No. 24-537

IN THE

Supreme Court of the United States

CANADIAN STANDARDS ASSOCIATION, PETITIONER,

v.

P.S. KNIGHT COMPANY, LTD., ET AL., RESPONDENTS.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF AND BRIEF OF *AMICI CURIAE* AMERICAN NATIONAL STANDARDS INSTITUTE, INCORPORATED, AMERICAN SOCIETY OF HEATING, REFRIGERATING, AND AIR CONDITIONING ENGINEERS, AMERICAN SOCIETY FOR TESTING AND MATERIALS, AMERICAN SOCIETY OF SAFETY PROFESSIONALS, INTERNATIONAL ASSOCIATION OF PLUMBING & MECHANICAL OFFICIALS, INTERNATIONAL CODE COUNCIL, INC., INTERNATIONAL ELECTROTECHNICAL COMMISSION, THE INSTITUTE OF ELECTRICAL AND ELECTRONICS ENGINEERS, INCORPORATED, INTERNATIONAL ORGANIZATION FOR STANDARDIZATION, NORTH AMERICAN ENERGY STANDARDS BOARD, NATIONAL ELECTRICAL MANUFACTURERS ASSOCIATION, STANDARDS AUSTRALIA LIMITED, TELECOMMUNICATIONS INDUSTRY ASSOCIATION, ULSE INC., AND X12 INCORPORATED IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONER

Pursuant to Rule 21.2(b), *amici* move this Court to permit it to file this brief. The Court docketed the petition for writ of certiorari on November 14, 2024. Amicus briefs are, therefore, due on December 16, 2024. *Amici* inadvertently failed to provide the ten-day notice to Respondents by December 6, 2024 as provided by Rule 37.2. Upon realizing the oversight, *Amici* provided notice to Respondents' counsel on December 13, 2024. *Amici* sought Respondents' position regarding the filing of the amicus brief. Respondents do not consent to this motion. *Amici* timely provided notice to Petitioner. *Amici* respectfully seek leave from the Court to accept its filing, which will assist the Court in deciding the petition for certiorari because it describes the perspectives and experiences of fourteen standards development organizations in relation to the question presented.

Respectfully submitted,

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INTERESTS OF AMICI[1]

Amici Curiae include American National Standards Institute, Incorporated ("ANSI"), a national standards coordinating institution, along with fourteen standards development organizations ("SDOs") that participate in developing technical and specialized standards. Amici SDOs are listed in the Appendix to this brief. Each of the SDO amici invest substantial resources to produce high-quality standards that are vital to the functioning and safety of a range of industries, consumer products, and regulated fields.

I. SUMMARY OF ARGUMENT

This case presents important legal issues whose resolution below imperils the ability of standards development organizations ("SDOs") to continue their shared missions to advance safety and innovation through standardization. After Canadian Standards Association ("CSA") obtained a judgment in Canada against Respondents Gordon Knight and his Canadian company, P.S. Knight Company, Ltd., enjoining them from infringing CSA's copyrights in its standards, Knight opened shop in the United States under the name P.S. Knight Americas, Inc. and resumed infringing CSA's copyrighted works in the United States. The Fifth Circuit excused Respondents' conduct, holding that (1) the government edicts doctrine precluded enforcement of CSA's copyrights in the United States because CSA's standards had been incorporated by

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[1] Pursuant to Supreme Court Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part, and that no person or entity other than *amici curiae*, their members, and their counsel made a monetary contribution intended to fund the preparation or submission of this brief. *Amici* notified the parties of its intent to file this amicus brief.

reference ("IBR'd") into law in Canada and (2) the merger doctrine results in CSA's standards losing their copyright protection when they were IBR'd. *Canadian Standards Ass'n v. P.S. Knight Co., Ltd.*, 112 F.4th 298, 305 (5th Cir. 2024) (the "Decision").

The Decision directly contradicts this Court's precedent. In 2020, this Court resolved a longstanding debate about how the government edicts doctrine should be applied. It held that the doctrine is a straightforward rule based on the identity of the author wherein "*officials empowered to speak with the force of law* cannot be the authors of—and therefore cannot copyright—the works they create in the course of their official duties." *Georgia v. Public.Resource.Org, Inc.*, 590 U.S. 255, 259 (2020) (emphasis added). The contrapositive is also true: the doctrine "does not apply . . . to works created by government officials (or private parties) who lack the authority to make or interpret the law[.]" *Id.* at 265.

Despite this straightforward rule, the Fifth Circuit held that private parties, like Petitioner and *amici* SDOs, who create concededly copyrighted works can have their copyright stripped upon IBR by any governmental entity in the United States or abroad. The Decision expanded the Fifth Circuit's prior holding in *Veeck v. S. Bldg. Code Cong. Int'l, Inc.*, 293 F.3d 791 (5th Cir. 2002) (*en banc*) ("*Veeck*").

The Decision also contravenes the weight of authority concerning the merger doctrine, a rare exception to copyright that forecloses protection where an idea addresses such a narrow subject matter that it can only be expressed in one or few ways. Breaking from the majority of circuits and guidance from the United States Solicitor General, the Fifth Circuit held that post-creation facts (*i.e.* later IBR of a copyrighted

work) can result in the copyrighted work entering the public domain.[2]

These holdings threaten significant harm to SDOs, like *amici*, who are non-profit entities that each serve a public purpose of making the world safer through standardization and dissemination of best practices across a vast array of industries. Instead of preserving copyright protection, the Decision contorts the judicially created government edicts doctrine and merger doctrine to reward pirates like Respondents. If left undisturbed, Respondents and other commercial profiteers will exploit the aberrant Decision below for commercial gain. Such conduct will disrupt the longstanding public-private partnerships that exist between SDOs and governments, in which SDOs supply considerable expertise to advance safety in every industry and bear the considerable costs associated with standard development. This Court should therefore grant the Petition to reverse the Fifth Circuit's Decision and restore meaningful copyright protection for standards. Doing so will ensure that the congressionally approved public-private standards partnership can continue to advance public safety and reduce the burden on government and its citizens.

II. COPYRIGHT PROTECTION IS ESSENTIAL TO PRIVATE STANDARDS DEVELOPMENT.

The Constitution enshrines the Founders' goal of "promot[ing] the Progress of Science," and empowers

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[2] There is an existing circuit split concerning whether the merger doctrine is treated as a question of copyrightability or an affirmative defense. 4 Melville B. Nimmer & David Nimmer, Nimmer on Copyright § 13.03[B][3][e] (2024) ("Nimmer"). In either circumstance, as addressed *infra,* Section III(B), the merger doctrine should be assessed at the time of creation.

Congress to further this goal "by securing for limited Times to Authors … the exclusive Right to their respective Writings[.]" U.S. Const. art. 1, § 8, cl. 8. As this Court has long recognized:

> The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts.' Sacrificial days devoted to such creative activities deserve rewards commensurate with the services rendered.

Mazer v. Stein, 347 U.S. 201, 219 (1954). For over a century, copyright law has fostered the creation of standards by SDOs.

A. Copyright protection fuels the resource-intensive standards development process.

"Standards" are technical works that describe product specifications, provide methods for manufacturing and testing, and offer recommended safety practices. They provide guidance that can range from the broadly applicable, *e.g.*, International Building Code, to the esoteric, *e.g.*, ASTM E2311 (Standard Practice for QCM Measurement of Spacecraft Molecular Contamination in Space). Standards play a "crucial role . . . in all facets of daily life," H.R. Rep. No. 104-390, pt. VII, at 23 (1995). They are used in a wide range of fields, including building safety, consumer products, occupational safety, electrotechnology, and business processes.

In the United States, standards are principally developed by private SDOs. Development processes vary, but most prioritize transparency and inclusiveness, with development processes designed to seek

opinions from a broad spectrum of interested parties. Accordingly, SDOs typically avoid placing any undue financial barriers on participation, such as conditioning voting on membership status or allowing a single interest group to exert disproportionate influence on the process.

Creating and updating standards is expensive. While thousands of volunteers provide input, the SDOs themselves must cover the cost of staff who oversee the process and assist in drafting the standards' text. Some SDOs employ technical experts to assist with standards development. SDOs also pay for meeting space to accommodate hundreds of participants. And they incur significant expenses in publishing various committee reports, collecting public comments, coordinating outreach and education efforts, and managing information technology systems used for standards development. This process is costly. In 2023 alone, the American Society for Testing and Materials ("ASTM") spent more than $26.8 million on technical committee operations, and International Code Council, Inc. ("ICC") spent over $4 million on code development and $1.5 million conducting hearings for its 2024 code-cycle. SDOs incur still more costs in publishing the standards.

Rather than requiring private or governmental entities to fund the process in advance, many SDOs rely on a back-loaded funding model through which SDOs bear the initial costs to develop their standards and then generate revenue from selling and licensing their standards to the professionals who use them in their work. Copyright protection is what makes this possible. For example, about 70% of ASTM's revenue and 49% of ICC's revenue are derived from the sale of copyrighted standards. Although SDOs fund their

work through such revenues, many SDOs make IBR'd standards available for read-only viewing for free and/or make copies available at minimal cost. Accordingly, none of the cases addressing the copyright protection for IBR'd standards has ever identified a single person who was unable to access the standards at issue.

This funding model is by design. When developing a standard depends on advance funding, typically obtained by charging parties to participate in the standards development process, groups with limited financial resources—including individuals, public interest groups, and academics—have little chance to participate in the process. A back-loaded funding model, in contrast, encourages broader participation in the standards development process because the SDO is not tethered to large funders. Standards developed through the back-loaded model thus reflect the consensus of a broader range of interested parties. That, in turn, makes such standards more likely to gain wide voluntary acceptance and credibility.

As other Circuits have correctly held, IBR does not nullify copyright protection. *See CCC Info. Servs., Inc. v. Maclean Hunter Mkt. Rpts, Inc.*, 44 F.3d 61 (2d Cir. 1994); *Prac. Mgmt. Info. Corp. v. Am. Med. Ass'n*, 121 F.3d 516 (9th Cir. 1997), amended, 133 F.3d 1140 (9th Cir. 1998); *see also Am. Soc'y for Testing & Materials v. Public.Resource.Org, Inc.*, 896 F.3d 437, 441 (D.C. Cir. 2018) ("*ASTM I*") (declining to decide issue); *Bldg. Officials & Code Adm. v. Code Tech., Inc.*, 628 F.2d 730, 736 (1st Cir. 1980) ("*BOCA*") (same). Executive agencies similarly recognized that IBR'd material retain its copyright. *See, e.g.*, Incorporation by Reference, 9 Fed. Reg. 66,267 (Nov. 7, 2014) ("recent developments in Federal law, including the *Veeck* decision … have not

eliminated the availability of copyright protection for privately developed codes and standards referenced in or incorporated into federal regulations."); Off. of Mgmt. & Budget, Exec. Off. of the President, *Revised OMB Circular No. A-119*, 81 FR 4673, 4673-4674 (2016)[3] ("A-119") ("If an agency incorporates by reference material that is copyrighted … [it should] respect[] the copyright owner's interest in protecting its intellectual property."). That consensus approach is correct.

When Congress enacted the 1976 Copyright Act, it knew that copyrighted works were routinely incorporated into federal, state, and local law. *Hall v. United States*, 566 U.S. 506, 516 (2012) (courts should "assume that Congress is aware of existing law when it passes legislation") (quotation omitted). Ten years earlier, Congress authorized federal agencies to incorporate standards into federal regulations—and the agencies did so. *See* Act of June 5, 1967, Pub. L. 90-23, § 552, 81 Stat. 54, 54 (codified at 5 U.S.C. § 552) (1967).

In 1992 Congress passed Public Law 102-245, requesting the National Research Council to conduct a study on standards development. *See* National Research Council, *Standards, Conformity Assessment, and Trade Into the 21st Century* (National Academy Press 1995), *available at* http://www.nap.edu/read/4921/chapter/1. That study contained a detailed overview of the U.S. standards-development system, and specifically noted that many SDOs "offset expenses and generate income through sales of standards documents, *to which they hold the copyright*. For many SDOs, publishing is a significant source of operating revenue." *Id*. at 32 (emphasis added). The study concluded that

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[3] *Available at* https://www.whitehouse.gov/wp-content/uploads/2020/07/revised_circular_a-119_as_of_1_22.pdf.

the "U.S. standards development system serves the national interest well" by "support[ing] efficient and timely development of product and process standards that meet economic and public interests." *Id*. at 157.

Following the study's recommendations, Congress passed the National Technology Transfer and Advancement Act of 1995 ("NTTAA"), Pub. L. No. 104-113 § 12(d), 110 Stat. 775, codified at 15 U.S.C. § 272 (Notes). Since 1996, Congress has required "all Federal agencies and departments [to] use technical standards that are developed or adopted by voluntary consensus bodies, using such technical standards as a means to carry out policy objectives or activities." *Id*. This statutory requirement codified longstanding Executive Branch policy that it is "more efficient[] and effective[]" for agencies to use voluntary standards that have been created through a consensus process by private organizations with "expertise" in an industry than it is for the government to formulate its own standard to impose upon an industry. *See* Administrative Conf. of the United States, 44 Fed. Reg. 1357, 1357 (Jan. 5, 1979); *see also* Off. of Mgmt. & Budg., Exec. Off. of the President, *Issuance of Circular No. A-119,* Federal Participation in the Development and Use of Voluntary Standards, 47 Fed. Reg. 49,496 (Nov. 1, 1982) (original OMB Circular A-119); A-119 at 17-18 (2016 revised Circular).

As one court explained, "[i]f Congress intended to revoke the copyrights of such standards when it passed the NTTAA, or any time before or since, it surely would have done so expressly." *Am. Soc'y for Testing & Materials v. Public.Resource.Org, Inc.*, No. 13-cv-1215, 2017 WL 473822, at *11 (D.D.C. Feb. 2, 2017) ("*ASTM II*"), *rev'd on other grounds* 896 F.3d 437 (D.C. Cir. 2018). It did not.

Copyright protection enables SDOs to recoup the bulk of their investment in the standards development process. Without copyright protection, their revenues would drop precipitously, threatening SDOs' ability to continue to develop the highest quality standards and undermining the century-old, carefully crafted private-public partnership.

First, SDOs could be forced to reduce the rigor or frequency of their development process. That might mean less public participation, fewer technical experts, and less comprehensive review. *Veeck* mistakenly suggests "it is difficult to imagine an area of creative endeavor in which the copyright incentive is needed less." *Veeck*, 293 F.3d at 806 (quoting 1 Paul Goldstein, Goldstein on Copyright § 2.5.2 at 2:51 (2000). This statement, untethered from any factual basis, was untrue then and remains untrue today. *Amici* SDOs are non-profits. Like most businesses, SDOs make difficult choices about where to invest their limited resources. Losing the revenue historically earned from the sale and licensing of works they create would force them to alter their business practices to the great detriment of their mission.

Second, SDOs might be forced to charge or increase fees to those who wish to participate in standards development. Currently, SDOs receive and respond to input from a broad range of interested parties, including individuals and entities who are unlikely to pay hefty fees to participate in the development process. Recouping SDOs' costs through up-front fees would likely reduce participation from public-interest groups, academics, and interested members of the public. Decreased participation would likely lead to a commensurate increase in the power of regulated industries to influence standard setting. *See* Emily S. Bremer,

Technical Standards Meet Administrative Law: A Teaching Guide on Incorporation by Reference, 71 Admin. L. Rev. 315, 329 (2019).

Third, the absence of copyright protection would threaten the breadth of standard-setting work that SDOs now engage in. Like many creative industries that rely on a few copyright "hits" to generate the revenue needed to support the full range of their expressive works, SDOs often rely on a few flagship standards to generate most of their revenues. The sale and licensing of these standards effectively subsidize the development of standards that serve narrower markets and, accordingly, cannot generate enough revenue to cover the cost of their creation. *See id.* at 329-30. For example, ASTM generates 80% of its standards revenue from only about 20% of its standards. Currently, *amici* SDOs do not consider whether a standard will be profitable (or at least self-sustaining) in deciding whether to develop or update it. If SDOs' revenues decreased substantially, this approach might no longer be viable.

B. The public benefits from IBR of privately developed standards.

Federal, state, and local governments have long benefited from privately developed standards. Rather than creating a new set of statutes or regulations for a particular industry or practice, legislatures and agencies can IBR an existing standard.

IBR'd standards play a critical role in promoting public health and safety. For example, all fifty states have IBR'd one or more of ICC's model codes at the state or local level.

IBR offers enormous public benefits. Governments are spared the cost and administrative burden of

assembling the expertise and conducting the processes necessary to produce and update the standards—which in turn spares taxpayers from funding the endeavor. Emily S. Bremer, *On the Cost of Private Standards in Public Law*, 63 U. Kan. L. Rev. 279, 294 (2015). Moreover, because standards often dictate industry norms, incorporation decreases "the burden of complying with agency regulation." A-119 (2016) at 14. The prospect of incorporation encourages private organizations to develop "standards that serve national needs" and promotes "efficiency, economic competition, and trade." *Id.*

The development and use of privately developed standards also allow the government to be nimbler in addressing industry needs and emerging technologies. For example, ASTM worked with industry, government officials, safety advocates, and others to develop standards that increase drone and aircraft safety when drones operate in regulated airspace. The Federal Aviation Administration ("FAA") considers compliance with one of these standards—ASTM F3586-22—as one way for a drone manufacturer to demonstrate compliance with regulations for remote identification systems. Accepted Means of Compliance; Remote Identification of Unmanned Aircraft; Correction, 88 Fed. Reg. 77895 (Nov. 14, 2023).

If SDOs lost copyright protection for their standards, government institutions might attempt to fill the void themselves. But it is highly unlikely that they would possess the capacity to invest the time and resources that SDOs now invest.

The absence of meaningful nationwide standard development by SDOs would also threaten uniformity across jurisdictions. Rather than a single standard, multiple jurisdictions would likely set out to develop

their own rules for a particular field—especially for standards that only have relevance locally. The process would be doubly inefficient, duplicating efforts on the front end, and requiring industries to meet multiple jurisdictions' requirements on the back end. And, while national SDOs solicit broad input from leading experts and participants with a wide variety of interests, an individual jurisdiction would be unlikely to attract the same intensity or diversity of views, worsening the resulting regulation it crafted.

III. THE DECISION BELOW CONTRAVENES THIS COURT'S JURISPRUDENCE AND THREATENS PRIVATE STANDARDS DEVELOPMENT.

A. The Decision Contravenes This Court's Holding Regarding the Government Edicts Doctrine and Increases Uncertainty About Whether SDOs Can Continue to Perform Their Public Work.

Prior to 2020, there arguably was a split of authority as to whether privately authored works that a governmental authority adopts or IBRs lose their copyright protection under what is called the "government edicts doctrine." *See ASTM I*, 896 F.3d at 441 ("leaving for another day the far thornier question of whether standards retain their copyright after they are incorporated by reference into law"); *see also Veeck*, 293 F.3d at 804-05; *Prac. Mgmt.*, 121 F.3d at 518-19; *CCC*, 44 F.3d at 74; *BOCA*, 628 F.2d at 736.

The Supreme Court resolved this issue in *Georgia v. Public.Resource.Org, Inc.* 590 U.S. at 259. The Court explained that under the "government edicts doctrine, *officials empowered to speak with the force of law* cannot be the authors of—and therefore cannot

copyright—the works they create in the course of their official duties." *Id.* (emphasis added). Thus, "whatever work that [a] judge or legislator produces in the course of his judicial or legislative duties is not copyrightable." *Id.* at 276. On the other hand, the Court also made clear that the government edicts doctrine's prohibition on copyright protection does not apply "to works created by government officials (or *private parties*) who lack the authority to make or interpret the law[.]" *Id.* at 265 (emphasis added).

The Decision below held that Petitioner's concededly copyrighted works "once incorporated into law, [] are not protected under the Copyright Act." *CSA*, 112 F.4th at 305. But this Court rejected this argument in *Georgia*, holding that "[r]ather than attempting to catalog the materials that constitute 'the law,' the doctrine bars the officials responsible for creating the law from being considered the 'author[s]' of 'whatever work they perform in their capacity' as lawmakers." *Georgia,* 590 U.S. at 265-66. Lest there be any confusion on this point, this Court concluded its opinion by saying:

> Instead of examining whether given material carries "the force of law," we ask *only whether the author of the work is a judge or a legislator*. If so, then whatever work that judge or legislator produces in the course of his judicial or legislative duties is not copyrightable. That is the framework our precedents long ago established, and we adhere to those precedents today.

Georgia, 590 U.S. at 276 (emphasis added).

In the Decision, the Fifth Circuit resurrected uncertainty that plagued the SDO community prior to the *Georgia* decision.

As discussed above, SDOs require incentives to carry out their public work. It is critical that economic actors be able to know in advance whether contemplated investments in authorship will be protected. *CCC*, 44 F.3d at 69 ("The financial incentives to authors consist of exclusive rights to their writings, that may be sold or licensed for money, so that authors may earn a living from the creations that benefitted the public."). The Decision upends that certainty. Without clear assurances that they will receive "a fair return for their labors," potential "contributors to the store of knowledge" will make the rational choice not to invest in making those contributions at all. *Harper & Row*, *Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 546 (1985).

B. The Fifth Circuit's Decision Ignores the Weight of Authority Concerning the Application of the Merger Doctrine.

Merger is a judicially created doctrine that limits copyright protection where there is only one or a limited number of ways of expressing an idea (*e.g.*, a mathematical equation). 1 Nimmer § 2A.05 (2024) (discussing the origin of the merger doctrine in the Supreme Court's decision in *Baker v. Selden*, 101 U.S. 99, 103 (1879)). In such situations, the idea is said to "merge" with the expression, such that it cannot be protected. *See Zalewski* v. *Cicero Builder Dev., Inc.*, 754 F.3d 95, 102-103 (2d Cir. 2014).

Merger is a "rare occurrence" and should only be found when "there are no or few other ways of expressing a particular idea." *Silvertop Assocs. v.*

Kangaroo Mfg., 931 F.3d 215, 222 (3d Cir. 2019) (quotation and citation omitted); *CCC*, 44 F.3d at 70 (explaining that the doctrine is narrowly construed because "[u]nbridled application of the merger doctrine would undo the protection the copyright law intends to accord to compilations."); *see also Veeck*, 293 F.3d at 820 (dissent) (challenging the majority's holding in part because "[t]he merger doctrine, however, is a limited exception in copyright law, intended to shelter only those rare cases in which the 'idea' is susceptible of more than one expression, but the number of possible *expressions* is so finite and small as to have effectively 'merged' with the *idea.*").

The weight of authority finds that merger should be assessed at the time the work is created by examining the options available to the author. *Compulife Software, Inc. v. Newman*, 111 F.4th 1147, 1159 (11th Cir. 2024) (analyzing options available to the author in its use of radio buttons for certain user selections and finding merger); *Oracle Am., Inc. v. Google Inc.*, 750 F.3d 1339, 1361 (Fed. Cir. 2014) (holding whether an idea and an expression merge must be "evaluated at the time of creation, not at the time of infringement."); *John G. Danielson, Inc. v. Winchester-Conant Properties, Inc.,* 322 F.3d 26, 43 (1st Cir. 2003) (analyzing choices available to the mapmaker at the time the map was drawn); *Bucklew v. Hawkins, Ash, Baptie & Co., LLP.*, 329 F.3d 923, 928 (7th Cir. 2003) (describing the multitude of choices available to the author when the form at issue was created); *BellSouth Advert. & Pub. Corp. v. Donnelley Info. Pub., Inc.*, 999 F.2d 1436, 1442-43 (11th Cir. 1993) (analyzing the choices available to the author of a directory and finding merger because there were so few ways to express the information); *Kregos v. Associated Press*, 937 F.2d 700, 709 (2d Cir. 1991) (analyzing merger by examining choices available to

the author at the time he created the forms); *Apple Comput., Inc. v. Franklin Comput. Corp.*, 714 F.2d 1240, 1253 (3d Cir. 1983) (abrogated on other grounds) (finding that the relevant assessment was the number of options available to express the copyright holder's idea, not the alleged infringer's commercial objective of designing competitive or compatible software).

In *Oracle v. Google*, Oracle asserted that Google infringed its copyrights in certain application programming interfaces ("APIs"). 750 F.3d at 1347. Google argued the doctrine of merger applied to Oracle's API packages because they had subsequently become the effective industry standard. *Id.* at 1372. The Federal Circuit was "unpersuaded" by this argument and noted that "Google cites no authority for its suggestion that copyrighted works lose protection when they become popular, and we have found none." *Id.* Thus, the Federal Circuit concluded:

> the district court erred in focusing its merger analysis on the options available to Google at the time of copying. It is well-established that copyrightability and the scope of protectable activity are to be evaluated at the time of creation, not at the time of infringement. . . . . The focus is, therefore, on the options that were available to Sun/Oracle at the time it created the API packages.

Id. at 1361 (citations omitted).

The U.S. Solicitor General later confirmed that this approach was consistent with the statutory scheme of the Copyright Act. As the Solicitor General explained, if merger was assessed at some later date, "the copyrightability of a particular work would turn on events that substantially postdated the work's creation. That result is at odds with the Copyright Act's basic design,

under which copyright protection subsists from the creation of a work through the prescribed statutory term." Brief of the United States as Amicus Curiae at 18 n.2, *Google, Inc. v. Oracle Am., Inc.*, No. 14-410 (May 26, 2015)); *accord* Brief of the United States as Amicus Curiae at 12, *Google, Inc. v. Oracle Am., Inc.,* No. 18-956 (Feb. 19, 2020) ("Petitioner thus asks the Court to perform its merger analysis based on the circumstances that existed when petitioner's copying occurred. But copyrightability is determined as of the time when a work is created.").

Likewise, the Second and Ninth Circuits each reject merger as a mechanism to remove copyright protection based on the post-creation fact of IBR. *See CCC Info. Servs.*, 44 F.3d at 61 (reversing the district court's application of merger to the IBR'd work); *Prac. Mgmt. Info. Corp.*, 121 F.3d at 520 n.8 (rejecting argument that IBR of a particular standard resulted in merger).

The panel majority below believed it was bound by the earlier *Veeck* decision on merger. *See CSA*, 112 F.4th at 304-305. But *Veeck*'s merger analysis is an outlier from the well-reasoned appellate precedents and the United States Government's conclusion that merger must be assessed at the time a work is created. *Veeck* rejected the argument that merger was inapplicable because the model codes could be written in a variety of ways. *Veeck*, 293 F.3d at 802. Instead, the Fifth Circuit found that "[model] codes are 'facts' under copyright law. They are the unique, unalterable expression of the 'idea' that constitutes local law." *Veeck*, 293 F.3d at 801. The *Veeck* court ignored the core analysis: whether the model building code at issue was capable of being expressed in so few ways at the time they were created that merger should apply—not

the choices available to the wholesale copier of the model codes.

Numerous courts have recognized that SDOs' standards are capable of being expressed in many ways. *See ASTM II*, 2017 WL 473822, at *14 ("At the time they were authored, there were certainly myriad ways to write and organize the text of the standards"); *Nat'l Fire Protection Assn. v. UpCodes, Inc.*, No. 2:21-cv-05262-SPG-E, Dkt. 230-1 at 19 (C.D. Cal. Nov. 4, 2024) ("*NFPA*") ("there are numerous ways to express the ideas underlying NFPA's standards."); *Prac. Mgmt.*, 121 F.3d at 520 n.8 (finding merger inapplicable because AMA's standards did not prevent "competitors from developing comparative or better coding systems"). In fact, *amici* often write entirely different and competing works concerning the same idea. For example, both the ICC and the International Association of Plumbing and Mechanical Officials, Inc. ("IAPMO") author and publish competing model plumbing codes. The organizations' plumbing codes share the same ideas both at a high level of abstraction, *i.e.*, to provide a comprehensive model plumbing code, and at the more granular level, i.e., each containing chapters on water heaters and plumbing fixtures. Importantly, however, the language used by ICC and IAPMO to express the ideas in their respective model codes differs significantly. Likewise, a legislature acting in its capacity as a lawmaker could choose yet another manner of drafting legislation concerning requirements for installation of water heaters in different structures—and many do make changes at the state and local level. As such, the merger doctrine should not apply to IBR'd standards.

The Fifth Circuit's departure from well-accepted merger principles creates deep uncertainty for the SDO

community. Without any approval or action by an SDO, the copyright in its works can be stripped by any government in the United States, or (as here) abroad, if that work is adopted or even referenced in any law.

Although the Copyright Act grants authors decades of copyright protection for the effort of creating copyrighted works, 17 U.S.C. § 302, if the Decision stands, any federal, state, local, or foreign government can significantly curtail the statutory term for copyright protection based on the merger doctrine by merely IBR'ing a standard. This is particularly problematic because many regulations automatically adopt the newest version of a standard. For example, a Consumer Product Safety Commission ("CPSC") regulation concerning automatic residential garage doors, 16 C.F.R. Part 1211, IBRs Underwriters Laboratories, Inc.'s ("UL") standard UL 325, titled *Standard for Door, Drapery, Gate, Louver, and Window Operators and Systems* ("UL 325"). Subject to CPSC's review, Section 203 of the Consumer Product Safety Improvement Act of 1990, Public Law 101–608, provides for the automatic revision of the CPSC rule concerning garage door operators by IBR'ing the most recent revision of UL 325 upon notice from UL that the standard has been updated. The most recent revision to the CPSC rule occurred this year. CPSC's direct final rule IBR'd the February 2023 version of UL 325 and became effective May 13, 2024. 89 Fed. Reg 18,538 (March 14, 2024). The Fifth Circuit's application of the merger doctrine would diminish UL's copyright term for this standard from 95 years or more to just over a year. Moreover, standards can be IBR'd at any time, leaving SDOs uncertain as to how long they will be able to exercise their copyright. As SDOs rely so heavily on the revenue from their copyrighted works to fund the continued development and publication of their

standards, this uncertainty significantly threatens future standards development and SDOs' ability to ensure their future financial stability.

SDOs also lie at the mercy of unscrupulous actors, like Respondent, who misapply the merger doctrine to create a commercially competitive product, often offered at a price with which non-profit SDOs cannot compete. As discussed above, the merger doctrine is intended to be the rare exception to prevent narrow subject matter like depictions of nature or mathematic equations from becoming the exclusive property of a single author. As applied by the Fifth Circuit, the merger doctrine acts as a cloak for pirates, like Respondent, and other commercial actors to stand up competitive businesses.

C. The Fifth Circuit's Decision Threatens Continuing and Considerable Harm To SDOs.

The Decision invites and emboldens pirates, like Respondents, to create commercially competitive businesses by reproducing and distributing SDOs' copyrighted works at a cut rate price or for free. *See, e.g.*, *NFPA*, 2:21-cv-05262-SPG-E, Dkt. 230-1 at 10 (UpCodes, Inc., a for-profit enterprise that commercially exploits copyrighted works created by numerous non-profit SDOs, asserts the government edicts and merger doctrines among its defenses). This threatens the continued viability of SDOs' existing market for the sale and licensing of their standards. As discussed above, a considerable portion of the revenue that SDOs generate is based on the sale and licensing of their works.

At least one other commercial enterprise, UpCodes, Inc. ("UpCodes") has already leveraged the Fifth Circuit's analysis in the Decision to argue that the

government edicts doctrine and merger apply to strip SDOs of their copyright protection in their works. There, defendants argue that not only do IBR'd standards lose their copyright protection based upon adoption or IBR, but any standard *referenced in* an IBR'd standard likewise loses copyright protection. *See Am. Soc'y for Testing & Materials v. UpCodes, Inc.*, No. 2:24-cv-1895, Dkt. 85 (E.D. Pa.) (notice of supplemental authority concerning the denial of CSA's Petition for Rehearing En Banc, No. 23-50081 (5th Cir. Aug. 14, 2024)).

The Decision will embolden entities like Respondents and UpCodes to steal the fruits of non-profit SDOs' labor to build for profit enterprises that directly compete with the SDOs without incurring any of the costs associated with standards development. With every new pirate that takes from SDOs and reaps a profit from its theft, non-profit SDOs lose critical resources that would otherwise be used for future standards development. The risk posed to the SDOs by Respondents and other pirates is significant. *See, e.g., Warner Bros. Ent. Inc. v. WTV Sys., Inc.*, 824 F. Supp. 2d 1003, 1013 (C.D. Cal. 2011) (defendants' service threatened "to create incorrect but lasting impressions with consumers about what constitute[d] lawful video on demand exploitation" of copyrighted works); *MGM Studios, Inc. v. Grokster, Ltd.*, 518 F. Supp. 2d 1197, 1215 (C.D. Cal. 2007) (finding loss of market share irreparable). For example, Standards Australia Limited ("Standards Australia") already suffers from rampant piracy of its standards. Standards Australia finds unauthorized copies of its standards made available to download for free. Significant lost sales diverted to pirates endangers the integrity of the SDO ecosystem.

Relatedly, the Decision threatens SDOs ability to maintain and negotiate licensing agreements and harms the SDOs' goodwill and relationships with their licensees. For example, American National Standards Institute, Inc. ("ANSI") operates a webstore that provides access to over 500,000 standards from more than 130 publishers, including those published by many of the *amici* here. Other licensees like MADCAD or Accuris also provide expansive digital libraries of standards. As more pirates follow Respondents' example, additional pressure is placed on SDOs' licensees' businesses, straining SDOs' relationships with their licensees. If the Decision stands and becomes adopted more widely, it will be increasingly difficult to imagine how any licensee can continue to pay an SDO to reproduce its copyrighted works while others reproduce them for free—posing a separate existential threat to the SDO community. *See 22nd Century Techs., Inc. v. iLabs, Inc.*, No. 22-2830, 2023 WL 3409063, at *7 (3d Cir. May 12, 2023) (harm to client relationships is irreparable); *Fox Television Stations, Inc. v. BarryDriller Content Sys., PLC*, 915 F. Supp. 2d 1138, 1147 (C.D. Cal. 2012) (discussing clear harm when revenues from licensing market "are used to fund the development and acquisition of [new works]" and the allegedly infringing service "threaten[ed] to damage Plaintiffs' ability to negotiate favorable [licenses]").

Permitting commercial entities to profit from SDOs' standards, as condoned by the Decision, would be devastating to the SDO community. Even the Fifth Circuit previously recognized in *Veeck* should have been different if Veeck's use had a competitive/commercial character. *See Veeck*, 293 F.3d at 805 ("the result in this case would have been different if Veeck had published [the codes] as model codes" in competition with SBCCI).

The economic harms discussed above threaten SDOs' ability to create and update standards and thus their contributions to overall public safety. If SDOs cannot fund their public missions, they will be forced to find alternative models to make up for the lack of sales and licensing revenue or reduce their current production. As discussed in Section II(A), whether SDOs choose to accomplish this by producing fewer standards, updating their existing standards less frequently, or altering their funding model to front-load the costs, those changes significantly impair the important public mission of these organizations. If not reversed, the economic philosophy motivating copyright protection is undermined to benefit pirates, like Respondents.

CONCLUSION

Amici respectfully request the Court grant the petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX

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Appendix

American National Standards Institute, Incorporated

The Amici SDOs are:

American Society of Heating, Refrigerating, and Air Conditioning Engineers

American Society for Testing and Materials d/b/a/ ASTM International

American Society of Safety Professionals

International Association of Plumbing & Mechanical Officials

International Code Council, Inc.

International Electrotechnical Commission

The Institute of Electrical and Electronics Engineers, Incorporated

International Organization for Standardization

North American Energy Standards Board

National Electrical Manufacturers Association

Standards Australia Limited

Telecommunications Industry Association

ULSE Inc.

X12 Incorporated.