

# Incorporated Standards and Fair Use: Remaining Uncertainties Set the Stage for Further Litigation

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## I. INTRODUCTION

Industry standards—often created by private non-profit groups called standards developing organizations or “SDOs”—play a foundational role in modern U.S. industry.<sup>1</sup> A single laptop computer depends on over 250 different standards to operate.<sup>2</sup> These standards can govern areas as diverse as “minimum requirements for product safety, criteria for judging quality, content, environmental sustainability and other product features, uniform metrics for measurement and assessment, and requirements for product interoperability.”<sup>3</sup> In doing so, industry standards provide a variety of benefits to consumers, businesses, and regulatory agencies alike by helping maintain product quality, safety, and convenience.

Ordinarily, compliance with the standards developed by SDOs is voluntary,<sup>4</sup> but governments sometimes incorporate them into law by reference, thus giving privately developed standards legal force.<sup>5</sup> Incorporation by reference occurs when a rule promulgated by a government agency references, but does not reprint, other material as containing the requirements for regulatory compliance.<sup>6</sup> This benefits both government regulators, who can adopt efficient industry standards without having to devote public resources to developing their own, as well as businesses, who no longer have to worry about complying with two different standards in the form of industry

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<sup>1</sup> See CONG. RSCH. SERV., RL31951, INNOVATION, INTELLECTUAL PROPERTY, AND INDUSTRY STANDARDS 1 (2003), <https://perma.cc/L83L-SETL>.

<sup>2</sup> See Jorge L. Contreras & Andrew T. Hernacki, *Copyright Termination and Technical Standards*, 43 U. BALT. L. REV. 221, 226 (2014).

<sup>3</sup> *Id.*

<sup>4</sup> See Nuno Pires de Carvalho, *Technical Standards, Intellectual Property, and Competition—A Holistic View*, 47 WASH. U. J.L. & POL’Y 61, 65 (2015).

<sup>5</sup> See Emily S. Bremer, *Technical Standards Meet Administrative Law: A Teaching Guide on Incorporation by Reference*, 71 ADMIN. L. REV. 315, 316 (2019).

<sup>6</sup> See *id.*; see also *Am. Soc’y for Testing & Materials v. Public.Resource.Org, Inc.*, 82 F.4th 1262, 1265 (D.C. Cir. 2023) (“For example, 29 C.F.R. § 1915.507(b)(1) requires shipyard operators to select, maintain, and test portable fire extinguishers in accordance with NFPA 10, which is incorporated by reference in 29 C.F.R. § 1915.5(i)(6).”).

standards and government regulations.<sup>7</sup> In fact, “agency personnel who were interviewed unanimously reported that, without the work of private standard-development organizations (SDOs), agencies would not have the time, resources, or technical expertise to fulfill their regulatory missions.”<sup>8</sup> However, SDOs have copyrights in their technical standards—as the standards are original works of authorship—which SDOs traditionally retain even after incorporation occurs, leading to potentially substantial constitutional issues concerning public access to the law.<sup>9</sup>

On September 12, 2023, the U.S. Court of Appeals for the District of Columbia Circuit held that the noncommercial publication of industry standards developed by private entities and incorporated by reference into law constitutes fair use and thereby precludes liability for copyright infringement in *American Society for Testing & Materials v. Public.Resource.Org, Inc.*<sup>10</sup> This case, which began a decade ago in 2013 and attracted more than fifty amicus briefs,<sup>11</sup> may therefore dramatically impact the standards development industry by reducing the revenue from the sale of standards that SDOs use to fund their efforts.<sup>12</sup> As this Article will outline, the D.C. Circuit’s decision will likely trigger debates in the courts over the relative weight of the four fair-use factors, the ultimate scope of the fair-use defense for incorporated standards, and even the status of copyrights under the Takings Clause.

## II. ANALYSIS

This Section will set out the D.C. Circuit’s opinion, then look ahead to the uncertainties that remain in light of the decision—and the litigation and legislation that may come about as a result.

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<sup>7</sup> See Emily S. Bremer, *Incorporation by Reference in an Open-Government Age*, 36 HARV. J.L. & PUB. POL’Y 131, 140 (2013).

<sup>8</sup> *Id.* at 139.

<sup>9</sup> See KEVIN J. HICKEY, CONG. RSCH. SERV., R47656, COPYRIGHT IN STANDARDS INCORPORATED BY REFERENCE INTO LAW AND THE PRO CODES ACT 2 (2023), <https://perma.cc/G7V7-97GZ>.

<sup>10</sup> See *Public.Resource.Org*, 82 F.4th at 1265.

<sup>11</sup> See Daan G. Erikson, *D.C. Circuit Court of Appeals Holds Non-Commercial Use of Industry Standards Incorporated into Law Is Fair Use*, HUSCH BLACKWELL (Sept. 18, 2023), <https://perma.cc/NMP8-GLDX>; Jake B. Vallen, *Standard Practice: The Public Has Right to Copyrighted Material Incorporated Into Law*, NAT’L L. REV. (Sept. 28, 2023), <https://perma.cc/4AVK-BZ6C>.

<sup>12</sup> See Bremer, *supra* note 7, at 176 (“Many standard-development organizations rely on proceeds from the sale of their publications to fund their standard-development activities.”).

## A. The D.C. Circuit’s Opinion

The tension between the copyright interests of SDOs in their privately developed standards and the goal of public access to the law was the main issue in *American Society for Testing & Materials v. Public.Resource.Org, Inc.* In 2013, three SDOs—the American Society for Testing and Materials (ASTM), the American Society of Heating, Refrigerating, and Air-Conditioning Engineers (ASHRAE), and the National Fire Protection Association (NFPA)—claimed that the non-profit organization Public.Resource.Org committed copyright infringement when it uploaded hundreds of the plaintiffs’ incorporated standards online.<sup>13</sup> After a decade of litigation and two prior remands, the D.C. Circuit at last affirmed the district court’s finding that Public.Resource.Org’s publishing of the materials was a fair use and thus did not lead to liability for copyright infringement.<sup>14</sup>

The court reached this conclusion by examining the four factors that weigh into a fair-use affirmative defense:

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.<sup>15</sup>

The court found that the first factor weighed strongly in favor of fair use, as Public.Resource.Org’s publication was for “nonprofit, educational purposes . . . as opposed to commercial use,”<sup>16</sup> which by itself weighs in favor of fair use.<sup>17</sup> Moreover, the court found that Public.Resource.Org’s use was transformative, as it was publishing the incorporated standards because they were law instead of “seek[ing] to advance science and industry by producing standards reflecting industry or engineering best practices”<sup>18</sup> as the plaintiffs did. In coming to this determination, the court emphasized that copying can be transformative in purpose even if it makes no alterations to the original work.<sup>19</sup> The court also dismissed an argument by the plaintiffs that the use was not transformative:

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<sup>13</sup> See *Public.Resource.Org*, 82 F.4th at 1265–66.

<sup>14</sup> See *id.* at 1265.

<sup>15</sup> See *id.* at 1267 (citing 17 U.S.C. § 107).

<sup>16</sup> *Id.* at 1267.

<sup>17</sup> See *id.*

<sup>18</sup> *Id.* at 1267–68.

<sup>19</sup> See *Public.Resource.Org*, 82 F.4th at 1268.

[The plaintiffs claim that] they make standards available for free in online reading rooms . . . . Yet all but one of these rooms opened after Public Resource began posting incorporated standards. Moreover, the plaintiffs' reading rooms do not provide equivalent or even convenient access to the incorporated standards. Among other things, text is not searchable, cannot be printed or downloaded, and cannot be magnified without becoming blurry. Often, a reader can view only a portion of each page at a time and, upon zooming in, must scroll from right to left to read a single line of text. Public Resource's postings suffer from none of these shortcomings.<sup>20</sup>

For the second fair-use factor, the court found that the strongly factual—and if incorporated, legal—nature of industry standards means that they are by nature located near the edges of copyright protections.<sup>21</sup> As a result, this factor too weighed heavily in favor of fair use.<sup>22</sup>

The court also found that the third fair-use factor weighed strongly in favor of fair use.<sup>23</sup> Incorporation by reference of a whole standard gives the entirety of that standard the force of law.<sup>24</sup> Public.Resource.Org's publication of the entirety of the incorporated standards was therefore considered reasonable in relation to its goal of providing the public with full access to the law.<sup>25</sup> Thus, the wholesale copying did not mitigate against a finding of fair use under the third factor as per usual, but instead strengthened Public.Resource.Org's fair-use defense.<sup>26</sup>

The fourth and final fair-use factor concerned whether or not Public.Resource.Org's copying harmed the market for the plaintiffs' standards. The plaintiffs stressed what the court called "a common-sense inference [that once] users can download an identical copy of an incorporated standard for free, few will pay to buy the standard."<sup>27</sup> However, the court found this assertion unpersuasive absent an actual quantification of past and potential future harms.<sup>28</sup> Moreover, the court pointed to evidence that suggested that the plaintiffs' sales had in fact improved in the years

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<sup>20</sup> *Id.* at 1270.

<sup>21</sup> *See id.*

<sup>22</sup> *See id.*

<sup>23</sup> *See id.* at 1268–69.

<sup>24</sup> *See id.* at 1269.

<sup>25</sup> *See Public.Resource.Org*, 82 F.4th at 1269.

<sup>26</sup> *See id.* at 1268–69.

<sup>27</sup> *Id.* at 1271.

<sup>28</sup> *See id.*

following Public.Resource.Org’s copying, or at least were not noticeably harmed.<sup>29</sup> The court additionally stated that even proven monetary harms suffered by the plaintiffs would need to outweigh the public benefits Public.Resource.Org provided by ensuring convenient and free access to the law.<sup>30</sup> Ultimately, the court found that “the fourth fair-use factor does not significantly tip the balance one way or the other.”<sup>31</sup>

As three of the four fair-use factors weighed heavily in favor of fair use and the final factor was ambivalent, the D.C. Circuit held that Public.Resource.Org’s noncommercial publishing of incorporated standards was fair use,<sup>32</sup> and thus did not create liability for copyright infringement.<sup>33</sup>

## B. Looking Ahead

The D.C. Circuit’s holding in *American Society for Testing & Materials v. Public.Resource.Org, Inc.* presents several questions that courts will likely need to address in subsequent litigation. For one, the court’s finding that the fourth fair-use factor was equivocal under the facts of the case makes it unclear what the outcome would be if the fourth factor weighed strongly against a finding of fair use. In other words, if an SDO could prove that noncommercial publication by another entity would severely harm the market for that SDO’s standards, would this be enough to prevent a finding of fair use?

Such a result seems unlikely if the first three factors still weighed strongly in favor of fair use, but this would mean that SDOs that substantially depend on revenue from sales of their standards would likely be driven out of the market. This would eventually result in economic harm to businesses and consumers alike—as the standards for the industries served by those SDOs would become progressively more out of date without an SDO to continuously revise them. Moreover, these potential losses could even discourage SDOs that don’t substantially depend on revenue from sales of their standards from investing additional resources in the development of new standards or the continuous updating of old ones. SDOs may also seek to avoid losses by lobbying for governments to not incorporate—or even unincorporate—their standards, which would deprive businesses and government regulators of the efficiencies that result from incorporation by reference. Finally, the potential loss of revenue from sales of standards would deter new SDOs (who would not yet be

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<sup>29</sup> *See id.*

<sup>30</sup> *See id.*

<sup>31</sup> *Public.Resource.Org*, 82 F.4th at 1272.

<sup>32</sup> *See id.* at 1272.

<sup>33</sup> *See id.* at 1265.

established enough to “profit though [sic] trainings [or] membership fees”<sup>34</sup>) from emerging in new and developing industries, precisely where industry standards could have the greatest positive economic impact.

An additional ambiguity lies in the precise scope of the fair-use defense under the D.C. Circuit’s holding: when a standard that is incorporated by reference into law itself references another standard that is not so incorporated, would a fair-use defense protect the publishing of this second standard? While the court did say that “Public Resource may not copy unincorporated standards—or unincorporated portions of standards only partially incorporated,”<sup>35</sup> the court also stated:

[B]ecause law is interpreted contextually, even explanatory and background material will aid in understanding and interpreting legal duties—especially when the promulgating agency references it. Courts routinely consult congressional findings, statements of purpose, and other background material enacted by Congress to decipher the meaning of ambiguous statutory provisions . . . . The introductory and background material of an incorporated standard—along with rules addressing how the standard operates in other contexts besides the one directly at issue—may prove similarly important for resolving ambiguities in the portions of standards that set forth the directly binding legal obligations.<sup>36</sup>

Under this reasoning, it seems quite plausible that fair use would protect publishing unincorporated standards that are referenced by an incorporated standard. This in turn would widen the scope of the economic disincentives discussed above.

Ultimately, the most important issue that the opinion raises is likely whether or not incorporation by reference now constitutes a taking sufficient to trigger the protections of the Takings Clause.<sup>37</sup> Surprisingly, it is not clear if copyright is considered “private property” for the purposes of the Takings Clause,<sup>38</sup> and vigorous scholarly debate has produced arguments on both sides of this issue.<sup>39</sup> However, the Supreme Court has held that trade secrets are “private property” protected by the

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<sup>34</sup> Corynne McSherry, *Access to Law Should Be Fully Open: Tell Congress Not to Be Fooled by the Pro Codes Act*, ELECTRONIC FRONTIER FOUNDATION (Oct. 25, 2023), <https://perma.cc/E8XX-CN5>.

<sup>35</sup> *Public.Resource.Org*, 82 F.4th at 1271.

<sup>36</sup> *Id.* at 1270–71.

<sup>37</sup> U.S. CONST. amend. V (“[N]or shall private property be taken for public use, without just compensation.”).

<sup>38</sup> See Hickey, *supra* note 9, at 10–11.

<sup>39</sup> See *id.* at 11 n.123.

Takings Clause and that copyrights are a property interest protected by the Fourteenth Amendment’s Due Process Clause, which together suggest that copyrights likely fall within the scope of the Takings Clause.<sup>40</sup> Even assuming this, however, it remains uncertain whether or not the losses that incorporation by reference causes for copyright holders would be considered a per se taking (mandating compensation) or a regulatory taking (requiring consideration of a balance of factors).<sup>41</sup> Given that the copyright in the standard itself is not taken, but rather the value in holding the copyright is reduced by permitting fair-use publication, it seems that a regulatory taking is the more likely classification, though this would make it more difficult for SDOs to receive compensation.<sup>42</sup>

In addition to potential litigation concerning these questions, Congress may weigh in on some of these considerations by passing the Protecting and Enhancing Public Access to Codes (or “Pro Codes”) Act.<sup>43</sup> Introduced in March of 2023, the Act would provide that:

A standard to which copyright protection subsists under [federal copyright law] at the time of its fixation shall retain such protection, notwithstanding that the standard is incorporated by reference, if the applicable standards development organization, within a reasonable period of time after obtaining actual or constructive notice that the standard has been incorporated by reference, makes all portions of the standard so incorporated publicly accessible online at no monetary cost.<sup>44</sup>

While this text does not explicitly address the fair-use issues under consideration in *American Society for Testing & Materials v. Public.Resource.Org, Inc.*, the Act does protect SDOs’ copyright interests in their incorporated standards so long as they provide the public with free online access, thus making explicit the traditional assumption that a copyright cannot be lost due to incorporation.

No matter how the courts or Congress address the ambiguities surrounding copyrights in incorporated standards, the solutions will have to carefully balance the interests of four different stakeholders: SDOs, businesses, government regulators, and the public. Not allowing public access to incorporated standards goes against the public’s preeminent interest in knowing the law, as the D.C. Circuit correctly noted.<sup>45</sup>

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<sup>40</sup> *See id.* at n.124.

<sup>41</sup> *See id.* at 11.

<sup>42</sup> *See, e.g.,* Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 123–129 (1978).

<sup>43</sup> H.R. 1631, 118th Cong. § 1 (2023).

<sup>44</sup> *Id.* § 3.

<sup>45</sup> *See Public.Resource.Org*, 82 F.4th at 1271.

However, the post-decision regime risks discouraging incorporation by reference, which harms the interests of both businesses, who must now comply with two differing standards, and government regulators, who must expend public resources creating their own standards. At its extreme, the regime could result in standards being updated far less frequently, or for some industries not even being developed at all. This not only goes against the interests of SDOs, businesses, and regulators, but also those of the public, which would suffer from lower product quality and safety. Finding the proper balance between all four stakeholders' interests is therefore crucial to allow public access to the law while also minimizing the negative economic consequences that may ensue from the weakening of copyright protections in incorporated standards.

### III. CONCLUSION

The outcome in *American Society for Testing & Materials v. Public.Resource.Org, Inc.* will likely accelerate the development of the law surrounding this issue. The additional questions raised by the court's holding, as well as the economic and public policy interests at stake, indicate that future litigation (and possibly even legislation) are on the horizon. Perhaps the most important of these issues that will likely see further litigation is whether or not the Takings Clause mandates compensation when privately developed standards are incorporated by reference into law, thereby costing SDOs revenue by allowing free publication of their standards on fair-use grounds. In wrestling with this question, courts will finally have to address whether or not copyrights are considered property that falls under the Takings Clause. The case may therefore ultimately force the resolution of a long-standing ambiguity in takings jurisprudence and copyright law. Regardless of precisely how and when this and other resulting uncertainties are resolved, this area of the law is now one to watch for future developments.