

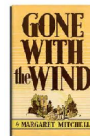
## What's fair in fair use?

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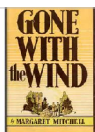
## Fair or Unfair?: *The Wind Done Gone*

Margaret Mitchell's 1936 novel tells its bestselling story of the Civil War South through the story of Scarlett O'Hara

Alice Randall's *The Wind Done Gone* (2001) recounts the same episodes through the eyes of "S"'s slave-born half-sister, Cynara



## Fair or Unfair?:



Mitchell's arguments:

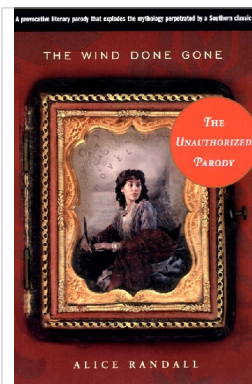
- Copying, substantial similarity
- Lots of the work was used
- This is going to hurt the market
  - Especially the market for derivative works
- This isn't parody, but satire
- Encourage authors with control over works

Randall's arguments:

- Transformative
- Parody, commentary, mocking -
- Used only enough to conjure up the original
- No effect on market for the book
- Encourage creative criticism – furthers copyright's goals



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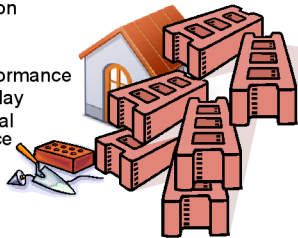


1. Purpose and character of the use?
2. Nature of the copyrighted work?
3. Amount and substantiality of portion used?
4. Effect on the market?

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## Author's benefit

- Exclusive rights over original expression
  - Reproduction
  - Derivative
  - Distribution
  - Public Performance
  - Public Display
  - Public Digital Performance



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## Public benefit

- Creation and distribution of new works
- Access to ideas
- First sale
- Fair use of expressive elements



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## Litigating Infringement

- Plaintiff must prove:
  - Ownership of a valid copyright
  - Infringement of an exclusive right
    - if Reproduction:
      - Copying
      - Unauthorized appropriation of copyrightable expression
- Defendant may show “authorization” by permission or by law

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## Authorization by law

includes

- First Sale, § 109
- Library or archive, § 108
- Compulsory “cover” license, § 114

Most general:

- Fair Use, § 107

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## First Sale, § 109.

- (a) Notwithstanding the provisions of section 106(3), the owner of a particular copy or phonorecord lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord.
- Does not apply to sound recordings or software.

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## § 107 Limitations on exclusive rights: Fair use

- The fair use of a copyrighted work... for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright... [T]he factors to be considered shall include
  - (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
  - (2) the nature of the copyrighted work;
  - (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
  - (4) the effect of the use upon the potential market for or value of the copyrighted work.
- The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

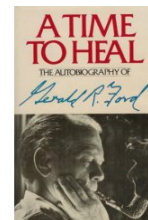
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## The Four Factors

1. purpose and character of the use
2. nature of the copyrighted work
3. amount and substantiality of the portion used
4. effect of the use upon the potential market for or value of the copyrighted work

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## Harper & Row v. Nation

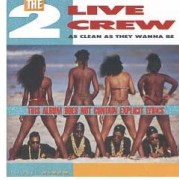
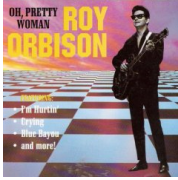


**The Nation.**

Purpose and character of the use  
Nature of the copyrighted work  
Amount and substantiality of portion used  
Effect on the market

"the Framers intended copyright itself to be the engine of free expression" 12

## Campbell v. Acuff-Rose



- Purpose and character of the use
  - Nature of the copyrighted work
  - Amount and substantiality of portion used
  - Effect on the market
- "When parody takes aim at a particular original work, the parody must be able to 'conjure up' ... that original"

[link](#)

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## Campbell v. Acuff-Rose

- Listen to the songs here:
- [http://ccnmtl.columbia.edu/projects/law/library/cases/case\\_campbellacuff.html](http://ccnmtl.columbia.edu/projects/law/library/cases/case_campbellacuff.html)

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## The Four Factors

1. the purpose and character of the use
  - profit/nonprofit
  - transformative use
2. the nature of the copyrighted work
  - fact/fiction
3. the amount and substantiality of the portion used
  - proportion, "heart"
  - used only so much as necessary
4. the effect of the use upon the potential market for or value of the copyrighted work
  - substitution
  - licensing market

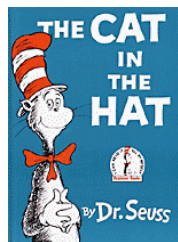
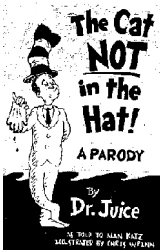
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## The Four Factors

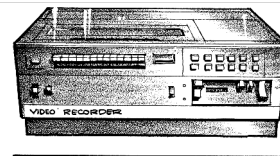
- Fair use is not a numerical sum or tallying of votes. A strong showing of transformative use or a minimal effect on the market can be enough.

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## Fair Parody or Unfair Satire?



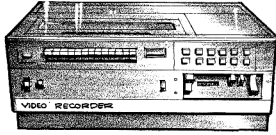
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ON WHICH ITEM HAVE THE COURTS RULED THAT MANUFACTURERS AND RETAILERS BE HELD RESPONSIBLE FOR HAVING SUPPLIED THE EQUIPMENT?

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## Sony v. Universal (“Betamax”)



Is Sony liable for users' activity?

"It need merely be capable of substantial non-infringing use."

Are users infringing?

- Purpose and character of the use
- Nature of the copyrighted work
- Amount and substantiality of portion used
- Effect on the market