FROM THE CHAIR

George Freeman

Frankly, my dears, I never read *Gone With The Wind* (and I'll admit to having fallen asleep during the movie). And I haven't read *The Wind Done Gone* for a more nefarious reason—a federal district judge enjoined its publication.[1]

But not reading assigned materials has never kept me from having strongly held views. I think it is totally outrageous and unsupportable that a judge ordered a prior restraint on a book that plainly was meant to be a social commentary on racism, using one of the most famous novels in American history as its starting point. If nothing else—and with apologies to those in the copyright bar among our membership—the decision underscores the bizarre and incongruous place of copyright law in broader First Amendment jurisprudence. But even more frighteningly, the reaction to this bizarre decision among First Amendment practitioners was a shockingly muted one—which says something, I fear, about the unhappy effects of media conglomeration and raises dire questions about our roles as professionals in the wonderful area in which we practice.

For the uninitiated, *Done Gone* is an unauthorized retelling of *GWTW*, but from the slaves' perspective. The Margaret Mitchell Trust sued to stop the book's publication. They cast it as a sequel that, they felt, violated their intellectual property rights and diminished their ability to grant, and maximize profits from, future licensing rights.

The *Done Gone* defense was that it was a parody, protected by the recent Supreme Court decision in the *2 Live Crew* case. Notwithstanding that the author took some fifteen characters, Tara, and some situations of the original work, to me it was a social commentary on racism, one of our nation's most pressing issues, and as such, should have been protected by the fair use doctrine.

Amazingly, the trial judge felt that the book was a sequel more than a parody, and hence decided the Mitchell Trust was likely to succeed on the merits. But encouraging speech on public issues is what our heritage is based on, not worrying about every possible dollar a dead author's estate can exploit from her fictional characters. And *Done Gone* was hardly a normal sequel, a new narrative about the further adventures of *GWTW*'s characters; rather, it was a caustic look at the presumptions on which *GWTW*—and Southern plantation society—were based. (To the extent it has been pointed out that protection for copyrighted works is included in the Constitution, the purpose was as an incentive for authors to write, not as a disincentive for others to pen critical commentaries about them. It can hardly be argued that had Margaret Mitchell known that decades later a critical commentary of her plot may have ensued, she would have been deterred from writing her novel and making the millions of dollars that have resulted from her work.)

Even worse, a prior restraint was entered. The case illustrates what I believe is the myopic view of copyright lawyers who believe that this was perfectly appropriate. The only way to stop piracy, they say, is to really stop it. But by no stretch of the imagination was this book piracy. It was not in any way a word-for-word taking, where, perhaps, an injunction might somehow be appropriate. Instead, it was a book, which used another book as a starting point, and to do so obviously used some of the characters and descriptions of *GWTW*.

If the Pentagon Papers, which thirty years ago this month raised questions of national security, could not be enjoined; if a book that contains libelous statements—hurting a victim's reputation far more than a trust fund's pocketbook—cannot be enjoined; if a television broadcast about a defendant on the eve of trial—perhaps implicating his constitutional fair trial rights—cannot be enjoined, how can an organized body of law possibly allow for a prior restraint here?

Even if plaintiff's lawyers can cite some precedent, that is not the point. It simply cannot be, that, whatever the copyright cases say, one of the most basic values that this country holds dear, that government shouldn't tell us what we can or can't read, can be so easily overridden. As one who was told by copyright lawyers in the *NBA/Motorola* case that the NBA could copyright the scores of their games, notwithstanding that scores are fact, not expression, and that all the movement of an NBA game is hardly copyrightable, this is just another example—albeit a far more telling one—of how the copyright law is dangerously inconsistent with our broader jurisprudence. It is, I believe, a warning signal that the unquestioned protections for the owner and future exploiter of intellectual property must be curtailed for the good of robust discussion and transmission of (nonpirated) information in our society at large.

More troubling still, however, was the reaction to the prior restraint. At a number of bar meetings I either attended or heard about, First Amendment lawyers were surprisingly quiet when this topic arose. It is hard to imagine that the silence was because they agreed with the view of the trust or the judge in this case—and privately many told me that they strongly believed in Alice Randall's right to write and distribute *Done Gone.* The unfortunate reason for the lack of outrage was that many of their clients were sympathetic to the trust: indeed, large media conglomerates are fiercely and greedily protective of their property, whether they be television shows, movies, or books, and employ others, such as some of us, to safeguard their property rights and to enable those conglomerates to squeeze every last penny from them. Thus, as lawyers, many felt beholden to their clients.

However, in accepting the gift of practicing in the most exciting area of the law there is, we owe something of a responsibility, in instances such as this, to at least fight for what is right and use our position and stature to argue for the rights of free speech and distribution of ideas over mere pecuniary interests.

I was distressed that so few media companies, with the exception of Dow Jones, The Tribune Company, Media General, CNN, Cox, and The New York

1. An Eleventh Circuit panel has summarily reversed the injunction (*Sun Trust Bank v. Houghton Mifflin*, No. 01-12200, 2001 U.S. App. LEXIS 10802 (11th Cir. May 25, 2001), but a full opinion that the panel promised has not come down as we go to press.

Times Company, were willing to support an amicus brief arguing against the prior restraint in this case. Obviously, in the end, our clients call the shots. And while I am no expert in office politics, and have perhaps done a thing or two over the years that has not been the most diplomatic, I certainly hope that all of us in this bar, at the least, argued to our clients as to why this new book should not be barred. Isn't it our professional duty, after all, to argue against prior restraints on ideas and to support the distribution of a book about race that might actually be read, especially when the only counterbalance is pecuniary.

As this article is submitted, an Eleventh Circuit panel summarily reversed the injunction, but the trust is seeking en banc review. Whatever the outcome, the fact that there can even be a question about the publication of this book is scary—and as a profession it is our duty to make it clear to the public and to our clients that we support more speech on such important issues, not less or none.