

## VEECK V. SOUTHERN BUILDING CODE CONGRESS INTERNATIONAL, INC.

*By Nick Martini*

Many documents produced by the federal government perform important, socially-desirable functions. Furthermore, the government provides incentives to ensure its works will continue to be developed. For these reasons copyright protection has generally been denied for governmental works. Nevertheless, courts struggle to determine what constitutes a government work. *Veeck v. Southern Building Code Congress International, Inc.*<sup>1</sup> addressed whether model codes created by private entities lose copyright protection when adopted by municipalities, thus grappling with the question of how broad of a scope should be given to the government works exception to copyright protection.

This Note will proceed in three parts. Part I traces the history of the government works exception in copyright law, and tracks the evolving importance of incentives in determining whether a work falls under the exception. Part II examines the history and progression of *Veeck*, highlighting the main issues presented in the case. Part III analyzes *Veeck* in the context of the government works exception, specifically considering what incentives promote the creation of such works and whether copyright incentives are needed. This Note concludes that while sufficient incentives motivate the creation of important governmental works such as judicial opinions, statutes, and model codes, less significant government-affiliated works such as tax maps or health care coding systems may require additional incentives for their creation.

### **I. BACKGROUND: THE HISTORY OF THE GOVERNMENT WORKS EXCEPTION TO COPYRIGHT PROTECTION**

Early government works exception precedents remain an important basis for contemporary decisions and also identify the importance of incentives to create a document in determining whether a work should fall under the government works exception.<sup>2</sup> Beginning with common law cases in the early nineteenth century, courts began to recognize the injustice of

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1. 49 F. Supp. 2d 885 (E.D. Tex. 1999) [hereinafter *Veeck I*], *aff'd*, 241 F.3d 398 (5th Cir. 2001) [hereinafter *Veeck II*], *rev'd en banc*, 293 F.3d 791 (5th Cir. 2002) [hereinafter *Veeck III*], and *petition for cert. filed*, 71 U.S.L.W. 3170 (Sept. 4, 2002).

2. See, e.g., *Veeck III*, 293 F.3d at 795-99; *Bldg. Officials & Code Adm'r v. Code Tech., Inc.*, 628 F.2d 730, 733-34 (1st Cir. 1980) [hereinafter *BOCA*].

granting copyright protection to expressions of primary law.<sup>3</sup> In time, the federal government began to codify these holdings into statutes barring copyright protection for government works.<sup>4</sup> Since its common law inception, courts have struggled to define the scope of the government works exception<sup>5</sup> and this task has only become more difficult as the volume and range of government works has expanded.<sup>6</sup>

In *Wheaton v. Peters*,<sup>7</sup> which established the common law government works exception, the Supreme Court denied copyright protection to the official reporter of its cases, stating that courts were “unanimously of the opinion, that no reporter has or can have any copyright in the written opinions delivered by this court; and that the judges thereof cannot confer on any reporter any such right.”<sup>8</sup> *Banks v. Manchester*<sup>9</sup> expanded *Wheaton*<sup>10</sup> by denying copyright protection for state judicial opinions.<sup>11</sup> The Court provided two justifications for its ruling: (1) judges had adequate finan-

3. See, e.g., *Callaghan v. Myers*, 128 U.S. 617, 645-47 (1888); *Banks v. Manchester*, 128 U.S. 244, 253-54 (1888); *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591, 668 (1834); *Howell v. Miller*, 91 F. 129, 138 (6th Cir. 1898); *Davidson v. Wheelock*, 27 F. 61, 62 (C.C.D. Minn. 1866); *Nash v. Lathrop*, 6 N.E. 559, 562-63 (Mass. 1886).

4. See, e.g., 17 U.S.C. §§ 101, 105 (2002); 17 U.S.C. § 8 (repealed 1976).

5. See, e.g., *Banks*, 128 U.S. at 254; *Wheaton*, 33 U.S. (8 Pet.) at 668; *Heine v. Appleton*, 11 F. Cas. 1031, 1032-33 (S.D.N.Y. 1857) (No. 6324).

6. See, e.g., *County of Suffolk v. First Am. Real Estate Solutions*, 261 F.3d 179 (2d Cir. 2001) (considering whether copyright protection should be afforded to tax maps prepared by a county government); *Practice Mgmt. Info. Corp. v. AMA*, 121 F.3d 516, 518-20 (9th Cir. 1997) (determining whether a health care coding system adopted by a federal agency was a government work); *Schnapper v. Foley*, 667 F.2d 102 (D.C. Cir. 1981) (determining whether a movie commissioned by the federal government was an uncopyrightable work of the government); *Bldg. Officials & Code Adm’r v. Code Tech., Inc.*, 628 F.2d 730 (1st Cir. 1980) (considering whether privately created building codes, adopted by local governments, could maintain their copyright protection); *S & H Computer Sys., Inc. v. SAS Inst., Inc.*, 568 F. Supp. 416 (M.D. Tenn. 1983) (determining whether government funding for development of a software program made it a government work).

7. 33 U.S. (8 Pet.) at 668.

8. *Id.* Lacking statutory rules, the Court in *Wheaton* relied on equity principles to ensure public access to judicial opinions. See *Andrea Simon, Note, A Constitutional Analysis of Copyrighting Government-Commissioned Work*, 84 COLUM. L. REV. 425, 428 (1984); accord *Veeck III*, 293 F.3d at 795.

9. 128 U.S. 244 (1888).

10. *Wheaton* held that federal judicial opinions could not be copyrighted. *Wheaton*, 33 U.S. (8 Pet.) at 668. *Banks* expanded the *Wheaton* holding to also prevent copyright protection for state judicial opinions. *Banks*, 128 U.S. at 252-54.

11. *Banks*, 128 U.S. at 252-54.

cial incentives to ensure creation of opinions;<sup>12</sup> and (2) judicial opinions constituted the law and due process required complete access to the law.<sup>13</sup>

The Printing Act of 1885 contained the first legislative provision precluding copyright protection for government works.<sup>14</sup> Section 52 of the Act established the Public Printer (later the Government Printing Office),<sup>15</sup> allowing it to sell printing plates for government documents to private parties on the condition that “no publication reprinted from such stereotype or electrotype plates and no other [g]overnment publication shall be copyrighted.”<sup>16</sup> The Printing Act ushered in a new era for the government works exception by allowing courts to base their decisions on statutory construction rather than the more nebulous common law principles.<sup>17</sup>

Congress later incorporated the Printing Act’s prohibition on the copyright of government works into section 8 of the Copyright Act of 1909 (1909 Act), which provided that, “[n]o copyright shall subsist in the original text of any work which is in . . . any publication of the United States government, or any reprint, in whole or in part, thereof . . . .”<sup>18</sup> While this provision reflected Congress’ intention to deny copyright protection to government works, the 1909 Act failed to specify what constituted “publications of the United States Government.”<sup>19</sup> This oversight caused a great deal of confusion and inconsistency as courts struggled to interpret the scope of this phrase.<sup>20</sup>

12. *Id.* at 253. The court held that judges receive a salary from the public treasury, and can, therefore, have no “pecuniary interest or proprietorship, as against the public at large, in the fruits of their judicial labors.” *Id.*

13. According to the *Banks* court, “The 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 . . . .” *Id.* at 253.

14. Printing Act, ch. 23, 28 Stat. 601 (1895) (repealed 1909). See also David Rabinowitz, *Everything You Ever Wanted to Know About the Copyright Act Before 1909, But Couldn’t Be Bothered to Look Up*, 49 J. COPYRIGHT SOC’Y 649, 652 (2001).

15. §§ 1-2, 28 Stat. at 601. See also L. Ray Patterson & Craig Joyce, *Monopolizing the Law: The Scope of Copyright Protection for Law Reports and Statutory Compilations*, 36 UCLA L. REV. 719, 752 (1989).

16. § 52, 28 Stat. at 608.

17. Compare *Callaghan v. Myers*, 128 U.S. 617, 647-52 (1888), and *Banks*, 128 U.S. at 253, and *Wheaton*, 33 U.S. (8 Pet.) at 668, with *Sherrill v. Grieves*, 20 COPY-RIGHT OFF. BULL. 675 (D.C. Sup. Ct. 1929).

18. 17 U.S.C. § 8 (repealed 1976).

19. *What is a “Publication of the United States Government”? A Search for a Meaningful Solution*, 17 RUTGERS L. REV. 579, 579 (1963) [hereinafter *Meaningful Solution*].

20. See, e.g., *Scherr v. Universal Match Corp.*, 297 F. Supp. 107, 110-11 & n.8 (S.D.N.Y. 1967) (discussing the difficulty courts faced trying to define “publications of the United States Government”). See also *Meaningful Solution*, *supra* note 19, at 579

In a series of cases from the 1920s through the 1970s, courts considered three factors to determine whether a particular work should be classified as a government publication under the 1909 Act:<sup>21</sup> (1) the relationship between the work and the author's government employment;<sup>22</sup> (2) the degree to which an author used government facilities, personnel, and resources to create the work;<sup>23</sup> and (3) whether the government claimed authorship or distributed the work.<sup>24</sup> *Public Affairs Associates, Inc. v. Rickover*<sup>25</sup> illustrates the difficulty courts faced applying these factors.<sup>26</sup> Even though Vice Admiral Rickover's speeches were printed using government resources and bore official seals of federal agencies, the court gave more weight to the fact that they were developed on Rickover's private time and had little to do with his duties and thus the court held that the speeches were not publications of the government.<sup>27</sup>

Congress attempted to remedy its failure to define what constituted a government publication in the Copyright Act of 1976 (1976 Act). Section 101 of the 1976 Act provided a definition for "governmental work" as one "prepared by an officer or employee of the United States Government as part of that person's official duties."<sup>28</sup>

One of the first major challenges of the framework of the 1976 Act occurred in *Building Officials & Code Administrators v. Code Technology*,

(stating that because of the limited amount of government publishing in the early twentieth century, there was little need to specifically define government publications).

21. See, e.g., *Sawyer v. Crowell Publ'g Co.*, 46 F. Supp. 471 (S.D.N.Y. 1942) [hereinafter *Sawyer I*], *aff'd*, 142 F.2d 497 (2d Cir. 1944) [hereinafter *Sawyer II*]; *Grieves*, 20 COPYRIGHT OFF. BULL. at 685-87; see also *Meaningful Solution*, *supra* note 19, at 585-590.

22. See, e.g., *U.S. v. First Trust Co.*, 251 F.2d 686, 688-91 (8th Cir. 1958); *Sawyer I*, 46 F. Supp. at 473; *Grieves*, *supra* note 17, at 685-87.

23. See, e.g., *Sawyer II*, 142 F.2d at 498; *Grieves*, 20 COPYRIGHT OFF. BULL. at 685.

24. See, e.g., *U.S. v. First Trust Co.*, 251 F.2d 686, 688-91 (8th Cir. 1958); *Sawyer II*, 142 F.2d at 498-99; *Grieves*, *supra* note 17, at 686.

25. 177 F. Supp. 601 (D.D.C. 1959), *rev'd*, 284 F.2d 262 (D.C. Cir. 1960) [hereinafter *Rickover II*], *vacated by* 369 U.S. 111 (1962), *remanded to* 268 F. Supp. 444 (D.D.C. 1967) [hereinafter *Rickover IV*].

26. *Rickover* was appealed from the district court to the Court of Appeals for the District of Columbia, then was granted certiorari by the Supreme Court, and ultimately was reheard and decided by the district court nearly eight years after the action was instigated. See *supra* note 25.

27. *Rickover IV*, 268 F. Supp. at 448-50, 456.

28. 17 U.S.C. § 101 (2002). In addition to providing a definition of "governmental work," Congress replaced section 8 of the 1909 Act with the more succinct section 105 of the 1976 Act, which states, "Copyright protection under this title is not available for any work of the United States Government . . ." *Id.* § 105.

*Inc.*<sup>29</sup> The Building Officials and Code Administrators (BOCA), developers of a privately created model code that was subsequently adopted by a local government, attempted to prevent Code Technology from copying and distributing the code.<sup>30</sup> On appeal from a preliminary injunction order, BOCA defended the injunction on the ground that its codes differed from statutes and judicial opinions because government employees did not create the codes, and the model codes did not receive funding from the government, and thus copyright protection was essential to ensure adequate incentives for development of their codes.<sup>31</sup> The court dismissed these arguments and vacated the grant of preliminary injunction.<sup>32</sup>

Courts also encountered difficulties adjudicating cases where works were funded by the government, but, unlike statutes and judicial opinions, did not have the binding effect of law. In *Schnapper v. Foley*,<sup>33</sup> the federal government hired a movie director to create a documentary about the Supreme Court, and required the director to assign his copyright in the completed work.<sup>34</sup> The director later sued for declaratory relief, claiming that the movie was a government work, making his copyright assignment unenforceable.<sup>35</sup> The court of appeals rejected the director's argument and found that even though 17 U.S.C. § 105 precluded the government from directly obtaining a copyright, nothing prevented it from commissioning a work and requiring the creator to copyright the work and assign the copyright to the government.<sup>36</sup>

As the variety and volume of government-affiliated works lacking direct legal effect increased, courts became more inclined to place such works outside the ambit of the government works exception. In *CCC Information Services, Inc. v. Maclean Hunter Market Reports*,<sup>37</sup> copyright protection was given to a compilation of automobile values known as the Red Book, which was cited by several states as an alternative standard for valuing automobiles.<sup>38</sup> The Second Circuit was "not prepared to hold that

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29. 628 F.2d 730 (1st Cir. 1980).

30. *Id.* at 731.

31. *Id.* at 733-34.

32. *Id.* at 736.

33. 667 F.2d 102 (D.C. Cir. 1981).

34. *Id.* at 106.

35. *Id.* at 105.

36. *Id.* at 109. In another case, a district court found that funding from the federal government and use of government resources did not convert a software program into an uncopyrightable government work. *S & H Computer Sys., Inc. v. SAS Inst., Inc.*, 568 F. Supp. 416, 419 (M.D. Tenn. 1983).

37. 44 F.3d 61 (2d Cir. 1994).

38. *Id.* at 73.

a state's reference to a copyrighted work as a legal standard for valuation results in loss of the copyright."<sup>39</sup> Similarly, in *Practice Management Information Corp. v. AMA*,<sup>40</sup> the Ninth Circuit found that even though a government agency regulation required use of a privately developed coding system for hospital forms, the coding system did not enter the public domain.<sup>41</sup> The court distinguished *Banks v. Manchester* on the grounds that a private entity created the coding system, the government did not pay the entity, and there was no evidence that anyone was denied access to the system.<sup>42</sup>

Finally, *County of Suffolk v. First American Real Estate Solutions, Inc.*<sup>43</sup> held that tax maps developed by a county government could be sufficiently different from opinions and statutes and thus entitled to copyright protection.<sup>44</sup> Two factors must be considered in determining if a work should be treated the same as opinions and statutes: whether the public needed access to the work and whether the entity creating the work had sufficient economic incentives to create the work.<sup>45</sup> The court found little need for the public to have access to tax maps, since these maps did not create legal obligation to pay property taxes.<sup>46</sup> However, it remanded the case for further development and a determination of whether copyright incentives were needed for the county to invest the resources it did into creating the maps.<sup>47</sup>

## II. CASE SUMMARY

### A. Facts and Procedural History

In 1998 Peter Veeck's plans to rehabilitate a two-story, commercial building in Denison, Texas, were delayed when he was unable to locate Denison's building code.<sup>48</sup> After several unsuccessful attempts to locate

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39. *Id.* at 74.

40. 121 F.3d 516 (9th Cir. 1997).

41. *Id.* at 521.

42. *Id.* at 518-19.

43. 261 F.3d 179 (2d Cir. 2001).

44. *Id.* at 187.

45. *Id.* at 193-94 (citing *Practice Mgmt. Info. Corp. v. AMA*, 121 F.3d 516, 518-19 (9th Cir. 1997) and *Bldg. Officials & Code Adm'r v. Code Tech., Inc.*, 628 F.2d 730, 734-35 (1st Cir. 1980), both of which relied on *Banks v. Manchester*, 128 U.S. 244 (1888) to establish the two considerations).

46. *Id.* at 195.

47. *Id.* at 194-95.

48. See Daniel Fisher, *We Own That Law*, FORBES, Apr. 30, 2001, at 60; Charles Paul Freund, *The Price of Legislation*, REASON, Aug. 1, 2001, at 16, 16-17.

the code Veeck bought an electronic copy from SBCCI for \$72, and copied and published the text of the building code on his website.<sup>49</sup> SBCCI was an organization that developed, promoted, and promulgated model codes.<sup>50</sup> To facilitate adoption of its codes, SBCCI did not charge local governments any fees when its codes were adopted, did not keep track of entities that adopted its codes, and did not execute any licensing agreements with the government.<sup>51</sup> It relied on dues from its members and sales of copies of its codes to private entities to cover its expenses.<sup>52</sup>

Responding to SBCCI's threat of litigation, Veeck filed for declaratory judgment, arguing that SBCCI's codes were uncopyrightable on several grounds.<sup>53</sup> Veeck's primary argument was that granting copyright protection to the model codes violated due process, which required unrestricted access to the law, and, since copyright restricted access, SBCCI could not have a copyright in the enacted model codes.<sup>54</sup> Veeck also made claims under the idea-expression dichotomy, merger doctrine,<sup>55</sup> copyright misuse,<sup>56</sup> copyright waiver,<sup>57</sup> and fair use.<sup>58</sup> SBCCI counterclaimed alleging copyright infringement, unfair competition, and breach of contract.<sup>59</sup> Both parties subsequently moved for summary judgment.<sup>60</sup>

## B. District Court Decision

The district court rejected Veeck's due process claim based on its interpretation of *Banks v. Manchester*.<sup>61</sup> According to the court, *Banks de-*

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49. *Veeck III*, 293 F.3d at 793. Veeck claimed to have searched through Denison's bookstores and libraries, and visited approximately twenty towns in North Texas in an attempt to locate a complete version of the code. *Id.* at 809 (Wiener, J., dissenting).

50. *Id.* at 793-94.

51. *Id.* at 794.

52. *Id.* at 816 (Wiener, J., dissenting). The dissent went on to note SBCCI gets \$3 million annually from selling copies of its code. The remaining \$6 million in its budget was obtained from membership dues. *Id.* at 816 n.24.

53. *Veeck I*, 49 F. Supp. 2d at 888.

54. *Id.* at 888-90.

55. Veeck argued that laws are facts, and that once the model codes were enacted into law they merged with fact to create a single, uncopyrightable document. *Veeck III*, 293 F.3d at 800.

56. Veeck claimed that SBCCI misused their model code copyrights by requiring "exclusive use of its codes or any other of its services as a condition of a governmental subdivision's adopting one of the codes." *Id.* at 822 (Wiener, J., dissenting).

57. Veeck claimed that SBCCI "waived its right to copyright protection by encouraging municipalities to adopt its codes by reference." *Veeck II*, 241 F.3d at 409.

58. *Id.* at 409-10.

59. *Veeck III*, 293 F.3d at 794.

60. *Id.*

61. *Veeck I*, 49 F. Supp. 2d at 888-90 (interpreting 128 U.S. 244 (1888)).

nied copyright protection to judicial opinions on the grounds that judges were public servants and thus their works must be in the public domain, and that public policy supported the placement of judicial opinions in the public domain since these opinions were “authentic expositions of law.”<sup>62</sup> Since SBCCI was not a public servant and there was no evidence that public access to the model codes had been denied, the district court held that neither of the *Banks* justifications applied and copyright could be extended to SBCCI’s enacted model codes.<sup>63</sup> The court also rejected Veeck’s other arguments<sup>64</sup> and permanently enjoined Veeck from interfering with SBCCI’s copyrights.<sup>65</sup>

### C. Fifth Circuit Decision

Veeck appealed to the Fifth Circuit, which affirmed the district court’s ruling in a divided panel.<sup>66</sup> The court upheld the district court’s finding that due process had not been violated because neither of the concerns identified in *Banks v. Manchester* were exhibited in *Veeck*.<sup>67</sup> However, the Fifth Circuit supplemented this analysis by balancing due process concerns with policy considerations.<sup>68</sup> According to the court, if copyright protection was not extended to groups like SBCCI, they would lose the incentive to create model codes, and governments would be forced to spend considerable amounts of money to fill the void.<sup>69</sup> The court used similar reasoning as the district court to reject Veeck’s other copyright claims, consequently finding SBCCI’s copyrights to be valid and infringed.<sup>70</sup>

### D. Fifth Circuit En Banc Decision

Veeck appealed the decision and petitioned the Fifth Circuit for *en banc* review. The Fifth Circuit granted review, reversing the Fifth Circuit

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62. *Id.* at 888.

63. *Id.* at 888-89.

64. The district court rejected Veeck’s idea-expression dichotomy, merger doctrine, copyright misuse, copyright waiver, and fair use claims. *Id.* at 890-91.

65. The district court also awarded attorneys’ fees and \$2,500 in statutory damages. *Id.* at 892-93.

66. *Veeck II*, 241 F.3d at 411.

67. Specifically, the court held *Banks* denied copyright protection to judicial opinions because judges were paid with public funds and because the law should be available to the public. Because SBCCI was not paid with public funds, and because Veeck failed to prove his access to the law was denied, the court found *Banks* did not apply. *Id.* at 404-05.

68. *Id.* at 405-06.

69. *Id.* at 406.

70. *Id.*

panel's holdings to sustain each of Veeck's claims. The majority began its analysis by reviewing Supreme Court cases denying copyright protection to judicial opinions.<sup>71</sup> The Fifth Circuit interpreted the Supreme Court rulings in *Wheaton v. Peters* and *Banks v. Manchester* as unequivocal support for the proposition that the law cannot be copyrighted.<sup>72</sup> *Banks* never proposed that judges were not authors because the government paid them or that they did not need incentives to create judicial opinions.<sup>73</sup> The majority also applied the *Banks* holding that laws should be available to the public.<sup>74</sup> Ultimately the court found, "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."<sup>75</sup> Because the court found that Veeck had only copied the law, it held that SBCCI's copyright had not been infringed.<sup>76</sup>

In addition to its due process analysis, the court buttressed its finding that SBCCI should not have a copyright in the law with three additional arguments. First, the majority found that the Copyright Act's idea-expression dichotomy prevented the grant of copyright protection to SBCCI's model codes.<sup>77</sup> Second, the majority claimed that the remainder of the caselaw suggested that SBCCI should be denied a copyright in its enacted model codes.<sup>78</sup> The court cited *BOCA* as "clearly favoring Veeck's position over that of SBCCI . . ."<sup>79</sup> The First Circuit in *BOCA* denied a preliminary injunction to prevent copying of an enacted model code because it was not convinced that model codes were sufficiently different from statutes and judicial opinions to warrant different treatment.<sup>80</sup>

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71. *Veeck III*, 293 F.3d at 795-99.

72. *Id.* at 795-96.

73. *Id.* at 797. In so holding, the majority rejected SBCCI's argument that *Banks* held, *inter alia*, that judicial opinions could not be copyrighted because the government provided sufficient incentives for judges to create these government works. *Id.*

74. *Id.* at 800.

75. *Id.* at 793.

76. *Id.* at 800.

77. According to the court, SBCCI's "codes are 'facts' under the copyright law. They are the unique, unalterable expression of the 'idea' that constitutes local law." *Id.* at 801.

78. *Id.* at 803.

79. *Id.* at 803. See also *supra* notes 29-32 and accompanying text.

80. *BOCA*, 628 F.2d at 732. The *Veeck* court then distinguished *CCC Info. Services and Practice Mgmt.*, see *supra* notes 37-42 and accompanying text, from the current case. *Veeck III*, 293 F.3d at 804-05. According to the Fifth Circuit these decisions were distinguishable because each dealt with standards that were only referred to by laws or regulations. This did not create the same binding effect of law that results from enactment of model codes. *Id.* at 804-05. Furthermore, the court placed considerable weight on the fact

Finally, the majority considered policy arguments and concluded that SBCCI did not need the incentive of copyright to ensure production of its model codes.<sup>81</sup>

The dissent endorsed the view of the Fifth Circuit en banc panel, viewing *Veeck* as balancing due process concerns and preservation of incentives to create valuable works. First, the dissent considered the potential due process violations that could exist if copyright protection was extended to SBCCI's enacted model codes.<sup>82</sup> According to the dissent, due process violation asserted by *Veeck* asserted was "murky at best."<sup>83</sup> First, *Veeck* was never prosecuted for violating any of the building codes he claimed were unavailable, thus precluding claims of procedural due process violations.<sup>84</sup> Consequently, the only remaining due process argument that *Veeck* could make was that the model codes entered the public domain upon enactment into law and that this robbed the codes of copyright protection.<sup>85</sup> The dissent challenged this proposition by distinguishing two opinions arguably supporting this position, *Banks* and *BOCA*.<sup>86</sup> Because there was no evidence that *Veeck* was denied due process, and since no controlling precedent identified due process concerns for cases like *Veeck*, the dissent concluded that due process did not invalidate SBCCI's copyrights.<sup>87</sup>

The dissent analyzed the policy considerations favoring the grant of a copyright to SBCCI, and argued that denying copyright protection would

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that neither author in these cases created their works for the purpose of incorporating them into law. *Id.* at 805.

81. The court provided three reasons why SBCCI did not need copyright protection. First, SBCCI produced model codes for sixty years without copyright protection and would likely continue to survive without these rights. Second, even without copyright protection the possibility of self-regulation created a powerful enough incentive for SBCCI to continue to make model codes. Third, if SBCCI really needed copyright protection for its codes it could be obtained for any value-added versions of the codes it produced. *Id.* at 805-06.

82. *Id.* at 811-14 (Wiener, J., dissenting).

83. *Id.* at 812 (Wiener, J., dissenting).

84. *Id.* at 813 (Wiener, J., dissenting).

85. *Id.* (Wiener, J., dissenting).

86. The dissent found that the "*Banks* holding is obviously limited to the work of taxpayer-paid public officials who produce or interpret the law." *Id.* at 811 (Wiener, J., dissenting). Because SBCCI was not a public official and was not funded by taxes, its model codes did not present the same due process/public domain concerns implicated by judicial opinions. While the dissent conceded *BOCA* favored *Veeck*'s argument, it argued *BOCA* did not explicitly deny copyright protection to enacted model codes. *See id.* at 813-14 (Wiener, J., dissenting). Consequently neither *Banks* nor *BOCA* could be interpreted as holding that model codes entered the public domain upon enactment.

87. *Id.* at 818 (Wiener, J., dissenting).

erode incentives for creating such works. It described SBCCI as a privately owned, nonprofit organization that relied heavily on revenues from the sale of its model codes.<sup>88</sup> It argued that if SBCCI and similar entities were denied copyright protection, they would lose significant revenue and thus the ability and incentives to create the model codes.<sup>89</sup> This concern was corroborated by *Practice Management Information Corp. v. AMA*,<sup>90</sup> which held that denying copyright protection to nonprofit organizations that perform public services could eliminate necessary incentives to perform the public service.<sup>91</sup> The dissent argued that private code-creating entities like SBCCI performed essential services to small towns by providing sophisticated and current model codes at a low cost. If SBCCI and similar organizations discontinued this service, these communities would have to spend considerable resources to create codes.<sup>92</sup> Preventing Veeck from publishing SBCCI's model codes on the Internet would not "obstruct reasonable and necessary usage of and compliance with the adopted codes."<sup>93</sup> Based on these arguments the dissent concluded that serious policy concerns necessitated copyright protection for SBCCI's enacted model codes.<sup>94</sup>

### III. DISCUSSION

The history of the government works exception and the arguments presented in *Veeck* indicate that incentives to create play an important role in a court's determination of whether a work fits under the government works exception.<sup>95</sup> If insufficient incentives exist to create a work, it is much less likely that courts will find it fits under the government works

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88. *Id.* at 816 (Wiener, J., dissenting).

89. *Id.* at 816-17 (Wiener, J., dissenting).

90. 121 F.3d 516 (9th Cir. 1997).

91. *Veeck III*, 293 F.3d at 816 (Wiener, J., dissenting) (quoting *Practice Mgmt.*, 121 F.3d at 518).

92. *Id.* at 817 (Wiener, J., dissenting).

93. *Id.* (Wiener, J., dissenting).

94. Upon completing its policy analysis, the dissent performed a cursory analysis of Veeck's other claims and found: (1) because there were several ways to express model codes Veeck's idea-expression dichotomy and merger claims did not apply; (2) there was no evidence SBCCI misused its copyright; (3) SBCCI did not waive its copyright when it encouraged towns to adopt its codes; (4) Veeck did not engage in fair use because he copied almost the entire code, and this copying had the potential to have a substantial detrimental effect on SBCCI's ability to generate revenue; and (5) Veeck infringed SBCCI's valid copyright in its codes. *Id.* at 820-25 (Wiener, J., dissenting).

95. *See supra* Parts I, II.

exception.<sup>96</sup> This Part considers the incentives for creating various works affiliated with the government, and how these incentives affect the ultimate classification and copyrightability of the works.

#### A. Incentives to Create Judicial Opinions, Legislative Statutes, and Model Codes

Judicial opinions and legislative enactments have the most direct incentives for the creation of all government works.<sup>97</sup> Judges and legislators must, by the very nature of their jobs, produce literary works for the government. Judges write opinions documenting the reasoning used to resolve a dispute, while legislators draft legislation. Courts have recognized that salaries produce sufficient incentives for judges and legislators to continue to create government works.<sup>98</sup>

While the incentives to create opinions and statutes are clear, the motivation to create model codes is less apparent. Usually developers of model codes do not receive funding from the government.<sup>99</sup> Instead, they count on a significant part of their revenue to come from the sale of their copyright protected model codes.<sup>100</sup> Consequently, barring copyright protection for model codes could potentially eliminate much of the incentive to create these codes.<sup>101</sup> While this result is possible, examination of the incentives behind model code development indicates that savings from industry standardization, quality control, and self-regulation make creation of model codes profitable for practically any trade organization regardless of whether they are awarded a copyright for the codes.<sup>102</sup> These incentives are examined in the following studies of the housing, software, and banking industries.

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96. See *County of Suffolk v. First Am. Real Estate Solutions, Inc.*, 261 F.3d 179, 194 (2d Cir. 2001); *Practice Mgmt.*, 121 F.3d at 518-19.

97. Even in the nineteenth century courts had firmly resolved that part of the reason why the law could not be copyrighted was because creators of these literary works were government employees, paid by tax dollars. *Banks v. Manchester*, 128 U.S. 244, 253 (1888); *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591, 616 (1834) (quoting argument by counsel for Wheaton).

98. "The copyright system's goal of promoting the arts and sciences by granting temporary monopolies to copyright holders was not at stake in *Banks* because judges' salaries provided adequate incentive to write opinions." *Practice Mgmt.*, 121 F.3d at 518.

99. See *Veeck III*, 293 F.3d at 794; *BOCA*, 628 F.2d at 734.

100. See *Veeck III*, 293 F.3d at 816 n.24 (Wiener, J., dissenting).

101. See *id.* at 816-17 (Wiener, J., dissenting).

102. *Id.*

### 1. *The Housing Industry*

The housing industry presents excellent examples of why organizations will participate in the creation of model codes regardless of the availability of copyright protection. Until recently there were several organizations promulgating “competing editions of building codes that were adopted primarily on a regional basis.”<sup>103</sup> In the last few years, these organizations began to consolidate into one mega-organization.<sup>104</sup> The primary source of building regulations has traditionally been these codes, and the codes themselves have been, and continue to be, heavily influenced by firms in the housing industry.<sup>105</sup> The result of this influence is seen in the International Residential Code, which focused on a new public policy of “affordable housing” while eliminating protection of property as a purpose of the code.<sup>106</sup> The effect of this shift in focus was that “without any form of legislative oversight, the industry succeeded in imposing its preferred policy as law.”<sup>107</sup> The industry’s ability to change the values in the de facto law in building construction from safety to affordability saved the housing industry a significant amount of money, and serves as a powerful example of why organizational groups will continue to be interested in the creation of model codes even if the codes do not receive copyright protection.

### 2. *The Software Industry*

Another example of the importance of model codes in furthering an organization’s or industry’s goals is seen in the creation and adoption of the Uniform Computer Information Transactions Act (UCITA).<sup>108</sup> UCITA was created by the National Conference of Commissioners of Uniform State Law (NCCUSL),<sup>109</sup> which relies heavily on the “opinions and

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103. Michael D. Turner, *Paradigms, Pigeonholes, and Precedent: Reflections on Regulatory Control of Residential Construction*, 23 WHITTIER L. REV. 3, 28 (2001).

104. *Id.* at 28, 32. In 1994 SBCCI, BOCA, and the International Conference of Building Officials (ICBO) merged to form the International Code Congress (ICC). *See About ICC*, at <http://www.intlcode.org/about/index.htm> (last visited Mar. 2, 2003).

105. Turner, *supra* note 103, at 32.

106. *Id.* at 32-34.

107. *Id.* at 33.

108. *See* Brian D. McDonald, Note, *The Uniform Computer Information Transactions Act*, 16 BERKELEY TECH. L.J. 461, 463 (2001).

109. NCCUSL creates uniform laws, which it then recommends to state legislatures. Most of its financial support comes from state appropriations. While NCCUSL drafting committees are typically headed by academics, practitioners tend to control the results. Alan Schwartz & Robert E. Scott, *The Political Economy of Private Legislatures*, 143 U. PA. L. REV. 595, 601-02 (1995).

viewpoints” of interested groups and allows these groups to “actively participate in the exhaustive drafting process.”<sup>110</sup> The main complaint against UCITA is that it gives “too much power to the computer information industry and strips consumers of many significant rights that would be protected in non-UCITA jurisdictions.”<sup>111</sup> Not only did the software industry influence the drafting of UCITA, but at least one commentator had claimed that it also strong-armed two states into adopting the Act.<sup>112</sup> Under UCITA consumer rights are diminished in several ways,<sup>113</sup> which has the potential to save the software industry millions of dollars, and making model code development attractive to software companies regardless of the code’s copyrightability.

### 3. *The Banking Industry*

Finally, amendment of Article 9 of the Uniform Commercial Code (UCC)<sup>114</sup> illustrates the importance interest groups place in the development of model codes.<sup>115</sup> When the UCC announced the revision of Article 9, which pertains to banking and financing institutions, several representatives of banking and financial institutions volunteered their help.<sup>116</sup> Because of this “support,” Article 9 was revised to overwhelmingly promote the interests of banks and finance companies.<sup>117</sup> The revisions lower the cost of financing while creating rules that many commentators argue disadvantage borrowers.<sup>118</sup> Undoubtedly the assistance of representatives from the banking industry played a role in the adoption of these measures which, if enacted into law, have the potential to save the banking industry

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110. See McDonald, *supra* note 108, at 476-77 (citing M. Michael Cramer et al., *Uniformity in State Laws*, 33 MD. B.J. 48 (2000)).

111. *Id.* at 463.

112. *Id.* at 481-82. See also Brendan I. Koerner, *Bugging Out*, THE NEW REPUBLIC, Nov. 27, 2000, at 13.

113. UCITA erodes consumer rights by: (1) requiring buyers to agree to the terms of the contract before seeing what those terms are, (2) making software agreements licenses rather than sales, (3) allows the licensor to draft advantageous choice-of-law and self-help provisions, and (4) allows licensors to change the terms of agreements and disavow implied warranties. McDonald, *supra* note 108, at 464-65 & nn.21-24.

114. The UCC was drafted jointly by NCCUSL and the American Law Institute (ALI). See Schwartz & Scott, *supra* note 109, at 596. ALI drafts and publishes the Restatements of Law, model codes, and other legal reforms. A reporter and a few associate reporters draft most of the text promulgated by the ALI. *Id.* at 600.

115. *Id.* at 638-40.

116. *Id.* at 640 (noting that the group in charge of updating Article 9 consisted of thirteen lawyers, most of whom worked for banking or financial institutions).

117. *Id.* at 639.

118. *Id.* See also Robert E. Scott, *The Politics of Article 9*, 80 VA. L. REV. 1783, 1823-24 (1994).

a lot of money.<sup>119</sup> Therefore, interest groups in the banking industry have an incentive to participate in model codes like Article 9 even if copyright protection will not be available for these codes.

### **B. Incentives for the Creation of Less Significant Works Affiliated with the Government**

While strong incentives exist to create opinions, statutes, and model codes, incentives to create less significant works of the government, like tax maps and health care coding systems, are comparatively weak. These lesser works are beneficial to society, but also cost significant amounts of money to develop. Unlike judicial opinions, statutes, or model codes, tax maps and health care coding systems might not have necessary financial incentives to ensure adequate development, making copyright protection necessary for these works.

In *County of Suffolk v. First American Real Estate Solutions, Inc.*,<sup>120</sup> even though a New York statute directed each county to create tax maps, the Second Circuit ruled copyright protection for the maps might be necessary to ensure they were adequately developed.<sup>121</sup> In addition to the statute requiring tax maps, New York also passed a Freedom of Information Law, requiring all state agencies (including the counties) to “make available for public inspection and copying all records.”<sup>122</sup> Consequently, each county in New York was required to create tax maps and make them available to the public. Suffolk County, through its Real Property Tax Service Agency, not only created maps for all of its divisions, but it also invested considerable resources to update the maps and make them useful.<sup>123</sup> Although the county allowed any citizen to have complete access to its tax maps, it obtained a copyright in the maps to prevent businesses from exploiting the value it invested in the maps.<sup>124</sup> Despite this, First American copied Suffolk County’s tax maps without consent and sold these maps on CD-ROMs.<sup>125</sup> In response, Suffolk County sued First American for copyright infringement.<sup>126</sup>

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119. See generally Schwartz & Scott, *supra* note 109, at 638-42.

120. 261 F.3d 179 (2d Cir. 2001). See *supra* notes 43-47 and accompanying text.

121. *Id.* at 183-84.

122. *Id.* at 185 (citing N.Y. PUB. OFF. LAW § 87(2) (McKinney Supp. 2001)).

123. *Id.* at 184. Suffolk mapped all of its tax districts and special district boundaries. In addition, it “creates new maps and indices annually to reflect alterations in size, shape, and/or location of parcels of land . . . .” *Id.* The county created 4,600 tax maps mapping over 500,000 parcels of land in ten townships. *Id.*

124. *Id.* at 184.

125. *Id.*

126. *Id.*

Because a New York statute mandated creation of the maps, Suffolk County clearly had sufficient incentives to create tax maps. The mere fact that the county had to create the maps, however, did not guarantee the quality or usefulness of the maps. State and local governments work under finite budgets.<sup>127</sup> Furthermore, recent economic slumps have caused several state governments to face budget crises.<sup>128</sup> Creating tax maps requires the compilation of a great deal of information.<sup>129</sup> Assembling this data, monitoring changes in mapped parcels, and amending maps can be quite costly.<sup>130</sup> Furthermore, tax maps do not have quite the legal importance of other government works such as judicial opinions or statutes.<sup>131</sup> Given budget constraints and the limited importance of tax maps, it was unclear to the *Suffolk* court whether the New York statute mandating creation of tax maps produced sufficient incentive for Suffolk County to develop the maps as extensively as it did.<sup>132</sup> Consequently, the court refused to deny the county copyright protection in its tax maps without fully determining whether there were sufficient incentives outside of copyright protection to ensure the quality of the tax maps would not diminish.<sup>133</sup>

*Practice Management Information Corp. v. AMA*<sup>134</sup> held that government adoption of a privately developed coding system did not invalidate the system's copyright, in part, to preserve sufficient incentives to create works like the coding system.<sup>135</sup> In this case, the AMA developed a coding system for health care procedures.<sup>136</sup> The Health Care Financing Administration (HCFA), in an attempt to establish a low cost, uniform code for identifying physicians' services, adopted the AMA system.<sup>137</sup> When Prac-

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127. Howard Gleckman et al., *To the Victors Belong the Budget Mess*, BUS. WK., Dec. 9, 2002, at 100 ("Nearly every state government is required by law to balance its budget every year. Plus, the states can't print money the way Washington can. So while the federal government can borrow and spend or borrow to cut taxes, states cannot.").

128. See *id.* See also *Davis Hopes to Slice \$10.2 Billion*, OAKLAND TRIB., Dec. 7, 2002, at News 1.

<sup>129</sup> 129. See, e.g., *Sidwell Parcel Map Features*, at <http://www.sidwellmaps.com/mapfeatures.asp>; *Tax Parcels in the Town of Plattekill, Ulster County*, at <http://www.nysgis.state.ny.us/gis3/data/ulster.PLATTBNDY.html> (last visited Mar. 2, 2003).

130. See *Suffolk*, 261 F.3d at 184.

131. As the court in *Suffolk* noted, "tax maps themselves do not create the legal obligation to pay property taxes but are merely a means by which the government assesses a pre-existing obligation." *Id.* at 195.

132. *Id.* at 194.

133. *Id.*

134. 121 F.3d 516 (9th Cir. 1997). See *supra* notes 40-42 and accompanying text.

135. *Id.* at 518-19.

136. *Id.* at 517.

137. *Id.*

tice Management, a distributor of forms containing the AMA system, did not receive the volume discount it anticipated, it sued to invalidate the AMA's copyright. Practice Management argued that forms entered the public domain when they were adopted by the HCFA.<sup>138</sup> The court rejected this argument, holding, "[t]o vitiate copyright, in [these] circumstances, could, without adequate justification, prove destructive of the copyright interest . . . ."<sup>139</sup>

Because the AMA coding system was not mandated by statute, or funded by the government, barring copyright protection for the system could eliminate much of the incentives to create such a system. The AMA spent more than thirty years continuously developing a comprehensive coding system for more than six thousand medical procedures.<sup>140</sup> The procedures are divided into six sections so that the user can efficiently locate code numbers.<sup>141</sup> Unquestionably, the AMA invested considerable resources into the system. Because the AMA did not receive any compensation from the government when the HCFA adopted the system,<sup>142</sup> denying it copyright protection would have diminished the AMA's ability to recover its investment in the system. This policy argument, coupled with the lack of evidence that access to the coding system was ever denied, led the court to preserve the AMA's copyright in the coding system.<sup>143</sup>

Creating works such as tax maps and health care coding systems presents governments with a dilemma. On the one hand, these works are beneficial to society. Tax maps allow people to know how much the government is going to tax a given parcel of land,<sup>144</sup> while a uniform, efficient health care coding system facilitates the provision of medical services. On the other hand, governments do not have spare money to develop these costly works. Where useful, but not necessary, works of the government are costly to develop, copyright protection might be the only means of ensuring development of the works. Since lesser works of the government often do not have the binding effect of law,<sup>145</sup> copyrighting these works does not create the same due process concerns that were

138. *Id.* at 518.

139. *Id.* at 517.

140. *Id.* at 517.

141. *Id.*

142. *Id.* at 517-18.

143. *Id.* at 519-20.

144. *County of Suffolk v. First Am. Real Estate Solutions, Inc.*, 261 F.3d 179, 195 (2d Cir. 2001).

145. *See, e.g., id.* at 195; *CCC Info. Sys., Inc. v. Maclean Hunter Mkt. Reports*, 44 F.3d 61, 73 (2d Cir. 1994) (granting copyright to a work containing automobile valuation figures despite the work being referred to by several state statutes as an *alternative* legal standard for valuation).

does not create the same due process concerns that were presented in *Veeck*. Consequently, copyright protection might be the best choice for ensuring development of these works.

#### IV. CONCLUSION

For over a century courts have struggled to determine whether various works affiliated with the government fit within the scope of the government works exception. One factor that has consistently played a large role in these analyses has been the incentive to create a particular work. Government salaries serve as direct incentives that guarantee judges and legislators will continue to create opinions and statutes. Model codes also have significant incentives in the form of industry standardization, quality control, and self-regulation, which generate huge savings for business interests and guarantee development of model codes even without the lure of copyright protection. Lesser works of the government, such as tax maps and health care coding systems, on the other hand, are costly to make and difficult to maintain. Without copyright protection, works like tax maps and coding systems may be neglected at the expense of other more enticing endeavors. Consequently, copyright protection might be warranted for less important government works that are labor intensive but valuable to society.