UNITED STATES COURT OF APPEALS for the DISTRICT OF COLUMBIA CIRCUIT
March 20, 2023, 9:30AM, Courtroom 31
Judges Henderson, Pillard, Katsas

Case 22-7063
American Society for Testing and Materials v. Public.Resource.Org, Inc
Unofficial Transcript

[THE CLERK OF THE COURT] Oyez, Oyez, Oyez. All persons having business before the Honorable, the United States Court of Appeals for the District of Columbia Circuit, are admonished to draw near and give their attention for the court is now sitting. God save the United States and this Honorable Court. Be seated, please.

[THE CLERK] Case number 22-1763, American Society for Testing and Materials et al., appellant, versus Public.Resource.Org, Inc. Mr. Klaus for the appellants, Ms. McSherry for the appellee.

[Judge Henderson] Mr. Klaus, good morning.

[Mr. Kelly Klaus] Thank you, Judge Henderson. Good morning. May it please the court.

The District Court's order permits Public Resource to engage in the essentially verbatim copying and unlimited Internet distribution of more than 200 different works that plaintiffs properly copyrighted and that Congress, governmental agencies, and private parties alike relied on and encouraged to promote public safety, save the government and taxpayers from having to bear the costs of development, and support the efficient operation of wide swaths of the economy.

The District Court reached that sweeping result as to 185 different works by systematically misapplying the fair guidance and specific instructions that this court provided when it demanded for reconsideration of Public Resource's permanent defense of fair use. As to the 32 works where the District Court held Public Resource's use was not fair, the District Court abused its discretion by declining to enjoin Public Resource based on the speculative possibility that one or more of the works might one day be incorporated by reference.

It was error to grant Public Resource's summary judgment motion and not enjoin it. The District Court's order invites Public Resource, and anyone similarly situated to it, to copy and distribute any IBR work without limitation. No copyright owner could long survive the unrestricted and widespread copying of the type of Public Resource's engaged in, but that is where the District Court's order leaves it.

Your Honor, there's been a substantial amount of briefing and paper in this case, I know. I would propose to focus on three areas, although obviously subject to the court's questions. First

involves the first three fair use factors as set forward in this court's what we call ASTM2 decision. And then I'd like to spend some time on the fourth factor, for market harm, and then to talk about Public Resource's alternative argument for affirmance based on Georgia versus Public Resource, which we think is an inapplicable bias.

So to start, Your Honors, with respect to the first three fair use factors, this court remanded the District Court with quite specific instructions, quite detailed set of issues that the District Court was to consider as to each of the standards. The court made it clear to be a standard-by-standard evaluation of the particular legal status and to weigh the factors as PRO's use as applied to each. And with respect to-

[Judge Katsas] The District Court went standard by standard in excruciating detail.

[Mr. Klaus] Judge Katsas, the District Court did go standard by standard and the appendix is quite lengthy. I agree with that.

But what the District Court did not do was to grapple with the specific instructions that the court gave as to each of the first three fair use factors. For each of these paragraphs in the appendix, they did say-

[Judge Katsas] The first thing the District Court did, tell me if you disagree with this, but she solved the problem of copying standards or portions of standards that hadn't been incorporated into law, right? You won on 32 of those and half of one.

[Mr. Klaus] There was a grouping at the end of the so-called category.

[Judge Katsas] So really what we're talking about is the non-commercial dissemination of standards that have been incorporated into law.

[Mr. Klaus] That the standards, so Judge Katsas, the standards have been incorporated, but whether the standards actually in total impose binding legal obligation, which is the question that the court asked the District Court to consider and essentially the-

[Judge Katsas] Maybe yes, we flagged that as a relevant consideration for fair use, but we didn't really say that background material or safe harbor provisions could not be fair use.

[Mr. Klaus] That is correct, but what the court did say was that the justification for the copy might be quite different from what you have with something that did not impose a binding legal obligation. What Public Resource did, I don't have a copy of one of the standards, but if you'll forgive me for using this as an example, they essentially copied and posted everything of cover to cover.

[Judge Katsas] Everything that had been incorporated.

[Mr. Klaus] Well that's it, that is actually, we actually dispute that with respect to a number of the standards, Your Honor, because we think that the incorporation with respect to some of these standards did not incorporate the entire document. Let me give you an example.

So Public Resource says at page six of the red brief, they say when Congress are with an agency wants to incorporate the entirety of the standard, it just doesn't say anything. When it wants to incorporate a specific portion, it incorporates a specific portion. They give as the example a regulation from the Pipeline and Hazardous Materials Safety Administration, 49 CFR 192.7.

And in the Joint Appendix, the Statement of Facts, what Public Resource said is, if you've read through that, what it says is, NFPA 70-2008. We're done. Congratulations. You've found a standard that's been incorporated in full.

But in fact, when you read through what 49 CFR 192.7 subsection four, actually says is that the National Electrical Code is IBR approved for two further subsections. And when you go to those further subsections, one of them says 192.163(e): As electrical facilities, electrical equipment and wiring installed in compressor stations must conform to NFPA 70 so far as that code is applicable.

And we know that there are huge portions of the NFPA 70, of the National Electrical Code, that couldn't possibly apply to a compressor station. There are entire sections of that standard that deal with things like carnivals, circuses, fairs. That deal with motion picture and television studios and special wiring issues for those.

And so Judge Katsas, that's to the point that we submit that when an agency has simply said we incorporate this standard for these purposes, take the Life Safety Code example that we gave, which applies the Veterans Affairs regulation for veteran cemeteries. Where the underlying code has provisions that deal with one and two story family dwellings and daycare centers. It can't possibly be the case, but what the agency is saying is, well, we've incorporated that. It's, it's kaboom. We're just going to, you should, everybody in the world should assume that the entire document, cover to cover, has been incorporated by law.

[Judge Katsas] Suppose it's crystal clear the incorporating statute identifies with precision the private standard incorporated. Right, ASHRAE 100.2 or whatever it is. And then you look at that provision and let's say it just conceptually has three different parts. One is the directly binding legal text, right? What we said would be essential to understanding legal obligations. Okay? That's the first category.

Second category is a safe harbor provision, right? It says if you do the following, you will be in compliance with the standard. Okay? Maybe less essential, but it's a safe harbor. And the third category is explanatory material. It has a, the private standard has findings, it has a statement of purpose.

I had thought this whole dispute is about those second and third categories and you say those can't fairly be copied.

[Mr. Klaus] The dispute, I-

[Judge Katsas] Is that fair?

[Mr. Klaus] If I understand your question-

[Judge Katsas] This is a conceptual-

[Mr. Klaus] I think conceptually, the answer is yes. It is with respect to, in the type of circumstance, but the type of IBR regulation that you described, it is with respect to the other two categories. [Judge Katsas] And wouldn't someone, wouldn't someone trying to figure out, is it her legal obligations, want to know all three categories?

[Mr. Klaus] They would, they potentially would want to know the second category. I grant that on the question, although that is as the point that this court made was that with respect to something like a safe harbor or a reference procedure, that something like a paraphrase might be, might be, might be more adequate.

And that's one of the many showings that we made in the District Court in terms of taking the court's opinion and trying to apply it to the record was to show that it was not necessary for there to be 100% verbatim copying.

And then when you move-

[Judge Pillard] Mr. Klaus, let me, let me just, oh, I'm sorry. Finish your sentence.

[Mr. Klaus] I was just going to, thank you, Judge, I was just going to say, Judge Katsas, with respect to the third category, we think that it moves even farther afield in terms of what some of the, and the other point that I would make, and it's a point that this court emphasized over and over again, five years ago, is that not all of these are created equal. And so what you have described as being in pocket three, Judge Katsas, as informational material.

[Judge Katsas] Right.

[Mr. Klaus] There's a wide variety of that type of informational material. Again, we did the work in the District Court of trying to explain what, you know, how to separate, how to separate these matters. And what we instead, what we were instead told by Public Resource, and it does appear that the District Court accepted it is: as long as you can find an incorporated regulation, that

doesn't specifically carve out a particular section, then you are essentially, you're home free on the first three fair use sections.

[Judge Pillard] Now, what about, who is you and for what purpose? I understand the problem, I believe, from SDO's perspective, which is if incorporation by reference is used, let's just say sort of broadly or sloppily, you know, I'm going to refer to the whole, you know, fire standards and everyone who looks at them is going to know, you know, that they're supposed to go to the wood structures thing.

But so I don't even as the, as the lawmaker incorporating by reference, I don't have the incentive to be very precise about it. Your problem is then, and then Public Resource is just looking at what the lawmaker said, because Public Resource is not, you know, a highly trained lawyer who's going to go through and carve out, you know, and edit away the non-necessary portion. They're just going to put up what the incorporation by reference refers to. But the problem from your client's perspective is when it's done in that sort of wholesale way, then you end up with someone who might want to, you know, publish things that your clients want to publish, and that is their work, and send it off.

And it becomes a substitute even in the industry setting where, you know, electricians want to be doing things in a uniform way and fire safety professionals want to be doing something in a uniform way. And so they're referring to these in a context that is distinct from the context of legally binding standards. If that, is that a fair description of sort of the-

[Mr. Klaus] That is a completely fair description. Yes.

[Judge Pillard] OK, so but I've also flagged the difficulty of requiring somebody in the position of Public Resource's to make the more fine-grained division. But so, if it were possible in the real world to say fair use applies, you know, except what the District Court did in terms of applying the fair use analysis to what the law-making authority referenced, and only that, right? And if we then were to apply the fair use defense only to uses of those standards qua law, you know, when used as law, and say the fair use defense does not apply when enterprising publisher wants to scoop the fire codes and sell them at a, you know, undersell the owners of the work. That even though they found it on Public Resource, it is not fair use when it's not being used, sold, profited from in its role as a law.

I mean, it's conceptually that that's sort of, I'm wondering if that were a distinction that could be maintained, would it be accept- is that acceptable to you?

[Mr. Klaus] It is. I think I understand the question, Judge Pillard, that it would not be acceptable for the following reasons. One is that what Public Resource puts up is a verbatim copy of what we've got. We've stipulated that. And there is no limitation on the distribution of it.

And to the point that, well, what about the people in the world who would need to see, maybe there is someone, although there is no record evidence of it, there's been 10 years of litigation and we have not had anyone come in and say, I wanted to debate one of these standards. I wanted to propose something. We don't have any of that.

But if there were, if there were someone who said, I really need to have this, all of the standards, every one of them, cover to cover, is made available by the plaintiffs.

[Judge Pillard] I think you lost that argument on the first appeal. Is that not right? I mean, if that were enough, then the prior panel wouldn't have rendered the decision that it did.

[Mr. Klaus] In this respect, I don't think that it's settled by the former appeal, Your Honor, which is that there has to be an evaluation of what it is that the defendant here is doing, but the effect, as you pointed out, the substitutional effect on the plaintiff's market is. And the fact that, and we think that it is relevant to the consideration, both to the degree of transformativeness and to the question of the substitution.

[Judge Pillard] But is it a conceptual problem or a practical problem? If Public Resource website were, you know, directed that it's to be used only to analyze or critique or refer to the materials in so far as they've been IBR'd. Isn't that, isn't that an adequate limitation?

[Mr. Klaus] If there were a way to keep the genies in the bottle, that would be a very different case, Judge Pillard, and I think that it would be much harder.

[Judge Pillard] Why is there not a way to keep the genie in the bottle? I mean, why is that not the situation we face here?

[Mr. Klaus] Oh, there are a couple of ways, there are a couple of ways for Public Resource to do some things. For example, we had evidence in the record that the Internet Archive, which is where they post all of their material, that they have a borrowing or a checkout function. And so someone, unlike a, you know, a Napster for the standards world type situation where anybody can go and take something down, that there is a function where you can put a checkout on. The book is taken out, the book is taken back.

Similarly, with respect to the sight-impaired, there is a function on Internet Archive that provides for encrypted copying, for encrypted copies, and that they will only be used by persons who have sight impairments.

There are those, those mechanisms were available, and Public Resource doesn't use them. So I would agree with you, Judge Pillard, it would be, it would be a much closer, a much different case if what there was, if what we had in the sense was Public Resource operating a speaker's corner. And nobody could take the standards with them when they left speaker's corner, after listening to them explain. Or somebody who wanted to research them could go out and do that in

some way. But again, that's not the, that's not the situation that we have with respect to the defendant's use.

[Judge Pillard] Right. Well, they want to be able to make it easy for people, have free access. And I mean, I take it the problem is if they really were using it only for legal analysis, legal compliance, that could be on the fair use side. The difficulty is in the implementation of that line.

I mean, what if you found that … do you understand anything about the first panel's decision to prevent you from pursuing someone who did what I was referring to before: downloaded the full fire code because it's been IBR'd in full, bound it up into a book, and sold it in competition with your client to firefighting professionals who are not worried about complying with the law, they're worried about, or construction professionals who are worried about making good buildings that aren't going to burn too easily. That you could still pursue that as not fair use under, under the ruling of the, of the first panel.

[Mr. Klaus] Well, unfortunately, Judge Pillard, the way that the, the way that the Internet works, we had evidence that we submitted, is that the people who can download these are, we don't have any record of who they are. Very deliberately, Public Resource does not keep track who downloads their works. And so we don't know, for example, who the people are, who with respect to the 2017 version of the National Electrical Code, to download that work, or access that work, could either be to view or to download, something like 40,000 times.

We don't have, we don't have a record of it. And we do see, as we put into the records, evidence of some people actually reselling, reselling things on a site like Scribd. And part of the lesson, frankly, not just from this case, but from 20 plus years of cases involving distribution of copyrighted works on the internet, is that you don't want it, is that it's, it's unfair to put the copyright owner into, into the, into having to play a game of whack-a-mole.

[Judge Pillard] I have a much more specific question for you, which is, if we were to agree with you that the District Court misstated the burden on market harm, can you spell out how, if at all, it affected the summary judgment determination? And in particular, is there any way that your clients relied on what you say is the appropriate burden allocation to somehow hold back on developing or presenting evidence of market harm?

[Mr. Klaus] We did not. So we did, we did not hold back on developing evidence of market harm. That said, Judge Pillard, we think that it's clear that it was the, the allocation of the burden was wrong, as we've said. And we also think that regardless of who has the burden or where it was, at a minimum, we presented a triable question of market harm.

[Judge Pillard] So you're saying, just looking, you know, putting the bracketing, the burden question on the record, you've made a case that, that prevents summary judgment.

[Mr. Klaus] On the record. And I, and I'll just pick up on the point that I was just describing to your Honor Judge Pillard, where I said that there were these copies that we know are Public Resource copies, because when you go to the Scribd website, what it shows you is the first page. And the first page is not the title of the ASTM standard. The first page is Public Resource's, stars and stripes, and all that, and all that page. And it's there.

And what the district judge said about that, at page 32 of the memorandum, was that there was no causal connection between Public Resource's distribution and these third party sales. And there were numerous other pieces of evidence that we had, Your Honor, that we think clearly add up to, at a minimum, again, a tribal question of fact on market harm.

[Judge Katsas] Finished on that? So two quick questions.

One is, in the government edicts context, the chief justice expressed concern with having a dual system where some people have the coach version of the law and others have the first class version of the law. And that was in the context where the coach version was everything with the force and effect of law, and the first class version was the annotations, which under Georgia law had no force and effect of law.

Isn't that concern present here and even greater? Because my categories two and three are materials which have the force and effect of law. So the coach version is you just get the directly controlling text, and the first class version is you get the safe harbors and the explanatory material.

[Mr. Klaus] I completely understand the point Judge Katsas has, and I would say no, because I think the interests on the other side are different.

The interests that the interest of the chief justice was responding to was a series of arguments that Georgia made for saying, as you pointed out, that the line should be drawn at what has the force of law. And I think what that said is there's no need to get into that here, because we have these straightforward authorship, and it would cause a lot of difficulties. Whereas I think the interests in this case are different, because the standards are privately authored.

[Judge Katsas] And I guess I would just quibble just a little bit saying the interests of the public in knowing the law are the same, but you might have more on the opposite side of the balance.

[Mr. Klaus] Well, except for the fact, Your Honor, that we, again, we made all of the standards available online. That's one thing. And the second thing is that you have a multi-decade process of, frankly, of the political branches of the Congress, the administrative agencies, considering the argument and balancing the question, which really what this comes down to, Judge Katsas, is a balance between providing the incentive for this, what no one denies is incredibly important work to be done, and providing access, which is done through the reasonable availability standard.

[Judge Katsas] Last one for me, which is you have flagged what seems to be a problem of, let's call it, over-broad IBR. And the case that sticks in my mind is the regulator wants to address treating veterans' cemeteries, and they incorporate, you know, whatever.

[Mr. Klaus] Why say G-code when I want it?

[Judge Katsas] The question is, would you be able, when the standard has to be formally incorporated through notice and comment rulemaking. And you've cited a lot of authority suggesting Congress wants the copyright to be respected somewhat. So in a case like that, I assume your clients could come into the IBR rulemaking and argue that the proposed incorporation is arbitrary and capricious because it's over-broad. Is there any reason why you couldn't do that?

[Mr. Klaus] Well, I guess a couple of reasons. One is our having notice of it. And while that is, well, that is essentially a, I don't know what the manageability of that would be at the federal level, just in my response to it, Judge Katsas. We also face the problem that it occurs at the state and local level as well. The idea of putting the burden on to the standards development organization who essentially have, you know, a radar on what can be done in any jurisdiction, we think, is too much a burden.

[Judge Katsas] Is there any mechanism to make that argument later, I don't know, petition for unincorporating? I probably face a pretty tough stand.

[Mr. Klaus] I would, up the top of my head, Your Honor, I don't know the answer. And again, I do think we, I do, and I also think-

[Judge Katsas] I take your point about notice. Thank you.

[Mr. Klaus] Thank you. Your Honor, I'm substantially over my time, I'm happy if the court has other questions.

[Judge Henderson] We'll give you a couple of minutes in reply.

[Mr. Klaus] Thank you. And also, Your Honors, Mr. Fee, who represents ASTM, is here and was available if the court had any ASTM-specific questions, but if not, I'll just come back and respond.

[Judge Henderson] Thank you.

[Mr. Klaus] Thank you, Your Honor.

[Judge Henderson] Ms. McSherry?

[Ms. Corynne McSherry] Can you hear me? Is this okay? All right. Thank you. Excuse me.

Good morning. May it please the court.

As has been mentioned a few times, this is our second round up here, but the core question has not changed. The core question is, can my client, Public Resource, an entirely non-commercial entity provide the public …. And by the public, I mean citizens, I mean advocates, I mean journalists, and even courts with unfettered access to the law. And the answer to that question is still yes, whether it's a tax code or the building code, the public should be able to access, explore, comprehend, and teach the law.

[Judge Katsas] The last time around, I thought there was a pretty straightforward question with a pretty straightforward answer, but Judge Tatel's opinion for the court was a lot more complicated than that.

[Ms. McSherry[Well, I still think it's actually boils down to a pretty straightforward question. That was an answer that was reflected in how the District Court interpreted ASTM-2 and applied it.

[Judge Katsas] And he was very specific in saying that IBR can have different consequences. And he did seem to distinguish the three categories I laid out. The directly binding legal text is different from the safe harbors and the explanatory material.

[Ms. McSherry[So the opinion does draw some distinction there. It never draws a categorical distinction to suggest that. It creates a spectrum. But as we interpreted it, and I think as the District Court interpreted it, when you're trying to look for what is a binding obligation in this context, it's fair to look to the incorporating language. And if you think about it as a practical matter, that's because that's what normal people would look to.

So if the APA and the CFR lay out how to go about incorporating by reference, and agencies then follow that procedure, when they follow that procedure, they've created a binding legal obligation. And putting people like my clients or anybody else in the position of having to second-guess that decision creates just a morass of difference.

[Judge Pillard] That makes a lot of sense to me, but it also, you know, the opposing counsel's argument also makes a lot of sense. The authority that the government officials that are incorporating by reference don't really have an incentive to slice this as finely as perhaps they should. What's your response to that?

I mean, you have to appreciate that in your mission, which I understand to be about the law, it is only a subset of materials that the development and use of which is within their mission, which is, you know, much more generally coming up with useful standards that are, you know, many of

which may never touch law that have to do with uniformity across industries and jurisdictions and best practices.

So if the posting ends up needlessly, because of, you know, sloppiness on the part of the incorporators by reference, needlessly impinging on their distinct project, what's your response to sort of how that should be dealt with other than as they propose, which is that PRO go through and distinguish between necessary and binding and other.

[Ms. McSherry] And what one of the other reasons that Public Resource doesn't do that is we look to...

[Judge Pillard] I understand that. You look at what the legal authorities themselves have specified and you don't second guess that.

[Ms. McSherry] And also what people, such as the administrator of the National Institute of Standards and Technology, how they approach it, how they think about it. We think that ordinary people are entitled to rely on how government agencies think about it. But to get back to your question, so again, we only post... The standards organizations post and create many, many thousands of standards. We only post what has been specifically incorporated by reference into law via notice and comment proceeding, in the context where Congress has delegated to regulators lawmaking authority. That's the small universe of what we look to. Usually all the standards in this case have been superseded already, they're no longer standards. That standard, they're updated versions, and that's really what the organizations focus on. But we focus on this subset.

The second thing though is … standards…

[Judge Pillard] Just a little question for information, maybe this is really for the other side, but I forgot to ask. Is it not common to incorporate in what one might call a dynamic way, sort of say the latest version of ASTM such and such?

[Ms. McSherry] No, usually you incorporate a very specific version, and that might be updated over time, but often there's a lag between an updated and the incorporation process.

[Judge Pillard] Got it.

[Ms. McSherry] So two more points directly to your question. One is that agency regulators are actually, regulators are capable of identifying when they only need a specific section. They're capable of it …

[Judge Pillard] But they don't always do it.

[Ms. McSherry] They don't always do it, but they do do it. So it's not like they don't know how. T'hey do know how, and that is what they are supposed to do. So I'm sorry if they don't always do that, but it's difficult for an ordinary citizen to know, because I can't second guess the mind of the regulator.

And the second thing is I think that we know that standards organizations work very closely with government, in fact. The notion of surprise, particularly incorporated in federal law, it strikes me as disingenuous at best. So there's evidence in the record, for example, ASTM is very proud that 93% of its committees have a participation of government employees. Some agencies are actually mandated to work with the private organizations in the development of these standards.

So I think the idea that there might be a surprise is unlikely, and so really not a genuine worry.

[Judge Pillard] I have a specific question for you about the market harm factor. Before the District Court, you argued that the plaintiffs bore the burden of proving market harm, and the District Court followed your suggestion to announce that when a defendant uses the copyrighted work for non-commercial purpose, the court has placed the burden on the plaintiff to show by the preponderance of evidence that some meaningful likelihood of future harm exists. They're quoting Sony. If we were to disagree, I mean, after all, ordinarily the burden is on defendants to establish an affirmative defense, and some of the circuits have been explicit that the defendant bears the burden of establishing a lack of market harm. So if we wanted to avoid a circuit split, how, and could we, affirm what the district court did here in view of, assuming, I mean, we haven't decided this issue, but assuming we were to decide that that was an error of law, could we still affirm?

[Ms. McSherry] Yes. So, for two reasons. One is, I would just point out that two other circuits have said that they're saying the way we do.

[Judge Pillard] I'm sorry, two other circuits you say have said that it's the plaintiff's burden, although ...

[Ms. McSherry] Well, just to be clear, what Sony stands for is not an entire shift burden. What Sony says is when a use is entirely non-commercial, like the one here, the plaintiff should be able to come forward with some evidence. Not entirely shifting the burden, but rather they should be able to come forward with some evidence, and the plaintiffs were not able to do that.

But also, even that aside, even if we disregard Sony, we met our burden. As best you can prove a negative, we came to court, we submitted evidence of testimony from their own executives saying, we actually can't track any real evidence of harm. Their own expert simply relied on the self-serving statements of their executives. And we also showed, just one more point, that we also showed that with respect to ASTM, their sales were up. With respect to NFPA, their sales have been said, they said they're cyclical, and they were falling as of 2006, which is long before a Public Resource was doing anything. So we brought evidence to the table.

[Judge Pillard] You say they were unable to come up with some evidence. They point in their reply brief to the drop in NFPA's publication sales, and they point to 42,000 downloads of reposted works following this court's 2018 opinion, in this case vacating the injunction. So they're pointing to some pretty specific things that they've calibrated kind of date-wise to the availability of duplicate or similar versions. How do you respond to that? I mean, why doesn't that create a triable issue?

[Ms. McSherry] So two reasons, one is that I think that they provided some evidence, and I think that the District Court reviewed it carefully and said, this is just inadequate. And I think, frankly, she was a little disappointed that this far into the litigation, the plaintiffs who have unlimited access to their own market data couldn't provide some more empirical, quantifiable evidence than they did. So I think that's part of what happened.

The other thing is, I would just point out, this is a fair use case. It's also a copyrightability case, but we'll see if we get to that. But on fair use, you don't just look at one factor. You look at all four factors and consider it in light of the purposes of copyright.

And secondly, with respect to market harm in particular, the Supreme Court has told us that when you think about the market harm, you don't just look at numbers, so that's important. But, you also have to look at the public interest and weigh it against the need for copyright incentives. And one of the things we know from the Veeck court, and we've also heard it from scholars since, is that were ever an area where there is less of a need for copyright incentives, it's this one.

These standards are created—in terms of the actual work done—by volunteers who are just excited about making good best practices for their industry. Government employees get in the mix, lots and lots of people come together. None of those people are doing the work because they're looking for royalties.

[Judge Pillard] But, and I gather you don't question, that the institutional infrastructure to bring those people together and to track their work and to publish its product, I mean, there is an institution here. You can't say that it isn't expensive, for example, to run a university even though the faculty are … I mean, it's not just faculty salaries, and so when these folks are coming together and aren't being paid, there's still a lot of resources necessitated.

[Ms. McSherry] Well, that's correct. But there I would point out that one of the things you just think about in a copyright case. when you're thinking about market harm, is you have to think about copyright harm. And we know going all the way back to Feist that, simply investing in labor as opposed to creativity does not a copyright make. Again, I'm in no way discounting the value of the work. I am simply saying that I think part of the calculus has to be how much this is a copyright when most of the people who are doing the actual creative work here are people who are volunteers.

I have a couple other points to make if I might, but I want to make sure I answer those questions.

Okay. So I just want to say that I do think that the Supreme Court, I'm sorry, the District Court, I think really actually did look at every standard individually as she was supposed to do. She thought carefully, as this court said, about the legal status of the works by looking at the incorporating language, which we provided to her. But she was also prepared to consider what would be necessary to comprehending a legal duty, which this court also allowed for. And I think after Georgia, at least we know that is good and appropriate for a court to do, and that's what she did.

And she looked at all four factors together rather than applying them in a mechanical way, which is what she was supposed to do. So I think on balance, this is a really one of an excellent fair use analysis, as these things go, particularly when you've got 200 standards to look at.

And when you look at some of them, she said not fair use. She went the other way.

[Judge Katsas] She went standard by standard and distinguished among them in various ways, and she was very careful to figure out what was or wasn't incorporated. But at the end of the day, she applied a per se rule that whatever was IBR'd can be copied.

[Ms. McSherry] I think she applied a broad line rule that looks to what is legal.

[Judge Katsas] At least by your client who is doing this for non-commercial purposes.

[Ms. McSherry] Correct. Exactly. I mean, there is a whole other context of the other factors. But I think she did apply the rule of what is a binding regulation and what is not. And the APA...

[Judge Katsas] Yes, but binding understood in its broad sense of what was incorporated into law, as opposed to the narrow sense of what is the precise operative text that establishes the obligation.

[Ms. McSherry] Well, actually, I think, Your Honor, that she applied not just what was binding, but also what would be necessary to comprehend what was binding. But actually, she really can go back to when a regulator in the agency issues a binding regulation pursuant to the APA, follows all the rules. That whole thing, pursuant to this lawmaking authority, that's law.

[Judge Katsas] That makes a lot of sense to me. I guess it's just an open question whether it's consistent with the panel opinion last time around.

[Ms. McSherry] Yeah, I think it has to be. Well, I think it is, fortunately. But also because, remember, the panel opinion said there's a spectrum here. It's not, and allowed for some flexibility. It actually didn't itself assign such a bright-line rule.

[Judge Katsas] What do you …

[Ms. McSherry] Go ahead. I didn't mean to...

[Judge Katsas] One more. What do you do with this phenomenon that I described as over-broad incorporation? The regulator wants to get at the cemeteries and ends up incorporating something about apartment buildings.

[Ms. McSherry] Well, I think...

[Judge Katsas] They just out of luck?

[Ms. McSherry] Well, I think what happens in advance is SDOs normally would work a lot more closely with the regulators to prevent that. And I think going forward, they're concerned about it. They can do that even more aggressively. We know they, again, they communicate with regulators all the time. So that is something that can be addressed.

But I think most importantly, again, for the purposes of this case, because a tiny little nonprofit in the Valley can't possibly have to be in the position of trying to figure that out in advance. But again, it's trying to actually do something I think we can all agree is to be laudable and important and beneficial to the public interest.

And related to that, I just want to have one more note on the reading rooms. Because I think it's important that the reading rooms provide very limited accessibility. Public Resource does something very, very different. It installs a repository, not a gate.

You don't have to give Public Resource your home address and sign up for spam. And you can link, you can search, you can cross reference. And we've got evidence from multiple amici saying this would be really valuable. We would like this. Sonoma County would like to be able to have an integrated code so that people could really understand all the different codes that affect their conduct. Copyright is standing in the way of that right now. That, I think, is not good for the public.

[Judge Pillard] You haven't mentioned your government edicts doctrine. You opened your brief with it. If you were correct that it applied, wouldn't that remove copyright protection more categorically than the District Court judgment did here?

[Ms. McSherry] Well, our argument is that, and this was kept open in the first opinion. Our argument is that if the court decides that we haven't met fair use with respect to any standard at issue before the court, then it would be wise at this point to reach the copyrightability question and basically save other people from having to roll the dice on a fair use defense, as Justice Roberts put it in the first case, I'm sorry, in Georgia.

And there, it also feeds back into the fair use argument because one of the themes of that case, of that opinion, is the animating principle behind all of this should be that no one owns the law. And that was the animating principle behind Georgia. Now, I will admit that applying Georgia here requires a bit of an extension, but not much of one. Again, because as I said, when a regulator issue, uses its lawful authority to issue a binding regulation, it's creating law in the same way. And when it incorporates other texts into it, incorporating means making part of the law.

[Judge Pillard] So you sort of see that. I mean, that's a little bit how I understand that in the court in Veeck. I think they made a fair use holding, but they were reverting to the government ethics kind of ethos in so doing. So you don't think that the government edicts doctrine would yield a broader ruling than what the District Court made under fair use?

[Ms. McSherry] So I think what the government ethics doctrine does, is it's an alternative path of affirming the judgment below. And that's really the question, is the court is supposed to look to the judgment, not just the reason. This is an alternative reason to affirm that judgment.

[Judge Katsas] If we rest on copyrightability, the incorporation would vitiate the copyright as to everybody. It'd have a commercial competitor coming in, selling stuff.

[Ms. McSherry] Well, then I think you have questions about how that commercial competitor was operating and what they were doing with it. And I also don't think that's very likely.

[Judge Katsas] If the incorporated material loses its copyright protection upon incorporation, none of that would matter. I mean, one major part of the analysis here is the non-commercial nature of your clients' particular use. You can't account for that under copyrightability.

[Ms. McSherry] Right. So, what I think would happen is not... Well, I just don't think that would happen because standards organizations don't operate that way. They compete actually for...

[Judge Katsas] No, but your answer to Judge Pillard's question has to be yes.

[Judge Pillard] And if it is, I think that Judge Katsas is entirely right, that it does yield a broader... It would remove copyright protection more broadly. And then I wonder, since you didn't cross appeal, if that's even before us. Because it isn't an alternative route to defending the judgment. I think it would yield a much broader judgment.

[Ms. McSherry] I think you'd still end up in the same place with respect to the 182 standards that are obsolete as a matter of law. Because that's only what's at issue here. It's just these standards.

[Judge Pillard] I know, but it's the nature of these standards. I gather under the District Court's holding that they still have copyright protection with respect to other non-law, as-law uses, right?

[Ms. McSherry] Well, I think under the fair use of the approach, that would be... That would be correct.

[Judge Pillard] That's what I'm saying. So it's a very different judgment if it's under government edicts, because as Judge Katsas was just saying, that would vitiate the copyright altogether.

[Ms. McSherry] So another way of thinking about this is that what happens when a work is incorporated into law is that essentially you have now a branch. So you have a different work.

[Judge Pillard] You have the private version of the work and you have the government edict version of the work. So you would basically say, no, this is actually the result under government edicts. under government edicts would track the result under fair use. It would just be a different analysis to get a more direct route to get there.

[Ms. McSherry] Correct.

[Judge Pillard] All right.

[Ms. McSherry] Exactly.

[Judge Pillard] All right. There are no more questions. Thank you.

[Ms. McSherry] Thank you.

[Judge Henderson] Mr. Klaus, why don't you take two minutes?

[Mr. Klaus] Thank you. Just a few very brief points.

One is the suggestion was made that there's not reason to worry about commercial competitors in this space. As we pointed out in our papers, my client, the NFPA, is already engaged with litigation in California against a commercial competitor that is doing what a Public Resource is doing and is trying to claim the benefit of the fair use defense and making the copyrightability arguments. So they are out there.

There was a suggestion that was made by Public Resource's counsel that there is coziness between the SDOs and the administrative agencies. I think there was a suggestion that ASTM people are in Washington boasting about their relationship with the government agencies. And so there's nothing to worry about their ability to monitor what's going on and what's being IBR'd. There's no evidence about the actual record evidence in the case. From Mr. Thomas's declaration, which is at page 699 of the Joint Index, which is that ASTM does not lobby for its standards to be IBR'd.

There was also a lot of discussion about market harm and the claim that there was nothing that we essentially had. I think we had a substantial amount of evidence that you had pointed out, Judge Pillard. The other thing that I would say, two points, that the standard for harm is whether not just what Public Resource's is doing would cause harm, but whether everybody was doing this in a widespread unrestricted way.

And the other, yet the last point I'll make is that the standards were down from Public Resource, not just during the time period the injunction was in effect, but they actually took them down in November of 2015. And since the time that the injunction was vacated by this court, Public Resource has posted just one standard, the 2017 version of the National Electrical Code. And so we don't actually have a real-time example of what would happen if they had put the 2020 or 23 National Electrical Codes online as well. We don't know.

And so in some respects, the reason that the evidence of harm and calculating specific harm has been difficult is because of choices that Public Resource has made.

[Judge Pillard] But they're reflecting choices of legislators. And one of the points that they make is that typically legislators are a couple steps behind your clients in that they do incorporate by reference particular date-issued standards. And as your clients are constantly working to improve the substitutability of what's incorporated by reference, you know, it quickly is sort of diminished given that you're on the edge of progress and the legislators are always a couple steps behind.

[Mr. Klaus] They may be. I understand the point you're trying to make. The only thing I would say is that with respect to what has actually been posted ours and showing market harm, I don't think that … I think that one needs to consider that there are huge numbers of standards that our clients develop that have been IBR'd from the time the injunction was listed, but they had not been put back up. So what we've got is a record that is based on some of the...

[Judge Pillard] A little bit of a pause.

[Mr. Klaus] Yes.

[Judge Pillard] Let me ask you about that. You mentioned the... Do you have a sense of the proportion of the work of these three SDOs that is and is not IBR'd under the District Court's definition where if a standard in full is referenced, even if, you know, you would say that some smaller portion of it should be fair use, but if, you know, in terms of the unit size that the lawmakers reference, what proportion of your clients works in total is IBR'd?

[Mr. Klaus] I do not have that information at the top of mind for my client. Mr. Fee may for ASTM. ASHRAE has the standard number of 90.1 that is a much smaller number of works. What I would say, Judge Pillard, is that the works that are at issue here account for an outsized huge portion of the revenue, that publication revenue is responsible for most of the activities.

And I see Mr. Fee, Judge Pillard. Mr. Fee may have a more specific answer on ASTM.

[Mr. Kevin Fee] Your Honor, I do know the answer to your question with respect to ASTM. Approximately 10% of ASTM standards are incorporated by reference into federal regulations, and that's at JA 699.

[Judge Pillard] JA 699?

[Mr. Fee] Yes, Your Honor. Thank you. Did you have anything else for Mr. Klaus?

[Judge Pillard] Pardon?

[Mr. Fee] Is there anything else for Mr. Klaus?

[Judge Henderson] All right, any more questions? No. Thank you.

[Mr. Klaus] Thank you, Your Honor.