

Am. Soc’y for Testing & Materials v. UpCodes, Inc.
172 F.4th 253 (3d Cir. 2026)

Year	2026
Court	United States Court of Appeals for the Third Circuit
Key Facts	Plaintiff American Society for Testing & Materials (“ASTM”) is a non-profit organization that develops and publishes technical standards for various industries. ASTM funds these activities by selling and licensing its copyrighted standards as individual documents or via subscription. Many of ASTM’s standards have been incorporated by reference, either directly or indirectly, into local, state, or federal laws and regulations. A legislature incorporating an ASTM standard by reference typically “references the standard by name in the text of a law but does not reproduce the standard’s content.” Defendant UpCodes is a “for-profit startup” that operates an online research platform offering searchable databases for building codes and technical standards that have been incorporated into law. UpCodes does not publish unincorporated standards or update the standards on its website unless an updated version is incorporated into law. UpCodes offers free access to any user who creates an account but also has a subscription service with “advanced features” that allows paying customers to bookmark or annotate the documents as well as use artificial intelligence tools. In 2024, UpCodes began publishing ASTM’s standards, including ten standards that include both “mandatory” and “non-mandatory” text. These ten standards were incorporated by reference into the 2018 International Building Code (“IBC”), a copyrighted work created by the International Code Council that has been adopted by several jurisdictions, including Philadelphia, as governing law. ASTM has since updated nine of the ten standards, though UpCodes still displays the 2018 IBC versions. ASTM sued for copyright and trademark infringement and moved for a preliminary injunction. The district court denied ASTM’s motion, concluding that it was unlikely to succeed on the merits because there was a reasonable probability that UpCodes was likely to show that its posting of the standards was fair use. ASTM appealed.
Issue	Whether it constitutes fair use for a for-profit entity to make available online for free verbatim copies of privately authored technical standards that have been incorporated by reference into law.
Holding	The Third Circuit affirmed the denial of a preliminary injunction, concluding that the district court did not abuse its discretion in finding UpCodes likely to succeed in asserting a fair use defense. Analyzing fair use, on the first factor, the purpose and character of the use, the appellate panel agreed with the district court’s finding that although UpCodes republished ASTM’s standards unaltered, its use served a transformative purpose because it “achieves the distinct objective of making the law freely accessible and educating the public on the contents of binding laws.” The panel determined that whereas ASTM creates its standards to improve public health and safety through industry best practices, UpCodes publishes standards that have been incorporated into law to “help members of the public access and comply with the laws that govern their built environment.” Moreover, the court noted “UpCodes has a particularly compelling independent justification for copying [because i]t cannot achieve its purpose of disseminating the law without copying the law itself,” which includes ASTM’s standards. Regarding commerciality, the court concluded it “does little to help either party.” UpCodes being a for-profit entity with a subscription service was relevant to the analysis, but not dispositive, reasoning that users pay for access to the proprietary tools rather than to view ASTM’s works given that any UpCodes account holder can view currently incorporated standards

	for free. The court noted that while UpCodes may receive “tangential benefits” like increased web traffic, such indirect benefits carry less weight than direct profits and “the manner and extent of that benefit remain unclear.” In short, the court found the first factor favored fair use, because any commerciality was outweighed by the transformative purpose. The panel likewise agreed with the district court that the second factor, the nature of the copyrighted work, strongly weighed in favor of fair use because, as technical standards, the works are factual and “once . . . incorporated by reference into law . . . they moved even further to the periphery of copyright’s core protection.” Next, the court agreed with the lower court’s finding that the third factor, the amount and substantiality of the portion used in relation to the copyrighted work, favored fair use. Although UpCodes copied the entirety of the works, the court found it was reasonable to do so because given that the IBC incorporated ASTM’s standards in their entirety, a person would need to read the entire standards to comply with the law. The panel held that copying the “non-mandatory” portions was also reasonable because “such portions still have legal effect and may prove integral to understanding the standard’s material requirements.” Finally, the court agreed with the district court that the fourth factor, the effect upon the potential market for or value of the original work, was “equivocal,” but for different reasons. The court observed that the case presented an “atypical scenario” because while UpCodes’s copies served as effective substitutes for ASTM’s works, broader market harm to technical standards “appear[ed] limited” as it was unclear whether publication of older versions of standards affected ASTM subscriptions or sales of updated standards. Regarding ASTM’s argument that UpCodes’s copying has led to lost revenue, the panel stated “we have no insight into what percentage of revenue derives from sales of standards incorporated into law.” Considering the likely public benefits of the use, the court found a “clear and significant” public benefit in making the law available. Yet, the court acknowledged potential public harm if ASTM suffers substantial economic loss from UpCodes’s copying and that deters ASTM from continuing to develop and publish updated technical standards that ultimately benefit public safety. The court concluded that at this stage of the litigation it lacked sufficient information on market harm and “many important questions remain unanswered.” With the first three factors strongly favoring fair use, and the fourth factor equivocal, the court affirmed the district court’s finding that UpCodes was likely to prevail on the merits of its fair use defense.
Tags	Education/Scholarship/Research; Textual Work; Used in Government Proceeding
Outcome	Preliminary finding; Fair use found

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