

STUDENT NOTE

**DOES THE WIND BLOW FAIR?:
A DISCUSSION AND CRITIQUE OF
THE SUNTRUST V. HOUGHTON-MIFFLIN CASE***

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A. Introduction

Alice Randall, black author and historian of southern culture first read Margaret Mitchell's Pulitzer Prize winning novel, *Gone With The Wind*,¹ as a young girl. Like most other readers, was intrigued by Scarlett O'Hara's courageous efforts to restore her family's dignity and prominence in the antebellum South. However, she was disturbed by the story's one-dimensional portrayal of slaves. Finding it hard to overlook the book's racism and bigotry, Randall developed a deep-seated need to address the misconceptions of slavery set forth in *Gone With The Wind*, and proclaimed to provide a more realistic perspective of the slaves of Tara plantation.²

The product of Randall's proclamation, *The Wind Done Gone*,³ turned out to be an innovative combination of several literary genres -- sequel, social commentary, satire and parody. It is a sequel in the sense that it continues the story of *Gone With The Wind*, while recollecting on some of its main events. However, these recollections are told from the point of view of Cynara⁴ – Gerald O'Hara and Mammy's mulatto slave child, Scarlett O'Hara's half sister and ex-slave. In several entries of her journal, Cynara recollects on her painful life at Tara, and she writes of how she dreads returning for her mother's funeral. Although *The Wind Done Gone*

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¹ Margaret Mitchell, *Gone With The Wind* (Warner 1936).

² "When I was twelve, I read *Gone With The Wind* and fell in love with the novel. This was a troubled love from the beginning. I had to overlook racist stereotyping and Klan whitewashing to appreciate the ambitious, resilient, hard-working, hard-loving character who is Scarlett. Like so many others, I managed to do it. Then one day, reading the book, enormous questions rose for me: Where are the mulattos on Tara? Where is Scarlett's half-sister? Almost immediately I knew I had to tell her story, tell the story that hadn't been told. Tell it because the silence injured me." Alice Randall, *The Wind Done Gone*, "A Conversation with Alice Randall" (Houghton Mifflin Company 2001).

³ Alice Randall, *The Wind Done Gone*, Disc 1, Track 4 (Houghton Mifflin Company 2001) (CD recording).

⁴ Margaret Mitchell Base *Gone With The Wind* on the female subject of an Earnest Dawson poem, *Non Sum Qualis Eram Bonae Sub Regno Cynarae* (I am not quite as I was under the rule of the beautiful Cynara.).

does continue the story of *Gone With The Wind*, it also becomes a whole new story based on the life of a phantom character of *Gone With The Wind*.

The Wind Done Gone is both a social commentary and a satire because it aims to shed light upon and disprove misconceptions and stereotypes of southern society that are not only set forth in *Gone With The Wind*, but other literary and creative works that touch on these issues.⁵ *The Wind Done Gone* addresses homosexuality, interracial relationships and biracialism, but the most prominent stereotypes addressed were those that portrayed slaves as child-like and imbecilic. Randall is persistent in using Cynara as a catalyst to strike down these images by making Sinner's character the exact opposite of the "Prissy" and "Mammy" characters in *Gone With The Wind*, who spoke with broken language, and were insistent upon staying with their owners, and continuing to live their lives as servants even after the war had ended and the slaves were freed.

In *The Wind Done Gone*, Cynara admits to using broken language as a slave, but once slavery ends she takes advantage of the opportunities of literacy and culture that are presented to her. She reads Greek mythology, the works of Shakespeare, Jane Austin, Walter Scott, Harriet Beecher-Stowe and Frederick Douglass. As the concubine of a Southern aristocrat, Rhett Butler (referred to as "R" in *The Wind Done Gone*), she is taken on "the Grand Tour" – a voyage through Europe frequented by prominent white men who are accompanied by their black concubines or mistresses.

As for the ex-slaves who never acquired any type of formal education – Pork, Mammy and Prissy – Randall portrays these characters as equally clever. Pork, ("Garlic" in *The Wind Done Gone*), is won by Gerald O'Hara ("Planter") in a poker game along with the land that would later be called "Tara". Garlic fixes the game by drugging his owner, because Garlic knew he would have a better life as Gerald O'Hara's valet, because O'Hara was well on his way to becoming a prominent cotton planter in Georgia. Garlic also arranged for Gerald O'Hara to buy Mammy as a nanny for his children and a mistress for himself. Garlic later saved Tara from being destroyed by the Union soldiers during the war.

It wasn't God who saved the cotton farm. It was Garlic, when he...begged the Union troops to carry him away from all the fever and dying in the house. Every time he'd approach a Union soldier, they'd buck back farther away. Nobody wanted to get close

⁵ Like *Gone With The Wind*, D.W. Griffith's, *The Birth of a Nation* is also considered an American classic as one of the greatest movies ever made, even though both works convey the same racial stereotypes depicting blacks as simple and child-like, who refuse to leave their former owners even though they have been freed.

to any of the buildings to rescue a slave or
make a building barbecue possible....⁶

Randall's comment is that even though these are fictional events, they are based on the reality of the antebellum South and are aiming to rectify *Gone With The Wind*'s one-dimensional portrayal of that reality. Mitchell tries to demonstrate that blacks, like any other type of people, have different ways of dealing with a common condition – slavery followed by freedom – and were in no sense of the word one-dimensional. Some blacks, like Mammy, Prissy and Garlic, felt they were entitled to their owner's land after their owner died and slavery ended; however there were blacks like Cynara, who wanted no part of the life they were forced into and chose to go off and make new lives for themselves.

To further her goal of commenting on the social fallacies of *Gone With The Wind*, Randall felt it would be most effective to pose her novel as a parody of *Gone With The Wind* which retells Mitchell's classic from the perspective of Scarlett's mulatto half-sister, who is also Scarlett's ex-slave. The most obvious parodical element is the title's play on words, "*The Wind Done Gone*", as well as the changing of character names and their descriptions to fit the perspective of an ex-slave: Scarlett is changed to "Other"; Rhett Butler to "R"; Melanie Wilkes to "Mealy Mouth"; Ashley Wilkes to "Dreamy Gentleman", Gerald O'Hara to "Planter"; Ellen O'Hara to "Lady"; Pork to "Garlic"; Prissy to "Miss Priss"; Tara Plantation to "Tata"; and Twelve Oaks Plantation to "Twelve Slaves Strong as Trees". The only character's name that does not change is "Mammy".⁷

The most prominent mocking is done with Scarlett's character, "Other." The same character that Mitchell builds up as being courageous and self-determined, Randall tears down through Cynara's hatred of her. Cynara despises Other, not because their father, "Planter," disposed of her, selling her to a family friend, but because her mother, Mammy, was more of a mother to Scarlett than to her. Mammy breast-fed, clothed, primped and pampered Other, and Cynara was bound to assist.

Mammy always called me 'Chile'. She never called me soft, or to her softness. She called me to do things, usually for Other, who she called 'Lamb'. It was, "Get dressed 'Chile', and what's my 'Lamb' gonna

⁶ Alice Randall, *The Wind Done Gone*, Disc 1, Track 4 (Houghton Mifflin Company 2001) (CD recording).

⁷ For the duration of the paper, all of the characters mentioned will be referred to using their *The Wind Done Gone* names.

wear.”... Other owns mother by more than
ink and law....⁸

At the onset of the story, Cynara’s loathing of Other and Planter is in a sense justified by R, who tells her that the Irish are “shiftless, lazy crackers no matter how rich they get,” and that Georgia used to be a penal colony mainly inhabited by the Irish. R’s views of Cynara’s family fuels her hatred for them. Yet, an ironic turn in the latter part of the book reveals that Other is also of African decent. Lady (Ellen O’Hara) bequeathed to Cynara some love letters that Lady and her cousin, “Feleepe”, had written to one another. Upon reading them, it was revealed that Lady’s great grandmother was black, and Lady and Feleepe were forbidden from marrying because of the fear they might bear a child of strong black resemblance. To keep the family secret, they are forced to marry outside of the family to full-blooded spouses, as a way of cleansing their blood of their black ancestry.

In spite of Randall’s efforts to pose her book as a parody, the Stephens-Mitchell Trust (Mitchell Trust) felt that it did not constitute a fair use of *Gone With The Wind*, and filed suit against her publisher, Houghton Mifflin, for copyright infringement on the basis that it was not a fair use of *Gone With The Wind*. The Mitchell Trust prevailed in District Court and received an injunction to keep Houghton-Mifflin from releasing *The Wind Done Gone*,⁹ but the injunction was ultimately lifted in the recent opinion of *Suntrust v. Houghton-Mifflin*.¹⁰ The Eleventh Circuit held that Alice Randall’s interpretation of Margaret Mitchell’s *Gone With The Wind* constituted a fair use of the Mitchell Trust’s copyrighted characters and plots.¹¹

The Eleventh Circuit’s holding was based on the Supreme Court’s dual meaning of parody set forth in *Campbell v. Acuff-Rose*,¹² which suggests that “the aim of parody is “comic effect or ridicule,” and then proceeds to discuss parody more expansively in terms of ‘commentary’ on an original work.”¹³ Since *The Wind Done Gone* does not have an overall “comic effect” but does comment on *Gone With The Wind*, the Eleventh Circuit chose to employ the Supreme Court’s broader definition of parody and construed *The Wind Done Gone* as a parody. In doing so, the Eleventh Circuit broadened the scope of parody by dividing it into two categories: parody that

⁸ Alice Randall, *The Wind Done Gone*, Disc 1, Track 8 (Houghton Mifflin Company 2001) (CD recording).

⁹ *Suntrust v. Houghton Mifflin*, 136 F. Supp. 2d 1357 (N.D.Ga.2001).

¹⁰ *Suntrust*, 268 F. 3d 1357, (2001)

¹¹ *Id.*

¹² *Campbell v. Acuff Rose Music, Inc.*, 510 U.S. 569 (1994).

¹³ *Id.* at 580 - 81

aims at having comic affect, and parody that aims at being social commentaries through the guise of creative or fictional works.¹⁴

The Eleventh Circuit was correct in stating that *The Wind Done Gone* was of great social utility, because the book addresses several misconceptions of slavery during the Civil War and Reconstruction eras of the South. However, construing *The Wind Done Gone* as a parody with social utility was a bit too far-reaching, because parodies have always been known to be humorous interpretations of a prior work. Merriam-Webster's Online Collegiate Dictionary defines parody as a "literary or musical work in which the style of an author or work is closely imitated for comic effect or in ridicule;" ridicule is defined as "the act of exposing to laughter".¹⁵ *The Wind Done Gone* attempts to impugn the reputation and status of *Gone With The Wind* as an American classic by shedding light on the social fallacies set forth in the book, but it's purpose is not to arouse laughter.¹⁶

The purpose of this paper, is to thoroughly discuss how the Eleventh Circuit reached its decision of construing *The Wind Done Gone* as a parody in the *SunTrust v. Houghton-Mifflin* case.¹⁷ This paper will argue for an approach that will be conducive to analyzing future copyright infringement cases that deal with parodies. Instead dividing parody into two categories – those that are humorous and those that are not – the court should have construed Randall's work as what it simply is – a social commentary and criticism of *Gone With The Wind*.

In furtherance of this argument, this paper will demonstrate how *The Wind Done Gone* can fall within the purview of fair use standards without standing on the notion that it has to be a parody to do so. This argument will be supported with a brief background of copyright law and its fair use exception, followed by a discussion of the possible repercussions the Eleventh Circuit's decision may have on future copyright infringement cases.

B. Copyright and the Fair Use Defense

The purpose of copyright law is two-fold: (1) to promote public access to knowledge by providing an incentive for authors to publish books and disseminate

¹⁴ Before this case was decided, social commentaries were only legally recognized as scholarly or journalistic works.

¹⁵ *Miriam-Webster's Online Collegiate Dictionary* (2001), <<http://www.m-w.com/cgi-bin/dictionary.html>> [hereinafter *Miriam-Webster*].

¹⁶ Even though there are some elements of the book, which may be humorous, the overall tone, which Randall has set for the book, is not that of a comedy, but of a dramatic interpretation of racial stereotypes. This issue is discussed further on page 19.

¹⁷ *Suntrust*, 268 F.3d 1257.

ideas to the public; and (2) to ensure that works enter the public domain after an author's rights have expired.¹⁸

A common misconception about the purpose of a copyright is that it grants the author an absolute ownership interest in the entire work itself, as though declaring to the world that this work is the author's own private possession to which no one else can use, refer to, or comment on without the author's permission. This is not true. Copyright law was established to induce members of the public to disseminate their ideas, while allowing them to control the copying and appropriation of the expression of their ideas only. Thus, a copyright furnishes its holder with a monopoly on the expression that the author has created, and this monopoly is limited to a statutory period, determined by Congress, so that the author has received a fair return for his or her labors.¹⁹

The misconception that a copyright allows the author to control the idea behind a copyrighted work is an underlying and recurring theme in much of today's copyright infringement claims. Most copyright litigation is based on the author's complaint that his or her copyright has been infringed because their work was used or referred to in an unfavorable light without the author's permission. The author has asserted a claim of copyright infringement as a pretext for suing, when the actual reason for the suit is that the author did not appreciate the manner in which their work was referred to or used.²⁰

In the *Campbell*, *Leibovitz* and *Suntrust* cases,²¹ there is an underlying theme in the copyright holder's claim, which shows they are not only annoyed by the fact that their copyrighted expressions were used without their permission, but also by the manner in which they were used. For example, Annie Leibovitz was not impressed by Nelson's dumbstruck facial expression attached to another female body in the same pose as Demi Moore in her photograph, and complained that Paramount infringed upon her copyright in the *Vanity Fair* cover because it took too much of her expression and was not a fair use; despite the fact that the 2 Live Crew was offering Acuff-Rose Music, Inc. the appropriate royalties for use of "Oh, Pretty Woman," Acuff-Rose did not appreciate the group's transformation of the song into a rap song that depicted the stereotypical shortcomings of urban women; and the Mitchell Trust has repeatedly succeeded in keeping all derivative works of *Gone With The Wind* free of references to miscegenation or homosexuality, issues which were key elements of *The Wind Done Gone*.²²

¹⁸ *Harper & Row Publishers, Inc. v. Nation Enters*, 471 US 539, at 558 (1985).

¹⁹ *Suntrust*, 268 F.3d 1257 at 1262.

²⁰ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569; *Leibovitz v. Paramount Pictures*, 137 F.3d 109 (N.Y. 1998); *Suntrust v. Houghton Mifflin*, 268 F.3d 1257

²¹ *Id*

²² *Suntrust*, 268 at 1282.

Copyright laws were in large part enacted to prevent private censorship.²³ If the Mitchell trust is allowed to control how *Gone With The Wind* is used and referred to, to the extent that no one can refer to it in a manner which they feel was demeaning, then the Mitchell trust is unconstitutionally using its copyrights as a means of censorship. For this very same reason, Leibovitz and Acuff Rose did not prevail in their suits against Paramount and 2 Live Crew, respectively. Judge Stanley Marcus, in his concurring opinion of the *Suntrust* case, stated that, "The Mitchell Trust may not invoke copyright for the purpose of preserving *Gone With The Wind*'s reputation, or to protect its story from taint... and may not use copyright to shield *Gone With The Wind* from unwelcome comment."²⁴ It is for these reasons, that the fair use statute was enacted, because in all three cases the copyright holders would not have authorized such criticisms of their works.²⁵

Similarly, in *Campbell*, Supreme Court Justice Souter stated that in determining a fair use, it should not matter whether the parody (or social commentary) is in good taste or bad taste. Justice Souter then supports this contention with a quote from Justice Holmes.

It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of [a work], outside of the narrowest and most obvious limits. At the one extreme some works of genius would be sure to miss appreciation. Their very novelty would make them repulsive until the public had learned the new language in which their author spoke....²⁶

Justice Holmes held in the *Bleinstein* case, that sketches of circus scenes were protected by copyright not because they are artistic creations, but also because they are the work of "one man alone," and that it is not the court's role to assess artistic merit.²⁷ The Mitchell Trust's argument is based on a similar principal, and therefore should be decided similarly.

Justices Holmes' and Souter's reasoning applies in the present case because the Mitchell trust is using copyright infringement as a pretext for suing, when they are actually suing because *The Wind Done Gone* casts an unfavorable light upon *Gone With The Wind* by giving readers a new and controversial perspective of the

²³ *Id.* at 1263.

²⁴ *See Id.* at 1283.

²⁵ *Campbell*, 510 U.S. at 592

²⁶ *Bleinstein v. Donaldson Lithographing Co.*, 188 U.S. 239 at 251.

²⁷ *Id.*

world that Mitchell had created and presents readers with Alice Randall's "new language" of *Gone With The Wind*.

Although the Mitchell Trust's suit is based on the potential harm of copyright infringement,²⁸ the courts can only decide whether Randall's use of the copyrighted elements was fair, and whether *The Wind Done Gone* was hers and hers alone. The courts cannot decide whether her use was in good taste or bad taste, or whether it possesses artistic merit. Holmes insisted that this determination should not be based on the judges' personal taste, or whether the use "taints the reputation" of the copyrighted work being referred to. Instead, the work should be based on whether it furthers the purpose of copyright law – to promote public access and knowledge.²⁹ This purpose would be defeated if copyright owners were allowed to dictate and restrict the commentary of their copyrighted works, or judges were allowed to apply their own personal tastes as to the "worth of a work." Commentary, in of itself, is the expression of one's ideas on a prior work or event, and is just as deserving, if not more, of copyright protection and First Amendment rights.

In *Folsom v. Marsh*,³⁰ Justice Story recognized this potential problem and established the "fair use doctrine," which classified certain uses of copyrighted works as non-infringing. Story's original formula was comprised of three steps: (1) looking at the nature and objects of the selections made, (2) the quantity and value of the materials used, and (3) the degree to which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work. His formula was later adapted into the statute as Section 107 of the Copyright Act of 1976³¹, which is now comprised of four factors to be measured in determining whether the use of a copyrighted work is fair. They include: (1) the purpose and character of the use, including whether such use is of commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount of 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 value of the copyrighted work.³²

Although in assessing a copyright infringement claim, the application of this four-step analysis is not exclusive, section 107 gives courts the authority to use other means for determining uses of copyrighted works to be fair. In addition, the Supreme Court has acknowledged that the fair use doctrine should be applied on a case-by-case basis and that courts are not required to apply it in a rigid formula. *Pacific and*

²⁸ Rule 11 of Federal Rules of Civil Procedure prohibits attorneys from filing frivolous lawsuits, and requires that all suits are based on actual harms.

²⁹ *United States Constitution*. Article 1, Section 8, Clause 8. Patents and Copyrights. To promote the progress of sincere and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.

³⁰ *Folsom*, 9 F.Cas. 342 (C.C.Mass. 1841).

³¹ 17 USC § 107

³² 17 USC §107

Southern Co., Inc. v. Duncan held that “where strict enforcement of rights of a copyright holder would conflict with the purpose of copyright law or with other important societal values, courts should be free to fashion an appropriate fair use exemption.”³³ It also has been held that the fair use doctrine offers a means of balancing exclusive rights of a copyright holder with the public’s interest in disseminating information affecting areas of universal concern such as art, science, history, or industry.³⁴

C. Suntrust v. Houghton-Mifflin Case

Margaret Mitchell chose to express her ideas of the antebellum South through the fictional story of *Gone With The Wind*. Alice Randall challenged Mitchell’s expression of the antebellum South through the fictional story of *The Wind Done Gone*. The Mitchell Trust perceived such an expression as a mere attempt to capitalize on the best-selling book to which they held the copyrights and sought to keep *The Wind Done Gone* from being released until they were able to secure a judgment of copyright infringement. The District Court of the Northern District of Georgia found that Houghton Mifflin’s publication and sale of *The Wind Done Gone* would violate the Mitchell Trust’s copyright interests and granted a temporary restraining order (TRO) enjoining Houghton-Mifflin from “further production, display, distribution, advertising, sale or offer for sale of *The Wind Done Gone*.”³⁵

At trial, the Mitchell Trust contended that Randall’s book was an unfair use of *Gone With The Wind*, because it (1) explicitly referred to *Gone With The Wind* in its foreword, (2) copied core characters, character traits, and relationships from *Gone With The Wind*, (3) copied and summarized famous scenes and other elements of the plot from *Gone With The Wind*, and (4) copied verbatim dialogues and descriptions from *Gone With The Wind*.³⁶ As an affirmative defense Randall contended that she used such elements of *Gone With The Wind* because she was relying on the assumption that she was creating a parody, which implied a fair use of the copyrighted elements without the authorization of the Mitchell Trust.

A claim of copyright infringement must be supported by direct proof of copying or proof that the defendant had access to the copyrighted work and that the allegedly infringing work is substantially similar to the copyrighted work. Substantial similarity is proven by showing that an “average lay observer would recognize the alleged copy as having been appropriated from the copyrighted work.”³⁷ The Mitchell Trust conceded that it did not have direct proof of Randall copying *Gone With The Wind*, but Randall admitted that she did have access to it and

³³ *Pacific*, 744 F.2d 1490, at 1492

³⁴ *Twin Peaks Productions, Inc. v. Publications Intern*, 778 F. Supp. 1247 (N.Y. 1993).

³⁵ *Suntrust*, 268 F. 3rd at 1259.

³⁶ *Id.* at 1259.

³⁷ *Suntrust*, 268 F.3d at 1266

in comparing the two works, the District Court found that they were substantially similar in plot, scenes and characters.³⁸

The Wind Done Gone uses fifteen fictional characters from *Gone With The Wind*,³⁹ incorporating their physical attributes, mannerisms, and the distinct features that Mitchell used to describe them, as well as their complex relationships with each other. In addition the various fictional locales,⁴⁰ settings, characters, themes, and plot of *The Wind Done Gone* closely mirror those contained in *Gone With The Wind*. And even though Randall renames many of these characters in her book, she does so using Mitchell's descriptions of them such as Dreamy Gentleman (Ashley Wilkes), Mealy Mouth (Melanie Wilkes), and Planter (Gerald O'Hara).⁴¹

Despite the fact that the Mitchell Trust was able to secure a TRO from the District Court based on the substantial similarity of the two works, that order was quickly vacated on appeal by the Eleventh Circuit on the basis that such an order would violate Randall's First Amendment rights as an unconstitutional prior restraint,⁴² and found that it was not likely that the Mitchell Trust would overcome Randall's fair use defense. Although, the two works were so substantially similar, the Eleventh Circuit sought to examine the "extent to which a critic may use a work to communicate her criticism of the work without infringing the copyright in that work."⁴³ The Eleventh Circuit's assessment of this issue was based on Randall's assertion of the fair use defense of parody. Thus, the court proceeded in applying the four-factored fair use test of the statute based on *The Wind Done Gone* being a parody of *Gone With The Wind*.⁴⁴

In weighing the first element of the test, the purpose and character of the work, the court held that *The Wind Done Gone* overcame both facets of this factor; the "for-profit" facet was strongly overshadowed and outweighed in view of the "transformative" facet. Even though *The Wind Done Gone* is a commercial product, its use of Mitchell's fictional locales, settings, characters, themes and plot of *Gone With The Wind* were highly transformative in casting a new light and a new perspective on Mitchell's romanticized story. Strong characters from the original story are depicted as weak (and vice-versa) in the new work, and the institutions and

³⁸ *Id.* at 1259.

³⁹ Scarlett O'Hara, Rhett Butler, Bonnie Butler, Melanie Wilkes, Ashley Wilkes, Gerald O'Hara, Ellen O'Hara, Mammy, Pork, Dilcey, Prissy, Belle Watling, Careen O'Hara, Stuart and Brenton Tarleton, Jeems, Phillippe, and Aunt Pittypat.

⁴⁰ The O'Hara's Plantation, Tara and the neighboring plantation of the Wilkes, Twelve Oaks.

⁴¹ *Suntrust*, 268 F.3d at .1267.

⁴² According to *New York Times Co. v. United States*, 403 U.S. 713, (1971), and *Near v. Minnesota*, 283 U.S. 697,(1931) prior restraints on publication are unconstitutional if the interest in doing so is any other than preserving the secrecy of information that, if disclosed, might seriously impair the security of the nation.

⁴³ *Suntrust*, 268 F. 3d at 1265

⁴⁴ *Infra* p. 17.

values romanticized in *Gone With The Wind* are exposed as corrupt in *The Wind Done Gone*.⁴⁵

In past parody cases, courts gave little weight to the second factor – the nature of the copyrighted work - because parodies are more likely than not, copying an original, creative work, such as *Gone With The Wind*, than they are factual compilations or derivative works. In most other types of cases, however, greater copyright protection is given to original, creative work than to derivative works and factual compilations. Parodies are more likely than not, copying an original, creative work, such as *Gone With The Wind*, than they are factual compilations or derivative works.⁴⁶

A well established issue in analyzing the third factor – the amount of substantiality of the portion used in relation to the copyrighted work as a whole – is that writing a parody requires the author to take enough from the targeted work to “conjure up” the original in the minds of the readership, and any further takings must specifically serve the new work’s parodic aims.⁴⁷ But the question is, “How much is enough?” The court could have resolved this issue by looking to the primary purpose of Randall’s work – to strike down the stereotypes set forth in *Gone With The Wind*. Mitchell needed to conjure up the elements of the book that presented those stereotypes in order to strike them down, and given the fact that almost every element of *Gone With The Wind* was a stereotype, a half-truth or entirely wrong, Randall was very efficient in acclimating and transforming all of these elements from a 1200 page epic into a 210 page novel.

In some instances Randall took directly from the copyrighted elements of *Gone With The Wind* – the idea and the expression. But in doing so, Randall has taken Mitchell’s expressions and transformed them to fit the perspective of a former slave. For example, the final lines of *Gone With The Wind*, “Tomorrow, I’ll think of some way to get him back. After all, tomorrow is another day,” are transformed in *The Wind Done Gone* as, “For all those we love for whom tomorrow will not be another day, we send the sweet prayer of resting in peace.” Another appropriation of Mitchell’s expression is the scene of Planter’s acquisition of Garlic. In *Gone With The Wind*, Gerald won Pork in a card game with a man from St. Simons Island. In *The Wind Done Gone* Planter wins Garlic in a card game with a man from St. Simons Island, but Garlic is not the passive being as he is portrayed in *Gone With The Wind*. Instead, he outsmarts both white characters by orchestrating the outcome of the card game and determining his own fate by drugging his owner, the man from St. Simons Island, so that Planter would win the game.⁴⁸ Garlic, seeing that Planter was a bit of

⁴⁵ *Id.* at 1267.

⁴⁶ *Id.* at 1270.

⁴⁷ *Campbell*, 510 U.S. at 588.

⁴⁸ *Suntrust*, F.3d 1257 at 1272.

an alcoholic, knew he would have an easier life with Planter, than he would with his current owner.

What was perplexing to the court was the fact that some of the scenes and expressions Randall used in her book did not aid in criticizing *Gone With The Wind*. Randall referred to the scene in *Gone With The Wind* where Jeems is given to the Tarleton twins as a birthday present. The scene was included in *The Wind Done Gone* because Randall felt that this was one of the most important scenes in *Gone With The Wind* to impugn – the fact that a black child is given to two white children as a birthday present. The Mitchell Trust contended to the court that it was enough for Randall to make reference to this scene, but she did not have to use Mitchell’s descriptions of the twins as well – having red hair and being killed in Gettysburg. Here, the court returns to the issue of how much is enough to conjure it up, and how much is excessive.⁴⁹

Even though this is a minute appropriation of Mitchell’s work, the court may have some concern for a slippery slope. If Randall is allowed to appropriate such descriptions even after she has conjured up enough of the original for the readership to grasp what she is referring to, then how far can the next author go in appropriating copyrighted elements of another prior work? The court attempts to resolve this issue by referring to the *Campbell* case where the Supreme Court held that “once enough has been taken to assure identification, how much more is reasonable will depend on the extent to which the work’s overriding purpose and character is to parody the original or, in contrast, the likelihood that the parody may serve as a market substitute for the original.”⁵⁰ Thus, after a thorough discussion and analysis of the third factor, the court reasoned that its outcome was heavily dependent upon the outcome of the fourth factor – the effect on the market value of the original.⁵¹

Modeling its analysis after that of the Supreme Court’s in *Campbell*, the Eleventh Circuit chose only to address the issue of whether readers would substitute *The Wind Done Gone* for *Gone With The Wind*. There was no need to assess whether *The Wind Done Gone* would impair the Mitchell Trust’s market for derivative uses, because a critical commentary has no relevance to another author seeking to write a sequel or another movie script.⁵² Thus, the court held that the evidence the Mitchell Trust presented fell short of establishing that *The Wind Done Gone* or others like it would act as market substitutes for *Gone With The Wind* or would significantly harm its market for derivative works such as sequels and motion picture adaptations.

⁴⁹ *Id.* at 1272-73.

⁵⁰ *Id.* at 1273.

⁵¹ *See id.* at 1270.

⁵² *Suntrust*, 268 F.3d 1257 at 1273.

Given this analysis of the *The Wind Done Gone*'s use of the copyrighted elements of *Gone With The Wind*, the court found it improper for the Mitchell Trust to maintain its temporary restraining order on Houghton Mifflin's release of *The Wind Done Gone* because doing so would be incongruent "with the shared principles of the First Amendment and copyright law."⁵³ The TRO would constitute a prior restraint on speech, because the public would not have access to Randall's ideas in the particular form of expression she chose⁵⁴

The Eleventh Circuit's reasoning and analysis for lifting the TRO was proper, but construing *The Wind Done Gone* as a parody will not be very efficient when adjudicating future copyright infringement cases, particularly parody cases. A more practical classification that is completely within the text of 17 U.S.C. §107, would be a "comment" or "criticism."

D. An Alternative Method To that Employed in the Suntrust v. Houghton Mifflin Case

Notwithstanding the provisions of §§106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research is not an infringement of copyright....⁵⁵

In continuing with the original text of the statute, the Eleventh Circuit could have simply construed *The Wind Done Gone* as what it plainly is -- a comment on, or criticism of *Gone With The Wind*. The book does not need to stand on the notion of being a parody to be considered a fair use. Parody, which is not mentioned in the statute, was established through case law as an example of a fair use, particularly an example of a criticism or comment. A parody is only one literary format in which an author can critique or comment on the ideas of a prior work. Other literary genres

⁵³ *Id.* at 1277.

⁵⁴ *Id.* at 1277

⁵⁵ [17 U.S.C.A §107]

that comment on and critique prior works may include, but are not limited to, journal or magazine articles, short stories, and treatises.⁵⁶

The Wind Done Gone is an innovative compilation of several different literary genres, and an excellent example of a work that not only critiques and comments on a prior work, but is also creative and of great social utility. It possesses the types of ideas and creativity that the framers of the statute had in mind when constructing the statute. In this sense, *The Wind Done Gone* is more deserving of fair use protection than parodies, because its aim is not to make fun of a prior work for the sake of comedy, but to enhance society's awareness of very serious racial stereotypes and to impugn the prior work that helped to create and encourage such stereotypes. In his concurring opinion, Judge Marcus notes that *The Wind Done Gone's* critical nature is clearer than that of other works courts have found to be protected parodies, because this case does not involve a pop song that simply "comments on the naivete of the original of an earlier day" as done by 2 Live Crew in the Campbell case.⁵⁷

In *Leibovitz*,⁵⁸ Judge Preska notes, "the fair use defense requires a sensitive balancing of inherently antagonistic interests in order to secure public access to the greatest number of creative works."⁵⁹ *The Wind Done Gone* makes it extremely easy for the Eleventh Circuit to balance Randall's antagonistic interests against her need to have access to *Gone With The Wind*. Randall did not need access to *Gone With The Wind* to create a rap song that would poke fun of its characters (*Campbell*),⁶⁰ or to digitally modify an image of Vivien Leigh as Scarlett O'Hara to exaggerate her features for comic effect (*Leibovitz*).⁶¹ Randall accessed the plot and characters of *Gone With The Wind* for a socially valuable purpose – to let society know that slaves did not really talk with an over-exaggerated Southern accent, and that not all slaves were happy being slaves or loyal to the people who enslaved them.

⁵⁶ Although some journal articles, and most treatises, naturally serve scholarly and educational purposes, they also possess a "for-profit" nature making them comparable to literary genres that are more creative such as novels, poems and short stories.

⁵⁷ *Suntrust*, 268 F.3d 1257 at 1278.

⁵⁸ *Leibovitz*, 137 F.3d 109. Photographer Annie Leibovitz photographed an eight-month pregnant Demi Moore in the nude for the cover of Vanity Fair magazine. Paramount Pictures used the same idea to promote its new Leslie Nielson movie by placing his face on the body of a model who was also eight months pregnant posed in the same fashion as Demi Moore in the Leibovitz photo. Leibovitz sues for copyright infringement, and the court holds that the Nielson photo is a fair use of Leibovitz's copyrighted photo because the alleged infringers took no more of the copyrighted photo than was necessary, and there was little likelihood that consumers would purchase the Nielson photo in place of Leibovitz's.

⁵⁹ *Suntrust*, 268 F.3d 1257 at 1276.

⁶⁰ *Campbell*, 510 U.S. 569 (1994).

⁶¹ *Leibovitz*, 137 F.3d 109.

If the court had construed *The Wind Done Gone* as simply a social commentary or criticism, it would not have been necessary to even consider whether *The Wind Done Gone* was a humorous parody or non-humorous parody. In creating these two categories, future courts will have to determine whether or not a work is humorous, which requires the assessment of different levels of humor, and to whom the humor may appeal to, which is far too suggestive. As it was not the duty of the court to determine the artistic merit of Mr. Bleinstein's circus posters,⁶² it is not the duty of the court to determine whether a work is humorous, or to what level a work may be construed as humorous. There are many levels of humor that appeal to many different types of people. And the mere fact that a work contains a few humorous elements and plot twists does not classify the work as a comedy.⁶³

Parodies have always been associated with the level of humor to that of a comedy – light and happy. *The Wind Done Gone* does not possess that level of humor. It carries a very serious tone that emanates irony and not humor. There are parts of the book which some may find humorous, but it does not make the book a comedy, or more particularly, a parody.

It is understood that Alice Randall's innovation in expressing her ideas of a prior work, has made it hard for the courts to legally interpret it, as there is no precedent for adjudicating the legalization of such a style of work, but it was not a good a good decision to construe her work as a parody. In looking at past parody cases, such as *Leibovitz*⁶⁴ and *Campbell*,⁶⁵ it was clear that the style of comment was parody. The *Naked Gun* movies have always been known to mock and imitate elements of other movies, and 2 Live Crew has numerous songs and music videos that mock and imitate the black urban experience. But in both "Pretty Woman" and "The Naked Gun 33 1/3" poster, the mocking is done in a light and foolhardy manner. In contrast, there is nothing light or foolhardy about the tone of *The Wind Done Gone*. The book is a fictional compilation of diary entries written by an ex-slave who expresses her loathing of being biracial and never feeling a sense of belonging. Her mother and father arranged for her to be sold at the age of 13, because her teenage audaciousness made their lives uncomfortable. As an adult, she found her visit to Washington, DC, refreshing as she befriended other blacks who were also taking advantage of their freedom, by voting and electing black senators, attending universities, and traveling abroad. They knew she was married to a white man, "R", and congratulated her for that. They all had very sharp memories of black women being taken against their will, and were happy to see that "R" was such a gentleman and treated her as a human being. But because Cynara has never been in a

⁶² *Bleinstein*, 188 U.S. 239 at 251.

⁶³ A dramatic work that is light and often humorous or satirical in tone and that usually contains a happy resolution of the thematic conflict. *Miriam Webster*

⁶⁴ *Leibovitz*, 137 F.3d 109. [Note: could not get the spaces from in between these footnotes]

⁶⁵ *Campbell*, 510 U.S. 569.

relationship with a black man, she has an affair with a black senator and is shunned from the same black social groups where she was once welcomed.

He will never be elected again if he keeps up with you. Voting Negroes won't vote for a man living with another man's wife. Whoever you think you are in the polite society of Negro teachers, preachers, lawyers and doctors, you will always be known as the confederate's concubine... We're a prim and proper lot....⁶⁶

Through Cynara's ostracism from her family and the black community, Randall expresses her views of how neither the North nor the South, or whites nor blacks were susceptible to interracial relationships at the time.

Like most other dramas, there are bouts of comic relief from the seriousness of the story. Cynara writes about how she stood bare-breasted in the glaring sun on the auction block and is ultimately bought by the prominent Atlanta madame, Beauty (Belle Whatling), to work as a maid in her brothel. Because of the fact that she was so fair and pretty, she was frequently asked by customers how she got beyond the "white columns and painted walls" of the plantation. She responded with a fancy sentence that earned her a quarter each time she was asked.

A strange series of deaths and rapid succession following an influenza epidemic left a trail of inheritances that led me to the flesh market with the stock of work that the family couldn't afford to keep a second lady's maid....⁶⁷

But soon after the comical interludes, Randall returns to the overriding scornful and serious tone of the book.

Truth was everybody was too busy... mourning and grieving to write Planter to tell him that his old friend was dead. That

⁶⁶ *The Wind Done Gone*, at Disc 4, Track 101.

⁶⁷ Alice Randall, *The Wind Done Gone*, Disc 2, Track 13 (Houghton Mifflin Company 2001) (CD recording).

the friend's son had died before he could marry. That I was living with a family that needed money, and would he like to buy me back. I didn't know how to write then. I couldn't tell the news that might have saved me....⁶⁸

With this type of pattern continuing throughout the book, with very few comical interludes, it can hardly be construed a parody when parodies have always been known to be a form of comedies. Again referring to Justice Holmes' statement in the *Bleinstein* case, it would be greatly confusing for those trained only in the legal profession to dictate what a proper literary classification is to those who are trained in the literary arts.⁶⁹ By construing *The Wind Done Gone* simply as a commentary or criticism, such a classification can be recognized in both the literary and legal professions without any confusion. Such a classification remains in the scope of the fair use statute⁷⁰ while maintaining the literary perception of what parody is.

E. Conclusion

The purpose of this paper has been to address the intricacies in maintaining a balance between the legal standards in copyright law while being open and susceptible to the creativity and innovation of the literary and artistic crafts. Had the Eleventh Circuit construed *The Wind Done Gone* as a social commentary and critique of *Gone With The Wind*, it would have maintained such a balance.

As a social commentary and criticism, *The Wind Done Gone* would have come out the same under the four-factor analysis of the fair use statute⁷¹ without dividing parody into two categories: (1) The book still has a for-profit character and the character can still be construed as highly a transformative use of *Gone With The Wind*; (2) *Gone With The Wind* is an original work of fiction deserving a higher amount of copyright protection than derivative works or factual compilations; (3) *The Wind Done Gone* makes use of a substantial amount of the copyrighted elements of *Gone With The Wind* (sometimes verbatim), but uses such elements to disprove the myths which they project; and (4) *The Wind Done Gone* does not effect the market

⁶⁸ *Id.* at Disc 2, Track 13. Even though Plantet did not wish to have Cynara around anymore, because she was a constant reminder to him of all the terrible things he had done and wanted to ease his conscience, he was only willing to sell her to someone who he knew would not treat her badly. But the friend to whom she was sold died and they could no longer afford to keep her. She knew that Planter would not have wanted her sold in the slave auction, but because she was not literate could not write to tell him.

⁶⁹ *Bleinstein*, 188 U.S. 239 at 251.

⁷⁰ 47 USC §107

⁷¹ 47 USC § 107

value of *Gone With The Wind*, because as a social commentary it does not pose a threat to the Mitchell Trust's marketability to contract for more derivatives.

Despite the fact that the Eleventh Circuit's decision may not be very conducive to adjudicating future parody cases, it has been effective in showing that the courts are not frigid towards new ways of thinking that may be presented in the course of a continuously evolving and expanding world. This case has shown that there are several ways to challenge the status quo not only for legal interpretation but for the parameters of the literary world as well.

Had it not been for Randall's innovative and spirited expression of her views on Mitchell's one-sided version of slavery and the antebellum South, and Houghton Mifflin's willingness in taking a chance in publishing such a work and risking suit, the Eleventh Circuit would not have had the chance to partake in such adjudication. There may be other authors and publishing companies who have encountered other innovative means of expression, but were hesitant in publishing them out of fear of being sued or having their expressions modified to fit the current legal and literary classifications. This is exactly the type of conduct that the framers of the Constitution were trying to prevent by including the copyright clause in the Constitution; they wanted to promote the arts and sciences, and to encourage new ideas and new ways of thinking that would accumulate from them. The *Suntrust v. Houghton Mifflin* case is an excellent example of the law doing just that.