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May 22, 2001

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

Re: 01-12200 – Suntrust Bank v. Houghton Mifflin Company

Dear Mr. Kahn,

I am counsel for a group of *amici* in this matter, namely PEN American Center, the American Booksellers Foundation for Free Expression, the Freedom to Read Foundation, Washington Lawyers for the Arts, the First Amendment Project and the National Coalition against Censorship. In accordance with the direction of the Court dated May 17, 2001, we hereby submit the following letter brief relating to the applicability of the *Cable News Network* decision to this case (see *Cable News Network v. Video Monitoring Services*, 940 F.2d 1471 (11th Cir. 1991), *vacated and rehearing en banc granted*, 949 F.2d 378 (11th Cir. 1991), *appeal dismissed*, 959 F.2d 188 (11th Cir. 1992) (*en banc*)).

The original panel decision in *Cable News* fully supports the position taken by *Amici* in their prior submission. The panel decision emphasized the important First Amendment considerations that must illumine any analysis of copyright protection. It recognized that “rights under the Copyright Clause [may] . . . collide with the First Amendment’s right of free speech” and that “free speech [considerations] encompass[] the right of access to the free flow of ideas,” 971 F.2d at 1478. Quoting from the law review article of Professor L. Ray Patterson, the panel decision noted: “the expression of ideas presented to the public [in copyrighted material] . . . become part of the stream of information whose unimpeded flow is critical to a free society.” Patterson, *Free Speech, Copyright, and Fair Use*, 40 Vanderbilt L.Rev. 1, 5 (1987), 941 F.2d at 1478. Thus when a court should afford proper copyright protection to original works of authorship, it must balance the legal rights of copyright owners with the need to allow “public access to discussion, debate and dissemination of information and ideas” contained in such material, 941 F.2d at 1479. In short, there must be a “balance between the Copyright Clause and the First Amendment that harmonizes the underlying concerns of the founding fathers embodied in our constitutional legacy.” 941 F.2d at 1478.

Besides emphasizing the First Amendment considerations that are present when a second work contains "information and ideas" that promote public debate and discussion, the panel decision also warned against the grant of an injunction covering material that is not protected by copyright law generally or that is not protected by the copyright registration asserted by the plaintiff. Any broad injunction that covers unprotectable material or material protected by the First Amendment cannot be sustained by a federal court. "To approve of such a far-reaching, broad and inclusive form of injunctive relief both endangers free speech and is inconsistent with the law of copyright." 941 F.2d at 1480.

Thus a copyright owner never has a monopoly over the ideas contained in his or her work, and an injunction that prohibits use of such ideas violates both the Constitution and the Copyright law itself. This Court wrote: "Moreover, the emergence of the doctrine that free speech encompasses the right to have access to, as well as the right to disseminate ideas underscores the need for courts to exercise great care when fashioning injunctive relief in the copyright arena. '[Copyright] protection has never accorded the copyright owner complete control over all possible uses of his work.'" *Sony Corp. v. Universal City Studios*, 464 U.S. 417, 432, 104 S.Ct. 774, 784, 78 L.Ed.2d 574 (1984), 941 F.2d at 1484.

The defect in the injunction issued in the *Cable News* case was that it covered material not subsumed within the copyright registration on which the plaintiff brought suit. "Based upon the copyright registration of a single 30-minute segment of CNN's 24-hour-a-day transmission programming, the district court entered an injunction" that broadly prohibited the defendant from using all the materials previously broadcast by CNN and material to be broadcast in the future. 941 F.2d at 1470-80.

In this case, the copyright registration owned by plaintiff cannot be invoked to prohibit the use of ideas or material from *Gone with the Wind* for purposes of comment and criticism. Similarly it cannot be used to ban a second work containing reference to the characters from GWTW in a manner that advances the "free flow of ideas and access to ideas . . . mandated by the First Amendment," 941 F.2d at 1484.

This is not a situation where a court can attempt to tailor an injunction to eliminate any copyright problems by requiring the author to remove references to specific incidents or characters in the original work. Defendant's book is ready to be printed and distributed in its current form. If any changes are mandated by a court, the entire print run must be destroyed, and the publisher and author must start the entire publishing process anew, delaying publication for months if not years. More important, such an approach would require the court to become a super-editor, dictating artistic choices to the author about how much of GWTW can be used. Courts cannot serve in that role, as the Supreme Court has reminded us. "[i]t would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of [a work], outside of the narrowest and most obvious limits." *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903).

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At the very least, as noted in our opening brief, if the use in a second work is arguably fair, (because of the comment and criticism contained in the work) and there is a reasonable basis for concluding that the use might be determined to be fair at trial, no preliminary injunction should issue, as the Supreme Court noted in *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578, n. 10 (1994): if the second user has raised "reasonable contentions of fair use" and "there may be a strong public interest in the publication of the secondary work," a court should hesitate to grant an injunction. This is particularly true where "the copyright owner's interest may be adequately protected by an award of damages for whatever infringement [may be] found at a later trial."

I am enclosing six copies of this letter for distribution to the panel.

Sincerely,



Leon Friedman

CERTIFICATE OF FILING AND SERVICE

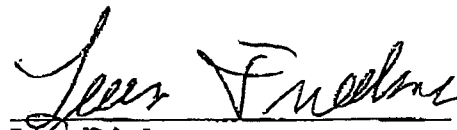
This is to certify that I have this day filed one (1) original and six (6) true and correct copies of the forgoing LETTER BRIEF OF PEN AMERICAN CENTER, AMERICAN BOOKSELLERS' FOUNDATION FOR FREEDOM OF EXPRESSION, FREEDOM TO READ COMMITTEE, WASHINGTON LAWYERS FOR THE ARTS, THE FIRST AMENDMENT PROJECT and the NATIONAL COALITION AGAINST CENSORSHIP by sending the same via Federal Express to the Clerk of the Court, United States Court of Appeals for the Eleventh Circuit, 56 Forsyth Street, N.W, Atlanta, Ga. 30303.

This is to further certify that I have this day served two (2) true and correct copies of the foregoing document via Federal Express overnight delivery addressed to:

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This 22nd day of May, 2001.


Leon Friedman