

**INTERNATIONAL CODE COUNCIL INC.'S
MEMORANDUM OF LAW IN SUPPORT OF ITS
MOTION FOR SUMMARY JUDGMENT**

FILED UNDER SEAL

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK**

INTERNATIONAL CODE COUNCIL, INC.,

Plaintiff,

v.

UPCODES, INC.;
GARRETT REYNOLDS; and
SCOTT REYNOLDS,

Defendants.

Civil Action No.: 1:17-cv-6261-JFK-DCF

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OF ITS MOTION FOR SUMMARY JUDGMENT**

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INTRODUCTION

Plaintiff International Code Council, Inc. (“ICC”) is a nonprofit organization that develops and publishes numerous model codes to improve the safety of the built environment, including the 41 International Codes at issue in this case (collectively, the “I-Codes”). In furtherance of its nonprofit mission, ICC makes its I-Codes publically available to view for free, and it licenses governmental authorities to use the language of the I-Codes in their own building codes, although jurisdictions frequently amend the I-Codes to reflect local practices and laws (the “I-Codes as Adopted”). The I-Codes and I-Codes as Adopted are collectively referred to as “ICC’s Codes.” In these license agreements, governmental authorities agree that ICC retains its copyrights in the I-Codes.

Defendants are a for-profit business and its two founders. Defendant UpCodes is a start-up business backed by a San Francisco based investor that claims to have funded over 2,000 startups worth more than \$100 billion, including Airbnb and Dropbox. UpCodes was launched with the hope of becoming the next multi-million-dollar success story. The heart of Defendants’ business is making unauthorized copies of ICC’s copyrighted publications available for free to their more than 200,000 monthly active users via the UpCodes website with the expectation that they will convert many of those visitors into paying subscribers, who receive access to additional ICC publications and/or additional tools to use in connection with ICC publications.

Defendants have infringed ICC’s copyrights in the I-Codes in at least three ways. First, Defendants posted the model I-Codes on their website and (i) made them available for free downloading, printing, or any other use; and (ii) sold subscription access to the I-Codes with increased functionality, including greater search capabilities and bookmarking functionality. Second, Defendants posted documents comparing the I-Codes to versions of the I-Codes as

Adopted in a redline format (the “I-Code Redlines”) and charged its users a subscription fee to access the I-Codes Redlines. Third, Defendants posted the I-Codes as Adopted online, originally charging for access to them and later giving away access for free. Defendants took these brazen actions with full awareness of and indifference to the detrimental effect its actions would have on ICC’s non-profit mission. In fact, Defendants bragged that [REDACTED]
[REDACTED]

Defendants’ actions threaten to undo a public/private partnership that Congress, the executive branch, and state and local governments carefully established. This partnership incentivizes private entities to assume the burden of creating standards and codes while permitting governments to incorporate those copyrighted works in statutes and regulations. Preserving the copyright in standards and codes is an indispensable element to create an incentive for organizations, like ICC, to shoulder the cost of code development. Nevertheless, Defendants disregarded ICC’s copyrights in an attempt to profit from ICC’s work and ask the Court to topple a carefully balanced arrangement that has worked well for over 100 years.

As part of this public/private partnership, ICC ensures that the public has easy access to the I-Codes. In fact, ICC makes all of the I-Codes available to view for free on its website. As a result, long before UpCodes, the public could easily access ICC’s Codes. Thus, although Defendants sometimes suggest that their posting of the I-Codes on their website was justified by a desire to make the I-Codes available to the public, the truth is that these codes were already available to all, and Defendants are simply trying to build a multi-million dollar business off of the hard work of a non-profit organization focused on enhancing building safety.

Defendants do not deny that ICC initially owned copyrights in the I-Codes or that Defendants copied the vast majority of the I-Codes. Instead, Defendants argue that

governmental adoption of the I-Codes strips the I-Codes of all copyright protection, including the copyright in the I-Codes as model codes. But there is no support for that proposition.

Defendants' posting of the I-Codes as Adopted fares no better. Although there is arguably a split of authority on the subject, the Second Circuit has expressly rejected the argument that governmental adoption of a privately authored standard invalidates copyright protection.

Moreover, the Supremacy Clause of the U.S. Constitution prohibits state action from invalidating a federal copyright. Accordingly, the Court should grant summary judgment in favor of ICC on its copyright infringement claim, find Defendants' infringement to be willful, and enjoin future infringement.

STATEMENT OF FACTS

I. THE STANDARDS DEVELOPMENT SYSTEM AND ICC'S DEVELOPMENT ACTIVITIES

ICC is a non-profit organization that exists for the purpose of lessening the burdens of government through the development, maintenance, and publication of model codes and standards to advance public safety, ensure compatibility across products and services, facilitate training, and spur innovation. ICC's Statement of Undisputed Material Fact ("SUMF") ¶ 17.

"Standards" refer to a variety of technical works, including works that contain model codes, product specifications, installation methods, methods for manufacturing or testing materials, recommended practices to ensure safety or efficiency, or other guidelines or best practices.

SUMF ¶ 1. Model codes are one type of standard. SUMF ¶ 1; *Veeck v. Southern Bldg. Code Congress Intern., Inc.*, 293 F.3d 791, 815 n.20 (5th Cir. 2002) (*en banc*) (Higginbotham, J., dissenting) ("In substance, . . . technical codes are 'standards;' . . . those terms are synonymous.") An organization that develops standards is a "standards development organization" or "SDO." SUMF ¶ 4.

A. The Standards Development Process

In the United States, standards are typically developed by private organizations that have technical expertise in the relevant area. SUMF ¶ 5. Standards are usually highly technical and specialized, and are written for audiences that have particular expertise in the relevant fields. SUMF ¶ 6. Standards are used by industry actors as a form of self-regulation and as a source of best practices. SUMF ¶ 7. Governmental authorities also use standards, including by incorporating them into statutes and regulations. SUMF ¶ 8.

This system of privately developed standards emerged over the course of a century. It serves the country well by facilitating the development and updating of the highest quality standards covering a range of topics at little to no public expense. SUMF ¶ 9. The costs of developing standards are “commonly underwritten, in whole or in significant part, by the revenues made possible from the copyright-protected sales and licensing of the standards themselves.” SUMF ¶ 11. Governmental authorities do not have the technical expertise or resources to develop comparable standards. SUMF ¶¶ 13–14. Plus, governments save time and money by adopting model codes. ECF No. 20 ¶ 21.

B. ICC

ICC’s mission is safety. SUMF ¶¶ 15–16. ICC provides the highest quality codes, standards, products and services for all concerned with the safety and performance of the built environment. SUMF ¶ 18. ICC’s model codes and other standards are used in a wide range of fields, including architecture, construction, manufacturing, design, and research. SUMF ¶ 28. ICC has over 64,000 members comprised of manufacturers, testing laboratories, consumers, regulators, builders, contractors, designers, product certifiers, and academics from more than 50 countries. SUMF ¶ 41. Interested stakeholders participate in the development of the I-Codes through the submission of code change proposals and public comments as well as by testifying at

the hearings and through participating on technical committees. SUMF ¶ 42–45.

ICC’s code development processes draw on a wide range of input from a variety of interests and sources of expertise. SUMF ¶¶ 28, 45. ICC coordinates code development committees composed of subject matter experts, regulators, and interest groups to create a transparent and inclusive consensus based process that complies with the Office of Management and Budget’s Circular No. A-119 (“OMB Circular”), a memorandum detailing the federal government’s policy on the use of voluntary consensus standards. SUMF ¶¶ 37, 45. ICC’s goal is to conduct a process open to all parties with safeguards to avoid domination by proprietary interests. SUMF ¶ 38.

ICC has developed 15 comprehensive model codes through its exhaustive code development process, and multiple versions of each of these codes are included in the I-Codes that are the subject of this lawsuit. SUMF ¶¶ 19, 43–57. All I-Codes are revised on a three-year schedule and either reapproved, revised or withdrawn in two revision cycles that typically take up to 12-18 months to complete. SUMF ¶ 58.

ICC incurs substantial costs for its code development infrastructure and delivery platforms, including the resources it provides to encourage collaboration among members and the public. SUMF ¶¶ 59–65. ICC’s members are supported by a dedicated ICC code development staff of approximately [REDACTED] employees. SUMF ¶ 62. ICC incurs code development expenses relating to technical committee meetings and balloting as the standards make their way through the development process, and editing, producing, distributing and promoting the completed standards. SUMF ¶ 61. ICC spends [REDACTED] of dollars per year on code development. SUMF ¶ 65. In 2017, ICC spent more than [REDACTED] just to cover the cost of code development staff employment and travel expenses alone. SUMF ¶ 63. Additionally, in

2017 ICC spent over [REDACTED] on the publication of copyrighted materials. SUMF ¶ 63. ICC invested over [REDACTED] over the last six years on its cdpACCESS tool used to create the I-Codes. SUMF ¶ 63. ICC incurs [REDACTED] dollars in code development expenses relating to technical committee meetings, public hearings, and balloting as the standards make their way through the development process. SUMF ¶ 61. ICC also incurs [REDACTED] dollars in expenses associated with editing, producing, printing distributing and promoting the completed standards. SUMF ¶ 61. These expenses do not include an allocation for all ICC employees who are involved in the code development process but whose costs are not allocated to business units directly tied to code development, such as the executive team, information technology, and member services and support. SUMF ¶ 64.

ICC heavily relies on the revenues that it earns from the sale and licensing of the I-Codes to fund these expenses. In 2016 alone, [REDACTED] percent of ICC's revenue derived from sales of the I-Codes. SUMF ¶¶ 68–71. ICC also generates [REDACTED] of dollars of revenue from licensing its codes to organizations like [REDACTED], an online reference library, where users can purchase model codes, commentary, and guidelines. SUMF ¶ 71–72.

C. Incorporation Into Law

Governments at all levels—federal, state, and local—from time to time incorporate into law privately developed standards in statutes and regulations. Many of the I-Codes have been incorporated at least in part into law, resulting in the I-Codes as Adopted.

Federal policy strongly favors incorporation into law of private sector standards. As explained in the OMB Circular, incorporation of voluntary consensus standards, *inter alia*, saves government the cost of developing standards on its own, provides incentives to establish standards that serve national needs, promotes efficiency and economic competition through harmonization of standards, and furthers the federal policy of relying on the private sector to

meet government needs for goods and services. SUMF ¶¶ 12, 14. Federal law requires that materials incorporated in the Federal Register must be “reasonably available to the class of persons affected.” 5 U.S.C. § 552(a)(1) (2006); 1 C.F.R. § 51.7(3) (2014). The regulations specify that (i) a copy of the incorporated material must be on file with the Office of the Federal Register and (ii) the regulations incorporating such material must state the ways those incorporated materials are reasonably available to interested parties. 1 C.F.R. §§ 51.3(4) & 51.5 (2014). The regulations do not require that such materials be available to the public at no cost.

State and local governments also incorporate standards into law and reap similar benefits from this system, including achieving uniformity across state lines and avoiding the cost to governments of developing their own standards. SUMF ¶ 34. No state or local government requires incorporated materials to be available to the public at no cost. *See* SUMF ¶ 35. ICC works with state and local governments that want to use the I-Codes, including publishing and distributing codebooks with state or local amendments online or in hard copy. SUMF ¶¶ 66, 80. ICC’s license agreements with governmental units acknowledge ICC’s copyrights in I-Codes. SUMF ¶ 80. The state and local publications frequently include ICC’s copyright notices. SUMF ¶ 80.

D. ICC’s Codes Are Widely Available to the Public.

ICC recognizes the importance of ensuring that the public has meaningful access to the I-Codes. As a result, ICC makes its codes available for free on its website—in a read-only format—through its publicACCESS site. SUMF ¶ 66. Hence, any member of the public who wants *to read or access* the I-Codes can do so—at no cost—simply by going to ICC’s website. SUMF ¶ 66. Persons that want *to copy or distribute copies* of the I-Codes pay for that right or otherwise obtain a license. SUMF ¶¶ 72–73.

ICC also makes all of the I-Codes available to the public in multiple formats and through

multiple additional distribution channels. SUMF ¶¶ 66–69. First, members of the public can purchase copies of the codes, in hard copy or digital format, and on one-off or subscription bases. SUMF ¶ 69. ICC sells copies of its codes at reasonable cost. For example, individual I-Codes sell in the range of \$25 to \$150. SUMF ¶¶ 69–70. Members of the public can also obtain copies of the I-Codes through ICC’s subscription service, premiumACCESS, which allows users to access additional features like commentaries, and tools, such as searching, highlighting, bookmarking, annotating, and multi-user functionality. SUMF ¶ 67. The public can also purchase I-Codes for a reasonable price from ICC’s numerous licensees, like [REDACTED]. SUMF ¶ 72. ICC often provides copies of the I-Codes at a reduced cost or at no cost when it is informed that the regular cost is a burden to the requester. SUMF ¶ 76.

ICC also makes its standards reasonably available to the public in other ways. ICC routinely grants permission to researchers, academics and others to reproduce I-Codes in part or in whole at no cost for non-commercial purposes. SUMF ¶ 78. ICC also donates hundreds of copies of its I-Codes to libraries throughout the United States. SUMF ¶ 77.

II. DEFENDANTS’ WILLFUL COPYING AND DISTRIBUTION OF THE I-CODES

A. Defendants Are Building a For-Profit Business Off of Their Willful Infringement of the I-Codes.

Defendant UpCodes is a start-up, for-profit corporation, founded and run by two brothers – Defendants Garrett and Scott Reynolds. SUMF ¶ 87. Defendants are backed by Y Combinator, a San Francisco based investor that claims to have funded over 2,000 startups worth more than \$100 billion, including Airbnb and Dropbox. SUMF ¶ 88.

From the start, Defendants’ business model was to profit off of their copying of ICC’s publications by making them available on their website for free without ICC’s permission and in a manner such that others can copy, print, save, or distribute the I-Codes without any limitations

or restrictions. SUMF ¶¶ 93–94. Defendants designed their [REDACTED] business model to attract users by offering free content and then seek to [REDACTED]

SUMF ¶ 94.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Before they embarked on their mission of ending ICC’s primary revenue source, Defendants [REDACTED]

[REDACTED]. SUMF ¶¶ 168, 172. In fact, Defendants reproduced ICC’s copyright notices when they copied ICC’s Codes. SUMF ¶ 133. [REDACTED]

[REDACTED] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

¹ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

B. Defendants' Creation and Posting of ICC's Codes

Defendants copied the I-Codes and I-Codes as Adopted by [REDACTED]
[REDACTED] of ICC's Codes and posting them to the UpCodes website.

SUMF ¶ 103. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

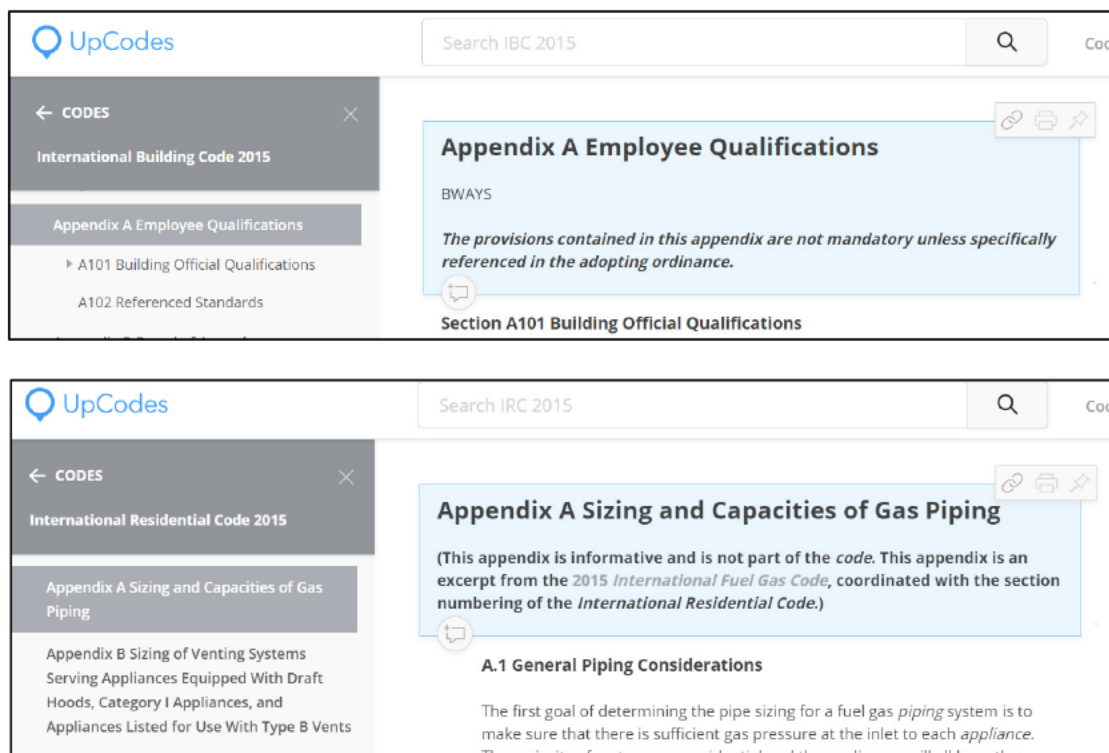
[REDACTED]

[REDACTED]

[REDACTED]

SUMF ¶¶ 124–126.² Garrett and Scott Reynolds similarly admit that they reproduced 40 of the I-Codes and either wrote or directed the copying and display of the I-Codes for the purpose of displaying them on UpCodes’ website. SUMF ¶¶ 135–139. Among the I-Codes that Defendants reproduced and displayed, three have not been adopted in any U.S. jurisdiction. SUMF ¶¶ 127–128. Additionally, for several of the I-Codes that Defendants admit to reproducing and displaying as model codes, the only jurisdiction to adopt the code without amendment was the village of South Holland, IL. SUMF ¶ 129.

Defendants posted the entire content of I-Codes, including appendices that contained express statements that they were “not mandatory” or “not part of the code.” SUMF ¶ 130.



In addition to copying and displaying the I-Codes, Defendants promoted access to the I-Codes as Adopted. SUMF ¶ 131. However, at least initially, UpCodes’ website restricted access

² UpCodes added the 2018 version of ICC’s Codes to its website after this lawsuit was filed. SUMF ¶ 146.

to the I-Codes as Adopted to users that upgraded to access the “base code+local amendments.” SUMF ¶ 131. To access the I-Codes as Adopted, users were required to pay for UpCodes’ premium subscription service. SUMF ¶ 132.³

C. Defendants’ Post-Litigation Revisions to Its Website

After ICC brought this lawsuit in September 2017 and Defendants retained [REDACTED] copyright counsel, UpCodes redesigned its website, [REDACTED] to remove the model I-Codes and only display the I-Codes as Adopted. SUMF ¶¶ 140, 185.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

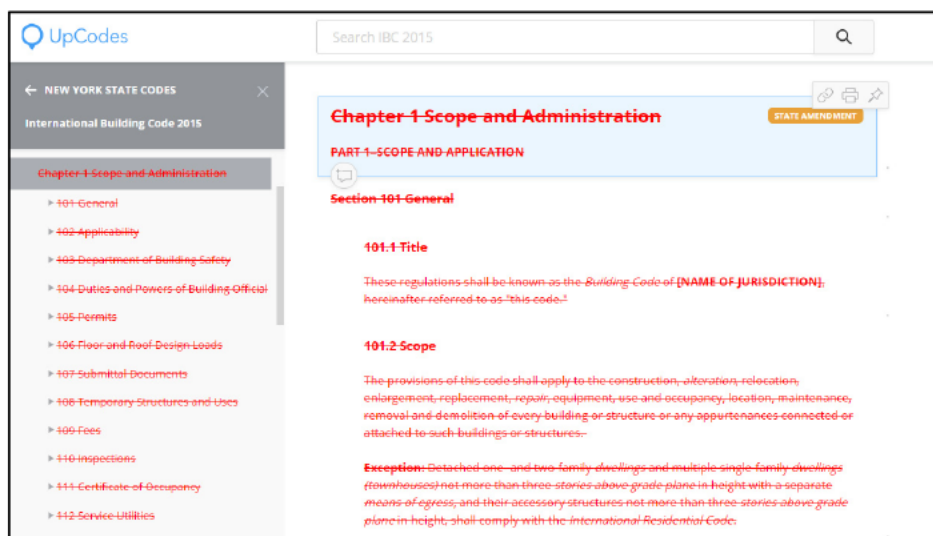
[REDACTED]

[REDACTED]

[REDACTED]

For UpCodes’ premium subscribers, UpCodes’ website featured the same “general code names” (*e.g.*, International Building Code 2015) and bold text indicating that this copy of the Work contained state amendments. SUMF ¶ 144. Within each of the I-Codes as Amended, UpCodes displayed the full text of the I-Code, redlined to show the state level amendments. SUMF ¶ 145. This included reproducing entire chapters of each I-Code that had not been adopted into law. SUMF ¶ 145.

³ UpCodes recently released a new product called “UpCodes AI” that appears to copy at least some of ICC’s Codes. See <https://up.codes/features/ai>. This product is not the subject of the Complaint in the current case. See ECF No. 1 at ¶¶ 30, 32, 34 (referencing Defendants’ posting of the I-Codes, the I-Codes as Adopted, and the I-Code Redlines). As a result, this motion does not address the UpCodes AI product.



Defendants have continued to post versions of the I-Codes and I-Codes as Adopted owned by ICC, including as recently as 2019. SUMF ¶¶ 146-148.

ARGUMENT

III. STANDARD FOR SUMMARY JUDGMENT

A motion for summary judgment should be granted upon a showing “that there is no genuine dispute as to any material fact.” Fed. R. Civ. P. 56; *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). The mere existence of some factual dispute between the parties does not defeat summary judgment; rather, the dispute must be both “material,” meaning that “a dispute over it might affect the outcome of the suit,” and “genuine,” meaning that “a reasonable jury could return a verdict for the nonmoving party.” *Baldwin v. EMI Feist Catalog, Inc.*, 805 F.3d 18, 25 (2d Cir. 2015).

IV. ICC IS ENTITLED TO SUMMARY JUDGMENT ON ITS COPYRIGHT INFRINGEMENT CLAIM.

A copyright infringement plaintiff must prove “(1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original.” *On Davis v. The Gap, Inc.*, 246 F.3d 152, 158 (2d Cir. 2001), *as amended* (May 15, 2001) (quoting *Feist Publ’ns, Inc. v.*

Rural Tel. Serv. Co., 499 U.S. 340, 361 (1991)). The undisputed facts show that ICC satisfies both elements. Defendants cannot carry their burden of proof on any of their affirmative defenses. ICC therefore is entitled to summary judgment.

A. ICC Owns Valid Copyrights in the I-Codes.

It is undisputed that ICC is the duly registered owner of the copyrights in the I-Codes. SUMF ¶¶ 20-22. ICC registered the I-Codes within five years of first publication, creating a presumption that ICC is the lawful owner of valid copyright in the I-Codes. 17 U.S.C. § 410(c) (2018); *Durham Indus., Inc. v. Tomy Corp.*, 630 F.2d 905, 908 (2d Cir. 1980). “It is well settled that this puts the burden of proof as to invalidity on the defendant in an infringement action.” *Gaste v. Kaiserman*, 863 F.2d 1061, 1064 (2d Cir. 1988). Defendants cannot meet that burden.

B. Defendants Reproduced, Distributed, and Displayed the I-Codes Without Authorization.

Defendants cannot and do not deny that they “copied” the I-Codes by (1) posting the I-Codes as model codes; (2) posting the I-Code Redlines; and (3) posting the I-Codes as Amended. SUMF ¶¶ 117, 140, 145, 151. In the copyright infringement context, “[t]he word copying is shorthand for the infringing of any of the copyright owner’s five exclusive rights” that 17 U.S.C. § 106 vests in ICC as the owner of the copyright. *See Arista Records, LLC v. Doe 3*, 604 F.3d 110, 117 (2d Cir. 2010) (internal citations and quotations omitted). “Those rights include the rights to display, perform publicly, reproduce, distribute, and prepare derivative works of the copyrighted material.” *Pearson Educ., Inc. v. Ishayev*, 9 F. Supp. 3d 328, 335 (S.D.N.Y. 2014). Here, Defendants infringed several of ICC’s exclusive rights.

First, Defendants infringed ICC’s exclusive rights of reproduction under § 106(1) when they scanned the model I-Codes and the I-Codes as Adopted into digital formats and when

See *UMG Recordings, Inc. v. MP3.Com, Inc.*, 92

F. Supp. 2d 349, 350-51 (S.D.N.Y. 2000) (granting summary judgment to plaintiff copyright owner where defendant infringed its copyright by converting CDs into digital files (MP3s) without authorization) (citing *Infinity Broad. Corp. v. Kirkwood*, 150 F.3d 104, 108 (2d Cir. 1998)).⁴ UpCodes admits that it “reproduced one or more portions” of each of the I-Codes at issue except for the 2015 International Zoning Code. SUMF ¶¶ 125–126. The I-Code Redlines also reproduce the entirety of the I-Codes. SUMF ¶ 145.

In addition, Defendants infringed ICC’s exclusive rights to distribute copies of and to display the I-Codes under § 106(3) and (5), when they uploaded ICC’s Codes to the UpCodes website for members of the public to immediately view and download at will — which they enable over 200,000 monthly active users to do – and when they sell subscriptions to their premium service – which featured the model I-Codes, the I-Code Redlines, and the I-Codes as Adopted. SUMF ¶¶ 115, 124, 132, 144, 160–61, 163; see *Goldman v. Breitbart News Network, LLC*, 302 F. Supp. 3d 585, 586 (S.D.N.Y. 2018) (granting summary judgment for copyright owner finding that “when defendants caused the embedded Tweets to appear on their websites, their actions violated plaintiff’s exclusive display right”); *Capitol Records, LLC v. ReDigi Inc.*, 934 F. Supp. 2d 640, 651 (S.D.N.Y. 2013), *aff’d*, 910 F.3d 649 (2d Cir. 2018) (“[T]he sale of digital music files on ReDigi’s website infringes Capitol’s exclusive right of distribution.”); accord *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1014 (9th Cir. 2001) (uploading digital files for others to copy violates distribution right). Again, UpCodes admits that it displayed and distributed one or more portions of each of the model I-Codes at issue except for the 2015 International Zoning Code. SUMF ¶ 114–115.

Defendants admittedly did not seek or obtain ICC’s consent before infringing any of

⁴ Defendants’ responses to requests for admission and other evidence establishing its infringement of the exclusive rights of copyright owners are listed in ICC’s Statement of Undisputed Facts Nos. 92-148.

these exclusive rights. SUMF ¶ 92. Thus, the undisputed evidence confirms that UpCodes infringed ICC's copyrights in the I-Codes.

C. Defendants' Defenses for Posting the I-Codes as Model Codes are Meritless.

Because ICC established a prima facie case of infringement, the burden shifts to Defendants to show a disputed question on at least one of the following defenses to infringement. *See, e.g., FameFlynet, Inc. v. Shoshanna Collection, LLC*, 282 F. Supp. 3d 618, 625 (S.D.N.Y. 2017) ("where a plaintiff has demonstrated both ownership and infringement" the "defendant bears the burden to come forward with evidence" of its defenses). It cannot do so.

1. Governmental Adoption of the I-Codes Does Not Terminate ICC's Copyright Protection.

Defendants cannot dispute that the I-Codes were protected by copyright when they were originally "fixed in any tangible medium of expression." 17 U.S.C. § 102(a). Defendants instead argue that a single act of incorporation by any governmental entity strips ICC of its copyrights in the I-Codes in their entirety, placing even the model I-Codes "in the public domain as a result of its adoption into law." ECF No. 20 at 7. This argument is inconsistent with the Copyright Act and other relevant statutes, the position of all of the federal agencies that have addressed the issue, public policy, and the precedent of the Second Circuit and the weight of judicial authority. Therefore, Defendants cannot meet their burden on this defense.

a. Nothing in the Copyright Act or Other Statutes Destroys Copyright Upon Incorporation by a Governmental Entity.

When Congress enacted the 1976 Copyright Act, it was well aware that copyrighted works were routinely incorporated into federal, state, and local law. *Hall v. United States*, 566 U.S. 506, 516 (2012) (courts should "assume that Congress is aware of existing law when it passes legislation") (internal quotation marks omitted). Ten years earlier, Congress authorized federal agencies to incorporate standards into federal regulations—and the agencies did so. *See*

Act of June 5, 1967, Pub. L. No. 90-23, § 552, 81 Stat. 54, 54 (codified at 5 U.S.C. § 552) (1967); *see also* 39 Fed. Reg. 23,502, 23,538 (June 27, 1974) (incorporating the 1971 edition of the National Fire Protection Agency’s National Electric Code).

Nothing in the 1976 Copyright Act suggests that Congress intended to terminate copyright protection for standards incorporated into statutes or regulations. The Act provides that copyright in a work “vests initially in the author or authors of the work.” 17 U.S.C. § 201(a). And the Act enumerates how copyright can be divested, *e.g.*, through the transfer or expiration of copyrights, *id.* §§ 204, 302, but it never suggests that a copyright is terminated or divested by the work’s incorporation into law. *See id.* § 201(e) (“no action by any governmental body or other official or organization purporting to seize, expropriate, transfer, or exercise rights of [a] copyright . . . shall be given effect under this title, except as provided under title 11 [for bankruptcy]”). Given Congress’s awareness of the widespread practice of incorporation of privately authored works into law, however, Congress easily could have provided that incorporated standards lose their copyright protection upon incorporation. But Congress did not—and Defendants’ attempt to remake copyright law in their quest for profits must be rejected.

Such an interpretation would also flout the prohibition on state interference with rights granted by the federal government in violation of the Supremacy Clause of the U.S. Constitution. *See* U.S. CONST. art. VI, § 2. As a result, state adoption of a copyrighted work cannot divest the author of his or her copyright. *See Coll. Entrance Examination Bd. v. Pataki*, 889 F. Supp. 554, 564 (N.D.N.Y. 1995) (holding that New York’s Standardized Testing Act (“STA”) was preempted by the Copyright Act because it “interfere[d] with the moving plaintiffs’ exclusive ownership rights as set forth in § 106 of the Copyright Act,” by, for example, “classif[y]ing] these disclosed materials as public records and, thereby, subjects them to disclosure to, and

reproduction by, the public.”); *see also Assn. of Am. Med. Colls. v. Cuomo*, 928 F.2d 519, 523 (2d Cir. 1991) (“If the STA facilitates infringement, it conflicts with the federal Copyright Act and is preempted.”). Moreover, a finding that state action divested ICC’s copyrights in the I-Codes would be particularly anomalous given the states’ acknowledgment of ICC’s copyrights in the I-Codes in the license agreements. SUMF ¶ 80; *see also Schnapper v. Foley*, 667 F.2d 102, 109 (D.C. Cir. 1981) (“[W]e are reluctant to cabin the discretion of government agencies to arrange ownership and publication rights with private contractors absent some reasonable showing of a congressional desire to do so.”).

Other provisions of the Copyright Act and their legislative history further undermine Defendants’ argument. The Copyright Act addresses the relationship between action by the federal government and copyright protection, and in doing so draws a distinction between works created by the government and works created by private authors. It provides that copyright protection “is not available for any work of the United States Government, but the United States Government is not precluded from receiving and holding copyrights transferred to it by assignment, bequest, or otherwise.” 17 U.S.C. § 105. Notably, Section 105’s text expressly applies only to works “prepared by an officer or employee of the United States Government as part of that person’s official duties.” 17 U.S.C. § 101. Congress easily could have provided that incorporated standards be treated like government-authored works for copyright purposes. But Congress did not.⁵ Indeed, as the House Report explains, “publication or other use by the Government of a private work *would not affect its copyright protection in any way.*” H.R. Rep.

⁵ *Expressio unius est exclusio alterius*, “the mention of one thing implies the exclusion of another,” applies here. *Shook v. D.C. Fin. Responsibility & Mgmt. Assistance Auth.*, 132 F.3d 775, 782 (D.C. Cir. 1998). Congress specifically *carves out* works authored by the federal government as a category of works not protected under the Act and makes no such mention regarding works authored by non-governmental entities (or state governments). By not mentioning works authored by non-governmental entities—while expressly mentioning (and excluding) works authored by the federal government—Congress intended for works authored by non-governmental entities to be protected by the Copyright Act.

No. 1476, 94th Cong., 2d Sess. 60 (1976) (emphasis added).

Subsequent federal statutes confirm that governmental incorporation does not destroy copyright. For example, in 1992 Congress passed Public Law 102-245, requesting the National Research Council to conduct a study on standards development. *See* National Research Council, *Standards, Conformity Assessment, and Trade into the 21st Century* (National Academy Press 1995), available at <http://www.nap.edu/read/4921/chapter/1>. That study contained a detailed overview of the U.S. standards-development system, and specifically noted that many SDOs “offset expenses and generate income through sales of standards documents, *to which they hold the copyright*. For many SDOs, publishing is a significant source of operating revenue.” *Id.* at 32 (emphasis added). The study concluded that the “U.S. standards development system serves the national interest well” by “support[ing] efficient and timely development of product and process standards that meet economic and public interests.” *Id.* at 157.

The study recommended that Congress pass a law to promote agency use of privately developed standards, and in response Congress passed the National Technology Transfer and Advancement Act of 1995 (“NTTAA”), Pub. L. No. 104-113 § 12(d), 110 Stat. 775, codified at 15 U.S.C. § 272 (Notes). The NTTAA declares that “all Federal agencies and departments shall use technical standards that are developed or adopted by voluntary consensus bodies, using such technical standards as a means to carry out policy objectives or activities.” *Id.*

As one court recently put it, “[i]f Congress intended to revoke the copyrights of such standards when it passed the NTTAA, or any time before or since, it surely would have done so expressly.” *Am. Soc’y for Testing & Materials v. Public.Resource.Org, Inc.*, 13-cv-1215, 2017 WL 473822, at *11 (D.D.C. Feb. 2, 2017), *rev’d on other grounds* 896 F.3d 437 (D.C. Cir. 2018). It did not.

b. Executive Agency Actions Confirm that Copyright Protection Survives Incorporation by a Governmental Entity.

As a result of Congress's clear intention to preserve copyright protection for incorporated standards, the executive branch has repeatedly and uniformly recognized the copyrights of incorporated standards. For example, pursuant to the NTTAA, the Office of Management and Budget ("OMB") has issued guidelines for the use of privately developed standards, and those guidelines provide that when an agency incorporates a standard, "your agency must observe and protect the rights of the copyright holder and any other similar obligations." OMB Circular No. A-119, 63 Fed. Reg. 8545, 8554-55 (revised Feb. 10, 1998); Revised OMB Circular No. A-119, 81 FR 4673, 4673-4674 (2016); *see also* Incorporation by Reference, Announcement of Final Rule, Office of the Federal Register ("OFR Rule Announcement"), 79 Fed. Reg. 66,267 (Nov. 7, 2014) ("If we required that all materials IBR'd into the CFR be available for free, that requirement would compromise the ability of regulators to rely on voluntary consensus standards, possibly requiring them to create their own standards, which is contrary to the NTTAA and the OMB Circular A-119."); SUMF ¶ 36. Likewise, numerous federal agencies have expressly taken the position that incorporation of materials into regulations does not destroy the copyright in those materials. *See, e.g.*, Sept. 8, 2015 Letter from U.S. Department of Interior; August 6, 2015 Letter from U.S. Department of Housing and Urban Development; May 18, 2015 Letter from U.S. Consumer Product Safety Commission. SUMF ¶ 36.⁶

c. Public Policy Strongly Favors Copyright Protection for the I-Codes and Other Privately Authored Standards.

The existing standards development system undoubtedly serves the public interest. In its

⁶ The OMB addressed the question of whether incorporation into law should destroy copyright protection in a recent proposal for revision of OMB Circular A-119: "OMB does not believe the public interest would be well-served by requiring standards incorporated by reference to be made available 'free of charge.'" SUMF ¶ 35.

report on the NTTAA, the House Science Committee explained this as follows:

the crucial role standards play in all facets of daily life and in the ability of the nation to compete in the global marketplace. The United States, unlike the federalized standards system of most other countries, relies heavily on a decentralized, private sector based, voluntary consensus standards system This unique consensus-based voluntary system has served us well for over a century and has contributed significantly to United States competitiveness, health, public welfare, and safety.

H.R. Rep. No. 104-390, pt. VII, § 12, at 23–24 (1995). As explained above, this system of privately developed standards has evolved for over a century, and has been built on the longstanding understanding that SDOs can assert copyright in their standards and can fund their continued operations through the sale of those copyrighted standards. SUMF ¶¶ 9, 35–36, 80. To upend that understanding – by holding that SDOs may not assert copyright – would gravely harm not only the SDOs but also the wide array of public and private actors that rely on these standards. SUMF ¶¶ 81–83.

Defendants admit that the I-Codes [REDACTED] SUMF ¶ 24. The undisputed evidence in this case shows that ICC depends on its copyrights to conduct its operations and to continue to develop and update standards that protect public safety and promote efficiency. SUMF ¶ 59, 82, 203. As ICC’s expert economist John Jarosz explained, “[ICC] requires substantial resources to continue standards-development efforts. For many SDOs, including ICC, revenue generated from the sale and licensing of copyrighted standards, and downstream products and services, is a key contributor to the resources needed to carry out these functions.” SUMF ¶ 82.⁷ Jarosz further concluded that the effect of a loss of copyright protection “will be a

⁷ Defendants’ expert offered criticism of certain of Mr. Jarosz’s opinions, but on the topic of economic incentives, he admitted that he did not have “the necessary expertise to offer an opinion” on whether or how ICC or any other SDO could or should respond to a finding that they are not entitled to copyright protection for any works that are incorporated by governmental agencies. SUMF ¶¶ 85–86.

likely reduction in the number, quality, and acceptability of critical standards. This will cause harm to governments, the public, and industry actors that rely on the creation of these standards as well as to the Plaintiff. Any offsetting benefits are insignificant as to the Defendants, non-existent as to the Plaintiff, and limited as to the public.” SUMF ¶ 83.

Jarosz’s conclusions are supported by the undisputed record evidence, which shows that: (i) ICC’s code development processes are extremely resource-intensive, SUMF ¶¶ 59–65; (ii) ICC relies heavily on its copyright protection for ICC’s Codes to obtain needed revenue, SUMF ¶ 68; and (iii) government and other entities rely on ICC’s code development activities and could not replace those activities if ICC became unable to continue them. SUMF ¶¶ 81, 83. In light of the foregoing, it is hardly surprising that Defendants have been unable to identify any plausible way that ICC could develop ICC’s Codes without revenue from sales of copyrighted works. SUMF ¶ 84.

There is no reason for this Court to take the “absolutist position” that Defendants need in order to prevail here. Public policy is an important consideration in copyright law, and the need to provide a continued incentive for SDOs to produce standards in the public interest is a powerful reason to recognize the copyright interests at stake in this case.

d. The Second Circuit Has Rejected Defendants’ Argument that Government Adoption Destroys Copyrights in Privately Authored Works.

In keeping with the statutory framework and executive branch policy, most courts, including the Second Circuit, have rejected arguments that incorporation into law terminates copyright protection in privately authored works. In *CCC Information Services, Inc. v. Maclean Hunter Market Reports, Inc.*, 44 F.3d 61 (2d Cir. 1994), the Second Circuit addressed the issue of whether state regulations’ incorporation of the Red Book, which provides automobile valuations, destroyed the copyright in that work. In reversing the district court’s decision in

favor of the accused infringer, CCC, the Second Circuit explained:

[CCC's] argument is that the public must have free access to the content of the laws that govern it; if a copyrighted work is incorporated into the laws, the public need for access to the content of the laws requires the elimination of the copyright protection.

No authority cited by CCC directly supports the district court's view. . . .

We 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. While there are indeed policy considerations that support CCC's argument, they are opposed by countervailing considerations. For example, a rule that the adoption of such a reference by a state legislature or administrative body deprived the copyright owner of its property would raise very substantial problems under the Takings Clause of the Constitution. . . . Although there is scant authority on CCC's argument, Nimmer's treatise opposes such a suggestion as antithetical to the interests sought to be advanced by the Copyright Act. *See* NIMMER § 5.06 [C] at 5–60.

Id. at 73–74. As a result, the Second Circuit held that the author of the Red Book “demonstrated a valid copyright and infringement thereof” and directed entry of judgment in favor of the author.

Similarly, the Ninth Circuit rejected the argument that privately authored works lose their copyright once they are incorporated into law. In *Practice Management*, the Ninth Circuit considered a copyrighted coding system developed by the American Medical Association (“AMA”) to help doctors and other healthcare workers identify medical procedures. *Practice Mgmt. Info. Corp. v. Am. Med. Ass’n*, 121 F.3d 516, 517 (9th Cir. 1997). The federal Health Care Financing Administration (“HCFA”) “adopted regulations requiring applicants for Medicaid reimbursement to use” the AMA’s codes for each procedure. *Id.* at 518. An AMA competitor sought to publish those codes, arguing that the codes “became uncopyrightable law when HCFA adopted the regulation mandating [their] use.” *Id.* The court rejected that argument, holding that the codes continued to be protected by copyright. *Id.* at 520.

Emphasizing copyright’s purpose under the Constitution to “promote the progress of science and the useful arts” (U.S. CONST. art. I, § 8, cl. 8), the court reasoned that “[t]o vitiate

copyright, in such circumstances, could, without adequate justification, prove destructive of the copyright interest, in encouraging creativity,’ a matter of particular significance in this context because of ‘the increasing trend toward state and federal adoptions of model codes.’” 121 F.3d at 518 (quoting 1 NIMMER ON COPYRIGHT § 5.06[C], at 5-92 (1996)).

The *Practice Management* court then analyzed *Banks v. Manchester*, 128 U.S. 244 (1888). In *Banks*, the Supreme Court held that judges do not hold copyright in their opinions because (1) “the public owns the opinions because it pays the judges’ salaries” and (2) “due process require[s] free access to the law.” *Practice Mgmt.*, 121 F.3d at 518-19 (citing *Banks*, 128 U.S. at 253). As the *Practice Management* court explained, *Banks*’s first justification does not apply to privately developed standards because “copyrightability of the [codes] provides the economic incentive for the [SDO] to produce and maintain [it].” *Id.* at 518. And *Banks*’s second rationale (due process) arises only if there is “evidence that anyone wishing to use the [codes] has any difficulty obtaining access to it.” *Id.* at 519. Therefore, the Ninth Circuit concluded that the AMA codes retained their copyright protection notwithstanding the HFCA’s requirement that healthcare professionals use the AMA codes.

In *County of Suffolk v. First American Real Estate Solutions*, 261 F.3d 179 (2d Cir. 2001), the Second Circuit went further, holding that even government-authored works that were required to be created by law are entitled to copyright protection in certain circumstances. In that case, the Second Circuit addressed the copyrightability of tax maps that Suffolk County was required by law to create and make available to the public and that were authored by Suffolk County employees. *Id.* at 184. The defendant contended that the tax maps “should be viewed as being in the public domain, and hence, uncopyrightable,” citing *Banks*. *Id.* at 193.

In rejecting this argument, the Second Circuit held that “two considerations influence

whether a particular work may be properly deemed in the public domain: (1) whether the entity or individual who created the work needs an economic incentive to create or has a proprietary interest in creating the work and (2) whether the public needs notice of this particular work to have notice of the law,” citing the Ninth Circuit’s decision in *Practice Management*. *Id.* at 194. The Second Circuit recognized that “[j]udges and legislators do not need additional economic incentives to, respectively, write opinions or enact legislation,” but many other works of government, “due to their expense, may require additional incentives in order to justify their creation.” *Id.* Thus, the Second Circuit was “unable to declare a general rule that works by state governmental authors are automatically in the public domain from their inception.” *Id.* With respect to notice considerations, the court noted that “there is no allegation that any individual required to pay the applicable property tax has any difficulty in obtaining access to either the law or the relevant tax map,” and that “[n]otice concerns simply are not present here.” *Id.* at 195. Accordingly, the court held that the tax maps “cannot, as a matter of law, be deemed to be in the public domain” and that “Suffolk County is entitled to present evidence in support of its copyright infringement claim.” *Id.*

Thus, the Second Circuit has made clear that the adoption of privately authored standards into law does not destroy the copyrights in those standards and that even government-authored works are copyrightable provided the author needs an economic incentive to spur creation and there are no notice concerns. These holdings are consistent with the majority of courts that have concluded that copyright protection for privately authored standards is not destroyed upon incorporation into law.⁸

⁸ The First Circuit and D.C. Circuit have reserved judgment on the question, but district courts in both of these Circuits persuasively held that copyright protection continues even after incorporation into law. *See Am. Soc’y for Testing & Materials v. Public.Resource.Org, Inc.*, 896 F.3d 437, 441 (D.C. Cir. 2018) (indicating that the court was “leaving for another day the far thornier question of whether standards retain their copyright after they are

The only case holding that governmental incorporation of privately authored standards has any impact on copyright protection is the sharply divided decision by the Fifth Circuit in *Veeck v. Southern Building Code Congress International, Inc.* 293 F.3d at 791. Even though the *Veeck* majority went to great lengths to stress the “limits of [its] holding,” *id.* at 803, its decision has been widely criticized as unpersuasive in its extreme views, and it should be rejected.

The plaintiff in *Veeck* was SBCCI, an organization that created a set of five “model building codes” known collectively as the Standard Building Codes. *Veeck v. Southern Bldg. Code Cong. Int’l, Inc.*, 49 F. Supp. 2d 885, 887 (E.D. Tex. 1999). Two small towns in Texas, Anna and Savoy, “enacted ordinances adopting [these] model codes by reference.” *Id.* *Veeck* purchased copies of the model codes and posted them on his website, but *Veeck* “did not specify that the codes were written by SBCCI. Instead, he identified them, correctly, as the building codes of Anna and Savoy, Texas.” 293 F.3d at 793. SBCCI alleged that posting the model codes as the building codes of these two towns constituted copyright infringement. *Id.* at 794. By a 9-6 vote, the *en banc* Fifth Circuit held that under the particular circumstances in that case, when the model codes were “adopted by a legislative body and bec[a]me ‘the law’,” they

incorporated by reference into law”); *Bldg. Officials & Code Adm. v. Code Tech., Inc.* (“BOCA”), 628 F.2d 730, 736 (1st Cir. 1980) (“Normally . . . we would expect to rule finally on such a ‘legal’ issue. We think it is inadvisable to do so here, however.”); *John G. Danielson, Inc. v. Winchester-Conant Properties, Inc.*, 322 F.3d 26, 40 (1st Cir. 2003) (“There are compelling arguments on both sides of the question we reserved in *BOCA*. They implicate the proper scope of the public domain and the best means to encourage private involvement and expertise in lawmaking. But . . . we need not resolve the question we left open in *BOCA* in order to rule on this case.”); *ASTM*, 13-cv-1215, 2017 WL 473822, at * 14 (“Plaintiffs’ standards have not entered the public domain upon their incorporation by reference into federal regulations”), *rev’d on other grounds* 896 F.3d 437 (D.C. Cir. 2018); *John G. Danielson, Inc. v. Winchester-Conant Properties, Inc.*, 186 F. Supp. 2d 1, 22 (D. Mass. 2002) (“the balance of competing interests . . . favors preserving copyright protection for works incorporated by reference”), *aff’d in part, rev’d in part* 322 F.3d 26 (1st Cir. 2003). While Defendants may claim that *Code Revision Commission v. Public.Resource.Org.*, 906 F.3d 1229 (11th Cir. 2018), addressed this question, it did not do so. In that case, the court was “presented with the question of whether the annotations contained in the Official Code of Georgia Annotated (OCGA), *authored by the Georgia General Assembly* . . . may be *copyrighted by the State of Georgia*.” *Id.* at 1231-32 (emphasis added). As a result, *Code Officials* did not address whether privately developed standards that are admittedly copyrightable in the first instance lose their copyright protection any time a governmental authority adopts them. Moreover, to the extent the *Code Revision* decision contains dicta suggesting that government adoption destroys copyright protection, it is inconsistent with the Second Circuit’s *CCC* decision.

“enter[ed] the public domain and [were] not subject to the copyright holder’s exclusive prerogatives.” *Veeck*, 293 F.3d at 793.

At the same time, the *Veeck* majority made it clear that SBCCI retained its copyright in the model codes as model codes. *Id.* The opening paragraph of the majority’s opinion confirms that it is addressing whether a “code-writing organization [may] prevent a website operator from posting the text of a model code *where the code is identified simply as the building code of a city that enacted the model code as law*,” and that “[a]s model codes, however, the organization’s works retain their protected status.” *Id.* (emphasis added). The majority later reiterated that “[t]his court’s opinion does not, of course, withdraw all copyright protection from the model codes qua model codes,” *id.* at 806 n.22, and made clear that “the result in this case would have been different if *Veeck* had published not the building codes of Anna and Savory, Texas, but the SBCCI model codes, as model codes,” *id.* at 805.

In reaching its decision, the *Veeck* court attempted to distinguish the unusual facts before it from the facts in *CCC* and *Practice Management* in several ways. It indicated that, unlike copyright holders in *CCC* and *Practice Management*, “SBCCI operates with the sole motive and purpose of creating codes that will become obligatory in law.” *Id.* In addition, the *Veeck* court concluded that “[t]o the extent incentives are relevant to the existence of copyright protection, the authors in [*CCC* and *Practice Management*] deserved incentives.” *Id.* at 805.

The majority opinion was subject to a blistering 6-judge dissent. As the dissent explained, “[b]efore such a work is enacted into law, the Copyright Act unquestionably affords copyright protection to its author; and Congress has given no indication that, on enactment, this protected status evanesces ipso facto as to the whole universe of potential copiers.” *Id.* at 811 (Weiner, J., dissenting). The dissent concluded by stating:

Summarizing all pertinent factors -- (1) the lack of controlling precedent from the Supreme Court or specific guidance from Congress on the issue, (2) federal law and federal agency policy encouraging the adoption of model codes and increasing the trend toward federal and state adoption of model codes, (3) the palpable distinction between the model codes at issue here and judicial opinions or legislative enactments, (4) case law from our fellow circuits that supports the retention of copyright protection even after adoption by reference into law, (5) the complete absence of any denial of access, (6) the truism that neither due process nor the metaphorical concept of citizen ownership of the law mandates totally unrestricted publication of adopted model codes, (7) SBCCI's identity as a private not-for-profit company which, unlike courts and legislatures, needs self-generated financial resources to continue independently creating and modifying its codes, (8) the knowledge that governmental obtain, free of cost, accurate, efficient and uniform regulatory codes which otherwise would be time-consuming and expensive (if not impossible in many instances) to develop in SBCCI's absence, and (9) the comfort that all reasonable and necessary use, copying, and republication by building owners, builders, contractors, design professionals, teachers, lawyers, as well as citizens and officials of the towns themselves, is assured protection by the fair use and implied license doctrines -- convinces me that the public policy scale is tipped in favor of enforcing SBCCI's copyright protection against Veeck, who has never been denied access to the codes of Anna and Savoy and almost certainly never will be (but, if he ever is, he has alternative remediation available).

Id. at 818.

In addition to all these flaws, the *Veeck* majority also disregarded the “well-established” principle that “copyrightability and the scope of protectable activity are to be evaluated at the time of creation, not at the time of infringement.” *Oracle Am., Inc. v. Google Inc.*, 750 F.3d 1339, 1361 (Fed. Cir. 2014). Thus, the copyrightability of model codes is determined when they are “fixed in a tangible medium of expression,” *see* 17 U.S.C. § 102(a), and not at some later date, such as when they are adopted by a governmental authority.

Because of its flaws, all federal regulatory agencies to address this issue, a leading copyright treatise, and scholarly commentators have concluded that the *Veeck* majority opinion should not be followed.⁹ For the same reasons, this Court should adhere to the Second Circuit’s

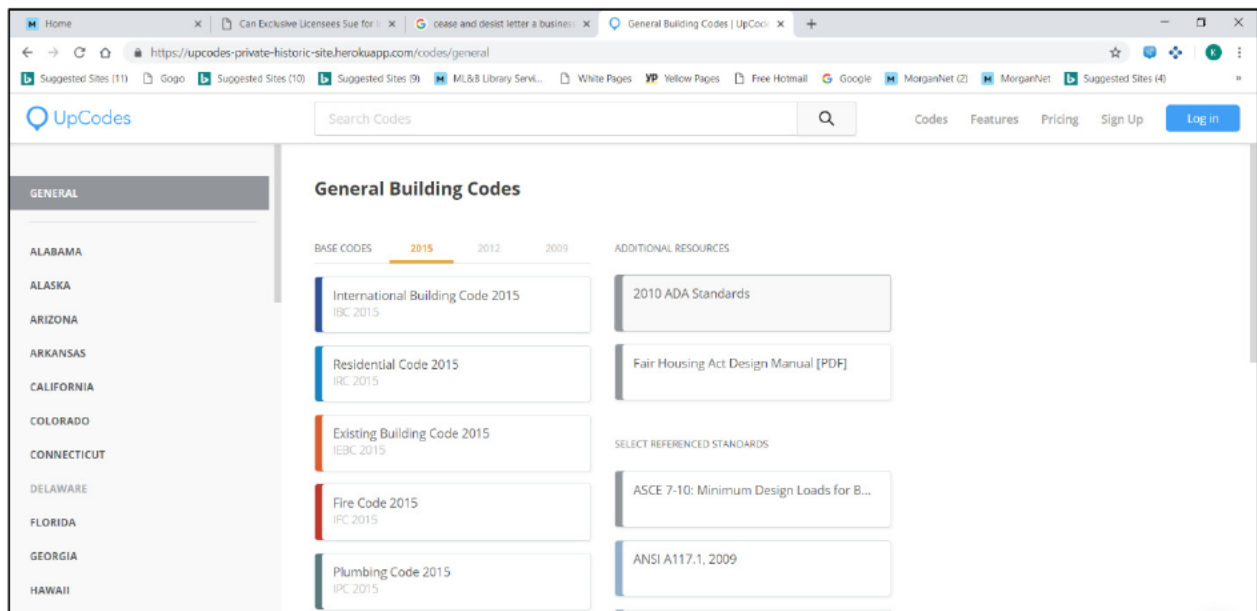
⁹ *See, e.g.*, OFR Rule Announcement (SUMF ¶ 36), 79 Fed. Reg. at 66268 (“recent developments in Federal law, including the *Veeck* decision ... have not eliminated the availability of copyright protection . . . for privately developed codes and standards referenced in or incorporated into federal regulations. Therefore, we agreed with

position and majority rule that governmental incorporation does not strip copyright protection for privately authored standards.

e. ICC Unquestionably Retains Its Copyrights in the Model I-Codes, Even Under *Veeck*.

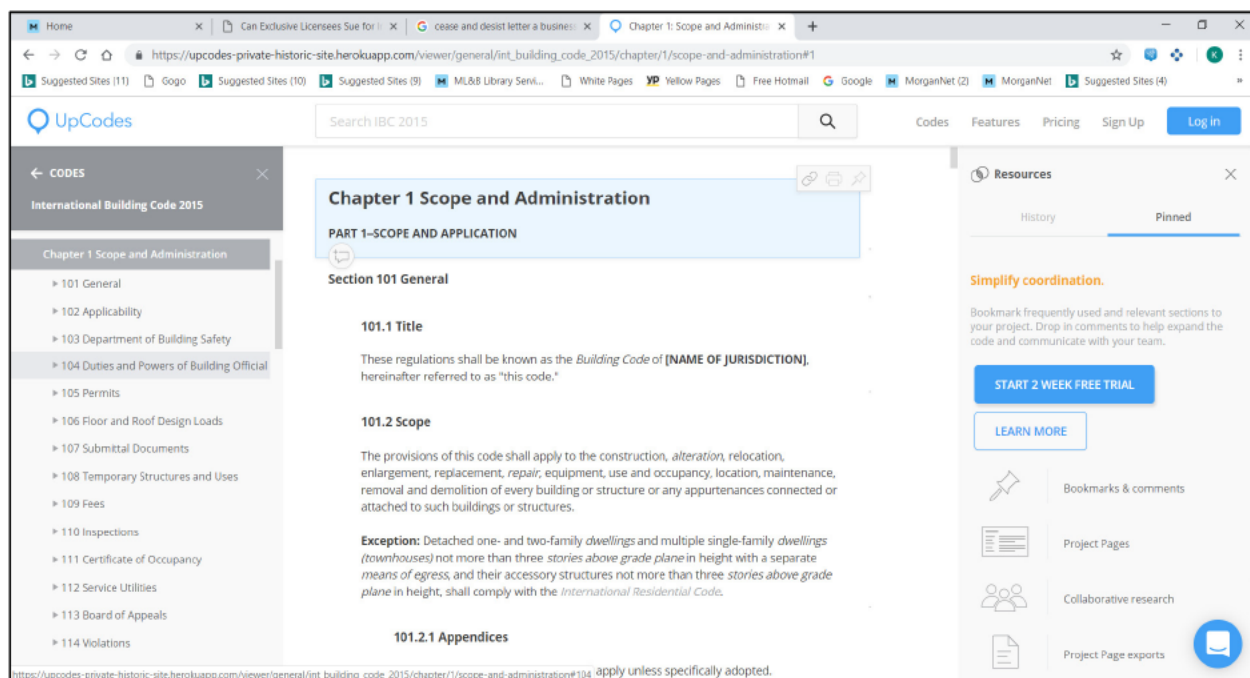
In this case, as shown below, Defendants posted the I-Codes as model codes rather than identifying them simply as the building code of a specific jurisdiction. In this circumstance, even the majority opinion in *Veeck* confirms that the model I-Codes “retain their protected status.” *Veeck*, 293 F.3d at 793. Simply put, there is literally no statutory or case law support for an argument that ICC lost its copyright protection in the I-Codes as model codes.¹⁰ SUMF

¶ 117.



commenters who said that when the Federal government references copyrighted works, those works should not lose their copyright.”); 2 *Patry on Copyright* §4.84 (arguing that the *Veeck* majority opinion is “deeply flawed” and “should be disapproved of”); Emily S. Bremer, *On the Cost of Private Standards in Public Law*, 63 U. Kan. L. Rev. 279, 292–94 (2015) (noting that *Veeck* was “controversial” and arguing that “[s]tripping copyright protection for incorporated materials is a poor solution to the public access problem”).

¹⁰ There is even less support for posting the three model codes that have not been adopted in any U.S. jurisdiction. SUMF ¶ 127.



Similarly, the *Veck* majority made clear that its “decision might well be the opposite if Veck . . . had indiscriminately mingled those portions of ‘the law’ of Anna and Savoy adopted by their town councils with other parts of the model codes not so adopted.” *Id.* at 800 n.14. Again, UpCodes has done exactly that in its posting of the I-Code Redlines, which compare the I-Codes as Adopted for a jurisdiction to the model I-Codes. SUMF ¶ 145. Therefore, Defendants’ postings of the I-Code Redlines cannot be justified by *Veck*.

f. ICC Also Retains Its Copyrights in the Portions of the I-Codes Included in the I-Codes as Adopted.

As explained above, the text of the Copyright Act and the majority of the courts that have addressed the issue of whether governmental adoption of privately authored works destroys the authors’ copyrights in the adopted works have concluded that it does not. For example, in *CCC*, the Second Circuit rejected the argument that “that a state’s reference to a copyrighted work as a legal standard . . . results in loss of the copyright.” *CCC*, 44 F.3d at 74. This precedent of course is binding in this Court, and, therefore, ICC is entitled to summary judgment on this defense in

its entirety, including as applied to the I-Codes as Adopted.

Even under the more defendant-friendly test of *County of Suffolk* (which applies to government-authored works rather than privately-authored works), ICC is entitled to summary judgment on this defense. In *County of Suffolk*, the Second Circuit considered “(1) whether the entity or individual who created the work needs an economic incentive to create or has a proprietary interest in creating the work and (2) whether the public needs notice of this particular work to have notice of the law.” 261 F.3d at 194. In the present case, the unrebutted¹¹ evidence confirms that ICC requires the economic incentive of copyright protection to continue to create and update the I-Codes. As Mr. Jarosz concludes, “[i]f the Plaintiff loses copyright protection for its model codes when the government incorporates them into law, the Plaintiff’s business model and incentives will be seriously impaired. The result will be a likely reduction in the number, quality, and acceptability of critical standards.” SUMF ¶ 209. [REDACTED]

[REDACTED]

[REDACTED] SUMF ¶ 203, and [REDACTED]

[REDACTED]

[REDACTED] SUMF ¶ 204. With respect to the second consideration, the public undeniably already has access to the I-Codes and the I-Codes as Adopted.

For similar reasons, ICC should prevail even under the analysis of the *Veeck* majority. The *Veeck* majority ruled against SBCCI at least in part based on its factual findings that “SBCCI operates with the sole motive and purpose of creating codes that will become obligatory in law” and that SBCCI did not require an economic incentive to create the codes at issue. *Veeck*, 293

¹¹ As Defendants’ “expert” witness admits he is not an expert in the incentives faced by SDOs. SUMF ¶ 86.

F.3d at 805. In the present case, the uncontradicted evidence in this case confirms that the I-Codes are created for a variety of reasons, including for use as industry best practices and in voluntary compliance programs, for use in training, and use by the insurance industry, SUMF ¶¶ 25–34, and are not written with the “sole motive and purpose of creating codes that will become obligatory in law.” *See Veeck*, 293 F.3d at 805. In addition, as explained above, the expert testimony confirms that ICC requires an economic incentive to create the I-Codes. Therefore, the undisputed material facts differ from *Veeck*, as should the result.

2. The “Merger Doctrine” or the “Idea/Expression Dichotomy” Does Not Excuse Defendants’ Conduct.

Defendants also assert “merger” and the “idea/expression dichotomy” as affirmative defenses. The merger doctrine provides that courts will not protect a copyrighted work from infringement if the idea underlying the copyrighted work “can only be expressed in a limited number of ways.” *Zalewski v. Cicero Builder Dev., Inc.*, 754 F.3d 95, 102-103 (2d Cir. 2014); *CCC*, 44 F.3d at 68 (“when the expression is essential to the statement of the idea, the expression also will be unprotected”). In other words, an author may not obtain copyright protection in a work if the author has merely identified the only way of expressing a particular idea, because that could interfere with the ability of future authors to create works involving the same idea. The work is copyrightable, however, “so long as alternate expressions are available.” *Atari Games Corp. v. Nintendo of Am., Inc.*, 975 F.2d 832, 840 (Fed. Cir. 1992).

As an initial matter, the Second Circuit rejected the defendant’s merger argument in the analogous *CCC* case. The Second Circuit held that “this was not an appropriate instance to apply the merger doctrine so as to deprive Red Book of copyright protection” because if the merger doctrine barred the author’s claim against “CCC’s wholesale takings, this would seriously undermine the protections guaranteed by § 103 of the Copyright Act . . . [and] “largely

vitiating the inducements offered by the copyright law to the makers of original useful” works. 44 F.3d at 72–73. Defendants’ merger argument also fails because the relevant time period at which to assess whether the merger doctrine precludes copyright protection is at the time of original authorship. *Oracle*, 750 F.3d at 1361 (“It is well-established that copyrightability and the scope of protectable activity are to be evaluated at the time of creation, not at the time of infringement.”). Hence, if a work is originally copyrightable, the merger doctrine cannot subsequently strip the work of copyright protection. *Id.* at 1372 (“[T]o the extent Google suggests that it was entitled to copy the Java API packages because they had become the effective industry standard, we are unpersuaded.”)

Here, the merger doctrine does not apply because the I-Codes were original works of expression when they were created,¹² and there is no question that other authors could create alternative expressions of building safety standards. For example, ICC’s 2015 *International Fire Code* is a 505-page standard containing minimum standards for fire prevention and fire protection systems. ICC’s original authorship in no way interferes with the production of such competing codes. In fact, the National Fire Protection Association has written a competing code, *NFPA 1, Fire Code*, which addresses similar fire safety concerns. SUMF ¶ 23.

Like Defendants, the majority in *Veeck* missed this point. Without citing any authority on point, the *Veeck* majority simply concluded that the merger doctrine applied because it was “obvious that for copyright purposes, laws are ‘facts.’” *Veeck*, 293 F.3d at 801. *Veeck*’s conclusion was far from “obvious.” As mentioned above, the Second Circuit reached the opposite conclusion in the *CCC* case. Moreover, the *Veeck* majority gave no attention to the fact

¹² As stated above, the certificate of registration for I-Codes registered within 5 years of first publication constitutes *prima facie* evidence of the validity of the copyright in such works. 17 U.S.C. § 410(c). Defendants cannot point to any evidence that refutes ICC’s presumption. SUMF ¶¶ 20–22.

that at the time the plaintiff created the model codes — *i.e.*, at the time that counts for the merger doctrine — those codes were *not* the only way to express the underlying ideas. The *Veeck* majority’s analysis of merger is either *ipse dixit* or a recycling of its conclusions about the effect of incorporation into law. *See Veeck*, 293 F.3d at 807 (Higginbotham, J., dissenting) (explaining that majority opinion’s discussion of the merger doctrine was “tautological” and “a restatement of the conclusion that adopting the codes invalidated the copyright, not an independent reason why that is so”). In any case, the majority’s reasoning is not persuasive, and this Court should follow the Second Circuit precedent on point and not *Veeck*.

3. Defendants’ Plan to Profit by Copying of ICC’s Codes in their Entirety and Making Them Available to the Public Is Not Fair Use.

Defendants also have raised the fair use defense. Fair use is an affirmative defense, so Defendants bear the burden of proving it. *Fox News Network, LLC v. Tveyes, Inc.*, 883 F.3d 169, 176 (2d Cir.), *cert. denied*, 139 S. Ct. 595 (2018). In considering whether a use is a fair use, the Court should consider the four statutory factors set forth in 17 U.S.C. § 107.

a. The Purpose and Character of the Use

To evaluate the purpose and character of the use, courts often consider the following subfactors (1) the transformative nature of the allegedly infringing work; (2) whether the use was for a commercial or nonprofit purpose; and (3) whether the infringer acted in bad faith. *Sinclair v. Am. Media, Inc.*, 2018 WL 5258583, at *3 (S.D.N.Y. Sept. 7, 2018).

With respect to the first subfactor, a use is “transformative” when it “serves a new and different function from the original work and is not a substitute for it.” *Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87, 96 (2d Cir. 2014) (explaining that “[a]dded value or utility is not the test”). Defendants have not argued that their use is “transformative.” *See* SUMF ¶ 191. Nor could they. Defendants have not added any new expressive content or message of the I-Codes,

and Defendants mere conversion of a work from one format to another is not a transformative use. *See Seltzer v. Green Day, Inc.*, 725 F.3d 1170, 1177 (9th Cir. 2013) (“In the typical ‘non-transformative’ case, the use is one which makes no alteration to the *expressive content or message* of the original work.”); *see also Infinity*, 150 F.3d at 108 (concluding retransmission of radio broadcast over telephone lines is not transformative); *UMG Recordings*, 92 F. Supp. 2d at 351 (converting audio CD into MP3 format is not transformative).

With respect to the second subfactor, a use is commercial where “the user stands to profit from exploitation of the material without paying the customary price.” *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 562 (1985); *accord Am. Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 922 (2d Cir. 1994). Here, it is undeniable that Defendants have copied ICC’s Codes for use of a commercial nature and without paying the customary price. SUMF ¶ 87, 93–102. In fact, Defendants’ copying of ICC’s Codes was the backbone of their entire start-up business, and they charged a subscription fee for access to some of ICC’s Codes. SUMF ¶ 93–102, 160, 162. Defendants clearly derived significant financial benefit from their infringing activities, which weighs against a finding of fair use. SUMF ¶ 163, 200-201.

Defendants attempt to justify their copying by claiming that it was done “at least partially for nonprofit educational purposes” or to “enable[e] commentary on the law,” SUMF ¶ 191, is misplaced. While it may be possible for visitors to use UpCodes’ website for educational purposes or to facilitate commentary, Defendants do not get to stand in the shoes of downstream users. *See Basic Books, Inc. v. Kinko’s Graphics Corp.*, 758 F. Supp. 1522, 1531 (S.D.N.Y. 1991) (rejecting Kinko’s attempt to “impress this court with its purportedly altruistic motives” and holding that “[t]he use of the Kinko’s packets, in the hands of the students, was no doubt educational. However, the use in the hands of Kinko’s employees is commercial.”); *see also*

Princeton Univ. Press v. Michigan Doc. Services, Inc., 99 F.3d 1381, 1386 (6th Cir. 1996) (en banc) (“[C]ourts have ... properly rejected attempts by for-profit users to stand in the shoes of their customers making nonprofit or noncommercial uses.”).

Finally, with respect to the third subfactor, Defendants copied ICC’s Codes in bad faith. “Bad faith exists where the use had not merely the incidental effect but the intended purpose of supplanting the copyright holder’s commercially valuable right of first publication.” *Sinclair*, 2018 WL 5258583 at *5 (internal quotation marks omitted). Lest there be any doubt of Defendants’ intent to have their copies supplant ICC’s rights, Defendants spelled it out in writing, stating that [REDACTED] [REDACTED] SUMF ¶ 154. Moreover, Defendants knew that the codes they were posting were protected by copyright. SUMF ¶ 133. In fact, [REDACTED] [REDACTED] their website’s Terms and Conditions [REDACTED] include a warning that the “website may also contain rules and regulations which are copyrighted works owned by relevant organizations and associations,” y [REDACTED] [REDACTED] SUMF ¶ 170.

For all these reasons, the first factor severely undermines Defendants’ fair use defense.

b. The Nature of the Copyrighted Work

The second factor is “the nature of the copyrighted work.” 17 U.S.C. § 107. This factor asks whether the work at issue is “close[] to the core of intended copyright protection.” *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 586 (1994) . The Second Circuit recognizes that “authors of factual works, like authors of fiction, should be entitled to copyright protection of their protected expression.” *Authors Guild v. Google, Inc.*, 804 F.3d 202, 220 (2d Cir. 2015); *accord Fox News*, 883 F.3d at 178 (rejecting infringer’s “argument that, since facts are not copyrightable, the factual nature of [plaintiff’s] content militates in favor of a finding of fair

use”). Here, because the I-Codes are original and complex works that take a high degree of resources to produce, and because providing an incentive for ICC to develop and publish these works is manifestly in the public interest, these works are at the core of copyright law, and so this factor weighs in ICC’s favor. SUMF ¶¶ 37–85, 204–222.

c. The Amount and Substantiality of the Work Taken

The third factor is “the amount and substantiality of the portion used” of the protected work taken. 17 U.S.C. § 107. This factor clearly weighs in ICC’s favor, because Defendants admittedly copied and made available to the public all or nearly all of ICC’s Codes. SUMF ¶¶ 122–26; *see Fox News*, 883 F.3d at 179 (“This factor clearly favors Fox because TVEyes makes available virtually the entirety of the Fox programming that TVEyes users want to see and hear.”) “While wholesale copying does not preclude fair use *per se*, copying an entire work militates against a finding of fair use.” *Worldwide Church of God v. Philadelphia Church of God, Inc.*, 227 F.3d 1110, 1118 (9th Cir. 2000) (quotation marks omitted). In cases such as this one, where the purpose of the alleged infringing use “is precisely the same” as otherwise authorized uses, “the question of whether the amount used was reasonable in relation to the purpose of the copying must [necessarily] be answered in the negative.” *Sinclair*, 2018 WL 5258583, at *6 (quoting *BWP Media USA, Inc. v. Gossip Cop Media, Inc.*, 196 F. Supp. 3d 395, 409 (S.D.N.Y. 2016)).

To be sure, courts occasionally have recognized the fair-use defense when a defendant copies the entirety of a work, but only if the defendants’ use created a new product or service “without providing the public with a substantial substitute for matter protected by the Plaintiffs’ copyright interests in the original works.” *Authors Guild v. Google*, 804 F.3d at 207. For example, in *Authors Guild v. Google*, the Second Circuit held that Google’s digital copying of copyrighted books, to enable the public to search and view snippets of the books, was a fair use.

But the court recognized the lengths to which Google went to ensure that the public could not download the books in their entirety, and noted that “[i]f Plaintiffs’ claim were based on Google’s converting their books into a digitized form and making that digitized version accessible to the public, their claim would be strong.” *Id.* at 225; *accord HathiTrust*, 755 F.3d at 97 (upholding fair-use defense for book-search service after noting that “[i]mportantly, . . . in providing this service, the [the allegedly infringing product] does not add into circulation any new, human-readable copies of any books”). Here, by contrast, Defendants did exactly what the Second Circuit in *Google* said would make a plaintiff’s claim “strong” — it created digitized copies of all or virtually all of ICC’s Codes and made those copies available to the public. SUMF ¶¶ 125–26. Accordingly, this factor weighs heavily against fair use.¹³

d. The Effect of the Use Upon the Potential Market

The fourth factor is the effect of the Defendants’ use on the potential market for or value of the copyrighted work. 17 U.S.C. § 107. The Supreme Court has described the fourth factor as “undoubtedly the single most important element of fair use.” *Harper & Row*, 471 U.S. at 566; *accord ReDigi*, 910 F.3d at 662 (quoting the same). UpCodes bears the burden of proving its copying will not usurp a market that properly belongs to ICC. *See Infinity*, 150 F.3d at 110.

¹³ Defendants also attempt to minimize the significance of the amount of their copying by arguing that “in order to accurately and completely represent a particular law, the entirety of that law must be used.” SUMF ¶ 190. This argument certainly is inapplicable with respect to Defendants’ posting of (1) the I-Codes as model codes, (2) the posting of redlined versions of the model I-Codes showing the language that was excluded from the law by various jurisdictions; and (3) the appendices that contained express statements that they were “not mandatory” or “not part of the code.” SUMF ¶ 130. In all of these instances, Defendants are not posting the law at all. Defendants’ wholesale copying of the I-Codes as Adopted fares no better. In *CCC*, the Second Circuit stressed that:

[Professor] Nimmer argues that the adoption of a private work into law might well justify a fair use defense for personal use, but should not immunize a competitive commercial publisher from liability since this would “prove destructive of the copyright interest in encouraging creativity in connection with the increasing trend toward state and federal adoptions of model codes.” NIMMER, § 5.06[C] at 5–60.

44 F.3d at 74 n.30. Of course, Defendants are “a competitive commercial publisher,” and the Second Circuit made it clear that this type of copying is not fair use.

“[W]hen a commercial use amounts to mere duplication of the entirety of an original, it clearly supersedes the objects of the original and serves as a market replacement for it, making it likely that cognizable market harm to the original will occur.” *Campbell*, 510 U.S. at 590 (internal quotation marks and citation omitted). As the Supreme Court made clear in *Campbell*, this is simply “common sense.” *Id.* This common sense principle certainly applies in the Internet age, where the availability of free, unauthorized copies of a copyrighted work on the Internet will pose a clear threat to the market for the copyrighted works themselves. *See BMG Music v. Gonzalez*, 430 F.3d 888, 890 (7th Cir. 2005) (“Music downloaded for free from the Internet is a close substitute for purchased music; many people are bound to keep the downloaded files without buying downloads.”).

[REDACTED]

[REDACTED]

[REDACTED]

SUMF ¶ 156, G. Reynolds Tr. 200:23-201:8 (emphasis added).¹⁴

Defendants’ admissions are consistent with the expert testimony. As ICC’s economist explained, “freely-distributed, unrestricted versions of Plaintiff’s standards . . . can be expected to have an adverse impact on the marketplace for the Plaintiff’s standards . . . and to displace sale of those standards by the Plaintiff.” SUMF ¶ 198. [REDACTED]

¹⁴ See also *id.* at 198:17–199:3. [REDACTED]

[REDACTED]; *id.* at 199:24–200:2 (“

[REDACTED]; *id.* ¶ 158 [REDACTED]

But even if Defendants' posting of the model I-Codes did not adversely impact the *sales* of the I-Codes, this factor still would not favor Defendants. "It is indisputable that, as a general matter, a copyright holder is entitled to demand a royalty for licensing others to use its copyrighted work, and that the impact on potential licensing revenues is a proper subject for consideration in assessing the fourth factor.'" *Fox News*, 883 F.3d at 180 (quoting *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 614 (2d Cir. 2006)).

In the present case, there undeniably is a market for licensing the I-Codes, as evidenced by the fact that ICC actually licenses that content to third parties. SUMF ¶¶ 71–73. The uncontested evidence (and common sense) confirm that these licensees "are likely to cease paying royalties to ICC's if the Court hold that UpCodes is permitted to continue to post ICC's Codes online." SUMF ¶ 74.

As a result, Defendants' copies are likely to adversely impact both ICC's sales and licensing of the ICC Codes. Therefore, this factor strongly suggests Defendants' use is not fair.

4. Defendants' Other Affirmative Defenses are Meritless

Defendants also assert the affirmative defenses of *scènes à faire*, *de minimis* infringement, and collateral estoppel. ECF No. 20 at 6. But Defendants have not identified any evidence supporting these defenses in response to ICC's contention interrogatories. SUMF ¶ 186-194. This alone demonstrates that Defendants have forfeited these throw-away defenses. *See, e.g., Zenith Electronics Corp. v. WH-TV Broad. Corp.*, 395 F.3d 416, 420 (7th Cir. 2005) (affirming exclusion of damages theory based on party's "fail[ure] to respond to [the] contentions interrogatory with a description of its damages theory and the proof to be employed"). In addition, each of the three defenses is a particularly ill fit to the facts in this case.

Scènes à Faire: *Scènes à faire*—literally, "scenes that must be done"—bars an

infringement finding as to expressive elements of a work that constitute “incidents, characters or settings which are as a practical matter indispensable, or at least standard, in the treatment of a given topic.” *Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972, 979 (2d Cir. 1980) (internal quotations omitted); *Reyher v. Children’s Television Workshop*, 533 F.2d 87, 91 (2d Cir. 1976) (“Copyrights [] do not protect thematic concepts or scenes which necessarily must follow from certain similar plot situations”). The crux of *scènes à faire* is whether similarities claimed to be evidence of copying are the sorts of similarities that someone writing about the same general topic would be expected to use regardless of copying. See 4 NIMMER ON COPYRIGHT § 13.03[d][4] (describing *scènes à faire* as relevant to the question of infringement if two works are *similar*). Here, of course, Defendants copied the I-Codes verbatim, so even if some elements within a Work were *scènes à faire*, many other elements that Defendants copied would not be. SUMF ¶¶ 124–130.

But Defendants’ argument fails at a more fundamental level. To support its affirmative defense, Defendants must point to specific elements that it claims are *scènes à faire*. See *Williams v. Crichton*, 84 F.3d 581, 588–91 (2d Cir. 1996) (requiring specific identification of “unprotectible elements” in order to determine whether “the protectible elements, standing alone, are substantially similar” and examining whether numerous specific details regarding the settings of the original and allegedly infringing work were stock or commonplace). Defendants do not attempt to identify a single word or sentence from any Work that is barred by *scènes à faire*, much less attempt to show that *the entirety* of ICC’s Codes are *scènes à faire*. SUMF ¶ 189.

De minimis Copying: This circuit has held that even exceptionally low amounts of verbatim copying do not justify the application of a *de minimis* defense to copyright infringement. *Ringgold v. Black Entm’t Television, Inc.*, 126 F.3d 70, 76–77 (2d Cir. 1997)

(rejecting *de minimis* defense where defendant’s television program showed a copyrighted poster for an “aggregate duration of . . . 26.75 seconds” across nine segments that “lasted between 1.86 and 4.16 seconds”). Defendants’ claim that “copying of protected material is so trivial as to fall below the quantitative threshold of substantial similarity.” SUMF ¶ 190. This is ludicrous in light of Defendants’ admission that “UpCodes downloaded and posted much of the text of the codes, of the I-Codes,” which comprise over 3,600 pages of content. SUMF ¶ 190. This is not the type of “technical violation of a right so trivial that the law will not impose legal consequences” required for the defense to apply. *See Ringgold*, 126 F.3d at 74.

Collateral Estoppel: Collateral estoppel bars relitigation of issues actually litigated and necessary to the outcome of a prior action with a participating party to a prior action. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 (1979); *NLRB v. Thalbo Corp.*, 171 F.3d 102, 109–10 (2d Cir. 1999). Defendants claim that “[a]t least some of the text that was asserted to infringe copyright in *Veeck* is also asserted to infringe in this case,” but they have not identified any language where the doctrine would apply. SUMF ¶ 194.

V. ICC IS ENTITLED TO A PERMANENT INJUNCTION.

At this juncture, ICC requests the Court permanently enjoin Defendants from all unauthorized reproduction of, display of, or distribution of ICC’s Codes. Under the Copyright Act, the Court has the discretion to grant this relief. 17 U.S.C. § 502(a).

The Supreme Court has clarified that, when assessing entitlement to a permanent injunction, a court must look to a plaintiff’s evidence “(1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and Defendants, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.” *eBay v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006);

Cariou v. Prince, 714 F.3d 694, 712 n.5 (2d Cir. 2013) (directing district court to apply *eBay* standards for determining what permanent injunctive relief may be appropriate in a copyright infringement case). Here, each of these four factors weighs in favor of injunctive relief.

A. ICC Has Suffered Irreparable Injury.

ICC has suffered—and will continue to suffer—irreparable injury as a result of Defendants’ infringement. Defendants’ unauthorized copying of ICC’s Codes threatens harm to (i) ICC’s business model and code development process; (ii) ICC’s rights to exclude others from the use of their copyrighted works; and (iii) ICC’s reputation.

1. Economic Harm and Ramifications to ICC’s Business Model

ICC generates significant revenue from sales of ICC’s Codes, as well as other products and services that are closely tied to the codes. SUMF ¶ 68. And basic economic principles—as well as quantitative tracking of a noticeable decline in ICC’s sales of the I-Codes since Defendants began posting ICC’s Codes online—indicate that Defendants’ practice of making ICC’s Codes available for free supplants these sources of revenue. *Id.* at ¶¶ 160–162, 203–205, 211. There also is a significant risk that if Defendants’ conduct goes unchecked, it will act as a signal to the market that the creation of unauthorized versions of ICC’s Codes is acceptable and ICC’s harm will be compounded over time as more people use unauthorized the versions of the codes. *Id.* at 217.

A continuation of Defendants’ infringement will force ICC to consider significantly altering its business model. SUMF ¶¶ 204–215. ICC relies primarily on users of ICC’s Codes to fund the development of the codes, rather than charging upfront fees before developing them. SUMF ¶ 59. ICC’s “back-loaded” business models features extremely low barriers to participating in the codes creation process but then funds the process through sale of the resulting codes. SUMF ¶ 41, 203. ICC could be forced to significantly alter their business models to a

more “front-loaded” system that charges for participation in the standard-creation process, which would preclude the participation of certain stakeholders and/or limit the quantity and subject matter of the codes ICC develop. SUMF ¶¶ 203–216. ICC also likely will lose revenue associated with other ancillary activities that rely on or incorporate some or all of ICC’s Codes, including training courses and commentary on the I-Codes. SUMF ¶ 211.

2. Harm to ICC’s Right to Exclude

One of the fundamental tenets of intellectual property law is the right to exclude others from using the protected work. Thus, “[h]arm can be irreparable . . . where a copyright holder seeks to prevent the use of his or her work and, absent an injunction, the defendant is likely to continue infringing the copyright.” *Broad. Music, Inc. v. Pamdh Enters.*, No. 13-cv-2255 (KMW), 2014 WL 2781846, at *4 (S.D.N.Y. June 19, 2014); *WPIX, Inc. v. ivi, Inc.*, 691 F.3d 275, 285–87 (2d Cir. 2012) (affirming finding of irreparable harm in preliminary injunction under *eBay* factors where “the absence of an injunction would result in the continued infringement” of plaintiff’s copyrighted material and “would [] threaten to destabilize the entire industry”). Indeed, this Court has repeatedly recognized that a threat of continuing infringement justifies granting an injunction. *Complex Sys., Inc. v. ABN AMRO Bank N.V.*, No. 08 CIV. 7497 KBF, 2014 WL 1883474, at *11 (S.D.N.Y. May 9, 2014) (explaining that “permanent injunctions are generally granted where liability has been established and there is a threat of continuing infringement.”) (internal quotations omitted) (collecting cases); *Hounddog Prods., L.L.C. v. Empire Film Grp., Inc.*, 826 F. Supp. 2d 619, 634 (S.D.N.Y. 2011) (granting injunctive relief because where defendant’s “conduct hardly suggests that it will refrain from infringing [p]laintiffs’ copyright in the future.”) Put simply, ICC has a right to exclude future unauthorized use of ICC’s Codes, and the threat of continued unauthorized use by Defendants justifies a finding that the harm to ICC is “irreparable.”

Here, Defendants have consistently defied ICC's right to exclude others from using its copyrighted works and will continue to do so based on Defendants' belief that [REDACTED] [REDACTED] SUMF ¶¶ 117–118, 146. In fact, during the course of this litigation, Defendants have continued to post versions of the I-Codes and I-Codes as Adopted as recently as 2019. SUMF ¶ 146. Absent an injunction, Defendants will continue to cause irreparable injury by disseminating ICC's copyrighted works in violation of ICC's rights. *Complex*, No. 08 CIV. 7497 KBF, 2014 WL 1883474, at *12–13 (finding irreparable harm where defendant's use of plaintiff's copyrighted materials put plaintiff at "risk of losing customers" due to competition with the defendant) (collecting cases)

3. Harm to ICC's Reputation

ICC also has a right to protect its reputation. Here, "[ICC] has spent decades establishing the goodwill associated with its name, which the public and numerous government agencies associates with its high quality work." SUMF ¶ 218. ICC's goodwill and its mission may be severely compromised if Defendants are allowed to publish versions of ICC's Codes that are incomplete, contain transcription errors, or otherwise alter the content of ICC's Codes. SUMF ¶ 218; *see also Complex*, No. 08 CIV. 7497 KBF, 2014 WL 1883474, at *15 (issuing permanent injunction and holding that "there is reputational harm directly and causally related to [defendant's] use of an older, outdated version of [the copyrighted work]"). Yet, as discussed above, [REDACTED] [REDACTED]. SUMF ¶ 221. These actions pose a risk to ICC's reputations as creators of high-quality technical codes.

B. Remedies Available at Law Are Inadequate.

In determining whether remedies at law are adequate, a court may look to both the difficulty of quantifying damages and the defendants' ability to pay. *See Salinger v. Colting*, 607

F.3d 68, 81 (2d Cir. 2010) (explaining that “[h]arm might be irremediable, or irreparable, for many reasons, including that a loss is difficult to replace or difficult to measure.”); *WPIX*, 691 F.3d at 286 (affirming injunction in copyright infringement case in part based on finding that the unlikelihood that defendant[s] . . . would, in any event, be able to satisfy a substantial damage award further supports a finding of irreparable harm.”) (internal quotations and citations omitted). Here, both considerations weigh in favor of injunction.

The continuation of Defendants’ infringing activities could force ICC to shift its business models or reduce operations, and it is exceedingly difficult to quantify or forecast the economic impact of these types of changes. SUMF ¶¶ 209–10. Certainly, Defendants have not quantified the economic impact. SUMF ¶ 222. Additionally, much of the harm sustained by ICC — including the harm to its goodwill — is by nature very difficult to quantify. SUMF ¶¶ 219–221. Defendants posted ICC’s Codes in a manner that they can be copied, downloaded, or printed by any member of the public. SUMF ¶ 115. [REDACTED]

[REDACTED] SUMF ¶ 116. [REDACTED]
[REDACTED]
[REDACTED]

Moreover, any effort to recover damages may be futile. Defendants acknowledge that they have copied significant portions of 40 of the copyrighted works at issue in this case, SUMF ¶ 117, and statutory damages can range up to \$150,000 per work. 17 U.S.C § 504(c).

[REDACTED]. SUMF ¶ 216. As a result, money damages are not an adequate remedy in this case. SUMF ¶ 116; *WPIX*, 691 F.3d at 286 (“The unlikelihood that defendants would, in any event, be able to satisfy a substantial damage award [in a copyright case] further supports a finding of irreparable harm.”)

(internal quotation marks omitted).

C. The Balance of Hardships Favors Issuing an Injunction.

In contrast to the financial and reputational harms that ICC faces, an injunction would cause no cognizable harm to Defendants because Defendants cannot claim an equitable interest in continuing their unlawful, infringing activity. *WPIX*, 691 F.3d at 287 (“It is axiomatic that an infringer of copyright cannot complain about the loss of ability to offer its infringing product” and “cannot be legally harmed by the fact that it cannot continue [infringing] plaintiffs’ [copyrighted works], even if this ultimately puts [defendant] out of business.”) (internal quotations and citations omitted).

D. The Public Interest Favors Issuing an Injunction.

The public interest is served by upholding copyrights and protecting the creative work of copyright holders like ICC. *Salinger*, 607 F.3d at 82 (“The object of copyright law is to promote the store of knowledge available to the public. But to the extent it accomplishes this end by providing individuals a financial incentive to contribute to the store of knowledge, the public’s interest may well be already accounted for by the plaintiff’s interest.”); *WPIX*, 691 F.3d at 287 (“Copyright law inherently balances the two competing public interests . . . the rights of users and the public interest in the broad accessibility of creative works, and the rights of copyright owners and the public interest in rewarding and incentivizing creative efforts”). This is especially true in the current case where it is not disputed that ICC provides a myriad of public benefits through the creation and publication of ICC’s Codes. *See* SUMF ¶¶ 15, 24–34 (Defendants conceding that “ICC provides a valuable service, coordinating the committees to write the codes is important work, so in that are they are doing a great job.”)

It is also widely accepted that without the work of private SDOs, government agencies would not have the resources or technical expertise to fulfill their regulatory duties as well as

they do currently. SUMF ¶ 13. Unfortunately, as Mr. Jarosz has explained in detail, the outcome of this litigation could negatively impact ICC’s ability to provide that public good and may force ICC to alter its business model. SUMF ¶¶ 213–214 .

In addition, the public would suffer if ICC is forced to alter its business model to a “front loaded” model. SUMF ¶ 213. Codes developed under a front-loaded model are more likely to feature only the viewpoints of industry interests with the resources to participate in the process and are less likely to reflect the views and concerns of the general public. SUMF ¶ 214.

Another unfortunate option would be for ICC simply to reduce its activities in response to the financial losses that would occur in the absence of an injunction. SUMF ¶ 209–10. ICC could shift focus to developing only the most popular codes or release updated versions of codes less frequently. *Id.* Overall, any scenario where Defendants’ conduct is not enjoined will result in less robust or suboptimal code development.

For all these reasons, the public interest favors enjoining future infringement.

VI. DEFENDANTS’ WILLFUL CONDUCT ENTITLES ICC TO STATUTORY DAMAGES UP TO \$150,000 PER WORK INFRINGED BY DEFENDANTS.

17 U.S.C. § 504(c)(2) provides for statutory damages of up to \$150,000 per work infringed when the “infringement was committed willfully.” “Willfulness in this context means that the defendant ‘recklessly disregarded’ the possibility that ‘its conduct represented infringement.’” *Yurman Design, Inc. v. PAJ, Inc.*, 262 F.3d 101, 112 (2d Cir. 2001) (quoting *Hamil Am. Inc. v. GFI*, 193 F.3d 92, 97 (2d Cir. 1999)).

In the present case, Defendants have built their for-profit business based in large part on making unauthorized copies of ICC’s Codes available to their customers. Defendants did so even though they knew that ICC claimed copyright protection in ICC’s Codes. In fact, Defendants reproduced ICC’s copyright notices, SUMF ¶ 133–134, [REDACTED]

[REDACTED] SUMF ¶ 180.

[REDACTED] SUMF ¶¶ 178-82. [REDACTED]

[REDACTED] SUMF

¶ 179. [REDACTED]

that the “website may also contain rules and regulations which are copyrighted works owned by relevant organizations and associations.” SUMF ¶ 170-71. Still undeterred, Defendants proceeded to post ICC’s copyrighted works on their website without permission or seeking legal advice. SUMF ¶ 114, 173.

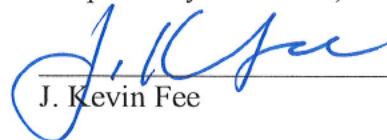
At a minimum, Defendants demonstrated a reckless disregard for the possibility that their conduct would constitute trademark infringement in their zeal to become the next Internet multi-millionaires. Therefore, this Court should enter a summary judgment of willful copyright infringement, thereby entitling ICC to enhanced statutory damages award of up to \$150,000 per work infringed in an amount to be determined at trial.

CONCLUSION

For all the foregoing reasons, the Court should grant ICC’s motion.

Dated: May 31, 2019

Respectfully submitted,



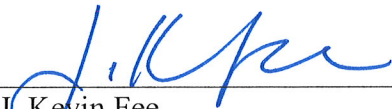
J. Kevin Fee

¹⁵ Had Defendants bothered to read even the first paragraph of *Veeck* (rather than portions of a Wikipedia entry regarding the case), they would have known that even *Veeck* made clear that model codes retain their copyright protection as model codes and that Defendants therefore could not legally post copies of the I-Codes as model codes. SUMF ¶¶ 178-79.

CERTIFICATE OF SERVICE

I hereby certify that on May 31, 2019, the foregoing International Code Council Inc.'s Memorandum of Law in Support of Its Motion for Summary Judgment was filed with the clerk of this Court and served on counsel of record *via* email, including:

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