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A Case of Scarlett Fever

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A Case of Scarlett Fever

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Abstract

In her declaration offered in defense of the book *The Wind Done Gone*, in a copyright dispute with *Gone With The Wind*, Alice Randall claimed that ‘[the book]...uses characteristic elements of *Gone With The Wind* and imitates them in a way that appears ridiculous.’ This case raises numerous questions regarding the treatment of the parody defense in federal courts: Are federal judges qualified to evaluate the ‘transformative’ test created by Pierre Leval? How much weight do judges place on the testimony and declarations of expert witnesses? Do judges feel comfortable making decisions about the unique characteristics of certain literary genres? One would assume that judges decide the law in copyright cases based on the criteria provided by the Copyright Act. However, when the parody defense is asserted, it appears that expert witnesses—as well as the testimony of the authors involved—exert a singularly powerful influence upon the decision of the judge. This paper argues that judges are heavily influenced by expert witnesses in cases involving the parody defense. The effect can be seen in more recent cases such as *The Wind Done Gone*, as well as earlier copyright cases in which the transformative test was first put to use, such as *Cambell v. Acuff-Rose*.

Keywords:

Corresponding Author:

I.

With the impending publication of Alice Randall's *The Wind Done Gone* by Houghton Mifflin in 2001 and the immediate attempt by Margaret Mitchell's Estates to stop the release of the book, the concept of cultural re-appropriation collided with the legal concept of 'transformation.' Mitchell had depicted her vision of the Antebellum South in *Gone With The Wind* and Alice Randall attempted to re-imagine it from an African American perspective through the use of parody.

The Mitchell Estates claimed that Randall's work infringed upon *Gone With The Wind*, violating their copyright. Alice Randall's lawyers asserted a fair use defense, claiming that *The Wind Done Gone* was a parody of *Gone With The Wind* that accomplished a 'transformation' of the original, which was a complete defense to a claim of copyright infringement. The resulting dispute placed both works in the legal arena where the operative question was one of fair use. Had a metamorphosis occurred? Did Randall create a work unique in its own right or did she merely borrow the material of *Gone With The Wind* in order to profit from its success?

In this dispute, critics and lawyers alike asked how artistic transformation collides with legal transformation. The clash between Randall and Mitchell reveals that a space exists where literary and legal categories meld - where re-appropriation as a method of examining artwork from a ironic perspective becomes the slippery legal concept of transformation involved in a fair use defense - where the ultimate arbiter of the collision is not an academic or a critic or an author, but a judge. In this space, intangible elements such as the artistic nature of the works come under examination, as well as other less obvious issues such as book sales, market share and, most importantly, expert witness testimony.

Once entwined in the legal arena, these works cannot be analyzed and compared from a purely literary perspective because the Copyright Act provides a four-factor test to determine the legality of a fair use defense; however, this clash does illuminate the process of re-appropriation, particularly from an African American perspective, and the space it occupies in the consciousness of the public sphere as well as the current legal system. Further, this dispute cannot be divorced from its uniquely *American* character, delving into the heart of the American experience with slavery. Mitchell portrayed the Old South as honorable, distinguished and remarkably unblemished by the slave trade in which it participated. This conception of the Antebellum South is exactly what Randall attacked, doing so by creating a new vision of Mitchell's characters, her scenic plantation descriptions, and her portrayal of Atlanta as the brave heart of the Confederacy.

In her project Randall borrowed heavily from *Gone With The Wind*, and the extent of her usage made *The Wind Done Gone* vulnerable to legal challenge. The substantial amount of re-appropriated material also complicated the dispute for the courts, because the legality of parody depends upon its success in transforming the original, which in turn requires extensive usage of

the original. But is the legal test for copyright infringement – as it is currently formulated – appropriately configured to analyze these issues? The issue of ‘transformation’ as both a literary and legal concept can overwhelm the traditional legal structure applied to a copyright infringement analysis and allow ‘experts’ such as authors and publishing executives to appropriate in their own right decisions that should depend upon a judicial balancing test based upon the language of the Copyright Act and the interpretive precedent that has developed from its application.

This analysis begins with a critical analysis of *The Wind Done Gone* and *Gone With The Wind* - tracing their conflict through the courtroom - and concludes with a comparison of the conflict between Alice Randall and Margaret Mitchell to a similar dispute concerning cultural reappropriation recently before the Supreme Court, which reveals that the art of parody is inherently entwined with legal doctrines that do not necessarily have the tools to properly evaluate them.

II.

While the *The Wind Done Gone* is two hundred and six pages and *Gone With The Wind* is over one thousand, there is extensive overlap between the two works. Randall appropriates 18 characters from Mitchell’s work. In addition, the Mitchell Estates contend that ‘[*The Wind Done Gone*] copies, often in wholesale fashion the descriptions and histories of these fictional characters...as well as their relationships with one another...[and] appropriates...many aspects of [*Gone With The Wind*’s] plot as well...’¹ The extent of appropriation in such a short work is not altogether remarkable given that Mitchell’s novel seeks to reinvent the three major story lines of *Gone With The Wind*: the relationship between Scarlett and Rhett, between Scarlett and Ashley, and the destruction and rehabilitation of the South during and after the Civil War.

In her Declaration to the Georgia District Court, Randall clearly articulates her intent in writing *The Wind Done Gone* as an attempt to revise the perception of African Americans in *Gone With The Wind*:

I wrote The Wind Done Gone as a parody of Gone With The Wind, that is, as a book that uses characteristic elements of Gone With The Wind and imitates them in a way that appears ridiculous. I made Gone With The Wind the target of my parody because that book, more than any other I know, has presented and helped perpetuate an image of the South that I, as an African American woman living in the South, felt compelled to comment upon and criticize. It is an image of a world in which blacks are buffoonish, lazy, drunk and

¹*Houghton Mifflin Co.*, 268 F.3d 1257, 1267 (11th Cir. 2001).

*physically disgusting and in which they are routinely compared to 'apes,' 'gorillas,' and 'naked savages.'*¹

This statement emphasizes her personal relationship to the text, her compelling need to create it specifically because she was an 'African American woman living in the South.' And perhaps it is this very urgency, which may, in the words of Michiko Kakutani from the New York Times 'unfortunately, [end up] inadvertently diminishing the horrors and deprivations of slavery, while undermining sympathy for some of the very characters it wants to promote.'²

Randall wanted to write a 'book that stood in ironic relationship to the object of [her] parody.'³ But because her intent is so clearly infused with her subject the irony is lost in the nature of her project. However, for Gene Andrew Jarrett, author of *Law, Parody, and the Politics of African American Literary History*, this reimagination serves a different purpose. He emphasizes how Randall's legal defense focused on the political value of Randall's work: 'Houghton Mifflin argued that the district court judge wrongly prioritized the copyright-infringement protection of a primary artistic work over the First Amendment protection of a secondary artist who sought to transform this work for a 'political purpose.'⁴ In this case, it is not so much the success of the parody, as the use of parody itself that transformed *The Wind Done Gone* into a political commentary that both legitimized it and provoked the backlash from the Mitchell estate.

Further, whether the intent of Randall's work was too overt and her work overly political, it maintained at times a poignancy described by Jeff Zaleski from the *Book Review* as '[p]art playful fabrication, part bid for redemption, and full-on venture into our common literary past.'⁵ Zaleski identified an element in *The Wind Done Gone*, which can be found in lines such as those spoken by her main character Cynara: 'why do I remember my world better than I remember myself.' Cynara's question establishes the central role memory plays in both *Gone With The Wind* and *The Wind Done Gone*, whose conflict becomes one of dueling memories of a bygone past. Randall appropriates Mitchell's literary memory of an historical era and attempts to reclaim it for a new generation of both Caucasians and African Americans alike. But does she accomplish her task? Does *The Wind Done Gone* force a reevaluation of *Gone With The Wind* or, in the words of Teresa Weaver, will Randall be more famous for her attempt than the result? Will Randall 'forevermore...[be] known as the one who tried to retell *Gone With The*

¹Decl. of Alice Randall.

²Michiko Kakutani, *Within Its Genre, A Takeoff on Tara Groves for a Place*, N.Y. Times, May 5, 2001.

³Decl. of Alice Randall.

⁴Jarrett, 439.

⁵Jeff Zaleski, *Book Review: The Wind Done Gone*, Publisher's Weekly, May 15, 2001.

Wind...that massive, magnificently flawed piece of fiction [which] looks none the worse for the challenge’?¹

III.

Currently there do not exist reliable numbers regarding the readership of *The Wind Done Gone*, but the range of authors, critics and industry executives that spoke out in the work’s defense demonstrate its impact. Henry Louis Gates, Jr., Harvard professor, declared that ‘[*The Wind Done Gone*] is both an original work of art and a moving act of political commentary.’² Pat Conroy, author, self described as ‘Atlanta born...and shaped,’ stated in a Declaration in defense of Randall that ‘alice randall’s book is a parody and a grand send-off of gone with the wind...if you censor her book then Saturday night live has no right to exist.’³ And Frank Price, former President of Universal Pictures, claimed, ‘it is a brilliantly handled example of dry, deadpan humor, and social and political criticism.’⁴

All three of these declarations refer back to Gene Jarrett’s thesis regarding *The Wind Done Gone*’s use of irony as political criticism, *i.e.*, Gates’ reference to ‘political commentary,’ Conroy’s invocation of censorship and Price’s claim that Randall’s work is political in its intent. Her message is not merely one that speaks to a younger generation’s imagination of the Antebellum South but also one that explicitly speaks to the First Amendment’s responsibility to protect political speech. Parody is an instrument that transcends the work, in which one finds Randall’s voice speaking out as an African American woman against the censorship of a distinctly African American work and an African American vision of the Antebellum South. And it is this voice, and its supporters, which leaks into published legal opinions connected with determining whether *The Wind Done Gone* is a legitimate parody of Mitchell’s work.

From the perspective of the Mitchell Estates, Randall’s work is simply a form of theft, not only of individual characters and scenes but also of *Gone With The Wind*’s status as an icon of the Antebellum South, which explains the Mitchell Estates’ reaction to its publication. Alice Randall was the first author to use the language and characters of *Gone With The Wind* to directly undermine the status of *Gone With The Wind* with ammunition provided by the work. On the one hand, this is the goal of parody, but the question is whether Alice Randall attempts something more malevolent (from the Estates’ perspective) that negates her fair use defense.

In the words of Gabriela Motola, a professor Emeritus at the City University of New York and the New School, as well as a Mellon Fellow: ‘Based on my reading of *The Wind Done Gone* and *Gone With The Wind*, I

¹Teresa K. Weaver, ‘*Wind Done Gone*’ short on freshness, humor, *The Atlanta Journal-Constitution*, June 10, 2001.

²Decl. of Henry Louis Gates, Jr.

³Decl. of Pat Conroy.

⁴Decl. of Frank Price.

conclude the line between parody and plagiarism has been breached, the effect of which unequivocally transposes major portions—i.e., ‘the lifting [and] filching’—of *Gone With The Wind* into *The Wind Done Gone*.¹ Or in the words of Anton Mueller, Randall commits ‘an exuberant act of literary revenge.’² In these writers’ words Randall’s action becomes one of ‘filching’ and ‘revenge’ which evokes deceitfulness and malevolence—words with an emotional tenor that mirrors the language of intent inherent in Randall’s declaration when she describes depictions of slavery in *Gone With The Wind*. There is a heightened emotional urgency to both plaintiff and defendant in this dispute, which helps explain the immediacy of the Mitchell Estates’ response to *The Wind Done Gone*’s publication.

Further, just as *The Wind Done Gone* uses the characters of Mitchell’s work to undermine it, the Mitchell Estates use the words of Pat Conroy, an expert for Randall’s defense to undermine his own credibility. In his affidavit, Thomas Clarke, a lawyer, reveals that in a letter, Pat Conroy, who spoke on behalf of Randall, ‘confirms his belief that ‘the black characters in *Gone With The Wind*...are as well drawn as the characters in Tony Morrison’s or Alice Walker’s novels.’³ Conroy seemingly undermines Randall’s own declaration that Mitchell portrays ‘a world in which blacks are buffoonish, lazy, drunk and physically disgusting and in which they are routinely compared to ‘apes,’ ‘gorillas,’ and ‘naked savages.’ This display of ‘the battle of the experts’ becomes particularly critical when one examines the judicial opinions themselves: the inherent weight that the judges give to these experts in deciding whether Randall’s work is a parody as well as the manner in which lawyers for both Randall and Mitchell shape their arguments around these expert opinions.

IV.

In *Folsom v. Marsh*, decided in 1841, Justice Story expanded the scope of copyright protection in the United States and laid the foundation for the creation of the Copyright Act when he declared that when deciding a copyright case ‘we must often . . . look to the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work.’⁴ The Copyright Act as it is currently formulated builds upon this theory in its articulation of a four-factor test to determine whether a work qualifies for a fair use defense. It attempts to eliminate subjective characteristics such as the wit or humor of a work - or even whether it is a successful parody - from the decision of whether it infringes the original:

¹Affidavit of Gabriela Motola.

²Decl. of Anton Mueller

³Affidavit Thomas Clark, Esq.

⁴9 F. Cas. 342, 348 (C.C. D. Ma. 1841).

Notwithstanding the provisions of section 106, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include-

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;*
- (2) the nature of the copyrighted work;*
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and*
- (4) the effect of the use upon the potential market for or value of the copyrighted work.¹*

After being overruled in a case involving a fair-use defense,² Pierre Leval first introduced the doctrine of ‘transformation’ into the first factor of the test established by the Copyright Act. In March of 1990, in a *Harvard Law Review* article, Pierre Leval investigated how a work’s ‘transformative’ character factored into the evaluation of a fair use defense. According to Leval, the parody fair use defense ‘turns primarily on whether, and to what extent, the challenged use is *transformative*. The use must be productive and must employ the quoted matter in a different manner or for a different purpose from the original.’³

The Supreme Court adopted this standard in a case decided in 1994, *Campell v. Acuff-Rose*, where the rap group 2 Live Crew was accused of infringing upon Roy Orbison’s ‘O Pretty Woman’ with its song ‘Pretty Woman.’ First the Court found that ‘if 2 Live Crew had copied a significantly less memorable part of the original it is difficult to see how its parodic character would have shown through.’ The Court also drew upon Leval when looking back to the original language of the Copyright Act in its holding that the use of parody may extend protection beyond the traditional ‘bounds of fair use’: *Because the fair use inquiry often requires close questions of judgment as to the extent of permissible borrowing in cases involving parodies...courts may also wish to bear in mind that the goals of the copyright law, ‘to stimulate the creation and publication of edifying matter’...are not always best served by automatically granting injunctive relief when parodists are found to have gone beyond the bounds of fair use.*⁴

Given the extent of the protection that the Supreme Court granted to parody in 1994 by legitimizing the use of the ‘transformative’ inquiry, Judge

¹17 U.S.C. Sec. 107 (1982).

²*Salinger v. Random House, Inc*, 650 F. Supp. 413 (S.D.N.Y 1986).

³Leval, 1111.

⁴*Campbell*, 510 U.S. 569, 578 (1994)

Pannell's decision in 2001 in the Georgia District Court, enjoining the publication of *The Wind Done Gone* becomes all the more peculiar.¹ Jonathan Fox offers a fascinating explanation that distinguishes Pannell's decision from a functional fair use copyright analysis according to the statutory factors. He concludes that '[i]n reaching [his decision], Pannell seems to have been persuaded by the plaintiff's literary experts...that by using her book to critique [*Gone With The Wind*] and the antebellum south, Randall had crossed the bounds of parody.'² Fox believes that 'Judge Pannell got distracted by all the literary experts who had submitted affidavits and allowed their opinions to color his judgment about the character of Randall's work,'³ accepting their negative portrayal of her work and its qualification as a parody.

Support for this theory can be found in the affidavits submitted by the plaintiff, which include statements by John Canarroe, President of the John Simon Guggenheim Memorial Foundation, Alex Holtz, president of a literary consulting agency and Hope Dellon, the Executive Editor in Trade of Saint Martin's Press. Fox is correct when he states that 'in footnotes and the main text of the opinion, [Pannell] quoted extensively from experts (especially Alex Holtz and John Canarroe) in the literary and publishing fields about whether or not Randall's book was a parody and whether the book was a sequel or something new.'⁴ For example, in a footnote the court quoted Canarroe extensively:

*'The Wind Done Gone' is not parody or satire. It is, rather, an aggregation of characters, themes and languages lifted virtually intact from 'Gone With The Wind.' 'The Wind Done Gone' gains such interest as it has from the prestige it borrows from its famous source. Parody is a term that implies wit and humor, neither of which is in evidence here. Rather, the manuscript makes sense only by taking Margaret Mitchell's characters...for dramatic purposes.'*⁵

Critically, though the key to parody for Canarroe may be 'wit and humor,' neither of these elements enters into the four-factor test outlined by the Copyright Act; however, when the determinative element of a parody becomes its transformative nature, it is not surprising that this definition should creep into the infringement analysis, as can be seen by Judge Pannell's declaration that: *The question before the court is not who gets to write history, but rather whether Ms. Randall can permeate most of her new critical work with the copyrighted characters, plot, and scenes from 'Gone With The Wind' in order to correct the 'pain, humiliation and outrage' of the 'a-historical representation' of the previous work, while simultaneously criticizing the*

¹*Suntrust Bank*, 136 F. Supp. 2d 1357 (N.D. Ga. 2001).

²Fox, 643.

³*Ibid.*

⁴*Ibid.*

⁵*Suntrust Bank*, 136 F. Supp. 2d 1357, 1374.

*antebellum and more recent South.*¹ Just as ‘wit and humor’ should not drive this decision, questions of ‘pain, humiliation and outrage’ have no relevance in a fair-use defense.

In Fox’s opinion, Judge Panell’s decision was more a product of the collision between the literary arguments provided by Henry Louis Gates and Tony Morrison for the defense versus those of Alex Holtz and John Canarroe for the plaintiff than a careful analysis of the four step fair use defense analysis. While one would expect a judge to account for these experts, one would still assume that the final decision stems from an inherently legal analysis driven by the status of the work as determined by the Copyright Act.

Thus, the debate over the publication of *The Wind Done Gone* turned in a political and cultural debate rather than a specifically legal discussion. And this transformation could be predicated upon the issue that the Supreme Court identified ‘when parodists are found to have gone beyond the bounds of fair use,’ but enjoinder is still not appropriate. When the subjectivity of expert opinions regarding *The Wind Done Gone*’s sociological implications enters the opinion, it appears to ‘have gone beyond the bounds of fair use,’ and Judge Pannell’s decision exemplifies this intrusion. This territory though is not one that necessarily hurts the author, because the subjectivity in the process Pannell used to arrive at his decision allowed for his reversal by the Eleventh Circuit.

In their brief to the Eleventh Circuit, Alice Randall’s lawyers used 14 pages - more than half of the entire document – outlining, primarily in her own words and the words of her experts – the content and context of the *Wind Done Gone*.² After eventually arriving at the summary of their legal argument, Randall’s lawyers turned again from a discussion of the standards of fair use and its precedents to the expert testimony: *Given the declarations of Henry Louis Gates, Jr., John Sitter, Barbara McCaskill, Anton Mueller and Alice Randall, discussed above, [The Wind Done Gone] is parody not only in perception but in fact...[The defendants] [l]argely [rely on] conclusions from experts who, with one exception, have no background in parody—much less in political or social parody couched in the form of African American humor or criticism—plaintiffs attack only the edges of defendant’s parody claim.*³

In this brief, experts control what ‘is parody’ particularly African American parody embedded in its own unique political and social position. Further in this declaration as to the historical motivations for parody couched in specifically ‘African American humor or criticism’ there may be a caution directed as much at the judge as the plaintiffs. What does the judge know of this subject matter? What are his qualifications to make this decision? But in the final analysis should the judge’s expertise in such cultural traditions play a role? The answer is a definitive ‘no’ if the guidelines of the Copyright Right Act are followed.

¹*Suntrust Bank*, 136 F. Supp. 2d 1357, 1378.

²Brief of Appellant Houghton Mifflin Company to 11th Circuit Court of Appeals

³*Ibid.* at 21

Without implying that this brief provided the entire basis for the Eleventh Circuit's reversal in favor of the publication of Randall's work, it did have an impact on the decision, which draws language almost verbatim from the defendant's brief. Quoting the District Court, the Eleventh Circuit states that 'Randall's work flips...traditional race roles, portrays powerful whites as stupid and feckless...[while] nearly every black character is given some redeeming quality.'¹ Similarly, according to Randall's brief to the Eleventh Circuit, her work: 'alludes to those characters...and thoroughly transforms [them]...Clever and interesting black characters [reduce] white characters to stereotypes...[She] endows the stereotypical black characters...with agency, cunning, depth and significance.'² The opinion mirrors the major point of the brief that *The Wind Done Gone* reverses the roles and characteristics of the white and black characters.

Both courts appear to be heavily influenced by experts; nevertheless, the Eleventh Circuit reversed the district court's ruling. To argue that this result was merely a matter of the individual's judge's artistic tastes is too simplistic. Consider that this was not merely a dispute over literary merit, but one with specifically African American political and social dimensions and the pressure on the Eleventh Circuit, one step below in the Supreme Court in its position and prestige, becomes relevant. The context of the media attention and the racial implications of the decision become more charged with sentiment arising from the very history of slavery that both works tackle in their content.

Further, that an analysis of the content of the disputed work is appropriate in an infringement case is not under contention. The significance of this decision and reversal is not that the individual judges differed in their engagements with the material of *Gone With The Wind* and *The Wind Done Gone*, but that they demonstrated a remarkable reliance on the opinions of experts on both sides of the debate. These experts opined as much on the legal significance of the material as on the material itself inappropriately influencing the test outlined by the Copyright Act.

When the Declarations of the experts as to the significance as well as the legal implications of *The Wind Done Gone* leak into the opinions of both the district court and the Eleventh Circuit, the dimensions of the copyright analysis mutates. The decisions allow the perspective of authors and critics - with no legal training in the four step analysis of a fair use analysis to shape the legal opinions, which has disturbing implications and reflects back on the transformative test created by the Supreme Court in *Campbell*. The decision and reversal exemplify why the transformative test may not be an appropriate tool for analyzing copyright infringement and may have damaged the ability of courts to engage in a consistent analysis, one which would create unanimity from court to court across jurisdictions throughout the United States, yielding stable precedents in the copyright area.

¹*Houghton Mifflin Co.*, 268 F.3d 1257, 1270 (11th Cir. 2001).

²Opcit. at 11.

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