

May 23, 2001

Mr. Thomas K. Kahn, Clerk
United States Court of Appeals for the Eleventh Circuit
56 Forsyth Street, NW
Atlanta, GA 30303

RE: SunTrust Bank, Plaintiff-Appellee v. Houghton Mifflin Company, Defendant-Appellant - Case No. 01-122-00-HH.

Dear Mr. Kahn:

This letter brief is in response to the Court's direction that the parties and amici address the issues and legal concerns set out in Cable News Network v. Video Monitoring Svcs., 940 F.2d 1471 (11th Cir. 1991)(subsequent history omitted). In the CNN opinion, this Court recognized that the Copyright Clause, when properly understood, "is in harmony" with First Amendment values, not opposed to them. 940 F.2d at 1478. The central policy of the Copyright Clause – to benefit the public through the advancement of learning – is in harmony with the free speech values in the First Amendment that protect not only the rights of speakers to speak, but of the public to learn. Id. Congress's grant of a limited monopoly of copyright "[i]n order to promote learning" therefore aligns with both constitutional provisions. Id.

The fair use doctrine assists in the maintenance of this harmony. Id. at 1484. Properly understood, therefore, the fair use doctrine insures that copyright will encourage public debate, not impede it. As part of ensuring this "unimpeded flow" that "is critical to a

free society,” *id.* at 1479, fair use is intended to protect the public’s right to use works in ways that stimulate learning. *Id.* at 1484.

Alice Randall has testified that she wrote WDG to “add my voice” to the public discussion over GWTW and its depictions of African-Americans, race relations, and the historical eras of the Civil War and Reconstruction. (R. Doc 20-Ex 5-Pgs 2-3-¶ 3) (Randall Decl.). If the Court allows her voice to be heard – not merely because of the unconstitutionality of the prior restraint, but also because of this Court’s reaffirmation of the “fair use” principles enunciated in the CNN decision – then WDG’s critique of GWTW will stimulate thought and discussion in literature, politics and history. (R. Doc. 11-Ex 1-Pg 9-¶ 17)(Sitter Decl.); (R.Doc. 20-Ex 4-Pg 7-¶ 11)(McCaskill Decl.); (R.Doc. 20-Ex 6-Pgs 5, 9-33-¶¶ 10, 14)(Mueller Decl.). It will also bring these discussions to a broader public than an esoteric critique in a scholarly journal would reach. That defendant adopts the **effective** tactic of using **fiction** to comment upon, criticize and parody one of the most culturally and politically important and enduring works of fiction of all time should be encouraged, not censored.

The Mitchell Trusts assert virtually unlimited rights in the GWTW “property.” Yet the Trusts’ conception of its monopoly “franchise” fails to account for copyright’s ultimate purpose of promoting learning. “The promotion of learning is inherently antithetical to censorship.” L. Ray Patterson, “Free Speech, Copyright and Fair Use,” 40 Vand. L. Rev. 1, 14 (1987). Buttressed by the erroneous district court opinion, the amount of concentrated power the Trusts now purport to wield is breathtaking. An affirmance of the Trusts’ power to squelch the kind of criticism leveled by WDG will tame the future public debate of GWTW in at least two ways antithetical to both the First Amendment and the Copyright

Clause: by silencing GWTW's most eloquent critic; and by relegating other would-be critics to unread academic journals.

The Trust's central claim in this case, it must be remembered, is not that WDG will in any way harm the sale of copies of GWTW, but that it **might** hurt the market for works that have not yet been created, including the as yet unwritten "Second Sequel." But not only does such a claim implicate CNN's concern with overreaching; such a claim is **directly opposed** by uncontroverted evidence in the record. As noted in defendant's initial brief to this Court, the **uncontroverted** evidence establishes that WDG will not in any sense supplant the market for a sequel to GWTW, both because it will appeal to a totally different demographic, and because readers will "easily perceive" that WDG is not a sequel. Such evidence comports both with defendant's initial plan to publish only 25,000 copies of WDG (far fewer than would have been printed for any "sequel to GWTW"), and with common sense. Any fan of GWTW and/or *Scarlett* who wants a book with "more of the same" would be sorely disappointed – and likely offended – by WDG. Compare the similar sentiments of the Second Circuit:

Because the social good is served by increasing the supply of criticism--and thus, potentially, of truth--creators of original works cannot be given the power to block the dissemination of critical derivative works. While we agree that the fair use defense can play a valuable role in allowing commentary with criticizing messages to see the light of day, the fair use doctrine is broad enough to protect even those commentaries that are not so damaging that the original author would refuse to license them for a fee.

Leibovitz v. Paramount Pictures Corp., 137 F.3d 109, 115 n.3 (2d Cir. 1998).

The Court's analysis in the CNN decision thus confirms that the restriction of overreaching claims by aggressive copyright owners does not "condemn" private "property" for public use. Rather, courts **must** restrict overreaching copyright claims in order to prevent

copyright owners from curtailing the free flow of ideas. The tightly constrained nature of the uses of GWTW that the Trusts will permit – for example, no miscegenation – are undisputed. (R. Doc. 20-Ex 7-Pgs 1-2)(Conroy Decl.) The Trusts’ narrow view of appropriate uses of GWTW does not serve the constitutional purpose of fostering the free flow of ideas.¹

Finally, according to the Trusts’ representations to the Copyright Office, its licensed sequel *Scarlett: The Sequel to Margaret Mitchell’s Gone With the Wind* is **not** a derivative work (for which the scope of the Trust’s copyright would inarguably be lesser), but a wholly original one.² Such a registration (which, as the Court noted in CNN, 940 F.2d at 1481 n.17, is entitled to presumptive force in litigation under 17 U.S.C. § 401(c)) can only be seen as a calculated attempt to set the stage for claims of equal breadth to those asserted here well past the expiration of the copyright in GWTW.

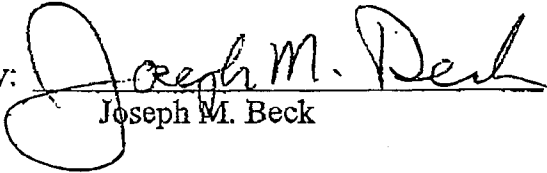
In sum, the Trusts in this case seek to extend the limited monopoly in GWTW far beyond permissible limits. By using its copyright in GWTW as a hammer for squelching WDG, the Trusts are the epitome of the “aggressive and overreaching copyright owner.” Id. at 1483. The principles of the CNN decision thus confirm that this Court should reverse the district court’s order granting a preliminary injunction and remand the case with instructions that clearly indicate that WDG is the exemplar of fair use.

¹ The Trust couples its unprecedentedly broad reading of the derivative work right with a rigid view permitting no exceptions to injunctive relief upon a finding of infringement. Such centralized control – whether the controlling authority be public or private – “is the essence of censorship.” Patterson and Birch, Copyright and Free Speech Rights, 4 J.Intell.Prop.L. at 4.

² See Copr. Reg. No. TX 3-145-421 (R. Doc. 5-Anderson Aff.-Ex B-Pg 4-§ 6)(in which the section used for registering a work as a “derivative work” is left blank, and GWTW is not identified as a prior work upon which *Scarlett* is based).

Respectfully submitted,

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