Who Owns "the Law"? The Effect on Copyrights When Privately-Authored Works Are Adopted or Enacted by Reference into Law

Katie M. Colendich

Follow this and additional works at: https://digitalcommons.law.uw.edu/wlr

Part of the Intellectual Property Law Commons

Recommended Citation
Available at: https://digitalcommons.law.uw.edu/wlr/vol78/iss2/7

This Notes and Comments is brought to you for free and open access by the Law Reviews and Journals at UW Law Digital Commons. It has been accepted for inclusion in Washington Law Review by an authorized editor of UW Law Digital Commons. For more information, please contact cnyberg@uw.edu.
WHO OWNS “THE LAW”? THE EFFECT ON COPYRIGHTS WHEN PRIVATELY-AUTHORED WORKS ARE ADOPTED OR ENACTED BY REFERENCE INTO LAW

Katie M. Colendich

Abstract: “The law,” including judicial opinions and statutes, is not copyrightable because neither individuals nor organizations own the law. This longstanding principle is supported by the public’s due process right to access the law. The United States Supreme Court has never determined the status of a private organization’s copyright on model codes or standards when a legislature adopts those materials into law. Federal courts have taken several different approaches to resolving this issue; however, their decisions are in direct conflict with each other. The Second and Ninth Circuits permit private authors to retain copyrights of materials subsequently enacted into law, while the Fifth Circuit does not. This Comment argues that the Fifth Circuit’s decision in Veeck v. Southern Building Code Congress International, Inc., created an unsupported exception to copyright law when it held that private organizations whose works are passed into law cannot retain their copyrights. Further, this Comment argues that the U.S. Supreme Court should resolve the current circuit split in favor of enforcing copyright to ensure that privately authored materials’ copyrights remain enforceable across the nation.

Land Management Group (LMG), a coalition of storeowners, business managers, and contractors, spent the past two years developing a comprehensive collection of sample zoning regulations for city growth and development.\(^1\) LMG promoted its plan in several states, leading two counties in Louisiana to adopt the zoning regulations in full, and three counties in Arizona to adopt the regulations by reference. LMG is a non-profit organization whose annual budget derives from sales of its sample regulations.

Norman Ferland, an entrepreneur in Louisiana, inquired into local zoning ordinances before drawing plans for a new restaurant. Ferland had difficulty locating the zoning regulations at the county office so he bought an electronic copy directly from LMG for $95.00. His copy included a software licensing agreement and a copyright notice stating that users may not copy or distribute the zoning regulations. Ferland copied the regulations onto his website without crediting LMG as the author. If LMG challenged Ferland’s actions as a violation of its

\(^1\) Hypothetical based on Veeck v. Southern Building Code Congress International, Inc., 293 F.3d 791 (5th Cir. 2002) (en banc).
copyright, federal courts in Ferland’s state would likely find that LMG’s copyright became invalid when the county adopted its code into law.\(^2\)

Meanwhile, Susan Rowe, the owner of a chain of spas in Arizona, wished to open two new locations. Like Ferland, she checked into the zoning ordinances of several counties but had difficulty obtaining copies, so she purchased electronic versions directly from LMG as well. Rowe also posted the zoning regulations on a website. If LMG challenged Rowe’s actions, federal courts in Rowe’s state would likely uphold LMG’s copyright and find that Rowe’s actions constitute copyright infringement.\(^3\)

The unequal treatment of the same copyright in these two situations illustrates the problem that can arise when courts across the country disagree about the status of a privately held copyright once the copyrighted material is incorporated into law. The executive branch and Congress have supported government use of model codes written by private organizations.\(^4\) However, the U.S. Supreme Court has not provided guidance on how lower courts should treat copyrights on such privately authored material. The U.S. Court of Appeals for the Second and Ninth Circuits have addressed the issue and agreed that privately authored materials retain their copyright even after a government adopts them, whether in full or by reference, into the law.\(^5\) However, the Fifth Circuit took a different approach in *Veeck v. Southern Building Code Congress International, Inc.*,\(^6\) when it held that privately authored works automatically lose their copyrights when they are incorporated into law.\(^7\)

This Comment argues that the Fifth Circuit’s *Veeck* decision created an unsupported exception to copyright law. The *Veeck* court misconstrued persuasive authority from other circuits and ignored strong support for maintaining the copyright protection of privately authored model codes and standards. This Comment argues that the U.S. Supreme Court should reject this new exception by reversing the Fifth Circuit’s

---

2. See *Veeck*, 293 F.3d at 791.
5. Practice Mgmt., 121 F.3d at 520; CCC Info. Servs., Inc. v. Maclean Hunter Mkt. Reports, Inc., 44 F.3d 61, 74 (2d Cir. 1994).
6. 293 F.3d 791 (5th Cir. 2002).
7. The merger doctrine was also part of the *Veeck* court’s rationale in holding that privately authored materials lose their copyright. *Veeck*, 293 F.3d at 800–02. This issue is beyond the scope of this Comment.
decision in *Veeck* to ensure that copyrights of privately authored laws receive uniform, nationwide protection.⁸

Part I of this Comment introduces the historical development of copyright law and its application to judicial opinions and statutes. Part II traces the recent development and subsequent application of the federal courts of appeals tests for assessing whether a private author’s copyright becomes invalid when a government enacts the author’s work into law. Part III argues that the Fifth Circuit’s *Veeck* decision created an unsupported exception to copyright law, contradicting decisions from the Second and Ninth Circuits as well as policies of the legislative and executive branches. Further, Part III suggests that instead of adopting a per se rule, the Fifth Circuit should have followed the Second Circuit’s lead by using the doctrine of fair use to balance the private authors’ copyright interests with the public’s due process right to access the law. Finally, Part IV concludes by recommending that the U.S. Supreme Court should resolve this circuit split by reversing the *Veeck* decision and ensure that copyrights of privately authored laws receive uniform, nationwide protection.

I. HISTORICALLY, “THE LAW” WAS TREATED AS PART OF THE PUBLIC DOMAIN, BUT MODERN DEVELOPMENTS HAVE CHALLENGED THIS APPROACH

Copyright law has origins in both the Constitution and federal statutes.⁹ Until recently, it was well settled that no author could copyright the text of “the law” in public domain.¹⁰ This principle, however, has become less clear as government agencies have adopted the work of private authors and incorporated it into law. It is unclear whether private authors retain their copyright in materials once they are adopted into law.¹¹ Further, it is unclear whether state and local governments are also

---

⁸ The implications of holding that privately authored material is protected under copyright law are unclear. It is unclear whether a private organization such as the Southern Building Code Congress International (SBCCI) could seek royalties from a state legislative body. Therefore, it is beyond the scope of this Comment.


¹⁰ See, e.g., Banks v. Manchester, 128 U.S. 244, 253 (1888); Wheaton v. Peters, 33 U.S. (8 Pet.) 591, 668 (1834).

bound by the Copyright Act.\textsuperscript{12} It is possible that courts will rely on the modern "fair use" doctrine to resolve these types of copyright disputes.

\textbf{A. Copyright Protections Originate in the Constitution and Title 17 of the United States Code}

The current American copyright system flows directly from the Copyright Clause of the U.S. Constitution.\textsuperscript{13} The Copyright Clause gives Congress the authority "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writing and Discoveries."\textsuperscript{14} Since the ratification of the Constitution, Congress has protected the rights of copyright holders by enacting various statutory frameworks.\textsuperscript{15} Each statutory enactment has attempted to protect the core purpose of copyright law—"to secure a fair return for an author's creative labor"—because stimulating artistic creativity ultimately benefits the public with the production of valuable work.\textsuperscript{16} The U.S. Supreme Court has stated "[a] copyright, like a patent, is 'at once the equivalent given by the public for benefits bestowed by... the skill of individuals, and the incentive to further efforts for the same important objectives.'"\textsuperscript{17} Creating incentives for artists, writers, and scientists has remained a dominant theme of copyright law even though subsequent legislation has altered the scope of the protection.\textsuperscript{18}

Copyright is a matter of federal law governed by Congressional statutes passed under the authority of the Copyright Clause.\textsuperscript{19} Under the

\begin{enumerate}
\item See County of Suffolk v. First Am. Real Estate Solutions, 261 F.3d 179, 187 (2d Cir. 2001).
\item See, e.g., qad, Inc. v. ALN Assoc. Inc., 974 F.2d 834, 835 (7th Cir. 1992) (declaring that basis for American copyright system is Article I, section 8, clause 8 of the U.S. Constitution); accord Morely Music Co. v. Cafe Cont'l Inc., 777 F. Supp. 1579, 1582 (S.D. Fla. 1991); see also Karl Fenning, \textit{The Origin of the Patent and Copyright Clause of the Constitution}, 17 GEO. L.J. 109, 109 (1929) (stating that United States copyright laws are based on Article I, section 8, clause 8 even though clause does not employ the word "copyright").
\item U.S. Const. art. I, § 8, cl. 8.
\item Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 460 (1984) ("This Nation's initial copyright statute was passed by the First Congress.").
\item Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975); accord Fox Film Corp. v. Doyal, 286 U.S. 123, 127 (1932) (The "sole interest of the United States and the primary object in conferring the monopoly lie in the general benefits derived by the public from the labors of authors").
\item Fox, 286 U.S. at 127-28 (citing Kendall v. Winsor, 62 U.S. (21 How.) 322, 327-28 (1858); Grant v. Raymond, 31 U.S. (6 Pet.) 218, 241-42 (1832)).
\item See Sony Corp., 464 U.S. at 429.
\end{enumerate}
Copyrights of Model Building Codes

Copyright Act of 1976, copyright protection exists in “original works of authorship”\textsuperscript{20} and commences upon creation\textsuperscript{21}—that is, the moment the work is “fixed in tangible medium of expression.”\textsuperscript{22} Examples of copyrightable works covered by federal law include: (1) literature, (2) music, (3) drama, (4) architecture, (5) pantomimes and choreography, (6) pictorial, graphic, and sculptural works, (7) motion pictures and other audiovisual works, and (8) sound recordings.\textsuperscript{23} However, copyright protection does not extend to broad concepts such as ideas, processes, methods of operation, or discoveries.\textsuperscript{24}

The duration of copyrights for works that are now being created extends for the life of the author plus seventy years.\textsuperscript{25} If the work is pseudonymous, anonymous or made for hire, copyright extends for ninety-five years from its first publication, or 120 years from its creation, whichever expires first.\textsuperscript{26} Thereafter, the work enters the public domain and may be freely used.\textsuperscript{27}

B. Historically, Copyright Has Not Extended to Publishers of “The Law”

Certain categories of works created by government organizations, such as statutes, ordinances, regulations, and judicial opinions, have traditionally entered the public domain from the moment of their creation.\textsuperscript{28} Until recently, it has been a well-settled premise that no author can copyright the text of “the law” in the public domain. This principle developed over 150 years ago through common law decisions that prohibited authors from holding private copyrights in federal court decisions,\textsuperscript{29} state court decisions,\textsuperscript{30} and statutes.\textsuperscript{31}

\begin{footnotes}
\item 20. \textit{Id.} § 102(a).
\item 21. \textit{Id.} § 302(a).
\item 22. \textit{Id.} § 301(a).
\item 23. \textit{Id.} § 102(a)(1)–(8).
\item 24. \textit{Id.} § 102(b); see also Trotter Hardy, \textit{The Copyrightability of New Works of Authorship: "XML Schemas" as an Example}, 38 HOUS. L. REV. 855, 864 (2001).
\item 27. \textit{Id.}
\item 28. See Banks \textit{v.} Manchester, 128 U.S. 244, 253 (1888).
\item 30. See, e.g., Banks, 128 U.S. at 253–54; Callaghan \textit{v.} Myers, 128 U.S. 617, 648–49 (1888).
\end{footnotes}
The U.S. Supreme Court issued its first decision regarding copyright law in *Wheaton v. Peters* in 1834. The Court held unanimously in *Wheaton* that court reporters could not hold copyrights in the judicial opinions they compiled. Henry Wheaton, the reporter of Supreme Court cases from 1816 to 1827, claimed that the defendant had infringed his copyright in twelve volumes of Supreme Court reports when the defendant published an identical version of the decisions. The Court disagreed, holding that "no reporter has or can have any copyright in the written opinions delivered by this Court; and... the judges thereof cannot confer on any reporter any such right."

The Court’s opinion in *Wheaton* marked the beginning of a policy to prevent authors from using copyright law to create monopolies on information. The Court reasoned that Wheaton obtained the opinions "not for his own sake, but for the benefit and use of the public; not for his own exclusive property, but for the free and unrestrained use of the citizens of the United States." Accordingly, the *Wheaton* Court laid the foundation for the Court’s "bedrock policy... that the public should have maximum access to the law."

The Court reaffirmed this policy in 1888, when it further defined what constitutes "the law" for copyright purposes in *Banks v. Manchester*. In *Banks*, the Court denied a copyright to a court reporter who printed the opinions of the Ohio Supreme Court. The U.S. Supreme Court held that the official reporter could not obtain a copyright for the syllabus, the statement of the case, or the opinion of the court because these elements were the work of the judges. The *Banks* court first reasoned that the

---


32. 33 U.S. (8 Pet.) 591 (1834).


35. Id. at 593–94.

36. Id. at 668.

37. See Patterson & Joyce, *supra* note 33, at 732.


40. 128 U.S. 244 (1888).

41. Id. at 254.

42. Id. at 253–54.
public owns judicial opinions because taxpayers pay the judges' salaries. Relying on a public policy rationale, the court next held that "[t]he whole work done by judges constitutes the authentic exposition and interpretation of the law, which[,] binding every citizen, is free for publication to all, whether it is a declaration of unwritten law, or an interpretation of a constitution or a statute." The Banks Court relied on an earlier decision of the Massachusetts Supreme Judicial Court, holding that justice requires all people to have free access to judicial opinions, and that it would be against public policy to prevent access to statutes or opinions of the court. Since Banks and Wheaton, judicial opinions have been considered in the public domain and may not be copyrighted.

The same year as Banks, the U.S. Supreme Court also decided a case that expanded the scope of copyright protection to an author's original additions to "the law." In Callaghan v. Myers, the defendant Callaghan & Co. owned the copyright on the first thirty-one volumes of the Illinois Supreme Court Reports, while the plaintiff E.B. Myers owned the copyright on volumes thirty-two through forty-six. Callaghan attempted to buy the rights to the subsequent volumes, but refused to pay Myers' asking price. Callaghan then reprinted Myers' volumes without permission, including title pages, table of cases, arrangement and pagination, statements of the case, syllabi, and headnotes. The Court held that Callaghan infringed Myers' copyright. Although the facts of Callaghan and Wheaton were similar, the Court distinguished Callaghan by recognizing Myers' copyright in his original additions to the court opinions, including the arrangement of the cases, headnotes, tables, and pagination of the volumes. The Court noted the difference between "the law" and the additions made by the reporter using his own ingenuity.

43. Id. at 253.
44. Id. (citing Nash v. Lathrop, 142 Mass. 29, 35 (1886)).
45. Nash, 142 Mass. at 35.
46. 128 U.S. 617 (1888).
47. Id. at 619–20.
48. Id. at 622.
49. Id.
50. See id. at 667.
51. Id. at 649–50.
52. Id. at 651. Callaghan's emphasis on the creative work done by a case reporter was reinforced in 1998, when the Second Circuit denied copyright protection to a commercial publisher of cases because its additions to cases were not sufficiently original or creative enough to merit copyright protection. See Matthew Bender & Co. v. West Publ'g Co., 158 F.3d 674, 688 (2d Cir. 1998).
In addition to judicial opinions, legislative acts have also historically been in the public domain and a statute's publishers could not hold copyright in their legal works. As early as 1886, in the case of *Davidson v. Wheelock*, a federal district court for the District of Minnesota held that a compiler of state statutes "could obtain no copyright for the publication of the laws only; neither could the legislature confer any such exclusive privilege upon him." A few years later in *Howell v. Miller*, the Sixth Circuit clarified that although an individual cannot own a copyright in statutory material produced by the government, the individual's copyright in editorial enhancements should be protected. Although the U.S. Supreme Court has never addressed this distinction in the context of statutory materials, the *Howell* court's rule parallels the *Callaghan* Court's protection of editorial enhancements to judicial opinions.

C. Copyright Act of 1976

The Copyright Act of 1976 eliminated a historical dual system of copyright protection, in which unpublished works received protection under state law and published works were protected under federal law. Section 301(a) of the 1976 Act eliminated state law copyright for all works that are the subject of federal preemption. In addition, Congress codified in section 201 the general principle that a copyright in a work "vests initially in the author or authors of the work." However, under section 105, there is no copyright protection for works of the U.S. Government. Thus, it is unclear whether the current Copyright Act would protect a private author whose copyrighted material was enacted

53. 27 F. 61 (D. Minn. 1886).
55. 91 F. 129 (6th Cir. 1898).
56. Id. at 138.
57. See infra Part I.B.
58. See RICHARD WINCOR & IRVING MANDELL, COPYRIGHT, PATENTS & TRADEMARKS: THE PROTECTION OF INTELLECTUAL AND INDUSTRIAL PROPERTY 26 (1980) (explaining that the 1976 Copyright Act basically abolished dual system in favor of "[a] single system of statutory protection for all copyrightable works").
59. See 1 Nimmer, supra note 11, at § 2.02.
61. See id. § 105.
into law. The legislative branch and executive branch have recently considered this issue and explicitly suggested that private authors whose materials are incorporated into law should retain their copyright.

Under section 201, a copyright in a work vests initially in the author of the work. Legislative history indicates that Congress enacted this section to reaffirm the basic principle that an author's copyright is secure and cannot be taken away by involuntary transfer. Subsection 201(e) makes clear that the government cannot force authors to transfer copyright involuntarily from their owners. At least one commentator has explained that Congress did not intend to allow the government to circumvent section 201 by drafting contract provisions that allow an independent contractor to obtain a copyright in work done for the government, and then require, as a term of the contract, that the contractor transfer the copyright to the United States Government.

Although copyright generally vests in the author of the work, section 105 of the Copyright Act specifically prohibits any person from owning copyright in any work of the U.S. Government. Section 105 provides "Copyright protection under this title is not available for any work of the United States Government..." All official records and documents of the U.S. Government are in the public domain and therefore cannot be copyrighted. One commentator has explained that "any work" includes all works that would be eligible for copyright if they were not "prepared by an officer or employee of the United States Government as a part of that person's official duties." Under this reading of the statute, government officials or employees could secure a copyright in works

64. See 17 U.S.C. § 201.
65. See H.R. REP. NO. 94-1476, at 60.
66. See 17 U.S.C. § 201(e). The only exception to this provision is when the government’s ownership rights are determined during Title 11 bankruptcy proceedings. 17 U.S.C. § 201(e).
67. I NIMMER, supra note 11, at § 5.13.
68. 17 U.S.C. § 105 Two exceptions to the prohibition of government copyright exist. First, the Postmaster General may secure copyright in Post Office publications. See H.R. REP. NO. 94-1476, at 60. Second, the Secretary of Commerce may secure copyright on behalf of the United States in “standard reference data” compiled by or for the Department of Commerce. 15 U.S.C. § 290(e) (2000).
70. 1 NIMMER, supra note 11, at § 5.13.
71. Id.
written outside of their official government duties.\textsuperscript{72} When passing the Act, the House specifically noted in a Committee Report that the government’s publication, or other use of privately authored work would not affect the work’s pre-existing copyright protection.\textsuperscript{73} Thus, in accordance with section 201, the legislative history of section 105 suggests that private authors retain their copyright when their material is incorporated into law.\textsuperscript{74} Nothing in the Copyright Act specifically mandates termination of a private author’s copyright protection.

Section 105 also does not explicitly prohibit private authors from holding copyright in their works when commissioned by the government or prepared under a government grant.\textsuperscript{75} In a Committee Report, the House specifically noted that private parties and institutions are not precluded from holding copyright in works produced under federal government grants and contracts.\textsuperscript{76} Thus, the legislative history of section 105 also suggests that Congress did not deem a contractor to be an “officer or employee of the United States Government.”\textsuperscript{77} Consequently, in such a situation the government agency involved could determine by contract on a case-by-case basis whether to allow an independent contractor to secure copyrights in works prepared using government funds.\textsuperscript{78}

Both the legislative branch and executive branch have recently considered copyright ownership in government works. In the National Technology Transfer and Advancement Act of 1995 (NTTA),\textsuperscript{79} Congress directed “[f]ederal agencies and departments [to] use technical standards that are developed or adopted by voluntary consensus standards bodies.”\textsuperscript{80} Congress encouraged federal agencies to use these
organizations to support their policy objectives and activities, unless that use would be inconsistent with applicable law or impractical. 81

Executive guidelines also contemplated that privately authored material would find its way into government works. The Office of Management and Budget (OMB) responded to NTTA by issuing Circular A-119. 82 This circular contained instructions on the use of privately developed, consensus based standards, requiring that “if a voluntary standard is used and published in an agency document, your agency must observe and protect the rights of the copyright holder and any other similar obligations.” 83 The OMB offered several reasons why government agencies should use the works of standards-setting organizations, including decreasing the cost to the government, providing incentives and opportunities to establish standards that serve national needs, and furthering the policy of reliance on the private sector to support government needs. 84 Thus, under Circular A-119, federal agencies are required to observe and protect the copyrights of private authors.


The Copyright Act of 1976 does not address whether state governments can hold a copyright in “the law.” The Act prohibits the federal government from obtaining copyright protection in its work, 85 but does not explicitly forbid state and local governments from doing the same. 86 Although the U.S. Supreme Court has not addressed this issue, the Second Circuit and the First Circuit have interpreted the Act’s limitation on copyright ownership to extend only to the federal government. 87 These courts have interpreted the plain language of section 105 as specifying a limitation solely on the federal government and not

81. Id.
83. Id. at 8555.
84. Id. at 8554–55.
86. Id. at § 105.
87. County of Suffolk v. First Am. Real Estate Solutions, 261 F.3d 179, 187 (2d Cir. 2001); Bldg. Officials Code Adm’rs v. Code Tech., Inc., 628 F.2d 730, 735–36 (1st Cir. 1980) (“Works of state governments are therefore left available for copyright protection by the state or the individual author ...”).
the state government.\textsuperscript{88} The Second Circuit noted that because the Copyright Act specifies a limitation on ownership against the federal government, it implies that states are not similarly restricted.\textsuperscript{89}

A federal district court for the Northern District of Georgia, however, reached a different result in \textit{Georgia v. Harrison Co.}\textsuperscript{90} The State of Georgia sued a publisher of the state code for copyright infringement, arguing that state governments can hold a copyright in state law even if private citizens can not.\textsuperscript{91} The plaintiff reasoned that if Congress had intended to preclude state copyright protection, Congress would have explicitly provided for such a limitation in the Copyright Act.\textsuperscript{92} Despite the lack of an express prohibition by Congress, the district court followed the traditional principle that no entity may hold a copyright in judicial opinions or statutes.\textsuperscript{93} Further, the court held that the rationale for prohibiting copyright in judicial opinions and statutes—that the public should have open access to the law free from copyright barriers—applies equally whether the party seeking the copyright is an individual or the state itself.\textsuperscript{94}

Thus, historically “the law” in the form of judicial opinions and statutes has been in the public domain and has not been amenable to copyright. Congress has not only attempted to adapt to changes in technology and society by amending the Copyright Act, but also has responded to changes in the way government business is conducted, by addressing the frequent government use of documents authored by private contractors.

\textbf{E. Fair Use Defense}

In 1976, Congress made major alterations to copyright law in an effort to stay current with new technological innovations.\textsuperscript{95} Congress codified

\begin{thebibliography}{99}
\bibitem{88} See Suffolk, 261 F.3d at 187; Bldg. Officials Code Adm’rs, 628 F.2d at 735–36.
\bibitem{89} See Suffolk, 261 F.3d at 187.
\bibitem{91} Id. at 114.
\bibitem{92} Id.
\bibitem{93} Id.
\bibitem{94} Id.
\end{thebibliography}
the doctrine of “fair use,” providing an affirmative defense for certain “fair uses” of copyrighted material, including reproduction. Codified at 17 U.S.C. § 107, the “fair use” doctrine allows copyrighted works to be reproduced for purposes of criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, and research. The doctrine “creates a limited privilege in those other than the owner of a copyright to use the copyrighted material in a reasonable manner without the owner’s consent.”

Congress codified four factors in the Copyright Act of 1976 that courts should consider when a user of a copyrighted work raises the fair use exception as an affirmative defense. First, a court should examine the purpose and character of the use, such as whether the use is for commercial or nonprofit, educational purposes. Second, a court should consider the nature of the copyrighted work. The more creative a work, the more it should be protected from copying; the more informational or functional the work, the broader the scope of the fair use defense should be. Third, a court should assess the amount and substantiality of the portion of the copyrighted work used. Finally, a court should consider the economic impact of the use, such as the effect on the potential market for the work or the value of the work. In addition, courts have considered a party’s motive for using the copyrighted material.

The U.S. Supreme Court has noted that the fair use doctrine gives courts the flexibility to avoid rigid application of the copyright statute when it would stifle the creativity it was designed to promote. The fair use doctrine balances copyright owners’ exclusive rights to what they create with the Constitution’s goal of promoting learning.
Commentators have stated that fair use is a well-established, equitable doctrine that fine tunes the scope of copyright on a case-by-case basis. It is not a blanket provision that affords or denies copyright protection to particular information. Instead, the doctrine is an exception to the bundle of property rights afforded to the copyright holder. The fair use doctrine allows courts to balance authors’ and inventors’ interests in the use of their writings and discoveries against society’s competing interest in the “free flow of ideas, information, and commerce . . . .”

In sum, Congress codified many fundamental copyright concepts in the Copyright Act of 1976. The Act created a comprehensive framework that incorporated the doctrine of fair use as well as prohibiting owning copyrights in government works. The well established principle that no author can copyright the text of “the law” has been challenged by recent circuit court decisions determining whether private authors retain their copyright in materials when they are incorporated into law.

II. THE FEDERAL CIRCUIT COURTS HAVE RECENTLY DIVIDED OVER THE VALIDITY OF A PRIVATELY HELD COPYRIGHT ON “THE LAW”

While it is well established that individuals and the federal government cannot claim copyright in federal judicial opinions and statutes, the U.S. Supreme Court has never determined whether this prohibition also applies to state statutes and regulations. One specific context in which this issue arises is when a private organization, acting in an independent capacity, authors a model code or regulation. The authoring entity owns copyright in original material it creates. However, courts are divided as to whether the copyright terminates when the work is subsequently adopted in whole or by reference into the official statutes and regulations of a state government. Circuit courts in

108. 4 NIMMER, supra note 11, at § 13.05.
114. See 1 NIMMER, supra note 11, at § 5.12.
the Second and Ninth Circuits have held that private organizations retain their copyrights in these works.\textsuperscript{115} However the Fifth Circuit recently split from this reasoning in \textit{Veeck v. Southern Building Code International, Inc.}, and held that private code-authoring organizations automatically lose their copyright when a local government enacts their works into law.\textsuperscript{116}

\textbf{A. The Second and Ninth Circuits Have Enforced the Copyrights of Privately Authored Materials Adopted Into Law}

In recent years, two Circuit Courts have reached the conclusion that private organizations retain their copyright in model codes and regulations adopted into law. The Second Circuit first reached this decision in \textit{CCC Information Services, Inc. v. Maclean Hunter Market Reports, Inc.}\textsuperscript{117} and later extended it to a different set of facts.\textsuperscript{118} Following the Second Circuit’s example, the Ninth Circuit has also held that private authors do not lose copyright protections in their work when a government adopts the work into law.\textsuperscript{119}

\textbf{1. CCC Information Services, Inc. v. Maclean Hunter Market Reports and Subsequent Case Law}

The Second Circuit first addressed the issue of whether private authors retain copyright in materials adopted into law in \textit{CCC}. Maclean, the publisher of the “Red Book” (a compilation of used car value estimates), sued for copyright infringement when CCC Information Services, Inc. (CCC), a competitor, copied Maclean’s valuations into a computer database for sale to its customers.\textsuperscript{120} CCC combined Maclean’s Red Book valuations for each vehicle with the vehicle’s valuation in the National Automobile Dealer’s Association Official Used Car Guide (the Bluebook).\textsuperscript{121} Certain state laws incorporate the Red Book and Bluebook

\textsuperscript{115} Practice Mgmt. Info. Corp. v. Am. Med. Ass’n, 121 F.3d 516, 520 (9th Cir. 1997); CCC Info. Servs., Inc. v. Maclean Hunter Mkt. Reports, Inc., 44 F.3d 61, 74 (2d Cir. 1994).
\textsuperscript{117} 44 F.3d 61 (2d Cir. 1994).
\textsuperscript{118} County of Suffolk, N.Y. v. First Am. Real Estate Solutions, 261 F.3d 179, 195 (2d Cir. 2001).
\textsuperscript{119} Practice Mgmt., 121 F.3d at 520.
\textsuperscript{120} CCC, 44 F.3d at 63–64.
\textsuperscript{121} Id. at 64.
averages as a minimum for specific insurance payments. Thus, the issue arose whether Maclean retained its copyright in the Red Book.

A federal district court granted summary judgment for CCC because it reasoned that the Red Book fell into the public domain when states incorporated it into official regulations as a factor in the average calculation. However, a three-judge panel of the Second Circuit reversed and granted summary judgment for Maclean, upholding his copyright in the Red Book. The Second Circuit stressed the need "to balance the conflicts and contradictions that pervade the law of copyright," requiring courts to make policy determinations when conflicts exist, to determine which claim will prevail. The court considered the originality and creativity of the material in the Red Book and held that it was sufficient to warrant copyright protection.

The Second Circuit reasoned that extending copyright protection to the original elements of the work imposed little cost or disadvantage to society. The court refused to hold that a state’s reference to a copyrighted work was the same as a judicial opinion. Further, the court looked beyond the outcome of the CCC case to the possible consequences of its ruling, and expressed concern that a failure to extend copyright protection in CCC would compel undesired results in other cases. For example, if a private individual’s copyright in a work terminated upon its adoption by a state government, authors could conceivably lose their rights when a state-mandated curriculum assigned their books as school reading, because their books would be incorporated by reference into a state law. As a result, the Second Circuit held that a private individual’s copyright endures even after a state government adopts the author’s material by reference into law.

The Second Circuit recently addressed a similar issue in County of Suffolk, New York v. First American Real Estate Solutions. Suffolk

122. Id.
123. Id. at 63.
124. Id.
125. Id. at 74.
126. Id. at 68.
127. Id. at 66–68.
128. Id. at 66.
129. Id. at 74.
130. Id.
131. Id.
132. Id.
133. 261 F.3d 179 (2d Cir. 2001).
County, through its Real Property Tax Service Agency (RPTSA), created a series of original maps of tax districts and special district boundaries (tax maps) with an index system. Suffolk County registered its copyright claims for these tax maps and affixed a notice of copyright in the introduction to each tax map album. Suffolk County filed for an injunction against First American Real Estate Solutions when it published paper and CD-ROM copies of the tax maps, and placed them in the market without first obtaining a license or the county's consent.

First American defended its actions by arguing that Suffolk County was barred from asserting its copyright under New York's Freedom of Information Law (FOIL). FOIL requires state agencies to make all government records available for public inspection and copying. Thus, First American argued that FOIL prevented Suffolk County from receiving copyright protection for its tax maps. The Second Circuit disagreed, holding that the county could own a copyright under the Copyright Act, and that FOIL did not destroy the county's copyright. The Second Circuit reached this conclusion after examining the Banks decision and the U.S. Supreme Court's rationale for holding that judges may not own copyrights in their own opinions. The Second Circuit noted two main considerations behind Banks: first, whether the work's creator needs an economic incentive to create or has a proprietary interest in the work; and second, whether the public must access the work to have notice of the law. Applying these considerations to the facts before it, the court remanded the case for a determination of the first factor whether RPTSA required any incentive to create the maps. In regards to the second factor, the Second Circuit noted that public access existed because there was no allegation that any individual could not access the law or tax maps. Further, the court rejected First American's argument that due process required the tax maps to be public.

134. Id. at 184.
135. Id.
136. Id.
137. Id. at 183.
138. N.Y. PUB. OFF. LAW § 84 (McKinney 1988).
139. Suffolk, 261 F.3d at 183.
140. Id. at 195.
141. Id. at 193–94.
142. Id. at 194.
143. Id. at 195.
144. Id.

605
domain from the moment of inception, because it found no evidence that the maps were not freely available to the public.\footnote{Id.}

2. Practice Management Information Corp. v. American Medical Ass'n

The Ninth Circuit addressed this issue in \textit{Practice Management Information Corp. v. American Medical Ass’n},\footnote{Id. at 518–19.} by applying the analysis and reasoning of the Second Circuit's decision in \textit{CCC}. The Ninth Circuit held that the American Medical Association’s (AMA) copyright of its medical procedure code, the Physician’s Current Procedural Terminology (CPT), was still valid after a federal agency adopted the code for use on Medicaid claim forms.\footnote{Id.} Despite Practice Management’s argument that the CPT entered the public domain when the federal Health Care Financing Agency Administration required its use, the court decided that the AMA did not lose its right to enforce its copyright simply because the government chose to use its coding system.\footnote{Id. at 518–19.} The Ninth Circuit reasoned that if the code entered the public domain through governmentally mandated use, a large number of copyrights on privately authored codes, standards, and reference works would be subject to invalidation.\footnote{Id. at 518.}

The Ninth Circuit distinguished \textit{Practice Management} from the \textit{Banks} decision in which the U.S. Supreme Court held that judicial opinions are not subject to copyright.\footnote{Id. at 518.} According to the Ninth Circuit, the \textit{Banks} court reasoned that the public owns judicial opinions because taxpayers pay the judges’ salaries, and the due process principle of free access requires the law to be in the public domain.\footnote{Id. at 518.} The Ninth Circuit reasoned that neither of these considerations required the invalidation of the AMA’s copyright.\footnote{Id. at 518–19.} First, the court noted that the copyright system was not critical in the \textit{Banks} decision because judges had no proprietary interest over their opinions.\footnote{Id.} In contrast, the AMA’s copyright in CPT

\footnotesize
\begin{itemize}
\item 145. Id.
\item 146. 121 F.3d 516 (9th Cir. 1997).
\item 147. Id. at 518, 520.
\item 148. Id.
\item 149. Id. at 519.
\item 150. Id. at 518.
\item 151. Id. at 518–19.
\item 152. Id.
\item 153 Id.
\end{itemize}
was critical to the AMA because the AMA authored, owned, and maintained the CPT and claimed copyright in it.\textsuperscript{154} Second, enforcing AMA’s copyright would not jeopardize the due process requirement to maintain free access to the law because the court found no evidence that anyone wishing to use the CPT had difficulty obtaining access to it.\textsuperscript{155} Thus, the Ninth Circuit joined the Second Circuit in holding that private individuals or organizations do not lose their copyright to work they have created once it is adopted into law.

\section*{B. The First and Fifth Circuits Have Declined to Enforce Copyrights of Privately Authored Materials Adopted Into Law}

Not all courts confronted with this issue have enforced the copyrights of privately authored materials that are adopted or incorporated by reference into law.\textsuperscript{156} Although the Second and Ninth Circuits have been willing to extend copyright protection to such privately authored works, the First Circuit has strongly suggested that copyright protection does not exist.\textsuperscript{157} Further, the Fifth Circuit recently refused to enforce such a copyright, declaring that the copyright automatically terminated when the privately authored materials were adopted into law.\textsuperscript{158}

\subsection*{1. The BOCA Ruling Left Open Whether to Enforce Copyrights of Privately Authored Materials Adopted Into Law}

In 1980, the First Circuit declined to rule on the validity of a non-profit group’s copyright in its building code when the State of Massachusetts subsequently adopted the code into law.\textsuperscript{159} In \textit{Building Officials & Code Administrators v. Code Technology, Inc.}, the plaintiff Building Officials and Code Administration (BOCA), a code writing organization, claimed copyright protection for its BOCA Basic Building Code.\textsuperscript{160} This private organization had developed and published the code

\begin{thebibliography}{9}
\bibitem{154} Id.
\bibitem{155} Id.
\bibitem{157} Practice Mgmt., 121 F.3d at 520; CCC Info. Servs., Inc. v. Maclean Hunter Mkt. Reports, Inc., 44 F.3d 61, 74 (2d Cir. 1994); Bldg. Officials & Code Adm’rs v. Code Tech., Inc., 628 F.2d 730, 736 (1st Cir. 1980).
\bibitem{158} Veeck, 293 F.3d at 806.
\bibitem{159} Bldg. Officials & Code Adm’rs, 628 F.2d at 736.
\bibitem{160} Id. at 731.
\end{thebibliography}
BOCA’s procedure was to secure a copyright in the building code and then encourage government authorities to use its licensing program and adopt the code by reference, in whole, or in part. The defendant Code Technology, Inc. (CT), a private publisher, later published and distributed its own edition of the building code in almost identical form to BOCA’s version. BOCA sought an injunction to prevent CT from publishing its own edition of the building code and selling it to the public. CT argued that because the state adopted BOCA’s code as a set of administrative regulations having the force of law, BOCA lost its copyright protection and the code entered the public domain. CT relied on the Banks and Wheaton decisions as support and analogized the “citizen authorship” of building codes to the work of judges when writing opinions.

Although the First Circuit did not reach the merits of the BOCA case, it vacated the district court’s preliminary injunction, which had prevented defendant CT from publishing and selling its own edition of the building code. The court reasoned that BOCA had not demonstrated a sufficient probability that it would succeed on the merits, and therefore declined to grant an injunction. Because the court addressed the issue only for purposes of preliminary relief, it did not specifically decide whether BOCA’s authorship of the building code entitled it to copyright protection. But, the court strongly suggested that copyright protection did not exist, noting that it was “far from persuaded” that BOCA could enforce its copyright in this way. The First Circuit reasoned that the public “owns the law,” not because the public pays the salaries of the authors of the work, as the Wheaton and Banks Courts had reasoned, but

161. Id. at 732.
162. Id.
163. Id.
164. Id. at 731.
165. Id. at 733.
166. Id. at 733–34.
167. Id. at 736.
168. Id.
169. Id. at 734. In a subsequent lower court opinion in the First Circuit, a federal district court in the District of Massachusetts stated that the First Circuit has never definitively decided whether privately authored works, once adopted by government bodies into law, enter the public domain and lose their status as copyrightable works. See John G. Danielson, Inc. v. Winchester-Conan Props., Inc., 186 F. Supp. 2d 1, 22 (D. Mass. 2002).
170 Id. at 735.
rather because "the citizens are the authors of the law."\textsuperscript{171} The First Circuit deemed citizens the metaphorical "authors" of the law because the law derives its authority from the consent of the public as expressed through the democratic process.\textsuperscript{172} In addition, the court reasoned that the concept of due process guarantees citizens access to the law, to provide notice of their legal obligations.\textsuperscript{173}

At the same time, the BOCA court recognized the important public function of code drafting organizations\textsuperscript{174} and left open whether the copyright exception for judicial opinions created in the 1800s should be applied to technical codes.\textsuperscript{175} The court highlighted the federal and state trend towards adoption of privately authored works.\textsuperscript{176} Thus, even though the First Circuit was "far from persuaded" that BOCA could enforce its copyright, the court ultimately refused to determine whether a private organization could retain its copyright in material adopted into law.\textsuperscript{177}

2. The Fifth Circuit's Veeck Decision Terminated Copyright Protection of Privately Authored Works Enacted into Law

Most recently, an en banc panel of the Fifth Circuit addressed private authors' copyright interests in state laws in \textit{Veeck v. Southern Building Code Congress International, Inc.} Peter Veeck controlled and operated RegionalWeb, a non-commercial website that posted various information of local interest to North Texas residents.\textsuperscript{178} Veeck posted the local building codes of two small towns in North Texas.\textsuperscript{179} These codes incorporated part of the Standard Building Code written by the Southern Building Code Congress International (SBCCI), a non-profit organization with approximately 14,500 members drawn from governmental bodies, the construction industry, business and trade associations, and college departments.\textsuperscript{180} Unlike the BOCA case, SBCCI did not execute a licensing agreement when the county adopted its

\begin{itemize}
\item \textsuperscript{171} \textit{Bldg. Officials \\ & Code Adm'rs}, 628 F.2d at 735.
\item \textsuperscript{172} Id. at 734.
\item \textsuperscript{173} Id.
\item \textsuperscript{174} Id. at 736.
\item \textsuperscript{175} Id.
\item \textsuperscript{176} Id.
\item \textsuperscript{177} Id. at 735.
\item \textsuperscript{178} \textit{Veeck v. S. Bldg. Code Cong. Int'l, Inc.}, 293 F.3d 791, 793 (5th Cir. 2002) (en banc).
\item \textsuperscript{179} Id. at 735.
\item \textsuperscript{180} Id.
\end{itemize}
codes. Yet after the codes passed into law, SBCCI continued to assert its copyright. Veeck bought the model building codes directly from SBCCI for $72.00 and received a copy of the codes on a computer disk. Posting the codes onto his website, he disregarded the licensing agreement and copyright notice that prohibited copying and distribution. Consequently, SBCCI demanded that Veeck stop infringing on its copyright, so Veeck sought a declaratory judgment that he was not violating the Copyright Act.

A federal district court for the Eastern District of Texas decided in SBCCI's favor. The court recognized that SBCCI held a copyright in the model codes, and rejected Veeck's argument that adopting the codes into law stripped SBCCI of its copyrights. The court also rejected Veeck's argument that protecting SBCCI's copyright was a violation of the public's due process right of "[f]ree access to the law," because the court found that the codes were readily available to citizens and that Veeck himself was never denied access. The court rejected Veeck's alleged defense of fair use, reasoning that Veeck's use of SBCCI's material had an adverse impact on the market for SBCCI's copyrighted works, and that such a harm was sufficient to overcome the public's "fair use" interests in the material. Therefore, the district court sustained SBCCI's infringement claim, awarded statutory damages, and imposed a permanent injunction against Veeck. On appeal, a three judge panel of the Fifth Circuit affirmed the district court's decision.

A year later, the Fifth Circuit granted rehearing en banc and reversed the district court decision in a divided nine to six opinion. The en banc panel held that Veeck's copying was not infringement because the codes were in the public domain. First, the majority relied on the concept of "citizen authorship" of the law, which had been previously discussed by

181. Id. at 794.
182. Id.
183. Id. at 793.
184. See id. at 794.
185. Id.
187. Id. at 891.
188. Id. at 889.
189. Id. at 891.
190. Id. at 892–93.
193. Id. at 799–800.
the First Circuit in BOCA.\textsuperscript{194} The Fifth Circuit reasoned that the process of lawmaking demands and incorporates contributions by "the people,"\textsuperscript{195} that lawmakers represent the public will, and that the public is the final "author" of the law.\textsuperscript{196} The Veeck majority also relied on the Banks decision, which it said focused on the "metaphorical concept of citizen authorship" together with the need for citizens to have free access.\textsuperscript{197} By characterizing Banks in this way, the Fifth Circuit disagreed with the Second and Ninth Circuit's emphasis on the "incentives" for authorship.\textsuperscript{198}

The Fifth Circuit also distinguished Veeck from Practice Management and CCC by differentiating between codes and standards.\textsuperscript{199} According to the majority, standards incorporated by reference, such as those at issue in Practice Management and CCC, do not become law simply because a law refers to them.\textsuperscript{200} In contrast, the majority found that SBCCI created its model codes for the sole purpose of having them enacted into law.\textsuperscript{201} However, the dissenting judges argued that the distinction between codes and standards is meaningless because they in effect operate in the same way.\textsuperscript{202} Judge Weiner reasoned in his dissent that the main difference in the terms is that federal law uses the term "standards" and state law uses the term "codes," but that both terms can be used to refer to agency regulations.\textsuperscript{203}

Thus, the Circuit Courts are divided over whether to enforce private authors' copyrights when a government enacts their works by reference or adoption into law. The Second and Ninth Circuits favor protection of the private copyright holder's proprietary rights.\textsuperscript{204} However, the Fifth Circuit rejected the right of a private organization to retain its copyright and instead emphasized the public's authorship of the law and its need to access the law.\textsuperscript{205}

\begin{itemize}
\item \textsuperscript{194} Id. at 799.
\item \textsuperscript{195} Id.
\item \textsuperscript{196} Id.
\item \textsuperscript{197} Id.
\item \textsuperscript{198} See id. at 796–97.
\item \textsuperscript{199} Id. at 804–05.
\item \textsuperscript{200} Id. at 805.
\item \textsuperscript{201} Id.
\item \textsuperscript{202} Id. at 815 n.20 (Weiner, J., dissenting).
\item \textsuperscript{203} Id.
\item \textsuperscript{204} Practice Mgmt. Info. Corp. v. Am. Med. Ass'n, 121 F.3d 516, 520 (9th Cir. 1997); CCC Info. Servs., Inc. v. Maclean Hunter Mkt. Reports, Inc., 44 F.3d 61, 74 (2d Cir. 1994).
\item \textsuperscript{205} Veeck, 293 F.3d at 796.
\end{itemize}
III. PRIVATE AUTHORS WHOSE CODES ARE ENACTED BY REFERENCE OR ADOPTION INTO LAW SHOULD RETAIN THEIR COPYRIGHTS

The Fifth Circuit's decision in *Veeck* created a split among the federal Circuit Courts when it held that private organizations automatically lose their copyright in works that are later enacted by reference into law. Both federal legislative and executive branch statements and public policy concerns run counter to such a rule. Moreover, the Second and Ninth Circuits' decisions indicate that such a rule undermines copyright law. In *Veeck*, the Fifth Circuit erroneously relied on cases that are substantively distinguishable and in the process created an unwarranted exception to copyright law.

A. The *Veeck* Decision Conflicts with the Second and Ninth Circuits

The Fifth Circuit's en banc decision in *Veeck* created a conflict among the federal Circuit Courts. The Fifth Circuit held that non-profit organizations that author copyrighted model codes and standards automatically lose their copyright protection when a governmental body incorporates the model codes by reference into law. The *Veeck* decision stands in stark contrast to the Second and Ninth Circuits holding that a private author's copyright is not terminated when the author's codes or standards are adopted into law.\(^{206}\)

The division in the circuits is significant because it can lead to inconsistent application of federal copyright law around the country. Local governments in several circuits can adopt model codes drafted by organizations like SBCCI, raising the potential for inconsistent copyright protections for the same code in different jurisdictions. Until the U.S. Supreme Court, or alternatively the U.S. Congress through legislation, resolves this issue, there is the potential for a race to the courthouse in the jurisdiction most favorable to each party.\(^{207}\)

---

\(^{206}\) See *id.* at 796.

\(^{207}\) See *Practice Mgmt. Info. Corp.*, 121 F.3d at 520; *CCC*, 44 F.3d at 74.

\(^{208}\) See EUGENE F. SCOLLES ET AL., CONFLICT OF LAWS § 3.36 (3d ed. 2000).
B. Congressional Intent and Executive Branch Directives Favor Copyright Protection of Privately Authored Materials

The en banc Veeck court created an unsupported exception to modern copyright law by holding that adopting privately authored codes into law automatically places them in the public domain.209 This decision undermines the long-standing purpose of the Copyright Act to provide authors and inventors with incentives to produce work that will be valuable to the public.210 The plain language of the Copyright Act indicates that copyrighted model codes and standards should retain their protected status even when adopted and incorporated into the law. For example, 17 U.S.C. § 201(a) states that a copyright in a work "vests initially in the author or authors of the work."211 Legislative history indicates that the purpose of this section was to reaffirm the basic principle that an author’s copyright is secure, and cannot be taken away by involuntary transfer.212

The Fifth Circuit misconstrued the policies behind the Copyright Act and incorrectly interpreted the policy underlying the government’s adoption of SBCCI’s codes. The purpose of the Copyright Act is to provide incentives to produce valuable work in science and the arts for the public.213 One of the incentives is granting authors copyright protection under section 201.214 The court’s ruling that copyright protection ceases when material is adopted into law could eliminate the incentive to create and effect an involuntary transfer of copyright prohibited by section 201(e).

Further, at least one commentator has argued that the text of the Copyright Act itself prohibits changing in the copyright status of privately authored codes because they have been adopted or referenced by a legislative body.215 If the code was original and expressive enough to qualify for copyright protection, then it has not lost those qualities purely because the material was enacted into law.216 In the Veeck case, the defendant never disputed that the codes were copyrighted when he

210. 1 NIMMER, supra note 11, at § 1.03.
213. See supra Part I.C.
214. See supra Part I.C.
215. Hardy, supra note 24, at 878.
216. Id.
purchased copies of the codes and a licensing agreement from SBCCI. The protected status of SBCCI’s works should not change simply because those works were adopted into law.

Aside from the problematic circuit split created by the Veeck decision, it also conflicts with policies set forth by the federal legislative and executive branches. Congress has indicated that it supports the copyright protection of works commissioned by the government. The executive branch has reinforced this policy by instructing agencies to recognize the copyrights of private authoring organizations when using voluntary standards.

Although the U.S. Supreme Court has not ruled on the issue, legislative actions by the U.S. Congress indicate that it supports copyright protection for materials authored by entities like SBCCI. Congress has indicated that the federal government’s incorporation of copyrighted model codes and standards should not jeopardize private author’s copyrights. Section 105 prevents the federal government from holding copyrights. But, the House Committee Report on this section indicates it should not have a negative impact on copyrights. The House committee specifically noted that the government’s publication of privately authored work does not affect that work’s preexisting copyright. Further, in the same Committee Report, the House explicitly directed that private parties and institutions should not be precluded from holding copyright in works commissioned by the government or prepared under a government grant. Thus, SBCCI’s copyright in its works should not terminate because it was adopted into law.

The Fifth Circuit’s decision also conflicts with the policy embodied in the National Technology Transfer and Advancement Act of 1995 (NTTA). Congress directed federal agencies under NTTA to use

222. See H.R. REP. NO. 94-1476, at 60.
223. Id.
224. See supra Part I.C.
standards developed by private authoring bodies.\textsuperscript{226} This indicates that Congress supports federal agencies' use of privately authored standards.

The Executive Branch also supports the use of privately authored standard and codes while protecting their copyrights. OMB revised Circular A-119 after the enactment of NTTA to guide federal agencies.\textsuperscript{227} In Circular A-119, the OMB interpreted this mandate as protecting the rights of the copyright holder.\textsuperscript{228} The OMB issued instructions on the use of privately developed, consensus based standards, requiring that "if a voluntary standard is used and published in an agency document, your agency must observe and protect the rights of the copyright holder and any other similar obligations."\textsuperscript{229}

The Fifth Circuit's decision in \textit{Veeck} directly conflicts with the congressional purpose of NTTA as interpreted by the OMB. Privately authored codes and standards are important resources to the government, because they are potentially cost-saving resources. Federal copyright law does not prohibit private authors from holding copyright in their works when commissioned by the government or prepared under a government grant.\textsuperscript{230} To deny these contractor's copyright protection of their work would have a negative impact on the government because it may eliminate an incentive for producing such work. Because the legislative and executive branches favor the use of privately authored works—and the private authors' retention of their copyrights—the Fifth Circuit's \textit{Veeck} decision contradicts the policy behind NTTA.

C. Judicial Precedent Favors Copyright Protections for Privately Authored Laws

The Fifth Circuit's en banc decision in \textit{Veeck} adopted a per se rule that when a municipality adopts a privately authored model code into law by reference, the work is stripped of its copyright protection. The Fifth Circuit's decision is flawed for several reasons. First, the Fifth Circuit reached its decision by factually distinguishing the \textit{Veeck} case from the decisions of the Ninth and Second Circuits, yet it overlooked the substantive similarities between these cases. Second, the circuit court's

\begin{itemize}
\item \textsuperscript{226} Id.
\item \textsuperscript{228} See id. at 8555.
\item \textsuperscript{229} Id.
\item \textsuperscript{230} See supra Part I.C.
\end{itemize}
reliance on *Banks* and *BOCA* was misguided because they are inapposite and do not provide support for the court’s decision. As a result, the Fifth Circuit has created an unsupported exception to copyright law.

I. *Although the Veeck Case is Factually Distinguishable from Practice Management and CCC, the Substantive Issues are Similar*

There are some factual differences between the *Veeck* case and those decided by the Second and Ninth Circuits. The *CCC* case from the Second Circuit involved standards that the local government incorporated by reference into a statute,\(^{231}\) while *Veeck* involved standards directly incorporated into law.\(^{232}\) In addition, *Practice Management* involved a private company seeking to invalidate a copyright for its own purposes,\(^ {233}\) while *Veeck* involved a private individual seeking to freely distribute a copyrighted public law for use by other citizens.\(^ {234}\)

However, the facts the Fifth Circuit relied upon to distinguish *Veeck* from *CCC* and *Practice Management* were not relevant to the legal questions presented. The Fifth Circuit distinguished *Veeck* from *CCC* and *Practice Management* because *Veeck* involved “codes” while the other two cases involved “standards.”\(^ {235}\) But, this difference in taxonomy is meaningless. In his dissent to *Veeck*, Judge Wiener explained that these labels are analogous and virtually indistinguishable.\(^ {236}\) The different labels reflect the difference between federal and local lawmaking—federal agency regulations generally address national standards, while state and local laws refer to more specific safety and building requirements typically found in state or municipal codes.\(^ {237}\) But there is no practical difference between these terms, because both terms can refer to privately authored collections of technical data used by government agencies to regulate specialized areas of society such as

\(^{231}\) *See CCC Info. Servs., Inc. v. Maclean Hunter Mkt. Reports*, 44 F.3d 61, 63–64 (2d Cir. 1994).


\(^{233}\) *Practice Mgmt. Info. Corp. v. Am. Med. Ass’n*, 121 F.3d 516, 518 (9th Cir. 1997).

\(^{234}\) *See Veeck*, 293 F.3d at 793.

\(^{235}\) *See id.* at 804.

\(^{236}\) *Id.* at 815 n.20 (Weiner, J., dissenting).

\(^{237}\) *Id.*
health, education, or construction.\footnote{238} Thus, these factual and linguistic differences do not justify the Fifth Circuit's departure in \textit{Veeck}.

Yet, despite these minor factual differences, the three Circuit Courts all faced similar legal issues. First, the courts each addressed how far the rights of private authors should extend when the work they have created is adopted into law.\footnote{239} Further, the courts had to answer the difficult question of how to balance the public's rights to access to the law against the copyright holder's proprietary interests.\footnote{240} At the time of the \textit{Veeck} decision and currently, \textit{Practice Management} and \textit{CCC} represent the most similar legal issues and the highest available level of authority on point, given that the Supreme Court has not yet ruled on the issue.\footnote{241} The Fifth Circuit's disregard for the substantive similarities of both decisions undermines the national uniformity of federal copyright law.

2. \textit{The Veeck Decision was Erroneously Based on the Banks and BOCA Cases}

While the Second and Ninth Circuit's decisions are factually distinguishable from \textit{Veeck}, they are more substantively analogous to the issue that was before the Fifth Circuit than \textit{Banks}. Yet, instead of relying on precedent set by its sister circuits, the Fifth Circuit based its \textit{Veeck} decision on the \textit{Banks} case, which is substantively distinguishable, and \textit{BOCA}, a First Circuit case that was not even decided on its merits.\footnote{242}

Although the \textit{Veeck} court based its decision in part on the U.S. Supreme Court's 1888 decision in \textit{Banks}, its interpretation of \textit{Banks}' holding and application of \textit{Banks} to the facts before it were incorrect. The Fifth Circuit is the only court that has relied on \textit{Banks} to invalidate an author's copyright in its privately authored "law."\footnote{243}

\begin{footnotes}
\item[238] Id.
\item[240] See \textit{Veeck}, 293 F.3d at 799–800; \textit{Practice Mgmt.}, 121 F.3d at 519; \textit{CCC}, 44 F.3d at 72.
\item[242] \textit{Bldg. Officials & Code Adm'rs v. Code Tech., Inc.}, 628 F.2d 730, 736 (1st Cir. 1980); \textit{Veeck}, 293 F.3d at 799–800.
\item[243] \textit{Veeck}, 293 F.3d 791.
\end{footnotes}
Supreme Court held in *Banks* that federal judges can not hold copyrights in work done in their official capacity.\(^{244}\) From this, the *Veeck* court fashioned a general rule that citizens are the metaphysical "authors" of the law, and that citizens must have free access to the law.\(^{245}\)

The Fifth Circuit should have followed the Ninth Circuit and Second Circuit's more accurate interpretation of *Banks*’ holding and application. In *Practice Management*, the Ninth Circuit suggested two rationales for the *Banks* decision: (1) the public owns judicial opinions because taxpayers pay judges’ salaries, and (2) the due process principle of free access to the law requires that the law be in the public domain.\(^{246}\) The Ninth Circuit held that neither of these holdings required it to invalidate the AMA's copyright.\(^{247}\) First, the Ninth Circuit reasoned that the *Practice Management* facts were different from *Banks* because private entities that write codes need the financial incentives provided by copyright law. In contrast, the judges in *Banks* were paid to write their opinions, and needed no independent incentives.\(^{248}\) Second, the Ninth Circuit distinguished *Practice Management* because there was no evidence that copyright protection prohibited the public's access to judicial opinions.\(^{249}\) Moreover, the *Practice Management* court noted that even if a free access problem arose, it would be better to deal with the problem through established doctrines of copyright law, such as fair use or perhaps a due process defense for infringers, rather than simply stripping the codes of copyright protection.\(^{250}\) The Ninth Circuit also noted another possible solution to this problem—to require mandatory licensing at a reasonable royalty if the copyright holder tried to severely restrict public access to its copyrighted information.\(^{251}\)

The Second Circuit also upheld the copyright protections of privately authored materials adopted into law in *CCC*. In *CCC*, the plaintiff argued that its use of the Red Book was defensible because the Red Book had come into public domain as a result of its adoption by reference into state statutes.\(^{252}\) The Second Circuit rejected this argument and refused to hold

\(^{244}\) *Banks v. Manchester*, 128 U.S. 244, 253–54 (1888).
\(^{245}\) *Veeck*, 293 F.3d at 799.
\(^{246}\) *Practice Mgmt.*, 121 F.3d at 518–19.
\(^{247}\) Id.
\(^{248}\) Id.
\(^{249}\) Id.
\(^{250}\) Id. at 519.
\(^{251}\) Id. (citing Abend v. MCA, Inc., 863 F.2d 1465, 1479 (9th Cir. 1988)).
\(^{252}\) *CCC Info. Servs., Inc. v. Maclean Hunter Mkt. Reports*, 44 F.3d 61, 73 (2d Cir. 1994).
that a state’s reference to a copyrighted work was the same as a judicial opinion. Following CCC, the Second Circuit held in County of Suffolk that the Banks decision required it to determine whether the author would have an adequate incentive to create the work absent copyright protections and whether the public had access to the law. The Fifth Circuit should have applied those factors to the Veeck case and found that copyright protection provides an incentive to SBCCI to create building codes. Moreover, as in County of Suffolk, the SBCCI’s copyright did not prevent the public from accessing the codes.

In contrast to the Second and Ninth Circuits, the Fifth Circuit stretched the facts of Banks to apply it to Veeck, and disregarded several significant facts that distinguished Veeck from Banks. First, privately authored model codes are not identical to judicial opinions and statutes because model codes are not created by publicly paid elected officials. The government does not contract with the authors of these standards to write the codes. Further, no established relationship exists between public officials and independent standards writers in which the authors are compensated by public funds.

Second, the codes and standards at issue in these cases are technical documents, narrowly focused on specific, detailed areas of law such as building codes. The detail and complexity they embody require the author to have technical expertise, and the scope of their effect is much narrower than judicial opinions and statutes that have broad application. Thus, the facts of Veeck are significantly different than those faced by the Banks court over a century ago. The Fifth Circuit should have followed the reasoning of the Second and Ninth Circuit instead of applying Banks to privately authored codes.

In addition to Banks, the Fifth Circuit incorrectly relied on the BOCA case from the First Circuit, which was never decided on the merits. Although the Veeck opinion purported to follow BOCA, the Veeck court was the first to squarely address the copyright effect when a private

253. Id. at 74.
254. County of Suffolk, N.Y. v. First Am. Real Estate Solutions, 261 F.3d 179, 194 (2d Cir. 2001).
256. See id. at 794.
257. See id. at 814 (Weiner, J., dissenting).
author's laws are adopted verbatim.259 The Veeck court erroneously based its response to this novel question on an overly broad reading of the BOCA decision.260 The Fifth Circuit relied heavily on the First Circuit’s dicta in BOCA, which stated “[T]he public’s essential due process right of free access to the law . . . can be reconciled with the exclusivity afforded a private copyright holder.”261 From this, the Fifth Circuit jumped to the conclusion that the proper way to ensure public access to the law was to terminate SBCCI’s copyright.262

The Fifth Circuit’s reliance on BOCA was misplaced because the First Circuit specifically avoided deciding whether BOCA’s model code retained its copyright after enactment.263 The BOCA court recognized that “the rule denying copyright protection to judicial opinions and statutes grew out of a much different set of circumstances than do these technical regulatory codes . . . .”264 In fact, the BOCA court even highlighted the possible trend towards federal and state adoption of these privately authored works.265 The First Circuit observed that code-drafting organizations served an increasingly “important public function,” and left open whether the copyright exception for judicial opinions established in the 1880s should be adapted “to accommodate modern realities” of drafting technical codes.266 Thus, the First Circuit distinguished BOCA from older cases such as Banks and Wheaton, and did not reach the question presented in Veeck.

D. The U.S. Supreme Court Should Reinforce the Protections Already Existing for Privately Authored Materials in Copyright Law

Protecting the copyright of privately authored codes does not violate due process principles requiring free access to the law. The three judge panel of the Fifth Circuit noted the importance of the “free accessibility of the law,” and observed that if privately authored materials adopted into law are not accessible to the public, that lack of access would violate

259. See Veeck, 293 F.3d at 811–12 (Weiner, J., dissenting).
260. See id. at 798–800.
261. Id. at 803 (citing Bldg. Officials & Code Adm’rs, 628 F.2d at 730).
262. See id. at 799–800.
263. Bldg. Officials & Code Adm’rs, 628 F.2d at 736.
264. Id.
265. Id.
266. Id.
due process. However, in *Veeck* there was no evidence that the privately authored codes were not accessible to the public. The controversy arose in *Veeck* not because Veeck had been denied access to the law, but because he wanted to post a full copy of the code on the internet. Nothing prevented Veeck or anyone else from accessing the law at a clerk’s office.

In addition, requiring users to pay a licensing fee to get a copy of the text of a building code does not violate due process. Free accessibility of the law is different than free unlimited copying of the law. Veeck had free access to the law. He could have viewed or copied the SBCCI codes in any city clerk’s or other municipal offices in the towns that had enacted the codes by reference. Access to building codes means that a person can consult the codes. This access was present in *Veeck*, because any person could have visited the town offices, read the code, and made a personal copy. In contrast, what Veeck wanted was a copy of the full text of the model code provisions in order to place them on his website. The due process requirement of free access to the law does not guarantee everyone a personal copy of the law for free.

The Fifth Circuit’s decision in *Veeck* focuses too heavily on the public’s ability to access the law and does not adequately consider an author’s right to copyright protection. In contrast, the Second Circuit’s decision in *County of Suffolk* strikes a proper balance by providing an example of how copyright interests can coexist with the public’s interest in accessing the law. The Second Circuit determined that Suffolk County could maintain its copyrights in its official tax maps without violating New York’s Freedom of Information Law (FOIL). Further, the Second Circuit held that under FOIL, the extent of the state agency’s obligation to make the law accessible is to make its records available for public inspection and copying. Like the tax maps in *County of Suffolk*,

268. *Id.*
271. *See id.*
272. *Id.* at 793.
273. *See id.* at 812 (Weiner, J., dissenting) (noting that “the type of due process asserted by *Veeck* is murky at best”).
275. *County of Suffolk* v. First Am. Real Estate Solutions, 261 F.3d 179, 190 (2d Cir. 2001).
276. *Id.* at 192.
the building codes in *Veeck* also contain original material, research, compilation, and organization. Moreover, the building codes, like the tax maps, are the result of substantial work, effort, and private expense.\(^\text{277}\)

The importance of protecting public access to the law as expressed in *County of Suffolk* is similar to the concerns expressed in *Veeck*.\(^\text{278}\) Unlike the Fifth Circuit, the Second Circuit resolved this concern by recognizing that the fair use doctrine protects free press and individuals seeking to use state agency records to educate other citizens or criticize the government.\(^\text{279}\)

The Fifth Circuit overlooked the “fair use” doctrine, a critical copyright concept that provides access to the law while still protecting the copyright holder’s proprietary rights in the material.\(^\text{280}\) The fair use doctrine, as codified in the Copyright Act, strikes a balance between the rights of a copyright holder and the interest of the public in accessing information.\(^\text{281}\) The fair use doctrine gives courts the flexibility to determine a proper outcome on a case-by-case basis, a flexibility in stark contrast to the per se rule created by the *Veeck* court.

The Fifth Circuit in *Veeck* viewed “the law” as publicly owned and therefore in the public domain for any use.\(^\text{282}\) The court listed acceptable uses of works in the public domain, including reproducing copies of the law for purposes such as influencing legislation, educating a neighborhood association, or simply to amuse.\(^\text{283}\) However, the court failed to notice that these uses are similar to the permissible uses under the fair use doctrine. What Fifth Circuit overlooked is that a legal code need not be in the public domain in order to be available for fair use.\(^\text{284}\) A code can be copyrighted but still accessible to citizens for educational purposes, news reporting, and criticism under the fair use affirmative defense.\(^\text{285}\) One of the Fifth Circuit’s justifications for why a code’s copyright must terminate when it is incorporated into law was the


\(^{278}\) See id. at 799–800; *Suffolk*, 261 F.3d 179 at 192–93.

\(^{279}\) *Suffolk*, 261 F.3d 179 at 192–93.

\(^{280}\) *KELLER & CUNARD*, supra note 26, at § 8:3.1.

\(^{281}\) 17 U.S.C. § 107 (2000) (The “fair use of a copyrighted work . . . for purposes such as criticism, comment, news, reporting, teaching, scholarship, or research, is not an infringement of copyright.”).

\(^{282}\) *Veeck*, 293 F.3d at 799–800.

\(^{283}\) Id.

\(^{284}\) See supra Part I.E.

\(^{285}\) See supra Part I.E.
Copyrights of Model Building Codes

concern that a copyright owner might refuse to make the materials accessible on a reasonable basis. However, the fair use doctrine eliminates this justification by permitting courts to strike a balance between the competing interests of protecting property rights and ensuring public access.

The Fifth Circuit created a spilt among the federal Circuit Courts with its decision in Veeck and created an unprecedented exception to copyright law. The Supreme Court has the opportunity to resolve this split by granting SBCCI’s petition for certiorari. By relying on the fair use doctrine, the U.S. Supreme Court could provide lower courts with a flexible test that balances the interests of the public and provides private authors with the copyright protection guaranteed to them by the Copyright Act.

IV. CONCLUSION

The Fifth Circuit’s decision in Veeck created an unprecedented exception to the Copyright Act by establishing the blanket rule that once a model code or standard is enacted into law, the authoring organization’s copyright automatically terminates and the code enters the public domain. This conflicts with the Second and Ninth Circuits, which have held that a private organization retains its copyright in material later adopted into law. A private organization’s copyright in model codes and standards should be protected as long the law is still available to the public. The U.S. Supreme Court should ensure this protection by granting certiorari in Veeck and creating a rule that relies on established principles of copyright law, such as fair use, in evaluating what is an acceptable use of copyrighted material on a case-by-case basis. This result ensures that the author’s proprietary rights are properly balanced against the public’s due process right of access to the law.

286. Veeck, 293 F.3d at 800.
287. See Keller & Cunard, supra note 26, at § 8:3.1.
288. See supra Part II.