

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION

LESLIE S. KLINGER, an individual,	)	
	)	
Plaintiff,	)	
	)	Case No.: 1:13-cv-01226
v.	)	
	)	Judge: The Hon. Ruben Castillo
CONAN DOYLE ESTATE, LTD., a business	)	
entity organized under the laws of the United	)	Magistrate Judge: The Hon. Sheila
Kingdom,	)	Finnegan
	)	
Defendant.	)	
	)	
	)	

**PLAINTIFF’S REPLY BRIEF IN SUPPORT OF PLAINTIFF’S MOTION FOR  
SUMMARY JUDGMENT PURSUANT TO FRCP 56**

Plaintiff LESLIE S. KLINGER (“Plaintiff”), by and through its attorneys, Scott M. Gilbert and Kourtney A. Mulcahy of Hinshaw & Culbertson LLP, submits this Plaintiff’s Reply Brief In Support of Plaintiff’s Motion for Summary Judgment pursuant to FRCP 56.

**INTRODUCTION**

Plaintiff seeks a declaratory judgment that the Sherlock Holmes Story Elements, all of which undisputedly first appeared in novels and stories that were published in the United States prior to 1923, are now in the public domain in the United States and are available for use by Plaintiff in creating and publishing new and original stories. Plaintiff respectfully submits that Defendant’s opposition is based on a contorted and wholly novel legal theory that is unsupported by any existing case law and represents yet another attempt by Defendant to obfuscate the factual allegations that have been deemed to be true by reason of Defendant’s default. Defendant asserts that the characters of Sherlock Holmes and Dr. Watson were not complete until the last of the Ten Stories were published in or after 1923 (“Ten Stories”) and thus remain under copyright for

as long as the Ten Stories remain under copyright. Defendant's arguments are unsupported and unavailing, and Plaintiff's Motion for Summary Judgment should be granted.

### ARGUMENT

1. All Facts in Plaintiff's Complaint Are Deemed Admitted by Reason of Defendant's Failure to Answer the Complaint.

Defendant Conan Doyle Estate, Ltd ("Defendant") elected not to file a responsive pleading to the Complaint in the present action, and Defendant's default was entered by the Court on June 25, 2013. Plaintiff thereafter filed its pending Motion for Summary Judgment in order to obtain a judgment on the merits on the claims at issue in the Complaint. Defendant was given notice of the hearing on Plaintiff's Motion for Summary Judgment but elected not to seek leave of court to appear and oppose and/or to file a motion to vacate the default. Defendant subsequently sought an extension of time to respond and ultimately filed a brief in opposition to the Motion for Summary Judgment. However, Defendant has never moved to set aside the default entered against it and has never sought leave of court to file an answer or other responsive pleading in response to the Complaint. Defendant remains in default.

As a result, while Defendant is presumably permitted to raise legal arguments in its Response, it cannot deny the factual allegations set forth in Plaintiff's Complaint or otherwise attempt to generate a factual dispute. As previously argued in Plaintiff's Motion for Summary Judgment, if a defendant fails to answer a complaint and a default is entered, "the well-pled allegations of the complaint relating to liability are taken as true." *Wehrs v. Wells*, 688 F. 3d 886, 892 (7<sup>th</sup> Cir. 2012). See also *Merrill Lynch Mortg. Corp. v. Narayan*, 908 F.2d 246, 253 (7<sup>th</sup> Cir. 1990). In the present action, Defendant elected not to answer the Complaint and elected not to seek leave of court to do so after its default was entered. The fact that Defendant filed a

Response to the Motion for Summary Judgment does not address or cure its failure to put at issue the well-pleaded allegations of the Complaint, all of which must now be taken as true.

Accordingly, Plaintiff respectfully submits that Defendant's Response does not create a triable issue of fact as to any allegation in the Complaint that is now deemed to be true by reason of Defendant's default. Defendant cannot avoid the consequences of its considered decision in the guise of a Response to the Motion for Summary Judgment, and to the extent Defendant attempts to challenge such admissions in its Response, the same should be stricken.

2. Defendant's Only Substantive Argument Is Wholly Unsupported by Fact or Law and Is Self-Contradictory.

Even if the Court accepts all of Defendant's asserted facts however, they still are insufficient to defeat summary judgment. Defendant's entire case is based on a novel proposition: "The Holmes and Watson characters are each single works of authorship created throughout the Canon" and that such characters "exist complete only in the entire Canon; no single published work or subset of the Canon can be considered derivative of any other subset." (Defendant's Rule 56.1(b)(3) Response to Plaintiff's Statement of Material Facts and Statement of Additional Facts ("Def.'s R.56"), ¶2-3.) This proposition is not only contradicted by Defendant's own assertions, but is also unsupportable as a matter of law. As Defendant readily admits (Def. Reply, p. 2), no court of law has ever held that a character who appears in multiple works of authorship is not complete — and, for that reason, not subject to copyright protection — until the final work in the series is published. It is a matter of simple logic that characters may be distinctly delineated for purposes of copyright infringement before all their stories have been told or character traits developed. Otherwise, characters in continuing series would never be protected by copyright law until the entire series was complete; even Mickey Mouse, whose character and countenance have changed significantly over the decades, would not be protected.

None would argue that MGM's copyright in the character of James Bond established by the Central District of California in 1995, has dissolved because MGM has made several James Bond movies after 1995, including some that further developed the Bond character and his early history. *See Metro-Goldwyn-Mayer, Inc. v. American Honda Motor Co., Inc.*, 900 F.Supp. 1287 (C.D.Cal. 1995) (holding that MGM owned copyright in the Bond character); *Jim Henson Prods. V. John T. Brady & Assocs.*, 16 F.Supp.2d 259 (S.D.N.Y. 1997) (noting that "even when an author transferred the copyright in a work in which a character was fully delineated, the author retained the right to use the character in sequels or other works.").

Even the cases cited by Defendant stand for the well-settled proposition that a character who is sufficiently delineated is subject to copyright protection at the time when the requisite degree of delineation has been achieved in a published work. (Def.'s Reply, p. 3, citing, *inter alia*, *Nichols v. Universal Pictures Corp.*, 45 F.2d 119 (2d Cir. 1930).) One of the cases cited by Defendant, in fact, holds that a minimal effort at character description — "his age, obviously phony title ('Count'), what he knows and says, his name, and his faintly Mosaic facial features" — were enough to create a character that is protected under copyright: "Nothing more is required for a character copyright." *Gaiman v. McFarlane*, 360 F.3d 644, 660 (7<sup>th</sup> Cir. 2004).

The only substantive question raised by Defendant is at what point in the writing and publishing of the Canon did Sir Arthur Conan Doyle achieve the threshold of copyright protection by sufficiently delineating his characters. (Def.'s Reply, p. 3.) Defendant argues that the author "continued to create Holmes's and Watson's character throughout the Canon, adding attributes, dimensions, background, and both positive and negative change in the characters until the last story." (Def.'s Reply, p. 4). The clear implication of the position take by Defendant is that the characters were *not* sufficiently delineated in the four novels and 46 stories that were

published prior to 1923 — the stories and novels that Plaintiff wishes to use in creating new derivative works — and that threshold of copyright protection was achieved only in the stories that were published after 1923 (the “Ten Stories”).

Defendant is clearly unwilling to commit fully to the argument on which it wholly relies in opposition the Motion for Summary Judgment precisely because that argument implies that the characters were not sufficiently delineated to be protected by copyright law until the Ten Stories were published. The implication of Defendant’s argument is that the versions of the characters that existed prior to 1923 were free for all to use, as they had failed to reach the threshold of delineation required for copyright protection. Plaintiff would, therefore, be free to publish its derivative work based not on the expiration of Defendant’s copyright, but on the basis that it never existed at all. To avoid that result, Defendant asserts that the Sherlock Holmes characters were the result of a continuing process of creation while, at the same time, cagily refusing to identify the exact point in the process at which the characters achieved sufficient delineation to achieve copyright protection.

At one point, for example, Defendant asserts that “Sherlock Holmes is among the most distinctive characters ever created” and cites Sherlock Holmes as “an example of a highly delineated character obviously entitled to copyright protection.” (Def.’s Response, p. 4, citing, *Metro-Goldwyn-Mayer, Inc. v. American Honda Motor Co.*, 900 F.Supp 1287, 1296 (C.D. Cal. 1995.)) At another point, however, Defendant insists that the delineation of the character was achieved only in the last of the Ten Stories: “[S]ir Arthur Conan Doyle created a single complex character complete in sixty stories.” (Def.’s Reply, p. 8.)

The applicable law, however, is clear. Defendants must choose between having characters that were sufficiently well-delineated in the four novels and 46 stories published prior

to 1923 to merit protection under copyright or having characters that were not protected at all until the publication of the Ten Stories after 1923. If any of the Sherlock Holmes Story Elements achieved copyright protection by reason of the pre-1923 works, then they are now in the public domain and are available for copying and use. But Defendant refuses to acknowledge the contradiction in its legal argument and instead suggests that the characters have always been subject to copyright protection, starting with the publication of the first Sherlock Holmes work in 1887 and ending only when the full term of copyright protection for the last of the Ten Stories expires in 2022.

Even taking into account Defendant's procedurally improper factual assertions, there can be no doubt that Sherlock Holmes, Dr. Watson and the other Sherlock Holmes Story Elements were fully delineated in the 50 novels and stories that were published prior to 1923. The mere addition of information about a character in subsequent works—even information that further develops a character's personality or history—does not negate a character's copyrightability based on earlier works. Indeed, it is a "basic principle of copyright law" that a character may develop over multiple works, yet still be distinctly delineated in an early work. The "copyrightable aspects of" the character of Superman were therefore dependent on copyright protection in "the work in which [those] particular aspect[s] of the character [were] first delineated." *Siegel v. Warner Bros. Entertainment, Inc.*, 690 F.Supp.2d. 1048, 1059 (C.D.Cal.2009). In *Siegel*, Warner Brothers argued that depictions of Superman since 1938 were "an ever-evolving portrayal, featuring new super powers, new villains, and new components to the Superman universe and back story [and that] the Superman story and characters evolved on an episode-by-episode basis,' including 'reference to some of the more

famous story elements now associated with Superman’ like ‘the name of Superman’s home planet ‘Krypton.’” *Siegel* at 1059. This argument was expressly rejected by the court in *Siegel*.

Thus, in the context of copyright termination, the *Siegel* court held that “there can be only one work upon which plaintiffs could ever seek to recapture the copyright to ‘the planet Krypton’ aspect of the ‘Superman character’—the work or series in which that aspect of the character was first explored.” *Id.* In other words, courts have addressed, and rejected, precisely the argument that the CDE now attempts to make. *See also Burroughs v. Metro-Goldwyn-Mayer, Inc.*, 683 F.2d 610 (2d Cir. 1982) (Newman, J., concurring) (“On the assumption that the character Tarzan is sufficiently delineated to support a copyright, there is no dispute that the delineation was complete upon the 1912 appearance of the first Tarzan title *Tarzan of the Apes*. Subsequent titles, including the omitted five, contained original exploits of Tarzan, but were not original with respect to the character itself. As to the character Tarzan, the subsequent titles were sequels, ‘subsequent stories employing the same character ( ),’”) (internal citations omitted). Here, the Story Elements were delineated before 1923. The ten stories that came later were sequels, “subsequent stories employing the same character.” *Siegel* at 1059.

Once delineated, the Sherlock Holmes Story Elements were eligible for legal protection for the full term of copyright in the United States, and once the term of copyright expired, they entered the public domain. This well-settled point was recently endorsed, by way of example, in *Siegel, supra*: “[T]he copyrightable aspects of a character...are protected only to the extent the work in which that particular aspect of the character was first delineated remains protected, but not in the subsequent sequels in which that attribute is later repeated or used.” The *Siegel* opinion makes clear that the existence of sequels does not undermine copyright protection in delineated characters and story elements.

The position that Defendant finds itself forced to take is contrary to law and would result in an exceedingly strange situation in which any of the 46 stories and four novels in the Canon that were published prior to 1923 can be reprinted freely by anyone because they are in the public domain in their entirety, but a new and original short story featuring the characters that first appeared in these public domain works would be actionable copyright infringement. In fact, since all 50 of the pre-1923 stories and novels contain the characters, Defendant's argument would create the nonsensical situation in which mere publication of a new story in the series after 1923 would somehow extend the term of copyright protection in the stories that are now in the public domain. This contradicts the well-settled statutory rule that re-publication of a work that is in the public domain does not extract the work from the public domain, and *only* new and original works that are added to the public domain elements may be entitled to copyright protection. 17 U.S.C. §103(b); see also, e.g., *Gaiman v. McFarlane*, 360 F.3d 644, 662 (7th Cir. 2004), citing, *inter alia*, *Lee v. A.R.T. Co.*, 123 F.3d 580 (7th Cir. 1997). Defendant simply ignores the express provisions of the Copyright Act that define and limit its copyright interests in the Ten Stories. Each of the Ten Stories is, by definition, a derivative work because each is based upon characters, settings and other preexisting material that first appeared in the 50 novels and stories that were published prior to 1923. "A 'derivative work' is a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted." (17 U.S.C. §101.) "The copyright in a ... derivative work extends only to the material contributed by the author of such work, as distinguished from the preexisting material employed in the work, and does not imply any exclusive right in the preexisting material. *The copyright in such work is*

*independent of, and does not affect or enlarge the scope, duration, ownership, or subsistence of, any copyright protection in the preexisting material.*” 17 U.S.C. §103(b) (Emphasis added).

Indeed, a well-settled line of authority in the Seventh Circuit expressly prohibits the tactic that Defendant is attempting to employ to impermissibly extend its now-expired copyright monopoly in the Sherlock Holmes Story Elements, all of which are now in the public domain. Merely using public domain elements from a previously published work in a new derivative work does not bestow copyright protection on such elements, and only the new and “significantly different” elements in the derivative work are subject to copyright. The purpose of the rule is, among other things, “to prevent a copyright owner from extending his copyright beyond the statutory period by making an identical work as the statutory period was nearing its end, calling it a derivative work, and copyrighting it.” *Gaiman*, at 662, citing, *inter alia*, *Lee v. A.R.T. Co.*, 123 F.3d 580 (7thCir 1997). This, of course, is essentially what Defendant is trying to but cannot lawfully achieve.

Defendant also attempts to obfuscate the well-settled rule of character protection under copyright by raising (but never answering) questions about the distinctions between “flat” and “round” characters, the distinctions between a series that is entirely in the public domain and a series in which most but not all installments are in the public domain, and the difference between an original work and a derivative work. None of these diversions amount to a substantive argument in response to Plaintiff’s motion for a judicial determination that the Sherlock Holmes Story Elements are now in the public domain and may be used by Plaintiff or anyone else.

The applicable rule is stated in the authoritative treatise, *Nimmer on Copyright*, which Defendant quotes but fails to distinguish: “The better view...would appear to be that *once a copyright in the first work that contained the character enters the public domain, then it is not*

*copyright infringement for others to copy the character in works that are otherwise original with the copier, even though later works in the original series remain protected by copyright.”\* I Nimmer on Copyright, §2.12, at 2.178.30-31 (Emphasis added).*

Defendant has failed to cite any case that holds otherwise, and Plaintiff is entitled to a ruling on its Motion for Summary Judgment in conformity with the rule articulated in *Nimmer* and the various controlling cases relied upon by *Nimmer*, and cited in Plaintiff's supporting briefs.

3. The Court Should Decline Defendant's Invitation to Change the Law of Copyright.

Defendant is frank in conceding that its purported rights under copyright in the Sherlock Holmes characters are based entirely on the bootstrapping notion that the author “continued creating the characters in the copyrighted Ten Stories” and, as a result, “the characters as works of authorship were only completed in copyright stories published in 1923 or after.” (Def.'s Response, p 2.) Defendant is also frank in stating: “No court has yet addressed this issue in the context of a literary character continuously created in a corpus of work.” (Def.'s Response, p. 1). As discussed above and in Plaintiff's Memorandum of Points and Authorities in Support of Plaintiff's Motion for Summary Judgment, Defendant's legal assertion is not correct. Even if it were, however, Defendant would be asking the Court to carve out a narrow exception for serial characters, contrary to a well-established body of law concerning characters more generally.

Presumably, Defendant must ask the Court to endorse its radical, contradictory and wholly insupportable position in order to salvage its business model, which consists entirely of extracting licensing fees for *all* derivative works based on Sherlock Holmes, including works

---

\* Defendant refers to “Prof. Nimmer” as the author of *Nimmer on Copyright*, apparently referring to the late Melville D. Nimmer, who died in 1985. The sole current author, and the author of the comment quoted above, is actually

that draw only on the pre-1923 novels and stories, for the remainder of the term of copyright for the Ten Stories.

Plaintiff respectfully submits that, under the doctrine of *stare decisis*, the Court should decline Defendant's invitation to overturn the well-settled case law on the protection of characters under copyright and invent a new and exceptional principle of law for the sole purpose of extending the copyright monopoly that Defendant wrongfully claims to own and control.

Although the Court is required to "give fair consideration to any substantial argument that a litigant makes for overruling a previous decision," it is also true that "[t]he essence of *stare decisis* is that the mere existence of certain decisions becomes a reason for adhering to their holdings in subsequent cases." *United States v. Reyes-Hernandez*, 624 F.3d 405, 412 (7th Cir. Ill. 2010) (Internal citations omitted). Unless a prior decision has been overruled, or "undermined by the decisions of a higher court, or other supervening developments, such as a statutory overruling," the doctrine of *stare decisis* "imparts authority to a decision, depending on the court that rendered it, merely by virtue of the authority of the rendering court...." *Id.*

Defendant faces a heavy burden in advocating that the Court ignore the doctrine of *stare decisis* in the present case. "While the doctrine is not rigid, it is also 'not a noodle.' . . . We need articulable reasons for overruling precedent — e.g. it might be unsound in principle or unworkable in practice," especially when, as here, "parties and/or citizens widely rely on a particular decision, the interests of stability, predictability and respect for the courts may counsel against overruling a particular case. *United States v. Sykes*, 598 F.3d 334, 338 (7th Cir. Ind. 2010). (Internal citations omitted). Plaintiff respectfully submits that Defendant has not met this

---

David Nimmer.

burden, and the Court should adhere to the doctrine of *stare decisis* in the present action by declining to invent new law.

4. Defendant's Response Impliedly Concedes That a Case or Controversy Exists in the Present Action.

Defendant argues that no case or controversy exists in the present action because “Plaintiff does not allege, let alone offer evidence, that Conan Doyle threatened litigation.” (Def. Response, p. 14.) The Supreme Court rejected a similar argument in *Medimmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 129, 127 S.Ct. 764, 772-3 (2007) (holding that a party need not violate the law to seek relief). See also *Geish, LLC v. Tuccillo*, 525 F.Supp.2d 1002, 1011 (N.D. Ill. 2007).

Even were that not the case, however, in the very same paragraph of its Response, Defendant expressly concedes that it threatened that “if [Plaintiff] proceeded with bringing out his infringing book, he should ‘not expect to see it offered for sale...’” and explains that its threat “merely indicates Conan Doyle will continue to police online retailers and remove online infringing works under the Digital Millennium Copyright Act. [“DMCA”].” (Id.) Defendant goes on to say that the plain threat of action under the DMCA “does not, as Plaintiff claims, establish ‘a reasonable’ or any other apprehension that Defendant will file suit against him.” (Id.)

Defendant's Response, however, is itself the best evidence that a case or controversy exists. First, Defendant openly concedes that it has always taken the position that Plaintiff's short-story collection is an “infringing book,” a position that Plaintiff explicitly denies. (Plaintiff's Local Rule 56.1(a)(3) Statement of Material Facts In Support of His Motion for Summary Judgment (“R.56”), §22 and §23; Dkt. 1 (“Compl.”); ¶¶21-23). Defendant is engaging in yet another example of self-contradiction when it asserts in one sentence that Plaintiff's

planned book is infringing and then turns around suggests that there is no actual case or controversy. Plainly, Plaintiff regards his book as non-infringing, and Defendant regards it as infringing.

Second, Defendant openly states that it “will continue to police online retailers and remove online infringing works under the Digital Millennium Copyright Act.” The section of the DMCA to which Plaintiff is here referring is 17 U.S.C. §512, which empowers a copyright owner to exercise certain legal remedies against online content that it deems to be infringing and, at the same time, establishes a safe harbor for the Internet service provider at whose site the content is posted. Section 512 is a subsection of Chapter 5 of the Copyright Act, which is titled “Copyright Infringement and Remedies” and specifically addresses various aspects of copyright infringement litigation. Section 512 is designed to condition the safe harbor for online service providers on their willingness to take down allegedly infringing content unless the party who posted the content gives a counter-notice that the content is non-infringing. Under such circumstances, Section 512(g)(3) contemplates that a counter-notice given by the party who posts the disputed content must consent to jurisdiction of the Federal District Court and accept service of process. Section 512, therefore, is itself an exercise of rights by an alleged copyright owner in contemplation of litigation under the Copyright Act.

It is beyond dispute that the express threat made by Defendant against Plaintiff, which Defendant does not and cannot deny, created an actual case or controversy and an actual apprehension of copyright infringement litigation. Plaintiff alleged these facts in the Complaint (Compl., ¶¶24-34 and ¶¶39-41; see also Plaintiff’s Response to Defendant’s Statement of Additional Facts, ¶12). Since Defendant did not bother to deny these allegations by answering the Complaint, and since Defendant is now in default, the allegations are deemed to be true.

Even putting aside the presumption, however, Defendant has conceded the truth of the allegations even while purporting to deny them in its Response.

5. The Court Should Exercise Jurisdiction for Prudential Reasons.

At the heart of the present action is an ongoing course of conduct by Defendant, whose business model consists of extracting fees from various third parties for use of Sherlock Holmes story elements that are now in the public domain under the implied or stated threat of litigation. (Compl., P 5, 17, 31.) Defendant's business model is based on a general apprehension about the copyright status of the Canon, an apprehension that Defendant has consciously promoted and from which it has profited.

Plaintiff is not the only victim of Defendant's copyright abuse, but he is one victim who has refused to accede to its demands. Plaintiff is asking the Court to clarify the copyright status of the Canon by ruling that the Sherlock Holmes Story Elements, all of which first appeared in novels and stories published in the United States prior to 1923, are now in the public domain and are available to Plaintiff and others for the creation of derivative works. By accepting and exercising its jurisdiction in the present case, the Court will not only "[settle] the entire controversy" as between Plaintiff and Defendant, as required under *Sears, Roebuck & Co., v. American Mut. Liab. Ins. Co.*, 372 F.2d 435, 438 (7<sup>th</sup> Cir. 1967) (Internal punctuation omitted), but it will also remove the fog of uncertainty that has allowed Defendant to prey upon numerous others.

6. Defendant's Purposed Statement of Additional Material Facts Regarding Story Elements First Appearing in the Ten Stories Are Inapposite and Should Be Excluded from the Present Motion.

Plaintiff's Statement of Additional Material Facts is intended to establish the overarching proposition that the characters of Sherlock Holmes and Dr. Watson are currently protected under copyright because the characters are "single works of authorship created throughout the Canon."

The proposition is denied by Plaintiff, and the Additional Material Facts presented by Defendant do not raise any triable issue of fact. (Plaintiff's Rule 56.1(b)(3) Response to Defendant's Statement of Additional Material Facts ("Pl.'s R.56 Response), ¶TK.)

Most of Defendant's purported Additional Material Facts merely propose that some invented facts in the fictional biography of Sherlock Holmes and Dr. Watson appear for the first time in the Ten Stories, e.g., "Holmes has converted his practice into an 'Agency' after Dr. Watson moved out of Baker Street." (Def.'s R.56 Response, ¶6(f). Other purported Additional Material Facts place Sherlock Holmes in a particular chronological era by referring to contemporary technology, e.g., "'The Lion's Mane' (1926)...brings Holmes into contact with the 'wireless' radio, another piece of technology that did not exist when the Sherlock Holmes Stories were new." (Def.'s R.56, ¶6(g).) None of these references, however, change or even add to the essential characters of Sherlock Holmes or Dr. Watson as they are defined in the Sherlock Holmes Story Elements.

The whole issue, however, is inapposite. As set forth in detail in Pl.'s R.56 Response, Plaintiff does not dispute that certain events and references appear for the first time in the Ten Stories and has conceded, for the purposes of this action only, that Plaintiff is not seeking a declaratory judgment that such traits or elements are in the public domain. Rather, the relief sought by Plaintiff is explicitly limited to the Sherlock Holmes Story Elements, all of which appeared for the first time in pre-1923 works and may be freely used to create new derivative works For that reason, such purported Additional Material Facts are outside the scope of Plaintiff's Motion for Summary Judgment and should be disregarded by the Court.

### **CONCLUSION**

WHEREFORE, Plaintiff Leslie S. Klinger respectfully requests that this Honorable Court enter an order granting its Motion for Summary Judgment and entering judgment as prayed for in

the Complaint in the present action. Plaintiff further requests that it be awarded his costs, including attorney and expert witness fees, pursuant to 17 U.S.C. §505.

Scott M. Gilbert, ARDC No. 6282951  
Kourtney A. Mulcahy, ARDC No. 6276695  
HINSHAW & CULBERTSON LLP  
222 N. LaSalle Street  
Chicago, IL 60601  
Phone No.: 312-704-3000  
Fax No.: 312-704-3001

Respectfully Submitted,  
LESLIE S. KLINGER

By: /s/Scott M. Gilbert  
One of Plaintiff's Attorneys

**CERTIFICATE OF SERVICE**

I hereby certify that on September 30, 2013, Plaintiff's Reply Brief in Support of Plaintiff's Motion for Summary Judgment Pursuant to FRCP 56 was electronically filed with the Clerk of the Court using the CM/ECF system which will send notification of such filing(s) to all counsel of record.

By: s/ Scott M. Gilbert  
HINSHAW & CULBERTSON LLP  
222 N. LaSalle Street, Ste 300  
Chicago, IL 60601  
(312) 704-3000