No. 02-355

In the Supreme Court of the United States

SOUTHERN BUILDING CODE CONGRESS INTERNATIONAL, INC., PETITIONER

v.

PETER VEECK, D/B/A REGIONAL WEB

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

This case concerns model codes, written and copyrighted by a private organization. The codes apply to the construction, alteration, use, occupancy, and maintenance of buildings and the electrical, plumbing, mechanical, and gas systems in them and provide criminal misdemeanor penalties for failure to comply. The private organization offers the codes to governmental entities for enactment into law. Two municipalities enacted ordinances that adopted the model codes by reference. The question presented is:

Whether copyright law gives the private organization the right to restrict individuals from making copies of the material incorporated by reference in the municipal codes of the two municipalities.

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This brief is submitted in response to the order of this Court inviting the Solicitor General to express the views of the United States. The court of appeals reached the correct result in this case, and its decision does not conflict with other decisions addressing significantly different uses of copyrighted material by the government. Development by the lower courts of the law in this area would further clarify the effect, if any, that different government uses of copyrighted materials have on the copyright of those materials. Accordingly, plenary review of this case is not warranted.

STATEMENT

1. Petitioner Southern Building Code Congress International, Inc. (SBCCI) is a nonprofit organization that creates and updates model codes, including five involved in this case: standard building, fire prevention, gas, mechanical, and plumbing codes. Pet. App. 2a, 103a. SBCCI has approximately 14,500 members, including about 2400 cities, counties, states, and governmental agencies, as well as architects, engineers, building contractors, trade associations, manufacturers, students, and colleges. Pet. 1a-2a; R. 152.[1] SBCCI copyrights all of its model codes. Pet. App. 68a. With SBCCI's express permission and without cost, thousands of municipalities have enacted some or all of these model codes into law as their own codes. Pet. 2. SBCCI places a notice on its model codes instructing that they can be adopted only by reference; they may not be set forth verbatim in the enacting ordinance. R. 538; see, *e.g.*, Standard Building Code at ii.[2]

SBCCI raises revenue by selling copies of its model codes. The price of its 1994 Standard Building Code, for example, is $48 for SBCCI members and $72 for nonmembers. Pet. App. 33a n.1. Approximately $3 million of SBCCI's $9 million annual revenue is said to be derived from the sale of its model codes. *Id.* at 47a n.24; see *id.* at 26a n.21.

2. The towns of Savoy and Anna, Texas, enacted five of SBCCI's model codes by reference—the standard building, fire prevention, gas, mechanical, and plumbing

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[1] "R." refers to the record on appeal filed in the court of appeals.

[2] This brief cites the 1994 editions of the model codes at issue. The codes themselves were not made a part of the record in this case.

codes. Pet. App. 2a; see, *e.g.*, Anna, Tex., Ordinance No. 95-15, § 1, *reprinted in* App., *infra*, 1a ("Be it ordained by the City of Anna that the following Codes are hereby adopted by reference as though they were copied herein fully."). The standard codes are generally available to the public at local government offices and libraries, although neither Savoy nor Anna has a public library and there is reason to believe that finding copies of the codes may be difficult. Pet. App. 2a, 32a-33a & n.3, 68a; R. 601.

The codes are broadly applicable. The standard building and fire prevention codes apply not only to new construction and repair or alteration of buildings, but also to the "use and occupancy" and "maintenance" of existing buildings. Standard Building Code § 101.4.2. The mechanical and plumbing codes apply to "installation" of mechanical and plumbing items, including "alterations, repairs, [and] replacement." *E.g.*, Standard Mechanical Code § 101.4.5. The gas code applies to "installation" of gas equipment and the "operation of residential and commercial gas appliances." Standard Gas Code § 101.4.4. Violations of the codes are subject to criminal sanctions. R. 99; see, *e.g.*, Standard Building Code § 110 ("Any person * * * who shall violate a provision of this code, or fail to comply therewith * * * shall be guilty of a misdemeanor.").

3. Respondent Peter Veeck operates a nonprofit web site that provides free access to information about North Texas. Pet. App. 2a, 103a. He tried to obtain copies of the building codes of approximately 20 towns in Texas, including Anna and Savoy, but he was unsuccessful in obtaining any of the codes from the towns themselves. *Id.* at 68a-69a. He purchased the five 1994 standard codes from SBCCI on computer disks for $385. *Id.* at 103a; Pet. 4. Veeck posted the

codes on his web site. Pet. App. 2a. He did not indicate that they were SBCCI's codes or refer to SBCCI's copyrights, but instead identified them as the building codes of Anna and Savoy. *Ibid.*

SBCCI sent an infringement letter to Veeck, who then filed this declaratory judgment action against SBCCI. Pet. App. 3a. SBCCI counterclaimed for copyright infringement, unfair competition, and breach of contract. *Ibid.* The district court granted summary judgment for SBCCI on the infringement claim. *Id.* at 102a-116a. It enjoined Veeck and awarded SBCCI $2,500 statutory damages plus attorneys' fees. *Id.* at 113a-115a.

4. a. After a divided panel of the Fifth Circuit issued a decision affirming the district court's judgment, Pet. App. 67a- 101a, the court decided to rehear the case en banc and reversed. *Id.* at 1a-66a. The en banc court held that while SBCCI held a copyright on its model codes and could prevent copying of them as model codes, it did not have "the right wholly to exclude others from copying" them "to the extent to which they are adopted as 'the law' of various jurisdictions." *Id.* at 4a.

The court based its analysis on its reading of *Wheaton* v. *Peters*, 33 U.S. (8 Pet.) 591 (1834), and *Banks* v. *Manchester*, 128 U.S. 244 (1888), which held, as a construction of the Copyright Act, that judicial opinions cannot be copyrighted. See Pet. App. 5a-15a. The Fifth Circuit rejected SBCCI's argument that *Wheaton* and *Banks* apply only when the material is authored by a public official, such as a judge. See *id.* at 8a-15a. Instead, the Fifth Circuit held that "*Banks* represents a continuous understanding that 'the law,' whether articulated in judicial opinions or legislative acts or ordinances, is in the public domain and thus not amenable to

copyright." *Id.* at 7a. The court found that the *Banks* rule applies to the building codes that were enacted into law in this case.

The Fifth Circuit held that the "merger doctrine" also operates to permit individuals to copy the law of the two municipalities. Pet. App. 16a-20a. The Copyright Act excludes from copyright protection "any idea, procedure, process, system, method of operation, concept, [or] principle." 17 U.S.C. 102(b). The Fifth Circuit noted that "[i]f an idea is susceptible to only one form of expression, the merger doctrine applies and § 102(b) excludes the expression from the Copyright Act." Pet. App. 17a. Although model codes can be expressed in a wide variety of different ways, once they are enacted into law, they are "transformed into the 'fact' and 'idea' of the towns' building codes," the court held, adding that "Veeck could not express the enacted law in any other way." *Id.* at 19a. The court concluded that SBCCI therefore lost its copyrights in the codes as enacted because its otherwise copyrightable expression merged with the uncopyrightable fact or idea of the law. *Id.* at 20a.

In concluding that the municipal codes in this case could be freely copied, the court relied on the First Circuit's decision in *Building Officials & Code Administrators* v. *Code Technology, Inc.*, 628 F.2d 730 (1980) (*BOCA*)—the only other appellate case addressing a similar building code. Pet. App. 13a-15a. The court distinguished cases from the Ninth and Second Circuits holding that government adoption of a preexisting private numbering system for medical conditions and a set of valuations for used cars did not vitiate the copyright holder's right to prevent others from making copies of the numbering system or set of valuations. See *Practice Mgmt. Info. Corp.* v. *Ameri-*

can Med. Ass'n, 121 F.3d 516 (1997) (*PMIC*) (numbering system), opinion amended by 133 F.3d 1140 (9th Cir. 1998), cert. denied, 524 U.S. 952 (1998); *CCC Info. Servs., Inc.* v. *Maclean Hunter Market Reports, Inc.*, 44 F.3d 61 (2d Cir. 1994) (used car valuations), cert. denied, 516 U.S. 817 (1995). The court stated that those cases merely involved "references to extrinsic standards," while this case involves "the wholesale adoption of a model code promoted by its author * * * precisely for use as legislation." Pet. App. 23a; see *id.* at 24a-26a.

Finally, the court stated that it was not persuaded that the loss of copyright protection would mean that SBCCI and other code-writing organizations would cease providing their services because of lost revenues. Pet. App. 26a-27a. The court stated that the "self-interest" of professionals in the affected fields can provide "powerful reasons stemming from industry standardization, quality control, and self-regulation to produce these model codes." *Id.* at 27a (quoting 1 Paul Goldstein, *Goldstein Copyright* § 2.5.2 (1998)). The court also suggested that code writers could follow the practice of compilers of statutes and judicial opinions and copyright the value they add in the form of commentary and other information. *Ibid.*

b. Judge Wiener filed a dissenting opinion, in which he was joined by all five of the other dissenting judges. Pet. App. 31a-66a. Judge Wiener stated that his analysis was "delimited by the particular * * * facts of the case," which include the facts that Veeck does not live or work in Anna or Savoy, that he posted the entire codes on his website, and that he did not allege that the towns denied him access to their codes. *Id.* at 35a. In Judge Wiener's view, *Wheaton* and *Banks* are "limited to the work of taxpayer-paid public officials who produce or interpret the law." *Id.* at 38a. According to

Judge Wiener, *Banks* teaches not that all law is not copyrightable, but that "[t]he question is one of public policy." *Id.* at 39a (quoting 128 U.S. at 253). He concluded that, although there are policy arguments in favor of stripping the copyright owner of protection when the code is enacted into law, the "scale of countervailing policy considerations is tipped * * * in favor of enforcing SBCCI's copyright vis-a-vis Veeck and any others (but only they) who are identically situated." *Id.* at 40a.

Judge Wiener also stated that federal statutes and regulations support SBCCI's position and that the majority's position would "substantially imping[e] on the financial incentive and ability [of SBCCI] to continue creating and revising its model codes." Pet. App. 47a n.24, 48a. In his view, technical codes and standards are "indispensable ingredients of Twenty-First Century life in this country," and the majority's decision has "predictably deleterious effects on these codes and standards, their authors, and the public and private entities that daily use and depend on them." *Id.* at 31a, 32a.

Judge Higginbotham also filed a dissent, joined by three other judges. Pet. App. 28a-31a. In Judge Higginbotham's view, the fact "[t]hat parts of the copied material contain the same expressions as the adopted codes of two Texas cities is no defense unless the use by the cities of the protected expression somehow invalidated SBCCI's copyright." *Id.* at 28a. He stated that, if SBCCI's right to prohibit copying is upheld, "[n]othing suggests that private entities will control access to 'the law,'" particularly in light of "the doctrines of fair use and implied license or the constitutionally footed right of persons to access the law." *Ibid.* Reading *Banks* more narrowly than the majority, he stated that *Banks* "is a case about authorship, about

the acquiring of copyrights by public officials, not a case invalidating the copyrights held by private actors when their work is licensed by lawmakers." *Id.* at 29a.

DISCUSSION

This case involves a comprehensive code specifically created for enactment into law and designed broadly to regulate the primary conduct of private parties. The court of appeals' holding that such a code may be copied by interested members of the public is correct, it is consistent with the views of the only other court of appeals to address the same issue, and it does not conflict with any decision of any other court of appeals. There is a broad range of differing governmental uses of a wide variety of different types of privately copyrighted materials. In a few cases, the courts of appeals have addressed the issues arising from such uses; they have divided between those involving the incorporation of copyrighted codes into laws that directly regulate primary conduct and those involving laws that reference copyrighted materials. In future cases, the courts of appeals can be expected further to develop the relevant differences between those two categories and thereby clarify the law in this area. To the extent a true conflict develops in the circuits, the Court could then review the issue with the benefit of further refinement of the relevant questions by the courts of appeals. Accordingly, further review is unwarranted.

A. There Is No Conflict In The Circuits

In the twenty years prior to this case, three other courts of appeals addressed the public's right to make copies of materials adopted or referred to in government regulations. The Fifth Circuit's narrow decision in this case is consistent with the only one of those decisions to address an analogous circumstance, and it

does not conflict with the two other decisions, which addressed substantially different factual and legal issues.

1. In *Building Officials & Code Administrators* v. *Code Technology, Inc.*, 628 F.2d 730 (1980), the First Circuit addressed an issue analogous to the one in this case. Massachusetts had adopted a building code that had been copyrighted by a private organization similar to SBCCI. A district court preliminarily enjoined a private party from copying the code and distributing it to others. *Id.* at 732. The First Circuit reversed on the ground that the copyright holder "has not demonstrated a sufficient probability that it will succeed" on the merits. *Id.* at 736. Analyzing a line of cases including this Court's decisions in *Wheaton* v. *Peters* and *Banks* v. *Manchester*, the Court observed that "[t]he law * * * seems clear that judicial opinions and statutes are in the public domain and are not subject to copyright." *Id.* at 734. Relying on that principle, the court stated that it was "far from persuaded that [the copyright holder's] virtual authorship of the Massachusetts building code entitles it to enforce a copyright monopoly over when, where, and how the Massachusetts building code is to be reproduced and made publicly available." *Id.* at 735. The court confronted the issue in the context of a preliminary injunction. Therefore, it did note that it "cannot altogether rule out the possibility that the simple rule of *Wheaton* v. *Peters* should be adapted in some as yet unknown manner to accommodate modern realities" and remanded for further proceedings. *Id.* at 736. But the court stated that it had "serious doubts as to [the copyright holder's] ability to prevail" and vacated the copyright holder's preliminary injunction. *Ibid.* The *BOCA* court's

reasoning and result generally support the Fifth Circuit's decision in this case.

2. a. Although petitioner contends (Pet. 8-12) that the court of appeals' decision conflicts with the Ninth Circuit's decision in *PMIC* and the Second Circuit's decision in *CCC Information Services*, that contention is mistaken. In *PMIC*, the federal government required applicants for medicare or medicaid reimbursement to use the numerical codes set forth in a book identifying medical procedures copyrighted by the American Medical Association (AMA), and a private party sought to distribute copies of the AMA's book. 121 F.3d at 516. The Ninth Circuit held that the AMA generally retained the right to limit or prevent publication by others of its numbering system. *Id.* at 519-520.

CCC Information Services involved the "Red Book," a privately created set of used car prices that state governments had adopted as an alternative standard for insurance companies to use in making payments for total losses in car accidents. 44 F.3d at 73 & n.29. Most of the Second Circuit's opinion in *CCC Information Services* addressed the copyrightability of the Red Book in the first instance. 44 F.3d at 64-73. But in a brief discussion at the end of its opinion, the court held that the Red Book had not fallen into the public domain. The court recognized that "there are indeed policy considerations that support" the argument that the used-car values could be freely copied, but the court held that it was "not prepared to hold that a state's reference to a copyrighted work as a legal standard for valuation results in loss of the copyright." *Id.* at 74.

b. As the Fifth Circuit correctly recognized, its decision in this case does not conflict with the decisions in *PMIC* or *CCC Information Services*. See Pet. App.

23a-26a. This case involves at least five features that were not present in one or both of those cases:

First, the codes in this case were created for the sole purpose of enactment into law, and SBCCI invited the towns of Anna and Savoy to enact them; in *PMIC* and *CCC Information Services*, the standards were created for other, private reasons and then adopted by organs of the federal or state government. See Pet. App. 25a.

Second, the codes in this case comprehensively govern a very broad range of primary conduct—*i.e.*, they regulate everyday conduct by private businesses and ordinary citizens, rather than the means by which a private party may obtain a government benefit (as in *PMIC*) or the specifications for a product or service to be sold to the government. Cf. *National Park Hospitality Ass'n* v. *Department of the Interior*, No. 02-196 (May 27, 2003), slip op. 6-7. Indeed, in SBCCI's terms (Pet. 26), the codes in this case may rightly be called "laws of general applicability."

Third, the codes in this case expressly regulate an entire area of private endeavor. The numbering system in *PMIC* and the Red Book car valuations in *CCC Information Services* did not themselves regulate any conduct; the government regulatory schemes involved in those cases were embodied in non-copyrighted statutes and regulations. See Pet. App. 24a-25a.

Fourth, unlike in *PMIC* and *CCC Information Services*, the codes in this case carry criminal penalties for their violation. Cf. *BOCA*, 628 F.2d at 734 (building codes "have the effect of law and carry sanctions of fine and imprisonment for violations").

Finally, Veeck made copies of the building codes of Anna and Savoy available to the public and did not identify or publish them as the SBCCI model codes. By contrast, the firms that sought to copy the AMA's

numbering system in *PMIC* and the Red Book in *CCC Information Services* attempted "termination of the AMA's copyright," 121 F.3d at 519, and a declaration that the Red Book of car valuations had "fallen into the public domain," 44 F.3d at 73. See Pet. App. 26a.

c. Because this case presents a setting so different from those in *PMIC* and *CCC Information Systems*, the Fifth Circuit correctly found that the decisions in those cases were "distinguishable in reasoning and result." Pet. App. 23a. Although some of the reasoning in *PMIC* differs from that in this case, neither the Ninth nor the Second Circuit was called upon to address the adoption into law of anything like the codes at issue here.[3] Moreover, much of the reasoning that was significant in *CCC Information Services* is of little import here.[4] In short, the opinions in *PMIC* and *CCC Information Services* did not purport to hold that governmental adoption of a privately created code could

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[3] The Ninth Circuit's reading of *Banks* v. *Manchester* in *PMIC* differed somewhat from that of the Fifth Circuit, see 121 F.3d at 518, and the Ninth Circuit also noted that "[n]on-profit organizations that develop these model codes and standards warn that they will be unable to continue to do so if the codes and standards enter the public domain when adopted by a public agency." 121 F.3d at 518-519. Despite those comments, however, the Ninth Circuit did not address facts similar to those present here, and its general comments in *PMIC* would certainly not be dispositive if that court faced the question whether the public may make copies in circumstances like those here.

[4] The Second Circuit in its brief discussion in *CCC Information Services* rested its decision in part on a concern that permitting free copying of the car valuation book "would raise very substantial problems under the Takings Clause of the Constitution." 44 F.3d at 74. That concern seems inapposite here, because SBCCI invited the towns to enact its building code and therefore would presumably not have a valid takings claim.

never affect the rights of the public to make copies of it, and they do not establish that there is a conflict in the circuits on the question presented in this case.[5]

B. The Fifth Circuit Correctly Decided This Case

1. In *Banks* v. *Manchester*, this Court held that the Copyright Act does not afford copyright protection to state judicial opinions. As the Court explained, "[t]he whole work done by the judges constitutes the authentic exposition and interpretation of the law, which, binding every citizen, is free for publication to all, whether it is a declaration of unwritten law, or an interpretation of a statute." 128 U.S. at 253. The Fifth Circuit understood that *Banks* stands for a general "understanding that 'the law,' whether articulated in judicial opinions or legislative acts or ordinances, is in the public domain and thus not amenable to copyright." Pet. App. 7a.[6] As the first Justice Harlan explained in

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[5] In its amicus brief in this Court in *PMIC*, the government took the position that *PMIC* was correctly decided and that further review by this Court was unwarranted. The government's brief noted as well that cases like *PMIC* pose a different question than did the wholesale incorporation into law of a building code, as in *BOCA*. See Br. of the United States at 11 n.14, *PMIC*, *supra* (No. 97-1254) (noting that "[t]he requirements at issue here and in *CCC Information Services* * * * are not backed up by any [criminal] sanctions and, unlike the model code in *BOCA*, they do not govern primary behavior").

[6] SBCCI contends that *Banks* stands for much narrower principles that are inapplicable here—that "the product of *public employees* performing government work belongs to the people" and that the "constitutional 'due process requirement of free access to the law' may prevent government officials from claiming 'copyright' ownership that restricts dissemination of information about the terms of 'the law' they create." Pet. 17. *Banks*, however, is not explicable on petitioner's grounds. The question presented in *Banks* was whether the State of Ohio could obtain a

an opinion filed while sitting on circuit, "any person desiring to publish the statutes of a state may use any copy of such statutes to be found in any printed book." See *Howell* v. *Miller*, 91 F. 129, 137 (6th Cir. 1898).

Those principles apply with full force in this case, because the building codes of Anna and Savoy are indistinguishable from other laws of general applicability that the public has always had the right to copy freely. The towns' building codes were created for the sole purpose of enactment into law, they comprehensively regulate a very broad area of primary conduct, they do not involve exceptional and unusually pervasive government regulation of a highly specialized industry, they are backed by criminal sanctions, and the party seeking to make copies seeks only to copy the portions of the codes actually enacted into law. If copyright

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copyright in state judicial decisions, so that it could give a publisher an exclusive right to publish those decisions. 128 U.S. at 245-247, 253. The fact that the authors of the opinions (the judges) were paid employees could not determine that question, because an employee's status on the payroll had nothing to do with the employee's ability to obtain a copyright and paid employees could of course assign their copyright to their employer (the State). In addition, less than a month after *Banks*, the Court held that the fact that a State pays a reporter who adds value to judicial opinions with marginal notes and the like does *not* preclude the employee from obtaining a copyright in the added value. *Callaghan* v. *Myers*, 128 U.S. 617, 647, 650 (1888) ("the question of a salary or no salary has no bearing upon the subject"). With respect to petitioner's contention that *Banks* was based on a "due process" rationale, the Court stated that its decision was based on a construction of the Copyright Act, not the Constitution. 128 U.S. at 252. Insofar as *Banks* relied on what petitioner describes as the "due process requirement of free access to the law" to construe the Copyright Act, its reasoning applies to materials that have been enacted into law in the relevant sense, regardless of their prior private or public authorship.

protection were nonetheless recognized, there would be "no outer limit on claims of copyright prerogatives by nongovernmental persons who contribute to writing 'the law,'" such as lobbyists or law professors. Pet. App. 12a-13a. An individual who drafted a statute or amendment later adopted by Congress could claim copyright in the text. The Fifth Circuit's conclusion that copyright protection does not apply to the kind of laws at issue here is correct.

That does not mean that every time the government makes a reference to a privately copyrighted work, the public may copy it freely. The Fifth Circuit properly noted that it was not ruling on the very different circumstances present in *PMIC* or *CCC Information Services*, nor addressing the very wide array of other circumstances in which privately developed codes or standards are used by government agencies. Pet. App. 23a-26a. Some government uses of some copyrighted materials may have no effect on the public's right to make copies. In short, although the Fifth Circuit reached the correct result in this case, neither that court nor the Second or Ninth Circuits nor the other courts of appeals have had the opportunity to examine the wide variety of government uses of privately copyrighted material that fall between this case and *PMIC*. In future cases, those courts can examine the distinctions between the various settings in which the government uses privately copyrighted material and develop the factors that clarify the limits of the *Banks* principle of a free right to copy the law.

b. SBCCI contends that the court of appeals' decision is inconsistent with federal statutes and regulations. That contention is wrong.

(i) Petitioner argues (Pet. 13) that the court of appeals' decision "flies in the face of the plain language" of 17 U.S.C. 201(e), which provides that

> [w]hen an individual author's ownership of a copyright * * * has not previously been transferred voluntarily by that individual author, no action by any governmental body * * * purporting to seize, expropriate, transfer, or exercise rights of ownership with respect to the copyright * * * shall be given effect.

Petitioner's contention is mistaken. Section 201(e) is inapplicable to this case by its terms, because it applies only to copyrights owned by "an individual author," not works owned by an entity such as SBCCI. Cf. 17 U.S.C. 201(a) (distinguishing between individual and joint works). More fundamentally, Section 201(e) addresses government actions avowedly intended to coerce a copyright holder to part with his copyright, so that the government itself may exercise ownership of the rights.[7] The towns of Anna and Savoy in this case did not "purport[] to seize, expropriate, transfer, or exercise rights of ownership with respect to" the building codes. Instead, they simply enacted the building codes into law, at petitioner's invitation. To the extent that action had some incidental legal effect on the

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[7] See H.R. Rep. No. 1476, 94th Cong., 2d Sess. 124 (1976) (noting that law "would protect foreign authors against laws and decrees purporting to divest them of their rights under the United States copyright statute, and would protect authors within the foreign country who choose to resist such covert pressures"); 3 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 10.04, at 10-56.5 (2003) (explaining that "it was feared that the Soviet Union * * * would [attempt] to enforce censorship in the United States of the works of its dissident authors").

citizens' ability to make copies, it still did not "purport to" expropriate the copyright. Section 201(e) simply does not address the legal effect of such enactment on a private party's right to copy the enacted material.

(ii) Petitioner also argues (Pet. 14-15) that the court of appeals "flouted" both 17 U.S.C. 105, which provides that copyright protection "is not available for any work of the United States Government," and a statute codified at 15 U.S.C. 272 note requiring federal agencies where practical to "use technical standards that are developed or adopted by voluntary consensus standards bodies." See 15 U.S.C. 272(b)(3). Neither of those statutes are pertinent here.

Section 105 has no application, because the federal government has not claimed copyright protection for any work at issue in this case. Nor would Section 105 be unnecessary under the Fifth Circuit's reading of *Banks*, because the United States Government generates substantial work product that is in no sense "the law" and that would be copyrightable in the absence of Section 105.

Similarly, the congressional policy embodied in the Section 272 note that encourages federal agencies to make use of privately set standards is not at issue in this case. This case does not involve a federal agency and the statute in any event does not address the legal consequences of governmental adoption of a particular code on the ability of members of the public to make copies. More to the point, as suggested above, nothing in the decision below or the copyright laws properly understood means that the mere "use" of a standard (as opposed to its adoption as a law of general applicability) affects the copyright status of the standard.

C. Further Development Of This Area Of The Law By The Lower Courts Will Likely Clarify The Effect On Standards Organizations

Petitioner argues (Pet. 27) that the decision in this case "will substantially undermine the financial capacity of standards-setting organizations to provide their services" because those organizations will no longer be able to rely on sales of copyrighted works. The continued ability of private standards organizations to develop and update their materials at a high level of quality and integrity is of substantial importance to the federal government; by our own count, the Code of Federal Regulations contains more than 7000 references to privately developed codes and standards, upon which federal agencies rely in a very wide variety of settings. Nonetheless, predictions of the effect of the Fifth Circuit's decision on private standards organizations is uncertain at best, and such predictions do not provide an independent basis to grant certiorari in this case.

If, as petitioner argues, the Fifth Circuit decision were understood as broadly applicable to *all* government adoption of and reference to privately developed standards and codes, the effect of the decision would still be highly speculative. The extent to which standards-setting organizations depend on the sale of copyrighted works no doubt varies widely, and such organizations have survived and prospered despite the threat to their copyright income that has existed at least since the First Circuit's decision in *BOCA* in 1980. Moreover, professionals in the fields affected by particular standards and codes may have ample incentive to continue to buy the "official" sets of standards notwithstanding the potential availability of other, unofficial editions. Even if profits from sales of copyrighted

materials were reduced, professionals in the field and others may have many reasons to ensure that broadly applicable standards and codes of high quality and integrity remain available.

In any event, the Fifth Circuit's decision is not a broad ruling applicable to *all* government adoption of and reference to privately developed standards and codes. As noted above, see p. 15, *supra*, the lower courts have not yet had the occasion to address the broad range of cases that may arise between *PMIC*, on the one hand, and the facts of this case, on the other. Insofar as the Fifth Circuit's decision in this case does not apply to the materials governments have adopted or referred to in a wide variety of other contexts, its effect on the financial health of private standards organizations is likely to be less significant. For this reason as well, further development in the lower courts is warranted. As the law in this area is developed in the lower courts, the impact on private standards organizations may become clearer and the resulting legal rules may be addressed by Congress or, in an appropriate case, by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 2003

APPENDIX

CITY OF ANNA, TEXAS

ORDINANCE NO. 95-15

AN ORDINANCE TO ADOPT VARIOUS STANDARD CODES RELATING TO INSPECTION ACTIVITIES OF THE CITY OF ANNA AND ENFORCEMENT OF BUILDING PROVISIONS AS PROVIDED IN SAID CODES.

Section 1. WHEREAS, it is the desire of the City of Anna to adopt, in all respects, the various Standard Codes relating to amusement devices, building, fire prevention, gas, housing, mechanical, plumbing and swimming pools and

WHEREAS, the adoption of these Codes is done to facilitate proper inspection activities by the City of Anna and relating to public safety, health and general welfare;

NOW, THEREFORE, BE IT ORDAINED BY THE CITY OF ANNA that the following Codes are hereby adopted by reference as though they were copied herein fully:

Standard Amusement Device Code - 1985 Edition

Standard Building Code - 1994 Edition

Standard Existing Building Code - 1988 Edition with 1991/1994 Revisions

Standard Fire Prevention Code - 1994 Edition

Standard Gas Code - 1994 Edition

Standard Housing Code - 1991 Edition with 1992/1994 Revisions

Standard Mechanical Code - 1994 Edition

Standard Plumbing Code - 1994 Edition

Standard Swimming Pool Code - 1991 Edition with 1993/1994 Revisions

Standard Unsafe Building Abatement Code - 1985 Edition

Section 2. BE IT FURTHER ORDAINED BY THE CITY OF ANNA that any matters in said Codes which are contrary to existing Ordinances of the City of Anna, shall prevail and that Ordinance Nos. 103-85, Uniform Building Code; 105-87, Uniform Fire Code; 108-87, Uniform Mechanical Code; 109-87, Uniform Plumbing Code; are hereby repealed and, to that extent any existing Ordinances to the contrary are hereby repealed in the respect only.

Section 3. BE IT FURTHER ORDAINED that within said Codes, when reference is made to the duties of a certain official named therein, that designated official of the City of Anna who has duties corresponding to those of the named official in said Code shall be deemed to be the responsible official insofar as enforcing the provisions of said Code are concerned.

Section 4. BE IT FURTHER ORDAINED that this Ordinance shall take effect and be in force from and after its passage, the public welfare requiring it.

PASSED AND APPROVED BY THE CITY OF ANNA on the day of [Illegible]

APPROVED: /s/ Ronald R. Ferguson
MAYOR

ATTEST: /s/ [Illegible]
CITY SECRETARY