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Private Standards in Public Law: Copyright, Lawmaking and the Case of Accounting

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PRIVATE STANDARDS IN PUBLIC LAW: COPYRIGHT, LAWMAKING AND THE CASE OF ACCOUNTING

*Lawrence A. Cunningham**

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INTRODUCTION

Government increasingly leverages its regulatory function by embodying in law standards that are promulgated and copyrighted by non-governmental organizations. Departures from such standards expose citizens to criminal, civil, and administrative sanctions, yet private actors generate, control, and limit access to them. Despite governmental ambitions, no one is responsible for evaluating the legitimacy of this approach *ex ante* and no framework exists to facilitate analysis. This Article contributes an analytical framework and proposes institutional mechanisms to implement it.

The lack of a comprehensive framework for evaluating copyright to standards embodied in law is surprising because the range of standards potentially affected is large and growing.¹ It includes standards relating to accounting, consumer product safety, energy, government contracting, insurance, medicine, and telecommunications; codes for buildings, corporations, and legal ethics; and manuals for stock exchange listings and scores of others.²

To illustrate, it is a violation of federal law for any person to file required financial statements with the Securities and Exchange Commission (“SEC”) that are not in conformity with generally accepted accounting principles (“GAAP”)³ or for auditors to attest to such financial statements unless audited in accordance with generally accepted auditing standards (“GAAS”). The SEC has enforced these laws in thousands of administrative proceedings and hundreds of federal court cases asserting violations of GAAP or GAAS or both.⁴ Yet these accounting standards are not freely available to the public or to prosecuted persons. Instead, they are claimed to

1. Scholarship addressing standards tends to examine patents covering industry standards, with particular attention to technology, not copyright addressed to narrative standards embodied in law. *E.g.*, Mark A. Lemley, *Intellectual Property Rights and Standard-Setting Organizations*, 90 CAL. L. REV. 1889 (2002); Janice M. Mueller, *Patenting Industry Standards*, 34 J. MARSHALL L. REV. 897 (2001); Mark R. Patterson, *Inventions, Industry Standards, and Intellectual Property*, 17 BERKELEY TECH. L.J. 1043 (2002).

2. *See, e.g.*, National Technology Transfer and Advancement Act (NTTA) of 1995, Pub. L. No. 104-113, § 12(d), 110 Stat. 775, 783 (1996); *cf.* Federal Advisory Committee Act, Pub. L. No. 92-463, 86 Stat. 770 (1972).

3. Federal securities statutes direct the SEC to establish requirements but do not require using GAAP. Securities Act of 1933, 15 U.S.C.A. § 77s (2004). GAAP are embodied in public law by SEC regulation, policy and enforcement actions. *See* 17 C.F.R. § 210.1-01 (2005); Certification of Disclosure in Companies’ Quarterly and Annual Reports, Securities Act Release No. 8124, Exchange Act Release No. 46427, 78 SEC Docket 875 (Aug. 28, 2002).

4. Penalties include injunctions, disgorgement, fines, resignations, and imprisonment. *See* MARK S. BEASLEY ET AL., *FRAUDULENT FINANCIAL REPORTING: 1987–1997*, at 37–39 (1999).

be copyrighted by the so-called “private” standard setters the SEC or Congress anoints to establish them.

This Article develops a three-part classification scheme to facilitate analysis of the copyright eligibility of such works based on how privately generated standards are embodied in public law. Otherwise copyright-eligible works can assume attributes of law potentially ineligible for copyright through three routes: by passing reference in legal materials (weak form), by incorporation into law after creation (semi-strong form), or by ex ante governmental designation of the standard setter as an officially recognized body (strong form). This Article’s framework facilitates analysis of all private standards embodied in public law; its case study of accounting standards is especially useful because their complex generation process provides illustrations of each class in this scheme.

Specifically, (a) contemporary auditing standards are generated by a recent congressionally created and publicly funded body (the Public Company Accounting Oversight Board, “PCAOB”) (strong form route);⁵ (b) contemporary accounting principles are generated by a single SEC-recognized and publicly funded body (the Financial Accounting Standards Board, “FASB”) whose standards for three decades have been incorporated by the SEC (semi-strong form route);⁶ and (c) auditing and accounting standards were set before these bodies were created by a private not-for-profit professional association (the American Institute of Certified Public Accountants, “AICPA”) whose standards were given the SEC’s imprimatur by reference (weak form route).⁷

Generally, under the framework this Article proposes, copyright is (a) not recognized in the strong form route; (b) recognized and generally continued in the weak form route (subject to qualifying conventions such as compulsory licensing and broadened fair use); and (c) derecognized in the semi-strong form route when factors concerning the author, the work, the copier, and the governmental relation to each bear features more akin to the strong form than to the weak form. For accounting standards, this means that PCAOB work cannot be copyrighted; AICPA work retains copyright, subject to some qualifying conventions; and most FASB work becomes ineligible for copyright.

These copyright adjustments are necessary to provide requisite access to standards. Otherwise, persons seeking access face considerable obstacles. In the case of accounting standards, only the most straightforward portions are

5. PCAOB establishes auditing standards solely for use in audits of public companies (not private enterprises, not-for-profit organizations, or governmental entities).

6. FASB establishes accounting standards for all entities producing financial statements for external users other than governmental entities, including public companies, private enterprises and not-for-profit organizations. Accounting for governmental entities is set by FASB’s sister organization the Governmental Accounting Standards Board, GASB (and, for the United States Government, by the Federal Financial Accounting Standards Board, FFASB).

7. AICPA establishes accounting and auditing standards for use by all entities producing audited financial statements for external users, including public companies, private enterprises, not-for-profit organizations, and governmental entities, though all of these are supplemental to standards produced by PCAOB, FASB, GASB, and FFASB.

available without charge on the Internet;⁸ others must be purchased from standard setters. Those wishing to copy materials must apply for permission and pay fees, which can require numerous inquiries of the standard setters and consume months of diligent effort. Copiers must pay or risk lawsuits, with nothing to rely upon but notoriously uncertain defenses to copyright infringement claims.⁹

Neither the laborious and costly processes nor related litigation uncertainty fit professional or legal needs of affected citizens. These systemic infirmities also frustrate the work of later generators of standards seeking to build upon predecessor works. In the case of accounting standards, moreover, none of these burdens is necessary because in 2002 Congress passed the Sarbanes-Oxley Act that provided PCAOB and FASB with funding for 100% of their respective budgets and stripped AICPA of power to produce accounting standards for entities over which the SEC has jurisdiction.¹⁰

These changes and the importance of accounting standards in governing the legal position of millions of persons make examination of their copyright status timely. Moreover, given that accounting standards illustrate a larger class of standards embodied in law, and that this class grows steadily, the analysis is useful to resolve complex public policy trade-offs in the innumerable contexts in which privately promulgated standards are embodied in public law.

Two matters of administrative law arise that this Article's framework also helps to analyze. First, embodying private standards in public law can amount to abdication of lawmaking functions, violating traditional principles limiting lawmaker power to delegate this function to private parties. Delegation risks should be insignificant in the weak form route because embodiment is limited and insignificant in the strong form route because the promulgator is a recognized lawmaker. Delegation risks may be considerable in the semi-strong form route, however. Second, federal governmental agencies may incorporate by reference private standards in public law without following requisite rulemaking procedures or publication requirements, likely posing issues in semi-strong form cases but not in weak or strong form circumstances.

8. See, e.g., Financial Accounting Standards Board, <http://www.fasb.org> (last visited May 6, 2005).

9. Consider my experience seeking permission from accounting standard setters to copy materials in a casebook called *Law and Accounting* for law school instruction. It took three months to obtain permission and cost \$3,000. Copyright lawyers advised that my choices were to pay the fees or publish anyway and fight any infringement lawsuit by asserting defenses evaluated in this Article. Being risk-averse, I paid the fees and skipped the lawsuit; as an academic, I wrote this Article. There are likely many persons like me in the former category; I have some company in the latter. See Paul B.W. Miller & Paul R. Bahnson, *Funding FASB*, ACCT. TODAY, June 17, 2002 ("FASB standards and publications essentially define legal constraints on practice; therefore, they are part of the public record and must be readily accessible. . . . FASB's practice of selling standards is totally anachronistic. . . . We even had to pay [it] a permission fee to reprint brief excerpts from pronouncements in our upcoming book. . . .").

10. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 109, 116 Stat. 745 (2002) [hereinafter SOX].

For the federal government, this Article proposes to require the Director of the *Federal Register* to classify standards embodied in law according to this Article's three-part framework and to administer related copyright effects. It also contemplates that the Director would police impermissible delegation of lawmaking functions to private actors and ensure federal government entity compliance with publication requirements. The proposed regulatory approach to copyright consequences is necessary because of institutional limitations on the federal judiciary's competence to provide a comprehensive ex ante framework. Short of the regulatory solution, however, guidance developed in this Article should aid courts in resolving disputes.

I. THREE-PART FRAMEWORK

Underlying aspects of the problem of copyright to standards embodied in law are clear: legal materials are ineligible for copyright. Far less clear are the more manifest aspects of the problem: legal doctrine governing copyright to such standards is sparse, conflicting, and ad hoc.

A. Ancient Concepts

Since Roman times, a central feature of a law-based civilization has been public access to legal materials.¹¹ The ancient concepts were adopted early in U.S. history when the Supreme Court announced in the classic cases of *Wheaton v. Peters*¹² and *Banks v. Manchester*¹³ that judicial opinions cannot be protected by copyright. A critical rationale is that these opinions bind all citizens and so must be "free for publication to all" (what might somewhat simply be called the public domain rationale).¹⁴ A related rationale is that judges need no incentives to generate written legal opinions because this production function is an essential component of their work assignment (call this the incentives rationale).¹⁵ The same rationales apply to legislative enactments, making these likewise ineligible for copyright.¹⁶ These principles apply to all judicial opinions and statutes constituting law, both federal and state.¹⁷ They

11. See 3 WILL DURANT, *STORY OF CIVILIZATION: CAESAR AND CHRIST* 31–32 (1944); PETER STEIN, *ROMAN LAW IN EUROPEAN HISTORY* 3–4 (1999).

12. 33 U.S. (8 Pet.) 591, 668 (1834).

13. 128 U.S. 244, 253 (1888).

14. *Id.* at 253; see Francine Biscardi, *The Historical Development of the Law Concerning Judicial Report Publication*, 85 *LAW LIBR. J.* 531 (1993).

15. See *County of Suffolk v. First Am. Real Estate Solutions*, 261 F.3d 179, 194 (2d Cir. 2001); *Practice Mgmt. Info. Corp. v. Am. Med. Ass'n*, 121 F.3d 516, 518 (9th Cir. 1997), *amended by* 133 F.3d 1140 (9th Cir.), *cert. denied*, 524 U.S. 952 (1998).

16. See *Nash v. Lathrop*, 6 N.E. 559 (Mass. 1886).

17. See ROBERT P. MERGES ET AL., *INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE* 365 (2003); DAVID NIMMER, *NIMMER ON COPYRIGHT* § 5.12[A], at 5–91 (2004); L. Ray Patterson & Craig Joyce, *Monopolizing the Law: The Scope of Copyright Protection for Law Reports and Statutory Compilations*, 36 *UCLA L. REV.* 719, 751–58 (1989).

encompass regulations and rules of administrative bodies¹⁸ and local governmental entities.¹⁹

In the Copyright Act of 1976, Congress furthered these ancient concepts by extending relinquishment of claims to copyright for any work of the U.S. government.²⁰ Relinquishment does not reach works of other governmental entities²¹ nor does it automatically extend to work that federal agencies commission from independent contractors. In the latter context, the Copyright Act's legislative history provides guidance to federal agencies. It suggests that copyright would be (a) inappropriate when the independent contractor produces work the agency could produce itself but (b) appropriate when denying it "would be unfair or would hamper the production and publication of important works."²² The issue is balancing the need for free access to the work with the need of the private author to secure a copyright. Thus, where government would be incapable of inducing the work's production except through copyright protection, copyright may be justified.²³

B. Modern Standards

Contemporary production of legal materials relies significantly and increasingly on private-sector standard setters, whose products are embodied in law by legislatures, regulators, courts, and other governmental authorities.²⁴ Fitting these standards into the ancient concepts making law ineligible for copyright is not as easy as declaring that legislative and judicial pro-

18. See Federal Register Act, 44 U.S.C. § 1507 (2000); *Atkins v. Rivera*, 477 U.S. 154 (1986).

19. See *County of Suffolk*, 261 F.3d at 179.

20. Copyright Act, 17 U.S.C. § 105 (2000). Section 101 defines "a work of the United States Government" as "a work prepared by an officer or employee of the United States Government as part of that person's official duties." *Id.* § 101. The rationale of the government works doctrine is an extension of the rationale against copyright in judicial and legislative pronouncements, not that allowing copyright in government works would make the public "pay twice" for these works. WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* 15 (2003).

21. See, e.g., *County of Suffolk*, 261 F.3d at 179; see also Marvin J. Nodiff, *Copyrightability of Works of the Federal and State Governments Under the 1976 Act*, 29 ST. LOUIS U. L.J. 91, 104 (1984). The pending Database and Collections of Information Misappropriation Act denies copyright protection to state and local governmental entities as well as the federal government. H.R. 3261, 108th Cong. § 5(a) (2003).

22. H.R. REP. NO. 94-1476, at 59 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5672. The legislative history appears to guide federal agencies and Congress, not judicial interpretation of the statute. Still, the guidance expresses federal congressional policy, so it should be legitimate for those grappling with related policy questions to consider it. See *infra* note 119.

23. See *County of Suffolk*, 261 F.3d at 194.

24. See, e.g., National Technology Transfer and Advancement Act of 1995, Pub. L. No. 104-113, 110 Stat. 775 (1996); U.S. Office of Mgmt. & Budget, Circular A-119, 63 Fed. Reg. 8545, 8555 (Feb. 19, 1998); see also *Standards for Business Practices of Interstate Natural Gas Pipelines*, FERC Order No. 587-A, 77 FERC ¶ 61061 n.11 (Oct. 21, 1996). American National Standards Institute ("ANSI") boasts that the congressional policy is "having a dramatic impact upon the way federal agencies do business in the standardization area." ANSI, Significant Federal Laws and Policies, http://www.ansi.org/government_affairs/laws_policies/laws.aspx?menuid=6 (last visited May 25, 2005).

nouncements are ineligible for copyright. Apart from ambiguity as to whether they constitute law in the way legislation and court decisions do, neither public domain concerns (of due process and free access) nor inherent incentives of lawmakers to produce law are as obvious. Even the somewhat more involved balancing inquiry used to assess suitability of copyright to government works prepared by independent contractors does not readily resolve such cases.

A prominent illustration concerns municipalities adopting a privately generated building code as law, as in *Veeck v. Southern Building Code Congress International, Inc.*²⁵ The eight-member en banc majority emphasized that legislative adoption rendered the code law and this, ipso facto, put it in the public domain, ineligible for copyright. The six-member en banc dissent (through two separate opinions) stressed the need to consider incentive effects of such a conclusion on future production of kindred materials. Each side recognized the legitimacy of the other's argument: the dissenters observed that the case raised no due process or free access issues (the copier was neither charged with nor prosecuted for any violation of law) and the majority observed that no incentives were upset because the private standard setter in question promulgated standards principally for the purpose of getting them enacted into law.²⁶

Dividing the majority and dissents in *Veeck* was also disagreement as to the proper role of intermediate federal appellate courts in resolving such a profound issue of public policy (not merely of law, but posing novel legal issues in a complex public policy context). Thus, while all the court's judges appeared to accept the basic policy stakes as pitting public domain concerns against incentive effects on production, they emphasized different aspects of these competing policy objectives.

What makes *Veeck* a difficult case is that the standards at issue were adopted (a) formally rather than in passing and (b) in full long after their promulgation. Point (a) made it difficult for the majority to shrug off adoption as one might a passing judicial reference to a professional standard in a negligence case; point (b) made it difficult for the dissent to accept the impaired incentives entailed by copyright vitiating upon the code's adoption as law. This combination of points marks relatively easier cases at each end of the spectrum: (1) passing reference in legal materials to standards does not make standards law with copyright-destroying effects (even *Veeck*'s majority makes this clear) and (2) formal ex ante anointment of an organization to prepare standards bearing binding legal effects can destroy copyright (even *Veeck*'s dissents appear to accept this, certainly when due process issues arise).

A three-part classification scheme thus emerges, as both a descriptive and normative matter. The classes within the threefold classification scheme

25. *Veeck v. S. Bldg. Code Cong. Int'l, Inc.*, 293 F.3d 791 (5th Cir. 2002) (en banc), *cert. denied*, 539 U.S. 969 (2003). Only three other federal appellate cases exist, none adjudicated by the Supreme Court. See *infra* Section I.C.

26. *Veeck*, 293 F.3d at 805.

by which standards become embodied in law may be called for convenience: weak form, semi-strong form, and strong form. Descriptively, this framework derives from reconciling judicial opinions in cases like *Veeck*; normatively, it enables capturing the important factors relevant to conducting requisite public policy balancing inquiries: the author's identity, the nature of the work, the identity and nature of the copier, and the relation of the governmental entity to the author, work, and copier. Consider some illustrations.

Standards take the weak form route into law by reference, as when courts admit authoritative materials into evidence to evaluate a defendant's potential liability. Judicial references to *Gray's Anatomy* to help define a physician's standard of care do not destroy copyright in that work.²⁷ The author and the work are autonomous from any governmental action and the governmental use arises in a discrete context. Derecognizing copyright is not necessary as a due process matter because the referenced text does not formally bind all or a class of citizens *ex ante* but is used in a particular judicial evaluation; letting such judicial use vitiate copyright in particular works would destroy copyright altogether, eliminating all incentives copyright offers.

This class is as widespread as the legal regime it ultimately but indirectly serves—and is growing in size as more standards are embodied in law. Critical to traditional jurisprudential recognition of such references, however, is both their authoritative status and their accessibility. As this class of standards embodied in law grows, these attributes assume greater social significance, requiring more formal assurance that the standards are widely available to affected persons.

The semi-strong form route occurs through adoption when, as in *Veeck*, a legislative body formally enacts a standard as law. As the split court in *Veeck* attests, this context poses considerable difficulties. The author may or may not seek to contribute his work to the fabric of law, the work itself may or may not assume characteristics of a law-like codification, and the governmental interest in it may be expressed by wholesale adoption or cut-and-paste adaptation. Difficult issues arise from these differences in the exercise of balancing free access and due process on the one hand with the incentive effects on prospective producers of such standards on the other. This class can be sizable, including, for example, the American Bar Association's *Model Code of Professional Responsibility* adopted by many state supreme courts and promulgations of the Gas Industry Standards Board embodied in regulations of the Federal Energy Regulatory Commission.²⁸

The strong form route of standards-into-law arises by ordainment, as where a governmental authority anoints a designated standard setter to pro-

27. Cf. *Freshwater v. Scheidt*, 714 N.E.2d 891, 896 n.2 (Ohio 1999) (citations omitted).

28. See *infra* note 207; see also Standards for Business Practices of Interstate Natural Gas Pipelines, 61 FED. REG. 39,053 (July 17, 1996); Standards for Business Practices of Interstate Natural Gas Pipelines, 61 FED. REG. 19,211 (May 1, 1996); Michael Ariens, *The Ethics of Copyrighting Ethics Rules*, 36 U. TOL. L. REV. 235 (2005).

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Private Standards in Public Law

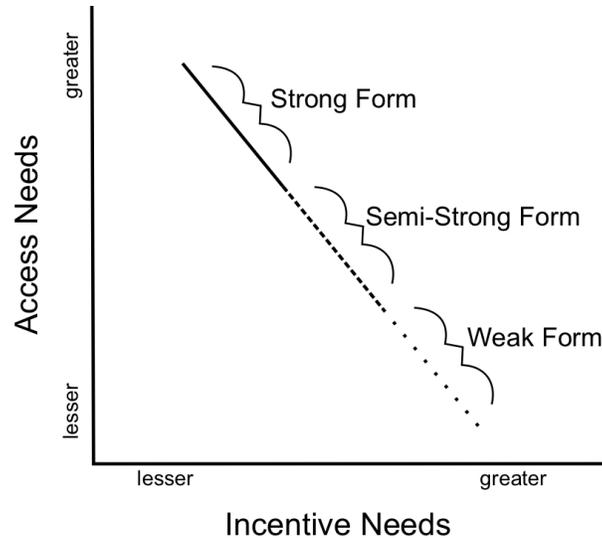
9

duce materials the authority itself could produce. This is the functional equivalent of legislative enactment. In contrast to weak form adoption, this is an outright assignment of the task and comprehensive embrace of the work to bind all those to whom the legal, regulatory, and standard-setting framework speaks; in contrast to semi-strong form adoption, those features negate incentive concerns. This class appears likely to have few members at present, but could become an increasingly appealing governmental policy option.²⁹

A distinguishing feature of this class of strong form standards-into-law is how standards form the corpus of the law governing those addressed. They do not merely inform the legal basis for negligence and other transgressions to which passing references (weak form adoption) may be applied, but constitute the fabric of that law. As a result, covered persons need knowledge of these standards to comply with law, as do lawyers advising them. In these respects, such materials are de facto law. The source of this distinguishing feature is formal legislative and administrative anointment of the body as an official legal standard setter, needing none of the incentives that copyright provides.

These descriptive illustrations can be summarized abstractly. Component variables reveal the ultimate policy tension as balancing incentive needs with access needs. Conceptually, the framework relates trade-off relativity as follows: weak form embodiment circumstances are characterized by greater incentive needs for producers and lesser access needs for users while strong form embodiment circumstances are characterized by lesser incentive needs for producers and greater access needs for users (semi-strong embodiment circumstances are characterized by needs of intermediate orders). The figure below summarizes.

29. See *infra* Section III.A.



As to author identity and the nature of a work, private actors producing materials for purposes other than embodiment in law epitomize the weak form route (non-copyright incentives may be low), while officially anointed actors creating standards for embodiment in law epitomize the strong form route (non-copyright incentives suffice). As to user identity, persons who are members of a class affected by a standard embodied in law signal the strong form route (class access is critical), while randomly affected persons associate with the weak form route (*public* access is not compelling). The governmental relation to each likewise drives towards the strong form route when government's role is consciously a lawmaking function and towards the weak form route in opposite cases. The generality of this framework can be seen initially by reviewing existing judicial doctrine, sparse and ad hoc though it is.³⁰

C. Judicial Doctrine

The Supreme Court has yet to address the copyright consequences of privately promulgated standards embodied in public law. Only four federal appellate court opinions address the context. Three of these decline to treat such embodiment as vitiating copyright—*Veck* is the exception and also the

30. See Maryjane Boone Bonfield, Casenote, *Veck v. SBCCI*, 293 F.3d 791 (5th Cir. 2002), 56 SMU L. REV. 1025 (2003); Katie M. Colendich, Comment, *Who Owns "The Law"? The Effect on Copyrights when Privately Authored Works are Adopted or Enacted by Reference into Law*, 78 WASH. L. REV. 589 (2003); Shubha Ghosh, *Copyright as Privatization: The Case of Model Codes*, 78 TUL. L. REV. 653 (2004); Robert Kry, Case Note, *The Copyright Law*, 111 YALE L.J. 761 (2001); Nick Martini, Note, *Veck v. Southern Building Code Congress International, Inc.*, 18 BERKELEY TECH. L.J. 93 (2003).

most recent.³¹ A review suggests basic components of the doctrinal terrain to which more complex elaborations are developed in the rest of this Article.

The review of judicial doctrine reveals the appeal of this Article's three-part classification scheme as a descriptive matter, being derivable from the cases; the review also supports its normative aspects, being analytically defensible to think through policy trade-offs the cases struggle with. That struggle, in turn, illustrates inherent limitations on the judiciary's ability to resolve the trade-offs without aid of at least a formal framework such as the framework this Article contributes; it also shows need for an administrative mechanism to provide *ex ante* solutions, which this Article also contributes.

1. BOCA (*1st Circuit 1980*)³²

BOCA vacated an author's preliminary injunction against a copier of a state-adopted building code as improvidently granted. The author encouraged public authorities to adopt its code by reference, provided updates, and sold the subject-state's version for \$22 per copy (the copier sold its version for \$35 per copy, though it contained only modest variations compared to the official copyrighted code). The novel issue was whether inclusion of the copyrighted code in state regulations rendered the materials freely available for copying. The copier's chief argument was that such adoption bore the force of law, stripping the code of copyright. *BOCA* thus illustrates what I call the semi-strong form route standards take into law.

The court stopped short of ruling definitely on the point. It framed the issue by reference to the absence of copyright in judicial and legislative works under *Wheaton v. Peters*³³ and other cases, considering whether the code's private authorship made a legal difference compared to such cases. Weighing public domain with incentives concerns, the court was "far from persuaded" that the author retained copyright and was unable to conclude that the rule as to judicial and legislative materials did not apply equally to codes adopted as regulation. But it opted to "leave the door slightly ajar with respect to [this] issue," saying only that the author's claim was insufficient to sustain a preliminary injunction.³⁴

This reticence was due in part to the issue's novelty and in part due to "a possible trend towards state and federal adoption, either by means of incorporation by reference or otherwise, of model codes."³⁵ The issue remains novel as a matter of law, but the "possible" trend rapidly accelerated.

31. For district court opinions, see *Harrison Co. v. Code Revision Comm'n*, 260 S.E.2d 30, 34 (Ga. 1979), and *Georgia v. Harrison Co.*, 548 F. Supp. 110, 114–15 (N.D. Ga. 1982), *vacated per stipulation*, 559 F. Supp. 37 (N.D. Ga. 1983).

32. *Bldg. Officials and Code Admin. v. Code Tech., Inc.*, 628 F.2d 730 (1st Cir. 1980) [hereinafter *BOCA*].

33. 33 U.S. (8 Pet.) 591, 668 (1834).

34. *Id.* at 736.

35. *Id.* (citing 29 C.F.R. § 1910, 308–309 (2005), adopting as federal regulation the National Electrical Code, a copyrighted code similar to that at issue in *BOCA*).

2. CCC (2d Circuit 1994)³⁶

CCC reversed a declaratory judgment for a copier against an author. Both published information on used car valuations, the author in the so-called *Red Book* and the copier in a computer database. The court devoted most of its opinion to questions of basic copyright eligibility, including as to originality and the contours of copyright eligibility for compilations, turning finally and briefly to the copier's public domain defense to infringement. This argument rested on establishment in state insurance law of *Red Book* values as an alternative standard to set minimum loss payouts.³⁷ State law's passing reference to the *Red Book* thus illustrates what I call the weak form route standards take into law.

The court found no authority for the copier's view, not even the otherwise sympathetic *BOCA* case, stating its unwillingness to decide "that a state's reference to a copyrighted work as a legal standard for valuation results in loss of the copyright."³⁸ While not dismissing the argument's credibility, offsetting considerations included its potential as a taking under the Constitution³⁹ and its sweeping reach. The court instanced the threat to copyright in school textbooks when states require these in mandatory curriculums.⁴⁰ It noted doctrinal authority for a different balance: expanding fair use defenses for personal copiers, but not immunizing commercial copiers because this would destroy copyright's goal of promoting creativity amid "the increasing trend toward state and federal adoptions of model codes."⁴¹ Since CCC, this "increasing trend" has become a hardened reality.

3. Practice Management (9th Circuit 1997)⁴²

Practice Management affirmed a ruling that the American Medical Association ("AMA") did not lose its copyright in a medical procedure coding system when the system was required by government regulations.⁴³ AMA publishes and updates the coding system to classify medical procedures for ease of reference. Congress instructed the Health Care Financing Administration ("HCFA") to establish a uniform code to identify physicians'

36. CCC Info. Servs. Inc. v. MacLean Hunter Mkt. Rep., Inc., 44 F.3d 61 (2d Cir. 1994) [hereinafter CCC].

37. *Id.* at 73 n.29 (citing N.J. Admin. Code 11:3-10.4 (1988); 11 N.Y. Admin. Code § 216.7(c) (1990)).

38. *Id.* at 74.

39. The takings issue is real but likely underwhelming. *See infra* Section III.D.

40. CCC, 44 F.3d at 74.

41. *Id.* at 74, n.30 (quoting NIMMER, *supra* note 17, § 5.06[C] at 5-60).

42. Practice Mgmt. Info. Corp. v. Am. Med. Ass'n, 121 F.3d 516 (9th Cir. 1997), *amended by* 133 F.3d 1140 (9th Cir. 1998), *cert. denied*, 524 U.S. 952 (1998).

43. The court found against the AMA on grounds that it misused this copyright in dealing with the government. *Id.* at 521.

services used in Medicare and Medicaid claim forms.⁴⁴ Heraldng trends in the regulatory use of private standards, HCFA contracted with AMA to use its coding system rather than reinvent the wheel.⁴⁵ The contract required HCFA to use this system and the regulation required users to do so.⁴⁶

The court referenced the law against copyrighting judicial opinions and statutes, identifying the dual policy objectives associated with incentives versus public domain (access, due process, notice). As to incentives, it stated that: “invalidating [AMA’s] copyright on the ground that the [coding system] entered the public domain when HCFA required its use would expose copyrights on a wide range of privately authored model codes, standards, and reference works to invalidation”—including the *Bluebook* guide to legal citations.⁴⁷ As to public domain, the court found “no evidence that anyone wishing to use the [coding system] has any difficulty obtaining access to it” and “no realistic threat to public access.”⁴⁸

The court identified qualifying conventions to combat access restrictions that private standard setters such as AMA might impose. These include: (1) regulatory agencies could terminate agreements or adopt regulations requiring standard setters to expand access;⁴⁹ (2) courts could enlarge copyright infringement defenses such as fair use and due process; and (3) legislators could adopt compulsory licensing arrangements.⁵⁰ The Ninth Circuit in *Practice Management* thus joined the Second Circuit in *CCC* to sustain private copyrights when standards are embodied in law following what I call the weak form route—with the First Circuit in *BOCA* deferring judgment when private standards were embodied in law using what I call the semi-strong form route.

4. *Veeck* (5th Circuit 2002)⁵¹

The Fifth Circuit’s initial panel decision in *Veeck* joined the Second and Ninth Circuits in these conclusions but, upon rehearing en banc, blazed a different trail that closed the door left ajar by the First Circuit in *BOCA*. All agreed on the facts: Southern Building Code Congress International, Inc. (“SBCCI”) is a not-for-profit membership association that writes building

44. 42 U.S.C. § 1395w-4(c)(5) (2000).

45. *Practice Mgmt.*, 121 F.3d at 518.

46. The court found the former to be misuse of copyright. *Id.* at 521. *Practice Management* illustrates difficulties that can arise when classifying adoptions. The HCFA-AMA contract suggests more than mere passing reference, signaling semi-strong form embodiment. But the court’s treatment of its terms as misuse of copyright vitiated copyright protection and thus the contract, justifying classification as weak form embodiment.

47. *Id.* at 519.

48. *Id.*

49. *Id.* (citing H.R. REP. NO. 94-1476, at 59, reprinted in 1976 U.S.C.C.A.N. §§ 5659, 5672).

50. *Id.*

51. *Veeck v. S. Bldg. Code Cong. Int’l, Inc.*, 293 F.3d 791 (5th Cir. 2002) (en banc), cert. denied, 539 U.S. 969 (2003).

codes; two small Texas towns enacted the 1994 edition of SBCCI's *Standard Building Code* into law; and an individual published the enacted code on a website (having paid for a copy but despite an accompanying licensing agreement prohibiting such publication).

The *Veck* majority emphasized *Banks v. Manchester*'s public domain rationale, rejecting arguments that the opinion rested entirely on the rationale that judges (and legislators) are paid to produce laws.⁵² When embodied in law, the code lost copyright eligibility for another doctrinal reason: this rendered the code a "fact" or "idea" incapable of expression in any way except as embodied and copyright never protects facts or ideas.⁵³ The majority also distinguished *CCC* and *Practice Management* that upheld continuing copyright in codes or standards when official legal materials make mere passing references to them (what I call the weak form route).⁵⁴

As a matter of policy and incentives, the *Veck* majority noted that, characteristic of such weak form adoption cases, authors produced work for purposes other than enactment as law, whereas SBCCI's purpose was to get its codes enacted as law.⁵⁵ The majority discounted arguments that decopyrighting privately produced standards when formally embodied in law would so reduce producer revenues as to destroy incentives for production.⁵⁶ The majority emphasized that industry experts have inherent incentives to produce industry codes, copyright or not, finding it difficult to imagine circumstances where greater inherent incentives exist (what I call the strong form route illustrates what the court found difficult to imagine).⁵⁷

Judge Higginbotham's brief dissent, which described *Veck* as a "difficult case," resisted deciding it under the refrain that "the law" belongs to the people, emphasizing lack of institutional knowledge within federal appellate courts concerning related incentive effects. It distinguished *Banks* as "about the acquiring of copyrights by public officials, not . . . invalidating the copyrights held by private actors when their work is licensed by lawmakers."⁵⁸ The challenge is to balance competing and abstract public policies, generally better suited for Congress than courts, but on the *Veck* facts the balance tipped toward SBCCI since: (a) the towns received a benefit and (b) holding for the copier would invalidate copyright on all published codes ever adopted by any governmental body.⁵⁹

52. *Id.*

53. *Id.* at 800–01 (citing *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991)). The *Veck* majority wove together its analysis of how embodiment of the code in law rendered the result a "fact" and/or an "idea." See *infra* Section I.D.

54. *Veck*, 293 F.3d at 804–05.

55. *Id.* at 805.

56. *Id.* at 805 n.21.

57. See *id.* at 806.

58. *Id.* at 806–07 (Higginbotham, J., dissenting).

59. *Id.* Judge Higginbotham's conclusion that the majority's ruling vitiates copyright in codes embodied in law likely is correct. See *infra* text accompanying notes 253–254.

Judge Wiener elaborated a blistering dissent, calling the majority's opinion "drastic" and "ill-suited for modern realities,"⁶⁰ not a result that federal courts are justified in reaching. First, Judge Wiener accepted the facts as undisputed, but underscored: (a) the code's embodiment in law was through "incorporation by reference," (b) the work was original, (c) the code was readily available for purchase, and (d) the copier adopted the work wholesale without identifying its author.⁶¹ Second, Judge Wiener criticized the majority opinion's approach as providing no respectable analytical framework because it ignores: the nature of the author, the character of the work, the relationship of the copier to the work and of the copier to the governmental enactor, and the nature of the copier (that is, whether the copier needs to know the work/law's contents).

Judge Wiener also emphasized that *Veeck* is "not a free access case"⁶² and that no precedent exists, treating *Banks* as based on judicial compensation preventing judges from copyrighting their opinions (and similarly for legislators)⁶³ and noting the CCC court's decision to continue copyright protection in private standards embodied in public law (through what I call the weak form route).⁶⁴ As a result, the case presented "a wide-open and unresolved question of copyright law" that should await resolution by Congress or the Supreme Court because it is entirely a matter of public policy.⁶⁵ The majority filled the blankness of this policy slate chiefly by treating the code as a "fact" or "idea" once embodied in law; Judge Wiener regarded this treatment as simply a legal conclusion derived from policy determinations, not an independent analytical tool.⁶⁶

Judge Wiener charged that the majority's rhetoric of citizen ownership of law is uncritical, naïve, "simplistic," and "grandiloquent."⁶⁷ It fails to explore "distinctions between different types of enactments and the policy considerations attendant on each."⁶⁸ Codes differ from judicial opinions or statutes as to author, work, copier, and the governmental relation to each. Thus, privately produced codes are: not funded from the "public fisc," usually specialized requiring technical expertise, applicable to narrow classes of

60. *Veeck*, 293 F.3d at 809–10 (Wiener, J., dissenting).

61. *Id.* at 808–09.

62. *Id.* at 810. Judge Wiener acknowledged that, if standards embodied in law were not freely accessible to the public, "any defendant prosecuted for violating [them] would surely prevail on a due process defense." *Id.* at 813 n.13.

63. *Id.* at 811, 813 n.15; see also *County of Suffolk v. First Am. Real Estate Solutions*, 261 F.3d 179, 193 (2d Cir. 2001).

64. *Id.* at 811 (Wiener, J., dissenting) (citing *CCC Info. Servs., Inc. v. Maclean Hunter Mkt. Rep.*, 44 F.3d 61, 73–74 (2d Cir. 1994)).

65. *Id.* at 812 & n.12 (citing *Banks v. Manchester*, 128 U.S. 244, 253 (1888); *CCC*, 44 F.3d at 68).

66. *Id.* at 818–20. Judge Wiener responded fully to the majority's conclusion that embodiment rendered the codes "ideas" but did not grapple with the conclusion that such embodiment rendered the codes "facts." See *infra* Section I.D.

67. *Veeck*, 293 F.3d at 814 (Wiener, J., dissenting).

68. *Id.*

persons not the public at large, and favored as a matter of congressional policy.⁶⁹ Judge Wiener noted that other federal courts recognize such distinctions, instancing *Practice Management* and *CCC*.⁷⁰

The majority's holding reduces production incentives, Judge Wiener believed, as SBCCI relies on revenues from code sales to fund operations (\$3 million of its \$9 million in revenues are from sales).⁷¹ Other federal courts recognize this incentives component of the balancing exercise, again citing *Practice Management*.⁷² When vitiating copyright causes revenue reduction, incentives diminish "absent some alternative source of funds."⁷³ Providing funding from sales (as opposed to member dues or contributions) keeps standard setters independent from parochial influence.⁷⁴ Governments benefit from works that such incentives create, given that otherwise they must produce materials themselves, which may (a) be infeasible for lack of expertise and (b) produce non-uniformity across jurisdictions.⁷⁵ Judge Wiener also noted other ways to maintain public access without impairing incentives, including through doctrines of fair use, implied license, or waiver.⁷⁶

5. County of Suffolk (*Variation*)⁷⁷

Judge Wiener's dissent in *Veeck* drew, in part, on *County of Suffolk*, a case varying the theme of *Veeck* and its predecessors in that a governmental entity created a copyrighted work rather than embody one created by another. As required by state law, the county created tax maps reflecting ownership, size, and location of real property in the county's subdivisions. The court vacated an order dismissing the county's complaint that a third party infringed the county's copyright.

The public domain issue, while novel, centered on the same question *Veeck* and its predecessors turned on: whether tax maps are analogous to statutes and judicial opinions. The court announced an approach familiar to readers of the foregoing case summaries. Two factors influence whether a work is in the public domain: (1) the author's need for economic incentives to create the work and (2) the public's need for notice of the work to have notice of law. Neither factor supported public domain in *County of Suffolk*, because (1) even governmental authors may require incentives and (2) the

69. *Id.*

70. *See id.* at 815 n.23 (Wiener, J., dissenting).

71. *Id.* at 816 n.24.

72. *Id.* at 816 n.25.

73. *Id.* at 816–17. The alternative source of funds is a key point amplified in the case study of accounting standards, *infra* text accompanying notes 171–174.

74. *Veeck*, 293 F.3d at 817.

75. *Id.*

76. Judge Wiener found that none of those existed in *Veeck*, without acknowledging any tension. *Id.* at 824–25 (Wiener, J., dissenting).

77. *County of Suffolk v. First Am. Real Estate Solutions*, 261 F.3d 179, 194 (2d Cir. 2001).

tax maps created no legal obligations and in any event access to them was not restricted.

County of Suffolk thus appears to be an easy case. Its framework follows *CCC* and *Practice Management*, also relatively easy cases in that they demonstrate the weak form route standards take into law (as the *Veck* majority acknowledged). *BOCA* and *Veck* are more complex, exhibiting the semi-strong form route that standards take into law. While Judge Wiener's *Veck* dissent more completely investigates competing public policy trade-offs, the *Veck* majority's conclusion is more likely on the right track, as was the *BOCA* court's judicious reluctance to resolve the issue upon a preliminary injunction motion.

As an institutional matter, however, Judge Higginbotham's brief dissent in *Veck* most resonates in expressing the federal judiciary's inherent limitations in addressing such a sprawling public policy issue. Cases and controversies federal courts resolve are not suitable forums to provide optimal solutions to the problems of private standards embodied in public law. Such a framework must be provided by a more elaborate policy-oriented process. Absent some process (prescribed in Part III), federal courts may be aided by the analytical framework this Article contributes. Application will be enriched by appreciating that copyright is not absolute but provides a protective scope varying with context.

D. Protective Scope

The varying scope of copyright protection is conventionally imagined as a continuum from thin to thick.⁷⁸ Core doctrines pivot around this conception. As discussed below, these doctrines are principally (1) copyright ineligibility for ideas and facts (dubbed the "idea-expression dichotomy" and the related "merger doctrine")⁷⁹ and (2) "fair use," overcoming copyright when certain factors concerning the nature of the work, copying, and market justify permitting copying freely.⁸⁰

The idea-expression dichotomy holds that expressions of ideas are eligible for copyright but that ideas are not (analogous but independent analysis applies to distinguish facts from their expression). The difference between expressions and ideas is difficult to draw abstractly.⁸¹ The difficulty of sustaining the idea-expression distinction manifests in copyright's merger

78. *E.g.*, *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991); *Fleener v. Trinity Broad. Network*, 203 F. Supp. 2d 1142, 1149 (C.D. Cal. 2001); SIVA VAIDHYANATHAN, *COPYRIGHTS AND COPYWRONGS: THE RISE OF INTELLECTUAL PROPERTY AND HOW IT THREATENS CREATIVITY* 115–16 (2001); Sonia K. Katyal, *Ending the Revolution*, 80 *TEX. L. REV.* 1465, 1485 (2002) (book review).

79. *E.g.*, Copyright Act, 17 U.S.C. § 102(b) (2000); *Feist Publ'ns*, 499 U.S. at 350; *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 547–48 (1985).

80. *E.g.*, 17 U.S.C. § 107 (2000); *see* *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994).

81. *See* *Baker v. Selden*, 101 U.S. 99 (1879); *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930), *cert. denied*, 282 U.S. 902 (1931).

doctrine. It holds that the idea-expression distinction vanishes when there is only one way (or are few ways) an idea can be expressed. Sustaining the idea-expression distinction becomes so tenuous that the concepts merge and become essentially the same thing.⁸² When the distinction between an idea and its expression vanishes, copyright functionally treats the result as an idea, not an expression, rendering it ineligible for copyright.

While the idea-expression distinction and merger doctrine provoke reasonable classification disputes for particular examples,⁸³ difficulties essentially disappear once any otherwise contestable idea/expression is embodied in law.⁸⁴ Even if an idea can be expressed in numerous ways, when a governmental entity prescribes that a particular expression of that idea is the one to be followed under penalty of law, then there becomes only one way to express that (legal) idea: the one found in the text embodied in law. Copyright law does not recognize any property interest in the idea. Put in a kindred doctrinal box: facts are not eligible for copyright protection and standards embodied in law are facts.

The fair use doctrine further restricts copyright's protective scope based upon numerous factors.⁸⁵ A key factor is the nature of the work. Copying is substantially restricted as to works of fiction compared to a relatively more expansive fair use zone as to works of fact. Standards reside on the fact end of this continuum. When embodied in law, standards move to the extreme end of the continuum as facts (indeed, standards embodied in law may be the ultimate facts in copyright terms).

A second factor is the purpose of copying. The least attractive copiers are those who pass off another's work as their own; also unattractive are copiers selling another's work at cut-rate prices, having avoided associated preparation costs. Such activities with respect to standards promulgated by others remain unattractive; many standards, however, are commonly used to train persons responsible for related administration and to enable compliance—creating a need for the most attractive copiers.⁸⁶

A third fair use factor concerns the effect of a copying upon the market for a work. Public policy envisions an active marketplace for the expression of ideas that will generate for society maximal idea production. In the market, ideas battle for supremacy through competitive expression. This competition is desirable across a wide spectrum, from the best way to account for mergers

82. See *Morrissey v. Procter & Gamble Co.*, 379 F.2d 675 (1st Cir. 1967).

83. Reasonableness of disagreement justifies Judge Wiener's statement in *Veck* that the idea-expression distinction and merger doctrine are end points of a legal analysis involving balancing competing policy goals, not independent analytical tools. *Veck v. S. Bldg. Code Cong. Int'l, Inc.*, 293 F.3d 791 (5th Cir. 2002) (en banc), cert. denied, 539 U.S. 969 (2003), (Wiener, J., dissenting); see also Dennis S. Karjala, *Distinguishing Patent and Copyright Subject Matter*, 35 CONN. L. REV. 439, 501 n.251 (2003).

84. This disappearance justifies the *Veck* majority's conclusion that, once embodied in law, codes become "ideas" and/or "facts" ineligible for copyright. *Veck*, 293 F.3d at 800–01; see also Karjala, *supra* note 83.

85. E.g., Copyright Act, 17 U.S.C. § 107 (2000).

86. Cf. *Am. Geophysical Union v. Texaco Inc.*, 60 F.3d 913 (2d Cir. 1994).

to the best cake recipe.⁸⁷ How far this market vision should extend is uncertain.

Many standard setters compete solely for the prize of having their standards embodied in law. The market metaphor's appropriate extent becomes more certain in the case of governmental embodiment of a standard: the race is over and that expression of an idea won. Competition shifts from racing for best ideas and expressions to disseminating the idea most cheaply. Monopoly pricing that copyright affords would constitute a social defeat in this leg of the competition.

Although *Veeck* and its predecessors did not fully develop or deploy these doctrinal tools in this way, scholars and courts in other copyright disputes do so to determine the appropriate scope of copyright protection in given cases.⁸⁸ This account of copyright's protective scope, and the doctrinal summary preceding it, show both the uses of such techniques to resolve disputes and their limits. Copyright's protective scope is thin for standards, but it does exist.

While this presentation can thus sharpen understanding of the legal landscape for future federal courts resolving disputes,⁸⁹ it remains a bundle of ex post solutions in circumstances crying out for ex ante guidance that the judiciary appears institutionally incapable of providing.⁹⁰ Moreover, doctrines of greatest utility, particularly compulsory licensing arrangements and regulations mandating access, are outside a federal court's competence to establish.⁹¹

Apart from institutional limitations on the federal judiciary's policymaking ability, also missing from the contributions of the relevant cases and doctrines defining copyright's protective scope are theoretical perspectives on the context of producing standards destined for embodiment in law. These theoretical perspectives can be gleaned by considering the philosophical basis of U.S. copyright law.

E. *Utilitarian Theory*

A comprehensive theory of copyright law is not necessary to develop the framework and analysis in this Article, but three key features of such a theory

87. See Malla Pollack, Note, *Intellectual Property Protection for the Creative Chef, or How to Copyright a Cake: A Modest Proposal*, 12 CARDOZO L. REV. 1477 (1991).

88. See *Veeck*, 293 F.3d at 817. A fourth fair use factor addresses the portion of a copying compared to a work as a whole. This factor presents questions of policy relating to rights to prevent derivative works, discussed *infra* Section I.E.

89. These doctrinal analyses are also valuable in understanding that while government embodiment of privately promulgated standards in law may constitute a taking, the property interest taken may be slight. See *infra* Section III.D.

90. A few cases resolved in a similar way applying a similar framework could do the trick. Judging by the divided court in *Veeck* and differing analyses appearing in *BOCA*, *CCC*, and *Practice Management*, it is risky to rely upon such an approach.

91. Copyright lawmaking is increasingly produced administratively and legislatively rather than judicially. See Joseph P. Liu, *Regulatory Copyright*, 83 N.C. L. REV. 87 (2004).

bear expressing. First, while some strands of a natural-rights basis for endowing a work's creator with associated rights to control making and distributing copies exist,⁹² the dominant rationale for copyright in the United States is utilitarian. For example, the Constitution grants Congress power to enact copyright laws to "promote the Progress of Science"—that is, learning and knowledge.⁹³ Creating incentives to produce, rather than rewarding production, is the overarching objective and philosophical basis of U.S. copyright law.⁹⁴

Copyright law struggles to balance providing incentives to produce with the more important objective of dissemination of ideas.⁹⁵ Copyright's ambition, then, is to achieve public, not private, benefits.⁹⁶ While this conception is not beyond dispute, its contours favoring the public interest are particularly poignant in the context of standards embodied in law. Along with the location of standards embodied in law at the thin edge of copyright's protective scope, this conception means that, in close cases, copyright law should err on the side of concluding that such standards have become law, entered the public domain, and lost copyright eligibility. It is on these grounds that one may support the *Veck* majority's conclusions even while appreciating the more complete analysis provided in Judge Wiener's dissent.

Second, the foregoing doctrinal discussions illustrate a recurring theme in copyright law: competing public policies must invariably be balanced. A common component of such weighting exercises, likewise visible in the foregoing discussions, concerns incentives copyright creates for production. This incentive function has a long history in copyright theory and law. It is debated because, in part, emerging evidence suggests that incentives supplied by copyright are less necessary than once thought to generate production of copyright-eligible materials.⁹⁷ While this debate may influence copyright's contours, incentive effects play a critical role in prevailing copyright law. They figure prominently as an analytical matter in the standards-embodied-in-law inquiry conducted in this Article.

For standard setters, however, incentives must be tailored to prevent over-production. Unlike commercial producers for whom excessive incentives causing over-production can be dismissed by the marketplace by

92. E.g., Jane C. Ginsburg, *A Tale of Two Copyrights: Literary Property in Revolutionary France and America*, 64 TUL. L. REV. 991 (1990); Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287, 350–53 (1988); Alfred C. Yen, *Restoring the Natural Law: Copyright as Labor and Possession*, 51 OHIO ST. L.J. 517 (1990).

93. U.S. CONST. art. I, § 8, cl. 8; STEPHEN BREYER, ECONOMIC REASONING AND JUDICIAL REVIEW: AEI-BROOKINGS JOINT CENTER 2003 DISTINGUISHED LECTURE PRESENTED AT THE AMERICAN ENTERPRISE INSTITUTE DECEMBER 4, 2003, at 13 (AEI-Brookings Joint Ctr. For Reg. Studies ed., 2004).

94. See, e.g., *Wheaton v. Peters* 33 U.S. (8 Pet.) 591, 644 (1834).

95. See *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975).

96. See *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984).

97. E.g., LANDES & POSNER, *supra* note 20, at 41–50; Adam D. Moore, *Intellectual Property, Innovation, and Social Progress: The Case Against Incentive Based Arguments*, 26 HAMLINE L. REV. 601, 619 (2003).

ignoring a product, over-production of standards requiring access and compliance can produce significant social costs. Quality is a more important feature of standard setting than is quantity. In the case of accounting standards, for example, evidence indicates that there has been over-production in quantity and under-production in quality.⁹⁸ This consequence may not be due to the standard setter's assertion of copyright and consequent royalties and licensing fees. But it does not support a case that copyright-and-sales arrangements governing standards produce desirable much less optimal qualitative attributes.

The third key feature of copyright theory especially relevant to standards concerns incremental improvement in works. Copyright law vests rights to create derivative works in authors of the original.⁹⁹ In this protection, copyright's utilitarianism cuts two ways. Copyright protection may provide incentives in a present author to create a work, but protection also destroys incentives for future authors to create derivative works that incrementally improve prior work.

These competing cuts drive through copyright's normative center, yielding contentious debates that invoke such powerful concepts as First Amendment free speech rights to challenge protection of derivative works.¹⁰⁰ That William Shakespeare incrementally improved numerous previously published plays—not possible when copyright protects against derivative works—is a dramatic exhibit supporting free rights to create derivative works.¹⁰¹

For standards, the cut should probably be against copyright protection giving standard setters absolute control over derivative works and in favor of allowing third parties to provide incremental improvement through derivative works. This cut favors copyright's spirit of promoting the public good, of maximal idea production through competition for expression supremacy. Determining an appropriate balance may vary with relative complexity of a particular standard and the importance of keeping it up to date. Those not requiring much improvement warrant thicker derivative rights protection; those susceptible to improvement warrant thinner protection and freer third-party

98. Accountants refer to over-production measured by standards quantity as standards-overload. See, e.g., *The FASB Addresses Standards Overload through New Projects*, THE FINANCIAL ACCOUNTING STANDARDS BOARD REPORT, Feb. 28, 2002, at 5; Bernhard Grossfeld, *Global Accounting: Where Internet Meets Geography*, 48 AM. J. COMP. L. 261, 294 (2000). Under-production measured by standards quality is manifest in criticism that accounting standards are too dense and rule-bound and insufficiently principles-based. See, e.g., William W. Bratton, *Enron, Sarbanes-Oxley and Accounting Rules Versus Principles Versus Rents*, 48 VILL. L. REV. 1023 (2003); Frederick Gill, *Standards-Based Accounting Principles*, 28 N.C. J. INT'L L. & COM. REG. 967 (2003); Matthew A. Melone, *United States Accounting Standards—Rules or Principles? The Devil Is Not in the Details*, 58 U. MIAMI L. REV. 1161 (2004).

99. Copyright Act, 17 U.S.C. § 106(2) (2000); see Tyler T. Ochoa, *Copyright, Derivative Works and Fixation: Is Galoob a Mirage, or Does the Form (Gen) of the Alleged Derivative Work Matter?*, 20 SANTA CLARA COMPUTER & HIGH TECH. L.J. 991, 1018–20 (2004).

100. E.g., Rebecca Tushnet, *Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It*, 114 YALE L.J. 535, 551–56 (2004).

101. Pun recognized. See LANDES & POSNER, *supra* note 20, at 66–70.

ability to make improvements this way. These issues pervade copyright law, and apply to all standards, whether or not embodied in law.

For standards embodied in law, if incremental improvement by derivative works were the sole factor, one might conclude that embodiment entails relinquishment of this component of copyright protection. All standards embodied in law would be subject to improvement through free rights to derivative creation. Yet just as other factors influence the degree to which standards embodied in law should be subject to free copying, they prevent such an easy solution to determining the extent of derivative rights. This Article's three-part framework again helps to focus normative attention. Strong form adoption signals high juridical stakes in standards quality, implying greater need for freer third-party rights to create derivative works; weak form signals the opposite end of the spectrum; and semi-strong form circumstances reside in between.

II. CASE STUDY

The history of accounting standard setting in the United States shows numerous different bodies participating in an endless process of establishing and evolving generally accepted accounting principles ("GAAP") and generally accepted auditing standards ("GAAS"). Unlike in most countries, where accounting standards are produced by legislative bodies, in the United States private organizations produce them.¹⁰² Nevertheless, they bind citizens, just as laws do, meaning they must be accessible to such persons and professional advisors. Successive generations of standard setters must likewise have access to—and may need ability to build upon—promulgations of predecessors.

Until 2002, the American Institute of Certified Public Accountants ("AICPA") and its predecessors, not-for-profit professional associations of accountants, promulgated GAAS. AICPA substantially codified its standards in 2002.¹⁰³ These are comprised of about 100 *Statements on Auditing Standards* prescribing methods of performing financial statement audits, as well as pronouncements governing quality controls, ethics, independence and other matters.¹⁰⁴ AICPA asserts copyright over all these materials.¹⁰⁵

102. See Lawrence A. Cunningham, *Semiotics, Hermeneutics, and Cash: An Essay on the True and Fair View*, 28 N.C. J. INT'L L. & COM. REG. 893 (2003). Globalization pressures countries away from the traditional legislative approach of enacting accounting standards towards using unelected private bodies. See *id.* at 921–22.

103. CODIFICATION OF ACCOUNTING STANDARDS AND PROCEDURES, Statement of Auditing Standards No. 95, § 150 (Am. Inst. of Certified Pub. Accountants 2002).

104. E.g., CODIFICATION OF ACCOUNTING STANDARDS AND PROCEDURES, Code of Professional Conduct §§ 101, 102, 191 (Am. Inst. of Certified Pub. Accountants 2002); CODIFICATION OF ACCOUNTING STANDARDS AND PROCEDURES, Statements on Quality Control Standards §§ 20–40 (Am. Inst. of Certified Pub. Accountants 2002).

105. A few additional independence principles forming part of GAAS were produced by the short-lived Independence Standards Board. INDEPENDENCE STANDARDS NOS. 1–3 (Independence Standards Bd. 1998–2000). The SEC also directly establishes certain GAAS components, principally concerning independence. See Reg. S-X, 17 C.F.R. § 210.2-01 (2004).

In 2002, Congress ousted AICPA from this role, creating instead a Public Company Accounting Oversight Board (“PCAOB”).¹⁰⁶ PCAOB is nominally a private not-for-profit corporation, though it has characteristics of an instrumentality of the federal government relevant to questions of due process.¹⁰⁷ It is funded by fees Congress levies on public companies and their auditors.¹⁰⁸ PCAOB began its mission by adopting a substantial body of GAAS promulgated by AICPA.¹⁰⁹ PCAOB did not assert copyright over these materials and has produced few of its own worth copyrighting, but asserts copyright over the contents of its website and its annual reports.

Until 1973, promulgation of GAAP was dominated by bodies designated by AICPA.¹¹⁰ Many of these works remain integral to GAAP, as do various supplemental publications AICPA has produced since 1973 that build on earlier materials by interpretation or elaboration. AICPA always has asserted copyright over these works, which span thousands of pages of text almost certainly meeting basic requirements for copyright eligibility.

Since 1973, production of GAAP has been dominated by the Financial Accounting Standards Board (“FASB”). The SEC formally recognizes FASB as an authoritative standard setter.¹¹¹ FASB’s primary promulgations are *Statements of Financial Accounting Standards*, plus numerous supplemental materials aggregating some ten-thousand pages of copyright-qualifying text, over all of which FASB asserts copyright.¹¹²

So who owns copyrights to accounting standards, PCAOB, AICPA, FASB, or no one? This Part’s case study of accounting standards animates a framework designed to facilitate analysis of such questions. The framework delineates two examples at the extremes: PCAOB illustrates the strong form route standards take into law (its standards are never eligible for copyright in this framework) and AICPA illustrates the weak form route standards take into law (its standards may retain copyright, subject to qualifying conventions

106. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 101, 116 Stat. 750 (codified at 15 U.S.C. § 7211). AICPA continues to establish auditing standards for audits of non-SEC entities.

107. See *infra* text accompanying notes 113–118.

108. Sarbanes-Oxley Act § 109.

109. PROFESSIONAL STANDARDS, Interim Auditing Standards, Rule 3200T (Pub. Co. Acct. Oversight Bd. 2003).

110. These were: the Committee on Accounting Procedure (1938–59 which published *Accounting Research Bulletins*, including a codification of extant standards in 1953), see RESTATEMENT AND REVISION OF ACCOUNTING RESEARCH BULLETINS, Accounting Research Bulletin No.43 (Am. Inst. of Certified Pub. Accountants: Comm. On Accounting Procedure 1953), and the Accounting Principles Board (1962–73), which published OPINIONS, see, e.g., INTERPRETATIVE OPINIONS NOS. 1–31 (Am. Inst. of Certified Pub. Accountants: Accounting Principles Bd. 1962–73).

111. See Commission Statement of Policy Reaffirming the Status of the FASB as a Designated Private-Sector Standard Setter, Securities Act Release No. 8221, Exchange Act Release No. 47743, 80 SEC Docket 139 (Apr. 25, 2003) [hereinafter SEC Policy Statement Reaffirming FASB Status]; Accounting Series Release No. 150, 3 SEC Docket 275 (1973) [hereinafter SEC, ASR No. 150].

112. FASB produces voluminous secondary and tertiary guidance addressing subjects that are more complex, novel, or specialized than those that primary materials address, making access to them less pressing in general but more critical for those affected by particular issues.

protecting access while preserving incentives). FASB illustrates the semi-strong route standards take into law. This poses the greatest difficulties, but these are eased by evaluation of the other examples. Application suggests that most, but not all, FASB promulgations are ineligible for copyright.

A. Strong Form: PCAOB

The easiest illustration of the strong form route that standards take into law is when a governmental agency develops standards and adopts them as regulation—a widespread practice in federal government.¹¹³ Nearly as easy to classify are standards that PCAOB produces. Despite congressional protestations, PCAOB appears to be part of the U.S. government; even if it were not, its congressional mandate and funding system negate rationales for copyright in its standards.

1. Government Works

When Congress created PCAOB in the Sarbanes-Oxley Act of 2002 (“SOX”), it announced that PCAOB “shall not be an agency or establishment of the United States [g]overnment.”¹¹⁴ Congressional characterizations of instrumentalities it creates are not definitive, at least as to constitutional matters.¹¹⁵ Notwithstanding this characterization, PCAOB’s characteristics more likely make it a branch of the U.S. government, at least for due process purposes.¹¹⁶ It is authorized to make and enforce law, is overseen by the SEC in every particular from board identity to approval of standards, and properly follows processes characteristic of federal lawmaking bodies.¹¹⁷ If these characteristics render PCAOB a part of the U.S. government, then its

113. See *infra* Section III.A (noting federal government repository boasting some 3 million items).

114. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 101(b), 116 Stat. 750 (codified at 15 U.S.C. § 7211). SOX also states that “No member or person employed by, or agent for, [PCAOB] shall be deemed to be an officer or employee of or agent for the Federal Government by reason of such service.” *Id.*

115. See, e.g., *Lebron v. Nat’l R.R. Passenger Corp.*, 513 U.S. 374 (1995). While Congress might properly declare Amtrak not a government agency for purposes of such congressionally controlled matters as jurisdiction under the Administrative Procedure Act or sovereign immunity, “it is not for Congress to make the final determination of Amtrak’s status as a [g]overnment entity for purposes of determining the constitutional rights of citizens affected by its actions.” *Id.* at 375.

116. See Donna M. Nagy, *Playing Peekaboo with Constitutional Law: The PCAOB and Its Public/Private Status*, 80 NOTRE DAME L. REV. 975 (2005).

117. See Securities Exchange Act of 1934, 15 U.S.C. § 78j-1 (2002); Sarbanes-Oxley Act § 105(c)(4); INVESTIGATIONS AND ADJUDICATIONS, Rules 5100-13, 5200-06, 5300-04, 5400-69 (Pub. Co. Acct. Oversight Bd. 2004). PCAOB promulgations require SEC approval and the SEC generally is required to publish any proposed PCAOB rule for public comment before it decides to approve the rule or to institute disapproval proceedings. Sarbanes-Oxley Act § 107(b)(4).

works are ineligible for copyright under the government works doctrine of the Copyright Act and as a matter of due process.¹¹⁸

2. *Independent Contractor*

PCAOB's exact juridical status may be uncertain. PCAOB's putative lawmaking function is a compelling reason to consider it part of the U.S. government. If it were not part of that government, then its purported lawmaking and enforcement roles risk running afoul of limitations on lawmaker delegation of lawmaking functions to private actors.¹¹⁹ This limitation would be checked, in part, by rules that require the SEC to approve all PCAOB promulgations before they become effective.¹²⁰

But suppose PCAOB is neither part of the U.S. government nor an agent thereof. It may be viewed as an independent contractor, preparing works for the U.S. government that the government could prepare itself. While it is possible for independent contractors of the federal government who produce works to hold related copyright, this conclusion is not automatic.

Congressional policy guides agencies in using independent contractors to perform such work, balancing not only the need for access with the need for incentives, but also inquiring into whether the agency could produce the work itself.¹²¹ There is no question that the SEC could promulgate auditing standards itself. In fact, it does so routinely in a body of auditing regulations that supplement or complement GAAS promulgated by PCAOB or AICPA. Examples include the SEC's independence requirements for auditors.¹²²

Consider an illustration of SEC promulgation of auditing standards despite private-sector efforts to do so. In the late 1990s, the Independence Standards Board ("ISB"), a private body led by AICPA-member firms and private professionals, pursued promulgating auditor independence standards.¹²³ The SEC participated as an observer in its process for three years, before deciding it did not like ISB's proposals. So it effectively shut ISB

118. Copyright Act, 17 U.S.C. § 105 (2000); *supra* Section I.A; *see also* *Veeck v. S. Bldg. Code Cong. Int'l, Inc.*, 293 F.3d 791 (5th Cir. 2002) (en banc), *cert. denied*, 539 U.S. 969 (2003) (Wiener, J., dissenting).

119. *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 537 (1935); *see infra* Part III.

120. *Supra* note 117.

121. *See* *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989) (factors bearing upon status of independent contractor under work-for-hire doctrine); *United States v. Wash. Mint, L.L.C.*, 115 F. Supp. 2d 1089 (D. Minn. 2000) (independent contractor coin within exception because federal mint workers lacked skill necessary to achieve public approval); *see also* *Schnapper v. Foley*, 471 F. Supp. 426 (D.D.C. 1979) (independent contractor films within government works doctrine exception because using private filmmaker was not "an alternative to having one of [the agency's] own employees prepare the work"). *Reid's* independent contractor test may be read to give federal agencies latitude in characterizing the status of persons they hire to generate standards and the copyright consequences. While judicial deference to such conclusions may be warranted, additional regulatory oversight may be desirable to assure optimal classification. *See supra* notes 21–22 and accompanying text; *see also infra* Part III.

122. *See* Reg. S-X, 17 C.F.R. § 210.2-01 (2004).

123. I served as director of one of ISB's task forces during 1999–2001.

down and established rules it preferred, addressing precisely the contexts on which ISB had worked.¹²⁴ To the extent that copyright in government works produced by independent contractors hinges on whether the government could produce the work itself, as a normative matter, PCAOB's standards should not be protected.

3. Incentives

As a matter of congressionally announced policy, incentives are another factor in assessing whether an independent contractor should be entitled to hold copyright in works it produces under contract with the federal government.¹²⁵ Congress created PCAOB and directed it to promulgate GAAS for public companies. That mandate moots incentive inquiries for PCAOB that copyright could provide.¹²⁶ While simply paying an independent contractor to perform work would not necessarily deprive it of copyright, in PCAOB's case its function is far broader and ongoing: it is establishing law, investigating compliance with it, and enforcing those laws against citizens.

The ongoing funding of these operations likewise renders nugatory questions of copyright-driven incentives for others. PCAOB has a congressional grant of monopoly power over this production function. No other body is recognized to produce GAAS for SEC registrants, nor is there any mechanism in SOX for creating or recognizing any such alternative body. Given monopoly power in the production function, it is unnecessary to recognize the monopoly power of copyright in resulting work. This result also justifies authorizing others than PCAOB freely to create derivative works based on its standards as and after it generates them. Allowing such use would improve standard-making capabilities of standard setters currently promulgating auditing principles for non-SEC contexts (including AICPA) and will improve such capabilities of any successors to PCAOB Congress or the SEC may create in the future.

Moreover, as with any standard setter, incentives measured by royalties and licensing fees likely drive an organization towards greater emphasis on quantity of production rather than quality of production. Thus it would be a mistake to believe that copyright incentives for PCAOB serve copyright's goals or the securities regulation goals underlying SOX's creation of PCAOB. Securities regulation goals include promoting reliable financial

124. The SEC adopted auditor independence rules in 2001 and Congress enacted them into law, substantially verbatim, in the Sarbanes-Oxley Act of 2002. *Compare* Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 201(a), 116 Stat. 771 (amending 15 U.S.C. § 78j-1), *with* 17 C.F.R. § 210.2-01(c)(4)(i)-(ix) (2004) (the statute and the regulations restrict auditors from providing exactly the same non-audit services, using nearly identical language).

125. *See supra* notes 21-22 and accompanying text.

126. *See* Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 363 (1991); *see also* County of Suffolk v. First Am. Real Estate Solutions, 261 F.3d 179, 194 (2d Cir. 2001). If exceeding minimum statutory mandate requires incentives, additional analysis may be necessary. It would recognize that copyright protection's availability does not depend on the quality of expression (compared to patentability, for example, which does depend on quality of invention). *See* Karjala, *supra* note 83.

reporting through superior audits in order to protect investors and the public interest. These goals likely are advanced by permitting free access to PCAOB standards, including rights to create derivative works based upon them.

Finally, PCAOB's funding arrangements negate the relevance of royalties or licensing fees and their incentive effects. PCAOB began operating in 2003. For that year, operating revenues were provided virtually entirely by fees Congress levied on public companies.¹²⁷ These totaled \$52.8 million.¹²⁸ The remaining portion, \$2 million, was provided by audit firm registration fees,¹²⁹ which are allocated specifically to recovering related costs.¹³⁰ Total expenses amounted to \$29.4 million. The excess of revenue over expense, along with \$400,000 in interest income, yielded an unrestricted net asset balance of \$25.8 million.¹³¹ PCAOB simply does not need royalties or licensing fees from copyright on its work, as a matter of incentives or of budgeting generally.

In its first years of operation, PCAOB produced few of its own standards worth publishing or selling—under copyright or otherwise. Its adoption of GAAS promulgated by AICPA in prior decades raises the question whether PCAOB has the right to copy and distribute this material. As critically, does PCAOB have the right freely to use these standards to improve them? That is, does AICPA have copyright over these? The foregoing provides grounds for concluding that AICPA—and everyone else—should be free to use and modify PCAOB standards. The reciprocal inquiry concerns what rights PCAOB—and everyone else—has as to AICPA standards.¹³²

B. *Weak Form: AICPA*

The easiest illustration of the weak form route that standards take into law in the accounting context occurs when a judge or regulator references textbooks, handbooks or other materials recognized as constituting a generally accepted accounting principle.¹³³ Such references do not destroy

127. PUB. CO. ACCT. OVERSIGHT BD., 2003 ANNUAL REPORT 19 (2003).

128. *Id.*

129. *Id.*

130. *Id.* at 15.

131. *Id.* at 19.

132. PCAOB's website discloses the following in explaining its adoption of AICPA materials as its own standards: "The AICPA asserts a copyright in the AICPA Codification and standards. This material is being displayed on the PCAOB's Web site pursuant to a license and is displayed with an AICPA copyright notice." PUB. CO. ACCT. OVERSIGHT BD., INTERIM STANDARDS: COPYRIGHT NOTICE, http://www.pcaobus.org/standards/interim_standards/copyright.asp (last visited June 7, 2005). PCAOB's rights thus depend on the scope of this license. PCAOB does not otherwise have any copyright in AICPA standards because PCAOB did not create them.

133. This is possible under AICPA's Statement on Auditing Standards No. 69, which defines a hierarchy of sources that constitute generally accepted accounting standards; when the listed guidance does not address a matter, authority may be found in textbooks, handbooks, and articles. CODIFICATION OF ACCOUNTING STANDARDS AND PROCEDURES, Statement on Auditing Standards No. 69, § 411.05 (Am. Inst. of Certified Pub. Accountants 2001).

copyright. However, to the extent such materials represent embodiment in law implicating due process matters, such materials could not be restricted from public access. Traditional jurisprudence in the law of evidence and Constitutional law implicitly recognizes such concerns.¹³⁴

When such materials provide a more comprehensive basis for evaluating legal obligations, access concerns become proportionately more prominent, even when the materials are embodied in law by mere citation. This more interesting—and important—context is illustrated by AICPA’s role in establishing accounting standards. AICPA is a private not-for-profit association whose leadership is not appointed by nor overseen by any governmental authority. Its work is conducted for the trade association at large, for the profession of CPAs, and its promulgations of GAAS and GAAP address a wide range of circumstances beyond the SEC’s purview. References to its standards have been far broader than passing references such as to textbooks, but their embodiment in law has nevertheless been attenuated.

1. Legal References

As for AICPA’s work on GAAS, Congress authorized PCAOB to adopt as initial or transitional standards “any portion of any statement of auditing standards or other professional standards that [PCAOB] determines satisfy the requirements of [the Act] and that were proposed by 1 or more professional groups of accountants.”¹³⁵ It also directed that any such standards be separately approved by the SEC. Pursuant to this law, PCAOB announced that auditors of public companies must comply with GAAS as articulated by AICPA.¹³⁶ The SEC approved these standards.¹³⁷ They thus became embodied in law through the weak form route.

As for AICPA’s works contributing to GAAP, they became embodied in law by weak form adoption as well, though in slightly different manner. In 1938, the SEC formally adopted a policy of recognizing accounting principles as acceptable for which “substantial authoritative support existed.”¹³⁸ AICPA bodies were the primary providers of such support through 1973, and continued to provide supplemental authority after that year. The SEC reiterated its recognition in 1973 when it also recognized FASB, stating that extant AICPA standards would continue to be so recognized unless superseded.¹³⁹ While the SEC has never similarly recognized AICPA’s post-1973

134. For example, references to obscure medical texts would simply not be probative of a physician’s standard of care in a negligence case.

135. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 103(a)(3)(B), 116 Stat. 756 (codified at 15 U.S.C. § 7214).

136. PROFESSIONAL STANDARDS, Rules 3200T, 3300T, 3400T, 3500T, 3600T (Pub. Co. Acct. Oversight Bd. 2003).

137. Order Regarding Section 103(a)(3)(B) of the Sarbanes-Oxley Act of 2002, Securities Act Release No. 8222, Exchange Act Release No. 47745, 80 SEC Docket 142 (Apr. 25, 2003) [hereinafter SEC Order Approving PCAOB Initial Standards].

138. Accounting Series Release No. 4, Fed. Sec. L. Rep. (CCH) ¶ 72,005 (Apr. 25, 1938).

139. SEC, ASR No. 150, *supra* note 111, at 276 n.1.

supplemental contributions, it relies on them in enforcement actions¹⁴⁰ and has more indirectly recognized them.¹⁴¹

2. Incentives

Despite weak form embodiment in law of AICPA promulgations that bind public companies and their employees and advisors, the issue of incentives remains for AICPA as well as others similarly situated.¹⁴² In general, AICPA has incentives to work for its trade association members. Since its members are subject to promulgations of FASB and PCAOB (and the SEC), AICPA has incentives to assist these organizations in standard setting. It does this through comment letters and other drafting exercises that it knows are not destined to constitute authoritative standards. These contributions make it difficult to imagine AICPA's leadership withdrawing from the field of accounting standard setting after having led it for nearly a century, whether or not its work is protected by copyright.

On the other hand, after SOX the SEC ordained FASB as the national accounting standard setter, possibly erasing incentives for AICPA or any other body to contribute to standards-development by independent promulgations. This destruction of incentives, however, is not a matter of copyright law, making the question of incentives as a matter of copyright law moot. Some residual incentives to promulgate formal stances on accounting matters may remain to the extent that FASB's SEC-designation is neither irrevocable nor necessarily exclusive.¹⁴³ This incentive exists as a matter of competition for regulatory recognition, however, not so much as a consequence of the copyright regime.¹⁴⁴

Furthermore, neither SOX's creation of PCAOB nor the SEC's recognition of FASB alters the role AICPA plays in creating accounting standards for entities outside the jurisdiction of the federal securities laws. These include private enterprises, not-for-profit organizations, individuals, and

140. See, e.g., Avon Prods., Inc., Exchange Act Release No. 34-46215, 78 SEC Docket 70 (July 17, 2002); America Online, Inc., Exchange Act Release No. 34-42781, 72 SEC Docket 1009 (May 15, 2000).

141. First, PCAOB adopted AICPA-GAAS, including Statement of Auditing Standard No. 69, which defined the "GAAP hierarchy" that includes post-1973 AICPA promulgations. Second, in 2003 the SEC endorsed PCAOB's adoption of these auditing standards establishing the GAAP hierarchy. SEC Order Approving PCAOB Initial Standards, *supra* note 137.

142. Many persons may have incentives to participate in establishing accounting standards; existing literature establishes a "GAAP hierarchy," defining a priority among GAAP sources that begins with pronouncements of FASB and AICPA and concludes with a catch-all that includes articles, handbooks, textbooks and similar resources. See *supra* notes 133, 141. Some believe too many accounting standard setters exist. See Grossfeld, *supra* note 98.

143. This is the SEC's position. See *infra* Section II.C.3 (FASB's current statutory role).

144. See *Veeck v. S. Bldg. Code Cong. Int'l, Inc.*, 293 F.3d 791, 805 (5th Cir. 2002) (en banc), *cert. denied*, 539 U.S. 969 (2003) (plaintiff and other code writers have "survived and grown over 60 years, yet no court has previously awarded copyright protection for the copying of an enacted building code under circumstances like these"); see also Karjala, *supra* note 83 (noting that the 1980 BOCA opinion expressed reservations and it was only in the 1994 CCC case that such judicial protection was first expressed).

governmental entities. While these organizations and their advisors may be bound, as a functional matter of law, by applicable AICPA pronouncements, they are so bound as a result of weak form reference to these pronouncements in various legal materials, ranging from one-off judicial opinions to statutory or regulatory reference.¹⁴⁵

Withdrawing copyright from AICPA works could, in theory, reduce AICPA's production incentives, at least as a matter of quantity. As noted, however, some evidence suggests that AICPA over-produced quantities of materials, paying inadequate attention to quality.¹⁴⁶ On the other hand, a review of AICPA's financial performance and the role of sales in its budget suggest that copyright revenue is not a main reason or motivation for its production of materials.

As a percentage of total revenue, AICPA's sales hover around 18%.¹⁴⁷ Of AICPA's \$165 million in 2003 revenue, for example, \$31 million is from sales (in 2002, these figures were \$162 million and \$33 million).¹⁴⁸ AICPA's sales arms sustained significant losses and as of mid-2003 suffered a common stockholders' deficit of \$85 million, funded primarily by preferred stockholders.¹⁴⁹ While AICPA boasted positive net unrestricted assets from 1999 through 2001, it accumulated a deficit during 2002 and 2003, and ran a net revenue-expense deficit in each of those years.¹⁵⁰

These difficulties besetting AICPA likely reflect that AICPA's primary mission is to serve as a trade association for accountants. Trade associations are not in the business of making money. Not only are they not likely to be good at this, profit-seeking is likely to disaffect association members not sharing in profits as owners. AICPA's financial performance mirrors that of traditional guilds, not profit-seeking enterprises. Selling products is thus not exactly a good business for AICPA, providing no evidence that these revenue streams are a source of AICPA production incentives. It is thus difficult to conclude that copyright protection is an important motivator in inducing AICPA to contribute to standard-setting processes.

Finally, protecting AICPA copyright in its historical works would impair PCAOB's ability freely to use and distribute this work, including those it

145. *E.g.*, GOVERNMENT AUDITING STANDARDS ¶ 1.09 (U.S. Comptroller Gen. 2003). In some circumstances, courts have expressly rejected GAAP as a binding legal standard. *See, e.g.*, *Klang v. Smith's Food & Drug Ctrs.*, 702 A.2d 150, 155 (Del. 1997).

146. *See supra* text accompanying note 98; *see also* SEC, STUDY PURSUANT TO SECTION 108(D) OF THE SARBANES-OXLEY ACT OF 2002 ON THE ADOPTION BY THE UNITED STATES FINANCIAL REPORTING SYSTEM OF A PRINCIPLES-BASED ACCOUNTING SYSTEM (2003), *available at* <http://www.sec.gov/news/studies/principlesbasedstand.htm> (last modified July 25, 2003) [hereinafter SEC, STUDY ON ADOPTING PRINCIPLE-BASED ACCOUNTING SYSTEM].

147. AM. INST. OF CERTIFIED PUB. ACCOUNTANTS, 2002–2003 ANNUAL REPORT, *available at* <http://www.aicpa.org/about/annrpt/homepage.htm>.

148. *Id.* at 19. Sales derive from copyrighted accounting publications of the Accounting Principles Board ("APB") and the Committee on Accounting Procedures ("CAP"), as well its other promulgations that constitute supplemental sources of GAAP, and all AICPA's GAAS promulgations.

149. *Id.* at 30 n.12.

150. *Id.*

formally adopted as its own. This impairment could reduce the quality of standards PCAOB and other successor bodies produce. While this privilege can be important to successor bodies, it risks further impairing incentives in present bodies. That is, if AICPA knows successors (including PCAOB) can simply copy its promulgations, as well as use them as first drafts of new standards, AICPA incentives to produce may incrementally decline.

On balance, to the extent AICPA accounting materials are embodied in law and bear on the legal obligations of managers, accountants and auditors, the requirement of public domain may outweigh any residual incentive requirements for the AICPA. The standards are thus entitled to thin copyright protection, at best. This likely remains the case when rights to create derivative works are included in the calculus. The balancing inquiry is certainly far closer in the case of AICPA than with PCAOB (or FASB, as discussed below).

3. *Qualifying Conventions*

While resolving close cases in favor of derecognizing copyright is defensible given copyright's thin protection of standards and utilitarian underpinnings, other qualifying doctrines can be sought. These are intermediate measures between completely retaining and completely derecognizing copyright. Such measures can be tailored to circumstances in which standards embodied in law create public access needs yet are produced by private bodies requiring production incentives that copyright provides. They can also be adapted to provide authorization for third parties to create derivative works in appropriate cases, as where standards are complex and dynamic.

The most general copyright limitation applicable to standards embodied in law is due process. To the extent legal materials define rights and duties of citizens, they must be freely accessible or else run afoul of due process considerations. It is possible to treat this due process constraint as a qualifying doctrine in that persons denied access have a defense to charges of violating a standard or that copyright infringement would be excused.¹⁵¹ But this characterization is unsatisfactory because it does not promote access and it arises in an ex post context. Needed are mechanisms, ex ante, to promote free access, avoid resort to litigation in which such defenses are asserted and, in appropriate circumstances, authorize production of derivative works.¹⁵²

151. This characterization appears in both *Practice Mgmt. Info. Corp. v. Am. Med. Ass'n*, 121 F.3d 516 (9th Cir. 1997), amended by 133 F.3d 1140 (9th Cir. 1998), cert. denied, 524 U.S. 952 (1998), and Judge Wiener's *Veeck* dissent, in *Veeck v. S. Bldg. Code Cong. Int'l, Inc.*, 293 F.3d 791, 810 (5th Cir. 2002) (en banc), cert. denied, 539 U.S. 969 (2003).

152. Such qualifying doctrines are mentioned in the cases discussed in Section I.C. See *supra* notes 49–50 and accompanying text; *supra* note 39 and accompanying text. Judge Wiener's dissenting opinion in *Veeck* also mentioned implied license and waiver. 293 F.3d at 810. But such exercises of voluntary authorization or relinquishment of a known right are not adaptable for inclusion in an ex ante prescriptive framework. The doctrines may bear on any takings analysis arising from governmental embodiment of private standards in public law. See *infra* Section III.D.

Existing fair use doctrine may encompass many circumstances in which the copyright consequences of embodying standards in law are at issue. As Section I.D. demonstrated in discussing the scope of copyright protection, standards likely drive the broadest possible scope of fair use. As with due process, however, fair use is a defense to copyright infringement allegations, an ex post posture that a prudent framework for evaluating copyright standards embodied into law would rely upon only as a back-up.¹⁵³ Courts should use such doctrines to resolve disputes, but a coherent policy requires an administrative mechanism to provide solutions ex ante.

More promising ex ante solutions are compulsory licensing arrangements.¹⁵⁴ The Copyright Act provides numerous examples of these arrangements in which copyright is recognized but owners are obliged to grant licenses to use works at designated fee levels.¹⁵⁵ Properly designed, these can optimize competing policy objectives.¹⁵⁶ While critics note that they also reduce incentives for actors to search for privately negotiated terms of access,¹⁵⁷ these criticisms are inapposite to the context of standards embodied in law implicating due process concerns.

Others may object to using compulsory licensing for standards because they believe that standards deserve no copyright protection at all. These opposing views reflect the fact that compulsory licensing schemes are controversial. But they also suggest, rightly, that such an approach can be an ideal way to balance policy trade-offs in many weak form embodiment cases and would be particularly suitable in the case of AICPA.¹⁵⁸ It guarantees access while providing any needed funding.¹⁵⁹ They can also be used to

153. Copyright's idea-expression distinction and merger doctrine suggest a narrow scope of copyright protection for standards, before and after embodiment, but these tools are applied ex post. See *supra* Section I.D.

154. See *Practice Mgmt.*, 121 F.3d at 519.

155. E.g., 17 U.S.C. § 111 (2000) (cable television); 17 U.S.C. §§ 114–15 (2000) (sound recordings); 17 U.S.C. § 118 (2000) (public broadcasting); 17 U.S.C. § 119 (2000) (satellite); see also 17 U.S.C. § 116 (repealed 1993) (jukeboxes).

156. See generally Paul Goldstein, *Preempted State Doctrines, Involuntary Transfers and Compulsory Licenses: Testing the Limits of Copyright*, 24 UCLA L. REV. 1107, 1127–39 (1977).

157. Robert P. Merges, *Of Property Rules, Coase, and Intellectual Property*, 94 COLUM. L. REV. 2655 (1994); see also Robert P. Merges, *Contracting Into Liability Rules: Intellectual Property Rights and Collective Rights Organizations*, 84 CAL. L. REV. 1293 (1993).

158. See Barbara A. Ringer, *Copyright in the 1980's*, 23 BULL. COPYRIGHT SOC'Y 299 (1976). In fashioning compulsory licensing arrangements, U.S. lawmakers must assure compliance with applicable international treaties, including the Trade Related Aspects of Intellectual Property (TRIPs) treaty. See David Nimmer, *GATT's Entertainment: Before and NAFTA*, 15 LOY. L.A. ENT. L.J. 133, 147–50 (1995). Establishing compulsory licensing arrangements for standards embodied in law should easily satisfy TRIPs, which limits copyright restrictions according to reasonableness standards.

159. Another alternative is an open-access concept. Standard setters fix the work in an electronic format and retain copyright, but permit users in perpetuity free access and limited copying rights. See Samuel E. Trosow, *Copyright Protection for Federally Funded Research: Necessary Incentive or Double Subsidy?*, 22 CARDOZO ARTS & ENT. L.J. 613, 671–72 (2004). This guarantees access but provides no funding.

distinguish various rights that copyright law provides, ranging from rights to copy to rights to prepare derivative works.

Another useful qualifying convention may be administered by the governmental entity embodying standards in law. The entity could simply require a standard setter to provide greater access to recognized standards or to withdraw recognition of those standards. It could also address questions of derivative rights. A partial version of this approach is implicitly used by many federal governmental agencies when embodying standards into law through incorporation by reference.¹⁶⁰ This resembles the stance that the SEC now favors for FASB's promulgation of accounting standards, discussed next.

C. Semi-Strong Form: FASB

Federal securities laws vest the SEC with authority to define generally accepted accounting principles ("GAAP").¹⁶¹ The SEC traditionally discharges this responsibility by looking to accounting standards generated by professional organizations. In 1973, the SEC formally recognized FASB pronouncements as establishing authoritative GAAP.¹⁶² In 2002, SOX imposed boundaries on this traditional SEC policy, including requiring any recognized standard setter to be funded entirely by fees that Congress levies on public companies.¹⁶³

Pursuant to SOX, FASB applied to the SEC for recognition and the SEC approved this request.¹⁶⁴ In doing so, the SEC noted that such recognition is permitted under SOX's boundaries only when a standard setter is able to assist the SEC in meeting requirements of the federal securities laws, including helping to improve the reliability of financial reporting.¹⁶⁵ The SEC opined that FASB's overseer, the Financial Accounting Foundation ("FAF"),¹⁶⁶ met

160. Part III, *infra*, builds upon this insight to propose requiring the Director of the Federal Register to include an overall assessment of copyright consequences when approving federal embodiment of standards in law.

161. *See, e.g.*, Securities Act of 1933, 15 U.S.C. §§ 77g, 77s(a), 77aa(25) & (26) (2000).

162. SEC, ASR No. 150, *supra* note 111. Formal approval of FASB promulgations by the SEC is not required. In fact, FASB promulgations also address entities outside the SEC's jurisdiction. *E.g.*, FINANCIAL STATEMENTS OF NOT-FOR-PROFIT ORGANIZATIONS, Statement of Financial Accounting Standards No. 117 (Fin. Accounting Standards Bd. 1993). However, the SEC exerts significant influence over FASB and as a practical matter no accounting standard applicable to public companies is adopted without the SEC's functional approval. Congress also exercises direct oversight of FASB through various standing committees, and occasionally threatens to terminate its status or uses other means to influence the standards it promulgates. *E.g.*, Equity Expansion Act of 1993, H.R. 2759, 103d Cong. (1st Sess. 1993); DONALD E. KIESO, ET AL., INTERMEDIATE ACCOUNTING 871, 997-98 (10th ed. 2001); ARTHUR LEVITT, TAKE ON THE STREET, 109-13, 241 (2002).

163. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 108 (2002).

164. SEC Policy Statement Reaffirming FASB Status, *supra* note 111.

165. *Id.*

166. The Financial Accounting Foundation is a Delaware corporation organized in 1972 to operate exclusively as a Section 501(c)(3) entity under the Internal Revenue Code. In addition to overseeing FASB, it oversees Governmental Accounting Standards Board ("GASB"), promulgator

this and other SOX requirements.¹⁶⁷ With this congressionally mandated SEC recognition, FASB now receives 100% of its funding from congressionally levied fees on public companies.

1. Public Domain

As a result of the SEC's formal anointment of FASB in 1973, and its congressionally inspired reaffirmation in 2003, FASB's pronouncements are embodied in law. Preliminary doubt thus arises as to whether these pronouncements remain eligible for copyright. This is particularly so given that this otherwise private body is now funded entirely by congressionally levied fees. Based on these considerations, the SEC has drawn the policy conclusion that FASB should make its standards freely available. In a SOX-mandated study of the quality of U.S. accounting standards, the SEC explained:

[There is no] single, searchable database containing all of the authoritative guidance. . . . [S]uch a *database should be more readily available to accounting professionals. . . . [and] to financial statement users seeking to better understand the meaning of financial statements. . . .* FASB should have the responsibility for developing and maintaining the resource. . . . *[T]he key question is whether this resource should be freely available to the public or should be made available on a subscription or cost-per-access basis. [Given SOX's funding of FASB,] we believe that the long-run goal should be for the FASB's documents to be freely available.*¹⁶⁸

This SEC policy statement speaks firmly in declaring the importance of access and its reference to FASB's funding under SOX shows the irrelevance of FASB incentives.¹⁶⁹ On the other hand, the statement does not address rights to create derivative works that could promote incremental improvement of standards quality. A coherent policy should address this question as well.¹⁷⁰ Moreover, additional attention to incentives and to related policy

of accounting principles for governmental entities. This relationship and its problems are discussed below in this section.

167. SEC Policy Statement Reaffirming FASB Status, *supra* note 111. The SEC concluded that "the standards set by the FASB are recognized as 'generally accepted' under section 108 of the Sarbanes-Oxley Act." *Id.*

168. SEC, STUDY ON ADOPTING PRINCIPLES-BASED ACCOUNTING SYSTEM, *supra* note 146, pt. IV.E (emphasis added).

169. FAF's 2004 Financial Statements claim: "In 2003, FASB made its Statements available for downloading without charge from the Board's website." FIN. ACCT. FOUND., 2004 ANNUAL REPORT 29 (2005). This disclosure is potentially misleading in that (a) the materials are in *PDF* (portable data format, meaning secure against digital manipulation) and (b) only the most basic materials are so available, omitting those addressing the more difficult and uncertain areas of accounting, where legal risks arising from non-compliance are greatest. The website announces customary assertions of copyright and demands that users assent to their terms, including limitations on use, copying and distribution.

170. In FASB's case, the SEC participates alongside it in developing standards, not only in a supervisory capacity but as an independent standard setter. *See, e.g.*, The Last-In, First-Out Method of Accounting for Inventories, Securities Act Release No. 6325, Exchange Act Release No. 17912, 23 SEC Docket (July 2, 1981); Adoption of Requirements for Financial Accounting and Reporting

matters bear examination for their utility both as a complete assessment of FASB's status and for lessons applicable to many other contexts in which private standards are embodied in public law, particularly those following the semi-strong form route.

2. Economic Incentives

Until SOX, publication sales represented the lion's share of FASB's operating revenues. In 2002, before SOX took effect, FASB generated \$13.3 million in sales revenue with an additional \$3.9 million in revenue from private contributions.¹⁷¹ In 2003, after SOX, FASB received \$19.7 million from fees Congress levied on public companies to cover its entire budget and ceased accepting private contributions. Yet it continued to sell products, generating \$12.6 million in sales.¹⁷² Before SOX, sales proceeds may have been important to provide FASB not only incentives but sustenance;¹⁷³ after SOX, such proceeds are unnecessary for either purpose.¹⁷⁴

3. Non-Economic Incentives

FASB also has non-economic incentives to produce accounting standards. Unlike PCAOB's unique statutory production monopoly, SOX permits FASB competitors to vie for recognition as accounting standard setters.¹⁷⁵ The implicit theory is that competition among standard setters for recognition is desirable, and that a hierarchy among their pronouncements can be established, so that any number of potential standard setters could both compete for and gain SEC recognition.¹⁷⁶ This generates incentives for FASB to produce standards independent of sales from publications or copyright-induced incentives.¹⁷⁷ This view is confirmed by FASB's

Practices for Oil and Gas Producing Activities, Securities Act Release No. 5966, Exchange Act Release No. 15108, 15 SEC Docket 929 (Aug. 31, 1978); SEC Staff Accounting Bulletin No. 102, 75 SEC Docket 890 (July 6, 2001); SEC Staff Accounting Bulletin No. 101, 71 SEC Docket 590 (Dec. 3, 1999); SEC Staff Accounting Bulletin No. 99, 1999 WL 1123073 (Aug. 12, 1999). SEC promulgations would benefit considerably from the free ability to build upon FASB works.

171. FIN. ACCT. FOUND., 2004 ANNUAL REPORT (2005). Compare FASB's sales as a percentage of revenue of approximately 76% with AICPA (18%, *supra* text accompanying note 144) and the building code-producer in *Veeck* (33%, *supra* text accompanying note 69).

172. FIN. ACCT. FOUND., 2004 ANNUAL REPORT (2005).

173. As to incentives, compare *supra* note 141, noting observations that standard setters operated for generations with no judicial awards of copyright protection over their standards that are embodied in law.

174. Excess FASB revenues in 2003 were used to fund operations of its sister organization, GASB, discussed *infra* Section ILC.6.

175. That is the SEC's interpretation of SOX. See SEC Policy Statement Reaffirming FASB Status, *supra* note 111, at n.5.

176. For example, AICPA's Statement on Auditing Standards No. 69 provides a GAAP hierarchy among existing standards. See *supra* notes 131, 138, 139; see also *supra* Section I.D.

177. If recognizing multiple standard setters presents reconciliation or conflict risks then any number of potential standard setters can vie for SEC recognition, but the SEC ultimately would designate one.

application to the SEC for recognition as a statutory standard setter under SOX.¹⁷⁸

This policy and related competitive incentives also justify concluding that there is no reason to cement FASB's leadership position by advantages that copyright provides. That conclusion extends to derivative works. FASB competitors could freely use FASB standards to create derivative works, yielding competitors demonstrating superior capability to produce quality standards. Far from reducing FASB's incentives to produce requisite standards, the competition should reinforce them.

4. Standard Setter Independence

A standard setter's independence can influence the policy perspective with respect to copyright in its works.¹⁷⁹ FASB's independence hinges on an important securities law policy matter. SOX expressed concern that FASB's independence from the accounting profession was compromised by its practice of accepting contributions from the profession to fund its operations.¹⁸⁰ It addressed this concern by fully funding FASB. In doing so, however, it authorized FASB to use additional revenue sources, including from publication sales, but only if this does not impair its independence, in fact or appearance, in the SEC's judgment.¹⁸¹

FASB's independence can be influenced by whether and how it sells its products. One danger is that nominal product purchasers are clandestine contributors (or may be so perceived). FASB's pre-SOX practice was to provide complimentary subscriptions to its donors,¹⁸² a practice it ceased after SOX prohibited it from receiving contributions to preserve independence from subscribers.¹⁸³ Critical to the SEC's judgment about the effects of publication sales on FASB independence is whether sales are monopolized

178. It does not appear that any other body applied for recognition—including AICPA. FASB thus signals that it possesses incentives that others do not. In AICPA's case, it may have incentives to try, but in the political climate of the period when SOX was enacted, it had no chance of ordainment. See generally Lawrence A. Cunningham, *The Sarbanes-Oxley Yawn: Heavy Rhetoric, Light Reform (And It Might Just Work)*, 35 U. CONN. L. REV. 915 (2003).

179. *Veeck's* dissent made this point in considering the value to a standard setter of revenue streams from publications sales. See *Veeck v. S. Bldg. Code Cong. Int'l, Inc.*, 293 F.3d 791, 814–15 (5th Cir. 2002) (en banc) (Wiener, J., dissenting), cert. denied, 539 U.S. 969 (2003).

180. Before SOX, FASB was funded by a combination of private contributions, including from the accounting profession, and sales of its publications. For example, in 2002, before SOX, AICPA contributed \$2 per member to support FASB and AICPA boasts approximately 335,000 members. AM. INST. OF CERTIFIED PUB. ACCOUNTANTS, 2002–03 ANNUAL REPORT 13, 27 (2003).

181. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 109(i), 116 Stat. 745 (2002). The SEC's public statements authorizing FASB's funding from congressionally levied fees provides no indication that the SEC considered the effects of copyright on FASB's independence. ORDER REGARDING REVIEW OF FASB ACCOUNTING SUPPORT FEE UNDER SECTION 109 OF THE SARBANES-OXLEY ACT OF 2002, SECURITIES ACT RELEASE NO. 8389, Exchange Act Release No. 49290, 82 SEC Docket 669 (Feb. 20, 2004); see also *infra* text accompanying notes 188–193 (reviewing this SEC statement in relation to incoherence of the funding system SOX establishes).

182. FIN. ACCT. FOUND., 2004 ANNUAL REPORT (2005).

183. *Id.*

or competitive. If copyright is sustained, then FASB is the only source from which to buy its materials, directly or through licensees. This makes it easy to disguise contributions as sales. If products are freely available, unusually high-volume purchases from FASB would appear as red flags of influence-seeking. Accordingly, not recognizing copyright in FASB works advances SOX's legislative purpose of insulating FASB from parochial influence.¹⁸⁴

5. *Standards Quality*

In addition to the compelling policy objectives favoring relinquishing copyright to create free access for those legally subject to FASB pronouncements (and the public at large), a related policy concerns its effect on accounting standards. The SEC statement quoted above urging FASB to relinquish copyright was made in the context of a congressionally mandated SEC study concerning the quality of U.S. accounting standards. A wide debate erupted after the staggering accounting debacles of the early 2000s regarding whether FASB's GAAP is too dense and rule-bound or too general and principles-based.¹⁸⁵ This criticism, which is legitimate, may evidence skewed incentives to produce greater quantities of standards rather than standards of superior quality. Taking copyright's economic incentives out of the equation may thus enhance the quality of FASB's standards.¹⁸⁶

Permitting publishers to compete freely could produce considerable additional public benefits, further weighting the public policy balance towards derecognizing copyright to standards embodied in law using the semi-strong form route. This step could produce public benefits by promoting competition among providers for superior presentation of materials. Professional publishers likely are better equipped than trade associations or standard setters to publish materials in beneficial ways, in terms of presentation and distribution.¹⁸⁷ Similarly, freer availability of standards may expose them to a broader audience inclined to provide criticism that can be necessary to improve standards quality.

Absence of copyright need not deprive standard setters of rights to publish and sell materials. Subject to independence effects of allowing sales, official promulgators could enjoy an economic advantage from that status. For example, when the status of pronouncements is functional law, users

184. The relation among sales, copyright and independence often will be an important factor in evaluating copyright standards embodied in law. In fact, SOX applies the same SEC-determined test to the effect of sales on PCAOB's independence. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 109, 116 Stat. 745 (2002).

185. See *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984).

186. This point complements the related point that in a system where successive standard setters establish GAAP and GAAS, they may need to rely upon and use work of predecessors to maximize standards quality. See *supra* Section I.E.

187. A leading example is John Wiley & Sons, which serves as FASB's licensee and publisher and publishes well-regarded texts on GAAP and GAAS that are in turn copyrighted by AICPA. Others include publishers of legal materials: large houses such as Thomson, Reed Elsevier and Wolters Kluwer and smaller presses such as Anderson Publishing Co., Bureau of National Affairs, Carolina Academic Press, Law Office Systems and Practicing Law Institute.

require an official text, updated regularly. In intellectual property terms, an official standard setter's trademarks or service marks can carry substantial economic value in the marketplace.¹⁸⁸ Accordingly, FASB likely would still generate revenues from publications (as would PCAOB and perhaps even AICPA) whether or not related works were protected by copyright.

6. *Secondary Incentives: GASB*

As noted, while SOX commands funds for 100% of FASB's budget, FASB continues to sell products to generate revenues far exceeding its budget. It uses the excess to fund the standard-setting activities of its sister-organization, GASB, the accounting standard setter for governmental entities. This use of sales proceeds raises a host of further issues pivoting around what might be called secondary incentives—that is, a standard setter may benefit from incentives copyright provides not to produce its own standards but to fund production of standards by others.

In 2003, the Financial Accounting Foundation (overseer of both FASB and GASB) followed its traditional practice of providing audited financial statements covering activities of both FASB and GASB. In them, it presented revenues from contributions and sales separately for FASB and GASB. As SOX requires, the Foundation also prepared separate 2003 financial statements for FASB.¹⁸⁹ The only source of revenue presented in FASB's stand-alone statements is the SOX accounting support fees (of \$19.7 million, plus \$263,000 in services contributed).¹⁹⁰ The statements make no mention of any sales revenue. The Foundation explained that it reallocated these revenue sources from FASB to itself and to GASB.¹⁹¹

This reallocation is difficult to square with SOX, although SOX itself appears to be self-contradictory. One section of SOX directs that all of FASB's budget is to be funded by congressionally levied fees while another section authorizes FASB's budget to be funded by sales of its publications.¹⁹² It is impossible to reconcile these two provisions.¹⁹³ If *all* of the budget is paid by fees, what happens to sales revenue? If sales revenue defrays budgetary costs, how can all of the budget be paid by fees? The Foundation

188. See Karjala, *supra* note 83.

189. Sarbanes-Oxley Act § 108(b)(2).

190. FINANCIAL ACCOUNTING STANDARDS BOARD, 2003 FINANCIAL STATEMENTS 1 (2004).

191. *Supra* note 182, at 30.

192. Section 109(c)(1) of SOX states that “*all* of the budget of the standard setting body referred to [FASB] . . . shall be payable from annual accounting support fees . . .” Sarbanes-Oxley Act § 109(c)(1) (emphasis added). Section 109(i) states that “Nothing in this section shall be construed . . . to prevent such organization from utilizing additional sources of revenue for its activities, *such as earnings from publication sales*, provided that each additional source of revenue shall not jeopardize, in the judgment of the [SEC], the actual and perceived independence of such organization.” Sarbanes-Oxley Act § 109(i) (emphasis added).

193. Equally unhelpful is sub-section (f), which states: “The amount of fees collected under this section for a fiscal year on behalf of . . . the standards setting body . . . shall not exceed the recoverable budget expenses of the . . . body . . .” Sarbanes-Oxley Act § 109(f). Recoverable budget expense may be determined before or after sales revenues are absorbed.

resolved this contradiction in SOX by reallocating FASB's revenue from publication sales to itself and to GASB, and by funding all of FASB's budget with congressionally levied fees.

Increasing funding for GASB is desirable.¹⁹⁴ The Foundation's approach to meeting this goal, however, exposes a complex problem of incentives and budgeting. GASB may need these funds to provide both incentives and sustenance. Yet the funds are derived from sales of products whose production requires no incentives (SOX pays for it), by a body (FASB) whose operations require no funding from copyrighted sales.¹⁹⁵

The conundrum is due to the SOX funding system, which is incoherent in two ways. First, public companies must support GASB standards applicable to governmental entities by contributing funds Congress intended to support FASB. Second, public companies must support FASB standards applicable not only to them but also to not-for-profit organizations, private enterprises, and individuals.

This incoherence can be corrected by using the classification scheme this Article suggests. As to FASB, its promulgations applicable to public companies should be seen as taking the *semi-strong form* route into public law, paid for by public companies, subject to SEC oversight, and therefore should be treated as in the public domain. FASB promulgations applicable to other persons should be seen as taking the *weak form* route into public law so that FASB can retain copyright in these works (subject to qualifying conventions guaranteeing access) to recoup from sales the proceeds necessary to provide incentives and sustenance to support this undertaking.

For GASB, three alternatives appear. First, it could be recognized and funded by statute on terms equivalent to PCAOB, with fees levied on governmental entities to which its standards apply. Under this approach, its promulgations would take the *strong form* route into public law for which no copyright is necessary or appropriate. While this is probably the superior alternative,¹⁹⁶ two other options appear. GASB could be (1) so recognized and funded on terms equivalent to FASB, so that its promulgations are seen as taking the *semi-strong form* route into law with similar consequences or (2) permitted to retain copyright in its promulgations, and treated as taking the *weak form* route into legal recognition (also subject to qualifying conventions guaranteeing access).

The incoherence in SOX's funding system and the suggested menu of alternatives to resolve it arise, in part, because no one is responsible for making the required classification determinations.¹⁹⁷ That is, in addition to

194. GASB needs both funding and insulation from parochial pressures that occasionally threaten its existence. See Opinion, *GASB Faces the Fight of Its Life*, ACCT. TODAY, Jan. 19, 1998.

195. See *supra* Section III.C.2.

196. FAF is seeking this route in funding GASB. See FIN. ACCT. FOUND., 2004 ANNUAL REPORT (2005). It lacks legal power to order funding; instead, it seeks to persuade governmental entities to which its accounting standards apply to provide support voluntarily.

197. The SEC approved FASB's 2004 funding from fees Congress levied on public companies. ORDER REGARDING REVIEW OF FASB ACCOUNTING SUPPORT FEE UNDER SECTION 109 OF THE SARBANES-OXLEY ACT OF 2002, SECURITIES ACT RELEASE No. 8389, Exchange Act Release

the absence of a classification framework for evaluating copyright to standards embodied in law, there is no institutional mechanism for providing solutions. In the next Part, the classification scheme is generalized and institutional mechanisms are identified to implement it.

III. GOVERNMENTAL STRATEGY

The evolution in SEC policy concerning recognizing accounting standards promulgated by others shows the range of possible approaches to implementing such a governmental strategy. Until 1973, the SEC sought to rely extensively on the private sector, by pointing to AICPA bodies to establish standards; from 1973 through 2002, it strengthened its reliance upon such bodies and simultaneously bolstered its influence over them. Since 2002, that influence has risen to the congressional level, with SOX establishing and funding PCAOB to promulgate GAAS and defining FASB's attributes and funding to establish GAAP.

The SEC's policy of relying upon such bodies outside the formal federal budget reflects a governmental off-balance sheet financing strategy. But the SEC's experience of increasingly incorporating private bodies into formal public lawmaking shows the difficulties of achieving regulatory objectives when regulators lack direct control over the standard-setting process. The SEC has steadily ratcheted up its power over these bodies, indicating limitations on the regulatory effectiveness of deference to private standard setters. The SEC's experience—if not its historical policy—characterizes like efforts of other governmental entities.

All governmental uses of privately promulgated standards are intended, in part, to conserve governmental resources.¹⁹⁸ Government seeks to leverage its regulatory effectiveness and oversight by piggybacking on costs expended in the private sector. At least in the case of the federal government, it simultaneously seeks to preserve copyright in those privately promulgated standards.¹⁹⁹

This twofold policy is at war with itself, as the SEC recognized when it urged FASB to relinquish copyright over its standards in favor of providing free public access.²⁰⁰ Optimizing leverage necessarily entails reduced copy-

No. 49290, 82 SEC Docket 669 (Feb. 20, 2004). It observed without noting the contradiction that SOX both provides all of the budget for a standard setter and that a standard setter can generate revenue from publication sales (subject to preserving its independence). The SEC stated without explanation that it "considered the interrelation of the operating budgets of the FAF, the FASB and the Government Accounting Standards Board. . . ." *Id.* The SEC makes no mention of related effects on FASB's independence, standards quality or the funding system's incoherence. Nor did the SEC speak to FASB's pricing policies. *Id.*

198. *E.g.*, OMB Circular A-119, 63 Fed. Reg. 33,8545, 33,8555 (Feb. 19, 1998). Calculating costs to assess whether to use private standards or to develop regulations internally must address a variety of costs associated with delegation of functions. *See* Sidney A. Shapiro, *Outsourcing Government Regulation*, 53 DUKE L.J. 389 (2003).

199. *See* OMB Circular A-119, 63 Fed. Reg. 33,8545, 33,8555 (Feb. 19, 1998).

200. *See supra* text accompanying note 168.

right protection.²⁰¹ While these competing objectives cannot easily be reconciled, trade-offs can be crystallized using this Article's three-class scheme to relate the leverage function to its copyright consequences.²⁰²

Optimal leverage from using private standard setters occurs by the strategy that minimizes use of governmental resources while maximizing achievement of regulatory objectives. Resource conservation is maximized when private standards are used by passing reference, incorporating benefits of privately produced standards without associated costs. But while this weak form route maximizes resource conservation, it may not maximize regulatory objectives. Maximizing regulatory objectives is achieved through the strong form route standards take into law, by formal designation of a statutory standard setter; optimization is achieved when costs are met by a governmentally directed function, but not from governmental revenues. Intermediate leveraging occurs through the semi-strong form route.

Apart from leverage, governmental strategy of embodying private standards in public law using the semi-strong form route confronts two administrative law constraints.²⁰³ First, constitutional principles nearly as old as those prohibiting copyrighting judicial opinions limit governmental delegation of lawmaking functions to private parties.²⁰⁴ There may be some legitimate room for permitting private parties to perform lawmaking functions.²⁰⁵ But the assignment poses considerable questions of legitimacy²⁰⁶ and implicates transcendent issues of democracy.²⁰⁷ Second, a powerful norm pulsing through the administrative lawmaking function requires publication of regulatory promulgations in the spirit of open government and public access to law.²⁰⁸ Federal lawmakers respect these animating themes

201. Achieving the objective of copyright preservation is possible in the weak form route, is not possible when using the strong form route and remains difficult in the semi-strong form route.

202. My denomination of the governmental strategy as providing regulatory leverage receives the more stinging cast of an "aggravated free lunch" in Malla Pollack, *Purveyance and Power, or Over-Priced Free Lunch: The Intellectual Property Clause as an Ally of the Takings Clause in the Public's Control of Government*, 30 SW. U. L. REV. 1, 134-35 (2000).

203. These do not arise in the strong form route when a promulgator is a functional lawmaker and follows prescribed publication requirements nor in the weak form route when there is no pretense of lawmaking and associated materials are or are not made widely available.

204. See *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936).

205. A middle ground of private participation in regulatory practice is called negotiated rulemaking. See *Negotiated Rulemaking Act*, Pub. L. No. 101-648, 104 Stat. 4969 (codified at 5 U.S.C. §§ 561-570); Philip J. Harter, *Negotiating Regulations: A Cure for Malaise*, 71 GEO. L.J. 1 (1981).

206. See David M. Lawrence, *Private Exercise of Governmental Power*, 61 IND. L.J. 647 (1986); David V. Snyder, *Private Lawmaking*, 64 OHIO ST. L.J. 371 (2003).

207. See RICHARD J. PIERCE, JR., ET AL., *ADMINISTRATIVE LAW AND PROCESS* 10-28 (3d ed. 1999). To be distinguished from governmental delegation to private parties is the more contestable issue of legislative delegation to the executive branch or to administrative agencies. *E.g.*, *Whitman v. Am. Trucking Ass'n, Inc.*, 531 U.S. 457 (2001).

208. A good specific example is that SOX requires the SEC to approve all PCAOB standards using traditional administrative rulemaking processes beginning with release for public comment and concluding with publication in the *Federal Register*. See *supra* note 115. More general examples, all codified in the Administrative Procedure Act, include the following statutes: Freedom of Information Act of 1967, 5 U.S.C. § 552(a)(1)-(3) (2000); Federal Advisory Committee Act of

by comporting with due process footings upon which such laws are founded.²⁰⁹ Steps include publication of adopted laws.²¹⁰

To illuminate governmental choices in establishing policy, the following discusses various sources and processes used to embody standards in law, sorted according to this Article's three-class scheme. It also proposes implementation mechanisms to facilitate governmental navigation of these trade-offs. For the federal government, this involves appointing an administrative authority to serve a channeling function when receiving proposals from federal governmental entities to embody private standards in public law.²¹¹ Analogous mechanisms would be used at state and local governmental levels.²¹²

A. Strong Form

When a governmental authority promulgates standards for embodiment in law, no question of copyright arises, either because the standards assume the status of legislative enactment per se as a matter of due process (constitutional law) or because of the government works doctrine (the Copyright Act). Hundreds of federal agencies promulgate standards of various kinds routinely. A prominent example is the National Institute of Standards and Technology, created in 1901 as a non-regulatory federal agency within the Commerce Department to promote standards in a broad cross-section of fields.²¹³ The National Institute of Standards and Technology makes its website and its content widely accessible, noting that most "information presented on these pages is considered public information and may be distributed or copied."²¹⁴

In turn, federal law requires copies of governmentally generated standards to be deposited with the National Technical Information Service

1972, Pub L. No. 92-463, 86 Stat. 770 (1972); Government in the Sunshine Act of 1976, 5 U.S.C. § 552b (2000). See PIERCE, *supra* note 207, at 420–23, 476–85.

209. See PIERCE, *supra* note 207, at 226.

210. See Administrative Procedure Act, § 552(a)(1)(D) (2000).

211. For reasons of convenience described below, the Director of the Federal Register is likely best suited to assume this function for the federal government.

212. Coordination among governmental entities can be arranged through an array of existing bodies engaged in kindred cooperative undertakings. A leading example is the National Conference of Commissioners on Uniform State Laws ("NCCUSL"), an organization created and funded by states which produces hundreds of model or uniform legal codes or standards, including the Uniform Commercial Code, the Uniform Probate Code, and Uniform Rules of Evidence. Also helpful can be the American Bar Association, a private professional association of lawyers and producer of such works as the Model Business Corporation Act and the Model Rules of Professional Responsibility. Other useful associations include Council of State Governments, National Conference of State Legislatures, National Association of Counties, National City Government Resource Link, and U.S. Conference of Mayors.

213. Perhaps the most popular contribution of the National Institute of Standards and Technology is the Baldrige National Quality Program, which manages the annual Malcolm Baldrige National Quality Award to recognize performance excellence and quality achievement.

214. National Institute of Standards and Technology (NIST) Disclaimer Statement, http://www.nist.gov/public_affairs/disclaim.htm (last visited Sept. 15, 2005).

(“NTIS”).²¹⁵ This Service is the federal government’s clearinghouse for scientific and technical information produced by or for federal agencies.²¹⁶ Information includes results from scientific and engineering research, as well as economic and market information relevant to business and industry.²¹⁷ The NTIS catalogues, organizes, and disseminates resulting materials (totaling some 3 million items) to business, industry, academia and the general public. According to its website, the NTIS “receives no appropriations and sustains its operations through the sale of such documents to the public and by providing related information-dissemination services to other Federal agencies.”²¹⁸

One step removed from direct governmental production of standards is the anointment of a designated standard setter to produce standards embodied in law using the strong-form route. To date, PCAOB appears to be the sole example of a governmental standard setter Congress designates as residing outside the formal boundaries of the federal government.²¹⁹ Internal federal standard setters abound and numerous federal corporations exist,²²⁰ but the latter do not generally produce standards embodied in law as PCAOB does. PCAOB’s public-body characteristics, moreover, alleviate concerns that congressional delegations of lawmaking power to it are unconstitutional or illegitimate²²¹ and PCAOB follows to a tee the publication and other requirements necessary to the legitimacy of administrative agency lawmaking.²²²

Despite absence of federal PCAOB-equivalents, the PCAOB model may be appealing to governmental agencies.²²³ The SEC struggled for years with AICPA in developing auditing standards that the SEC preferred;²²⁴ SOX presented the ultimate showdown of replacing AICPA with PCAOB. Other federal agencies may elicit superior standard setting from private organizations by threatening to persuade Congress to follow a similar route in their regulatory domain. If necessary funding sources can be obtained outside the federal budget as with PCAOB, this can be an ideal way to generate standards

215. 15 U.S.C. 3704b-2 (2000); *see also* 15 C.F.R. pt. 1180 (2005).

216. 15 U.S.C. §§ 1151–1157, § 3704b (2000).

217. 15 C.F.R. § 1180.2 (2005).

218. National Institute of Standards and Technology, Section 515 Information Quality Standards, <http://www.ntis.gov/new/quality.asp?loc=7-2-0>. (last visited Sept. 15, 2005).

219. *See supra* Section III.A. At the state level, the National Conference of Commissioners on Uniform State Laws (NCCUSL) exhibits the strong form route of standards embodied in law. NCCUSL is created and funded by states for the purpose of drafting laws destined for state-adoption on a wide range of subjects from administrative law to zoning. *Cf.* Alan Schwartz & Robert E. Scott, *The Political Economy of Private Legislatures*, 143 U. PA. L. REV. 595 (1995); James J. White, *Ex Proprio Vigore*, 89 MICH. L. REV. 2096 (1991).

220. *See* 31 U.S.C. § 9101(2)–(3) (2000).

221. *See supra* Section II.A.2.

222. *See* *Lebron v. Nat’l R.R. Passenger Corp.*, 513 U.S. 374 (1995).

223. *See, e.g., supra* text accompanying note 196 (suggested approach for GASB).

224. *See supra* text accompanying notes 123–124 (SEC interaction with ISB).

while retaining regulatory control. Such an approach would also substantially eliminate difficulties associated with copyright to standards embodied in law.

B. Weak Form

While Dr. Samuel Johnson quipped that no one but a blockhead writes, except for money,²²⁵ the volumes of materials published suggest the cynicism in this hyperbole. The vast majority of such materials likely would be produced even absent copyright incentives to do so (so long as attribution norms are maintained). Nevertheless, copyright is designed to provide incrementally requisite incentives—not quite rewards—for this labor and its utilitarian underpinnings justify preserving such incentives, if only to promote production of the minority of materials for which copyright is an inducement. Thus, passing references to these materials, even to contribute significantly to deciding a judicial case or prescribing a legislative or regulatory policy, should respect such copyright.

Examples of how such private materials may be embodied in law following the weak form route abound. Two appeared in the cases discussed in Part I: (1) state legislators may reference valuation books on insured property as a basis for establishing insurance loss payouts²²⁶ and (2) a federal agency may reference medical coding systems as a basis for processing reimbursement requests.²²⁷ In these examples, governmental leverage is exploited by avoiding costs to generate standards. Preserving copyright promotes incentives for numerous standard setters to vie for regulatory recognition, helping the regulator to a menu of alternatives. Provided materials are sufficiently available and recognized to justify such invocation, public domain concerns of due process and access diminish to the vanishing point.

Similarly, the *Practice Management* court gave examples of standards referenced in federal regulations.²²⁸ All illustrate the weak form route standards take into law, akin to the classic case of judicial references to *Gray's Anatomy*. Thus copyright is not vitiated by: (1) federal court rules requiring attorneys to follow *The Bluebook: A Uniform System of Citation*, published by a group of law school journals;²²⁹ (2) an agency limiting reimbursable dental benefits to those listed in the reference work *Current Dental Terminology*, published by the American Dental Association;²³⁰ or (3) an agency limiting reimbursement for medical costs associated with mental disorders listed in *Diagnostic & Statistical Manual of Mental Disorders*, published by

225. 3 BOSWELL'S LIFE OF JOHNSON 19 (G.B. Hill & L.F. Powell rev. ed., 1934) (1791).

226. CCC Info. Servs. Inc. v. MacLean Hunter Mkt. Rep., Inc., 44 F.3d 61 (2d Cir. 1994).

227. Practice Mgmt. Info. Corp. v. Am. Med. Ass'n, 121 F.3d 516 (9th Cir. 1997), *amended* by 133 F.3d 1140 (9th Cir. 1998), *cert. denied*, 524 U.S. 952 (1998).

228. *Practice Mgmt.*, 121 F.3d at 519 n.5.

229. *E.g.*, 11TH CIR. R. 28-1(k).

230. 32 C.F.R. § 199.13(e)(2) (2004).

the American Psychiatric Association.²³¹ In each case, constitutional and prudential limitations assure related access. Such materials would not be entitled to such recognition unless they were readily available for access.

When such materials supply a more general basis of legal obligations, additional qualifying conventions are necessary. Part II's discussion of AICPA's role in promulgating accounting standards for public companies illustrated this. Weak form references to these standards may not justify vitiating related copyright, but as sources of functional law, qualifying doctrines of fair use, compulsory licensing, or regulations mandating access are necessary to meet due process requirements. Attention to the role of rights to create derivative works can also be important. At present, however, no mechanism exists for establishing these administrative necessities, except on an ad hoc basis through federal adjudication.

C. Semi-Strong Form

Between the relatively easy classes of cases arising under the strong and weak form routes standards take into law are the more difficult cases following the semi-strong form route. In this context, a private-sector cottage industry promulgates standards, to which copyright's incentive structures may or may not contribute. Participants include organizations pursuing broad-gauged standard-setting and dissemination efforts²³² and specialized industry standard setters.²³³

How lawmakers embody standards produced by such organizations into public law varies. Some governmental authorities affirmatively encourage agencies to adopt private standards. Congress did so for the federal government in the National Technology and Transfer Act,²³⁴ directing agencies to adopt private sector standards whenever practicable and appropriate; executive branch implementing guidance directed agencies to preserve copyright in such standards when embodied in law.²³⁵ Agencies follow a regulated and routine

231. 32 C.F.R. § 199.2 (2004).

232. The National Information Standards Organization ("NISO") website boasts: "Standards are big business today and NISO has many partners in the standards area. The latest U.S. directory of standards developers lists over 700 standards developers responsible for over 90,000 national standards." NISO, Standards: Putting Innovation to Work, <http://www.niso.org> (last visited Jun. 12, 2005). NISO identifies ANSI as the principal US standards-federation in that it accredits other standard setters (some 400 of them, including NISO). It also identifies the American Society for Testing Materials as sponsoring 128 standards committees for industry. NISO, The Standards World, <http://www.niso.org/world/index.html> (last visited Jun. 12, 2005).

233. ANSI and numerous other organizations filed amicus briefs in *Practice Management and Veck*. On its website, ANSI markets products promulgated by more than 60 standard-setting organizations. Am. Nat'l Standards Inst., eStandards Store: SDO Developers, http://webstore.ansi.org/ansidocstore/sdo_developers.asp (last visited Jun. 12, 2005).

234. Pub. L. No. 104-113, 110 Stat. 783 (1996).

235. OMB Circular A-119, 63 Fed. Reg. 33,8545, 33,8555 (Feb. 19, 1998).

process when doing so.²³⁶ This process differs somewhat from traditional administrative rulemaking, particularly as to publication requirements.

In traditional administrative rulemaking, agencies are required to publish resulting promulgations in the *Federal Register*.²³⁷ When embodying private standards in public law, however, Congress authorizes agencies to sidestep the publication requirement using an exception known as incorporation by reference.²³⁸ In particular, the Freedom of Information Act and implementing regulations direct that agencies incorporate copyrighted standards by reference into agency regulations.²³⁹ Rather than publish embodied standards in the *Federal Register* in full, agencies simply refer to them.

To be eligible for incorporation by reference under the statute, an agency must determine that standards are reasonably available to the class of persons affected by the publication.²⁴⁰ Agencies must then submit proposed regulations to the Office of the Federal Register, and regulations only become effective when published in the *Federal Register*. The Director of the Federal Register is charged with reviewing such submissions for approval or disapproval.²⁴¹ The Director's review includes a determination that materials incorporated by reference are reasonably available.

Reasonable availability does not require that materials be free. In fact, while some standard setters do not require payment for reproduction,²⁴² it is common for them to charge fees to defray associated publication and overhead costs.²⁴³ They tend to follow the approach the National Technical Information Service uses by charging fees to recoup associated production costs (likely to be far more essential than copyright royalties to generate production). However, nothing prevents standard setters from charging the monopoly rates that copyright law facilitates (as FASB does, with the SEC's blessing²⁴⁴) or limiting third-party creation of derivative works. Nor does the

236. See, e.g., Standards for Business Practices of Interstate Natural Gas Pipelines, 61 Fed. Reg. 39,053, 39,055 (Jul. 26, 1996); III FERC Stats. & Regs. Regulations Preambles ¶ 31,039 (Jul. 17, 1996) [hereinafter, FERC Order].

237. Administrative Procedure Act, 5 U.S.C. § 552(a)(1)(D) (2000). The process that SOX directs the SEC and PCAOB to follow in PCAOB standard setting illustrates legitimate traditional practice. See *supra* note 115.

238. See 5 U.S.C. § 552(a)(1)(D).

239. 5 U.S.C. § 552(a)(1) (2000); 1 C.F.R. 51.7(4) (2005); see also 28 U.S.C. § 1498 (2002).

240. 5 U.S.C. § 552(a)(1) (2000); 1 C.F.R. § 51.7(4) (2005).

241. See NAT'L ARCHIVES & RECORDS ADMIN., FEDERAL REGISTER DOCUMENT DRAFTING HANDBOOK, 6-1 (1998), available at http://www.archives.gov/federal_register/document_drafting_handbook/document_drafting_handbook_faq.html (last visited Jun. 12, 2005).

242. E.g., FERC Order, *supra* note 236.

243. *Id.* (citing ANSI, Why There Is a Charge for Standards and Standards Information, <http://www.ansi.org/why-chrg.html> (last visited Jun. 12, 2005) ("explaining why charges need to be assessed for standards even if obtained electronically, with no publishing costs")); see also ANSI, Why Charge for Standards, http://www.ansi.org/help/charge_standards.aspx?menuid=help (last visited Oct. 5, 2005).

244. See *supra* note 192 (SEC approval of FASB's budget).

process require lawmakers to publish resulting standards according to usual administrative practice.

The same process—with associated infirmities—applies when federal statutes direct agencies to incorporate private standards.²⁴⁵ To illustrate, the Consumer Product Safety Act directs the Consumer Product Safety Commission (“CPSC”) to use private standards when possible and consistent with regulatory objectives.²⁴⁶ CPSC adopted regulations governing the testing of bicycle helmets that incorporated, by reference, standards promulgated by private organizations.²⁴⁷ Regulations indicate that the Director of the Federal Register approved incorporation by reference.²⁴⁸ Following the Director’s guidelines, CPSC states the name and addresses of the standards organizations from which copies of these standards are available and that they are available for copying from the Secretary of the CPSC. They are not published in the *Federal Register*.

State and local governmental entities follow various processes to embody standards in law. This is illustrated by the building code cases.²⁴⁹ Codes were not referenced in passing but adopted formally by legislative bodies with binding effects.²⁵⁰ No additional legislative action appears to have been taken to promote access or address copyright consequences. This inaction left the conflict between public domain and copyright incentives for resolution by federal courts institutionally incapable of providing a comprehensive public policy framework.²⁵¹ In fact, neither the *BOCA* court nor any of the three opinions in *Veeck* recognized that vitiating copyright raises questions under the takings clause of the Constitution.²⁵²

Nor does it appear that any governmental authority recognized the consequences of *Veeck* for other standards within its scope. Consider standards adopted by the Department of Housing and Urban Development for manufactured housing. Following procedures established in the Administrative Procedure Act and others summarized above, it incorporated by reference model codes of the Council of American Building Officials and the National Fire Protection Association.²⁵³ Under *Veeck*, this embodiment vitiates

245. In legislation directing agencies to adopt private standards, Congress should specify copyright consequences by directing that a given standard setter make its works freely available, subject them to compulsory licensing or otherwise provide ex ante solutions to avoid the conundrum otherwise created.

246. See Consumer Product Safety Act, 15 U.S.C. § 2056(b)(1) (2000).

247. 16 C.F.R. § 1203.3 (2004).

248. *Id.* § 1203.3(b).

249. See *supra* Section I.C.1; see also *Veeck v. S. Bldg. Code Cong. Int’l, Inc.*, 293 F.3d 791 (5th Cir. 2002) (en banc), *cert. denied*, 539 U.S. 969 (2003); *BOCA*, 628 F.2d 730, 732 (1st Cir. 1980).

250. *Veeck*, 293 F.3d at 793; *BOCA*, 628 F.2d at 730.

251. See *supra* text accompanying notes 90–92.

252. The CCC court (the used car valuation handbook case) recognized this in passing. See *CCC Info. Servs., Inc. v. Maclean Hunter Rep., Inc.*, 44 F.3d 61, 73 n.29 (2d Cir. 1994) (citing N.J. Admin. Code 11:3-10.4 (1988); 11 N.Y. Admin. Code § 216.7(c) (1990)).

253. See 24 C.F.R. §§ 200.926b, 200 app. A, 3280.801 (2004).

copyright. But no mechanism exists to make this determination and no framework exists to govern it.²⁵⁴

D. Administration

Alternative institutional arrangements may be designed to facilitate classifying standards embodied in law for copyright and lawmaking purposes.²⁵⁵ For the federal government, an existing central participant in the embodiment process is the Director of the Federal Register, who oversees the process and can be assigned the additional task of classification. State and local governmental authorities would follow similar procedures in conformity with respective administrative and legal infrastructures.²⁵⁶

The Director of the Federal Register would be charged with evaluating the route taken, as weak, semi-strong or strong. The Director would determine the copyright effect of embodiment, applying the factors discussed in this Article.²⁵⁷ In all strong form cases, no copyright may be granted. In other cases, classification analysis and copyright effects would proceed as follows.

In weak form cases, copyright may be maintained, so long as the Director confirms that designated materials are widely available (this is an evaluation the Director makes under existing practice). If not, the Director should suggest to the submitting agency that it require access by regulation.²⁵⁸ Failing this, the Director must determine whether compulsory

254. Federal judges cite cascade effects on other works when upholding challenged copyright to standards embodied in law. *See, e.g., Veeck*, 293 F.3d at 806 (Higginbotham, J., dissenting); *Practice Mgmt. Info. Corp. v. Am. Med. Ass'n*, 121 F.3d 516, 519 (9th Cir. 1997); *CCC*, 44 F.3d at 74; *supra* text accompanying notes 40–41, 47, 59. Such judicial reticence is prudent as a matter of federal court competence; absence of a policy framework for resolving it is a national regulatory abomination.

255. Leading candidates include the Librarian of Congress, the Copyright Office, Copyright Royalty Judges, or the Director of the Federal Register. The Librarian of Congress and the Copyright Office possess requisite expertise concerning the scope of copyright protection. *See Liu, supra* note 91, at 147–66. Copyright Royalty Judges possess expertise concerning compulsory licensing arrangements. As federal law's gatekeeper, however, the Director of the Federal Register is best positioned to provide general channeling functions. Accordingly, as discussed in the following text, an effective approach would repose overall administration in the Director of the Federal Register, with specific directives upon it and these other government organs to coordinate particular aspects.

256. Virtually every state has adopted an administrative procedure act, ultimately modeled on the federal version, although derived from model codes promulgated by NCCUSL. *See RONALD A. CASS, ADMINISTRATIVE LAW: CASES AND MATERIALS 5* (4th ed. 2002) (This handily illustrates the need for standard setters to have the ability to prepare derivative works.).

257. To recapitulate, key factors are free public access (emphasizing copyright's thin protective scope for standards) and incentives (emphasizing quality, not quantity, and promoting standard setter independence). The shape of these factors will vary with a case's particulars, such as government's role in production (including under the government works doctrine and its independent contractor component), production incentives other than copyright, and the appropriateness of alternative qualifying conventions.

258. This suggestion can embolden an agency to pressure standard setters in ways the agency otherwise may hesitate to do. This can be useful in both negotiated rulemaking, *supra* note 201, and in the more general contexts in which agencies seek cordial relationships with those they oversee, including standard setters. *See IAN AYRES & JOHN BRAITHWAITE, RESPONSIVE REGULATION: TRAN-*

licensing is necessary. In this determination, the Director would coordinate with the Librarian of Congress, the Copyright Office, and Copyright Royalty Judges. These bodies are currently required to participate in administering the Copyright Act's existing compulsory licensing arrangements.²⁵⁹ All possess expertise to guide the Director in making necessary determinations.

In semi-strong form cases, the Director should make two procedural determinations, likely already required but worth emphasizing. First, to police delegation, agencies must exercise judgment and reach an independent determination of appropriateness as to private standards they embody in public law, to respect basic concepts reposing lawmaking functions in lawmakers. Second, to promote legitimacy, the Director should scrutinize incorporation by reference practices to concord with due process norms pervading traditional administrative processes,²⁶⁰ particularly concerning publication.²⁶¹ In certain circumstances, the agency mandate to make materials publicly available may not be met by incorporation by reference but may require publication in the *Federal Register*.²⁶²

In semi-strong form cases, the Director must make substantive determinations as to whether copyright is derecognized. If so, the government must determine whether, and to what extent, embodiment constitutes a taking under the Constitution. Not all embodiments constitute takings, particularly for standards whose authors intend them for this purpose.²⁶³ Such standard setters effectively grant an implied license to governmental entities to embody the standards in law.²⁶⁴ License scope includes permitting citizens to use such works, negating takings claims.²⁶⁵ Many embodiments that are takings will

SCENDING THE DEREGULATION DEBATE 199–203 (1992). For example, the SEC urges FASB to make its standards freely available, *supra* text accompanying note 168, but to maintain a cordial working relationship hesitates to mandate this result. If the Director of the Federal Register tells the SEC that it believes such a measure is necessary, the SEC can pass this on to FASB as a sympathetic goodwill ambassador rather than heavy-handed regulator.

259. Copyright Act, 17 U.S.C. §§ 111, 114, 115, 118, 119 (2005) (establishing compulsory licensing arrangements for various contexts); *id.* § 801 (effective May 31, 2005) (prescribing participation of these actors in administering such arrangements); *see supra* note 155 (discussing compulsory licensing).

260. *See* PIERCE, *supra* note 207, at 226.

261. Norms of publication and availability have assumed amplified importance in the digital age when dissemination of materials has become so much easier than historically was the case. *See, e.g.,* Electronic Freedom of Information Act Amendments of 1996, Pub. L. No. 104-231, §§ 3-22, 110 Stat. 3049 (1996).

262. *E.g.,* Administrative Procedure Act, 5 U.S.C. § 552(a)(2) (2000).

263. *See* Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984).

264. *Cf. Veeck v. S. Bldg. Code Cong. Int'l, Inc.*, 293 F.3d 791, 807, 817 n.59 (5th Cir. 2002) (en banc), *cert. denied*, 539 U.S. 969 (2003) (citing Christopher M. v. Corpus Christi Indep. Sch. Dist., 933 F.2d 1285, 1292 (5th Cir. 1991)).

265. It may be tempting to attribute alteration of copyright to standards embodied in law primarily to copyright doctrine and only secondarily to governmental action. Copyright law's merger doctrine negates copyright protection when an idea and its expression merge—without regard to why—and this could include embodiment in law. *See* Pollack, *supra* note 202. While this analysis is credible, it essentially ignores the undeniable fact that government action caused copyright's merger doctrine to trigger

amount to taking a relatively modest property interest.²⁶⁶ After all, under copyright doctrine, the scope of protection provided to standards is thin, even before embodiment in law.²⁶⁷

For such evaluations, the Director would follow existing procedures governing governmental takings, specifically those denominated as regulatory takings.²⁶⁸ Under existing law, administrative agencies are empowered to exercise judgment concerning takings rights, claims, and proceedings, subject to judicial oversight. In the proposed framework, the Director would require each agency to make such a determination but would also have *de novo* review over agency judgments. Similar to weak form cases, the Director of the Federal Register would consult with the Librarian of Congress, the Copyright Office, and Copyright Royalty Judges in reaching determinations. Directorial decisions would remain subject to judicial review for adequacy and constitutionality, as under existing law.²⁶⁹

In all cases, the Director also must address the question of derivative works. That is, can government or third parties freely revise standards embodied in law, and subject them to copyright alteration, without the standard setter's permission?²⁷⁰ This latitude is an important factor in limiting copyright to standards embodied in law, as it facilitates producing standards of higher quality. Accordingly, it must be possible to permit this in appropriate circumstances. A standard setter's reasonable objections can be addressed by negotiation between it and the Director, bearing in mind the framework this Article contributes.²⁷¹ Negotiations would occur when discussing other consequences, whether establishing terms of compulsory licensing arrangements, evaluating the nature and measurement of takings, or considering the need and scope of any regulations mandating access.

Modest legislative change would be necessary to create the administrative scheme contemplated, principally assigning responsibilities and

its vitiating effects. The relative causal weight of these factors likely varies with circumstances and participants would be entitled to negotiate over the issue.

266. See *supra* Section I.D.

267. See *supra* Section I.D. Analysis using the idea-expression distinction, for example, indicates thin protection of standards because they tend to address ideas expressible in relatively few ways. See *supra* text accompanying notes 81–84. Likewise, multiple prongs of the fair use doctrine point to an expansive scope of fair use, including the nature of standards as factual, the uses of them for training and compliance, and vying in the marketplace of ideas for embodiment in law. See *supra* text accompanying notes 85–88. Thin copyright protection can nevertheless be of considerable value. The key point is that measuring that value must account for the particular scope of protection at stake.

268. See David A. Westbrook, *Administrative Takings: A Realist Perspective on the Practice and Theory of Regulatory Takings Cases*, 74 NOTRE DAME L. REV. 717 (1999).

269. E.g., *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999); *Yee v. City of Escondido*, 503 U.S. 519 (1992); see generally *Veeck v. S. Bldg. Code Cong. Int'l, Inc.*, 293 F.3d 791 (5th Cir. 2002) (en banc), cert. denied, 539 U.S. 969 (2003); *BOCA*, 628 F.2d 730, 732 (1st Cir. 1980).

270. See Karjala, *supra* note 83, at 502 n.255.

271. Delineation and evaluation of all potentially relevant fact patterns potentially arising would require at least one entirely separate article, but the framework this Article contributes should be sufficient to define reasonable reference points for such negotiations.

defining the framework. First, the Federal Register Act would be amended to require the Director of the Federal Register to perform the proposed functions, in consultation with the other designated bodies.²⁷² Second, the Copyright Act would be amended to limit copyright's exclusive rights in accordance with the mandate so imposed on the Director, along lines contemplated by this Article's three-part framework.²⁷³ Third, the Copyright Act would be amended to direct cooperation by the Librarian of Congress, the Copyright Office, and Copyright Royalty Judges with the Director of the Federal Register to enable satisfying statutory duties.²⁷⁴

E. Loose Ends

Potential implementation challenges this proposal faces are dwarfed by the public access and publication considerations that government's leverage strategy creates but previously has ignored or hidden from public view. Moreover, implementation challenges likely appear more substantial than they are. Several issues illustrate, suggesting a variety of loose ends rather than substantial hurdles.

First, consider a standard setter's continuing rights to control use. That is, should a standard setter be required to accept a governmental embodiment or have rights to withdraw standards to prevent embodiment? While this seems a difficult question conceptually, as a practical matter it should be

272. New section 1512 of the Federal Register Act, 44 U.S.C., could be added as follows:

Section 1512. *Standards Embodied in Law.* The Director of the Federal Register shall review all standards proposed to be incorporated by reference for publication in the *Federal Register* to determine the effects of such embodiment in law on associated copyrights. The Director shall establish by regulation a framework for making such determinations having appropriate regard for the author, the work, those affected, and balancing the need for public access with the need to provide appropriate incentives for production under copyright law. In promulgating and carrying out such regulations, the Director shall consult with the Librarian of Congress, the Copyright Office and Copyright Royalty Judges to obtain expert guidance.

Legislative history may refer to scholarly contributions such as this Article and other sources to guide governmental actors in fulfilling statutory duties.

273. The Copyright Act's limitations on exclusive rights currently appear in 17 U.S.C. §§ 108–122, so a new § 123 could be added as follows:

Section 123. *Limitations on exclusive rights: Standards embodied in law.* Notwithstanding any other provisions of this Title, (1) no copyright shall be recognized in any standards embodied in law promulgated by or on behalf of the United States government or any agency or instrumentality thereof and (2) copyright to other standards embodied in law shall be limited in accordance with regulations promulgated by the Director of the Federal Register pursuant to 44 U.S.C. § 1512.

274. The Copyright Act's directives covering these bodies in administering existing compulsory licensing arrangements appear in 17 U.S.C. § 801 (effective May 31, 2005), with cross-references to the Copyright Act's sections imposing such arrangements (§§ 111, 114, 115, 118 & 119) (2000). So amendments would add a cross-reference to newly created § 123, *supra* note 273, and also provide as follows:

Section 801 (as amended). *Coordination with Director of the Federal Register.* The Librarian of Congress, the Copyright Office and Copyright Royalty Judges shall provide expert guidance to the Director of the Federal Register to enable the Director to discharge statutory responsibilities set forth in 44 U.S.C. § 1512 as contemplated by § 123 of this Title.

of limited significance. Most organizations whose standards are embodied in law seek this result and should eagerly cooperate. For others, difficult remaining issues are no more acute than in the absence of institutional mechanisms to resolve them.

Second, standards embodied in law do not necessarily remain embodied in law forever. A governmental authority may embody a standard in law at one time and later announce that meeting it is no longer legally required. This occurs, for example, when FASB promulgates an accounting standard that supercedes a previously applicable AIPCA standard.²⁷⁵ Such withdrawal should revive copyright in such works to the same extent that general principles of copyright law provide. The justification for altering copyright is embodiment in law and the work's removal from embodiment justifies reversing the alteration. While so returning such works to copyright protection can pose intriguing complexities, the stakes as a practical matter should be low. The value of such a copyright would be near zero in all but the rare cases where some archival value endured.

Third, classifying commentary accompanying standards embodied in law can present challenges. For example, FASB accounting standards adopted by majority vote sometimes include separate opinions from dissenting members.²⁷⁶ The best way to think about associated copyright effects is by analogy to dissenting judicial opinions. These inform law's shape, even if they do not constitute law. So for reasons akin to those applicable to other legal materials, they are in the public domain.

Fourth and finally, does embodiment in law of private standards render them law so that their interpretation involves the practice of law within the meaning of state regulation of lawyers? If so, then only lawyers qualified to practice in a given jurisdiction would be authorized to engage in this activity. In the case of accounting standards embodied in law, a tempting implication is that accounting becomes lawyering. Despite the temptation, boundaries clarify professional domains in this and numerous other contexts. Distinctions do not classify materials as legal or activities as the practice of law (this is to tilt at windmills) but denominate them as the authorized or unauthorized practice of law. Accountants and others interpreting standards embodied in law are engaged in the authorized practice of law.²⁷⁷ Treating private standards embodied in public law according to this Article's analytical framework thus should not raise complex problems otherwise associated with non-lawyers engaging in the practice of law.

275. See *supra* text accompanying note 139.

276. See Wanda A. Wallace, *Contrarians or Soothsayers*, CPA J., Dec. 2001 (examining 145 dissenting opinions from FASB standards expressed in its 28-year life and noting how these can be "extremely informative" and sometimes emerge years later as majority stances).

277. See Lawrence A. Cunningham, *Out-of-State Attorney Fee Forfeiture*, 8 CARDOZO L. REV. 1191, 1193-94 & n.25 (1987).

CONCLUSION

As a matter of national policy, Congress encourages governmental leveraging of regulatory functions by embodying privately promulgated standards in public law, the executive branch amplifies the policy to include protecting copyright in such private standards, and administrative agencies dutifully fulfill these mandates. State and local governments follow suit. The few federal courts that have addressed the consequences of this widespread practice contribute limited guidance, in part because the judicial branch can respond only in *ex post* cases and controversies.

Despite governmental ambitions, no one is accountable for evaluating issues of public access to such materials, which ultimately hinge on copyright law and pose subsidiary issues of administrative law. The case of accounting standards illustrates the many ways standards become embodied in law and resulting trade-offs. These illustrations—and the broader class of which they are part—show need to repose decisionmaking authority and accountability in governmental officials to make classification determinations and administer related copyright consequences. This Article contributes a framework for evaluation and nominates designated officials to perform these increasingly critical functions.²⁷⁸

278. Drafts of this Article bore the title: “Who Owns Accounting Standards?” The answer: they are part of the commons, mostly. Under the Article’s analysis, no one owns copyrights to any PCAOB standard or any FASB standard applicable to public companies; the public owns a right to compel fair licensing of AICPA standards as well as an expansive scope of fair use. Easy answers to such questions are elusive. *Cf.* Ghosh, *supra* note 30, at 655 (reporting the following aftermath of *Veeck v. S. Bldg. Code Cong. Int’l, Inc.*, 293 F.3d 791 (5th Cir. 2002) (en banc) (footnotes omitted):

An illustration of the stakes is provided by the facts surrounding the case of Peter Veeck. In June 2002, visitors to the Regional Web site, a forum for discussing and sharing the local law of Northern Texas and Southern Oklahoma, were confronted with the question “Who Owns the Law?” in bold red lettering. In equally bold lettering, the Web site provided the answer: “YOU DO!”

Not quite. The questions in the quotation and the draft’s original title are richer rhetorically than analytically. No one owns law or accounting standards. Questions concern rights to control access, to copy and to improve law or standards derivatively.

