

CASE NO. 01-12200-HH

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 RESPONSE TO
APPELLEE'S RESPONSE TO THE
MOTION FOR EXPEDITED REVIEW

Miles J. Alexander
Georgia Bar No. 009000
Jerre B. Swann
Georgia Bar No. 694050
Joseph M. Beck
Georgia Bar No. 046000
Kilpatrick Stockton LLP
1100 Peachtree Street, Suite 2800
Atlanta, Georgia 30309-4530
(404) 815 6500

Attorneys for Defendant

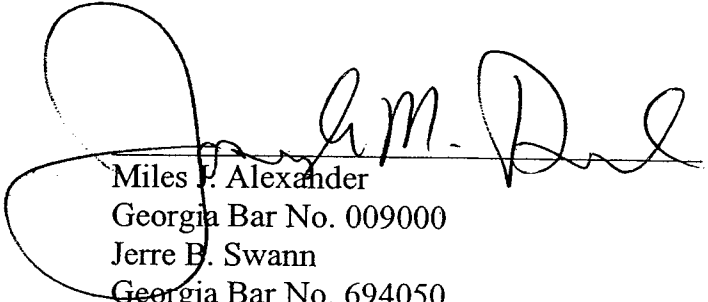
Plaintiff SunTrust Bank argues that neither the First Amendment nor the Copyright Act prevents an injunction against an unauthorized sequel, but the **undisputed evidence** is that *The Wind Done Gone* is not a sequel; and that no market harm to any interest cognizable under the Copyright Act would result from the publication of *The Wind Done Gone*.

Plaintiff cites no case in support of its First Amendment argument requesting prior restraint. As noted by Defendant, there is no decision granting prior restraint where a reasonable argument for fair use was made. *The Salinger v. Random House, Inc.*, 811 F.2d 90 (2d Cir. 1987) case referred to by Plaintiff in oral argument is completely distinguishable, not only because Mr. Salinger, a recluse for 20 years who objected to the publication of his unpublished love letters, was a victim of extensive verbatim copying; but also because of the court's undue emphasis on the unpublished nature of the letters. Indeed, as a result of the *Salinger* decision, the Congress amended 17 U.S.C. 107 by making clear that the fact that a work was unpublished was not of itself a basis for denying fair use.

Defendant challenged Plaintiff to point out a **single instance** of an allusion in *The Wind Done Gone* to *Gone With the Wind* that did not serve a parodic purpose. Plaintiff failed to do so in the court below; the court below mentioned no such example; and none is addressed in the Plaintiff's brief in opposition.

Defendant sees no need to address Plaintiff's reading of *Campbell v. Acuff-Rose* and is completely comfortable with the reading which the court will undoubtedly give it – which we are confident will be consistent with the reading that we give to that opinion.

Defendant acknowledges that it has requested a highly expedited briefing and argument schedule. If the Court cannot hear this matter in the requested framework, Defendant asks that the most stringent dates that the Court considers workable be granted.

A handwritten signature in black ink, appearing to read "Miles P. Alexander", is written over the typed name and bar number.

Miles P. Alexander
Georgia Bar No. 009000
Jerre B. Swann
Georgia Bar No. 694050
Joseph M. Beck
Georgia Bar No. 046000
W. Swain Wood
Georgia Bar No. 774849
Kilpatrick Stockton LLP
1100 Peachtree Street, Suite 2800
Atlanta, Georgia 30309-4530
(404) 815 6500

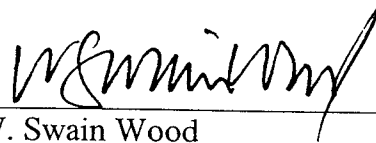
Attorneys for Defendant

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been faxed to
counsel of record as follows:

Martin Garbus, Esq.
Frankfurt Garbus Kurnit Klein & Selz
Via Fax (212) 593-9175

This 25th day of April, 2001.



W. Swain Wood
Georgia Bar No. 774849
Kilpatrick Stockton LLP
1100 Peachtree Street, Suite 2800
Atlanta, Georgia 30309-4530
(404) 815 6500

Attorneys for Defendant