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Cases of Note--Round vs. Flat Characters

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LEGAL ISSUES



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Cases of Note — Copyright

Round vs. Flat Characters

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LESLIE KLINGER V. CONAN DOYLE ESTATE, LTD. UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT. 755 F.3d 496; 2014 U.S. App. LEXIS 11319.

Leslie Klinger has annotated H.P. Lovecraft, *The Sandman* comics series, **Bram Stoker's Dracula**, and has a *Frankenstein* soon to be in print. More to the point here, he has done a three-volume annotation of the Sherlock Holmes novels and stories. He was a consultant on the movies *Sherlock Holmes* and *Sherlock Holmes, Game of Shadows*. And he's a lawyer. *How convenient. Frustrated author goes to law school.*

The previous annotation of Holmes was the very well done William S. Baring-Gould, The Annotated Sherlock Holmes.

Arthur Conan Doyle published four Holmes novels and 56 short stories between 1887 and 1927. The final 10 came into print between 1923-27. Due to the **1998 Copyright Term Extension Act**, those will not enter the public domain until 95 years after publication which will run from 2018 to 2022.

Study in Sherlock: Stories Inspired by the Sherlock Holmes Canon (2011) is an anthology of stories by modern authors using the Holmes characters. It was co-edited by **Leslie Klinger**.

The **Conan Doyle Estate** demanded \$5,000 from **Random House** which paid up and was given a copyright license.

Next, **Klinger** and co-ed set out to publish a sequel called *In the Company of Sherlock Holmes* to be published by **Pegasus Books**. Once again, the **Doyle Estate** had its hand out and threatened to prevent distribution through **Amazon, Barnes & Noble** et al. and sue Internet service providers who might distribute it. See **Digital Millennium Copyright Act**, 17 U.S.C. § 512(i)(1)(A).

Pegasus caved, and as publishers are wont to do, put the onus of getting a license on **Klinger**.

Klinger instead sued the **Estate** for a declaratory judgment that he could use the Holmes stories that were out of copyright. **Estate** defaulted, and **Klinger** moved for summary judgment. Which he got. Which in turn gave him his declaratory judgment. **Estate** appealed.

The Appeal

Estate argued that Holmes was a complex character that developed continually through the stories, and therefore copyright protection to Holmes should continue until the last story dropped into the public domain.

Which I think is a pretty good argument, although I turn out to be dead wrong.

Indeed, case law is squarely against the **Estate**.

Silverman v. CBS Inc., 870 F.2d 40, 49-51 (2d Cir. 1989) is “on all fours” as they say with our current case. **Amos** and **Andy** had appeared in long running radio shows with some of the scripts out of copyright, some still in.

“[A] copyright affords protection only for original works of authorship and, consequently, copyrights in derivative works secure protection only for the incremental additions of originality contributed by the authors of the derivative works.” *Id.* at 49; see **Leslie A. Kurtz**, “The Methuselah Factor: When Characters Outlive Their Copyrights,” 11 *U. Miami Entertainment & Sports L. Rev.* 437, 447-48 (1994).

Our Holmes-Watson stories are derivative works, and only their fresh elements are protected. But anyone can now publish a Holmes-Watson story with the new elements protected by copyright.

Hanging in gamely, **Estate** argued “flat” vs. “round” characters. A flat character, it defined as one fully described in the first story with no later additions. A round character evolves through the stories.

The court replied with a legal equivalent of ooo-kay. And by golly referenced **Shakespeare**. Sir John Falstaff evolves through *Henry IV, Part 1*; *Henry IV, Part 2*; *The Merry Wives of Windsor*, and finally dies in *Henry V*. But this has nothing to do with copyright law.

New aspects of Holmes and Watson from the final 10 stories are protected; info on the duo in the prior ones are open for all to use.

Applying my Baker Street Irregular trivia knowledge, The Adventure of the Three Garridebs is among the final ten.

In it, Watson is shot and wounded. So a new derivative work could not include reference to his recuperation. But could reference his wound from the Second Afghan War which turns up in Study in Scarlet.

And of further interest, many Holmes aficionados believe the last ten stories were ghost written.

And for more trivia, Doyle played on a cricket team with J.M. Barrie, author of Peter Pan. And he introduced skiing to Switzerland from Scandinavia. 🇨🇭

