No. 99-40632

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETER VEECK, doing business as RegionalWeb,

Appellant,

v.

SOUTHERN BUILDING CODE CONGRESS INTERNATIONAL INC.,

Appellee.

Appeal from the United States District Court
for the Eastern District of Texas
Honorable David Folsom

Brief for Amici Curiae American Medical Association, American National Standards Institute; American Society of Association Executives; American Society of Heating, Refrigerating and Air-Conditioning Engineers; American Society of Mechanical Engineers; National Fire Protection Association; Texas Municipal League; and Underwriters Laboratories Inc. Filed in Support of Appellee Southern Building Code Congress International Inc. Supporting Affirmance

---

AKIN, GUMP, STRAUSS, HAUER & FELD, L.L.P.

Patrick F. McGowan
Michael Lowenberg
1700 Pacific Avenue, Suite 4100
Dallas, Texas 75201-4675
(214) 969-2800
(214) 969-4343 (facsimile)
ATTORNEYS FOR AMICI CURIAE

SUPPLEMENTAL STATEMENT OF INTERESTED PARTIES

Peter Veeck, doing business as RegionalWeb,
Appellant,

v.

No. 99-40632

Southern Building Code Congress International Inc.,
Appellee.

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the judgment of this court may evaluate possible disqualification or recusal.

American Medical Association, Amicus Curiae
American National Standards Institute, Amicus Curiae
American Society of Association Executives, Amicus Curiae
American Society of Heating, Refrigerating and Air-Conditioning Engineers, Amicus Curiae
American Society of Mechanical Engineers, Amicus Curiae
National Fire Protection Association, Inc., Amicus Curiae
Texas Municipal League, Amicus Curiae
Underwriters Laboratories Inc., Amicus Curiae

Patrick F. McGowan
Michael Lowenberg
AKIN, GUMP, STRAUSS, HAUER & FELD, L.L.P.
1700 Pacific Avenue, Suite 4100
Dallas, Texas 75201-4675
Counsel for Amici Curiae

Patrick F. McGowan

Attorney of Record for Amici Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

CONCISE STATEMENT OF IDENTITY OF AMICI CURIAE, INTEREST IN THE CASE, AND SOURCE OF AUTHORITY TO FILE

The model building-related codes involved in the present case are part of a large genre of creative works, including model codes, standards and other reference works (hereinafter collectively referred to as "standards"), that are developed by private, not-for-profit organizations and are made available for the use and adoption by government instrumentalities throughout the United States. Amici curiae are all organizations that are involved in the creation or use of these socially valuable works. Specifically, amici fall into three categories, as follows.

a. The Administrator and Coordinator of Voluntary Standards Development in the United States.

Amicus curiae, American National Standards Institute (ANSI), is a nonprofit membership organization which, for more than 75 years, has administered and coordinated the voluntary standardization system in the United States. ANSI is a unique partnership of approximately 1,300 companies, 250 professional, technical, trade, labor, academic and consumer organizations and some 30 government agencies. The members of the ANSI federation develop standards and otherwise participate in their development. ANSI facilitates this system by accrediting standards developers and accrediting groups to participate in the development of international standards, and it provides a forum for addressing policy issues related to domestic and international standardization.

b. Standards Development Organizations.

Amici curiae, American Medical Association (AMA), American Society of Association Executives (ASAE), American Society of Heating, Refrigerating and Air-Conditioning Engineers (ASHRAE), American Society of Mechanical Engineers (ASME), National Fire Protection Association (NFPA) and Underwriters Laboratories Inc. (UL) (hereinafter, collectively referred to, along with ANSI, as "the standards developer amici") are all not-for-profit organizations that either develop or whose members are involved in developing copyrighted standards which are widely used and adopted by local, state and federal governments, as well as the private sector. Amici use the revenue generated from the sales and licensing of their copyrighted standards to support the creation, refinement and updating of their standards. An additional description of each individual amici may be found in the Motion for Leave to File Brief of Amici Curiae in Support of Appellee, on file with this Court.

c. Organization Representing Certain Government Beneficiaries of Private Standards Development.

The Texas Municipal League (TML) is a non-profit association that represents the interests of its 1,044 member cities (of the 1,197 incorporated cities in Texas). It accomplishes its mission by providing legislative services, legal advice, educational training, and publications to the governing bodies, officials, and employees of those cities. The TML's member cities routinely adopt by

reference in their laws or otherwise utilize and rely on copyrighted model codes and standards and other reference works.

The codes and standards created and administered by private organizations such as the standards developer amici and their members (and SBCCI) are sought for use by both the private sector and government. In particular, these codes and standards are widely used and adopted by local and state governments and federal authorities throughout the United States who do not otherwise have the necessary facilities and resources to develop these safety standards independently. Private standards developers like those represented by the standards developer amici and their members support their standards development activities through revenues derived from the publication, sale and licensing of codes and standards made possible by the protection of the copyright laws. The ability to maintain and coordinate these standards writing activities would be severely undercut if the law were to be interpreted in a manner by which this work product could be indiscriminately copied by others because of loss of copyright protection.

Amici believe that the position argued by appellant Veeck is an ill-advised departure from established principles of law and logic. The copyrighted SBCCI codes at issue in this case are part of a large genre of creative works developed by not-for-profit standards developers such as the standards developer amici and their members and relied upon by governments such as the municipalities represented

by amicus Texas Municipal League. Standards developers create and maintain at their own substantial expense their copyrighted codes, standards and reference works and make them available to interested parties, government regulators, and the public at large. Loss of copyright protection for these works would drastically undermine the ability of standards developers to fund the ongoing creation and updating of these important works, and would therefore harm the governments and the public who benefit from and rely on the work of these standards developers.

For these reasons, amici have a direct and vital interest in the issues presented to this Court by the present case, and believe that they can provide the Court with additional perspective on the important policy considerations bearing on these issues.

ARGUMENT

The appellant Veeck's primary contention is that, because SBCCI's privately authored standards[1] have been incorporated by reference in the law of the cities of Anna and Savoy, Texas, those works have forever lost their copyright protection. If this sweeping contention were accepted, it would profoundly, deleteriously affect both private standards developers as well as the governments – state, local, and federal – who reap the benefits of private standards development. In Part A of the Argument which follows, amici address the public policy considerations which weigh against such a result. Amici then address, in Parts B and C, Veeck's principal legal arguments urging invalidation of copyright protection for codes and standards which have been referenced in laws.[2]

---

[1] For convenience, this brief uses the terms "standards" or "codes and standards" for works ranging from model codes, to compilations of rules, standards, specifications, guidelines, recommended practices, works of nomenclature, and other reference works created by private organizations for the use of the private sector and for government reference in statutes, regulations and ordinances.

[2] Amici have principally addressed the arguments by Veeck of due process and free expression and the applicability of the copyright merger doctrine. This brief does not, therefore, address in detail the issues framed by Veeck in terms of waiver, fair use, or copyright misuse. These doctrines either do not apply or, as used by Veeck, are merely a recasting in another form of his due process/free expression argument that the public right of access to and notice of the law renders void the copyrights to any work that has been incorporated by reference in a law.

The waiver argument, for example, as argued by Veeck, is that SBCCI, although it expressly reserved its copyrights, nevertheless waived them by allowing towns to adopt its model codes by reference "knowing that the codes would be transformed into something which, by their very nature, should be in the public domain." (Veeck's Br., VI.B. at 14.) Veeck's waiver argument, therefore, is wholly dependent on the acceptance of Veeck's due process argument that SBCCI's works would enter the public domain upon adoption by reference in the law of Savoy and Anna. Amici address that due process argument at Part B of the Argument.

A. The Destruction of Copyrights in Model Codes and Standards Would Have Damaging Consequences, Not Just for the Non-Profit Organizations Which Develop These Works, but for the Local, State and Federal Governments Which, in Ever Increasing Numbers, Rely on Those Organizations to Produce High Quality Codes and Standards for Government Use and Adoption.

Veeck's position that a work such as the SBCCI model codes enters the public domain the moment any government instrumentality adopts the work by reference in a law potentially has the broadest implications for copyright holders like those represented by the standards developer amici who develop codes and standards which they make available for government use and adoption. More importantly, that position, if accepted, would harm governments such as those represented by amicus TML and would thwart the public interest in encouraging creativity in the development of original works for the use and adoption by these governments.

Similarly, Veeck's argument that his copying is a fair use is suffused with the false assumptions, also addressed in Part B, that SBCCI's work is already in the public domain or that it is, absent Veeck's copying, unavailable in a constitutional due process sense. (*See* Veeck's Br., VI.D. at 2.) In arguing for fair use, moreover, Veeck can cite to no case holding, as he would have this Court hold, that the copying verbatim of an entire copyrighted work onto the Internet for the purpose of providing unlimited, free downloading by the public could constitute a fair use. Finally, as to copyright misuse, Veeck does not even claim the existence, much less present evidence, of any agreement such as that condemned as a misuse in *Practice Management Information Corp. v. American Medical Ass'n*, 121 F.3d 516, 520-521 (9th Cir. 1997), *modified*, 133 F.3d 1140 (9th Cir. 1998), *cert. denied*, 119 S. Ct. 40 (1998).

All of these issues are treated in the district court's Memorandum and Order and in SBCCI's brief, which amici wholly support. In addition, amicus, NFPA, briefed the waiver and misuse issues in its Amicus Brief and its Supplemental Amicus Brief, filed in the district court, copies of which are a part of the record before this Court.

To appreciate those implications one must understand, first, that the creation of high quality, up-to-date codes and standards is very costly and that private standards developers rely on copyright protection, and the ability it affords to generate revenue from the sales and licensing of the works they create for government adoption, to generate the revenues necessary to sustain their on-going standards creation, refinement and updating.

The development of useful, high-quality, up-to-date, consensus-based standards is a costly, time consuming process. Drafting standards requires wide-ranging creative input from a variety of concerned constituencies and sources of expertise, including representatives of the consuming public, industry, the academy, and the public safety and regulatory community. In addition, the standards drafting process draws heavily on the administrative, technical, and support services provided by the organizations that develop them. The NFPA, for example, develops its proprietary 312 fire safety codes and standards through a voluntary consensus process approved by ANSI, the body which oversees private consensus standards developers to ensure openness, due process and the participation of a balance of relevant interests. The NFPA, for example, arranges for the hundreds of standards-related meetings that take place yearly. It provides logistical, administrative and clerical support to the 229 committees that draft and regularly update standards, and it maintains a large permanent staff of engineers,

fire service experts, administrators, and clerical staff who support the NFPA's standards development activities.

Moreover, the costs of developing standards by private, non-profit standards developers are commonly underwritten, in whole or significant part, by the revenues made possible from the copyright-protected sales and licensing of the standards themselves. Without copyright protection, others would be free to expropriate and sell or give away the works created by standards developers such as amici, and the ability of these standards developers to sustain their standards development activities, as well as other mission related programs, would be thwarted since they could no longer rely on the copyright laws to protect the revenues they realize from sales and licensing of their works.[3]

The impact of copyright destruction, however, would be felt by more than just the standards developers whose copyrights would be lost. Private standards development provides federal, state and local governments with valuable and high quality codes and standards at no cost to taxpayers, and governments at all levels

---

[3] As noted in a congressional report, a large segment of the standards development community consists of non-profit, general membership organizations such as amici, which are devoted to public safety or other charitable purposes. *See* U.S. Congress, (Office of Technology Assessment), *Global Standards: Building Blocks for the Future* 50-51 (1992). The congressional report confirms that these types of standards development organizations are heavily dependent on the sale of their standards to support their activities. *See id.*; *see also* National Research Council, *Standards, Conformity Assessment, and Trade into the 21st Century* 32 (National Academy Press 1995). It is these types of organizations that, through their technical expertise, independence, and the openness and fairness of their processes produce the standards most desirable for government adoption and use.

have recognized the importance of privately developed codes and standards by adopting them in great numbers.

The federal government, for example, relies heavily on privately developed standards. It has been estimated to be the single largest user of private sector developed standards. *See* National Institute of Standards & Technology (U.S. Department of Commerce), "Standards Activities of Organizations in the United States" (NIST Special Publication 806, February 1991); *see, e.g.*, 3 Index to the Code of Federal Regulations at 2090-2091 (Congressional Information Service, Inc. 1999) (indexing over 200 citations in the Code of Federal Regulations to copyrighted NFPA standards).

Moreover, in recognition of the benefits of private standards development, the federal government has made it a policy to adopt such standards unless there is a valid reason for not doing so. For example, the Office of Management and Budget ("OMB") has directed all federal agencies to incorporate, "in whole, in part, or by reference" privately developed standards for regulatory and other activities "whenever practicable and appropriate," thereby "[e]liminat[ing] the cost to the Government of developing its own standards." 63 Fed. Reg. 8545, 8554-8555 (Feb. 19, 1998) (OMB Notice of Final Revision of Circular A-119). For this initiative to succeed, private authors must have an incentive to create works useful to the government. OMB thus requires agencies to "observe and protect the rights

of the copyright holder and any other similar obligations." *Id.* at 8555. Indeed, the federal policy of utilizing privately developed standards is so strong that "[i]n February 1996, Section 12(d) of Public Law 104-113 . . . was passed by the Congress in order to establish the policies of the existing OMB Circular A-119 in law." *Id.* at 8546; *see* National Technology Transfer and Advancement Act of 1995, Pub. L. No. 104-113, § 12(d), 110 Stat. 775, 783 (1996). Under Veeck's position, however, government use or adoption of a private work as part of its regulatory scheme would, by definition, invalidate the author's copyright.

At the state and local level, it is fair to say that governments could not effectively function without privately developed codes and standards. Virtually all safety regulation requires expertise and experience that is beyond the resources of such governments alone to marshal. While complete statistics are not available due to the multiplicity of state and local governmental entities and methods of regulation, it is clear that many state and local regulations rely, in whole or in part, on privately developed standards.[4] *See Directory of Building Codes & Regulations* (National Conference of States on Building Codes and Standards, Inc. 1998 ed.)

[4] A multitude of state laws, for example, adopt or mandate the regulatory adoption of privately authored works. *See, e.g.,* WASH. REV. CODE § 19.27.031 (1999) (adopting the model Uniform Building Code and related standards). Many states, moreover, have enacted express legislative approval of and methods for state and municipal adoption of privately developed works through incorporation by reference. *See, e.g.*, 65 ILL. COMP. STAT. ANN. 5/1-3-1 to -6 (West 1999).

(two volume listing of state and selected municipal adoptions of building-related model codes and standards).

The prime example of this reliance is in the regulation of buildings and structures and related systems such as heating, plumbing and electricity. Virtually all state and local building codes, for example, are based on one of the three model building codes currently available in the United States. Amicus NFPA, for example, has, for close to 100 years, developed and updated every three years an electrical code called the National Electrical Code®. The 1999 edition is a prodigious work exceeding 900 pages and covering a vast array of subjects related to electrical installations. As its name suggests, it has become the national standard for electrical installations and has been adopted in one form or another, depending on state governmental structures, in every state in the union as well as in Puerto Rico and Guam. As another example, amicus ASHRAE, for over 100 years, has provided similar standards and guidelines in the field of indoor environments.

Standards developers like amici, in furtherance of their non-profit fire safety and welfare purposes, offer and encourage the use of their works by governmental entities in setting safety and other regulations and in administering government programs. They do so with the knowledge that these works will have to be made available to anyone who needs them in order to comply with the law or to

participate in the government programs which incorporate those works. Indeed, for these works to have any utility for the governments that utilize them, they must be made generally available, and it is in the interests of the standards developers to see that they are.

The ability of private standards developers to underwrite the development and updating of their standards would be destroyed by the loss of copyright protection, since, without such protection, others could freely publish and sell or otherwise exploit their work product without contributing to any of the substantial development costs. The reduction or elimination of private standards development activity that would result from the loss of copyright protection for private standards developers who developed standards for government use would be a severe loss to the governments and the public who so greatly benefited from these activities. As this brief next discusses, the law does not require a result that would be so harmful to the public interest.

B. There is No Judicially Created Exception to the Copyright Laws for Privately Authored Works that Have Been Referenced in a Law, and No Constitutional Principle of Due Process or Free Expression Requires the Creation of Such an Exception.

Veeck can cite to no case that has held invalid the copyright of a privately authored work on the grounds that it has been incorporated by reference in a law. Indeed, recent precedent is to the contrary. *See Practice Management Info. Corp. v. American Med. Ass'n*, 121 F.3d 516 (9th Cir. 1997), *modified*, 133 F.3d 1140

(9th Cir.), *cert. denied*, 119 S. Ct. 40 (1998) ("PMIC"); *CCC Info. Servs., Inc. v. MacLean Hunter Mkt. Reports, Inc.*, 44 F.3d 61, 73-74 (2d Cir. 1994). A holding invalidating a copyright on these grounds would, moreover, be contrary to the Copyright Act which, by its terms, denies copyright protection only to copyrightable works which have been originally created by the federal government or its officials, 17 U.S.C. §§ 101, 105 (1999),[5] and which prohibits the seizure or expropriation of a copyright through action by a governmental entity, 17 U.S.C. § 201(e) (1999). Such a holding would also be contrary to firmly established government policy, and to the wide practice of federal, state and local governments throughout the United States in adopting and referencing, without controversy, copyright-protected, privately authored works. *See* discussion *supra* Part A of Argument.

In the face of statute, policy, and practice to the contrary, Veeck invokes constitutional principles of due process and free expression. He claims that these principles require the destruction of a copyright owner's property rights in a privately developed standard the moment that any governmental authority adopts it, and that this is required in order to ensure the public's right to full access to and

[5] Indeed, in enacting Sections 101 and 105 of the Copyright Act, Congress was careful to ensure that "publication or other use by the Government of a private work would not affect its copyright protection in any way." H.R. REP. NO. 1476, at 60 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5672.

comment on the laws. The only question, therefore, is whether as a matter of constitutional law, this Court should reject the conclusion of the district court and establish the new principle that Veeck espouses to invalidate SBCCI's otherwise valid copyrights. It should not.

Veeck argues that copyright invalidation is necessary in order to allow the public to "discuss the law." However, this case does not involve any attempt by SBCCI to withhold the work or otherwise prevent discussion of the municipal codes, nor is there any evidence of record that it has used its copyright protection to do so. Absent such evidence, there simply is no issue of free expression raised. *See Schnapper v. Foley*, 667 F.2d 102, 115-116 (D.C. Cir. 1981) (First Amendment claim that copyright in government commissioned work should be voided to guard against government withholding of work rejected where there was no tenable allegation in the case that anyone had been denied access to the work).

Veeck also argues that copyright invalidation is necessary to ensure public availability of government adopted, privately authored works. He invokes the due process principle that individuals cannot be held responsible for complying with the law unless they are given fair notice of what the law requires. As the record in this case demonstrates, however, there simply was no issue as to notice or the availability of the municipal codes, which, as the district court pointed out, Veeck, himself, was easily able to obtain.

As Veeck's easy access to SBCCI's work demonstrates, model codes and standards are frequently more accessible than government drafted works. In sharp contrast to the drafters of a local ordinance who might meet availability requirements exclusively by providing copies for inspection at the municipal clerk's office,[6] standards developers have every incentive to make their works widely available. Quite apart from the substantial financial incentives to standards developers to achieve wide sales and distribution of their standards, standards developers who develop standards for government use understand that any restriction on access to governmentally adopted standards would result in the loss of confidence and reliance of its beneficiary governments. It is easily foreseeable that, were a standards developer ever to attempt to restrict availability of codes and standards, governments would be unwilling to continue to adopt the developer's work.

Indeed, codes and standards developers typically make their codes and standards available through multiple distribution channels, including, depending on the organization, catalog, telephone, Internet and retail sales, and they offer them in a variety of formats, including individual pamphlets, complete bound sets, loose-leaf subscription services, and various electronic products. In sum, among a

[6] *See, e.g.*, OR. REV. STAT. § 221.330 (1999) (requiring three copies of any codes adopted by reference to be on file in the office of the city recorder for use and examination by the public).

standards developer's best assurance of revenue, and best arguments for governmental adoption, is the wide and easy availability of its codes and standards. For this reason, despite the long and widespread tradition in the United States of governmental adoption of model codes and standards, Veeck can point to no reported case where lack of notice has been raised as a defense to a failure to comply with a provision contained in a model code or standard. Nor has he presented evidence of lack of notice to anyone in this case.

But even if there did arise a case in which a real question of availability in any constitutional sense were raised, the requested remedy of total copyright invalidation, by destroying the powerful incentive copyright protection provides to create such works, would not be appropriate. As all the recent precedent teaches, so drastic and ultimately destructive a remedy is simply not required to ensure the public's access to the law.[7]

In *PMIC*, for example, the Ninth Circuit affirmed a district court's ruling that the American Medical Association's copyright in a publication known as the Physician's Current Procedural Terminology (the "CPT") was not invalidated when a governmental entity, the Health Care Financing Administration adopted the

[7] Indeed, while addressing no actual due process notice problem, a rule that the adoption of a standard by a state legislature or administrative body deprived the copyright owner of its property would, as one court has observed, "raise very substantial problems under the Takings Clause of the Constitution." *CCC Info. Servs., Inc.*, 44 F.3d at 74. This Court should construe the copyright law to foreclose these problems. *See Roth v. Pritikin*, 710 F.2d 934, 939 (2d Cir. 1983); *accord NLRB v. Catholic Bishop*, 440 U.S. 490, 501 (1979).

CPT as part of its regulations. *See PMIC*, 121 F.3d at 518-520. The court, noting that the AMA's copyright "pose[d] no realistic threat to public access" and that the AMA "ha[d] no incentive to limit or forgo publication," specifically rejected the assertion that the due process requirement of free access to the law requires a holding of copyright invalidity. *Id.* at 519.

In *CCC Information Services, Inc.*, 44 F.3d at 74, the Second Circuit rejected a similar claim, declining to invalidate the copyright on a privately developed listing of automobile values that several states required insurance companies to use in calculating insurance awards. Agreeing that invalidation of copyright was not necessary to ensure public access, the court pointed to the countervailing good that copyright protection affords in spurring the creation of creative works useful to government. In the court's view, "a hold[ing] that a state's reference to a copyrighted work as a legal standard . . . results in loss of the copyright . . . is antithetical to the interests sought to be advanced by the Copyright Act." *Id. See also Texas v. West Publ'g Co.*, 882 F.2d 171, 177 (5th Cir. 1989) (rejecting similar due process claim because "there is no evidence that anyone is being denied access" to the copyrighted work in question).

Even in a First Circuit case on which Veeck attempts to rely, the court, reviewing the grant of a preliminary injunction, expressly declined to rule on the merits of a claim that the BOCA building code, a model building code like that of

SBCCI, had lost its copyright because of state adoption by reference. *See Building Officials & Code Admin. v. Code Tech., Inc.*, 628 F.2d 730 (1st Cir. 1980) ("*BOCA*"). In *BOCA*, the court expressed concern over early precedent, such as *Banks v. Manchester*, 128 U.S. 244 (1888), which ruled that judicial opinions and statutes are in the public domain. Even so, the *BOCA* court acknowledged that an interpretation of these cases as limiting the rule to works created by government itself, "is not without foundation." *BOCA*, 628 F.2d at 734. Moreover, while reversing the district court's grant of a preliminary injunction against copying the work, the court stressed that it was not "ruling definitely on the underlying issues," and left open a possible ruling that would "accommodate modern realities" evident in the "trend towards state and federal adoption" of model standards. *Id.* at 732, 736. As the court observed:

> Groups such as BOCA serve an important public function; arguably they do a better job than could the state alone in seeing that complex yet essential regulations are drafted, kept up to date and made available. . . . [T]he rule denying copyright protection to judicial opinions and statutes grew out of a much different set of circumstances than do these technical regulatory codes . . . .

Id. at 736.

Rather than wholly invalidating a copyright, it would be far more rational to apply due process principles in an individual case, should one ever arise, of a person actually deprived of notice of laws than to destroy on a blanket basis all of the copyrights of private standards developers together with the broad public

benefit that such copyrights ensure. *See PMIC*, 121 F.3d at 519 (suggesting other remedies for a case of actual unavailability, including fair use and due process defenses for infringers and mandatory licensing at a reasonable royalty.)

As Professor Nimmer has observed in commenting on the argument that privately developed standards should enter the public domain upon adoption into law:

> Th[e] limitation on copyright [considered in *BOCA*] was predicated on the public's due process right "to have notice of what the law requires of them so that they may obey it and avoid its sanctions." It is questionable whether this rationale justifies the denial of copyright to a private person or group who produces such a model code. . . . Failure to observe such due process notice requirements would certainly constitute a defense for one charged with violation of the nonpublicized law. It might well also justify, and perhaps require, the recognition of a fair use defense by one who reproduced such copyrighted code for his own personal use. It may be doubted, however, whether it should also immunize from copyright liability a competitive commercial publisher . . . , at least where the copyright owner of the code, or its licensee, has published and adequately disseminated authorized copies of the code. To vitiate copyright, in such circumstances, could, without adequate justification, prove destructive of the copyright interest, in encouraging creativity in connection with the increasing trend toward state and federal adoptions of model codes.

1 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 5.06[C], at 5-91 to 5-92 (1999) (footnotes omitted); *see also CCC Info. Servs., Inc.*, 44 F.3d at 73-74 & n.30 (citing Professor Nimmer's position with approval); *PMIC*, 121 F.3d at 518-520.

As the above-quoted passage suggests, the copyright laws exist, not primarily for the benefit of authors, but for the benefit of the public in that, by giving authors the exclusive rights to their works, copyright serves to stimulate writing and invention that will be of benefit to the public. *See generally* 1 Nimmer & Nimmer, *supra*, § 1.03[A]. Privately developed codes and standards designed for government use and adoption provide the most direct and cogent example imaginable of how copyright protection, by allowing private citizens to underwrite the development costs of these codes and standards, serves to benefit the public. The law need not and should not be interpreted in a way that thwarts this public benefit. *See* discussion *supra* Part A of Argument (discussing the public benefits of private standards development).

C. Because The Ideas Embodied In SBCCI's Codes Can Be Expressed In Many Ways, The Merger Doctrine Does Not Apply.

Veeck appeals to the "merger doctrine" in support of his claim that SBCCI's codes are not protected by copyright. The argument is meritless.

A copyright protects the expression of an idea but not the idea itself. Under the merger doctrine, however, expression is not protected if it "represent[s] the only means of expressing the ideas" in question. *Educational Testing Servs. v. Katzman*, 793 F.2d 533, 540 (3d Cir. 1986). *See generally CCC Info. Servs., Inc.*, 44 F.3d at 68-73. This doctrine is limited to cases in which, as a conceptual matter, "a given idea is inseparably tied to a particular expression." 3 Nimmer &

Nimmer, *supra*, § 13.03[B][3], at 13-67.[8] Indeed, cases involving merger are cases in which, unlike here, an idea was *conceptually* susceptible to only one form of expression.[9] Here, the ideas contained in the SBCCI's codes, as well as other privately developed codes and standards, are plainly susceptible to multiple forms of expression.

Veeck, of course, does not contend that idea and expression merged at the time the SBCCI received a copyright on its works. His argument is rather that merger occurred only later at the point that the work was incorporated into the law of Anna and Savoy. The argument misconstrues the merger doctrine, which

---

[8] *Accord Atari Games Corp. v. Nintendo of Am., Inc.*, 975 F.2d 832, 840 (Fed. Cir. 1992) (merger doctrine inapplicable "so long as alternate expression are available"); *Apple Computer, Inc. v. Formula Int'l, Inc.*, 725 F.2d 521, 525 (9th Cir. 1984) (merger doctrine inapplicable when the "idea is capable of various modes of express") (quotations omitted); *Infodek, Inc. v. Meredith-Webb Printing Co.*, 830 F. Supp. 614, 623 (N.D. Ga. 1993) ("dispositive issue is whether a particular [idea] is capable of being expressed in various different ways").

[9] *See Bellsouth Adver. & Publ'g Corp. v. Donnelly Info. Publ'g, Inc.*, 999 F.2d 1436, 1442-43 (11th Cir. 1993) (*en banc*) (organizational structure of yellow pages cannot be copyrighted in which no serious alternatives exist); *Sega Enters. Ltd. v. Accolade Inc.*, 977 F.2d 1510, 1524-26 & n.7 (9th Cir. 1992) (portion of computer program cannot be copyrighted where it is "functional" and not "creative"); *Computer Assocs. Int'l, Inc. v. Altai, Inc.*, 982 F.2d 693, 707-710 (2d Cir. 1992) (same); *Kern River Gas Transmission Co. v. Coastal Corp.*, 899 F.2d 1458, 1464 (5th Cir. 1990) (map publisher cannot copyright the sole means of displaying a pipeline's location on a map); *Landsberg v. Scrabble Crossword Game Players, Inc.*, 736 F.2d 485, 488-89 (9th Cir. 1984) (denying copyright to those elements of game strategy book that, as a conceptual matter, "must unavoidably be produced" by anyone seeking to describe underlying ideas); *Herbert Rosenthal Jewelry Corp. v. Kalpakian*, 446 F.2d 738, 742 (9th Cir. 1971) (although specific jewelry design can be copyrighted, general "idea" of jeweled bee cannot); *Apple Computer Inc. v. Microsoft Corp.*, 799 F. Supp. 1006, 1023 (N.D. Cal. 1992) (denying copyright to elements of computer software that "serve a purely functional purpose in the same way that the visual displays and user command of the dashboard, steering wheel, gear shift, brakes, clutch and accelerator serve as the user interface of an automobile"), *aff'd in part and rev'd in part*, 35 F.3d 1435 (9th Cir. 1994).

protects the expression of ideas, not laws or other categories of use to which ideas can be put. Clearly, the ideas expressed of the laws of Anna and Savoy are expressible in many ways and that is all that is relevant to an analysis under the merger doctrine.

Veeck, in any case, can cite no authority for his proposition that a user's decision to use a copyright in a particular way (e.g., a governmental entity's decision to incorporate the copyrighted material by reference in regulations) can create a merger and thus terminate a copyright that was originally valid. Indeed, the existing authority is to the contrary.

In *PMIC*, the leading case on the validity of copyrights in privately developed works developed for government use, the Ninth Circuit rejected the merger argument out of hand. *See* 121 F.3d at 520 n.8. The plaintiff in that case argued that the AMA's codes were uncopyrightable "ideas" under § 102(b) of the Copyright Act because a federal agency had mandated their use as part of the Medicaid regulations. In rejecting this argument, the court pointed out that the AMA codes were not the only way to express the facts and ideas involved and that competitors could develop better coding systems and lobby the federal government and private actors to adopt them. As the Ninth Circuit said:

> [The AMA's copyright in its medical codes] does not stifle independent creative expression in the medical coding industry. It does not prevent Practice Management or the AMA's competitors from developing comparative or better coding systems and lobbying

> the federal government and private actors to adopt them. It simply prevents wholesale copying of an existing system.

Id.

The same can be said for SBCCI's model codes. The SBCCI's copyright in its building code does not stifle independent creative expression in the building code arena. The universe of building standards can be categorized in countless ways and at any level of generality, and the SBCCI must make difficult judgments about the content of and degree of specificity with which its codes should describe different provisions. Indeed, Veeck does not challenge that this is the case.

Belying any claim that copyright of a building code stifles independent creative expression is the fact that SBCCI codes are not the only building/construction codes available for adoption by state and local governments. Currently, the market offers at least two competing sets of building codes, in addition to the SBCCI's building code: the National Codes published by the Building Officials and Code Administrators International, and the Uniform Codes published by the International Conference of Building Officials. Clearly, then, there are, in practice, a variety of model codes from which state and local governments may choose.

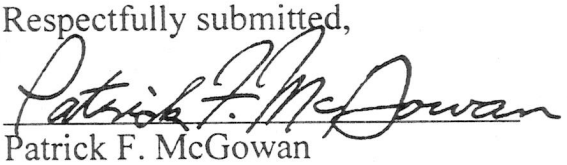
Even if the SBCCI were the dominant or even the only promulgator of such codes, the doctrine of copyright merger would not apply because there are many ways of expressing the ideas embodied in such codes. *Cf. Educational Testing*

Servs., 793 F.2d at 540 (rejecting argument under the merger doctrine that ETS-created tests were invalid or unenforceable because those tests "dominated" the field of college admissions testing). Since the ideas embodied in SBCCI's code are susceptible of many forms of expression, others can develop competing forms of expression and attempt to convince governments and the public to adopt and use them. The purpose of preventing the stifling of independent creative expression served by the merger doctrine simply does not come into play in this case.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,



Patrick F. McGowan
Texas Bar No. 13642000
Michael Lowenberg
Texas Bar No. 12630000

AKIN, GUMP, STRAUSS, HAUER
& FELD, L.L.P.
1700 Pacific Avenue, Suite 4100
Dallas, Texas 75201-4675
(214) 969-2800
(214) 969-4343 (facsimile)

ATTORNEYS FOR AMICI CURIAE

CERTIFICATE OF SERVICE

I hereby certify that true and correct paper and electronic copies of the above BRIEF OF AMICI CURIAE NATIONAL FIRE PROTECTION ASSOCIATION, INC. were served upon all counsel of record, as listed below, via certified mail, return receipt requested, on this 7th day of January, 2000:

Eric Weisberg
200 West Main
Denison, Texas 75020
Attorney for Appellant

Robert J. Veal
Veal & Bush, LLC
200 Cahaba Park Circle, Suite 125
Birmingham, Alabama 35242
Attorney for Appellee

Scott J. Williams

Scott T. Williams

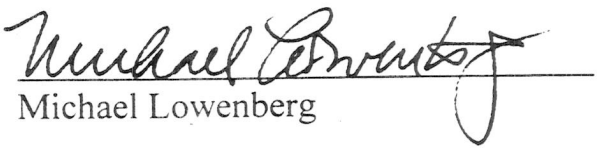
CERTIFICATE OF COMPLIANCE

Pursuant to FIFTH CIRCUIT RULE 32.2 and .3, the undersigned certifies this brief complies with the type-volume limitations of FED. R. APP. P. 32(a)(7).

1. Exclusive of the portions exempted by FIFTH CIRCUIT RULE 32.2, this brief contains 6105 words.

2. This brief has been prepared using Microsoft Word for Windows 97, version 8.0b in proportionally spaced, serif typeface using Times New Roman 14 point font in text and Times New Roman 12 point font in footnotes.

3. THE UNDERSIGNED UNDERSTANDS THAT A MATERIAL MISREPRESENTATION IN COMPLETING THIS CERTIFICATE, OR CIRCUMVENTION OF THE TYPE-VOLUME LIMITS IN FED. R. APP. P. 32(a)(7), MAY RESULT IN THE COURT'S STRIKING THIS BRIEF AND IMPOSING SANCTIONS AGAINST THE PERSON SIGNING THE BRIEF.



Michael Lowenberg