

Am. Soc'y for Testing & Materials v. Public.Resource.Org, Inc.
82 F.4th 1262 (D.C. Cir. 2023)

Year	2023
Court	United States Court of Appeals for the District of Columbia
Key Facts	Plaintiffs are three non-profit standards-developing organizations: ASTM, NFPA, and ASHRAE. Plaintiffs own copyrights in various voluntary standards developed by subject matter experts under Plaintiffs' guidance to embody industry best practices. Plaintiffs sell copies of their standards, maintain reading rooms for viewing the standards, and provide digital access through subscription services. Defendant Public.Resource.Org, Inc., a non-profit organization, shares legal materials freely online, including unauthorized scans of Plaintiffs' standards. In 2013, Plaintiffs sued for copyright infringement. The district court concluded Defendant's conduct did not qualify as fair use and granted summary judgment for Plaintiffs. The court of appeals subsequently reversed in part and remanded the case for further consideration of fair use and additional factual development. On remand, the district court conducted a standard-by-standard analysis of each work and found that posting standards incorporated by reference into law was fair use while posting standards not so incorporated was infringement. Plaintiffs appealed.
Issue	Whether it constitutes fair use to freely make available online a verbatim copy of privately developed standards that have been incorporated by reference into law, without obtaining authorization from the copyright owner.
Holding	The court held that non-commercial dissemination of technical standards incorporated by reference into law was fair use. The court concluded that the first factor, the purpose and character of the use, favored fair use because Defendant's use of the standards was for nonprofit, educational purposes. In addition, the panel determined Defendants' use to be transformative, reasoning that there is a fundamental distinction between Defendant's purpose in "republishing . . . standards . . . to provide the public with a free and comprehensive repository of law" and Plaintiffs' purpose "to advance science and industry by producing standards reflecting industry or engineering best practices." The second factor, the nature of the copyrighted work, strongly favored fair use because incorporated standards are factual and have legal force, and thus are further from the core of intended copyright protection. Likewise, the third factor, the amount and substantiality of the portion used in relation to the copyrighted work as a whole, strongly supported fair use because reproduction of incorporated standards that have the force of law was reasonable in relation to Defendant's purpose of providing free access to the law. The court further addressed Plaintiffs' "two principal objections" concerning the analysis of the first three fair use factors. First, Plaintiffs argued that copying should be limited to "portions of standards essential to comprehending legal duties," which they contend does not include "standards prescribing how compliance may be assessed, also known as reference procedures" or other material that does not directly prescribe legal compliance such as "introductory or background material" or "material addressing contexts other than the focus of the incorporating regulation." The court rejected this argument, explaining that "all material that has been validly incorporated by reference carries the force of law" and that "explanatory and background material will aid in understanding and interpreting legal duties." Second, Plaintiffs argued that because they make the standards freely available to read online, Defendant's use could not be transformative. The court rejected this argument because (1) other than one online reading room, Plaintiffs largely had not made standards available online until after Defendant had posted them; and (2) Plaintiffs' access is not equivalent to Defendant's as Plaintiffs' versions are

	not text-searchable, cannot be printed or downloaded, and cannot be magnified. Turning to the fourth factor, the effect of the use upon the potential market for or value of the copyrighted work, the court determined it was equivocal. The court noted that while “[c]ommon sense suggests that free online access . . . would tamp down the demand for [Plaintiffs’] works,” because Plaintiffs more frequently update their standards than regulators, “builders, engineers, and other regular consumers” may prefer to purchase Plaintiffs’ up-to-date versions. In addition, the court observed that Plaintiffs produced no quantifiable evidence of past or future market harm. Moreover, the court concluded that “free and easy access to the law” provided a substantial public benefit. With three factors strongly favoring fair use and one factor equivocal, the court affirmed the district court’s fair use finding.
Tags	Education/Scholarship/Research; Textual Work; Used in government proceeding
Outcome	Fair use found

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