

ORAL ARGUMENT NOT YET SCHEDULED

No. 22-7063

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

AMERICAN SOCIETY FOR TESTING AND MATERIALS, et al.,
Appellants

v.

PUBLIC.RESOURCE.ORG, INC.,
Appellee

Appeal from the United States District Court
for the District of Columbia
Hon. Tanya S. Chutkan, No. 1:13-cv-1215-TSC

PUBLIC APPENDIX
VOLUME 13 (JA9198-JA9505)
MATERIAL UNDER SEAL IN SEPARATE SUPPLEMENT

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Example 5-4: Notice correction

[BILLING CODE]

POSTAL SERVICE**Specification for Postal Security Devices and Indicia (Postmarks); Correction****AGENCY:** Postal Service.**ACTION:** Notice; correction.**SUMMARY:** The Postal Service published a document in the *Federal Register* of July 23, 20xx, concerning request for comments on specifications for postal security devices and indicia (postmarks). The document contained incorrect dates.**FOR FURTHER INFORMATION CONTACT:** John Stamp, 202-000-0000.**SUPPLEMENTARY INFORMATION:****Correction**

In the *Federal Register* of July 2, 20xx, in FR Doc. 9x-12345, on page 23456, in the second column, correct the “Dates” caption to read:

DATES: Submit comments on the two specifications on or before September 30, 20xx.

Submit comments addressing intellectual property issues on or before August 15, 20xx. A general meeting on this subject is planned for July 19, 20xx, in Washington, DC. Interested parties may submit questions by July 17, 20xx.

Dated: July 5, 20xx.

[SIGN]

Type name,
Title.**5.9 Corrections to the CFR****AGENCY CORRECTIONS TO THE CFR**

If your agency did not catch an error, or was not able to publish a correction, before the CFR was amended, use the format for correcting amendments to the CFR (frequently called “technical amendments”) in **Example 5-5**. Or amend the affected provisions in the next final rule affecting that CFR part.

Example 5-5: Correcting amendment to the CFR

The Federal Communications Commission published a rule on April 21, 20XX which became effective on May 21, 20XX. The FCC published a correction on January 29, 20XX as a correcting amendment to the CFR.

[BILLING CODE]

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 90

[WT Docket No. 01-146; RM-9966; FCC 03-35]

Applications and Licensing of Low Power Operations in the Private Land

Mobile Radio 450-470 MHz Band; Corrections

AGENCY: Federal Communications Commission.

ACTION: Correcting amendments.

SUMMARY: On April 21, 20XX, the Federal Communications Commission revised Commission rules. That document inadvertently failed to update the station class for frequency 464.575 MHz and incorrectly listed a cross-reference. This document corrects the final regulations.

DATES: Effective on January 29, 20XX.

FOR FURTHER INFORMATION CONTACT: Brian Marengo, Acting Associate Division Chief, Public Safety and Critical Infrastructure Division at (202) 418-0838.

SUPPLEMENTARY INFORMATION: This is a summary of the FCC’s Erratum, FCC 03-35, published April 21, 20XX (68 FR 19444). This is the second set of corrections. The first set of corrections was published in the *Federal Register* on September 25, 20XX (68 FR 55319). This document augments the corrections which were published in the *Federal Register* on September 25, 20XX (68 FR 55319).

List of Subjects in 47 CFR Part 90

FCC equipment, Radio, Reporting and recordkeeping requirements.

Accordingly, 47 CFR part 90 is corrected by making the following correcting amendments:

PART 90-PRIVATE LAND MOBILE RADIO SERVICE

1. The authority citation for part 90 continues to read as follows:

Authority: Sections 4(i), 11, 303(g), 303(r) and 332(c)(7) of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 161, 303(g), 303(r), 332(c)(7).

2. In § 90.35, amend paragraph (b)(3) by adding entry 464.575 to the table to read as follows:

§ 90.35 Industrial/Business Pool.

(b) ***

(3) ***

Industrial/Business Pool Frequency Table

Frequency or band Class of station(s) Limitations Coordinator

464.575..... Base or mobile..... 62.....

3. Revise paragraph (e)(3) of § 90.267 to read as follows:

§ 90.267 Assignment and use of frequencies in the 450-470 MHz band for low power use.

(e) ***

(3) The frequencies in Group C that are subject to the provisions of § 90.35(c)(67) will not be available for itinerant use until the end of the freeze on the filing of high power applications for 12.5 kHz offset channels in the 460-470 MHz band.

Federal Communications Commission.

Name

Title.

OFR CORRECTIONS TO THE CFR

If you discover errors in CFR text that differs from how it published in a rule document, your Liaison Officer should contact our Code of Federal Regulations unit as soon as possible. We may be able to correct errors up to 10 years old, if we can establish that we caused the error. Any error more than 10 years old is the responsibility of the issuing agency, regardless of who caused the original error. The 10-year period is calculated from the revision date of the CFR volume where the amendment(s) first appeared incorrectly incorporated into the CFR. For example, an error that first appeared in a volume revised as of April 1, 2009 must be reported to OFR by April 1, 2019.

Chapter 6: ELECTRONIC FILES AND ONLINE SUBMISSIONS

6.1 Submitting files

PAPER DOCUMENTS WITH CERTIFIED ELECTRONIC FILE

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You can submit a document for publication as an electronic original document (digitally signed), using our web portal at webportal.fedreg.gov. Submitting an electronic original eliminates the need for paper copies, disks, certification letters, and preparing and shipping a package. For detailed information regarding how to get a digital signature and the submission process, see [Appendix B: PKI and Digital Signature - Introduction and FAQs](#).

Note: For continuity of operations purposes, including pandemic readiness, agencies should implement our currently available digital signature technology for Federal Register documents. Agencies should make digitally signed Federal Register documents a part of their daily business process to satisfy Presidential continuity directives (NSPD-51/HSPD-20).

Anyone at your agency who is authorized to sign physical documents can obtain a digital signature; in fact, they probably already have one on their HSPD-12 PIV ID card. And, your agency can have multiple people authorized to sign a document. The OFR does not determine who is authorized to sign documents, only that the name on the document matches the name of the digital signature.

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6.2 Submission requirements for all electronic files

DOCUMENT DRAFTING GUIDELINES

Follow the drafting requirements and guidelines in **Chapter 1: What are the requirements for drafting any document?**, and **Chapter 2: How do I write a document for the Proposed Rules category?** **Chapter 3: How do I write a document for the Rules and Regulations category?** or **Chapter 4: How do I write a document for the Notices category?** of this handbook when you draft any *Federal Register* document, whether you plan to submit it on paper or as a computer file.

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Your electronic file must be an MS-Word file, specifically the current open standard format ending with the extension “.docx.”. We will not erase any hidden data or “scrub” your documents before they are displayed online for public inspection. Please remove all metadata from the files before you send them to our office.

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The file on the disk should be saved from the same file used to print the signed paper original. In order for us to use the file in the publication process, you must include a letter certifying that the electronic file on the disk is an identical version of the enclosed paper original. The Certifying Officer, Liaison Officer, or signer of the document may sign this letter (see **Appendix A: Disk Verification / Certification**).

Note: *Certifying the file on a disk as a true copy of the original is a formal legal statement. Certifiers must take extraordinary care to ensure that the file on the disk is exactly the same as the signed paper original. This is a separate certification from certifying that the 2 paper copies of the document are copies of the original signed document. See section 1.6: **Signature and certification** for more information on certifying paper copies.*

The electronic file is used as the basis of the Public Inspection document and the published *Federal Register* document. If there is a question about your agency sent for publication, we will use this electronic file for verification. If OFR finds any discrepancies between the certified electronic file and the legal paper original before publication, we will immediately remove the document from the production process and make it available for pick-up. We may also add an editorial note of the agency error if the document has been placed on public inspection.

TYPE OF DISK

CD-ROM, DVD-R, or DVD+R. OFR prefers Word files on optical disk. Make sure the optical disk can be read without proprietary software.

High Density 3.5 Diskettes. OFR can also accept Word files on high density (HD), 3.5 inch diskettes, formatted for PC. Use new or reformatted diskettes to ensure that we receive a readable diskette with no extra files. Scan the diskette to ensure that it is virus-free.

Note: OFR does not accept any other type of media, including flash drives and SD cards, due to IT security concerns.

DISK PREPARATION

- If the document spans two or more files, merge these as a single file, in sequence to match the paper original. If files are too large to fit on floppy diskette, you must use a CD-ROM.
- Send only one document per disk. Send a separate disk and include a separate certification letter for each document. The certified file must be the only file on the disk. Delete drafts, supporting documents, and any other files before you send the disk to OFR.
- Do not send password protected or encrypted files or files with track-changes or comments.
- Do not send files with metadata.
- Do not submit macro-enabled files.

DISK LABELING

Include the following information on the label of the disk:

Name of your agency.

Name of the file on the disk.

File format: MS-Word.

Subject heading, CFR citation, or agency docket number, tying it to the paper document.

6.4 Digitally-signed files submitted online

The Federal Register Document Submission Portal (web portal) lets agencies securely submit documents and special handling letters online instead of traditional delivery options such as US Mail or courier. It also allows agencies to receive immediate feedback on the status of their documents while saving resources such as paper, toner, and CDs.

Note: Only submit special handling letters when you submit your document. Never submit a letter through the portal without a document. Never email a special handling letter to the Scheduling Unit.

When sending documents through the web portal, the digital signature is an important security measure that ensures the integrity of your document. We will only accept MS

Word documents (.docx) signed with a medium assurance level digital signature certificate, cross-certified by the Federal Bridge Certification Authority in PKCS#7 open standard. Most Federal Government-issued HSPD-12 Personal Identity Verification ID cards meet this level of certification. For the purpose of digital submission to the Federal Register, this process is abbreviated as Public Key Infrastructure, or PKI. You may be required to purchase a card reader if your computer is not equipped with one.

Note: This is NOT the same as a digital signature within Adobe Acrobat or MS Word. We can only accept PKCS#7 digital signatures.

There are two ways to obtain a digital certificate. If your agency has issued FBCA HPSD-12 compliant PIV identification badges, you likely already have a digital signing certificate issued to you. Check with your IT Security group to verify. A PIV-card reader may also be needed if your machine is not equipped with one.

For users without PKI certificates, you can purchase FBCA-compliant certificates from GPO, which includes technical support from GPO. For more details on obtaining a GPO certificate, go to www.gpo.gov/docs/default-source/public-key-infrastructure-documents/getting-started-with-pki.pdf.

All the rules for drafting documents still apply to documents that are digitally signed and submitted through the web portal.

Note: If your document contains graphics, appendices, or annexes, include them in the document where they should appear in print. Do not send them as separate files in addition to your text.

Step-by-step instructions for digitally signing documents are provided at piv.idmanagement.gov/userguides/signworddoc-ofr/. Submission instructions are available on OFR's web portal site at webportal.fedreg.gov > Learn > How to Submit. If you have questions about digital submission, contact OFR's DDSA Division at ofrtechgroup@gpo.gov.

6.5 Making changes to electronic submissions

To correct any document, you must follow the procedures in **Chapter 5: How do I correct a document?** The standard correction requirements also apply to documents submitted online or documents accompanied by disk submissions.

If the changes are extensive, we can immediately remove the document from the production process and make it available for pick-up. Once you've made necessary corrections, you can resubmit the document following normal submission procedures.

6.6 Definitions

MS-Word. MS-Word is the word processing application you must use to create your document file. The OFR can process files created from MS-Word 2010 or higher saved in open standard format (.docx).

Metadata. Metadata is hidden information embedded in an MS-Word document and can include personal information about the author of the document. Metadata is not accepted on *Federal Register* electronic documents.

Macros. Macros are sets of computer instructions that will automatically run in MS-Word, usually used to generate or format content.

6.7 Checklist for electronic submissions

- ✓ Submit only one file per disk.
- ✓ Use a CD-ROM, High Density 3.5" diskette, or the Document Submission Portal.
- ✓ If your document contains graphics, appendices, or annexes, include them in the document where they should appear in print. Do not send them as separate files in addition to your text.
- ✓ Do not submit a read-only, encrypted, or password-protected file.
- ✓ Do not submit a macro-enabled file.
- ✓ When drafting your document do not use the automatic formatting features of your word-processing program.
- ✓ Accept all tracked changes before submitting the electronic file.
- ✓ Make sure there are no comments in the file before submitting it.
- ✓ Take the necessary precautions regarding the metadata before submitting the file.
- ✓ Save your document in Microsoft Word open standard format (.docx).

Chapter 7: FIGURES, FORMS, TABLES, NOTES, AND APPENDICES

7.1 Format, placement, and quality

Include all material within the Word file as you wish it to appear in the published document. (See [sections 2.13](#), [3.13](#) for more information about placement and designations.) Use Word formatting features for table- and text-based figures. You can also use image files (.gif, .jpg, .bmp). If you have a complex table, GPO may have difficulty reprinting it exactly, so we may recommend that you opt to use an image of the table or have GPO photo the table instead of using text.

Note: *If you have an image that you need to include in a manuscript file, contact the Scheduling Unit as soon as possible to discuss your options before sending the document for publication.*

If you have specific language that regulated parties are supposed to use (for example, the warranty language that must be posted in the window of a used car for sale, [16 CFR 455.2](#) and [16 CFR 455.5](#) ([81 FR 81679](#), [Nov. 18, 2016](#)), or specific clauses to use in certain types of contracts and written agreements), include that text in smaller font and add a thin border around the text. This will ensure that we treat this text like a figure and won't require that you add a label or other designation.

7.2 Figures

Figures include maps, diagrams, graphs, and other pictorial material, as well as text-based figures.

All details of a figure, such as captions, numbers, place names, and keys, must be completely legible.

If you amend a figure, submit a completely new figure with the amendatory document.

We do not recommend including illustrative material that uses color. Both online and in print, the *Federal Register* is a black and white publication. Medium reds and medium blues, for example, will render the identical medium gray.

Each figure needs a title, which indicates its relationship to the CFR structure. It can be:

- within a section, and related to a specific paragraph

- at the end of a section, and related to the whole section
- within an appendix, and related to the structure of the appendix, or
- the appendix, and related to the part or subpart

Table 7-1: Label for a figure
Figure 1 to paragraph (b) – Specifications for ramps
Figure 2 to § 201.3 – Map coordinates

7.3 Forms

GPO cannot recreate forms within regulatory text. If you need to add a specific form, usually as part of a Notice document or in an appendix, provide the OFR with a legible image file, included as part of the document you want published (for example [77 FR 73912](#)).

7.4 Tables

REDESIGNATION TABLES

When you rearrange and renumber your agency's rules, you may use a redesignation table. A redesignation table is a listing of the old CFR unit numbers with the corresponding new CFR unit numbers.

You may use a redesignation table in the amendatory instruction of a rule or proposed rule document (see [Example 7-1](#)).

Example 7-1: Redesignation table

§ § 1475.12 through 1475.20 [Redesignated]

2. Redesignate § § 1475.12 through 1475.20 as follows:

Old section	New section
1475.12	1475.13
1475.13	1475.14
1475.14	1475.15
1475.15	1475.17
1475.16	1475.18
1475.17	1475.19
1475.18	1475.20
1475.19	1475.21
1475.20	1475.22

(note that this leaves § 1475.16 empty)

DISTRIBUTION AND DERIVATION TABLES

When you reorganize, rewrite, and set out rules on a large scale, you may want to use distribution and derivation tables in your preamble (see **Example 7-2, Example 7-3**).

Distribution and derivation tables are complementary. A distribution table shows where each piece of the original material went or indicates why it is no longer needed. A derivation table shows where each piece of the revised material comes from. You may decide to use either or both.

Place distribution and derivation tables in the preamble under SUPPLEMENTARY INFORMATION. Do not include them in the regulatory text as part of an amendatory instruction. Instead, use specific amendatory terms to state which CFR units are being removed, revised, or added (see **Example 7-4**). For a complete discussion of amendatory terms see **sections 2.14, 3.14**.

Example 7-2: Distribution table	
Old Section	New Section
--- --	Parts 11 and 12 (subchapter D)
3.4(a)	11.1
Introductory text of 3.4(b)	Removed
3.4(b)(1)	Removed
3.4(b)(2)	Removed
3.4(b)(3)	11.2
3.4(b)(4) through (b)(8)	11.3 through 11.7
7.1	12.1(a)
7.4	12.1(b)
7.5	12.1(c)
7.6	12.1(d)
8.8	12.2
9.3(a)	12.3(a)
9.3(b)	12.3 (b) and (c)
9.3(c)	Removed

Example 7-3: Derivation table	
New Section	Old Section
250.1	250.210(a).
250.3	250.210(b) (1st sentence).
250.5	250.210(b) (1st para.)(2d sentence preceding the words "...or the reasonable..."). 250.210(c)(except last sentence).
250.7	250.210(c) last sentence.
250.9	250.210(b)(2d para.)(1st sentence).
250.11	250.210(b)(2d para.)(except 1st sentence).
250.13	250.210(b)(1st para.)(2d sentence after "...such capital expenditures..." and next to last sentence).
250.15	250.210(b)(1st para.)(last sentence).
250.17	250.210(d).

Example 7-4: Amendatory instructions for changes described in Example 7-2**PART 3—SERVICES TO THE PUBLIC**

1. The authority citation for part 3 continues to read as follows:

Authority: 44 U.S.C. 1506; sec. 6, E.O. 10530, 19 FR 2709, 3 CFR, 1954-1958 Comp., p. 189.

§ 3.4 [Removed]

2. Remove § 3.4.

PART 7—[REMOVED]

3. Remove part 7.

PART 8—CODE OF FEDERAL REGULATIONS

4. The authority citation for part 8 continues to read as follows:

Authority: 44 U.S.C. 1506, 1510; sec. 6, E.O. 10530, 19 FR 2709, 3 CFR, 1954-1958 Comp., p. 189.

§ 8.8 [Removed]

5. Remove § 8.8.

PART 9—THE UNITED STATES GOVERNMENT MANUAL

6. The authority citation for part 9 continues to read as follows:

Authority: 44 U.S.C. 1506; sec. 6, E.O. 10530, 19 FR 2709, 3 CFR, 1954-1958 Comp., p. 189.

7. Revise the part heading to read as shown above.

§ 9.3 [Removed]

8. Remove § 9.3.

9. Add new subchapter D, consisting of parts 11 and 12, to read as follows:

SUBCHAPTER D—AVAILABILITY OF OFFICE OF THE FEDERAL REGISTER PUBLICATIONS**PART 11—SUBSCRIPTIONS****Sec.**

11.1 Subscription by the public.

11.2 Federal Register.

11.3 Code of Federal Regulations.

11.4 The United States Government Manual.

11.5 Public Papers of the Presidents of the United States.

11.6 Weekly Compilation of Presidential Documents.

11.7 Federal Register Index.

11.8 LSA (List of CFR Sections Affected).

Authority: 44 U.S.C. 1506; sec. 6, E.O. 10530, 19 FR 2709, 3 CFR, 1954-1958 Comp., p. 189.

[omitted text not included.]

IF / THEN TABLES

If/Then tables present regulatory text in a columnar format (see **Example 7-5**). Each column must have a heading. The column heading may:

- Identify the type of information presented in each column; or
- When read with the entry in the column present a complete sentence.

Designate each entry in the If/Then table to make it easier to amend.

If you do not designate each entry in the If/Then table, you can change the table only by revising it (reprinting the table in its entirety with the changes integrated). This is costly if your table is large.

Whichever type of If/Then table you use, be sure that each entry presents a complete and logical thought.

Example 7-5: Column headings that identify the information in the entries**§ 114.103 Who may file a claim?**

(a) If a claim is based on factors listed in the first column, then it may be presented by persons listed in the second column.

Table 1 to paragraph (a)

Claim factors	Claim presenters
(1) Injury to or loss of property	The owner of the property, his or her duly authorized agent, or legal representative.
(2) Personal injury	The injured person, his or her duly authorized agent, or legal representative.
(3) Death	The executor, administrator, or legal representative of the decedent's estate, or any other person entitled to assert the claim under applicable state law.
(4) Loss wholly compensated by an insurer with rights as a subrogee.	The parties individually, as their interests appear, or jointly.

DATA TABLES

If you arrange the data in a logical (usually alphanumeric) order, you do not need to designate each row. You can then amend a specific row of the table without having to amend the entire table.

Example 7-6: Data table

§ 172.379 Vitamin D.

* * * * *

(c) The additive may be used as follows:

Table 2 to paragraph (c)

Category of Food	Maximum Levels in Food (as Served)
Soy beverages	50 International Units (IU)/100 grams (g)
Soy beverage products	89 IU/100 g
Soy-based butter substitute spreads	330 IU/100 g
Soy-based cheese substitutes and soy-based cheese substitute products	270 IU/100 g

Example 7-7: Amend table in Example 7-6 (7 asterisks)

2. In § 172.379, amend table 4 to paragraph (c) by adding entries for "Edible plant-based beverages intended as milk alternatives" and "Edible plant-based yogurt alternatives" in alphabetical order to read as follows:

§ 172.379 Vitamin D₂.

* * * * *

(c) * * *

Table 4 to paragraph (c)

Category of Food	Maximum Levels in Food (as Served)
Edible plant-based beverages intended as milk alternatives	84 IU/100 g
Edible plant-based yogurt alternatives	89 IU/100 g

* * * * *

7.5 Footnotes and Notes

Number footnotes separately for each unit listed below:

- Preamble
- Each CFR section
- Table
- Figure
- Form
- Appendix

The first footnote in a CFR section starts with “1.” The first footnote in each appendix starts with “1.”

Number the footnotes in the preamble to a rule or proposed rule document independently from the footnotes in the regulatory text. Type footnotes to tables, figures, and forms at the end of the table, figure, or form and not at the bottom of the page on which they appear.

Whenever a footnote number appears in regulatory text or tables, print the text of the footnote ***even if there is no change to the footnote.***

Note: Do not include formulas or tables in footnotes.

Footnotes and notes in the CFR must be explanatory; they **cannot** be regulatory.

If you remove a footnote in the regulatory text, you must redesignate the remaining footnotes to close the gap. You cannot remove and reserve a footnote, nor can you add a footnote with an alpha character, for example, “9c.”

Remember to separately number the footnotes for figures, forms, tables, and appendices. If you remove a figure, form, table, or appendix, it will not disrupt the footnote numbering of the regulatory text.

You can also add notes to paragraphs and to sections, in the same way you can add figures and tables. Notes should not be more than one or two paragraphs and should never have multiple paragraph levels. Complex notes that cannot be restructured into a simple paragraph should be codified, included in an appendix, or removed from the CFR.

You cannot add Editorial Notes. These can only be added or removed by the OFR.

7.6 Appendices

We allow two types of appendices. Appendices to the regulatory text in rule and proposed rule documents that will appear in the CFR or appendices to the *Federal Register* document itself. An appendix to the *Federal Register* document, unlike an appendix to a CFR part or subpart, will not appear in the CFR.

You can use an appendix to improve the quality or utility of a document but you cannot use an appendix to impose requirements or restrictions⁵⁷.

Use an appendix to present:

- Supplemental, background, or explanatory information which illustrates or amplifies a rule that is complete in itself.
- Forms or charts which illustrate the regulatory text.

You may not use the appendix as a substitute for regulatory text. Set out regulatory material in standard CFR sections, not in an appendix. Material in an appendix may not:

- Amend or affect existing portions of CFR text; or
- Introduce new requirements or restrictions into your regulations.

CFR APPENDICES

Anything not in a standard codification structure (i.e. CFR section) is an appendix, regardless of how your agency refers to it (for example, CFPB supplements, FAA SFARs). An appendix may appear at the part or subpart level. Designate each appendix and identify whether it belongs to a part or subpart (for example, Appendix A to part 51) and give it a descriptive heading (see **Example 7-8**). For a new or revised part or subpart, list the appendix heading in the table of contents. A complete appendix heading should:

- Conform to a uniform system of designation for appendices throughout your agency's CFR provisions;
- Indicate the CFR unit to which the appendix is attached; and
- Provide a brief, descriptive subject heading.

⁵⁷ 44 U.S.C. § 1510, 1 CFR 1.1, 5.2(c), 5.9(b) and (c), 8.1, and 21.11

Example 7-8: Descriptive Headings for Appendices

Appendix A to Part 430—Insulation Adequacy Evaluation Criteria
Appendix B to Subpart C of Part 430—Test Procedures for Tire Traction

Place the appendix immediately following the CFR unit to which it is appended.

DESIGNATING AND AMENDING CFR APPENDICES

Designate each paragraph in the text of an appendix. You may use the CFR paragraph designations (see **sections 2.13, 3.13**) or develop an alternate *logical* numbering system.

You may amend individual paragraphs of an appendix **only if** each paragraph has a unique designation that falls logically within the structure of the appendix. While you do not have to use standard CFR paragraph designations, you do need to designate paragraphs consistently across paragraph levels.

Example 7-9: Appendix paragraphs designated with numerals across levels*2. Testing conditions:*

2.1 Installation Requirements. Install the dishwasher according to the manufacturer's instructions. A standard or compact under-counter or under-sink dishwasher must be tested in a rectangular enclosure constructed of nominal 0.374 inch (9.5 mm) plywood painted black. The enclosure must consist of a top, a bottom, a back, and two sides. If the dishwasher includes a counter top as part of the appliance, omit the top of the enclosure. Bring the enclosure into the closest contact with the appliance that the configuration of the dishwasher will allow.

2.2 Electrical energy supply.

2.2.1 Dishwashers that operate with an electrical supply of 115 volts. Maintain the electrical supply to the dishwasher at 115 volts ± 2 percent and within 1 percent of the nameplate frequency as specified by the manufacturer.

2.2.2 Dishwashers that operate with an electrical supply of 240 volts. Maintain the electrical supply to the dishwasher at 240 volts ± 2 percent and within 1 percent of its nameplate frequency as specified by the manufacturer.

2.3 Water temperature. Measure the temperature of the water supplied to the dishwasher using a temperature measuring device as specified in section 3.1 of this appendix.

2.3.1 Dishwashers to be tested at a nominal 140 °F inlet water temperature. Maintain the water supply temperature at 140° ± 2 °F.

2.3.2 Dishwashers to be tested at a nominal 120 °F inlet water temperature. Maintain the water supply temperature at 120° ± 2 °F.

2.3.3 Dishwashers to be tested at a nominal 50 °F inlet water temperature. Maintain the water supply temperature at 50° ± 2 °F.

2.4 Water pressure. Using a water pressure gauge as specified in section 3.4 of this appendix, maintain the pressure of the water supply at 35 ± 2.5 pounds per square inch gauge (psig) when the water is flowing.

2.5 Ambient and machine temperature. Using a temperature measuring device as specified in section 3.1 of this appendix, maintain the room ambient air temperature at 75° ± 5 °F, and ensure that the dishwasher and the test load are at room ambient temperature at the start of each test cycle.

2.6 Test Cycle and Load.

2.6.1 Non-soil-sensing dishwashers to be tested at a nominal inlet temperature of 140 °F. These units must be tested on the normal cycle and truncated normal cycle without a test load if the dishwasher does not heat water in the normal cycle.

2.6.2 Non-soil-sensing dishwashers to be tested at a nominal inlet temperature of 50 °F or 120 °F. These units must be tested on the normal cycle with a clean load of eight place settings plus six serving pieces, as specified in section 2.7.1 of this appendix. If the capacity of the dishwasher, as stated by the manufacturer, is less than eight place settings, then the test load must be the stated capacity.

You can also use a combination of alphanumeric and standard CFR paragraph numbering, as long as you use it consistently throughout the appendix and each paragraph has a unique designation.

Example 7-10: Appendix paragraphs designated with a mix of styles constituent across levels

S1. *Scope*. This standard specifies requirements for low-speed vehicles.

S2. *Purpose*. The purpose of this standard is to ensure that low-speed vehicles operated on the public streets, roads, and highways are equipped with the minimum motor vehicle equipment appropriate for motor vehicle safety.

S3. *Applicability*. This standard applies to low-speed vehicles.

S4. [Reserved]

S5. *Requirements*.

(a) When tested in accordance with test conditions in S6 and test procedures in S7, the maximum speed attainable in 1.6 km (1 mile) by each low-speed vehicle shall not more than 40 kilometers per hour (25 miles per hour).

(b) Each low-speed vehicle shall be equipped with:

(1) Headlamps,

(2) Front and rear turn signal lamps,

(3) Taillamps,

(4) Stop lamps,

[text omitted]

If you cannot identify a specific paragraph by a unique designation that allows CFR editors to locate it within the appendix, you will not be able to amend that paragraph. Instead, you must revise the next-highest level that you can identify using a unique designation. In some cases, this could mean that you must republish the entire appendix.

FEDERAL REGISTER DOCUMENT APPENDICES

You may include an appendix at the end of the preamble or at the end of a rule or proposed rule document. Appendices that appear at the end of the preamble are not part of the CFR amendments and are not included in the CFR. However, if you include the appendix at the end of the rule or proposed rule document, you must direct that the appendix not be reprinted in the CFR. Further, if an appendix does not appear in the CFR, you cannot reference it in your regulatory text. If you do not want the appendix to appear in the CFR, place a note before the appendix heading in your rule or proposed rule document stating it will not appear in the CFR (see **Example 7-11**).

Example 7-11: Format for an appendix following regulation text but not to be reprinted in the CFR

Note: The following appendix will not appear in the Code of Federal Regulations.
APPENDIX HEADING

Document Drafting Handbook | April 2019

Chapter 8: HOW DO I PUBLISH A DOCUMENT IN THE *FEDERAL REGISTER*?

8.1 Who do I contact with questions?

AT THE OFFICE OF THE FEDERAL REGISTER

Your agency must designate a Federal Register Liaison Officer and a Certifying Officer⁵⁸. Each Officer must have an Alternate.

Your agency must notify the Director of the Federal Register, in writing, of the name, title, address, telephone, and fax numbers of each person designated. You must also notify the Director of the Federal Register of any changes (see **Appendix A: Disk Verification / Certification**).

The Liaison Officer is the main contact between your agency and the OFR. Therefore, your agency should choose a person who is directly involved in the regulatory program. The Liaison Officer and the Alternate resolve any problems concerning documents that you submit for publication in the *Federal Register* or other problems concerning your agency's rules in the CFR.

The Certifying Officer ensures that copies of original documents and any disks or CDs submitted for publication are true and accurate copies. The Certifying Officer signs a statement at the bottom of the signature page on each copy: "Certified to be a true copy of the original" (see **Example 8-1**). The Certifying Officer also signs the certification letter that accompanies a disk (see **Appendix A: Disk Verification / Certification**). The certification is a legal declaration that the certified copy and disk (or CD) are identical to the original.

AT THE GOVERNMENT PUBLISHING OFFICE?

The GPO requires that your agency designate a Printing Officer who is the liaison between your agency and GPO in all billing matters.

⁵⁸ 1 CFR 16.1

8.2 What do I need to send?

You must send one original and two certified copies or three originals of each document for filing and publication in the *Federal Register*. An official authorized to sign documents for publication in the *Federal Register* must sign the original document in ink. The OFR suggests using blue ink since a black ink signature may look like a photocopy.

One original and two certified copies

If you send one original document, you must also submit two certified copies. Submit legible and complete copies that are identical to the original. Your certified copies may be double-sided.

Certified copies are not signed by the issuing official. Instead they contain a copy of the original signature. The agency also places a signed certification statement on the signature page (see **Example 8-1**). The agency's Certifying Officer signs the certification statement. The Certifying Officer attests that the copies are identical to the original document. Certification means that the copies match the original document ensuring that they are identical and complete. This statement on the copy of the document is different from the letter certifying that the electronic file is the same as the paper file.

Example 8-1: Certification statement

Certified to be a true copy of the original document.
[Signature of Certifying Officer]

Three originals

You may choose to provide three identical original documents that the issuing official has signed in ink, with name and title typed below. In this case, you need no certification statement because all documents are originals.

Special handling letter

If you need anything special, like delayed filing or emergency publication, you need to request it in a special handling letter when you send in the document. Make sure you include a point of contact in your letter, especially if it is someone other than your Liaison Officer. You can combine this letter with the Disk Certification letter (see **Appendix A: Special Handling Request**).

Disk Certification letter

If you include a disk with a Word file of your document, you need to certify that the electronic file is identical to the paper file you have submitted. You can combine this document with the Special Handling letter (see [Appendix A: Disk Verification / Certification](#)).

8.3 Where do I deliver my document?

U.S. Mail delivery

DO NOT ADDRESS U.S. MAIL to 7 G Street, NW. Your package will be delayed and you risk possible damage to documents and disks. But if you do use U.S. Mail, address your package to:

Office of the Federal Register (F)
National Archives and Records Administration
8601 Adelphi Road
College Park, MD 20740

Hand delivery

Deliver letters or documents in person or by FedEx, UPS, etc., or messenger to:

Office of the Federal Register
7 G Street, NW, Suite A-734
Washington, DC 20401

(Two blocks north of Union Station Metro)

We are open to accept deliveries only between 8:45 a.m. and 5:15 p.m. ET, Monday through Friday, except Federal holidays.

8.4 How can I get proof of receipt of my document?

You can request a receipt on delivery through the U.S. Post Office or your messenger service. We will sign a slip that you provide. We will not create a receipt for you.

8.5 When is my document filed for public inspection?

The OFR files each document for public inspection at 8:45 a.m. on the business day before the date of publication (unless you have requested special filing). Our public inspection docket is online at www.federalregister.gov/public-inspection and physically located at:

Office of the Federal Register

7 G Street, NW, Suite A-734

Washington, DC 20401

(Two blocks north of Union Station Metro)

Anyone may inspect or copy⁵⁹ filed documents during our business hours, 8:45 a.m. to 5:15 p.m. ET, Monday through Friday, except for Federal holidays. We update the public inspection list throughout the day.

We recommend that you notify your public affairs office that we do not release information concerning a document to the public until the document is on file for public inspection.

8.6 How can I get emergency or immediate filing?

You may request earlier filing if you do so in a special handling letter that accompanies your submission package (see **Appendix A: Special Handling Request, Emergency Publication Request, Immediate Filing Request**⁶⁰). We are able to file documents for public inspection only during official business hours, 8:45 a.m. to 5:15 p.m. ET, Monday through Friday, except for Federal holidays.

We place a document on file for public inspection only after we have reviewed it, resolved any problems, and assigned it a publication date.

8.7 How can I delay filing?

You may request a filing time that is later than 8:45am, but not later than 4:15pm, on the business day before publication, as long as you request the delayed filing as part of the special handling letter or **before** your document is assigned public inspection and publication dates. You can only delay the filing of your document to a different day if you

⁵⁹ OFR does not provide copies or photocopiers; individuals may use personal devices to make copies.

⁶⁰ An Immediate Filing Request is also known as an Emergency Filing Request.

also delay the publication date. Once a publication date is assigned, you cannot delay the publication date.

8.8 When will my document be published, and how can I get confirmation of a publication date?

The OFR assigns a publication date once a document meets our publication requirements. The publication dates are based on the schedules described below.

We do not automatically contact agencies with the publication date. We send an automated email notification providing publication and filing information to the person your agency has designated as your Liaison Officer. Your agency must maintain this contact information.

REGULAR SCHEDULE

The OFR normally assigns each document to the regular publication schedule. Documents received before 2 p.m. are on a 3-day schedule, and those received after 2 p.m. are on a 4-day schedule.

Table 8-1: Regular publication schedule

If we receive a document before 2 p.m. on:	We file it for public inspection at 8:45 a.m. on:	And publish it in the <i>Federal Register</i> on:
Monday	Wednesday	Thursday
Tuesday	Thursday	Friday
Wednesday	Friday	Monday
Thursday	Monday	Tuesday
Friday	Tuesday	Wednesday

This table does not reflect the changes caused by Federal holidays.

SUNSHINE ACT MEETING SCHEDULE

Sunshine Act meeting notices received before 4 p.m. are published on a 2-day publication schedule and Sunshine Act meeting notices received after 4 p.m. are placed on a 3-day publication schedule (see [section 4.10](#)).

DEFERRED SCHEDULE

The OFR assigns your document to the deferred schedule if:

- You request delayed publication;
- The length of the document requires additional review and processing time (a document of 100 double-spaced pages or more requires additional time);
- The complexity of the document requires additional review and processing time; or
- Technical printing considerations require additional time for publication.

8.9 Can I get emergency publication?

If you need emergency publication, include why you need emergency handling in the special request letter. You must briefly describe the emergency and the benefits attributed to emergency scheduling. We will consider your request based on our workload, the length and complexity of the document, and the amount of time it takes to resolve any problems with the document. We do not approve all emergency requests (see **Appendix A: Special Handling Request, Emergency Publication Request, Immediate Filing Request**).

8.10 How can I get extra copies of a document that appeared in the *Federal Register*?

Your agency can purchase extra copies of a separate part of the *Federal Register*, or of an entire issue, by requesting a press overrun from GPO. These copies are available shortly after the issue is printed.

To arrange for an overrun of a separate part of the *Federal Register*, when you submit your document for publication, in your special handling letter (see **Appendix A: Special Handling Request**), you must:

- Request its publication as a separate part;
- Request a publication date and separate part number; and
- Provide the publication date and separate part number to your agency's Printing Officer.

Your Printing Officer orders the overrun by submitting a Standard Form 1 (SF-1) to GPO before noon on the workday before the publication date.

Document Drafting Handbook | April 2019

Appendix A: MODEL LETTERS

We offer these model letters to help you prepare written requests regarding *Federal Register* documents and other matters.

U.S. Mail:

FEDERAL REGISTER (F)
NATIONAL ARCHIVES AND RECORDS ADMINISTRATION
8601 ADELPHI ROAD
COLLEGE PARK, MD 20740-6001

Hand delivery or messenger service:

Office of the Federal Register
7 G, NW, Suite A-734
Washington, DC 20401
(Two blocks north of Union Station Metro)

Electronically:

With a submitted document – OFR web portal
By itself (signed and scanned as a pdf) – fedreg.liaison@nara.gov

We accept hand deliveries only between 8:45 a.m. and 5:15 p.m. ET, Monday through Friday, except Federal holidays.

Regardless of the method of delivery, use the U.S. Mail address above on your letter.

One of the following agency officials may sign your letter: Federal Register Liaison Officer or Alternate; Federal Register Certifying Officer or Alternate (for certification letters); or Signer of the document (see [section 5.4, Chapter 6: Electronic files and online submissions](#)).

A.1 Emergency Publication Request

AGENCY LETTERHEAD

December 25, 20xx

[Insert full name of DIRECTOR], Director
Office of the Federal Register (F)
The National Archives and Records Administration
8601 Adelphi Road
College Park, MD 20740-6001

Director [Insert last name of DIRECTOR]:

Please publish this [RULE, PROPOSED RULE, OR NOTICE] concerning [INSERT SUBJECT (including agency docket number, and, for rules and proposed rules, RIN number)] on the emergency publication schedule.

[EXPLAIN WHY YOU NEED EMERGENCY PUBLICATION.] [GIVE ANY SPECIAL PRINTING AND/OR PROCESSING INSTRUCTIONS.]

Call [INSERT YOUR NAME] at [TELEPHONE NUMBER] to confirm the publication date and for answers to any questions.

Sincerely,

[SIGN]

Type name, Title

A.2 Immediate Filing Request

AGENCY LETTER HEAD

December 25, 20xx

[Insert full name of DIRECTOR], Director
Office of the Federal Register (F)
The National Archives and Records Administration
8601 Adelphi Road
College Park, MD 20740-6001

Director [Insert last name of DIRECTOR]:
Please immediately file for public inspection this [RULE, PROPOSED RULE, OR NOTICE]
concerning [INSERT SUBJECT (including agency docket number, and, for rules and
proposed rules, RIN number)].

[EXPLAIN WHY YOU NEED IMMEDIATE FILING.] [GIVE ANY SPECIAL PRINTING AND/OR
PROCESSING INSTRUCTIONS.]

Call [INSERT YOUR NAME] at [TELEPHONE NUMBER] to confirm the publication date and
file time and for answers to any questions.

Sincerely,

[SIGN]

Type name, Title

A.3 Special Handling Request

I request the following special handling for this document:

- Deferred publication date: Please publish this document on .
- Emergency publication: Attached is a letter requesting and explaining why we need emergency publication.
- Immediate Filing: Attached is a letter requesting and explaining why we need immediate filing.
- Separate part: Please publish this document in a separate part of the Federal Register and call to tell me the separate part number.

Signed

[Telephone number]

Note: If you submit a document with only a special handling request and no certification letter, the special handling request must be on agency letterhead.

A.4 Disk Verification / Certification

AGENCY LETTERHEAD

December 25, 20xx

[Insert full name of DIRECTOR], Director
Office of the Federal Register (F)
The National Archives and Records Administration
8601 Adelphi Road
College Park, MD 20740-6001

Director [Insert last name of DIRECTOR]:

This is to certify that the file furnished with the [RULE, PROPOSED RULE, NOTICE] concerning [INSERT SUBJECT (including agency docket number, and, for rules and proposed rules, RIN number)] is a true copy of the original signed document.

[GIVE ANY SPECIAL PRINTING AND/OR PROCESSING INSTRUCTIONS.]

Sincerely,

[SIGN]

Type name, Title

A.5 Correcting a Document After Filing

AGENCY LETTERHEAD

December 25, 20xx

[Insert full name of DIRECTOR], Director
Office of the Federal Register (F)
The National Archives and Records Administration
8601 Adelphi Road
College Park, MD 20740-6001

Director [Insert last name of DIRECTOR]:

Please make the following corrections to the [RULE, PROPOSED RULE, OR NOTICE] concerning [INSERT SUBJECT (including agency docket number, and, for rules and proposed rules, RIN number)] that is currently on public inspection and scheduled to publish in the Federal Register on [INSERT DATE]:

On page 6, second paragraph, line 7, remove the phrase "outgoing mail".

On page 15, after the heading "Introduction" add the sentence: "Indicated in the report is the percentage of correctly manually processed boxes versus correctly electronically processed boxes."

If you have any questions, please contact [INSERT NAME] at [TELEPHONE NUMBER].

Sincerely,

[SIGN]

Type name, Title

A.6 Withdrawing a Document from Publication

BEFORE FILING:

AGENCY LETTER HEAD

December 25, 20xx

[Insert full name of DIRECTOR], Director
Office of the Federal Register (F)
The National Archives and Records Administration
8601 Adelphi Road
College Park, MD 20740-6001

Director [Insert last name of DIRECTOR]:

Please withdraw from publication the [RULE, PROPOSED RULE, NOTICE] concerning INSERT SUBJECT (including agency docket number, and, for rules and proposed rules, RIN number)] which we submitted on [INSERT DATE].

A messenger will pick up this document. Print the following return information on the envelope:

[INSERT RETURN INFORMATION]

Sincerely,

[SIGN]

Type name, Title

AFTER FILING:**A G E N C Y L E T T E R H E A D**

December 25, 20xx

[Insert full name of DIRECTOR], Director
Office of the Federal Register (F)
The National Archives and Records Administration
8601 Adelphi Road
College Park, MD 20740-6001

Director [Insert last name of DIRECTOR]:

Please withdraw from publication the [RULE, PROPOSED RULE, OR NOTICE] concerning INSERT SUBJECT (including agency docket number, and, for rules and proposed rules, RIN umber)] which is currently on public inspection and scheduled to publish in the Federal Register on [INSERT DATE].

[GIVE LEGAL JUSTIFICATION FOR REMOVING DOCUMENT FROM PUBLIC INSPECTION.]

Sincerely,

[SIGN]

Type name, Title

A.7 Deviation Request letter

AGENCY LETTER HEAD

December 25, 20xx

[Insert full name of DIRECTOR], Director
Office of the Federal Register (F)
The National Archives and Records Administration
8601 Adelphi Road
College Park, MD 20740-6001

Director [Insert last name of DIRECTOR]:

The [NAME OF AGENCY] is requesting a deviation from *Federal Register* publication requirements under 1 CFR 21.14.

[Describe the deviation you need, why you need it, for which document or series of documents you need it, and for how long you need it. Explain the unique situation that prevents you from following the publication requirements. Include any legal rationale.]

Sincerely,

[SIGN]

Type name, Title

A.8 Designate Federal Register Liaison Officer / Certifying Officer

A G E N C Y L E T T E R H E A D

December 25, 20xx

[Insert full name of DIRECTOR] Director
Office of the Federal Register (F)
The National Archives and Records Administration
8601 Adelphi Road
College Park, MD 20740-6001

Director [Insert last name of DIRECTOR]:

The [NAME OF AGENCY] designates the following individuals to work with the Office of the Federal Register:

Liaison Officer: [NAME, TITLE, ADDRESS, TELEPHONE NUMBER, EMAIL ADDRESS]

Alternate Liaison Officer: [NAME, TITLE, ADDRESS, TELEPHONE NUMBER, EMAIL ADDRESS]

Certifying Officer: [NAME, TITLE, ADDRESS, TELEPHONE NUMBER, EMAIL ADDRESS]

Alternate Certifying Officer: [NAME, TITLE, ADDRESS, TELEPHONE NUMBER, EMAIL ADDRESS]

The agency fax number is [FAX NUMBER].

The email address for scheduling notification is [EMAIL ADDRESS].

Sincerely,

[SIGN]

Type name, Title

Appendix B: PKI AND DIGITAL SIGNATURE - INTRODUCTION AND FAQs⁶¹

A Beginner's Guide, including Frequently Asked Questions (FAQs), to Public Key Infrastructure (PKI) for Digitally Signing Documents for Publication in the Federal Register

B.1 Introduction to PKI

WHAT IS PKI?

PKI stands for Public Key Infrastructure. “A PKI establishes and maintains a trustworthy networking environment by providing key and certificate management services that enable encryption and digital signature capabilities across applications — all in a manner that is transparent and easy to use.” (Entrust website: www.entrust.com/products/entrust-authority-pki/) For information about the Federal PKI program, visit fpki.idmanagement.gov/.

WHAT DOES PKI DO AS IT RELATES TO PUBLICATION IN THE FEDERAL REGISTER?

PKI allows the user to sign a Word file digitally, with no pen and ink. The system is set up in a way that the signed file can be handled (attached, etc.) without invalidating the signature. This allows for electronic submission of digitally signed documents.

B.2 Benefits of PKI

WHY SHOULD I USE PKI?

- PKI can reduce the time between signature and publication depending on your agency's business process. This time savings occurs for a few reasons:
 - No package for staff to bundle (making copies, burning a CD, filling out and printing forms)
 - No mail required. File can be sent immediate via the web portal at webportal.fedreg.gov.
- PKI will save Agency resources by eliminating paper, toner, disks, and time spent putting a package together.

⁶¹ Portions of this appendix were written by staff at the Environmental Protection Agency to address questions for the agency side of the PKI program. We want to thank them for their significant contribution to this appendix and to our PKI presentation.

HOW MUCH TIME DOES DIGITAL SIGNATURE SAVE?

This process could save some offices between 2-5 days in preparation time; in other words, it would eliminate 2-5 days between when the document is signed and when it is published. The amount of time depends on the usual method of submission (regional mailing vs. HQ hand-delivery).

HOW MUCH MONEY WILL DIGITAL SIGNATURE SAVE?

The cost savings of digital signature can vary based on the typical length of documents for an office and your agency's publication business process. Variations include:

- Do your regional offices mail their documents to a headquarters? If so, how does the headquarters get it to the OFR?
- Cost of toner, ink, printer maintenance.
- Staff time spent putting package together (making copies, burning CD, printing and filling out appropriate forms)

HOW MUCH MONEY DOES DIGITAL SIGNATURE COST?

Probably nothing, unless your agency needs to purchase PKI certificates or card readers. The PKI process uses the native MS Word signing feature, so there is no special software needed to digitally sign.

DOES EMBARKING ON THE PKI DIGITAL SIGNATURE PROGRAM MEAN MY OFFICE ALWAYS HAS TO USE IT?

PKI digital signature does not preclude offices from submitting documents with the normal paper and CDs.

B.3 Preparing and editing the Word file to be signed

WHY DOES THE FILE NEED TO BE SUBMITTED AS A .DOCX?

OFR needs to edit the document, which is one of the reasons we do not accept .pdfs, .p7m or any other file than .docx. We cannot accept .docm, as these can contain harmful macros. This rule applies not only to the document being sent for publication, but also the special handling letter, if one is needed.

Use MS Word versions 2010 or later. Only submit ".docx" file types. Older versions of MS Word have no standard method to validate digital signatures. The old file type ".doc" is not compatible with OFR's digital validation process and is not accepted in the web portal.

IF OFR NEEDS TO EDIT THE DOCUMENT, THEN WHY DO I NEED TO DIGITALLY SIGN IT?

When your document arrives, with your digital signature still intact, we are able to confirm that

- 1) Your name matches the name printed as the signer in the document; and
- 2) Since your signature is intact, the contents of the document have not been tampered with.

CAN I EDIT THE DOCUMENT AFTER I HAVE SIGNED IT? WHY OR WHY NOT?

Yes, but you must resign after edits are completed. Once the document has been digitally signed, you cannot edit the document without removing the digital signature. The web portal will reject unsigned files. However, if any “last-minute” changes or corrections are needed, you can remove the digital signature, make the edits, resave, and have the signer resign. Remember, we reject “for” signatures, so the person whose name is in the signature block must be the digital signer.

HOW CAN I MAKE SURE THE SIGNED DOCUMENT IS THE ONE I WANT TO SEND?

A digitally signed .docx file can be viewed clearly in “read-only” mode. If the reader determines changes must be made, the digital signature can be removed so the file can be edited.

WHO NEEDS TO OBTAIN A DIGITAL SIGNATURE CERTIFICATE TO SUBMIT ELECTRONICALLY?

Anyone who is authorized to sign documents at your agency and whose name will appear in the signature block.

WHAT IF THE ONLY PERSON WHO IS AUTHORIZED TO SIGN THE DOCUMENT IS NOT AVAILABLE?

This is a business process question that is important for agencies to consider. Remember: **no one is authorized to use someone else’s credentials to sign a document digitally on someone else’s behalf.** This applies to both PIV card digital signing and “soft certificate” use such as GPO or Entrust certificates. So the signer **MUST** apply their digital signature themselves. Your agency may need to look at its delegations of authority to ensure that the individuals necessary can be available to sign documents when needed. **The person whose name is in the document MUST be the person whose digital signature is applied to the document.** If the names do not match, the document will be rejected by our office.

B.4 Sending the signed file to the OFR

HOW DO I KNOW THIS WILL WORK?

We recommend to that all agencies starting their PKI program send a digitally signed test document to us for test validation at ofrttechgroup@gpo.gov. We will work with you to test if the digital signature validates, and if it does not, we will help you fix the issue. Do **not** submit a test document through the web portal. The web portal is only for documents to be published.

DO I NEED A DISK CERTIFICATION LETTER?

Since there is no disk and no paper copy, you do not need a certification letter for digital submission.

CAN I STILL MAKE SPECIAL HANDLING REQUESTS DIGITALLY?

Yes, you can still create special handling letters and attach them to individual documents in the web portal. Remember: **the special handling letter MUST be saved as a .docx file and digitally signed**, but the signer of the document and the special handling letter do not need to be the same person. For instance, a Director may sign the document, but a liaison can sign the special handling letter. In the web portal, you will see a checkbox option, "Requires Special Handling." Checking that box will open another file upload box specifically for the special handling letter.

HOW DO I GET THE SIGNED FILE TO THE OFR?

First, you need an account with our portal at webportal.fedreg.gov. Once you have created an account, we will verify your information and approve or reject the account set up. If you are approved, you will receive a link via e-mail to create a unique password.

Once your account has been created, you will be able to submit via the web portal. You can upload up to 20 documents at a time, as well as special handling letters, if required.

DO I NEED A DIGITAL CERTIFICATE TO SEND THE DOCUMENT IN THE WEB PORTAL?

No, you do not need a digital certificate to send the document. Digital certificates are only required to sign the document or the special handling letter.

For step-by-step instructions on digital signing, visit piv.idmanagement.gov/userguides/signworddoc-ofr/. Submission instructions are available on OFR's web portal site at webportal.fedreg.gov > Learn > How to Submit.

Appendix C: DRAFTING CONVENTIONS NO LONGER PERMITTED

The publication requirements in 1 CFR chapter I have changed over the years. When these changes impact the structure or content of the CFR, however, we do not require that agencies immediately update all regulations to meet the new standards. While we allow agencies to make conforming changes when they revise or otherwise amend an affected section, agencies must make conforming changes unless they have a formally-approved deviation. The following is a non-inclusive list of drafting conventions that are no longer permitted:

- Effective date contingent on OMB-approval
- Footnotes numbered consecutively throughout a part (instead of section-by-section)
- Footnotes that are [Reserved]
- Footnotes or notes that are multiple paragraphs long
- Footnotes or notes with multiple paragraph levels
- Footnotes or note with regulatory content
- Paragraph designations in the middle of a paragraph
- Section-level authority citations
- Section-level appendices
- Undesignated CFR text (with the exception of an introductory paragraph to a section)
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fedderal register

SATURDAY, NOVEMBER 4, 1972
WASHINGTON, D.C.

Volume 37 ■ Number 214

PART II



ADMINISTRATIVE
COMMITTEE
OF THE
FEDERAL REGISTER

Regulations affecting
Federal Register

■

OFFICE OF THE
FEDERAL REGISTER

Incorporation by Reference

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RULES AND REGULATIONS

Title 1—GENERAL PROVISIONS**Chapter I—Administrative Committee
of the Federal Register****REVISION OF REGULATIONS**

This document effects a complete revision of the regulations of the Administrative Committee of the Federal Register. The purpose of this revision is to make the FEDERAL REGISTER a more meaningful and more useful publication. With the enactment of the Administrative Procedure Act in 1946, Congress provided an opportunity for general participation in the administrative actions of the Federal Government. However, in order to participate effectively, citizens must be able to understand the actions, both proposed and final, as published in the FEDERAL REGISTER. Unfortunately, in many instances, documents are being written so that the criticisms by Rudolph Flesch in his 1946 book, "The Art of Plain Talk" are still valid. In a chapter entitled "How To Read the FEDERAL REGISTER," Mr. Flesch quotes several virtually unintelligible documents and reaches this conclusion:

Slowly we begin to understand. The FEDERAL REGISTER is not supposed to be read at all. It simply prints things so that some day, somewhere, some government official can say: "Yes, but it says in the FEDERAL REGISTER * * *". All this government stuff, in other words, is not reading matter, but prefabricated parts of quarrels.

Today, interest in the FEDERAL REGISTER is at an all-time high. Consumer groups and other public-interest oriented organizations regularly examine its contents to keep up with the administrative rulings of the Federal Government. The Administrative Committee of the Federal Register feels that affirmative action is required to make the FEDERAL REGISTER more meaningful to readers and believes that the new requirements contained in this revision will further that purpose.

Following is a summary of the most significant changes in existing regulations effected by this revision:

1. Requirement for a preamble in each document that describes the contents of the document in a manner sufficient to apprise a reader who is not an expert in the subject area of the general subject matter of the document.
2. Requirement for setting forth specific effective dates and action dates.
3. Changes in publication dates of the daily FEDERAL REGISTER.
4. Staggered publication of the Code of Federal Regulations.

In general, the responses to the three proposals published by the Administrative Committee on which these amendments are based were almost completely favorable. Two of the proposals published on July 27, 1972, at 37 F.R. 15006, related to limited subject areas (effective dates and time periods and staggered publication of the Code of Federal Regulations) and because of overwhelmingly favorable comments received may be disposed of quickly.

Effective dates and time periods. There was no significant opposition to the Committee's proposal that to the extent practical each document submitted for publication in the FEDERAL REGISTER should set forth dates certain as opposed to dates based on publication which must be computed by each interested party. Nor was there any significant objection to the computation method proposed to be used by the staff of the FEDERAL REGISTER for inserting a date certain where a document does contain a time period based on the publication date.

In commenting on this proposal, a large number of commentators indicated that too often Federal agencies allow inadequate time periods for commenting on proposed regulations. Several commentators stated that for most proposals of any significance a 45-day comment period should be considered the minimal. While outside the scope of this proposal, the Administrative Committee calls these comments to the attention of regulatory agencies since it is apparent that many persons feel that in the past they have not had adequate time to analyze and comment on proposed Federal actions.

Staggered publication of the Code of Federal Regulations. The proposal to stagger the publication of the Code of Federal Regulations also received almost unanimous support. There was some concern that it would be more difficult to check on changes to a particular Code of Federal Regulations volume since the current finding aids (the General Index and List of Sections Affected) are based on the annual Code of Federal Regulations. The Office of the Federal Register will revise the coverage of these finding aids so that Code of Federal Regulations users will have no difficulty at any time determining the regulations currently in effect.

The proposed general revision of the Administrative Committee's Regulations. The remaining changes in the present regulations of the Administrative Committee of the Federal Register are based on the notice of proposed rule making published in the FEDERAL REGISTER on April 4, 1972 (37 F.R. 6805).

Adequate preambles. Not surprisingly, virtually all of the comments received from outside the Federal establishment enthusiastically supported the Committee's proposal that each rule making document contain adequate preamble statements that summarize the contents of the document and discuss such things as the substance of the proposed rules, major issues involved, and basis and purpose thereof, etc. The comments received from Federal rule making agencies generally supported the proposed requirement although several felt that the proposal went beyond the requirements of the Administrative Procedure Act (5 U.S.C. 551-555). Others questioned the authority for the Director of the Federal Register to return a document to a Federal agency when it is signed by a qualified official of the agency.

With respect to the first point, as was discussed in the preamble to the notice of

proposed rule making and in the amendment adopting the "Highlights" requirement (36 F.R. 5203), the Administrative Committee believes that the proposed requirements are clearly within the spirit and intent of the Federal Register Act (44 U.S.C. 1501-1511) and the Administrative Procedure Act.

One Federal agency recommended that the required preamble statement should describe the contents of the document "in a manner sufficient to apprise a reader, who is not an expert, of the general subject matter of such rules." The Committee believes this language expresses its intent even better than the language proposed and has incorporated it in a revised § 18.12 so that it applies to both notices of proposed rule making and final rules. Also, as suggested by several comments, § 18.12, as adopted, requires that to the extent practicable each proposed rule making preamble should discuss the reasons for the proposed rule.

Where a final rule was preceded by a notice of proposed rule making, § 18.12, as adopted, also requires that the preamble "indicate in general terms the principal differences, if any, between the rules as proposed and the rules as adopted." This requirement (as commentators suggested) has been substituted for the proposed requirement that the preamble discuss "the disposition of the significant comments received."

The provision concerning the return of documents by the Director of the Federal Register to agencies has been transferred from section 18.12 to a more appropriate location, section 2.4, which relates to the general authority of the Director. It should be pointed out that throughout the years since the beginning of the FEDERAL REGISTER, the Director has exercised this authority many times. This does not mean that the Director is substituting his judgment for that of the issuing agency. In most cases, questions concerning the adequacy of documents are handled informally to the satisfaction of both the agency and the Office of the Federal Register. Only in an extreme case, when a document is patently inadequate, would the Director return the document.

Liaison officers. Several agencies questioned the proposed change concerning liaison officers to the extent that it appeared to inject the Director of the Federal Register into the internal affairs of an agency. This, of course, was not the intent of the proposal. As adopted, § 16.1(b) has been modified to simply recommend that each agency choose as its liaison officer a person who is directly involved in the agency's regulatory program. In this way the officer will be in the best position to serve both his agency and the Office of the Federal Register.

Publication dates. There were only two significant objections to the proposal that the FEDERAL REGISTER be published Monday through Friday rather than Tuesday through Saturday, as it has been for over 35 years. Several commentators were concerned that the former Saturday issue, which would now carry a Monday date, might not be put in the mails un-

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til Monday rather than early Saturday morning, as is presently the case. As the preamble to the notice of proposed rule making stated, adoption of the new publication schedule would not change existing work schedules. The FEDERAL REGISTER bearing the Monday dateline will be printed and deposited at the post office before 9 a.m. on Saturday.

The other objection concerned certain agricultural marketing documents that have for many years been published in the Saturday FEDERAL REGISTER in advance of the new crop-week which begins on Sunday. While the Committee recognizes that elimination of the Saturday FEDERAL REGISTER will require certain adjustments in this particular regulatory area, it believes that the overall benefits justify this one inconvenience. Furthermore, any person depending on the FEDERAL REGISTER for notice of a particular action would be hard pressed to obtain copies of a Saturday FEDERAL REGISTER before the beginning of a time period commencing on Sunday. Therefore, while the practice of publishing such documents on a Saturday may have provided pro forma compliance with some legal requirement, the Committee believes that publication of the same class of documents in the Friday FEDERAL REGISTER will better serve to provide actual notice to those persons affected.

Inclusion of dates in the Highlights listing. The response to the Committee's request for advice on the advisability of continuing to publish significant dates in the Highlights listing was mixed. After considering all the comments received, the Committee has decided to continue the use of important dates in the Highlights listing where practicable.

Except for a few minor reorganization and other nonsubstantive changes, 1 CFR Chapter I, set forth below, conforms to the notices of proposed rule making referred to above.

In consideration of the foregoing, 1 CFR Chapter I is amended to read as set forth below:

Effective date. Except for the provisions of § 8.3, which take effect immediately, this amendment is effective January 2, 1973.

**ADMINISTRATIVE COMMITTEE OF
THE FEDERAL REGISTER,**

JAMES B. RHOADS,
*Archivist of the United
States, Chairman.*

H. J. HUMPHREY,
*Acting Public Printer,
Member.*

MARY O. EASTWOOD,
*Representative of the
Attorney General,
Member.*

Approved:

RICHARD G. KLEINDIENST,
Attorney General.

A. SAMPSON,
*Acting Administrator of
General Services.*

SUBCHAPTER A—GENERAL

PART 1—DEFINITIONS

§ 1.1 Definitions.

As used in this chapter, unless the context requires otherwise—

"Administrative Committee" means the Administrative Committee of the Federal Register established under section 1506 of title 44, United States Code;

"Agency" means each authority, whether or not within or subject to review by another agency, of the United States, other than the Congress, the courts, the District of Columbia, the Commonwealth of Puerto Rico, and the territories and possessions of the United States;

"Document" includes any Presidential proclamation or Executive order, and any rule, regulation, order, certificate, code of fair competition, license, notice, or similar instrument issued, prescribed, or promulgated by an agency;

"Document having general applicability and legal effect" means any document issued under proper authority prescribing a penalty or course of conduct, conferring a right, privilege, authority, or immunity, or imposing an obligation, and relevant or applicable to the general public, members of a class, or persons in a locality, as distinguished from named individuals or organizations; and "Regulation" and "rule" have the same meaning.

(44 U.S.C. 1506; sec. 6, E.O. 10530, 19 FR 2709; 3 CFR 1954-1958 Comp. p. 189)

PART 2—GENERAL INFORMATION

Sec.

- 2.1 Scope and purpose.
- 2.2 Administrative Committee of the Federal Register.
- 2.3 Office of the Federal Register; location; office hours.
- 2.4 General authority of Director.
- 2.5 Publication of statutes, regulations, and related documents.
- 2.6 Unrestricted use.

AUTHORITY: 44 U.S.C. 1506; sec. 6, E.O. 10530, 19 FR 2709; 3 CFR 1954-1958 Comp. p. 189.

§ 2.1 Scope and purpose.

(a) This chapter sets forth the policies, procedures, and delegations under which the Administrative Committee of the Federal Register carries out its general responsibilities under Chapter 15 of Title 44, United States Code.

(b) A primary purpose of this chapter is to inform the public of the nature and uses of FEDERAL REGISTER publications.

§ 2.2 Administrative Committee of the Federal Register.

(a) The Administrative Committee of the Federal Register is established by section 1506 of Title 44, United States Code.

(b) The Committee consists of—

(1) The Archivist, or Acting Archivist, of the United States, who is the Chairman;

(2) An officer of the Department of Justice designated by the Attorney General; and

(3) The Public Printer or Acting Public Printer.

(c) The Director of the Federal Register is the Secretary of the Committee.

(d) Any material required by law to be filed with the Committee, and any correspondence, inquiries, or other material intended for the Committee or which relate to Federal Register publications shall be sent to the Director of the Federal Register.

§ 2.3 Office of the Federal Register; location; office hours.

(a) The Office of the Federal Register is a component of the National Archives and Records Service of the General Services Administration.

(b) The Office is located at 633 Indiana Avenue NW., Washington, D.C.

(c) The mailing address is: Office of the Federal Register, National Archives and Records Service, Washington, D.C. 20408.

(d) Office hours are 8:45 a.m. to 5:15 p.m., Monday through Friday, except for official Federal holidays.

§ 2.4 General authority of Director.

(a) The Director of the Federal Register is delegated authority to administer generally this chapter, the related provisions of Chapter 15 of Title 44, United States Code, and the pertinent provisions of statutes and regulations contemplated by section 1505 of Title 44, United States Code.

(b) The Director may return to the issuing agency any document submitted for publication in the FEDERAL REGISTER, or a special edition thereof, if in his judgment the document does not meet the minimum requirements of this chapter.

§ 2.5 Publication of statutes, regulations, and related documents.

(a) The Director of the Federal Register is responsible for the central filing of the original acts enacted by Congress and the original documents containing Executive orders and proclamations of the President, other Presidential documents, regulations, and notices of proposed rule making and other notices, submitted to the Director by officials of the executive branch of the Federal Government.

(b) Based on the acts and documents filed under paragraph (a) of this section, the Office of the Federal Register publishes the "slip laws," the "United States Statutes at Large," the daily FEDERAL REGISTER, and the "Code of Federal Regulations."

(c) Based on source materials that are officially related to the acts and documents filed under paragraph (a) of this section, the Office also publishes the "United States Government Organization Manual," the "Public Papers of the Presidents of the United States," and the "Weekly Compilation of Presidential Documents."

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§ 2.6 Unrestricted use.

Any person may reproduce or republish, without restriction, any material appearing in any regular or special edition of the FEDERAL REGISTER.

PART 3—SERVICES TO THE PUBLIC

Sec.

- 3.1 Information services.
3.2 Public inspection of documents.
3.3 Reproductions and certified copies of acts and documents.
3.4 Availability of Federal Register publications.

AUTHORITY: 44 U.S.C. 1506; sec. 6, E.O. 10530, 19 F.R. 2709; 3 CFR 1954-1958 Comp. p. 189.

§ 3.1 Information services.

Except in cases where the time required would be excessive, information concerning the publications described in § 2.5 of this chapter and the original acts and documents filed with the Office of the Federal Register is provided by the staff of that Office. However, the staff may not summarize or interpret substantive text of any act or document.

§ 3.2 Public inspection of documents.

(a) Current documents filed with the Office of the Federal Register pursuant to law are available for public inspection in Room 405, 633 Indiana Avenue NW., Washington, D.C., during the Office of the Federal Register office hours. There are no formal inspection procedures or requirements.

(b) The Director of the Federal Register shall cause each document received by the office to be filed for public inspection not later than the working day preceding the publication day for that document.

(c) The Director shall cause to be placed on the original and certified copies of each document a notation of the day and hour when it was filed and made available for public inspection.

(d) Manual, typewritten, or other copies of documents or excerpts may be made at the inspection desk.

§ 3.3 Reproductions and certified copies of acts and documents.

The regulations for the public use of records in the National Archives (41 CFR Part 105-61) govern the furnishing of reproductions of acts and documents and certificates of authentication for them. Section 105-61.108 of those regulations provides for the advance payment of appropriate fees for reproduction services and for certifying reproductions.

§ 3.4 Availability of Federal Register publications.

(a) The publications described in § 2.5 of this chapter are published by the Government Printing Office and are sold by the Superintendent of Documents, Government Printing Office, Washington, D.C. 20402. They are not available for free distribution to the public.

(b) Federal Register publications are available through subscription, as follows:

(1) *Slip laws.* In accordance with section 709 of title 44, United States Code, printed slip form copies of public and private laws are available from the Superintendent of Documents, individually or by subscription service on a yearly basis.

(2) *U.S. Statutes at Large.* In accordance with section 728 of title 44, United States Code, copies of the United States Statutes at Large are available from the Superintendent of Documents.

(3) *Federal Register.* Daily issues are furnished to subscribers on a monthly or yearly basis, at a price determined by the Administrative Committee and paid in advance to the Superintendent of Documents. Limited quantities of current or recent copies may be obtained from the Superintendent of Documents at a price determined by him.

(4) *Code of Federal Regulations.* Subscription services on a yearly basis to the volumes comprising the Code, and individual copies thereof, are sold by the Superintendent of Documents at prices determined by him, under the general direction of the Administrative Committee.

(5) *U.S. Government Organization Manual.* Placed on sale by the Superintendent of Documents at a price determined by him, under the general direction of the Administrative Committee.

(6) *Public Papers of the Presidents of the United States.* Annual volumes are placed on sale by the Superintendent of Documents at a price determined by him, under the general direction of the Administrative Committee.

(7) *Weekly Compilation of Presidential Documents.* Placed on sale by the Superintendent of Documents at a price determined by him, under the general direction of the Administrative Committee.

SUBCHAPTER B—THE FEDERAL REGISTER

PART 5—GENERAL

Sec.

- 5.1 Publication policy.
5.2 Documents required to be filed and published.
5.3 Publication of other documents.
5.4 Publication not authorized.
5.5 Supplement to the Code of Federal Regulations.
5.6 Daily publication.
5.7 Delivery and mailing.
5.8 Form of citation.
5.9 Categories of documents.

AUTHORITY: 44 U.S.C. 1506; sec. 6, E.O. 10530, 19 F.R. 2709; 3 CFR 1954-1958 Comp. p. 189.

§ 5.1 Publication policy.

(a) Pursuant to Chapter 15 of Title 44, United States Code, and this chapter, the Director of the Federal Register shall publish a serial publication called the "FEDERAL REGISTER" to contain the following:

(1) Executive orders, proclamations, and other Presidential documents.

(2) Documents required to be published therein by law.

(3) Documents accepted for publication under § 5.3.

(b) Each document required or authorized to be filed for publication shall

be published in the FEDERAL REGISTER as promptly as possible, within limitations imposed by considerations of accuracy, usability, and reasonable costs.

(c) In prescribing regulations governing headings, preambles, effective dates, authority citations, and similar matters of form, the Administrative Committee does not intend to affect the validity of any document that is filed and published under law.

§ 5.2 Documents required to be filed and published.

The following documents are required to be filed with the Office of the Federal Register and published in the FEDERAL REGISTER:

(a) Presidential proclamations and Executive orders in the numbered series, and each other document that the President submits for publication or orders to be published.

(b) Each document or class of documents required to be published by act of Congress.

(c) Each document having general applicability and legal effect.

§ 5.3 Publication of other documents.

Whenever the Director of the Federal Register considers that publication of a document not covered by § 5.2 would be in the public interest, he may allow that document to be filed with the Office of the Federal Register and published in the FEDERAL REGISTER.

§ 5.4 Publication not authorized.

(a) Chapter 15 of Title 44, United States Code, does not apply to treaties, conventions, protocols, or other international agreements, or proclamations thereof by the President.

(b) Chapter 15 of Title 44, United States Code, prohibits the publication in the FEDERAL REGISTER of comments or news items.

(c) The Director of the Federal Register may not accept any document for filing and publication unless it is the official action of the agency concerned. Chapter 15 of Title 44, United States Code, does not authorize or require the filing and publication of other papers from an agency.

§ 5.5 Supplement to the Code of Federal Regulations.

The FEDERAL REGISTER serves as a daily supplement to the Code of Federal Regulations. Each document that is subject to codification and published in a daily issue shall be keyed to the Code of Federal Regulations.

§ 5.6 Daily publication.

There shall be an edition of the FEDERAL REGISTER for each official Federal working day.

§ 5.7 Delivery and mailing.

The Government Printing Office shall distribute the FEDERAL REGISTER by delivery or by deposit at a post office at or before 9 a.m. on the publication day, except that each FEDERAL REGISTER dated for a Monday shall be deposited at a post office at or before 9 a.m. on the preceding Saturday.

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§ 5.8 Form of citation.

Without prejudice to any other form of citation, FEDERAL REGISTER material may be cited by volume and page number, and the short form "FR" may be used for "FEDERAL REGISTER". For example, "37 FR 6803" refers to material beginning on page 6803 of volume 37 of the daily issues.

§ 5.9 Categories of documents.

Each document published in the FEDERAL REGISTER shall be placed under one of the following categories, as indicated:

(a) *The President*. Containing each Executive order or Presidential proclamation, and each other Presidential document that the President submits for publication or orders to be published.

(b) *Rules and regulations*. Containing each document subject to codification, except those covered by paragraph (a) of this section.

(c) *Proposed rule making*. Containing each notice of proposed rule making submitted pursuant to section 553 of Title 5, United States Code, or any other law, and each notice of a similar nature voluntarily submitted by an issuing agency.

(d) *Notices*. Containing miscellaneous documents not covered by paragraph (a), (b), or (c) of this section, such as notices of hearings that are not included under proposed rule making documents and documents accepted for publication on the basis of public interest.

PART 6—INDEXES AND ANCILLARIES

Sec.

- 6.1 Index to daily issues.
- 6.2 Analytical subject indexes.
- 6.3 Daily lists of parts affected.
- 6.4 Monthly list of sections affected.
- 6.5 Index-digests and guides.

AUTHORITY: 44 U.S.C. 1506; sec. 6, E.O. 10530, 19 FR 2709; 3 CFR 1954-1958 Comp. p. 189.

§ 6.1 Index to daily issues.

Each daily issue of the FEDERAL REGISTER shall be appropriately indexed.

§ 6.2 Analytical subject indexes.

Analytical subject indexes covering the contents of the FEDERAL REGISTER shall be published as currently as practicable, and shall be cumulated and separately published at least once each calendar year.

§ 6.3 Daily lists of parts affected.

(a) Each daily issue of the FEDERAL REGISTER shall carry a numerical list of the parts of the Code of Federal Regulations specifically affected by documents published in that issue.

(b) Beginning with the second issue of each month, each daily issue shall also carry a cumulated list of the parts affected by documents published during that month.

§ 6.4 Monthly lists of sections affected.

A monthly list of sections of the Code of Federal Regulations affected shall be separately published on a cumulative basis during each calendar year. The list shall identify the sections of the Code

specifically affected by documents published in the FEDERAL REGISTER during the period it covers.

§ 6.5 Index-digests and guides.

(a) The Director of the Federal Register may cause to be prepared and published, yearly or at other intervals as necessary to keep them current and useful, index-digests and similar guides, based on laws, Presidential documents, regulations, and notice materials published by the Office and which serve a need of users of the FEDERAL REGISTER.

(b) Each digest and guide is considered to be a special edition of the FEDERAL REGISTER whenever the public need requires special printing or special binding in substantial numbers.

PART 7—DISTRIBUTION WITHIN FEDERAL GOVERNMENT

Sec.

- 7.1 Members of Congress.
- 7.2 The Judiciary.
- 7.3 Executive agencies.
- 7.4 Requisitions for quantity overruns of specific issues.
- 7.5 Requisitions for quantity overruns of separate Part II issues.
- 7.6 Extra copies.

AUTHORITY: 44 U.S.C. 1506; sec. 6, E.O. 10530, 19 FR 2709; 3 CFR 1954-1958 Comp. p. 189.

§ 7.1 Members of Congress.

Each Senator and each Member of the House of Representatives is entitled to not more than five copies of each daily issue of the FEDERAL REGISTER, without charge.

§ 7.2 The Judiciary.

(a) *The Supreme Court*. The Supreme Court is entitled to the number of copies of each daily issue of the FEDERAL REGISTER that it needs for official use, without charge.

(b) *Other courts*. Each other constitutional or legislative court of the United States is entitled to the number of copies of each daily issue of the FEDERAL REGISTER that it needs for official use, without charge, based on a written authorization submitted to the Director of the Federal Register by the Director of the Administrative Office of the U.S. Courts specifying the number needed.

§ 7.3 Executive agencies.

(a) Each Federal executive agency is entitled to the number of copies of each daily issue of the FEDERAL REGISTER that it needs for official use, without charge.

(b) The person in each agency concerned who is authorized under §§ 16.1 and 16.4 of this chapter to list the officers and employees of that agency who need the FEDERAL REGISTER for daily use shall send a written request to the Director of the Federal Register for placement of the names of those officers and employees on the mailing list.

§ 7.4 Requisitions for quantity overruns of specific issues.

(a) To meet its needs for special distribution of the FEDERAL REGISTER in substantial quantity, any agency may request an overrun of a specific issue.

(b) An advance printing and binding requisition on Standard Form 1 must be submitted by the agency directly to the Government Printing Office, to be received not later than 12 noon on the working day before publication.

§ 7.5 Requisitions for quantity overruns of separate Part issues.

(a) Whenever it is determined by the Director of the Federal Register to be in the public interest, one or more documents may be published as a separate Part (e.g., Part II, Part III) of the FEDERAL REGISTER.

(b) Advance arrangements for this service must be made with the Office of the Federal Register.

(c) Any agency may request an overrun of such a separate Part by submitting an advance printing and binding requisition on Standard Form 1 directly to the Government Printing Office, to be received not later than 12 noon on the working day before the publication date.

§ 7.6 Extra copies.

An agency may order limited quantities of extra copies of a specific issue of the FEDERAL REGISTER, for official use, from the Superintendent of Documents, to be paid for by that agency.

SUBCHAPTER C—SPECIAL EDITIONS OF THE FEDERAL REGISTER

PART 8—CODE OF FEDERAL REGULATIONS

Sec.

- 8.1 Policy.
- 8.2 Orderly development.
- 8.3 Periodic updating.
- 8.4 Indexes.
- 8.5 Ancillaries.
- 8.6 General format and binding.
- 8.7 Agency cooperation.
- 8.8 Official distribution.
- 8.9 Form of citation.

AUTHORITY: 44 U.S.C. 1506; sec. 6, E.O. 10530, 19 FR 2709; 3 CFR 1954-1958 Comp. p. 189.

§ 8.1 Policy.

(a) Pursuant to Chapter 15 of Title 44, United States Code, the Director of the Federal Register shall publish periodically a special edition of the FEDERAL REGISTER to present a compact and practical code called the "Code of Federal Regulations", to contain each Federal regulation of general applicability and current or future effect.

(b) The Administrative Committee intends that every practical means be used to keep the Code as current and readily usable as possible, within limitations imposed by dependability and reasonable costs.

§ 8.2 Orderly development.

To assure orderly development of the Code of Federal Regulations along practical lines, the Director of the Federal Register may establish new titles in the Code and rearrange existing titles and subordinate assignments. However, before taking an action under this section, the Director shall consult with each agency directly affected by the proposed change.

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§ 8.3 Periodic updating.

(a) *Criteria.* Each book of the Code shall be updated at least once each calendar year. If no change in its contents has occurred during the year, a simple notation to that effect may serve as the supplement for that year. More frequent updating of any unit of the Code may be made whenever the Director of the Federal Register determines that the content of the unit has been substantially superseded or otherwise determines that such action would be consistent with the intent and purpose of the Administrative Committee as stated in § 8.1.

(b) *Staggered publication.* The Code will be produced over a 12-month period under a staggered publication system to be determined by the Director of the Federal Register.

(c) *Cutoff dates.* Each updated Title of the Code will reflect each amendment to that Title published in the FEDERAL REGISTER on or before the "As of" date. Thus, each Title updated as of July 1 each year will reflect all amendatory documents appearing in the daily FEDERAL REGISTER on or before July 1.

§ 8.4 Indexes.

A subject index to the entire Code shall be annually revised and separately published. An agency-prepared index for any individual book may be published with the approval of the Director of the Federal Register.

§ 8.5 Ancillaries.

The Code shall provide, among others, the following-described finding aids:

(a) *Parallel tables of statutory authority and rules.* In Title 2 of the Code of Federal Regulations or at such other place as the Director of the Federal Register considers appropriate, numerical lists of all sections of the current edition of the United States Code (except section 301 of Title 5) which are cited by issuing agencies as rule making authority for currently effective regulations in the Code of Federal Regulations. The lists shall be arranged in the order of the titles and sections of the United States Code with parallel citations to the pertinent titles and sections of the Code of Federal Regulations.

(b) *Parallel tables of Presidential documents and agency rules.* In Title 3 of the Code of Federal Regulations, or at such other place as the Director of the Federal Register considers appropriate, tables of proclamations, Executive orders, and similar Presidential documents which are codified, cited as authority, quoted, cited in text, or included or referred to in currently effective regulations as published in the Code of Federal Regulations.

(c) *List of sections affected.* Following the text of each book or cumulative supplement, a numerical list of sections which are affected by documents published in the FEDERAL REGISTER. (A separate volume, "List of Sections Affected, 1949-1963" lists all sections of the Code which have been affected by documents published during the period January 1,

1949 to December 31, 1963.) Listings shall refer to FEDERAL REGISTER pages and shall be designed to enable the user of the Code to assure himself of the precise text that was in effect on a given date in the period covered.

§ 8.6 General format and binding.

The Director of the Federal Register shall provide for the binding of the Code into as many separate books as are indicated by the needs of users and compatible with the facilities of the Government Printing Office.

§ 8.7 Agency cooperation.

Each agency shall cooperate in keeping publication of the Code current by complying promptly with deadlines set by the Director of the Federal Register and the Public Printer.

§ 8.8 Official distribution.

(a) The Code shall be distributed to the following, without charge:

(1) *Congress.* To each committee of the Senate and House of Representatives in the quantity needed for official use, upon the written authorization of the committee chairman or his delegate, to the Director of the Federal Register.

(2) *Supreme Court.* To the Supreme Court in the quantity needed for official use.

(3) *Other courts.* To other constitutional and legislative courts of the United States, in the quantity needed for official use, upon the written authorization of the Director of the Administrative Office of the U.S. Courts to the Director of the Federal Register.

(4) *Executive agencies.* To officials, libraries, and major organizational units of the executive agencies in the quantity needed for official use, upon the written authorization of the authorizing officer or his alternate designated under § 16.1 of this chapter.

(b) Legislative, judicial, and executive agencies of the Federal Government may obtain selected units of the Code, as needed in substantial quantity for special distribution, by the timely submission of a printing and binding requisition to the Government Printing Office on Standard Form 1.

§ 8.9 Form of citation.

The Code of Federal Regulations may be cited by title and section, and the short form "CFR" may be used for "Code of Federal Regulations." For example, "1 CFR 10.2" refers to Title 1, Code of Federal Regulations, Part 10, section 2.

PART 9—U.S. GOVERNMENT ORGANIZATION MANUAL

Sec.

9.1 Publication required.

9.2 Scope.

9.3 Distribution to Government agencies.

AUTHORITY: 44 U.S.C. 1506; sec. 6, E.O. 10530, 19 FR 2709; 3 CFR 1954-1958 Comp. p. 189.

§ 9.1 Publication required.

The Director of the Federal Register shall separately publish annually or at

times designated by the Administrative Committee of the Federal Register a special edition of the FEDERAL REGISTER called the "United States Government Organization Manual" or any other title that the Administrative Committee of the Federal Register considers appropriate. The Director of the Federal Register may issue special supplements to the Manual when he considers such supplementation to be in the public interest.

§ 9.2 Scope.

(a) The Manual shall contain appropriate information about the Executive, Legislative, and Judicial branches of the Federal Government, which for the major Executive agencies shall include—

(1) Descriptions of the agency's public purposes, programs and functions;

(2) Established places and methods whereby the public may obtain information and make submittals or requests; and

(3) Lists of officials heading major operating units.

(b) Brief information about quasi-official agencies and supplemental information that in the opinion of the Director of the Federal Register is of enough public interest to warrant inclusion shall also be published in the Manual.

§ 9.3 Distribution to Government agencies.

(a) The Manual shall be distributed to the following, in the quantities indicated, without charge:

(1) *Members of Congress.* Each Senator and each Member of the House of Representatives shall be furnished two copies, and is entitled to not more than 10 additional copies upon his written authorization to the Director of the Federal Register.

(2) *Congressional committees.* Each committee is entitled to the quantity needed for official use, upon the written request of the chairman of the committee, or his delegate, to the Director, for placement on the mailing list.

(3) *Supreme Court.* The Supreme Court is entitled to 18 copies.

(4) *Other courts.* Each other constitutional or legislative court is entitled to one copy, upon the written authorization of the Director of the Administrative Office of the U.S. Courts to the Director of the Federal Register.

(5) *Executive agencies.* The head of each executive agency and each liaison officer designated under § 16.1 or § 20.1 of this chapter is entitled to one copy.

(b) Legislative, judicial, and executive agencies of the Federal Government may obtain additional copies of the Manual, at cost, for official use by submission, before the press run, of a printing and binding requisition to the Government Printing Office on Standard Form 1. After the press run, each request for extra copies of the Manual must be addressed to the Superintendent of Documents, to be paid for by the agency or official making the request.

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PART 10—PRESIDENTIAL PAPERS

Subpart A—Annual Volumes

- Sec. 10.1 Publication required.
- 10.2 Coverage of prior years.
- 10.3 Scope and sources.
- 10.4 Format, indexes, and ancillaries.
- 10.5 Distribution to Government agencies.
- 10.6 Extra copies.

Subpart B—Weekly Compilation

- 10.10 Publication required.
- 10.11 Format and indexes.
- 10.12 Distribution to Government agencies.

AUTHORITY: 44 U.S.C. 1506; sec. 6, E.O. 10530, 19 FR 2709; 3 CFR 1954-1958 Comp. p. 189.

Subpart A—Annual Volumes

§ 10.1 Publication required.

The Director of the Federal Register shall publish, at the end of each calendar year, a special edition of the FEDERAL REGISTER called the "Public Papers of the Presidents of the United States." Unless the amount of material requires otherwise, each volume shall cover one calendar year.

§ 10.2 Coverage of prior years.

After consulting with the National Historical Publications Commission on the need therefor, the Administrative Committee may authorize the publication of volumes of papers of the Presidents covering specified years before 1957.

§ 10.3 Scope and sources.

(a) The basic text of each volume shall consist of oral statements by the President or of writings subscribed by him, and selected from—

- (1) Communications to the Congress;
- (2) Public addresses;
- (3) Transcripts of news conferences;
- (4) Public letters;
- (5) Messages to heads of State;
- (6) Statements released on miscellaneous subjects; and
- (7) Formal executive documents promulgated in accordance with law.

(b) In general, ancillary text, notes, and tables shall be derived from official sources.

§ 10.4 Format, indexes, and ancillaries.

(a) Each annual volume, divided into books whenever appropriate, shall be separately published in the binding and style that the Administrative Committee considers suitable to the dignity of the Office of the President of the United States.

(b) Each volume shall be appropriately indexed and contain appropriate ancillary information respecting significant Presidential documents not printed in full text.

§ 10.5 Distribution to Government agencies.

(a) The Public Papers of the Presidents of the United States shall be distributed to the following, in the quantities indicated, without charge:

(1) *Members of Congress.* Each Senator and each Member of the House of Representatives is entitled to one copy of each annual volume published during

his term of office, upon his written request to the Director of the Federal Register.

(2) *Supreme Court.* The Supreme Court is entitled to 12 copies of each annual volume.

(3) *Executive agencies.* The head of each executive agency is entitled to one copy of each annual volume upon application to the Director.

(b) Legislative, judicial, and executive agencies of the Federal Government may obtain copies of the annual volumes, at cost, for official use, by the timely submission of a printing and binding requisition to the Government Printing Office on Standard Form 1.

§ 10.6 Extra copies.

Each request for extra copies of the annual volumes must be addressed to the Superintendent of Documents, to be paid for by the agency or official making the request.

Subpart B—Weekly Compilation

§ 10.10 Publication required.

The Director of the Federal Register shall publish a special edition of the FEDERAL REGISTER called the "Weekly Compilation of Presidential Documents."

§ 10.11 Format and indexes.

(a) The Weekly Compilation shall be published in the binding and style that the Administrative Committee considers suitable for public and official use.

(b) The Director of the Federal Register shall provide indexes and any other finding aids that he considers appropriate for effective use.

§ 10.12 Distribution to Government agencies.

(a) The Weekly Compilation shall be distributed regularly to Members of the Senate and House of Representatives and to officials of the legislative, judicial, and executive branches of the Federal Government in the quantities needed for official use.

(b) Requests for copies shall be made in writing by the authorizing officer to the Director of the Federal Register.

(c) Special needs for selected issues in substantial quantity shall be filled by the timely submission of a printing and binding requisition to the Government Printing Office on Standard Form 1.

SUBCHAPTER D—PREPARATION, TRANSMITTAL, AND PROCESSING OF DOCUMENTS

PART 15—SERVICES TO FEDERAL AGENCIES

Subpart A—General

- Sec. 15.1 Cooperation.
- 15.2 Information services.
- 15.3 Staff assistance.
- 15.4 Reproduction of certified copies of acts and documents.
- 15.5 Official subscriptions and requisitions of Federal Register publications.

Subpart B—Special Assistance

- 15.10 Information on drafting and publication.

Subpart C—Supplemental Printing and Editorial Services

- 15.15 Purpose.
- 15.16 Use of Federal Register standing type.
- 15.17 Special editorial service.
- 15.18 Supplemental loose-leaf services.

AUTHORITY: 44 U.S.C. 1506; sec. 6, E.O. 10530, 19 FR 2709; 3 CFR 1954-1958 Comp. p. 189.

Subpart A—General

§ 15.1 Cooperation.

The Director of the Federal Register shall assist each agency in complying with the pertinent publication laws to assure efficient public service in promulgating administrative documents having the effect of legal notice or of law.

§ 15.2 Information services.

The Director of the Federal Register shall provide for the answering of each appropriate inquiry presented in person, by telephone, or in writing. Each written communication and each matter involving classified material or the Administrative Committee shall be sent to the Director, Office of the Federal Register, National Archives and Records Service, Washington, DC 20408.

§ 15.3 Staff assistance.

The staff of the Office of the Federal Register shall provide informal assistance and advice to officials of the various agencies with respect to general or specific programs of regulatory drafting, procedures, and promulgation practices.

§ 15.4 Reproduction of certified copies of acts and documents.

The Director of the Federal Register shall furnish to requesting agencies, without charge, reproductions or certified copies of original acts and documents filed with that Office that are needed for official use. However, in a case involving voluminous material or numerous copies, the requesting agency may be required to reimburse the cost of reproduction.

§ 15.5 Official subscriptions and requisitions of Federal Register publications.

The following governs the availability of Federal Register publications for official use.

(a) *Slip laws.* Single copies may be obtained from the House or Senate Document Room, U.S. Congress. Quantity overruns of any slip law may be obtained by the timely submission of a requisition to the Government Printing Office on Standard Form 1.

(b) *U.S. Statutes at Large.* Written requests should be directed to the Joint Committee on Printing, United States Capitol, Washington, D.C. 20510. General provisions relating to the distribution of the U.S. Statutes at Large are set forth in section 728 of Title 44, United States Code.

(c) *Federal Register.* See §§ 7.1 to 7.6 of this chapter.

(d) *Code of Federal Regulations.* See § 8.8 of this chapter.

(e) *U.S. Government Organization Manual.* See § 9.3 of this chapter.

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(f) *Public Papers of the Presidents of the United States*. See §§ 10.5 and 10.6 of this chapter.

(g) *Weekly Compilation of Presidential Documents*. See § 10.12 of this chapter.

Subpart B—Special Assistance**§ 15.10 Information on drafting and publication.**

The Director of the Federal Register may prepare, and distribute to agencies, information and instructions designed to promote effective compliance with the purposes of Chapter 15 of Title 44, United States Code, sections 553–554 of Title 5, United States Code, related statutes, and this chapter. The Director may also develop and conduct programs of technical instruction.

Subpart C—Supplemental Printing and Editorial Services**§ 15.15 Purpose.**

The Director of the Federal Register may provide special services to agencies to promote efficiency and economy through the use of printing and editorial facilities developed in editing and publishing Federal Register publications.

§ 15.16 Use of Federal Register standing type.

Type used in printing the FEDERAL REGISTER is available for reuse by agencies in making reprints, on their own requisition, by submitting a printing and binding requisition on Standard Form 1 to the Office of the Federal Register for forwarding to the Government Printing Office.

§ 15.17 Special editorial service.

Upon written request by an appropriate agency official, the staff of the Office of the Federal Register may compile and collate Code units, as of a given date, to assist an issuing agency to prepare a document for publication in the FEDERAL REGISTER.

§ 15.18 Supplemental loose-leaf services.

The Director of the Federal Register may cooperate with agencies in developing supplemental loose-leaf services for special items in which the need would justify the cost.

PART 16—AGENCY REPRESENTATIVES

Sec.

- 16.1 Designation.
16.2 Liaison duties.
16.3 Certifying duties.
16.4 Authorizing duties.

AUTHORITY: 44 U.S.C. 1506; sec. 6, E.O. 10530, 19 FR 2709; 3 CFR 1954–1958 Comp. p. 189.

§ 16.1 Designation.

(a) Each agency shall designate, from its officers or employees, persons to serve in the following capacities with relation to the Office of the Federal Register:

- (1) A liaison officer and an alternate.
- (2) A certifying officer and an alternate.

(3) An authorizing officer and an alternate.

The same person may be designated to serve in one or more of these positions.

(b) In choosing its liaison officer, each agency should consider that this officer will be the main contact between that agency and the Office of the Federal Register and that the liaison officer will be charged with the duties set forth in § 16.2. Therefore, the agency should choose a person who is directly involved in the agency's regulatory program.

(c) Each agency shall notify the Director of the name, title, address, and telephone number of each person it designates under this section and shall promptly notify the Director of any changes.

§ 16.2 Liaison duties.

Each liaison officer shall—

(a) Represent his agency in all matters relating to the submission of documents to the Office of the Federal Register, and respecting general compliance with this chapter;

(b) Be responsible for the effective distribution and use within his agency of FEDERAL REGISTER information on document drafting and publication assistance authorized by § 15.10 of this chapter; and

(c) Promote his agency's participation in the technical instruction authorized by § 15.10 of this chapter.

§ 16.3 Certifying duties.

The certifying officer is responsible for attaching the required number of true copies of each original document submitted by his agency to the Office of the Federal Register and for making the certification required by §§ 18.5 and 18.6 of this chapter.

§ 16.4 Authorizing duties.

The authorizing officer is responsible for furnishing, to the Director of the Federal Register, a current mailing list of officers or employees of his agency who are authorized to receive the FEDERAL REGISTER, the Code of Federal Regulations, and the Weekly Compilation of Presidential Documents for official use.

PART 17—PUBLICATION SCHEDULES

Sec.

17.1 Receipt and processing.**REGULAR SCHEDULE****17.2 Procedure and timing for regular schedule.****EMERGENCY SCHEDULE****17.3 Criteria for emergency schedule.****17.4 Procedure and timing for emergency schedule.****17.5 Transmittal from distant points.****DEFERRED SCHEDULE****17.6 Criteria.**

AUTHORITY: 44 U.S.C. 1506; sec. 6, E.O. 10530, 19 FR 2709; 3 CFR 1954–1958 Comp. p. 189.

§ 17.1 Receipt and processing.

Unless special arrangements are made with the Director of the Federal Register, the Office of the Federal Register receives documents only during official working hours. Upon receipt, each document shall be held for confidential processing until it is filed for public inspection.

REGULAR SCHEDULE**§ 17.2 Procedure and timing for regular schedule.**

(a) Each document received shall be assigned to the regular schedule unless the issuing agency makes special arrangements otherwise. Receipt of a document in the ordinary course of business is considered to be a request for publication on the regular schedule.

(b) The regular schedule for publication is as follows:

Received	Filed	Published
Monday	Wednesday	Thursday
Tuesday	Thursday	Friday
Wednesday	Friday	Monday
Thursday	Monday	Tuesday
Friday	Tuesday	Wednesday

Where a legal Federal holiday intervenes, one additional work day is added.

EMERGENCY SCHEDULE**§ 17.3 Criteria for emergency schedule.**

The emergency schedule is designed to provide the fastest possible publication of a document involving the prevention, alleviation, control, or relief of an emergency situation.

§ 17.4 Procedure and timing for emergency schedule.

(a) Each agency requesting publication on the emergency schedule shall briefly describe the emergency and the benefits to be attributed to immediate publication in the FEDERAL REGISTER. The request shall be made by letter if time permits.

(b) The Director of the Federal Register shall assign a document to the emergency schedule whenever he concurs with a request for that action and it is feasible. The Director shall confirm the assignment as soon as possible.

(c) Each document assigned to the emergency schedule shall be published as soon as possible.

§ 17.5 Transmittal from distant points.

The text of a document assigned to the emergency schedule may be transmitted from a distant field installation to the Washington Office of the agency concerned by telecommunication. A certified transcription of the text may be filed in advance of receipt of the original document. The agency must file the original document at the earliest possible time. In such a case, the publication date is based on receipt of the certified transcribed copies by the Office of the Federal Register.

§ 17.6 Criteria.

A document may be assigned to the deferred schedule under the following conditions:

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(a) There are technical problems, unusual tabulations, or illustrations, or the document is of such size as to require extraordinary processing time.

(b) The agency concerned requests a deferred publication date.

PART 18—PREPARATION AND TRANSMITTAL OF DOCUMENTS GENERALLY

Sec.	
18.1	Original and copies required.
18.2	Prohibition on combined documents.
18.3	Submission of documents and letters of transmittal.
18.4	Form of document.
18.5	Certified copies.
18.6	Form of certification.
18.7	Signature.
18.8	Seal.
18.9	Style.
18.10	Illustrations and tabular material.
18.11	Forms.
18.12	Preamble requirements.
18.13	Withdrawal of filed documents.
18.14	Correction of errors in documents.
18.15	Correction of errors in printing.
18.16	Highlights.
18.17	Effective dates and time periods.

AUTHORITY: 44 U.S.C. 1506; sec. 6, E.O. 10630, 19 FR 2709; 3 CFR 1954-1958 Comp. p. 189.

§ 18.1 Original and copies required.

(a) Except as provided in § 19.2 of this subchapter for Executive orders and proclamations, each agency submitting a document to be filed and published in the FEDERAL REGISTER shall send an original and two duplicate originals or certified copies. However, if the document is printed or processed on both sides, the agency shall send, in addition to the original, three duplicate originals or certified copies.

(b) In the case of a document issued outside of the District of Columbia, an agency may submit certified text in place of the original. However, it must replace the certified text with the original document as soon as practicable for filing as required by Chapter 15 of Title 44, United States Code.

§ 18.2 Prohibition on combined documents.

(a) The Director of the Federal Register may not accept a document for filing and publication if it combines material that must appear under more than one category in the FEDERAL REGISTER. For example, a document may not contain both rule making and notice of proposed rule making material.

(b) Where two related documents are to be published in the same FEDERAL REGISTER issue, the agency may arrange with the Office of the Federal Register for the insertion of cross-references in each document.

§ 18.3 Submission of documents and letters of transmittal.

(a) Each document authorized or required by law to be filed with the Office of the Federal Register, published in the FEDERAL REGISTER, or filed with the Administrative Committee shall be sent to the Director of the Federal Register.

(b) Except for cases involving special handling or treatment, there is no need for a letter of transmittal for a document submitted for filing and FEDERAL REGISTER publication.

§ 18.4 Form of document.

(a) Except as provided in paragraph (b) of this section, to be eligible for filing and publication in the FEDERAL REGISTER, a document must be typewritten on white bond paper approximately 8 by 10½ inches in size, double spaced, with a left-hand margin of approximately 1½ inches and a right-hand margin of approximately 1 inch.

(b) A printed or processed document may be accepted for filing and publication if it is suitable as an archival original. However, a photostatic copy may not be accepted as an original document.

(c) A document in the form of a letter may not be accepted for filing or publication in the rules and regulations, proposed rule making, or notices categories of the FEDERAL REGISTER.

§ 18.5 Certified copies.

(a) The certified copies or duplicate originals of each document must be attached to the original. Each copy or duplicate must be entirely clear and legible.

(b) Copies of a typewritten original may be the first two carbon copies of the ribbon original, positive photostats on paper with a matte surface, or electrostatic copies.

(c) Publication dates are determined at the time when clear and legible copies are received.

§ 18.6 Form of certification.

Each copy of each document submitted for filing and publication, except a Presidential document or a duplicate original, must be certified substantially as follows:

(Certified to be a true copy of the original) signed by a certifying officer designated under § 16.1 of this chapter.

§ 18.7 Signature.

The original and each duplicate original document must be signed in ink, with the name and title of the official signing the document typed or stamped beneath his signature. Initialed or impressed signatures may not be accepted.

§ 18.8 Seal.

Use of a seal on an original document or certified copy is optional with the issuing agency.

§ 18.9 Style.

Each agency submitting a document for filing and publication shall prepare it in accordance with the following:

(a) Punctuation, capitalization, spelling, and other matters of style must conform, in general, to the current edition of the U.S. Government Printing Office Style Manual.

(b) The spelling of geographic names must conform to the decisions of the Board on Geographic Names, established by section 2 of the act of July 25, 1947, 61 Stat. 456 (43 U.S.C. 364a).

(c) Descriptions of land must conform, so far as practicable, to the current edition of the "Specifications for Descriptions of Tracts of Land for Use in Executive Orders and Proclamations" prepared by the Bureau of Land Management, Department of the Interior.

§ 18.10 Illustrations and tabular material.

(a) An original drawing, or a clear reproduction, of each map, chart, graph, or other illustration that is found to be a necessary part of a document to be filed and published may be accepted only after submission to the Director of the Federal Register at least 6 working days before the date on which publication is desired.

(b) A clear and legible reproduction of the original illustration, approximately 8 by 10½ inches, shall be included in the original document and each certified copy.

(c) Tabular material consisting of more than two typewritten pages that is to be a part of a document to be filed and published shall be submitted to the Director at least 6 working days before the date on which publication is desired.

§ 18.11 Forms.

Except when considered necessary by the Director of the Federal Register, tabulated blank forms for applications, registrations, reports, contracts, and similar items, and the instructions for preparing the forms, may not be published in full. In place thereof, the agency concerned shall submit for publication a simple statement describing the purpose and use of each form and stating the places at which copies may be obtained.

§ 18.12 Preamble requirements.

Each notice of proposed rule making and final rule making document shall conform to the following:

(a) There must be a clear preamble statement that describes the contents of the document in a manner sufficient to apprise a reader, who is not an expert in the subject area, of the general subject matter of the rule making document.

(b) To the extent practicable, the preamble statement for a proposed rule making document should also discuss the major issues involved in, and the reasons for, the proposed rules.

(c) To the extent practicable, the preamble statement for a rule or regulation that was preceded by a notice of proposed rule making, should also indicate in general terms the principal differences, if any, between the rules as proposed and the rules as adopted.

§ 18.13 Withdrawal of filed documents.

A document that has been filed with the Office of the Federal Register and placed on public inspection as required by this chapter, may be withdrawn from publication by the submitting agency only by a timely written instrument revoking that document, signed by a duly authorized representative of the agency. Both the original and the revoking document shall remain on file.

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§ 18.14 Correction of errors in documents.

After a document has been filed for public inspection and publication, a substantive error in the text may be corrected only by the filing of another document effecting the correction.

§ 18.15 Correction of errors in printing.

Typographical or clerical errors made in the printing of the FEDERAL REGISTER shall be corrected by insertion of an appropriate notation or a reprinting in the FEDERAL REGISTER published without further agency documentation, if the Director of the Federal Register determines that—

- (a) The error would tend to confuse or mislead the reader; or
- (b) The error would affect text subject to codification.

§ 18.16 Highlights.

(a) Except as provided in paragraph (b) of this section, each agency which submits a document for publication in the FEDERAL REGISTER shall furnish with the document two copies of a descriptive catchword or phrase and a brief statement that:

- (1) Names the agency issuing the document;
- (2) Identifies the principal subject of the document; and
- (3) States any important dates, such as closing date for comments, hearing date, or effective date.

The language of the statement submitted under this section and the headings required by Parts 17 and 22 of this chapter may be the same whenever appropriate. The following are examples of the kinds of statements intended by this requirement:

DETERGENTS—Proposed FTC labeling and advertising requirements for synthetic detergents—comment period ends 4-19-72; public hearing 4-26-72.

COAL MINE SAFETY—Interior Department procedures to assess civil penalties for violations—effective 1-16-73.

(b) A statement need not be submitted with a document that is making nonsubstantive changes that are corrective or editorial in nature. The Director of the Federal Register may grant additional exceptions to the requirements of this section. The Director shall publish once each month in the FEDERAL REGISTER a list of the classes of documents exempted under this section during the preceding month, stating the agency involved and the document or class of documents.

(c) Selected statements submitted under this section shall be included in a highlights listing which will be printed in a prominent place in the daily FEDERAL REGISTER. The Director shall exercise final editorial control over the wording of each statement and make the final determination as to its inclusion in the highlights listing.

(d) Neither failure to submit a statement under this section, nor failure to print such a statement in the highlights listing in the FEDERAL REGISTER

affects the legal status of a document printed in the FEDERAL REGISTER. Highlights listings printed in the FEDERAL REGISTER are intended solely to serve as an aid to readers and the wording of a listed item is not intended to interpret the language of the document. FEDERAL REGISTER readers should continue to use the Table of Contents to identify the documents published in each issue and the text of a document to determine its legal effect.

§ 18.17 Effective dates and time periods.

(a) Whenever practicable, each document submitted for publication in the FEDERAL REGISTER should set forth dates certain. Thus, a document should state "all comments received before July 3, 1972, will be considered" or "this amendment takes effect July 3, 1972," rather than stating a time period measured by a certain number of days after publication in the FEDERAL REGISTER. Where a document does contain a time period rather than a date certain, the FEDERAL REGISTER staff will insert a date certain to be computed as set forth in paragraph (b) of this section.

(b) Dates certain will be computed by counting the day after the publication day as one, and by counting each succeeding day, including Saturdays, Sundays, and holidays. However, where the final count would fall on a Saturday, Sunday, or holiday, the date certain will be the next succeeding Federal business day.

PART 19—EXECUTIVE ORDERS AND PRESIDENTIAL PROCLAMATIONS

Sec.

- 19.1 Form.
- 19.2 Routing and approval of drafts.
- 19.3 Routing and certification of originals and copies.
- 19.4 Proclamations calling for the observance of special days or events.
- 19.5 Proclamations of treaties excluded.
- 19.6 Definition.

NOTE: The provisions of this Part 19 derived from sections 1 to 6 of Executive Order 11030, 27 FR 5847, 3 CFR 1959-1963 Comp., p. 610, and E.O. 11354, 32 FR 7695, 1966-1970 Comp., p. 652.

§ 19.1 Form.

Proposed Executive orders and proclamations shall be prepared in accordance with the following requirements:

- (a) The order or proclamation shall be given a suitable title.
- (b) The order or proclamation shall contain a citation of the authority under which it is issued.
- (c) Punctuation, capitalization, spelling, and other matters of style shall, in general, conform to the most recent edition of the U.S. Government Printing Office Style Manual.
- (d) The spelling of geographic names shall conform to the decisions of the Board on Geographic Names, established by section 2 of the act of July 25, 1947, 61 Stat. 456 (43 U.S.C. 364a).
- (e) Descriptions of tracts of land shall conform, so far as practicable, to the most recent edition of the "Specifi-

cations for Descriptions of Tracts of Land for Use in Executive Orders and Proclamations," prepared by the Bureau of Land Management, Department of the Interior.

(f) Proposed Executive orders and proclamations shall be typewritten on paper approximately 8 x 13 inches, shall have a left-hand margin of approximately 1½ inches and a right-hand margin of approximately 1 inch, and shall be double-spaced except that quotations, tabulations, and descriptions of land may be single-spaced.

(g) Proclamations issued by the President shall conclude with the following-described recitation:

IN WITNESS WHEREOF, I have hereunto set my hand this ____ day of _____, in the year of our Lord _____, and of the Independence of the United States of America the _____

§ 19.2 Routing and approval of drafts.

(a) A proposed Executive order or proclamation shall first be submitted, with seven copies thereof, to the Director of the Office of Management and Budget, together with a letter, signed by the head or other properly authorized officer of the originating Federal agency, explaining the nature, purpose, background, and effect of the proposed Executive order or proclamation and its relationship, if any, to pertinent laws and other Executive orders or proclamations.

(b) If the Director of the Office of Management and Budget approves the proposed Executive order or proclamation, he shall transmit it to the Attorney General for his consideration as to both form and legality.

(c) If the Attorney General approves the proposed Executive order or proclamation, he shall transmit it to the Director of the Office of the Federal Register, National Archives and Records Service, General Services Administration: *Provided*, That in cases involving sufficient urgency the Attorney General may transmit it directly to the President: *And provided further*, That the authority vested in the Attorney General by this section may be delegated by him, in whole or in part, to the Deputy Attorney General, Solicitor General, or to such Assistant Attorney General as he may designate.

(d) After determining that the proposed Executive order or proclamation conforms to the requirements of § 19.1 and is free from typographical or clerical error, the Director of the Office of the Federal Register shall transmit it and three copies thereof to the President.

(e) If the proposed Executive order or proclamation is disapproved by the Director of the Office of Management and Budget or by the Attorney General, it shall not thereafter be presented to the President unless it is accompanied by a statement of the reasons for such disapproval.

§ 19.3 Routing and certification of originals and copies.

(a) If the order or proclamation is signed by the President, the original and two copies shall be forwarded to the Di-

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rector of the Federal Register for publication in the **FEDERAL REGISTER**.

(b) The Office of the Federal Register shall cause to be placed upon the copies of all Executive orders and proclamations forwarded as provided in paragraph (a) of this section the following notation, to be signed by the Director or by some person authorized by him to sign such notation: "Certified to be a true copy of the original."

§ 19.4 Proclamations calling for the observance of special days or events.

Except as may be otherwise provided by law, responsibility for the preparation and presentation of proposed proclamations calling for the observance of special days, or other periods of time, or events, shall be assigned by the Director of the Office of Management and Budget to such agencies as he may consider appropriate. Such proposed proclamations shall be submitted to the Director at least 60 days before the date of the specified observance.

§ 19.5 Proclamations of treaties excluded.

Consonant with the provisions of Chapter 15 of Title 5 of the United States Code (44 U.S.C. 1511), nothing in these regulations shall be construed to apply to treaties, conventions, protocols, or other international agreements, or proclamations thereof by the President.

§ 19.6 Definition.

The term "Presidential proclamations and Executive orders," as used in Chapter 15 of Title 5 of the United States Code (44 U.S.C. 1505 (a)), shall, except as the President or his representative may hereafter otherwise direct, be deemed to include such attachments thereto as are referred to in the respective proclamations or orders.

PART 20—HANDLING OF UNITED STATES GOVERNMENT ORGANIZATION MANUAL STATEMENTS

- Sec. 20.1 Liaison officers.
- 20.2 Preparation of agency statements.
- 20.3 Organization.
- 20.4 Description of program activities.
- 20.5 Sources of information.
- 20.6 Form, style, arrangement, and apportionment of space.
- 20.7 Deadline dates.

AUTHORITY: 44 U.S.C. 1506; sec. 6, E.O. 10530, 19 FR 2709; 3 CFR 1954-1958 Comp. p. 189.

§ 20.1 Liaison officers.

Each of the following shall appoint an officer to maintain liaison with the Office on matters relating to the United States Government Organization Manual:

- (a) Agencies of the legislative and judicial branches.
- (b) Executive agencies that do not have a liaison officer designated under § 16.1 of this chapter or who wish to appoint a liaison officer for Manual matters other than the one designated under such § 16.1.

(c) Quasi-official agencies represented in the Manual.

(d) Any other agency that the Director believes should be included in the Manual.

Each liaison officer will insure his agency's compliance with Part 9 of this chapter and this Part 20.

§ 20.2 Preparation of agency statements.

In accordance with schedules established under § 20.7 each agency shall submit for publication in the Manual an official draft of the information required by § 9.2 of this chapter and this Part 20.

§ 20.3 Organization.

(a) Information about lines of authority and organization may be reflected in a chart if the chart clearly delineates the agency's organizational structure. Charts must be submitted in duplicate in the form of clear prints suitable for photographing. Charts should be prepared so as to be perfectly legible when reduced to the size of a Manual page. Charts that do not meet this requirement will not be included in the Manual.

(b) Listings of heads of operating units should be arranged wherever possible to reflect relationships between units.

(c) Verbal descriptions of organization that duplicate information conveyed by charts or by lists of officials will not be published in the Manual.

§ 20.4 Description of program activities.

Descriptions should state clearly the public purposes that the agency serves, and the programs that carry out those purposes. Detailed descriptions of the responsibilities of individuals will not be accepted for publication in the Manual.

§ 20.5 Sources of information.

Pertinent sources of information useful to the public, in areas of public interest such as employment, consumer activities, contracts, services to small business, and other topics of public interest should be provided with each agency statement. These sources of information shall plainly identify the places at which the public may obtain information or make submittals or requests.

§ 20.6 Form, style, arrangement and apportionment of space.

The form, style, and arrangement of agency statements and other material included in the Manual and the apportionment of space therein shall be determined by the Director of the Federal Register. The U.S. Government Printing Office Style Manual is the applicable reference work in determining style.

§ 20.7 Deadline dates.

The Manual is published on a schedule designed to provide the public with information about their Government on a timely basis. Therefore, agencies must comply with the deadline dates established by the Director of the Federal Register for transmittal of statements

and charts and for the verification of proofs. Failure to do so may result in publication of an outdated statement or the omission of important material, thus depriving members of the public of information they have a right to expect in a particular edition of the Manual.

PART 21—PREPARATION OF DOCUMENTS SUBJECT TO CODIFICATION

Subpart A—General

- Sec. 21.1 Drafting.
- 21.2 [Reserved]
- 21.3 [Reserved]
- 21.4 Descriptions of organization.
- 21.5 Separate documents for each title and chapter amended.
- 21.6 Notice of expiration of codified material.

CODE STRUCTURE

- 21.7 Titles and subtitles.
- 21.8 Chapters and subchapters.
- 21.9 Parts, subparts, and undesignated center heads.
- 21.10 Sections.

NUMBERING

- 21.11 Divisions of the Code of Federal Regulations.
- 21.12 Reservation of numbers.
- 21.13 Addition of new units between existing units.
- 21.14 Keying to agency numbering systems.
- 21.15 Statements of policy and interpretations.

HEADINGS

- 21.16 Required Code headings.
- 21.17 Additional captions.
- 21.18 Tables of contents.
- 21.19 Composition of part headings.

AMENDMENTS

- 21.20 General requirements.

REFERENCES

- 21.21 General requirements.
- 21.22 References between or within titles.
- 21.23 Parallel citations of Code and **FEDERAL REGISTER**.
- 21.24 References to 1938 Edition of Code.

EFFECTIVE DATE STATEMENT

- 21.30 General.

Subpart B—Citations of Authority

- 21.40 General requirements.
- 21.41 Agency responsibility.
- 21.42 Exceptions.

PLACEMENT

- 21.43 Coverage.
- 21.44 Documents involving various amendments.
- 21.45 Nonstatutory authority.

FORM

- 21.51 General.
- 21.52 Statutory materials.
- 21.53 Nonstatutory materials.

AUTHORITY: 44 U.S.C. 1506; sec. 6, E.O. 10530, 19 FR 2709; 3 CFR 1954-1958 Comp. p. 189.

Subpart A—General

§ 21.1 Drafting.

(a) Each agency that prepares a document that is subject to codification shall draft it as an amendment to the

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Code of Federal Regulations, in accordance with this subchapter, before submitting it to the Office of the Federal Register.

(b) The agency shall place a promulgation statement in the document precisely describing the relationship of the new provisions to the Code.

§§ 21.2, 21.3 [Reserved]

§ 21.4 Descriptions of organization.

The Director of the Federal Register may designate documents submitted under section 552(a)(1)(A) of Title 5, United States Code, as "documents subject to codification" under special agreement with the issuing agency. The agreement must be in writing, signed by the head of the agency, or his designee, and stating that—

(a) Publication in the Code is necessary or desirable for the effective discharge of the agency's functions or activities; and

(b) Publication in the Code may be discontinued by the Administrative Committee for failure of the agency to keep publication current.

§ 21.5 Separate documents for each title and chapter amended.

Whenever an agency is taking an action that will amend more than one title, or more than one chapter, of the Code of Federal Regulations, it shall prepare a separate document for each title and each chapter that is to be amended.

§ 21.6 Notice of expiration of codified material.

(a) Whenever a document subject to codification expires after a specified period by its own terms or by law, the issuing agency shall submit a notification by document for publication in the FEDERAL REGISTER.

(b) If the preparation of the document is not practicable, the agency shall send a timely notice, in writing, to the Director of the Federal Register, stating that the document is no longer in effect, citing the pertinent terms.

CODE STRUCTURE

§ 21.7 Titles and subtitles.

(a) The major divisions of the Code are titles, each of which brings together broadly related Government functions.

(b) Subtitles may be used to distinguish between materials emanating from an overall agency and the material issued by its various components. Subtitles may also be used to group chapters within a title.

§ 21.8 Chapters and subchapters.

(a) The normal divisions of a title are chapters, assigned to the various agencies within a title descriptive of the subject matter covered by the agencies' regulations.

(b) Subchapters may be used to group related parts within a chapter.

§ 21.9 Parts, subparts, and undesignated center heads.

(a) The normal divisions of a chapter are parts, consisting of a unified body of

regulations applying to a specific function of an issuing agency or devoted to specific subject matter under the control of that agency.

(b) Subparts or undesignated center heads may be used to group related sections within a part. Undesignated center heads may also be used to group sections within a subpart.

§ 21.10 Sections.

(a) The normal divisions of a part are sections. Sections are the basic units of the Code.

(b) When internal division is necessary, a section may be divided into paragraphs, and paragraphs may be further subdivided using the lettering indicated in § 21.11.

NUMBERING

§ 21.11 Divisions of the Code of Federal Regulations.

(a) Titles are numbered consecutively in Arabic throughout the Code.

(b) Subtitles are lettered consecutively in capitals throughout the title.

(c) Chapters are numbered consecutively in Roman capitals throughout each title.

(d) Subchapters are lettered consecutively in capitals throughout the chapter.

(e) Parts are numbered in Arabic throughout each title.

(f) Subparts may be lettered in capitals or be undesignated.

(g) Sections are numbered in Arabic throughout each part. A section number includes the number of the part followed by a decimal point and the number of the section. For example, the section number for section 15 of Part 21 is "§ 21.15".

(h) The lettering for divisions of a section is as follows:

Division	Illustrative lettering
Paragraph	(a), (b), etc.
Further subdivision of a paragraph	(1), (2), etc. (i), (ii), etc. (A), (B), etc. (1), (2), etc. (i), (ii), etc.

§ 21.12 Reservation of numbers.

In a case where related parts or related sections are grouped under a heading, numbers shall be reserved at the end of each group to allow for expansion.

§ 21.13 Addition of new units between existing units.

(a) Whenever it is necessary to introduce a new part or section between existing consecutive parts or sections, the new part or section shall be designated by the addition of a lower case letter to the number of the preceding part or section. For example, a part inserted between Parts 31 and 32 is numbered "31a", and a section inserted between § 31.1 and § 31.2 is numbered "§ 31.1a".

(b) Whenever it is necessary to insert a paragraph between existing consecutive paragraphs, and revision of the entire paragraph is not desired, the new paragraph shall be designated by the addition of a hyphen and an Arabic num-

ber to the letter designating the preceding paragraph. For example, a paragraph inserted between paragraph (a) and (b) is designated "(a-1)".

§ 21.14 Keying to agency numbering systems.

The Director of the Federal Register may allow the keying of section numbers to correspond to a particular numbering system used by an agency only when, in his opinion, the keying will benefit both that agency and the public.

§ 21.15 Statements of policy and interpretations.

(a) Whenever a statement of general policy or an interpretation, submitted pursuant to section 552(a)(1)(D) of Title 5, United States Code, applies to an entire part, it shall be included in or appended to that part.

(b) Whenever a statement of general policy or an interpretation applies to a specific section it shall be appended to that section.

(c) Statements of policy and interpretations that are broader in scope than those covered by paragraphs (a) and (b) of this section shall be assigned to a part or group of parts within the chapter affected.

HEADINGS

§ 21.16 Required Code headings.

(a) The title, chapter, and part headings, in that order, shall be set forth in full on separate lines at the beginning of each document. Subtitle, subchapter, and subpart headings shall, if applicable, also be set forth.

(b) Each section shall have a brief descriptive heading, preceding the text, on a separate line.

§ 21.17 Additional captions.

(a) For the purpose of publication in the FEDERAL REGISTER, a brief caption more specifically describing the scope of a document constituting a partial amendment of the material in a part shall be provided immediately below the part heading.

(b) An agency that uses regulation numbers or other identifying symbols shall place them in brackets centered immediately above the part heading.

§ 21.18 Tables of contents.

A table of contents shall be used at the beginning of the part whenever a new part is introduced, an existing part is completely revised, or a group of sections is revised or added and set forth as a subpart or otherwise separately grouped under a center heading. The table shall follow the part heading and precede the text of the regulations in that part. It shall also list the headings for the subparts, undesignated center headings, and sections in the part.

§ 21.19 Composition of part headings.

Each part heading shall indicate briefly the general subject matter of the part. Phrases such as "Regulations under the Act of July 28, 1955" or other expressions that are not descriptive of the sub-

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ject matter may not be used. Introductory expressions such as "Regulations governing" and "Rules applicable to" may not be used.

AMENDMENTS

§ 21.20 General requirements.

(a) Each amendatory document shall identify in specific terms the unit amended, and the extent of the changes made.

(b) The number and heading of each section amended shall be set forth in full on a separate line.

REFERENCES

§ 21.21 General requirements.

(a) Each reference to the Code of Federal Regulations shall be in terms of the specific titles, chapters, parts, sections, and paragraphs involved. Ambiguous references such as "herein", "above", "below", and similar expressions may not be used.

(b) Each document that contains a reference to material published in the Code shall include the Code citation as a part of the reference.

§ 21.22 References between or within titles.

Unless the meaning is otherwise precisely expressed and an undue or awkward repetition would result, the following references shall be used:

(a) *Between titles.* When reference is made to material codified in a title other than that in which the reference occurs, the short form of citation shall be used. For example, a reference within Title 41 to § 2.4 of Title 1 is "1 CFR 2.4".

(b) *Within titles.* When reference is made to material codified in the same title, the following forms shall be used, as appropriate:

Chapter ----- of this title.
Part ----- of this title.
§ ----- of this title.

(c) *Within chapters.* When reference is made to material codified in the same chapter, the following forms shall be used, as appropriate:

Part ----- of this chapter.
§ ----- of this chapter.

(d) *Within sections.* When reference is made to material codified in the same section, the following forms shall be used, as appropriate:

Paragraph (-----) of this section.

§ 21.23 Parallel citations of Code and Federal Register.

For parallel reference, the Code of Federal Regulations and the FEDERAL REGISTER may be cited in the following forms, as appropriate:

----- CFR ----- (----- FR -----).
§ ----- of this chapter (----- FR -----).

§ 21.24 References to 1938 edition of Code.

When reference is made to material codified in the 1938 edition of the Code of Federal Regulations, or a supplement

thereto, the following forms may be used, as appropriate:

----- CFR, 1938 Ed., -----
----- CFR, 1943, Cum. Supp., -----
----- CFR, 1946 Supp., -----

EFFECTIVE DATE STATEMENT

§ 21.30 General.

Each document subject to codification shall include a clear statement as to the date or dates upon which its contents become effective.

Subpart B—Citations of Authority

§ 21.40 General requirements.

(a) Each section in a document subject to codification shall include, or be covered by, a complete citation of the authority under which the section is issued, including—

(1) General or specific authority delegated by statute; and

(2) Executive delegations, if any, necessary to link the statutory authority to the issuing agency.

§ 21.41 Agency responsibility.

(a) Each issuing agency is responsible for the accuracy and integrity of the citations of authority in the documents it issues.

(b) Each issuing agency shall formally amend the citations of authority in its codified material to reflect any changes therein.

§ 21.42 Exceptions.

The Director of the Federal Register may make exceptions to the requirements of this subpart relating to placement and form of citations of authority whenever he determines that strict application would impair the practical use of the citations.

PLACEMENT

§ 21.43 Coverage.

(a) *Single section.* Authority covering a single section shall be cited in parentheses on a separate line immediately following the text of the section. For example:

(Sec. 5, Pub. L. 89-670, 80 Stat. 935 (49 U.S.C. 1654))

(b) *Blanket coverage.* Authority covering two or more consecutive sections shall be cited following the word "AUTHORITY" and placed as a text note immediately preceding the first section of the group. For example:

AUTHORITY: Sec. 5, Pub. L. 89-670, 80 Stat. 935 (49 U.S.C. 1654).

(c) *Combined blanket and separate coverage.* Whenever individual sections within a group covered by a blanket citation reflect additional authority, a combined form shall be used. For example:

AUTHORITY: Sec. 5, Pub. L. 89-670, 80 Stat. 935 (49 U.S.C. 1654), unless otherwise noted.

(d) *Combined blanket coverage.* Whenever a group of two or more consecutive sections within a broader group covered by a blanket citation reflects the same additional authority, a combined blanket citation shall be used. For example:

AUTHORITY: Sec. 5, Pub. L. 89-670, 80 Stat. 935 (49 U.S.C. 1654), §§ 7.1 to 7.11 also issued under sec. 313, Pub. L. 85-726, 72 Stat. 752 (49 U.S.C. 1354).

§ 21.44 Documents involving various amendments.

(a) Whenever a document prescribes several amendments issued under common authority, the citation to that authority shall be placed in parentheses on a separate line after the last amendment.

(b) Whenever a document prescribes several amendments issued under varying authorities, each amendment shall be followed by the appropriate citation in parentheses on a separate line.

§ 21.45 Nonstatutory authority.

Citation to a document as authority shall be placed after the statutory citations. For example:

AUTHORITY: Sec. 9, Pub. L. 89-670, 80 Stat. 944 (49 U.S.C. 1657), E.O. 11222, 30 FR 6469, 3 CFR 1965 Comp.

FORM

§ 21.51 General.

(a) Formal citations of authority shall be in the shortest form compatible with positive identification and ready reference.

(b) The Office of the Federal Register shall assist agencies in developing model citations.

§ 21.52 Statutory materials.

(a) *Public laws.* Citations to current public laws shall include reference to the volume and page of the U.S. Statutes at Large to which they have been assigned. For example:

Sec. 5, Pub. L. 89-670, 80 Stat. 935 (49 U.S.C. 1654)

(b) *U.S. Statutes at Large.* Citations to the U.S. Statutes at Large shall refer to section, page, and volume. The page number should refer to the page on which the section cited begins. If the cited material is contained in a title of the United States Code that has not been positively enacted, the parallel United States Code citation shall also be given. For example:

Sec. 5, Pub. L. 89-670, 80 Stat. 935 (49 U.S.C. 1654); sec. 313, Pub. L. 85-726, 72 Stat. 752 (49 U.S.C. 1354)

(c) *Positive law titles of the United States Code.* Citations to titles of the United States Code that have been enacted into positive law (such as 1, 5, 10, etc.) shall be cited as follows, without public law or U.S. Statutes at Large citation:

10 U.S.C. 501.

§ 21.53 Nonstatutory materials.

Nonstatutory documents shall be cited by document designation and by FEDERAL REGISTER volume and page, followed, if possible, by the parallel citation to the Code of Federal Regulations. For example:

Special Civil Air Reg. SR-422A, 28 FR 6703, 14 CFR Part 4b, E.O. 11130, 28 FR 12789; 3 CFR 1959-1963 Comp.

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PART 22—PREPARATION OF NOTICES
AND RULE MAKING PROPOSALS

NOTICES IN GENERAL

- Sec.
22.1 Name of issuing agency and subdivision.
22.2 Authority citation.
- NOTICES OF PROPOSED RULE MAKING
- 22.5 General requirements.
22.6 Code designation.
22.7 Codification.

AUTHORITY: 44 U.S.C. 1506; sec. 6, E.O. 10530, 19 FR 2709; 3 CFR 1954-1958 Comp. p. 189.

NOTICES IN GENERAL

§ 22.1 Name of issuing agency and subdivision.

(a) The name of the agency issuing a notice shall be placed at the beginning of the document.

(b) Whenever a specific bureau, service, or similar unit within an agency issues a notice, the name of that bureau, service, or unit shall be placed on a separate line below the name of the agency.

(c) An agency that uses file numbers, docket numbers, or similar identifying symbols shall place them in brackets immediately below the other headings required by this section.

(d) A suitable short title identifying the subject shall be provided beginning on a separate line immediately after the other required caption or captions. Whenever appropriate, an additional brief caption indicating the nature of the document shall be used.

§ 22.2 Authority citation.

The authority under which an agency issues a notice shall be cited in narrative form within text or in parentheses on a separate line following text.

NOTICES OF PROPOSED RULE MAKING

§ 22.5 General requirements.

Each notice of proposed rule making required by section 553 of title 5, United States Code, or any other statute, and any similar notice voluntarily issued by an agency shall include a statement of—

(a) The time, place, and nature of public rule making proceedings; and

(b) Reference to the authority under which the regulatory action is proposed.

§ 22.6 Code designation.

The area of the Code of Federal Regulations directly affected by a proposed regulatory action shall be identified by placing the appropriate CFR citation in brackets immediately below the name of the issuing agency. For example:

[1 CFR Part 22]

§ 22.7 Codification.

Any part of a notice of proposed rule making document that contains the full text of a proposed regulation shall also conform to the pertinent provisions of Part 21 of this chapter.

[FR Doc.72-18989 Filed 11-3-72; 8:51 am]

Chapter II—Office of the
Federal RegisterPART 51—INCORPORATION BY
REFERENCE

The purpose of this amendment is to adopt a revised regulation governing the incorporation by reference of material outside the Code of Federal Regulations in Federal Register documents. This amendment is based on a notice of proposed rule making published in the FEDERAL REGISTER on April 4, 1972 (37 F.R. 6805).

Several of the commenters expressed general opposition to the use of "incorporation by reference" in Federal Register documents and recommended against adoption of proposed Part 51. With respect to these comments, it should be pointed out that specific congressional authority for the use of incorporation by reference has existed since 1967 (5 U.S.C. 552(a)) and that proposed Part 51 is for the most part a revision of 1 CFR Part 20, which was originally adopted the same year. Thus, adoption of Part 51 is not an invitation to increased usage of incorporation by reference. Actually, as was discussed in the notice of proposed rule making, in several respects revised Part 51 imposes more restrictions and places more control in the Director of the Federal Register than did the previous regulations.

One commenter suggested that the proposed regulations appear to apply to notice of proposed rule making documents although 5 U.S.C. 552(a) applies only to final rule making documents. To clarify this, a new paragraph (e) has been added to § 51.1. This new provision also encourages agencies to consult with the office of the Federal Register with respect to the requirements of Part 51 before submission of proposed rule making documents. In this way agencies can avoid problems that might surface after a document has gone through notice and public comment.

Another commenter pointed out that the use of incorporation by reference in a proposed rule making document can affect the reasonableness of the time period for public comment. This commenter made the valid point that sometimes it takes weeks to obtain a technical document proposed to be incorporated by reference and that little time may be left for review and submission of comments. While this comment is outside the scope of the proposed regulation, agencies are urged to consider this factor in establishing the comment period.

One commenter pointed out that, as proposed, § 51.10(c) would require the republication of a document or a portion thereof, whenever a document containing an incorporation by reference is published in the FEDERAL REGISTER without the Director's advance approval. The commenter suggested that a more flexible approach might be warranted since the incorporation by reference might well be

one that the Director would be willing to approve after publication and that in such a case republication would serve no useful purpose. Section 51.10(c) has been rewritten to make it clear that the mere publication in the FEDERAL REGISTER of a document containing an incorporation by reference is not of itself approval by the Director of that incorporation. In such a situation, the Director will review the document after publication and the proper corrective action can be worked out between the agency and the Director.

In consideration of the foregoing, and after considering all relevant comments received, Part 51 is adopted as proposed with the following changes:

1. A new paragraph (e) is added to § 51.1.
2. A new paragraph (c) is added to § 51.10.
3. Section 51.12 is revised.

Effective date. This amendment is effective January 2, 1973.

FRED J. EMERY,
Director of the Federal Register.

GENERAL

- Sec.
51.1 Policy.
51.2 Matter eligible.
51.3 Distinctions.
51.4 Elements on which approval may be based.
51.5 Filing.

DRAFTING STANDARDS

- 51.6 Language of incorporation.
51.7 Identification and description.
51.8 Statement of availability.

PUBLICATION PROCEDURES

- 51.10 Advance consultation.
51.11 Letter transmitting final document.
51.12 Stamp of approval.

AUTHORITY: The provisions of this Part 51 issued under 5 U.S.C. 552(a).

GENERAL

§ 51.1 Policy.

(a) Section 552(a) of Title 5, United States Code, provides, in part, that "matter reasonably available to the class of persons affected thereby is deemed published in the FEDERAL REGISTER when incorporated by reference therein with the approval of the Director of the Federal Register."

(b) The Director will strictly interpret the language quoted in paragraph (a) of this section to provide fairness and uniformity in administrative proceedings involving publication in the FEDERAL REGISTER.

(c) The Director will interpret and apply the language quoted in paragraph (a) of this section with full regard to the significance of related instruments governing publication in the FEDERAL REGISTER and the Code of Federal Regulations. Related instruments include—

- (1) Subchapter II of Chapter 5 of Title 5, United States Code;
- (2) Chapter 15 of Title 44, United States Code;
- (3) Chapter I of this title; and

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(4) Special statutory provisions listed in appendix B to Chapter I of this title, that require publication in the FEDERAL REGISTER.

(d) The Director will assume that the language quoted in paragraph (a) of this section is—

(1) Designed to cover the limited purposes of section 552(a) of title 5, United States Code;

(2) Intended to benefit both the Federal Government and the members of the classes affected by reducing the volume of matter printed in the FEDERAL REGISTER; and

(3) Not intended to detract from the legal or practical attributes of the system established under the basic instruments listed in paragraph (c) of this section.

(e) While the requirements of 5 U.S.C. 552(a) and of this part apply to a final rule making document, issuing agencies are encouraged to consult the Office of the Federal Register with respect to the requirements of this part before submitting for publication a notice of proposed rule making document that contains an incorporation by reference.

§ 51.2 Matter eligible.

To be eligible for incorporation by reference, under section 552(a) of Title 5, United States Code, in a document to be published in the FEDERAL REGISTER, material must conform to the policy stated in § 51.1 and be in the nature of published data, criteria, standards, specifications, techniques, illustrations, or other published information reasonably available to the members of the class that would be affected by the publication.

§ 51.3 Distinctions.

(a) *Ordinary references.* For the purposes of this part, informational references and cross references that do not purport to incorporate outside matter within a FEDERAL REGISTER document are not considered to be legal incorporations by reference under section 552(a) of Title 5, United States Code.

(b) *Regulations governing availability of agency issuances.* Regulations governing the availability of agency issuances are not considered to be legal incorporation by reference under section 552(a) of Title 5, United States Code.

§ 51.4 Elements on which approval may be based.

The Director of the Federal Register will approve an incorporation by reference only when the following considera-

tions are favorable and reasonably stable:

(a) The matter is eligible.

(b) Incorporation will substantially reduce the volume of material published in the FEDERAL REGISTER.

(c) The matter incorporated is in fact available to the extent necessary to afford fairness and uniformity in the administrative process.

(d) The incorporating document is drafted and submitted for publication in accordance with this part.

§ 51.5 Filing.

Copies of material approved for incorporation by reference including copies of all amendments or revisions to that material, shall be filed with the Office of the Federal Register.

DRAFTING STANDARDS

§ 51.6 Language of incorporation.

(a) The language incorporating material by reference shall be as precise and complete as possible.

(b) The words expressing the incorporation shall make it clear that the incorporation by reference is intended and completed by the document in which it appears.

§ 51.7 Identification and description.

(a) Each incorporation by reference shall include an identification and subject description of the matter incorporated, in terms as precise and useful as practicable within the limits of reasonable brevity.

(b) Titles, dates, editions, numbers, authors, and publishers shall be stated whenever they would contribute to clear identification.

(c) A brief subject description shall be included to inform the user of his potential need to obtain the matter incorporated.

§ 51.8 Statement of availability.

(a) *Information.* Each incorporation by reference shall include a statement covering the availability of the material incorporated, including current information as to where and how copies of it may be examined and be readily obtained with maximum convenience to the user.

(b) *Official showing.* Inclusion of the statement required by paragraph (a) of this section constitutes an official showing by the issuing agency that the material incorporated is, in fact, reasonably available to the class of persons affected.

(c) *Future amendments or revisions.*

In any case in which incorporated material will be subject to change, the statement required by paragraph (a) of this section shall set forth that information. However, the incorporation of material in a FEDERAL REGISTER document by reference is limited to the material as it exists on the effective date of the document. Future amendments or revisions of material incorporated by reference are not included. They may be added as they become available, or at any later time, by the issuance of an amendatory document. Separate approval of the Director of the incorporation of each amendment whose original incorporation was approved need not be obtained if all other requirements of this part are met.

PUBLICATION PROCEDURES

§ 51.10 Advance consultation.

(a) To avoid delay, each issuing agency shall consult in advance with the Director of the Federal Register regarding the approval of any specific incorporation by reference. The consultation should take place at least 10 working days before the proposed date of submission of the document.

(b) After completion of the consultation, the Director will notify the agency of his decision, at least 5 working days before the proposed date of submission of the document.

(c) Publication in the FEDERAL REGISTER of a document containing an incorporation by reference does not, of itself, constitute approval by the Director of the incorporation by reference.

§ 51.11 Letter transmitting final document.

Each agency submitting a document under this part shall send with it a letter of transmittal covering the matter of incorporation by reference and referring specifically to the advance consultation.

§ 51.12 Stamp of approval.

(a) Whenever the Director of the Federal Register accepts a document under this part a statement will be printed in the FEDERAL REGISTER as part of the document substantially as follows:

Incorporation by reference provisions approved by the Director of the Federal Register _____
(date)

[FR Doc.72-18990 Filed 11-3-72;8:51 am]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN SOCIETY FOR TESTING)
AND MATERIALS, *et al.*,)
)
Plaintiffs,)
)
v.) Case No. 13-cv-1215 (TSC)
)
PUBLIC.RESOURCE.ORG, INC.,)
)
Defendant.)

MEMORANDUM OPINION

Plaintiffs are three non-profit organizations that develop and publish industry standards to guide professionals working in a variety of commercial trades. They allege that Defendant, a non-profit organization devoted to publicly disseminating legal information, violated copyright and trademark laws by copying and republishing some of Plaintiffs' written works onto its website. In 2017, the court granted summary judgment to Plaintiffs on their copyright and trademark claims. In 2018, the D.C. Circuit reversed the court's decision and remanded with instructions to further develop the factual record. The parties have since supplemented the record, each filing new statements of fact and motions for summary judgment that are now pending before the court. For the reasons explained below, the court will GRANT IN PART and DENY IN PART Plaintiffs' motion for summary judgment and for a permanent injunction, and GRANT IN PART and DENY IN PART Defendant's cross-motion for summary judgment.

I. BACKGROUND

In the United States, a complex public-private partnership has developed over the last century in which private industry groups or associations, rather than government agencies,

develop standards, guidelines, and procedures that set the best practices in particular industries. Plaintiffs—the American Society for Testing and Materials (“ASTM”), National Fire Protection Association, Inc. (“NFPA”), and American Society of Heating, Refrigerating, and Air-Conditioning Engineers (“ASHRAE”)—each participate in such a public-private partnership.¹ Each Plaintiff relies on volunteers and association members from numerous sectors with technical expertise to develop private sector codes and standards aimed at advancing public safety, ensuring compatibility across products and services, facilitating training, and spurring innovation. *See* ECF No. 118-2, Pls.’ Statement of Material Facts (“Pls.’ SMF”) ¶¶ 9, 13, 14, 86, 87, 129, 130. These standards include technical works, product specifications, installation methods, methods for manufacturing or testing materials, safety practices, and other best practices or guidelines. *Id.* ¶ 1. For example, ASTM has developed over 12,000 standards that are used in a wide range of fields, including consumer products, iron and steel products, rubber, paints, plastics, textiles, medical services and devices, electronics, construction, energy, water, and petroleum products, and are a result of the combined efforts of over 23,000 technical members. *Id.* ¶¶ 13, 28, 41. NFPA has developed over 300 standards in the areas of fire, electrical, and building safety, including the National Electrical Code, first published in 1897 and most recently in 2020. *Id.* ¶¶ 86, 87, 92-94. And ASHRAE has published over 100 standards for

¹ In *ASTM I*, the court also considered copyright and trademark claims brought in a related case against Defendant by American Educational Research Association, Inc., American Psychological Association, Inc., and National Council on Measurement in Education, Inc. *See Am. Soc’y for Testing & Materials v. Public.Resource.org, Inc.*, No. 13-CV-1215 (TSC), 2017 WL 473822, at *1-2 (D.D.C. Feb. 2, 2017) (referencing Case No. 14-CV-857-TSC). On October 14, 2020, the parties in that case entered a joint stipulation whereby the plaintiffs agreed to dismiss all claims and Defendant agreed to dismiss all counterclaims. *See* ECF No. 149, Stipulation of Dismissal; *see also* Min. Order (Oct. 20, 2020) (dismissing plaintiffs’ claims with prejudice and dismissing Defendant’s counterclaims as moot).

a variety of construction-related fields, including energy efficiency, indoor air quality, refrigeration, and sustainability. *Id.* ¶ 130.

The standards Plaintiffs develop comprise the technical expertise of many volunteers and association members from numerous sectors, who develop the standards “using procedures whose breadth of reach and interactive characteristics resemble governmental rulemaking, with adoption requiring an elaborate process of development, reaching a monitored consensus among those responsible within the [standard development organizations].” Peter L. Strauss, *Private Standards Organizations and Public Law*, 22 Wm. & Mary Bill Rts. J. 497, 501 (2013). ASTM Plaintiffs develop their standards using technical committees with representatives from industry, government, consumers, and technical experts. Pls.’ SMF ¶¶ 7, 28, 29, 109, 114, 135. These committees conduct open proceedings, consider comments and suggestions, provide for appeals, and through subcommittees, draft new standards, which the full committees vote on. *Id.* ¶¶ 31–37, 109, 136, 139.

The standards ordinarily serve as voluntary guidelines for self-regulation. However, federal, state, and local governments have incorporated by reference thousands of these standards into law. Pursuant to 5 U.S.C. § 552, federal agencies may incorporate voluntary consensus standards—as well as, for example, state regulations, government-authored documents, and product service manuals—into federal regulations by reference. See Emily S. Bremer, *Incorporation by Reference in an Open-Government Age*, 36 Harv. J.L. & Pub. Pol’y 131, 145–47 (2013) (providing a general overview of the federal government’s incorporation of materials by reference). The federal government’s practice of incorporating voluntary consensus standards by reference is intended to achieve several goals, including eliminating the cost to the federal government of developing its own standards, encouraging long-term growth for U.S. enterprises,

promoting efficiency, competition, and trade, and furthering the reliance on private sector expertise. *See ASTM*, 2017 WL 473822, at *2-4 (discussing incorporation by reference of industry standards); *Am. Soc’y for Testing & Materials v. Public.Resource.Org, Inc.*, 896 F.3d 437, 442 (D.C. Cir. 2018) (same).

Plaintiffs recoup the cost of creating their standards the way that copyright owners generally do—they sell copies of their work product in both PDF and hard copy form to the public. *See ASTM*, 2017 WL 473822, at *4, *10-11; Pls.’ SMF ¶¶ 45-47, 106-08, 153-54. Plaintiffs also maintain “reading rooms” on their websites that allow interested parties to view the standards that have been incorporated by reference into law as images. *Id.* ¶¶ 63–64, 100, 161. Those standards may not, however, be printed or downloaded in that format. *Id.*

Defendant Public.Resource.Org, Inc. (“PRO”) is a not-for-profit organization whose mission is to “make the law and other government materials more widely available so that people, businesses, and organizations can easily read and discuss [the] laws and the operations of government.” ECF No. 213-20, Pls.’ Statement of Disputed Facts (“Pls.’ SDF”) ¶ 2. For example, Defendant posts government-authored materials on its website, including judicial opinions, Internal Revenue Service records, patent filings, and safety regulations. *Id.* ¶¶ 3–4. It does not charge fees to view or download these materials. *Id.* ¶ 5.

Between 2012 and 2014, Defendant purchased hard copies of each of the standards at issue, scanned them into PDF files, added a cover sheet, and posted them online. *ASTM*, 896 F.3d at 444. In some instances, Defendant modified the files so that the text of the standards could more easily be enlarged, searched, and read with text-to-speech software. *Id.* The copies that Defendant posted to its website all bore Plaintiffs’ trademarks. Pls.’ SMF ¶ 210. Defendant

also uploaded Plaintiffs' standards to the Internet Archive, a separate independent website. Pls.' SDF ¶ 185.

A. ASTM I

In 2013, Plaintiffs sued Defendant for copyright and trademark infringement, contributory copyright infringement, unfair competition, and false designation of origin as to 257 standards. *See* ECF No. 1, Compl. ¶¶ 142–195. Defendant counter-sued, seeking a declaratory judgment that its conduct does not violate copyright law or trademark law. *See* ECF No. 21, Answer ¶¶ 174–205. Plaintiffs moved for summary judgment on all but their contributory copyright infringement claim and limited their motion to nine of the 257 standards, contending that the court's guidance on those nine standards, a "subset of particularly important standards," would allow the parties "to resolve any remaining dispute with respect to the other works in suit." ECF No. 118-1, Pls.' First Mot. for Summ. J. ("Pls.' First MSJ") at 2 & n.1.² Defendant responded with its own cross-motion for summary judgment.

The court denied Defendant's motion and granted summary judgment to Plaintiffs on their direct copyright infringement and trademark infringement claims. The court found that Plaintiffs held valid and enforceable copyrights in the incorporated standards that Defendant had copied and distributed, and that Defendant failed to create a triable issue of fact that its reproduction qualified as "fair use." *ASTM*, 2017 WL 473822, at *18. As to ASTM's trademark infringement claims, the court held that Defendant had used copies of ASTM's marks in commerce in a manner "likely to cause confusion," *id.* at *20, *22-23 (citing Restatement

² In *ASTM I*, the nine standards were: ASTM D86-07, ASTM D975-07, ASTM D396-98, ASTM D1217-93 (98), the 2011 and 2014 versions of NFPA's National Electrical Code, and the 2004, 2007 and 2010 versions of ASHRAE's Standard 90.1. Pls.' First MSJ at 2.

(Third) of Unfair Competition § 21 cmt. j (1995)), and that its reproduction of the marks did not qualify as a nominative fair use, *id.* at *23.

Defendant appealed, challenging the court’s ruling as to both copyright and trademark infringement.

The D.C. Circuit first rejected Defendant’s arguments as to copyright ownership. Defendant had argued that the participation of federal government employees in the creation of certain standards rendered them noncopyrightable works of the U.S. Government. *ASTM*, 896 F.3d at 446. The Circuit found that Defendant “forfeited” this argument by not adequately presenting it to the district court, and that such a claim was, in any event, “meritless,” because Defendant “submitted no evidence that specific language in any of the works was ‘prepared by an officer or employee of the United States Government as part of that person’s official duties.’” *Id.* (quoting 17 U.S.C. § 101).

Aside from its government-work argument, Defendant primarily advanced two arguments upon which the Circuit focused. First, Defendant argued that incorporation by reference makes the standards “part of the ‘law,’ and the law can never be copyrighted.” *Id.* The Circuit reasoned that Defendant’s argument presented a “serious constitutional concern with permitting private ownership of standards essential to understanding legal obligations,” but opted to save this “thorn[y]” constitutional question “for another day.” *Id.* at 441, 447. It explained that it could resolve the appeal within the confines of the Copyright Act without addressing the constitutional question, a course that was particularly prudent because the record revealed little about how the challenged standards were incorporated. *Id.* at 447. For example, “it is one thing to declare that ‘the law’ cannot be copyrighted but wholly another to determine whether any one of these incorporated standards—from the legally binding prerequisite to a labeling requirement,

see 42 U.S.C. § 17021(b)(1), to the purely discretionary reference procedure, *see* 40 C.F.R. § 86.113-04(a)(1)—actually constitutes “the law.”” *Id.* By avoiding the constitutional question, the Circuit also limited “the economic consequences that might result from [Plaintiffs] losing copyright . . . by allowing copying only where it serves a public end rather than permitting competitors to merely sell duplicates at a lower cost.” *Id.* The Circuit explained that its narrow approach avoided creating “*sui generis* caveats to copyright law for incorporated standards.” *Id.*

The Circuit then addressed the second of Defendant’s two main arguments: that its use of Plaintiffs’ copyright material was permissible “fair use” because it facilitates public discussion about the law—a use within the “public domain.” *Id.* at 448. Though the Circuit found reason to believe “as a matter of law” that Defendant’s “reproduction of certain standards ‘qualif[ies] as a fair use of the copyrighted work,’” it reasoned that “the better course is to remand the case for the district court to further develop the factual record and weigh the [four fair-use] factors as applied to [Defendant’s] use of each standard in the first instance.” *Id.* at 448-49 (quoting *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 560 (1985)). The Circuit found that the record did not support the conclusion that Defendant distributed copies of the incorporated standards solely to undermine Plaintiffs’ ability to raise revenue. *Id.* at 449 (citing *ASTM*, 2017 WL 473822, at *18). Rather, it appeared that Defendant distributed the standards to educate “the public about the specifics of governing law.” *Id.* (citing Def. Br. 43 (explaining that “[t]here is no better way to teach the law to the public than to *provide the public with the law*”)); ASTM Br. 34 (“[Defendant’s] purpose is to enable members of the public to obtain copies of [the standards].”). The Circuit also faulted the court and parties for “treating the standards interchangeably” by not considering the variations and legal status of each of the standards. *Id.* at 448-49. It therefore directed the court to reconsider Defendant’s defense on “a fuller record

regarding the nature of each of the standards at issue, the way in which they are incorporated, and the manner and extent to which they were copied by [Defendant].” *Id.* at 449. At the same time, the court need not consider each standard individually where, as here, the standards are susceptible to groupings relevant to the fair use analysis. *Id.*

On Plaintiffs’ trademark infringement claims, the Circuit directed the court to reconsider Defendant’s affirmative defense of nominative fair use, reasoning that “it may well be that [Defendant] overstepped when it reproduced both ASTM’s logo and its word marks,” but that the district court’s analysis of that defense would “provide valuable insight both into whether trademark infringement has occurred and, if so, how broad a remedy is needed to address the injury.” *Id.* at 457.

B. Fact Development on Remand and Second Motions for Summary Judgment

Following remand, Defendant reposted its versions of Plaintiffs’ standards to the Internet Archive website. ECF No. 199-2, Pls.’ Second Statement of Material Facts (“Pls.’ 2d SMF”) ¶ 11; ECF No. 204-1, Def.’s Statement of Disputed Facts (“Def.’s SDF”) ¶ 11. In doing so, it largely redacted Plaintiffs’ logos. *See* Pls.’ 2d SMF ¶¶ 21-25; Def.’s SDF ¶¶ 21-25. Plaintiffs, however, point to instances where Defendant did not redact the ASTM logo and word mark, and the NEC logo. *See* Pls.’ 2d SMF ¶¶ 23-25.

Defendant also changed the disclaimers it includes with each of Plaintiffs’ works that it posts. Those disclaimers take three forms. The first appears on the cover page of posted PDF copies of Plaintiffs’ works. Pls.’ 2d SMF ¶ 26; Def.’s SDF ¶ 26. The second appears on the Internet Archive webpage below the PDF copy. Pls.’ 2d SMF ¶ 27; Def.’s SDF ¶ 27. The third appears as a “preamble” to Defendant’s HTML-format copies of Plaintiffs’ standards available for download on the Internet Archive website. Pls.’ 2d SMF ¶ 28; Def.’s SDF ¶ 28.

Plaintiffs and Defendant have since developed (and sought to limit) the factual record by filing statements of fact and evidentiary objections,³ and each side has again moved for summary judgment.

As to its copyright claims, Plaintiffs move for summary judgment with regard to 217 standards. *See* ECF No. 199, Pls.’ Second Mot. for Summ. J. (“Pls.’ 2d MSJ”); *see also* ECF 198-2, Pls.’ Appendix A (listing each of the 217 standards). Plaintiffs argue that they own valid copyrights in the 217 standards, that Defendant “indiscriminately” copied and republished those standards and therefore failed to comport with Circuit guidance on what qualifies as “fair use.” *See* Pls.’ 2d MSJ at 10-12. Plaintiffs group the standards into five categories: (1) standards for which Defendant has not correctly identified an incorporating reference; (2) standards containing discretionary portions or reference procedures; (3) standards that have only been partially incorporated by reference into law; (4) standards that do not impose legal duties on any private party; and (5) standards containing non-mandatory aids or supplements, including appendices,

³ *See* Pls.’ 2d SMF; ECF No. 203-2, Def.’s Second Statement of Material Facts (“Def. 2d SMF”); Def.’s SDF; ECF No. 204-2, Def.’s Evidentiary Objs.; Pls.’ SDF; ECF No. 212-2, Pls.’ Resp. to Def. Statement of Disputed Facts; ECF No. 213-1, Pls.’ Third Statement of Material Facts (“Pls.’ 3d SMF”); ECF No. 213-21, Pls.’ Resp. to Evidentiary Objs.; ECF No. 214-1, Def.’s Resp. to Evidentiary Objs.; ECF No. 215-2, Def.’s Evidentiary Objs. in Reply to Pls.’ Opp’n; ECF No. 215-10, Def.’s Suppl. Statement of Disputed Facts (“Def.’s Suppl. SDF”); ECF No. 215-12, Def.’s Mot. to Strike Pls.’ Resp. to Def.’s Statement of Disputed Facts; ECF No. 217, Pls.’ Evidentiary Objs. to Def.’s Reply ISO 2d MSJ; ECF No. 218, Def.’s Resp. to Pls.’ Evidentiary Objs. to Def.’s Reply ISO 2d MSJ. The court does not rely on the disputed evidence in resolving the parties’ cross-motions and therefore does not address the evidentiary objections.

Defendant has also asked the court to take judicial notice of certain aspects of the version of the 2002 National Electrical Safety Code (NESC) that the Indiana Supreme Court cited in *Bellwether Properties, LLC v. Duke Energy Indiana, Inc.*, 87 N.E.3d 462, 469 (Ind. 2017), *see* ECF No. 204-3. The court grants Defendant’s request to take judicial notice of certain aspects of the version of the 2002 National Electrical Safety Code (NESC) that the Indiana Supreme Court cited in *Bellwether Properties, LLC v. Duke Energy Indiana, Inc.*, 87 N.E.3d 462, 469 (Ind. 2017); however, the court does not rely on this information to resolve the parties’ cross-motions.

summaries of changes, summaries of test methods, significance and use sections, and supplementary requirements. *See* Pls.' 2d SMF at 8-44. Plaintiffs also argue that Defendant's use of each standard undermines the actual and potential markets for Plaintiffs' works. *See* Pls.' 2d MSJ at 25-31.

As to its trademark claims, Plaintiffs argue that Defendant does not need to use Plaintiffs' marks, logos, organizational names, or identify the standards by name to advance its mission of educating the public about binding legal obligations. *Id.* at 33-34. Plaintiffs also contend that Defendant's use of Plaintiffs' logos goes beyond what is reasonably necessary to identify Plaintiffs' works, and that Defendant's disclaimers fail to adequately reduce the likelihood of consumer confusion. *Id.* at 34-37.

Finally, Plaintiffs seek a permanent injunction barring Defendant from reproducing and using Plaintiffs' standards and trademarks because they will otherwise suffer irreparable harm, no other adequate remedy is available to compensate them, the harm to Plaintiffs outweighs any potential harm to Defendant, and the public interest favors an injunction. *Id.* at 38-45.

Defendant responds to Plaintiffs' copyright claims by arguing that its use of the incorporated standards is non-infringing fair use. *See* ECF No. 203-1, Def. Second Mot. for Summ. J. ("Def.'s 2d MSJ"). Specifically, Defendant contends that the federal government has incorporated into law every standard at issue in its entirety, that those standards are not generally and freely accessible, and that Defendant's actions have no effect on Plaintiffs' standard sales. *Id.* at 8-10. Defendant also "reasserts its earlier arguments" made in support of its first motion for summary judgment that Plaintiffs' standards are not entitled to copyright protection because: (1) the standards are binding laws of the United States and at least one state; (2) the standards are not copyrightable subject matter pursuant to 17 U.S.C. § 102(b); (3) the merger doctrine

precludes enforcement of copyright in works which have become government edicts and political facts as laws by incorporation; and (4) enforcement of the copyrights through the prior restraint that Plaintiffs seek case would violate the First, Fifth, and Fourteenth Amendments of the United States Constitution. *See* ECF No. 202 (citing ECF Nos. 120-126, 146-147, 149, 151, 160-161, 163-168).

In response to Plaintiffs' trademark claim, Defendant argues that Plaintiffs have not offered evidence of consumer confusion and that its use of Plaintiffs' marks constitutes nominative fair use because the standards are not readily identifiable without Plaintiffs' marks, Defendant has included only what is necessary to identify the standards, and has not suggested that Plaintiffs sponsor or endorse Defendant's postings. Def.'s 2d MSJ at 30-37.

C. Supplemental Briefing: *Georgia v. Public.Resource.Org, Inc.*

After the parties submitted their summary judgment briefing, the Supreme Court decided *Georgia v. Public.Resource.Org, Inc.*, 140 S. Ct. 1498 (2020). At the court's request, the parties submitted supplemental briefing on the impact of that decision on this case.

In *Georgia*, the Court considered whether annotations in the Official Code of Georgia Annotated, which is the authoritative version of Georgia's statutes under Georgia law, were in the public domain along with the statutes themselves. *Georgia*, 140 S. Ct. at 1504-05. LexisNexis drafted the annotations pursuant to a work-for-hire agreement with a Georgia state commission, such that Georgia was considered the "author" of those annotations for copyright purposes. *See id.* at 1505. When PRO—the same defendant as in this case—copied the annotated code, Georgia sued, arguing that the annotations were not in the public domain because, unlike the statutes, they did not carry the "force of law." *See id.* The district court

agreed with Georgia, but the Eleventh Circuit reversed, using a three-part test that considered whether the annotations were constructively authored by citizens. *See id.* at 1505–06.

The Supreme Court affirmed the Eleventh Circuit but announced a different rule: that the government edicts doctrine—under which officials empowered to speak with the force of law cannot be the authors of, and therefore cannot copyright, the works they create in the course of their official duties—applies equally to “non-binding, explanatory legal materials created *by a legislative body* vested with the authority to make law.” *Id.* at 1503 (emphasis in original). The Court based its rule in significant part on its construction of the term “author,” noting that judges and legislators could not be considered authors entitled to copyright in their official works because those officials were “vested with the authority to make and interpret the law.” *Id.* at 1507. As a corollary to its author-focused rule, the Supreme Court added that the government edicts doctrine “does not apply, however, to works created by . . . private parties[] who lack the authority to make or interpret the law.” *Id.*

The Court went on to note: “The animating principle behind [the government edicts doctrine] is that no one can own the law. Every citizen is presumed to know the law, and it needs no argument to show . . . that all should have free access to its contents.” *Id.* (internal quotation marks and citations omitted).

II. LEGAL STANDARD

Summary judgment may be granted if “the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48 (1986) (“[T]he mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine

issue of material fact.”) (emphasis in original); *Holcomb v. Powell*, 433 F.3d 889, 895 (D.C. Cir. 2006). Summary judgment may be rendered on a “claim or defense . . . or [a] part of each claim or defense.” Fed. R. Civ. P. 56(a).

“A party asserting that a fact cannot be or is genuinely disputed must support the assertion by . . . citing to particular parts of materials in the record.” Fed. R. Civ. P. 56(c)(1)(A). “A fact is ‘material’ if a dispute over it might affect the outcome of a suit under governing law; factual disputes that are ‘irrelevant or unnecessary’ do not affect the summary judgment determination. An issue is ‘genuine’ if ‘the evidence is such that a reasonable jury could return a verdict for the nonmoving party.’” *Holcomb*, 433 F.3d at 895 (quoting *Liberty Lobby*, 477 U.S. at 248) (citation omitted). The party seeking summary judgment “bears the heavy burden of establishing that the merits of his case are so clear that expedited action is justified.” *Taxpayers Watchdog, Inc. v. Stanley*, 819 F.2d 294, 297 (D.C. Cir. 1987).

In considering a motion for summary judgment, “[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor.” *Liberty Lobby*, 477 U.S. at 255; see also *Mastro v. Potomac Elec. Power Co.*, 447 F.3d 843, 850 (D.C. Cir. 2006) (“We view the evidence in the light most favorable to the nonmoving party and draw all inferences in its favor.”). The nonmoving party’s opposition, however, must consist of more than mere unsupported allegations or denials, and must be supported by affidavits, declarations, or other competent evidence setting forth specific facts showing that there is a genuine issue for trial. See Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). The non-movant “is required to provide evidence that would permit a reasonable jury to find [in his favor].” *Laningham v. U.S. Navy*, 813 F.2d 1236, 1242 (D.C. Cir. 1987).

Plaintiffs seek to permanently enjoin Defendant from all reproduction, display, or distribution of Plaintiffs' standards and all use of Plaintiffs' trademarks. *See* Pls.' 2d MSJ at 38. "A preliminary injunction is 'an extraordinary remedy that may only be awarded upon a clear showing that the [movant] is entitled to such relief.'" *John Doe. Co. v. Consumer Fin. Prot. Bureau*, 849 F.3d 1129, 1131 (D.C. Cir. 2017) (alteration in original) (quoting *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008)). A "plaintiff seeking a permanent injunction must satisfy a four-factor test before a court may grant such relief." *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006). Specifically, a plaintiff must show that: (1) it has suffered or will suffer an irreparable injury; (2) remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) weighing the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) the public interest would not be disserved by a permanent injunction. *Id. See also Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 162 (2010) (finding permanent injunction not warranted because, "[m]ost importantly," respondent failed to show "any present or imminent risk of likely irreparable harm").

III. ANALYSIS

A. Copyright Infringement

Article I, Section 8, Clause 8, of the Constitution empowers Congress "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." U.S. Const. art. I, § 8, cl. 8. So empowered, the first Congress enacted the Copyright Act of 1790, granting authors of certain works "the sole right and liberty of printing, reprinting, publishing and vending" those works "for the term of fourteen years." Act of May 31, 1790, § 1, 1 Stat. 124.

Since then, the precise contours of the Copyright Act have changed, but Congress's purpose has remained constant:

The enactment of copyright legislation by Congress under the terms of the Constitution is not based upon any natural right that the author has in his writings . . . but upon the ground that the welfare of the public will be served and progress of science and useful arts will be promoted by securing to authors for limited periods the exclusive rights to their writings.

H.R. Rep. No. 60-2222, at 7 (1909); *see also Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984) (This “limited grant” is “intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired.”). “The challenge with each iteration of the Act, both for its drafters and its interpreters, has been to strike the ‘difficult balance between the interests of authors and inventors in the control and exploitation of their writings and discoveries on the one hand, and society’s competing interest in the free flow of ideas, information, and commerce on the other hand.’” *ASTM*, 896 F.3d at 448 (quoting *Sony Corp.*, 464 U.S. at 429).

Under the current iteration of the Copyright Act, copyright protection subsists “in original works of authorship fixed in any tangible medium of expression,” and vests initially in the author(s) of that work. 17 U.S.C. §§ 102(a), 201(a). Ownership can be transferred in whole or in part, and the exclusive rights of copyright ownership may also be transferred. *Id.* § 201(d). An owner of a valid copyright has the “exclusive right[]” to reproduce, distribute, or display the copyrighted works as well as to prepare derivative works based upon it. *Id.* § 106(1) – (3), (5). One who violates the exclusive rights of the copyright owner “is an infringer of the copyright or right of the author, as the case may be.” *Id.* § 501(a). The legal or beneficial owner of that exclusive right may then “institute an action for any infringement.” *Id.* § 501(b). To succeed on

a copyright infringement claim, a plaintiff must prove both “(1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original.” *Stenograph, LLC v. Bossard Assocs., Inc.*, 144 F.3d 96, 99 (D.C. Cir. 1998) (quoting *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991)).

On the other hand, reflecting copyright’s balance between private ownership and public welfare, the Act has long recognized that certain “fair use[s]” of a copyrighted work do not constitute infringement. *ASTM*, 896 F.3d at 446 (citing 17 U.S.C. § 107). Not all uses of a copyrighted work are “within the exclusive domain of the copyright owner,” rather, as the Supreme Court has explained, “some are in the public domain.” *Id.* (quoting *Sony Corp.*, 464 U.S. at 433).

1. Ownership of Valid Copyrights

a. Ownership

Plaintiffs move for summary judgment on 217 standards: the 9 standards at issue in *ASTM I*,⁴ plus 208 additional standards listed in their Complaint. While the court previously held that Plaintiffs own copyrights in the 9 standards at issue in *ASTM I*, it must now determine whether Plaintiffs own copyrights in the other 208 standards such that they have standing to challenge Defendant’s alleged infringement. The court finds that they do.

The Copyright Act provides that possession of a certificate of registration from the U.S. Copyright Office “made before or within five years after first publication of the work shall constitute prima facie evidence,” creating a rebuttable presumption of ownership of a valid

⁴ See ECF No. 118, Pls.’ First Mot. for Summ. J. (moving for summary judgment as to ASTM D86-07, ASTM D975-07, ASTM D396-98, ASTM D1217-93(98), the 2011 and 2014 versions of NFPA’s National Electrical Code, and the 2004, 2007 and 2010 versions of ASHRAE’s Standard 90.1).

copyright. 17 U.S.C. § 410(c); *see also* *MOB Music Publ'g v. Zanzibar on the Waterfront, LLC*, 698 F. Supp. 2d 197, 202 (D.D.C. 2010). If the copyright was registered more than five years after the work was published, the “evidentiary weight to be accorded . . . shall be within the discretion of the court.” 17 U.S.C. § 410(c).

When a party offers as prima facie evidence a registration certificate for a compilation of individual works that it authored rather than the registration for a specific individual work, a court may consider this to be similar prima facie evidence of ownership, creating the same rebuttable presumption. *See Xoom, Inc. v. Imageline, Inc.*, 323 F.3d 279, 283-84 (4th Cir. 2003), *abrogated by Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154 (2010); *Morris v. Business 12 Concepts, Inc.*, 259 F.3d 65, 68 (2d Cir. 2001), *abrogated on other grounds by Muchnick*, 559 U.S. 154 (2010). Moreover, the registration certificate is sufficient prima facie evidence for the individual works within the compilation, if the compilation is deemed to be a “single work.” Federal regulations provide that “all copyrightable elements that are otherwise recognizable as self-contained works, that are included in the same unit of publication, and in which the copyright claimant is the same” constitute a “single work,” and are validly registered under a single registration certificate. 37 C.F.R. § 202.3(b)(4); *Kay Berry, Inc. v. Taylor Gifts, Inc.*, 421 F.3d 199, 205–06 (3d Cir. 2005); *Yurman Studio, Inc. v. Castaneda*, 591 F. Supp. 2d 471, 483 (S.D.N.Y. 2008).

Plaintiffs produced registration certificates for each of the 217 standards at issue, and each certificate lists Plaintiffs as the authors of the works. *See* Pls.’ 2d SMF ¶¶ 1-10. Specifically, ASTM has obtained copyright registration certificates that cover 191 of its standards. *See* ECF No. 198-5, Declaration of Jane W. Wise (“Wise Decl.”) ¶¶ 2, 31-149, Exs. 30-148; ECF No. 118-7, Declaration of Thomas O’Brien (“O’Brien Decl.”) ¶¶ 5-12, Exs. 1-4.

The registrations for 187 of ASTM’s standards—those whose numbers appear in bold in Plaintiffs’ Annex A, ECF No. 198-4—were effective within five years of the date of first publication identified in the registration certificate. *See* Pls.’ 2d SMF ¶ 7; Wise Decl. ¶¶ 2-33, 35-57, 59-65, 67-149, Exs. 1-32, 34-56, 58-148; O’Brien Decl. ¶¶ 7-11, Exs. 3-4. ASTM’s other four standards⁵ were registered more than five years after they were published, but the court accords these the same evidentiary weight as if they had been registered within five years. *See* 17 U.S.C. § 410(c) (court has discretion over evidentiary weight).

NFPA produced copyright registration certificates for its twenty-three standards at issue, each obtained within five years of publication. ECF No. 118-3, Declaration of Dennis J. Berry (“Berry Decl.”) ¶¶ 2-3, Exs. A, B; ECF No. 198-50, Supplemental Declaration of James T. Pauley (“Supp. Pauley Decl.”) ¶¶ 6-24, Exs. W-OO (certificates of registration). Likewise, ASHRAE produced copyright registration certificates for its three standards at issue, each within five years of publication. ECF No. 118-10, Declaration of Stephanie Reiniche (“Reiniche Decl.”) ¶ 15, Exs. 3-5.

Plaintiffs’ registration certificates create a presumption of validity and ownership with respect to both their individually registered works and to the original works that comprise Plaintiffs’ registered compilations. *ASTM*, 2017 WL 473822, at *6-7 (“Plaintiffs are the owners of the copyrights at issue and have standing to bring their claims.”); 17 U.S.C. § 410(c); *MOB Music Publ’g*, 698 F. Supp. 2d at 202.

Consequently, the burden shifts to Defendant to prove the contrary. *Hamil Am., Inc. v. GFI, Inc.*, 193 F.3d 92, 98 (2d Cir. 1999) (once a copyright holder has proffered prima facie evidence of ownership, the alleged infringer “challenging the validity of the copyright has the

⁵ A106/A108M, C150, D86, D975.

burden to prove the contrary”); *United Fabrics Int’l, Inc. v. C&J Wear, Inc.*, 630 F.3d 1255, 1257 (9th Cir. 2011) (infringer “has the burden of rebutting the facts set forth in the copyright certificate”). Defendant makes three arguments challenging validity, none of which are persuasive.

First, Defendant questions whether the standards at issue were ever validly copyrighted given the Act’s prohibition on copyrighting “work[s] of the United States Government.” 17 U.S.C. § 105(a). According to Defendant, “[m]any federal government employees were among the volunteers [who collaborated with non-government employees and Plaintiffs to write the standards], so the employees (or the federal government itself) are among the joint authors.” *See* Def.’s 2d MSJ at 44 (emphasis in original).

Defendant made this argument for the first time on appeal, and the Circuit rejected it as untimely and because Defendant “submitted no evidence that specific language in any of the works was ‘prepared by an officer or employee of the United States Government as part of that person’s official duties.’” *ASTM*, 896 F.3d at 446. While Defendant has now raised the argument with this court, *see* Def.’s 2d MSJ at 45 n.20, it has proffered no evidence that an officer or employee of the government prepared specific language in any of Plaintiffs’ standards as part of their official duties. *See id.* at 44. Without such evidence, Defendant’s argument is “meritless.” *ASTM*, 896 F.3d at 446.

For the same reason, Defendant’s second and related argument—that the standards are “government edicts”—fails. The government edicts doctrine applies only to state works and is narrower than the bar on copyright protection for federal works. *See Georgia*, 140 S. Ct. at 1509–10. For instance, the doctrine applies only to works of a judge or legislator, *id.* at 1513, whereas the Act’s bar on copyrighting “work[s] of the United States Government,” in 17 U.S.C.

§ 105, applies to works created by all federal “officer[s] or employee[s],” without regard to the nature of their position or scope of their authority, *id.* at 1509-10.

Defendant does not offer any evidence that a judge or legislator wrote any of Plaintiffs’ standards. Instead, it argues that “once incorporated into law, [Plaintiffs’ standards] are recreated as—transformed into—government edicts.” Def. Supp. Br. at 3-4 (citing *Georgia*, 140 S. Ct. at 1504). For support, Defendant relies on *Georgia v. Public.Resource.Org*, 140 S. Ct. at 1503, in which the works in question were prepared by a private company, Lexis, pursuant to a work-for-hire agreement with Georgia’s Code Revision Commission. *Georgia*, 140 S. Ct. at 1508. Unlike in *Georgia*, there is no evidence here that that state legislators hired Plaintiffs to draft the standards. The Copyright Act’s use of the term “author[.]” “presuppose[s] a degree of originality” and “[o]riginal, as the term is used in copyright, means . . . that the work was independently created by the author (as opposed to copied from other works).” *Feist*, 499 U.S. at 345-46. A government body that merely incorporates a standard by reference does not independently create any content, and therefore does not become an “author” of the standard. Defendant points to no authority to the contrary.

Third, Defendant attempts to overcome the presumption that Plaintiffs own copyrights in the standards by arguing that Plaintiffs failed to list all joint authors in their registration applications. Def.’s 2d MSJ at 45. The court has already considered and rejected this argument. *See ASTM*, 2017 WL 473822, at *7. “Beyond showing that Plaintiffs’ recordkeeping could perhaps be more thorough, Defendant has not identified any evidence that [Plaintiffs] do not own the copyrights of the standards.” *Id.*; *see also Alaska Stock, LLC v. Houghton Mifflin Harcourt Pub. Co.*, 747 F.3d 673, 685 (9th Cir. 2014) (upholding the validity of copyright registrations that did not list all joint authors); *Metro. Reg’l Info. Sys., Inc. v. Am. Home Realty Network, Inc.*,

722 F.3d 591, 593, 596-99 (4th Cir. 2013) (same); 2 Nimmer on Copyright § 7.20[B][1]; (“mention in a registration certificate of only one of two co-authors does not affect the validity of the registration”). The Circuit did not disturb this holding, and Defendant has not offered any new evidence or argument that would cause the court to reconsider.

As in *ASTM I*, Defendant has not presented any “evidence *disproving* Plaintiffs’ authorship.” *ASTM*, 2017 WL 473822, at *7. Consequently, the court finds that Plaintiffs own copyrights in each of the 217 standards at issue and therefore have standing to bring their claims.

b. Valid Copyrights

In *ASTM I*, the court held that Plaintiffs owned “valid” copyrights, rejecting Defendant’s arguments that the standards either were never copyrightable or lost their copyright protection upon incorporation by reference into federal regulations. *See id.* at *8-15. The Circuit did not rule on this issue, and instead “left for another day” the “thorn[y] question of whether standards retain their copyright after they are incorporated by reference into law.” *ASTM*, 896 F.3d at 441. On remand, Defendant has not presented argument or evidence regarding the validity of Plaintiffs’ copyrights and therefore the court need not reconsider the issue.

2. Copying an Original Work and the Fair Use Defense

It is undisputed that Defendant reproduced and posted online for display or distribution the 217 standards at issue. In *ASTM I*, the court rejected the application of the merger or *scènes à faire* doctrines as affirmative defenses, a holding the Circuit did not disturb and that this court will not revisit. Defendant’s remaining argument is that its copying and posting of the standards was “fair use.”

The fair use defense provides that “the fair use of a copyrighted work, including such use by reproduction in copies . . . for purposes such as criticism, comment, news reporting, teaching

(including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.” 17 U.S.C. § 107. When considering whether a particular use is fair, courts must consider the following factors:

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

Id. “The factors enumerated in the section are not meant to be exclusive: ‘[S]ince the doctrine is an equitable rule of reason, no generally applicable definition is possible, and each case raising the question must be decided on its own facts.’” *Harper & Row Publishers, Inc.*, 471 U.S. at 560 (alteration in original) (quoting H.R. Rep. No. 94-1476, at 65 (1976), as reprinted in 1976 U.S.C.C.A.N. 5659, 5678). Defendant bears the burden of showing fair use. *See Campbell*, 510 U.S. at 590.

Following remand, the parties provided additional details regarding the 217 standards at issue, including:

- A copy of each of Plaintiffs’ standards at issue, *see* Wise Decl., Ex. 149, ECF Nos. 198-5, 199-3–11; Pauley Decl., Exs. A–V, ECF Nos. 198-50, 199-12–33; Reiniche Decl., Exs. 1–2, ECF Nos. 198-53, 199-34; Dubay Decl., Ex. A, ECF Nos. 155-6;
- A copy of each of the ASTM standards as republished by Defendant on the Internet Archive, *see* Wise Decl., Ex. 151, ECF Nos. 198-5, 198-30–32;
- A copy of each of the ASTM standards as republished by Defendant in PDF format, *see* Wise Decl., Ex. 152, ECF Nos. 198-5, 198-33–37;

- A copy of some of the ASTM standards as republished by Defendant in HTML format; *see* Wise Decl., Ex. 165, ECF Nos. 198-5, 198-48;
- A copy of some of the NFPA standards as republished by Defendant on the Internet Archive, *see* Wise Decl., Ex. 166–68, ECF Nos. 198-5, 198-48;
- A copy of the cover sheets Defendant attached to the ASHRAE standards it republished on the Internet Archive, *see* Wise Decl., Ex. 169, ECF Nos. 198-5, 198-48; and
- Arguments as to how each standard has (or has not) been incorporated by reference into law, *see* Def.’s 2d MSJ at 9-10; Becker Decl. ¶ 57, Ex. 89-91; Supp. Wise Decl., Exs. 175–176.

Before turning to each of the four factors, and the court’s standard-by-standard analysis, the court first distinguishes between standards that have and have not been incorporated by reference into law.

For each of the 217 standards at issue, Defendant provided the court with what it contends is the incorporating-by-reference regulation. *See* Becker Decl. ¶ 57, Ex. 89-91. For 153 of the 217 standards, Defendant provided at least one regulation incorporating into law the standard Defendant published. These are identified in the attached Appendix as “Group 1 Standards.” As to the other 64 standards, Defendant cited to a regulation that incorporated a standard bearing a different designation than the one it published.⁶

⁶ Each ASTM standard has a unique designation. In each serial designation, the number following the dash indicates the year of original adoption as a standard, or the year the standard was last revised. *See* Pls.’ 2d SMF ¶ 35 (citing O’Brien Decl. Ex. 3 at 1349). Standards that have been reapproved without change are indicated by the year of last reapproval in parentheses as part of the designation number. For example, ASTM C5-79 (1997) indicates that ASTM C5 was reapproved in 1997. *Id.* A letter following this number indicates more than one revision during that year. For example, ASTM A106-04b indicates the second revision in 2004 to ASTM A106. *Id.* A superscript epsilon indicates an editorial change since the last revision or reapproval, so that ASTM A36-97ae1 indicates the first editorial revision of the 1997 version of

For 32 of those 64 standards, Defendant cites to a regulation that incorporated a version identical in text to the version Defendant published, but which was approved and published in a different year. *See* Pls.’ 2d SMF ¶ 35 (“Standards that have been reapproved without change are indicated by the year of last reapproval in parentheses as part of the designation number (e.g., C5-79 (1997) indicates that C5 was reapproved in 1997.”) (citing O’Brien Decl. Ex. 3 at 1349); Def.’s SDF at ¶ 35 (no objection); Def.’s 2d MSJ at 10 (contending that the “only difference between what was posted and the document cited in the C.F.R. is that the title adds a second, reissue, date in parentheses. All other text is identical”) (citing Def.’s 2d SMF ¶ 84). These standards are identified in the attached Appendix as “Group 2 Standards.”

Defendant argues that because the Group 2 Standards are identical to the text incorporated by reference into law, any discrepancy in the standard’s reissue date is not material to the fair-use analysis. Def.’s 2d MSJ at 9-10. The court agrees. As to each of these standards, Defendant has “[f]aithfully reproduc[ed] the *relevant text* of a technical standard incorporated by reference for purposes of informing the public about the law,” which “obviously has great value.” *ASTM*, 896 F.3d at 451 (emphasis added).

For the final 32 standards, identified as “Group 3 Standards,” Defendant concedes that these bear editorial and substantive differences from the ones incorporated by reference into law. Def.’s 2d MSJ at 9-10. Defendant does not identify which provisions of its postings are

ASTM A36. *Id.* If a standard is written in metric units, the metric version is indicated by the letter M (e.g., A369M-92 indicates that this version of A389 contains metric units). *Id.* When ASTM publishes standards in metric and inch-pound units it identifies the standard with a dual designation (e.g., ASTM A369/A369M-92 identifies a dual standard). *Id.* Regulations like the Code of Federal Regulations typically identify ASTM standards according to this specific designation number. For example, 40 C.F.R. § 114.600 specifies the edition of the ASTM standards incorporated by reference in 46 C.F.R. § 119.440, including B122/B122M95 and B96-93. *See* 40 C.F.R. § 114.600.

substantively different from what has been incorporated into law, or which provisions are the same; instead, it indiscriminately posted its versions in their entirety. Defendant describes its error as “unfortunate” and contends that its mistake as to these 32 standards should not bear on the court’s fair use analysis regarding the other 185 standards. *Id.* at 10 n.5. While it may be that Defendant could permissibly repost the text of Group 3 Standards that is identical to text incorporated into law, its fair use defense that it may indiscriminately post standards known to be substantively different than versions incorporated by reference into law is dubious. *See ASTM*, 896 F.3d at 450 (explaining that incorporation of the 2011 version of a standard would not justify reproducing the 2014 edition that had not been incorporated); *id.* at 452 (explaining that a regulation requiring compliance with the two provisions of the 2011 National Electrical Code “would likely justify posting the specific text of only *those* two provisions of *that* version of the National Electrical Code,” but not other versions) (emphasis in original). “[U]nless a particular provision” of a standard has been incorporated into law, Defendant’s “claim that a paraphrase or summary would always be inadequate to serve its purposes seems less persuasive.” *Id.* at 451. Moreover, while Defendant could make a standard-by-standard argument that its publication of these 32 standards is a transformative use because portions of each provide key information for the public to debate certain public policies, *id.*, it has not done so.

a. Purpose and Character of the Use

The first fair-use factor asks courts to consider “the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes.” 17 U.S.C. § 107(1). Mindful of the statute’s stated goal to protect purposes such as criticism and comment, “the Supreme Court has explained that the fact that an infringing ‘publication was commercial as opposed to nonprofit . . . tends to weigh against a finding of fair use.’” *ASTM*,

896 F.3d at 449 (quoting *Harper & Row*, 471 U.S. at 562). While one consideration of the fair use inquiry is whether the copy “may serve as a market substitute for the original,” *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 587 (1994) (discussing the fourth fair use factor, *i.e.*, market effect), the “crux of the profit/nonprofit distinction is . . . whether the user stands to profit from exploitation of the copyrighted material without paying the customary price,” *Harper & Row*, 471 U.S. at 562.

Defendant’s “copies of the technical standards may, in some cases, serve as a [market] substitute” for Plaintiffs’ standards, in that Defendant distributes identical standards online in the same commercial market. The more pertinent inquiry, however, is whether Defendant stands to profit from its reproductions. *ASTM*, 896 F.3d at 449.

Here, “little, if anything, in the record indicates that [Defendant] stands to profit from its reproduction” of any of the 217 standards. *Id.* Indeed, this finding is consistent with Defendant’s “claimed purpose, reflected in the organization’s mission statement and summary-judgment submissions to the court, that it was distributing the standards to facilitate public debate.” *Id.*; *see also* Def.’s 2d MSJ at 16 (describing Defendant’s mission to promote public discourse by providing free access to the law, including statutes, judicial opinions, and professional standards incorporated by reference into law) (citing Def.’s 2d SMF ¶ 68). Defendant’s “attempt to freely distribute standards incorporated by reference into law qualified as a use that furthered the purposes of the fair use defense.” *ASTM*, 896 F.3d at 449.

A second facet of the “purpose and character” factor is “whether the use ‘adds something new, with a further purpose,’ or, put differently, ‘whether and to what extent the new work is transformative.’” *Id.* (quoting *Campbell*, 510 U.S. at 578–79) (internal quotation marks omitted). Although “transformative use is not absolutely necessary for a finding of fair use, the

goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works.” *Campbell*, 510 U.S. at 579 (internal citation omitted).

The D.C. Circuit found that this court “properly rejected some of [Defendant’s] arguments as to its transformative use—for instance, that [Defendant] was converting the works into a format more accessible for the visually impaired or that it was producing a centralized database of all incorporated standards.” *ASTM*, 896 F.3d at 450 (citing *ASTM*, 2017 WL 473822, at *16; *Am. Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 923–24 (2d Cir. 1994) (holding that photocopying articles “into a form more easily used in a laboratory” does not constitute transformative use but acknowledging “the benefit of a more usable format”)).

The Circuit remanded, though, for this court to consider “whether, in certain circumstances, distributing copies of the law for purposes of facilitating public access could constitute transformative use.” *ASTM*, 896 F.3d at 450. Specifically, the Circuit distinguished between an incorporated standard that “provides information essential to comprehending one’s legal duties,” which “would weigh heavily in favor of permitting a nonprofit seeking to inform the public about the law to reproduce in full the relevant portions of that particular standard,” and the incorporation of a standard as a reference procedure, which does not. *Id.*

The court conducts this inquiry on a standard-by-standard basis in the attached Appendix.

b. The Nature of the Copyrighted Work

The second fair use factor, “the nature of the copyrighted work,” 17 U.S.C. § 107(2), also requires an individual appraisal of each standard and its incorporation, *ASTM*, 896 F.3d at 451. “This factor,” the Supreme Court has explained, “calls for recognition that some works are closer to the core of intended copyright protection than others, with the consequence that fair use is more difficult to establish when the former works are copied.” *Campbell*, 510 U.S. at 586.

“Courts often reduce this inquiry to the question of whether the work is factual or fictional, as ‘[t]he law generally recognizes a greater need to disseminate factual works than works of fiction or fantasy.’” *ASTM*, 896 F.3d at 451 (quoting *Harper & Row*, 471 U.S. at 563).

One principle relevant to this inquiry is that “the express text of the law falls plainly outside the realm of copyright protection.” *See id.* at 450 (citing *Banks v. Manchester*, 128 U.S. 244, 253 (1888) (holding that state court judges may not copyright their judicial opinions because the “exposition and interpretation of the law, which, binding every citizen, is free for publication to all”); *Howell v. Miller*, 91 F. 129, 137 (6th Cir. 1898) (Harlan, J.) (“[A]ny person desiring to publish the statutes of a state may use any copy of such statutes to be found in any printed book, whether such book be the property of the state or the property of an individual.”)). Standards incorporated by reference, though, are closer to “the outer edge of ‘copyright’s protective purposes.’” *ASTM*, 896 F.3d at 451 (quoting *Campbell*, 510 U.S. at 586). As to this “outer edge” of copyright protection, the Circuit distinguishes between text that is incorporated by reference into law in a manner akin to copying all of the standard’s text into law, and text that is incorporated into law in a more nuanced way, such that the standard’s text is not an easy substitute for what is incorporated into law. *Id.* at 452. The former example would weigh “heavily in favor of fair use,” whereas in the latter example “fair use is harder to justify.” *Id.* The court considers this factor on a standard-by-standard basis in the attached Appendix.

c. The Amount of the Work Used

The third fair use factor focuses on “the amount and substantiality of the portion used in relation to the copyrighted work as a whole.” 17 U.S.C. § 107(3). The “extent of permissible copying varies with the purpose and character of the use,” and courts must consider whether

“the amount and substantiality of the portion used[’] . . . are reasonable in relation to the purpose of the copying.” *Campbell*, 510 U.S. at 586–87 (quoting 17 U.S.C. § 107(3)).

As with the first two factors, this third inquiry is ill-suited to wholesale resolution. *ASTM*, 896 F.3d at 451. Accordingly, the court considers Defendant’s copying on a standard-by-standard basis. *Id.* If Defendant “limits its copying to only what is required to fairly describe the standard’s legal import, this factor would weigh strongly in favor of finding fair use here, especially given that precision is ten-tenths of the law.” *Id.* at 452.

Here, as detailed in the attached Appendix, most of the standards at issue have been incorporated by reference into regulations that do not specify that only certain provisions of the standards are incorporated by reference into law, nor do the regulations indicate which specific provisions of the standards relate to regulatory compliance, suggesting that “a greater amount of the standard’s text might be fairly reproduced.” *Id.*

d. Effect on Value or Market

Under the fourth factor, the court must consider what effect the use has on “the potential market for or value of the copyrighted work.” 17 U.S.C. § 107. This requires the court to “consider not only the extent of market harm caused by the particular actions of the alleged infringer, but also ‘whether unrestricted and widespread conduct of the sort engaged in by the defendant . . . would result in a substantially adverse impact on the potential market’ for the original.” *Campbell*, 510 U.S. at 590 (alteration in original) (quoting 3 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 13.05[A][4], at 13–102.61 (1993) (footnotes omitted)). The court must also take into account the “harm to the market for derivative works,” which the Supreme Court declared to be “undoubtedly the single most important element of fair use.” *Harper & Row*, 471 U.S. at 566, 568 (footnote and citation omitted).

The parties disagree about who bears the burden of showing the effect Defendant's republication has on the potential market for or value of Plaintiffs' standards. The Supreme Court has applied the burden differently depending on whether the challenged use is commercial or non-commercial. When a case involves commercial use, there is a presumption that some meaningful "likelihood of future harm . . . exists," and the Court has held that the defendant must rebut that presumption of market effect. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 451 (1984) ("If the intended use is for commercial gain, that likelihood may be presumed. But if it is for a noncommercial purpose, the likelihood must be demonstrated."); *see also Campbell*, 510 U.S. at 590-91 (holding that, because fair use is an affirmative defense, "its proponent would have difficulty carrying the burden of demonstrating fair use without favorable evidence about relevant markets," and that a silent record on the fourth factor "disentitled the proponent of the defense" to summary judgment).

On the other hand, when a defendant uses the copyrighted work for noncommercial purposes, the Court has placed the burden on the plaintiff to show "by a preponderance of the evidence that *some* meaningful likelihood of future harm exists." *See Sony Corp.*, 464 U.S. at 451; *see also Fox Broad. Co. v. Dish Network L.L.C.*, 747 F.3d 1060, 1069 (9th Cir. 2014) (finding fourth factor weighed in favor of fair use where challenged use was for noncommercial purpose and the plaintiff failed to show likelihood of market harm); *Princeton Univ. Press v. Mich. Document Servs., Inc.*, 99 F.3d 1381, 1385 (6th Cir. 1996) ("The burden of proof as to market effect rests with the copyright holder if the challenged use is of a 'noncommercial' nature."); *Ass'n of Am. Med. Colls. v. Cuomo*, 928 F.2d 519, 526 (2d Cir. 1991) (Mahoney, J., concurring) ("Because [plaintiff] is challenging noncommercial use by the state, [plaintiff] has

the burden of proving ‘that *some* meaningful likelihood of future harm [to marketability] exists.’”) (quoting *Sony Corp.*, 464 U.S. at 451).

As previously explained, Defendant’s use is noncommercial, and so Plaintiffs must show “by a preponderance of the evidence that *some* meaningful likelihood of future harm exists.” *Sony Corp.*, 464 U.S. at 451. In *ASTM I*, the Circuit posited that Plaintiffs “are right to suggest that there may be some adverse impact on the market for the copyrighted works [Defendant] reproduced on its website,” but found that the record was unclear as to “just how serious that impact is.” *ASTM*, 896 F.3d at 453. The Circuit identified three questions to guide the court’s inquiry into the meaningful likelihood of future harm. *Id.* First, because Plaintiffs make copies of many of their standards freely available online in controlled reading rooms, and they “presumably do so without entirely cannibalizing sales of their standards, just how much additional harm does [Defendant’s] reproduction cause to the market for these standards?” *Id.* Second, if Defendant “were to reproduce only the incorporated provisions, would there still be a vibrant market for the standards in their entirety?” *Id.* And third, what consequences do Defendant’s postings have on the market for derivative works? *Id.*

As to the first question, Plaintiffs’ evidence falls well short of showing some meaningful likelihood of future harm. Plaintiffs begin with the premise that Defendant’s postings are “unrestricted” and “widely viewed,” and conclude that “[t]his means its users include those individuals and entities who would otherwise purchase or license copies of Plaintiffs standards.” *See* Pls.’ 2d MSJ at 27. But Plaintiffs’ evidentiary support for this proposition is meager: correspondence from an engineer asking Defendant if the Circuit’s decision in *ASTM I* meant Defendant could “update the site,” Wise Decl. ¶ 174, Ex. 173 at PRO_00267293, and correspondence from an engineering firm telling Defendant it heard about its organization from a

“colleague” and asking Defendant how it could access Defendant’s postings, *id.* ¶ 165, Ex. 164 at Interrog. 22. Those communications—showing that two entities were interested in accessing Defendant’s postings—do not explain whether the entities were interested in accessing Defendant’s postings in lieu of purchasing Plaintiffs’ standards, as opposed to simply accessing them in Plaintiffs’ read-only access rooms.

Plaintiffs also argue that beyond those two engineering entities, there “may also” be “further would-be-infringers” who could repurpose Defendant’s postings to turn a profit for themselves. *See* Pls.’ 2d MSJ at 27. This argument is even more tenuous than the former. Plaintiffs point to a third-party website offering users the ability to pay to access ASTM standards, but they do not assert—or offer any evidence to show—that the third party’s offerings are a result of Defendant’s actions, or whether the third party, like Defendant, purchased Plaintiffs’ standards and then scanned and uploaded them to its website. *See id.* (citing Pls.’ 2d SMF ¶¶ 105-06 (citing Wise Decl. ¶ 154-55)). In other words, evidence that other websites are also posting Plaintiffs’ standards—without any causal connection to Defendant’s actions—does not show “market harm caused by the particular actions of the alleged infringer,” nor does it show whether Defendant’s actions enabled “widespread conduct of the sort engaged in by [Defendant]” that “would result in a substantially adverse impact on the potential market for the original.” *Campbell*, 510 U.S. at 590 (internal quotation marks omitted).

Plaintiffs also contend that entities that regularly use Plaintiffs’ standards “are likely to use [Defendant’s] versions of the standards,” instead of purchasing standards from Plaintiffs or accessing Plaintiffs’ read-only rooms. *See* Pls.’ 2d MSJ at 28. In support, Plaintiffs cite to several declarations and one expert report, none of which are helpful. *See* Pls.’ 2d MSJ at 28 (citing Pls.’ 2d SMF ¶¶ 86 (citing Supp. Pauley Decl. ¶¶ 43, 45; Supp. Reiniche Decl. ¶ 3;

Thomas Decl. ¶ 12), 88 (citing Thomas Decl. ¶ 14; Jarosz Rep., ECF No. 119 ¶ 86; Pls.’ SMF ¶ 240 (citing Berry Decl. ¶¶ 11-12))).

For example, the relevant portions of the supplemental Pauley, Reiniche, Thomas, and Berry declarations offer only general assertions about Plaintiffs’ read-only access rooms. *See* Supp. Pauley Decl. ¶¶ 43, 45 (describing NFPA’s “belie[f]” that read-only access rooms offers members of the public adequate access to its standards); Supp. Reiniche Decl. ¶ 3 (explaining that ASHRAE offers online read-only access to many of its standards); Thomas Decl. ¶¶ 12, 14 (stating that ASTM develops consensus standards that are “used by scientists and engineers in their laboratories, by architects and designers in their plans, and by industry in their business contracts”); Berry Decl. ¶¶ 11-12, Exs. J, K (providing email exchange with third-party entity regarding the third-party’s ability to sell an NFPA standard on eBay and an email exchange with a second third-party entity regarding a “promotional piece” and the entity’s ability to access the 2014 National Electrical Code online). These declarations offer no clarity on whether entities who use the standards are likely to access Defendant’s postings instead of buying them from Plaintiffs or accessing them in Plaintiffs’ read-only rooms. The relevant portion of the Jarosz Report is mostly conclusory and, in part, undermines Plaintiffs’ argument that consumers will switch to using Defendant’s postings. *See* Jarosz Rep. ¶ 86 (describing ASTM’s standards as reasonably priced and easily accessible in read-only rooms).

With regards to the Circuit’s second question, Plaintiffs improperly shift the burden, arguing that Defendant has offered no analysis of what impact partial re-postings, as opposed to full re-postings, would have on the market for the originals. The court recognizes that it is difficult to provide quantifiable data on this issue given that Defendant has only reposted each of

the standards in full. But that does not excuse Plaintiffs' failure to offer *any* analysis on this question.

Third, the court must consider whether Defendant's copying and distribution of Plaintiffs' standards would harm any markets for derivative works. For instance, does Defendant's posting of outdated standards harm the market for updated, unincorporated editions of the standards? *ASTM*, 896 F.3d at 453. "If, as [Plaintiffs] assert, the primary purpose in developing technical standards is to have them used by private industry and other non-governmental users to address technical issues or problems, . . . there is at least some reason to think that the market demand for the most up-to-date standards would be resilient." *Id.* (internal quotation marks omitted). Plaintiffs argue that some of the new versions of its standards are perfect substitutes for the older, incorporated versions, and "[a]s a result, for many users, the availability of a free and unrestricted" prior version "will interfere with the market for these derivative Works." Pls.' 2d MSJ at 39-40. This assertion, though, is unsupported and begs the question it seeks to answer. Plaintiffs' argument that the sale of derivative training and seminar materials will also be harmed is similarly speculative and does not differentiate between outdated incorporated standards and newer, unincorporated standards. *See id.* at 40 (citing Jarosz Rep. ¶ 146).

Fourteen years have elapsed since Defendant first began posting Plaintiffs' standards. *See* Def.'s 2d MSJ at 13. And four years have elapsed since Plaintiffs' expert opined that Defendant's activities "would" threaten the market for Plaintiffs' products. *See* Jarosz Rep. ¶ 4. Now, aided by the passage of time, the court is less deferential to conclusory opinions that market harm "is real" but "difficult to measure." *Id.* ¶ 7; *see also id.* ¶¶ 130-155 (arguing without evidence that Defendant's actions are likely to harm the market for Plaintiffs' standards

and downstream products). One can reasonably expect that if over the last four years market harm was occurring, or was likely to occur, Plaintiffs could provide economic data and analysis showing that to be the case. For example, Plaintiffs could have offered a side-by-side comparison of sales figures for standards that have and have not been reposted on Defendant's site to demonstrate the market impact of Defendant's postings. They could have provided testimony from former customers who stopped purchasing Plaintiffs' standards because they are available for download on Defendant's website. The fact that they do not provide any quantifiable evidence, and instead rely on conclusory assertions and speculation long after Defendant first began posting the standards, is telling.

The economic data that Plaintiffs provide—ASTM's and NFPA's overall sales figures—does not advance their argument. ASTM's sales have increased despite Defendant's activities. Def.'s 2d SMF ¶ 153. NFPA's overall revenue has “in recent years” declined, but it concedes that “revenue is somewhat cyclical with publications.” *See* Pls.' 2d SMF ¶ 100. And ASHRAE has not attempted to determine what, if any, losses were attributable to Defendant's postings, and was unable to identify any evidence of harm in response to one of Defendant's interrogatories. *See* Def.'s 2d SMF ¶¶ 150, 154.

Ultimately, the court finds that “the evidence is such that a reasonable jury could not return a verdict for” Plaintiffs that Defendant's actions have caused, or likely will cause, market harm with regards to the specific standards at issue. *See Wash. Post Co. v. U.S. Dep't of Health & Hum. Servs.*, 865 F.2d 320, 325 (D.C. Cir. 1989) (citing *Anderson*, 477 U.S. at 248). Accordingly, this factor supports Defendant's fair use defense for each of the 217 standards at issue.

e. Standard-By-Standard Analysis

The court has considered each of the 217 standards individually using the four fair-use factors. That analysis is included in the attached Appendix. For ease of reference, the standards are divided generally into three groups. *See ASTM*, 896 F.3d at 449 (recognizing that the standards may be “susceptible to groupings that are relevant to the fair use analysis”). The first group contains standards which Defendant has shown to be incorporated by reference into law. The second group comprises standards which are identical in text to standards incorporated by reference into law. And the third group comprises standards for which Defendant provided the court a regulation that incorporates a different substantive version of the standard than the one Defendant posted.

As shown in the Appendix, the court concludes that Defendant may not copy, reproduce, or distribute 32 standards that Defendant posted which differ in substantive ways from those incorporated by reference into law, that Defendant may copy, reproduce, or distribute 184 standards in their entirety, and may copy, reproduce, or distribute only specified portions of 1 standard. Thus, as to the 32 standards not shown to be incorporated by reference into law, the court will GRANT Plaintiffs’ motion for summary judgment and DENY Defendant’s motion for summary judgment. As to the 184 standards that Defendant may copy, reproduce, or distribute in their entirety, the court will DENY Plaintiffs’ motion for summary judgment and GRANT Defendant’s motion for summary judgment. And as to the 1 standard that Defendant may partially reproduce, the court will GRANT IN PART and DENY IN PART both motions.

B. Lanham Act: Nominative Fair Use of Trademarks

To establish a trademark infringement claim under the Lanham Act, Plaintiffs “must show that [Defendant] used in commerce, without [Plaintiffs’] consent, a ‘reproduction,

counterfeit, copy, or colorable imitation of a registered mark in connection with the sale, offering for sale, distribution, or advertising of any goods or services on or in connection with which such use is likely to cause confusion.” *ASTM*, 896 F.3d at 455-56 (quoting 15 U.S.C. § 1114(1)(a)). “This inquiry boils down to two questions: (1) does ASTM own ‘a valid mark entitled to protection’ and (2) is [Defendant’s] use of it . . . likely to cause confusion.” *Id.* (quoting *Gruner + Jahr USA Publ’g v. Meredith Corp.*, 991 F.2d 1072, 1075 (2d Cir. 1993)).

The court previously held that there was no genuine dispute on the factual issue of whether consumer confusion was likely. Specifically, the evidence showed that Defendant intentionally created copies meant to appear identical to Plaintiffs’ versions, including the use of Plaintiffs’ word and logo marks. And Defendant’s “disclaimers” were inadequate mitigation against the likelihood of confusion because they did “not mention Defendant’s creation of the reproductions, Plaintiffs’ lack of association or authorization, or that they are even reproductions or transcriptions,” and therefore could “hardly be called disclaimers at all.” *ASTM*, 2017 WL 473822, at *23.

Defendant did not contest either of these holdings on appeal in *ASTM I*, nor does it contest them now. Instead, Defendant argues that its use of ASTM’s trademarks qualifies as “nominative” fair use permitted under the Lanham Act. *See* Def.’s 2d MSJ at 30-37.

Nominative fair use “occurs when ‘the defendant uses the plaintiff’s trademark to identify the plaintiff’s own goods and makes it clear to consumers that the plaintiff, not the defendant, is the source of the trademarked product or service.’” *ASTM*, 896 F.3d at 456 (quoting *Rosetta Stone Ltd. v. Google, Inc.*, 676 F.3d 144, 154 (4th Cir. 2012) (cleaned up)); *accord Century 21 Real Estate Corp. v. Lendingtree, Inc.*, 425 F.3d 211, 220 (3d Cir. 2005). To qualify as nominative fair use, “[1] the product or service in question must be one not readily identifiable

without use of the trademark; [2] only so much of the mark or marks may be used as is reasonably necessary to identify the product or service; and [3] the user must do nothing that would, in conjunction with the mark, suggest sponsorship or endorsement by the trademark holder.” *New Kids on the Block v. News Am. Publ’g, Inc.*, 971 F.2d 302, 306–07 (9th Cir. 1992).

In *ASTM I*, this court rejected Defendant’s nominative fair use claim, finding that because it had “already determined that consumer confusion as to the source of the trademarked standards is likely, the nominative fair use defense is inapplicable and the court need not assess each of the [] factors.” *ASTM*, 2017 WL 473822, at *23. The Circuit rejected this analysis. Though it noted that it has “yet to opine on the precise factors courts should consider when assessing likelihood of confusion,” and that “[c]ourts of appeals have disagreed about how exactly to evaluate nominate fair use claims,” it clarified that “the likelihood of confusion analysis remains incomplete without at least some discussion of these factors.” *ASTM*, 896 F.3d at 456-57.

Just how the court should assess the nominative fair use analysis remains unsettled law. *See id.* at 457 (discussing Circuit split on proper approach and noting that “we need not resolve today, which approach our court should adopt”). For instance, should the court treat nominative fair use as an affirmative defense? *See Century 21 Real Estate Corp. v. Lendingtree, Inc.*, 425 F.3d 211, 220 (3d Cir. 2005) (treating nominative fair use “as an affirmative defense to be proven by defendant after likelihood of confusion has been demonstrated by the plaintiff.”). Should it consider the three nominative fair use factors as substitutes for the ordinary multi-factor likelihood of confusion test? *See New Kids on the Block*, 971 F.2d at 308 (defining nominative fair use defense without reference to the likelihood of confusion factors). Or should it consider the three nominative fair use factors in addition to the ordinary likelihood of confusion factors? *See Int’l Info. Sys. Sec. Certification Consortium, Inc. v. Sec. Univ., LLC*

(*ISSC*), 823 F.3d 153, 168 (2d Cir. 2016) (“Because we believe that the nominative fair use factors will be helpful to a district court’s analysis, we hold that, in nominative use cases, district courts are to consider the Ninth Circuit and Third Circuit’s nominative fair use factors, in addition to the [likelihood of confusion] factors.”).

Having reviewed and considered each of these three approaches, the court believes that the Second Circuit’s approach—requiring consideration of the nominative fair use factors in addition to the likelihood of confusion factors—is the most appropriate.

First, the nominative fair use defense is not an affirmative defense. The Supreme Court has interpreted the Lanham Act to distinguish between descriptive fair use and nominative fair use. Descriptive fair use, which falls within section 1115(b)(4)’s definition of affirmative defenses, involves the use of a name, term, or device otherwise than as a mark. Nominative fair use involves a defendant’s use of a mark to describe the plaintiff’s product, and “cannot fall within § 1115(b)(4)’s language.” See *ISSC*, 823 F.3d at 165, 167 (“It is called ‘nominative’ use because it ‘names’ the real owner of the mark.”). “A prototypical example of nominative fair use would be where ‘an automobile repair shop specializing in foreign vehicles runs an advertisement using the trademarked names of various makes and models to highlight the kind of cars it repairs.’” *ASTM*, 896 F.3d at 456 (quoting *Rosetta Stone Ltd.*, 676 F.3d at 154). In that example, the repair shop’s use differs from the use defined by section 1115(b)(4) because it uses the trademarked names to identify the automaker’s goods. The same is true here because Defendant uses Plaintiffs’ marks to describe the Plaintiffs’ own products. See Def.’s 2d MSJ at 32.

Second, the nominative fair use factors should supplement, rather than supplant, the likelihood of confusion analysis. See *ISSC*, 823 F.3d at 168. This approach offers district

courts additional flexibility where certain factors may be “a bad fit” for the facts presented. *See id.*

As noted, in *ASTM I* the court found that there was a likelihood of confusion where Defendant intended its reproductions to appear identical to Plaintiffs’ works by including Plaintiffs’ word and logo marks and disclaimers that did “not mention Defendant’s creation of the reproductions, Plaintiffs’ lack of association or authorization, or that they are even reproductions or transcriptions.” *See ASTM*, 2017 WL 473822, at *23. The court now supplements that analysis by considering the three nominative fair use factors, and the steps Defendant has taken to reduce that likelihood of confusion.

As to the first nominative fair use factor, the court finds that Defendant’s use of Plaintiffs’ trademarks is necessary to describe Plaintiffs’ works. Indeed, “it is hard to see how [Defendant] could fulfill” its goal of informing the public about the law “without identifying the standard by its name—the very name also used in the incorporating law.” *ASTM*, 896 F.3d at 457. Plaintiffs’ alternative suggestion, that Defendant identify standards by their incorporating regulation, *see* Pls.’ Opp’n and Reply at 28, is untenable because regulations commonly incorporate multiple standards at a time. *See generally* Appendix. Similarly, some standards are incorporated by many provisions. *See generally id.*

Regarding the second factor, the court finds that Defendant’s use of Plaintiffs’ *word* marks is reasonably necessary to identify Plaintiffs’ works, but that its use of Plaintiffs’ *logos* is not. Perhaps recognizing this, Defendant previously stated it was not committed to using Plaintiffs’ logos. *See* ECF No. 173, Hearing Tr. at 116 (Sept. 12, 2016) (“Public.Resource would take direction from this Court. Logos: yes or no? [Defendant] doesn’t care.”). And following remand, Defendant removed Plaintiffs’ logos from all its postings, save for two that it

“overlooked.” *See* Def.’s 2d MSJ at 34 n.14 (conceding that in two instances, Defendant redacted an ASTM logo in certain postings of a law by reference but overlooked it in the HTML version); Pls.’ 2d MSJ at 34 (citing Pls.’ 2d SMF ¶ 23 (NFPA’s National Electrical Code), 24 (ASTM D86-07)).

Third, the court considers whether Defendant’s use of Plaintiffs’ marks suggests that Plaintiffs have sponsored or endorsed Defendant’s posts. As an initial matter, there is no evidence to suggest Defendant has taken any action “in conjunction with the mark,” to imply “sponsorship or endorsement by the trademark holder.” *New Kids on the Block*, 971 F.2d at 308. Instead, since *ASTM I*, Defendant has taken steps to distance its reproductions from Plaintiffs.

For example, while “the disclaimers initially used by [Defendant] were quite barebones, the record contains examples of more fulsome disclaimers it later appended to at least some standards.” *ASTM*, 896 F.3d at 457-58 (citing O’Brien Decl., Ex. 18 (disclaiming, among other things, that [Defendant] “has transformed this specification into [HTML],” that “[a]ny errors in the transformation of th[e] specification should be reported to [PRO],” and that PRO “is not affiliated in any way with any of the organizations named herein”)). Since remand, Defendant has also distanced its reproductions from Plaintiffs by more extensive use of disclaimers, which now take three forms. Each standard Defendant posted in PDF format now has a cover page with a disclaimer identifying Defendant as posting the document and disclaiming any affiliation with, or authorization by, Plaintiffs. *See* Def.’s 2d SMF ¶ 166. Disclaimers appearing on the Internet Archive website versions state that Defendant posted the document and that Defendant is not affiliated with Plaintiffs, explain Defendant’s process for posting the laws by incorporation, note the possibility of errors, and encourage readers to check with Plaintiffs or governmental authorities “for further information and access to definitive versions of these

important laws.” *Id.* And finally, Defendant’s HTML-format copies—available for download on the Internet Archive website—contain the following disclaimer:

In order to promote public education and public safety, equal justice for all, a better informed citizenry, the rule of law, world trade and world peace, this legal document is hereby made available on a noncommercial basis, as it is the right of all humans to know and speak the laws that govern them.

This document was prepared and posted by Public.Resource.Org (Public Resource), a U.S.-based charity certified under section 501(c)(3) of the Internal Revenue Code. Public Resource is not affiliated with, nor has it received authorization from, any standards development organization, for the posting of this document. Please note that the posting of this document has been subject to litigation in U.S. federal courts and was done so by Public Resource for the non-commercial purpose of informing our fellow citizens about their rights and obligations under the laws of the United States

Wise Decl., Ex. 165.

Plaintiffs challenge each of the three forms of disclaimers, claiming they are inadequate mitigation against likely association between them and Defendant’s posts.

As to the cover pages on Defendant’s PDF versions, Plaintiffs take exception to the accompanying “star-spangled” design, patriotic “regalia,” and text, which states, “By Authority of the United States of America Legally Binding Document.” *See* Pls.’ 2d MSJ at 35-36.

Plaintiffs argue that this “conveys a clear message” that the document is “By Authority of the United States of America” and a “Legally Binding Document,” rather than Defendant’s own work. *See id.* But Plaintiffs miss the mark: the pertinent question is not whether Defendant’s use is likely to be confused as endorsed by the *U.S. Government*, but whether it is likely to be confused as endorsed by *Plaintiffs*. The court finds the latter mistake unlikely given that the only references to any Plaintiff appear (1) in the name of the standard, which as previously discussed, is necessary to describe the work, and (2) in the disclaimer, which states “Not Affiliated or Authorized by [Plaintiff] or by the United States Government.” *See* Pls.’ 2d SMF ¶ 26. These

disclaimers sufficiently mitigate against any confusion that Plaintiffs sponsored or endorsed Defendant's PDFs.

The same is true for the other two forms of disclaimers—those appearing on Defendant's Internet Archive and HTML formatted posts. Plaintiffs argue that users are unlikely to read the disclaimers because they must scroll down the webpage to see the Internet Archive disclaimer and because the HTML disclaimer appears under a heading titled, "PREAMBLE (NOT PART OF THE STANDARD)." But there is no evidence indicating that users would not scroll down to see a disclaimer, or that they would not read a standard's preamble. The court instead finds Defendant's disclaimers to be positioned in prominent enough locations to "adequately eliminate the possibility a consumer would assume sponsorship of endorsement by ASTM," *ASTM*, 896 F.3d at 457, given the minimal references to any Plaintiff elsewhere in the posts and Defendant's removal of Plaintiffs' logos, *see Dr. Seuss Enters., L.P. v. ComicMix LLC*, 300 F. Supp. 3d 1073, 1091 (S.D. Cal. 2017) (finding defendant satisfied the third nominative fair use factor where it did "nothing in conjunction with the use of the mark to suggest a sponsorship or endorsement by Plaintiff" and added a disclaimer to the third page of the contested work); *Keurig, Inc. v. Strum Foods, Inc.*, 769 F. Supp. 2d 699, 709 (D. Del. 2011) (finding that although disclaimer was on the bottom of a box, it nonetheless was sufficient where there was no evidence demonstrating that customers would not look to the bottom of the box); *see also Playboy Enters., Inc. v. Welles*, 279 F.3d 796, 803 (9th Cir. 2002) ("In addition to doing nothing in conjunction with her use of the marks to suggest sponsorship or endorsement by [plaintiff], [the defendant] affirmatively disavows any sponsorship or endorsement. Her site contains a clear statement disclaiming any connection to [the plaintiff].")

Ultimately, considering the record on remand, and the nominative fair use factors in conjunction with the likelihood of confusion analysis, the court finds that Defendant's use of Plaintiffs' word marks is nominative fair use, but its use of Plaintiffs' logos is not.

C. Remedy

Having found that Plaintiffs have succeeded on the merits of their copyright claim as to 32 standards that do not qualify for the fair use defense, and its trademark claim as to Defendant's use of Plaintiffs' trademarked logos, the court turns to Plaintiffs' request that it permanently enjoin Defendant from all reproduction, display, or distribution of those standards and logos. *See* Pls.' 2d MSJ at 38. A preliminary injunction is "an extraordinary remedy," that is "never awarded as of right." *Winter*, 555 U.S. at 22, 24. To obtain a permanent injunction, Plaintiffs must show (1) irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for their injury; (3) that a remedy in equity is warranted after considering the balance of hardships; and (4) that the public interest would not be disserved by a permanent injunction. *See eBay Inc.*, 547 U.S. at 391. Failure to satisfy any factor "is grounds for denying relief." *Morgan Drexen, Inc. v. Consumer Fin. Prot. Bureau*, 785 F.3d 684, 694 (D.C. Cir. 2015). "If a less drastic remedy . . . [is] sufficient to redress [the] injury, no recourse to the additional and extraordinary relief of an injunction [is] warranted." *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165–66 (2010).

1. Irreparable Injury

Plaintiffs claim they will face three separate irreparable injuries if Defendant is permitted to continue distribution of Plaintiffs' standards and logos: substantial declines in revenue that may cause their business models to change; loss of the exclusive rights under the Copyright Act

to exclude others from distributing, reproducing, or displaying their protected works; and loss of control of the goodwill associated with their trademarks.

First, as previously explained, Plaintiffs have not offered credible evidence of economic harm caused by Defendant's use of those 32 standards or Plaintiffs' logos, which shows that there is little to no "likelihood of substantial and immediate irreparable injury." *Apple, Inc. v. Samsung Elecs. Co.*, 678 F.3d 1314, 1324–25 (Fed. Cir. 2012) ("A mere showing that Apple might lose some insubstantial market share as a result of Samsung's infringement is not enough.").

Second, though the court previously found that there was no evidence indicating Defendant's conduct would end absent an injunction, *see ASTM*, 2017 WL 473822, at *24, the court notes that the updated record reflects Defendant's intention to only post documents that have been incorporated into law. *See* Def. Statement of Disp. Facts, ECF No. 203-3. The court also notes that Defendant's voluntary removal all of Plaintiffs' trademarked logos from each of the reposted standards, save for two that it "overlooked," *see* Def. 2d MSJ at 34, shows Defendant's willingness to comply with the court's order without the "extraordinary relief" of an injunction, *see Winter*, 555 U.S. at 22.

Third, the court finds that Defendant's use of Plaintiff's trademarked logos in the two "overlooked" standards will result in irreparable harm because the trademark owner will lose control of the goodwill associated with its mark. *See Hanley-Wood LLC v. Hanley Wood LLC*, 783 F. Supp. 2d 147, 151 (D.D.C. 2011); *Breaking the Chain Found. V. Capitol Educ. Support, Inc.*, 589 F. Supp. 2d 25, 30 (D.D.C. 2008). Plaintiffs claim to have spent "decades establishing the goodwill associated with their names and logos, which the public associates with their high-quality work." Pls.' SMF ¶ 245 (citing Jarosz Rep. ¶ 151). Yet, it is undisputed that some of

Defendant's posts have included errors. *See* Pls.' 2d Supp. SMF ¶¶ 13-14. While Defendant claims that it has and will continue to correct any errors brought to its attention, *see id.*, this is hardly reassuring for Plaintiffs.

2. Adequacy of Monetary Damages

Plaintiffs argue that because damages here are difficult to quantify and Defendant may be unable to pay damages, legal remedies are inadequate. *See Fox Television Stations, Inc. v. FilmOn X LLC*, 966 F. Supp. 2d 30, 50 (D.D.C. 2013). Neither party has submitted evidence that would be helpful in calculating damages, such as how many users who access Defendant's posts actually download them, and whether those downloads were in lieu of purchases. Moreover, Defendant has not disputed that it has "extremely limited financial resources available to pay any damages award" and that in 2014 it "generated under \$100,000 in operating income and had \$248,000 in total net assets." *See* ASTM PSMF ¶¶ 272-73. Given that the Copyright Act provides for statutory damages ranging from \$750 to \$30,000 for each of the standards at issue in the overall case, or even up to \$150,000 per infringement if Plaintiffs were to later prove that infringement was willful, Defendant's potential inability to pay is certainly a factor weighing towards equitable relief. *See* 17 U.S.C. § 504(c)(1) – (2)

3. Balance of Hardships & Public Interest

The court must weigh the likely harms to Plaintiffs as described above with any harm to Defendant if an injunction is imposed. Defendant's CEO Carl Malamud, when asked in his ASTM deposition what financial impact an injunction barring posting of the standards would have on Public Resource, responded, "probably none." ECF No. 118-12, Rubel Decl., Ex. 3, Malamud Dep. at 219:22-220:4. The only harm he identified was that "one hates to have wasted

that [] effort” that went into posting the standards online. *Id.* Without evidence of any additional harms, this factor weighs strongly in favor of an injunction.

Moreover, the public interest is served by the policy interests that underlie the Copyright Act itself, namely the protection of financial incentives for the continued creation of valuable works, and the continued value in maintaining the U.S. public-private system in place to ensure continued development of technical standards. At the same time, the public would be greatly disserved by an injunction barring distribution of any of the 32 standards which may later be incorporated by reference into law.

Considering all the injunction factors, the court finds that while Plaintiffs are entitled to summary judgment on their copyright claim as to the 32 unincorporated standards, the record does not support a permanent bar on Defendant’s use of those standards, in light of the meager evidence of irreparable harm and the possibility that these standards will be incorporated into law at a later date. Injunctive relief is, however, appropriate as to Plaintiffs’ trademarked logos, and Defendant will be permanently barred from any use of Plaintiffs’ trademarked logos in connection with the posting of these standards online or elsewhere.

IV. CONCLUSION

For the reasons set forth above, Plaintiffs’ Motion will be GRANTED IN PART and DENIED IN PART, and Defendant’s Cross-Motion will be GRANTED IN PART and DENIED IN PART.

Date: March 31, 2022

Tanya S. Chutkan
TANYA S. CHUTKAN
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

_____)	
AMERICAN SOCIETY FOR TESTING)	
AND MATERIALS, <i>et al.</i> ,)	
)	
Plaintiffs,)	
)	
v.)	Case No. 13-cv-1215 (TSC)
)	
PUBLIC.RESOURCE.ORG, INC.,)	
)	
Defendant.)	
_____)	

APPENDIX

I. GROUP 1: STANDARDS THAT HAVE BEEN INCORPORATED BY REFERENCE INTO LAW.

1. ASTM D2036 (1998):

- Defendant identifies 40 C.F.R. § 136.3(a), Table IB (2003) as the incorporating by reference regulation. *See* Becker Decl. ¶ 57, Ex. 90 at 50. Section 136.3(a) states that the “full text of the referenced test procedures are incorporated by reference” into Table IB. 40 C.F.R. § 136.3(a). Table IB references ASTM D2036 (1998) (A) and (B), an apparent reference to Test Methods A and B, set forth in the standard. *See* ECF No. 199-4, Exhibit 149 Part 2 to Declaration of Jane W. Wise at 250-68. Table IB does not reference portions of the standard describing Test Methods C or D. Accordingly, the standard’s text pertaining to Test Methods C and D have not been incorporated by reference into law. Moreover, it does not appear that the text of those portions—Test Methods C and D—are relevant for regulatory compliance. The standard also includes background sections defining the standard’s scope, referenced documents, terminology, significance and use, purity of reagents, and sampling, as well as an appendix, none of which are explicitly incorporated into law. *See id.*
- First Factor: There is no indication that Defendant stands to profit from republishing this standard; Defendant’s apparent purpose is to inform the public about the law and facilitate public debate. *See ASTM*, 896 F.3d at 449; Def’s 2d Mot. at 16. Defendant’s “attempt to freely distribute standards incorporated by reference into law qualifie[s] as a use that further[s] the purposes of the fair use defense.” *ASTM*, 896 F.3d at 449. Further, the incorporated standard provides information essential for a private entity to comprehend its legal duties regarding Test Methods A and B, which weighs heavily in favor of permitting Defendant’s reproduction. *See ASTM*, 896 F.3d at 450.
- Second Factor: The “express text of the law falls plainly outside the realm of copyright protection.” *ASTM*, 896 F.3d at 451. Here, the standard is incorporated into law only

With regard to the text of Test Methods A and B, and not With regard to Test Methods C and D, or the standard's general provisions pertaining to the standard's scope, referenced documents, terminology, significance and use, purity of reagents, and sampling, as well as an appendix. Because only portions of the standard are incorporated into law, Defendant's wholesale reproduction is "harder to justify." *Id.*

- Third Factor: The incorporating regulation specifies that only specific portions of the standard are incorporated by reference into law. While that incorporation justifies posting the specific text of those provisions—the text of Test Methods A and B—it does not justify posting the entire standard. *Id.*
- Fourth Factor: Defendant's reproductions have not had a "substantially adverse impact on the potential market for the originals," nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm." Memo Op. at 30–36 (internal quotation and citation marks omitted).
- Conclusion: Defendant may fairly reproduce the text of Test Methods A and B, but may not fairly reproduce the standard's remaining portions absent some change in the incorporating language.

2. ASHRAE 90.1 (2004):

- Defendant identifies 10 C.F.R. § 433.3 (2013) as the incorporating by reference regulation, *see* Becker Decl. ¶ 57, Ex. 89, which incorporates the standard into §§ 433.2, 433.4, 433.5. Section 433.4 requires that all federal agencies shall design new Federal buildings that are commercial and multi-family high-rise residential buildings, for which design for construction began on or after January 3, 2007, but before August 10, 2012, to . . . "[m]eet ASHRAE 90.1–2004." 10 C.F.R. § 433.4(a)(1)(i). Section 433.5 requires federal agencies in certain circumstances "to determine energy consumption levels for both the ASHRAE Baseline Building 2004 and proposed building by using the Performance Rating Method found in appendix G of ASHRAE 90.1–2004." *Id.* § 433.5(a)(1). An "ASHRAE Baseline Building 2004" is defined as "a building that is otherwise identical to the proposed building but is designed to meet, but not exceed, the energy efficiency specifications in" ASHRAE 90.1–2004. *Id.* § 433.2.
- First Factor: There is no indication that Defendant stands to profit from republishing this standard; Defendant's apparent purpose is to inform the public about the law and facilitate public debate. *See ASTM*, 896 F.3d at 449; Def's 2d Mot. at 16. Defendant's "attempt to freely distribute standards incorporated by reference into law qualifie[s] as a use that further[s] the purposes of the fair use defense." *ASTM*, 896 F.3d at 449. With regard to transformative use, the regulation does not incorporate the standard in a manner that requires a private entity to comprehend the standard to comply with its legal duties. Rather, the applicable regulation pertains only to federal agencies. Allowing public access to ASHRAE 90.1 (2010) facilitates public debate on certain energy efficiency requirements imposed on federal buildings. *See id.* at 451.
- Second Factor: The "express text of the law falls plainly outside the realm of copyright protection." *ASTM*, 896 F.3d at 451. Here, the standard is incorporated into law without limitation such that "the consequence of the incorporation by reference is

virtually indistinguishable from a situation in which the standard had been expressly copied into law.” *Id.* at 452. Accordingly, “this factor weighs heavily in favor of fair use.” *Id.*

- Third Factor: The incorporating regulation does not specify that only certain provisions of this standard are incorporated by reference into law, nor does it indicate which specific provisions of the standard are relevant for regulatory compliance, suggesting that “a greater amount of the standard’s text might be fairly reproduced.” *Id.*
- Fourth Factor: Defendant’s reproductions have not had a “substantially adverse impact on the potential market for the originals,” nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm.” Memo Op. at 30–36 (internal quotation and citation marks omitted).
- Conclusion: Defendant may fairly reproduce this incorporated standard in its entirety.

3. ASHRAE 90.1 (2007):

- Defendant identifies 10 C.F.R. § 433.3 (2013) as the incorporating by reference regulation, *see* Becker Decl. ¶ 57, Ex. 89, which incorporates the standard into §§ 433.2, 433.4, 433.5. Section 433.4 requires that all federal agencies shall design new Federal buildings that are commercial and multi-family high-rise residential buildings, for which design for construction began on or after January 3, 2007, but before August 10, 2012, to . . . “[m]eet ASHRAE 90.1–2004.” 10 C.F.R. § 433.4(a)(1)(ii). Section 433.5 requires federal agencies in certain circumstances “to determine energy consumption levels for both the ASHRAE Baseline Building 2007 and proposed building by using the Performance Rating Method found in appendix G of ASHRAE 90.1–2007.” *Id.* § 433.5(a)(2). An “ASHRAE Baseline Building 2007” is defined as “a building that is otherwise identical to the proposed building but is designed to meet, but not exceed, the energy efficiency specifications in” ASHRAE 90.1–2007. *Id.* § 433.2.
- First Factor: There is no indication that Defendant stands to profit from republishing this standard; Defendant’s apparent purpose is to inform the public about the law and facilitate public debate. *See ASTM*, 896 F.3d at 449; Def’s 2d Mot. at 16. Defendant’s “attempt to freely distribute standards incorporated by reference into law qualifie[s] as a use that further[s] the purposes of the fair use defense.” *ASTM*, 896 F.3d at 449. With regard to transformative use, the regulation does not incorporate the standard in a manner that requires a private entity to comprehend the standard to comply with its legal duties. Rather, the applicable regulation pertains only to federal agencies. Allowing public access to ASHRAE 90.1 (2010) facilitates public debate on the virtues of certain energy efficiency requirements imposed on federal buildings. *See id.* at 451.
- Second Factor: The “express text of the law falls plainly outside the realm of copyright protection.” *ASTM*, 896 F.3d at 451. Here, the standard is incorporated into law without limitation such that “the consequence of the incorporation by reference is virtually indistinguishable from a situation in which the standard had been expressly copied into law.” *Id.* at 452. Accordingly, “this factor weighs heavily in favor of fair use.” *Id.*
- Third Factor: The incorporating regulation does not specify that only certain provisions

of this standard are incorporated by reference into law, nor does it indicate which specific provisions of the standard are relevant for regulatory compliance, suggesting that “a greater amount of the standard’s text might be fairly reproduced.” *Id.*

- Fourth Factor: Defendant’s reproductions have not had a “substantially adverse impact on the potential market for the originals,” nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm.” Memo Op. at 30–36 (internal quotation and citation marks omitted).
- Conclusion: Defendant may fairly reproduce this incorporated standard in its entirety.

4. ASHRAE 90.1 (2010):

- Defendant identifies 24 C.F.R. § 905.110 (2015) as the incorporating by reference regulation, *see* Becker Decl. ¶ 57, Ex. 89, which incorporates the standard into §§ 905.200(b) and 905.312(b). Section 905.200 provides that “[a]ctivities that are eligible to be funded with Capital Funds as identified in this section include . . . [b]uilding code compliance,” which “includes design and physical improvement costs associated with . . . [a] national building code, such as those developed by the International Code Council or the National Fire Protection Association; and the IECC or ASHRAE 90.1–2010.” 24 C.F.R. § 905.200(a), (a)(6)(ii). Section 905.312 requires that a Public Housing Agency “shall meet the following design and construction standards, as applicable, for all development and modernization,” including, that [a]ll development projects shall be designed and constructed in compliance with . . . [a] national building code, such as those developed by the International Code Council or the National Fire Protection Association; and the IECC or ASHRAE 90.1–2010.” 24 C.F.R. § 905.312(b)-(b)(1). Public Housing Agency is defined as any “state, county, municipality, or other governmental entity or public body or agency or instrumentality of these entities that is authorized to engage or assist in the development or operation of public housing under this part.” *Id.* § 905.108. The regulation does not specify that only certain provisions of ASHRAE 90.1 (2010) are incorporated by reference into law, nor does it indicate which specific provisions of ASHRAE 90.1 (2010) are relevant for regulatory compliance with the regulation.
- First Factor: There is no indication that Defendant stands to profit from republishing this standard; Defendant’s apparent purpose is to inform the public about the law and facilitate public debate. *See ASTM*, 896 F.3d at 449; Def’s 2d Mot. at 16. Defendant’s “attempt to freely distribute standards incorporated by reference into law qualifie[s] as a use that further[s] the purposes of the fair use defense.” *ASTM*, 896 F.3d at 449. With regard to transformative use, the regulation does not incorporate the standard in a manner that requires a private entity to comprehend the standard to comply with its legal duties. Specifically, section 905.200 incorporates the standard as a reference procedure for Public Housing Agencies and resident management corporations to understand their eligibility for certain federal financial assistance. And section 905.108 incorporates the standard such that the standard provides information essential for a public, not private entity to comprehend its legal duties. Accordingly, “while knowing the content of this incorporated standard might help inform one’s understanding of the law,” it “is not essential to [any private entity] complying with any legal duty,” and thus, Defendant’s use is less transformative and “its wholesale copying, in turn, less

justified.” *ASTM*, 896 F.3d at 450. Allowing public access to ASHRAE 90.1 (2010) facilitates public debate on the virtues of the requirements imposed on Public Housing Agencies and resident management corporations to receive federal funding for building public housing. *See id.* at 451.

- **Second Factor:** The “express text of the law falls plainly outside the realm of copyright protection.” *ASTM*, 896 F.3d at 451. Here, the standard is incorporated into law without limitation such that “the consequence of the incorporation by reference is virtually indistinguishable from a situation in which the standard had been expressly copied into law.” *Id.* at 452. Accordingly, “this factor weighs heavily in favor of fair use.” *Id.*
- **Third Factor:** The incorporating regulation does not specify that only certain provisions of this standard are incorporated by reference into law, nor does it indicate which specific provisions of the standard are relevant for regulatory compliance, suggesting that “a greater amount of the standard’s text might be fairly reproduced.” *Id.*
- **Fourth Factor:** Defendant’s reproductions have not had a “substantially adverse impact on the potential market for the originals,” nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm.” Memo Op. at 30–36 (internal quotation and citation marks omitted).
- **Conclusion:** Defendant may fairly reproduce this incorporated standard in its entirety.

5. NFPA 1 (2003): Uniform Fire Code:

- The parties identify Florida Administrative Code Register 69A-3.012 (2005) as the incorporating by reference regulation, *see* Becker Decl. ¶ 57, Ex. 91; Wise Decl., Ex. 175, which states that “the Florida specific edition” of NFPA 1 (2003): Uniform Fire Code . . . is applicable to those buildings and structures specified in paragraphs (a) and (b) of subsection (1) of Section 633.022, F.S.” Fla. Admin. Code R. 69A-3.012. The regulation does not specify that only certain provisions of NFPA 1 (2003) are incorporated by reference into law, nor does it indicate which specific provisions of NFPA 1 (2003) are relevant for compliance with the regulation.
- **First Factor:** There is no indication that Defendant stands to profit from republishing this standard; Defendant’s apparent purpose is to inform the public about the law and facilitate public debate. *See ASTM*, 896 F.3d at 449; Def’s 2d Mot. at 16. Defendant’s “attempt to freely distribute standards incorporated by reference into law qualify[es] as a use that further[s] the purposes of the fair use defense.” *ASTM*, 896 F.3d at 449. However, the court finds that the incorporated standard does not provide information essential for a private entity to comprehend its legal duties, but rather is incorporated as a reference procedure. Accordingly, “while knowing the content of this incorporated standard might help inform one’s understanding of the law,” it “is not essential to complying with any legal duty,” and thus, Defendant’s use is less transformative and “its wholesale copying, in turn, less justified.” *ASTM*, 896 F.3d at 450.
- **Second Factor:** The “express text of the law falls plainly outside the realm of copyright protection.” *ASTM*, 896 F.3d at 451. Here, the standard is incorporated into law without limitation such that “the consequence of the incorporation by reference is virtually indistinguishable from a situation in which the standard had been expressly

copied into law.” *Id.* at 452. Accordingly, “this factor weighs heavily in favor of fair use.” *Id.*

- Third Factor: The incorporating regulation does not specify that only certain provisions of this standard are incorporated by reference into law, nor does it indicate which specific provisions of the standard are relevant for regulatory compliance, suggesting that “a greater amount of the standard’s text might be fairly reproduced.” *Id.*
 - Fourth Factor: Defendant’s reproductions have not had a “substantially adverse impact on the potential market for the originals,” nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm.” Memo Op. at 30–36 (internal quotation and citation marks omitted).
 - Conclusion: Defendant may fairly reproduce this incorporated standard in its entirety.
6. **NFPA 1 (2006): Uniform Fire Code:**
- The parties identify Florida Administrative Code Register 69A-60.003 as the incorporating by reference regulation, *see* Becker Decl. ¶ 57, Ex. 91, Wise Decl., Ex. 175, which states that “NFPA 1, the Uniform Fire Code, Florida 2006 edition, is hereby adopted and incorporated herein by reference and shall take effect on the effective date of this rule as a part of the Florida Fire Prevention Code.” The regulation does not specify that only certain provisions of NFPA 1 (2006) are incorporated by reference into law, nor does it indicate which specific provisions of NFPA 1 (2006) are relevant for compliance with the regulation.
 - First Factor: There is no indication that Defendant stands to profit from republishing this standard; Defendant’s apparent purpose is to inform the public about the law and facilitate public debate. *See ASTM*, 896 F.3d at 449; Def’s 2d Mot. at 16. Defendant’s “attempt to freely distribute standards incorporated by reference into law qualifie[s] as a use that further[s] the purposes of the fair use defense.” *ASTM*, 896 F.3d at 449. However, the court finds that the incorporated standard does not provide information essential for a private entity to comprehend its legal duties, but rather is incorporated as a reference procedure. Accordingly, “while knowing the content of this incorporated standard might help inform one’s understanding of the law,” it “is not essential to complying with any legal duty,” and thus, Defendant’s use is less transformative and “its wholesale copying, in turn, less justified.” *ASTM*, 896 F.3d at 450.
 - Second Factor: The “express text of the law falls plainly outside the realm of copyright protection.” *ASTM*, 896 F.3d at 451. Here, the standard is incorporated into law without limitation such that “the consequence of the incorporation by reference is virtually indistinguishable from a situation in which the standard had been expressly copied into law.” *Id.* at 452. Accordingly, “this factor weighs heavily in favor of fair use.” *Id.*
 - Third Factor: The incorporating regulation does not specify that only certain provisions of this standard are incorporated by reference into law, nor does it indicate which specific provisions of the standard are relevant for regulatory compliance, suggesting that “a greater amount of the standard’s text might be fairly reproduced.” *Id.*
 - Fourth Factor: Defendant’s reproductions have not had a “substantially adverse impact on the potential market for the originals,” nor have Plaintiffs shown by a preponderance

of the evidence that there is a meaningful likelihood of future harm.” Memo Op. at 30–36 (internal quotation and citation marks omitted).

- Conclusion: Defendant may fairly reproduce this incorporated standard in its entirety.

7. NFPA 54 (2006): National Fuel Gas Code:

- The parties identify Florida Administrative Code Register 5F-11.002 as the incorporating by reference regulation, *see* Becker Decl. ¶ 57, Ex. 91; Wise Decl., Ex. 175, which states that “for gas appliances and gas piping as published in NFPA 54, National Fuel Gas Code, 2006 edition, shall be the accepted standard[] for this state and [is] hereby adopted and incorporated by reference” and that the standard “shall be utilized by the Department as a guide in interpreting the provisions of Chapter 527, F.S.” Fla. Admin. Code R. 5F-11.002(1). The regulation does not specify that only certain provisions of NFPA 54 (2006) are incorporated by reference into law, nor does it indicate which specific provisions of NFPA 54 (2006) are relevant for compliance with the regulation.
- First Factor: There is no indication that Defendant stands to profit from republishing this standard; Defendant’s apparent purpose is to inform the public about the law and facilitate public debate. *See ASTM*, 896 F.3d at 449; Def’s 2d Mot. at 16. Defendant’s “attempt to freely distribute standards incorporated by reference into law qualifie[s] as a use that further[s] the purposes of the fair use defense.” *ASTM*, 896 F.3d at 449. However, the court finds that the incorporated standard does not provide information essential for a private entity to comprehend its legal duties, but rather is incorporated as a reference procedure for a public Department. Accordingly, “while knowing the content of this incorporated standard might help inform one’s understanding of the law,” it “is not essential to complying with any legal duty,” and thus, Defendant’s use is less transformative and “its wholesale copying, in turn, less justified.” *ASTM*, 896 F.3d at 450.
- Second Factor: The “express text of the law falls plainly outside the realm of copyright protection.” *ASTM*, 896 F.3d at 451. Here, the standard is incorporated into law without limitation such that “the consequence of the incorporation by reference is virtually indistinguishable from a situation in which the standard had been expressly copied into law.” *Id.* at 452. Accordingly, “this factor weighs heavily in favor of fair use.” *Id.*
- Third Factor: The incorporating regulation does not specify that only certain provisions of this standard are incorporated by reference into law, nor does it indicate which specific provisions of the standard are relevant for regulatory compliance, suggesting that “a greater amount of the standard’s text might be fairly reproduced.” *Id.*
- Fourth Factor: Defendant’s reproductions have not had a “substantially adverse impact on the potential market for the originals,” nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm.” Memo Op. at 30–36 (internal quotation and citation marks omitted).
- Conclusion: Defendant may fairly reproduce this incorporated standard in its entirety.

8. NFPA 11 (2005): Standard for Low Medium and High Expansion Foam:

- The parties identify 29 C.F.R. § 1915.5 (2015) as the incorporating by reference regulation, *see* Becker Decl. ¶ 57, Ex. 91; Wise Decl., Ex. 175, which states that the incorporation by reference is “approved for § 1915.507(d)(3).” *See* § 1915.5(d)(4)(xiii). Section 1915.507(d), in turn, requires that when dealing with “Fixed extinguishing systems,” an employer must “select, install, maintain, inspect, and test all fixed systems required by OSHA,” including “[f]ixed extinguishing systems that use water or foam as the extinguishing agent according to . . . NFPA 11-2005 Standard for Low-, Medium-, and High-Expansion Foam (incorporated by reference, *see* § 1915.5).” The regulation does not specify that only certain provisions of NFPA 11 (2005) are incorporated by reference into law, nor does it indicate which specific provisions of NFPA 11 (2005) are relevant for compliance with the regulation.
- First Factor: There is no indication that Defendant stands to profit from republishing this standard; Defendant’s apparent purpose is to inform the public about the law and facilitate public debate. *See ASTM*, 896 F.3d at 449; Def’s 2d Mot. at 16. Defendant’s “attempt to freely distribute standards incorporated by reference into law qualifie[s] as a use that further[s] the purposes of the fair use defense.” *ASTM*, 896 F.3d at 449. Further, the incorporated standard provides information essential for a private entity to comprehend its legal duties, which weighs heavily in favor of permitting Defendant’s reproduction. *See ASTM*, 896 F.3d at 450.
- Second Factor: The “express text of the law falls plainly outside the realm of copyright protection.” *ASTM*, 896 F.3d at 451. Here, the standard is incorporated into law without limitation such that “the consequence of the incorporation by reference is virtually indistinguishable from a situation in which the standard had been expressly copied into law.” *Id.* at 452. Accordingly, “this factor weighs heavily in favor of fair use.” *Id.*
- Third Factor: The incorporating regulation does not specify that only certain provisions of this standard are incorporated by reference into law, nor does it indicate which specific provisions of the standard are relevant for regulatory compliance, suggesting that “a greater amount of the standard’s text might be fairly reproduced.” *Id.*
- Fourth Factor: Defendant’s reproductions have not had a “substantially adverse impact on the potential market for the originals,” nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm.” Memo Op. at 30–36 (internal quotation and citation marks omitted).
- Conclusion: Defendant may fairly reproduce this incorporated standard in its entirety.

9. NFPA 12 (2005): Standard on Carbon Dioxide Extinguishing Systems:

- The parties identify 29 C.F.R. § 1915.5 (2015) as the incorporating by reference regulation, *see* Becker Decl. ¶ 57, Ex. 91; Wise Decl., Ex. 175, which states that the incorporation by reference is “approved for § 1915.507(d)(5).” *See* § 1915.5(i)(15). Section 1915.507(d), in turn, requires that when dealing with “Fixed extinguishing systems,” an employer must “select, install, maintain, inspect, and test all fixed systems required by OSHA,” including “[f]ixed extinguishing systems using gas as the extinguishing agent according to NFPA 12-2005 Standard on Carbon Dioxide Extinguishing Systems (incorporated by reference, *see* § 1915.5).” The regulation does

not specify that only certain provisions of NFPA 12 (2005) are incorporated by reference into law, nor does it indicate which specific provisions of NFPA 12 (2005) are relevant for compliance with the regulation.

- First Factor: There is no indication that Defendant stands to profit from republishing this standard; Defendant's apparent purpose is to inform the public about the law and facilitate public debate. *See ASTM*, 896 F.3d at 449; Def's 2d Mot. at 16. Defendant's "attempt to freely distribute standards incorporated by reference into law qualify[es] as a use that further[s] the purposes of the fair use defense." *ASTM*, 896 F.3d at 449. Further, the incorporated standard provides information essential for a private entity to comprehend its legal duties, which weighs heavily in favor of permitting Defendant's reproduction. *See ASTM*, 896 F.3d at 450.
- Second Factor: The "express text of the law falls plainly outside the realm of copyright protection." *ASTM*, 896 F.3d at 451. Here, the standard is incorporated into law without limitation such that "the consequence of the incorporation by reference is virtually indistinguishable from a situation in which the standard had been expressly copied into law." *Id.* at 452. Accordingly, "this factor weighs heavily in favor of fair use." *Id.*
- Third Factor: The incorporating regulation does not specify that only certain provisions of this standard are incorporated by reference into law, nor does it indicate which specific provisions of the standard are relevant for regulatory compliance, suggesting that "a greater amount of the standard's text might be fairly reproduced." *Id.*
- Fourth Factor: Defendant's reproductions have not had a "substantially adverse impact on the potential market for the originals," nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm." Memo Op. at 30–36 (internal quotation and citation marks omitted).
- Conclusion: Defendant may fairly reproduce this incorporated standard in its entirety.

10. NFPA 10 (2002): Standard for Portable Fire Extinguishers (Title of work on certificate of registration is "National Fire Codes Vol 1-12 and Master Index"):

- The parties identify 29 C.F.R. § 1915.5 (2015) as the incorporating by reference regulation, *see* Becker Decl. ¶ 57, Ex. 91; Wise Decl., Ex. 175, which states that the incorporation by reference is "approved for §§ 1915.507(b)(1) and (b)(2)." *See* § 1915.5(i)(6). Section 1915.507(b), in turn, requires the following:

1915.507(b)(1)

The employer must select, install, inspect, maintain, and test all portable fire extinguishers according to NFPA 10-2002 Standard for Portable Fire Extinguishers (incorporated by reference, *see* § 1915.5).

1915.507(b)(2)

The employer is permitted to use Class II or Class III hose systems, in accordance with NFPA 10-2002 (incorporated by reference, *see* § 1915.5), as portable fire extinguishers if the employer selects, installs, inspects, maintains, and tests those systems according to the specific

recommendations in NFPA 14-2003 Standard for the Installation of Standpipe and Hose Systems (incorporated by reference, see § 1915.5).

Neither regulation specifies that only certain provisions of NFPA 10 (2002) are incorporated by reference into law, nor do they indicate which specific provisions of NFPA 10 (2002) are relevant for compliance with the regulations.

- First Factor: There is no indication that Defendant stands to profit from republishing this standard; Defendant’s apparent purpose is to inform the public about the law and facilitate public debate. *See ASTM*, 896 F.3d at 449; Def’s 2d Mot. at 16. Defendant’s “attempt to freely distribute standards incorporated by reference into law qualify[es] as a use that further[s] the purposes of the fair use defense.” *ASTM*, 896 F.3d at 449. And while the standard is incorporated into Section 1915.507(b)(2) as a discretionary procedure, the court finds that the incorporated standard provides information essential for a private entity to comprehend its legal duties to comply with section 1915.507(b)(1), which weighs heavily in favor of permitting Defendant’s reproduction. *See ASTM*, 896 F.3d at 450.
- Second Factor: The “express text of the law falls plainly outside the realm of copyright protection.” *ASTM*, 896 F.3d at 451. Here, the standard is incorporated into law without limitation such that “the consequence of the incorporation by reference is virtually indistinguishable from a situation in which the standard had been expressly copied into law.” *Id.* at 452. Accordingly, “this factor weighs heavily in favor of fair use.” *Id.*
- Third Factor: The incorporating regulation does not specify that only certain provisions of this standard are incorporated by reference into law, nor does it indicate which specific provisions of the standard are relevant for regulatory compliance, suggesting that “a greater amount of the standard’s text might be fairly reproduced.” *Id.*
- Fourth Factor: Defendant’s reproductions have not had a “substantially adverse impact on the potential market for the originals,” nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm.” Memo Op. at 30–36 (internal quotation and citation marks omitted).
- Conclusion: Defendant may fairly reproduce this incorporated standard in its entirety.

11. NFPA 13 (2002): Installation of Sprinkler Systems (Title of work on certificate of registration is “National Fire Codes Vol 1- 12 and Master Index”):

- The parties identify 29 C.F.R. § 1915.5 (2015) as the incorporating by reference regulation, *see* Becker Decl. ¶ 57, Ex. 91; Wise Decl., Ex. 175, which states that the incorporation by reference is “approved for § 1915.507(d).” *See* § 1915.5(i)(9). Section 1915.507(d), in turn, requires that when dealing with “Fixed extinguishing systems,” an employer must “select, install, maintain, inspect, and test all fixed systems required by OSHA,” including [a]utomatic sprinkler systems according to NFPA 25-2002 . . . , and either (i) NFPA 13-2002” or “(ii) NFPA 750-2003.” 29 C.F.R. § 1915.507(d). The regulation does not specify that only certain provisions of NFPA 13 (2002) are incorporated by reference into law, nor does it indicate which specific provisions of NFPA 13 (2002) are relevant for compliance with the regulation.
- First Factor: There is no indication that Defendant stands to profit from republishing

this standard; Defendant's apparent purpose is to inform the public about the law and facilitate public debate. *See ASTM*, 896 F.3d at 449; Def's 2d Mot. at 16. Defendant's "attempt to freely distribute standards incorporated by reference into law qualifie[s] as a use that further[s] the purposes of the fair use defense." *ASTM*, 896 F.3d at 449. However, the court finds that the incorporated standard does not provide information essential for a private entity to comprehend its legal duties, because the entity could rely on the procedures set forth in NFPA 750-2003 to comply with the regulation. Accordingly, "while knowing the content of this incorporated standard might help inform one's understanding of the law," it "is not essential to complying with any legal duty," and thus, Defendant's use is less transformative and "its wholesale copying, in turn, less justified." *ASTM*, 896 F.3d at 450.

- Second Factor: The "express text of the law falls plainly outside the realm of copyright protection." *ASTM*, 896 F.3d at 451. Here, the standard is incorporated into law without limitation such that "the consequence of the incorporation by reference is virtually indistinguishable from a situation in which the standard had been expressly copied into law." *Id.* at 452. Accordingly, "this factor weighs heavily in favor of fair use." *Id.*
- Third Factor: The incorporating regulation does not specify that only certain provisions of this standard are incorporated by reference into law, nor does it indicate which specific provisions of the standard are relevant for regulatory compliance, suggesting that "a greater amount of the standard's text might be fairly reproduced." *Id.*
- Fourth Factor: Defendant's reproductions have not had a "substantially adverse impact on the potential market for the originals," nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm." Memo Op. at 30–36 (internal quotation and citation marks omitted).
- Conclusion: Defendant may fairly reproduce this incorporated standard in its entirety.

12. NFPA 25 (2002): Inspection, Testing and Maintenance of WaterBased Fire Protection Systems (Title of work on certificate of registration is "National Fire Codes Vol 1- 12 and Master Index"):

- The parties identify 29 C.F.R. § 1915.5 (2015) as the incorporating by reference regulation, *see* Becker Decl. ¶ 57, Ex. 91; Wise Decl., Ex. 175, which states that the incorporation by reference is "approved for § 1915.507(d)." *See* § 1915.5(i)(11). Section 1915.507(d), in turn, requires that when dealing with "Fixed extinguishing systems," an employer must "select, install, maintain, inspect, and test all fixed systems required by OSHA," including [a]utomatic sprinkler systems according to NFPA 25-2002 . . . , and either (i) NFPA 13-2002" or "(ii) NFPA 750-2003." 29 C.F.R. § 1915.507(d). The regulation does not specify that only certain provisions of NFPA 25 (2002) are incorporated by reference into law, nor does it indicate which specific provisions of NFPA 25 (2002) are relevant for compliance with the regulation.
- First Factor: There is no indication that Defendant stands to profit from republishing this standard; Defendant's apparent purpose is to inform the public about the law and facilitate public debate. *See ASTM*, 896 F.3d at 449; Def's 2d Mot. at 16. Defendant's "attempt to freely distribute standards incorporated by reference into law qualifie[s] as

a use that further[s] the purposes of the fair use defense.” *ASTM*, 896 F.3d at 449. Further, the incorporated standard provides information essential for a private entity to comprehend its legal duties, which weighs heavily in favor of permitting Defendant’s reproduction. *See ASTM*, 896 F.3d at 450.

- Second Factor: The “express text of the law falls plainly outside the realm of copyright protection.” *ASTM*, 896 F.3d at 451. Here, the standard is incorporated into law without limitation such that “the consequence of the incorporation by reference is virtually indistinguishable from a situation in which the standard had been expressly copied into law.” *Id.* at 452. Accordingly, “this factor weighs heavily in favor of fair use.” *Id.*
- Third Factor: The incorporating regulation does not specify that only certain provisions of this standard are incorporated by reference into law, nor does it indicate which specific provisions of the standard are relevant for regulatory compliance, suggesting that “a greater amount of the standard’s text might be fairly reproduced.” *Id.*
- Fourth Factor: Defendant’s reproductions have not had a “substantially adverse impact on the potential market for the originals,” nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm.” Memo Op. at 30–36 (internal quotation and citation marks omitted).
- Conclusion: Defendant may fairly reproduce this incorporated standard in its entirety.

13. NFPA 30 (2003): Flammable and Combustible Liquids Code:

- The parties identify 49 C.F.R. § 192.7 (2009) as the incorporating by reference regulation, *see* Becker Decl. ¶ 57, Ex. 91; Wise Decl., Ex. 175, which recognizes the applicable regulation at 49 C.F.R. § 192.735(b). Section 192.735(b), in turn, requires that “[a]boveground oil or gasoline storage tanks must be protected in accordance with NFPA-30 (incorporated by reference, *see* § 192.7).” The regulation does not specify that only certain provisions of NFPA 30 (2003) are incorporated by reference into law, nor does it indicate which specific provisions of NFPA 30 (2003) are relevant for compliance with the regulation.
- First Factor: There is no indication that Defendant stands to profit from republishing this standard; Defendant’s apparent purpose is to inform the public about the law and facilitate public debate. *See ASTM*, 896 F.3d at 449; Def’s 2d Mot. at 16. Defendant’s “attempt to freely distribute standards incorporated by reference into law qualifie[s] as a use that further[s] the purposes of the fair use defense.” *ASTM*, 896 F.3d at 449. Further, the incorporated standard provides information essential for a private entity to comprehend its legal duties, which weighs heavily in favor of permitting Defendant’s reproduction. *See ASTM*, 896 F.3d at 450.
- Second Factor: The “express text of the law falls plainly outside the realm of copyright protection.” *ASTM*, 896 F.3d at 451. Here, the standard is incorporated into law without limitation such that “the consequence of the incorporation by reference is virtually indistinguishable from a situation in which the standard had been expressly copied into law.” *Id.* at 452. Accordingly, “this factor weighs heavily in favor of fair use.” *Id.*
- Third Factor: The incorporating regulation does not specify that only certain provisions

of this standard are incorporated by reference into law, nor does it indicate which specific provisions of the standard are relevant for regulatory compliance, suggesting that “a greater amount of the standard’s text might be fairly reproduced.” *Id.*

- Fourth Factor: Defendant’s reproductions have not had a “substantially adverse impact on the potential market for the originals,” nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm.” Memo Op. at 30–36 (internal quotation and citation marks omitted).
- Conclusion: Defendant may fairly reproduce this incorporated standard in its entirety.

14. NFPA 58 (2001): Liquefied Petroleum Gas Code (Title of work on certificate of registration is “National Fire Codes Vol 3”):

- The parties identify 49 C.F.R. § 171.7 (2011) as the incorporating by reference regulation, *see* Becker Decl. ¶ 57, Ex. 91; Wise Decl., Ex. 175, which recognizes the applicable regulation at 49 C.F.R. §§ 173.5 and 173.315. *See* 49 C.F.R. § 171.7(a)(3) (2011). Sections 173.5 and 173.315 both appear in Part 173 of Department of Transportation regulations titled “Shippers-General Requirements for Shipments and Packaging.” Section 173.5 provides “[a] non-DOT specification cargo tank motor vehicle may be used to transport Liquefied petroleum gas” if, *inter alia*, “[t]he cargo tank . . . conforms to applicable requirements in National Fire Protection Association (NFPA) 58.” *Id.* § 173.5(d)(4). Section 173.315 requires that “[l]iquefied compressed gases that are transported in UN portable tanks, DOT specification portable tanks, or cargo tanks must be prepared in accordance with this section.” *Id.* § 173.315(a). Among the section’s requirements is that “[s]torage containers for liquified petroleum gas or propane charged to five percent of their capacity or less and intended for permanent installation on consumer premises may be shipped by private motor carrier under” certain conditions, including that “[e]ach container must be equipped with safety devices in compliance with the requirements for safety devices on containers as specified in NFPA 58, Liquefied Petroleum Gas Code (IBR, *see* §171.7 of this subchapter). *Id.* § 173.5(j), (j)(2). Neither regulation specifies that only certain provisions of NFPA 58 (2001) are incorporated by reference into law, nor do they indicate which specific provisions of NFPA 58 (2001) are relevant for compliance with the regulations.
- First Factor: There is no indication that Defendant stands to profit from republishing this standard; Defendant’s apparent purpose is to inform the public about the law and facilitate public debate. *See ASTM*, 896 F.3d at 449; Def’s 2d Mot. at 16. Defendant’s “attempt to freely distribute standards incorporated by reference into law qualifie[s] as a use that further[s] the purposes of the fair use defense.” *ASTM*, 896 F.3d at 449. Further, the incorporated standard provides information essential for a private entity to comprehend its legal duties, which weighs heavily in favor of permitting Defendant’s reproduction. *See ASTM*, 896 F.3d at 450.
- Second Factor: The “express text of the law falls plainly outside the realm of copyright protection.” *ASTM*, 896 F.3d at 451. Here, the standard is incorporated into law without limitation such that “the consequence of the incorporation by reference is virtually indistinguishable from a situation in which the standard had been expressly copied into law.” *Id.* at 452. Accordingly, “this factor weighs heavily in favor of fair

use.” *Id.*

- Third Factor: The incorporating regulation does not specify that only certain provisions of this standard are incorporated by reference into law, nor does it indicate which specific provisions of the standard are relevant for regulatory compliance, suggesting that “a greater amount of the standard’s text might be fairly reproduced.” *Id.*
- Fourth Factor: Defendant’s reproductions have not had a “substantially adverse impact on the potential market for the originals,” nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm.” Memo Op. at 30–36 (internal quotation and citation marks omitted).
- Conclusion: Defendant may fairly reproduce this incorporated standard in its entirety.

15. NFPA 58 (2004): Liquefied Petroleum Gas Code:

- The parties identify 49 C.F.R. § 192.7 (2009) as the incorporating by reference regulation, *see* Becker Decl. ¶ 57, Ex. 91; Wise Decl., Ex. 175, which identifies the applicable regulations at 49 C.F.R. §§ 192.11(a), 192.11(b), 192.11(c). *See* 49 C.F.R. § 192.7(c)(2)(F)(2) (2009). Section 192.11(a) requires that “[e]ach plant that supplies petroleum gas by pipeline to a natural gas distribution system must meet the requirements of this part and ANSI/ NFPA 58 and 59; section 192(b) requires that “[e]ach pipeline system subject to this part that transports only petroleum gas or petroleum gas/air mixtures must meet the requirements of this part and of ANSI/NFPA 58 and 59,” and section 192(c) provides that “[i]n the event of a conflict between this part and ANSI/NFPA 58 and 59, ANSI/NFPA 58 and 59 prevail. The regulation does not specify that only certain provisions of NFPA 58 (2004) are incorporated by reference into law, nor does it indicate which specific provisions of NFPA 58 (2004) are relevant for compliance with the regulation.
- First Factor: There is no indication that Defendant stands to profit from republishing this standard; Defendant’s apparent purpose is to inform the public about the law and facilitate public debate. *See ASTM*, 896 F.3d at 449; Def’s 2d Mot. at 16. Defendant’s “attempt to freely distribute standards incorporated by reference into law qualifie[s] as a use that further[s] the purposes of the fair use defense.” *ASTM*, 896 F.3d at 449. Further, the incorporated standard provides information essential for a private entity to comprehend its legal duties, which weighs heavily in favor of permitting Defendant’s reproduction. *See ASTM*, 896 F.3d at 450.
- Second Factor: The “express text of the law falls plainly outside the realm of copyright protection.” *ASTM*, 896 F.3d at 451. Here, the standard is incorporated into law without limitation such that “the consequence of the incorporation by reference is virtually indistinguishable from a situation in which the standard had been expressly copied into law.” *Id.* at 452. Accordingly, “this factor weighs heavily in favor of fair use.” *Id.*
- Third Factor: The incorporating regulation does not specify that only certain provisions of this standard are incorporated by reference into law, nor does it indicate which specific provisions of the standard are relevant for regulatory compliance, suggesting that “a greater amount of the standard’s text might be fairly reproduced.” *Id.*
- Fourth Factor: Defendant’s reproductions have not had a “substantially adverse impact

on the potential market for the originals,” nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm.” Memo Op. at 30–36 (internal quotation and citation marks omitted).

- Conclusion: Defendant may fairly reproduce this incorporated standard in its entirety.

16. NFPA 59 (2004): Utility LP Gas Plant Code:

- The parties identify 49 C.F.R. § 192.7 (2009) as the incorporating by reference regulation, *see* Becker Decl. ¶ 57, Ex. 91; Wise Decl., Ex. 175, which identifies the applicable regulations at 49 C.F.R. §§ 192.11(a), 192.11(b), 192.11(c). *See* 49 C.F.R. § 192.7(c)(2)(F)(2) (2009). Section 192.11(a) requires that “[e]ach plant that supplies petroleum gas by pipeline to a natural gas distribution system must meet the requirements of this part and ANSI/ NFPA 58 and 59; section 192(b) requires that “[e]ach pipeline system subject to this part that transports only petroleum gas or petroleum gas/air mixtures must meet the requirements of this part and of ANSI/NFPA 58 and 59,” and section 192(c) provides that “[i]n the event of a conflict between this part and ANSI/NFPA 58 and 59, ANSI/NFPA 58 and 59 prevail. The regulation does not specify that only certain provisions of NFPA 59 (2004) are incorporated by reference into law, nor does it indicate which specific provisions of NFPA 59 (2004) are relevant for compliance with the regulation.
- First Factor: There is no indication that Defendant stands to profit from republishing this standard; Defendant’s apparent purpose is to inform the public about the law and facilitate public debate. *See ASTM*, 896 F.3d at 449; Def’s 2d Mot. at 16. Defendant’s “attempt to freely distribute standards incorporated by reference into law qualifie[s] as a use that further[s] the purposes of the fair use defense.” *ASTM*, 896 F.3d at 449. Further, the incorporated standard provides information essential for a private entity to comprehend its legal duties, which weighs heavily in favor of permitting Defendant’s reproduction. *See ASTM*, 896 F.3d at 450.
- Second Factor: The “express text of the law falls plainly outside the realm of copyright protection.” *ASTM*, 896 F.3d at 451. Here, the standard is incorporated into law without limitation such that “the consequence of the incorporation by reference is virtually indistinguishable from a situation in which the standard had been expressly copied into law.” *Id.* at 452. Accordingly, “this factor weighs heavily in favor of fair use.” *Id.*
- Third Factor: The incorporating regulation does not specify that only certain provisions of this standard are incorporated by reference into law, nor does it indicate which specific provisions of the standard are relevant for regulatory compliance, suggesting that “a greater amount of the standard’s text might be fairly reproduced.” *Id.*
- Fourth Factor: Defendant’s reproductions have not had a “substantially adverse impact on the potential market for the originals,” nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm.” Memo Op. at 30–36 (internal quotation and citation marks omitted).
- Conclusion: Defendant may fairly reproduce this incorporated standard in its entirety.

17. NFPA 70 (1999): National Electric Code:

- The parties identify 7 C.F.R. § 1755.509 (2010) as the incorporating by reference regulation, *see* Becker Decl. ¶ 57, Ex. 91; Wise Decl., Ex. 175, which does so in relation to “methods of making service installations at customer access locations in telecommunications systems of [rural utility services] borrowers.” *See* 7 C.F.R. § 1755.502 (dictating scope of §§ 1755.503 to 1755.510). Part 1755 contains numerous provisions requiring compliance with NFPA 70 (1999) generally, *see, e.g., id.* § 1755.503(j) (requiring “NIDs, BETs, and fused primary station protectors shall be installed and grounded to meet the requirements of the ANSI/NFPA 70–1999, NEC ®, or local laws or ordinances, whichever are more stringent”); *id.* § 1755.503(d) (requiring that “[a]erial service wires shall be run in accordance with the construction drawings contained in §1755.510 and shall conform to all clearance requirements of the ANSI/NFPA 70–1999”), portions requiring compliance with specific provisions of NFPA 70 (1999), *see, e.g., id.* § 1755.505(f)(13) (requiring that “[t]he installation shall comply with all the requirements of section 800–12(c) of ANSI/NFPA 70–1999”), as well as provisions incorporating NFPA 70 (1999) as a reference procedure, *see, e.g., id.* § 1755.501 (adopting and providing various definitions set forth in NFPA 70 (1999)); *id.* § 1755.503(c) (explaining that the “requirements provided in this section and §§1755.504 through 1755.510 have been designed to coordinate with the provisions of the ANSI/NFPA 70– 1999”).
- First Factor: There is no indication that Defendant stands to profit from republishing this standard; Defendant’s apparent purpose is to inform the public about the law and facilitate public debate. *See ASTM*, 896 F.3d at 449; Def’s 2d Mot. at 16. Defendant’s “attempt to freely distribute standards incorporated by reference into law qualifie[s] as a use that further[s] the purposes of the fair use defense.” *ASTM*, 896 F.3d at 449. Further, the incorporated standard provides information essential for a private entity to comprehend its legal duties, which weighs heavily in favor of permitting Defendant’s reproduction. *See ASTM*, 896 F.3d at 450.
- Second Factor: The “express text of the law falls plainly outside the realm of copyright protection.” *ASTM*, 896 F.3d at 451. Here, the standard is incorporated into law without limitation such that “the consequence of the incorporation by reference is virtually indistinguishable from a situation in which the standard had been expressly copied into law.” *Id.* at 452. Accordingly, “this factor weighs heavily in favor of fair use.” *Id.*
- Third Factor: In some provisions, the incorporating regulation identifies specific portions of the standard that are relevant to regulatory compliance. *See, e.g.,* 7 C.F.R. § 1755.505(f)(13) (requiring that “[t]he installation shall comply with all the requirements of section 800–12(c) of ANSI/NFPA 70–1999”). Other provisions, though, do not specify which specific provisions of the standard are relevant for regulatory compliance. *See, e.g., id.* § 1755.503(j) (requiring “NIDs, BETs, and fused primary station protectors shall be installed and grounded to meet the requirements of the ANSI/NFPA 70–1999, NEC ®, or local laws or ordinances, whichever are more stringent”); *id.* § 1755.503(d) (requiring that “[a]erial service wires shall be run in accordance with the construction drawings contained in §1755.510 and shall conform to all clearance requirements of the ANSI/NFPA 70–1999”). This suggests that “a greater amount of the standard’s text might be fairly reproduced.” *Id.*

- Fourth Factor: Defendant’s reproductions have not had a “substantially adverse impact on the potential market for the originals,” nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm.” Memo Op. at 30–36 (internal quotation and citation marks omitted).
- Conclusion: Defendant may fairly reproduce this incorporated standard in its entirety.

18. NFPA 70 (2005): National Electric Code:

- The parties identify 49 C.F.R. § 192.7 as the incorporating by reference regulation, *see* Becker Decl. ¶ 57, Ex. 91; Wise Decl., Ex. 175, which incorporates the standard into 49 C.F.R. § 192.163(e) and § 192.189(c). *See* 49 C.F.R. § 192.7(c)(2)(F)(4) (2009). Section 192.163(e) provides that “[e]lectrical equipment and wiring installed in compressor stations must conform to [NFPA 70], so far as that code is applicable.” 49 C.F.R. § 192.163(e) (2009). Section 192.189 provides “[e]lectrical equipment in vaults must conform to the applicable requirements of Class 1, Group D, of the [NFPA 70].” 49 C.F.R. § 192.189. Neither regulation specifies that only certain provisions of NFPA 70 (2005) are incorporated by reference into law, nor do they indicate which specific provisions of NFPA 70 (2005) are relevant for compliance with the regulations.
- First Factor: There is no indication that Defendant stands to profit from republishing this standard; Defendant’s apparent purpose is to inform the public about the law and facilitate public debate. *See ASTM*, 896 F.3d at 449; Def’s 2d Mot. at 16. Defendant’s “attempt to freely distribute standards incorporated by reference into law qualifie[s] as a use that further[s] the purposes of the fair use defense.” *ASTM*, 896 F.3d at 449. Further, the incorporated standard provides information essential for a private entity to comprehend its legal duties, which weighs heavily in favor of permitting Defendant’s reproduction. *See ASTM*, 896 F.3d at 450.
- Second Factor: The “express text of the law falls plainly outside the realm of copyright protection.” *ASTM*, 896 F.3d at 451. Here, the standard is incorporated into law without limitation such that “the consequence of the incorporation by reference is virtually indistinguishable from a situation in which the standard had been expressly copied into law.” *Id.* at 452. Accordingly, “this factor weighs heavily in favor of fair use.” *Id.*
- Third Factor: The incorporating regulation does not specify that only certain provisions of this standard are incorporated by reference into law, nor does it indicate which specific provisions of the standard are relevant for regulatory compliance, suggesting that “a greater amount of the standard’s text might be fairly reproduced.” *Id.*
- Fourth Factor: Defendant’s reproductions have not had a “substantially adverse impact on the potential market for the originals,” nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm.” Memo Op. at 30–36 (internal quotation and citation marks omitted).
- Conclusion: Defendant may fairly reproduce this incorporated standard in its entirety.

19. NFPA 70 (2008): National Electric Code:

- Defendant identifies 24 C.F.R. § 3285.4 (2013) as an incorporating by reference regulation, *see* Becker Decl. ¶ 57, Ex. 91, but that regulation incorporates the 2005

edition of NFPA 70—not the 2008 edition. Defendant also identifies Rhode Island State Regulation SBC-5-2008 (Rhode Island State Building Code) as an incorporating by reference regulation, which incorporates NFPA 70 (2008) in full as the Rhode Island State Electrical Code, together with the amendments set by the Rhode Island State Regulation. *See* SBC-5-2008. While SBC-5-2008 provides text of the amended provisions of NFPA 70 (2008), it does not reproduce most of its provisions.

- First Factor: There is no indication that Defendant stands to profit from republishing this standard; Defendant’s apparent purpose is to inform the public about the law and facilitate public debate. *See ASTM*, 896 F.3d at 449; Def’s 2d Mot. at 16. Defendant’s “attempt to freely distribute standards incorporated by reference into law qualify[es] as a use that further[s] the purposes of the fair use defense.” *ASTM*, 896 F.3d at 449. Further, the incorporated standard provides information essential for a private entity to comprehend its legal duties, which weighs heavily in favor of permitting Defendant’s reproduction. *See ASTM*, 896 F.3d at 450.
- Second Factor: The “express text of the law falls plainly outside the realm of copyright protection.” *ASTM*, 896 F.3d at 451. Here, the standard is incorporated into law without limitation such that “the consequence of the incorporation by reference is virtually indistinguishable from a situation in which the standard had been expressly copied into law.” *Id.* at 452. Accordingly, “this factor weighs heavily in favor of fair use.” *Id.*
- Third Factor: The incorporating regulation does not specify that only certain provisions of this standard are incorporated by reference into law, nor does it indicate which specific provisions of the standard are relevant for regulatory compliance, suggesting that “a greater amount of the standard’s text might be fairly reproduced.” *Id.*
- Fourth Factor: Defendant’s reproductions have not had a “substantially adverse impact on the potential market for the originals,” nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm.” Memo Op. at 30–36 (internal quotation and citation marks omitted).
- Conclusion: Defendant may fairly reproduce this incorporated standard in its entirety.

20. NFPA 70 (2011): National Electric Code:

- The parties identify 49 C.F.R. § 192.7 (2015) as the incorporating by reference regulation, *see* Becker Decl. ¶ 57, Ex. 91; Wise Decl., Ex. 175, which incorporates the standard into 49 C.F.R. § 192.163(e) and § 192.189(c). *See* 49 C.F.R. § 192.7(c)(2)(F)(4) (2015). Section 192.163(e) provides that “[e]lectrical equipment and wiring installed in compressor stations must conform to the NFPA-70, so far as that code is applicable.” 49 C.F.R. § 192.163(e) (2015). Section 192.189 provides “[e]lectrical equipment in vaults must conform to the applicable requirements of Class 1, Group D, of the [NFPA 70].” 49 C.F.R. § 192.189(c) (2015). Neither regulation specifies that only certain provisions of NFPA 70 (2011) are incorporated by reference into law, nor do they indicate which specific provisions of NFPA 70 (2011) are relevant for compliance with the regulations.
- First Factor: There is no indication that Defendant stands to profit from republishing this standard; Defendant’s apparent purpose is to inform the public about the law and

facilitate public debate. *See ASTM*, 896 F.3d at 449; Def’s 2d Mot. at 16. Defendant’s “attempt to freely distribute standards incorporated by reference into law qualifie[s] as a use that further[s] the purposes of the fair use defense.” *ASTM*, 896 F.3d at 449. Further, the incorporated standard provides information essential for a private entity to comprehend its legal duties, which weighs heavily in favor of permitting Defendant’s reproduction. *See ASTM*, 896 F.3d at 450.

- Second Factor: The “express text of the law falls plainly outside the realm of copyright protection.” *ASTM*, 896 F.3d at 451. Here, the standard is incorporated into law without limitation such that “the consequence of the incorporation by reference is virtually indistinguishable from a situation in which the standard had been expressly copied into law.” *Id.* at 452. Accordingly, “this factor weighs heavily in favor of fair use.” *Id.*
- Third Factor: While section 192.189(c) references specific provisions of NFPA 70 that are relevant for regulatory compliance, section 192.163(e) does not indicate which specific provisions of the standard are relevant for regulatory compliance, suggesting that “a greater amount of the standard’s text might be fairly reproduced.” *Id.*
- Fourth Factor: Defendant’s reproductions have not had a “substantially adverse impact on the potential market for the originals,” nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm.” Memo Op. at 30–36 (internal quotation and citation marks omitted).
- Conclusion: Defendant may fairly reproduce this incorporated standard in its entirety.

21. NFPA 70 (2014): National Electric Code:

- Defendant identifies 16 C.F.R. § 1211.40(c)(1) (2019) as the incorporating by reference regulation, *see* Becker Decl. ¶ 57, Ex. 91, which does not exist. However, 16 C.F.R. § 1211.40(c)(1) (2016) incorporates the standard into § 1211.40.2(c). Section 1211.40.2 defines “[r]esidential garage door operator” as “a vehicular door operator which,” *inter alia*, “[s]erves a residential building of one to four single family units” and “[i]s intended to be employed in ordinary locations in accordance with NFPA 70.” 16 C.F.R. § 1211.2 (2016). It does not specify that only certain provisions of NFPA 70 (2014) are incorporated by reference into law, nor does it indicate which specific provisions of NFPA 70 (2014) are relevant for compliance with the regulation.
- First Factor: There is no indication that Defendant stands to profit from republishing this standard; Defendant’s apparent purpose is to inform the public about the law and facilitate public debate. *See ASTM*, 896 F.3d at 449; Def’s 2d Mot. at 16. Defendant’s “attempt to freely distribute standards incorporated by reference into law qualifie[s] as a use that further[s] the purposes of the fair use defense.” *ASTM*, 896 F.3d at 449. However, the court finds that the incorporated standard does not provide information essential for a private entity to comprehend its legal duties, but rather is incorporated as a reference procedure. Accordingly, “while knowing the content of this incorporated standard might help inform one’s understanding of the law,” it “is not essential to complying with any legal duty,” and thus, Defendant’s use is less transformative and “its wholesale copying, in turn, less justified.” *ASTM*, 896 F.3d at 450.
- Second Factor: The “express text of the law falls plainly outside the realm of copyright

protection.” *ASTM*, 896 F.3d at 451. Here, the standard is incorporated into law without limitation such that “the consequence of the incorporation by reference is virtually indistinguishable from a situation in which the standard had been expressly copied into law.” *Id.* at 452. Accordingly, “this factor weighs heavily in favor of fair use.” *Id.*

- Third Factor: The incorporating regulation does not specify that only certain provisions of this standard are incorporated by reference into law, nor does it indicate which specific provisions of the standard are relevant for regulatory compliance, suggesting that “a greater amount of the standard’s text might be fairly reproduced.” *Id.*
- Fourth Factor: Defendant’s reproductions have not had a “substantially adverse impact on the potential market for the originals,” nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm.” Memo Op. at 30–36 (internal quotation and citation marks omitted).
- Conclusion: Defendant may fairly reproduce this incorporated standard in its entirety.

22. NFPA 72 (2002): National Fire Alarm Code:

- The parties identify 29 C.F.R. § 1915.5 (2015) as the incorporating by reference regulation, *see* Becker Decl. ¶ 57, Ex. 91; Wise Decl., Ex. 175, which incorporates the standard into §1915.507(c)(6). *See* 29 C.F.R. § 1915.5(d)(4)(viii) (2015). That section provides that “[t]he employer must . . . [s]elect, install, inspect, maintain, and test all automatic fire detection systems and emergency alarms according to NFPA 72–2002 National Fire Alarm Code (incorporated by reference, *see* § 1915.5).” 29 C.F.R. § 1915.507(c)(6). It does not specify that only certain provisions of NFPA 72 (2002) are incorporated by reference into law, nor does it indicate which specific provisions of NFPA 72 (2002) are relevant for compliance with the regulation.
- First Factor: There is no indication that Defendant stands to profit from republishing this standard; Defendant’s apparent purpose is to inform the public about the law and facilitate public debate. *See ASTM*, 896 F.3d at 449; Def’s 2d Mot. at 16. Defendant’s “attempt to freely distribute standards incorporated by reference into law qualifie[s] as a use that further[s] the purposes of the fair use defense.” *ASTM*, 896 F.3d at 449. Further, the incorporated standard provides information essential for a private entity to comprehend its legal duties, which weighs heavily in favor of permitting Defendant’s reproduction. *See ASTM*, 896 F.3d at 450.
- Second Factor: The “express text of the law falls plainly outside the realm of copyright protection.” *ASTM*, 896 F.3d at 451. Here, the standard is incorporated into law without limitation such that “the consequence of the incorporation by reference is virtually indistinguishable from a situation in which the standard had been expressly copied into law.” *Id.* at 452. Accordingly, “this factor weighs heavily in favor of fair use.” *Id.*
- Third Factor: The incorporating regulation does not specify that only certain provisions of this standard are incorporated by reference into law, nor does it indicate which specific provisions of the standard are relevant for regulatory compliance, suggesting that “a greater amount of the standard’s text might be fairly reproduced.” *Id.*
- Fourth Factor: Defendant’s reproductions have not had a “substantially adverse impact

on the potential market for the originals,” nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm.” Memo Op. at 30–36 (internal quotation and citation marks omitted).

- Conclusion: Defendant may fairly reproduce this incorporated standard in its entirety.

23. NFPA 99 (2005): Health Care Facilities Code:

- The parties identify 46 C.F.R. § 110.10-1 (2009) as the incorporating by reference regulation, *see* Becker Decl. ¶ 57, Ex. 91; Wise Decl., Ex. 175, which incorporates the standard into 46 C.F.R. § 111.105-37. *See* 46 C.F.R. § 110.10-1(l)(3) (2009). That section provides that “[e]ach electric installation where a flammable anesthetic is used or stored must meet NFPA 99.” 46 C.F.R. § 111.105-37 (2009). It does not specify that only certain provisions of NFPA 99 (2005) are incorporated by reference into law, nor does it indicate which specific provisions of NFPA 99 (2005) are relevant for compliance with the regulation.
- First Factor: There is no indication that Defendant stands to profit from republishing this standard; Defendant’s apparent purpose is to inform the public about the law and facilitate public debate. *See ASTM*, 896 F.3d at 449; Def’s 2d Mot. at 16. Defendant’s “attempt to freely distribute standards incorporated by reference into law qualify[es] as a use that further[s] the purposes of the fair use defense.” *ASTM*, 896 F.3d at 449. Further, the incorporated standard provides information essential for a private entity to comprehend its legal duties, which weighs heavily in favor of permitting Defendant’s reproduction. *See ASTM*, 896 F.3d at 450.
- Second Factor: The “express text of the law falls plainly outside the realm of copyright protection.” *ASTM*, 896 F.3d at 451. Here, the standard is incorporated into law without limitation such that “the consequence of the incorporation by reference is virtually indistinguishable from a situation in which the standard had been expressly copied into law.” *Id.* at 452. Accordingly, “this factor weighs heavily in favor of fair use.” *Id.*
- Third Factor: The incorporating regulation does not specify that only certain provisions of this standard are incorporated by reference into law, nor does it indicate which specific provisions of the standard are relevant for regulatory compliance, suggesting that “a greater amount of the standard’s text might be fairly reproduced.” *Id.*
- Fourth Factor: Defendant’s reproductions have not had a “substantially adverse impact on the potential market for the originals,” nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm.” Memo Op. at 30–36 (internal quotation and citation marks omitted).
- Conclusion: Defendant may fairly reproduce this incorporated standard in its entirety.

24. NFPA 101 (2000): Life Safety Code:

- The parties identify 42 C.F.R. § 460.72 (2010) as the incorporating by reference regulation, *see* Becker Decl. ¶ 57, Ex. 91; Wise Decl., Ex. 175, which requires that a “PACE center must meet the applicable provisions of the” standard. 42 C.F.R. § 460.72(b)(1) (2010). The regulation does not specify that only certain provisions of NFPA 101 (2000) are incorporated by reference into law, nor does it indicate which

specific provisions of NFPA 101 (2000) are “applicable” for compliance with the regulation.

- First Factor: There is no indication that Defendant stands to profit from republishing this standard; Defendant’s apparent purpose is to inform the public about the law and facilitate public debate. *See ASTM*, 896 F.3d at 449; Def’s 2d Mot. at 16. Defendant’s “attempt to freely distribute standards incorporated by reference into law qualifie[s] as a use that further[s] the purposes of the fair use defense.” *ASTM*, 896 F.3d at 449. Further, the incorporated standard provides information essential for a private entity to comprehend its legal duties, which weighs heavily in favor of permitting Defendant’s reproduction. *See ASTM*, 896 F.3d at 450.
- Second Factor: The “express text of the law falls plainly outside the realm of copyright protection.” *ASTM*, 896 F.3d at 451. Here, the standard is incorporated into law without limitation such that “the consequence of the incorporation by reference is virtually indistinguishable from a situation in which the standard had been expressly copied into law.” *Id.* at 452. Accordingly, “this factor weighs heavily in favor of fair use.” *Id.*
- Third Factor: The incorporating regulation does not specify that only certain provisions of this standard are incorporated by reference into law, nor does it indicate which specific provisions of the standard are relevant for regulatory compliance, suggesting that “a greater amount of the standard’s text might be fairly reproduced.” *Id.*
- Fourth Factor: Defendant’s reproductions have not had a “substantially adverse impact on the potential market for the originals,” nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm.” Memo Op. at 30–36 (internal quotation and citation marks omitted).
- Conclusion: Defendant may fairly reproduce this incorporated standard in its entirety.

25. NFPA 101 (2003): Life Safety Code:

- The parties identify 38 C.F.R. § 39.63 (2011) as the incorporating by reference regulation, *see* Becker Decl. ¶ 57, Ex. 91; Wise Decl., Ex. 175, which provides that veterans cemeteries must comply with the “[a]rchitectural and structural requirements” of NFPA 101 (2003). 38 C.F.R § 39.63 (2011). The regulation does not specify that only certain provisions of NFPA 101 (2003) are incorporated by reference into law, nor does it indicate which specific provisions of NFPA 101 (2003) are relevant for compliance with the regulation.
- First Factor: There is no indication that Defendant stands to profit from republishing this standard; Defendant’s apparent purpose is to inform the public about the law and facilitate public debate. *See ASTM*, 896 F.3d at 449; Def’s 2d Mot. at 16. Defendant’s “attempt to freely distribute standards incorporated by reference into law qualifie[s] as a use that further[s] the purposes of the fair use defense.” *ASTM*, 896 F.3d at 449. Further, the incorporated standard provides information essential for a private entity to comprehend its legal duties, which weighs heavily in favor of permitting Defendant’s reproduction. *See ASTM*, 896 F.3d at 450.
- Second Factor: The “express text of the law falls plainly outside the realm of copyright protection.” *ASTM*, 896 F.3d at 451. Here, the standard is incorporated into law

without limitation such that “the consequence of the incorporation by reference is virtually indistinguishable from a situation in which the standard had been expressly copied into law.” *Id.* at 452. Accordingly, “this factor weighs heavily in favor of fair use.” *Id.*

- Third Factor: The incorporating regulation does not specify that only certain provisions of this standard are incorporated by reference into law, nor does it indicate which specific provisions of the standard are relevant for regulatory compliance, suggesting that “a greater amount of the standard’s text might be fairly reproduced.” *Id.*
- Fourth Factor: Defendant’s reproductions have not had a “substantially adverse impact on the potential market for the originals,” nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm.” Memo Op. at 30–36 (internal quotation and citation marks omitted).
- Conclusion: Defendant may fairly reproduce this incorporated standard in its entirety.

26. NFPA 101 (2006): Life Safety Code:

- The parties identify 38 C.F.R. § 51.200 (2010) as the incorporating by reference regulation, *see* Becker Decl. ¶ 57, Ex. 91; Wise Decl., Ex. 175, which relates to the “Physical environment” of a nursing home care facility and requires that the facility “must meet the applicable provisions of the National Fire Protection Association’s NFPA 101, Life Safety Code (2006 edition), except that the requirement in paragraph 19.3.5.1 for all buildings containing nursing homes to have an automatic sprinkler system is not applicable until August 13, 2013, unless an automatic sprinkler system was previously required by the Life Safety Code and the NFPA 99, Standard for Health Care Facilities (2005 edition).” 38 C.F.R. § 51.200(a) (2010). The regulation also requires that an emergency power system “must be the appropriate type essential electrical system in accordance with the applicable provisions of the National Fire Protection Association’s NFPA 101, Life Safety Code (2006 edition) and the NFPA 99, Standard for Health Care Facilities (2005 edition).” While the regulation specifies that one provision of NFPA 101 (2006) does not have legal import until a certain date, it does not specify that only that provision, or others, are incorporated by reference into law, nor does it indicate which specific provisions of NFPA 101 (2006) are relevant for compliance with the regulation.
- First Factor: There is no indication that Defendant stands to profit from republishing this standard; Defendant’s apparent purpose is to inform the public about the law and facilitate public debate. *See ASTM*, 896 F.3d at 449; Def’s 2d Mot. at 16. Defendant’s “attempt to freely distribute standards incorporated by reference into law qualifie[s] as a use that further[s] the purposes of the fair use defense.” *ASTM*, 896 F.3d at 449. Further, the incorporated standard provides information essential for a private entity to comprehend its legal duties, which weighs heavily in favor of permitting Defendant’s reproduction. *See ASTM*, 896 F.3d at 450.
- Second Factor: The “express text of the law falls plainly outside the realm of copyright protection.” *ASTM*, 896 F.3d at 451. Here, the standard is incorporated into law without limitation such that “the consequence of the incorporation by reference is virtually indistinguishable from a situation in which the standard had been expressly

copied into law.” *Id.* at 452. Accordingly, “this factor weighs heavily in favor of fair use.” *Id.*

- Third Factor: The incorporating regulation does not specify that only certain provisions of this standard are incorporated by reference into law, nor does it indicate which specific provisions of the standard are relevant for regulatory compliance, suggesting that “a greater amount of the standard’s text might be fairly reproduced.” *Id.*
- Fourth Factor: Defendant’s reproductions have not had a “substantially adverse impact on the potential market for the originals,” nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm.” Memo Op. at 30–36 (internal quotation and citation marks omitted).
- Conclusion: Defendant may fairly reproduce this incorporated standard in its entirety.

27. NFPA 704 (2007): Standard System for the Identification of the Hazards of Materials for Emergency Response:

- Defendant identifies 6 C.F.R. § 27.204 (2012) as the incorporating by reference regulation, *see* Becker Decl. ¶ 57, Ex. 91, which does not exist. Presumably Defendant intended to identify either 6 C.F.R. § 27.203 (2012) or 6 C.F.R. § 27.204 (2007). The first section, 27.203 (2012), provides that “in calculating whether a facility possesses an amount that meets the STQ for release chemicals of interest, the facility shall only include release chemicals of interest . . . “[i]n “gasoline, diesel, kerosene or jet fuel (including fuels that have flammability hazard ratings of 1, 2, 3, or 4, as determined by using National Fire Protection Association (NFPA) 704: Standard System for the Identification of the Hazards of Materials for Emergency Response [2007 ed.], which is incorporated by reference at 27.204(a)(2)) stored in aboveground tank farms, including tank farms that are part of pipeline systems.” 6 C.F.R. § 27.203(b), (b)(v). The second section, 6 C.F.R. § 27.204 (2007), requires that “if a release-flammable chemical of interest is present in a mixture in a concentration equal to or greater than one percent (1%) by weight of the mixture, and the mixture has a NFPA flammability hazard rating of 1, 2, or 3, the facility need not count the mixture toward the STQ. The flammability hazard ratings are defined in NFPA 704: Standard System for the Identification of the Hazards of Materials for Emergency Response [2007 ed.]” 6 C.F.R. § 27.204 (2007). Neither of these regulations specifies that only certain provisions of NFPA 704 (2007) are incorporated by reference into law, nor do they indicate which specific provisions of NFPA 704 (2007) are relevant for compliance with the regulations.
- First Factor: There is no indication that Defendant stands to profit from republishing this standard; Defendant’s apparent purpose is to inform the public about the law and facilitate public debate. *See ASTM*, 896 F.3d at 449; Def’s 2d Mot. at 16. Defendant’s “attempt to freely distribute standards incorporated by reference into law qualifie[s] as a use that further[s] the purposes of the fair use defense.” *ASTM*, 896 F.3d at 449. Further, the incorporated standard provides information essential for a private entity to comprehend its legal duties, which weighs heavily in favor of permitting Defendant’s reproduction. *See ASTM*, 896 F.3d at 450.
- Second Factor: The “express text of the law falls plainly outside the realm of copyright

protection.” *ASTM*, 896 F.3d at 451. Here, the standard is incorporated into law without limitation such that “the consequence of the incorporation by reference is virtually indistinguishable from a situation in which the standard had been expressly copied into law.” *Id.* at 452. Accordingly, “this factor weighs heavily in favor of fair use.” *Id.*

- Third Factor: The incorporating regulation does not specify that only certain provisions of this standard are incorporated by reference into law, nor does it indicate which specific provisions of the standard are relevant for regulatory compliance, suggesting that “a greater amount of the standard’s text might be fairly reproduced.” *Id.*
- Fourth Factor: Defendant’s reproductions have not had a “substantially adverse impact on the potential market for the originals,” nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm.” Memo Op. at 30–36 (internal quotation and citation marks omitted).
- Conclusion: Defendant may fairly reproduce this incorporated standard in its entirety.

28. ASTM A106/A106M (2004b):

- Defendant identifies 49 C.F.R. § 192.7 (2010) as the incorporating by reference regulation, *see* Becker Decl. ¶ 57, Ex. 90. The incorporating language in that regulation, however, references only ASTM A106/A106M-08, and not the 2004b version that Defendant published. Nonetheless, ASTM A106/A106M (2004b) was incorporated by reference into law by 49 C.F.R. § 192.7 (2006), which provides that “[a]ny documents or portions thereof incorporated by reference in this part are included in this part as though set out in full. When only a portion of a document is referenced, the remainder is not incorporated in this part.” 49 C.F.R. § 192.7(a). The regulation goes on to incorporate ASTM A106/A106M (2004b) for 49 C.F.R. § 192.113, which lists the standard as the reference procedure for determining the longitudinal joint factor for “seamless” pipe class. *See* 49 C.F.R. § 192.113. That regulation does not specify that only certain provisions of A106/A106M (2004b) are incorporated by reference into law, nor does it indicate which specific provisions of A106/A106M (2004b) are relevant for compliance with the regulation.
- First Factor: There is no indication that Defendant stands to profit from republishing this standard; Defendant’s apparent purpose is to inform the public about the law and facilitate public debate. *See ASTM*, 896 F.3d at 449; Def’s 2d Mot. at 16. Defendant’s “attempt to freely distribute standards incorporated by reference into law qualifie[s] as a use that further[s] the purposes of the fair use defense.” *ASTM*, 896 F.3d at 449. However, the court finds that the incorporated standard does not provide information essential for a private entity to comprehend its legal duties, but rather is incorporated as a reference procedure. Accordingly, “while knowing the content of this incorporated standard might help inform one’s understanding of the law,” it “is not essential to complying with any legal duty,” and thus, Defendant’s use is less transformative and “its wholesale copying, in turn, less justified.” *ASTM*, 896 F.3d at 450.
- Second Factor: The “express text of the law falls plainly outside the realm of copyright protection.” *ASTM*, 896 F.3d at 451. Here, the standard is incorporated into law without limitation such that “the consequence of the incorporation by reference is

virtually indistinguishable from a situation in which the standard had been expressly copied into law.” *Id.* at 452. Accordingly, “this factor weighs heavily in favor of fair use.” *Id.*

- Third Factor: The incorporating regulation does not specify that only certain provisions of this standard are incorporated by reference into law, nor does it indicate which specific provisions of the standard are relevant for regulatory compliance, suggesting that “a greater amount of the standard’s text might be fairly reproduced.” *Id.*
- Fourth Factor: Defendant’s reproductions have not had a “substantially adverse impact on the potential market for the originals,” nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm.” Memo Op. at 30–36 (internal quotation and citation marks omitted).
- Conclusion: Defendant may fairly reproduce this incorporated standard in its entirety.

29. ASTM A184 (1979):

- The parties identify 24 C.F.R. § (Parts 200 to 499) (2005) as the incorporating by reference regulation, *see* Becker Decl. ¶ 57, Ex. 90; Wise Decl., Ex. 176, which incorporates ASTM A184 (1979) for 24 C.F.R. § Part 200, Subpart S. *See* 24 C.F.R. § (Parts 200 to 499). The regulation does not specify that only certain provisions of ASTM A184 (1979) are incorporated by reference into law, nor does it indicate which specific provisions of ASTM A184 (1979) are relevant for compliance with the regulation.
- First Factor: There is no indication that Defendant stands to profit from republishing this standard; Defendant’s apparent purpose is to inform the public about the law and facilitate public debate. *See ASTM*, 896 F.3d at 449; Def’s 2d Mot. at 16. Defendant’s “attempt to freely distribute standards incorporated by reference into law qualifie[s] as a use that further[s] the purposes of the fair use defense.” *ASTM*, 896 F.3d at 449. However, the court finds that the incorporated standard does not provide information essential for a private entity to comprehend its legal duties, but rather is incorporated as a reference procedure. Accordingly, “while knowing the content of this incorporated standard might help inform one’s understanding of the law,” it “is not essential to complying with any legal duty,” and thus, Defendant’s use is less transformative and “its wholesale copying, in turn, less justified.” *ASTM*, 896 F.3d at 450.
- Second Factor: The “express text of the law falls plainly outside the realm of copyright protection.” *ASTM*, 896 F.3d at 451. Here, the standard is incorporated into law without limitation such that “the consequence of the incorporation by reference is virtually indistinguishable from a situation in which the standard had been expressly copied into law.” *Id.* at 452. Accordingly, “this factor weighs heavily in favor of fair use.” *Id.*
- Third Factor: The incorporating regulation does not specify that only certain provisions of this standard are incorporated by reference into law, nor does it indicate which specific provisions of the standard are relevant for regulatory compliance, suggesting that “a greater amount of the standard’s text might be fairly reproduced.” *Id.*
- Fourth Factor: Defendant’s reproductions have not had a “substantially adverse impact on the potential market for the originals,” nor have Plaintiffs shown by a preponderance

of the evidence that there is a meaningful likelihood of future harm.” Memo Op. at 30–36 (internal quotation and citation marks omitted).

- Conclusion: Defendant may fairly reproduce this incorporated standard in its entirety.

30. ASTM A185 (1979):

- The parties identify 24 C.F.R. § (Parts 200 to 499) (2005) as the incorporating by reference regulation, *see* Becker Decl. ¶ 57, Ex. 90; Wise Decl., Ex. 176, which incorporates ASTM A185 (1979) for 24 C.F.R. § Part 200, Subpart S. *See* 24 C.F.R. § (Parts 200 to 499). That regulation does not specify that only certain provisions of ASTM A185 (1979) are incorporated by reference into law, nor does it indicate which specific provisions of ASTM A185 (1979) are relevant for compliance with the regulation.
- First Factor: There is no indication that Defendant stands to profit from republishing this standard; Defendant’s apparent purpose is to inform the public about the law and facilitate public debate. *See ASTM*, 896 F.3d at 449; Def’s 2d Mot. at 16. Defendant’s “attempt to freely distribute standards incorporated by reference into law qualify[es] as a use that further[s] the purposes of the fair use defense.” *ASTM*, 896 F.3d at 449. However, the court finds that the incorporated standard does not provide information essential for a private entity to comprehend its legal duties, but rather is incorporated as a reference procedure. Accordingly, “while knowing the content of this incorporated standard might help inform one’s understanding of the law,” it “is not essential to complying with any legal duty,” and thus, Defendant’s use is less transformative and “its wholesale copying, in turn, less justified.” *ASTM*, 896 F.3d at 450.
- Second Factor: The “express text of the law falls plainly outside the realm of copyright protection.” *ASTM*, 896 F.3d at 451. Here, the standard is incorporated into law without limitation such that “the consequence of the incorporation by reference is virtually indistinguishable from a situation in which the standard had been expressly copied into law.” *Id.* at 452. Accordingly, “this factor weighs heavily in favor of fair use.” *Id.*
- Third Factor: The incorporating regulation does not specify that only certain provisions of this standard are incorporated by reference into law, nor does it indicate which specific provisions of the standard are relevant for regulatory compliance, suggesting that “a greater amount of the standard’s text might be fairly reproduced.” *Id.*
- Fourth Factor: Defendant’s reproductions have not had a “substantially adverse impact on the potential market for the originals,” nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm.” Memo Op. at 30–36 (internal quotation and citation marks omitted).
- Conclusion: Defendant may fairly reproduce this incorporated standard in its entirety.

31. ASTM A203/A203M (1997):

- The parties identify 46 C.F.R. § 54.01-1 (2010) as the incorporating by reference regulation, *see* Becker Decl. ¶ 57, Ex. 90; Wise Decl., Ex. 176, which incorporates the standard into 46 C.F.R. § 54.05-20. That regulation, in turn, provides in relevant part: “Transversely oriented Charpy V-notch impact specimens of ASTM A 203

(incorporated by reference, see §54.01–1) nickel steels must exhibit energies not less than the values shown in §54.05–20 (a).” 46 C.F.R. § 54.05-20(b). The regulation does not specify that only certain provisions of A203/A203M (1997) are incorporated by reference into law, nor does it indicate which specific provisions of ASTM A203/A203M (1997) are relevant for compliance with the regulation.

- First Factor: There is no indication that Defendant stands to profit from republishing this standard; Defendant’s apparent purpose is to inform the public about the law and facilitate public debate. *See ASTM*, 896 F.3d at 449; Def’s 2d Mot. at 16. Defendant’s “attempt to freely distribute standards incorporated by reference into law qualifie[s] as a use that further[s] the purposes of the fair use defense.” *ASTM*, 896 F.3d at 449. Further, the incorporated standard provides information essential for a private entity to comprehend its legal duties, which weighs heavily in favor of permitting Defendant’s reproduction. *See ASTM*, 896 F.3d at 450.
- Second Factor: The “express text of the law falls plainly outside the realm of copyright protection.” *ASTM*, 896 F.3d at 451. Here, the standard is incorporated into law without limitation such that “the consequence of the incorporation by reference is virtually indistinguishable from a situation in which the standard had been expressly copied into law.” *Id.* at 452. Accordingly, “this factor weighs heavily in favor of fair use.” *Id.*
- Third Factor: The incorporating regulation does not specify that only certain provisions of this standard are incorporated by reference into law, nor does it indicate which specific provisions of the standard are relevant for regulatory compliance, suggesting that “a greater amount of the standard’s text might be fairly reproduced.” *Id.*
- Fourth Factor: Defendant’s reproductions have not had a “substantially adverse impact on the potential market for the originals,” nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm.” Memo Op. at 30–36 (internal quotation and citation marks omitted).
- Conclusion: Defendant may fairly reproduce this incorporated standard in its entirety.

32. ASTM A242 (1979):

- The parties identify 24 C.F.R. § (Parts 200 to 499) (2005) as the incorporating by reference regulation, *see* Becker Decl. ¶ 57, Ex. 90; Wise Decl., Ex. 176, which incorporates ASTM A242 (1979) for 24 C.F.R. § Part 200, Subpart S. *See* 24 C.F.R. § (Parts 200 to 499). That regulation does not specify that only certain provisions of ASTM A242 (1979) are incorporated by reference into law, nor does it indicate which specific provisions of ASTM A242 (1979) are relevant for compliance with the regulation.
- First Factor: There is no indication that Defendant stands to profit from republishing this standard; Defendant’s apparent purpose is to inform the public about the law and facilitate public debate. *See ASTM*, 896 F.3d at 449; Def’s 2d Mot. at 16. Defendant’s “attempt to freely distribute standards incorporated by reference into law qualifie[s] as a use that further[s] the purposes of the fair use defense.” *ASTM*, 896 F.3d at 449. However, the court finds that the incorporated standard does not provide information essential for a private entity to comprehend its legal duties, but rather is incorporated

as a reference procedure. Accordingly, “while knowing the content of this incorporated standard might help inform one’s understanding of the law,” it “is not essential to complying with any legal duty,” and thus, Defendant’s use is less transformative and “its wholesale copying, in turn, less justified.” *ASTM*, 896 F.3d at 450.

- Second Factor: The “express text of the law falls plainly outside the realm of copyright protection.” *ASTM*, 896 F.3d at 451. Here, the standard is incorporated into law without limitation such that “the consequence of the incorporation by reference is virtually indistinguishable from a situation in which the standard had been expressly copied into law.” *Id.* at 452. Accordingly, “this factor weighs heavily in favor of fair use.” *Id.*
- Third Factor: The incorporating regulation does not specify that only certain provisions of this standard are incorporated by reference into law, nor does it indicate which specific provisions of the standard are relevant for regulatory compliance, suggesting that “a greater amount of the standard’s text might be fairly reproduced.” *Id.*
- Fourth Factor: Defendant’s reproductions have not had a “substantially adverse impact on the potential market for the originals,” nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm.” Memo Op. at 30–36 (internal quotation and citation marks omitted).
- Conclusion: Defendant may fairly reproduce this incorporated standard in its entirety.

33. ASTM A285 (1978):

- The parties identify 49 C.F.R. § 171.7 (2009) as the incorporating by reference regulation, *see* Becker Decl. ¶ 57, Ex. 90; Wise Decl., Ex. 176, which incorporates the standard into 49 C.F.R. § 179.300-7. That regulation, in turn, states that “the maximum allowable carbon content for carbon steel must not exceed 0.31 percent,” but that “the individual ASTM specification may allow for a greater amount of carbon.” *See* 49 C.F.R. § 179.300-7 (a). The regulation does not specify which provisions of ASTM A285 (1978) are relevant for determining whether it allows for a greater amount of carbon or under what circumstances. *See id.*
- First Factor: There is no indication that Defendant stands to profit from republishing this standard; Defendant’s apparent purpose is to inform the public about the law and facilitate public debate. *See ASTM*, 896 F.3d at 449; Def’s 2d Mot. at 16. Defendant’s “attempt to freely distribute standards incorporated by reference into law qualifie[s] as a use that further[s] the purposes of the fair use defense.” *ASTM*, 896 F.3d at 449. However, the court finds that the incorporated standard does not provide information essential for a private entity to comprehend its legal duties, but rather is incorporated as a discretionary procedure. Accordingly, “while knowing the content of this incorporated standard might help inform one’s understanding of the law,” it “is not essential to complying with any legal duty,” and thus, Defendant’s use is less transformative and “its wholesale copying, in turn, less justified.” *ASTM*, 896 F.3d at 450.
- Second Factor: The “express text of the law falls plainly outside the realm of copyright protection.” *ASTM*, 896 F.3d at 451. Here, the standard is incorporated into law without limitation such that “the consequence of the incorporation by reference is

virtually indistinguishable from a situation in which the standard had been expressly copied into law.” *Id.* at 452. Accordingly, “this factor weighs heavily in favor of fair use.” *Id.*

- Third Factor: The incorporating regulation does not specify that only certain provisions of this standard are incorporated by reference into law, nor does it indicate which specific provisions of the standard are relevant for regulatory compliance, suggesting that “a greater amount of the standard’s text might be fairly reproduced.” *Id.*
- Fourth Factor: Defendant’s reproductions have not had a “substantially adverse impact on the potential market for the originals,” nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm.” Memo Op. at 30–36 (internal quotation and citation marks omitted).
- Conclusion: Defendant may fairly reproduce this incorporated standard in its entirety.

34. ASTM A325 (1979):

- The parties identify 24 C.F.R. § (Parts 200 to 499) (2005) as the incorporating by reference regulation, *see* Becker Decl. ¶ 57, Ex. 90; Wise Decl., Ex. 176, which incorporates ASTM A325 (1979) for 24 C.F.R. § Part 200, Subpart S. *See* 24 C.F.R. § (Parts 200 to 499). That regulation does not specify that only certain provisions of ASTM A325 (1979) are incorporated by reference into law, nor does it indicate which specific provisions of ASTM A325 (1979) are relevant for compliance with the regulation.
- First Factor: There is no indication that Defendant stands to profit from republishing this standard; Defendant’s apparent purpose is to inform the public about the law and facilitate public debate. *See ASTM*, 896 F.3d at 449; Def’s 2d Mot. at 16. Defendant’s “attempt to freely distribute standards incorporated by reference into law qualifie[s] as a use that further[s] the purposes of the fair use defense.” *ASTM*, 896 F.3d at 449. However, the court finds that the incorporated standard does not provide information essential for a private entity to comprehend its legal duties, but rather is incorporated as a reference procedure. Accordingly, “while knowing the content of this incorporated standard might help inform one’s understanding of the law,” it “is not essential to complying with any legal duty,” and thus, Defendant’s use is less transformative and “its wholesale copying, in turn, less justified.” *ASTM*, 896 F.3d at 450.
- Second Factor: The “express text of the law falls plainly outside the realm of copyright protection.” *ASTM*, 896 F.3d at 451. Here, the standard is incorporated into law without limitation such that “the consequence of the incorporation by reference is virtually indistinguishable from a situation in which the standard had been expressly copied into law.” *Id.* at 452. Accordingly, “this factor weighs heavily in favor of fair use.” *Id.*
- Third Factor: The incorporating regulation does not specify that only certain provisions of this standard are incorporated by reference into law, nor does it indicate which specific provisions of the standard are relevant for regulatory compliance, suggesting that “a greater amount of the standard’s text might be fairly reproduced.” *Id.*
- Fourth Factor: Defendant’s reproductions have not had a “substantially adverse impact on the potential market for the originals,” nor have Plaintiffs shown by a preponderance

of the evidence that there is a meaningful likelihood of future harm.” Memo Op. at 30–36 (internal quotation and citation marks omitted).

- Conclusion: Defendant may fairly reproduce this incorporated standard in its entirety.

35. ASTM A333/A333M (1994):

- The parties identify 46 C.F.R. § 56.01 (2011) as the incorporating by reference regulation, *see* Becker Decl. ¶ 57, Ex. 90; Wise Decl., Ex. 176, which incorporates the standard into 46 C.F.R. §§ 56.50-105; 56.60-1. Section 56.50-105 lists ASTM A333 as the controlling standard setting toughness test criteria for carbon and low alloy steels. 46 C.F.R. § 56.50-105 (Table). It further states that “[s]teels equivalent to those listed in Table 56.50-105 of this part, but not produced according to a particular ASTM specification [including specifications in ASTM A333], may be used only with the prior consent of the Marine Safety Center.” *Id.* § 56.50-105 (a)(1)(iii). Section 56.60-1 lists ASTM A333 as the controlling standard for piping systems made with low temperature steel pipe. Neither regulation specifies that only certain provisions of ASTM A333/A333M (1994) are incorporated by reference into law, nor does it indicate which specific provisions of ASTM A333/A333M (1994) are relevant for compliance with the regulation.
- First Factor: There is no indication that Defendant stands to profit from republishing this standard; Defendant’s apparent purpose is to inform the public about the law and facilitate public debate. *See ASTM*, 896 F.3d at 449; Def’s 2d Mot. at 16. Defendant’s “attempt to freely distribute standards incorporated by reference into law qualifie[s] as a use that further[s] the purposes of the fair use defense.” *ASTM*, 896 F.3d at 449. Further, the incorporated standard provides information essential for a private entity to comprehend its legal duties, which weighs heavily in favor of permitting Defendant’s reproduction. *See ASTM*, 896 F.3d at 450.
- Second Factor: The “express text of the law falls plainly outside the realm of copyright protection.” *ASTM*, 896 F.3d at 451. Here, the standard is incorporated into law without limitation such that “the consequence of the incorporation by reference is virtually indistinguishable from a situation in which the standard had been expressly copied into law.” *Id.* at 452. Accordingly, “this factor weighs heavily in favor of fair use.” *Id.*
- Third Factor: The incorporating regulation does not specify that only certain provisions of this standard are incorporated by reference into law, nor does it indicate which specific provisions of the standard are relevant for regulatory compliance, suggesting that “a greater amount of the standard’s text might be fairly reproduced.” *Id.*
- Fourth Factor: Defendant’s reproductions have not had a “substantially adverse impact on the potential market for the originals,” nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm.” Memo Op. at 30–36 (internal quotation and citation marks omitted).
- Conclusion: Defendant may fairly reproduce this incorporated standard in its entirety.

36. ASTM A369/A369M (1992):

- The parties identify 46 C.F.R. § 56.01-2 (2011) as the incorporating by reference

regulation, *see* Becker Decl. ¶ 57, Ex. 90; Wise Decl., Ex. 176, which incorporates the standard into 46 C.F.R. § 56.60-1. Section 56.60-1 lists ASTM A369 as the controlling standard for piping systems made with pipe, forged, and bored. The regulation does not specify that only certain provisions of A369/A369M (1992) are incorporated by reference into law, nor does it indicate which specific provisions of A369/A369M (1992) are relevant for compliance with the regulation.

- First Factor: There is no indication that Defendant stands to profit from republishing this standard; Defendant's apparent purpose is to inform the public about the law and facilitate public debate. *See ASTM*, 896 F.3d at 449; Def's 2d Mot. at 16. Defendant's "attempt to freely distribute standards incorporated by reference into law qualifie[s] as a use that further[s] the purposes of the fair use defense." *ASTM*, 896 F.3d at 449. Further, the incorporated standard provides information essential for a private entity to comprehend its legal duties, which weighs heavily in favor of permitting Defendant's reproduction. *See ASTM*, 896 F.3d at 450.
- Second Factor: The "express text of the law falls plainly outside the realm of copyright protection." *ASTM*, 896 F.3d at 451. Here, the standard is incorporated into law without limitation such that "the consequence of the incorporation by reference is virtually indistinguishable from a situation in which the standard had been expressly copied into law." *Id.* at 452. Accordingly, "this factor weighs heavily in favor of fair use." *Id.*
- Third Factor: The incorporating regulation does not specify that only certain provisions of this standard are incorporated by reference into law, nor does it indicate which specific provisions of the standard are relevant for regulatory compliance, suggesting that "a greater amount of the standard's text might be fairly reproduced." *Id.*
- Fourth Factor: Defendant's reproductions have not had a "substantially adverse impact on the potential market for the originals," nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm." Memo Op. at 30–36 (internal quotation and citation marks omitted).
- Conclusion: Defendant may fairly reproduce this incorporated standard in its entirety.

37. ASTM A441 (1979):

- The parties identify 24 C.F.R. § (Parts 200 to 499) (2005) as the incorporating by reference regulation, *see* Becker Decl. ¶ 57, Ex. 90; Wise Decl., Ex. 176, which incorporates ASTM A441 (1979) for 24 C.F.R. § Part 200, Subpart S. *See* 24 C.F.R. § (Parts 200 to 499). That regulation does not specify that only certain provisions of ASTM A441 (1979) are incorporated by reference into law, nor does it indicate which specific provisions of ASTM A441 (1979) are relevant for compliance with the regulation.
- First Factor: There is no indication that Defendant stands to profit from republishing this standard; Defendant's apparent purpose is to inform the public about the law and facilitate public debate. *See ASTM*, 896 F.3d at 449; Def's 2d Mot. at 16. Defendant's "attempt to freely distribute standards incorporated by reference into law qualifie[s] as a use that further[s] the purposes of the fair use defense." *ASTM*, 896 F.3d at 449. However, the court finds that the incorporated standard does not provide information

essential for a private entity to comprehend its legal duties, but rather is incorporated as a reference procedure. Accordingly, “while knowing the content of this incorporated standard might help inform one’s understanding of the law,” it “is not essential to complying with any legal duty,” and thus, Defendant’s use is less transformative and “its wholesale copying, in turn, less justified.” *ASTM*, 896 F.3d at 450.

- Second Factor: The “express text of the law falls plainly outside the realm of copyright protection.” *ASTM*, 896 F.3d at 451. Here, the standard is incorporated into law without limitation such that “the consequence of the incorporation by reference is virtually indistinguishable from a situation in which the standard had been expressly copied into law.” *Id.* at 452. Accordingly, “this factor weighs heavily in favor of fair use.” *Id.*
- Third Factor: The incorporating regulation does not specify that only certain provisions of this standard are incorporated by reference into law, nor does it indicate which specific provisions of the standard are relevant for regulatory compliance, suggesting that “a greater amount of the standard’s text might be fairly reproduced.” *Id.*
- Fourth Factor: Defendant’s reproductions have not had a “substantially adverse impact on the potential market for the originals,” nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm.” Memo Op. at 30–36 (internal quotation and citation marks omitted).
- Conclusion: Defendant may fairly reproduce this incorporated standard in its entirety.

38. ASTM A449 (1978a):

- The parties identify 24 C.F.R. § (Parts 200 to 499) (2005) as the incorporating by reference regulation, *see* Becker Decl. ¶ 57, Ex. 90; Wise Decl., Ex. 176, which incorporates ASTM A449 (1978a) for 24 C.F.R. § Part 200, Subpart S. *See* 24 C.F.R. § (Parts 200 to 499). That regulation does not specify that only certain provisions of ASTM A449 (1978a) are incorporated by reference into law, nor does it indicate which specific provisions of ASTM A449 (1978a) are relevant for compliance with the regulation.
- First Factor: There is no indication that Defendant stands to profit from republishing this standard; Defendant’s apparent purpose is to inform the public about the law and facilitate public debate. *See ASTM*, 896 F.3d at 449; Def’s 2d Mot. at 16. Defendant’s “attempt to freely distribute standards incorporated by reference into law qualifie[s] as a use that further[s] the purposes of the fair use defense.” *ASTM*, 896 F.3d at 449. However, the court finds that the incorporated standard does not provide information essential for a private entity to comprehend its legal duties, but rather is incorporated as a reference procedure. Accordingly, “while knowing the content of this incorporated standard might help inform one’s understanding of the law,” it “is not essential to complying with any legal duty,” and thus, Defendant’s use is less transformative and “its wholesale copying, in turn, less justified.” *ASTM*, 896 F.3d at 450.
- Second Factor: The “express text of the law falls plainly outside the realm of copyright protection.” *ASTM*, 896 F.3d at 451. Here, the standard is incorporated into law without limitation such that “the consequence of the incorporation by reference is virtually indistinguishable from a situation in which the standard had been expressly

copied into law.” *Id.* at 452. Accordingly, “this factor weighs heavily in favor of fair use.” *Id.*

- Third Factor: The incorporating regulation does not specify that only certain provisions of this standard are incorporated by reference into law, nor does it indicate which specific provisions of the standard are relevant for regulatory compliance, suggesting that “a greater amount of the standard’s text might be fairly reproduced.” *Id.*
- Fourth Factor: Defendant’s reproductions have not had a “substantially adverse impact on the potential market for the originals,” nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm.” Memo Op. at 30–36 (internal quotation and citation marks omitted).
- Conclusion: Defendant may fairly reproduce this incorporated standard in its entirety.

39. ASTM A490 (1979):

- The parties identify 24 C.F.R. § (Parts 200 to 499) (2005) as the incorporating by reference regulation, *see* Becker Decl. ¶ 57, Ex. 90; Wise Decl., Ex. 176, which incorporates ASTM A490 (1979) for 24 C.F.R. § Part 200, Subpart S. *See* 24 C.F.R. § (Parts 200 to 499). That regulation does not specify that only certain provisions of ASTM A490 (1979) are incorporated by reference into law, nor does it indicate which specific provisions of ASTM A490 (1979) are relevant for compliance with the regulation.
- First Factor: There is no indication that Defendant stands to profit from republishing this standard; Defendant’s apparent purpose is to inform the public about the law and facilitate public debate. *See ASTM*, 896 F.3d at 449; Def’s 2d Mot. at 16. Defendant’s “attempt to freely distribute standards incorporated by reference into law qualifie[s] as a use that further[s] the purposes of the fair use defense.” *ASTM*, 896 F.3d at 449. However, the court finds that the incorporated standard does not provide information essential for a private entity to comprehend its legal duties, but rather is incorporated as a reference procedure. Accordingly, “while knowing the content of this incorporated standard might help inform one’s understanding of the law,” it “is not essential to complying with any legal duty,” and thus, Defendant’s use is less transformative and “its wholesale copying, in turn, less justified.” *ASTM*, 896 F.3d at 450.
- Second Factor: The “express text of the law falls plainly outside the realm of copyright protection.” *ASTM*, 896 F.3d at 451. Here, the standard is incorporated into law without limitation such that “the consequence of the incorporation by reference is virtually indistinguishable from a situation in which the standard had been expressly copied into law.” *Id.* at 452. Accordingly, “this factor weighs heavily in favor of fair use.” *Id.*
- Third Factor: The incorporating regulation does not specify that only certain provisions of this standard are incorporated by reference into law, nor does it indicate which specific provisions of the standard are relevant for regulatory compliance, suggesting that “a greater amount of the standard’s text might be fairly reproduced.” *Id.*
- Fourth Factor: Defendant’s reproductions have not had a “substantially adverse impact on the potential market for the originals,” nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm.” Memo Op. at 30–

36 (internal quotation and citation marks omitted).

- Conclusion: Defendant may fairly reproduce this incorporated standard in its entirety.

40. ASTM A496 (1978):

- The parties identify 24 C.F.R. § (Parts 200 to 499) (2005) as the incorporating by reference regulation, *see* Becker Decl. ¶ 57, Ex. 90; Wise Decl., Ex. 176, which incorporates ASTM A496 (1978) for 24 C.F.R. § Part 200, Subpart S. *See* 24 C.F.R. § (Parts 200 to 499). That regulation does not specify that only certain provisions of ASTM A496 (1978) are incorporated by reference into law, nor does it indicate which specific provisions of ASTM A496 (1978) are relevant for compliance with the regulation.
- First Factor: There is no indication that Defendant stands to profit from republishing this standard; Defendant's apparent purpose is to inform the public about the law and facilitate public debate. *See ASTM*, 896 F.3d at 449; Def's 2d Mot. at 16. Defendant's "attempt to freely distribute standards incorporated by reference into law qualify[es] as a use that further[s] the purposes of the fair use defense." *ASTM*, 896 F.3d at 449. However, the court finds that the incorporated standard does not provide information essential for a private entity to comprehend its legal duties, but rather is incorporated as a reference procedure. Accordingly, "while knowing the content of this incorporated standard might help inform one's understanding of the law," it "is not essential to complying with any legal duty," and thus, Defendant's use is less transformative and "its wholesale copying, in turn, less justified." *ASTM*, 896 F.3d at 450.
- Second Factor: The "express text of the law falls plainly outside the realm of copyright protection." *ASTM*, 896 F.3d at 451. Here, the standard is incorporated into law without limitation such that "the consequence of the incorporation by reference is virtually indistinguishable from a situation in which the standard had been expressly copied into law." *Id.* at 452. Accordingly, "this factor weighs heavily in favor of fair use." *Id.*
- Third Factor: The incorporating regulation does not specify that only certain provisions of this standard are incorporated by reference into law, nor does it indicate which specific provisions of the standard are relevant for regulatory compliance, suggesting that "a greater amount of the standard's text might be fairly reproduced." *Id.*
- Fourth Factor: Defendant's reproductions have not had a "substantially adverse impact on the potential market for the originals," nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm." Memo Op. at 30–36 (internal quotation and citation marks omitted).
- Conclusion: Defendant may fairly reproduce this incorporated standard in its entirety.

41. ASTM A497 (1979):

- The parties identify 24 C.F.R. § (Parts 200 to 499) (2005) as the incorporating by reference regulation, *see* Becker Decl. ¶ 57, Ex. 90; Wise Decl., Ex. 176, which incorporates ASTM A497 (1979) for 24 C.F.R. § Part 200, Subpart S. *See* 24 C.F.R. § (Parts 200 to 499). That regulation does not specify that only certain provisions of ASTM A497 (1979) are incorporated by reference into law, nor does it indicate which

specific provisions of ASTM A497 (1979) are relevant for compliance with the regulation.

- First Factor: There is no indication that Defendant stands to profit from republishing this standard; Defendant's apparent purpose is to inform the public about the law and facilitate public debate. *See ASTM*, 896 F.3d at 449; Def's 2d Mot. at 16. Defendant's "attempt to freely distribute standards incorporated by reference into law qualifie[s] as a use that further[s] the purposes of the fair use defense." *ASTM*, 896 F.3d at 449. However, the court finds that the incorporated standard does not provide information essential for a private entity to comprehend its legal duties, but rather is incorporated as a reference procedure. Accordingly, "while knowing the content of this incorporated standard might help inform one's understanding of the law," it "is not essential to complying with any legal duty," and thus, Defendant's use is less transformative and "its wholesale copying, in turn, less justified." *ASTM*, 896 F.3d at 450.
- Second Factor: The "express text of the law falls plainly outside the realm of copyright protection." *ASTM*, 896 F.3d at 451. Here, the standard is incorporated into law without limitation such that "the consequence of the incorporation by reference is virtually indistinguishable from a situation in which the standard had been expressly copied into law." *Id.* at 452. Accordingly, "this factor weighs heavily in favor of fair use." *Id.*
- Third Factor: The incorporating regulation does not specify that only certain provisions of this standard are incorporated by reference into law, nor does it indicate which specific provisions of the standard are relevant for regulatory compliance, suggesting that "a greater amount of the standard's text might be fairly reproduced." *Id.*
- Fourth Factor: Defendant's reproductions have not had a "substantially adverse impact on the potential market for the originals," nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm." Memo Op. at 30–36 (internal quotation and citation marks omitted).
- Conclusion: Defendant may fairly reproduce this incorporated standard in its entirety.

42. ASTM A500 (1978):

- The parties identify 24 C.F.R. § (Parts 200 to 499) (2005) as the incorporating by reference regulation, *see* Becker Decl. ¶ 57, Ex. 90; Wise Decl., Ex. 176, which incorporates ASTM A500 (1978) for 24 C.F.R. § Part 200, Subpart S. *See* 24 C.F.R. § (Parts 200 to 499). That regulation does not specify that only certain provisions of ASTM A500 (1978) are incorporated by reference into law, nor does it indicate which specific provisions of ASTM A500 (1978) are relevant for compliance with the regulation.
- First Factor: There is no indication that Defendant stands to profit from republishing this standard; Defendant's apparent purpose is to inform the public about the law and facilitate public debate. *See ASTM*, 896 F.3d at 449; Def's 2d Mot. at 16. Defendant's "attempt to freely distribute standards incorporated by reference into law qualifie[s] as a use that further[s] the purposes of the fair use defense." *ASTM*, 896 F.3d at 449. However, the court finds that the incorporated standard does not provide information essential for a private entity to comprehend its legal duties, but rather is incorporated

as a reference procedure. Accordingly, “while knowing the content of this incorporated standard might help inform one’s understanding of the law,” it “is not essential to complying with any legal duty,” and thus, Defendant’s use is less transformative and “its wholesale copying, in turn, less justified.” *ASTM*, 896 F.3d at 450.

- Second Factor: The “express text of the law falls plainly outside the realm of copyright protection.” *ASTM*, 896 F.3d at 451. Here, the standard is incorporated into law without limitation such that “the consequence of the incorporation by reference is virtually indistinguishable from a situation in which the standard had been expressly copied into law.” *Id.* at 452. Accordingly, “this factor weighs heavily in favor of fair use.” *Id.*
- Third Factor: The incorporating regulation does not specify that only certain provisions of this standard are incorporated by reference into law, nor does it indicate which specific provisions of the standard are relevant for regulatory compliance, suggesting that “a greater amount of the standard’s text might be fairly reproduced.” *Id.*
- Fourth Factor: Defendant’s reproductions have not had a “substantially adverse impact on the potential market for the originals,” nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm.” Memo Op. at 30–36 (internal quotation and citation marks omitted).
- Conclusion: Defendant may fairly reproduce this incorporated standard in its entirety.

43. ASTM A501 (1976):

- The parties identify 24 C.F.R. § (Parts 200 to 499) (2005) as the incorporating by reference regulation, *see* Becker Decl. ¶ 57, Ex. 90; Wise Decl., Ex. 176, which incorporates ASTM A501 (1976) for 24 C.F.R. § Part 200, Subpart S. *See* 24 C.F.R. § (Parts 200 to 499). That regulation does not specify that only certain provisions of ASTM A501 (1976) are incorporated by reference into law, nor does it indicate which specific provisions of ASTM A501 (1976) are relevant for compliance with the regulation.
- First Factor: There is no indication that Defendant stands to profit from republishing this standard; Defendant’s apparent purpose is to inform the public about the law and facilitate public debate. *See ASTM*, 896 F.3d at 449; Def’s 2d Mot. at 16. Defendant’s “attempt to freely distribute standards incorporated by reference into law qualify[es] as a use that further[s] the purposes of the fair use defense.” *ASTM*, 896 F.3d at 449. However, the court finds that the incorporated standard does not provide information essential for a private entity to comprehend its legal duties, but rather is incorporated as a reference procedure. Accordingly, “while knowing the content of this incorporated standard might help inform one’s understanding of the law,” it “is not essential to complying with any legal duty,” and thus, Defendant’s use is less transformative and “its wholesale copying, in turn, less justified.” *ASTM*, 896 F.3d at 450.
- Second Factor: The “express text of the law falls plainly outside the realm of copyright protection.” *ASTM*, 896 F.3d at 451. Here, the standard is incorporated into law without limitation such that “the consequence of the incorporation by reference is virtually indistinguishable from a situation in which the standard had been expressly copied into law.” *Id.* at 452. Accordingly, “this factor weighs heavily in favor of fair

use.” *Id.*

- Third Factor: The incorporating regulation does not specify that only certain provisions of this standard are incorporated by reference into law, nor does it indicate which specific provisions of the standard are relevant for regulatory compliance, suggesting that “a greater amount of the standard’s text might be fairly reproduced.” *Id.*
- Fourth Factor: Defendant’s reproductions have not had a “substantially adverse impact on the potential market for the originals,” nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm.” Memo Op. at 30–36 (internal quotation and citation marks omitted).
- Conclusion: Defendant may fairly reproduce this incorporated standard in its entirety.

44. ASTM A502 (1976):

- The parties identify 24 C.F.R. § (Parts 200 to 499) (2005) as the incorporating by reference regulation, *see* Becker Decl. ¶ 57, Ex. 90; Wise Decl., Ex. 176, which incorporates ASTM A502 (1976) for 24 C.F.R. § Part 200, Subpart S. *See* 24 C.F.R. § (Parts 200 to 499). That regulation does not specify that only certain provisions of ASTM A502 (1976) are incorporated by reference into law, nor does it indicate which specific provisions of ASTM A502 (1976) are relevant for compliance with the regulation.
- First Factor: There is no indication that Defendant stands to profit from republishing this standard; Defendant’s apparent purpose is to inform the public about the law and facilitate public debate. *See ASTM*, 896 F.3d at 449; Def’s 2d Mot. at 16. Defendant’s “attempt to freely distribute standards incorporated by reference into law qualifie[s] as a use that further[s] the purposes of the fair use defense.” *ASTM*, 896 F.3d at 449. However, the court finds that the incorporated standard does not provide information essential for a private entity to comprehend its legal duties, but rather is incorporated as a reference procedure. Accordingly, “while knowing the content of this incorporated standard might help inform one’s understanding of the law,” it “is not essential to complying with any legal duty,” and thus, Defendant’s use is less transformative and “its wholesale copying, in turn, less justified.” *ASTM*, 896 F.3d at 450.
- Second Factor: The “express text of the law falls plainly outside the realm of copyright protection.” *ASTM*, 896 F.3d at 451. Here, the standard is incorporated into law without limitation such that “the consequence of the incorporation by reference is virtually indistinguishable from a situation in which the standard had been expressly copied into law.” *Id.* at 452. Accordingly, “this factor weighs heavily in favor of fair use.” *Id.*
- Third Factor: The incorporating regulation does not specify that only certain provisions of this standard are incorporated by reference into law, nor does it indicate which specific provisions of the standard are relevant for regulatory compliance, suggesting that “a greater amount of the standard’s text might be fairly reproduced.” *Id.*
- Fourth Factor: Defendant’s reproductions have not had a “substantially adverse impact on the potential market for the originals,” nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm.” Memo Op. at 30–36 (internal quotation and citation marks omitted).

- Conclusion: Defendant may fairly reproduce this incorporated standard in its entirety.

45. ASTM A514 (1977):

- The parties identify 24 C.F.R. § (Parts 200 to 499) (2005) as the incorporating by reference regulation, *see* Becker Decl. ¶ 57, Ex. 90; Wise Decl., Ex. 176, which incorporates ASTM A514 (1977) for 24 C.F.R. § Part 200, Subpart S. *See* 24 C.F.R. § (Parts 200 to 499). That regulation does not specify that only certain provisions of ASTM A514 (1977) are incorporated by reference into law, nor does it indicate which specific provisions of ASTM A514 (1977) are relevant for compliance with the regulation.
- First Factor: There is no indication that Defendant stands to profit from republishing this standard; Defendant's apparent purpose is to inform the public about the law and facilitate public debate. *See ASTM*, 896 F.3d at 449; Def's 2d Mot. at 16. Defendant's "attempt to freely distribute standards incorporated by reference into law qualify[es] as a use that further[s] the purposes of the fair use defense." *ASTM*, 896 F.3d at 449. However, the court finds that the incorporated standard does not provide information essential for a private entity to comprehend its legal duties, but rather is incorporated as a reference procedure. Accordingly, "while knowing the content of this incorporated standard might help inform one's understanding of the law," it "is not essential to complying with any legal duty," and thus, Defendant's use is less transformative and "its wholesale copying, in turn, less justified." *ASTM*, 896 F.3d at 450.
- Second Factor: The "express text of the law falls plainly outside the realm of copyright protection." *ASTM*, 896 F.3d at 451. Here, the standard is incorporated into law without limitation such that "the consequence of the incorporation by reference is virtually indistinguishable from a situation in which the standard had been expressly copied into law." *Id.* at 452. Accordingly, "this factor weighs heavily in favor of fair use." *Id.*
- Third Factor: The incorporating regulation does not specify that only certain provisions of this standard are incorporated by reference into law, nor does it indicate which specific provisions of the standard are relevant for regulatory compliance, suggesting that "a greater amount of the standard's text might be fairly reproduced." *Id.*
- Fourth Factor: Defendant's reproductions have not had a "substantially adverse impact on the potential market for the originals," nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm." Memo Op. at 30–36 (internal quotation and citation marks omitted).
- Conclusion: Defendant may fairly reproduce this incorporated standard in its entirety.

46. ASTM A522/A522M (1995b):

- The parties identify 46 C.F.R. § 56.01-2 (2011) as the incorporating by reference regulation, *see* Becker Decl. ¶ 57, Ex. 90; Wise Decl., Ex. 176, which incorporates the standard into 46 C.F.R. § 56.50-105. Section 56.50-105 lists ASTM A522 as the controlling standard setting toughness test criteria for forged flanges, fittings, and valves. *See* § 56.50-105 (Table). It further states that "[s]teels equivalent to those listed in Table 56.50-105 of this part, but not produced according to a particular ASTM specification [including specifications in ASTM A522], may be used only with the

prior consent of the Marine Safety Center.” *Id.* § 56.50-105 (a)(1)(iii). The regulation does not specify that only certain provisions of ASTM A522/A522M (1995b) are incorporated by reference into law, nor does it indicate which specific provisions of ASTM A522/A522M (1995b) are relevant for compliance with the regulation.

- **First Factor:** There is no indication that Defendant stands to profit from republishing this standard; Defendant’s apparent purpose is to inform the public about the law and facilitate public debate. *See ASTM*, 896 F.3d at 449; Def’s 2d Mot. at 16. Defendant’s “attempt to freely distribute standards incorporated by reference into law qualifie[s] as a use that further[s] the purposes of the fair use defense.” *ASTM*, 896 F.3d at 449. Further, the incorporated standard provides information essential for a private entity to comprehend its legal duties, which weighs heavily in favor of permitting Defendant’s reproduction. *See ASTM*, 896 F.3d at 450.
- **Second Factor:** The “express text of the law falls plainly outside the realm of copyright protection.” *ASTM*, 896 F.3d at 451. Here, the standard is incorporated into law without limitation such that “the consequence of the incorporation by reference is virtually indistinguishable from a situation in which the standard had been expressly copied into law.” *Id.* at 452. Accordingly, “this factor weighs heavily in favor of fair use.” *Id.*
- **Third Factor:** The incorporating regulation does not specify that only certain provisions of this standard are incorporated by reference into law, nor does it indicate which specific provisions of the standard are relevant for regulatory compliance, suggesting that “a greater amount of the standard’s text might be fairly reproduced.” *Id.*
- **Fourth Factor:** Defendant’s reproductions have not had a “substantially adverse impact on the potential market for the originals,” nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm.” Memo Op. at 30–36 (internal quotation and citation marks omitted).
- **Conclusion:** Defendant may fairly reproduce this incorporated standard in its entirety.

47. ASTM A539 (1990a):

- The parties identify 24 C.F.R. § 3280.4 (2004) as the incorporating by reference regulation, *see* Becker Decl. ¶ 57, Ex. 90; Wise Decl., Ex. 176, which incorporates the standard, “as though set forth in full.” 24 C.F.R. § 3280.4(a). Section 3280.703, in turn, requires that “[h]eating, cooling and fuel burning appliances and systems in manufactured homes shall be free of defects, and shall conform to applicable standards,” including ASTM A539 (1990a). Moreover, section 3280.705(b)(4) requires that “[s]teel tubing shall be constructed in accordance with ASTM Standard Specification for Electric-Resistance-Welded Coiled Steel Tubing for Gas and Fuel Oil Lines, ASTM A 539–83, and shall be externally corrosion protected.” The regulation does not specify that only certain provisions of ASTM A539 (1990a) are incorporated by reference into law, nor does it indicate which specific provisions of A539 (1990a) are relevant for compliance with the regulation.
- **First Factor:** There is no indication that Defendant stands to profit from republishing this standard; Defendant’s apparent purpose is to inform the public about the law and facilitate public debate. *See ASTM*, 896 F.3d at 449; Def’s 2d Mot. at 16. Defendant’s

“attempt to freely distribute standards incorporated by reference into law qualifie[s] as a use that further[s] the purposes of the fair use defense.” *ASTM*, 896 F.3d at 449. Further, the incorporated standard provides information essential for a private entity to comprehend its legal duties, which weighs heavily in favor of permitting Defendant’s reproduction. *See ASTM*, 896 F.3d at 450.

- Second Factor: The “express text of the law falls plainly outside the realm of copyright protection.” *ASTM*, 896 F.3d at 451. Here, the standard is incorporated into law without limitation such that “the consequence of the incorporation by reference is virtually indistinguishable from a situation in which the standard had been expressly copied into law.” *Id.* at 452. Accordingly, “this factor weighs heavily in favor of fair use.” *Id.*
- Third Factor: The incorporating regulation does not specify that only certain provisions of this standard are incorporated by reference into law, nor does it indicate which specific provisions of the standard are relevant for regulatory compliance, suggesting that “a greater amount of the standard’s text might be fairly reproduced.” *Id.*
- Fourth Factor: Defendant’s reproductions have not had a “substantially adverse impact on the potential market for the originals,” nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm.” Memo Op. at 30–36 (internal quotation and citation marks omitted).
- Conclusion: Defendant may fairly reproduce this incorporated standard in its entirety.

48. ASTM A570 (1979):

- The parties identify 24 C.F.R. § (Parts 200 to 499) (2005) as the incorporating by reference regulation, *see* Becker Decl. ¶ 57, Ex. 90; Wise Decl., Ex. 176, which incorporates ASTM A570 (1979) for 24 C.F.R. § Part 200, Subpart S. *See* 24 C.F.R. § (Parts 200 to 499). That regulation does not specify that only certain provisions of ASTM A570 (1979) are incorporated by reference into law, nor does it indicate which specific provisions of ASTM A570 (1979) are relevant for compliance with the regulation.
- First Factor: There is no indication that Defendant stands to profit from republishing this standard; Defendant’s apparent purpose is to inform the public about the law and facilitate public debate. *See ASTM*, 896 F.3d at 449; Def’s 2d Mot. at 16. Defendant’s “attempt to freely distribute standards incorporated by reference into law qualifie[s] as a use that further[s] the purposes of the fair use defense.” *ASTM*, 896 F.3d at 449. However, the court finds that the incorporated standard does not provide information essential for a private entity to comprehend its legal duties, but rather is incorporated as a reference procedure. Accordingly, “while knowing the content of this incorporated standard might help inform one’s understanding of the law,” it “is not essential to complying with any legal duty,” and thus, Defendant’s use is less transformative and “its wholesale copying, in turn, less justified.” *ASTM*, 896 F.3d at 450.
- Second Factor: The “express text of the law falls plainly outside the realm of copyright protection.” *ASTM*, 896 F.3d at 451. Here, the standard is incorporated into law without limitation such that “the consequence of the incorporation by reference is virtually indistinguishable from a situation in which the standard had been expressly

copied into law.” *Id.* at 452. Accordingly, “this factor weighs heavily in favor of fair use.” *Id.*

- Third Factor: The incorporating regulation does not specify that only certain provisions of this standard are incorporated by reference into law, nor does it indicate which specific provisions of the standard are relevant for regulatory compliance, suggesting that “a greater amount of the standard’s text might be fairly reproduced.” *Id.*
- Fourth Factor: Defendant’s reproductions have not had a “substantially adverse impact on the potential market for the originals,” nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm.” Memo Op. at 30–36 (internal quotation and citation marks omitted).
- Conclusion: Defendant may fairly reproduce this incorporated standard in its entirety.

49. ASTM A572 (1979):

- The parties identify 24 C.F.R. § (Parts 200 to 499) (2005) as the incorporating by reference regulation, *see* Becker Decl. ¶ 57, Ex. 90; Wise Decl., Ex. 176, which incorporates ASTM A572 (1979) for 24 C.F.R. § Part 200, Subpart S. *See* 24 C.F.R. § (Parts 200 to 499). That regulation does not specify that only certain provisions of ASTM A572 (1979) are incorporated by reference into law, nor does it indicate which specific provisions of ASTM A572 (1979) are relevant for compliance with the regulation.
- First Factor: There is no indication that Defendant stands to profit from republishing this standard; Defendant’s apparent purpose is to inform the public about the law and facilitate public debate. *See ASTM*, 896 F.3d at 449; Def’s 2d Mot. at 16. Defendant’s “attempt to freely distribute standards incorporated by reference into law qualifie[s] as a use that further[s] the purposes of the fair use defense.” *ASTM*, 896 F.3d at 449. However, the court finds that the incorporated standard does not provide information essential for a private entity to comprehend its legal duties, but rather is incorporated as a reference procedure. Accordingly, “while knowing the content of this incorporated standard might help inform one’s understanding of the law,” it “is not essential to complying with any legal duty,” and thus, Defendant’s use is less transformative and “its wholesale copying, in turn, less justified.” *ASTM*, 896 F.3d at 450.
- Second Factor: The “express text of the law falls plainly outside the realm of copyright protection.” *ASTM*, 896 F.3d at 451. Here, the standard is incorporated into law without limitation such that “the consequence of the incorporation by reference is virtually indistinguishable from a situation in which the standard had been expressly copied into law.” *Id.* at 452. Accordingly, “this factor weighs heavily in favor of fair use.” *Id.*
- Third Factor: The incorporating regulation does not specify that only certain provisions of this standard are incorporated by reference into law, nor does it indicate which specific provisions of the standard are relevant for regulatory compliance, suggesting that “a greater amount of the standard’s text might be fairly reproduced.” *Id.*
- Fourth Factor: Defendant’s reproductions have not had a “substantially adverse impact on the potential market for the originals,” nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm.” Memo Op. at 30–

36 (internal quotation and citation marks omitted).

- Conclusion: Defendant may fairly reproduce this incorporated standard in its entirety.

50. ASTM A588 (1979a):

- The parties identify 24 C.F.R. § (Parts 200 to 499) (2005) as the incorporating by reference regulation, *see* Becker Decl. ¶ 57, Ex. 90; Wise Decl., Ex. 176, which incorporates ASTM A588 (1979a) for 24 C.F.R. § Part 200, Subpart S. *See* 24 C.F.R. § (Parts 200 to 499). That regulation does not specify that only certain provisions of ASTM A588 (1979a) are incorporated by reference into law, nor does it indicate which specific provisions of ASTM A588 (1979a) are relevant for compliance with the regulation.
- First Factor: There is no indication that Defendant stands to profit from republishing this standard; Defendant's apparent purpose is to inform the public about the law and facilitate public debate. *See ASTM*, 896 F.3d at 449; Def's 2d Mot. at 16. Defendant's "attempt to freely distribute standards incorporated by reference into law qualify[es] as a use that further[s] the purposes of the fair use defense." *ASTM*, 896 F.3d at 449. However, the court finds that the incorporated standard does not provide information essential for a private entity to comprehend its legal duties, but rather is incorporated as a reference procedure. Accordingly, "while knowing the content of this incorporated standard might help inform one's understanding of the law," it "is not essential to complying with any legal duty," and thus, Defendant's use is less transformative and "its wholesale copying, in turn, less justified." *ASTM*, 896 F.3d at 450.
- Second Factor: The "express text of the law falls plainly outside the realm of copyright protection." *ASTM*, 896 F.3d at 451. Here, the standard is incorporated into law without limitation such that "the consequence of the incorporation by reference is virtually indistinguishable from a situation in which the standard had been expressly copied into law." *Id.* at 452. Accordingly, "this factor weighs heavily in favor of fair use." *Id.*
- Third Factor: The incorporating regulation does not specify that only certain provisions of this standard are incorporated by reference into law, nor does it indicate which specific provisions of the standard are relevant for regulatory compliance, suggesting that "a greater amount of the standard's text might be fairly reproduced." *Id.*
- Fourth Factor: Defendant's reproductions have not had a "substantially adverse impact on the potential market for the originals," nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm." Memo Op. at 30–36 (internal quotation and citation marks omitted).
- Conclusion: Defendant may fairly reproduce this incorporated standard in its entirety.

51. ASTM A615 (1979):

- The parties identify 24 C.F.R. § (Parts 200 to 499) (2005) as the incorporating by reference regulation, *see* Becker Decl. ¶ 57, Ex. 90; Wise Decl., Ex. 176, which incorporates ASTM A615 (1979) for 24 C.F.R. § Part 200, Subpart S. *See* 24 C.F.R. § (Parts 200 to 499). That regulation does not specify that only certain provisions of ASTM A615 (1979) are incorporated by reference into law, nor does it indicate which

specific provisions of ASTM A615 (1979) are relevant for compliance with the regulation.

- First Factor: There is no indication that Defendant stands to profit from republishing this standard; Defendant's apparent purpose is to inform the public about the law and facilitate public debate. *See ASTM*, 896 F.3d at 449; Def's 2d Mot. at 16. Defendant's "attempt to freely distribute standards incorporated by reference into law qualifie[s] as a use that further[s] the purposes of the fair use defense." *ASTM*, 896 F.3d at 449. However, the court finds that the incorporated standard does not provide information essential for a private entity to comprehend its legal duties, but rather is incorporated as a reference procedure. Accordingly, "while knowing the content of this incorporated standard might help inform one's understanding of the law," it "is not essential to complying with any legal duty," and thus, Defendant's use is less transformative and "its wholesale copying, in turn, less justified." *ASTM*, 896 F.3d at 450.
- Second Factor: The "express text of the law falls plainly outside the realm of copyright protection." *ASTM*, 896 F.3d at 451. Here, the standard is incorporated into law without limitation such that "the consequence of the incorporation by reference is virtually indistinguishable from a situation in which the standard had been expressly copied into law." *Id.* at 452. Accordingly, "this factor weighs heavily in favor of fair use." *Id.*
- Third Factor: The incorporating regulation does not specify that only certain provisions of this standard are incorporated by reference into law, nor does it indicate which specific provisions of the standard are relevant for regulatory compliance, suggesting that "a greater amount of the standard's text might be fairly reproduced." *Id.*
- Fourth Factor: Defendant's reproductions have not had a "substantially adverse impact on the potential market for the originals," nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm." Memo Op. at 30–36 (internal quotation and citation marks omitted).
- Conclusion: Defendant may fairly reproduce this incorporated standard in its entirety.

52. ASTM A616 (1979):

- The parties identify 24 C.F.R. § (Parts 200 to 499) (2005) as the incorporating by reference regulation, *see* Becker Decl. ¶ 57, Ex. 90; Wise Decl., Ex. 176, which incorporates ASTM A616 (1979) for 24 C.F.R. § Part 200, Subpart S. *See* 24 C.F.R. § (Parts 200 to 499). That regulation does not specify that only certain provisions of ASTM A616 (1979) are incorporated by reference into law, nor does it indicate which specific provisions of ASTM A616 (1979) are relevant for compliance with the regulation.
- First Factor: There is no indication that Defendant stands to profit from republishing this standard; Defendant's apparent purpose is to inform the public about the law and facilitate public debate. *See ASTM*, 896 F.3d at 449; Def's 2d Mot. at 16. Defendant's "attempt to freely distribute standards incorporated by reference into law qualifie[s] as a use that further[s] the purposes of the fair use defense." *ASTM*, 896 F.3d at 449. However, the court finds that the incorporated standard does not provide information essential for a private entity to comprehend its legal duties, but rather is incorporated

as a reference procedure. Accordingly, “while knowing the content of this incorporated standard might help inform one’s understanding of the law,” it “is not essential to complying with any legal duty,” and thus, Defendant’s use is less transformative and “its wholesale copying, in turn, less justified.” *ASTM*, 896 F.3d at 450.

- Second Factor: The “express text of the law falls plainly outside the realm of copyright protection.” *ASTM*, 896 F.3d at 451. Here, the standard is incorporated into law without limitation such that “the consequence of the incorporation by reference is virtually indistinguishable from a situation in which the standard had been expressly copied into law.” *Id.* at 452. Accordingly, “this factor weighs heavily in favor of fair use.” *Id.*
- Third Factor: The incorporating regulation does not specify that only certain provisions of this standard are incorporated by reference into law, nor does it indicate which specific provisions of the standard are relevant for regulatory compliance, suggesting that “a greater amount of the standard’s text might be fairly reproduced.” *Id.*
- Fourth Factor: Defendant’s reproductions have not had a “substantially adverse impact on the potential market for the originals,” nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm.” Memo Op. at 30–36 (internal quotation and citation marks omitted).
- Conclusion: Defendant may fairly reproduce this incorporated standard in its entirety.

53. ASTM A617 (1979):

- The parties identify 24 C.F.R. § (Parts 200 to 499) (2005) as the incorporating by reference regulation, *see* Becker Decl. ¶ 57, Ex. 90; Wise Decl., Ex. 176, which incorporates ASTM A617 (1979) for 24 C.F.R. § Part 200, Subpart S. *See* 24 C.F.R. § (Parts 200 to 499). That regulation does not specify that only certain provisions of ASTM A617 (1979) are incorporated by reference into law, nor does it indicate which specific provisions of ASTM A617 (1979) are relevant for compliance with the regulation.
- First Factor: There is no indication that Defendant stands to profit from republishing this standard; Defendant’s apparent purpose is to inform the public about the law and facilitate public debate. *See ASTM*, 896 F.3d at 449; Def’s 2d Mot. at 16. Defendant’s “attempt to freely distribute standards incorporated by reference into law qualifie[s] as a use that further[s] the purposes of the fair use defense.” *ASTM*, 896 F.3d at 449. However, the court finds that the incorporated standard does not provide information essential for a private entity to comprehend its legal duties, but rather is incorporated as a reference procedure. Accordingly, “while knowing the content of this incorporated standard might help inform one’s understanding of the law,” it “is not essential to complying with any legal duty,” and thus, Defendant’s use is less transformative and “its wholesale copying, in turn, less justified.” *ASTM*, 896 F.3d at 450.
- Second Factor: The “express text of the law falls plainly outside the realm of copyright protection.” *ASTM*, 896 F.3d at 451. Here, the standard is incorporated into law without limitation such that “the consequence of the incorporation by reference is virtually indistinguishable from a situation in which the standard had been expressly copied into law.” *Id.* at 452. Accordingly, “this factor weighs heavily in favor of fair

use.” *Id.*

- Third Factor: The incorporating regulation does not specify that only certain provisions of this standard are incorporated by reference into law, nor does it indicate which specific provisions of the standard are relevant for regulatory compliance, suggesting that “a greater amount of the standard’s text might be fairly reproduced.” *Id.*
- Fourth Factor: Defendant’s reproductions have not had a “substantially adverse impact on the potential market for the originals,” nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm.” Memo Op. at 30–36 (internal quotation and citation marks omitted).
- Conclusion: Defendant may fairly reproduce this incorporated standard in its entirety.

54. ASTM A633 (1979a):

- The parties identify 49 C.F.R. § 171.7 (2009) as the incorporating by reference regulation, *see* Becker Decl. ¶ 57, Ex. 90; Wise Decl., Ex. 176, which incorporates the standard into 49 C.F.R. § 178.338-2. Section 178.338-2 states that “material used for evacuated jacket pressure parts must conform to the chemistry and steelmaking practices of one of the material specifications of Section II of the ASME Code or” one of several different ASTM standards, including ASTM A633. The regulation does not specify that only certain provisions of ASTM A633 (1979a) are incorporated by reference into law, nor does it indicate which specific provisions of ASTM A633 (1979a) are relevant for compliance with the regulation.
- First Factor: There is no indication that Defendant stands to profit from republishing this standard; Defendant’s apparent purpose is to inform the public about the law and facilitate public debate. *See ASTM*, 896 F.3d at 449; Def’s 2d Mot. at 16. Defendant’s “attempt to freely distribute standards incorporated by reference into law qualifie[s] as a use that further[s] the purposes of the fair use defense.” *ASTM*, 896 F.3d at 449. Further, the incorporated standard provides information essential for a private entity to comprehend its legal duties, which weighs heavily in favor of permitting Defendant’s reproduction. *See ASTM*, 896 F.3d at 450.
- Second Factor: The “express text of the law falls plainly outside the realm of copyright protection.” *ASTM*, 896 F.3d at 451. Here, the standard is incorporated into law without limitation such that “the consequence of the incorporation by reference is virtually indistinguishable from a situation in which the standard had been expressly copied into law.” *Id.* at 452. Accordingly, “this factor weighs heavily in favor of fair use.” *Id.*
- Third Factor: The incorporating regulation does not specify that only certain provisions of this standard are incorporated by reference into law, nor does it indicate which specific provisions of the standard are relevant for regulatory compliance, suggesting that “a greater amount of the standard’s text might be fairly reproduced.” *Id.*
- Fourth Factor: Defendant’s reproductions have not had a “substantially adverse impact on the potential market for the originals,” nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm.” Memo Op. at 30–36 (internal quotation and citation marks omitted).

- Conclusion: Defendant may fairly reproduce this incorporated standard in its entirety.

55. ASTM A82 (1979):

- The parties identify 24 C.F.R. § (Parts 200 to 499) (2005) as the incorporating by reference regulation, *see* Becker Decl. ¶ 57, Ex. 90; Wise Decl., Ex. 176, which incorporates ASTM A82 (1979) for 24 C.F.R. § Part 200, Subpart S. *See* 24 C.F.R. § (Parts 200 to 499). That regulation does not specify that only certain provisions of ASTM A82 (1979) are incorporated by reference into law, nor does it indicate which specific provisions of ASTM A82 (1979) are relevant for compliance with the regulation.
- First Factor: There is no indication that Defendant stands to profit from republishing this standard; Defendant's apparent purpose is to inform the public about the law and facilitate public debate. *See ASTM*, 896 F.3d at 449; Def's 2d Mot. at 16. Defendant's "attempt to freely distribute standards incorporated by reference into law qualify[es] as a use that further[s] the purposes of the fair use defense." *ASTM*, 896 F.3d at 449. However, the court finds that the incorporated standard does not provide information essential for a private entity to comprehend its legal duties, but rather is incorporated as a reference procedure. Accordingly, "while knowing the content of this incorporated standard might help inform one's understanding of the law," it "is not essential to complying with any legal duty," and thus, Defendant's use is less transformative and "its wholesale copying, in turn, less justified." *ASTM*, 896 F.3d at 450.
- Second Factor: The "express text of the law falls plainly outside the realm of copyright protection." *ASTM*, 896 F.3d at 451. Here, the standard is incorporated into law without limitation such that "the consequence of the incorporation by reference is virtually indistinguishable from a situation in which the standard had been expressly copied into law." *Id.* at 452. Accordingly, "this factor weighs heavily in favor of fair use." *Id.*
- Third Factor: The incorporating regulation does not specify that only certain provisions of this standard are incorporated by reference into law, nor does it indicate which specific provisions of the standard are relevant for regulatory compliance, suggesting that "a greater amount of the standard's text might be fairly reproduced." *Id.*
- Fourth Factor: Defendant's reproductions have not had a "substantially adverse impact on the potential market for the originals," nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm." Memo Op. at 30–36 (internal quotation and citation marks omitted).
- Conclusion: Defendant may fairly reproduce this incorporated standard in its entirety.

56. ASTM B111 (1995):

- The parties identify 46 C.F.R. § 56.01-2 (2011) as the incorporating by reference regulation, *see* Becker Decl. ¶ 57, Ex. 90; Wise Decl., Ex. 176, which incorporates the standard into 46 C.F.R. § 56.60-1. Section 56.60-1 lists ASTM B111 as the controlling standard for seamless tube piping systems made with copper and copper alloy. The regulation does not specify that only certain provisions of ASTM B11 (1995) are incorporated by reference into law, nor does it indicate which specific provisions of ASTM B11 (1995) are relevant for compliance with the regulation.

- First Factor: There is no indication that Defendant stands to profit from republishing this standard; Defendant's apparent purpose is to inform the public about the law and facilitate public debate. *See ASTM*, 896 F.3d at 449; Def's 2d Mot. at 16. Defendant's "attempt to freely distribute standards incorporated by reference into law qualify[es] as a use that further[s] the purposes of the fair use defense." *ASTM*, 896 F.3d at 449. Further, the incorporated standard provides information essential for a private entity to comprehend its legal duties, which weighs heavily in favor of permitting Defendant's reproduction. *See ASTM*, 896 F.3d at 450.
- Second Factor: The "express text of the law falls plainly outside the realm of copyright protection." *ASTM*, 896 F.3d at 451. Here, the standard is incorporated into law without limitation such that "the consequence of the incorporation by reference is virtually indistinguishable from a situation in which the standard had been expressly copied into law." *Id.* at 452. Accordingly, "this factor weighs heavily in favor of fair use." *Id.*
- Third Factor: The incorporating regulation does not specify that only certain provisions of this standard are incorporated by reference into law, nor does it indicate which specific provisions of the standard are relevant for regulatory compliance, suggesting that "a greater amount of the standard's text might be fairly reproduced." *Id.*
- Fourth Factor: Defendant's reproductions have not had a "substantially adverse impact on the potential market for the originals," nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm." Memo Op. at 30–36 (internal quotation and citation marks omitted).
- Conclusion: Defendant may fairly reproduce this incorporated standard in its entirety.

57. ASTM B122/B122M (1995):

- The parties identify 46 C.F.R. § 58.03-1 (2011) as the incorporating by reference regulation, *see* Becker Decl. ¶ 57, Ex. 90; Wise Decl., Ex. 176, which incorporates the standard into 46 C.F.R. § 58.50-5. Section 58.50-5 requires that copper-nickel gasoline fuel tanks be constructed in accordance with the minimum thickness requirements set forth in ASTM B122 (1995). Section 58.50-5 also provides the applicable thickness requirements. *See* 46 C.F.R. § 58.50-5(a)(2), Table 1.
- First Factor: There is no indication that Defendant stands to profit from republishing this standard; Defendant's apparent purpose is to inform the public about the law and facilitate public debate. *See ASTM*, 896 F.3d at 449; Def's 2d Mot. at 16. Defendant's "attempt to freely distribute standards incorporated by reference into law qualify[es] as a use that further[s] the purposes of the fair use defense." *ASTM*, 896 F.3d at 449. However, the court finds that the incorporated standard does not provide information essential for a private entity to comprehend its legal duties, but rather is incorporated as a reference procedure, given that the regulation provides the applicable thickness requirements. Accordingly, "while knowing the content of this incorporated standard might help inform one's understanding of the law," it "is not essential to complying with any legal duty," and thus, Defendant's use is less transformative and "its wholesale copying, in turn, less justified." *ASTM*, 896 F.3d at 450.
- Second Factor: The "express text of the law falls plainly outside the realm of copyright

protection.” *ASTM*, 896 F.3d at 451. Here, the standard is incorporated into law without limitation such that “the consequence of the incorporation by reference is virtually indistinguishable from a situation in which the standard had been expressly copied into law.” *Id.* at 452. Accordingly, “this factor weighs heavily in favor of fair use.” *Id.*

- Third Factor: The incorporating regulation does not specify that only certain provisions of this standard are incorporated by reference into law, nor does it indicate which specific provisions of the standard are relevant for regulatory compliance, suggesting that “a greater amount of the standard’s text might be fairly reproduced.” *Id.*
- Fourth Factor: Defendant’s reproductions have not had a “substantially adverse impact on the potential market for the originals,” nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm.” Memo Op. at 30–36 (internal quotation and citation marks omitted).
- Conclusion: Defendant may fairly reproduce this incorporated standard in its entirety.

58. ASTM B124 (1996):

- The parties identify 46 C.F.R. § 56.01-2 (2011) as the incorporating by reference regulation, *see* Becker Decl. ¶ 57, Ex. 90; Wise Decl., Ex. 176, which incorporates the standard into 46 C.F.R. § 56.60-2. Section 56.60-2 references ASTM B124 as providing the adopted bar stock and nonferrous forging and casting specifications for six different types of alloy. 46 C.F.R. § 56.60-2, Table 2(a). The regulation does not specify that only certain provisions of ASTM B124 (1996) are incorporated by reference into law, nor does it indicate which specific provisions of ASTM B124 (1996) are relevant for compliance with the regulation.
- First Factor: There is no indication that Defendant stands to profit from republishing this standard; Defendant’s apparent purpose is to inform the public about the law and facilitate public debate. *See ASTM*, 896 F.3d at 449; Def’s 2d Mot. at 16. Defendant’s “attempt to freely distribute standards incorporated by reference into law qualify[es] as a use that further[s] the purposes of the fair use defense.” *ASTM*, 896 F.3d at 449. Further, the incorporated standard provides information essential for a private entity to comprehend its legal duties, which weighs heavily in favor of permitting Defendant’s reproduction. *See ASTM*, 896 F.3d at 450.
- Second Factor: The “express text of the law falls plainly outside the realm of copyright protection.” *ASTM*, 896 F.3d at 451. Here, the standard is incorporated into law without limitation such that “the consequence of the incorporation by reference is virtually indistinguishable from a situation in which the standard had been expressly copied into law.” *Id.* at 452. Accordingly, “this factor weighs heavily in favor of fair use.” *Id.*
- Third Factor: The incorporating regulation does not specify that only certain provisions of this standard are incorporated by reference into law, nor does it indicate which specific provisions of the standard are relevant for regulatory compliance, suggesting that “a greater amount of the standard’s text might be fairly reproduced.” *Id.*
- Fourth Factor: Defendant’s reproductions have not had a “substantially adverse impact on the potential market for the originals,” nor have Plaintiffs shown by a preponderance

of the evidence that there is a meaningful likelihood of future harm.” Memo Op. at 30–36 (internal quotation and citation marks omitted).

- Conclusion: Defendant may fairly reproduce this incorporated standard in its entirety.

59. ASTM B209 (1996):

- The parties identify 46 C.F.R. § 58.03-1 (2011) as the incorporating by reference regulation, *see* Becker Decl. ¶ 57, Ex. 90; Wise Decl., Ex. 176, which incorporates the standard into 46 C.F.R. §§ 58.50-5; 58.50-10. Section 58.50-5 requires that aluminum gasoline fuel tanks be constructed in accordance with the minimum thickness requirements set forth in ASTM B209 (1996). Section 58.50-5 also provides the applicable thickness requirements. *See* 46 C.F.R. § 58.50-5(a)(2), Table 1. Section 58.50-10 requires that diesel fuel tanks assembled with aluminum be constructed in accordance with the minimum thickness allowed in ASTM B209, and it provides the applicable thickness and gauge requirements.
- First Factor: There is no indication that Defendant stands to profit from republishing this standard; Defendant’s apparent purpose is to inform the public about the law and facilitate public debate. *See ASTM*, 896 F.3d at 449; Def’s 2d Mot. at 16. Defendant’s “attempt to freely distribute standards incorporated by reference into law qualify[s] as a use that further[s] the purposes of the fair use defense.” *ASTM*, 896 F.3d at 449. However, the court finds that the incorporated standard does not provide information essential for a private entity to comprehend its legal duties, but rather is incorporated as a reference procedure, given that the regulation provides the applicable thickness requirements. Accordingly, “while knowing the content of this incorporated standard might help inform one’s understanding of the law,” it “is not essential to complying with any legal duty,” and thus, Defendant’s use is less transformative and “its wholesale copying, in turn, less justified.” *ASTM*, 896 F.3d at 450.
- Second Factor: The “express text of the law falls plainly outside the realm of copyright protection.” *ASTM*, 896 F.3d at 451. Here, the standard is incorporated into law without limitation such that “the consequence of the incorporation by reference is virtually indistinguishable from a situation in which the standard had been expressly copied into law.” *Id.* at 452. Accordingly, “this factor weighs heavily in favor of fair use.” *Id.*
- Third Factor: The incorporating regulation does not specify that only certain provisions of this standard are incorporated by reference into law, nor does it indicate which specific provisions of the standard are relevant for regulatory compliance, suggesting that “a greater amount of the standard’s text might be fairly reproduced.” *Id.*
- Fourth Factor: Defendant’s reproductions have not had a “substantially adverse impact on the potential market for the originals,” nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm.” Memo Op. at 30–36 (internal quotation and citation marks omitted).
- Conclusion: Defendant may fairly reproduce this incorporated standard in its entirety.

60. ASTM B16 (1992):

- The parties identify 46 C.F.R. § 56.01-2 (2011) as the incorporating by reference

regulation, *see* Becker Decl. ¶ 57, Ex. 90; Wise Decl., Ex. 176, which incorporates the standard into 46 C.F.R. § 56.60-2. Section 56.60-2 states that ASTM B16 provides the adopted bar stock and nonferrous forging and casting specifications for soft and half hard tempers. 46 C.F.R. § 56.60-2, Table 2(a). The regulation does not specify that only certain provisions of ASTM B16 (1992) are incorporated by reference into law, nor does it indicate which specific provisions of ASTM B16 (1992) are relevant for compliance with the regulation.

- First Factor: There is no indication that Defendant stands to profit from republishing this standard; Defendant’s apparent purpose is to inform the public about the law and facilitate public debate. *See ASTM*, 896 F.3d at 449; Def’s 2d Mot. at 16. Defendant’s “attempt to freely distribute standards incorporated by reference into law qualify[es] as a use that further[s] the purposes of the fair use defense.” *ASTM*, 896 F.3d at 449. Further, the incorporated standard provides information essential for a private entity to comprehend its legal duties, which weighs heavily in favor of permitting Defendant’s reproduction. *See ASTM*, 896 F.3d at 450.
- Second Factor: The “express text of the law falls plainly outside the realm of copyright protection.” *ASTM*, 896 F.3d at 451. Here, the standard is incorporated into law without limitation such that “the consequence of the incorporation by reference is virtually indistinguishable from a situation in which the standard had been expressly copied into law.” *Id.* at 452. Accordingly, “this factor weighs heavily in favor of fair use.” *Id.*
- Third Factor: The incorporating regulation does not specify that only certain provisions of this standard are incorporated by reference into law, nor does it indicate which specific provisions of the standard are relevant for regulatory compliance, suggesting that “a greater amount of the standard’s text might be fairly reproduced.” *Id.*
- Fourth Factor: Defendant’s reproductions have not had a “substantially adverse impact on the potential market for the originals,” nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm.” Memo Op. at 30–36 (internal quotation and citation marks omitted).
- Conclusion: Defendant may fairly reproduce this incorporated standard in its entirety.

61. ASTM B21 (1996):

- The parties identify 46 C.F.R. § 56.01-2 (2011) as the incorporating by reference regulation, *see* Becker Decl. ¶ 57, Ex. 90; Wise Decl., Ex. 176, which incorporates the standard into 46 C.F.R. § 56.60-2. Section 56.60-2 establishes bar stock and nonferrous forging and casting specifications, supplementary testing requirements, and service limitations for welded pipe and tubing, and identifies ASTM B21 as providing specifications for three types of alloy. 46 C.F.R. § 56.60-2(a) (Table). It also requires that “[a]llowable stresses shall be the same as those listed in UNF23 of section VIII of ASME Boiler and Pressure Vessel Code for SB-171, naval brass.” *Id.* § 56.60-2(a) n.8. The regulation does not specify that only certain provisions of ASTM B21 (1996) are incorporated by reference into law, nor does it indicate which specific provisions of ASTM B21 (1996) are relevant for compliance with the regulation.
- First Factor: There is no indication that Defendant stands to profit from republishing

this standard; Defendant's apparent purpose is to inform the public about the law and facilitate public debate. *See ASTM*, 896 F.3d at 449; Def's 2d Mot. at 16. Defendant's "attempt to freely distribute standards incorporated by reference into law qualifie[s] as a use that further[s] the purposes of the fair use defense." *ASTM*, 896 F.3d at 449. Further, the incorporated standard provides information essential for a private entity to comprehend its legal duties, which weighs heavily in favor of permitting Defendant's reproduction. *See ASTM*, 896 F.3d at 450.

- Second Factor: The "express text of the law falls plainly outside the realm of copyright protection." *ASTM*, 896 F.3d at 451. Here, the standard is incorporated into law without limitation such that "the consequence of the incorporation by reference is virtually indistinguishable from a situation in which the standard had been expressly copied into law." *Id.* at 452. Accordingly, "this factor weighs heavily in favor of fair use." *Id.*
- Third Factor: The incorporating regulation does not specify that only certain provisions of this standard are incorporated by reference into law, nor does it indicate which specific provisions of the standard are relevant for regulatory compliance, suggesting that "a greater amount of the standard's text might be fairly reproduced." *Id.*
- Fourth Factor: Defendant's reproductions have not had a "substantially adverse impact on the potential market for the originals," nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm." Memo Op. at 30–36 (internal quotation and citation marks omitted).
- Conclusion: Defendant may fairly reproduce this incorporated standard in its entirety.

62. ASTM B21 (1983b):

- The parties identify 46 C.F.R. § 56.01-2 (1999) as the incorporating by reference regulation, *see* Becker Decl. ¶ 57, Ex. 90; Wise Decl., Ex. 176, which incorporates the standard into 46 C.F.R. § 56.60-2. Section 56.60-2 identifies ASTM B21 as providing the adopted bar stock and nonferrous forging and casting specifications for certain alloys. *See* 46 C.F.R. § 56.60-2, Table 2(a). It also requires that "[p]hysical testing, including mercurous nitrate test, shall be performed as for material manufactured to ASTM B21." *Id.* § 56.60-2(a) n.10. The regulation does not specify that only certain provisions of ASTM B21 (1983b) are incorporated by reference into law, nor does it indicate which specific provisions of ASTM B21 (1983b) are relevant for compliance with the regulation.
- First Factor: There is no indication that Defendant stands to profit from republishing this standard; Defendant's apparent purpose is to inform the public about the law and facilitate public debate. *See ASTM*, 896 F.3d at 449; Def's 2d Mot. at 16. Defendant's "attempt to freely distribute standards incorporated by reference into law qualifie[s] as a use that further[s] the purposes of the fair use defense." *ASTM*, 896 F.3d at 449. Further, the incorporated standard provides information essential for a private entity to comprehend its legal duties, which weighs heavily in favor of permitting Defendant's reproduction. *See ASTM*, 896 F.3d at 450.
- Second Factor: The "express text of the law falls plainly outside the realm of copyright protection." *ASTM*, 896 F.3d at 451. Here, the standard is incorporated into law

without limitation such that “the consequence of the incorporation by reference is virtually indistinguishable from a situation in which the standard had been expressly copied into law.” *Id.* at 452. Accordingly, “this factor weighs heavily in favor of fair use.” *Id.*

- Third Factor: The incorporating regulation does not specify that only certain provisions of this standard are incorporated by reference into law, nor does it indicate which specific provisions of the standard are relevant for regulatory compliance, suggesting that “a greater amount of the standard’s text might be fairly reproduced.” *Id.*
- Fourth Factor: Defendant’s reproductions have not had a “substantially adverse impact on the potential market for the originals,” nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm.” Memo Op. at 30–36 (internal quotation and citation marks omitted).
- Conclusion: Defendant may fairly reproduce this incorporated standard in its entirety.

63. ASTM B283 (1996):

- The parties identify 46 C.F.R. § 56.01-2 (2011) as the incorporating by reference regulation, *see* Becker Decl. ¶ 57, Ex. 90; Wise Decl., Ex. 176, which incorporates the standard into 46 C.F.R. § 56.60-2. Section 56.60-2 identifies ASTM B283 as providing the adopted bar stock and nonferrous forging and casting specifications for forging brass. *See* 46 C.F.R. § 56.60-2, Table 2(a). The regulation does not specify that only certain provisions of ASTM B283 (1996) are incorporated by reference into law, nor does it indicate which specific provisions of ASTM B283 (1996) are relevant for compliance with the regulation.
- First Factor: There is no indication that Defendant stands to profit from republishing this standard; Defendant’s apparent purpose is to inform the public about the law and facilitate public debate. *See ASTM*, 896 F.3d at 449; Def’s 2d Mot. at 16. Defendant’s “attempt to freely distribute standards incorporated by reference into law qualify[es] as a use that further[s] the purposes of the fair use defense.” *ASTM*, 896 F.3d at 449. Further, the incorporated standard provides information essential for a private entity to comprehend its legal duties, which weighs heavily in favor of permitting Defendant’s reproduction. *See ASTM*, 896 F.3d at 450.
- Second Factor: The “express text of the law falls plainly outside the realm of copyright protection.” *ASTM*, 896 F.3d at 451. Here, the standard is incorporated into law without limitation such that “the consequence of the incorporation by reference is virtually indistinguishable from a situation in which the standard had been expressly copied into law.” *Id.* at 452. Accordingly, “this factor weighs heavily in favor of fair use.” *Id.*
- Third Factor: The incorporating regulation does not specify that only certain provisions of this standard are incorporated by reference into law, nor does it indicate which specific provisions of the standard are relevant for regulatory compliance, suggesting that “a greater amount of the standard’s text might be fairly reproduced.” *Id.*
- Fourth Factor: Defendant’s reproductions have not had a “substantially adverse impact on the potential market for the originals,” nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm.” Memo Op. at 30–

36 (internal quotation and citation marks omitted).

- Conclusion: Defendant may fairly reproduce this incorporated standard in its entirety.

64. ASTM 315 (1993):

- The parties identify 46 C.F.R. § 56.01-2 (2011) as the incorporating by reference regulation, *see* Becker Decl. ¶ 57, Ex. 90; Wise Decl., Ex. 176, which incorporates the standard into 46 C.F.R. § 56.60-1. Section 56.60-1 identifies ASTM A315 as the controlling standard for seamless tube piping systems made with copper-silicon. The regulation does not specify that only certain provisions of ASTM A315 (1993) are incorporated by reference into law, nor does it indicate which specific provisions of ASTM A315 (1993) are relevant for compliance with the regulation.
- First Factor: There is no indication that Defendant stands to profit from republishing this standard; Defendant's apparent purpose is to inform the public about the law and facilitate public debate. *See ASTM*, 896 F.3d at 449; Def's 2d Mot. at 16. Defendant's "attempt to freely distribute standards incorporated by reference into law qualify[es] as a use that further[s] the purposes of the fair use defense." *ASTM*, 896 F.3d at 449. Further, the incorporated standard provides information essential for a private entity to comprehend its legal duties, which weighs heavily in favor of permitting Defendant's reproduction. *See ASTM*, 896 F.3d at 450.
- Second Factor: The "express text of the law falls plainly outside the realm of copyright protection." *ASTM*, 896 F.3d at 451. Here, the standard is incorporated into law without limitation such that "the consequence of the incorporation by reference is virtually indistinguishable from a situation in which the standard had been expressly copied into law." *Id.* at 452. Accordingly, "this factor weighs heavily in favor of fair use." *Id.*
- Third Factor: The incorporating regulation does not specify that only certain provisions of this standard are incorporated by reference into law, nor does it indicate which specific provisions of the standard are relevant for regulatory compliance, suggesting that "a greater amount of the standard's text might be fairly reproduced." *Id.*
- Fourth Factor: Defendant's reproductions have not had a "substantially adverse impact on the potential market for the originals," nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm." Memo Op. at 30–36 (internal quotation and citation marks omitted).
- Conclusion: Defendant may fairly reproduce this incorporated standard in its entirety.

65. ASTM B42 (1996):

- The parties identify 46 C.F.R. § 56.01-2 (2011) as the incorporating by reference regulation, *see* Becker Decl. ¶ 57, Ex. 90; Wise Decl., Ex. 176, which incorporates the standard into 46 C.F.R. § 56.60-1. Section 56.60-1 identifies ASTM B42 as the controlling standard for seamless piping systems made with copper. The regulation does not specify that only certain provisions of ASTM B42 (1996) are incorporated by reference into law, nor does it indicate which specific provisions of ASTM B42 (1996) are relevant for compliance with the regulation.
- First Factor: There is no indication that Defendant stands to profit from republishing

this standard; Defendant's apparent purpose is to inform the public about the law and facilitate public debate. *See ASTM*, 896 F.3d at 449; Def's 2d Mot. at 16. Defendant's "attempt to freely distribute standards incorporated by reference into law qualifie[s] as a use that further[s] the purposes of the fair use defense." *ASTM*, 896 F.3d at 449. Further, the incorporated standard provides information essential for a private entity to comprehend its legal duties, which weighs heavily in favor of permitting Defendant's reproduction. *See ASTM*, 896 F.3d at 450.

- Second Factor: The "express text of the law falls plainly outside the realm of copyright protection." *ASTM*, 896 F.3d at 451. Here, the standard is incorporated into law without limitation such that "the consequence of the incorporation by reference is virtually indistinguishable from a situation in which the standard had been expressly copied into law." *Id.* at 452. Accordingly, "this factor weighs heavily in favor of fair use." *Id.*
- Third Factor: The incorporating regulation does not specify that only certain provisions of this standard are incorporated by reference into law, nor does it indicate which specific provisions of the standard are relevant for regulatory compliance, suggesting that "a greater amount of the standard's text might be fairly reproduced." *Id.*
- Fourth Factor: Defendant's reproductions have not had a "substantially adverse impact on the potential market for the originals," nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm." Memo Op. at 30–36 (internal quotation and citation marks omitted).
- Conclusion: Defendant may fairly reproduce this incorporated standard in its entirety.

66. ASTM B557 (1984):

- The parties identify 49 C.F.R. § 171.7 (2009) as the incorporating by reference regulation, *see* Becker Decl. ¶ 57, Ex. 90; Wise Decl., Ex. 176, which incorporates the standard into 49 C.F.R. § 178.46 (2009). Section 178.46 states that in the context of seamless aluminum cylinders, the "yield strength must be determined by either the 'offset' method or the 'extension under load' method as prescribed in ASTM B 557." 49 C.F.R. § 178.46(i)(3)(i). The regulation does not specify that only certain provisions of ASTM B557 (1984) are incorporated by reference into law, nor does it indicate which specific provisions of ASTM B557 (1984) are relevant for compliance with the regulation.
- First Factor: There is no indication that Defendant stands to profit from republishing this standard; Defendant's apparent purpose is to inform the public about the law and facilitate public debate. *See ASTM*, 896 F.3d at 449; Def's 2d Mot. at 16. Defendant's "attempt to freely distribute standards incorporated by reference into law qualifie[s] as a use that further[s] the purposes of the fair use defense." *ASTM*, 896 F.3d at 449. Further, the incorporated standard provides information essential for a private entity to comprehend its legal duties, which weighs heavily in favor of permitting Defendant's reproduction. *See ASTM*, 896 F.3d at 450.
- Second Factor: The "express text of the law falls plainly outside the realm of copyright protection." *ASTM*, 896 F.3d at 451. Here, the standard is incorporated into law without limitation such that "the consequence of the incorporation by reference is

virtually indistinguishable from a situation in which the standard had been expressly copied into law.” *Id.* at 452. Accordingly, “this factor weighs heavily in favor of fair use.” *Id.*

- Third Factor: The incorporating regulation does not specify that only certain provisions of this standard are incorporated by reference into law, nor does it indicate which specific provisions of the standard are relevant for regulatory compliance, suggesting that “a greater amount of the standard’s text might be fairly reproduced.” *Id.*
- Fourth Factor: Defendant’s reproductions have not had a “substantially adverse impact on the potential market for the originals,” nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm.” Memo Op. at 30–36 (internal quotation and citation marks omitted).
- Conclusion: Defendant may fairly reproduce this incorporated standard in its entirety.

67. ASTM B580 (1979):

- The parties identify 49 C.F.R. § 171.7 (2009) as the incorporating by reference regulation, *see* Becker Decl. ¶ 57, Ex. 90; Wise Decl., Ex. 176, which incorporates the standard into 49 C.F.R. §§ 173.316, 173.318, 178.338-17. Section 173.316 requires that for cryogenic liquids in cylinders, a “valve or fitting made of aluminum with internal rubbing or abrading aluminum parts that may come in contact with oxygen in the cryogenic liquid form may not be installed on any cylinder used to transport oxygen, cryogenic liquid unless the parts are anodized in accordance with ASTM Standard B 580.” *See* 49 C.F.R. § 173.316(a)(4). Section 173.318 requires for cryogenic liquids in tanks that a “valve or fitting made of aluminum with internal rubbing or abrading aluminum parts that may come in contact with oxygen in the cryogenic liquid form may not be installed on any cargo tank used to transport oxygen, cryogenic liquid unless the parts are anodized in accordance with ASTM Standard B 580.” *Id.* § 173.318(a)(4). Section 178.338-17 requires for pumps and compressors that “valve or fitting made of aluminum with internal rubbing or abrading aluminum parts that may come in contact with oxygen (cryogenic liquid) may not be installed on any cargo tank used to transport oxygen (cryogenic liquid) unless the parts are anodized in accordance with ASTM B 580.” *Id.* § 178.338-17. These regulations do not specify that only certain provisions of ASTM B580 (1979) are incorporated by reference into law, nor do they indicate which specific provisions of ASTM B580 (1979) are relevant for compliance with the regulation.
- First Factor: There is no indication that Defendant stands to profit from republishing this standard; Defendant’s apparent purpose is to inform the public about the law and facilitate public debate. *See ASTM*, 896 F.3d at 449; Def’s 2d Mot. at 16. Defendant’s “attempt to freely distribute standards incorporated by reference into law qualifie[s] as a use that further[s] the purposes of the fair use defense.” *ASTM*, 896 F.3d at 449. Further, the incorporated standard provides information essential for a private entity to comprehend its legal duties, which weighs heavily in favor of permitting Defendant’s reproduction. *See ASTM*, 896 F.3d at 450.
- Second Factor: The “express text of the law falls plainly outside the realm of copyright protection.” *ASTM*, 896 F.3d at 451. Here, the standard is incorporated into law

without limitation such that “the consequence of the incorporation by reference is virtually indistinguishable from a situation in which the standard had been expressly copied into law.” *Id.* at 452. Accordingly, “this factor weighs heavily in favor of fair use.” *Id.*

- Third Factor: The incorporating regulation does not specify that only certain provisions of this standard are incorporated by reference into law, nor does it indicate which specific provisions of the standard are relevant for regulatory compliance, suggesting that “a greater amount of the standard’s text might be fairly reproduced.” *Id.*
- Fourth Factor: Defendant’s reproductions have not had a “substantially adverse impact on the potential market for the originals,” nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm.” Memo Op. at 30–36 (internal quotation and citation marks omitted).
- Conclusion: Defendant may fairly reproduce this incorporated standard in its entirety.

68. ASTM B68 (1995):

- The parties identify 46 C.F.R. § 56.01-2 (2011) as the incorporating by reference regulation, *see* Becker Decl. ¶ 57, Ex. 90; Wise Decl., Ex. 176, which incorporates the standard into 46 C.F.R. § 56.60-1. Section 56.60-1 identifies ASTM B68 as one of the controlling standard for “Tube, seamless” piping systems made with copper. The regulation does not specify that only certain provisions of ASTM B68 (1995) are incorporated by reference into law, nor does it indicate which specific provisions of ASTM B68 (1995) are relevant for compliance with the regulation.
- First Factor: There is no indication that Defendant stands to profit from republishing this standard; Defendant’s apparent purpose is to inform the public about the law and facilitate public debate. *See ASTM*, 896 F.3d at 449; Def’s 2d Mot. at 16. Defendant’s “attempt to freely distribute standards incorporated by reference into law qualifie[s] as a use that further[s] the purposes of the fair use defense.” *ASTM*, 896 F.3d at 449. Further, the incorporated standard provides information essential for a private entity to comprehend its legal duties, which weighs heavily in favor of permitting Defendant’s reproduction. *See ASTM*, 896 F.3d at 450.
- Second Factor: The “express text of the law falls plainly outside the realm of copyright protection.” *ASTM*, 896 F.3d at 451. Here, the standard is incorporated into law without limitation such that “the consequence of the incorporation by reference is virtually indistinguishable from a situation in which the standard had been expressly copied into law.” *Id.* at 452. Accordingly, “this factor weighs heavily in favor of fair use.” *Id.*
- Third Factor: The incorporating regulation does not specify that only certain provisions of this standard are incorporated by reference into law, nor does it indicate which specific provisions of the standard are relevant for regulatory compliance, suggesting that “a greater amount of the standard’s text might be fairly reproduced.” *Id.*
- Fourth Factor: Defendant’s reproductions have not had a “substantially adverse impact on the potential market for the originals,” nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm.” Memo Op. at 30–36 (internal quotation and citation marks omitted).

- Conclusion: Defendant may fairly reproduce this incorporated standard in its entirety.

69. ASTM B694 (1986):

- The parties identify 7 C.F.R. § 1755.390 (2010) as the incorporating by reference regulation, *see* Becker Decl. ¶ 57, Ex. 90; Wise Decl., Ex. 176, which does not incorporate the standard for any specific sections of the Code of Federal Register. *See* 7 C.F.R. § 1755.390(a)(v)(7). Other sections of 7 C.F.R. § 1755 identifying requirements of ASTM B694 (1986) do not specify that only certain provisions of ASTM B694 (1986) are incorporated by reference into law, nor do they indicate which specific provisions of ASTM B694 (1986) are relevant for compliance with the regulation. *See* 7 C.F.R. § 1755.390(h)(5)(v) (“The 5-mil copper clad stainless steel tape must be in the fully annealed condition and must conform to the requirements of American Society for Testing and Materials (ASTM) B 694–86, with a cladding ratio of 16/68/16.”); *id.* § 1755.860(i)(4)(ii) (“Copper alloy 220. The shielding material, prior to application to the wire, must be in the fully annealed condition and shall conform to the requirements of ASTM B 694–86 for C22000 commercial bronze.”); *id.* § 1755.860(i)(4)(iii) (“Copper-clad stainless steel. In addition to meeting the requirements of paragraph (i)(4)(i) of this section, the shielding material, prior to application to the wire, must be in the fully annealed condition and must conform to the requirements of ASTM B 694–86, with a cladding ratio of 16/68/16 and must have a minimum electrical conductivity of 28 percent IACS when measured in accordance with ASTM B 193–87.”); *id.* § 1755.860(i)(4)(iv) (“Copper alloy 664. In addition to meeting the requirements of paragraph (i)(4)(i) of this section, the shielding material, prior to application to the wire, must be annealed temper and must conform to the requirements of ASTM B 694–86 and must have a minimum electrical conductivity of 28 percent IACS when measured in accordance with ASTM B 193–87.”); *id.* § 1755.890(h)(5)(v) (The 5-mil copper clad stainless steel tape must be in the fully annealed condition and must conform to the requirements of American Society for Testing and Materials (ASTM) B 694–86, with a cladding ratio of 16/68/16.”).
- First Factor: There is no indication that Defendant stands to profit from republishing this standard; Defendant’s apparent purpose is to inform the public about the law and facilitate public debate. *See ASTM*, 896 F.3d at 449; Def’s 2d Mot. at 16. Defendant’s “attempt to freely distribute standards incorporated by reference into law qualifie[s] as a use that further[s] the purposes of the fair use defense.” *ASTM*, 896 F.3d at 449. Further, the incorporated standard provides information essential for a private entity to comprehend its legal duties, which weighs heavily in favor of permitting Defendant’s reproduction. *See ASTM*, 896 F.3d at 450.
- Second Factor: The “express text of the law falls plainly outside the realm of copyright protection.” *ASTM*, 896 F.3d at 451. Here, the standard is incorporated into law without limitation such that “the consequence of the incorporation by reference is virtually indistinguishable from a situation in which the standard had been expressly copied into law.” *Id.* at 452. Accordingly, “this factor weighs heavily in favor of fair use.” *Id.*
- Third Factor: The incorporating regulation does not specify that only certain provisions of this standard are incorporated by reference into law, nor does it indicate which

specific provisions of the standard are relevant for regulatory compliance, suggesting that “a greater amount of the standard’s text might be fairly reproduced.” *Id.*

- Fourth Factor: Defendant’s reproductions have not had a “substantially adverse impact on the potential market for the originals,” nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm.” Memo Op. at 30–36 (internal quotation and citation marks omitted).
- Conclusion: Defendant may fairly reproduce this incorporated standard in its entirety.

70. ASTM B75 (1997):

- The parties identify 46 C.F.R. § 56.01-2 (2011) as the incorporating by reference regulation, *see* Becker Decl. ¶ 57, Ex. 90; Wise Decl., Ex. 176, which incorporates the standard into 46 C.F.R. § 56.60-1. Section 56.60-1 identifies ASTM B75 as one of the controlling standard for “Tube, seamless” piping systems made with copper. The regulation does not specify that only certain provisions of ASTM B75 (1997) are incorporated by reference into law, nor does it indicate which specific provisions of ASTM B75 (1997) are relevant for compliance with the regulation.
- First Factor: There is no indication that Defendant stands to profit from republishing this standard; Defendant’s apparent purpose is to inform the public about the law and facilitate public debate. *See ASTM*, 896 F.3d at 449; Def’s 2d Mot. at 16. Defendant’s “attempt to freely distribute standards incorporated by reference into law qualifie[s] as a use that further[s] the purposes of the fair use defense.” *ASTM*, 896 F.3d at 449. Further, the incorporated standard provides information essential for a private entity to comprehend its legal duties, which weighs heavily in favor of permitting Defendant’s reproduction. *See ASTM*, 896 F.3d at 450.
- Second Factor: The “express text of the law falls plainly outside the realm of copyright protection.” *ASTM*, 896 F.3d at 451. Here, the standard is incorporated into law without limitation such that “the consequence of the incorporation by reference is virtually indistinguishable from a situation in which the standard had been expressly copied into law.” *Id.* at 452. Accordingly, “this factor weighs heavily in favor of fair use.” *Id.*
- Third Factor: The incorporating regulation does not specify that only certain provisions of this standard are incorporated by reference into law, nor does it indicate which specific provisions of the standard are relevant for regulatory compliance, suggesting that “a greater amount of the standard’s text might be fairly reproduced.” *Id.*
- Fourth Factor: Defendant’s reproductions have not had a “substantially adverse impact on the potential market for the originals,” nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm.” Memo Op. at 30–36 (internal quotation and citation marks omitted).
- Conclusion: Defendant may fairly reproduce this incorporated standard in its entirety.

71. ASTM B85 (1984):

- The parties identify 46 C.F.R. § 56.01-2 (1997) as the incorporating by reference regulation, *see* Becker Decl. ¶ 57, Ex. 90; Wise Decl., Ex. 176, which incorporates the standard into 46 C.F.R. § 56.60-2. Section 56.60-2 requires that compliance with

ASTM B85 specifications for welding pipe and tubing materials. The regulation does not specify that only certain provisions of ASTM B85 (1984) are incorporated by reference into law, nor does it indicate which specific provisions of ASTM B8575 (1984) are relevant for compliance with the regulation

- First Factor: There is no indication that Defendant stands to profit from republishing this standard; Defendant's apparent purpose is to inform the public about the law and facilitate public debate. *See ASTM*, 896 F.3d at 449; Def's 2d Mot. at 16. Defendant's "attempt to freely distribute standards incorporated by reference into law qualifie[s] as a use that further[s] the purposes of the fair use defense." *ASTM*, 896 F.3d at 449. Further, the incorporated standard provides information essential for a private entity to comprehend its legal duties, which weighs heavily in favor of permitting Defendant's reproduction. *See ASTM*, 896 F.3d at 450.
- Second Factor: The "express text of the law falls plainly outside the realm of copyright protection." *ASTM*, 896 F.3d at 451. Here, the standard is incorporated into law without limitation such that "the consequence of the incorporation by reference is virtually indistinguishable from a situation in which the standard had been expressly copied into law." *Id.* at 452. Accordingly, "this factor weighs heavily in favor of fair use." *Id.*
- Third Factor: The incorporating regulation does not specify that only certain provisions of this standard are incorporated by reference into law, nor does it indicate which specific provisions of the standard are relevant for regulatory compliance, suggesting that "a greater amount of the standard's text might be fairly reproduced." *Id.*
- Fourth Factor: Defendant's reproductions have not had a "substantially adverse impact on the potential market for the originals," nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm." Memo Op. at 30–36 (internal quotation and citation marks omitted).
- Conclusion: Defendant may fairly reproduce this incorporated standard in its entirety.

72. ASTM B88 (1996):

- The parties identify 46 C.F.R. § 56.01-2 (2011) as the incorporating by reference regulation, *see* Becker Decl. ¶ 57, Ex. 90; Wise Decl., Ex. 176, which incorporates the standard into 46 C.F.R. § 56.60-1. Section 56.60-1 identifies ASTM B88 as one of the controlling standard for "Tube, seamless" piping systems made with copper. The regulation does not specify that only certain provisions of ASTM B88 (1996) are incorporated by reference into law, nor does it indicate which specific provisions of ASTM B88 (1996) are relevant for compliance with the regulation
- First Factor: There is no indication that Defendant stands to profit from republishing this standard; Defendant's apparent purpose is to inform the public about the law and facilitate public debate. *See ASTM*, 896 F.3d at 449; Def's 2d Mot. at 16. Defendant's "attempt to freely distribute standards incorporated by reference into law qualifie[s] as a use that further[s] the purposes of the fair use defense." *ASTM*, 896 F.3d at 449. Further, the incorporated standard provides information essential for a private entity to comprehend its legal duties, which weighs heavily in favor of permitting Defendant's reproduction. *See ASTM*, 896 F.3d at 450.

- Second Factor: The “express text of the law falls plainly outside the realm of copyright protection.” *ASTM*, 896 F.3d at 451. Here, the standard is incorporated into law without limitation such that “the consequence of the incorporation by reference is virtually indistinguishable from a situation in which the standard had been expressly copied into law.” *Id.* at 452. Accordingly, “this factor weighs heavily in favor of fair use.” *Id.*
- Third Factor: The incorporating regulation does not specify that only certain provisions of this standard are incorporated by reference into law, nor does it indicate which specific provisions of the standard are relevant for regulatory compliance, suggesting that “a greater amount of the standard’s text might be fairly reproduced.” *Id.*
- Fourth Factor: Defendant’s reproductions have not had a “substantially adverse impact on the potential market for the originals,” nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm.” Memo Op. at 30–36 (internal quotation and citation marks omitted).
- Conclusion: Defendant may fairly reproduce this incorporated standard in its entirety.

73. ASTM B96 (1993):

- The parties identify 46 C.F.R. § 56.01-2 (2011) as the incorporating by reference regulation, *see* Becker Decl. ¶ 57, Ex. 90; Wise Decl., Ex. 176, which incorporates the standard into 46 C.F.R. § 56.60-2. Section 56.60-2 requires that “Physical testing shall be performed as for material manufactured to ASTM B 96.” The regulation does not specify that only certain provisions of ASTM B96 (1993) are incorporated by reference into law, nor does it indicate which specific provisions of ASTM B96 (1993) are relevant for compliance with the regulation
- First Factor: There is no indication that Defendant stands to profit from republishing this standard; Defendant’s apparent purpose is to inform the public about the law and facilitate public debate. *See ASTM*, 896 F.3d at 449; Def’s 2d Mot. at 16. Defendant’s “attempt to freely distribute standards incorporated by reference into law qualify[es] as a use that further[s] the purposes of the fair use defense.” *ASTM*, 896 F.3d at 449. Further, the incorporated standard provides information essential for a private entity to comprehend its legal duties, which weighs heavily in favor of permitting Defendant’s reproduction. *See ASTM*, 896 F.3d at 450.
- Second Factor: The “express text of the law falls plainly outside the realm of copyright protection.” *ASTM*, 896 F.3d at 451. Here, the standard is incorporated into law without limitation such that “the consequence of the incorporation by reference is virtually indistinguishable from a situation in which the standard had been expressly copied into law.” *Id.* at 452. Accordingly, “this factor weighs heavily in favor of fair use.” *Id.*
- Third Factor: The incorporating regulation does not specify that only certain provisions of this standard are incorporated by reference into law, nor does it indicate which specific provisions of the standard are relevant for regulatory compliance, suggesting that “a greater amount of the standard’s text might be fairly reproduced.” *Id.*
- Fourth Factor: Defendant’s reproductions have not had a “substantially adverse impact on the potential market for the originals,” nor have Plaintiffs shown by a preponderance

of the evidence that there is a meaningful likelihood of future harm.” Memo Op. at 30–36 (internal quotation and citation marks omitted).

- Conclusion: Defendant may fairly reproduce this incorporated standard in its entirety.

74. ASTM C330 (1999):

- The parties identify 30 C.F.R. § 250.198 (2007) as the incorporating by reference regulation, *see* Becker Decl. ¶ 57, Ex. 90; Wise Decl., Ex. 176, which incorporates the standard into 30 C.F.R. § 250.901(a)(14). Section 250.901(a), (a)(14) requires that all “plans for platform design, analysis, fabrication, installation, use, maintenance, inspection and assessment must, as appropriate, conform to” a number of industry standards, including ASTM C330-99. The regulation does not specify that only certain provisions of ASTM C330 (1999) are incorporated by reference into law, nor does it indicate which specific provisions of ASTM C330 (1999) are relevant for compliance with the regulation.
- First Factor: There is no indication that Defendant stands to profit from republishing this standard; Defendant’s apparent purpose is to inform the public about the law and facilitate public debate. *See ASTM*, 896 F.3d at 449; Def’s 2d Mot. at 16. Defendant’s “attempt to freely distribute standards incorporated by reference into law qualify[es] as a use that further[s] the purposes of the fair use defense.” *ASTM*, 896 F.3d at 449. Further, the incorporated standard provides information essential for a private entity to comprehend its legal duties, which weighs heavily in favor of permitting Defendant’s reproduction. *See ASTM*, 896 F.3d at 450.
- Second Factor: The “express text of the law falls plainly outside the realm of copyright protection.” *ASTM*, 896 F.3d at 451. Here, the standard is incorporated into law without limitation such that “the consequence of the incorporation by reference is virtually indistinguishable from a situation in which the standard had been expressly copied into law.” *Id.* at 452. Accordingly, “this factor weighs heavily in favor of fair use.” *Id.*
- Third Factor: The incorporating regulation does not specify that only certain provisions of this standard are incorporated by reference into law, nor does it indicate which specific provisions of the standard are relevant for regulatory compliance, suggesting that “a greater amount of the standard’s text might be fairly reproduced.” *Id.*
- Fourth Factor: Defendant’s reproductions have not had a “substantially adverse impact on the potential market for the originals,” nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm.” Memo Op. at 30–36 (internal quotation and citation marks omitted).
- Conclusion: Defendant may fairly reproduce this incorporated standard in its entirety.

75. ASTM C509 (1984):

- The parties identify 10 C.F.R. § 440, Appendix A (1984) as the incorporating by reference regulation, *see* Becker Decl. ¶ 57, Ex. 90; Wise Decl., Ex. 176, which incorporates the standard into part 440. Part 440, Appendix A requires compliance with ASTM C509 for the use of certain gaskets and sealants in insulating materials for fire safety. The regulation does not specify that only certain provisions of ASTM C509

(1984) are incorporated by reference into law, nor does it indicate which specific provisions of ASTM C509 (1984) are relevant for compliance with the regulation.

- First Factor: There is no indication that Defendant stands to profit from republishing this standard; Defendant's apparent purpose is to inform the public about the law and facilitate public debate. *See ASTM*, 896 F.3d at 449; Def's 2d Mot. at 16. Defendant's "attempt to freely distribute standards incorporated by reference into law qualifie[s] as a use that further[s] the purposes of the fair use defense." *ASTM*, 896 F.3d at 449. Further, the incorporated standard provides information essential for a private entity to comprehend its legal duties, which weighs heavily in favor of permitting Defendant's reproduction. *See ASTM*, 896 F.3d at 450.
- Second Factor: The "express text of the law falls plainly outside the realm of copyright protection." *ASTM*, 896 F.3d at 451. Here, the standard is incorporated into law without limitation such that "the consequence of the incorporation by reference is virtually indistinguishable from a situation in which the standard had been expressly copied into law." *Id.* at 452. Accordingly, "this factor weighs heavily in favor of fair use." *Id.*
- Third Factor: The incorporating regulation does not specify that only certain provisions of this standard are incorporated by reference into law, nor does it indicate which specific provisions of the standard are relevant for regulatory compliance, suggesting that "a greater amount of the standard's text might be fairly reproduced." *Id.*
- Fourth Factor: Defendant's reproductions have not had a "substantially adverse impact on the potential market for the originals," nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm." Memo Op. at 30–36 (internal quotation and citation marks omitted).
- Conclusion: Defendant may fairly reproduce this incorporated standard in its entirety.

76. ASTM D1217 1993 (1998):

- Defendant identifies 40 C.F.R. § 75.6 (2010) as the incorporating by reference regulation. Becker Decl. ¶ 57, Ex. 90 at 38. Plaintiffs argue that Section 75.6 does not actually incorporate ASTM D1217 1993 (1998) because the regulation states that it incorporates "ASTM D1217–993 (Reapproved 1998)." *See Wise Decl.*, Ex. 176 at n.2 ("Where the ASTM standard referenced in the quoted C.F.R. language differs from the version of the ASTM standard that PRO reproduced and displayed, ASTM has highlighted and bolded that language."); *id.* at 44 (highlighting and bolding text of ASTM D1217–993). The court agrees with Defendant that 40 C.F.R. § 75.6 incorporates ASTM D1217 1993 (1998) by reference into 40 C.F.R. § 75, appendix D. Appendix D requires that where "the flowmeter records volumetric flow rate rather than mass flow rate, analyze oil samples to determine the density or specific gravity of the oil. Determine the density or specific gravity of the oil sample in accordance with" several ASTM standards, including "D1217–93 (Reapproved 1998)." 40 C.F.R. § 75.6, App. D, 2.2.6. The regulation does not specify that only certain provisions of ASTM D1217 1993 (1998) are incorporated by reference into law, nor does it indicate which specific provisions of ASTM D1217 1993 (1998) are relevant for compliance with the regulation.

- First Factor: There is no indication that Defendant stands to profit from republishing this standard; Defendant's apparent purpose is to inform the public about the law and facilitate public debate. *See ASTM*, 896 F.3d at 449; Def's 2d Mot. at 16. Defendant's "attempt to freely distribute standards incorporated by reference into law qualify[s] as a use that further[s] the purposes of the fair use defense." *ASTM*, 896 F.3d at 449. Further, the incorporated standard provides information essential for a private entity to comprehend its legal duties, which weighs heavily in favor of permitting Defendant's reproduction. *See ASTM*, 896 F.3d at 450.
- Second Factor: The "express text of the law falls plainly outside the realm of copyright protection." *ASTM*, 896 F.3d at 451. Here, the standard is incorporated into law without limitation such that "the consequence of the incorporation by reference is virtually indistinguishable from a situation in which the standard had been expressly copied into law." *Id.* at 452. Accordingly, "this factor weighs heavily in favor of fair use." *Id.*
- Third Factor: The incorporating regulation does not specify that only certain provisions of this standard are incorporated by reference into law, nor does it indicate which specific provisions of the standard are relevant for regulatory compliance, suggesting that "a greater amount of the standard's text might be fairly reproduced." *Id.*
- Fourth Factor: Defendant's reproductions have not had a "substantially adverse impact on the potential market for the originals," nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm." Memo Op. at 30–36 (internal quotation and citation marks omitted).
- Conclusion: Defendant may fairly reproduce this incorporated standard in its entirety.

77. ASTM D1253 1986 (1996):

- The parties identify 40 C.F.R. § 141.131(a)(2) (2008) as the incorporating by reference regulation, *see* Becker Decl. ¶ 57, Ex. 90; Wise Decl., Ex. 176, which provides that "ASTM Methods D 1253-86 and D 1253-86 (Reapproved 1996) shall be followed in accordance with the Annual Book of ASTM Standards, Volume 11.01, American Society for Testing and Materials International, 1996 or any ASTM edition containing the IBR-approved version of the method may be used." The regulation does not specify that only certain provisions of ASTM D1253 1986 (1996) are incorporated by reference into law, nor does it indicate which specific provisions of ASTM D1253 1986 (1996) are relevant for compliance with the regulation.
- First Factor: There is no indication that Defendant stands to profit from republishing this standard; Defendant's apparent purpose is to inform the public about the law and facilitate public debate. *See ASTM*, 896 F.3d at 449; Def's 2d Mot. at 16. Defendant's "attempt to freely distribute standards incorporated by reference into law qualify[s] as a use that further[s] the purposes of the fair use defense." *ASTM*, 896 F.3d at 449. Further, the incorporated standard provides information essential for a private entity to comprehend its legal duties, which weighs heavily in favor of permitting Defendant's reproduction. *See ASTM*, 896 F.3d at 450.
- Second Factor: The "express text of the law falls plainly outside the realm of copyright protection." *ASTM*, 896 F.3d at 451. Here, the standard is incorporated into law

without limitation such that “the consequence of the incorporation by reference is virtually indistinguishable from a situation in which the standard had been expressly copied into law.” *Id.* at 452. Accordingly, “this factor weighs heavily in favor of fair use.” *Id.*

- Third Factor: The incorporating regulation does not specify that only certain provisions of this standard are incorporated by reference into law, nor does it indicate which specific provisions of the standard are relevant for regulatory compliance, suggesting that “a greater amount of the standard’s text might be fairly reproduced.” *Id.*
- Fourth Factor: Defendant’s reproductions have not had a “substantially adverse impact on the potential market for the originals,” nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm.” Memo Op. at 30–36 (internal quotation and citation marks omitted).
- Conclusion: Defendant may fairly reproduce this incorporated standard in its entirety.

78. ASTM D1266 (1998):

- The parties identify 40 C.F.R. § 1065.1010 (2005) as the incorporating by reference regulation, *see* Becker Decl. ¶ 57, Ex. 90; Wise Decl., Ex. 176, which incorporates the standard into 40 C.F.R. § 1065.210. Section 40 C.F.R. § 1065.210 requires that “[u]nless the standard-setting part requires testing with fuel appropriate for low temperatures, use gasoline test fuels meeting” certain specifications, including ASTM D 1266-96, which establish the specifications for sulfur weight percentage. 40 C.F.R. § 1065.210 (a), Table 1; *see also id.* § 1065.215, Table 2 (same as to low temperature test fuel). The regulations do not specify that only certain provisions of ASTM D1266 (1998) are incorporated by reference into law, nor do they indicate which specific provisions of ASTM D1266 (1998) are relevant for compliance with the regulation.
- First Factor: There is no indication that Defendant stands to profit from republishing this standard; Defendant’s apparent purpose is to inform the public about the law and facilitate public debate. *See ASTM*, 896 F.3d at 449; Def’s 2d Mot. at 16. Defendant’s “attempt to freely distribute standards incorporated by reference into law qualifie[s] as a use that further[s] the purposes of the fair use defense.” *ASTM*, 896 F.3d at 449. Further, the incorporated standard provides information essential for a private entity to comprehend its legal duties, which weighs heavily in favor of permitting Defendant’s reproduction. *See ASTM*, 896 F.3d at 450.
- Second Factor: The “express text of the law falls plainly outside the realm of copyright protection.” *ASTM*, 896 F.3d at 451. Here, the standard is incorporated into law without limitation such that “the consequence of the incorporation by reference is virtually indistinguishable from a situation in which the standard had been expressly copied into law.” *Id.* at 452. Accordingly, “this factor weighs heavily in favor of fair use.” *Id.*
- Third Factor: The incorporating regulation does not specify that only certain provisions of this standard are incorporated by reference into law, nor does it indicate which specific provisions of the standard are relevant for regulatory compliance, suggesting that “a greater amount of the standard’s text might be fairly reproduced.” *Id.*
- Fourth Factor: Defendant’s reproductions have not had a “substantially adverse impact

on the potential market for the originals,” nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm.” Memo Op. at 30–36 (internal quotation and citation marks omitted).

- Conclusion: Defendant may fairly reproduce this incorporated standard in its entirety.

79. ASTM D129 (1995):

- The parties identify 40 C.F.R. § 60.17 (2011) as the incorporating by reference regulation, *see* Becker Decl. ¶ 57, Ex. 90; Wise Decl., Ex. 176, which incorporates the standard into 40 C.F.R. §§ 60.106(j)(2), 60.335(b)(10)(i), and appendix A: Method 19, 12.5.2.2.3. Section 60.106(j)(2) requires the use of ASTM D129-95, or one of eleven other standards, for separately analyzing “[f]resh feed samples.” *See* 42 C.F.R. §§ 60.106(j)(2). Section 60.335(b)(10)(i) only references ASTM D129 (2000), and not the 1995 version that Defendant published. *See id.* § 60.335(b)(10)(i). Section appendix A, Method 19 requires the use of ASTM D129, or one of four other standards, “to determine the sulfur content (%S)” for a particular sample and analysis. *See id.* § appendix A, Method 19 at 12.5.2.2.3. In addition, Section 60.4415 requires the use of ASTM D129 for analyzing samples of total sulfur content using liquid fuels. *See id.* § 60.4415(a)(i). These regulations do not specify that only certain provisions of ASTM D129 (1995) are incorporated by reference into law, nor do they indicate which specific provisions of ASTM D129 (1995) are relevant for compliance with the regulation.
- First Factor: There is no indication that Defendant stands to profit from republishing this standard; Defendant’s apparent purpose is to inform the public about the law and facilitate public debate. *See ASTM*, 896 F.3d at 449; Def’s 2d Mot. at 16. Defendant’s “attempt to freely distribute standards incorporated by reference into law qualifie[s] as a use that further[s] the purposes of the fair use defense.” *ASTM*, 896 F.3d at 449. Further, the incorporated standard provides information essential for a private entity to comprehend its legal duties, which weighs heavily in favor of permitting Defendant’s reproduction. *See ASTM*, 896 F.3d at 450.
- Second Factor: The “express text of the law falls plainly outside the realm of copyright protection.” *ASTM*, 896 F.3d at 451. Here, the standard is incorporated into law without limitation such that “the consequence of the incorporation by reference is virtually indistinguishable from a situation in which the standard had been expressly copied into law.” *Id.* at 452. Accordingly, “this factor weighs heavily in favor of fair use.” *Id.*
- Third Factor: The incorporating regulation does not specify that only certain provisions of this standard are incorporated by reference into law, nor does it indicate which specific provisions of the standard are relevant for regulatory compliance, suggesting that “a greater amount of the standard’s text might be fairly reproduced.” *Id.*
- Fourth Factor: Defendant’s reproductions have not had a “substantially adverse impact on the potential market for the originals,” nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm.” Memo Op. at 30–36 (internal quotation and citation marks omitted).
- Conclusion: Defendant may fairly reproduce this incorporated standard in its entirety.

80. ASTM D1335 1967 (1972):

- The parties identify 24 C.F.R. § 200.94 (2015) as the incorporating by reference regulation, *see* Becker Decl. ¶ 57, Ex. 90; Wise Decl., Ex. 176, which incorporates the standard but not for any specific regulation. Section 200.945 requires that all carpet “shall be designed, manufactured, and tested in compliance with,” among other standards, ASTM D1336. The regulation does not specify that only certain provisions of ASTM D1335 1967 (1972) are incorporated by reference into law, nor does it indicate which specific provisions of ASTM D1335 1967 (1972) are relevant for compliance with the regulation.
- First Factor: There is no indication that Defendant stands to profit from republishing this standard; Defendant’s apparent purpose is to inform the public about the law and facilitate public debate. *See ASTM*, 896 F.3d at 449; Def’s 2d Mot. at 16. Defendant’s “attempt to freely distribute standards incorporated by reference into law qualifie[s] as a use that further[s] the purposes of the fair use defense.” *ASTM*, 896 F.3d at 449. Further, the incorporated standard provides information essential for a private entity to comprehend its legal duties, which weighs heavily in favor of permitting Defendant’s reproduction. *See ASTM*, 896 F.3d at 450.
- Second Factor: The “express text of the law falls plainly outside the realm of copyright protection.” *ASTM*, 896 F.3d at 451. Here, the standard is incorporated into law without limitation such that “the consequence of the incorporation by reference is virtually indistinguishable from a situation in which the standard had been expressly copied into law.” *Id.* at 452. Accordingly, “this factor weighs heavily in favor of fair use.” *Id.*
- Third Factor: The incorporating regulation does not specify that only certain provisions of this standard are incorporated by reference into law, nor does it indicate which specific provisions of the standard are relevant for regulatory compliance, suggesting that “a greater amount of the standard’s text might be fairly reproduced.” *Id.*
- Fourth Factor: Defendant’s reproductions have not had a “substantially adverse impact on the potential market for the originals,” nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm.” Memo Op. at 30–36 (internal quotation and citation marks omitted).
- Conclusion: Defendant may fairly reproduce this incorporated standard in its entirety.

81. ASTM D1480 1993 (1997):

- The parties identify 40 C.F.R. § 75.6 (2010) as the incorporating by reference regulation, *see* Becker Decl. ¶ 57, Ex. 90; Wise Decl., Ex. 176, which incorporates the standard into appendix D. That section, in turn, requires that where “the flowmeter records volumetric flow rate rather than mass flow rate, analyze oil samples to determine the density or specific gravity of the oil. Determine the density or specific gravity of the oil sample in accordance with,” several standards, including ASTM D1480. The regulation does not specify that only certain provisions of ASTM D1480 1993 (1997) are incorporated by reference into law, nor does it indicate which specific provisions of ASTM D1480 1993 (1997) are relevant for compliance with the regulation.

- First Factor: There is no indication that Defendant stands to profit from republishing this standard; Defendant's apparent purpose is to inform the public about the law and facilitate public debate. *See ASTM*, 896 F.3d at 449; Def's 2d Mot. at 16. Defendant's "attempt to freely distribute standards incorporated by reference into law qualify[s] as a use that further[s] the purposes of the fair use defense." *ASTM*, 896 F.3d at 449. Further, the incorporated standard provides information essential for a private entity to comprehend its legal duties, which weighs heavily in favor of permitting Defendant's reproduction. *See ASTM*, 896 F.3d at 450.
- Second Factor: The "express text of the law falls plainly outside the realm of copyright protection." *ASTM*, 896 F.3d at 451. Here, the standard is incorporated into law without limitation such that "the consequence of the incorporation by reference is virtually indistinguishable from a situation in which the standard had been expressly copied into law." *Id.* at 452. Accordingly, "this factor weighs heavily in favor of fair use." *Id.*
- Third Factor: The incorporating regulation does not specify that only certain provisions of this standard are incorporated by reference into law, nor does it indicate which specific provisions of the standard are relevant for regulatory compliance, suggesting that "a greater amount of the standard's text might be fairly reproduced." *Id.*
- Fourth Factor: Defendant's reproductions have not had a "substantially adverse impact on the potential market for the originals," nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm." Memo Op. at 30–36 (internal quotation and citation marks omitted).
- Conclusion: Defendant may fairly reproduce this incorporated standard in its entirety.

82. ASTM D1481 1993 (1997):

- The parties identify 40 C.F.R. § 75.6 (2010) as the incorporating by reference regulation, *see* Becker Decl. ¶ 57, Ex. 90; Wise Decl., Ex. 176, which incorporates the standard into appendix D. That section, in turn, requires that where "the flowmeter records volumetric flow rate rather than mass flow rate, analyze oil samples to determine the density or specific gravity of the oil. Determine the density or specific gravity of the oil sample in accordance with," several standards, including ASTM D1481. The regulation does not specify that only certain provisions of ASTM D1481 1993 (1997) are incorporated by reference into law, nor does it indicate which specific provisions of ASTM D1481 1993 (1997) are relevant for compliance with the regulation.
- First Factor: There is no indication that Defendant stands to profit from republishing this standard; Defendant's apparent purpose is to inform the public about the law and facilitate public debate. *See ASTM*, 896 F.3d at 449; Def's 2d Mot. at 16. Defendant's "attempt to freely distribute standards incorporated by reference into law qualify[s] as a use that further[s] the purposes of the fair use defense." *ASTM*, 896 F.3d at 449. Further, the incorporated standard provides information essential for a private entity to comprehend its legal duties, which weighs heavily in favor of permitting Defendant's reproduction. *See ASTM*, 896 F.3d at 450.
- Second Factor: The "express text of the law falls plainly outside the realm of copyright

protection.” *ASTM*, 896 F.3d at 451. Here, the standard is incorporated into law without limitation such that “the consequence of the incorporation by reference is virtually indistinguishable from a situation in which the standard had been expressly copied into law.” *Id.* at 452. Accordingly, “this factor weighs heavily in favor of fair use.” *Id.*

- Third Factor: The incorporating regulation does not specify that only certain provisions of this standard are incorporated by reference into law, nor does it indicate which specific provisions of the standard are relevant for regulatory compliance, suggesting that “a greater amount of the standard’s text might be fairly reproduced.” *Id.*
- Fourth Factor: Defendant’s reproductions have not had a “substantially adverse impact on the potential market for the originals,” nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm.” Memo Op. at 30–36 (internal quotation and citation marks omitted).
- Conclusion: Defendant may fairly reproduce this incorporated standard in its entirety.

83. ASTM D1535 (1989):

- The parties identify 7 C.F.R. § 1755.910 (2014) as the incorporating by reference regulation, *see* Becker Decl. ¶ 57, Ex. 90; Wise Decl., Ex. 176, which incorporates the standard, but not for any specific regulation. See also 7 C.F.R. § 1755.860 (same). Several portions of Section 1755 require compliance with ASTM D1535-89, though none of those regulations specify that only certain provisions of ASTM D1535 (1989) are incorporated by reference into law, nor do they indicate which specific provisions of ASTM D1535 (1989) are relevant for regulatory compliance. *See* 7 C.F.R. § 1755.870 (“The color of the jacket shall be either black or dark grey in conformance with the Munsell Color System specified in ASTM D 1535–89.”); *id.* § 1755.910 (instructing manufacturers to “carefully review all the test requirements in order to develop a testing schedule that is comprehensive, efficient in terms of the number of test specimens required and can be accomplished in an orderly and logical sequence,” including those in ASTM D1535 (1989)); *id.* § 1755.910 (“The color of the housing finish should be compared against the Munsell system of color notation, as described in ASTM D 1535–89 to determine color consistency with that desired.”).
- First Factor: There is no indication that Defendant stands to profit from republishing this standard; Defendant’s apparent purpose is to inform the public about the law and facilitate public debate. *See ASTM*, 896 F.3d at 449; Def’s 2d Mot. at 16. Defendant’s “attempt to freely distribute standards incorporated by reference into law qualify[es] as a use that further[s] the purposes of the fair use defense.” *ASTM*, 896 F.3d at 449. Further, the incorporated standard provides information essential for a private entity to comprehend its legal duties, which weighs heavily in favor of permitting Defendant’s reproduction. *See ASTM*, 896 F.3d at 450.
- Second Factor: The “express text of the law falls plainly outside the realm of copyright protection.” *ASTM*, 896 F.3d at 451. Here, the standard is incorporated into law without limitation such that “the consequence of the incorporation by reference is virtually indistinguishable from a situation in which the standard had been expressly copied into law.” *Id.* at 452. Accordingly, “this factor weighs heavily in favor of fair

use.” *Id.*

- Third Factor: The incorporating regulation does not specify that only certain provisions of this standard are incorporated by reference into law, nor does it indicate which specific provisions of the standard are relevant for regulatory compliance, suggesting that “a greater amount of the standard’s text might be fairly reproduced.” *Id.*
- Fourth Factor: Defendant’s reproductions have not had a “substantially adverse impact on the potential market for the originals,” nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm.” Memo Op. at 30–36 (internal quotation and citation marks omitted).
- Conclusion: Defendant may fairly reproduce this incorporated standard in its entirety.

84. ASTM D1552 (1995):

- The parties identify 40 C.F.R. § 60.17 (2011) as the incorporating by reference regulation, *see* Becker Decl. ¶ 57, Ex. 90; Wise Decl., Ex. 176, which incorporates the standard into 40 C.F.R. §§ 60.106(j)(2), 60.335(b)(10)(i), and appendix A: Method 19, 12.5.2.2.3. Section 60.106(j)(2) requires the use of ASTM D1552-95, or one of eleven other standards, for separately analyzing “[f]resh feed samples.” *See* 42 C.F.R. §§ 60.106(j)(2). In addition, Section 60.4415 requires the use of ASTM D1552-95 for analyzing samples of total sulfur content using liquid fuels. *See id.* § 60.4415(a)(i). These regulations do not specify that only certain provisions of ASTM D1552 (1995) are incorporated by reference into law, nor do they indicate which specific provisions of ASTM D1552 (1995) are relevant for compliance with the regulation.
- First Factor: There is no indication that Defendant stands to profit from republishing this standard; Defendant’s apparent purpose is to inform the public about the law and facilitate public debate. *See ASTM*, 896 F.3d at 449; Def’s 2d Mot. at 16. Defendant’s “attempt to freely distribute standards incorporated by reference into law qualify[es] as a use that further[s] the purposes of the fair use defense.” *ASTM*, 896 F.3d at 449. Further, the incorporated standard provides information essential for a private entity to comprehend its legal duties, which weighs heavily in favor of permitting Defendant’s reproduction. *See ASTM*, 896 F.3d at 450.
- Second Factor: The “express text of the law falls plainly outside the realm of copyright protection.” *ASTM*, 896 F.3d at 451. Here, the standard is incorporated into law without limitation such that “the consequence of the incorporation by reference is virtually indistinguishable from a situation in which the standard had been expressly copied into law.” *Id.* at 452. Accordingly, “this factor weighs heavily in favor of fair use.” *Id.*
- Third Factor: The incorporating regulation does not specify that only certain provisions of this standard are incorporated by reference into law, nor does it indicate which specific provisions of the standard are relevant for regulatory compliance, suggesting that “a greater amount of the standard’s text might be fairly reproduced.” *Id.*
- Fourth Factor: Defendant’s reproductions have not had a “substantially adverse impact on the potential market for the originals,” nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm.” Memo Op. at 30–36 (internal quotation and citation marks omitted).

- Conclusion: Defendant may fairly reproduce this incorporated standard in its entirety.

85. ASTM D1688 (1995):

- Defendant identifies 40 C.F.R. § 136.3(a) Table 1B (2003) as the incorporating by reference regulation. Becker Decl. ¶ 57, Ex. 90 at 46. Plaintiffs argue that Section 136.3 does not actually incorporate this standard because the regulation states that it incorporates ASTM D1688-95 (A or B).” See Wise Decl., Ex. 176 at n.2 (“Where the ASTM standard referenced in the quoted C.F.R. language differs from the version of the ASTM standard that PRO reproduced and displayed, ASTM has highlighted and bolded that language.”); *id.* at 54 (highlighting and bolding text of “D1688-95(A or B)”). Section 136.3(a) states that the “full text of the referenced test procedures are incorporated by reference into Tables IA, IB, IC, ID, IE, and IF.” 40 C.F.R. § 136.3(a). Table IB, in turn, references ASTM D1688-95 Test Procedures A, B, and C. ASTM D1688 (1995) provides three test methods for determining copper in water: Test Methods A, B, and C. See ECF No. 199-4, Exhibit 149 Part 2 to Declaration of Jane W. Wise at 165-71. Accordingly, the regulation incorporates all three of the standard’s test procedures. However, the standard also includes background sections defining the standard’s scope, referenced documents, terminology, significance and use, purity of reagents, and sampling, as well as an appendix.
- First Factor: There is no indication that Defendant stands to profit from republishing this standard; Defendant’s apparent purpose is to inform the public about the law and facilitate public debate. See *ASTM*, 896 F.3d at 449; Def’s 2d Mot. at 16. Defendant’s “attempt to freely distribute standards incorporated by reference into law qualifie[s] as a use that further[s] the purposes of the fair use defense.” *ASTM*, 896 F.3d at 449. Further, the incorporated standard provides information essential for a private entity to comprehend its legal duties, which weighs heavily in favor of permitting Defendant’s reproduction. See *ASTM*, 896 F.3d at 450.
- Second Factor: The “express text of the law falls plainly outside the realm of copyright protection.” *ASTM*, 896 F.3d at 451. Here, the standard is incorporated into law without limitation such that “the consequence of the incorporation by reference is virtually indistinguishable from a situation in which the standard had been expressly copied into law.” *Id.* at 452. Accordingly, “this factor weighs heavily in favor of fair use.” *Id.*
- Third Factor: The incorporating regulation specifies that only specific portions of the standard are incorporated by reference into law, specifically, Test Procedures A, B, and C, which justifies posting the specific text of those provisions. *Id.* Those test procedures, however, constitute a substantial portion of the standard republished by Defendant. Moreover, copying and republishing the standard’s background sections and appendix “are reasonable in relation to the purpose of the copying,” *Campbell*, 510 U.S. at 586–87, given that they relate to the standard’s full text and assist readers with understanding the standard’s legal import.
- Fourth Factor: Defendant’s reproductions have not had a “substantially adverse impact on the potential market for the originals,” nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm.” Memo Op. at 30–36 (internal quotation and citation marks omitted).

- Conclusion: Defendant may fairly reproduce this incorporated standard in its entirety.

86. ASTM D1835 (1997):

- The parties identify 41 C.F.R. § 60.17 (2011) as the incorporating by reference regulation, *see* Becker Decl. ¶ 57, Ex. 90; Wise Decl., Ex. 176, which incorporates the standard into three subparts. *See* 41 C.F.R. §§60.41Da (defining “Liquid petroleum gas,” as that which is “defined by the American Society of Testing and Materials in ASTM D1835”); *id.* § 60.41b (same); *id.* § 60.41c (same). These regulations do not specify that only certain provisions of ASTM D1835 (1997) are incorporated by reference into law, nor do they indicate which specific provisions of ASTM D1835 (1997) are relevant for compliance with the regulation.
- First Factor: There is no indication that Defendant stands to profit from republishing this standard; Defendant’s apparent purpose is to inform the public about the law and facilitate public debate. *See ASTM*, 896 F.3d at 449; Def’s 2d Mot. at 16. Defendant’s “attempt to freely distribute standards incorporated by reference into law qualify[es] as a use that further[s] the purposes of the fair use defense.” *ASTM*, 896 F.3d at 449. However, the court finds that the incorporated standard does not provide information essential for a private entity to comprehend its legal duties, but rather is incorporated as a reference procedure. Accordingly, “while knowing the content of this incorporated standard might help inform one’s understanding of the law,” it “is not essential to complying with any legal duty,” and thus, Defendant’s use is less transformative and “its wholesale copying, in turn, less justified.” *ASTM*, 896 F.3d at 450.
- Second Factor: The “express text of the law falls plainly outside the realm of copyright protection.” *ASTM*, 896 F.3d at 451. Here, the standard is incorporated into law without limitation such that “the consequence of the incorporation by reference is virtually indistinguishable from a situation in which the standard had been expressly copied into law.” *Id.* at 452. Accordingly, “this factor weighs heavily in favor of fair use.” *Id.*
- Third Factor: The incorporating regulation does not specify that only certain provisions of this standard are incorporated by reference into law, nor does it indicate which specific provisions of the standard are relevant for regulatory compliance, suggesting that “a greater amount of the standard’s text might be fairly reproduced.” *Id.*
- Fourth Factor: Defendant’s reproductions have not had a “substantially adverse impact on the potential market for the originals,” nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm.” Memo Op. at 30–36 (internal quotation and citation marks omitted).
- Conclusion: Defendant may fairly reproduce this incorporated standard in its entirety.

87. ASTM D1890 (1996):

- The parties identify 40 C.F.R. § 136.3 (2003) as the incorporating by reference regulation, *see* Becker Decl. ¶ 57, Ex. 90; Wise Decl., Ex. 176, which incorporates the standard into 40 C.F.R. § 136.3, Table IE. That Table, in turn, identifies D1890-90 as having approved radiologic test procedures in certain circumstances. The regulation does not specify that only certain provisions of ASTM D1890 (1996) are incorporated by reference into law, nor does it indicate which specific provisions of ASTM D1890

(1996) are relevant for compliance with the regulation.

- First Factor: There is no indication that Defendant stands to profit from republishing this standard; Defendant's apparent purpose is to inform the public about the law and facilitate public debate. *See ASTM*, 896 F.3d at 449; Def's 2d Mot. at 16. Defendant's "attempt to freely distribute standards incorporated by reference into law qualify[es] as a use that further[s] the purposes of the fair use defense." *ASTM*, 896 F.3d at 449. Further, the incorporated standard provides information essential for a private entity to comprehend its legal duties, which weighs heavily in favor of permitting Defendant's reproduction. *See ASTM*, 896 F.3d at 450.
- Second Factor: The "express text of the law falls plainly outside the realm of copyright protection." *ASTM*, 896 F.3d at 451. Here, the standard is incorporated into law without limitation such that "the consequence of the incorporation by reference is virtually indistinguishable from a situation in which the standard had been expressly copied into law." *Id.* at 452. Accordingly, "this factor weighs heavily in favor of fair use." *Id.*
- Third Factor: The incorporating regulation does not specify that only certain provisions of this standard are incorporated by reference into law, nor does it indicate which specific provisions of the standard are relevant for regulatory compliance, suggesting that "a greater amount of the standard's text might be fairly reproduced." *Id.*
- Fourth Factor: Defendant's reproductions have not had a "substantially adverse impact on the potential market for the originals," nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm." Memo Op. at 30–36 (internal quotation and citation marks omitted).
- Conclusion: Defendant may fairly reproduce this incorporated standard in its entirety.

88. ASTM D1943 (1996):

- The parties identify 40 C.F.R. § 136.3 (2010) as the incorporating by reference regulation, *see* Becker Decl. ¶ 57, Ex. 90; Wise Decl., Ex. 176, which incorporates the standard into 40 C.F.R. § 136.3, Table IE. That Table, in turn, identifies D1890-90 as having approved radiologic test procedures in certain circumstances. The regulation does not specify that only certain provisions of 78. ASTM D1943 (1996) are incorporated by reference into law, nor does it indicate which specific provisions of ASTM D1943 (1996) are relevant for compliance with the regulation.
- First Factor: There is no indication that Defendant stands to profit from republishing this standard; Defendant's apparent purpose is to inform the public about the law and facilitate public debate. *See ASTM*, 896 F.3d at 449; Def's 2d Mot. at 16. Defendant's "attempt to freely distribute standards incorporated by reference into law qualify[es] as a use that further[s] the purposes of the fair use defense." *ASTM*, 896 F.3d at 449. Further, the incorporated standard provides information essential for a private entity to comprehend its legal duties, which weighs heavily in favor of permitting Defendant's reproduction. *See ASTM*, 896 F.3d at 450.
- Second Factor: The "express text of the law falls plainly outside the realm of copyright protection." *ASTM*, 896 F.3d at 451. Here, the standard is incorporated into law without limitation such that "the consequence of the incorporation by reference is

virtually indistinguishable from a situation in which the standard had been expressly copied into law.” *Id.* at 452. Accordingly, “this factor weighs heavily in favor of fair use.” *Id.*

- Third Factor: The incorporating regulation does not specify that only certain provisions of this standard are incorporated by reference into law, nor does it indicate which specific provisions of the standard are relevant for regulatory compliance, suggesting that “a greater amount of the standard’s text might be fairly reproduced.” *Id.*
- Fourth Factor: Defendant’s reproductions have not had a “substantially adverse impact on the potential market for the originals,” nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm.” Memo Op. at 30–36 (internal quotation and citation marks omitted).
- Conclusion: Defendant may fairly reproduce this incorporated standard in its entirety.

89. ASTM D1945 (1996):

- The parties identify 40 C.F.R. § 60.17 (2019) as the incorporating by reference regulation, *see* Becker Decl. ¶ 57, Ex. 90; Wise Decl., Ex. 176, which incorporates the standard into 40 C.F.R. § 60.45(f). Section 60.45(f)(5)(i) requires the use of ASTM D1945, or one of five other standards, “as applicable.” The regulation does not specify that only certain provisions of ASTM D1945 (1996) are incorporated by reference into law, nor does it indicate which specific provisions of ASTM D1945 (1996) are relevant for compliance with the regulation.
- First Factor: There is no indication that Defendant stands to profit from republishing this standard; Defendant’s apparent purpose is to inform the public about the law and facilitate public debate. *See ASTM*, 896 F.3d at 449; Def’s 2d Mot. at 16. Defendant’s “attempt to freely distribute standards incorporated by reference into law qualifie[s] as a use that further[s] the purposes of the fair use defense.” *ASTM*, 896 F.3d at 449. Further, the incorporated standard provides information essential for a private entity to comprehend its legal duties, which weighs heavily in favor of permitting Defendant’s reproduction. *See ASTM*, 896 F.3d at 450.
- Second Factor: The “express text of the law falls plainly outside the realm of copyright protection.” *ASTM*, 896 F.3d at 451. Here, the standard is incorporated into law without limitation such that “the consequence of the incorporation by reference is virtually indistinguishable from a situation in which the standard had been expressly copied into law.” *Id.* at 452. Accordingly, “this factor weighs heavily in favor of fair use.” *Id.*
- Third Factor: The incorporating regulation does not specify that only certain provisions of this standard are incorporated by reference into law, nor does it indicate which specific provisions of the standard are relevant for regulatory compliance, suggesting that “a greater amount of the standard’s text might be fairly reproduced.” *Id.*
- Fourth Factor: Defendant’s reproductions have not had a “substantially adverse impact on the potential market for the originals,” nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm.” Memo Op. at 30–36 (internal quotation and citation marks omitted).

- Conclusion: Defendant may fairly reproduce this incorporated standard in its entirety.

90. ASTM D2015 (1996):

- The parties identify 40 C.F.R. § 60.17 (2015) as the incorporating by reference regulation, *see* Becker Decl. ¶ 57, Ex. 90; Wise Decl., Ex. 176, which incorporates the standard into Section 12.5.2.1.3. Section 12.5.2.1.3 requires using ASTM D2015, or other enumerated standards, “to determine gross calorific value.” The regulation does not specify that only certain provisions of ASTM D2015 (1996) are incorporated by reference into law, nor does it indicate which specific provisions of ASTM D2015 (1996) are relevant for compliance with the regulation.
- First Factor: There is no indication that Defendant stands to profit from republishing this standard; Defendant’s apparent purpose is to inform the public about the law and facilitate public debate. *See ASTM*, 896 F.3d at 449; Def’s 2d Mot. at 16. Defendant’s “attempt to freely distribute standards incorporated by reference into law qualify[es] as a use that further[s] the purposes of the fair use defense.” *ASTM*, 896 F.3d at 449. Further, the incorporated standard provides information essential for a private entity to comprehend its legal duties, which weighs heavily in favor of permitting Defendant’s reproduction. *See ASTM*, 896 F.3d at 450.
- Second Factor: The “express text of the law falls plainly outside the realm of copyright protection.” *ASTM*, 896 F.3d at 451. Here, the standard is incorporated into law without limitation such that “the consequence of the incorporation by reference is virtually indistinguishable from a situation in which the standard had been expressly copied into law.” *Id.* at 452. Accordingly, “this factor weighs heavily in favor of fair use.” *Id.*
- Third Factor: The incorporating regulation does not specify that only certain provisions of this standard are incorporated by reference into law, nor does it indicate which specific provisions of the standard are relevant for regulatory compliance, suggesting that “a greater amount of the standard’s text might be fairly reproduced.” *Id.*
- Fourth Factor: Defendant’s reproductions have not had a “substantially adverse impact on the potential market for the originals,” nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm.” Memo Op. at 30–36 (internal quotation and citation marks omitted).
- Conclusion: Defendant may fairly reproduce this incorporated standard in its entirety.

91. ASTM D2163 1991 (1996):

- The parties identify 40 C.F.R. § 1065.1010 (2008) as the incorporating by reference regulation, *see* Becker Decl. ¶ 57, Ex. 90; Wise Decl., Ex. 176, which incorporates the standard into 40 C.F.R. § 1065.720. Section 40 C.F.R. § 106.720 requires that “[l]iquified petroleum gas for testing must meet the specifications” in ASTM D2163. The regulation does not specify that only certain provisions of ASTM D2163 1991 (1996) are incorporated by reference into law, nor does it indicate which specific provisions of ASTM D2163 1991 (1996) are relevant for compliance with the regulation.
- First Factor: There is no indication that Defendant stands to profit from republishing

this standard; Defendant's apparent purpose is to inform the public about the law and facilitate public debate. *See ASTM*, 896 F.3d at 449; Def's 2d Mot. at 16. Defendant's "attempt to freely distribute standards incorporated by reference into law qualify[es] as a use that further[s] the purposes of the fair use defense." *ASTM*, 896 F.3d at 449. Further, the incorporated standard provides information essential for a private entity to comprehend its legal duties, which weighs heavily in favor of permitting Defendant's reproduction. *See ASTM*, 896 F.3d at 450.

- Second Factor: The "express text of the law falls plainly outside the realm of copyright protection." *ASTM*, 896 F.3d at 451. Here, the standard is incorporated into law without limitation such that "the consequence of the incorporation by reference is virtually indistinguishable from a situation in which the standard had been expressly copied into law." *Id.* at 452. Accordingly, "this factor weighs heavily in favor of fair use." *Id.*
- Third Factor: The incorporating regulation does not specify that only certain provisions of this standard are incorporated by reference into law, nor does it indicate which specific provisions of the standard are relevant for regulatory compliance, suggesting that "a greater amount of the standard's text might be fairly reproduced." *Id.*
- Fourth Factor: Defendant's reproductions have not had a "substantially adverse impact on the potential market for the originals," nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm." Memo Op. at 30–36 (internal quotation and citation marks omitted).
- Conclusion: Defendant may fairly reproduce this incorporated standard in its entirety.

92. ASTM D2216 (1998):

- The parties identify 40 C.F.R. § 258.41 (2014) as the incorporating by reference regulation, *see* Becker Decl. ¶ 57, Ex. 90; Wise Decl., Ex. 176, which incorporates the standard and requires that for "Project XL Bioreactor Landfill Projects," a geosynthetic clay liner "shall be formulated and manufactured from polypropylene geotextiles and high swelling containment resistant sodium bentonite" and that the "high swelling sodium montmorillonite clay shall be at 12% moisture content as determined by the Standard Test Method for Laboratory Determination of Water (Moisture) Content of Soil and Rock by Mass, ASTM D2216–98." 40 C.F.R. § 258.41(a)(4)(iii)(A). The regulation does not specify that only certain provisions of ASTM D2216 (1998) are incorporated by reference into law, nor does it indicate which specific provisions of ASTM D2216 (1998) are relevant for compliance with the regulation.
- First Factor: There is no indication that Defendant stands to profit from republishing this standard; Defendant's apparent purpose is to inform the public about the law and facilitate public debate. *See ASTM*, 896 F.3d at 449; Def's 2d Mot. at 16. Defendant's "attempt to freely distribute standards incorporated by reference into law qualify[es] as a use that further[s] the purposes of the fair use defense." *ASTM*, 896 F.3d at 449. Further, the incorporated standard provides information essential for a private entity to comprehend its legal duties, which weighs heavily in favor of permitting Defendant's reproduction. *See ASTM*, 896 F.3d at 450.

- Second Factor: The “express text of the law falls plainly outside the realm of copyright protection.” *ASTM*, 896 F.3d at 451. Here, the standard is incorporated into law without limitation such that “the consequence of the incorporation by reference is virtually indistinguishable from a situation in which the standard had been expressly copied into law.” *Id.* at 452. Accordingly, “this factor weighs heavily in favor of fair use.” *Id.*
- Third Factor: The incorporating regulation does not specify that only certain provisions of this standard are incorporated by reference into law, nor does it indicate which specific provisions of the standard are relevant for regulatory compliance, suggesting that “a greater amount of the standard’s text might be fairly reproduced.” *Id.*
- Fourth Factor: Defendant’s reproductions have not had a “substantially adverse impact on the potential market for the originals,” nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm.” Memo Op. at 30–36 (internal quotation and citation marks omitted).
- Conclusion: Defendant may fairly reproduce this incorporated standard in its entirety.

93. ASTM D2234 (1998):

- The parties identify 41 C.F.R. § 60.17 (2011) as the incorporating by reference regulation, *see* Becker Decl. ¶ 57, Ex. 90; Wise Decl., Ex. 176, which incorporates the standard into appendix A: Method 19, Section 12.5.2.1.1. That section, in turn, requires the use of ASTM D2234-98, or one of three other standards, for sample increment collection and systemic spacing. It also requires that “[a]s a minimum, determine the number and weight of increments required per gross sample representing each coal lot according to Table 2 or Paragraph 7.1.5.2 of ASTM D 2234. Collect one gross sample for each lot of raw coal and one gross sample for each lot of product coal.” The regulation does not specify that only certain provisions of ASTM D2234 (1998) are incorporated by reference into law, and while the latter requirement identifies the specific provision of ASTM D2234 (1998) that is relevant for compliance with the regulation, the former does not.
- First Factor: There is no indication that Defendant stands to profit from republishing this standard; Defendant’s apparent purpose is to inform the public about the law and facilitate public debate. *See ASTM*, 896 F.3d at 449; Def’s 2d Mot. at 16. Defendant’s “attempt to freely distribute standards incorporated by reference into law qualifie[s] as a use that further[s] the purposes of the fair use defense.” *ASTM*, 896 F.3d at 449. Further, the incorporated standard provides information essential for a private entity to comprehend its legal duties, which weighs heavily in favor of permitting Defendant’s reproduction. *See ASTM*, 896 F.3d at 450.
- Second Factor: The “express text of the law falls plainly outside the realm of copyright protection.” *ASTM*, 896 F.3d at 451. Here, the standard is incorporated into law without limitation such that “the consequence of the incorporation by reference is virtually indistinguishable from a situation in which the standard had been expressly copied into law.” *Id.* at 452. Accordingly, “this factor weighs heavily in favor of fair use.” *Id.*
- Third Factor: The incorporating regulation does not specify that only certain provisions

of this standard are incorporated by reference into law, nor does it indicate which specific provisions of the standard are relevant for regulatory compliance, suggesting that “a greater amount of the standard’s text might be fairly reproduced.” *Id.*

- Fourth Factor: Defendant’s reproductions have not had a “substantially adverse impact on the potential market for the originals,” nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm.” Memo Op. at 30–36 (internal quotation and citation marks omitted).
- Conclusion: Defendant may fairly reproduce this incorporated standard in its entirety.

94. ASTM D2460 (1997):

- The parties identify 40 C.F.R. § 136.3 (2010) as the incorporating by reference regulation, *see* Becker Decl. ¶ 57, Ex. 90; Wise Decl., Ex. 176, which incorporates the standard as providing the approved radiologic test procedures in certain circumstances. The regulation does not specify that only certain provisions of ASTM D2460 (1997) are incorporated by reference into law, nor does it indicate which specific provisions of ASTM D2460 (1997) are relevant for compliance with the regulation.
- First Factor: There is no indication that Defendant stands to profit from republishing this standard; Defendant’s apparent purpose is to inform the public about the law and facilitate public debate. *See ASTM*, 896 F.3d at 449; Def’s 2d Mot. at 16. Defendant’s “attempt to freely distribute standards incorporated by reference into law qualifie[s] as a use that further[s] the purposes of the fair use defense.” *ASTM*, 896 F.3d at 449. Further, the incorporated standard provides information essential for a private entity to comprehend its legal duties, which weighs heavily in favor of permitting Defendant’s reproduction. *See ASTM*, 896 F.3d at 450.
- Second Factor: The “express text of the law falls plainly outside the realm of copyright protection.” *ASTM*, 896 F.3d at 451. Here, the standard is incorporated into law without limitation such that “the consequence of the incorporation by reference is virtually indistinguishable from a situation in which the standard had been expressly copied into law.” *Id.* at 452. Accordingly, “this factor weighs heavily in favor of fair use.” *Id.*
- Third Factor: The incorporating regulation does not specify that only certain provisions of this standard are incorporated by reference into law, nor does it indicate which specific provisions of the standard are relevant for regulatory compliance, suggesting that “a greater amount of the standard’s text might be fairly reproduced.” *Id.*
- Fourth Factor: Defendant’s reproductions have not had a “substantially adverse impact on the potential market for the originals,” nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm.” Memo Op. at 30–36 (internal quotation and citation marks omitted).
- Conclusion: Defendant may fairly reproduce this incorporated standard in its entirety.

95. ASTM D2502 1992 (1996):

- The parties identify 40 C.F.R. § 75.6 (2010) as the incorporating by reference regulation, *see* Becker Decl. ¶ 57, Ex. 90; Wise Decl., Ex. 176, which incorporates

the standard into appendix G. Section 75.10(a)(3)(i)-(iii) requires that the owner or operator of an affected unit shall use one of three approved methods for monitoring CO₂ emissions, one of which is outlined in appendix G. And “[i]f the owner or operator chooses to use the appendix G method,” for determining CO₂ emissions, “then the owner or operator shall follow the procedures in appendix G to this part for estimating daily CO₂ mass emissions based on the measured carbon content of the fuel and the amount of fuel combusted.” 40 C.F.R. § 75.13(b). Appendix G identifies ASTM D2502-92 (1996) as one of two permissible standards for complying with the portion of appendix G that pertains to determinations of the carbon content of oil (the other being ASTM D2503 1992 1997), which Defendant has also published). *See id.* § 75, App. G. The regulation does not specify that only certain provisions of ASTM D2502 1992 (1996) are incorporated by reference into law, nor does it indicate which specific provisions of ASTM D2502 1992 (1996) are relevant for compliance with the regulation.

- First Factor: There is no indication that Defendant stands to profit from republishing this standard; Defendant’s apparent purpose is to inform the public about the law and facilitate public debate. *See ASTM*, 896 F.3d at 449; Def’s 2d Mot. at 16. Defendant’s “attempt to freely distribute standards incorporated by reference into law qualify[es] as a use that further[s] the purposes of the fair use defense.” *ASTM*, 896 F.3d at 449. Further, the incorporated standard provides information essential for a private entity to comprehend its legal duties, which weighs heavily in favor of permitting Defendant’s reproduction. *See ASTM*, 896 F.3d at 450.
- Second Factor: The “express text of the law falls plainly outside the realm of copyright protection.” *ASTM*, 896 F.3d at 451. Here, the standard is incorporated into law without limitation such that “the consequence of the incorporation by reference is virtually indistinguishable from a situation in which the standard had been expressly copied into law.” *Id.* at 452. Accordingly, “this factor weighs heavily in favor of fair use.” *Id.*
- Third Factor: The incorporating regulation does not specify that only certain provisions of this standard are incorporated by reference into law, nor does it indicate which specific provisions of the standard are relevant for regulatory compliance, suggesting that “a greater amount of the standard’s text might be fairly reproduced.” *Id.*
- Fourth Factor: Defendant’s reproductions have not had a “substantially adverse impact on the potential market for the originals,” nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm.” Memo Op. at 30–36 (internal quotation and citation marks omitted).
- Conclusion: Defendant may fairly reproduce this incorporated standard in its entirety.

96. ASTM D2503 1992 (1997):

- The parties identify 40 C.F.R. § 75.6 (2010) as the incorporating by reference regulation, *see* Becker Decl. ¶ 57, Ex. 90; Wise Decl., Ex. 176, which incorporates the standard into appendix G. Section 75.10(a)(3)(i)-(iii) requires that the owner or operator of an affected unit shall use one of three approved methods for monitoring CO2 emissions, one of which is outlined in appendix G. And “[i]f the owner or operator chooses to use the appendix G method,” for determining CO2 emissions, “then the owner or operator shall follow the procedures in appendix G to this part for estimating daily CO2 mass emissions based on the measured carbon content of the fuel and the amount of fuel combusted.” 40 C.F.R. § 75.13(b). Appendix G identifies ASTM D2503-92 (1997) as one of two permissible standards for complying with the portion of appendix G that pertains to determinations of the carbon content of oil (the other being ASTM D2502 1992 1996), which Defendant has also published). *See id.* § 75, App. G. The regulation does not specify that only certain provisions of ASTM D2503 1992 (1997) are incorporated by reference into law, nor does it indicate which specific provisions of ASTM D2503 1992 (1997) are relevant for compliance with the regulation.
- First Factor: There is no indication that Defendant stands to profit from republishing this standard; Defendant’s apparent purpose is to inform the public about the law and facilitate public debate. *See ASTM*, 896 F.3d at 449; Def’s 2d Mot. at 16. Defendant’s “attempt to freely distribute standards incorporated by reference into law qualifie[s] as a use that further[s] the purposes of the fair use defense.” *ASTM*, 896 F.3d at 449. Further, the incorporated standard provides information essential for a private entity to comprehend its legal duties, which weighs heavily in favor of permitting Defendant’s reproduction. *See ASTM*, 896 F.3d at 450.
- Second Factor: The “express text of the law falls plainly outside the realm of copyright protection.” *ASTM*, 896 F.3d at 451. Here, the standard is incorporated into law without limitation such that “the consequence of the incorporation by reference is virtually indistinguishable from a situation in which the standard had been expressly copied into law.” *Id.* at 452. Accordingly, “this factor weighs heavily in favor of fair use.” *Id.*
- Third Factor: The incorporating regulation does not specify that only certain provisions of this standard are incorporated by reference into law, nor does it indicate which specific provisions of the standard are relevant for regulatory compliance, suggesting that “a greater amount of the standard’s text might be fairly reproduced.” *Id.*
- Fourth Factor: Defendant’s reproductions have not had a “substantially adverse impact on the potential market for the originals,” nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm.” Memo Op. at 30–36 (internal quotation and citation marks omitted).
- Conclusion: Defendant may fairly reproduce this incorporated standard in its entirety.

97. ASTM D2597 1994 (1999):

- The parties identify 40 C.F.R. § 60.17 (2011) as the incorporating by reference regulation, *see* Becker Decl. ¶ 57, Ex. 90; Wise Decl., Ex. 176, which incorporates the standard into 40 C.F.R. § 60.335(b)(9)(i). Section 60.335 requires that an owner or operator shall “determine the fuel bound nitrogen content of [liquid] fuel being fired (if an emission allowance is claimed for fuel bound nitrogen),” using ASTM D2597-94. The regulation does not specify that only certain provisions of ASTM D2597 1994 (1999) are incorporated by reference into law, nor does it indicate which specific provisions of ASTM D2597 1994 (1999) are relevant for compliance with the regulation.
- First Factor: There is no indication that Defendant stands to profit from republishing this standard; Defendant’s apparent purpose is to inform the public about the law and facilitate public debate. *See ASTM*, 896 F.3d at 449; Def’s 2d Mot. at 16. Defendant’s “attempt to freely distribute standards incorporated by reference into law qualify[es] as a use that further[s] the purposes of the fair use defense.” *ASTM*, 896 F.3d at 449. Further, the incorporated standard provides information essential for a private entity to comprehend its legal duties, which weighs heavily in favor of permitting Defendant’s reproduction. *See ASTM*, 896 F.3d at 450.
- Second Factor: The “express text of the law falls plainly outside the realm of copyright protection.” *ASTM*, 896 F.3d at 451. Here, the standard is incorporated into law without limitation such that “the consequence of the incorporation by reference is virtually indistinguishable from a situation in which the standard had been expressly copied into law.” *Id.* at 452. Accordingly, “this factor weighs heavily in favor of fair use.” *Id.*
- Third Factor: The incorporating regulation does not specify that only certain provisions of this standard are incorporated by reference into law, nor does it indicate which specific provisions of the standard are relevant for regulatory compliance, suggesting that “a greater amount of the standard’s text might be fairly reproduced.” *Id.*
- Fourth Factor: Defendant’s reproductions have not had a “substantially adverse impact on the potential market for the originals,” nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm.” Memo Op. at 30–36 (internal quotation and citation marks omitted).
- Conclusion: Defendant may fairly reproduce this incorporated standard in its entirety.

98. ASTM D2622 (1998):

- The parties identify 40 C.F.R. § 60.17 (2011) as the incorporating by reference regulation, *see* Becker Decl. ¶ 57, Ex. 90; Wise Decl., Ex. 176, which incorporates the standard into 40 C.F.R. §§ 60.106(j)(2) and 60.335(b)(10)(i). Section 60.106(j)(2) requires that “[f]resh feed samples shall be analyzed separately by using” the “applicable analytical test” in ASTM D2622 or one of several other standards. 40 C.F.R. § 60.106(j)(2). The regulation goes on to say that “applicable range of some of these ASTM methods is not adequate to measure the levels of sulfur in some fresh feed samples. Dilution of samples prior to analysis with verification of the dilution ratio is acceptable upon prior approval of the Administrator.” *Id.* Section 60.335(b)(10)(i)

requires the use of ASTM D2622-98 for determine the sulfur content of liquid fuel combusted in a turbine. *Id.* § 60. 335(b)(10)(i). These regulations do not specify that only certain provisions of ASTM D2622 (1998) are incorporated by reference into law, nor do they indicate which specific provisions of ASTM D2622 (1998) are relevant for compliance with the regulation.

- First Factor: There is no indication that Defendant stands to profit from republishing this standard; Defendant's apparent purpose is to inform the public about the law and facilitate public debate. *See ASTM*, 896 F.3d at 449; Def's 2d Mot. at 16. Defendant's "attempt to freely distribute standards incorporated by reference into law qualifie[s] as a use that further[s] the purposes of the fair use defense." *ASTM*, 896 F.3d at 449. Further, the incorporated standard provides information essential for a private entity to comprehend its legal duties, which weighs heavily in favor of permitting Defendant's reproduction. *See ASTM*, 896 F.3d at 450.
- Second Factor: The "express text of the law falls plainly outside the realm of copyright protection." *ASTM*, 896 F.3d at 451. Here, the standard is incorporated into law without limitation such that "the consequence of the incorporation by reference is virtually indistinguishable from a situation in which the standard had been expressly copied into law." *Id.* at 452. Accordingly, "this factor weighs heavily in favor of fair use." *Id.*
- Third Factor: The incorporating regulation does not specify that only certain provisions of this standard are incorporated by reference into law, nor does it indicate which specific provisions of the standard are relevant for regulatory compliance, suggesting that "a greater amount of the standard's text might be fairly reproduced." *Id.*
- Fourth Factor: Defendant's reproductions have not had a "substantially adverse impact on the potential market for the originals," nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm." Memo Op. at 30–36 (internal quotation and citation marks omitted).
- Conclusion: Defendant may fairly reproduce this incorporated standard in its entirety.

99. ASTM D2777 (1998):

- The parties identify 46 C.F.R. § 162.050-4 (2011) as the incorporating by reference regulation, *see* Becker Decl. ¶ 57, Ex. 90; Wise Decl., Ex. 176, which incorporates the standard into 46 C.F.R. § 162.050-15. Section 162.050-15 requires that "the absolute value of Tn for each measurement" be determined by ASTM D2777. The regulation does not specify that only certain provisions of ASTM D2777 (1998) are incorporated by reference into law, nor does it indicate which specific provisions of ASTM D2777 (1998) are relevant for compliance with the regulation.
- First Factor: There is no indication that Defendant stands to profit from republishing this standard; Defendant's apparent purpose is to inform the public about the law and facilitate public debate. *See ASTM*, 896 F.3d at 449; Def's 2d Mot. at 16. Defendant's "attempt to freely distribute standards incorporated by reference into law qualifie[s] as a use that further[s] the purposes of the fair use defense." *ASTM*, 896 F.3d at 449. Further, the incorporated standard provides information essential for a private entity to comprehend its legal duties, which weighs heavily in favor of permitting Defendant's

reproduction. *See ASTM*, 896 F.3d at 450.

- Second Factor: The “express text of the law falls plainly outside the realm of copyright protection.” *ASTM*, 896 F.3d at 451. Here, the standard is incorporated into law without limitation such that “the consequence of the incorporation by reference is virtually indistinguishable from a situation in which the standard had been expressly copied into law.” *Id.* at 452. Accordingly, “this factor weighs heavily in favor of fair use.” *Id.*
- Third Factor: The incorporating regulation does not specify that only certain provisions of this standard are incorporated by reference into law, nor does it indicate which specific provisions of the standard are relevant for regulatory compliance, suggesting that “a greater amount of the standard’s text might be fairly reproduced.” *Id.*
- Fourth Factor: Defendant’s reproductions have not had a “substantially adverse impact on the potential market for the originals,” nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm.” *Memo Op.* at 30–36 (internal quotation and citation marks omitted).
- Conclusion: Defendant may fairly reproduce this incorporated standard in its entirety.

100. ASTM D2879 (1997):

- The parties identify 40 C.F.R. § 60.17 (2011) as the incorporating by reference regulation, *see* Becker Decl. ¶ 57, Ex. 90; Wise Decl., Ex. 176, which incorporates the standard into 40 C.F.R. §§ 60.111b(f)(3), 60.116b(e)(3)(ii), 60.116b(f)(2)(i), 60.485(e)(1), and 60.485a(e)(1). Those sections require compliance with ASTM D2879 in a variety of contexts, including mandatory vapor tests for “vessels in which the vapor pressure of the anticipated liquid composition is above the cutoff for monitoring but below the cutoff for controls,” 40 C.F.R. § 60.116b(f)(2)(i), and determining vapor pressures to “demonstrate that a piece of equipment is in light liquid service,” *id.* § 60.485(e)(1). These regulations do not specify that only certain provisions of ASTM D2879 (1997) are incorporated by reference into law, nor do they indicate which specific provisions of ASTM D2879 (1997) are relevant for compliance with the regulations.
- First Factor: There is no indication that Defendant stands to profit from republishing this standard; Defendant’s apparent purpose is to inform the public about the law and facilitate public debate. *See ASTM*, 896 F.3d at 449; Def’s 2d Mot. at 16. Defendant’s “attempt to freely distribute standards incorporated by reference into law qualifie[s] as a use that further[s] the purposes of the fair use defense.” *ASTM*, 896 F.3d at 449. Further, the incorporated standard provides information essential for a private entity to comprehend its legal duties, which weighs heavily in favor of permitting Defendant’s reproduction. *See ASTM*, 896 F.3d at 450.
- Second Factor: The “express text of the law falls plainly outside the realm of copyright protection.” *ASTM*, 896 F.3d at 451. Here, the standard is incorporated into law without limitation such that “the consequence of the incorporation by reference is virtually indistinguishable from a situation in which the standard had been expressly copied into law.” *Id.* at 452. Accordingly, “this factor weighs heavily in favor of fair use.” *Id.*

- Third Factor: The incorporating regulation does not specify that only certain provisions of this standard are incorporated by reference into law, nor does it indicate which specific provisions of the standard are relevant for regulatory compliance, suggesting that “a greater amount of the standard’s text might be fairly reproduced.” *Id.*
- Fourth Factor: Defendant’s reproductions have not had a “substantially adverse impact on the potential market for the originals,” nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm.” Memo Op. at 30–36 (internal quotation and citation marks omitted).
- Conclusion: Defendant may fairly reproduce this incorporated standard in its entirety.

101. ASTM D2986 1995a (1999):

- The parties identify 40 C.F.R. § 86.1 (2008) as the incorporating by reference regulation, *see* Becker Decl. ¶ 57, Ex. 90; Wise Decl., Ex. 176, which incorporates the standard into 40 C.F.R. § 86.1310-2007. Section 86.1310-2007 requires that “[f]ilters shall have a minimum clean filter efficiency of 99% as measured by the ASTM D2986–95a DOP test.” The regulation does not specify that only certain provisions of ASTM D2986 1995a (1999) are incorporated by reference into law, nor does it indicate which specific provisions of ASTM D2986 1995a (1999) are relevant for compliance with the regulation.
- First Factor: There is no indication that Defendant stands to profit from republishing this standard; Defendant’s apparent purpose is to inform the public about the law and facilitate public debate. *See ASTM*, 896 F.3d at 449; Def’s 2d Mot. at 16. Defendant’s “attempt to freely distribute standards incorporated by reference into law qualify[es] as a use that further[s] the purposes of the fair use defense.” *ASTM*, 896 F.3d at 449. Further, the incorporated standard provides information essential for a private entity to comprehend its legal duties, which weighs heavily in favor of permitting Defendant’s reproduction. *See ASTM*, 896 F.3d at 450.
- Second Factor: The “express text of the law falls plainly outside the realm of copyright protection.” *ASTM*, 896 F.3d at 451. Here, the standard is incorporated into law without limitation such that “the consequence of the incorporation by reference is virtually indistinguishable from a situation in which the standard had been expressly copied into law.” *Id.* at 452. Accordingly, “this factor weighs heavily in favor of fair use.” *Id.*
- Third Factor: The incorporating regulation does not specify that only certain provisions of this standard are incorporated by reference into law, nor does it indicate which specific provisions of the standard are relevant for regulatory compliance, suggesting that “a greater amount of the standard’s text might be fairly reproduced.” *Id.*
- Fourth Factor: Defendant’s reproductions have not had a “substantially adverse impact on the potential market for the originals,” nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm.” Memo Op. at 30–36 (internal quotation and citation marks omitted).
- Conclusion: Defendant may fairly reproduce this incorporated standard in its entirety.

102. ASTM D3120 (1996):

- The parties identify 40 C.F.R. § 80.580(b) (2003) as the incorporating by reference regulation, *see* Becker Decl. ¶ 57, Ex. 90; Wise Decl., Ex. 176, which incorporates the standard into 40 C.F.R. § 80.580(a)(3). Section 80.580(a)(3) requires certain sampling and testing methods for sulfur and identifies ASTM D3120-96 as providing one of three test methods for “diesel fuel and diesel fuel additives subject to the 15 ppm standard of §80.520(a)(1).” 40 C.F.R. § 80.580(a)(3). The regulation does not specify that only certain provisions of ASTM D3120 (1996) are incorporated by reference into law, nor does it indicate which specific provisions of ASTM D3120 (1996) are relevant for compliance with the regulation.
- First Factor: There is no indication that Defendant stands to profit from republishing this standard; Defendant’s apparent purpose is to inform the public about the law and facilitate public debate. *See ASTM*, 896 F.3d at 449; Def’s 2d Mot. at 16. Defendant’s “attempt to freely distribute standards incorporated by reference into law qualify[es] as a use that further[s] the purposes of the fair use defense.” *ASTM*, 896 F.3d at 449. Further, the incorporated standard provides information essential for a private entity to comprehend its legal duties, which weighs heavily in favor of permitting Defendant’s reproduction. *See ASTM*, 896 F.3d at 450.
- Second Factor: The “express text of the law falls plainly outside the realm of copyright protection.” *ASTM*, 896 F.3d at 451. Here, the standard is incorporated into law without limitation such that “the consequence of the incorporation by reference is virtually indistinguishable from a situation in which the standard had been expressly copied into law.” *Id.* at 452. Accordingly, “this factor weighs heavily in favor of fair use.” *Id.*
- Third Factor: The incorporating regulation does not specify that only certain provisions of this standard are incorporated by reference into law, nor does it indicate which specific provisions of the standard are relevant for regulatory compliance, suggesting that “a greater amount of the standard’s text might be fairly reproduced.” *Id.*
- Fourth Factor: Defendant’s reproductions have not had a “substantially adverse impact on the potential market for the originals,” nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm.” Memo Op. at 30–36 (internal quotation and citation marks omitted).
- Conclusion: Defendant may fairly reproduce this incorporated standard in its entirety.

103. ASTM D3246 (1996):

- The parties identify 40 C.F.R. § 60.17 (2011) as the incorporating by reference regulation, *see* Becker Decl. ¶ 57, Ex. 90; Wise Decl., Ex. 176, which incorporates the standard into § 60.335(b)(10)(ii). Section 60.335(b)(10)(ii) requires the use of ASTM D3246-98 to determine the sulfur content of gaseous fuel combusted in a turbine. *Id.* § 60.335(b)(10)(ii). The regulation does not specify that only certain provisions of ASTM D3246 (1996) are incorporated by reference into law, nor does it indicate which specific provisions of ASTM D3246 (1996) are relevant for compliance with the regulation.
- First Factor: There is no indication that Defendant stands to profit from republishing

this standard; Defendant's apparent purpose is to inform the public about the law and facilitate public debate. *See ASTM*, 896 F.3d at 449; Def's 2d Mot. at 16. Defendant's "attempt to freely distribute standards incorporated by reference into law qualifie[s] as a use that further[s] the purposes of the fair use defense." *ASTM*, 896 F.3d at 449. Further, the incorporated standard provides information essential for a private entity to comprehend its legal duties, which weighs heavily in favor of permitting Defendant's reproduction. *See ASTM*, 896 F.3d at 450.

- Second Factor: The "express text of the law falls plainly outside the realm of copyright protection." *ASTM*, 896 F.3d at 451. Here, the standard is incorporated into law without limitation such that "the consequence of the incorporation by reference is virtually indistinguishable from a situation in which the standard had been expressly copied into law." *Id.* at 452. Accordingly, "this factor weighs heavily in favor of fair use." *Id.*
- Third Factor: The incorporating regulation does not specify that only certain provisions of this standard are incorporated by reference into law, nor does it indicate which specific provisions of the standard are relevant for regulatory compliance, suggesting that "a greater amount of the standard's text might be fairly reproduced." *Id.*
- Fourth Factor: Defendant's reproductions have not had a "substantially adverse impact on the potential market for the originals," nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm." Memo Op. at 30–36 (internal quotation and citation marks omitted).
- Conclusion: Defendant may fairly reproduce this incorporated standard in its entirety.

104. ASTM D3286 (1996):

- The parties identify 40 C.F.R. § 60.17 (2011) as the incorporating by reference regulation, *see* Becker Decl. ¶ 57, Ex. 90; Wise Decl., Ex. 176, which incorporates the standard into appendix A: Method 19, Section 12.5.2.1.3. Appendix A requires the use of ASTM D3286, or one of four other standards, to "determine gross calorific value." The regulation does not specify that only certain provisions of ASTM D3286 (1996) are incorporated by reference into law, nor does it indicate which specific provisions of ASTM D3286 (1996) are relevant for compliance with the regulation.
- First Factor: There is no indication that Defendant stands to profit from republishing this standard; Defendant's apparent purpose is to inform the public about the law and facilitate public debate. *See ASTM*, 896 F.3d at 449; Def's 2d Mot. at 16. Defendant's "attempt to freely distribute standards incorporated by reference into law qualifie[s] as a use that further[s] the purposes of the fair use defense." *ASTM*, 896 F.3d at 449. Further, the incorporated standard provides information essential for a private entity to comprehend its legal duties, which weighs heavily in favor of permitting Defendant's reproduction. *See ASTM*, 896 F.3d at 450.
- Second Factor: The "express text of the law falls plainly outside the realm of copyright protection." *ASTM*, 896 F.3d at 451. Here, the standard is incorporated into law without limitation such that "the consequence of the incorporation by reference is virtually indistinguishable from a situation in which the standard had been expressly copied into law." *Id.* at 452. Accordingly, "this factor weighs heavily in favor of fair

use.” *Id.*

- Third Factor: The incorporating regulation does not specify that only certain provisions of this standard are incorporated by reference into law, nor does it indicate which specific provisions of the standard are relevant for regulatory compliance, suggesting that “a greater amount of the standard’s text might be fairly reproduced.” *Id.*
- Fourth Factor: Defendant’s reproductions have not had a “substantially adverse impact on the potential market for the originals,” nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm.” Memo Op. at 30–36 (internal quotation and citation marks omitted).
- Conclusion: Defendant may fairly reproduce this incorporated standard in its entirety.

105. ASTM D3371 (1995):

- The parties identify 40 C.F.R. § 136.3 (2014) as the incorporating by reference regulation, *see* Becker Decl. ¶ 57, Ex. 90; Wise Decl., Ex. 176, which incorporates the “full text of the referenced test procedures” into Table IF. 40 C.F.R. § 136.3(a). Section 136 requires that the “procedures prescribed herein shall,” with some limited exceptions, “be used to preform the measurements indicated whenever the waste constituent specified is required to be measured for” an application for a permit under section 402 or 405(f) of the Clean Water Act.” *Id.* § 136.1(a), (b). Table IF identifies ASTM D3371 as containing one of four approved text procedures for the pharmaceutical pollutant acetonitrile. The regulation does not specify that only certain provisions of ASTM D3371 (1995) are incorporated by reference into law, nor does it indicate which specific provisions of ASTM D3371 (1995) are relevant for compliance with the regulation.
- First Factor: There is no indication that Defendant stands to profit from republishing this standard; Defendant’s apparent purpose is to inform the public about the law and facilitate public debate. *See ASTM*, 896 F.3d at 449; Def’s 2d Mot. at 16. Defendant’s “attempt to freely distribute standards incorporated by reference into law qualifie[s] as a use that further[s] the purposes of the fair use defense.” *ASTM*, 896 F.3d at 449. Further, the incorporated standard provides information essential for a private entity to comprehend its legal duties, which weighs heavily in favor of permitting Defendant’s reproduction. *See ASTM*, 896 F.3d at 450.
- Second Factor: The “express text of the law falls plainly outside the realm of copyright protection.” *ASTM*, 896 F.3d at 451. Here, the standard is only partially incorporated into law in that the regulation specifically incorporates the “full text of the referenced test procedures,” and not the entire standard. Defendant’s wholesale reproduction is thus “harder to justify.” *Id.* However, the regulation does not identify which portions of the standard are relevant to that referenced test procedure.
- Third Factor: The incorporating regulation does not indicate which specific provisions of the standard are relevant for regulatory compliance, suggesting that “a greater amount of the standard’s text might be fairly reproduced.” *Id.*
- Fourth Factor: Defendant’s reproductions have not had a “substantially adverse impact on the potential market for the originals,” nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm.” Memo Op. at 30–

36 (internal quotation and citation marks omitted).

- Conclusion: Defendant may fairly reproduce this incorporated standard in its entirety.

106. ASTM D3454 (1997):

- The parties identify 40 C.F.R. § 136.3(a) (2010) as the incorporating by reference regulation, *see* Becker Decl. ¶ 57, Ex. 90; Wise Decl., Ex. 176, which incorporates the “full text of the referenced test procedures” of the standard into Table IE. Table IE requires the use of ASTM D3454 as an approved method for a radiologic test procedure in particular circumstances. The regulation does not specify that only certain provisions of ASTM D3454 (1997) are incorporated by reference into law, nor does it indicate which specific provisions of ASTM D3454 (1997) are relevant for compliance with the regulation.
- First Factor: There is no indication that Defendant stands to profit from republishing this standard; Defendant’s apparent purpose is to inform the public about the law and facilitate public debate. *See ASTM*, 896 F.3d at 449; Def’s 2d Mot. at 16. Defendant’s “attempt to freely distribute standards incorporated by reference into law qualify[es] as a use that further[s] the purposes of the fair use defense.” *ASTM*, 896 F.3d at 449. Further, the incorporated standard provides information essential for a private entity to comprehend its legal duties, which weighs heavily in favor of permitting Defendant’s reproduction. *See ASTM*, 896 F.3d at 450.
- Second Factor: The “express text of the law falls plainly outside the realm of copyright protection.” *ASTM*, 896 F.3d at 451. Here, the standard is only partially incorporated into law in that the regulation specifically incorporates the “full text of the referenced test procedures,” and not the entire standard. Defendant’s wholesale reproduction is thus “harder to justify.” *Id.* However, the regulation does not identify which portions of the standard are relevant to that referenced test procedure.
- Third Factor: The incorporating regulation does not indicate which specific provisions of the standard are relevant for regulatory compliance, suggesting that “a greater amount of the standard’s text might be fairly reproduced.” *Id.*
- Fourth Factor: Defendant’s reproductions have not had a “substantially adverse impact on the potential market for the originals,” nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm.” Memo Op. at 30–36 (internal quotation and citation marks omitted).
- Conclusion: Defendant may fairly reproduce this incorporated standard in its entirety.

107. ASTM D3588 (1998):

- The parties identify 40 C.F.R. § 75.6 (2010) as the incorporating by reference regulation, *see* Becker Decl. ¶ 57, Ex. 90; Wise Decl., Ex. 176, which incorporates the standard into appendices D and F. Those appendices require the determination of “[gross caloric value] of each gaseous fuel at the frequency specified in this section” using either ASTM D3588 or another standard incorporated therein. 40 C.F.R. § 75, App. D, 2.3.4; *accord* § 75, App. F. These regulations do not specify that only certain provisions of ASTM D3588 (1998) are incorporated by reference into law, nor do they indicate which specific provisions of ASTM 3588 (1998) are relevant for compliance

with the regulation.

- First Factor: There is no indication that Defendant stands to profit from republishing this standard; Defendant's apparent purpose is to inform the public about the law and facilitate public debate. *See ASTM*, 896 F.3d at 449; Def's 2d Mot. at 16. Defendant's "attempt to freely distribute standards incorporated by reference into law qualify[es] as a use that further[s] the purposes of the fair use defense." *ASTM*, 896 F.3d at 449. Further, the incorporated standard provides information essential for a private entity to comprehend its legal duties, which weighs heavily in favor of permitting Defendant's reproduction. *See ASTM*, 896 F.3d at 450.
- Second Factor: The "express text of the law falls plainly outside the realm of copyright protection." *ASTM*, 896 F.3d at 451. Here, the standard is incorporated into law without limitation such that "the consequence of the incorporation by reference is virtually indistinguishable from a situation in which the standard had been expressly copied into law." *Id.* at 452. Accordingly, "this factor weighs heavily in favor of fair use." *Id.*
- Third Factor: The incorporating regulation does not specify that only certain provisions of this standard are incorporated by reference into law, nor does it indicate which specific provisions of the standard are relevant for regulatory compliance, suggesting that "a greater amount of the standard's text might be fairly reproduced." *Id.*
- Fourth Factor: Defendant's reproductions have not had a "substantially adverse impact on the potential market for the originals," nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm." Memo Op. at 30–36 (internal quotation and citation marks omitted).
- Conclusion: Defendant may fairly reproduce this incorporated standard in its entirety.

108. ASTM D396 (1998):

- The parties identify 40 C.F.R. § 60.17 (2011) as the incorporating by reference regulation, *see* Becker Decl. ¶ 57, Ex. 90; Wise Decl., Ex. 176, which incorporates the standard into §§ 60.41b of subpart Db, 60.41c of subpart Dc, 60.111(b) of subpart K, and 60.111a(b) of subpart Ka. Those sections require compliance with ASTM D396 in a variety of contexts, and they do not specify that only certain provisions of ASTM D396 (1998) are incorporated by reference into law, nor do they indicate which specific provisions of ASTM D396 (1998) are relevant for compliance with the regulation.
- First Factor: There is no indication that Defendant stands to profit from republishing this standard; Defendant's apparent purpose is to inform the public about the law and facilitate public debate. *See ASTM*, 896 F.3d at 449; Def's 2d Mot. at 16. Defendant's "attempt to freely distribute standards incorporated by reference into law qualify[es] as a use that further[s] the purposes of the fair use defense." *ASTM*, 896 F.3d at 449. Further, the incorporated standard provides information essential for a private entity to comprehend its legal duties, which weighs heavily in favor of permitting Defendant's reproduction. *See ASTM*, 896 F.3d at 450.
- Second Factor: The "express text of the law falls plainly outside the realm of copyright protection." *ASTM*, 896 F.3d at 451. Here, the standard is incorporated into law without limitation such that "the consequence of the incorporation by reference is

virtually indistinguishable from a situation in which the standard had been expressly copied into law.” *Id.* at 452. Accordingly, “this factor weighs heavily in favor of fair use.” *Id.*

- Third Factor: The incorporating regulation does not specify that only certain provisions of this standard are incorporated by reference into law, nor does it indicate which specific provisions of the standard are relevant for regulatory compliance, suggesting that “a greater amount of the standard’s text might be fairly reproduced.” *Id.*
- Fourth Factor: Defendant’s reproductions have not had a “substantially adverse impact on the potential market for the originals,” nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm.” Memo Op. at 30–36 (internal quotation and citation marks omitted).
- Conclusion: Defendant may fairly reproduce this incorporated standard in its entirety.

109. ASTM D4177 (1995):

- The parties identify 40 C.F.R. § 60.17 (2011) as the incorporating by reference regulation, *see* Becker Decl. ¶ 57, Ex. 90; Wise Decl., Ex. 176, which incorporates the standard into 40 C.F.R. § 60, appendix A: Method 19, Section 12.5.2.2.1. Method 19 provides data reduction procedures relating to various pollutants and requires that entities “[f]ollow the procedures for continuous sampling in ASTM D 270 or D4177-95) . . . for each gross sample from each fuel lot.” *Id.* The regulation does not specify that only certain provisions of ASTM D4177 (1995) are incorporated by reference into law, nor does it indicate which specific provisions of ASTM D4177 (1995) are relevant for compliance with the regulation.
- First Factor: There is no indication that Defendant stands to profit from republishing this standard; Defendant’s apparent purpose is to inform the public about the law and facilitate public debate. *See ASTM*, 896 F.3d at 449; Def’s 2d Mot. at 16. Defendant’s “attempt to freely distribute standards incorporated by reference into law qualify[es] as a use that further[s] the purposes of the fair use defense.” *ASTM*, 896 F.3d at 449. Further, the incorporated standard provides information essential for a private entity to comprehend its legal duties, which weighs heavily in favor of permitting Defendant’s reproduction. *See ASTM*, 896 F.3d at 450.
- Second Factor: The “express text of the law falls plainly outside the realm of copyright protection.” *ASTM*, 896 F.3d at 451. Here, the standard is incorporated into law without limitation such that “the consequence of the incorporation by reference is virtually indistinguishable from a situation in which the standard had been expressly copied into law.” *Id.* at 452. Accordingly, “this factor weighs heavily in favor of fair use.” *Id.*
- Third Factor: The incorporating regulation does not specify that only certain provisions of this standard are incorporated by reference into law, nor does it indicate which specific provisions of the standard are relevant for regulatory compliance, suggesting that “a greater amount of the standard’s text might be fairly reproduced.” *Id.*
- Fourth Factor: Defendant’s reproductions have not had a “substantially adverse impact on the potential market for the originals,” nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm.” Memo Op. at 30–

36 (internal quotation and citation marks omitted).

- Conclusion: Defendant may fairly reproduce this incorporated standard in its entirety.

110. ASTM D4268 (1993):

- The parties identify 33 C.F.R. § 164.03 (2014) as the incorporating by reference regulation, *see* Becker Decl. ¶ 57, Ex. 90; Wise Decl., Ex. 176, which incorporates the standard for 33 C.F.R. § 164.74. Section 164.74 requires that the “condition of each towline must be monitored” in part by “[k]eeping on board the towing vessel or in company files of a record of the towline’s initial minimum breaking strength as determined by the manufacturer, by a classification (“class”) society authorized in §157.04 of this chapter, or by a tensile test that meets” either ASTM D4268 or another enumerated standard. 33 C.F.R. § 164.74(a)(3)(i). The regulation does not specify that only certain provisions of ASTM D4268 (1993) are incorporated by reference into law, nor does it indicate which specific provisions of ASTM D4268 (1993) are relevant for compliance with the regulation.
- First Factor: There is no indication that Defendant stands to profit from republishing this standard; Defendant’s apparent purpose is to inform the public about the law and facilitate public debate. *See ASTM*, 896 F.3d at 449; Def’s 2d Mot. at 16. Defendant’s “attempt to freely distribute standards incorporated by reference into law qualifie[s] as a use that further[s] the purposes of the fair use defense.” *ASTM*, 896 F.3d at 449. Further, the incorporated standard provides information essential for a private entity to comprehend its legal duties, which weighs heavily in favor of permitting Defendant’s reproduction. *See ASTM*, 896 F.3d at 450.
- Second Factor: The “express text of the law falls plainly outside the realm of copyright protection.” *ASTM*, 896 F.3d at 451. Here, the standard is incorporated into law without limitation such that “the consequence of the incorporation by reference is virtually indistinguishable from a situation in which the standard had been expressly copied into law.” *Id.* at 452. Accordingly, “this factor weighs heavily in favor of fair use.” *Id.*
- Third Factor: The incorporating regulation does not specify that only certain provisions of this standard are incorporated by reference into law, nor does it indicate which specific provisions of the standard are relevant for regulatory compliance, suggesting that “a greater amount of the standard’s text might be fairly reproduced.” *Id.*
- Fourth Factor: Defendant’s reproductions have not had a “substantially adverse impact on the potential market for the originals,” nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm.” Memo Op. at 30–36 (internal quotation and citation marks omitted).
- Conclusion: Defendant may fairly reproduce this incorporated standard in its entirety.

111. ASTM D4294 (1998):

- The parties identify 40 C.F.R. § 75.6 (2010) as the incorporating by reference regulation, *see* Becker Decl. ¶ 57, Ex. 90; Wise Decl., Ex. 176, which incorporates the standard into appendices A and D. Those appendices require performing fuel sampling to determine the “MTC” using several standards, including ASTM D4294-

98, *see* 40 C.F.R. § 75, App. A, 2.1.1.2(c), and analyzing “oil samples for percent sulfur content by weight in accordance with” a number of standards, including ASTM D4294-98, *see id.* § 75, App. A, 2.1.5. The regulations do not specify that only certain provisions of ASTM D4294 (1998) are incorporated by reference into law, nor does it indicate which specific provisions of ASTM D4294 (1998) are relevant for compliance with the regulation.

- First Factor: There is no indication that Defendant stands to profit from republishing this standard; Defendant’s apparent purpose is to inform the public about the law and facilitate public debate. *See ASTM*, 896 F.3d at 449; Def’s 2d Mot. at 16. Defendant’s “attempt to freely distribute standards incorporated by reference into law qualify[es] as a use that further[s] the purposes of the fair use defense.” *ASTM*, 896 F.3d at 449. Further, the incorporated standard provides information essential for a private entity to comprehend its legal duties, which weighs heavily in favor of permitting Defendant’s reproduction. *See ASTM*, 896 F.3d at 450.
- Second Factor: The “express text of the law falls plainly outside the realm of copyright protection.” *ASTM*, 896 F.3d at 451. Here, the standard is incorporated into law without limitation such that “the consequence of the incorporation by reference is virtually indistinguishable from a situation in which the standard had been expressly copied into law.” *Id.* at 452. Accordingly, “this factor weighs heavily in favor of fair use.” *Id.*
- Third Factor: The incorporating regulation does not specify that only certain provisions of this standard are incorporated by reference into law, nor does it indicate which specific provisions of the standard are relevant for regulatory compliance, suggesting that “a greater amount of the standard’s text might be fairly reproduced.” *Id.*
- Fourth Factor: Defendant’s reproductions have not had a “substantially adverse impact on the potential market for the originals,” nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm.” Memo Op. at 30–36 (internal quotation and citation marks omitted).
- Conclusion: Defendant may fairly reproduce this incorporated standard in its entirety.

112. ASTM D4329 (1999):

- The parties identify 49 C.F.R. § 571.5 (2014) as the incorporating by reference regulation, *see* Becker Decl. ¶ 57, Ex. 90; Wise Decl., Ex. 176, which incorporates the standard into 49 C.F.R. § 571.106. Section 571.106 requires that certain test standards be in accordance with three standards, including ASTM D4329-99, and that “[i]f multiple plastic brake tubing assemblies are tested, then their position in the machine should be rotated according to ASTM D4329–99.” 49 C.F.R. § 571.106, S12.7(b)-(c)(2). The regulation does not specify that only certain provisions of ASTM D4329 (1999) are incorporated by reference into law, nor does it indicate which specific provisions of ASTM D4329 (1999) are relevant for compliance with the regulation.
- First Factor: There is no indication that Defendant stands to profit from republishing this standard; Defendant’s apparent purpose is to inform the public about the law and facilitate public debate. *See ASTM*, 896 F.3d at 449; Def’s 2d Mot. at 16. Defendant’s

“attempt to freely distribute standards incorporated by reference into law qualifie[s] as a use that further[s] the purposes of the fair use defense.” *ASTM*, 896 F.3d at 449. Further, the incorporated standard provides information essential for a private entity to comprehend its legal duties, which weighs heavily in favor of permitting Defendant’s reproduction. *See ASTM*, 896 F.3d at 450.

- Second Factor: The “express text of the law falls plainly outside the realm of copyright protection.” *ASTM*, 896 F.3d at 451. Here, the standard is incorporated into law without limitation such that “the consequence of the incorporation by reference is virtually indistinguishable from a situation in which the standard had been expressly copied into law.” *Id.* at 452. Accordingly, “this factor weighs heavily in favor of fair use.” *Id.*
- Third Factor: The incorporating regulation does not specify that only certain provisions of this standard are incorporated by reference into law, nor does it indicate which specific provisions of the standard are relevant for regulatory compliance, suggesting that “a greater amount of the standard’s text might be fairly reproduced.” *Id.*
- Fourth Factor: Defendant’s reproductions have not had a “substantially adverse impact on the potential market for the originals,” nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm.” Memo Op. at 30–36 (internal quotation and citation marks omitted).
- Conclusion: Defendant may fairly reproduce this incorporated standard in its entirety.

113. ASTM D4809 (1995):

- The parties identify 40 C.F.R. § 61.18 (2014) as the incorporating by reference regulation, *see* Becker Decl. ¶ 57, Ex. 90; Wise Decl., Ex. 176, which incorporates the standard into 40 C.F.R. § 61.245(e)(3). Section 61.245(e)(3) requires that the “net heating value of the gas being combusted in a flare shall be calculated using” a specified equation, one factor of which is determined using ASTM D4809 “if published values are not available or cannot be calculated.” The regulation does not specify that only certain provisions of ASTM D4809 (1995) are incorporated by reference into law, nor does it indicate which specific provisions of ASTM D4809 (1995) are relevant for compliance with the regulation.
- First Factor: There is no indication that Defendant stands to profit from republishing this standard; Defendant’s apparent purpose is to inform the public about the law and facilitate public debate. *See ASTM*, 896 F.3d at 449; Def’s 2d Mot. at 16. Defendant’s “attempt to freely distribute standards incorporated by reference into law qualifie[s] as a use that further[s] the purposes of the fair use defense.” *ASTM*, 896 F.3d at 449. Further, the incorporated standard provides information essential for a private entity to comprehend its legal duties, which weighs heavily in favor of permitting Defendant’s reproduction. *See ASTM*, 896 F.3d at 450.
- Second Factor: The “express text of the law falls plainly outside the realm of copyright protection.” *ASTM*, 896 F.3d at 451. Here, the standard is incorporated into law without limitation such that “the consequence of the incorporation by reference is virtually indistinguishable from a situation in which the standard had been expressly copied into law.” *Id.* at 452. Accordingly, “this factor weighs heavily in favor of fair

use.” *Id.*

- Third Factor: The incorporating regulation does not specify that only certain provisions of this standard are incorporated by reference into law, nor does it indicate which specific provisions of the standard are relevant for regulatory compliance, suggesting that “a greater amount of the standard’s text might be fairly reproduced.” *Id.*
- Fourth Factor: Defendant’s reproductions have not had a “substantially adverse impact on the potential market for the originals,” nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm.” Memo Op. at 30–36 (internal quotation and citation marks omitted).
- Conclusion: Defendant may fairly reproduce this incorporated standard in its entirety.

114. ASTM D4986 (1998):

- The parties identify 46 C.F.R. § 32.01-1 (2014) as the incorporating by reference regulation, *see* Becker Decl. ¶ 57, Ex. 90; Wise Decl., Ex. 176, which incorporates the standard into 46 C.F.R. § 32.57-10. Section 32.57-10 requires that “[e]xcept as provided in paragraph (d)(7-a) of this section, ceilings, linings, and insulation, including pipe and duct laggings, must be made of approved incombustible material,” and that “[c]ombustible insulations and vapor barriers that have a maximum extent of burning of 122 millimeters (5 inches) or less when tested in accordance with ASTM D 4986.” 46 C.F.R. § 32.57-10(d)(7)-(7-a). The regulation does not specify that only certain provisions of ASTM D4986 (1998) are incorporated by reference into law, nor does it indicate which specific provisions of ASTM D4986 (1998) are relevant for compliance with the regulation.
- First Factor: There is no indication that Defendant stands to profit from republishing this standard; Defendant’s apparent purpose is to inform the public about the law and facilitate public debate. *See ASTM*, 896 F.3d at 449; Def’s 2d Mot. at 16. Defendant’s “attempt to freely distribute standards incorporated by reference into law qualify[es] as a use that further[s] the purposes of the fair use defense.” *ASTM*, 896 F.3d at 449. Further, the incorporated standard provides information essential for a private entity to comprehend its legal duties, which weighs heavily in favor of permitting Defendant’s reproduction. *See ASTM*, 896 F.3d at 450.
- Second Factor: The “express text of the law falls plainly outside the realm of copyright protection.” *ASTM*, 896 F.3d at 451. Here, the standard is incorporated into law without limitation such that “the consequence of the incorporation by reference is virtually indistinguishable from a situation in which the standard had been expressly copied into law.” *Id.* at 452. Accordingly, “this factor weighs heavily in favor of fair use.” *Id.*
- Third Factor: The incorporating regulation does not specify that only certain provisions of this standard are incorporated by reference into law, nor does it indicate which specific provisions of the standard are relevant for regulatory compliance, suggesting that “a greater amount of the standard’s text might be fairly reproduced.” *Id.*
- Fourth Factor: Defendant’s reproductions have not had a “substantially adverse impact on the potential market for the originals,” nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm.” Memo Op. at 30–

36 (internal quotation and citation marks omitted).

- Conclusion: Defendant may fairly reproduce this incorporated standard in its entirety.

115. ASTM D5257 (1997):

- The parties identify 40 C.F.R. § 136.3 (2010) as the incorporating by reference regulation, *see* Becker Decl. ¶ 57, Ex. 90; Wise Decl., Ex. 176, which incorporates the “full text” of the standard’s “referenced test procedures” into 40 § 136.3(a), Table IB, *see* 40 C.F.R. § 136.3(a), and requires that those procedures “shall, except as noted in § 136.5, be used to perform the measurements indicated whenever the waste constituent specified is required to be measured” for specified application, reports, and certifications, *see id.* § 163.1(a). Table IB lists ASTM D5257 as the approved inorganic test procedure required under certain circumstances. The regulation does not specify that only certain provisions of ASTM D5257 (1997) are incorporated by reference into law, nor does it indicate which specific provisions of ASTM D5257 (1997) are relevant for compliance with the regulation.
- First Factor: There is no indication that Defendant stands to profit from republishing this standard; Defendant’s apparent purpose is to inform the public about the law and facilitate public debate. *See ASTM*, 896 F.3d at 449; Def’s 2d Mot. at 16. Defendant’s “attempt to freely distribute standards incorporated by reference into law qualifie[s] as a use that further[s] the purposes of the fair use defense.” *ASTM*, 896 F.3d at 449. Further, the incorporated standard provides information essential for a private entity to comprehend its legal duties, which weighs heavily in favor of permitting Defendant’s reproduction. *See ASTM*, 896 F.3d at 450.
- Second Factor: The “express text of the law falls plainly outside the realm of copyright protection.” *ASTM*, 896 F.3d at 451. Here, the standard is incorporated into law without limitation such that “the consequence of the incorporation by reference is virtually indistinguishable from a situation in which the standard had been expressly copied into law.” *Id.* at 452. Accordingly, “this factor weighs heavily in favor of fair use.” *Id.*
- Third Factor: The incorporating regulation does not specify that only certain provisions of this standard are incorporated by reference into law, nor does it indicate which specific provisions of the standard are relevant for regulatory compliance, suggesting that “a greater amount of the standard’s text might be fairly reproduced.” *Id.*
- Fourth Factor: Defendant’s reproductions have not had a “substantially adverse impact on the potential market for the originals,” nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm.” Memo Op. at 30–36 (internal quotation and citation marks omitted).
- Conclusion: Defendant may fairly reproduce this incorporated standard in its entirety.

116. ASTM D5673 (1996):

- The parties identify 40 C.F.R. § 444.12 (2004) as the incorporating by reference regulation, *see* Becker Decl. ¶ 57, Ex. 90; Wise Decl., Ex. 176, which incorporates the “full text of” the standard’s “methods” into 40 C.F.R. § 444.12(b)(1). Section 444.12 also states that “[c]ompliance with the [regulation’s] monitoring requirements

may be accomplished using approved test procedures listed” in the table of “List of Approved Inorganic Test Procedures.” 40 C.F.R. § 444.12(b)(1). That table lists ASTM D5673 as the approved inorganic test procedure required in seven specific circumstances. The regulation does not specify that only certain provisions of ASTM D5673 (1996) are incorporated by reference into law, nor does it indicate which specific provisions of ASTM D5673 (1996) are relevant for compliance with the regulation.

- First Factor: There is no indication that Defendant stands to profit from republishing this standard; Defendant’s apparent purpose is to inform the public about the law and facilitate public debate. *See ASTM*, 896 F.3d at 449; Def’s 2d Mot. at 16. Defendant’s “attempt to freely distribute standards incorporated by reference into law qualify[es] as a use that further[s] the purposes of the fair use defense.” *ASTM*, 896 F.3d at 449. Further, the incorporated standard provides information essential for a private entity to comprehend its legal duties, which weighs heavily in favor of permitting Defendant’s reproduction. *See ASTM*, 896 F.3d at 450.
- Second Factor: The “express text of the law falls plainly outside the realm of copyright protection.” *ASTM*, 896 F.3d at 451. Here, the standard is incorporated into law without limitation such that “the consequence of the incorporation by reference is virtually indistinguishable from a situation in which the standard had been expressly copied into law.” *Id.* at 452. Accordingly, “this factor weighs heavily in favor of fair use.” *Id.*
- Third Factor: The incorporating regulation does not specify that only certain provisions of this standard are incorporated by reference into law, nor does it indicate which specific provisions of the standard are relevant for regulatory compliance, suggesting that “a greater amount of the standard’s text might be fairly reproduced.” *Id.*
- Fourth Factor: Defendant’s reproductions have not had a “substantially adverse impact on the potential market for the originals,” nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm.” Memo Op. at 30–36 (internal quotation and citation marks omitted).
- Conclusion: Defendant may fairly reproduce this incorporated standard in its entirety.

117. ASTM D6216 (1998):

- The parties identify 40 C.F.R. § 60.17 (2011) as the incorporating by reference regulation, *see* Becker Decl. ¶ 57, Ex. 90; Wise Decl., Ex. 176, which incorporates the standard for 40 C.F.R. § 60, appendix B, Performance Specification 1. Appendix B provides that “ASTM D 6216–98 is the reference for design specifications, manufacturer’s performance specifications, and test procedures. The opacity monitor manufacturer must periodically select and test an opacity monitor, that is representative of a group of monitors produced during a specified period or lot, for conformance with the design specifications in ASTM D 6216–98. The opacity monitor manufacturer must test each opacity monitor for conformance with the manufacturer’s performance specifications in ASTM D 6216–98.” 40 C.F.R. § 60, appendix B, Performance Specifications, 2.1. Appendix B also provides several other requirements necessitating knowledge of ASTM D6216, including that “You, as owner or operator, are responsible

for purchasing an opacity monitor that meets the specifications of ASTM D 6216–98,” *id.* at 6.1, and that an owner or operator “must purchase an opacity monitor that complies with ASTM D 6216–98, *id.* at 8.1(1). These regulations do not specify that only certain provisions of ASTM D6216 (1998) are incorporated by reference into law, nor does it indicate which specific provisions of ASTM D6216 (1998) are relevant for compliance with the regulation.

- First Factor: There is no indication that Defendant stands to profit from republishing this standard; Defendant’s apparent purpose is to inform the public about the law and facilitate public debate. *See ASTM*, 896 F.3d at 449; Def’s 2d Mot. at 16. Defendant’s “attempt to freely distribute standards incorporated by reference into law qualify[es] as a use that further[s] the purposes of the fair use defense.” *ASTM*, 896 F.3d at 449. Further, the incorporated standard provides information essential for a private entity to comprehend its legal duties, which weighs heavily in favor of permitting Defendant’s reproduction. *See ASTM*, 896 F.3d at 450.
- Second Factor: The “express text of the law falls plainly outside the realm of copyright protection.” *ASTM*, 896 F.3d at 451. Here, the standard is incorporated into law without limitation such that “the consequence of the incorporation by reference is virtually indistinguishable from a situation in which the standard had been expressly copied into law.” *Id.* at 452. Accordingly, “this factor weighs heavily in favor of fair use.” *Id.*
- Third Factor: The incorporating regulation does not specify that only certain provisions of this standard are incorporated by reference into law, nor does it indicate which specific provisions of the standard are relevant for regulatory compliance, suggesting that “a greater amount of the standard’s text might be fairly reproduced.” *Id.*
- Fourth Factor: Defendant’s reproductions have not had a “substantially adverse impact on the potential market for the originals,” nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm.” Memo Op. at 30–36 (internal quotation and citation marks omitted).
- Conclusion: Defendant may fairly reproduce this incorporated standard in its entirety.

118. ASTM D6228 (1998):

- The parties identify 40 C.F.R. § 60.17 (2011) as the incorporating by reference regulation, *see* Becker Decl. ¶ 57, Ex. 90; Wise Decl., Ex. 176, which incorporates the standard for §§ 60.4360 and 60.4415. Section 60.4360 requires that “[y]ou must monitor the total sulfur content of the fuel being fired in the turbine,” and when “the total sulfur content of the gaseous fuel during the most recent performance test was less than half the applicable limit,” then it is appropriate to use ASTM D6228 to measure the major sulfur compounds. 40 C.F.R. § 60.4360. Section 60.4415 provides requirements for conducting initial and subsequent performance tests for sulfur and requires the analysis of samples for total sulfur content of gaseous fuels using ASTM D6228 or one of seven other enumerated standards. *See id.* § 60.4415(a)(1)(ii). These regulations do not specify that only certain provisions of ASTM D6228 (1998) are incorporated by reference into law, nor do they indicate which specific provisions of ASTM D6228 (1998) are relevant for compliance with the regulations.

- First Factor: There is no indication that Defendant stands to profit from republishing this standard; Defendant's apparent purpose is to inform the public about the law and facilitate public debate. *See ASTM*, 896 F.3d at 449; Def's 2d Mot. at 16. Defendant's "attempt to freely distribute standards incorporated by reference into law qualify[es] as a use that further[s] the purposes of the fair use defense." *ASTM*, 896 F.3d at 449. Further, the incorporated standard provides information essential for a private entity to comprehend its legal duties, which weighs heavily in favor of permitting Defendant's reproduction. *See ASTM*, 896 F.3d at 450.
- Second Factor: The "express text of the law falls plainly outside the realm of copyright protection." *ASTM*, 896 F.3d at 451. Here, the standard is incorporated into law without limitation such that "the consequence of the incorporation by reference is virtually indistinguishable from a situation in which the standard had been expressly copied into law." *Id.* at 452. Accordingly, "this factor weighs heavily in favor of fair use." *Id.*
- Third Factor: The incorporating regulation does not specify that only certain provisions of this standard are incorporated by reference into law, nor does it indicate which specific provisions of the standard are relevant for regulatory compliance, suggesting that "a greater amount of the standard's text might be fairly reproduced." *Id.*
- Fourth Factor: Defendant's reproductions have not had a "substantially adverse impact on the potential market for the originals," nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm." Memo Op. at 30–36 (internal quotation and citation marks omitted).
- Conclusion: Defendant may fairly reproduce this incorporated standard in its entirety.

119. ASTM D6420 (1999):

- The parties identify 40 C.F.R. § 63.14 (2019) as the incorporating by reference regulation, *see* Becker Decl. ¶ 57, Ex. 90; Wise Decl., Ex. 176, which incorporates the standard for §§63.5799, 63.5850, and Table 4 of Subpart UUUU. Some of those sections incorporate ASTM D6420 as a discretionary or reference procedure. For example, section 63.2354 provides that "[y]ou *may* use ASTM D6420–99 . . . as an alternative to EPA Method 18 if the target concentration is between 150 parts per billion by volume and 100 ppmv and either of the conditions specified in paragraph (b)(2)(ii)(A) or (B) of this section exists." 40 C.F.R. § 63.2354(b)(3)(ii). Other provisions, however, incorporate the standard in a manner that imposes a legal obligation to adhere to the standard. *See id.* § 63, Subpart UUUU, Table 4 (requiring that "you *must*" use either EPA Method 18 or ASTM D6420 when measuring toluene emissions at each existing or new cellophane operation); *see also id.* § 63.5850(e)(4)(ii) ("If the target compound(s) is not listed in Section 1.1 of ASTM D6420–99, but is potentially detected by mass spectrometry, an additional system continuing calibration check after each run, as detailed in Section 10.5.3 of ASTM D6420–99, must be followed, met, documented, and submitted with the performance test report even if you do not use a moisture condenser or the compound is not considered soluble."). The regulation does not specify that only certain provisions of ASTM D6420 (1999) are incorporated by reference into law, nor do they indicate all specific provisions of ASTM D6420 (1999) that are relevant for compliance with the regulation.

- First Factor: There is no indication that Defendant stands to profit from republishing this standard; Defendant's apparent purpose is to inform the public about the law and facilitate public debate. *See ASTM*, 896 F.3d at 449; Def's 2d Mot. at 16. Defendant's "attempt to freely distribute standards incorporated by reference into law qualify[s] as a use that further[s] the purposes of the fair use defense." *ASTM*, 896 F.3d at 449. Further, the incorporated standard provides information essential for a private entity to comprehend its legal duties, which weighs heavily in favor of permitting Defendant's reproduction. *See ASTM*, 896 F.3d at 450.
- Second Factor: The "express text of the law falls plainly outside the realm of copyright protection." *ASTM*, 896 F.3d at 451. Here, the standard is incorporated into law without limitation such that "the consequence of the incorporation by reference is virtually indistinguishable from a situation in which the standard had been expressly copied into law." *Id.* at 452. Accordingly, "this factor weighs heavily in favor of fair use." *Id.*
- Third Factor: The incorporating regulation does not specify that only certain provisions of this standard are incorporated by reference into law, nor does it indicate which specific provisions of the standard are relevant for regulatory compliance, suggesting that "a greater amount of the standard's text might be fairly reproduced." *Id.*
- Fourth Factor: Defendant's reproductions have not had a "substantially adverse impact on the potential market for the originals," nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm." Memo Op. at 30–36 (internal quotation and citation marks omitted).
- Conclusion: Defendant may fairly reproduce this incorporated standard in its entirety.

120. ASTM D6503 (1999):

- The parties identify 40 C.F.R. § 163 (2010) as the incorporating by reference regulation, *see* Becker Decl. ¶ 57, Ex. 90; Wise Decl., Ex. 176, which incorporates the "full text" of the standard's "referenced test procedures" into section 163(a), *see* 40 C.F.R. § 136.3(a), and requires that those procedures "shall, except as noted in § 136.5, be used to perform the measurements indicated whenever the waste constituent specified is required to be measured" for specified application, reports, and certifications, *see id.* § 163.1(a). Table IA identifies ASTM D6503 as containing the approved biological method for wastewater and sewer sludge under certain conditions. The regulation does not specify that only certain provisions of ASTM D6503 (1999) are incorporated by reference into law, nor does it indicate which specific provisions of ASTM D6503 (1999) are relevant for compliance with the regulation.
- First Factor: There is no indication that Defendant stands to profit from republishing this standard; Defendant's apparent purpose is to inform the public about the law and facilitate public debate. *See ASTM*, 896 F.3d at 449; Def's 2d Mot. at 16. Defendant's "attempt to freely distribute standards incorporated by reference into law qualify[s] as a use that further[s] the purposes of the fair use defense." *ASTM*, 896 F.3d at 449. Further, the incorporated standard provides information essential for a private entity to comprehend its legal duties, which weighs heavily in favor of permitting Defendant's reproduction. *See ASTM*, 896 F.3d at 450.

- Second Factor: The “express text of the law falls plainly outside the realm of copyright protection.” *ASTM*, 896 F.3d at 451. Here, the standard is incorporated into law without limitation such that “the consequence of the incorporation by reference is virtually indistinguishable from a situation in which the standard had been expressly copied into law.” *Id.* at 452. Accordingly, “this factor weighs heavily in favor of fair use.” *Id.*
- Third Factor: The incorporating regulation does not specify that only certain provisions of this standard are incorporated by reference into law, nor does it indicate which specific provisions of the standard are relevant for regulatory compliance, suggesting that “a greater amount of the standard’s text might be fairly reproduced.” *Id.*
- Fourth Factor: Defendant’s reproductions have not had a “substantially adverse impact on the potential market for the originals,” nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm.” Memo Op. at 30–36 (internal quotation and citation marks omitted).
- Conclusion: Defendant may fairly reproduce this incorporated standard in its entirety.

121. ASTM D86 (2007):

- The parties identify 40 C.F.R. § 80.47 (2017) as the incorporating by reference regulation, *see* Becker Decl. ¶ 57, Ex. 90; Wise Decl., Ex. 176, which incorporates the standard without limit or reference to any specific provision of the regulation, *see* 40 C.F.R. § 80.47(r)(1). Section 80.46 requires that “[s]ulfur content of gasoline and butane must be determined” using specific methods, including that “[t]hrough December 31, 2015, distillation parameters must be determined using ASTM D86.” 40 C.F.R. § 80.47(a), (d). The regulation does not specify that only certain provisions of ASTM D86 (2007) are incorporated by reference into law, nor does it indicate which specific provisions of ASTM D86 (2007) are relevant for compliance with the regulation.
- First Factor: There is no indication that Defendant stands to profit from republishing this standard; Defendant’s apparent purpose is to inform the public about the law and facilitate public debate. *See ASTM*, 896 F.3d at 449; Def’s 2d Mot. at 16. Defendant’s “attempt to freely distribute standards incorporated by reference into law qualifie[s] as a use that further[s] the purposes of the fair use defense.” *ASTM*, 896 F.3d at 449. Further, the incorporated standard provides information essential for a private entity to comprehend its legal duties, which weighs heavily in favor of permitting Defendant’s reproduction. *See ASTM*, 896 F.3d at 450.
- Second Factor: The “express text of the law falls plainly outside the realm of copyright protection.” *ASTM*, 896 F.3d at 451. Here, the standard is incorporated into law without limitation such that “the consequence of the incorporation by reference is virtually indistinguishable from a situation in which the standard had been expressly copied into law.” *Id.* at 452. Accordingly, “this factor weighs heavily in favor of fair use.” *Id.*
- Third Factor: The incorporating regulation does not specify that only certain provisions of this standard are incorporated by reference into law, nor does it indicate which specific provisions of the standard are relevant for regulatory compliance, suggesting

that “a greater amount of the standard’s text might be fairly reproduced.” *Id.*

- Fourth Factor: Defendant’s reproductions have not had a “substantially adverse impact on the potential market for the originals,” nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm.” Memo Op. at 30–36 (internal quotation and citation marks omitted).
- Conclusion: Defendant may fairly reproduce this incorporated standard in its entirety.

122. ASTM D512 1989 (1999):

- Defendant identifies 40 C.F.R. § 136.3(a), Table IB (2010) as the incorporating by reference regulation. Becker Decl. ¶ 57, Ex. 90 at 73. Section 136.3(a) states that the “full text of the referenced test procedures are incorporated by reference” into Table IB. 40 C.F.R. § 136.3(a). Table IB references ASTM D512-89 (1999) (A), (B), and (C), apparent references to Test Methods A, B, and C, set forth in the standard. *See* ECF No. 199-3, Exhibit 149 Part 1 to Declaration of Jane W. Wise at 534-40. Accordingly, the regulation incorporates all three of the standard’s test procedures. The standard also includes background sections defining the standard’s scope, referenced documents, terminology, significance and use, purity of reagents, and sampling, as well as an appendix, none of which are explicitly incorporated into law. *See id.*
- First Factor: There is no indication that Defendant stands to profit from republishing this standard; Defendant’s apparent purpose is to inform the public about the law and facilitate public debate. *See ASTM*, 896 F.3d at 449; Def’s 2d Mot. at 16. Defendant’s “attempt to freely distribute standards incorporated by reference into law qualify[es] as a use that further[s] the purposes of the fair use defense.” *ASTM*, 896 F.3d at 449. Further, the incorporated standard provides information essential for a private entity to comprehend its legal duties, which weighs heavily in favor of permitting Defendant’s reproduction. *See ASTM*, 896 F.3d at 450.
- Second Factor: The “express text of the law falls plainly outside the realm of copyright protection.” *ASTM*, 896 F.3d at 451. Here, the standard is only partially incorporated into law, such that Defendant’s wholesale reproduction is “harder to justify.” *Id.*
- Third Factor: The incorporating regulation specifies that only specific portions of the standard are incorporated by reference into law, specifically, Test Procedures A, B, and C, which justifies posting the specific text of those provisions. *Id.* Those test procedures, however, constitute a substantial portion of the standard republished by Defendant. Moreover, copying and republishing the standard’s background sections and appendix “are reasonable in relation to the purpose of the copying.” *Campbell*, 510 U.S. at 586–87.
- Fourth Factor: Defendant’s reproductions have not had a “substantially adverse impact on the potential market for the originals,” nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm.” Memo Op. at 30–36 (internal quotation and citation marks omitted).
- Conclusion: Defendant may fairly reproduce this incorporated standard in its entirety.

123. ASTM E11 (1995):

- The parties identify 33 C.F.R. § 159.4 (2014) as the incorporating by reference

regulation, *see* Becker Decl. ¶ 57, Ex. 90; Wise Decl., Ex. 176, which incorporates the standard into § 159.125. Section 159.125 requires that “[d]uring the sewage processing test (§159.121) 40 effluent samples of approximately 1 liter each shall be taken from a Type I device at the same time as samples taken in §159.123 and passed expeditiously through a U.S. Sieve No. 12 as specified in ASTM E 11.” 33 C.F.R. § 159.125. The regulation does not specify that only certain provisions of ASTM E11 (1995) are incorporated by reference into law, nor does it indicate which specific provisions of ASTM E11 (1995) are relevant for compliance with the regulation.

- First Factor: There is no indication that Defendant stands to profit from republishing this standard; Defendant’s apparent purpose is to inform the public about the law and facilitate public debate. *See ASTM*, 896 F.3d at 449; Def’s 2d Mot. at 16. Defendant’s “attempt to freely distribute standards incorporated by reference into law qualifie[s] as a use that further[s] the purposes of the fair use defense.” *ASTM*, 896 F.3d at 449. Further, the incorporated standard provides information essential for a private entity to comprehend its legal duties, which weighs heavily in favor of permitting Defendant’s reproduction. *See ASTM*, 896 F.3d at 450.
- Second Factor: The “express text of the law falls plainly outside the realm of copyright protection.” *ASTM*, 896 F.3d at 451. Here, the standard is incorporated into law without limitation such that “the consequence of the incorporation by reference is virtually indistinguishable from a situation in which the standard had been expressly copied into law.” *Id.* at 452. Accordingly, “this factor weighs heavily in favor of fair use.” *Id.*
- Third Factor: The incorporating regulation does not specify that only certain provisions of this standard are incorporated by reference into law, nor does it indicate which specific provisions of the standard are relevant for regulatory compliance, suggesting that “a greater amount of the standard’s text might be fairly reproduced.” *Id.*
- Fourth Factor: Defendant’s reproductions have not had a “substantially adverse impact on the potential market for the originals,” nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm.” Memo Op. at 30–36 (internal quotation and citation marks omitted).
- Conclusion: Defendant may fairly reproduce this incorporated standard in its entirety.

124. ASTM E1337 1990 (1996):

- The parties identify 49 C.F.R. § 571.126 (2008) as the incorporating by reference regulation, *see* Becker Decl. ¶ 57, Ex. 90; Wise Decl., Ex. 176, which incorporates the standard in S6.2.2. That section requires that “[t]he road test surface must produce a peak friction coefficient (PFC) of 0.9 when measured using an American Society for Testing and Materials (ASTM) E1136–93 (1993) standard reference test tire, in accordance with ASTM Method E 1337–90 (Reapproved 1996), at a speed of 64.4 km/h (40 mph), without water delivery.” 49 C.F.R. § 571.126, S6.2.2. The regulation does not specify that only certain provisions of ASTM E1337 1990 (1996) are incorporated by reference into law, nor does it indicate which specific provisions of ASTM E1337 1990 (1996) are relevant for compliance with the regulation.
- First Factor: There is no indication that Defendant stands to profit from republishing

this standard; Defendant's apparent purpose is to inform the public about the law and facilitate public debate. *See ASTM*, 896 F.3d at 449; Def's 2d Mot. at 16. Defendant's "attempt to freely distribute standards incorporated by reference into law qualifie[s] as a use that further[s] the purposes of the fair use defense." *ASTM*, 896 F.3d at 449. Further, the incorporated standard provides information essential for a private entity to comprehend its legal duties, which weighs heavily in favor of permitting Defendant's reproduction. *See ASTM*, 896 F.3d at 450.

- Second Factor: The "express text of the law falls plainly outside the realm of copyright protection." *ASTM*, 896 F.3d at 451. Here, the standard is incorporated into law without limitation such that "the consequence of the incorporation by reference is virtually indistinguishable from a situation in which the standard had been expressly copied into law." *Id.* at 452. Accordingly, "this factor weighs heavily in favor of fair use." *Id.*
- Third Factor: The incorporating regulation does not specify that only certain provisions of this standard are incorporated by reference into law, nor does it indicate which specific provisions of the standard are relevant for regulatory compliance, suggesting that "a greater amount of the standard's text might be fairly reproduced." *Id.*
- Fourth Factor: Defendant's reproductions have not had a "substantially adverse impact on the potential market for the originals," nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm." Memo Op. at 30–36 (internal quotation and citation marks omitted).
- Conclusion: Defendant may fairly reproduce this incorporated standard in its entirety.

125. ASTM E169 (1987):

- The parties identify 40 C.F.R. § 260.11 (2011) as the incorporating by reference regulation, *see* Becker Decl. ¶ 57, Ex. 90; Wise Decl., Ex. 176, which incorporates the standard into § 264.1063. Section 264.1063 requires that "an owner or operator of a facility must determine, for each piece of equipment, whether the equipment contains or contacts a hazardous waste with organic concentration that equals or exceeds 10 percent by weight using . . . methods described in" ASTM E169-87. 40 C.F.R. § 264.1063(d)-(1). The regulation does not specify that only certain provisions of ASTM E169 (1987) are incorporated by reference into law, nor does it indicate which specific provisions of ASTM E169 (1987) are relevant for compliance with the regulation.
- First Factor: There is no indication that Defendant stands to profit from republishing this standard; Defendant's apparent purpose is to inform the public about the law and facilitate public debate. *See ASTM*, 896 F.3d at 449; Def's 2d Mot. at 16. Defendant's "attempt to freely distribute standards incorporated by reference into law qualifie[s] as a use that further[s] the purposes of the fair use defense." *ASTM*, 896 F.3d at 449. Further, the incorporated standard provides information essential for a private entity to comprehend its legal duties, which weighs heavily in favor of permitting Defendant's reproduction. *See ASTM*, 896 F.3d at 450.
- Second Factor: The "express text of the law falls plainly outside the realm of copyright protection." *ASTM*, 896 F.3d at 451. Here, the standard is incorporated into law without limitation such that "the consequence of the incorporation by reference is

virtually indistinguishable from a situation in which the standard had been expressly copied into law.” *Id.* at 452. Accordingly, “this factor weighs heavily in favor of fair use.” *Id.*

- Third Factor: The incorporating regulation does not specify that only certain provisions of this standard are incorporated by reference into law, nor does it indicate which specific provisions of the standard are relevant for regulatory compliance, suggesting that “a greater amount of the standard’s text might be fairly reproduced.” *Id.*
- Fourth Factor: Defendant’s reproductions have not had a “substantially adverse impact on the potential market for the originals,” nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm.” Memo Op. at 30–36 (internal quotation and citation marks omitted).
- Conclusion: Defendant may fairly reproduce this incorporated standard in its entirety.

126. ASTM E185 (1982):

- The parties identify 10 C.F.R. § 50, Appendix H (2014) as the incorporating by reference regulation, *see* Becker Decl. ¶ 57, Ex. 90; Wise Decl., Ex. 176, which incorporates the standard into Appendix H and G. Section 50, Appendix H requires that for “each capsule withdrawal, the test procedures and reporting requirements must meet the requirements of ASTM E 185–82 to the extent practicable for the configuration of the specimens in the capsule.” 10 C.F.R. § 50, App. H, III, A, 1. Section 50, Appendix G provides that “[r]eactor vessel beltline materials must have Charpy upper-shelf energy” as “[d]efined in ASTM[E 185-79 and -82.” *Id.* § 50, Appendix G, IV, I (a), n.1. These regulations do not specify that only certain provisions of ASTM E185 (1982) are incorporated by reference into law, nor do they indicate which specific provisions of ASTM E185 (1982) are relevant for compliance with the regulations.
- First Factor: There is no indication that Defendant stands to profit from republishing this standard; Defendant’s apparent purpose is to inform the public about the law and facilitate public debate. *See ASTM*, 896 F.3d at 449; Def’s 2d Mot. at 16. Defendant’s “attempt to freely distribute standards incorporated by reference into law qualifie[s] as a use that further[s] the purposes of the fair use defense.” *ASTM*, 896 F.3d at 449. Further, the incorporated standard provides information essential for a private entity to comprehend its legal duties, which weighs heavily in favor of permitting Defendant’s reproduction. *See ASTM*, 896 F.3d at 450.
- Second Factor: The “express text of the law falls plainly outside the realm of copyright protection.” *ASTM*, 896 F.3d at 451. Here, the standard is incorporated into law without limitation such that “the consequence of the incorporation by reference is virtually indistinguishable from a situation in which the standard had been expressly copied into law.” *Id.* at 452. Accordingly, “this factor weighs heavily in favor of fair use.” *Id.*
- Third Factor: The incorporating regulation does not specify that only certain provisions of this standard are incorporated by reference into law, nor does it indicate which specific provisions of the standard are relevant for regulatory compliance, suggesting that “a greater amount of the standard’s text might be fairly reproduced.” *Id.*

- Fourth Factor: Defendant’s reproductions have not had a “substantially adverse impact on the potential market for the originals,” nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm.” Memo Op. at 30–36 (internal quotation and citation marks omitted).
- Conclusion: Defendant may fairly reproduce this incorporated standard in its entirety.

127. ASTM E23 (1982):

- The parties identify 46 C.F.R. § 56.012 (2000) as the incorporating by reference regulation, *see* Becker Decl. ¶ 57, Ex. 90; Wise Decl., Ex. 176, which incorporates the standard into § 56.50-105. Section 56.50-105 requires that “[a]ll materials used in low temperature piping systems shall . . . be tested for low temperature toughness using the Charpy V-notch specimen of ASTM E 23.” 46 C.F.R. § 56.50-105 (a)(1)(ii). The regulation does not specify that only certain provisions of ASTM E23 (1982) are incorporated by reference into law, nor does it indicate which specific provisions of ASTM E23 (1982) are relevant for compliance with the regulation.
- First Factor: There is no indication that Defendant stands to profit from republishing this standard; Defendant’s apparent purpose is to inform the public about the law and facilitate public debate. *See ASTM*, 896 F.3d at 449; Def’s 2d Mot. at 16. Defendant’s “attempt to freely distribute standards incorporated by reference into law qualifie[s] as a use that further[s] the purposes of the fair use defense.” *ASTM*, 896 F.3d at 449. Further, the incorporated standard provides information essential for a private entity to comprehend its legal duties, which weighs heavily in favor of permitting Defendant’s reproduction. *See ASTM*, 896 F.3d at 450.
- Second Factor: The “express text of the law falls plainly outside the realm of copyright protection.” *ASTM*, 896 F.3d at 451. Here, the standard is incorporated into law without limitation such that “the consequence of the incorporation by reference is virtually indistinguishable from a situation in which the standard had been expressly copied into law.” *Id.* at 452. Accordingly, “this factor weighs heavily in favor of fair use.” *Id.*
- Third Factor: The incorporating regulation does not specify that only certain provisions of this standard are incorporated by reference into law, nor does it indicate which specific provisions of the standard are relevant for regulatory compliance, suggesting that “a greater amount of the standard’s text might be fairly reproduced.” *Id.*
- Fourth Factor: Defendant’s reproductions have not had a “substantially adverse impact on the potential market for the originals,” nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm.” Memo Op. at 30–36 (internal quotation and citation marks omitted).
- Conclusion: Defendant may fairly reproduce this incorporated standard in its entirety.

128. ASTM E260 (1996):

- The parties identify 40 C.F.R. § 63.14 (2011) as the incorporating by reference regulation, *see* Becker Decl. ¶ 57, Ex. 90; Wise Decl., Ex. 176, which incorporates the standard into 40 C.F.R. §§ 63.750(b)(2) and 63.786(b)(5). Section 63.750 requires that “the composite vapor pressure of a blended hand-wipe solvent shall be determined

by quantifying the amount of each organic compound in the blend using manufacturer's supplied data or a gas chromatographic analysis in accordance with ASTM E 260–91 or 96." 40 C.F.R. § 63.750(b)(2). Section 63.786(b)(5) requires that "[m]ultiple and different analytical techniques must be used for positive identification if the components in a mixture under analysis are not known. In such cases a single column gas chromatograph (GC) may not be adequate. A combination of equipment may be needed such as a GC/mass spectrometer or GC/infrared system. (If a GC method is used, the operator must use practices in ASTM Method E260–91 or 96." *Id.* § 63.786(b)(5). These regulations do not specify that only certain provisions of ASTM E260 (1996) are incorporated by reference into law, nor does it indicate which specific provisions of ASTM E260 (1996) are relevant for compliance with the regulation.

- First Factor: There is no indication that Defendant stands to profit from republishing this standard; Defendant's apparent purpose is to inform the public about the law and facilitate public debate. *See ASTM*, 896 F.3d at 449; Def's 2d Mot. at 16. Defendant's "attempt to freely distribute standards incorporated by reference into law qualifie[s] as a use that further[s] the purposes of the fair use defense." *ASTM*, 896 F.3d at 449. Further, the incorporated standard provides information essential for a private entity to comprehend its legal duties, which weighs heavily in favor of permitting Defendant's reproduction. *See ASTM*, 896 F.3d at 450.
- Second Factor: The "express text of the law falls plainly outside the realm of copyright protection." *ASTM*, 896 F.3d at 451. Here, the standard is incorporated into law without limitation such that "the consequence of the incorporation by reference is virtually indistinguishable from a situation in which the standard had been expressly copied into law." *Id.* at 452. Accordingly, "this factor weighs heavily in favor of fair use." *Id.*
- Third Factor: The incorporating regulation does not specify that only certain provisions of this standard are incorporated by reference into law, nor does it indicate which specific provisions of the standard are relevant for regulatory compliance, suggesting that "a greater amount of the standard's text might be fairly reproduced." *Id.*
- Fourth Factor: Defendant's reproductions have not had a "substantially adverse impact on the potential market for the originals," nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm." Memo Op. at 30–36 (internal quotation and citation marks omitted).
- Conclusion: Defendant may fairly reproduce this incorporated standard in its entirety.

129. ASTM E29 (1990):

- The parties identify 40 C.F.R. § 86.1 (2008) as the incorporating by reference regulation, *see* Becker Decl. ¶ 57, Ex. 90; Wise Decl., Ex. 176, which incorporates the standard for §§ 86.609-84; 86.609-96; 86.609-97; 86.609-98; 86.1009-84; 86.1009-96; 86.1442; 86.1708-99; 86.1709-99; 86.1710- 99; 86.1728-99. Several of those regulations require manufacturers to round test result numbers using the procedures provided by ASTM E29-90. *See, e.g.*, 40 C.F.R. § 86.609-98 ("Rounding is done in accordance with the RoundingOff Method specified in ASTM E29–90, Standard Practice for Using Significant Digits in Test Data to Determine Conformance with

Specifications. This procedure has been incorporated by reference (see §86.1.”); *id.* § 86. 1708-99 (“Both the projected emissions and the Highway Fuel Economy Test standard shall be rounded to the nearest 0.1 g/mi in accordance with the Rounding-Off Method specified in ASTM E29–90, Standard Practice for Using Significant Digits in Test Data to Determine Conformance with Specifications, before being compared. These procedures are incorporated by reference (see §86.1).”). These regulations do not specify that only certain provisions of ASTM E29 (1990) are incorporated by reference into law, nor do they indicate which specific provisions of ASTM E29 (1990) are relevant for compliance with the regulation.

- **First Factor:** There is no indication that Defendant stands to profit from republishing this standard; Defendant’s apparent purpose is to inform the public about the law and facilitate public debate. *See ASTM*, 896 F.3d at 449; Def’s 2d Mot. at 16. Defendant’s “attempt to freely distribute standards incorporated by reference into law qualifie[s] as a use that further[s] the purposes of the fair use defense.” *ASTM*, 896 F.3d at 449. Further, the incorporated standard provides information essential for a private entity to comprehend its legal duties, which weighs heavily in favor of permitting Defendant’s reproduction. *See ASTM*, 896 F.3d at 450.
- **Second Factor:** The “express text of the law falls plainly outside the realm of copyright protection.” *ASTM*, 896 F.3d at 451. Here, the standard is incorporated into law without limitation such that “the consequence of the incorporation by reference is virtually indistinguishable from a situation in which the standard had been expressly copied into law.” *Id.* at 452. Accordingly, “this factor weighs heavily in favor of fair use.” *Id.*
- **Third Factor:** The incorporating regulation does not specify that only certain provisions of this standard are incorporated by reference into law, nor does it indicate which specific provisions of the standard are relevant for regulatory compliance, suggesting that “a greater amount of the standard’s text might be fairly reproduced.” *Id.*
- **Fourth Factor:** Defendant’s reproductions have not had a “substantially adverse impact on the potential market for the originals,” nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm.” Memo Op. at 30–36 (internal quotation and citation marks omitted).
- **Conclusion:** Defendant may fairly reproduce this incorporated standard in its entirety.

130. ASTM E424 (1971):

- The parties identify 24 C.F.R. § (Parts 200 to 499) (2005) as the incorporating by reference regulation, *see* Becker Decl. ¶ 57, Ex. 90; Wise Decl., Ex. 176, which incorporates ASTM E424 (1971) into 24 C.F.R. § Part 200, Subpart S. *See* 24 C.F.R. § (Parts 200 to 499). That regulation does not specify that only certain provisions of ASTM E424 (1971) are incorporated by reference into law, nor does it indicate which specific provisions of ASTM E424 (1971) are relevant for compliance with the regulation.
- **First Factor:** There is no indication that Defendant stands to profit from republishing this standard; Defendant’s apparent purpose is to inform the public about the law and facilitate public debate. *See ASTM*, 896 F.3d at 449; Def’s 2d Mot. at 16. Defendant’s

“attempt to freely distribute standards incorporated by reference into law qualifie[s] as a use that further[s] the purposes of the fair use defense.” *ASTM*, 896 F.3d at 449. However, the court finds that the incorporated standard does not provide information essential for a private entity to comprehend its legal duties, but rather is incorporated as a reference procedure. Accordingly, “while knowing the content of this incorporated standard might help inform one’s understanding of the law,” it “is not essential to complying with any legal duty,” and thus, Defendant’s use is less transformative and “its wholesale copying, in turn, less justified.” *ASTM*, 896 F.3d at 450.

- Second Factor: The “express text of the law falls plainly outside the realm of copyright protection.” *ASTM*, 896 F.3d at 451. Here, the standard is incorporated into law without limitation such that “the consequence of the incorporation by reference is virtually indistinguishable from a situation in which the standard had been expressly copied into law.” *Id.* at 452. Accordingly, “this factor weighs heavily in favor of fair use.” *Id.*
- Third Factor: The incorporating regulation does not specify that only certain provisions of this standard are incorporated by reference into law, nor does it indicate which specific provisions of the standard are relevant for regulatory compliance, suggesting that “a greater amount of the standard’s text might be fairly reproduced.” *Id.*
- Fourth Factor: Defendant’s reproductions have not had a “substantially adverse impact on the potential market for the originals,” nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm.” Memo Op. at 30–36 (internal quotation and citation marks omitted).
- Conclusion: Defendant may fairly reproduce this incorporated standard in its entirety.

131. ASTM E606 (1980):

- The parties identify 24 C.F.R. § (Parts 200 to 499) (2005) as the incorporating by reference regulation, *see* Becker Decl. ¶ 57, Ex. 90; Wise Decl., Ex. 176, which incorporates ASTM E606 (1980) into 24 C.F.R. § Part 200, Subpart S. *See* 24 C.F.R. § (Parts 200 to 499). That regulation does not specify that only certain provisions of ASTM E606 (1980) are incorporated by reference into law, nor does it indicate which specific provisions of ASTM E606 (1980) are relevant for compliance with the regulation.
- First Factor: There is no indication that Defendant stands to profit from republishing this standard; Defendant’s apparent purpose is to inform the public about the law and facilitate public debate. *See ASTM*, 896 F.3d at 449; Def’s 2d Mot. at 16. Defendant’s “attempt to freely distribute standards incorporated by reference into law qualifie[s] as a use that further[s] the purposes of the fair use defense.” *ASTM*, 896 F.3d at 449. However, the court finds that the incorporated standard does not provide information essential for a private entity to comprehend its legal duties, but rather is incorporated as a reference procedure. Accordingly, “while knowing the content of this incorporated standard might help inform one’s understanding of the law,” it “is not essential to complying with any legal duty,” and thus, Defendant’s use is less transformative and “its wholesale copying, in turn, less justified.” *ASTM*, 896 F.3d at 450.
- Second Factor: The “express text of the law falls plainly outside the realm of copyright

protection.” *ASTM*, 896 F.3d at 451. Here, the standard is incorporated into law without limitation such that “the consequence of the incorporation by reference is virtually indistinguishable from a situation in which the standard had been expressly copied into law.” *Id.* at 452. Accordingly, “this factor weighs heavily in favor of fair use.” *Id.*

- Third Factor: The incorporating regulation does not specify that only certain provisions of this standard are incorporated by reference into law, nor does it indicate which specific provisions of the standard are relevant for regulatory compliance, suggesting that “a greater amount of the standard’s text might be fairly reproduced.” *Id.*
- Fourth Factor: Defendant’s reproductions have not had a “substantially adverse impact on the potential market for the originals,” nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm.” Memo Op. at 30–36 (internal quotation and citation marks omitted).
- Conclusion: Defendant may fairly reproduce this incorporated standard in its entirety.

132. ASTM E681 (1985):

- The parties identify 49 C.F.R. § 171.7 (2004) as the incorporating by reference regulation, *see* Becker Decl. ¶ 57, Ex. 90; Wise Decl., Ex. 176, which incorporates the standard into 49 C.F.R. § 173.115. Section 173.115 requires that certain expressed temperature limits “shall be determined at 101.3 kPa (14.7 psi) of pressure and a temperature of 20 °C (68 °F) in accordance with ASTM E681–85.” The regulation does not specify that only certain provisions of ASTM E681 (1985) are incorporated by reference into law, nor does it indicate which specific provisions of ASTM E681 (1985) are relevant for compliance with the regulation.
- First Factor: There is no indication that Defendant stands to profit from republishing this standard; Defendant’s apparent purpose is to inform the public about the law and facilitate public debate. *See ASTM*, 896 F.3d at 449; Def’s 2d Mot. at 16. Defendant’s “attempt to freely distribute standards incorporated by reference into law qualify[es] as a use that further[s] the purposes of the fair use defense.” *ASTM*, 896 F.3d at 449. Further, the incorporated standard provides information essential for a private entity to comprehend its legal duties, which weighs heavily in favor of permitting Defendant’s reproduction. *See ASTM*, 896 F.3d at 450.
- Second Factor: The “express text of the law falls plainly outside the realm of copyright protection.” *ASTM*, 896 F.3d at 451. Here, the standard is incorporated into law without limitation such that “the consequence of the incorporation by reference is virtually indistinguishable from a situation in which the standard had been expressly copied into law.” *Id.* at 452. Accordingly, “this factor weighs heavily in favor of fair use.” *Id.*
- Third Factor: The incorporating regulation does not specify that only certain provisions of this standard are incorporated by reference into law, nor does it indicate which specific provisions of the standard are relevant for regulatory compliance, suggesting that “a greater amount of the standard’s text might be fairly reproduced.” *Id.*
- Fourth Factor: Defendant’s reproductions have not had a “substantially adverse impact on the potential market for the originals,” nor have Plaintiffs shown by a preponderance

of the evidence that there is a meaningful likelihood of future harm.” Memo Op. at 30–36 (internal quotation and citation marks omitted).

- Conclusion: Defendant may fairly reproduce this incorporated standard in its entirety.

133. ASTM E72 (1980):

- The parties identify 30 C.F.R. § 75.333 (2014) as the incorporating by reference regulation, *see* Becker Decl. ¶ 57, Ex. 90; Wise Decl., Ex. 176, which incorporates the standard. Section 75.333(e)(1)(i) requires that ventilation controls “shall be constructed in a traditionally accepted method and of materials that have been demonstrated to perform adequately or in a method and of materials that have been tested and shown to have a minimum strength equal to or greater than the traditionally accepted in-mine controls,” and that related tests may be performed under ASTM E72-80 or “comparative in-mine tests.” 30 C.F.R. § 75.333(e)(1)(i). The regulation does not specify that only certain provisions of ASTM E72 (1980) are incorporated by reference into law, nor does it indicate which specific provisions of ASTM E72 (1980) are relevant for compliance with the regulation.
- First Factor: There is no indication that Defendant stands to profit from republishing this standard; Defendant’s apparent purpose is to inform the public about the law and facilitate public debate. *See ASTM*, 896 F.3d at 449; Def’s 2d Mot. at 16. Defendant’s “attempt to freely distribute standards incorporated by reference into law qualify[es] as a use that further[s] the purposes of the fair use defense.” *ASTM*, 896 F.3d at 449. Further, while entities may rely on either ASTM E72-80 or “comparative in-mine tests,” entities must understand the test procedures set forth in ASTM E72 (1980) to know which in-mine tests are “comparative.” Thus, the court finds that the incorporated standard provides information essential for a private entity to comprehend its legal duties. which weighs heavily in favor of permitting Defendant’s reproduction. *See ASTM*, 896 F.3d at 450.
- Second Factor: The “express text of the law falls plainly outside the realm of copyright protection.” *ASTM*, 896 F.3d at 451. Here, the standard is incorporated into law without limitation such that “the consequence of the incorporation by reference is virtually indistinguishable from a situation in which the standard had been expressly copied into law.” *Id.* at 452. Accordingly, “this factor weighs heavily in favor of fair use.” *Id.*
- Third Factor: The incorporating regulation does not specify that only certain provisions of this standard are incorporated by reference into law, nor does it indicate which specific provisions of the standard are relevant for regulatory compliance, suggesting that “a greater amount of the standard’s text might be fairly reproduced.” *Id.*
- Fourth Factor: Defendant’s reproductions have not had a “substantially adverse impact on the potential market for the originals,” nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm.” Memo Op. at 30–36 (internal quotation and citation marks omitted).
- Conclusion: Defendant may fairly reproduce this incorporated standard in its entirety.

134. ASTM E773 (1997):

- The parties identify 24 C.F.R. § 3280.4 (2014) as the incorporating by reference regulation, *see* Becker Decl. ¶ 57, Ex. 90; Wise Decl., Ex. 176, which incorporates the standard for § 3280.403(d). Section 3280.403 requires that certain sealing systems “must be qualified in accordance with ASTM E 773–97.” 24 C.F.R. § 3280.4(d)(2). The regulation does not specify that only certain provisions of ASTM E773 (1997) are incorporated by reference into law, nor does it indicate which specific provisions of ASTM E773 (1997) are relevant for compliance with the regulation.
- First Factor: There is no indication that Defendant stands to profit from republishing this standard; Defendant’s apparent purpose is to inform the public about the law and facilitate public debate. *See ASTM*, 896 F.3d at 449; Def’s 2d Mot. at 16. Defendant’s “attempt to freely distribute standards incorporated by reference into law qualifie[s] as a use that further[s] the purposes of the fair use defense.” *ASTM*, 896 F.3d at 449. Further, the incorporated standard provides information essential for a private entity to comprehend its legal duties, which weighs heavily in favor of permitting Defendant’s reproduction. *See ASTM*, 896 F.3d at 450.
- Second Factor: The “express text of the law falls plainly outside the realm of copyright protection.” *ASTM*, 896 F.3d at 451. Here, the standard is incorporated into law without limitation such that “the consequence of the incorporation by reference is virtually indistinguishable from a situation in which the standard had been expressly copied into law.” *Id.* at 452. Accordingly, “this factor weighs heavily in favor of fair use.” *Id.*
- Third Factor: The incorporating regulation does not specify that only certain provisions of this standard are incorporated by reference into law, nor does it indicate which specific provisions of the standard are relevant for regulatory compliance, suggesting that “a greater amount of the standard’s text might be fairly reproduced.” *Id.*
- Fourth Factor: Defendant’s reproductions have not had a “substantially adverse impact on the potential market for the originals,” nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm.” Memo Op. at 30–36 (internal quotation and citation marks omitted).
- Conclusion: Defendant may fairly reproduce this incorporated standard in its entirety.

135. ASTM E774 (1997):

- The parties identify 24 C.F.R. § 3280.4 (2014) as the incorporating by reference regulation, *see* Becker Decl. ¶ 57, Ex. 90; Wise Decl., Ex. 176, which incorporates the standard for § 3280.403(d). Section 3280.403 requires that “[s]ealed insulating glass, where used, must meet all performance requirements for Class C in accordance with ASTM E 774–97.” The regulation does not specify that only certain provisions of ASTM E774 (1997) are incorporated by reference into law, nor does it indicate which specific provisions of ASTM E774 (1997) are relevant for compliance with the regulation.
- First Factor: There is no indication that Defendant stands to profit from republishing this standard; Defendant’s apparent purpose is to inform the public about the law and facilitate public debate. *See ASTM*, 896 F.3d at 449; Def’s 2d Mot. at 16. Defendant’s

“attempt to freely distribute standards incorporated by reference into law qualifie[s] as a use that further[s] the purposes of the fair use defense.” *ASTM*, 896 F.3d at 449. Further, the incorporated standard provides information essential for a private entity to comprehend its legal duties, which weighs heavily in favor of permitting Defendant’s reproduction. *See ASTM*, 896 F.3d at 450.

- Second Factor: The “express text of the law falls plainly outside the realm of copyright protection.” *ASTM*, 896 F.3d at 451. Here, the standard is incorporated into law without limitation such that “the consequence of the incorporation by reference is virtually indistinguishable from a situation in which the standard had been expressly copied into law.” *Id.* at 452. Accordingly, “this factor weighs heavily in favor of fair use.” *Id.*
- Third Factor: The incorporating regulation does not specify that only certain provisions of this standard are incorporated by reference into law, nor does it indicate which specific provisions of the standard are relevant for regulatory compliance, suggesting that “a greater amount of the standard’s text might be fairly reproduced.” *Id.*
- Fourth Factor: Defendant’s reproductions have not had a “substantially adverse impact on the potential market for the originals,” nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm.” Memo Op. at 30–36 (internal quotation and citation marks omitted).
- Conclusion: Defendant may fairly reproduce this incorporated standard in its entirety.

136. ASTM E96 (1995):

- The parties identify 24 C.F.R. § 3280.4 (2014) as the incorporating by reference regulation, *see* Becker Decl. ¶ 57, Ex. 90; Wise Decl., Ex. 176, which incorporates the standard for § 3280.504(a). Section 3280.504(a) requires that in express conditions, “ceilings must have a vapor retarder with a permeance of not greater than 1 perm (as measured by ASTM E 96–95.” 24 C.F.R. § 3280. 3280.504(a)(1). The regulation does not specify that only certain provisions of ASTM E96 (1995) are incorporated by reference into law, nor does it indicate which specific provisions of ASTM E96 (1995) are relevant for compliance with the regulation.
- First Factor: There is no indication that Defendant stands to profit from republishing this standard; Defendant’s apparent purpose is to inform the public about the law and facilitate public debate. *See ASTM*, 896 F.3d at 449; Def’s 2d Mot. at 16. Defendant’s “attempt to freely distribute standards incorporated by reference into law qualifie[s] as a use that further[s] the purposes of the fair use defense.” *ASTM*, 896 F.3d at 449. Further, the incorporated standard provides information essential for a private entity to comprehend its legal duties, which weighs heavily in favor of permitting Defendant’s reproduction. *See ASTM*, 896 F.3d at 450.
- Second Factor: The “express text of the law falls plainly outside the realm of copyright protection.” *ASTM*, 896 F.3d at 451. Here, the standard is incorporated into law without limitation such that “the consequence of the incorporation by reference is virtually indistinguishable from a situation in which the standard had been expressly copied into law.” *Id.* at 452. Accordingly, “this factor weighs heavily in favor of fair use.” *Id.*

- Third Factor: The incorporating regulation does not specify that only certain provisions of this standard are incorporated by reference into law, nor does it indicate which specific provisions of the standard are relevant for regulatory compliance, suggesting that “a greater amount of the standard’s text might be fairly reproduced.” *Id.*
- Fourth Factor: Defendant’s reproductions have not had a “substantially adverse impact on the potential market for the originals,” nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm.” Memo Op. at 30–36 (internal quotation and citation marks omitted).
- Conclusion: Defendant may fairly reproduce this incorporated standard in its entirety.

137. ASTM F1003 1986 (1992):

- The parties identify 46 C.F.R. § 199.05 (2014) as the incorporating by reference regulation, *see* Becker Decl. ¶ 57, Ex. 90; Wise Decl., Ex. 176, which incorporates the standard for 46 C.F.R. § 199.175. Section 199.175 pertains to searchlights on survival craft and boat equipment and requires that a searchlight “must be of the type originally provided with the approved lifeboat or rescue boat, or must be certified by the searchlight manufacturer to meet ASTM F 1003.” 46 C.F.R. § 199.175(a)(28). The regulation does not specify that only certain provisions of ASTM F1003 1986 (1992) are incorporated by reference into law, nor does it indicate which specific provisions of ASTM F1003 1986 (1992) are relevant for compliance with the regulation.
- First Factor: There is no indication that Defendant stands to profit from republishing this standard; Defendant’s apparent purpose is to inform the public about the law and facilitate public debate. *See ASTM*, 896 F.3d at 449; Def’s 2d Mot. at 16. Defendant’s “attempt to freely distribute standards incorporated by reference into law qualifie[s] as a use that further[s] the purposes of the fair use defense.” *ASTM*, 896 F.3d at 449. Further, the incorporated standard provides information essential for a private entity to comprehend its legal duties, which weighs heavily in favor of permitting Defendant’s reproduction. *See ASTM*, 896 F.3d at 450.
- Second Factor: The “express text of the law falls plainly outside the realm of copyright protection.” *ASTM*, 896 F.3d at 451. Here, the standard is incorporated into law without limitation such that “the consequence of the incorporation by reference is virtually indistinguishable from a situation in which the standard had been expressly copied into law.” *Id.* at 452. Accordingly, “this factor weighs heavily in favor of fair use.” *Id.*
- Third Factor: The incorporating regulation does not specify that only certain provisions of this standard are incorporated by reference into law, nor does it indicate which specific provisions of the standard are relevant for regulatory compliance, suggesting that “a greater amount of the standard’s text might be fairly reproduced.” *Id.*
- Fourth Factor: Defendant’s reproductions have not had a “substantially adverse impact on the potential market for the originals,” nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm.” Memo Op. at 30–36 (internal quotation and citation marks omitted).
- Conclusion: Defendant may fairly reproduce this incorporated standard in its entirety.

138. ASTM F1014 (1992):

- The parties identify 46 C.F.R. § 199.05 (2014) as the incorporating by reference regulation, *see* Becker Decl. ¶ 57, Ex. 90; Wise Decl., Ex. 176, which incorporates the standard for §§ 199.175 and 195.35-5. Section 199.175 requires flashlights on survival craft and rescue boat equipment “must be a type I or type III that is constructed and marked in accordance with the American Society of Testing and Materials (ASTM) F 1014.” 46 C.F.R. § 199.175(a)(12). Section 195.35-5 requires that fireman flashlights “shall be Type II or Type III, constructed and marked in accordance with ASTM F 1014.” *Id.* § 195.35-5(c). These regulations do not specify that only certain provisions of ASTM F1014 (1992) are incorporated by reference into law, nor does it indicate which specific provisions of ASTM F1014 (1992) are relevant for compliance with the regulation.
- First Factor: There is no indication that Defendant stands to profit from republishing this standard; Defendant’s apparent purpose is to inform the public about the law and facilitate public debate. *See ASTM*, 896 F.3d at 449; Def’s 2d Mot. at 16. Defendant’s “attempt to freely distribute standards incorporated by reference into law qualify[es] as a use that further[s] the purposes of the fair use defense.” *ASTM*, 896 F.3d at 449. Further, the incorporated standard provides information essential for a private entity to comprehend its legal duties, which weighs heavily in favor of permitting Defendant’s reproduction. *See ASTM*, 896 F.3d at 450.
- Second Factor: The “express text of the law falls plainly outside the realm of copyright protection.” *ASTM*, 896 F.3d at 451. Here, the standard is incorporated into law without limitation such that “the consequence of the incorporation by reference is virtually indistinguishable from a situation in which the standard had been expressly copied into law.” *Id.* at 452. Accordingly, “this factor weighs heavily in favor of fair use.” *Id.*
- Third Factor: The incorporating regulation does not specify that only certain provisions of this standard are incorporated by reference into law, nor does it indicate which specific provisions of the standard are relevant for regulatory compliance, suggesting that “a greater amount of the standard’s text might be fairly reproduced.” *Id.*
- Fourth Factor: Defendant’s reproductions have not had a “substantially adverse impact on the potential market for the originals,” nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm.” Memo Op. at 30–36 (internal quotation and citation marks omitted).
- Conclusion: Defendant may fairly reproduce this incorporated standard in its entirety.

139. ASTM F1120 1987 (1998):

- The parties identify 46 C.F.R. § 56.01-2 (2004) as the incorporating by reference regulation, *see* Becker Decl. ¶ 57, Ex. 90; Wise Decl., Ex. 176, which incorporates the standard for 46 C.F.R. § 56.60-1. Section 56.60-1 provides that “[c]omponents made in accordance with,” ASTM F1120, “and made of materials complying with paragraph (a) this section may be used in piping systems within the limitations of the standards and within any further limitations specified in this subchapter.” 46 C.F.R. § 56.60-1(b), Table 56.60-1(B). The regulation does not specify that only certain

provisions of ASTM F1120 1987 (1998) are incorporated by reference into law, nor does it indicate which specific provisions of ASTM F1120 1987 (1998) are relevant for compliance with the regulation.

- First Factor: There is no indication that Defendant stands to profit from republishing this standard; Defendant's apparent purpose is to inform the public about the law and facilitate public debate. *See ASTM*, 896 F.3d at 449; Def's 2d Mot. at 16. Defendant's "attempt to freely distribute standards incorporated by reference into law qualifie[s] as a use that further[s] the purposes of the fair use defense." *ASTM*, 896 F.3d at 449. Further, the incorporated standard provides information essential for a private entity to comprehend its legal duties, which weighs heavily in favor of permitting Defendant's reproduction. *See ASTM*, 896 F.3d at 450.
- Second Factor: The "express text of the law falls plainly outside the realm of copyright protection." *ASTM*, 896 F.3d at 451. Here, the standard is incorporated into law without limitation such that "the consequence of the incorporation by reference is virtually indistinguishable from a situation in which the standard had been expressly copied into law." *Id.* at 452. Accordingly, "this factor weighs heavily in favor of fair use." *Id.*
- Third Factor: The incorporating regulation does not specify that only certain provisions of this standard are incorporated by reference into law, nor does it indicate which specific provisions of the standard are relevant for regulatory compliance, suggesting that "a greater amount of the standard's text might be fairly reproduced." *Id.*
- Fourth Factor: Defendant's reproductions have not had a "substantially adverse impact on the potential market for the originals," nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm." Memo Op. at 30–36 (internal quotation and citation marks omitted).
- Conclusion: Defendant may fairly reproduce this incorporated standard in its entirety.

140. ASTM F1155 (1998):

- The parties identify 33 C.F.R. § 154.106 (2014) as the incorporating by reference regulation, *see* Becker Decl. ¶ 57, Ex. 90; Wise Decl., Ex. 176, which incorporates the standard into 33 C.F.R. § 154, Appendix A, 7.1, 8.4. That section requires that the "detonation flame arrester housing, and other parts or bolting used for pressure retention, shall be constructed of materials listed in ASTM F 1155." The regulation does not specify that only certain provisions of ASTM F1155 (1998) are incorporated by reference into law, nor does it indicate which specific provisions of ASTM F1155 (1998) are relevant for compliance with the regulation.
- First Factor: There is no indication that Defendant stands to profit from republishing this standard; Defendant's apparent purpose is to inform the public about the law and facilitate public debate. *See ASTM*, 896 F.3d at 449; Def's 2d Mot. at 16. Defendant's "attempt to freely distribute standards incorporated by reference into law qualifie[s] as a use that further[s] the purposes of the fair use defense." *ASTM*, 896 F.3d at 449. Further, the incorporated standard provides information essential for a private entity to comprehend its legal duties, which weighs heavily in favor of permitting Defendant's reproduction. *See ASTM*, 896 F.3d at 450.

- Second Factor: The “express text of the law falls plainly outside the realm of copyright protection.” *ASTM*, 896 F.3d at 451. Here, the standard is incorporated into law without limitation such that “the consequence of the incorporation by reference is virtually indistinguishable from a situation in which the standard had been expressly copied into law.” *Id.* at 452. Accordingly, “this factor weighs heavily in favor of fair use.” *Id.*
- Third Factor: The incorporating regulation does not specify that only certain provisions of this standard are incorporated by reference into law, nor does it indicate which specific provisions of the standard are relevant for regulatory compliance, suggesting that “a greater amount of the standard’s text might be fairly reproduced.” *Id.*
- Fourth Factor: Defendant’s reproductions have not had a “substantially adverse impact on the potential market for the originals,” nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm.” Memo Op. at 30–36 (internal quotation and citation marks omitted).
- Conclusion: Defendant may fairly reproduce this incorporated standard in its entirety.

141. ASTM F1173 (1995):

- The parties identify 46 C.F.R. § 56.01-2 (1997) as the incorporating by reference regulation, *see* Becker Decl. ¶ 57, Ex. 90; Wise Decl., Ex. 176, which incorporates the standard into 46 C.F.R. §§ 56.60-1; 56.60-25. Section 56.60-1 provides that “[c]omponents made in accordance with,” ASTM F1173, “and made of materials complying with paragraph (a) this section may be used in piping systems within the limitations of the standards and within any further limitations specified in this subchapter.” 46 C.F.R. § 56.60-1(b), Table 56.60-1(B). Section 56.60-25 provides that “[m]aterials, such as glass reinforced resins not meeting ASTM F1173 or other plastics, may be authorized by the Commandant (G–MSE) if full mechanical and physical properties and chemical description are furnished.” *Id.* § 56.60-25(a)(10). These regulations do not specify that only certain provisions of ASTM F1173 (1995) are incorporated by reference into law, nor does it indicate which specific provisions of ASTM F1173 (1995) are relevant for compliance with the regulation.
- First Factor: There is no indication that Defendant stands to profit from republishing this standard; Defendant’s apparent purpose is to inform the public about the law and facilitate public debate. *See ASTM*, 896 F.3d at 449; Def’s 2d Mot. at 16. Defendant’s “attempt to freely distribute standards incorporated by reference into law qualifie[s] as a use that further[s] the purposes of the fair use defense.” *ASTM*, 896 F.3d at 449. Further, the incorporated standard provides information essential for a private entity to comprehend its legal duties, which weighs heavily in favor of permitting Defendant’s reproduction. *See ASTM*, 896 F.3d at 450.
- Second Factor: The “express text of the law falls plainly outside the realm of copyright protection.” *ASTM*, 896 F.3d at 451. Here, the standard is incorporated into law without limitation such that “the consequence of the incorporation by reference is virtually indistinguishable from a situation in which the standard had been expressly copied into law.” *Id.* at 452. Accordingly, “this factor weighs heavily in favor of fair use.” *Id.*

- Third Factor: The incorporating regulation does not specify that only certain provisions of this standard are incorporated by reference into law, nor does it indicate which specific provisions of the standard are relevant for regulatory compliance, suggesting that “a greater amount of the standard’s text might be fairly reproduced.” *Id.*
- Fourth Factor: Defendant’s reproductions have not had a “substantially adverse impact on the potential market for the originals,” nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm.” Memo Op. at 30–36 (internal quotation and citation marks omitted).
- Conclusion: Defendant may fairly reproduce this incorporated standard in its entirety.

142. ASTM F1321 (1992):

- The parties identify 46 C.F.R. § 28.40 (2011) as the incorporating by reference regulation, *see* Becker Decl. ¶ 57, Ex. 90; Wise Decl., Ex. 176, which incorporates the standard into 46 C.F.R. § 28.535. Section 28.535 requires the performance of an “inclining test” for each vessel for which the lightweight displacement and centers of gravity must be determined in order to do the calculations.” 46 C.F.R. § 28.535 (a). It provides that, with two exceptions, ASTM F 1321 may be used as guidance for any inclining test or deadweight survey. *Id.* § 28.535 (d). The regulation does not specify that only certain provisions of ASTM F1321 (1992) are incorporated by reference into law, nor does it indicate which specific provisions of ASTM F1321 (1992) are relevant for compliance with the regulation.
- First Factor: There is no indication that Defendant stands to profit from republishing this standard; Defendant’s apparent purpose is to inform the public about the law and facilitate public debate. *See ASTM*, 896 F.3d at 449; Def’s 2d Mot. at 16. Defendant’s “attempt to freely distribute standards incorporated by reference into law qualifie[s] as a use that further[s] the purposes of the fair use defense.” *ASTM*, 896 F.3d at 449. However, the court finds that the incorporated standard does not provide information essential for a private entity to comprehend its legal duties, but rather is incorporated as a discretionary procedure. Accordingly, “while knowing the content of this incorporated standard might help inform one’s understanding of the law,” it “is not essential to complying with any legal duty,” and thus, Defendant’s use is less transformative and “its wholesale copying, in turn, less justified.” *ASTM*, 896 F.3d at 450.
- Second Factor: The “express text of the law falls plainly outside the realm of copyright protection.” *ASTM*, 896 F.3d at 451. Here, the standard is incorporated into law without limitation such that “the consequence of the incorporation by reference is virtually indistinguishable from a situation in which the standard had been expressly copied into law.” *Id.* at 452. Accordingly, “this factor weighs heavily in favor of fair use.” *Id.*
- Third Factor: The incorporating regulation does not specify that only certain provisions of this standard are incorporated by reference into law, nor does it indicate which specific provisions of the standard are relevant for regulatory compliance, suggesting that “a greater amount of the standard’s text might be fairly reproduced.” *Id.*
- Fourth Factor: Defendant’s reproductions have not had a “substantially adverse impact

on the potential market for the originals,” nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm.” Memo Op. at 30–36 (internal quotation and citation marks omitted).

- Conclusion: Defendant may fairly reproduce this incorporated standard in its entirety.

143. ASTM F1323 (1998):

- The parties identify 46 C.F.R. § 63.05-1 (2005) as the incorporating by reference regulation, *see* Becker Decl. ¶ 57, Ex. 90; Wise Decl., Ex. 176, which incorporates the standard into 46 C.F.R. § 63.25-9. Section 63.25-9 requires that “[i]ncinerators installed on or after March 26, 1998 must meet the requirements of IMO resolution MEPC.59(33),” and that incinerators “in compliance with both ASTM F 1323 . . . and Annexes A1–A3 of IMO resolution MEPC.59(33) are considered to meet the requirements of IMO resolution MEPC.59(33).” 46 C.F.R. § 63.25-9. The regulation does not specify that only certain provisions of ASTM F1323 (1998) are incorporated by reference into law, nor does it indicate which specific provisions of ASTM F1323 (1998) are relevant for compliance with the regulation.
- First Factor: There is no indication that Defendant stands to profit from republishing this standard; Defendant’s apparent purpose is to inform the public about the law and facilitate public debate. *See ASTM*, 896 F.3d at 449; Def’s 2d Mot. at 16. Defendant’s “attempt to freely distribute standards incorporated by reference into law qualify[es] as a use that further[s] the purposes of the fair use defense.” *ASTM*, 896 F.3d at 449. Further, the incorporated standard provides information essential for a private entity to comprehend its legal duties, which weighs heavily in favor of permitting Defendant’s reproduction. *See ASTM*, 896 F.3d at 450.
- Second Factor: The “express text of the law falls plainly outside the realm of copyright protection.” *ASTM*, 896 F.3d at 451. Here, the standard is incorporated into law without limitation such that “the consequence of the incorporation by reference is virtually indistinguishable from a situation in which the standard had been expressly copied into law.” *Id.* at 452. Accordingly, “this factor weighs heavily in favor of fair use.” *Id.*
- Third Factor: The incorporating regulation does not specify that only certain provisions of this standard are incorporated by reference into law, nor does it indicate which specific provisions of the standard are relevant for regulatory compliance, suggesting that “a greater amount of the standard’s text might be fairly reproduced.” *Id.*
- Fourth Factor: Defendant’s reproductions have not had a “substantially adverse impact on the potential market for the originals,” nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm.” Memo Op. at 30–36 (internal quotation and citation marks omitted).
- Conclusion: Defendant may fairly reproduce this incorporated standard in its entirety.

144. ASTM F1471 (1993):

- The parties identify 40 C.F.R. § 86.1 (2008) as the incorporating by reference regulation, *see* Becker Decl. ¶ 57, Ex. 90; Wise Decl., Ex. 176, which incorporates the standard into 40 C.F.R. § 86.1310-2007. Section 86.1310-2007 requires that “[p]rimary dilution air shall be filtered at the dilution air inlet. The manufacturer of the primary dilution air filter shall state that the filter design has successfully achieved a minimum particle removal efficiency of 98% (less than 0.02 penetration) as determined using ASTM test method F 1471–93.” 40 C.F.R. § 86.1310-2007(b)(1)(iii)(B). The regulation does not specify that only certain provisions of ASTM F1471 (1993) are incorporated by reference into law, nor does it indicate which specific provisions of ASTM F1471 (1993) are relevant for compliance with the regulation.
- First Factor: There is no indication that Defendant stands to profit from republishing this standard; Defendant’s apparent purpose is to inform the public about the law and facilitate public debate. *See ASTM*, 896 F.3d at 449; Def’s 2d Mot. at 16. Defendant’s “attempt to freely distribute standards incorporated by reference into law qualify[es] as a use that further[s] the purposes of the fair use defense.” *ASTM*, 896 F.3d at 449. Further, the incorporated standard provides information essential for a private entity to comprehend its legal duties, which weighs heavily in favor of permitting Defendant’s reproduction. *See ASTM*, 896 F.3d at 450.
- Second Factor: The “express text of the law falls plainly outside the realm of copyright protection.” *ASTM*, 896 F.3d at 451. Here, the standard is incorporated into law without limitation such that “the consequence of the incorporation by reference is virtually indistinguishable from a situation in which the standard had been expressly copied into law.” *Id.* at 452. Accordingly, “this factor weighs heavily in favor of fair use.” *Id.*
- Third Factor: The incorporating regulation does not specify that only certain provisions of this standard are incorporated by reference into law, nor does it indicate which specific provisions of the standard are relevant for regulatory compliance, suggesting that “a greater amount of the standard’s text might be fairly reproduced.” *Id.*
- Fourth Factor: Defendant’s reproductions have not had a “substantially adverse impact on the potential market for the originals,” nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm.” Memo Op. at 30–36 (internal quotation and citation marks omitted).
- Conclusion: Defendant may fairly reproduce this incorporated standard in its entirety.

145. ASTM F1546 / F1546M (1996):

- Defendant identifies 46 C.F.R. § 162.027-1 (2004) as the incorporating by reference regulation. Becker Decl. ¶ 57, Ex. 90 at 107. Plaintiffs argue that Section 162.027 does not actually incorporate this standard because the regulation states that it incorporates “ASTM F 1546 [or] F 1546 M-96.” *See* Wise Decl., Ex. 176 at n.2 (“Where the ASTM standard referenced in the quoted C.F.R. language differs from the version of the ASTM standard that PRO reproduced and displayed, ASTM has highlighted and bolded that language.”); *id.* at 131 (highlighting and bolding text of ASTM F 1546 [or] F 1546 M-96). The court agrees with Defendant that 46 C.F.R. §

162.027-1 (2004) incorporates by reference ASTM F1546 / F1546M (1996) into 46 C.F.R. §§ 162.027-2; 162.027-3. Section 162.027-2 requires that “[e]ach combination solid stream and water spray firehose nozzle required to be approved under the provisions of this subpart must be designed, constructed, tested, and marked in accordance with the requirements of ASTM F 1546 (incorporated by reference, see §162.027-1),” that “[a]ll inspections and tests required by ASTM F 1546 (incorporated by reference, see §162.027-1) must be performed by an independent laboratory accepted by the Coast Guard under subpart 159.010 of this chapter,” and that the “independent laboratory shall prepare a report on the results of the testing and shall furnish the manufacturer with a copy of the test report upon completion of the testing required by ASTM F 1546.” 46 C.F.R. § 162.027-2(a)-(c). Section 162.027-3 states that “[f]irehose nozzles designed, constructed, tested, and marked in accordance with ASTM F 1546 (incorporated by reference, see § 162.027-1) are considered to be approved under the provisions of this chapter.” *Id.* § 162.027-3(a). These regulations do not specify that only certain provisions of ASTM F1546 / F1546M (1996) are incorporated by reference into law, nor do they indicate which specific provisions of ASTM F1546 / F1546M (1996) are relevant for compliance with the regulation.

- First Factor: There is no indication that Defendant stands to profit from republishing this standard; Defendant’s apparent purpose is to inform the public about the law and facilitate public debate. *See ASTM*, 896 F.3d at 449; Def’s 2d Mot. at 16. Defendant’s “attempt to freely distribute standards incorporated by reference into law qualify[es] as a use that further[s] the purposes of the fair use defense.” *ASTM*, 896 F.3d at 449. Further, the incorporated standard provides information essential for a private entity to comprehend its legal duties, which weighs heavily in favor of permitting Defendant’s reproduction. *See ASTM*, 896 F.3d at 450.
- Second Factor: The “express text of the law falls plainly outside the realm of copyright protection.” *ASTM*, 896 F.3d at 451. Here, the standard is incorporated into law without limitation such that “the consequence of the incorporation by reference is virtually indistinguishable from a situation in which the standard had been expressly copied into law.” *Id.* at 452. Accordingly, “this factor weighs heavily in favor of fair use.” *Id.*
- Third Factor: The incorporating regulation does not specify that only certain provisions of this standard are incorporated by reference into law, nor does it indicate which specific provisions of the standard are relevant for regulatory compliance, suggesting that “a greater amount of the standard’s text might be fairly reproduced.” *Id.*
- Fourth Factor: Defendant’s reproductions have not had a “substantially adverse impact on the potential market for the originals,” nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm.” Memo Op. at 30–36 (internal quotation and citation marks omitted).
- Conclusion: Defendant may fairly reproduce this incorporated standard in its entirety.

146. ASTM F1548 (1994):

- The parties identify 46 C.F.R. § 56.012 (1997) as the incorporating by reference regulation, *see* Becker Decl. ¶ 57, Ex. 90; Wise Decl., Ex. 176, which incorporates

the standard into 46 C.F.R. § 56.30-35. Section 56.30-35 requires that “[f]ittings to which this section applies must be designed, constructed, tested, and marked in accordance with ASTM F 1476–93 and ASTM F 1548–94.” 46 C.F.R. § 56.30-35(a). The regulation does not specify that only certain provisions of ASTM F1548 (1994) are incorporated by reference into law, nor does it indicate which specific provisions of ASTM F1548 (1994) are relevant for compliance with the regulation.

- First Factor: There is no indication that Defendant stands to profit from republishing this standard; Defendant’s apparent purpose is to inform the public about the law and facilitate public debate. *See ASTM*, 896 F.3d at 449; Def’s 2d Mot. at 16. Defendant’s “attempt to freely distribute standards incorporated by reference into law qualify[es] as a use that further[s] the purposes of the fair use defense.” *ASTM*, 896 F.3d at 449. Further, the incorporated standard provides information essential for a private entity to comprehend its legal duties, which weighs heavily in favor of permitting Defendant’s reproduction. *See ASTM*, 896 F.3d at 450.
- Second Factor: The “express text of the law falls plainly outside the realm of copyright protection.” *ASTM*, 896 F.3d at 451. Here, the standard is incorporated into law without limitation such that “the consequence of the incorporation by reference is virtually indistinguishable from a situation in which the standard had been expressly copied into law.” *Id.* at 452. Accordingly, “this factor weighs heavily in favor of fair use.” *Id.*
- Third Factor: The incorporating regulation does not specify that only certain provisions of this standard are incorporated by reference into law, nor does it indicate which specific provisions of the standard are relevant for regulatory compliance, suggesting that “a greater amount of the standard’s text might be fairly reproduced.” *Id.*
- Fourth Factor: Defendant’s reproductions have not had a “substantially adverse impact on the potential market for the originals,” nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm.” Memo Op. at 30–36 (internal quotation and citation marks omitted).
- Conclusion: Defendant may fairly reproduce this incorporated standard in its entirety.

147. ASTM F1951 (1999):

- The parties identify 36 C.F.R. § 1191, App. B (2014) as the incorporating by reference regulation, *see* Becker Decl. ¶ 57, Ex. 90; Wise Decl., Ex. 176, which incorporates the standard into 36 C.F.R. § 1008.2.6.1. Section 1008.2.6.1 requires that “[g]round surfaces shall comply with ASTM F1951,” and “shall be inspected and maintained regularly and frequently to ensure continued compliance with ASTM F1951.” 36 C.F.R. § 1008.2.6.1. The regulation does not specify that only certain provisions of ASTM F1951 (1999) are incorporated by reference into law, nor does it indicate which specific provisions of ASTM F1951 (1999) are relevant for compliance with the regulation.
- First Factor: There is no indication that Defendant stands to profit from republishing this standard; Defendant’s apparent purpose is to inform the public about the law and facilitate public debate. *See ASTM*, 896 F.3d at 449; Def’s 2d Mot. at 16. Defendant’s “attempt to freely distribute standards incorporated by reference into law qualify[es] as

a use that further[s] the purposes of the fair use defense.” *ASTM*, 896 F.3d at 449. Further, the incorporated standard provides information essential for a private entity to comprehend its legal duties, which weighs heavily in favor of permitting Defendant’s reproduction. *See ASTM*, 896 F.3d at 450.

- Second Factor: The “express text of the law falls plainly outside the realm of copyright protection.” *ASTM*, 896 F.3d at 451. Here, the standard is incorporated into law without limitation such that “the consequence of the incorporation by reference is virtually indistinguishable from a situation in which the standard had been expressly copied into law.” *Id.* at 452. Accordingly, “this factor weighs heavily in favor of fair use.” *Id.*
- Third Factor: The incorporating regulation does not specify that only certain provisions of this standard are incorporated by reference into law, nor does it indicate which specific provisions of the standard are relevant for regulatory compliance, suggesting that “a greater amount of the standard’s text might be fairly reproduced.” *Id.*
- Fourth Factor: Defendant’s reproductions have not had a “substantially adverse impact on the potential market for the originals,” nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm.” Memo Op. at 30–36 (internal quotation and citation marks omitted).
- Conclusion: Defendant may fairly reproduce this incorporated standard in its entirety.

148. ASTM F631 (1993):

- The parties identify 33 C.F.R. § 154.106 (2014) as the incorporating by reference regulation, *see* Becker Decl. ¶ 57, Ex. 90; Wise Decl., Ex. 176, which incorporates the standard into Appendix C, 6.3 to part 154. Appendix C, in part, requires that a facility owner or operator determine the effective daily recovery capacity of oil recovery devices. *See* 33 C.F.R. § App. C, 6.2. To satisfy this requirement, owners and operators may “submit adequate evidence that a different effective daily recovery capacity should be applied for a specific oil recovery device. Adequate evidence is actual verified performance data in spill conditions or tests using ASTM F 631 (incorporated by reference, *see* §154.106), or an equivalent test approved by the Coast Guard.” *Id.* § App. C, 6.3. The regulation does not specify that only certain provisions of ASTM F631 (1993) are incorporated by reference into law, nor does it indicate which specific provisions of ASTM F631 (1993) are relevant for compliance with the regulation.
- First Factor: There is no indication that Defendant stands to profit from republishing this standard; Defendant’s apparent purpose is to inform the public about the law and facilitate public debate. *See ASTM*, 896 F.3d at 449; Def’s 2d Mot. at 16. Defendant’s “attempt to freely distribute standards incorporated by reference into law qualifie[s] as a use that further[s] the purposes of the fair use defense.” *ASTM*, 896 F.3d at 449. Further, the incorporated standard provides information essential for a private entity to comprehend its legal duties, which weighs heavily in favor of permitting Defendant’s reproduction. *See ASTM*, 896 F.3d at 450.
- Second Factor: The “express text of the law falls plainly outside the realm of copyright protection.” *ASTM*, 896 F.3d at 451. Here, the standard is incorporated into law

without limitation such that “the consequence of the incorporation by reference is virtually indistinguishable from a situation in which the standard had been expressly copied into law.” *Id.* at 452. Accordingly, “this factor weighs heavily in favor of fair use.” *Id.*

- Third Factor: The incorporating regulation does not specify that only certain provisions of this standard are incorporated by reference into law, nor does it indicate which specific provisions of the standard are relevant for regulatory compliance, suggesting that “a greater amount of the standard’s text might be fairly reproduced.” *Id.*
- Fourth Factor: Defendant’s reproductions have not had a “substantially adverse impact on the potential market for the originals,” nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm.” Memo Op. at 30–36 (internal quotation and citation marks omitted).
- Conclusion: Defendant may fairly reproduce this incorporated standard in its entirety.

149. ASTM F631 1980 (1985):

- The parties identify 33 C.F.R. § 154.106 (1999) as the incorporating by reference regulation, *see* Becker Decl. ¶ 57, Ex. 90; Wise Decl., Ex. 176, which incorporates the standard into 33 C.F.R. § Appendix C. Appendix C, in part, requires that a facility owner or operator determine the effective daily recovery capacity of oil recovery devices. *See* 33 C.F.R. § App. C, 6.2. To satisfy this requirement, owners and operators may “submit adequate evidence that a different effective daily recovery capacity should be applied for a specific oil recovery device. Adequate evidence is actual verified performance data in spill conditions or tests using ASTM F 631, ASTM F 808, or an equivalent test approved by the Coast Guard.” *Id.* § App. C, 6.3. The regulation does not specify that only certain provisions of ASTM F631 1980 (1985) are incorporated by reference into law, nor does it indicate which specific provisions of ASTM F631 1980 (1985) are relevant for compliance with the regulation.
- First Factor: There is no indication that Defendant stands to profit from republishing this standard; Defendant’s apparent purpose is to inform the public about the law and facilitate public debate. *See ASTM*, 896 F.3d at 449; Def’s 2d Mot. at 16. Defendant’s “attempt to freely distribute standards incorporated by reference into law qualifie[s] as a use that further[s] the purposes of the fair use defense.” *ASTM*, 896 F.3d at 449. Further, the incorporated standard provides information essential for a private entity to comprehend its legal duties, which weighs heavily in favor of permitting Defendant’s reproduction. *See ASTM*, 896 F.3d at 450.
- Second Factor: The “express text of the law falls plainly outside the realm of copyright protection.” *ASTM*, 896 F.3d at 451. Here, the standard is incorporated into law without limitation such that “the consequence of the incorporation by reference is virtually indistinguishable from a situation in which the standard had been expressly copied into law.” *Id.* at 452. Accordingly, “this factor weighs heavily in favor of fair use.” *Id.*
- Third Factor: The incorporating regulation does not specify that only certain provisions of this standard are incorporated by reference into law, nor does it indicate which specific provisions of the standard are relevant for regulatory compliance, suggesting

that “a greater amount of the standard’s text might be fairly reproduced.” *Id.*

- Fourth Factor: Defendant’s reproductions have not had a “substantially adverse impact on the potential market for the originals,” nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm.” Memo Op. at 30–36 (internal quotation and citation marks omitted).
- Conclusion: Defendant may fairly reproduce this incorporated standard in its entirety.

150. ASTM F715 (1995):

- The parties identify 33 C.F.R. § 154.106 (2014) as the incorporating by reference regulation, *see* Becker Decl. ¶ 57, Ex. 90; Wise Decl., Ex. 176, which incorporates the standard into 33 C.F.R. § Appendix C, 2.3.1. Appendix C provides that the “Coast Guard may require documentation that the boom identified in a response plan meets the criteria in Table 1. Absent acceptable documentation, the Coast Guard may require that the boom be tested to demonstrate that it meets the criteria in Table 1.” 33 C.F.R. § App. C, 2.3.1. Further, it requires that such “[t]esting must be in accordance with ASTM F 715 (incorporated by reference, see §154.106), or other tests approved by the Coast Guard.” *Id.* The regulation does not specify that only certain provisions of ASTM F715 (1995) are incorporated by reference into law, nor does it indicate which specific provisions of ASTM F715 (1995) are relevant for compliance with the regulation.
- First Factor: There is no indication that Defendant stands to profit from republishing this standard; Defendant’s apparent purpose is to inform the public about the law and facilitate public debate. *See ASTM*, 896 F.3d at 449; Def’s 2d Mot. at 16. Defendant’s “attempt to freely distribute standards incorporated by reference into law qualifie[s] as a use that further[s] the purposes of the fair use defense.” *ASTM*, 896 F.3d at 449. However, the court finds that the incorporated standard does not provide information essential for a private entity to comprehend its legal duties, but rather is incorporated as a discretionary procedure because entities may comply with the regulation by relying on “other test approved by the Coast Guard.” 33 C.F.R. § App. C, 2.3.1. Accordingly, “while knowing the content of this incorporated standard might help inform one’s understanding of the law,” it “is not essential to complying with any legal duty,” and thus, Defendant’s use is less transformative and “its wholesale copying, in turn, less justified.” *ASTM*, 896 F.3d at 450.
- Second Factor: The “express text of the law falls plainly outside the realm of copyright protection.” *ASTM*, 896 F.3d at 451. Here, the standard is incorporated into law without limitation such that “the consequence of the incorporation by reference is virtually indistinguishable from a situation in which the standard had been expressly copied into law.” *Id.* at 452. Accordingly, “this factor weighs heavily in favor of fair use.” *Id.*
- Third Factor: The incorporating regulation does not specify that only certain provisions of this standard are incorporated by reference into law, nor does it indicate which specific provisions of the standard are relevant for regulatory compliance, suggesting that “a greater amount of the standard’s text might be fairly reproduced.” *Id.*
- Fourth Factor: Defendant’s reproductions have not had a “substantially adverse impact

on the potential market for the originals,” nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm.” Memo Op. at 30–36 (internal quotation and citation marks omitted).

- Conclusion: Defendant may fairly reproduce this incorporated standard in its entirety.

151. ASTM F715 1981 (1986):

- The parties identify 33 C.F.R. § 154.106 (1999) as the incorporating by reference regulation, *see* Becker Decl. ¶ 57, Ex. 90; Wise Decl., Ex. 176, which incorporates the standard into 33 C.F.R. § Appendix C. Appendix C, in part, requires that “[f]acilities handling, storing, or transporting oil in more than one operating environment as indicated in Table 1 of this appendix must identify equipment capable of successfully functioning in each operating environment.” 33 C.F.R. § Appendix C, 2.2. It further provides that the “[a]bsent acceptable documentation [that the boom identified in a response plan meets applicable criteria], the Coast Guard may require that the boom be tested to demonstrate that it meets the criteria in Table 1. Testing must be in accordance with ASTM F 715, ASTM F 989, or other tests approved by the Coast Guard.” *See* 33 C.F.R. § App. C, 2.3.1. The regulation does not specify that only certain provisions of ASTM F715 1981 (1986) are incorporated by reference into law, nor does it indicate which specific provisions of ASTM F715 1981 (1986) are relevant for compliance with the regulation.
- First Factor: There is no indication that Defendant stands to profit from republishing this standard; Defendant’s apparent purpose is to inform the public about the law and facilitate public debate. *See ASTM*, 896 F.3d at 449; Def’s 2d Mot. at 16. Defendant’s “attempt to freely distribute standards incorporated by reference into law qualifie[s] as a use that further[s] the purposes of the fair use defense.” *ASTM*, 896 F.3d at 449. However, the court finds that the incorporated standard does not provide information essential for a private entity to comprehend its legal duties, but rather is incorporated as a discretionary procedure because entities may comply with the regulation by relying on “other test approved by the Coast Guard.” 33 C.F.R. § App. C, 2.3.1. Accordingly, “while knowing the content of this incorporated standard might help inform one’s understanding of the law,” it “is not essential to complying with any legal duty,” and thus, Defendant’s use is less transformative and “its wholesale copying, in turn, less justified.” *ASTM*, 896 F.3d at 450.
- Second Factor: The “express text of the law falls plainly outside the realm of copyright protection.” *ASTM*, 896 F.3d at 451. Here, the standard is incorporated into law without limitation such that “the consequence of the incorporation by reference is virtually indistinguishable from a situation in which the standard had been expressly copied into law.” *Id.* at 452. Accordingly, “this factor weighs heavily in favor of fair use.” *Id.*
- Third Factor: The incorporating regulation does not specify that only certain provisions of this standard are incorporated by reference into law, nor does it indicate which specific provisions of the standard are relevant for regulatory compliance, suggesting that “a greater amount of the standard’s text might be fairly reproduced.” *Id.*
- Fourth Factor: Defendant’s reproductions have not had a “substantially adverse impact

on the potential market for the originals,” nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm.” Memo Op. at 30–36 (internal quotation and citation marks omitted).

- Conclusion: Defendant may fairly reproduce this incorporated standard in its entirety.

152. ASTM G151 (1997):

- The parties identify 49 C.F.R. § 571.5 (2014) as the incorporating by reference regulation, *see* Becker Decl. ¶ 57, Ex. 90; Wise Decl., Ex. 176, which incorporates the standard into 49 C.F.R. § 571.106. Section 571.106 requires that ultraviolet light resistance testing using an accelerated weathering test machine be in accordance with ASTM G151-97 and two other standards. 49 C.F.R. § 571.106, S12.7(a)-(b). The regulation does not specify that only certain provisions of ASTM G151 (1997) are incorporated by reference into law, nor does it indicate which specific provisions of ASTM G151 (1997) are relevant for compliance with the regulation.
- First Factor: There is no indication that Defendant stands to profit from republishing this standard; Defendant’s apparent purpose is to inform the public about the law and facilitate public debate. *See ASTM*, 896 F.3d at 449; Def’s 2d Mot. at 16. Defendant’s “attempt to freely distribute standards incorporated by reference into law qualify[es] as a use that further[s] the purposes of the fair use defense.” *ASTM*, 896 F.3d at 449. Further, the incorporated standard provides information essential for a private entity to comprehend its legal duties, which weighs heavily in favor of permitting Defendant’s reproduction. *See ASTM*, 896 F.3d at 450.
- Second Factor: The “express text of the law falls plainly outside the realm of copyright protection.” *ASTM*, 896 F.3d at 451. Here, the standard is incorporated into law without limitation such that “the consequence of the incorporation by reference is virtually indistinguishable from a situation in which the standard had been expressly copied into law.” *Id.* at 452. Accordingly, “this factor weighs heavily in favor of fair use.” *Id.*
- Third Factor: The incorporating regulation does not specify that only certain provisions of this standard are incorporated by reference into law, nor does it indicate which specific provisions of the standard are relevant for regulatory compliance, suggesting that “a greater amount of the standard’s text might be fairly reproduced.” *Id.*
- Fourth Factor: Defendant’s reproductions have not had a “substantially adverse impact on the potential market for the originals,” nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm.” Memo Op. at 30–36 (internal quotation and citation marks omitted).
- Conclusion: Defendant may fairly reproduce this incorporated standard in its entirety.

153. ASTM G21 (1990):

- The parties identify 7 C.F.R. § 1755.910 (2014) as the incorporating by reference regulation, *see* Becker Decl. ¶ 57, Ex. 90; Wise Decl., Ex. 176, which incorporates the standard. *See* 7 C.F.R. § 1755.910(a)(7). Section 1755.910 requires that “[n]onmetallic housing materials shall have a fungus growth rating no greater than one according to ASTM G 21–90,” and that “[f]ungi resistance of nonmetallic housing

materials shall be tested according to the procedures of ASTM G 21–90.” *Id.* § 1755.910(d)(5)(iv), (e)(1)(vii). The regulation does not specify that only certain provisions of ASTM G21 (1990) are incorporated by reference into law, nor does it indicate which specific provisions of ASTM G21 (1990) are relevant for compliance with the regulation.

- First Factor: There is no indication that Defendant stands to profit from republishing this standard; Defendant’s apparent purpose is to inform the public about the law and facilitate public debate. *See ASTM*, 896 F.3d at 449; Def’s 2d Mot. at 16. Defendant’s “attempt to freely distribute standards incorporated by reference into law qualifie[s] as a use that further[s] the purposes of the fair use defense.” *ASTM*, 896 F.3d at 449. Further, the incorporated standard provides information essential for a private entity to comprehend its legal duties, which weighs heavily in favor of permitting Defendant’s reproduction. *See ASTM*, 896 F.3d at 450.
- Second Factor: The “express text of the law falls plainly outside the realm of copyright protection.” *ASTM*, 896 F.3d at 451. Here, the standard is incorporated into law without limitation such that “the consequence of the incorporation by reference is virtually indistinguishable from a situation in which the standard had been expressly copied into law.” *Id.* at 452. Accordingly, “this factor weighs heavily in favor of fair use.” *Id.*
- Third Factor: The incorporating regulation does not specify that only certain provisions of this standard are incorporated by reference into law, nor does it indicate which specific provisions of the standard are relevant for regulatory compliance, suggesting that “a greater amount of the standard’s text might be fairly reproduced.” *Id.*
- Fourth Factor: Defendant’s reproductions have not had a “substantially adverse impact on the potential market for the originals,” nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm.” Memo Op. at 30–36 (internal quotation and citation marks omitted).
- Conclusion: Defendant may fairly reproduce this incorporated standard in its entirety.

II. GROUP 2: STANDARDS WHICH ARE IDENTICAL IN TEXT TO STANDARDS INCORPORATED BY REFERENCE INTO LAW

154. ASTM A611-72 (1979)

- Defendant identifies 24 C.F.R. § (Parts 200 to 499) (2005) as the incorporating by reference regulation, *see* Becker Decl. ¶ 57, Ex. 90 at 18, which incorporates ASTM A611-72 for 24 C.F.R. § Part 200, Subpart S. *See* 24 C.F.R. § (Parts 200 to 499). While the regulation incorporates ASTM A611-72, not the 1979 version that Defendant published, the text of the two standards is identical. *See* Pls. 2d SMF ¶ 35 (“Standards that have been reapproved without change are indicated by the year of last reapproval in parentheses as part of the designation number (e.g., C5-79 (1997) indicates that C5 was reapproved in 1997.”) (citing O’Brien Decl. Ex. 3 at 1349); ECF No. 203-3, Def. Statement of Disputed Facts at ¶ 35 (no objection); Def. Mot. at 10 (contending that the “only difference between what was posted and the document cited

in the C.F.R. is that the title adds a second, reissue, date in parentheses. All other text is identical”) (citing Def. 2d SMF ¶ 84). The regulation does not specify that only certain provisions of ASTM A611-72 are incorporated by reference into law, nor does it indicate which specific provisions of A611-72 are relevant for compliance with the regulation.

- First Factor: There is no indication that Defendant stands to profit from republishing this standard; Defendant’s apparent purpose is to inform the public about the law and facilitate public debate. *See ASTM*, 896 F.3d at 449; Def’s 2d Mot. at 16. Defendant’s “attempt to freely distribute” this standard, the text of which has been incorporated by reference into law, “qualifie[s] as a use that further[s] the purposes of the fair use defense.” *ASTM*, 896 F.3d at 449. However, the court finds that the incorporated standard does not provide information essential for a private entity to comprehend its legal duties, but rather is incorporated as a reference procedure. Accordingly, “while knowing the content of this incorporated standard might help inform one’s understanding of the law,” it “is not essential to complying with any legal duty,” and thus, Defendant’s use is less transformative and “its wholesale copying, in turn, less justified.” *ASTM*, 896 F.3d at 450.
- Second Factor: The “express text of the law falls plainly outside the realm of copyright protection.” *ASTM*, 896 F.3d at 451. Here, the text published by Defendant is identical to text that was incorporated into law without limitation, such that “the consequence of the incorporation by reference is virtually indistinguishable from a situation in which the standard had been expressly copied into law.” *Id.* at 452. Accordingly, “this factor weighs heavily in favor of fair use.” *Id.*
- Third Factor: The incorporating regulation does not specify that only certain provisions of the text in ASTM A611-72 are incorporated by reference into law, nor does it indicate which specific provisions of the standard are relevant for regulatory compliance, suggesting that “a greater amount of the standard’s text might be fairly reproduced.” *Id.*
- Fourth Factor: Defendant’s reproductions have not had a “substantially adverse impact on the potential market for the originals,” nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm.” Memo Op. at 30–36 (internal quotation and citation marks omitted).
- Conclusion: Defendant may fairly reproduce the text of ASTM A611-72 (1979) in its entirety.

155. ASTM C5 1979 (1997):

- Defendant identifies 24 C.F.R. § (Parts 200 to 499) (2005) as the incorporating by reference regulation, *see* Becker Decl. ¶ 57, Ex. 90 at 18, which incorporates ASTM C5-79 for 24 C.F.R. § Part 200, Subpart S. *See* 24 C.F.R. § (Parts 200 to 499). While the regulation incorporates ASTM C5-79, not the 1997 version that Defendant published, the text of the two standards is identical. *See* Pls. 2d SMF ¶ 35; Def. Statement of Disputed Facts at ¶ 35 (no objection); Def. Mot. at 10 (citing Def. 2d SMF ¶ 84). The regulation does not specify that only certain provisions of ASTM C5-79 are

incorporated by reference into law, nor does it indicate which specific provisions of ASTM C5-79 are relevant for compliance with the regulation.

- First Factor: There is no indication that Defendant stands to profit from republishing this standard; Defendant's apparent purpose is to inform the public about the law and facilitate public debate. *See ASTM*, 896 F.3d at 449; Def's 2d Mot. at 16. Defendant's "attempt to freely distribute" this standard, the text of which has been incorporated by reference into law, "qualifie[s] as a use that further[s] the purposes of the fair use defense." *ASTM*, 896 F.3d at 449. However, the court finds that the incorporated standard does not provide information essential for a private entity to comprehend its legal duties, but rather is incorporated as a reference procedure. Accordingly, "while knowing the content of this incorporated standard might help inform one's understanding of the law," it "is not essential to complying with any legal duty," and thus, Defendant's use is less transformative and "its wholesale copying, in turn, less justified." *ASTM*, 896 F.3d at 450.
- Second Factor: The "express text of the law falls plainly outside the realm of copyright protection." *ASTM*, 896 F.3d at 451. Here, the text published by Defendant is identical to text that was incorporated into law without limitation, such that "the consequence of the incorporation by reference is virtually indistinguishable from a situation in which the standard had been expressly copied into law." *Id.* at 452. Accordingly, "this factor weighs heavily in favor of fair use." *Id.*
- Third Factor: The incorporating regulation does not specify that only certain provisions of the text in ASTM C5-79 are incorporated by reference into law, nor does it indicate which specific provisions of the standard are relevant for regulatory compliance, suggesting that "a greater amount of the standard's text might be fairly reproduced." *Id.*
- Fourth Factor: Defendant's reproductions have not had a "substantially adverse impact on the potential market for the originals," nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm." Memo Op. at 30–36 (internal quotation and citation marks omitted).
- Conclusion: Defendant may fairly reproduce the text of ASTM C5-79 (1997) in its entirety.

156. ASTM C564 1970 (1982):

- Defendant identifies 24 C.F.R. § (Parts 200 to 499) (2005) as the incorporating by reference regulation, *see* Becker Decl. ¶ 57, Ex. 90 at 18, which incorporates ASTM C564-70 for 24 C.F.R. § Part 200, Subpart S. *See* 24 C.F.R. § (Parts 200 to 499). While the regulation incorporates ASTM C564-70, not the 1982 version that Defendant published, the text of the two standards is identical. *See* Pls. 2d SMF ¶ 35; Def. Statement of Disputed Facts at ¶ 35 (no objection); Def. Mot. at 10 (citing Def. 2d SMF ¶ 84). The regulation does not specify that only certain provisions of ASTM C564-70 are incorporated by reference into law, nor does it indicate which specific provisions of ASTM C564-70 are relevant for compliance with the regulation.
- First Factor: There is no indication that Defendant stands to profit from republishing this standard; Defendant's apparent purpose is to inform the public about the law and

facilitate public debate. *See ASTM*, 896 F.3d at 449; Def’s 2d Mot. at 16. Defendant’s “attempt to freely distribute” this standard, the text of which has been incorporated by reference into law, “qualifie[s] as a use that further[s] the purposes of the fair use defense.” *ASTM*, 896 F.3d at 449. However, the court finds that the incorporated standard does not provide information essential for a private entity to comprehend its legal duties, but rather is incorporated as a reference procedure. Accordingly, “while knowing the content of this incorporated standard might help inform one’s understanding of the law,” it “is not essential to complying with any legal duty,” and thus, Defendant’s use is less transformative and “its wholesale copying, in turn, less justified.” *ASTM*, 896 F.3d at 450.

- Second Factor: The “express text of the law falls plainly outside the realm of copyright protection.” *ASTM*, 896 F.3d at 451. Here, the text published by Defendant is identical to text that was incorporated into law without limitation, such that “the consequence of the incorporation by reference is virtually indistinguishable from a situation in which the standard had been expressly copied into law.” *Id.* at 452. Accordingly, “this factor weighs heavily in favor of fair use.” *Id.*
- Third Factor: The incorporating regulation does not specify that only certain provisions of the text in ASTM C564-70 are incorporated by reference into law, nor does it indicate which specific provisions of the standard are relevant for regulatory compliance, suggesting that “a greater amount of the standard’s text might be fairly reproduced.” *Id.*
- Fourth Factor: Defendant’s reproductions have not had a “substantially adverse impact on the potential market for the originals,” nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm.” Memo Op. at 30–36 (internal quotation and citation marks omitted).
- Conclusion: Defendant may fairly reproduce the text of ASTM C564-70 (1982) in its entirety.

157. ASTM D1298 (1999):

- Defendant identifies 40 C.F.R. § 600.011 (2013) as the incorporating by reference regulation, *see* Becker Decl. ¶ 57, Ex. 90 at 18, which incorporates ASTM D 1298-99 (2005) for §§ 600.113–08(f) and (g), 600.113–12(f) and (g), 600.510 – 08(g), and 600.510–12(g). While the regulation incorporates ASTM D 1298-99 (2005), not the 1999 version that Defendant published, the text of the two standards is identical. *See* Pls. 2d SMF ¶ 35; Def. Statement of Disputed Facts at ¶ 35 (no objection); Def. Mot. at 10 (citing Def. 2d SMF ¶ 84).

Section 600.113–08(f) requires that fuels samples and methanol test fuel “shall be analyzed to determine . . . Specific gravity per ASTM D 1298. 40 C.F.R. §§ 600.011(f)(1)(i) – (2)(ii). *See also id.* § 600.113-12(f)(2) (requiring same with respect to gasoline test fuel properties); *id.* § 600.113-12(f)(4) (requiring same with respect to ethanol test fuel). Section 600.510 requires that the “density for alcohol fuels shall be determined per ASTM D 1298.” *Id.* § 600.510-12(g)(1)(ii)(B). The regulation does not specify that only certain provisions of ASTM D 1298-99 (2005) are incorporated by reference into law, nor does it indicate which specific provisions of ASTM D 1298-

99 (2005) are relevant for compliance with the regulation.

- First Factor: There is no indication that Defendant stands to profit from republishing this standard; Defendant's apparent purpose is to inform the public about the law and facilitate public debate. *See ASTM*, 896 F.3d at 449; Def's 2d Mot. at 16. Defendant's "attempt to freely distribute standards incorporated by reference into law qualifie[s] as a use that further[s] the purposes of the fair use defense." *ASTM*, 896 F.3d at 449. *See also id.* at 451 ("Faithfully reproducing the *relevant text* of a technical standard incorporated by reference for purposes of informing the public about the law obviously has great value.") (emphasis added). Further, the incorporated standard provides information essential for a private entity to comprehend its legal duties, which weighs heavily in favor of permitting Defendant's reproduction. *See id.* at 450.
- Second Factor: The "express text of the law falls plainly outside the realm of copyright protection." *ASTM*, 896 F.3d at 451. Here, the text published by Defendant is identical to text that was incorporated into law without limitation, such that "the consequence of the incorporation by reference is virtually indistinguishable from a situation in which the standard had been expressly copied into law." *Id.* at 452. Accordingly, "this factor weighs heavily in favor of fair use." *Id.*
- Third Factor: The incorporating regulation does not specify that only certain provisions of the text in ASTM D 1298-99 (2005) are incorporated by reference into law, nor does it indicate which specific provisions of the standard are relevant for regulatory compliance, suggesting that "a greater amount of the standard's text might be fairly reproduced." *Id.*
- Fourth Factor: Defendant's reproductions have not had a "substantially adverse impact on the potential market for the originals," nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm." Memo Op. at 30–36 (internal quotation and citation marks omitted).
- Conclusion: Defendant may fairly reproduce the text of ASTM D 1298-99 in its entirety.

158. ASTM D1412 1993 (1997):

- Defendant identifies 30 C.F.R. § 870.18 (1999) as the incorporating by reference regulation, *see* Becker Decl. ¶ 57, Ex. 90 at 18, which incorporates ASTM D1412-93 for §§ 870.19 and 870.20. While the regulation incorporates ASTM D1412-93, not the 1997 version that Defendant published, the text of the two standards is identical. *See* Pls. 2d SMF ¶ 35; Def. Statement of Disputed Facts at ¶ 35 (no objection); Def. Mot. at 10 (citing Def. 2d SMF ¶ 84).

Section 870.19 requires an operator who mined coal after June 1988 to deduct the weight of excess moisture in the coal to determine reclamation fees owed under 30 CFR § 870.12(b)(3)(i). Relevant to that calculation is a determination of "equilibrium moisture" which "means the moisture in the coal as determined through ASTM standard D1412-93." 30 CFR § 870.18(c)(7). The regulation does not specify that only certain provisions of ASTM D1412-93 are incorporated by reference into law, nor does it indicate which specific provisions of ASTM D1412-93 are relevant for compliance with the regulation.

- First Factor: There is no indication that Defendant stands to profit from republishing this standard; Defendant's apparent purpose is to inform the public about the law and facilitate public debate. *See ASTM*, 896 F.3d at 449; Def's 2d Mot. at 16. Defendant's "attempt to freely distribute standards incorporated by reference into law qualifie[s] as a use that further[s] the purposes of the fair use defense." *ASTM*, 896 F.3d at 449. *See also id.* at 451 ("Faithfully reproducing the *relevant text* of a technical standard incorporated by reference for purposes of informing the public about the law obviously has great value.") (emphasis added). Further, the incorporated standard provides information essential for a private entity to comprehend its legal duties, which weighs heavily in favor of permitting Defendant's reproduction. *See id.* at 450.
- Second Factor: The "express text of the law falls plainly outside the realm of copyright protection." *ASTM*, 896 F.3d at 451. Here, the text published by Defendant is identical to text that was incorporated into law without limitation, such that "the consequence of the incorporation by reference is virtually indistinguishable from a situation in which the standard had been expressly copied into law." *Id.* at 452. Accordingly, "this factor weighs heavily in favor of fair use." *Id.*
- Third Factor: The incorporating regulation does not specify that only certain provisions of the text in ASTM D1412-93 are incorporated by reference into law, nor does it indicate which specific provisions of the standard are relevant for regulatory compliance, suggesting that "a greater amount of the standard's text might be fairly reproduced." *Id.*
- Fourth Factor: Defendant's reproductions have not had a "substantially adverse impact on the potential market for the originals," nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm." Memo Op. at 30–36 (internal quotation and citation marks omitted).
- Conclusion: Defendant may fairly reproduce the text of ASTM D1412-93 (1997) in its entirety.

159. ASTM D2013 1986 (1994):

- Defendant identifies 40 C.F.R. § 60.17 (2011) as the incorporating by reference regulation, *see* Becker Decl. ¶ 57, Ex. 90 at 18, which incorporates ASTM D2013-72, 86 for appendix A: Method 19, Section 12.5.2.1.3. While the regulation incorporates ASTM D2013-72, 86, not the 1994 version that Defendant published, the text of the two standards is identical. *See* Pls. 2d SMF ¶ 35; Def. Statement of Disputed Facts at ¶ 35 (no objection); Def. Mot. at 10 (citing Def. 2d SMF ¶ 84).

Appendix A: Method 19, Section 12.5.2.1.3 requires that when determining the overall reduction in potential sulfur dioxide emission, subject entities shall use ASTM D2013-72, 86 to prepare the sample. The regulation does not specify that only certain provisions of ASTM D2013-72, 86 are incorporated by reference into law, nor does it indicate which specific provisions of ASTM D2013-72, 86 are relevant for compliance with the regulation.

- First Factor: There is no indication that Defendant stands to profit from republishing this standard; Defendant's apparent purpose is to inform the public about the law and facilitate public debate. *See ASTM*, 896 F.3d at 449; Def's 2d Mot. at 16. Defendant's

“attempt to freely distribute standards incorporated by reference into law qualifie[s] as a use that further[s] the purposes of the fair use defense.” *ASTM*, 896 F.3d at 449. *See also id.* at 451 (“Faithfully reproducing the *relevant text* of a technical standard incorporated by reference for purposes of informing the public about the law obviously has great value.”) (emphasis added). Further, the incorporated standard provides information essential for a private entity to comprehend its legal duties, which weighs heavily in favor of permitting Defendant’s reproduction. *See id.* at 450.

- Second Factor: The “express text of the law falls plainly outside the realm of copyright protection.” *ASTM*, 896 F.3d at 451. Here, the text published by Defendant is identical to text that was incorporated into law without limitation, such that “the consequence of the incorporation by reference is virtually indistinguishable from a situation in which the standard had been expressly copied into law.” *Id.* at 452. Accordingly, “this factor weighs heavily in favor of fair use.” *Id.*
- Third Factor: The incorporating regulation does not specify that only certain provisions of the text in ASTM D2013-72, 86 are incorporated by reference into law, nor does it indicate which specific provisions of the standard are relevant for regulatory compliance, suggesting that “a greater amount of the standard’s text might be fairly reproduced.” *Id.*
- Fourth Factor: Defendant’s reproductions have not had a “substantially adverse impact on the potential market for the originals,” nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm.” Memo Op. at 30–36 (internal quotation and citation marks omitted).
- Conclusion: Defendant may fairly reproduce the text of ASTM D2013-86 (1994) in its entirety.

160. ASTM D2724 1987 (1995):

- Defendant identifies 49 C.F.R. § 238, Appendix B (2010) as the incorporating by reference regulation, *see* Becker Decl. ¶ 57, Ex. 90 at 18, which incorporates ASTM D 2724-87 into Appendix B. While the regulation incorporates ASTM D 2724-87, not the 1995 version that Defendant published, the text of the two standards is identical. *See* Pls. 2d SMF ¶ 35; Def. Statement of Disputed Facts at ¶ 35 (no objection); Def. Mot. at 10 (citing Def. 2d SMF ¶ 84).

Appendix B requires that “surface flammability and smoke emission characteristics shall be demonstrated to be permanent by dry-cleaning, if appropriate, according to ASTM D 2724–87.” 49 C.F.R. § 238, App. B n.7. The regulation does not specify that only certain provisions of ASTM D 2724-87 are incorporated by reference into law, nor does it indicate which specific provisions of ASTM D 2724-87 are relevant for compliance with the regulation.

- First Factor: There is no indication that Defendant stands to profit from republishing this standard; Defendant’s apparent purpose is to inform the public about the law and facilitate public debate. *See ASTM*, 896 F.3d at 449; Def’s 2d Mot. at 16. Defendant’s “attempt to freely distribute standards incorporated by reference into law qualifie[s] as a use that further[s] the purposes of the fair use defense.” *ASTM*, 896 F.3d at 449. *See also id.* at 451 (“Faithfully reproducing the *relevant text* of a technical standard

incorporated by reference for purposes of informing the public about the law obviously has great value.”) (emphasis added). Further, the incorporated standard provides information essential for a private entity to comprehend its legal duties, which weighs heavily in favor of permitting Defendant’s reproduction. *See id.* at 450.

- Second Factor: The “express text of the law falls plainly outside the realm of copyright protection.” *ASTM*, 896 F.3d at 451. Here, the text published by Defendant is identical to text that was incorporated into law without limitation, such that “the consequence of the incorporation by reference is virtually indistinguishable from a situation in which the standard had been expressly copied into law.” *Id.* at 452. Accordingly, “this factor weighs heavily in favor of fair use.” *Id.*
- Third Factor: The incorporating regulation does not specify that only certain provisions of the text in ASTM D 2724-87 are incorporated by reference into law, nor does it indicate which specific provisions of the standard are relevant for regulatory compliance, suggesting that “a greater amount of the standard’s text might be fairly reproduced.” *Id.*
- Fourth Factor: Defendant’s reproductions have not had a “substantially adverse impact on the potential market for the originals,” nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm.” Memo Op. at 30–36 (internal quotation and citation marks omitted).
- Conclusion: Defendant may fairly reproduce the text of ASTM D 2724-87 (1995) in its entirety.

161. ASTM D3173 1987 (1996):

- Defendant identifies 40 C.F.R. § 60.17 (2011) as the incorporating by reference regulation, *see* Becker Decl. ¶ 57, Ex. 90 at 18, which incorporates ASTM D3173-73, 87 for appendix A: Method 19, Section 12.5.2.1.3. While the regulation incorporates ASTM D3173-73, 87, not the 1996 version that Defendant published, the text of the two standards is identical. *See* Pls. 2d SMF ¶ 35; Def. Statement of Disputed Facts at ¶ 35 (no objection); Def. Mot. at 10 (citing Def. 2d SMF ¶ 84).

Appendix A: Method 19, Section 12.5.2.1.3 requires that when determining moisture content in the context of determining overall reduction in sulfur dioxide emissions, entities shall use ASTM D3173-73, 87. The regulation does not specify that only certain provisions of ASTM D3173-73, 87 are incorporated by reference into law, nor does it indicate which specific provisions of ASTM D3173-73, 87 are relevant for compliance with the regulation.

- First Factor: There is no indication that Defendant stands to profit from republishing this standard; Defendant’s apparent purpose is to inform the public about the law and facilitate public debate. *See ASTM*, 896 F.3d at 449; Def’s 2d Mot. at 16. Defendant’s “attempt to freely distribute standards incorporated by reference into law qualifie[s] as a use that further[s] the purposes of the fair use defense.” *ASTM*, 896 F.3d at 449. *See also id.* at 451 (“Faithfully reproducing the *relevant text* of a technical standard incorporated by reference for purposes of informing the public about the law obviously has great value.”) (emphasis added). Further, the incorporated standard provides information essential for a private entity to comprehend its legal duties, which weighs

heavily in favor of permitting Defendant's reproduction. *See id.* at 450.

- Second Factor: The “express text of the law falls plainly outside the realm of copyright protection.” *ASTM*, 896 F.3d at 451. Here, the text published by Defendant is identical to text that was incorporated into law without limitation, such that “the consequence of the incorporation by reference is virtually indistinguishable from a situation in which the standard had been expressly copied into law.” *Id.* at 452. Accordingly, “this factor weighs heavily in favor of fair use.” *Id.*
- Third Factor: The incorporating regulation does not specify that only certain provisions of the text in ASTM D3173-73, 87 are incorporated by reference into law, nor does it indicate which specific provisions of the standard are relevant for regulatory compliance, suggesting that “a greater amount of the standard's text might be fairly reproduced.” *Id.*
- Fourth Factor: Defendant's reproductions have not had a “substantially adverse impact on the potential market for the originals,” nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm.” Memo Op. at 30–36 (internal quotation and citation marks omitted).
- Conclusion: Defendant may fairly reproduce the text of ASTM D3173-87 (1996) in its entirety.

162. ASTM D3178 1989 (1997):

- Defendant identifies 40 C.F.R. § 60.17 (2011) as the incorporating by reference regulation, *see* Becker Decl. ¶ 57, Ex. 90 at 18, which incorporates ASTM D3178-73, 79, 89 for § 60.45(f)(5)(i). While the regulation incorporates ASTM D3178-73, 79, 89, not the 1997 version that Defendant published, the text of the two standards is identical. *See* Pls. 2d SMF ¶ 35; Def. Statement of Disputed Facts at ¶ 35 (no objection); Def. Mot. at 10 (citing Def. 2d SMF ¶ 84).

Section 60.45(f)(5) provides that an owner or operator “may use” the specified equation “to determine an F factor . . . or Fc factor . . . in lieu of the F or Fc factors specific in paragraph (f)(4) of this section. Section 60.45(f)(5)(i) pertains to the specified equation and provides that the weight of certain elements “as determined . . . using ASTM D3178.” The regulation does not specify that only certain provisions of ASTM D3178-73, 79, 89 are incorporated by reference into law, nor does it indicate which specific provisions of ASTM D3178-73, 79, 89 are relevant for compliance with the regulation.

- First Factor: There is no indication that Defendant stands to profit from republishing this standard; Defendant's apparent purpose is to inform the public about the law and facilitate public debate. *See ASTM*, 896 F.3d at 449; Def's 2d Mot. at 16. Defendant's “attempt to freely distribute standards incorporated by reference into law qualifie[s] as a use that further[s] the purposes of the fair use defense.” *ASTM*, 896 F.3d at 449. *See also id.* at 451 (“Faithfully reproducing the *relevant text* of a technical standard incorporated by reference for purposes of informing the public about the law obviously has great value.”) (emphasis added). However, the court finds that the incorporated standard does not provide information essential for a private entity to comprehend its legal duties, but rather is incorporated as a reference procedure. Accordingly, “while knowing the content of this incorporated standard might help inform one's

understanding of the law,” it “is not essential to complying with any legal duty,” and thus, Defendant’s use is less transformative and “its wholesale copying, in turn, less justified.” *ASTM*, 896 F.3d at 450.

- Second Factor: The “express text of the law falls plainly outside the realm of copyright protection.” *ASTM*, 896 F.3d at 451. Here, the text published by Defendant is identical to text that was incorporated into law without limitation, such that “the consequence of the incorporation by reference is virtually indistinguishable from a situation in which the standard had been expressly copied into law.” *Id.* at 452. Accordingly, “this factor weighs heavily in favor of fair use.” *Id.*
- Third Factor: The incorporating regulation does not specify that only certain provisions of the text in ASTM D3178-73, 79, 89 are incorporated by reference into law, nor does it indicate which specific provisions of the standard are relevant for regulatory compliance, suggesting that “a greater amount of the standard’s text might be fairly reproduced.” *Id.*
- Fourth Factor: Defendant’s reproductions have not had a “substantially adverse impact on the potential market for the originals,” nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm.” Memo Op. at 30–36 (internal quotation and citation marks omitted).
- Conclusion: Defendant may fairly reproduce the text of ASTM D3178-89 (1997) in its entirety.

163. ASTM D3236 1988 (1999):

- Defendant identifies 21 C.F.R. § 177.1520 (2013) as the incorporating by reference regulation, *see* Becker Decl. ¶ 57, Ex. 90 at 18, which incorporates ASTM D3236-88. While the regulation incorporates ASTM D3236-88, not the 1999 version that Defendant published, the text of the two standards is identical. *See* Pls. 2d SMF ¶ 35; Def. Statement of Disputed Facts at ¶ 35 (no objection); Def. Mot. at 10 (citing Def. 2d SMF ¶ 84).

Section 177.1520(b) states that “basic olefin polymers identified in paragraph (a) of this section may contain optional adjuvant substances required in the production of such basic olefin polymers” and that those “optional adjuvant substances” “may include substances permitted for such use by applicable regulations in parts 170 through 189 of this chapter, substances generally recognized as safe in food and food packaging, substances used in accordance with a prior sanction or approval, and” several other instances, including “Petroleum hydrocarbon resins (cyclopentadiene-type), hydrogenated (CAS Reg. No. 68132–00–3)” that has, among other qualities, “a minimum viscosity of 3,000 centipoise, measured at 160°C, as determined by ASTM Method D 3236–88.” The regulation does not specify that only certain provisions of ASTM D3236-88 are incorporated by reference into law, nor does it indicate which specific provisions of ASTM D3236-88 are relevant for compliance with the regulation.

- First Factor: There is no indication that Defendant stands to profit from republishing this standard; Defendant’s apparent purpose is to inform the public about the law and facilitate public debate. *See ASTM*, 896 F.3d at 449; Def’s 2d Mot. at 16. Defendant’s

“attempt to freely distribute standards incorporated by reference into law qualifie[s] as a use that further[s] the purposes of the fair use defense.” *ASTM*, 896 F.3d at 449. *See also id.* at 451 (“Faithfully reproducing the *relevant text* of a technical standard incorporated by reference for purposes of informing the public about the law obviously has great value.”) (emphasis added). However, the court finds that the incorporated standard does not provide information essential for a private entity to comprehend its legal duties, but rather is incorporated as a reference procedure. Accordingly, “while knowing the content of this incorporated standard might help inform one’s understanding of the law,” it “is not essential to complying with any legal duty,” and thus, Defendant’s use is less transformative and “its wholesale copying, in turn, less justified.” *ASTM*, 896 F.3d at 450.

- Second Factor: The “express text of the law falls plainly outside the realm of copyright protection.” *ASTM*, 896 F.3d at 451. Here, the text published by Defendant is identical to text that was incorporated into law without limitation, such that “the consequence of the incorporation by reference is virtually indistinguishable from a situation in which the standard had been expressly copied into law.” *Id.* at 452. Accordingly, “this factor weighs heavily in favor of fair use.” *Id.*
- Third Factor: The incorporating regulation does not specify that only certain provisions of the text in ASTM D3236-88 are incorporated by reference into law, nor does it indicate which specific provisions of the standard are relevant for regulatory compliance, suggesting that “a greater amount of the standard’s text might be fairly reproduced.” *Id.*
- Fourth Factor: Defendant’s reproductions have not had a “substantially adverse impact on the potential market for the originals,” nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm.” Memo Op. at 30–36 (internal quotation and citation marks omitted).
- Conclusion: Defendant may fairly reproduce the text of ASTM D3236-88 (1999) in its entirety.

164. ASTM D3697 1992 (1996):

- Defendant identifies 21 C.F.R. § 165.110 (2015) as the incorporating by reference regulation, *see* Becker Decl. ¶ 57, Ex. 90 at 18, which incorporates ASTM D3697-92. While the regulation incorporates ASTM D3697-92, not the 1996 version that Defendant published, the text of the two standards is identical. *See* Pls. 2d SMF ¶ 35; Def. Statement of Disputed Facts at ¶ 35 (no objection); Def. Mot. at 10 (citing Def. 2d SMF ¶ 84).

Section 165.110 requires that “Analyses to determine compliance with the requirements of paragraph (b)(4)(iii)(A) of this section shall be conducted in accordance with an applicable method and applicable revisions to the methods listed in paragraphs (b)(4)(iii)(E)(1),” which includes the requirement that “Antimony shall be measured using,” in part, ASTM D3697-92. 21 C.F.R. § 165.110 (b)(4)(iii)(E) – (E)(1)(iv). The regulation does not specify that only certain provisions of ASTM D3697-92 are incorporated by reference into law, nor does it indicate which specific provisions of ASTM D3697-92 are relevant for compliance with the regulation.

- First Factor: There is no indication that Defendant stands to profit from republishing this standard; Defendant's apparent purpose is to inform the public about the law and facilitate public debate. *See ASTM*, 896 F.3d at 449; Def's 2d Mot. at 16. Defendant's "attempt to freely distribute standards incorporated by reference into law qualifie[s] as a use that further[s] the purposes of the fair use defense." *ASTM*, 896 F.3d at 449. *See also id.* at 451 ("Faithfully reproducing the *relevant text* of a technical standard incorporated by reference for purposes of informing the public about the law obviously has great value.") (emphasis added). Further, the incorporated standard provides information essential for a private entity to comprehend its legal duties, which weighs heavily in favor of permitting Defendant's reproduction. *See id.* at 450.
- Second Factor: The "express text of the law falls plainly outside the realm of copyright protection." *ASTM*, 896 F.3d at 451. Here, the text published by Defendant is identical to text that was incorporated into law without limitation, such that "the consequence of the incorporation by reference is virtually indistinguishable from a situation in which the standard had been expressly copied into law." *Id.* at 452. Accordingly, "this factor weighs heavily in favor of fair use." *Id.*
- Third Factor: The incorporating regulation does not specify that only certain provisions of the text in ASTM D3697-92 are incorporated by reference into law, nor does it indicate which specific provisions of the standard are relevant for regulatory compliance, suggesting that "a greater amount of the standard's text might be fairly reproduced." *Id.*
- Fourth Factor: Defendant's reproductions have not had a "substantially adverse impact on the potential market for the originals," nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm." Memo Op. at 30–36 (internal quotation and citation marks omitted).
- Conclusion: Defendant may fairly reproduce the text of ASTM D3697-92 (1996) in its entirety.

165. ASTM D5373 1993 (1997):

- Defendant identifies 40 C.F.R. § 75.6 (2004) as the incorporating by reference regulation, *see* Becker Decl. ¶ 57, Ex. 90 at 18, which incorporates ASTM D5373-93 for Appendix G of this part. While the regulation incorporates ASTM D5373-93, not the 1997 version that Defendant published, the text of the two standards is identical. *See* Pls. 2d SMF ¶ 35; Def. Statement of Disputed Facts at ¶ 35 (no objection); Def. Mot. at 10 (citing Def. 2d SMF ¶ 84).

Section 75.6, Appendix G provides procedures that "may be used" to estimate CO2 emissions from combustion and specifies that the procedure for determining the carbon content of each fuel sample, which can be done using one of two different standards, one of which is ASTM D5373-93. 40 C.F.R. § 75.6, App. G, 2.1.2. The regulation does not specify that only certain provisions of ASTM D5373-93 are incorporated by reference into law, nor does it indicate which specific provisions of ASTM D5373-93 are relevant for compliance with the regulation.

- First Factor: There is no indication that Defendant stands to profit from republishing this standard; Defendant's apparent purpose is to inform the public about the law and

facilitate public debate. *See ASTM*, 896 F.3d at 449; Def’s 2d Mot. at 16. Defendant’s “attempt to freely distribute standards incorporated by reference into law qualifie[s] as a use that further[s] the purposes of the fair use defense.” *ASTM*, 896 F.3d at 449. *See also id.* at 451 (“Faithfully reproducing the *relevant text* of a technical standard incorporated by reference for purposes of informing the public about the law obviously has great value.”) (emphasis added). However, the court finds that the incorporated standard does not provide information essential for a private entity to comprehend its legal duties, but rather is incorporated as a reference procedure. Accordingly, “while knowing the content of this incorporated standard might help inform one’s understanding of the law,” it “is not essential to complying with any legal duty,” and thus, Defendant’s use is less transformative and “its wholesale copying, in turn, less justified.” *ASTM*, 896 F.3d at 450.

- Second Factor: The “express text of the law falls plainly outside the realm of copyright protection.” *ASTM*, 896 F.3d at 451. Here, the text published by Defendant is identical to text that was incorporated into law without limitation, such that “the consequence of the incorporation by reference is virtually indistinguishable from a situation in which the standard had been expressly copied into law.” *Id.* at 452. Accordingly, “this factor weighs heavily in favor of fair use.” *Id.*
- Third Factor: The incorporating regulation does not specify that only certain provisions of the text in ASTM D5373-93 are incorporated by reference into law, nor does it indicate which specific provisions of the standard are relevant for regulatory compliance, suggesting that “a greater amount of the standard’s text might be fairly reproduced.” *Id.*
- Fourth Factor: Defendant’s reproductions have not had a “substantially adverse impact on the potential market for the originals,” nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm.” Memo Op. at 30–36 (internal quotation and citation marks omitted).
- Conclusion: Defendant may fairly reproduce the text of ASTM D5373-93 (1997) in its entirety.

166. ASTM D611 1982 (1998):

- Defendant identifies 21 C.F.R. § 176.170 (2014) as the incorporating by reference regulation, *see* Becker Decl. ¶ 57, Ex. 90 at 18, which incorporates ASTM D611 1982. While the regulation incorporates ASTM D611 1982, not the 1998 version that Defendant published, the text of the two standards is identical. *See* Pls. 2d SMF ¶ 35; Def. Statement of Disputed Facts at ¶ 35 (no objection); Def. Mot. at 10 (citing Def. 2d SMF ¶ 84).

Section 176.170 identifies substances that may be “safely used as components of the uncoated or coated food-contact surface of paper and paperboard intended for use in producing, manufacturing, packaging, processing, preparing, treating, packing, transporting, or holding aqueous and fatty foods, subject to the provisions of this section.” Included among the permissible substances is “Aromatic petroleum hydrocarbon resin, hydrogenated (CAS Reg. No. 88526–47–0),” so long as it meets certain qualities, including that it has “aniline point 70°C (158°F) minimum, as

determined by ASTM Method D 611–82.” The regulation does not specify that only certain provisions of ASTM D611 1982 are incorporated by reference into law, nor does it indicate which specific provisions of ASTM D611 1982 are relevant for compliance with the regulation.

- First Factor: There is no indication that Defendant stands to profit from republishing this standard; Defendant’s apparent purpose is to inform the public about the law and facilitate public debate. *See ASTM*, 896 F.3d at 449; Def’s 2d Mot. at 16. Defendant’s “attempt to freely distribute standards incorporated by reference into law qualifie[s] as a use that further[s] the purposes of the fair use defense.” *ASTM*, 896 F.3d at 449. *See also id.* at 451 (“Faithfully reproducing the *relevant text* of a technical standard incorporated by reference for purposes of informing the public about the law obviously has great value.”) (emphasis added). However, the court finds that the incorporated standard does not provide information essential for a private entity to comprehend its legal duties, but rather is incorporated as a reference procedure. Accordingly, “while knowing the content of this incorporated standard might help inform one’s understanding of the law,” it “is not essential to complying with any legal duty,” and thus, Defendant’s use is less transformative and “its wholesale copying, in turn, less justified.” *ASTM*, 896 F.3d at 450.
- Second Factor: The “express text of the law falls plainly outside the realm of copyright protection.” *ASTM*, 896 F.3d at 451. Here, the text published by Defendant is identical to text that was incorporated into law without limitation, such that “the consequence of the incorporation by reference is virtually indistinguishable from a situation in which the standard had been expressly copied into law.” *Id.* at 452. Accordingly, “this factor weighs heavily in favor of fair use.” *Id.*
- Third Factor: The incorporating regulation does not specify that only certain provisions of the text in ASTM D611 1982 are incorporated by reference into law, nor does it indicate which specific provisions of the standard are relevant for regulatory compliance, suggesting that “a greater amount of the standard’s text might be fairly reproduced.” *Id.*
- Fourth Factor: Defendant’s reproductions have not had a “substantially adverse impact on the potential market for the originals,” nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm.” Memo Op. at 30–36 (internal quotation and citation marks omitted).
- Conclusion: Defendant may fairly reproduce the text of ASTM D611 1982 (1998) in its entirety.

167. ASTM D814 (1995):

- Defendant identifies 40 C.F.R. § 1051.810 (2007) as the incorporating by reference regulation, *see* Becker Decl. ¶ 57, Ex. 90 at 18, which incorporates ASTM D814-95 (reapproved 2000) for section 1051.245. While the regulation incorporates ASTM D814-95 (reapproved 2000), not the 1995 version that Defendant published, the text of the two standards is identical. *See* Pls. 2d SMF ¶ 35; Def. Statement of Disputed Facts at ¶ 35 (no objection); Def. Mot. at 10 (citing Def. 2d SMF ¶ 84).

Section 1051.245(3) – (3)(1) states that “[y]ou may demonstrate for certification that

your engine family complies with the evaporative emission standards by demonstrating that you use” certain control standards, including that for a “metal fuel tank with no nonmetal gaskets or with gaskets made from a low-permeability material,” you “may design-certify with a tank emission level of . . . 1.5/g/m²/day. A “low-permeability material” is defined as permeability of “10 g/m²/day or less according to ASTM D 814-95.” 40 C.F.R. § 1051.245, Table 1, n.1. The regulation does not specify that only certain provisions of ASTM D814-95 (reapproved 2000) are incorporated by reference into law, nor does it indicate which specific provisions of ASTM D814-95 (reapproved 2000) are relevant for compliance with the regulation.

- First Factor: There is no indication that Defendant stands to profit from republishing this standard; Defendant’s apparent purpose is to inform the public about the law and facilitate public debate. *See ASTM*, 896 F.3d at 449; Def’s 2d Mot. at 16. Defendant’s “attempt to freely distribute standards incorporated by reference into law qualifie[s] as a use that further[s] the purposes of the fair use defense.” *ASTM*, 896 F.3d at 449. *See also id.* at 451 (“Faithfully reproducing the *relevant text* of a technical standard incorporated by reference for purposes of informing the public about the law obviously has great value.”) (emphasis added). However, the court finds that the incorporated standard does not provide information essential for a private entity to comprehend its legal duties, but rather is incorporated as a reference procedure. Accordingly, “while knowing the content of this incorporated standard might help inform one’s understanding of the law,” it “is not essential to complying with any legal duty,” and thus, Defendant’s use is less transformative and “its wholesale copying, in turn, less justified.” *ASTM*, 896 F.3d at 450.
- Second Factor: The “express text of the law falls plainly outside the realm of copyright protection.” *ASTM*, 896 F.3d at 451. Here, the text published by Defendant is identical to text that was incorporated into law without limitation, such that “the consequence of the incorporation by reference is virtually indistinguishable from a situation in which the standard had been expressly copied into law.” *Id.* at 452. Accordingly, “this factor weighs heavily in favor of fair use.” *Id.*
- Third Factor: The incorporating regulation does not specify that only certain provisions of the text in ASTM D814-95 (reapproved 2000) are incorporated by reference into law, nor does it indicate which specific provisions of the standard are relevant for regulatory compliance, suggesting that “a greater amount of the standard’s text might be fairly reproduced.” *Id.*
- Fourth Factor: Defendant’s reproductions have not had a “substantially adverse impact on the potential market for the originals,” nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm.” Memo Op. at 30–36 (internal quotation and citation marks omitted).
- Conclusion: Defendant may fairly reproduce the text of ASTM D814 (1995) in its entirety.

168. ASTM E283 1991 (1999):

- Defendant identifies 10 C.F.R. § 434.701 (2012) as the incorporating by reference regulation, *see* Becker Decl. ¶ 57, Ex. 90 at 18, which incorporates ASTM E283-91

for section 434.402.2. While the regulation incorporates ASTM E283-91, not the 1999 version that Defendant published, the text of the two standards is identical. *See* Pls. 2d SMF ¶ 35; Def. Statement of Disputed Facts at ¶ 35 (no objection); Def. Mot. at 10 (citing Def. 2d SMF ¶ 84).

Section 434.402.2, in conjunction with section 434.701, lists ASTM E283-91 as the reference procedure for certain specifications also provided by Table 434.402.2.1. The regulation does not specify that only certain provisions of ASTM E283-91 are incorporated by reference into law, nor does it indicate which specific provisions of ASTM E283-91 are relevant for compliance with the regulation.

- **First Factor:** There is no indication that Defendant stands to profit from republishing this standard; Defendant's apparent purpose is to inform the public about the law and facilitate public debate. *See ASTM*, 896 F.3d at 449; Def's 2d Mot. at 16. Defendant's "attempt to freely distribute standards incorporated by reference into law qualifie[s] as a use that further[s] the purposes of the fair use defense." *ASTM*, 896 F.3d at 449. *See also id.* at 451 ("Faithfully reproducing the *relevant text* of a technical standard incorporated by reference for purposes of informing the public about the law obviously has great value.") (emphasis added). However, the court finds that the incorporated standard does not provide information essential for a private entity to comprehend its legal duties, but rather is incorporated as a reference procedure. Accordingly, "while knowing the content of this incorporated standard might help inform one's understanding of the law," it "is not essential to complying with any legal duty," and thus, Defendant's use is less transformative and "its wholesale copying, in turn, less justified." *ASTM*, 896 F.3d at 450.
- **Second Factor:** The "express text of the law falls plainly outside the realm of copyright protection." *ASTM*, 896 F.3d at 451. Here, the text published by Defendant is identical to text that was incorporated into law without limitation, such that "the consequence of the incorporation by reference is virtually indistinguishable from a situation in which the standard had been expressly copied into law." *Id.* at 452. Accordingly, "this factor weighs heavily in favor of fair use." *Id.*
- **Third Factor:** The incorporating regulation does not specify that only certain provisions of the text in ASTM E283-91 are incorporated by reference into law, nor does it indicate which specific provisions of the standard are relevant for regulatory compliance, suggesting that "a greater amount of the standard's text might be fairly reproduced." *Id.*
- **Fourth Factor:** Defendant's reproductions have not had a "substantially adverse impact on the potential market for the originals," nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm." Memo Op. at 30–36 (internal quotation and citation marks omitted).
- **Conclusion:** Defendant may fairly reproduce the text of ASTM E283-91 (1999) in its entirety.

169. ASTM E408 (1971):

- Defendant identifies 16 C.F.R. § 460.5 (2014) as the incorporating by reference regulation, *see* Becker Decl. ¶ 57, Ex. 90 at 18, which incorporates ASTM E 408-71

(Reapproved 2002). While the regulation incorporates ASTM E 408-71 (Reapproved 2002), not the 1971 version that Defendant published, the text of the two standards is identical. *See* Pls. 2d SMF ¶ 35; Def. Statement of Disputed Facts at ¶ 35 (no objection); Def. Mot. at 10 (citing Def. 2d SMF ¶ 84).

Section 460.5(b) requires that “Single sheet systems of aluminum foil must be tested with ASTM E 408–71 (Reapproved 2002), “Standard Test Methods for Total Normal Emittance of Surfaces Using Inspection-Meter Techniques,” or ASTM C 1371–04a, ‘Standard Test Method for Determination of Emittance of Materials Near Room Temperature Using Portable Emissometers.’” The regulation does not specify that only certain provisions of ASTM E 408-71 (Reapproved 2002) are incorporated by reference into law, nor does it indicate which specific provisions of ASTM E 408-71 (Reapproved 2002) are relevant for compliance with the regulation.

- First Factor: There is no indication that Defendant stands to profit from republishing this standard; Defendant’s apparent purpose is to inform the public about the law and facilitate public debate. *See ASTM*, 896 F.3d at 449; Def’s 2d Mot. at 16. Defendant’s “attempt to freely distribute standards incorporated by reference into law qualifie[s] as a use that further[s] the purposes of the fair use defense.” *ASTM*, 896 F.3d at 449. *See also id.* at 451 (“Faithfully reproducing the *relevant text* of a technical standard incorporated by reference for purposes of informing the public about the law obviously has great value.”) (emphasis added). Further, the incorporated standard provides information essential for a private entity to comprehend its legal duties, which weighs heavily in favor of permitting Defendant’s reproduction. *See id.* at 450.
- Second Factor: The “express text of the law falls plainly outside the realm of copyright protection.” *ASTM*, 896 F.3d at 451. Here, the text published by Defendant is identical to text that was incorporated into law without limitation, such that “the consequence of the incorporation by reference is virtually indistinguishable from a situation in which the standard had been expressly copied into law.” *Id.* at 452. Accordingly, “this factor weighs heavily in favor of fair use.” *Id.*
- Third Factor: The incorporating regulation does not specify that only certain provisions of the text in ASTM E 408-71 (Reapproved 2002) are incorporated by reference into law, nor does it indicate which specific provisions of the standard are relevant for regulatory compliance, suggesting that “a greater amount of the standard’s text might be fairly reproduced.” *Id.*
- Fourth Factor: Defendant’s reproductions have not had a “substantially adverse impact on the potential market for the originals,” nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm.” Memo Op. at 30–36 (internal quotation and citation marks omitted).
- Conclusion: Defendant may fairly reproduce the text of ASTM E 408 (1971) in its entirety.

170. ASTM E711 1987 (1992):

- Defendant identifies 40 C.F.R. § 63.14 (2011) as the incorporating by reference regulation, *see* Becker Decl. ¶ 57, Ex. 90 at 18, which incorporates ASTM E711-87 (Reapproved 2004) for table 6 to subpart DDDDD of this part and table 5 to subpart

JJJJJ of this part. While the regulation incorporates ASTM E711-87 (Reapproved 2004), not the 1992 version that Defendant published, the text of the two standards is identical. *See* Pls. 2d SMF ¶ 35; Def. Statement of Disputed Facts at ¶ 35 (no objection); Def. Mot. at 10 (citing Def. 2d SMF ¶ 84).

Table 6 to subpart DDDDD requires that “you must comply with the following requirements for fuel analysis testing for existing, new or reconstructed affected sources. However, equivalent methods may be used in lieu of the prescribed methods at the discretion of the source owner or operator.” Table 6 goes on to require that you “must” determine the heat content of selected metals and hydrogen chloride using ASTM E711-87. Similarly, Table 5 to subpart JJJJJ requires that “you must comply with the following requirements for fuel analysis testing for affected sources.” Table 5 goes on to require that you “must” determine heat content of the fuel type when conducting a fuel analysis for mercury by using ASTM E711-87 for biomass. The regulation does not specify that only certain provisions of ASTM E711-87 (Reapproved 2004) are incorporated by reference into law, nor does it indicate which specific provisions of ASTM E711-87 (Reapproved 2004) are relevant for compliance with the regulation.

- First Factor: There is no indication that Defendant stands to profit from republishing this standard; Defendant’s apparent purpose is to inform the public about the law and facilitate public debate. *See ASTM*, 896 F.3d at 449; Def’s 2d Mot. at 16. Defendant’s “attempt to freely distribute standards incorporated by reference into law qualifie[s] as a use that further[s] the purposes of the fair use defense.” *ASTM*, 896 F.3d at 449. *See also id.* at 451 (“Faithfully reproducing the *relevant text* of a technical standard incorporated by reference for purposes of informing the public about the law obviously has great value.”) (emphasis added). Further, the incorporated standard provides information essential for a private entity to comprehend its legal duties, which weighs heavily in favor of permitting Defendant’s reproduction. *See id.* at 450.
- Second Factor: The “express text of the law falls plainly outside the realm of copyright protection.” *ASTM*, 896 F.3d at 451. Here, the text published by Defendant is identical to text that was incorporated into law without limitation, such that “the consequence of the incorporation by reference is virtually indistinguishable from a situation in which the standard had been expressly copied into law.” *Id.* at 452. Accordingly, “this factor weighs heavily in favor of fair use.” *Id.*
- Third Factor: The incorporating regulation does not specify that only certain provisions of the text in ASTM E711-87 (Reapproved 2004) are incorporated by reference into law, nor does it indicate which specific provisions of the standard are relevant for regulatory compliance, suggesting that “a greater amount of the standard’s text might be fairly reproduced.” *Id.*
- Fourth Factor: Defendant’s reproductions have not had a “substantially adverse impact on the potential market for the originals,” nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm.” Memo Op. at 30–36 (internal quotation and citation marks omitted).
- Conclusion: Defendant may fairly reproduce the text of ASTM E711-87 (1992) in its entirety.

171. **ASTM E776 1987 (1992):**

- Defendant identifies 40 C.F.R. § 63.14 (2011) as the incorporating by reference regulation, *see* Becker Decl. ¶ 57, Ex. 90 at 18, which incorporates ASTM E776-87 (Reapproved 2009) for table 6 to subpart DDDDD of this part. While the regulation incorporates ASTM E776-87 (Reapproved 2009), not the 1992 version that Defendant published, the text of the two standards is identical. *See* Pls. 2d SMF ¶ 35; Def. Statement of Disputed Facts at ¶ 35 (no objection); Def. Mot. at 10 (citing Def. 2d SMF ¶ 84).

Table 6 to subpart DDDDD requires that “you must comply with the following requirements for fuel analysis testing for existing, new or reconstructed affected sources. However, equivalent methods may be used in lieu of the prescribed methods at the discretion of the source owner or operator.” Table 6 goes on to require that you “must” measure chlorine concentration in fuel samples when conducting a fuel analysis of hydrogen chloride using ASTM E776-87 (1996) for biomass. The regulation does not specify that only certain provisions of ASTM E776-87 (1996) are incorporated by reference into law, nor does it indicate which specific provisions of ASTM E776-87 (1996) are relevant for compliance with the regulation.

- First Factor: There is no indication that Defendant stands to profit from republishing this standard; Defendant’s apparent purpose is to inform the public about the law and facilitate public debate. *See ASTM*, 896 F.3d at 449; Def’s 2d Mot. at 16. Defendant’s “attempt to freely distribute standards incorporated by reference into law qualifie[s] as a use that further[s] the purposes of the fair use defense.” *ASTM*, 896 F.3d at 449. *See also id.* at 451 (“Faithfully reproducing the *relevant text* of a technical standard incorporated by reference for purposes of informing the public about the law obviously has great value.”) (emphasis added). Further, the incorporated standard provides information essential for a private entity to comprehend its legal duties, which weighs heavily in favor of permitting Defendant’s reproduction. *See id.* at 450.
- Second Factor: The “express text of the law falls plainly outside the realm of copyright protection.” *ASTM*, 896 F.3d at 451. Here, the text published by Defendant is identical to text that was incorporated into law without limitation, such that “the consequence of the incorporation by reference is virtually indistinguishable from a situation in which the standard had been expressly copied into law.” *Id.* at 452. Accordingly, “this factor weighs heavily in favor of fair use.” *Id.*
- Third Factor: The incorporating regulation does not specify that only certain provisions of the text in ASTM E776-87 (Reapproved 2009) are incorporated by reference into law, nor does it indicate which specific provisions of the standard are relevant for regulatory compliance, suggesting that “a greater amount of the standard’s text might be fairly reproduced.” *Id.*
- Fourth Factor: Defendant’s reproductions have not had a “substantially adverse impact on the potential market for the originals,” nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm.” Memo Op. at 30–36 (internal quotation and citation marks omitted).
- Conclusion: Defendant may fairly reproduce the text of ASTM E776-87 (1992)

172. **ASTM E885 (1988):**

- Defendant identifies 40 C.F.R. § 63.14 (2011) as the incorporating by reference regulation, *see* Becker Decl. ¶ 57, Ex. 90 at 18, which incorporates ASTM E885-88 (Reapproved 1996) for table 6 to subpart DDDDD of this part 63. While the regulation incorporates ASTM E885-88 (Reapproved 1996), not the 1998 version that Defendant published, the text of the two standards is identical. *See* Pls. 2d SMF ¶ 35; Def. Statement of Disputed Facts at ¶ 35 (no objection); Def. Mot. at 10 (citing Def. 2d SMF ¶ 84).

Table 6 to subpart DDDDD requires that “you must comply with the following requirements for fuel analysis testing for existing, new or reconstructed affected sources. However, equivalent methods may be used in lieu of the prescribed methods at the discretion of the source owner or operator.” Table 6 goes on to require that you “must” measure total selected metals concentration in fuel samples when conducting a fuel analysis by using ASTM E885-88 (1996) for biomass. The regulation does not specify that only certain provisions of ASTM E885-88 (Reapproved 1996) are incorporated by reference into law, nor does it indicate which specific provisions of ASTM E885-88 (Reapproved 1996) are relevant for compliance with the regulation.

- First Factor: There is no indication that Defendant stands to profit from republishing this standard; Defendant’s apparent purpose is to inform the public about the law and facilitate public debate. *See ASTM*, 896 F.3d at 449; Def’s 2d Mot. at 16. Defendant’s “attempt to freely distribute standards incorporated by reference into law qualifie[s] as a use that further[s] the purposes of the fair use defense.” *ASTM*, 896 F.3d at 449. *See also id.* at 451 (“Faithfully reproducing the *relevant text* of a technical standard incorporated by reference for purposes of informing the public about the law obviously has great value.”) (emphasis added). Further, the incorporated standard provides information essential for a private entity to comprehend its legal duties, which weighs heavily in favor of permitting Defendant’s reproduction. *See id.* at 450.
- Second Factor: The “express text of the law falls plainly outside the realm of copyright protection.” *ASTM*, 896 F.3d at 451. Here, the text published by Defendant is identical to text that was incorporated into law without limitation, such that “the consequence of the incorporation by reference is virtually indistinguishable from a situation in which the standard had been expressly copied into law.” *Id.* at 452. Accordingly, “this factor weighs heavily in favor of fair use.” *Id.*
- Third Factor: The incorporating regulation does not specify that only certain provisions of the text in ASTM E885-88 (Reapproved 1996) are incorporated by reference into law, nor does it indicate which specific provisions of the standard are relevant for regulatory compliance, suggesting that “a greater amount of the standard’s text might be fairly reproduced.” *Id.*
- Fourth Factor: Defendant’s reproductions have not had a “substantially adverse impact on the potential market for the originals,” nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm.” Memo Op. at 30–36 (internal quotation and citation marks omitted).
- Conclusion: Defendant may fairly reproduce the text of ASTM E885 (1988) in its

entirety.

173. ASTM F1006 1986 (1997):

- Defendant identifies 46 C.F.R. § 56.01-1 (1997) as the incorporating by reference regulation, *see* Becker Decl. ¶ 57, Ex. 90 at 18, which incorporates ASTM F1006-86 for § 56.60-1. While the regulation incorporates ASTM F1006-86, not the 1997 version that Defendant published, the text of the two standards is identical. *See* Pls. 2d SMF ¶ 35; Def. Statement of Disputed Facts at ¶ 35 (no objection); Def. Mot. at 10 (citing Def. 2d SMF ¶ 84).

Table 56.01-1(b) provides standards applicable to piping systems, including ASTM F1006 as providing applicable guidance on “Pipe Line Expansion Joints of the Packed Slip Type for Marine Applications.” Footnote 4 to that table further states that because ASTM F1006 “offers the option of several materials, some of which are not generally acceptable to the Coast Guard, compliance with the standard does not necessarily indicate compliance with these regulations. The marking on the component or the manufacturer or mill certificate must indicate the material specification and/or grade as necessary to fully identify the materials used. The material used must comply with the requirements in this subchapter relating to the particular application.” The regulation does not specify that only certain provisions of ASTM F1006-86 are incorporated by reference into law, nor does it indicate which specific provisions of ASTM F1006-86 are relevant for compliance with the regulation.

- First Factor: There is no indication that Defendant stands to profit from republishing this standard; Defendant’s apparent purpose is to inform the public about the law and facilitate public debate. *See ASTM*, 896 F.3d at 449; Def’s 2d Mot. at 16. Defendant’s “attempt to freely distribute standards incorporated by reference into law qualifie[s] as a use that further[s] the purposes of the fair use defense.” *ASTM*, 896 F.3d at 449. *See also id.* at 451 (“Faithfully reproducing the *relevant text* of a technical standard incorporated by reference for purposes of informing the public about the law obviously has great value.”) (emphasis added). However, the court finds that the incorporated standard does not provide information essential for a private entity to comprehend its legal duties, but rather is incorporated as a reference procedure. Accordingly, “while knowing the content of this incorporated standard might help inform one’s understanding of the law,” it “is not essential to complying with any legal duty,” and thus, Defendant’s use is less transformative and “its wholesale copying, in turn, less justified.” *ASTM*, 896 F.3d at 450.
- Second Factor: The “express text of the law falls plainly outside the realm of copyright protection.” *ASTM*, 896 F.3d at 451. Here, the text published by Defendant is identical to text that was incorporated into law without limitation, such that “the consequence of the incorporation by reference is virtually indistinguishable from a situation in which the standard had been expressly copied into law.” *Id.* at 452. Accordingly, “this factor weighs heavily in favor of fair use.” *Id.*
- Third Factor: The incorporating regulation does not specify that only certain provisions of the text in ASTM F1006-86 are incorporated by reference into law, nor does it indicate which specific provisions of the standard are relevant for regulatory compliance, suggesting that “a greater amount of the standard’s text might be fairly

reproduced.” *Id.*

- Fourth Factor: Defendant’s reproductions have not had a “substantially adverse impact on the potential market for the originals,” nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm.” Memo Op. at 30–36 (internal quotation and citation marks omitted).
- Conclusion: Defendant may fairly reproduce the text of ASTM F1006-86 (1997) in its entirety.

174. ASTM F1121 1987 (1998):

- Defendant identifies 46 C.F.R. § 193.01-3 (2014) as the incorporating by reference regulation, *see* Becker Decl. ¶ 57, Ex. 90 at 18, which incorporates ASTM F1121-87 (Reapproved 2010) for § 193.10–10. While the regulation incorporates ASTM F1121-87 (Reapproved 2010), not the 1998 version that Defendant published, the text of the two standards is identical. *See* Pls. 2d SMF ¶ 35; Def. Statement of Disputed Facts at ¶ 35 (no objection); Def. Mot. at 10 (citing Def. 2d SMF ¶ 84).

Section 193.10–10(c) requires that “Vessels of 500 gross tons and over on an international voyage, must be provided with at least one international shore connection complying with ASTM F 1121.” The regulation does not specify that only certain provisions of ASTM F1121-87 (Reapproved 2010) are incorporated by reference into law, nor does it indicate which specific provisions of ASTM F1121-87 (Reapproved 2010) are relevant for compliance with the regulation.

- First Factor: There is no indication that Defendant stands to profit from republishing this standard; Defendant’s apparent purpose is to inform the public about the law and facilitate public debate. *See ASTM*, 896 F.3d at 449; Def’s 2d Mot. at 16. Defendant’s “attempt to freely distribute standards incorporated by reference into law qualifie[s] as a use that further[s] the purposes of the fair use defense.” *ASTM*, 896 F.3d at 449. *See also id.* at 451 (“Faithfully reproducing the *relevant text* of a technical standard incorporated by reference for purposes of informing the public about the law obviously has great value.”) (emphasis added). Further, the incorporated standard provides information essential for a private entity to comprehend its legal duties, which weighs heavily in favor of permitting Defendant’s reproduction. *See id.* at 450.
- Second Factor: The “express text of the law falls plainly outside the realm of copyright protection.” *ASTM*, 896 F.3d at 451. Here, the text published by Defendant is identical to text that was incorporated into law without limitation, such that “the consequence of the incorporation by reference is virtually indistinguishable from a situation in which the standard had been expressly copied into law.” *Id.* at 452. Accordingly, “this factor weighs heavily in favor of fair use.” *Id.*
- Third Factor: The incorporating regulation does not specify that only certain provisions of the text in ASTM F1121-87 (Reapproved 2010) are incorporated by reference into law, nor does it indicate which specific provisions of the standard are relevant for regulatory compliance, suggesting that “a greater amount of the standard’s text might be fairly reproduced.” *Id.*
- Fourth Factor: Defendant’s reproductions have not had a “substantially adverse impact on the potential market for the originals,” nor have Plaintiffs shown by a preponderance

of the evidence that there is a meaningful likelihood of future harm.” Memo Op. at 30–36 (internal quotation and citation marks omitted).

- Conclusion: Defendant may fairly reproduce the text of ASTM F1121-87 (1998) in its entirety.

175. ASTM F1122 1987 (1998):

- Defendant identifies 33 C.F.R. § 154.106 (2014) as the incorporating by reference regulation, *see* Becker Decl. ¶ 57, Ex. 90 at 18, which incorporates ASTM F1122-87 (Reapproved 1992) for § 154.500(d). While the regulation incorporates ASTM F1122-87 (Reapproved 1992), not the 1998 version that Defendant published, the text of the two standards is identical. *See* Pls. 2d SMF ¶ 35; Def. Statement of Disputed Facts at ¶ 35 (no objection); Def. Mot. at 10 (citing Def. 2d SMF ¶ 84).

Section 154.500(d) requires that specified hose assemblies “must either have” full threaded connections, flanges that meet ANSI B16.5 or ANSI B16.24, or quick-disconnect couplings that meet ASTM F1122. The regulation does not specify that only certain provisions of ASTM F1122-87 (Reapproved 1992) are incorporated by reference into law, nor does it indicate which specific provisions of ASTM F1122-87 (Reapproved 1992) are relevant for compliance with the regulation.

- First Factor: There is no indication that Defendant stands to profit from republishing this standard; Defendant’s apparent purpose is to inform the public about the law and facilitate public debate. *See ASTM*, 896 F.3d at 449; Def’s 2d Mot. at 16. Defendant’s “attempt to freely distribute standards incorporated by reference into law qualifie[s] as a use that further[s] the purposes of the fair use defense.” *ASTM*, 896 F.3d at 449. *See also id.* at 451 (“Faithfully reproducing the *relevant text* of a technical standard incorporated by reference for purposes of informing the public about the law obviously has great value.”) (emphasis added). However, the court finds that the incorporated standard does not provide information essential for a private entity to comprehend its legal duties, but rather is incorporated as a reference procedure. Accordingly, “while knowing the content of this incorporated standard might help inform one’s understanding of the law,” it “is not essential to complying with any legal duty,” and thus, Defendant’s use is less transformative and “its wholesale copying, in turn, less justified.” *ASTM*, 896 F.3d at 450.
- Second Factor: The “express text of the law falls plainly outside the realm of copyright protection.” *ASTM*, 896 F.3d at 451. Here, the text published by Defendant is identical to text that was incorporated into law without limitation, such that “the consequence of the incorporation by reference is virtually indistinguishable from a situation in which the standard had been expressly copied into law.” *Id.* at 452. Accordingly, “this factor weighs heavily in favor of fair use.” *Id.*
- Third Factor: The incorporating regulation does not specify that only certain provisions of the text in ASTM F1122-87 (Reapproved 1992) are incorporated by reference into law, nor does it indicate which specific provisions of the standard are relevant for regulatory compliance, suggesting that “a greater amount of the standard’s text might be fairly reproduced.” *Id.*
- Fourth Factor: Defendant’s reproductions have not had a “substantially adverse impact

on the potential market for the originals,” nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm.” Memo Op. at 30–36 (internal quotation and citation marks omitted).

- Conclusion: Defendant may fairly reproduce the text of ASTM F1122-87 (1998) in its entirety.

176. ASTM F1123 1987 (1998):

- Defendant identifies 46 C.F.R. § 56.01-2 (1997) as the incorporating by reference regulation, *see* Becker Decl. ¶ 57, Ex. 90 at 18, which incorporates ASTM F1123-87 for § 56.60-1. While the regulation incorporates ASTM F1123-87, not the 1998 version that Defendant published, the text of the two standards is identical. *See* Pls. 2d SMF ¶ 35; Def. Statement of Disputed Facts at ¶ 35 (no objection); Def. Mot. at 10 (citing Def. 2d SMF ¶ 84).

Table 56.60–1(a) identifies the acceptable pipe, tubing, and fitting specifications intended for piping system use. Materials used in piping systems must be selected from the specifications which appear in Table 56.60–1(a) of this section or Table 56.60–2(a) of this part, or they may be selected from the material specifications of section I, III, or VIII of the ASME Code if not prohibited by a regulation of this subchapter dealing with the particular section of the ASME Code. The regulation does not specify that only certain provisions of ASTM F1123-87 are incorporated by reference into law, nor does it indicate which specific provisions of ASTM F1123-87 are relevant for compliance with the regulation.

- First Factor: There is no indication that Defendant stands to profit from republishing this standard; Defendant’s apparent purpose is to inform the public about the law and facilitate public debate. *See ASTM*, 896 F.3d at 449; Def’s 2d Mot. at 16. Defendant’s “attempt to freely distribute standards incorporated by reference into law qualifie[s] as a use that further[s] the purposes of the fair use defense.” *ASTM*, 896 F.3d at 449. *See also id.* at 451 (“Faithfully reproducing the *relevant text* of a technical standard incorporated by reference for purposes of informing the public about the law obviously has great value.”) (emphasis added). Further, the incorporated standard provides information essential for a private entity to comprehend its legal duties, which weighs heavily in favor of permitting Defendant’s reproduction. *See id.* at 450.
- Second Factor: The “express text of the law falls plainly outside the realm of copyright protection.” *ASTM*, 896 F.3d at 451. Here, the text published by Defendant is identical to text that was incorporated into law without limitation, such that “the consequence of the incorporation by reference is virtually indistinguishable from a situation in which the standard had been expressly copied into law.” *Id.* at 452. Accordingly, “this factor weighs heavily in favor of fair use.” *Id.*
- Third Factor: The incorporating regulation does not specify that only certain provisions of the text in ASTM F1123-87 are incorporated by reference into law, nor does it indicate which specific provisions of the standard are relevant for regulatory compliance, suggesting that “a greater amount of the standard’s text might be fairly reproduced.” *Id.*
- Fourth Factor: Defendant’s reproductions have not had a “substantially adverse impact

on the potential market for the originals,” nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm.” Memo Op. at 30–36 (internal quotation and citation marks omitted).

- Conclusion: Defendant may fairly reproduce the text of ASTM F1123-87 (1998) in its entirety.

177. ASTM F1139 1988 (1998):

- Defendant identifies 46 C.F.R. § 56.01-2 (1997) as the incorporating by reference regulation, *see* Becker Decl. ¶ 57, Ex. 90 at 18, which incorporates ASTM F1139-88 for § 56.60-1. While the regulation incorporates ASTM F1139-88, not the 1998 version that Defendant published, the text of the two standards is identical. *See* Pls. 2d SMF ¶ 35; Def. Statement of Disputed Facts at ¶ 35 (no objection); Def. Mot. at 10 (citing Def. 2d SMF ¶ 84).

Components made in accordance with the commercial standards listed in Table 56.60–1(b) and made of materials complying with paragraph (a) this section may be used in piping systems within the limitations of the standards and within any further limitations specified in this subchapter. Among those standards listed is ASTM F1139-88 for Steam Traps and Drains. The regulation does not specify that only certain provisions of ASTM F1139-88 are incorporated by reference into law, nor does it indicate which specific provisions of ASTM F1139-88 are relevant for compliance with the regulation.

- First Factor: There is no indication that Defendant stands to profit from republishing this standard; Defendant’s apparent purpose is to inform the public about the law and facilitate public debate. *See ASTM*, 896 F.3d at 449; Def’s 2d Mot. at 16. Defendant’s “attempt to freely distribute standards incorporated by reference into law qualifie[s] as a use that further[s] the purposes of the fair use defense.” *ASTM*, 896 F.3d at 449. *See also id.* at 451 (“Faithfully reproducing the *relevant text* of a technical standard incorporated by reference for purposes of informing the public about the law obviously has great value.”) (emphasis added). Further, the incorporated standard provides information essential for a private entity to comprehend its legal duties, which weighs heavily in favor of permitting Defendant’s reproduction. *See id.* at 450.
- Second Factor: The “express text of the law falls plainly outside the realm of copyright protection.” *ASTM*, 896 F.3d at 451. Here, the text published by Defendant is identical to text that was incorporated into law without limitation, such that “the consequence of the incorporation by reference is virtually indistinguishable from a situation in which the standard had been expressly copied into law.” *Id.* at 452. Accordingly, “this factor weighs heavily in favor of fair use.” *Id.*
- Third Factor: The incorporating regulation does not specify that only certain provisions of the text in ASTM F1139-88 are incorporated by reference into law, nor does it indicate which specific provisions of the standard are relevant for regulatory compliance, suggesting that “a greater amount of the standard’s text might be fairly reproduced.” *Id.*
- Fourth Factor: Defendant’s reproductions have not had a “substantially adverse impact on the potential market for the originals,” nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm.” Memo Op. at 30–

36 (internal quotation and citation marks omitted).

- Conclusion: Defendant may fairly reproduce the text of ASTM F1139-88 (1998) in its entirety.

178. ASTM F1172 1988 (1998):

- Defendant identifies 46 C.F.R. § 56.01-2 (1997) as the incorporating by reference regulation, *see* Becker Decl. ¶ 57, Ex. 90 at 18, which incorporates ASTM F1172-88 for § 56.60-1. While the regulation incorporates ASTM F1172-88, not the 1998 version that Defendant published, the text of the two standards is identical. *See* Pls. 2d SMF ¶ 35; Def. Statement of Disputed Facts at ¶ 35 (no objection); Def. Mot. at 10 (citing Def. 2d SMF ¶ 84).

Components made in accordance with the commercial standards listed in Table 56.60–1(b) and made of materials complying with paragraph (a) this section may be used in piping systems within the limitations of the standards and within any further limitations specified in this subchapter. Among those standards listed is ASTM F1172-88 for fuel oil meters of the volumetric positive displacement type. The regulation does not specify that only certain provisions of ASTM F1139-88 are incorporated by reference into law, nor does it indicate which specific provisions of ASTM F1139-88 are relevant for compliance with the regulation.

- First Factor: There is no indication that Defendant stands to profit from republishing this standard; Defendant’s apparent purpose is to inform the public about the law and facilitate public debate. *See ASTM*, 896 F.3d at 449; Def’s 2d Mot. at 16. Defendant’s “attempt to freely distribute standards incorporated by reference into law qualifie[s] as a use that further[s] the purposes of the fair use defense.” *ASTM*, 896 F.3d at 449. *See also id.* at 451 (“Faithfully reproducing the *relevant text* of a technical standard incorporated by reference for purposes of informing the public about the law obviously has great value.”) (emphasis added). Further, the incorporated standard provides information essential for a private entity to comprehend its legal duties, which weighs heavily in favor of permitting Defendant’s reproduction. *See id.* at 450.
- Second Factor: The “express text of the law falls plainly outside the realm of copyright protection.” *ASTM*, 896 F.3d at 451. Here, the text published by Defendant is identical to text that was incorporated into law without limitation, such that “the consequence of the incorporation by reference is virtually indistinguishable from a situation in which the standard had been expressly copied into law.” *Id.* at 452. Accordingly, “this factor weighs heavily in favor of fair use.” *Id.*
- Third Factor: The incorporating regulation does not specify that only certain provisions of the text in ASTM F1172-88 are incorporated by reference into law, nor does it indicate which specific provisions of the standard are relevant for regulatory compliance, suggesting that “a greater amount of the standard’s text might be fairly reproduced.” *Id.*
- Fourth Factor: Defendant’s reproductions have not had a “substantially adverse impact on the potential market for the originals,” nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm.” Memo Op. at 30–36 (internal quotation and citation marks omitted).

- Conclusion: Defendant may fairly reproduce the text of ASTM F1172-88 (1998) in its entirety.

179. ASTM F1199 1988 (1998):

- Defendant identifies 46 C.F.R. § 56.01-2 (1997) as the incorporating by reference regulation, *see* Becker Decl. ¶ 57, Ex. 90 at 18, which incorporates ASTM F1199-88 for § 56.60-1. While the regulation incorporates ASTM F1199-88, not the 1998 version that Defendant published, the text of the two standards is identical. *See* Pls. 2d SMF ¶ 35; Def. Statement of Disputed Facts at ¶ 35 (no objection); Def. Mot. at 10 (citing Def. 2d SMF ¶ 84).

Components made in accordance with the commercial standards listed in Table 56.60–1(b) and made of materials complying with paragraph (a) this section may be used in piping systems within the limitations of the standards and within any further limitations specified in this subchapter. Among those standards listed is ASTM F1199-88 for fuel oil meters of the volumetric positive displacement type. The regulation does not specify that only certain provisions of ASTM F1199-88 are incorporated by reference into law, nor does it indicate which specific provisions of ASTM F1199-88 are relevant for compliance with the regulation.

- First Factor: There is no indication that Defendant stands to profit from republishing this standard; Defendant’s apparent purpose is to inform the public about the law and facilitate public debate. *See ASTM*, 896 F.3d at 449; Def’s 2d Mot. at 16. Defendant’s “attempt to freely distribute standards incorporated by reference into law qualifie[s] as a use that further[s] the purposes of the fair use defense.” *ASTM*, 896 F.3d at 449. *See also id.* at 451 (“Faithfully reproducing the *relevant text* of a technical standard incorporated by reference for purposes of informing the public about the law obviously has great value.”) (emphasis added). Further, the incorporated standard provides information essential for a private entity to comprehend its legal duties, which weighs heavily in favor of permitting Defendant’s reproduction. *See id.* at 450.
- Second Factor: The “express text of the law falls plainly outside the realm of copyright protection.” *ASTM*, 896 F.3d at 451. Here, the text published by Defendant is identical to text that was incorporated into law without limitation, such that “the consequence of the incorporation by reference is virtually indistinguishable from a situation in which the standard had been expressly copied into law.” *Id.* at 452. Accordingly, “this factor weighs heavily in favor of fair use.” *Id.*
- Third Factor: The incorporating regulation does not specify that only certain provisions of the text in ASTM F1199-88 are incorporated by reference into law, nor does it indicate which specific provisions of the standard are relevant for regulatory compliance, suggesting that “a greater amount of the standard’s text might be fairly reproduced.” *Id.*
- Fourth Factor: Defendant’s reproductions have not had a “substantially adverse impact on the potential market for the originals,” nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm.” Memo Op. at 30–36 (internal quotation and citation marks omitted).
- Conclusion: Defendant may fairly reproduce the text of ASTM F1199-88 (1998) in its

entirety.

180. ASTM F1200 1988 (1998):

- Defendant identifies 46 C.F.R. § 56.01-2 (1997) as the incorporating by reference regulation, *see* Becker Decl. ¶ 57, Ex. 90 at 18, which incorporates ASTM F1200-88 for § 56.60-1. While the regulation incorporates ASTM F1200-88, not the 1998 version that Defendant published, the text of the two standards is identical. *See* Pls. 2d SMF ¶ 35; Def. Statement of Disputed Facts at ¶ 35 (no objection); Def. Mot. at 10 (citing Def. 2d SMF ¶ 84).

Components made in accordance with the commercial standards listed in Table 56.60-1(b) and made of materials complying with paragraph (a) this section may be used in piping systems within the limitations of the standards and within any further limitations specified in this subchapter. Among those standards listed is ASTM F1200-88 for fuel oil meters of the volumetric positive displacement type. The regulation does not specify that only certain provisions of ASTM F1200-88 are incorporated by reference into law, nor does it indicate which specific provisions of ASTM F1200-88 are relevant for compliance with the regulation.

- First Factor: There is no indication that Defendant stands to profit from republishing this standard; Defendant's apparent purpose is to inform the public about the law and facilitate public debate. *See ASTM*, 896 F.3d at 449; Def's 2d Mot. at 16. Defendant's "attempt to freely distribute standards incorporated by reference into law qualifie[s] as a use that further[s] the purposes of the fair use defense." *ASTM*, 896 F.3d at 449. *See also id.* at 451 ("Faithfully reproducing the *relevant text* of a technical standard incorporated by reference for purposes of informing the public about the law obviously has great value.") (emphasis added). Further, the incorporated standard provides information essential for a private entity to comprehend its legal duties, which weighs heavily in favor of permitting Defendant's reproduction. *See id.* at 450.
- Second Factor: The "express text of the law falls plainly outside the realm of copyright protection." *ASTM*, 896 F.3d at 451. Here, the text published by Defendant is identical to text that was incorporated into law without limitation, such that "the consequence of the incorporation by reference is virtually indistinguishable from a situation in which the standard had been expressly copied into law." *Id.* at 452. Accordingly, "this factor weighs heavily in favor of fair use." *Id.*
- Third Factor: The incorporating regulation does not specify that only certain provisions of the text in ASTM F1200-88 are incorporated by reference into law, nor does it indicate which specific provisions of the standard are relevant for regulatory compliance, suggesting that "a greater amount of the standard's text might be fairly reproduced." *Id.*
- Fourth Factor: Defendant's reproductions have not had a "substantially adverse impact on the potential market for the originals," nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm." Memo Op. at 30-36 (internal quotation and citation marks omitted).
- Conclusion: Defendant may fairly reproduce the text of ASTM F1200-88 (1998) in its entirety.

181. ASTM F1201 1988 (1998):

- Defendant identifies 46 C.F.R. § 56.01-2 (1997) as the incorporating by reference regulation, *see* Becker Decl. ¶ 57, Ex. 90 at 18, which incorporates ASTM F1201-88 for § 56.60-1. While the regulation incorporates ASTM F1201-88, not the 1998 version that Defendant published, the text of the two standards is identical. *See* Pls. 2d SMF ¶ 35; Def. Statement of Disputed Facts at ¶ 35 (no objection); Def. Mot. at 10 (citing Def. 2d SMF ¶ 84).

Components made in accordance with the commercial standards listed in Table 56.60–1(b) and made of materials complying with paragraph (a) this section may be used in piping systems within the limitations of the standards and within any further limitations specified in this subchapter. Among those standards listed is ASTM F1201-88 for fuel oil meters of the volumetric positive displacement type. The regulation does not specify that only certain provisions of ASTM F1201-88 are incorporated by reference into law, nor does it indicate which specific provisions of ASTM F1201-88 are relevant for compliance with the regulation.

- First Factor: There is no indication that Defendant stands to profit from republishing this standard; Defendant’s apparent purpose is to inform the public about the law and facilitate public debate. *See ASTM*, 896 F.3d at 449; Def’s 2d Mot. at 16. Defendant’s “attempt to freely distribute standards incorporated by reference into law qualifie[s] as a use that further[s] the purposes of the fair use defense.” *ASTM*, 896 F.3d at 449. *See also id.* at 451 (“Faithfully reproducing the *relevant text* of a technical standard incorporated by reference for purposes of informing the public about the law obviously has great value.”) (emphasis added). Further, the incorporated standard provides information essential for a private entity to comprehend its legal duties, which weighs heavily in favor of permitting Defendant’s reproduction. *See id.* at 450.
- Second Factor: The “express text of the law falls plainly outside the realm of copyright protection.” *ASTM*, 896 F.3d at 451. Here, the text published by Defendant is identical to text that was incorporated into law without limitation, such that “the consequence of the incorporation by reference is virtually indistinguishable from a situation in which the standard had been expressly copied into law.” *Id.* at 452. Accordingly, “this factor weighs heavily in favor of fair use.” *Id.*
- Third Factor: The incorporating regulation does not specify that only certain provisions of the text in ASTM F1201-88 are incorporated by reference into law, nor does it indicate which specific provisions of the standard are relevant for regulatory compliance, suggesting that “a greater amount of the standard’s text might be fairly reproduced.” *Id.*
- Fourth Factor: Defendant’s reproductions have not had a “substantially adverse impact on the potential market for the originals,” nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm.” Memo Op. at 30–36 (internal quotation and citation marks omitted).
- Conclusion: Defendant may fairly reproduce the text of ASTM F1201-88 (1998) in its entirety.

182. ASTM F462 1979 (1999):

- Defendant identifies 24 C.F.R. § (Parts 200 to 499) (2005) as the incorporating by reference regulation, *see* Becker Decl. ¶ 57, Ex. 90 at 18, which incorporates ASTM F462-79 for 24 C.F.R. § Part 200, Subpart S. While the regulation incorporates ASTM F462-79, not the 1999 version that Defendant published, the text of the two standards is identical. *See* Pls. 2d SMF ¶ 35; Def. Statement of Disputed Facts at ¶ 35 (no objection); Def. Mot. at 10 (citing Def. 2d SMF ¶ 84). The regulation does not specify that only certain provisions of ASTM F462-79 are incorporated by reference into law, nor does it indicate which specific provisions of ASTM F462-79 are relevant for compliance with the regulation.
- First Factor: There is no indication that Defendant stands to profit from republishing this standard; Defendant's apparent purpose is to inform the public about the law and facilitate public debate. *See ASTM*, 896 F.3d at 449; Def's 2d Mot. at 16. Defendant's "attempt to freely distribute standards incorporated by reference into law qualify[es] as a use that further[s] the purposes of the fair use defense." *ASTM*, 896 F.3d at 449. *See also id.* at 451 ("Faithfully reproducing the *relevant text* of a technical standard incorporated by reference for purposes of informing the public about the law obviously has great value.") (emphasis added). However, the court finds that the incorporated standard does not provide information essential for a private entity to comprehend its legal duties, but rather is incorporated as a reference procedure. Accordingly, "while knowing the content of this incorporated standard might help inform one's understanding of the law," it "is not essential to complying with any legal duty," and thus, Defendant's use is less transformative and "its wholesale copying, in turn, less justified." *ASTM*, 896 F.3d at 450.
- Second Factor: The "express text of the law falls plainly outside the realm of copyright protection." *ASTM*, 896 F.3d at 451. Here, the text published by Defendant is identical to text that was incorporated into law without limitation, such that "the consequence of the incorporation by reference is virtually indistinguishable from a situation in which the standard had been expressly copied into law." *Id.* at 452. Accordingly, "this factor weighs heavily in favor of fair use." *Id.*
- Third Factor: The incorporating regulation does not specify that only certain provisions of the text in ASTM F462-79 are incorporated by reference into law, nor does it indicate which specific provisions of the standard are relevant for regulatory compliance, suggesting that "a greater amount of the standard's text might be fairly reproduced." *Id.*
- Fourth Factor: Defendant's reproductions have not had a "substantially adverse impact on the potential market for the originals," nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm." Memo Op. at 30–36 (internal quotation and citation marks omitted).
- Conclusion: Defendant may fairly reproduce the text of ASTM F462-79 (1999) in its entirety.

183. ASTM F478 1992 (1999):

- Defendant identifies 29 C.F.R. § 1910.137 (2012) as the incorporating by reference

regulation, *see* Becker Decl. ¶ 57, Ex. 90 at 18, which incorporates ASTM F478-92. While the regulation incorporates ASTM F478-92, not the 1999 version that Defendant published, the text of the two standards is identical. *See* Pls. 2d SMF ¶ 35; Def. Statement of Disputed Facts at ¶ 35 (no objection); Def. Mot. at 10 (citing Def. 2d SMF ¶ 84). Section 1910.137 (2012) lists ASTM F478-92 as one of several industry standards containing a test method that meets the requirements of § 1910.137(b)(2)(viii) and (b)(2)(ix). The regulation does not specify that only certain provisions of ASTM F478-92 are incorporated by reference into law, nor does it indicate which specific provisions of ASTM F478-92 are relevant for compliance with the regulation.

- First Factor: There is no indication that Defendant stands to profit from republishing this standard; Defendant’s apparent purpose is to inform the public about the law and facilitate public debate. *See ASTM*, 896 F.3d at 449; Def’s 2d Mot. at 16. Defendant’s “attempt to freely distribute standards incorporated by reference into law qualify[es] as a use that further[s] the purposes of the fair use defense.” *ASTM*, 896 F.3d at 449. *See also id.* at 451 (“Faithfully reproducing the *relevant text* of a technical standard incorporated by reference for purposes of informing the public about the law obviously has great value.”) (emphasis added). However, the court finds that the incorporated standard does not provide information essential for a private entity to comprehend its legal duties, but rather is incorporated as a reference procedure. Accordingly, “while knowing the content of this incorporated standard might help inform one’s understanding of the law,” it “is not essential to complying with any legal duty,” and thus, Defendant’s use is less transformative and “its wholesale copying, in turn, less justified.” *ASTM*, 896 F.3d at 450.
- Second Factor: The “express text of the law falls plainly outside the realm of copyright protection.” *ASTM*, 896 F.3d at 451. Here, the text published by Defendant is identical to text that was incorporated into law without limitation, such that “the consequence of the incorporation by reference is virtually indistinguishable from a situation in which the standard had been expressly copied into law.” *Id.* at 452. Accordingly, “this factor weighs heavily in favor of fair use.” *Id.*
- Third Factor: The incorporating regulation does not specify that only certain provisions of the text in ASTM F478-92 are incorporated by reference into law, nor does it indicate which specific provisions of the standard are relevant for regulatory compliance, suggesting that “a greater amount of the standard’s text might be fairly reproduced.” *Id.*
- Fourth Factor: Defendant’s reproductions have not had a “substantially adverse impact on the potential market for the originals,” nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm.” Memo Op. at 30–36 (internal quotation and citation marks omitted).
- Conclusion: Defendant may fairly reproduce the text of ASTM F478-92 (1999) in its entirety.

184. ASTM F682 1982a (1988):

- Defendant identifies 46 C.F.R. § 56.01-2 (1997) as the incorporating by reference

regulation, *see* Becker Decl. ¶ 57, Ex. 90 at 18, which incorporates ASTM 682-82a for § 56.60-1. While the regulation incorporates ASTM 682-82a, not the 1988 version that Defendant published, the text of the two standards is identical. *See* Pls. 2d SMF ¶ 35; Def. Statement of Disputed Facts at ¶ 35 (no objection); Def. Mot. at 10 (citing Def. 2d SMF ¶ 84).

Components made in accordance with the commercial standards listed in Table 56.60–1(b) and made of materials complying with paragraph (a) this section may be used in piping systems within the limitations of the standards and within any further limitations specified in this subchapter. Among those standards listed is ASTM 682-82a for fuel oil meters of the volumetric positive displacement type. The regulation does not specify that only certain provisions of ASTM 682-82a are incorporated by reference into law, nor does it indicate which specific provisions of ASTM 682-82a are relevant for compliance with the regulation.

- First Factor: There is no indication that Defendant stands to profit from republishing this standard; Defendant’s apparent purpose is to inform the public about the law and facilitate public debate. *See ASTM*, 896 F.3d at 449; Def’s 2d Mot. at 16. Defendant’s “attempt to freely distribute standards incorporated by reference into law qualify[es] as a use that further[s] the purposes of the fair use defense.” *ASTM*, 896 F.3d at 449. *See also id.* at 451 (“Faithfully reproducing the *relevant text* of a technical standard incorporated by reference for purposes of informing the public about the law obviously has great value.”) (emphasis added). Further, the incorporated standard provides information essential for a private entity to comprehend its legal duties, which weighs heavily in favor of permitting Defendant’s reproduction. *See id.* at 450.
- Second Factor: The “express text of the law falls plainly outside the realm of copyright protection.” *ASTM*, 896 F.3d at 451. Here, the text published by Defendant is identical to text that was incorporated into law without limitation, such that “the consequence of the incorporation by reference is virtually indistinguishable from a situation in which the standard had been expressly copied into law.” *Id.* at 452. Accordingly, “this factor weighs heavily in favor of fair use.” *Id.*
- Third Factor: The incorporating regulation does not specify that only certain provisions of the text in ASTM 682-82a are incorporated by reference into law, nor does it indicate which specific provisions of the standard are relevant for regulatory compliance, suggesting that “a greater amount of the standard’s text might be fairly reproduced.” *Id.*
- Fourth Factor: Defendant’s reproductions have not had a “substantially adverse impact on the potential market for the originals,” nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm.” Memo Op. at 30–36 (internal quotation and citation marks omitted).
- Conclusion: Defendant may fairly reproduce the text of ASTM 682-82a (1988) in its entirety.

185. ASTM F722 1982 (1988):

- Defendant identifies 33 C.F.R. § 154.106 (2014) as the incorporating by reference regulation, *see* Becker Decl. ¶ 57, Ex. 90 at 18, which incorporates ASTM F722-82

(Reapproved 2008) for Appendix A, 8.4, 8.6 to part 154. While the regulation incorporates ASTM F722-82 (Reapproved 2008), not the 1998 version that Defendant published, the text of the two standards is identical. *See* Pls. 2d SMF ¶ 35; Def. Statement of Disputed Facts at ¶ 35 (no objection); Def. Mot. at 10 (citing Def. 2d SMF ¶ 84).

Section 8.4 requires that “Threaded or flanged pipe connections shall comply with the applicable B16 standards in ASTM F 1155 (incorporated by reference, see §154.106). Welded joints shall comply with ASTM F 722.” Section 8.6 provides that where “welded construction is used for pressure retaining components, welded joint design details, welding and non-destructive testing shall be in accordance with Section VIII, Division 1, of the ASME Code and ASTM F 722. The regulation does not specify that only certain provisions of ASTM F722-82 (Reapproved 2008) are incorporated by reference into law, nor does it indicate which specific provisions of ASTM F722-82 (Reapproved 2008) are relevant for compliance with the regulation.

- First Factor: There is no indication that Defendant stands to profit from republishing this standard; Defendant’s apparent purpose is to inform the public about the law and facilitate public debate. *See ASTM*, 896 F.3d at 449; Def’s 2d Mot. at 16. Defendant’s “attempt to freely distribute standards incorporated by reference into law qualifie[s] as a use that further[s] the purposes of the fair use defense.” *ASTM*, 896 F.3d at 449. *See also id.* at 451 (“Faithfully reproducing the *relevant text* of a technical standard incorporated by reference for purposes of informing the public about the law obviously has great value.”) (emphasis added). Further, the incorporated standard provides information essential for a private entity to comprehend its legal duties, which weighs heavily in favor of permitting Defendant’s reproduction. *See id.* at 450.
- Second Factor: The “express text of the law falls plainly outside the realm of copyright protection.” *ASTM*, 896 F.3d at 451. Here, the text published by Defendant is identical to text that was incorporated into law without limitation, such that “the consequence of the incorporation by reference is virtually indistinguishable from a situation in which the standard had been expressly copied into law.” *Id.* at 452. Accordingly, “this factor weighs heavily in favor of fair use.” *Id.*
- Third Factor: The incorporating regulation does not specify that only certain provisions of the text in ASTM F722-82 (Reapproved 2008) are incorporated by reference into law, nor does it indicate which specific provisions of the standard are relevant for regulatory compliance, suggesting that “a greater amount of the standard’s text might be fairly reproduced.” *Id.*
- Fourth Factor: Defendant’s reproductions have not had a “substantially adverse impact on the potential market for the originals,” nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm.” Memo Op. at 30–36 (internal quotation and citation marks omitted).
- Conclusion: Defendant may fairly reproduce the text of ASTM F722-82 (1988) in its entirety.

III. GROUP 3: STANDARDS THAT DEFENDANT HAS NOT SHOWN TO BE INCORPORATED BY REFERENCE INTO LAW.

186. ASTM C518 (1991):

- The parties identify 10 C.F.R. § 443.105 (2010) as the incorporating by reference regulation, *see* Becker Decl. ¶ 57, Ex. 90; Wise Decl., Ex. 176. That regulation, however, states explicitly that “procedures in this subpart,” including ASTM C518, “are not incorporated by reference. These sources are given here for information and guidance.” 10 C.F.R. § 431.105(d)(1), (d)(2)(i). The regulation does not indicate that any provision of ASTM C518 (1991) are relevant for compliance with the law. Defendant bears the burden of demonstrating its affirmative fair use defense, *see Campbell*, 510 U.S. at 590, and here, it has not shown that this standard has been incorporated by reference into law.
- **First Factor:** There is no indication that Defendant stands to profit from republishing this standard, but Defendant’s stated purpose—to inform the public about the law and facilitate public debate—is not significantly furthered by publishing this standard rather than one that has been incorporated by reference into law. *See ASTM*, 896 F.3d at 449. Further, because the standard has not been incorporated by reference into law, Defendant’s use is less transformative. *See ASTM*, 896 F.3d at 450.
- **Second Factor:** Standards incorporated by reference into law “are, at best, at the outer edge of “copyright’s protective purposes.” *ASTM*, 896 F.3d at 451. Standards not incorporated into law, though factual works, fall more squarely within the realm of copyright protection. Here, Defendant has not shown that this standard has been incorporated into law and so this factor also counsels against Defendant’s fair use.
- **Third Factor:** The Supreme Court has characterized the relevant inquiry as whether ““the amount and substantiality of the portion used[’] . . . are reasonable in relation to the purpose of the copying.” *Campbell*, 510 U.S. at 586–87 (quoting 17 U.S.C. § 107(3)). Incorporating one standard by reference does not justify posting provisions of a different version that has not been incorporated into law. *See ASTM*, 896 F.3d at 452. Instead, Defendant’s purpose could be achieved with a paraphrase or summary.
- **Fourth Factor:** Defendant’s reproductions have not had a “substantially adverse impact on the potential market for the originals,” nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm.” Memo Op. at 30–36 (internal quotation and citation marks omitted).
- **Conclusion:** Under the presented facts, which are undisputed, Defendant may not fairly copy and republish this standard.

187. ASTM A36 (1977a^e):

- Defendant identifies 24 C.F.R. § 200 (2005) as the incorporating by reference regulation. *See* Becker Decl. ¶ 57, Ex. 90 at 5. The incorporating language in that regulation, however, references only ASTM A36 (1977a), and not the revised version ASTM A36 (1977a^e) that Defendant published. Defendant concedes that it posted editions of standards that have not been incorporated into law, *see* Def. 2d Mot. at 9–10, and it does not respond to Plaintiffs’ argument that Defendant has not shown this

specific standard has been incorporated into law. *See* Wise Decl., Ex. 176 at n.2 (“Where the ASTM standard referenced in the quoted C.F.R. language differs from the version of the ASTM standard that PRO reproduced and displayed, ASTM has highlighted and bolded that language.”); *id.* (highlighting and bolding text of this standard). Defendant bears the burden of demonstrating its affirmative fair use defense, *see Campbell*, 510 U.S. at 590, and here, it has not shown that this standard has been incorporated by reference into law.

- First Factor: There is no indication that Defendant stands to profit from republishing this standard, but Defendant’s stated purpose—to inform the public about the law and facilitate public debate—is not significantly furthered by publishing this standard than one that has been incorporated by reference into law. *See ASTM*, 896 F.3d at 449. Further, because the standard has not been incorporated by reference into law, Defendant’s use is less transformative. *See ASTM*, 896 F.3d at 450.
- Second Factor: Standards incorporated by reference into law “are, at best, at the outer edge of “copyright’s protective purposes.” *ASTM*, 896 F.3d at 451. Standards not incorporated into law, though factual works, fall more squarely within the realm of copyright protection. Here, Defendant has not shown that this standard has been incorporated into law and so this factor also counsels against Defendant’s fair use.
- Third Factor: The Supreme Court has characterized the relevant inquiry as whether ““the amount and substantiality of the portion used[’] . . . are reasonable in relation to the purpose of the copying.” *Campbell*, 510 U.S. at 586–87 (quoting 17 U.S.C. § 107(3)). Incorporating one standard by reference does not justify posting provisions of a different version that has not been incorporated into law. *See ASTM*, 896 F.3d at 452. Instead, Defendant’s purpose could be achieved with a paraphrase or summary.
- Fourth Factor: Defendant’s reproductions have not had a “substantially adverse impact on the potential market for the originals,” nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm.” Memo Op. at 30–36 (internal quotation and citation marks omitted).
- Conclusion: Under the presented facts, which are undisputed, Defendant may not fairly copy and republish this standard.

188. ASTM A36/A36M (1997a^{e1}):

- Defendant identifies 46 C.F.R. § 56.01-2 (2011) as the incorporating by reference regulation. Becker Decl. ¶ 57, Ex. 90 at 5. The incorporating language in that regulation, however, references only ASTM A36/A36M (1997a), and not the revised version ASTM A36/A36M (1997a^{e1}) that Defendant published. Defendant concedes that it posted editions of standards that have not been incorporated into law, *see* Def. 2d Mot. at 9-10, and it does not respond to Plaintiffs’ argument that Defendant has not shown this specific standard has been incorporated into law. *See* Wise Decl., Ex. 176 at n.2 (“Where the ASTM standard referenced in the quoted C.F.R. language differs from the version of the ASTM standard that PRO reproduced and displayed, ASTM has highlighted and bolded that language.”); *id.* (highlighting and bolding text of this standard). Defendant bears the burden of demonstrating its affirmative fair use defense, *see Campbell*, 510 U.S. at 590, and here, it has not shown that this standard has been

incorporated by reference into law.

- First Factor: There is no indication that Defendant stands to profit from republishing this standard, but Defendant’s stated purpose—to inform the public about the law and facilitate public debate—is not significantly furthered by publishing this standard rather than one that has been incorporated by reference into law. *See ASTM*, 896 F.3d at 449. Further, because the standard has not been incorporated by reference into law, Defendant’s use is less transformative. *See ASTM*, 896 F.3d at 450.
- Second Factor: Standards incorporated by reference into law “are, at best, at the outer edge of “copyright’s protective purposes.” *ASTM*, 896 F.3d at 451. Standards not incorporated into law, though factual works, fall more squarely within the realm of copyright protection. Here, Defendant has not shown that this standard has been incorporated into law and so this factor also counsels against Defendant’s fair use.
- Third Factor: The Supreme Court has characterized the relevant inquiry as whether “the amount and substantiality of the portion used[’] . . . are reasonable in relation to the purpose of the copying.” *Campbell*, 510 U.S. at 586–87 (quoting 17 U.S.C. § 107(3)). Incorporating one standard by reference does not justify posting provisions of a different version that has not been incorporated into law. *See ASTM*, 896 F.3d at 452. Instead, Defendant’s purpose could be achieved with a paraphrase or summary.
- Fourth Factor: Defendant’s reproductions have not had a “substantially adverse impact on the potential market for the originals,” nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm.” Memo Op. at 30–36 (internal quotation and citation marks omitted).
- Conclusion: Under the presented facts, which are undisputed, Defendant may not fairly copy and republish this standard.

189. ASTM A307 (1978^c):

- Defendant identifies 24 C.F.R. § 200 (Parts 200 to 499) (2005), as the incorporating by reference regulation. Becker Decl. ¶ 57, Ex. 90 at 3. The incorporating language in that regulation, however, references only ASTM A307 (1978), not the revised 1978^c version that Defendant published. Defendant concedes that it posted editions of standards that have not been incorporated into law, *see* Def. 2d Mot. at 9-10, and it does not respond to Plaintiffs’ argument that Defendant has not shown this specific standard has been incorporated into law. *See* Wise Decl., Ex. 176 at n.2 (“Where the ASTM standard referenced in the quoted C.F.R. language differs from the version of the ASTM standard that PRO reproduced and displayed, ASTM has highlighted and bolded that language.”); *id.* (highlighting and bolding text of this standard). Defendant bears the burden of demonstrating its affirmative fair use defense, *see Campbell*, 510 U.S. at 590, and here, it has not shown that this standard has been incorporated by reference into law.
- First Factor: There is no indication that Defendant stands to profit from republishing this standard, but Defendant’s stated purpose—to inform the public about the law and facilitate public debate—is not significantly furthered by publishing this standard rather than one that has been incorporated by reference into law. *See ASTM*, 896 F.3d at 449. Further, because the standard has not been incorporated by reference into law,

Defendant's use is less transformative. *See ASTM*, 896 F.3d at 450.

- Second Factor: Standards incorporated by reference into law “are, at best, at the outer edge of “copyright’s protective purposes.” *ASTM*, 896 F.3d at 451. Standards not incorporated into law, though factual works, fall more squarely within the realm of copyright protection. Here, Defendant has not shown that this standard has been incorporated into law and so this factor also counsels against Defendant’s fair use.
- Third Factor: The Supreme Court has characterized the relevant inquiry as whether “the amount and substantiality of the portion used[’] . . . are reasonable in relation to the purpose of the copying.” *Campbell*, 510 U.S. at 586–87 (quoting 17 U.S.C. § 107(3)). Incorporating one standard by reference does not justify posting provisions of a different version that has not been incorporated into law. *See ASTM*, 896 F.3d at 452. Instead, Defendant’s purpose could be achieved with a paraphrase or summary.
- Fourth Factor: Defendant’s reproductions have not had a “substantially adverse impact on the potential market for the originals,” nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm.” Memo Op. at 30–36 (internal quotation and citation marks omitted).
- Conclusion: Under the presented facts, which are undisputed, Defendant may not fairly copy and republish this standard.

190. ASTM A370 (1997^{e2}):

- Defendant identifies 56.01-1 (1997) as the incorporating by reference regulation. Becker Decl. ¶ 57, Ex. 90 at 7. The incorporating language in that regulation, however, references only ASTM A370 (1997), and not the revised version ASTM A370 (1997^{e2}) that Defendant published. Defendant concedes that it posted editions of standards that have not been incorporated into law, *see* Def. 2d Mot. at 9-10, and it does not respond to Plaintiffs’ argument that Defendant has not shown this specific standard has been incorporated into law. *See* Wise Decl., Ex. 176 at n.2 (“Where the ASTM standard referenced in the quoted C.F.R. language differs from the version of the ASTM standard that PRO reproduced and displayed, ASTM has highlighted and bolded that language.”); *id.* (highlighting and bolding text of this standard). Defendant bears the burden of demonstrating its affirmative fair use defense, *see Campbell*, 510 U.S. at 590, and here, it has not shown that this standard has been incorporated by reference into law.
- First Factor: There is no indication that Defendant stands to profit from republishing this standard, but Defendant’s stated purpose—to inform the public about the law and facilitate public debate—is not significantly furthered by publishing this standard rather than one that has been incorporated by reference into law. *See ASTM*, 896 F.3d at 449. Further, because the standard has not been incorporated by reference into law, Defendant’s use is less transformative. *See ASTM*, 896 F.3d at 450.
- Second Factor: Standards incorporated by reference into law “are, at best, at the outer edge of “copyright’s protective purposes.” *ASTM*, 896 F.3d at 451. Standards not incorporated into law, though factual works, fall more squarely within the realm of copyright protection. Here, Defendant has not shown that this standard has been incorporated into law and so this factor also counsels against Defendant’s fair use.

- Third Factor: The Supreme Court has characterized the relevant inquiry as whether “the amount and substantiality of the portion used[’] . . . are reasonable in relation to the purpose of the copying.” *Campbell*, 510 U.S. at 586–87 (quoting 17 U.S.C. § 107(3)). Incorporating one standard by reference does not justify posting provisions of a different version that has not been incorporated into law. *See ASTM*, 896 F.3d at 452. Instead, Defendant’s purpose could be achieved with a paraphrase or summary.
- Fourth Factor: Defendant’s reproductions have not had a “substantially adverse impact on the potential market for the originals,” nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm.” Memo Op. at 30–36 (internal quotation and citation marks omitted).
- Conclusion: Under the presented facts, which are undisputed, Defendant may not fairly copy and republish this standard.

191. ASTM A475-78 (1984^{e1}):

- Defendant identifies 7 C.F.R. § 1755.370(b) as the incorporating by reference regulation. Becker Decl. ¶ 57, Ex. 90 at 10 The incorporating language in that regulation, however, references only ASTM A476-78, not the revised version ASTM A475-78 (1984^{e1}) that Defendant published. Defendant concedes that it posted editions of standards that have not been incorporated into law, *see* Def. 2d Mot. at 9-10, and it does not respond to Plaintiffs’ argument that Defendant has not shown this specific standard has been incorporated into law. *See* Wise Decl., Ex. 176 at n.2 (“Where the ASTM standard referenced in the quoted C.F.R. language differs from the version of the ASTM standard that PRO reproduced and displayed, ASTM has highlighted and bolded that language.”); *id.* (highlighting and bolding text of this standard). Defendant bears the burden of demonstrating its affirmative fair use defense, *see Campbell*, 510 U.S. at 590, and here, it has not shown that this standard has been incorporated by reference into law.
- First Factor: There is no indication that Defendant stands to profit from republishing this standard, but Defendant’s stated purpose—to inform the public about the law and facilitate public debate—is not significantly furthered by publishing this standard rather than one that has been incorporated by reference into law. *See ASTM*, 896 F.3d at 449. Further, because the standard has not been incorporated by reference into law, Defendant’s use is less transformative. *See ASTM*, 896 F.3d at 450.
- Second Factor: Standards incorporated by reference into law “are, at best, at the outer edge of “copyright’s protective purposes.” *ASTM*, 896 F.3d at 451. Standards not incorporated into law, though factual works, fall more squarely within the realm of copyright protection. Here, Defendant has not shown that this standard has been incorporated into law and so this factor also counsels against Defendant’s fair use.
- Third Factor: The Supreme Court has characterized the relevant inquiry as whether “the amount and substantiality of the portion used[’] . . . are reasonable in relation to the purpose of the copying.” *Campbell*, 510 U.S. at 586–87 (quoting 17 U.S.C. § 107(3)). Incorporating one standard by reference does not justify posting provisions of a different version that has not been incorporated into law. *See ASTM*, 896 F.3d at 452. Instead, Defendant’s purpose could be achieved with a paraphrase or summary.

- Fourth Factor: Defendant’s reproductions have not had a “substantially adverse impact on the potential market for the originals,” nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm.” Memo Op. at 30–36 (internal quotation and citation marks omitted).
- Conclusion: Under the presented facts, which are undisputed, Defendant may not fairly copy and republish this standard.

192. ASTM B224 (1980^{e1}):

- Defendant identifies 7 C.F.R. § 1755.370(b) as the incorporating by reference regulation. Becker Decl. ¶ 57, Ex. 90 at 24. The incorporating language in that regulation, however, references only ASTM B224 (1980), and not the revised version ASTM B224 (1980^{e1}) that Defendant published. Defendant concedes that it posted editions of standards that have not been incorporated into law, *see* Def. 2d Mot. at 9–10, and it does not respond to Plaintiffs’ argument that Defendant has not shown this specific standard has been incorporated into law. *See* Wise Decl., Ex. 176 at n.2 (“Where the ASTM standard referenced in the quoted C.F.R. language differs from the version of the ASTM standard that PRO reproduced and displayed, ASTM has highlighted and bolded that language.”); *id.* (highlighting and bolding text of this standard). Defendant bears the burden of demonstrating its affirmative fair use defense, *see Campbell*, 510 U.S. at 590, and here, it has not shown that this standard has been incorporated by reference into law.
- First Factor: There is no indication that Defendant stands to profit from republishing this standard, but Defendant’s stated purpose—to inform the public about the law and facilitate public debate—is not significantly furthered by publishing this standard rather than one that has been incorporated by reference into law. *See ASTM*, 896 F.3d at 449. Further, because the standard has not been incorporated by reference into law, Defendant’s use is less transformative. *See ASTM*, 896 F.3d at 450.
- Second Factor: Standards incorporated by reference into law “are, at best, at the outer edge of “copyright’s protective purposes.” *ASTM*, 896 F.3d at 451. Standards not incorporated into law, though factual works, fall more squarely within the realm of copyright protection. Here, Defendant has not shown that this standard has been incorporated into law and so this factor also counsels against Defendant’s fair use.
- Third Factor: The Supreme Court has characterized the relevant inquiry as whether ““the amount and substantiality of the portion used[’] . . . are reasonable in relation to the purpose of the copying.” *Campbell*, 510 U.S. at 586–87 (quoting 17 U.S.C. § 107(3)). Incorporating one standard by reference does not justify posting provisions of a different version that has not been incorporated into law. *See ASTM*, 896 F.3d at 452. Instead, Defendant’s purpose could be achieved with a paraphrase or summary.
- Fourth Factor: Defendant’s reproductions have not had a “substantially adverse impact on the potential market for the originals,” nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm.” Memo Op. at 30–36 (internal quotation and citation marks omitted).
- Conclusion: Under the presented facts, which are undisputed, Defendant may not fairly copy and republish this standard.

193. ASTM C150 (1999a):

- Defendant identifies 30 C.F.R. § 250.901 as the incorporating by reference regulation. Becker Decl. ¶ 57, Ex. 90 at 31. The incorporating language in that regulation, however, references only ASTM C150 (1999), and not the revised version ASTM C150 (1999a) that Defendant published. Defendant concedes that it posted editions of standards that have not been incorporated into law, *see* Def. 2d Mot. at 9-10, and it does not respond to Plaintiffs’ argument that Defendant has not shown this specific standard has been incorporated into law. *See* Wise Decl., Ex. 176 at n.2 (“Where the ASTM standard referenced in the quoted C.F.R. language differs from the version of the ASTM standard that PRO reproduced and displayed, ASTM has highlighted and bolded that language.”); *id.* (highlighting and bolding text of this standard). Defendant bears the burden of demonstrating its affirmative fair use defense, *see Campbell*, 510 U.S. at 590, and here, it has not shown that this standard has been incorporated by reference into law.
- First Factor: There is no indication that Defendant stands to profit from republishing this standard, but Defendant’s stated purpose—to inform the public about the law and facilitate public debate—is not significantly furthered by publishing this standard rather than one that has been incorporated by reference into law. *See ASTM*, 896 F.3d at 449. Further, because the standard has not been incorporated by reference into law, Defendant’s use is less transformative. *See ASTM*, 896 F.3d at 450.
- Second Factor: Standards incorporated by reference into law “are, at best, at the outer edge of “copyright’s protective purposes.” *ASTM*, 896 F.3d at 451. Standards not incorporated into law, though factual works, fall more squarely within the realm of copyright protection. Here, Defendant has not shown that this standard has been incorporated into law and so this factor also counsels against Defendant’s fair use.
- Third Factor: The Supreme Court has characterized the relevant inquiry as whether “the amount and substantiality of the portion used[’] . . . are reasonable in relation to the purpose of the copying.” *Campbell*, 510 U.S. at 586–87 (quoting 17 U.S.C. § 107(3)). Incorporating one standard by reference does not justify posting provisions of a different version that has not been incorporated into law. *See ASTM*, 896 F.3d at 452. Instead, Defendant’s purpose could be achieved with a paraphrase or summary.
- Fourth Factor: Defendant’s reproductions have not had a “substantially adverse impact on the potential market for the originals,” nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm.” Memo Op. at 30–36 (internal quotation and citation marks omitted).
- Conclusion: Under the presented facts, which are undisputed, Defendant may not fairly copy and republish this standard.

194. ASTM C177 (1997):

- The parties identify 10 C.F.R. § 431.105 (2010) as the incorporating by reference regulation, *see* Becker Decl. ¶ 57, Ex. 90; Wise Decl., Ex. 176. That regulation, however, states explicitly that “procedures in this subpart,” including ASTM C177, “are not incorporated by reference. These sources are given here for information and guidance.” 10 C.F.R. § 431.105(d)(1), (d)(2)(ii). The regulation does not indicate that

any provision of ASTM C177 (1997) are relevant for compliance with the law. Defendant concedes that it posted editions of standards that have not been incorporated into law, *see* Def. 2d Mot. at 9-10, and it does not respond to Plaintiffs' argument that Defendant has not shown this specific standard has been incorporated into law. *See* Wise Decl., Ex. 176 at n.2 ("Where the ASTM standard referenced in the quoted C.F.R. language differs from the version of the ASTM standard that PRO reproduced and displayed, ASTM has highlighted and bolded that language."); *id.* (highlighting and bolding text of this standard). Defendant bears the burden of demonstrating its affirmative fair use defense, *see Campbell*, 510 U.S. at 590, and here, it has not shown that this standard has been incorporated by reference into law.

- First Factor: There is no indication that Defendant stands to profit from republishing this standard, but Defendant's stated purpose—to inform the public about the law and facilitate public debate—is not significantly furthered by publishing this standard rather than one that has been incorporated by reference into law. *See ASTM*, 896 F.3d at 449. Further, because the standard has not been incorporated by reference into law, Defendant's use is less transformative. *See ASTM*, 896 F.3d at 450.
- Second Factor: Standards incorporated by reference into law "are, at best, at the outer edge of "copyright's protective purposes." *ASTM*, 896 F.3d at 451. Standards not incorporated into law, though factual works, fall more squarely within the realm of copyright protection. Here, Defendant has not shown that this standard has been incorporated into law and so this factor also counsels against Defendant's fair use.
- Third Factor: The Supreme Court has characterized the relevant inquiry as whether "the amount and substantiality of the portion used['] . . . are reasonable in relation to the purpose of the copying." *Campbell*, 510 U.S. at 586–87 (quoting 17 U.S.C. § 107(3)). Incorporating one standard by reference does not justify posting provisions of a different version that has not been incorporated into law. *See ASTM*, 896 F.3d at 452. Instead, Defendant's purpose could be achieved with a paraphrase or summary.
- Fourth Factor: Defendant's reproductions have not had a "substantially adverse impact on the potential market for the originals," nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm." Memo Op. at 30–36 (internal quotation and citation marks omitted).
- Conclusion: Under the presented facts, which are undisputed, Defendant may not fairly copy and republish this standard.

195. ASTM C236 1989 (1993)^{e1}:

- Defendant identifies 10 C.F.R. § 434.701 (2012) as the incorporating by reference regulation. Becker Decl. ¶ 57, Ex. 90 at 32. The incorporating language in that regulation, however, references only ASTM c236-89 (Reapproved 1993), and not the revised (1993)^{e1} version that Defendant published. Defendant concedes that it posted editions of standards that have not been incorporated into law, *see* Def. 2d Mot. at 9-10, and it does not respond to Plaintiffs' argument that Defendant has not shown this specific standard has been incorporated into law. *See* Wise Decl., Ex. 176 at n.2 ("Where the ASTM standard referenced in the quoted C.F.R. language differs from the version of the ASTM standard that PRO reproduced and displayed, ASTM has

highlighted and bolded that language.”); *id.* (highlighting and bolding text of this standard). Defendant bears the burden of demonstrating its affirmative fair use defense, *see Campbell*, 510 U.S. at 590, and here, it has not shown that this standard has been incorporated by reference into law.

- **First Factor:** There is no indication that Defendant stands to profit from republishing this standard, but Defendant’s stated purpose—to inform the public about the law and facilitate public debate—is not significantly furthered by publishing this standard rather than one that has been incorporated by reference into law. *See ASTM*, 896 F.3d at 449. Further, because the standard has not been incorporated by reference into law, Defendant’s use is less transformative. *See ASTM*, 896 F.3d at 450.
- **Second Factor:** Standards incorporated by reference into law “are, at best, at the outer edge of “copyright’s protective purposes.” *ASTM*, 896 F.3d at 451. Standards not incorporated into law, though factual works, fall more squarely within the realm of copyright protection. Here, Defendant has not shown that this standard has been incorporated into law and so this factor also counsels against Defendant’s fair use.
- **Third Factor:** The Supreme Court has characterized the relevant inquiry as whether “the amount and substantiality of the portion used[’] . . . are reasonable in relation to the purpose of the copying.” *Campbell*, 510 U.S. at 586–87 (quoting 17 U.S.C. § 107(3)). Incorporating one standard by reference does not justify posting provisions of a different version that has not been incorporated into law. *See ASTM*, 896 F.3d at 452. Instead, Defendant’s purpose could be achieved with a paraphrase or summary.
- **Fourth Factor:** Defendant’s reproductions have not had a “substantially adverse impact on the potential market for the originals,” nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm.” Memo Op. at 30–36 (internal quotation and citation marks omitted).
- **Conclusion:** Under the presented facts, which are undisputed, Defendant may not fairly copy and republish this standard.

196. ASTM C516 1980 (1996)^{e1}:

- Defendant identifies 24 C.F.R. (Parts 200 to 499) (2005) as the incorporating by reference regulation. Becker Decl. ¶ 57, Ex. 90 at 34. The incorporating language in that regulation, however, references only ASTM C516-80, and not the revised (1996)^{e1} version that Defendant published. Defendant concedes that it posted editions of standards that have not been incorporated into law, *see* Def. 2d Mot. at 9-10, and it does not respond to Plaintiffs’ argument that Defendant has not shown this specific standard has been incorporated into law. *See* Wise Decl., Ex. 176 at n.2 (“Where the ASTM standard referenced in the quoted C.F.R. language differs from the version of the ASTM standard that PRO reproduced and displayed, ASTM has highlighted and bolded that language.”); *id.* (highlighting and bolding text of this standard). Defendant bears the burden of demonstrating its affirmative fair use defense, *see Campbell*, 510 U.S. at 590, and here, it has not shown that this standard has been incorporated by reference into law.
- **First Factor:** There is no indication that Defendant stands to profit from republishing this standard, but Defendant’s stated purpose—to inform the public about the law and

facilitate public debate—is not significantly furthered by publishing this standard rather than one that has been incorporated by reference into law. *See ASTM*, 896 F.3d at 449. Further, because the standard has not been incorporated by reference into law, Defendant’s use is less transformative. *See ASTM*, 896 F.3d at 450.

- **Second Factor:** Standards incorporated by reference into law “are, at best, at the outer edge of “copyright’s protective purposes.” *ASTM*, 896 F.3d at 451. Standards not incorporated into law, though factual works, fall more squarely within the realm of copyright protection. Here, Defendant has not shown that this standard has been incorporated into law and so this factor also counsels against Defendant’s fair use.
- **Third Factor:** The Supreme Court has characterized the relevant inquiry as whether ““the amount and substantiality of the portion used[’] . . . are reasonable in relation to the purpose of the copying.” *Campbell*, 510 U.S. at 586–87 (quoting 17 U.S.C. § 107(3)). Incorporating one standard by reference does not justify posting provisions of a different version that has not been incorporated into law. *See ASTM*, 896 F.3d at 452. Instead, Defendant’s purpose could be achieved with a paraphrase or summary.
- **Fourth Factor:** Defendant’s reproductions have not had a “substantially adverse impact on the potential market for the originals,” nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm.” Memo Op. at 30–36 (internal quotation and citation marks omitted).
- **Conclusion:** Under the presented facts, which are undisputed, Defendant may not fairly copy and republish this standard.

197. ASTM C549 1981 (1995)^{e1}:

- Defendant identifies 24 C.F.R. § 200, Appendix A (2010) as the incorporating by reference regulation. Becker Decl. ¶ 57, Ex. 90 at 35. The incorporating language in that regulation, however, references only ASTM C 549-81 Standard Specification for Perlite Loose Fill Insulation (Reapproved 1986), and not the revised (1995)^{e1} version that Defendant published. Defendant concedes that it posted editions of standards that have not been incorporated into law, *see* Def. 2d Mot. at 9-10, and it does not respond to Plaintiffs’ argument that Defendant has not shown this specific standard has been incorporated into law. *See* Wise Decl., Ex. 176 at n.2 (“Where the ASTM standard referenced in the quoted C.F.R. language differs from the version of the ASTM standard that PRO reproduced and displayed, ASTM has highlighted and bolded that language.”); *id.* (highlighting and bolding text of this standard). Defendant bears the burden of demonstrating its affirmative fair use defense, *see Campbell*, 510 U.S. at 590, and here, it has not shown that this standard has been incorporated by reference into law.
- **First Factor:** There is no indication that Defendant stands to profit from republishing this standard, but Defendant’s stated purpose—to inform the public about the law and facilitate public debate—is not significantly furthered by publishing this standard rather than one that has been incorporated by reference into law. *See ASTM*, 896 F.3d at 449. Further, because the standard has not been incorporated by reference into law, Defendant’s use is less transformative. *See ASTM*, 896 F.3d at 450.
- **Second Factor:** Standards incorporated by reference into law “are, at best, at the outer

edge of “copyright’s protective purposes.” *ASTM*, 896 F.3d at 451. Standards not incorporated into law, though factual works, fall more squarely within the realm of copyright protection. Here, Defendant has not shown that this standard has been incorporated into law and so this factor also counsels against Defendant’s fair use.

- Third Factor: The Supreme Court has characterized the relevant inquiry as whether “the amount and substantiality of the portion used[’] . . . are reasonable in relation to the purpose of the copying.” *Campbell*, 510 U.S. at 586–87 (quoting 17 U.S.C. § 107(3)). Incorporating one standard by reference does not justify posting provisions of a different version that has not been incorporated into law. *See ASTM*, 896 F.3d at 452. Instead, Defendant’s purpose could be achieved with a paraphrase or summary.
- Fourth Factor: Defendant’s reproductions have not had a “substantially adverse impact on the potential market for the originals,” nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm.” Memo Op. at 30–36 (internal quotation and citation marks omitted).
- Conclusion: Under the presented facts, which are undisputed, Defendant may not fairly copy and republish this standard.

198. ASTM D1246 1995 (1999):

- Defendant identifies 40 C.F.R. § 136.3(a) Table IB (2003) as the incorporating by reference regulation. Becker Decl. ¶ 57, Ex. 90 at 38. The incorporating language in that regulation, however, references only ASTM D1246-95(C), and not the revised (1999) version that Defendant published. Defendant concedes that it posted editions of standards that have not been incorporated into law, *see* Def. 2d Mot. at 9-10, and it does not respond to Plaintiffs’ argument that Defendant has not shown this specific standard has been incorporated into law. *See* Wise Decl., Ex. 176 at n.2 (“Where the ASTM standard referenced in the quoted C.F.R. language differs from the version of the ASTM standard that PRO reproduced and displayed, ASTM has highlighted and bolded that language.”); *id.* (highlighting and bolding text of this standard). Defendant bears the burden of demonstrating its affirmative fair use defense, *see Campbell*, 510 U.S. at 590, and here, it has not shown that this standard has been incorporated by reference into law.
- First Factor: There is no indication that Defendant stands to profit from republishing this standard, but Defendant’s stated purpose—to inform the public about the law and facilitate public debate—is not significantly furthered by publishing this standard rather than one that has been incorporated by reference into law. *See ASTM*, 896 F.3d at 449. Further, because the standard has not been incorporated by reference into law, Defendant’s use is less transformative. *See ASTM*, 896 F.3d at 450.
- Second Factor: Standards incorporated by reference into law “are, at best, at the outer edge of “copyright’s protective purposes.” *ASTM*, 896 F.3d at 451. Standards not incorporated into law, though factual works, fall more squarely within the realm of copyright protection. Here, Defendant has not shown that this standard has been incorporated into law and so this factor also counsels against Defendant’s fair use.
- Third Factor: The Supreme Court has characterized the relevant inquiry as whether “the amount and substantiality of the portion used[’] . . . are reasonable in relation to

the purpose of the copying.” *Campbell*, 510 U.S. at 586–87 (quoting 17 U.S.C. § 107(3)). Incorporating one standard by reference does not justify posting provisions of a different version that has not been incorporated into law. *See ASTM*, 896 F.3d at 452. Instead, Defendant’s purpose could be achieved with a paraphrase or summary.

- Fourth Factor: Defendant’s reproductions have not had a “substantially adverse impact on the potential market for the originals,” nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm.” Memo Op. at 30–36 (internal quotation and citation marks omitted).
- Conclusion: Under the presented facts, which are undisputed, Defendant may not fairly copy and republish this standard.

199. ASTM D1518 1985 (1998)^{e1}:

- Defendant identifies 46 C.F.R. § 160.174-3 (2014) as the incorporating by reference regulation. Becker Decl. ¶ 57, Ex. 90 at 43. The incorporating language in that regulation, however, references only ASTM D 1518-85 (1990), and not the revised (1998)^{e1} version that Defendant published. Defendant concedes that it posted editions of standards that have not been incorporated into law, *see* Def. 2d Mot. at 9-10, and it does not respond to Plaintiffs’ argument that Defendant has not shown this specific standard has been incorporated into law. *See* Wise Decl., Ex. 176 at n.2 (“Where the ASTM standard referenced in the quoted C.F.R. language differs from the version of the ASTM standard that PRO reproduced and displayed, ASTM has highlighted and bolded that language.”); *id.* (highlighting and bolding text of this standard). Defendant bears the burden of demonstrating its affirmative fair use defense, *see Campbell*, 510 U.S. at 590, and here, it has not shown that this standard has been incorporated by reference into law.
- First Factor: There is no indication that Defendant stands to profit from republishing this standard, but Defendant’s stated purpose—to inform the public about the law and facilitate public debate—is not significantly furthered by publishing this standard rather than one that has been incorporated by reference into law. *See ASTM*, 896 F.3d at 449. Further, because the standard has not been incorporated by reference into law, Defendant’s use is less transformative. *See ASTM*, 896 F.3d at 450.
- Second Factor: Standards incorporated by reference into law “are, at best, at the outer edge of “copyright’s protective purposes.” *ASTM*, 896 F.3d at 451. Standards not incorporated into law, though factual works, fall more squarely within the realm of copyright protection. Here, Defendant has not shown that this standard has been incorporated into law and so this factor also counsels against Defendant’s fair use.
- Third Factor: The Supreme Court has characterized the relevant inquiry as whether “the amount and substantiality of the portion used[’] . . . are reasonable in relation to the purpose of the copying.” *Campbell*, 510 U.S. at 586–87 (quoting 17 U.S.C. § 107(3)). Incorporating one standard by reference does not justify posting provisions of a different version that has not been incorporated into law. *See ASTM*, 896 F.3d at 452. Instead, Defendant’s purpose could be achieved with a paraphrase or summary.
- Fourth Factor: Defendant’s reproductions have not had a “substantially adverse impact on the potential market for the originals,” nor have Plaintiffs shown by a preponderance

of the evidence that there is a meaningful likelihood of future harm.” Memo Op. at 30–36 (internal quotation and citation marks omitted).

- Conclusion: Under the presented facts, which are undisputed, Defendant may not fairly copy and republish this standard.

200. ASTM D1785 (1986):

- Defendant identifies 46 C.F.R. § 56.01-2 (1997) as the incorporating by reference regulation. Becker Decl. ¶ 57, Ex. 90 at 46. The incorporating language in that regulation, however, references only ASTM D 1785-83, and not the 1986 version that Defendant published. Defendant concedes that it posted editions of standards that have not been incorporated into law, *see* Def. 2d Mot. at 9-10, and it does not respond to Plaintiffs’ argument that Defendant has not shown this specific standard has been incorporated into law. *See* Wise Decl., Ex. 176 at n.2 (“Where the ASTM standard referenced in the quoted C.F.R. language differs from the version of the ASTM standard that PRO reproduced and displayed, ASTM has highlighted and bolded that language.”); *id.* (highlighting and bolding text of this standard). Defendant bears the burden of demonstrating its affirmative fair use defense, *see Campbell*, 510 U.S. at 590, and here, it has not shown that this standard has been incorporated by reference into law.
- First Factor: There is no indication that Defendant stands to profit from republishing this standard, but Defendant’s stated purpose—to inform the public about the law and facilitate public debate—is not significantly furthered by publishing this standard rather than one that has been incorporated by reference into law. *See ASTM*, 896 F.3d at 449. Further, because the standard has not been incorporated by reference into law, Defendant’s use is less transformative. *See ASTM*, 896 F.3d at 450.
- Second Factor: Standards incorporated by reference into law “are, at best, at the outer edge of “copyright’s protective purposes.” *ASTM*, 896 F.3d at 451. Standards not incorporated into law, though factual works, fall more squarely within the realm of copyright protection. Here, Defendant has not shown that this standard has been incorporated into law and so this factor also counsels against Defendant’s fair use.
- Third Factor: The Supreme Court has characterized the relevant inquiry as whether “the amount and substantiality of the portion used[’] . . . are reasonable in relation to the purpose of the copying.” *Campbell*, 510 U.S. at 586–87 (quoting 17 U.S.C. § 107(3)). Incorporating one standard by reference does not justify posting provisions of a different version that has not been incorporated into law. *See ASTM*, 896 F.3d at 452. Instead, Defendant’s purpose could be achieved with a paraphrase or summary.
- Fourth Factor: Defendant’s reproductions have not had a “substantially adverse impact on the potential market for the originals,” nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm.” Memo Op. at 30–36 (internal quotation and citation marks omitted).
- Conclusion: Under the presented facts, which are undisputed, Defendant may not fairly copy and republish this standard.

201. ASTM D1946 1990 (1994)^{e1}:

- Defendant identifies 40 C.F.R. § 75.6 (2010) as the incorporating by reference regulation. Becker Decl. ¶ 57, Ex. 90 at 49. The incorporating language in that regulation, however, references only ASTM D1946-90 (Reapproved 2006), and not the 1994^{e1} version that Defendant published. Defendant concedes that it posted editions of standards that have not been incorporated into law, *see* Def. 2d Mot. at 9-10, and it does not respond to Plaintiffs' argument that Defendant has not shown this specific standard has been incorporated into law. *See* Wise Decl., Ex. 176 at n.2 ("Where the ASTM standard referenced in the quoted C.F.R. language differs from the version of the ASTM standard that PRO reproduced and displayed, ASTM has highlighted and bolded that language."); *id.* (highlighting and bolding text of this standard). Defendant bears the burden of demonstrating its affirmative fair use defense, *see Campbell*, 510 U.S. at 590, and here, it has not shown that this standard has been incorporated by reference into law.
- First Factor: There is no indication that Defendant stands to profit from republishing this standard, but Defendant's stated purpose—to inform the public about the law and facilitate public debate—is not significantly furthered by publishing this standard rather than one that has been incorporated by reference into law. *See ASTM*, 896 F.3d at 449. Further, because the standard has not been incorporated by reference into law, Defendant's use is less transformative. *See ASTM*, 896 F.3d at 450.
- Second Factor: Standards incorporated by reference into law "are, at best, at the outer edge of "copyright's protective purposes." *ASTM*, 896 F.3d at 451. Standards not incorporated into law, though factual works, fall more squarely within the realm of copyright protection. Here, Defendant has not shown that this standard has been incorporated into law and so this factor also counsels against Defendant's fair use.
- Third Factor: The Supreme Court has characterized the relevant inquiry as whether "the amount and substantiality of the portion used['] . . . are reasonable in relation to the purpose of the copying." *Campbell*, 510 U.S. at 586–87 (quoting 17 U.S.C. § 107(3)). Incorporating one standard by reference does not justify posting provisions of a different version that has not been incorporated into law. *See ASTM*, 896 F.3d at 452. Instead, Defendant's purpose could be achieved with a paraphrase or summary.
- Fourth Factor: Defendant's reproductions have not had a "substantially adverse impact on the potential market for the originals," nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm." Memo Op. at 30–36 (internal quotation and citation marks omitted).
- Conclusion: Under the presented facts, which are undisputed, Defendant may not fairly copy and republish this standard.

202. ASTM D4239 1997^{e1}:

- Defendant identifies 41 C.F.R. § 60.17 (2011) as the incorporating by reference regulation. Becker Decl. ¶ 57, Ex. 90 at 69. The incorporating language in that regulation, however, references only ASTM D4239-85, 94, 97, and not the revised 1997^{e1} version that Defendant published. Defendant concedes that it posted editions of standards that have not been incorporated into law, *see* Def. 2d Mot. at 9-10, and it does

not respond to Plaintiffs' argument that Defendant has not shown this specific standard has been incorporated into law. *See* Wise Decl., Ex. 176 at n.2 (“Where the ASTM standard referenced in the quoted C.F.R. language differs from the version of the ASTM standard that PRO reproduced and displayed, ASTM has highlighted and bolded that language.”); *id.* (highlighting and bolding text of this standard). Defendant bears the burden of demonstrating its affirmative fair use defense, *see Campbell*, 510 U.S. at 590, and here, it has not shown that this standard has been incorporated by reference into law.

- First Factor: There is no indication that Defendant stands to profit from republishing this standard, but Defendant’s stated purpose—to inform the public about the law and facilitate public debate—is not significantly furthered by publishing this standard rather than one that has been incorporated by reference into law. *See ASTM*, 896 F.3d at 449. Further, because the standard has not been incorporated by reference into law, Defendant’s use is less transformative. *See ASTM*, 896 F.3d at 450.
- Second Factor: Standards incorporated by reference into law “are, at best, at the outer edge of “copyright’s protective purposes.” *ASTM*, 896 F.3d at 451. Standards not incorporated into law, though factual works, fall more squarely within the realm of copyright protection. Here, Defendant has not shown that this standard has been incorporated into law and so this factor also counsels against Defendant’s fair use.
- Third Factor: The Supreme Court has characterized the relevant inquiry as whether “the amount and substantiality of the portion used[’] . . . are reasonable in relation to the purpose of the copying.” *Campbell*, 510 U.S. at 586–87 (quoting 17 U.S.C. § 107(3)). Incorporating one standard by reference does not justify posting provisions of a different version that has not been incorporated into law. *See ASTM*, 896 F.3d at 452. Instead, Defendant’s purpose could be achieved with a paraphrase or summary.
- Fourth Factor: Defendant’s reproductions have not had a “substantially adverse impact on the potential market for the originals,” nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm.” Memo Op. at 30–36 (internal quotation and citation marks omitted).
- Conclusion: Under the presented facts, which are undisputed, Defendant may not fairly copy and republish this standard.

203. ASTM D4891 1989 (1994)^{e1}:

- Defendant identifies 40 C.F.R. § 75.6 (2010) as the incorporating by reference regulation. Becker Decl. ¶ 57, Ex. 90 at 72. The incorporating language in that regulation, however, references only ASTM D4891-89 (Reapproved 2006), and not the (1994)^{e1} version that Defendant published. Defendant concedes that it posted editions of standards that have not been incorporated into law, *see* Def. 2d Mot. at 9-10, and it does not respond to Plaintiffs’ argument that Defendant has not shown this specific standard has been incorporated into law. *See* Wise Decl., Ex. 176 at n.2 (“Where the ASTM standard referenced in the quoted C.F.R. language differs from the version of the ASTM standard that PRO reproduced and displayed, ASTM has highlighted and bolded that language.”); *id.* (highlighting and bolding text of this standard). Defendant bears the burden of demonstrating its affirmative fair use defense, *see Campbell*, 510

U.S. at 590, and here, it has not shown that this standard has been incorporated by reference into law.

- First Factor: There is no indication that Defendant stands to profit from republishing this standard, but Defendant’s stated purpose—to inform the public about the law and facilitate public debate—is not significantly furthered by publishing this standard rather than one that has been incorporated by reference into law. *See ASTM*, 896 F.3d at 449. Further, because the standard has not been incorporated by reference into law, Defendant’s use is less transformative. *See ASTM*, 896 F.3d at 450.
- Second Factor: Standards incorporated by reference into law “are, at best, at the outer edge of “copyright’s protective purposes.” *ASTM*, 896 F.3d at 451. Standards not incorporated into law, though factual works, fall more squarely within the realm of copyright protection. Here, Defendant has not shown that this standard has been incorporated into law and so this factor also counsels against Defendant’s fair use.
- Third Factor: The Supreme Court has characterized the relevant inquiry as whether ““the amount and substantiality of the portion used[’] . . . are reasonable in relation to the purpose of the copying.” *Campbell*, 510 U.S. at 586–87 (quoting 17 U.S.C. § 107(3)). Incorporating one standard by reference does not justify posting provisions of a different version that has not been incorporated into law. *See ASTM*, 896 F.3d at 452. Instead, Defendant’s purpose could be achieved with a paraphrase or summary.
- Fourth Factor: Defendant’s reproductions have not had a “substantially adverse impact on the potential market for the originals,” nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm.” Memo Op. at 30–36 (internal quotation and citation marks omitted).
- Conclusion: Under the presented facts, which are undisputed, Defendant may not fairly copy and republish this standard.

204. ASTM D5489 (1996a):

- Defendant identifies 16 C.F.R. § 423.8 (2014) as the incorporating by reference regulation. Becker Decl. ¶ 57, Ex. 90 at 74. The incorporating language in that regulation, however, references only ASTM D5489-96c, and not the 1996a version that PRO published. Defendant concedes that it posted editions of standards that have not been incorporated into law, *see* Def. 2d Mot. at 9-10, and it does not respond to Plaintiffs’ argument that Defendant has not shown this specific standard has been incorporated into law. *See* Wise Decl., Ex. 176 at n.2 (“Where the ASTM standard referenced in the quoted C.F.R. language differs from the version of the ASTM standard that PRO reproduced and displayed, ASTM has highlighted and bolded that language.”); *id.* (highlighting and bolding text of this standard). Defendant bears the burden of demonstrating its affirmative fair use defense, *see Campbell*, 510 U.S. at 590, and here, it has not shown that this standard has been incorporated by reference into law.
- First Factor: There is no indication that Defendant stands to profit from republishing this standard, but Defendant’s stated purpose—to inform the public about the law and facilitate public debate—is not significantly furthered by publishing this standard rather than one that has been incorporated by reference into law. *See ASTM*, 896 F.3d at 449.

Further, because the standard has not been incorporated by reference into law, Defendant's use is less transformative. *See ASTM*, 896 F.3d at 450.

- Second Factor: Standards incorporated by reference into law “are, at best, at the outer edge of “copyright’s protective purposes.” *ASTM*, 896 F.3d at 451. Standards not incorporated into law, though factual works, fall more squarely within the realm of copyright protection. Here, Defendant has not shown that this standard has been incorporated into law and so this factor also counsels against Defendant’s fair use.
- Third Factor: The Supreme Court has characterized the relevant inquiry as whether “the amount and substantiality of the portion used[’] . . . are reasonable in relation to the purpose of the copying.” *Campbell*, 510 U.S. at 586–87 (quoting 17 U.S.C. § 107(3)). Incorporating one standard by reference does not justify posting provisions of a different version that has not been incorporated into law. *See ASTM*, 896 F.3d at 452. Instead, Defendant’s purpose could be achieved with a paraphrase or summary.
- Fourth Factor: Defendant’s reproductions have not had a “substantially adverse impact on the potential market for the originals,” nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm.” Memo Op. at 30–36 (internal quotation and citation marks omitted).
- Conclusion: Under the presented facts, which are undisputed, Defendant may not fairly copy and republish this standard.

205. ASTM D5865 (1998a):

- Defendant identifies 40 C.F.R. § 60.17 (2011) as the incorporating by reference regulation. Becker Decl. ¶ 57, Ex. 90 at 75. The incorporating language in that regulation, however, references only ASTM D5865-98, and not the 1998a version that Defendant published. Defendant concedes that it posted editions of standards that have not been incorporated into law, *see* Def. 2d Mot. at 9-10, and it does not respond to Plaintiffs’ argument that Defendant has not shown this specific standard has been incorporated into law. *See* Wise Decl., Ex. 176 at n.2 (“Where the ASTM standard referenced in the quoted C.F.R. language differs from the version of the ASTM standard that PRO reproduced and displayed, ASTM has highlighted and bolded that language.”); *id.* (highlighting and bolding text of this standard). Defendant bears the burden of demonstrating its affirmative fair use defense, *see Campbell*, 510 U.S. at 590, and here, it has not shown that this standard has been incorporated by reference into law.
- First Factor: There is no indication that Defendant stands to profit from republishing this standard, but Defendant’s stated purpose—to inform the public about the law and facilitate public debate—is not significantly furthered by publishing this standard rather than one that has been incorporated by reference into law. *See ASTM*, 896 F.3d at 449. Further, because the standard has not been incorporated by reference into law, Defendant’s use is less transformative. *See ASTM*, 896 F.3d at 450.
- Second Factor: Standards incorporated by reference into law “are, at best, at the outer edge of “copyright’s protective purposes.” *ASTM*, 896 F.3d at 451. Standards not incorporated into law, though factual works, fall more squarely within the realm of copyright protection. Here, Defendant has not shown that this standard has been

incorporated into law and so this factor also counsels against Defendant's fair use.

- Third Factor: The Supreme Court has characterized the relevant inquiry as whether “the amount and substantiality of the portion used['] . . . are reasonable in relation to the purpose of the copying.” *Campbell*, 510 U.S. at 586–87 (quoting 17 U.S.C. § 107(3)). Incorporating one standard by reference does not justify posting provisions of a different version that has not been incorporated into law. *See ASTM*, 896 F.3d at 452. Instead, Defendant's purpose could be achieved with a paraphrase or summary.
- Fourth Factor: Defendant's reproductions have not had a “substantially adverse impact on the potential market for the originals,” nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm.” Memo Op. at 30–36 (internal quotation and citation marks omitted).
- Conclusion: Under the presented facts, which are undisputed, Defendant may not fairly copy and republish this standard.

206. ASTM D665 (1998^{e1}):

- Defendant identifies 46 C.F.R. § 61.03-1 (2014) as the incorporating by reference regulation. Becker Decl. ¶ 57, Ex. 90 at 78. The incorporating language in that regulation, however, references only ASTM D665-98, and not the revised 1998^{e1} version that Defendant published. Defendant concedes that it posted editions of standards that have not been incorporated into law, *see* Def. 2d Mot. at 9-10, and it does not respond to Plaintiffs' argument that Defendant has not shown this specific standard has been incorporated into law. *See* Wise Decl., Ex. 176 at n.2 (“Where the ASTM standard referenced in the quoted C.F.R. language differs from the version of the ASTM standard that PRO reproduced and displayed, ASTM has highlighted and bolded that language.”); *id.* (highlighting and bolding text of this standard). Defendant bears the burden of demonstrating its affirmative fair use defense, *see Campbell*, 510 U.S. at 590, and here, it has not shown that this standard has been incorporated by reference into law.
- First Factor: There is no indication that Defendant stands to profit from republishing this standard, but Defendant's stated purpose—to inform the public about the law and facilitate public debate—is not significantly furthered by publishing this standard rather than one that has been incorporated by reference into law. *See ASTM*, 896 F.3d at 449. Further, because the standard has not been incorporated by reference into law, Defendant's use is less transformative. *See ASTM*, 896 F.3d at 450.
- Second Factor: Standards incorporated by reference into law “are, at best, at the outer edge of “copyright's protective purposes.” *ASTM*, 896 F.3d at 451. Standards not incorporated into law, though factual works, fall more squarely within the realm of copyright protection. Here, Defendant has not shown that this standard has been incorporated into law and so this factor also counsels against Defendant's fair use.
- Third Factor: The Supreme Court has characterized the relevant inquiry as whether “the amount and substantiality of the portion used['] . . . are reasonable in relation to the purpose of the copying.” *Campbell*, 510 U.S. at 586–87 (quoting 17 U.S.C. § 107(3)). Incorporating one standard by reference does not justify posting provisions of a different version that has not been incorporated into law. *See ASTM*, 896 F.3d at

452. Instead, Defendant's purpose could be achieved with a paraphrase or summary.

- Fourth Factor: Defendant's reproductions have not had a "substantially adverse impact on the potential market for the originals," nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm." Memo Op. at 30–36 (internal quotation and citation marks omitted).
- Conclusion: Under the presented facts, which are undisputed, Defendant may not fairly copy and republish this standard.

207. ASTM D975 1998b:

- Defendant identifies 41 C.F.R. § 60.17 (2011) as the incorporating by reference regulation. Becker Decl. ¶ 57, Ex. 90 at 80. The incorporating language in that regulation, however, references only ASTM D975-78, 96, 98a, and not the 1998b version that Defendant published. Defendant concedes that it posted editions of standards that have not been incorporated into law, *see* Def. 2d Mot. at 9-10, and it does not respond to Plaintiffs' argument that Defendant has not shown this specific standard has been incorporated into law. *See* Wise Decl., Ex. 176 at n.2 ("Where the ASTM standard referenced in the quoted C.F.R. language differs from the version of the ASTM standard that PRO reproduced and displayed, ASTM has highlighted and bolded that language."); *id.* (highlighting and bolding text of this standard). Defendant bears the burden of demonstrating its affirmative fair use defense, *see Campbell*, 510 U.S. at 590, and here, it has not shown that this standard has been incorporated by reference into law.
- First Factor: There is no indication that Defendant stands to profit from republishing this standard, but Defendant's stated purpose—to inform the public about the law and facilitate public debate—is not significantly furthered by publishing this standard rather than one that has been incorporated by reference into law. *See ASTM*, 896 F.3d at 449. Further, because the standard has not been incorporated by reference into law, Defendant's use is less transformative. *See ASTM*, 896 F.3d at 450.
- Second Factor: Standards incorporated by reference into law "are, at best, at the outer edge of "copyright's protective purposes." *ASTM*, 896 F.3d at 451. Standards not incorporated into law, though factual works, fall more squarely within the realm of copyright protection. Here, Defendant has not shown that this standard has been incorporated into law and so this factor also counsels against Defendant's fair use.
- Third Factor: The Supreme Court has characterized the relevant inquiry as whether "the amount and substantiality of the portion used['] . . . are reasonable in relation to the purpose of the copying." *Campbell*, 510 U.S. at 586–87 (quoting 17 U.S.C. § 107(3)). Incorporating one standard by reference does not justify posting provisions of a different version that has not been incorporated into law. *See ASTM*, 896 F.3d at 452. Instead, Defendant's purpose could be achieved with a paraphrase or summary.
- Fourth Factor: Defendant's reproductions have not had a "substantially adverse impact on the potential market for the originals," nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm." Memo Op. at 30–36 (internal quotation and citation marks omitted).
- Conclusion: Under the presented facts, which are undisputed, Defendant may not fairly

copy and republish this standard.

208. ASTM D975 2007:

- Defendant identifies 40 C.F.R. § 1065.1010 (2011) as the incorporating by reference regulation. Becker Decl. ¶ 57, Ex. 90 at 80. The incorporating language in that regulation, however, references only ASTM D975-07b, and not the 2007 version that Defendant published. Defendant concedes that it posted editions of standards that have not been incorporated into law, *see* Def. 2d Mot. at 9-10, and it does not respond to Plaintiffs' argument that Defendant has not shown this specific standard has been incorporated into law. *See* Wise Decl., Ex. 176 at n.2 ("Where the ASTM standard referenced in the quoted C.F.R. language differs from the version of the ASTM standard that PRO reproduced and displayed, ASTM has highlighted and bolded that language."); *id.* (highlighting and bolding text of this standard). Defendant bears the burden of demonstrating its affirmative fair use defense, *see Campbell*, 510 U.S. at 590, and here, it has not shown that this standard has been incorporated by reference into law.
- First Factor: There is no indication that Defendant stands to profit from republishing this standard, but Defendant's stated purpose—to inform the public about the law and facilitate public debate—is not significantly furthered by publishing this standard rather than one that has been incorporated by reference into law. *See ASTM*, 896 F.3d at 449. Further, because the standard has not been incorporated by reference into law, Defendant's use is less transformative. *See ASTM*, 896 F.3d at 450.
- Second Factor: Standards incorporated by reference into law "are, at best, at the outer edge of "copyright's protective purposes." *ASTM*, 896 F.3d at 451. Standards not incorporated into law, though factual works, fall more squarely within the realm of copyright protection. Here, Defendant has not shown that this standard has been incorporated into law and so this factor also counsels against Defendant's fair use.
- Third Factor: The Supreme Court has characterized the relevant inquiry as whether "the amount and substantiality of the portion used['] . . . are reasonable in relation to the purpose of the copying." *Campbell*, 510 U.S. at 586–87 (quoting 17 U.S.C. § 107(3)). Incorporating one standard by reference does not justify posting provisions of a different version that has not been incorporated into law. *See ASTM*, 896 F.3d at 452. Instead, Defendant's purpose could be achieved with a paraphrase or summary.
- Fourth Factor: Defendant's reproductions have not had a "substantially adverse impact on the potential market for the originals," nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm." Memo Op. at 30–36 (internal quotation and citation marks omitted).
- Conclusion: Under the presented facts, which are undisputed, Defendant may not fairly copy and republish this standard.

209. ASTM E145 (1994)^{e1}:

- Defendant identifies 40 C.F.R. § 63.14 (2011) as the incorporating by reference regulation. Becker Decl. ¶ 57, Ex. 90 at 82. The incorporating language in that regulation, however, references only ASTM E145-94 (Reapproved 2001), and not the (1994)^{e1} version that Defendant published. Defendant concedes that it posted editions

of standards that have not been incorporated into law, *see* Def. 2d Mot. at 9-10, and it does not respond to Plaintiffs' argument that Defendant has not shown this specific standard has been incorporated into law. *See* Wise Decl., Ex. 176 at n.2 ("Where the ASTM standard referenced in the quoted C.F.R. language differs from the version of the ASTM standard that PRO reproduced and displayed, ASTM has highlighted and bolded that language."); *id.* (highlighting and bolding text of this standard). Defendant bears the burden of demonstrating its affirmative fair use defense, *see Campbell*, 510 U.S. at 590, and here, it has not shown that this standard has been incorporated by reference into law.

- First Factor: There is no indication that Defendant stands to profit from republishing this standard, but Defendant's stated purpose—to inform the public about the law and facilitate public debate—is not significantly furthered by publishing this standard rather than one that has been incorporated by reference into law. *See ASTM*, 896 F.3d at 449. Further, because the standard has not been incorporated by reference into law, Defendant's use is less transformative. *See ASTM*, 896 F.3d at 450.
- Second Factor: Standards incorporated by reference into law "are, at best, at the outer edge of "copyright's protective purposes." *ASTM*, 896 F.3d at 451. Standards not incorporated into law, though factual works, fall more squarely within the realm of copyright protection. Here, Defendant has not shown that this standard has been incorporated into law and so this factor also counsels against Defendant's fair use.
- Third Factor: The Supreme Court has characterized the relevant inquiry as whether "the amount and substantiality of the portion used['] . . . are reasonable in relation to the purpose of the copying." *Campbell*, 510 U.S. at 586–87 (quoting 17 U.S.C. § 107(3)). Incorporating one standard by reference does not justify posting provisions of a different version that has not been incorporated into law. *See ASTM*, 896 F.3d at 452. Instead, Defendant's purpose could be achieved with a paraphrase or summary.
- Fourth Factor: Defendant's reproductions have not had a "substantially adverse impact on the potential market for the originals," nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm." Memo Op. at 30–36 (internal quotation and citation marks omitted).
- Conclusion: Under the presented facts, which are undisputed, Defendant may not fairly copy and republish this standard.

210. ASTM E695 1979 (1997)^{e1}:

- Defendant identifies 24 C.F.R. (Parts 200 to 499) (2005) as the incorporating by reference regulation. Becker Decl. ¶ 57, Ex. 90 at 90. The incorporating language in that regulation, however, references only ASTM E695-79 (Reapproved 1991), and not the 1997^{e1} version that Defendant published. Defendant concedes that it posted editions of standards that have not been incorporated into law, *see* Def. 2d Mot. at 9-10, and it does not respond to Plaintiffs' argument that Defendant has not shown this specific standard has been incorporated into law. *See* Wise Decl., Ex. 176 at n.2 ("Where the ASTM standard referenced in the quoted C.F.R. language differs from the version of the ASTM standard that PRO reproduced and displayed, ASTM has highlighted and bolded that language."); *id.* (highlighting and bolding text of this

standard). Defendant bears the burden of demonstrating its affirmative fair use defense, *see Campbell*, 510 U.S. at 590, and here, it has not shown that this standard has been incorporated by reference into law.

- **First Factor:** There is no indication that Defendant stands to profit from republishing this standard, but Defendant’s stated purpose—to inform the public about the law and facilitate public debate—is not significantly furthered by publishing this standard rather than one that has been incorporated by reference into law. *See ASTM*, 896 F.3d at 449. Further, because the standard has not been incorporated by reference into law, Defendant’s use is less transformative. *See ASTM*, 896 F.3d at 450.
- **Second Factor:** Standards incorporated by reference into law “are, at best, at the outer edge of “copyright’s protective purposes.” *ASTM*, 896 F.3d at 451. Standards not incorporated into law, though factual works, fall more squarely within the realm of copyright protection. Here, Defendant has not shown that this standard has been incorporated into law and so this factor also counsels against Defendant’s fair use.
- **Third Factor:** The Supreme Court has characterized the relevant inquiry as whether “the amount and substantiality of the portion used[’] . . . are reasonable in relation to the purpose of the copying.” *Campbell*, 510 U.S. at 586–87 (quoting 17 U.S.C. § 107(3)). Incorporating one standard by reference does not justify posting provisions of a different version that has not been incorporated into law. *See ASTM*, 896 F.3d at 452. Instead, Defendant’s purpose could be achieved with a paraphrase or summary.
- **Fourth Factor:** Defendant’s reproductions have not had a “substantially adverse impact on the potential market for the originals,” nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm.” Memo Op. at 30–36 (internal quotation and citation marks omitted).
- **Conclusion:** Under the presented facts, which are undisputed, Defendant may not fairly copy and republish this standard.

211. ASTM F1007 1986 (1996)^{e1}:

- Defendant identifies 46 C.F.R. § 56.01-2 (2004) as the incorporating by reference regulation. Becker Decl. ¶ 57, Ex. 90 at 96. The incorporating language in that regulation, however, references only ASTM F1007-86 (1996), and not the 1996^{e1} version that Defendant published. Defendant concedes that it posted editions of standards that have not been incorporated into law, *see* Def. 2d Mot. at 9-10, and it does not respond to Plaintiffs’ argument that Defendant has not shown this specific standard has been incorporated into law. *See* Wise Decl., Ex. 176 at n.2 (“Where the ASTM standard referenced in the quoted C.F.R. language differs from the version of the ASTM standard that PRO reproduced and displayed, ASTM has highlighted and bolded that language.”); *id.* (highlighting and bolding text of this standard). Defendant bears the burden of demonstrating its affirmative fair use defense, *see Campbell*, 510 U.S. at 590, and here, it has not shown that this standard has been incorporated by reference into law.
- **First Factor:** There is no indication that Defendant stands to profit from republishing this standard, but Defendant’s stated purpose—to inform the public about the law and facilitate public debate—is not significantly furthered by publishing this standard rather

than one that has been incorporated by reference into law. *See ASTM*, 896 F.3d at 449. Further, because the standard has not been incorporated by reference into law, Defendant’s use is less transformative. *See ASTM*, 896 F.3d at 450.

- Second Factor: Standards incorporated by reference into law “are, at best, at the outer edge of “copyright’s protective purposes.” *ASTM*, 896 F.3d at 451. Standards not incorporated into law, though factual works, fall more squarely within the realm of copyright protection. Here, Defendant has not shown that this standard has been incorporated into law and so this factor also counsels against Defendant’s fair use.
- Third Factor: The Supreme Court has characterized the relevant inquiry as whether “the amount and substantiality of the portion used[’] . . . are reasonable in relation to the purpose of the copying.” *Campbell*, 510 U.S. at 586–87 (quoting 17 U.S.C. § 107(3)). Incorporating one standard by reference does not justify posting provisions of a different version that has not been incorporated into law. *See ASTM*, 896 F.3d at 452. Instead, Defendant’s purpose could be achieved with a paraphrase or summary.
- Fourth Factor: Defendant’s reproductions have not had a “substantially adverse impact on the potential market for the originals,” nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm.” Memo Op. at 30–36 (internal quotation and citation marks omitted).
- Conclusion: Under the presented facts, which are undisputed, Defendant may not fairly copy and republish this standard.

212. ASTM F1020 1986 (1996)^{e1}:

- Defendant identifies 46 C.F.R. § 56.012 as the incorporating by reference regulation. Becker Decl. ¶ 57, Ex. 90 at 97. The incorporating language in that regulation, however, references only ASTM F1020 1986 (1996), and not the 1996^{e1} version that Defendant published. Defendant concedes that it posted editions of standards that have not been incorporated into law, *see* Def. 2d Mot. at 9-10, and it does not respond to Plaintiffs’ argument that Defendant has not shown this specific standard has been incorporated into law. *See* Wise Decl., Ex. 176 at n.2 (“Where the ASTM standard referenced in the quoted C.F.R. language differs from the version of the ASTM standard that PRO reproduced and displayed, ASTM has highlighted and bolded that language.”); *id.* (highlighting and bolding text of this standard). Defendant bears the burden of demonstrating its affirmative fair use defense, *see Campbell*, 510 U.S. at 590, and here, it has not shown that this standard has been incorporated by reference into law.
- First Factor: There is no indication that Defendant stands to profit from republishing this standard, but Defendant’s stated purpose—to inform the public about the law and facilitate public debate—is not significantly furthered by publishing this standard rather than one that has been incorporated by reference into law. *See ASTM*, 896 F.3d at 449. Further, because the standard has not been incorporated by reference into law, Defendant’s use is less transformative. *See ASTM*, 896 F.3d at 450.
- Second Factor: Standards incorporated by reference into law “are, at best, at the outer edge of “copyright’s protective purposes.” *ASTM*, 896 F.3d at 451. Standards not incorporated into law, though factual works, fall more squarely within the realm of

copyright protection. Here, Defendant has not shown that this standard has been incorporated into law and so this factor also counsels against Defendant's fair use.

- Third Factor: The Supreme Court has characterized the relevant inquiry as whether “the amount and substantiality of the portion used[’] . . . are reasonable in relation to the purpose of the copying.” *Campbell*, 510 U.S. at 586–87 (quoting 17 U.S.C. § 107(3)). Incorporating one standard by reference does not justify posting provisions of a different version that has not been incorporated into law. *See ASTM*, 896 F.3d at 452. Instead, Defendant's purpose could be achieved with a paraphrase or summary.
- Fourth Factor: Defendant's reproductions have not had a “substantially adverse impact on the potential market for the originals,” nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm.” Memo Op. at 30–36 (internal quotation and citation marks omitted).
- Conclusion: Under the presented facts, which are undisputed, Defendant may not fairly copy and republish this standard.

213. ASTM F1193 (2006):

- Defendant identifies 40 C.F.R. § 799.5087 (2014) as the incorporating by reference regulation. Becker Decl. ¶ 57, Ex. 90 at 101. The incorporating language in that regulation, however, references only ASTM E1193-97 (Reapproved 2004), and not the 2006 version that Defendant published. Defendant concedes that it posted editions of standards that have not been incorporated into law, *see* Def. 2d Mot. at 9-10, and it does not respond to Plaintiffs' argument that Defendant has not shown this specific standard has been incorporated into law. *See* Wise Decl., Ex. 176 at n.2 (“Where the ASTM standard referenced in the quoted C.F.R. language differs from the version of the ASTM standard that PRO reproduced and displayed, ASTM has highlighted and bolded that language.”); *id.* (highlighting and bolding text of this standard). Defendant bears the burden of demonstrating its affirmative fair use defense, *see Campbell*, 510 U.S. at 590, and here, it has not shown that this standard has been incorporated by reference into law.
- First Factor: There is no indication that Defendant stands to profit from republishing this standard, but Defendant's stated purpose—to inform the public about the law and facilitate public debate—is not significantly furthered by publishing this standard rather than one that has been incorporated by reference into law. *See ASTM*, 896 F.3d at 449. Further, because the standard has not been incorporated by reference into law, Defendant's use is less transformative. *See ASTM*, 896 F.3d at 450.
- Second Factor: Standards incorporated by reference into law “are, at best, at the outer edge of “copyright's protective purposes.” *ASTM*, 896 F.3d at 451. Standards not incorporated into law, though factual works, fall more squarely within the realm of copyright protection. Here, Defendant has not shown that this standard has been incorporated into law and so this factor also counsels against Defendant's fair use.
- Third Factor: The Supreme Court has characterized the relevant inquiry as whether “the amount and substantiality of the portion used[’] . . . are reasonable in relation to the purpose of the copying.” *Campbell*, 510 U.S. at 586–87 (quoting 17 U.S.C. § 107(3)). Incorporating one standard by reference does not justify posting provisions of

a different version that has not been incorporated into law. *See ASTM*, 896 F.3d at 452. Instead, Defendant’s purpose could be achieved with a paraphrase or summary.

- Fourth Factor: Defendant’s reproductions have not had a “substantially adverse impact on the potential market for the originals,” nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm.” Memo Op. at 30–36 (internal quotation and citation marks omitted).
- Conclusion: Under the presented facts, which are undisputed, Defendant may not fairly copy and republish this standard.

214. ASTM F1271 1990 (1995)^{e1}:

- Defendant identifies 46 C.F.R. § 39.10-5 (2009) as the incorporating by reference regulation. Becker Decl. ¶ 57, Ex. 90 at 104. The incorporating language in that regulation, however, references only ASTM F1271-90 (1995), and not the 1995^{e1} version that Defendant published. Defendant concedes that it posted editions of standards that have not been incorporated into law, *see* Def. 2d Mot. at 9-10, and it does not respond to Plaintiffs’ argument that Defendant has not shown this specific standard has been incorporated into law. *See* Wise Decl., Ex. 176 at n.2 (“Where the ASTM standard referenced in the quoted C.F.R. language differs from the version of the ASTM standard that PRO reproduced and displayed, ASTM has highlighted and bolded that language.”); *id.* (highlighting and bolding text of this standard). Defendant bears the burden of demonstrating its affirmative fair use defense, *see Campbell*, 510 U.S. at 590, and here, it has not shown that this standard has been incorporated by reference into law.
- First Factor: There is no indication that Defendant stands to profit from republishing this standard, but Defendant’s stated purpose—to inform the public about the law and facilitate public debate—is not significantly furthered by publishing this standard rather than one that has been incorporated by reference into law. *See ASTM*, 896 F.3d at 449. Further, because the standard has not been incorporated by reference into law, Defendant’s use is less transformative. *See ASTM*, 896 F.3d at 450.
- Second Factor: Standards incorporated by reference into law “are, at best, at the outer edge of “copyright’s protective purposes.” *ASTM*, 896 F.3d at 451. Standards not incorporated into law, though factual works, fall more squarely within the realm of copyright protection. Here, Defendant has not shown that this standard has been incorporated into law and so this factor also counsels against Defendant’s fair use.
- Third Factor: The Supreme Court has characterized the relevant inquiry as whether “the amount and substantiality of the portion used[’] . . . are reasonable in relation to the purpose of the copying.” *Campbell*, 510 U.S. at 586–87 (quoting 17 U.S.C. § 107(3)). Incorporating one standard by reference does not justify posting provisions of a different version that has not been incorporated into law. *See ASTM*, 896 F.3d at 452. Instead, Defendant’s purpose could be achieved with a paraphrase or summary.
- Fourth Factor: Defendant’s reproductions have not had a “substantially adverse impact on the potential market for the originals,” nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm.” Memo Op. at 30–36 (internal quotation and citation marks omitted).

- Conclusion: Under the presented facts, which are undisputed, Defendant may not fairly copy and republish this standard.

215. ASTM F1273 1991 (1996)^{e1}:

- Defendant identifies 33 C.F.R. § 154.106 (2014) as the incorporating by reference regulation. Becker Decl. ¶ 57, Ex. 90 at 105. The incorporating language in that regulation, however, references only ASTM F1273-91 (Reapproved 2007), and not the 1996^{e1} version that Defendant published. Defendant concedes that it posted editions of standards that have not been incorporated into law, Def. 2d Mot. at 9-10, and it does not respond to Plaintiffs' argument that Defendant has not shown this specific standard has been incorporated into law. Wise Decl., Ex. 176 at n.2 ("Where the ASTM standard referenced in the quoted C.F.R. language differs from the version of the ASTM standard that PRO reproduced and displayed, ASTM has highlighted and bolded that language."); *id.* (highlighting and bolding text of this standard). Defendant bears the burden of demonstrating its affirmative fair use defense, *see Campbell*, 510 U.S. at 590, and it has not shown that this standard has been incorporated by reference into law.
- First Factor: There is no indication that Defendant stands to profit from republishing this standard, but Defendant's stated purpose—to inform the public about the law and facilitate public debate—is not significantly furthered by publishing this standard rather than one that has been incorporated by reference into law. *See ASTM*, 896 F.3d at 449. Further, because the standard has not been incorporated by reference into law, Defendant's use is less transformative. *See ASTM*, 896 F.3d at 450.
- Second Factor: Standards incorporated by reference into law "are, at best, at the outer edge of "copyright's protective purposes." *ASTM*, 896 F.3d at 451. Standards not incorporated into law, though factual works, fall more squarely within the realm of copyright protection. Here, Defendant has not shown that this standard has been incorporated into law and so this factor also counsels against Defendant's fair use.
- Third Factor: The Supreme Court has characterized the relevant inquiry as whether "the amount and substantiality of the portion used['] . . . are reasonable in relation to the purpose of the copying." *Campbell*, 510 U.S. at 586–87 (quoting 17 U.S.C. § 107(3)). Incorporating one standard by reference does not justify posting provisions of a different version that has not been incorporated into law. *See ASTM*, 896 F.3d at 452. Instead, Defendant's purpose could be achieved with a paraphrase or summary.
- Fourth Factor: Defendant's reproductions have not had a "substantially adverse impact on the potential market for the originals," nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm." Memo Op. at 30–36 (internal quotation and citation marks omitted).
- Conclusion: Under the presented facts, which are undisputed, Defendant may not fairly copy and republish this standard.

216. ASTM F808 1983 (1988)^{e1}:

- Defendant identifies 33 C.F.R. § 154.106 (1999) as the incorporating by reference regulation. Becker Decl. ¶ 57, Ex. 90 at 114. The incorporating language in that regulation, however, references only ASTM F808-83 (1988), and not the (1988)^{e1} version that Defendant published. Defendant concedes that it posted editions of

standards that have not been incorporated into law, *see* Def. 2d Mot. at 9-10, and it does not respond to Plaintiffs' argument that Defendant has not shown this specific standard has been incorporated into law. *See* Wise Decl., Ex. 176 at n.2 ("Where the ASTM standard referenced in the quoted C.F.R. language differs from the version of the ASTM standard that PRO reproduced and displayed, ASTM has highlighted and bolded that language."); *id.* (highlighting and bolding text of this standard). Defendant bears the burden of demonstrating its affirmative fair use defense, *see Campbell*, 510 U.S. at 590, and here, it has not shown that this standard has been incorporated by reference into law.

- First Factor: There is no indication that Defendant stands to profit from republishing this standard, but Defendant's stated purpose—to inform the public about the law and facilitate public debate—is not significantly furthered by publishing this standard rather than one that has been incorporated by reference into law. *See ASTM*, 896 F.3d at 449. Further, because the standard has not been incorporated by reference into law, Defendant's use is less transformative. *See ASTM*, 896 F.3d at 450.
- Second Factor: Standards incorporated by reference into law "are, at best, at the outer edge of "copyright's protective purposes." *ASTM*, 896 F.3d at 451. Standards not incorporated into law, though factual works, fall more squarely within the realm of copyright protection. Here, Defendant has not shown that this standard has been incorporated into law and so this factor also counsels against Defendant's fair use.
- Third Factor: The Supreme Court has characterized the relevant inquiry as whether "the amount and substantiality of the portion used['] . . . are reasonable in relation to the purpose of the copying." *Campbell*, 510 U.S. at 586–87 (quoting 17 U.S.C. § 107(3)). Incorporating one standard by reference does not justify posting provisions of a different version that has not been incorporated into law. *See ASTM*, 896 F.3d at 452. Instead, Defendant's purpose could be achieved with a paraphrase or summary.
- Fourth Factor: Defendant's reproductions have not had a "substantially adverse impact on the potential market for the originals," nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm." Memo Op. at 30–36 (internal quotation and citation marks omitted).
- Conclusion: Under the presented facts, which are undisputed, Defendant may not fairly copy and republish this standard.

217. ASTM G154 (2000a):

- Defendant identifies 49 C.F.R. § 571.5 (2014) as the incorporating by reference regulation. Becker Decl. ¶ 57, Ex. 90 at 115. The incorporating language in that regulation, however, references only ASTM G154-00, and not the 2000a version that Defendant published. Defendant concedes that it posted editions of standards that have not been incorporated into law, *see* Def. 2d Mot. at 9-10, and it does not respond to Plaintiffs' argument that Defendant has not shown this specific standard has been incorporated into law. *See* Wise Decl., Ex. 176 at n.2 ("Where the ASTM standard referenced in the quoted C.F.R. language differs from the version of the ASTM standard that PRO reproduced and displayed, ASTM has highlighted and bolded that language."); *id.* (highlighting and bolding text of this standard). Defendant bears the

burden of demonstrating its affirmative fair use defense, *see Campbell*, 510 U.S. at 590, and here, it has not shown that this standard has been incorporated by reference into law.

- First Factor: There is no indication that Defendant stands to profit from republishing this standard, but Defendant’s stated purpose—to inform the public about the law and facilitate public debate—is not significantly furthered by publishing this standard rather than one that has been incorporated by reference into law. *See ASTM*, 896 F.3d at 449. Further, because the standard has not been incorporated by reference into law, Defendant’s use is less transformative. *See ASTM*, 896 F.3d at 450.
- Second Factor: Standards incorporated by reference into law “are, at best, at the outer edge of “copyright’s protective purposes.” *ASTM*, 896 F.3d at 451. Standards not incorporated into law, though factual works, fall more squarely within the realm of copyright protection. Here, Defendant has not shown that this standard has been incorporated into law and so this factor also counsels against Defendant’s fair use.
- Third Factor: The Supreme Court has characterized the relevant inquiry as whether ““the amount and substantiality of the portion used[’] . . . are reasonable in relation to the purpose of the copying.” *Campbell*, 510 U.S. at 586–87 (quoting 17 U.S.C. § 107(3)). Incorporating one standard by reference does not justify posting provisions of a different version that has not been incorporated into law. *See ASTM*, 896 F.3d at 452. Instead, Defendant’s purpose could be achieved with a paraphrase or summary.
- Fourth Factor: Defendant’s reproductions have not had a “substantially adverse impact on the potential market for the originals,” nor have Plaintiffs shown by a preponderance of the evidence that there is a meaningful likelihood of future harm.” Memo Op. at 30–36 (internal quotation and citation marks omitted).
- Conclusion: Under the presented facts, which are undisputed, Defendant may not fairly copy and republish this standard.

Date: March 31, 2022

Tanya S. Chutkan

TANYA S. CHUTKAN
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN SOCIETY FOR TESTING)
AND MATERIALS, *et al.*,)
)
Plaintiffs,)
)
v.) Case No. 13-cv-1215 (TSC)
)
PUBLIC.RESOURCE.ORG, INC.,)
)
Defendant.)

ORDER

For reasons explained in the accompanying Memorandum Opinion, ECF No. 239, Plaintiffs’ Motion for Summary Judgment and for a Permanent Injunction, ECF No. 198, is GRANTED IN PART and DENIED IN PART, and Defendant’s Cross-Motion for Summary Judgment, ECF No. 202, is GRANTED IN PART and DENIED IN PART.

Plaintiffs’ Motion for Summary Judgment is GRANTED, and Defendant’s Cross-Motion is DENIED as to the following 32 standards, which Defendant shall remove from its website and any other website within its possession, custody, or control by April 8, 2022:

- ASTM C518 (1991)
- ASTM A36 (1977a^e)
- ASTM A36/A36M (1997a^{e1})
- ASTM A307 (1978^e)
- ASTM A370 (1997^{e2})
- ASTM A475-78 (1984^{e1})
- ASTM B224 (1980^{e1})
- ASTM C150 (1999a)
- ASTM C177 (1997)
- ASTM C236 1989 (1993)^{e1}
- ASTM C516 1980 (1996)^{e1}
- ASTM C549 1981 (1995)^{e1}
- ASTM D1246 1995 (1999)

- ASTM D1518 1985 (1998)^{e1}
- ASTM D1785 (1986)
- ASTM D1946 1990 (1994)^{e1}
- ASTM D4239 1997^{e1}
- ASTM D4891 1989 (1994)^{e1}
- ASTM D5489 (1996a)
- ASTM D5865 (1998a)
- ASTM D665 (1998^{e1})
- ASTM D975 1998b
- ASTM D975 2007
- ASTM E145 (1994)^{e1}
- ASTM E695 1979 (1997)^{e1}
- ASTM F1007 1986 (1996)^{e1}
- ASTM F1020 1986 (1996)^{e1}
- ASTM F1193 (2006)
- ASTM F1271 1990 (1995)^{e1}
- ASTM F1273 1991 (1996)^{e1}
- ASTM F808 1983 (1988)^{e1}
- ASTM G154 (2000a)

Both parties' motions for summary judgment are GRANTED IN PART and DENIED IN PART as to the following standard, and Defendant shall remove all portions of this standard, other than the text of Test Methods A and B contained therein, from its website and any other website within its possession, custody, or control by April 8, 2022:

- ASTM D2036 (1998)

Plaintiffs' Motion for Summary Judgment is DENIED, and Defendant's Cross-Motion is GRANTED as to the remaining 184 standards listed in the court's Appendix to the accompanying Memorandum Opinion.

Plaintiffs' Motion for Summary Judgment is DENIED, and Defendant's Cross-Motion is GRANTED as to Defendant's use of Plaintiffs' trademarked words. Plaintiffs' Motion for Summary Judgment is GRANTED, and Defendant's Cross-Motion is DENIED as to Defendant's use of Plaintiffs' trademarked logos.

Plaintiffs' Motion for a Permanent Injunction is GRANTED as to Defendant's use of its trademarked logos and DENIED as to Defendant's use of its standards and trademarked words. It is ORDERED that Defendant is permanently enjoined from all unauthorized use of Plaintiffs' trademarked logos and Defendant shall remove Plaintiffs' trademarked logos from its website and any other website within its possession, custody, or control by April 8, 2022.

Date: March 31, 2022

Tanya S. Chutkan
TANYA S. CHUTKAN
United States District Judge

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

<p>AMERICAN SOCIETY FOR TESTING AND MATERIALS d/b/a ASTM INTERNATIONAL;</p> <p>NATIONAL FIRE PROTECTION ASSOCIATION, INC.; and</p> <p>AMERICAN SOCIETY OF HEATING, REFRIGERATING, AND AIR CONDITIONING ENGINEERS,</p> <p style="text-align: center;">Plaintiffs/ Counter-Defendants,</p> <p>v.</p> <p>PUBLIC.RESOURCE.ORG, INC.,</p> <p style="text-align: center;">Defendant/ Counter-Plaintiff.</p>	<p style="text-align: center;">Case No. 1:13-cv-01215-TSC</p>
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NOTICE OF APPEAL

Pursuant to 28 U.S.C. § 1292(a)(1), Plaintiffs American Society for Testing and Materials d/b/a ASTM International (“ASTM”), National Fire Protection Association, Inc. (“NFPA”), and American Society of Heating, Refrigerating, and Air Conditioning Engineers (“ASHRAE”) (collectively, “Plaintiffs”) hereby give notice of their appeal to the United States Court of Appeals for the District of Columbia Circuit from the Court’s March 31, 2022 order, Dkt. 240, denying in part Plaintiffs’ Second Motion for Summary Judgment and for a Permanent Injunction, Dkt. 198, as reflected in the memorandum opinion of the same date, Dkt. 239.

Dated: April 28, 2022

Respectfully submitted,

/s/ J. Kevin Fee

J. Kevin Fee (D.C. Bar: 494016)
Jane W. Wise (D.C. Bar: 1027769)

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*Counsel for American Society of Heating, Refrigerating,
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CERTIFICATE OF SERVICE

I hereby certify that on April 28, 2022 a true and correct copy of the foregoing document was served via CM/ECF upon all counsel of record.

/s/ Jane W. Wise
Jane W. Wise