# Case Note

## The Copyright Law

*Veeck v. Southern Building Code Congress International, Inc.*, 241 F.3d 398 (5th Cir. 2001).

"Congress shall make no law respecting an establishment of religion." These foundational words now appear on more than 15,000 different websites;[1] a testament to the profound impact of the Internet on the public dissemination of—and access to—the law. No one holds a copyright in the First Amendment; anyone wishing to reprint its text may do so at will.

But what if those who drafted laws could prevent others from distributing their works to the public? Imagine how different things would be if James Madison could collect royalties from all those who would reprint his august constitutional words.

One might think the idea far-fetched. The 1976 Copyright Act prohibits copyright of federal government works,[2] and the courts have long assigned statutes and judicial opinions to the public domain.[3] But the Fifth Circuit's recent decision in *Veeck v. Southern Building Code Congress International, Inc. (SBCCI)*[4] unsettles many of these long-held assumptions.

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1. Results of a search performed at http://www.google.com, Sept. 1, 2001.

2. 17 U.S.C. § 105 (1994); Robert M. Gellman, *Twin Evils: Government Copyright and Copyright-Like Controls over Government Information*, 45 SYRACUSE L. REV. 999, 1023-27 (1995); Marvin J. Nodiff, *Copyrightability of Works of the Federal and State Governments Under the 1976 Act*, 29 ST. LOUIS U. L.J. 91, 94-98 (1984); *see also* Andrea Simon, Note, *A Constitutional Analysis of Copyrighting Government-Commissioned Work*, 84 COLUM. L. REV. 425 (1984) (analyzing the copyrightability of work that the government commissions rather than produces).

3. Banks v. Manchester, 128 U.S. 244 (1888) (holding state judicial opinions uncopyrightable); Wheaton v. Peters, 33 U.S. (8 Pet.) 591 (1834) (holding federal judicial opinions uncopyrightable); Howell v. Miller, 91 F. 129 (6th Cir. 1898) (rejecting a claimed exclusive right to publish state statutes); Davidson v. Wheelock, 27 F. 61 (C.C.D. Minn. 1886) (same); Georgia v. Harrison Co., 548 F. Supp. 110 (N.D. Ga. 1982) (refusing to enforce a state's copyright in its own statutes), *vacated per stipulation*, 559 F. Supp. 37 (N.D. Ga. 1983).

4. 241 F.3d 398 (5th Cir. 2001).



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## I

Lawmaking in the modern regulatory state is a painstaking task. Instead of writing their own codes, many government entities rely on model codes that private companies like SBCCI develop and publish.[5] SBCCI claims a copyright in its model codes.[6] It allows municipalities to enact them free of charge.[7] The public can peruse the codes at a government office, but those seeking more convenient access must purchase a copy from SBCCI for seventy-two dollars.[8]

Peter Veeck operates a nonprofit website providing information about towns in Northern Texas. Some of these towns had enacted SBCCI building codes, and without the company's permission, Veeck posted copies at his site.[9] SBCCI sent Veeck a cease and desist letter claiming that he was violating its copyright, and litigation ensued.[10]

Veeck asserted two primary defenses. First, he argued that the public's due process interest in free access to the law extinguished SBCCI's copyright once its codes were enacted.[11] For this proposition, he relied on the First Circuit's decision in *Building Officials & Code Administrators International, Inc. (BOCA) v. Code Technology, Inc.*[12]

Second, Veeck relied on the merger doctrine. Copyright does not extend to any "idea, procedure, process, system, method of operation, concept, principle, or discovery."[13] When an idea or method can be expressed in only one or a few ways, the expression itself is also excluded from copyright: It "merges" with the underlying idea or method.[14] Veeck

5. *Id.* at 411; *see also id.* at 406 n.37 (listing as examples LA. REV. STAT. ANN. § 40:1722(B)(3) (West 2001) (building code); MISS. CODE ANN. § 45-11-73 (1993) (building code); and TEX. LOC. GOV'T CODE ANN. § 235.002(c)(1) (Vernon 1999) (fire code)). The Office of Management and Budget has directed federal agencies to adopt model codes "whenever practicable" in order to reduce costs. Revision of OMB Circular No. A-119, Notice of Implementation, 58 Fed. Reg. 57,643, 57,644-45 (Oct. 26, 1993).

6. *Veeck*, 241 F.3d at 401. SBCCI claims a copyright in the codes themselves, not merely in their selection and arrangement. Thus *Veeck* differs from cases where the uncompiled material is concededly in the public domain. *Compare* West Publ'g Co. v. Mead Data Cent., Inc., 799 F.2d 1219 (8th Cir. 1986) (enforcing West's copyright in its compilation and pagination of case law), *and* Oasis Publ'g Co. v. West Publ'g Co., 924 F. Supp. 918 (D. Minn. 1996) (same), *with* Matthew Bender & Co. v. West Publ'g Co., 158 F.3d 693 (2d Cir. 1998) (refusing to enforce West's copyright). *See generally* L. Ray Patterson & Craig Joyce, *Monopolizing the Law: The Scope of Copyright Protection for Law Reports and Statutory Compilations*, 36 UCLA L. REV. 719 (1989) (discussing the issue); Deborah Tussey, *Owning the Law: Intellectual Property Rights in Primary Law*, 9 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 173 (1998) (same).

7. *Veeck*, 241 F.3d at 401.

8. *Id.*

9. *Id.*

10. *Id.* at 401-02.

11. *Id.* at 403.

12. 628 F.2d 730 (1st Cir. 1980).

13. 17 U.S.C. § 102(b) (1994).

14. *See* Baker v. Selden, 101 U.S. 99, 103 (1879); Herbert Rosenthal Jewelry Corp. v. Kalpakian, 446 F.2d 738, 742 (9th Cir. 1971); Morrissey v. Procter & Gamble Co., 379 F.2d 675

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argued that when towns enacted SBCCI's building codes, they became facts that could be expressed in only one way, and thus fell outside the scope of copyright.[15]

The district court granted summary judgment to SBCCI, and the Court of Appeals for the Fifth Circuit affirmed over one dissent. It held that the codes' physical availability for inspection at public offices satisfied due process.[16] It refused to extend Supreme Court precedent to privately prepared codes, declining to follow the First Circuit's decision in *BOCA*.[17]

The court also rejected the merger argument. Under Fifth Circuit precedent, merger is evaluated only as of the time of a work's creation.[18] The court found that when SBCCI's building code was created, it did not merge because there are "many ways to write model building codes, not just one."[19] To bolster the point, the court observed that SBCCI's model codes compete with those of at least two other private organizations.[20]

Judge Little dissented. He agreed with the majority that SBCCI's codes were copyrightable prior to adoption. But he believed that once a code was enacted, there was no other way to express it. "An individual wishing to publish the text of a law cannot develop his own, unique version and still publish an authoritative copy."[21]

## II

The *Veeck* decision was not a faithful application of copyright principles. Whatever the merits of the due process holding, the majority's

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(1st Cir. 1967). For discussions of the merger doctrine and the idea-expression dichotomy generally, see MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.03[B][3], at 13-68 to -73 (2001); Dale P. Olson, *The Uneasy Legacy of* Baker v. Selden, 43 S.D. L. REV. 604 (1998); and Edward Samuels, *The Idea-Expression Dichotomy in Copyright Law*, 56 TENN. L. REV. 321 (1989).

15. *Veeck*, 241 F.3d at 407. In addition to his two primary arguments, Veeck raised defenses based on free speech, copyright misuse, waiver, and fair use. *Id.* at 408-10. The court rejected each of these. *Id.*

16. *Id.* at 403-04.

17. *Id.* at 404-07. The *Veeck* court claimed that its decision did not "create a circuit split" and that "no court ha[d] held to the contrary." *Id.* at 403, 405. The *BOCA* court had technically left the question open, ruling only that BOCA's likelihood of success was too slim to support a preliminary injunction. *Id.* at 405 & n.33 (quoting *BOCA*, 628 F.2d at 735). Nonetheless, *Veeck* and *BOCA* reached substantially opposite conclusions in their analyses of the same legal question.

18. *Id.* at 407 & n.45 (citing Mason v. Montgomery Data, Inc., 967 F.2d 135, 138 n.5 (5th Cir. 1992) (citing Kern River Gas Transmission Co. v. Coastal Corp., 899 F.2d 1458, 1460 (5th Cir. 1990))). The circuits are split on whether to evaluate merger as of the time of creation or the time of infringement. *Compare id.* (time of creation), *with* Kregos v. Associated Press, 937 F.2d 700, 705 (2d Cir. 1991) (time of infringement). *See generally* NIMMER & NIMMER, *supra* note 14, § 13.03[B][3], at 13-70 to -71 (reviewing the issue).

19. *Veeck*, 241 F.3d at 407.

20. *Id.*

21. *Id.* at 416 (Little, J., dissenting). Judge Little offered no response, however, to the majority's citation of Fifth Circuit precedent that merger is evaluated only as of the time of a work's creation.

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decision of the merger issue was flawed. The dissent, however, also failed to treat the merger issue properly. By conceding that model codes are copyrightable prior to adoption, the dissent fatally crippled its argument, because under Fifth Circuit law a work not merged at its creation cannot subsequently become so.[22]

In fact, model codes are not copyrightable, whether or not they have been enacted.[23] A model code describes a "method of operation" under 17 U.S.C. § 102(b) because it is a set of instructions for public governance.[24] The text of a model code merges with the underlying method because the substance of a law, whether enacted or merely proposed, depends inextricably on its particular textual formulation.[25] In other words, "[t]here is only one accurate way to express a law."[26]

This reasoning reflects the structure and purposes of copyright law. Model codes are functional works.[27] This fact does not make them uncopyrightable,[28] but it does place restrictions on the level of generality at

22. *See supra* note 18 and accompanying text.

23. If one conceived of merger not as defeating copyright but as providing a defense to infringement, one could say instead that model codes may be freely copied both before and after their enactment. The formulations are substantially equivalent for present purposes. For consistency, I use the other variant throughout.

24. In this respect, a model code is unlike an independently copyrightable work that merely happens to be incorporated by reference in a statute. *See, e.g.*, Practice Mgmt. Info. Corp. v. Am. Med. Ass'n, 121 F.3d 516 (9th Cir. 1997) (enforcing a copyright in a medical taxonomy, the use of which the Health Care Financing Administration subsequently mandated); CCC Info. Servs., Inc. v. Maclean Hunter Mkt. Reports, Inc., 44 F.3d 61 (2d Cir. 1994) (enforcing a copyright in a compilation of vehicle valuations whose use was subsequently mandated by state law); Del Madera Props. v. Rhodes & Gardner, Inc., 637 F. Supp. 262 (N.D. Cal. 1985) (enforcing a copyright in a map that a zoning ordinance had referenced); *see also* County of Suffolk v. First Am. Real Estate Solutions, Nos. 00-9011, 00-9169, 2001 U.S. App. LEXIS 16706 (2d Cir. July 25, 2001) (allowing a county to assert copyright in its tax maps). *But see* NADA Servs. Corp. v. CCC Info. Servs., Inc., No. 91-C-4593, 1991 U.S. Dist. LEXIS 18874 (N.D. Ill. Nov. 15, 1991) (reaching a legal conclusion substantially contrary to that of *Maclean Hunter*, 44 F.3d 61, on similar facts). The publications in these cases do not present the same merger issue that model codes do. *See Maclean Hunter*, 44 F.3d at 73 (noting that the publications "explain[ed] nothing, and describe[d] no method, process or procedure").

25. Examples of textual hair-splitting abound. Consider two: First, a drafter's choice among seeming synonyms has potential legal consequences because a court will read legislative intent into a decision to use a word that is the same as, or different from, words elsewhere in the legal code. *See* BFP v. Resolution Trust Corp., 511 U.S. 531, 536-37 (1994); Estate of Cowart v. Nicklos Drilling Co., 505 U.S. 469, 478-79 (1992). Second, a drafter's ordering of language has potential legal consequences because, under the doctrine *noscitur a sociis*, "a word is known by the company it keeps." Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or., 515 U.S. 687, 694 (1995). These (and other) canons of construction reveal that tweaking statutory language has functional, and not merely expressive, implications.

26. *Veeck*, 241 F.3d at 415-16 (Little, J., dissenting). The dissent was speaking of an enacted law, but the same observation applies to a model code, which is simply a proposed law.

27. By "functional work," I mean a work that is valued for its utility rather than for its literary or aesthetic qualities. *Cf.* Jane C. Ginsburg, *Four Reasons and a Paradox: The Manifest Superiority of Copyright over Sui Generis Protection of Computer Software*, 94 COLUM. L. REV. 2559, 2566-68 (1994) (employing a similar definition).

28. Pictorial, graphic, and sculptural works are uncopyrightable to the extent that they are functional. 17 U.S.C. §§ 101, 102(a)(5), 113 (1994). This limitation, however, does not apply to

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which the "idea" can be defined for merger purposes. Authors cannot claim monopolies over methods—that is the realm of patent.[29] The idea therefore must not be defined at a level that allows an author to appropriate the sole means of describing a functionally distinct method.[30]

A key concept is the distinction between descriptive substitutes and functional substitutes. Descriptive substitutes are different means of describing the same method; functional substitutes are different methods entirely. When a functional work has descriptive substitutes, it does not merge, because a copyright in the work does not preclude others from teaching that particular method.[31] When a functional work has only functional substitutes, however, the merger doctrine applies.[32]

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written works. *See* Am. Dental Ass'n v. Delta Dental Plans Ass'n, 126 F.3d 977, 978-79 (7th Cir. 1997); Ginsburg, *supra* note 27, at 2566-68; *see also* Lotus Dev. Corp. v. Borland Int'l, Inc., 49 F.3d 807, 819 (1st Cir. 1995) (Boudin, J., concurring) ("Utility does not bar copyright . . . but it alters the calculus.").

29. Baker v. Selden, 101 U.S. 99, 104-05 (1879); *see also* Mazer v. Stein, 347 U.S. 201, 217 (1954) ("Unlike a patent, a copyright gives no exclusive right to the art disclosed . . . ."). This rule does not apply when a work is functional only in the sense that it prescribes a method for generating something that is itself an expressive work. Thus, a musical score, a choreographic outline, or an architectural design for an artistic element of a building is copyrightable notwithstanding the fact that it gives the creator a monopoly over a method. *See Baker*, 101 U.S. at 103-04; Ginsburg, *supra* note 27, at 2567.

30. In the realm of nonfunctional works, courts enjoy substantial latitude in defining the appropriate level of generality of the idea for merger purposes. *See* Nichols v. Universal Pictures Corp., 45 F.2d 119, 121 (2d Cir. 1930). When a work is functional, however, the *Baker* rule (that copyright does not confer a monopoly over an art) places an upper bound on a judge's discretion.

*Baker* might instead be read for the narrower proposition that elements of a work are uncopyrightable to the extent that one actually uses them in the practice of a particular art (such as accounting forms in the practice of accounting). On this reading, *Baker* might not preclude copyright in a recipe, *cf. infra* note 33 and accompanying text; while a written list of ingredients may be necessary to teach the art, it is not a necessary implement of its practice (at least not in the sense that an accounting form is an implement of the practice of accounting). Even on this view, however, model codes are uncopyrightable. The text of a model code must itself be used in the process of enacting it. In other words, not only does a model code teach a particular art of legislation; the legal text is a necessary implement of the practice of that art.

31. Thus, *The Prince* is copyrightable (even though it is functional in that it prescribes a method of governance) because it has descriptive substitutes: There are many other ways to express Machiavelli's particular political philosophy. Altering the language may change the work's literary details, but those particular literary details are not (I would argue) essential to the expression of the work's functional aspect. *Cf. Am. Dental Ass'n*, 126 F.3d at 979 (noting that Einstein's exposition of his theory of relativity is copyrightable although the underlying equations are not). Other good examples of functional works that have descriptive substitutes are taxonomies, maps, and dictionaries. *See id.* (upholding a copyright in a dental taxonomy and giving several examples of descriptive substitutes); Practice Mgmt. Info. Corp. v. Am. Med. Ass'n, 121 F.3d 516 (9th Cir. 1997) (upholding a copyright in an AMA medical coding taxonomy); Rockford Map Publishers, Inc. v. Directory Serv. Co., 768 F.2d 145 (7th Cir. 1985) (enforcing a copyright in a map); *Lotus*, 49 F.3d at 819 (Boudin, J., concurring) (noting that dictionaries are copyrightable).

32. *See, e.g.*, *Lotus*, 49 F.3d at 818 ("The fact that there may be many different ways to operate a computer program . . . does not make the actual method of operation chosen copyrightable . . . ."), *aff'd by an equally divided Court*, 516 U.S. 233 (1996).

Congress may choose to extend copyright to functional works that arguably would have fallen outside its traditional scope. *See, e.g.*, Architectural Works Copyright Protection Act, Pub. L. No. 101-650, § 703, 104 Stat. 5133, 5133 (1990) (codified at 17 U.S.C. § 102(a)(8)). One could

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A helpful example is a recipe. When a recipe consists of nothing more than a list of ingredients, it is uncopyrightable, because that list of ingredients is essential to expressing the method of preparing the dish.[33] A list of ingredients has functional substitutes (there are many different recipes for chocolate cake). But since it has no descriptive substitutes, the merger doctrine bars copyright.

The *Veeck* majority reasoned that model building codes do not merge because there are many different ways to write them. This argument confuses descriptive substitutes with functional substitutes.[34] Competing codes differ in their functional attributes—even small changes in diction or ordering have potential legal consequences.[35] Like a recipe, a model code is uncopyrightable from the moment of its authorship. Indeed, a model code is simply a recipe for governance: a list of ingredients that a government entity should include in its legal code.

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put software in this category, since it is concededly difficult, although not impossible, otherwise to rationalize its copyrightability within the framework presented here. *See* An Act To Amend the Patent and Trademark Laws, Pub. L. No. 96-517, § 10, 94 Stat. 3015, 3028 (1980) (codified as amended at 17 U.S.C. § 117 (Supp. V 1999)); *cf.* Lloyd L. Weinreb, *Copyright for Functional Expression*, 111 HARV. L. REV. 1149, 1207 (1998) (declining in this context to muse on "the abstract jurisprudential question of the effect to be given a statutory provision manifestly based on incorrect premises"). In any event, no statutory extension exists in the case of model codes.

33. *See* Publ'ns Int'l, Ltd. v. Meredith Corp., 88 F.3d 473 (7th Cir. 1996); NIMMER & NIMMER, *supra* note 14, § 2.18[I], at 2-208 to -209 (doubting that recipes should be copyrightable); *see also* Lambing v. Godiva Chocolatier, No. 97-5697, 1998 U.S. App. LEXIS 1983 (6th Cir. Feb. 6, 1998) (holding in an unpublished opinion that recipes are uncopyrightable); *cf.* 37 C.F.R. § 202.1 (2001) (indicating that "mere listings of ingredients or contents" are uncopyrightable). A recipe is arguably copyrightable to the extent that it goes beyond providing a list of ingredients and contains descriptive instructions capable of being expressed in multiple ways. In that case, it would be a functional work with descriptive substitutes. *Meredith* held that not only the ingredients, but also the preparation instructions, were uncopyrightable. 88 F.3d at 480-81. This aspect of the holding is more debatable, but resolution of the issue is not necessary here.

Another instructive case is *Morrissey v. Procter & Gamble Co.*, 379 F.2d 675 (1st Cir. 1967). *Morrissey* found that instructions explaining how to enter a particular sweepstakes merged. *Id.* at 678-79. To the extent one conceives of sweepstakes entry rules as the precise set of conditions necessary to effect a valid entry, the case is exactly on point. Under the alternative conception that sweepstakes entry rules are intended as a "how to" guide to entry rather than as a set of regulatory parameters, *Morrissey*'s holding is broader and more debatable; the instructions seem more like a functional work with descriptive substitutes.

34. For another decision employing the same faulty reasoning, see *Del Madera Properties v. Rhodes & Gardner, Inc.*, 637 F. Supp. 262, 264 (N.D. Cal. 1985), which held that a property development plan did not merge because there were many different ways to develop the property.

35. *See supra* note 25. Different model building codes are functional substitutes even though their legal dissimilarities may be so insubstantial that the chance of differing legal interpretation is remote. The distinction between functional and descriptive substitutes is one of quality, not degree. Thus, a recipe calling for two cups of flour is uncopyrightable even though one calling for 1.99 cups of flour would be practically indistinguishable.

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## III

While the *Veeck* court was wrong on the law, the concerns animating its decision are far from illusory. Private organizations like SBCCI may often "do a better job than . . . the state alone in seeing that complex yet essential regulations are drafted, kept up to date and made available."[36] Because many different jurisdictions may enact their model codes, private groups can accumulate expertise and benefit from economies of scale.

Without some type of intellectual property protection, companies like SBCCI would not survive.[37] The dissent's proposal that SBCCI simply "charge a fair price to a city for code preparation"[38] misses the mark. Model codes are public goods.[39] It is far cheaper for a city to copy another city's code than to pay for an original one.[40] Property rights give municipalities and individuals a much stronger incentive to invest in developing better codes.

The problem with *Veeck* is not that it grants property rights to model code authors, but that it grants the wrong ones. A better regime would define the infringing act to be not republication of the code, but enactment. If SBCCI could prevent municipalities from enacting its codes without permission, it could negotiate fees without fear of free-riding.[41]

This approach is manifestly superior to the *Veeck* regime. It not only avoids the troublesome due process issue entirely, but is preferable on economic grounds as well. Under the *Veeck* regime, municipalities externalize their costs of governance—the entity making the adoption decision is not the entity paying the development costs. For that reason, *Veeck* is unlikely to lead to a socially optimal level of expenditure on code development.[42] *Veeck* is also distributively unjust because it imposes

36. *Veeck*, 241 F.3d at 411 (quoting *BOCA*, 628 F.2d at 736).

37. *Id.* at 406-07; Practice Mgmt. Info. Corp. v. Am. Med. Ass'n, 121 F.3d 516, 519 (9th Cir. 1997); *see also* NIMMER & NIMMER, *supra* note 14, § 5.06[C], at 5-90 to -92 (arguing that to deny copyright would "prove destructive of the copyright interest[] in encouraging creativity in connection with the increasing trend toward state and federal adoptions of model codes").

38. *Veeck*, 241 F.3d at 414 n.3 (Little, J., dissenting).

39. *Cf.* William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325, 326-28 (1989) (discussing the public-good nature of expressive works).

40. *See* Nodiff, *supra* note 2, at 104.

41. Government infringement of an individual's intellectual property right is normally compensable as a taking. *See, e.g.*, James v. Campbell, 104 U.S. 356 (1881). Sovereign immunity, however, may be an impediment to recovery if a state itself, rather than a municipality, wrongfully enacts a model code. *See* Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627 (1999).

42. *Cf. Veeck*, 241 F.3d at 414 n.3 (Little, J., dissenting) (observing that if model code authors had to recover their costs from municipalities, a city could compare those costs with the costs of in-house production). These expenditures are unlikely to be internalized through imperfect political channels. Overcompensation is particularly likely in the model code context. A model code is unlike a normal creative work that rewards its author only to the extent that it succeeds in the marketplace of ideas. Once enacted, a model code has a built-in market. In this

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governance costs on particular individuals when those costs should, in fairness, be borne by the public.[43] My proposal addresses these concerns.

The best legal basis for this proposed property regime is not copyright, but state common law.[44] A properly calibrated common-law remedy would allow free republication of model codes, but would grant the author a property right over their enactment.[45] In my view, an ideal regime would bar only actual copying (whether literal or nonliteral); thus, unlike patent law, it would grant no rights against independent development. I would also provide protection only for a limited term of years. These details of implementation, however, should not obscure the more fundamental point: Granting property rights over the mere republication of model codes is unnecessary and improvident.

## IV

*Veeck* tried to pound a square peg into the round hole of copyright law. The result was an inferior solution that fits poorly with both precedent and economic theory. Private model code authors provide a valuable service and their intellectual work product deserves protection, but *Veeck* chose the wrong tool for the job.

—*Robert Kry*

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respect, adopting a nonpublic model code is like mandating legal citation according to a nonpublic system. *See* Patterson & Joyce, *supra* note 6, at 727-28. While a state mandate does not make a work uncopyrightable (as *Veeck* pointed out, 241 F.3d at 406, a textbook does not lose its copyright merely because it is assigned as part of a school curriculum), it does present a risk of overcompensation. *Cf.* Tussey, *supra* note 6, at 178 & n.9 (noting the traditionally high profit margins of legal publishers).

43. Imposing costs on particular members of the public is not distributively unjust when those members benefit disproportionately (consider toll roads). But in the case of privately authored building codes, there is a poor fit between the set of those who must purchase a copy and the set of those who benefit.

44. Other decisions have turned to state common law to provide sui generis protection in comparable circumstances. *See, e.g.*, G.S. Rasmussen & Assocs. v. Kalitta Flying Serv., Inc., 958 F.2d 896 (9th Cir. 1992) (recognizing a state common-law conversion action for unauthorized use of another person's regulatory filing). For a review of other sui generis intellectual property regimes, see J.H. Reichman, *Legal Hybrids Between the Patent and Copyright Paradigms*, 94 COLUM. L. REV. 2432, 2453-500 (1994). Of course, a statute at either the federal or the state level could also confer this protection. I emphasize the common-law approach because it requires no legislative action.

Copyright law arguably prevents a state from prohibiting unauthorized republication of model codes, but it does not preempt state efforts to prohibit unauthorized enactment. *See* 17 U.S.C. § 301(b)(3) (1994); *Rasmussen*, 958 F.2d at 904; Samuels, *supra* note 14, at 378-79. Patent preemption may also be an issue, but *Rasmussen* rejected a patent preemption claim in analogous circumstances. *See* 958 F.2d at 904-05 (distinguishing Bonito Boats, Inc. v. Thunder Craft Boats, Inc., 489 U.S. 141 (1989)).

45. Whether a government entity should be allowed to claim such a right is a question that I leave for another day.

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