

# Copyright, IBR, and Recent Litigation

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# What is Copyright?

- Copyright is a type of intellectual property that protects original works of authorship as soon as an author fixes the work in a tangible form of expression.
- Copyright owners have the exclusive right to reproduce their works and create derivative works (among other things), subject to limited exceptions.



# What is IBR?

- 38 C.F.R. § 39.63, related to the architectural design standards for veterans cemeteries, provides:

The publications listed in this section are incorporated by reference. . . .

Architectural and structural requirements—(1) Life Safety Code.

Standards must be in accordance with the 2003 edition of the National Fire Protection Association Life Safety Code, NFPA 101.



# The Intersection of Copyright and IBR?

- There are two competing interests at play:
  1. The need for incentives to create and update standards in a manner that is likely to foster broad participation from a variety of interests.
  2. The public's right to access to legally binding text
- Courts have attempted to address these concerns in two primary ways:
  - The government edicts doctrine
  - Copyright fair use



# CCC and Practice Management

- *CCC Info. Service v. Maclean Hunter Market Reports* (2d Cir. 1994)
  - IBR of the Red Book, which provides automobile valuations, did not destroy the copyright in that work;
  - Free access would “prove destructive of the copyright interest in encouraging creativity”
- *Practice Management v. American Medical Ass’n* (9th Cir. 1997)
  - IBR of AMA’s coding system for identifying medical procedures did not eliminate copyright protection;
  - “To vitiate copyright, in such circumstances, could, without adequate justification, prove destructive of the copyright interest, in encouraging creativity,’ a matter of particular significance in this context because of the increasing trend toward state and federal adoptions of model codes.”



# *Veeck v. SBCCI* (5th Cir. 2002) (en banc)

- “[W]e hold that when Veeck copied only ‘the law of Anna and Savoy, Texas, which he obtained from SBCCI’s publication, and when he reprinted only ‘the law’ of those municipalities, he did not infringe SBCCI’s copyrights in its model building codes.”
- “We emphasize that in continuing to write and publish model building codes, SBCCI is creating copyrightable works of authorship.”
- The court distinguished between “extrinsic standards”—which require citizens “to consult or use a copyrighted work in the process of fulfilling their obligations”—and “the wholesale adoption of a model code.”



# *Georgia v. Public.Resource.Org* (U.S. Supreme Ct. 2020)

- “The question in this case is whether [copyright] protection extends to annotations contained in Georgia’s official annotated code.”
- “We hold that it does not. . . . Under what has been dubbed the government edicts doctrine, officials empowered to speak with the force of law cannot be the authors of—and therefore cannot copyright—the works they create in the course of their official duties.”
- The government edicts doctrine is “a straightforward rule *based on the identity of the author*,” and not on “whether given material carries ‘the force of law.’”
- “The animating principle behind this rule is that no one can own the law.”
- “This rule applies both to binding works (such as opinions) and to non-binding works (such as headnotes and syllabi). It does not apply, however, to works created by government officials (or private parties) who lack the authority to make or interpret the law . . . .”

# *ASTM v. Public.Resource.Org II* (D.C. Cir. 2023)

- “We hold that the non-commercial dissemination of such standards, as incorporated by reference into law, constitutes fair use”
- Fair Use Factor 1 -- the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes
  - Court found PRO’s use was non-commercial; it did note that there might be a different result when a “for-profit firm . . . charges customers for copies”
  - Court also found PRO’s use was “transformative because it serves a different purpose than the plaintiffs’ works.”
  - “Public Resource’s message (‘this is the law’) is very different from the plaintiffs’ message (‘these are current best practices for the engineering of buildings and products’).”
  - This ignores SDOs’ reading rooms, apparently because “all but one of these rooms opened after Public Resource began posting incorporated standards” and PRO allows printing and searching in its reading room.



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# *ASTM v. Public.Resource.Org II* (D.C. Cir. 2023)

- Fair Use Factor 2 -- the nature of the copyrighted work
  - “[S]tandards fall at the factual end of the fact-fiction spectrum, which counsels in favor of finding fair use. Moreover, legal text falls plainly outside the realm of copyright protection. And because incorporated standards have legal force, they too fall, at best, at the outer edge of copyright’s protective purposes.
  - “[T]he district court correctly concluded that if a standard is incorporated into law without limitation, the result is virtually indistinguishable from a situation in which the standard had been expressly copied into law, so the second factor thus weighs heavily in favor of fair use.”

# *ASTM v. Public.Resource.Org II* (D.C. Cir. 2023)

- Fair Use Factor 3 -- the amount and substantiality of the portion used in relation to the copyrighted work as a whole
- “If an agency has given legal effect to an entire standard, then its entire reproduction is reasonable in relation to the purpose of the copying, which is to provide the public with a free and comprehensive repository of the law.”



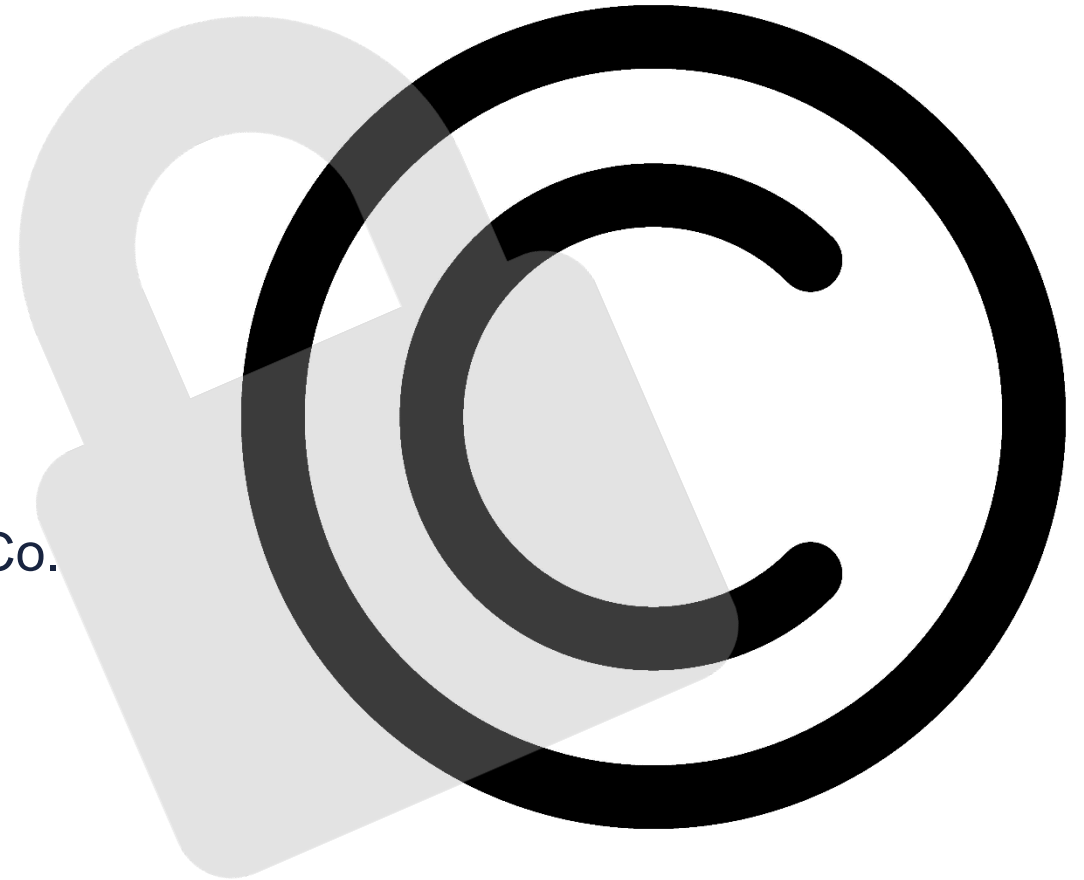
# *ASTM v. Public.Resource.Org II* (D.C. Cir. 2023)

- Fair Use Factor 4 -- the effect of the use upon the potential market for or value of the copyrighted work
- “We conclude that the fourth fair-use factor does not significantly tip the balance one way or the other. Common sense suggests that free online access to many of the plaintiffs’ standards would tamp down the demand for their works. But there are reasons to doubt this claim, the record evidence does not strongly support it, and the countervailing public benefits are substantial.”



# Other Venues Addressing the Impact of IBR on Copyright Protection

- *ICC v. UpCodes* (S.D.N.Y.)
- *NFPA v. UpCodes* (C.D. Cal.)
- *Facility Guidelines v. UpCodes* (E.D. Mo.)
- *Public.Resource.Org v. California Office of Administrative Law* (Cal. Super.)
- *Canadian Standards Association v. P.S. Knight Co.* (5th Cir.)
- The PRO Codes Act





# Where Do Things Stand Now?

- The SDOs could ask the Supreme Court to review the D.C. Circuit's recent decision in the *ASTM* case.
- There arguably is a circuit split (or at least tension) between the D.C. and Fifth Circuits' refusal to enforce copyrights of materials that are IBR'd and the Second and Ninth Circuits' holdings that copyrights remain enforceable after IBR.
- These issues will continue to be hashed out in the *UpCodes* cases, which involve copying by a for-profit entity, which happen to be in courts governed by the *CCC* and *Practice Management* decisions.
- The *ASTM II* decision suggests that commercial use of SDO's IBR'd standards may not fare as well in the fair use analysis.
- These issue also may be addressed, at least in part, in legislation (PRO Codes Act).

# Thank you



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