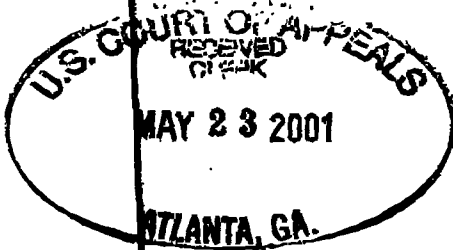




# Yale Law School

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May 23, 2001

Thomas K. Kahn, Clerk  
United States Court of Appeals  
Eleventh Circuit  
56 Forsyth Street, N.W.  
Atlanta, GA 30303

Re: *Suntrust Bank v. Houghton Mifflin Co.*, No. 01-12200

Dear Mr. Kahn:

This letter is respectfully submitted in compliance with the Court's request for supplemental briefs concerning the principles discussed in *CNN v. Video Monitoring Svcs.*, 940 F.2d 1471 (11<sup>th</sup> Cir.), *vacated and reh'g granted*, 949 F.2d 378 (11<sup>th</sup> Cir. 1991) (en banc), *dismissed as moot*, 959 F.2d 188 (11<sup>th</sup> Cir. 1992) (en banc).

A. The Principles Recognized in *CNN*.

The panel opinion in *CNN* stands fundamentally for three principles, all of which are essential to this case, and all of which have been repeatedly reaffirmed by the United States Supreme Court. These three principles are as follows.

(1) The "primary objective" of copyright law is not to reward authors, but to "promote the Progress of Science and useful Arts" and thereby to promote public "dissemination of information and ideas." *CNN*, 940 F.2d at 1483 n.18 (quoting *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991); *id.* at 1479 (quoting *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 783 (1978));

(2) Accordingly, "particularly where free speech concerns are implicated," courts in copyright cases cannot be guided only by the copyright owner's "proprietary" interests, but must also vindicate copyright's "regulatory" function, which is to promote and protect the "stream of information whose unimpeded flow is critical to a free society." *CNN*, 940 F.2d at 1478-79 (quoting Patterson, *Free Speech, Copyright, and Fair Use*, 40 Vanderbilt L. Rev. 1, 5 (1987)).

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(3) As a result, "where free speech concerns are implicated," copyright injunctions must not – contrary to the holding of District Judge Pannell below – be "freely" granted. See Slip Op. at 48 n.21. On the contrary, "injunctive relief" in such cases can create "dangerous precedents and fundamental problems" destructive to the proper "balance between the Copyright Clause and the First Amendment." *CNN*, 940 F.2d at 1484, 1478.

Although the panel opinion in *CNN* is not binding precedent, every one of these principles has been affirmed and reaffirmed by the Supreme Court. See, e.g., *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578 n.10 (1993) ("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'" (citation omitted); *Feist, supra*; *Sony Corp. v. Universal City Studios*, 464 U.S. 417, 429 (1984) ("The 'sole' interest of the United States and the primary object in conferring the [copyright] monopoly lie in the general benefits derived by the public from the labors of authors.") (quoting *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932)).

These principles dictate reversal here. The First Amendment interests infringed by the injunction granted below are the most serious possible, while the countervailing copyright concerns are at their weakest.

**B. The First Amendment Interests Here are the Most Serious Possible.**

A prior restraint against publication of a book with a clear, particularized, political message is "the most serious and least tolerable infringement on First Amendment freedoms." *Nebraska Press Ass'n*, 427 U.S. at 539, 559 (1976).

*The Wind Done Gone* has such a message: that *Gone with the Wind* – today the canonical work of popular American culture concerning life in the Old South – invidiously suppresses the realities, the miseries, the sufferings and strivings, indeed the entire life-world of blacks. Whether one agrees or disagrees with this message, there can be no doubt that it is entitled to the highest degree of First Amendment protection and, therefore, to the highest degree of protection from prior restraint.

As stated in our initial papers, see Brief for the Georgia First Amendment Foundation at 2, the relevant constitutional analogy is to an academic book criticizing the racism implicit and explicit in *Gone with the Wind*. Unquestionably, such a work would be constitutionally protected, even if it expressed its critical message by exploring Margaret Mitchell's characters, quoting some of her memorable sentences, discussing how the events in Ms. Mitchell's novel would have looked from the perspective of blacks, and speculating in detail on how life must have been for slaves on the Tara plantation. Alice Randall's novel does precisely these things, in order to express precisely the same message. There is no legally cognizable reason why Ms. Randall's novel is entitled to less protection from prior restraint than a professor's monograph would be.

On the contrary, if anything, Ms. Randall's novel is entitled to greater protection from prior restraint. First, *The Wind Done Gone* also tells a wholly new story, with a wholly new protagonist, and thus makes its own, original contribution to American literature. Second, an academic book

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would reach very few readers, and hence its First Amendment value to the public would inevitably be limited. By contrast, *The Wind Done Gone* brings the same critical message to life more powerfully, more accessibly, and potentially to a much larger audience.

*Gone with the Wind* is in essence a "public figure" in the world of American letters. Just as libel law accommodates First Amendment interests by giving wider breathing space to criticism of literal "public figures," so too copyright law – at least when deciding on the propriety of injunctive relief – should give wider breathing space to criticism of literary "public figures." Cf., e.g., *In re Capital Cities, Inc.*, 918 F.2d 140, 144 (11<sup>th</sup> Cir. 1990) ("in the context of works involving public figures which are historical or biographical in nature, the degree of copying necessary to constitute actionable infringement must be high" and the improper use "flagrant"). See also, e.g., *Nash v. CBS, Inc.*, 899 F.2d 1537 (7<sup>th</sup> Cir. 1990); *Miller v. Universal City Studios, Inc.*, 650 F.2d 1365 (5<sup>th</sup> Cir. 1981); *Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972 (2<sup>d</sup> Cir.), cert. denied, 449 U.S. 841 (1980).

Arguably, the fact that Ms. Randall chose the form of a novel to express her critical message about *Gone with the Wind* gives the holders of Ms. Mitchell's copyright some claim to a share of the profits, if any, produced by *The Wind Done Gone*. But this interest is solely "proprietary," in the language of the panel opinion in *CNN*. Similarly, the claim that *The Wind Done Gone* will reduce potential profits from authorized sequels to *Gone with the Wind* is solely a proprietary interest. District Judge Pannell responded to these alleged violations of plaintiff's proprietary interests by banning Ms. Randall's novel outright. In doing so, the district court ignored copyright's regulatory function, ignored the First Amendment, and ignored the repeated teachings of the Eleventh Circuit and the Supreme Court.

### C. The Countervailing Copyright Interests are at Their Weakest.

The "goals" of copyright law are "to stimulate the creation and publication of edifying matter." *Campbell*, 510 U.S. at 578 n.10 (citation omitted). In other words, the point of granting authors a (limited) copyright monopoly is to provide an incentive to individuals today to create original work of value to the public. Here, the concern that permitting publication of *The Wind Done Gone* will undermine this incentive is very weak indeed.

*Gone with the Wind* has enjoyed fame and fantastic commercial success for a long time. Indeed, its original copyright term, which would have expired in 1992 under the law as it existed when Ms. Mitchell published her novel, has been retroactively extended to ensure Ms. Mitchell's heirs even greater rewards for her labor. See Brief for Georgia First Amendment Foundation at 16-17. As a result, there can be no reasonable concern that enjoining *The Wind Done Gone* will undermine the incentive of authors to create and publish original work. No author today can rationally be expected to feel "chilled" or deterred in any way by the knowledge that critical parodies of his work might appear a century or more from now (after the currently specified maximum term of his copyright has expired) – or even sooner, if his work should attain the success and fame of *Gone with the Wind*. The idea that *The Wind Done Gone* must be banned "to stimulate the creation and publication" of original work is almost a contradiction in terms.

The only real interest plaintiff might assert that would justify injunctive relief is an interest in suppressing parodic works that portray Ms. Mitchell's novel or characters in an unflattering light. But this interest - once again *proprietary* in nature - is one that copyright law clearly does not protect.

As this Court recognized in *CNN*, copyright law does not permit a plaintiff "to use its status as copyright owner to  *censor*." *CNN*, 940 F.2d at 1486 n.24 (emphasis added). See, e.g., *United Christian Scientists v. Christian Science Bd. of Dirs.*, 829 F.2d 1152, 1156 n.18, 1168 (D.C. Cir. 1987) (discussing attempts by one group of Christian Scientists to use copyright to block distribution of another group's "unorthodox" version of Mary Baker Eddy's writings, and holding that Congress's grant of copyright to the First Church of Christ Science "amounts to little more than a prior restraint"); *Grundberg v. Upjohn Co.*, 137 F.R.D. 372, 388 (D. Utah 1991) (rejecting manufacturer's attempt to use copyright law to prevent 90,000 pieces of litigation documents from public access); *Wojnarowicz v. American Family Ass'n*, 745 F. Supp. 130, 147 (S.D.N.Y. 1990) (finding fair use and noting artist's attempt to use copyright law to prevent advocacy group from criticizing his work).

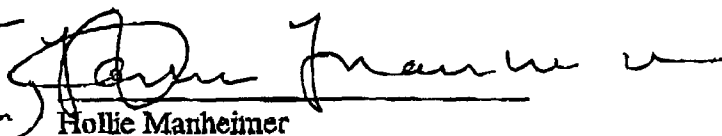
In this case, the holders of the *Gone with the Wind* copyright are attempting to use their legal protections to suppress critical, political speech. This is tantamount to censorship. If *The Wind Done Gone* is not obviously a fair use of *Gone with the Wind*, it at a minimum raises genuine, "reasonable contentions of fair use" and is therefore "worlds apart" from the kind of case in which an "injunctive remedy is justified." *Campbell*, 510 U.S. at 578 n.10.

Where "reasonable contentions of fair use" are present, and where a book expresses a particularized, transformative message critical and independent of the original, enjoining publication violates the proper "balance between the Copyright Clause and the First Amendment." *CNN*, 940 F.2d at 478. If plaintiff has a claim to monetary relief, let that claim be fully adjudicated. But the injunction granted below must be reversed.

Respectfully submitted,

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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.

CASE NO.: 01-122-00HH

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Letter Brief was served, by facsimile, and by placing same in the United States mail in a properly addressed envelope with adequate postage affixed thereto, to the following:

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