

APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 23-50081

CANADIAN STANDARDS ASSOCIATION
PLAINTIFF - APPELLEE

v.

P.S. KNIGHT COMPANY, LIMITED;
PS KNIGHT AMERICAS, INCORPORATED;
GORDON KNIGHT
DEFENDANTS - APPELLANTS

Filed: August 9, 2024

Before: KING, WILLETT, and DOUGLAS, Circuit
Judges.

OPINION

KING, Circuit Judge.

Our prior panel opinion, *Canadian Standards Ass'n v. P.S. Knight Co.*, 108 F.4th 329 (5th Cir. 2024), is **WITHDRAWN**. The following panel opinion is **SUBSTITUTED**:

This international copyright case considers the alleged infringement of seven of Plaintiff-Appellee’s model codes, all of which were created and copyrighted in Canada. The district court, finding that Defendants-Appellants infringed Plaintiff-Appellee’s copyrights, denied Defendants-Appellants’ motion for summary judgment, granted Plaintiff-Appellee’s motion for summary judgment, and issued a permanent injunction against Defendants-Appellants. Because we find that the district court improperly applied the explicit and controlling holding of *Veeck v. Southern Building Code Congress International, Inc.*, 293 F.3d 791 (5th Cir. 2002) (en banc), we **REVERSE** the district court’s summary judgment decisions, **VACATE** the district court’s grant of injunctive relief, and **REMAND** with instructions to grant summary judgment in favor of Defendants-Appellants and to dismiss Plaintiff-Appellee’s copyright infringement claim.

I.

Canadian Standards Association (“CSA”) is a Canadian not-for-profit corporation. It has developed over 3,000 voluntary standards and codes in Canada, and it holds Canadian copyright registrations in its model codes and standards. CSA sells these codes to relevant tradespeople working in industrial fields in Canada. Forty percent of CSA’s works have been incorporated by reference into different regulations or statutes in Canada.

Seven of CSA’s copyrighted model codes are at issue in this case.¹ All seven of these model codes have been fully incorporated by reference into at least one Canadian

¹ Those seven model codes are the 2015, 2018, and 2021 editions of CSA’s Canadian Electrical Code; the 2015 and 2020 editions of CSA’s Propane Storage and Handling Code; and the 2015 and 2019 editions of CSA’s Oil and Gas Pipeline Systems Code.

statute or regulation. There is no evidence to suggest that any of these seven works have been incorporated by reference into any United States federal, state, or city law, rule, or regulation.

Gordon Knight is the president and sole shareholder of the Canadian company P.S. Knight Co., and the sole corporate director of the American company P.S. Knight Americas, Inc. (hereinafter, collectively, “Knight”). Knight is also the owner and operator of the website “Deep 6 Project,” formerly “restorecsa.com,” dedicated to discussing the copyright litigation between CSA and Knight. Knight, through his companies, sells competing versions of CSA’s seven copyrighted works, which Knight describes as, “Same Code[s]—Different Price,” and, “All the Code[s] at less than ½ the cost!”

A.

The dispute between CSA and Knight originated in 1985, when Knight’s father, Peter Knight, published the first “Electrical Code Simplified” book, which included references to CSA’s Canadian Electrical Code. CSA alleges that over time, the “Electrical Code Simplified” transformed from an annotated, shorter version of CSA’s model code to an exact replica. CSA attempted to acquire Peter Knight’s business, but in 2005, after negotiations broke down, CSA wrote a letter to Gordon Knight stating that “it wanted its copyright in the Canadian Electrical Code respected.” In 2011, after Gordon Knight officially assumed control of the company from his father, CSA again informed Knight that he had “no license [in the Canadian Electrical Code]” and even if there ever was a license, it “had been terminated since at least 2005.”

After Knight failed to oblige, CSA filed suit against Knight in Canadian federal court, alleging copyright infringement of its 2015 Canadian Electrical Code. The Canadian trial court ruled in favor of CSA,² and it enjoined Knight from reproducing, distributing, or selling any publication that infringes upon CSA's copyright in its 2015 Canadian Electrical Code. On December 7, 2018, this judgment was affirmed on appeal.

On June 17, 2020, Knight formed P.S. Knight Americas, Inc. in the State of Texas. On September 1, 2020, Knight applied for, and successfully registered, a U.S. Copyright for "Knight's Canadian Electrical Code, Part One: 24th Code Edition, 2018-2021" under the name "Canadian Electrical Code."³ Knight then began to produce his own versions of other CSA model codes. By June 18,

² The Canadian trial court held that (1) CSA owned a valid copyright in its 2015 Canadian Electrical Code under Canadian law; (2) Knight presented no valid evidence to support his defense that he was a co-author of the code; (3) Knight had no license to reproduce the code; and (4) Knight infringed CSA's copyright.

³ In a blog post published on October 18, 2020, Knight explained: "Next, we checked US copyright on the Electrical Code. It turns out that the Canadian Standards Association (CSA) somehow forgot to register copyright over this document, even while it was under litigation in Canada. Seriously. They spent well over a million dollars in Canadian Courts, arguing that they own all our electrical laws and they feverishly pointed to their registration of copyright in Canada but, amazingly, didn't bother to lock down copyright in the US. So we did. As you read this, the Canadian Electrical Code is the private property of PS Knight Americas Inc in the US. Can you just imagine the fuming at CSA headquarters as they read that last sentence? All that taxpayer money, all that time, and frustration and, frankly, embarrassment in the industry for their conduct -all of that to no avail. Wow. Must be a difficult day over there."

2021, Knight offered four competing versions of CSA's codes.⁴

On May 9, 2021, Knight authored a blog post explaining that he had “fled the Country” because “both sides of the Civil Service were now moving rapidly to imprison [him] and take all that [he] own[ed].” The blog post specified, however, that Knight's codes would be “unaffected” and that “[f]or months, [Knight] had been quietly transferring [his] assets out of Canada . . . to ensure continuity of service.” On July 20, 2021, CSA requested that the Canadian federal court issue a contempt order against Knight. The Canadian court found Knight in contempt and extended its previous injunction.

On November 5, 2021, the Canadian federal court permanently enjoined Knight from infringing CSA's copyrights by selling certain electrical, oil and gas pipeline systems, and propane codes.⁵ The Canadian court also prohibited Knight from “importing into Canada [any infringing works]” and operating any website for the purpose of infringing CSA's copyrights, and it awarded CSA

⁴ The four competing versions were: (1) Knight's Canadian Electrical Code, Part One: 24th Code Edition, 2018-2021; (2) Knight's Canadian Electrical Code – 25th Edition, 2021-2024; (3) Knight's Propane Storage & Handling Code – 2015 Edition; and (4) Knight's Oil & Gas Pipeline Systems Code – 2019 Edition.

⁵ More specifically: (1) Knight's 2021 Canadian Electrical Code, in violation of CSA's copyright C22.1.21: Canadian Electrical Code, Part 1; (2) Knight's 2015 Oil & Gas Code, in violation of CSA's copyright CSA Z662-15: Oil and Gas Pipeline Systems; (3) Knight's 2019 Oil & Gas Code, in violation of CSA's copyright Z662-19: Oil and Gas Pipeline Systems; (4) Knight's 2015 Propane Code, in violation of CSA's copyright B-149.2-15: Propane Storage and Handling Code; and (5) Knight's 2020 Propane Code, in violation of CSA's copyright B149.2-20: Propane Storage and Handling Code.

\$100,000 in statutory damages and \$75,000 in punitive damages.

B.

While this Canadian litigation was occurring, on November 20, 2020, CSA filed suit against Knight in federal district court in the Western District of Texas. In its amended complaint, CSA alleged that Knight infringed seven of CSA's copyrights in its model codes. CSA sought a declaratory judgment of invalidity and non-ownership of Knight's United States copyright registration. Knight responded by asserting counterclaims of invalidity or unenforceability of CSA's seven Canadian-copyrighted works.⁶ Both parties moved for summary judgment on their claims, defenses, and counterclaims.

On January 4, 2023, the district court granted CSA's motion for summary judgment in its entirety and denied Knight's motion for summary judgment in its entirety. The district court also granted declaratory judgment in favor of CSA, holding Knight's copyright registration invalid as a matter of law,⁷ and it granted permanent injunctive relief to CSA, enjoining Knight from further infringing any of CSA's seven copyrighted model codes. Knight appealed the district court's grant of summary judgment and its issuance of injunctive relief.

⁶ Knight also sought declaratory judgment that he was a co-owner or co-author in CSA's Canadian Electrical Code, but that issue was not appealed.

⁷ The district court ordered Knight to cancel his U.S. copyright registration with the U.S. Copyright Office. Knight does not appeal that decision and, thus, we do not disturb the district court's order.

II.

“Because this case is before the court on cross motions for summary judgment, we review the district court’s rulings de novo and construe all evidence and inferences in favor of the non-moving parties.” *Evanston Ins. v. Mid-Continent Cas. Co.*, 909 F.3d 143, 146 (5th Cir. 2018). “We examine ‘each party’s motion independently.’” *Balfour Beatty Constr., L.L.C. v. Liberty Mut. Fire Ins.*, 968 F.3d 504, 509 (5th Cir. 2020) (quoting *Springboards to Educ., Inc. v. Hous. Indep. Sch. Dist.*, 912 F.3d 805, 811 (5th Cir. 2019)).

“The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). There is a genuine dispute over a material fact if “the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” *McCarty v. Hillstone Rest. Grp., Inc.*, 864 F.3d 354, 357-58 (5th Cir. 2017) (citing *Boudreaux v. Swift Transp. Co.*, 402 F.3d 536, 540 (5th Cir. 2005)).

Additionally, we “review questions regarding foreign law de novo.” *Alameda Films SA de CV v. Authors Rts. Restoration Corp.*, 331 F.3d 472, 476 (5th Cir. 2003) (citing *Karim v. Finch Shipping Co.*, 265 F.3d 258, 271 (5th Cir. 2001)); cf. *Itar-Tass Russian News Agency v. Russian Kurier, Inc.*, 153 F.3d 82, 92 (2d Cir. 1998) (noting, in reviewing a district court’s application of Russian copyright law, that a “[d]etermination of a foreign country’s law is an issue of law”). Both the United States and Canada are signatories to the Berne Convention for the Protection of Literary and Artistic Works. When countries are signatories to the Berne Convention, we are “commit[ed] . . . to apply foreign copyright law when required.” *Indusoft, Inc. v. Taccolini*, 560 F. App’x 245, 250 (5th Cir. 2014), as

revised (Mar. 20, 2014) (citing *Itar-Tass Russian News Agency*, 153 F.3d at 90-91).

III.

To bring a successful copyright infringement claim, “a plaintiff generally must prove two elements . . . ‘(1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original.’” *BWP Media USA, Inc. v. T & S Software Assocs., Inc.*, 852 F.3d 436, 439 (5th Cir. 2017) (quoting *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991)). To prove this second element, a plaintiff must show: “(1) factual copying and (2) substantial similarity.” *Baisden v. I’m Ready Prods., Inc.*, 693 F.3d 491, 499 (5th Cir. 2012) (quoting *Positive Black Talk Inc. v. Cash Money Recs., Inc.*, 394 F.3d 357, 367 (5th Cir. 2004)). The second element has also been referred to as “unauthorized copying.” *See Peel & Co. v. The Rug Mkt.*, 238 F.3d 391, 394 (5th Cir. 2001).

At the outset, we must determine which law—Canadian or United States—should apply to each element of copyright infringement. Courts, including the Fifth Circuit, have held that the “ownership and essential nature of the copyrights alleged to have been infringed” are determined by the foreign law where the copyrights are held, and “United States law determines whether those copyrights have been infringed in the United States and, if so, what remedies are available.” *Itar-Tass Russian News Agency*, 153 F.3d at 84; *see also Alameda Films SA de CV*, 331 F.3d at 477-80 (applying Mexican law to copyright ownership); *Ennio Morricone Music Inc. v. Bixio Music Grp. Ltd.*, 936 F.3d 69, 72 (2d Cir. 2019) (applying Italian law to copyright ownership); *Saregama India Ltd. v. Mosley*, 635 F.3d 1284, 1290 (11th Cir. 2011) (“Initial ownership of a copyrighted work is determined by the laws in the work’s country of origin.” (internal citations

omitted)). Accordingly, we apply Canadian law to questions of copyright ownership, and we apply United States law to questions of infringement.

A.

On element one, we agree with the district court, and the parties do not dispute, that CSA owns valid Canadian copyrights in all seven of the at-issue model codes. Canadian copyright law creates a presumption that valid ownership of a copyright rests in the party named on the certificate of registration. Copyright Act, R.S.C. 1985, c. C-42, §§ 34.1(1), 53(2). Moreover, “so long as it is original, any writing may be the subject of copyright in Canada. This would include laws and regulations.” *P.S. Knight Co. v. Canadian Standards Ass’n*, 2018 FCA 222 at ¶ 18. Here, it is undisputed that CSA developed its codes in Canada and that “CSA has been awarded Canadian copyright registrations for its standards, including the seven which are at issue in this case.” Accordingly, the district court correctly decided that CSA’s seven Canadian copyrights are validly owned by CSA.

B.

The crux of this dispute hinges on whether Knight has engaged in “unauthorized copying” of CSA’s codes. See *Peel & Co.*, 238 F.3d at 394. Knight argues that his copying of CSA’s codes is not actionable under the United States’ Copyright Act, as CSA’s model codes have become “the law” of Canada, and, thus, Knight’s copying of that “law” was permissible under this court’s holding in *Veeck v. Southern Building Code Congress International, Inc.*, 293 F.3d 791 (5th Cir. 2002) (en banc). We agree.

In *Veeck*, the plaintiff, Southern Building Code Congress International (“SBCCI”), a nonprofit organization, developed and copyrighted model building codes in the

United States. *Id.* at 793. SBCCI encouraged local governments to enact its model codes into law by reference for no cost. *Id.* at 794. Two Texas cities, Anna and Savoy, chose to do so, incorporating by reference into their laws the model “Standard Building Code” written by SBCCI. *Id.* at 793. In 1997, defendant Peter Veeck posted Anna and Savoy’s local building codes on his noncommercial website. *Id.* In order to get a copy of the cities’ codes, Veeck purchased the 1994 Standard Building Code from SBCCI and copied and pasted the text directly onto his website. *Id.* Veeck did not specify that the codes were written by SBCCI. *Id.* SBCCI sued Veeck and “demanded that [Veeck] cease and desist from infringing its copyrights.” *Id.* at 794.

This court, sitting en banc, held that Veeck did not infringe SBCCI’s copyrights in its model building codes. *Id.* at 800. First, this court examined the issue of copyright ownership, and held that SBCCI “indisputably holds a copyright in its model building codes.” *Id.* at 794. Second, this court addressed copyright infringement and held that “[w]hen [model] codes are enacted into law, . . . they become to that extent ‘the law’ of the governmental entities and may be reproduced or distributed as ‘the law’ of those jurisdictions.” *Id.* at 802.

The facts of this case are similar to those in *Veeck*: defendants in both cases reproduced, without permission, copyrighted model codes that had already been fully incorporated by reference into at least one government statute or regulation. However, rather than apply *Veeck*, the district court attempted to distinguish the case. The district court noted that the merger doctrine and the government edicts doctrine—the two main frameworks applied by the *Veeck* court to reach its holding—both ad-

dress copyrightability, not infringement. Thus, the district court reasoned that *Veeck* is inapplicable because Canadian law is applied to questions of copyrightability, and Canadian law does not recognize the merger doctrine or the government edicts doctrine.

But our inquiry begins and ends with *Veeck*'s clear holding. *Veeck* explicitly stated that the question before the court was whether "Peter Veeck *infringed* SBCCI's copyright." *Id.* at 794 (emphasis added). In fact, *prior* to reaching its discussion of infringement, the *Veeck* court specifically decided the issue of copyrightability: "As the organizational author of original works, *SBCCI indisputably holds a copyright in its model building codes.*" *Id.* (emphasis added). In other words, by "indisputably" answering the copyrightability question at the outset of the discussion section, the only question that was left for the *Veeck* court to contend with was infringement. And, because United States law applies to questions of infringement, *Veeck* is outcome determinative.⁸

Our colleague in dissent would uphold the district court, focusing on *Veeck*'s analysis rather than its holding. But that interpretation directly contradicts the explicit language of *Veeck*. While the *Veeck* court may have muddied the waters by extensively utilizing copyrightability reasoning throughout its opinion, its holding is clear: model building codes are copyrightable, but once incorporated into law, they are not protected under the Copyright Act. As a three-judge panel, we are bound to follow *Veeck*'s holding.

⁸ For the same reasons, the dissent's allusions to Canadian court determinations are inapposite to this court's analysis of whether *Knight infringed* CSA's model codes.

Moreover, the dissent’s proposed path conflicts with the policy goals behind our international copyright laws. As noted above, “United States law determines whether [foreign] copyrights have been infringed in the United States and, if so, what remedies are available.” *Itar-Tass Russian News Agency*, 153 F.3d at 84. This is for good reason: “[A]n author who is a national of one of the member states of either Berne or the U.C.C., or one who first publishes his work in any such member state, is entitled to the same copyright protection in each other member state *as such other state accords to its own nationals.*” 5 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 17.05 (2023) (emphasis added); *see Itar-Tass*, 153 F.3d at 89 (quoting Nimmer and calling this statement “correct”). In short, we do not give foreign authors stronger copyright protection than that afforded to United States authors.

Under *Veeck*, it is not copyright infringement to copy and reprint “only ‘the law,’” where copyrightable model codes have been adopted by reference into law by a governmental entity. *Veeck*, 293 F.3d at 800. The only material difference between *Veeck* and this case is that Knight reprinted only “the law” of Canada while *Veeck* reprinted only “the law” of two U.S. cities. Holding *Veeck* inapplicable would improperly expand U.S. copyright protection for Canadian (and other foreign) model codes.

We are also not persuaded by CSA’s alternative arguments attempting to distinguish *Veeck*. First, CSA points out that *Veeck* dealt with model codes written and implemented in the United States, while this case deals with model codes written and implemented in Canada. This distinction is immaterial. *Veeck* decided that “[w]hen [model] codes are enacted into law, . . . they become to that extent ‘the law’ of the governmental entities and may

be reproduced or distributed as ‘the law’ of those jurisdictions.” *Id.* at 802. *Veeck*’s holding makes no distinction between the law of the United States and the law of any other jurisdiction. Accordingly, when Canadian jurisdictions incorporate CSA’s model codes by reference into their laws, CSA’s codes become “the law” of those Canadian jurisdictions, just as SBCCI’s codes became “the law” of Anna and Savoy, Texas.

Second, CSA highlights a distinction made by the *Veeck* court between “model codes” and “extrinsic standards.” *See id.* at 803-05. While “model codes” serve “no other purpose than to become law,” “extrinsic standards” require citizens “to consult or use a copyrighted work in the process of fulfilling their obligation” and have other “non-governmental uses.” *Id.* at 804-05. In fact, *Veeck* noted that it was “important” that the standards in that case were not created by “private groups for reasons other than incorporation into law.” *Id.* at 805. Here, posits CSA, the seven copyrighted works at issue have other nongovernmental purposes, and are thus distinguishable as “extrinsic standards.” A review of the record, however, indicates otherwise.

It is true that (1) CSA’s codes are sold to relevant tradespeople working in relevant industrial fields in Canada; (2) CSA’s codes are created to “promote improved consistency in . . . installations across the country” and “better protect . . . workers”; and (3) only 40% of CSA’s standards are referenced in government regulations. However, these reasons are the same reasons that safety standards are adopted as laws in the first place and are not inapposite with the conclusion that CSA’s main reason for producing its codes is to eventually be adopted and enforced by regulatory authorities. Just because only 40%

of CSA's standards are presently implemented into government regulation does not mean that CSA does not intend for all of them to be implemented eventually. In fact, the Canadian court noted that the 2015 version of CSA's Electrical Code specifically states in its introduction that it is a "voluntary code [made] *for adoption and enforcement by regulatory authorities*," and, as such, has been adopted by "federal, provincial and territorial governments" in Canada. *P.S. Knight Co.*, 2018 FCA 222 at ¶ 9 (emphasis added). The Canadian court also noted that CSA is accredited by the Canadian Standards Council—a federal Crown corporation—which is empowered to accredit organizations "engaged in standards development" in Canada, and then to approve those standards as "national standards." *Id.* Thus, CSA's copyrighted works, like the copyrighted works in *Veeck*, are "model codes" and are not "extrinsic standards."

Finally, both CSA and the district court contended that because Knight produces wholesale replicas of CSA's copyrighted works, it is copying CSA's model codes "as model codes," and not merely as Canadian law. CSA is correct that *Veeck* carved out a "model codes as model codes" exception. Specifically, the court noted that "the result in [*Veeck*] may have been different if *Veeck* had published not the building codes of Anna and Savoy, Texas, but the SBCCI model codes, as model codes." *Veeck*, 293 F.3d at 805. However, CSA is incorrect that the exception applies here. Knight copies CSA's codes entirely as "wholesale replicas" because that is how Canadian jurisdictions incorporate CSA's codes into law. There is no indication that Knight publishes anything extra—that is, any material that has not been incorporated into law. Thus, Knight is not publishing CSA's model

codes “as model codes,” but it is publishing CSA’s model codes only and to the extent that those model codes have become “the law” of Canadian jurisdictions.

* * *

Accordingly, the facts in this case are not so dissimilar from the facts in *Veck* as to merit distinction. Nor do these facts fit into any of *Veck*’s exceptions. As such, *Veck*’s holding applies with full force—because CSA’s model codes are incorporated into Canadian law, Knight’s copying of those codes is not infringement. The district court erred by concluding otherwise.

IV.

Knight’s actions did not constitute copyright infringement as a matter of United States copyright law under *Veck*.⁹ We **REVERSE** the district court’s summary judgment decisions and **REMAND** with instructions to grant summary judgment in favor of Knight and to dismiss CSA’s infringement claim. Additionally, because CSA’s claim now fails as a matter of law, we **VACATE** the district court’s grant of injunctive relief.

⁹ Because Knight’s actions are not infringement as a matter of law, we need not reach Knight’s appeal of the district court’s decision on fair use.

DOUGLAS, Circuit Judge, dissenting.

I agree with the majority that the crux of this dispute hinges on whether Knight’s copying of Canadian law was permissible under our holding in *Veeck v. Southern Building Code Congress International, Inc.*, 293 F.3d 791 (5th Cir. 2002) (en banc). However, because I interpret *Veeck* differently, I depart ways with the majority and respectfully dissent.

“To prove copyright infringement, a plaintiff must show ‘ownership of a valid copyright’ and ‘copying’ by the defendant.” *Batiste v. Lewis*, 976 F.3d 493, 501 (5th Cir. 2020) (citing *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991)). I agree with the majority that CSA owns valid Canadian copyrights in all seven of the at-issue model codes. But I disagree that *Veeck*’s holding on infringement is outcome determinative in this case.

Although *Veeck* considered whether one party *infringed* on another’s model codes, its analysis focused on whether model codes are *copyrightable*. 293 F.3d at 794. “Our short answer is that as *law*, the model codes enter the public domain and are not subject to the copyright holder’s exclusive prerogatives. As model codes, however, the organization’s works *retain their protected status*.” *Id.* at 800 (emphases added). In other words, model codes are copyrightable, but adopted law is not—and what is not copyrightable cannot be infringed. This is demonstrated throughout the opinion.

For example, in reviewing Supreme Court decisions on copyrightability, we found that “there is no reason to believe that state or local laws are *copyrightable*.” *Id.* at 796 (emphasis added). Those decisions “consistently [] enunciate the principle that ‘the law,’ whether it has its

sources in judicial opinions or statutes, ordinances or regulations, is not subject to federal copyright law.” *Id.* at 800. To that end, we held that “[a]s governing law . . . the building codes of Anna and Savoy, Texas cannot be *copyrighted*.” *Id.* at 796 (emphasis added).

Of course, *Veck* speaks to infringement. But to determine whether the model building codes of Anna and Savoy, Texas, could be infringed, the court needed to determine whether those codes were in fact *copyrightable*. And in a thorough opinion, our en banc court determined that once adopted as “the law” in the United States, those codes lost their copyright protection and could not be infringed upon. Knight argues that his copying of CSA’s codes is not actionable under the United States’ Copyright Act because CSA’s model codes have become “the law” of Canada, and, thus, Knight’s copying of that law was permissible under *Veck*.

But Canada has determined that CSA’s model codes, whether adopted into Canadian law and regulations or not, are copyrightable. *P.S. Knight Co. v. Canadian Standards Ass’n*, 2018 FCA 222 at ¶ 18. Canada, whose determinations on copyrightability are conceded by the majority and Knight, does not make a distinction between adopted and unadopted model codes. Accordingly, *Veck’s reasoning* is inapplicable because it is premised on our understanding that “the law” in the United States is not copyrightable, unlike it is in Canada.¹

¹ Although the district court approached this question differently, its opinion reinforces my understanding of *Veck’s* application to these facts. Focusing on the government edicts doctrine, the district court rejected Knight’s argument that the copyrights are invalid because nobody “can own the law.” “[T]he validity of a foreign copyright is determined based on compliance with the foreign government’s

Having distinguished *Veeck*, this case is fairly straightforward. As the district court found, “[t]he facts here present the rare case in which there is direct evidence that defendants copied plaintiff’s work.” Aware of this, Knight’s second argument is that the district court erred in granting summary judgment to CSA on Knight’s fair use defense. In applying the fair use doctrine, we consider the following factors:

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

17 U.S.C. § 107; *Bell v. Eagle Mountain Saginaw Indep. Sch. Dist.*, 27 F.4th 313, 321 (5th Cir. 2022). Here, the overwhelming balance of factors cautions against a finding of fair use.

First, Knight’s Codes are not transformative, as they are simply copies of CSA’s code. Beyond providing nothing transformative, their purpose is entirely commercial—Knight is not a nonprofit, but a business, who is actively engaged in undercutting CSA’s prices to make

copyright law, not United States law.” Further, courts have only applied the government edicts doctrine to laws of the United States, including our court in *Veeck*. Even the text of the Copyright Act limits copyright carve-out for government edicts to “any work of the United States Government.” 17 U.S.C. § 105(a) (emphasis added). But CSA’s works were “authored in Canada by a private Canadian organization and incorporated only into *Canadian* law.”

money for itself. See *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 562 (1985) (“The fact that a publication was commercial as opposed to a non-profit is a separate factor that tends to weigh against a finding of fair use.”). The commerciality of Knight’s use distinguishes this case from *American Society for Testing & Materials v. Public.Resource.Org Inc.*, 896 F.3d 437 (D.C. Cir. 2018) (*ASTM I*) and *American Society for Testing and Materials v. Public.Resource.Org Inc.*, 82 F.4th 1262 (D.C. Cir. 2023) (*ASTM II*). There, defendant was a nonprofit that hosted a *free* website with the purpose of increasing access to the law and other government materials. *ASTM I*, 896 F.3d at 443-44. These cases suggest that posting enacted laws for the purpose of educating members of the public is a transformative use. See *ASTM II*, 82 F.4th at 1268. But Knight was not a nonprofit, and though his copies cost less than CSA’s, charging \$60 is by no means free. Thus, *ASTM I* and *II* have no bearing on the instant matter.

Additionally, the propriety of Knight’s conduct—incorporating a new entity in the United States and transferring assets to that entity to be “outside the direct jurisdiction of the [Canadian] Federal Court” that held it in contempt—weighs against a finding of fair use. See *Harper & Row*, 471 U.S. at 562. (“Also relevant to the ‘character’ of the use is ‘the propriety of the defendant’s conduct.’”) (internal citation omitted).

Although the second factor may be neutral, the third factor also weigh against fair use, as Knight’s Codes are not transformative, and CSA’s works are copied in their entirety. See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 587-88 (“[A] work composed primarily of an original, particularly its heart, with little added or changed, is

more likely to be a merely superseding use, fulfilling demand for the original.”). Knight even advertises his code as “the same.” As to the fourth factor, it too weighs against fair use because, as the district court noted, there is evidence in the record that CSA has suffered market harm because of Knight’s actions. On balance, the factors weigh against a finding of fair use.

As a final note, Knight’s conduct in this case was egregious, and a contrary opinion would effectively condone this behavior. Having concluded that *Veck* is distinguishable and therefore not outcome determinative in this case and that the defense of fair use is unavailable to Knight, I would affirm the district court.

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

No. 1:20-CV-1160-DAE

CANADIAN STANDARDS ASSOCIATION,
PLAINTIFF-COUNTERDEFENDANT,

v.

P.S. KNIGHT CO., LTD., PS KNIGHT AMERICAS, INC.,
AND GORDON KNIGHT,
DEFENDANTS-COUNTERPLAINTIFFS

Filed: January 4, 2023

**ORDER GRANTING PLAINTIFF'S MOTION
FOR SUMMARY JUDGMENT,
DENYING DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT, AND MOOTING
PLAINTIFF'S MOTION TO STRIKE**

EZRA, Senior United States District Judge.

Before the Court are three motions. The first two are cross-motions for summary judgment. On May 18, 2022, Defendants P.S. Knight Co. Ltd., PS Knight Americas, Inc., and Gordon Knight (collectively, "Defendants") filed

a Motion for Summary Judgment of Unenforceability and Noninfringement of Copyright. (Dkt. # 62.) Also on May 18, 2022, Plaintiff Canadian Standards Association (“Plaintiff” or “CSA”) filed a Motion for Summary Judgment. (Dkt. # 63.) Both parties timely filed a Response and a Reply in Opposition to the other’s motion.¹ (Dkts. ## 65, 66, 68, 69.) The Court finds these matters suitable for disposition without a hearing, and, after careful consideration of the filings both in support of and in opposition to summary judgment, the Court—for the reasons that follow—**GRANTS** Plaintiff’s Motion for Summary Judgment in its entirety. (Dkt. # 63.) The Court **DENIES** Defendants’ Motion for Summary Judgment. (Dkt. # 62.)

The third motion before the Court is Plaintiff’s Motion to Strike Defendants’ Jury Demand. (Dkt. # 61.) Because this Order Granting Plaintiff’s Motion for Summary Judgment ends the liability questions in the case, the Motion to Strike is hereby **DENIED AS MOOT**. (Dkt. # 61.)

BACKGROUND

CSA is a Canadian non-profit corporation that develops over 3,000 voluntary standards and codes in Canada. (Dkt. # 31 ¶ 2.) In particular, CSA has a long history of writing electrical, propane storage and handling, and oil and gas pipeline standards. (*Id.* ¶ 3-5.) CSA has been awarded Canadian copyright registrations for its standards, including the seven which are at issue in this case (collectively, “CSA’s Copyrighted Works”):

¹ On June 16, 2022, Defendants filed a Miscellaneous Objection (Dkt. # 70), alleging that Plaintiff’s June 15, 2022 Reply to Defendants’ Motion for Summary Judgment (Dkt. # 69) was untimely. This objection is hereby overruled, as Plaintiff’s Reply was timely under the scheduling order in this case. (Dkt. # 43.)

1. The Canadian Electrical Code (the “CEC”) (versions published in 2015, 2018, 2021);
2. The Propane Storage and Handling Code (versions published in 2015 and 2020); and
3. The Oil and Gas Pipeline Systems Code (versions published in 2015 and 2019).

(CSA Appx. at 151-274.)² CSA’s Copyrighted Works are voluntary codes for adoption and enforcement by regulatory authorities. (CSA Appx. at 280.) Accordingly, parts of the CSA’s Copyrighted Works have been incorporated by reference into local and federal regulations and statutes in Canada. (CSA Appx. at 281, 288-89, 291, 442-46; Dkt. # 62-1 (“Knight Appx.”) at 127, 134.)

Gordon Knight is the president and sole shareholder of Canadian company P.S. Knight Co. (“PSK Canada”) and sole corporate director of American company P.S. Knight Americas, Inc. (“PSK Americas”). (CSA Appx. at 456-66.) Gordon Knight also operates a website known as “Deep 6 Project,” previously known as “restorecsa.com,” that discusses CSA and the copyright litigation between Defendants and CSA. (CSA Appx. at 460-61; *see also* Gordon Knight, Deep 6 Project, deep6diaries.com).

In 1985, Gordon Knight’s father, Peter Knight, published the first *Electrical Code Simplified* book, which included references with attribution to the CEC. (Dkt. # 31 ¶ 69.) The same year, Peter Knight incorporated PSK Canada. (*Id.*) CSA alleges that over time, Peter Knight’s *Electrical Code Simplified* transformed from an annotated, shorter version of the CEC to a more exact replica of the CEC. (*Id.* ¶ 71-72.) CSA attempted to acquire Peter Knight’s business, but negotiations broke down in

² CSA Appx. references Dockets ## 63-1 to 63-4.

2005. (*Id.* ¶ 73.) Subsequently, CSA alleges that it wrote a letter telling Peter Knight that he needed to cease replicating the CEC. (CSA Appx. at 585.) CSA alleges it also issued a similar letter to PSK Canada in 2011, once Peter Knight had sold PSK Canada to Gordon Knight. (*Id.*) The parties’ decade-long legal battle began a few years later.

In 2012, CSA brought a copyright action in Canadian federal court against Peter Knight, Gordon Knight, and PSK Canada, alleging that the *Electrical Code Simplified* infringed the CEC.³ (CSA Appx. at 627.) Just after CSA filed the 2012 action, Gordon Knight launched “Restore CSA,” now known as “Deep 6 Project,” a website in which he authored articles and blogs about the copyright litigation between CSA and Defendants. (CSA Appx. at 460, 469, 669.) In response, CSA filed its second suit in Canadian court against PSK Canada and Gordon Knight in 2015, alleging defamation. *See Canadian Standards Association v. P.S. Knight Co. Ltd.*, 2015 ONSC 7980 (Can-LII). PSK Canada and Gordon Knight then threatened to sell “essentially an identical copy” of CSA’s 2015 CEC, and CSA filed a suit for copyright infringement based on CSA’s copyright in the 2015 CEC. (CSA Appx. at 586.) The Canadian trial court ruled in favor of CSA, holding that:

- 1) CSA owns a valid copyright under Canadian law in the 2015 CEC;
- 2) Defendants presented no valid evidence to support their defense that Peter Knight was a co-author of the 2015 CEC;

³ On May 11, 2022, the Canadian court entered judgment for Plaintiff. *See Canadian Standards Association v. P.S. Knight Co. Ltd., Gordon Knight, and Peter Knight*, File No. T-1178-12 (Fed. Ct.). The *Electrical Code Simplified* is not at issue in this case.

- 3) Defendants did not have a license to reproduce or distribute the 2015 CEC; and
- 4) Defendants infringed CSA's copyright in the 2015 CEC.

(CSA Appx. at 580-612.) The Canadian court enjoined PSK Canada and Gordon Knight from reproducing, distributing, or selling any publication infringing on the 2015 CEC. (CSA Appx. at 580-612.) This judgment was affirmed on appeal on December 7, 2018. (CSA Appx. 275-441, 656.)

On June 17, 2020, Gordon Knight formed PSK Americas. (CSA Appx. at 672.) In a blog post titled "Knight's Code is Back!" and dated October 18, 2020, Gordon Knight described PSK Americas and its purpose:

Knight's Code is back. That's right folks, our release of the 2018-2021 Canadian Electrical Code, which the [Canadian] Court [r]uled against, is happily available once again . . . [s]o how can we re-release Knight's Code now? Well first "we," (that's me), incorporated a new entity in the US and transferred assets to that new entity. Knight's Code is re-released by PS Knight Americas Inc., from the US, and outside the direct jurisdiction of the [Canadian] Federal Court.

(CSA Appx. at 669.) Next, Gordon Knight applied for and registered a U.S. Copyright ("Knight's Copyright") under the name Canadian Electrical Code, for *Knight's Canadian Electrical Code, Part One: 24th Code Edition, 2018-2021* (ISBN 978-0-920312-64-3). (CSA Appx. at 681-83, 463-64.) The listed author of the work is Peter Slim Knight, the date of completion is 2018, and the date of publication is April 1, 2018. (CSA Appx. at 682-83.) Gordon Knight's October 18, 2020 blog post describes

Knight's Copyright as being a copyright on the same document as the 2018 CEC copyrighted by CSA:

It turns out that [CSA] somehow forgot to register copyright over this document, even while it was under litigation in Canada . . . [and] didn't bother to lock down copyright in the US. So we did. As you read this, the Canadian Electrical Code is the private property of PS Knight Americas Inc. in the US. Can you just imagine the fuming at CSA headquarters as they read that last sentence? [I]t's only \$60. Tell your friends!

(CSA Appx. at 669.) As of at least June 18, 2021, <https://psknight.com/> offered the following works:

1. *Knight's Canadian Electrical Code, Part One: 24th Code Edition, 2018-2021* (hereinafter "*Knight's 2018 CEC*") (CSA Appx. at 576) ("2018 Legacy Code – 24th Code Edition – Still available – Buy");
2. *Knight's Canadian Electrical Code – 25th Edition, 2021-2024* (hereinafter "*Knight's 2021 CEC*") (CSA Appx. at 576) ("Knight's Canadian Electrical Code contains the full [CEC] . . . all illustrations, explanations and descriptions therein are presented entirely and exactly as enacted by Governments.");
3. *Knight's Propane Storage & Handling Code – 2015 Edition* (hereinafter "*Knight's 2015 Propane Code*") (CSA Appx. at 578) ("[a]ll the Code at less than ½ the cost" of "CSA's Propane Storage & handling Code");
4. *Knight's Oil & Gas Pipeline Systems Code – 2019 Edition* (hereinafter "*Knight's 2019 Oil & Gas Code*") (CSA Appx. at 579) (advertising the product as "identical to other reproductions of this Code," and "Same Code – Different Price" as "CSA's Oil & Gas Pipeline Systems Code").

In a blog post titled “PS Knight Publishes Two New Codes” posted on May 24, 2021, Gordon Knight described his motivation for publishing *Knight’s 2015 Propane Code* and *Knight’s 2019 Oil & Gas Code*:

Every time the Civil Service financially harms PS Knight, we have to dream up ways to offset the damage. These new titles [*Knight’s 2015 Propane Code* and *Knight’s 2019 Oil & Gas Code*] are an example of that. As the damage they cause increases, so our response is increased . . . I’ll be blunt with you; the sum of financial damage to PS Knight over the course of the last decade of Civil Service litigations and harassment now exceeds \$24MM. That’s a lot to recover from but we’re working on it. And we’re just getting going . . . You can help us collect on that bill. These new books are a bargain . . . [b]uy lots of them. Buy them as presents, reference material, pieces of protest art.

(CSA Appx. at 763-64.)

In December of 2020, CSA requested the Canadian federal court issue an Order of Contempt against Defendants for:

“Resum[ing] reproduction, distribution and sales of infringing Knight Code publications through a newly incorporated entity, Knight Americas, contrary to the terms of the Judgment.”

Canadian Standards Association v. PS Knight Co., Ltd. And Gordon Knight, 2021 FC 770. In a July 20, 2021 Order, the Canadian court granted CSA their requested relief, extending the previous injunction to PSK Americas, and finding Defendants guilty of contempt for disobeying the judgment of infringement by selling *Knight’s 2018*

CEC.⁴ (CSA Appx. at 624-649.) The court made clear that the “Knight Parties have not avoided the terms of the [Canadian court’s previous] judgment or the jurisdiction of this Court by their attempts to shield their activities through Knight Americas.” *Id.* at 21. Furthermore, the “terms of Judgment cover other editions or versions of the Knight Code that would violate CSA’s copyright in the 2015 CSA Code,” including the later editions of 2018 and 2021.⁵ *Knight’s 2018 CEC* reproduced a “substantial part of the 2015 CSA code,” accordingly violating the prior judgment. *Id.* at 20.

On May 9, 2021, Gordon Knight published a blog post stating that he had “fled the country” because of a “Secret Hearing” that would take place on November 10, 2021, and that “both sides of the Civil service were now moving rapidly to imprison [him] and take all that [he] own[ed].” (CSA Appx. at 678.) He reassured his readers that “[f]or months, we have been quietly transferring PS Knight assets out of Canada . . . to ensure continuity of,” and “emphasize[d]” that “the products of PS Knight . . . are unaffected and still ship from Canada.” (CSA Appx. at 679.)

On November 5, 2021, the Canadian Federal Court permanently enjoined Defendants from exploiting the rest of CSA’s Copyrighted Works by selling:

⁴ There was also a third Canadian suit for infringement, for the sale of the 2018 CEC, but it was seemingly resolved by the Canadian court’s resolution of the appeal in the 2015 CEC case. (CSA Appx. at 628.)

⁵ In particular, the court ruled that “the 2021 Knight Code reproduces a substantial part of the 2015 CSA Code,” but would not be the subject of the contempt proceeding because it was not distributed by Defendants until after the show cause order. 2021 FC 770 at 17. The ruling on the 2021 CEC therefore comes directly from the November 5, 2021 ruling.

1. *Knight's 2021 CEC* in violation of CSA's copyright C22.1.21, Canadian Electrical Code, Part 1;
2. *Knight's 2015 Oil & Gas Code* in violation of CSA's copyright CSA Z662-15: Oil and Gas Pipeline Systems;
3. *Knight's 2019 Oil & Gas Code* in violation of CSA's copyright Z662-19: Oil and Gas Pipeline Systems;
4. *Knight's 2015 Propane Code* in violation of CSA's copyright B-149.2-15: Propane Storage and Handling Code; and
5. *Knight's 2020 Propane Code* in violation of CSA's copyright B149.2-20: Propane Storage and Handling Code.

(CSA Appx. at 1186.) The court also prohibited Defendants from “importing into Canada the Infringing Works” or operating a website for the purpose of making such infringing sales, and awarded \$100,000 in statutory damages and \$75,000 in punitive damages. (CSA Appx. at 1188.)

On March 18, 2022, one month after this Court denied CSA's preliminary injunction request, Gordon Knight posted a blog stating “Knight's Code is BACK!” and indicating that *Knight's 2021 CEC* and *Knight's 2018 CEC* were both available for sale, and “[t]he rest of our suite of products will be relaunched very soon.” (CSA Appx. at 962.)

LEGAL STANDARD

Summary judgment may be granted if the moving party shows there is no genuine issue of material fact, and it is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). Summary judgment shall be rendered when the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine dispute

as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-25 (1986); *Washburn v. Harvey*, 504 F.3d 505, 508 (5th Cir. 2007). A dispute regarding a material fact is “genuine” if the evidence is such that a reasonable jury could return a verdict in favor of the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

“Where the non-movant bears the burden of proof at trial, the movant may merely point to the absence of evidence and thereby shift to the non-movant the burden of demonstrating . . . that there is an issue of material fact warranting trial.” *Nola Spice Designs, LLC v. Haydel Enter., Inc.*, 783 F.3d 527, 536 (5th Cir. 2015) (quotations omitted). “When the moving party has met its Rule 56(c) burden, the nonmoving party cannot survive a summary judgment motion by resting on the mere allegations of its pleadings.” *Duffie v. U.S.*, 600 F.3d 362, 371 (5th Cir. 2010). Instead, the non-movant must identify specific evidence in the record and articulate how that evidence supports the party’s claim. *Willis v. Cleco Corp.*, 749 F.3d 314, 317 (5th Cir. 2014). Mere conclusory allegations are not competent summary judgment evidence, and thus are insufficient to defeat a motion for summary judgment. *Turner v. Baylor Richardson Med. Ctr.*, 476 F.3d 337, 343 (5th Cir. 2007). When ruling on cross motions for summary judgment, “the court views the record in the light most favorable to plaintiff when considering defendant’s motion, and the court views the record in the light most favorable to defendant when considering plaintiff’s motion.” *Thompson-Harbach v. USAA Fed. Sav. Bank*, 359 F. Supp. 3d 606, 614 (N.D. Iowa 2019).

DISCUSSION**I. HAVE DEFENDANTS INFRINGED CSA'S CANADIAN COPYRIGHTS UNDER US LAW**

Since Canada is a signatory to the Berne Convention,⁶ Canadian copyright holders enjoy the same rights under the Copyright Act as United States copyright holders. 17 U.S.C. §§ 104, 1203; *see also Jaso v. Coca Cola Co.*, 435 F. App'x 346, 352 n.4 (5th Cir. 2011) (“[P]ublished works authored by Berne nationals and domiciliaries are protected under U.S. copyright law”) (citation omitted). Under the Copyright Act, “[t]o prove copyright infringement, a plaintiff must establish (1) ownership of a valid copyright; (2) factual copying; and (3) substantial similarity.” *Armour v. Knowles*, 512 F.3d 147, 152 (5th Cir. 2007) (per curiam). The foreign law where the copyrights are held “determines the ownership and essential nature of the copyrights alleged to have been infringed” while the “United States law determines whether those copyrights have been infringed” and what remedies are available. *Itar-Tass Russian News Agency v. Russian Kurier, Inc.*, 153 F.3d 82, 84 (2d Cir. 1998); *see Alameda Films SA de CV v. Authors Rights Restoration Corp.*, 331 F.3d 472, 476 (5th Cir. 2003) (addressing plaintiffs’ rights in Mexican films under Mexican copyright law); *Saregama India Ltd. v. Mosley*, 635 F.3d 1284, 1290 (11th Cir. 2011) (“Initial ownership of a copyrighted work is determined by the laws in the work’s country of origin.”) (citation omitted); *Edmark Indus. SDN. BHD. v. S. Asia. Int’l (H.K.) Ltd.*,

⁶ The Court takes judicial notice of the fact that Canada is a signatory to the Berne Convention. *See* World Intellectual Property Organization, Contracting Parties, Berne Convention, <https://www.wipo.int/treaties/en/ShowResults.jsp>.

89 F. Supp. 2d 840, 843 (E.D. Tex. 2000) (citing *Itar-Tass*, 153 F.3d 82).

A. No Genuine Issue of Material Fact as to CSA’s Ownership of Valid Copyrights for the Seven Copyrighted Works

The bulk of Defendants’ argument relates to the first element of direct copyright infringement: whether CSA owns a valid copyright in its works. (See Dkts. ## 62, 66.) Proof of U.S. registration is not a prerequisite to suit if the work originated in a country that is a signatory to the Berne Convention. *Edmark*, 89 F. Supp. 2d at 844 n.1; see also 17 U.S.C. § 411(a) (requiring that only a United States work be registered or preregistered before a civil action for infringement can be instituted); *Fourth Est. Pub. Benefit Corp. v. Wall-Street.com*, 139 S. Ct. 881, 891 (2019) (stating that Congress removed § 411(a) registration requirement for foreign works to comply with the Berne Convention). A party relying on the registration exemption must sufficiently allege that the works are not United States works within the meaning of Section 101 of the Copyright Act. *DigitAlb, Sh.a v. Setplex, LLC*, 284 F. Supp. 3d 547, 555 (S.D.N.Y. 2018). Section 34.1(2)(a) of the Canadian Copyright Act “provides that if the name of the author is indicated on the work in the usual manner, there is a presumption that the author owns valid copyright.”

CSA has provided the Canadian copyright certificates for all seven of its Copyrighted Works, on which CSA’s name appears. (CSA Appx. 151-274.) CSA has also indicated that it qualifies for a registration exemption because the Copyrighted Works are Canadian. Defendants do not challenge any of these facts. Instead, Defendants argue that CSA’s copyrights are invalid because “[n]o one can own the law,” and CSA’s Copyrighted Works constitute

“the law” in Canada. (Dkt. # 62 at 1.) This argument fails, just as it did in the Motion to Dismiss. (Dkt. # 47.)

The government edicts doctrine—from which Defendants draw their argument—is an American legal doctrine that prevents the copyrighting of American “government work product” created in the course of official duties. *Georgia v. Public.Resource.Org, Inc.*, 140 S. Ct. 1498, 1504 (2020). This doctrine has no application to the validity of CSA’s Copyrighted Works. As explained above, the validity of a foreign copyright is determined based on compliance with the foreign government’s copyright law, not United States law. Defendants do not point to any Canadian legal doctrine resembling the American government edicts doctrine.⁷ This is fatal to their argument.

Even if the government edicts doctrine was relevant, Defendants’ argument would fail on its merits. As Defendants’ cases reveal, courts have only applied the government edicts doctrine to works that have been incorporated into the federal, state, or local laws *of the United States*. See *Veeck v. S. Bldg. Code Congress Int’l, Inc.*, 293 F.3d 791, 796 (5th Cir. 2002) (finding that building codes adopted by Texas municipalities are not copyrightable); *Int’l Code Council, Inc. v. UpCodes, Inc.*, No. 17 Civ. 6261 (VM), 2020 WL 2750636, at *6 (S.D.N.Y. May 27, 2020) (finding that building codes adopted into law by U.S. ju-

⁷ Moreover, the many proceedings between the parties in Canadian federal court show that the *opposite* is true under Canadian copyright law: copyright vests in “material incorporated by reference into statutes or regulations, like the CSA Electrical Code.” (CSA Appx. at 285); 2018 FCA 222 at 9. The fact that Canadian copyright law may be broader than United States copyright law on this topic does not present a barrier to protecting Canadian copyrights. See *generally Golan v. Holder*, 565 U.S. 302, 333 (2012).

risdictions are in the public domain). The text of the Copyright Act likewise limits the copyright carve-out for government edicts to “any work of the *United States Government*.” 17 U.S.C. § 105(a) (emphasis added). Defendants admit that CSA’s Copyrighted Works were authored in Canada by a private Canadian organization, and incorporated only into *Canadian* law.⁸ (CSA Appx. 470-75, 490-91; Dkt. # 62 at 10.) Accordingly, their challenge to the validity of CSA’s Copyrighted Works on the basis that they are “the law” fails as a matter of law.

B. No Genuine Issue of Material Fact as to Factual Copying

The second prong of infringement, factual copying, can be proved by either direct or circumstantial evidence. *Armour*, 512 F.3d at 152. While “[d]irect evidence of copying is rarely available because it includes evidence such as party admissions, witness accounts of the physical act of copying, and common errors in the works of [the parties],” *Fed’n of State Massage Therapy Bds. v. Mendez Master Training Ctr., Inc.*, 393 F. Supp. 3d 557, 567 (S.D. Tex. 2019), when available, direct evidence is dispositive. *See Enter. Mgmt. Ltd. v. Warrick*, 717 F.3d 1112, 1120 (10th Cir. 2013). In *Nat’l Conf. of Bar Examiners*, for instance, direct evidence established the defendant test preparation company’s factual copying of Multistate Bar Examination (“MBE”) questions. *Nat’l Conf. of Bar Examiners v. Multistate Legal Studies, Inc.*, 458 F. Supp. 2d 252 (E. D. Pa. 2006). The court noted how defendant’s “advertisements brag about how close its questions are” to those of the MBE, “reproduce MBE questions nearly

⁸ Defendants’ contention that some members of CSA are “based in the United States” does not change this finding. (Dkt. # 62 at 10.)

verbatim,” and “contain trivial variations” suggestive of copying. *Id.* at 256.

The facts here present “the rare case in which there is direct evidence that defendants copied plaintiff’s work.” *Mendez Master Training Ctr., Inc.*, 393 F. Supp. 3d at 567 (quoting *Nat’l Conf. of Bar Examiners*, 458 F. Supp. 2d at 256). Defendants openly advertise using the “same code” as CSA’s Copyrighted Works. (CSA Appx. at 685) (advertising that *Knight’s 2018 CEC* contains the “full Code,” including “all illustrations, explanations and descriptions therein are presented entirely and exactly as enacted by Governments”); (CSA Appx. at 576) (advertising the same about *Knight’s 2021 CEC*); (CSA Appx. at 578) (advertising *Knight’s 2015 Propane Code* as “[a]ll the Code at less than ½ the cost” and “identical” to CSA’s code); (CSA Appx. at 766) (advertising *Knight’s 2020 Propane Code*); (CSA Appx. at 579) (advertising the same about *Knight’s 2019 Oil & Gas Code* and *Knight’s 2015 Oil & Gas Code*).

Even if this were insufficient direct evidence, the side-by-side comparisons between Knight’s works and CSA’s copyrighted works demonstrate “probative similarity” that is “sufficient circumstantial evidence to establish factual copying.” *Mendez Master Training Ctr., Inc.*, 393 F. Supp. 3d at 568 (finding factual evidence of copying where plaintiff’s side-by-side comparison of the works revealed that defendant’s materials were all verbatim or near verbatim of the copyrighted works). The Court’s side-by-side comparison of the works reveals that they are almost identical to CSA’s Copyrighted Work, with only font changes and some slight typographical errors, as discussed in more detail in the following section. (CSA Appx. at 690-761.)

Defendants have not rebutted this direct evidence. Defendants merely restate that their reproduction of

CSA's Copyrighted Works does not violate United States law because they are copying "model code text which has been . . . adopted as the law in Canada." (Dkt. # 62 at 15.) Defendants' regurgitation of the government edicts doctrine fails for the reasons already discussed. *See supra* Section I(A). The court has no duty to search the record for material fact issues. Rather, as the party opposing summary judgment on direct infringement, Defendants were required to identify *specific evidence* in the record and articulate precisely how this evidence supports their claim. *RSR Corp. v. Int'l Ins. Co.*, 612 F.3d 851, 857 (5th Cir. 2010) (internal citations omitted). Defendants have failed to point to any evidence rebutting the direct evidence of factual copying, relying instead on a legal argument the Court has already rejected. This is insufficient to survive summary judgment on factual copying. *Id.*

C. No Genuine Issue of Material Fact as to Substantial Similarity

The Court turns to the final element of direct infringement, substantial similarity between the works. "To determine whether an instance of copying is legally actionable, a side-by-side comparison must be made between the original and the copy to determine whether a layman would view the two works as substantially similar." *Peel & Co., Inc. v. The Rug Mkt.*, 238 F.3d 391, 395 (5th Cir. 2001) (internal citation omitted). The issue of substantial similarity is generally an issue of fact for the jury. However, where no reasonable jurors could disagree, summary judgment is appropriate. *Id.*; *see also Glasscraft Door I, L.P. v. Seybro Door & Weathership Co., Inc.*, No. CIV.A. H-08-2667, 2009 WL 3460372, at *4 (S.D. Tex. Oct. 22, 2009) (finding substantial similarity as a matter of law between two door designs based on the court's review of the designs).

Defendants certainly copied CSA's Copyrighted Works, as "[t]he similarities are so striking" they "can only be explained by copying, rather than by coincidence, independent creation, or prior common source." *Mendez Master Training Ctr., Inc.*, 393 F. Supp. 3d at 568. In particular, the Court finds persuasive the declaration of Doug Morton, stating that after reviewing all the publications at issue, "Knight's publications differ only in the cover, legal notice pages, and the back page." (CSA Appx. at 688.) In conducting its own review of the materials, side-by-side, the Court agrees that a layman would view the Knight works as substantially similar to the respective codes it purports to copy. (CSA Appx. 690-761.) The excerpts provided indicate that the codes are broken down into the same sections and subsections, contain the same preface and appendix material, include the same tables and charts, and that the body text is copied verbatim or near verbatim from the relevant CSA Copyrighted Works. (CSA Appx. at 690-761.)

Tellingly, Defendants do not dispute the substantial similarity of their works to those of CSA. In fact, the identity of Defendants' books to CSA's Copyrighted Works was and is central to Defendants' business plan. Defendants' webpage trumpets how each book offers the "same code" as that of CSA's Copyrighted Works, and provides 1:1 comparisons of the cost of CSA's book with the corresponding Knight's code version:

Why purchase Knight's Code?

Same Code — Different price.

PS Knight's Code book: \$80

CSA's Code book: \$185

You save \$105. All the Code at less than ½ the cost!

(CSA Appx. at 774.) Gordon Knight’s blog posts double down on Defendants’ scheme, explaining that he registered a United States copyright over one of CSA’s Copyrighted Works “even while it was under litigation in Canada” because CSA “somehow forgot to register copyright over this document.” (CSA Appx. at 669) (explaining that CSA “didn’t bother to lock down copyright in the US. So we did.”)

II. DEFENDANTS HAVE NOT RAISED A GENUINE ISSUE OF MATERIAL FACT AS TO ANY RELEVANT DEFENSE

Defendants have the burden of proof on each of their affirmative defenses. *Fontenot v. Upjohn Co.*, 780 F.2d 1190, 1194 (5th Cir. 1986). Once CSA moved for summary judgment on Defendants’ affirmative defenses, the burden shifted to Defendants to set forth specific facts showing an issue for trial.

Over the decade of litigation between the parties, Canadian federal courts have issued comprehensive rulings rejecting the defenses Defendants now raise in this Court.⁹ (CSA Appx. at 275-442, 530-667.) CSA argues that because of international comity, the Court may summarily reject Defendants’ defenses of (1) co-authorship/co-ownership; (2) license; (3) fair use; and (4) merger. (Dkt. # 63 at 11-19.) In this case, however, the contours of this Court’s deference to the capable Canadian courts are more complex than CSA suggests. The requirements of comity are complicated by the demands of issue preclusion and the bifurcation of governing law into matters of ownership and matters of infringement.

⁹ The only new defense raised by Defendants is the government edicts doctrine, as discussed in Section I(A).

Under principles of international comity, a foreign court's judgment on a matter is conclusive in a federal court when (1) the foreign judgment was rendered by a court of competent jurisdiction, which had jurisdiction over the cause and the parties, (2) the judgment is supported by due allegations and proof, (3) the relevant parties had an opportunity to be heard, (4) the foreign court follows procedural rules, and (5) the foreign proceedings are stated in a clear and formal record. *Int'l Transactions, Ltd. v. Embotelladora Agral Regiomontana*, SA de CV, 347 F.3d 589, 594 (5th Cir. 2003). The Canadian litigation satisfies all five requirements. The Court's review of the Canadian record from the Canadian trial court and federal court of appeal indicates that there was jurisdiction over the cause and the parties, the judgments were amply supported by due allegations and proof, Defendants and CSA had opportunities to be heard, procedural rules were followed, and the record was clearly stated. (See CSA Appx. at 275-441, 580-612.) Moreover, Canadian courts are regularly recognized courts of competent jurisdiction. See *Block v. InterOil Corp.*, 373 F. Supp. 3d 683, 689 (N.D. Tex. 2019). Finding no issue with the basics of comity, the Court will hold the Canadian judgments conclusive as to the issues tried upon the merits therein, to the extent that they satisfy the requirements of collateral estoppel.

Under the doctrine of collateral estoppel, "once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation." See *Montana v. United States*, 440 U.S. 147, 153 (1979). So long as a party has been given a "full and fair opportunity to litigate" a matter, he or she is precluded from further litigation of

the same matter. *Id.* Collateral estoppel may be used offensively to “estop a defendant from relitigating the issues which the defendant previously litigated and lost.” *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 329 (1979). Here, there is no doubt that Defendants had an opportunity to fully and fairly litigate their defenses in Canadian court. All three named Defendants were represented in the Canadian actions, and had every reason to vigorously defend themselves in that court as they do in this Court. Rather, the sticky question is whether the issues presented in this case are identical to those presented in the Canadian case. Issues are not identical if the second action involves an application of a different legal standard, even though—as here—the factual setting is the same in both actions. *B & B Hardware, Inc. v. Hargis Indus., Inc.*, 575 U.S. 138, 154 (2015); *see also Financial Acquisition Partners LP v. Blackwell*, 440 F.3d 278, 284-285 (5th Cir. 2006) (finding the ruling of a Tenth Circuit court not entitled to issue preclusion because Tenth and Fifth Circuits used different standard in determining whether corporate officer could be held liable for statements under the PSLRA); *In re Yarn Processing Patent Validity Litigation*, 498 F.2d 271, 278-279 (5th Cir. 1974) (finding that Canadian patent proceedings settling the “date of invention” did not preclude the issue of “reduction to practice” under United States patent law since the legal concepts were different).

Accordingly, this Court is collaterally estopped from revisiting the Canadian courts’ rulings only on the issues to which this Court must apply Canadian law. As explained earlier, Canadian law governs the *ownership* of copyright in this action, while United States law governs infringement. *See Itar-Tass*, 153 F.3d at 84. The Canadian courts applied Canadian law to their determination of (1) co-authorship/co-ownership; (2) license; (3) fair use;

and (4) merger. Therefore, collateral estoppel applies to whichever of the four defenses is based on ownership.

A. First Defense: Unenforceability – Merger

Defendants argue that CSA’s Copyrighted Works are unenforceable under the doctrine of merger “because laws are facts that are common property and incapable of being expressed in different terms in a meaningful way.” (Dkt. # 59 at 15.) The Court agrees with CSA that the doctrine of merger relates to the copyrightability of a work, not the existence of infringement. *See Veeck v. S. Bldg. Code Cong. Int’l, Inc.*, 293 F. 3d 791, 801-02 (5th Cir. 2002) (en banc) (characterizing merger doctrine as “limit on copyrightability instead of infringement); *see also Mason v. Montgomery Data, Inc.*, 967 F. 2d. 135, 140 (5th Cir. 1992). Accordingly, Canadian copyright law governs merger, and comity and collateral estoppel counsel this Court to adopt the Canadian courts’ well-reasoned rejection of Defendants’ merger defense.

As the Canadian courts held, Canadian law does not preclude private copyright of “materials incorporated by reference into statutes or regulations, like the CSA Electrical Code.” (CSA Appx. at 285-91) (citing the *Statutory Instruments Act*, R.S.C. 1985, c. S-22, ss. 10(1), 11(1), 18.1(1); *Interpretation Act*, R.S.C. 1985, c. I-21, s. 2(1)). Defendants’ merger defense therefore fails as a matter of law.¹⁰

¹⁰ Even if *Veeck* applied, Defendants have not shown the Court that they publish merely Canadian law, rather than a wholesale replica of CSA’s model code, as a model code. *See* 293 F. 3d at 805 (“[T]he result in this case may have been different if Veeck had published not the building codes of Anna and Savoy, Texas, but the SBCCI model codes, as model codes.”).

B. Second Defense – Co-authorship/Co-ownership of Canadian Electrical Code Copyrights

Defendants next claim that Peter Knight “contributed authorship to the [CEC] for decades” and that as his successors in interest, Defendants are “entitled to exploit the entirety of the work.” (Dkt. # 59 at 15.) Defendants limit this defense to the CEC, so the outcome of this affirmative defense only matters with respect to three of CSA’s Copyrighted Works: the 2015, 2018, and 2021 CECs, which Defendants have reproduced as *Knight’s 2015 CEC*, *Knight’s 2018 CEC*, and *Knight’s 2021 CEC*. Co-authorship is an issue of ownership. *See generally Data Sols., Inc. v. Directed Elecs. Canada, Inc.*, No. CV 18-1560-GW(EX), 2018 WL 4742289, at *7 (C.D. Cal. Aug. 15, 2018) (determining viability of Canadian copyright authorship claim by applying Canadian copyright law); *see also Roberts v. BroadwayHD LLC*, 518 F. Supp. 3d 719, 730-31 (S.D.N.Y. 2021) (“A copyright infringement claim is an ‘ownership claim’ when it . . . focuses on competing assertions of ownership or rights in the work at issue.”). Accordingly, Canadian copyright law governs the co-authorship claim, and comity and collateral estoppel counsel this Court to adopt the Canadian courts’ rejection of Defendants’ co-authorship defense.

As described by the Canadian trial court, Canadian copyright law encompasses a presumption that valid ownership of a copyright rests in the party named on the certificate of registration, in the absence of credible evidence to the contrary. (CSA Appx. at 593-96); *Copyright Act*, R.S.C. 1985, c. C-42, s. 34.1, 53(2). Defendants do not contest that CSA has produced the valid certificates of registration for all its Copyrighted Works. Instead, Defendants claim that they have produced credible evidence that Peter Knight made contributions to the CEC. (Dkt. # 66

at 9.) Defendants point to a table created by Gordon Knight or his counsel for the Canadian litigation: the table has dates from April 1, 1959 to October 19, 1983 and provides a one or two word description of Peter Knight's alleged contributions to the code. (Dkt. # 66-1 at 13-22.) As CSA notes, however, Defendants made no effort to connect the one-or two-word topics listed on the spreadsheet to any particular piece of the 2015, 2018, or 2021 CEC. In fact, the chart states that Peter Knight's contributions were made to CECs in the 70s and 80s, not the CECs at issue. (*Id.*) Furthermore, Defendants admit that Peter Knight never made a legal claim of authorship or ownership of the CEC. (*Id.* at 12.) Gordon Knight's creation of a spreadsheet documenting his father's alleged contributions to CEC versions that are not at issue in this litigation does not present a viable challenge to CSA's valid ownership certificates under Canadian law. (CSA Appx. at 593-96.)

C. Third Defense – Abandonment of Copyright

Defendants next argue that CSA abandoned its Canadian copyrights by allowing them to be incorporated into Canadian law. In copyright, abandonment is “the intentional relinquishment of a known right with knowledge of its existence and the intent to relinquish it.” *A & M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1026 (9th Cir. 2001). But abandonment of copyright “occurs only if there is an intent by the copyright proprietor to surrender rights in his work.” 4 Nimmer on Copyright § 13.06; *see also Furie v. Infowars, LLC*, 401 F. Supp. 3d 952, 966 (C.D. Cal. 2019) (finding genuine issue of material fact as to abandonment where copyright holder made public statements encouraging third-party use and profit of his copyrighted character).

Defendants did not produce any such evidence to suggest that CSA intended to abandon its copyrights. Rather, the record shows CSA's commitment to vindicating its copyrights. For the better part of a decade, CSA has sought the help of Canadian courts to protect its copyrighted works against Defendants' intrusions. Now that Defendants have moved their operations to the United States, CSA has continued their fight in American courts. Defendants' allegation of abandonment is therefore contradicted by the record and insufficient to raise a genuine issue of material fact on this defense.¹¹

D. Fourth and Eighth Defenses – Fair Use and Copyright Misuse

Defendants argue that the Knight publications are “purely educational in nature and are used to educate the public about the law that binds them,” so their republication is fair use. (Dkt. # 59 at 15-16.) Defendants also claim that “CSA is improperly using its copyright to limit the public's access to the law that binds them.” (*Id.* at 16.) Fair use relates to enforcement, rather than ownership, so the Canadian courts' holding on this defense is not preclusive.¹² *See Bridgeport Music, Inc. v. UMG Recordings, Inc.*, 585 F.3d 267, 277 (6th Cir. 2009) (“The doctrine of fair use operates to prevent the mechanistic enforcement of copyright law in a way that would work to repress creativity.”).

¹¹ Furthermore, Defendants' conflation of the integration of CSA's standards into Canadian law with CSA's intent to abandon its copyrights is belied by Canadian copyright law, as discussed in the context of merger. *See supra* Section II(A)

¹² Though, admittedly, the “fair dealing” standard employed in Canada is quite similar. (*See* Dkt. # 63 at 17, n. 5.)

The Copyright Act permits the fair use defense based on analysis of the following factors: (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work. *See* 17 U.S.C. § 107. Each of these factors weighs clearly in favor of CSA.

The record contradicts Defendants' claim that the Knight's Code is "purely educational in nature." (Dkt. # 59 at 15-16.) Defendants admit that they publish Knight's Code for "a reasonable price in the market" in an attempt to profit. (CSA Appx. at 466-69 (stating that "we are competing in the market," and that "[w]ere it not for [CSA], I would be making profit off [the Knight Codes]."))

Defendants cite *Am. Soc'y for Testing & Materials, et al. v. Public.Resource.Org, Inc.*, in which "little, if anything, in the record indicate[d]" that the defendant, a free website hosting standards incorporated into United States law, "[stood] to profit from its reproduction" of the law. 896 F.3d 437, 449 (D.C. Cir. 2018). But the facts here are entirely inapposite. Defendants' website and advertisements make clear that Knight's Code is produced to undermine CSA's sales and priced to undercut CSA's prices. (CSA Appx. at 577-79.) Despite Defendants' seemingly newfound dedication to public service, "[t]he crux of the profit/nonprofit distinction is . . . whether the user stands to profit from exploitation of the copyrighted material without paying the customary price." *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 562 (1985). Defendants could not be clearer about their intent to profit from the sale of the CSA's Copyrighted

Work at a lower price than CSA. (CSA Appx. at 763 (stating “So, engineers and other professionals needing to access these laws don’t have to pay CSA’s sky-high prices anymore. PS Knight’s prices are less than half of CSA’s prices.”)) Defendants openly advertise using the “same code” as CSA’s Copyrighted Works “at less than ½ the cost.” (CSA Appx. at 577-79.) The first factor clearly weighs in favor of CSA.

The second, third, and fourth factors likewise weigh in favor of CSA. As to the second factor, Defendants provide no facts indicating that they “add[ed] something new, with a further purpose” in their Knight’s Codes, such that their reproduction of CSA’s Copyrighted Works was “transformative.” *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994). For the third factor, Defendants did not provide facts to rebut CSA’s showing that Knight’s Codes reproduces CSA’s Copyrighted Works in their entirety, which weigh against a finding of fair use.¹³ *See Stross v. Stone Textile, LLC*, No. 1:18-CV-454-RP, 2019 WL 4060888, at *6 (W.D. Tex. June 27, 2019) (reproducing the entirety of a copyrighted work excusable only where necessary for the purpose or character of the use). Since Defendants’ production of Knight’s Code is commercial, the fourth factor presumptively weighs in CSA’s favor. *Id.* Defendants provided nothing to rebut this presumption: their own emails show the negative “potential market effects” of Defendants’ continued reproduction of CSA’s Copyrighted Works. *Id.* at *7; (CSA Appx. at 778-84

¹³ In particular, Defendants did not support their claim that they merely copied the “laws” of Canada, as opposed to CSA’s Copyrighted Works. This is especially damning given the fact that Knight’s Codes are broken down not by reference to any law where the standards might be found, but by the exact sections and subsections of CSA’s Copyrighted Works. (*See* CSA Appx. at 695, 716, 725.)

(demonstrating that selling Knight’s Code as an infringing version of CSA’s Copyrighted Works impacts the market negatively)).

Defendants have failed to raise an issue of material fact as to any of the four factors of fair use. Accordingly, CSA is entitled to summary judgment on the affirmative defense of fair use and copyright misuse.

E. Fifth and Sixth Defenses – Equitable Estoppel and License

Defendants claim that “[f]or decades . . . CSA allow[ed] them to publish books that quoted extensively from the most important provisions of the Canadian Electrical Code.” (Dkt. # 59 at 16.) Likewise, Defendants claim that “CSA provided Defendants with a license by way of written permission to ‘quote from the Code providing recognition of the source’ contained in a letter to Peter Slim Knight dated May 12, 1969.” (*Id.*) Defendants have failed to produce any evidence of the letter or any other support for these defenses. As the nonmoving party, Defendants “cannot survive a summary judgment motion by resting on the mere allegations of [their] pleadings.” Duffie, 600 F.3d at 371. Instead, Defendants needed to identify specific evidence in the record that supports their claim that CSA ever permitted Defendants to replicate all seven of CSA’s Copyrighted Works. *See Willis*, 749 F.3d at 317. Defendants cannot survive summary judgment on their fifth and sixth affirmative defenses.¹⁴

¹⁴ Even if the 1969 letter existed, allowing Defendants to “quote from the Code” with attribution to CSA, it would not cover Defendants’ conduct. As described at length already, CSA’s unrebutted side-by-side analysis shows that Defendants wholesale copy the code, without attribution. (CSA Appx. at 690-761.) Furthermore, the Canadian court found that any communication between the parties “put

F. Seventh and Ninth Defenses – Copyright Estoppel and Unenforceability

Defendants next argue that “[b]inding laws are facts not amenable to other forms of expression, and therefore not amenable to copyright protection in the United States.” (Dkt. # 59 at 16.) This argument is a reiteration of the premise rejected in the first affirmative defense of merger. Despite Defendants’ attempt to characterize this issue as one of enforceability under United States law, it is one of copyrightability, and thus governed by Canadian law. *See Veeck*, 293 F. 3d at 801-02. These affirmative defenses therefore fail for the same reason discussed in the context of merger. *See supra* Section II(A).

G. Counterclaim Count I: Declaratory Judgment of Co-Authorship or Co-Ownership

Defendants ask this Court for a Declaratory Judgment of Co-Authorship or Co-Ownership in the Canadian Electrical Code. (Dkt. # 59 at 21.) For the reasons discussed in Section II(B), the Court denies this request.

III. APPROPRIATE REMEDIES

CSA seeks: (1) all remedies afforded by the Copyright Act, including preliminary and permanent injunctive relief, CSA’s damages and Defendants’ profits from Defendants’ willfully infringing conduct in the United States, and other monetary relief; (2) a declaration that Defendants’ copyright registration, No. TX0008892018, dated September 1, 2020 and titled *Canadian Electrical Code, Part One*, is invalid and for an order directing Defendants to cancel the U.S. Registration with the U.S. Copyright Of-

Knight on notice that any such license would be terminated at least as early as 2005 and repeatedly thereafter.” (CSA Appx. at 596-97.)

face; and (3) a declaration that Defendants own no copyrights in any version of CSA's Copyrighted Works. (Dkt. # 31 at 6.)

A. Declaratory Judgment Granted on Invalidity of Copyright Registration No. TX0008892018

Declaratory judgment is an appropriate means of determining intellectual property rights when: (1) the party seeking declaratory judgment has real and reasonable apprehension of litigation; and (2) the party seeking declaratory judgment has engaged in a course of conduct that brings it into adversarial dispute with its opponent. *See State of Tex. v. W. Pub. Co.*, 882 F.2d 171, 175 (5th Cir. 1989). Both prongs are handily met here.

First, Defendants have engaged in a course of conduct that supports CSA's fear of litigation: the parties have been in near-constant litigation over CSA's rights in the CEC for a decade in Canadian courts. (CSA Appx. at 275-441, 580-667.) Moreover, Defendants have stated their intent to take this battle to the American court system. (CSA Appx. at 669 (explaining that Knight's Code is back because it was re-released "from the US, and outside the direct jurisdiction of [Canadian] Federal Court.")). As to the second prong, CSA is actively engaged in publishing the CEC, creating a direct adversarial dispute over who can publish the work copyrighted by Defendants in the United States. *See State of Tex.*, 882 F.2d at 175 ("[P]laintiff must show that it has actually published or is preparing to publish the material that is subject to the defendant's copyright."); (CSA Appx. at 491).

Turning to the merits of the request for declaratory judgment, the Court finds that Defendants' copyright registration was fraudulently obtained and therefore in-

valid. Under the Copyright Act, a certificate of registration satisfies statutory requirements and is valid unless (1) the applicant knowingly included inaccurate information and (2) the inaccuracy would have caused the Copyright Office to refuse registration. 17 U.S.C. § 411(b)(1). Defendants submitted *Knight's 2018 CEC* as the deposit copy with the copyright application, but publicly admitted and advertised that this was the “same code” as CSA’s Copyrighted Work. (CSA Appx. at 681, 684-85.) Gordon Knight furthermore demonstrated his knowledge that the *Knight's 2018 CEC* copyright was merely a copyright in CSA’s Copyrighted Work in his October 18, 2020 blog post:

It turns out that [CSA] somehow forgot to register copyright over this document, even while it was under litigation in Canada . . . [and] didn’t bother to lock down copyright in the US. So we did. As you read this, the Canadian Electrical Code is the private property of PS Knight Americas Inc. in the U.S.

(CSA Appx. at 669.); see *Interplan Architects, Inc. v. C.L. Thomas, Inc.*, No. 4:08-CV-03181, 2010 WL 4366990, at *24 (S.D. Tex. Oct. 27, 2010) (“There must be a showing of ‘scienter’ in order to invalidate a copyright registration.”). False statements of ownership or authorship in a work render a copyright registration invalid as a matter of law. *Hacienda Records, LP v. Ramos*, No. CV 2:14-19, 2016 WL 3543241, at *8 (S.D. Tex. June 29, 2016). The copyright registration lists Peter Slim Knight as the author of the work, rather than CSA. (CSA Appx. at 681-83.) The Copyright Office would have refused to register the copyright had it known of this inaccuracy.

Accordingly, the Court grants declaratory judgment, finding that: (1) Defendants’ fraudulently obtained copyright registration, No. TX0008892018, dated September

1, 2020 and titled Canadian Electrical Code, Part One (“the US Registration”), is invalid; and (2) directing Defendants to cancel the U.S. Registration with the U.S. Copyright Office.

B. Declaratory Judgment Granted as to CSA’s Copyrighted Works

As discussed at length above, Defendants have failed to raise a genuine issue of material fact as to the validity of CSA’s Canadian copyrights in all seven of its Copyrighted Works. Accordingly, the Court grants declaratory judgment, finding that CSA is the sole owner of all copyright rights, title and interest in the following works:

1. The Canadian Electrical Code (the “CEC”) (versions published in 2015, 2018, 2021);
2. The Propane Storage and Handling Code (versions published in 2015 and 2020); and
3. The Oil and Gas Pipeline Systems Code (versions published in 2015 and 2019). (CSA Appx. at 151-274.)
See 17 U.S.C. §§ 104, 1203.

C. Injunctive Relief Granted as to CSA’s Copyrighted Works

Under § 502(a) of the Copyright Act, the Court may issue a permanent injunction “to prevent or restrain infringement of a copyright.” Four elements must be present: (1) success on the merits; (2) no other adequate remedy at law; (3) the threatened injury outweighs any damage to the defendant; and (4) the injunction will not disserve public interest. *Christus Health Care Sys., Inc. v. Am. Consultants RX, Inc.*, No. SA:12-CV-1221-DAE, 2014 WL 1092096, at *9 (W. D. Tex. Mar. 18, 2014) (citing *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391, 394 (2006)).

First, CSA has succeeded on the merits in this suit. Second, there is no other adequate remedy at law, as Defendants' infringement of CSA's Copyrighted Works copyright persists despite extensive efforts by CSA to curb the infringement. *See Broad. Music, Inc. v. Bentley*, No. SA-16-CV-394-XR, 2017 WL 782932, at *5 (W.D. Tex. Feb. 28, 2017) (granting permanent injunction where defendant repeatedly violated plaintiff's copyrights despite plaintiff's efforts to curb the infringement). Next, any threatened injury to Defendants would be of their own making through their continued infringement. Lastly, the injunction will serve the public interest, as it prevents Defendants from circumventing the finality of Canadian federal courts by perpetuating copyright infringement from the United States. Most important, Gordon Knight has stated that Defendants are "just getting going" and expressed an interest in expanding the line of infringing publications Defendants offer for sale in the United States. (CSA Appx. at 763-64.)

Accordingly, a permanent injunction is appropriate to prevent Defendants from infringing in the future. Defendants are hereby enjoined from any unauthorized use of CSA's Copyrighted Works or their subsequent or previous versions, including reproducing, distributing, publishing, performing, selling, offering for sale, publicly displaying, and/or preparing the Copyrighted Works or derivative works in any form, including hard copy, pdf or any other electronic or printed format, or otherwise using any portion of CSA's Copyrighted Works in an unauthorized manner. This injunction further prohibits Defendants from applying to register or registering in the United States Copyright Office any copyright for CSA's Copyrighted Works or their subsequent or previous versions.

D. Granting CSA Leave to File Supplemental Motion for Summary Judgment on Damages

Section 504 of the Copyright Act allows copyright holders to recover either actual damages and any additional profits of the infringer, or statutory damages. 17 U.S.C. § 504(a). CSA has indicated that it intends to recover actual damages and the profits of Defendants, as opposed to statutory damages.¹⁵ (Dkt. # 31 at 6.) “[O]nce liability has been shown, § 504(b) creates an initial presumption that the infringer’s ‘profits . . . attributable to the infringement’ are equal to its gross revenue.” *MGE UPS Sys., Inc. v. GE Consumer & Indus., Inc.*, 622 F.3d 361, 367 (5th Cir. 2010) (internal citation omitted). CSA failed to provide information from which the Court could accurately measure either the profits attributable to Defendants’ infringement or the damages suffered by CSA. However, because the works at issue here are of the type where “every sale made by the defendant is one that the plaintiff otherwise could have made,” CSA has not failed to make a *prima facie* showing, and the Court will allow CSA to submit a Supplemental Motion for Summary Judgment on the issue of damages. Paul Goldstein, Copyright § 12.1.1.1, at 12:7 (2d ed. 2000).

Accordingly, the Court grants CSA leave to file a Supplemental Motion for Summary Judgment on the issue of damages within sixty (60) days of the entry of this Order. If, at that time, CSA has not filed such a motion, the Clerk

¹⁵ CSA stated vaguely in its Amended Complaint that it requested “actual damages in an amount to be proven at trial, or, in the alternative, its statutory damages for willful infringement in the amount of \$150,000 per violation.” (Dkt. # 31 at 54.) CSA’s Motion for Summary Judgment fails to address damages at all. (Dkt. # 63.)

of Court will be directed to enter judgment and close the case.

CONCLUSION

The Court **GRANTS** Plaintiff's Motion for Summary Judgment in its entirety. (Dkt. # 63.) The Court **DE-NIES** Defendants' Motion for Summary Judgment. (Dkt. # 62.) Because this Order Granting Plaintiff's Motion for Summary Judgment ends the liability issue in the case, Plaintiff's Motion to Strike is hereby **DENIED AS MOOT**. (Dkt. # 61.)

The Court grants declaratory judgment as specified in Section III(B), and **ORDERS** Defendants to cancel the registration of TX0008892018 with the U.S. Copyright Office. Permanent injunctive relief is to be entered according to the description given in Section III(C).

Lastly, the Court allows CSA the opportunity to file a Supplemental Motion for Summary Judgment on the issue of damages. CSA must file this motion within **sixty (60) days** of this Order.¹⁶ If no Supplemental Motion for Summary Judgment is filed within 60 days, the Clerk is **instructed to enter judgment** and close the case. Until such time, however, the case will remain open for the Court to resolve the issue of damages.

¹⁶ Defendants will then have fourteen days following CSA's filing the supplement in which to file their response to the motion. *See* Local Rule CV-7(d).

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 23-50081

CANADIAN STANDARDS ASSOCIATION
PLAINTIFF - APPELLEE

v.

P.S. KNIGHT COMPANY, LIMITED;
PS KNIGHT AMERICAS, INCORPORATED;
GORDON KNIGHT
DEFENDANTS - APPELLANTS

Appeal from the United States District Court
For the Western District of Texas
USDC No. 1:20-CV-1160

**ON PETITION FOR REHEARING
AND REHEARING EN BANC**

Before: KING, WILLETT, and DOUGLAS, Circuit
Judges.

PER CURIAM:

The petition for panel rehearing is **DENIED**. Because no member of the panel or judge in regular active service requested that the court be polled on rehearing en banc

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(Fed. R. App. P. 35 and 5th Cir. R. 35), the petition for rehearing en banc is **DENIED**.

FILED August 14, 2024

Lyle C. Cayce, Clerk

APPENDIX D

1. 17 U.S.C. 101:

Except as otherwise provided in this title, as used in this title, the following terms and their variant forms mean the following:

...

The “Berne Convention” is the Convention for the Protection of Literary and Artistic Works, signed at Berne, Switzerland, on September 9, 1886, and all acts, protocols, and revisions thereto.

...

A “work of the United States Government” is a work prepared by an officer or employee of the United States Government as part of that person’s official duties.

2. 17 U.S.C. 102:

(a) Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.

...

(b) In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.

3. 17 U.S.C. 104(b):

The works specified by sections 102 and 103, when published, are subject to protection under this title if—

...

(2) the work is first published in the United States or in a foreign nation that, on the date of first publication, is a treaty party[.]

4. 17 U.S.C. 105(a):

Copyright protection under this title is not available for any work of the United States Government, but the United States Government is not precluded from receiving and holding copyrights transferred to it by assignment, bequest, or otherwise.

5. 17 U.S.C. 106:

Subject to sections 107 through 122, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

(1) to reproduce the copyrighted work in copies or phonorecords;

(2) to prepare derivative works based upon the copyrighted work;

(3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending[.]

6. 17 U.S.C. 107:

[T]he fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

7. 17 U.S.C. 302(a):

Copyright in a work created on or after January 1, 1978, subsists from its creation and, except as provided by the following subsections, endures for a term consisting of the life of the author and 70 years after the author's death.