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Dionissia Siozios

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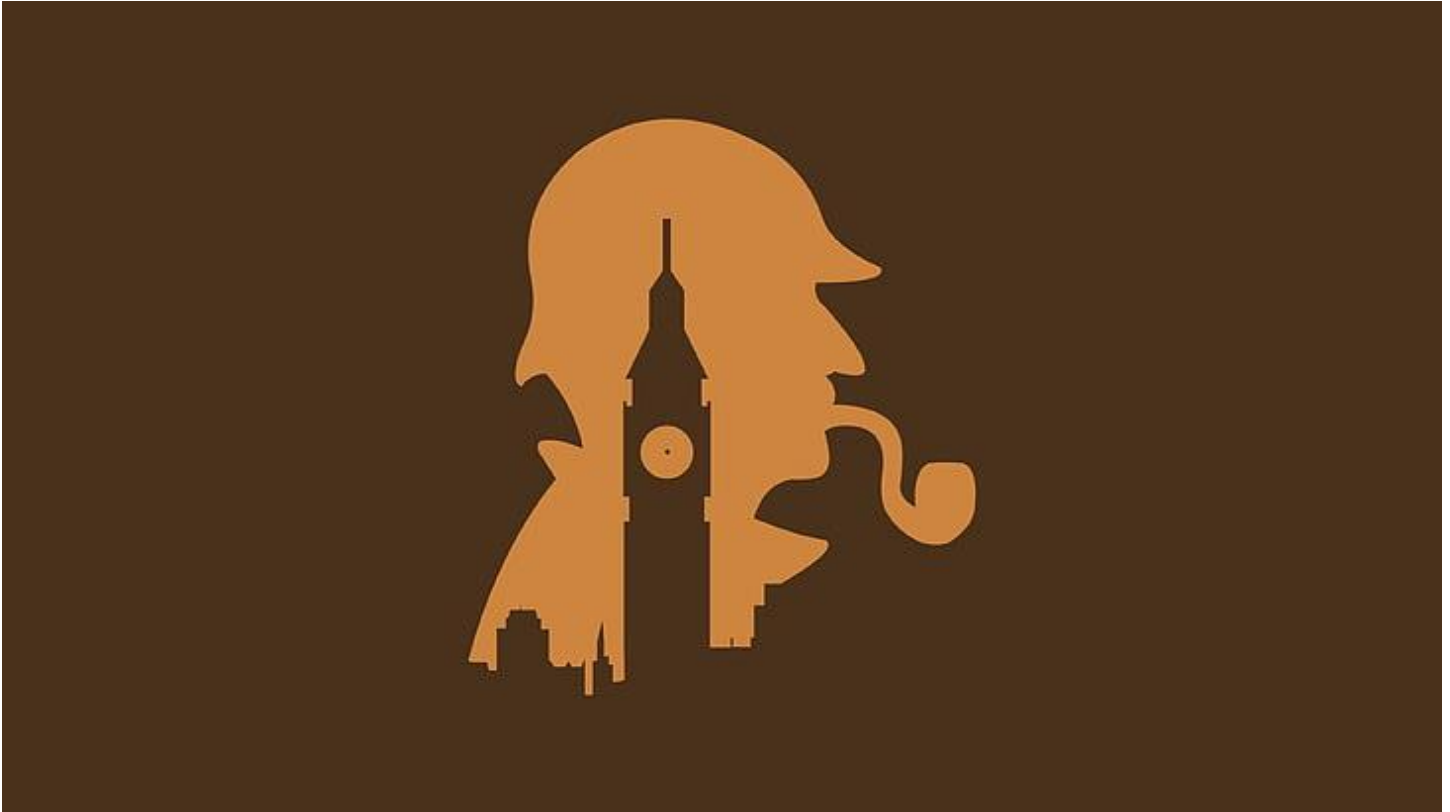
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# Emotions, My Dear Watson: Dissecting Copyright/Trademark Infringement in Netflix's Portrayal of Sherlock Holmes

BY [DIONISSIA SIOZIOS](#)/ON OCTOBER 19, 2020



*Photo by isonerinan*

Are feelings protected expression?

On September 23, 2020, Netflix released the "Enola Holmes" movie despite being embroiled in a lawsuit for alleged copyright and trademark infringement brought by the estate of Sir Arthur Conan Doyle (the author of the Sherlock Holmes novels).<sup>1</sup> "Enola Holmes" is a film based on a book about the life of Sherlock Holmes' younger sister. The movie stars actress Millie Bobby Brown as Enola, and Henry Cavill as Sherlock Holmes. In the complaint, the estate argues that although most of the Holmes novels are in the public domain, Doyle only began to give Holmes true human emotion in the last ten stories (which are still protected).<sup>2</sup> The estate claims that this emotion, which is portrayed by the character in the movie, is protected expression.<sup>3</sup>

The original complaint was filed in New Mexico federal court in June, 2020, by the Doyle Estate against Netflix, Legendary Pictures, Penguin Random House, and Nancy Springer, whose books on Holmes' remarkable sister form the basis for the Netflix release.<sup>4</sup> In 2014, Judge Posner for the 7th Circuit ruled that Doyle's stories published before 1923 were in the

public domain, and therefore elements within those works were available for use without a license.<sup>5</sup> However, the court confirmed that Doyle's stories published in and after 1923 were still under copyright protection.<sup>6</sup> Thus, the Doyle Estate continues to hold copyrights for ten original stories written between 1923 and 1927, collected in "The Case-Book of Sherlock Holmes."<sup>7</sup>

The estate argues that these stories differ from the rest because tragic events experienced by the author inspired him to imbue Holmes with emotion.<sup>8</sup> The complaint alleges that due to losing his eldest son in World War I and his brother four months later, Doyle found it "... no longer enough that Holmes character was the most brilliant and rational mind. Holmes needed to be human. The character needed to develop human emotion and empathy."<sup>9</sup> And that these emotions, unique to the last ten stories, is "... at the center ..." of Springer's novels and Netflix's film – particularly in their initial portrayals of Holmes as cold and detached, "[t]hen chang[ing] to respond to [Enola] with warmth and kindness."<sup>10</sup> Essentially, the estate claims that the Sherlock Holmes character "... as a brain without a heart ..." falls under fair use but portrayals of him as "... a character with a heart[]" infringe upon copyrighted expression in Doyle's remaining protected works.<sup>11</sup>

The estate attempts to establish that Doyle's expression of Holmes' emotional ethos is copyrightable, separately from the series generally and that the depiction of Sherlock in "Enola Holmes" is derivative of that portrayal.<sup>12</sup> In order for Holmes' feelings to be copyrighted they must be original forms of creative expression<sup>13</sup> and not solely constitute an idea or a typical element of the genre, which would be prohibited from protection under the doctrine of scenes-a-faire.<sup>14</sup> This doctrine lies within the idea-expression dichotomy, which restricts copyright protection solely to expressions of ideas within a work and not the ideas themselves.<sup>15</sup>

Although infringement can occur by appropriating the plot or scene of a novel without directly copying the words used,<sup>16</sup> it does not seem plausible that a court will find infringement in this case. The estate does not argue that the film appropriates certain expressions of Holmes' feelings specifically found in Doyle's novels, but simply the idea that a man devoid of emotion, through the trials and tribulations of life may start to feel something towards those close to him.<sup>17</sup> In Justice Learned Hand's outline of the abstractions test to decipher protectable expression from ideas within a work, this would seem to be categorized more as a "general statement" of an idea<sup>18</sup> on which the work is based and a far departure from the "literal"<sup>19</sup> or the expressive substance of the protected novels. Therefore, Holmes' ability to develop and express emotion would seem to fall more on the idea side, rather than on the expression side of the spectrum.

Further, the estate alleges that "Enola Holmes" infringes trademark protection of the Holmes series and brand.<sup>20</sup> This may be difficult to prove since the Supreme Court's decision in *Dastar Corp. v. Twentieth Century Fox Film Corp.* disfavored extending trademark protection to works

no longer protected by copyright.<sup>21</sup> Further, under the *Rogers* test, trademark law is only applied to artistic works if the public interest in avoiding consumer confusion outweighs the public interest in free expression.<sup>22</sup> It seems likely that the public interest in free expression will prevail in this case since the film is based on novels that are only tangentially connected with the Sherlock Holmes series (of which the character appearing in “Enola Holmes” is in the public domain).

Given the hurdles to proving infringement under copyright or trademark law, it seems unlikely that the Doyle Estate will recover damages in a court proceeding. However, in 2015, the estate was successful in obtaining a settlement against Miramax over the “Mr. Holmes” film.<sup>23</sup> It may be the case again that Netflix will settle rather than spend the time and resources to battle this dispute out in court. Although specific expressions of feelings may be protectable, it would seem that the general idea of a cold analytical man developing feelings would not be, especially when the base character has fallen into the public domain and “... become fair game for follow-on authors.”<sup>24</sup>

*Dionissia Siozios is a third-year law student at the Benjamin N. Cardozo School of Law and a Staff Editor at the Cardozo Arts and Entertainment Law Journal. With over 20 years of experience as a dancer and 5 years of professional experience in the entertainment industry, Dionissia has focused her academic career on intellectual property issues pertaining to the performing arts.*

1. ‘Enola Holmes’ Netflix Movie At The Center Of New Copyright, Trademark Infringement Lawsuit By Sir Arthur Conan Doyle Estate, Forbes (June 24, 2020, 7:06 PM), <https://www.forbes.com/sites/legalentertainment/2020/06/24/enola-holmes-netflix-movie-at-the-center-of-new-copyright-trademark-infringement-lawsuit-by-sir-arthur-conan-doyle-estate/> [https://perma.cc/LW39-Q4JG].
2. Complaint, Conan Doyle Est. Ltd. v. Springer, 2020 WL 3451968 (D.N.M. 2020) (No. 1:20-CV-00610).
3. *Id.* at \*26-40.
4. See generally, Complaint, *supra* note 2.
5. *Klinger v. Conan Doyle Estate, Ltd.*, 755 F.3d 496, 497 (7th Cir. 2014).
6. *Id.* at 497. The Copyright Act’s term protection is 95 years from date of publication, which means that copyright protection for the 10 stories expired between December 31, 2018 and December 31, 2022. The new complaint specifies that “[f]or those stories whose copyright terms have ended, th[e] action is brought within the three-year limitations period for infringement.” Complaint, *supra* note 2 at \*2.
7. Complaint, *supra* note 2 at \*2.
8. *Id.* at \*20.
9. *Id.*
10. *Id.* at \*29.
11. *Id.* at \*21.

12. See Complaint, *supra* note 2 at \*37.
13. See generally 17 U.S.C.A. § 101 et seq.
14. Leslie A. Kurtz. Copyright: The Scenes A Faire Doctrine, 41 Fla. L. Rev. 79, 87-88 (1989). “. . . [W]hile most definitions refer to necessary, indispensable, or inevitable scenes, courts have provided scant explanation of what makes a scene necessary.” *Id.* at 88.
15. *Mazer v. Stein*, 347 U.S. 201, 217 (1954) (codified at 17 U.S.C. § 102(b)).
16. *Frankel v. Irwin*, 34 F.2d 142, 143 (S.D.N.Y. 1918).
17. See generally Complaint, *supra* note 2.
18. *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930). “Upon any work . . . a great number of patterns of increasing generality will fit equally well, as more and more of the incident is left out. The last may perhaps be no more than the most general statement of what the [work] is about, and at times might consist only of its title; but there is a point in this series of abstractions where they are no longer protected, since otherwise the playwright could prevent the use of his “ideas,” to which, apart from their expression, his property is never extended . . . Nobody has ever been able to fix that boundary, and nobody ever can.” *Id.* at 121.
19. See Kurtz, *supra* note 14, at 85.
20. See Complaint, *supra* note 2 at \*60-65.
21. *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 37 (2003).
22. *Rogers v. Grimaldi*, 875 F.2d 994, 999 (2d Cir. 1989).
23. Ted Johnson, Mr. Holmes’ Lawsuit Reaches Settlement, Says Arthur Conan Doyle Estate Attorney, *Variety* (Sept. 3, 2015, 5:44 PM), <https://variety.com/2015/biz/news/mr-holmes-lawsuit-settlement-arthur-conan-doyle-1201585667/> [<https://perma.cc/P8PQ-JDBD>]; See generally, Complaint, *Conan Doyle Estate Ltd. v. Miramax, LLC*, 2015 WL 3398262 (D.N.M. 2015) (No. 1:15-CV-432).
24. *Klinger*, 755 F.3d at 500, citing *Silverman v. CBS Inc.*, 870 F.2d 40, 49-51 (2d Cir. 1989).