Case No. 23-50081

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Canadian Standards Association
Plaintiff-Appellee

v.

P.S. Knight Company, Limited; PS Knight Americas, Incorporated; Gordon Knight
Defendants-Appellants

On Appeal from the United States District Court for the Western District of Texas, Austin Division
Civil Action No. 1:20-CV-1160

BRIEF OF AMICI CURIAE ON BEHALF OF AMERICAN NATIONAL STANDARDS INSTITUTE AND SEVEN STANDARDS ORGANIZATIONS IN SUPPORT OF APPELLEE'S PETITION FOR REHEARING EN BANC

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that–in addition to the persons and entities listed in Appellee's Certificate of Interested Persons–the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

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North American Energy Standards Board
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Undersigned counsel further certifies, pursuant to Federal Rule of Appellate Procedure 26.1(a), that *amici curiae* are not publicly held corporations and do not

have any parent corporation, and that no publicly held corporation owns 10 percent or more of any corporation's stock.

/s/ J. Kevin Fee
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INTERESTS OF AMICI[1]

Amici Curiae include American National Standards Institute, Incorporated ("ANSI"), a national standards coordinating institution, along with seven standards development organizations ("SDOs") that participate in developing technical and specialized standards.

ANSI is a not-for-profit membership organization that, for more than 100 years, has administered and coordinated the voluntary standardization system in the United States. ANSI facilitates the development of American National Standards ("ANS") by accrediting the procedures of SDOs. These SDOs work cooperatively to develop voluntary national consensus standards that are used in virtually every industry sector and in all aspects of daily life, from toys and food safety, to IT and the built environment. ANSI accreditation signifies that a standards developer's procedures used for the development of ANS meet ANSI's essential requirements for openness, balance, consensus, and due process. These requirements help ensure that the resulting standards promote reliability, interoperability, safety, and quality. Each of the SDO *Amici* are among the approximately 240 SDOs accredited by ANSI and are representative of ANSI's broader SDO community.

[1] Pursuant to Federal Rule of Appellate Procedure 29, *amici* affirm that no counsel for a party authored this brief in whole or in part, and that no person or entity other than *amici*, their members, and their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

The *Amici* SDOs are:

American Society for Testing and Materials d/b/a/ ASTM International ("ASTM"). ASTM is a non-profit organization established in 1898 and headquartered in West Conshohocken, Pennsylvania. ASTM is dedicated to the development and publication of international voluntary consensus standards for materials, products, systems, and services. ASTM has developed more than 12,500 standards and has more than 30,000 members worldwide. Through its standards, ASTM positively impacts public health and safety, consumer confidence, and overall quality of life.

American Society of Safety Professionals ("ASSP"). Founded in 1911, ASSP is a global association for occupational safety and health professionals. ASSP develops industry consensus standards that promote safe work environments, improve productivity and drive continuous improvement.

International Association of Plumbing & Mechanical Officials ("IAPMO"). Founded in 1926, IAPMO is a not-for-profit membership organization dedicated to providing minimum requirements and standards for the protection of public health, safety, and welfare. IAPMO coordinates the development of plumbing and mechanical codes and standards such as the *Uniform Plumbing Code* ("UPC") and the *Uniform Mechanical Code* ("UMC") through a consensus standards development process accredited by ANSI. This process brings together volunteers

representing varied viewpoints and interests to achieve consensus on plumbing and mechanical issues. IAPMO codes are used by jurisdictions in the United States and abroad.

International Code Council, Inc. ("ICC"). ICC is a non-profit membership association dedicated to building safety. The International Codes, or I-Codes, published by ICC, provide one set of comprehensive and coordinated model codes covering all disciplines of construction including structural safety, plumbing, fire prevention and energy efficiency. All fifty states and the District of Columbia have adopted certain I-Codes at the state or other jurisdictional levels. Federal agencies including the Architect of the Capitol, General Services Administration, National Park Service, Department of State, U.S. Forest Service and the Veterans Administration also use I-Codes for the facilities that they own or manage.

North American Energy Standards Board ("NAESB"). NAESB was formed in 1994 as a not-for-profit SDO dedicated to the development of commercial business practices that support the wholesale and retail natural gas and electricity markets. NAESB maintains a membership of over 300 corporate members representing the spectrum of gas and electric market interests and has more than 2,000 participants active in standards development. To date, NAESB, and its predecessor organization the Gas Industry Standards Board, have developed over

4,000 standards, a majority of which have been incorporated by reference in federal regulations by the Federal Energy Regulatory Commission.

National Electrical Manufacturers Association ("NEMA"). NEMA is the association of electrical equipment manufacturers, founded in 1926. NEMA sponsors the development of and publishes over 700 standards relating to electrical products and their use. NEMA's member companies manufacture a diverse set of products focused on end-user markets in the grid, industrial, mobility and built environment sectors, including transformers, inverters, factory automation and control systems, building controls and electrical systems components, lighting systems, electric vehicle motors, and medical diagnostic imaging systems.

ULSE Inc. ("UL"). UL is an independent, not-for-profit standards developer dedicated to promoting safe living and working environments since the founding of its parent Underwriters Laboratories Inc. in 1894. UL's standards provide a critical foundation for the safety system in the United States and around the world, while also promoting innovation and environmental sustainability. With over 120 years of experience and the development of over 1,500 standards, UL advances a safer, more sustainable world.

I. Summary of Argument

Twenty-two years ago, this Court's 9-to-6 *en banc* decision in *Veeck v. Southern Building Code Congress International, Inc.* ("*Veeck*") held that the owner of the copyrights in model codes that were incorporated by reference ("IBR'd") could not enforce its copyrights against an individual who made them available online for free and identified them "as the building code of a city that enacted the model code as law." 293 F.3d 791, 793 (5th Cir. 2002).

The panel decision in this case went far beyond *Veeck*. The panel read that decision to allow a commercial entity to profit from "sell[ing] competing versions" of the plaintiff's "copyrighted works." Op. 2-3. As Appellee argues, recent Supreme Court precedent makes clear that the underpinnings of *Veeck* were wrong, as was the panel decision here. *Amici* write to highlight the significant importance that copyright plays for standards development organizations ("SDOs"), as well as the government entities and the public at large, all of whom rely on the standards SDOs develop, and how the panel's broad interpretation threatens SDOs' ability to do their critical work.

Recently, an insidious practice of pirating SDOs' copyrighted works for profit under the guise of promoting access to IBR'd works has arisen in *Veeck*'s wake. Commercial competitors, including Appellants, attempt to weaponize *Veeck* as a "get out of jail free" card. Some "enterprising" for-profit entities, like UpCodes,

Inc., seek to expand *Veeck's* holding even further to justify their copying of standards that have never been IBR'd but were simply *referenced in* IBR'd standards authored by an unrelated party. *See Am. Soc'y for Testing & Materials v. UpCodes, Inc.*, No. 2:24-cv-01895-AB (E.D. Pa. 2024) (arguing ASTM standards that were never IBR'd lose copyright protection because they are referenced in ICC model codes that were subsequently IBR'd). This expansion of *Veeck* threatens thousands of copyrighted works that have never been IBR'd by any governmental authority.

If accepted, these developments threaten incalculable harm to the SDO ecosystem. Unlike Appellants and other bad actors, SDOs need the revenue from the sale of their copyrighted standards to fund the creation and maintenance of new and existing standards. Governments and citizens are impacted by the strain on SDOs because the loss of privately developed standards will result in either higher taxes to fund governmental standards development or decreased safety innovation if SDOs are unable to create and maintain their standards. Separately, localities may face Takings Clause challenges if incorporation truly results in a stripping of SDO's copyrights. The only beneficiaries of *Veeck* are profiteers like Appellants and UpCodes, while citizens, SDOs, and governments bear the significant costs. Accordingly, *amici* urge the Fifth Circuit to rehear Appellee's appeal *en banc* and revisit the *Veeck* decision.

II. Copyright Protection is Essential to Private Standards Development.

The Constitution expressly declares the Founders' goal of "promot[ing] the Progress of Science," and empowers Congress to further this goal "by securing for limited Times to Authors … the exclusive Right to their respective Writings." U.S. Const. art. 1, § 8, cl. 8.

For over a century, copyright law has fostered the creation of standards by SDOs. The standards development process requires an investment of considerable time and effort. Like other authors, SDOs recoup their investment through the copyrights they hold in those standards. Governments, in turn, IBR the standards, allowing governments to benefit from the private-sector investment and utilize the considerable expertise that the standard-setting process brings to bear. Eliminating copyright protection threatens this system, rewarding profiteers like Appellants at the public's expense.

A. Copyright protection fuels the resource-intensive standards development process.

1. "Standards" are technical works that describe product specifications, provide methods for manufacturing and testing, and offer recommended safety practices. In the United States, standards are principally developed by private SDOs. Development processes vary, but most prioritize transparency and inclusiveness, with development processes designed to seek opinions from a broad spectrum of interested parties. Accordingly, SDOs avoid placing any undue financial barriers to

participation, such as conditioning voting on membership status or allowing a single interest group to exert disproportionate influence on the process.

2. Creating and updating standards is expensive. While thousands of expert and lay volunteers provide input, the SDOs themselves must cover the cost of salary and benefits paid to staff who oversee the process and assist in drafting the standards' text. Some SDOs employ technical experts to assist with standards development. SDOs also pay for meeting space to accommodate hundreds of participants. And they incur significant expenses in publishing various committee reports, collecting public comments, coordinating outreach and education efforts, and managing information technology systems used for standards development. In 2023 alone, the American Society for Testing and Materials ("ASTM") spent more than $26.8 million on technical committee operations, and International Code Council, Inc. ("ICC") spent over $4 million on code development and $1.5 million conducting hearings for its 2024 code-cycle. SDOs incur still more costs in publishing the standards.

SDOs can fund this considerable investment because they generate revenue from selling and licensing their standards to the professionals who use them in their work. Copyright protection is what makes this possible. For example, about 70% ASTM's revenue and 49% of ICC's revenue are derived from the sale of copyrighted standards. Although SDOs fund their work through such revenues, most SDOs make

IBR'd standards available for read-only viewing for free and/or make copies available at minimal cost. Accordingly, none of the cases addressing IBR since *Veeck* has identified a single person who was unable to access the standards at issue.

3. As other Circuits have correctly held, IBR does not nullify copyright protection. *See CCC Info. Servs., Inc. v. Maclean Hunter Mkt. Rpts, Inc.*, 44 F.3d 61 (2d Cir. 1994); *Practice Mgmt. Info. Corp. v. Am. Med. Ass'n*, 121 F.3d 516 (9th Cir. 1997); *see also Am. Soc'y for Testing & Materials v. Public.Resource.Org, Inc.*, 896 F.3d 437, 441 (D.C. Cir. 2018) (declining to decide issue); *Bldg. Officials & Code Adm. v. Code Tech., Inc.*, 628 F.2d 730, 736 (1st Cir. 1980) (same). Executive agencies have similarly recognized that IBR'd material continues to retain its copyright. *See, e.g.*, Incorporation by Reference, 9 Fed. Reg. 66,267 (Nov. 7, 2014) ("recent developments in Federal law, including the *Veeck* decision … have not eliminated the availability of copyright protection for privately developed codes and standards referenced in or incorporated into federal regulations."); Revised OMB Circular No. A-119, 81 FR 4673, 4673-4674 (2016)[2] ("A-119") ("If an agency incorporates by reference material that is copyrighted … [it should] respect[] the copyright owner's interest in protecting its intellectual property."). That consensus

[2] *Available at* https://www.whitehouse.gov/wp-content/uploads/2020/07/revised_circular_a-119_as_of_1_22.pdf.

approach is correct: no provision of the Copyright Act provides for the divestiture of copyright protection on the basis of IBR.[3]

B. The public benefits from privately developed standards through IBR.

Federal, state, and local governments have long benefited from privately developed standards. Rather than creating a new set of statutes or regulations for a particular industry or practice, legislatures and agencies can IBR an existing standard.

IBR'd standards play a critical role in promoting public health and safety. For example, the federal government has incorporated ASTM standards regarding continuous emission monitoring. *See, e.g.*, 40 C.F.R. § 75(A)(App'x. A) (ASTM D129-00: Standard Test Method for Sulfur in Petroleum Products (General Bomb

[3] The *Veeck* majority also ruled in Mr. Veeck's favor based on merger, but its merger analysis incorrectly considered facts arising after the creation of the model code—IBR. Since *Veeck*, the United States and other Circuits have made clear that merger must be "evaluated at the time of creation, not at the time of infringement." *Oracle Am., Inc. v. Google Inc.*, 750 F.3d 1339, 1361 (Fed. Cir. 2014); *accord* U.S. Br. at 12 in *Google, Inc. v. Oracle Am., Inc.*, No. 18-956 (Feb. 19, 2020) ("Petitioner thus asks the Court to perform its merger analysis based on the circumstances that existed when petitioner's copying occurred. But copyrightability is determined as of the time when a work is created."); U.S. Br. at 18 n.2 in *Google, Inc. v. Oracle Am., Inc.*, No. 14-410 (May 26, 2015) (rejecting argument that "the copyrightability of a particular work [c]ould turn on events that substantially postdated the work's creation. That result is at odds with the Copyright Act's basic design, under which copyright protection subsists from the creation of a work through the prescribed statutory term."); *John G. Danielson, Inc. v. Winchester-Conant Props., Inc.*, 322 F.3d 26, 42-43 (1st Cir. 2003) (rejecting post-creation facts to support merger).

Method)). All fifty states have adopted one or more of ICC's model codes at the state or local level. Many of Texas' most populous cities, including Austin, Houston, and Dallas, IBR ICC model codes.

IBR offers enormous public benefits. Governments are spared the cost and administrative burden of assembling the expertise and conducting the processes necessary to produce and update the standards—which in turn spares taxpayers from funding the endeavor. Emily Bremer, *On the Cost of Private Standards in Public Law*, 63 U. Kan. L. Rev. 279, 294 (2015). Moreover, because standards often dictate industry norms, incorporation decreases "the burden of complying with agency regulation." A-119 at 14. The prospect of incorporation encourages private organizations to develop "standards that serve national needs" and promotes "efficiency, economic competition, and trade." *Id.*

The development and use of privately developed standards also allows the government to be nimbler in addressing industry needs and emerging technologies. For example, ASTM worked with industry, government officials, safety advocates, and others to develop standards that increase drone and aircraft safety when drones operate in regulated airspace. The Federal Aviation Administration ("FAA") considers compliance with one of these standards—ASTM F3586-22—as one way for a drone manufacturer to demonstrate compliance with regulations for remote identification systems. 88 Fed. Reg. 77895 (Nov. 14, 2023).

C. Copyright is vital to sustainable private standards development.

1. Copyright protection enables SDOs to recoup the bulk of their investment in the standards development process. Without copyright protection, their revenues would drop precipitously.

Veeck mistakenly suggests "it is difficult to imagine an area of creative endeavor in which the copyright incentive is needed less." *Veeck*, 293 F.3d 791, 806 (5th Cir. 2002) (quoting 1 *Goldstein on Copyright* § 2.5.2, at 2:51). This statement, untethered from any factual basis, was untrue then and remains untrue today. *Amici* SDOs are non-profits. Like most businesses, SDOs make difficult choices about where to invest their limited resources. Losing the revenue historically earned from the sale and licensing of works they create would force them to alter their business practices to the great detriment of their mission. First, SDOs could be forced to reduce the rigor or frequency of their development process. That might mean less public participation, fewer technical experts, and less comprehensive review.

Second, SDOs might be forced to charge or increase fees to those who wish to participate in development. Currently, SDOs receive and respond to input from a broad range of interested parties, including individuals and entities who are unlikely to pay hefty fees to participate in the development process. Recouping SDO's costs through fees would likely reduce participation from public-interest groups, academics, and interested members of the public. Decreased participation would

likely lead to a commensurate increase in the power of regulated industries to influence standard setting. *See* Emily Bremer, *Technical Standards Meet Administrative Law: A Teaching Guide on Incorporation by Reference*, 71 Admin. L. Rev. 315, 329 (2019).

Third, the absence of copyright protection would threaten the breadth of standard-setting work that SDOs now engage in. Like many creative industries that rely on a few copyright "hits" to generate the revenue needed to support the full range of their expressive works, SDOs often rely on a few flagship standards to generate most of their revenues, and the sales of these standards effectively subsidize the development of standards that serve narrower markets and, accordingly, cannot generate enough revenue to cover the cost of their creation. *See id.* at 329-30. For example, ASTM generates 80% of its standards revenue from only about 20% of its standards. Currently, *amici* SDOs do not consider whether a standard will be profitable in deciding whether to develop or update it. If SDOs' revenues decreased substantially, this approach might no longer be sustainable.

Extending *Veeck* to protect commercial entities profiting from SDOs' standards, as condoned by the majority here, would be devastating to the SDO community. In fact, *Veeck* recognized that its finding would have been different if Veeck's use had a competitive/commercial character. *See Veeck*, 293 F.3d at 805

("the result in this case would have been different if Veeck had published [the codes] as model codes" in competition with SBCCI).

2. If SDOs lost copyright protection for their standards, government institutions might attempt to fill the void themselves. But it is highly unlikely that they would possess the capacity to invest the time and resources that SDOs now invest.

The absence of meaningful nationwide standard development by SDOs would also threaten uniformity across jurisdictions. Rather than a single standard, multiple jurisdictions would likely set out to develop their own rules for a particular field—especially for standards that only have relevance locally. The process would be doubly inefficient, duplicating efforts on the front end, and requiring industries to meet multiple jurisdictions' requirements on the back end. And, while national SDOs solicit broad input from leading experts and participants with a wide variety of interests, an individual jurisdiction would be unlikely to attract the same intensity or diversity of views, worsening the resulting regulation it crafted.

III. The Panel Decision, If Not Corrected, Threatens to Expose Governmental Entities to Takings Clause Liability.

The Constitution prohibits governmental takings of private property without just compensation. *See* U.S. Const. Amend. V. And "[c]opyrights are a form of property." *Allen v. Cooper*, 589 U.S. 248, 261 (2020). Congress's copyright legislation proceeds from "the conviction that encouragement of individual effort by

personal gain is the best way to advance public welfare through the talents of authors" and that "[s]acrificial days devoted to such creative activities deserve rewards commensurate with the services rendered." *Mazer v. Stein*, 347 U.S. 201, 219 (1954).

The Second and Ninth Circuits recognize the tension between the Takings Clause and the view that IBR'ing eliminates a vested copyright. In *CCC Information Services v. Maclean Hunter Market Reports, Inc.*, the Second Circuit acknowledged that holding that IBR of privately authored works deprives "the copyright owner of its property would raise very substantial problems under the Takings Clause of the Constitution." 44 F.3d at 74. The Ninth Circuit reached a similar conclusion in *Practice Management Information Corp. v. American Medical Association*, 121 F.3d at 520. Thus, the doctrine of constitutional avoidance counsels against holding that IBR extinguishes copyrights. *See Clinton v. Jones*, 520 U.S. 681, 690 (1997).

Veeck suggested that no taking occurs if the SDO encouraged the government entity to incorporate the work. *See, e.g., Veeck*, 293 F.3d at 803. But governmental authorities frequently rely on privately authored works without the author's knowledge—much less consent. Even where the author consents, it ordinarily is based on the mutual understanding that the author retains the copyright. *E.g.*, Texas State Law Libraries "Building Codes" at https://www.sll.texas.gov/law-legislation/texas/building-codes/. An author's encouragement of a government's

use of its work does not mean the author consents to relinquish its copyright, especially when both the author and government affirm that SDO's copyright survives IBR.

IV. Conclusion

Amici respectfully request the Court grant Appellee's Petition for Rehearing *en banc*.

Dated: August 6, 2024

Respectfully submitted,

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Dated: August 6, 2024

/s/ J. Kevin Fee
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I certify that on August 6, 2024, the foregoing document was served on all counsel of record through the Court's CM/ECF system.

Dated: August 6, 2024

/s/ J. Kevin Fee
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