characters’ identities, with respect to the remaining protected vestiges of the Sherlock Holmes stories, provide a reasonable interpretation of the “increments of expression” test under the U.S. Copyright Act?<sup>13</sup>

8. William W. Fisher III, THEORIES OF INTELLECTUAL PROPERTY, NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY 168, 169 (Stephen R. Munzer ed., Cambridge University Press, 2001).

9. *Klinger v. Conan Doyle Estate, Ltd.*, 755 F.3d 496, 497 (7th Cir. 2014).

10. *See id.* (“As a result of statutory extensions of copyright protection culminating in the 1998 Copyright Term Extension Act, the American copyrights on those final stories (copyrights owned by Doyle’s estate, the appellant) will not expire until 95 years after the date of original publication—between 2018 to 2022, depending on the original publication date of each story. The copyrights on the other 46 stories and the 4 novels, all being works published before 1923, have expired as a result of a series of copyright statutes well described in *Societe Civile Succession Guino v. Renoir*, 549 F.3d 1182, 1189–90 (9th Cir. 2008).”)

11. *Id.* at 883 n.2 (internal citations omitted).

12. *See Klinger*, 755 F.3d at 497.

13. *See Klinger*, 988 F. Supp. 2d at 891 (“The ‘increments of expression’ test originates from the Copyright Act’s discussion of the copyrightability of derivative works . . . . The Copyright Act specifically grants the author of a derivative work copyright protection in the incremental original expression he contributes as long as the derivative work does not infringe the underlying work.”) (quoting *Schrock v. Learning Curve Int’l. Inc.*, 586 F.3d 513, 518 (7th Cir. 2009)).

The fact remains that prior to *Klinger v. Conan Doyle Estate, Ltd.*, the U.S. Seventh Circuit Court of Appeals had not proffered a ruling on whether literary sequels constituted derivative works.<sup>14</sup> Therefore, in June 2014 the Estate Company sought appellate review on the issue.<sup>15</sup> In turn, this appeal raised an intriguing and unprecedented intellectual property question before the U.S. Seventh Circuit Court of Appeals.

This paper proceeds as follows: Part I explores the basic statutory framework of the U.S. Copyright Term Extension Act of 1998. Part II recounts the chronological development of THE COMPLETE 60 SHERLOCK CANON. Lastly, Part III examines the intriguing history of *Klinger v. Conan Doyle Estate, Ltd.*, as well as the legal implications and countervailing social policy interests that were embodied in the Seventh Circuit's landmark ruling.

### I. THE U.S. COPYRIGHT TERM EXTENSION ACT OF 1998

In essence, the law of copyright, according to William Fisher, “protects various ‘original forms of expression,’ novels, movies, musical compositions, and computer software programs.”<sup>16</sup> In the *Klinger* case, the Estate Company actively sought U.S. copyright protection for the characters of Sherlock Holmes and Dr. Watson for a term of 135 years (spanning the character's creation in 1887 to the year of the last story's copyright expiration in the U.S. in 2022).<sup>17</sup> On a prima facie analysis, a copyright term of 135 years appears to generously favor the author as the proprietor, in comparison with the meager temporal parameters set forth in the Statute of Anne of 1710.<sup>18</sup> Great Britain's Statute of Anne was essentially the “world's first copyright statute,” and provided 28 years of protection before a work would become available in the public domain.<sup>19</sup>

A long standing principle of U.S. copyright law holds that “[o]nce the copyright on a work expires, the work becomes a part of the public domain

14. *Id.* at 892 (“The Seventh Circuit ha[d] been silent on the issue of whether literary sequels or series constitute derivative works.”)

15. *Klinger*, 755 F.3d at 496.

16. Fisher, *supra* note 8 at 169.

17. *Klinger*, 755 F.3d at 503.

18. See *Statute of Anne, Great Britain 1710*, ENCYCLOPEDIA BRITANNICA, <http://www.britannica.com/topic/Statute-of-Anne> (last visited Apr. 18, 2016) (describing that “[t]he Statute of Anne, passed in England in 1710, was a milestone in the history of copyright law. It recognized that authors should be the primary beneficiaries of copyright law and established the idea that such copyrights should have only limited duration (then set at 28 years), after which works would pass into the public domain”).

19. Mark Rose, *The Author in Court: Pope v. Curl (1741)*, CULTURAL CRITIQUE, NO. 21 197, 199 (University of Minnesota Press, 1992).

and can be copied and sold without need to obtain a license from the holder of the expired copyright.”<sup>20</sup> The main point of contention, however, and which subsequently forms the crux of this paper’s inquiry into U.S. copyright law, is determining how THE PROTECTED 10 STORIES should be treated under the existing legal schema. Because THE PROTECTED 10 STORIES were published after 1923, they are still legally protected under the U.S. Copyright Term Extension Act of 1998.<sup>21</sup>

To be precise, THE PROTECTED 10 STORIES comprise the following titles, along with their respective dates of publication:<sup>22</sup>

1. *The Creeping Man* (1923)
2. *The Sussex Vampire* (1924)
3. *The Three Garridebs* (1924)
4. *The Illustrious Client* (1924)
5. *The Three Gables* (1926)
6. *The Blanched Soldier* (1926)
7. *The Lion’s Mane* (1926)
8. *The Retired Colourman* (1926)
9. *The Veiled Lodger* (1927)
10. *Shoscombe Old Place* (1927)

Under the 1998 Copyright Term Extension Act, these stories will expire ninety-five years from the work’s respective original dates of publication, thereby placing their public domain release dates in the U.S. between 2018 and 2022.<sup>23</sup>

However, the Estate Company averred that because Sir Arthur Conan Doyle did not officially complete the character development of Sherlock Holmes and Dr. John H. Watson until 1927, both the characters and THE PROTECTED 10 STORIES qualify for extended protections under the 1998 U.S. Copyright Term Extension Act.<sup>24</sup> Given that the Sherlock Holmes

20. *Klinger*, 755 F.3d at 497.

21. *See id.*

22. Jones McClure, *My Dear Watson, We May No Longer Speak of Your Second Wife*, ANNOTATIONS.COM, Jan.18, 2014, <http://annotations.jonesmcclure.com/2014/01/18/dear-watson-may-longer-speak-second-wife/#sthash.qkoHOpQI.dpbs> (last visited Apr. 18, 2016).

23. *See Klinger*, 755 F.3d at 497 (explaining that the copyrights here “will not expire until 95 years after the date of original publication—between 2018 to 2022, depending on the original publication date of each story”).

24. *Id.* at 503 (Judge Posner concluding that “[t]he spectre of perpetual, or at least nearly perpetual, copyright (perpetual copyright would violate the copyright clause of the Constitution, Art. I, § 8, cl. 8, which authorizes copyright protection only for ‘limited Times’) looms, once one realizes that the Doyle

stories and characters are not a linear subject matter, but instead incorporate and augment the story elements and motifs established in other stories in the public domain, how can this ruling be equitably enforced?<sup>25</sup>

Under modern U.S. copyright law, public policy interests trump a private individual's claim to a perpetual copyright, because expiration limits ensure "the public will not be permanently deprived of the fruits of an artist's labors."<sup>26</sup> Further, a perpetual copyright to the Sherlock Holmes story elements and characters would violate the U.S. Constitution, article I, section 8, clause 8: "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>27</sup> Indeed, it is because of the bedrock social policy interests embedded in the Progress Clause, as well as in the U.S. Copyright Act, that the district court ultimately rejected the Estate Company's argument.<sup>28</sup>

## II. HISTORY OF THE COMPLETE 60 SHERLOCK CANON

To understand the U.S. District Court and U.S. Seventh Circuit Court of Appeals analyses in *Klinger v. Conan Doyle Estate Ltd.*, familiarity with the history of THE COMPLETE 60 SHERLOCK CANON is essential. According to Stanford University's Discovering Sherlock Holmes Institute, Arthur Conan Doyle was born May 22, 1859 in Edinburgh, to a devout Catholic family.<sup>29</sup> As the eldest surviving son of seven children, Conan Doyle had a thirst for adventure, and developed a love for reading novels and studying British history.<sup>30</sup> Throughout Conan Doyle's childhood, his family's financial situation was volatile, because his father, Charles Doyle, struggled with depression, alcoholism, and unsuccessful employment as an architect.<sup>31</sup> Conan Doyle's mother, Mary Foyle Doyle, had high aspirations for her son to attain a reputable profession that would provide him with

estate is seeking 135 years (1887-2022) of copyright protection for the character of Sherlock Holmes as depicted in the first Sherlock Holmes story").

25. *See id.* at 502 (the Estate arguing that Holmes and Dr. Watson are not flat characters, but rather dynamic, "round" characters, and therefore qualify for extended protection because "Holmes and Watson . . . were not fully rounded off until the last story written by Doyle").

26. *Klinger*, 988 F. Supp. 2d at 890 (quoting *Stewart v. Abend*, 495 U.S. 207, 228 (1990)).

27. U.S. CONST. art. I, § 8, cl. 8 (emphasis added).

28. *Klinger*, 988 F. Supp. 2d at 890. ("The effect of adopting Conan Doyle's position would be to extend impermissibly the copyright of certain character elements of Holmes and Watson beyond their statutory period, contrary to the goals of the Copyright Act.")

29. *Discovering Sherlock Holmes, Arthur Conan Doyle*, STANFORD UNIVERSITY: DISCOVERING SHERLOCK HOLMES, <http://sherlockholmes.stanford.edu/biography.html> (last visited Apr. 18, 2016).

30. *Id.*

31. *Id.*

financial security. With the magnanimous financial support of his family's benefactor, Bryan Charles Waller, Conan Doyle was able to attend medical school at the University of Edinburgh.<sup>32</sup>

While Conan Doyle was not impassioned to study medicine and found his studies tedious at first, that changed when he met Doctor Joseph Bell.<sup>33</sup> The Stanford University's Discovering Sherlock Holmes Institute noted that Dr. Bell served as Conan Doyle's inspiration for the character of Sherlock Holmes: "Dr. Bell taught his students the importance of observation, using all the senses to obtain an accurate diagnosis. He enjoyed impressing students by guessing a person's profession from a few indications, through a combination of deductive and inductive reasoning, like Holmes."<sup>34</sup>

Upon graduating from medical school, Conan Doyle shocked his religious family when he informed them of his decision to become an agnostic. The Doyle family then withdrew their financial support and offers to write him letters of introduction to establish his medical practice.<sup>35</sup> To help finance his practice, Conan Doyle was subsequently hired on as a ship doctor on voyages to exotic locales such as Africa and Antarctica, where he began dabbling with writing adventure stories about his travel experiences and childhood.<sup>36</sup> By 1885, Conan Doyle was able to establish a modest practice for himself and married Louise Hawkins, the sister of one of his deceased patients.<sup>37</sup>

In 1886, Conan Doyle drafted his first Sherlock Holmes novella, *A Study in Scarlet*.<sup>38</sup> The work was rejected several times before Conan Doyle sold it for publication in the 1887 *Beeton's Christmas Annual* for £25.<sup>39</sup> The novella was subsequently released in the U.S. in 1890, thereby marking Sherlock Holmes and Dr. Watson's first debut in the American literary market.<sup>40</sup> Conan Doyle's second Sherlock Holmes novella, *Sign of the Four*, was published shortly thereafter, but received only tepid reception.<sup>41</sup> While writing the early Sherlock Holmes novellas, Conan Doyle also composed several British history accounts.<sup>42</sup>

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. *Klinger v. Conan Doyle Estate, Ltd.*, 988 F. Supp. 2d 879, 883 (N.D. Ill. 2013).

41. *See Discovering Sherlock Holmes*, *supra* note 29.

42. *Id.*

Up to this point, Conan Doyle's works had enjoyed modest success, but his stature as a writer blossomed when his 1891 series of Sherlock short stories appeared in *The Strand Magazine*.<sup>43</sup> It was in this year that Conan Doyle attained the status of an international "celebrity" writer.<sup>44</sup> After composing three highly lucrative installments of twelve Sherlock Holmes novellas, Conan Doyle decided it was time to start a new chapter in his literary career.<sup>45</sup> Conan Doyle reasoned that "the Holmes stories [were] light fiction, good for earning money, but destined to be quickly forgotten, *the literary equivalent of junk food*."<sup>46</sup>

As a result, in the 1893 Sherlock Holmes novella, *The Final Problem*, Conan Doyle resolved to "kill off" the world-renowned detective.<sup>47</sup> Conan Doyle, however, was unprepared for the public's extremely passionate and acrimonious outcry at Holmes' death.<sup>48</sup> Some fans even sent Conan Doyle life-threatening letters to coerce him into resurrecting Sherlock Holmes in future works.<sup>49</sup> Others wrote to Conan Doyle, imploring him to breathe life back into the beloved literary character, while other fans silently mourned the literary world's loss by wearing black armbands.<sup>50</sup> In a letter to a friend, Conan Doyle commented on the situation saying "I couldn't revive him if I would, at least not for years . . . for I have had such an overdose of him that I feel towards him as I do towards *pâté de foie gras*, of which I once ate too much, so that the name of it gives me a sickly feeling to this day."<sup>51</sup>

Almost a decade after publishing *The Final Problem*, Conan Doyle finally relented and took up his pen once more for the great Sherlock Holmes.<sup>52</sup> Conan Doyle's third Sherlock Holmes novel, *The Hound of the Baskervilles*, was published in installments in *The Strand Magazine* from 1901 to 1902.<sup>53</sup> *The Hound of the Baskervilles* did not *per se* "resurrect" the character of Sherlock Holmes.<sup>54</sup> Instead, it was penned to be an "old case," or memory of Dr. Watson before Sherlock Holmes' death.<sup>55</sup> In his 1903 novel, *The Empty House*, Conan Doyle finally capitulated, and officially

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.* (emphasis added).

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

resurrected Sherlock Holmes.<sup>56</sup> For inspiration, Doyle drew from contemporary events such as the First World War to craft his later Sherlock Holmes stories.<sup>57</sup> In Conan Doyle's 1916 novel, *His Last Bow*, Sherlock Holmes serves England in the Great War, and performs counter-espionage work against Germany.<sup>58</sup> In fact, Conan Doyle continued to produce Sherlock Holmes literature until 1927, thus ending an impressive forty-year career writing about the adventures of Sherlock Holmes.<sup>59</sup>

### III. THE PROCEDURAL HISTORY OF KLINGER V. CONAN DOYLE ESTATE, LTD.

#### A. Background Facts

In *Klinger*, the Plaintiff, Leslie S. Klinger, was a Los Angeles entertainment lawyer who co-authored, along with Laurie R. King, a Sherlock Holmes anthology for publication in the U.S. with Random House Publishing Company. In his own words, from his personal website, Mr. Klinger describes himself as “one of the world’s foremost authorities on those twin icons of the Victorian era, Sherlock Holmes and Dracula . . . the editor of the three-volume collection of the short stories and novels, *The New Annotated Sherlock Holmes*, published by W.W. Norton in 2004 and 2005, winner of the Edgar Award for Best Critical/Biographical Work and nominated for every other major award in the mystery genre.”<sup>60</sup> Mr. Klinger’s anthology, *A Study in Sherlock*, was a commercialized adaptation of THE COMPLETE 60 SHERLOCK CANON, restyled as modern fan fiction short stories.<sup>61</sup>

While it is permissible fair use to produce non-commercial Sherlock Holmes fan fiction in the U.S., the Estate Company does, however, charge license fees for producing and/or distributing commercial adaptations.<sup>62</sup> In fact, while the British Broadcasting Company’s (BBC) modern television series adaptation of the Sherlock Holmes stories did not require a license from the Estate Company to air the TV program in the United Kingdom, the

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Leslie S. Klinger Biography*, LESLIE S. KLINGER.COM, <http://lesliesklinger.com/> (last visited Apr. 18, 2015).

61. *Leslie S. Klinger Biography*, LESLIE S. KLINGER.COM, <http://lesliesklinger.com/books/a-study-in-sherlock/synopsis/> (last visited Apr. 18, 2016).

62. See Rosenblatt, *supra* note 4 (explaining that “U.S. Sherlockians have always relied on copyright fair use principles to support the creation of fanworks”).

BBC did need a distribution license for the show's airing in the U.S.<sup>63</sup> According to *The Economist*, in order “[t]o avoid similar disputes, high-profile [U.S.] film-makers, television producers and other creators have paid the estate in the past, including for the BBC’s *Sherlock*, CBS’s *Elementary* and the Hollywood films starring Robert Downey junior (for which Mr. Klinger served as a Holmes expert).”<sup>64</sup>

Upon learning about Mr. Klinger’s soon-to-be-published anthology, the Estate Company contacted Random House Publishing, and reminded them of their legal requirement to first enter into a licensing agreement with the Estate Company before publishing in the U.S.<sup>65</sup> As noted by the U.S. District Court for the Northern District of Illinois, the Estate “intervened to assert its exclusive copyright over the use of the characters Sherlock Holmes and Dr. Watson.”<sup>66</sup> The Estate Company is owned by members of Arthur Conan Doyle’s family, and “licenses its intellectual property, including copyrights, in the works of Sir Arthur Conan Doyle to third parties through its exclusive authorized licensing agents in the United States.”<sup>67</sup>

Although Klinger and King formed a contract with Random House to publish the anthology, even before *A Study in Sherlock* could be published, the Estate Company intervened and informed Random House that it first needed a licensing agreement from the Estate.<sup>68</sup> Because Klinger and King ultimately disagreed with the Estate Company and Random House that a license was in fact needed, Mr. Klinger filed an action against the Estate Company on February 14, 2013.<sup>69</sup>

### B. *The U.S. District Court for the Northern District of Illinois*

The parties presented their case before Judge Rubén Castillo of the U.S. District Court for the Northern District of Illinois on December 23, 2013.<sup>70</sup>

63. *Id.*

64. See G.F. Seattle, *Public Domain: Who Owns Sherlock Holmes?*, THE ECONOMIST, Feb. 20, 2013, <http://www.economist.com/blogs/prospero/2013/02/public-domain> (last visited Apr. 18, 2016).

65. *Klinger v. Conan Doyle Estate, Ltd.*, 988 F. Supp. 2d 879, 883 (N.D. Ill. 2013).

66. *Id.*

67. *Id.*

68. *Id.* at 883 (“Klinger and King entered into a contract with Random House to publish the anthology. Before Random House published *A Study in Sherlock*, Conan Doyle intervened to assert its exclusive copyright over the use of the characters Sherlock Holmes and Dr. Watson. Conan Doyle informed Random House that it must enter into a licensing agreement with it in order to publish the anthology. Although Klinger and King believed that the law did not require them to obtain a license, Random House disagreed and entered into a licensing agreement with Conan Doyle.”) (internal citations omitted).

69. *Id.* at 884.

70. *Id.* at 879.

Mr. Klinger sought to obtain a declaratory judgment under the federal Declaratory Judgment Act that the “[1] various characters, [2] character traits and [3] other story elements from Sir Arthur Conan Doyle’s Sherlock Holmes stories are free for the public to copy without infringing Conan Doyle’s rights under the Copyright Act, 17 U.S.C. § 101 *et seq.*”<sup>71</sup>

The crux of Mr. Klinger’s argument was that “characters and story elements first articulated in public domain works are free for public use, while the further delineation of the characters and story elements in protected works retain their protected status.”<sup>72</sup> Thus, “[t]he copyrightable aspects of a character . . . are protected only to the extent the work in which that particular aspect of the character was first delineated remains protected.”<sup>73</sup>

Oddly enough, because the Estate Company failed to make a timely response to the complaint—filed by Mr. Klinger in February 2013—the District Court entered a default judgment against the Estate Company on June 25, 2013.<sup>74</sup> Next, pursuant to Rule 56 of the U.S. Federal Rules of Civil Procedure, the District Court allowed Mr. Klinger to file a motion for summary judgment against the Estate Company on July 29, 2013.<sup>75</sup>

Under the Declaratory Judgment Act, a federal court with proper jurisdiction to hear a matter is therefore authorized to “declare the rights and other legal relations of any interested party seeking such declaration.”<sup>76</sup> According to Mr. Klinger, the purpose for seeking recourse under the Declaratory Judgment Act was to “clarify the copyright status of the Sherlock Holmes Story Elements so that he, along with the public, may use the Elements without being subject to Conan Doyle’s licensing demands.”<sup>77</sup>

However, the Estate Company averred that because the character development of Sherlock Holmes and Dr. Watson was not officially completed by Conan Doyle until 1927, both the characters and THE PROTECTED 10 STORIES qualified for extended protections under the 1998 Copyright Term Extension Act.<sup>78</sup>

71. *Id.* at 882.

72. *Id.* at 890 (citing *Siegel v. Warner Bros. Entm’t Inc.*, 690 F. Supp. 2d 1048, 1058–59 (C.D. Cal. 2009)).

73. *Id.* (citing *Siegel*, 690 F. Supp. 2d at 1058–59).

74. *Id.* at 884.

75. *Id.*; *see also* FED. R. CIV. P. 56(a) (“The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.”).

76. 28 U.S.C. § 2201(a) (2012).

77. *Klinger*, 988 F. Supp. 2d at 887.

78. *Id.* at 888.

To reiterate, under the 1998 Copyright Term Extension Act, the statutory extensions of copyright protection for Sherlock Holmes and Dr. Watson is permissible for a maximum term of ninety-five years.<sup>79</sup> As a result, the District Court treated the characters as fully delineated entities for the complete ninety-five year term, and did not fracture them into protected and unprotected parts: “[a] character, character trait, and a storyline, which are copyrightable increments of expression.”<sup>80</sup>

With respect to the Estate Company’s argument in favor of protecting the characters of Sherlock Holmes and Dr. Watson because they were part and parcel of THE PROTECTED 10 STORIES, the District Court found this directly violated the fundamental principles of copyright law: “It is a bedrock principle of copyright that ‘once work enters the public domain it cannot be appropriated as private (intellectual) property,’ and even the most creative of legal theories cannot trump this tenet.”<sup>81</sup>

For the foregoing reasons, the U.S. District Court ruled that creators (i.e., other filmmakers and writers) are free to use the characters Sherlock Holmes and Dr. Watson, as well as THE PUBLIC USE 50 STORIES, without licensing them from the Estate Company because of their public use status.<sup>82</sup> Specifically, the court held that “[w]here an author has used the same character in a series of works, some of which are in the public domain, the public is free to copy story elements from the public domain works . . . . ‘Clearly anyone may copy such elements as have entered the public domain, and no one may copy such elements as remain protected by copyright.’”<sup>83</sup>

### 1. The New Creative Works Exception

A significant exception to the District Court’s ruling, however, is that new creative works about these two characters cannot use elements that appear exclusively in the Sherlock Holmes short stories released after 1923.<sup>84</sup> For example, Conan Doyle’s 1926 Sherlock Holmes short story, *The Adventure of the Lion’s Mane*, describes the details of Sherlock’s retirement in Sussex.<sup>85</sup> Because the story element referring to Sherlock’s retirement is

79. *Klinger v. Conan Doyle Estate, Ltd.*, 755 F.3d 496, 497 (7th Cir. 2014).

80. *Klinger*, 988 F. Supp. 2d at 893.

81. *Id.* at 889 (internal citation omitted).

82. *See id.* at 882.

83. *See id.* at 889 (quoting 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 2.12).

84. *See Rosenblatt, supra* note 4; Sir Arthur Conan Doyle, *The Adventure of the Lion’s Mane*, THE STRAND MAGAZINE (1926), available at <https://sherlock-holm.es/stories/pdf/a4/1-sided/lion.pdf> (last visited Apr. 18, 2016).

85. Sir Arthur Conan Doyle, *supra* note 84.

not contained in THE PUBLIC USE 50 STORIES, it is under U.S. copyright protection.<sup>86</sup>

## 2. The Increments of Expression Test

The District Court also evaluated the Estate's arguments for protecting the copyright of derivative literary works under the increments of expression test.<sup>87</sup> Prior to this case, the U.S. Seventh Circuit Court of Appeals had not specifically addressed the issue of "whether literary sequels or series constitute derivative works."<sup>88</sup> Judge Castillo stated that "[b]ecause the Seventh Circuit's incremental expression case law focuses on images rather than literature, it is difficult to apply its precedent seamlessly." However, despite this uncertainty, there is a "low threshold of originality required for increments of expression."<sup>89</sup>

The court's narrow ruling was that the following story elements/character traits of the Sherlock series were under copyright protection: "(1) Dr. Watson's second marriage; (2) Dr. Watson's history as an athlete; and (3) Holmes's retirement from his detective agency."<sup>90</sup> Thus, if Mr. Klinger wanted to write a commercial anthology of Sherlock Holmes' retirement in Sussex for publication in the U.S., he would legally need to obtain a license from the Estate Company.<sup>91</sup> In summary, the District Court's holding fractured the literary characters of Sherlock Holmes and Dr. Watson into protected and unprotected copyrightable components to the extent that the statutory copyright protections to THE PROTECTED 10 STORIES would be upheld. As a result, the court's ruling in *Klinger* signified a theoretical landmark for intellectual property law.<sup>92</sup>

### C. The U.S. Seventh Circuit Court of Appeals

The Estate Company challenged the District Court's ruling, because "[m]any aspects of these characters' natures are not revealed until the final 10 stories, which are still under copyright protection . . . . The 10 stories are

86. See Rosenblatt, *supra* note 4.

87. *Klinger*, 988 F. Supp. 2d at 891.

88. *Id.* at 892.

89. *Id.*

90. See McClure, *supra* note 22.

91. See *id.*

92. See Rosenblatt, *supra* note 4 ("The same rule, applied broadly, would free not only Holmes and Watson, but also other characters created early in the 20th century, like G.K. Chesterton's Father Brown, Edgar Rice Burroughs' Tarzan, and Agatha Christie's Hercule Poirot.").

not set exclusively in the characters' old age but at various points throughout the characters' lives."<sup>93</sup> The Estate further argued that the

copyright on a 'complex' character in a story, such as Sherlock Holmes or Dr. Watson, whose full complexity is not revealed until a later story, remains under copyright until the later story falls into the public domain . . . . [T]he fact that early stories in which Holmes or Watson appeared are already in the public domain does not permit their less than fully 'complexified' characters in the early stories to be copied even though the stories themselves are in the public domain.<sup>94</sup>

The Estate Company's argument for the living, breathing, complexity of the characters appears tangentially related to German philosopher Johann Gottfried von Herder's<sup>95</sup> theory of a creative work that "one ought to be able to regard each book as the imprint [*Abdruck*] of a living human soul."<sup>96</sup>

On June 16, 2014, the U.S. Seventh Circuit Court of Appeals upheld the District Court's ruling that the copyright protections at issue did not preclude the American public's fair use of the characters Sherlock Holmes and Dr. Watson.<sup>97</sup> Thus, the remaining PROTECTED 10 STORIES shall remain under U.S. copyright protection until their release into the public domain around 2022.<sup>98</sup>

Specifically, the Seventh Circuit reasoned that where "stories in which copyright persists are derivative from the earlier stories, so only original elements added in the later stories remain protected. The 'freedom to make

93. Bill Mears, *Sherlock Holmes goes to the Supreme Court for a case of Copyright*, CNN.COM, July 17, 2014, <http://www.cnn.com/2014/07/16/us/sherlock-holmes-supreme-court/> (last visited Apr. 18, 2016).

94. *Klinger v. Conan Doyle Estate, Ltd.*, 755 F.3d 496, 498 (7th Cir. 2014).

95. Hans Dietrich Irmscher, *Johann Gottfried von Herder*, ENCYCLOPEDIA BRITANNICA (2014), <http://www.britannica.com/biography/Johann-Gottfried-von-Herder> ("[Herder was a] German critic, theologian, and philosopher, who was the leading figure of the Sturm und Drang literary movement and an innovator in the philosophy of history and culture. His influence, augmented by his contacts with the young J.W. von Goethe, made him a harbinger of the Romantic movement. He was ennobled (with the addition of von) in 1802.") (last visited Apr. 18, 2016).

96. See Martha Woodmansee, *The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the 'Author'*, EIGHTEENTH CENTURY STUDIES, Vol. 17, Issue 4, 446-47, Summer 1984 (citing Herder's theory: "Any poem, even a long poem - a life's (and soul's) work - is a tremendous betrayer of its creator, often where the latter was least conscious of betraying himself. Not only does one see in it the man's poetic talents, as the crowd would put it; one also sees which senses and inclinations governed him, how he received images, how he ordered and disposed them and the chaos of his impressions, the favorite places in his heart just as his life's destinies, his manly or childish understanding, the stays of his thought and his memory.") (citing Herder, *Vom Erkennen und Empfinden der menschlichen Seele*, 208, <http://www.compilerpress.ca/Competitiveness/Anno/Anno%20Woodmansee%20Genius%20&%20Copyright.htm> (last visited Apr. 18, 2016)).

97. *Klinger*, 755 F.3d at 497.

98. Redmond, *supra* note 3. ("In the United States, the only Sherlock Holmes remaining in copyright is portions of *The Case Book*. Three of the stories, published in 1921 through 1923, are already in the public domain; the rest will enter the public domain in various years leading up to 2023.")

new works based on public domain materials ends where the resulting derivative work comes into conflict with a valid copyright.”<sup>99</sup> In an opinion delivered by Judge Richard Posner, the Seventh Circuit rejected the appellant’s (the Conan Doyle Estate company’s) argument that because Sherlock Holmes and Dr. Watson are “complex” characters, in that the full contours of their personality are not fully realized until the final story in 1927, the characters should be under copyright protection until 2022.<sup>100</sup>

Judge Posner found the Estate’s argument that Holmes and Dr. Watson are complex, multi-dimensional characters, such that they are an exception to the increments of expression test, unpersuasive: “The more vague, the less ‘complete,’ a character, the less likely it is to qualify for copyright protection. An author ‘could not copyright a character described merely as an unexpectedly knowledgeable old wino,’ but could copyright ‘a character that has a specific name and a specific appearance . . . . No more is required for a character copyright.”<sup>101</sup>

Judge Richard Posner has written extensively on intellectual property law and economics, and is regarded by legal scholars, like William Fisher, as a proponent of utilitarianism.<sup>102</sup> As such, an objective of economic theorists is “simultaneously to increase incentives for creative activity and to reduce the associated welfare losses.”<sup>103</sup> Thus, Judge Posner’s utilitarian rationale, as examined by Professor William Fisher, is seeking legal outcomes that ultimately maximize the net social welfare:

The distinctive characteristics of most intellectual products, Landes and Posner argue, are that they are easily replicated and that enjoyment of them by one person does not prevent enjoyment of them by other persons . . . [w]e can avoid . . . economically inefficient outcome[s] by allocating to the creators (for limited times) the exclusive right to make copies of their creations. The creators of works that consumers find valuable - *i.e.*, for which there are not, in the opinion of consumers, equally attractive substitutes - will be empowered thereby to charge prices for access to those works substantially greater than they could in a competitive market.<sup>104</sup>

It is unsurprising then, that Judge Posner vehemently rejected the Estate Company’s subterfuge argument for reviving subsequently expired

99. *Klinger*, 755 F.3d at 497 (citing *Warner Bros. Entertainment, Inc., v. X One X Productions*, 644 F.3d 584, 596 (8th Cir. 2011)).

100. *Klinger v. Conan Doyle Estate Ltd.*, COPYRIGHT AND FAIR USE: STANFORD UNIVERSITY LIBRARIES, June 16, 2014, <http://fairuse.stanford.edu/case/klinger-v-conan-doyle-estate-ltd/> (last visited Apr. 18, 2016).

101. *Klinger*, 755 F.3d at 497 (quoting *Gaiman v. McFarlane*, 360 F.3d 644, 660 (7th Cir. 2004)).

102. See Fisher, *supra* note 8 at 70.

103. *Id.* at 96.

104. *Id.* at 70.

copyright protections to the characters in THE PUBLIC USE 50 STORIES. Further, the appellate court reasoned that the story elements embedded in Conan Doyle's Sherlock literature before 1923 are available in the public domain, and that "alterations do not revive the expired copyrights on the original characters."<sup>105</sup> To demonstrate the fallacy of the Estate Company's rationale for reviving copyright protections to a character already in the public domain, the court offered a salient analogy to the *Star Wars* movie franchise: "A contemporary example is the six *Star Wars* movies: Episodes IV, V, and VI were produced before I, II, and III. The Doyle estate would presumably argue that the copyrights on the characters as portrayed in IV, V, and VI will not expire until the copyrights on I, II, and III expire."<sup>106</sup>

At the very least, the Estate Company appears to have taken up the mantle of Thomas Becket, and the London booksellers and printers, in the 1774 case of *Donaldson v. Becket* by advocating a perpetual copyright principle.<sup>107</sup> In *Donaldson*, the "proponents of perpetual copyright asserted the author's natural right to a property in his creation . . . the opponents of perpetual copyright replied that ideas could not be treated as property and that copyright could only be regarded as a limited personal right of the same order as a patent."<sup>108</sup> Similar to the House of Lords ruling in *Donaldson v. Becket* for temporal limitations on a copyright, the U.S. federal court's ruling in *Klinger* rejected the notion of an eternal copyright in a character.<sup>109</sup>

In sum, THE PROTECTED 10 STORIES retain their copyright protection in the U.S. until the end of 2022, upon which the final canon shall exist in the public domain.<sup>110</sup>

#### D. The U.S. Supreme Court

Returning to the theme established in the epigraph at the outset of this paper, "[t]here is nothing more stimulating than a case where everything goes

105. *Klinger*, 755 F.3d at 503.

106. *Id.* at 502.

107. See Mark Rose, *The Author as Proprietor: Donaldson v. Becket and the Genealogy of Modern Authorship*, 23 REPRESENTATIONS 51, 51 (University of California Press, 1988) ("Becket and the respondents asserted the theory of an underlying common-law right and the principle of perpetual copyright. Donaldson maintained that once the twenty-eight-year maximum term of copyright under the statute had expired a work was freely available.").

108. *Id.* at 65.

109. *Id.* at 51 ("Donaldson v. Becket was before the House of Lords for nearly three weeks until on 22 February the peers voted in favor of Donaldson and the principle that copyright should be limited in time.").

110. See Redmond, *supra* note 3. ("In the United States, the only Sherlock Holmes remaining in copyright is portions of *The Case Book*. Three of the stories, published in 1921 through 1923, are already in the public domain; the rest will enter the public domain in various years leading up to 2023.")

against you.” This Holmes quotation best encapsulates the spirit of the Estate Company’s efforts to continue appealing the federal court’s ruling.<sup>111</sup> Dissatisfied with the outcome of the case, the Estate Company petitioned the U.S. Supreme Court to delay enforcing the lower court’s ruling, so that their counsel could prepare a revised petition for an emergency stay to the Supreme Court.<sup>112</sup> In response, on July 17, 2014, Supreme Court Justice Elena Kagan denied the Estate’s petition, thereby making the ruling by the Seventh Circuit final.<sup>113</sup> Justice Kagan did not, however, publicly provide a reason for her decision.<sup>114</sup> Nonetheless, the Estate reserved their right to file a writ of certiorari.<sup>115</sup>

On November 3, 2014, the U.S. Supreme Court issued a pithy response to the Estate Company:

Dear Clerk:

The Court today entered the following order in the above-entitled case:

The petition for a writ of certiorari is denied.<sup>116</sup>

As a result, the Estate Company was finally confronted with the reality of their legal defeat. The one consolation for the Estate Company, however, was that THE PROTECTED 10 STORIES, and the increments of expression unique to those select stories, would remain under U.S. copyright protection until 2022.<sup>117</sup>

## CONCLUSION

In summary, literary characters such as Sherlock Holmes and Dr. Watson can exist in the public domain, even while certain story elements featuring these characters remain under protection pursuant to the U.S. Copyright Extensions Act of 1998. The federal court’s ruling in *Klinger* is both reasonable and equitable, in balancing the interests of the author and the public in protecting copyrightable works. Had the federal courts ruled in favor of the Estate Company, other U.S. copyright holders could essentially

111. CONAN DOYLE, *supra* note 1 loc.79.

112. *See* Mears, *supra* note 93.

113. *See* Bill Donahue & Michael Lipkin, *July 2014: Petition for Emergency Denied*, FREE SHERLOCK.COM, July 19, 2014, <http://free-sherlock.com/2014/07/19/july-2014-petition-for-emergency-stay-denied/> (last visited Apr. 18, 2016).

114. *Id.*

115. *See id.*

116. *See* Memorandum from the United States Supreme Court Office of the Clerk for Clerk of the United States Court of Appeals for the Seventh Circuit in Conan Doyle Estate, Ltd. v. Leslie S. Klinger, Nov. 3, 2014, <https://freesherlock.files.wordpress.com/2014/11/klinger-supreme-court-minute-order-denying-cert-c.pdf> (last visited Apr. 18, 2016).

117. *Klinger v. Conan Doyle Estate, Ltd.*, 755 F.3d 496, 497 (7th Cir. 2014).

petition for an “eternal” copyright in a character by continually producing works on that character to secure their rights as the holder.<sup>118</sup>

This scenario would violate a central tenet of U.S. copyright law, that “once [a] work enters the public domain it cannot be appropriated as private (intellectual) property, and even the most creative of legal theories cannot trump this tenet.”<sup>119</sup> In sum, after 2022, when the remaining copyright protections expire, writers such as Mr. Klinger will be free to make use of THE COMPLETE 60 SHERLOCK CANON.<sup>120</sup> Until then, the story elements embedded in THE PUBLIC USE 50 STORIES are in the public domain and subsequent alterations to the characters will not revive expired copyrights.

118. *See id.* (recognizing that a “[p]erpetual copyright would violate the copyright clause of the Constitution, U.S. Const. art. I, § 8, cl. 8, which authorizes copyright protection only for limited Times”) (internal quotation omitted).

119. *Klinger v. Conan Doyle Estate, Ltd.*, 988 F. Supp. 2d 879, 882 (N.D. Ill. 2013) (quoting *Assessment Techs. of WI, LLC v. WIREdata, Inc.*, 361 F.3d 434, 436 (7th Cir. 2004)).

120. *See Klinger*, 755 F.3d at 497 (reasoning that the copyright at issue here “will not expire until 95 years after the date of original publication—between 2018 to 2022, depending on the original publication date of each story”).