

CASE NO. 01-122-00-HH

IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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

Plaintiff-Appellee,

v.

HOUGHTON MIFFLIN COMPANY,

Defendant-Appellant.

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

**BRIEF OF MICROSOFT CORPORATION AS
AMICUS CURIAE IN SUPPORT OF APPELLANT
RECOMMENDING REVERSAL**

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**CERTIFICATE OF INTERESTED PERSONS
AND CORPORATE DISCLOSURE STATEMENT**

The following is, to the best of Microsoft Corporation's knowledge, a complete list of the interested persons or entities required to be disclosed pursuant to FRAP 26.1 and 11th Cir. R. 26.1-1:

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TABLE OF CONTENTS

	<u>Page</u>
CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT	C-1
TABLE OF CONTENTS	i
TABLE OF CITATIONS	ii
STATEMENT OF INTEREST	1
SUMMARY OF ARGUMENT	3
ARGUMENT	6
I. The Right To Make Fair Use Of Copyrighted Material Is A Necessary Balance To Copyright Protection In The Context Of Political And Social Commentary, Criticism, And Debate.	6
II. The District Court Misunderstood The Significance Of Both The Copyrighted And The Challenged Work In This Case And Thereby Misapplied The Fair Use Standard.	11
A. The Purpose and Character of the Secondary Use.	12
B. Nature of the Copyrighted Work.....	16
C. Amount and Substantiality of Work Used.	17
D. The Effect of the Use on the Market Value of the Original.....	19
CONCLUSION	22
CERTIFICATE OF COMPLIANCE	
CERTIFICATE OF SERVICE	

TABLE OF CITATIONS

CASES

<i>*Campbell v. Acuff-Rose, Music, Inc.</i> , 510 U.S. 569 (1994).....	<i>passim</i>
<i>Harper & Row v. Nation Enterprises</i> , 471 U.S. 539 (1985)	19
<i>Leibovitz v. Paramount Pictures Corporation</i> , 137 F.3d 109 (2d Cir. 1998)	9
<i>New Era Publications International, APS v. Henry Holt and Company, Inc.</i> , 695 F. Supp. 1493 (S.D.N.Y. 1988)	9

STATUTES

*17 U.S.C. § 107	<i>passim</i>
U.S. Const. art. I, § 8, cl. 8	3, 6

MISCELLANEOUS

Melville B. Nimmer & David Nimmer, <i>Nimmer on Copyright</i> (2001).....	10, 16, 17
*P. Leval, <i>Toward a Fair Use Standard</i> , 103 Harv. L. Rev. 1105 (1990).....	<i>passim</i>
<i>The Parody Defense to Copyright Infringement: Productive Fair Use After Betamax</i> , 97 Harv. L. Rev. 1395 (1984)	10
Paul Goldstein, <i>Copyright</i> (2001)	6, 9, 10

STATEMENT OF INTEREST¹

Microsoft Corporation is a leading developer of a wide variety of software platforms, applications and tools that are used by millions of consumers and businesses worldwide. Among these products are the Microsoft Windows operating systems (including Windows 2000 and Windows 98), the Microsoft Office suite of programs (including Microsoft Word, Microsoft Outlook, Microsoft Excel and others), the Microsoft Windows Media Player (and related Digital Rights Management tools that help copyright owners protect against unauthorized use of their works), the Microsoft Encarta encyclopedia, and various entertainment software (including games).

In addition, Microsoft creates and operates the MSN.com web site, which is the most visited web portal on the Internet that averages more than 200 million visitors each month. MSN offers visitors access to a variety of different websites, including Slate, a popular online magazine related to news, politics and culture; Money Central, which provides financial information and services to consumers; and MSNBC, a joint venture internet news service between Microsoft and NBC. All of these products contain large

¹ This brief is filed with the consent of both Appellant and Appellee.

amounts of original content, some of which Microsoft itself has authored and some of which Microsoft uses under license from other sources.

This significant volume of software and content is protected, *inter alia*, under the copyright laws, 17 U.S.C. §§ 101 *et seq.* Microsoft has long recognized that these laws provide essential protection of its most valuable asset – intellectual property. Throughout its 25-year history, Microsoft has been a leader in promoting enforcement of copyright laws and public education as to the importance of these laws. Microsoft has similarly recognized that a critical component of the Copyright Act, the fair use doctrine, 17 U.S.C. § 107, permits others to use its copyrighted material in certain limited contexts without its permission. Conversely, in its role as a content creator and provider, Microsoft on occasion uses the copyrighted material of third parties pursuant to the same fair use doctrine.

As a result of its position as both a copyright owner whose works are subject to fair use and a content creator that at times avails itself of fair use, Microsoft has a direct interest in how the balance is struck between strong copyright protection, on the one hand, and legitimate fair use, on the other. To be sure, Microsoft is keenly interested in ensuring that the copyright laws are properly interpreted and applied to adequately protect intellectual property. At the same time, Microsoft firmly believes that, properly interpreted and applied,

the fair use doctrine must balance legitimate societal interests against the important interests that underlie copyright protection. Because of Microsoft's interest in ensuring that this balance is struck properly and reasonably, Microsoft submits this brief in support of the appellant's claim that *The Wind Done Gone* makes fair use of copyrighted material from appellee's work, *Gone With The Wind*.²

SUMMARY OF ARGUMENT

I. The overriding purpose of the copyright laws, as recognized in the Constitution, is "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors . . . the exclusive Right to their . . . writings." U.S. Const. art. I, § 8, cl. 8. As a creator of intellectual property, Microsoft strongly endorses this Constitutional mandate. However,

² In the unusual circumstances of this expedited appeal, Microsoft has not had the opportunity to conduct its own close comparison of the two books at issue here. Microsoft has, however, reviewed the court filings and transcripts in this litigation, which include all of the appellee's arguments against the publication of *The Wind Done Gone* and appellee's factual and expert declarations (which quote numerous excerpts from the book). On this basis, this brief assumes the following facts that were culled from those materials: (1) with the exception of the first and last sentences of *The Wind Done Gone*, it directly copies almost no literal expression from *Gone With The Wind*; (2) 15 characters from that book appear in somewhat altered form in *The Wind Done Gone*; and (3) *The Wind Done Gone* contains references to numerous scenes from *Gone With The Wind*. Microsoft was unable to find any evidence in the record, including attorney Beeber's charts, to support the district court's statement that "*The Wind Done Gone* continually appropriates direct quotes from *Gone With the Wind*." Order 15; see, e.g., Plaintiff's Memorandum in Support of Motion for Temporary Restraining Order and Preliminary (continued...)

the copyright laws have long recognized that there must be some opportunity for the fair use of copyrighted materials for purposes such as criticism, comment and similar uses, including parody especially when it is used for social or political purposes. Accordingly, the Supreme Court held in *Campbell v. Acuff-Rose, Music, Inc.*, 510 U.S. 569, 579 (1994), that a “work which adds something new, with a further purpose or different character, altering the [original work] with new expression, meaning, or message” is “transformative” and “lie[s] at the heart of the fair use doctrine’s guarantee of breathing space within the confines of copyright.”

These precepts directly apply in this case, particularly given the pervasive impact that *Gone With The Wind* has had upon the Nation’s perception of the Antebellum South and the radically different perspective offered by *The Wind Done Gone*. Indeed, few works in American literature have had the cultural impact of *Gone With The Wind*.

II. The district court’s failure to give adequate weight to the purpose and character of *The Wind Done Gone* led it to reject appellant’s fair use defense. As Alice Randall made clear, her objective was to debunk the “myth” of the Old South as rendered in Margaret Mitchell’s book because it

Injunction at 13 (suggesting that the first and last sentences of *Gone With The Wind* were the only instances of verbatim textual copying).

had become “more powerful than history, because it is better known than history.” Order 26-27. The district court failed adequately to appreciate this objective, instead repeatedly mischaracterizing *The Wind Done Gone* as a mere sequel.

Microsoft does not question that *Gone With The Wind* deserves the full protection of the copyright laws and that substantial copying of its characters or scenes for the purpose of creating a sequel clearly would infringe its copyright. But as Alice Randall and the declarants who support her have stated, she could not have achieved her objective of writing a searing critique of *Gone With The Wind* without using some of the scenes and characters from that book.

In dealing with the amount and substantiality of the work used, the district court mischaracterized Alice Randall’s purpose as being solely to correct the inaccurate portrayal of southern history contained in *Gone With The Wind*. Her objective of debunking the myth of *Gone With The Wind* through parody could only be achieved through use of characters and scenes from that book.

The district court’s erroneous conclusion that *The Wind Done Gone* would substantially affect the market value of the original, because others could then “tell the love story of *Gone With The Wind* from another

point of view,” Order 42, once again fails to give adequate weight to Alice Randall’s objective in writing her book. Viewed for what it is – not a love story, but instead an assault upon the negative stereotypes of African Americans portrayed in *Gone With The Wind* – the district court clearly erred in concluding that *The Wind Done Gone*’s fair use characteristics are “slight” or that it has significant “market substitution” potential “as a sequel.” Order 45.

ARGUMENT

I. The Right To Make Fair Use Of Copyrighted Material Is A Necessary Balance To Copyright Protection In The Context Of Political And Social Commentary, Criticism, And Debate.

The Constitution provides that the purpose of copyright law is “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.” U.S. Const. art. I, § 8, cl. 8. Section 106(2) of the Copyright Act accordingly gives the author of a copyrighted work the exclusive right to prepare derivative works. This exclusive right serves a critical role in encouraging and fostering creativity, and allowing copyright owners to reap returns on their work “not only from the market in which their work will first be published, but from other, derivative, markets as well.” II Paul Goldstein, *Copyright* § 5.3 (2001) (“Goldstein”).

However, the right to prepare derivative works is not absolute and, like the other exclusive rights set forth in Section 106, it must under limited circumstances yield to fair use. Indeed, “[f]rom the infancy of copyright protection, some opportunity for fair use of copyrighted materials has been thought necessary to fulfill copyright’s very purpose.” *Campbell*, 510 U.S. at 575; *see also, e.g.*, P. Leval, *Toward a Fair Use Standard*, 103 Harv. L. Rev. 1105, 1105 (1990) (“Leval”) (“Not long after the creation of the copyright by the Statute of Anne of 1709, courts recognized that certain instances of unauthorized reproduction of copyrighted material, first described as ‘fair abridgement,’ later ‘fair use,’ would not infringe the author’s rights”).

The fair use doctrine is codified in 17 U.S.C. § 107. That section provides that “the fair use of a copyrighted work . . . for purposes such as criticism, comment, news reporting, teaching . . . scholarship, or research, is not an infringement of copyright.” *Id.* The Act further provides that “[i]n 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 . . . ; (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.” *Id.* Courts must balance these factors in the context of copyright law’s utilitarian purpose.

The Copyright Act’s express reference to “criticism,” “comment,” and other specific types of uses recognizes that much intellectual activity requires the capacity to reference and in limited circumstances even incorporate portions of prior works. As Judge Leval observed in his influential article on fair use, which was relied on extensively by the Supreme Court in *Campbell*, “[p]hilosophy, criticism, history, and even the natural sciences require continuous reexamination of yesterday’s theses. Monopoly protection of intellectual property that impeded referential analysis and the development of new ideas out of old would strangle the creative process.” Leval 1109.

It is out of this concern with upholding the underlying objective of copyright that courts have permitted fair uses that stimulate intellectual activity, enrichment, or debate without excessively hampering incentives for creativity. *Id.* at 1110. Of particular relevance here, the Supreme Court has made it clear that a protected work may be copied for purposes such as criticism, comment or parody where the challenged work “adds something new, with a different purpose or different character, altering the first with new expression, meaning or message.” *Campbell*, 510 U.S. at 579.

“Transformative works” such as these “lie at the heart of the fair use doctrine’s guarantee of breathing space within the confines of copyright.” *Id.*

As the Supreme Court has also recognized, “[e]very book in literature, science, and art borrows, and must necessarily borrow, and use much which was well known and used before.” *Id.* at 575. Re-describing an artistic work in a new idiom is particularly powerful when the artistic work in question has a mythic quality that has shaped – and arguably distorted – a society’s image of its past. *See Leibovitz v. Paramount Pictures Corporation*, 137 F.3d 109, 115 n.3 (2d Cir. 1998) (“Because the social good is served by increasing the supply of criticism – and thus, potentially, of truth – creators of original works cannot be given the power to block the dissemination of critical derivative works.”); *see also New Era Publications International, APS v. Henry Holt and Company, Inc.*, 695 F.Supp. 1493, 1509 (S.D.N.Y. 1988) (literal quotation of passages from prior work constituted “fair use” because “the passages are quoted . . . to show the aggrandized, boastful, pretentious mythic idiom employed . . . [by the original author]”).

Similarly, there can be no dispute that “[p]arody has an obvious claim to transformative value” and “like other comment or criticism, may claim fair use under § 107.” *Campbell*, 510 U.S. at 579. As Professor Goldstein has observed, “[p]arody has long enjoyed a secure niche in the critical tradition,

from Aristophanes' parodies of Aeschylus and Euripides to current lampoons of popular cartoon characters. Courts generally recognize that parodies are 'deserving of substantial freedom – both as entertainment and as a form of social and literary criticism.'" II Goldstein § 10.2.1.2 (citations omitted). The Supreme Court in *Campbell* acknowledged that parody "can provide social benefit, by shedding light on an earlier work and, in the process, creating a new one." 510 U.S. at 579.

In addition, as with other forms of criticism and commentary,

parody is unlikely to be the subject of a license from the author of a serious work. Only by the recognition of a fair use defense is society likely to reap the benefit of this socially useful literary genre. Too, the function of the copyrighted work is not undermined by parody, as the owner will typically not exploit the potential market for skewering his own property.

4 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* §13-203

(2001) ("Nimmer") (citing Note, *The Parody Defense to Copyright*

Infringement: Productive Fair Use After Betamax, 97 Harv. L. Rev. 1395

(1984)); *see also Campbell*, 510 U.S. at 592 ("creators of imaginative works" are unlikely to license parodies).

II. The District Court Misunderstood The Significance Of Both The Copyrighted And The Challenged Work In This Case And Thereby Misapplied The Fair Use Standard.

Judge Leval succinctly sets forth the principles that both govern the disposition of this case and reveal the district court's error in denying fair use to *The Wind Done Gone*:

Does the use fulfill the objective of copyright law to stimulate creativity for public illumination? This question is vitally important to the fair use inquiry, and lies at the heart of the fair user's case.

[The] question of justification turns primarily on whether, and to what extent, the challenged use is *transformative*. The use must be productive and must employ the quoted material in a different manner or for a different purpose from the original If the quoted material is used as raw material, transformed in the creation of new information, new aesthetics, new insights and understandings – this is the very type of activity that the fair use doctrine intends to protect for the enrichment of society.

Leval 1111, *cited approvingly* in *Campbell*, 510 U.S. at 579.

Judge Leval went on to note that “[r]ecent judicial opinions have not sufficiently recognized [the] importance” of fair use to achieve the various objectives of the copyright law. Leval 1111. The district court's opinion in this case reveals that it made the same mistake.

A. The Purpose and Character of the Secondary Use.

The district court properly recognized that “parody, like any other comment or criticism, may claim fair use under 17 U.S.C. § 107,” and further that “[t]he critical question in analyzing the first factor is determining whether the secondary work is ‘transformative.’” Order 20 (quoting *Campbell*, 510 U.S. at 579-82); *see also* Order 21 (quoting *Campbell*, 510 U.S. at 579) (“[T]he question for the court is whether such a work ‘adds something new, with a further purpose or different character’”).

However, the district court’s own quotation of and response to Alice Randall’s explanation of the “new information, new aesthetics, new insights and understandings,” Leval 1111, that she was trying to achieve reveal the court’s misunderstanding of both the nature of the copyrighted work and of her interpretation of that work:

GWTW – the book, the movie, the costumes, the quips – has reached the status of myth in our culture. It is more powerful than history, because it is better known than history. Unfortunately, GWTW is an inaccurate portrait of southern history. It’s a South without miscegenation, without whippings, without families sold apart, without free blacks striving for their education, without Booker T. Washington and Frederick Douglass. GWTW depicts a South that never ever existed.

Order 26-27 (quoting a “Conversation with Alice Randall” at the end of her book).

The district court’s immediate response to Alice Randall – who the court never disputed on this point – reveals the error that affects most of its opinion:

Even a casual reading of *The Wind Done Gone* illustrates that Ms. Randall has succeeded in including all of these historical elements in her work. The issue, however, is that she does not simply add these historical facts **to a new story** but, rather, reintroduces these historical elements to an existing story, *Gone With The Wind*, and then retells that story with the same characters, plots and scenes, from the perspective of a person, Cynara, who could appreciate these historical elements.

Order 27 (emphasis added). On this basis, the district court concluded that *The Wind Done Gone* “seems to fit well within the definition of a sequel.” *Id.* See also Order 31 (“*The Wind Done Gone* achieves exactly what it bills itself as, a sequel to *Gone With The Wind* told from the perspective of Scarlett’s mulatto half-sister”); *id.* at 33 (“[T]he book’s overall purpose is to create a sequel to the older work and provide Ms. Randall’s social commentary on the antebellum South”).

The district court’s misperception that *The Wind Done Gone* is a “sequel” to *Gone With The Wind* and that Alice Randall should have expressed

her version of the historical facts about the old South in “a new story” simply ignores her un rebutted – and indeed self-evident – point that *Gone With The Wind* “has reached the status of myth in our culture,” and “[i]t is more powerful than history because it is better known than history.”³ As Alice Randall stated in her declaration that the district court quoted, “[i]f I had made only one or a few allusions, my literary critique would have been lost.” Randall Decl. Ex. 5 at ¶ 5(b), *quoted at* Order 28. *See also* Declaration of Dr. Sitter, R. Doc. 20-Ex. 3, p. 3 ¶ 5, *quoted at* Appellant’s Br. 33.

Of course, Alice Randall used the characters of *Gone With The Wind*, rather than write her own “new story,” because her stated objective was to debunk point-by-point the “myth” of the original and to expound her view of slavery and its aftermath – a subject of unsurpassing political, social, and constitutional importance throughout the Nation’s history – on the same platform that was used by Margaret Mitchell when she, through her novel, set forth a significantly different perspective on the same issues.⁴

³ The myth-like status of *Gone With The Wind* was conceded by plaintiff’s own expert, *see* Rubin Aff., R. Doc.-22 ex. C, p. 3 ¶ 8, and is highlighted by, *inter alia*, the enduring nature of the work’s most famous lines; the eight Academy Awards won by the film version of the book (including Best Picture, Best Director, Best Actress and Best Screenplay); and a U.S. Postal Service-issued stamp commemorating the work.

⁴ It bears noting that, as demonstrated by declarations appellant submitted below, Randall’s view is not hers alone but is shared by many others. *See, e.g.*, Declaration of Henry Louis Gates Jr. at ¶5 (“GWTW is widely regarded in the (continued...)”)

The Wind Done Gone – as its own title celebrating the end of slavery shows (See Appellant’s Br. at 12) – is no more a “sequel” to *Gone With The Wind* than 2 Live Crew’s rap version of “Pretty Woman” was a sequel to Roy Orbison’s song. In both instances – indeed, even more so in this case – radically different social and cultural perspectives were brought to the same material, making what appeared to be attractive in the original work unattractive in the accused’s work.⁵ Far from being sequels, both “instead add[ed] something new, with a further purpose or a different character, altering the first with new expression, meaning or message.” *Campbell*, 510 U.S. at 579, citing *Leval* at 1111.

The record shows that Alice Randall’s work is transformative in a way that goes to the heart of the fairness of her use. She appropriates elements

black community as one of the most racist depictions of slavery and black slaves in American literature.”); Declaration of Toni Morrison (“[W]hat [TWDG] does is imagine and occupy narrative spaces and silences never once touched upon . . . in [GWTW]: that is, the interior lives of slaves and ex-slaves, their alternate views, their different journey.”).

⁵ Just as 2 Live Crew’s rap song could “be taken as a comment on the naivete of the original [song] of an earlier day, as a rejection of its sentiment that ignores the ugliness of street life and the debasement that it signifies,” *Campbell*, 510 U.S. at 583, appellant’s declarations demonstrate that *The Wind Done Gone* is a comment on *Gone With The Wind* and its perspective that, in Randall’s view, ignored the ugliness of slavery and racism. See, e.g., Declaration of Henry Louis Gates Jr. at ¶7; Supplemental Declaration of John E. Sitter (reviewing in detail various specific parodic elements of *The Wind Done Gone*); Declaration of Barbara McCaskill (same); Declaration of Toni Morrison (*Gone With The Wind* “equated slaves with animals and cartoonized them” causing “pain, humiliation, and outrage”).

of Margaret Mitchell's work not to entertain as Mitchell's work entertains, but to create entertainment and interest out of Randall's biting critical perspective. The primary attraction to readers of *The Wind Done Gone* is the perspective of Alice Randall's voice, not the parroting of elements from the prior work. The intended effect of her transformation of the work is not to "avoid the drudgery" of creation of a work that interests readers, but to ground her original elements in a radically different portrayal of the prior work. *See Campbell*, 510 U.S. at 580.

B. Nature of the Copyrighted Work.

No one can take issue with the district court's finding that *Gone With The Wind* is "creative, imaginative, and written to gain a financial return for the author's efforts," nor that, *in general*, "it deserves more protection than a scholarly, historical, or newsworthy work." Order 37.

In connection with parodies of creative works, however, this factor in the fair use analysis typically recedes into insignificance because parodies are normally based upon and to some extent *must* utilize fictional works. *See* 4 Nimmer § 13.05 [C]. In this case, at the heart of Alice Randall's creation is the observation (apparently widely shared, according to the expert testimony, *see* Appellants Br. at 3-5), that Margaret Mitchell's work is itself perceived as an act of historical revisionism that is a "visceral affront" to "most

black Americans.” The very nature of *Gone With The Wind*, viewed in this light, compelled Alice Randall to use some of its characters and scenes for the parody that she sought to achieve.⁶

C. Amount and Substantiality of Work Used.

The district court began its discussion of this factor with a quotation that correctly frames the issue in this case with respect to the third factor to be considered under the fair use doctrine:

Parody presents a difficult case. Parody’s humor, or in any event its comment, necessarily springs from recognizable allusion to its object through distorted imitation. Its art lies in the tension between a known original and its parodic twin. When parody takes aim at a particular original work, the parody must be able to “conjure up” at least enough of that original to make the object of its critical wit recognizable Once enough has been taken to ensure identification, how much more is reasonable will depend, say, 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.

Order 38-39 (citing *Campbell*, 510 U.S. at 588).

⁶ In its briefing below, appellant suggested that some of the characters or scenes from *Gone With The Wind* are not entitled to any copyright protection. See, e.g., Defendant’s Response in Opposition to Motion for TRO and Preliminary Injunction at 11. Microsoft does not share in this view. See 1 Nimmer § 2.12 at 2-172.33 (“it is clearly the prevailing view that characters *per se* are entitled to copyright protection”). However, the issue here is (continued...)

Having correctly stated these principles, the district court then misapplied them to the facts of this case. It characterized Alice Randall's purpose as being merely "to shed light upon and correct the 'inaccurate portrayal of southern history' contained in *Gone With The Wind*," and thus concluded that she had used "too much copyrighted material in doing so." Order 39.

If Alice Randall's only purpose was to correct the "inaccurate portrait of southern history" set forth in Margaret Mitchell's book and in the movie based on that book, she could (and should) have written a work of non-fiction or a different novel, as many others now have.⁷ But as Alice Randall has explained, and appellee has not rebutted, her purpose was to take on the myth of *Gone With The Wind* on its own terms, and that simply cannot be done effectively without using characters and scenes from the book.⁸ The district court's conclusion that the "new creative elements [added] to the original

whether for the unique purposes of her book, Alice Randall could make fair use of these characters and scenes.

⁷ See, e.g., Order 29 n.14 (referring to such works).

⁸ The district court's quotation from *Campbell*, 510 U.S. at 587, Order 40, explaining that copying verbatim "may reveal a dearth of transformative character or purpose under the first factor, or a greater likelihood of market harm under the fourth" is even less applicable here (where appellee alleges little verbatim copying) than it was in that case where the Supreme Court reversed the appellate court's denial of fair use (and where inarguably the proportion of verbatim copying was greater).

story” by Alice Randall “only decorate [the original work] and do not develop something new except to form a sequel” reveals its failure properly to recognize the purpose behind Alice Randall’s novel.

D. The Effect of the Use on the Market Value of the Original.

The district court recognized that “this factor is arguably the most important of the four factors of the fair use doctrine.” Order 41; *see also Harper & Row v. Nation Enterprises*, 471 U.S. 539, 566 (1985) (recognizing that, indeed, it is “undoubtedly the single most important element of fair use”). However, having already described *The Wind Done Gone* as a “sequel” to *Gone With The Wind*, the court predictably marched to the conclusion that the market impact of *The Wind Done Gone* tipped decisively against the accused’s work. In addition to the errors described above in relegating the challenged work to “sequel” status, other aspects of this part of the court’s opinion show that it misconceived the nature of Alice Randall’s book.

For example, the Court noted that “if the defendant is permitted to publish *The Wind Done Gone*, . . . then anyone could tell the **love story** of *Gone With The Wind* from another point of view and/or create sequels or prequels populated by Ms. Mitchell’s copyrighted characters without compensation to the Mitchell trusts.” Order 42. This statement, standing alone, shows a misunderstanding of the fair use issues raised in the case. Of

course, the mere retelling of a copyrighted work from the perspective of another character would constitute infringement of the exclusive right to create a derivative work. A ruling that *The Wind Done Gone* is a parody offered for overriding political, social or cultural purposes protected by fair use would not, however, in any manner unleash a slew of unauthorized derivative works.⁹

It is apparent from the record that Alice Randall's objective here was **not** to tell "the love story of *Gone With The Wind* from another point of view." *The Wind Done Gone* is not a simple love story; it is an attempt, from her point of view, to debunk the myth created by the original book and to portray the stereotyped African Americans from the original work as full rounded characters who lived in, but emerged successfully from, the bonds of slavery.

This love story characterization of *The Wind Done Gone* by the district court led it to err in holding that the book damages or even precludes the appellee's "ability to continue to tell the love story of Scarlett and Rhett." To the extent there is any overlap in the readership of *The Wind Done Gone*

⁹ The district court's misperception was doubtless the result of appellee's oral argument below referring to works (the X-Files, Harry Potter, Superman, and James Bond) that might be retold from the perspective of a different character. Comparing *The Wind Done Gone* to a retelling of the X-Files from the perspective of an alien, Harry Potter from the perspective of the Muggles, Superman from the perspective of Lois Lane, or James Bond from the (continued...)

and potential sequels to *Gone With The Wind*, it seems unlikely that such readers will be unable to separate the parodic treatment of “Other” and “R” in *The Wind Done Gone* from the Scarlett and Rhett that they have come to know and want to read more about.

Finally, this love story approach ignores the parodic nature of *The Wind Done Gone* and thus sidesteps the Supreme Court’s recognition that there “is no derivative market for critical works, including parody.” *Campbell*, 510 U.S. at 592.

The penultimate paragraph of the district court’s discussion of the merits concludes that:

The parodic effect, however, is slight in comparison to the extensive copying. Accordingly, the Court finds that the market harm created by *The Wind Done Gone* is not due to the ‘effectiveness of critical commentary’ but rather to its ‘market substitution’ as a sequel.

Order 45. Viewed as only a “love story” this may be so. But viewed as it is described by Alice Randall and by world-renowned scholars and literary figures, Appellant’s Br. 3-14 – an assault upon the negative stereotypes of African Americans portrayed in *Gone With The Wind* – the district court erred

perspective of “Q” completely misses the critical significance of *The Wind Done Gone*, which is precisely what makes the work a fair use.

in concluding that *The Wind Done Gone*'s fair use characteristics are "slight" or that it has significant "market substitution" potential "as a sequel."

CONCLUSION

The Wind Done Gone should be held to be a fair use of *Gone With The Wind*, and the preliminary injunction entered by the district court should be vacated.

Respectfully submitted,



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CERTIFICATE OF COMPLIANCE

Undersigned counsel hereby certifies, relying on the word processing system word count, that the foregoing brief of amicus curiae Microsoft Corporation was prepared in 14-point type and contains 5240 words. It therefore meets the type of volume limitations set forth in FED. R. APP. P. 32(a)(7).


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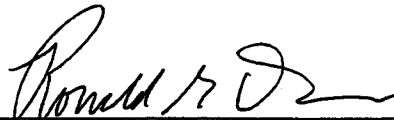
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