

Why Voluntary Consensus Standards Incorporated By Reference into Federal Government Regulations Should Retain Copyright Protection

Should standards be free? What if they are incorporated by reference into federal legislation, rules or regulations? Should people have to pay for “the law?” These questions have been the subject of much discussion and debate within the standards community for many years. ANSI is often asked about “[Why SDOs Charge for Standards](#)” at all? The answer is because every standard is a work of authorship and, under U.S. and International law, is copyright protected, giving the owner certain rights of control and remuneration that cannot be taken away without just compensation. Also, there are many costs in developing, maintaining and distributing standards – which can be reflected in the price of a standard. Different standards developing organizations (SDOs) have different business models and funding sources but all seek to protect the intellectual property we call standards. See, “[A Business Model that Works](#)”.

[The Copyright Act](#) protects standards along with all other works of authorship, and although revised and amended several times in recent years, Congress has made no exception for standards. When the government references copyrighted standards into law, rules or regulations, therefore, the same considerations that underlie copyright protection for non-government-referenced standards apply. The approach that should be taken in such cases is to balance the standards developer’s right to copyright protection for its works of authorship against the public’s right to reasonable access to the standard. What follows is a discussion of the relevant questions.

1. What is the U.S. Federal Government’s Policy on the Subject of Incorporation of Voluntary Consensus Standards by Reference?

Any discussion of government incorporation by reference of voluntary consensus standards should start with an examination of the federal government’s own policy on the subject. In recognition of the benefits of private standards development, the federal government has made it a policy to incorporate, “in whole, in part, or by reference” privately developed standards for regulatory and other activities “whenever practicable and appropriate,” thereby “[e]liminat[ing] the cost to the Government of developing its own standards.” Section 1, 6, [Office of Management and Budget \(OMB\) Circular A-119](#). Importantly, OMB requires the agencies to “observe and protect the rights of the copyright holder and any other similar obligations.” See Section 6 j.¹ In February 1996, the [National Technology Transfer and Advancement Act of 1995](#), Pub. L. No. 104-113, § 12(d), 110 Stat. 775, 783 (1996) (“NTTAA”) was passed by Congress in order to establish standards policy and to coordinate the use by Federal agencies of private-sector standards, encouraging where possible the use of standards developed by private, consensus organizations.

¹ Some states have similarly passed their own versions of OMB A-119. For example, under a Florida statute (§120.54, Fla. Stat.), effective Jan 1, 2011, an agency regulation may incorporate a code or standard by reference only if either:

“a. The material has been submitted in the prescribed electronic format to the Department of State and the full text of the material can be made available for free public access through an electronic hyperlink from the rule making the reference in the Florida Administrative Code; or

“b. The agency has determined that posting the material on the Internet for purposes of public examination and inspection would constitute a violation of federal copyright law, in which case a statement to that effect, along with the address of locations at the Department of State and the agency at which the material is available for public inspection and examination, must be included in the notice required by subparagraph (3)(a)1.”

With only some narrow exceptions, the Congressional policy set by the NTTAA is that: “all Federal agencies and departments shall use technical standards that are developed or adopted by voluntary consensus standards bodies, using such technical standards as a means to carry out policy objectives or activities determined by the agencies and departments” *id.*

2. Does Incorporating Standards By Reference Deny Adequate Public Access or Give SDOs an Improper Monopoly Over the Law?

Everyone should have the right to access standards referenced into law and be able to review such work at a minimum at government facilities and libraries on a read-only basis. Depending on the nature of the standard and its intended use, many such standards are also electronically available for viewing for free on either a long- or short-term basis.

Reasonable access, however, does not mean that everyone has the right to own a free copy. Copyright protection must be afforded to standards developers for their original works of authorship. Thus, most courts have found that standards incorporated into law do not lose their copyright protection and the copyright holder does not lose its right to commercial exploitation. *See, e.g.,* [Practice Mgt. Info. Corp. v. American Med. Ass’n, 121 F.3d 516 \(9th Cir. 1997\), opinion amended by \(9th Cir. 1998\) 133 F3d 1140](#), (the AMA did not lose the right to enforce copyright when use of its promulgated coding system was required by government regulations); [CCC Info. Servs. v. Maclean Hunter Mkt. Reports, Inc., 44 F.3d 61, 74 \(2nd Cir. 1994\)](#) (upholding copyright of privately prepared listing of automobile values that states required insurance companies to use). *But cf.* [Veeck v. Southern Building Code Congress International, Inc., 293 F.3d 791, 804 \(5th Cir. 2002\), cert. denied, 539 U.S. 969 \(2003\)](#) (holding that “*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”); [BOCA v. Code Tech. Inc., 628 F.2d 730, 736 \(1st Cir. 1980\)](#) (expressing doubt over the enforceability of the copyright given that the state had adopted the code and remanding the case for further development). *See generally,* [Amicus Brief of ANSI, et al. Veeck v. Southern Building Code Congress International Inc., No. 99-40632](#) (discussion of relevant authorities).

Federal agencies have likewise denied requests to give away for free copies of privately developed standards that were incorporated into federal regulation. *See,* [Updating OSHA Standards Based on National Consensus Standards, 74 FR 46350-46361 \(September 9, 2009\)](#) (“OSHA notes that copyright laws protect national consensus standards.”); [Airworthiness Directives: Airbus Model A300 Airplanes, 72 FR 6923 \(February 14, 2007\)](#) (incorporated by reference materials “do not lose their copyright protection.”). One federal agency said that, taken to its logical extreme, the argument that standards should be given away for free just because they are incorporated into federal regulation would require that a school system’s decision to require children to acquire and read the novel “*Fahrenheit 451*” over summer vacation would undo the copyright in that novel and obligate the school to reprint the text. [FERC, Docket No. RM05-5-013; Order No. 676-E, Standards for Business Practices and Communication Protocols for Public Utilities, November 24, 2009](#). Such a result would make no sense. In its *Framework and Roadmap for Smart Grid Interoperability Standards*, Release 1.0, [NIST Special Publication 1108](#), NIST advised (page 46):

In making the selections of SSO documents listed in this section, NIST attempted to ensure that documents were consistent with the guiding principles, including that they be open and accessible. This does not mean that all of the standards and specifications are available for free, or that access can be gained to them without joining an organization (including those organizations requiring a fee). It does mean that they will be made available on fair, reasonable, and nondiscriminatory terms and conditions, which may include monetary compensation. (Emphasis added.)

3. Why is it Necessary to Charge for Government-Incorporated by Reference Standards?

Although most of the people working on standards development are volunteers, standards developers incur 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, a great deal of time and effort is involved in supporting the volunteers who write the documents. Drafting standards requires input from a variety of concerned constituencies and sources of expertise, including representatives of the consuming public, industry, academia, and the public safety and regulatory community. The standards drafting process draws heavily on the administrative, technical, and support services provided by the organizations that develop them. Sometimes these organizations contribute to an international document which is then adopted as an international standard. Thousands of staff employed by standards developing organizations across the nation provide direct support for the technical development activities of the volunteers.

How do SDOs (for the most part not-for-profit organizations) recoup these costs? Some rely on membership support, including membership fees, project fees, registration fees and other member-generated income. Another business model relies on recouping these costs through revenues made possible from the copyright-protected sales and licensing of the standards themselves. Many SDOs use a combination of both. By funding operations at least in part through sales of standards, SDOs can minimize barriers to qualified participation and maximize independence from entities seeking to influence the outcome for commercial or political reasons. Under this model, the actual recouped costs through standards sales is but a fraction of what the total production costs would have been if the developers were not volunteers. In short, standards sales allow not-for-profit SDOs to recoup basic administrative costs while passing on to implementers all of the benefits of the voluntary and inclusive process of standards development.

4. Wouldn't it be less Expensive and more Efficient for Government Agencies to Develop Regulatory Standards Themselves?

The development of voluntary consensus standards using input processes adapted to the particular industries involved is often a more efficient and cost effective method of developing technical standards than the use of a highly structured notice and comment rulemaking process. Indeed, the very purpose of OMB A-119 was to allow the government to tap into this efficiency and “[e]liminate the cost to the Government of developing its own standards.” Section 1, [Office of Management and Budget \(OMB\) Circular A-119](#). Many SDOs provide government agencies copies of a standard for free or at a reduced cost so these agencies may properly promulgate a regulation and provide proper reference within a regulation or code.

The success of this process has been acknowledged by many federal agencies. For example, when FERC evaluated a private NAESB standards-development process against the cost to the Commission and the industry of developing these standards through notice and comment rulemaking, FERC found that the NAESB process was more efficient:

When the Commission weighed the advantages achieved by the 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. . . . In choosing to take advantage of the efficiency of the NAESB process, we followed the government regulations that require the use of incorporation by reference. These rules appropriately balance the interest of the standards organization and the expediency of governmental use of privately developed standards. Under section 552(a) of title 5, material may be incorporated by reference when such material is reasonably available to the public.

[FERC, Docket No. RM05-5-013; Order No. 676-E, Standards for Business Practices and Communication Protocols for Public Utilities, November 24, 2009.](#)

5. *Does Incorporating Voluntary Consensus Standards By Reference Allow for Sufficient Participation by Government and Industry in the Development of the Law?*

The intent of OMB A-119 was to require federal agencies to participate in private standards development and have full representation in such bodies. The National Technology Transfer and Advancement Act “requires agencies to consult with voluntary consensus standards bodies and to participate with such bodies in the development of technical standards ‘when such participation is in the public interest and is compatible with agency and departmental missions, authorities, and budget resources.’” “Neither the Act nor its legislative history indicates that federal agency representatives are to have less than full and equal representation in such bodies.” See 63 Fed. Reg. 8545, 8554-8555 (Feb. 19, 1998) (OMB Notice of Final Revision of Circular A-119).

Under the consensus procedures used by ANSI, all other materially interested parties are similarly represented. Participants in the consensus body include representatives of industry trade associations, consumer advocate organizations and end users, in addition to federal and possibly state regulatory communities. See Article, *North American Energy Standards Board: Legal and Administrative Underpinnings of a Consensus Based Organization*, 27 Energy Law Journal 147, 164 (2006).

In addition to the consensus procedures used to create standards, government-referenced standards are subject to full review under the relevant regulatory or legislative procedure applicable to the laws in which they are being considered for reference, and there is a full opportunity for industry, consumer, or other public input during the course of adoption by reference.

Conclusion

When the government references copyrighted works those works should not lose their copyright, but the responsible government agency should insure that the public does have reasonable access to the referenced documents. The U.S. government’s announced policy under OMB 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. Reasonable access to standards is ensured through electronic purchasing models utilized by most SDOs and many standards developers make some or all of their standards available without charge to selected users of those standards. The process works and benefits everyone involved.

Bibliography of Other Relevant Materials

What are some of the Applicable Laws Pertaining to Governmental Use of Voluntary Consensus Standards?

Administrative Procedures Act (“APA”) (establishing the rule-making and adjudicative proceedings of federal administrative agencies);

Trade Agreements Act of 1979 (“TAA”) (prohibiting federal agencies from engaging in any standards-related activity that creates unnecessary obstacles to trade and requires federal agencies to take into consideration international standards);

National Technology Transfer and Advancement Act (“NTTAA”) (directing federal agencies to use, when practical and not otherwise prohibited by law, standards developed by voluntary consensus standards bodies to achieve public policy and procurement objectives and charging NIST with coordinating the standards needs of U.S. federal agencies to achieve greater reliance on voluntary consensus standards);

Office of Management and Budget (“OMB”) Circular A-119 (providing support for the implementation of the NTTAA and setting forth policies on federal use and participation in the development of voluntary consensus standards). (Section 6.j states: How should my agency reference voluntary consensus standards? Your agency should reference voluntary consensus standards, along with sources of availability, in appropriate publications, regulatory orders, and related internal documents. In regulations, the reference must include the date of issuance. For all other uses, your agency must determine the most appropriate form of reference, which may exclude the date of issuance as long as users are elsewhere directed to the latest issue. If a voluntary standard is used and published in an agency document, your agency must observe and protect the rights of the copyright holder and any other similar obligations.);

Consumer Product Safety Improvement Act (directing the **CPSC** to rely on Voluntary Consensus consumer product safety standards rather than its own standards);

See, **NIST Report on the Use of Voluntary Standards in Support of Regulation in the United States**, October 2009.

How Does the Federal Government, In Practice, Use Private Consensus Standards?

Federal Statutes allow incorporation by reference of technical standards and this allows Federal agencies to publish regulations in the *Federal Register* by referring to materials already published elsewhere. The legal effect of incorporation by reference is that the material is treated as if it were published in full in the *Federal Register*. For example, one Federal agency, the **Federal Communications Commission (“FCC”)** has incorporated by reference standards developed by the following standards development organizations:

Advanced Television Systems Committee (“ATSC”)

American Society for Testing Materials (“ASTM”)

Consumer Electronics Association (“CEA”)

Electronic Industries Alliance (“EIA”)

Federal Aviation Administration (“FAA”)

IEEE (“IEEE”)

International Electrotechnical Commission (“IEC”)

International Maritime Organization (“IMO”)

International Organization for Standardization (“ISO”)

International Special Committee on Radio Interference (“CISPR”)

International Telecommunication Union (“ITU”)

[North American Numbering Council \(“NANC”\)](#)
[Radio Technical Commission for Aeronautics \(“RTCA”\)](#)
[Radio Technical Commission for Maritime Services \(“RCTM”\)](#)
[Society of Cable Telecommunications Engineers \(“SCTE”\)](#)
[Telecommunications Industry Association \(“TIA”\)](#)

Incorporation by reference allows Federal agencies to comply with the requirement to publish rules in the *Federal Register* by referring to materials already published elsewhere. This material, like any other properly issued rule, has the force and effect of law. Congress in Pub. L. 90-23 gave the discretion to the Director of the Federal Register when to allow incorporation by reference of matter. (“For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.”) 5 U.S.C. §552(a)(1). As noted by the Office of the Federal Register in [Chapter 6](#) of its [Federal Register Document Drafting Handbook](#) (August 2008 Ed.): “This material, like any other properly issued rule, has the force and effect of law. Congress authorized incorporation by reference in the Freedom of Information Act to reduce the volume of material published in the *Federal Register* and Code of Federal Regulations (“CFR”).”

Where can I find a list of Standards Incorporated by Reference Into Law?

NIST hosts a [Standards Incorporated by Reference \(“SIBR”\) Database](#) which includes the voluntary consensus standards, government unique standards, private industry standards, and international standards referenced in the [Code of Federal Regulations \(“CFR”\)](#) and those used by U.S. Federal Government Agencies in their procurement activities.

Additional Documents of Interest

[U.S.-E.U. High-Level Regulatory Cooperation Form: Report on the use of Voluntary Standards in Support of Regulation in the United States](#), National Institute of Standards and Technology, October 2009.

[Using and Referencing ISO and IEC Standards for Technical Regulations](#), ISO and IEC, September 2007.

Article: [The Myth of Free Standards: Giving Away the Farm](#), by Andrew N. Bank, winner of the 1998 World Standards Day Paper Competition.

Article: [Why Aren’t all TIA and EIA Standards Free?](#)

[Definition of “Open Standards.”](#) Open standards refers to a collaborative, balanced, and consensus-based approval process for the promulgation of domestic or international standards. This traditional definition is in alignment with the policies of the International Organization for Standardization, the International Electrotechnical Commission, and Annex 4 of the Second Triennial Review of the World Trade Organization Technical Barriers to Trade Agreement. [ANSI Critical Issues Paper on “Current Attempts to Change Established Definition of “Open Standards”.](#)

At a meeting of the WIPO Standing Committee on the Law of Patents in March 2009, the U.S. Patent and Trademark Office (“USPTO”) expressed strong support for the private-sector led and public-sector supported U.S. standards system and for the use of standards developed through an open and consensus-based process. [USPTO Statement.](#)

The [United States Standards Strategy](#) establishes a framework that can be used by all interest parties to further advance trade issues in the global marketplace, enhance consumer health and safety, meet stakeholder needs and, as appropriate, advance U.S. viewpoints in the regional and international arena.

The [United States Conformity Assessment Principles](#) for the United States document articulates the principles for U.S. conformity assessment activities that the consumer, buyers, sellers, regulators and other interested parties should be aware of to have confidence in the processes of providing conformity assessment, while avoiding the creation of unnecessary barriers to trade.

The [Overview of the United States Standardization System](#) will provide a greater understanding of the U.S. Voluntary Consensus Standardization and Conformity Assessment Infrastructure.

[American National Standards – Value of the ANSI Designation](#) brochure. An American National Standard (“ANS”) is a document that has been sponsored by an ANSI-Accredited Standards Developer, achieved consensus, met ANSI’s Essential Requirements, and been approved by the Institute.

[ANSI Reporter – Special Feature on the National Technology Transfer and Advancement Act.](#)

[Adoption of DHS Directorate Standards as Department of Homeland Security \(DHS\) National Standards.](#)