

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

FILED IN CLERK'S OFFICE
U.S.D.C. Atlanta

APR 24 2001

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.)
_____)

LUTHER D. THOMAS, Clerk
By:  Deputy Clerk

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

**DEFENDANT'S MOTION FOR IMMEDIATE SUSPENSION OF
PRELIMINARY INJUNCTION PENDING APPEAL AND
MEMORANDUM OF LAW IN SUPPORT**

I. Motion for Stay Pending Appeal

Defendant respectfully moves, pursuant to Rule 62(b) of the Federal Rules of Civil Procedure, for an immediate suspension of the preliminary injunction issued by this Court on April 20, 2001, to be effective during the pendency of Defendant's appeal of that injunction to the Eleventh Circuit Court of Appeals. Defendant has filed a Notice of Appeal of this Court's April 20th Order, as well as an Emergency Motion for Expedited Review in the Eleventh Circuit Court of Appeals. Pursuant to FRAP 8(a), a motion for suspension of an injunction must generally be filed in the District Court before a similar motion is presented to the Court of Appeals.

II. Memorandum of Law in Support

A. Standards for Determining Whether to Grant a Stay Pending Appeal

“When an appeal is taken from [a] judgment granting . . . an injunction, the court in its discretion may suspend . . . an injunction during the pendency of the appeal upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party.” Fed.R.Civ.P. 62(c).

Four factors should be considered in deciding whether to suspend an injunction pending appeal: (1) the likelihood that the moving party will ultimately prevail on the merits of the appeal; (2) the extent to which the moving party would be irreparably harmed by denial of the stay; (3) the potential harm to other parties interested in the proceeding if the stay is issued; and (4) the public interest. Hilton v. Braunskill, 481 U.S. 770, 776, 107 S. Ct. 2113, 2119 (1987); Advanced Estimating Sys., Inc. v. Riney, 171 F.R.D. 327, 329, 41 U.S.P.Q.2d 1638 (S.D. Fla. 1997).

(1) Defendant is Likely to Prevail on the Merits of its Appeal

As argued in Defendant’s initial and supplemental memorandums, there is no substantial similarity between *The Wind Done Gone* and the protectable expression in *Gone With the Wind*. And even if there were substantial similarity between the works, this Court would be compelled to find that any such copying is a fair use under Section 107 of the Copyright Act. Defendant hereby incorporates by reference its previous memoranda and evidence submitted to the Court.

(2) Defendant Will Be Irreparably Harmed if the Stay is Denied

“It 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, 49 L.Ed.2d 547 (1976) (additional cits. omitted).

Here, the preliminary injunction issued by the Court will, at the very least, indefinitely delay Defendant’s publication of *The Wind Done Gone*. Such “indefinite 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) (Blackmun, Circuit Justice).

The CBS decision involved a meat packing company’s attempt to enjoin the CBS television network from broadcasting video footage that it had obtained at the company’s factory, allegedly after trespassing on that property. A state court in South Dakota entered a temporary restraining order and preliminary injunction forbidding CBS from broadcasting the footage, finding that the meatpacking company was likely to be irreparably harmed by the allegedly wrongfully obtained footage. Id. at 913. Finding “extraordinary circumstances,” Justice Blackmun stayed the injunction. Id. at 1317. Justice Blackmun held that “indefinite delay of the broadcast will cause irreparable harm to the news media that is intolerable under the First Amendment.” Id. at 1318. Justice Blackmun went on to observe that there would be an adequate legal remedy for any breach by CBS of the meatpacking company’s property rights: “If CBS has breached its state law obligations, the First Amendment requires that [the meatpacking company] remedy its harms through a damages proceeding rather than through suppression of protected speech.” Id. at 1318. See also Southeastern

Promotions, Ltd. v. City of Mobile, 457 F.2d 340, 341 (ordering city authorities to allow stage production of the musical production “Hair” in a city-owned auditorium on the same day as the decision, and refusing to allow the district court to wait until the next day to decide the matter: “we cannot countenance this prior restraint on freedom of speech and irreparable harm and damage will ensue”).

(3) Other Parties Will Be Irreparably Harmed if the Stay is Denied

Neither Plaintiffs nor any other party will be irreparably harmed by the granting of this stay pending appeal. Plaintiffs cannot dispute the adequacy of a legal remedy: even in the event Defendant’s work were ultimately found to infringe *Gone With the Wind*, any impact to Plaintiffs could be quantified in terms of lost sales, including future sales, of *Gone With the Wind* and related works, and testimony about the value of a licensed slave narrative.

(4) The Public Interest Requires Staying the Injunction

As argued in Defendant’s supplemental memorandum, *The Wind Done Gone* is an explosive and timely political parody and satire, aimed at countering the offensive racial stereotypes in *Gone With the Wind*. *The Wind Done Gone*’s brand of political and social commentary deserves heightened First Amendment protection. Enjoining this book not only deprives Alice Randall of her constitutional right to express an important political message to the public; it also deprives the public of its constitutional right to hear that message. Because, at minimum, there is a compelling argument that Defendant’s novel is political speech protected by the First

Amendment, enjoining publication of the book is an unconstitutional prior restraint of speech.

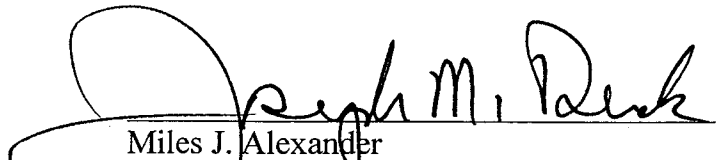
As argued in the Defendant's supplemental memorandum, the intense public interest in this case is recognition that **now** is the time for the political and cultural critique that *The Wind Done Gone* represents, and if this injunction persists, even if only for the months (or years) it may take to resolve this case, this especially ripe moment in American history may be forever lost.

Injunctions are not favored in fair use cases such as this one. As the Supreme Court said, 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, n.10. 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); Belushi v. Woodward, 598 F. Supp. at 37-38.

III. Conclusion

The Defendant respectfully submits that the four factors above strongly favor the defendant's motion to suspend the preliminary injunction issued by this Court pending appeal.

This 24th day of April, 2001.



Miles J. 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
John R. Renaud
Georgia Bar No. 600652
Kilpatrick Stockton LLP
1100 Peachtree Street, Suite 2800
Atlanta, Georgia 30309-4530
(404) 815 6500

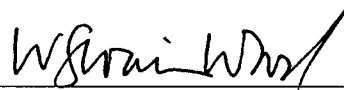
Attorneys for Defendant

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Defendant's Motion for Immediate Suspension of Preliminary Injunction Pending Appeal and Memorandum of Law in Support has been hand-delivered to counsel of record as follows:

William B. B. Smith
Ralph R. Morrison
Anne M. Johnson
JONES, DAY, REAVIS & POGUE
3500 SunTrust Plaza
303 Peachtree Street, N.E.
Atlanta, Georgia 30308

This 24th 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