

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

MARGARET BARTON DRIGGS

PLAINTIFF

vs.

3:05cv48BN

GLORIA JACKSON WINTERS AND CLARENCE WINTERS

DEFENDANTS

ORDER GRANTING MOTION FOR A PRELIMINARY INJUNCTION

THIS MATTER CAME BEFORE THE COURT on the Motion of Plaintiff Margaret Barton Driggs for entry of an Order Granting Preliminary Injunction pursuant to Rule 65(b) of the Federal Rules of Civil Procedure and Uniform Local Rule 7.2(h), following this Court's entry of its Order Granting Motion for a Temporary Restraining Order, dated February 4, 2005. The Court has considered the record, including the Motion, the Complaint, and the sworn affidavits of Margaret Barton Driggs and David T. Hall, and the testimony of Mike Shoemaker, the certification of counsel of record, and the memorandum of law in support of the motion.

On February 18, 2005, the Court reviewed a letter from Defendant Gloria Jackson Winters which the Court considered to be an Answer filed *pro se* by the Defendant. The Court has directed the Clerk of the Court to docket the letter as an Answer. The attorneys for the Plaintiff requested the Court to consider the contents of the letter as evidence at the hearing, which the Court did.

After due consideration, the Court is of the opinion, based upon the findings of fact and conclusions of law set forth below, that the supporting affidavits and evidence show that Defendant Gloria Jackson Winters will continue to present dramatizations of or

from *Sweet Chariot* or any unauthorized derivative version thereof unless restrained by Order of this Court, and the Plaintiff will suffer irreparable injury for which there is no adequate remedy at law before Defendant can be heard in opposition to the entry of any Final Judgment in this proceeding.

Findings of Fact

1. Plaintiff Margaret Barton Driggs has brought this motion for injunctive relief related to defendants' copyright infringement, defendants' unfair competition in Mississippi, Washington, Massachusetts, Pennsylvania, and other states, as well as British Columbia, Canada; and defendants' misuse and misappropriation of the rights of Plaintiff Driggs to a derivative work, namely stage rights or dramatic rights of the literary work *Sweet Chariot*. This action is to enforce Driggs' rights in her copyrighted play as guaranteed by the United States Constitution, Article I, 8, cl. 8, and the Copyright Act of 1976, 17 U.S.C. §§ 101, *et seq.*

2. Plaintiff Margaret "Peggy" Barton Driggs, a citizen and resident of the State of Maryland, solely and independently conceived, originated, devised, created and wrote a new play or dramatization based on the life of Harriet Tubman which Driggs entitled *Sweet Chariot* in 1992. The play or dramatization was initially a one-act play in 1992, but in 1993 Driggs expanded the play to two acts. Between May 1992 and November 12, 1993, Driggs complied in all respects with the Copyright Act of 1976, 17 U.S.C. §§ 101 *et seq.* ("the Act"), and all other law governing copyright, and secured the exclusive rights and privileges in and to the copyright of the play, and received from the Registrar of Copyrights certificates of registration, dated and identified as follows: "May 27, 1992, PAU 1-638-211" and "November 12, 1993, PAU 1-802-900."

3. Harriet Tubman was an escaped slave and abolitionist who helped hundreds of other slaves escape through the Underground Railroad in the mid-19th century. The play *Sweet Chariot* has a unique sequence of events, characters, speeches, and other copyrighted features in addition to the plot and development of the story related to the life of Harriet Tubman.

4. Defendant Gloria Jackson Winters had access to a script of *Sweet Chariot* in 1994 when she played the role of Harriet Tubman in a production of Driggs' copyrighted work *Sweet Chariot* at the University of Mississippi in Oxford, Mississippi. Since then, Winters has staged productions or dramatizations of *Sweet Chariot* in a variety of venues in the last several years, each time appearing on stage in the role of Harriet Tubman. Sometimes, Winters has advertised and performed the play as *Sweet Chariot* and at other times as *The Deliverer*. The instances of her prior performances are more particularly described in Paragraphs 16 through 22 of the Complaint and the Affidavit of Margaret Barton Driggs, attached as Exhibit C to the Complaint.

5. On January 20, 2005, Driggs filed her Complaint asking for, among other things, a preliminary injunction and a judgment enjoining Defendant Gloria Jackson Winters' continued deprivation of Driggs' rights to her copyrighted work.

6. Plaintiff Driggs has demonstrated that Defendant Gloria Jackson Winters has a propensity to perform Driggs' play, whether by its title *Sweet Chariot* or by other names, such as *The Deliverer*, in the months of February and March of each year.

7. Further, Gloria Jackson Winters has scheduled a performance of *Sweet Chariot* on February 28, 2005, at the Northwest Mississippi Community College.

8. Defendant Gloria Jackson Winters has not responded previously to several

requests made on behalf of Driggs that she cease and desist from further infringement of *Sweet Chariot*, and she has knowingly and intentionally violated Driggs' legal rights in her copyrighted works.

9. Unless enjoined by this Court, Defendant Gloria Jackson Winters will continue to stage and perform dramatizations of or related to *Sweet Chariot* without permission or licensing rights, to the detriment of Driggs.

10. After the filing of her Complaint against Defendant, Plaintiff through her legal counsel subsequently learned that Defendant Gloria Jackson Winters, along with her late husband Clarence L. Winters, had filed a Chapter 7 bankruptcy proceeding on August 31, 2004, in the Bankruptcy Court for the United States District Court for the Southern District of Mississippi, Jackson Division, bearing cause no. 3:04-04606.

11. A certified copy of the Notice of Bankruptcy and of Automatic Stay filed on behalf of the Defendant, dated August 31, 2004, has been made a part of the record of this proceeding. The Schedules attached to Defendant's Voluntary Petition for Bankruptcy show that Defendant does not list any play manuscripts or copyrights or other intellectual property in Schedule B-Personal Property; that Defendant does not list Plaintiff as a creditor of the bankruptcy estate in Schedules D-F; and that Defendant does not list any executory contracts with Plaintiff in Schedule G. Accordingly, the Petition for Bankruptcy of the Defendant shows that Defendant did not provide Plaintiff of prior notice of her Petition and that Defendant does not claim any property interests of any type whatsoever in *Sweet Chariot*, including the right to perform that work or any adaptations of the work under any agreement with Plaintiff.

12. At the hearing on the Motion for Preliminary Injunction, Plaintiff through

her counsel has advised this Court that the relief sought at this hearing is limited solely to prospective injunctive relief from any post-bankruptcy petition acts of infringement by Defendant and that Plaintiff seeks no other relief at this time.

Conclusions of Law

13. The Court has original, exclusive jurisdiction of any civil action arising under any Act of Congress relating to copyrights. 28 U.S.C. § 1338(a).

14. In order to secure all protections of the Copyright Act, two steps must be undertaken: (a) copyright notice must be given on all copies; and (b) registration of the copyright must be filed with the Copyright Office. See 17 U.S.C. § 301. Driggs complied with the Copyright Act of 1976, 17 U.S.C. §§ 101 *et seq.* ("the Act"), and secured the exclusive rights and privileges in and to the copyright of the play *Sweet Chariot*, and she received from the Registrar of Copyrights certificates of registration. Further, she affixed the copyright notice or mark to the script of *Sweet Chariot*.

15. Registration certificates are prima facie evidence of the validity of a copyright and of the facts stated in the certificate. 17 U.S.C. § 410(c).

16. Pursuant to the Act, the author of a work, including a dramatic work, 17 U.S.C. § 102, has the exclusive rights

(1) to reproduce the copyrighted work in copies or phonorecords; (2) to prepare derivative works based upon the copyrighted work; (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease or lending; (4) in the case of literary, musical, dramatic and choreographic works, pantomimes and motion pictures and other audiovisual works, to perform the copyrighted work publicly; (5) in the case of literary, musical, dramatic and choreographic works, pantomimes and pictorial, graphic or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the

copyrighted work publicly.

17 U.S.C. § 106.

17. The Court notes that a preliminary injunction is an extraordinary remedy that should not be granted unless the movant has demonstrated, by a clear showing; (1) a substantial likelihood of prevailing on the merits; (2) a substantial threat of irreparable harm if the injunction is not granted; (3) that the threatened injury outweighs any harm that may result from an injunction to the non-movant; (4) that the injunction will not undermine public interests. *Canal Authority of Florida v. Callaway*, 489 F.2d 567, 572 (5th Cir. 1974); see also *Walgreen Co. v. Hood*, 275 F.3d 475, 477 (5th Cir. 2001); *Baldwin v. City of Jackson*, 2004 WL 1877949 *2 (S.D. Miss. 2004). The Court finds that Driggs has proven each of these elements by a preponderance of the evidence.

18. The Court is persuaded by the reasoning of the United States District Court of South Carolina in its recent opinion in *Palmetto Builders and Designers, Inc. v. Unireal, Inc.*, 342 F.Supp.2d 468, 471 (D. S.C. Oct. 24, 2004), in which it held:

In deciding motions for preliminary injunctions in the context of copyright law, a lower standard of proof is applied. "Under Fourth Circuit precedent, if a plaintiff establishes a prima facie case of copyright infringement, a court is 'entitled to presume that ... [the plaintiff] could show both probable likelihood of success on the merits and irreparable harm.' " *National Medical Care, Inc. v. Julian L. Espiritu, MD.*, 284 F.Supp.2d 424, 431 (S.D.W.Va.2003) (quoting *Service and Training Inc. v. Data General Corp.*, 963 F.2d 680, 690 (4th Cir.1992)). The First Circuit has stated that the rationale for this presumption stems from the unique, expressive nature of information protected by the Copyright Act.

Thus, in copyright cases, a plaintiff who can establish a prima facie case of infringement wins both the balance of hardships test and the likelihood of success on the merits inquiry. *Service and Training Inc.*, 963 F.2d at 690 ("Once

[the plaintiff] established a *prima facie* claim of copyright infringement, the district court was entitled to presume that [plaintiff] could show *both* probable likelihood of success on the merits *and* irreparable harm."

19. A substantial likelihood exists that Driggs will succeed on the merits under her statutory claim arising from the laws of the United States and under her common law claims, as she is the valid owner and holder of the copyright in and to the play *Sweet Chariot* and is the sole proprietor of its dramatic rights. "To establish copyright infringement, a plaintiff must prove ownership of a valid copyright and copying of constituent elements of the work that are copyrightable." *Compaq Computer Corp. v. Ergonome, Inc.*, 2004 WL 2222385 *2 (5th Cir. 2004) (quoting *Eng'g Dynamics, Inc. v. Structural Software, Inc.*, 26 F.3d 1335, 1340 (5th Cir. 1994); *see also General Universal Systems, Inc. v. HAL, Inc.*, 2004 WL 1616832 *5 (5th Cir. 2004). To succeed in an infringement action, a plaintiff alleging infringement

must first show that his or her work was actually copied. Copying may be established either by direct evidence of copying or by indirect evidence, including access to the copyrighted work, similarities that are probative of copying between the works, and expert testimony. If actual copying is established, a plaintiff must then show that the copying amounts to an improper appropriation by demonstrating that substantial similarity to protected material exists between the two works.

Laureyssens v. Idea Group, Inc., 964 F.2d 131, 140 (2d Cir.1992). *See also General Universal Systems, Inc.*, 2004 WL 1616832 at *5; *Palmetto Builders and Designers, Inc.*, 342 F.Supp.2d at 472. Driggs has established her likelihood of success on the merits by her registration of the work; the Defendant Gloria Jackson Winter's access to the copyrighted work; the copying of the play by Winters by her unauthorized performances of the *Sweet Chariot* script with its unique sequence of events, characters, speeches, and

other copyrighted features; and misappropriation by the numerous unauthorized performances by Winters as well as her attempt to disguise her acts of misappropriation by a title change. Even without the direct evidence of copying, the Defendant Gloria Jackson Winters' access to the copyrighted play and the substantial similarity of her performances to the play *Sweet Chariot* creates a presumption of copying. *Palmetto Builders and Designers, Inc.*, 342 F.Supp.2d at 472.

20. In the absence of injunctive relief prohibiting such infringement pending final disposition, Winters will likely continue her infringement of Driggs' copyrighted work and continue to schedule and give unauthorized performances of *Sweet Chariot* or unauthorized derivative versions in the coming months. Driggs has no plain, adequate, or complete remedy at law concerning the prospect of future performances and an injunction is the only means of securing this relief.

21. This preliminary injunction order is issued because Driggs has shown that Gloria Jackson Winters and those acting in concert with Winters, unless restrained, will continue to stage and perform dramatizations of or from *Sweet Chariot* without permission or licensing rights, and that the continued infringement of Plaintiff's copyright will immediately and irreparably injure her. *See Merkos L'inyonei Chinuch, Inc. v. Otsar Sifrei Lubavitch, Inc.*, 312 F.3d 94, 96 (2d Cir.2002) ("when a copyright plaintiff makes out a prima facie showing of infringement, irreparable harm may be presumed"); *ABKCO Music, Inc. v. Stellar Records, Inc.*, 96 F.3d 60, 64 (2d Cir.1996) (in copyright case, irreparable harm requirement can be met by proof of likelihood of success on merits); *Rodrigue v. Putnam*, 2004 WL 3088615 *1-3 (E.D. La. 2004) ("the continued infringement of plaintiff's copyrights will immediately and irreparably injure

him"). See also *Royalty Designs, Inc. v. Thrifticheck Service Corp.*, 204 F.Supp. 702, 704 (S. D.N.Y. 1962) (where prima facie case made for infringement, general statements by plaintiff as to irreparable damage it has and will continue to suffer from infringement are sufficient and damages need not be detailed for preliminary injunction).

22. No other remedy would offer Plaintiff substantial and complete protection from the continuation of Defendant's unlawful and unconstitutional acts, policies, customs, and practices.

23. Granting a preliminary injunction will not disserve the public interest but will ensure that further potential infringing action will be precluded until this matter is finally decided on the merits.

24. The automatic stay provision of 11 U.S.C § 362 does not apply to the injunctive relief sought by Plaintiff in the instant proceeding because (a) Defendant's Petition for Chapter 7 Bankruptcy shows that Defendant does not claim any contractual or property interest of any nature whatsoever in any the copyrighted works of Plaintiff; (b) Plaintiff's claim for injunctive relief is based on the anticipated post-petition infringing conduct of Defendant; and (c) Plaintiff at this time only seeks to enjoin the post-petition infringing conduct of Defendant. *Larami Ltd. V. Yes! Entertainment Corp.*, 244 B.R. 56 (Bankruptcy D. N. J. 2000); *Int'l Ass'n of Machinists v. Continental Airlines, Inc.*, 254 F. Supp. 892 (D.C.D.C. 1990); see *Connor v. Howe*, 344 F. Supp. 2d 1164 (S.D. Ind. 2004).

25. Granting a preliminary injunction will not disserve the public interest but will ensure that further potential infringing action will be precluded until this matter is finally decided on the merits.

26. Plaintiff Driggs is entitled to an order Granting a Preliminary Injunction.

IT IS THEREFORE ORDERED that defendant Gloria Jackson Winters, and all persons acting in concert or participation with her, shall be enjoined:

a. From presenting any further production or dramatization of *Sweet Chariot* or any unauthorized derivative version thereof including any such production or dramatization that is presently scheduled wherever located;

b. From otherwise infringing Driggs' copyright in the play *Sweet Chariot* and from inducing any person or public or private entity or business to infringe Driggs' copyright in the play *Sweet Chariot*;

c. From advertising any performances of *Sweet Chariot* or any unauthorized derivative version thereof;

d. From asking anyone to assist in the performance, production, promotion, marketing, advertising on any performance of *Sweet Chariot* or *The Deliverer*.

e. From competing unfairly with Driggs by performing the play *Sweet Chariot* under any other titles, including *The Deliverer*;

f. From doing any act or thing that might tend to damage the business reputation of Driggs; and

g. From benefiting from their misuse, misappropriation, pirating, and theft of the dramatic rights of Driggs in and to the literary and dramatic work;

IT IS FURTHER ORDERED that the bond submitted on behalf of Plaintiff and filed with the Court shall be deemed adequate security for the payment of such costs and damages which may be incurred by Defendant Gloria Jackson Winters if the relief herein is found to have improvidently granted;

AND IT IS FURTHER ORDERED that this Order is binding upon Defendant Gloria Jackson Winters, her agents, servants, representatives, and attorneys, and upon those persons in active concert or participation with her or them who receive actual notice of the Order by personal service or otherwise.

ISSUED at 10:15 a.m. on February 18, 2005.

s/ William H. Barbour, Jr.
UNITED STATES DISTRICT JUDGE

Submitted by:

s/ John C. Henegan

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