

CASE NO. 01-12200-HH

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IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

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HOUGHTON MIFFLIN COMPANY,

Defendant-Appellant.

v.

SUNTRUST BANK as Trustee of  
the Stephens Mitchell Trusts f/b/o Eugene  
Muse Mitchell and Joseph Reynolds Mitchell,

Plaintiff-Appellee

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On Appeal from the United States District Court  
for the Northern District of Georgia

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**APPELLEE'S RESPONSE TO THE MOTION  
FOR EXPEDITED REVIEW**

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**APPELLEE'S REPLY TO  
MOTION FOR EXPEDITED REVIEW**

After three weeks of intense comparison of the two works at issue following full scale arguments by counsel and followed by a second full scale argument by counsel, the District Court found blatant, extensive copyright infringement and "unabated piracy" (Decision p. 14), warranting issuance of a preliminary injunction as mandated by the Copyright Act. In a scholarly, carefully reasoned 51 page opinion the District Court emphatically concluded that the parodic effect of the infringing work was slight in comparison to the extensive copying, and the harm to the derivative right in *Gone With the Wind* if this "sequel" were to be unleashed on the marketplace would be impossible to remedy. (Decision pp. 45-46).

As the District Court found, the infringing work is largely a sequel to *Gone With the Wind* (Decision p. 33), and "the Second Sequel [authorized by the copyright owner] is expected to tell Rhett's story. A story that [the infringer] attempts to largely tell in The Wind Done Gone." (Decision p. 44). The potential damage to the multi-million dollar sequel rights and ancillary rights are incalculable. (The television rights alone to the First Sequel were sold for nine million dollars.) The critical findings of fact found by the District Court (Decision pp. 49-50) are not clearly erroneous – indeed they are overwhelmingly compelling – and alone are sufficient to establish that the defendant cannot meet any of its burdens on this motion. Surely, the other appeals clamoring to be heard by this Court have as much right to this Court's attention as the defendant whose only pleas is for this Court to rush to grant it a license to sell someone else's property.

### STATEMENT OF FACTS

The facts as found by the District Court clearly establish copyright infringement:

“In many places the new work merely paraphrases *Gone With the Wind* and does not, as the defendant suggests, subtly allude to the older work. The new work does not create a new story of the south during Reconstruction. Rather with the canvas of *Gone With the Wind* as backdrop, *The Wind Done Gone* repeats the story of *Gone With the Wind*, by utilizing a detailed encapsulation of the older work and exploiting its copyrighted characters, story lines, and settings as the palette for the new story.” (Decision p. 11).

As the District Court found, “The Wind Done Gone consists of actionable copying because it is substantially similar to *Gone With the Wind* in both quantitative and qualitative terms.” (Decision p. 12). All that it is necessary is to read the two works to conclude as the Court below found that “the characters, character traits, scenes, settings, physical descriptions, and plot are taken directly from *Gone With the Wind*. The new work merely renames some of the new characters and settings but otherwise adopts, almost verbatim in many instances, those contained in *Gone With the Wind*.” (Decision p. 12).

Most significantly, as the District court found, “putting aside the plot summaries, verbatim text, and identical scenes, *The Wind Done Gone* also uses the earlier work’s main characters . . .” (Decision p. 13). In doing this, as the District Court found, “*The Wind Done Gone* copies the heart of *Gone With the Wind*’s characters and scenes.” (Decision p. 14). Thus, as the Court below found, copyright infringement was established under the “average lay observer” test. Indeed, as the Court found,

“*The Wind Done Gone*’s use of these characters, story lines, detailed descriptions of settings like Tara and Twelve Oaks, which are fictional, not historical, places, constitutes unabated piracy of *Gone With the Wind*. The new work does not simply make general

descriptions that passively call attention to the former work; on the contrary, it repeatedly abridges several pages of the lengthy text of *Gone With the Wind* and merely retells the same scene in a single paragraph.” (Decision p. 14).

The District Court also found that the alternative test of copyright infringement of “fragmented literal similarity” was also met. As the Court notes, *The Wind Done Gone* “lifts” directly from *Gone With the Wind*.” (Decision p. 15). And finally, the District Court found that the third test for copyright infringement was also established in that “*The Wind Done Gone* goes so far in its copying of the plot, scenes, and characters of *Gone With the Wind* as to support a finding of comprehensive nonliteral similarity.” (Decision p. 16). In short, the Court found an unbelievable level of copyright infringement noting that

“its finding of fragmented literal similarity and comprehensive nonliteral similarity does not overshadow the court’s crucial holding that an average lay observer would recognize *The Wind Done Gone* as having appropriated from *Gone With the Wind*. Accordingly, the Court finds as a matter of fact that the substantial similarities between the two works involve actionable copyrightable elements and that an average lay observer or a reasonable juror would find the works substantially similar in expression.” (Decision p. 17).

## ARGUMENT

### I

#### **NEITHER PARODY NOR FAIR USE EXCUSES THE INFRINGEMENT OF THE COPYRIGHT OWNER’S RIGHT TO CONTROL SEQUELS**

In a tortured jumble of partial quotations of isolated phrases, defendant recasts the holding of the Supreme Court decision in Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994). It does so because it cannot meet the test the Court actually laid down. Contrary to defendant’s attempt to argue that there is some “overall purpose” test that permits an infringer on

showing some degree of parody a license to appropriate the entire copyrighted work, the clear holding in Campbell is that to evade the copyright law the would-be parodist must meet three burdens: (1) that it has appropriated only as much as is necessary to conjure up or assure identification (factor one); (2) that it has only taken so much as can be justified as is necessary to the purpose of parody and comment (factor three); and (3) where there is a showing by the copyright holder that there is a bonafide interest in sequels, meeting the burden of demonstrating that the infringing work will have no impact on the market place for sequels. Defendant utterly fails to meet any of these three burdens and therefore cannot possible meet the burden here of establishing likelihood that it will prevail on the merits.

A. The Purpose in Character of the Infringing Work

After a detailed and comprehensive analysis of the two works, the Court below concluded that “while *The Wind Done Gone* in part criticizes *Gone With the Wind*, the book’s overall purpose is to create a sequel to the older work and provide Ms. Randall’s social commentary on the antebellum South.” (Decision p. 33). “As much as the work transforms the earlier work, it does so no more than any other sequel to an original work.” (Decision p. 34).

The Supreme Court in Campbell anticipated a case such as this when it instructed:

“If a parody whose wide dissemination in the market runs the risk of serving as a substitute for the original or licensed derivatives . . ., it is more incumbent on one claiming fair use to establish the extent of transformation and the parody’s critical relationship to the original.”

Campbell, *supra*, 580 n. 14. It is this balancing which the District Court undertook with great sensitivity which, coupled with the Court’s findings that “*The Wind Done Gone* is unquestionably a fictional work that has an overarching economic purpose,” (Decision p. 36)

results in the first factor tipping in favor of the plaintiff.

**B. The Nature of the Copyrighted Work**

The Court below easily found that "*Gone With the Wind* is certainly a work of fiction that is creative, imaginative, and written to gain a financial return for the author's efforts." (Decision p. 37). Accordingly, the Court concluded that the second factor militates in favor of the plaintiff. Defendant argues that if its work were entirely parody without any of the massive appropriations of the original which are merely commercial appropriation, this would not be an important factor. However, as the Court below found, the vast majority of the material appropriated from *Gone With the Wind* was appropriated precisely for the exploitation of its artistic and creative value and consequently there is no factual basis to discount the second factor.

**C. The Amount in Substantiality of the Appropriation**

In Campbell, upon finding that the work at issue was a parody, the Supreme Court remanded the case for a determination as to whether or not in creating the parody the infringer had taken more elements of the original work than could be justified as necessary to the parody. In that case involving a parody of a song, the court held that if the parodist could not establish that it was necessary to appropriate a base riff of three notes, the parody defense would fail. Thus, the claim by the defendant that Campbell stands for a license to appropriate more than is necessary for comment based on some "overriding purpose" test is on its face a misreading of Campbell. Campbell holds:

"Once enough has been taken to assure identification, how much more is reasonable will depend, say, on the extent to which the . . . 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."

Campbell, *supra* at 587 (emphasis added).

Reliance on a misstatement of Campbell to suggest that an overriding purpose of parody will provide a license to appropriate the heart of the underlying work and a wealth of material that bears no connection to the claimed parody or comment shows that defendant has not been able to meet its burden. As the detailed analysis of the Court below establishes and as the Court found:

“The Wind Done Gone’s use of copyrighted material from *Gone With The Wind* goes well beyond that which is necessary to parody it. The use of so much material removes the new work from the safe harbor of parody and, as written, becomes piracy.” (Decision p. 41). Thus, the third and crucial factor defeats the claim of fair use.

**D. Affect of the use on market value of the original.**

The Supreme Court in Campbell was emphatic in reiterating that since fair use is an affirmative defense the infringer has the burden of proving that the new work will not have an adverse affect on the market for derivative works. Indeed, the Supreme Court stressed that “the licensing of derivatives is an important economic incentive to the creation of originals.

Campbell, *supra* at 591. The Court below found that the contract for the second sequel is expected to tell Rhett’s story. “A story that Ms. Randall attempts to largely tell in The Wind Done Gone. (Decision p. 44). Thus the Court found that “the parodic effect, however, is slight in comparison to the extensive copying,” and “the Court finds that the market harm created by The Wind Done Gone is not due to the ‘effectiveness of its critical commentary’ but rather to its ‘market substitution’ as a sequel.” (Decision p. 45).

The Supreme Court in Campbell noted the grave risk to the entire copyright scheme enunciated by Congress in permitting fair use to provide a license to invade the rights of copyright holders generally. The Supreme Court stated that the Courts are required "to consider not only the extent of market harm caused by the particular actions of the alleged infringer, but also 'whether unrestricted and widespread conduct of the sought engaged in by the defendant . . . would result in a substantially adverse impact on the potential market' for the original." Campbell, *supra* at 590 (quoting, Nimmer § 13.05[A][4], p. 13-102.61). The mischaracterization of the law advocated by defendant in pressing for an exemption for parody permitting the appropriation of the heart of a creative work and the displacement of sequels is so far reaching as to completely undermine the essential right to control derivative works which is an exclusive right of the copyright holder. Copyright Act § 106(2). A reversal of the District Court's Opinion is not only not likely it is almost impossible to imagine.

## II

### THERE IS NO CONFLICT WITH THE FIRST AMENDMENT

Defendant repeatedly attempts to transform this simple case of copyright infringement into a political controversy akin to efforts by the federal government to suppress factual information or a defamation claim being used to delay publication of time sensitive news. Nothing could be further from the facts. There is no time sensitivity to the claimed purpose of correcting the historical record with respect to the anti-bellum south or for that matter any criticism of *Gone With the Wind*. There is no question that unlike defamation in which a plaintiff may be relegated to voluntary damages, the owner of copyright is entitled to injunctive relief to protect its exclusive rights to control derivative works.

There is no basis in law for the suggestion that the copyright interest may be condemned to some higher public service with a court determination of fair compensation to follow. (Even the historically unique Zapruder of the Kennedy assassination was protected by copyright.) As the District Court properly noted, "injunctive relief may be freely granted by the courts in order to prevent infringement of a copyright," including an injunction against the publication of a book prior to its publication. (Decision p. 49, n. 21). As the District Court found, the public interest in maintaining the integrity of the copyright scheme established by Congress outweighs any claims by the defendant to be exempt from the simple obligation of properly editing its manuscript to remove copyrightable material which cannot justified under the existing doctrine of fair use. Any delay occasioned by requiring defendant to properly edit the manuscript is a delay brought upon defendant by its own audacity in so blatantly appropriating the art of another.

### III

#### **SCHEDULING OF THIS APPEAL IS A MATTER FOR THE SOUND DISCRETION OF THIS COURT**

The public interest in the fair administration of the federal judicial system and the interests of other appellants waiting to have their day in court are matters for the court's determination. There must be an injunction to prevent defendant shipping the book and mooting the appeal. If this Court were to reverse the District Court it, surely would not permit the wholesale distribution of an unauthorized sequel (and the obvious incalculable harm to the derivative rights protected by copyright), without permitting review of such an unprecedented decision by the United States Supreme Court. Thus, it is inconceivable that the preliminary injunction would be summarily lifted.

The parties should be given adequate time to present the record to this Court, and the panel must be given adequate time to read both of the books against the District Court's detailed, 51 page analysis in order to determine the proper application of the standards laid down by the Supreme Court in Campbell. Consequently, no purpose is served by rushing, and in the unlikely event that defendant prevails on appeal it still will not be permitted to distribute this book within the month.

### CONCLUSION

Defendant has not carried any of its burdens on this motion for an expedited appeal.

#### A. Likelihood Success

The District Court's meticulous findings have not been effectively questioned. The Court below found: (1) "the plaintiff has a substantial likelihood of succeeding on the merits" (Decision p. 46); (2) "the plaintiff has the presumption of irreparable harm, and the defendant has failed to rebut it" (Decision p. 47); (3) "the magnitude of the plaintiff's potential damage is far greater than the damage that an injunction will cause the defendant" (Decision p. 48); and (4) "The competing public interests of access to Ms. Randall's work and preserving a copyright holder's ownership interests, on balance, favor preserving the plaintiff's copyright interests" (Decision p. 49) mandates injunctive relief. Indeed, the District Court perceived that "wide dissemination of the infringing work now would likely prevent the court from providing adequate relief in the future" (Decision p. 48).

#### B. Harm to the Defendant

The harm claimed by defendant has already occurred. A federal Court has determined (with national press coverage) that the Wind Done Gone is "unabated piracy." (Decision p. 14).

The shipment of books has been delayed, and necessarily will be delayed even if the appeal is expedited. Delays in publication dates are extremely common. (Affidavit of Alex Holtz; Affidavit of Ellis B. Levine). The claim that defendant is harmed by limiting its ability to exploit press coverage of its excessive copying and wrong doing is totally without merit.

**C. Possible Harm to Other Parties**

This appeal challenges the essence of Congress' determination of the balance of Copyright interests and the public interest. A reversal would gut the derivative rights provision of the Copyright Act. Any rush to upset the preliminary injunction would be devastating to the interests of all copyright holders.

**D. The Public Interest**

There is no "prior restraint" in enjoining copyright infringement. Prior restraints deal with newsworthy information. There is absolutely nothing "hot news" about criticism of slavery, the antebellum South, or *Gone With the Wind*. As the District Court found, injury to the derivative rights of the copyright holder would be incalculable and huge. The dicta cited by defendant in cases holding that there was no infringement are irrelevant. This is not a case where an almost insignificant portion of a compilation might be the basis for upsetting all of the other copyright holders' interest in publication as in Greenberg v. Nat'l Geographic, 58 U.S.P.Q. 1267 (11<sup>th</sup> Cir. 2001) (actually holding that the District Court would be within its sound discretion to enter an injunction).

For all of the foregoing reasons, this Court should deny the appellant's motion for an expedited appeal.

Dated: New York, New York  
April 25, 2001

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