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Committee on the Judiciary
House of Representatives
Congress of the United States
2138 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Goodlatte and Ranking Member Conyers:

On behalf of the American National Standards Institute (ANSI), coordinator of the U.S. standardization system, I want to thank you for meeting with us on September 10, 2015, and for furthering the dialogue on copyright policy issues. We are grateful for the opportunity to speak with you again¹, and we appreciate your continued consideration of the views of the U.S. standardization community, which includes companies, non-profit organizations, trade associations, government agencies, academics, and consumer groups from a wide range of technical areas and industry sectors.

The Reasonable Availability Dialogue

To summarize ANSI's January 2014 testimony, the U.S. standardization community believes that the "reasonably available" approach is the best, most flexible way to deal with copyright when a standard has been incorporated by reference (IBR-ed) into law.

As a reminder, for a standard to be IBR-ed, the agency must determine that the standard is "reasonably available" to the class of persons affected by the anticipated regulation. As we noted to the Subcommittee in our prior testimony², "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.

At the time of ANSI's testimony, this definition of "reasonably available" was the subject of some debate. Specifically, in early 2012, Professor Peter Strauss of Columbia University petitioned NARA, the National Archives and Records Administration, arguing that IBR-ed materials in the Code of Federal Regulations (CFR) should be free.³ Many others responded to the petition, noting that there are a variety of ways to make materials "reasonably available," including by leaving hard copies of IBR-ed documents at public libraries or publishing IBR-ed documents to online reading rooms. At the time of the hearing where ANSI testified in January 2014, the issue had not yet been resolved.

¹ A copy of ANSI's written testimony from the January 2014 hearing on "The Scope of Copyright Protection" may be found here: http://judiciary.house.gov/_cache/files/a3a26cab-a4be-44bc-80a1-274d2fb9bf8b/011414-testimony-griffin.pdf

² *Ibid*, p. 2

³ March 2012, *Federal Register*: <https://www.federalregister.gov/articles/2012/03/22/2012-6935/incorporation-by-reference>

Important Development Following ANSI's Testimony

Importantly, after ANSI's testimony before the Subcommittee, NARA's Office of the Federal Register, OFR, issued a final rule concluding that "reasonably available" continues to mean just that, and it does not mean "for free."⁴ The final rule states that agencies must set out the following information in the preambles of their rule-making documents:

1. Discussions of how the materials are reasonably available and, if they aren't, the actions the agency took to make the materials reasonably available to interested parties, and
2. Summaries of the content of the materials they wish to incorporate by reference.

We feel it is very significant that OFR preferred to maintain flexibility and allow agencies to work directly with SDOs and other publishers to make the material available. Further, OFR expressly rejected the "for free" arguments advanced by Professor Strauss, stating that requiring all IBR-ed materials to be available for free would "compromise the ability of regulators to rely on voluntary consensus standards, possibly requiring them to create their own standards, which is contrary to the NTTAA and the OMB Circular A-119."

ANSI has learned from its SDO members that this process has been working well since the publication of the final rule. Standards users are able to get access to standards that have been IBR-ed. Regulators have a flexible, practical approach to meet their legal obligation for reasonable availability. And each SDO can provide reasonable access in the way that makes sense for them and doesn't undermine their copyright.

Flexibility Is Key

The OFR's final rule 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 – reasonable availability is already working to provide access to IBR-ed standards. 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.⁵ Since the portal's launch in October 2013, thousands of individuals have used the portal to view IBR-ed standards.

⁴ November 2014, *Federal Register*: <https://www.federalregister.gov/articles/2014/11/07/2014-26445/incorporation-by-reference>

⁵ <http://ibr.ansi.org>

Not Just the U.S.

It is worth noting that other countries have been grappling with this issue as well, and they have come to the same conclusion that copyright is maintained when standards are incorporated by reference into law.

In March 2015, the Regional Court in Hamburg ruled in favor of the German standards organization (DIN), rejecting⁶ arguments that would remove protection to DIN's copyright on the grounds that the DIN standard at issue had been referred to in laws. And in 2012, the Dutch Supreme Court rendered a similar judgment in a case about whether standards referenced in the Dutch Building Act are protected by copyright.⁷ In summary, the court found that the standards were protected by copyright, and were furthermore already made reasonably available.

In Conclusion

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

As ANSI stated in its testimony to the Subcommittee, and as the OFR has since confirmed, the “reasonably available” approach provides a flexible mechanism that allows SDOs to work collaboratively with regulatory authorities to determine the most “reasonable” way to make IBR-ed documents available to materially interested parties, depending on the circumstances.

Once again, we thank you for this opportunity to speak with members of the Committee and to further discuss this important issue.

Sincerely,



Patricia A. Griffin

cc: Scott Cooper, ANSI Vice President, Government Relations

⁶ <http://www.din.de/cmd?level=tpl-artikel&languageid=en&cmstextid=237032>

⁷ <http://www.debrauw.com/wp-content/uploads/NEWS%20-%20LEGAL%20ALERTS/IP%20+%20ICT/2012/IP-Legal-Alert-27-June-2012-Standards-are-Copyright-Protected.pdf>