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IN "GONE WITH THE WIND" CASE, COURT DIDN'T GIVE A DAMN ABOUT PARODY DEFENSE

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Margaret Mitchell's best-selling 1936 novel, *Gone With the Wind*, and the movie made from the novel have become part of U.S. popular culture. Many people doubtlessly see the story as an accurate portrayal of the Reconstruction-era South. Perhaps that's why so much attention has been paid to the April 20 decision of the federal district court in Atlanta granting a preliminary injunction halting distribution of *The Wind Done Gone*. The novel, by Alice Randall, the court found, "incorporated the characters, character traits, settings, plot lines, title, and other elements" of its famous predecessor. *Suntrust Bank* v. *Houghton Mifflin Co.*, No. 01-CV-701-CAP, 2001 WL 402351 (N.D. Ga., Apr. 20, 2001). *The New York Times*, for example, criticized the decision for its "elevation of copyright to a right of censorship."

Randall's novel tells the story from the perspective of a character named Cynara, the mulatto half-sister of Scarlett O'Hara. As the court found, Randall "uses 15 fictional characters from *Gone With the Wind*, incorporating their physical attributes, mannerisms, and the distinct features that Ms. Mitchell used to describe them, as well as their complex relationships with each other. Moreover, the various locales (Atlanta, Tara or Tata, Twelve Oaks or Twelve Slaves Strong, Charleston), settings, characters, themes, and plot of Randall's book closely mirror those of *Gone With the Wind*." A detailed recounting of Mitchell's plot takes up "the bulk of the first half of the book." The use of this material, according to the court, "constitutes unabated piracy."

Supported by a group of experts including Nobel Laureate Toni Morrison, Houghton Mifflin, publisher of *The Wind Done Gone*, argued that the novel was "an exuberant act of literary revenge" that does no more than make fair use of elements from *Gone With the Wind*. But the court rejected that defense.

Applying the test of *Campbell* v. *Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994), the court found that Randall's novel was not a "parody" because its "overall purpose" was not to present humorous criticism of the book, but "to create a sequel to the older work and provide Ms. Randall's social commentary on the antebellum South." It also found that Randall took more from Mitchell's book than was permitted under the parody doctrine. Because the Mitchell estate has an active program of licensing sequels, Randall's book would significantly affect the market value of *Gone With the Wind*. And while *Campbell* held that injunctions should not be "automatically" granted in parody cases, the district court found that, without a preliminary injunction, the estate would not be able to obtain adequate relief in the future.

Will this ruling be sustained on appeal? Much will depend on whether the U.S. Court of Appeals for the Eleventh Circuit agrees with the line drawn by the trial court between "parody" and "social commentary." While the trial judge was clearly offended

by the amount of material Randall took from Mitchell's novel, the appellate court may not be. Or the Eleventh Circuit may find that a damage award, not an injunction, is the appropriate remedy in this case.

A reversal would certainly please critics like *The New York Times*. But that result would risk an extension of the fair use doctrine to allow authors to create derivative works based on almost any successful book or film. Since the Eleventh Circuit has granted an expedited appeal, we should get the answer fairly soon.