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THE WIND DONE GONE:
TRANSFORMING TARA INTO A PLANTATION PARODY

In June 2001, amid a flurry of legal wrangling, Houghton Mifflin Company sent to print Alice Randall’s first novel, The Wind Done Gone.\(^1\) Described by the publisher as a “provocative literary parody that explodes the mythology perpetrated by a Southern Classic,”\(^2\) the novel takes direct aim at Margaret Mitchell’s Gone with the Wind,\(^3\) the definitive epic novel of the Civil War era South.\(^4\) Targeting the racist and paternalistic treatment of African-American slaves pervasive throughout Gone with the Wind,\(^5\) Randall’s novel begins by retelling the Gone with the Wind story from the perspective of an illegitimate mulatto slave, Cynara.\(^6\) It then proceeds to the tales that Gone with the Wind left untold—the events of Scarlett’s anxiously awaited “tomorrow,” and the sad conclusion to Scarlett and Rhett’s tempestuous relationship, as seen through Cynara’s eyes.\(^7\)

Randall, however, does not simply retell and conclude Gone with the Wind. Rather, she deconstructs every assumption on which Mitchell’s novel rests, creating a world that, although superficially...

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2. Id.
4. Gone with the Wind, published in 1936, has sold “tens of millions of copies” and been translated into over 30 languages. See Suntrust Bank v. Houghton Mifflin, 136 F. Supp. 2d 1357, 1363 (N.D. Ga.), rev’d, 268 F.3d 1257 (11th Cir. 2001). For clarity, this comment will refer to the district court’s decision as “Suntrust Bank I” and the court of appeals’ decision as “Suntrust Bank II.”
5. An authorized sequel was published in 1991, entitled Scarlett: The Sequel to Margaret Mitchell’s Gone With the Wind, by Alexandra Ripley. A 1939 movie version of the novel won 10 Academy Awards and is still widely considered an all-time classic. Id.
6. See Suntrust Bank v. Houghton Mifflin, 268 F.3d 1257 (11th Cir. 2001) (discussing several of the racist comments and themes present in Gone with the Wind).
7. Adding fuel to the fire, Randall’s protagonist is the half-sister to Gone with the Wind heroine Scarlett O’Hara. Scarlett and Cynara share the same father, while Cynara’s mother is Scarlett’s memorable Mammy. The Wind Done Gone is presented to the reader as if it were a diary written by Cynara.
8. The retelling of a prior story through the eyes of a character undeveloped in the original can be referred to as “literary ventriloquism.” See Stephen Rebikoff, Restructuring the Test for Copyright Infringement in Relation to Literary and Dramatic Plots, 25 MELB. U. L. REV. 340, 370 (2001) (defining literary ventriloquism as when “a character with a minor or even absent role in the original work takes centre stage and begins to speak”).

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identical to the land of Tara and Twelve Oaks, entirely contradicts Gone with the Wind's crude portrayal of African-American slaves. In Randall's own words, rather than retell the story of Gone with the Wind, she "wanted to explode it" by "draw[ing] a picture of another woman—one who was able to persevere through all the pain of slavery."10

Nonetheless, Randall's work borrows heavily from Gone with the Wind. Indeed, readers of The Wind Done Gone who have not previously encountered Gone with the Wind would find the former to be "nearly incomprehensible . . . [o]r at least meaningless."11 In response to Randall's extensive "borrowing," the Mitchell Trusts, owners and protectors of the Gone with the Wind copyright, sought to enjoin the publication of The Wind Done Gone.12 The publisher, Houghton Mifflin, defended The Wind Done Gone by asserting that it constituted a lawful parody of Gone with the Wind, rather than a sequel. Therefore, they argued, it was protected by the "fair use" doctrine. The Eleventh Circuit agreed, refusing to uphold a district court's grant of injunctive relief and allowing the novel to be published.13 The importance of the Eleventh Circuit's decision, its impact on future attempts at literary ventriloquism, and the ultimate outcome of The Wind Done Gone case remain to be seen.

This Comment focuses on the legal dispute that surrounded the publication of The Wind Done Gone. Part I discusses the legal background surrounding the Suntrust case, particularly the Supreme Court decision in Campbell and the scope of parody and fair use. Part II summarizes the history of the litigation surrounding The Wind Done Gone, addressing both Judge Pannell's opinion at the district court level, and the Eleventh Circuit's reversal. Part III argues that the Eleventh Circuit correctly held that The Wind Done Gone transformed Gone with the Wind for the purpose of criticizing its content through thoughtful parody. Additionally, Part III explores the potential ramifications of the decision for future authors of fictional parodies.

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8 See Part III, infra, for a detailed discussion of this "transformation." See also Terry Teachout, Entitlement Publishing, NAT'L REV., Aug. 20, 2001 (noting that "Margaret Mitchell seems to have thought of blacks as a slightly more articulate breed of dog (i.e., stupid but loyal)").

9 See Nick Gillespie, Tomorrow Is Another Day in Court, REASON, July 2001 (quoting Alice Randall).


I. FAIR USE, PARODY, AND 2 LIVE CREW

Although a copyright owner generally has exclusive rights in his or her work, § 107 of the Copyright Act provides that "the fair use of a copyrighted work . . . is not an infringement."14 This important limitation on the scope of copyright protection enables subsequent authors to make "reasonable and customary" use of a prior work.15 Such reasonable use promotes "the constitutional policy of promoting the progress of science and the useful arts, since a prohibition of such use would inhibit subsequent writers from attempting to improve upon prior works and thus . . . frustrate the very ends sought to be attained."16 In determining whether a subsequent work falls under the protective umbrella of the fair use doctrine, the Copyright Act states a four factor test, directing courts to look to:

(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.17

Among its other purposes, the fair use doctrine provides an opportunity for authors to criticize or comment on prior works, and allows them to borrow elements of the prior work in order to further their critique.18 Included within fair use's protective scope are works that constitute parodies of prior copyrighted works, provided that the parody survives the four factors of scrutiny elucidated by the Copyright Act.19

Unfortunately, a definition of fair use cannot simply be reduced to a bright line test, such as that in the Copyright Act. Rather, fair use

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16 Id.
18 See Suntrust Bank II, 268 F.3d at 1267-68.
must be evaluated on a case-by-case basis, with each of the four statutory factors being "explored and weighed together" with the others. This makes it difficult to define parody, particularly in light of the scant judicial authority addressing the issue. However, the 1994 *Campbell v. Acuff-Rose Music, Inc.* decision, the Supreme Court's most definitive statement on parody as fair use, provides some guidance.

*Campbell* arose when Acuff-Rose Music, Inc. ("Acuff-Rose") filed suit against the rap group 2 Live Crew alleging that the latter's song, "Pretty Woman," infringed on Acuff-Rose's copyright to Roy Orbison's "Oh, Pretty Woman." The band responded by arguing that their song parodied and commented on Orbison's prior hit, falling within the scope of the fair use doctrine. The Supreme Court agreed, holding that 2 Live Crew's version of "Pretty Woman" was entitled to protection as a parody.

Justice Souter, writing for the Court, rejected the appellate court's holding that the commercial nature of 2 Live Crew's song prevented it from taking advantage of the fair use doctrine. Rather, the true inquiry of the first fair use factor should be whether the new work supplants the original, or whether it transforms it into a new work. Works that are "transformative," according to Justice Souter, promote the purposes of copyright—the stimulation of the sciences and arts—by adding "meaning, expression, or message" to the original. Therefore, although "transformation" is not absolutely necessary to a finding of fair use, a more transformative work will merit that less significance be given to the other factors weighing against fair use, including "commercialism."

Furthermore, Justice Souter cautioned that a finding of parody does not automatically qualify a work for fair use protection. Neither does "the fact that parody can claim legitimacy for some appropriation" mean that the parodist is entitled to copy wholesale from the original. Indeed, a finding of parody alone does not "tell either parodist or judge much about where to draw the line" on what constitutes legitimate appropriation. Justice Souter also noted that courts

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20 Id. at 577.
21 See Note, *Gone With the Wind Done Gone: "Re-Writing" and Fair Use*, 115 HARV. L. REV. 1193, 1197 (2002) (discussing the "ill-defined" contours of fair use). The dearth of judicial authority defining parody is even more pronounced in the field of literature.
23 *Campbell*, 510 U.S. at 593-94.
24 Id. at 579-80.
25 Id.
26 Id. at 581.
27 Id.
28 Id.
should not attempt to evaluate the subjective quality of a work, so long as the work is of a parodic character. He concluded by holding:

2 Live Crew juxtaposes the romantic musings of a man whose fantasy comes true, with degrading taunts, a bawdy demand for sex, and a sigh of relief from paternal responsibility. The later words can be taken as a comment on the naiveté of the original of an earlier day, as a rejection of its sentiment . . . [and as the type of] reference and ridicule that marks off the author’s choice of parody from the other types of comment and criticism that traditionally have had a claim to fair use protection as transformative works.

Having discussed the first statutory factor at length, Justice Souter next proceeded to essentially disregard the second statutory factor—the nature of the copyrighted work—deeming it no help in assessing whether a work is a parody. Moving on to the third factor, the “amount and substantiality of the portion used in relation to the copyrighted work as a whole,” Justice Souter disputed the appellate court’s conclusion that “taking the heart of the original and making it the heart of a new work was to purloin a substantial portion of the essence of the original.” In fact, he argued, it is precisely the heart of the original which most effectively “conjures up the song for parody,” and at which parody takes aim. In other words, without copying enough of the original to force listeners to mentally conjure up the parody’s target, the parody itself will fail in its critique. The court then remanded this portion of the case for a determination as to whether the amount of music taken amounted to excessive copying.

29 Id. at 582 (“[i]t would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of [a work], outside of the narrowest and most obvious limits” (quoting Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251 (1903) (Holmes, J.) (holding that circus posters have copyright protection)).
30 Id. at 583.
31 Id. at 586 (“[T]he Orbison original’s creative expression . . . falls within the core of the copyright’s protective purposes. This fact, however, is not much help in this case, or ever likely to be much help in separating the fair use sheep from the infringing goats in a parody case, since parodies almost invariably copy publicly known, expressive works.”). Elaboration of this second factor, which Justice Souter disregarded, has been urged by one commentator as a means of resolving “re-writing” cases such as The Wind Done Gone. See generally Note, supra note 21.
34 Id. at 588.
35 Id. at 589.
Arriving at the fourth and final statutory factor, Justice Souter discussed whether the market for the original, or any potentially derivative work, would be harmed by the actions of the potential infringer.\textsuperscript{36} Referring back to his discussion of the previous factors, Justice Souter again noted that the extent to which a work is "transformative" is crucial to this analysis. Works that transform the original into something new and original are far less likely to harm the market for the original than those that completely "supercede" it.\textsuperscript{37}

Moreover, even if the parody does damage the market for the original, another distinction must be made before infringement can be found. As Justice Souter explained, parodies that harm the market for the original simply because they are "lethal" in their criticism do not violate the Copyright Act.\textsuperscript{38} In contrast, parodies that usurp the place of the original work essentially annex the public demand for the original into their own market, violating the Act.\textsuperscript{39}

II. WIND DONE GONE GOES TO COURT

The task of applying the Supreme Court's decision in Campbell to \textit{The Wind Done Gone} fell first to Judge Charles Pannell, District Court Judge for the Northern District of Georgia. Judge Pannell granted a preliminary injunction in favor of the Mitchell Trusts, temporarily prohibiting Houghtin Mifflin from publishing \textit{The Wind Done Gone}.\textsuperscript{40} In the course of his opinion, Judge Pannell faced both the issue of whether substantial similarity existed between the two works and whether \textit{The Wind Done Gone} attempted to parody \textit{Gone with the Wind}, or constituted an unauthorized sequel.\textsuperscript{41}

\textsuperscript{36} See Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 568 (1985) (holding that the inquiry "must take account not only of harm to the original but also of harm to the market for derivative works").

\textsuperscript{37} \textit{Campbell}, 510 U.S. at 591. Justice Souter attributes this to the fact that "the parody and the original usually serve different market functions." \textit{Id.}

\textsuperscript{38} \textit{Id.} at 591-92. The court provides the example of a scathing theater review that, although it clearly does not violate the Copyright Act, kills off any interest in the original theatrical performance. \textit{Id.}

\textsuperscript{39} \textit{Id.} Justice Souter also pointed out at length that economic harm to the original work results as much from a new work superceding a potential derivative of the original as from the new work directly superceding the original. As derivative markets can be valuable economically to the copyright holder, and neither party presented any evidence as to the impact 2 Live Crew's song would have on the market for a rap version of "Oh, Pretty Woman," the Court remanded for additional findings on this point.


\textsuperscript{41} In the absence of evidence of direct copying, a plaintiff can prove copying by showing that the defendant had access to the copyrighted work and that the two works are "substantially similar." See \textit{Herzog} v. Castle Rock Entertainment, 193 F.3d 1241, 1248 (11th Cir. 1999). Randall admitted to reading \textit{Gone with the Wind}, so Judge Pannell's inquiry focused on substantial similarity between the works.
A. Substantial Similarity: The Wind Done Gone and Gone with the Wind

It takes no more than a cursory glance at *The Wind Done Gone* to find an example of Randall's extensive copying from *Gone with the Wind*. While the latter opens by declaring that "Scarlett O'Hara was not beautiful, but men seldom realized it when caught by her charm as the Tarleton twins were," Randall's protagonist laments early in her diary that "[s]he was not beautiful, but men seldom recognized this, caught up in the cloud of commotion and scent in which she moved." Randall then bookends her novel with quotes borrowed from *Gone with the Wind* by similarly altering and re-using its final line.

The many unforgettable, well-delineated characters that delighted readers of *Gone with the Wind* also reappear in *The Wind Done Gone*. In all, fifteen characters are lifted from the pages of *Gone with the Wind*, as well as many of the fictional settings. Although the names are generally changed, usually by use of a pun or play on words, it is unmistakable which characters from *Gone with the Wind* are being referred to in *The Wind Done Gone*. Randall's use of these characters treads particularly thin ice when assessing substantial similarity, as most of the *Gone with the Wind* characters are sufficiently well-defined to receive copyright protection in and of themselves.

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42 In addition to the similarities discussed, it is readily apparent that the title of Randall's work alone is intended to reference *Gone with the Wind*.


44 Id. *Gone with the Wind* famously concludes with Scarlett declaring that "Tomorrow, I'll think of some way to get him back. After all, tomorrow is another day." Randall's conclusion ends with Cynara opining that "For all those we love for whom tomorrow will not be another day, we send the sweet prayer of resting in peace."

45 Suntrust Bank I, 136 F. Supp. 2d at 1368.

46 See Plaintiff's Memorandum, supra note 43, at 8-9. The characters common to both works are: Scarlett O'Hara, who becomes "Other" in *The Wind Done Gone*; Rhett Butler ("R.B" or "Debt Chaffeur"); Mammy; Bonnie, Rhett and Scarlett's daughter ("Precious"); Melanie ("Mealy Mouth"); Ashley Wilkes ("Dreamy Gentleman"); Gerald O'Hara ("Planter"); Ellen O'Hara ("Lady"); Pork ("Garlic"); Prissy ("Miss Priss"); Dilcey ("Mrs. Garlic"); Belle Watling ("Beauty"); Jeems; The Tarleton Twins (usually referred to as the red-haired "Twins"); Phillipe, or Feeleep ("Feeleepe"); Carreen ("Karen"); and Aunt Pittypat ("Aunt Pattypit"). Additionally, the O'Hara's cotton plantation becomes "Cotton Farm," the O'Hara's plantation home, Tara, becomes "Tata," and the neighboring Twelve Oaks mansion becomes "Twelve Slaves Strong as Trees."

Randall’s borrowing from *Gone with the Wind* is not confined to superficial rephrasing of select quotes, or even to her global use of *Gone with the Wind* characters, but extends to substantial borrowing of plots, scenes, and events as well. Indeed, approximately the first half of Randall’s work is a retelling of the *Gone with the Wind* story, constituting precisely the same events, and altered only to provide Cynara’s unique perspective on the occurrences in *Gone with the Wind*. For most of this “retelling” of Mitchell’s prior story, Randall summarizes several pages or chapters of *Gone with the Wind* into but a few pages of Cynara’s diary. However, several of *Gone with the Wind’s* most famous scenes are referred to with more particular detail in *The Wind Done Gone*, rendering the plot connections indisputable. For example, in the dramatic conclusion to *Gone with the

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48 Granted, Cynara’s perspective on the novel depicts a radically altered vision of the Tara plantation on which Scarlett is born and raised. In Cynara’s story, it is the black slaves, rather than the white “masters,” who actually run the plantation.

49 Suntrust Bank I, 136 F. Supp. 2d at 1369.

50 The following plot and scene similarities are a sample of those alleged by the Mitchell Trusts, and are quoted from Plaintiff’s Memorandum, supra note 43, at 10-12:

- “*The Wind Done Gone*” opens with R.B. leaving Other after their daughter, Precious, dies in an accident. In a familiar sounding passage, R.B. “cursed [Other] but called her *darling* or *dear* but told her he didn’t give a tinker’s damn what happened to her. When he walked out, she sat down on the stairs and cried”;
- Cynara tells how “everyone at Twelve Slaves Strong as Trees knew the story of how Other threw herself and some kind of vase at Dreamy Gentleman and of how R. heard it because he was lying down on a couch unseen”;
- Cynara also tells how Other and Mealy Mouth kill a Union soldier, rob his dead body and drag him off in their chemises;
- In *Gone With the Wind*, Scarlett is married three times, first to Charles Hamilton, Melanie’s brother. Charles dies in the war, and Scarlett gives birth to his son after he has died. Scarlett then marries Frank Kennedy, and has a daughter. Frank is killed while riding out with the Ku Klux Klan. Finally, Scarlett marries Rhett. They have a daughter, Bonnie, who dies in a riding accident. In “The Wind Done Gone,” Other is married three times, first to Mealy Mouth’s brother, who dies in the war. Other gives birth to a son after her husband has died. Her second marriage is to a man who is “killed riding out with the Klan.” She has a daughter from that marriage. Her third marriage is to R.B., who leaves her after their daughter is killed;
- In *Gone With the Wind*, Gerald wins Pork, his loyal butler, in a poker game with a man from St. Simon’s Island. The man later offers Gerald twice the amount he lost to buy Pork back, but Gerald refuses. Gerald also wins Tara in a poker game. In “The Wind Done Gone,” Garlic tells how Planter won Tata, and Garlic himself, “in a poker game. My old master was a rich young planter from St. Simon’s island. Good-looking, good-mannered, we went everywhere . . . . Later Young Marse offered twice the money to get me back . . . .”;
- In *Gone With the Wind*, Rhett is heartbroken over the death of his daughter Bonnie. Because Bonnie was afraid of the dark, Rhett refuses to have her buried. Instead, he takes her body to his room and sits up with it, candles and lamps blazing so that she won’t be afraid. In “The Wind Done Gone,” after Precious dies, Cynara tells how R. B. stayed with her “his dead Precious, in that room those days between her death and the burial” and “held his hand in the burning light, because Precious was afraid of the dark.”
Rhett leaves Scarlett sitting on the stairway at Tara with the famous line, “Frankly, my dear, I don’t give a damn.” In Cynara’s tale, Rhett’s character (“R.B.”) “cursed [Other] but called her darling or dear but he told her he didn’t give a tinker’s damn what happened to her” as she sat on the steps and cried.\textsuperscript{51}

Houghton Mifflin offered several justifications for Randall’s borrowing from \textit{Gone with the Wind}. They first argued that much of the similarity between the two works derived simply from the fact that both works were romantic novels set in Reconstruction era Georgia, and that Mitchell “[has] no monopoly in using the Reconstruction era as a setting.”\textsuperscript{52} Judge Pannell rejected this assertion, pointing out that the similarities went far beyond merely sharing the same fictional setting, but extended even to the front door of the O’Hara home. Moreover, Randall had not simply used the “canvas of \textit{Gone with the Wind} as a backdrop for a new story, but had used the story and plot of \textit{Gone with the Wind} in their entirety, “exploiting its copyrighted characters, story lines, and settings as the palette for the new story.”\textsuperscript{53}

Judge Pannell also rejected Houghton Mifflin’s argument that Randall’s use of the \textit{Gone with the Wind} characters rendered them “flat, one-dimensional characters who are not substantially similar to the characters created by Margaret Mitchell.”\textsuperscript{54} To the contrary, characters such as Rhett and Scarlett play roles every bit as integral to \textit{The Wind Done Gone}’s plot as they do in \textit{Gone with the Wind}. Indeed, Rhett, who becomes Cynara’s lover in Randall’s tale, and Mammy, Cynara’s somewhat estranged mother, are two of the character’s around which \textit{The Wind Done Gone} revolves.\textsuperscript{55} Houghton Mifflin also contended that “Other,” rather than simply reincarnating Scarlett, represented an analog to Scarlett—an “archetypal other person which is, in much conventional literature, the minority race.”\textsuperscript{56} While Randall does cleverly minimize “Other’s” role in Cynara’s eyes, showing that Cynara dismisses her white half-sister in the same fashion that \textit{Gone with the Wind} ignores and neglects the black slave characters, Randall had not “simply crafted a nameless ‘other’“ to accomplish

\textsuperscript{51} Id. While \textit{Gone with the Wind} concludes with this scene, \textit{The Wind Done Gone} begins with it, picking up at the point where the prior work left off.

\textsuperscript{52} Suntrust Bank I, 136 F. Supp. 2d at 1366. The argument that similarity exists only at a level of generalized abstraction, rather than at the plot and scene level, is addressed in the discussion pertaining to Judge Learned Hand’s “pattern test” for similarity, \textit{infra} at note 58.

\textsuperscript{53} Id. at 1367.

\textsuperscript{54} Id. at 1368 (quoting Defendant’s Response in Opposition to Plaintiff’s Motion for a Temporary Restraining Order and Preliminary Injunction at 12, Suntrust Bank v. Houghton Mifflin, 136 F. Supp. 2d (N.D. Ga. 2001) (No. 1:01 CV-701)).

\textsuperscript{55} Id. at 1369 (noting that Randall’s work “merely adopts the earlier work’s descriptions and then adds a few more traits as seen by Cynara”).

\textsuperscript{56} Id. at 1368.
this. Rather, she had recast Scarlett in the role, leading Judge Pannell to reject Randall’s argument that her copying extended only to an abstract “first-dimension” of Mitchell’s characters.

After considering the vast extent to which The Wind Done Gone mirrors Gone with the Wind, Judge Pannell concluded that the former reflected “unabated piracy” of the latter. Referring to Judge Learned Hand’s “pattern test,” Judge Pannell condemned The Wind Done Gone’s adoption of Gone with the Wind characters, appropriation of direct quotes, and use of the prior works plots and scenes, holding that Randall’s “recitation of so much of the earlier work is overwhelming and constitutes fragmented literal similarity.” Having found similarity, he moved on to address whether Randall’s work made fair use of Gone with the Wind.

The Eleventh Circuit, addressing Judge Pannell’s grant of a preliminary injunction, agreed that The Wind Done Gone borrowed tremendously from Gone with the Wind. Allotting the majority of its analysis to fair use, the court simply concluded that “[w]hile we agree with Houghton Mifflin that the characters, settings, and plot taken from [Gone with the Wind] are vested with a new significance when viewed through the character of Cynara in [The Wind Done Gone], it does not change the fact that they are the very same copyrighted characters, settings, and plot.”

B. The Wind Done Gone as Fair Use

Both courts agreed that The Wind Done Gone relied heavily on material borrowed from Gone with the Wind. Thus, the dispute narrowed to whether the borrowing constituted fair use. This forced the

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57 Id. at 1369.
58 See Nichols v. Universal Pictures Corp., 45 F.2d 119, 121 (2d Cir. 1930). Judge Hand articulated the test for substantial similarity by pronouncing that “[u]pon any work, and especially upon a play, a great number of patterns of increasing generality will fit equally well, as more and more of the incident is left out. The last may perhaps be no more than the general statement of what the play is about, and at times consist of only the title; but there is a point in this series of abstractions where they are no longer protected, since otherwise the playwright could prevent the use of his ‘ideas,’ to which apart from their expression, his property is never extended . . . . Nobody has ever been able to fix that boundary, and nobody ever can.” Applying this test to Gone with the Wind, a description of the novel as a “Reconstruction era romantic drama” would be a general pattern that would certainly be unprotected. In contrast, a very specific pattern might elaborately describe the plantation Tara, the personalities of Scarlett and Rhett, and the other characters and localities in the novel. To the extent that this pattern constituted the author’s expression, it would be entitled to copyright protection. Somewhere in the middle would be the pattern to which Judge Hand refers when he discusses the limits of protection, and the fixing of boundaries.
60 Id. at 1267.
61 Id.
courts to address whether Randall’s novel transformed *Gone with the Wind* into a new work, criticizing and commenting on the prior, or whether it constituted an unauthorized sequel. The right to publish a sequel to *Gone with the Wind*, as established by the authorized sequel published in 1991, is a valuable economic right held by the Mitchell Trusts. Accordingly, if Randall’s work is nothing more than a sequel to Mitchell’s epic, than it infringes on the Mitchell Trusts’ right to license derivative works for consideration.

Houghton Mifflin and Randall argued that *The Wind Done Gone* is a parody intended to ridicule *Gone with the Wind*, comment on its racist treatment of black characters, and exact “an exuberant act of literary revenge” on *Gone with the Wind* for its offenses. An instructive example is the transformation of Pork, the loyal, obedient slave from *Gone with the Wind*, into Garlic, a resourceful slave who “controls his master so thoroughly that, when Garlic pulls the strings, the master dance[s] like a bandy-legged Irish marionette.” Throughout *The Wind Done Gone*, it is evident that Randall intended to reverse the negative conceptions of Civil War era blacks perpetuated by *Gone with the Wind*, rather than to provide a sequel. The very essence of Randall’s novel is this reversal; whereas *Gone with the Wind* minimizes and derides blacks as beast-like creatures, completely reliant on their white owners, *The Wind Done Gone* portrays a world where the black slaves brilliantly manipulate the lives of their ignorant and unaware white “masters.” Where *Gone with the Wind* fawningly idealizes the white slave owners and “gentlemen,” gloriously portraying them as knightly reminders of a beautiful lost era, *The Wind Done Gone* exposes them for their despicable, patronizing, and racist treatment of the enslaved black race. In other words, while

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62 In addition to the 1991 sequel, the Mitchell Trusts have authorized a second sequel, yet to be written. Taken together, these two sequels can be used to establish the value and scope of the market for *Gone with the Wind* sequels as derivative works.


64 *Suntrust Bank I*, 136 F. Supp. 2d at 1374.

65 Id. (quoting Defendant’s Response, *supra* note 54, at 17-18 (quoting RANDALL, *supra* note 1, at 63)) (internal quotation marks omitted).


67 One of the most offensive aspects of *Gone with the Wind*, to Randall, was the novel’s portrayal of a “world in which black people are buffoonish, lazy, drunk, and physically disgusting, and in which they are routinely compared to ‘apes’ ‘gorillas,’ and ‘naked savages.’” Declaration of Alice Randall at ¶ 2, Suntrust Bank v. Houghton Mifflin, 136 F. Supp. 2d 1357 (N.D. Ga. 2001) (No. 1:01 CV-701).

The Wind Done Gone admittedly adopts the fictional setting of Gone with the Wind, Houghton Mifflin argued that it transformed that world into one entirely of Randall's own invention through its clever inversion and deconstruction.\footnote{Id.}

Furthermore, Houghton Mifflin argued, Randall borrowed no more than was necessary to allude to the topic of her criticism, Gone with the Wind. Randall justified the amount she took by creating an analogy to another historical misconception, suggesting that “[I]f I had made only one or a few allusions, my literary critique would have been lost. The closest analogy I can draw is that of propaganda. If I wanted to create a satire of the Soviet Union’s claim during the Cold War that all worthy inventions had been created in Russia, I could not single out one claimed invention for ridicule and be done with it. I would have to create a fuller picture.”\footnote{Id. at 1375-76.}

Judge Pannell disagreed, finding that Randall had over-extended herself in her efforts to allude to Gone with the Wind.\footnote{Id. at 1378.} While he admitted that elements of The Wind Done Gone were indeed transformative, he held that the bulk The Wind Done Gone simply repeated the Gone with the Wind story. The fact that it was a different character with a different perspective doing the retelling did not automatically make it a parody, according to Judge Pannell, because he felt Cynara’s contribution to the Gone with the Wind story transformed it no more than a traditional sequel would have.\footnote{Id. at 1268-69.}

The Eleventh Circuit, proclaiming the importance of “the free flow of ideas—particularly criticism and commentary” to the copyright laws, came to The Wind Done Gone’s rescue.\footnote{Suntrust Bank v. Houghton Mifflin, 268 F.3d 1257, 1268 (11th Cir. 2001).} Relying heavily on Campbell, the court chose to treat parody “as 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.”\footnote{Id. at 1268-69.} It then resoundingly concluded that The Wind Done Gone constituted a protectable parody, working through each of the four factors.\footnote{Id.} The decision of the Eleventh Circuit is included and discussed in greater detail in Section III.

\footnote{Id. at 1375-76.}
\footnote{Id. at 1378.}
\footnote{Id.}
\footnote{Suntrust Bank v. Houghton Mifflin, 268 F.3d 1257, 1268 (11th Cir. 2001).}
\footnote{Id. at 1268-69. This expansive definition allowed the court to avoid the need to determine whether or not a work needs to be “humorous” in order to be a parody, a distinction left unclear by Campbell. Id. at 1269 n.23. See also Note, supra note 21, at n.97 (discussing humor in parody). See also Part III.B, infra.}
\footnote{Suntrust Bank II, 268 F.3d at 1276.}
III. ANALYSIS

As the Eleventh Circuit recognized, it seems clear that The Wind Done Gone is a transformative work. Indeed, Randall’s literary skewering of the inhabitants of Atlanta, Tara, and Twelve Oaks may well have dealt the sharpest blow to the antebellum South since Sherman’s march to the sea. Randall’s treatment of the cherished Gone with the Wind characters illustrates the impact with which her novel strikes at the stereotypes and misconceptions of Mitchell’s work.

The white characters of Mitchell’s classic generally turn out to have been puppets, frauds, gay, or black. Scarlett, the prototypical “southern belle,” falls into the latter category when Cynara discovers that her rival half-sister is actually of mixed descent. Rhett, the aristocratic southern gentleman/scoundrel, ends up marrying Cynara and, after being abandoned by her for a black Congressman, finishing life as “a washed out former cad.” Ashley Wilkes, the unattainable object of Scarlett’s affections, pursues liaisons with Melanie’s brother, Charles, and a young slave boy in The Wind Done Gone. Belle Watling, fallen lady of the Atlanta brothel, turns out to be a lesbian. Gerald O’Hara, patriarch of Tara and the cotton plantation, is reduced to a puppet at the unseen command of his African-American butler. In general, whites in The Wind Done Gone are portrayed as “stupid and feeble,” except those who turn out to be gay.

In contrast, the African-American characters in Gone with the Wind take on far greater roles in Randall’s parody. Marginalized in the prior work, Randall provides these characters with traits far different from those that Mitchell would have provided, had she bothered to do so. For example, Prissy, the slave best known in Gone with the Wind for her ignorance as to the “birthin’” of babies, becomes the calculating, cunning Miss Priss, killing off white heirs to

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76 Id. at 1270-71.
77 See Fred Goss, Gay With the Wind, THE ADVOCATE, Sept. 11, 2001 (Book Review). In an interview with the author, Randall states that “[i]t’s part of the parody that when I bring the white characters over, most of them eventually I reveal to be black.” Id.
78 Suntrust Bank II, 268 F.3d at 1271.
79 See Goss, supra note 77. Randall “decided to transform Ashley, this icon of Southern maleness—the perfect aristocrat, as Mitchell presents him—into a gay male character in the same way that [she] took the icon of Southern beauty away from Scarlett, not giving it to Other but to [her] new character, Cynara.” Id.
80 Suntrust Bank II, 268 F.3d at 1270.
81 See Goss, supra note 77 (quoting Randall as saying that “the only positive characters in my book who [are entirely white] are the gay characters. . . . Not everyone is black, so I decided I would leave two positive characters white—the two gay characters.”)
82 Suntrust Bank II, 268 F.3d at 1271 (noting that “[i]n TWDG, nearly every black character is given some redeeming quality—whether depth, wit, cunning, beauty, strength, or courage—that their GWTW analogues lacked”).
the O'Hara plantation to seal "Garlic's and the other African-Americans' control over the drunken Planter." Garlic himself demonstrates his intellectual superiority over his white "masters" by "orchestrating the outcome of the card game and determining his own fate" in *The Wind Done Gone*. While Randall suggests that she wrote the novel so that "whites and blacks could have a deep, hearty belly laugh together," others have suggested that it comes across more like a "racial vendetta."

Of course, the extent to which *The Wind Done Gone* transforms *Gone with the Wind* is not assessed in a vacuum, but in relation to the total amount of material which the novel borrows from its target. The Eleventh Circuit addressed both of these factors, finding that "[w]here Randall directly refers to Mitchell's plot and characters, she does so in service of her general attack on [Gone with the Wind]." The court cited the "gift" of the black slave Jeems to the Tarleton twins in *Gone with the Wind* as an example of a scene that "clearly . . . is fair game for criticism." However, it also noted Randall's troublesome tendency to allude to "descriptions of characters" and "minor details" from *Gone with the Wind* that serve no parodic purpose in *The Wind Done Gone*. As a result, the court could not "determine in any conclusive way whether the quantity and value of the materials used are reasonable in relation to the purpose of copying" and remanded for further fact-finding.

Despite the Eleventh Circuit's reservations about the extent to which Randall could claim the fair use doctrine for portions of her work, the court's decision appears to expand significantly the fair use doctrine announced by the Supreme Court in *Campbell*. In an area of law with few well-defined contours and little authoritative judicial

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83 Id. at 1270 n.25. Laments Miss Priss, "What would we a done with a sober white man on this place?" *Id.*
84 Id at 1272.
85 See Al Neuharth, Is 'Wind Done Gone' a Parody or a Steal?, USA TODAY, June 22, 2001 (quoting Randall).
87 Suntrust Bank II, 268 F.3d at 1268 (proscribing that the four statutory factors involved in assessing parody "be explored, and the results weighted together in light of the purposes of copyright").
88 Id. at 1273-74.
89 Id. at 1273. The court cites several examples, including descriptions of Mammy as "being like an elephant" and Melanie/Mealy Mouth as being "flat-chested." Additionally, the court calls out Randall's reference to the entire scene where Scarlett throws a vase at Ashley without any apparent parodic intent.
guidance, the *Wind Done Gone* case seems destined to influence future fair use and parody litigation, particularly in the field of literature. This Comment concludes by identifying three likely consequences of the Eleventh Circuit's holding, should it either be adopted by the Supreme Court, or followed by other circuits.

A. Future Authors Will Have Extensive Leeway in Claiming Fair Use

The primary impact of the decision to allow publication of *The Wind Done Gone* is that it clearly extends the scope of fair use protection to cover works such as Randall's, providing the public with valuable social commentary and critique. Given the lengthy duration of copyright protection provided to authors of original works, a broad exception for fair use is necessary to reconcile copyright's protective function with its overarching purpose of promoting the progress of science and the arts.92

The Copyright Act has expanded dramatically in the last two centuries, currently protecting an original work for the life of the work's author plus seventy years.93 As a result of this expansion, by the time many copyrighted literary works fall into the public domain they will have either become unassailable classics, or have fallen out of the public consciousness. Either way, those works, absent a fair use exception, might be safely beyond the scope of criticism and commentary until well after anyone would care enough to bother to criticize them. Fair use, therefore, provides a valuable right to those compelled to challenge a prior work—the right to make reasonable use of the work in their criticism.94 Therefore, as copyright expands in scope, it would seem intuitive to suggest that the fair use exception ought to parallel that expansion.95

The Eleventh Circuit's opinion reflected this notion by refusing to silence *The Wind Done Gone*, a work that essentially amounts to a fictionalized critique of the perceived injustice inherent within *Gone with the Wind*. Of course, Randall could simply have framed her critique in the form of non-fictional commentary, and avoided the need to wage a battle in the courts over "transformation" and parody. However, she undoubtedly realized that many more people would be

92 See Suntrust Bank II, 268 F.3d at 1260-61.
95 See Note, supra note 21, at 1210-11. The author applies particular importance to this expansion in the context of "re-writing" cases, such as *The Wind Done Gone*. 
interested in hearing her viewpoint if she used outlandish mockery as the vehicle for her criticism, rather than formal, scholarly commentary. Furthermore, Randall has mentioned the importance of parody to African-Americans in America, gravitating her towards that medium of expression for her criticism. Her preference for commenting on Gone with the Wind’s faults by use of fiction, provided that her work escapes the four-factored gauntlet of the Copyright Act, should be entitled to the same protection as non-fictional critique.

On the other hand, Randall’s wholesale copying and borrowing from Gone with the Wind troubled both Judge Pannell and the Eleventh Circuit. By allowing the novel to go to publication despite such extensive use of the characters and scenes of the parody’s “target,” the Eleventh Circuit may have opened a “Pandora’s box” of future copying. After seeing the liberties taken by Randall in helping herself to Mitchell’s literary inventions, future authors may well feel at ease to do extensive borrowing of their own. In situations where the future work is as socially provocative and stimulating as Randall’s The Wind Done Gone, this allowance for parodic borrowing will work to promote the goals of copyright. However, where the “commentary” component of the work is less pronounced than in Randall’s, it would be unfortunate for courts to allow borrowing to the extent of that permitted by the Eleventh Circuit in The Wind Done Gone.

96 Houghton Mifflin’s website contains a series of questions and answers about the dispute, including the query: “Why did Ms. Randall write this book? What did she hope to accomplish?” The answer states that Randall wrote “to draw attention directly to the pain Gone With the Wind’s many portrayals have caused.” An answer to a subsequent question indicates that Randall, troubled by “our culture’s continued acceptance of the work,” felt the need to “take on Mitchell’s work directly to undermine its myths, make readers question its world, and explode the archetypes that have leapt off its pages into America’s consciousness.” See The Wind Done Gone: Questions and Answers About This Dispute, available at http://www.houghtonmifflinbooks.com/features/randall_url/qandas.shtml (last visited May 10, 2002).

97 See Chat with Alice Randall, Author of “The Wind Done Gone,” available at http://www.cnn.com/2001/SPECIALS/ken/06/22/randall.cnn/index.html. Randall stated, “One thing I’d like to note, which is harder to look up, is that the tradition of American parody is vital to the African-American experience. There’s a dance called the cake-walk, and it’s the dance I allude to in my parody, “The Wind Done Gone.” It mocks the dancing of the white folks. It appears to be one thing, and it’s another. Parody is very important in the African-American tradition. For those who are wondering about parody and my novel, they should be reminded that my original title was ’The Wind Done Gone: A Meaningful Parody.”

98 Suntrust Bank v. Houghton Mifflin, 268 F.3d 1257, 1269 (11th Cir. 2001) (“The fact that Randall chose to convey her criticisms of GWTW through a work of fiction, which she contends is a far more powerful vehicle for her message than a scholarly article, does not, in and of itself, deprive TWDG of fair-use protection.”).

99 See Note, supra note 21, at 1208 (“The Wind Done Gone might move a reader to reconsider his opinion of Gone with the Wind, rendering what was a grand Southern novel a more morally complex work that raises but fails to recognize important questions about race and power.”).
A second important implication of the decision in <i>Suntrust</i> is the seeming elimination of a requirement that some courts tacked on to the parody defense—the need for a parody to be “humorous.” In <i>Campbell</i>, the Supreme Court noted that the aim of parody is “comic effect or ridicule,” and went on to require that “a parodic character . . . reasonably be perceived” in the alleged infringing work. In light of the vagueness of this standard, it could be inferred that the Supreme Court was requiring a finding of humor to satisfy the requisite “parodic character.” The Eleventh Circuit rejected this notion as inconsistent with <i>Campbell</i>’s later admonition not to evaluate the success of intended humor when assessing parodic character. This clarification of <i>Campbell</i> eliminates a potential judicial stumbling block in parody cases, allowing courts to focus more appropriately on whether the parody comments of criticizes the prior work, rather than on whether the parody is likely to elicit laughter.

C. Increased Use of the First Amendment as a Protection from Copyright

The complex integration of First Amendment principles of free speech and the limitations of these principles inherent in the Copyright Act are topics of immense scrutiny in legal commentary, and are generally beyond the scope of this Comment. However, it bears mention that, according to one commentator, <i>Suntrust II</i> appears to be the “first time an appellate court has applied the First Amendment’s Free Speech Clause to constrain the enforcement of a copyright.”

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101 A humor requirement in parody would also run afoul of Justice Holmes’ famous admonition, quoted in <i>Campbell</i>, that “[i]t would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of [a work], outside of the narrowest and most obvious limits. At the one extreme some works of genius would be sure to miss appreciation. Their very novelty would make them repulsive until the public had learned the new language in which the author spoke.” <i>Bleistein v. Donaldson Lithographing Co.</i>, 188 U.S. 239, 251 (1903) (holding that circus posters have copyright protection).

102 <i>Suntrust Bank II</i>, 268 F.3d at 1268 (declaring that “we will treat a work as a parody if its aim is to comment upon or criticize a prior work”). See also id. at 1269 n.23 (demonstrating the difficulty inherent in assessing humor by mentioning a New York Times review of <i>The Wind Done Gone</i> finding it to be “decidedly unfunny,” and comparing it to Houghton Mifflin’s implied claim that the novel represents “African-American humor” which perhaps cannot be understood by “non-African-American judges”).

103 See, e.g., Neil Weinstock Netanel, <i>Locating Copyright Within the First Amendment Skein</i>, 54 STAN. L. REV. 1 (2001) (arguing that the First Amendment should be used to support copyright law’s fair use exception); Note, supra note 21, at 1213-16 (arguing that, in cases involving re-writing, courts should consider “the iconic or sociopolitical status of an original work when considering a First Amendment defense to copyright infringement”).

104 See Netanel, supra note 103, at 2.
Netanel's reference is to the Eleventh Circuit's reversal of Judge Pannell's preliminary injunction against publication of *The Wind Done Gone*, which the circuit court labeled "an unlawful prior restraining in violation of the First Amendment." Netanel goes on to argue that attention to the First Amendment is appropriate in copyright cases because of the "onerous burden on speech" imposed by copyright protection's expansive evolution. Should copyright law indeed expand to allow First Amendment defenses, it would be another step towards allowing future authors greater freedom to critique and comment on prior works through the exercise of fictional parody.

CONCLUSION

*Gone with the Wind* is beautifully written and romantic, an epic depiction of a time long gone. Its characters are unforgettable, and its impact on American culture is arguably unequalled in popular literature. However, it paints at best an incomplete picture of Reconstruction era Southern life; at worst, it serves to perpetuate brutal racial stereotypes and marginalize the role of African-American slaves during Reconstruction. Prior to Randall's publication of *The Wind Done Gone*, many critics, both silent and outspoken, felt the sting of Mitchell's treatment of black characters. Randall, however, dragged these flaws into the public consciousness with a dramatic flair unprecedented in *Gone with the Wind*'s critical scrutiny. While the quality and impact of her work remains to be judged, she succeeded in accomplishing what she set out to do—to "explode" *Gone with the Wind* and condemn the misconceived notions of an ignorant era.

The Eleventh Circuit, in recognizing Randall's right to publish *The Wind Done Gone*, correctly realized that the book transformed its target into a scathing parody. In upholding a novel that copied so extensively from its predecessor, the court also expanded the boundaries of fair use significantly. Whether this expansion is for the better, stimulating future discourse and progress in the sciences and arts, or for the worse, authorizing subsequent author's to raid original works for their own commercial gain, remains to be seen.

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105 *Id.* at 4.

106 The author is resisting use of the obvious pun here.

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