Note

Copyrighted Laws: Enabling and Preserving Access to Incorporated Private Standards

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In 1997, a north Texas nonprofit regional-information website posted the municipal building code laws of two nearby rural towns.[1] The original drafter of those codes, a private code developer, issued a copyright infringement cease and desist to the website owner demanding removal of the laws.[2] In response, the website operator filed suit seeking a non-infringement declaration, and the code developer filed a counterclaim for copyright infringement.[3] Both the district court and a Fifth Circuit panel sided with the code developer upholding its copyright infringement claim.[4] On rehearing en banc, however, a deeply divided Fifth Circuit narrowly reversed for the operator, holding that laws are in the public domain and not subject to the exclusive control of a copyright holder.[5] This sequence of holdings is troublesome. Over 120 years ago, the Su-

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1. *See* Veeck v. S. Bldg. Code Cong. Int'l, Inc., 293 F.3d 791, 793 (5th Cir. 2002) (en banc).

2. *See id.* at 794.

3. *See id.*

4. *See* Veeck v. S. Bldg. Code Cong. Int'l, Inc., 241 F.3d 398 (5th Cir. 2001); Veeck v. S. Bldg. Code Cong. Int'l, Inc., 49 F. Supp. 2d 885 (E.D. Tex. 1999).

5. *Veeck*, 293 F.3d at 793.

preme Court held and later reaffirmed that copyright could not be held in judicial opinions.[6] Since then, courts have broadly applied the precedent to all forms of laws, including statutes and regulations.[7] So why would this developer seek to enforce a copyright infringement claim for publishing a statute, and be successful in getting both a district court *and* an appellate court to rule contrary to a universal precedent?

As a growing trend, private organizations create and volunteer to lawmakers thousands of model safety codes and industry standards (also known as voluntary consensus standards or Standards Developing Organization (SDO) standards), which lawmakers enact as law through a process known as "incorporation by reference."[8] Incorporation by reference allows lawmakers to give legal force to one of these standards by merely publishing the name of the standard inside the body of a law, instead of publishing the actual text of the entire standard. This results in thousands of statutes and regulations that do not contain any content—just the name of a standard—yet carry penalties for noncompliance as if the standard's actual contents *were* published inside the law. Members of the public seeking to comply with the law must then obtain the standard from the organization that authored it. The organizations assert copyright over their standards and typically charge the public fees to access them.[9] In some instances, the organizations file copyright infringement suits against anyone for publishing, printing, or distributing their standard that has been

6. *See* Wheaton v. Peters, 33 U.S. 591, 668 (1834) ("[N]o reporter . . . can have any copyright in the written opinions delivered by this court . . . ."); *see also* Banks v. Manchester, 128 U.S. 244, 253 (1888) ("The whole work done by the judges constitutes the authentic exposition and interpretation of *the law*, which, binding every citizen, is free for publication to all . . . ." (emphasis added)).

7. *See, e.g.*, Howell v. Miller, 91 F. 129, 137 (6th Cir. 1898) ("[N]o one can obtain the exclusive right to publish the laws of a state . . . ."); Georgia v. Harrison Co., 548 F. Supp. 110, 115 (N.D. Ga. 1982) ("[T]his court holds that a state may not copyright its statutes . . . .").

8. Nina A. Mendelson, *Private Control over Access to the Law: The Perplexing Federal Regulatory Use of Private Standards*, 112 MICH. L. REV. 737, 739 (2014) [hereinafter Mendelson, *Private Control*] ("The CFR today contains nearly 9,500 . . . standards . . . ."); Nina A. Mendelson, *Taking Public Access to the Law Seriously: The Problem of Private Control over the Availability of Federal Standards*, 45 ENVTL. L. REP. 10776, 10776 (2015) [hereinafter Mendelson, *Taking Public Access*].

9. Mendelson, *Private Control*, *supra* note 8, at 743. In *Veeck*, the website operator purchased copies of the law directly from the developer. 293 F.3d at 793.

enacted into law.[10] This practice is not a minor, infrequent occurrence; sales of these incorporated standards generate millions of dollars in revenue annually from members of the public who simply need to know their legal obligations.[11]

Concealing laws from the public and controlling access to them with fees and threats of litigation raises significant due process concerns. In the United States, ignorance of a statute or regulation is not a defense to its violation.[12] To remain consistent with that principle, Congress has promoted accessibility and transparency to laws by establishing government printing programs and freely distributing legal materials to local depositories and Internet websites.[13] Also, throughout history the government has taken action when affluence has been used as a control to fundamental rights and necessities.[14] Recognizing that controlling access to laws runs contrary to these principles, there have been some attempts—without addressing copyright law—to make the copyrighted standards available to the public.[15] But these attempts have all generally failed for three reasons. First, government reliance on private standards is systemic so they cannot simply be abandoned in favor of government-made alternatives. Second, incorporated standards are not traditional laws, they are legitimate copyrighted works that laws incorporate *after* copyright has been bestowed. Lastly, lawmakers are thus barred from any action infringing the own-

10. *See, e.g.*, *Veeck*, 293 F.3d at 794 ("SBCCI counterclaimed for copyright infringement . . . ."); Bldg. Officials & Code Adm'rs. v. Code Tech., Inc. (BOCA), 628 F.2d 730, 732 (1st Cir. 1980) ("BOCA says it holds a copyright for its [enacted code], which defendant CT has allegedly infringed."); *see also infra* note 218 and accompanying text (listing currently pending infringement litigation).

11. *See infra* Part III.C.2 (discussing the tax disclosures of some SDOs).

12. *See* United States v. Int'l Minerals & Chem. Corp., 402 U.S. 558, 563 (1971).

13. Mendelson, *Private Control*, *supra* note 8, at 764–66 (quoting H.R. JOURNAL, 3d Cong., 2d Sess. 328–29 (1795)) ("[M]ost conducive to the general information of the people."); *see, e.g.*, U.S. GOV'T PUB. OFF., https://www.gpo.gov (last visited Nov. 24, 2016).

14. *See, e.g.*, U.S. CONST. amend. XXIV, § 1 (abolishing federal poll taxes); *see also* Harper v. Va. Bd. of Elections, 383 U.S. 663, 666 (1966) (holding any wealth-based electoral standard unconstitutional).

15. *E.g.*, Pub. L. No. 113-30, 127 Stat. 510 (2013) (codified at 49 U.S.C. § 60102(p)) (requiring an agency to only incorporate standards that are freely available); Incorporation by Reference, 79 Fed. Reg. 66,267, 66,273–74 (Nov. 7, 2014) (to be codified at 1 C.F.R. pt. 51) (categorically rejecting solutions to incorporation by reference that may have any negative implication on an organization's copyright).

er's copyright, regardless of placement in any law. Since the Copyright Code fails to expressly address the copyright of laws or any work that possesses legal effect, an analysis of how existing copyright doctrines may be construed to enable free access to incorporated standards is due.

This Note argues that existing copyright doctrines do not provide any solution for altering the copyrightability of incorporated standards, and under the current statutes the incorporated standards still maintain their copyright. To fully resolve this problem, then, copyright revision is necessary to make the legal obligations created by incorporation by reference freely available to the public. Part I of this Note introduces voluntary consensus standards and describes how they become enacted into law. This Part also explains the copyright protections extended to both voluntary consensus standards and laws. Part II examines how copyright cannot properly analyze copyrighted works that subsequently become law in the same manner as traditional laws, perpetuating the conflict. Part III argues for two copyright law provisions that would make laws ineligible for copyright and assign works with legal force to the public domain.

I. VOLUNTARY CONSENSUS STANDARDS, LAWS, AND HOW COPYRIGHT TREATS THEM DIFFERENTLY

Voluntary consensus standards are uniform rules created by private nonprofit entities to promote safety, predictability, and uniformity amongst industries and trades. Upon creation, these standards receive copyright protection. Incorporation by reference is a frequent lawmaking tactic that directly adopts these standards into law, not by duplicating their copyrighted contents word-for-word inside of the statute or regulation, but by simply referring to the name of the standard.[16] These mere references force the public to seek out the standard from its developer, who generally charges a licensing fee to obtain it. Traditionally, access to laws (in any form) cannot be controlled by a copyright holder. But the control asserted here is not over a law—it is over a copyrighted work that a *separate* law requires

16. *See* Emily S. Bremer, *Incorporation by Reference in an Open-Government Age*, 36 HARV. J.L. & PUB. POL'Y 131, 134, 139–41 (2013) [hereinafter Bremer, *Open Age*] (discussing the benefits and ongoing emphasized agency use of SDO standards); Peter L. Strauss, *Private Standards Organizations and Public Law*, 22 WM. & MARY BILL RTS. J. 497, 505–06 (2013) (discussing saturation of agency selection).

verbatim compliance with at risk of penalty. The Copyright Code itself does not explicitly address the eligibility of works that possess legal force. Thus, lawmakers cannot take any action that would infringe the copyright, nor is there any statutory method of removing the copyright. This sets up the issue at hand: lawmakers are dependent upon private standards, which upon adoption must remain under the exclusive control of their authors. This forces the general public to either spend money to comply or blindly risk violating regulations.

At the center of this conflict are two conceptually opposite aspects of law. One is copyright—the grant of exclusive rights to incentivize useful works.[17] The other is open access—the due process principle that laws must be freely accessible to the public.[18] The challenge to this issue is preserving both. This Part summarizes these two conflicting concepts. Section A provides an introduction to voluntary consensus standards and the logistics of how incorporation by reference gives some of them legal force. Section B explores how copyright applies to voluntary consensus standards, which will be analyzed further in Part II. Section C explains why laws cannot be subject to copyright.

A. VOLUNTARY CONSENSUS STANDARDS AND HOW THEY RECEIVE LEGAL FORCE

The popularity of incorporation by reference among all levels of lawmaking is a direct response to the high quality of voluntary consensus standards.[19] Subsection 1 outlines what voluntary consensus standards are and where they come from. Subsection 2 explains how incorporation by reference gives them legal effect in the context of federal regulations.[20]

17. 17 U.S.C. § 106 (2012) (granting "[e]xclusive rights in copyrighted works"); *see also infra* Part I.B (further discussing applicable copyright provisions).

18. Even the most notorious, unforgiving lawmakers of antiquity did not hide laws from the citizens subject to their punishments. *See* RONALD S. STROUD, DRAKON'S LAW ON HOMICIDE 74 (1968) (noting the code of Drakon, "which had been written on [public wooden tablets]").

19. Some authors have called into question whether SDO standards are really inherently valuable at all. *See, e.g.*, Mendelson, *Private Control*, *supra* note 8, at 761 (scrutinizing SDO internal process as not representative, unaccountable to authorities, and lacking transparency).

20. When examples or context is needed, this Note will use federal regulations as the level of lawmaking that employs incorporation by reference because of their national effect and near-total saturation of using voluntary consensus standards in lieu of any other type.

1. Origin of Voluntary Consensus Standards

Standards Developing Organizations (SDOs) are sophisticated private entities that develop and publish voluntary consensus standards.[21] The standards establish industry-wide uniform systems of safety or manufacturing, and cover a broad range of daily life such as automobile lighting, exhaust systems, and the energy usage of an air conditioner.[22] The dangers of deviating from these standards are well documented and tragic, often found in immense industrial explosions or structural collapses.[23] Thus, industry-wide adoption of even a single standard promotes quality, compatibility, and predictability in the marketplace.

The network of SDOs in the United States is extensive. SDOs are comprised of constituent "members" representing many different industries and interests, such as government professionals, corporate trade companies, and safety-certification organizations.[24] There are hundreds of SDO entities just in the United States, and each individual SDO can have membership reaching thousands.[25] These SDOs have a prolific impact. There are more than one hundred thousand voluntary consensus standards in use throughout the United States and the largest SDOs have multi-million dollar revenue streams from selling training products, annotated standards, and certifications.[26]

21. Strauss, *supra* note 16, at 499.

22. *The Scope of Copyright Protection: Hearing Before the Subcomm. on Courts, Intellectual Prop., & the Internet of the H. Comm. on the Judiciary*, 113th Cong. 92 (2014) [hereinafter *Scope Hearings*] (statement of Carl Malamud, President, Public.Resource.Org).

23. *Id.* at 90 (statement of Carl Malamud, President, Public.Resource.Org). *See generally* John M. Broder, *Panel Says Firms Knew of Cement Flaws Before Spill*, N.Y. TIMES (Oct. 28, 2010), http://www.nytimes.com/2010/10/29/us/29spill.html (noting cementing standards were ignored in Deepwater Horizon disaster); Steven Greenhouse, *BP To Pay Record Fine for Refinery*, N.Y. TIMES (Aug. 12, 2010), http://www.nytimes.com/2010/08/13/business/13bp.html (referencing safety code violations in 2005 Texas City refinery tragedy).

24. *See, e.g.*, Strauss, *supra* note 16, at 539–40 (discussing the membership makeup of the North American Energy Standards Board).

25. *Id.* at 500; *see* Veeck v. S. Bldg. Code Cong. Int'l, Inc., 293 F.3d 791, 793 (5th Cir. 2002) (en banc) ("[C]onsisting of approximately 14,500 members . . . .").

26. Emily S. Bremer, *A Multidimensional Problem*, 45 ENVTL. L. REP. 10783, 10784 (2015) [hereinafter Bremer, *Multidimensional*]; *see Scope Hearings*, *supra* note 22, at 94–95 (statement of Carl Malamud, President, Pub-

Even though a voluntary consensus standard by itself does not carry the force of a law, the process of developing a standard mirrors traditional lawmaking.[27] SDO members are involved in an intricate process of writing, commenting, and adoption of standards,[28] sometimes taking up to five years to finalize.[29] Since SDOs are private entities, they are not required to disclose their exact development procedures and each SDO has its own unique development process.[30] For example, some SDOs allow outside non-members to participate and others may have traditional membership-only participation.[31] The careful vetting practice matched with each member's expertise creates high-quality standards.

2. How Voluntary Consensus Standards Become Law

For the past few decades, the federal government has increasingly relied on voluntary consensus standards in lawmaking. The first use began with the Reagan administration's Circular A-119, which encouraged federal agencies to consider and utilize voluntary consensus standards in their regulations and rulemaking.[32] In 1996 Congress went further and passed the National Technology Transfer and Advancement Act of 1995 (NTTAA) *requiring* federal agencies to use voluntary consensus standards in place of government-authored standards where such usage was sufficient.[33] Circular A-119 was then updated in 1998 to provide additional guidance to agencies for vetting the

lic.Resource.Org); *infra* Part III.C.2 (discussing SDO revenue reported on Form 990 tax disclosures).

27. *See* OMB Circular A-119, 63 Fed. Reg. 8546, 8553–54 (Feb. 19, 1998) (noting force of law comes from agency adoption into regulations).

28. Strauss, *supra* note 16, at 501; *see also* OMB Circular A-119, 63 Fed. Reg. 8546, 8554, § 4(a)(1) (1998) (listing characteristics common to SDO standard development processes).

29. *See* Lydia DePillis, *Should Legal Codes Be Copyrighted? Let's Sue To Find Out!*, WASH. POST (Aug. 7, 2013), http://wpo.st/SxlJ1 ("Most of ASTM's standards are on a five-year development timeline . . . .").

30. *See* Mendelson, *Private Control*, *supra* note 8, at 759 ("[F]ull public access to SDO decisionmaking is limited . . . .").

31. Mendelson, *Taking Public Access*, *supra* note 8, at 10778.

32. Strauss, *supra* note 16, at 504. *See generally* OMB Circular A-119, 63 Fed. Reg. 8546 (1998) (issuing White House directive to agencies regarding revised procedure and guidelines for SDO standard use).

33. *See* National Technology Transfer and Advancement Act of 1995, Pub. L. No. 104-113, § 12(a)(3), 110 Stat. 775, 782 (1996) (codified at 15 U.S.C. § 272(b)(3) (2012)) (authorizing the Secretary of Commerce "to coordinate the use by Federal agencies of private sector standards, emphasizing where possible the use of standards developed by private, consensus organizations").

development history of a standard before adopting it into law.[34] Since then, agencies have almost exclusively adopted SDO standards in their rulemaking, in lieu of writing standards themselves.[35]

Federal law requires all binding agency regulations to be published in the Federal Register.[36] When the Federal Register and Code of Federal Regulations began to swell in size, Congress sought to reduce page quantities by using a practice known as incorporation by reference.[37] Incorporation by reference creates an exception to the Federal Register publishing mandate, allowing agencies to merely refer to SDO standards by name in lieu of publishing the text of the standard.[38] The only requirement for this publishing exemption is that the standard be made "reasonably available to the class of persons affected."[39] "Reasonably available" simply means providing a physical copy for inspection in Washington, D.C.[40] Thus, if one were to look up a regulation in the Federal Register that incorporated a voluntary consensus standard by reference, the text of the standard would not be published despite being given full

34. Strauss, *supra* note 16, at 504–05; *see also* OMB Circular A-119, 63 Fed. Reg. 8546, 8554 (1998) (defining SDO processes that help satisfy agency policy).

35. In a 2013 report for the preceding year, the National Institute of Standards and Technology found only a single instance of an agency using a government-developed standard in lieu of an SDO standard, in contrast to using 423 SDO standards, some of which even replaced older government-developed standards. Strauss, *supra* note 16 (citing NATHALIE RIOUX, NIST, SIXTEENTH ANNUAL REPORT ON FEDERAL AGENCY USE OF VOLUNTARY CONSENSUS STANDARDS AND CONFORMITY ASSESSMENT 1 (2013)).

36. *See* 5 U.S.C. § 552(a)(1) (2012) ("Each agency shall separately state and currently publish in the Federal Register.").

37. Strauss, *supra* note 16, at 502.

38. *See* 5 U.S.C. § 552(a)(1).

39. *Id.*

40. Mendelson, *Taking Public Access*, *supra* note 8, at 10776–78; *see also* Incorporation by Reference, 1 C.F.R. § 51.9(b)(4) (2015) (requiring a showing that referenced standards are available for inspection); *cf.* Strauss, *supra* note 16, at 518–19 (suggesting Congress had a wider availability in mind for "reasonably available" than what is currently viewed as sufficient). Much debate centers just on what amount of access is required to statutorily satisfy "reasonably available" in today's digital age and to what extent the government should be accountable for providing it. *Compare, e.g.*, Bremer, *Open Age*, *supra* note 16, at 156–59 (arguing access should be broad and agencies bear responsibility for ensuring availability), *with* Strauss, *supra* note 16, at 523–24 (arguing the Internet has eliminated the "space-saving rationale" of incorporation by reference and created new access obligations for the Office of the Federal Register).

legal force as if it were. For example, the regulation that specifies the criteria for OSHA-compliant protective eyewear simply states, "devices must comply with any of the following consensus standards . . . ."[41] That regulation then lists three different standards, only by name, and provides no further information.[42]

This means anyone wishing to see the standard must search for it. The standards generally cannot be found on the Internet or in government depositories, meaning the public must obtain the standard from the SDO that authored it.[43] The SDOs often claim a copyright in the standard and charge a license fee to obtain a copy. In the instances where the SDO provides the standard with no charge, they still reserve the right to limit access or begin charging a fee.[44] The fees for the standards are arbitrarily set by the SDO.[45] The fees may range in amount, for example, from $91.50 for the Minnesota State Fire Code to $6000 for a Medicare prescription drug standard.[46] In the context of the above OSHA regulation, the public must either pay $57 to comply with the law, or risk a $12,471 fine by blindly going without it.[47]

The government did not anticipate that SDOs would claim copyright over the standards, but rather expected them to be widely available in libraries or commercial publications.[48] Despite this unexpected assertion of copyright, SDOs continue to maintain this control because Circular A-119 directs agencies

41. 29 C.F.R. § 1910.133(b)(1) (2016).

42. *Id.* § 1910.133(b)(1)(i)–(iii).

43. *See* Mendelson, *Taking Public Access*, *supra* note 8, at 10776; Strauss, *supra* note 16.

44. Mendelson, *Private Control*, *supra* note 8, at 753. Even in the instances where SDOs do provide "free" access, it is only under strict conditions within their exclusive control, and users accessing it must sign waivers for challenging the copyright claims. *Id.*

45. S*ee* Strauss, *supra* note 16, at 507 ("[T]he monopoly price a valid copyright would permit a private organization 'owning' that legal obligation to charge.").

46. *See* Mendelson, *Private Control*, *supra* note 8, at 744; INT'L CODE COUNCIL, MINN. ST. FIRE CODE (2007), http://shop.iccsafe.org/minnesota-state-fire-code.html (last visited Nov. 24, 2016). *See generally* MINN. R. 7511.0010–7511.8440 (2016) (Minnesota State Fire Code Regulation).

47. *See* 29 C.F.R. § 1903.15(d)(3)–(4) (2016) (penalties for violation); *ANSI Webstore*, AM. NAT'L STANDARDS INST., http://webstore.ansi.org/RecordDetail.aspx?sku=ANSI%2fISEA+Z87.1-2010+Package (last visited Nov. 24, 2016).

48. *See* Strauss, *supra* note 16, at 519 (citing S. REP. NO. 88-1219, at 4–5 (1964)). The legislature anticipated commercial publishers would issue compilations of incorporated standards, thus making Federal Register printing redundant. *See* S. REP. NO. 88-1219, at 4 (1964).

to "observe and protect the rights of the copyright holder."[49] This has multiple implications. First, it prevents agencies from just publishing the contents of the standard for free, meaning the public is forced to buy it from the SDOs.[50] Second, it means that all incorporated standards are *voluntarily* offered as candidates for incorporation by the owner organization, as opposed to the agencies forcefully adopting them.[51] Third, this means current agency policy does not recognize a standard's copyright, nor its pricing, as a preclusion to incorporation.[52]

Lastly, it means an incorporated standard that has even been superseded and outdated by its own SDO still maintains copyright respect as long as the regulation referencing it still exists.[53] This especially has a wide-reaching impact, as most of the standards referenced in the Code of Federal Regulations are outdated and no longer represent SDO consensus yet *still* require payment of a fee.[54] Many outdated SDO standards remain legally binding despite being unable to be found or, in some cases, subsequently shown to be hazardous.[55] This lag occurs because the Office of the Federal Register does not permit a regulation to automatically update whenever its respective standard is revised.[56] So a regulation cannot simply state the criteria of compliance as "whatever the most recent version" of a standard is. Regulations may only incorporate existing standards—not hypothetical standards with uncertain contents—and may only be updated with new rulemaking.[57]

In conclusion, incorporation by reference places SDOs in a very favorable position. Agencies must use voluntary consensus

49. OMB Circular A-119, 63 Fed. Reg. 8555, § 6(j) (1998).

50. *See* 17 U.S.C. § 106(1), (3) (2012).

51. This is not a takings issue; this is a fully aware business decision. *See generally* U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation.").

52. *See* Mendelson, *Taking Public Access*, *supra* note 8, at 10778.

53. Strauss, *supra* note 16, at 507.

54. *Id.* at 506–07.

55. *E.g.*, 46 C.F.R. § 160.041-4(b) (2014) (requiring, pursuant to a 1941 Coast Guard regulation, that first aid kits contain phenacetin, now internationally recognized as a carcinogen). SDOs have no obligation to keep standards available after incorporation, and there is discussion of whether an unavailable standard renders its regulation unenforceable. *See* Mendelson, *Taking Public Access*, *supra* note 8, at 10779.

56. *See* 1 C.F.R. § 51.1(f) (2016) ("Incorporation by reference of a publication is limited to the edition of the [standard] that is approved. Future amendments or revisions of the [standard] are not included.").

57. Strauss, *supra* note 16, at 506.

standards and cannot violate their copyright when doing so. This enables the organizations to receive an exclusive self-priced revenue stream that exists for the lifetime of the regulation even where the standard is outdated or abandoned.[58] There is seemingly no obligation requiring the SDO to sustain availability of the standard or maintain any involvement once the standard is incorporated. These benefits showcase why organizations *never* decline to have their standards incorporated into law, and often refuse to make their standards free to the public.[59]

B. HOW COPYRIGHT APPLIES TO VOLUNTARY CONSENSUS STANDARDS

Voluntary consensus standards are copyright protected works. The owner of a copyrighted work receives exclusive control over the reproduction, derivation, and distribution of that work. This grant provides SDOs with the power to control their standards—a power that agencies cannot infringe upon. An incorporated standard creates a unique situation because the organizations do not author a law—they author a copyrighted standard—and the designation of legal force comes *after* the copyright grant. Since copyright is created by statute, the statute must dictate the terms upon which a copyright ceases. Some judicial copyright doctrines and sections of the Copyright Code provide an intuitive starting point for resolving copyright control of an incorporated standard, but, as this Note will argue later, none are sufficient. For now, a discussion of copyright fundamentals is necessary in order to understand the nuances that will be introduced later. Subsection 1 will outline the relevant statutory basics of copyright and how they apply to voluntary consensus standards. Subsection 2 will discuss the rights of copyright owners and some limits to those rights.

1. The Purpose, Basics, and Scope of Copyright

The primary purpose of copyright is to incentivize future authors by granting them temporary exclusive rights over their works. In exchange, when the copyright expires, the work becomes public domain so the public and society may benefit from

58. *See supra* notes 44, 53, and accompanying text.

59. *See Scope Hearings*, *supra* note 22, at 127–28 (testimony of Carl Malamud, President, Public.Resource.Org) ("I have never seen a standards body object to one of their documents becoming incorporated by law.").

its use.[60] This purpose is expressed in the Constitution, which gives Congress authority to create copyright law.[61] That authority is currently codified as the Copyright Act of 1976, which has been amended several times.[62] The Copyright Code specifically dictates where copyright applies and where it does not.

An author may receive copyright protection in "original works of authorship fixed in any tangible medium of expression . . . from which they can be perceived, reproduced, or otherwise communicated."[63] An author is anyone to whom a work owes its origin.[64] A work is fixed when "its embodiment . . . is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration."[65] Moreover, an original work is one "independently created by the author (as opposed to copied from other works) . . . possess[ing] at least some minimal degree of creativity."[66] These requirements implicate a wide variety of subjects and forms of creativity, such as literature, photographs, and architectural plans.[67]

There are limits, however, on which aspects of a work receive copyright protection. For example, facts are excluded from copyright protection because they are not original to an author.[68] Utilitarian aspects of copyrighted visual works are also excluded, such as the wiring or bulb socket of a sculpture used as a table lamp.[69]

60. *See* Fox Film Corp. v. Doyal, 286 U.S. 123, 127–28 (1932).

61. U.S. CONST. art. I, § 8 ("[P]romote the progress of . . . useful arts, by securing for limited times to authors . . . the exclusive right to their respective writings . . . ."); *see also Fox Film Corp.*, 286 U.S. at 127 ("Congress did not sanction an existing right, but created a new one.").

62. Pub. L. No. 94-553, 90 Stat. 2541 (codified as Title 17 of the United States Code); *see, e.g.*, Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (1998) (extending duration of copyrights); Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998) (establishing criminal penalties for infringement).

63. 17 U.S.C. § 102(a) (2012).

64. Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 57–58 (1884).

65. 17 U.S.C. § 101 (providing a definition of "fixed").

66. Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 345 (1991).

67. *See* 17 U.S.C. § 102(a)(1)–(8) (listing specific types of protected works).

68. *Feist Publ'ns, Inc.*, 499 U.S. at 345.

69. 17 U.S.C. § 101 (providing a definition of "[p]ictorial, graphic, and sculptural works" and "useful article"); *see also* Mazer v. Stein, 347 U.S. 201, 218 (1954) (noting copyright protection does not extend to "mechanical or utilitarian aspects").

The most difficult determination for copyright, however, is the idea/expression dichotomy. Copyright law grants authors protection for their original expressions, but permits other authors to "build freely upon the *ideas* . . . conveyed by [the] work."[70] Thus, any ideas present in a copyrighted work are not protected.[71] But even the circuit courts agree that differentiating between an idea and an expression is a difficult task.[72] If the level of abstraction for an idea is set very narrowly, subsequent authors may lawfully copy large amounts of an original work to the detriment of the author. But if the level is set too high, the original author could claim copyright over broad generalizations like "romance novel" to the detriment of future authors and the public.[73] Thus, for any inquiry, the idea/expression line needs to be drawn in a position that provides benefits to an author but still permits other authors to build upon the ideas of that work.[74]

Further complicating this abstraction are scenarios where an expression cannot be separated from its idea at all. When one cannot separate an expression from its idea, the expression then cannot be copyrighted. This concept is known as the merger doctrine.[75] The merger doctrine was developed by the courts[76] as a means of protecting ideas with limited numbers of

70. *Feist Publ'ns, Inc.*, 499 U.S. at 349–50 (emphasis added).

71. 17 U.S.C. § 102(b); *see also* Baker v. Selden, 101 U.S. 99, 102 (1879) (stating an author cannot have copyright over methods of operation); 37 C.F.R. § 202.1(b) (2016).

72. *See, e.g.*, Seng-Tiong Ho v. Taflove, 648 F.3d 489, 498 (7th Cir. 2011) ("[T]he line between an expression and an idea can be difficult to determine . . . ."); Gates Rubber Co. v. Bando Chem. Indus., 9 F.3d 823, 834 (10th Cir. 1993) ("Determining which elements . . . are protectable is a difficult task."); Comput. Assocs. Int'l, Inc. v. Altai, Inc., 982 F.2d 693, 704 (2d Cir. 1992) ("Drawing the line between idea and expression is a tricky business."); Robert R. Jones Assocs., Inc. v. Nino Homes, 858 F.2d 274, 279 (6th Cir. 1988) ("Other courts have also struggled to balance these competing concerns . . . ."); Apple Comput., Inc. v. Franklin Comput. Corp., 714 F.2d 1240, 1253 (3d Cir. 1983) ("[Courts] draw[ing] the line between an idea and expression have found difficulty in articulating where it falls.").

73. *See* Nichols v. Universal Pictures Corp., 45 F.2d 119, 121 (2d Cir. 1930) (describing how removing copyrighted portions of a story piece by piece eventually leaves "no more than the most general statement of what the play is about, and at times might consist only of its title").

74. Herbert Rosenthal Jewelry Corp. v. Kalpakian, 446 F.2d 738, 742 (9th Cir. 1971).

75. Michael D. Murray, *Copyright, Originality, and the End of the Scènes à Faire and Merger Doctrines for Visual Works*, 58 BAYLOR L. REV. 779, 788 (2006).

76. Russell Hasan, *Copyright's Merger Doctrine as a Solution to Conflicts*

expressions from being monopolized by the authors who would copyright those limited expressions first.[77] For example, in *Herbert Rosenthal Jewelry Corp. v. Kalpakian*, the Ninth Circuit held that the idea and expressions of a "jeweled bee pin" are equivalent, noting that any similarities between different jeweled bee pins are simply a result of them *being* jeweled bee pins.[78] When a court determines that few expressions are available to an idea, the merger doctrine applies and the court need not wait for all possible expressions to be copyrighted.[79] Thus, an expression can maintain copyright, but not if it is one of limited ways to express an idea.

Voluntary consensus standards meet the statutory requirements for copyright protection. There is no question of the independent creativity involved in authoring a standard.[80] Further, any voluntary consensus standard is just one of seemingly infinite ways in which to express the idea of a safety code so there is no merger issue involved.[81] On its own, a voluntary consensus standard is indeed a copyright protected work.

2. Rights of Copyright Owners

The owner of a copyright is given exclusive power to control the reproduction, derivation, and distribution of that copyrighted work.[82] For SDOs developing voluntary consensus standards, these rights last for either 120 years after creation of the standard or 95 years after the standard's first publication, whichever comes first.[83] Anyone who violates one of these rights

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Between Copyright Law and Freedom of Speech, CARDOZO ARTS & ENT. L.J., http://www.cardozoaelj.com/hasan_blog (last visited Nov. 24, 2016).

77. *See* Morrissey v. Procter & Gamble Co., 379 F.2d 675, 678–79 (1st Cir. 1967).

78. *See Kalpakian*, 446 F.2d at 742 ("There is no greater similarity between the pins of plaintiff and defendants than is inevitable from the use of jewel-encrusted bee forms in both.").

79. *See Morrissey*, 379 F.2d at 679 ("[Merger doctrine's] operation need not await an attempt to copyright all possible forms.").

80. *See* Veeck v. S. Bldg. Code Cong. Int'l, Inc., 293 F.3d 791, 794 (5th Cir. 2002) (en banc) ("As the organizational author of original works, SBCCI indisputably holds a copyright in its model building codes.").

81. Veeck v. S. Bldg. Code Cong. Int'l, Inc., 49 F. Supp. 2d 885, 890 (E.D. Tex. 1999) ("[T]he subject of building codes is open to a number of different types of expressions.").

82. 17 U.S.C. § 106(1)–(3) (2012).

83. *Id.* § 302(c) (explaining the duration of copyright on works made for hire).

is guilty of copyright infringement.[84] A derivative work is one that is based upon another, such as a translation or dramatization.[85] Since incorporation by reference deals with a single established version of a standard, derivative rights do not arise when SDO rights are violated. Reproduction and distribution are the most relevant rights in this context.

The reproduction right is the bedrock of the copyright owner's power.[86] Generally, the reproduction right prohibits anyone from copying the protected aspects of a work into another fixed copy.[87] There are different degrees of copying. The most straightforward type is the *exact copy*, whereby a substantial portion of protected elements are simply duplicated.[88] This often occurs in cases dealing with photography,[89] literature,[90] or music.[91] A total duplication of a work consisting of non-protected elements still represents unlawful reproduction.[92] On the opposite end is the de minimis copy—one "so trivial that the law will not impose legal consequences."[93]

84. *See id.* § 501(a). *But see* Nat'l Ass'n of Bds. of Pharmacy v. Bd. of Regents, 633 F.3d 1297, 1313 (11th Cir. 2011) (suggesting that the states still possess sovereign immunity in the realm of copyright infringement violations).

85. *See* 17 U.S.C. § 101 (defining "derivative work").

86. *See* JULIE E. COHEN ET AL., COPYRIGHT IN A GLOBAL INFORMATION ECONOMY 248 (4th ed. 2015).

87. *Cf.* Harper & Row, Publishers, Inc. v. Nat'l Enters., 471 U.S. 539, 548 (1985) ("[C]opyright does not prevent . . . copying . . . those constituent elements that are not original . . . as long as such use does not unfairly appropriate the author's original contributions.").

88. *See* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 464 (1984) (Blackmun, J., dissenting) ("[A] copyrighted work would be infringed by reproducing it in whole or in any substantial part, and by duplicating it exactly . . . ." (quoting H.R. REP. NO. 94-1476, at 61 (1976))).

89. *See, e.g.*, Images Audio Visual Prods., Inc. v. Perini Bldg Co., 91 F. Supp. 2d 1075, 1079–80 (E.D. Mich. 2000) (duplicating copyrighted commercial construction photographs infringed the photograph owner's right of reproduction).

90. *See, e.g.*, Basic Books, Inc. v. Kinko's Graphics Corp., 758 F. Supp. 1522, 1530 (S.D.N.Y. 1991) (holding a printing company infringed the copyright of academic articles when it wholesale-copied substantial excerpts from the articles into topical classroom packets).

91. *See, e.g.*, A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1013–14 (9th Cir. 2001) (noting that computer users that download and upload copyrighted songs infringe the owner's reproduction rights to both the musical composition and the sound recording).

92. *See* Hoehling v. Universal City Studios, Inc., 618 F.2d 972, 980 (2d Cir. 1980) ("A verbatim reproduction of another work . . . even in the realm of nonfiction, is actionable as copyright infringement.").

93. Ringgold v. Black Entm't Television, Inc., 126 F.3d 70, 74 (2d Cir. 1997).

Copyright would serve little purpose if it were limited to complete duplication. Thus reproduction rights also prevent copies that make use of only *some* protected elements.[94] These are called *substantially similar* copies and they infringe upon protected elements but do so with less obvious copying.[95] The various types of copying illustrate how a reproduction right can extend broadly to prohibit many similar copies. In the context of voluntary consensus standards, reproduction of an incorporated standard makes for an easy infringement action. Because citizens need to know the exact terms of a legal obligation, infringement usually involves duplicating the entire standard and not just portions of it.

In addition to reproduction, SDOs have the exclusive right of distribution. The distribution right protects against disseminating unauthorized copies of the protected work "to the public by sale or other transfer of ownership, or by rental, lease, or lending."[96] Although reproduction and distribution often implicate each other when infringement is involved, distribution is a distinct action.[97] This provides copyright owners with more options for control. The threat of distribution infringement has a suffocating effect on the availability of incorporated standards that are outside of the SDO's direct sales. It prevents commercial legal publishers, for example, from ever taking the initiative to compile incorporated standards and sell them as a volume, despite the obvious market for such a product.[98]

As noted above, these rights are not absolute and are subject to a variety of exceptions. The most famous exception is fair use.[99] Fair use is a statutory affirmative defense to copyright infringement, permitting a user to infringe the rights of a copy-

94. *See* COHEN ET AL., *supra* note 86, at 257–58 (discussing the concept of the substantially similar copy).

95. *See, e.g.*, Funky Films, Inc. v. Time Warner Entm't Co., 462 F.3d 1072, 1076–81 (9th Cir. 2006) (analyzing similarity between, inter alia, plots, character developments, themes, and dialogue of two different television show scripts).

96. 17 U.S.C. § 106(3) (2012).

97. *See* COHEN ET AL., *supra* note 86, at 346 (noting the "hand in hand" nature of reproduction and distribution).

98. Perhaps the easiest example to provide here is Thomson Reuters. Arguably the market leader in selling consolidated legal resources, the company does not sell any product that consolidates all incorporated regulations. Instead, to distribute voluntary consensus standards they operate a website that merely serves as a retail outlet for proprietary SDO publications. *See* TECH STREET, http://www.techstreet.com (last visited Nov. 24, 2016).

99. *See* COHEN ET AL., *supra* note 86, at 563.

right holder "for purposes such as criticism, comment, news reporting, teaching . . . scholarship, or research."[100] Fair use represents a principle that an informed society requires using copyrighted materials to communicate.[101] The Copyright Code sets out four non-exhaustive factors that a court must weigh when determining if a fair use has occurred. The first factor is "the purpose and character of the use."[102] This factor considers whether the use "transforms" or adds something new to the copyrighted work, such as reproducing books into a digital form to enable computer searches for single words.[103] The second factor is "the nature of the copyrighted work."[104] This evaluates the characteristics of the original work. For example, copying a factual work is more allowable than a fictional work.[105] The third factor is "the amount and substantiality of the portion used in relation to the [original] copyrighted work as a whole."[106] This includes both quantity *and* quality of the used portions.[107] Lastly, courts must consider "the effect of the use upon the potential market for or value of the copyrighted work."[108] The potential market includes both the effects of that specific use, and the adverse effects which would occur if use were widespread.[109]

Despite this guidance, fair use practicality suffers. First, it is so factually circumstantial that it offers very little predictability for anyone using a copyrighted expression.[110] This is prob-

100. 17 U.S.C. § 107.

101. *See* COHEN ET AL., *supra* note 86, at 564–65 (noting that some of the most important topics of discourse require balancing usage of a copyrighted work with the copyright owner's interests).

102. 17 U.S.C. § 107(1).

103. *See, e.g.*, Authors Guild v. Google, Inc., 804 F.3d 202, 214–19 (2d Cir. 2015) (discussing analysis that shows digital reproductions of books for the purpose of searching words and phrases contained within is a new purpose and character).

104. 17 U.S.C. § 107(2).

105. *See* Harper & Row Publishers, Inc. v. Nat'l Enters., 471 U.S. 539, 563 (1985) ("The law generally recognizes a greater need to disseminate factual works than works of fiction or fantasy.").

106. 17 U.S.C. § 107(3).

107. *See* Cariou v. Prince, 714 F.3d 694, 710–11 (2d Cir. 2013) (analyzing whether an artist's dark, gothic alterations to a photographer's scientific documentary photographs retained too much of the original photograph as to be substantial).

108. 17 U.S.C. § 107(4).

109. *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 590–94 (1994) (discussing the potential market effects that a parody song has on the original on which it is based).

110. Michael W. Carroll, *Fixing Fair Use*, 85 N.C. L. REV. 1087, 1090

lematic because communication sometimes requires using copyrighted expressions. Fair use forces a user to balance the need to use the expression with the risk of committing infringement.[111] This reveals the second concern: fair use is only applied as a *defense* to infringement. Unlike usage of facts and ideas, which by themselves cannot be infringed, a use must be litigated before knowing whether the exception applies. As discussed in Part II, fair use may not always apply to reproduction and distribution of incorporated standards.

C. HOW COPYRIGHT APPLIES TO LAWS

It is a well-established rule that laws cannot be copyrighted. This rule is reflected in a variety of ways at the federal level. For example, the Copyright Code expressly denies protection for any work of the United States Government.[112] Similarly, the U.S. Copyright Office will not register a copyright in any legislation, judicial opinion, agency regulation, or work that has the force of law.[113] But this rule is insufficient by itself for solving the problem posed above. Incorporated standards are not works of the United States and the Copyright Office does not promulgate binding rules.[114] The Copyright Code itself is actually entirely silent on how copyright applies to laws. Instead, the rule arose from a pair of Supreme Court cases over one hundred years ago.

The rule originates from 1834 in *Wheaton v. Peters*, which held that judicial opinions cannot be copyrighted.[115] In that

(2007); *see also* Castle Rock Entm't, Inc. v. Carol Publ'g Grp., Inc., 150 F.3d 132, 144 (2d Cir. 1998) (stating that amount and substantiality analysis must be conducted not just by itself but *within* the context of purpose and use as well).

111. *See id.* at 1096 (noting the potential for "high costs of litigation and the potentially enormous statutory damages" if a court disagrees with a user's fair use judgement).

112. 17 U.S.C. § 105.

113. *See* U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 313.6(C)(1)–(2) (3d ed. 2014) [hereinafter COMPENDIUM].

114. *See* Capitol Records, LLC v. Vimeo, LLC, 826 F.3d 78, 93 (2d Cir. 2016) ("[A]n opinion expressed by the Copyright Office . . . does not receive *Chevron* deference of the sort accorded to rulemaking by authorized agencies . . . .").

115. *See* Wheaton v. Peters, 33 U.S. 591, 668 (1834) ("[T]he court [sic] are unanimously of opinion, that no reporter has or can have any copyright in the written opinions delivered by this court; and that the judges thereof cannot confer on any reporter any such right.").

case, an early Supreme Court Reporter of Decisions[116] sued his successor for copyright infringement when the successor republished court opinions originally issued and published during the plaintiff's tenure.[117] The Supreme Court did not give any reasoning for that holding, however. The Court later provided reasoning for the rule that judicial opinions could not be copyrighted in *Banks v. Manchester*. In *Banks*, an Ohio Supreme Court reporter alleged copyright infringement against a third-party publisher for copying two opinions from the reporter's official publications.[118] The *Banks* Court reaffirmed *Wheaton*, and finally clarified the holding by stating that "[t]he whole work done by the judges constitutes the authentic exposition and interpretation of the law, which, *binding every citizen*, is free for publication to all . . . ."[119] The Court further explained that judges, in their official capacities, are outside of copyright's purpose, since judges earn "a stated annual salary, fixed by law, and can themselves have no pecuniary interest or proprietorship, as against the public at large, in the fruits of their judicial labors."[120]

Since then courts have applied a broader rule from the reasoning that laws in *any* form—statute, regulation, or judicial opinion—are not eligible for copyright.[121] And up until now, there has been little controversy about the copyright ineligibility of laws. The case law since *Banks* firmly establishes the existing broader rule that laws in all forms are not subject to copyright for two reasons. The first is policy (needing to know laws one is bound to), and the second is incentive (the laws are written by individuals whose public duty is to write them sans incentive). As discussed below in Part II, however, the fusion of

116. The Reporter of Decisions is the editor tasked with preparing Supreme Court opinions for publication in the United States Reports. *See* SUP. CT. R. 41.

117. *See Wheaton*, 33 U.S. at 593–95.

118. *See* Banks v. Manchester, 128 U.S. 244, 247–50 (1888).

119. *Id.* at 253–54 (emphasis added) (citing Nash v. Lathrop, 6 N.E. 559, 560 (Mass. 1886)).

120. *Id.* at 253; s*ee also, e.g.*, Practice Mgmt. Info. Corp. v. Am. Med. Ass'n, 121 F.3d 516, 518 (9th Cir. 1997) ("[T]he public owns the opinions because it pays the judges' salaries.").

121. *See, e.g.*, Bldg. Officials & Code Adm'rs. V. Code Tech, Inc., 628 F.2d 730, 734 (1st Cir. 1980) ("[J]udicial opinions and statutes are in the public domain and are not subject to copyright."); Howell v. Miller, 91 F. 129, 137 (6th Cir. 1898) ("[N]o one can obtain the exclusive right to publish the laws of a state . . . ."); Georgia v. Harrison Co., 548 F. Supp. 110, 113 (N.D. Ga. 1982) ("[N]either judicial opinions nor statutes can be copyrighted.").

traditional law-making with private standard authorship to create legal obligations does not fit neatly into this analysis. The functioning of incorporation by reference, combined with the silence of copyright statutes on the eligibility of laws, creates legitimate concerns that remain unanswered about whether incorporated copyrighted works should continue to be protected by copyright.

Although laws cannot be copyrighted, incorporated standards are copyrightable because they are original works of authorship. Authors of voluntary consensus standards can claim exclusive rights in the standard under § 106 of the Copyright Code.[122] Then, when an agency incorporates the standard into law, it must respect the copyright of the SDO.[123] This prevents the agency from infringing the SDO's reproduction or distribution rights in any way, and permits the SDO to capitalize on its placement in law.[124] The Copyright Office will not acknowledge a copyright in works that have legal force,[125] but by this point the SDO will have already obtained its copyright. There is no statutory provision revoking or limiting a work's copyright it *after* it is enacted into law.

II. COPYRIGHT LAW DOES NOT PROVIDE A SOLUTION FOR ENABLING ACCESS TO VOLUNTARY CONSENSUS STANDARDS INCORPORATED INTO LAW

Copyright does not provide a solution that makes incorporated standards unconditionally accessible to the public. There are two reasons for this: (1) the copyright code does not address how copyright applies to laws; (2) incorporated standards are actual copyrighted works, confusing the analysis that would

122. *See* Veeck v. S. Bldg. Code Cong. Int'l, Inc., 293 F.3d 791, 794 (5th Cir. 2002) (en banc) ("As the organizational author of original works, SBCCI indisputably holds a copyright in its model building codes."). *But see* Int'l Code Council, Inc., v. Nat'l Fire Prot. Ass'n, Inc., No. 02 C 5610, 2006 WL 850879, at *23 (N.D. Ill. 2006) ("[G]enuine material disputes of fact exist as to whether Plaintiff owns, by operation of the work-for-hire doctrine with respect to the acts of authorship by the technical subcommittee members or ICC staff liaisons, many of the allegedly infringed provisions in the IBC 2000.").

123. OMB Circular No. A-119, 63 Fed. Reg. 8546, 8555, § 6(j) (Feb. 19, 1998).

124. *See* Mendelson, *Private Control*, *supra* note 8, at 743 (noting that SDOs retain an entitlement to charge for access to their copyrighted materials); Mendelson, *Taking Public Access*, *supra* note 8, at 10778 & n.26 (noting that executive order draft revisions are silent on SDO access fees).

125. COMPENDIUM, *supra* note 113 (describing, as examples of works with legal force, statutes, regulations, judicial opinions, and edicts of government).

otherwise apply to traditional laws. This Part will examine whether copyright's other doctrines can adequately protect access to incorporated standards despite the statute failing to specifically address copyright of laws in general. This Note concludes that they cannot. Section A explains how the Supreme Court's *Banks* analysis does not cleanly apply to incorporated standards. Section B examines whether a law can be a fact or idea for copyright purposes and how that may apply to incorporated standards. Finally, Section C shows how fair use fails to provide a last-resort solution for protecting use of incorporated standards.

A. THE RULE IN *BANKS* DOES NOT APPLY TO INCORPORATED STANDARDS

The broader *Banks* rule teaches that traditional laws are not eligible for copyright because they need to be accessed freely by the public and their author's public duties are not within the incentivizing purpose of copyright. First, incorporated standards are distinguished from traditional laws by the incentivized purpose of their authors. The *Banks* rule only analyzes laws that are written by lawmakers in their official capacities and ignores circumstances like incorporation by reference where laws are initially authored by private parties. The decision in *Banks* turned on the incentive of the author: the Court found judicial opinions could not be copyrighted because the public duty of judges to draft opinions is outside the purpose of copyright law—to cultivate future works for the benefit of society by providing authors with an incentive to create them.[126] Thus, lawmakers draft laws because it is their public duty and the Supreme Court does not recognize that duty as being within the scope of copyright's incentivizing purpose.[127]

While traditional laws therefore cannot be copyrighted, incorporated standards can still maintain copyright because SDO authorship is within copyright's incentivizing purpose.[128] As

126. *See generally* Banks v. Manchester, 128 U.S. 244 (1888) (noting the word "incentive" does not appear in the opinion).

127. *See Veeck*, 293 F.3d at 796 (noting the SBCCI argument regarding judge economic incentives); Bldg. Officials & Code Adm'rs. v. Code Tech., Inc., 628 F.2d 730, 734 (1st Cir. 1980) ("BOCA's argument implies that the rule of *Wheaton v. Peters* was based on the public's property interest in work produced by legislators and judges, who are, of course, government employees.").

128. *See Veeck*, 293 F.3d at 796 (noting the SBCCI argument that private authors have different interests than government employees); *Bldg. Officials & Code Adm'rs.*, 628 F.2d at 734 ("BOCA argues that [their code], unlike judi-

mentioned previously, it is only *after* the SDOs receive copyright that the standards become incorporated into law. Because the *Banks* reasoning relies on the authorship incentive purpose, incorporated standards will be able to maintain copyright under the current Copyright Code, placing them outside of *Banks* even after the standards become incorporated.

This after-the-fact legal effect indicates the second reason *Banks* cannot apply: SDOs do not claim copyright over the actual law, but something the law *refers* to. *Banks* involved an attempt to copyright a judicially drafted legal opinion, which is significantly different from a voluntary consensus standard. The SDOs do not draft legally binding materials—they draft copyrighted works that later become *referenced* by a law that *lawmakers* author. Thus, the SDO is not claiming copyright over the actual law that references its standard. It is claiming copyright over the standard that exists regardless of any lawmaker's decision to incorporate it into law. If the SDO attempted to claim copyright over the law itself, surely it would be denied. Additionally, such a claim would be redundant because the text of the standard is not included in the law. So the SDO would be claiming copyright over a law that simply contains a single sentence reference to the author's own code. In other words, there is no need for a copyright claim over the law itself referencing the standard because the SDO already has a copyright over the part that matters. This would not change even if the concept of "law ownership" was broad and more abstract, such as society owning the laws instead of the lawmaker that literally drafted it.[129]

Therefore, under *Banks*, SDOs have a valid copyright in their incorporated standards because the standards were privately authored within the incentivizing scope of copyright despite their subsequent legal effect. Additionally, the claim is not over an enacted law, but a work the law refers to. Strictly applying the *Banks* principle, SDOs are within their rights to protect their copyright interest. Practically, however, this outcome is what the *Banks* Court was trying to prevent—citizens

cial opinions and statutes, is principally the work . . . of itself-a private organization operating with little or no government support . . . .").

129. *See, e.g.*, *Bldg. Officials & Code Adm'rs.*, 628 F.2d at 734 ("[C]itizens are the authors of the law, and therefore its owners, regardless of who actually drafts the provisions, because the law derives its authority from the consent of the public . . . .").

will not have free access to their legal obligations.[130] This exposes the inadequacy of the current common law approach and suggests a need for a new solution.

B. LAWS AS FACTS AND IDEAS

Facts are not eligible for copyright and limited expressions of an idea will be precluded from protection. While it seems intuitive that a law is an idea with a limited expression, this premise fails when the expression of a law may be arbitrarily designated as anything. Similarly, an existing law has a factual element to it. But copyright's non-protective treatment of facts hinges on their lack of originality. Voluntary consensus standards are undeniably original works, which contradicts any fact analysis. Even though the mechanics of ideas, expressions, and facts can easily be applied to a voluntary consensus standard and the separate law that references it, the same familiar issues surface from Part II.A: an incorporated standard is not a traditional law and the arbitrary way that it receives legal force does not transform it so either. Subsection 1 examines whether laws can be analyzed as facts. Subsection 2 evaluates whether a law is an idea and how the expression of an incorporated standard should be analyzed against the law referencing it.

1. Laws as Facts

For copyright purposes, the Supreme Court has never expressly held that laws are facts. The Court has explained that the essence of a fact is that it is not original to any author, but rather is something to be discovered.[131] Under this reasoning a law could be considered a fact. The Copyright Code is, for example, a factual thing that exists to be discovered by someone. But this reasoning begins to break down in the context of anything that actually originated in an incentivized author because whether something is discovered is a matter of perspective. For example, Prince wrote, produced, and performed the entirety of his album *1999* all by himself.[132] To anyone who is *not* Prince,

130. *See Banks*, 128 U.S. at 253 ("[T]he law, which, binding every citizen, is free for publication to all . . . .").

131. *See* Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 345 (1991).

132. *See* Joey DeGroot, *Seven Great Albums Recorded by One Person: Prince, Paul McCartney, and More*, MUSIC TIMES (Apr. 6, 2014), http://www

1999 would be a factual thing to be discovered (perhaps in a record store). To Prince, *1999* was not discovered, because it originated from his efforts. Analyzing *1999* as a fact would then allow anyone who is *not* Prince to make use of *1999* without restriction—clearly violating Prince's exclusive rights to *1999*. Thus, analyzing any original work as a fact leads to a contradictory result. The *act* of Prince creating *1999* was a factual event that occurred, which may be reproduced, distributed, or translated into a derivative. The album itself is not. This applies to an incorporated standard as well. Anyone who is *not* the SDO author would be discovering the standard.

The laws-as-facts analysis has seen some success in courts, but the outcomes still provide little guidance for incorporated standards. For example, in *Veeck v. Southern Building Code Congress International*, the majority held laws must be factual because they cannot be stated in any other language than that which is expressed in the law.[133] One could argue under this reasoning that incorporated standards are facts because they can only be stated the way the SDOs have written them. The court's reasoning is questionable, however, because it mistakes the essence of a fact. Facts are not determined by whether they can be stated differently—John F. Kennedy was assassinated; A man murdered President John F. Kennedy—they are determined by lack of origin in an author. John F. Kennedy's assassination is a fact that originated in no one, no matter how many different ways it can be stated.

After accepting that laws are facts, the *Veeck* majority does not explain what legally causes a copyrighted standard to become a single unprotectable fact. In that case, the SDO did not author the laws of a city, it authored several safety standards that became incorporated.[134] The majority avoids explaining this standard-into-fact transformation by instead bizarrely holding that the copyright held on the standard is not *entirely* unprotected: if a would-be infringer reproduces or distributes the standard as *the law*, the laws-as-facts analysis applies and the SDO cannot enforce infringement claims because it cannot

.musictimes.com/articles/5280/20140406/seven-great-albums-recorded-by-one-person-prince-paul-mccartney-and-more.htm.

133. *Veeck*, 293 F.3d at 801 (quoting Veeck v. S. Bldg. Code Cong. Int'l, Inc., 241 F.3d 398, 416 (5th Cir. 2001) (Little, J., dissenting)).

134. *See id.* at 793–94 (noting that SBCCI's Standard Gas Code, Standard Fire Prevention Code, and Standard Mechanical Code were at issue in the case).

control a fact; but if someone uses the standard as *a model code* the SDO may exert control over the use.[135] But what is the difference between these two uses? There could be no way to know if the source that was copied from was the copyrighted work or the law when both are identical.[136] There is no use or value to a copyright if an exact replica of the protected work exists simultaneously as an unprotected fact that may be wholesale reproduced and distributed by anyone.

And even if this bi-usage rationale was accepted and it precluded a copyright infringement claim for reproducing or publishing a standard *as law*, it does not solve the problem of SDOs controlling access to the public's legal obligations by charging access fees when law seekers are forced to obtain it from them.

2. Laws as Ideas

Now an analysis of whether a law is an idea with a limited number of expressions. Recall that the merger doctrine requires a difficult analysis of competing interests before an idea and expression are merged. To begin with, there are multiple ways to express model codes and simply enacting one into law does not render it any less than one of many ways to express a building code.[137] However, using a law as the idea that an expression is analyzed against (instead of the original idea it was authored under, i.e., a safety code) requires distorting merger doctrine analysis that cannot be accepted.

Under normal merger doctrine analysis, the copyright eligibility of a standard would be determined by analyzing the standard as a single expression of a model code (the idea). Then, the court would weigh whether SDO interests (economic incentive) outweigh the public's interest (only way to express the idea of a model code) before deciding whether the expres-

135. *See id.* at 800 ("[W]e hold that when Veeck copied *only* 'the law' of Anna and Savoy, Texas, which he obtained from SBCCI's publication, and when he reprinted only 'the law' of those municipalities, he did not infringe . . . .").

136. This dilemma brings to mind Judge Learned Hand's famous independent creation hypothetical: "[I]f by some magic a man who had never known it were to compose anew Keats's Ode on a Grecian Urn, he would be an 'author,' and, if he copyrighted it, others might not copy that poem, though they might of course copy Keats's." Sheldon v. Metro-Goldwyn Pictures Corp., 81 F.2d 49, 54 (2d Cir. 1936). The same trouble surfaces: duplicate copies exist as both protected and in the public domain *only by magic*.

137. *See Veeck*, 293 F.3d at 807 (Higginbotham, J., dissenting) ("A complex code, even a simple one, can be expressed in a variety of ways."); Veeck v. S. Bldg. Code Cong. Int'l, Inc., 49 F. Supp. 2d 885, 890 (E.D. Tex. 1999).

sion should be merged and therefore unprotected. Since the standard is one of infinite ways to express a model code, there is no public interest to merge the expression with the idea and the standard would retain its copyright.

But this is not the question under laws as ideas analysis. Instead, the law-as-idea context is asking whether a specific wording or expression is the only way to express a particular law. For example, is the text of the Eighth Amendment the only way to express the Eighth Amendment? The answer would have to be yes. But the amendment's text could be a replica of anything the lawmakers want it to be—*Anna Karenina*, *The Raven*, or a George Carlin joke—linking those expressions to an idea it would never be analyzed against under standard merger analysis, which poses a problem for practice. Consider a real world possibility: a person drafts a philosophical text on ethics and morals. In the broadest abstract, this author's work would be one possible way to express the idea of "how to behave." The day after its publication, Congress enacts it as Title 57 of the United States Code, nullifying its copyright because it is the only way to express the idea of Title 57. But the author didn't create an expression of Title 57. The expression itself is being declared an idea, simply by choosing it to be so.[138] This completely goes against merger doctrine analysis, which requires an expression to be analyzed in light of the idea it was authored under. The whole purpose of merger vanishes when a copyrighted expression is compared to arbitrary ideas that have no relation to its essence.

The merger doctrine does not change a copyrighted expression into the sole unprotected expression of an entirely unrelated idea by simply incorporating it into law and declaring it to be "merged" with an arbitrarily chosen idea. Likewise, there are practical problems with declaring original works to be facts. These fundamentals of copyright analysis do not change just because a standard is incorporated and given legal effect.

C. FAIR USE AS A LAST DEFENSE

Since the previous Sections have shown that voluntary consensus standards retain their copyrights when incorporated, it is important to determine if a fair use defense can safely provide the public with access to incorporated standards. This Sec-

138. *See Veeck*, 293 F.3d at 807 (Higginbotham, J., dissenting) ("[T]he reasoning is wholly tautological.").

tion will address whether fair use is an appropriate solution to preserve the public's use of incorporated standards.[139] Though fair use looks like a reasonable option because it protects many uses in which the text of an incorporated standard would be reproduced, it ultimately fails because it cannot protect a usage that seeks to simply spread information.

To begin, fair use is not an ideal solution procedurally because, even if it applies, it would require costly litigation, which would undermine goals of improving access. Fair use is a *defense* to established infringement, meaning any user would have to establish in court that the exception applies. And because SDOs would initiate the litigation, they have complete control to determine strategically when to bring infringement actions.[140] This is not merely a hypothetical: selective copyright enforcement is a known strategy among owners of copyright to manipulate the value of their works.[141] The cost and time-consuming nature of lawsuits, combined with SDO's discretion of when to bring suits, illustrates how even an effective fair use claim does not provide optimum access for the public. Reproducing or distributing a legal obligation ought to not require defending a copyright infringement suit, especially given the unpredictable nature of asserting the defense.

Substantively, a user of an incorporated standard has an uncomfortably probable chance of failing a fair use analysis given the nature of how laws are communicated. It would be difficult to use incorporated standards in a different way. Legal writing and analysis often must reproduce the text of laws and opinions verbatim in order to be effective.[142] It would not be useful for purposes of teaching, information, or analysis if the exact text could not be used. Similarly, judicial statutory interpretation standards first seek to derive plain meaning from the

139. *But see Veeck*, 293 F.3d at 806–07 (Higginbotham, J., dissenting); *id.* at 817 (Wiener, J., dissenting) ("[F]air use . . . [is] more than adequate to preserve the ability of residents . . . to copy any portions of the code that they want or need to view.").

140. *See id.* at 800 ("Free availability of the law, by this logic, has degenerated into availability as long as [SDOs] choose[] not to file suit.").

141. *See, e.g.*, Sean Kirkpatrick, Comment, *Like Holding a Bird: What the Prevalence of Fansubbing Can Teach Us About the Use of Strategic Selective Copyright Enforcement*, 21 TEMP. ENVTL. L. & TECH. J. 131, 133–34 (2003) (analyzing the market strategy of Japanese corporations to withhold aggressive copyright infringement litigation schemes against fan bases).

142. *See* Collyn A. Peddie, *The Ten Commandments of Legal Writing*, HOUS. LAW., July/Aug. 1994, at 36, 40–41 (noting legal communication requires clearly knowing and understanding the law).

literal text of a law.[143] This would be a futile task without the exact text. It is therefore crucial to use the exact words of a law when communicating it. Unfortunately, replication is often not treated positively by the third factor of fair use analysis, the *amount and substantiality*, unless the use is different and transformative.

Replication is only part of the analysis, however. Simply being within one of the expressed purposes of the fair use statute does not automatically protect the usage.[144] But if the purpose *does* fall within one of those purposes, like criticism, teaching, or research, duplicating text may be more forgivable even if the entire work is reproduced.[145] The *nature of the copyrighted work* factor would further support a fair use finding since incorporated standards are informational and copying of informational works is more likely to be found in favor of fair use.[146] Lastly, the *market effect* factor for these uses would support fair use for two reasons: (1) incorporated standards and works critiquing them serve different markets and it is unlikely that an SDO would simultaneously offer works that criticize its own product; and (2) the negative market effects of effective criticism are not a recognized harm under copyright law.[147] Thus, copying substantial portions of an incorporated standard for critical or annotated educational purposes would have a very strong presumption of fair use, thereby protecting public access. But this list of purposes is not exhaustive, and there is one remaining purpose that poses a significant problem—the informational purpose.

Anyone desiring to read a law is likely to seek a source that contains the law in its entirety, because of the importance of exact wording. Recalling the different markets described above, a person seeking to read a work would not seek out a criticism

143. *See* Carcieri v. Salazar, 555 U.S. 379, 387 (2009) (noting that the first step of statutory construction is to "determine whether the statutory text is plain and unambiguous").

144. *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 577–78 (1994) (describing the fair use categories as *illustrative* to analysis).

145. *E.g.*, Caner v. Autry, 16 F. Supp. 3d 689, 714 (W.D. Va. 2014) (acknowledging that courts widely accept reproducing a protected work in its entirety for criticism and opinion).

146. *See, e.g.*, New Era Publ'ns Int'l, ApS v. Carol Publ'g Grp., 904 F.2d 152, 157–58 (2d Cir. 1990) (holding books on L. Ron Hubbard's life, religion, and family were factual in nature and permitted greater leniency for copying).

147. *See Campbell*, 510 U.S. at 591–92 (discussing the market effects of parody music on a song and its derivatives).

of that work as a substitute. In the law publishing context, then, there is absolutely a need for sources that that simply display the unaltered law free of criticism or annotations.[148] But this "informational" purpose for reproducing incorporated standards is far less likely to be considered fair use in comparison to the statutory transformational purposes.

Recall that the first factor, *purpose*, evaluates whether the use supersedes the original work or adds something new, and whether the use is commercial or non-profit educational.[149] This is problematic from the start because an informational purpose does not fit cleanly into any of the statute's transformation categories, nor is it commercial or non-profit educational—it is just to spread information. A *non*-transformative purpose does not bar a finding of fair use, but it severely hamstrings the likelihood of fair use by damaging the context that the other factors are considered in.[150] Such as the *amount and substantiality* factor: while wholesale copying would probably be acceptable under a criticism purpose, under a non-transformative purpose, wholesale copying goes directly against fair use.[151] Under the *market effect* factor, a non-transformative use either directly usurps the market of the original work by competing against its replica, or destroys the market entirely where the reproductions are given away for free (as is likely with spreading information).[152] All of these factors taken together provide a gloomy projection for an informational purpose.

Failure to protect an informational purpose is the deal breaker. While fair use may be adequate where usage is for

148. *See, e.g.*, THOMSON REUTERS ANNUAL REPORT 2015, at 9 (2016) (noting that, in 2015 alone, the Thomson West Legal Services Division earned $3.4 billion in revenue).

149. *See Campbell*, 510 U.S. at 578–79 (noting the evaluation of purpose and use); *see also* 17 U.S.C. § 107(1) (2012) (requiring evaluation of the "purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes").

150. *See* Princeton Univ. Press v. Mich. Document Servs., Inc., 99 F.3d 1381, 1388 (6th Cir. 1996) (en banc) ("In the context of non-transformative uses, at least, and except insofar as they touch on the [market] fourth factor, the other statutory factors seem considerably less important.").

151. *E.g.*, Bouchat v. Balt. Ravens Ltd. P'ship, 619 F.3d 301, 311 (4th Cir. 2010) ("Unless the use is transformative, the use of a copyrighted work in its entirety will normally weigh against a finding of fair use.").

152. *E.g.*, Clean Flicks of Colo., LLC v. Soderbergh, 433 F. Supp. 2d 1236, 1242 (D. Colo. 2006) (reselling unauthorized "clean" films was a non-transformative use that usurped a market copyright owners were entitled to engage).

criticism and the like, if the fair use defense cannot protect something like a non-profit informational website for simply displaying the text of an incorporated standard, then it cannot be sufficient to protect the public's access. A *partial* access to law, in hopes of gambling a satisfactory fair use defense to copyright infringement, does not correspond with the public's need to access the laws that govern it. Finally, even while fair use may provide an opportunity for reproducing the text of an incorporated standard in many uses, it does not resolve the issue of paying to obtain the standard.

III. HOW COPYRIGHT CAN BE CHANGED TO PROTECT ACCESS TO INCORPORATED VOLUNTARY CONSENSUS STANDARDS

Revising the Copyright Code will be necessary to allow incorporated standards to be obtained without cost, and be free for reproduction and distribution. These changes will inevitably affect how standard industries operate, but they will not impair their ability to maintain competitiveness and accrue substantial revenue. This Part discusses how copyright law should be changed. First, Section A proposes finally adding laws to the § 102 subject matter statute. Then Section B introduces considerations for copyrighted works that voluntarily receive subsequent legal effect. Finally, Section C raises and defends the economic and incentive implications for altering the copyright of incorporated standards.

A. ADDING LAWS TO § 102

Despite the extensive history of denying copyright in laws, the Copyright Code does not address the copyright eligibility of laws leaving enforcement of this longstanding rule vulnerable and unclear. The Copyright Office will reject registrations of materials with legal effect, but they are not policy makers nor do they write or bindingly interpret the statutes.[153] Courts have

153. *See* COMPENDIUM, *supra* note 113 (denying copyright in state and federal statutes, judicial opinions, and regulations). In addition, the behavior of the Copyright Office indicates that it should not be relied upon to side on the interest of the public when rights holder's interests are at stake. The Copyright Office has a troubling pattern of blatantly misinterpreting and misapplying copyright statutes to expand the power of copyright holders, injecting its pro-rights holder's opinions into policy topics beyond its place or expertise, and courts repeatedly ignoring or rejecting its opinions as contrary to the statutes.

repeatedly found that laws should not be copyrightable. But despite the consensus in case law, the subject of copyrighted laws continues to surface in unorthodox cases, often where new technology or third party/private organizations are involved with the drafting process.[154] These create factual circumstances that do not fit cleanly into the case law.

Legislation is required to ensure laws and materials with legal effect are not subject to copyright for all circumstances. Congress should therefore add laws to the § 102(b) general subject matter exclusions.[155] Doing so would be consistent with how copyright law developed. Much of the prohibited subject matter in § 102(b) first developed in case law and was later written into the statute by lawmakers.[156] The case precedent of denying copyright protection to laws is extensive enough to represent a judicial consensus that laws cannot be copyrighted, thus making it ripe for inclusion into § 102(b).[157] In addition, this would be in line with congressional intent. A Senate report for the Copyright Act stated the purpose of § 102(b) was to codify already-established doctrines of ideas and concepts.[158] Codifying the long-standing consensus on copyright eligibility of laws would bolster that purpose.

Adding laws to § 102(b) finally establishes that laws and materials with legal effect are unrestricted and free for the

See generally PUBLIC KNOWLEDGE, CAPTURED: SYSTEMIC BIAS AT THE UNITED STATES COPYRIGHT OFFICE 1–2 (2016).

154. *See, e.g.*, Matthew Bender & Co. v. West Publ'g Co., 158 F.3d 693, 708 (2d Cir. 1998) (discussing the effect of "star pagination" on digital copies of court opinions); Complaint, Code Revision Comm'n v. Public.Resource.Org, Inc., No. 1:15-cv-02594-MHC (N.D. Ga. July 21, 2015) (alleging that annotations of a state code are copyrightable where state declares annotated version to be the official state code).

155. *See* 17 U.S.C. § 102(b) (2012); *see also* 37 C.F.R. § 202.1(b) (2016).

156. *See, e.g.*, COHEN ET AL., *supra* note 86, at 90–91 ("[L]egislative history . . . indicates that Congress intended §102(b) in part to codify the holding of *Baker*.").

157. *See* Banks v. Manchester, 128 U.S. 244, 253 (1888) ("The whole work done by the judges constitutes the authentic exposition and interpretation of *the law*, which, binding every citizen, is free for publication to all." (emphasis added)); Wheaton v. Peters, 33 U.S. 591, 668 (1834) ("[N]o reporter . . . can have any copyright in the written opinions delivered by this court . . . ."); Howell v. Miller, 91 F. 129, 137 (6th Cir. 1898) ("[N]o one can obtain the exclusive right to publish the laws of a state . . . ."); Georgia v. Harrison Co., 548 F. Supp. 110, 115 (N.D. Ga. 1982) ("[T]his court holds that a state may not copyright its statutes.").

158. *See* S. REP. NO. 93-983, at 108 (1974) ("Its purpose is to restate, in the context of the new single Federal system of copyright, that the basic dichotomy between expression and idea remains unchanged.").

public's use. As technology and practices like incorporation by reference evolve, they will continue to push the boundaries of what may be copyrighted. Only a statutory solution that resolves the issue outright protects access to laws under novel circumstances. By adding laws to § 102(b), Congress removes the possibility that any laws or materials with legal effect can be subject to exclusive control.

B. FOR COPYRIGHTED WORKS SUBSEQUENTLY GIVEN LEGAL FORCE

Simply adding laws to § 102(b), however, is not enough to remedy this issue by itself because it does not change the fact that a valid copyright exists in incorporated standards. The best approach would be to treat any copyrighted work as free of control the moment it is given legal effect. Incorporated standards are distinguishable from other privately developed works that receive legal effect, like the Model Penal Code (MPC), in that they are meant to be concealed from publication, sometimes spawn copyright infringement litigation, and require the public to spend significantly to obtain.[159] The MPC and state statutes that adopt portions of it are publicly distributed, thus there is no gateway allowing the MPC authors to exercise control. Thus, while adding laws to § 102(b) may prevent controls like infringement lawsuits, SDOs may still continue to control access to their hidden incorporated standards with fees because they are the only source for obtaining them. Additional reform is therefore needed to fully address the problem.

This Note suggests that Congress create a provision specifically altering the copyright of a protected work that has been given legal force, by assigning that work to the public domain.[160] A copyright owner cannot be *forced* by the government to distribute or share their copyrighted work.[161] Voluntary con-

159. *See* 5 U.S.C. § 552(a)(1) (2012) ("[M]atter reasonably available to the class of persons affected thereby is *deemed published* in the Federal Register when incorporated by reference . . . ." (emphasis added)).

160. *Cf. Scope Hearings*, *supra* note 22, at 127 (statement of Rep. Darrell Issa) ("[I]f I am willing to have [my standard] released to everyone, as an owner of that copyright and an undivided owner, don't [I] ultimately have no possibility of protection?").

161. *See* 17 U.S.C. § 201(e) (2012) (noting involuntary transfer orders by government are generally prohibited); *see also* Hendricks & Lewis PLLC v. Clinton, 766 F.3d 991, 997 (9th Cir. 2014) ("[T]he United States copyright of an individual author shall be secured to that author, and cannot be taken away by any involuntary transfer.").

sensus standards enacted into law are not done under a "takings clause," but rather are *voluntarily offered* by their SDOs.[162] A copyright holder always has the ability to assign their work to the public domain.[163] There are many financial benefits that come with incorporated standards besides sales to parties who are mandated to comply. If some SDOs do not want to give up the copyright on their standards, they can simply opt not to offer them up for incorporation and forego the other benefits that come from adoption. There are many competitors that might take their place, whose standards still encompass quality. And some incorporated standards are already made available for free online by their owners. This provision would also enable the government, legal publishers, and public advocates to prevent misplacement by preserving the standard online, while maintaining the size considerations of the Federal Register.[164]

The provision will also help agencies make standards widely available. Statutory limitations prevent agencies from violating copyrights.[165] The most recent Office of Federal Register efforts to reform incorporation by reference continue to reject many reasonable solicited public proposals because of copyright conflicts.[166] With the provision, agencies will not be forced to

162. *See* Strauss, *supra* note 16, at 547 (discussing the shortcomings of a hypothetical "takings" arrangement between SDOs and government agencies); *cf.* Kelo v. City of New London, 545 U.S. 469 (2005) (upholding government forcing private owner to transfer land to another private owner for development of public use under Fifth Amendment).

163. *See* Nat'l Comics Publ'ns, Inc. v. Fawcett Publ'ns, Inc., 191 F.2d 594, 598 (2d Cir. 1951) ("[An] author . . . may abandon . . . his copyright in [a work]. . . ." (internal quotations omitted)); *see also* Timothy K. Armstrong, *Shrinking the Commons: Termination of Copyright Licenses and Transfers for the Benefit of the Public*, 47 HARV. J. ON LEGIS. 359, 391–95 (2010) (discussing the uncertainty of copyright abandonment in case law and recent amendments).

164. It is likely that the digital age has nullified the space-saving considerations that brought about the practice of incorporation by reference in the first place. *See* Strauss, *supra* note 16, at 523–24 (discussing how the Internet and electronic distribution have replaced physical space concerns).

165. *See* Incorporation by Reference, 79 Fed. Reg. 66,267, 66,270 (Nov. 7, 2014) (to be codified at 1 C.F.R. pt. 51) ("[W]e balanced our statutory obligations regarding reasonable availability of the standards with: (1) U.S. copyright law . . . ."); ADMIN. CONFERENCE OF THE U.S., ADMINISTRATIVE CONFERENCE RECOMMENDATION 2011-5: INCORPORATION BY REFERENCE 3 (2011) [hereinafter ACUS RECOMMENDATION] ("[T]he recommendation encourages agencies to take steps to promote the availability of incorporated materials within the framework of existing law.").

166. *See, e.g.*, Final Revision of OMB Circular No. A-119, 81 Fed. Reg. 4673, at *6–7 (2016), https://www.whitehouse.gov/sites/default/files/omb/

negotiate access to standards with SDOs or bend to their leverage, and may distribute incorporated standards freely when adopted. Agencies encourage greater access to standards, so the new provision will be aligned with that goal.[167] Without the provision, agencies will continue struggling to provide access to incorporated standards by being prohibited from taking any action that would violate the copyright.[168]

The provision will also provide guidance to judges in future cases. Judges show a reluctance to decide the copyright of incorporated standards because of the statutory shortcomings. The opinions that have denied copyright to incorporated standards come off as unsure or unwilling to fully conclude the issue, and even the opinions that *have* supported maintaining copyright have been vocal about courts being inappropriate for resolving the issue.[169] A provision will provide clarity for future courts addressing this issue.[170]

inforeg/revised_circular_a-119_as_of_1_22.pdf; Incorporation by Reference, 79 Fed. Reg. 66,267, 66,268, 66,270, 66,273–74 (Nov. 7, 2014) (to be codified at 1 C.F.R. pt. 51).

167. *See, e.g.*, Incorporation by Reference, 79 Fed. Reg. 66,267, 66,271 (Nov. 7, 2014) (to be codified at 1 C.F.R. pt. 51) ("OFR applauds all the efforts of these private organizations to make their [incorporated by reference] standards available to the public. We encourage agencies and SDOs to continue to ensure access to [incorporated by reference] standards.").

168. *See, e.g.*, Final Revision of OMB Circular No. A-119, 81 Fed. Reg. 4673, at *21 (2016), https://www.whitehouse.gov/sites/default/files/omb/inforeg/revised_circular_a-119_as_of_1_22.pdf ("If an agency incorporates by reference material that is copyrighted . . . the agency should *work with* the [SDO] to promote the availability of the materials . . . while respecting the copyright owner's interest . . . ." (emphasis added)); ACUS RECOMMENDATION, *supra* note 165, at 5, § 3(b) ("If copyright owners do not consent to free publication of incorporated materials, agencies should *work with them* . . . [to] promote the availability of the materials while respecting the copyright owner's interest . . . ." (emphasis added)).

169. *See* Veeck v. S. Bldg. Code Cong. Int'l, Inc., 293 F.3d 791, 794 (5th Cir. 2002) (en banc) ("The answer to this narrow issue *seems* compelled . . . ." (emphasis added)); *id.* at 807 (Higginbotham, J., dissenting) ("It bears emphasis that the Congress is best suited to accommodate its Congressionally-created [sic] copyright protection."); *id.* at 808 (Wiener, J., dissenting) ("[I f]irmly believ[e] that for this court to be the first federal appellate court to go [this] far is imprudent."); Veeck v. S. Bldg. Code Cong. Int'l, Inc., 241 F.3d 398, 410–11 (5th Cir. 2001) (stating earlier courts were wise not to conclude the issue); Bldg. Officials & Code Adm'rs v. Code Tech., Inc., 628 F.2d 730, 735 (1st Cir. 1980) ("While we do not rule finally on the question, we cannot say with any confidence that the same policies applicable to statutes and judicial opinions may not apply equally to regulations of this nature.").

170. When the en banc *Veeck* decision was appealed to the Supreme Court, the Court first invited the Solicitor General to file an amicus brief. S. Bldg. Code Cong. Int'l, Inc. v. Veeck, 537 U.S. 1043 (2002). The Solicitor General

Critics argue this provision is too drastic and would cause great economic harm.[171] But it is necessary to neutralize SDOs' leverage. With a statutory change, the SDOs will not have the option to holdout and deny their incorporated standards to agencies, like some did with the Pipeline and Hazardous Materials Safety Administration (PHMSA).[172] The Administrative Conference even suggests that agencies reject SDOs that do not compete and find competitors that will.[173] In addition, even without selling standards, the rewards of having a standard incorporated into law are still compelling.[174] Standards development is a highly competitive industry.[175] If the economic incentives are as crucial to development as the SDOs urge, removing just a portion of the potential revenue from incorporation should increase competition among SDOs even more.[176]

recommended denial of certiorari, advising that "[d]evelopment by the lower courts . . . would further clarify the effect . . . that different government use[] of copyrighted materials ha[s] on the copyright of those materials." Brief for the United States as Amicus Curiae at 1, *Veeck*, 537 U.S. 1043 (No. 02-355) [hereinafter U.S. Amicus Brief]. The Court denied hearing. S. Bldg. Code Cong. Int'l, Inc. v. Veeck, 539 U.S. 969 (2003). This advice is flawed, because the sums paid for access to standards are paltry compared to the cost of litigation. There is a reason that case law of this issue is so scarce, despite the existence of the issue for decades. SDOs appear to have priced their standards at just the right point to be maximum lucrative while at the same time not overly risking attention to the conflict. Waiting for the district and circuit courts to ripen this issue is likely never going to happen, which makes reliance upon the Supreme Court for a solution folly and misguided.

171. *See Scope Hearings*, *supra* note 22, at 82–83 (statement of Patricia Griffin, Vice President and General Counsel, ANSI) (arguing a "blanket" rule would infringe upon too many considerations); Bremer, *Multidimensional*, *supra* note 26, at 10785 (stating such an approach is "simple, uncompromising, and unworkable").

172. *See infra* Part III.C.4 (discussing SDO leverage power on government dependency).

173. *See* ACUS RECOMMENDATION, *supra* note 165, at 5, § 3(c) ("If more than one standard is available to meet the agency's need, it should consider the availability of the standards as one factor in determining which standard to use.").

174. *See infra* notes 201–03 and accompanying text (discussing additional benefits of enactment); *supra* Part I.A.2 (discussing the favorable position of SDOs).

175. *See Scope Hearings*, *supra* note 22, at 81 (statement of Patricia Griffin, Vice President and General Counsel, ANSI) (describing U.S. standardization as "[m]arket-driven and highly diversified"); *cf*. NAT'L RESEARCH COUNCIL, STANDARDS, CONFORMITY ASSESSMENT, AND TRADE: INTO THE TWENTY-FIRST CENTURY 15 (1995) (stating excessive uniform standardization reduces market choices, stifling manufacturer competition and innovation, and perhaps eliminating any benefit to standards at all).

176. *See infra* Part III.C (discussing the economic dependency of selling

Additionally, both commenters and the government warn against the erosion of the "public-private partnership."[177] But to them, the only "solution" that does not devalue the partnership is the current one—where the public pays to read a legal obligation, gets sued for repeating it to a neighbor, SDOs leverage power, and the government bends to their demands.[178] That is not a partnership. If the SDOs ceased to exist, the government would still write standards.[179] The institutional dependency on SDO standards was only made possible from wrongly, but understandably, anticipating SDOs would not hold standards hostage and charge for their access.[180] Coupled with inflexible fiscal pricing, it thus seems misplaced to portray the SDO role as so charitable and egalitarian to be worthy of a "partnership" label. Making a change that increases access to the law and minimizes leverage, while preserving benefits for SDO contribution, would help foster a true partnership. Fortunately, a complete copyright overhaul is not necessary to obtain this balance. Provisions that add laws to unprotected subject matter and expressly dictate treatment of copyrighted works that are volunteered into law will have an immediate, nation-wide impact on improving access.

C. INCENTIVE AND THE ECONOMIC IMPLICATIONS OF CHANGING THE CURRENT FRAMEWORK

The constitutional purpose of copyright is anchored on incentivizing authors to cultivate benefits for society. Thus, in-

standards).

177. *See* Incorporation by Reference, 79 Fed. Reg. 66,267, 66,271 (Nov. 7, 2014) (to be codified at 1 C.F.R. pt. 51) ("One [comment] stated that access is important but shouldn't undermine or dismantle the public-private partnership that currently exists . . . ."); ACUS RECOMMENDATION, *supra* note 165, at 2 ("Efforts to increase transparency . . . may conflict with . . . the significant value of the public-private partnership in standards."); Bremer, *Open Age*, *supra* note 16, at 156 ("[T]he public-private partnership . . . likely would be undermined by an overly aggressive approach.").

178. ACUS RECOMMENDATION, *supra* note 165, at 5–6 (recommending agencies continue to "work with" SDOs for availability); Bremer, *Open Age*, *supra* note 16, at 156 (arguing a "collaborative solution" that merely mirrors the status quo).

179. *See* Emily S. Bremer, *On the Cost of Private Standards in Public Law*, 63 U. KAN. L. REV. 279, 308 (2015) [hereinafter Bremer, *On the Cost*] ("[I]ntegrat[ing] private standards into public law is not . . . [a] statutory requirement.").

180. *See* Mendelson, *Private Control*, *supra* note 8, at 751 ("Congress . . . clearly . . . [did not] anticipate[] that SDOs would . . . charge access fees.").

centive is repeatedly discussed throughout this Note's analysis because of its role in contrasting traditional lawmaking with SDO authorship. This Note advocates for changes that would reduce the *financial-return* incentives that are currently available to the owner of an incorporated standard. In defense of proposed changes to the status quo, SDOs are quick to urge that they are existentially dependent on maximizing the current opportunities for financial return. Since the government relies almost exclusively on incorporated standards, this doomsday warning provides SDOs tremendous leverage for preventing changes that would hinder their dependency. While it is true that SDOs do depend on revenues that their standards generate, there is a lot of hyperbole that distorts incentives and exaggerates SDOs economic reality. These changes are not meant to put SDOs out of business or deprive them of their works, but rather to establish a balance that allows both the public to access legal obligations and SDOs to fairly reap incentives for the valuable work they produce. This Section hopes to place economic concerns into their correct perspective and promote the balance of interests by showing that copyright's purpose is not fulfilled by accrual of wealth, existing adverse changes have not diminished SDO efforts, and incentives other than copyright protect against degradation of future standard quality.

The most common argument advanced is that, unlike governments which are publicly funded, SDOs are non-profit organizations that depend on standard sales to finance future developments.[181] Without control over reproduction and distribution, SDOs would suffer a drastic revenue reduction, which would severely impede their standard development or

181. This Note assumes that the development costs are substantial. There are some claims that, taken as a whole, might suggest development costs are not as high as claimed. *Compare* OMB Circular A-119, 63 Fed. Reg. 8546, 8554, § 4(a) (1998) (stating member-IP contributions to development are given royalty-free), *and* MICHAEL B. SPRING & MARTIN B.H. WEISS, FINANCING THE STANDARDS DEVELOPMENT PROCESS 290 (1995) ("[E]ach [member] bears the direct cost of participation of its experts." (citation omitted)), *and Why Charge for Standards?*, ANSI, https://www.ansi.org/help/help.aspx?menuid=15#purchasing (last visited Nov. 24, 2016) [hereinafter *Why Charge*] ("[M]ost of the people working on standards development are volunteers."), *with Scope Hearings*, *supra* note 22, at 83 (statement of Patricia Griffin, Vice President and General Counsel, ANSI) ("The standardization community believes . . . that the development . . . requires a massive investment of time, labor, expertise, and money.").

cease SDO existence entirely.[182] After a shortage of SDO development, governments would likely be forced to draft their own regulations and statutes, thereby draining limited time and resources. Consequently, this reduction of expertise would create scattered variations of codes negating uniformity, safety, and efficiency across the nation.[183] These are reasonable concerns, but they are not as drastic in reality.

1. Maximizing Wealth Is Not the Purpose of Copyright

The "ultimate aim" of copyright is "to stimulate artistic creativity for the general public good," and the possibility of financial return for that effort is just one of many benefits (exclusive control, lengthy duration, etc.) that copyright grants to authors in furtherance of that aim.[184] The absence or limitation of any particular of these benefits does not necessarily defeat the purpose of copyright. The copyright code does not state that a financial gain must be preserved for copyright holders. Such a provision would likely be surplusage since most copyrights do not make money anyway.[185] And despite the fact that SDOs have thrived for decades on selling incorporated standards,[186] numerous statutory policy exceptions already exist that infringe upon the potential revenue of a valid copyright, such as fair use, allowing libraries to reproduce for archives, and special reproductions for vision-impaired individuals, among oth-

182. *Scope Hearings*, *supra* note 22, at 83 (statement of Patricia Griffin, Vice President and General Counsel, ANSI); *see* Brendan Greeley, *One Man's Quest To Make Information Free*, BLOOMBERG BUSINESSWEEK (Apr. 12, 2012), http://www.bloomberg.com/news/articles/2012-04-12/one-mans-quest-to-make-information-free ("This source of revenue gives us great independence.").

183. *Scope Hearings*, *supra* note 22, at 82–83 (statement of Patricia Griffin, Vice President and General Counsel, ANSI).

184. Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975). Additional examples are the exclusive rights of reproduction, distribution, and derivation, the ability to assign ownership, and life-time duration. *See* 17 U.S.C. §§ 106(a)–(c), 201(d), 302(a) (2012).

185. Mike Masnick, *A Dozen Bad Ideas That Were Raised at the Copyright Office's DMCA Roundtables*, TECHDIRT (May 18, 2016), https://www.techdirt.com/articles/20160517/17541834469/dozen-bad-ideas-that-were-raised-copyright-offices-dmca-roundtables.shtml (noting the substantial difficulty content creators face when trying to monetize their works).

186. *See* David Halperin, *Industry Groups Insist on Charging You $1,195 To Read a Public Law*, REPUBLIC REP. (May 16, 2012), https://www.republicreport.org/2012/industry-groups-charge-read-law (reporting that private organizations make "tens of millions of dollars annually" selling laws to people).

ers.[187] Adding another exception that would decrease some of the revenue potentially earned by the copyright would not violate any constitutional purpose. SDOs are *allowed* to make money, not granted protection to guarantee the maximum possible revenue at all times. Such totalitarian control would undermine copyright's policy emphasis on promoting communication and societal benefit.

2. Previous Adverse Changes in the Law Have Not Decreased Economic Position

Existing adverse changes in the law have not impaired SDO economic reality like predicted in the argument.[188] Take one example: the *Veeck v. Southern Building Code Congress International* decision handed down in 2002. At stake was an en banc Fifth Circuit decision that rejected the copyright claims of an SDO over their incorporated standards. In that case, some of the largest SDOs filed amicus briefs all echoing the SDO defendant's warning that their entity would diminish and their developments shrivel should the Fifth Circuit rule in favor of the plaintiff to limit the copyrights.[189] The Fifth Circuit sided with the plaintiff, and ten years later the SDO economic realities actually *improved*. For example, in 2002, pre-*Veeck*, the National Fire Protection Association (NFPA) reported $58.5 million in total revenue, with $36.4 million gross profit from sales of inventory (includes law sales).[190] It invested $9.7 million in code development, held $121 million in assets, paid its executives over $2.7 million in salaries, and spent $13,000 on lobbying.[191] Contrast with 2012, post-*Veeck*, NFPA reported $69 million in total revenue, with $33.9 million in net inventory sales income.[192] It invested $12.5 million in code development,

187. *See generally* 17 U.S.C. §§ 107–22 (limiting exclusive rights).

188. In its amicus curiae brief for the *Veeck* appeal, the Solicitor General expressed serious skepticism and doubt about the economic predictions, stating they were "uncertain at best" and "such organizations have survived and prospered despite the threat to their copyright income that has existed at least since . . . 1980." U.S. Amicus Brief, *supra* note 170, at 1.

189. *See, e.g.*, Veeck v. S. Bldg. Code Cong. Int'l, Inc., 293 F.3d 791, 796 n.6 (noting International Code Council amicus brief); Veeck v. S. Bldg. Code Cong. Int'l, Inc., 241 F.3d 398, 402 n.3 (5th Cir. 2001) (noting American National Standards Institute, National Fire Protection Association, Underwriters Laboratories amici).

190. *See* Nat'l Fire Prot. Ass'n, IRS FORM 990, RETURN OF ORGANIZATION EXEMPT FROM INCOME TAX at ll. 12 & 102 (2002).

191. *Id.* at pt. III.b l. 59, pt. V sched. A, pt. IV-B l. i.

192. *See* Nat'l Fire Prot. Ass'n, IRS FORM 990, RETURN OF ORGANIZATION

held $258 million in assets, paid executives $3.6 million in salaries and bonuses, and spent $11,000 on lobbying.[193] The argument's negative effects were not realized, and indeed the NFPA was not the only amicus to improve.[194]

This flourishing is in part because of monopoly pricing schemes used by the copyright holders for standards the public is forced to purchase.[195] Professor Peter Strauss highlighted a perfect example:[196] an FDA regulation requires the names of botanical ingredients in dietary supplements to be consistent with a 1992 digital pdf-only text titled *Herbs of Commerce*.[197] The publisher, American Herbal Products Association (AHPA), also offers an enhanced 2000 edition that is *not* incorporated into law, described as "[a] must-have for anyone who writes about or manufactures herbal products."[198] At the time of Professor Strauss's publishing, the FDA-incorporated 1992 pdf-only copy was $250 and the updated "must-have" edition went for only $99.99.[199] This is a pricing scheme designed to take full advantage of its mandated compliance in law.[200]

EXEMPT FROM INCOME TAX at pt. I l. 12, pt. VIII l. 10c (2012).

193. *Id.* at pt. III l. 4b, pt. X l. 16, sched. J pt. II, sched. C pt. II-B.

194. Likewise, in 2002 the American National Standards Institute (ANSI) reported $17.3 million in total revenue, invested $11 million in code activities, held $14.6 million in assets, and paid its executives over $1.8 million in salaries. *See* ANSI, IRS FORM 990, RETURN OF ORGANIZATION EXEMPT FROM INCOME TAX at pt. I l. 12, pt. III ll. a-c, pt. IV l. 59, pt. V (2002). Contrast with 2012 ANSI reported $36.5 million in total revenue, invested $29 million in code activities, held $18.7 million in assets, and paid its executives $4.98 million in compensation and bonuses. *See* ANSI, IRS FORM 990, RETURN OF ORGANIZATION EXEMPT FROM INCOME TAX pt. I l. 12, pt. III l. 4e, pt. X l. 16, sched. J pt. II (2012).

195. *See* Lawrence A. Cunningham, *Private Standards in Public Law: Copyright, Lawmaking and the Case of Accounting*, 104 MICH. L. REV. 291, 309 (2005) ("Monopoly pricing that copyright affords . . . ."); Mendelson, *Private Control*, *supra* note 8, at 801 ("[Old] versions of SDO standards are sometimes priced higher than current versions simply because a federal agency has elected to incorporate the older one by reference." (footnote omitted)); *cf.* Strauss, *supra* note 16, at 537–55 (alternatives to avoid SDO monopoly pricing). *But see* Bremer, *On the Cost*, *supra* note 179, at 317–23 (analyzing the presence of monopoly pricing in PHMSA standards).

196. *See* Strauss, *supra* note 16, at 509–10 (discussing the *Herbs of Commerce* editions).

197. *See* 21 C.F.R. § 101.4(h) (2016).

198. Strauss, *supra* note 16, at 509 (quoting *Bookstore*, AHPA, http://www.ahpa.org/Default.aspx?tabid=357 (last visited Dec. 12, 2013)).

199. *See* Strauss, *supra* note 16, at 510. It appears the AHPA has finally equalized the price of the 1992 PDF copy to $99.99. Perhaps because AHPA has ramped up lobbying efforts to replace it, now "urg[ing the] FDA to modify the rule to name the [2000] edition." *AHPA Generally Supports FDA's Pro-*

This pricing opportunity raises a peculiar observation: it suggests that the real value for an incorporated standard is not in the copyright it retains, but is really acquired from being enacted into law.[201] Consider the conditions surrounding a $99 purchase of a twenty-four year-outdated *Herbs of Commerce* PDF file. If the purchase is made because of the copyright monopoly, then the purchase is made because the work is one-of-a-kind and no other substitute can be accepted (or replica created). This can be dismissed, because an improved version existed for a lesser cost (now both equal in cost), yet there are purchases that still opt for the outdated version. If the purchase is made because of it being enacted into law, then the purchase is made because federal regulatory violations loom overhead of anyone not willing to make the purchase. Thus, possessing exclusive control to a book that no one wants does not raise its value—but getting that book enacted into law suddenly maximizes its value. Further, having a standard incorporated into law bolsters the prestige and status of the developing organization.[202] This enables it to sell value-added products such as annotations, training, and certifications in addition to sales of the standard.[203] SDOs covet this position as evidenced by aggressive lobby efforts,[204] infringement lawsuits against SDO com-

posed Rule, but Recommends Some Changes, AHPA (Aug. 18, 2014) [hereinafter AHPA], http://www.ahpa.org/News/LatestNews/tabid/96/ArtMID/1179/ArticleID/374/Default.aspx.

200. *See* Mendelson, *Private Control*, *supra* note 8, at 801 ("The prices SDOs currently charge for IBR standards are not 'platonic' in any sense or even a function of the cost of production. [Adoption] of an SDO standard unquestionably increases the demand for it and, in turn, the likely income an SDO will receive." (footnote omitted)).

201. *See Scope Hearings*, *supra* note 22, at 96 (statement of Carl Malamud, President, Public.Resource.Org) ("[T]he goal . . . is precisely that their work become law.").

202. *See* Strauss, *supra* note 16, at 515 ("[IBR] . . . also confer[s] satisfying prestige.").

203. *See* Veeck v. S. Bldg. Code Cong. Int'l, Inc., 293 F.3d 791, 806 (5th Cir. 2002) (en banc) ("SBCCI could easily publish them . . . with 'value-added' in the form of commentary . . . and other information valuable to a reader."); *Scope Hearings*, *supra* note 22, at 95 (statement of Carl Malamud, President, Public.Resource.Org) ("The NFPA can, and does, sell all sorts of value-added products"); *cf.* U.S. Amicus Brief, *supra* note 170, at 18 ("[P]rofessionals . . . may have ample incentive to continue to buy the 'official' sets of standards notwithstanding the potential availability of other, unofficial editions.").

204. *Scope Hearings*, *supra* note 22, at 95 (statement of Carl Malamud, President, Public.Resource.Org); *see, e.g.*, *Electrical Code Coalition Launches Website*, NAT'L FIRE PROT. ASS'N (June 11, 2013), http://www.nfpa.org/news-and-research/news-and-media/press-room/news-releases/2013/electrical-code

petitors,[205] and glowing press releases boasting about new adoptions.[206]

3. A Decrease in Revenue Will Not Decrease Quality of Future Standards

The SDOs' argument asserts that without capitalizing on incorporated standards, future quality will deteriorate, thereby making industries substantially less safe. But some argue that the high quality of SDO standards is not a product of financial incentive but borne out of self-interest, such as how an architect's interest in his own building not collapsing on top of him will incentivize him to produce a high quality building design.[207]

Indeed, evidence supports this: for example, in the context of federal regulation, of the 100,000 (including non-incorporated) SDO standards in use throughout the United States, Emily Bremer estimates that only two to four percent

-coalition-launches-website ("[W]hich aims to facilitate direct and full adoption, application and uniform enforcement of the latest edition of . . . the *National Electrical Code*."); AHPA, *supra* note 199 (AHPA "urging" FDA). *But see* Mendelson, *Private Control*, *supra* note 8, at 750 (stating that marketability of some standards rests on utility, not on the perceived benefits it were to bring if enacted into law (citing Strauss, *supra* note 16, at 546)).

205. *See* Int'l Code Council v. Nat'l Fire Prot. Ass'n, No. 02-C-5610, 2006 WL 850879, at *1 (N.D. Ill. 2006) (involving a major SDO alleging copyright infringement against competitor SDO in its building code).

206. *See, e.g.*, *API Highlights Adoption of Industry Standards in Proposed Well Control Rule*, AM. PETROLEUM INST. (July 17, 2015), http://www.api.org/news-policy-and-issues/news/2015/07/17/api-highlights-adoption-industry-standar; *see also Two UL Battery Safety Standards Are Now FDA Recognized Consensus Standards for Medical Devices*, UNDERWRITERS LAB. (July 21, 2014), http://ul.com/newsroom/pressreleases/two-ul-battery-safety-standards-are-now-fda-recognized-consensus-standards-for-medical-devices.

207. *See Veeck*, 293 F.3d at 806; 1 PAUL GOLDSTEIN, GOLDSTEIN ON COPYRIGHT § 2.5.2, at 2:59 (3d ed. 2005) ("[I]t is difficult to imagine an area of creative endeavor in which the copyright incentive is needed less."); *cf. Scope Hearings*, *supra* note 22, at 127 (statement of Darrell Issa, Rep. of Cal., member, S. Comm. on Courts, Intellectual Property, & the Internet) ("The one thing I know is I don't need a copyright to promote politicians making laws."). In the software industry, this is known as "dogfooding," whereby a company produces a better product by forcing its use companywide. *See Definition of Dogfooding*, PC MAG. ENCYCLOPEDIA (last visited Nov. 24, 2016), http://www.pcmag.com/encyclopedia/term/56655/dogfooding; *see, e.g.*, Brian Bremner, *The Bats Affair: When Machines Humiliate Their Masters*, BLOOMBERG (Mar. 23, 2012), http://www.bloomberg.com/news/articles/2012-03-23/the-bats-affair-when-machines-humiliate-their-masters (recounting an instance of a stock trading software developer launching its IPO on its own software and failing because of poor software).

are actually incorporated into federal law.[208] At best, then, this would represent 96,000 actively used standards that are not earning the financial benefits of being enacted into law, either by SDO choice to preclude the standard from incorporation or by the government incorporating a competing standard instead. In either case, it would be a stretch to suggest that the high development costs of the non-earning 96,000 standards were subsidized just on the revenue gained from the incorporated 4000.[209] Thus, if the 96,000 non-incorporated standards were not subsidized by the incorporated ones, something other than financial gain incentivized their quality and development, making self-interest a probable explanation. In other words, SDOs may invest time and resources into a standard they do not intend to profit from, but to invest in one that does not even keep themselves safe is unlikely.

4. The Leverage Created by Government Reliance Stifles Change

The argument reflects an overall reluctance and resistance to change a business model that preys upon the consequences of violating a legal obligation. Generally, when the government modifies regulations, organizations must often change their business model to adapt.[210] SDOs, however, are quick to leverage government dependency to prevent any policy changes that would disrupt their business model, and this leverage is outstanding.

In one instance, before Congress could investigate safety violations in the 2010 Deepwater Horizon explosion, it first had to absurdly track down copies of the oil pipeline standards that were incorporated into the safety regulations—including one which the American Petroleum Institute (API) demanded

208. Bremer, *Multidimensional*, *supra* note 26.

209. This is unlikely because of the "quite substantial" costs incurred in the development process of every standard. SPRING & WEISS, *supra* note 181; *see also Why Charge*, *supra* note 181 (detailing the costs of development, distribution, and administration).

210. *See, e.g.*, Peter Baker & David M. Herszenhorn, *Obama to Wall St.: 'Join Us, Instead of Fighting Us,'* N.Y. TIMES (Apr. 22, 2010), http://nyti.ms/21tCWvF (discussing the effects Wall Street reform will have on banking business models); Kathleen L. Brown, *Like It or Not, Obamacare Is Reshaping the Healthcare Industry*, FORBES (Oct. 7, 2014), http://www.forbes.com/sites/janetnovack/2014/10/07/like-it-or-not-obamacare-is-reshaping-the-healthcare-industry (discussing how the Affordable Care Act has "radically alter[ed] business models that hadn't changed in decades").

$1195 from Congress to obtain.[211] In response to the payment demand, § 24 of the subsequent Pipeline Safety Act of 2011 ordered the PHMSA to no longer incorporate any SDO standards unless they were "made available to the public, free of charge, on an Internet Web site."[212] Shortly after, however, Congress amended the section to remove the "on an Internet Web site" restriction,[213] to enable "greater flexibility in providing public access to documents incorporated by reference."[214] Some critics characterize this as Congress recognizing the restriction as too limiting on the PHMSA because public safety demands agencies have the best standards as options (even if that means they cannot read them).[215] But this downplays the cause of the flexibility shortage—SDO leverage. The amendment's House Report makes no mention of needing to access the *best* standards. Instead, it states that the restriction was being lifted because SDOs refused to act contrary to their closed-access business models.[216] This had the effect of shutting out the PHMSA from standards, knowing that government dependency would force Congress to neuter the statute.[217]

The revenue gained from selling laws makes for a lucrative business. But it is a business capitalizing on an unintended situation. As private entities performing a public good there is a sensitivity for preserving their efforts. Completely eliminat-

211. Mendelson, *Private Control*, *supra* note 8, at 788–89; Halperin, *supra* note 186.

212. Pipeline Safety Act of 2011, Pub. L. No. 112-90, 125 Stat. 1919, § 24 (2012) (codified at 49 U.S.C. § 60102(p)).

213. Pub. L. No. 113-30, 127 Stat. 510 (2013).

214. H.R. REP. No. 113-152, pt. 1, at 4 (2013).

215. *See* Bremer, *Multidimensional*, *supra* note 26 ("An important consideration is the potential implications for public health and safety if an agency is prohibited from using . . . technically superior, authoritative . . . private standard[s]."). PHMSA was able to get seventy-eight percent of the standards to comply. Bremer, *On the Cost*, *supra* note 179, at 326.

216. *See* H.R. REP. No. 113-152, pt. 1, at 3 (calling it "an unintended consequence"). This may not mean that *all* SDOs refused, but it would not have taken much dissent to suffocate the PHMSA, as a mere three SDOs owned seventy-three percent of PHMSA standards, with the other twenty-seven percent being owned by only eight more. Bremer, *On the Cost*, *supra* note 179, at 309–10. And indeed that was the case: agency dependency on a single 14,000 page standard that could not be substituted was enough to force a statutory change. *Id.* at 327–28.

217. The Internet provision was the entire force of the statute, because the standards have always been available to the public free of charge already—in Washington, D.C. *See* Mendelson, *Private Control*, *supra* note 8, at 806 ("[P]roviding free access to IBR rules only in a Washington, D.C., reading room.").

ing their earnings would be counter-productive, but this Note's approach only reduces a portion of their revenues. They will maintain their positions in a competitive industry, with many benefits and rewards still being obtained for adoption into law. Their business models will need adjustment, but this is the nature of competition and regulation.

CONCLUSION

Federal agencies enact private standards into law using a lawmaking technique called incorporation by reference. That technique allows law makers to forego publishing the contents of the standard inside of the law and merely refer to it by name. Members of the public seeking to comply with the standard must then obtain it from the organization that authored it. These private standards are copyrighted works and their owners accordingly charge license fees to access them. Concealing and controlling access to society's legal obligations creates significant due process issues that demand resolution.

Solutions that enable unrestricted access to the public are difficult. Generally, traditional laws are precluded from copyright protection. However, the copyright statutes do not contain any specific guidance for evaluating whether incorporated standards maintain their copyright after *subsequently* becoming enacted into law. By statute, federal agencies are required to utilize private standards and are barred from taking any action that would infringe their copyrights. Courts are hesitant to invalidate copyrights where there is no express statutory authority to do so. Without any solution, the public pays millions of dollars each year to the copyright owners in order to access the standards and avoid blindly violating federal regulations or being subject to infringement litigation.[218]

The best solution is one that allows free, unrestricted access to the standards but preserves benefits to incentivize the owners to develop future standards. This Note asserts making two simple modifications to the Copyright Code. The first pro-

218. *See* Complaint, Am. Educ. Res. Ass'n, Inc. v. Public.Resource.Org, Inc., No. 1:14-cv-00857 (D.D.C. May 23, 2014); Complaint, Am. Soc'y Testing & Materials v. Public.Resource.org, Inc., No. 1:13-cv-01215 (D. D.C. Aug. 6, 2013). *See generally* Carl Malamud, *Pulled over for Copying U.S. Federal Law: Do You Have a License and Registration for That Law?*, HARV. L. REC. (Feb. 2, 2015), http://hlrecord.org/2015/02/pulled-over-for-copying-u-s-federal-law-do-you-have-a-license-and-registration-for-that-law (discussing recent infringement litigation).

vision adds the concept of laws to the subject matter exclusions of § 102(b). The second provision specifically places copyrighted works that receive legal effect into the public domain. Because of the copyright, agencies may only incorporate standards that are *voluntarily* offered by owners. And since there are numerous benefits—besides coerced sales—that incorporated standard owners may receive, these provisions work in tandem to strike a balance that keeps legal obligations unrestricted while maintaining incentives for future standard authors.