

DUPLICATE

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IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

APR 9 2001

LUTHER D. THOMAS, Clerk
By:  Deputy Clerk

SUNTRUST BANK as Trustee of)
the Stephens Mitchell Trusts f/b/o Eugene)
Muse Mitchell and Joseph Reynolds Mitchell)
Plaintiff,)
v.)
HOUGHTON MIFFLIN COMPANY,)
Defendant.)

Civil Action File
No. 1:01 CV-701-CAP

ANSWER AND AFFIRMATIVE DEFENSES

Now Comes Defendant Houghton Mifflin Company, through counsel, in answer to Plaintiff's Complaint, as follows:

THE NATURE OF THE ACTION

1. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 1 of the Complaint, and therefore neither admits nor denies them.

2. Defendant admits that Plaintiff's action purports to be for copyright infringement and unfair competition under state and federal law. Defendant denies that *The Wind Done Gone* is an unauthorized sequel to *Gone With the Wind*. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations set forth in Paragraph 2 of the Complaint, and therefore neither admits nor denies them.

3. Defendant admits that it neither sought nor obtained a license from the Plaintiffs to publish *The Wind Done Gone*. Defendant denies all remaining allegations set forth in Paragraph 3 of the Complaint.

4. Defendant admits that Plaintiffs seek to restrain and enjoin publication of *The Wind Done Gone* and to obtain monetary damages, costs, and attorney's fees. Defendant denies all remaining allegations set forth in Paragraph 4 of the Complaint.

PARTIES

5. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 5 of the Complaint, and therefore neither admits nor denies them.

6. Defendant admits the allegations set forth in Paragraph 6 of the Complaint.

JURISDICTION AND VENUE

7. Defendant admits the allegations set forth in Paragraph 7 of the Complaint.

8. Defendant admits the allegations set forth in Paragraph 8 of the Complaint.

9. Defendant admits the allegations set forth in Paragraph 9 of the Complaint.

PLAINTIFFS' FACTUAL ALLEGATIONS

10. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 10 of the Complaint, and therefore neither admits nor denies them.

11. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 11 of the Complaint, and therefore neither admits nor denies them.

12. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 12 of the Complaint, and therefore neither admits nor denies them.

13. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 13 of the Complaint, and therefore neither admits nor denies them.

14. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 14 of the Complaint, and therefore neither admits nor denies them.

15. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 15 of the Complaint, and therefore neither admits nor denies them.

16. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 16 of the Complaint, and therefore neither admits nor denies them.

17. Defendant admits that it has contracted to publish a novel entitled *The Wind Done Gone* by Alice Randall. Defendant denies all remaining allegations set forth in Paragraph 17 of the Complaint.

18. Defendant admits that it has distributed a limited number of advance copies of *The Wind Done Gone* to reviewers and others, and that booksellers, including

Amazon and Barnes & Noble, have accepted advance orders for the book. Defendant lacks knowledge or information sufficient to form a belief as to the truth of all remaining allegations set forth in Paragraph 18, and therefore neither admits nor denies them..

19. With “June of 2001” inserted for “May of 2001,” Defendant admits the allegations set forth in Paragraph 19 of the Complaint.

20. Defendant denies the allegations set forth in Paragraph 20 of the Complaint.

21. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 21 of the Complaint, and therefore neither admits nor denies them.

22. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 21 of the Complaint, and therefore neither admits nor denies them.

23. Defendant admits that the novel *The Wind Done Gone* is expressed, in part, in the form of diary entries made by the fictitious character “Cynara,” the out-of-wedlock daughter of “Planter,” a plantation owner, and “Mammy,” a slave. Defendant denies all remaining allegations set forth in Paragraph 23 of the Complaint.

24. Defendant admits that Houghton Mifflin’s promotional materials have stated that the author of *The Wind Done Gone* “supplies the story that has been missing from the work that more than any other has defined our image of the antebellum South, Margaret Mitchell’s *Gone With the Wind*.” Defendant denies all remaining allegations set forth in Paragraph 24.

25. Defendant admits the allegations set forth in Paragraph 25 of the Complaint.

26. Defendant admits that Cynara uses the phrase “gone with the wind” once in *The Wind Done Gone*. Defendant denies all remaining allegations set forth in Paragraph 26 of the Complaint.

27. Defendant admits that the name “Cynara” derives in part from the poem “Non sum qualis eram bonae sub rogo Cynarae,” by Ernest Dowson, that the Dowson poem contains the line “I have forgot much, Cynara! gone with the wind,” and that Exhibit C to the Complaint is a copy of the second page of *The Wind Done Gone*. Defendant denies all remaining allegations set forth in Paragraph 27 of the Complaint.

28. Defendant denies the allegations set forth in Paragraph 28 of the Complaint.

29. Defendant denies the allegations set forth in Paragraph 29 of the Complaint.

30. Defendant denies the allegations set forth in Paragraph 30 of the Complaint.

31. Defendant denies the allegations set forth in Paragraph 31 of the Complaint.

COUNT I
(Copyright Infringement)

32. Defendant restates and incorporates by reference Paragraphs 1 through 31 above.

33. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 33 of the Complaint, and therefore neither admits nor denies them.

34. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 34 of the Complaint, and therefore neither admits nor denies them.

35. Defendant denies the allegations set forth in Paragraph 35 of the Complaint.

36. Defendant denies the allegations set forth in Paragraph 36 of the Complaint.

WHEREFORE, Defendant denies that it has violated or will violate Plaintiffs' rights and respectfully prays that this Honorable Court dismiss Count I of Plaintiffs' Complaint with prejudice.

COUNT II
(Lanham Act Violation)

37. Defendant restates and incorporates by reference Paragraphs 1 through 36 above.

38. Defendant lacks sufficient knowledge or information to form a belief as to the truth of the allegations set forth in Paragraph 38 of the Complaint, and therefore neither admits nor denies them.

39. Defendant denies the allegations set forth in Paragraph 39 of the Complaint.

40. Defendant denies the allegations set forth in Paragraph 40 of the Complaint.

41. Defendant denies the allegations set forth in Paragraph 41 of the Complaint.

42. Defendant denies the allegations set forth in Paragraph 42 of the Complaint.

43. Defendant denies the allegations set forth in Paragraph 43 of the Complaint.

WHEREFORE, Defendant denies that it has violated or will violate Plaintiffs' rights and respectfully prays that this Honorable Court dismiss Count II of Plaintiffs' Complaint with prejudice.

COUNT III
(Deceptive Trade Practices Under Georgia State Law)

44. Defendant restates and incorporates by reference Paragraphs 1 through 43 above.

45. Defendant denies the allegations set forth in Paragraph 45 of the Complaint.

46. Defendant denies the allegations set forth in Paragraph 46 of the Complaint.

WHEREFORE, Defendant denies that it has violated or will violate Plaintiffs' rights and respectfully prays that this Honorable Court dismiss Count III of Plaintiffs' Complaint with prejudice.

AFFIRMATIVE DEFENSES

In further answer to Plaintiffs' Complaint, and by way of affirmative defenses, Defendant states that it will rely upon the following affirmative defenses, if applicable and if supported by the facts.

A. Defendant's right to publish *The Wind Done Gone* is protected by the First Amendment of the United States Constitution.

B. A restraining order or injunction impeding promotion and/or publication of *The Wind Done Gone* would be an unconstitutional prior restraint.

C. *The Wind Done Gone* is an original work of expression created by Alice Randall.

D. In the event the Court or jury finds that *The Wind Done Gone* copies copyrightable expression from *Gone With the Wind*, any such copying is a fair use of that expression under 17 U.S.C. §107.

E. Plaintiff's actions in bringing this lawsuit constitute copyright misuse.

F. Plaintiffs do not possess trademark rights in the characters, settings, plot lines and other elements of *Gone With the Wind*, or any derivatives thereof.

G. Defendant does not make trademark use of Plaintiffs' characters, settings, plot lines and other elements of *Gone With the Wind*, or any derivatives thereof.

H. If Defendant makes trademark use of Plaintiff's characters, settings, plot lines and other elements of *Gone With the Wind*, such use is a fair, parodic use of these devices.

I. Defendant's *The Wind Done Gone* does not create consumer confusion, mistake or deception as to affiliation, connection, sponsorship, or association with the Plaintiff, or Plaintiff's works.

J. Publishing *The Wind Done Gone* has not caused, and will not cause Plaintiffs' to be wrongfully damaged, and has not and will not cause Plaintiffs to suffer irreparable harm.

K. At all times relevant to this suit, Defendant acted in good faith with regard to Plaintiffs and had reasonable grounds for believing its actions were not in violation of any law.

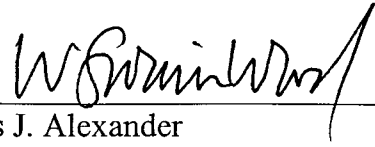
Defendant respectfully reserves the right to amend its answer to add additional or other affirmative defenses or to delete or withdraw affirmative defenses, or to add counterclaims as may become necessary after a reasonable opportunity for appropriate discovery.

To the extent not specifically admitted above, Defendant denies each and every allegation of each paragraph of the Complaint.

WHEREFORE, Defendant denies that it has violated or will violate Plaintiffs' rights and respectfully prays that this Honorable Court dismiss the Complaint in its entirety with prejudice, deny Plaintiff's requested relief, award Defendant its costs and attorneys' fees incurred in this action, and grant Defendant such other relief as the Court may deem just and proper.

Respectfully submitted,

DATED this 9th day of April, 2001.



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CERTIFICATE OF SERVICE

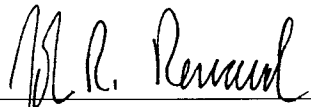
This is to certify that a true and correct copy of the foregoing **Answer and Affirmative Defenses** has been hand-delivered to counsel of record as follows:

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This 9th day of April, 2001.



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