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'Midnight In Paris' Faulkner Quote Suit Just Sound And Fury

By **Ryan Davis**

Law360, New York (October 26, 2012, 9:01 PM ET) -- The estate of William Faulkner appears to be breaking new legal ground by suing the makers of the film "Midnight In Paris" over a scene quoting a famous line by the author, since scant legal precedent supports the idea that such use could infringe copyright, attorneys say.

The suit, filed Thursday, claims the 2011 Woody Allen film infringes the estate's copyright by paraphrasing the line, "The past is never dead. It's not even past," in part because the scene is likely to confuse viewers into believing the Faulkner estate is affiliated with the movie.

The suit appears to be part of an emerging campaign by the estate to enforce its rights in the author's work: It filed a similar suit Friday against Northrop Grumman Corp., which used a different Faulkner quotation in an ad.

With regard to "Midnight In Paris," the copyright implications of quoting a famous line in a film have rarely, if ever, been litigated, but the claim seems like a reach that ignores established rules of fair use and attribution, said Marc Reiner of Anderson Kill & Olick PC.

"You hear about a lot of aggressive cases that get brought, and sometimes they even win," he said. "But I can't think of any precedent that's even close to this."

The case seems to be unusual in that it involves the use of only a few lines of a Faulkner work, the 1951 book "Requiem for a Nun," as only a small part of Allen's film, said Lee Eulgen of Neal Gerber & Eisenberg LLP.

"It's axiomatic in copyright law that you can't obtain a copyright on a short phrase," he said. "If I was on the other side, I'd be suggesting to the court that to allow a copyright claim based on a short phrase would be to open the floodgates to a whole lot of litigation that is unnecessary."

The studio that produced the film, Sony Pictures Classics Inc., is likely to argue that using Faulkner's words in dialogue constitutes fair use under copyright law, and it appears to have strong arguments on most of the fair use factors, attorneys said.

In the film, Owen Wilson's character, who has been transported in time to the 1920s, says,

"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."

One of the factors in considering fair use is whether the use is transformative, and that appears to be the case in the context of the film, Reiner said. Rather than conveying Faulkner's original sentiments, the lines as used in the film are part of the portrayal of Wilson's character and his fantastic situation.

"Transformative doesn't mean it has to be actually changed, just that it's used in a way that communicates something different from the original use," Reiner said.

In this case, the lines are "worked into the storyline of a completely creative work, which is transformative," Tom Ferber of Pryor Cashman LLP said.

Another part of the fair-use analysis is how much of the original work has been copied, and the use of only two lines from a full-length novel appears to weigh heavily in favor of the filmmakers, attorneys said.

The other key fair-use factor is the effect of the use on the value of the underlying work, which again should favor the filmmakers, Ferber said.

"No reasonable person is going to believe that this use is going to hurt the market of the novel the lines come from," he said.

Taken together, the fair-use analysis presents a difficult challenge for the estate, Marc Simon of Cowan DeBaets Abrahams & Sheppard LLP said.

"The factors are analyzed on a totality basis, so one prong is not going to be determinative," he said. "But it doesn't seem likely they'd win the case. What are the damages?"

While the odds appear to favor the filmmakers on the copyright claim, the Faulkner estate may have a somewhat stronger case on its Lanham Act claim that the film is likely to confuse viewers, according to Eulgen.

Although copyright protection is typically not available for short phrases, trademarks often consist of a few words, so the estate may have an easier time arguing that the appearance of the lines in Allen's film could deceive people into believing Faulkner endorsed or was affiliated with it, he said.

"To me, that seems to be a more tenable claim, as opposed to copyright," he said.

"However, the case law has shown that it's very difficult to prove infringement in a creative arts context like this, where you'd have to show that some percentage of viewers believed Faulkner was associated with the film."

One wild card in the case is that it was filed in federal court in Faulkner's home state of Mississippi, rather than in a court in New York or California that frequently handles copyright and fair-use cases, Simon said.

"It appears the plaintiffs are looking for home-court advantages by filing in Faulkner country," he said.

If the estate were to successfully prove infringement, the outcome could have far-reaching implications, Reiner said.

"Imagine if, every time a famous word or phrase came into an author's or artist's mind, she had to ask the copyright owner for permission to quote it," he said. "That would counteract one of the main purposes of copyright law — to stimulate creativity for the benefit of the general public. A ban on quoting snippets of others' works with attribution would have the exact opposite effect."

Faulkner's famous phrase about the past has been quoted numerous times, including by President Barack Obama in his 2008 speech on race relations, which raises the question of who else might be in the Faulkner estate's copyright crosshairs, Reiner said.

In the suit against Northrop Grumman and the Washington Post filed Friday, the estate took issue with an ad the defense contractor ran in the paper on July 4, 2011, which included the words: "We must be free, not because we claim freedom, but because we practice it. — William Faulkner."

Those lines come from an essay the author published in 1956 about the Brown v. Board of Education decision by the Supreme Court, and Northrop and the Post should have sought the estate's permission before using them, the suit says.

The Faulkner estate is represented by J. Cal Mayo Jr., Pope S. Mallette and Paul B. Watkins Jr. of Mayo Mallette PLLC.

Counsel information for the defendants was not immediately available.

The cases are Faulkner Literary Rights LLC v. Sony Picture Classics Inc. et al., case number 3:12-cv-00100, and Faulkner Literary Rights LLC v. Northrop Grumman Corp. et al., case number 3:12-cv-00732, in the U.S. District Court for the Northern District of Mississippi.

--Editing by Elizabeth Bowen and Richard McVay.

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