



CASE NO. _____

IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

HOUGHTON MIFFLIN COMPANY,

Defendant-Appellant.

v.

SUNTRUST BANK as Trustee of
the Stephens Mitchell Trusts f/b/o Eugene
Muse Mitchell and Joseph Reynolds Mitchell,

Plaintiff-Appellee

On Appeal from the United States District Court
for the Northern District of Georgia

APPELLANT'S EMERGENCY MOTION
FOR EXPEDITED REVIEW

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Pursuant to this Court's Rule 27-1 (b) and Internal Operating Procedure –3, Appellant Houghton Mifflin Company (“Defendant”) files this emergency motion to expedite the briefing schedule in this case and to expedite consideration of its appeal. Defendant desires to publish a book entitled *The Wind Done Gone*, a parody of the novel *Gone With the Wind*. On April 20, 2001, and prior to publication, the Hon. Charles Pannell enjoined defendant from producing, distributing, advertising, selling, or offering to sell *The Wind Done Gone*. Defendant seeks an expedited appeal to vindicate its First Amendment right to publish the novel by the end of June, 2001. If the injunction is not vacated or stayed by May 16, 2001, that target cannot be met.

STATEMENT OF FACTS

In *The Wind Done Gone*, the central protagonist is Cynara, the product of a miscegenational liaison between “Planter,” a white Southern plantation owner, and “Mammy,” one of his slaves. Written as a diary, the novel describes Cynara’s young days as a slave, her marriage to “R” whom she eventually leaves, and her travels to Europe and Washington, D.C., where she meets a black Congressman from the South. To evoke *Gone With the Wind* for the purpose of parodying it, *The Wind Done Gone* necessarily alludes to various characters, scenes and story elements in the novel.

The Wind Done Gone is a multidimensional work of literature. Declaration of John Sitter, Charles Howard Candler Professor of English at Emory University, ¶ 5. On one level, it is a story of Cynara’s self-development and coming of age. At another, it is classic parody, and a powerful political and social criticism of *Gone With the Wind*. *Id.* at ¶ 15; *see also* Declaration of Barbara McCaskill, Professor of English at the University of Georgia, specializing in African American literature, ¶¶ 3-10.

Defendant decided to publish *The Wind Done Gone* because it considers its author, Alice Randall, a provocative new literary voice. Declaration of Wendy J. Strothman, ¶ 7. Toni Morrison, winner of the Nobel Prize for Literature, has submitted a declaration that “Miss Randall’s prose is by turns evocative, wry, plangent. Her wit is sharp but free of malice. Her gift for lyrical economy is rare....” Pat Conroy has submitted a declaration that:

I read [*The Wind Done Gone*] with pleasure and laughed out loud at its clever inversions and insiders jokes on the themes of [*Gone With the Wind*]. [T]he only suitable response that black [A]merica can have to the immense popularity of gwtw is to turn to parody, to mockery, to humor and to the power of laughter.... [A]lice [R]andall’s book is a parody and a grand send-off of gwtw.

Many other prominent American writers have reviewed and lavishly praised Ms. Randall’s work. Declaration of Anton Mueller ¶ 10. Still others, including Harper Lee and Arthur Schlesinger, have called for its publication. *Id.* at ¶ 14.

On March 16, 2001, Suntrust Bank, as Trustee of the Stephens Mitchell trusts (“Plaintiff”), filed the complaint herein, alleging that *The Wind Done Gone* infringes its copyright in *Gone With the Wind*. On March 29 and April 18, 2001, Judge Pannell heard argument of counsel, and the court also considered the written evidence, briefs and other pleadings of the parties submitted herewith, including the brief of amici curiae,¹ which argued that the requested injunction should be denied as an unconstitutional prior restraint. On April 20, 2001, the district court filed its opinion containing the referenced injunction from which this appeal is taken. Many of these events have been reported on the front page of the New York Times, in other newspapers

¹ The amici curiae are the American Booksellers Foundation for Free Expression, Freedom to Read Foundation, and PEN American Center.

and periodicals, and on television and radio newscasts throughout the United States and beyond.

**APPELLANT’S GOOD CAUSE FOR
SEEKING EXPEDITED REVIEW**

I.O.P. – 3 to FRAP 27 provides that an appeal to this Court may be expedited for good cause shown. 11th Cir. R. 27-1 (b) provides that the movant shall state the reasons for granting the requested relief and must specifically discuss:

- “(i) the likelihood the moving party will prevail on the merits;
- “(ii) the prospect of irreparable injury to the moving party if relief is withheld;
- “(iii) the possibility of harm to other parties if relief is granted; and
- “(iv) the public interest.”

For the purposes of this motion, and further proceedings herein, it is important to note that this Court “must ‘make an independent examination of the whole record’ in order to make sure ‘that the judgment [of the district court] does not constitute a forbidden intrusion on the field of free expression.’” Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 499, 104 S. Ct. 1949 (1984).

1. The Likelihood that Defendant Will Prevail on the Merits.

Defendant asserts that *The Wind Done Gone* does not infringe Plaintiff’s copyright,² and is in any event fair use under 17 U.S.C. § 107. An evaluation of fair use requires a review of (a) the purpose and character of the new work; (b) the nature of the original work; (c) the amount and substantiality of the portion taken; and (d) the market effect of the new work on the original.

² See Defendant Houghton-Mifflin Co.’s Response in Opposition to Plaintiff’s Motion for a Temporary Restraining Order and Preliminary Injunction, 6-15.

a. The Purpose and Character of the New Work.³

A parody is a “literary or artistic work that imitates the characteristic style of an author or work for comic effect or ridicule.” Campbell v. Acuff-Rose, 510 U.S. 569, 580, 114 S. Ct. 1164, 1171 (1994). Professors John Sitter and Barbara McCaskill, and authors Toni Morrison and Pat Conroy, have testified that *The Wind Done Gone* is a parody. In addition, defendant submitted the declaration of Henry Louis Gates, Jr., Chair of the Department of Afro-American Studies at Harvard University, who has written several books dealing with the political and social misperceptions of African Americans created by novels such as *Gone With the Wind* and who has written an award winning book about the nature and practice of parody in the African American tradition. Professor Gates notes (at ¶ 7) that:

The Wind Done Gone is a classic parody, in a long line of literary creations that extend back to the ancient Greeks.... It constitutes both an original work of art and a moving act of political commentary, deconstructing as it does a text that many scholars believe to be racist.

There can thus be no question that the parodic character of *The Wind Done Gone* “may reasonably be perceived.” Campbell, 510 U.S. at 582, 114 S. Ct. at 1174. Even the district court, albeit reluctantly, concluded that “*The Wind Done Gone* contains transformative parody that criticizes the earlier work and the antebellum South in general.” Op. at 34.

Works which transform the copyrighted work – whether by parody, comment or criticism – are favored under the fair use doctrine because they “lie at the heart of

³ As noted by the Supreme Court, “[t]he enquiry here may be guided by the examples given in the preamble to § 107, looking to whether the use is for criticism, comment, news reporting, and the like....” Campbell, 510 U.S. at 578-79, 114 S. Ct. at 1171.

the fair use doctrine's guaranty of breathing space within the confines of copyright." Campbell, 510 U.S. at 579 (citations omitted). Because *The Wind Done Gone* constitutes a transformative parody – as well as comment and criticism – other issues under the first factor, such as commercialism, are less significant. Campbell, 510 U.S. at 579, 114 S. Ct. at 1171. The first factor thus tips decidedly in favor of Defendant.

b. The Nature of the Copyrighted Work.

The district court determined that the creative nature of *Gone With the Wind* "militates against a finding of fair use." Op. at 38. In Campbell, 510 U.S. at 586, 114 S. Ct. at 1175, however, the Supreme Court noted that the nature of the original work "is not much help in this case, or ever likely to help much in separating fair use sheep from the infringing goats in a parody case, since parodies almost invariably copy publicly known, expressive works." Accord, Leibovitz v. Paramount Pictures Corp., 137 F.3d 109 (2d Cir. 1998). The second factor is thus of no help to plaintiff.

c. The Amount and Substantiality of the Portion Taken.

The third fair use factor, the amount and substantiality of the taking, turns on two components: first, on whether the allusions drawn were "to assure identification" with the original; and, second, if more was taken, "on the extent to which the [work's] overriding purpose and character is to parody the original..." Campbell, 510 U.S. at 588, 114 S. Ct. at 1176. Discussing only the first, the district court concluded that "Ms. Randall's use cannot receive the benefit of the fair use defense because she uses far more of the original than necessary." Op. at 40. For reasons set forth, *inter alia*, in Defendant's Supplemental Memorandum in Reply to Plaintiff's Expert Affidavits, appended hereto, it is submitted that the district court is in error – that Ms. Randall

took “sparingly” from a work of more than a 1,000 pages. Declaration of Alice Randall at ¶ 5; *see also* McCaskill Declaration, ¶ 12.

The district court, however, **does not deal at all with the second prong** of the Campbell test; i.e., whether *The Wind Done Gone*’s overriding purpose and character is to parody *Gone With the Wind*. The district court, for example, does not cite one allusion to *Gone With the Wind* that was not in furtherance of its “overall” parodic purpose. Plaintiff’s seven experts, likewise, were **unable to do so**, notwithstanding the passage of almost a month from the filing of the complaint to the submission of their evidence.⁴ By comparison, Professor Sitter’s Supplemental Declaration, illustrating in elaborate detail that there are no gratuitous allusions – that every reference supports the parodic purpose of *The Wind Done Gone* – is **uncontested**. Ms. Randall’s sworn statement that she made no allusion “without a purpose,” Randall Declaration at ¶ 5, is **also un rebutted** in the record.

Ms. Randall’s purpose was to parody, criticize and comment upon the entire book and movie, *Gone With the Wind*, and to satirize, criticize and comment on the pre- and post-Civil War South which continues to exist in the minds of many as a result the iconographic *Gone With the Wind* works. Ms. Randall was particularly at pains to ridicule, comment and criticize perceptions of slaves and freed slaves portrayed in *Gone With the Wind* – images which for her and many Americans endure to this day. Ms. Randall was not dealing with a “single stereotyping of blacks”; rather,

⁴ It is also relevant that: (a) none of Plaintiff’s experts were trained in African American literature; (b) only one was trained in parody; and (c) all presented their views essentially as conclusions without supporting examples. *See* Fed. R. Evid. 702 and advisory committee notes thereto (requiring a “sufficient factual basis” for opinions).

she dealt with a series of stereotypes that continually grew “worse in the course of” *Gone With the Wind*. Id. In the ante-bellum South, blacks were “presented as being happy with their lot, as simple minded and incapable of accomplishment,” *e.g.*:

Time and again, Ellen had said: ‘Be firm but be gentle with inferiors, especially darkies.’ But if she was gentle the darkies would sit in the kitchen all day, talking endlessly about the good old days when a house nigger wasn’t supposed to do a field hand’s work. (*Gone With the Wind*, Scribner Ed. 1964, at 432).

Moreover, Ms. Randall “could not stop, however, with a rejoinder to that treatment, because blacks during [and immediately after] the Civil War are depicted in even more demeaning terms” (Randall Decl. ¶ 5):

The negroes she passed turned insolent grins at her and laughed among themselves as she hurried by, slipping and sliding in the mud, stopping, panting to replace her slippers. How dared they laugh, the black apes! How dared they grin at her, Scarlett O’Hara of Tara! She’d like to have them all whipped until the blood ran down their backs. What devils the Yankees were to set them free, free to jeer at white people! (*Gone With the Wind* at 589).

Finally, Ms. Randall “still could not stop with the treatment during and immediately after the period of the war, because blacks during Reconstruction are then represented in the most derogatory fashion of all” (Randall Decl. ¶ 5):

... urged on by a fervor of Northern hatred almost religious in its fanaticism, the former field hands found themselves suddenly elevated to the seats of the mighty. There they conducted themselves as creatures of small intelligence might naturally be expected to do. Like monkeys or small children turned loose among treasured objects whose value is beyond their comprehension, they ran wild – either from perverse pleasure in destruction or simply because of their ignorance. (*Gone With the Wind* at 654).

Thus, during Reconstruction, as depicted in *Gone With the Wind*, “negroes sat in the legislature where they spent most of their time eating goobers and easing their unaccustomed feet into and out of new shoes.” GWTW at 904. Spread over three

decades, therefore, there were a host of pejorative stereotypes that still haunt America, and against which Ms. Randall, in the words of Professor Gates, had to “fight back.” Gates Decl. ¶ 4.⁵

Gone With the Wind, quite simply, is not a work that can be parodied with a few simple references. Rather, as Professor Sitter notes, it:

tells the story of a complex social structure, full of subtle gradations and manifest power differentials, and of the households within it. In order to begin to parody the complex world of *Gone With the Wind*, *The Wind Done Gone* must allude to the characters and interrelationships that form the basis of that social structure. An allusion to only two or three characters from *Gone With the Wind* would not be sufficient to call up the relationships among the characters and the complex view of society they collectively convey.

Supplemental Sitter Declaration at ¶ 5. Against such a backdrop, the references are truly “economical,” as well as overridingly parodic. *Id.* at ¶ 7. It is **uncontested upon the evidence before the Court** that every allusion in *The Wind Done Gone* to *Gone With the Wind* supports this parodic and critical purpose. (Sitter Supp. Decl. at ¶ 3). As a result, factor three favors Defendant.

d. The Market Effect on the Original.

The critical “market effect” question posed in Campbell focuses on “the likelihood that the parody may serve as a **market substitute** for the original.” 510 U.S. at 589-90, 114 S. Ct. at 1177 (emphasis supplied). Where Defendant’s work is a

⁵ As added examples, Ms. Randall had to allude to *Gone With the Wind* to parody, from multiple counterpoints, the pervasive image of blacks as loyal retainers (“Negroes were provoking sometimes and stupid and lazy, but there was loyalty in them that money couldn’t buy,” GWTW at 472); as lacking in even marginal intelligence (“How stupid negroes were! They never thought of anything unless they were told,” GWTW at 409); and as “far better off under slavery...” GWTW at 759. The **partial** list of images Ms. Randall was forced to confront goes on for 15 pages. Randall Decl., Exhibit A.

transformative parody or critical of the Plaintiff's work, neither market substitution nor market harm should be presumed. Campbell, 510 U.S. at 591, 114 S. Ct. at 1177.⁶

Defendant submitted two declarations on the issue and both declarants concluded, based on extensive analysis, that "*The Wind Done Gone* will [not] in any sense supplant the market for *Gone With the Wind*"; that "it will not appeal to any desire among readers for a sequel...." Declaration of Frank Price ¶ 10; Declaration of Jane Chelius ¶ 4. Quite simply, as noted in Campbell, a "parody and the original usually serve different market functions." 510 U.S. at 591, 114 S. Ct. at 1178.

Remarkably, Plaintiff submitted three affidavits on the sequel issue and **not one** concluded that *The Wind Done Gone* was a sequel.⁷ Moreover, not one concluded that *The Wind Done Gone* would serve as a **market substitute** for *Gone With the Wind*.⁸ As is true, therefore, with respect to the overriding parodic purpose of *The Wind Done Gone*, the evidence as to the lack of market substitution is **uncontroverted**. As a result, there is no basis in fact, law or logic for the district court's conclusion that the "new work would serve as a market substitute for a potentially licensed derivative work." Op. at 50.

⁶ The Campbell Court recognized that "**there is no protectable derivative market for criticism**. The market for potential derivative uses includes only those that creators of original works would ... license others to develop." 510 U.S. at 592, 114 S. Ct. at 1178 (emphasis supplied). From the Conroy declaration, it is uncontested that Plaintiff would not have licensed *The Wind Done Gone*.

⁷ Two had not even read *The Wind Done Gone*, including the expert quoted extensively by the district court in a footnote. Op. at 43 n. 19.

⁸ Mr. Anderson opined that *The Wind Done Gone* would "tarnish" *Gone With the Wind*, but that is not "harm cognizable under the Copyright Act." Campbell, 501 U.S. at 592, 114 S. Ct. at 1178.

In sum, factors one, three and four of the fair use doctrine clearly support Defendant's claim of fair use, and factor two is neutral. For that reason, there is a substantial likelihood Defendant will succeed on the merits of its fair use defense.

2. Harm to the Defendant.

Not only will Defendant, as the district court recognizes, suffer irreparable harm in the form of losing its carefully planned and orchestrated publication date (Op. at 47), but of equal significance:

The time to publish the book is now. If the book is enjoined even for as short a time as three months, *The Wind Done Gone* will be stale news; readers will no longer feel a need to read the work because they will think they "know all about it" from the prior, extensive press coverage. Even more damaging, an injunction would change the public perception of the work from that of a literary creation to a literary curiosity; from a serious work to a notorious one. It is true that *The Wind Done Gone* has "garnered far more publicity than it would if there had been no litigation." That is only true, however, for the present and is unlikely ever to be true again. A lengthy delay will destroy interest in the work; even a short delay will distort the novel's reputation and reception.

Declaration of Anton Mueller, ¶ 12.

Moreover, "[i]t is well settled that the loss of First Amendment freedoms for even minimal periods of time constitutes irreparable injury." Deerfield Medical Center v. City of Deerfield Beach, 661 F.2d 328, 338 (5th Cir. Unit B 1981) citing Elrod v. Burns, 427 U.S. 347, 373, 96 S.Ct. 2673, 2689 (1976).

3. Possible Harm to Other Parties if Relief Is Granted.

Neither Plaintiff nor any other party can be harmed by the granting of this motion for expedited appeal.

4. The Public Interest.

Because, at minimum, there is a compelling argument that Defendant's novel

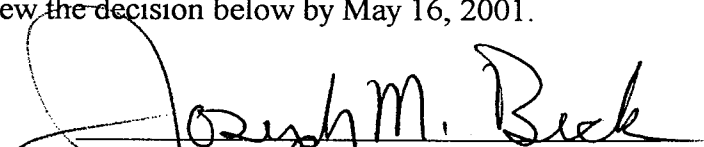
is political speech protected by the First Amendment, the district court's decision to enjoin publication of the book is an unconstitutional prior restraint of speech. New York Times Co. v. U.S., 403 U.S. 713, 91 S. Ct. 2140 (1971)(any prior restraint comes to a reviewing court under the weight of a "strong presumption against its constitutional validity"); Near v. Minnesota, 283 U.S. 697, 51 S.Ct. 265 (1931). "[I]ndefinite delay" in the right to free speech is not permitted under the First Amendment. CBS, Inc. v. Davis, 510 U.S. 1315, 1318, 114 S. Ct. 912, 914 (1994). See also Deerfield Medical Center, 661 F.2d at 338.

While an injunction against copyright infringement is justified in cases of "simple piracy, such cases are 'worlds apart from many of those raising reasonable contentions of fair use' where '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.'" Campbell 510 U.S. 569 at 578 n. 10, 114 S.Ct. at 1170. In Trust Co. Bank v. Putnam Publ. Co., 5 U.S.P.Q.2d 1874, 1879 (C.D. Cal. 1988), therefore, the court refused to issue a preliminary injunction restraining publication of a novel which plaintiff claimed infringed its copyright in *Gone With the Wind*, observing "[t]here is a strong public interest favoring the publication of books and novels; an injunction prohibiting the publication of *The Blue Bicycle* would not serve that public interest. The public interest in the integrity of copyrights does not in this case outweigh the public interest in free expression." Accord Rosemont Enters., Inc. v. Random House, Inc., 366 F.2d 303 (2d Cir. 1966), cert. denied, 385 U.S. 1009, 187 S.Ct. 714 (1967).

Indeed, even where infringement has been found and attorney fees awarded with respect to an infringing work that had been in the market for quite some time, this Circuit warned as recently as last month that a court should not hastily enjoin even further distribution of the work because of its informative and entertaining qualities, values cherished under the First Amendment. Greenberg v. National Geographic, 58 U.S.P.Q.2d 1267 (11th Cir. 2001). Under the settled law, therefore, the public interest clearly disfavors the prior restraint of publication of *The Wind Done Gone*.

III. CONCLUSION

There are close parallels between this case and the Campbell case (e.g., “white bread” music v. rap; “overriding [parodic] purpose”; and serious fact issues as to the amount of taking). Defendant, therefore, respectfully requests an expedited briefing schedule that will enable this Court to review the decision below by May 16, 2001.



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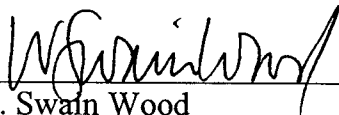
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CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the foregoing Appellant's Emergency Motion for Expedited Review, together with the Papers Filed Pursuant to Eleventh Circuit Rule 27-1, and the Attachment to Papers Filed Pursuant to Eleventh Circuit Rule 27-1, have been hand-delivered to counsel of record as follows:

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