

United States Court of Appeals  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Argued May 14, 2018

Decided July 17, 2018

No. 17-7035

AMERICAN SOCIETY FOR TESTING AND MATERIALS, ET AL.,  
APPELLEES

v.

PUBLIC.RESOURCE.ORG, INC.,  
APPELLANT

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Consolidated with 17-7039

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Appeals from the United States District Court  
for the District of Columbia  
(No. 1:13-cv-01215)  
(No. 1:14-cv-00857)

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*Corynne McSherry* argued the cause for appellant. With her on the briefs were *Andrew P. Bridges*, *Matthew B. Becker*, *Mitchell L. Stoltz*, and *David Halperin*.

*Adina H. Rosenbaum* and *Allison M. Zieve* were on the brief for *amici curiae* Public Citizen, Inc., et al. in support of appellant.

*Charles Duan* was on the brief for *amici curiae* Sixty-Six Library Associations, et al. in support of appellant.

*Catherine R. Gellis* was on the brief for *amici curiae* Members of Congress in support of appellant.

*Samuel R. Bagenstos* was on the brief for *amici curiae* Intellectual Property Professors in support of appellant.

*Phillip R. Malone* and *Jeffrey T. Pearlman* were on the brief for *amicus curiae* Sina Bahram in support of appellant.

*Donald B. Verrilli, Jr.*, argued the cause for appellees. With him on the brief for appellees American Society for Testing and Materials, et al. were *Allyson N. Ho*, *Anne Voigts*, *Joseph R. Wetzel*, *J. Blake Cunningham*, *Kelly M. Klaus*, *Rose L. Ehler*, and *J. Kevin Fee*.

*John I. Stewart Jr.* and *Clifton S. Elgarten* were on the brief for appellees American Educational Research Association, Inc., et al. *Jeffrey S. Bucholtz* and *Michael F. Clayton* entered appearances.

*V. Robert Denham, Jr.*, was on the brief for *amicus curiae* American Insurance Association in support of appellees.

*Bonnie Y. Hochman Rothell* was on the brief for *amici curiae* American National Standards Institute, Inc., and Ten Standards Organizations in support of appellees.

*Anthony J. Dreyer* was on the brief for *amicus curiae* International Trademark Association in support of appellees.

*Jack R. Bierig* was on the brief for *amici curiae* American Medical Association, et al. in support of appellees.

Before: TATEL, WILKINS, and KATSAS, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* TATEL.

Concurring opinion filed by *Circuit Judge* KATSAS.

TATEL, *Circuit Judge*: Across a diverse array of commercial and industrial endeavors, from paving roads to building the Internet of Things, private organizations have developed written standards to resolve technical problems, ensure compatibility across products, and promote public safety. These technical works, which authoring organizations copyright upon publication, are typically distributed as voluntary guidelines for self-regulation. Federal, state, and local governments, however, have incorporated by reference thousands of these standards into law. The question in this case is whether private organizations whose standards have been incorporated by reference can invoke copyright and trademark law to prevent the unauthorized copying and distribution of their works. Answering yes, the district court granted partial summary judgment in favor of the private organizations that brought this suit and issued injunctions prohibiting all unauthorized reproduction of their works. In doing so, the court held that, notwithstanding serious constitutional concerns, copyright persists in incorporated standards and that the Copyright Act's "fair use" defense does not permit wholesale copying in such situations. The court also concluded that the use of the private organizations' trademarks ran afoul of the Lanham Act and did not satisfy the judicial "nominative fair use" exception. Because the district court erred in its application of both fair use doctrines, we reverse and remand, leaving for another day the far thornier question of whether standards retain their copyright after they are incorporated by reference into law.

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**I.**

Ever operated a tank barge and wondered what power source you would need for your cargo tank's liquid overflow protection system to comply with the law? Probably not. But if you did, you might consider thumbing through the Code of Federal Regulations, where you would discover that one option is to hook up to an off-barge facility, provided that your system has "a 120-volt, 20-ampere explosion-proof plug that meets . . . NFPA 70, Articles 406.9 and 501-145." 46 C.F.R. § 39.2009(a)(1)(iii)(B). Dig deeper and you would learn that NFPA 70 is not some obscure rule or regulation or agency guidance document but is instead another name for the "National Electrical Code," a multi-chapter technical standard prepared by the National Fire Protection Association (the eponymous "NFPA"), detailing best practices for "electrical installations." Complaint ¶ 66, *American Society for Testing & Materials v. Public.Resource.Org, Inc. (ASTM)*, No. 1:13-cv-01215 (D.D.C. Aug. 6, 2013) ("ASTM Compl."), Dkt. No. 1, Joint Appendix (J.A.) 86. Parts of NFPA 70 have been incorporated into the statutes or regulations of at least forty-seven states and, as we have just seen, the federal government. American Insurance Ass'n Amicus Br. 5.

NFPA 70 is one of thousands of standards developed by so-called Standards Developing Organizations (SDOs), six of whom are plaintiffs-appellees here. The typical SDO operates through volunteer committees that focus on narrow technical issues. Comprised of industry representatives, academics, technical experts, and government employees, these committees meet regularly to debate best practices in their areas of expertise and to issue new technical standards or update existing ones. Once a committee decides on a standard, the SDO publishes the standard and secures a copyright registration.

Technical standards are as diverse as they are many, addressing everything from product specifications and installation methods to testing protocols and safety guidelines. Take, for instance, the more than 12,000 standards developed by the American Society for Testing and Materials (ASTM), a plaintiff-appellee here. Its standards establish best practices and specifications in a wide variety of fields, including consumer products, textiles, medical services, electronics, construction, aviation, and petroleum products. ASTM Compl. ¶ 48, J.A. 81. Three other plaintiffs-appellees, the American Educational Research Association, Inc., the American Psychological Association, Inc., and the National Council on Measurement in Education, Inc. (collectively, “AERA”), have collaborated to jointly produce a single volume, “Standards for Educational and Psychological Testing,” a collection of standards that aims “to promote the sound and ethical use of tests and to provide a basis for evaluating the quality of testing practices.” AERA, *Standards for Educational and Psychological Testing* 1 (1999), J.A. 2245.

Industry compliance with technical standards developed by private organizations is entirely voluntary. In some cases, however, federal, state, or local governments have incorporated technical standards into law. In fact, federal law encourages precisely this practice. *See* National Technology Transfer and Advancement Act of 1995, Pub. L. No. 104-113, § 12, 110 Stat. 775, 782 (1996) (codified as amended at 15 U.S.C. § 272(b)(3)) (authorizing the National Institute of Standards and Technology “to coordinate the use by Federal agencies of private sector standards, emphasizing where possible the use of standards developed by private, consensus organizations”). As the Office of Management and Budget has explained, incorporating private standards “eliminate[s] the cost to the Federal government of developing its own standards” and “further[s] the reliance upon private sector expertise to supply

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