

## CASE FILE 21: THE SIX DETECTIVES

### LEARNING AIMS

- Understand if and how fictional characters are protected under copyright law
- Appreciate that different types of law, other than copyright, might protect fictional characters

### KEY QUESTIONS

The following key questions should be discussed to address the learning aims:

- Does copyright protect fictional characters?
- What other types of law might protect fictional characters?

Students will be expected to use Case File information to analyse ideas, to give opinions, and to justify opinions. Other questions posed within the Case File can be used to generate further discussion.

### DOES COPYRIGHT PROTECT FICTIONAL CHARACTERS?

- See **TEXT BOX #2 and #4**
- In the UK, it is unclear whether fictional characters can be protected by copyright on their own. That is: while the stories featuring fictional characters are protected by copyright as literary works, the characters themselves may not be protected.
- This issue is particularly important in the context of fan fiction (see **TEXT BOX #4** for more on fan fiction) or when someone's adaptation of an existing work focuses primarily on the characters from the original work.
- In *Kelly v Cinema Houses*, a judge commented that if a defendant's work had involved 'a character as distinctive and remarkable ... as Sherlock Holmes', then he might have to give greater thought to whether the character was protected in its own right. That is, the more distinctive the character, the more likely that it will be protected.
- Some legal scholars have interpreted these comments to mean that copyright protection probably does not exist for literary characters outside of the work in which they appear. However, the judge's comments are not conclusive on the issue and if the case were decided today the courts may well take a different approach – one that was more in line with contemporary commercial attitudes to character merchandising.
- In other jurisdictions, such as Germany and the United States, there are clearer rules about protecting fictional characters (see **TEXT BOX #2**).
- At best, all that can be said is that there is no decisive case law in the UK about whether characters should be protected by copyright.

What do the students think? Should fictional characters be protected by copyright?

## WHAT OTHER TYPES OF LAW MIGHT PROTECT FICTIONAL CHARACTERS?

- See **TEXT BOX #3**
- Although fictional characters may not be protected by copyright separately from the work in which they appear, they may be protected by other forms of intellectual property law.
- Passing off is a form of intellectual property that protects the goodwill someone has established in their product or services, like a form of unregistered trade mark. Goodwill can be established in many different things: a brand name, a form of packaging, or an advertising style.

Based on this, in *Doyle v London Mystery Magazine* (1949) the Conan Doyle Estate attempted to prevent a newly established magazine from using the name 'Sherlock Holmes' and the address '221B Baker Street' as part of their promotional activities for a new magazine: the *London Mystery Magazine*. However, they were unsuccessful.

The court decided that readers would not be confused into thinking that the magazine was produced by, or had anything to do with, the Conan Doyle estate. As such, the magazine was free to continue making use of the character's name and his fictional address.

- Sometimes a character could also be registered as a trade mark. Even when a work goes into the public domain (for more information about copyright duration and the public domain, see [Case File #2](#)), the character might still be protected by trade mark law, like Beatrix Potter's Peter Rabbit.
- In these areas of law, a court would consider whether or not a member of the public would be confused about whether the original author had authored the new work.

## SUGGESTED ACTIVITIES

While discussing the **KEY QUESTIONS** above, you might ask the students to think about their favourite fictional character and whether they have ever seen it in a work different from the original, e.g. in fan fiction or an adaptation.

Is the character remarkable and distinctive enough to merit copyright protection outside of the work in which it appears? If they wanted to create a work of fan fiction featuring their favourite character, do the students think they would need permission from the creator of the character?

## CASE FILE 21: THE SIX DETECTIVES

### 1. INTRODUCTION

Mary's problems began when she 'started fleshing out the main character: the hero-detective'. Before settling on one and starting seeing the others everywhere, she considered six potential protagonists for her story. As some may notice, each of the six detectives (and Mary herself) are inspired by and based on famous existing characters from various books, films, TV shows, plays, and graphic novels, as well as real people.

This Case File #21 explores the conditions for the protection and lawful reuse of fictional characters.

### 2. COPYRIGHT AND FICTIONAL CHARACTERS

Copyright law protects the unauthorised reproduction of literary and artistic works, but how copyright protects specific elements of these works, such as the characters in a story, is less clear. Invented names are not protected by copyright law because the name itself is not an original literary work. We know, however, that fictional characters are much more than just an invented name: they are often well-defined personalities with distinctive looks, habits and speech patterns. But should they enjoy protection outside of the story?

Within the UK, there is little legal guidance on this issue. In *Kelly v Cinema Houses* (1933), the author Joan Kelly sued a film production company for copying her book adaptation of *The Outsider*, a play originally written by another author Dorothy Brandon. Mrs Kelly had Ms Brandon's permission to turn the play into a book. The film production company also had permission from Ms Brandon to adapt her play for the screen, but they had not acquired any rights from Mrs Kelly. When the film was released, Mrs Kelly argued that, in adapting the Ms Brandon's play for the screen, the filmmakers had also copied aspects of her novel both in terms of plot and character.

Ultimately, the court decided in favour of the film projection company: the film, essentially, was an adaptation of the play alone; if the filmmakers had borrowed from Mrs Kelly's novel, they had only borrowed trivial or commonplace elements. There was no copyright infringement. But, in handing down his decision, Mr Justice Maugham commented as follows:

If, for instance, we found a modern playwright creating a character as distinctive and remarkable ... as Sherlock Holmes, would it be an infringement if another writer, one of the servile flock of imitators, were to borrow the idea and to make use of an obvious copy of the original? I should hesitate a long time before I came to such a conclusion.

Some legal scholars have interpreted these comments to mean that copyright protection probably does not exist for literary characters outside of the work in which they appear. However, the judge's comments are not conclusive on the issue and if the case were decided today the courts may well take a different, more contemporary approach. At best, all that can be said is that there is no decisive case law in the United Kingdom indicating whether characters should be protected by copyright.

By contrast, other jurisdictions around the world have established clearer rules about protecting literary characters through extensive litigation. For example, a German court recently held that the fictional character Pippi Longstocking, created by the Swedish author Astrid Lindgren, had a 'unique personality' and was protected by

copyright as a literary work. Similarly, in the United States characters are generally considered independently copyrightable so long as the character is 'sufficiently delineated'.

Indeed, Sherlock Holmes, as a character, has been the subject of litigation in the United States (you can read a press release about this recent litigation from the Conan Doyle Estate [here](#) as well as further reports about the case on this [Free Sherlock!](#) blog).

### 3. OTHER FORMS OF LEGAL PROTECTION

Despite the fact that UK copyright law may not protect characters separately from the work in which they appear, those characters may enjoy protection through other forms of intellectual property law, such as trade mark law or passing off.

This is particularly true when the character in question is represented by drawings or on film. For example, many of the character illustrations from Beatrix Potter's children's books are registered trade marks even though her works are no longer in copyright (Beatrix Potter, 1866 – 1943). So, even though her work is in the public domain (from a copyright perspective), the use of the characters' names and likenesses, such as the much beloved Peter Rabbit, is still protected by other forms of intellectual property law.

Using other forms of intellectual protection is not always successful, though. Passing off is a form of intellectual property that protects the goodwill someone has established in their product or services, like a form of unregistered trade mark. Goodwill can be established in many different things: a brand name, a form of packaging, or an advertising style. In *Doyle v London Mystery Magazine* (1949) the Conan Doyle Estate attempted to prevent a newly established magazine from using the name 'Sherlock Holmes' and the address '221B Baker Street' as part of its promotional activities.

When Conan Doyle originally wrote the Sherlock Holmes stories, 221B Baker Street did not exist: it was a fictional address. However, in 1949 the Abbey National Building Society owned the block of buildings from 219-223 Baker Street. The magazine reached an agreement with the Abbey National to use the famous address for all of the magazine's correspondence. In turn, The London Mystery Magazine was advertised to readers as coming from '221B Baker Street ... the address of the late Sherlock Holmes, Esq'. Bringing an action based on passing off, the Conan Doyle Estate argued that readers might be misled into thinking the magazine had something to do with the Sherlock Holmes stories, or might even feature Sherlock Holmes.

In court, the judge decided in favour the magazine: while the Conan Doyle Estate might enjoy goodwill in the actual stories relating to Sherlock Holmes, the magazine publishers were doing nothing wrong. Readers would not be confused. The magazine was free to continue using the character's name and address.

The *London Mystery Magazine* went on to become the longest running British mystery magazine, lasting from 1949 to 1982.

### 4. FOR DISCUSSION: THE AFTERLIFE OF CHARACTERS

Do you think that a character in a literary work should be protected by copyright? Do any of the approaches adopted by other jurisdictions make sense?

One area where character protection is contentious concerns fan fiction, that is fictional stories written by fans about characters from a favourite TV show or film and then shared with other fans online. These stories are rarely written with the permission or authorisation of the original author or copyright owner. At the same time, very few of these stories are ever commercially or professionally published: rather, they represent a form of creative, non-commercial reuse of literary characters by fans who love or enjoy those characters. In some jurisdictions, fan fiction might be protected as a form of parody under fair dealing or fair use, but this will not always be the case. Indeed, some copyright owners are attempting to introduce licensing systems specifically for this type of character reuse.

Should fan fiction authors be required to obtain a licence to reuse characters from a literary work that is still in copyright? Should fans be able to write and share creative stories about their favourite characters without having to seek permission or pay a fee? Would it make a difference if they are sharing those stories for free, or trying to make some money out of them?

## 5. USEFUL REFERENCES

A press release from the Conan Doyle Estate about the case *Klinger v Conan Doyle Estate* can be found here: <http://www.conandoyleestate.com/index.php/press-release-klinger-v-conan-doyle-estate/>

Further reports about the case *Klinger v Conan Doyle Estate* can be found on the Free Sherlock! blog: <https://free-sherlock.com/>

For further information about the concept of the public domain, see here: <https://www.copyrightuser.org/create/public-domain/>

For further information about Fan Fiction, see here: [https://en.wikipedia.org/wiki/Fan\\_fiction](https://en.wikipedia.org/wiki/Fan_fiction)