

No. _____

In the Supreme Court of the United States

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CONAN DOYLE ESTATE, LTD., PETITIONER

V.

LESLIE S. KLINGER, RESPONDENT

**PETITIONER'S APPLICATION FOR STAY AND TO RECALL THE MANDATE OF THE
UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT PENDING
THE ESTATE'S PETITION FOR A WRIT OF CERTIORARI**

**To the Honorable Elena Kagan, Associate Justice of the Supreme Court of
the United States and Circuit Justice for the Seventh Circuit**

INTRODUCTION

The Conan Doyle Estate, Ltd. moves under Rule 23 for a stay and to recall the mandate to maintain the status quo while the Estate seeks this Court's review of two issues involving the Estate's copyright in its Sherlock Holmes character. The Seventh Circuit denied a stay two days ago and issued the mandate yesterday, despite the Estate's showing that a petition for certiorari will present substantial questions involving the justiciability of declaratory judgment actions under Article III and the scope of the nation's copyright laws.

There is good cause for staying the effect of the Seventh Circuit's opinion. Allowing it to have immediate effect will stifle the Estate's ability to manage the Sherlock Holmes character's further promotion and development through licensing agreements at a time when Sherlock Holmes movies and television shows are more popular than ever. Conversely, the only harm to Respondent Klinger is that—in the event he finishes his proposed collection of Sherlock Holmes stories before this Court issues its ruling—he will have to enter into a licensing agreement, an

agreement that will be voided (and any royalty payments refunded) if Klinger ultimately prevails and if his forthcoming book avoids infringement.

JURISDICTION

The Seventh Circuit denied the Estate's request for a stay in an order entered July 9, 2014. (Appendix A.) This Court has jurisdiction under Supreme Court Rule 23.2 and 28 U.S.C. § 2101(f), and the Court can issue a stay under Rule 23.

STANDARD FOR GRANTING RELIEF

A party seeking a stay should demonstrate (1) a reasonable probability that four Justices will consider the issues presented sufficiently meritorious to grant certiorari; (2) a fair prospect that a Court majority will vote to reverse the judgment below; and (3) a likelihood of irreparable harm in the event a stay is denied. *Hollingsworth v. Perry*, 130 S. Ct. 705, 709-10 (2010) (per curiam); accord *Barnes v. E-Systems, Inc. Group Hosp. Med & Surgical Ins. Plan*, 501 U.S. 1301, 1302 (1991) (Scalia, J., in chambers), citing *Times-Picayune Publishing Corp. v. Schulinkgamp*, 419 U.S. 1301, 1305 (1974) (Powell, J., in chambers).

In close cases, the Court or the Circuit Justice will balance the equities and weigh the relative harms to the applicant and respondent. *Hollingsworth*, 130 S. Ct. at 710 (citing *Lucas v. Townsend*, 486 U.S. 1301, 1304 (1988) (Kennedy, J., in chambers), and *Rostker v. Goldberg*, 448 U.S. 1306, 1308 (1980) (Brennan, J., in chambers)).

Here, all three of the stay conditions are met, and the relative harms to the Estate far outweigh any potential negligible harm to Respondent Klinger. Accordingly, the stay should be granted.

STATEMENT

Sherlock Holmes and Dr. Watson

Sherlock Holmes and Dr. John H. Watson are among the most recognized and loved characters in modern literature. Sir Arthur Conan Doyle's creation of them spanned four novels and 56 short stories published in the United States from 1887 to 1927. The novels and the first 46 stories are now in the public domain. But the final 10 stories were published between 1923 and 1927, and the parties agree that these stories remain under United States copyright protection until December 31, 2022. The Estate of Sir Arthur Conan Doyle manages and licenses the literary rights in all of the Sherlock Holmes works, licensing those rights for a variety of well-liked books, movies, television programs, and other uses.

Sherlock Holmes and Dr. Watson were not static but are dynamic literary characters who changed and developed throughout the Sherlock Holmes canon. Many aspects of these characters' natures are not revealed until the final 10 stories, which are still under copyright protection. The 10 stories are not set exclusively in the characters' old age but at various points throughout the characters' lives.

The infringing work

In 2011, Plaintiff Leslie Klinger invited contemporary writers to author new stories using Holmes, Watson, and other elements from the Sherlock Holmes canon. The Estate informed Klinger he would need a license, and Klinger disagreed. Klinger's publisher sided with the Estate and entered into a licensing agreement for the book, titled *A Study in Sherlock*. Klinger has since conceded that his book did need a license because it used material from the Estate's copyrighted 10 stories.

By accident, the Estate learned that Klinger was planning a sequel, *In the Company of Sherlock Holmes*, when one of the contributing authors asked the Estate for permission to use a character that appeared only in a story still subject to copyright. The Estate wrote Klinger and his publisher to explain that a license would again be necessary for the new book, and it reminded Klinger and his publisher that the Estate routinely polices online retailers selling unauthorized works. As a result, the publisher refused to publish Klinger's book unless he obtained a license from the Estate. Klinger then filed this suit, seeking a declaratory judgment that Klinger's new book did not infringe the Estate's copyright.

In the typical case where a plaintiff seeks a declaration that his intellectual property does not infringe an existing work, the plaintiff comes forward with his completed work so that a court can determine (1) if any elements of the new work overlap with the existing work, and (2) if so, whether the defendant has a valid patent or copyright in the elements found to be overlapping. That is because courts are loath to invalidate some or all of a patent or copyright in the absence of an actual case or controversy.

But Klinger did not produce his proposed book here. Instead, he offered the district court a list of "story elements" that did not overtly include the Holmes and Watson characters, but instead listed a series of character traits/ideas: "Bohemian nature," "Loner," "Smoking," and "Patriotic." Klinger then asked the district court to rule on his list, apart from the fully-realized character Arthur Conan Doyle created and expressed in his works. To this day, Klinger has never offered a federal court Doyle's actual expression—or Klinger's own—for purposes of a comparison

and declaration of non-infringement. Nonetheless, Klinger's own Complaint alleges that the "actual controversy" is "whether the publication of [his forthcoming book] by Plaintiff, co-editor, and their licensees infringes any copyright of Defendant."

The litigation

Given the modest licensing fee at issue with Klinger's very minor work, the Estate allowed a default to be entered so that Klinger could publish his book without the Estate being forced to litigate the issue of its copyright in the Sherlock Holmes character. Klinger wasn't satisfied. He declined a default judgment, requested summary judgment, and created a website, free-sherlock.com. Klinger then submitted additional facts through declarations stating that Holmes and Watson as characters were essentially created in pre-1923 stories and therefore in the public domain in their entirety.

Forced to defend, the Estate offered five affidavits, three from recognized Sherlock Holmes experts and two from literary-character experts. These affidavits demonstrated that the Sherlock Holmes and Dr. Watson characters were created not just in the earlier stories and novels, but throughout the entire Holmes canon, with significant contributions to the characters' development appearing in the final 10 stories. These scholars quoted many of Klinger's own previously published comments to the same effect, i.e., about how the 10 stories had contributed to the depth and breadth of the Holmes character.

Rather than requiring Klinger to come forward with a completed work and compare that work to the protected elements of the last 10 stories, the district court accepted Klinger's list of abstract character elements and held there was no

infringement and therefore no need for a license. The district court concluded that the Holmes and Watson characters were fully created in the very first work of the Sherlock Holmes canon. This factual issue was genuinely disputed in extensive detail by the affidavits mentioned above.

The Seventh Circuit affirmed the district court in a published opinion authored by Judge Richard Posner. (Appendix B.) The court conceded that Article III jurisdiction requires an actual case or controversy and does not allow advisory opinions. Slip op. 4-5. But, like the district court, the Seventh Circuit relieved Klinger of his obligation to come forward with a completed work based on Klinger's mere representation "that his book will contain no original and therefore copyrightable material that appears only in the last ten stories, which are still under copyright, but only material that appears in the public-domain works." Slip op. 7. That holding allowed the Seventh Circuit to address the validity of the Estate's copyright in the "characters of Holmes and Watson as they are depicted in the stories and novels of Arthur Conan Doyle that are in the public domain," Slip op. 7, even in the absence of any concrete work demonstrating exactly what character development Klinger is intending to use.

Turning to the merits, the Seventh Circuit conceded that "original elements added in the later stories remain protected." Slip op. 9. But the court misconstrued the primary issue presented as "whether copyright protection of a fictional character can be extended beyond the expiration of the copyright on it because the author altered the character in a subsequent work." Slip op. 8. Based on that misconception, the Seventh Circuit felt comfortable relying on Klinger's assurance

that he “wants just to copy the Holmes and the Watson of the early stories, the stories no longer under copyright.” Slip op. 12. And the court affirmed the district court, characterizing the Estate’s appeal as “border[ing] on the quixotic” for seeking “nearly perpetual” copyright protection. Slip op. 15.

ARGUMENT

I. There is a reasonable probability that this Court will grant the Estate’s petition for certiorari and a fair prospect of reversal.

The Seventh Circuit’s decision presents two questions that have a reasonable probability for a cert. grant and a fair prospect of reversal.

A. A plaintiff seeking a declaration of non-infringement must come forward with a fixed, finished work.

The first question presented is whether a plaintiff’s request to invalidate a defendant’s intellectual property rights presents an actual case or controversy when the plaintiff offers no fixed and definite new work for a declaration of non-infringement. The Seventh Circuit acknowledged that Klinger “hadn’t finished the book,” Slip op. 2-3, and no new book—finished or unfinished—has ever been presented for judicial review. That is an extraordinarily odd circumstance in the context of a Complaint alleging that the “actual controversy” is “whether the publication of [the new book] by Plaintiff, his co-editor, and their licensees infringes any copyright of Defendant.” R. 26. (Indeed, that is the only actual controversy possible, because the Copyright Act provides only an action for infringement. I.e., while the validity of copyrights often needs to be decided in infringement actions, the Copyright Act provides no independent cause of action seeking a declaration of copyright invalidity.)

In holding that Klinger's claim of invalidity could be decided apart from the ultimate issue of infringement, the Seventh Circuit created a conflict with numerous other circuits (and a previous Seventh Circuit decision) rejecting similar invitations to adjudicate intellectual property disputes before a plaintiff's proposed new work was final.

For example, in *Matthews Int'l Corp. v. Biosafe Eng'g, LLC*, 695 F.3d 1322 (Fed. Cir. 2012), the plaintiff was marketing the use of an alkaline hydrolysis process rather than incineration for cremation. Although the plaintiff had not fully developed the process or determined the parameters for it, the plaintiff sought a judicial declaration that the process would not infringe the defendant's patents or, alternatively, that defendant's patents were invalid and unenforceable. The Federal Circuit began by noting that the "Declaratory Judgment Act does not provide an independent basis of subject matter jurisdiction," *id.* at 1328 (citing *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 71-72 (1950)), and that Article III's case or controversy requirement prohibits a court from adjudicating "a difference or dispute of a hypothetical or abstract character" or "one that is academic or moot," *id.* (quoting *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240 (1937)). A justiciable controversy requires a dispute that is "definite and concrete, touching the legal relations of parties having adverse legal interests," and will "admi[t] of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts." *Id.* (quoting *Aetna*, 300 U.S. at 240-41).

The plaintiff's patent dispute failed to present a justiciable controversy because it "lack[ed] the requisite *immediacy* and *reality* to support the exercise of declaratory judgment jurisdiction." 695 F.3d at 1328 (emphasis added). The dispute lacked immediacy because there was "no evidence as to when, if ever," plaintiff's equipment would "be used in a manner that could potentially infringe" the defendant's patents. *Id.* That is, "[u]ntil some specific and concrete evidence regarding how [the plaintiff's] customers plan to use the [product] is available, any judicial determination regarding whether such use would infringe the [p]atents would be premature." *Id.* at 1329 (citing *Sierra Applied Scis., Inc. v. Advanced Energy Indus., Inc.*, 363 F.3d 1361, 1379 (Fed. Cir. 2004); *Telectronics Pacing Sys., Inc. v. Ventritex, Inc.*, 982 F.2d 1520, 1527 (Fed. Cir. 1992); and *Lang v. Pac. Marine & Supply Co.*, 895 F.2d 761, 764 (Fed. Cir. 1990)).

It is true that "a showing of actual infringement is not required for a case or controversy to exist." *Id.* at 1330 (citing *MedImmune, Inc. v. Genetech, Inc.*, 549 U.S. 118, 134 (2007)). But when a potential new work is not even complete, "it is unclear when any even arguably infringing activity will occur," and "a dispute will lack the immediacy necessary to support the exercise of declaratory judgment jurisdiction." *Id.*

The parties' dispute in *Matthews* also "fail[ed] to meet constitutionally-mandated *reality* requirements." 695 F.3d at 1330 (emphasis added). The "greater the variability of the subject of a declaratory-judgment suit, particularly as to its potentially infringing features, the greater the chance that the court's judgment will be purely advisory, detached from the eventual, actual content of that subject—in

short, detached from eventual reality.” *Id.* (quoting *Sierra*, 363 F.3d at 1379). A party “has no right to obtain declaratory relief when it provides ‘insufficient information for a court to assess whether [its future activities] would be infringing or not.’” *Id.* at 1331 (quoting *Benitec Austl., Ltd. v. Nucleonics, Inc.*, 495 F.3d 1340, 1349 (Fed. Cir. 2007)). Because the plaintiff’s proposed product was “fluid and indeterminate” and not “substantially fixed,” the dispute lacked “the requisite reality to support the exercise of declaratory judgment jurisdiction.” *Id.* (citing *Sierra*, 363 F.3d at 1379-80; *Telectronics*, 982 F.2d at 1527; and *Int’l Harvester Co. v. Deere & Co.*, 623 F.2d 1207, 1216 (7th Cir. 1980)).

The immediacy and reality requirements that the Federal Circuit imposes on plaintiffs before taking jurisdiction of intellectual property disputes are echoed in circuits around the country. In *Vantage Trailers, Inc. v. Beall Corp.*, 567 F.3d 745, 751 (5th Cir. 2009), the Fifth Circuit affirmed dismissal for lack of subject-matter jurisdiction where the declaratory-judgment plaintiff “failed to meet its burden to show that its design was substantially fixed as to the potentially infringing elements,” even though defendant had threatened to sue for infringement.

In *International Harvester*, the Seventh Circuit took the exact opposite position it did here, holding that any legal dispute over the defendant’s patent validity was not yet justiciable when the plaintiff’s potential new work was still in process of revision: “to be anything other than an advisory opinion, the plaintiff must establish that the product presented to the court is the same product which will be produced if a declaration of noninfringement is obtained.” *Id.* at 1216.

And in *Wembley, Inc. v. Superba Cravats, Inc.*, 315 F.2d 87, 89-90 (2d Cir. 1963), the Second Circuit dismissed plaintiff's claim without prejudice where, although plaintiff had made a prototype of its potentially infringing necktie, it had not yet "entered upon an actual manufacture, use or sale of its necktie."

The Seventh Circuit's approach here conflicts directly with these decisions. Klinger has never presented his proposed work in even draft (much less final) form. There is no writing to compare to the Sherlock Holmes canon to see what elements overlap and to determine which Sherlock Holmes character traits (if any) can be copied. This case presents precisely the kind of hypothetical/advisory dispute that other circuits routinely reject in analogous contexts.

Had Klinger filed this action in a different circuit, he would not have been relieved of his burden to come forward with a new book that was fixed, definite, and finished. Indeed, even when a plaintiff intends to re-publish an exact copy of a defendant's copyrighted work, and the only issue is copyright validity, courts have held that a justiciable claim requires the plaintiff to show that its new work is fully prepared and ready for immediate publication. *Re-Alco Indus. v. Nat'l Center for Health Educ., Inc.*, 812 F. Supp. 387, 395 (S.D.N.Y. 1993) (quoting the Seventh Circuit's decision in *International Harvester* and citing the Second Circuit's decision in *Wembley* to hold that when a plaintiff wants to argue invalidation, "a declaratory judgment would be inappropriate [when] plaintiff has failed to meet the requirements for obtaining declaratory relief," i.e., to "have actually produced the [potentially infringing] article or have engaged in preparations for production such that [plaintiff could begin production immediately]."). See also *Texas v. West Publ'g.*

Co., 681 F. Supp. 1228, 1230-31 (W.D. Tex. 1988) (following the *International Harvester* test for justiciability of intellectual-property claims and holding it improper for the court to issue an advisory opinion where the only effect “would be to invalidate a claimed copyright”).

Since Klinger’s proposed book lacked “sufficient immediacy and reality,” the Seventh Circuit departed from the established rule in other circuits by exercising its declaratory-judgment jurisdiction. *Matthews*, 695 F.3d at 1325. And in so doing, the Seventh Circuit deprived the Estate of an opportunity to present a proper defense.

The immediacy and reality requirements are not mere academic restrictions on Article III jurisdiction, as this very case demonstrates. Because of the Seventh Circuit’s approach, the ultimate issue between the parties here has still not been resolved. That issue, as alleged in plaintiff’s own Complaint, is whether his forthcoming book infringes any copyright of the Estate. The Seventh Circuit acknowledged that its decision did not decide that issue, and that another action is required to resolve what *this* action purportedly put at issue. See Slip op. 7 (“If [Klinger is] lying [about the content of his new book], the estate will have a remedy when the book is published.”). That outcome defeats the whole purpose of the Case or Controversy Clause, which requires a plaintiff to do more than simply represent that a future new work will not infringe—thus necessitating a second lawsuit over whether that representation was accurate.

The Seventh Circuit's decision conflicts not only with the law of other circuits but with this Court's recent teaching in *Calderon v. Ashmus*, 523 U.S. 740 (1998). *Calderon* held that a declaratory judgment action is merely a request for an advisory opinion when the plaintiff seeks to have a legal dispute decided that is carved out of the ultimate controversy between the parties. And that is exactly what happened here. The Seventh Circuit held that the parties' legal disagreement over the scope of the Estate's copyrights may be decided as an abstract matter, without deciding the ultimate issue of whether Mr. Klinger's forthcoming book infringes the Estate's copyrights.

The Seventh Circuit's decision has an enormous impact, one that extends far beyond the Sherlock Holmes and Dr. Watson characters. That is because the decision can be applied to any literary character created before the 1978 effective date of the Copyright Act of 1976 and developed dynamically through works published over a multi-year period. A plaintiff filing suit in the Seventh Circuit can now obtain a declaration of non-infringement—without the need to produce a fixed work—regarding a multitude of beloved literary characters based on the date those characters' earliest works entered the public domain. These include Agatha Christie's Hercule Poirot and Miss Marple, A.A. Milne's Winnie the Pooh, Rabbit, Tigger, Eeyore, and Christopher Robin, Dr. Seuss' Cat in the Hat, Ian Fleming's James Bond, D.C. Comic's Superman, Marvel's Iron Man, and many, many others.¹ Certiorari is both warranted and likely, as is reversal.

¹ See Merle L. Jacob & Hope Apple, *To Be Continued: An Annotated Guide to Sequels* (2d ed. 2000), listing 1762 fictional series, many created under the 1909 Act. Among them are three series by William Faulkner (nos. 483–85), C.S. Forester's

B. A character that develops dynamically over time is entitled to copyright protection based on the last publication depicting the character's evolution.

The second question presented is when an evolving, copyrighted character enters the public domain. The Seventh Circuit held that (pre-1978) characters lose their copyright based on the date the character first appears in a publication. Slip op. 8-15. But as Professor Nimmer explains, this is a difficult question (even though he ultimately reaches the same conclusion as the Seventh Circuit): “Assuming the character to be sufficiently developed as to be protectable,” copying a character depicted in multiple works, only some of which have entered the public domain, “arguably . . . would constitute an infringement of those works that remain in copyright.” 1 *Nimmer on Copyright* § 2.12, at 2-178.31 (2013).

Consider the analogous circumstances in *Warner Brothers Entertainment Inc. v. X One X Productions*, 644 F.3d 584 (8th Cir. 2001). The defendant, a film memorabilia company, licensed merchandise containing images found in lobby cards and movie posters for *Gone with the Wind*, *The Wizard of Oz*, and several *Tom and Jerry* cartoons. The lobby cards and posters were in the public domain under the 1909 Copyright Act because they were published without the requisite copyright notice, but the copyright in the films remained.

The *Warner Brothers* court started in the same place as the Seventh Circuit, noting that the public is generally free to make derivative works by taking public-

Horatio Hornblower series (no. 515), Günter Grass's Danzig trilogy (no. 622), John LeCarre's George Smiley novels (no. 909), O.E. Rolvaag's trilogy of Norwegian immigrants (no. 1341), Jean-Paul Sartre's *The Roads to Freedom* series (no. 1392), J.R.R. Tolkien's Middle-Earth series (no.1575), John Updike's Bech and Rabbit series (1598–99), and hundreds of others.

domain materials and altering them so long as the derivative work does not infringe a valid copyright. *Id.* at 596. But the court declined the defendant's invitation, as here, to hold that the *entire characters* were thrust into the public domain, because the poster and lobby-card characters did not "anticipate the full range of distinct speech, movement, and other personality traits that combine to establish a copyrightable character." *Id.* at 598. Thus, said the court, merchandise that evoked the character delineation that occurred in the film (such as a picture of Dorothy with the phrase "There's no place like home") was infringement. *Id.* at 603. Other courts have similarly considered a character's evolution and growth over time (or lack thereof) when determining whether that character has fallen into the public domain. E.g., *Harvey Cartoons v. Columbia Pictures Indus.*, 645 F. Supp. 1564 (S.D.N.Y. 1986) (cartoon ghost character "Fatso" did not evolve and was therefore in the public domain based on date of first publication).

This kind of analysis raises a significant question: whether a dynamic and changing character should receive copyright protection in its entirety running from the latest publication date, *i.e.*, the date when the character's development stopped. The Seventh Circuit said no, analyzing later character developments as mere "derivative works" that could not "extend" the character's copyright protection. Slip op. 8-9 (citing *Silverman v. CBS Inc.*, 870 F.2d 40, 49-51 (2d Cir. 1989), a case involving the radio characters Amos and Andy).

But there is nothing in the Copyright Act of 1909 that suggests a dynamically changing character that appears in multiple works should be analyzed as a single original work followed by a series of derivative works. To the contrary, an evolving

character is more like a mural that is gradually painted publicly over time to include more and more dimensions and details. The artist's copyright in the final work means very little if the public is free to copy earlier, unfinished versions. Yet that approach is precisely the one the Seventh Circuit took with respect to the Estate's acknowledged copyright in the Sherlock Holmes character.

In rejecting the mural hypothetical, the Seventh Circuit offered no legal analysis, only a policy: if other artists can copy the earliest elements of an unfinished work, they "will have a greater incentive to improve it, or to create other works inspired by it, because they won't have to pay a license fee to do so provided that the copyright of the original work has expired." Slip op. 11. But the countervailing policy is that under the Seventh Circuit's rule, the original artist has a significantly diminished incentive to finish her mural. The same is true of dynamic characters. This is precisely the kind of issue this Court needs to resolve.

At a bare minimum, as explained above, federal courts should at least stay their hand in these circumstances until the plaintiff actually presents a fixed, finished work to evaluate, and then compare that finished work to the character attributes that are undisputedly protected. Consider Judge Posner's reference to the six Star Wars films. Slip op. 11-12. The Darth Vader character depicted in those films changes significantly from Episode IV to Episode VI, transforming from a force of ultimate evil to a loving father redeemed by his son. To make the analogy, assume Episode IV was released in 1887 and Episode VI was released in 1927. As a result, Episode IV would be in the public domain but Episode VI would not.

It is impossible to evaluate whether a new proposed work based on the Darth Vader character violates the protected elements of the Episode VI Darth Vader until the proposed work is final. Even if a plaintiff has the right to use the Episode IV Darth Vader (which the Estate does not concede), it would deprive George Lucas of the ability to fully exploit the evolved Episode VI Darth Vader if the plaintiff is not required to come forth with a final work that allows a court to set that work next to Episode VI Darth Vader and compare protected and unprotected elements. Yet that is precisely the burden the Seventh Circuit relieved Klinger of here.

The comparison of protected and unprotected elements necessarily requires addressing what parts of the Sherlock Holmes character remain protected. See, e.g., *X One X Prods.*, 644 F.3d at 597 (“We must determine (1) the apparent scope of the copyrights in the later works . . .”). The Seventh Circuit declined to conduct this key inquiry. Had it done so, the record shows that the protected parts of Sherlock Holmes’s character created in the 10 stories are significant. They include Holmes softening and growing more emotional (*The Lion’s Mane*), developing a truly close friendship with Watson (*The Three Garridebs*), embracing modern technologies as tools to fight crime (*Shoscombe Old Place*), changing his views on dogs (*The Creeping Man*), and revealing a host of other details that make for the full portrayal of Holmes and Watson as the world now knows them.

Because the 10 stories are set at different points in Holmes’s fictional life, it is extremely difficult, if not impossible, to create new stories about Holmes without infringing these copyrighted materials. Mr. Klinger understandably did not want to submit his book for this analysis. But the Seventh Circuit should not have gone

along with that, and doing so resulted in a decision that makes it appear there is little copyright protection left for Sherlock Holmes, despite the court having never looked at what that protection was, and never applying it to Mr. Klinger's forthcoming book.

One more point about the merits. The Estate rejects Judge Posner's *ad hominem* that the Estate's appeal "borders on the quixotic" by seeking a "perpetual" copyright. Slip op. 15. First and foremost, the Estate seeks to put Klinger (and any similarly situated plaintiff) to his proofs: this Court should grant the Estate's petition for certiorari and hold that Klinger must come forward with a fixed work that the district court can compare to the protected elements of the Sherlock Holmes character set forth in the last 10 stories. Only then will the district court have the subject-matter jurisdiction to make a final determination about the validity of the Estate's copyright in the unfinished Sherlock Holmes character depicted in earlier stories and novels. And if the Court desires to offer needed clarity for copyright holders and prospective authors regarding Sherlock Holmes and the dozens of additional characters that fall under the 1909 Copyright Act's protection, the Court should further hold that the Estate's copyright in the fully formed Sherlock Holmes character runs from the date the last Holmes story was published. Neither of these requests involves a perpetual (or even nearly perpetual) copyright.

II. Good cause exists to stay the mandate.

The *Guinness World Records* has consistently listed Sherlock Holmes as the “most portrayed movie character,” with more than 70 actors playing the part in over 200 films.² The Estate has carefully managed these authorized uses through licensing agreements, thus ensuring that the character is not despoiled in a way that would irreparably damage the value of the Sherlock Holmes copyright. The Seventh Circuit acknowledged this possible harm, Slip op. 14, but dismissed the Estate’s concerns because “there is no copyright infringement of a story or character that is not under copyright,” and because the Estate appears “concerned not with specific alterations in the depiction of Holmes or Watson in Holmes-Watson stories written by authors other than Arthur Conan Doyle, but with *any* such story that is published without payment to the estate of a licensing fee.” Slip op. 14.

As for the latter point about the Estate’s “actual” concerns, it is simply not true, and there is nothing in the record to support the Seventh Circuit’s assertion. As for the former point, it begs the question whether the Sherlock Holmes character remains under copyright and also ignores that, at the very least, the Estate has a copyright in the Holmes character development from the last 10 stories. In other words, given the Estate’s valid copyright that even the Seventh Circuit and Klinger acknowledge, the Estate has a substantial interest in managing the Holmes character through licensing agreements.

The risk of third parties to this litigation disparaging the characters is real and imminent. As *Forbes* magazine speculated in a recent article, the Seventh

² http://en.wikipedia.org/wiki/Sherlock_Holmes#Adaptations_and_derived_works

Circuit's decision "means Warner Bros. is free to put Sherlock Holmes in the next Lego movie, fans are free to create new Sherlock Holmes series for YouTube, and Dr. Watson can be used to sell antacids, all without permission from or payments to the estate of Holmes' creator Sir Arthur Conan Doyle."³

Conversely, a stay of the mandate will cause no harm to Klinger, who is free to proceed with publication of *In the Company of Sherlock Holmes* once he finishes the work and obtains a modest license from the Estate. (The license for his first book was \$5,000). And if Klinger ultimately prevails in this litigation—and his new book, unlike his previous book, does not infringe the last 10 stories—the licensing agreement can be voided and the Estate can refund to Klinger the royalty. Accordingly, good cause exists for staying the effect of the Seventh Circuit's decision.

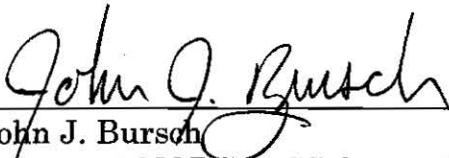
As noted above, in cases where the stay question is close, the Court or the Circuit Justice will balance the equities and weigh the relative harms to the applicant and respondent. *Hollingsworth*, 130 S. Ct. at 710. Here, in the absence of a stay, the harm to the Estate is substantial and likely irreparable. But if a stay is granted, the harm to Klinger is negligible and easily remedied if this Court ultimately rules in Klinger's favor. Thus, to the extent the Court sees the Estate's stay request as a close question, a balancing of the equities and relative harms weighs heavily in favor of granting the stay.

³ Peter Decherney, Get Ready for More Sherlock Holmes As Appeals Court Affirms Character Is In Public Domain, *Forbes* (June 19, 2014), available at <http://www.forbes.com/sites/peterdecherney/2014/06/19/get-ready-for-even-more-sherlock-holmes/>.

CONCLUSION

The Estate has met its burden under Supreme Court Rule 23 and Federal Rule of Appellate Procedure 42(d)(2)(A) of demonstrating that (1) there is a reasonable probability that the Court will review the questions presented and a fair prospect for reversal, and (2) good cause exists, such that a stay is warranted. Accordingly, the Estate respectfully asks for an order that stays the effect of the Seventh Circuit's decision and recalls the mandate that the Seventh Circuit issued the day after denying the Estate's motion to stay. The Estate does not ask the Court to pre-judge the merits, only an opportunity to present its petition without losing its ability to manage and protect the Sherlock Holmes and Dr. Watson characters in the interim through appropriate licensing.

Respectfully submitted,



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APPENDIX A

**TO PETITIONER'S APPLICATION FOR STAY AND TO RECALL THE MANDATE OF THE
UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT PENDING THE
ESTATE'S PETITION FOR A WRIT OF CERTIORARI**

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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NOTICE OF ISSUANCE OF MANDATE

July 10, 2014

To: Thomas G. Bruton
UNITED STATES DISTRICT COURT
Northern District of Illinois
Chicago, IL 60604-0000

No.: 14-1128	LESLIE S. KLINGER, Plaintiff - Appellee v. CONAN DOYLE ESTATE, LTD., Defendant - Appellant
District Court No: 1:13-cv-01226 Northern District of Illinois, Eastern Division District Judge Ruben Castillo	

Herewith is the mandate of this court in this appeal, along with the Bill of Costs, if any. A certified copy of the opinion/order of the court and judgment, if any, and any direction as to costs shall constitute the mandate.

NOTE TO COUNSEL:

If any physical and large documentary exhibits have been filed in the above-entitled cause, they are to be withdrawn ten (10) days from the date of this notice. Exhibits not withdrawn during this period will be disposed of.

Please acknowledge receipt of these documents on the enclosed copy of this notice.

Received above mandate and record, if any, from the Clerk, U.S. Court of Appeals for the Seventh Circuit.

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APPENDIX B

**TO PETITIONER'S APPLICATION FOR STAY AND TO RECALL THE MANDATE OF THE
UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT PENDING THE
ESTATE'S PETITION FOR A WRIT OF CERTIORARI**

In the
United States Court of Appeals
For the Seventh Circuit

No. 14-1128

LESLIE S. KLINGER,

Plaintiff-Appellee,

v.

CONAN DOYLE ESTATE, LTD.,

Defendant-Appellant.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.
No. 13 C 1226 — **Rubén Castillo**, *Chief Judge*.

ARGUED MAY 22, 2014 — DECIDED JUNE 16, 2014

Before POSNER, FLAUM, and MANION, *Circuit Judges*.

POSNER, *Circuit Judge*. 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. 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).

Once the copyright on a work expires, the work becomes a part of the public domain and can be copied and sold without need to obtain a license from the holder of the expired copyright. Leslie Klinger, the appellee in this case, co-edited an anthology called *A Study in Sherlock: Stories Inspired by the Sherlock Holmes Canon* (2011)—“canon” referring to the 60 stories and novels written by Arthur Conan Doyle, as opposed to later works, by other writers, featuring characters who had appeared in the canonical works. Klinger’s anthology consisted of stories written by modern authors but inspired by, and in most instances depicting, the genius detective Sherlock Holmes and his awed sidekick Dr. Watson. Klinger didn’t think he needed a license from the Doyle estate to publish these stories, since the copyrights on most of the works in the “canon” had expired. But the estate told Random House, which had agreed to publish Klinger’s book, that it would have to pay the estate \$5000 for a copyright license. Random House bowed to the demand, obtained the license, and published the book.

Klinger and his co-editor decided to create a sequel to *A Study in Sherlock*, to be called *In the Company of Sherlock Holmes*. They entered into negotiations with Pegasus Books for the publication of the book and W.W. Norton & Company for distribution of it to booksellers. Although the editors

hadn't finished the book, the companies could estimate its likely commercial success from the success of its predecessor, and thus decide in advance whether to publish and distribute it. But the Doyle estate learned of the project and told Pegasus, as it had told Random House, that Pegasus would have to obtain a license from the estate in order to be legally authorized to publish the new book. The estate didn't threaten to sue Pegasus for copyright infringement if the publisher didn't obtain a license, but did threaten to prevent distribution of the book. It did not mince words. It told Pegasus: "If you proceed instead to bring out *Study in Sherlock II* [the original title of *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." There was also a latent threat to sue Pegasus for copyright infringement if it published Klinger's book without a license, and to sue Internet service providers who distributed it. See Digital Millennium Copyright Act, 17 U.S.C. § 512(i)(1)(A). Pegasus yielded to the threat, as Random House had done, and refused to publish *In the Company of Sherlock Holmes* unless and until Klinger obtained a license from the Doyle estate.

Instead of obtaining a license, Klinger sued the estate, seeking a declaratory judgment that he is free to use material in the 50 Sherlock Holmes stories and novels that are no longer under copyright, though he may use nothing in the 10 stories still under copyright that has sufficient originality to be copyrightable—which means: at least a tiny bit of originality, *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340, 345 (1991) ("at least some minimal degree of crea-

tivity ... the requisite level of creativity is extremely low"); *CDN Inc. v. Kapes*, 197 F.3d 1256, 1257, 1259–60 (9th Cir. 1999).

The estate defaulted by failing to appear or to respond to Klinger’s complaint, but that didn’t end the case. Klinger wanted his declaratory judgment. The district judge gave him leave to file a motion for summary judgment, and he did so, and the Doyle estate responded in a brief that made the same arguments for enlarged copyright protection that it makes in this appeal. The judge granted Klinger’s motion for summary judgment and issued the declaratory judgment Klinger had asked for, thus precipitating the estate’s appeal.

The appeal challenges the judgment on two alternative grounds. The first is that the district court had no subject-matter jurisdiction because there is no actual case or controversy between the parties. The second ground is that if there is jurisdiction, the estate is entitled to judgment on the merits, because, it argues, 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. The estate argues that the 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.

But jurisdiction first. Article III of the Constitution limits the jurisdiction of federal courts to cases or controversies (terms that appear to be synonyms), which is to say to actual legal disputes. It would be very nice to be able to ask federal judges for legal advice—if I do thus and so, will I be subject

to being sued and if I am sued am I likely to lose and have to pay money or even clapped in jail? But that would be advisory jurisdiction, which, though it exists in some states and foreign countries, see, e.g., Nicolas Marie Kublicki, "An Overview of the French Legal System From an American Perspective," 12 *Boston University Int'l L.J.* 57, 66, 78–79 (1994), is both inconsistent with Article III's limitation of federal jurisdiction to actual disputes, thus excluding jurisdiction over merely potential ones, and would swamp the federal courts given these courts' current caseload, either leaving the judges little if any time for adjudicating disputes or requiring that judges' staffs be greatly enlarged.

So no advisory opinions in federal courts. Declaratory judgments are permitted but are limited—also to avoid transgressing Article III—to "case[s] of actual controversy," 28 U.S.C. § 2201(a), that is, actual legal disputes. Had Klinger had no idea how the Doyle estate would react to the publication of *In the Company of Sherlock Holmes*, he could not have sought a declaratory judgment, because he would not have been able to demonstrate that there was an actual dispute. He could seek advice, but not from a federal judge. But the Doyle estate had made clear that if Klinger succeeded in getting his book published the estate would try to prevent it from being sold by asking Amazon and the other big book retailers not to carry it, implicitly threatening to sue the publisher, as well as Klinger and his co-editor, for copyright infringement if they defied its threat. The twin threats—to block the distribution of the book by major retailers and to sue for copyright infringement—created an actual rather than merely a potential controversy. This is further shown by the fact that Klinger could have sued the estate for having

committed tortious interference with advantageous business relations by intimidating his publisher.

So he's been injured and seeks a judicial declaration that the conduct by the Doyle estate that caused the injury violated his legal rights because the threat was based on a groundless copyright claim. Only if Klinger obtains the declaration will he be able to publish his book without having to yield to what he considers extortion.

Compare the more common example of a suit by an insurance company seeking a judicial declaration that it has no obligation to defend or indemnify its insured. The company prefers to seek declaratory relief rather than waiting to be sued by the insured and defending against the suit because if it lost that suit it might be ordered to pay punitive damages. This case is similar. Klinger doesn't want to publish his book before his controversy with the Doyle estate is resolved, for if he does he'll be facing the prospect not only of being enjoined from selling the book but also of having to pay damages if the estate sues him for copyright infringement and wins. Even if the book's sales turn out to be modest, and actual damages (as measured by losses of sales by competing editions licensed by the estate) therefore small, the estate would be entitled, for each copyrighted work infringed, to up to \$30,000 in statutory damages and up to \$150,000 if the court determined that Klinger had infringed the estate's copyrights willfully. 17 U.S.C. §§ 504(c)(1), (2). Anyway he *can't* publish his book; his publisher is unwilling to take a chance on publishing it, given the estate's threat to impede distribution. And to be effective and thus harm the person seeking declaratory relief, a threat need not be a

threat to sue. See, e.g., *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 132 (2007).

The estate argues that Klinger's suit is premature ("un-ripe" in legal jargon), and therefore not yet an actual controversy and so not within the jurisdiction of the federal courts, for until the book is completed (and thus can be read), how is one to decide whether it infringes? That would be a good argument in many cases but not in the present one, because the only issue presented by Klinger's quest for a declaratory judgment is one of law: whether he is free to copy the characters of Holmes and Watson as they are depicted in the stories and novels of Arthur Conan Doyle that are in the public domain. To answer that question requires no knowledge of the contents of the book. A different question is whether the book will infringe the estate's unexpired copyrights, and to answer *that* question would require knowledge of the contents. But that question is not presented by this suit. Klinger avers that his book will contain no original and therefore copyrightable material that appears only in the last ten stories, which are still under copyright, but only material that appears in the public-domain works. If he's lying, the estate will have a remedy when the book is published. To require him to defer suit until he finishes the book would gratuitously discourage declaratory-judgment suits by authors and publishers threatened with suits for copyright infringement or with boycotts by distributors—and so would discourage authors from ever writing such works in the first place.

There is still another jurisdictional wrinkle. Apparently because of a mislabeling of certain exhibits, the district judge was under the impression that Klinger's suit was challenging the copyrights on the ten stories published after 1922,

and so he denied summary judgment insofar as those stories were concerned. That makes it seem as if there were no final judgment in the district court, in which event we would not have jurisdiction of the appeal, as there is no suggestion that there is any basis for an interlocutory appeal. The plaintiff claims, however, not to be challenging the copyrights on the last ten stories. And the claim is correct, for he acknowledges that those copyrights are valid and that the only copying he wants to include in his book is copying of the Holmes and Watson characters as they appear in the earlier stories and in the novels. The summary judgment ruling on the last ten stories was a mistake, and can be ignored. Nothing remains in the district court. The declaratory judgment issued by the district judge, limited entirely to the earlier works, ended the litigation in that court.

So the judge was right to assert (and retain) jurisdiction over the case, and we come to the merits, where the issue as we said is whether copyright protection of a fictional character can be extended beyond the expiration of the copyright on it because the author altered the character in a subsequent work. In such a case, the Doyle estate contends, the original character cannot lawfully be copied without a license from the writer until the copyright on the later work, in which that character appears in a different form, expires.

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, as held in *Silverman v. CBS Inc.*, 870 F.2d 40, 49–51 (2d Cir. 1989), a case much like this one. At issue was the right to copy fictional characters (Amos and Andy)

who had appeared in copyrighted radio scripts. The copyrights covered the characters because they were original. As in this case the characters also appeared in subsequent radio scripts that remained under copyright, though the copyrights on the original scripts in which the characters had appeared had expired. The court ruled that “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). The copyrights on the derivative works, corresponding to the copyrights on the ten last Sherlock Holmes stories, were not extended by virtue of the incremental additions of originality in the derivative works.

And so it is in our case. The ten Holmes-Watson stories in which copyright persists are derivative from the earlier stories, so only original elements added in the later stories remain protected. *Id.* at 49–50. The “freedom to make new works based on public domain materials ends where the resulting derivative work comes into conflict with a valid copyright,” *Warner Bros. Entertainment, Inc. v. X One X Productions*, 644 F.3d 584, 596 (8th Cir. 2011)—as Klinger acknowledges. But there is no such conflict in this case.

Lacking any ground known to American law for asserting post-expiration copyright protection of Holmes and Watson in pre-1923 stories and novels going back to 1887, the estate argues that creativity will be discouraged if we don’t allow such an extension. It may take a long time for an

author to perfect a character or other expressive element that first appeared in his early work. If he loses copyright on the original character, his incentive to improve the character in future work may be diminished because he'll be competing with copiers, such as the authors whom Klinger wishes to anthologize. Of course this point has no application to the present case, Arthur Conan Doyle having died 84 years ago. More important, extending copyright protection is a two-edged sword from the standpoint of inducing creativity, as it would reduce the incentive of subsequent authors to create derivative works (such as new versions of popular fictional characters like Holmes and Watson) by shrinking the public domain. For the longer the copyright term is, the less public-domain material there will be and so the greater will be the cost of authorship, because authors will have to obtain licenses from copyright holders for more material—as illustrated by the estate's demand in this case for a license fee from Pegasus.

Most copyrighted works include some, and often a great deal of, public domain material—words, phrases, data, entire sentences, quoted material, and so forth. The smaller the public domain, the more work is involved in the creation of a new work. The defendant's proposed rule would also encourage authors to continue to write stories involving old characters in an effort to prolong copyright protection, rather than encouraging them to create stories with entirely new characters. The effect would be to discourage creativity.

The estate offers the hypothetical example of a mural that is first sketched and only later completed by being carefully painted. If the sketch is allowed to enter the public domain, there to be improved by creative copiers, the mural artist

will have a diminished incentive to perfect his mural. True; but other artists will have a greater incentive to improve it, or to create other works inspired by it, because they won't have to pay a license fee to do so provided that the copyright on the original work has expired.

The estate asks us to distinguish between "flat" and "round" fictional characters, potentially a sharper distinction than the other one it urges (as we noted at the beginning of this opinion), which is between simple and complex. Repeatedly at the oral argument the estate's lawyer dramatized the concept of a "round" character by describing large circles with his arms. And the additional details about Holmes and Watson in the ten late stories do indeed make for a more "rounded," in the sense of a fuller, portrayal of these characters. In much the same way we learn things about Sir John Falstaff in *Henry IV, Part 2*, in *Henry V* (though he doesn't actually appear in that play but is merely discussed in it), and in *The Merry Wives of Windsor*, that were not remarked in his first appearance, in *Henry IV, Part 1*. Notice also that *Henry V*, in which Falstaff is reported as dying, precedes *The Merry Wives*, in which he is very much alive. Likewise the ten last Sherlock Holmes stories all are set before 1914, which was the last year in which the other stories were set. One of the ten, *The Adventure of the Veiled Lodger* (published in 1927), is set in 1896. See 2 William S. Baring-Gould, *The Annotated Sherlock Holmes* 453 (1967). Thus a more rounded Holmes or Watson (or Falstaff) is found in a later work depicting a younger person. We don't see how that can justify extending the expired copyright on the flatter character. 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 charac-

ters as portrayed in IV, V, and VI will not expire until the copyrights on I, II, and III expire.

The estate defines “flat” characters oddly, as ones completely and finally described in the first works in which they appear. Flat characters thus don’t evolve. Round characters do; Holmes and Watson, the estate argues, were not fully rounded off until the last story written by Doyle. What this has to do with copyright law eludes us. There are the early Holmes and Watson stories, and the late ones, and features of Holmes and Watson are depicted in the late stories that are not found in the early ones (though as we noted in the preceding paragraph some of those features are retrofitted to the earlier depictions). Only in the late stories for example do we learn that Holmes’s attitude toward dogs has changed—he has grown to like them—and that Watson has been married twice. These additional features, being (we may assume) “original” in the generous sense that the word bears in copyright law, are protected by the unexpired copyrights on the late stories. But Klinger wants just to copy the Holmes and the Watson of the early stores, the stories no longer under copyright. The Doyle estate tells us that “no workable standard exists to protect the Ten Stories’ incremental character development apart from protecting the completed characters.” But that would be true only if the early and the late Holmes, and the early and the late Watson, were indistinguishable—and in that case there would be no incremental originality to justify copyright protection of the “rounded” characters (more precisely the features that makes them “rounder,” as distinct from the features they share with their earlier embodiments) in the later works.

It's not unusual for an author to use the same character in successive works, yet with differences resulting, in the simplest case, just from aging. In Shakespeare's two *Henry IV* plays, the Henry who later becomes Henry V is the Prince of Wales, hence Crown Prince of England; in *Henry V* he is the King of England. Were *Henry IV* in the public domain and *Henry V* under copyright, Henry Prince of Wales could be copied without Shakespeare's permission but not Henry V. Could the Doyle estate doubt this? Could it think Holmes a more complex and altered character than Henry?

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. Cogliostro's age, obviously phony title ('Count'), what he knows and says, his name, and his faintly Mosaic facial features combine to create a distinctive character. No more is required for a character copyright." *Gaiman v. McFarlane*, 360 F.3d 644, 660 (7th Cir. 2004); see also *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930) (L. Hand, J.). From the outset of the series of Arthur Conan Doyle stories and novels that began in 1887 Holmes and Watson were distinctive characters and therefore copyrightable. They were "incomplete" only in the sense that Doyle might want to (and later did) add additional features to their portrayals. The resulting somewhat altered characters were derivative works, the additional features of which that were added in the ten late stories being protected by the copyrights on those stories. The alterations do not revive the expired copyrights on the original characters.

We can imagine the Doyle estate being concerned that a modern author might write a story in which Sherlock Holmes was disparaged (perhaps by being depicted as a drug dealer—he was of course a cocaine user—or as an idiot detective like Inspector Clouseau of the *Pink Panther* movies), and that someone who read the story might be deterred from reading Doyle's Sherlock Holmes stories because he would realize that he couldn't read them without puzzling confusedly over the "true" character of Sherlock Holmes. The analogy would be to trademark dilution, see, e.g., *Hyatt Corp. v. Hyatt Legal Services*, 736 F.2d 1153, 1157–59 (7th Cir. 1984), as if a hot-dog stand advertised itself as "The Rolls-Royce Hot-Dog Stand." No one would be confused as to origin—Rolls-Royce obviously would not be the owner. Its concern would be that its brand would be diminished by being linked in people's involuntary imagination to a hot-dog stand; when they thought "Rolls-Royce," they would see the car and the hot-dog stand—an anomalous juxtaposition of high and low. There is no comparable doctrine of copyright law; parodies or burlesques of copyrighted works may or may not be deemed infringing, depending on circumstances, see *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 580–81 and n. 14, 588, 591 (1994), but there is no copyright infringement of a story or character that is not under copyright. Anyway it appears that the Doyle estate is concerned not with specific alterations in the depiction of Holmes or Watson in Holmes-Watson stories written by authors other than Arthur Conan Doyle, but with *any* such story that is published without payment to the estate of a licensing fee.

With the net effect on creativity of extending the copyright protection of literary characters to the extraordinary lengths urged by the estate so uncertain, and no legal

grounds suggested for extending copyright protection beyond the limits fixed by Congress, the estate's appeal borders on the quixotic. The 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 estate is seeking 135 years (1887–2022) of copyright protection for the character of Sherlock Holmes as depicted in the first Sherlock Holmes story.

AFFIRMED.

No. _____

In the Supreme Court of the United States

◆◆◆
CONAN DOYLE ESTATE, LTD., PETITIONER

v.

LESLIE S. KLINGER, RESPONDENT

**ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT**

PROOF OF SERVICE

The undersigned certifies that on July 11, 2014, she served the Application to the Honorable Elena Kagan for Stay and to Recall The Mandate of The United States Court of Appeals for the Seventh Circuit Pending The Estate's Petition For a Writ of Certiorari by mailing same in an envelope bearing postage fully prepaid, plainly addressed as follows:

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