



Legal Issues Forum

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ANSI LEGAL ISSUES FORUM

Panel II: Copyright Panel

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Presented by

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Acknowledgement

- **I thank Patty Griffin, ANSI VP and General Counsel, for the granting of an oral copyright license to much of the material shown in this PowerPoint and given at the Organizational Member Forum (OMF) meeting on Tuesday, October 10, 2006, since it saved me a lot of time.**
- **How many of you attended the OMF meeting?**

Pop Quiz Time - True/False

- 1. In order to have “copyright” in a standard you must file a registration with the US Copyright office.
- 2. You can grant a license to use copyrighted material “orally.”
- 3. Assignment of copyright or transfer of the ownership of the copyright “must be in writing” signed by copyright owner.
- 4. US Government documents can be protected by copyright in the US Government.
- 5. An “International Copyright” under the Berne Convention protects your copyright globally.
- 6. Mr. Veeck was a nice man, like Mr. Miranda was a nice man.
- 7. If Steve Oksala writes a letter to Patty Griffin and then Patty Griffin sells that letter on E-Bay to Joe Bhatia, Joe now owns the copyright in the letter and can publish Steve’s letter in his new book, “Joe’s E-Bay Purchases for Under a Dollar.”
- 8. The only time SDOs need to worry about copyright issues are in draft standards and published standards.
- 9. There is no such thing as “Essential Copyright” in a standard requiring getting license rights for third-party use of any copyrighted material in that standard.
- 10. Getting a copyright requires a level of creativity, but it is a low standard and the phone company can get a copyright in just a list of names and numbers like the White Pages listing in the phone book.

WHAT IS A COPYRIGHT?

- Copyright is a form of intellectual property protection granted by law for “original works of authorship” that are “fixed in a tangible medium of expression.”
- “Original works of authorship” include literary, dramatic, musical, and artistic works, such as poetry, novels, movies, songs, computer software, *and standards*.
- Copyright does *not* protect facts, ideas, systems, or methods of operation: *it protects the way these things are expressed!*

HOW DOES A COPYRIGHT DIFFER FROM A PATENT?

- ***Copyright*** protects “authorship” while a ***patent*** protects inventions. Ideas and discoveries are not protected by the copyright law, although the way in which they *are expressed* may be.

SO, WHEN IS A STANDARD COPYRIGHTABLE?

- **When it's *original* in the sense that:**
 - It wasn't copied from another's work (unless with permission);
 - Was not in the public domain like government documents; and
 - It shows creativity.

HOW CREATIVE MUST A STANDARD BE?

- **The *creativity* requirement is not that difficult to meet:**
 - A White Pages directory of phone numbers is *not* creative enough;
 - But a list of coding procedures when accompanied by an original way of expressing the relationships among such procedures *is* creative enough.
 - **BUT**, for homework and your next Pop Quiz, read:
 - **Southco v. Kanebridge (Copyright)**. Judge Alito wrote the majority opinion of the en banc panel of the Court of Appeals in Southco v. Kanebridge, a case regarding what is copyrightable subject matter.

HOW CREATIVE MUST A STANDARD BE?

■ Southco v. Kanebridge

- On December 3, 2004, the Court of Appeals issued its divided en banc opinion [40 pages in PDF]. Judge Alito wrote the majority opinion. The issue was what constitutes sufficient creativity and originality to be protected by copyright. Southco claimed copyright in the serial numbers that it assigns to the parts that it manufactures. Southco used four part numbers that not only identify the product, but also convey information about the product. Kanebridge copied Southco's numbering system and numbers.
- This case goes to what rules or mechanical based expression satisfies the originality requirement of the Copyright Act. Ideas, no matter how creative, cannot be protected by copyright. Expression can be protected by copyright. **In this case, Judge Alito and the majority of the 3rd Circuit's en banc panel took the position that all of the creativity came in the creation of the rules (an idea) for assigning numbers. The numbers themselves (expression) are entirely dictated by the rules, and hence involve no creativity, or originality.** Thus, these numbers are **not entitled to protection under copyright law.**

WHEN IS EXPRESSION SIMPLY AN IDEA?

- **You cannot copyright ideas – only the means of expression**
 - You *cannot* copyright the “idea” of reality T.V.
 - You *can* copyright *Fear Factor*

- **SDOs, therefore, *cannot* copyright a common practice or procedure that standards contain**
 - You *cannot* copyright the idea of building a deck
 - You *can* copyright the exact presentation of how to build a deck.

EXAMPLE: ICC v. NFPA

- **SDO A claimed that SDO B infringed A's model building code in that the two codes used similar or identical language in many of their provisions and tables. B said that most of the similarities were uncopyrightable ideas.**
- **The court said the case could go to trial because it was possible that the infringing parts were not just ideas but original works of authorship.**

SAID THE COURT

*True, the **idea** of what a “deck” is exists in the public domain and cannot be copyrighted, but Plaintiff chose to **express this idea** in Section 1602 of the IBC 2000 as “[a]n exterior floor supported on at least two opposing sides by an adjacent structure, and/or posts, piers or other independent supports,” rather than as a “flat-floored roofless area adjoining a building,” as the dictionary does.*

HOW DOES MULTIPLE AUTHORSHIP IMPACT COPYRIGHTS IN STANDARDS?

- **Standards do not have a single author – they have many authors:**
 - All the committee members;
 - All the experts;
 - All the people that have submitted comments during the public comment stage;
 - Some standards are copied from earlier US government documents.

- **Copyright can be shared in “collective works” through:**
 - Assignments or licenses by participants in the standards process;
 - Application of the “work for hire” doctrine.

WHAT HAPPENS WHEN STANDARDS BECOME THE LAW?

Veck v. Southern Building Code Congress International, Inc., 393 F.3d791 (5th Cir. 2002):

- Individual named Veck posted a Texas local building code to his Texas Website;
- The Texas local building code was based on a standard/code developed by SBCCI, but Veck posted the actual document text he had gotten from SBCCI, **NOT** the Texas code itself (the actual law).
- The developer of the code said this violated its copyright;
- Veck countered that because the Southern Building Code was adopted into “law,” it had entered the public domain and SBCCI could no longer claim copyright.

SAID THE COURT

- *When Veeck copied only “the law” ... which he obtained from [the SDO’s] publication and when he reprinted only “the law” of those municipalities, he did not infringe [the SDO’s] copyrights in the model building codes.*
- *We emphasize that in continuing to write and publish model building codes, [the SDO] 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 or distributed as “the law” of those jurisdictions.*

HOW DO SDOs TRY TO PROTECT THEIR COPYRIGHTS?

- **Make sure text is a copyrightable unique expression;**
- **Make sure text is not taken from another copyrighted work without permission;**
- **Obtain assignments or licenses to use text contributed by committee member, expert, or public commenter;**
- **Use Digital Rights Management (DRM) to protect against unauthorized copying;**
 - You may have legal obligations by contracts with others to employ DRM
- **Provide easy access to your standards.**
- **Claim copyright not only in final “published” standards but also “drafts” of your standards.**

HOW DO THEY DEAL WITH GOVERNMENT INCORPORATION?

- **Insist on normative referencing only with no rights to reprinting;**
 - If federal agencies, send them a copy of OMB Circular A-119
- **Enter into written licensing agreements with Government requiring:**
 - publication of only parts of standards (with those parts set off in italics);
 - reference to SDO's copyright;
 - proper citation to standard; and
 - inclusion of statement that standard is published only “by permission” and cannot be reproduced.

HOW DO SDOs MANAGE GETTING COPYRIGHT PERMISSIONS?

- **Some SDOs strive for ASSIGNMENT or TRANSFER of Copyright from members of technical committees.**
- **Many SDOs, ask for non-exclusive, non-revocable, royalty-free Copyright license to use contributed material in SDO's standards and ask for right to extend that license to others like third-party publishers or other SDOs who might base their Standards on that SDO's standards.**
 - **“The document to which this cover statement is attached is submitted to a Formulating Group or sub-element thereof of the [SDO] in accordance with the provisions of Sections 6.4.1-6.4.6 inclusive of the [SDO's] Manual dated March 2005, all of which provisions are hereby incorporated by reference.” “THE BELT”**

HOW DO SDOs MANAGE GETTING COPYRIGHT PERMISSIONS?

- **Once a project is undertaken, a proposed standard begins to take form in the Formulating Group as the result of written submissions, and of open discussion in meetings. Ultimately, the finished document will be copyrighted and published by the [SDO]. Joint standards may be copyrighted by all pertinent Standards Development Organizations involved in development and as determined by agreement among them.**
- **If Joint Standards Documents are being produced, the language may need slight modification to include all Standards Development Organizations who will hold copyright.**
- **The applicable statements mentioned below grant [the SDO] the right to copyright and sell [SDO] Publications, which contain the submission in whole or in part, and to allow publication of excerpts from the [SDO] Publications. The statements also extend these rights to [SDO's] existing policy of allowing and encouraging other regional, national or international standards bodies to adopt [SDO] Publications as their own. (These statements make it clear that a license to use the [SDO's] copyrighted material contained in a [SDO] Publication granted to another region, nation, or SDO does not automatically convey rights to Essential Patents or copyrights required for conformance with the [SDO] Publication.)**

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- When a submission is submitted by the Source(s) to assist the [SDO] Formulating Group, it is proposed to the Committee as a basis for discussion and is not to be construed as a binding proposal on the Source(s). The Source(s) specifically reserves the right to amend or modify the material contained in the submission

HOW DO SDOs MANAGE GETTING COPYRIGHT PERMISSIONS?

Important Notice for Participation

- **Participation in, or attendance at**, any activity of a [SDO] Formulating Group or any sub-element thereof, **constitutes acceptance of and agreement** to be **bound by all** provisions of the [SDO] Manual and **permission** that all communications and statements, oral or written, or other information disclosed or presented, and any translation or derivative thereof, **may without compensation**, and to the **extent such participant or attendee may legally and freely grant such copyright rights**, be **distributed, published, and posted** on [SDO's] Web site, in whole or in part, on a **non-exclusive basis** by [SDO] or [SDO's] licensees or assignees, or as [SDO] directs. Exceptions to the foregoing may be granted or permitted in writing to the Chair of the Formulating Group by [SDO's person in charge of Standards Program] on a case-by-case basis.
“THE SUSPENDERS!”

OTHER COPYRIGHT ISSUES: -- INCLUSION OF COPYRIGHTED SOFTWARE

General Considerations

- In general, [SDO] discourages Formulating Groups from including essential copyrighted Software in a Standard in such a manner that the Standard cannot be practiced without infringing the copyright rights in the absence of a license. It should also be noted that if a different expression of the same ideas as are contained in the copyrighted software is possible so those wishing to do so may practice the Standard without infringing the copyright, then such copyright is not deemed essential and these guidelines do not apply.

Inclusion of Software as a Normative Element (Mandatory, Optional or Alternate)

- The purpose of this Section is to provide guidance in the event a Formulating Group decides to incorporate Software in a Standard under such circumstances that any party seeking to practice the Standard may require a copyright license to do so. In other words, it is intended to cover the situation where the practice of the Standard in the absence of a copyright license would necessarily infringe copyright in the Software. Since, unlike patents, a copyright grants to its owner the right to exclude others from copying a particular expression of an idea, or several ideas, without granting protection to the ideas expressed, it is clear that such rights are substantially different from those involved when a patent is issued. Some Software is protected by patents. These guidelines are not concerned with such cases. These guidelines are in addition to the provisions contained in this [SDO] Manual, which deal with the grant of copyright to [SDO], with certain sublicensing rights, for the purpose of printing, distribution and other reproduction of Standards and other [SDO] Publications.

Assigned HOMEWORK for next Pop Quiz

- Put “Southco” “Berkeley” and “Alito” in Prof. Google and read the opinion.
- Go to <http://www.copyright.gov/fls/fl100.html> and read about “international Copyrights”
- Find out the dates and times for next meetings of ANSI IPRPC, Patent Group, and Copyright Group
 - HINT: See Patty Griffin

Questions/Discussions?

