

New Legal Developments Impacting the Practice of Incorporation by Reference

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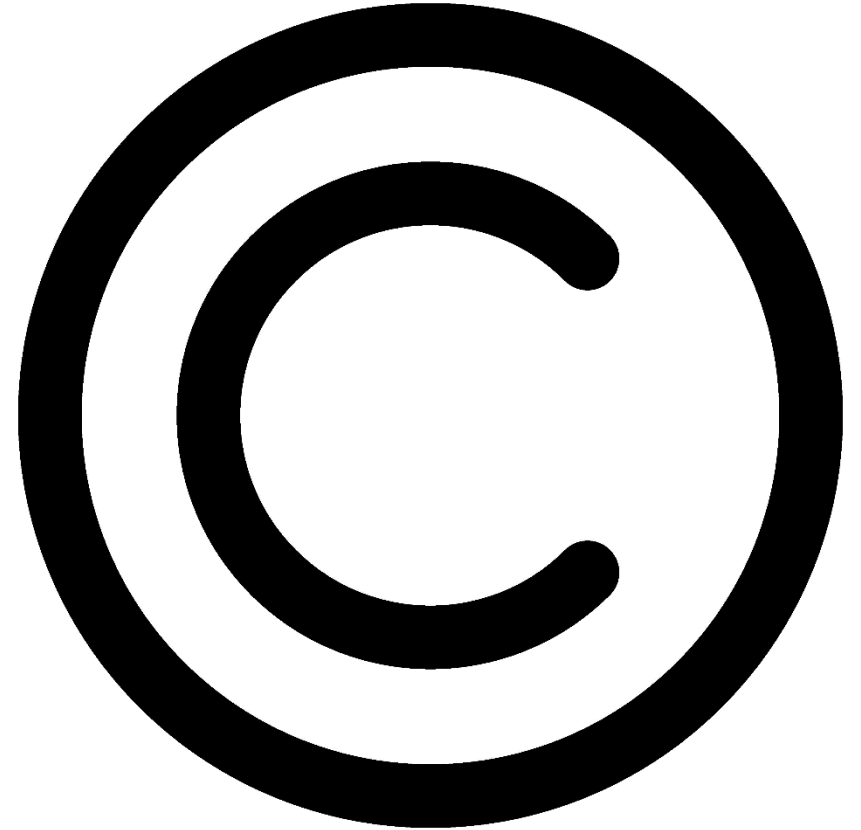
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WORLD STANDARDS WEEK, 2024

Developments on the Intersection of Copyright and IBR

- *Canadian Standards Association v. P.S. Knight Company*
- *Public.Resource.Org v. FCC*
- *The Conflicting Decisions in NFPA v. UpCodes and ASTM v. UpCodes*



Canadian Standards Association v. P.S. Knight Co. (5th Cir.)

Majority Opinion

“Knight argues that his copying of CSA's codes is not actionable under the United States' Copyright Act, as CSA's model codes have become “the law” of Canada, and, thus, Knight's copying of that “law” was permissible under this court's holding in *Veeck v. Southern Building Code Congress International, Inc.*, 293 F.3d 791 (5th Cir. 2002) (*en banc*). We agree.”

Dissent

“Veeck's reasoning is inapplicable because it is premised on our understanding that ‘the law’ in the United States is not copyrightable, unlike it is in Canada.”

“Knight's Codes are not transformative, as they are simply copies of CSA's code” and “there is evidence in the record that CSA has suffered market harm because of Knight's actions.”

Canadian Standards Association v. P.S. Knight Co. (S. Ct.)

No.

In the Supreme Court of the United States

CANADIAN STANDARDS ASSOCIATION, PETITIONER

v.

P.S. KNIGHT COMPANY, LTD., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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- On November 12, 2024, CSA filed a petition for a writ of certiorari at the Supreme Court.
- Question presented: “Whether the government-edicts and merger doctrines strip concededly copyrighted and copyrightable works of protection under the Copyright Act merely because those works have been subsequently incorporated by reference into law.”

Public.Resource.Org v. FCC (D.C. Cir.)

- PRO argues that the FCC's failure to publish the entirety of four standards that it IBR'd violated
 - (1) the requirement that agencies provide the public with notice and a meaningful opportunity to present their views on proposed substantive rule changes; and
 - (2) the requirement that the final text of approved rules be published in the Federal Register, on the FCC's website, or otherwise reasonably available.

Public.Resource.Org v. FCC (D.C. Cir.)

- FCC argues that IBR'd standards
 - “do not have to be available for free” and
 - are “reasonably available to the class of persons affected thereby” when they are available for public inspection at the FCC and OFR and available on ASNI’s IBR portal which provides free, online, read-only access.”
- FCC also notes “there is a significant (and undecided) question of whether a federal agency’s posting of copyrighted materials on its website without restriction would constitute fair use.”

The Conflicting UpCodes Decisions

Fair Use Factor 1 – The purpose and character of the use, including whether the use is for commercial purposes

NFPA v. UpCodes Decision

Posting NFPA's standards on its free tier to grow the funnel for its paid tier is **indisputably commercial**.

UpCodes' unlicensed use of NFPA's standards on both its "free" and "paid" tier has one objective purpose: making money. The objective purpose behind UpCodes' posting of the standards for free is to serve its "freemium" business strategy.

ASTM v. UpCodes Decision

UpCodes is a for-profit company, but its use of the Copyrighted Standards is **largely noncommercial**.

And although UpCodes may receive tangential benefits from its copying, it derives no direct monetary profit from publishing the Copyrighted Standards.

The Conflicting UpCodes Decisions

Fair Use Factor 1 – The purpose and character of the use, including whether the use is for commercial purposes

NFPA v. UpCodes Decision

UpCodes' specific use of NFPA's standards **share the same purpose** as NFPA's use.

UpCodes' purported intent to publish "the law" with a "socially useful purpose" does not make its use of NFPA's standards transformative.

UpCodes' use shares the same overriding purpose as NFPA's—namely, to provide access to the text of NFPA's standards for AEC companies and professionals who use those standards for various reasons in their jobs.

ASTM v. UpCodes Decision

UpCodes' use is transformative because it "**has a further purpose** or different character".

UpCodes achieves the distinct objective of making the law freely accessible and educating the public on the contents of binding laws. Unlike ASTM, UpCodes seeks neither to publish industry best practices nor to "positively impact[] public health and safety" by developing high-quality technical standards..

The Conflicting UpCodes Decisions

Fair Use Factor 4 – The effect of the use upon the potential market for or value of the copyrighted work

NFPA v. UpCodes Decision

NFPA and UpCodes have both provided evidence that, if UpCodes can continue with its current practices, or if these practices become widespread, it may be exceptionally difficult for NFPA to compete. **The resulting revenue loss would potentially imperil NFPA's self-funded, voluntary consensus development model.** As the Court recognized above, NFPA and UpCodes have the same target market. Additionally, UpCodes and NFPA compete for the same customers and sales. The potential for market harm is thus great.

ASTM v. UpCodes Decision

On one hand, it seems fair to assume that free online access to the Copyrighted Standards will lessen customers' incentive to purchase the standards from ASTM. On the other hand, **there is reason to believe that ASTM will still be incentivized to create its standards**, and there are significant public benefits to allowing free online access to technical standards that have been incorporated by reference into law. Thus, the fourth factor does not significantly tip the balance one way or the other.

ANSI LEGAL ISSUES FORUM

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