

THE INJUNCTION DONE GONE: FEDERAL APPEALS COURT UPHOLDS
“GONE WITH THE WIND” PARODY FAIR USE COPYRIGHT DEFENSE

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An African-American woman writes a parody of “Gone With the Wind” from the perspective of a black slave (and half-sister of the leading white female character) rather than from the perspective of the dominant white plantation-owning culture. The representative of the deceased author objects to the use of its copyrighted material and sues to prevent publication of the book. Who wins?

In a significant copyright decision, a federal appeals court in Atlanta ruled in favor of the author in vacating a preliminary injunction issued by the district court that would have prevented publication of a novel entitled "The Wind Done Gone," a critique of Margaret Mitchell's famous novel “Gone With the Wind” and its depiction of slavery and the South during the Civil War era. SunTrust Bank v. Houghton Mifflin Company, No. 01-12200 (11th Cir October 10, 2001).

The plaintiff was the trustee of a trust established by Margaret Mitchell, the author of “Gone with the Wind” (GWTW) which, since its publication in 1936, has become one of the best-selling books in the world, second in sales only to the Bible. The defendant was the publisher of the novel, “The Wind Done Gone” (TWDG), by Alice Randall, which she claimed was a critique or parody of GWTW. In her novel, she used many of the characters, plot and major scenes from GWTW. The plaintiff sued the defendant for copyright infringement and related claims, and the trial court issued a preliminary injunction barring publication of the book.

On appeal, the defendant argued that the doctrine of fair use protects TWDG because it is primarily a parody of GWTW. Under the Copyright Act, the copyright owner is granted a bundle of independent exclusive rights, including reproduction, distribution, public display, public performance, and the right to make derivative works. Violation of any of these rights may constitute copyright infringement, unless there is a valid defense.

One of the most important defenses is the fair use doctrine, which provides that the "fair use" of a copyrighted work for purposes such as criticism, comment, news reporting, teaching, scholarship or research is not an infringement, and sets out a number of factors for courts to consider. These factors include the purpose and character of the use, the nature of the copyrighted work; the amount and substantiality of the portion used; and the effect of the use upon the potential market for or value of the copyrighted work. 17 U.S.C. §§107.

First the court considered whether there was substantial similarity between the two novels to constitute a prima facie case of copyright infringement. According to the trial court, TWDG used fifteen of GWTW's fictional characters, including Scarlett O'Hara and Rhett Butler (who were renamed “Other” and “RB”), incorporating their physical attributes, mannerisms, and other distinct features, and their complex relationships with each other, along with fictional locales, settings, themes, and plot closely mirroring GWTW's.

The defendant argued that there was no substantial similarity because her retelling of the story is an inversion of GWTW: the characters, places, and events are often cast in a different light, strong characters from the original are depicted as weak (and vice-versa) , and the institutions

and values romanticized in GWTW are exposed as corrupt in TWDG. The court agreed that the characters, settings, and plot taken from GWTW were vested with a new significance in TWDG, but that did not change the fact that they were still the same copyrighted characters, settings, and plot.

Turning to the fair use defense, the court noted that the defendant had argued that TWDG is entitled to protection as a parody, relying on a recent Supreme Court case, Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994), which involved a parody of Roy Orbison's 1960s song "'O Pretty Woman'" by the rap group Two Live Crew. There, the Supreme Court held that parody, although not specifically listed in §§107, is a form of comment and criticism that may constitute a fair use of the copyrighted work being parodied. Parody, which is directed toward a particular literary or artistic work, is distinguishable from satire, which more broadly addresses the institutions and mores of society. For purposes of fair use analysis, the court said it would treat a work as a parody if its aim is to comment upon or criticize a prior work by appropriating elements of the original in creating a new artistic, as opposed to scholarly or journalistic, work.

The court analyzed the fair use factors by finding that TWDG was a "highly transformative" use of GWTW's copyrighted elements because it provided a different viewpoint by inverting various aspects of the original work. Where Randall referred directly to Mitchell's plot and characters, she did so in service of her general attack on GWTW. It would be difficult to see how she could have specifically criticized GWTW without depending heavily upon copyrighted elements of the book.

As to the amount and substantiality of the portion used, the plaintiff argued that the author took more of the protected elements than was necessary to serve a parodic function. The court noted that parodists are not restricted to the bare minimum necessary to conjure up the original work. Parody must be able to conjure up at least enough of the original to make the object of its critical wit recognizable. If the parodist uses more than the bare minimum, it may still be reasonable if it does not negatively affect the market for the original work. Here, given the nature of TWDG, it was unlikely to displace sales of GWTW.

The court thus found that the likelihood that a fair use defense would prevail, together with First Amendment concerns regarding comment and criticism and against prior restraints on speech, mandated the vacating of the preliminary injunction against publication of the book.

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