

Historical Fact or Creative Expression? Anastasia Copyright Dispute Proceeds to Trial

April 24, 2018 – The TMCA

by Sandra Edelman



Winston Churchill famously commented in 1939 that Russia was “a riddle wrapped in a mystery inside an enigma.” The same could be said about Grand Duchess Anastasia Romanov, daughter of Russian Tsar Nicholas II, who was rumored to have survived the massacre of the Tsar’s family in 1918. The riddle wrapped in a mystery deepened in the following years, with various women, with varying degrees of psychological problems, claiming to be long-lost daughter Anastasia, presumably entitled to the Tsar’s fortunes hidden away in foreign banks.

The history of these women’s efforts to convince the world and surviving relatives that they were in fact Anastasia Romanov spawned a number of dramatic works, most

notably for purposes of this blog post, a fictionalized Play written in the 1940s by French author Marcelle Maurette (later adapted into English in 1952), and a musical version of the Anastasia story written by Terence McNally that opened on Broadway in April 2017. Both the Play and the Musical focused on one particular woman claiming to be Anastasia -- Anna Anderson -- who spent many years trying to convince the public and surviving members of the royal family of her identity. The rights holders in the Play sued McNally and commercial partner Anastasia Musical LLC for copyright infringement, alleging that the Musical had copied creative elements from the Play going beyond the historical record. *Jean-Etienne de Becdelievre et al. v. Anastasia Musical LLC*, 16 Civ. 9471 (SDNY) (AKH). District Judge Hellerstein denied the defendants' motion to dismiss in January 2017, holding that it was not possible to resolve the issues in dispute by making a "complicated comparison" of the two works and the historical record before answers were filed "and without guidance by experts." The case proceeded into discovery, limited to the issue of how the Musical was created. The court also directed the plaintiffs to make a submission identifying what specific plot elements, characters, dialogue and scenes had been infringed. Defendants then filed a motion for summary judgment, which was denied by Opinion and Order dated April 2, 2018.

The court began its analysis by articulating the mission to determine "whether the two works are substantially similar, extracting from the analysis any non-copyrightable historical facts." Judge Hellerstein also confirmed that when a work contains both copyrightable and non-copyrightable material, as was the case here, the appropriate legal standard for judging substantial similarity is the "more discerning ordinary observer test." The court further acknowledged that because substantial similarity "is customarily an extremely close question of fact, summary judgment has traditionally been frowned upon" in copyright litigation. Ultimately, after a detailed review of the historical record as well as the content of the Play and the Musical, the court concluded that material issues of disputed fact precluded summary judgment.

The decision to deny summary judgment rested on a few "crucial elements" of both the Play and the Musical "that cannot be traced back to the historical record." The court cited in particular "a much-anticipated meeting" between Anna/Anastasia and her supposed grandmother, the Dowager Empress, resulting in a very emotionally resonant scene in both works in which the Empress finally softens her resistance to believing Anna's story and agrees to support her as a member of the family. No such meeting ever took place according to any historical evidence. Both works also featured a climactic scene in which Anna/Anastasia was supposed to be presented to the world at a ceremony, but instead Anna/Anastasia "makes an off-stage decision to reject royalty and wealth, in favor of a simple life." The court observed, "As with the meeting between Anastasia and the Empress, the presentation scene has no apparent basis in the historical record."

Defendants argued that the ideas embodied in these overlapping plot developments were *scenes a faire* that were not subject to copyright protection. The court disagreed, saying plaintiffs' claim was "limited to a particular expression" of the scenes. The court also rejected defendants' argument that the Play and Musical were different in "total concept and feel", citing Second Circuit precedent in *Castle Rock Entertainment Inc. v.*

Carol Publishing Group that “the total concept and feel test... is simply not helpful in analyzing works that, because of their different genres and media, must necessarily have a different concept and feel.”

So a case involving competing dramatic presentations of the Anna Anderson story, and the riddle wrapped in a mystery inside an enigma about whether Anastasia Romanov survived the assassination of the Tsar’s family, will now – barring a settlement – proceed to trial.