

Am. Soc'y for Testing & Materials v. Public.Resource.Org, Inc.
No. 13-cv-1215 (TSC), 2022 U.S. Dist. LEXIS 60922 (D.D.C. Mar. 31, 2022)

Year	2022
Court	United States District Court for the District of Columbia
Key Facts	<p>Defendant Public.Resource.Org, Inc., a non-profit organization, has a mission to make the “law and other government materials more widely available so that people, businesses, and organizations can easily read and discuss [the] laws and the operations of government.” Plaintiffs consist of three non-profit standards-developing organizations: (1) “ASTM,” which is focused on industry-related technical and safety standards; (2) “NFPA,” which is focused on safety standards; and (3) “ASHRAE,” which is focused on construction-related standards. Plaintiffs own copyrights in various “voluntary consensus standards,” which are developed by numerous subject matter experts under Plaintiffs’ guidance. Plaintiffs sell PDFs and hard copies of their standards and maintain reading rooms for viewing the standards. Defendant purchased hard copies of Plaintiffs’ standards and, without authorization, scanned and made digital, verbatim, copies freely available online to the public. This case concerns 191 ASTM standards, 23 NFPA standards, and 3 ASHRAE standards that Defendant claims have been incorporated by reference into federal law. Plaintiffs brought copyright, trademark, and unfair competition claims; Defendant countersued, seeking declaratory judgment. The parties filed motions for summary judgment. In 2017, the district court found that all factors weighed against fair use. On appeal, the court of appeals reversed in part and remanded the case back to the district court without a detailed discussion of the fair use factors for additional factual development. On remand, both parties again moved for summary judgment.</p>
Issue	Whether it is fair use to make available online for free a verbatim copy of privately developed standards, which have been incorporated by reference into law, without obtaining authorization from the copyright owner.
Holding	<p>As directed by the court of appeals, the district court conducted a four-step fair use analysis for each of the 217 allegations of infringement, concluding that Defendant’s reproduction of 184 standards was fair use, reproduction of 32 standards was not fair use, and that portions of the reproduction of 1 standard was fair use. For all 217 standards, the court found that the fourth factor, the effect of the use upon the potential market for or value of the work, favored fair use. Having found that Defendant’s use was noncommercial, the court determined that Plaintiffs did not provide sufficient evidence to show some meaningful likelihood of future harm exists. The court noted that it was “less deferential” to Plaintiffs’ “conclusory opinions” about market harm given that, during the elapsed time since the alleged infringement and the commencement of the litigation Plaintiffs could have provided “economic data and analysis” supporting their arguments. The court also found that Defendant’s reproductions did not have a “substantially adverse impact on the potential market for the originals.”</p> <p>Regarding the 184 standards that the court found Defendant reproduced fairly, the court determined that 153 were incorporated by reference into law and that the other 31 were identical in text to standards incorporated by reference. The court concluded that the first factor, the purpose and character of the use, generally favored fair use because Defendant did not “stand to profit” from the reproduction and that its purpose was “to inform the public about the law and facilitate public debate.” The court noted that Defendant’s use qualified as one that “furthere[d] the purposes” of fair use, and</p>

	<p>generally provided information “essential for a private entity to comprehend its legal duties,” which weighed “heavily in favor” of fair use. In assessing the second factor, the nature of the copyrighted work, the court considered that “the express text of the law falls plainly outside the realm of copyright protection” and determined that consequently the standards incorporated by reference “are, at best, at the outer edge of ‘copyright’s protective purposes.’” Thus, this factor weighed “heavily in favor” of fair use. The court explained that the 184 standards were incorporated into law “without limitation” such that “the consequence of the incorporation by reference is virtually indistinguishable from a situation in which the standard had been expressly copied into law.” The third factor, the amount and substantiality of the portion used, also favored fair use as the court found that “a greater amount of the standard’s text might be fairly reproduced” because the incorporating regulations did “not specify” whether certain provisions, or the entire text, of the standards were incorporated by reference into law and did not indicate which specific provisions were “relevant for regulatory guidance.” Balancing the factors, the court found fair use and denied Plaintiffs’ motion for summary judgment regarding these 184 standards.</p> <p>Regarding the 32 standards that the court found were not reproduced fairly, the court noted that these standards were not shown to be incorporated by reference into law and “differ[ed] in substantive ways from those incorporated by reference into law.” Discussing the first factor, the court found that this factor weighed slightly against fair use because Defendant’s purpose of “inform[ing] the public about the law” was not “significantly furthered” by publishing standards with substantive differences from the standards that were incorporated by reference. The second factor weighed against fair use because there was no evidence showing that the standards were incorporated into law. And, although the standards were more factual than creative, the court concluded that these works “fall more squarely within the realm of copyright protection” than standards incorporated into law. The third factor weighed against fair use, as Defendant’s purpose of informing the public about the law “could be achieved with a paraphrase or summary.” The court also noted that “[i]ncorporating one standard by reference does not justify posting provisions of a different version that has not been incorporated into law.” Balancing these factors, the court did not find fair use and denied Defendant’s motion for summary judgment regarding these 32 standards.</p> <p>Regarding the 1 standard where the court found that portions of the reproduced standard were used fairly, only the parts incorporated by reference into a regulation were found to be fair use. In its second factor analysis, distinguishing the portions not incorporated into law, the court found that Defendant’s “wholesale reproduction” of the standard was “harder to justify” because only parts of the standard were incorporated into law.</p>
Tags	Education/Scholarship/Research; Textual Work; Used in government proceeding
Outcome	Mixed Result

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