

CASE NO. 01-122-00-HH

IN THE  
UNITED STATES COURT OF APPEALS  
FOR THIS COURT

HOUGHTON MIFFLIN COMPANY,

Defendant-Appellant,

v.

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

Plaintiff-Appellee.

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

**REPLY BRIEF OF APPELLANT HOUGHTON MIFFLIN COMPANY**

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## I. The Standard of Review.

In Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 104 S. Ct. 1949 (1984), the Supreme Court held that when First Amendment freedoms are at stake, the reviewing court should not give deference to the factual conclusions of the lower court, but must conduct its own independent review. Plaintiff argues that Bose merely “permits” an appellate court to review the entire record, and that its reach is “limited” to defamation cases. See Pl.-Appellee’s Br. 17. Such narrow views of Bose are unwarranted.

First, the rule in Bose is mandatory, not permissive; the Court observed that the rule of independent review “assigns to judges a constitutional responsibility that **cannot be delegated** to the trier of fact,” id. at 501, 104 S. Ct. at 1959, and that it “**must make an independent examination of the whole record.**” Id. at 508, 104 S. Ct. at 1964 (internal citations omitted) (emphasis added).

Second, both the language and rationale of Bose compel its application to this case. The Bose Court observed, for example, that the First Amendment mandates independent review in a wide array of contexts, citing Miller v. California, 413 U.S. 15, 93 S. Ct. 2607 (1973) (obscenity); New York v. Ferber, 458 U.S. 727, 102 S. Ct. 3348 (1982) (child pornography); NAACP v. Claiborne Hardware, Co., 458 U.S. 886, 102 S. Ct. 3409 (1982) (interference with business relations); New York Times Co v. Sullivan, 376 U.S. 254, 84 S. Ct. 710 (1964) (defamation); Street v. New York, 394 U.S. 576, 89 S. Ct. 1354 (1969) (fighting words); and Hess v. Indiana, 414 U.S. 105, 94 S. Ct. 326 (1973) (advocacy inciting imminent lawless action).

The Bose Court reasoned that reviewing courts simply cannot defer to factual conclusions about the nature of speech because:

Every communication has an individuality and 'value' of its own. The suppression of a particular writing or other tangible form of expression is, therefore, an individual matter, and in the nature of things every such suppression raises an individual constitutional problem, in which a reviewing court must determine for itself whether the attacked expression is suppressible within constitutional standards. Since those standards do not readily lend themselves to generalized definitions, the constitutional analysis becomes one of particularized judgments which appellate courts must make for themselves.

Bose, 466 U.S. at 507 n.25, 114 S. Ct. at 1963 quoting Roth v. United States, 354 U.S. 476, 497-498, 77 S. Ct. 1304, 1315-1316 (1957). This rationale applies with full force to copyright/fair use cases, particularly one, such as this, that implicates political speech. See Eugene Volokh & Brett McDonnell, Freedom of Speech and Independent Review in Copyright Cases, 107 Yale L. J. 2431 (1998) ("Though Bose was a libel case, its justification for independent review applies equally to copyright law: In both cases, some speech is protected and some is not; in both cases the factfinder may misclassify the speech as unprotected."). To argue that the Supreme Court was interested in protecting pornography from an unconstitutional invasion, but not a literary parody, is simply unsound.

Finally, because there was no live testimony in this case (at plaintiff's own instance), this Court can review the books and the evidence at issue as easily as did the district court. No strong reason to defer to the district court exists. See Bose, 466 U.S. at 500, 104 S. Ct. at 1959 ("the presumption of correctness that attaches to factual findings is stronger in some cases than in others."). Accordingly, this Court must make an independent examination of the entire record to determine whether defendant's First Amendment rights have been violated by the district court's injunction.

## II. Preliminary Comments.

Plaintiff alternately adopts throughout its brief (as did the district court throughout its opinion) three clearly erroneous propositions: (i) that WDG is a substantial retelling of GWTW; (ii) that WDG “copies” verbatim material from GWTW; and (iii) that WDG is a sequel to GWTW.

### A. WDG Does Not Retell GWTW

In its “Statement of Facts,” plaintiff primarily wears a “retelling” hat, setting forth an abbreviated version of the thoroughly discredited and abandoned “Beeber Charts.” Pl.-Appellee’s Br. 7-10. The “Brief Charts,” however, perpetuate the essential flaw of the “Beeber Charts”: they are misleadingly incomplete; they refer to what was purportedly “copied” but omit parodic use.

To illustrate, plaintiff asserts that defendant “copied” from GWTW the “distinct feature” that Scarlett had three brothers, “all of whom died in infancy”; plaintiff omits that in WDG, the infant brothers were murdered as a prelude to Garlic’s ultimate assumption of control of Tata. R. Doc 20-Ex 3-Pg 13-¶ 18(b). Taking another example, plaintiff asserts that defendant “copied” from GWTW the “distinct feature” that Ellen would have married Phillippe “but for their family’s disapproval”; plaintiff omits that in WDG the marriage was impossible because both Lady and Feleepe shared a black ancestor, and might thus have produced a black child. R. Doc 25-Ex 5-Pg 2-¶ 3. Similarly, plaintiff asserts that defendant “copied” from GWTW the “distinct feature” that Prissy was “shrill” and “foolish,” omitting

the fact that in WDG, Miss Priss “possessed a keen and labyrinthine intelligence,” there is nothing “simple about her.” R. Doc 20-Ex 3-Pg 14-¶ 19.<sup>1</sup>

Nor is it “compelling” (or correct) that WDG allegedly was marketed as a retelling. Pl.-Appellee’s Br. 27-28. Rather, the verbiage that plaintiff (and the district court) selectively quote from the back cover of WDG is: (i) **introduced** by the statement that WDG is “**a brilliant rejoinder**”; and (ii) **is almost immediately followed** by the statement that WDG “**ingeniously and ironically transform[s]**” events in GWTW. Among the credits inside the cover is a quotation from Reginald Hudlin that “**Alice Randall is dropping a literary A-bomb in our on-going cultural Civil War.**” Defendant has thus been consistent:

As for the implication, in a recent filing by the Mitchell Trusts, that “parody” is a recent invention of Houghton Mifflin, it is nonsense. Parody was part of [the] initial discussions with Ms. Randall; the initial title to Ms. Randall’s work included the subtitle, “A Meaningful Parody”; **in the publishing agreement, entered into in August of 2000, the work to be delivered by Ms. Randall is described as a parody of Gone with the Wind**; ... we have attempted to be careful not to use “parody” in the sense that it is often used, a comic broadside, but every item Houghton Mifflin has put out has driven home the “dramatic rejoinder” message of Ms. Randall’s book; that message was perceived by, and is both implicit and explicit in, all of the ... comments that Houghton Mifflin has received about the book – and all of this activity took place well prior to the initiation by the plaintiff of litigation.

R. Doc 20-Ex 6-Pg 9-¶ 13 (Mueller). Plaintiff’s selection of a single phrase out of context does not convert WDG into a retelling of GWTW; rather, as the total body of information conveyed about WDG makes clear, it turns GWTW upside down and inside out.<sup>2</sup>

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<sup>1</sup> As defendant has noted earlier (Def.-Appellant’s Br. 6-11), the substantive personality of each significant character is not “retold”; it is fundamentally transformed. For that reason, too, the Brief Charts do not support the proposition that WDG is a substantial “retelling,” copied from GWTW.

<sup>2</sup> Plaintiff strains to find some non-parodic treatment of GWTW, stating, e.g., that the “red-haired Twins are the unique products of Margaret Mitchell’s imagination” and were unnecessary to the parodic intent of WDG. Pl.-Appellee’s Br. 34, n.11. As, however, Ms. Randall has observed:

## B. There Is No Verbatim Copying

Even less persuasive is plaintiff's effort to support the district court's clearly erroneous findings that defendant "lifts quotes directly" from (R. Doc 35-Pg 15) and "adopts, almost verbatim in many instances" (R. Doc 35-Pgs 12-13) scenes from GWTW. Pl.-Appellee's Br. 12-13. Plaintiff tries to buttress the district court with three examples. But plaintiff's first example is a classic instance of parodic "conjuring up" followed by a humorous inversion (the "she was not beautiful, but men seldom recognized this" line sets up Cynara's observation, when R. leaves Other, that "maybe he's just the unseldom one who do recognize" [WDG at 1]). Plaintiff's second example of "verbatim copying" is not "verbatim"; rather, it is a misreading by plaintiff's counsel and a classic example of parodic "conjuring up" and biting inversion (see Def.-Appellant's Br. 11 n.15 ["Tomorrow is another day," an expression of hope, becomes "For all those we love for whom tomorrow will not be another day," a poignant remembrance of dead slaves]). Plaintiff's third example omits WDG's parodic use, which poignantly contrasts Mammy's use of "Lamb" for Other with her

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In [GWTW], ... Jeems is a very minor character, and is described as follows: "Jeems was [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 [WDG], Jeems [and the Tarleton twins are] included 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.

R. Doc 20-Ex 5-Pgs 3-4-¶ 4(b). As Professor Sitter notes, moreover, the Twins, Carreen, and the convent, in conjunction with Jeems, are used to invert the notion of Other's attractiveness to men. R. Doc 20-Ex 3-Pg 15-¶ 22. Plaintiff's evidence of nonparodic allusion is thus reduced to the convent being in Charleston, but Carreen is such a minor character in both GWTW and WDG that placing her in a Knoxville convent might not have "conjured her up" at all.

use of the harsher term "Chile" to refer to her own child (the full sentence reads "It was 'Get dressed, Chile!' [for Cynara] and 'What's mah Lamb gwanna wear?' [for Other]"). R. Doc 20-Ex 3-Pg 6-¶ 10(a).

### **C. WDG Is Not a Sequel to GWTW**

Given the dramatic differences in characterization, the "retelling" theme does not resonate. No one will really believe that Ashley Wilkes in GWTW was a homosexual who slept with a slave, R. Doc 20-Ex 4-Pg 6-¶ 9, or that Melanie was a serial-killer, R. Doc 20-Ex 3-Pg 8-¶ 13. Similarly, given the difference of expression in GWTW and in WDG, plaintiff does not labor long in support of the clearly erroneous opinion of the district court that there was "verbatim" or "almost verbatim" copying. Rather, plaintiff devotes most of its energy to the "sequel" theme.

At the core of the district court's opinion is the conclusion that WDG is a sequel. The district court used that conclusion to discount the parodic content of WDG under the first fair use factor and to place the fourth factor in plaintiff's column. Accordingly (and necessarily), the core of plaintiff's argument on appeal is that WDG is a sequel, but that argument, too, is infirm.

#### **1. The Literary Meaning of Sequel.**

Plaintiff acknowledges in its brief, for example, that a sequel "preserv[es] the expectations of an avid reading public...." Pl.-Appellee's Br. 4. The district court acknowledges that in a true sequel, the "hero performs even more astonishing feats...." R. Doc 35-Pg 27.

A sequel in literary terms is thus – by plaintiff's and the district court's standard – a continuation in which the characters in the original go on to new experiences that preserve

the expectations of the reader of the original. A sequel's purpose is to build on a developed relationship between the reader and the characters of the original; a sequel fulfills an "implied contract" between the author and reader.

A sequel caters to readers' developed expectations and preserves a similar point of view, tone and style. Characters stay "in character." Rocky is always Rocky; James Bond, James Bond. Because a sequel satisfies the reader's appetite for more of the original, it is undisputed that from a literary standpoint:

the motivation to buy and read sequels is to enjoy more of the same thing that has given pleasure in the past. **Readers who are interested in sequels are generally readers who loved the original work and want to love its sequel in the same way.** This desire among sequel readers for more of the same is not satisfied by parodies or other works that are sharply critical of the original.

R. Doc 25-Ex 3-¶ 3 (Chelius).

Alexandria Ripley's *Scarlett*, therefore, represents a true sequel, a point of view and style that look and sound like Margaret Mitchell. Alice Randall's biting critique, by contrast, is the antithesis of Margaret Mitchell. In a parody, characters are shown as quite different from their original portrayals. This difference is, of course, the parodist's invention, meant to expose a blindness or partiality in the original work.

Accordingly, any reader wanting "more" of GWTW would not be required by WDG. Any reader anticipating new experiences with *Scarlett* would need to look elsewhere. It is thus again undisputed that:

**[WDG] will not appeal to any desire among readers for a sequel to [GWTW]. Readers will easily perceive that [WDG] is a parody of [GWTW], not a sequel. ... A reader looking for a sequel to [GWTW] would be looking for a continuation of the story of the principal characters, and would be looking for a further portrayal of the romantic world of that novel. ... The purpose of [WDG] is not to perpetuate the fictional legacy of GWTW, to invite readers back into that created**

world; in fact it is quite the opposite. ... Therefore I cannot see that publication of [WDG] would have any adverse effect on the sales of licensed sequels to [GWTW].

The target audiences for the two books are also very different. ... [WDG will] have a far stronger appeal to African-American readers than [GWTW] has due to its offensive depictions of African-American characters. While [GWTW] appeals to readers of romance novels, ... such readers would [not] be particularly attracted to [WDG].

R. Doc 25-Ex 3-¶¶ 4-5 (Chelius). Not surprisingly, therefore, none of plaintiff's experts opines that WDG is a sequel.

## 2. Sequels under Copyright Law.

Copyright law does not refer to a right to prepare sequels. It refers to a right to prepare derivative works based on a copyrighted work, 17 U.S.C. § 106(2), and it recognizes that many copyrightable works are "derivative" to some degree from prior works. Emerson v. Davies, 8 F. Cas. 615, 619 no. 4436 (C.C.D. Mass. 1845) ("Every book in literature, science and art, borrows and must necessarily borrow, and use much which was well known and used before . . . . Virgil borrowed much from Homer; . . . even Shakespeare and Milton . . . would be found to have gathered much more from the abundant stories of current knowledge and classical studies in their days . . ."), cited in Campbell, 510 U.S. at 575, 114 S. Ct. at 1169. Thus, a work cannot be derivative in the copyright infringing sense merely because it borrows from pre-existing works:

"A work is not derivative unless it has substantially copied from a prior work. ... [A] work will be considered a derivative work only if it would be considered an infringing work if the material that it has derived from a pre-existing work had been taken without the consent of a copyright proprietor of such pre-existing work."

Melville & David Nimmer, Nimmer on Copyright, § 3.01 at 3-4 (2001 ed.) (emphasis in the original).

Defendant agrees that – subject to the fair use doctrine – the owners of copyrights may prevent a “usurpation” of their right to create derivative works (i.e., works that are substantially similar in copyrightable expression to the original work). Campbell, 510 U.S. at 590-94, 114 S. Ct. at 1177-79. As elsewhere argued,<sup>3</sup> WDG is not such a derivative work of GWTW because it does not infringe: it does not reproduce “verbatim” or in substantially similar form the **copyrightable** expression of GWTW.

Moreover, to the extent the Court finds **any** substantial similarity between WDG and GWTW, it is a result of WDG’s permissible use of GWTW for the fair use purposes of parody, satire, comment and criticism. Under Campbell, the owner of a copyright cannot, by claiming “sequel,” extend its limited statutory monopoly either to prevent criticism of the original or to suppress works that are so transformative that they serve a “different market.” Campbell, 510 U.S. at 592, 114 S. Ct. at 1178. “Because the social good is served by increasing the supply of criticism – and thus, potentially, of truth – creators of original works **cannot be given the power to block dissemination of critical derivative works.**” Leibovitz v. Paramount Pictures Corp., 137 F.3d 109, 115 n.3 (2d. Cir. 1998). Such an expansion of copyright would discourage, not promote, creativity.

Finally, WDG is not a sequel to GWTW in a copyright sense for two additional, but related, reasons. First, “[t]he market for potential derivative uses includes only those that creators of original works would in general develop or license others to develop.” Campbell, 510 U.S. at 592, 114 S. Ct. at 1178. In the wake of the declaration of Pat Conroy (R. Doc 20-Ex 7), any assertion that plaintiff would have authorized a work like WDG cannot withstand scrutiny. WDG indisputably is not the kind of “potential derivative use” that

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<sup>3</sup> Def.-Appellee’s Br. 19; R. Doc 11-Pgs 8-15.

plaintiff “would in general develop or license others to develop.” WDG does not infringe a protectable derivative market because “there is no protectible derivative market for criticism.” Campbell, 510 U.S. at 592, 114 S. Ct. at 1178.

Second, WDG will not act “as a substitute” for GWTW; here, “the parody and the original ... serve different market functions.” Campbell, 510 U.S. at 591, 114 S. Ct. at 1178. Indeed, plaintiff offered three sequel experts, **not one of whom opined that WDG would serve to replace GWTW.** The words “market substitute” appear **only** (albeit repeatedly) in plaintiff’s brief; **they are not words in the factual record of this appeal.** The record is undisputed:

*The Wind Done Gone* is unlikely to have any discernable effect on the market for sequels other than, possibly, through its criticism. *The Wind Done Gone* will not supplant the market position of *Gone With the Wind* or any imaginable licensed derivatives.

R. Doc 25-Ex 2-Pg 3-¶ 7 (Price). In every respect, the district court’s sequel finding must be set aside.

**D. WDG Is Transformative Parody, Satire, Comment, and Criticism**

In sum, WDG is not a “retelling”; it is not “verbatim” or “almost verbatim” copying; nor is it a “sequel.” Rather, it is a work that: (i) “conjures up” the heart of (sufficiently “retells”) an original so that the author can “be sure the audience” will know it (here, in its vast and multiple manifestations); and (ii) then proceeds not only to invert that “heart,” but to skewer every facet of the historical and political “myth” that the original’s characterizations have generated. As such, it is transformative parody, satire, comment and criticism.

Plaintiff's urges that a parodist has three burdens under Campbell:<sup>4</sup> "(i) that it has appropriated (without specific commentary or criticism) only as much as is necessary to conjure up or assure identification of the original [by, e.g., alluding to its "heart"]; (ii) that any additional takings are justified as necessary to the purpose of parody and comment on the original; and (iii) where a market for sequels and other derivative works of the original has been established, that the putative parody will not serve as a market substitute for the original." Pl.-Appellee's Br. 25. Putting temporarily aside the fact that plaintiff's characterization of Campbell comports neither with the language or rationale of either Campbell or any case law applying Campbell, nor with the fundamental purpose of copyright law, defendant clearly prevails on each of these three prongs based on the undisputed record before the court.

Given, for example, the vastness and complexity of GWTW, defendant has met the first prong. GWTW is a "sprawling novel [of over a thousand pages] containing a vast number of characters [and] episodes" and "an allusion to only two or three characters ... would not be sufficient to call up the relationships among the characters and the complex view of society that they collectively convey." R. Doc 20-Ex 3-Pgs 1,3-¶¶ 2,5 (Sitter).

Given the thoroughgoing and unrebutted analysis contained in the Sitter, McCaskill, Randall and Mueller Declarations, defendant also has met the second prong. There are no gratuitous allusions. Ms. Randall "did not allude to more than [she] had to; [she] did not do anything... without a purpose." R. Doc 20-Ex 5-Pg 4-¶ 5 (Randall).

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<sup>4</sup> In truth, on a preliminary injunction, the burden is actually at all times on the plaintiff. Canal Auth. v. Callaway, 489 F.2d 567 (5<sup>th</sup> Cir. 1974).

And given the total demolition of plaintiff's sequel theory in the Price and Chelius Declarations (and plaintiff's failure to address the issue), defendant has met the third prong. To repeat, WDG will not "in any sense supplant the market for *Gone With the Wind* or any derivatives ... that would conceivably be licensed by the Mitchell Trusts." R. Doc 25-Ex 2- Pg 5-¶ 10 (Price).<sup>5</sup>

Plaintiff is correct, therefore, in suggesting that "[s]ummary judgment on this record -- essentially the two books [and the declarations] -- would be appropriate." Pl.-Appellee's Br. 47. On this record, however, **summary judgment is appropriate for defendant** because plaintiff has completely **failed to rebut** the overwhelming evidence that WDG (a) is a transformative parody; and (b) is neither a "sequel" nor a work which performs the same market function as GWTW.<sup>6</sup>

#### **E. Plaintiff's Erroneous Fair Use Test**

Moreover, although defendant has convincingly met the burden plaintiff would place upon it, plaintiff plainly miscasts Campbell. Plaintiff's three prong test -- which it claims a "putative parodist" must satisfy "to avoid violating the copyright law" -- actually covers only portions of the third and fourth fair use factors. Plaintiff's purported test ignores the Supreme Court's emphasis on the interrelationship between the four fair use factors, and ignores the first fair use factor altogether. The Supreme Court in Campbell emphasized that the statutory fair use factors are **not** four discrete, unrelated inquiries. For example, in

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<sup>5</sup> If anything, WDG is "biting criticism that merely suppresses demand," not "copyright infringement, which usurps it." Campbell, 510 U.S. at 592, 114 S. Ct. at 1178.

<sup>6</sup> On the other hand, summary judgment is not appropriate for the plaintiff because of, *inter alia*, its complete failure to show market harm. Indeed, there are material questions of fact as to whether there is substantial similarity of copyrightable expression between GWTW and WDG.

analyzing the third factor, the Court noted that “the extent of permissible copying varies with the purpose and character of the use [i.e., with factor one].” 510 U.S. at 586-87, 114 S. Ct. at 1175. Moreover, “the facts bearing on [the third] factor will also tend to address the fourth, by revealing the degree to which the parody may serve as a market substitute for the original or potentially licensed derivatives.” Id. at 587, 114 S. Ct. at 1175.

When each of the four factors are applied as the Supreme Court intended in Campbell, it is even clearer that defendant’s fair use defense prevails. Under factor one, as argued above (and as even the district court partially conceded), WDG is a transformatively satiric parody and criticism of GWTW.

As for factor two, plaintiff concedes the validity of defendant’s argument that this factor carries little relevance in cases of parody. (Pl.-Appellee’s Br. 31). Plaintiff lacks support, however, for its claim that this diminished weight “has no application” where factors one and three favor the plaintiff. Id. at 31-32. Campbell says nothing of the kind. 510 U.S. at 586, 114 S. Ct. at 1175. Rather, it clearly states that the fact that the original is a work of creative expression “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.” Id. Indeed, because of GWTW’s nature, it is not only the typical kind of work targeted by parody; it is a work – because of its political and cultural weight – that is especially subject to a fair use parody. If anything, therefore, the second factor tips in favor of fair use.

Under the third factor, plaintiff attempts to recast Campbell as laying down a somewhat stricter, two-step test (which then becomes the first two prongs of plaintiff’s novel three-prong test for fair use). Plaintiff asserts that, under Campbell, a parodist may only use

enough of an original “to assure identification,” and if any more is taken, the parodist “must prove that each taking from the original is justified.” (Pl.-Appellee’s Br. 32.) In the first place, as noted above, the detailed analyses by Professor Sitter and Alice Randall herself establish such justification – and plaintiff does not rebut the analyses.<sup>7</sup>

Moreover, contrary to plaintiff’s urgings, the fundamental inquiry under factor three is straightforward: whether the parody’s use of the original is “excessive in relation to its parodic purpose.” *Id.* at 589, 114 S. Ct. 1176. That this “excessive in relation” language is fundamental to the factor three analysis is apparent from the fact that the Court employs it twice within a single page of its factor three discussion. *Id.* at 588-89, 114. S. Ct. at 1176.

Campbell then proceeds to note that whether a parody’s use of the original is reasonable or excessive will be influenced in large part by its status under the first and fourth fair use factors: it “will depend, say, on the extent to which the overriding purpose and character is to parody the original or, in contrast, the likelihood that the parody may serve as a market substitute for the original.” *Id.* Thus, as the Second Circuit recognized in Leibovitz, 137 F.3d at 116, Campbell’s approach “leaves the third factor with little, if any, weight against fair use so long as the first and fourth factors favor the parodist.” (emphasis added). Where, as with WDG, the critique transforms elements of the original so

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<sup>7</sup> In an effort to show a non-parodic use, plaintiff labors intensely to challenge Professor Sitter, even to the point of accusing him of finding “punning change” in a mistyping of “scarlett.” Brief of Plaintiff-Appellant 28-29. In fact, Professor Sitter stated:

While Ellen dies from typhoid in *Gone With the Wind*, in *The Wind Done Gone* “Lady caught some fever, smallpox or scarlett, and died.” (42). (Charts at 29). This punning change in the cause of death perhaps implies that the racist world of *Gone With the Wind* as exemplified by the word “scarlett” is poisonous.

R. Doc 20-Ex 3-Pg 12-¶ 17(d) (emphasis added). Professor Sitter thus attributed nothing to a “typo”; his observation does not turn on whether “the cause of [Lady’s] death” was “scarlett” or “scarlet” fever. Rather, it is plaintiff’s “typographical” example that reflects excessive advocacy and confirms the persuasiveness and effectiveness of the Sitter Declarations.

significantly that the resulting work is unlikely to supplant the market for the original or licensed derivatives, the amount of the work used by the parodist has little relevance to whether the use was "fair."

Here, WDG's critique of GWTW is profoundly transformative, and the unrebutted evidence conclusively demonstrates that it will not supplant the market for licensed derivatives. Thus, as in Leibovitz, since the first and fourth factors clearly favor defendant, the third has little significance. That plaintiff rests virtually its entire fair use analysis on a factor that, in a case of this type, bears small weight, speaks volumes about the weakness of plaintiff's overall position.

### **III. The Apocalypse Is Not Impending.**

Plaintiff's suggestion that sanctioning WDG will open the infringement floodgates is hyperbole. First, as plaintiff argues, "[t]here is no serious dispute as to the fame of [GWTW]." Pl.-Appellee's Br. 3. Indeed, its own expert referred to the book as "historical myth." R. Doc 22-Ex C-Pg 3-¶ 8 (Rubin).

Second, GWTW "especially in its book form -- is widely regarded in the black community as one of the most racist depictions of slavery ... in American literature." R. Doc 20-Ex 2-Pg 2-¶ 5 (Gates). It is a book in which blacks are "routinely compared to 'apes,' 'gorillas,' and 'naked savages.'" R. Doc 20-Ex 5-Pg 1-¶ 2 (Randall). Subjecting such an "historical myth" to criticism will thus not lay waste to copyright law. Rather, the truest irony confronting the Court is the demand to enjoin WDG, as observed by Nobel Prize winner Toni Morrison:

Considering the First Amendment rights properly accorded *Gone With the Wind*, in spite of the pain, humiliation and outrage it's a-historical representation has caused African Americans, it seems particularly odd for the Mitchell estate to deny this

clever but gentle effort to assuage the damage *Gone With the Wind* has caused. That it has asked legal redress does not seem to have embarrassed it.

R. Doc 25-Ex 1-Pg 3.

As Campbell makes clear, fair use claims always require a careful and particularized factual analysis of the works at issue. The underlying work here is a "historical myth" of unique power and duration; the challenged work is a parodic political commentary of enormous depth and subtlety. These circumstances present important First Amendment considerations, more compelling than those presented by other recent cases upholding the right of a parodist to publish despite an accusation of copyright infringement. The air waves are not filled with parodic versions of country classics as a result of the holding in Campbell; our newspapers and magazines are not filled with parodies of famous photographs as a result of the holding in Leibovitz. Finding fair use here will not open the "floodgates" of infringement.

#### **IV. The Role of the First Amendment.**

There are two distinct First Amendment issues in this case: first, whether the facts warrant a grant of prior restraint, in the form of a pre-publication injunction against WDG; and second, the degree to which First Amendment values infuse and inform a proper understanding and application of the fair use doctrine.

##### **A. The Issue of Prior Restraint of Speech**

What is striking about plaintiff's brief is its failure, in the course of almost 20 pages, to respond to the direction of the Supreme Court in Campbell. As this Court will recall, Campbell directed that while injunctions may issue routinely in cases of "simple piracy, such cases are 'worlds apart from any of those raising reasonable contentions of fair use'

where ‘there may be a strong public interest in the publication of the secondary work [and] the copyright owner’s interest may be adequately protected by an award of damages for whatever infringement is found.’ Campbell, 510 U.S. 569 at 578 n.10, 114 S. Ct. at 1170, quoting Pierre N. Leval, Toward a Fair Use Standard, 103 Harv. L. Rev. 1105, 1133 (1990). Indeed, the best plaintiff can muster in response to these authorities is to call the language “dicta” (and, similarly, to characterize as “dicta” this court’s recent instruction in Greenberg v. Nat’l Geographic Soc’y, 244 F.3d 1267 (11<sup>th</sup> Cir. 2001)). In Greenberg, this Court, in perfect harmony with Campbell and other cases involving copyright and First Amendment values, cautioned that injunctive relief should not flow “automatically” even from a clear finding on appeal of infringement by a work that had been in public distribution for years. “In assessing the appropriateness of injunctive relief, we urge the court to consider alternatives . . . in lieu of foreclosing the public’s . . . access to this educational and entertaining work.” 244 F.3d 1267, 1275.

Of course, neither the Supreme Court, this Court, Judge Leval, nor defendant has argued that such a reading of the Copyright Clause and the First Amendment amounted to a demand for a “compulsory license.” Rather, “compulsory license” is the straw man offered up by the plaintiff. Pl.-Appellee’s Br. 52-54.

Plaintiff insists that there is no such thing as “prior restraint in enjoining copyright infringement,” Pl.-Appellee’s Br. 43, relying on the “automatic” injunctions issued in cases of simple piracy, but as noted, this ignores Campbell and Greenberg, and constitutes exactly the sort of “legal rhetoric” that “has dulled thought on the injunction remedy,” Leval, supra at 1133. Compare Rosemont, 366 F.2d 303 (“The spirit of the First Amendment applies to the copyright laws . . . .”); Religious Tech. Ctr. v. Lerma, 897 F.Supp. 260, 262-63 (E.D.Va.

1995) (“If a threat to national security was insufficient to warrant a prior restraint in New York Times v. U.S., the threat to appellee’s copyrights and trade secrets is woefully inadequate”); and Globe Int’l v. Nat’l Inquirer, Inc., No. 98-10613 CAS, 1999 WL 727232 at \*5 (C.D. Ca. 1999) (“The prior restraint analysis has been applied to requests for copyright injunctions, even though Congress has included injunctive relief as a remedy for infringement.”)

Conceding, as it must, that the antipathy for prior restraint of speech is a formidable obstacle under the settled law, plaintiff suggests that this injunction “does not prohibit publication of any information or facts.” But the injunction **does** prohibit publication of information and facts. Plaintiff apparently fails to appreciate that WDG provides a wealth of new information, aesthetics, insights and understanding about GWTW’s picture of happy, docile slaves. Def.-Appellant’s Br. 24-26. That those facts and information are conveyed through the medium of fiction rather than an academic journal or newspaper article affords no basis for drawing a First Amendment distinction. See Winters v. New York, 333 U.S. 507, 510, 68 S. Ct. 665, 667 (1948) (“the line between the informing and the entertaining is too elusive for the protection of that basic right.”). Indeed, the First Amendment would be a poor sanctuary if it only protected the communication of facts and information through academic journals and newspaper articles and did not equally protect novels, television programs, motion pictures and songs.

Even less is plaintiff accurate when it argues that this injunction “does not prohibit publication of any ideas, arguments or criticism of [GWTW].” Pl.-Appellee’s Br. 43. To the contrary, that is exactly what the injunction does. Moreover, in the course of silencing one

of the most eloquent critics to date of GWTW, the injunction will tame the future public debate over GWTW by relegating would be critics to unread academic journals.<sup>8</sup>

Plaintiff is correct that copyright does not protect information or ideas but only their expression, and that the idea-expression dichotomy assists in harmonizing First Amendment and fair use concerns. But these axioms of copyright law, which help rationalize the issuance of injunctions in “simple piracy” cases, are of no assistance to a plaintiff charged (at the preliminary injunction stage) with the burden of negating fair use. The fair use defense, after all, only arises where a plaintiff has carried its burden of proving infringement not of unprotectable ideas but of copyrightable expression.

In a further attempt to defend the unconstitutional prior restraint of WDG, plaintiff engages in a “parade of horrors” that exaggerates the consequences of dissolving the injunction. Plaintiff’s assertion that “Defendant asks this Court to carve out an exception to the remedy provisions of the Copyright Act” is incorrect on its face: the remedy provision is permissive in nature. See 17 U.S.C. § 502(a). Its argument that a refusal to enjoin arguably transformative uses of copyrighted material will deprive proprietors of control over all derivative works is classic slippery-slope logic; the Copyright Act already requires federal courts to distinguish, case-by-case, between fair and unfair uses.<sup>9</sup> Indeed, given the all but unique and continuing political and cultural impact of GWTW, this case is the easy one.

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<sup>8</sup> Plaintiff argues that Alice Randall is not among the “critics” and “scholars” who use copyrighted material to make a point, and that “[n]o facts, no arguments, no comment, and no criticism is enjoined.” Pl.-Appellee’s Br. 50, 57-58. While plaintiff obviously takes a dim view of defendant’s book, its assertion that WDG offers no commentary fails on its face in light of the uncontradicted testimony of numerous authors and scholars who perceive WDG’s profound critique of GWTW.

<sup>9</sup> The authorities cited by plaintiff are easily distinguishable from this case: Showcase Atlanta, 479 F. Supp. 351, 356 (N. D. Ga 1979) involved a play that “as a whole [was] not a critical

## B. The First Amendment Values Embodied in the Fair Use Doctrine

The primary goal of copyright law is to benefit the public through dissemination of knowledge, and only secondarily to reward authors. Campbell, 510 U.S. at 574, 114 S. Ct. at 1169; Feist Publ'ns Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 349 (1991). That is a principle of **copyright law**, not a principle of First Amendment law, yet the implications of that copyright law principle for First Amendment values and interests is obvious: copyright should enhance, not inhibit, the dissemination and discussion of ideas, information and points of view. These First Amendment considerations particularly come into play where controversial political ideas and viewpoints are part and parcel of a copyrighted work.

Plaintiff's oversimplified reliance on copyright axioms such as "the idea expression dichotomy" serve no useful purpose in a case involving parody, satire, comment and criticism – the kinds of works which often necessarily copy expression, not ideas. Indeed, precisely because such copying is technically an "infringement" – which would result in injunctions against parody, satire, comment and criticism – the fair use doctrine, informed by First Amendment considerations, resolves the conflict **in favor of freedom of expression**.<sup>10</sup>

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commentary of GWTW"; Salinger, 811 F.2d 90 (2d Cir. 1987) concerned a biographer's attempt to make the first publication of verbatim copies of J.D. Salinger's private letters, and turned in part on Salinger's right to privacy; Dr. Seuss Enters., 924 F. Supp 1559 (S.D. Cal. 1996) involved use of expression that did not comment upon the plaintiff's work. The remaining cases plaintiff cites do not remotely address the concerns implicated in this case: Cable/Home Communication, 902 F.2d 829, 849 (11<sup>th</sup> Cir. 1990) involved a defendant that distributed information about how to use pirate computer chips to access copyrighted television programs; Pacific and Southern Co., 744 F.2d 1490 (11<sup>th</sup> Cir. 1990) involved verbatim copies of news broadcasts without any attempt to comment or criticize; In re Capital Cities/ABC, Inc., 918 F.2d 140 (11<sup>th</sup> Cir. 1990) concerned a discovery order; Dallas Cowboys Cheerleaders, 600 F.2d 1184 (5<sup>th</sup> Cir 1979) dealt with a pornographic poster that had already been published in a magazine.

<sup>10</sup> Indeed, it has been argued that because of the policy behind the copyright clause – benefit to the public through the advancement of learning – the First Amendment and copyright are in fact in harmony, and not in conflict at all. L. Ray Patterson & Judge Stanley F. Birch, Jr.

Plaintiff's argument that "taken to its logical conclusion," "infringers would be able to escape liability" merely by arguing that the new work portrays the copyrighted characters in a new light" is, therefore, flawed for two fundamental reasons. First, the argument ignores the fact that federal judges are capable of distinguishing, case-by-case, between fair and unfair uses. Secondly, the argument trivializes the First Amendment values which lead courts to permit the publication of (allegedly infringing) literary works while enjoining (allegedly infringing) carpet designs and software. That such a distinction is important and not trivial was affirmed in Campbell (distinguishing between routine cases of "simple piracy" and cases "raising reasonable contentions of fair use") and by this Court in Greenberg, 244 F.3d at 1275 (urging consideration of alternatives to injunctions against distribution of an infringing but nonetheless "educational and entertaining" work).

In sum, plaintiff thoroughly failed to establish a substantial likelihood of success on its copyright claims. Plaintiff equally failed to demonstrate either that the harm it claims it will suffer from publication of WDG – a work that its own experts do not opine will supplant any market for "sequels" – outweighs the harm to defendant's constitutional rights, or that the public interest will not be adversely affected by barring this stimulating work from the public debate.<sup>11</sup> Plaintiff's footnote reference to a trademark argument that defendant disposed of in less than two minutes below, R. Doc 31-Pgs 79-80, is similarly unavailing. Accordingly, the district court erred in granting the injunction.

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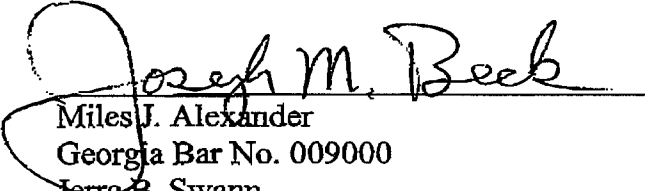
Copyright and Free Speech Rights, 4 J. Intell. Prop. L. 1 (1996). Such a view, it respectfully is submitted, is also in perfect harmony with defendant's position that First Amendment values and principles infuse and inform the fair use doctrine.

<sup>11</sup> For a more detailed discussion of these factors, see Def.-Appellant's Br. 35-38.

CONCLUSION

For the foregoing reasons, defendant respectfully requests that this Court reverse the order of the district court, vacate the preliminary injunction, and remand the case with instructions that make clear that WDG is a quintessential fair use.

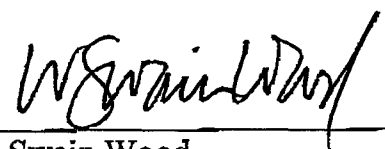
Respectfully submitted this 23<sup>rd</sup> day of May, 2001.

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

Pursuant to FRAP 32(a)(7), I hereby certify that the foregoing brief, not including the Table of Contents or Table of Citations, contains 6,813 words.



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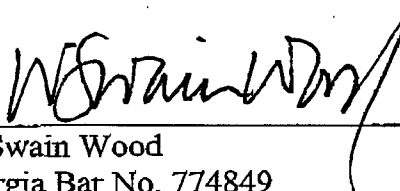
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