

**Int'l Code Council, Inc. v. UpCodes, Inc.**  
**17 Civ. 6261 (VM), 2020 U.S. Dist. LEXIS 92324 (S.D.N.Y. May 27, 2020)**

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| Year      | 2020                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 |
| Court     | United States District Court for the Southern District of New York                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   |
| Key Facts | Plaintiff, International Code Council, Inc. (“ICC”), develops a variety of model codes for use in the construction industry. ICC provides free, read-only access to its codes and licenses its codes and derivative works, such as supplemental training materials and services. Upcodes, Inc., founded by Garrett and Scott Reynolds (collectively “Defendants”), is a start-up company that aims to provide convenient online access to materials used in the architecture, engineering and construction industries, including ICC’s codes. At various times, Defendants posted on its website free verbatim copies of ICC codes that were adopted into law by state or city governments (“I-Codes as Adopted”), and offered paying customers Defendants also make available to paying subscribers versions of ICC codes that depict in redline sections of the model codes that were not adopted into law (“I-Code Redlines”). ICC moved for summary judgment on copyright infringement of forty I-Codes; and Defendants moved for partial summary judgment on their counterclaim for a declaration of noninfringement, asserting the I-Codes are in the public domain as well as defenses of merger, fair use, and collateral estoppel.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          |
| Issue     | Whether it is a fair use to (1) post online free verbatim copies of privately-developed codes that were adopted into law and (2) post online for paying customers copies of those codes that include text that has not been adopted into law.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        |
| Holding   | Having concluded that the I-Codes as Adopted are likely in the public domain, the court proceeded with a fair use analysis of both the I-Code Redlines and I-Codes as Adopted. The court found the posting of the I-Codes as Adopted was a fair use. The first factor, the purpose and character of the use, weighed heavily in favor of fair use because Defendants’ posting served a transformative purpose of “disseminating enacted laws for public awareness.” The second factor, the nature of the work, also weighed in favor of fair use because the adopted codes are “clearly factual” and posted “in their capacity as laws.” The third factor, the amount and substantiality of the work used, did not weigh against fair use because, although the copying was substantial, “accurate copying” entails posting “ten-tenths of the law.” The fourth factor, the effect of the use upon the potential market for or value of the work, could weigh against fair use; however, there was no clear evidence of market harm and such harm was unlikely to be determinative “given the combined weight of the other three factors.” In contrast, disputes regarding material issues of fact prevented the court from deciding whether the posting of I-Code Redlines was a fair use. The first factor did not favor either party. Defendants argued that the I-Code Redlines help educate the public; however, the court found the posting of these materials was “debatable” because the ability to view unadopted text was of questionable value and offering these materials “only to paying customers” could “offset any transformative use.” The second factor weighed in favor of fair use “given the Redlines’ predominantly factual quality.” The third factor likely weighed against fair use because Defendants’ purpose could have been accomplished without including the unadopted text. Finally, there were factual disputes regarding the fourth factor market effect. The parties’ cross-motions were denied. |
| Tags      | Education/Scholarship/Research; Textual Work; Used in government proceeding                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          |
| Outcome   | Mixed result                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                         |

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