



PUBLIC.RESOURCE.ORG ~ *A Nonprofit Corporation*

Public Works for a Better Government

March 8, 2013

The ASME Brand Protection Team
c/o MarkMonitor®
425 Market Street, 5th Floor
San Francisco, CA 94105
via email to brandprotection@mmasme.com, admin@markmonitor.com

Dear ASME Brand Protection Team:

I am in receipt of your communication of March 6, 2013, referencing our web pages <https://law.resource.org/pub/us/code/ibr/asme.a17.3.2008.pdf> <https://law.resource.org/pub/us/code/safety.html> and notifying Public.Resource.Org that the appearance of “ASME” on our website “infringes upon the exclusive intellectual property rights of ASME.” You further assert, “by using such trademark, you have intentionally attempted to attract Internet users to your web site(s) or other online location(s), by creating a likelihood of confusion with ASME’s trademark as to the source, sponsorship, affiliation, or endorsement of your web site(s), online location(s), products or services.”

THE LAW MAKES CLEAR THAT WE HAVE NOT INFRINGED ON YOUR TRADEMARK OR ANY OTHER INTELLECTUAL PROPERTY RIGHTS.

Public Resource is a non-profit organization dedicated to improving citizens’ ability to access the laws and codes that govern their lives. As part of this work, Public Resource acquires and makes readily available to the public various codes and standards that have been incorporated into federal and state laws, such as fire safety codes, pipeline safety standards, and food safety standards. By improving public access to governing codes incorporated into law, Public Resource helps enable citizens, businesses, journalists, consumer advocates, researchers, and others to educate themselves regarding legally-binding rules affecting the public safety.

The ASME code at <https://law.resource.org/pub/us/code/ibr/asme.a17.3.2008.pdf> , ASME A17.3–2008, Safety Code for Existing Elevators and Escalators, and the various other ASME codes listed at <https://law.resource.org/pub/us/code/safety.html> have all been incorporated by reference into the law of states and localities of our nation. See, for example, <http://dbs.idaho.gov/programs/industrial/elevator.html> (Idaho has adopted A17.3–2008); http://www.com.ohio.gov/dico/docs/dico_ElevatorSafetyStandards.pdf (Ohio has adopted A17.3–2008); National Board Synopsis of Boiler and Pressure Vessel Laws, Rules and Regulations, <http://>

www.nationalboard.org/SiteDocuments/NB-370.pdf, pp. 252–254 (identifying numerous state and local governments that have adopted various ASME boiler standards that we listed at <https://law.resource.org/pub/us/code/safety.html>).

Indeed, according to ASME itself, ASME A17.3–2008, the standard you have singled out, “is intended to serve as the basis for state and local jurisdictional authorities in adopting retroactive requirements for existing elevators and escalators to enhance the safety of the general public.” <http://www.asme.org/products/codes---standards/safety-code-for-existing-elevators-and-escalators> That is, ASME intends for governments to enact its code as law.

Long-standing precedent of the United States Supreme Court holds that copyright claims cannot prevent citizens from reading, knowing, and speaking the law. See *Wheaton v. Peters*, 33 U.S. 591 (1834); *Banks v. Manchester*, 128 U.S. 244 (1888). While codes drafted by ASME were entitled to copyright protection when issued, once incorporated into law these codes became the law, and thus have entered the public domain. The United States Court of Appeals for the 5th Circuit, sitting en banc, expressed this principle clearly in *Veeck v. Southern Building Code Congress*, 293 F.3d 791 (5th Cir. 2002), which concerned a model building code incorporated in the law of two Texas towns. The Court held that, once incorporated into law, the model code became law, and as law, the model code entered the public domain and is not subject to copyright protection.

As you can see by looking at the ASME codes posted on our website, in each case, we have prepended a cover sheet that informs citizens that the code is a document legally binding on citizens and indicates one or more state or local provisions that incorporates the code by reference into law.

In these circumstances, a trademark infringement claim – that Public.Resource.Org has “intentionally attempted to attract Internet users to [our] web site(s) or other online location(s), by creating a likelihood of confusion with ASME’s trademark as to the source, sponsorship, affiliation, or endorsement of [our] web site(s), online location(s), products or services” -- cannot be sustained. See *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23 (2003) (reverse passing off claim rejected; trademark law cannot prevent unauthorized use of material that is no longer protected by copyright).

As various states and localities have incorporated these ASME codes in their entirety, the entire codes have become law, and Public.Resource.Org has no basis to delete components of the codes. Moreover, nothing on our website creates any likelihood of confusion as to the source, sponsorship, or endorsement of our website, online location, products, or services. By publishing the codes in their entirety, we have made clear that the codes are the product of ASME, not Public.Resource.Org or anyone else, and we have not indicated or implied anywhere on our site that Public.Resource.Org is affiliated with ASME. Rather we have made plain that we have posted ASME codes, along with other privately-created codes, standards, manuals, and other documents, because they are the law.

Our inclusion of “ASME” on the relevant pages on our website is also protected as nominative fair use. See *Toyota Motor Sales, U.S.A., Inc. v. Tabari*, 610 F.3d 1171 (9th Cir. 2010); *Playboy Enters., Inc. v. Welles*, 279 F.3d 796, 801 (9th Cir. 2002); *New Kids on the Block v. News Am. Publ’g, Inc.*, 971 F.2d 302, 308 (9th Cir. 1992).

The purpose of making ASME codes part of binding law is to help promote the public safety. ASME codes were incorporated into the law, with ASME's encouragement, because of the high quality and integrity of the work. The rule of law requires that citizens know and obey the law. Our noncommercial posting of these legally mandated regulations helps to inform citizens and promote the public safety.

I would be happy to discuss this matter further if you wish.

Sincerely yours,

/signed/
Carl Malamud
Public.Resource.Org