

# NOTES

## *Veeck v. Southern Building Code Congress International, Inc.:* Invalidating the Copyright of Model Codes upon Their Enactment into Law

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### I. INTRODUCTION

Peter Veeck (Veeck), operates a Web site providing information about municipalities in north Texas.<sup>1</sup> Veeck posted the building codes of Anna and Savoy, Texas, on his Web site.<sup>2</sup> Both Anna and Savoy adopted building codes written by Standard Building Code Congress International, Inc. (SBCCI).<sup>3</sup> After unsuccessful attempts to locate the towns' copies of the building codes, Veeck purchased and received copies of the building codes on software directly from SBCCI.<sup>4</sup> SBCCI is a nonprofit organization that develops model codes and encourages local government entities to enact its codes into law.<sup>5</sup> Despite being a nonprofit organization, SBCCI has an annual budget of several million dollars, partially derived from sales of its model codes, and used to fund its continued development of model codes.<sup>6</sup> SBCCI asserts copyright protection for the model codes it creates.<sup>7</sup>

Upon learning Veeck had posted its codes on the Internet, SBCCI demanded Veeck cease and desist from infringing upon its copyrighted codes.<sup>8</sup> Veeck sought a declaratory judgment ruling that he did not infringe SBCCI's copyright; SBCCI counterclaimed for, inter alia, copyright infringement.<sup>9</sup> The United States District Court for the Eastern District of Texas granted summary judgment to SBCCI on the issue of

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1. *Veeck v. S. Bldg. Code Cong. Int'l, Inc.*, 293 F.3d 791, 793 (5th Cir. 2002), *petition for cert. filed*, 71 U.S.L.W. 3170 (U.S. Sept. 4, 2002) (No. 2-35).

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.* at 793-94.

6. *Id.* at 794.

7. *Id.*

8. *Id.*

9. *Id.*

copyright infringement.<sup>10</sup> Veeck appealed, and a divided panel of the United States Court of Appeals for the Fifth Circuit first upheld SBCCI's copyright in the building codes.<sup>11</sup> Recognizing the "novelty and importance" of the issue before them, the Fifth Circuit reheard the case en banc.<sup>12</sup> Ultimately, the Fifth Circuit reversed the district court's decision and *held* that as governing law, the building codes of cities cannot be copyrighted. *Veeck v. Southern Building Code Congress International, Inc.*, 293 F.3d 791, 796 (5th Cir. 2002).

## II. BACKGROUND

United States Supreme Court cases concerning the copyrightability of "the law" date back to the nineteenth century. In 1834, the Supreme Court in *Wheaton v. Peters* remarked "that no reporter has or can have any copyright in the written opinions delivered by this court."<sup>13</sup> The import of the decision in *Wheaton*, was that it made the law more accessible to the public.<sup>14</sup> In *Banks v. Manchester*, the Supreme Court, building upon *Wheaton*, denied a state court reporter copyright in Ohio Supreme Court opinions.<sup>15</sup> The Supreme Court stated that since judges receive a salary from public funds, judges "can themselves have no pecuniary interest or proprietorship . . . in the fruits of their judicial labors."<sup>16</sup> Noting a public policy concern, the Supreme Court further reasoned that the "work done by the judges constitutes the authentic exposition and interpretation of the law, which, binding every citizen, is free for publication to all."<sup>17</sup> Taken together, *Wheaton* and *Banks* stand for the proposition that judicial opinions are in the public domain, and thus "the law" is not afforded any protection under copyright law.<sup>18</sup>

These early cases provide the setting for the copyrightability of model codes. The United States Court of Appeals for the First Circuit in *Building Officials and Code Administration v. Code Technology, Inc.* (*BOCA*), was the first court of appeals to address the issue of whether the inclusion of model codes in government regulations would invalidate

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10. *Id.*

11. *Id.*

12. *Id.*

13. *Wheaton v. Peters*, 33 U.S. 591, 668 (1834).

14. L. Ray Patterson & Craig Joyce, *Monopolizing the Law: The Scope of Copyright Protection for Law Reports and Statutory Compilations*, 36 UCLA L. REV. 719, 733 (1989).

15. *See Banks v. Manchester*, 128 U.S. 244, 252 (1888).

16. *Id.* at 253.

17. *Id.*

18. *See* 1-5 MELVILLE NIMMER & DAVID NIMMER ON COPYRIGHT § 5.12 (2002).

the copyright in such codes.<sup>19</sup> BOCA, a nonprofit organization, published and copyrighted a building code, with private funds, with the intent of encouraging government entities to adopt the code.<sup>20</sup> The Commonwealth of Massachusetts eventually adopted a “substantial part” of the building code.<sup>21</sup> Code Technology, Inc. (CTI), copied and published the Massachusetts building code without BOCA’s permission.<sup>22</sup> BOCA sued for copyright infringement and the district court granted BOCA’s motion for preliminary injunction.<sup>23</sup> CTI appealed, asserting the defense that BOCA’s building code, upon enactment by Massachusetts, entered the public domain and lost its copyright protection.<sup>24</sup> BOCA urged the First Circuit not to extend the rule that “the law” is in the public domain, because unlike judicial opinions and statutes, the building code was written by a private author dependent on the economic incentives of copyright law.<sup>25</sup>

Despite this distinction, the First Circuit reversed the district court’s ruling in favor of BOCA.<sup>26</sup> The court stated, “citizens are the authors of the law, and therefore its owners, regardless of who actually drafts the provisions.”<sup>27</sup> According to the court, the “metaphorical concept of citizen authorship,” along with the due process policy concern of free accessibility of the law are the actual premises *Wheaton* and *Banks* advanced.<sup>28</sup> Further commenting on due process concerns, the court declared, “the law is generally available for the public to examine” and “any failure to gain actual notice results from simple lack of diligence.”<sup>29</sup> Although the First Circuit reversed the district court’s ruling and expressed doubt as to BOCA’s likelihood of success, the court avoided making a final determination with respect to the copyrightability of BOCA’s building code.<sup>30</sup> In refraining, the court noted a trend of government adoption of model codes, and recognized the per se rule

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19. *Bldg. Officials & Code Admin. v. Code Tech., Inc.*, 628 F.2d 730, 734 (1st Cir. 1980).

20. *Id.* at 731-32.

21. *Id.* at 732.

22. *Id.*

23. *Id.*

24. *Id.* at 733.

25. *Id.*

26. *Id.* at 736.

27. *Id.* at 734.

28. *Id.*

29. *Id.*

30. *Id.* at 736.

established in *Wheaton* might better be “adapted in some as yet unknown manner to accommodate modern realities.”<sup>31</sup>

The United States Court of Appeals for the Second Circuit also addressed the issue of copyrightability of model codes in *CCC Information Services, Inc. v. Maclean Hunter Market Reports, Inc.*<sup>32</sup> In *CCC Information Services*, Maclean published the “Red Book,” which listed valuations of used cars.<sup>33</sup> CCC, via a computer database, also provided valuations of used cars.<sup>34</sup> CCC loaded substantial portions of the “Red Book” into its database.<sup>35</sup> The insurance statutes of several states used “Red Book” valuations as a standard for insurance payments.<sup>36</sup> The Second Circuit disagreed with CCC’s argument that the “Red Book” valuations had fallen into the public domain by reference in the insurance statutes.<sup>37</sup> The court asserted that no authority supported CCC’s argument that the free accessibility of the law required elimination of copyright.<sup>38</sup> Noting that the district court did rely upon *BOCA* in sustaining CCC’s argument, the Second Circuit observed that the *BOCA* court never decided the issue of copyrightability of model codes, they “merely vacated a preliminary injunction, expressing doubts as to the . . . copyright holder’s likelihood of success.”<sup>39</sup> Concluding, the Second Circuit declared, “[w]e are not prepared to hold that a state’s reference to a copyrighted work as a legal standard for valuation results in loss of the copyright.”<sup>40</sup>

The United States Court of Appeals for the Ninth Circuit in *Practice Management Information Corp. v. American Medical Ass’n* was the next circuit court to uphold the copyright of a model code.<sup>41</sup> In *Practice Management*, the American Medical Association (AMA) developed a coding system copyrighted in the Physician’s Current Procedural Terminology (CPT).<sup>42</sup> A federal agency, the Health Care Financing Administration (HCFA), pursuant to congressional instruction, agreed

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31. *Id.*

32. *See CCC Info. Servs., Inc. v. Maclean Hunter Mkt. Reports, Inc.*, 44 F.3d 61, 74 (2d Cir. 1994).

33. *Id.* at 63.

34. *Id.* at 64.

35. *Id.*

36. *Id.* at 73.

37. *Id.*

38. *Id.*

39. *Id.* at 73-74.

40. *Id.* at 74.

41. *Practice Mgmt. Info. Corp. v. Am. Med. Ass’n*, 121 F.3d 516, 520 (9th Cir. 1997), *cert. denied*, 522 U.S. 933 (1997).

42. *Id.* at 517.

with the AMA to adopt the CPT and required its use on Medicaid forms.<sup>43</sup> Practice Management Information Corporation (PMIC), a publisher and distributor, purchased copies of the CPT from AMA for resale.<sup>44</sup> After failing to receive a volume discount, PMIC sought declaratory judgment that the CPT was uncopyrightable because its use was required as a part of a federal regulation and thus had entered the public domain.<sup>45</sup>

Relying on the ruling in *Banks*, which rests on dual rationales, the Ninth Circuit recognized PMIC's claim that the CPT had entered the public domain.<sup>46</sup> The first rationale, the Ninth Circuit explained, was that judicial opinions are uncopyrightable because the public pays the judges' salaries, and therefore owns the opinions.<sup>47</sup> The court identified the policy concern that due process requires free accessibility to the law as the second rationale in *Banks*.<sup>48</sup> The court found neither consideration applicable to the CPT.<sup>49</sup>

In finding the first rationale inapplicable, the court observed that judges already have adequate incentive to write opinions in their publicly-funded salaries, thus the economic incentives of copyright law relied on by AMA to create and maintain the CPT were not at stake in *Banks*.<sup>50</sup> Furthermore, the court stated that invalidating copyrights of model codes on the basis that they have entered the public domain "would expose copyrights on a wide range of privately authored model codes, standards, and reference works to invalidation."<sup>51</sup> Addressing the due process rationale found in *Banks*, the court held that termination of AMA's copyright in the CPT was not justified because there was no evidence of anyone being denied access to the CPT.<sup>52</sup> In determining that AMA's copyright in the CPT was valid, the court also noted that neither the First Circuit in *BOCA*, nor the Second Circuit in *CCC Information Services*, chose to invalidate a copyright authored by a private group.<sup>53</sup>

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43. *Id.* at 517-18.

44. *Id.* at 518.

45. *Id.*

46. *Id.*

47. *Id.* (citing *Banks v. Manchester*, 128 U.S. 244, 253 (1888)).

48. *Id.* (citing *Banks*, 128 U.S. at 253).

49. *Id.*

50. *Id.*

51. *Id.* at 519.

52. *Id.* (citing *State of Texas v. W. Publ'g Co.*, 882 F.2d 171, 177 (5th Cir. 1989) (asserting that when no evidence exists of anyone being denied access to the law, there are no due process concerns)).

53. *Id.* at 519-20.

## III. THE COURT'S DECISION

In the noted case, the Fifth Circuit held that model codes are not copyrightable to the extent they are enacted into law.<sup>54</sup> Before beginning their analysis, the court acknowledged SBCCI was the author of the building codes and thus held a valid copyright in its codes.<sup>55</sup> The court initially relied on the holdings of *Wheaton* and *Banks* and stated that “the law” in the form of judicial opinion or statute, is not afforded copyright protection since it is in the public domain.<sup>56</sup> The court extended this reasoning to SBCCI’s building codes and concluded that as the law of Anna and Savoy, Texas, SBCCI’s building codes could not be copyrighted.<sup>57</sup>

The court rejected SBCCI’s argument that the *Banks* ruling was divided into two rationales, (1) judges as government employees do not require economic copyright incentives for their work and (2) the public must have free access to the law.<sup>58</sup> SBCCI claimed neither holding was applicable since SBCCI was a private author dependent on the economic incentives of copyright law and there was no dispute over the public availability of SBCCI’s model codes.<sup>59</sup> In dismissing SBCCI’s contention, the court interpreted *Banks*’ reference to judicial salaries as merely indicating that the public, not judges, own the economic interest in official judicial work.<sup>60</sup> The court also observed that the First Circuit in *BOCA* did not “endorse bifurcation” of *Banks*, but rather identified the real premises of *Banks* as the “metaphorical concept of citizen authorship” and free accessibility of the law to the public.<sup>61</sup> The Fifth Circuit also rejected SBCCI’s argument that due process involves accessibility of its codes need only be sufficient, noting “[f]ree availability of the law, by this logic, has degenerated into availability as long as SBCCI chooses not to file suit.”<sup>62</sup>

Next, the Fifth Circuit attempted to limit its holding that model codes are not afforded copyright protection to the extent they have been

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54. *Veeck v. S. Bldg. Code Cong. Int’l, Inc.*, 293 F.3d 791, 800 (5th Cir. 2002). The court alternatively held SBCCI’s building codes were “facts” pursuant to the merger doctrine, and therefore uncopyrightable. *Id.* at 801.

55. *Id.* at 794.

56. *Id.* at 795-96.

57. *See id.* at 796.

58. *See id.* at 796-97.

59. *Id.*

60. *Id.* at 797.

61. *Id.* at 798-99 (citing *Bldg. Official & Code Adm. v. Code Tech., Inc.*, 638 F.2d 730, 734 (1st Cir. 1980)).

62. *Id.* at 799-800.

enacted as law by distinguishing “references to extrinsic standards” from the “wholesale adoption of a model code promoted by its author . . . for use as legislation.”<sup>63</sup> The court determined that *CCC Information Services* and *Practice Management* were inapplicable because the copyrighted works in those cases “were created by private groups for reasons other than incorporation into law.”<sup>64</sup> Noted the court, a model code such as one of SBCCI’s model codes “serves no other purpose than to become law.”<sup>65</sup> The court, by analogy, added, “the result in this case would have been different if Veeck had published not the building codes of Anna and Savoy, Texas, but the SBCCI model codes, as model codes.”<sup>66</sup>

Finally, the Fifth Circuit advanced several policy arguments in rejecting SBCCI’s claim that it would lack revenue to continue developing model codes without copyright protection.<sup>67</sup> First, the court stated that code-writing organizations such as SBCCI have survived many years without being awarded copyright protection.<sup>68</sup> Second, the court determined that modern and technological challenges were attributable to SBCCI’s success, not copyright law.<sup>69</sup> Third, the court stated that SBCCI could enhance the market value of its codes by publishing their codes with “value-added” enhancements, such as commentary and questions and answers.<sup>70</sup>

A dissent, written by Judge Wiener, and joined by six of the fifteen judges on the en banc panel, disagreed with the majority’s adoption of a “blanket, *per se* rule” invalidating the copyright of a work upon adoption into law.<sup>71</sup> The dissent stated a ruling for SBCCI would have been “well within the precedential and persuasive boundaries of established copyright law” and claimed the majority’s rule was “ill-suited for modern realities.”<sup>72</sup> In noting the lack of controlling authority, the dissent argued that the Supreme Court’s ruling in *Banks* is limited to publicly paid officials and not applicable to private citizens or groups, such as SBCCI,

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63. *Id.* at 803-04.

64. *Id.* at 805.

65. *Id.*

66. *Id.*

67. *See id.*

68. *Id.*

69. *Id.* at 805-06.

70. *Id.* at 806.

71. *Id.* at 810. Another dissent written by Judge Higginbotham deemed the majority’s application of *Banks* improper, stating *Banks* “is a case about authorship, about the acquiring of copyrights by public officials, not a case invalidating the copyrights held by private actors when their work is licensed by lawmakers.” *Id.* at 807.

72. *Id.* at 810.

and thus “falls markedly short of answering the question” whether a model code loses its copyright protection upon enactment into law.<sup>73</sup>

The dissent stated that the lesson learned from *Banks* is that public policy is central to assessing the copyrightability of works, and considering that there is no evidence Veeck was denied access to the codes, the facts tip the policy considerations in SBCCI’s favor.<sup>74</sup> Admitting *BOCA*’s “metaphorical concept of citizen authorship” supported the majority’s stance, the dissent observed that this support was found in *BOCA*’s “grandiloquent dicta” and that the holding of *BOCA* was actually quite narrow, noting the First Circuit “expressly avoided” determining if *BOCA*’s model code lost copyright protection upon enactment.<sup>75</sup>

Model codes were also distinguished from judicial opinions and statutes by the dissent.<sup>76</sup> The dissent stated that publicly paid officials do not create model codes; rather model codes are the work of private groups, therefore “rendering inapt the mythical concept of citizen authorship.”<sup>77</sup> The dissent argued the majority’s determination that “the law” should be treated the same regardless of form was flawed because of the distinction appellate courts have made between model codes and judicial opinions and statutes.<sup>78</sup> Furthermore, the dissent noted nonprofit organizations such as SBCCI rely on the economic incentive provided by copyright law in order to continue their public service, whereas judges and legislators are paid from public funds.<sup>79</sup>

In concluding, the dissent observed the decision of the First Circuit in *BOCA* “wisely left open for future evaluation the modern realities surrounding technical regulatory codes and standards.”<sup>80</sup> Recognizing the governmental trend of model code adoption, the dissent stated that SBCCI’s codes should not lose their copyright protection in total once enacted into law, as long as the public has reasonable access to them.<sup>81</sup> Reemphasizing that no one had been denied access to SBCCI’s building codes and that public policy favored SBCCI, the dissent declared it could

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73. *Id.* at 811-12.

74. *See id.* at 812. Not finding support for the majority’s acceptance of Veeck’s due process/public domain argument, the dissent declared “this is *not* a free access case and cannot be so classified.” *Id.* at 810.

75. *Id.* at 814.

76. *Id.*

77. *Id.*

78. *Id.* at 815-16.

79. *Id.* at 816.

80. *Id.* at 825.

81. *Id.* at 826.

not join the “majority’s inflexible reasoning and unnecessarily overbroad holding.”<sup>82</sup>

#### IV. ANALYSIS

The Fifth Circuit, in reversing the panel decision and adopting a per se rule invalidating the copyright of model codes upon their enactment into law, disregarded judicial precedent established by the First, Second, and Ninth Circuits. The court’s per se rule is overbroad and sweeping, and as the dissent points out, assessing the copyrightability of a work adopted into law is more appropriately resolved through case-by-case determinations.<sup>83</sup>

Given that SBCCI made available copies of its building codes, and Veeck was not denied access to these codes, automatic invalidation of a model code upon enactment could “prove destructive of the copyright interest in encouraging creativity in connection with the increasing trend toward state and federal adoptions of model codes.”<sup>84</sup> This is especially true considering the increased potential for copying and dissemination of copyrighted works with the advent of the Internet and new developments in modern technology. Also, as both dissents argued, creating a broad rule invalidating the copyright of a work upon its enactment into law is beyond the scope of an appellate court.<sup>85</sup>

In addition to creating “an extremely broad and inflexible rule,” the Fifth Circuit also misapplied *Banks*.<sup>86</sup> The majority extended the *Banks* ruling to the noted case and thereby invalidated the copyright of SBCCI’s model codes because upon enactment by Anna and Savoy, the codes became “the law,” and “the law” in any form is not afforded copyright protection.<sup>87</sup> As Judge Wiener properly observed in his dissent, the *Banks* holding is limited to “the law” as created by publicly paid officials, who are in no need of copyright law’s economic incentive, whereas SBCCI, a private organization, is dependent on the incentives provided by copyright law.<sup>88</sup>

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82. *See id.*

83. *See id.* at 808.

84. 1-5 NIMMER & NIMMER, *supra* note 18, § 5.12.

85. In his dissent Judge Higginbotham stated, “Congress is best suited to accommodate its Congressionally-created copyright protection with extraordinary changes in communication trailing the development of the internet.” *Veeck*, 293 F.3d at 807. Judge Wiener, in his dissent, remarked that both the Supreme Court and Congress are better suited than a circuit court to address the copyrightability of a model code based upon its adoption by a government entity. *See id.* at 812.

86. *Id.* at 810-12.

87. *See id.* at 795-96.

88. *Id.* at 811-12.

Furthermore, in adopting a per se rule invalidating governmentally adopted model codes because they are “the law,” the Fifth Circuit found it necessary to distinguish extrinsic standards from wholesale adoption of codes, in order to elude the precedent established by its sister circuits.<sup>89</sup> In making such a distinction, the court contradicted its own argument that “the law,” in any form, is not afforded copyright protection, and immediately created an exception to its per se rule, thus diminishing the force of its own blanket ruling. Also, an exception carved out of a per se rule in the very decision setting forth that rule indicates that other, as yet undiscovered exceptions may exist, thus reiterating the point that the copyrightability of model codes enacted into law is best determined on a case-by-case basis.

It should also be mentioned that the noted case makes an interesting candidate for certiorari due to the circuit split created by the Fifth Circuit’s en banc decision, the recent trend towards government adoption of model codes, and the continuing development of the Internet and its increasing and continuing role in copyright law.

Daniel J. Russell

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89. See *id.* at 804.