

# *Art as Innovation:*

## *“The Wind Done Gone” Case*

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### Introduction

On October 10, 2001, the Eleventh Circuit handed down a decision, *SunTrust v. Houghton Mifflin*,<sup>1</sup> that involved an unauthorized sequel to the classic novel *Gone with the Wind* (GWTW). Representing the estate of original author Margaret Mitchell, plaintiffs contended that the new book, entitled *The Wind Done Gone* (TWDG), took excessively from the original novel.<sup>2</sup> The defendants portrayed the book as a critique of the portrayal of ante-Bellum slavery in the original and a fair use parody under 17 U.S.C. 107. Based on definitions of parody and satire, and considerations of market substitution, excessive borrowing, and “conjuring up”, the District Court upheld the Mitchell Estate and granted a preliminary injunction.<sup>3</sup> On appeal, the Eleventh Circuit vacated the injunction. The case settled in May for an undisclosed amount. Had the matter continued, damages might yet have been assessed on the publishers of the new work.

Legal theorists may now debate the wisdom of the decision. For market advocates with a less metaphysical bent, *Suntrust* was a waste. The great contest between free speech and copyright was played before two Federal Courts now limited by the present fair use doctrine. However nuanced the doctrine may appear, judges were confined to choosing between two fundamentally unattractive options -- injunction and free use.<sup>4</sup>

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<sup>1</sup>268 F. 3d 1257 (11<sup>th</sup> Cir. 2001).

<sup>2</sup>*Id.*, 1259.

<sup>3</sup>136 F. Supp. 2d 1357, 1363 (2001).

<sup>4</sup>A. Kozinski and C. Newman, What’s So Fair about Fair Use?, J. COPYR. SOC’Y 513, 525 (2000).

## **Rules without Economics**

Based on differing interpretations of *Campbell v. Acuff-Rose*,<sup>5</sup> the two Courts in *Suntrust* differed with respect to the fundamental considerations regarding acceptable conjuring of original works and the nature of parody. The District Court found that Ms. Randall's takings of the original were excessive; the book used "fifteen fictional characters from [GWTW], incorporating their physical attributes, mannerisms, and the distinct features that Ms. Mitchell used to describe them, as well as their complex relationships with each other. Moreover, the various ... settings, characters, themes, and plot of [TWDG] closely mirror those contained in [GWTW]." <sup>6</sup> The Circuit Court agreed that the first half of Ms. Randall's book was largely an "encapsulation of [GWTW that] exploits its copyrighted characters, story lines, and settings as the palette for the new story."<sup>7</sup> However, the Court offered no answer to the primary legal question of whether this conjuring was excessive.<sup>8</sup>

Moreover, the author's stated original intent, which extended to a general social and historical criticism of the American South, was beyond the proper domain of parody.<sup>9</sup> The Court then held that TWDG is a "specific criticism of and rejoinder to the depiction of slavery, and the relationships between blacks and whites, in GWTW".<sup>10</sup> It found that *Campbell v. Acuff Rose* was ambiguous on whether this is a protected parody; "the [Supreme] Court suggests that the aim of parody is 'comic effect or ridicule', but it then proceeds to discuss parody more expansively in terms of its 'commentary' on the original. *Campbell*, [*supra* note 6], at 580 . We choose to take the broader view."<sup>11</sup>

Had they appropriate authority, the two Courts actually might have arrived at a mutually beneficial resolution. The District Court recognized that the

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<sup>5</sup>510 U.S. 569 (1994).

<sup>6</sup>*Supra* note 3, 1367.

<sup>7</sup>*Supra* note 1.

<sup>8</sup>"Based on this record at this juncture, we cannot determine in any conclusive way whether 'the quantity and value of the materials used' are reasonable in relation to the purpose of the copying." *Id.*, 1274.

<sup>9</sup>*Id.*, 1378.

<sup>10</sup>*Id.*, 1268-9.

<sup>11</sup>*Id.*, 1268

copyright owners administered a well-established market for licensed derivatives, including two sequels.<sup>12</sup> The Circuit Court too acknowledged the presence of a licensing market, although it did not (or could not) enforce royalties based on conceivable benchmarks.<sup>13</sup> Rather, the Circuit Court enforced the “market substitution” test of *Campbell*;<sup>14</sup> “the evidence ... demonstrates why Randall’s book is unlikely to displace sales”<sup>15</sup> or “supplant demand for SunTrust’s licensed derivatives.”<sup>16</sup> Were TWDG to have paid reasonable royalties, Ms. Randall could have published her work and the Mitchell Trust would have equitably been paid for use of its copyrighted material.

## The Hallmarks of Market Inefficiency

The present process for assigning fair use and preliminary injunction is not economically efficient for a number of reasons.

Market Harm: Transformative works present an existing product with a new expression and meaning.<sup>17</sup> Transformative works then tend to serve entirely different audiences who would not traffic in the basic products of the primary market. Serving new markets, they would therefore pose no direct threat to sales of primary goods or derivative licenses.<sup>18</sup>

Innovation: As new products, transformative works enhance consumer choice and welfare, and contribute to political discourse and cultural sensibility. The use of material preexisting in the public mind may actually heighten the

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<sup>12</sup>*Supra* note 3, 1373-4, n. 12

<sup>13</sup>*Supra* note 1, 1274.

<sup>14</sup>*Id.*, 1274-6.

<sup>15</sup>*Id.*, 1276.

<sup>16</sup>*Id.*, 1275.

<sup>17</sup>*Campbell*, 579; see also Leval, *infra* note 26, at 1111. Transformative works are unlike superseding works (*Folsom v. Marsh*, 9 F. Cas. 342 (No. 4,901) (CCD Mass. 1841)) that directly supplant sales of the original, or derivatives that primary creators may develop or license in existing or likely markets (*supra* note 5, 592)

<sup>18</sup>“The issue is not whether the [transformative work] uses the same media as the copyrighted work ... but whether it is ‘capable of serving as a substitute for the original’ (A. Latman, *The Copyright Law*, 215 (5<sup>th</sup> ed. 1979)), which depends on demand and product overlap rather than on the market in which the two products are vended. Applying this correct standard, it is eminently clear that two works [may] respond to wholly differing demands and that a customer for one would not buy the other in its place.” *MCA v. Wilson*. 677 F. 2d 180 (2<sup>nd</sup> Cir. 1982); Mansfield, Dissent, 188

power of the criticism, particularly in the hands of artists and musicians not given to speech or prose.<sup>19</sup>

Transactions Difficulties: Because transformative uses are highly ideosyncratic, the market for transformative uses tends to be “thin”<sup>20</sup> -- i.e., buyers and sellers may be unique, and haggling, holdout, cheating, and other transactional difficulties conceivably may be more likely. In this regard, an artist’s chances for obtaining a voluntary license for a number of critical or jarring transformative uses (such as *The Wind Done Gone*) may be quite slim.<sup>21</sup>

Market Uncertainty: Clouded by the highly subjective considerations of fair use protection, present jurisprudence is expectedly daunting to the innovating producer. Uncertain of clearing legal hurdles, writers and publishers may then shy away from producing these works in the first place.

Business Promotion: Contingent upon payment of a reasonable royalty (which may vary with revenues), there is also no particularly good economic reason to disfavor commercial production and dissemination, as the first fair use criterion does.<sup>22</sup> Instead of impending injunctions, strong protection of producer rights to publish and disseminate transformative works would encourage their production and distribution.

The Extent of Taking: The benefit of the third fair use criteria in transformative cases is questionable.<sup>23</sup> As product quality in a new publication is critical, creators now face considerable economic pressure to avoid an overbearing or trivial restatement of the original work. Transformative artists are encouraged by the market to offer their best interpretation rather than limited expressions that may dilute their principal messages.

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<sup>19</sup> It is unrealistic to contend that transformative artists who are denied access to one work do so simply to “avoid the drudgery in working up something fresh” (Acuff-Rose, 114 S. Ct. at 1172) or may always find an equally effective substitute taking (as argued by J. Bisceglia, Parody and Copyright Protection: Turning the Balancing Act into a Juggling Act, 34 COPYRIGHT L. SYMP. (ASCAP) 1, 25 (1987)).

<sup>20</sup>From an economic perspective, bargaining difficulties may recede when markets are “thick”; i.e., populated by many buyers and sellers and/or subject to a repetitive process that can discipline behavioral frictions that interfere with efficient exchange

<sup>21</sup>Indeed, the fair use defense to copyright infringement now may reasonably exist to facilitate exchange for just this reason. (W. J. Gordon, “Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessors”, 82 COL. L. REV. 1600 (1982))

<sup>22</sup>17 U.S.C. § 107 (2000).

<sup>23</sup> 17 U.S.C. § 107(3).

Market Equity: Fair use is generally problematic on equitable grounds; producers are morally entitled to just deserts for their efforts.<sup>24</sup> While it is socially desirable to facilitate criticism and parody, it is not clear why free takings of underlying primary material are defensible, at least for commercial purposes.

Primary Incentives: If suppressed, the loss of transformative product that results from injunctions has no countervailing gain in primary markets. It is unlikely that any primary work would go unpublished if injunctions against transformative uses were discontinued.

## **The End of Injunctions?**

A number of prominent legal authorities have suggested that the copyright system is prone to too many injunctions and a feasible alternative system would institute reasonable royalties that courts may mediate or arbitrate.<sup>25</sup> These points found their way to the Supreme Court, which stated in *Campbell v. Acuff-Rose* that the “goals of copyright law, ‘to stimulate the creation and publication of edifying matter’, are not always best served by automatically granting injunctive relief when parodists are found to have gone beyond the bounds of fair use.”<sup>26</sup> I would suggest that the Court’s view is wisely extended to cover all transformative works undertaken for a commercial purpose. Noncommercial transformative uses may yet be reasonably governed by fair use.

Generally, the “single most important prerequisite for the issuance of a preliminary injunction” is the showing of irreparable harm.<sup>27</sup> While Courts outside of copyright cases have found that contended harm must be “likely and imminent, not remote and speculative”, and that the injury must be something beyond simple monetary damages,<sup>28</sup> the task in copyright is considerably less

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<sup>24</sup>W. J. Gordon, “An Inquiry into the Merits of Copyright: The Challenges of Consistency, Consent, and Encouragement Theory”, 41 STAN. L. REV. 1343, 1353 (1989).

<sup>25</sup>P.N. Leval, Toward a Fair Use Standard, 103 HARV. L. REV. 1105, 1132 (1990) (“there may be a strong public interest in the publication of the secondary work [and] the copyright owner’s interest may be adequately protected by an award of damages for whatever infringement is found.”); A. Kozinski and C. Newman, What’s So Fair about Fair Use?, J. COPYR. SOC’Y 513, 525 (2000). (“The best way to promote production of valuable intellectual works is to give authors and inventors the ability to demand and receive compensation for the values they create.... The best way to do this is to grant property rights that give their products exchange value.”)

<sup>26</sup>*Campbell*, *supra* note 5, at 578, n. 10.

<sup>27</sup>*Bell & Howell: Mamiya Co. v. Masel Supply Co.*, 719 F. 2d 42, 45 (2d Cir. 1983).

<sup>28</sup>*NAACP v. Town of East Haven*, 70 F. 3d 219, 224 (2d Cir. 1995); *JSG Trading Corp. Tray-Wrap, Inc.*, 917 F. 2d 75, 79 (2d Cir. 1990). (holding that “possibility” of harm in insufficient)

onerous. In the copyright domain, “a showing of a prima facie case of copyright infringement or reasonable likelihood of success on the merits usually raises a presumption of irreparable harm for preliminary injunction purposes.”<sup>29</sup> The requirements to make a prima facie case are simple; plaintiff must show copyright ownership, and that defendants have engaged in unauthorized copying or violated exclusive owner rights.<sup>30</sup> Moreover, “once a prima facie case of copyright infringement is established, the allegations of irreparable injury need not be very detailed because such injury is *generally assumed*.” [emphasis mine]<sup>31</sup>

While there is no economic reason to believe yet that acts of unauthorized copying necessarily lead to irreparable market harm to the original rights owner, the use of injunctions and statutory damages may be economically justified for superseding and basic derivative applications.<sup>32</sup> However, for reasons outlined above, the case for injunctions for transformative uses is considerably less compelling.

Following a distinction in tort law between trespass and nuisance,<sup>33</sup> Courts may forego injunctions and confer plaintiff awards for transformative infringement to establish actual damages (properly measured by demonstrated lost profits or foregone license fee<sup>34</sup>) or reasonable royalties. To estimate reasonable

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<sup>29</sup>Medias & Company v. Ty Inc., 106 F. Supp. 2d 1132, 1139 (D. Colo. 2000)

<sup>30</sup>Hasbro Bradley, Inc., v. Sparkle Toys, Inc., 780 F. 2d 189, 192 (2d Cir. 1985); Sandoval v. New Line Cinema Corp., 973 F. Supp. 409, 412 (S.D.N.Y. 1997).

<sup>31</sup>Hofheinz v. AMC Productions, 147 F. Supp. 2d 127, 134 (E.D.N.Y. 2001); sourcing ABKCO Music Inc. v. Stellar Records, 96 F. 3d 60, 64 (2d Cir. 1996); Wainwright Securities, 558 F. 2d at 94.

<sup>32</sup> Superseded business (e.g., record labels) may be hurt to the core by repeat infringement, which can be widely distributed geographically and greatly enabled by digital technology. This suggests that economic damages would be difficult for plaintiffs to measure and courts to confirm. Moreover, measuring damage to actual and potential markets from derivative infringements would be equally difficult, as these markets – particularly if digital – may take time to congeal and may be difficult to monitor for proper compliance.

<sup>33</sup>T. W. Merrill, “Trespass, Nuisance, and the Costs of Determining Property Rights”, 14 JOURNAL OF LEGAL STUDIES, 13, 18 (1985). The principal distinction between trespass and nuisance is the standard of care applied to determine whether the interference is actionable. There is no balancing of relative costs and benefits of the trespass; defendant will be subject to liability regardless of whether he caused actual harm to the other party. By contrast, a nuisance is actionable only if the gravity of the harm outweighs the utility gained by the defendant; damages are paid only to harmed parties. Courts in trespass actions will award injunctions and punitive damages, even if unproven, without considering a balancing of equities and making no exception for de minimis harm. Monetary damages in nuisance cases will be more even-handed; “failure to show actual damages ... usually results in the denial of all relief because of the failure to satisfy the ‘substantial harm’ requirement for liability.” So long as damages are paid, injunctions are rare.

<sup>34</sup>On Davis v. The Gap, 246 F. 3d 152, 166 (2<sup>nd</sup> Cir. 2001)

royalties when actual damages cannot be determined, Courts may establish fees from benchmarks culled from comparable situations. This is now common in patent cases, where infringers are not generally enjoined nor must they disgorge all profits; rather, courts often use reasonable royalties to compensate rightful patent owners.<sup>35</sup> Indeed, the District Court for the Southern District of New York specified fifteen criteria that could help establish reasonable royalties in a patent case, including royalties implicated in comparable uses, as well as a hypothetical amount that could result from an imagined negotiation where both sides reasonably and voluntarily sought agreement.<sup>36</sup> Moreover, arbitrated royalties now appear in copyright administration as well, as Copyright Arbitration Royalty Panels now set royalties for music performances of compositions in jukeboxes, satellite transmissions, and distant cable retransmissions; secondary reproductions of compositions; and performances of sound recordings in digital audio transmissions.<sup>37</sup>

***As an exercise in practical ratemaking, this author researched hypothetical benchmark royalties for The Wind Done Gone (assuming that previous sequels were an unreasonable guide). Licensing data were gathered with the use of the RoyaltySource Intellectual Property Database.<sup>38</sup> In 1999, Brighter Child Interactive acquired rights to use the characters from the television program “Adventures with Kanga Roddy” in connection with its interactive software production. In 1997, Kideo Productions Inc. acquired the rights to publish personalized storybooks using Disney Standard Characters for a \$25,000 upfront and a 10 percent royalty rate. The license contract specified a \$20,000 upfront payment plus a royalty amount based on 8 percent of net revenues. In the same year, ClubCharlies.com Inc. acquired screenplay rights to an original story plot entitled “The Misadventures of Charlie Chance”; rates were \$150,000 upfront and 10 percent of net revenues. These illustrative data would suggest that characters or plots are appropriately licensed with royalties between 8 and 10 percent, with negotiable upfronts.***

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<sup>35</sup>“There is a variety of possible elements of damages for patent infringement, such as the profits made by the infringer, the actual damage to the patentee, or a reasonable royalty.” Atlas-Pacific Engineering Co. v. Ashlock, 339 F. 2d 288, 290 (9<sup>th</sup> Cir. 1964); *cert. denied*, 382 U.S. 842, 86 S. Ct. 55, 15 L. Ed. 2d 83 (1965).

<sup>36</sup>Georgia Pacific Corporation v. United States Plywood Corporation, 318 F. Supp. 1116, 1120 (S.D.N.Y. 1970).

<sup>37</sup>*see generally* 17 U.S.C. §. 800. (2001).

<sup>38</sup> A professional service provided by AUS Consultants, Moorestown, NJ (<http://www.royaltysource.com>). Reported information in the RoyaltySource database is gathered from public financial records, news releases, and other articles and references. The service also publishes the Licensing Economics Review. I am indebted to David G. Weiler, Managing Director, for facilitating the use of the RoyaltySource database.

Two administrative modifications may greatly facilitate negotiation and settlement terms for transformative copies that lend new meaning to previously published material. First, to qualify for a court-adjudicated royalty, a prospective publisher, movie studio, theater, or record label (etc.) must be obliged to make a license offer to rights owners in the original material. This would implicitly forego a fair use plea and admit grounds for a fee to be administered by the court or arbitrator. If negotiation is unsuccessful and the work is deemed to be a transformative copy, the Court may transfer rights at the arbitrator's designated rate. The test for "transformative" should be limited to the presence of "new meaning".

If the arbitrator's eventual judgment is above the tendered amount, the taker must compensate the owner for all costs incurred subsequent to the offer. However, if the arbitrator's eventual judgment is below the tendered amount, the owner must compensate the borrower. This symmetry would require amending Section 505 of the Copyright Act to allow both a winning or losing party to recover costs, under Rule 68 of the Federal Rules of Civil Procedure, for a work that is deemed to be transformative.<sup>39</sup> Section 505 at present can be invoked only on behalf of a prevailing defendant.<sup>40</sup>

As a second option, plaintiff rights to receive statutory damages for transformative infringements can be eliminated. Copyright plaintiffs now may press for actual or statutory compensation in infringement cases before the final verdict is rendered.<sup>41</sup> This may encourage the defendant to settle, but may actually serve as a disincentive to the plaintiff, as it implicates the danger of leaving more money on the table. This provides incentives for rights owners to continue the case in order to gamble for higher compensation that is unrelated to market value

The suggested approach presents an administrative improvement over the present considerations for fair use established in 17 U.S.C. § 107. Under present statute, courts judge fair use through a four part test that implicates subjective considerations of "transformativeness", commercial use, sufficient "conjuring up", market harm, and the true nature of parody, satire, and criticism. Opposing factors in the constellation are arbitrarily weighted and resolved into a blunt vector that may enjoin the work entirely or license it without payment to the rights owner. Under the proposed alternative, the contending considerations are narrowed to one that directly implicates the pivotal value of freedom of speech – i.e., whether the use adds a new meaning to the original work. If new meaning can

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<sup>39</sup>See David Goldberg and Robert J. Bernstein, "Attorneys Fees Revisited: Rule 68 and Section 505", N.Y.L. J., March 15, 2002.

<sup>40</sup>Harbor Motor v. Arnell Chevrolet, 265 F. 3d 638 (7<sup>th</sup> Cir. 2001); *see also* Jordan v. Time, Inc., 111 F. 3d 102 (11<sup>th</sup> Cir. 1997).

<sup>41</sup>17 U.S.C. § 504(a) (2000).



be established, transformative producers may publish their work with certainty at a fee that can be determined through negotiation or arbitration.

Admittedly, a number of uses may go badly compensated for lack of a good measure or other relevant evidence (although nothing seems as extreme as the potential domain of free use and injunction). However, the licensing vacuum will have opportunity to fill out only if the Courts enforce exchangeable property rights in adjacent markets. This would provide the greatest opportunity and incentive for owners and agents to “thicken” their licensing operations and would widen the number of comparable standards in any dispute. Indeed, the capacity for a market to fill out a license rate was the topic of a vigorous dissent in *Williams and Wilkins v. U.S.*<sup>42</sup>

In defining clear property rights, Courts can draw in collectives and other licensing agents, which may then evolve and provide new services to facilitate exchange.<sup>43</sup> However, “to persuade users to proceed through the device, copyright owners might well need a judicial declaration that the uncompensated use, previously minor and left unfettered, constituted an infringement of copyright.”<sup>44</sup> Fair use, if too broadly applied, could sap the incentive to develop the requisite licensing institutions.<sup>45</sup>

#### *Conclusion*

Curiously, Courts last year acknowledged the need for equitable benchmarks in copyright cases.<sup>46</sup> The Supreme Court concluded in *New York Times Co. v. Tasini*: “If necessary, the court and Congress may draw on numerous models for distributing copyrighted works and remunerating authors for their distribution.” [emphasis mine].<sup>47</sup> Moreover, the Eleventh Circuit remanded *Greenberg v.*

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<sup>42</sup>487 F. 2d 1345 (Ct. Cl. 1973). The decision held in 1973 that photocopying by the defendants National Institute of Health and National Library of Medicine was fair use because it was unclear “whether a . . . clearinghouse system can be developed without legislation, and if so whether it would be desirable.” At 1360-61. In his dissent, Chief Judge Cowen argued that a plaintiff award “may very well lead to a satisfactory agreement between the parties for a continuation of the photocopying by the defendant upon payment of a reasonable royalty to plaintiff.” At 1372.

<sup>43</sup>R. P. Merges, “Contracting into Liability Rules: Intellectual Property Rights and Collective Rights Organizations”, 84 CALIF. L. REV 1293, 1326 (1996).

<sup>44</sup>Gordon, *supra* note 21, 1621.

<sup>45</sup>W. M. Landes and R. A. Posner, “An Economic Analysis of Copyright Law”, 18 J. OF LEG. STUD. 325, 358 (1989).

<sup>46</sup>A point made by M. Nimmer, NIMMER ON COPYRIGHT, sec 13.05[E][4][e], at 13-90 to 13-92 (1982) (admitting a possible judicial role in the creation of the compulsory license).

<sup>47</sup>533 U.S. 483, 519; 121 S. Ct. 2381, 2393-4; 150 L. Ed. 2d 500, 541 (2001).

*National Geographic Society* to the District Court: “In assessing the appropriateness of injunctive relief, we urge the court to consider alternatives, such as mandatory license fees, in lieu of foreclosing the public’s computer-aided access to this educational and entertaining work.” [emphasis mine].<sup>48</sup> *Suntrust* was evidently not the object of these considerations.

Were *The Wind Done Gone* mediated, the outcome would have been immediately ensured; the book gets published and the copyright owners get paid. After much expense, this was precisely what resulted. Defenders of the present system then are called upon to establish what benefits the intermediate legal contest provided, and to whom.

## ABOUT THE AUTHOR

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Litigation support involving media economics and [copyright damages](#) has involved [music](#), movies, television, advertising, branding, apparel, architecture, fine arts, video games, and photography. Matters have involved Universal Music, BMG, Sony Music Holdings, Disney Music, NBCUniversal, Paramount Pictures, DreamWorks, Burnett Productions, Rascal Flatts, P. Diddy, Nelly Furtado, Usher, 50 Cent, Madonna, and U2.

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<sup>48</sup>244 F. 3d 1267, 1276 (11<sup>th</sup> Cir. 2001)

Matters involving trademark damages have included the Kardashians/BOLDFACE Licensing, Oprah Winfrey/Harpo Productions, Madonna/Material Girl, CompUSA, Steve Madden Shoes, Kohl's Department Stores, *The New York Observer*, and Avon Cosmetics. Matters in publicity right damages have involved Zooey Deschanel, Arnold Schwarzenegger, Rosa Parks, Diane Keaton, Michelle Pfeiffer, Yogi Berra, Melina Kanakaredes, Woody Allen, and Sandra Bullock.

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