

DOCKET NO. 01-122-00-HH

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

-against-

HOUGHTON MIFFLIN COMPANY

Defendant-Appellant

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

BRIEF OF PEN AMERICAN CENTER, AMERICAN BOOKSELLERS
FOUNDATION FOR FREEDOM OF EXPRESSION, FREEDOM TO
READ FOUNDATION, WASHINGTON LAWYERS' FOR THE ARTS, THE
FIRST AMENDMENT PROJECT, AND THE NATIONAL COALITION
AGAINST CENSORSHIP, AS *AMICI CURIAE* IN SUPPORT OF APPELLANTS
SEEKING REVERSAL OF THE DECISION BELOW

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

The following is, to the best of *Amici's* knowledge, a complete list of the interested persons or entities required to be disclosed pursuant to FRAP 26.1 and 11th Cir.

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Preliminary Statement

This brief is submitted by PEN American Center, the American Booksellers Foundation for Free Expression, the Freedom to Read Foundation, Washington Area Lawyers for the Arts, The First Amendment Project, and the National Coalition Against Censorship as *amici curiae* in support of Appellants, seeking reversal of the decision below, which preliminarily enjoined publication of *The Wind Done Gone*. *Amici*, like many other observers of the current legal dispute (such as *The New York Times*, the *Washington Post* and *The Wall Street Journal* among others, see note 1 below), are extremely concerned about the implications of a federal court issuing a preliminary injunction blocking publication of a potentially significant work of fiction that comments on the evils of slavery. No matter how the ultimate issue of copyright infringement is decided, a federal court must be extremely leery about issuing an order that restrains the publication of a book, as opposed to some other item of commerce protected by the trademark or copyright laws. The Supreme Court held unanimously in *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578, n. 10 (1994) that if the fair use justification for copying a prior work is arguable or debatable or if the second user has raised “reasonable contentions of fair use” and “there may be a strong public interest in the publication of the secondary work,” a court should hesitate to grant an injunction. This is particularly true where “the copyright owner’s interest may be adequately protected by an award of damages for whatever infringement is found.”

We believe that this situation fits the *Campbell* rule exactly, there is a “strong public interest in the publication of the secondary work,” and that plaintiff’s interests will

be adequately protected by an award of damages. For those reasons, we believe that the order granting the injunction should be reversed.

INTEREST OF THE AMICI AND AUTHORITY TO FILE

Pursuant to the provisions of FRAP 29(a), *Amici* certify that all parties to this appeal have consented to the filing of this brief.

PEN American Center (PEN) is an organization of over 2,500 novelists, poets, essayists, translators, playwrights, and editors. As part of international PEN, it and its affiliated organizations are chartered to defend free and open communication within all nations and internationally. American PEN has taken a leading role in attacking rules that limit freedom of expression in this country.

The American Booksellers Foundation for Free Expression (ABFFE) was organized as a not-for-profit organization by the American Booksellers Association in 1990 to inform and educate booksellers, other members of the book industry, and the public about the danger of censorship and to promote and protect the free expression of ideas, particularly freedom in the choice of reading materials. ABFFE has over 600 member bookstores, primarily in the United States.

The Freedom to Read Foundation (FTRF) was established in 1969 by the American Library Association to promote and defend First Amendment rights, support the rights of libraries to include in their collections and make available to the public any work they may legally acquire, and help shape legal precedent for the freedom to read on behalf of all citizens.

Washington Area Lawyers for the Arts (WALA), founded in 1983, provides legal support and legal education for the creative and cultural efforts of individuals and

institutions. WALA includes authors and scholars among a broad constituency with an interest in preserving First Amendment rights. As a major provider of legal services to low-income persons, WALA has a special interest in guarding against over-broad enforcement of proprietary claims against emerging and innovative expression.

The First Amendment Project (FAP) is a nonprofit, public interest law firm and advocacy organization dedicated to protecting and promoting freedom of information, expression, and petition. FAP provides advice, educational materials, and legal representation to its core constituency of activists, journalists, and artists in service of these fundamental liberties. Central to FAP's mission is ensuring that the First Amendment right to publish is preserved to its fullest and that courts continue to reject requests to restrain publication short of a full and final legal examination.

The National Coalition Against Censorship (NCAC) is an alliance of fifty-one national nonprofit organizations, including religious, educational, professional, artistic, labor and civil rights groups. United by a conviction that freedoms of thought, inquiry and expression are indispensable to a healthy democracy, they work to educate their members and the public about the dangers of censorship and how to oppose it. The positions advocated by NCAC in this brief do not necessarily reflect the positions of each of its participating organizations.

Amici submit this brief to emphasize the First Amendment protection accorded to, and the consequent significant public interest in, transformative works such as parodies or other works that comment on or criticize earlier works. We take no stand on the issue of any alleged copying involved in this case or whether damages may be awarded at a

later time, but wish to present our views only on the propriety of issuing the preliminary injunction.

INTRODUCTION AND SUMMARY OF ARGUMENT

This decision below has raised considerable concern around the country about the danger to First Amendment interests by the issuance of the injunction against a work intended as criticism and comment on slavery. *Time Magazine*, *The New York Times*, *Newsday*, the *Washington Post*, the *Los Angeles Times* and many other publications around the country have condemned the decision as dangerous to free expression.¹ The

¹ “*The Wind Done Gone* deserves a better fate than suppression. The notion that this slim, intense book will deplete the reservoir of readers being served periodic sequels by the Mitchell estate seems ludicrous.” *Time*, May 7, 2001, p. 74; “The book you cannot read is fictional commentary, at times clever, at times obvious, at times arresting, at time flat, but always pointed like a cannon at the original. . . . If the right to make a mockery is not protected [in the 11th Circuit] than neither is any critical essay or political satire.” Ellen Goodman, “You should Be Able to Read Spoofs,” *Newsday*, May 6, 2001, p. B6; “Now . . . people who care about freedom of expression and First Amendment rights frankly do give a damn,” Michiko Kakutani, “Within Its Genre, A Takeoff on Tara Groves for Place,” *The New York Times*, May 5, 2001, p. B5; “Most Americans do not realize how far we have come toward a regime in which history, myth and contested social visions can be appropriated as entertainment and then protected as property. The resulting chill on creativity leaves us all poorer. . . . [T]here must be something disturbing to any writer in realizing that prior restraints on publication now depend on the literary taste of federal judges.” Garrett Epps, “Room for Creativity is ‘Gone with the Wind,’” *Los Angeles Times*, May 2, 2001, p. 6, Part 2; “Who knows whether it is good literature? In this country that is supposed to be a decision of critics, publishers and book buyers -- not judges. The appeals court should let *The Wind* go, straight to the bookstores.” Editorial, “Wind suppression,” *Courier-Journal* (Louisville, Ky). May 1, 2001, p. 8a; “This could turn out to be an important test case. In an era when media conglomerates control the rights to vast amounts of intellectual property, routine elevation of copyright to a right of censorship could easily squelch active debate and criticism of important ideas.” Editorial, “Gone with The First Amendment,” *The New York Times*, May 1, 2001, p. A22; “In *The Wind Done Gone*, Randall uses a mixture of contempt and laughter to ease the hurt caused by Mitchell’s book. Her fine work should not be censored.” DeWayne Wickham, “[Citizen] Kane’ would love this ruling,” *USA Today*, May 1, 2001, p. 15A; “The testimony of those who have read the ‘parody’ indicates that Randall allows the slaves in Mitchell’s little universe to have revenge upon their white masters and oppressors. . . . [It]

Court below mechanically applied the so-called normal or default rule that where a prima facie showing of copyright infringement is made, irreparable injury is presumed and a preliminary injunction should issue. “Generally, once a plaintiff has made out a prima facie showing of infringement, irreparable harm may be presumed.” Order 4/19/01, at 46. But the Supreme Court has added another requirement when arguable works of parody, comment or criticism are involved. The Court below improperly applied the *Campbell* test in this case.

The question here is not whether the work at issue can be unequivocally called a parody. This important case cannot be decided by labels. Certainly members of the literary community have called it a parody, as shown by the editorial comments in note 1 above and by the many distinguished authors and critics who submitted declarations below. The real issue is whether the book contains sufficient comment and criticism to be entitled to the added protection against an injunction required by the Supreme Court. On that issue, there can be no doubt.

The Supreme Court’s ruling in *Campbell* fully established a proposition long recognized by the courts and the commentators: that there is a tension between the First Amendment and the so called “automatic” requirement that an injunction issue against a

does not seem unreasonable to ask whether this, as much as profits and copyright infringement, is what really troubles the agents of the Mitchell estate.” Jonathan Yardley, “The Book Done Gone,” *The Washington Post*, April 30, 2001, p. C2; “The real infringement here is not on copyright, but on the sacrosanct image of the Old South and ‘The Cause,’” Greg Langley, “*Wind Done Gone* a Poke in the Eye for Southern Apologists,” *Sunday Advocate*, (Baton Rouge, LA.) April 29, 2001, p. 23, Mag; “In a democratic society, [Alice Randall] was justified in setting such a goal [to write a novel full of pain transcended by black humor]. History confirms political parody has such power potential. That’s why suppression of her book is so appalling.” Stebbins Jefferson, “Old South Won’t Go Hungry Again,” *The Palm Beach Post*, April 28, 2001, p. 14A.

book or other publication when a prima facie showing of copyright infringement is made. There can be no doubt in this case that the work at issue contains criticism and comment protected by the First Amendment. Under the *Campbell* rule, no injunction should have issued.

ARGUMENT

I. WORKS OF COMMENT AND CRITICISM, SUCH AS PARODY, ARE PROTECTED BY THE FIRST AMENDMENT

This case does not turn on whether *The Wind Done Gone* is technically a parody. The Court below found that it contained parodic elements. “Ms. Randall has offered her vision of how to answer those unanswered questions [about slavery], albeit with a partially parodic purpose in mind.” Order at 48. “Thus, the court finds that *The Wind Done Gone* contains transformative parody that criticizes the earlier work and the antebellum South in general.” (order at 34). Later the court commented: “*The Wind Done Gone* in part criticizes and satirizes *Gone With the Wind* and is partly transformative (*Id.* at 50).

Newspaper commentary about the book certainly has applied the parody label to the work, see note 1 above, as did the writers who submitted declarations below. But the issue of “parody” is simply part of a larger question that the courts must ask: does the work contain a serious effort to comment upon and criticize an earlier book? If so, then the new *Campbell* rule must apply.

It is certainly true that parody is a unique and time-honored literary genre involving the transformative use of existing material in order to create a new work that, at least in part, comments on the existing work. See *Campbell v. Acuff-Rose Music, Inc.*,

510 U.S. 569, 580 (1994). As the Court noted in *Campbell*, parody “needs to mimic an original to make its point, and so has some claim to use the creation of its victim’s . . . imagination.” 510 U.S. at 580-81. In doing so, “it can provide social benefit, by shedding light on an earlier work, and, in the process, creating a new one.” Parody’s status among the illustrative fair uses reflects recognition of “the broad scope permitted parody in First Amendment law.” *Groucho Marx Prod., Inc. v. Day and Night Co.*, 689 F.2d 317, 319 n.2 (2d Cir. 1980).²

However, the Supreme Court noted in *Campbell* that the principle established in that case does not depend on whether the second work technically qualifies as a parody.

Writing for an unanimous Court, Justice Souter noted:

Because the fair use enquiry often requires close questions of judgment as to the extent of permissible borrowing in cases *involving parodies (or other critical works)*, courts may also wish to bear in mind that the goals of the copyright law, “to stimulate the creation and publication of edifying matter,” Leval [Toward a Fair Use Standard, 103 *Harv.L.Rev.* 1105 (1990)] 1134, are not always best served by automatically granting injunctive relief when parodists are found to have gone beyond the bounds of fair use. 510 U.S. at 578, n. 10 (emphasis added)

Justice Souter noted that the question of whether the 2-Live Crew version of “Pretty Woman” was a parody was not obvious and that the question of how much can be taken in a work that targets an earlier work does not lend itself to a bright-line test. In words that clearly apply to the present case, the Supreme Court stated:

² See also *Berlin v. E.C. Publications, Inc.*, 329 F.2d 541, 545 (2d Cir.), *cert. denied*, 379 U.S. 822 (1964) (“parody and satire *are* deserving of substantial freedom – both as entertainment and as a form of social and literary criticism”) (emphasis in original); *Cardtoons, L.C. v. Major League Baseball Players Ass’n*, 95 F.3d 959, 976 (10th Cir. 1996) (finding parody baseball cards “an important form of entertainment and social commentary that deserve First Amendment protection”).

A parody that more loosely targets an original than the parody presented here may still be sufficiently aimed at an original work to come within our analysis of parody. . . . [W]hen there is little or no risk of market substitution, whether because of the large extent of transformation of the earlier work, the new work's minimal distribution in the market, the small extent to which it borrows from an original, or other factors, taking parodic aim at an original is a less critical factor in the analysis, and looser forms of parody may be found to be fair use, as may satire with lesser justification for the borrowing than would otherwise be required. 510 U.S. at 581, n. 14.

More important, courts should be very reluctant to make literary judgments of the type made below that question the choices made by the author. Judge Pannell commented: "The new work's use of copyrighted materials from *Gone With the Wind* goes well beyond *that which is necessary to create a parody* and, thus, makes excessive use of the original work." Order at 50 (emphasis added). The Supreme Court expressed concern about a court deciding that the author's purpose could have been accomplished in another literary manner than that chosen by the writer, as the court did below. See Order at 28-29: "This analogy, however, keenly illustrates the difference between parodying the antebellum South by providing a more accurate, non-copyrighted, and historical narrative and using copyrighted material to do so." While the author could have attacked slavery without reference to *Gone With the Wind*, that was not the book that she wished to write. The Supreme Court noted in *Campbell*:

The threshold question when fair use is raised in defense of parody is whether a parodic character may reasonably be perceived. Whether, going beyond that, parody is in good taste or bad does not and should not matter to fair use. As Justice Holmes explained, "[i]t 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." *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251, 23 S.Ct. 298, 300, 47 L.Ed. 460 (1903) (circus posters have copyright protection); cf. *Yankee Publishing Inc. v. News America Publishing, Inc.*, 809

F.Supp. 267, 280 (SDNY 1992) (Leval, J.) (“First Amendment protections do not apply only to those who speak clearly, whose jokes are funny, and whose parodies succeed”) (trademark case). 510 U.S. at 582-83.

The Court then went on to note: “While we might not assign a high rank to the parodic element here, we think it fair to say that 2 Live Crew's song reasonably could be perceived as commenting on the original or criticizing it, to some degree.” 510 U.S. at 583.

Exactly the same judgment must be made here. There is no doubt that *The Wind Done Gone* “could reasonably be perceived as commenting on the original or criticizing it, to some degree.” That is all that is required to invoke the *Campbell* limitation on injunctive relief.

In any event, the copyright statute specifically identifies “criticism” and “comment” among the illustrative examples of fair use. See 17 U.S.C. § 107. While parody is one form of such criticism and comment, it is not the only kind. And many other literary devices may “transform” an earlier work by presenting a new work “a further purpose or different character, altering the first with new expression, meaning, or message,” as the Court said in *Campbell*, 510 U.S. at 579. The Nobel-prize winning novelist, Toni Morrison, explained the critical contribution made in the work at issue: “*The Wind Done Gone* neither ‘follows’ nor copies, nor exploits *Gone With the Wind*. What Miss Randall’s book does is imagine and occupy narrative spaces and silences never once touched upon nor conceived of in Mrs. Mitchell’s novel: that is the interior lives of slaves and ex-slaves, their alternate views; their different journey.” Declaration of Toni Morrison, dated April 15, 2001, p. 2.

Under the standard noted in *Campbell*, the work contains enough comment or criticism to place it within a protected zone of the First Amendment protection. That is, a court cannot “automatically grant[] injunctive relief [even] when parodists are found to have gone beyond the bounds of fair use.” The First Amendment requires that Ms. Randall’s alternate view of the slave-holding plantation system be made available for the world to read, and this is true even if a court later determines that the author and publisher exceeded the limits of fair use and must therefore pay damages to the Mitchell estate.

II. A PRELIMINARY INJUNCTION SHOULD NOT HAVE ISSUED IN THIS CASE

The court below granted a preliminary injunction to prevent publication of *The Wind Done Gone* in advance of a final adjudication on the merits. Although a preliminary injunction may be appropriate in a garden-variety case of copyright piracy, it is not appropriate where the record presents a reasonable basis for concluding that the allegedly infringing work contains comment and criticism that may be entitled to protection as a fair use.

There has been considerable debate whether a preliminary injunction should issue as a matter of course in a copyright infringement case, even when a second work uses an earlier work for comment.³ At least four distinguished federal Circuit judges have

³ See Mark A. Lemley and Eugene Volokh, “Freedom of Speech and Injunctions in Intellectual Property Cases,” 48 *Duke L.J.* 147 (1998); Tiffany D. Trunko, “Remedies for Copyright Infringement: Respecting the First Amendment,” 80 *Colum. L. Rev.* 1940 (1989); Paul Goldstein, “Copyright and the First Amendment,” 70 *Colum. L. Rev.* 983, 1030 (1970) (“[A]n award of damages should be preferred to the injunction relief remedy.”)

written on the subject, all of them criticizing the “automatic” rule noted above and suggesting that First Amendment considerations must be taken into account when an injunction is sought in a copyright infringement case.⁴ Indeed, the Supreme Court in *Campbell* quoted and adopted the rule suggested by Judge Leval in his article, “Toward a Fair Use Standard,” 103 *Harv. L. Rev.* 1105, 1132 (1990)). See *Campbell*, 510 U.S. at 578, n. 10:

[C]ourts may also wish to bear in mind that the goals of the copyright law, “to stimulate the creation and publication of edifying matter,” Leval 1134, are not always best served by automatically granting injunctive relief when parodists are found to have gone beyond the bounds of fair use. . . . Leval 1132 (while in the “vast majority of cases, [an injunctive] remedy is justified because most infringements are simple piracy,” such cases are “worlds apart from many of those raising reasonable contentions of fair use” where “there may be a strong public interest in the publication of the secondary work [and] the copyright owner’s interest may be adequately protected by an award of damages for whatever infringement is found”)

There is no doubt that the grant of a preliminary injunction restraining the publication of a book, before a full determination of the merits of the dispute, must be analyzed as a prior restraint, the most serious infringement of First Amendment rights: “[C]opyright law is a speech restriction. Accordingly, injunctions against distributing a supposedly infringing work are injunctions restraining speech; and preliminary

⁴ Pierre Leval, “Fair Use or Foul,” 36 *J. Copyright Soc.* 167, 179-80 (1989); James L. Oakes, “Copyrights and Copyremedies: Unfair Use and Injunctions,” 18 *Hofstra L. Rev.* 983, 995-96, 1001 (1990): “The question is whether the public interest in the dissemination of knowledge is taken into account at all in determining whether an injunction should issue”; Richard A. Posner, “When is Parody Fair Use,” 21 *J. Legal Studies* 67, 71 (1992); Alex Kozinski and Christopher Newman, “What’s So Fair About Fair Use,” 46 *J. Copyright Soc.* 513, 529 (1999): “So long as [the copyright owner’s] right to share in the profits of derivative uses is enforced [through payment of a license fee], I suspect that copyright holders would actually be better off in a system where everyone was allowed to exploit the work.”

injunctions restraining speech are generally considered unconstitutional ‘prior restraints.’” See Mark A. Lemley and Eugene Volokh, “Freedom of Speech and Injunctions in Intellectual Property Cases,” 48 *Duke L.J.* 147, 169 (1998)

The danger of issuing preliminary injunctions in copyright cases has been noted in many cases. Courts mindful of First Amendment interests are reluctant to grant preliminary injunctions against publication. In *Rosemont Enterprises, Inc. v. Random House, Inc.*, 366 F.2d 303, 311 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967), the Second Circuit, ruling on a motion for a preliminary injunction against publication of an allegedly infringing biography of Howard Hughes, stated:

The normal reluctance to impose a summary restraint in advance of a full and complete trial is particularly acute in a case such as this which deals with the publication of a book. Before the court will intrude into an area fraught with sensitivity in its possible impingement upon fundamental democratic and intellectual institutions, it will require a showing by the movant of a right, both legal and factual, in most unequivocal terms.

The *Rosemont* court noted that its “reluctance to . . . intervene and condemn in this manner and at this stage of the action is heightened by the realization that we are dealing with a book and not with an ordinary subject of commerce.” 366 F.2d at 311 (citation omitted). See also *Belushi v. Woodward*, 598 F. Supp. 36, 37 (D.D.C. 1984) (refusing to enjoin publication of allegedly infringing biography of John Belushi notwithstanding plaintiff’s showing of a likelihood of success on the merits, noting competing public interest in “the promotion of free expression and robust debate”); *Religious Technology Center v. Lerma*, 897 F. Supp. 260, 267 (E.D. Va. 1995) (“the public interest and the constitutional presumption against prior restraint weigh heavily against the plaintiff”). Cf. *Greenberg v. National Geographic Soc’y*, No. 00-10510, 2001

WL 280075 (11th Cir. Mar. 22, 2001) (urging trial court, on remand, to consider alternatives to injunctive relief, such as mandatory licensing fees, despite finding CD-ROM product infringing, so as not to foreclose public access to an “educational and entertaining work”).⁵ The Supreme Court in *Campbell* cited the holding in *Abend v. MCA, Inc.*, 863 F.2d 1465, 1479 (CA9 1988) (finding “special circumstances” that would cause “great injustice” to defendants and “public injury” were injunction to issue), *aff’d sub nom. Stewart v. Abend*, 495 U.S. 207, 110 S.Ct. 1750, 109 L.Ed.2d 184 (1990).

The reason for this reluctance is obvious. Before a full trial is held and all the evidence has been submitted, it is not clear that a work protected by the First Amendment, such as a book, will be held to infringe a plaintiff’s copyright. Given the loose standard used to justify preliminary injunctions, a court should be very concerned about imposing a prior restraint, the most serious violation of the First Amendment, based on the limited evidence before it and based on the looser standard required to obtain a preliminary injunction.

Traditional subsequent punishments, such as civil or criminal liability, punish speech only when, at the end of the trial, the speech is found to be constitutionally unprotected. But judicial or administrative preliminary restraints are actually more restrictive because while they are in force they restrain even speech that may ultimately prove to be protected. In addition, since preliminary injunctions are often easier to get than final determinations on the merits and are granted based

⁵ Similar First Amendment considerations come into play with respect to Lanham Act claims involving works of parody. *See Cliff Notes, Inc. v. Bantam Doubleday Dell Publishing Group, Inc.*, 886 F.2d 490, 494, 495 (2d Cir. 1989) (“in deciding the reach of the Lanham Act in any case where an expressive work is alleged to infringe a trademark, it is appropriate to weigh the public interest in free expression against the public interest in avoiding consumer confusion”; a balancing approach to assessing consumer confusion “allows greater latitude for works such as parodies, in which expression, and not commercial exploitation of another’s trademark, is the primary intent, and in which there is a need to evoke the original work being parodied”).

on less evidence and less deliberation, the danger that the court will get it wrong and mistakenly restrict protected speech is even greater.

Mark A. Lemley and Eugene Volokh, "Freedom of Speech and Injunctions in Intellectual Property Cases," 48 *Duke L.J.* 147, 176 (1998).

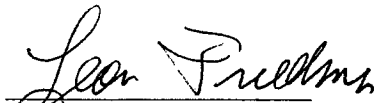
As alluded to above, preliminary injunctive relief is inappropriate where damages will adequately remedy any harm that may ultimately be found attributable to infringing publication. See *Rosemont*, 366 F.2d at 311 ("if upon the trial infringement to any extent were to be established, there seems to be no dispute that Random House would be able to respond to such damages as might be found); *Belushi*, 598 F. Supp. at 37 ("it appears that legal remedies would vindicate any rights that may have been impinged").

This case presents the question of whether *The Wind Done Gone* is a work of piracy or a work of serious comment and criticism. Given the solicitude of the First Amendment and copyright law itself for works of social criticism and commentary, the Court below should have refrained from enjoining publication of *The Wind Done Gone* prior to a final determination that it infringes *Gone With the Wind* rather than risk abridging defendant's First Amendment rights.

CONCLUSION

Amici, as leading members of the community of the book, respectfully urge this Court to accord proper weight to the First Amendment interests implicated by this case and reverse the grant of a preliminary injunction.

Respectfully submitted,


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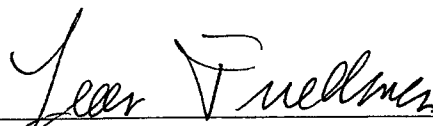
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Arts, The First Amendment Project and the
National Coalition Against Censorship.

May 9, 2001

CERTIFICATE OF COMPLIANCE WITH FRAP 32(a)(7)

Pursuant to FRAP 32(a)(7), I hereby certify that the foregoing brief, not including the Corporate Disclosure Statement, Table of Contents, Table of Authorities, contains 3,636 words.

A handwritten signature in cursive script that reads "Leon Friedman". The signature is written in black ink and is positioned above a horizontal line.

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CERTIFICATE OF FILING AND SERVICE


This is to certify that I have this day filed one (1) original and six (6) true and correct copies of the forgoing BRIEF OF PEN AMERICAN CENTER, AMERICAN BOOKSELLERS FOUNDTION FOR FREEDOM OF EXPRESSION, FREEDOM TO READ COMMITTEE, WASHINGTON LAWYERS FOR THE ARTS, AND THE FIRST AMENDMENT PROJECT by sending the same via Federal Express to the Clerk of the Court, United States Court of Appeals for the Eleventh Circuit, 56 Forsyth Street, N.W, Atlanta, Ga. 30303.

This is to further certify that I have this day served two (2) true and correct copies of the foregoing document via Federal Express overnight delivery addressed to:

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This 9th day of May, 2001.



Leon Friedman