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## Can the Law Be Copyrighted - Fifth Circuit Holds That Model Building Codes Lose Copyrights upon Adoption into Law - *Veeck v. SBCCI*

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CAN THE LAW BE COPYRIGHTED?—  
FIFTH CIRCUIT HOLDS THAT MODEL  
BUILDING CODES LOSE COPYRIGHTS  
UPON ADOPTION INTO LAW—  
*VEECK v. SBCCI*

Maryjane Boone Bonfield\*

WELL established law deems judicial opinions and statutes to be within the public domain and, therefore, not subject to copyrights.<sup>1</sup> The question remains, however, whether this principle likewise covers “state-promulgated administrative regulations” modeled on a privately developed, copyrighted code.<sup>2</sup> Because the Supreme Court has not considered such a case in which the author asserted a proprietary interest in material adopted by the government as law, the issue appears to be one of first impression at the circuit level.<sup>3</sup> While the First, Second, and Ninth Circuits correctly have declined to enjoin enforcement of private copyrights in these circumstances,<sup>4</sup> the Fifth Circuit did not do so in *Veeck v. Southern Building Code Congress International, Inc.*<sup>5</sup> Rather, in the absence of express congressional guidance or directly controlling Supreme Court precedent, the Fifth Circuit overstepped its bounds in determining that the entirety of a privately created model code, access to which had been denied to no one, should lose its copyright protection *in toto*, solely by virtue of its enactment into law.<sup>6</sup> No justification for such loss of protection exists.

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1. See *Bldg. Officials & Code Admin. (BOCA) v. Code Tech., Inc.*, 628 F.2d 730, 734 (1st Cir. 1980).

2. *Id.*

3. *Practice Mgmt. Info. Corp. v. Am. Med. Ass'n*, 121 F.3d 516, 519 (9th Cir. 1997); *BOCA*, 628 F.2d at 734.

4. *Practice Mgmt.*, 121 F.3d at 519 (holding that a federal agency’s adoption of a work as the standard in preparation of Medicare and Medicaid claims did not render a copyright invalid); *BOCA*, 628 F.2d at 730 (refrained from holding a copyright on a privately created building code adopted by the state invalid); *CCC Info. Servs., Inc. v. Maclean Hunter Mkt. Reports, Inc.*, 44 F.3d 61, 72 (2d Cir. 1994) (declining to invalidate the copyright on a privately prepared listing of automobile values that several states required insurance companies to use in calculating insurance awards).

5. *Veeck v. S. Bldg. Code Cong. Int’l, Inc.*, 293 F.3d 791 (5th Cir. 2002).

6. *Id.* at 812 (Wiener, J., dissenting).

Southern Building Code Congress International, Inc. ("SBCCI") is a non-profit organization whose primary mission has been to develop, promote, and promulgate building codes.<sup>7</sup> It encourages local government entities to enact its codes into law, without cost to the governmental entity.<sup>8</sup> While SBCCI continues to assert its copyright prerogatives, even as to codes that have been adopted by local entities, the organization allows the public to view and copy codes on display at government offices.<sup>9</sup>

Peter Veeck operates a non-commercial website that provides information about North Texas.<sup>10</sup> In 1997, Veeck decided to post the local building codes of Anna and Savoy, two towns that had adopted model codes written by SBCCI.<sup>11</sup> Unable to locate the building codes easily, Veeck purchased copies on a copyrighted disk directly from SBCCI and proceeded to cut and paste the exact SBCCI text onto his website.<sup>12</sup>

Upon receiving demands to desist copyright infringement from SBCCI, Veeck refused to do so and filed a declaratory judgment action seeking a ruling that he did not violate the Copyright Act by posting a copy of the municipal building codes on his website.<sup>13</sup> SBCCI counterclaimed for copyright infringement, among other claims.<sup>14</sup> The district court granted summary judgment for SBCCI finding that it did own valid copyrights in the building codes.<sup>15</sup> On appeal, the Fifth Circuit upheld SBCCI's copyrights in the municipal building codes and rejected Veeck's defenses to infringement based on due process, merger, fair use, misuse, and waiver.<sup>16</sup> The Fifth Circuit elected to rehear the case *en banc* because of the "novelty and importance" of the issues presented by the case.<sup>17</sup> After an *en banc* hearing, the Fifth Circuit reversed its original holding.<sup>18</sup>

Writing for the court of appeals, Judge Edith Jones stated that, as the author of an original work, SBCCI indisputably held a copyright in its model building codes before they were adopted into law.<sup>19</sup> Under copyright law, SBCCI had the right to exclusively make or condone derivative works and to regulate the copying and distribution of both the original and derivative works.<sup>20</sup> The Fifth Circuit needed to determine, however, whether SBCCI retained the right wholly to exclude others from copying

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7. *Id.* at 793.

8. *Id.* at 794.

9. *Id.*

10. *Id.* at 793.

11. *Id.*

12. *Id.*

13. *Id.* at 794.

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.* at 791.

19. *Id.* at 794; see Copyright Act of 1976, 17 U.S.C. § 102(a) (1995) (stating that "copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible means of expression").

20. *Veeck*, 293 F.3d at 794; see Copyright Act of 1976, 17 U.S.C. § 106 (1995) (articulating the exclusive rights protected in copyrighted works).

the building codes *after* they had been adopted into the law of various jurisdictions.<sup>21</sup>

According to the Fifth Circuit, SBCCI did not retain copyrights over model codes after they have been incorporated into law.<sup>22</sup> Looking to Supreme Court precedent, the court interpreted a line of cases suggesting that the citizens are the true authors and owners of the law regardless of who actually drafts the provisions. In this way, the law inherently fell within the public domain and could not be subject to the Copyright Act.<sup>23</sup> In light of the Copyright Act limitation, even in the event that the law of municipalities could be copyrighted, the court found building codes to be “facts” within the meaning of the merger doctrine and, thereby, excluded from the Copyright Act.<sup>24</sup> The court also distinguished this case in noting that the building codes were wholly adopted into the actual text of the law rather than merely referenced by statute.<sup>25</sup> Finally, the Fifth Circuit attempted to absolve any concerns as to the elimination of author incentives in the event law is deemed uncopyrightable.<sup>26</sup>

Judge Higginbotham wrote a short dissent supported by three judges in which he pointed out the availability of the building codes to the public, distinguished Supreme Court precedent from this case, and looked to public policy over the merger doctrine.<sup>27</sup>

A more thorough dissent, written by Judge Weiner and supported by five judges, opposed the majority’s *per se* rule that once a copyrighted work is enacted into law, it loses its entire copyright protection, *ipso facto*, regardless of the nature of the author, the character of the work, or the relationship of the copier to the work.<sup>28</sup> The dissent based its opinion primarily on an absence of controlling legal authority as well as public policy clearly supporting copyright protection for privately created works adopted into law.<sup>29</sup> The court also declined to apply the merger doctrine where public policy does not demand it and where more than one means of expression exists.<sup>30</sup> Finally, the dissent refuted all affirmative defense arguments: free speech, misuse, waiver, and fair use.<sup>31</sup>

The Fifth Circuit incorrectly interpreted Supreme Court precedent as a *per se* rule refusing copyright protection for all law regardless of the circumstances; it incorrectly defined building codes as “facts” excluded from copyright protection; it incorrectly applied the merger doctrine by diminishing public policy concerns; and it incorrectly distinguished building

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21. *Veeck*, 293 F.3d at 794.

22. *Id.* at 791.

23. *Id.* at 799.

24. *Id.* at 800.

25. *Veeck*, 293 F.3d at 804.

26. *Id.* at 804-05 (finding the following additional incentives for authors: self-interest, options to publish and sell value-added compilations of law).

27. *Id.* at 806-07.

28. *Id.* at 810.

29. *See Veeck*, 293 F.3d at 810-18.

30. *See id.* at 819-20.

31. *Id.* at 820-24.

codes fully adopted into law from standards referenced by law.<sup>32</sup>

First, the majority opinion mischaracterized the SBCCI model building codes as “fact.” A fundamental copyright principle is that only the expression of an “idea” or “fact,” and not the “idea” or “fact” itself, is protectable.<sup>33</sup> Thus, should the majority be correct in finding the code to be “fact” upon its adoption into law, it would also be correct in denying copyright protection. The absence of express support in Supreme Court precedent, statutes, and analogous cases denies, by implication, that a code adopted into law automatically becomes “fact” or “idea.”

While Supreme Court precedent does restrict copyright protection for statutes and judicial opinions, it bases its opinions on author incentives and public policy issues rather than the more obvious fact/expression dichotomy.<sup>34</sup> Why would the Supreme Court look to more tangential factors over the more obvious and central reason for restricting copyright protection: that “fact” is not protected by the Copyright Act? Statutes and judicial opinions may not necessarily be “fact” by virtue of being enacted into law. By failing to address the obvious limits on copyright protection, the Supreme Court implicitly suggests that the laws at issue were not “fact” and not excluded from protection. If a judicial opinion created by a government official and applied according to its specific phrasing is not “fact,” then a model building code, created by a private party and not applied according to its specific phrasing but according to its overall concepts, is not “fact” either.

Furthermore, analogous case law does address the fact/expression dichotomy.<sup>35</sup> No case dealing with privately created works adopted by law, however, has ever found such works to be “fact” and subsequently excluded from copyright protection.<sup>36</sup> Again, by implication, one would assume that adoption into law does not render a work as “fact.”

Looking to the Copyright Act itself, works of the federal government specifically have been excluded from copyright.<sup>37</sup> In turn, the Act seems to allow copyrights for such works of state and local governments by not specifically excluding them. Why would the Act allow the possibility of

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32. See *id.* at 793-806.

33. *Kregos v. Associated Press*, 937 F.2d 700, 705 (2d Cir. 1991); see Copyright Act of 1976, 17 U.S.C. § 102 (1995) (stating that “in no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work”).

34. See *Banks v. Manchester*, 128 U.S. 244 (1888) (holding that law authorizing an official reporter for the Ohio Supreme Court to obtain a copyright on the opinions of the court to be invalid where judges are paid by the public and where the public retains the right to free access); *Wheaton v. Peters*, 33 U.S. 591 (1834).

35. *CCC Info. Servs.*, 44 F.3d at 61; *Practice Mgmt.*, 121 F.3d at 516; *BOCA*, 628 F.2d at 730.

36. See *CCC Info. Servs.*, 44 F.3d at 61; *Practice Mgmt.*, 121 F.3d at 516; *BOCA*, 628 F.2d at 730.

37. Copyright Act of 1976, 17 U.S.C. § 105 (1995) (stating that “copyright protection under this title is not available for any work of the United States government, but the United States government is not precluded from receiving and holding copyrights transferred to it by assignment, bequest, or otherwise”).

copyrights on state laws if all law is excludable as “fact”? It would not. Thus, laws are not inherently “fact.” In light of these reasons, the court cannot definitively state that the municipal codes are “fact” without giving some sort of supporting rationale—which it has not done.

Second, the automatic application of the merger doctrine by the majority ignored essential public policy considerations. While the municipal codes do not appear to be “fact” in and of themselves, neither do they appear to “merge” into “fact” upon adoption into law. The merger doctrine arises out of the courts’ difficulty in locating the precise boundary between fact and expression.<sup>38</sup> It states that when the expression of a fact is inseparable from the fact itself, the expression and fact merge. Such a merger occurs where only one means of expressing a fact exists such that protection of the expression would effectively confer a monopoly of the fact upon the copyright owner.<sup>39</sup> Thus, upon merging with a “fact,” the expression no longer retains its copyright.

Though seemingly simple, determining when the fact and its expression have merged is a task requiring considerable care: if the merger doctrine is applied too readily, arguably available alternative forms of expression will be precluded; if applied too sparingly, protection will be accorded to facts. Recognizing this tension, courts have been cautious in applying the merger doctrine to selections of factual information.<sup>40</sup> A court’s decision whether to apply the merger doctrine often depends on how it defines the author’s idea.<sup>41</sup> For this reason, the guiding consideration in drawing the line is public policy, including the preservation of the balance between competition and protection reflected in copyright laws.<sup>42</sup>

The majority opinion carelessly dismissed public policy considerations in determining whether to apply the merger doctrine, stating that where the idea/expression dichotomy is “clear cut,” public policies need not be addressed. But the idea/expression dichotomy was not “clear cut” in this case or in any cases for that matter. Judge Learned Hand went as far as to say that “nobody has ever been able to fix that boundary [between idea and expression], and nobody ever can.”<sup>43</sup> Thus, public policy considerations must be weighed in determining whether to apply the merger doctrine. In turn, as articulated in the dissent, public policy weighs against the application of the merger doctrine because the consequences

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38. *Kern River Gas Transmission Co. v. Coastal Corp.*, 899 F.2d 1458, 1463 (5th Cir. 1990).

39. *See Mason v. Montgomery Data, Inc.*, 967 F.2d 135, 141 (5th Cir. 1992); *Kregos*, 937 F.2d at 705; *Kern*, 899 F.2d at 1463.

40. *Kregos*, 937 F.2d at 705.

41. *Mason*, 967 F.2d at 140.

42. *Id.*; *see also CCC Info. Servs.*, 44 F.3d at 72 n.25 (quoting *Herbert Rosenthal Jewelry Corp. v. Kalpakian*, 446 F.2d 738, 742 (9th Cir. 1971)); MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.03[F] at 13-128 (1994) (discussing the merger doctrine, Nimmer points out that “this line [for determining when an idea has become sufficiently delineated to warrant copyright protection] is a pragmatic one, drawn not on the basis of some metaphysical property of ‘ideas,’ but by balancing the need to protect the labors of authors with the desire to assure free access to ideas”).

43. *Veeck*, 293 F.3d at 820.

of giving the benefit of the merger doctrine are too destructive to the intended protection of the Copyright Act without giving sufficient benefit to the preservation of public access to facts.<sup>44</sup> The merger doctrine does not apply.

Furthermore, the majority's distinction between "model codes" adopted in whole and "standards" adopted by reference is wrong. Two analogous cases decided by the Second and Ninth Circuits decline to exclude privately created works adopted by law from copyright protection.<sup>45</sup> The majority attempted to distinguish the cases by noting that they involved mere references within the law rather than wholesale adoption of a standard into the law's text.<sup>46</sup> This distinction, however, is not viable. If a citizen must refer to a set of standards referred to by the written text of the law to have notice of the government's expectations for their actions, those standards are law. They are no different than model codes published within the law itself. Thus, the refusal of the Second and Ninth Circuits to enjoin copyright protection for privately created works adopted into law has weight in *Veeck*.

As already stated, the question of whether a work created and copyrighted by a private interest group loses its copyright upon being adopted into law is one of first impression at the circuit level. The Fifth Circuit, however, denied copyright protection in such a way as to fly in the face of Supreme Court precedent and the balance of analogous case law. By mischaracterizing the Copyright Act and the scope of its protection, the Fifth Circuit's holding in *Veeck* will create a ripple effect throughout the U.S. judicial system. Before *Veeck*, the circuit courts remained united in their refusal to deny copyright protection. The Fifth Circuit's decision in *Veeck*, however, created a split that only the Supreme Court can resolve.

Not only is the question one of first impression, but it is a question of great importance in view of a possible trend towards state and federal adoption of model codes.<sup>47</sup> The complexities of modern life and the breadth of problems addressed by government entities necessitate continuous participation by private experts and interest groups in all aspects of statutory and regulatory lawmaking.<sup>48</sup> The groups often relieve the government from the physical and economic burdens of lawmaking. By denying copyright protection, the Fifth Circuit removes the economic incentives motivating many of these private interest groups. In turn, it essentially declines future benefits for the government. Without private help, the government will not be able to meet the statutory needs of a modern, technological culture and American citizens will suffer. The Fifth Circuit not only reaches an incorrect conclusion based on law, but points the way towards the demise of the U.S. statutory arena.

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44. *CCC Info Servs.*, 44 F.3d at 72.

45. *See Practice Mgmt.*, 121 F.3d at 516; *CCC Info. Servs.*, 44 F.3d at 61.

46. *See Veeck*, 293 F.3d at 803-05.

47. *BOCA*, 628 F.2d at 736.

48. *Veeck*, 293 F.3d at 798.