

**Written Testimony of the American National Standards Institute
before the U.S. House of Representatives Committee on the Judiciary,
Subcommittee on Courts, Intellectual Property, and the Internet**

**Hearing on “The Scope of Copyright Protection”
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Statement of

Patricia Griffin, Vice President and General Counsel
American National Standards Institute
pgriffin@ansi.org; 212.642.4954

Thank you, Chairman Goodlatte and Chairman Coble. Good morning, ladies and gentlemen.

My name is Patricia Griffin and I am vice president and general counsel of the American National Standards Institute. ANSI is the coordinator of the U.S. standardization system, and we thank you for the opportunity to testify.

Why Standards Matter

Most people don't think about how much we depend upon standards to make our everyday life work. For example, standards help ensure that a light bulb fits in a socket, that you can use any ATM in the world, and that products on store shelves are safe.

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.

The U.S. Standardization System

In the U.S., our standardization system is led by the private sector, with hundreds of individual standards developing organizations, or SDOs, working in different technical areas and industry sectors. It is a consensus-based and market-driven process that is open to participation by all affected stakeholders.

The U.S. government is one such stakeholder. And federal, state, and local governments are active partners in the development of standards and codes when the activity is relevant to their needs.

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.

The Public-Private Partnership

One of the great strengths of the U.S. approach to standards and conformance is the “public-private partnership” – a term that stakeholders in government and industry use to describe the long-standing, effective, and cooperative working relationship between the public and private sectors.

The public-private partnership in the United States is strong because it is a true partnership. Neither government nor industry claims or exerts overall authority over the other, and by working together in respectful cooperation, we are able to most effectively respond to the strategic needs of the nation. This dynamic makes our standardization system unique in the world.

Our national standardization system and its public-private partnership are reflected in the *National Technology Transfer and Advancement Act of 1995* (NTTAA), and the associated OMB Circular A-119. The NTTAA directs agencies to consider the use of private-sector-developed standards in lieu of government-unique standards whenever possible.

The government uses standards in a variety of ways, including to establish internal procedures, aid in developing regulations for public safety and welfare, and improve the efficiency of the procurement process. When adopting a voluntary consensus standard into a regulation, federal agencies are permitted to incorporate the standard by reference – that is, without publication of the standard itself – in the *Federal Register*.

Incorporation by Reference and the “Reasonably Available” Dialogue

For a standard to be incorporated by reference or “IBR-ed,” the agency must determine that the standard is “reasonably available” to the class of persons affected by the anticipated regulation. In this case, “reasonably available” simply means that the standard is accessible to any potential user. It does not require that the standard be available without a fee.

In the past few years, concerns have been raised about whether the “reasonably available” requirement should be changed in light of expectations of free online access. For example, in early 2012, Professor Peter Strauss of Columbia University petitioned NARA, the National Archives and Records Administration, arguing that IBR-ed materials in the CFR should be free.¹

After soliciting and then publishing comments on this petition in October 2013², NARA’s Office of the Federal Register, OFR, concluded that “reasonably available” continues to mean just that, and it does not mean “for free.” OFR relied in large part on a comprehensive analysis of the issue conducted by ACUS, the Administrative Conference of the United States, in December 2011.³

The question OFR was trying to answer was simple: why shouldn’t IBR-ed standards be free? It seems like a valid point. But the blanket statement that all IBR-ed standards should be free misses some very important considerations:

- Every standard is a work of authorship and, under U.S. and international law, is copyright protected⁴, giving the owner certain rights of control and remuneration that cannot be taken away without just compensation.⁵
- 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. An SDO’s right to receive these revenues is based primarily in their copyright rights in the standard. Without such copyright protections, many SDOs would not have the financial ability to continue their work. 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.

¹ March 2012, *Federal Register*: <https://www.federalregister.gov/articles/2012/03/22/2012-6935/incorporation-by-reference>

² October 2013, *Federal Register*: <https://www.federalregister.gov/articles/2013/10/02/2013-24217/incorporation-by-reference>

³ http://www.acus.gov/sites/default/files/Recommendation-2011-5-Incorporation-by-Reference_0.pdf

⁴ <http://www.copyright.gov/title17/>

⁵ In February 2011, ANSI’s Intellectual Property Rights Policy Committee developed a white paper on the copyright implications of voluntary consensus standards in regulation: “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>

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 process of standards development, including openness, balance, opportunities to participate, and protection from undue influence.⁶

If SDOs cannot charge for standards and codes, this disrupts the standards development ecosystem. The funding has to come from somewhere. Increasing participation fees to offset lost sales revenue would disenfranchise consumers, small businesses, and local governments. Those with the money would have all the influence.

- Standards must be maintained and the publication kept up to date. This requires ongoing development, revision maintenance, and administrative costs. The government and taxpayers benefit from the current system by not paying for these recurring development and administrative costs.
- If SDOs cannot afford to stay in business, safety standards would not be updated, with the potential for dangerous consequences. And standards for new technologies would go unwritten, affecting U.S. competitiveness and innovation. The government would have to step up, take over what is now a market-driven system, and somehow find the money, time, and expertise – for every single technology and industry area.⁷
- Finally, 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.

⁶ ANSI Essential Requirements, 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

⁷ Agencies have explored what that scenario might mean. Consider the following findings of the Federal Energy Regulatory Commission (FERC), published in the *Federal Register* in December 2009⁷:

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.

What Is the Answer?

Reasonable availability is the best solution, as it allows for the flexibility required by different industries, agencies, and SDOs. The public and private sectors should continue to make standards and codes available on a reasonable basis. For some this may mean providing read-only but free access, and for others it may mean at reasonable prices.

Recognizing that there is not “one solution to the access issue,”⁸ the OFR found that it is for the federal agencies to work with SDOs to provide reasonable access to IBR-ed standards.

The OFR’s recent assessment reaffirms the decade-old guidance contained in OMB Circular A-119 – 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.

And that’s just what is being done. Many SDOs make standards available for free or at a discount to consumers, policymakers, and small businesses. And some SDOs make certain standards and codes available online on a read-only basis.

For its part, ANSI has launched an online IBR Portal for the benefit of the user community, including consumers. The portal provides a voluntary, centralized infrastructure that can help the hundreds of SDOs in this country make their IBR-ed standards available in read-only format, should they wish to participate.⁹

In Conclusion

The standardization community believes – as OMB, NARA, OFR, and ACUS believe – that the development of complex, highly specialized, technical standards requires a massive investment of time, labor, expertise, and money. Federal agencies continue to incorporate privately developed standards, eliminating costs of developing government-unique standards.

⁸ For example, one 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 reasonable availability requirements would not have any jurisdictional effect on current sales and distribution policies of ISO and IEC.

⁹ <http://ibr.ansi.org>

Standards development in this country is one of the earliest and most successful examples of the public-private partnership, which has benefitted our nation tremendously on many fronts – competitiveness, public safety, successfully commercializing American innovations globally, and much more.

We thank you for this opportunity to provide testimony.

Due to the limited advance notice of this hearing, we would respectfully request the Chairman to hold the hearing record open for at least 14 days, to allow affected organizations or individuals adequate time to file additional testimony on this important subject.

About ANSI

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.

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