


APR 12 2001

LUTHER D. THOMAS, Clerk

By:  Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

SUNTRUST BANK as Trustee of)
the Stephens Mitchell trusts f/b/o Eugene)
Muse Mitchell and Joseph Reynolds Mitchell)
Plaintiff,)
v.)
HOUGHTON MIFFLIN COMPANY,)
Defendant.)

Civil Action File No.
1:01 CV-701-CAP

**DEFENDANT HOUGHTON-MIFFLIN CO.'S SUPPLEMENTAL
MEMORANDUM IN OPPOSITION TO PLAINTIFF'S
MOTION FOR A TEMPORARY RESTRAINING ORDER AND
PRELIMINARY INJUNCTION**

Defendant Houghton Mifflin Company ("Defendant") respectfully submits this supplemental memorandum of law in opposition to Plaintiff's motion for a temporary restraining order and a preliminary injunction:

I. *The Wind Done Gone* Is an Explosive and Timely Political Parody and Satire, Aimed at Countering the Offensive Racial Stereotypes in *Gone With the Wind*, And It Deserves Strong First Amendment Protection.

This case has struck a nerve. The intense public interest is itself recognition that now is the time for the political and cultural critique that *The Wind Done Gone* represents.

The impoundment and physical destruction of all existing copies of this book is Plaintiff's stated goal. Compl. at ¶ G, p. 20. If this Court grants an injunction impounding this book and prohibiting, under penalty of criminal contempt, Defendant from publishing *The Wind Done Gone*, even if only for the months (or years) it may take to resolve this case, this especially ripe moment in time may be forever lost. Defendant and Alice Randall will

have been deprived of their constitutional right to express an important political and social message to the public; and the public will have been deprived of its constitutional right to hear that message.

A. *The Wind Done Gone's Political Message*

Alice Randall describes her reason for writing *The Wind Done Gone* as a parody of *Gone With the Wind* as follows:

I made *Gone With the Wind* the target of my parody because that book, more than any other work I know, has presented and helped perpetuate an image of the South that I, as an African-American woman living in the South, felt compelled to comment upon and criticize. It is an image of a world in which black people are buffoonish, lazy, drunk, and physically disgusting, and in which they are routinely compared to "apes," "gorillas," and "naked savages."

Randall Decl. at ¶ 2.

People who only have seen the film version of *Gone With the Wind* do not know that many passages in the written novel are **shockingly racist by any standard**; and many who have read the novel have forgotten or overlooked those passages, captivated by the romantic soap-opera unfolding on the pages of the book. The following is only a sampling of the scores of examples of such offensive passages in the novel:¹

"How **stupid negroes** were! They never thought of anything unless they were told. And the Yankees wanted to free them." (p. 409)

"The faint **niggery smell** which crept from the cabin increased her nausea and, without strength to combat it, she kept on retching miserably while the cabins and trees revolved swiftly around her." (p. 427)

"Time and again, Ellen had said: '**Be firm but be gentle with inferiors, especially darkies.**' But if she was gentle the darkies would sit in the kitchen all day, talking endlessly about the good old days when a house nigger wasn't supposed to do a field hand's work." (p. 432).

¹ A fuller, but by no means exhaustive, list, is attached as Exhibit A to the Declaration of Alice Randall.

“Negroes were provoking sometimes and **stupid and lazy**, but there was loyalty in them that money couldn’t buy, a feeling of oneness with their white folks which made them risk their lives to keep food on the table.” – (p. 472).

“‘Always remember, dear,’ Ellen had said, ‘you are responsible for the moral as well as the physical welfare of the darkies God has intrusted to your care. You must realize that they are **like children** and must be guarded from themselves like children, and you must always set them a good example.’” (pp. 472-73).

“The negroes she passed turned insolent grins at her and laughed among themselves as she hurried by, slipping and sliding in the mud, stopping, panting to replace her slippers. How dared they laugh, the **black apes!** How dared they grin at her, Scarlett O’Hara of Tara! She’d like to have them all whipped until the blood ran down their backs. What devils the Yankees were to set them free, free to jeer at white people!” (p. 589).

“‘Free darkies are certainly worthless,’ Scarlett agreed, completely ignoring his hint that she should sell. ‘Mr. Johnson says he never knows when he comes to work in the morning whether he’ll have a full crew or not. You just can’t depend on the darkies any more. They work a day or two and then lay off till they’ve spent their wages, and the whole crew is like as not to quit overnight. The more I see of **emancipation** the more criminal I think it is. It’s **just ruined the darkies**. Thousand of them aren’t working at all and the ones we can get to work at the mill are so lazy and shiftless they aren’t worth having.’” -- pg. 639.

“[T]he former field hands found themselves suddenly elevated to the seats of the mighty. There they conducted themselves as **creatures of small intelligence** might naturally be expected to do. **Like monkeys** or small children turned loose among treasured objects whose value is beyond their comprehension, they ran wild -- either from perverse pleasure in destruction or simply because of their ignorance.” -- pg. 654.

“Here was the astonishing spectacle of half a nation attempting, at the point of bayonet, to force upon the other half the rule of negroes, many of them **scarcely one generation out of the African jungles**.” -- pg. 656.

“These negroes sat in the legislature where they spent most of their time **eating goobers** and easing their unaccustomed feet into and out of new shoes.” -- pg. 904.

Many Americans have overlooked these passages that have long caused anguish for African-Americans. As Harvard University Professor Henry Louis Gates, Jr. testifies:

Gone With the Wind – especially in its book form – is widely regarded in the black community as one of the most racist depictions of slavery and black slaves in American literature.

Gates Decl. at ¶ 5. As the author, Alice Randall herself states:

In *Gone with the Wind* ... Jeems is a very minor character, and is described as follows: “Jeems was their [the Tarleton twins’] body servant and, like the dogs, accompanied them everywhere. He had been their childhood playmate and had been given to the twins for their own on their tenth birthday.” In *The Wind Done Gone*, Jeems is included in my novel not “in order to give more color and detail” to my book as the Mitchell Trust has asserted, but because I wanted to evoke and comment on what is perhaps the single most repellent paragraph in Margaret Mitchell’s novel: a black child is given to two white children as a birthday present, and the incident is treated in a perfectly matter-of-fact manner, as if the buying and selling of children had no moral significance.

The effect of the passages above and others like them are exacerbated by the fact that *Gone With the Wind*’s portrayal of African-American characters generally consists of crude and, to some, offensive stereotypes that, in the minds of some, have been perpetuated to the present. Sitter Decl. at ¶ 10. These portrayals “continue to impact contemporary American culture and media,” McCaskill Decl. at ¶ 7, and their impact “has taken decades for black authors to overcome.” Gates Decl. at ¶ 6.

Margaret Mitchell had an undoubted First Amendment right to create and publish these portrayals. Defendant respectfully submits that it has a First Amendment right to “fight back,” in the words of Professor Henry Louis Gates. Gates Decl. At ¶ 4. The overriding intent of *The Wind Done Gone* is to parody the racial attitudes that *Gone With the Wind* portrays and advances. Thus, the book is fundamentally “a political response to *Gone With the Wind*.” McCaskill Decl. at ¶ 10, 12. Alice Randall, the book’s author, had this intent to

parody before she began writing her book, Mueller Decl. at ¶ 13, Randall Decl. at ¶ 2, and her intent pervades every aspect of *The Wind Done Gone*. Sitter Decl. at ¶ 7. *Gone With the Wind* is not only a proper subject of parody; it demands ridicule root and branch.

Faced both with *Gone With the Wind*'s hurtful portrayal of African-Americans, and with the cultural impact that portrayal has had, *The Wind Done Gone* does "fight back," transforming pain into humor and insight. *The Wind Done Gone* accomplishes this through parody. As Professor Gates attests, "African Americans have used parody since slavery to 'fight back' against their masters." Gates Decl. at ¶ 4. Professor Gates explains further that

parody is at the heart of African American expression, because it is a creative mechanism for the exercise of political speech, sentiment, and commentary on the part of people who feel themselves oppressed or maligned and wish to protest that condition of oppression or misrepresentation.

Gates Decl. at ¶ 2. In sum, *The Wind Done Gone*, like many great parodies, is a work of protest and of political fiction. This Court should not forbid Defendant from publishing it.

B. The First Amendment Factors Into the Court's Analysis of This Case in Several Ways

Plaintiff asserts that the First Amendment is "a red herring." March 29 Hearing Transcript (hereinafter "Tr.") at 79. In fact, established precedent demonstrates that the First Amendment must inform this Court's analysis of each major issue in this case. The First Amendment is relevant to this Court's analysis in at least three ways. First, for this Court to enjoin publication of *The Wind Done Gone* would be the very definition of a prior restraint,² which comes to any reviewing court under the weight of a "strong presumption against its constitutional validity." New York Times Co. v. U.S., 403 U.S. 713, 91 S. Ct. 2140 (1971).

² "A system of 'prior restraint' is any scheme which gives public officials the power to deny use of a forum in advance of its actual expression." Black's Law Dictionary (6th Ed. 1990).

Secondly, the Court's copyright fair use analysis must adequately reflect the heightened First Amendment importance of *The Wind Done Gone*'s brand of political and social commentary. And finally, enjoining the publication of this book would disserve the public interest – thereby turning the critical public interest factor for injunctive relief sharply against Plaintiff – and irreparably harm both Defendant and Alice Randall, by barring the message of *The Wind Done Gone* from being spoken at this especially ripe moment in American history.

A Brief History of Prior Restraint

The United States, unique in the world, simply and straightforwardly prohibits laws abridging the freedom of speech or of the press. (“Congress shall make no law abridging the freedom of speech or the press.” U.S. Const., amend I). While there continues to be debate as to the more dynamic interpretations of the First Amendment, **no one** today seriously questions that the prohibition against prior restraint is virtually absolute.³

American antipathy to prior restraint grew out of the English experience with the “Licensing Laws,” which required permission from the Star Chamber to publish particular works. As noted in W. Blackstone, IV *Commentaries on the Law of England*, 151-52 (1769), summarizing the effect of their repeal 50 years before the American Revolution:

“The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no **previous** restraints upon publications Every free man has an undoubted right to lay what sentiments he pleases before the public; to forbid this, is to destroy the freedom of the press; but if he publishes what is improper, mischievous or illegal, he must take the consequences of his own temerity.”

³ Defendant of course acknowledges that the Copyright Act provides that a court “**may** . . . grant temporary . . . injunctions . . . to prevent or restrain infringement of a copyright.” 17 U.S.C. § 502(a). But, as the foregoing authorities demonstrate, where an injunction would restrain protected speech under the First Amendment, the plaintiff bears a very heavy burden in justifying its request.

Justice Oliver Wendell Holmes, in what many regard as the first important pronouncement on the meaning of the First Amendment, acknowledged as a given that prior restraint was unconstitutional, and then went on to lay the basis for the First Amendment jurisprudence which we know today:

“In the first place, the main purpose of [the First Amendment] is ‘to **prevent all such previous restraints** upon publications as has been practiced by other governments,’ and they do not prevent the subsequent punishment of such as may be deemed contrary to the public welfare. The preliminary freedom extends as well to the false as to the truth; the subsequent punishment may extend as well to the true as to the false.” Patterson v. Colorado, 205 U.S. 454, 27 S. Ct. 556 (1907) (citations omitted).

Accord Near v. Minnesota, 283 U.S. 697, 51 S.Ct. 265 (1931) (noting “the general conception that liberty of the press, historically considered and taken up by the Federal Constitution, has meant, principally although not exclusively, immunity from previous restraints or censorship The fact that for approximately 150 years there has been almost an entire absence of attempts to impose previous restraints . . . is significant of the deep seated conviction that such restraints would violate constitutional right”); Nebraska Press Ass’n. v. Stuart, 427 U.S. 539, 559, 96 S. Ct. 2791, 2803 (1976) (viewing prior restraints as “the most serious and least tolerable infringement on First Amendment rights”); Elrod v. Burns, 427 U.S. 347, 373, 96 S. Ct. 2673, 2690 (1976) (“[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury”); In re Providence Journal Co., 809 F.2d 63 (1st Cir. 1986) (“[o]f all the constitutional imperatives protecting a free press under the First Amendment, the most significant is the restriction against prior restraint upon publication.”) It is thus no wonder that another district court observed that “if a threat to national security was insufficient to warrant a prior restraint . . . the threat to plaintiff’s copyrights . . . is woefully inadequate.” Religious Tech.

Center v. Lerma, 897 F.Supp. 260, 262-63 (E.D.Va. 1995). See generally for the proposition that copyright does not justify prior restraint in this case pages 26-28 of Defendant's previous memorandum.

A denial of an injunction in prior restraint -- for example, of a book before its publication -- does not mean that if a subsequent infringement is found and defendant's fair use defense is rejected, there will be no consequence. At that point the Court may consider the multitude of damages remedies previously referred to and, subject to the guidance of the Eleventh Circuit in Greenberg, the possibility of a carefully tailored injunction. That was the message of Blackstone ("If he publishes what is improper, mischievous or illegal, he must take the consequences"), and of Justice Holmes in Patterson ("the subsequent punishment may extend as well to the true as to the false"). But now is not the time for punishment.

II. A Preliminary Injunction Is Not Proper in This Case

A. Plaintiff Has Failed to Establish a Substantial Likelihood of Success

Plaintiff has failed to demonstrate a substantial likelihood of success because they have failed to submit credible evidence, much less carry their burden of proving, a likelihood of success. The allegation by one of Plaintiff's attorneys of record that she has made and presented as "evidence" a "fair" comparison of the works is not credible for the reasons stated at the TRO hearing and well-known to the Court. Such selective and subjective charts and lists are always suspect, see Herzog v. Castlerock Entm't, 193 F.3d 1241, 1257 (11th Cir. 1999), and are even less persuasive when offered by an attorney-advocate in the case. Charitably interpreting Plaintiff's arguments, they at best present "serious questions for litigation." But as Defendant has previously pointed out, while such a showing is sufficient

in other circuits, it is not sufficient in the Eleventh Circuit, which requires a **strict showing of substantial likelihood of success.** Snook v. Trust Co. of Georgia Bank of Savannah, N.A., 909 F.2d 480, 483 n.3 (11th Cir. 1990).

As argued in Defendant's initial memorandum, Plaintiff is unlikely to succeed on the merits of either their copyright or Lanham Act claims. Plaintiff has not shown that *The Wind Done Gone* copies protectable expression from *Gone With the Wind* (and Defendant incorporates by reference its argument at pages 6-15 of its previous memorandum, in which this argument is made). Moreover, as Defendant has previously argued, and elaborates *infra*, this Court would be compelled to find that any such copying is a fair use under Section 107 of the Copyright Act.

B. Plaintiff Has Failed to Demonstrate Irreparable Injury

Plaintiff is flatly inaccurate when it states that “[t]he law of this circuit is that irreparable injury is presumed in a case of trademark or copyright infringement.” Pl.’s Repl. Memo at 9. In fact, irreparable injury is only presumed in a **garden variety** case not involving the First Amendment, and **only if** the plaintiff has carried its burden of demonstrating a likelihood of success on the merits. Here, no presumption of irreparable injury arises.

In the event Plaintiff prevails on the merits in this case, it can seek under the Copyright Act to recover damages in the form of lost profits, or, at its election, disgorgement of any profits made by the infringer that are attributable to the infringement, diminution in the value of a plaintiff's copyrighted work, and any impairment of Plaintiff's ability to produce or authorize new derivative works based on *Gone With the Wind*. 17 U.S.C. § 504(b); Abend v. MCA, Inc., 863 F.2d 1465, 1479 (2d Cir. 1988)(refusing to enjoin defendants from distributing the film “Rear Window” because “any impairment of [plaintiff's] ability to

produce new derivative works based on the story would be reflected in the calculation of the damage to the fair market value of the story), aff'd sub nom. Stewart v. Abend, 495 U.S. 207, 110 S. Ct. 1750 (1992). Plaintiff may seek to recover “statutory damages” – **without proving any financial harm**. 17 U.S.C. § 504(c). If it prevails, plaintiff may even seek to recover its attorneys fees and costs. 17 U.S.C. § 505.

But, “An injunction is a ‘harsh and drastic’ discretionary remedy, never an absolute right,” even in a case of clear copyright infringement. Abend v. MCA, Inc., 863 F.2d at 1479. See also Greenberg v. National Geographic Society, No. 00-10510, 2001 WL 280075 at *7 (11th Cir., Mar. 22, 2001)(even though the work in question, a CD-ROM of 100 years of National Geographic’s magazine, had been in distribution for many months, and even though the Eleventh Circuit found that the CD-ROMs infringed, the Court cautioned the district court not simply to grant an injunction: “In assessing the appropriateness of injunctive relief, we urge the Court [on remand] to consider alternatives . . . in lieu of foreclosing the public’s . . . access to this educational and entertaining work.”). See also Chase-Riboud v. Dreamworks, Inc., 987 F. Supp. 1222, 1232 (C.D.Cal. 1997)(refusing to enjoin the release of the major motion picture “Amistad” because, although plaintiff had shown “serious questions for litigation” concerning her claim that producers of the film had infringed her copyrighted novel, defendants had made substantial investments in the film and its nationwide release was “imminent” and plaintiff had therefore failed to show that the balance of hardships tipped in her favor). Thus, in many cases, “an injunction may be an **inappropriate** remedy,” Abend, 863 F.2d at 1479, even where the defendant has clearly infringed the plaintiff’s copyright. Accord, Greenberg v. National Geographic Society 2001 WL 280075 at *7. The damages calculation may be complex, and the resulting figure

potentially either large or small, but courts must give careful consideration to whether an injunction is appropriate at all where the damages to the plaintiff can be reasonably ascertained. Id. at 1478.⁴

As the then-Chief Judge of the Second Circuit observed in a concurring opinion,

From a first amendment viewpoint, the effect of an injunction is to restrain the infringing expression altogether – an effect which goes beyond what is necessary to secure the copyright property. An aware of money damages, which permits the infringing expression at a reasonable cost, is more tolerable from a first amendment point of view.

New Era Publ. Int. v. Henry Holt and Co., Inc., 873 F.2d 576, 597 (2d Cir. 1989)(Oakes, C.J., concurring).

C. The Balance of Hardships Strongly Favors Defendant

Enjoining the publication of this book would irreparably harm both Defendant and Alice Randall by barring them from speaking, through the medium of *The Wind Done Gone*, at this particular time and potentially forever. The intense public interest this case has provoked is itself recognition that **now** is an especially ripe moment for the political and cultural critique that *The Wind Done Gone* represents. It cannot be rebutted that:

The time to publish the book is now. If the book is enjoined even for as short a time as three months, *The Wind Done Gone* will be stale news; readers will no longer feel a need to read the work because they will think they “know all about it” from the prior, extensive press coverage. Perhaps even more damaging, an injunction would change the public perception of the work from that of a literary creation to a literary curiosity; from a serious work to a notorious one.

⁴ In an effort to support their demand for prior restraint, Plaintiffs (apparently seriously) allege that they will be irreparably harmed if Defendant’s book is allowed to “kill off” Scarlett O’Hara. Putting aside the issue of whether any readers of future sequels of *Gone With the Wind* would reasonably consider Scarlett to have been “killed off” in *The Wind Done Gone*, the Court undoubtedly could reasonably ascertain the resulting damage to Plaintiffs. Such damages would fall into the category of “any damages caused to the fair market value of [Plaintiffs’] story . . . [as well as] any impairment of [Plaintiffs’] ability to produce new derivative works based on the story. . .” Abend, 863 F.2d at 1478.

Mueller Decl., ¶ 12. As the Chase-Riboud case, in which the court refused to enjoin the imminent release of the film “Amistad,” makes clear, it is proper for the Court to weigh such business-related harm to the Defendant in considering whether to enjoin publication of its book. 987 F. Supp. at 1233.

D. The Public Interest Would be Harmed by an Injunction

If this Court issues an injunction against publication of *The Wind Done Gone*, the public literally may **never** have a chance to read the book. It will have been impounded and censored entirely from the public debate.

In Campbell, the Supreme Court sternly cautioned against automatically enjoining publication of expressive works **even where they are determined not to be making a fair use of the copyrighted work**. 510 U.S. at 578 n.10, 114 S. Ct. at 1171. The Court cited with approval a scholarly commentary in which the author explained that injunctions should be employed cautiously when there is a “reasonable” contention of fair use. Id. citing Pierre N. Leval, Toward A Fair Use Standard, 103 Harv. L. Rev. 1105, 1133 (1990) (“the customary bias in favor of the injunctive remedy in conventional cases of copyright infringement **has no proper application to the type of case here discussed**”) (emphasis supplied). The Court, citing Judge Leval, explained:

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’⁵

⁵ As proposed by Defendant in oral argument, the “simple piracy” cases are analogous to this Court’s example of a bulldozer tearing up a pasture. See Tr. at 66-70.

Id. citing Leval at 1132. This sensitivity to First Amendment principles was also reflected during the oral arguments in Campbell, where one of the Justices stated:

But you [Acuff-Rose] have featured Judge LaValle [sic] and you know he has put forth a very interesting idea that there may be infringements that are not properly subject to injunction because you take into account the value of parody. You take into account First Amendment concerns not simply on the liability side, but on the remedy side.

Transcript, U.S.S.C.T., 1993 WL 757656 at * 33 (Nov. 9, 1993, 10:06 a.m.).

The cases Plaintiff relies upon in support of its argument that a preliminary injunction in this case would not be a prior restraint of speech are inapposite to this case, where there are serious First Amendment considerations. Most of the cases Plaintiff cites involved enjoining works that had already been published or made available to the public. For example, in Harper & Row Publs., Inc. v. Nation Enters., 471 U.S. 539, 105 S. Ct. 2218 (1985), the case relied on most heavily by the Plaintiff, the infringing magazine article was published before plaintiff filed suit, and was not enjoined until after a six day bench trial. Moreover, the infringing material in any event would have been published by *Time Magazine* (thereby assuring public access). The same can be said of Plaintiff's reliance on Dallas Cowboy Cheerleaders, Inc. v. Pussycat Cinema, Ltd., 604 F.2d 200 (2nd Cir. 1979) (defendant displayed movie for over two months before district court issued preliminary injunction); Metro-Goldwyn-Mayer v. Showcase Atlanta Coop. Prods., 479 F. Supp. 351 (N.D. Ga. 1979) (defendant's play was publicly performed, and Judge Evans attended one such performance, before it was enjoined); Cable/Home Communication Corp. v. Network Prod., 902 F.2d 829 (11th Cir. 1990) (pirate chips had already been distributed before plaintiff filed suit); Foxworthy v. Custom Tees, Inc., 879 F. Supp. 122 (N.D. Ga. 1995)(defendant's shirts appeared in retail stores before suit was filed).

Furthermore, the cases cited by Plaintiff where injunctions did issue prior to publication are easily distinguishable from this case because they did not implicate the kind of **protected political speech** that is involved here or raise a serious defense of parody. In Dallas Cowboys Cheerleaders Inc. v. Scoreboard Posters, Inc., 600 F. 2d 1184 (5th Cir. 1979), for example, the court affirmed the district court's injunction of a novelty calendar which showed bare-breasted ex-Dallas Cowboy Cheerleaders in nearly identical uniforms worn by the real cheerleaders. Defendant did not develop a parody defense. As the court of appeals stated, "nothing beyond an unelaborated invocation of the term 'parody' was ever put before the district court." Id. at 1188.

Plaintiff cites In re Capital Cities/ABC, Inc., 918 F. 2d 140 (11th Cir. 1990) which also involved facts that are completely different from this case. There the prior restraint issue arose in a discovery dispute regarding the production of a "shooting script," and did not involve any fair use much less parody defense. Moreover, the Eleventh Circuit stressed that any injunctive relief must be "surgically" precise to accommodate First Amendment concerns. Id. at 144.

Finally, Plaintiff relies on Salinger v. Random House, Inc., 811 F. 2d 90 (2nd Cir. 1987), which involved large-scale verbatim copying of the plaintiff's unpublished letters and turned on the plaintiff's right to control the first public appearance **of his own** work. Id. at 95. The creative expression enjoined from public distribution, therefore was not that of the alleged infringer, but of the author J.D. Salinger. Here, if the Court grants a preliminary injunction forbidding Defendant from publishing *The Wind Done Gone*, it will be Alice Randall's, not Margaret Mitchell's, work that will be censored from public view.

III. Plaintiff Ignores Established Precedent That Compels the Conclusion That *The Wind Done Gone* Is Fair Use.

The two most significant legal decisions to guide the Court in its fair use analysis in this case are Campbell v. Acuff-Rose Music, 510 U.S. 569, 114 S. Ct. 1164 (1994), and Leibovitz v. Paramount Pictures Corp., 137 F.3d 109 (2d Cir. 1998). See Defendant's Memo at 15-22. Leibovitz is the single circuit court decision decided since Campbell that is most factually similar to this case. Plaintiff ignores Leibovitz and mischaracterize Campbell.

A. The *Leibovitz* Decision

Recognizing that Campbell was a "clarification of the fair use defense for parodies," 137 F.3d at 113, the Second Circuit Court of Appeals held in Leibovitz that a promotional photograph that copied almost every detail of a famous photographer's copyrighted work, and that was then used in an advertising campaign for a movie, was a fair use parody of the original photograph. Side-by-side reproductions of the two photographs at issue in Leibovitz are attached hereto as exhibits. As the Court will note on reviewing Exhibit A, Plaintiff's photograph depicts the well-known actress Demi Moore, naked and pregnant, striking a particular pose. Although defendant's photograph used a different model, the model strikes exactly the same pose as Moore, the shape of the model's body is virtually identical to Moore's, and the lighting, camera angle, and skin tone are deliberately identical to plaintiff's photograph. The only difference between the two photographs was that defendant superimposed the head of the male comedian Leslie Nielsen in place of Demi Moore's head.

In short, defendant's photograph copied plaintiff's work "to an extreme degree[.]" 137 F.3d at 116. Indeed, the Second Circuit observed that defendant "went to great lengths to have its ad copy protectable aspects of the [plaintiff's] photograph." Id. at 116. "Great

effort was made to ensure that the [defendant's] photograph resembled in meticulous detail the one taken by [plaintiff]." *Id.* at 111. Applying *Campbell*, the Second Circuit held that defendant's use of its photograph as an advertisement to promote its movie *Naked Gun 33 1/3* was fair use under the Copyright Act.

The Wind Done Gone, in its allusions to a relative few of *Gone With the Wind*'s more than 100 characters for the permitted (fair use) purpose of conjuring them up, presents a far stronger case for fair use than was before the court in *Leibovitz*, where so much more was taken, and was used for the purely commercial purpose of advertising a film. Here, the free speech issue is far more compelling.

B. The Fair Use Doctrine

While the preamble to § 107 expressly mentions "criticism" as an example of fair use, the courts generally require an analysis of the four statutory fair use factors.⁶

1. The Nature of the Use:

Plaintiff variously argues that they win under the first factor because *The Wind Done Gone* either: is not a parody; does not "attempt to achieve comic effect"; seeks to "entertain" rather than challenge or criticize; or has an unfair "profit motivation." Pl.'s Memo at 24-25; Tr. at 10-11. Each of these contentions is dead wrong.

The **evidence** before the Court is unmistakable and unrefuted: *The Wind Done Gone* is a classic parody of *Gone With the Wind*. Professor Henry Louis Gates, Jr., the W.E.B. DuBois Professor of Afro-American Studies at Harvard University, describes *The Wind*

⁶ In its initial brief and at oral argument before the Court on March 29, Defendant set forth in detail how the four factors should be applied to this case, and Defendant will not belabor the point by restating those arguments here, but rather will address points argued by Plaintiff.

Done Gone as “a classic parody, in a long line of literary creations that extend back to the ancient Greeks.” Gates Decl. At ¶ 7. Professor John Sitter, the Candler Professor of English at Emory University and a renowned expert in literary parody, has testified that *The Wind Done Gone* “is a classic example of a parody of *Gone With the Wind*, both in its overall treatment and through numerous examples.” Sitter Decl. At ¶ 15. Professor Barbara McCaskill, a professor of English at the University of Georgia, concurs that “*The Wind Done Gone* is a parody of *Gone With the Wind*.” McCaskill Decl. At ¶ 3.

Indeed, Alice Randall’s intent to parody *Gone With the Wind* becomes obvious as soon as the reader examines her book’s title. As the Court itself observed at oral argument on March 29, the title of *The Wind Done Gone* immediately clues the reader into the fact that the book intends to call to mind *Gone With the Wind*. Professor McCaskill has testified that the title of *The Wind Done Gone* is a humorous transformation of *Gone With the Wind*, and describes the title as “an example of irony.” McCaskill Decl. at ¶ 5(d). She explains that irony is part of what gives a parody its comic effect. *Id.* at ¶ 5. By using a black vernacular form of speech to reverse Margaret Mitchell’s title, Ms. Randall creates an “amusing irony”: *The Wind Done Gone* pokes fun at white society’s sadness that pre-Civil War plantation culture has ended, and “celebrates the end of that society from the perspective of those that were oppressed by it.” *Id.* at ¶ 5(d).

Plaintiff next asserts that “*The Wind Done Gone* does not even attempt to achieve comic effect.” Pl.’s Memo. at 24. In the first place, Plaintiff offers **no evidence** – only its own opinion. In the second place, *The Wind Done Gone* is riddled with comically ironic references to *Gone With the Wind*, fitting within the long tradition of slave narratives which employ humor as a “consistent and integral element.” McCaskill Decl. at ¶¶ 5-6. Finally,

parody (and satire) are premised on ridicule, not slapstick: that Ms. Mitchell's nephews and their trustee do not see *The Wind Done Gone* as humorous is neither surprising nor relevant.

Of course, the questions of what is or is not humor is often a matter of which audience, which reader, is being asked the questions. The following are a few of the examples African-American Professor McCaskill found to be humorous in *Gone With the Wind*. R. (the parody of Rhett Butler) is in love with and eventually marries a former slave whom he met at a whorehouse. *Id.* at ¶ 5(a). Instead of being the "heartbreaker" who leaves Scarlett with the immortal words "frankly, my dear, I don't give a damn," R. is abandoned by Cynara, the former slave he has married. *Id.* Still another humorous example for Professor McCaskill was the slaves' secret switching of Mammy's grave so she is in the white cemetery lying next to Planter, while Planter's white wife is buried in the slave cemetery, thus ridiculing the tacit assumptions of racial purity and segregation in *Gone With the Wind*. *Id.*

In the tradition of slave narratives, *The Wind Done Gone* contains numerous examples of slaves tricking their masters, revealing that they are the ones who are really in control. Perhaps Margaret Mitchell herself, if not her nephews, can hear the chuckling as the slaves, out from under of the watchful eyes of the white "masters," replace the yule log to extend their Christmas holiday. *Id.* at ¶ 6(a).

Plaintiff next contends that *The Wind Done Gone*'s purpose in using elements of *Gone With the Wind* "is to entertain," and therefore, presumably, is not entitled to the fair use defense. Pl.'s Memo at 24, citing Castle Rock Entertainment v. Carol Publ. Group, Inc., 150 F.3d 132 (2d Cir. 1998). See also Tr. at 10-11. While Defendant certainly hopes readers will find *The Wind Done Gone* entertaining, Plaintiff's reliance on the Second Circuit's Castle Rock decision is misplaced. Castle Rock involved a trivia quiz book entitled *The Seinfeld*

Aptitude Test, (the SAT) which was based on the famous NBC television series *Seinfeld*.

The quiz book contained 643 multiple choice trivia questions testing readers' knowledge of various events and scenes from the television series. After reading the book, the Second Circuit found "scant reason to conclude that this trivia quiz book seeks to educate, criticize, parody, comment, report upon, or research *Seinfeld*, or otherwise serve a transformative purpose." 150 F.3d at 142-43. Instead, the court found that Defendant's book "simply poses trivia questions." *Id.* at 142-43.

Importantly, the court observed that the defendants would have had a stronger case for fair use if the incorrect answer choices to the multiple choice questions had attempted in some way to parody *Seinfeld*. *Id.* at 143, n.7. **But there was no such attempt:** the answer choices simply tested whether the reader accurately recalled events from *Seinfeld* episodes. The court therefore concluded that the "plain purpose" was not to challenge readers' views about *Seinfeld* or to criticize or expose anything about *Seinfeld*, but simply "to repackage *Seinfeld* to entertain *Seinfeld* viewers." *Id.* at 142-43.

Clearly, Castle Rock has no application here. *The Wind Done Gone* makes good on the burning desire Alice Randall has had since she was a teenager to ridicule and expose the limitations of *Gone With the Wind* in an artistic way. That her explosive political parody and satire may also entertain does not effect Defendant's right to publish it.

Finally, Plaintiff asserts that "even if Defendant's purpose in copying *Gone With the Wind* was to comment on that work, its profit motivation undercuts the fairness of the use[.]" Pl.'s Memo at 24. Confronted at the March 29 hearing in this case with the Supreme Court's discussion in Campbell, which held that commerciality does not have presumptive signifi-

cance in analyzing the first fair use factor, Plaintiff's counsel oversimplified Campbell and omitted the central thrust of its discussion of parody:

the Court [in Campbell] was saying a commercial use is certainly a factor to consider, and, in fact, as in this case, it weighs against the fair use defense. It's not dispositive, but weighs against it.

Tr. at 19, ll. 14-18.

In fact, the Supreme Court in Campbell observed that “no man but a blockhead ever wrote, except for money.” 510 U.S. at 584, quoting 3 Boswell's Life of Ben Jonson 19 (G. Hill ed. 1934). The Court went on to say simply that commerciality

tends to weigh against a finding of fair use. . . **But that is all**, and the fact that even **the force of that tendency will vary with the context** is a further reason against elevating commerciality to hard presumptive significance.

510 U.S. at 585 (emphasis added). Obviously, the profit motive – the sale for profit of the popular commercial rap song “Pretty Woman” -- carried far less weight than the transformative use made of the copyrighted work. Any other reading of Campbell – including that advanced by Plaintiff's comment in oral argument – is simply a misreading of the law.

For these reasons, as well as those set forth in Defendant's initial memorandum, the first factor in the fair use analysis clearly favors Defendant.

2. The Nature of the Original Work

In considering the second fair use factor the Second Circuit pointed out in Leibovitz that “Campbell instructs that the creative nature of an original will normally not provide much help in determining whether a parody of the original is fair use.” 137 F.3d at 115, citing Campbell, 510 U.S. at 586, 114 S. Ct. at 1175 (the fact that plaintiffs' work is a work of creative expression, falling within the core of copyright's protective purposes, “is not much help in this case, or ever likely to help much in separating the fair use sheep from the

infringing goats in a parody case, since parodies almost invariably copy publicly known, expressive works.”)

Plaintiff ignores this discussion in Campbell and overlooks Leibovitz entirely. The second factor therefore is no help to Plaintiff.⁷

3. The Amount and Substantiality of the Portion Taken

Plaintiff asserts that the third factor cuts in their favor because *The Wind Done Gone* takes “far more material than is necessary for its alleged purpose of commentary or parody.” Pl.’s Memo at 26. Plaintiff is wrong on two counts. First, the allusions in *The Wind Done Gone* to *Gone With the Wind* are tied directly to its overriding purpose of ridiculing, poking fun, criticizing, and revealing the limitations – in short, parodying – *Gone With the Wind*. Secondly, even if *The Wind Done Gone* had taken “more than was minimally necessary” to conjure up *Gone With the Wind*, that fact has “little, if any, weight” against fair use. See Leibovitz, 137 F.3d at 116.

(a) The Wind Done Gone’s Uses of Elements From Gone With the Wind Are Directly Tied to its Overriding Purpose of Parodying That Book.

Plaintiff cites to particular “details” in WDG which they argue “are taken in order to given more color and detail to ‘The Wind Done Gone,’ not to comment on social issues.” Pl.’s Repl. Memo at 8. On the contrary, the details cited by the Plaintiff are alluded to in order to make specific and powerful political and social commentary and reveal precisely why Ms. Randall needed to use the elements that she did While the deaths of the twins are tragic for the white characters of GWTW, and Gettysburg serves as an emblem of that

⁷ The defendant, indeed, does not even need to avail itself of the observation in the McCaskill Declaration that “*Gone with the Wind* is more than just fiction: it is a cultural, historical artifact,” McCaskill Decl. at ¶ 12, entitling it to less protection under the second factor.

tragedy, the black perspective is different. WDG deliberately undercuts the sorrow in GWTW with the cruel and painful fact that “Jeems was their tenth birthday present. He was ten too.” *WDG* at p. 69. From the blacks’ perspective, the Twins’ deaths and the battle of Gettysburg are necessary to liberate Jeems: Cynara writes, “I wonder what [Jeems] would have been if the Twins had survived the war. Something less.” *Id.* at 66. See also Sitter Supp. Decl. at ¶ 26(a).

Carreen in *Gone With the Wind* is routinely rejected by Scarlett's suitors. In *The Wind Done Gone*, however, Jeems reveals that the twins actually preferred Kareen to Other. Thus, the detail that she is in a convent is alluded to only to make that detail ironic because Kareen, unlike Carreen, is desirable, yet unavailable, to men. Sitter Supp. Decl. at ¶ 22. Also, bare plot outlines such as the fact that the convent is in Charleston must be preserved in order to effectively conjure up the setting for the parody of the work in which they are contained. To move the convent to New York or other settings would hardly have that effect. Sitter Supp. Decl. at ¶ 22.

The rosy image that often comes to readers’ minds when *Gone With the Wind* is briefly conjured up is exactly what *The Wind Done Gone* sets out to debunk: but *The Wind Done Gone* can only call into question that image by first conjuring it up, by alluding to specific details from that work; and thereby transforming them, through parody, into a new insight. Randall Decl. at ¶ 5; Mueller Decl. at ¶ 7. Far from being extensive, *The Wind Done Gone*’s use of elements from *Gone With the Wind* is “sporadi[c]” and is “remarkabl[y] subtl[e] and econom[ical].” Gates Decl. at ¶ 7; Sitter Decl. at ¶ 17; McCaskill Decl. at ¶ 3(*The Wind Done Gone* “sparingly allud[es] to characters and descriptions in *Gone With the Wind* in order to parody them”).

(b) The Third Fair Use Factor Has “Little, if Any Weight” Against Fair Use in This Case.

Plaintiff incorrectly asserts that, even if the Court finds *The Wind Done Gone* to be a parody, “Houghton Mifflin has the burden of showing that the elements it copied from *Gone With the Wind* were parodied, and that it took no more than was necessary to accomplish its supposed parodic purpose.” Pl.’s Repl. Memo at 7. This is a misstatement of the law. In fact, even if *The Wind Done Gone* had taken “far more material than is necessary for its alleged purpose of commentary or parody,” Pl.’s Memo at 26, that fact would have little significance for the Court’s fair use analysis. See Leibovitz, 137 F.3d at 116. This is because *The Wind Done Gone*, as a whole and in each of its references to *Gone With the Wind*, is highly critical of that work. As a result, it is impossible to imagine that *The Wind Done Gone*, even if it had substantially copied from *Gone With the Wind*, could ever function as a market substitute either for *Gone With the Wind* itself or any derivative works that Plaintiff would authorize. In short, because the first factor (nature of the use) and the fourth factor (market impact) in the fair use analysis so clearly favor *The Wind Done Gone*, “the third factor [has] little, if any, weight against fair use[.]” Leibovitz, 137 F.3d at 116.

In Leibovitz, the Second Circuit held that by copying the Demi Moore photograph in meticulous detail, the defendant had taken “more . . . than was minimally necessary to conjure it up.” Id. at 116. However, as the court correctly noted, “Campbell instructs that a parodist’s copying of more of an original than is necessary to conjure it up will not necessarily tip the third factor against fair use.” Id. at 116, citing Campbell, 510 U.S. at 588, 114 S. Ct. at 1176.

To the contrary, “once enough has been taken to assure identification,” as plainly occurred here, the reasonableness of taking additional aspects of the

original depends on the extent to which the “overriding purpose and character” of the copy “is to parody the original,” and “the likelihood that the parody may serve as a market substitute for the original[.]”

Id. at 116, quoting *Campbell*, 510 U.S. at 588, 114 S. Ct. at 1176. As a result, even though the defendant’s copying of plaintiff’s photograph was “extensive,” the third factor was no help to plaintiff because the defendant’s extensive use of the Demi Moore photograph was reasonable in light of its overriding purpose and character as a parody of that photograph. *Id.* at 116. The evidence before this Court establishes irrefutably that *The Wind Done Gone*’s overriding purpose and character is to criticize and ridicule *Gone With the Wind*.

4. The Market Effect of the New Work on the Original

The evidence before the Court establishes beyond doubt that Plaintiff would **never have authorized** *The Wind Done Gone*. As a result, there is no credible claim that *The Wind Done Gone* harms the market for *Gone With the Wind* or any licensed derivatives. Indeed, as Defendant have previously pointed out to the Court, Plaintiff boasts of the strict content-based control that they impose on anyone wishing to create a derivative work based on *Gone With the Wind*. Pl.’s Memo. at 5. Among other things, Plaintiff requires that there shall be no mixing of the races and no homosexuality, and the characters of Scarlett O’Hara and Rhett Butler shall not be killed off. *See* Conroy Decl. Plaintiff’s attempt to get this Court to forbid the public from ever having a chance to read *The Wind Done Gone* reveals the intensity of their commitment to censor opinions about their work that they find objectionable.

As noted earlier, even without the testimony of famed novelist Pat Conroy about his first hand experience with the Plaintiff, *see* Conroy Decl., it is simply impossible to imagine that Plaintiffs would authorize a slashing criticism like *The Wind Done Gone* that taunts and

ridicules *Gone With the Wind*, exposes its flaws and limitations, including the racism inherent within it, its rosy recollection of pre-Civil War Southern society, and its willful blindness to the oppressive reality of slavery. *The Wind Done Gone* “mocks the tacit obsession with racial purity found in *Gone With the Wind* . . . by giving [that book’s white characters] ‘black’ attributes, either by blood or culture.” McCaskill Decl. at ¶¶ 5(a), 8. Moreover, *The Wind Done Gone* turns “Ashley Wilkes, the model of a Southern gentleman, into Dreamy Gentleman, a homosexual who sleeps with a slave.” *Id.* at ¶ 9. And the character Other, the analog to Scarlett O’Hara, the paragon of white Southern femininity, is descended from a black woman. *Id.* at ¶ 8(a). It is respectfully submitted that it affronts commonsense to believe Plaintiff would license such a work.⁸ To repeat, *The Wind Done Gone* ridicules *Gone With the Wind* root and branch.

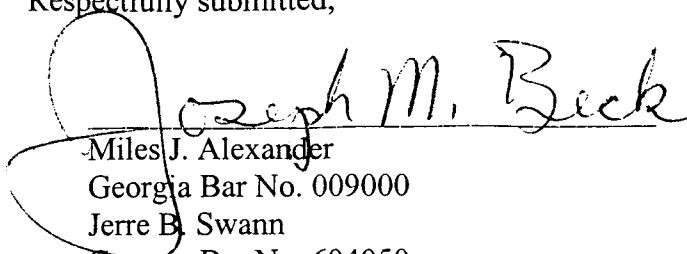
As Defendant has argued previously, copyright law does not extend protection against derivative uses in works of criticism. Campbell, 510 U.S. at 591, 114 S. Ct. at 1178. Any impact *The Wind Done Gone* has on the market for *Gone With the Wind* or its licensed derivatives will flow from its stinging criticism, not from “supplanting” those works. As a result, the fourth fair use factor strongly favors Defendant.

III. CONCLUSION

Defendant respectfully submits that Plaintiff has thoroughly failed to establish its entitlement to the extraordinary relief it seeks. Plaintiff’s motion should be denied.

⁸ *Gone With the Wind* also completely ignores what it must have felt like to be a slave, and actually implies that slaves must have enjoyed that condition. One of *The Wind Done Gone*’s most powerful passages is Cynara’s description of standing “bare-breasted in the market in Charleston” while slaveholders inventory her body. *Id.* at ¶ 10.

Respectfully submitted,

A large, handwritten signature in cursive script that reads "Joseph M. Beck". The signature is written in black ink and is positioned above the typed names of the attorneys.

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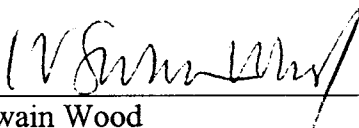
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of **DEFENDANT HOUGHTON-MIFFLIN CO.'S SUPPLEMENTAL MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION** has been hand-delivered to counsel of record as follows:

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This 12th day of April, 2001.



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