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May 23, 2001

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VIA HAND DELIVERY

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

Re: *SunTrust Bank as Trustee of the Stephens Mitchell Trusts,*
v. Houghton Mifflin Company, Case No. 01-122-00-HH

Dear Mr. Kahn:

Pursuant to the Clerk of Court's May 17, 2001 letter directing supplemental briefing, we submit this letter on behalf of Amici Curiae The New York Times Company, Dow Jones & Company, Inc., The Tribune Company, Media General, Inc., and Cox Enterprises, Inc., concerning *Cable News Network v. Video Monitoring Services*, 940 F.2d 1471 (11th Cir.), *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).

The *Cable News Network* panel opinion is instructive in this case for several reasons. Most notably, the *Cable News Network* panel recognized that overbroad injunctive relief in copyright infringement cases is both inconsistent with the Copyright Clause and violative of the First Amendment.

As the *Cable News Network* panel explained, copyright law has two aspects:

Copyright's basis as a proprietary concept is that it enables one to protect his or her own creations. Its regulatory basis is that when these creations constitute the expression of ideas presented to the public, they become part of the stream of information whose unimpeded flow is critical to a free society.

Id. at 1478 (quoting L. Ray Patterson, *Free Speech, Copyright, and Fair Use*, 40 *Vanderbilt L. Rev.* 1, 5 (1987)). The regulatory aspect of copyright law "is in harmony with the First Amendment doctrine that free speech encompasses 'public access to discussion, debate and dissemination of information and ideas'." *Id.* at 1479 (quoting *Board of Education v. Pico*, 457 U.S. 853, 866 (1982)).

However, "in affording [copyright] relief, the interest of the public in the free flow and availability of ideas is often overlooked." *Id.* at 1483. As Professor Patterson concluded, modern copyright law has failed to recognize free speech limitations. Patterson, *supra*, at 36. *Gone With The Wind* ("GWTW") is an American classic. The regulatory aspect of copyright law

acknowledges that, consistent with First Amendment principles, public access to GWTW should be unimpeded. The Wind Done Gone (“WDG”) is a critical commentary on GWTW and such commentary on the iconic work should be without limitation.

Amici believe that the First Amendment must limit any remedy that would inhibit public access to WDG. Indeed, “when courts grant broad and sweeping injunctive relief . . . dangerous precedents and fundamental problems are created.” *Cable News Network*, 940 F.2d at 1484. The dangers of injunctive relief in this case are extreme. The District Court banned the publication of an original work. The District Court acknowledged as much, noting that WDG had transformative elements. The purpose of copyright law is to protect such works, not remove them from the shelves. *See id.* at 1485 (noting that originality is the “touchstone of copyright protection”). In such cases, First Amendment rights are most vulnerable to overbroad injunctions. Amici feel that the banning of original works should never be tolerated.

The *Cable News Network* panel correctly noted that injunctive remedies ignoring the regulatory aspect of copyright law and concomitant free speech principles are overbroad. The opinion thus contains sound jurisprudential

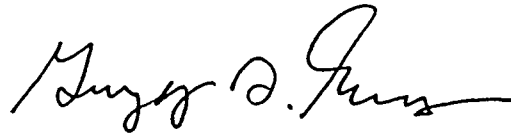
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warnings regarding the propriety of injunctive relief in certain copyright cases.

Amici believe that the District Court should have heeded these warnings.

Sincerely,

HOLLAND & KNIGHT LLP



Gregg D. Thomas
Fla. Bar No. 223913

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