

Plaintiff SunTrust Bank, as Trustee of inter vivos and testamentary trusts created by Stephens Mitchell f/b/o Eugene Muse Mitchell and Joseph Reynolds Mitchell (hereinafter "Plaintiff" or the "Mitchell Trusts") submits this memorandum and the accompanying affidavits of Paul H. Anderson, Esq., March 23, 2001 (the "Anderson Aff.") Maura J. Wogan, Esq., March 23, 2001 (the "Wogan Aff.") and Jessie Beeber, Esq., March 23, 2001 (the "Beeber Aff.") in support of its motion for a temporary restraining order and preliminary injunction.

PRELIMINARY STATEMENT

In this case of blatant copyright infringement, immediate preliminary relief is necessary to prevent serious irreparable harm to the Plaintiff. Plaintiff, the Mitchell Trusts, is the owner of the copyright in the famous novel "Gone With the Wind." As such, the Mitchell Trusts have the exclusive right to authorize derivative works, including sequels. Defendant Houghton Mifflin has published, and plans to distribute nationwide, a novel called "The Wind Done Gone," an unauthorized derivative work that incorporates and infringes upon the fully developed characters, settings, plot lines and other copyrighted

elements of "Gone With the Wind."

"The Wind Done Gone," a sequel, picks up the story of Scarlett, Rhett, Mammy and Margaret Mitchell's other core characters where "Gone With the Wind" left off. Houghton Mifflin's clear intent is to trade off of the enormous popularity and widespread appeal of "Gone With the Wind," and to confuse consumers into thinking that the Mitchell Trusts have sponsored or endorsed this unauthorized sequel.

In a copyright or trademark infringement case, irreparable harm is presumed. Even if it were not, however, the Mitchell Trusts can show serious irreparable harm in this case. The Mitchell Trusts have authorized several derivative works based on "Gone With the Wind," including two sequel novels. Because "The Wind Done Gone" is an unauthorized sequel, its publication will diminish, or preclude outright, the ability of the Mitchell Trusts to authorize and control future derivative works. Moreover, future publishers will not pay for rights that Houghton Mifflin has taken for free.

Should this Court permit the publication of "The Wind Done Gone," that decision will have extraordinary ramifications for

Plaintiff and all copyright holders, depriving them of their basic right to control the fate of their works and characters. Nothing will prevent the publication of an unauthorized sequel to any literary work, be it Harry Potter (where children wait with baited breath for the next installment of the story of J.K. Rowling's famous characters) or "To Kill a Mockingbird" (where another writer might tell that story from Calpurnia's point of view, copying Harper Lee's famous characters Jem, Scout and Atticus, her imagery, the plot she created and even the very words she put to paper).

Immediate preliminary relief is necessary. The Mitchell Trusts have learned that review copies of "The Wind Done Gone" have already been distributed, that Houghton Mifflin plans to sell the book nationwide in May 2001, and that the book may be purchased from Barnes & Noble today with delivery in three to five weeks. (Beeber Aff., Exh. C.)

The Mitchell Trusts are not requesting a prior restraint on free speech. This is not an example of fair use of a copyrighted work. There is no telling when this book will be distributed and, once that happens, there is no way to repair the damage that

will be done to the Mitchell Trusts. On the other hand, if this Court enters a temporary order enjoining Houghton Mifflin from further publication and distribution of the book, and later determines that such relief was not necessary, the order can be lifted and Houghton Mifflin can proceed with its publication plans. Plaintiff's motion should be granted.

STATEMENT OF FACTS

The Mitchell Trusts' Rights

The Mitchell Trusts are the copyright owners of the bestselling novel "Gone With the Wind" by Margaret Mitchell. (Anderson Aff., ¶ 2.) "Gone With the Wind" was published in 1936 to widespread acclaim, has been translated into over 30 languages and has sold tens of millions of copies. (Complaint, at ¶¶ 2, 10.) Over the years, Ms. Mitchell and the Mitchell Trusts have authorized derivative works of "Gone With the Wind."

For instance, in 1988, the Mitchell Trusts authorized the publication of "Scarlett: The Sequel to Margaret Mitchell's Gone With the Wind" (hereinafter the "Sequel"), written by Alexandra Ripley and published by Warner Books in 1991. (Anderson Aff., ¶ 6.) The Sequel incorporated the characters, character traits,

settings, plot lines, title and other elements of the original novel.

The Mitchell Trusts have also entered into a contract authorizing, under certain conditions, the making of a second sequel to "Gone With the Wind," again using copyrighted elements of the original novel (the "Second Sequel"). The Second Sequel, if approved by the Mitchell Trusts, will be published by St. Martin's Press.¹ The contract for the Second Sequel specifically provides that neither Scarlett O'Hara nor Rhett Butler may die, thus preserving the expectations of an avid reading public, as well as the Mitchell Trusts' ability to authorize sequels in the future.

Ms. Mitchell and the Mitchell Trusts also have authorized use of the elements of "Gone With the Wind" in a wide variety of commercial contexts, including a television miniseries based on the Sequel and licensed consumer products. (Anderson Aff., ¶ 9.)

The Defendant's Infringement

"The Wind Done Gone" is an unauthorized sequel to "Gone With

¹The Mitchell Trusts are the sole owners in the copyright to the Sequel and, by written agreement, will be the sole copyright owners of the Second Sequel. (Anderson Aff., ¶¶ 7, 8.)

the Wind." It is the "diary" of a woman named "Cynara," the illegitimate daughter of "Planter," a plantation owner, and "Mammy," the slave who cares for his children.

**1. Defendant Explicitly Refers to
the Novel "Gone With the Wind"**

Houghton Mifflin brazenly seeks to associate "The Wind Done Gone" with "Gone With the Wind" in order to trade off of its phenomenal success. For instance, a foreword entitled "Notes on the Text" states that the character Cynara was supposedly hospitalized twice for emotional collapse, coinciding "with the publication and movie première of Margaret Mitchell's *Gone With the Wind*". (Complaint, Exh. B.)

The title of the book, "The Wind Done Gone" is almost identical to "Gone With the Wind." Cynara's name derives from the poem "Non Sum Qualis Eram Bonae Sub Regno Cynarae" by Ernest Dowson (reprinted in "The Wind Done Gone"), which served as Ms. Mitchell's inspiration for the title of her work. (Complaint, Exh. C.) The author even has the audacity to credit "Margaret Mitchell's novel *Gone With the Wind*...." in the Acknowledgments. (Beeber Aff., Exh. D.)

2. Defendant Copies Core Characters, Character Traits and Relationships from "Gone With the Wind"

"Gone With the Wind" is the sweeping epic tale of Scarlett O'Hara, the black-haired, green-eyed "belle of five counties" who weathers the hardships of the Civil War and Reconstruction, sustained by her love for her cotton plantation, Tara. Scarlett is the eldest of the three daughters of Gerald and Ellen O'Hara, and is raised by a slave, Mammy. The novel centers around Scarlett's unrequited love for Ashley Wilkes (the heir of Twelve Oaks plantation) and her relationships with Ashley's wife, Melanie, whom Scarlett both loves and despises, and Rhett Butler, a dashing scoundrel. The novel follows Scarlett through her girlhood at Tara and her three marriages and the birth of her three children, set against the backdrop of historical events such as the burning of Atlanta, the battles of the Civil War, Sherman's March to the Sea and the social upheaval of the South during Reconstruction.

Characters in "The Wind Done Gone," their personalities and physical traits, and their relationships with other characters are explicitly copied from "Gone With the Wind." See Character

Chart. (Beeber Aff., Exhibit A.)² While some of the characters in "The Wind Done Gone" are referred to by nicknames, they are readily identifiable as the core Mitchell characters. For example, the following characters, and their attributes, are copied from "Gone With the Wind":

- "Other" (Scarlett O'Hara), Cynara's half sister, is described as a "raven-haired," green-eyed "belle of five counties";
- "R.B." or "Debt Chauffeur" (Rhett Butler) is Other's husband;
- "Mammy" (Mammy) is Other's nurse;
- "Precious" (Bonnie) is Other and Debt's daughter who dies in an accident, while wearing her signature blue velvet riding habit;
- "Mealy Mouth" (Melanie) is Other's frail sister-in-law, married to "Dreamy Gentleman" (Ashley Wilkes), the heir of the plantation "Twelve Slaves Strong as Trees" (Twelve Oaks);

² Given the exigency of the circumstances in this case, by necessity the comparison charts submitted herewith do not include every similarity between the two works, but instead contain representative examples. A copy of "Gone With the Wind" is submitted herewith as Exhibit F to the Beeber Aff. "The Wind Done Gone" has not yet been submitted in its entirety, because of the concern that its dissemination will cause additional irreparable damage to the Mitchell Trusts. The Mitchell Trusts have contemporaneously moved for a protective order directing the Clerk to accept "The Wind Done Gone" for filing subject to restrictions on public access and photocopying.

- "Planter" (Gerald O'Hara) is Other and Cynara's father, an "Irishman" and the owner of a plantation in Georgia;
- "Lady" or "E." (Ellen O'Hara) is Planter's wife and Other's mother;
- "Garlic" (Pork) is the loyal butler Planter won in a card game from a man from St. Simon's Island;
- "Miss Priss" (Prissy) is the daughter of "Mrs. Garlic" (Dilcey), Garlic's wife;
- "Beauty" (Belle Watling) is a "waddling" woman, a madam with a powdered white face and dyed red hair who lives in Atlanta;
- "Jeems" (Jeems) is the slave given to the red-haired "Twins" (the Tarleton Twins) for their tenth birthday;
- "Feelepe" (Philippe or Feeleep) is Lady's cousin and lover, who would have married her but for their family's disapproval, and who dies in New Orleans;
- Other's sister Kareen (Carreen), who was betrothed to the red-haired twin "B." (Brent Tarleton) joins a convent in Charleston; and
- At one point, Mealy Mouth and Other live with their "Aunt Pattypit" (Aunt Pittypat).

See Character Chart. (Beeber Aff., Exh. A.)

The famous fictional settings of "Gone With the Wind" have also been copied, from the vast O'Hara cotton plantation ("Cotton

Farm" in "The Wind Done Gone") with its stately home Tara ("Tata"), to Belle Watling's brothel in Atlanta.

3. Defendant Copied and Summarized Famous Scenes and Other Elements of the Plot from Gone With the Wind

Any person who has read the novel "Gone With the Wind," or seen the Film, will recall such famous scenes as Rhett leaving Scarlett with the memorable words "My dear, I don't give a damn"; Scarlett hurling a china bowl at the wall after being rejected by Ashley, then finding that Rhett, hidden on a couch, has witnessed the entire scene; or Scarlett killing a Union soldier who has invaded Tara, then robbing his body, wrapping it in Melanie's chemise and burying it behind the house.

"The Wind Done Gone" infringes upon these and other famous scenes of "Gone With the Wind." For example:

- "The Wind Done Gone" opens with R. B. leaving Other after their daughter, Precious, dies in an accident. In a familiar-sounding passage, R.B. "cursed [Other] but called her *darling* or *dear* but he told her he didn't give a tinker's damn what happened to her. When he walked out, she sat down on the stairs and cried";
- Cynara tells how "everyone at Twelve Slaves Strong as Trees knew the story of how Other threw herself and some kind of vase at Dreamy Gentleman and of how R. heard it because he was lying down on a couch unseen";

- Cynara also tells how Other and Mealy Mouth kill a Union soldier, rob his dead body and drag him off in their chemises;
- In "Gone With the Wind," Scarlett is married three times, first to Charles Hamilton, Melanie's brother. Charles dies in the war, and Scarlett gives birth to his son after he has died. Scarlett then marries Frank Kennedy, and has a daughter. Frank is killed while riding out with the Ku Klux Klan. Finally, Scarlett marries Rhett. They have a daughter, Bonnie, who dies in a riding accident. In "The Wind Done Gone," Other is married three times, first to Mealy Mouth's brother, who dies in the war. Other gives birth to a son after her husband has died. Her second marriage is to a man who is "killed riding out with the Klan." She has a daughter from that marriage. Her third marriage is to R. B., who leaves her after their daughter is killed;
- In "Gone With the Wind," Scarlett is the eldest of three girls. She has three younger brothers, all of whom died in infancy and are buried in the family plot next to the house. In "The Wind Done Gone," Other is one of three sisters. She had three brothers, all of whom died in infancy and are buried in the family plot next to the house;
- In "Gone With the Wind," Gerald wins Pork, his loyal butler, in a poker game with a man from St. Simon's Island. The man later offers Gerald twice the amount he lost to buy Pork back, but Gerald refuses. Gerald also wins Tara in a poker game. In "The Wind Done Gone," Garlic tells how Planter won Tara, and Garlic himself, "in a poker game. My old master was a rich young planter from St. Simon's island. Good-looking, good-mannered, we went everywhere . . . later Young Marse offered twice the money to get me back . . .";

- In "Gone With the Wind," when the family is desperate for food, Pork steals chickens from his neighbors and gets shot in the leg in the process. In "The Wind Done Gone," Garlic tells how he was shot in the leg stealing food;
- In "Gone With the Wind," after Gerald dies, Scarlett gives his gold watch to Pork, as a token of her appreciation for his loyal service. In "The Wind Done Gone," Othello gives Garlic Planter's gold watch as a reward for his loyalty;
- In "Gone With the Wind," Jeems, a slave, is given to the big, red-haired Carleton twins (Brent and Stuart) for their birthday. The twins are thrown out of every major Southern University. Brent is to marry Scarlett's sister Carreen, but he and Stuart die at Gettysburg. Carreen, bereft, joins a convent. In "The Wind Done Gone," Jeems, a slave, is given to the "big red-haired twins" as a gift on their tenth birthday. The Twins are thrown out of all of the major Southern universities. "B." was to marry Kareen but both twins die at Gettysburg. Kareen then goes into a convent in Charleston; and
- In "Gone With the Wind," Rhett is heartbroken over the death of his daughter Bonnie. Because Bonnie was afraid of the dark, Rhett refuses to have her buried. Instead, he takes her body to his room and sits up with it, candles and lamps blazing so that she won't be afraid. In "The Wind Done Gone," after Precious dies, Cynara tells how R. stayed with her "his dead Precious, in that room those days between her death and the burial" and "held his hand in the burning light, because Precious was afraid of the dark."

See "Plot Summaries" Chart. (Beeber Aff., Exh. B.)

Even some of the most subtle imagery and detail from "Gone With the Wind" has been copied by "The Wind Done Gone," including the scent of lemon verbena surrounding Lady, Other's dream of being lost in a fog, a white infant with a "rosebud" mouth nursing on a brown breast, and Precious' signature blue velvet riding habit.

4. Defendant Copied Verbatim Dialogue and Description from "Gone With the Wind"

Without permission, Defendant has stolen verbatim dialogue and description from "Gone With the Wind." For example:

- The first line of "Gone With the Wind" is "Scarlett O'Hara was not beautiful, but men seldom realized it when caught by her charm as the Tarleton twins were"; "The Wind Done Gone" says "She was not beautiful but men seldom recognized this, caught up in the cloud of commotion and scent in which she moved";
- The last lines of "Gone With the Wind" are "Tomorrow, I'll think of some way to get him back. After all, tomorrow is another day." The last line of "The Wind Done Gone" is "For all those we love for whom tomorrow will not be another day, we send the sweet prayer of resting in peace";
- Mammy's pet name for Scarlett is "Lamb". She asks Scarlett "Whut mah lamb gwine wear?" In "The Wind Done Gone," Mammy calls Other "Lamb" and asks Other "What's mah Lamb gwanna wear?"

Defendant has Refused to Withdraw the Book

After discovering these similarities, and many others, between "Gone With the Wind" and "The Wind Done Gone," the Mitchell Trusts immediately filed the Complaint in this action on March 16, 2001. That same day, a copy of the Complaint was sent to Paul Weaver, Esq., Senior Vice President and General Counsel of Houghton Mifflin, with an accompanying letter stating that, if Houghton Mifflin did not agree to cease all publication and distribution of "The Wind Done Gone," the Mitchell Trusts would have to seek preliminary relief. (Wogan Aff., ¶ 2, Exh. A.) On March 19, 2001, Houghton Mifflin declined to withdraw "The Wind Done Gone" from the market relying on a fair use defense that "The Wind Done Gone" is a parody of "Gone With the Wind." (Wogan Aff., ¶ 3.) The Mitchell Trusts then filed the instant motion.

ARGUMENT

**THE MITCHELL TRUSTS ARE ENTITLED TO A TEMPORARY
RESTRAINING ORDER AND PRELIMINARY INJUNCTION**

To obtain a temporary restraining order or preliminary injunction, the movant must show: (a) a substantial likelihood that it will prevail on the merits of its case; (b) that it will suffer irreparable injury if the preliminary relief is not

granted; (c) that the threatened injury to it outweighs whatever harm the injunction may cause the defendant; and (d) that the injunction is not adverse to the public interest. See, e.g., *Metro-Goldwyn-Mayer v. Showcase Atlanta Coop. Productions, Inc.*, 479 F. Supp. 351, 355 (N.D. Ga. 1979) (granting the Mitchell Trusts' motion for a preliminary injunction to prevent a parody stage production of "Gone With the Wind" called "Scarlett Fever"); *Levi Strauss & Co. v. Sunrise International Trading, Inc.*, 51 F.3d 982, 985 (11th Cir. 1995); *Johnson v. U.S. Department of Agriculture*, 734 F.2d 774, 781 (11th Cir. 1984).³

Here, the Mitchell Trusts can sustain this burden and are therefore entitled to a temporary restraining order and preliminary injunction enjoining Defendant from the publication and promotion of "The Wind Done Gone" and any other work that infringes upon Plaintiff's copyrights and other rights in "Gone With the Wind," the Sequel and other authorized derivative works.

³ The Copyright Act "clearly contemplates injunctive relief to 'prevent' infringement." *In re Capital Cases/ABC, Inc.*, 918 F.2d 140,143 (11th Cir. 1990); *Dallas Cowboys Cheerleaders, Inc. v. Scoreboard Posters Inc.*, 600 F.2d 1184 (5th Cir. 1979).

I

THE MITCHELL TRUSTS HAVE ESTABLISHED A SUBSTANTIAL
LIKELIHOOD OF SUCCESS ON THE MERITS OF THEIR CLAIMS

A. The Mitchell Trusts are Likely to Succeed
on Their Copyright Infringement Claim

1. "The Wind Done Gone" Infringes Upon the
Mitchell Trusts' Right to Make Derivative Works

The Mitchell Trusts can show that "The Wind Done Gone" infringes upon their right to make derivative works of "Gone With the Wind." Section 106(2) of the Copyright Act provides, in pertinent part, that "[the owner of copyright under this title has the exclusive rights to do and authorize [the] . . . prepar[ation] [of] derivative works based upon the copyrighted works" Thus, the Mitchell Trusts'

ownership of valid, existing copyrights in the . . . novel *Gone With The Wind* . . . automatically establishes that Plaintiffs have the exclusive right to prepare derivative works based on the copyrighted work . . . and that Plaintiffs are entitled to prevent any unauthorized " . . . musical arrangement, dramatization . . . or any other form in which the work may be recast, transformed or adapted."

Showcase, 479 F. Supp. at 355-6, citing 17 U.S.C. § 101

(definition of "derivative work").

The Mitchell Trusts, as copyright owner, have the exclusive

right to authorize derivative works and to control the fate of their characters. Defendant, however, has usurped that right in "The Wind Done Gone," where Debt Chauffeur leaves Other and marries Cynara; Mammy dies; Other dies; Cynara returns to Tata for Mammy's funeral; and learns from Miss Priss that Mammy killed Other's three baby brothers and Cynara goes to see Beauty in Atlanta. Thus, in one fell swoop, Defendant has killed off two of the core Mitchell characters, Scarlett and Mammy, and married a third, Rhett, to a stranger. Defendant's actions may even jeopardize the publication of the Second Sequel, whose author has been contractually prohibited from writing in the death of Scarlett or Rhett.

2. **Defendant Has Admitted Access
to "Gone With the Wind"**

Even if "The Wind Done Gone" were not a derivative work of "Gone With the Wind," the Mitchell Trusts still could show a substantial likelihood of establishing a prima facie case of copyright infringement, that is, ownership of a valid copyright and copying by the defendant.⁴ *Bateman v. Mnemonics, Inc.*, 79

⁴Infringement of the right to make derivative works is a proper, separate ground for a finding of copyright infringement. That the infringing work is "derivative" is "unnecessary for a

F.3d 1532, 1539 (11th Cir. 1996); *Showcase*, 479 F. Supp. at 355. Copying may be shown through "access" and "substantial similarity". *Original Appalachian Artworks, Inc. v. Toy Loft, Inc.*, 684 F.2d 821, 829 (11th Cir. 1982); *Showcase*, 479 F. Supp. at 355.

It is indisputable that the Mitchell Trusts are the copyright owners of "Gone With the Wind" and the Sequel, and that they have valid copyright registrations for those works. (Anderson Aff., ¶¶ 4, Exhs. A and B.) Defendant also has admitted that it had access to "Gone With the Wind" by its explicit references to "Gone With the Wind" in its book. (See Statement of Facts, p. 6.)

Moreover, the Eleventh Circuit and this Court have already held that Stephens Mitchell and the Trustee for the Mitchell Trusts hold a valid copyright interest in "Gone With the Wind" and its characters. *Trust Company Bank v. MGM/UA Entertainment Co.*, 772 F.2d 740, (11th Cir. 1985), *Showcase*, 479 F.Supp. at 354, n.1.

finding of prima facie infringement." *Twin Peaks Productions, Inc. v. Publications Int'l, Ltd.*, 996 F.2d 1366, 1373 (2d Cir. 1993).

3. **"The Wind Done Gone" is Substantially Similar to "Gone With the Wind"**

"Substantial similarity" exists where "to the ordinary observer . . . the alleged copy comes so near the original as to give the audience the idea created by the original." *Showcase*, 479 F.Supp at 356. In this case, Defendant has copied the characters, character traits and relationships, settings and situations of "Gone With the Wind," has impermissibly summarized its plot and has copied certain dialogue and passages verbatim. As such, the works are substantially similar. *Showcase*, 479 F. Supp. at 355 (finding substantial similarity between "Gone With the Wind" and "Scarlett Fever" in "both quantitative and qualitative terms when similarities existed in the foundation, materials of locale, settings, characters, situations and relationships"); *DC Comics Inc. v. Unlimited Monkey Business, Inc.*, 598 F. Supp. 110, 117 (N.D. Ga. 1984) (finding substantial similarity where script for singing telegrams evoked plaintiff's character Superman, "based on plot structure, phrases, costumes and names"); *Twin Peaks*, 996 at F.2d 1372 (finding substantial similarity where defendant's book summarized the plot of plaintiff's television show).

a. Character Copying

The characters of "Gone With the Wind" themselves are copyrightable, apart from the story they inhabit, and they cannot be used in a new work without the permission of the copyright holder. See 1 NIMMER ON COPYRIGHT § 2.12, at 2-172.32-33:

"[T]he increasing prevalence of 'sequels' in novels, motion pictures and television, wherein characters from a prior work are used in an otherwise completely new work renders it appropriate to consider the copyrightability of a character apart from the original work in which [it] appeared . . . the prevailing view [is] that characters *per se* are entitled to copyright protection."

See also *Metro-Goldwyn-Mayer v. American Honda Motor*, 900 F. Supp. 1287 (C.D. Cal. 1995) (James Bond character is copyrightable); *Burroughs v. Metro-Goldwyn-Mayer, Inc.*, 519 F. Supp. 388 (S.D.N.Y. 1981) (Tarzan character is copyrightable), *aff'd*, 683 F.2d 610 (2d Cir. 1982).

The test of copyrightability, as articulated in *Burroughs*, is how well-delineated the characters are. The characters of "Gone With the Wind" are certainly sufficiently "well-delineated" to merit copyright protection. Indeed, the Eleventh Circuit already has held that the right to use these characters from

"Gone With the Wind" (as "portrayed in the original stories") in "new and different stories" belongs exclusively to the Mitchell Trusts. *Trust Company Bank v. MGM/UA Entertainment Co.*, 772 F.2d 740, 741 (11th Cir. 1985) (affirming finding that MGM could not make a motion picture sequel to "Gone With the Wind," using the same characters, without the Mitchell Trusts' permission).

As discussed above, "The Wind Done Gone" uses at least fifteen characters from "Gone With the Wind," incorporating not only their names, but also the physical attributes and traits Ms. Mitchell uses to describe them, as well as their intricate relationships to each other. See Character Chart. (Beeber Aff., Exh. A.)

It is irrelevant that the author has called some of the characters by nicknames. Those nicknames are either derived from Margaret Mitchell's own names for the characters (such as "Debt Chauffeur" for Rhett Butler or "Aunt Pattypit" for Aunt Pittypat) or from the words Mitchell used to describe them (such as "Lady" for Scarlett's mother, "Mealy Mouth" for Melanie, or "Dreamy Gentleman" for Ashley). Moreover, altering a character's name does not insulate an infringer from liability. See *DC Comics*,

598 F. Supp at 114 (finding copyright infringement even though defendant changed character names such as "Clark Kent" to "Dark Dent," "Superman" to "Super Stud" and "Wonder Woman" to "Wonder Wench").⁵

b. Impermissible Plot Summarization

Defendant has summarized large portions of the plot of "Gone With the Wind," including some of its most famous scenes. Statement of Facts, p. 10-13 and Plot Summaries Chart (Beeber Aff., Exh. B). The fact that defendant has paraphrased or summarized these scenes, rather than copying them verbatim, does not preclude a finding of substantial similarity. See *O.W. Donald v. Zack Meyer's T.V. Sales and Service*, 426 F.2d 1027, 1030 (5th Cir. 1970) (paraphrasing is equivalent to outright copying).

c. Verbatim Copying

Substantial similarity may also be shown by the verbatim copying of words from the original work. *Showcase*, 479 F. Supp. at 356, 358. In this case, "The Wind Done Gone" copies verbatim

⁵In fact, the name changes here almost seem like the type of evidence that in a criminal context would constitute "consciousness of guilt."

dialogue, images and other lines of text from "Gone With the Wind," including its famous opening and closing lines.

(Statement of Facts, p. 13.)

In sum, where, as here, the defendant has "cull[ed] the most characteristic and most memorable portions of the . . . plots, and the core of the . . . stories - the sequence of events and character development," substantial similarity has been shown. *DC Comics*, 598 F. Supp. at 117. The Mitchell Trusts have shown a likelihood of success on their copyright claim.

4. Defendant Has No Fair Use Defense to Plaintiff's Claim of Copyright Infringement

"The Wind Done Gone" is not, as defendant apparently plans to argue, a parody or commentary that makes fair use of the copyrighted elements of "Gone With the Wind."

Section 107 of the Copyright Act specifies the four factors to be considered in performing a fair use analysis:

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

17 U.S.C. § 107.

Each of these factors, when applied to the Defendant's copying of "Gone With the Wind," militates strongly in favor of a finding that Defendant has far exceeded the limits of fair use.

"The Wind Done Gone" fails under the first fair use factor, "the purpose and character of the use, including whether such use is of a commercial nature." While Defendant asserts that "The Wind Done Gone" is a parody, it is not. The definition of parody, applied by the Court in *Showcase*, is "a work in which the language or style of another work is closely imitated or mimicked for comic effect or ridicule" and has "social value beyond its entertainment function." *Showcase*, 479 F. Supp. at 357. "The Wind Done Gone" does not even attempt to achieve comic effect. Moreover, Defendant's purpose in taking the beloved Mitchell characters and placing them in a new settings is to entertain, and sell books to, avid "Gone With the Wind" fans, a ready-made market for the next "Gone With the Wind" sequel. See *Castle Rock Entertainment*, 150 F.3d at 141. Moreover, 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:

"The crux of the profit/nonprofit distinction is not whether the sole motive of the use is monetary gain but whether the user stands to profit from exploitation of the copyrighted material without paying the customary price."

Harper & Row Publishers, Inc. v. Nation Enterprises, 471 U.S. 539, 562 (1985).

The fair price to be paid for the right to publish a sequel to "Gone With the Wind" already has been set by the two publishers who have agreed to pay, or paid, substantial advances and royalties for the right to create sequels to "Gone With the Wind." (Anderson Aff., ¶¶ 6 and 8.) Defendant Houghton Mifflin decided to exploit the Mitchell characters in a sequel without paying that fair price.

The second fair use factor, the "nature of the [Plaintiff's] copyrighted work," also weighs in favor of Plaintiff. The scope of fair use is most narrow with respect to fictional works such as "Gone With the Wind." *Stewart v. Abend*, 495 U.S. 207, 237 (1990) ("In general, fair use is more likely to be found in factual works than in fictional works.").

Applying the third factor, "the amount and substantiality of the portion of the copyrighted work used," the Supreme Court, in

Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994), focused on whether the "extent of the use" was consistent with or more than necessary to further "the purpose and character of the use." *Id.* at 586-81. Here, Houghton Mifflin has incorporated far more material than is necessary for its alleged purpose of commentary or parody. Some of the most famous and compelling scenes from "Gone With the Wind," as detailed above, are merely summarized for the reader without any commentary that would add to, or challenge, the reader's understanding of the story. Rather, the very substantial portions copied from "Gone With the Wind" add a creative element that the author of "The Wind Done Gone" chose not to develop herself.

Finally, the fourth factor also favors a finding that Defendant's use of material from "Gone With the Wind" does not constitute fair use. Here, the Court must consider "not only the extent of the market harm caused by the particular actions of the alleged infringer, but also whether unrestricted and widespread conduct of the sort engaged in by the defendant . . . would result in a substantially adverse impact on the potential market for [the plaintiff's copyrighted works]." *Campbell*, 510 U.S. at

590.

Since 1936, when Margaret Mitchell wrote "Gone With the Wind," both she and her heirs have authorized, produced and published derivative works (including the Film, the Sequel and the Second Sequel) that have generated millions of dollars for the Mitchell Trusts. If Defendant is permitted to publish this unauthorized derivative work, the result will be that anyone could tell the story of "Gone With the Wind" from another point of view or create sequels or prequels populated by the Mitchell characters without any compensation to the Mitchell Trusts.⁶ Nothing would have a more dramatic and detrimental effect on the potential market for the sequels and other authorized derivative works.⁷

⁶ Moreover, the particular actions of Defendant, in killing two core "Gone With the Wind" characters and marrying off another, have the immediate effect of damaging, or maybe even precluding, the Mitchell Trusts' ability to continue to tell the story of Scarlett and Rhett.

⁷ In *Showcase*, this Court used the "functional test" described in Nimmer's treatise on Copyright for this fourth factor analysis:

If both the plaintiff's and defendant's works are used for the same purpose, then under the functional test the defense of fair use should not be available since the defendant's work serves the same function as that

Thus, there can be no fair use defense to Houghton Mifflin's blatant theft of Plaintiff's copyrighted material.

B. The Mitchell Trusts are Likely to Succeed on Their Lanham Act Claim

Section 43(a) of the Lanham Federal Trademark Act:

protects unregistered, common-law trademarks from infringement by unauthorized users where the unauthorized use would likely confuse the consuming public as to the source or sponsorship of goods or services.

Bonito Boats, Inc. v. Thunder Craft Boats, Inc., 489 U.S. 141, 157 (1989) (principle underlying this law is the protection of consumers from "confusion as to source"); *Foxworthy*, 879 F. Supp. at 1210 (N.D. Ga. 1995) (granting preliminary injunction to protect plaintiff's common-law trademark rights in his catch phrase "You might be a redneck if . . .").

The Mitchell Trusts can and will show:

of the plaintiff's. (citations omitted) The scope of fair use is then constricted where the two works in issue fulfill the same function in terms of actual or potential consumer demand, and expanded where such functions differ. (citations omitted).

Showcase, 479 F. Supp. at 361, citing 3 NIMMER ON COPYRIGHT § 13.05(B). Here, both the infringing work and "Gone With the Wind" are novels directed to the same trade book market and, thus, do fulfill the same function.

(1) that [they have] trademark rights in the mark or name at issue . . . , and (2) that the defendant adopted a mark or name that was the same, or confusingly similar, to the plaintiff's mark, such that there was a likelihood of confusion for consumers as to the proper origin of the goods created by the defendant's use of the [mark] in [its] trade or business.

Foxworthy, 879 F. Supp. at 1210, quoting *Conagra, Inc. v. Singleton*, 743 F.2d 1508, 1512 (11th Cir. 1984); *Toho Co., Ltd. v. William Morrow and Co., Inc.*, 33 F. Supp. 2d 1206, 1215 (C.D. Cal. 1998) (preliminarily enjoining defendant from printing and marketing a book using plaintiff's character, "Godzilla").

In *DC Comics*, 598 F. Supp. at 116, the court found that defendants' use of "Super Stud" and "Wonder Wench" characters in connection with singing telegrams caused a "likelihood of confusion, mistake or deception as to the source of defendants' singing telegram services and as to any affiliation between plaintiff and defendants." Such protection also extends to the use of the plaintiff's fictional character in an unauthorized book. See *Toho*, 33 F.Supp. 2d at 1215.

In this case, the Mitchell Trusts will be able to show that they have common-law trademark rights in their characters, settings and other elements of "Gone With the Wind." The

Mitchell Trusts have entered into a written merchandising agreement with the owner of the rights to the Film, by which the Mitchell Trusts receive royalties for the sale of merchandise bearing the characters and settings of "Gone With the Wind." (Anderson Aff., ¶ 9.) Pursuant to that agreement, dolls, figurines, posters, Christmas ornaments and other items have been sold. This merchandising, along with sales of the novel "Gone With the Wind," the Film, the Sequel, the Second Sequel and the miniseries is sufficient to establish the Mitchell Trusts' common-law trademarks in the characters and other elements at issue here. *Foxworthy*, 879 F. Supp. at 1210.

There is also a substantial likelihood of confusion as to the source, endorsement and sponsorship of "The Wind Done Gone." As discussed above, Houghton Mifflin has unabashedly associated itself with "Gone With the Wind" in the text of the book and its promotion and advertising. Consumers, familiar with the Mitchell Trusts' properties are likely to think that the Mitchell Trusts have authorized the publication of "The Wind Done Gone." How else, consumers will think, would the Defendants have been permitted to so shamelessly copy "Gone With the Wind"? As such,

the Mitchell Trusts are likely to prevail on their Lanham Act claim.

II

IRREPARABLE INJURY IS PRESUMED

If a copyright owner has made a prima facie case of copyright infringement, irreparable injury is presumed. *Sony Corporation of America v. Universal City Studios, Inc.*, 464 U.S. 417, 451 (1984) ("if the intended use of the copyrighted material is for commercial gain, the likelihood of future harm may be presumed"); *Showcase*, 479 F. Supp. at 362; *Foxworthy*, 879 F. Supp. at 1219; *Georgia Television Company, d/b/a WSB-TV v. Duncan*, 718 F. Supp. 939, 948 (N.D. Ga. 1989) (preliminary injunction granted where plaintiff made prima facie case of copyright infringement of its news broadcasts). The same is true for trademark infringement. *Foxworthy*, 879 F. Supp. at 1219.

The Mitchell Trusts will be irreparably harmed if Houghton Mifflin is permitted to proceed with its stated plan for the imminent widespread sale and distribution of "The Wind Done Gone." Once the infringing work is distributed, it will be nearly impossible to retrieve the copies. The Mitchell Trust

will have been deprived of its most basic right to create and authorize derivative works and to control the way its copyrighted characters are portrayed. Moreover, if defendant is permitted to publish this unauthorized derivative work, anyone could, without Plaintiff's consent, retell the story of "Gone With the Wind" from another point of view or create sequels or prequels populated by the Mitchell characters. The potential market for "Gone With the Wind" derivative works will be destroyed and the associated impact and loss of revenue would be incalculable.

III

A BALANCE OF THE HARDSHIPS FAVORS THE MITCHELL TRUSTS

In considering the balance of hardships, the Court need only determine whether the injury to the plaintiff will be greater than that to the defendant if the injunction is wrongly issued. *See Dunkin' Donuts Inc. v. Kashi Enterprises, Inc.*, 106 F. Supp. 1325, 1327 (N.D. Ga. 2000).

Here, the potential harm to the Mitchell Trusts vastly outweighs that to Houghton Mifflin. Should this Court decide not to issue the injunction sought, it will permit the widespread distribution of an infringing work. Once "The Wind Done Gone" is

made available to the public, there will be no way to reverse the harm to the Mitchell Trusts. Should the Plaintiff prevail on its copyright claim at a later date, any remedy the Court might fashion would be like closing the proverbial barn door after the horse has gotten loose. In contrast, an order enjoining the publication of "The Wind Done Gone" will not cause any substantial injury to Defendant. If Defendant later prevails in demonstrating that "The Wind Done Gone" does not infringe on plaintiff's copyright, it will have suffered only a brief delay in publication of the work.

The Mitchell Trusts are entitled to exercise their exclusive rights in derivative works and to be protected from competing, unauthorized derivative works that clearly diminish the value of an authorized grant of the sequel rights. Houghton Mifflin is not entitled to sell infringing works. See *Foxworthy*, 879 F. Supp at 1219 (In balancing the hardships in favor of plaintiff, reasoned that the "[f]ailure to issue the injunction would harm plaintiff, at a minimum, forcing him to compete with an infringer. Issuing an injunction, however, will harm defendants only to the extent that they cannot sell illegally infringing

[products]").

IV

PRELIMINARY RELIEF IN THIS CASE IS NOT ADVERSE TO THE PUBLIC INTEREST

An injunction preventing further distribution of "The Wind Done Gone," will serve the public interest by "upholding copyright protections and, correspondingly, preventing the misappropriation of the skills, creative energies, and resources which are invested in the protected work." *Apple Computer, Inc. v. Franklin Computer Corporation*, 714 F.2d 1240 (3^d Cir. 1983), citing *Klitzner Industries, Inc. v. H. K. James & Co.*, 535 F. Supp. 1249, 1259. *Foxworthy* 879 F. Supp. at 1219 (public interest is served by enforcing the exclusive rights of authors which promotes the progress of science and the useful arts as proscribed by the United States Constitution); *Cable/Home Communication Corporation, M/A-Com Inc. v. Home Box Office, Inc.*, 902 F.2d 829 (11th Cir. 1990) (copyright law implements affirmative constitutional duty to promote the progress of science and the arts).

Moreover, an injunction preventing further violations of the Lanham Act serves the public interest by preventing confusion in

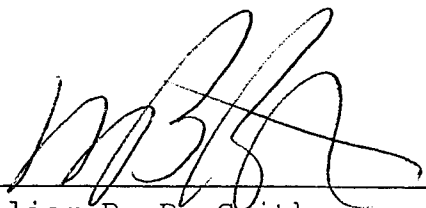
the marketplace among book buyers concerning the source of "The Wind Done Gone." *Foxworthy*, 879 F. Supp at 1219-20.

As such, the preliminary relief is appropriate relief sought by the Mitchell Trusts.

CONCLUSION

For all of the foregoing reasons, this Court should grant the Mitchell Trusts' motion for a temporary restraining order and preliminary injunction, enjoining the further publication and distribution of the book "The Wind Done Gone," and grant Plaintiff such other and further relief as is just and proper.

Dated: Atlanta, Georgia
March 23, 2001



William B. B. Smith
(Georgia Bar No. 664637)
Ralph R. Morrison
(Georgia Bar No. 525145)
Anne M. Johnson
(Georgia Bar No. 392229)
JONES, DAY, REAVIS & POGUE
3500 SunTrust Plaza
303 Peachtree Street, N.E.
Atlanta, Georgia 30308-3242
Telephone (404) 521-3939
Facsimile (404) 581-8330

Of Counsel:

FRANKFURT GARBUS KURNIT KLEIN & SELZ, P.C.
Maura J. Wogan, Esq. (MW 9589) (pro hac application pending)
Jessie F. Beeber, Esq. (JB 3129) (pro hac application pending)
Thomas D. Selz, Esq. (TDS 66969)
488 Madison Avenue
New York, New York 10022
Telephone (212) 980-0120
Facsimile (212) 758-7954
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

This is to certify that I have this day caused a true and correct copy of the within and foregoing **MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION FOR A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION** to be delivered by hand to counsel for the Defendant as follows:

Miles J. Alexander
Jerre B. Swann
Joseph M. Beck
KILPATRICK STOCKTON LLP
1100 Peachtree Street, N.E.
Suite 2800
Atlanta, Georgia 30309-4530

This 23rd day of March, 2001.



An Attorney for Plaintiff

CERTIFICATE OF SERVICE

This is to certify that I have this 23rd day of March, 2001, caused a true and correct copy of the PLAINTIFF'S MOTION FOR LEAVE TO FILE BRIEF IN EXCESS OF TWENTY-FIVE PAGES to be hand delivered, addressed to counsel for Defendant as follows:

Miles J. Alexander, Esq.
Jerre B. Swann, Esq.
Joseph M. Beck, Esq.
KILPATRICK STOCKTON LLP
1100 Peachtree Street, N.E.
Suite 2800
Atlanta, Georgia 30309-4530



An Attorney for Plaintiff