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TESLAW E-Newsletter

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Dear Members,

Welcome to the first TESLAW E-Newsletter of 2015. TESLAW is looking forward to a great year! TESLAW's first event will be the TESLAW [SXSW](#) Mixer, from 3-5 p.m Thursday, March 19 at the Iron Cactus on 6th Street. We invite all TESLAW members, whether involved in music, film, multi-media or other entertainment, to come and enjoy the spectacle at one of the leading legal networking events during the week. We look forward to seeing you there.

Very truly yours,
[Craig Crafton](#), Chair
[Entertainment and Sports Law Section](#)

Spotlight on Buck McKinney

[Buck McKinney](#) is a musician and entertainment lawyer in Austin, Texas. McKinney's law practice has a special emphasis on litigation within the music industry. His clients include recording artists, major record labels, publishers, concert promoters, music venues, film producers, photographers and authors. Before establishing his law practice, McKinney served as staff counsel in the Business and Legal Affairs department of A&M Records, a division of PolyGram International.

Prior to serving as staff counsel at A&M, McKinney co-owned and operated Houston live music venue and concert production company, Rockefeller, where McKinney and his business partners produced over 340 concerts by artists including Dave Matthews, Dixie Chicks, Pat Metheny, Buddy Guy and Joe Satriani. Rockefeller was awarded "Best Live Venue" in Houston during McKinney's tenure.

McKinney is a former adjunct professor of music law at Austin Community College, a former board member of the Entertainment and Sports Law Section of the State Bar of Texas, a voting member of NARAS (National Academy of Recording Arts & Sciences) and a published songwriter with BMI.

As a musician, McKinney plays guitar with various critically acclaimed bands, including the alternative jazz group, Gnappy (Bean Pie Records), funk-soul outfit, Flyjack (Hammondbeat Records), and Paolo "Apollo" Negri. Gnappy's last album, "Unloaded," spent eight weeks on the CMJ Top 40 Jazz Radio Charts in the summer of 2006, peaking at No. 20, and Flyjack continues to perform regularly.



Is it Flat or Round? In the World of Copyright Law, It Doesn't Matter Much

by Melissa Thrailkill

When the U.S. Supreme Court refused to grant cert to an appeal of a 7th Circuit decision concerning Sir

Arthur Doyle's famous Sherlock Holmes character and stories, it closed the case on the mystery of whether the character has ventured into the public domain. By leaving the 7th Circuit decision, handed down in June 2014 and authored by Richard Posner, intact, it's now settled that no license is required to use much of Doyle's original character and stories. Given the court's somewhat narrow ruling, however, it's unlikely that litigation and controversy over the use of Sherlock Holmes in new literature, television and film has been settled for good.

Although the 7th Circuit's ruling came down in June, it was not until the Supreme Court denied cert that author Leslie Klinger could feel comfortable moving forward on publishing his anthology "In the Company of Sherlock Holmes," which features short stories written by contemporary authors and inspired by Doyle's Sherlock Holmes books. This would be Klinger's second such type of collection. Random House, who published his first Sherlock Holmes anthology, paid the Doyle Estate's \$5,000 licensing fee.

When Klinger began work with Pegasus Books on the second anthology, the Doyle Estate again sought a licensing fee. In its demand, the Estate threatened to prevent distribution by all major U.S. booksellers and foreshadowed potential copyright infringement suits if the book moved forward without the proper license. Pegasus told Klinger he'd need to license the rights from Doyle's estate before it would publish the book.

Klinger decided to sue the Estate, seeking a declaratory judgment for the right to move forward without a license. Klinger argued that 50 of the 60 Sherlock Holmes stories written by Doyle had been written between 1887 and 1923, and, therefore, were no longer protected under the copyright law. He asserted that because his anthology would only cover aspects of Doyle's stories in these pre-1923 works, he should not be required to cave to the Estate's "extortion."

The Estate raised two arguments in response. First, it argued that the federal court lacked jurisdiction to consider Klinger's suit because no live controversy existed. Second, it argued that Doyle's series of books depicting the adventures of Sherlock Holmes and his sidekick Dr. Watson could not be separated from each other. That is, because the "full complexity" of these characters was not realized until the last book was published, the pre-1923 iterations of these characters and stories remain protected until the later stories fall into the public domain.

In regard to the jurisdictional argument, the Estate argued that Klinger was asking the court to provide him legal advice as to whether his anthology would infringe upon Doyle's copyright. There was no way to know that until after he published his book and, therefore, no actual dispute existed and the court lacked jurisdiction under Article III of the U.S. Constitution.

The court disagreed, ruling that the Estate's threats had created an actual dispute - Pegasus refused to publish the book. Thus, because the Estate had made their intentions known to Klinger if he moved forward without paying the licensing fee, the Estate had created a live controversy. If Klinger had not known how the Estate planned on treating his anthology, then he would have been left seeking counsel from an attorney, rather than seeking relief from a federal court.

Moreover, the court ruled, Klinger presented only a legal question: Are the pre-1923 works by Doyle in the public domain, or not? There was no need to read the anthology before deciding that question.

In its arguments on the merits, the Estate claimed that the copyright protection of Doyle's pre-1923 Sherlock Holmes stories should be extended because of the subsequent alterations he made to the character and stories in the later 10 works. The Estate's argument hinged on the concept of "flat" vs. "round" characters. Because Holmes and Dr. Watson were works in progress, evolving over time and throughout 1887-1927, the earlier, flatter characters could not be copied without a license from the writer until the copyright on the later, rounder characters expired.

The Estate offered no basis in law for their theory, but rather claimed that authors would be less likely to build upon and grow their characters if their earlier manifestations of the same character would be open to interpretation and use by new authors. The court essentially dismissed the Estate and its "quixotic" arguments, giving little weight to the alleged threat to creativity by authors.

The court instead gave much more weight to the danger the Estate's position would have on future creativity if they were to extend the copyright protection and prevent the works from entering the public domain. Future works would be stifled, the Court reasoned, because artists would have less incentive to improve or create new works inspired by older works if they were forced to pay a licensing fee.

The court acknowledged the Estate's argument that two separate copyright periods for the same character might cause a Sherlock Holmes with a split personality, but decided that this argument was more akin to a trademark dilution claim and no such claim existed in copyright law.

While it's now clear that authors, publishers and others can bring declaratory judgments pre-publication when threatened by copyright holders and that pre-1923 Sherlock Holmes stories are fair game, the Doyle Estate's tough tactics are not completely barred and the potential for litigation still exists. Indeed the court acknowledged as much, writing that if Klinger's book did infringe on the copyright of the last 10 stories, then the estate would have a remedy. Therefore, the Doyle Estate may have to table its pre-emptive attacks and requests for licensing fees, but it will still likely police contemporary portrayals of Doyle's famous Sherlock Holmes and Dr. Watson to ensure that their rounder, more developed and protected attributes are not exploited without a license.

Melissa G. Thrailkill is a solo attorney in Oak Cliff. She is licensed in Texas and California and helps clients and other attorneys with family law, estate planning, probate, small business and intellectual property issues.

Practice Document

Please find attached to our January E-Newsletter a [Synchronization and Master Use License Agreement](#) provided by Tanner Robinson. Tanner is a trademark, copyright, and entertainment attorney at [Richard Law Group](#) in Dallas, Texas. An SMU law alum, he co-owns an [independent record label](#) and enjoys composing post-rock. Contact [Tanner Robinson](#).

Send questions, comments, and submissions for the TESLAW E-Newsletter to [Victoria Helling](#), E-Newsletter editor in chief.

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