Full of sound and fury, signifying nothing

Weil, Gotshal & Manges' **Randi W Singer** and **Olivia J Greer** explore the repercussions of Faulkner Literary Rights' case against Sony

How might William Faulkner, Woody Allen, and a defence contractor find themselves in a sentence together? In a Woody Allen movie, of course, or, alternatively, through the never-dull annals of the US legal system. And, in this case, it is the latter. Back in October 2012, Faulkner Literary Rights ("FLR") brought two lawsuits in quick succession. The entity, which manages the literary estate of famed Southern Gothic novelist William Faulkner, first sued Sony Pictures over a Faulkner (mis)quote spoken by Owen Wilson's character in the hit 2011 Woody Allen film, *Midnight in Paris*.[1] The next day, FLR sued defence contractor Northrop Grumman and *The Washington Post* over an advertisement containing another Faulkner quote.[2]

Both complaints alleged infringement under the US Copyright and Lanham Acts, as well as commercial misappropriation. The gist is that FLR owns all copyright rights to the works that contain the quotes, and therefore controls use of the quotes. It alleges that Sony/Grumman infringed on those exclusive rights, that the use of the quote and Faulkner's name is likely to cause confusion regarding Faulkner's approval of Sony/Grumman's goods or services, and that Sony/Grumman appropriated Faulkner's name and work for their own benefit.

Pundits across the internet scoffed at the lawsuits, particularly the suit against Sony, arguing that these are clear instances of fair use, that the suits might go so far as to be frivolous, and that, at the very least, FLR has no hope of prevailing. Others expressed concern that a result favouring FLR (the suits were, after all, filed in Mississippi, Faulkner's territory) would have a disastrously stifling impact on creativity, preventing artists from creating new work inspired by the work of other artists.

In an odd turn of events, in December 2012, FLR settled with Northrop Grumman and *The Washington Post*, with the US District Court of Mississippi ordering dismissal of all claims with prejudice (the terms of the settlement are confidential). The Sony lawsuit continues to move forward. Without weighing theoretical outcomes of either case in a litigation, Grumman's use was so much more overtly commercial than Sony's use, that it appeared at the outset to be more likely to move forward, if only on the Lanham Act claims. Instead, it is gone, and Sony presses on, filing a motion to dismiss, simultaneously with a motion to transfer venue to the Southern District Court of New York, on 18 December 2012.

So what happened? Most likely, Sony sees an opportunity to win a favourable ruling, shoring up the parameters of copyright's fair use doctrine. Settling would be a concession that could put Sony, and the film industry as a whole, at risk of having to pay licensing fees every time a script quotes a literary work. The Faulkner team has indicated that this is the outcome they prefer, having reportedly already secured a licence from the television show *Modern Family* for the use of a Faulkner quote.[3] For Hollywood, obviously, such an outcome would be highly inopportune.

Now it just remains to be seen how Sony will fare in rebutting each of the claims against it, as well as whether Sony will succeed in getting the lawsuit transferred out of Mississippi, a state without an expansive body of copyright law.

On the copyright infringement front, commentators have been crying fair use since this lawsuit was filed, Sony argues as much in its motion to dismiss, and they are all probably right. Section 107 of the Copyright Act protects limited reproduction of a copyrighted work to comment upon or critique that work, under certain circumstances. Section 107 sets out a four factor analysis to determine fair use. Here, Sony likely wins the analysis. The challenged use is best characterised as transformative, giving the first factor to Sony. Owen Wilson's character in *Midnight in Paris* uses Faulkner's words to express his own experience and recontextualises the quoted words. The quoted work is both fictional and published, constituting a strike against Sony on the second factor. But the third and fourth factors lean decidedly toward Sony. The amount of the work taken is minor – nine words from a 286-page novel[4] (in fact, Sony suggests that, before fair use is even considered, the case should be dismissed on a finding that the use is *de minimus*). Finally, it is simply too much of a stretch to argue seriously that the film could interfere with a potential market for the book.

Lee Caplin, a lawyer and film producer who manages FLR for Faulkner's descendants, claims that the offending line is not fair use because it comes at a crucial moment in the film and makes a crucial point. But this argument flips the fair use inquiry on its head. The factors look at whether the portion used constitutes the heart of the original work itself, not the heart of the work in which it was reproduced. Caplin argues further that the film is a commercial venture, but commercial use is not necessarily unfair. Rather, the inquiry related to commercial use is whether the new work is likely to intrude on the market for the original work. Here, that is highly unlikely. It is hard to imagine that watching *Midnight in Paris* would prevent someone from buying Faulkner's novel; more plausibly, it might inspire a person to do just that.

With regard to the Lanham Act claim, it is unclear precisely what wrong FLR alleges. The complaint states only that the use of the quote and Faulkner's name "is likely to cause confusion, to cause mistake,

and/or to deceive" viewers of the film as to an affiliation or association between Faulkner and Sony, or as to Faulkner's approval or sponsorship of the film. Is FLR suggesting that moviegoers mistakenly thought Faulkner or his estate had something to do with the making of *Midnight in Paris*? If that is the case, it is a wonder that the estates of Gertrude Stein, Cole Porter, Pablo Picasso, and Ernest Hemingway – all characters in the film – have not brought their own lawsuits. Ultimately, there is very little possibility of confusion here. Even if there were, the Lanham Act cannot be used to bring claims that really belong to the Copyright Act. Claims of unauthorised copying are copyright claims. If that was not enough, as Sony points out, the First Amendment provides extra protection for expressive work like films from just this type of action – requiring that the risk of confusion be "particularly compelling" to justify a Lanham Act claim.[5] From all appearances, FLR cannot meet this burden.

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Finally, FLR's commercial appropriation claim is likely not cognisable. Commercial appropriation is a creature of state law. Mississippi common law recognises the appropriation of a person's identity as an invasion of privacy tort. Using Faulkner's name in a movie might constitute an unpermitted appropriation. The problem for FLR, though, is that the Mississippi privacy right does not survive a person's death. Further, as Sony argues, in the Fifth Circuit, any publicity rights attaching to a celebrity's name protect only against unauthorised use in an advertisement – and not in a motion picture.

The eagerness of armchair attorneys and scholars alike to laugh away FLR's claims is reason enough to take them seriously. But Sony has done a thorough job of dispatching each claim. That certainly does not mean the Mississippi court will not take a flier and rule for its home town hero, and the Faulkner gang has placed a lot on this bet. They could be right. Such a calculation may have been on the minds of Northrop Grumman and *The Washington Post* when they decided to settle. But, in the end, this sound and fury will most likely signify nothing, at least in the way of licensing fees and punitive damages.

So why did FLR file these lawsuits? The *Grumman* settlement is confidential, so it is unclear whether FLR saw significant financial gain, which would certainly seem to justify the undertaking, at least on some level. Did FLR simply misjudge, assuming that Sony would also settle, and that the Faulkner estate would see some income? Or are there more considerations at work here? Outside of the possibility of settlement income, there are at least three possible considerations driving FLR to file these lawsuits.

One possibility is licensing fees. FLR has reportedly already convinced a major producer, Ron Howard, to pay a fee for the use of a Faulkner quote on the network television sitcom *Modern Family*. Query why Howard would have agreed to this, but that is the subject of a separate article. Once that payment was made, FLR would undermine its own business model if it failed to assert its "rights" against parties using Faulkner quotes without paying licensing fees.

Another possibility is publicity. Sony and Grumman put Faulkner's name into the mainstream media with their uses, which any savvy businessperson would see as an opportunity on which to capitalise. For an author who would be 116 years old this year, appearances in a major motion picture and a top international newspaper is pretty good press. But with FLR's lawsuit, Faulkner's cheerleaders got to see his name in countless other press outlets, and blogs across the globe and all for the relatively low cost of filing a couple of lawsuits in federal court. To be sure, most of these mentioned contained some ridicule, but, as they say, all press is good press.

Finally, FLR may be offering a lesson in etiquette. It looks like Lee Caplin was just mad that no one reached out to FLR to clear the uses. Caplin said of Woody Allen, "he just wanted to kind of take [the quote] and he felt entitled". And, of Grumman, "the use of the quote by Grumman was rather odious", and "[t]he family would not have granted it a licence if the company had asked". Another way to put it is: it really hurt my feelings, on Will Faulkner's behalf, that no one thought to take the time and ask if it was okay to use the quote and his name.

Unfortunately for FLR, there is no applicable law to protect hurt feelings or impose good manners. Practitioners will want to watch this case as it moves forward, since a favourable ruling for FLR on its copyright claim would have considerable repercussions for the fair use doctrine. But such a result is improbable, and it is more likely that this detent will strut and fret its hour upon the stage, and then be heard no more.[6]

Footnotes

1. "The past is not dead! Actually, it's not even past. You know who said that? Faulkner. And I met him, too. I ran into him at a dinner party." Complaint ¶ 9, *Faulkner Literary Rights LLC v Sony Pictures Classics, Inc*, No 3:12-cv-100-M-A (ND Miss 25 Oct 2012).
2. "We must be free not because we claim freedom, but because we practice it." Complaint ¶ 7, *Faulkner Literary Rights LLC v Northrop Grumman Corporation and the Washington Post Company*, No 3:12-cv-732-HTW-LRA (SDMiss 26 Oct 2012).
3. Lisa Schuchman, *Furious Fight Waged for Right to Quote Faulkner, Daily Report*, 14 Nov 2012, http://bit.ly/ZwCsQd; Jeff Amy, '*Midnight in Paris*' Sued By Faulkner Estate Over Quote, *The Huffington Post*, 29 Oct 2012, http://www.huffingtonpost.com/2012/10/30/midnight-in-paris-sued-faulkner-estate_n_2044271.html.
4. William Faulkner, *Requiem For a Nun* (Vintage Books 1975).
5. *Rogers v Grimaldi*, 875 F.2d 994, 998-99 (2d Cir.1989) (holding that the Lanham Act may be applied to artistic work "only where the public interest in avoiding consumer confusion outweighs the public interest in free expression."). *See also* Sony Memorandum in Support of Motion to Dismiss, *supra* note 10, at 90 (citing *Sugar Busters LLC v Brennan*, 177 F.3d 258, 269 n.7 (5th Cir.1999)).
6. William Shakespeare, *Macbeth* Act 5, scene 5, 25–26.

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