



From A to Veck:
Standardization and the Law

2005 ANSI Annual Conference



Veeck Update

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Remember Veeck?

- Veeck v. Southern Building Code Congress, International, Inc., 393 F.3d 791 (5th Cir. June 7, 2002).
- A case of major concern to SDO's that support their activities through the copyright protected sales of their standards.



What was Veeck about?

- In 1998 Veeck posted the SBCCI's Southern Building Code (SBC) on his website devoted to information about North Texas.
- The SBC was adopted by reference as the local building code for two small Texas towns (Sherman & Anna).
- SBCCI claimed infringement of its copyright in the SBC.
- Veeck claimed that, because the SBC was adopted into law, it had entered the public domain and was no longer protected by copyright.



What did the Veeck hold?

- The posting of the entire SBC onto the internet was NOT an infringement of SBCCI's copyright.
- “We emphasize that in continuing to write and publish model building codes, SBCCI is creating copyrightable works of authorship. When those codes are enacted into law, however, they become to that extent ‘the law’ of the governmental entities and may be reproduced and distributed as ‘the law’ of those jurisdictions.”



What happened next?

- SBCCI petitioned the U.S. Supreme Court for review.
- SDO's filed amicus brief in support of the SBCCI.
- At the request of the Court, the Solicitor General filed a brief expressing the view of the federal government. The brief argued that the 5th Circuit decision was CORRECT and that there was no need for Supreme Court review.
- In June, 2003, the Supreme Court denied the petition for review.



Then What?

- The U.S. Copyright Office reacts:
 - In June, 2003, the CO sent letters to two SDO's suggesting that their standards might not be entitled to copyright registration.
 - What caught the CO's eye? A statement on a copy of one of the works that “this code can be incorporated into public law by reference.”
 - Said the letter: “It is the position of the Copyright Office that public laws are in the public domain and are not subject to copyright protection.”
 - The CO view seems more extreme than Veeck (which did NOT void copyrights); but no follow-up and not clear what role Copyright Office can or will play.



So what does it all mean, and what happens next?

- Not Clear, and
- Not Muchyet!



Post Veeck developments and trends: The Courts

■ In the Courts

- No known Veeck challenges to SDO's have yet emerged.
- Little new precedent shedding light on the issues raised in Veeck.
 - Danielson v. Winchester-Conant Properties, 322 F.3d 26 (1st Cir. 2003) rejecting claim under Veeck that architectural drawings entered public domain by virtue of their inclusion in restrictive covenant approved by town government.



Post Veeck developments and trends: The Courts

Why no rush to make Veeck type challenges?

The limits of Veeck:

- Veeck did not void the SDO's copyright and emphasizes that the works are still protected by copyright.
- Other ambiguities in Veeck makes litigation perilous for potential copiers.
 - the “extrinsic standards” exception
 - the role of SDO intention and copier motivation
 - the meaning of copying a model code “as the law.”



Post Veeck developments and trends: The Courts

The limits of Veeck (cont.):

- Veeck only applies in the Fifth Circuit and favorable precedent exists elsewhere:
 - PMIC v. AMA, 121 F.3d 516 (9th Cir. 1997)
 - CCC v. Maclean Hunter, 44 F.3d 61 (2d Cir. 1994)
- Veeck did not address or foreclose contract claims:
 - Shrink wrap licences
 - Click through licences
- The Veeck decision characterized itself as limited, and the Solicitor General agreed.



Post Veeck developments and trends: Legislative and Technological developments

■ Potential Legislative Solution to Veeck:

- Explored by SDO's in late 2003 and 2004. Desirability or feasibility of this approach uncertain.
- Amend Section 105 of the Copyright Act to make clear that:

The copyright subsisting in a work created by a non-governmental author is not terminated, annulled, or diminished if the work or any part of it is adopted or incorporated by reference into Federal, State, or local law or regulations.



Post Veeck developments and trends: Legislative and Technological developments

- Why no rush to make Veeck-type challenges? Other contributing factors:
 - Digital Rights Management, e.g.,
 - Technological limits on copying
 - Watermarking
 - The Digital Millennium Copyright Act



Post Veeck developments and trends: Regulatory Trends

- Increasing desire of governments to provide full text web access to proposed and adopted regulations, including referenced codes and standards.
- Increasing desire of governments to incorporate codes and standards by transcription rather than by reference.
- Isolated legislative efforts to preclude copyrights in governmentally adopted standards. E.g., H.R. 3295, *Help America Vote Act*, section 221.



Conclusion

- Make sure you have valid copyrights in your works.
- Explore the incorporation of “value-added” copyrightable commentary and other content into codes and standards.
- Use licenses and contracts to obtain rights in addition to copyright.
- Use digital rights management to obtain technological protection against unauthorized copying.
- Make sure you provide plenty of access to your works (maintain access to old editions; recognize liberal fair use; consider copy protected free access)
- Choose your battles wisely. Be prepared. This story is just beginning.





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