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DC Circ. Deems Copyrighted Regulations Fair Use

By **Adam Lidgett**

Law360 (September 12, 2023, 7:15 PM EDT) -- The D.C. Circuit on Tuesday ruled in favor of transparency group Public.Resource in a case claiming it violated copyrights by distributing various private industry rules that were later made into federal law, saying noncommercial dissemination was fine.

A three-judge panel affirmed a ruling handing a win to Public.Resource in a dispute with three groups that create industry standards, saying "the noncommercial dissemination of such standards, as incorporated by reference into law, constitutes fair use and thus cannot support liability for copyright infringement."

The circuit court said "because law is interpreted contextually, even explanatory and background material will aid in understanding and interpreting legal duties — especially when the promulgating agency references it."

"Courts routinely consult congressional findings, statements of purpose, and other background material enacted by Congress to decipher the meaning of ambiguous statutory provisions," the circuit panel wrote.

This is the **the second time** the case has made it to the appellate level.

This time, counsel for the American Society for Testing and Materials; the National Fire Protection Association; and the American Society of Heating, Refrigerating and Air-Conditioning Engineers told the panel that the lower court had not followed the instructions it received when the case was remanded almost five years ago.

The first time around, the standard-setting groups largely came out on top, and the D.C. federal judge overseeing the case said federal law was on their side and granted them summary judgment.

But the D.C. Circuit ultimately said the court had to go back and take another look, this time individually assessing the standards at issue. When that decision came back, the lower court found that in almost 200 cases, the material wasn't copyrightable. But about 32 were, per the ruling.

"We are pleased that the court of appeals affirmed what other U.S. courts, including the Supreme Court, have said for almost 200 years: In a democracy, private parties have no business controlling who can read, share, and speak the law — whether it is a statute, a judicial opinion or a building code," Corynne McSherry, an attorney for Public.Resource, said in a statement to Law360 on Tuesday.

Counsel for the other parties did not immediately respond to requests for comment Tuesday.

Judges Karen L. Henderson, Cornelia Pillard and Gregory G. Katsas sat on the panel for the D.C. Circuit.

Public.Resource is represented by Andrew P. Bridges and Matthew B. Becker of Fenwick & West LLP, Mitchell L. Stoltz and Corynne McSherry of the Electronic Frontier Foundation and David

Halperin.

The American Society for Testing and Materials is represented by J. Kevin Fee, Jane W. Wise and Stanley J. Panikowski of DLA Piper.

The National Fire Protection Association is represented by Donald B. Verrilli Jr., Rachel G. Miller-Ziegler, Kelly M. Klaus and Rose Leda Ehler of Munger Tolles & Olson LLP.

The American Society of Heating, Refrigerating and Air-Conditioning Engineers is represented by Jeffrey S. Bucholtz, David P. Mattern and Kenneth L. Steinthal of King & Spalding LLP.

The case is American Society for Testing and Materials et al. v. Public.Resource.Org Inc., case number 22-7063 in the U.S. Court of Appeals for the District of Columbia.

--Additional reporting by Nadia Dreid. Editing by Stephen Berg.

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