

DUPLICATE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF GEORGIA, ATLANTA DIVISION

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:
SUNTRUST BANK, as Trustee :
of the Stephens Mitchell :
trusts f/b/o Eugene Muse :
Mitchell and Joseph Reynolds :
Mitchell, : CASE NO. 1:01 CV-701-CAP
:
Plaintiff, :
:
v. :
:
HOUGHTON MIFFLIN COMPANY, :
:
Defendant. :
:
-----X

REPLY MEMORANDUM OF LAW IN FURTHER
SUPPORT OF PLAINTIFF'S MOTION
FOR A PRELIMINARY INJUNCTION

PRELIMINARY STATEMENT

Defendant asks this Court to permit an unprecedented invasion of the right of the copyright owner to determine when to authorize derivative works. Under the guise of "parody," it claims the right to publish a book based on a famous novel using characters, scenes, plot elements and even the words of the original copyrighted work of fiction.¹ "The Wind Done Gone" simply usurps the market for a sequel by telling us a future of the characters beyond the original novel.

Under Defendant's theory, anyone could write a sequel to Mario Puzo's "The Godfather," populate it with Don Corleone, his sons and the other familiar characters from that bestseller, and recount numerous familiar scenes as long as the sequel was "critical" of the stereotyped treatment of Italian-Americans in the novel.

The Copyright Clause of the Constitution mandates that

¹ Plaintiff has incorporated herein the substance of the Brief in further support of the issuance of a Temporary Restraining Order filed on April 9, 2001. The Court may, therefore, disregard that submission and consider this brief along with Plaintiff's initial brief in support of its motion for a Temporary Restraining Order and Preliminary Injunction ("Pl. Mem.")

Congress determine the extent of the rights of authors to control any use of their works.² Section 106(2) of the Copyright Act makes the right to prepare derivative works exclusive to the author for the term of the copyright.

Defendant apparently recognizes that its use of elements from "Gone With the Wind" cannot meet the definition of parody -- for comic effect or to make the work or its author appear ridiculous. It now claims a new exception to copyright that would permit an infringer to violate the copyright law in order to correct the public's ignorance of historical facts.³ However, even adding this new defense, defendants have taken far, far more than can possibly be justified as fair use. Plainly, Defendant

²Defendant submits a "petition" of sorts signed by writers who apparently advocate a narrower scope to copyright. This plea, like the plea made by public supporters of Napster, MP3 and other recent challengers to the application of existing copyright law, may only be made to Congress. See *Eldred v. Reno*, 239 F.3d 372 (D.C. Cir. 2001) (rejecting challenge to Congress's right to define term of copyright).

³ In an effort to wrap themselves in the first amendment, defendant in its Supplemental Memorandum in Opposition to Plaintiff's Motion for a Temporary Restraining Order and Preliminary Injunction ("Def. Supp. Mem.") tries to claim that its work is a political commentary, shifting between political commentary and parody. But there is no case law holding that one work of fiction can borrow extensively from another copyrighted work of fiction to make a political point.

could have conjured up "Gone With the Wind" with a simple reference to the title or an author's note and gone on to create an original fictional world in order to make any point it wished about the racism or other social conditions of that time. Any taking of copyrightable elements must be shown to be necessary to the fair use purpose. Quite simply, defendant has failed to justify as fair use the extensive appropriation of copyrightable elements, including characters, dialog, scenes, literary devices, and even the wonderful words of Margaret Mitchell's novel. Defendant also has failed to take the necessary steps to avoid trading on the popularity and demand for authorized "Gone with the Wind" sequels and products.

This is a simple case of copyright infringement and of parasitic marketing. Injunctive relief is necessary to prevent serious, irreparable harm to the Plaintiff, which has established its exclusive right to produce sequels and other derivative works. Plaintiff has demonstrated that it is likely to succeed on the merits of its copyright and Lanham Act claims and that it will suffer serious and irreparable harm if Defendant is not

enjoined.⁴

ARGUMENT

I

THE MITCHELL TRUSTS HAVE SHOWN A LIKELIHOOD OF SUCCESS IN ESTABLISHING COPYRIGHT INFRINGEMENT

Defendant does not dispute that characters, plot and actual words from "Gone With the Wind" have been copied by the author of "The Wind Done Gone."⁵ Instead, Defendant resorts to arguments that copyright does not apply, or in the alternative that the assertion of a "parody" defense permits wholesale appropriation of copyrighted elements. The simple fact is that Defendant has copied, and copied too much, from "Gone With the Wind," and seeks to profit from the demand for authorized sequels.

⁴ The law is absolutely clear that the grant of an injunction to prevent copyright infringement does not constitute a prior restraint. *Harper & Row Publishers v. Nation Enterprises*, 471 U.S. 539 (1985) (enjoining an article concerning misconduct by two Presidents as copyright infringement).

⁵ Defendant appears to have backed away, at least in part, from the strained arguments it made in its initial brief that it did not copy protectable expression from "Gone With the Wind." But because Defendant continues to give at least lip service to this argument by incorporating it by reference into its Supplemental Brief (Def. Supp. Br., p. 9), Plaintiff will respond briefly in this section.

A. Defendant Has Usurped The Mitchell Trusts' Exclusive Right to Make Derivative Works

Defendant also has violated the exclusive right to make derivative works of "Gone With the Wind" under Section 106(2) of the Copyright Act. Pl. Mem. at 14-15; *Trust Company Bank v., MGM/UA Entertainment Company*, 772 F.2d 740 (11th Cir. 1985) (upholding ownership of Trust in sequel rights to "Gone With the Wind"); *Metro-Goldwyn-Mayer v. Showcase Atlanta Cooperative Productions, Inc.*, 479 F. Supp. 351, 355-6 (N.D. Ga. 1979).

As Dr. Sitter, Defendant's expert, admits, a sequel is "something that follows" from or is a "continuation" of "Gone With the Wind". Declaration of John E. Sitter, dated March 28, 2001 ("Sitter Decl."), ¶ 7. Here, there is no doubt that "The Wind Done Gone" is a continuation of "Gone With the Wind," as it takes up the story of Mitchell's core characters at the point where "Gone With The Wind" leaves off, and even depicts the death of Scarlett. "The dramatic elements of the plot of "Wind Done Gone," however, do not come from the historical events of the Civil War and Reconstruction eras that figure in "Gone With the Wind" (and numerous other novels); they are derived largely from the fictional plot and character relations created by Margaret

Mitchell." Affidavit of Professor Louis D. Rubin, an expert on Southern literary history ("Rubin Aff.") ¶ 4. See Affidavit of Gabe Motola, ¶ 7.

The Mitchell Trusts have the exclusive right to authorize derivative works and to control the fate of their characters. Defendant has usurped that right.

B. The Two Works Are Substantially Similar

Defendant has in effect conceded the author's access to "Gone With the Wind." With respect to substantial similarity, the only copying to which Plaintiff objects are the copyrightable elements of "Gone With the Wind," including characters, plot summaries, verbatim dialogue and description. Pl. Mem. at 16-20. The Civil War, Reconstruction, plantation life, slavery, history or facts are not at issue. This case is about the appropriation of highly developed characters, fictional events and original, creative, literary elements without legal justification. See Pl. Mem. at 16-20; Beeber Aff., Exhs. A and B. For example, the scene of Scarlett throwing a vase at Ashley while Rhett hides on the couch is so vivid and memorable that one might want to believe that it really happened, but of course it did not. This scene,

like so many appropriated by Defendant, is included in the infringing work precisely because of the creativity of its expression without any possible justification.

1. Character Copying

Defendant admits that characters are copyrightable and that Ms. Randall's characters are "analogs" for those created by Margaret Mitchell. Def. Mem. at 3. (admitting that Garlic is an analog for Pork, Scarlett for Oother, Gerald O'Hara for Planter, and Mammy for Mammy). Defendant attempts to argue, however, that the characters in "Gone With the Wind" are too indistinct to merit copyright protection, or that they are too indistinct in "The Wind Done Gone" to infringe upon the copyright.⁶ Neither of these arguments has merit. First, the law is very clear that copyright protects literary characters, even apart from the original works in which they appear. *Metro-Goldwyn-Mayer, Inc. v.*

⁶ Defendant's denigration of the "Gone With the Wind" characters is entirely inconsistent with its prior restraint and other first amendment arguments. If the "Gone With the Wind" characters are so one-dimensional, they could hardly have become so significant that they inform people's understanding of this period of history, even counter to facts and the numerous other works which have been written on this period from an African American perspective or giving important roles to African American characters.

American Honda Motor Co. 900 F. Supp. 1287 (C.D. Cal. 1995)
(James Bond); *New Line Cinema Corp. v. Bertlesman Music Group, Inc.* 693 F. Supp. 1517, 1521 n.5 (S.D.N.Y. 1988) ("Because New Line has valid copyrights in the Nightmare [on Elm Street film] series, it is clear that it has acquired copyright protection as well for the character of Freddy.") (emphasis added); *Warner Bros. Inc. v. American Broadcasting Companies*, 720 F.2d 231, 235 (2d Cir. 1983).

Defendant claims, for example, that the character Mammy is merely a stock character in "Gone With the Wind," such that she may be freely appropriated. In fact, however, "The Wind Done Gone" incorporates the very specific attributes of this supposed "stock character" which are used to make her a full and vibrant character in "Gone With the Wind." In both books, Mammy wears her distinctive red petticoat, in both she calls Scarlett "Lamb", in both Scarlett seeks the shelter of Mammy's ample bosom, and so on. See *Beeber Aff.*, Exh. A. Defendant further admits that Scarlett is a fully developed character in "Gone With the Wind" but says that because she is one-dimensional in "The Wind Done Gone," there is no infringement. The same analysis as above

applies, though in reverse. "The Wind Done Gone" copies the unique and creative words that define Scarlett in "Gone With the Wind". In both books she is the vital, green-eyed, black haired "belle of five counties" who likes to wear green dresses, who has nightmares of being trapped in a fog, who is carried up the staircase by Rhett Butler, and so on. See Beeber Aff., Exhs. A and B.

The cases cited by Defendant on this point are easily distinguishable. In *Herzog v. Castle Rock Entertainment*, as Defendant points out, the characters shared a "broad similarity" but were otherwise "completely different in background story, personal attributes [and] purpose." 193 F.3d 1241, 1258 (11th Cir. 1999). Here, in contrast, the "analog" characters share the same background story, personal attributes and purpose, down to the last detail. Pl. Mem. at 16-20; Beeber Aff., Exhs. A and B. *Nichols v. Universal Pictures Corp.*, 45 F.2d 119 (2d Cir. 1930), held that characters could be copyrightable apart from the plot but the court found that the the characters in the two works in question were not that similar. In neither case was the defendant forced to admit that its characters were "analogs" for

the original characters; in neither case did the defendant take so much of the original work.

This Court many years ago held that the precise artifice used by Defendant - taking the characters from "Gone with the Wind, but giving them altered names - was copyright infringement which must be enjoined. *Metro-Goldwyn-Mayer v. Showcase Atlanta Cooperative Productions, Inc.*, 479 F. Supp. 351, 357 (N.D. Ga. 1979)

2. Other Elements

Defendant concedes that "[f]ragments" from "Gone With the Wind" have been taken. That is enough to constitute copyright infringement. *Twin Peak Productions, Inc. v. Publications International Ltd.*, 996 F.2d 1366, 1372 (2d Cir. 1993).

Defendant argues, however, that there are no similarities between the works in terms of theme, mood and pace. Def. Mem. at 12-14. That is irrelevant to copyright infringement. Differences between the two works are irrelevant, because "no copier may defend the act of plagiarism by pointing out how much . . . he has not pirated." *Rogers v. Koons*, 960 F.2d 301, 308 (2d Cir. 1992) (Photograph re-interpreted as a life-size sculpture is not

protected parody, but is a copyright infringement).

There can be no real question that Defendants have appropriated substantial copyrighted elements from "Gone With the Wind." The critical question is whether there is any defense to this taking. For the reasons set forth below, Defendant's appropriation is completely unjustified and must be enjoined.

II

**"THE WIND DONE GONE"
IS NOT A PARODY**

Defendant's fair use defense in general, and its position on the first fair use factor in particular, depends entirely on its claim that its book is a "parody" of "Gone With the Wind" therefore justifying each of its infringements. Def. Mem. at 15. As the Supreme Court made clear in *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 582 (1994), it is for this Court, not Defendant, to decide whether the "The Wind Done Gone" qualifies as a parody. However, *Campbell*, which involved a parody of a popular song, provides little guidance here where an author's note or the title would have been sufficient to conjure up and communicate the parodic intent of "The Wind Done Gone." Indeed,

the ultimate holding of *Campbell* is that once a parody defense is upheld, the defendant has to meet a second burden of proving that each copyrightable element taken qualifies as a fair use.

In *Campbell*, the Supreme Court relied upon two well-established definitions of parody as "a literary or artistic work that imitates the characteristic style of an author or a work for comic effect or ridicule" or a "composition in prose or verse in which the characteristic turns of thought and phrase in an author or class of authors are imitated in such a way as to make them appear ridiculous." 510 U.S. at 580 (quoting American Heritage Dictionary 1317 (3d ed. 1992) and 11 Oxford English Dictionary 247 (2d ed. 1989), respectively).⁷ See *Metro-Goldwyn-Mayer v. Showcase Atlanta Cooperative Productions, Inc.*, 479 F. Supp. 351, 357 (N.D. Ga. 1979) ("A parody is a work in which the language or

⁷Two of the individuals who have submitted declarations on behalf of defendant, Henry Louis Gates and John E. Sitter (in his first declaration), appear to have invented their own (though identical to one another) definition of parody as "a work which imitates another work and in so doing comments on that work, usually in order to ridicule it or to suggest its limitations." Gates Decl. ¶ 3; Sitter Decl. ¶ 15 (emphasis added). This definition, which expands parody beyond humor and ridicule and into the realm of "suggesting limitations," is not supported by citation to any dictionary, court decision or other source.

style of another work is closely imitated or mimicked for comic effect or ridicule."), quoting *Dallas Cowboys Cheerleaders, Inc. v. Pussycat Cinema, Ltd.*, 467 F. Supp. 366 (S.D.N.Y. 1979). *Paramount Pictures Corp. v. Carol Publishing Group*, 11 F. Supp. 2d 329, 335 (S.D.N.Y. 1998), aff'd, 181 F.3d 83 (2d Cir. 1999) ("A parody is devoted to making fun of its subject").

Plaintiff has submitted the affidavits of a number of prominent academics and experts on American literature and criticism to show that Defendant's work is not a parody. For example, Professor Gabriel Motola, Professor Emeritus of English at the City University of New York, recites a definition of Parody from J. A. Cuddon's A Dictionary of Literary Terms and Literary Theory as "[t]he imitative use of words, style, attitude, tone and ideas of an author in such a way as to make them ridiculous." (Motola Aff., ¶ 4) and goes on to state that:

Parody may also poke fun of public figures, such as politicians, celebrities, or - in much rarer cases - other literary figures or their work. But while parody may allude to another work or figure, it does so briefly while securing its own imaginative plot and language so that the parodied work is ultimately put aside in the reader's imagination, replaced by the work being read. In the case of "The Wind Done Gone," the

reader's imagination is always anchored to "Gone With the Wind" precisely because of the constant [mis]appropriation of Margaret Mitchell's characters, language, and plot.

Motola Aff., ¶ 6 (Rubin Aff., ¶ 7). See also Affidavit of Joel Conarroe, ¶ 5 ("'The Wind Done Gone' is not parody or satire. It is, rather, an aggregation of characters, themes and language lifted virtually intact from 'Gone With the Wind.'"); Declaration of Alan Lelchuk, ¶ 8.

In his concurring opinion in *Campbell*, Justice Kennedy warned that "as future courts apply our fair use analysis, they must take care that not just any commercial takeoff is rationalized *post hoc* as a parody." 510 U.S. at 600. Justice Kennedy noted that because fair use is an affirmative defense, doubts about whether the use is fair must be resolved against the "self-proclaimed parodist," and went on to warn, that "[a]lmost any revamped modern version of a familiar [work] can be construed as a "comment on the naivete of the original." *Id.* Similarly, the Second Circuit in *Leibovitz* cautioned about "the ease with which every purported parodist could win on the first factor simply by pointing out some feature that contrasts with the original. Being different from an original does not inevitably

'comment' on the original." 137 F.3d at 114. The submissions by Defendant's experts on their face are precisely what these courts have warned against. They point out differences, but for most there is no "comment." Indeed, for the most important takings, the only justification is that "any effective parody would almost necessarily have to reference them in some way." Supplemental Declaration of John E. Sitter ("Sitter Supp. Decl." at 19).

III

DEFENDANT'S FAIR USE DEFENSE FAILS

Plaintiff has established its ownership of the copyrights in "Gone with the Wind" and the fact that Defendant has made significant use of copyrighted elements from its work. Accordingly, the only way Defendant can hope to avoid an injunction is to establish that each appropriation qualifies as "Fair Use." Defendant has failed to meet its burden of establishing this affirmative defense. *Campbell*, supra, 510 U.S. at 590 (1994).

Defendant relies almost entirely on the one significant *post-Campbell* parody case to uphold the infringer's fair use defense: *Leibovitz v. Paramount Pictures Corp.*, 137 F.3d 109 (2d Cir. 1998). In *Leibovitz*, however, almost all of the copying was

of public domain elements and there was no possibility of any sequel or other derivative rights being jeopardized. The single photograph at issue in *Leibovitz* bears no meaningful relationship to the starkly different fact situations presented by "the Wind Done Gone."⁸ Nothing in *Leibovitz* can possibly be read to justify a ruling that an infringing novel can so extensively use copyrighted characters, scenes, plot elements and words of another novel, particularly one that has led to a series of authorized sequels, including the likely publication of a sequel told from a different perspective (that of Rhett Butler).

Supplemental Affidavit of Paul H. Anderson, Sworn on April 16, 2001 ("P. Anderson Supp. Aff."), ¶ 3.

A. The Purpose and Character of the Use

The first of the four fair use factors requires an analysis of "the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes." 17 U.S.C. § 107. Plainly, Defendant set out to

⁸ *Campbell* involved the use of the first line and a base riff from the well-known popular song "Oh Pretty Woman" in a comic take-off of the original that among other things, transformed the title lyric to "Big Hairy Woman". *Leibovitz* concerned the use of a single photograph in an undeniably comical movie poster showing the male star of the film naked and pregnant.

capitalize on the market for "Gone With The Wind" related products and this aspect of the work and its marketing is entirely commercial in nature. Defendant claims it also has produced a parody. While the parody aspect of the work clouds the issue, the fact remains that the predominant use of "Gone With the Wind" is to usurp the market for a sequel. Thus, the key question for the Court on the first factor is whether each of the takings from "Gone With The Wind" used in "The Wind Done Gone" really criticize the work or whether many of these infringements serve only to "substitute for the original or licensed derivatives." *Campbell*, 510 U.S. at 580 n.14.

The question for this Court as it evaluates each infringement is whether the appropriation at issue is for the purpose of ridicule or is it for the purpose of exploiting the commercial value of "Gone With The Wind" by satisfying a demand for repetition and allusion to that masterpiece in order to add to the sales of the infringing work by filling the market for a related work. Persuading the Court that some of the takings have an element of ridicule is not sufficient where, as here, the predominant effect is merely to exploit the commercial value of "Gone With The Wind."

As shown below in discussing the third factor, defendant has not met its burden. The predominant purpose of the infringement is to use Margaret Mitchell's magnificent words, characters and genius for imagery simply to make "The Wind Done Gone" interesting.

B. The Nature of the Copyrighted Work

As a general rule, works of pure creativity, such as novels, enjoy the greatest degree of protection under this factor because it is precisely this type of creativity that copyright law is designed to foster. *Rogers v. Koons*, 960 F.2d 301 (2d Cir. 1992). This factor heavily favors the Plaintiff.

In order to neutralize or prevail on this point, Defendant must fall back on its parody argument. See Def. Supp. Br. at 20-21. But even if a few of the appropriations at issue appear to the Court to meet the test of parody, as shown above in Point II, "The Wind Done Gone" is not a parody. Accordingly, this factor heavily favors the plaintiff. *See Dr. Seuss Enterprises, L.P. v. Penguin Books USA, Inc.*, 109 F.3d 1394 (9th Cir. 1997)

The demand for sequels and derivative works based on "Gone With the Wind" also weighs against Defendant in considering this second prong of the Fair Use test. "Gone With the Wind" has

already generated one sequel novel which has been adapted for an eight-hour miniseries, and a second sequel novel has been authorized, which will be told from the perspective of Rhett Butler. "Gone With the Wind" has also been adapted for a live stage production in Japan; the first sequel novel has been adapted for a live stage production in Japan; it is being licensed for a musical stage adaptation in this country; and numerous items of commercial merchandise have been licensed. P. Anderson Aff. ¶¶ 5-10; P. Anderson Supp. Aff., ¶¶ 2-3. Thus, when considering the nature of the copyrighted work, the value of the derivative rights accorded to the copyright holder by Section 106(2) is one element to be considered, and it weighs heavily in plaintiff's favor in this case.

**C. The Amount and Substantiality of
The Portion Used in Relation to the
Copyrighted Work as a Whole**

Even if this Court finds that "The Wind Done Gone" might be viewed as a parody, the second hurdle established by the Supreme Court in *Campbell* cannot be satisfied. Given Defendant's characterization of "Gone With the Wind" as having achieved iconic status, very little would be needed to "conjure up" the original. First, it is obvious that it is extraordinarily easy to

conjure up "Gone With the Wind" in the mind of a reader. A mere reference to the title, Scarlet O'Hara or Tara would be sufficient.

Once the novel has been brought to mind, each of the copyrightable elements copied from "Gone With the Wind" must be justified. *Campbell*, 510 U.S. at 576. The Court in *Campbell* embraced Judge Leval's analysis which requires that this Court "must consider the question of fair use for each challenged passage and not merely for the secondary work overall." P. Leval, "Commentary: Toward a Fair Use Standard", 103 Harv. L. Rev., 1105, 1112 (1990); See *Salinger v. Random House, Inc.*, 650 F.Supp., 413 (S.D.N.Y. 1986), reversed on other grounds, 811 F.2d 90 (2d. Cir.), cert. denied, 484 U.S. 890 (1987).

Defendant has not, and cannot, sustain this burden. While it concedes that it must prove that "every event in ["The Wind Done Gone"] that echoes an element of ["Gone With the Wind"] does so to make that element appear ridiculous, or to suggest ["Gone With the Wind's"] limitations," Def. Supp. Mem. at 17, it utterly fails to justify the excessive copying of minute details from Ms. Mitchell's work. Defendant cannot possibly explain why it needed to "make use of the characterization, plot and milieu of the

earlier work to create another work of fiction centered on a supposed half-sister of Margaret Mitchell's principal character." Rubin Aff., ¶ 7. See Motola Aff., ¶ 6; Conarroe Aff., ¶ 5 ("the manuscript makes sense only by taking Margaret Mitchell's characters and plot and interweaving them through Ms. Randall's book for dramatic purposes, not for purposes of parody or commentary.") (emphasis in original).⁹

Defendant argues that the third factor (the amount and substantiality of the portion taken) favors it because "the allusions to in 'The Wind Done Gone' in 'Gone With the Wind' are tied directly to its overriding purpose of parodying 'Gone With the Wind.'" Def. Mem. at 21. In support of that argument, Defendant submits the second declaration from Professor Sitter to

⁹For example, the red-haired Twins are the unique products of Margaret Mitchell's imagination. Yet they are appropriated by Defendant in minute detail: the big, red-haired Tarleton twins (Brent and Stuart) 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 Charleston. See Beeber Aff., Exhs. A and B. "The Wind Done Gone" does not comment upon Mitchell's pure invention of the twins, nor is there any social value in reporting that the twins die at Gettysburg, or that Carreen goes to a convent, much less a convent in Charleston. These details are taken in order to give more color and detail to "The Wind Done Gone," and to fulfill the pure commercial purpose of making this work part of the story and franchise of "Gone With The Wind," not to comment upon social issues.

provide evidence that "[e]ach and every reference that 'The Wind Done Gone' makes to 'Gone With the Wind' is carefully chosen in order to parody 'Gone With the Wind.'" Sitter Supp. Decl. ¶ 3 (emphasis supplied). However, neither Professor Sitter nor Professor Barbara McCaskill (who also submitted a declaration on behalf of Defendant) even begins to provide an explanation, or parodic justification, for Defendant's extensive copying of the very detailed and expressive descriptions of characters and fictional events from "Gone With the Wind."

In his examples, Professor Sitter both minimizes the amount and extent of the takings¹⁰ and stretches to find a parodic

¹⁰ Professor Sitter's analysis of entries in the charts submitted by Plaintiff ignores the full amount of descriptive language taken by Defendant in "The Wind Done Gone." For example, Sitter discusses the Gerald and Ellen characters but never explains why Planter (Gerald) is described in "The Wind Done Gone" as having been "run out of Ireland with the law on his tail, wanted for a murder he had committed" or that he married Lady (Ellen) because she was "quality" -- all details from "Gone With the Wind." Sitter does not explain why, in "The Wind Done Gone," Melanie is called "Mealy Mouth" -- the precise words Margaret Mitchell used to describe Melanie in "Gone With the Wind." While Sitter argues that "The Wind Done Gone" merely "calls up" the fact that Rhett is a war profiteer, blockade buster and soldier, it does much more than that, giving the reader the details of Rhett's war profiteering (how Rhett made a great deal of money by selling cotton in foreign markets and hid the money in foreign banks, of which are all fictional elements from "Gone With the Wind").

purpose for those takings. Often, Professor Sitter provides his own commentary to "Gone With the Wind," commentary which is nowhere to be found in "The Wind Done Gone." In fact, Professor Sitter's analysis calls to mind Professor Nimmer's warning that a person with both "a fertile imagination [and] a literature degree [who] could probably suffice to locate some commentary by [the parodist] on the [original], perhaps between any two works at random."¹¹ 4 Nimmer on Copyright § 13.05[C][2], at 13-217.

Professor Sitter justifies the fact that Defendant misappropriates fifteen fully developed characters and the details of their relationships to one another by arguing that Defendant's work "alludes only to those characters in 'Gone With the Wind' most essential to its parody of 'Gone With the Wind's' social structure and the romanticized depiction of slaveholding society that pervades it." Sitter Supp. Decl. ¶ 6. However, "The Wind Done Gone" simply does not include the commentary

¹¹Professor Sitter's extraordinary ability to explain just about anything as parody is best demonstrated by his "analysis" of what is in fact a typographical error in Plaintiff's submission in this case. Sitter argues that the misspelling of scarlet fever (as "scarlett" fever) is a "punning change" (actually it is Plaintiff's counsel's typo) which "perhaps implies the racist world of 'Gone With the Wind' as exemplified by the word 'scarlett' is poisonous." Sitter Supp. Decl. ¶ 17(d).

Sitter claims it does. For example, there is no commentary on the relationship between Rhett Butler and his father, yet the details of that relationship and a description of the impact of the father's death on Rhett are included, according to Sitter, not to comment but to advance the plot. Sitter Supp. Aff., ¶ 11. Professor Sitter actually contends that there is "commentary" in "The Wind Done Gone" where that book includes certain famous scenes from "Gone With the Wind" of no significance in "The Wind Done Gone" arguing that "[t]he dramatic insignificance of these [same] moments in 'The Wind Done Gone' parodies the sentimental and romantic aspects of 'Gone With the Wind.'" Sitter Supp. Decl. ¶ 27(b). In other words, where "The Wind Done Gone" merely summarizes the fully developed plot found in "Gone With the Wind" without any elaboration or embellishment of its own, because they are important to fans of "Gone With the Wind," Sitter finds commentary worthy of protection under the fair use doctrine of the copyright law.

Finally, Professor Sitter argues that the characters in "The Wind Done Gone" have been so transformed that they "resemble 'Gone With the Wind' 's characters only superficially, so as to allow the reader to recognize them as parodies of those

characters." Sitter Decl. ¶ 7. Actually, Defendant is counting on the fact that readers of "The Wind Done Gone" will see its characters as precisely the same characters that appeared in "Gone With the Wind." Defendant is hoping that those people deciding whether to purchase "The Wind Done Gone" will believe that, by reading it, they will learn what happened to their beloved Mitchell characters, including Scarlet, Rhett and Mammy.¹²

Throughout the infringing work, juicy tidbits of "Gone With the Wind" are used for no purpose other than to enliven the text or to fulfill the promise of a sequel. See *Craft v. Kobler*, 667

¹² In sharp contrast, the readers of the so-called "Gone With the Wind" parodies held up by Defendant's counsel during oral argument on plaintiff's application for a temporary restraining order know they are not getting the next installment in the story of Rhett and Scarlett. In "Today is Another Tomorrow," written by Missy D'Urberville, Starlight O'Hara lives in Scarsdale (an affluent predominately Jewish suburb north of New York City) and wears Laura Ashley dresses and L.L. Bean footwear. In "Frankly Scarlett, I Do Give a Damn," written by Beverly West and Nancy Peske, Scarlett is a "modern" woman who marries Rhett "because she saw the possibility for a mutually satisfying and fulfilling partnership between equals." In "The Book of Sequels," Scarlett is a "ruthless businesswoman who gets a "hasty Mexican divorce from Rhett in order to marry Ashley Wilkes. Readers of these books are seeing fully transformed characters, not an unauthorized sequel to the original work. Significantly, the latter two works are only a few pages long, contained in a compilation of other short parodies of famous works.

F. Supp. 120 (S.D.N.Y. 1987) (rejecting claim of fair use where quotations from Igor Stravinsky constituted takings of "startingly expressive phrases to make a richer, better portrait of Stravinsky, and to make better reading than a drab paraphrase.") Indeed, many of the very best characterizations and plot twists in the original are simply recounted as being "told to" a character in "The Wind Done Gone." The infringing work is populated with characters and scenes from the original not for some parodic purpose but rather in order to make it interesting. Conarroe Aff., ¶ 7; Rubin Aff., ¶ 12.

Defendant's explanation for its takings on the ground that they somehow expand upon the characterizations written by Margaret Mitchell is precisely the type of after the fact justification warned against by Justice Kennedy in his concurring opinion in *Campbell*. 510 U.S. at 600.

**D. The Effect of the Use Upon
the Potential Market for or
Value of the Copyrighted Work**

Defendant's argument once again rises and falls on its claim that "*The Wind Done Gone*" is a parody. But as the Supreme Court pointed out in *Campbell*, "the role of the courts is to distinguish between 'biting criticism [that merely] suppresses

demand [and] copyright infringement [, which] usurps it."

Campbell, 510 U.S. at 592 quoting *Fisher v. Dees*, 794 F.2d 432, 438 (9th Cir. 1986). While a parody might not cause cognizable harm because of its adverse comment on the original, such harm might arise if the parody serves as a market substitute for a derivative work based upon the original. *Campbell*, 510 U.S. at 591-95; *Leibovitz v. Paramount Pictures Corporation*, 137 F.3d at 114 ("harm might arise if the parody serves as a market substitute for a derivative work based on the original").

Here, unlike the popular song in *Campbell* or the single photograph in *Leibovitz*, there is extensive proof of Plaintiff's derivative uses of the copyrighted work and of the serious potential harm to the valuable right to license or exploit authorized derivative works. Affidavit of Paul M. Anderson ("P. Anderson Aff.") (member of the Committee which directs the Trusts), ¶¶ 5-9; Affidavit of Hope Dellon ("Dellon Aff.") (the Executive Editor of the Trade Division at St. Martin's Press, which holds the right to publish a second sequel to "Gone With The Wind."), ¶¶ 8-9. St. Martin's Press has paid well into seven figures for the right to publish a sequel to a well-known work, and the value of permitting the reading public to know more about

the characters that have captured their imagination is tremendously valuable. Dellon Aff., ¶¶ 6-9. The importance of carefully controlling the development of these fabulous characters is essential to the value of the sequel because a large part of the appeal of the work is to satisfy the public's desire to learn more about the familiar characters. *Id.*, ¶ 8.

Just because a work is recognized as a classic, does not mean that it can be used with impunity.

One cannot with impunity rewrite Mario Puzo's "The Godfather" from a different perspective to correct some perceived slight against Italian immigrants; one cannot rewrite James Clavell's "Sho-Gun" to correct any inaccuracies about the Japanese; one cannot rewrite Louis L'Amour's classic westerns to correct the unjust portrayal, real or imagined, of Native Americans.¹³

Thus, it is Plaintiff's choice as to when and where it chooses to exercise its rights under the copyright to produce or authorize derivative rights, such as prequels and sequels.

¹³ Affidavit of Kevin J. Anderson sworn to April 12, 2001 (K. Anderson's Aff., ¶ 8). Kevin Anderson (no relation to Paul), one of the nation's most successful novelists and arguably the most important writer of authorized prequels, sequels and other derivative works. He has written over two dozen such works, including "Star Trek" novels and authorized prequels to "Dune," one of our country's most beloved and respected works of science fiction. *Id.* ¶¶ 1-3. Mr. Anderson describes the economic harm to the copyright holder that would be caused by permitting unauthorized derivative works. *Id.*, at ¶ 6.

Plaintiff, not Defendant, has the specific right under Section 106 of the Copyright Act, to choose when to take advantage of public interest and economic conditions and create a derivative work. Plaintiff has already chosen to license the right to a sequel in which the story would be told from the point of view of Rhett Butler. P. Anderson Supp. Aff., ¶ 3. Plaintiff could later authorize a retelling from "Mammy's" viewpoint, or even from the viewpoint of a minor African- American character, much as Tom Stoppard did in "Rosencrantz and Guildenstern Are Dead", in which minor characters in "Hamlet" (obviously a public domain work) tell their story, intersecting with elements from "Hamlet" from time to time. Defendant here robs Plaintiff of its statutory right to control the nature and timing of such derivative works.

If an injunction does not issue here, nearly any work derived from a famous original could be published without authorization. The Harry Potter story could be told from the point of view of "underdeveloped" Muggles or the James Bond story could be told from the point of view of "one dimensional" Miss Money Penny, each to purportedly make some socially relevant point about the original.

III

PLAINTIFF IS ENTITLED TO AN
INJUNCTION ON THE LANHAM ACT CLAIM

Recognizing the likelihood that consumers will be confused into believing that Defendant's work was authorized or approved by Plaintiff, Defendant modified its book cover supposedly to minimize consumer confusion. This change is inadequate. Defendant's refusal to properly label its counterfeit product as "unauthorized" is sufficient proof of its improper parasitic marketing.

A. Plaintiff Has Demonstrated a Likelihood Of Success

Where fair use permits an unauthorized appropriation of copyright or trademark, the "fair user" bears the burden of avoiding a likelihood of confusion as to the "origin, sponsorship, or approval, of his or her goods. . ." under Section 43(a)(1) of the Lanham Act. 15 U.S.C. § 1125(a)(1). This section "encompass[es] a broad spectrum of marks, symbols, design elements and characters which the public directly associates with the plaintiff or its product." *Warner Bros., Inc. v. Gay Toys, Inc.*, 658 F.2d 76, 78 (2d Cir. 1981). Plaintiff has marketed a variety of products beyond the original composition -- books,

movies, collectibles and other merchandise -- which indicate that such products and services emanate from a particular source.¹⁴

P. Anderson Aff., ¶¶ 5-9. Defendant is seeking to piggy back on this multi-million dollar franchise. If permitted to do so, defendant must avoid the likelihood of consumer confusion as to whether the appropriation is condoned or authorized by the legitimate owner of the goodwill associated with the franchise. See Pl. Br. At 25-27.

In choosing to market a product based on copyrighted material, defendant must separately satisfy the requirements of the Copyright Act and the Lanham Act. *Toho Co. Ltd. v. William Morrow & Co.*, 33 F. Supp. 1206 (C.D. Cal. 1988) (Use of copyrighted material not fair use and cover of book not adequate to avoid confusion as to authorization); see *Twin Peaks Productions, Inc. v. Publications International, Ltd.*, 996 F.2d 1366 (2d Cir. 1993) (affirming finding of copyright liability and

¹⁴Relying on a couple of *sui generis* decisions holding that musical compositions are not trademarks in and of themselves, Defendant argues that no protection extends to the Plaintiff's title, characters, plot settings and other unique and highly recognizable story elements under trademark law. Def. Mem. at 28-29. The cases cited by Defendant, however, merely stand for the proposition that an alleged trademark in a musical composition must do more than just identify the composition.

remanding as to finding of trademark liability for fuller consideration of factors indicating a likelihood of confusion); *Foxworthy v. Custom Tees, Inc.*, 879 F. Supp. 1200 (N.D. Ga. 1995) (granting preliminary injunction based on copyright and trademark infringement).

A claim for likelihood of confusion as to association does not require a copyright or a trademark. The Lanham Act protects consumers, as well as the good will of any entity that may be implicated in marketing a product. See, e.g., *Wendt v. Host Int'l Inc.*, 125 F.3d 806 (9th Cir. 1997), cert. denied, 121 S. Ct. 33 (2000) (roles played by plaintiffs in a television series); *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093, 1107 (9th Cir. 1992) (distinctive vocal style); *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395, 1400 (9th Cir. 1992) cert. denied, 113 S. Ct. 2443 (1993) (plaintiff's function on TV show); *Warner Bros., Inc. v. Gay Toys, Inc.*, 724 F.2d 327 (2d Cir. 1983) (distinctive elements of a car featured in television series); *Dallas Cowboys Cheerleaders, Inc. v. Pussycat Cinema, Ltd.*, 604 F.2d 200, 206-7 (2d Cir. 1979) (uniforms); *Allen v. National Video, Inc.*, 610 F. Supp. 612, 627 (S.D.N.Y. 1985) (celebrity's persona).

Here, Defendant is using a substantially similar title and the same characters and plot elements in order to compete unfairly and trade upon the tremendous goodwill Plaintiff has built up through sales of myriad derivative works and products. Under the circumstances presented, plaintiff can clearly establish a likelihood of consumer confusion.¹⁵

**B. Defendant's Alleged
Disclaimer is Ineffective**

Defendant argues that it will avoid confusion by including the word "Parody" in small type on the cover of the infringing book. This is wholly inadequate, since a parody may be authorized. Thus, defendant's suggestion of adding a disclaimer as follows: "A provocative, literary parody that explodes the mythology perpetrated by a Southern classic" is not sufficient.

¹⁵The seven factors that this Circuit uses for determining the likelihood of confusion are (1) the type of mark; (2) the similarity of the two marks; (3) the similarity of the goods; (4) the identity of customers and similarity of retail outlets, sometimes called the similarity of trade channels; (5) the similarity of advertising; (6) the intent, i.e., good or bad faith, of the alleged infringer; and (7) evidence of actual confusion, if any. *Carnival Brand Seafood Co. v. Carnival Brands, Inc.*, 187 F.3d 1307, 1311-12 (11th Cir. 1999). It is obvious that in publishing a novel with a similar title and promoting it as derivative of plaintiff's competing products, including an authorized sequel, these factors weigh heavily in plaintiff's favor. See *Dr. Seuss Enterprises, L.P. v. Penguin Books USA, Inc.*, 109 F.3d 1394, 1403-07 (9th Cir. 1997).

It does not tell the reader that the work is unauthorized and not approved or sponsored by Plaintiff. *Dr. Seuss Enterprises, L.P. v. Penguin Books USA, Inc.*, 109 F.3d 1394, 1405 (9th Cir. 1997).

As noted in *Toho Co., Ltd. v. William Morrow Co.*, 33 F. Supp. 2d 1206, 1213 (C.D. Cal. 1998), even the bold face use of the word "UNAUTHORIZED" on the front and back covers would be ineffective because that term conveys only limited and ambiguous information. Indeed, since books are displayed on store shelves, the spine of the book should include the word unauthorized. *Id.* Here, the alleged disclaimer says nothing about authorization and would not serve to alert the reader that the work has not been prepared, approved, or licensed by the owners of the original classic it so clearly seeks to trade on. *See Twin Peaks*, 996 F.2d at 1379; *Allen v. Men's World Outlet, Inc.*, 679 F. Supp. 360, 362 (S.D.N.Y. 1988).

Defendant bears a heavy burden to prove that its cover will avoid confusion as to the nature of its association with "Gone With the Wind." *See, e.g., Home Box Office, Inc. v. Showtime/The Movie Channel, Inc.*, 832 F.2d 1311, 1315, 142 (3d Cir. 1987); *United States Jaycees v. Philadelphia Jaycees*, 639 F.2d 134, 142

(3d Cir. 1981); *Miss Universe, Inc. v. Flesher*, 605 F.2d 1130, 1134-35 (9th Cir. 1979). Defendant's failure to include a disclaimer consistent with the instructions provided by the courts in *Toho* and *Twin Peaks*, essentially proves its intent to trade on the popularity of "Gone With the Wind" and to confuse the millions of loyal fans of this work and devotees of all things associated with it. Injunctive relief is warranted on Plaintiff's claim under Section 43(a) of the Lanham Act to protect the Plaintiff and the general public.

IV

AN INJUNCTION IS THE APPROPRIATE REMEDY IN THIS CASE

The overwhelming weight of authority mandates relief once a violation of copyright law has been shown. *Cable/Home Communication Corporation v. Network Productions, Inc.*, 902 F.2d 829 (11th Cir. 1990) (copyright law implements affirmative constitutional duty to promote the progress of science and the arts); *Pacific and Southern Co. v. Duncan*, 744 F.2d 1490, 1499 (11th Cir. 1984); *Metro-Goldwyn-Mayer, Inc. v. Showcase Atlanta Cooperative Productions, Inc.*, 479 F. Supp. 351, 362 (N.D. Ga. 1979) (applying presumption of irreparable injury and enjoining

musical production based upon "Gone With the Wind" prior to opening). In addition, 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 sought by the Mitchell Trusts is appropriate.

**A. Irreparable Harm Is Presumed
In a Copyright Case**

Irreparable injury is presumed in a case of trademark or copyright infringement. *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 451 (1984) ("[i]f 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 (live stage "parody" enjoined before the opening); *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 cases cited by Defendant is an effort to convince this

Court to depart from the well-established rule that copyright violations must be enjoined present starkly different situations. In *Chase-Riboud v. Dreamworks, Inc.*, 987 F. Supp. 1222 (C.D. Cal. 1997), for example, an injunction was denied because plaintiff failed to show likelihood of establishing a copyright violation. In *New Era Publications International ApS v. Henry Holt and Company*, 873 F.2d 576 (2d Cir. 1989), cert. denied, 493 U.S. 1094 (1990) an injunction was denied because of plaintiff's "unconscionable delay" in seeking injunctive relief. In *Abend v. MCA, Inc.*, 863 F.2d 1465, aff'd sub nom *Stewart v. Abend*, 495 U.S. 207 (1992), the court refused to enjoin continued distribution of a motion picture that had been in public distribution for more than 30 years. *Greenberg v. National Geographic, Inc.*, 2001 U.S. App. LEXIS 4270 (11th Cir. 2001), involved consideration of remedies after the grant of summary judgment to plaintiff who was the copyright owner of a few photographs on defendants 30 disk compilation of every issue of "National Geographic" magazine.¹⁶

¹⁶ *Greenberg* suggests that the issue of enjoining the entire fact based work due to the use of one copyright owner's photographs raised concerns which may warrant entertaining alternatives. See *Tasini v. New York Times Co.*, 206 F.3d 161 (2d

The other copyright cases cited by Defendant in which an injunction was denied involve sharply different facts. In *Religious Technology Center v. Lerma*, 897 F. Supp. 260 (E.D. Va. 1995), the court declined to enjoin the publication by the Washington Post of factual and informational documents from court files. In *Globe Int'l, Inc. v. National Enquirer, Inc.*, No. 98-10613 CAS, 1999 WL 727232 (C.D. Cal. Jan. 25, 1999), relief was denied because the plaintiff sought to enjoin copying that had not yet occurred. In *Belushi v. Woodward*, 598 F. Supp. 36 (D.D.C. 1984), after 145,000 copies of a book had already been distributed nationally, the plaintiff sought to enjoin the distribution of an additional 30,000 copies. In *Trust Co. Bank v. Putnam Publ. Co.*, 5 U.S.P.Q.2d 1874 (C.D. Ca. 1988), the Court declined to enjoin the distribution of some 300,000 copies of the paperback edition of the book because plaintiffs failed to seek an injunction of the publication of the hardcover.

Cir.), cert. granted, 121 S. Ct. 425 (2000) (Does the absolute right to an injunction to preclude a derivative work which permits copyright owners to prevent inclusion in an archival online database of newspapers and magazines pose an untoward burden on the dissemination of information?) Here the only copyright holder is plaintiff, and plaintiff's exclusive rights cannot be questioned.

Defendant has failed to rebut the presumption of irreparable injury arising from usurping Plaintiff's exclusive right to authorize derivative works.¹⁷ The Mitchell Trusts will be irreparably harmed if Defendant is permitted to proceed with its stated plan for the imminent widespread sale and distribution of "The Wind Done Gone." Pl. Mem. at 27-28. Once the infringing work is distributed, it will be nearly impossible to retrieve the copies. The Mitchell Trusts will have been deprived of their right to create and authorize derivative works and to control the way their copyrighted characters are portrayed. See Affidavit of Alex Holtz, sworn to on April 11, 2001 ("Holtz Aff.") ¶ 3-6. The damage to the exclusive derivative right is clearly unknowable and incalculable. The anger and disappointment of fans of "Gone With the Wind" at having been misled and deceived may well rub off on Plaintiff. Future authorized sequels may be delayed or given less value by potential publishers. Furthermore, if Defendant is permitted to publish this unauthorized derivative

¹⁷As noted at the hearing on the temporary restraining order, the Court should be extremely dubious of the 50 to 60 "examples" of existing parodies cited by the Defendant. Many of their examples have nothing to do with a parody of "Gone With the Wind", for instance, one refers to Teddy Roosevelt's mother as being like a parody of a character from "Gone With the Wind." (Transcript, pp. 78-79).

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. This will have a devastating, and incalculable, effect not only on the Mitchell Trusts, but on other authors and copyright owners of any works that are worthy of a sequel or other derivative executions.

B. An Injunction in this Case is Not a Prior Restraint

The first amendment simply does not bar enforcement of laws protecting intellectual property. *Cable/Home*, 902 F.2d at 849 ("the first amendment is not a license to trammel on legally recognized rights in intellectual property.") (quoting *Dallas Cowboys Cheerleaders, Inc. v. Scoreboard Posters, Inc.*, 600 F.2d 1184, 1188 (5th Cir. 1979)). See *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 555-60 (1985) (enjoining an article concerning conduct of two Presidents with respect to pardon of President Nixon as copyright infringement); *New York Times Co. v. United States*, 403 U.S. 713, 731n.1 (1971) (White, J. concurring) ("no one denies that a newspaper can properly be enjoined from publishing the copyrighted works of another").

The cases defendant cites in support of its prior restraint

argument involve matters of news and public information, and the policy issues are completely different when dealing with a work of fiction. News and public information are not the subject of copyright (only the expression is subject to copyright), and so the countervailing demands of copyright protection and the First Amendment, both rooted in the Constitution, do not arise.

Even when dealing with matters of news and matters of national importance, a preliminary injunction has been issued in a case involving copyright. Thus an excerpt taken from Gerald Ford's biography about the Nixon resignation -- surely one of the most newsworthy events imaginable -- was properly enjoined on showing that it was not a fair use under Copyright law. *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 555-60 (1985).⁹

⁹ In fact, a recitation of all of the cases in which courts have enjoined the publication of literary works based on claims of infringement of intellectual property rights would fill many pages. See, e.g., *Harper & Row*, 471 U.S. at 555-60; *Cable/Home*, 902 F.2d at 850 (rejecting first amendment defense to copyright infringement claim); *In re Capital Cases/ABC, Inc.*, 918 F. 2d 140 (11th Cir. 1990) (injunction requiring removal of infringing portions of motion picture not a prior restraint); *Metro-Goldwyn-Mayer v. Showcase Atlanta Coop. Prods., Inc.*, 479 F. Supp. 351 (N.D. Ga. 1979) (enjoining prior to opening a stage production of "Scarlett Fever," a takeoff of "Gone With the Wind"); *Salinger v. Random House, Inc.*, 811 F.2d 90 (2d Cir.) cert. denied, 484 U.S.

The prior restraint cases cited by Defendant in its supplemental brief (pages 7-8) involved governmental efforts to prevent disclosure of factual information, not copyrighted material. *E.g., Near v. Minnesota*, 283 U.S. 697 (1931) (denying attempt to enjoin newspaper from publishing charges of official dereliction); *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976) (denying attempt to enjoin publication of accounts of confessions and admissions made by person accused of a crime).

C. **A Balance of the Hardships
Favors the Mitchell Trusts**

In considering this factor, 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).

The potential harm to the Mitchell Trusts vastly outweighs

890 (1987) (enjoining publication of book quoting copyrighted letters); *Dallas Cowboys Cheerleaders, Inc. v. Pussycat Cinema, Ltd.*, 604 F.2d 200, 206 (2d Cir. 1979) (rejecting claim that injunction on copyright and Lanham Act claims would be prior restraint holding that "the propriety of a preliminary injunction where such relief is sought is so clear that courts have often issued an injunction without even mentioning the first amendment").

that to Defendant. See Pl. Mem. at 28-30. A delay in distribution of a work of fiction is not significant.¹⁰ Publishing schedules are changed constantly, for a variety of reasons ranging from the failure of an author to deliver a manuscript as promised, to a change in market conditions requiring the release of a particular book at a different time. See Affidavit of Ellis Levine March, ¶¶ 4-6; Holtz Aff., ¶ 7. The harm caused to Defendant if it has to delay the release of "The Wind Done Gone" is significantly less than that which will be inflicted upon the Mitchell Trusts if the book is irretrievably released.

**D. An Injunction in This Case
Is In the Public Interest**

The overriding public interest in this case is the protection of the exclusive right to authorize derivative works - a key concept in Congress's copyright scheme. This clearly


¹⁰ Any hardship brought on by defendant's wrongful conduct is irrelevant to the balance of hardship analysis. See *My-T-Fine Corp. v. Samuels*, 69 F.2d 76, 78 (2d Cir. 1934) (L. Hand, J.) ("advantages built upon a deliberately plagiarized [item] do not seem to us to give the [infringer] any standing to complain that his vested interests will be disturbed."); *Concrete Machinery Co. v. Classic Lawn Ornaments*, 843 F.2d 600, 612 (1st Cir. 1988); *Apple Computer Inc. v. Franklin Computer Corp.*, 714 F.2d 1240, 1255 (3d Cir. 1983).

overrides Defendant's interest in choosing to communicate commentary or criticism in the form of a novel as opposed to an essay. The second overriding public interest is the protection of the public from false and misleading marketing. This overrides Defendant's desire to sell a product in a way that creates a false impression that it is part of the "Gone With the Wind" franchise when in fact the product is unauthorized.

CONCLUSION

For all of the foregoing reasons, this Court should grant the Mitchell Trusts' motion for a 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
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CERTIFICATE OF SERVICE

This is to certify that I have this day caused a true and correct copy of the within and foregoing document to be delivered by hand by 5:00 p.m. to counsel for the Defendant as follows:

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This 16th day of April, 2001.


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