
IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CASE NO. 01-122-00-HH

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

Plaintiff-Appellee,

v.

HOUGHTON MIFFLIN COMPANY,

Defendant-Appellant.

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

**AMICI CURIAE BRIEF OF THE NEW YORK TIMES COMPANY, DOW
JONES & COMPANY, INC., THE TRIBUNE COMPANY, MEDIA
GENERAL, INC., CABLE NEWS NETWORK LP, LLLP, AND COX
ENTERPRISES, INC. IN SUPPORT OF DEFENDANT/APPELLANT,
HOUGHTON MIFFLIN COMPANY, FOR REVERSAL**

HOLLAND & KNIGHT LLP
Gregg D. Thomas
James B. Lake
Rachel E. Fugate
P.O. Box 1288
Tampa, FL 33601-1288
(813) 227-8500

**CERTIFICATE OF INTERESTED PERSONS
AND CORPORATE DISCLOSURE STATEMENT**

Pursuant to 11th Cir. R. 26.1-1, I certify that the following persons or entities have an interest in the outcome of this case:

Miles J. Alexander, counsel for Appellant

Joseph M. Beck, counsel for Appellant

David S. Bralow, Esq., counsel for Amicus Curiae Tribune Company

Cable News Network LP, LLLP, Amicus Curiae

An indirect subsidiary of AOL Time Warner, Inc.; affiliates are:

America Online, Inc.

AOLTV, Inc.

AOL Asia Limited

AOL GP Holdings LLC

AOL Australia Pty Ltd

AOL International Finance CV

EJV Reorganization, Inc.

AOL Luxembourg SARL

AOL Europe SA

AOL (UK) Limited

CompuServe Interactive Services Limited

AMSE France SARL

Netfin Online Verwaltungsgesellschaft mbH

AOL SVC GmbH & Co. KG

AOL America Online (Deutschland)

AOL Bertelsmann Online GmbH & Co.

AOL Nederland BV

Cyberfin Online UK Holding Limited

AOL Bertelsmann Service Operations

AOL Technologies Ireland Limited

CompuServe Interactive Services, Inc.

Digital City, Inc.

Digital Marketing Services, Inc.

DoCoMo AOL, Inc.

ICQ Limited

MapQuest.com, Inc.

MovieFone, Inc.

Netscape Communications Corporation

Netscape Communications Canada, Inc.

AOL Canada, Inc.

Netscape Communications Europe SARL

Quack.com, Inc.

Spinner Networks, Inc.

Tegic Communications Corporation

Time Warner Inc.

SunTrust Bank v. Houghton Mifflin Company
Case No. 01-122-00-HH

Turner Broadcasting System, Inc.

Turner Arena Productions and Sales, Inc.

Atlanta Hockey Club, Inc.

Atlanta National League Baseball Club, Inc.

Hawks Basketball, Inc.

CNN Investment Company, Inc.

Cable News International, Inc.

CNN America, Inc.

CNN Newsource Sales, Inc.

Castle Rock Entertainment, Inc.

Castle Rock Entertainment

Goodwill Games, Inc.

HB Holding Co.

Hanna-Barbera Entertainment Co., Inc.

New Line Cinema Corporation

Turner Entertainment Group, Inc.

Turner Entertainment Networks, Inc.

Superstation, Inc.

Turner Entertainment Networks Asia, Inc.

TEN Investment Company, Inc.

Turner Network Television LP, LLLP

SunTrust Bank v. Houghton Mifflin Company
Case No. 01-122-00-HH

The Cartoon Network LP, LLLP

Turner Classic Movies LP, LLLP

Turner Pictures Group, Inc.

Turner Home Entertainment, Inc.

Turner Broadcasting Sales, Inc.

Turner Broadcasting System Asia Pacific, Inc.

Turner Home Satellite, Inc.

Turner Broadcasting System (Holdings) Europe Ltd.

Turner International, Inc.

Turner Sports, Inc.

Time Warner Companies, Inc.

American Television and Communications Corporation ('ATC')

Asiaweek Limited

Time International Inc.

Time Inc.

Book-of-the-Month Club, Inc.

Book-of-the-Month Club Holdings LLC

BD Book Clubs G.P.

Entertainment Weekly, Inc.

Time Distribution Services, Inc.

Time Inc. Ventures

Time Publishing Ventures, Inc.

Southern Progress Corporation

Sunset Publishing Corporation

The Parenting Group Inc.

Times Mirror Magazines, Inc.

Time Life Inc.

Time Warner Trade Publishing Inc.

Little, Brown and Company (Inc.)

Warner Books, Inc.

Warner Publisher Services Inc.

TWI Cable Inc.

Summit Communications Group, Inc.

WCI Record Club Inc.

The Columbia House Company

Warner Communications Inc.

Elektra Entertainment Group Inc.

DC Comics

Warner-Tamerlane Publishing Corp.

WB Music Corp.

Warner/Chappell Music, Inc.

Warner Bros. Music International Inc.

SunTrust Bank v. Houghton Mifflin Company
Case No. 01-122-00-HH

Warner Bros. Publications U.S. Inc.

New Chappell Inc.

CPP/Belwin, Inc.

E.C. Publications, Inc.

Warner Music Group Inc.

London-Sire Records Inc.

Warner Bros. Records Inc.

WBR/Sire Ventures Inc.

SR/MDM Venture Inc.

Maverick Recording Company

Atlantic Recording Corporation

Rhino Entertainment Company

Warner-Elektra-Atlantic Corporation

WEA International Inc.

Warner Music Canada Ltd.

The Columbia House Company (Canada)

Warner Music Newco Limited

Embleton Ltd.

London Records 90 Limited

Warner Special Products Inc.

WEA Manufacturing Inc.

Ivy Hill Corporation

Time Warner Entertainment Company, L.P.

Time Warner Entertainment-Advance/Newhouse Partnership

CV of Viera

Texas Cable Partners, L.P.

Century Venture Corporation

Erie Telecommunications Inc.

Kansas City Cable Partners

Queens Inner Unity Cable System

Comedy Partners, L.P.

Courtroom Television Network LLC

DC Comics

Classwell Learning Group, Inc., affiliate of Appellant

Computer Adaptive Technologies, Inc., affiliate of Appellant

Cox Enterprises, Inc.

Subsidiaries are:

Cox Newspapers, Inc.

The Atlanta Journal-Constitution

Cox Texas Publications, Inc.

Dayton Newspapers, Inc.

Springfield Newspapers, Inc.

SunTrust Bank v. Houghton Mifflin Company
Case No. 01-122-00-HH

Grand Junction Newspapers, Inc.

Cox Broadcasting Inc.

Cox Radio, Inc.

Bing Crosby Productions, Inc.

ASCO Music

BeePee Music

Georgia Television Company

KFI, Inc.

KKBQ-AM-FM

KTVU Inc.

Miami Valley Broadcasting Corporation

TeleRep, Incorporated

WFTV, Inc.

WHIO, Inc.

WPXI Inc.

WSB, Inc.

WSOC Television, Inc.

WTOV, Inc.

WTVR-AM/FM

WWRM, Inc.

Cox Communications, Inc.

SunTrust Bank v. Houghton Mifflin Company
Case No. 01-122-00-HH

Cox Communications-Amherst
Cox Communications-Ashland
Cox Communications-Bakersfield
Cox Communications-Cedar Rapids
Cox Communications-Cleveland
Cox Communications-Gainesville/Ocala
Cox Communications-Greater Hartford
Cox Communications-Humboldt Bay
Cox Communications-Lafayette
Cox Communications-Louisiana
Cox Communications-Lubbock
Cox Communications-Meriden
Cox Communications-Middle Georgia
Cox Communications-Midland
Cox Communications-Myrtle Beach
Cox Communications-New Orleans
Cox Communications-Oklahoma City
Cox Communications-Omaha
Cox Communications-Orange County
Cox Communications-Palos Verdes
Cox Communications-Pensacola/Ft. Walton

SunTrust Bank v. Houghton Mifflin Company
Case No. 01-122-00-HH

Cox Communications-Phoenix
 Arizona Sports Programming Network
Cox Communications-Providence/Weymouth
Cox Communications-Quad Cities
Cox Communications-Rhode Island
Cox Communications-Roanoke
Cox Communications-Saginaw
Cox Communications-San Diego
Cox Communications-Santa Barbara
Cox Communications-Spokane
Cox Communications-Springfield
Cox Communications-Vista
Cox Communications-Washington
Cox Communications-Williamsport
CableRep, Inc.
Cox Cable Greater Ocala, Inc..
Cox Cable Hampton Roads, Inc.
Cox Cable University City, Inc.
Cox Communications of Northern Virginia
TWC Cable Partners
Video Service Company

SunTrust Bank v. Houghton Mifflin Company
Case No. 01-122-00-HH

Emerald Coast Cable Television

Manheim Auctions, Inc.

Albuquerque Auto Auction Inc.

Aloha Auto Auction

American Auto Auction, Inc.

Arena Auto Auction Inc.

Arizona Auto Auction Services

Atlanta Auto Auction, Inc.

Auction Transport Inc.

Aycock Auto Auction

Baltimore-Washington Auto Exchange Inc.

Butler Auto Auction

California Auto Dealers Exchange, Inc.

Bay Cities Auto Auction

Los Angeles Dealers Auto Auctions

Southern California Auto Auction

Clanton's Auto Auction

Colorado Auction Services Corporation

Dallas Auto Auction Inc.

Denver Auto Auction

Detroit Auto Auction, Inc.

SunTrust Bank v. Houghton Mifflin Company
Case No. 01-122-00-HH

Dothan Auto Auction
Florida Auto Auction of Orlando, Inc.
Fort Wayne Vehicle Auction Inc.
Fresno Auto Dealers Auction
Georgia Dealers Auto Auction
 Bishop Brothers Auto Auction
Greater Chicago Auto Auction
Greater Tampa Bay Auto Auction
Harrisonburg Auto Auction
Hatfield Auto Auction
Imperial Auto Auction
Kansas City Auto Auction
Lakeland Auto Auction
Lauderdale-Miami Auto Auction Inc.
Manheim's Greater Orlando Auto Auction
Manheim's Omaha Auto Auction
Metro Milwaukee Auto Auction
Mid-America Auto Auction
Minneapolis Auto Auction
Mississippi Auto Auction Inc.
Missouri Auction Services Corp.

SunTrust Bank v. Houghton Mifflin Company
Case No. 01-122-00-HH

Nashville Auto Auction Inc.
National Auto Dealers Exchange
Newburgh Auto Auction
Northstar Auto Auction Inc.
Ohio Auto Auction
Portland Auto Auction
St. Louis Auto Auction
St. Pete Auto Auction
San Diego Auto Auction Inc.
Skyline Auto Exchange
Skyline Port Newark Facility
South Seattle Auto Auction
Statesville Auto Auction
Texas Auto Auction Services, Inc.
 Fort Worth Auto Auction
 San Antonio Auto Auction
 Texas Hobby Auto Auction
Utah Auto Auction
West Palm Beach Auto Auction, Inc.
Manheim's Oshawa Dealers Exchange
Toronto Auto Auction

SunTrust Bank v. Houghton Mifflin Company
Case No. 01-122-00-HH

Trader Publishing Company

Dow Jones and Company, Inc., Amicus Curiae

Subsidiaries are:

DJBI, LLC

Dow Jones & Company (Australia) Pty Limited

Dow Jones & Company (Singapore) Pte Limited

Dow Jones AER Company, Inc.

Economic Research Company, Inc.

Dow Jones BD Services, Inc.

Dow Jones Broadcasting (Asia), Inc.

Dow Jones Broadcasting (Europe), Inc.

Dow Jones Broadcasting (USA), Inc.

Dow Jones Canada, Inc.

Dow Jones Consulting (Shanghai) Limited

Dow Jones Distribution Co. (Asia), Inc.

Dow Jones Financial Publishing Corp.

Dow Jones Information Publishing, Inc.

Dow Jones Information Services International (HK) Ltd.

Dow Jones International GmbH

Dow Jones International Ltd.

Dow Jones International Marketing Services

SunTrust Bank v. Houghton Mifflin Company
Case No. 01-122-00-HH

Dow Jones (Japan) K.K.

Dow Jones, L.P.

Dow Jones Newsprint Company, Inc.

Dow Jones Newswires Holdings, Inc.

Dow Jones Printing Company (Asia), Inc.

Dow Jones Publishing Company (Asia), Inc. (90% owned)

Dow Jones Publishing Company (Europe), Inc.

Dow Jones Southern Holding Company, Inc.

Dow Jones Ventures V, Inc.

Dow Jones Ventures VI, Inc.

Dow Jones Cash Management, Inc.

Ottaway Newspapers, Inc.

Essex County Newspapers, Inc.

News-Sun, Inc.

ONI Press, Inc.

Research and Marketing Solutions, Inc.

The Inquirer & Mirror, Inc.

Portuguese-American Publications, Inc.

Seacoast Newspapers, Inc.

Federal Filings, Incorporated

IDD LP Holdings, Inc.

SunTrust Bank v. Houghton Mifflin Company
Case No. 01-122-00-HH

National Delivery Service, Inc.

Review Publishing Company Limited

The China Phone Book Co. Ltd.

The Wall Street Journal Europe S.P.R.L.

Frankfurt, Garbus, Kurnit, Klein & Selz, law firm for Appellee

George Freeman, Esq., counsel for Amicus Curiae The New York Times Company

Rachel E. Fugate, Esq., counsel for Amici Curiae

Martin Garbus, counsel of record for Appellee

Great Source Education Group, Inc., affiliate of Appellant

HMI Holdings, Inc., affiliate of Appellant

Holland & Knight LLP, law firm for Amici Curiae

Houghton Mifflin Canada Limited, affiliate of Appellant

Houghton Mifflin Foreign Sales Corporation, affiliate of Appellant

Houghton Mifflin Company, Appellant

Houghton Mifflin Company International, Inc., affiliate of Appellant

Houghton Mifflin International, Inc., affiliate of Appellant

Anne M. Johnson, counsel for Appellee

Jones, Day, Reavis & Pogue, law firm for Appellee

Stuart D. Karle, Esq., counsel for Amicus Curiae Dow Jones & Company

Kilpatrick Stockton LLP, law firm for Appellant

James B. Lake, Esq., counsel for Amici Curiae

SunTrust Bank v. Houghton Mifflin Company
Case No. 01-122-00-HH

Adam Liptak, Esq., counsel for Amicus Curiae The New York Times Company
Media General, Inc., Amicus Curiae

Subsidiaries are are:

Garden State Paper Company, Inc.

M.G. Broadcasting of Birmingham II, LLC

M.G. Broadcasting of Birmingham Holdings, LLC

Media General Broadcasting of South Carolina Holdings, Inc.

Media General Communications, Inc.

Media General Financial Services, Inc.

Media General Operations, Inc.

NES II, Inc.

Professional Communications Systems, Inc.

Tall Towers, Inc.

Tampa Tower General Partnership

The Tribune Company Holdings, Inc.

Virginia Paper Manufacturing Corp.

Andrew A. Merdek, counsel for Amicus Curiae Cox Enterprises, Inc.

Ralph R. Morrison, counsel for Appellee

McDougal Littell, Inc., affiliate of Appellant

The New York Times Company, Amicus Curiae

Subsidiaries are:

SunTrust Bank v. Houghton Mifflin Company
Case No. 01-122-00-HH

NYT Capital, Inc.

City & Suburban Delivery Systems, Inc.

Comet-Press Newspapers, Inc.

Crossroads Holding Corporation

Donohue Malbaie Inc.

Globe Newspaper Company, Inc.

Boston Globe Electronic Publishing, Inc.

Boston Globe Marketing, Inc.

Community Newsdealers Inc.

Globe Specialty Products, Inc.

NYT Management Services

Retail Sales, Inc.

Hendersonville Newspaper Corporation

Lakeland Ledger Publishing Corporation

NYT Holdings, Inc.

NYT Shared Service Center, Inc.

The Dispatch Publishing Company, Inc.

The Houma Courier Newspaper Corporation

The Times Southwest Broadcasting, Inc.

The New York Times Company Magazine Group, Inc.

NYT Special Services, Inc.

SunTrust Bank v. Houghton Mifflin Company
Case No. 01-122-00-HH

The New York Times Distribution Corporation
The New York Times Electronic Media Company
The New York Times Sales, Inc.
The New York Times Syndication Sales Corporation
The Spartanburg Herald-Journal, Inc.
Times Leasing, Inc.
Times On-Line Services, Inc.
Wilmington Star-News, Inc.
WNEP-TV, Inc.
WNEP-TV, LP
Worcester Telegram & Gazette Corporation
WREG-TV, Inc.
WREG-TV, LLC
WTKR-TV, Inc.

International Herald Tribune S.A.S.

London Bureau Limited

Madison Paper Industries

NYT Administradora de Bens e Servicos Ltda.

NYT 1896T, Inc.

Rome Bure au S.r.l

Times Company Digital, Inc.

SunTrust Bank v. Houghton Mifflin Company
Case No. 01-122-00-HH

Abuzz Technologies, Inc.

On-Line Learning, Inc., affiliate of Appellant

The Honorable Charles A. Pannell, Jr., District Court Judge

Alice Randall, author of *The Wind Done Gone*

The Riverside Publishing Company, affiliate of Appellant

Thomas D. Selz, counsel for Appellee

Sentry Realty Corporation, affiliate of Appellant

William B. B. Smith, counsel for Appellee

The Stephens Mitchell Trusts f/b/o Eugene Muse Mitchell and Joseph Reynolds

Mitchell, Appellee

Jere B. Swann, counsel for Appellant

Gregg D. Thomas, Esq., counsel for Amici Curiae

Ticknor & Fields, Inc., affiliate of Appellant

Tribune Company, Amicus Curiae

Subsidiaries are:

Achieve Global

Achieve Global

Achieve Global

The Advocate

The Baltimore Sun Newspapers

Homestead Publishing

SunTrust Bank v. Houghton Mifflin Company
Case No. 01-122-00-HH

CLTV News

Chicago National League Ball Club, Inc. (Chicago Cubs)

Chicago Tribune Co.

RELCON, Inc.

Tribune Direct

Greenwich Times

The Hartford Courant Company

Jeppesen Sanderson Inc.

Jeppesen and Co. GmbH

Los Angeles Times

Los Angeles Times Syndicate

The Morning Call

Newsday

Tribune Broadcasting Company

KCPQ-TV

KDAF (WB)

KHWB-TV

KSWB-TV

KTLA, Inc.

KTXL Channel 40

KWGN Inc.

SunTrust Bank v. Houghton Mifflin Company
Case No. 01-122-00-HH

Tribune Denver Radio, Inc.

KEZW-AM

KKHK

KOSI-FM

Tribune Entertainment Company

WBDC-TV

WBZL Channel 39

WEWB-TV

WGN Radio

WGN-TV

WGNO Inc.

WLVI-TV

WPHL-TV, Inc.

WPIX, Inc.

WPMT Channel 43

WTIC

WXIN

WXMI-TV

Tribune Interactive Inc.

Tribune Publishing Company

Daily Press, Incorporated

SunTrust Bank v. Houghton Mifflin Company
Case No. 01-122-00-HH

Orlando Sentinel Communications

Sun-Sentinel Company

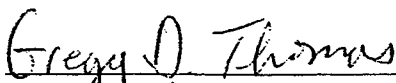
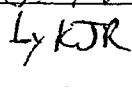
Tribune Media Services, Inc.

Tribune Regional Programming Inc.

Maura J. Wogan, counsel for Appellee

Stacey E. Wolf, counsel for Amicus Curiae Cable News Network LP, LLLP

W. Swain Wood, counsel for Appellant


Attorney 

TPA1 #1134242 v2

TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PARTIES AND
CORPORATE DISCLOSURE STATEMENT C-1

TABLE OF CONTENTS..... i

TABLE OF AUTHORITIES ii

STATEMENT OF THE ISSUES..... 1

INTERESTS OF THE AMICI CURIAE 2

SUMMARY OF THE ARGUMENT 6

ARGUMENT 7

I. A PRELIMINARY INJUNCTION BANNING INDEPENDENTLY
EXPRESSIVE SPEECH IS A PRIOR RESTRAINT 7

 A. The dangers of prior restraints..... 7

 B. The dangerous intersection of copyright law and prior restraints. 10

 C. The preliminary injunction in the instant case acts as an
 unconstitutional prior restraint..... 19

CONCLUSION 24

CERTIFICATE OF COMPLIANCE WITH F.R.A.P 32(A)(7)(B)(I) AND
 ELEVENTH CIRCUIT RULE 28-1(M) 26

CERTIFICATE OF SERVICE 27

TABLE OF AUTHORITIES

FEDERAL CASES

<i>Bantam Books, Inc. v. Sullivan,</i>	
372 U.S. 58 (1963).....	7
<i>Bernard v. Gulf Oil Co.,</i>	
619 F.2d 459 (5th Cir. 1980), <i>aff'd</i> , 452 U.S. 89 (1981)	10
<i>Blount v. Rizzi,</i>	
400 U.S. 410 (1970).....	9
<i>Campbell v. Acuff-Rose Music, Inc.,</i>	
510 U.S. 569 (1994).....	17, 19
<i>In re Capital Cities/ABC, Inc.,</i>	
918 F.2d 140 (11th Cir. 1990)	18
<i>Fort Wayne Books, Inc. v. Indiana,</i>	
489 U.S. 46 (1989).....	13
<i>Globe International, Inc. v. National Enquirer, Inc.,</i>	
No. 98-10613 CAS, 1999 WL 727232 (C.D. Cal. Jan. 25, 1999).....	15
<i>Greenberg v. National Geographic Soc'y,</i>	
244 F.3d 1267 (11th Cir. 2001)	18
<i>Harper & Row, Publishers, Inc. v. Nation Enter.,</i>	
471 U.S. 539 (1985).....	11, 12

<i>M.I.C., Ltd. v. Bedford Township,</i>	
463 U.S. 1341 (1983) (Brennan, Circuit Justice)	14
<i>NAACP v. Claiborne Hardware Co.,</i>	
458 U.S. 886 (1982).....	20
<i>Near v. Minnesota,</i>	
283 U.S. 697 (1931).....	7, 8
<i>Nebraska Press Ass'n v. Stuart,</i>	
427 U.S. 539 (1976).....	8
<i>New York Times Co. v. United States,</i>	
403 U.S. 713 (1971).....	7, 8, 16, 17
<i>Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations,</i>	
413 U.S. 376 (1973).....	7
<i>Religious Technology Center v. Lerma</i>	
897 F. Supp. 260 (E.D. Va. 1995)	15
<i>Sony Corp. of Amer. v. Universal City Studios, Inc.,</i>	
464 U.S. 417 (1984).....	11
<i>Triangle Publications, Inc. v. Knight-Ridder Newspapers, Inc.,</i>	
445 F. Supp. 875 (S.D. Fla.), <i>aff'd on other grounds,</i>	
626 F.2d 1171 (5th Cir. 1980)	12

<i>United States v. Columbia Broadcasting System, Inc.</i> , 497 F.2d 102 (5th Cir. 1974)	9, 18
<i>United States v. Noriega</i> , 917 F.2d 1543 (11th Cir.), <i>cert. denied</i> , 498 U.S. 976 (1990)	9, 10, 17, 18
<i>Vance v. Universal Amusement Co., Inc.</i> , 445 U.S. 308 (1980).....	8, 14, 21

CONSTITUTIONS AND STATUTES

U.S. Const. art. I, § 8	10
17 U.S.C. § 505 (1999)	22

MISCELLANEOUS

Mark A. Lemley & Eugene Volokh, <i>Freedom of Speech and Injunctions</i> <i>in Intellectual Property Cases</i> , 48 Duke L.J. 147 (1998).....	11, 14, 16
Henry P. Monaghan, <i>First Amendment "Due Process,"</i> 83 Harv. L. Rev. 518 (1970).....	13
<i>Title I – Fair Use of HR 2372, 1991: Hearings on H.R. 2372 Before the</i> <i>Subcomm. on Intellectual Property and Judicial Administration Comm.</i> <i>on the Judiciary</i> , 102d Cong., 1 st Sess. (1991) (statement of Kenneth M. Vittor on behalf of the Magazine Publishers of America)	22

STATEMENT OF THE ISSUES

- I. WHETHER A PRELIMINARY INJUNCTION BANNING INDEPENDENTLY EXPRESSIVE SPEECH IS A PRIOR RESTRAINT.

INTERESTS OF THE AMICI CURIAE

Pursuant to FRAP 29(a), Amici Curiae certify that all parties to this appeal have consented to the filing of this brief.¹

The New York Times Company (“The Times”) is a diversified communications company primarily in the business of reporting and distributing news. The Times publishes almost a score of daily newspapers, including *The New York Times*, a national newspaper, several of which are published in the Eleventh Circuit. In addition, the Times owns eight television stations, including one in the Eleventh Circuit.

Dow Jones & Company, Inc. (“Dow Jones”) is the publisher of, *inter alia*: *The Wall Street Journal*, a national newspaper published each business day; WSJ.com, the largest paid website on the World Wide Web, with more than 550,000 subscribers; Dow Jones Newswires, real-time, 24-hour newswires distributed electronically to subscribers; Barron’s, a weekly newspaper of business and finance; and, through its Ottaway Newspapers, Inc. subsidiary, nineteen daily and seventeen weekly newspapers.

¹ Appellant, Houghton Mifflin Company will be referred to as “Houghton Mifflin.” Appellee SunTrust Bank, as Trustee of the Stephens Mitchell Trusts f/b/o Eugene Muse Mitchell and Joseph Reynolds Mitchell will be referred to as “Mitchell Trust.” The Amici Curiae will be referred to as “Amici.”

The Tribune Company (“Tribune”) is a media industry leader with operations in the major markets of the United States, including eighteen of the top thirty markets. Through television, newspapers, radio and the Internet, the Tribune reaches eighty percent of U.S. households. Among the newspapers Tribune publishes are *Chicago Tribune*, *Los Angeles Times*, *Newsday*, *Orlando Sentinel* and *South Florida Sun-Sentinel*.

Media General, Inc. (“Media General”) is an independent, publicly owned communications company situated primarily in the Southeast. Media General is a leading provider of news and information through its interests in newspapers, television stations, interactive media and diversified information services. Media General’s publishing assets include *The Tampa Tribune*, the *Richmond Times-Dispatch*, the *Winston-Salem Journal*, and twenty-two other daily newspapers in Virginia, North Carolina, Florida, Alabama and South Carolina, as well as nearly 100 other publications. Media General’s twenty-six network-affiliated television stations reach more than thirty percent of the television households in the Southeast, and nearly eight percent of those in the United States.

Cable News Network LP, LLLP (“CNN”) is one of the world’s most respected and trusted sources for news and information. Its reach extends to sixteen cable and satellite television networks; three private, place-based networks; two radio networks; fourteen websites, including CNN.com, the first major news

and information website; CNN Mobile, which provides news and information to mobile devices; and CNN Newsource, the world's most extensively syndicated news service.

Cox Enterprises, Inc. ("Cox"), headquartered in Atlanta, publishes the *Atlanta Journal-Constitution*, and with subsidiary Cox Newspapers, Inc. publishes a total of eighteen daily and thirty non-daily newspapers with over 2.5 million total circulation. Other Cox subsidiary media businesses include fifteen television stations, eighty-six radio stations, cable television systems reaching 6.2 million subscribers, and Internet city sites in twenty-two cities.

The Amici have conflicting interests in this case. On one hand, the Amici are the owners of countless copyrights, including the respective newspapers they publish and the expressions contained in those publications. As such, the Amici support the rights of copyright owners and have the usual economic interest in protecting their own intellectual property. On the other hand, the Amici are publishers of news, editorials, commentary, criticism, and, at times, parody. Thus, the Amici embrace an expansive reading of the First Amendment and the protection it affords expressive activity – even when that protection comes at the expense of Amici's own economic interests.

This case strikes at the very core of the First Amendment and illustrates the dangers inherent in placing property rights above free speech protections. The

District Court enjoined the publication of “The Wind Done Gone” (“WDG”) – a critical commentary on the iconic work “Gone With The Wind” (“GWTW”). As such, the injunction is a classic example of a prior restraint. Prior restraints are the most offensive and least tolerable prohibitions on speech. Yet the injunction was issued solely on the basis of possible harm to the copyright holder’s pecuniary interest, without due consideration of the significant First Amendment principles that value speech over money. Accordingly, the Amici believe that injunction was unwarranted without a final judicial finding that important First Amendment expression is not burdened. The order below should be reversed.

SUMMARY OF THE ARGUMENT

Few, if any, justifications allow a court to ban publication of a book. There has always been an almost insurmountable presumption against the constitutional validity of any such prior restraint. Despite this high hurdle, copyright law authorizes preliminary injunctions to prevent copyright infringement. If a copyright holder establishes a prima facie case of infringement, a court will presume irreparable harm and (in most instances) issue a preliminary injunction. Such injunctive relief halting the publication of a book, film, news article, or other work that contains independently expressive speech threatens First Amendment interests. In such cases, therefore, significant First Amendment rights must be considered.

The court below enjoined publication of WDG. In so doing, it applied a traditional preliminary injunction analysis. Based upon a prima facie showing of copyright infringement, the District Court presumed irreparable harm, and the injunction easily flowed from that point. The District Court failed to give adequate consideration to the First Amendment. In any other context, a prior restraint would not have issued. An injunction should not have issued in this case.

ARGUMENT

I. A PRELIMINARY INJUNCTION BANNING INDEPENDENTLY EXPRESSIVE SPEECH IS A PRIOR RESTRAINT.

A. The dangers of prior restraints.

“The special vice of a prior restraint is that communication will be suppressed . . . before an adequate determination that it is unprotected by the First Amendment.” *Pittsburgh Press Co. v. Pittsburgh Comm’n on Human Relations*, 413 U.S. 376, 390 (1973). A prior restraint – by banning speech before it occurs – is the most offensive and intolerable curtailment of free expression. As such, “[a]ny system of prior restraints of expression comes to [the courts] bearing a heavy presumption against its constitutional validity.” *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963); *see also New York Times Co. v. United States*, 403 U.S. 713, 714 (1971) (per curiam).

Few, if any, justifications permit a court to enter a prior restraint. If such orders are not *per se* unconstitutional, they are valid only in the most extraordinary circumstances, such as the “the publication of the sailing dates of transports” of troops during wartime or “incitements to acts of violence and the overthrow by force of orderly government.” *Near v. Minnesota*, 283 U.S. 697, 716 (1931). In *New York Times Company v. United States*, the government’s interest in national security did not justify an injunction against the publication of the Pentagon Papers, a classified study regarding the United States’ decision-making process on

Vietnam policy. 403 U.S. at 714. Likewise, in *Nebraska Press Association v. Stuart*, a criminal defendant's right to a fair trial did not justify a prior restraint on speech. The Supreme Court noted, "[r]easonable minds can have few doubts about the gravity of the evil pretrial publicity can work, but the probability that it would do so here was not demonstrated with the degree of certainty our cases on prior restraint require." 427 U.S. 539, 569 (1976).

As the case law illustrates, few interests short of life or limb will support a prior restraint on free speech. The Supreme Court's consistent rejection of prior restraints reflects the "chief purpose" of the Constitution's free-speech clause: "to prevent previous restraints upon publication." *Near*, 283 U.S. at 713.

Most important, even when the interest is sufficiently compelling to justify a prior restraint – for instance the sailing dates of U.S. troops during wartime – there must be strict procedural protections to prevent the burdening of core protected speech. The District Court's slavish observance of presumptions of irreparable injury in copyright infringement cases does not nearly meet these important First Amendment protections. For example, absent such procedural safeguards, the government's interest in preventing the dissemination of obscene material does not justify a prior restraint before a final determination that the material is in fact obscene and thus outside the protections of the First Amendment. *Vance v.*

Universal Amusement Co., Inc., 445 U.S. 308, 316-17 (1980); *Blount v. Rizzi*, 400 U.S. 410, 416-18 (1970).

[T]he First Amendment requires that procedures be incorporated that “ensure against the curtailment of constitutionally protected expression, which is often separated from obscenity only by a dim and uncertain line. Our insistence that regulations of obscenity scrupulously embody the most rigorous procedural safeguards is but a special instance of the large principle that the freedoms of expression must be ringed about with adequate bulwarks.”

Blount, 400 U.S. at 416 (quoting *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 66 (1963)).

This Court has recognized the importance of such First Amendment interests by repeatedly setting a high standard for the entry of prior restraints in a variety of contexts. For example, as this Court has noted in weighing whether fair-trial concerns justify a prior restraint, “a conclusory representation that publicity might hamper a defendant’s right to a fair trial is insufficient.” *United States v. Noriega*, 917 F.2d 1543, 1549 (11th Cir.), *cert. denied*, 498 U.S. 976 (1990). Rather, as the former Fifth Circuit has explained, “before a prior restraint may be imposed by a judge, even in the interest of assuring a fair trial, there must be ‘an imminent, not merely likely, threat to the administration of justice. The danger must not be remote or even probable; it must immediately imperil’.” *United States v. Columbia Broadcasting System, Inc.*, 497 F.2d 102, 104 (5th Cir. 1974) (quoting *Craig v. Harney*, 331 U.S. 367, 376 (1947)). A “District Court must delineate

carefully its reasons for proscribing the broadcast” or publication of speech. *Noriega*, 917 F.2d at 1550. Similarly, in discussing a prohibition upon communications with potential plaintiffs in a class action, the former Fifth Circuit explained that the “validity of a prior restraint entered under Rule 23 must be tested by the same standards utilized in other contexts,” and cited the test of whether there is “clear and present danger or a reasonable likelihood of a serious and imminent threat to the administration of justice.” *Bernard v. Gulf Oil Co.*, 619 F.2d 459, 475 (5th Cir. 1980), *aff’d*, 452 U.S. 89 (1981). Absent findings that meet these exacting standards, this Court has made clear, a prior restraint is unconstitutional. Amici suggest that the Copyright Act must accommodate this special solicitude for protected speech before core political expression is removed from the marketplace of ideas.

B. The dangerous intersection of copyright law and prior restraints.

Copyright law also generally protects and promotes the societal interest in free expression. The rights and entitlements conferred by copyright law assure copyright holders a fair return on their labors. This encourages those artistic and literary efforts and thus increases the amount and quality of speech available to the public. This societal bargain is reflected in Article, I § 8, of the Constitution: “The Congress shall have Power . . . to Promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their

Respective Writings and Discoveries.” Copyright itself can thus be an engine of free expression. “By establishing a marketable right to the use of one’s expression, copyright supplies the economic incentive to create and disseminate ideas.”

Harper & Row, Publishers, Inc. v. Nation Enter., 471 U.S. 539, 558 (1985).

Amici and the public benefit daily from the copyright laws. The purpose of copyright law is consistent with the purpose of First Amendment.

[T]he limited grant [of a copyright] is a means by which an important public purpose may be achieved. It is intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired.

Sony Corp. of Amer. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984).

Copyright law embodies important values and furthers many of the same interests protected by the First Amendment, because both aim to protect the free flow of information and the dissemination of ideas. At bottom, copyright serves to preserve, not deter, the arts and writings. Where a writing would not have been deterred and where the only interest of the original writer is in protecting a property interest, the constitutional underpinning for protecting the copyright holder no longer exists.

To be sure, copyright law does, in some instances, restrict speech: “it restricts you from writing, painting, publicly performing, or otherwise communicating what you please.” Mark A. Lemley & Eugene Volokh, *Freedom*

of Speech and Injunctions in Intellectual Property Cases, 48 Duke L.J. 147, 165-55 (1998). Some courts and commentators, therefore, have noted the occasional tension between copyright law and freedom of speech. *See, e.g., Triangle Publications, Inc. v. Knight-Ridder Newspapers, Inc.*, 445 F. Supp. 875, 881-82 (S.D. Fla.), *aff'd on other grounds*, 626 F.2d 1171 (5th Cir. 1980).

Substantive protections entrenched in copyright law largely assuage this tension by insuring that First Amendment rights are not sacrificed in order to protect a copyright holder. For example, the idea/expression dichotomy “strike[s] a definitional balance between the First Amendment and the Copyright Act by permitting free communication of facts while still protecting an author’s expression.” *Harper & Row*, 471 U.S. at 556. Likewise, the fair use doctrine provides latitude to use copyrighted material in scholarship or comment. Thus, as a substantive matter, copyright law contains provisions that protect and support free expression.

Despite these substantive protections, stark tensions arise if First Amendment procedural protections are ignored in favor of protecting a copyright. The Copyright Act authorizes a court to issue preliminary injunctions to prevent infringement. In many cases, these preliminary injunctions may issue against books, movies, news articles or other works of art. Often, such works enjoy fair use or other First Amendment defenses to a copyright infringement claim. In light

of these defenses, it is critical that courts asked to preliminarily enjoin speech require more than a mere showing that the copyright holder is likely to prevail on the merits of the copyright infringement claim. If a copyright holder can show a likelihood of success on the merits of the claim, then harm is somehow presumed and a court might – wrongly we submit – issue a preliminary injunction. What is missing from this equation is the recognition that the First Amendment severely limits the availability of preliminary injunctions in these cases.

Article, I § 8, of the Constitution makes no mention of remedies or injunctions. The remedies contained in the Copyright Act are statutorily created and should never be allowed to trump First Amendment protections. In short, although copyright law is grounded in the Constitution, it certainly is not inconsistent with the Act's purpose to apply First Amendment procedural protections to statutory remedies Congress created to effectuate that purpose. *See* Henry P. Monaghan, *First Amendment "Due Process,"* 83 Harv. L. Rev. 518, 518 (1970) (noting that procedural safeguards play as large a role in protecting free speech as substantive First Amendment rights).

The Supreme Court has made clear that the First Amendment limits the restraints that may be imposed on even highly suspect speech. Indeed, injunctions entered prior to a final determination that speech falls outside the protections of the First Amendment are considered unconstitutional prior restraints. *See Fort Wayne*

Books, Inc. v. Indiana, 489 U.S. 46, 66 (1989) (probable cause that books were obscene insufficient to remove them from circulation); *M.I.C., Ltd. v. Bedford Township*, 463 U.S. 1341, 1343 (1983) (Brennan, Circuit Justice) (issuing emergency stay because “the trial court’s broad proscription [barred], in advance of any final judicial determination that the suppressed films are obscene, the exhibition of any film that might offend the court’s ban”); *Vance*, 445 U.S. at 316, n13 (finding statutes, which authorized prior restraints before a final adjudication that speech was obscene, unconstitutional). When confronted with speech that may be libelous or obscene, it may appear desirable to enjoin the speech so to avert the harm that the potentially unprotected speech may cause. And it is hard to deny that reputational harm is a grave injury that often is hard to quantify in terms of monetary damages. However, “prior restraint law embodies a judgment that such prophylactic injunctions are generally too grave a burden on free speech rights.” *Lemley & Volokh, supra*, at 176. Amici feel strongly that in a free society the balance must weigh heavily against prior restraint unless the copying is mere piracy.

These same principles apply in the copyright context. Accordingly, some courts have noted the danger that preliminary injunctions in copyright infringement cases constitute impermissible prior restraints. For example, in *Religious Technology Center v. Lerma*, the Church of Scientology sought to enjoin *The*

Washington Post from publishing the writings of Church founder L. Ron Hubbard. 897 F. Supp. 260, 261-62 (E.D. Va. 1995). The District Court proceeded with a traditional preliminary injunction analysis, but in balancing the harms noted that “to the extent that the requested relief would place limitations on the defendants’ reporting, it would constitute a prior restraint on expression.” *Id.* at 262. As such, there was a strong presumption against the constitutionality of such an injunction. *Id.* In finding the balance of harms tipped in favor of The Washington Post, the court stressed that “[i]f a threat to national security was insufficient to warrant a prior restraint in *New York Times Co. v. United States*, the threat to plaintiff’s copyrights and trade secrets is woefully inadequate.” *Id.* at 263.

Likewise, the court in *Globe International, Inc. v. National Enquirer, Inc.*, No. 98-10613 CAS, 1999 WL 727232 (C.D. Cal. Jan. 25, 1999), noted that despite the fact that Congress included preliminary injunctions as a remedy for infringement, the prior restraint analysis has been applied to requests for such relief in copyright infringement cases:

The spirit of the First Amendment applies to the copyright laws at least to the extent that the courts should not tolerate any attempted interference with the public’s right to be informed regarding matters of general interest when anyone seeks to use the copyright statute which was designed to protect interests of quite a different nature.

Id. at *5 (quoting *Rosemont Enter., Inc. v. Random House, Inc.*, 366 F.2d 303, 311 (2d Cir. 1966) (Lumbard, C.J., concurring)).

The special danger of preliminary injunctions in copyright infringement cases is that the banned speech ultimately may prove to be protected. This danger is amplified by the fact that, even where liability may ultimately be found, monetary damages will provide an adequate and far less extreme remedy. In such circumstances, the prior restraint causes permanent constitutional injury that cannot be remedied. As Justice Black stated in *New York Times Co. v. United States*, “every moment’s continuance of the injunctions against the[] newspapers amount[ed] to a flagrant, indefensible, and continuing violation of the First Amendment.” 403 U.S. at 715 (Black, J., Douglas, J., concurring). In contrast, copyright law generally serves economic interests. See Lemley & Volokh, *supra*, at 205 (copyright law is “primarily intended to provide a financial incentive that encourages people to contribute to the market place of ideas”). Damage to such property interests generally is not truly irreparable – an injured party can be made whole by a monetary award. In any event, such interests will rarely outweigh the harms caused by the curtailment of speech.

In most copyright cases, this danger to speech never arises, either because of the nature of the alleged infringement or because of the remedies sought. For example, there is no great danger to protected speech in a case of literal copying unaccompanied by criticism, commentary, or some other new or transformative use. A defendant accused of selling photocopies of GWTW, videotaping a film in

a movie theater and selling bootleg copies on the street, or placing another's song on the Internet to be downloaded by others can and should be enjoined.

Importantly, such piracy is not truly the infringer's speech. As the United States Supreme Court has noted, such activity is "simple piracy" for which an injunctive remedy is justified. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578, n.10 (1994).

In other copyright cases, no pre-trial danger to protected speech arises because no preliminary injunction is sought. The plaintiff either eschews injunctive relief altogether or seeks such a remedy only after trial. But in those relatively rare cases in which a preliminary injunction is sought in the face of "reasonable contentions of fair use," *id.*, courts can and must give great weight to the Supreme Court's admonition that, "[a]ny system of prior restraints comes to this Court bearing a heavy presumption against its constitutional validity." *New York Times Co. v. United States*, 403 U.S. at 714 (emphasis added).

In order to overcome this heavy presumption, a copyright plaintiff seeking a preliminary injunction imposing a prior restraint should be required to meet the same, high standard that this Court has set in other prior restraint cases. Just as "a conclusory representation that publicity might hamper a defendant's right to a fair trial is insufficient," *Noriega*, 917 F.2d at 1549, so too a copyright plaintiff's mere assertion of irreparable harm, or worse – presumption – cannot support a prior

restraint against arguably protected speech. Rather, before a prior restraint may be imposed in such a case, a plaintiff should have to show more than “remote or even probable” harm, but rather a danger that is “imminent” and will “immediately imperil.” *Columbia Broadcasting System*, 497 F.2d at 104. The record must be sufficient to enable the trial court to “delineate carefully its reasons for proscribing” speech. *Noriega*, 917 F.2d at 1550. Translating these standards into the copyright context, “the degree of copying necessary to constitute actionable infringement must be high and the fact of copying clear,” and the damage alleged must be clearly irreparable (at least in a case involving arguably protected speech about a matter of public concern). *In re Capital Cities/ABC, Inc.*, 918 F.2d 140, 144 (11th Cir. 1990). Absent findings that meet these high standards, a pre-trial prior restraint against arguably protected speech should be denied.

Moreover, as this Court explained in *Greenberg v. National Geographic Society*, lower courts must consider alternatives to injunctive relief “in lieu of foreclosing the public’s . . . access to [] educational and entertaining work.” 244 F.3d 1267, 1276 (11th Cir. 2001). Likewise in *Campbell v. Acuff-Rose Music, Inc.*, the Supreme Court opined:

Because the fair use enquiry often requires close questions of judgment as to the extent of permissible borrowing in cases involving parodies (or other critical works), courts may also wish to bear in mind that the goals of the copyright law, “to stimulate the creation and publication of edifying matter,” are not always best served by

automatically granting injunctive relief when parodists are found to have gone beyond the bounds of fair use.

Campbell, 510 U.S. at 578 n.10 (citations omitted). Indeed, “in the ‘vast majority of cases, [an injunctive] remedy is justified because most infringements are simple piracy,’ such cases are ‘worlds apart from many of those raising reasonable contentions of fair use’.” *Id.* (quoting Pierre N. Leval, *Toward A Fair Use Standard*, 103 Harv. L. Rev. 1105, 1132 (1990)).

C. The preliminary injunction in the instant case acts as an unconstitutional prior restraint.

The District Court preliminarily enjoined further production, display, distribution, advertising, sale, or offer for sale of WDG. Houghton Mifflin contends that WDG is a political and social commentary about racism in the antebellum south. Illustrating the stark dangers of prior restraint, the public cannot even evaluate the judicial reaction to this argument because WDG is now banned. Whether WDG is satire, parody, humor, ridicule, inversion, or criticism, a topic perhaps best left to literary scholars and readers, can never be determined. What WDG is not is pure and simple piracy.

What we do know is that the vehicle for this commentary is the American classic GWTW. GWTW is an entrenched part of the American psyche. As most literature that is engrained in the collective consciousness of a nation, rigorous and robust debate, parody or criticism about it should be without limitation. Authors,

publishers, reporters and editors now are presented with a decision standing for the proposition that iconic works of literature are sacrosanct. Houghton Mifflin asserts that WDG is a parody of GWTW and, in doing so, attempts to debunk the classic's sometimes racist and stereotypical portrayal of African-Americans. Speech that "protest[s] racial discrimination is essential political speech lying at the core of the First Amendment." *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 914 (1982) (quoting *Henry v. First Nat'l Bank of Clarksdale*, 595 F.2d 291, 303 (1979)). Thus, WDG is entitled to the ultimate protection of the First Amendment before its message can be suppressed.

Even the District Court agreed that WDG yielded parodic elements and had transformative value. This new book "changes the older work by adding something new 'with a further purpose or different character, altering the first [work] with new expression, meaning, or message'." April 19, 2001 Order at 31. (quoting *Campbell*, 510 U.S. at 579). The District Court further opined:

Because, however, the structure and style of the new work differ dramatically from the epic qualities of "Gone With The Wind," the court finds that the work is, at least in part, transformative. The new work takes its new character Cynara on new adventures and creates new scenes with the older work's characters, while it also revisits the older work's scenes. Thus, the court finds that "The Wind Done Gone" contains transformative parody that criticizes the earlier work and the antebellum South in general.

Id. at 34. Based upon the District Court's findings alone, it is apparent that WDG is subject at the least to a colorable fair use defense. The risk that WDG may

prove to be protected speech is simply too great in this case. Indeed, “the line between legitimate and illegitimate speech is often so finely drawn that the risks of freewheeling censorship are formidable.” *Vance*, 445 U.S. at 316 n.13 (discussing prior restraint in obscenity context).

Nonetheless, the District Court issued a preliminary injunction that bans WDG. The fact that the injunction acts as a prior restraint cannot be in dispute. It is a perfect example of the fruition of the special vice of prior restraints – it was entered before an adequate determination that the speech in question was unprotected by the First Amendment. Once the District Court determined that the Mitchell Trust was likely to succeed on the merits of its copyright infringement claim, irreparable harm was presumed and the issuance of the injunction easily flowed, without any consideration of the dangers it posed to free expression. The District Court’s analysis of the irreparable harm and the First Amendment issues is woefully thin, and hinges on pecuniary harm, which the law traditionally does not consider as irreparable.

Despite the dangers inherent in prior restraints, First Amendment concerns did not factor into the District Court’s analysis. Instead, the District Court completely subordinated free speech interests and simply presumed publication of WDG would cause the Mitchell Trust irreparable harm. The First Amendment, however, requires more – especially in the context of prior restraint. As explained

above, at the very least, the First Amendment requires proof, as opposed to a presumption, that the damage is clearly irreparable. *See Title I – Fair Use of HR 2372, 1991: Hearings on H.R. 2372 Before the Subcomm. on Intellectual Property and Judicial Administration Comm. on the Judiciary, 102d Cong., 1st Sess. (1991)* (statement of Kenneth M. Vittor on behalf of the Magazine Publishers of America). Any harm that may come to the Mitchell Trust as a result of a copyright infringement is not truly irreparable – it can be compensated with monetary damages. This is true, even if monetary damages are hard or impossible to quantify. Indeed, the Copyright Act’s allowance of statutory damages more than compensates an author when actual pecuniary harm is not demonstrable. *See 17 U.S.C. § 505 (1999)*. Clearly, when a pecuniary remedy is statutorily established, there is no legitimate reason to devalue fundamental First Amendment protections. As a nation, we have staked our all on the proposition that certain rights, notably that of free expression, must override other interests, including even national security and fair trial rights, in all but the most extreme cases.

The preliminary injunction in this case should not be tolerated. If the book contained obscene pictures, a prior restraint could not issue. If the book contained libelous statements, a prior restraint could not issue. If the book revealed national security secrets, a prior restraint could not issue. If the book jeopardized the fair trial rights of a criminal defendant, a prior restraint could not issue. If the book

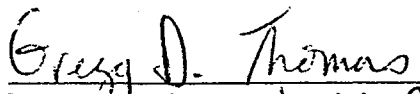
invaded another's privacy, a prior restraint could not issue. No prior restraint should have issued here.

CONCLUSION

There are serious First Amendment issues at stake in this case – issues that were not thoroughly considered by the District Court below. The result is that a book has been banned. The Amici believe this is improper. The decision of the District Court should be reversed.

Respectfully submitted,

HOLLAND & KNIGHT LLP


Gregg D. Thomas by KDR
Florida Bar No. 228913
James B. Lake
Florida Bar No. 0023477
Rachel E. Fugate
Florida Bar No. 0144029
Post Office Box 1288
Tampa, Florida 33601-1288
(813) 227-8500
Fax: (813) 229-0134
Counsel for Amici

Of Counsel:

George Freeman, Esq.
Adam Liptak, Esq.
The New York Times Company
229 West 43rd Street
New York, New York 10036

Stuart D. Karle, Esq.
Dow Jones & Company, Inc.
200 Liberty Street
New York, New York 10281

David S. Bralow, Senior Counsel
Tribune Company
633 North Orange Avenue
Orlando, Florida 32601

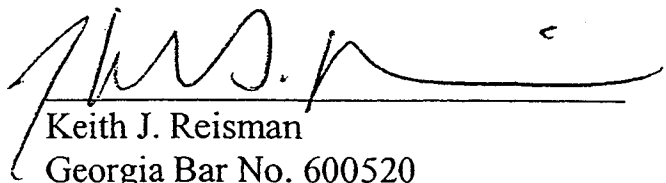
George L. Mahoney, Esq.
Media General, Inc.
333 East Franklin Street
Richmond, Virginia 23219

Stacey E. Wolfe, Esq.
Cable News Network LP, LLLP
One CNN Center
Atlanta, Georgia 30303

Andrew A. Merdek, Esq.
Cox Enterprises, Inc.
1400 Lake Hearn Drive
Atlanta, Georgia 30348

CERTIFICATE OF COMPLIANCE WITH F.R.A.P 32(a)(7)(B)(i)
AND ELEVENTH CIRCUIT RULE 28-1(m)

Undersigned counsel certifies that this brief complies with the requirements of FRAP Rule 32(a)(7)(B)(i) inasmuch as the brief, exclusive of the Certificate of Interested Persons and Corporate Disclosure Statement, Table of Contents, Table of Citations, and this certificate, does not exceed 7,000 words and is printed in Times New Roman, 14 point.

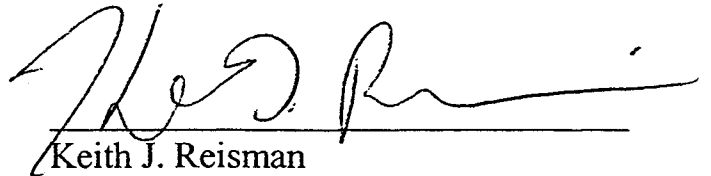


Keith J. Reisman
Georgia Bar No. 600520
Of Counsel for Amici Curiae

Holland & Knight LLP
Suite 2000, One Atlantic Center
1201 W. Peachtree Street, N.E.
Atlanta, Georgia 30309-3400
(404)817-8500

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 14, 2001, a true and correct copy of the foregoing was served via hand delivery to **William B. Smith, Esq., Ralph R. Morrison, Esq., and Anne M. Johnson, Esq.,** Jones, Day, Reavis & Pogue, 3500 SunTrust Plaza, 303 Peachtree Street, N.E., Atlanta, Georgia 30308; and **Miles J. Alexander, Esq., Jerre B. Swann, Esq., Joseph M. Beck, Esq., and W. Swain Wood, Esq.,** Kilpatrick Stockton LLP, 1100 Peachtree Street, Suite 2800, Atlanta, Georgia 30309-4530.



Keith J. Reisman
Georgia Bar No. 600520
Of Counsel for Amici Curiae

Holland & Knight LLP
Suite 2000, One Atlantic Center
1201 W. Peachtree Street, N.E.
Atlanta, Georgia 30309-3400
(404)817-8500