



ANSI Comments to the American Bar Association Resolution on Incorporation by Reference

June 2016

On behalf of the U.S. standardization community, the American National Standards Institute¹ (ANSI) respectfully submits the following comments on the American Bar Association (ABA) Resolution that deals with the matter of standards that have been incorporated by reference (IBR) into law.

In summary, the Resolution would request that Congress amend the Administrative Procedure Act to require agencies to make IBR-ed standards accessible, without charge, to members of the public – at minimum: online, read-only access to the incorporated portion of the standard. The Resolution further requests that agencies review their historical incorporations by reference, and make such arrangements for these standards as well, or amend or repeal the regulation to eliminate the incorporation by reference.

ANSI disagrees with this position and takes this opportunity to present four specific concerns about the Resolution to interested ABA members.

1. First, ANSI is concerned that the ABA may be making decisions in a vacuum and without the significant input and analysis already developed on this subject by three government agencies:
 - Administrative Conference of the United States (ACUS) Recommendation: Incorporation by Reference (December 2011)²
 - Office of the Federal Register (OFR) Final Rule: Incorporation by Reference (November 2014)³
 - OFR IBR Handbook (April 2016)⁴
 - OMB Circular A-119: Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities (January 2016)⁵

¹ ANSI is a private, non-profit organization that administers and coordinates the U.S. voluntary standards and conformity assessment system. <http://www.ansi.org/>

² <https://www.acus.gov/recommendation/incorporation-reference>

³ <https://www.federalregister.gov/articles/2014/11/07/2014-26445/incorporation-by-reference>

⁴ <https://www.archives.gov/federal-register/write/handbook/ibr.pdf>

⁵ https://www.whitehouse.gov/sites/default/files/omb/inforeg/revised_circular_a-119_as_of_1_22.pdf

These groups have considered all sides of this issue during the past 5 years, and each agency has ultimately supported the need for copyright protection and a flexible approach for assuring the reasonable availability of IBR-ed material.

This effort to push the matter through ABA in the form of a Resolution feels like an end run around multiple fairly and publicly developed government guidance documents. In particular, the ink is barely dry on the 2016 revision of OMB Circular A-119, so it is hard to give credence to any assertion that the system isn't working when the latest approaches suggested in that document have hardly been given a chance to be implemented.

In summary, it strikes ANSI as ironic that those who advocate so strongly for the public's right to information are now trying to force a significant decision through a closed forum.

2. Second, prohibiting agencies from using IBR without first obtaining the free and unlimited access to copyright-protected documents will severely constrain an agency's ability to make use of consensus-driven standards, which is directly counter to federal policy set forth in OMB Circular A-119 and to the *National Technology Transfer and Advancement Act of 1995 (NTTAA)*.⁶

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 (e.g., through taxes or additional interest on the national debt).⁷ In addition, new staff and contracting mechanisms would be required to negotiate with SDOs on appropriate compensation for standards development and dissemination.

Consider the following findings of the Federal Energy Regulatory Commission (FERC), published in the *Federal Register* in December 2009⁸:

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.

⁶ <http://www.nist.gov/standardsgov/nttaa-act.cfm>

⁷ Requiring that U.S. government agencies pay license fees for access to standards introduces another challenge: it would likely 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.

⁸ <http://edocket.access.gpo.gov/2009/E9-28619.htm>

As one of the biggest users of standards, the U.S. government's participation in and support of standards development activities as mandated by the NTTAA 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 voluntary consensus standards and compliance programs.

ANSI feels that forcing agencies to obtain free and unlimited access to IBR-ed materials could have a chilling effect on agencies' willingness to refer to voluntary standards in support of regulatory actions.

3. Third, a requirement of read-only online access is problematic for many SDOs. Practically speaking, this will devastate the market for purchasing the standards from the SDO, and will eliminate the primary source of funding for the development of these standards.

Some SDOs believe that the Resolution's proposed limitation to "read-only" disclosure of copyrighted material, as well as the suggestion that proposed legislation would not impact copyright "rights or defenses," is illusory in today's global technology world. Technical professionals increasingly access and work in the field with documents on mobile devices, as opposed to desktop computers or hard copies. Calling up a standard on a tablet or a personal phone to "read" its contents is precisely how such standards tend to be utilized.

ANSI agrees that public and private interests must be balanced and, to that end, everyone should have the right to access standards referenced into law and be able to review such work at government facilities and libraries on a read-only basis. Depending on the nature of the standard and its intended use, many such standards could also be electronically available for viewing for free on either a long- or short-term basis, but a blanket "one size fits all" mandate is not in the public interest. Reasonable access does not mean that everyone has the right to own a free copy or that SDOs should have their copyrights rendered meaningless because their standards are available for free on the web. Copyright protection must be afforded to standards developers for their original works of authorship.

SDOs that have only a small portion of their standards IBR-ed may not feel this burden as acutely, and so they may be comfortable with read-only access. But for those SDOs that produce a single, massive standard that has been IBR-ed, it's clear to see how this Resolution would destroy, or at least fundamentally alter, that business. If a government agency is now forced to provide funding for an IBR-ed standard, and an SDO's sole work product is that standard, then the SDO is essentially no longer a consensus-based non-profit organization; it is in effect operating as a de facto government entity. This not only disrupts the business model of that organization, it also significantly alters the very nature of our nation's private-sector-led, market-driven standardization system.

The destructive potential of this Resolution could also leave a safety vacuum that cannot be easily filled – if SDOs are forced to go out of business, then what will happen to the hundreds upon hundreds of standards that protect health, safety, and the environment? This could put the general

public at serious risk. How will the government, without the presence of SDOs, efficiently convene thousands of subject-matter experts from industry, insurers, regulatory authorities, unions, end users, and other interested parties to draft and maintain highly technical standards addressing a multitude of specialized disciplines? Who will pay for this activity? How quickly will progress advance? And how many injuries and avoidable accidents will occur in the interim?

4. Finally, as ACUS, OFR, and OMB have each recognized in their guidance documents, this matter cannot be solved with a single-size solution. While the report attached to the ABA Resolution attempts to address some of this complexity, ANSI believes that there is much more to understand, both in terms of the business/market implications and the technical complexity of implementing the Resolution as currently written. And ANSI believes the government's extensive multi-year review of this issue and guidance to agencies reflecting substantial, diverse public input ought to be given sufficient time to work before the ABA engages on this controversial issue.

ANSI has an Organizational Member Forum (OMF), which consists of nearly 250 ANSI-accredited standards developers. We would be pleased to assist the ABA by convening a meeting of the ABA and the OMF, so the potential effects of this Resolution's proposals can be more thoroughly explored and understood.

The ABA should not lend its considerable voice to this issue without due consideration of the very real ramifications that this Resolution presents.

For further information on ANSI's position on IBR, please visit www.ansi.org/ibr, where you may also read our public comments submitted to OFR (and its National Archives and Records Administration, NARA) and OMB when those agencies weighed the same issue.

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.