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## The Integrity of Copyright

Martin Garbus

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**THE INTEGRITY OF COPYRIGHT\***

**Martin Garbus\*\***

The status of the case before the Circuit Court was the question of the injunction. And after reversing the injunction, they remanded the case for trial. So the present status is that it is awaiting trial.

I will be very brief with respect to *Gone With The Wind*. There was no testimony, just affidavits on both sides. The Mitchell Estate had affidavits from the head of the Guggenheim, from people at Dartmouth, Columbia, NYU, as well as some southern scholars.

If you read the decision of the lower court, it contradicts nearly everything that Joe Beck said. Then if you read the opinion of the Circuit Court, it contradicts nearly everything the district court said. So, I think that what happens here is the interesting issue.

The interesting issue is, how do you decide cases like these? And there is a distinction between cases like the *Martin Luther King* case and the *Gone With The Wind* case. It is a distinction of some significance, but it is not of great significant because it involves too many different things. When you're talking about the Martin Luther King case, you're talking about the writing of history. Who has access to certain kinds of materials? It is impossible to write about the history of the civil rights movement without using some of Martin Luther King's information. So, how do you protect that access while at the same time give history its due?

Now, if you wanted to write about those periods of time, how could you not write about those periods without pictures? We face that situation. We represented Spike Lee when he did a film called *Malcolm X*. This opens up with the showing of the Rodney King beating, and then it goes on to the fires in Watts. An injunction was brought against the lawsuit, by the fellow who filmed the Rodney King beating.

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They tried to stop this film, which was then a \$40 million dollar film. We went into court and we argued the First Amendment. We argued that in order to set off the passions that Malcolm X came to and left with, you had to understand what the situation was in America at any particular given moment. We argued that history has a right to use that in a way that history may have a right to use Martin Luther King's speech.

How do you protect history? How do you protect the First Amendment? How do you protect the asset of a copyright? How do you make sure that the man who took the pictures of Rodney King or Martin Luther King is compensated, while at the same time allowing historians to use that material? Once you give control of that material, whether it is to the estate of Martin Luther King or Mr. Zapruder, and they can sell the information, then it may be that CBS can buy it, but the small publisher can't. And if you're talking about a country now where you have an extraordinary amount of concentration of media power, you may be talking about the loss of that information to people who cannot afford to pay the fee. So that seems to me to be one of the interesting questions. Another interesting question is, how do you decide these issues?

Whether it be *Gone With The Wind*, or *Lolita*, or the *Koons* case, judges try to decide what is transformative and what is derivative. Judges use words as if they have some extraordinary significance. These are the only ways in which we can judge; these are the only tools to use this kind of language. Justice Rhenquist has talked about this issue pointing out that any judge brings his own whims and caprices, and judges through those lenses.

You can see in any case, in any area, that goes up to the United States Supreme Court, judges throughout the United States render different decisions on the exact same thing. Then circuits clash, then en banc will clash. Then the United States Supreme Court rules, and it is five to four. So at the end of the day in large cases, you have 20 judges on one side, and 20 judges on the other. And they are interpreting words like 'transformative' and 'derivative'.

Now, what does that have to do with this issue? What does that have to do with transformative and what does that have to do with derivative? Those are the critical issues. If I tried to take *Lolita* and write a parody of it, regardless of my talent it could not be called transformative, it would be derivative. But if someone else, of great talent did, it would be transformative because he has the ability to take material and transform it. That was the *Lolita* case. Exactly what did these words that we bandy about mean? And these were some of the words also that were used in this particular case. Then the real very complicated issue is, who decides? Who decides whether or not someone has transformative abilities or only derivative abilities? Who decides whether or not a book is good or bad, and should that be a factor at all? It should be a factor if you are talking about words like transformative and derivative.

Each implies a different set of skills. The experts in our case, in *Gone With The Wind*, said only bad things about the book, only bad things about the author, said it was a huge cliché, and that it does not deal with this or that.

All of us who have litigated know you can get experts who will say nearly anything. Some will say the moon is made out of green cheese. And when you get in areas like what is transformative and what is derivative, you certainly get experts who are going to say most nearly everything. It seems to me the whole question of balancing copyright and First Amendment has to be looked at from this vista. When the country started, copyright protection was roughly 14 years. Recently, the copyright law was amended. It was amended fundamentally at the behest of the Disney people and other large corporations. Mickey Mouse and Walt Disney were going to come out of copyright and they wanted to do it to protect their asset.

If copyright law protects something for five years or ten years, then you come to one set of conclusions about what kind of protection is given. Then Martin Luther King or Rodney King should have for a certain period of time the right to use that material alone. If in fact the copyright law extends 100 years, and people can take material out of history and for information, that seems to me to be too long. Now we filed a suit. I was involved with some other groups who filed a lawsuit in D.C. seeking to find unconstitutional Congress' extension of the copyright law. We lost two to one. One of the judges said that 100 years was too long to tie up history. And in the Spike Lee case we lost two to one.

Judge Reinhardt said that there is no other way to tell the story of race in America at this particular time without talking about the Rodney King beating. So I come to a different conclusion. For both fiction and nonfiction, the law is the same. I come to different conclusions based on my feelings about the First Amendment. The law does not draw those distinctions.

We have another case that we just lost in the Second Circuit. The case had to do with the new technologies and the new media. The case was about the movie studios trying to stop people from ripping off DVDs. We had six professors from Princeton and Dartmouth testifying for us. They said, "when I look at this movie material and want to teach a course about it, I no longer can take a little piece out of it. I used to be able to take a little piece out with videos. You certainly can quote from a book, but a DVD locks it up. And not only does it lock it up for the copyright period, but it locks it up forever, as long as the whole DVD system is there." Some of the new technologies permit copyright holders to have an infinitely long interest in the particular property they have.

Pierre Leval is one of the most liberal judges on this particular issue. Judge Birch of the Circuit that heard our case is probably the second most liberal judge in the country on this particular area. The *Harvard Law Review* piece that he wrote,

which looks into different forms of art, is probably the most sophisticated piece he has written. Pierre Leval's wife happens to be in the art world. Many judges do not have a literary or cultural background that allows them to put it into the kind of perspective that both Judge Birch had when he heard the *Gone With The Wind* case, and Judge Leval had when he heard other cases.

At the end of the day, the issues are money, copyright, and history, and who is owed what. The *Lolita* case was somewhat different. It was not a parody case, it posed a new and interesting issue. A woman wrote a book called *Lo's Diary*. *Lo's Diary* retold the *Lolita* story from the perspective of the girl. It was her view of what had happened in the room and throughout the story. In *Lo's Diary*, the young girl was in charge. The young girl seduced the old man. The ending of the book is somewhat different. The book matches every scene in *Lolita* identically, more so than *The Wind Done Gone*. The book never uses the same sentence. It uses the same people, but it always tells it from a different perspective. In my eyes, it was an extraordinarily creative work. It was dealing with the feminist issues of our day in a new and original way.

The question as to whether Alice Randall's book deals with issues in a new, and transformative way is too complicated an issue to be left to the judges. But the judges will decide this.