



### PRELIMINARY STATEMENT

This is a simple case of copyright infringement and both a temporary restraining order and preliminary injunction are necessary to prevent serious, irreparable harm to the Plaintiff. Defendant Houghton Mifflin's attempts to justify its wholesale taking of "Gone With the Wind" are unavailing.

Contrary to Defendant's assertions, Plaintiff is not asking this Court to protect elements of "Gone With the Wind" such as stock characters, mood, theme, or historical facts. Rather, Houghton Mifflin has copied fifteen fictional characters, their relationships, the plot and precise wording of "Gone With the Wind." "The Wind Done Gone" is not a parody, and labeling it as one does not excuse this blatant appropriation of copyrighted material. As the Supreme Court held in *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994), parody only permits extremely *limited* use of an original work, as much as is necessary to conjure it up in the mind of the reader. Here Houghton Mifflin has taken far too much from "Gone With the Wind." The minute details that have been taken are not used for parody, but are there simply to color and populate Ms. Randall's work, and to trade off the fame of "Gone With the Wind."

The relief sought here is not a prior restraint on speech. Injunctive relief in a copyright or trademark action is necessary

to prevent the irreparable harm presumed in a case like this. Injunctions have been approved by the courts time and time again, to stop the presses on an infringing news story (*Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. at 539 (1985)), to prevent the distribution of a movie (*Dallas Cowboys Cheerleaders, Inc. v. Pussycat Cinema, Ltd.*, 604 F.2d 200 (2d Cir. 1979)), to keep a stage production from opening (*Metro-Goldwyn-Mayer v. Showcase Atlanta Coop. Prods., Inc.*, 479 F. Supp. 351 (N.D. Ga. 1979)), and to halt the publication of a book (*Salinger v. Random House, Inc.*, 811 F.2d 90 (2d Cir.) cert. denied, 484 U.S. 890 (1987)).

Plaintiff has amply demonstrated its entitlement to a temporary restraining order in this case and the motion should be granted.

#### **STATEMENT OF FACTS**

The facts relevant to the determination of Plaintiff's motion, including a recitation of some of the similarities between the two works, are set forth in detail in the Mitchell Trusts' moving papers. See Pl. Mem. at 3-12, as well as the comparison charts attached to the Beeber Aff. as Exhibits A and B.<sup>1</sup>

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<sup>1</sup>Pl. Mem. designates Plaintiff's Memorandum of Law in Support of Motion for Temporary Restraining Order and Preliminary

## ARGUMENT

### I

#### PLAINTIFF IS SEEKING PROTECTION FOR ONLY THE COPYRIGHTABLE ELEMENTS OF "GONE WITH THE WIND"

Houghton Mifflin has in effect conceded the author's access to "Gone With the Wind."<sup>2</sup> With respect to substantial similarity, the copying at issue concerns only copyrightable elements of "Gone With the Wind," including characters, plot summaries, verbatim dialogue and description. Pl. Mem. at 16-20.<sup>3</sup>

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

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Injunction. Capitalized terms and abbreviations have the meanings ascribed to them in Plaintiff's moving papers.

<sup>2</sup>Defendant makes the conclusory statement that "the evidence will show that the author of ["The Wind Done Gone"] has never read *Scarlett*," the authorized sequel to "Gone With the Wind." No such evidence has been submitted to this Court, and in fact Defendant depicts the death of Mammy, an event which occurs in the Sequel, not "Gone With the Wind".

<sup>3</sup>Defendant makes much of its argument that "charts are unreliable" yet in its opposition brief it does not point out one inaccuracy in the charts submitted to the Court. In any event, those charts are intended to be demonstrative aids to the Court, in that they highlight the obvious similarities between the two works.

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 is a moment in real history, but of course it is just fiction. There can be no justification for wholesale appropriation of such creativity.

## II

### HOUGHTON MIFFLIN'S FAIR USE DEFENSE FAILS

Houghton Mifflin's fair use defense depends on its claim that its book is a "parody" of "Gone With the Wind" therefore justifying the infringement. Def. Mem. at 15.

It is for this Court, not Houghton Mifflin, to decide whether the "The Wind Done Gone" even qualifies as a parody. *Campbell*, 510 U.S. at 582. Houghton Mifflin relies extensively on *Campbell*, but the factual analysis in that case -- involving the use of elements of a popular song -- provides little guidance as to whether the extensive appropriation in this case is fair use. Indeed, the *Campbell* Court did not decide the ultimate issue of whether 2 Live Crew's infringement was justified by fair use; it instead remanded the case for consideration of whether 2 Live Crew took too much of the original song.

"The Wind Done Gone" is not a parody. As defined by the Supreme Court in *Campbell*, a parody is "a literary or artistic

work that imitates the characteristic style of an author or 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); see, e.g., *Paramount Pictures Corp. v. Carol Publishing Group*, 11 F. Supp. 2d 329 (S.D.N.Y. 1998), aff'd, 181 F.3d 83 (2d Cir. 1999) ("A parody is devoted to making fun of its subject"); *Steinberg v. Columbia Pictures Industries, Inc.*, 663 F. Supp. 706, 714 (S.D.N.Y. 1987) ("Defendants' variation on the visual joke of plaintiff's illustration does not, without an element of humor aimed at some aspect of the illustration itself, render it a parody and therefore a fair use of plaintiff's work.").

In his concurring opinion in *Campbell*, Justice Kennedy questioned whether 2 Live Crew's use of the opening line and bass riff from Roy Orbison's song "Oh, Pretty Woman" was in fact a parody, and 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 not be

resolved in favor of the "self-proclaimed parodist." *Id.* He went on to warn, referring to the facts at issue in the case before the Court, that "[a]lmost any revamped modern version of a familiar composition can be construed as a "comment on the naivete of the original." *Id.* Thus, this Court should not accept without question Houghton Mifflin's self-serving proclamation that "The Wind Done Gone" is a parody.

Even if this Court finds that "The Wind Done Gone" is a parody, too much of "Gone With the Wind" has been taken. In the wake of *Campbell*, Houghton Mifflin has the burden of showing that the elements it copied from "Gone With the Wind" were parodied, and that it took no more than was necessary to accomplish its supposed parodic purpose. *Campbell*, 510 U.S. at 590. Houghton Mifflin has not, and cannot, sustain this burden. While it makes the conclusory argument 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. Mem. at 17, it cannot explain away the excessive copying of minute details from Ms. Mitchell's work.

The fact is, as shown in Plaintiff's prior submissions to this Court, Houghton Mifflin's extensive takings from "Gone With the Wind" are completely unjustified. To cite but one of many

examples, in "Gone With the Wind" Jeems, a slave, is given to the big, red-haired Tarleton twins (Brent and Stuart) for their tenth birthday. The twins are thrown out of every major Southern University. Brent is to marry Scarlett's sister Carreen, but he and Stuart die at Gettysburg. Carreen, bereft, joins a convent in Charleston. See Beeber Aff., Exhs. A and B. In "The Wind Done Gone," the same story is told down to the last detail. Jeems, a slave, is given to the "big red-haired twins" as a gift on their tenth birthday. The Twins are thrown out of all of the major Southern universities. "B." was to marry Kareen but both twins die at Gettysburg. Kareen then goes into a convent in Charleston. *Id.*

Jeems, Carreen and the red-haired Twins are all the unique products of Margaret Mitchell's imagination. They are fictional characters. "The Wind Done Gone" does not comment upon Mitchell's pure invention that Jeems is given to the twins on their **tenth** birthday, nor is there any social value in reporting that the twins die at **Gettysburg**, or that Kareen 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," not to comment upon social issues. That Houghton Mifflin has taken from "Gone With the Wind" so completely, and down to the very last details, belies its argument that this literary

theft is fair use.

Under Houghton Mifflin's theory, nearly any work derived from a famous original could qualify as a parody. The Harry Potter story could be told from the point of view of the Muggles, or the James Bond story could be told from the point of view of Miss Money Penny, each to purportedly make some socially relevant point about the original. Houghton Mifflin's strained claim of parody calls to mind Professor Nimmer's warning that "a fertile imagination or a literature degree could probably suffice to locate some commentary by [the parodist] on the [original], perhaps between any two works at random." 4 NIMMER ON COPYRIGHT § 13.05[C][2], at 13-217.

### III

#### IRREPARABLE HARM IS PRESUMED IN THIS CIRCUIT

The law of this Circuit is that irreparable injury is presumed in a case of trademark or copyright infringement. Pl. Mem. at 27.

Defendant cites a District of Columbia case, *Belushi v. Woodward*, 598 F. Supp. 36 (D.D.C. 1984), for the proposition that the presumption of irreparable harm can be rebutted, and has been rebutted in this case. In the first place, this Court need not follow the opinion of another district court that some heightened showing of irreparable harm is necessary where the courts of this

Circuit have imposed no such requirement.

Moreover, were the Mitchell Trusts held to a higher standard of demonstrating harm beyond monetary damages, they could more than sustain that burden. As set forth in their opening brief, the Mitchell Trusts will be irreparably harmed if Houghton Mifflin is permitted to proceed with its stated plan for the imminent widespread sale and distribution of "The Wind Done Gone." 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. Over the vehement objections of the copyright owner, Scarlett will have been killed. Furthermore, if Defendant is permitted to publish this unauthorized derivative work, anyone could, without Plaintiff's consent, retell the story of "Gone With the Wind" from another point of view or create sequels or prequels. This will have a devastating, and incalculable, effect not only on the Mitchell Trusts, but on other authors and copyright owners as well.

#### IV

##### 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. Pl. Mem. at 28-29.

As set forth in the Mitchell Trusts' opening brief, the potential harm to the Mitchell Trusts vastly outweighs that to Houghton Mifflin. Pl. Mem. at 28-30. Houghton Mifflin argues that it will be irreparably damaged if preliminary relief is wrongly granted, but 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, April 6, 2001 (the "Levine Aff."), ¶¶ 4-5. The argument that its reputation will be tarnished is also spurious. Levine Aff. ¶6. The harm caused to Houghton Mifflin 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.

V

**PRELIMINARY RELIEF IN THIS CASE  
WOULD NOT BE A PRIOR RESTRAINT**

It is well-settled law in this Circuit that injunctive relief to remedy the potential harms posed by infringement is not just constitutional, but entirely appropriate. *Cable/Home*

*Communication Corporation, M/A-Com Inc. v. Home Box Office, Inc.*, 902 F.2d 829 (11th Cir. 1990) (copyright law implements affirmative constitutional duty to promote the progress of science and the arts). Moreover, an injunction preventing further violations of the Lanham Act serves the public interest by preventing confusion in the marketplace concerning the source of "The Wind Done Gone." *Foxworthy v. Custom Tees, Inc.*, 879 F. Supp. 122 (N.D. Ga. 1995).

A temporary restraining order in this case would not be a prior restraint on speech. The protections extended to authors by the Copyright Act derive from the Constitution. As such, even "the first amendment is not a license to trammel on legally recognized rights in intellectual property." *Cable/Home*, 902 F.2d at 849, (quoting *Dallas Cowboys Cheerleaders, Inc. v. Scoreboard Posters, Inc.*, 600 F.2d 1184, 1188 (5th Cir. 1979)).

Prior restraint concerns generally arise in the context of news and public information. For example, when the Nation Magazine sought to publish an excerpt taken from Gerald Ford's biography about the Nixon resignation -- surely one of the most newsworthy events imaginable -- the Supreme Court confirmed that an injunction preventing publication was appropriate. See *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 555-60 (1985).

In fact, courts have repeatedly enjoined the publication of literary works based on claims of infringement of intellectual property rights. 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 permitting 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. 890 (1987) (enjoining publication of book quoting copyrighted letters); *Dallas Cowboys Cheerleaders, Inc. v. Pussycat Cinema, Ltd.*, 604 F.2d 200 (2d Cir. 1979) (enjoining motion picture on copyright and Lanham Act claims).

Indeed in the cases cited by Defendant, an injunction was denied not because the court found it would be an unconstitutional restraint, but because the plaintiffs failed to show irreparable harm and/or a likelihood of success on the merits.

For example, the plaintiff in *Belushi*, after 145,000 copies of a book had already been distributed nationally, sought to enjoin the distribution of an additional 30,000 copies on the

ground that a single one of plaintiff's copyrighted photograph was included. 598 F. Supp. at 36. Defendant's reliance on *Trust Co. Bank v. Putnam Publ. Co.*, 5 U.S.P.Q.2d 1874 (C.D. Ca. 1988) is even more misplaced. The Court declined there 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. The Court found that such delay tipped the balance of the hardships in favor of defendants.

The same can be said for Defendant's reliance on *Religious Technology Center v. Lerma*, 897 F. Supp. 260 (E.D. Va. 1995), concerning the *Washington Post's* attempt to quote minimal portions of factual works by L. Ron Hubbard that the *Post* had copied from a file in a California Federal Court. The Court declined to grant the injunctive relief sought, because the balance of harm tipped so decidedly in defendant's favor. The harm to the plaintiff was "at best slight" because "[t]he documents in question are so esoteric as to require years of training in Scientology to understand them." 877 F. Supp. At 263. Those facts bear no resemblance to this case concerning the wholesale appropriation of a famous novel. Nor do the facts of *Globe Int'l, Inc. v. National Enquirer, Inc.*, No. 98-10613 CAS, 1999 WL 727232 (C.D. Ca. Jan. 25, 1999), in which relief was denied because the plaintiff sought to enjoin copying that had

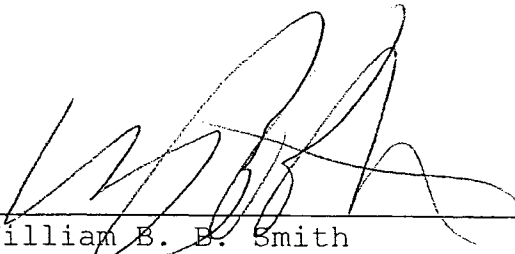
not yet occurred.

Finally, the Defendant's citation of *Greenberg v. National Geographic Society*, No. 00-10510, 2001 WL 280075 (11th Cir. March 2, 2001), does not involve a request for a temporary restraining order of preliminary injunction. Rather the Court of Appeals reversed summary judgment for the alleged infringer and entered judgment upholding the copyright holder's claim remanded the case to the District Court to consider all appropriate remedies including injunctive relief.

**CONCLUSION**

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

Dated: Atlanta, Georgia  
April 9, 2001

  
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CERTIFICATE OF SERVICE

This is to certify that I have this 9th day of April, 2001, caused a true and correct copy of the REPLY MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION FOR A TEMPORARY RESTRAINING ORDER to be hand delivered, addressed to counsel for Defendant as follows:

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