LEGAL UPDATES

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D.C. Circuit Court of Appeals Holds Non-Commercial Use of Industry Standards Incorporated into Law Is Fair Use

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On September 12, 2023, the Court of Appeals for the District of Columbia issued its opinion in *American Society for Testing and Materials (ASTM) v. Public.Resource.Org, Inc.*, holding that non-commercial use of standards incorporated by reference into law is fair use and not copyright infringement.

The ruling impacts the business models of industry standard-setting organizations like ASTM, which sets standards used in production and testing of a wide variety of products. Legislatures incorporate many of these standards by reference into laws and regulations. The standards-setting organizations may publish them for sale or make them available at no cost.

Copyright normally subsists in original works of authorship like these standards, but there are several exceptions, including the "government edicts doctrine." In 2020, the U.S. Supreme Court decided the case *Georgia v. Public.Resource.Org* involving annotations to Georgia state law. The Supreme Court concluded copyright does not vest in works judges and legislators create pursuant to their judicial and legislative duties. It held the annotations not copyrightable even though an outside non-governmental entity, Lexis, had prepared them under the supervision and approval of Georgia legislators.

Public Resource later relied on the *Georgia* case as justification for copying and publishing industry standards incorporated into laws and regulations. The district court ruled last March that it was fair use under copyright law for the nonprofit to publish without permission the versions of the standards incorporated into law, and nominative fair use under trademark law to name the relevant organizations that authored the standards. However, the district

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court held Public Resource went too far by publishing portions of the standards not incorporated into law and by using the logo marks of the relevant organizations.

ASTM and others appealed to the D.C. Circuit and the case attracted more than fifty amicus briefs. The D.C. Circuit analyzed the four fair use factors and pointed to perceived differences between the purposes of Public Resource's use and the standards-setting organizations' use. Because of this asserted distinction, among other factors, the D.C. Circuit ruled in Public Resource's favor, affirming the lower court's finding of fair use and even finding publication of the explanatory and background materials permissible. As a next step, the standards-setting organizations will likely seek rehearing or rehearing en banc from the D.C. Circuit.

What this means to you

For now, the non-commercial distribution of standards incorporated by reference into law remains legal under the D.C. Circuit's ruling. Considering the more than 50 amicus briefs filed in the D.C. Circuit on the policy issues of free dissemination of the law versus protection for experts' carefully crafted and researched work, the amount of interest shown in the case to date indicates that even more interested parties may weigh in on any further proceedings. Congress also has interest in the issue, particularly given the potential economic impact, so there are several developments in this area to watch.

Contact us

If you have a question as to the implications of this case or any related matter, please contact Daan Erikson or your Husch Blackwell attorney.

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