



ANSI Response to Request for Comments on Incorporation by Reference

1 CFR Part 51 [NARA 12-0002]

National Archives and Records Administration, Office of the Federal Register

Thank you for the opportunity to comment on the petition submitted by Professor Peter Strauss *et al.* to the Office of the Federal Register (OFR), regarding the availability of material incorporated by reference (IBR) in the Code of Federal Regulations (CFR).

The American National Standards Institute¹ (ANSI) respectfully submits the following comments addressing two main issues:

- Why IBR matters to ANSI and the standardization community
- The nine specific questions asked by the OFR in the *Federal Register* notice

Why Does IBR Matter to ANSI and the Standardization Community?

ANSI is a private, non-profit organization that administers and coordinates the U.S. voluntary standards and conformity assessment system. In this role, the Institute oversees the development and use of voluntary consensus standards by accrediting the procedures used by standards developing organizations, and approving their finished documents as American National Standards.

Internationally, the Institute is the official U.S. representative to the International Organization for Standardization (ISO) and, via the U.S. National Committee, the International Electrotechnical Commission (IEC).

ANSI's membership is comprised of businesses, government agencies, professional societies and trade associations, standards developing organizations (SDOs), and consumer and labor organizations. The Institute represents the diverse interests of more than 125,000 companies and organizations and 3.5 million professionals worldwide. ANSI works closely with stakeholders from both industry and government to identify consensus-based solutions to national and global priorities – an inclusive, collaborative partnership between the public and private sectors.

The U.S. Standardization System

Standards are the backbone of trade, the building blocks for innovation, and the basis for quality, safety, and interoperability. Voluntary consensus standards and compliance activities are essential to the U.S. economy. Market driven and highly diversified, standards support technological innovation, build bridges to new markets, and create gateways for businesses in this increasingly complex world of global access. Standardization also helps to assure health, safety, and quality of life for individuals in the United States and around the world.

¹ <http://www.ansi.org/>

Our national standardization system is a democratic process that thrives on the active participation and engagement of all affected stakeholders. The open, market-driven, and private sector–led nature of our system is critical to achieving the widely shared policy goals of expanded U.S. leadership and innovation on the global stage.

Currently, the U.S. has the most robust standardization system in the world, which gives the nation a competitive advantage. Unlike the standards development systems of many other countries, the U.S. system considers the views of all interested parties in a balanced way. And the openness of the system to new participants means that their needs can be met quickly and through innovative, collaborative solutions.

Decisions made about our national standardization system and our priorities for action reach far beyond our borders, especially when it comes to the continued success of our products, services, and workforce on the global stage. Any decisions or actions that would fundamentally undermine this system will cause the U.S. to lose this competitive advantage to other countries that would be quick to seize the opportunity. Additionally, significant changes to the system would compromise the role that standards play in protecting health, safety, and the environment.

Why Does IBR Matter to the Standardization Community?

ANSI is often asked about why SDOs charge for standards at all.² The answer is that every standard is a work of authorship and, under U.S. and international law, is copyright protected³, giving the owner certain rights of control and remuneration that cannot be taken away without just compensation.

Although many people working on standards development are volunteers, SDOs incur significant expenses in the coordination of these voluntary efforts. From the time a new project is commenced until the final balloting and adoption of a standard, the drafting process draws heavily on an SDO's administrative, technical, and support services. Tens of thousands of staff employed by SDOs across the nation provide direct support for the technical development activities of the volunteers.

SDOs are – for the most part – non-profit organizations. In order to recoup their costs, some SDOs rely heavily on revenue from copyright-protected sales and licensing of the standards. Some organizations receive revenue through membership support including membership fees, project fees, registration fees, and other member-generated income. Still others rely on a combination of these and other revenue-generating activities.

By funding operations at least in part through sales and licensing of standards, SDOs can minimize barriers to qualified participation and maximize independence from entities seeking to influence the outcome for commercial or political reasons. Standards sales also allow non-profit SDOs to recoup basic administrative costs while passing on to implementers all of the benefits of the voluntary and inclusive

² "Why Charge for Standards,"

http://publicaa.ansi.org/sites/apdl/Documents/ANSI%20Position%20on%20Protection%20of%20Copyright%20for%20Standards%20Referenced%20into%20Public%20Law/Why_Charge_for_Standards.pdf

³ <http://www.copyright.gov/title17/>

process of standards development, including openness, balance, opportunities to participate, and protection from undue influence.⁴

The U.S. government's announced policy under OMB Circular A-119 is to "observe and protect" the right of copyright holders when incorporating by reference into law voluntary consensus standards. The very purpose of this policy is to permit the government to benefit from the efficiencies of the voluntary consensus standards development process. When the government references copyrighted works, those works should not lose their copyright, but the responsible government agency should collaborate with the SDOs to ensure that the public does have reasonable access to the referenced documents.

In February 2011, ANSI's Intellectual Property Rights Policy Committee⁵ developed a white paper on the copyright implications of voluntary consensus standards in regulation. The complete white paper is appended to this response and is also available for download.⁶

Responses to Questions from the *Federal Register* notice

Given the importance of this issue to the broader U.S. standardization community, ANSI requested input from its membership on the following questions posed in the *Federal Register* notice. The responses below take into account the input received, and represent a consensus response that has been approved by the ANSI Intellectual Property Rights Policy Committee and vetted by ANSI's governance.

1. *Does "reasonably available"*

a) *mean that the material should be available*

i) *For free and*

ii) *To anyone online?*

b) *Create a digital divide by excluding people without Internet access?*

ANSI believes that the text of standards and associated documents should be available to all interested parties on a reasonable basis, which includes appropriate compensation as determined by the SDO/copyright holder.⁷

⁴ ANSI Essential Requirements, <http://www.ansi.org/essentialrequirements>; World Trade Organization (WTO) Technical Barriers to Trade (TBT) Agreement Principles for the Development of International Standards, http://www.wto.org/english/tratop_e/tbt_e/tbt_e.htm

⁵ IPRPC includes participation from a broad range of stakeholders, including several U.S. government agencies.

⁶ "Why Voluntary Consensus Standards Incorporated by Reference into Federal Government Regulations Are Copyright Protected," <http://publicaa.ansi.org/sites/apdl/Documents/News%20and%20Publications/Critical%20Issues/Copyright%20on%20Standards%20in%20Regulations/Copyright%20on%20Standards%20in%20Regulation.pdf>

⁷ This statement is in alignment with the Administrative Conference of the United States (ACUS) recommendations from December 2011, which in turn reference a statement made by the National Science and Technology Council Subcommittee on Standards. <http://www.acus.gov/wp-content/uploads/downloads/2011/12/Recommendation-2011-5-Incorporation-by-Reference.pdf>

“Reasonably available” should not be strictly defined using terms such as “for free” and “to anyone online;” rather, the definition should encompass a broad spectrum of access options. For example, some SDOs make certain standards available online on a read-only basis. And many SDOs make standards available at discounts or without charge to consumers, policymakers, and small businesses.

“Reasonably available” means that the public and private sectors should work together to make standards available on a timely basis and readily accessible – either for free or at reasonable prices – to anyone who wants them. This approach is already working in the marketplace, and ANSI has not been made aware of any instances where access was denied to an individual or organization. While SDOs continue to actively consider further efforts that can be made to make their documents available, this is a dynamic environment with no one-size-fits-all solution.⁸

The internet has certainly expanded the public’s access to information. However, it has not changed the underlying protections of intellectual property, nor has it changed the need and the ability of standards developers to cover the significant costs of creating the documents that are used to further public policy goals in law and rulemaking.

2. Does “class of persons affected” need to be defined? If so, how should it be defined?

ANSI does not believe that this term needs to be defined. CFR language states that a document incorporated by reference must be “reasonably available to and usable by the class of persons affected by the publication.” But depending upon the standard being referenced, the “class of persons affected” may vary significantly.

3. Should agencies bear the cost of making the material available for free online?

Generally speaking, ANSI would discourage agencies from bearing the cost of making materials available for free online. If agencies subsidize the costs of standards, then budgets will need to be substantially increased in order to pay such costs, either through taxes or additional interest on the national debt.⁹

⁸ For example, any attempt to define “reasonable availability” must take into account the myriad uses of IBR by different agencies. Many standards accepted under IBR have within them normative references to a second, or even third, level of standards. Making each and every standard referenced directly or indirectly through an IBR available free of charge to the public would be challenging and extremely cost-ineffective.

Furthermore, many standards under current IBR rules are International Standards such as those promulgated by ISO and IEC. Any changes to CFR Part 51 would not have any jurisdictional effect on current sales and distribution policies of ISO and IEC.

⁹ Requiring that U.S. government agencies pay license fees for access to standards introduces another challenge: it would make the U.S. government the monopoly purchaser of standards, and could compromise balanced influence and representation of all stakeholders within the standards development process. These changes would fundamentally undermine the current market-based standardization system.

Rather, agencies should continue on the path that has already proven successful – working with the individual SDOs whose standards are incorporated by reference in order to determine the best mechanism for making those documents reasonably available.

Consider the following findings of the Federal Energy Regulatory Commission (FERC), published in the *Federal Register* in December 2009¹⁰:

When the Commission weighed the advantages achieved by the North American Energy Standards Board (NAESB) standards development process against the cost to the Commission and the industry of developing these standards through notice and comment rulemaking, we found, and continue to find, that the benefits of having a well-established, consensus process outweigh whatever costs non-members may incur in having to obtain copies of the standards.

As one of the biggest users of standards, the U.S. government's participation in and support of standards development activities are of the utmost importance. The standardization community highly values the expert input that government employees provide and the reliance that agencies demonstrate by adopting and relying on voluntary consensus standards and compliance programs.

4. How would this impact agencies budget and infrastructure, for example?

As indicated above, agency budgets would be significantly impacted by undertaking the responsibility to provide all referenced standards for free online. In addition, new staff and contracting mechanisms would be required to negotiate with SDOs on appropriate compensation for standards development and dissemination. A separate but equally significant issue would be the real or perceived undue influence by a single stakeholder – the U.S. government – in the consensus-based standards development process.

5. How would OFR review of proposed rules for IBR impact agency rulemaking and policy, given the additional time and possibility of denial of an IBR approval request at the final stage of the rulemaking?

Both in the development of voluntary consensus standards and the federal rulemaking process, stakeholders have adequate opportunity to review pending standards and regulations and provide feedback. As the national body to facilitate standards development, ANSI has promulgated strict guidance for the standards development process and publishes weekly notices of upcoming development activities and requests for comments. Further, the OFR does not maintain expertise in the subjects agencies have identified for rulemaking. If OFR were to circumvent the development of rules and regulations by agencies with the statutory expertise and obligation, OFR would essentially drive the development of rules and regulations, which is not part of its mission.

¹⁰ <http://edocket.access.gpo.gov/2009/E9-28619.htm>

6. *Should OFR have the authority to deny IBR approval requests if the material is not available online for free?*

For the many reasons outlined above, OFR should not have the authority to deny IBR approval requests solely on free availability of the referenced document. Requesting such authority would likely place OFR in the midst of a contentious fight involving numerous federal agencies and many private-sector entities over copyright limitations. See the response to question 8 below.

7. *The Administrative Conference of the United States recently issued a Recommendation on IBR. 77 FR 2257 (January 17, 2012). In light of this recommendation, should we update our guidance on this topic instead of amending our regulations?*

ACUS speaks with the authority of the General Counsels of U.S. government departments and independent agencies. It is both an independent federal agency and a federal advisory committee. Updating OFR guidance on IBR based upon the ACUS recommendation, which was passed on a voice vote at the December 2011 ACUS Plenary, makes good sense.

8. *Given that the petition raises policy rather than procedural issues, would the Office of Management and Budget be better placed to determine reasonable availability?*

As described above, the SDO community has already been working in partnership with agencies to make standards available as appropriate. This issue is already the subject of policy in OMB Circular A-119; it is unclear that there is any new need to escalate this issue to a policy level. But if that course of action is pursued, then OMB could be the appropriate office to set the parameters of acceptable agency use of IBR, including recognition of copyright protections.

9. *How would an extended IBR review period at both the proposed and final rule stages impact agencies?*

An extended review period at various stages of rulemaking at agencies would almost certainly further slow this already complex and time-consuming process. This could have a chilling effect on agencies' willingness to refer to voluntary standards in support of regulatory actions, which would undermine the federal policy set forth in OMB Circular A-119.

Conclusion

Standards and conformity assessment activities are inextricably linked to all facets of our national economy and are vital to the continued global competitiveness of U.S. industry and the maintenance of appropriate health, safety, and environmental protection mechanisms. ANSI appreciates this opportunity to share more information about the U.S. standardization system, and welcomes further dialogue on this critical issue.

We thank you for this opportunity to provide comments.