

No. 03-1479

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT

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CHICAGO SCHOOL REFORM BOARD OF TRUSTEES,  
an Illinois municipal corporation,  
*Plaintiffs-Appellees,*

v.

SUBSTANCE, INC., an Illinois corporation,  
and GEORGE N. SCHMIDT,  
*Defendants-Appellants.*

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On Appeal from the United States District Court  
for the Northern District of Illinois, Eastern Division  
No. 99 C 440  
The Honorable Charles R. Norgle

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**BRIEF FOR THE CHICAGO TEACHERS UNION,  
LOCAL 1, AMERICAN FEDERATION OF TEACHERS, AFL-CIO  
AS AMICUS CURIAE IN SUPPORT OF DEFENDANTS-APPELLANTS  
URGING REVERSAL**

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Dated: June 25, 2003

**CIRCUIT RULE 26.1 DISCLOSURE STATEMENT**

(formerly known as Certificate of Interest)

Appellate Court No: 03-1479

Short Caption: Chicago School Reform Board of Trustees v. Substance, Inc.

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## **STATEMENT OF IDENTITY AND INTEREST OF *AMICUS CURIAE***

*Amicus curiae* the Chicago Teachers Union, Local 1, American Federation of Teachers, AFL-CIO (“CTU”) represents all teachers and most in-school support personnel in the Chicago Public Schools system, the third largest in the country. Formed in 1937, it is the largest union local in Illinois, with more than 35,000 members, including approximately 28,000 public school teachers. The CTU’s objectives include giving teachers and other educational professionals a voice in key issues that affect their work lives and key decisions that affect their students, and working with the Board of Education and the Chicago Public Schools system to formulate and implement school improvement initiatives. The CTU believes that effective educational reform can be accomplished only when teachers play an integral role in improving schools.

This case implicates the First Amendment rights of teachers to speak out on matters of public concern relating to educational policies and practices affecting their students. The district court allowed the Chicago School Reform Board of Trustees (“Board”) to silence a teacher’s criticism of educational policy and practice – in particular, the use of certain standardized tests – on the ground that the teacher violated the government’s copyright by reproducing some of the copyrighted test questions in a newspaper article criticizing the Board’s use of the tests.

The CTU has a strong interest in the outcome of this case because the district court’s opinion endangers the ability of teachers to voice their opinions on educational policy and reform. Because of its interest in protecting the First Amendment rights of teachers to speak out on these matters, the CTU is particularly well suited to provide additional insight into the issues presented here. The CTU asks this Court to hold that the government’s use of a copyright infringement suit to censor speech critical of its policies and practices is inconsistent with the

core principles of the First Amendment, as well as copyright law, and that the speech at issue here cannot constitute copyright infringement in light of those principles.

### **SOURCE OF AUTHORITY TO FILE**

The parties have consented to the filing of this brief.

### **SUMMARY OF ARGUMENT**

This case presents an issue of extraordinary importance to teachers, public employees, and citizens generally – whether a school district may use copyright law to suppress public criticism of its educational practices. In answering this question in the affirmative, the district court failed to consider the First Amendment rights implicated by the government’s use of copyright as both a shield to protect itself from public criticism, and a sword to silence and punish core political speech. The unique and substantial First Amendment concerns raised by such governmental action cannot be brushed aside by the district court’s would-be categorical rule that the First Amendment plays no role in copyright infringement cases. To the contrary, First Amendment concerns are at their height where, as here, the government asserts copyright protection to suppress speech critical of governmental policies and practices. Application of copyright law to suppress publication of speech under these circumstances violates the core principles of both the First Amendment and copyright law. The district court’s rulings to the contrary should be reversed.

## ARGUMENT

### I. The District Court Erroneously Held That the First Amendment Is Irrelevant in the Face of Copyright Law.

The district court's rejection of the First Amendment claims and defenses raised by defendants Substance, Inc. and George N. Schmidt (collectively, "defendants") was based on a distortion of basic First Amendment law and a misunderstanding of its relationship with copyright law. The district court drew exactly the wrong conclusion from the fact finding that defendants published government-copyrighted material in order to raise an issue of public concern. Rather than recognizing the constitutional protection inherent in core First Amendment speech such as a newspaper article "creating public awareness of potentially ineffective educational tests," *Chicago Sch. Reform Bd. of Trustees v. Substance, Inc.*, 79 F. Supp. 2d 919, 929 (N.D. Ill. 2000), the court somehow reasoned that the speech was *unprotected* by the First Amendment *because* it involved a matter of public concern. The court thus inexplicably concluded: "Given that Defendants['] sole motivation for publishing the tests was to stir public debate, the court finds that the First Amendment provides no protection for Defendants['] actions." *Id.*

The district court's conclusion is directly contrary to basic and well-settled First Amendment law. The "core value of the Free Speech Clause of the First Amendment" is the "public interest in having free and unhindered debate on matters of public importance." *Pickering v. Board of Educ.*, 391 U.S. 563, 573 (1968). "[A] major purpose of [the First] Amendment was to protect the free discussion of governmental affairs." *Buckley v. Valeo*, 424 U.S. 1, 14 (1976) (internal citations omitted). This constitutional safeguard "was fashioned to

assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.” *New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964) (internal citations omitted). The First Amendment thus embodies our “profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open.” *Id.* at 270.

This constitutional commitment to open debate on public issues has long secured the right of public employees to speak out on matters of public concern. In particular, the Supreme Court specifically has emphasized the importance of ensuring that public school teachers may speak freely on matters concerning educational policies and practices. “Teachers are, as a class, the members of a community most likely to have informed and definite opinions” regarding issues relating to the education of their students, and it is therefore “essential that they be able to speak out freely on such questions.” *Pickering*, 391 U.S. at 572. The role of teachers makes them especially important contributors to the public dialogue about educational reform and standardized testing.

The district court’s disregard of these First Amendment considerations was based on a mistaken belief that when copyrighted speech – here, test questions for which the school district held the copyright – is at issue, First Amendment concerns simply fall by the wayside.<sup>1</sup> The Supreme Court recently rejected that very proposition. In *Eldred v. Ashcroft*, 123 S. Ct. 769 (2003), the Supreme Court reviewed a decision by the D.C. Circuit upholding against constitutional challenge the Copyright Term Extension Act (“CTEA”), which extended the

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<sup>1</sup>The court essentially instructed defendants at the very outset of the case not to raise a First Amendment claim or defense. *See* Short Appendix of Defendants-Appellants at Tab A, p.2.

duration of copyrights by twenty years. Like the district court below, the D.C. Circuit in that case had broadly held that there is no First Amendment interest in copyrighted work. *See Eldred v. Reno*, 239 F.3d 372, 376 (D.C. Cir. 2001) (“plaintiffs lack any cognizable first amendment right to exploit the copyrighted works of others”). Although the Supreme Court affirmed the judgment, it held that “the D.C. Circuit spoke too broadly when it declared copyrights ‘categorically immune from challenges under the First Amendment.’” *Eldred v. Ashcroft*, 123 S. Ct. at 789-90 (quoting *Eldred v. Reno*, 239 F.3d at 375). The district court here similarly painted with too broad a brush when it refused to consider the First Amendment implications of the government’s use of copyright.

Contrary to the district court’s categorical dismissal, the First Amendment plays a significant role in copyright infringement cases. As an initial matter, copyright itself is intended to be an “engine of free expression.” *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 557 (1985). That is, “[b]y establishing a marketable right to the use of one’s expression, copyright supplies the economic incentive to create and disseminate ideas.” *Id.* at 558. *See also SunTrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1261-62 (11<sup>th</sup> Cir. 2001). Furthermore, to some extent, “copyright law contains built-in First Amendment accommodations.” *Eldred v. Ashcroft*, 123 S. Ct. at 788. First, copyright protects expression, but not facts or ideas. *Id.* at 788-89; *see* 17 U.S.C. § 102(b). Second, the statutory “fair use” doctrine permits the use of copyrighted expression under certain circumstances, including for purposes such as criticism, comment, news reporting, and teaching.<sup>2</sup> These copyright doctrines

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<sup>2</sup>*See* 17 U.S.C. § 107 (“The fair use of a copyrighted work, including such use by reproduction in copies . . . , for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of

clearly could not provide “free speech safeguards,” *Eldred v. Ashcroft*, 123 S. Ct. at 789, or “First Amendment protections,” *Harper & Row*, 471 U.S. at 560, if there were, as the district court erroneously ruled, no First Amendment protection for the publication of copyrighted works.<sup>3</sup>

Finally, copyright’s built-in First Amendment accommodations are only “generally” adequate to address First Amendment concerns. *Eldred v. Ashcroft*, 123 S. Ct. at 789. *See also*, e.g., *SunTrust Bank*, 268 F.3d at 1263 (“the balance between the First Amendment and copyright law is preserved, *in part*, by the idea/expression dichotomy and the doctrine of fair use”) (emphasis added); *Twin Peaks Prods, Inc. v. Publications Int’l, Ltd.*, 996 F.2d 1366, 1378 (2d Cir. 1993) (First Amendment defense independent of fair use doctrine available in extraordinary cases). As is clear from the Supreme Court’s rejection of the type of categorical approach employed by the district court, the First Amendment implications of copyright enforcement must be considered in the context of the specific facts of a given copyright infringement claim. The district court erred in refusing to do so here.

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copyright.”). Although the statute lists four factors to be considered in the determination of whether a given use is “fair,” those factors are illustrative, rather than exhaustive, and are not a “formula for decision,” but rather, considerations in applying a rule of reason. *Ty, Inc. v. Publications Int’l Ltd.*, 292 F.3d 512, 522 (7<sup>th</sup> Cir. 2002). Above all, “fair use analysis must always be tailored to the individual case.” *Harper & Row*, 471 U.S. at 552.

<sup>3</sup>In characterizing the nature of the speech as “commercial,” for fair use purposes, because it was published in a for-profit newspaper, the district court again failed to appreciate the significance of the political, critical nature of the speech. *See Substance*, 79 F. Supp. 2d at 932. *Cf. Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 584 (1994) (noting that “nearly all of the illustrative uses listed in [the statutory fair use provision, 17 U.S.C. § 107,] including news reporting, comment, criticism, teaching, scholarship, and research . . . are generally conducted for profit in this country”) (internal quotation marks and citation omitted).

## **II. Both First Amendment and Copyright Principles Prohibit the Government's Use of Copyright to Suppress Public Criticism of Governmental Policies or Practices.**

The district court's failure to appreciate the First Amendment principles at stake here led it to enjoin speech whose sole purpose was to criticize the government by bringing its practices to the public's attention, on the ground that the speech infringed the government's copyright in the criticized material. That result is contrary to both First Amendment and copyright law. "The Copyright Clause and the First Amendment . . . were drafted to work together to prevent censorship; copyright laws were enacted in part to prevent private censorship and the First Amendment was enacted to prevent public censorship." *SunTrust Bank*, 268 F.3d at 1263. The use of copyright protection as a *means* of public censorship raises serious constitutional concerns under the First Amendment and fails to further the purpose of copyright law.

"Criticism of government is at the very center of the constitutionally protected area of free discussion." *Rosenblatt v. Baer*, 383 U.S. 75, 85 (1966). The question is whether defendants' criticism forfeited its First Amendment protection because defendants reproduced some copyrighted material in order to illustrate and explain their criticism. *Cf. Sullivan*, 376 U.S. at 271 (where individuals who published article critical of official conduct were sued in libel action, question was whether article forfeited its First Amendment protection by the falsity of factual statements and by allegedly defamatory statements). In the circumstances presented here, the answer must be "no."

First Amendment concerns are at their height where, as here, the government seeks to enjoin (pursuant to copyright or any other law) a newspaper article critical of government conduct. As the Supreme Court has observed:

The dominant purpose of the First Amendment was to prohibit the widespread practice of governmental suppression of embarrassing information. It is common knowledge that the First Amendment was adopted against the widespread use of the common law of seditious libel to punish the dissemination of material that is embarrassing to the powers-that-be.

*New York Times v. United States (Pentagon Papers Case)*, 403 U.S. 713, 723-24 (1971)

(Douglas, J, concurring). Thus, even the most pressing governmental concerns have been held insufficient to overcome the right to publish such material. In the *Pentagon Papers Case*, the Supreme Court held that the First Amendment protected the right of the press to publish the contents of a classified government study entitled “History of U.S. Decision-Making Process on Viet Nam Policy,” and that the United States government could not enjoin the publication, even on the ground that disclosure of the material would endanger national security. 403 U.S. at 714 (per curiam); *id.* at 718-19 (Black, J., concurring); *id.* at 740-41 (Marshall, J., concurring).

The *Pentagon Papers Case* underscores the importance, for First Amendment purposes, of considering not only the nature of the speech sought to be enjoined, but the identities of the would-be speaker and the individual or entity seeking to enjoin the speech. In his concurrence in the *Pentagon Papers Case*, Justice White distinguished the impermissible injunction against the press sought by the government in that case from permissible forms of prior restraint of speech. Justice White explained why cease-and-desist orders issued by the Federal Trade Commission against unfair methods of competition, and by the National Labor Relations Board against employers found to have engaged in certain behavior, are permissible even though they often restrict speech, and why newspapers may sometimes be enjoined from publishing the copyrighted works of another. 403 U.S. at 731 n.1 (White, J., concurring). Such restrictions on speech, he

noted, are wholly distinct from the situation presented in the *Pentagon Papers Case*, where the government sought to enjoin the press from publishing government documents:

[T]hose enjoined under the statutes relating to the National Labor Relations Board and the Federal Trade Commission are private parties, not the press; and *when the press is enjoined under the copyright laws the complainant is a private copyright holder* enforcing a private right. These situations are quite distinct from the Government's request for an injunction against publishing information about the affairs of government . . . .

*Id.* (emphasis added). In other words, an injunction against the press pursuant to the copyright laws is permissible only *where the complainant is a private actor*.

As in the *Pentagon Papers Case*, and contrary to the typical copyright case distinguished by Justice White, here the *government* requested an injunction against the publication in the press of material from government documents. The confluence of these factors necessitates the same result as in the *Pentagon Papers Case*. This is not a case in which a private actor seeks to enjoin the press from publishing copyrighted material. *See, e.g., Harper & Row*, 471 U.S. at 541-44 (rejecting assertion of fair use and holding that newspaper's reproduction of portions of former President Gerald Ford's memoirs before the book's publication date violated publisher's copyright). Nor is it a case in which the alleged infringer is using the government's copyrighted material in order to compete with the government. *See County of Suffolk v. First American Real Estate Solutions*, 261 F.3d 179, 183-84 (2d Cir. 2001) (vacating dismissal of copyright complaint by county claiming that defendant companies "infringed its copyrights in its official tax maps by publishing and marketing those maps without . . . permission"). Here, the district court proceeded on the assumption that defendants used copyrighted government speech in order to illustrate, criticize, and bring to the public's attention a certain governmental practice. Justice

White's explanation for the permissibility of a typical injunction against the publication of copyrighted material by the press is simply inapplicable in these circumstances.<sup>4</sup>

Rather, this case presents the danger of censorship through governmental assertion of copyright to which the D.C. Circuit alluded in *Schnapper v. Foley*, 667 F.2d 102 (D.C. Cir. 1981). There, the court affirmed the dismissal of plaintiffs' claim that a public television station should not be permitted to hold copyrights in certain government-commissioned films. *Id.* at 105. Although the court rejected the plaintiffs' First Amendment claim because it found that the films were in fact publicly available and that no person interested in viewing them had been denied the opportunity to do so, it acknowledged the potential danger of censorship through the assertion of copyright:

We are confident that should the day come when the Government denies someone access to a work produced at its direction on the basis of a copyright, and if the doctrine of fair use and the distinction between an idea and its expression fail to vindicate adequately that person's interests – although we have no reason to believe that they would – the courts of the United States would on the basis of facts, not hypotheses, consider afresh the First Amendment interests implicated thereby.

*Id.* at 116. The First Amendment implications of the Board's assertion of copyright similarly merit fresh consideration here.

Where, as here, copyright law is used by the government to “throttle free expression,” *id.* at 115, by preventing public criticism and debate of governmental conduct or policy, the

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<sup>4</sup>The Copyright Act excludes “work of the United States government” from copyright protection. 17 U.S.C. § 105. If the government could have held a copyright in the Pentagon Papers, however, Justice White's concurrence strongly suggests that the result in the *Pentagon Papers Case* would have been the same.

Constitution requires that copyright accommodate First Amendment interests.<sup>5</sup> An analogous rule has long been applied with respect to libel actions brought by public officials against critics of their official conduct. In *New York Times Co. v. Sullivan*, 376 U.S. 254, 256 (1964), the Supreme Court confronted an issue similar to the one presented here: “the extent to which the constitutional protections for speech and press limit a State’s power to award damages in a libel action brought by a public official against critics of his official conduct.” In that case, Sullivan, a city official, alleged that the New York Times had published certain libelous statements about his conduct in relation to a civil rights demonstration and certain treatment of Dr. Martin Luther King. *Id.* at 256-58. The Supreme Court of Alabama upheld a ruling in favor of Sullivan, found the statements “libelous per se,” and rejected the newspaper’s constitutional claims, stating that “‘The First Amendment of the U.S. Constitution does not protect libelous publications.’” *Id.* at 263-64.<sup>6</sup>

The Supreme Court reversed the judgment, holding that the libel rule applied by the Alabama courts was “constitutionally deficient for failure to provide the safeguards for freedom of speech and of the press that are required by the First and Fourteenth Amendments in a libel action brought by a public official against critics of his official conduct.” *Sullivan*, 376 U.S. at

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<sup>5</sup>The role of state action in these circumstances is far more dangerous to First Amendment interests than in the typical copyright case. In the typical case, First Amendment protections are implicated because the court enforces a government-created right of action on behalf of a private party plaintiff asserting copyright protection. Here, in contrast, the government has an additional, more direct role in the suppression of speech because it is the actual *plaintiff* filing suit to assert copyright protection.

<sup>6</sup>Here, the district court made a strikingly similar statement in ruling against defendants: “The First Amendment Does Not Protect Copyright Violators.” *Substance*, 79 F. Supp. 2d at 925.

264. Rejecting the notion that libel law could claim “talismanic immunity from constitutional limitations,” *id.* at 269, the Court noted that its prior statements that libelous publications were not constitutionally protected did not foreclose the constitutional inquiry before it, since “[n]one of the cases [in which such statements were made] sustained the use of libel laws to impose sanctions upon expression critical of the official conduct of public officials,” *id.* at 268. The Court concluded that such expression was protected speech that did not lose its constitutional protection due to either the falsity of some of the factual statements or by its alleged defamation of Sullivan. *Id.* at 271-79.<sup>7</sup>

The reasoning of *Sullivan* is equally applicable here. Like the libel law in *Sullivan*, the copyright law was used here by a public actor to file suit against the author of an article critical of the public actor, and the newspaper that published the article.<sup>8</sup> As in *Sullivan*, the court below dismissed the defendants’ constitutional claims out of hand, stating that “The First Amendment Does Not Protect Copyright Violators,” *Substance*, 79 F. Supp. 2d at 925, and relying on dicta from inapposite cases that did not deal with the specific and compelling situation of “the use of [copyright] laws to impose sanctions upon expression critical of the official conduct of public officials.” *Sullivan*, 376 U.S. at 268.<sup>9</sup> Like the application of libel law at issue in *Sullivan*, the

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<sup>7</sup>The Court fashioned a rule to protect the constitutional guarantees that prohibits a public official from recovering damages for a defamatory falsehood related to his official conduct unless he proves the statement was made with actual malice. *Id.* at 279-80.

<sup>8</sup>In fact, this case presents a more troubling scenario than *Sullivan* did, because that case, unlike this one, dealt only with the issue of damages, and not an injunction prohibiting the speech. *Sullivan*, 376 U.S. at 256.

<sup>9</sup>See *Substance*, 79 F. Supp. 2d at 925-26 (citing *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991); *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977); *San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.*, 483 U.S. 522 (1987); *Branzburg v.*

particular use of copyright law here does not “suffice[] to remove the First Amendment shield from criticism of official conduct.” *Bartnicki v. Vopper*, 532 U.S. 514, 535 (2001).<sup>10</sup>

In *Bartnicki*, the Supreme Court relied on parallel reasoning to hold that the First Amendment protects speech disclosing the contents of an illegally intercepted communication. 532 U.S. at 535. There, an unidentified person intercepted and recorded cellular telephone conversations between the president and chief negotiator of a state teachers’ union concerning collective bargaining negotiations. *Id.* at 518. In connection with subsequent news reports about a settlement, a radio commentator who had been critical of the union played a tape of the conversation on his talk show. *Id.* at 519. The conversation was then broadcast by another station, and was published in the newspaper. *Id.* The participants in the conversation sued the individuals and entities that disclosed the tape, pursuant to federal and state wiretapping statutes. *Id.* at 520.

Assuming that the disclosures were made in violation of the federal and state statutes, the Supreme Court held that the application of those statutes to the specific facts of the case violated the First Amendment:

[T]he outcome of the case does not turn on whether [the statute] may be enforced with respect to most violations of the statute without offending the First

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*Hayes*, 408 U.S. 665 (1972); *Dallas Cowboys Cheerleaders, Inc. v. Scoreboard Posters, Inc.*, 600 F.2d 1184 (5<sup>th</sup> Cir. 1979)).

<sup>10</sup>The Supreme Court’s statement in *Harper & Row* that “we see no warrant for expanding the doctrine of fair use to create what amounts to a public figure exception,” 471 U.S. at 560, is not to the contrary. In *Harper & Row*, the issue was whether, pursuant to First Amendment principles, a newspaper could publish quotations from a former political figure’s private memoirs “for the purpose of ‘scooping’ the authorized first serialization.” *Id.* at 556. The Court rejected the proposal that the First Amendment required elevation of “the public’s interest in learning this news as fast as possible” over “the right of the author to control its first publication.” *Id.*

Amendment. The enforcement of that provision in this case, however, implicates the core purposes of the First Amendment because it imposes sanctions on the publication of truthful information of public concern.

*Bartnicki*, 532 U.S. at 533-34. The enforcement of copyright by the Board in the context of this case similarly implicates and threatens the core purposes of the First Amendment.

Forbidding the government to utilize the copyright laws to stifle criticism of its practices is not only necessary to protect core First Amendment interests, but is also consistent with the purpose and function of copyright law. “The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare.” *Mazer v. Stein*, 347 U.S. 201, 219 (1954). The purpose of copyright protection is thus “to create incentives for creative effort.” *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 450 (1984). But because the formulation and implementation of educational policy is a governmental function, there is no need for the additional incentive that copyright law provides to private actors through the creation of a temporary monopoly.<sup>11</sup> Proper accommodation of First Amendment protection in this narrow context therefore would not unduly interfere with the purpose and function of copyright law.

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<sup>11</sup>*Cf. Banks v. Manchester*, 128 U.S. 244, 253 (1888) (judges may not hold copyright in judicial opinions in part because they are paid to write opinions in the course of their employment); *Practice Mgmt. Info. Corp. v. American Med. Ass’n*, 121 F.3d 516, 518 (9<sup>th</sup> Cir. 1997) (“The copyright system’s goal of promoting the arts and science by granting temporary monopolies to copyright holders was not at stake in *Banks* because judges’ salaries provided adequate incentive to write opinions.”), *opinion amended on other grounds* by 133 F.3d 1140 (9<sup>th</sup> Cir. 1998); *First Am. Real Estate*, 261 F.3d at 194 (determination of whether work is in public domain requires consideration of whether governmental entity has adequate incentive to create the work absent copyright protection).

To the contrary, because copyright “is intended to increase and not to impede the harvest of knowledge,” *Harper & Row*, 471 U.S. at 545, and “[t]o promote the Progress of Science and useful Arts,” U.S. Const. art. I, § 8, cl. 8, the protection of critical speech that uses copyrighted material in order to explain and illustrate its criticism actually furthers the goals of copyright law.<sup>12</sup> On the other hand, using copyright to “further secrecy and concealment instead of public illumination” would conflict with the purpose of copyright as a “body of law conceived to encourage publication for the public edification.” Pierre N. Leval, *Toward A Fair Use Standard*, 103 Harv. L. Rev. 1105, 1119-20 & n.67 (1990). Copyright is an “engine of free expression.” *Harper & Row*, 471 U.S. at 558. “It was never intended to serve the goals of secrecy and concealment.” Leval, 103 Harv. L. Rev. at 1135.

Where, as here, a government entity’s assertion of copyright protection suppresses speech that uses government-copyrighted material in order to criticize governmental policy and conduct, the First Amendment forbids a finding of copyright infringement. Because the injunction issued in these circumstances otherwise would violate the First Amendment, the Copyright Act should be construed to permit the defendants’ publication of the copyrighted material. *Chowdhury v. Ashcroft*, 241 F.3d 848, 853 (7<sup>th</sup> Cir. 2001) (statutes should be construed, where possible, to avoid constitutional problems).

Thus, the Court should hold that the publication of government-copyrighted material in the specific circumstances presented here either constitutes fair use, or is otherwise permitted

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<sup>12</sup>That is especially true in this case, in which a teacher criticized the validity and utility of standardized tests administered to public school students. Such criticism, coming from an individual uniquely familiar with the educational needs and performance of students, is likely to improve standardized testing and educational policies generally, or at least to increase knowledge about standardized testing and educational policy.

under the First Amendment. *See First Am. Real Estate*, 261 F.3d at 189 (“the free press or an individual seeking to use . . . state agency records to educate others or to criticize the state or the state agency may be protected by the Copyright Act’s fair use doctrine”); *SunTrust Bank*, 268 F.3d at 1265, 1277 (reversing preliminary injunction against publication of parody of *Gone With the Wind* as a prior restraint on speech “at odds with the shared principles of the First Amendment and the copyright law” and emphasizing that court must remain cognizant of First Amendment protections in determining whether critic may fairly use copyrighted material in order to communicate criticism); *Ty, Inc. v. Publications Int’l Ltd.*, 292 F.3d 512, 517 (7<sup>th</sup> Cir. 2002)(discussing the fair use doctrine and noting “the impairment of freedom of expression that would result from giving a copyright holder control over public criticism of his work”); *National Rifle Ass’n v. Handgun Control Fed’n*, 15 F.3d 559, 562 (6<sup>th</sup> Cir. 1994) (holding that reproduction of copyrighted material was fair use where it “was used primarily in exercising [defendant’s] First Amendment speech rights to comment on public issues”); *Keep Thomson Governor Comm. v. Citizens for Gallen Comm.*, 457 F. Supp. 957, 959-61 (D.N.H. 1978) (finding fair use of copyrighted political advertisement where defendant used it as part of political campaign message, implicating fundamental First Amendment activities); *Time, Inc. v. Bernard Geis Assoc.*, 293 F. Supp. 130, 131-32, 146 (S.D.N.Y. 1968) (holding that reproduction in defendant’s book of frames of Zapruder film of Kennedy assassination was fair use due to “public interest in having the fullest information available on the murder of President Kennedy”).<sup>13</sup>

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<sup>13</sup>In fair use terms, the reproduction of the copyrighted material to illustrate and explain criticism of the material is “complementary” to the copyrighted work, rather than a “substitute” for it. *See Ty*, 292 F.3d at 517-18.

## CONCLUSION

For the reasons stated herein, the district court's judgment that neither the First Amendment nor the fair use doctrine protects defendants' publication of copyrighted material should be reversed, and this Court should hold that defendants' publication was a fair use of the copyrighted material, or was otherwise protected by the First Amendment. At the least, the case should be remanded to the district court for further proceedings in light of the First Amendment principles expressed here.

Respectfully submitted,

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Dated: June 25, 2003

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**CERTIFICATE OF COMPLIANCE WITH F.R.A.P. 29(d) and 32(a)(7)(B)**

I certify that this brief complies with the type volume limitation set out in Federal Rules of Appellate Procedure 29(d) and 32(a)(7)(B). The number of words in this brief, computed in the manner explained in Rule 32(a)(7)(C), is 5,074, according to the word-processing system that was used to prepare this brief.

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## CERTIFICATE OF SERVICE

I certify that on this 25<sup>th</sup> day of June 2003, two copies of the foregoing, and one copy of the foregoing on a 3 ½" floppy disk in PDF format, were served, via U.S. first class mail, upon the following individuals:

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