Requiem for a lawsuit

Weil, Gotshal & Manges' **Randi W Singer** and **Olivia J Greer** discuss Faulkner Literary Rights' loss against Sony's use of a nine-word quote

In July, a federal court in Mississippi dismissed a lawsuit brought by the estate of William Faulkner, challenging the use of a nine-word quote from a Faulkner novel, spoken by Owen Wilson in the Woody Allen film, *Midnight in Paris*.

In an amusing moment in the film, Wilson's character tells his incredulous fiancée, "The past is not dead. Actually, it's not even past. You know who said that? Faulkner, and he was right. And I met him too. I ran into him at a dinner party." The reference was to Faulkner's 1950 novel *Requiem for a Nun*, and Faulkner Literary Rights ("FLR"), the plaintiff in the dispute, did not find the reference to be amusing at all. FLR brought a lawsuit, alleging infringement under the Copyright and Lanham Acts, as well as commercial misappropriation under state law.[1]

Dispelling any suspicions that a Mississippi court, sitting deep in Faulkner territory, might show favour to a hometown hero, Judge Michael P Mills of the Northern District Court of Mississippi, summarily dispensed with FLR's claims, dismissing the suit on the motion of the defendant, Sony Pictures Classics. Judge Mills summed up the matter succinctly, "At issue in this case is whether a single line from a full-length novel singly paraphrased and attributed to the author in a full-length Hollywood film can be considered a copyright infringement. In this case, it cannot."[2]

In a previous article discussing the case,[3] we expressed our surprise that FLR settled a similar claim it had brought against Northrop Grumman and *The Washington Post*, while the Sony lawsuit moved forward. We speculated that Sony saw an opportunity to win a favourable ruling, establishing conclusively that use of a brief quote in a film, with attribution to the author, was a clear example of fair use under section 107 of the Copyright Act, which permits certain unauthorised uses of copyrighted works for purposes such as comment or criticism.[4] Indeed, Sony appears to have achieved exactly the ruling it sought, with Judge Mills – despite being an avowed William Faulkner fan and an author himself – marveling, "How Hollywood's flattering and artful use of literary allusion is a point of litigation, not celebration, is beyond this court's comprehension."[5]

As we, along with legal pundits and the blogosphere anticipated, the court found Sony's use of the Faulkner quote to be fair use, under the four factor test set out in section 107.[6] Central to the court's finding was its analysis of the first factor – the purpose and character of the use. The court found that the new work "undoubtedly" transformed the original work, "add[ing] something new, with a further purpose or different character, altering the first with new expression, meaning, or message".[7] According to the court, Sony had transformed the Faulkner quote both through context – transporting it to a different time and place – and through medium, taking it from "serious" literature to "a speaking part in a movie comedy" rather than to another printed medium. The court also found that the "miniscule amount borrowed" diminished the significance of any consideration of commercial use. It said, "It is difficult to fathom that Sony somehow sought some substantial commercial benefit by infringing on copyrighted material for no more than eight seconds in a 90 minute film."[8] The first factor thus tipped very heavily in favour of Sony, the court found. So much so, in fact, that the court barely addressed factor two – the nature of the copyrighted work – and found it to be neutral, not weighing in favour or against either party.[9]

Factor three – the substantiality of the portion used in relation to the original work as a whole – was also found to weigh in favour of Sony. FLR had argued that the quote was essential to the key theme of *Requiem for a Nun* and that the factor therefore weighed in FLR's favour. The court explained that FLR's argument addressed the importance of a *theme* in the novel and not the "importance of the quote itself". In other words, in the court's view, FLR was seeking protection of an unprotectable idea, rather than that idea's copyrightable expression.[10] The court found that the quote was just a "small portion" of the expression of the theme throughout the novel, and thus not sufficiently substantial to turn the fair use inquiry in FLR's favour. Further, the court addressed a flaw in FLR's argument that we highlighted in our earlier article: FLR argued the quote was not fair use because it came at a crucial moment in the film and made a crucial point.[11] The court noted that the third factor does not provide for consideration of the quote's *subsequent* fame – at issue is merely the importance of the quote to the *originating* work. Both qualitatively and quantitatively, the court found the quote to be insubstantial in relation to the original work.[12]

Finally, the court found that the fourth factor – the effect of the use on the potential market for or value of the copyrighted work – was "essentially a non-issue in light of the stark balance of the first factors weighing in favor of Sony".[13] The court acknowledged that Sony had not presented evidence about relevant markets for the original and secondary work, and noted that ordinarily the burden would be on the proponent of the fair-use defence to present such evidence. The court was unconcerned by the silent record on this issue, however, and expressed that it was "highly doubtful" that any relevant markets were harmed by the use at issue. While this treatment of the fourth factor may raise eyebrows in copyright circles, Judge Mills understandably was of the view that it was "more likely to suppose that the film indeed helped the plaintiff and the market value of *Requiem [for a Nun]* if it had any effect at all".[14] The court's finding on the fourth factor was influenced also by FLR's failure to plead any injury other than "statutory entitlement to an award", and Judge Mills admonished that "the court does not consider a copyright holder to be entitled to licensing fees for fair use of his or her work".[15]

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Upon dispatching FLR's copyright claim, the court looked with similar disfavour on FLR's Lanham Act claims, finding that FLR was not able to establish a cause of action, as it had not identified any provisions of the statute to support its claim, instead emphasising state law claims of misappropriation and rights of publicity and privacy. The court rejected the state law claims, finding them to be "wholly conclusory", and further declining to exercise jurisdiction over them, given the elimination of all federal law claims before trial.[16] The court also stated, as we suggested in our earlier article, that Sony's First Amendment interests "no doubt" outweigh FLR's interest in pursuing a Lanham Act claim. Given the court's other findings, it did not explore this issue further, but the point is certainly supported by case law indicating that the First Amendment provides extra protection for expressive work such as films, requiring that the risk of confusion be "particularly compelling" to justify a Lanham Act claim.[17]

Judge Mills handed down a well-reasoned – and at times witty – ruling that, absent a *deus ex machina* ending worthy of the drama of Faulkner, could not rationally have come out any differently. Lee Caplin, FLR's administrator, of course found the ruling to be disappointing. Caplin said that the ruling "is problematic for authors throughout the US" and announced that he is considering what further legal options may be available – although, to date, there has been no appeal filed. In Caplin's view, the ruling was "not only wrong, it's going to be damaging to creative people everywhere".[18] But, apparently trying to keep things friendly, Caplin did say that he "can't really blame Woody Allen. He wrote the script he did. It is really up to the licensing department to follow up".[19]

On matters of licensing and intellectual property law, it is indeed up to the licensing department to follow up. Practitioners should take note that this case does little in the way of clarifying any bright lines with regard to the fair-use defence. The cinematic use of a brief quote from a novel, with attribution to the author, is a relatively clear case of fair use, as Judge Mills confirmed. But other recent fair use litigation, such as the Second Circuit's April ruling in *Cariou v Prince*, makes clear that the fair use analysis remains a highly fact-driven inquiry, and depends largely on the fact-finder's view of fairness, sound and fury notwithstanding.[20]

Footnotes

1. Complaint 15-18, *Faulkner Literary Rights LLC v Sony Pictures Classics, Inc,* No 3:12-cv-100-M-A (NDMiss 25 Oct 2012) (Copyright Act claim), 20-24 (Lanham Act claim), 26-29 (commercial appropriation claim).
2. *Faulkner Literary Rights, LLC v Sony Pictures Classics Inc*, No 3:12-cv-00100-MPM-JMV, slip op at 518 (ND Miss 18 Jul 2013).
3. 'Full of sound and fury, signifying nothing', *Intellectual Property Magazine*'s February 2013 issue, p57-58.
4. 17 USC § 107.
5. *Faulkner Literary Rights*, slip op, at 530.
6. 17 USC § 107 ("In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include: (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.")
7. *Faulkner Literary Rights,* slip op, at 526 (citing *Campbell v Acuff-Rose Music*, Inc, 510 US 569, 579 (1994)). *See also* 17 USC § 107.
8. id at 526.
9. id at 527.
10. id at 527-28.
11. *Faulkner Literary Rights*, slip op, at 529.
12. id.
13. id.
14. id at 530.
15. id.
16. id at 532-33.
17. See, eg, *Rogers v Grimaldi*, 875 F.2d 994, 998-99 (2d Cir1989) (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").
18. Dennis Abrams, 'Faulkner Heirs Lose Lawsuit Against Sony Pictures', *Publishing Perspectives*, 22 Jul 2013 http://bit.ly/161lvCK.
19. Ted Johnson, 'Sony Wins '*Midnight in Paris*' Lawsuit Over Faulkner Quote', *Variety,* 18 Jul 2013. http://bit.ly/14jT7xG.
20. *Cariou v Prince*, No 11-1197, 2013 WL 1760521 (2d Cir 25 Apr 2013).

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