

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS**

GATEHOUSE MEDIA MASSACHUSETTS I,
INC., DOING BUSINESS AS GATEHOUSE MEDIA
NEW ENGLAND,

Plaintiff,

v.

THE NEW YORK TIMES COMPANY,
DOING BUSINESS AS BOSTON.COM,

Defendant,

and

THE NEW YORK TIMES COMPANY,
GLOBE NEWSPAPER COMPANY, INC.,
AND BOSTON GLOBE ELECTRONIC
PUBLISHING, INC.,

Counterclaim-Plaintiffs,

v.

GATEHOUSE MEDIA MASSACHUSETTS I,
INC., DOING BUSINESS AS GATEHOUSE MEDIA
NEW ENGLAND, AND GATEHOUSE MEDIA,
INC.,

Counterclaim-Defendants.

Civil Action No. 08-12114-WGY

**DEFENDANT'S ANSWER, AFFIRMATIVE
DEFENSES, AND COUNTERCLAIM-PLAINTIFFS'
COUNTERCLAIMS TO PLAINTIFF'S COMPLAINT**

Defendant The New York Times Company (“New York Times”) submits the following answer, affirmative defenses, and counterclaims to Plaintiff GateHouse Media Massachusetts I, Inc.’s (“GateHouse”) Complaint as follows:

NATURE OF THE ACTION

1. Paragraph 1 of the Complaint is a narrative for which no answer is required. To the extent that an answer is required, New York Times denies the allegations of Paragraph 1 of the Complaint.

2. Paragraph 2 of the Complaint states a legal conclusion for which no answer is required. To the extent that an answer is required, New York Times denies the allegations of Paragraph 2 of the Complaint.

3. Paragraph 3 of the Complaint states a legal conclusion for which no answer is required. To the extent that an answer is required, New York Times denies the allegations of Paragraph 3 of the Complaint.

4. Paragraph 4 of the Complaint states the remedy sought by Plaintiff for which no answer is required. To the extent that an answer is required, New York Times denies the allegations of Paragraph 4 of the Complaint.

5. Paragraph 5 of the Complaint is a narrative for which no answer is required. To the extent that an answer is required, New York Times denies the allegations of Paragraph 5 of the Complaint.

PARTIES

6. New York Times is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 6 of the Complaint, and therefore denies the same.

7. New York Times admits the first sentence of Paragraph 7 of the Complaint, and denies the remaining allegations contained in Paragraph 7 of the Complaint.

JURISDICTION AND VENUE

8. Paragraph 8 of the Complaint states a legal conclusion for which no answer is required. To the extent that an answer is required, New York Times denies the allegations of Paragraph 8 of the Complaint, to the extent they relate to the Copyright claims (Count I).

9. New York Times admits that personal jurisdiction exists over it in this District. Except as so admitted, New York Times denies the allegations of Paragraph 9 of the Complaint.

10. New York Times admits the allegations contained in Paragraph 10 of the Complaint.

11. Paragraph 11 of the Complaint states a legal conclusion for which no answer is required. To the extent that an answer is required, New York Times denies the allegations of Paragraph 11 of the Complaint.

FACTUAL ALLEGATIONS

12. New York Times is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 12 of the Complaint, and therefore denies the same.

13. New York Times is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 13 of the Complaint, and therefore denies the same.

14. New York Times is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 14 of the Complaint, and therefore denies the same.

15. New York Times is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 15 of the Complaint, and therefore denies the same.

16. New York Times admits that when GateHouse launched *Wicked Local*, New York Times did not offer an online hyper-local news service in the Commonwealth of Massachusetts. New York Times denies the remaining allegations in Paragraph 16.

17. New York Times is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 17 of the Complaint, and therefore denies the same.

18. New York Times is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 18 of the Complaint, and therefore denies the same.

19. New York Times is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 19 of the Complaint, and therefore denies the same.

20. New York Times is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 20 of the Complaint, and therefore denies the same.

21. New York Times is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 21 of the Complaint, and therefore denies the same.

22. New York Times is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 22 of the Complaint, and therefore denies the same.

23. New York Times denies the allegations of Paragraph 23 of the Complaint.

24. New York Times admits that on December 11, 2008, a press release was published by Boston.com, and refers to that press release for its complete and accurate content. Except as so admitted, New York Times denies the allegations of Paragraph 24 of the Complaint.

25. New York Times denies the allegations contained in Paragraph 25 of the Complaint.

26. New York Times denies the allegations in Paragraph 26 of the Complaint.

27. New York Times denies the allegations in Paragraph 27 of the Complaint.

28. Paragraph 28 of the Complaint states a legal conclusion for which no answer is required. To the extent that an answer is required, New York Times denies the allegations of Paragraph 28 of the Complaint.

29. New York Times is without knowledge or information sufficient to form a belief as to the truth of the allegations in the first and third sentences of Paragraph 29 of the Complaint, and therefore denies the same. New York Times denies the allegations set forth in the second sentence of Paragraph 29. The documents referenced in the third sentence of Paragraph 29 speak for themselves, and no further response is required.

30. New York Times denies the allegations contained in Paragraph 30 of the Complaint.

31. New York Times denies the allegations contained in Paragraph 31 of the Complaint.

32. New York Times denies the allegations contained in Paragraph 32 of the Complaint.

33. New York Times is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 33 of the Complaint, and therefore denies the same.

34. New York Times is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 34 of the Complaint, and therefore denies the same.

35. Paragraph 35 of the Complaint states a legal conclusion for which no answer is required. To the extent that an answer is required, New York Times denies the allegations of Paragraph 35 of the Complaint.

36. New York Times admits that headlines and ledes, accompanied by source-identifying information, are displayed on the website. Except as so admitted, New York Times denies the allegations of Paragraph 36 of the Complaint.

37. New York Times admits that a user viewing the website can mouse click on the headline and is taken to the third party article or blog entry on the website of the third party. Except as so admitted, New York Times denies the allegations of Paragraph 37 of the Complaint.

38. New York Times denies the allegations contained in Paragraph 38 of the Complaint.

39. New York Times admits Plaintiff sent a cease and desist letter demanding removal of GateHouse material. Except as so admitted, New York Times denies the allegations of Paragraph 39 of the Complaint.

40. New York Times denies the allegations contained in Paragraph 40 of the Complaint.

41. New York Times admits that it replied to Plaintiff's cease and desist letter by letter dated November 26, 2008. Except as so admitted, New York Times denies the allegations of Paragraph 41 of the Complaint.

42. New York Times admits it received a letter from Plaintiff dated December 2, 2008, and had no further written communications with Plaintiff. Except as expressly admitted herein, New York Times denies the allegations contained in Paragraph 42 of the Complaint.

43. New York Times is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 43 of the Complaint, and therefore denies the same.

44. New York Times denies the allegations contained in Paragraph 44 of the Complaint.

COUNT I
(For Direct Copyright Infringement, 17 U.S.C. 501, et seq.)

45. New York Times incorporates by reference its responses to Paragraphs 1-44 of the Complaint.

46. Paragraph 46 of the Complaint states a legal conclusion for which no answer is required. To the extent that an answer is required, New York Times denies the allegations of Paragraph 46 of the Complaint.

47. New York Times is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 47 of the Complaint, and therefore denies the same.

48. Paragraph 48 of the Complaint states a legal conclusion for which no answer is required. To the extent that an answer is required, New York Times denies the allegations of Paragraph 48 of the Complaint.

49. New York Times denies the allegations contained in Paragraph 49 of the Complaint.

50. New York Times denies the allegations contained in Paragraph 50 of the Complaint.

51. New York Times denies the allegations contained in Paragraph 51 of the Complaint.

52. Paragraph 52 of the Complaint states a legal conclusion for which no answer is required. To the extent that an answer is required, New York Times denies the allegations of Paragraph 52 of the Complaint.

53. Paragraph 53 of the Complaint states a legal conclusion for which no answer is required. To the extent that an answer is required, New York Times denies the allegations of Paragraph 53 of the Complaint.

54. Paragraph 54 of the Complaint states a legal conclusion for which no answer is required. To the extent that an answer is required, New York Times denies the allegations of Paragraph 54 of the Complaint.

COUNT II
(Unfair Competition and False Designation of Origin, 15 U.S.C. 1125(a)(1))

55. New York Times incorporates by reference its responses to Paragraphs 1-54 of the Complaint.

56. Paragraph 56 of the Complaint states a legal conclusion for which no answer is required. To the extent that an answer is required, New York Times denies the allegations of Paragraph 56 of the Complaint.

57. New York Times is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 57 of the Complaint, and therefore denies the same.

58. New York Times is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 58 of the Complaint, and therefore denies the same.

59. New York Times is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 59 of the Complaint, and therefore denies the same.

60. New York Times is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 60 of the Complaint, and therefore denies the same.

61. New York Times denies the allegations contained in Paragraph 61 of the Complaint.

62. New York Times denies the allegations contained in Paragraph 62 of the Complaint.

63. New York Times denies the allegations contained in Paragraph 63 of the Complaint.

64. New York Times denies the allegations contained in Paragraph 64 of the Complaint.

65. Paragraph 65 of the Complaint states a legal conclusion for which no answer is required. To the extent that an answer is required, New York Times denies the allegations of Paragraph 65 of the Complaint.

66. New York Times denies the allegations contained in Paragraph 66 of the Complaint.

67. Paragraph 67 of the Complaint states a legal conclusion for which no answer is required. To the extent an answer is required, New York Times denies the allegations contained in Paragraph 67 of the Complaint.

68. Paragraph 68 of the Complaint states a legal conclusion for which no answer is required. To the extent that an answer is required, New York Times denies the allegations of Paragraph 68 of the Complaint.

69. Paragraph 69 of the Complaint states a legal conclusion for which no answer is required. To the extent that an answer is required, New York Times denies the allegations of Paragraph 69 of the Complaint.

70. Paragraph 70 of the Complaint states a legal conclusion for which no Answer is required. To the extent that an answer is required, New York Times denies the allegations of Paragraph 70 of the Complaint.

COUNT III
(False advertising, 15 U.S.C. 1125(a)(2))

71. New York Times incorporates by reference its responses to Paragraphs 1-70 of the Complaint.

72. Paragraph 72 of the Complaint states a legal conclusion for which no answer is required. To the extent that an answer is required, New York Times denies the allegations of Paragraph 72 of the Complaint.

73. New York Times denies the allegations contained in Paragraph 73 of the Complaint.

74. New York Times denies the allegations contained in Paragraph 74 of the Complaint.

75. New York Times denies the allegations contained in Paragraph 75 of the Complaint.

76. Paragraph 76 of the Complaint states a legal conclusion for which no answer is required. To the extent that an answer is required, New York Times denies the allegations of Paragraph 76 of the Complaint.

77. Paragraph 77 of the Complaint states a legal conclusion for which no answer is required. To the extent that an answer is required, New York Times denies the allegations of Paragraph 77 of the Complaint.

78. Paragraph 78 of the Complaint states a legal conclusion for which no answer is required. To the extent that an answer is required, New York Times denies the allegations of Paragraph 78 of the Complaint.

79. New York Times denies the allegations contained in Paragraph 79 of the Complaint.

80. Paragraph 80 of the Complaint states a legal conclusion for which no answer is required. To the extent that an answer is required, New York Times denies the allegations of Paragraph 80 of the Complaint.

81. Paragraph 81 of the Complaint states a legal conclusion for which no answer is required. To the extent that an answer is required, New York Times denies the allegations of Paragraph 81 of the Complaint.

COUNT IV
(Trademark dilution, 15 U.S.C. 1125(c))

82. New York Times incorporates by reference its responses to Paragraphs 1-81 of the Complaint.

83. Paragraph 83 of the Complaint states a legal conclusion for which no answer is required. To the extent that an answer is required, New York Times denies the allegations of Paragraph 83 of the Complaint.

84. Paragraph 84 of the Complaint states a legal conclusion for which no answer is required. To the extent that an answer is required, New York Times denies the allegations of Paragraph 84 of the Complaint.

85. New York Times denies the allegations contained in Paragraph 85 of the Complaint.

86. New York Times denies the allegations contained in Paragraph 86 of the Complaint.

87. New York Times denies the allegations contained in Paragraph 87 of the Complaint.

88. New York Times denies the allegations contained in Paragraph 88 of the Complaint.

89. Paragraph 89 of the Complaint states a legal conclusion for which no answer is required. To the extent that an answer is required, New York Times denies the allegations of Paragraph 89 of the Complaint.

90. Paragraph 90 of the Complaint states a legal conclusion for which no answer is required. To the extent that an answer is required, New York Times denies the allegations of Paragraph 90 of the Complaint.

91. Paragraph 91 of the Complaint states a legal conclusion for which no answer is required. To the extent that an answer is required, New York Times denies the allegations of Paragraph 91 of the Complaint.

COUNT V
(Unfair Business Practices, Mass. Gen. Laws, ch. 93A, § 11)

92. New York Times incorporates by reference its responses to Paragraphs 1-91 of the Complaint.

93. Paragraph 93 of the Complaint states a legal conclusion for which no answer is required. To the extent that an answer is required, New York Times denies the allegations of Paragraph 93 of the Complaint.

94. New York Times admits Paragraph 94.

95. Paragraph 95 of the Complaint states a legal conclusion for which no answer is required. To the extent that an answer is required, New York Times denies the allegations of Paragraph 95 of the Complaint.

96. New York Times denies the allegations contained in Paragraph 96 of the Complaint.

97. New York Times denies the allegations contained in Paragraph 97 of the Complaint.

98. Paragraph 98 of the Complaint states a legal conclusion for which no answer is required. To the extent that an answer is required, New York Times denies the allegations of Paragraph 98 of the Complaint.

99. Paragraph 99 of the Complaint states a legal conclusion for which no answer is required. To the extent that an answer is required, New York Times denies the allegations of Paragraph 99 of the Complaint.

100. Paragraph 100 of the Complaint states a legal conclusion for which no answer is required. To the extent that an answer is required, New York Times denies the allegations of Paragraph 100 of the Complaint.

Count VI
(Trademark Infringement, Mass. Gen. Laws, ch. 110H, § 13)

101. New York Times incorporates by reference its responses to Paragraphs 1-100 of the Complaint.

102. Paragraph 102 of the Complaint states a legal conclusion for which no answer is required. To the extent that an answer is required, New York Times denies the allegations of Paragraph 102 of the Complaint.

103. New York Times denies the allegations contained in Paragraph 103 of the Complaint.

104. Paragraph 104 of the Complaint states a legal conclusion for which no answer is required. To the extent that an answer is required, New York Times denies the allegations of Paragraph 104 of the Complaint.

105. Paragraph 105 of the Complaint states a legal conclusion for which no answer is required. To the extent that an answer is required, New York Times denies the allegations of Paragraph 105 of the Complaint.

COUNT VII
(Unfair competition)

106. New York Times incorporates by reference its responses to Paragraphs 1-105 of the Complaint.

107. New York Times denies the allegations contained in Paragraph 107 of the Complaint.

108. New York Times is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 108 of the Complaint, and therefore denies the same.

109. Paragraph 109 of the Complaint states a legal conclusion for which no answer is required. To the extent that an answer is required, New York Times denies the allegations of Paragraph 109 of the Complaint.

110. New York Times denies the allegations contained in Paragraph 110 of the Complaint.

111. Paragraph 111 of the Complaint states a legal conclusion for which no answer is required. To the extent that an answer is required, New York Times denies the allegations of Paragraph 111 of the Complaint.

112. Paragraph 112 of the Complaint states a legal conclusion for which no answer is required. To the extent that an answer is required, New York Times denies the allegations of Paragraph 112 of the Complaint.

COUNT VIII
(Breach of Contract)

113. New York Times incorporates by reference its responses to Paragraphs 1-112 of the Complaint.

114. New York Times admits that a disclaimer is currently placed in the lower right-hand corner stating its “original content [is] available for noncommercial use under a Creative Commons license, except where noted” and that the graphic box to the right of the text currently links to a summary of the Creative Commons license. New York Times denies the remaining allegations of Paragraph 114 of the Complaint.

115. The allegations in Paragraph 115 state a legal conclusion to which no response is required. To the extent a response is required, New York Times denies the allegations of Paragraph 115 of the Complaint.

116. New York Times admits that users who view the summary referenced in Paragraph 115 of the Complaint may currently select a link to view the full license. Except as so admitted, New York Times denies the allegations contained in Paragraph 116 of the Complaint.

117. New York Times denies the allegations contained in Paragraph 117 of the Complaint.

118. New York Times is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 118 of the Complaint, and therefore denies the same.

119. New York Times is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 119 of the Complaint, and therefore denies the same.

120. Paragraph 120 of the Complaint states a legal conclusion for which no answer is required. To the extent that an answer is required, New York Times denies the allegations of Paragraph 120 of the Complaint.

121. Paragraph 121 of the Complaint states a legal conclusion for which no answer is required. To the extent that an answer is required, New York Times denies the allegations contained in Paragraph 121 of the Complaint.

AFFIRMATIVE DEFENSES

New York Times, for its affirmative defenses states as follows:

1. The Complaint fails to state any claims upon which relief can be granted.
2. Plaintiff's claims are barred by the doctrine of unclean hands.
3. Plaintiff's claims are barred by the doctrine of fair use.
4. Plaintiff's claims are barred by the doctrine of laches.
5. Plaintiff's unfair competition and business practices claims are preempted by federal law to the extent they are coextensive with Count I.
6. Plaintiff's claims are barred by the doctrine of acquiescence.
7. Plaintiff's claims are barred by the doctrine of estoppel.
8. Plaintiff's claims are barred by waiver.
9. Plaintiff's claims are barred due to an express or implied license.
10. Plaintiff's requested relief would constitute a prior restraint in violation of the First Amendment of the United States of America.
11. Plaintiff's claims are barred by the doctrine of copyright misuse.
12. New York Times reserves the right to assert additional affirmative defenses based upon further investigation and discovery.

COUNTERCLAIMS

Defendant and Counterclaim-Plaintiff The New York Times Company ("New York Times") and Counterclaim-Plaintiffs Globe Newspaper Company, Inc. and Boston Globe Electronic Publishing, Inc. (together, "The Boston Globe") bring these Counterclaims against

Counterclaim-Defendants GateHouse Media Massachusetts I, Inc. and GateHouse Media, Inc. (together, “GateHouse”). As set forth more fully below, GateHouse filed a Complaint, motion for temporary restraining order, and motion for preliminary injunction notwithstanding the fact that (1) GateHouse had already determined that the conduct complained of was lawful and (2) GateHouse itself has engaged and continues to engage in the same and substantially similar conduct, including verbatim copying of headlines and/or ledes¹ from New York Times and The Boston Globe. Despite having been put on express notice by New York Times that its claims are baseless, GateHouse continues to pursue its action and demand for immediate injunctive relief. Upon information and belief, GateHouse is engaged in an unlawful attempt to interfere with The Boston Globe’s launch of its own local websites and obtain an unfair and improper competitive advantage.

In addition, given that GateHouse engages in the same and substantially similar conduct that it claims is unlawful and entitles it to monetary damages, to the extent GateHouse prevails, it should be liable on identical claims based on its own past and present third-party news aggregation and verbatim headline and lede linking practices. Specifically, as set forth below, GateHouse entities routinely copy headlines and/or ledes from New York Times and The Boston Globe without authorization and sometimes without attribution. If GateHouse’s claims against New York Times have any merit, then its own conduct constitutes copyright and trademark infringement and unfair competition.

THE PARTIES

1. Upon information and belief, GateHouse Media Massachusetts I, Inc. is a Delaware corporation with its principal place of business in Fairport, New York. GateHouse Media

¹ For purposes of these counterclaims the Counterclaim-Plaintiffs adopt GateHouse’s definition of the term “lede,” which GateHouse defines as the first sentence of a newspaper article. *See* Compl. at ¶ 2.

Massachusetts I, Inc. is a wholly-owned subsidiary of GateHouse Media, Inc., a Delaware corporation with its principal place of business in Fairport, New York. GateHouse Media Massachusetts I, Inc. owns and operates the website *Wicked Local Newton*, located at <http://www.wickedlocal.com/newton>, among others. GateHouse Media Massachusetts I, Inc. is registered to do business in the Commonwealth of Massachusetts, and, upon information and belief, maintains a place of business in Needham, Massachusetts, among others.

2. Upon information and belief, GateHouse Media, Inc., is a Delaware corporation with its principal place of business in Fairport, New York. Upon information and belief, GateHouse Media, Inc., is owner of the website *The Batavian*, located at <http://www.thebatavian.com>, the website “Election 2008,” located at http://elections.gatehousenewsservice.com/regional_election_news, the website *MyZeeland.com*, located at <http://www.myzeeland.com>, the website “Southwest Daily News,” located at <http://www.sulphurdailynews.com>, and the website *Rockford Register Star*, located at <http://www.rrstar.com>, among others.

3. The New York Times Company is a New York corporation with its principal place of business in New York, New York. The New York Times Company owns and operates the daily newspaper *The New York Times* and its online counterpart located at <http://www.nytimes.com>.

4. Globe Newspaper Company, Inc., is a Massachusetts corporation with its principal place of business in Boston, Massachusetts. Globe Newspaper Company, Inc. owns and operates the daily newspaper *The Boston Globe*. Globe Newspaper Company, Inc. is a wholly owned subsidiary of The New York Times Company.

5. Boston Globe Electronic Publishing, Inc., is a Massachusetts corporation with its principal place of business in Boston, Massachusetts. Boston Globe Electronic Publishing, Inc. is a wholly owned subsidiary of Globe Newspaper Company, Inc. Boston Globe Electronic Publishing, Inc. owns and does business as the website Boston.com, located at <http://www.boston.com>.

JURISDICTION AND VENUE

6. The Court has exclusive subject matter jurisdiction over The Boston Globe and New York Times' claims against GateHouse under the Copyright Act, 17 U.S.C. § 501 *et seq.*, pursuant to 28 U.S.C. § 1338.

7. The Court has subject matter jurisdiction over The Boston Globe and New York Times' claims against GateHouse under 15 U.S.C. § 1125 pursuant to 28 U.S.C. § 1331.

8. The Court has supplemental jurisdiction over The Boston Globe and New York Times' claims against GateHouse under Mass. Gen. Laws ch. 93A pursuant to 28 U.S.C. § 1367(a) because this claim is so related to The Boston Globe and New York Times' claims under federal law that it forms the same case or controversy and derives from a common nucleus of operative facts.

9. Counterclaim-Defendant GateHouse Media Massachusetts I, Inc., is subject to the personal jurisdiction of this Court because, among other reasons, it maintains places of business in this District, regularly transacts business within the Commonwealth of Massachusetts, is registered to do business within this District, and has consented to the personal jurisdiction of this Court by initiating this action.

10. Counterclaim-Defendant GateHouse Media, Inc., is subject to the personal jurisdiction of this Court because, upon information and belief, it regularly transacts business

within the Commonwealth of Massachusetts. In addition, it maintains and operates at least one website that is accessible within the Commonwealth of Massachusetts and that, as is stated below, directly infringes The Boston Globe and New York Times' copyright and trademark rights, causing The Boston Globe and New York Times injury within the Commonwealth of Massachusetts.

11. Venue is proper in this District under 28 U.S.C. §§ 1391(b) and (c) because this is the judicial district where (i) a substantial part of the events or omissions giving rise to the claims occurred; and (ii) where GateHouse resides and/or conducts business.

FACTUAL ALLEGATIONS

Background

12. This case is about linking, the ubiquitous and fundamental online practice of connecting from one website to another.

13. Websites, such as those owned by The Boston Globe and GateHouse, provide links so that their users may traverse the Internet, obtaining content and information from a wide variety of sources in a quick and convenient manner.

14. The practice of linking to another content-provider's content on a website is the backbone of contemporary online news aggregation, and is a practice used by The Boston Globe, GateHouse, and numerous other popular online news outlets, such as Google and Yahoo!.

15. The question raised in this case is whether a party commits copyright and trademark infringement when it engages in the common and widespread practice of posting linked headlines and story identifying ledes on its website that are the original content of another.

Boston.com's Linking Activities

16. The Boston Globe owns and operates Boston.com, a website that provides news and information on a wide variety of subjects on the local, regional, and national level. Boston.com has been an active website since at least 1996, and since that time The Boston Globe has expended significant resources developing Boston.com into the preeminent news and information website for the Greater Boston and New England region.

17. For more than a decade, Boston.com has offered links to content from other local publishers on its website for the convenience of Boston.com users. Specifically, since 2006 Boston.com has offered a search tool called "Local Search." The tool regularly crawls webpages from various other local news sources chosen by editors and stores them in a database. The stored pages are indexed to allow Boston.com users to search for information within the sources. When a user conducts a search the results are displayed as a list of links. The links are the title of the original source; also included is a sentence or two of the original content, which permits the user to identify whether the result is responsive. In other words, the search results appear as they do in popular search engines like Google and Yahoo!.

18. In November 2008, Boston.com launched a trial or "Beta" version of a new Internet initiative at <http://www.boston.com/yourtown> ("Boston.com Your Town"). Boston.com Your Town is an effort by Boston.com to provide Internet users with a comprehensive online resource for aggregated news, events, weather, traffic, schools, businesses, and other information and happenings regarding individual cities and towns in and around the greater Boston area.

19. Boston.com intended the initial launch in November 2008 as a trial of the individual town website Your Town Newton, located at the website <http://www.boston.com/yourtown/newton>. ("Your Town Newton"). As part of a wider trial run,

Boston.com later launched <http://www.boston.com/yourtown/waltham> (“Your Town Waltham”) and <http://www.boston.com/yourtown/needham> (“Your Town Needham”) (together, the “Your Town Sites”).

20. Among numerous other resources and information (both original and third-party), the Your Town Sites include, as part of their content, links to third party news articles that concern the particular city or town. These links are identified by the headline and lede of the original article. For example, Your Town Newton includes a list of links to current news stories related to Newton, Massachusetts, identified by their headlines and ledes.

21. The links on the Your Town Sites are collected from various online news sources, including Boston.com and third-party online publications, including those owned and operated by GateHouse (such as the *Newton TAB* and *WickedLocal.com*). The GateHouse links on the Your Town Sites are sourced from the Boston Globe’s proprietary automated news aggregating software program (the “Aggregator”).

22. The Aggregator is designed to collect free and publicly available information from websites (including GateHouse and other third-party websites) by subscribing to those websites’ RSS (“Really Simple Syndication”) “feed.” An RSS feed is a file offered by websites (including GateHouse publication websites) for the specific purpose of allowing third-parties to link back to the original website. RSS files typically contain headlines and the entire body of news articles chosen by the offering website specifically for the purpose of linking. The Aggregator also collects data provided by a third-party search engine that produces results to pre-set searches compiled in a form similar to RSS.

23. Once the data are gathered in the Aggregator, a website news producer can select a news article and convert the original headline and lede into HTML code that links the user to the

original source and the complete article. During this process, the original content delivered to the Aggregator (other than the headline and lede) is deleted. Selected links are then posted on the relevant Your Town Site.

24. The headline and lede link is immediately followed by an attribution indicating the relevant newspaper or website as the original source and its date of publication. When clicked on by the user, the link's HTML code is implemented to automatically redirect the webpage from the Boston.com Your Town Site directly to the original source webpage and the entire original article.

25. There is nothing particularly new, novel, or innovative about this process. Indeed, and as described above, the process of aggregating news articles from multiple sources on the Internet and offering links to the original sources of each article in one place has been a fundamental component of the online experience for years.

GateHouse's Past and Present Linking Activities

26. GateHouse websites have engaged in and continue to engage in conduct that is substantially similar to, and in some cases indistinguishable from, The Boston Globe's conduct described above.

27. For example, GateHouse's website The Batavian, located at <http://www.thebatavian.com>, regularly and continuously aggregates and copies headlines as links to news articles created by news organizations neither owned by nor affiliated with GateHouse.

28. The "National Headlines" section of The Batavian includes numerous verbatim headline links to news articles published by a wide variety of news organizations, including New York Times. *See* Screenshot, Exhibit 1; *see generally* <http://www.thebatavian.com/tags/national-headlines>. The verbatim headline links are presented in the center of the page as the principal content and include no attribution of original source. *Id.*

29. Other sections of The Batavian, including “Nation and World,” “World Headlines,” and “Political Headlines,” include verbatim headline links to news articles published by a wide variety of news organizations, including The Boston Globe and New York Times. *See* Screenshots, Exhibit 2; *see generally* <http://www.thebatavian.com/nation-and-world>; <http://www.thebatavian.com/tags/political-headlines>; <http://www.thebatavian.com/tags/world-headlines>. The verbatim headline links are presented in the center of the page as the principal content and include no attribution of original source. *Id.*

30. Upon information and belief, GateHouse has regularly and continuously used The Boston Globe and New York Times headlines as links without attribution since the launch of GateHouse’s Batavian website in May 2008. Even after the filing of this litigation, GateHouse continues to use verbatim headlines from New York Times and The Boston Globe as links without authorization and without any attribution. None of these unattributed verbatim uses of headlines are specifically authorized by New York Times or The Boston Globe.

31. Another GateHouse website focused on political news, “Election 2008,” located at http://elections.gatehousenewsservice.com/regional_election_news, aggregated and copied third-party news headlines and ledes as links as recently as October 30, 2008. The third-party headline and lede links were still publicly available on the website as of January 4, 2009. As of the time of filing, the website appears to redirect to <http://www.gatehousenewsservice.com>.

32. Furthermore, upon information and belief, until November 12, 2008, GateHouse aggregated third party news links, including both headlines and ledes, from other news providers and regularly provided those links on WickedLocal.com in the form of search results. *See* Screenshots, Exhibit 3. Upon information and belief, until November 12, 2008, approximately

half of the news links displayed on GateHouse's website WickedLocal.com originated from Boston.com.

33. Upon information and belief, GateHouse and its predecessor began aggregating third party links for its local search function in 2006.

34. In addition to GateHouse's Batavian, Election 2008, and WickedLocal.com websites, documents produced in discovery show that other GateHouse websites engage in similar conduct. For example:

- a. GateHouse's website <http://www.sulphurdailynews.com>, a news website focused on the community of Sulphur, Louisiana, aggregated and used third-party news headlines and ledes verbatim as links as recently as September 2, 2008.
- b. GateHouse's website <http://www.myzeeland.com>, a news website focused on the community of Zeeland, Michigan, aggregated and used third-party news headlines and ledes verbatim as links as recently as January 8, 2009.
- c. GateHouse's website <http://www.rrstar.com>, a website focused on the community of Rockford, Illinois, aggregated and used third-party news headlines and ledes verbatim as links.

35. To date, it is unknown how many of GateHouse's numerous websites have aggregated links to third-party news stories in the past.

GateHouse's Documents Demonstrate GateHouse Does Not Believe in the Basis of its Suit

36. Upon information and belief, GateHouse's own executives believe the basic linking practices at issue here are not only unremarkable but perfectly permissible. Documents produced by GateHouse show that its executives consider the copying of headlines and ledes to be a fair use. Documents produced by GateHouse establish that prior to filing the instant litigation, senior

executives at GateHouse concluded internally and expressed to third-parties that the unauthorized use of its headlines and ledes by third-parties did not violate GateHouse’s rights.

37. For example, in an email dated October 2, 2008, Howard Owens, GateHouse’s Director of Digital Publishing and Publisher of The Batavian, wrote that a third party’s copying and displaying of a “headline, a few [para]graphs and a link back to [GateHouse] isn’t a Creative Commons issue, but a fair use issue, and they would probably win on that one.” *See* Bates No. 00677, Exhibit 4.

38. In response to an inquiry from a GateHouse employee about the third-party’s use of a GateHouse headline and lede on its website, Mr. Owens specifically instructed the employee to “compare what we do with [the Batavian].” *See* Bates No. 00677, Exhibit 4.

39. Even more recently, on November 10, 2008 Mr. Owens, in response to an email regarding the use of “headlines and links” by a different third party, wrote that “CC [Creative Commons] wouldn’t really apply here . . . Fair use to grab headlines and links.” *See* Bates No. 02065, Exhibit 5.

40. In addition, Anne Eisenmenger, GateHouse’s Vice President of Audience Development, has affirmatively approved of the very actions GateHouse complains of in this litigation and has stated to a third-party website operator that GateHouse has no objection to the use of its headlines and ledes, provided GateHouse is attributed. In an email dated October 9, 2008, Ms. Eisenmenger wrote:

I am responsible for GateHouse Media’s Wicked Local sites, which include Wicked Local Arlington. I would like to speak with you at your earliest convenience about Famboogle’s use of copyrighted GateHouse content on your Arlington site.

We have no objection to Famboogle - or any other website - posting a headline and a line or two of text from a GateHouse story, so long as it is properly credited and links back to our site for the complete story. I can certainly foresee that, in the

future, we might want to do the same with Famboogle stories.

See Bates No. 00682, Exhibit 6 (emphasis added).

The Instant Lawsuit

41. On November 19, 2008, approximately one week after the initial launch of Your Town Newton, GateHouse media sent a Cease & Desist Letter to The Boston Globe, claiming that the display of headlines and ledes on Your Town Newton from GateHouse websites constituted copyright and trademark infringement.

42. On December 22, 2008, GateHouse filed a complaint against New York Times alleging Direct Copyright Infringement (Count I), Unfair Competition and False Designation of Origin (Count II), False Advertising (Count III), Trademark Dilution (Count IV), Unfair Business Practices (Count V), Trademark Infringement (Count VI), Unfair Competition (Count VII), and Breach of Contract (Count VIII). *See* Compl. (Docket Entry No. 1), filed December 22, 2008.

43. Concurrent with the filing of its Complaint, GateHouse filed a motion for a temporary restraining order and a preliminary injunction seeking to enjoin Boston.com from “reproducing, uploading, posting, displaying, or distributing [GateHouse’s] copyrighted content” and from “using [GateHouse’s] trade names ‘*Newton TAB*’ and/or ‘*Newton TAB Blog*’ and/or ‘*Daily News Tribune*’ and/or ‘*Wicked Local*’ in a manner that falsely states or implies that plaintiff has authorized, licensed or endorsed defendant, its Infringing Website and/or its complained of actions and/or which confuses the public as to the source or origin of the materials posted at <http://www.boston.com/yourtown/newton>.” *See* Complaint at Prayer for Relief (a). In support of its motion, GateHouse alleged that it has suffered and will continue to suffer irreparable harm as a result of Boston.com’s display of the headlines and ledes that originate at GateHouse’s website. *See* Mem. of Law in Support of GateHouse Media Massachusetts I, Inc.’s

Application for a Temporary Restraining Order and Preliminary Injunction (Docket Entry No. 3), filed December 22, 2008, at 4.

44. Upon information and belief, GateHouse is engaged in an unlawful effort to harass Counterclaim-Plaintiffs, thwart the launch of the Your Town Sites, and otherwise obtain an improper competitive advantage against Boston.com. Evidence of GateHouse's bad faith and improper purpose is found among its own regular business practices and its internal communications disclosed in discovery. For example, on November 20, 2008, Rick Daniels, then-Chief Operating Officer of GateHouse, wrote to GateHouse staff that "we have to . . . work like Hell to kill the Globe's Newton baby in the cradle. . ." *See* Bates No. 01404, Exhibit 7.

45. In addition, upon information and belief, GateHouse attempted, in bad faith, to obscure its prior conduct. One week prior to sending its Cease and Desist letter, GateHouse instructed its third-party news aggregator vendor, Planet Discover, to immediately "discontinue to aggregate outside news content," urging it to "kill it off asap". *See* Bates No. 000039, Exhibit 8. Kirk Davis, then-President of GateHouse, stated in his deposition in this action that the decision to "kill off" news aggregation was done in anticipation of filing this action. *See* Deposition of Kirk A. Davis, January 7, 2009, at 45:10-54:17, Exhibit 9.

46. Thus, until one week before it transmitted its Cease and Desist Letter, GateHouse regularly engaged in substantially the same conduct that it would later represent to this Court would cause it irreparable harm and entitled it to an immediate preliminary and permanent injunction.

47. As another example, Count VIII of the Complaint alleges a breach of contract on the grounds that Boston.com has breached the "Creative Commons" license through its use of materials posted on Wicked Local. GateHouse states this allegation despite the fact that its own

Director of Digital Publishing does not believe such use implicates its “Creative Commons” license. *See* Exhibit 4, *supra*.

48. What’s more, GateHouse did not disclose any of its widespread similar practices on The Batavian, Election 2008, WickedLocal.com, <http://www.sulphurdailynews.com>, <http://www.myzeeland.com>, or <http://www.rrstar.com> to the Defendant or the Court at the time of its motion for a temporary restraining order.

49. Instead, based upon the same or similar conduct in which GateHouse itself engages, GateHouse claimed that it was entitled to immediate injunctive relief, alleging that “Defendant is responsible for the reproduction, transmission, display and distribution of unauthorized versions of GateHouse’s publications on the Infringing Website to users across the United States and beyond,” *see* Compl. at ¶ 38, and that “Defendant’s . . . uses of plaintiff’s marks were willful, intentional predatory acts.” *See* Compl. at ¶ 96. GateHouse made these claims without disclosing that GateHouse regularly engages in the same conduct.

50. As set forth above, GateHouse has brought this lawsuit, and has attempted to invoke the equitable powers of this Court, to enjoin Boston.com from engaging in activities that:

- a. GateHouse itself engaged in with respect to Boston.com content until immediately prior to sending its cease and desist letter;
- b. GateHouse itself engages in – even today – with numerous of its websites;
- c. GateHouse executives have previously concluded are not objectionable; and
- d. GateHouse executives have affirmatively approved with respect to other third-party websites.

51. Upon information and belief, this lawsuit and demand for preliminary and permanent injunctive relief was brought for an improper and unlawful purpose and to obtain an

impermissible collateral competitive advantage over Boston.com. For example, upon learning of the upcoming launch of Boston.com’s Your Town Newton, Greg Reibman, Editor-in-Chief of GateHouse’s Metro Unit wrote to his colleagues that “[m]y suggestion would be for us to do all we can to make sure the Globe fails here before they roll this out to other communities.” See Bates No. 00426, Exhibit 10.

52. Upon information and belief, GateHouse sought a temporary restraining order prior to discovery on the hope that this Court would issue an injunction prior to Defendant’s discovery of the foregoing facts.

53. New York Times has informed GateHouse of these facts and its beliefs in writing and asked that GateHouse withdraw its baseless claims. GateHouse refused.

Counterclaim-Plaintiffs’ Copyright and Trademark Rights

54. New York Times has registered its copyrights in works appearing in *The New York Times* through September of 2007, and has submitted applications for registration for the first half of 2008. In addition, applications have been submitted for the registration of certain individual articles through December of 2008. The following works are included within those registrations and applications for registration and, upon information and belief, the headline of each has been copied by GateHouse on its website <http://www.thebatavian.com>:²

SOURCE (DATE)	ARTICLE	AUTHOR	TAG
NY TIMES (12/10/2008)	“Carbon Dioxide (No S.U.V.’s) Detected on Distant Planet”	Kenneth Chang	nation and world
NY TIMES (11/30/2008)	“Deep Discounts Draw Shoppers, but Not Profits”	Stephanie Rosenbloom	nation and world

² The Counterclaim-Plaintiffs expect that discovery will identify additional headlines use by The Batavian and will seek leave to amend to add additional works if necessary.

NY TIMES (11/18/2008)	“France Arrests Basque Rebel Tied to Killings”	Victoria Burnett	nation and world
NY TIMES (11/18/2008)	“Clinton Vetting Includes Look at Mr. Clinton”	Peter Baker and Helene Cooper	nation and world
NY TIMES (11/16/2008)	“Across U.S., Big Rallies for Same-Sex Marriage”	Jesse McKinley	nation and world
NY TIMES (9/8/2008)	“Hurricane Ike Smashes West Through Caribbean”	Marc Lacey	World Headlines
NY TIMES (9/3/2008)	“In Japan, a Leadership Vacuum”	Martin Fackler	World Headlines
NY TIMES (9/1/2008)	“As Throngs of Protesters Hit Streets, Dozens Are Arrested After Clashes”	Patrick Healy and Colin Moynihan	National Headlines
NY TIMES (8/29/08)	“Choice of Palin Is a Bold Move by McCain, With Risks”	Peter Baker	Political Headlines
NY TIMES (8/29/08)	“Surge in Natural Gas Has Utah Driving Cheaply”	Clifford Krauss	National Headlines
NY TIMES (8/27/08)	“Clinton Rallies Her Troops to Fight for Obama”	Patrick Healy	Political Headlines
NY TIMES (8/27/08)	“For Obama, a Challenge to Clarify His Message”	Jackie Calmes	Political Headlines
NY TIMES (8/25/08)	“Communities Become Home Buyers to Fight Decay”	Vikas Bajaj	National Headlines
NY TIMES (8/25/08)	“War Veterans’ Concussions Are Often Overlooked”	Lizette Alvarez	National Headlines
NY TIMES (8/24/08)	“Drilling Boom Revives Hopes for Natural Gas”	Clifford Krauss	National Headlines
NY TIMES (8/24/08)	“Holding Out, to Last Tiny Isle, as Cajun Land Sinks Into Gulf”	Susan Saulny	National Headlines
NY TIMES (8/24/08)	“Survivors in Georgia Tell of Ethnic Killings”	Sabrina Tavernise	World Headlines

NY TIMES (8/19/08)	Drug Makers' Push Leads to Cancer Vaccines' Rise	Elisabeth Rosenthal	National Headlines
NY TIMES (8/15/08)	No Cold War, but Big Chill Over Georgia	Steven Lee Meyers	National Headlines

55. New York Times is the exclusive owner of numerous versions and variations of the distinctive and famous federally registered mark THE NEW YORK TIMES for, among other goods and services, a “daily newspaper” and “providing a wide range of general interest news and information via a global computer network.” See U.S. Reg. Nos. 0227904 and 2120865, Exhibits 11 and 12. The goodwill connected with the use of, and symbolized by, THE NEW YORK TIMES Mark is an extremely valuable asset of New York Times.

56. The Boston Globe has registered its copyrights in works appearing in *The Boston Globe* and/or Boston.com for the first half of 2008, and has submitted applications for registration through October of 2008. The following works are included within those registrations and applications for registration and, upon information and belief, the headline of each has been copied by GateHouse on its website <http://www.thebatavian.com>:³

SOURCE (DATE)	ARTICLE	AUTHOR	TAG
BOSTON GLOBE (10/22/08)	“McCain, Palin pound away at Biden's crisis remark”	Globe Staff	nation and world
BOSTON GLOBE (9/26/08)	“Kennedy taken to hospital”	Milton Valencia and Stephen Smith	nation and world
BOSTON GLOBE (9/4/2008)	“Palin plunges into the fray”	Michael Kranish	Political Headlines
BOSTON GLOBE (8/2/08)	“Ex-wife accused Rockefeller of being fraud, sources say”	Maria Cramer	National Headlines

³ The Counterclaim-Plaintiffs expect that discovery will identify additional headlines use by The Batavian and will seek leave to amend to add additional works if necessary.

BOSTON GLOBE (7/21/08)	“Lightning leaves 4 in critical condition”	James Vaznis and Emma Brown	National Headlines
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57. The Boston Globe and its related entities are the exclusive owner of numerous versions and variations of the distinctive and famous federally registered mark THE BOSTON GLOBE, for a “daily newspaper.” See U.S. Reg. Nos. 0199556 and 0721044, Exhibits 13 and 14. In addition, The Boston Globe and its related entities are the exclusive owner of the distinctive and famous federally registered mark BOSTON.COM, for the provision of online news and information services. See U.S. Reg. No. 2903204, Exhibit 15. As a result of these efforts, consumers identify the mark with The Boston Globe. The goodwill connected with the use of, and symbolized by, THE BOSTON GLOBE and BOSTON.COM Marks are extremely valuable assets of The Boston Globe.

COUNT I
(Claim for Costs and Attorneys’ Fees)
(By The Boston Globe and New York Times against GateHouse)

58. The Boston Globe and New York Times reallege the allegations set forth in Paragraphs 1 through 57 of the Counterclaim as though fully set forth herein.

59. GateHouse’s conduct in bringing this action without basis has caused and continues to cause harm to The Boston Globe and New York Times.

60. As stated in Paragraphs 45-54 of the Complaint, GateHouse has brought this action pursuant, in part, to 17 U.S.C. § 501, *et seq.*

61. GateHouse is therefore liable for New York Times and The Boston Globe’s full costs and reasonably attorneys’ fees as stated in 17 U.S.C. § 505.

62. As stated in Paragraphs 55-91 of the Complaint, GateHouse has also brought this action pursuant, in part, to 15 U.S.C. § 1125 (a), (c).

63. GateHouse's conduct in bringing this action without any basis in fact or law has caused and continues to cause harm to The Boston Globe and New York Times.

64. GateHouse's bad faith conduct makes this an "exceptional case" pursuant to 15 U.S.C. § 1117(a), and therefore The Boston Globe and New York Times are entitled to recovery of their reasonable attorneys' fees.

65. GateHouse is further subject to the Court's inherent power to award costs and attorneys' fees as it sees fit and just.

66. Given the egregious nature of GateHouse's aforementioned conduct, the Court should do so in this instance, and award The Boston Globe and New York Times its costs and attorneys' fees.

COUNT II

(Direct Copyright Infringement, 17 U.S.C. § 501, et seq.)
(By The Boston Globe and New York Times against GateHouse)

67. The Boston Globe and New York Times reallege the allegations set forth in Paragraphs 1 through 66 of the Counterclaim as though fully set forth herein.

68. The Boston Globe and New York Times' publications *The Boston Globe*, *The New York Times*, and their online editions contain material that is wholly copyrightable subject matter, alone or in combination, under the laws of the United States, and that material is owned by The Boston Globe and New York Times, which holds or will hold copyright interests therein pursuant to 17 U.S.C. § 404.

69. The Boston Globe and New York Times have valid and subsisting registrations and applications for registration for Certificates of Copyright Protection to The Boston Globe and New York Times for numerous articles appearing in *The Boston Globe*, *The New York Times*, and on Boston.com and NYTimes.com, as reflected in paragraphs 54 and 56 above.

70. GateHouse has mined each of these sources for the purpose of reproducing, distributing, displaying, and/or creating derivative works from, in whole or in part, The Boston Globe and New York Times' original content without permission, license or authority. Based on GateHouse's own assertions in Paragraph 48 of the Complaint, the conduct described above and committed by GateHouse violates the copyright laws of the United States and the rights of The Boston Globe and New York Times.

71. GateHouse had access to each issue of *The Boston Globe* and *The New York Times*, and their online counterparts, and GateHouse has uploaded content from those sources, in whole or in part, to GateHouse's websites, including WickedLocal.com and The Batavian, in a form identical to that in which they appear in or at the original source, and for the identical purpose.

72. According to GateHouse's legal theories, as articulated in Paragraph 50 of its Complaint, such conduct is willful and intentional infringement of The Boston Globe and New York Times' exclusive rights in the headlines and ledes under 17 U.S.C. § 106, in violation of 17 U.S.C. § 501.

COUNT III
(Unfair Competition, False Designation Of Origin, and False Advertising, 15 U.S.C. § 1125)
(By The Boston Globe and New York Times against GateHouse)

73. The Boston Globe and New York Times reallege the allegations set forth in Paragraphs 1 through 72 of the Counterclaim as though fully set forth herein.

74. As stated above, The Boston Globe, New York Times, and their related entities owns all rights in and to the marks THE BOSTON GLOBE, THE NEW YORK TIMES, and BOSTON.COM, each of which is either arbitrary, inherently distinctive or suggestive, and/or a mark in which The Boston Globe or New York Times has acquired a secondary meaning.

75. The respective marks have been used by The Boston Globe or New York Times continuously and extensively in commerce in the United States for several years, and, upon information and belief, have become synonymous with The Boston Globe and New York Times and the news content they provide as part of their core business models. The mark THE BOSTON GLOBE has been in continuous use in the Boston, Massachusetts area and nationally since at least 1872, and the mark THE NEW YORK TIMES has been in use in New York, New York and nationally since at least 1851. The mark BOSTON.COM has been in continuous use online since 1995.

76. The Boston Globe and New York Times have established extensive goodwill in the marks, which are uniquely associated with The Boston Globe and New York Times in the minds of the general public.

77. GateHouse has used the marks THE BOSTON GLOBE and BOSTON.COM in connection with its own services, including but not limited to WickedLocal.com and the *Newton TAB* Blog, all without authorization or license from The Boston Globe or New York Times.

78. In addition, GateHouse has used headlines of news stories created by New York Times and The Boston Globe, and has copied and displayed those headlines on its website The Batavian without any attribution to the actual source of the news story.

79. According to the legal theory and claim advanced by GateHouse in Paragraph 63 of the Complaint, GateHouse's conduct and uses of THE BOSTON GLOBE, THE NEW YORK TIMES, and BOSTON.COM marks and/or the articles associated therein, demonstrate an intent to deceive, and has deceived, consumers and advertisers to believe that the products and services offered by GateHouse on its websites, including WickedLocal.com and The Batavian, include The Boston Globe and New York Times' original content, and that the display of such original

content by GateHouse is authorized and licensed for use or otherwise approved by The Boston Globe or New York Times, which it is not.

80. According to the legal theory and claim advanced by GateHouse in Paragraph 64 of the Complaint, such uses of The Boston Globe and New York Times' marks are a direct and proximate cause of the public's likely confusion as to the origin and source of GateHouse's products and services, and/or is likely to lead the public to believe that GateHouse is licensed or otherwise authorized by The Boston Globe or New York Times to offer those products and services, including The Boston Globe and New York Times' original content.

81. According to the legal theory and claim advanced by GateHouse in Paragraph 65 of its Complaint, GateHouse's use of The Boston Globe and New York Times' marks constitutes willful and intentional trademark infringement and unfair competition.

COUNT IV
(Violation Of Mass. Gen. Laws ch. 93A)
(By The Boston Globe and New York Times against GateHouse)

82. The Boston Globe and New York Times reallege the allegations set forth in Paragraphs 1 through 81 of the Counterclaim as though fully set forth herein.

83. The parties are engaged in the conduct of trade or commerce within the meaning of Mass. Gen. Laws. ch. 93A, § 11. GateHouse's acts, conduct, and practices as described above occurred and are occurring primarily and substantially within the Commonwealth of Massachusetts.

84. The acts and practices described above constitute unfair and deceptive acts within the meaning of Mass. Gen. Laws. ch. 93A.

85. As set forth above, The Boston Globe and New York Times' marks are distinctive and/or have acquired a secondary meaning and therefore qualify for protection under the laws of the Commonwealth of Massachusetts.

86. According to the legal theories advanced by GateHouse in the Complaint, GateHouse's actions amount to willful, intentional, unfair and deceptive acts which began after each of The Boston Globe and New York Times' marks had become distinctive.

87. According to GateHouse's own legal theories, as articulated by GateHouse in the Complaint, GateHouse's actions and uses of The Boston Globe and New York Times' marks are likely to cause confusion as to the source of origin of the services and materials displayed and distributed on GateHouse's websites, including WickedLocal.com and The Batavian, among others. According to GateHouse's own legal theories, as articulated by GateHouse in the Complaint, GateHouse's actions also falsely suggest The Boston Globe or New York Times' endorsement or sponsorship of GateHouse's websites.

88. In addition, by bringing its lawsuit and seeking injunctive relief in bad faith and for an improper ulterior purpose, GateHouse has acted willfully, unfairly, and deceptively.

89. The Boston Globe and New York Times have been damaged, and continue to suffer damages, as a result of GateHouse's unfair and deceptive acts in an amount to be determined at trial.

WHEREFORE, Counterclaim-Plaintiffs respectfully request that this Court:

- A. Dismiss with prejudice the claims brought by GateHouse against Defendant;
- B. Award statutory and actual damages, in an amount to be determined at trial;
- C. Find that the claims alleged by Counterclaim-Plaintiffs render this an "exceptional case" for the purposes of awarding costs and fees under the Lanham Act, and include a finding

that Counterclaim-Plaintiffs are “prevailing parties” for the purposes of awarding costs and fees under the Copyright Act;

D. Award Counterclaim-Plaintiffs treble damages and costs, reasonable attorneys’ fees and expenses incurred in defending and bringing this action; and

E. Provide such other relief as the Court deems just and proper.

Dated: January 16, 2009

Respectfully submitted,

THE NEW YORK TIMES CO., GLOBE
NEWSPAPER COMPANY, INC., AND
BOSTON GLOBE ELECTRONIC
PUBLISHING, INC.,

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CERTIFICATE OF SERVICE

I, R. David Hosp, hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non-registered participants on January 16, 2009.
