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

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