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Publisher of industry standards loses appeal over startup's fair-use defense

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(April 09, 2026) - The American Society for Testing and Materials, a not-for-profit publisher of widely used technical standards, has lost its appeal of a decision that let a startup off the hook for publishing ASTM's copyrighted construction codes without permission.

[American Society for Testing and Materials v. UpCodes Inc. et al., No. 24-2965, \(3d Cir. Apr. 7, 2026\)](#).

In an April 7 ruling, the 3rd U.S. Circuit Court of Appeals said UpCodes Inc., a for-profit startup that provides access to a searchable online library of building codes, is protected by the affirmative defense of fair use.

The appellant, which does business as ASTM International, is a Philadelphia-based membership organization that publishes "voluntary consensus standards" for systems and products in various industries. Many of these standards are incorporated by reference into state and local laws.

ASTM sued UpCodes in 2024 in the U.S. District Court for the Eastern District of Pennsylvania, claiming the startup's unauthorized publication of some of its standards undermined its business model, which relies on selling and licensing the standards to fund its operations.

U.S. District Judge Anita B. Brody denied ASTM's motion for a preliminary injunction, ruling that while ASTM had a valid copyright claim, UpCodes' copying was likely a fair use. [Am. Soc'y for Testing & Materials v. UpCodes Inc., 752 F. Supp. 3d 480 \(E.D. Pa. 2024\)](#).

The 3rd Circuit agreed, affirming the lower court's decision after analyzing the four fair-use factors codified in Section 107 of the Copyright Act, [17 U.S.C.A. § 107](#).

'Fundamental' difference of purpose

The panel first concluded that UpCodes' use of the standards is transformative because it serves a different purpose from ASTM's original works.

The panel said ASTM's purpose is to create technical standards that reflect industry best practices, while UpCodes' mission is to "help members of the public access and comply with the laws that govern

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This distinction is fundamental, the panel said, noting that UpCodes publishes only the versions of standards that have been incorporated into law, even if they are outdated, whereas ASTM focuses on providing the most current standards.

The panel found this reasoning consistent with the D.C. Circuit's in *ASTM v. Public.Resource.Org Inc.*, 82 F.4th 1262 (D.C. Cir. 2023).

While acknowledging UpCodes' for-profit status, the panel said the commercial elements of its model do not outweigh the transformative nature of its use. The first factor therefore weighed in UpCodes' favor.

Factual nature, reasonable copying

Two other fair-use factors also favored UpCodes, the 3rd Circuit said.

The panel reasoned that the standards are factual works, not creative ones, placing them at the "periphery of copyright's core protection." Once incorporated into law, their protection is even weaker, the opinion said.

The panel also determined that UpCodes' copying of the entire standards was reasonable.

Because the building codes incorporated standards in full, "it cannot fulfill its purpose of disseminating the law without copying standards that have been incorporated in full into the law," it said.

Uncertain market harm

The panel found the fourth factor — the effect on the potential market for the work — to be "equivocal."

It acknowledged that making the standards available could create an "effective substitute" that harms ASTM's sales. But it also noted that the record showed limited evidence of significant market harm and that demand for the outdated, incorporated versions of the standards appeared "dim in comparison to the demand for current standards."

Overall, any potential economic harm to ASTM is balanced by the "clear and significant public benefit" of providing access to the law, the panel said.

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