The Wind Done Gone Controversy: American Studies, Copyright Law, and the Imaginary Domain

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> "Everything about ownership is changing."
> —Alice Randall, *The Wind Done Gone*, 111.

On March 16, 2001, the Stephens Mitchell trust, the copyright owners of Margaret Mitchell's *Gone With the Wind,* sought an injunction against Houghton Mifflin from publishing and distributing Alice Randall's *The Wind Done Gone* and an order to immediately destroy all materials relating to it.[1] The copyright owners claimed that *The Wind Done Gone* constituted an unauthorized derivative work that incorporated and infringed on the characters and plot lines of Mitchell's classic.[2] In their defense, Houghton Mifflin asserted that "*The Wind Done Gone* is an original work of expression created by Alice Randall" and that "in the event that the Court or jury finds that *The Wind Done Gone* copies copyrightable expressions from *Gone With The Wind*, any such copying is a fair use."[3] After a lengthy court battle, the Court of Appeals for the Eleventh Circuit refused to issue the injunction[4] and the parties arrived at a settlement before the Court delivered its final decision in the case.

This case created substantial controversy because it involved *Gone With the Wind*, a novel that some have considered "the best-selling popular historical novel ever published in America."[5] *Gone With the Wind* tells the story of the

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vivacious and impetuous Scarlett O'Hara, who reaches adulthood on the eve of the Civil War and struggles to find love and wealth in the South during and after this watershed event in United States history. Given its southern setting and Scarlett's position as the daughter of a white, rich plantation owner, the novel contains many African American characters who begin the novel as slaves and follow their former owners even after the war. Upon its release, the book and subsequent movie produced a wide range of responses—from adulation to disgust.[6] Although 60 years have elapsed between the release of the book and the movie and the present day, *Gone With the Wind* (in both the movie and book form) still remains popular.[7]

As a response to the continued appreciation and presence of *Gone With the Wind*, Alice Randall wrote *The Wind Done Gone*.[8] Randall's novel takes the original and turns it on its head. Randall's revision focuses on the viewpoints of the slaves and servants on the plantation Tara. Unlike *Gone With the Wind*, which does not include any characters that suggest sexual liaisons between whites and blacks in the antebellum South, Randall creates a new narrative center for her retelling by developing a character—Cynara, the illegitimate daughter of Scarlett's father, Gerald O'Hara—(and therefore Scarlett's half-sister) who was not present in Mitchell's version. Cynara's life is a direct contrast to Scarlett's and demonstrates the differences between black experiences and memories of that period from those described by Mitchell. In her parody, Randall changes character and place names: Scarlett is now named Other; Ashley Wilkes, the white gentleman after whom Scarlett pines, is Dreamy Gentleman, and he is gay; Melanie Wilkes, Ashley's husband, is Mealy Mouth. Other changes include transforming the main plantation's name from Tara to Tata and another plantation from "Twelve Oaks" to "Twelve Slaves Strong as Trees."

The first half of *The Wind Done Gone* retells the basic plot of *Gone With the Wind* from the perspective of slaves and servants. The second half of Randall's book follows the life of Cynara as she explores the upper echelons of African American society during Reconstruction, including a fictional party at Frederick Douglass's house in Washington D.C. After recreating Mitchell's world from a particular African American perspective, Randall then produces an image of African American culture that echoes contemporary theoretical understandings of how racial identity works, drawing on an array of contemporary sources including Toni Morrison's work on memory and Patricia Williams's approach to ownership and "owning the self."[9] *The Wind Done Gone* begins with *Gone With the Wind* as a mythic narrative that plays a central role in creating the dominant image of American history and then seeks to deconstruct and reconstruct these mythic foundations.[10] The Stephens Mitchell's Trust lawsuit against Randall and Houghton Mifflin asked the following two questions: (1) Was there a substantial similarity between *Gone With the Wind* and *The Wind Done Gone*? and (2) If there is a substantial similarity between the two, should the parodic nature of *The Wind Done Gone* be considered a fair use of *Gone With The Wind*?

In this essay, I explore the legal controversy surrounding publication of Alice Randall's *The Wind Done Gone*, which illustrates how African American cultural practices and copyright law re-write and re-work one another as each grows and develops.[11] While the debate about the influence of copyright law and intellectual properties in post-Civil Rights era African American culture could be traced through the art of Betye Saar, the copyright activism of rapper Chuck D, or the recent fiction of Percival Everett, this essay will use *The Wind Done Gone* as a case study to explore the efficacy of recent copyright legislation and court decisions.[12] In particular, I focus on how cultural texts produce subjects and how the very process of identification through cultural texts agitates the border of traditional concepts of property and ownership.

Although *The Wind Done Gone* controversy brings to light cultural processes regarding creativity, textual consumption, the circulation of racial imagery, and the deployment of legal discourse, it also proves the adage that cultural importance is not the same as legal importance. The litigation and subsequent discussion of the case is an exceptional *cultural* event because relatively few books have been subjected to such detailed legal scrutiny and because a wide range of writers, publishers, scholars, and activists used the case to address the relationship between copyright law and cultural production. The actual legal decision and the doctrine that it furthers, however, will likely have only a limited *legal* application because the Eleventh Circuit Court of Appeals did not develop any new doctrines or theories to reorganize copyright law. Moreover, the Court affirmed copyright case law by engaging in a fact-intensive reading of the dispute that renders it unlikely that other disputes will fit the exact fact pattern established in the case. The legal decision, therefore, ultimately failed to protect textual producers from claims of coyright infringement.

For American studies, this controversy provides a crucial opportunity to intervene in public debates about the operation and function of American cultural relations and processes. Of particular interest to American studies scholars should be how the legal system regulates cultural and social matters. In this article, I will review the development of copyright law in the United States (which is relatively unexplored territory for American studies), explore the link between the regulation of creative expression and American studies scholarship, and then examine the court records (especially the expert testimony of academics) produced during the course of the lawsuit as well as popular descriptions and analyses of the case. Because I bring a cultural studies perspective to legal discourse, my research does not conflate the statements of any particular actor as the "Law" (as much writing by cultural studies scholars on legal matters does)[13] but considers each statement as one position among a multiplicity of positions and arguments that together comprise legal discourse.

Although no single theoretical approach can fully capture the shifting terrain of copyright law, *The Wind Done Gone* provides an excellent opportunity to examine the nature of public dialogue over the idea of intellectual property in a

period during which shifts in technology and communication have radically altered the spatial and temporal framework that has provided the foundation for the property concept.[14] The ideals that, at least theoretically, founded the nation, including freedom, equality, and democracy, are being re-written as the internet, globalization, genetic engineering, and other technological shifts create bold, new frontiers for cultural-legal exploration. These developments reshape notions of the self and community as they simultaneously transform cultural geography. In a universe that is increasingly marked by cyborgs, simulations, and global souls, *The Wind Done Gone* asks its readers to contemplate the very real effects of imagined realities such as *Gone With the Wind* and to rethink selfhood in an age of mass media. Who "owns" dominant myths and who has the authority to regulate and/or contest those myths constitutes one of the primary and foundational questions of American cultural studies.

Intellectual License or Intellectual Property?

In order to understand the controversy around *The Wind Done Gone*, we must examine the legal framework within which it was framed. To begin with the origins of legal concepts does not privilege legal discourse as a disciplinary logic; rather, such a starting point uncovers the debris of previous social debates (both legal and cultural) that has provided the intellectual foundation for contemporary discourses about ownership and authorship. As with many concepts within the law of the United States, the genealogy of property and copyright laws descends from English law and political theory.[15] Political theory meets legal pragmatism in the history of "intellectual property" because the concept that we today know as copyright does not derive from a "pure" application of a single theory, but from the interplay of theoretical models and very specific economic problems. Moreover, the concept of "intellectual property" has developed from uneasy extensions of theories about real and movable property to the realm of ideas and expression. In this shift from tangible to intangible property, the very definition of what it means to "own" something begins to unravel. The slippage regarding ownership becomes particularly significant for American studies scholars as the "ownership" of property and (cultural) "authority" begin to blend into one another within much public discourse.[16]

John Locke's treatise on the origin of property has shaped the definition and application of the concepts of ownership and property in American law. Locke argued that if someone removed something from the state of nature and added labor to it and joined to it something of his/her own, it became his/her property.[17] For Locke and many contemporary thinkers, ownership over property meant that the "owner is allowed to exercise his natural powers over the subject-matter uninterfered with, and is more or less protected in excluding other people from such interference. The owner is allowed to exclude all but one, and is accountable to no one."[18]

Locke's framework, however, has presented conceptual difficulties when applying his land-based metaphors/fictions to production, consumption, and regulation of ideas and expression. Intellectual texts are not technically "property" under contemporary legal doctrine. As a secondary or tertiary step in a property-based epistemology in a liberal legal state, Locke's enlightenment vision merged with romantic assumptions about genius and creativity to create a notion of copyright that was "founded on the concept of the unique individual who creates something original and is entitled to reap a profit from those labors."[19] In other words, the public commitment to allocate substantial, if not exclusive, control over the expression of an idea (i.e., a novel, poem, film, song, screenplay, etc.) follows from Locke's premise that the "author" mixed her intellectual and imaginative labor with a natural resource (such as language, musical notation, a movie location) and produced something wholly new. The romantic concepts of authorship and creativity transformed a messy complex of inspirations, models, teachers, and critics that shape a given intellectual product into "natural" resources to be mined, refined, and then sold as a commodity. In the realm of ideas, ownership activities include, but are not limited to, the right to copy and distribute and the authority to license other users. However, these ownership rights are further limited by a number of doctrines that undermine the application of Locke's theory to the realm of ideas and creation. Copyright (and patent) law transformed ownership from a tangible, physical, and material relationship with a specific object to a more ephemeral relationship that allows the "owner" to authorize the use, reproduction, and distribution of an expression of an idea, but not a generalized or paraphrased version of the idea.

The first step in this re-casting of ownership in Anglo-American jurisprudence began in 1710, when the English Parliament passed the Statute of Anne and created modern copyright.[20] Previously, the Crown of England had controlled publishing by extending monopoly rights to publishers to produce specific types of works, thus regulating who could publish what. The Statute of Anne, however, lifted Royal control from publishing and pulled a step back from full-blown printer monopolies by adding a time limit on such monopolies (14 years for new books—renewable for another 14 years—and 21 years for classics already printed by a publisher) as incentive to writers for increased public knowledge.[21] These newly-created time limits provided an opportunity for books to enter the public domain. This shift was also dramatic because monopoly rights of limited ownership over the expression of ideas were transferred from Royal control to the marketplace. What should be noted about this legislation is that it primarily regulated the interests of publishers, *not writers*! While publishers invoked the romantic theory of authorship in their rhetoric supporting the Statute of Anne, the final version of the legislation did not produce much legal protection for writers, only publishers.[22]

English law ruled the thirteen colonies and individual American states, laying the intellectual and legal background for the framers of the United States

Constitution. While it may have revised other aspects of English law and political theory, the Constitution adopted primarily English ideas and laws on copyright. The Constitution stated that Congress shall have the power "to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[23] Within the Constitutional schema, copyright was by definition a limited right. Perhaps even more important, such rights were secured in order to promote the progress of science and the arts, thus balancing individual and societal interests, not conveying a purely individual interest! Although I would not argue that English copyright law's inclusion into the foundation of American law suggested the founders' full-fledged commitment to any particular position *vis-à-vis* the romantic theory of authorship, it nonetheless contradicts the idea that writers have a permanent or even semi-permanent right[24] in their products once those products enter the public sphere.[25] If anything, the inclusion of English law on copyright in the Constitution signaled a desire (albeit a conflicted desire) to maintain (at least theoretically) a public sphere where social problems can be discussed and examined.[26]

After the Constitution was adopted, United States and English copyright law diverged because England, relying much more on the romantic conception of authorship, created stronger rules favoring the rights of writers (and publishers) over those of the public. Perhaps because of the popularity of republican theories within nineteenth-century America, the United States hesitated to strengthen copyright protections to match European legal standards. In *Wheaton v. Peters* (1834), the Supreme Court upheld the Constitutional focus on the public domain and the public good that followed from publication and denied Wheaton's cause for copyright infringement against Peters.[27] Meredith McGill has argued that *Wheaton* "buil[t] into American law a resistance to individual control over texts" and that "the nature of copyright [in the early nineteenth century] neither establishe[d] the text as a commodity nor ground[ed] the right to literary property in the person of the author."[28]

Surprising to this cultural studies practitioner, legal discourse in the nineteenth century articulated a position toward readership that has certain affinities to the understandings produced by reader response theory.[29] For example, in the 1853 case of *Stowe v. Thomas* (which concerned an unauthorized translation of *Uncle Tom's Cabin* into German), the Circuit Court for the Eastern District of Pennsylvania expounded on the nature of copyright:

> An author may be said to be the creator or inventor, both of the ideas contained in his book, and the combination of words to represent them. Before publication he has the exclusive possession of his invention [as *personal*, not *intellectual* property]. His dominion is perfect. But when he has published his book, and given his thoughts, sentiments, knowledge or discoveries to the world, he can have no longer an exclusive

> possession of them. Such an appropriation becomes impossible, and is inconsistent with the object of publication. The author's conceptions have become the common property of his readers, who cannot be deprived of the use of them, nor of their right to communicate them to another clothed in their own language, by lecture or by treatise . . . . When he has sold his book, the only property which he reserves to himself, or which the law gives to him, is the exclusive right to multiply the copies of that particular combination of characters which exhibits to the eyes of another the ideas intended to be conveyed. This is what the law terms copy, or copyright.[30]

Although only a statement of a lower court, Justice Grier clearly acknowledged that once a book was published and read by an audience, readers come to "own" texts as they "bec[a]me the common property of his readers." Moreover, Grier reminded Stowe that the only protection that copyright law provided during the antebellum era was from piracy of her book within the United States.[31] Interestingly and probably unwittingly, Justice Grier's decision in effect licensed the subsequent efforts of African American writers and intellectuals to "rewrite" or "write over" Stowe's characterization of Uncle Tom.[32] Grier's understanding, however, of the public's ownership of what they read and the dialogue that books produce has not (much to the probable chagrin of most cultural studies scholars) been carried forward to the present. The economic interests of publishing houses and writers demanded that legal discourse protect the investments of publishers and writers.

Because of the differences between United States and European copyright laws, piracy flourished on both sides of the Atlantic during the nineteenth century. Publishers within the United States pirated European works and vice versa. "While authors sought to control the production and sale of their texts amidst widespread literary piracy," according to Martin Buinicki, "those opposed to strengthening or expanding copyright law often cited fear of granting monopoly power to authors and large publishing firms, robbing the reading public of access to affordably priced books."[33] To protect the style and tone of their work, some writers sought to use trademark protection as a substitute for the limited protection of nineteenth-century copyright law. Melissa Homestead has demonstrated how the success of Fanny Fern, a prominent newspaper columnist who dispensed homespun wisdom on a wide range of topics, required that she vigorously defend her "trademark" style from unauthorized reprints and imitations, lest her reputation and the value of her own writings become diluted through piracy.[34] Washington Irving, Bret Harte, and Mark Twain each tried (with various measures of success) to use trademark law to protect access to and control over their writings.

By the 1870s, an alliance of interests pushed for changes in copyright law that reflected more fully the romantic conception of authorship. The interests of

American authors, American publishing houses, and foreign publishing houses converged to promote expanded copyright protection of books to match European standards of copyright.[35] Because cheap, low-priced versions of British novels had flooded the United States market, copyright reform constituted a victory for international publishers. By strengthening international copyright and by sharing copyright protection with England in 1891, the United States ended the pirating of English books and, in effect, allowed homegrown writers to compete on an even playing field with their European counterparts because publishers had to pay royalties to both American and foreign writers.[36] This shift in copyright law constituted a victory for publishers and writers, who would be now compensated for their writings.

A second factor that helped push copyright law in the direction of romantic authorship was the growing disarray in the publishing industry in the 1870s. The gap in copyright law that permitted publishers within the United States to publish cheap pirated editions of European books helped the major New York publishers create the "courtesy" system in which publishing houses divided up the pirated works and had a gentleman's agreement in which they agreed not to compete. (Even though they did not compete with one another, American versions of European books were still much cheaper). In 1875, Donnelly, Loyd, and Co., a Chicago publisher, created the Lakeside Library of classics. Donnelly destroyed the "courtesy" system of publishing and began the growth of penny presses that lowered prices substantially on the already cheap versions of European books. In order to restore equilibrium to the publishing market, the major New York publishers urged Congress to join the international copyright movement and strengthen national copyright laws to diminish competition in the sale of literature.[37]

The third part of this constellation of forces that changed copyright law around the turn of the twentieth century were writers. One of the loudest authorial voices for copyright law reform was Mark Twain, who began researching copyright law after his own work had been pirated. Twain, the "folksiest" of American writers, sought to "push his rather 'un-American' ideas about copyright in distinctly 'American' language."[38] In other words, Twain countered republican sentiments of a strong democratic public sphere (reminiscent of republican rhetoric during the early years of the Republic) and adopted the less egalitarian European approach to copyright. The success of copyright reforms in 1891 (the passing of legislation on international copyright) and 1909 (expanding the definition and extending the term of copyright), however, reflected more than a victory for authorial rights. It validated more fully than ever before Lockean principles of property for intellectual labor. By extending Lockean metaphors to the act of writing, other problems developed as advocates for authorial control sought to enlarge their rights by expanding the scope of those rights to encroach upon the intellectual labor of readers and consumers. To expand the ownership interest of the copyright holder, cultural authority regarding the work in question

also passed over to the copyright holder. This, in turn, further diminished the role of the public and the public domain in distributing and interpreting the work.

Since 1909, the balance between public sphere and the rights of the author has shifted in favor of the author, in its own right, or as a proxy for corporate interests. Eighteenth- and nineteenth-century notions of limited monopoly, or literary licenses, for writers in their creations for the public good have moved ever closer to the idea of intellectual property, with all the connotations that property brings with it. While the terrain has shifted to different issues, such as derivative works, works for hire, joint authorship, parody, in each conflict the same theoretical justifications have been brought to bear.

Whether copyright law provides "literary license" or literary property is not a settled question (and one that probably cannot and will not ever be answered fully). Legal and public discourses currently lean toward a theory of literary *property*, a position articulated by Stephen Carter in his essay, "Does it Matter Whether **Intellectual Property** is Property?" He writes:

> [S]cholars write about whether **intellectual property** is property. Nobody else seems to care. Certainly practitioners and judges—the traditional audiences for legal scholarship–are more concerned with the proper adjustment to Section 103 of the Patent Act to take account of university research styles than with whether those university researchers happen to discover what is properly considered "property."[39]

Carter urged abolition of the special status of *intellectual* property (and, in turn, a revision of the Constitution) and the application of traditional property law concepts to copyrights, trademarks, and patents.[40] He argued that property doctrines (particularly the rules on antitrust) are sufficient to balance individual and societal interests for copyrights, trademarks, and patents. According to Carter, legal discourse only creates inefficiencies with its consideration of the amorphous categories of the public domain and the public sphere. By relying on a blend of pragmatism and economic theory, Carter dispensed with the few remaining features of republican rhetoric within copyright law.[41]

In the following sections, my goal will be to use *The Wind Done Gone* controversy to demonstrate that any attempt to collapse the distinction between intellectual property and other forms of property is a disastrous step. As I have attempted to point out in retelling the history of the copyright, the physical relationship between object and person that is central to real (i.e., land) or chattel (i.e., things or objects) property has no analog with regard to the expression of ideas, which are subject to the laws of copyrights, trademarks, and patents. Moreover, Locke's myth of the creation of physical property totally fails to capture how intellectual discoveries operate. Rather than occurring in a

theoretical state of nature, the creation of books, artworks, and manufacturing processes require an active and vibrant culture that provides the impetus, reason, or motivation for the creative or inventive act. Moreover, such acts tend to build on the work of others. No intellectual or inventor is an island. Recent attempts to fold intellectual and scientific work into "property" represents a problem distinct from the effort in legal discourse to adequately theorize cultural processes. Instead, I will argue for an approach to copyright law that emphasizes limited monopoly rights not just in terms of the time-period of the monopoly, but the scope and reach of the copyright as well.

American Studies and "Intellectual Property"

For American studies scholars, the debate over "intellectual property"represents a problem distinct from the efforts in legal discourse to balance the rights of writer, publisher, and public in a given text. Rather than seeking to deconstruct authorship (although some American studies scholarship has followed this path), the interest of American studies turns (or, in my estimation, should turn) the matter of "intellectual property" upside down. The logic of "intellectual property" as currently debated by legal scholars,[42] economic scholars, and even by most literary and cultural studies scholars focuses first and foremost on the writer, director, or musician who "creates" a work or text. In American studies, the question of audiences and the "intellectual properties" of social groups should constitute the primary emphasis of examination. In other words, most scholarship on intellectual property focuses on the copyright holder. What I want to examine is the importance of the public and the public domain in copyright law.

Recent work in American studies has focused on what stories should be central to the public domain, what myths, stories, narratives, and images are central for understanding America.[43] Rather than assume one giant public domain, universally shared, American studies has increasingly viewed the "American imagination" as multi-layered and hierarchical. Contemporary American studies classics, such as *Reading the Romance*, *Mechanic Accents*, *Watching Race*, *Immigrant Acts*, and *Telling Identities*, each described the intellectual terrain or operations of particular social groups.[44] These works turned the idea of "intellectual property" on its head because (1) they focused as much or more on the consumption of textual objects or the reformulation of dominant narratives in the production of resistant texts[45] and (2) the notion of the public sphere theorized and examined was plural (i.e., public spheres) and overlapping rather than the generalized imagined national public implied by dominant constructions of intellectual property within legal discourse. In these studies, scholars examined the cultural life of texts in the public domain. This approach intentionally undermined the authority (but not the ownership interests) of the producers and distributers of the texts under consideration. Ironically, such studies may have

increased the monetary value of a given text, while undermining the cultural authority of its producer.

The American studies focus on the cultural life of texts and ideas has not proven effective in transforming copyright law. Instead, a workable conception of the imaginary domain must be developed as a potential solution to tensions within copyright law. Drucilla Cornell has defined the imaginary domain as the social terrain into which the individual places herself by selecting and then attempting to accomplish a particular vision of herself.[46] For Cornell, the primary difference that must be re-visioned through a construction of the imaginary domain was feminine difference.[47] The imaginary domain, according to Cornell, must become a freer, more equitable realm so that invidious stereotypes do not limit who people are and what they can accomplish. Cornell's imaginary domain was not a monolithic construction that cannot account for operations of difference, alternative imaginary domains, or counter-hegemonic spaces. Rather, Cornell sought to safeguard the existence and functioning of such imaginary spaces through legal discourse. In other words, her understanding of the imaginary domain is premised on the contention that conflicts in culture and politics are not simply differences of opinion or interests that can be discussed rationally, but differences based in psychic investments and the production of subjectivity.[48]

The theorization of the existence of psychic harms due to racism, sexism, and colonialism was not, in itself, a new development. Cornell's work is important for American studies scholars precisely because she (along with critical race theorists)[49] attempted to translate the contentions of critical theory and cultural studies scholarship into the language of legal discourse, rather than throwing out the baby (of liberal legal discourse) with the bathwater (i.e., the racialized nature of contemporary dominant discourse) and reinvent the embodiments (both theoretical and applied) of equality and freedom that already exist in American legal discourse.

In terms of copyright law, a more complex understanding of how the imagination works could radically alter how legal discourse regulates and distributes ownership interests and cultural authority. Michel de Certeau provocatively described reading as "poaching." "Whether it is a question of newspapers or Proust, the text has a meaning only through its readers: it changes along with them; *it is ordered in accord with codes of perception that it does not control*" [emphasis added].[50] For de Certeau, reading connected the material object (i.e., the text) to the imagination. De Certeau's goal in *The Practices of Everyday Life* was to shift the academic gaze from the productive labor of the writer to the productive labor of the reader. For de Certeau and cultural studies scholars who embrace his theoretical model,[51] mental activity constituted a necessary realm for understanding social and cultural relations. Currently such mental "actions" have no protection within the United States's current intellectual property regime because an intellectual property is created only when it is set into a material form.[52] As a result, consumers have no legal control over the

mental labor that they perform on a given text, unless they create an original product based on their efforts.

Tracing the effects of consumption practices on cultural values and meanings without examining the shift (or lack of shift) in proprietary relationships constitutes an incomplete cultural studies methodology. In *Textual Poachers*, Henry Jenkins provided some tantalizing examples of how copyright law limited the kinds of rituals, practices, and habits in which film and television fans could engage. Despite offering such illustrations, Jenkins did not consider the broader relationship between law and culture. Culture remained a relatively free-standing entity, free from the regulation of state authorities and private proprietary interests. Jenkins concluded: "[t]he nature of fan creation challenges the media industry's claims to hold copyright on popular narratives. Once television characters enter into a broader circulation, intrude into our living rooms, pervade the fabric of our society, they belong to their audience and not simply the artists who originated them."[53] In a sense, Jenkins was correct in arguing that audience members have "ownership" over popular texts, but that ownership interest is not one currently recognized in legal discourse. If not recognized legally, then the ability to control its use and circulation is limited. In other words, the audience has little "authority" *vis-à-vis* a given text. The very autonomy that Jenkins sought to identify and explain is in fact regulated and constrained by legal discourse.

Currently, the only partial limitation on the public/private dichotomy within the discourses concerning United States copyright law has been the attempt to develop a Native American exception to copyright law that would allow for some amount of collective ownership of cultural products and processes.[54] Although not endorsed or adopted by Congress, such attempts would provide a necessary corrective to copyright law, and such proposals may help American studies scholars rethink the public/private dichotomy deployed by legal discourse. While copyright law does acknowledge some limited instances of joint authorship,[55] courts tend to prefer copyright arrangements with singular authors (even if those authors are corporate entities).[56] As will become clear in the next section, legal discourse, whether in the litigant's or the court's textual productions, has not considered that multiple publics and multiple subjectivities might exist within the territorial borders of the United States. Legal discourse (even in the very astute but frequently arcane commentary of copyright law in law reviews) cannot conceive of cultural borders distinct from national or territorial borders. The result is that legal discourse is burdened with a conception of culture (and authorship) that cannot make sense of claims of *cultural* or *communal* ownership made either by dominant or by emergent social groups.

Despite its importance in distributing the monetary rewards derived from a given text, a copyright does not remove a text from circulation within the public domain. Rather, a copyright is increasingly the mark that signifies entry into public discourse, but under conditions that allow the copyright holder to guard

against literal and even some metaphorical piracy.[57] Even though legal discourse suggests that copyrighted items are not within the public domain, American studies should insist that a copyright does not remove a text from the public domain; it only protects it from certain unauthorized acts of reproduction. An American studies perspective on copyright law should constantly remind legal scholars and the public that a copyright does not remove a text from circulating within the public domain, but merely allows the copyright holder a certain limited authority to regulate that circulation.

From another angle of vision, it should be noted that academics and intellectuals frequently claim a similar kind of authority over texts fully within the public domain and even some copyrighted texts. As cultural "authorities," scholars and intellectuals through their scholarship attempt to alter and thus regulate the reproduction, distribution, and circulation of texts and images (whether or not such things are technically copyrighted). During the culture wars of the 1980s and 1990s, cultural "authorities" selected texts to enter into or remove from the canon and sought to rewrite both dominant and emerging imaginary domains by acknowledging the overlapping network of national and cultural myths in existence within the territory of the United States.[58] Such active regeneration of foundational myths, not surprisingly, produced a strong counter-reaction by conservatives and created debates about cultural authority and in a more general sense "ownership" over the "Western Canon."[59] In effect, many (but not all) cultural conservatives sought a copyright-like kind of ownership interest in the "Western Canon." Of course, copyright law did not recognize such attempts to control the production and distribution of these materials even if the rhetoric defending the "Western Canon" frequently included the metaphorical references to property and ownership.

There are, of course, significant differences between the cultural authority of the "Western Canon" and the bundle of rights produced by copyright law. In my critical analysis of each, however, what they may share is even more important: each constitutes part of the images, symbols, and metaphors that people use to understand, order, and critique their experiences, beliefs, and everyday routines. In more common traditional American studies terminology, the "myths and symbols" that varied Americans may use remain in the public domain even if a given text may be copyrighted. Once an image, idea, or phrase becomes ingrained in any of the many public discourses within American culture, copyright law prohibits a narrow range of reproduction, distribution, and circulation.

Despite the tenor of recent decisions in copyright cases, the goal of many writers is not simply to accumulate money (although that is certainly *a* goal) but to have a profound effect on the social imagination. What better way to allow such effects to flourish than by opening up the cultural ownership rights to their works? Safeguarding the imaginary domain and freeing individuals and social groups to liberate themselves from a limited referential universe should be the

focus of copyright law (which I think is the unstated argument behind Randall's claim for copyright).[60] While it is all too common to suggest that copyright holders now have too much control over their texts, the rationales for curtailing that control has proved elusive.[61] A renewed focus on liberating people and social groups can help forge a more equitable balance between private interest and public *domains*. *The Wind Done Gone* controversy provides an opportunity to examine the contours of such overlapping domains.

The Wind Done Gone Controversy and the (Black?) Imaginary Domain

Copyright law has not been terribly kind to historically marginalized groups; dominant peoples have often utilized minority cultures as resources to be developed and then sold within the capitalist economy. Alice Randall's *The Wind Done Gone* reverses this historical pattern. In response to the continuing popularity of *Gone With the Wind*, Randall sought to "write over" it.[62] She decided to produce a parody of *Gone With The Wind* after a popular exhibit on the costumes from the movie version of the book ran in Nashville, Randall's hometown, and she noted that "the exhibit didn't comprehend that it might be painful to part of the community."[63]

Despite subsequent interviews, it is not entirely clear when Randall's book became identified as a parody. According to the district court (which ruled against Randall), Houghton Mifflin, its publisher, did not explicitly claim that *The Wind Done Gone* was a parody until after litigation had begun in the case.[64] By identifying Randall's book as a parody in its marketing campaign, Houghton Mifflin[65] sought protection under the fair use doctrine of copyright law and created the expectation for its readers that the novel parodies[66] as well as criticizes the original because parody, at least legally, would permit borrowing from the original. In other words, without a claim of parody the defense of fair use might be unavailable and it would be more likely that the book would constitute an infringement of copyright.[67]

For the purposes of American studies scholars, this lawsuit represents just one example of how copyright law sets the framework for cultural production.[68] The primary questions that this stage of the lawsuit presented were: (1) Was there a substantial similarity between *Gone With the Wind* and *The Wind Done* Gone? and (2) If there is a substantial similarity between the two, should the parodic nature of *The Wind Done Gone* be considered a fair use of *Gone With The Wind*?

To answer these questions, both sides submitted affidavits and letters from distinguished sets of writers, intellectuals and scholars. The heirs of *Gone With the Wind* submitted expert testimony from Kevin J. Anderson, a science fiction writer; Gabriel Mottola, an expert in Jewish and Holocaust literature who taught classes in parody and satire; Joel Conarroe, an expert in poetry; Louis Rubin, Jr., an expert in southern literary studies; and Alan Lelchuk, a writer and expert

in European and Jewish literature, among others. The absence of any scholars of African American literature or culture among the plaintiff's bevy of experts is particularly noteworthy. Although the court did not specifically address issues of "cultural expertise" in its opinion, the lawyers for Mitchell's heirs attempted to create ostensibly "colorblind" knowledge structures, including parody, southern history, and the writing of derivative works, which then formed the basis for establishing race-neutral or "un-raced" forms of knowledge.[69] In all of their submissions to the court, the lawyers for the Mitchell heirs sought to frame the issues of the case solely within a "colorblind" framework to make invisible how race complicated the issues in the case.[70]

For American studies practitioners, cultural theorists, and legal scholars, the decision of the Mitchell estate's lawyers to diminish the role that particular readers and viewers of *Gone With the Wind* play in shaping its meaning and value was a critical one for understanding cultural debates about the scope and meaning of copyright. Such a tactic, however, only furthered Randall's claim that her intervention was as much critical as it was "inventive" or "creative." *The Wind Done Gone* criticized precisely the racialized imaginary that sought to describe itself as "unraced" or "colorblind." Thus, the Mitchell estate's litigation strategy itself heightened and underscored the importance of Randall's intervention into the effects of *Gone With the Wind.*

Another problem with the Mitchell estate's strategy was that it flew in the face of the shifting rules for canonization in the academy during the post-Civil Rights era. To critics and supporters of multiculturalism alike, it was clear that race-, gender-, and class-"neutral" approaches to literature, history, and culture no longer constituted the only ideal in shaping the meaning and value of written texts and social processes. Regardless of whether one saw this as positive or negative development, the appeal to such race-neutral categories in a case about the racialized effects of *Gone With the Wind* constituted a poor tactical choice. While I do not doubt that the Stephens Mitchell Trust viewed Randall's work as falling under the "colorblind" rules of copyright infringement, it should have become immediately clear to the trust and its lawyers that such an approach would fail to acknowledge Randall's race-based critique of *Gone With the Wind.*[71] Shifting constructions of academic knowledge requires a shift in the legal rules that regulate textual production. As the standards of interpretation change, the rules regulating the ownership of texts must change with them, otherwise the contradictions between discursive spheres becomes too great and risks destabilizing and delegitimizing each sphere. Because of the interdisciplinary nature of American studies inquiry, one of the goals of such scholarship should be to work through and resolve these tensions.

Based on their pre- or anti-multicultural forms of analysis, the experts for the Mitchell heirs concluded that *The Wind Done Gone* borrows heavily, if not exclusively, on the original. They submitted an affidavit from Gabriel Motola, an expert in satire and parody. Of Randall's novel, Motola writes: "In the case

of *The Wind Done Gone*, the reader's imagination is always anchored to *Gone With the Wind* precisely because of the constant appropriation of Magaret Mitchell's characters, language, and plot."[72] According to Alan Lelchuk, Randall's book was "a subliterary parasitical work . . . [having] no literary voice, no substantial style, or character to remember." He also reasoned that *The Wind Done Gone* "is not satire or parody . . . [because] [t]here is no consistency here, of style, tone, or attitude of critical mockery." Lelchuk concluded that the book has "little or no literary value."[73] These comments focused primarily on aesthetic analyses that are oblivious to all consideration of racial subjectivity as a matter for art. In the closing lines of his affidavit, Lelchuk admited that telling *Gone With the Wind* from a black viewpoint might be a literary endeavor, but Randall's version failed to live up to this lofty goal. Kevin Anderson, an expert on writing sequel or spinoff novels, argued that Randall "has commandeered Margaret Mitchell's original characters, situations, and storylines without regard to the wishes or intent of the legitimate copyright holders" and that "this misappropriation . . . would seriously taint the original property for further development."[74]

Lelchuk, Mottola, and Anderson's readings of and testimony about *The Wind Done Gone* reflected an analysis of the book based on legal standards for copyright that failed to acknowledge or address the broader cultural or literary issues at hand. Lelchuk's comments, for instance, neglected the stylistic and literary differences between a book told through third person narration and one developed through a series of first-person diary entries of a character who did not exist in the original. If Randall had merely converted Mitchell's third-person novel into a first-person narrative purporting to be Scarlett's diary, then she would have infringed on the Mitchell estate's copyright because Randall would have simply transferred the story from one genre to another. However, Randall created characters and perspectives entirely absent from *Gone With the Wind*, exploring the gaps in Mitchell's vision of the South. Lelchuk's testimony ignored these differences because he sought to increase the Stephens Mitchell trust's copyright to include anything remotely connected to *Gone With The Wind.*

Similarly, Anderson's testimony/argument spoke directly to the possible dilution of value of the Mitchell estate, and its contention that it would lose control over the licensing of subsequent works were the public suddenly to lose interest in *Gone With the Wind.*[75] Neither Anderson nor Lelchuk contended, however, that Mitchell's initial work captured in full the *ideas* or *expressions* of the African American characters and culture or the responses of African American readers. By removing the racialized nature of the book and its reception, the Mitchell estate sought to enlarge their copyright ownership to a world that Mitchell could barely—and did not—imagine or express.[76] Their argument attempted to turn back the clock on literary and cultural analysis to an earlier period where texts and cultural practices were reduced to self-contained objects that existed in a world apart from audiences and cultural politics.

Louis Rubin Jr., a southern literary historian who edited a collection on *Gone With the Wind*, developed a provocative attack on Randall's parody. In his testimony, Rubin argued that *The Wind Done Gone* cannot be a criticism of the original because "the racial stereotypes have long since been exploded, and it would be difficult to imagine many contemporary readers who believe that the depiction of the black-white, slave-master relationships in *Gone With the Wind* are historically realistic."[77] In order to attack the claim of fair use by Randall and Houghton Mifflin, he asserted that because the stereotypes described in *Gone With the Wind* were no longer commonly held, they therefore cannot be the subject of fair use.

Rubin's premise was faulty or at least inaccurate because it did not account for the continued popularity of the book and its image of the South. Why is *Gone with the Wind* and its licensed products still so popular if everyone knows it is a racist fabrication of events?[78] An alternative—and to me more compelling—explanation is that the book remains popular *because of* its stereotyped depictions. Whether people *believe* such depictions are accurate is irrelevant, rather what matters is the continuing *effects* of such admittedly false depictions. Rubin apparently believed that fair use applies only if factual material—narrowly defined—is at issue. Of course, the fair use exception to copyright ownership does not make such a distinction. More importantly, the very popularity of this fiction or fantasy suggests that it is precisely the kind of text whose "life" and "ownership" have exceeded the bounds of creativity imparted by the author. The continuing popularity of *Gone With the Wind* can no longer be solely attributable to the work of Margaret Mitchell.[79] Copyright law as currently conceived needs to incorporate the insights of reader response theory and consumption theory in cultural studies to address such complexities.

In contrast to the "color-blind" version of intellectual property offered by the Mitchell trust, the lawyers for Houghton Mifflin and Alice Randall argued that *The Wind Done Gone* was not substantially similar to *Gone With The Wind* or if it were, it constituted a fair use of Mitchell's book as a parody. Their position was supported by affidavits and letters from a wide range of academics, scholars, and authors who study African American literature, history, philosophy, and culture.[80] Randall's experts, like those of the Mitchell trust, deployed a variety of arguments, not all of which easily meshed with legal discourse, the primary discursive structure in deciding whether *The Wind Done Gone* would be published.

The most interesting expert evidence submitted by Randall was proffered by Nobel-prize winning novelist and long-time editor Toni Morrison and by Harvard scholar Henry Louis Gates Jr. The majority of Morrison's testimony focused on the nature of textual production. She testified:

> This process of being simulated by one narrative into a writer's own literary invention is virtually the history of

> literature. There would be no *Ulysses* by James Joyce without Homer; no *Pygmalion* by George Bernard Shaw without Ovid's *The Metamorphosis*; no "My Fair Lady" without *Pygmalion*. More recent examples include John Updike's *Gertrude and Claudius*, a wholly re-imagined tale of two characters in Hamlet. A list of such responses to earlier stories is very long indeed, and the subject of masses of literary scholarship.[81]

Morrison's statement combined the thesis of her essay "Unspeakable Things Unspoken" (that an unspoken black presence has haunted white writers) with Harold Bloom's *The Anxiety of Influence* (which sought to de-mythologize the romantic conception of authorship—the center of the *rhetoric* around which copyright law is based).[82] Unlike the testimony offered by Suntrust's lawyers, Morrison sought to demonstrate how textual productions constitute responses to cultural conditions rather than wholesale creations of new worlds. More significantly, Morrison suggested that it is precisely the task of writers to "re-write" or "write over" older stories. What is unique (and therefore copyrightable) about a particular story, according to Morrison's logic, is the narrative viewpoint and the subjectivities explored rather than the mere existence of similar characters or plots.[83] Morrison's testimony argued for an approach to creative production that emphasized copyright law's ability to promote new artistic productions by re-reading copyright law to restrict its application to the problem of piracy (i.e., wrongful reproduction of copies) as suggested by the early history of copyright law legislation in Anglo-American jurisprudence.

Within Morrison's attempt to shift the theoretical basis of copyright law (*vis-à-vis* the nature of intellectual production), she specifically attacked the Mitchell estate's claim that the stories were "substantially similar" based on her understanding of the racialized nature of subjectivity and experience within the United States during the twentieth century. It was only in a brief passage that Morrison undermined the "colorblind" approach to intellectual property law that the plaintiff had been suggesting. Morrison stated that *"The Wind Done Gone* neither follows nor copies, nor exploits *Gone With The Wind*. What Miss. Randall's book does is imagine and occupy narrative spaces and silences never once touched upon nor conceived of in Mrs. Mitchell's novel: that is the interior lives of slaves and ex-slaves, their alternate views; their different journey."[errors in original][84] Emphasizing the historically-located and dramatically different *racial* subjectivities that each writer brought to her writings and represented in her texts, these two sentences rejected the claim that Mitchell's and Randall's works were substantially similar. Moreover, and of even greater import, it allowed for the possibility of more than one African American version.

For Morrison (and cultural studies scholars as well), therefore, any discussion of similarities between these texts must consider how racial identity

shapes cultural production and consumption. Legal discourse, however, does not at least formally acknowledge such a position. In the decision of the Court of Appeals for the Eleventh Circuit, the Court came close to acknowledging how differing racial subjectivities might shape the story, but it ultimately framed such differing perspectives as secondary to the stylistic and plot differences.[85] The question that Morrison raised is whether Mitchell or any writer could "own" unexamined and probably never considered racial subjectivities. To permit such individual ownership of multiple perspectives of a story constitutes a stunning frustration of public dialogue over sensitive matters such as race, ethnicity, gender, and sexuality.

Within the idea/expression dichotomy, a racial subjectivity could and should constitute a distinctive expression of an idea. Because only individual expressions of ideas are protected by copyright, different expressions of an idea, including one from a different racial subjectivity, should be separately copyrightable (even if the work refers to copyrighted characters). One could argue that such a situation is already governed by the concept of derivative works, which the copyright statute defines as "a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgement, condensation or any other form in which a work may be recast, transformed, or adopted."[86] It is clear that the examples in this lengthy list are mostly concerned primarily with translating or adapting a copyrighted text from one form (say, a novel) to another form (say, a movie) and do not extend to expressions of different *perspectives* that the copyrighted text may have elicited.

Therefore, because *The Wind Done Gone* did substantially more than transfer the story from one form to another, it would not fall within the derivative works category even if the Court found similarities between the two books. The similarities that did exist between the two books allowed Randall to demonstrate the faulty premises on which *Gone With the Wind* stood and offered a foundation for a counter-narrative. In effect, she attempted to create a different—more just—imaginary domain, where some African Americans could imagine themselves within popular culture but free from dominant stereotypes. In many ways, Randall's re-writing of *Gone With the Wind* was the fictional analogue to the revision of literary and historical canons during the 1980s and 1990s. Rather than signaling theft or infringement, *The Wind Done Gone* served as a reminder of the possibility of public dialogue about serious issues. If American studies can demonstrate how audience reception and response is a fundamental part of the democratic enterprise, then a rewriting of copyright law might be accomplished.

Henry Louis Gates Jr.'s testimony built on Morrison's and described how *The Wind Done Gone* exemplified a specifically African American version of parody, known as signifyin'. Gates wrote in his declaration:

> African Americans have used parody since slavery to "fight back" against their masters. The dance called "the cake walk"

> was one of the earliest examples in which black slaves imitated and mocked the dancing practices and dress of white slaveholders and created their own dance out of this parody of the original. The result was so hilarious that it became a national craze at the turn-of-the century . . . . *The Wind Done Gone* is a classic parody, in a long line of literary creations that extend back to the Ancient Greeks. As the definition of parody cited above indicates, parody in literature can only be effective when a previously published work is revised, imitated, riffed, or "signified" upon.

Expanding on Morrison's discussion of creativity, Gates provided a corrective to the traditional paradigm of artistic creation embedded in copyright law. Using parody and its appearance within *African American cultural practices* (a possibility not seriously considered by the Stephens Mitchell Trusts experts, who located parody and satire solely within the writings of European and white Americans), Gates revised the narrative about the creation of artistic products. More importantly for scholars, Gates noted that criticism (what we do as American studies scholars) *requires* that its practitioners evoke and then re-work the ideas and experiences of others. Most significantly, Gates located textual production and consumption within particular discursive communities. He then asserted that "*Gone With the Wind*—especially in its *book form*—is widely regarded by the black community as one of the most racist depictions of slavery and black slaves in American literature."[87] Although a more thorough documentary record would be needed definitively to establish the validity of Gates's claim,[88] it is critical (at least theoretically) to recognize that different racial communities may have dramatically different readings of particular texts and events, which in turn give rise to questions over textual ownership.

Suggesting that racial perspectives should limit the expansive ownership interests conferred by copyright law is not without difficulties. By positing a distinction between white and black subjectivities in the ownership of copyright interests, courts would be required to distinguish between such subjectivities. Moreover, subjectivities and counterpublics frequently overlap, meaning that one person does not simply belong to one discursive sphere and possess a singular subject position.[89] Any simplistic or binary approach to race, gender, class or sexuality would create an inflexible and dogmatic system of conferring copyright protection that thus reifies categories of difference (as such simple approaches have limited the reach of the Fourteenth Amendment).[90] Moreover, there might be some situations in which a white-identified writer might produce a work that attempts to articulate black subjectivities. Rather than provide a prescriptive framework of differences to be acknowledged by copyright law, I propose that an already existing legal test of "substantial similarity" for copyright infringement cases be extended to recognize that the articulation of a different subjectivity,

however constructed and demonstrated, would constitute a distinct work for purposes of copyright. Any other legal doctrine would prove unduly burdensome and restrict the free flow of ideas and cultural criticism. Moreover, such a position would protect writers and authors from piracy, while promoting artistic production and public dialogue.[91]

Conclusions

In May 2002, Alice Randall, Houghton Mifflin, and the Mitchell estate arrived at an out-of-court settlement. According to press releases, Houghton Mifflin will make "unspecified contributions to Morehouse College, a historically black school in Atlanta. In return, the lawyers for Mitchell's estate agreed to stop trying to block sales of Randall's book." Ironically, Randall will retain the derivative rights to her book (meaning that she will control adaptations of *The Wind Done Gone*).

This controversy illustrated the troubling relationship between the imaginary domain, copyright law, and American studies. How should legal discourse distribute the ownership of acts, texts, and objects that provide a foundation for imaginative activities in a heterogeneous American society? These "rights" are extremely valuable and important because they possess the power to control the very acts of meaning making, community building, and value maintenance that all social groups desire and need to ensure their sovereignty and freedom. If distributed primarily to one copyright owner, such "rights" could limit criticism of the original by not allowing writers to respond in a similar format as the original.[92] In other words, a series of academic articles criticizing a popular novel/movie does not have the same power as a novel or film making the same critique. In its decision in this case, the Court of Appeals for the Eleventh Circuit insisted that copyright did not immunize a work from comment and criticism.[93] From this premise, the court argued that *The Wind Done Gone* "is principally and purposefully a critical statement that seeks to rebut and destroy the perspective, judgments, and mythology of *Gone With The Wind*."[94] Moreover, the court acknowledged that by re-framing *Gone With the Wind* from the perspective of a southern slave culture to one produced from an African American viewpoint Randall transformed the story into something new that, if not completely dissimilar, constituted a fair use as a parody. The court, I believe, reached the proper result, but failed to articulate an adequate theoretical basis for its decision.

In this article, I have argued that, because of its understanding of the role of readers and consumption in shaping the meaning and value of texts, American studies must produce scholarship that is relevant to legal discourse and can translate its insights into the language of this discourse. I have tried to augment the ideas/expression dichotomy in order to specify the notion of expression (in the idea/expression dichotomy) by connecting it more tightly to a particular community and/or subjectivity. Moreover, although I am committed to

developing a race and gender conscious jurisprudence consonant with critical race theory, I have not sought to delineate the exact number or types of subjectivities that can or should be protected. Instead, I have argued for a fact-intensive inquiry that examines the overlapping boundaries of experiences and subject positions. Finally, I contend that once the issue of alternative subjectivity, experience, or imaginary domain is raised, copyright owners who claim an infringement should have the burden of proof that their work identifies and develops that alternative subjectivity. By arranging the burden of proof in this way, copyright law would err on the side of the public domain, which the Constitution seems to suggest, instead of property rights.

Notes

1. Complaint, *Suntrust Bank v. Houghton Mifflin Company* 1:10 CV-701-CAP (U.S.D.C. GA 2001) see generally.

2. At least one other book-length parody of *Gone With the Wind* appeared in the 1990s, but it did not challenge the primary racial subjectivity presented and analyzed in *Gone With the Wind*. I was unable to learn whether the Mitchell estate licensed or brought suit against this parody. In either case, it is evidence of the continuing centrality of *Gone With the Wind* in dominant American culture. See Missy D'Urberville, *Today is Another Tomorrow: The Epic* Gone With the Wind *Parody* (New York: St. Martin's Press, 1991).

3. Answer and Affirmative Defense, *Suntrust Bank v. Houghton Mifflin Company* 1:10 CV-701-CAP (U.S.D.C. GA 2001) 8.

4. See *Suntrust Bank v. Houghton Mifflin Company* 268 F. 3d 1257 (11th Cir. 2001).

5. Louis Rubin Jr., "Scarlett O'Hara and the Two Quentin Compsons," *Recasting:* Gone With the Wind *in American Culture*, ed. Darden Asbury Pyron (Miami: University of Florida Press, 1983) 81.

6. See Thomas Cripps, "Winds of Change: *Gone With the Wind* and Racism as a National Issue," *Recasting:* Gone With the Wind *in American Culture*, 137-152.

7. According to Helen Taylor's research, *Gone With the Wind* and its authorized sequels remain popular with at least a portion of the United States and world reading public. Taylor estimates that 5.5 million copies worldwide of *Scarlett: The Sequel to Margaret Mitchell's "Gone With The Wind"* were sold within two months of its release in 1991 (35). *Scarlett*, a 1994 television miniseries, was also a major financial success. Helen Taylor, *Circling Dixie: Contemporary Southern Culture Through a Transatlantic Lens* (New Brunswick: Rutgers University Press, 2001).

The continuing popularity of *Gone With The Wind* can be also demonstrated by the recent opening of the Shaw-Tumblin Collection of artifacts in the *Gone With the Wind* Movie Museum in Marietta, Georgia in June of 2002. See Associated Press, "*Gone With the Wind* Movie Museum Opens in Marietta" *Chattanooga Times* June 16, 2002, NG4. The continued popularity of the Margaret Mitchell House in Atlanta, which receives 50,000 visitors a year, is further evidence of the book/movie's following. See Tray Butler, "The House is on Fire: The Margaret Mitchell House Wants To Be the Heart of the South's Literary Community, But Does its Racial Stigma Stand in the Way?" *Creative Loafing Atlanta*, February 27, 2002. Finally, over the past few years the American Film Institute ranked *Gone With The Wind* as the second greatest film love story of all-time (http://www.afi.com/tv/pdf/passions100.pdf) and the fourth best American film (http://www.afi.com/tv/movies.asp).

8. Alice Randall, *The Wind Done Gone* (New York: Houghton Mifflin, 2001). On the copyright page, Houghton Mifflin attempted to clarify the "ownership" and originality issues by stating: "[t]his novel is the author's critique of and reaction to the world described in Magaret Mitchell's *Gone With the Wind*. It is not authorized by the Stephens Mitchell Trusts, and no sponsorship or endorsement by the Mitchell Trust is implied." The cover makes clear that the book is an "unauthorized parody." In the acknowledgments section, Randall writes that "Margaret Mitchell's novel *Gone With the Wind* inspired me to think" (210).

9. See Toni Morrison, "The Site of Memory," *Inventing the Truth: The Art and Craft of Memoir*, ed. William Zissner (Boston: Houghton Mifflin, 1987) 103-124, and Patricia Williams, "Owning the Self in a Disowned World," *The Alchemy of Race and Rights* (Cambridge: Harvard University Press, 1991) 181-201.

10. In many ways, Randall followed Morrison's suggestion for interrogating and recreating dominant national myths. See Toni Morrison, "The Official Story: Dead Man Golfing," *Birth of*

a Nation'hood: Gaze, Script, and Spectacle in the O.J. Simpson Case, eds. Toni Morrison and Claudia Brodsky Lacour (New York: Pantheon, 1997) vii-xxviii.

11. See Jon-Christian Suggs, *Whispered Consolations: Law and Narrative in African American Life* (Ann Arbor: University of Michigan Press, 2000) and Robert Stepto, *From Behind the Veil: A Study of Afro-American Narrative* (2nd ed., Urbana: University of Illinois Press, 1991).

12. See Betye Saar, *The Liberation of Aunt Jemima*, University of California, Berkeley Art Museum; John Borland, "Rapper Chuck D Throws Weight Behind Napster" *C-Net.com* http://news.com.com/2100-1023-239917.html?legacy=cnet; Jennifer Sullivan, "Chuck D Keys on Notes," *Wired News*, http://www.wired.com/news/culture/0,1284,18317,00.html; and Percival Everett, *Erasure: A Novel* (Hanover, NH: University of New England Press, 2001). For a discussion of Ishmael Reed's parodic strategies to undermine myths within the African American community, see Christian Moraru, "Dancing to the Typewriter: Rewriting and Cultural Appropriation in *Flight To Canada*," *Critique* (Winter 2000) 41.2: 99-114.

13. The difference between these two approaches to the cultural study of intellectual property can be best characterized by comparing Rosemary Coombe's *The Cultural Life of Intellectual Properties* and Siva Vaidhyanathan's *Copyrights and Copywrongs: The Rise of Intellectual Property and How It Threatens Creativity*. Both books are wonderful examples of bold, interdisciplinary scholarship. Coombe's analysis begins with the work that ordinary consumers perform on intellectual properties and how this work shapes the meaning and value of intellectual properties. Vaidhyanathan, on the other hand, considers how authorship is shaped by the pronouncements of courts (and some intellectual property owners). Because of their divergent premises, their analyses reach strongly differing conclusions. Coombe concludes with a discussion of the effect of intellectual property law on the public sphere and the future of democracy. Vaidhyanathan laments the limited possibilities for artistic expression under the current intellectual property regime. The diverging ends of these two inquiries is significant for American studies practitioners who focus on explaining *cultural* processes. Despite his training and expertise in American studies, Vaidhyanathan adopts the individualistic tones of legal discourse that has shaped much copyright law. Rather than criticize Vaidhyanathan, I must admit that my own work has been consistently lured by the siren's song of legal discourse and hope that this article is able to provide some resistance to it. See Coombe, *The Cultural Life of Intellectual Property: Authorship, Appropriation, and the Law* (Durham: Duke University Press, 1998) and Vaidhyanathan, *Copyrights and Copywrongs: The Rise of Intellectual Property and How It Threatens Creativity* (New York: New York University Press, 2001).

14. Legal journals have already published some impressive and interesting articles on the import of the *Suntrust Bank v. Houghton Mifflin* case (This legal case around the status of *The Wind Done Gone*. Suntrust Bank represented the Mitchell Estate, and Houghton Mifflin published Randall's book). Despite the sophisticated understanding of intellectual property law and its relationship to contemporary debates in postcolonial and postmodern theory, these essays do not examine the issues that my article seeks to examine: how intellectual property law can confer ownership rights over subjectivities (particularly minority subjectivities) inconceivable to the original writer. The *Harvard Law Review* casenote "Originality" is particularly prescient in its dissection of the case, but it failed to consider the questions I examine, I think, because those questions fell outside the disciplinary logic of legal discourse. Despite the relative success of critical race theory in challenging the unwritten racialized assumptions of legal discourse, the initial critical writings on the case neglected to consider fully how unconscious racialized assumptions undergird the legal debate around the case. See "Note: Originality," *Harvard Law Review* 115 (May 2002): 1988-2008; "Note: Gone With *The Wind Done Gone*: 'Re-Writing' and Fair Use" *Harvard Law Review* 115 (February 2002): 1193-1216; "Recent Case: Copyright Law - Fair Use Doctrine - Eleventh Circuit Allows Publication of Novel Parodying *Gone With The Wind*," *Harvard Law Review* 115 (June 2002): 2364-2370; and Veronica Soto, "Case Note: The Scale Tips in Favor of Parodists and Freedom of Speech Advocates, As "Other" Version of *Gone With the Wind* Held Fair Use Under Copyright Law: *Suntrust Bank v. Houghton Mifflin Co.*," *Computer and High Technology Law Review* 18 (May 2002) 405-415.

15. A form of copyright existed in Roman Law. Commentators, however, generally locate the primary origin of modern copyright law for Anglo-Americans in England. See Benjamin Kaplan, *An Unhurried View of Copyright* (New York: Columbia University Press, 1967) 2-9.

16. From a literary perspective, William Moddelmog has recently examined how the narratives that grounded the authority of property within American political culture shifted during the early twentieth century. See Moddelmog, *Reconstituting Authority: American Fiction in the Province of the Law, 1880-1920* (Iowa City: University of Iowa Press, 2000).

17. John Locke, *The Second Treatise of Government*, ed. J.W. Gough (rev. ed., Oxford: Basil Blackwell, 1976) 15.

18. Oliver Wendell Holmes, *The Common Law*, ed. Mark DeWolfe Howe (1881; Boston: Little, Brown, 1963) 193.

19. Mark Rose, *Authors and Owners: The Invention of Copyright* (Cambridge: Harvard University Press, 1993) 2.

20. While commonly referenced, this "origin"of copyright in Anglo-American jurisprudence has been called into question by recent scholarship. See Vaidhynathan, *Copyrights and Copywrongs* 40-43; Peter Lindenbaum, "Milton's Contract," *The Construction of Authorship: Textual Appropriation in Law and Literature*, eds. Martha Woodmansee and Peter Jaszi (Durham: Duke University Press, 1994) 175-190; and John Feather, "From Rights in Copies to Copyright: The Recognition of Authors' Rights in English Law and Practice in the Sixteenth Century," *The Construction of Authorship: Textual Appropriation in Law and Literature*, 191-210.

21. In this formative period in England, the issues of racialized subjectivity that I raise latter in the essay are not yet "problems" for copyright law because the number of writers in any one country was a relatively small, culturally and socially homogenous group.

22. See Vaidhynathan, *Copyrights and Copywrongs,* 40-43.

23. Article I Section 8, *The Constitution of the United States* (1787).

24. Vaidhyanthan pointed to several passages in the papers of Thomas Jefferson that suggested he doubted the wisdom of giving even limited monopolies in copyrights and patents. Vaidhynathan, *Copyrights and Copywrongs,* 23. See also *The Writings of Thomas Jefferson*, vol 7 (Washington: Thomas Jefferson Memorial Association, 1904) 93-99 and 444-453.

25. Under common law, a writer did have exclusive ownership over his or her texts before they entered the public domain and they remained personal, tangible properties.

26. In his *Letters of the Republic: Publication and the Public Sphere,* Michael Warner argued that the emergence of the public sphere in the thirteen colonies provided an opportunity for new political arrangements, particularly republican forms of government. See Warner, *Letters of the Republic: Publication and the Public Sphere* (Cambridge: Harvard University Press, 1990). Responding to Warner's work, Grantland Rice argued that (1) there was considerable nervousness attendant to the growth of the public sphere because it constituted a major shift in political authority and (2) the public sphere could have been an effect of the economic and political arrangements (rather than a cause of them). See Grantland Rice, *The Transformation of Authorship in America* (Chicago: University of Chicago Press, 1997).

27. See *Wheaton v. Peters* 33 U.S. 591 (1834).

28. Meredith McGill, "The Matter of the Text: Commerce, Print Culture, and the Authority of the State in American Copyright Law," *American Literary History* 9:1 (1997) 142-43

29. Probably the most influential scholarship in this model for American studies has been Janice Radway, *Reading the Romance: Women, Patriarchy, and Popular Literature* (1984, Chapel Hill: University of North Carolina Press, 1991).

30. *Stowe v. Thomas* 1853 U.S. App. Lexus 751-752 (1853).

31. In 1870, Congress altered copyright law and extended the protection of copyright to dramatizations, performances, and translations. If this law had been in effect during the Stowe case, the result probably would have been different.

32. Some prominent examples include: Richard Wright, *Uncle Tom's Children* (Reissue Edition, New York: Harper, 1993) and James Baldwin, "Everybody's Protest Novel," *Notes of a Native Son* (New York: Bantam, 1964) 9-17.

33. Martin Buinicki, "'mere articles of trade': Literary Property, Copyright, and Democracy" *James Feinmore Cooper Society Miscellaneous Papers* 14 (August 2001) 1-6. http://www.oneonta.edu/external.copper/articles/ala/2001ala-buinicki.html.

34. Homestead's account of Fanny Fern suggests a path not taken by this essay. Perhaps it could be profitable to think of *Gone With the Wind* more as a trademark than a copyrighted text because trademarks can enter the public domain if they become too successful. For instance, kleenex lost trademark protection because it came to be *used* as a synonym for tissues. (In a recent case, the Court of Appeals for the Ninth Circuit refused to allow the trademarked status of "Barbie Dolls" to insulate the dolls from criticism in a pop song. See *Mattel v MCA Records* 2002 U.S. App. Lexis 14821 (U.S. 9th Cir. 2002)). Perhaps the abundance of references to *Gone With the Wind* have made it a generic product, no longer the "property" of any one person. While a provocative idea, I think that such an understanding of copyright law would be even less likely to be accepted by courts than what I am suggesting in my essay. Moreover, such a development of copyright law would not enable lawyers and judges to develop better strategies to understand and regulate the relationship between race and intellectual property. See Melissa Homestead, "'Every Body Sees the Theft': Fanny Fern and Literary Proprietorship in Antebellum America," *The New England Quarterly* 74, no. 2 (2001) 210-238.

35. It should be noted, with some irony, that the United States, when recently confronted with widespread piracy of copyrighted materials, has pushed for stronger intellectual property rights laws abroad, was slow to adopt those same measures when it was a part of the "developing" world. See James Barnes, *Authors, Publishers, and Politicians: The Quest for Anglo-American Copyright Agreement, 1815-1854* (Columbus: Ohio State University Press, 1974) 49-51.

36. Prior to 1891, people in the United States were more likely to read books written by foreigners than books by their countrymen primarily because of the availability of inexpensive,

pirated copies of European books. Similarly, cheap copies of books by writers from the United States were sold in Europe. This should remind scholars of the nineteenth century that the national boundaries that frequently serve as dividing lines in the study of literature and culture may not be terribly useful in understanding literature and culture of a particular period in a particular place because texts lose their connection to a given people or place when they enter the stream of commerce. Ezra Greenspan, Melissa Homestead, and Martin Buinicki, "Roundtable Discussion: Copyright and the Construction of 19th Century American Authorship and Literature" American Literature Association, May 31, 2002.

37. See Vaidhynathan, *Copyrights and Copywrongs*, 50-55 and Michael Demming, *Mechanic Accents: Dime Novels and Working-Class Culture in America* (New York: Verso, 1987) 12-13.

38. Vaidhynathan pointed out that there was considerable irony in Twain's arguments for copyright protection given his penchant for "borrowing" stories. See Vaidhynathan, *Copyrights and Copywrongs*, 55-67 & 70.

39. Stephen Carter, "Does it Matter Whether Intellectual Property is Property?" *Chicago-Kent Law Review* 68 (1993) 715.

40. Not all neo-conservative law scholars agreed with his analysis. For example, Richard Posner has written a more theoretically-inflected article that raised many of issues discussed here and arrives at conclusions similar to my own. See Richard Posner, "The Law and Economics of Intellectual Property," *Daedalus* (Spring 2002) 5-12.

41. In addition to the incursions of property analysis into intellectual property law, contract law is increasingly regulating the use and dissemination of intellectual property. Peter Jazsi described such contract-based market solutions to the copyright law as "metacopyright." See Peter Jazsi, "Is This the End of Copyright As We Know It" (1997) http://webserver.law.yale.edu/censor/jaszi.htm. "Metacopyright" occurs most commonly in computer software and internet commerce with "shrink-wrap" and "click-on" licensing that extends the boundaries of traditional copyright law and limits what consumers can do with a product. Metacopyright can produce results that appear contrary to my analysis because contract law can limit how consumers use a product in ways that go beyond the provisions of intellectual property law. It also can shape the production of cultural texts. For instance, *Lingua Franca* detailed how contractual terms between Disney (the copyright owner of Winnie-the-Pooh) and Dutton publishing limited the terms on which Dutton (who had a license for certain images of the copyrighted characters) could permit the publications of those images. See Kate Julian, "How Milne Works," *Lingua Franca* 11.7 (October 2001). While the article may seem to suggest that copyright law is what limits the publication of the photos in Frederick Crews *The Postmodern Pooh*, the specific terms of the contract between Disney and Dutton is the real culprit.

42. A notable and significant exception to this generalization is Rosemary Coombe. See Coombe, *The Cultural Life of Intellectual Property*.

43. For examples of the role of American studies scholarship and activism, see Alice Kessler-Harris, "Cultural Locations: Positioning American Studies in the Great Debate," *American Quarterly,* Vol 44, No. 3 (September 1992); Lawrence Levine, *The Opening of the American Mind: Canons, Culture, and History* (Boston: Beacon Press, 1996); and Gary Nash, Ross Dunn, and Charlotte Crabtree, *History on Trial: Culture Wars and the Teaching of the Past* (New York: Vintage, 2000). George Sanchez, however, has argued that American studies has not done enough to promote multiculturalism and has proposed some ways to create an even more multicultural American studies. See George Sanchez, "Creating the Multicultural Nation: Adventures in Post-Nationalist American Studies in the 1990s," *Post-Nationalist American Studies*, ed. John Carlos Rowe (Berkeley: University of California Press, 2000) 40-62.

44. Radway, *Reading the Romance*; Demming, *Mechanic Accents*; Herman Gray, *Watching Race: Television and the Struggle for "Blackness"* (Minneapolis: University of Minnesota Press, 1995); Lisa Lowe, *Immigrant Acts: On Asian American Cultural Politics* (Durham: Duke University Press, 1996); and Rosaura Sánchez, *Telling Identities: The Californio Testimonios* (Minneapolis: University of Minnesota Press, 1995).

45. Paul Lauter recently divided this point into two working principles of American studies methodology. First, Lauter noted that American studies "focus[es] less on the formal qualities and structures of a text or material object and more on why it emerges as it does in its particular moment, how the forms of production, distribution, and consumption materialize–what forces, social, economic, aesthetic, technological, have come together to produce this thing in this place at this time?" (15) Second, he observed that for American studies textuality is explored through "the variety of forms people construct for the many purposes to which we devote ourselves." (16) Paul Lauter, *From Walden Pond to Jurassic Park: Activism, Culture & American Studies* (Durham: Duke University Press, 2001).

46. Cornell's approach, due to its Lacanian influences, explored how individuals are created *within* the social constructions of various identifications *before* they enter the public sphere. In other words, Cornell examined how the private/public dichotomy, so evident in both copyright law and in the cultural studies derivations of Habermas's notion of the public sphere, itself obscures

the ways that subjectivity and personal longings and desires are already the product of the individual's interaction with socially-based images and values. In applying Cornell to copyright law, I seek to show how the public/private framework, as currently conceived, fails to account for the creation of the public and the private. Moreover, within much discussion of the public sphere how citizens decide who they are and what their interests are is not examined, theorized, or discussed.

47. Drucilla Cornell, *The Imaginary Domain: Abortion, Pornography, and Sexual Harassment* (New York: Routledge, 1995). For the development of Cornell's thinking, see Drucilla Cornell, *Beyond Accommodation: Ethical Feminism, Deconstruction, and the Law* (New York: Routledge, 1991) and Drucilla Cornell, *Transformations: Recollective Imagination and Sexual Difference* (New York: Routledge, 1993). Arjun Appadurai has also developed an understanding of the social imagination. He wrote: "*the imagination as a social practice*: No longer mere fantasy (opium for the masses whose real work is elsewhere), no longer simple escape (from a world defined principally by more concrete purposes and structures), no longer elite pastime (thus not relevant to the lives of ordinary people) and no longer mere contemplation (irrelevant for new forms of desire and subjectivity), the imagination has become an organized field of social practices, a form of work (both in the sense of labor and culturally organized practice) and a form of negotiation between sites of agency ('individuals') and globally defined fields of possibility" (273-4). Appadurai, "Disjuncture and Difference in the Global Cultural Economy," *The Phantom Public*, ed. Bruce Robbins (Minneapolis: University of Minneapolis Press, 1993) 269-295.

48. See Judith Butler, *Bodies That Matter: On the Discursive Limits of "Sex,"* (New York: Routledge, 1993) 27-31.

49. See Mari Matsuda, Charles Lawrence III, Kimberlé Crenshaw, and Richard Delgado, *Words That Wound: Critical Race Theory, Assaultive Speech, and the First Amendment* (Boulder: Westview Press, 1993).

50. Michel de Certeau, *The Practice of Everyday Life*, trans. Steven Rendall (Berkeley: University of California Press, 1984) 170.

51. Most notably, Henry Jenkins, *Textual Poachers: Television Fans and Participatory Culture* (New York: Routledge, 1992).

52. "Created," 17 U.S.C. section 101.

53. Jenkins, *Textual Poachers*, 279.

54. In 1990, the Native American Graves Protection and Repatriation Act (NAGPRA) extended a property right to Native American communities in *tangible property*. For examples of some models to protect the *intellectual* property of Native American communities, see David Jordan, "Square Pegs and Round Holes: Domestic Intellectual Property Law and Native American Economic and Cultural Policy: Can It Fit?" *American Indian Law Review* 25 (2000/2001) 93-115. and Angela Riley, "Recovering Collectivity: Group Rights to Intellectual Property in Indigenous Communities," *Cardozo Arts and Entertainment Law Journal* 18 (2000) 175-225.

55. See 17 U.S.C. section 201.

56. In *Childress v. Taylor* (1991), the Court of Appeals for the Second Circuit argued that "it seems more consistent with the spirit of copyright law to oblige all joint authors to make copyrightable contributions, leaving those with non-copyrightable contributions to protect their rights through contract" (507). In other words, individual joint authors are entitled to participate in joint authorship only if they can identify a portion of the work that they themselves contributed and could claim copyright independently of the group. *Childress v. Taylor* 945 F. 2d 500 (2nd Cir. 1991).

57. For example, the Disney corporation has withheld copyright permissions to make it difficult for scholars and intellectuals to publish criticism of their productions. See Henry Giroux, *Fugitive Cultures: Race, Violence, & Youth* (New York: Routledge, 1996) footnote 6, 219. The battles over the intellectual property of Martin Luther King Jr. is an apt example within African American studies. Dexter Scott King wrote: "My family and I have repeatedly been attacked in the media and unfairly accused in recent years of trying to profit from my father's legacy. The intention behind our efforts to protect his intellectual property—his name, image, writings, speeches, and recorded voice—have been characterized and distorted. In fact, as my father did during his lifetime, we have simply been protecting this property in order to maintain, preserve and protect the integrity of his message" (198). It probably need not be noted, but King's intellectual property is not coextensive with his message. Thus, attempts to authorize the proper use of King is not the same as protecting against piracy. Nonetheless, this is precisely the type of ownership that Intellectual Property Management has sought to accomplish in its many lawsuits. Dexter Scott King with Ralph Wiley, *Growing Up King: An Intimate Memoir* (New York: Warner, 2003).

58. I am blending Raymond Williams's discussion of hegemonies (i.e., dominant, residual, and emergent) with Drucilla Cornell's conception of the imaginary domain. While I do not think that Cornell's description of the imaginary domain stood above or beyond cultural or social debates, standing alone it might appear as if it were. Similarly, Williams's discussion of hegemonies did not necessarily foreclose an engagement with the imaginary domain, but his work did not appear to continue the project of protecting individual rights, which is the *raison d'etre* of liberal

legal discourse. Perhaps because of his Marxist framework, Williams's terminology standing alone would seem insufficient to describe the generative potential of the imaginary domain concept that mediates between the individual and the social. See Raymond Williams, *Marxism and Literature* (New York: Oxford University Press, 1977).

59. See Allan Bloom, *The Closing of the American Mind* (New York: Simon & Schuster, 1987); Dinesh D'Souza, *Illiberal Education* (New York: Free Press, 1991); Roger Kimball, *Tenured Radicals* (New York: Harper & Row, 1990); and Martin Anderson, *Impostors in the Temple* (New York: Simon & Schuster, 1992).

60. Jed Rubenfeld, the lead attorney for Houghton Mifflin and Alice Randall, published an article that explored how copyright interferes with the "Freedom of Imagination." His approach offered an exceedingly general explanation for the problem presented in *The Wind Done Gone* without addressing the difficult cultural questions that arose in the case. In what follows, I try to offer a solution that merges contemporary legal discourse with current theories within cultural studies. See Rubenfeld, "The Freedom of Imagination: Copyright's Constitutionality," *Yale Law Journal* 112:1 (October 2002) 1-60.

61. For example, in a recent case, copyright's opponents challenged the constitutionality of recent legislation that increased the amount of time a work is protected by copyright. They argued that increasing the period of protection from the life of the author plus 50 years to the life of the author plus 70 years violated the Constitutional section that allows Congress to limit monopolies for copyrighted texts and violated the First Amendment. They lost because their arguments seemed too radical for a majority of justices. See *Eldred v. Ashcroft* 2003 U.S. Lexis 751.

62. In postcolonial theory, there has been considerable writing on the practice of mimicry, which seeks to destabilize the colonial regime. See Homi Bhabha, *The Location of Culture* (New York: Routledge, 1994). While some law review articles do apply the postcolonial framework to this copyright infringement case, I am not sure if Randall's work can be seen as anything but overtly critical. See "Note: Originality," *Harvard Law Review*. Mimicry, on the other hand, appears to respect conventions but in fact subverts them. In my reading of *The Wind Done Gone*, there is very little that appears to respect the original in any meaningful way.

63. Robin Dougherty, "Alice Randall Shaking Up the Plantation," *Boston Globe*, 8 July 2001: D4. In other interviews, however, she explained that she wrote so that her daughter would not have to grow up with the stereotypes that Randall and her grandmother were forced to endure. See Susan Larson, "How Alice Randall Turned an American Icon on its Head in *The Wind Done Gone*," *New Orleans Times Picayune* 21 March 2002: Living, 1.

64. *Suntrust Bank v. Houghton Mifflin* 136 F. Supp. 2d 1357, 1376.

65. It is crucial to remember that Houghton Mifflin was the primary defendant in this case, so they were the ones who paid the attorneys arguing this case. Houghton Mifflin could have just as easily been the plaintiff bringing suit against another publisher for violating one of their copyright. Similarly, Houghton Mifflin does not publish books by African Americans exclusively. Thus, their defense of Randall's work should not be considered as the sole or authentic African American voice regarding the relationship between African American culture and copyright law.

66. A number of critics found the book wanting as a parody, suggesting that another characterization may have better served the book in terms of winning it a better reception. See Mary Mitchell, "This Novel 'Done Gone' to the Dogs," *Chicago Sun-Times* (July 1, 2002) Show 12; and Margaret Quamme , "Soft Breeze Would Diffuse Weak *Wind Done Gone*," *Columbia Dispatch* (June 26, 2001) 8D.

67. At least one major media article noticed this dilemma. Paul Gray realized that (1) *The Wind Done Gone* fit uneasily within the category of parody and that (2) the book nonetheless seemed like a fair use because of its very different purposes and achievements from *Gone With the Wind*. Like this article, Gray suggested that limiting fair use to parodies but not critical rewritings seems illogical and goes against the grain of copyright law. The Court of Appeals in its final decision, however, relied on the equation of parody as fair use to permit Randall's rewriting of *Gone With the Wind*. See Paul Gray, "The Birth of a Novel: Is a Black Version of *Gone With the Wind* parody or plagiarism? And Why You Should Give a Damn," *Time* (May 7, 2001) 74. Commentaries that too quickly jumped from copyright law to the First Amendment missed the subtle ways that copyright law already balances free speech and criticism within its discursive structure. For an example, see "Gone With the First Amendment" *New York Times* (May 1, 2001) A22.

68. Another major example would be the regulation of sampling within rap music. See Neela Kartha, "Digital Sampling and Copyright Law in a Social Context: No More Color Blindness!" *University of Miami Entertainment and Sports Law Review* 14 (Fall 1996/ Spring 1997) 218-242.

69. Alice Randall's lawyers argued this point as follows: "[t]he literary expertise that is critical to the resolution of the issues before the Court is parody, particularly as expressed in the form of social and political comment couched in African American humor. None of the Plaintiff's [the Stephens Mitchell Trust] experts is qualified as to the latter; only one is qualified as to parody. Plaintiff's experts thus do not have knowledge in the 'relevant field.' See "Defendant's

Supplemental Memorandum in Reply to Plantiff's Expert Affidavits," *Suntrust Bank v. Houghton Mifflin*, 2-3.

70. Ironically, it was a conservative critique of *The Wind Done Gone* published in the ultra-conservative *National Review* that acknowledged that "[r]ace, not intellectual property, is the overriding issue" (64). Although Florence King adamantly disagreed that *Gone With the Wind* was a racist book that omitted African American perspectives, she clearly understood that the controversy focused on the relationship between race and creativity, not a "pure" or "colorblind" discussion of copyright law. See Florence King, Untitled Column, *National Review* (May 14, 2001) 64.

71. The difference in racial subjectivities between Mitchell and Randall may have distinguished this case from the situation in *Rogers v. Koons*, in which Rogers brought a successful copyright infringement against Jeffery Koons for his sculpture that imitated and mocked the banality of one of Roger's photographs. Both Rogers and Koons were "white" artists. Although the Second Circuit dismissed the creative efforts of Koons (and thus dismissed his claim of originality based on its—limited—understanding of aesthetics), the subjectivities brought to bear in the two works came from artists with relatively similar subject positions. Thus, it was harder for a court to see a difference between their works. See Marlin Smith, "The Limits of Copyright: Property, Parody, and the Public Domain," *Duke Law Journal* (April 1993) 1233-1272.

72. Affidavit of Gabriel Mottola, *Suntrust Bank v. Houghton Mifflin*, 3.

73. Affidavit of Alan Lelchuk, *Suntrust Bank v. Houghton Mifflin*, 2-3.

74. Affadavit of Kevin Anderson, *Suntrust Bank v. Houghton Mifflin*, 3.

75. Diminution of *value* resulting from changes in audience perception of a text is not and cannot become part of the test to decide whether copyright infringement has occurred. Because value is determined by the desires of the marketplace, there is no natural baseline with which to establish what is the "natural" level of desire for a product. What can be measured is the effect of substituting pirated products on the sales or profits of the "real thing." If sales of a book change because of shifting notions of quality or because of a celebrity endorsement, this is not an actionable matter. If *The Wind Done Gone* convinces the public that *Gone With the Wind* is a racist or racialized text, that is not the same as pirating the story even if it diminishes the value of *Gone With the Wind*. Similarly, if opponents of Indian mascots convince the American public that such copyrighted and trademarked mascots constitute moral offenses and violations of tort law, that is not a copyright violation. If it were, then any critique that harmed the "value" of a text might constitute an infringement if it actually mentioned or summarized the object under criticism.

76. *Gone With the Wind* focused almost exclusively on the subjectivity of Scarlett O'Hara. Most white characters and all the black characters in the novel constitute mere objects in Scarlett's struggle to find wealth and romance. To suggest that Mitchell, thus, owned such unexamined (and most likely, never-considered) subjectivities would in effect protect her work from criticism. That the authorized derivative work based on *Gone With the Wind* continued to neglect the subjectivities of African American characters and the responses of African American readers suggests that such a work was not one that Mitchell, her hers, or Alexandra Ripley had considered and was thus beyond the scope of what the copyright owners understood as the imaginary terrain their copyright protected. See Alexandra Ripley, *Scarlett: The Sequel to Margaret Mitchell's Gone With The Wind* (New York: Warner, 1991).

77. Affidavit of Louis Rubin Jr., *Suntrust Bank v. Houghton Mifflin*, 4

78. For example, the San Francisco Music Box company sells 13 different music boxes depicting scenes from the book/movie (ranging from $50.00 to $80.00 each). The first *Gone With the Wind* music box in their catalog depicts Mammy arranging Scarlett's hair. See While not conclusive evidence, Amazon.com currently publishes 360 movie and 410 book customer reviews and ranks each as fairly strong sellers, despite their relative age in the marketplace. The 360 movie reviews give an average mark of 4.5 out of 5 (in terms of its excellence, 5 being the highest possible ranking) and it ranks as the 434th most purchased movie–not bad for a movie that is over 60 years old–on amazon.com. See http://www.amazon.com/exec/obidos/ASIN/B00004RF96/qid=1026156599/sr=8-1/ref=sr_8_1/103-1989558-1879068. The 410th book reviews give an average mark of 5 out of 5 for the book. The book is ranked as the 3,652 bestseller on amazon.com. http://www.amazon.com/exec/obidos/ASIN/0446365386/qid=1026156599/sr=8-4/ref=sr_8_4/103-1989558-1879068.

79. A counter argument to this point is that the Stephens Mitchell estate has made considerable efforts to maintain the book's central role in American culture. It is unclear, however, why such *management* of copyrighted properties deserves the same treatment as the *creation* of such properties. Given the origins of copyright in the United States and the country's apparent high regard for capitalism and the marketplace, there is no reason to treat such an investment differently from other marketing efforts, which do not enjoy the right of limited monopoly. Also, copyright law, at its base, is designed to protect against piracy. There is considerable danger in lengthening copyright protections because as they increase, they do not protect against piracy so much as they limit creativity and appropriate as profits the net-increase in the value of certain

texts from the work that critics, intellectuals, and readers do in continuing the legacies of books such as *Gone With the Wind.*

80. Signers of the letter of support for Randall's *The Wind Done Gone* include: Ben Bagdikian, John Berendt, Robert Brown, Catherine Clinton, Dennis Dickerson, Steve Earle, John Egerton, Shelby Foote, Larry Griggin, Rita Goldberg, Adam Hochschild, Reginald Hudlin, A. Yvette Huginnie, Linda Hutcheon, Charles Johnson, Suzanne Jones, Ward Just, Nick Kotz, Michael Kreyling, Harper Lee, William S. Longwell, Myra Longwell, James Alan McPherson, Larry McMurtry, Christian Moraru, Lucius Outlaw Jr., Nell Painter, Shannon Ravenel, Arthur Schlessinger Jr., and Andrea Simpson. See "Letter of Support," *Suntrust Bank v. Houghton Mifflin.*

81. Declaration of Toni Morrison, *Suntrust Bank v. Houghton Mifflin*, 2.

82. Toni Morrison, "Unspeakable Things Unspoken: The Afro-American Presence in American Literature," *Michigan Quarterly Review* 28, no. 1(Winter 1989) 1-34 and Harold Bloom, *The Anxiety of Influence: A Theory of Poetry* (New York: Oxford University Press, 1973).

83. Richard Wright identified "perspective" as one of the key elements of African American literature that distinguished it from other *American* literatures. (50-51) Following this reasoning, it should be clear that if "perspective" is a unique characteristic of African American literature, then copyright law should acknowledge such generic and categorical distinctions. See Richard Wright, "Blueprint for Negro Writing," *African American Literary Theory: A Reader*, ed. Winston Napier (New York: New York University Press, 2000) 45-53. In later years, Wright argued that the persistence of something identifiable as African American literature only demonstrated the "uniqueness" of the African American experience from that of other Americans. See Richard Wright, *White Man, Listen!* (HarperPerennial Edition, New York: HarperCollins, 1997) 108-109.

84. Declaration of Toni Morrison, *Suntrust Bank v. Houghton Mifflin*, 2.

85. See *Suntrust Bank v. Houghton Mifflin* 1269-1272.

86. "Derivative work," 17 U.S.C. Section 101.

87. Declaration of Henry Louis Gates Jr., *Suntrust v. Houghton Mifflin*, 2.

88. Although it does not fully realize its thesis, Condé's "Some African-American Fictional Responses to *Gone With the Wind*" provided some evidence that African American have attempted to respond to Mitchell's portrayal of slaves. See Mary Condé, "Some African-American Fictional Responses to *Gone With the Wind*," *Yearbook of English Studies* 26 (1996) 208-217.

89. Harold Cruse astutely noticed this problem in the 1960s in his *The Crisis of the Negro Intellectual: A Historical Analysis of the Failure of Black Leadership*, in which he argued that the people who served as African American intellectuals had lost touch with ordinary or average African Americans and thus limited their ability to articulate the claims of such ordinary folks or to produce social change. Thus, it would be a grave mistake to allow certain portions of a community to copyright the entire community's response. See Cruse, *The Crisis of the Negro Intellectual: A Historical Analysis of the Failure of Black Leadership* (1967, New York: Quill, 1984).

90. See Kimberlé Crenshaw, "Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color," *After Identity: A Reader in Law and Culture*, eds. Dan Danielsen and Karen Engle (New York: Routledge, 1995) 332-354.

91. Lawrence Lessig, a professor of law who studies copyright issues, used *The Wind Done Gone* controversy to further his argument that copyright law needs to return to the Constitutional schema's protection for "limited times" to encourage more robust public debate. While I do not disagree with his general principle (many of the scholars cited in this essay also suggest similar reforms), I think that he missed the real significance of the controversy. For Lessig, copyright law must remain "colorblind" and "gender-neutral." I am arguing for a jurisprudence that follows the general framework of copyright law, but can work to promote dialogues about difference in American culture. Lessig's prescription would only accomplish this after the limited time period has run, not during the initial period when the copyrighted work may have its strongest influence. Lawrence Lessig, "Let the Stories Go," *New York Times* (April 30, 2001) A19.

92. Pat Conroy's declaration, which humorously outlined his failed attempts to write a sequel for the Stephens Mitchell Trust, perhaps more than any other document demonstrated how copyright holders who hold particular social views could use their copyright to stifle dissent. Conroy discussed how the Trust would forbid potential sequel writers to use any multi-racial characters in their books or to question the sexuality of any of the characters in the book as Conroy had proposed. He also describes how the novel was not merely the property of Mitchell's heirs, but the intellectual inheritance of all Americans, whether they wished it to be so or not. See "Declaration of Pat Conroy," *Suntrust v. Houghton Mifflin*, 1-3.

93. *Suntrust v. Houghton Mifflin*, 268 F. 3d, 1257, 1265.

94. *Suntrust v. Houghton Mifflin* at 1270.