

**SUPREME COURT OF THE STATE OF NEW YORK  
APPELLATE DIVISION: THIRD DEPARTMENT**

CHRISTOPHER PORCO,

Plaintiff-Respondent,

Case No. 516390

-against-

LIFETIME ENTERTAINMENT SERVICES, LLC,

Defendant-Appellant.

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**BRIEF OF  
HOME BOX OFFICE, INC.; ADVANCE PUBLICATIONS, INC.; AMC  
NETWORKS INC.; ASSOCIATION OF AMERICAN PUBLISHERS, INC.;  
CBS CORPORATION; DISCOVERY COMMUNICATIONS, LLC; DOW  
JONES & COMPANY, INC.; GANNETT CO., INC.; MOTION PICTURE  
ASSOCIATION OF AMERICA, INC.; MPA – THE ASSOCIATION OF  
MAGAZINE MEDIA; THE NEW YORK TIMES COMPANY;  
REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS; SCRIPPS  
NETWORKS INTERACTIVE, INC.; AND TIME INC.  
AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANT-APPELLANT**

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## IDENTITY AND INTEREST OF AMICI CURIAE

*Amici* include many of the most significant media companies in the United States. *Amici* publish, broadcast, produce, and distribute news, information and entertainment in New York to millions of New Yorkers on a regular basis.<sup>1</sup>

*Amici* are profoundly concerned with the ruling below, which summarily allowed a prior restraint prohibiting the telecast of a movie days before its planned premiere. They fear that any exception to one of the most deeply held constitutional values in our society -- that government cannot restrain or censor publication of speech, let alone speech about the criminal justice system -- is wholly unwarranted, and may invite applications for similar prior restraints and needless litigation in the future. *Amici* are particularly concerned that the lower court's March 19, 2013 injunction (the "Order") barring the broadcast of a movie was granted based on the most general allegations, without any showing of irreparable harm.

Those *amici* who produce and distribute films are particularly concerned that any individual mentioned or depicted could go to court and, as easily as here, obtain an injunction. Moreover, as is the case here, they fear that any injunction, even if ultimately reversed by the appellate courts, could cost them significant sums of money, not only in litigation fees, but also in changed production,

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<sup>1</sup> A description of each of the *amici* is listed at Appendix A of this brief.



marketing, and distribution schedules -- and, worse, may result in some films not being produced, depriving the public of valuable works.

More generally, all movies are clearly protected under the First Amendment, whether entirely factual, fictional, or like here, based on the public record, even if some details and incidents may be fictionalized, and some composite characters created for simplicity's sake in scripting. Thus, these movies cannot be subject to "trade or advertising" liability under New York Civil Rights Law §§50-51 ("Section 51"), let alone the more drastic remedy of a prior restraint. Docudramas, in particular, have both educational and entertainment value, and are protected from exactly the type of claim that Plaintiff makes here. For all these reasons, as set forth in greater detail below, *amici* are keenly interested in the outcome of these proceedings.

## **SUMMARY OF ARGUMENT**

In the "Pentagon Papers" case, a prior restraint on the publication of classified documents was rejected by the United States Supreme Court in the face of claims by top U.S. government officials that publication would have a deleterious effect on both the war and peace efforts in Vietnam and would imperil national security. *N.Y. Times Co. v. United States*, 403 U.S. 713 (1971) ("Pentagon Papers"). Similarly, in *Nebraska Press Association v. Stuart*, 427 U.S. 539 (1976), a gag on publication of information which might have been prejudicial to a

defendant's fair trial was denied despite claims that his constitutional rights were infringed. Yet, in this case, Christopher Porco ("Plaintiff") obtained an injunction blocking the marketing and distribution of a movie about him and his criminal history (the "Lifetime movie") based on the mere allegation that his name and likeness would be used in the movie, and that, to some degree, the movie was a fictionalization of true events about him. That a prior restraint, which has never been allowed by the U.S. Supreme Court in any case remotely like this, was granted here was grave and constitutional error.

Putting aside the fact that some fictionalization or embellishment to a movie or work of art does not take that work out of the ambit of First Amendment protection, nor subject it to liability under Section 51, this brief focuses on the issuance of the prior restraint. Here, the lower court granted an injunction where an individual nakedly alleged exploitation of his name, without even making a showing of irreparable harm.<sup>2</sup> The lower court's decision falls frighteningly outside the bounds of the First Amendment values our state and our country have honored for centuries.

Prior restraints against speech about matters of public interest have almost never been upheld. The U.S. Supreme Court has not allowed a prior restraint in a

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<sup>2</sup> A prior restraint on any form of expression on the basis of such a weak showing appears patently unconstitutional. It is especially unsupportable where, as here, the Lifetime movie is about a matter of public concern, namely, the criminal justice system.

defamation or invasion of privacy case in our nation's history. To the extent that normal judicial rules require a three-pronged test of irreparable injury, likelihood of success on the merits and a balance of the equities to be adjudicated in most injunction cases, they are particularly pertinent here, as an additional filter before any injunction could possibly be entered in a case restraining speech.

Section I briefly relates our historic and jurisprudential aversion to prior restraints and shows, based on U.S. Supreme Court precedent, that such restraints on speech, particularly on matters of public concern, have never been upheld, particularly in a case like this. If prior restraints are not allowed in cases of jeopardy to national security, possible prejudice to a fair trial right of a defendant, and instances where a libel has already been determined, how could one be allowed here?

Section II focuses on New York Law, showing that Section 51 does not allow an injunction or prior restraint based on the mere allegations of a plaintiff regardless of whether the work in question is fact, fiction, or something in between. Indeed, particularly after recent Supreme Court and Second Circuit precedent, it is clear that the traditional, equitable three-prong test to be considered before any injunction is entered is a minimum requirement that was wrongly ignored in this case. When dealing with speech and expression, the test considered before a prior restraint can be entered should hardly be a more relaxed one.

Section III shows how docudramas and other films convey valuable information to the public. Even a partially fictionalized work has an important educational component together with an entertainment one. Not only do these movies form a public service and informative function to their viewers, they clearly are protected by the First Amendment.

## **ARGUMENT**

### **I. PRIOR RESTRAINTS ARE ALMOST NEVER ALLOWED, AND THEN ONLY IN THE MOST EXCEPTIONAL CIRCUMSTANCES**

#### **A. The Dangers of Prior Restraint**

“Prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights,” and “one of the most extraordinary remedies known to our jurisprudence.” *Neb. Press Ass’n*, 427 U.S. at 559, 562. As Justice Brennan wrote, concurring in *Nebraska Press*, the First Amendment “accords greater protection against prior restraints than it does against subsequent punishment for a particular speech.” *Id.* at 589 (Brennan, J., concurring). There is a “deep-seated American hostility to prior restraints.” *Id.*

As Chief Justice Hughes wrote for the Court in *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 713 (1931), “it is the chief purpose of the [First Amendment] guaranty to prevent previous restraints upon publication.” Indeed, the Court has been clear that, “a threat of criminal or civil sanctions after publication ‘chills’ speech, prior restraint ‘freezes’ it.” *Neb. Press Ass’n*, 427 U.S. at 559.

Thus, looking at the standards to be used in a case such as this, “[a]ny system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity.” *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963). The moving party “thus carries a heavy burden of showing justification for the imposition of such a restraint.” *Org. for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971).<sup>3</sup>

Not so remarkably given our historic and cultural aversion to censorship, the U.S. Supreme Court has *never* allowed a prior restraint to stand in a defamation or invasion of privacy case. In the 223 years of the Supreme Court, there has been an unbroken precedent establishing a “virtually insurmountable barrier” against the issuance of just the type of order which the trial court entered here. *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241, 259 (1979) (White, J., concurring).

Justice Scalia has explained that “an injunction against speech is the very prototype of the greatest threat to First Amendment values, the prior restraint.” *Madsen v. Women’s Health Ctr., Inc.*, 512 U.S. 753, 797 (Scalia, J., concurring in part and dissenting in part). He reasoned -- very aptly to the instant case -- that injunctions are the “product of individual judges rather than of legislators -- and often of judges who have been chagrined by prior disobedience of their orders.

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<sup>3</sup> This brief focuses on the inappropriateness of the prior restraint entered below, not on the question of whether fictionalization may kindle liability under Section 51. While *amici* strongly believe that the fictionalization here is protected under the caselaw interpreting Section 51 and the First Amendment, we stress here that an injunction (or prior restraint) is unconstitutional in any event.

The right to free speech should not be lightly placed within the control of a single man or woman.” *Id.* at 793. He concluded, “I know of no authority for the proposition that restriction of speech, rather than fines or imprisonment, should be the sanction for misconduct.”<sup>4</sup> *Id.* at 794 n.1.

The reasons why prior restraints -- such as the one that must be struck down here -- are so disfavored are both jurisprudential and historical. First, prior restraints directly contravene the dictate of the First Amendment that “Congress shall make no law . . . abridging the freedom . . . of the press.” U.S. Const. amend. I. The Constitution, thus, bans government censorship on speech, exactly what a prior restraint is and exactly what has transpired here. Though over time, the absolute view of Justices William Douglas and Hugo Black that “no law” really means *no* law has been overcome by the view that in extraordinary cases, exceptions may exist, the Constitution still stands as a direct impediment to the entry of a court order against publication. A prior restraint contradicts the very core of the words and purpose of the First Amendment. While in libel law, *see*

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<sup>4</sup> As the Supreme Court explained in *Vance v. Universal Amusement Co., Inc.*:

The presumption against prior restraints is heavier -- and the degree of protection broader -- than that against limits on expression imposed by criminal penalties. Behind the distinction is a theory deeply etched in our law: a free society prefers to punish the few who abuse the rights of speech *after* they break the law than to throttle them and all others beforehand.”

445 U.S. 308 (1980) (per curiam).

*N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964), the law protecting journalists from revealing their confidential sources, *see Branzburg v. Hayes*, 408 U.S. 665 (1972), and the law regarding access to the judicial system, *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980), the First Amendment influences are indirect, prior restraints *are directly barred by the very words of the Constitution*. And, as Justice Scalia's opinion in *Madsen* underscores, a single judge's order barring publication is even more suspect than a legislative statute.

Historically, the aversion to prior restraints dates back to the Old World. Blackstone summarized the law in England as follows:

The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no *previous* restraints upon publications, and not in freedom from censure for criminal matter when published. Every free man has an undoubted right to lay what sentiments he pleases before the public; to forbid this, is to destroy the freedom of the press; but if he publishes what is improper, mischievous or illegal, he must take the consequences of his own temerity.

4 William Blackstone, Commentaries 151-52.

In the very first American case on the subject, New York's Chancellor Walworth followed the traditional English rule by refusing to enjoin the publication of a libelous pamphlet:

It is very evident that this court cannot assume jurisdiction of the case . . . or of any other case of the like nature, without infringing upon the liberty of the press, and attempting to exercise a power of preventive justice

which . . . cannot safely be entrusted to any tribunal consistently with the principles of a free government.

*Brandreth v. Lance*, 8 Paige Ch. 24, 26 (N.Y. Ch. 1839). As Professor Erwin Chemerinsky concluded after a survey of Anglo-American history, “[i]f history matters in interpreting the First Amendment, it could not be clearer: injunctions were not allowed as a remedy in defamation actions.” Erwin Chemerinsky, *Injunctions in Defamation Cases*, 57 Syracuse L. Rev. 157, 168 (2007).

B. The Supreme Court Has Consistently Rejected Prior Restraints

The U.S. Supreme Court’s first serious attempt to evaluate prior restraint came in *Near*, where the publication of a “smear sheet” vilifying Jews and Catholics was halted under a Minnesota statute authorizing the enjoining of any periodical which published “malicious, scandalous and defamatory material.” 283 U.S. at 703. After the Minnesota courts upheld the prior restraint, the publishers appealed to the Supreme Court. The Court struck down the statute as an unconstitutional prior restraint. *Id.* at 722-23. After noting that Blackstone would have allowed no prior restraints at all, Chief Justice Hughes conceded that there were a limited number of hypothetical exceptional cases where limitations on the “no prior restraint” principle could be recognized:

No one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops. On similar grounds, the primary requirements of decency may be enforced



against obscene publications. The security of the community life may be protected against incitements to acts of violence and the overthrow by force of orderly government. The constitutional guaranty of free speech does not protect a man from an injunction against uttering words that may have all the effect of force.

*Id.* at 716 (citation and quotation marks omitted).

It is important to note that, in all three of these extraordinary exceptions, it is the nation or community that is at peril, not simply one individual, as here. This principle accords with present New York law, which emphasizes that prior restraint is unconstitutional “absent a showing on the record that such expression will immediately and irreparably create *public injury*.” *People ex rel. Arcara v. Cloud Books, Inc.*, 68 N.Y.2d 553, 558 (N.Y. 1986) (emphasis added). Here, of course, not only is there no public injury -- the only claimed harm is to the sensibilities of one man -- but the order was entered without a showing of any such harm.

Following *Near* was the Pentagon Papers case. There, the government sought a prior restraint of *amicus New York Times*’ publication of leaked classified documents about the then pending Vietnam War, claiming that the publication would harm the war effort. *Pentagon Papers*, 403 U.S. at 714. Nonetheless, the Court rebuffed the Government. In the concurring opinion of Justice Stewart, a prior restraint on publication was unconstitutional unless the disclosures would “surely result in direct, immediate, and irreparable damage to our Nation or its

people,” *id.* at 730, setting an intentionally high standard. It is important to note that the Supreme Court ruled this way even though four of the Justices suggested that the government could prosecute the New York Times post-publication.

Even where a defendant’s Sixth Amendment fair trial right might be prejudiced -- a constitutional interest undoubtedly more significant than Mr. Porco’s reputational and proprietary interest in his name -- the Supreme Court in *Nebraska Press*, 427 U.S. at 570, ruled that a lower court order enjoining the news media from disseminating information about an imminent trial was an unconstitutional prior restraint.

Pertinent to this case, the Supreme Court has also made clear that motion pictures -- whether fact or fiction -- are squarely within the scope of the First Amendment. *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952). *Burstyn* involved a New York law that allowed a government censor to deny a license to a film described as “obscene, indecent, immoral, inhuman, [or] sacrilegious.” *Id.* at 497. The film in question – “The Miracle” – was refused a license on the ground that it was sacrilegious. The Court found that the New York law constituted an illegal system of prior restraint:

The statute involved here does not seek to punish, as a past offense, speech or writing falling within the permissible scope of subsequent punishment. On the contrary, New York requires that permission to communicate ideas be obtained in advance from state officials who judge the content of the words and pictures

sought to be communicated. This Court recognized many years ago that such a previous restraint is a form of infringement upon freedom of expression to be especially condemned.

*Id.* at 503.<sup>5</sup>

If such a film, offending the entire community, could not be restrained, how can the present movie, simply because Plaintiff claims it exploits his not-so-good name?

C. Prior Restraint in the Context of the Torts of Libel and Invasion of Privacy Demands the Same High Standard

Courts, including New York courts, consistently deny injunctions even for material found to be libelous.<sup>6</sup>

The Supreme Court had reason to recently visit this issue in *Tory v. Cochran*, 544 U.S. 734, 735 (2005), where a former client of attorney Johnnie Cochran picketed outside his office with placards that were found by the lower court to be libelous. Before the court's ruling, Cochran died, though the case was not found moot. *Id.* at 736. While the Court noted that the grounds for the

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<sup>5</sup> Even when it comes to obscenity, speech outside the parameters of the First Amendment can be restrained only after a judicial proceeding where a court determines that the material is not protected. See Don R. Pember & Clay Calvert, *Mass Media Law* 71 (18th ed. 2013).

<sup>6</sup> Defamation is quite analogous to invasion of privacy, protecting similar interests. See, e.g., *Machleder v. Diaz*, 801 F.2d 46, 53 (2d Cir. 1986) (drawing an analogy between New Jersey's invasion of privacy law and defamation). Indeed, at argument before this Court, Plaintiff discussed allegedly false facts tarnishing his name, a defamation interest, as much as his "right of publicity." (Of course, that is not to say that falsity is relevant to a misappropriation claim; it clearly is not.)

injunction were diminished in light of the Plaintiff's death, they had not disappeared altogether. The Court ruled that "the injunction, as written, now amounts to an overly broad prior restraint upon speech, lacking plausible justification. As such, the Constitution forbids it." *Id.* at 738 (internal citations omitted); *see also Rombom v. Weberman*, 309 A.D.2d 844, 845 (App. Div. 2d Dep't 2003) ("Absent extraordinary circumstances, injunctive relief should not be issued in defamation cases[.]"); *Ramos v. Madison Square Garden Corp.*, 684 N.Y.S.2d 212, 257 (App. Div. 1st Dep't. 1999) ("Even if some form of equitable remedy were appropriate for defamation, a dubious proposition at best, the particular equitable relief here sought, in the nature of a prior restraint, is strongly disfavored and would be wholly inappropriate." (internal citation omitted)); *Rosemont Enters., Inc. v. McGraw-Hill Book Co.*, 85 Misc.2d 583, 586 (N.Y. Sup. Ct. 1975) (denying an injunction of the publication of an avowedly fictionalized autobiography and noting that "prior restraint may not issue even as against a publication alleged to be false or scandalous").

This Court similarly denied an injunction in *Altbach v. Kulon*, 754 N.Y.S.2d 709, 710 (App. Div. 3d Dep't 2003), where an artist had painted an unflattering portrait of plaintiff and used the reproduction of a plaintiff's picture to promote his art gallery. The plaintiff sued the artist for both libel and invasion of privacy and the trial court entered an injunction. This court found that the lower court should

have vacated the injunction in its entirety because the painting was artistic expression, and the use of plaintiff's name and photograph were ancillary to that protected expression. *Id.* at 712-13.

Though invasion of privacy has had a decidedly shorter history, here too the Supreme Court has never affirmed an injunction. In its leading case of *Organization for a Better Austin v. Keefe*, 402 U.S. at 415, the lower court enjoined a group of picketers and pamphleteers from protesting a real estate developer's business practices on the basis of an invasion of privacy claim by the plaintiff. Even after an adversarial hearing on the matter, the Supreme Court struck down the injunction, finding that, "so far as it imposes prior restraint on speech and publication, [it] constitutes an impermissible restraint on First Amendment rights." *Id.* at 418.

Similarly, in *In re King World Prods., Inc.*, 898 F.2d 56, 57 (6th Cir. 1990), the producer of "Inside Edition" posed as a patient and surreptitiously videotaped a nationally-known diet doctor. Although the plaintiff alleged that his privacy was invaded, the Sixth Circuit vacated the injunction issued by the district court, ruling that, "while he may be embarrassed by the broadcast, [the doctor] has simply failed to show the type of irreparable harm or injury that would tip the scale toward justifying a prior restraint of Inside Edition's first amendment freedoms to broadcast the video tapes." *Id.* at 60.

Finally, in *CBS, Inc. v. Davis*, 510 U.S. 1315, 1316 (1994) (Blackmun, Circuit Justice), South Dakota courts had enjoined the telecast of a CBS news videotape taken by an employee of a meat packing company with a hidden camera. Despite the fact that plaintiff alleged trespass and other torts, Justice Blackmun vacated the injunction, noting that “[w]here . . . a direct prior restraint is imposed upon the reporting of news by the media, each passing day may constitute a separate and cognizable infringement of the First Amendment.” *Id.* at 1317.

Enjoining the broadcast of the Lifetime movie to prevent it from airing unquestionably constitutes a prohibited prior restraint. This type of injunction presents the most serious and least tolerable infringement of First Amendment rights. To justify such a prior restraint of speech requires far more of a showing than that necessary to demonstrate an entitlement to other remedies in the First Amendment arena. Here -- in the absence of any showing of harm whatsoever -- this most extraordinary remedy was plainly unconstitutional.

**II. A PLAINTIFF SEEKING INJUNCTIVE RELIEF UNDER SECTION 51 MUST MAKE A SHOWING WITH RESPECT TO THE TRADITIONAL THREE-PRONG EQUITABLE TEST**

Even if a preliminary injunction were available in a right of publicity case, one cannot issue on the mere allegation of misappropriation. Rather, to obtain preliminary injunctive relief under Section 51, a plaintiff must at least make a successful showing with respect to the three factors traditionally required to

demonstrate an entitlement to provisional relief: 1) likelihood of success on the merits; 2) irreparable injury; and 3) a balance of the equities in plaintiff's favor. Issuing a preliminary injunction absent such a showing, particularly when enjoining speech, constitutes an impermissible prior restraint and runs afoul of well-established law. Even if the traditional three-prong test could somehow be met, an injunction in any case remotely similar to this one would be an unconstitutional and unprecedented prior restraint pursuant to the governing Supreme Court precedent. *See supra* Part I.

A. Awarding Preliminary Injunctive Relief Under Section 51 is a Prior Restraint

Under New York law, preliminary injunctive relief is a drastic remedy, which is not to be routinely granted. *Marietta Corp. v. Fairhurst*, 301 A.D.2d 734, 736 (N.Y. App. Div. 3rd Dep't 2003). The party seeking such relief is required to make a showing of "a probability of success on the merits, danger of irreparable injury in the absence of an injunction and a balance of equities in its favor." *Nobu Next Door, LLC v. Fine Arts Hous., Inc.*, 4 N.Y.3d 839, 840 (2005). A plaintiff "seeking to invoke such stringent relief is obligated to establish a clear and compelling legal right thereto based on undisputed facts." *Estate of Hemingway v. Random House, Inc.*, 49 Misc.2d 726, 728 (N.Y. Sup. Ct. 1966), *aff'd*, 269 N.Y.S.2d 366 (N.Y. App. Div. 1st Dep't 1966).

In the context of speech, the remedy of preliminary injunctive relief is even more drastic, as an injunction is a form of “prior restraint” on expression, and thus comes with a “heavy presumption against its constitutional validity.” *Org. for a Better Austin*, 402 U.S. at 419 (quotation marks omitted). “[T]he temporary nature [of a lower court’s order] . . . does not relax this presumption because a prior restraint, by definition, has an immediate and irreversible sanction.” *In re King World Prods.*, 898 F.2d at 60 (quotation marks and alterations omitted) (citing *Neb. Press Ass’n*, 427 U.S. at 559).

B. The Lower Court Erred by Granting a Preliminary Injunction Without Consideration of the Traditional Equitable Factors

Notwithstanding the “heavy presumption” against prior restraint, the lower court granted an injunction without making *any* findings with respect to the traditional equitable factors of likelihood of success on the merits, irreparable harm, and a balance of the equities. Instead, the lower court cited a single case for the erroneous proposition that, because the text of Section 51 indicates that injunctive relief may be available, all that the plaintiff had to do to obtain injunctive relief was to allege facts that suggest the existence of a valid claim under Section 51.

The lower court’s holding is legally flawed and must be reversed. As numerous courts have made clear, if anything, there should be *additional* filters or a heightened showing required when considering a preliminary injunction in the



context of speech, rather than fewer. *See, e.g., Bosley v. WildWetT.com*, No. 04-3428, 2004 WL 1093037, at \*1 (6th Cir. Apr. 21, 2004) (staying injunction granted by district court because the appellant “has shown a strong likelihood of success in demonstrating that the district court’s preliminary injunction is a prior restraint in violation of the First Amendment” and suggesting that procedural safeguards would be necessary to enjoin even “purely commercial” speech).

The statutory language regarding injunctive relief found in Section 51 does not displace the traditional analysis required before awarding preliminary injunctive relief. For example, in *Shoeman v. Agon Sports, LLC*, 11 Misc.3d 1077(A), at \*2 (N.Y. Sup. Ct. Apr. 11, 2006), the court considered the irreparable harm, likelihood of success on the merits, and the balancing of the equities of plaintiff’s claim when addressing a motion for a preliminary injunction under Section 51. The court noted that it was considering those factors “to assure a complete analysis of the issues presented on this motion.” *Id.* at \*1. The majority of state and federal courts in New York have taken that same approach. *See, e.g., Marshall v. Marshall*, No. 08 CV 1420(LB), 2012 WL 1079550, at \*30 (E.D.N.Y. Mar. 30, 2012) (considering the “traditional equitable factors” including a showing of irreparable harm when determining whether to issue injunction under Section 51); *Henrink v. Harper & Row Publishers, Inc.*, 607 F. Supp. 657, 660 (S.D.N.Y. 1985) (denying a motion for a preliminary injunction under Section 51 after

carefully analyzing the likelihood of success on the merits); *Baldeo v. Majeed*, 33 Misc.3d 1233(A), at \*2–4 (N.Y. Sup. Ct. Dec. 13, 2011) (analyzing the three traditional equitable factors in denying a preliminary injunction under Section 51); *Albert v. N.Y. Tel. Co.*, 28 Misc.2d 296, 297-98 (N.Y. Sup. Ct. 1960) (assuming a violation of Section 51, yet denying injunctive relief after balancing the equities); *see also* 1 J. Thomas McCarthy, *The Rights of Publicity & Privacy* § 6:97 (2d ed. 2011) (“Out of caution, most courts will employ the traditional approach of examining irreparable harm, likelihood of success and balancing of equities.”).

Requiring full and careful consideration of the traditional equitable factors when considering a motion for a preliminary injunction under Section 51 is entirely consistent with general principles of law. In fact, it is well-established that, in the related context of all intellectual property cases, “a court deciding whether to issue an injunction must not adopt ‘categorical’ or ‘general’ rules or presume that a party has met an element of the injunction standard.” *Salinger v. Colting*, 607 F.3d 68, 78 n.7 (2d Cir. 2010) (citing *eBay, Inc. v. MercExchange, LLC*, 547 U.S. 388, 391-94 (2006)). Rather, the traditional principles of equity “are the presumptive standard[s] for injunctions in *any* context.” *Appalseed Prods., Inc. v. MediaNet Digital, Inc.*, No. 11 Civ. 5922(PGG), 2012 WL 2700383, at \*7 (S.D.N.Y. July 6, 2012) (emphasis added).

In *eBay v. MercExchange*, 547 U.S. at 391, a patent infringement case, the Supreme Court was asked to review the reversal of a denial of an injunction by the Federal Circuit, which had applied a general rule that courts will issue injunctions against patent infringement absent exceptional circumstances. The Supreme Court reversed, stating that, “a major departure from the long tradition of equity practice should not be lightly implied.” *Id.* The Court analogized to copyright law, noting that it “has consistently rejected invitations to replace traditional equitable considerations with a rule that an injunction automatically follows a determination that a copyright has been infringed.” *Id.* at 392-93. The Court thus held that “the decision whether to grant or deny injunctive relief rests with the equitable discretion of the district courts, and that such discretion must be exercised consistent with traditional principles of equity, in patent disputes no less than in other cases governed by such standards.” *Id.* at 394.

In *Salinger v. Colting*, the Second Circuit applied the injunction standard set forth in *eBay* in the context of a copyright infringement case, reasoning that “we see no reason why *eBay* would not apply with equal force to an injunction in *any* type of case.” 607 F.3d at 78 n.7. In so doing, the court endorsed the argument that a preliminary injunction standard that fails to account for the three traditional

equitable factors “is an unconstitutional prior restraint on speech” that “is in conflict with the Supreme Court’s decision in *eBay*.”<sup>7</sup> *Id.* at 76.

Here, the lower court’s holding that a prior restraint can be issued under Section 51 on the mere allegation of misappropriation, without analysis of irreparable injury and the other equitable factors,<sup>8</sup> is in obvious conflict with *eBay* and its progeny. *See Marshall*, 2012 WL 1079550, at \*30 (“Therefore, to be both cautious and consistent, I proceed to analyze plaintiff’s [Section 51] claim according to the traditional . . . *eBay* test.”).

*Amici* urge this Court to interpret Section 51 and injunctive relief in a manner that is consistent with *eBay* and the vast majority of courts facing the

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<sup>7</sup> It is important to note that the remedy of an injunction is included in the text of the U.S. Copyright Act (and the copyright interest itself is set forth in the Constitution). However, as is clear from *eBay* and *Salinger*, the mere mention of an injunction in the statute is *not* a basis upon which to circumvent the traditional three-prong analysis required when a court is considering an injunction in *any* context. *See eBay*, 547 U.S. at 392-93. Similarly, the mere mention of the remedy of an injunction in Section 51 does *not* supplant the need to analyze the factors contained in the traditional three-prong test for equitable relief. *Shoeman*, 11 Misc.3d 1077(A), at \*1.

<sup>8</sup> Notwithstanding the fact that the lower court did not even engage in any analysis with respect to the likelihood of success on the merits, *amici* are confident that there is, in fact, no likelihood of success on the merits here, as movies just like this one, even if fictionalized, clearly fall under the protection of the First Amendment and do not constitute trade and advertising under Section 51. *See Altbach*, 754 N.Y.S.2d at 658 (where this Court noted that “[t]he Court of Appeals has repeatedly observed that the prohibitions of [Section 51] are to be strictly limited to nonconsensual commercial appropriations of the name, portrait, or picture of a living person,” and that “[t]hese statutory provisions prohibit the use of pictures, names or portraits for advertising purposes or for the purposes of trade *only*, and nothing more” (internal citations and quotation marks omitted)); *see also Tyne v. Time Warner Entm’t Co. L.P.*, 901 So.2d 802, 807 (Fla. 2005) (“[U]se ‘for the purpose of trade’ does not ordinarily include the use of a person’s identity in news reporting, commentary, entertainment, works of fiction or nonfiction, or in advertising incidental to such uses.”).

issue.<sup>9</sup> And *amici* respectfully request that this Court make clear that Section 51 does not override the constitutional prohibition against prior restraints. See *N.Y. Magazine, a Div. of Primedia Magazines, Inc. v. Metro. Transp. Auth.*, 136 F.3d 123, 131 (2d Cir. 1998) (noting that “we see no reason why the requirement of procedural safeguards [for prior restraints] should be relaxed whether the speech is commercial or not”).

### III. THE LIFETIME MOVIE IS IN THE LONG TRADITION OF MOVIES AND DOCUDRAMAS WHICH BOTH ENTERTAIN AND EDUCATE, AND WHICH HAVE LONG RECEIVED FIRST AMENDMENT PROTECTION

Although Plaintiff calls the Lifetime movie a “substantially fictionalized account” in his Amended Memorandum of Law, the movie, like many television movies and motion pictures, is based on a true story. The affidavit from Lifetime states that the essential elements of the movie are true and accurate, and that the movie is based on court and police records as well as interviews with persons involved, and historical and other documents. (Aff. of David Sternbach ¶ 6.) If

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<sup>9</sup> To the extent that a few lower courts have found that the statutory authority for injunctive relief found in Section 51 supplants the need for a traditional equitable showing, those courts have done so only where a violation of Section 51 “*has been established or conceded*.” *Marcinkus v. NAL Publ’g Inc.*, 138 Misc.2d 256, 265 (N.Y. Sup. Ct. 1987) (emphasis added); see also, e.g., *Dugrom v. CBS, Inc.*, 29 Misc.2d 394, 396 (N.Y. Sup. Ct. 1961) (“Regardless of what the equities of the situation may be and the damage to defendants from the granting of the injunction, a denial of injunctive relief *for a conceded violation of the statute* would emasculate the provisions for injunctive relief.” (emphasis added)). Here, the lower court did not engage in an analysis of Plaintiff’s likelihood of success on the merits. Nor was there a concession of a violation of Section 51.

Moreover, those cases were decided prior to the Supreme Court’s decision in *eBay*, which makes plain that discretion with respect to whether to issue an injunction “must be exercised consistent with traditional principles of equity, in patent disputes no less than in other cases governed by such standards.” *eBay*, 547 U.S. at 394.

Plaintiff's theory of the law had been the norm, many acclaimed movies about, based on, or inspired by real people likely would never have been made.<sup>10</sup>

Ultimately, the degree of fictionalization is not relevant to the First Amendment analysis in the misappropriation context. Many *amici* have produced and distributed works where the plot is an accurate historical depiction, but where some of the characters are composites, some of the conversations invented, and time is compressed. These movies, often referred to as "docudramas," have been produced for decades and have long included fictionalizations to make the movie viable, but, in the end, have entertained, inspired, and educated the viewing public by drawing on actual events and people. *See, e.g., Alfano v. NGHT, Inc.*, 623 F. Supp. 2d 355, 359 (E.D.N.Y.) (2009) (noting the newsworthiness of *Inside the Mafia*, a docudrama featuring the trial of John Gotti, notwithstanding its lack of strict historical accuracy since the "activities of organized crime in the United States have long been a matter of public interest, even fascination").

A prime example is this year's Oscar winner for Best Picture, "Argo." The film is based on a real-life story, and while it contains fictionalizations, the film won universal plaudits for being both entertaining and educational. It taught a lesson about the Iranian hostage crisis, the experiences of the six Americans who were able to escape from being taken as hostages, the friendship of the Canadians

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<sup>10</sup> As two examples, Steven Spielberg might never have made the award-winning films, "Saving Private Ryan" or "Schindler's List."

at high risk to themselves in helping the Americans, and the daring and crafty escape plan hatched and implemented by the CIA. Whether one calls it history, art, a fictionalized movie, or a docudrama, a work such as this has always received First Amendment protection, and clearly is -- and ought to be -- protected from the reach of Section 51.

In recent years, there has been no shortage of movies or docudramas, which, as the Lifetime movie, relate a historical tale with some fictionalization. *Amicus* HBO produced and distributed "Recount," about the 2000 presidential election, focusing on the post-election day fight for Florida's electoral votes (which won the Emmy Award for Outstanding Made for Television Movie); "Game Change," about Vice-Presidential candidate Sarah Palin's role in the 2008 election (which won the Emmy for Outstanding Miniseries or Movie and The Golden Globe Award for Best Television Film); and "Too Big to Fail," about the 2008 financial meltdown (nominated for 11 Emmys). All three movies were based on real events but included fictionalized elements to allow for a more condensed and viewer-friendly script, and all were award-winning works that educated as well as entertained the viewing public. While Sarah Palin criticized her depiction in "Game Change," the public could learn a great deal about her merits and deficiencies as a candidate by watching the film. Likewise, "Too Big to Fail" made the financial crisis and the banks' malfeasance understandable to the public

despite the complex and esoteric subject matter. Not to mention that one of the most watched television mini-series ever was “Roots,” a historical fiction, which both entertained and educated millions about the history of slavery and increased public sensitivity as to racial issues.<sup>11</sup>

Finally, perhaps the fictionalized movie most like the Lifetime movie is “In Cold Blood,” based on Truman Capote’s book of the same name. Capote himself called the book a non-fiction novel, and the movie included a fictional character who helped to give the plot coherence. Despite such fictionalization, the movie certainly was educational with respect to the criminal justice system and the question of capital punishment, and also was nominated for four Academy Awards.

Sixty years ago, in *Burstyn*, 343 U.S. at 501, 502, the U.S. Supreme Court confirmed that films -- whether fact or fiction -- are “a significant medium for the communication of ideas” entitled to full First Amendment protection, just like books, newspapers and other forms of expressive communication. The Court made clear that these constitutional protections are not diminished by the fact that the work may be properly labeled as “entertainment,” noting that “[t]he importance of motion pictures as an organ of public opinion is not lessened by the fact that they are designed to entertain as well as to inform.” *Id.* at 501, 504 n.15; *accord*

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<sup>11</sup> “The King’s Speech,” “The Blind Side,” “Erin Brockovich,” “The Perfect Storm,” and “The Social Network” are just a few other recent critically-acclaimed films based on real-life people and events.



*Winters v. New York*, 333 U.S. 507, 510 (1948) (explaining that both entertainment and news are fully protected by the First Amendment because “[t]he line between the informing and the entertaining is too elusive for the protection of that basic right [of a free press]”).

Following this rationale, courts across the country have held that the First Amendment protects all forms of expressive works from misappropriation claims, whether they be entirely fictional, semi-fictional, “based on” or “inspired by” real events and people, entirely factual news reporting or documentaries. *See, e.g., Guglielmi v. Spelling-Goldberg Prods.*, 25 Cal.3d 860, 866-68 (Cal. 1979) (finding constitutional protection for unauthorized use of Rudolph Valentino’s name and likeness in a semi-fictional movie); *Tyne v. Time Warner Entm’t Co., L.P.*, 901 So.2d 802, 810 (Fla. 2005) (protecting the film, “The Perfect Storm,” a dramatized account of the actual disappearance of a fishing vessel and crew during a powerful storm); *Meeropol v. Nizer*, 560 F.2d 1061, 1066-67 (2d Cir. 1977) (finding fictionalized account of Julius and Ethel Rosenberg trial not actionable under misappropriation theory since both “historical” and “fictional” works are fully protected by the First Amendment); *Matthews v. Wozencraft*, 15 F.3d 432, 438 n.5, 440 (5th Cir. 1994) (holding that First Amendment protects use of persona in novel, including plaintiff’s “character, occupation and the general outline of his career, with many incidents in his life”); *Hicks v. Casablanca Records*, 464 F.

Supp. 426 (S.D.N.Y. 1978) (finding use of name and characteristics of Agatha Christie in fictional film protected under First Amendment); *Seale v. Gramercy Pictures*, 949 F. Supp. 331, 337 (E.D. Pa. 1996) (concluding that use of plaintiff's persona in dramatized film about Black Panthers was protected expression); *Rosemont Enters.*, 85 Misc.2d at 587 (holding that unauthorized, fictionalized biography of Howard Hughes could not provide the basis for a misappropriation claim and noting that "Howard Hughes is no different from any other person in that he cannot have a monopoly, nor can he give a monopoly to any entity, with respect to works concerning his life").

Similar to these docudramas, particularly "In Cold Blood," the Lifetime movie both entertains and generally educates viewers about how the criminal justice system works, about the consequences of crime, and about the historical incidents portrayed. As with all these other movies, it is based on the historical record, in this case actual court and police documents, and is, at bottom, a work of combined art and non-fiction, which, no matter how it is characterized, has long been viewed as protected by the First Amendment. Most important, as all these movies, it is of significant value to the public.

## CONCLUSION

Despite the dangers inherent in prior restraints, First Amendment concerns did not factor into the lower court's analysis. Instead, the lower court completely subordinated free speech interests and simply (and incorrectly) presumed that because the movie was a fictionalization, it was unprotected by the First Amendment and violated Section 51; (incorrectly) presumed that the use of plaintiff's name in such a movie inexorably led to liability under the statute; and (incorrectly) brazenly entered a prior restraint with no consideration of its very dubious constitutional validity, and without ensuring even at a minimum that Plaintiff met the three-prong test for all injunctions, a test which should be particularly stringent where censorship of speech is concerned. As we have demonstrated, the First Amendment requires more -- especially in the context of prior restraint.

The injunction in this case should not be tolerated. If a work contained libelous statements, a prior restraint could not issue. If a work revealed a national security secret short of surely causing direct and immediate danger to our nation or its people, a prior restraint could not issue. If a work might jeopardize the fair trial right of a criminal defendant, a prior restraint could not issue. No prior restraint should have issued here.

Dated:       New York, NY  
              April 5, 2013

Respectfully submitted,



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## Appendix A: Identity of Individual *Amici*

ADVANCE PUBLICATIONS, INC., directly and through its subsidiaries, publishes 18 magazines with nationwide circulation, newspapers in over 20 cities, and weekly business journals in over 40 cities throughout the United States. It also owns many Internet sites and has interests in cable systems serving over 2.3 million subscribers.

AMC NETWORKS INC. has been dedicated to producing quality programming and movie content for more than 30 years. AMC Networks owns and operates several of the most popular and award-winning brands in cable television: AMC, IFC, Sundance Channel, WE tv, and IFC Films. AMC is available across all platforms, including on-air, online, on demand and mobile.

ASSOCIATION OF AMERICAN PUBLISHERS, INC. (“AAP”) is the national association of the U.S. book publishing industry. AAP’s members include most of the major commercial book publishers in the United States, as well as smaller and non-profit publishers, university presses and scholarly societies. AAP members publish hardcover, paperback, and electronic books in every field, scholarly and professional journals, educational materials for the elementary, secondary, postsecondary, and professional markets, computer software, and electronic products and services. The Association represents an industry whose very existence depends upon the free exercise of rights guaranteed by the First Amendment.

CBS CORPORATION is a mass media company that creates and distributes industry-leading content across a variety of platforms to audiences around the world. The Company’s operations span virtually every field of media and entertainment, including cable, publishing, radio, local TV, film, outdoor advertising, and interactive and socially responsible media. CBS’s businesses include CBS Broadcasting (which, among other things, owns and operates the CBS News Division and is the owner and operator of various television stations nationwide), Showtime Networks (which owns and operates the premium television networks SHOWTIME® and THE MOVIE CHANNEL™), and Simon & Schuster (a global leader in the field of general interest publishing).

DISCOVERY COMMUNICATIONS, LLC is a leading, global nonfiction media company that reaches more than 1.8 billion cumulative subscribers in 218 countries and territories. Discovery has more than 150 worldwide television networks, including Discovery Channel, TLC, Animal Planet, Science and Investigation Discovery, as well as joint venture networks OWN: Oprah Winfrey Network, The Hub, and 3net.

DOW JONES & COMPANY, INC. is the publisher of *The Wall Street Journal*, a daily newspaper with a national circulation of over two million; WSJ.com, a news website with more than one million paid subscribers; Barron’s, a weekly business and finance magazine; and through its Dow Jones Local Media Group, community newspapers throughout the United States. In addition, Dow Jones provides real-time financial news around the world through Dow Jones Newswires as well as news and other business and financial information through Dow Jones Factiva and Dow Jones Financial Information Services.

GANNETT CO., INC. is an international news and information company that publishes 82 daily newspapers in the United States, including USA TODAY, as well as hundreds of non-daily publications. In broadcasting, the company operates 23 television stations in the U.S. with a market reach of more than 21 million households. Each of Gannett's daily newspapers and TV stations operates Internet sites offering news and advertising that is customized for the market served and integrated with its publishing or broadcasting operations.

HOME BOX OFFICE, INC. is the world's most successful pay television service, delivering the HBO and Cinemax television services. HBO and Cinemax branded networks are available in over 70 countries, with more than 114 million subscribers worldwide, and HBO's original programming is licensed to television networks in over 150 countries and is also distributed via DVDs, Blu-ray and digital downloads in over 70 countries. HBO's original productions continue to be recognized as some of the most innovative, honored and critically acclaimed programming on television.

MOTION PICTURE ASSOCIATION OF AMERICA, INC. ("MPAA")<sup>1</sup> is a not-for-profit trade association founded in 1922 to address issues of concern to the United States motion picture industry. Its members and their affiliates are the leading producers and distributors of audiovisual entertainment in the theatrical, television and DVD/home video markets. MPAA often has appeared as *amicus curiae* in cases involving claims that potentially implicate the First Amendment rights of its members, including cases (like this one) in which the plaintiff is attempting to assert a right-of-publicity claim based on allegations that his name, likeness, or persona was used in an expressive work.

MPA, THE ASSOCIATION OF MAGAZINE MEDIA, is the industry association for multi-platform magazine companies. Established in 1919, MPA represents 175 domestic magazine media companies with more than 900 titles, approximately 30 international companies and more than 100 associate members. Staffed by magazine media specialists, MPA is headquartered in New York City, with a government affairs office in Washington, DC.

THE NEW YORK TIMES COMPANY is the publisher of The New York Times, The Boston Globe, and the International Herald Tribune. It also owns and operates nytimes.com and other websites.

THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided representation, guidance and research in First Amendment and Freedom of Information Act litigation since 1970.

SCRIPPS NETWORKS INTERACTIVE, INC. is a publicly traded cable television programmer with flagship networks Food Network, HGTV, Travel Channel,

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<sup>1</sup> The members of MPAA are: Paramount Pictures Corporation; Sony Pictures Entertainment Inc.; Twentieth Century Fox Film Corporation; Universal City Studios LLC; Walt Disney Studios Motion Pictures; and Warner Bros. Entertainment Inc.

Cooking Channel, DIY Network, and Great American Country Network.

TIME INC. is the largest magazine publisher in the United States. It publishes over 90 titles, including Time, Fortune, Sports Illustrated, People, Entertainment Weekly, InStyle and Real Simple. Time Inc. publications reach over 100 million adults and its Web sites, which attract more visitors each month than any other publisher, serve close to 2 billion page views each month.

## **PRINTING SPECIFICATIONS STATEMENT**

I hereby certify pursuant to 22 NYCRR § 600.10 that the foregoing brief was prepared on a computer using Microsoft Word.

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