

The Public's Right to Know: American Society for Testing and Materials, et al. v. Public.Resource.Org, Inc.

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In a case involving publication of industry standards, the US Court of Appeals for the District of Columbia reversed a grant of summary judgment in favor of private organizations under the Copyright Act and Lanham Act's fair use doctrines. *American Society for Testing and Materials, et al. v. Public.Resource.Org, Inc.*, Case No. 17-7035 (DC Cir. July 17, 2018) (Tatel, J).

The issue began when Public.Resource.Org (PRO) purchased copies of industry standards from Standards Developing Organizations (SDOs), scanned them into digital files and uploaded them onto a public website. PRO is a nonprofit organization that makes available online a variety of public documents, such as federal rules about safety, government-produced videos and product designs. Several SDOs filed a lawsuit asserting that they owned the copyrights to the material uploaded by PRO.

The district court ruled that private standards setting groups can claim copyright ownership of industry standards documentation and granted summary judgment to the SDOs on their claims of direct copyright infringement, finding that the SDOs had valid and enforceable copyrights in the standards that PRO had copied and distributed, and that PRO failed to create a triable issue of fact that its reproduction qualified as "fair use." The district court also determined that one of the SDOs was entitled to summary judgment on its trademark infringement claims because PRO had used copies of the organization's marks in commerce in a manner "likely to cause confusion" and because PRO's use of the marks did not qualify as a nominative fair use. The district court issued an injunction prohibiting PRO from all unauthorized use of the standards and trademarks. PRO appealed.

The DC Circuit vacated the injunction and remanded the case back to the district court. The Court found that the standards at issue were largely factual and that the amount used must be considered in the light of the public need being met, especially given that "precision is ten-tenths of the law." The Court found that the district court erred in its application of the fair use doctrine and remanded to the district court to develop a fuller record regarding the nature of each of the standards at use, how they were incorporated, and the manner and extent to which they were copied by PRO.

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