

What Standard Developing Organizations (SDOs) Need to Know About Incorporation By Reference (IBR)



Outline

- The Basics and IBR Concerns
- Current Trends in IBR and Where They Will Lead
- Timing
- Strategic Insights
- Current Efforts to Address IBR Concerns
- Taking Action

Definitions

COPYRIGHT

A type of intellectual property that protects original works of authorship as soon as an author fixes the work in a tangible form of expression.

IBR

A practice by federal, state, local, and Tribal authorities agencies of referencing standards in regulations.

FAIR USE

A legal doctrine that allows the use of copyrighted material without permission for certain purposes. These purposes include criticism, comment, news reporting, teaching, scholarship, or research.

What Are the Competing Interests?

The need for incentives to create and update standards in a manner that is likely to foster broad participation from a variety of interests



The public's right to access legally binding text

What is Copyright?

- Copyright is a type of intellectual property that protects original works of authorship as soon as an author fixes the work in a tangible form of expression.
- Copyright owners have the exclusive right to reproduce their works and create derivative works, subject to limited exceptions, such as “fair use.”

**Standards are
copyright-
protected
works of
authorship.**

What Is IBR?

- IBR is a practice by federal, state, local, and Tribal authorities of referencing standards into regulations.
- The materials IBR'd into federal regulation are available to the public at a federal library, but no internet access to IBR'd standards is provided by the Office of the Federal Register (OFR) or other government agencies.

EXAMPLE OF INCORPORATION BY REFERENCE

Title 33: Navigation and Navigable Waters

PART 1 01—MARITIME SECURITY: GENERAL

Subpart C—Communication (Port—Facility—Vessel)

§ 101.310 Additional communication devices.

(a) Alert Systems. Alert systems, such as the ship security alert system required in [Safety of Life at Sea \(“SOLAS”\) Chapter XI-2, Regulation 6](#) may be used to augment communication and may be one of the communication methods listed in a vessel or facility security plan under part 104, 105, or 106 of this subchapter. [SOLAS Chapter XI-2, Regulation 6 \(2006\) is incorporated by reference into this section with the approval of the Director of the Federal Register under 5 U.S.C. 552\(a\) and 1 CFR part 5 1.](#) To enforce any edition other than that specified in this section, the Coast Guard must publish a document in the *Federal Register* and the material must be available to the public. This incorporation by reference (IBR) material is available for inspection at the Coast Guard and at the National Archives and Records Administration (NARA). Contact Coast Guard at: Commandant (CG-NAV), U.S. Coast Guard Stop 7418, Attn: Office of Navigation Systems, 2703 Martin Luther King Jr. Ave. SE., Washington, DC 20593-7418; telephone 202-372-1565. For information on the availability of this material at NARA, visit www.archives.gov/federal-register/cfr/ibr-locations.html or email fr.inspection@nara.gov. The material may be obtained from the International Maritime Organization (IMO) Publications Section, 4 Albert Embankment, London SE 1 7SR, United Kingdom; +44 (0)20 7735 7611; www.imo.org.

(b) Automated Identification Systems (AIS). AIS may be used to augment communication, and may be one of the communication methods listed in a vessel security plan under part 104 of this subchapter.

Why Is Incorporation by Reference Used?

- Incorporation by reference allows Federal agencies to comply with the requirement to publish rules in the *Federal Register* and the Code of Federal Regulations (CFR) by referring to material already published elsewhere.
- The legal effect of incorporation by reference is that the material is treated as if it were published in the *Federal Register* and CFR.

This is true at the state and local levels as well.

What Is the Current Federal Policy on IBR?

The Office of Management and Budget (“OMB”) Circular A-119

Directs all federal agencies to incorporate “in whole, in part, or by reference” privately developed standards for regulatory and other activities “whenever practicable and appropriate.”

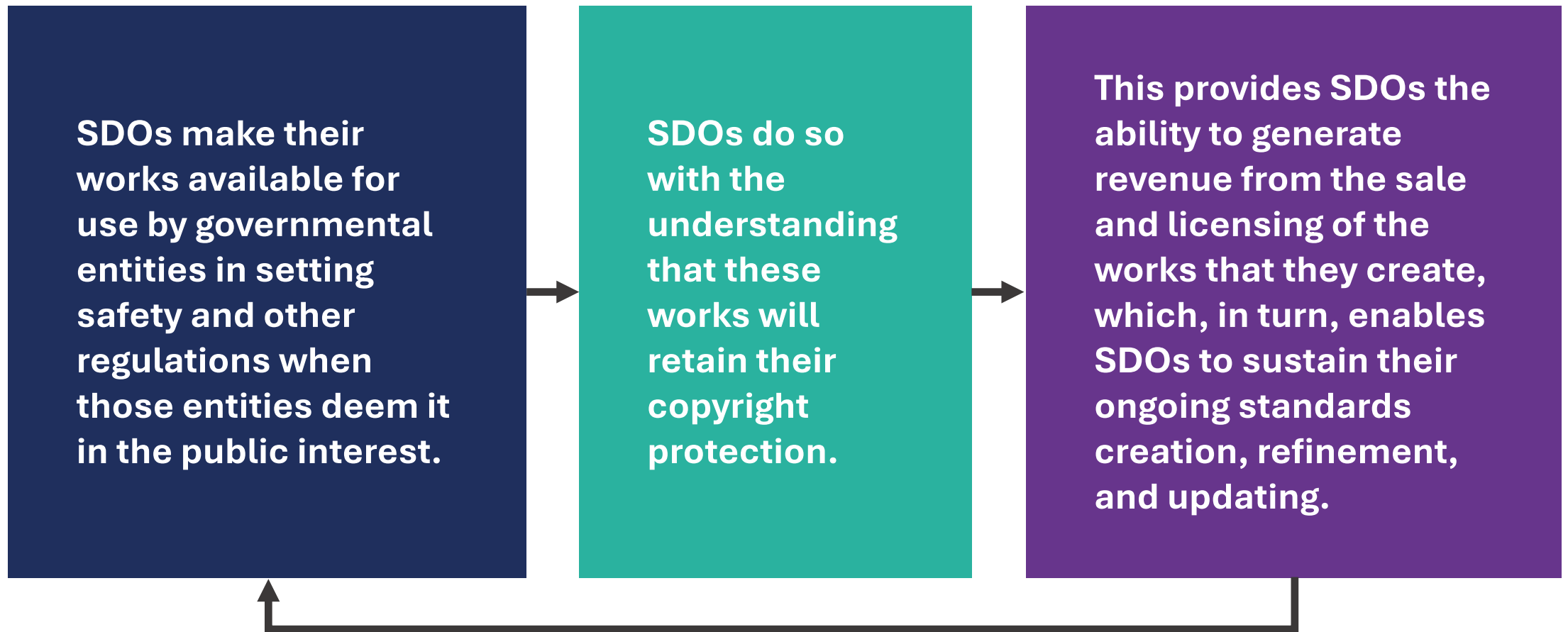
For this policy to succeed, private authors must have an incentive to create works useful to the government.

OMB thus requires agencies to “observe and protect the rights of the copyright holder and any other similar obligations.”

Freedom of Information Act (“FOIA”)

Balances competing interests by authorizing reference by the CFR to materials incorporated by reference, with the approval of the Office of the Federal Register, that are “reasonably available to the class of persons affected thereby.”

Why Is Copyright Protection Essential to Private Standards Development?



What Are the Current Trends in IBR?

- Notwithstanding federal policy, case law is trending towards limiting copyright protection in IBR'd standards.
- What's Changed?... Adoption of a Fair Use Analysis
 - As noted, fair use is a doctrine in United States law that permits limited use of copyrighted material without having to first acquire permission from the copyright holder.
- This follows a global trend favoring increased access to material free and online.

A recent federal appeals case in a lawsuit brought by ASTM and others held:

- **The non-commercial publication of standards incorporated by reference into law is fair use and not copyright infringement.**
- **There are several additional U.S.-based cases that may follow down this same track.**

Where Will These Trends Lead?

- Trends could continue with fair use dominating IBR analysis in the courts.

The fair use analysis might be extended beyond the ASTM case to include commercial exploitation of IBR'd standards.

The fair use defense may also be extended to the situation where a standard that is incorporated by reference into law itself references another standard that is not so incorporated.

Expansion of fair use analysis could lead to additional exceptions to assertions of copyright in all standards.

- If SDOs cannot fund standards development as a result of loss of copyright in IBR'd standards, standards may not be updated as frequently, or for some industries not at all.

Global Trends in IBR

- Finding exceptions to copyright protection on IBR'd standards is gaining acceptance globally.
- PublicResource.Org, the principal plaintiff in many of these cases (including the U.S.-based, ASTM case previously mentioned), is winning cases in many jurisdictions.

In a decision released earlier this year, the EU Court of Justice similarly found that certain European Harmonised Technical Standards must be freely available without charge because of the overriding public interest in the law justifying disclosure of those standards.

Timing (How Fast Is This Moving)

- The IBR issue is moving quickly in the courts and will continue to be argued throughout the U.S. Current cases include:

ICC v. UpCodes
(Southern District of New York)

NFPA v. UpCodes
(Central District of California)

ASTM v. UpCodes
(Eastern District of Pennsylvania)

Public.Resource.Org, Inc v. FCC
(Appeals Court of D.C.)

- Preliminary decisions in some of these cases indicate that the courts will adopt a “fair use” analysis and allow copying and dissemination of IBR’d standards.
 - It is unclear how the courts will deal with commercial exploitation of such standards.

Another recent Circuit case breathes new life into *Veeck*, holding that defendants’ copying of model codes does not constitute copyright infringement under U.S. law.

Strategic Insights

- The ASTM case and other cases trending towards a fair use analysis signals that:

Federal, state, and local agencies may not be able to continue to rely on private sector standards for IBR purposes and these agencies will need to develop alternative ways to regulate.

SDOs whose standards are incorporated by reference by federal, state, and/or local agencies may not be able to rely on revenues derived from standards sales and will need to find alternative business models to sustain standards development activities.

- SDOs need to make their positions known so as to enlighten courts and legislatures about the consequences of eliminating copyright in IBR'd standards.

Strategic Insights, cont'd

- For example, SDOs may urge that:

Governments consider alternative means to incorporate their standards to continue to benefit from efficiencies that result from incorporation by reference.

Courts recognize the significant property interest in copyrighted standards.

Decisions like the ASTM decision are tantamount to a “taking” sufficient to trigger the protections of the Takings Clause of the U.S. Constitution.

- At bottom, the standards community will need to get out the word on its perspective on these issues to ensure that a proper balance of interest is ultimately achieved.

Current Efforts to Address the IBR Concerns

- Two ANSI Board Task Groups (TGs) have been looking into the IBR Issue:

Education/Communications TG

Focuses on:

- Strategies for communicating the viewpoints of SDOs on IBR to stakeholders, federal/state agencies, legislators, and the public.
- Legislative responses to judicial decisions, for example through the proposed [Pro Codes Act](#):
 - which seeks to protect SDO copyright in IBR'd standards and codes;
 - while, at the same time, requiring SDOs to make IBR'd standards publicly accessible online in a readable format at no monetary cost to the reader (a stricter requirement than “reasonably available”).

IBR Mechanics TG

Examines:

Technical solutions relating to how standards are used by federal agencies and IBR'd into the CFR.

SDOs Should Ask Themselves...

1

How do these trends align with the SDOs' mission, vision, and long-term goals?

2

How do these trends affect the stakeholders supported by SDOs?

3

What risks do these trends pose, and how can we address them?

4

How resilient are we to this disruption, and do we have contingency plans?

5

Are there opportunities to consider alternative business models such as developing new derivative products (e.g., training, certification, appendices)?

Contact Information

Patricia A. Griffin

SVP and General Counsel

pgriffin@ansi.org

Mary Saunders

SVP, Government Relations and Public Policy

msaunders@ansi.org

