Gone with the wind: copyright law and fair use

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The copyright defence of fair use has been tested in a recent United States case involving the classic *Gone with the wind*. [Suntrust Bank, as Trustee of the Stephens Mitchell trusts v Houghton Mifflin Company (2001) 136 F. Supp. 2d 1357; and Suntrust Bank, as Trustee of the Stephens Mitchell trusts v Houghton Mifflin Company (2001) US Appeal Lexis 21690.]

The case concerned an unauthorised sequel to Margaret Mitchell's novel, which was entitled *The wind done gone*. The author, Alice Randall, argued that the new book was a parody and a commentary of the classic:

> Gone with the wind — *the book, the movie, the costumes, the quips — has reached the status of myth in our culture. It is more powerful than history because it is better known than history. Unfortunately,* Gone with the wind *is an inaccurate portrait of Southern history. It's a South without miscegnation, without whippings, without families sold apart, without free blacks striving for their education, without Booker T Washington and Frederick Douglas.* Gone with the wind *depicts a South that never ever existed. [http://www.thewinddonegone.com]*

The work chronicled the diary of a woman named Cynara, the illegitimate daughter of Planter, a plantation owner, and Mammy, a slave who cares for his children.

The novel *The wind done gone* belongs to a distinguished literary tradition of 'shadow texts' which seek to re-write and subvert canonical texts from fresh perspectives and view-points. In *Wide Sargasso Sea*, Jean Rhys seeks to re-write Charlotte Bronte's novel *Jane Eyre* from the perspective of a Carribean woman. In *Jack Maggs*, Peter Carey re-imagines the life of the Australian convict Magwitch in Charles Dickens' *Great Expectations*. Tom Stoppard regularly subverts Shakespearean texts in his work — such as in *Rosencratz and Guildenstern are dead* and *Shakespeare in love*. As a note in the *Harvard Law Review* says: 'Re-writing is literature as palimpsest'. ['Gone with the wind done gone: 'Re-writing' and fair use', *Harvard Law Review*, 2002, Vol. 115, p1193.]

In response to a law suit by the Mitchell estate, the District Court held that *The wind done gone* was a copyright infringement of *Gone with the wind*. It granted an injunction banning the publication of the novel by Houghton Mifflin.

The author and the publisher appealed against the decision of the District Court. It was supported in its submissions by writers such as Toni Morrison and Harper Lee, organisations such as the National Coalition against Censorship, and the PEN/American Centre, and companies like the Microsoft Corporation, The New York Times Company, and Dow Jones. It is interesting that the case of Alice Randall garnered the support of an unlikely alliance of free speech advocates and media conglomerates. An editorial in *The New York Times* stressed: 'The constitutional protection of copyrights was not meant to trump the First Amendment'. [Editorial. 'Gone with the first amendment', *The New York Times*, 1 May 2001.]

A three-judge panel of the 11th US Circuit Court of Appeals lifted the injunction against the publication of the parody. It rejected the judgment of the District Court that *The wind done gone* was an infringement of the copyright in *Gone with the wind*. It found that *The wind done gone* was deserving of protection under the doctrine of fair use in relation to criticism and review. They stressed that 'copyright does not immunise a work from comment and criticism'. The court of appeals argued that the commercial nature of the publication was strongly overshadowed by its highly transformative use of *Gone with the wind*. It emphasized that *The wind done gone* was a specific criticism of the depiction of slavery and race relations in *Gone with the wind*. It found that the injunction against *The wind done gone*, was an 'extraordinary and drastic remedy' that 'amounts to unlawful prior restraint in violation of the First Amendment.'

The court of appeals provided an eloquent articulation of the goals of copyright law. It claimed, 'The Copyright Clause was intended 'to be the engine of free expression'.' [Suntrust Bank, as Trustee of the Stephens Mitchell trusts v Houghton Mifflin Company (2001) US Appeal Lexis 21690.] It emphasised that the decision upheld the main objectives of copyright law: the promotion of learning, the protection of the public domain, the granting of an exclusive right to the author, and the prevention of private censorship.

The decision in the case of *The wind done gone* should be welcomed by copyright users. It provides an expansive reading of the defence of fair use. As Wendy Strothman, executive vice-president, of Houghton Mifflin Company, said:

Today's decision is an absolute victory for both the First Amendment and for the fair use doctrine of the Copyright Act, *both crucial to American culture and freedom of expression. We are grateful to the Court for its swift action as well as to the many prominent authors, corporations, media companies and First Amendment advocates who supported our position. We are particularly pleased that the American public will now be able to judge Alice Randall's parody for themselves. [http://www.thewinddonegone.com]*

The decision highlights the need for the fundamental reform of the defence of fair dealing in Australia. The present law is wanting because it is limited to a narrow range of activities, and lacks a coherent explanation of its purpose. The case shows the wisdom of the proposal of the Copyright Law Review Committee that Australia should adopt a defence of fair use, along the lines of the United States.

The case also highlights the dangers of lengthening the duration of copyright protection. Lawrence Lessig complained that the Mitchell estate was the undeserving beneficiary of successive extensions of the term of copyright protection by the American congress:

When Margaret Mitchell published Gone with the wind *in 1936, the law gave her a copyright for up to 56 years. Under that agreement, the book should have fallen into the public domain in 1993. Why, then, was Mitchell's copyright, now owned by her estate, still powerful enough to prevent the planned publication this month of Alice Randall's* The wind done gone, *a re-telling of the story of 19th century Southern plantation life from an African-American viewpoint?*

Following what has become a pattern, Congress had extended Mitchell's copyright — along with many others. Indeed, Congress has extended the term of existing copyrights eleven times in the past forty years. Since the federal court decided that Ms Randall's book derives from Mitchell's novel, the earliest publication date for the Randall book is now 2032 (unless Congress extends the term of copyrights again). [L Lessig. 'Let the stories go', The New York Times, *30 April 2001.]*

Lessig argues that a simple solution to the case would be to insist upon the duration of copyright protection for the death of the author plus fifty years. That would render it unnecessary to consider the question of copyright infringement and fair use.

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