

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

AMERICAN SOCIETY FOR TESTING AND MATERIALS, <i>et al.</i> ,	)	
	)	
Plaintiffs,	)	
	)	Case No. 13-cv-1215 (TSC)
v.	)	
	)	
PUBLIC.RESOURCE.ORG, INC.,	)	
	)	
Defendant.	)	
	)	
AMERICAN EDUCATIONAL RESEARCH ASSOCIATION, INC. <i>et al.</i> ,	)	
	)	
Plaintiffs,	)	
	)	Case No. 14-cv-0857 (TSC)
v.	)	
	)	
PUBLIC.RESOURCE.ORG, INC.,	)	
	)	
Defendant.	)	

**MEMORANDUM OPINION**

Before the court are motions and cross-motions for summary judgment in two related cases. Because there is significant factual and legal overlap between the two cases, the court issues this consolidated opinion to be filed in both cases.

Plaintiffs American Society for Testing and Materials (“ASTM”), National Fire Protection Association, Inc. (“NFPA”), and American Society of Heating, Refrigerating, and Air-Conditioning Engineers (“ASHRAE”) (collectively “ASTM Plaintiffs”) brought suit against Defendant Public.Resource.org, Inc. (“Public Resource”) under the Copyright Act (17 U.S.C. § 101 *et seq.*) and the Lanham Act (15 U.S.C. § 1051 *et seq.*), alleging copyright infringement and trademark infringement. Plaintiffs American Educational Research Association, Inc.

(“AERA”), American Psychological Association, Inc. (“APA”), and National Council on Measurement in Education, Inc. (“NCME”) (collectively “AERA Plaintiffs”) also brought copyright infringement claims against Public Resource under the Copyright Act. Plaintiffs<sup>1</sup> in both cases seek permanent injunctions barring Defendant from continued display of their works.

Plaintiffs moved for summary judgment, and Defendant filed cross-motions for summary judgment in both cases. The court held a combined oral argument on September 12, 2016 to consider the motions. Upon consideration of the parties’ filings, the numerous amicus briefs, and the arguments presented at the motions hearing, and for the reasons stated herein, the ASTM Plaintiffs’ motion for summary judgment is GRANTED and Defendant’s cross-motion is DENIED. The AERA Plaintiffs’ motion for summary judgment is GRANTED IN PART AND DENIED IN PART, and Defendant’s cross-motion is DENIED.

## I. FACTUAL BACKGROUND

### A. The Parties

#### 1. ASTM Plaintiffs

ASTM Plaintiffs are not-for-profit organizations that develop private sector codes and standards in order to advance public safety, ensure compatibility across products and services, facilitate training, and spur innovation. (*See* ASTM Pls. Statement of Material Facts (“PSMF”) ¶¶ 9, 13, 14, 86, 87, 129, 130 (ASTM ECF No. 118-2)).<sup>2</sup> These standards include technical works, product specifications, installation methods, methods for manufacturing or testing materials, safety practices, and other best practices or guidelines. (*Id.* ¶ 1). ASTM has

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<sup>1</sup> For simplicity, the court’s use of “Plaintiffs” refers collectively to the ASTM Plaintiffs and AERA Plaintiffs.

<sup>2</sup> All initial citations to the record in this Opinion will include the docket number as “ASTM ECF” or “AERA ECF.”

developed over 12,000 standards that are used in a wide range of fields, including consumer products, iron and steel products, rubber, paints, plastics, textiles, medical services and devices, electronics, construction, energy, water, and petroleum products, and are the combined efforts of over 23,000 technical members, representing producers, users, consumers, government, and academia. (*Id.* ¶¶ 13, 28, 41). NFPA has developed over 300 standards in the areas of fire, electrical, and building safety, with the goal of reducing the risk of death, injury, and property and economic loss due to fire, electrical, and related hazards. (*Id.* ¶¶ 86, 87, 92). NFPA’s most well-known standard is the National Electrical Code, first published in 1897 and most recently in 2014. (*Id.* ¶¶ 93–94). Finally, ASHRAE has published over 100 standards for a variety of construction-related fields, including energy efficiency, indoor air quality, refrigeration, and sustainability. (*Id.* ¶ 130).

## 2. AERA Plaintiffs

AERA Plaintiffs are not-for-profit organizations that collaboratively develop the Standards for Educational and Psychological Testing, including the 1999 edition at issue in this case (“the 1999 Standards”). (AERA PSMF ¶¶ 1, 5, 13 (AERA ECF No. 60-2)). AERA is a national scientific society whose mission is “to advance knowledge about education, to encourage scholarly inquiry related to education, and to promote the use of research to improve education.” (*Id.* ¶ 2). APA is the world’s largest association of psychologists, and its mission is “to advance the creation, communication, and application of psychological knowledge.” (*Id.* ¶ 3). Finally, NCME is a professional organization “for individuals involved in assessment, evaluation, testing, and other aspects of educational measurement.” (*Id.* ¶ 4).

## 3. Public Resource

Defendant Public Resource is a not-for-profit entity devoted to publicly disseminating

legal information. (ASTM DSMF ¶¶ 1–2 (ASTM ECF No. 120-3); AERA DSMF ¶¶ 1–2 (AERA ECF No. 68-3)). Its mission is “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.” (ASTM DSMF ¶ 2; AERA DSMF ¶ 2). Public Resource has posted government-authored materials on its website, including judicial opinions, Internal Revenue Service records, patent filings, and safety regulations. (ASTM DSMF ¶¶ 3–4; AERA DSMF ¶¶ 3–4). It does not charge fees to view or download the materials on its website. (ASTM DSMF ¶ 5; AERA DSMF ¶ 5).

### **B. Incorporation by Reference of Industry Standards**

In the United States, a complex public-private partnership has developed over the last century in which private industry groups or associations, rather than government agencies, typically develop standards, guidelines, and procedures that set the best practices in a particular industry.<sup>3</sup> Applicable standards are used by entities and individuals in order to self-regulate and conform to the best practices of that industry. Professor Peter Strauss has noted that “manufacturing and markets are greatly aided, and consumers offered protection, by the application of uniform industrial standards created independent of law, as means of assuring quality, compatibility, and other highly desired market characteristics.” Peter L. Strauss, *Private Standards Organizations and Public Law*, 22 Wm. & Mary Bill Rts. J. 497, 499 (2013).

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<sup>3</sup> See U.S. Office of Management and Budget, Revised Circular No. A-119, [https://obamawhitehouse.archives.gov/sites/default/files/omb/inforeg/revised\\_circular\\_a-119\\_as\\_of\\_1\\_22.pdf](https://obamawhitehouse.archives.gov/sites/default/files/omb/inforeg/revised_circular_a-119_as_of_1_22.pdf) (“OMB Revised Circular”) at 1 (Jan. 27, 2016) (“The vibrancy and effectiveness of the U.S. standards system in enabling innovation depends on continued private sector leadership and engagement. Our approach—reliance on private sector leadership, supplemented by Federal government contributions to discrete standardization processes as outlined in OMB Circular A-119—remains the primary strategy for government engagement in standards development.”).

Standards are typically developed by standards developing organizations (“SDOs”), like Plaintiffs, who work to develop “voluntary consensus standards,” such as those here. Voluntary consensus standards are the ultimate product of many volunteers and association members from numerous sectors bringing together technical expertise. They are “developed using procedures whose breadth of reach and interactive characteristics resemble governmental rulemaking, with adoption requiring an elaborate process of development, reaching a monitored consensus among those responsible within the SDO.” *Id.* at 501. ASTM Plaintiffs develop their standards using technical committees with representatives from industry, government, consumers, and technical experts. (ASTM PSMF ¶¶ 7, 28, 29, 109, 114, 135). These committees conduct open proceedings, consider comments and suggestions, and provide for appeals, and through subcommittees, draft new standards, which the full committees vote on. (*Id.* ¶¶ 31–37, 109, 136, 139). The AERA Plaintiffs developed the 1999 Standards through a Joint Committee which considered input from the public in a notice-and-comment process. (AERA PSMF ¶¶ 13–16).

Pursuant to 5 U.S.C. § 552, federal agencies may incorporate voluntary consensus standards—as well as, for example, state regulations, government-authored documents, and product service manuals—into federal regulations by reference. *See* Emily S. Bremer, *Incorporation by Reference in an Open-Government Age*, 36 Harv. J.L. & Pub. Pol’y 131, 145–47 (2013) (providing a general overview of the federal government’s incorporation of materials by reference). The federal government’s practice of incorporation by reference of voluntary consensus standards is intended to achieve several goals, including eliminating the cost to the federal government of developing its own standards, encouraging long-term growth for U.S. enterprises, promoting efficiency, competition, and trade, and furthering the reliance upon private sector expertise. *See* OMB Revised Circular, *supra*, at 14.

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