NEW YORK LAW SCHOOL

DigitalCommons@NYLS

Media Center

History & Archives

Spring 2002

Flexibility in Parody of Copyrighted Material

Joseph Beck

Follow this and additional works at: https://digitalcommons.nyls.edu/media_center

Recommended Citation

Beck, Joseph, "Flexibility in Parody of Copyrighted Material" (2002). *Media Center*. 105.
https://digitalcommons.nyls.edu/media_center/105

This Media Law and Policy, volume 10, number 2, Spring 2002 is brought to you for free and open access by the History & Archives at DigitalCommons@NYLS. It has been accepted for inclusion in Media Center by an authorized administrator of DigitalCommons@NYLS. For more information, please contact camille.broussard@nyls.edu, farrah.nagrampa@nyls.edu.

VOLUME X MEDIA LAW & POLICY NUMBER 2

FLEXIBILITY IN PARODY OF COPYRIGHTED MATERIAL*

Joseph Beck**

First Amendment copyright case of mine; *Estate of Martin Luther King v. CBS, Inc.*[1] This is a case about publication. The counsel for CBS argued that CBS was entitled to use Dr. King's "I Have A Dream" speech, because the speech had been published without a copyright notice.

I did not think that was a good argument. However, as it turned out the district judge agreed with CBS. We had to appeal. On appeal, we essentially argued for the estate, "What's Dr. King supposed to do?" Say, "Thank God almighty, we are free at last, all rights reserved?" The appellate court agreed that this was unnecessary. They reversed the case, and the parties quickly settled. The settlement terms are confidential. However, we can talk about what was not decided in that case -- the question of transformative use, which also was very important for *SunTrust v. Houghton Mifflin.*

In 1963, as many of you know, Dr. King led a group of American citizens to Washington, D.C., where he delivered the speech which came to be known as the "I Have a Dream" speech. CBS was there amongst international media crews. They were invited to be there. Nobody asked them to get a clearance, or sign a royalty sheet or

A&E, which broadcast the CBS show, is a for-profit television programmer, owned by the Hearst Corporation and others. The CBS program was about 47 minutes long, to allow for commercials. It was shown repeatedly in the U.S. and sold as a video. A&E and CBS translated the program into Portuguese, Hebrew, and Mandarin (that we know of) and sold it worldwide. It is a great program. It traces Dr. King's activities from Montgomery, Alabama, through Memphis, Tennessee, where he was assassinated. Twenty percent of the program consists of the speech; 62 percent of the entire copyrighted speech is used. Now, on those facts alone, I would like to just get a show of hands as to how many think that the program is a copyright infringement?

One of the things we learned upon taking depositions at CBS was that CBS was selling what they called "our footage" of "I Have a Dream" to public schools for $1,000 a minute with a 30-second minimum. We learned this when we discovered some CBS correspondence with WETV, a Washington public television station that wanted to use a very small amount and could not spring for the 30 second minimum. I felt that even if CBS owned the copyright in the moving picture, the video, they did not own the audio or the underlying words that they did not write.

In one of the 11 depositions I took at CBS, we learned that CBS knew the speech was copyrighted. We discovered that CBS took a license to use a much smaller portion of the "I Have a Dream" speech in a program hosted by Bill Moyers on the 20th anniversary of the speech. It also ran a copyright credit at the end of the speech. Not only had CBS done the '83 deal in which they recognized the copyright, but they were fully aware "I Have a Dream" was copyrighted. They just decided it was fair use for CBS. In a way, it is a shame that the case went off on this issue of publication, as that is not a terribly important issue under the new Act,[3] and really should not have been in the case. The real issue is whether CBS made a transformative fair use – for example, when CBS cut from Martin Luther King saying "sons of former slaves," to a photo of a slave with his back bleeding, was a transformative use, as that term was used in the *Acuff-Rose*[4] case, which is also an important case to grapple with in *The Wind Done Gone*[5] litigation.

Was it a transformative use of the speech when Martin Luther King mentioned the governor of Alabama, "with his lips dripping with the doctrine of interposition and nullification," and CBS cut to a photo George Wallace standing in the schoolhouse door? We did not think so. We did not think that transformed the words. We think transformative use means that you change the meaning of the words or change the meaning of the message. Alice Randall did this of course, in *The Wind Done Gone*. And by the way, it was interesting to me that these photos that CBS cut away to of

---

[3] *17 U.S.C. 301-305 (1976).*
[4] *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994).
[5] ALICE RANDALL, *THE WIND DONE GONE* (2001).

slaves and Governor Wallace were all public domain photos. They said in depositions that they did not want to pay the royalty for copyrighted photos.

In fact, it was rather sad – they had a chance to use a great photo of Marian Anderson, the wonderful African-American soprano who could not sing at one locale in Washington because of the views of the Daughters of the American Revolution, and for whom Eleanor Roosevelt procured a spot at the Lincoln Memorial. It was a great photo, and it would have been a great thing to use if you were going to use photos to try to make a transformative use. But it was copyrighted by Bettman Archives, and it would have cost a little money to use, so CBS passed.

CBS protected its own copyrights. A year after Dr. King gave his speech, CBS sued a small documentary film company for a film made around 1963. Of course that documentary had to refer to the assassination of John Kennedy in 1963, and in doing so they used a very brief cut in which the CBS reporter takes off his glasses and says, "I'm sorry to inform you that John Kennedy has just died at Parkland Hospital in Dallas." It was a very poignant moment for people my age. And it would have been important to put that in the documentary film. But CBS sued and won, citing *King v. Mr. Maestro* – in which Dr. King sued an infringer of "I Have a Dream" here in New York – for the proposition that a performance is not a divestive publication.

As I said, CBS copied 62 percent of the speech, but they copied 90 percent of the best material, all of which was extemporaneous. It was absolutely incredible to me, that the phrase "I have a dream" was not in the written speech that Martin Luther King and Coretta Scott King wrote out at 4:00 in the morning on August 28th. That written speech that CBS initially claimed was published was placed in the press tent. The phrase "I have a dream" was something that came to Dr. King standing there. And if you watch the entire speech you'll see what happens. To Ms. King I said, "how did he do that? In front of all these people he did not split an infinitive." She said, "well, you know, he felt the crowd." If you watch, you can see him begin to see the crowd building. And he puts his notes down. And all the lines at the end about sons of former slaves, and Jews and gentiles, Protestants, Catholics, and all those great lines were completely extemporaneous. Of course, we argued those lines could not have been published in the press tent, and therefore, were not in the public domain. So that was our ace in the hole.

CBS came right back four days before summary judgment briefs were due. I got a phone call from CBS counsel saying that "we have a document we are going to be using, and I think you are going to want to know about it.'" Litigators know when a lawyer says that to you your heart sinks. What does he have? And what he had was an issue of the *Southern Christian Leadership Newsletter* of September, 1963 in which the entire speech, including his extemporaneous lines, had been published without a copyright notice. He was going to move for summary judgment of divestive publication based on that.

We went into what can only be described as the "scramble mode." I talked to Ms. King; I talked to Andy Young and several other people who were with Dr. King. We put in six affidavits within about 48 hours. We were able to prove not only that Dr. King was not in Atlanta to make sure that the copyright bug was placed on the *Southern Christian Leadership Newsletter*, since he was in Birmingham where four children had just been killed, but also, that he was compulsive about the copyright notice. Dora MacDonald, his executive secretary, testified that he was that way. He insisted on that copyright notice. And it was because he was a writer. He made a living as a writer and he knew he had to put the copyright notice on his work to protect his rights. He registered two dozen copyrights, he used a New York literary agent, he brought a law suit in the Southern District of New York for copyright infringement and won. He knew about copyright, and he would not have deliberately authorized anyone to put his most famous work in the public domain. So we argued. The 11th Circuit saw it that way too.

But the real issue in that case was transformative use. Do you transform a work merely by illustrating it, *e.g.* by cutting from a reference to a slave to a picture of a slave, from a reference to George Wallace to a picture of George Wallace? In my view, that is not transformative use. But *The Wind Done Gone* case was a case about transformative use.

Marty Garbus, my opponent in *The Wind Done Gone* case, wrote an article[6] about his great defense of *Lo's Diary*. *Lo's Diary* was written from the point of view of "Lolita" in Vladamir Nabokov's book bearing that same name. The owners of copyright in Nabokov's work brought a lawsuit claiming that that was copyright infringement.

Marty eloquently defended the right of creators of new works in that case to make transformative use of copyrighted material from older works. He explained in a very literary way how, in order for creators of literature, music, and film to advance new works, they must borrow from old works. Of course, I agree with him on that.

So with that background, let us talk at last about *The Wind Done Gone* case in some detail because it is an extremely important copyright case, and I think that win, lose or draw, Marty would agree.

Let us begin with what it takes to get an injunction in the 11th Circuit. In the 11th Circuit, you have to prove four things - - not three out of four, no balancing test, no majority or mushiness, but all four. The plaintiff has to show a substantial likelihood that he will win on the copyright infringement claim. Second, the plaintiff must show that he will suffer irreparable harm. Third, the plaintiff's harm must outweigh the defendant's harm. Finally, an injunction must be in the public interest.

---

[6] M. Garbus, *Evergreen Review*, Fall / Winter, 1999.

We took the position right out of the chute that there was no likelihood of success in this case by the Mitchell estate for two reasons. First, we made a novel argument. Although almost every parody case concedes "substantial similarity," we did not. (In a copyright case, you have to prove what is called "substantial similarity," of copyrightable expression. We said there was no such similarity.) That was an argument not terribly well received by the court, but I am glad we made it. And I would say to those who litigate in this area to think about it, not to simply lie down on that question and move on to "Yes, we copied but it's fair use."

Let us look at a few of the characters in the books and consider if they really are "substantially similar." Scarlett O'Hara was referred to in *Gone With the Wind* as the "black haired, green-eyed belle of Five Counties, not beautiful, but men seldom realized it." In *The Wind Done Gone* she is described as a "raven haired, green-eyed belle of Five Counties, not beautiful, but men seldom recognized this." Remember, we are commenting on, doing a parody of, *Gone With the Wind*, and so we have to describe Scarlett as she was. We could not call her a blond from San Francisco. But that is the extent of the similarity.

Look at Melanie. Melanie was married to Ashley Wilkes in *Gone With the Wind* and was described by Scarlett herself as "mealy-mouthed." In *The Wind Done Gone* she's called "Mealy Mouth."

Look at Ashley Wilkes. Who could forget Ashley? In *Gone With the Wind* he was the "heir of Twelve Oaks plantation, a gentleman who would spin brightly colored dreams." In *The Wind Done Gone* he is referred to as a "Dreamy Gentleman," and was heir of the plantation, "Twelve Slaves Strong As Trees."

And let us look at one more character called "Pork." You probably will not remember much about Pork because there is not much to him as depicted by Margaret Mitchell. He is just a block of flesh. He had no persona, no intelligence. He was the manservant of Gerald O'Hara, and he was won in a card game on Saint Simon's Island when Gerald O'Hara won Tara. Alice Randall had a character who is his analog, called "Garlic." and he also was won in a card game.

This was not a case of substantial similarity for several reasons. First, the tones of the two books are different. Our book is a sad book, and in some ways, a funny book. But one thing there is no sadness about is the death of Confederate soldiers. When they begin reading the names of the soldiers who have died and the Confederate widows are there all dressed in black, everybody is very weepy and sad in *Gone With the Wind.* You do not have that sort of tone at all in *The Wind Done Gone*.

The setting of *The Wind Done Gone*, to be sure, is a plantation south of Atlanta. But it is a very differently perceived plantation. The Twelve Slaves Strong As Trees plantation, analogous to the Twelve Oaks plantation of *Gone With the Wind*, was built

by the slaves as the architects. The flutes on the columns were like the stripes on the backs of the slaves, Alice Randall wrote.

The prose style of the two works could not be more different. *Gone With the Wind* is 1,100-plus pages of romantic, flowing, old-fashioned prose. *The Wind Done Gone* is written in the vernacular of a slave. It is written in the form of a diary. It was written by a person for whom literacy was a crime. She could have gone to jail or perhaps been executed for simply being able to write. To give verisimilitude to the story, Alice Randall wrote the book in the vernacular of a person who was not educated. That makes it difficult for some people to understand. It also makes it very different stylistically from *Gone With the Wind.*

The book *The Wind Done Gone* will stand in the minds of many, after *Gone With the Wind* is no longer with us. It was written as an academic book for use in colleges. Therefore, the style and the plot are quite different. Cynara, who is the protagonist, the author of the diary, and the mulatto half-sister of Scarlett O'Hara, is a slave herself. Cynara wins "Rhett." And Pork, who Cynara calls Garlic, wins Tara. So, the story turns out a little differently in *The Wind Done Gone.*

Let us look again at these characters. The character analogous to "Scarlett" in *Gone With the Wind* is called "Other," always the name for the outsider in literary fiction, has the proverbial drop of black blood. Other has a black ancestor. Other dies, and loses her man. So there is not at all the kind of substantial similarity between Scarlett and Other that would ordinarily result in copyright infringement. "Mealy-mouth" ("Melanie" in the novel), is a serial killer. You remember the character of "Melanie" in *Gone With the Wind* as someone who never did anything wrong and was too good to be true. "Mealy-mouth" is not the same character as Melanie in *Gone With the Wind.* And "Dreamy Gentleman" (Ashley in *Gone With the Wind*) is a homosexual who sleeps with a slave.

"Garlic," as I say, was a completely different character. "Garlic" engineers his freedom. There is a wonderful line from *The Wind Done Gone* that described how "Garlic" does this. They are playing cards in Saint Simon's Island, and in Alice Randall's words, "Garlic pours the old master heavy and the young master light." Now that is the sort of prose that some found impenetrable. What Alice Randall obviously meant by, or perhaps not so obviously, is that "Garlic" got the old master drunk so he would bet and lose Tara. Therefore, "Garlic" improved his life by being won by a better master, Gerald O'Hara. Garlic then went off to Harvard with the Tarleton twins where he, according to Alice Randall, learned more standing in Harvard Square than the twins did in class. So he is a very different character than Pork in *Gone With the Wind.* Although you may not like him and think that he is manipulative, he is certainly human, which is quite a change.

The court did not agree with me. The district court said it is a "piratical" copy. So, we went up to the 11th Circuit on that. We also had a back-up defense: fair use. There are four factors. First is the purpose and character of the use. Typically, that means: is it educational or is it commercial? That is not always an easy line to draw. Was CBS's program an excerpt of educational or commercial in the Martin Luther King case? The second factor is the nature of the copyrighted work. Simply put, works that are creative get more protection. You would get better protection for *Gone With the Wind* than you would for a software manual. The third factor is how much you took, and the relationship of what you took to the work as a whole. In the *Harper and Row* case, *The Nation* magazine published 300 words out of 200,000 in Gerald Ford's memoir without his permission, yet the Supreme Court found that this was a copyright infringement because those were the heart of the memoir, the discussion of his pardon of Richard Nixon.[7] So, it is both the weight of the material, and the amount of the material taken. Finally, the fourth factor is the affect on the market.

As the Supreme Court said in *Campbell v. Acuff Rose*, parody, satire, comment, and criticism, like news reporting, are favored as fair use.[8] In *Campbell,* Two Live Crew did a song called "Ugly Woman" that was potentially a comment by an African American group on white bread country music -- specifically, "Pretty Woman" by Roy Orbison.

According to the Supreme Court, Two Live Crew's song was potentially a good example of what the court called "transformative use."[9] Transformative use is a term that was coined by the great Second Circuit Judge Pierre Leval, in an article in the *Harvard Law Review*, which was heavily quoted by the Supreme Court in the *Campbell* case.[10]

Judge Leval and the Supreme Court were getting at the notion that while copyright and authors ought to be protected, we need to allow breathing room for new work. And where that new work uses the old work in a transformative way, in a way that gives new meaning and new message to the older work, the new work may well be a fair use and not copyright infringement.

The Supreme Court went on to observe in *Campbell* that a classic example of transformative use is parody. Parody is the kind of literature that imitates another work

---

[7] *Harper & Row, Publishers, Inc. v. Nation Enters Priges*, Inc., 471 U.S. 539 (1985).
[8] *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994).
[9] *Id.*

[10] Pierre N Leval, *Commentary: Toward A Fair Use Standard*, 103 HARV. L. REV. 1105 (1992).

for the purpose of ridicule, often but not necessarily for humor. Humor can be there, but it does not have to be. And discussing the necessity that parody ridicules the work it copies – the first important, fun copyright case I had was for D.C. Comics, a New York company that owns *Superman* and *Wonder Woman*. In that case we sued some folks who had a company called "Unlimited Monkey Business."[11] The defendants had live actors who would come into a room like this and this guy dressed in a business suit would say, "It's a nerd, it's insane, it's Super Stud," and rip out of the business suit to reveal a blue and red leotard costume like that of Superman. For other occasions, usually a bachelor type party, they had a character called "Wonder Wench" who dressed like Wonder Woman and she would come in and tie the guy up with the Golden Truth Rope. We won that case on summary judgment because what they did was to copy without making a comment, without ridiculing.

I had fabulous witnesses on the subject of parody, of ridicule, in *The Wind Done Gone* case. John Sitter, the first declarant here, is the Professor of Parody at Emory. The second is a Professor of African American Studies at the University of Georgia. The third one, Henry Lewis Gates, presently at Harvard, was also a great witness. All of them agreed on these essential elements. A parody is a work that imitates, and therefore copies, in order to ridicule. The 11th Circuit, Judge Birch writing for the majority, found that *The Wind Done Gone* not only ridiculed *Gone With the Wind*; it "made war" against *Gone With the Wind*, that it used the elements that it copied -- conscripted as he calls it -- for that purpose.

Judge Stanley Marcus, concurring, said that *The Wind Done Gone* was "unequivocally" a parody of *Gone With the Wind*, shattering *Gone With the Wind*'s picture of the South. So on this first factor, the nature of the use, the 11th Circuit agreed with us that *The Wind Done Gone* is a classic example of parody.

The second factor: the nature of the work. *Gone With the Wind,* of course, is fiction, and as such, is entitled to maximum protection under the law. But as the Supreme Court pointed out in *Campbell v. Acuff Rose*, parody always goes after fiction.[12] It always goes after popular fiction. There is no point in making fun of something no one has read or heard of. Therefore, to credit the second factor to the plaintiff in a parody case would be meaningless; they would always win. Thus, this factor is neutralized.

Regarding the third factor, there are two interesting issues here. The first is the amount taken. We have been criticized for taking too much. And yet, you have to take at least enough to conjure up a work. Some of the older cases that talked about parody said that was all you could take. That's no longer the law. *Campbell v. Acuff Rose* is the

---

[11] *D.C. Comics, Inc. v. Unlimited Monkey Business, Inc.*, 598 F. Supp 110 (N.D.Ga. 1984).

standard.[13] You can do "at least" enough to conjure up the work. After that you have to defend yourself. You must explain why you took more than that. Our view was that *Gone With the Wind* is a whale of a book. Growing up as I did in Montgomery, Alabama, it may not have out-sold the Bible, but it was right up there. It was an extraordinarily popular and influential work. When people from Japan come to Atlanta they want to see Tara, not CNN or Coca-Cola. That is the image many have of the South.

So, in order to effectively parody that work, it was necessary that Alice Randall take more, much more than what little it takes to conjure up *Gone With the Wind.* After all, you can conjure up *Gone With the Wind* by saying "Frankly my dear, I don't give a damn." We immediately see it. But to effectively parody, to effectively ridicule, it is necessary that you build on – some would say "copy" -- the characters to some extent and then bring them down hard. And that is what Alice Randall did.

The 11th Circuit came up with a new take on our argument about how much had to be taken to effectively parody *Gone With the Wind* that I think my brothers and sisters from the copyright bar will want to look at it. I think the new twist is on the third factor. It is a conflation of factors three and four. How much is too much will depend first on whether the over-riding purpose is to parody; and the second factor is on the likelihood that the parody may serve as a market substitute. Now that is a new twist on factor three, and a very interesting one. As to the first point, clearly the reason for *The Wind Done Gone* was to parody *Gone With the Wind.*

As to the second part, did we take enough to negatively affect the potential market? And this is the touchy point of this case. This is what everybody gets excited about. Because *Gone With the Wind* is an enormously profitable franchise. The movie probably has been seen by more people than any other movie in the world? If the price of 15 cents in 1939 were adjusted to fit present day standards, it would probably be the largest grossing movie as well. And it continues to have a life. A new sequel apparently has been authorized from the point of view of Rhett Butler. So, the book has legs.

The question is about whether our little slim parody will affect that market. Judge Birch said that Sun Trust's witnesses focused on the market value of *Gone With the Wind* and its derivatives, but failed to address, and offered little evidence or argument to demonstrate that *The Wind Done Gone* would supplant demand, even though that is the crucial evidence. What the Sun Trust people argued was something called "taint " There is no question that our book does have that effect on *Gone With the Wind.* But that is not copyright damage, any more than a bad review of a play that thereafter closes after the first night has been damaged in the copyright sense by the bad review. A bad review may quote from the play, and may damage the play, but that is not copyright damage. Significantly, none of Sun Trust's experts were willing to swear

[13] *Id.*

that *The Wind Done Gone* would be regarded as a sequel. I can only conclude that such witnesses were not available.

Our witnesses, on the other hand, were happy to swear that in their opinion there would be no affect on the sequel market. And the 11th Circuit noted that the evidence we offered "specifically and correctly" focused on market substitution, and demonstrated why Randall's book was unlikely to displace sales of *Gone With the Wind.*

One of our fabulous witnesses on this point was Frank Price. He is a former Chairman and CEO of Columbia, producer of "Out of Africa," and winner of eight Academy Awards. Mr. Price is a guy who virtually invented the idea of the television sequel. Mr. Price was very clear that there was no discernible effect on the sequel market of *Gone With the Wind* from a book like *The Wind Done Gone*. We did not take a "right to a sequel" from the Mitchell estate because *The Wind Done Gone* is not the sort of thing that they would have licensed to begin with.

I have a quick example that maybe helpful to illustrate that point – that the Mitchell Estate would never license a book like *The Wind Done Gone*. One of my witnesses was Pat Conroy, the author of *Prince of Tides* and many other great books. He used to live in Atlanta. He and the Mitchell Estate were negotiating over "Scarlett," the first sequel to *Gone With the Wind.* Conroy's mother loved *Gone With the Wind.* He wanted to write the sequel for her. They negotiated and came to terms on the rights and the money and so forth. Then, somewhere along the way, the Mitchell Estate said, "Pat, there are three conditions we've not told you about." He said, "Conditions? What are these conditions?" And they said, "Well, no miscegenation, no homosexuality, and Scarlett must never die." Conroy said, "You know, I'm not sure I was going to do any of that. But as I'm an established writer, I can't as a matter of principle agree to these conditions in order to do this book. But I really want to do the book. Let me do the book. I want to do it for my mother. It'll be a great book I promise you. A lovely book." But the Mitchell Estate persisted, "Pat, three conditions." My guess is that the agents came in and said 'Look, we'll work this out. You guys go to lunch.' But they could not. The Mitchell Estate stood very firmly on that. "If those are your conditions," Conroy said, "then here is the first sentence of the book that I'll write: On the morning after the death of Scarlett O'Hara, Rhett Butler rolled over in bed to face Ashley Wilkes, and he said, "Ashley did I ever tell you that my grandmother was black?" That ended the negotiations, and that was put in as evidence that the Mitchell Estate would never have licensed a book like ours, in which there is miscegenation, homosexuality and in which Scarlett dies.

After likelihood of success, the next issue for a preliminary injunction is irreparable harm. Copyright lawyers always assume that if you prove likelihood of success, it is a sleigh ride after that, because irreparable harm generally is presumed. Some of us never had to think about that before. Well, in this case, we had to think about it a lot. I read a lot of cases. Most of the cases just assumed irreparable harm,

because that is what the law has always been. The cases that presumed irreparable harm presumed it in one of these four examples. First, the defendant cannot pay the judgment. Well, Houghton Mifflin, big strong 175 year old Boston publisher, now part of Vivendi, certainly could pay the judgment, so that was not a problem. Another time irreparable harm is presumed is where there is a threat to the plaintiff's competitive position because of cheaper goods. That is the classic knockoff case where somebody dumps a lot of stuff on the market and you cannot fight it competitively. And so you have to get an injunction to stop it. The third example where courts presume irreparable harm is in cases involving things with relatively short commercial lives like video games. Finally, irreparable harm is presumed where there is an inability to track because the defendants do not keep good records. None of that was present here.

An injunction may be issued when money is not enough, is not sufficient to compensate the copyright owner. That is the classic argument for irreparable harm. But money would be enough here. Money would fairly compensate them. The fact that they could value, through St. Marten's Press, what the sequel rights were worth after *Scarlett* in order to sell the Rhett sequel clearly shows that you can put a monetary value on a sequel right -- if this had been a sequel.

As for the slippery slope argument of harm to *Gone With the Wind*, that a ruling for Houghton Mifflin would "open the parody floodgates;" this is the argument that people always make when that is all that is left. The answer is very simple: in order to publish a parody of *Gone With the Wind*, you have to fight through these four fair use factors: nature of the work, nature of the use, how much did you take, and the effect on the market. If you do that, it should be published. It may not sell, but it should be published.

Another reason the Mitchell trust was not irreparably harmed was because there are many parodies of *Gone With The Wind*. We searched the Internet and found dozens of parodies of *Gone With The Wind*. For example, one is a picture of a contemporary man who is clearly Clark Gable or Rhett Butler. He is kissing Scarlett in that great pose that we all know and love. It is clearly Scarlett. The background is a mansion and a BMW, and they are in Scarsdale, New York. The thought bubble above says, "On second thought, I do give a damn." It is a parody and it gets a laugh. There are dozens like that on the Internet, and the Mitchell Estate does not object to that, because those kinds of parodies reinforce the iconographic stature of *Gone With The Wind*. Our book does not reinforce the iconographic stature of *Gone With The Wind*, and that is why it was attacked.

In *Campbell*, the Court held that injunctions, in ordinary copyright cases, should flow almost as a matter of course. However, in works involving parody, or literature, we should be a little more hesitant. It should not be automatic, because these cases are worlds apart from, for example, fabric cases. In those cases, you

should be able to get an injunction, but that is not the case when you are talking about books.

Greenberg v. National Geographic Society,[14] an 11th Circuit case in which I was involved, was written by the same judge as in *SunTrust*. *Greenberg* is "a son of *Tasini*" kind of case.[15]

In *Greenberg*, the Greenbergs had taken photographs and National Geographic published them with permission. Later National Geographic came out with *100 Years of National Geographic* on a CD-ROM. The question was whether or not that fell within *Tasini*. The same 11th Circuit judge who wrote *The Wind Done Gone* opinion said, "this was an infringement;"[16] however, he also said that even though it is an infringement, a remedy other than an injunction should be imposed. Injunctions for works such as this CD-Rom should not be issued lightly.

Gone With The Wind's proprietors should have known that. They had lost a case in California,[17] concerning a book called *The Blue Bicycle*. It is *Gone With The Wind*, except the book is set during World War Two rather than in the South. Many other details allegedly are very similar. The Mitchell Estate sued. The court agreed that this was probably an infringement, but decided not the enjoin it. The court reasoned that there was a strong public interest against issuing the injunction. The court said that the harm caused to the proprietors was not so substantial that it cannot be compensated for monetarily. The *Belushi v. Woodward* case [18] involved the same thing.

While there was no irreparable harm to the Mitchell Estate, an injunction would cause harm to my client and we put in evidence on that as well. First, the Supreme Court, in *Elrod v. Burns*, held that the loss of First Amendment freedom for any period of time is irreparable.[19] Moreover, Anton Mueller, the brilliant editor for Alice Randall, testified in this case that if Ms. Randall's book was enjoined for even a short amount of time, it would damage the book. People would think that they had known everything they needed to know about it. There would also be injury to Ms. Randall's reputation from having her book enjoined.

Moreover, planning for any book publication, especially a big book publication, is a massive undertaking. You must commit to autographing, to distribution, and to different media in which books come. All of this is the product of lots of coordinated planning.

---

[14] *Greenberg v. National Geographic Soc'y*, 244 F.3d 1267 (11th Cir. 2001).
[15] *NY Times, Co. v. Tasini*, 533 U.S. 483 (2001).
[16] *See supra* note 15.
[17] *Trust Co. Bank v. Putnam Pub. Group, Inc.*, 1988 WL 62755 (C.D.Cal. 1988).
[18] *Belushi v. Woodward*, 598 F.Supp. 36 (D.D.C. 1984).
[19] *Elrod v. Burns*, 427 U.S. 347 (1976).

Wendy Strothman, our client's executive Vice President, said that the delay would put us in a terrible bind. The court recognized the problem in *Belushi v. Woodward*.[20] There, as in our case, the carefully orchestrated, costly plans for selling and marketing a book would be disrupted, costing lost sales. Therefore, an injunction does create serious harm to the respondent.

Finally, there is the issue of the First Amendment and its relation to copyright, in particular the conflict between the ability to enjoin an infringing work and the issue of prior restraint. It is interesting in the age of the Napster litigation, that this feud between copyright and freedom of speech is really a very old one. It began during the time of the licensing laws in England, which were created shortly after the invention of the printing press. The English monarchy and churches were concerned that this new invention was going to destabilize what they wanted to accomplish. The monarchy thought about ways to bring this new printing press under control, and came up with licensing laws. In order to publish a book in England, you had to have a license and the manuscript had to be licensed as well. This was also a kind of early copyright. It was clothed in the preamble of protecting authors' rights by making sure that they did not get cheated. The English eventually gagged on the licensing laws because of the censorship, and as Blackstone notes, the English abolished the licensing laws, about 50 years before the American Revolution. The principle that the English adopted, not in a written constitution, as they do not have one, was the principle of no more prior restraint. Let the book be published, then hang the publisher if you will, but do not enjoin the book.

The first great First Amendment case in America was *Patterson v. Colorado*.[21] The opinion was delivered by Justice Oliver Wendell Holmes. Discussing the case, Holmes referred to Blackstone, stating the main purpose of the First Amendment is to prevent all prior restraints. According to Holmes in *Patterson*, the Constitution did not prevent the subsequent punishment of such acts as may be deemed contrary to the public welfare. Of course, by the time Holmes dissented in *Gitlow*,[22] he had a different view of that. But in *Patterson*, he was building a position. And that is the first great case that says no prior restraint. You do not enjoin the book in America. To stop the conversation that Alice Randall wants to have about *Gone With The Wind* would stand American law on its head, even more than she stood the characters in *Gone With The Wind* on theirs. There is simply no precedent for it, from the *New York Times*[23] Pentagon papers case and forward.

---

[20] *Belushi v. Woodward*, 598 F.Supp. 36 (D.D.C. 1984).
[21] *Patterson v. Colorado*, 205 U.S. 454 (1907).
[22] *Gitlow v. New York*, 268 U.S. 652 (1925).
[23] *New York Times Co. v. United States*, 403 U.S. 713 (1971).

Parody is entitled to First Amendment protection, and especially African American uses of it, because it has a political purpose. According to our witness, Henry Lewis Gates, parody is often used by oppressed people to fight back. That is really what Alice Randall was doing here. She read *Gone With the Wind* when she was 12 years old, and she liked it. But she knew something was missing, and as she thought about it Randall realized: where were the voices of the slaves? Where were the examples of miscegenation? Where was the rest of the story? After graduating with honors from Harvard, she came to Nashville, Tennessee, where, interestingly, her first venture was to write a best-selling country song which went all the way to number one. Randall then began work on *The Wind Done Gone.*

I believe very strongly in protecting copyright rights, and I believe injunctions often are necessary. But even a lawyer the stature of Martin Garbus should not win a case like this. The 11th Circuit agreed and we argued the case on an expedited schedule. It was really a heart-stopper for us. We had to turn in a brief in an hour, and then we had 30 minutes to reply - - very fast-paced, almost like a death row case. We got oral argument early. I got the sense during my argument that the court was leaning my way. It seemed like it was headed in a good direction. So I asked to reserve five minutes, and I used the five minutes not to talk about why the injunction ought to be vacated, but really to ask the court to give the district judge the strongest possible guidance on fair use. There was no summary judgment motion pending; I almost wish there had been. When I finished my argument Judge Birch said, "Mr. Beck, you'll remain in your place."

Litigators know that is lawyer talk for, 'it's a hot bench, and maybe they will ask some more questions.' But as it turned out, I just stayed there for a couple of minutes. I do not know if you have ever had that experience, but it was very interesting to me. The judges began to whisper back and forth. Finally Judge Birch said, "Joe, you can sit down if you want to." So, I sat down. We waited, and then he leaned forward and said, "This injunction was entered as an abuse of discretion in violation of the First Amendment of the Constitution, a prior restraint of speech. We will vacate this injunction immediately. There will be an order within an hour, you can publish your book today." Well, I wanted to say, "Yes!" But you cannot do that. We waited until the last black robe disappeared through the door, then we celebrated. It was a great thrill, and a great victory.