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May 22, 2001

BY FEDERAL EXPRESS

Thomas K. Kahn
Clerk
United States Court of Appeals
Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

Re: Case No. 01-122-00-HH – Suntrust Bank v. Houghton Mifflin Company

Dear Sir:

Amicus curiae Microsoft Corporation (“Microsoft”) submits this letter brief in response to the Court’s notice dated May 17, 2001, concerning *Cable News Network v. Video Monitoring Services*, 940 F.2d 1471 (11th Cir. 1991), *vacated and reh’g en banc granted*, 949 F.2d 378 (11th Cir. 1991), *appeal dismissed*, 959 F.2d 188 (11th Cir. 1992) (en banc) (hereinafter “*CNN v. VMS*”).

As more fully explained in Microsoft’s *amicus curiae* brief, the factual record and fundamental principles of copyright law – and in particular the Supreme Court’s fair use analysis in *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994) – demonstrate that *The Wind Done Gone* is a fair use of *Gone With The Wind*. Accordingly, Microsoft believes it is unnecessary for this Court to look beyond the Copyright Act or to reach any of the issues in *CNN v. VMS* in determining the outcome of this appeal.

Even if the Court were to consider the interplay between the Copyright Act and the First Amendment as discussed in *CNN v. VMS*, well-established precedent demonstrates that (1) there is no independent First Amendment defense to copyright infringement and (2) the proper application of the fair use doctrine under Section 107 of the Copyright Act, coupled with Section 102’s prohibition of copyright protection for ideas, assures that the Act can be applied consistent with the First Amendment.¹ As the United States Supreme Court has explained, “the public’s

¹ To the extent that *CNN v. VMS* may be read to address the propriety of injunctive relief in copyright cases, it is axiomatic that “in the vast majority of cases, [an injunctive remedy] is justified because most infringements are simple piracy....” *Campbell*, 510 U.S. at 578, n.10 (quoting Leval, *Toward a Fair Use Standard*, 103 Harv.L.Rev. 1105, 1132 (1990)). In this case, however, because the factual record demonstrates that *The Wind Done Gone* makes fair use of copyrighted material from *Gone With The Wind*, an injunction should not have been entered by the district court.

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interest in the free flow of information is assured by the [Copyright] law's refusal to recognize a valid copyright in facts." *Harper & Row Publishers Inc. v. Nation Enterprises*, 471 U.S. 539, 558 (1985) (quoting *Iowa State University Research Foundation, Inc. v. American Broadcasting Cos.*, 621 F.2d 57, 61 (2d Cir. 1980)). Copyright's 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." *Id.* at 556 (alterations in original); see also 1 Melville B. Nimmer and David Nimmer, *Nimmer on Copyright* §1.10[B][2] at 78 (2001) ("On the whole, therefore, it appears that the idea-expression line represents an acceptable definitional balance as between copyright and free speech interests."); II Paul Goldstein, *Copyright* § 10.3 (1999).

Recent cases have applied *Harper & Row's* teachings relating to the idea-expression dichotomy and the First Amendment, and several of these cases have noted that First Amendment concerns are also protected by the Copyright Act's fair use doctrine. See *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1028 (9th Cir. 2001) ("We, however, briefly address Napster's First Amendment argument so that it is not reasserted on remand.... We note that First Amendment concerns in copyright are allayed by the presence of the fair use doctrine. There was a preliminary determination here that Napster users are not fair users. Uses of copyrighted material that are not fair uses are rightfully enjoined."); *Nihon Keizai Shimbun, Inc. v. Comline Business Data, Inc.*, 166 F.3d 65, 74 (2d Cir. 1999) ("We have repeatedly rejected First Amendment challenges to injunctions from copyright infringement on the ground that First Amendment concerns are protected by and coextensive with the fair use doctrine."); *Los Angeles News Serv. v. Tullo*, 973 F.2d 791 (9th Cir. 1992) ("[T]he idea-expression dichotomy ... serves to accommodate the competing interests of copyright and the first amendment.... First Amendment concerns are also addressed in the copyright field through the 'fair use' doctrine.").

Accordingly, in light of this authority and the record's demonstration that *The Wind Done Gone* makes fair use of copyrighted material from *Gone With The Wind*, Microsoft believes that the Court need not independently address any First Amendment issues in this case.

Respectfully submitted,



E. Edward Bruce
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