

ORAL ARGUMENT NOT YET SCHEDULED

No. 17-7035 (Lead Case); No. 17-7039

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

AMERICAN SOCIETY FOR TESTING AND MATERIALS;
NATIONAL FIRE PROTECTION ASSOCIATION, INC.;
AND AMERICAN SOCIETY OF HEATING, REFRIGERATING,
AND AIR CONDITIONING ENGINEERS, INC.

Plaintiff-Appellees,

v.

PUBLIC.RESOURCE.ORG, INC.

Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

**AMICUS CURIAE BRIEF OF AMERICAN INSURANCE ASSOCIATION
IN SUPPORT OF PLAINTIFF/APPELLEES AND AFFIRMANCE**

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CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

Pursuant to Circuit Rules 26.1 and 28(a)(1), the American Insurance Association (“AIA”) certifies as follows:

(A) Parties and Amici. All parties and amici appearing in the district court and in this Court are listed in the Defendant-Appellant’s brief and in the briefs filed by amici in support of Defendant-Appellant. The AIA appears in this appeal with the consent of all parties as amicus curiae in support of Plaintiffs-Appellees.

(B) Rulings Under Review. The Defendant-Appellant’s brief states the rulings upon which Defendant-Appellant seeks review.

(C) Related Cases. Case No. 17-7035 is the lead case with which Case No. 17-7039 has been consolidated. The AIA understands that there are no related cases currently pending in this Court or any other court and that this case was not previously before this Court or any other court.

(D) Rule 26.1 Disclosure. The AIA is a trade association and has no parent corporation. No privately held company has an ownership interest in the AIA.

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GLOSSARY OF ABBREVIATIONS

The following abbreviated terms are used in this brief:

AIA	American Insurance Association
ASHRAE	American Society of Heating, Refrigerating and Air Conditioning Engineers
ASTM	American Society for Testing and Materials
NFPA	National Fire Protection Association
NIST	National Institute of Standards and Technology
SDO	Standards Development Organization

STATEMENT OF INTEREST

Founded in 1866 as the National Board of Fire Underwriters, the AIA is a national trade association representing approximately 325 property and casualty insurance companies in the United States. AIA members range in size from small companies to large insurers with global operations. Member companies underwrite virtually all lines of property and casualty insurance.

The AIA appears as *amicus curiae* to highlight the importance of the research and guidance provided in the standards promulgated by NFPA, ASTM, ASHRAE, and other standards development organizations (SDOs). The standards promulgated by Plaintiff-Appellees play a central role in the prevention and control of losses and the reduction of insurance risk. The AIA is uniquely positioned to explain as *amicus curiae* the industry's reliance on the continuing availability of NFPA and other safety standards and the crucial importance of these standards in protecting the public from fire and other safety hazards.

RULE 29 CERTIFICATE

The AIA files this separate brief because the AIA's brief offers a different perspective than the briefs of the other amici in support of Plaintiffs-Appellees. The AIA is uniquely positioned to explain from the vantage point of the property and casualty insurance industry the crucial role played by the standards funded and developed by Plaintiffs-Appellees in the prevention of fire and other insured losses -- and in protecting the public from fire and other life safety hazards.

Counsel for the AIA authored this brief in its entirety. No party or its counsel contributed content or money to the preparation or submission of this brief. Other than the AIA, its members, or its counsel, no person contributed financially to the preparation and submission of this brief.

ARGUMENT

The property insurance industry is an active consumer of the standards written and copyrighted by the NFPA, ASTM and ASHRAE. The insurance industry relies on the objective, high quality research and guidance that underpins these safety standards. As one commentator has explained, the “[s]afety standards help insurers in two ways: (1) they provide convenient underwriting criteria, and (2) they promote general loss control.”¹

This brief will explain the role that the standards of NFPA and the other organizations play in the prevention and reduction of insured losses, particularly fire losses. AIA’s goal is to show the Court the critical importance of the continued availability of the fire protection and safety standards at issue in this case to the insurance industry and to public safety in the United States.

The organizations that produce these standards fund their research and development work, to a significant extent, by the licensing and sale of their copyrighted standards. Without copyright protection, the critical source of funding that makes possible the production of these world class standards will disappear, calling into question the future independence, quality and even existence of these standards.

¹ Cheit, Ross E., *Setting Safety Standards: Regulation in the Public and Private Sectors*, Berkeley: University of California Press, c.1990, p. 237. <http://ark.cdlib.org/ark:/13030/ft8f59p27j/>.

- 1. The NFPA is essential not only to the insurance industry that formed it, but also to the architects, sprinkler designers and installers, builders, fire departments, building owners and many others who rely on its published standards.**

The property and casualty insurance industry relies heavily on the standards of the NFPA and similar organizations. In fact, “[s]everal major standards setting organizations, including . . . NFPA, trace their origins to the insurance industry.”²

In November 1896, twenty fire insurance companies came together at the offices of the New York Board of Fire Underwriters and formed the National Fire Protection Association. At the time, automatic fire sprinklers were growing in popularity as a means to extinguish fires, reduce fire deaths, and limit fire damage to factories and warehouses. Sprinkler system failures were common, however, as there was no consensus standard for the design and installation of such systems. The insurance industry recognized the need for reliable sprinkler systems to effectively control fire losses, and the first order of business for the National Fire Protection Association was its 1896 approval of a consensus standard for the design and installation of automatic fire sprinkler systems – the standard that became NFPA 13.³

NFPA 13 and related standards, as continuously amended, have been

² *Id.*

³ Bugbee, P., *Men Against Fire: The Story of the National Fire Protection Association*, 1896-1971, National Fire Protection Association, 1971, pp. 1-4.

synonymous with the state of the art in fire sprinkler design and installation for more than a century. But from the beginning, the NFPA's mission was broader than sprinklers – the continued improvement and standardization of all aspects of fire protection:

To bring together the experience of different sections and different bodies of underwriters, to come to a mutual understanding, and if possible an agreement in general principles governing fire protection, to harmonize and adjust our differences, so that we may go before the public with uniform rules and conditions which may appeal to their judgment, is the object of this Association.

Executive Committee Report, National Fire Protection Association.⁴ True to its broader mission, in the 121 years since its formation, the scope of the NFPA's research and guidance has grown with technology and experience to include all aspects of fire prevention, fire protection, firefighting, and life safety.

The breadth of reliance upon NFPA research and guidance has grown in tandem with the scope of its work. Along with the work of ASTM and ASHRAE, NFPA's published research and guidance are now relied on by insurers, architects, sprinkler professionals, builders, fire departments, building owners and many others.

NFPA's modern mission statement is contained in its current Articles of

⁴ *A Partial Record of the Transactions at First Annual Meeting of the National Fire Protection Association*, Standard Publishing Company, 1897, p. 13.

Organization:

The purposes of the . . . Association. . . shall be to promote the science and improve the methods of fire protection and prevention, electrical safety and other related safety goals; to obtain and circulate information and promote education and research on these subjects and to secure the cooperation of its members and the public in establishing proper safeguards against loss of life and property.

Article 2, NFPA Articles of Organization.⁵ The broad mission of today's NFPA is reflected in the more than 300 consensus codes and guidance standards published by NFPA, all sharing the goal of minimizing the risk and effects of fire and life safety hazards.

The following examples, drawn from a list of NFPA codes and standards, illustrate the breadth of industries and professions that (like the property insurance business) have come to routinely rely on the research and guidance of the NFPA:

- NFPA 13: Standard for Installation of Sprinkler Systems
- NFPA 31: Standard for Installation of Oil-Burning Equipment
- NFPA 37: Standard for the Installation and Use of Engines and Gas Turbine
- NFPA 45: Standard on Fire Protection for Laboratories Using Chemicals
- NFPA 51B: Standard for Fire Prevention During Welding, Cutting, and Other Hot Work

⁵ The NFPA Articles of Organization are available at www.nfpa.org/about-nfpa/nfpa-overview/nfpa-operations/articles-of-organization.

- NFPA 59A: Standard for the Production, Storage, and Handling of LNG
- NFPA 70: National Electrical Code
- NFPA 86: Standards for Ovens and Furnaces
- NFPA 99: Health Care Facilities Code
- NFPA 101: Life Safety Code
- NFPA 120: Standard for Fire Prevention and Control in Coal Mines
- NFPA 312: Standard for the Fire Protection of Marine Vessels
- NFPA 407: Standard for Aircraft Fuel Servicing
- NFPA 513: Standard for Motor Freight Terminals
- NFPA 730: Guide for Premises Security
- NFPA 900: Building Energy Code
- NFPA 1192: Standard on Recreational Vehicles
- NFPA 1616: Standard for Mass Excavation and Sheltering
- NFPA 1700: Guide for Structural Firefighting
- NFPA 1984: Standard on Respirators for Wildland Firefighting Operations
- NFPA 1994: Standard on Protective Ensembles for CBRN Terrorism First Responders
- NFPA 1999: Standard on Protective Clothing for Emergency Medical Operations
- NFPA 5000: Building Construction and Safety Code

Some of these standards and codes have been selectively incorporated by reference in law or governmental regulations, where they have served the public interest in fire safety. One such example is NFPA 70, the National Electrical Code, which has been incorporated in whole or in part in the statutes or regulations of 47 states. The National Electrical Code maximizes the electrical fire safety of tens of millions of homes and businesses in the United States. While relatively few NFPA

standards have been selectively incorporated in statutes or rules in this manner, all of the standards serve the interests of the public and insurers alike by providing up-to-date best practice guidance.

It is important to note that the standards of NFPA and the other organizations are not static. A key value of the standards is that they are regularly updated by committees of technical experts, particularly in response to major incidents and changes in technology. As explained in a Society of Fire Protection Engineers' publication,

many of the advances in fire protection were brought about as a reaction to disastrous fires, and NFPA and its technical committees were instrumental. . . . Much of the knowledge for fire protection engineering came from loss experience, the development of property loss prevention innovations and fire research conducted by these founding organizations.

Cote, Arthur E., *History of Fire Protection Engineering*.⁶

The NFPA continuously studies large fires and other disasters, distills important lessons, and publishes new life-saving standards and code provisions to mitigate future disasters. For example, the NFPA 3000 committee is currently developing a standard for preparedness and response to active shooter incidents that will draw on the lessons of recent mass casualty shooter incidents. If history is

⁶ Fire Protection Engineering Magazine, October 2008, available at <http://magazine.sfpe.org/professional-practice/history-fire-protection-engineering>.

a guide, NFPA 3000 will set a de facto standard, improving emergency response to active shooter incidents nationally.

But the NFPA's ability to learn from disasters and then use the lessons to advance public safety is more than a recent phenomenon. An early example involved a 1911 factory fire in New York that killed 145 young women due to inadequate exit routes and locked exit doors. The Triangle Shirtwaist fire caused the formation of the NFPA Life Safety committee, resulting in a new building exits standard that later became NFPA 101: Life Safety Code.⁷ NFPA led and government followed, incorporating major elements of NFPA 101 into state building and fire codes.

A more recent example proves the extent to which NFPA standards continue to represent the "gold standard" for fire prevention, fire protection and life safety. After the Station nightclub fire took 100 lives in Rhode Island in 2003, the U.S. Department of Commerce's National Institute of Standards and Technology ("NIST") Fire Research Division undertook a comprehensive, technical investigation of the fire. The investigation compared the conditions in the building to the fire protection requirements of NFPA 13 (Sprinklers); NFPA 101 (Life Safety); NFPA 255 (Burn Characteristics of Building Materials); NFPA 1126

⁷ J. Kenneth Richardson, *History of Fire Protection Engineering*, National Fire Protection Association and Society of Fire Protection Engineers, 2001, p. 258.

(Pyrotechnics); NFPA 5000 (Building Safety), ASTM E84 (Burn Characteristics of Building Materials), and to sections of the International Building Code.

As illustrated by these excerpts from NIST’s final report, investigators found that failures to follow the guidance of NFPA and ASTM were “highly relevant and [following the guidance of these standards] would almost certainly have reduced substantially the loss of life”:

Table 8-1 Findings Concerning Materials Relevant to Model Codes and Standards

Issue	References	Relev.		
		H	M	L
Polyurethane foam used as sound insulation on platform and walls. Foam thermal insulation unprotected in back platform wall.	ASTM E84 [9]	X		
	NFPA 255 [11]	X		
	NFPA 286 [10]		X	
	IBC:2604 [4]		X	
	5000:10.4.3.1 [3]		X	
Pyrotechnic devices were used as part of the theatrics. Little guidance provided to AHJ* regarding appropriate use of pyrotechnics.	NFPA 1126 [12]	X		

* Authority Having Jurisdiction

Table 8-2 Findings Concerning Fire Protection Systems Relevant to Model Codes and Standards

Issue	References	Relev.		
		H	M	L
Automatic sprinklers not required for existing structures.	101:13.3.5.1 [7]	X		
	5000:16.3.5.1.1 [3]	X		
	IBC:903.2.1.2 [4]	X		
	101.12.3.5.1 [7]			X

Table 8-3 Findings Concerning Occupant Load and Egress Relevant to Model Codes and Standards

Issue	References	Relev.		
		H	M	L
Main entrance did not have capacity to handle 50% of the occupants on the night of the fire, and 50% would have been insufficient to safely evacuate all occupants in time (1-1/2 minutes).	IBC:1024.2 [4] 5000:16.2.3.3 [3] 101:12.2.3.3 [7] 101:13.2.3.3 [7]	X		
Festival seating overloaded the exit capacity.	5000:16.2.5.4.1 [3] 101:12.2.5.4.1 [7] 101:13.2.5.4.1 [7] 5000:16.2.4.1 [3]	X X X X		

National Institute of Standards and Technology, Report of the Technical Investigation of the Station Nightclub Fire.⁸

There is probably no more powerful and poignant example of the value of the independent standards of NFPA and the other SDOs than NIST's finding that if the Station nightclub had been equipped with NFPA 13 compliant sprinklers, the nightclub fire would have been extinguished in under two minutes, likely saving all 100 lives. Because there were no sprinklers, the club instead reached excessive temperatures and lost breathable oxygen within 90 seconds, causing 100 deaths.⁹

⁸ Grosshandler, William L, et al., Report of the Technical Investigation of the Station Nightclub Fire, National Institute of Standards and Technology, NIST NCST Act Report 2, Government Printing Office, June 2005, pp. 8-7 and 8-8, available at www.nist.gov/manuscript-publication-search.cfm?pub_id=100988

⁹ *Id.*, pp. 5-19, 5-52, 5-61, 8-3; Bryner, Nelson, *Reconstructing the Station Nightclub Fire – Computer Modeling of the Fire Growth and Spread*, National Institute of Standards and Technology, 2007, pp. 1-2, available at

The Station Nightclub Fire led to several almost immediate changes to NFPA 101 and NFPA 5000. These included guidance requiring automatic fire sprinklers in new nightclubs and for existing clubs that accommodate more than 100 persons, a requirement that building owners maintain records documenting that building exits are free of obstructions, a requirement for one trained crowd manager per 250 persons, and a ban on standing assemblies of crowds over 250 unless a fire department life-safety evaluation has been performed.¹⁰

As the NIST's Station Nightclub investigation's reliance on NFPA and ASTM demonstrates, it is not just insurance companies, architects, sprinkler designers and installers, builders, electricians, fire departments, and building owners that benefit from the research and guidance of the NFPA and the other organizations. The public benefits in a very real way because the NFPA and the other organizations lead the way in advancing fire, materials, and building safety. NFPA and the other SDOs lead; government and the public benefit.

The American system of generating fire and safety standards is a private one. This system has the flexibility to incorporate new knowledge and

www.nist.gov/publications/reconstructing-station-nightclub-fire-materials-testing-and-small-scale-experiments.

¹⁰ The text of the amendments is available through a link at <https://www.nfpadevweb.gvpi.net/Public-Education/By-topic/Property-type-and-vehicles/Nightclubs-assembly-occupancies/the-station-nightclub-fire>.

developments quickly and effectively, and to create standards embodying new guidance available almost immediately. The system depends on funding the development of these timely, high quality, and independent standards through the licensing or sale of copyrighted works.¹¹ The system costs the public almost nothing. The system works. There is no ready or feasible substitute for it.

The federal government acknowledges its near-complete reliance on private consensus standards.¹² The codification of fire and other safety codes often falls to state legislatures whose *only* source of independent research and guidance (in the absence of government-generated standards) may be found in the standards promulgated by NFPA and the other Plaintiffs-Appellees.

The work of NFPA and the other organizations saves lives and property. Consider the reduction in lives lost in fires over the last century:



¹¹ Docket Nos. 118-11, ¶38; 118-8, ¶46.

¹² National Technology and Transfer Act of 1995, P.L. 104-113, § 12(d), 110 Stat. 783 (1996)(“Federal agencies and departments shall use technical standards that are developed or adopted by voluntary consensus standards bodies . . .”).

U.S. Fire and Burn Deaths, 1913-99¹³

In 1918, there were 9.1 fire deaths per 100,000 people in the United States. By 1998, the fatality rate had been reduced by 87% to 1.1 fire deaths per 100,000 people.¹⁴

The major fire protection advance in the earlier twentieth century was the improvement and increasing adoption of automatic fire sprinklers through NFPA 13. The major fire protection advance since 1980 has been the improvement and increasing adoption of smoke and fire alarms in commercial and residential space through NFPA 72.¹⁵ Notably, both were driven by NFPA standards.

The learning, research, updated standards of independent SDOs like NFPA, ASTM and ASHRAE propel improvements in fire safety, materials safety, and life safety. Advancements are brought forward through voluntary consensus standards developed by leading technical experts and then selectively adopted by

¹³ National Center for Health Statistics, National Safety Council as reprinted in Cote, Arthur E., *Organizing For Fire and Rescue Services*, National Fire Protection Association, 2003, p. 6.

¹⁴ National Safety Council, *Injury Facts*, National Safety Council Publications, 2000, pp. 38-41; Cote, Arthur E., *Organizing For Fire and Rescue Services*, National Fire Protection Association, 2003, p. 6.

¹⁵ In the residential context, NFPA's published estimates are that working smoke alarms reduce the occupant's risk of dying in the fire by about 50 percent while automatic fire sprinklers reduce the risk of dying by about 80 percent. www.nfpa.org/Public-Education/By-topic/Fire-and-life-safety-equipment/Home-fire-sprinklers.

government and/or the marketplace. See e.g. NFPA 13 (Sprinklers); NFPA 72 (Fire and Smoke Alarms); NFPA 101 (Life Safety); NFPA 1500 (Firefighter Safety), NFPA 5000 (Building Safety). These advancements save lives and property.

The “copyright system is intended both to encourage innovation” and “to protect innovative content.” *Fox Television Stations, Inc. v. Filmon X LLC*, 966 F.Supp.2d 30, 39 (D.D.C. 2013); *Christian Louboutin S.A. v. Yves Saint Laurent America Holding*, 696 F.3d 206, 216 (2d Cir. 2012) (copyright law “seek[s] to encourage innovation”). It is hard to imagine innovation more worthy of copyright protection than the original life-saving works of NFPA and other SDOs, or circumstances more prone to irreparable harm in the absence of vigorous copyright enforcement than the circumstances here. See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 586 (1994) (original creative expression “falls within the core of copyright’s protective purposes”). This is a case in which truly “the public interest can only be served by upholding copyright protections and correspondingly, preventing the misappropriation of skills, creative energies, and resources which are invested in the protected work.” *Apple Computer, Inc. v. Franklin Computer Corp.*, 714 F.2d 1240, 1255 (3d Cir. 1983).

2. The copyright protection of the works of NFPA, ASTM and ASHRAE serves the important societal goal of funding the fire prevention and safety engineering work of these organizations.

The standards developed by NFPA and similar SDOs are in the first instance drafted or amended by a committee of technical experts (including insurance industry professionals, academics, and experts from other industries) who work as volunteers. SDO approval and amendment processes are evaluated and accredited by the American National Standards Institute for their consensus decision-making, openness, balancing of interests, and fairness. Because of the prestige of serving on an SDO committee, committee expertise is very high, explaining why the standards of organizations like NFPA are often referred to as the “gold standard.” *E.g. Brosville Community Fire Dept. v. Navistar, Inc.* 2014 U.S. Dist. Lexis 173422 at *21, n. 9 (W.D. Va. 2014); *Sarro v. Philip Morris USA*, 857 F.Supp.2d 182, 186, n. 3 (D. Mass. 2012).

While the written work product of SDOs is generally referred to as a standard or code,¹⁶ these terms encompass a variety of technical best practices, guidelines, suggested rules, design and installation procedures, test methods, and specifications. As with the NFPA’s original fire sprinkler standard or code, the

¹⁶ Both standards and codes should be entitled to copyright protection as “privately organized and authored collections of hyper-technical data for use in a specialized segment of today’s complex society that benefits from uniformity in those data.” *Veeck* dissent of Judge Wiener, 293 F.3d at 814, n.20.

goal is standardization around best practices, not necessarily legislation. The SDOs work to integrate standards and codes in related areas, maximizing safety, reliability and interoperability.

SDOs pay for the substantial administrative research and engineering support costs of developing standards, in whole or significant part, with revenue generated from the sale or licensing of their copyrighted standards. This funding mode keeps SDOs independent, objective and in business, and avoids potential compromises (real and perceived) arising from seeking funding from industries interested in modifying standards to suit their own special interest. *Veck v. Southern Building Code Congress International*, 293 F.3d 791, 817 (5th Cir. 2002)(Judge Wiener's dissenting opinion).

By guaranteeing independence, the funding-by-sale-of-publication model also allows SDOs the freedom to focus on best practices and fire safety without political or partisan distraction – a freedom that has resulted in:

- High quality, objective standards that save lives and money;
- Fast and efficient updating of standards to meet emerging fire and life safety issues;
- Access to state-of-the-art research and guidance for stakeholders and the public at reasonable or no cost;
- Standardization of practices and products internationally around standards produced by U.S.-based SDOs, fueling foreign demand for U.S. products.

AIA members and others with a business or professional interest in mitigating fire-

related losses of life and property directly benefit from the copyright protection that makes possible the high quality standards produced by SDOs. The importance of copyright protection for SDO works, however, is far broader. Copyright protection funds the fire and life safety standards upon which the American public relies, and protects the nation's access to published research and guidance that saves lives.

But copyright protection is only as strong as its enforcement. Here, enforcement not only serves the goals of our copyright system -- to encourage innovation and protect innovative content. *E.g., Fox Television Stations, supra* at 39. The district court's copyright enforcement also preserves the system of fire and life safety standards upon which the public relies and encourages continuous innovation and improvements in the standards. Only continuing copyright enforcement will serve the public interest by "preventing the misappropriation of the skills, creative energies, and resources which are invested in the" standards. *Apple Computer, 714 F.2d at 1255.*

CONCLUSION

The research and guidance of SDOs and the resulting standards contribute directly to the fire and life safety of the public, while also benefitting numerous stakeholders including the members of AIA. The Court should uphold copyright protection for the life-saving and property-preserving work of SDOs.

Dated: December 6, 2017

Respectfully submitted,

By: /s/ V. Robert Denham, Jr.

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/s/ V. Robert Denham, Jr.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served this sixth day of December, 2017 by e-filing via ECF upon all counsel of record.

/s/ V. Robert Denham, Jr.

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